Aequitas

Newsletter for Justice Court Judges

WINTER 2014

A MESSAGE FROM THE CHAIR OF THE BOARD

Judge Reuben Renstrom

I am humbled by the responsibilities that have attended my recent assignment as chair of the Board of Justice Court Judges. One of the issues that we have been watching carefully as a board is what is transpiring with the Judicial Performance Evaluation Committee [hereinafter JPEC]. A select few have already passed through this evaluative process; however, the majority of us will still have the opportunity to be evaluated in the future. This is an issue that has brought angst to some among us. My hope is that with a greater level of knowledge some of this angst may be alleviated.

JPEC

In an effort to obtain sufficient information to legitimately evaluate a judge, JPEC has decided to divide justice court judges into three different categories: Full evaluation; mid- level evaluation; and basic evaluation. Each classification is based upon a combination of weighted caseload data and the number of attorneys that appear before a judge. Let me stress that this is not the current manner in which judges are being evaluated. JPEC is currently proposing legislation and a fiscal note to implement this evaluative process. However, anecdotally it does seem to have some traction with the legislature.

In the event the legislation fails pass the proposed legislation, JPEC will retain the definition of a full-time judge that is currently in place. That definition simply adopts the Administrative Office of the Court's definition of a full-time judge as having a judicial weighted caseload of more the 1.0, or working in a court that has a caseload at this level. All other judges would continue to be classified as part-time judges.

Proposed Changes

Full Time

Full time has been proposed by JPEC to include judges in whose courtroom more than 50 qualified attorneys appear on an annual basis. In order for an attorney to be a "qualified attorney," or in other words an attorney counted for the purposes of the above calculation, an attorney must appear before the judge a minimum of three times within a one-year period.

Once a judge has been determined to be fulltime, the judge will be evaluated using all the requirements in the JPEC Act. This includes an electronic survey of attorneys, court staff, and jurors (if any). The grading rubric for the survey will be based upon a score of one through five, one being the lowest score and five being the highest score. It has been determined that the judge must have a minimum score of a 3.6 average in three different categories: Legal ability: Integrity and judicial temperament; and Administrative skills including communications. The 3.6 average is set legislatively, wherein the statute requires a judge have a minimum of 65% to pass. Full-time judges will also be subject to courtroom observation, both during the midterm and retention evaluation periods.

Mid Level

A mid level judge would be defined as a judge who has a caseload greater than .2, but who has less than 50 qualifying attorneys appearing before them on an annual basis.

If a judge is defined as a mid level judge, then JPEC will evaluate that judge using an electronic intercept survey. Volunteers will approach all people leaving the courtroom and invite them to evaluate the judge on the spot, using a survey instrument that is accessed

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Inside This Issue

SERVICE PROVIDER REFERRALS

Brent Johnson

In 2012, the Utah Judicial Council's Ethics Advisory Committee received an inquiry about whether a judge could create a list of service providers and then refer defendants to the providers on a rotating basis. The Ethics Advisory Committee determined in Informal Opinion 12-02 that a judge could create a list of providers as long as the criteria for being included on the list were reasonable and not designed to exclude certain providers from qualifying. The Ethics Advisory Committee then determined that judges could not make referrals from the list, even on a rotating basis. The Committee stated that judges must instead provide the list to defendants, who would then select their own provider.

The conclusion of this opinion created concerns for many judges. Because of these concerns, the Judicial Council reviewed the opinion and ultimately decided to modify the conclusions. The Council agreed that judges may create rosters of service providers. The Council then made two important revisions on the use of rosters. The Council first determined that judges could make referrals from rosters on a rotating basis. The Council then determined that a judge could deviate from a regular rotation in a particular circumstance if the judge could articulate why deviation might increase the likelihood that a defendant will be more successful with a particular provider. A judge could, for example, consider a provider's proximity to a defendant if the defendant is more likely to comply with probation when the defendant does not have to travel far to meet obligations.

Although the Ethics Advisory Committee, and in turn the Judicial Council, answered all questions that were posed through the opinion request, judges have still had questions about how the opinion may apply in particular circumstances. Although I cannot provide definitive answers, I can offer opinions that I think are solidly supported by the rationale behind the opinion.

The questions posed in Informal Opinion 12-02 arose from an earlier opinion in which the Ethics Advisory Committee addressed the question of whether a judge may refer parties to a specific mediator. The Committee determined that a judge may not make such a referral. The ethics principles rooted in the conclusion are that 1) a judge must always maintain neutrality and impartiality, and 2) a judge may not lend the prestige of the judicial office to advance the private interests of others. If a judge is referring parties to a particular mediator, that may create an appearance that the judge is favorably disposed to the work of that mediator. The mediator also benefits financially from the judge's referrals. A judge may not have favorites and a judge may not make referrals at the expense of others.

The concern in dealing with service providers is that judges must avoid showing partiality toward any one service provider. This is accomplished by establishing neutral and reasonable criteria that allow providers an equal chance to receive referrals. A judge must also avoid lending the prestige of judicial office to advance the interests of providers. This is accomplished by referring providers on a rotating basis and only deviating if a judge can articulate why deviation will benefit the defendant and the court.

In creating a list of service providers, judges must establish reasonable criteria for inclusion on the list and the process for applying must be available to all interested providers. A judge can establish the minimum services that must be provided and the qualifications that the providers must possess. As long as the criteria are not biased towards or against specific providers, and are designed to assist the court in the accomplishment of its duties, the process will be ethical.

A question that has been posed is

(See Referrals on page 3)

(Chair Message cont.)

with an iPad. It is likely that the same average score of 3.6 will be required. Mid-level judges will not be subject to courtroom observation.

Basic

Basic evaluation is defined as a judge serving in a court that has less than a weighted case load of .2.

If a judge is defined as a basic evaluation judge, the judge will have to maintain the same minimum standards that they have historically maintained. This includes maintaining annual education hours at or above 30 hours per year, attending the spring conference, not taking a case under advisement for more than six months, and being physically and mentally fit to hold office.

If you have any further questions regarding this information, you are welcome to ask me. If you would like a more thorough answer, however, Joanne Slotnik, executive director of JPEC indicated that she would be happy to respond to any questions or attend regional education meetings. Her e-mail address is jslotnik@utah.gov.

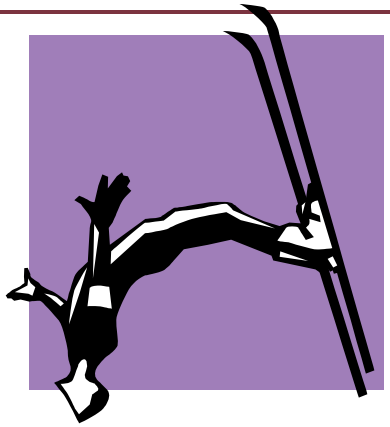
(Referrals cont.)

what happens if only one provider applies to be on the list or there is only one provider in the area. If only one provider qualifies for the list, then a judge may have a list of only one. Again, as long as the process is open to all who are interested, the fact that the list is ultimately very short will not undermine the fact that the process was neutral and ethical. A related question is whether the court may refer a defendant to a government agency and the agency is the one that selects the provider. This is permitted. The judge remains impartial and the prestige of the judicial office is not implicated.

A similar question is whether a judge may use an RFP (request for proposal) process to select one provider who will provide all services for a certain period of time. Although this is a more difficult question, in my opinion a judge may follow such a process. If the goal is, again, to avoid favoritism and ensure that all interested providers have an opportunity to provide services to the court, then a neutral RFP process will satisfy ethical obligations. Government entities frequently use RFP processes to select one provider for a period of time. This is often the most efficient way for government agencies to operate. There are always limitations on the length of those contracts and therefore if a court chooses to follow such a process, the process should be regularly revisited and reviewed.

Another question is what may be done with those providers who are on the list but ultimately perform services that are not satisfactory to the court. Can providers be removed from the list? Although a court must be careful in how a removal process is conducted, a provider does not have an absolute right to remain on the list if the provider is not performing satisfactorily. There are certain important considerations if a judge wants to remove a provider. Once a court grants an entity the right to be on the list that entity will then have an expectation of work, particularly since work will be given on a rotating basis. In order to remove that expectation, the court must provide a certain amount of due process. The provider must have a clear understanding of what is expected, the provider should have notice of when the provider has not met those expectations, and the provider must have an opportunity to correct deficiencies or to otherwise explain why the provider should remain on the list.

A question has also arisen about what constitutes a service provider as contemplated by the ethics advisory opinion. The opinion did not expressly answer that question. However, there is nothing to suggest that this does not apply to every



individual or entity that provides services to the courts or defendants. The opinion did not contain limiting language. The opinion applies to treatment providers, probation providers, education providers, and other similarly situated entities. Courts should always err on the side of treating an individual or entity as a service provider.

If judges will bear in mind the fundamental principles behind the restrictions, courts will be able to navigate the process for referring defendants to service providers. As with all ethical restrictions, judges are cautioned to stay as far away as possible from a particular line. Judges should choose the method that creates the fewest appearance problems while also remaining effective. Judges must simply be confident in the criteria that they use and select those criteria that are most likely to be effective, without unnecessarily excluding or restricting others.

LEARNING OPPORTUNITIES FOR JUSTICE COURT JUDGES

March 20-21—Midway
Law & Literature

April 14-15—St. George
Spring Session of the Legal Institute. The 14th Ammendment & Due Process

April 16-19—St. George
Spring Conference

May 5-9—Salt Lake City
New Judge Orientation

August 1—Delta
Summer Workshop

December 5—Salt Lake City
Winter Workshop

Judge Robison turned and faced the cowboy

And he banged his gavel hard

He glared with consternation

Tortoise poaching was the charge.

The cowboy's face turned deathly pale

His voice shook with his plea

He said "I'm innocent your honor,

It was either him or me."

See I was out west of Gandy

When my pony got away

And I hadn't had a thing to eat

For Seven nights and days

When late one night upon my knees

And tellin the Lord my care

Why into camp a tortoise crawls an answer to my prayers

So I rubbed my flint and steel together and I built me up a loop

And I dangled him over that fire and had me a bowl of tortoise soup."

Well now the judge, he found compassion for this cowboy near in tears

So he waived the fine and sentence that was nearly 50 years.

As the cowboy turned to walk away

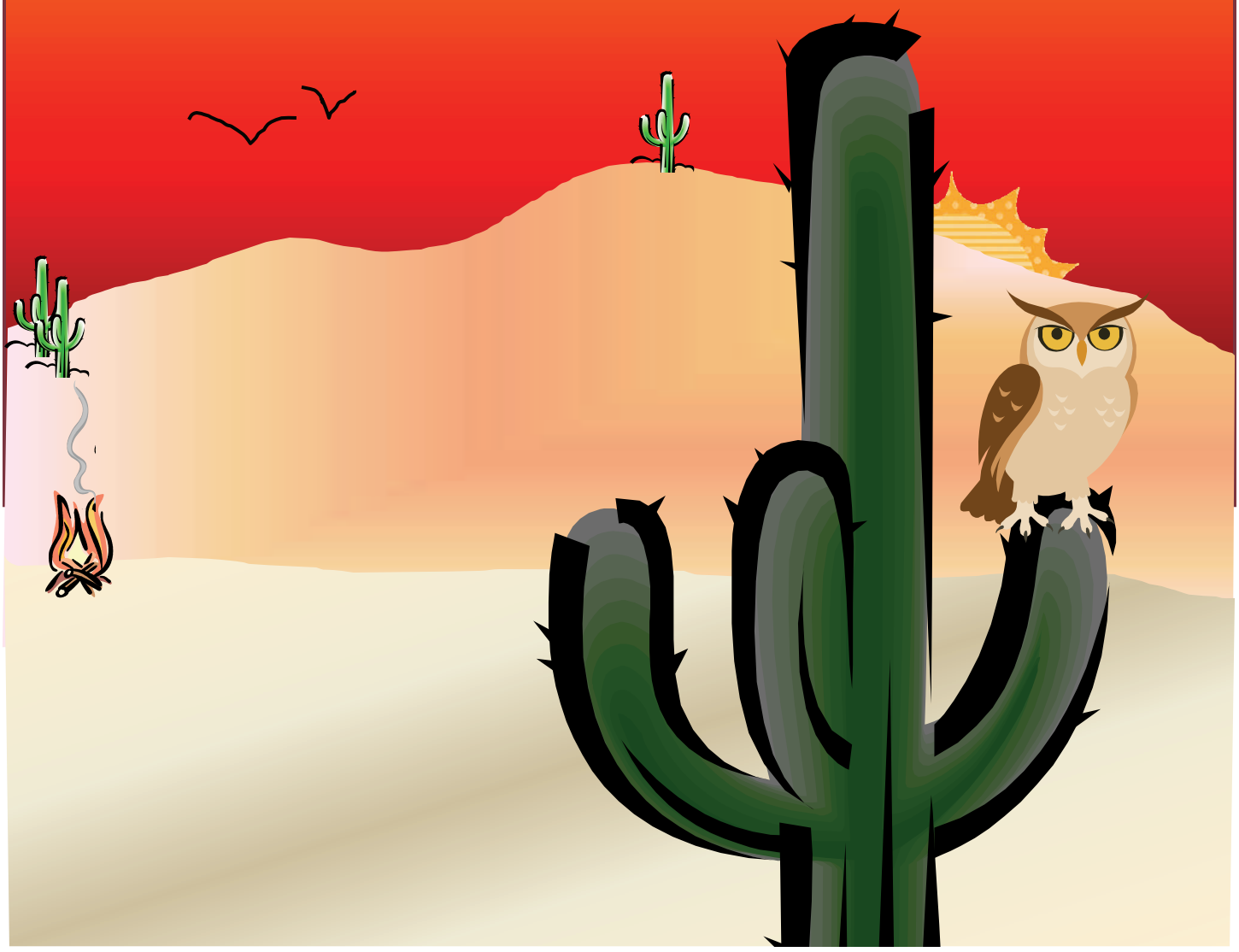
The Judge leaned toward the mike and says

"Now wait a minute cowboy tell me just what does tortoise soup taste like?"

Well the cowboy turned and faced the judge as the jury gave a howl.

He said "It's fishy like the bullhead trout and sweet like spotted owl."

Author Unknown



WHERE THEY SIT

Judge Elayne Storrs

Judge Stan Robison, sitting on the middle front row at conference has been sitting in the Delta City Justice Court since July 1983 and at the Fillmore City Justice Court since 2010. His Delta Bench is located on Hwy 6 in the central west desert on the way to the Great Basin, while his Fillmore Bench is in the middle of the state just off I70. Raised in Delta, he graduated from B.Y.U. with a degree in Accounting, Business Education and Economics and worked in the petroleum distribution business for 38 years. He is passing his time now by serving his mission in the Manti Temple and tending honey bees for a bee keeper in Delta

His clerks say he is a genuinely pleasant person who is thoughtful and fair but isn't fooled by a good story teller.

*While I took license with his name in this poem, I'm sure he has heard many such stories.

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Traveling east from Delta toward Capitol Reef you arrive in Wayne County, Where Judge Roy Brown resides when he is not sitting in the middle back row at conference. A retired contractor, he still enjoys wood work and giving the fruits of his labors as gifts. Speaking of fruits he maintains a green house and has fresh strawberries all year long which he also shares.

He was appointed as the Wayne County West Precinct Judge in 1988 and as the Wayne County Judge in 1992.

Not only is he understanding and considerate according to his clerks, his compassion and kindness are among his fine qualities. He enjoyed teaching his children horsemanship and working with them in 4H programs.

And yes, he can verify that there is a MARS Desert Research Station in his part of the world that was built in 2000 to simulate Mars exploration. It is manned by small crews from time to time.

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Traversing the top of the state, we are now in Northern Cache County in the town of Clarkston where Judge Wayne Cooper was appointed as the Judge for Clarkston, Cornish and Trenton in 1991. He retired from the aerospace industry as a financial analyst. Though the cities where he served decided to close their court last June, he will remain an active judge with an unexpired term and will be with us at conference on the left side back row.

He loves golfing especially at Birch Creek and working with his horses. Trying new talents, he has been busy with carpentry honing his skills by building a deck and doing some remodeling.

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Now we head north to Morgan where Tony Hassel has presided since 1982. A licensed certified social worker, Tony retired from the Division of Youth Corrections. One of many positions that he held was that of the Director of Northern Utah Youth Corrections.

Judge Hassel has been a positive influence on a myriad of lives in the 30 years he worked with the youth and the 31 years he has been an adjudicator. Though firm he is very considerate and has a great sense of humor.

He loves the beautiful Morgan county side home of the famous Devil's Slide. Fishing is top priority on his list of to dos, but if you go with him to his favorite pond, please leave the worms at home in the ground.

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(See Judges on page 8)

CASE LAW UPDATE

Judge Joseph Bean

State v. Sommerville

2013 UT App 40

This case originated as interlocutory appeal from defendant's Motion to Dismiss for multiple prosecution for events arising from one single criminal episode. Trial court denied the Motion to Dismiss and the Court of Appeals reversed concluding that the single criminal episode statutes barred further prosecution of the defendant. State filed a request for rehearing before the Court of Appeals and in a rare reversal of itself, the Court of Appeals revised its opinion and concluded that there was not a multiple prosecution arising out of one single criminal episode.

Facts:

Following an investigation for a hit and run in Murray City, defendant was cited for DUI and Following Too Close along with other minor misdemeanors. The investigating officer later filed another citation by mail citing only Following Too Close. The defendant immediately paid the bail forfeiture for the Following Too Close.

Murray City subsequently filed an Information charging the other misdemeanor offenses and the DUI. When the prosecution became aware of the fact that the defendant had already forfeited bail on the amended citation, the city moved to dismiss the other misdemeanors and DUI on the basis that all of the acts arose out of a single criminal episode and since the defendant had disposed of the case by paying the bail, it would constitute multiple prosecutions arising from a single criminal episode and violated the double jeopardy clause of the Fifth Amendment. The Motion to Dismiss was granted.

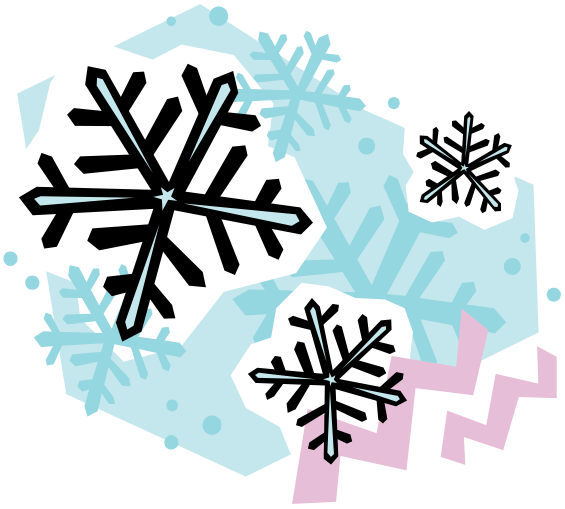
Two months later, Salt Lake County charged the defendant with felony DUI and the other misdemeanors, by information, which arose out of the same criminal episode. Defendant moved to dismiss in the district court on the grounds of single criminal episode, double jeopardy and res judicata. The district court dismissed the other misdemeanors but allowed continued prosecution of the felony DUI. Defendant appealed.

Issue on appeal was whether dismissal of the DUI and other misdemeanors in justice court, after defendant forfeited bail on the Following Too Close offense, constituted a prosecution that barred further prosecution arising out of the same criminal episode in the district court.

Court of Appeals, on rehearing, undertook an in depth analysis of Utah Code Ann. §§76-1-402 and -403. After reviewing the statutes, the Court of Appeals concluded that "[t]he issuance and disposition of the citation does not constitute a prosecution under the Single Criminal Episode Statute." 11. Under Utah law, "all criminal prosecutions whether for felony, misdemeanor or infraction shall be commenced by the filing of an information or the return of an indictment." 12. An information is "an accusation, in writing, charging a person with a public offense [and] is presented, signed, and filed in the office of the clerk where the prosecution is commenced." 12

Under Utah law, the filing of an information—and, therefore, the initiation of a prosecution—requires the involvement of a prosecuting attorney. 12. Indeed, a person who is issued a citation is only "subject to . . . prosecution." 14. Thus, if a citation is disposed of by voluntary forfeiture of bail, no information is filed and, therefore, no prosecution is initiated. 14.

The Utah Court of Appeals declined to comment on whether a defendant who consents in writing to proceed on the citation has been "subject to prosecution." Footnote 6.



SHOULD I ISSUE A WARRANT FOR FAILURE TO APPEAR ON A PARKING CITATION?

Judge Paul C. Farr

Parking and Registration Violations

While some cities deal with parking violations administratively, many still treat them as infractions or misdemeanors that get filed in justice court. Most parking violations are commenced by law enforcement leaving a citation on the windshield of the parked vehicle, issued in the name of the registered owner. Generally the officer will make a note on the citation to the effect of, "left on windshield." The citation would then be filed with the court.

No registration violations can be treated the same way. Some jurisdictions will cite vehicles that are parked on public streets without registration. As with parking tickets, the officer will generally issue a citation in the name of the registered owner and leave it on the windshield of the car with a note to that effect on the citation. Notes on the citation were important in these cases as a citation for no registration could also be issued to an individual as a result of a traffic stop. While that charge is commonly associated with other moving violations, it can also be a stand-alone charge. The notes on the citation ("left on windshield") may be the only indication as to whether the citation was left on a parked vehicle or issued directly to a driver.

Service of Citations

Section 77-7-20, Utah Code Ann., deals with service of citations. This is the section that was recently amended to require electronic filing of citations. This section now states, in relevant part, that the officer who issues the citation, "shall give the citation to the person cited and shall within five days electronically file the data. . ." This section further states, "(3) By electronically filing the data with the court, the peace officer or public official certifies to the court that: (a) the citation or information, including the summons and complaint, was served upon the defendant in accordance with the law . . .

This creates a problem for jurisdictions that issue parking citations through the justice court, and not administratively. The law now requires that those citations be filed with the court electronically. By filing the citation electronically the officer is certifying that he or she gave the citation, "to the person cited," and also that it, "was served upon the defendant in accordance with the law."

In the event of a parking ticket, or a non-moving registration ticket, the officer neither gave the citation to the person cited or served it in upon the defendant in accordance with the law. Further, because the citation is filed electronically, the court does not have access to any notes on the citation. While the court used to be able to see if the citation was "left on windshield," that information is no longer viewable.

Failure to Appear and Issuance of Warrants

As we all know, a person who receives a citation and fails to appear is subject to arrest. Specifically, section 77-7-19(3)(b), Utah Code Ann., states that, "The magistrate may issue a warrant of arrest based upon a citation that was served and filed in accordance with Section 77-7 -20."

In the event of a parking ticket or a non-moving registration ticket that is left on a windshield, the citation is not being served in accordance with 77-7-20. As a result, the authority to issue a warrant for a failure to appear, does not apply.

It is true that by electronically filing a parking citation, officers are certifying that it was properly served. While some of these citations are personally served, the majority of them are not. This places law enforcement in a difficult position. The law requires that they file citations electronically, and that the filing constitutes a certification of service. They either don't file the citation, or file it knowing that the certification is inaccurate. In my opinion, this is something that ought to be addressed as we move forward. In any event, we

(See Warrant on page 8)

(Warrant cont.)

as judges know the reality that parking citations are not being personally served, and should not be issuing warrants for failure to appear.

What to do With "No Registration" Citations

I would suggest the reasoning discussed above applies to stand-alone "no registration" tickets as well. If a citation includes other moving offenses, suspended license charge, or the like, it is fair to rely on the certification of service given as part of the electronic filing. However, if a citation contains only a charge of "no registration" it is possible that the citation was issued to an individual, or that it was simpaly left on the windshield of a vehicle. It is not possible for the court to distinguish which. If a jurisdiction is going to issue "no registration" citations to parked vehicles, the appropriate practice would be to treat all stand-alone "no registration" citations as parking tickets and not issue warrants for failure to appear.

How to Deal with Parking/ Registration FTA's

As discussed above, in jurisdictions that do not handle parking citations administratively, courts should not issue warrants for failure to appear on the citation. However, this does not mean that cities cannot proceed on these citations. Rather, if a jurisdiction wants to pursue these cases the prosecutor may still file an information and have a summons served on an individual. If an individual fails to appear based on a properly served summons, a warrant could then be issued.

Conclusion

A court should not issue warrants for failure to appear on a parking citation, or a stand-alone "no registration" charge. Under the new electronic filing system, it is not possible for courts to know if defendants were in fact, properly served.

It's not hard to imagine many scenarios that give rise to serious problems. For example: Mom or dad allows child to use their vehicle. Child parks the vehicle illegally and gets a ticket. The ticket is issued in the name of mom or dad, the registered owner, and it is left on the windshield. Child is scared or embarrassed and throws away the ticket without telling mom or dad. Time passes and mom or dad, who know nothing of the ticket, fail to appear within the required time periods. Based on the electronic case filing, and the failure to appear, the court issues a warrant for mom or dad's arrest. Some time later mom or dad gets stopped for speeding in rural Utah and gets booked into jail on the warrant. This booking is based on a warrant that was issued without authority. Next comes discussions involving words like liability and discipline.

Better to be safe than sorry.

(Judges cont.)

In January 1991 Judge Elayne Storrs was sitting in her first day of New Judge Orientation when she received a note to call her husband immediately. The news she received was that he could be deployed for Desert Storm. Fortunately, he did not leave for a few weeks, so Judge Storrs could complete her orientation before returning home to begin life as a new single mother and as the new judge in Carbon County.

During her years on the bench, Judge Storrs has served on the Judicial Ethics Committee, as education director for the Seventh District Judges, and the Justice Court Board of Judges. She was named Justice Court Judge of the year in 1999 and received the Quality of Justice Award in 2004. Her court and staff at Carbon County Justice Court were recognized for their quality of service when it was named Justice Court of the Year in 2009.

Judge Storrs is quite a prankster. Her clerk recalls a time when there was a mouse in the office, "I jumped up on a chair until it was gone. Shortly afterward we went into court and I checked underneath the bench just to make sure there were no mice before doing the minutes." Judge Storrs passed a note to the defendant that said for her to tell the clerk that she saw a mouse. She completed the joke that Halloween by redecorating the bathroom with a mouse printed toilet seat cover and a jar of peanut butter in the corner labeled *Mouse Bait.*

After having served the people of Carbon County and Wellington City faithfully for over twenty years, Judge Storrs will be retiring from the bench and deploying with her husband to the Miramar Marine Corps Installation in San Diego as an LDS Military Relations Specialist.

Judge Storrs has been in charge of the Judicial Spotlights that have been included in these newsletters, to which we give her a special thanks

She will be dearly missed on the bench, but we look forward to hearing about her adventures that are sure to come.

A MESSAGE FROM THE EDUCATION COMMITTEE

Kristine Prince, Judicial Educator

Something New for 2014

Mark your calendars now. We have planned an important and interesting experiential learning opportunity for the Summer Workshop this year which will be held on Friday, August 1, 2014. Our theme is:

Did Justice Fail?

This experiential learning activity will focus on the greatest injustice in twentieth-century U.S. history. Ignoring the Constitution, the U.S. government rounded up innocent citizens of Japanese descent and locked them away based solely on race. The fact that they were American citizens, and guilty of no crime, did not matter. Many Japanese Americans were taken from their homes on the West Coast and sent to inland internment camps, one of which was the Topaz Internment Camp, sixteen miles west of Delta, Utah. Named for a nearby mountain, Topaz was in the middle of an area charitably described as a "barren, sand-choked wasteland." The first internees were moved into Topaz in September, 1942, and it was closed in October, 1945. At its peak, Topaz held 9,408 people in barracks of tar paper and wood.

Learning Activities:

We will begin the day at 9:00 am at the Delta Community Center. Next door to the Community Center is the Topaz Museum which we will tour. We'll then travel to the site of the Topaz Internment Camp which is about 15 miles outside of Delta. The Topaz Internment Camp is where 8,400 Japanese Americans were incarcerated for up to three years. We will have a guide who will explain important issues and point out sites there.

We are hoping to get some of the last remaining survivors of the camp to talk to the group about what life was like in the Topaz Internment Camp and their thoughts about being forced to leave their lives behind and to be incarcerated simply because they were of Japanese descent.

We will also view a video about the United States Supreme Court Case (1944) Korematsu v. United States concerning the constitutionality of Executive Order 9066 which ordered Japanese Americans into internment camps during World War II regardless of citizenship. In a 6-3 decision, the Court sided with the government ruling that the exclusion order was constitutional.

We hope you will take advantage of this important learning opportunity. More information will be sent out as the date gets nearer.