Armed Citizens' LEGAL DEFENSE NETWORK, INC.

Defending Pepper Spray Use

An Interview with Attorney Penny Dean

Two winters ago, in a large northeastern city, a Network member was shoved against a wall and choked. Although licensed to carry a concealed firearm, our member had a canister of oleoresin capsaicin, pepper spray, which was used to break free of the attacker. Any use of force in self defense needs to be reported to law enforcement. Our member rightly called 9-1-1 and as a result, the man who attacked our member was taken to an emergency room complaining of burning eyes and blurred vision, while our member was arrested and taken to jail.

Our member was released later that day. The following day, our member called Network President Marty Hayes for help before an arraignment scheduled on a Monday, two days later. Reaching out to one of the very best in that region, Hayes immediately telephoned attorney Penny Dean, who, although it was the weekend, contacted our Network member to see what she could do to help. Licensed to practice law in a number of states, Attorney Dean's law firm is located in New Hampshire, not the state in which the incident occurred, but she agreed to travel to the member's location.

We turn now to Attorney Dean in a discussion intended to help Network members understand why vigorous legal representation–even after using pepper spray–is so very essential. At our member's request, we must carefully shield details that might lead to identification. This is sensible, owing to concerns about reprisals, the potential of civil litigation and adverse affects on employment. Thus, Penny Dean's efforts in this case, will tell the story.

eJournal: First, Penny, let me thank you sincerely for offering your valuable time to help Network members understand what you did in this case and telling us why expert legal representation was essential to keeping our member from being punished for steps taken to avoid being choked into unconsciousness. What happened after Marty called to ask if you could assist our member?

Dean: I called the client and we spent 11-12 hours on the phone over two days prepping for Monday's hearing. Arraignment and bail determination or redetermination can be real death traps. The client had to send me a biographical life history, literally a résumé, and lots of other documents.

eJournal: Did our member have that kind of documentation ready for you? I ask, because I doubt I would have!

Dean: No, the member had an older résumé that we were able to polish up, but no personal family history. 99% of people don't have those, so we got that done. Then on Monday, when I went to the arraignment, there was a huge blizzard. Mine was almost the only vehicle on the road and my travel time was literally double the normal commute.

eJournal: The statutes cited in charging our member were very broad. I'm hoping you can give us some insight into the accusations and maybe explain the rationale behind them, because I had trouble correlating the member's actions with the charges.

Dean: Here's what the complaint says: "Did on [date], by means of a dangerous weapon, Mace®, assault and beat [name] in violation of [specific statute number and section]" Then they give the penalty and that is very helpful: "State prison not more than ten years, or house of corrections, not more than two and a half years, or not more than a $5,000 fine or both such fine and imprisonment. District Court has final jurisdiction under [state code]." That is count one.

The member was charged with two counts. The second was "assault and battery [cites chapter, section, and subparagraph], on [date], did assault and beat [name] (arm was grabbed). Penalty, house of corrections not more than two and a half years or more than a thousand

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dollar fine." That means you can get sentenced to two and a half years and you will lose your Federal gun rights for putting your hands on other people. Many people do not think a state law misdemeanor can cause you to lose your firearm rights. It can. Any crime for which you could have received more than two years' imprisonment will cost you your firearms rights even if you never serve a day.

So our client was potentially facing a total of 12 ½ years. Most people would consider that a long period of time, especially as you have asked, "For pepper spraying someone?" When I tell my clients, "Know before you go," I mean if you do not know the consequences of your actions on every stupid little thing, do not do those actions. Do not do them because the consequences can be much, much, much more severe than you ever imagined in your wildest nightmares. You must decide if you want to pay that price. That is a decision for each person to make.

eJournal: Fortunately, our member had extensive training and background and knew the local laws. While cornered and unable to escape, that knowledge no doubt led to timely use of the pepper spray before the member was choked into unconsciousness.

Dean: I teach the legal part of many firearms classes, and after I've scared the students until some say they just won't carry a gun, one of my favorite instructors always asks me, "Knowing all these scary things, is it worth carrying a gun?" And I always say, "It is absolutely worth it, but you have got to think about this whenever you decide to clear leather." Then I add, a fight avoided is a fight won. No matter how bad the other jerk is, sometimes winning is walking away and getting the heck out of there! Listen, you've got to ask yourself, "Is it worth it?"

eJournal: Well, like I said, our member was out of options. I'm left wondering how could the law consider defensive use of a chemical deterrent assault and battery?

Dean: Anything can be assault and battery. I am not exaggerating. Let's say I have a really hot cup of coffee as was the situation with the infamous McDonald's spilled hot coffee verdict. The secret to better coffee is brewing it hotter, so if I get the hottest, best coffee and someone does something and I throw hot coffee in their face, I had better be ready to justify that, because I am going to be charged with assault with a dangerous weapon because it is essentially boiling water. In NH, for example, anything in the manner that it is used or intended to be used, can be considered a deadly weapon. It depends on how you use that item.

eJournal: I've learned to adjust my terminology about intermediate physical force options, including pepper spray. Because we've been told that pepper spray won't cause long-term harm, many have given it to family members who were underage or headed for college where guns are prohibited. We need to give instruction, not only in the most effective ways to deploy it, but also in when it is appropriate. How does justification change if facing angry or aggressive speech compared to being flanked by two guys who won't let a college coed leave? There's quite a difference in the danger level.

Dean: You know Gavin de Becker's book, *The Gift of Fear?* Reading it makes me think that people need to be more and more careful about defining what is a real threat. I think people need to be better at that. It comes down to reading people.

In our society, there are a million people who have allergies and carry inhalers, so we have to be realistic in using pepper spray. Although it is justified and you may save your life, you have to think it could be the same as a firearm, because what if that person has a reaction, or can't breathe because of that pepper spray? I think you have to ask yourself, "Does this rise to the level that I am justified in defending myself with pepper spray?" In our case, our member was being choked and feared passing out. That's justified.

eJournal: Did our member's attacker demand that police arrest our member?

Dean: Yes, implicitly.

eJournal: You know, I'd wondered if the arrest was just the local default response to use of force–with no consideration for who attacked whom? In the Northeast, where you've practiced law for 20 years, is that normal?

Dean: Yes, that is SOP–standard operating procedure–sadly.

eJournal: You commented that the State changed prosecuting attorneys mid-case. Did you try to bring the new prosecutor up to speed, or did you just sit back and silently thank them for what they were NOT doing?

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Dean: There are two answers to that question. I did thank them for what they were NOT doing, silently, just not orally in public! I was very grateful for that. But I had to do the same things over and over because I would make a request to the prosecutor and initially give them the courtesy and the respect that they are going to be honorable and follow up. But that person would leave and when we were next in court, I'd say to the new prosecutor, "Hey, we are missing XYZ, ABC," and they would say, "Oh, I don't see any notes on that."

Usually when I request information when we're starting on a case, the prosecutor says, "Oh, yes, we have that information. I just saw it come in. I'll get it for you." In this case, what I would get was, "I have no clue whether that information is available or not. I just started this case and I haven't read the case file."

Sometimes they would act like it was not important, like, "This is the first time you've asked me for that," and I would have to say, "Well, yes, this is the first time I have asked YOU, but it is not the first time I have asked your office for that information." So then I'd put it in writing, and I'd say, "On June 4th, I asked your predecessor for X and it didn't happen. This is really impeding my case preparation. I need that information so I can make determinations and advise my client."

eJournal: That's frustrating, but fortunately you understood that this was serious and you didn't just wait for the State to hand over their version of what happened. You hired a private investigator quite early in the timeline. Why did you feel that was important?

Dean: Oh, yes. If I had been called right after it happened, the PI, photographer and I would have been on the road right then, even if it was 2 a.m. we would get out of our warm beds and go to work.

The PI should be hired yesterday and is worth his/her weight in gold. Witnesses can disappear, the physical scene can change and evidence can be missed. You do not know what will be important, because cases take many twists and turns. Besides, it never hurts for the police department to know that this case will not be a slam-dunk, and the defendant knows his rights, has competent counsel and will be asserting his/her innocence every step of the way. You can never get there too quickly!

You can never have too many photos. You could catch the license plate of a car whose driver is hiding because they don't want to get involved. In short, hundreds of photos should be taken from every angle and every inch. That is the job of the PI and/or photographer. Typically, you have to walk the area to see what can be seen from which vantage point, but remember there will be more ear witnesses than eyewitnesses. Talk to anyone you see in the area, both visitors and residents.

In the big scheme of things, our case had a relatively small and uncomplicated scene. Nonetheless, the second time I was there for court, I went to the scene and I spent two or three hours there. I needed to look over everything; I needed to check what you could hear. I had the client in this case stand in a particular area where the event had happened and yell the same things yelled during the incident in the same tone of voice, as best as we could recreate (understanding what happens under fight or flight). I would go to different areas and listen and see what I could hear, if anything.

We chose to do this at that particular time because it was the same day of the week and the same time of day that the event had happened. That matters! That matters a lot! The client believed that it was as close as we could replicate to a similar level of foot traffic, so there was the same level of background noise. We spent quite a bit of time making sure the same doors were open or closed, because it is the little things that really can matter.

We determined the acoustics and physical space made it unlikely there were any more witnesses, however, you have to be careful. If a witness hears only a select portion, they could be a bad surprise witness against you. If anything is taken out of context, what was said can appear different than it was. For example, I didn't want the prosecution to come up later and say, "We have Sally Lou and she is an ear witness who heard A, B and C." Statistically speaking there will be more ear witnesses than eyewitnesses. I wanted to see what ear witnesses potentially were available. Were we missing any? We had to know this so the PI could track down everybody he could.

eJournal: Without divulging private details, how did your investigator's discoveries guide your interaction with the courts on behalf of our member?

Dean: In addition to evidence that the alleged "victim" had assaulted my client, we found out details about whom the alleged "victim" hung out with, employment

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history, and many details about the man who was with him who had several felony convictions. All this allowed me to approach the prosecutor to ask for a hearing to see if the alleged "victim" would assert his Fifth Amendment rights against self-incrimination regarding the injuries he had inflicted upon my client. It also allowed me to present the bad facts about the witnesses the state would have to rely on, and how the jury would view the word of convicted criminals against my client's pristine record.

eJournal: While you and the PI were digging up the underlying facts, what was happening in the courts by way of hearings, court filings and requests that you were making?

Dean: I was attending lots of hearings, and filing requests including one for clarification of bail conditions, filing what is called Notice of Affirmative Defenses of Self Defense, and making a lot of requests for discovery and a request for a view. This was only the beginning, had we gone to trial many more would have been filed.

eJournal: Yes, I noticed that you filed a motion requesting a "view." Tell us, if you would please, why that was important.

Dean: In the interest of protecting identities, let me speak generically about a view. I have viewed a lot of scenes where crimes happened. Even if you give me the best photographs and the best aerial view—hundreds, even thousands of photographs—in order for me to see everything and make sure I don't miss anything and make sure I understand how everything worked, I have to physically walk through the scene myself. The jury needs to do the same.

Here is my thought process: We are always going to tell the truth, although the prosecution may sometimes lie, they play games with the truth, they play fast and loose. They really mess with you if they want a conviction badly enough. So, I want the jury to be able to see everything, so they can think, "Wait a minute! We walked through that scene, what the prosecution is saying is not possible there."

I cannot imagine not having a view. I have never had a case that I did not request a view, although I have been denied a view. They might say, "Because it is not relevant. The jurors can figure it all out from photos." I think that is a cop out and I make a big stink about that! I say, "If we lose, this is grounds for appeal!" Trust me, I am on my feet, throwing fits.

eJournal: Who, besides the jury, goes along on a view? Are judges, attorneys for both sides, and security taken along, too? What if the incident in question took place in a sketchy part of town? At night?

Dean: Yes, you need absolute security: security for the court, security for the jurors, and we are not just talking about one or two bailiffs, we are talking about some staff because you are taking jurors to who knows where.

eJournal: Does your client go out to the scene with that group?

Dean: I always have my clients go with the group because the client has the right to be present at all proceedings. The client stays beside you, looks nice, and doesn't say a word. I tell them I want no smiles on their face, no expressions, no talking and their cell phone will be off. You behave very properly because every nano-second the jury is observing you and judging you.

I instruct my clients, that they are to be human and they are to do the courteous thing. Sometimes clients who would normally open the door for an old lady or help a disabled person are so paralyzed by this process that they do nothing. All those things sound simple, but if they happen, I believe, they can make a difference in how your client is judged.

eJournal: Does the court place restrictions on what the jurors are allowed to view at a scene? The logistics seem challenging, because in the case we are discussing, you would have taken a large group into a fairly small, constricted area.

Dean: Or, sometimes you are taking them into a private home. I have a private investigator go through the scene in advance, making sure that nothing has changed and that there are no snafus. We don't want ten empty beer bottles all of a sudden appearing at the scene. Once a juror sees that, they now have an impression of our client that I don't want. You cannot unring a bell.

Each judge has a different set of rules about how things should be conducted at the scene. For example, I've never seen testimony allowed at the scene. Never. The

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lawyers are allowed to point things out to the jurors. I don't say, "There are ten windows," I have to say, "Please note how many windows there are in this room." "Please note where this couch is positioned," things like that will allow me to fill in testimony later, but testimony is not allowed at the scene during the view.

Views are critically important and you have to make all of these arrangements in the beginning. The lawyer has to get the jury to the scene, and the client has to pay, so you have to budget for that. In my experience, most courts have an approved bus service that you are allowed to use for juries, which means you have to call them in advance and make sure they have got a bus ready for as many people as you are going to take to the scene. You have to plan months in advance. Everything has to be in place.

I have developed a checklist over the years, because I determined very quickly that I am human and I can make a mistake and that mistake could affect my client. My checklist is eight pages long. When I get a new case, I print the checklist and I put it in the front of the file folder on the left side of the pleading file and I go through and either I put a line through an item if it is not relevant, or a check that I've done it. On that checklist, a view is just SOP–I think it is malpractice not to ask for one. It is so critically important.

eJournal: Added to your request for a view are requests for the documents, reports, videos and communications recordings from various authorities. The numbers are mind-boggling.

Dean: I asked for information from every government agency I thought might have any records about this incident–dispatch, sheriff and 9-1-1 communications because you can never assume you know what one agency may not have or what another may have! You cannot overlook any options because your client's freedom and very life depends on you turning over every stone.

eJournal: What detail were you seeking?

Dean: I'm looking for things that don't make sense to me. If I am reading everything and I go, "Yeah, yeah, yeah," well, OK. But if I'm reading something and I go, "Huh?" then maybe there is something I need to look into more closely. In our case, the authorities originally wouldn't give me not only the client's second 9-1-1 call, they also would not give me the alleged victim's 9-1-1 call. That made me ask, "What the heck?!"

According to the phone bill, our client had made two 9-1-1 calls. The first call was 21 minutes before the second. To make it as easy for the police as I could, I asked, "I believe there are two 9-1-1 calls made from this number which is my client's number, made at this time and lasting this long." The client had cell phone records, so I knew the times and I knew exactly how long the calls lasted.

They came back and gave me the first 9-1-1 call and then eventually the second one. Do you know why they didn't want to give us the second call? Because it tells that they didn't respond for all that time. Our client would not have been calling 9-1-1 if police had already been there!

eJournal: Why do you give retrieving 9-1-1 records such immediate priority?

Dean: Even though the prosecution has the duty to preserve all exculpatory evidence, they do not always do so. Judges often put the burden on the defendant, and they've asked me, "Attorney Dean, did you request those 9-1-1 call recordings?" I say, "In fact, Your Honor, I did that the day I was retained." Most judges who are being fair will say, "You tried, didn't you?" and I say, "I sure did," even though they are supposed to preserve it. That's why if the prosecutor starts messing with things, most judges will go, "Wait a minute!"

Here is what I did in our case: I sent a fax and wrote a letter to all three places that might or might not have these communications; I also sent an emergency communication to preserve to the trial court. Every department has different 9-1-1 preservation systems and this varies state by state, too.

I have a case in a different state where the client called 9-1-1 and when I asked for the call recording, I was told that it went to a very small department that is closed on weekends. So I said, "Well, the client called 9-1-1 and it was answered." That department told me that on the weekend the county would have answered the call. I was glad they told me, because I was able to quickly ask the county for the 9-1-1 recordings and they agreed to send them to me.

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Had I not asked, those recordings would have been lost, because call records are only preserved for between ten and thirty days. If you take the average client who gets arrested and arraigned, they may not have their next court date for up to 45 days. They may think, "Oh, I'll get a lawyer before that court date," but even if the lawyer takes action the very day you hire them, some of those recordings may already be gone.

eJournal: The Network pays an attorney to get to work ASAP as a key element in our membership benefits. We worry that people wait to hire an attorney because they don't have the money. Legal issues rarely go away on their own, and if ignored grow more serious—like losing the records of the true victim's call for police help.

Now, there is a very long list of additional steps you took to protect our member's rights after the defensive pepper spray use. Out of respect for our readers' time, I'd like to take a break here, and come back with the second half of this story next month.

I really appreciate not only all the time you put in defending our member, but just as much, I am grateful for the time you're taking to explain the reasons you implement certain protections on behalf of clients. I'd like to make sure we hold reader attention through the second half of those steps.

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Attorney Penny Dean is a well-known name in Northeast U.S. gun rights litigation, and has been a Network affiliated attorney since 2008. She practices law in NH, ME and MA and is admitted to all federal and state courts in those states as well as the First Circuit Court of Appeals, the United States Supreme Court and the D.C. Circuit. In addition to her busy law practice, Penny is a frequent media consultant on gun rights and firearms issues, and is well known by students of firearms courses at which she teaches the legal segments of the instruction. Enjoy her blog posts at http://www.pennydean.org.

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President's Message

Mea Culpa

By Marty Hayes, J.D.

I start out this month's column with a mea culpa of sorts. In last month's journal I discussed a political issue regarding President Trump and the need to keep him around to appoint conservative Supreme Court justices. And while I still believe in what I wrote, a member took umbrage with what I said, and he was right. Our member explained that I should not be using my position to forward my political views, and I must agree with him. I have endeavored to keep the *eJournal* non-political, but I guess I slipped up. I will try to do better in the future.

Have you donated to a good cause lately?

A few months ago, I was asked to speak on a Polite Society Podcast, along with guest Shelley Hill. Shelley runs her own self-defense school, The Complete Combatant, and is also strongly involved in a non-profit organization called Racheal's Rest (http://rachealsrest.org/). Racheal's Rest hosts retreats for women and children that have been involved in domestic violence incidents along with other assistance to help them recover. The podcast I took part in is very compelling and can be heard here.

Shelley is hosting a get together for women in Alpharetta, Georgia in May, called "The Mingle." I mention this because the local ladies from the Network might like to attend, but the bigger goal for The Mingle is the fundraiser for Racheal's Rest. This fund raiser is a raffle for training courses from many of the top instructors in the country, where purchasing a $25 ticket designated for a particular trainer/course might just allow you to attend that several hundred dollar course for the $25 ticket price. The Network was also asked to donate three memberships, so your $25 ticket could also go towards receiving another year of membership in the Network for $25. You need to purchase a separate ticket for each different training course or Network membership for which you want to be considered, one ticket doesn't cover all of them. Complete information can be seen at this web link.

This is a worthwhile event, and if you are like me and like to occasionally do things for other people that makes you feel good, then this here is one of those things. Maybe if enough current Network members will make the $25.00 donation to buy a ticket for the Network, we can take home the top raffle ticket seller trophy! (Check out the above link to see what I mean.)

News about RangeMaster's Tactical Conference

I use the time I spend at the yearly RangeMaster Tactical Conference to recharge my batteries, and it does it very well. I am grateful for the many, many Network members who came up to me and said hi, along with other complimentary words. It is so gratifying to have been the one who thought up the concept of the Network, and see how it is helping so many people sleep a little better at night.

I have an announcement, especially for our west coast members. My teaching business, The Firearms Academy of Seattle is hosting a regional Tactical Conference in July. It will include a taste of the training offered by Caleb Causey of Lone Star Medics, shown to the left, as well as a number of other instructors as listed along with other program details at this link: https://firearmsacademy.com/actvities/nw-tactical-conference. While smaller in size, the type of training offered at the NW Regional Tactical Conference will be the same high quality as if you attended back in Arkansas. Our northwest event is closing in on being full (it is two-thirds full now, so if you have an interest, please consider enrolling right away while there is still room for you). If you wait till the last minute, you might just miss the event.

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Come visit us at the fair!

Well, not exactly the fair, but instead, please do make plans to come visit the Network at the NRA Annual Meeting, in Dallas, TX. Elsewhere in this edition of the *eJournal* you will find Vincent's invitation with all the great details, but I just wanted to personally also extend the invitation. Look for our dark blue booth backdrop, as shown below from last year's meeting, when we enjoyed having Massad Ayoob as a guest in our booth.

This year's NRA annual meeting should be very interesting, especially after all the hullabaloo over NRA CarryGuard. As an update for members who have been following my concerns about the direction the NRA has taken with this, I still have not received any official response from NRA after my two letters, one to Wayne LaPierre, and the other to the Board of Directors of the NRA.

With the current issues facing us regarding school shootings and the attacks on the NRA, I suspect they have their hands full. I plan to attend the NRA Annual Board Meeting the day after the annual meeting, as I did last year, and will report back to you afterwards.

Now having said all that, if you are not a member of the NRA, you should be, and this would be a great time to sign up. You can go to their website and join the NRA, by following this link.

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Please enjoy the next article.]

Letters from Members

To the Editor:

I have a few comments about the March *Editor's Notebook* section.

I really liked almost all of this section of the March journal. I especially enjoyed the suggestion of gun businesses donating a small portion of sales to help train volunteer school employees. I almost always take advantage of the NRA Round Up feature in the checkout of retailers such as Midway USA and Brownells. Maybe a similar program could work for this, too.

However, I was a little surprised by the logic used concerning young adults. When I read the comparison of the 19 year olds of today vs. yesteryear, I braced myself for a story about walking to school barefoot through a foot of snow uphill in both directions. I am no longer 19, but being 30 often sees me lumped in with millennials. This is a group that is often accused of doing everything wrong and will likely doom the human race. I become much less engaged in a conversation when I hear arguments of this nature. This is much the same way we as gun owners react when accused of not caring about kids or being racist.

I believe that there is nothing new under the sun. All generations consist of an overwhelming majority of good people and a few bad apples. All generations also seem to contain a fair number of people that complain about succeeding generations and new technologies (a fun example of this is illustrated by web comic XKCD at https://xkcd.com/1227/ The Pace of Modern Life). When I was 19, I remember hearing many adults and news programs lament the many terrible and stupid things kids were doing at the time. My perception then was that only a very small minority of kids fit these descriptions. Unfortunately, the few stupid people tend to grab our attention more often than the good majority especially with our sensationalist news media. Restricting the rights of everyone in a certain group based on the bad actions of a few is a notion gun owners often fight against. We should not be proposing it ourselves.

Having said that, I believe the age limit discussion is one worth having. I also initially reacted favorably to the suggestion of raising the gun buying age to 21. After further thought, I realized that reaction was most likely because it would not affect me at all and would be a small price to pay for avoiding further regulations. Throwing young shooters under the bus in this fashion reminds me of how in *To Ride, Shoot Straight, and Speak the Truth* Jeff Cooper urged all groups of shooters to stand up for each other unless we want to be picked off one by one. Ultimately, my personal view is that we should recognize a person as fully adult at one age, whatever that may be. When I was in college, the drinking age had been raised to 21, yet those students who were inclined to abuse alcohol did so before and after turning 21. Many more students consumed alcohol responsibly regardless of their age. Additionally, a surprising number of students actually waited until they were of age before partaking responsibly. And this was in Wisconsin, where beer is a major food group along with cheese and brats.

I hope my response has not been too much of a rant. I appreciate you expressing your honest opinion so that we can have good conversations as a network. I really enjoy the journal and am grateful for all you do for Network members and gun enthusiasts in general.

DJ in Wisconsin

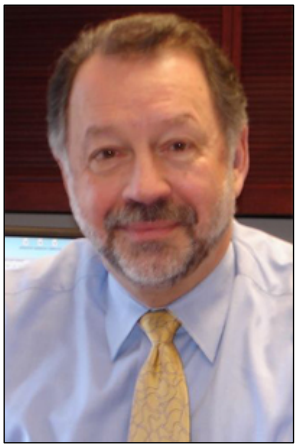
To the Editor,

I just happened to check some of the archived editions and read the Feb. 2013, article *Why America Needs Assault Rifles,* by Marty Hayes. I'm an experienced gun person, grew up with guns, and own several now and shoot often. My position was, "I don't need an assault rifle, but the Second Amendment says I can have one if I want one." After reading Marty's thoughts and opinion on the "need," I realized my thinking was short sighted and didn't fully understand the meaning of the amendment.

And I'm thinking how many others have joined the Network since his article was published and didn't get to view it, and could benefit by having their thinking about the true meaning and impact of the article, crystalized and focused, like mine has been. I think every reader would gain by reading it.

EB in North Carolina

We respond:
Thank you for your comments, sir! Members, you can read the article at https://armedcitizensnetwork.org/why-american-citizens-need-assault-rifles.



Vice President's Message

The NRA Goes to Dallas

by J. Vincent Shuck

Things are big and bright in Texas and Dallas is a prime example of what the Lone Star State has to offer. From JR Ewing to the Dallas Cowboys, and their cheerleaders, the city presents great dining opportunities, unique museums and plenty for any history buff to see. Dealey Plaza, Texas barbecue, or a rodeo, there are enough attractions in the city to satisfy any visitor.

Come join us in Dallas for the NRA Annual Meetings and Exhibits on Friday, May 4 through Sunday, May 6 at the Kay Bailey Hutchison Convention Center. The Network will be among the over 800 exhibitors in the 15-acre hall featuring every major firearm company, plus shooting accessories, knife merchants, hunting outfitters and gun collections.

Educational seminars, special events and celebrity speakers are available to you and the 80,000 other attendees. Exhibit hours are:

Friday – 9am – 6pm
Saturday – 9am – 6pm
Sunday – 10am – 5pm

Admission is free to NRA members and family.

Network staff will be in **Booth #7855** on Friday, Saturday and Sunday focusing on our primary missions of recruiting new members and saying hello to current members. If you are a Network member, please stop by the booth and say howdy. We truly enjoy the chance to extend a special thank you for your Network membership.

On Saturday afternoon we will have a special occasion in the booth. Our Advisory Board members will join us and be available to meet you to answer your questions. Although not all of the Board members have confirmed their participation, Massad Ayoob, John Farnam, Jim Fleming and Dennis Tueller have cleared their schedules and will be available.

Go to www.nraam.org for meeting, housing and travel details and then join us in Dallas for the NRA meeting!

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Attorney Question of the Month

This month we wrap up last month's question with our Network affiliated attorneys in which we asked:

Can a person who shoots in self defense be held criminally or civilly liable for injuries to an innocent third person, in spite of being justified in the use of deadly force against the attacker?

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Under Tennessee law and perhaps generally in other states, the answer is yes.

If someone uses deadly force but in the course of doing so injures or kills a bystander or innocent third person, that person could be held criminally liable for the injuries to these innocent third parties. Tennessee law expressly provides that "Even though a person is justified under this part in threatening or using force or deadly force against another, the justification afforded by this part is unavailable in a prosecution for harm to an innocent third person who is recklessly injured or recklessly killed by the use of such force." See, Tennessee Code Annotated § 39-11-604.

There is also the issue of civil liability. Quite frequently, some think that innocent or acquittal in a criminal case should be a defense in a civil case arising out of the same facts. That doctrine is referred to in some cases as "defensive collateral estoppel." However, it seldom applies successfully as a defense in a civil case. Some of the reasons why that is the case is that the legal issues in a civil case are different, the burden of proof are different between civil and criminal cases ("preponderance" versus "beyond a reasonable doubt") and the cases are typically tried by different attorneys to different judges and heard by different juries.

Indeed, Tennessee law makes clear that the justifiable use of force, including deadly force, as a matter of criminal law is not an absolute defense in a civil action arising out of the same facts. Tennessee Code Annotated § 39-11-605 provides "The fact that conduct is justified under this part does not abolish or impair any remedy for the conduct that is or may be available in a civil suit."

Thus, a person in Tennessee using force or deadly force to protect herself or a third party could still be criminally charged for recklessly injuring or killing a bystander even if the use of force against an attacker was deemed justified. Similarly, even the justifiable use of force against an attacker or the injury of an innocent bystander or property could give rise to civil claims of recklessness, gross negligence, negligence or even excessive force under the circumstances.

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Many states have immunity statutes that will prevent any civil or criminal liability if the defendant is found to have acted in lawful self defense. The rules vary greatly from state to state. Some of those states, such as Illinois, limit the immunity from civil suits to actions brought by the aggressor, his family, or his estate. An innocent bystander is not prevented from bringing a civil suit in Illinois, regardless of whether the defendant's acts (shooting at the aggressor) were justifiable self defense. Moreover, in Illinois, there is an exception to the immunity from suits by the aggressor, his estate, and his family, even if the shots were fired in lawful self defense, if the defendant's actions constituted willful and wanton conduct, which can be whatever the judge in the civil trial believes it means, at least up to a point or when an appellate court rules otherwise.

The innocent bystander who is injured in Illinois, not being subject to the immunity statute, need only prove the elements of negligence by a preponderance (majority) of the evidence, which is a much lower standard than the prosecutor's burden of disproving the elements of self defense beyond a reasonable doubt. A jury will decide if the plaintiff met his or her burden. A defendant who is not charged or even one who wins the criminal trial will therefore be required to defeat a suit by an innocent bystander in a civil case. The plaintiff will allege the defendant owed a duty of care to the innocent

[Continued next page…]

bystander, could reasonably foresee that an innocent bystander might be injured, did not use reasonable care when shooting at the aggressor, and caused injury to the bystander.

The crucial element in most civil cases will be whether the defendant used reasonable care when shooting, given the surrounding circumstances. A defendant who sprays bullets all around the area might have a more difficult case to win than a defendant who fired a shot that ricocheted, for example. Expert witness testimony may be required, although the judge might or might not allow it, depending on the facts of the case. If there is any evidence supporting the plaintiff's claim, the issues will be decided by the jury, which means high risk for the defendant.

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From the outset, it is important to note that the person who justifiably shoots an attacker in self defense could still possibly be charged with a criminal offense for injuries to an innocent third party–depending upon the facts of the situation. It is always difficult to say one would never be prosecuted when a prosecutor applies his or her judgment to what could be an infinite number of factual scenarios. However, the chances are probably slim assuming the actions where deemed reasonable under the circumstances, and you were justified in the use of deadly force against the attacker. The more likely scenario is where the person is sued civilly for injuries to an innocent third party. It is important to emphasize that even if the prosecution or civil suit for damages is ultimately unsuccessful, the armed citizen will still suffer the consequences of having to mount a successful defense, which involves significant time and cost.

This question could be answered differently, depending on the exact factual circumstances of the deadly force encounter. For instance, a purported negligent or reckless discharge in the course of an extended self-defense encounter could occur where the armed citizen does not hit the attacker and hits an innocent third-party. Under this circumstance, the armed citizen could conceivably be liable to the third-party for civil damages or even charged criminally with something like criminal recklessness–while at the same time being justified in his use of self defense against the attacker.

Discussion of potential civil liability might be the most useful analysis. Even if there is no criminal prosecution of a citizen for a self-defense shooting, that would not preclude a civil action against the citizen by an innocent bystander. In a civil case, the party bringing the suit (the plaintiff) will focus on attempting to recover monetary damages from the citizen who used deadly force in self defense. Although there are few cases, analyzing our Indiana statute from the perspective of civil liability, it would seem safe to conclude that for a plaintiff to prevail in a civil case, he would have to prove that the person acting in self defense did not act reasonably. Unlike a criminal case requiring proof beyond a reasonable doubt, the plaintiff would simply have to prove, by a preponderance of evidence, that the armed citizen did not act reasonably.

Ultimately, the armed citizen should be able to articulate why he acted as he did under the circumstances to assist a potential jury in concluding that his actions were reasonable and proportional to the threat presented to him and that he acted as a reasonably prudent person would act in a similar situation.

A MAG 40 class taught by Massad Ayoob, a Network membership and the DVDs as well as monthly newsletters provided to Network members furnish a wealth of educational information that may help one articulate why your actions were reasonable and prudent.

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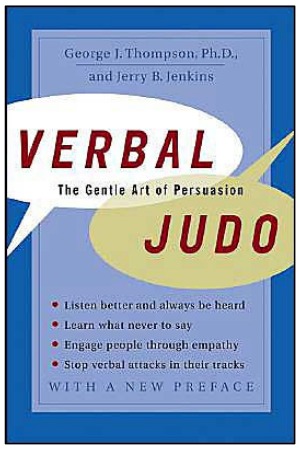
A big "Thank You!" to our affiliated attorneys for their contributions to this interesting and educational discussion. Please return next month when we have a new topic of discussion for our affiliated attorneys.

Book Review



Verbal Judo:
The Gentle Art of Persuasion

By George Thompson PhD
Paperback: 224 pages
Publisher: William Morrow; Dec. 17, 2013
ISBN-13: 978-0062107701
http://store.verbaljudo.com

Reviewed by Gila Hayes

This month, I enjoyed reviewing a classic written by the late Dr. George J. Thompson. I reread it to refresh understanding of how and when our words amp up conflict and when our words can calm a potentially violent confrontation. *Verbal Judo* is one of those "old but great" books that deserve to be reread now and again, so I thought I'd share some of my notes from this classic.

Thompson wrote that he taught *Verbal Judo* in seminars and in this book to encourage "better communication through empathy," skills applicable to law enforcement as well as customer service, education, business and medical professionals, to name only a few. In 2018's conflicted America, I think it is more important than ever to seek training in what he described as "the art of finding the right means and the right words to generate voluntary compliance." He taught how to reduce "conflict, tension and abuse," in daily life, through "responding, not reacting" while taking control of stressful situations. I thought Thompson's book was a great catalyst for introspective self-analysis and improvement, even after all these years.

Thompson wrote about fostering cooperation in difficult people through redirection, not resistance. Achieving compliance starts with better communication, he taught, and the basis for optimum communication is empathy, and respecting the dignity of others. In the 1980s when this book was published, there was a lot of focus on cultural and gender differences. Instead, he suggested there really were only three personality types: nice people, difficult people and wimps. Communicating and forging cooperation requires different approaches, and much of his writing dealt with not getting spun up in arguments with difficult people or avoiding backstabbing from wimp personalities.

Difficult people always want to know why, Thompson continued. They need to know, "What is in it for me?" He explained, "When I want voluntary compliance from a Difficult Person, I explain early on what's in it for him. As clearly and specifically as I can, I show him what he has to gain. Only when that doesn't work will I tell him what he stands to lose."

Thompson suggested that handling interpersonal contact skillfully starts with knowing what sets you off. For some, that may be challenges to authority; if so, recognize that trigger and keep the anger hidden. Only through acknowledging weakness, do we have the power to control our flaws. "Make a list of your most harmful weaknesses. Then name them. Give each a little tag and pin it wriggling to the wall of definition. Then you own them. Once you're in control inside, you can be in control outside," he advised.

Thompson stressed the necessity of matching word to deed and deed to word, and that calls for emotional control and the "ability to stay calm and avoid the anger." Cultivate a mental state in which other, difficult people can't rouse your anger, he advised. "The samurai warrior, when surrounded by attackers, went absolutely still inside," he compared.

It is all too tempting to act tough when we approach difficult people. "The first principle of physical judo is to not resist your opponent. Instead, move with him and redirect his energy. Ignoring or dismissing a question is the same as resisting it. In *Verbal Judo* you do not try to shut out pesky questioning of your authority, reasons, or methods. It's important to always answer, rather than dismiss the question when someone asks why...See questions as invitations to explain yourself, to tell what you do, to fill someone in on your views. Here's the chance to educate a person, to win his respect, and provide him with deeper understanding so he won't go away angry," Thompson explained.

Here are a few examples of restructuring how we approach others. If tempted to say--

1. *"Come here!"* Try instead, "Could we chat for a moment?"
2. *"You wouldn't understand."* Try instead, "I hope I can explain this clearly."

[Continued next page…]

3. *"Do it because those are the rules."* Try instead an explanation of why the standards exist.
4. *"It's none of your business."* Instead, "If it's a confidential matter, say why. For instance, 'The parties involved would not want me to say anything without…permission.'" It is worth noting that Thompson called #4 the "slam-dunk of verbal abuse."

Some of the other danger phrases included-

"What do you want ME to do about it?"
"Calm down!"
"What's your problem?"
"You never..." or "You always..."
"I'm not going to say this again."
"I'm doing this for your own good."
"Why don't you be reasonable?"

Verbal Judo is full of lists and this chapter provided a lot of language that encourages cooperation.

The next few pages were very interesting as Thompson taught how to respond to the above examples of verbal aggression, to stay safe, keep the exchange reasonable, and defuse the aggressor's emotion. Throw-away phrases, like "I appreciate that," indicate you've heard the other person and may even sound a little humorous, but can also cut through building tension and allow you to move the conversation forward to the goal as needed.

Having taught deflection, Thompson turned to how to employ paraphrasing to "cut into a tirade and take control." There is a sentence, he wrote that is, "empathetic, so full of conciliation and cooperation, so pregnant with sincerity, that you'll hardly ever see someone let it slide by." It is, "Let me be sure I heard what you just said." He explained its power, "Paraphrasing is gentle. It tones down the volume and makes a diatribe a conversation. There should be no condemnation in the completely disinterested voice, the essence of effective paraphrasing. Paraphrasing should make me sound as if I'm trying to work on the problem, rather than react to the problem," he wrote.

"One of the greatest communication skills is listening, really listening to people—to what they say and how they say it" which requires empathy, Thompson reiterated. Listening is not our natural state! "Active listening is a highly complex skill that has four different steps: Being open and unbiased, hearing literally, interpreting the data, and acting," adding later, "Underscore these by projecting a listening face."

"When you're on the listening end, you may be open and unbiased and able to literally hear, but how do you interpret what you've heard so you can decide on a course of action?" Thompson asked rhetorically. "Start with one of my undeniable, inarguable, street-survival truths: People hardly ever say what they mean. If you react to what they say, you make a mistake. People under the influence of liquor, drugs, rage, fear, anxiety, ignorance, stupidity, or bias, don't mean anything they say. If you begin to grasp this point, you can become a more effective communicator," he wrote.

Mediation, Thompson explained, is "redirecting behavior" through giving comparisons between the bad things an opponent was headed for compared to lesser problems if suggested alternatives are accepted. He taught, "reach people by putting what you want them to do in terms of what they have to gain or lose. If your opponent or customer has something to gain or lose, you have something you can use." He comments about one mediation he experienced, "I had to think with him and—because he was under so many influences—I had to think for him, too."

This book contains so much material! In closing it bears a reminder of the five basic principles of *Verbal Judo:*

1. All people want to be treated with dignity and respect.
2. All people want to be asked rather than being told to do something.
3. All people want to be told why they are being asked to do something.
4. All people want to be given options rather than threats.
5. All people want a second chance when they make a mistake.

Thompson outlines strategies for various situation, far too many to list here. When I began rereading *Verbal Judo,* I thought it would be fairly quick to read. Much later, I realized it was slow going because of note taking–so much of the instruction is applicable to smoothing day-to-day contacts that I took extensive notes for later review. I had forgotten how many useful strategies *Verbal Judo* incorporates and how many I'd forgotten.

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

Guest Editorial

by Marty Hayes, J.D.

This past month, I attended the 20th annual RangeMaster Tactical Conference, where I joined about 200 other trainers and armed citizens for a three-day weekend of training. One of the training blocks was entitled *Active Killer Response,* taught by Lt. Col. (Ret.) Ed Monk who runs a training business in Arkansas called Last Resort Training. His presentation was nothing short of amazing, and dovetailed nicely with what I wrote last month regarding stopping school shootings.

His research into the phenomenon of not only school shootings but also mass shootings at malls, military bases and other places where large numbers of people gather is extraordinary. I would like to share with you (with his permission, of course) a few nuggets that struck me as very informative.

First, let's discuss school shootings. Invariably, when there is a shooting at a middle school or high school, the shooter is a student or if more than one, the shooters are students of that school. Columbine is the perfect example. This does not hold true for elementary schools, however, due to the age of the students. Overwhelmingly, the evidence shows that school shootings start either in the entry of the school or in the school cafeteria. The violence spreads to other parts of the school, mainly where students have been locked down in classrooms, when the shooter gains entry to the classrooms and it is easy to kill many students.

In school shootings, when confronted by armed individuals–whether law enforcement, school staff or other armed individuals–the shooter usually kills himself. Analysts speculate that in the recent Parkland, FL shooting, the shooter was unable to kill himself because of a malfunctioning firearm, and so was taken into custody. Not long thereafter, a student in Maryland got a Glock and started killing students in a high school. Deputy Blaine Gaskill of the St. Mary's County Sheriff's Dept. confronted him and fired one shot. The student fired a shot, too, at approximately the same time. As of this writing, that is all we know. We do not know if Deputy Gaskill fired the fatal shot, or the shooter killed himself. Historically this is what occurs: the school shooter is either killed or kills himself.

When a shooting starts, I learned from Col. Monk, on average, someone is shot every 10 seconds. That is an astounding statistic, and a bad one. It means that once the shooting begins, each ten second brings another casualty. A three-minute delay in response time by law enforcement means 18 casualties. In my neck of the woods, it would likely be at least ten minutes before law enforcement arrived. How many casualties is that?

After attending Col. Monk's presentation, I am even more convinced that my idea about a national coalition of industry businesses, each putting in 1% of their gross receipts would be a great way to fund a campaign to put armed personnel–be it school staff, community volunteers or law enforcement–into our schools. An armed school shooter interceptor serving in each school in the nation is the only way to stop the slaughter.

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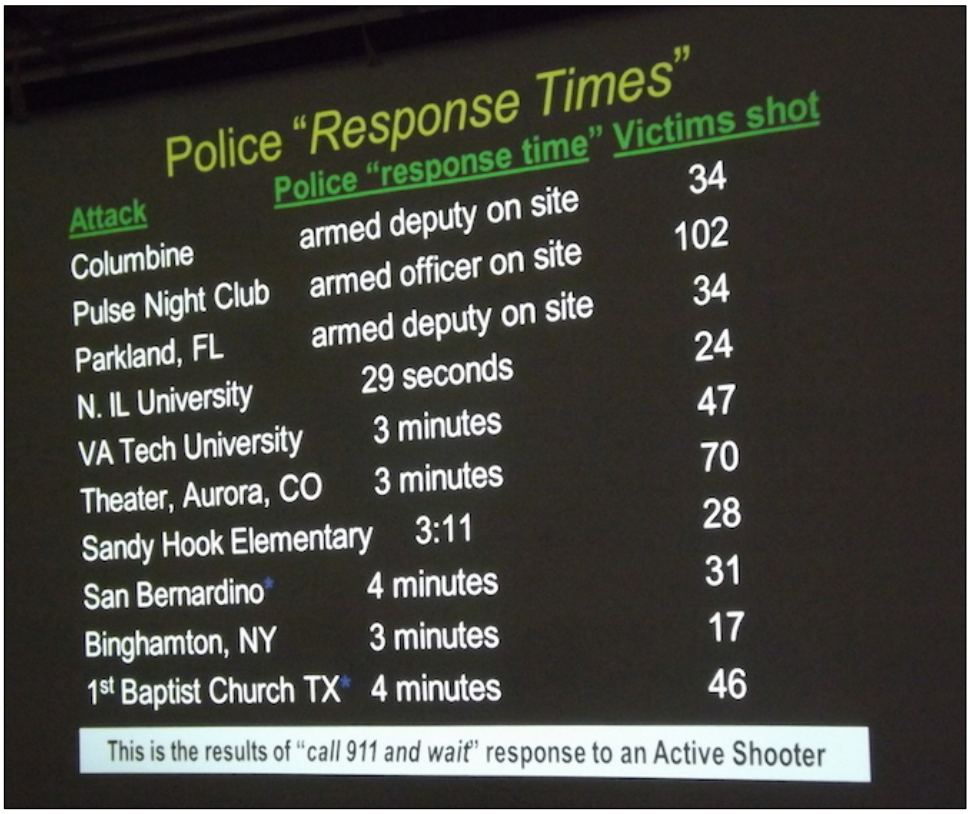
I am writing this discussion of school shootings in this column as a continuation of my last editorial at https://armedcitizensnetwork.org/march-2018-editorial. You can see by the picture from Col. Monk's presentation that calling 9-1-1 and waiting for police response is not the best answer to stopping school shooters and this is why I'm driven to find better solutions.



After publishing my commentary last month, I received 25 separate responses, and most were in support with some very helpful additional suggestions. At some point, I will organize this valuable input and put your responses into a cogent compilation. In the meantime, I will be looking at ways to take the idea to the next step. I would like to see an industry leader or two embrace the idea and take it forward. Frankly, I do not have the ability to build the American Coalition To Stop School Shootings–ACTSSS–alone. Others who have a passion to make it happen are needed to take the idea and run with it. If you or anyone you know has any contacts in the industry that might want to get involved, please contact them and run it by them. I do not expect to let the idea languish, but I also don't want to try single-handedly to get it going and have it fail for lack of momentum.

[End of April 2018 eJournal.
Please return for our May 2018 edition.]

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