



## Kapelsohn Joins Network Advisory Board

From our beginnings in January, 2008, the Network has enjoyed the backing of many prominent firearms trainers, including Massad Ayoob, John Farnam, Tom Givens and Dennis Tueller, who graciously accepted positions on our first Board of Advisors before the Network even had a proven track record.

Why were those first board members training luminaries, not lawyers? The impetus for preparing private armed citizens to cope with the legal aftermath of a self-defense incident has never come from the legal community—it has come from instructors training armed citizens in self-defense shooting skills. Massad Ayoob, in particular, has made understanding interactions with the criminal justice system a cornerstone of his training curriculum, teaching that it is entirely possible to successfully defend against criminal attack, but fail to manage events afterwards and wind up in prison. In establishing the Network, we drew heavily upon Ayoob's teachings, and then developed the membership benefits as a solution to the considerable expense of skilled attorneys and experts to assist in defending self defense.

Still, as the Network flourished, the need to expand the Advisory Board's scope of experience to include stronger representation from the legal sector was apparent, and we were fortunate in November of 2010 to add to the board Jim Fleming, who was already serving as a Network Affiliated Attorney, and was at the time poised to become the Network's Director of Curriculum for our Continuing Legal Education initiative.

Last month, the opportunity arose to further enhance the legal expertise on the Network's Advisory Board, when attorney, defensive firearms instructor and expert witness Emanuel Kapelsohn (pictured above) agreed to serve. This is a powerful addition, because Kapelsohn's



career in the law has focused on firearms and use of force issues, from both the plaintiff's and the defendant's viewpoints. His input will be invaluable when, as it surely will in the future, the Advisory Board is asked to weigh the legality and justifiability of actions a member undertakes in self defense.

The Advisory Board is charged with finding the balance between providing services for Network members and guaranteeing that the Network does not squander funds trying to defend use of force that is not justifiably undertaken in self defense. Not only must the Advisory Board identify and recommend ways to provide for a member's post incident needs, they will also evaluate incident reports so they can

assure the Network, its membership, contributors and the public that Legal Defense Fund monies are being used only to defend justifiable self defense. In the rare instance that someone vilifies the Network and its mission, it is generally to charge that our goal is to get people who commit murder off scot-free. While nothing could be further from the truth, that line of attack underscores why this duty of the Network Advisory Board is so very, very important.

In light of Kapelsohn's career, his contributions to this task will make a tremendous difference. Like many of our Advisory Board members (see bios to follow) Kapelsohn has been a firearms, tactics and use of force expert in trials across the nation, defending use of force cases in federal and state courts, in both civil and criminal trials. Work as an expert witness has made him integral to cases involving self-defense use of force, officer-involved shootings, gun accidents, hunting accidents, home storage of firearms accidents, product liability cases involving guns, holsters and more. He has

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worked for the prosecution on some cases and for the defense on others. He is a certified shooting scene reconstructionist and also testifies about ballistics and firearms, human factors like tunnel vision, auditory exclusion, sensory gating and other phenomena associated with the psychological responses present in deadly force encounters. He has provided legal advice, training and expert witness services to federal agencies including the U.S. Department of Justice and others, big city police departments including NYC, Pittsburgh, Philadelphia, Washington, D.C., Miami, Seattle, Phoenix, Dallas and others, and several state attorney general's offices, including those of SD, WY and PA. He is on a DOJ list of attorneys on call to provide immediate post-shooting representation to federal agents.

An attorney with a Pennsylvania firm, Kapelsohn started practicing law in 1978, holds degrees from Yale (with honors) and Harvard Law School, and has been an adjunct instructor at Indiana University's criminal justice department.

He is an NRA endowment member, an active reserve deputy sheriff, and has for 26 years served on the Board of Directors of the International Association of Law Enforcement Firearms Instructors (IALEFI). He is also the author of over 100 published articles, and longer works including *Firearms Training Standards For Law Enforcement Personnel*, *Standards And Practices Guide For Law Enforcement Firearms Instructors*, and *Safety Guidelines For Simulation Training*.

He is currently writing a book on post-shooting concerns, policies and considerations, with co-authors including such prominent experts in the firearms training field as John Farnam, Dr. Bill Lewinsky, Lt. Col. Dave Grossman, Dr. Alexis Artwohl, Chief Jeff Chudwin, Evan Marshall, and others.

Kapelsohn has long been influential in firearms training on a national and international basis, both through his Peregrine Corporation and as a firearms trainer for the gun manufacturers including Glock, Mossberg, Para Ordnance and others, as well as directly for police agencies nationwide. He has taught police firearms instructor development courses for the NRA and for a wide variety of agencies. In addition to his work with IALEFI, he has worked with other police organizations including the American Society for Law Enforcement Training (ASLET) and the

International Law Enforcement Educators and Trainers Association (ILEETA).

Network members can enjoy an introduction to Kapelsohn through an interview with him published in the August 2012 edition of this journal as well as his responses in our Attorney Question of the Month column. The enthusiasm with which our existing Advisory Board members welcomed the addition of Kapelsohn to their number speaks volumes. Interestingly, Massad Ayoob and Kapelsohn were both involved as expert witnesses in the 1980s New York case against Frank Maglioti, the lessons of which have informed many an armed citizen since.

As mentioned earlier, Kapelsohn joins a board made up of our industry's best minds. Since this group labors largely in obscurity, this is an excellent opportunity to give members an introduction to all the Network Advisory Board members.



Massad Ayoob (left) is an internationally known firearms and self-defense instructor, with a long career as an expert witness in trials where use of force or self-defense concerns were at issue.

First rising to prominence as director of the Lethal Force Institute, Ayoob several years ago converted his instructional business to the Massad Ayoob Group, but though the name changed, his top priority continues to be offering the best armed self-defense training available. The Network has been grateful for Ayoob's generous participation

since the time when our organization was a mere idea, and his guidance has been vital in our growth and development. Ayoob is part of the Network's Continuing Legal Educational faculty.

John Farnam (below, left) was also one of the original Network advisory board members, and we have always appreciated his straight forward advice.



Farnam's passion is teaching self-defense skills and mindset to armed citizens through his rigorous nation-wide teaching schedule, and as author of numerous books, articles, and email commentaries. In addition to serving as a sheriff's deputy since 1971, Farnam regularly works in the courts as an expert witness on firearms-related cases. He challenges all in his sphere of influence to excel, and he is an inspirational member of our Advisory Board.

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James Fleming (right) brings over 28 years experience as a trial attorney to back up the guidance he offers as part of the Network Advisory Board. Before his career as an attorney, Fleming was a police officer in Nebraska, so he well knows both sides of use of force issues. During his law career, Fleming has conducted well over 250 trials, plus numerous appeals in both state and federal courts, including the Eight Circuit Court of Appeals. In addition to his private practice, Fleming Law Offices, he is also employed by the Minnesota State Public Defender's Office as a felony trial specialist. Pursuing his love of firearms, Fleming is president and instructor for Mid-Minnesota Self-Defense, Inc., a training organization in Monticello, MN.



reactionary gap and the necessity of distance in successfully defending against an aggressor armed with a knife or impact weapon. Tueller currently teaches in Glock, Inc.'s police firearms instructor and armorer training division, having retired from the Salt Lake City Police Department as Lieutenant after 25 years of service.

Tueller (below) is one of the best respected firearms training authorities in the country, and the Network is fortunate that he is part of our Advisory Board.

Before settling down in 1996 to his second career as owner/operator of Rangemaster, Memphis, TN's



preeminent indoor range and training facility, Tom Givens (left) completed a 25-year career in law enforcement and specialized security work, during which time he made hundreds of arrests, including taking numerous armed felons into custody.

He has successfully used a handgun to defend himself and others against armed criminals. Givens is certified as an expert witness on firearms and firearms training, giving testimony in both state and federal courts all over the country. The Network is the fortunate beneficiary of Givens' support and advice through his role on our Advisory Board, and we have appreciated his willingness to help from our earliest days.

Sometimes we get so busy with day to day operations at the Network that we fail to recognize the contributions made by our Advisory Board to the Network's long-term goal of being well-prepared to provide top-quality defense for Network members who are forced to defend themselves. Each of our Advisory Board members brings much to the task of providing essential direction to a trial team defending a Network member, as well as guiding the Network's decisions as it grows and expands services to its members. Full biographical sketches of the Advisory Board's members can be viewed at <http://www.armedcitizensnetwork.org/defense-fund/advisory-board>.



In addition to these luminaries, the Advisory Board is lead by Network President Marty Hayes and Vice President Vincent Shuck. Read more about them at <http://www.armedcitizensnetwork.org/learn/network-leadership>

Dennis Tueller rose to prominence as a police firearms instructor in the 1980s when as an instructor and author, he pioneered what is now called "proxemics," through which police and armed citizens came to understand the

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## President's Message

by Marty Hayes, J.D.

As I sit hunkered down in a camper on the Oregon Coast on Thanksgiving, I think it is a good time to write this month's President's Message. While there are countless personal items I would normally acknowledge as

being thankful for, I will skip these and just address Thanksgiving and the Network.

What got me thinking along these lines was sitting next to the *Boots On the Ground* phone and being thankful yet again that it hadn't rung. In fact, over the three years since we instituted the *Boots On the Ground* program, it has rung only one time with a call from a member in need. For details about this aspect of Network membership benefits, log in to the Network website and read <http://www.armedcitizensnetwork.org/boots-on-the-ground>

Our number one mission here at the Network is to aid and assist our membership after an incident, but who wants to jump into action on Thanksgiving Day? I worked enough holidays as a cop. Still, that phone follows me everywhere and you should know that while I can't promise it will always be answered at a moment's notice, after all, cell signals are still sporadic here in the great Northwest, I have a signal most of the time, and it alerts me if I have a message waiting when I come back into cell signal range.

I attribute the limited *Boots On The Ground* activity to the quality of members we have here at the Network. You folks just are not getting yourselves into jams, but that doesn't really surprise me. A well-trained individual is less likely to be singled out as a potential criminal victim. Well-trained people are alert, hard to catch off guard and otherwise not easy victims. Secondly, with the legal and tactical education the Network provides, I think our members are more likely to make good decisions. In two instances where we have supported members after self-defense incidents, neither member shot their attacker.

The Network's educational programs really set us apart from the myriad of other legal insurance and pre-paid legal schemes that have popped up since we started the Network. I love the American free enterprise system,



because it allows the cream of the crop to rise to the top. I believe we are the cream, because we offer more for the money than any other program of which I know. So, on this Thanksgiving morning, I say thank you, Network members, for being who you are, and taking your responsibilities as armed citizens so seriously.

I am also thankful for the hundreds of Network Affiliated Instructors who share our vision of the Network and who act as our outreach to the self-defense community. When we started the Network, one of the first things I did was speak with instructors I know to run the idea past them and ask if they would be a part of the new organization.

The instant, "Heck, yes!" response from most, along with their willingness to tell their students about the Network and recommend they join, is the driving force behind recruitment of new members. We also appreciate the active support group of our Network Affiliated Gunshops, which spread the word about the Network and educate the armed citizen customer about the legalities of armed self defense using our free booklet. Thank you Network Affiliated Instructors and Gunshops, for playing your role in the Network so well.

When starting the Network, one of the first and most difficult questions we faced was how our members could get legal representation before becoming involved in an incident, instead of desperately searching for a lawyer after

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a self-defense incident. I thought then that it would be easier than it has been to put together a list of gun-savvy, self-defense-savvy attorneys who wanted to be a part of this organization. At first it was really slow going, so we instituted the *Boots on the Ground* program, to serve as a sort of "Legal SWAT Team" to assess the needs of the member and seek out solutions to the unique problems faced after a self-defense encounter. Even now, with a 260-strong Affiliated Attorney list, I would initiate a *Boots on the Ground* response in the event of a shooting involving a Network member, even if they have a local attorney. It is pretty nice that we now have the resources in our Legal Defense Fund to provide this level of oversight to be sure members get the best help possible. But having said that, the local attorney is still the keystone to putting the legal defense in place and protecting the rights of our members in the critical hours and days after the incident. Thank you to each of our Affiliated Attorneys for being there for our members.

Of course, one of the key ingredients of the Network is our Advisory Board, consisting of James Fleming, Massad Ayoob, Dennis Tueller, Tom Givens, John Farnam and our latest addition, Emanuel Kapelsohn (see lead story).

When called upon, these gentlemen assess the legality of the shooting incident, deciding if the Network can back the member, and if so, to what extent. So far they have not been called upon to make these decisions, and with any luck it will be a long time before they do. I could not imagine a better, more experienced and more self-defense savvy group of individuals to direct the most critical aspect of Network membership benefits. Thank you, Advisory Board, for giving the Network your support and advice.

A word of thanks also needs to also be spoken publicly to the Network sponsors, companies like Galco, Cor-Bon, North American Arms, Black Hills Ammunition and Crimson Trace who have all generously donated products that we sold at auction to raise money for the Legal Defense Fund. In the future, we expect to broaden this program considerably, and we are indebted to these companies for helping us get started. In addition, Blade-Tech, CCW Breakaways, Cleveland's Holsters, Gum Creek, LLC, N82 Tactical and Recluse Holsters have shouldered the additional work and shipping expense to include Network information in every order they ship. We see tremendous response from this outreach effort and owe these online retailers a big thank you.

Of course, the Network would not exist without the people behind the scenes who make the day to day operations move along smoothly. These include Jennie and Brady, who respectively work on membership services and coordination for the Network Affiliated Gunshops and Instructors outreach. I am also thankful to have such great partners, Operations Manager Gila Hayes and Vice President Vincent Shuck. Without their support and willingness to work long hours, the Network would still be one of those "good ideas" that never got off the ground.

In closing, a word of thanks to the good Lord for opening this door for us to walk through and for not sending a tsunami our way the last couple of days.

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## Attorney Question Of The Month

Network members frequently ask where they stand legally if they shoot an attacking dog. Most cities have ordinances prohibiting the discharge of a firearm, and the shooter may face animal cruelty charges or additional violations piled on by a prosecutor. We asked our Affiliated Attorneys how these matters stand in their state.

### **Joshua S. Reed**

Law Office of Joshua S. Reed  
5915 Casey Dr., Knoxville, TN 37909  
865-450-3333  
[www.knoxvilletnlaw.com](http://www.knoxvilletnlaw.com)  
[reedlawfirm@yahoo.com](mailto:reedlawfirm@yahoo.com)

In Tennessee the law would allow someone to shoot an attacking dog if they are acting "under a reasonable belief that the animal was creating an imminent danger of death or serious bodily injury to that person or another or an imminent danger of death to an animal owned by that person."

In a case of self defense for the shooting, the same factors would provide a defense to any unlawful discharge issues as well. If the attacking dog is someone's pet, and the pet owner pushes the issue, it is fairly likely that the D.A. would press charges. I have represented someone who shot and killed a neighbor's pet and I believe he likely would not have been charged if the owner of the pet had not "pushed" for it with the local police department.

### **Lance W. Tyler**

Tyler Law Firm, LLC  
1325 Satellite Blvd. NW, Ste. 1501, Suwanee, GA  
30024  
678-869-5101  
[www.gwinnettduilawyer.com](http://www.gwinnettduilawyer.com)  
[lyler@tlfdui.com](mailto:lyler@tlfdui.com)

Georgia's self-defense statute (O.C.G.A. 16-3-21) allows the use of force, including deadly force against another person, in defense of yourself or others who are in imminent jeopardy of serious bodily injury or death and provides that any rule, regulation or policy of any agency of the state or any ordinance, resolution, rule, regulation, or policy of any county, municipality or other political

subdivision which is in conflict with the self-defense statute shall be null, void, and of no force and effect. Where you would be authorized to shoot a person, you would be authorized to shoot an animal.

O.C.G.A. 16-3-23 allows the use of force in defense of a habitation and the use of deadly force against another person, not a member of the family or household and who unlawfully and forcibly enters or the entry is made or attempted to commit a felony and the force is necessary to prevent the commission of the felony. "Habitation" includes motor vehicles.

O.C.G.A. 16-3-24.2 provides a person who uses force in self defense immunity from prosecution unless the carrying or possession of the weapon was illegal (e.g. a convicted felon could be prosecuted because it is a felony for him/her to possess a firearm at all). If the State were to accuse a crime, a person who used force in self defense may file a plea at bar and a hearing will be provided to determine whether the act was self defense. If it is determined the actions constituted self defense, prosecution for any charges, including local ordinances, cruelty to animals, etc., would be barred. I have used self defense to bar the administrative discipline of an officer who violated department policy and shot a dog on duty. The self-defense statute trumps departmental use of force policy.

O.C.G.A. 16-3-24 allows the use of force (other than deadly force) in defense of property other than a habitation. O.C.G.A. 16-3-23.1 establishes no duty to retreat. The combination of these laws would allow a person to defend his property and not retreat. Shooting a dog is not prohibited and is allowed where it would be necessary to defend property other than a habitation; deadly force against a person is not authorized in defense of property other than a habitation.

Georgia's self-defense statutes do have some exceptions. You can not provoke the attack, be the aggressor or be attempting to commit, committing, or fleeing after the commission of a felony when the force is used. In Georgia, criminals do not have the right to self defense when committing a felony.

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In short, Georgia's self-defense laws would allow the shooting of a dog in lawful defense of a person or property where the force was necessary and provide immunity from prosecution.

**Peter N. Georgiades**

Greystone Legal Associates, P.C.  
1712 E Carson St., Pittsburgh, PA 15203  
412-381-8100  
peterg@greystonelaw.com  
www.greystonelaw.com

I suggest your members check with local attorneys for advice on their respective states' dog laws. In Pennsylvania it is lawful to shoot an attacking dog. Indeed, one is granted immunity from civil suit by the dog's owner if one shoots a dog while the dog is in the process of attacking people, livestock or pets.

I am a dog lover. I do not believe there are bad dogs, only bad owners. Sometimes the incompetence of a dog's owner puts the dog in a position where it has to be shot to protect other animals or people. Our law allows for this.

**Timothy A. Forshey**

Timothy A. Forshey, P.C.  
1650 North First Avenue, Phoenix, AZ 85003  
(602) 266-7667  
tforshey@dmflaw.com

This is a great question that I just discussed with a client this morning (involving a rattlesnake's untimely demise last weekend)! Here in Arizona, especially in some of the urban outlying areas, we have problems with coyote attacks. Cats and smaller dogs are particularly tasty morsels for many of these desert dogs. Many people feel about their family pets the same way that they feel about other family members. Unfortunately, in the eyes of the law, pets are NOT family members. Shooting at a coyote that is dragging your dog out of your house for lunch is, legally, the same as shooting at a coyote that is dragging off a piece of lawn furniture. Your pet dog is "chattel" and, as such, you cannot justifiably use lethal force to save the dog.

We often see the same dilemma with regard to rattlesnakes. It can be difficult to prove you were justified in using lethal force in self defense from a rattlesnake, absent a threat to a child or infant, because it's usually pretty easy to avoid rattlesnakes.

If, however, a person believes that they are reasonably in fear for their life, or the life of some other human, lethal force CAN legally be used against a dangerous animal. In Arizona there is no exception to that general rule.

Within city limits there are additional charges that you can face, and the use of lethal force to defend property only is illegal. In short, if you're defending a human being, lethal force is justified, regardless of city ordinance or local prohibitions against firing shots within the municipality. If you are defending property only, it is not. Whether we like it or not, our family pets are "property only." You'd better love that dog one heck of a lot to risk one to ten years in prison for defending him or her (which would be, sorry, a bitch).

**Tim Evans**

29 No. D St., Hamilton, OH 45013  
513-868-8229  
tim219@zoomtown.com

In Ohio it is illegal to allow a dog to run at large. Even in cities if you are attacked you can use a firearm for self defense. The same holds true while protecting livestock or pets, but if your pet is a dog it must be on a leash or confined to your property.

**Richard E. Gardiner**

Suite 403, Chain Bridge Rd., Fairfax, VA 22030  
703-352-7276

In Virginia, shooting a dog, a companion animal, is potentially a violation of Code § 18.2-144, which provides in part: Except as otherwise provided for by law, if any person maliciously shoot, stab, wound or otherwise cause bodily injury to . . . any horse, mule, pony, cattle, swine or other livestock of another, with intent to maim, disfigure, disable or kill the same...he shall be guilty of a Class 5 felony. If any person do any of the foregoing acts to any...companion animal with any of the aforesaid intents, he shall be guilty of a Class 1 misdemeanor.

In *Shifflett v. Commonwealth*, 221 Va. 191, 269 S.E.2d 353 (1980), the Virginia Supreme Court approved the following jury instruction on the meaning of "malicious:"

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The word “malice” is used in a technical sense, and includes not only anger, hatred and revenge, but every unlawful and unjustifiable motive. It is not confined to ill will to any one or more particular persons, but is intended to denote an action flowing from a wicked or corrupt motive, done with an evil mind and purpose and wrongful intention, where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and deliberately bent on mischief; therefore, malice is implied by law from any willful, deliberate and cruel act against another, however sudden. (221 Va. at 193)

If a dog was attacking, and a person was acting in self defense, there would be no “malice,” so there would be no violation of Code § 18.2-144.

Code § 18.2-280 prohibits discharge of a firearm in “any place of public business or place of public gathering,” but exempts a person whose act is “otherwise justifiable or excusable at law in the protection of his life or property, or is otherwise specifically authorized by law.”

Although I have not represented a client on a charge arising from shooting an attacking dog, I think it very unlikely that shooting an attacking dog would result in charges.

If a person is defending a pet or livestock, instead of a human, against the attacking dog, I would think that there would also be no “malice,” so there would be no violation of Code § 18.2-144. Similarly, Code § 18.2-280 expressly allows for the protection of property, and because animals are considered property under Virginia law, I would think that there would also be no violation of Code § 18.2-144.

**Robert S. Appgood**

Carpelaw PLLC

2400 NW 80th St., #130, Seattle, WA 98117

206-624-2379

[rob@carpelaw.com](mailto:rob@carpelaw.com)

Washington state law on shooting attacking dogs is very straight-forward and has been long-established, both by statute and by case law.

This is true, regardless of whether there are restrictions on open carrying or shooting in the area.

See, generally, RCW 16.08 - Dogs

“RCW 16.08.020. It shall be lawful for any person who shall see any dog or dogs chasing, biting, injuring or killing any sheep, swine or other domestic animal, including poultry, belonging to such person, on any real property owned or leased by, or under the control of, such person, or on any public highway, to kill such dog or dogs, and it shall be the duty of the owner or keeper of any dog or dogs so found chasing, biting or injuring any domestic animal, including poultry, upon being notified of that fact by the owner of such domestic animals or poultry, to thereafter keep such dog or dogs in leash or confined upon the premises of the owner or keeper thereof, and in case any such owner or keeper of a dog or dogs shall fail or neglect to comply with the provisions of this section, it shall be lawful for the owner of such domestic animals or poultry to kill such dog or dogs found running at large.”

Is it likely that shooting an attacking dog would result in charges? It depends on the circumstances. One may kill a vicious animal in the necessary defense of himself or the members of his household, or under circumstances that indicate danger that property will be injured or destroyed unless the aggressor is killed, but it seems that such killing is justified only when the animal is actually doing injury... Drolet v. Armstrong, 141 Wash. 654, 657 (Wash. 1927).

How do these considerations change if the shooter defends their pet or livestock, instead of human life, against the attacking dog? Every person has a natural right to defend and protect his animate property—as cattle, stock and fowls—from injury or destruction by dogs, and in pursuance of that object may kill dogs engaged in doing injury to such animals owned by him; but there must exist an apparent necessity for such a course, and the destruction of the dog must be reasonably necessary under the circumstances...The right to kill dogs, in order to protect inanimate property, is based upon the same considerations. Drolet v. Armstrong, 141 Wash. 654, 657 (Wash. 1927).

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## Book Review



### **Prosecution Complex** *America's Race to Convict and Its Impact on the Innocent*

By Daniel S. Medwed  
239 pages, hardcover  
NYU Press (March 5, 2012)  
ISBN-13: 978-0814796245  
Retail: \$39

*Reviewed by Gila Hayes*

Daniel S. Medwed, nationally recognized scholar in the field of wrongful convictions, has written a detailed and disturbing book explaining how wrongful convictions occur. Medwed works with the Innocence Project and was associate director of the Brooklyn Law School's Second Look Program while a professor there. Despite the good work done by these volunteer groups, stumbling blocks to overturning convictions are staggering and so *Prosecution Complex* outlines reforms to prevent injustices. Medwed breaks his analysis of unjust prosecutions into three segments—case preparation, trial, and post conviction.

Medwed's criticisms focus on police investigators, prosecutors and district attorneys, unreliable laboratories and experts, plea-bargains, juries overawed by forensic evidence and a system of toothless sanctions against prosecutorial misconduct. Prosecutors and a system that does little to restrict them come in for the lion's share of criticism. "Prosecutors are the most powerful players in the criminal justice system, capable of determining who should be charged and with what crimes," Medwed writes. There are checks on prosecutorial power, like requirements to turn over exculpatory evidence before trial, but he charges that, "courts and ethics committees seldom punish prosecutors for violating them." The problem, of course, is that prosecutors are human, with competitive drives to win, tunnel vision when interpreting evidence, and naturally a little blind when reviewing questionable convictions they've won.

When deciding to charge an individual with a crime, the prosecutor need only "believe the person more likely than not committed the crime," Medwed explains. This decision need not consider the defense's claims and even may be based on court-inadmissible hearsay. He suggests requiring prosecutors to consider exculpatory evidence and raising the charging standard to proof beyond a reasonable doubt to "weed out borderline cases and spare some innocent suspects."

Why would a prosecutor try a shaky case? Prosecutors develop tunnel vision when reviewing police reports focused on a single suspect because they are not shown a full police report that may include other suspects, the author explains. He recommends requiring police to disclose complete case files to prosecutors. Review committees, to whom prosecutors must explain charging decisions, are needed, he continues. Retired prosecutors and judges with little to lose by challenging mistakes would be best suited to serve, he explains. To avoid overload, these committees could limit oversight to cases where "the risk of wrongful conviction is most pronounced," writes Medwed, including "possible eyewitness misidentifications, false confessions, unreliable informants, or tenuous forensic findings."

Once charges are filed and the case is moving toward a trial, the prosecution labors under discovery rules, including requirements to divulge exculpatory evidence. Enforcement is somewhat toothless, though, and even if a judge grants a new trial because the case was materially harmed by the prosecutor's failure to disclose the evidence, the offending prosecutor is rarely identified by name or sanctioned. Medwed suggests harsher punishment for Brady violations (See Supreme Court decision *Brady v. Maryland* [http://www.law.cornell.edu/wex/brady\\_rule](http://www.law.cornell.edu/wex/brady_rule)), including the possibility of disbarment for blatant violators or at least overturning verdicts without opportunity to retry the case. Better yet would be internal case monitoring committees, or requiring prosecutors to share all information bearing on guilt or innocence with the defense, he contends.

One stage at which the prosecution and defense do talk is when a plea bargain is offered. Medwed asserts that in more than 95% of criminal convictions the defendant pleads guilty to a lesser crime than the one originally

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charged. He colorfully describes plea-bargaining as “a marketplace where the defendant barter his right to a jury trial and the government its right to pursue the highest sentence possible.”

Why would an innocent person participate? Intimidation starts when investigating police convince a suspect that they face a death penalty unless they confess to the preferred version of the story, perhaps one that implicates a second person. The government is not obligated to reveal exculpatory evidence or acknowledge flimsy evidence when offering reduced charges, so their case appears undeservedly strong. With plea-bargaining, the case closes with minimal documentation, complicating an appeal, which is unlikely indeed, in light of a signed confession.

Still, going to trial is risky! Medwed dissects what happens at trial, outlining areas of particular risk for false convictions, including eyewitness testimony, jailhouse informants, ineffective counsel, prosecutorial manipulation to strengthen shaky evidence, and appeals to prejudice. Pressure from both the public and the internal power structure of the prosecutor's office to “view convictions as the coin of their realm” fuels these abuses, he explains. A prosecutor's office must convince the electorate that they're tough on crime, because voters view “themselves as prospective crime victims rather than defendants” he describes.

Though prohibited from grooming witnesses to give only favorable testimony, prosecutors find grey areas to exploit to win cases. Witness preparation occurs behind closed doors, so lacks ethics oversight so that common abuses range from guiding a witness' recollections, to exchanging immunity from prosecution for testimony and allowing false testimony from police. When an inmate trades testimony for a lighter sentence, pretrial hearings are sorely needed to prevent perjury, Medwed asserts. When truthfulness is in question, as with a jailhouse snitch's account for example, their testimony should only be allowed if independently corroborated, he adds.

Juries are prone to convict when shown scientific evidence, even if they do not fully understand it. Medwed asserts that fingerprints, DNA testing, handwriting analysis, hair comparison, bite mark analysis and arson investigative techniques, are especially subject to misinterpretation. He lays some blame on shoddy laboratory work, coupled with inadequate validation. Sometimes findings that don't match the theory of the case are withheld; other times an expert testifies that scientific evidence is rock-solid

when it really is not. Discovery rules should require revealing scientific evidence for validation long before trial, Medwed recommends.

He calls out for a means to elicit only objective testimony from experts, though he adds “the image of the ‘impartial’ and ‘independent’ forensic scientist is woefully naïve.” After the *Daubert v. Merrell Dow* case, civil courts imposed higher standards on experts and scientific evidence but this has not affected criminal trials. “Weak forensic science continues to pour, not drip, into criminal trials. This may be attributable to a number of variables, among them judicial inertia and the failure of the criminal defense bar to mount effective challenges to scientific evidence,” he charges.

Once all the evidence has been presented and witnesses examined, each side gives a summation emphasizing their strongest arguments. Sometimes the prosecution is allowed to rebut the defense's summation, and Medwed calls “The ability to speak both first and last... a potent one-two punch,” suggesting that rebuttal summations stop or the defense be allowed to rebut the rebuttal.

Medwed explains that summations are largely unrestricted, though it is the rule that closing arguments may not include a personal opinion about guilt or innocence, vouch for witnesses' credibility, introduce information excluded during trial, inflame juror prejudices or comment on a defendant's refusal to testify. Prosecutors cross those lines, he asserts, “Inflammatory appeals to passion, misstatements of the evidence, and other foul blows by prosecutors can profoundly affect the jury because they carry the imprimatur of government approval.” Emotional closing statements distract the jury from making a rational analysis, he adds.

“Trial judges are loath to meddle in summations,” Medwed explains. Appellate courts, on the other hand, are better positioned to enforce restraints on prosecutors. Unless shown that a violation during closing arguments substantially affected the verdict, most courts will not overturn a conviction, due to the harmless error doctrine. “Prosecutors can play fast and loose with the rules during closing argument,” he writes, “because the chance of reversal on appeal is so small.”

The author is pessimistic about correcting abuses through self-regulation, judicial oversight or legislation. Perhaps law students could scrutinize open trial records

*[Continued...]*

to identify violations, and then periodically publish offender lists to shame them into compliance, he suggests.

The final section in *Prosecution Complex* details obstacles to appeals for retrials. A workforce is the greatest asset to winning an appeal, something a convicted inmate lacks unless volunteers like the Innocence Project adopt the cause. Though reversals based on DNA testing grab headlines, DNA evidence is not applicable in many cases. With subjective evidence, witnesses need to be reinterviewed or the case reinvestigated, and that requires staffing. If new evidence is found, the court has to be convinced that it merits reconsideration. Time limits and grounds for appeal diminish success and the Supreme Court has held that "a claim of factual innocence based on newly discovered evidence by itself is generally an insufficient ground for federal habeas corpus relief," Medwed reports.

Lying claims of innocence flood courts and prosecutor's offices, overshadowing genuine injustices. The prosecutor who won the conviction is often assigned to review the complaint, essentially asked to spotlight their own errors. Other assistant prosecutors may risk retribution for identifying a colleague's mistakes. Without rules defining conditions under which prosecutors must reopen cases, and with no punishment for failing to make a good-faith analysis of new evidence, post-conviction relief is rare.

Is it worth the effort and expense to free criminals who, while not guilty of the crime of which they are convicted, have prior criminal histories? It is. Medwed cites a 2011 study estimating that Illinois paid \$214 million convicting, incarcerating and later compensating for losses more than 80 innocent prisoners. The criminals who committed the crimes remained free, and at least 94 additional felonies including 14 murders have been attributed to them, he reports. Convicting the wrong person leaves an active criminal free to continue harming the citizenry. A convict may spend decades incarcerated, during which he may lose family members to death and suffer other unrecoverable losses, too.

The criminal justice system needs to abandon its hell-bent pursuit of closed cases, Medwed believes. True, closing cases increases public confidence, but it also makes acknowledging proof of innocence nearly impossible. Sometimes prosecutors run across exculpatory evidence while trying other cases. Rules of professional conduct require disclosure of post-conviction evidence of innocence to the court or other appropriate authority, but the Supreme Court has failed

to extend the Brady requirement of sharing exculpatory evidence beyond trial. This, Medwed would change.

Medwed would like to focus prosecutors on protecting the innocent and that includes working proactively to correct wrongful convictions without being forced to. Prosecutors should be "ministers-of-justice," he suggests, not just a force focused on winning convictions. He lauds examples of prosecutors investigating innocence claims, including the Dallas, TX District Attorney's Conviction Integrity Unit and a similar unit in New York City. At the state level, creation of an innocence commission, as exists in North Carolina, has merit, he suggests.

American justice hinges on the adversarial system. At points throughout *Prosecution Complex*, Medwed suggests that the system is flawed, but instead of calling for a systemic redesign, he suggests that fine-tuning it to avoid miscarriages of justice is the solution. This assertion he supports with comparisons from other nation's criminal justice systems, in which, pretrial decisions are made by a broader array of authorities and the judiciary plays a far more active role in the quest for the truth.

He urges that removing secrecy from charging decisions and expanding discovery would go far to prevent wrongful convictions. Some would devolve from legislation, but more needs to come from the grassroots, with prosecutors and their assistants sensitized to the ethical concerns surrounding their role in the criminal justice system. Changing attitudes should start with students in law schools, he adds, putting less emphasis on black letter law and more on ethics. He quotes a former U.S. Attorney General, Robert Jackson, who said, "sensitiveness to fair play and sportsmanship is perhaps the best protection against abuse of power."

*Prosecution Complex* is a great introduction to the causes of false convictions. In addition to 170 pages of solid text illuminated by compelling stories and examples, Medwed gives the reader nearly 30 pages of footnotes citing in detail the sources of his information. An additional eight-page index proves useful in checking back when the reader wants to update memory of what they learned. Medwed's academic roots really pay off for the reader in both the skillful presentation of his theories and in creating accessibility to a complex subject. If you care about this topic—and anyone who may become embroiled in the criminal justice system must care—you will want to read the entire book.

[End of Article.  
Please enjoy the next article.]



## Networking

by Brady Wright

Our Network affiliates have been very busy, and some have been in touch with me to get more Network materials, or just let me know how things are going. Here are some of the most interesting highlights—

Alex Haddox is one of our affiliates who does a regular podcast that covers all manner of things related to concealed carry. He just published his second book, *How to Write Range Safety Standard Operating Procedures*. It is available in all of the top eBook formats: Kindle, iBooks and Nook.

Alex tells me, "Range Safety SOPs is a rather esoteric subject, but one I had experience with and saw a need for. After completing my NRA Range Safety Officer and Chief Range Safety Officer training, I noted a distinct lack of instruction on how to write a range SOP. All of the training explained what needed to be included and that the SOP was absolutely critical, but there was no guide on how to write one. So, I sat down and wrote a SOP instruction manual for the firearms industry. It probably won't appeal to most, but those that need it will REALLY need it."

Having looked through an advance copy that Alex sent along, I can say that if you are even contemplating setting up a range or you are involved with an existing facility, this would be a very handy resource. The direct link to Alex's site is, Palladium Education, Inc. <http://www.palladium-education.com>

Business is booming (pun intended) for Pat and Norman Hood. They have classes with Dave Spaulding scheduled March 16-17 and Jeff Hall (Hojutsu-Ryu) May 10-12 (with Dave Grossman attending) at their firm, Defensive Solutions LLC, in South Bend, Indiana. Pat and Norm do all kinds of training and these are two solid anchors for their 2013 schedule, which you can check



out at <http://www.defensivesolutionsllc.com>, or you can email [akhoodlum@gmail.com](mailto:akhoodlum@gmail.com) for details.

You may be curious about Hojutsu-Ryu: I was and learned that this discipline is the martial art of shooting. Rather than recite the details here, I'll simply suggest that you Google Hojutsu or Soke Jeff Hall or go to Hall's website at <http://www.forceoptions.net/about.php>. You'll find it interesting, I promise!

I send out shipments of our booklet, *What Every Gun Owner Needs to Know About Self-Defense Law*, on a regular basis to affiliates, instructors and retailers all over the country. Sometimes, I get feedback like this note from Don Roberts at [www.guninstructor.net](http://www.guninstructor.net) who has a table at large gun shows in his area where he gives out our booklet. Don sent some photos of his table and the way the pamphlets "dress up" his display.

One Saturday evening Don wrote, "I received the second box of pamphlets today and that is good, because the first box is just about all gone. When the show ended this evening, I just accepted the fact that I wouldn't have enough for Sunday and would run out by 10 or 11 A.M. People were grabbing those things left and right. The cool thing is, I wasn't necessarily asking folks if they wanted one unless I could see them hesitating, then I'd encourage them to take one. That is a testament to how well-designed that front cover is."



Copies of the Network's educational booklet draw the eye of gun show attendees to firearms instructor Don Roberts' table.

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Tom Tomasi at the New Mexico Handgun Academy has been providing personal protection, firearms training and concealed carry instruction in NM since 2004. His academy hosted Massad Ayoob and his MAG 20 Live Fire Course on Oct 20-21 in Albuquerque, attended by 29 people from all around New Mexico, Colorado and the panhandle of Texas.



The weather was perfect and everyone enjoyed the class immensely and gained valuable experience and training. "Mas's teaching skills are beyond compare and had the constant attention of all the students throughout the entire 20 hours of instruction," Tom enthused. Many of the students were finishing the MAG 40 course series, since Mas came to town in November of 2011 and taught the MAG 20 Armed Citizens Rules of Engagement classroom course, he explained.

Check out Tom's website at [www.nmhandgunacademy.com](http://www.nmhandgunacademy.com) or call at 505-249-9942 to find out more about his classes.

As usual, if you need any Network booklets or brochures to give to clients or customers, call or email me at [brady@armedcitizensnetwork.org](mailto:brady@armedcitizensnetwork.org) and remember to be in touch if you have news to share or know of a win we should celebrate. Finding emails or calls from members is like Christmas coming early for me and, by the way, I hope all of you have a great holiday season and get whatever new toys you are wishing for under the tree. More importantly, I hope your holidays are full of family, health and safety, in any order you like.

There's more to come next month. Stay safe out there!

*[End of article.  
Please enjoy the next article.]*



## Editor's Notebook Got Questions?

by Gila Hayes

Once a year, we dedicate one of the editions of this journal to defining exactly what it is that the Network does. I hadn't really planned that the December edition would be the one, but on

review of this month's articles, I found that our focus had been largely on the Network's goals and mission, so I went with the flow, knowing that the more clearly members and prospective members understand what the Network does, the stronger our organization grows.

It is fairly easy to identify where folks are getting confused about parts of the Network's post-incident protections: I need only read inquiries from the "Ask A Question" form on the Network's website. For example, a recent email promotion for a self-defense insurance policy endorsed by the NRA raised a number of questions about how insurance would work in tandem with Network benefits, posed by both Network members and folks who wondered if they should be Network members. Let's review those questions in the hope that you will find some of the questions, answers and commentary helpful.

*Question:* I received an email solicitation from the NRA for their affiliate insurance coverage. I'm wondering how it compares to the benefits we have.

*Answer:* Thank you for the "heads up." Others, too, have noticed the NRA solicitation and brought it to my attention. Judging from a call I made to their sales agents, it appears that the NRA-endorsed insurance sold by Lockton Risk remains a plan for reimbursement, paid to the insured if a court returns a Not Guilty verdict. There is a second policy available to address liability concerns.

In general, the big difference between any insurance and the Network's membership post-incident protections is that the Network vigorously participates in the member's civil or criminal defense by providing financial assistance with attorney fees and providing additional

legal defense resources DURING the post-incident, pre-trial and trial phases, should it go that far.

*Question:* I've heard Marty on Gun Talk Radio and this is where I heard about your Network. He mentioned the Network coverage is different than self defense insurance. Do you also have this type of insurance?

*Answer:* The Network does not sell insurance, and frankly, there is a fair bit of argument whether or not the liability coverage included in most of the self-defense insurance plans is a good idea. Generally these policy's liability limits are extremely inadequate compared to the dollar amounts usually awarded in wrongful death suits, and yet the hint of getting anything out of an insurance company's "deep pockets" may attract a plaintiff's attorney and encourage a civil complaint requesting damages. In civil court, you can lose if the trier of fact deems it a mere 1% more likely than not that you are liable. Taking this discussion further becomes something of a philosophical debate, and so the Network takes no side in encouraging or discouraging its members to have or not to have self-defense insurance in addition to Network membership protections.

*Question:* Do you have any advice for people who have other insurance for self defense who are thinking about joining your organization?

*Answer:* Because so many armed citizens have self-defense insurance policies, prospective members often ask if the Network would withhold benefits from members who also have self-defense insurance.

Of course, the answer is a resounding, "No!" In providing for a member's needs immediately after an incident, we would not even ask if the member had an insurance plan, because at that moment our greatest concern is assuring that they have legal representation to help manage the immediate aftermath.

Once beyond the immediate aftermath during which members receive the deposit against attorney fees described in the second point on our webpage here <http://www.armedcitizensnetwork.org/learn/membership-benefits> we would ask members requesting further grants to pay legal fees to eventually repay those grants from any self-defense insurance payouts received upon

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acquittal. This would keep the Legal Defense Fund strong for the support of other members, without taking any money out of the individual member's pocket and concurrently serving to protect all against any allegations that they profited monetarily from acting in self defense.

Sometimes the next question is, "Will my insurer refuse to pay if I use Network Legal Defense Fund monies to pay my lawyer?" To this, we can only shake our heads and say, "You'll have to ask your insurer."

Although both the Network and self-defense insurance plans help armed citizens deal with the daunting legal expenses following a self-defense incident, there is quite a bit more to Network membership than just the funding aspect. As I answer questions that come in asking us to compare the Network to other gun owner support plans, it is apparent that the Network approaches post-incident protections quite differently from other organizations in the following areas of concern:

**What we do when a member needs legal services:**

Network assistance starts when we receive a call from the member's attorney or family member. If the member already has an attorney, we send that attorney the immediate deposit against fees to represent our member during any questioning plus initiate an independent investigation of the incident to tie down the facts before witnesses vanish or have their recollections influenced by others.

If the member does not have an attorney or has traveled outside his or her home area, we send a Network official (in all likelihood Network President Marty Hayes or another Advisory Board member) to liaise with and obtain legal counsel for the member, as well as consulting with that attorney about the initial representation and any court appearances, and more, in short, to be sure the member's legal needs are thoroughly met.

This show of force right up front both clarifies the facts of what actually necessitated the self-defense actions our member took, plus in jurisdictions where the trend is to take any use of force—legitimate or not—to trial it shows that this is a well-connected individual who can not only articulate why he or she used force, but has considerable resources to put on a good defense in court. In situations where prosecution is not discouraged, the Network Legal Defense Fund stands ready to provide grants of financial assistance to help with further legal costs, plus access to the Network's experts who

are tremendous assets in working with the trial team to build a successful strategy, plus they can articulate for a jury why the armed citizen was justified in using force in self defense during the incident under scrutiny.

Grants of assistance from the Network's Legal Defense Fund are not contingent on whether the trial is of a criminal or civil nature and are not limited to use of a gun in self defense, either, so if a knife is all a member can legally carry, the Network would still assist after a self-defense incident.

**In-person response for worst-case scenarios:**

Now and then members write, "When traveling out of state and legally carrying on one of my carry licenses, if I need help, what number do I call?" We answer, "On the back of the sheet to which your membership card was attached is the information about using the off-hours member response phone, which goes directly to our Network President. In case you no longer have that letter, you can get the same information at <http://www.armedcitizensnetwork.org/boots-on-the-ground.>"

If you call us after an incident (instead of having your attorney or a family member do so), please understand that we will need to strictly limit what you tell us since no attorney client privilege exists between you and us. That's why we so strongly recommend that you get to know an attorney and make your first call to him or her where ever that is possible, so that you do enjoy privileged communications when you call for help. If you are out of your home area where you do not know an attorney, then certainly, make the call to the Network office or to the *Boots on the Ground* cell phone and we will get help to you.

**Legal Expertise:**

The Network's expertise in legalities bearing on self defense is one of the defining differences in Network services compared to those of other organizations. We are better positioned than any organization of which we know to bring together qualified, experienced attorneys with expert witnesses to argue a successful self-defense case. Few would disagree that most trial attorneys know only a little about self-defense law, the affirmative defense, and defending truly innocent people. The Network aspires to change that reality and in the process is working hard toward a goal of becoming the premier provider of Continuing Legal Education on

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defending self-defense cases. (See <http://www.armedcitizensnetwork.org/legal-education>)

In addition, our Network affiliated attorneys, who are also full Network members, are a tremendous resource. Our affiliated attorney list is made up of attorneys who have either been recommended to us, contacted us and offered to serve, or were specifically identified through other sources as gun-friendly attorneys who we then personally invited to affiliate with the Network. When attorneys ask if they can help, we make them full members of the Network so that they receive the same educational materials as our members.

Many of our affiliated attorneys contribute to a column in this journal, helping educate our members about legal issues. They are a great group of men and women!

While on this topic, it should be stressed that the Network is not an attorney referral resource. The affiliated attorneys list is more for the convenience of Network members who have not located an attorney they would call after a self-defense incident. As such, the lists of Network affiliated attorneys, sorted by state, are restricted to use by Network members only.

**Use of force education by recognized, expert sources:**

The Network, drawing on the considerable experience of our founders and advisory board, have a very different view of aftermath management than the “shut up and

say nothing to police” advice so prevalent on the Internet. It would be incalculably more difficult to successfully defend an innocent member who, in their initial contact with police after defending themselves, followed that advice to wait however long it takes for legal representation to arrive before speaking with police, compared to a well-prepared, educated Network member who gave a very limited statement to point out evidence of the violence against them and to clarify who was the aggressor. This concern is addressed in <http://armedcitizensnetwork.org/unintended-consequences-of-silence> and there is more vital info at <http://armedcitizensnetwork.org/3-most-common-post-shooting-errors> as well as a good discussion of the topic in the second of our educational DVD series, which all members receive.

Network members receive seven educational DVDs with first year membership and an additional DVD with every year's renewal. These are lectures given by recognized authorities in use of force education, bearing on issues surrounding using guns for self defense.

As I've prepared this column, several more “Ask A Question” emails have arrived. We're out of time and out of room here, so I'll go now and answer those individual inquiries.

*[End of December 2012 eJournal.  
Please return next month for our January 2013 edition.]*



# About the Network's Online Journal

The **eJournal** of the Armed Citizens' Legal Defense Network, Inc. is published monthly on the Network's website at <http://www.armedcitizensnetwork.org/our-journal>. Content is copyrighted by the Armed Citizens' Legal Defense Network, Inc.

Do not mistake information presented in this online publication for legal advice; it is not. The Network strives to assure that information published in this journal is both accurate and useful. Reader, it is your responsibility to consult your own attorney to receive professional assurance that this information and your interpretation or understanding of it is accurate, complete and appropriate with respect to your particular situation.

In addition, material presented in our opinion columns is entirely the opinion of the bylined author, and is intended to provoke thought and discussion among readers.

To submit letters and comments about content in the **eJournal**, please contact editor Gila Hayes by email sent to [editor@armedcitizensnetwork.org](mailto:editor@armedcitizensnetwork.org).

The Armed Citizens' Legal Defense Network, Inc. receives its direction from these corporate officers:  
Marty Hayes, President  
J. Vincent Shuck, Vice President  
Gila Hayes, Operations Manager

We welcome your questions and comments about the Network. Please write to us at [info@armedcitizensnetwork.org](mailto:info@armedcitizensnetwork.org) or PO Box 400, Onalaska, WA 98570 or call us at 360-978-5200.

