Armed Citizens' LEGAL DEFENSE NETWORK, INC.

Lessons About Appealing Verdicts

An Interview with Lisa J. Steele, Esq.

by Gila Hayes

The Network is frequently asked about funding to appeal a wrongful conviction after use of force in self defense. While we can't give non-members charity, our own members have a very legitimate interest in the Network's provisions for funding appeals. As part of the up-to-half of the Legal Defense Fund we make available for legal defense of a member's self-defense incident, the Network does fund appeals when there are appealable issues.

The questions we are asked suggest that some think appeals are another venue in which to assert their justification for use of force. This led us to seek out a widely-published attorney who has made appeals cases her career to ask questions about the ins and outs of appealing unfavorable verdicts.

Lisa J. Steele, Esq. specializes in indigent criminal defense appeals in MA and CT. At various points in her career, she encountered defendants who said they had acted in self defense but were convicted at trial. This led to research on self-defense law, defending self-defense cases, firearms law, forensic firearms identification challenges, perception and memory and numerous related topics, many about which Steele subsequently published scholarly articles. She has taught classes on firearms and self-defense law for a variety of agencies as well as teaching for Gun Owners Action League for many years.

After exchanging emails asking about appellate procedures, we spoke with Ms. Steele by phone and the following Q & A is so educational that we share it here with our readers in two parts, starting this month and concluding in December.

eJournal: Thank you for helping me with this effort to foster a better understanding about appeals.

Steele: I'm delighted to help. Part of my job is education to demystify appeals both for the public and for my colleagues. My clients have many of the same questions you're asking. I find myself trying to explain what I can do and what I can't do; which problems I can help with and the problems that I can't do anything about.

eJournal: What are some of the issues you can't address in an appeal?

Steele: A lot of appeals founder on very technical things. Did the trial attorney preserve the issue? Did the trial attorney say the right objection in the right way at the right time in order to alert the trial judge so that the judge makes the correct ruling or so the appeals court can decide whether the judge made the right call.

If the attorney doesn't object in just the right way, the court may say you didn't "preserve" the issue, meaning it wasn't clearly presented to the trial judge, so the appeal is denied. The appeals can't reach the merits of the argument because the trial attorney didn't say the right words. One reason I publish is to help my colleagues on the trial bar to say those right magic words.

eJournal: You mentioned earlier that the U.S. Constitution doesn't assure the right to an appeal. Can we presume that all states have some provision for appealing a conviction?

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Steele: The vast majority of self-defense cases will come through the state courts, each of which has their own variations on law and procedure. My understanding is that all states will have at minimum a statutory provision for appeal or do it through common law, so yes, there is going to be some provision in your state for how you appeal a conviction. The mechanics differ state to state, with wide variations about whether you have to wait until conviction at the end of the case to appeal any possible issues or whether you can appeal certain decisions in the middle of the case. Some places you can plead guilty and reserve constitutional issues for appeal, but others won't let you.

Your trial attorney should be generally familiar with the process: how to preserve things for appeal and how to start the appeal rolling. They're not necessarily going to know all the intricate details; one thing we learn in law school is where all the yellow flags are so we can go to our colleagues and ask advice.

eJournal: In brief, what is the hierarchy of courts the trial and then an appeal might move through?

Steele: At least for CT and MA, any homicide case goes to the superior court or the equivalent. If somebody died and if your state's courts have two gradations, you are likely to be in the higher court.

Let's describe the mechanics of an appeal. So, you have had your trial. Your trial is over, and your trial attorney will usually file some sort of notice of appeal. Many clients, even though they had enough money for private trial counsel, are now in jail and out of money. They are now legally indigent and in the hands of the public defender or its equivalent. The case may get assigned to the original trial attorney, a public defender staff attorney or end up in the hands of assigned counsel: myself and my colleagues who do this on a contract basis.

If it's assigned to me, I have to gather all the pieces. I go to the court reporter and say, "I want all the transcripts" (a written record of everything that was said in the courtroom). I have to tell the court reporter if I want just the trial, the trial and jury selection, and all or some of the pretrial hearings. What I order varies by state and by custom. In CT, we order everything, so I will have half a dozen transcripts that are just briefly saying that the case was called and continued, but I know what is there and I know nothing important was said. Sometimes something important gets said in there. In MA, pre-trial hearings are not routinely ordered unless trial counsel or the record indicates that something important might have been said or done.

Once I get the transcript, I have to read and take notes on it. Often there are little record problems to sort out: there's a date missing; something is incomplete. We have inordinate problems with recorded evidence. There's been a 9-1-1 call and it is played for the jury. In some places the court reporter will transcribe it; some places they won't. Sometimes the recording is very clear; sometimes it is very muddy, so the court reporter says, "It is unintelligible; it is undiscernible," and I'm left wondering, "OK, now what?" How do I show the appellate court what evidence the jury heard?

At some point, I'll go to the trial court clerk. All the papers and objects given to the trial court and the jury are saved by the clerk. They'll bring out a box and everything is going to be in there. All the papers are going to be in there; hopefully the CD recording of that 9-1-1 call will be there; the weapon will be there; ammunition may be there. If they introduced clothing as an exhibit, it may be there. All of that stuff is going to be sitting in this box. My job is to look through the box and at least lay eyes on everything the jury saw.

I am going to get copies of some of it; I may take pictures of some of it. I normally travel with a little ruler, so if I have to take a picture of a firearm, for example, I put it next to the ruler so I know how big it is. I'm going to try to get a copy of that audio. I will look at all the clothing. Most clerk's offices are OK with counsel taking cell phone pictures of the exhibits because they're public record. It beats the old days where we had to lay everything out on the photocopier.

After I've gathered everything, I start sorting out what happened and what is wrong with this case. I'll ask the trial attorney, "What were the most important things that you thought went wrong?" They are going to have an opinion! Then I go to the client and say, "Tell me about it. What went wrong?" and they are going to have an opinion.

From all of that I'm going to come up with what I think are decent issues for appeal. I have to be able to support each issue from the record. Sometimes the client will tell me things like, "One of the jurors had their eyes closed a lot. I don't think they were really paying attention when they convicted me." I ask the attorney,

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"Do you remember this? Did you do anything about it?" Can I go to the trial court and create a record of something that happened in the courtroom that isn't in the transcripts?

Sometimes people will gesture. The transcript says they asked a witness, "How was he standing? How was he holding the gun?" and then the transcript says, "Witness gestured," so I'm asking attorneys, "And HOW did the witness gesture?" In an ideal world, the trial attorney would have said after the witness responded, "Let the record reflect the witness held his right arm straight out from his shoulder." Sometimes, we can reconstruct it and sometimes we can't.

eJournal: If there were multiple errors, do you throw it all into your appellate brief?

Steele: The appellate attorney has a large amount of discretion over what issues to raise, and attorneys are going to differ significantly on how they approach appeals. If there were lots of mistakes, I'll pick the strongest one to three issues for the brief. The appellate brief is a formal document. In CT it is limited to 35 pages and in MA it is 50 pages (the difference is in the size of the margins and the font you can use; both have roughly the same amount of actual content).

In those pages I have to explain in a formal manner what were the original charges, how were the charges brought, was it a jury trial, when did it take place and what was the sentence? I have to explain the facts of the case and I've got to tell the bad facts, too. The prosecution is going to tell the court all the bad facts so the court might as well hear it up front from me so I can put it in context rather than hearing it first in the prosecutor's brief and thinking, "Hey, wait a minute! Attorney Steele didn't tell me that this happened."

About a third of the brief is going to be trying to explain to the court what happened and how it happened. Then the brief is going to explain to the court, "This is the problem. This is what the attorneys did. This is what the objections were." Then, "This is what the governing law is," and "Now, here is what I would like you to do about it." It takes pages to do that well.

At best, you are probably looking at one to three issues depending on how complicated they are. How many of those pages do I need to explain my best issue? How many pages for my second best? Can I get these issues to work together? Sometimes I'll have an issue that, maybe on its own would be a "c," "d" or an "e" issue but it works nicely with the first issue, so we're going to do those two because they logically fit together or I can use one to help explain why the other one is important.

At the end of all of this, I often have to explain to the court how the client is hurt. The court wants to know the strength of the state's case; the court wants to know why this error is important. Whenever I'm working on an issue, the thought in the back of my head is, "What is my prosecutor going to say?" and I want to head off as many of those problems as I can.

eJournal: How much control does the client have over which issues the brief addresses?

Steele: I will sit down with the client, and say, "This is what I want to do and this is why." As much as possible I want to sit down and work with the client. Ideally, I want the client to be happy with the brief, because the client is doing the time. Sometimes I get a client who wants me to do what I can't do. They're insistent on an issue that just isn't there, and I have to say, "I can't do that for you." They'll get a long, written explanation from me showing why I can't do it.

eJournal: What are they asking you to do?

Steele: Often, the client will say, "The witness lied," or "how could the jury have believed that witness?" We see this a lot. In self-defense cases, the witnesses are going to disagree on what they saw. If there isn't a video and there isn't an objective record, the jury has to decide whom they are going to believe. I can talk about the inconsistencies; I might be able to say, "Witness A, who was standing 20 feet away, said 'X.' Witness B, who was at conversational distances, standing right next to it, said 'Y.'"

I can suggest to the court that "Y" is more credible than "X," but the court may respond, "We didn't see these witnesses. We have cold transcripts. We don't know how they presented; we don't know what their tone of voice was; we don't know what their body language was. We're not going to decide which witness was more credible. As long as the jury can reasonably come to a conclusion, we'll accept that."

This is most important when it affects the strength of the whole case. Sometimes, then the court can look at it and

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say, "Because Witness Y was closer, we are going to look to them for the strength of the case more than Witness X who was farther away."

eJournal: When you get assigned a case, how much attention do you pay to problems like a substandard police investigation?

Steele: We have problems with confirmation bias and tunnel vision. At some stage in the process, the investigators form a theory. Maybe they start to think that this is not a self-defense case and that the client did something horrible. When that happens, it is human nature to ignore, excuse or explain away things that don't fit the theory. Investigators may say, "We are not going to go chase down those witnesses because we know this guy did it. Why do we need to go chase down those other three or four people at the scene? Why do we need to go look for extra video? Why should we send this stuff out for expert testing?"

For an assault or weapons possession case, they are probably not going to pull out all investigative stops. The scope of the investigation is going to depend a lot on resources and where you live. I'm going to see a very different police report in a homicide case when a state police major crimes unit shows up and they bring in the state lab's investigators who document the case in a totally different way than if a bar-fight/assault case with no serious injuries is being done by a small-town agency. They are going to preserve different things, make records of different things and photograph different things.

That is just the luck of the draw. Where were you when this happened? Yes, some small towns are better than others; same thing with detectives, some are better than others. The town I grew up in had an average of one murder every five years. They had a fine police department, but they don't have the experience that Boston has, where you may have two or three murders in one night.

I've got a case now where the victim was shot and there were two casings found at the scene but apparently, they were never tested by the lab to see if they came from the same gun. They are the same caliber, different manufacturer. The assumption has been there was only one gun and that it was in the hands of whoever shot this young man, but nobody tested it. It may well have been one of those, "Well, the victim says that the defendant did it. He knows the defendant, he is 100% sure the defendant did it. Why do we need to spend probably $3,000 to $4,000 to confirm this thing that we already know?"

eJournal: When you're starting to work on an appeal, it seems that even the volume of reports and evidence you have to root through would be significantly different based on the quality of the investigation. Wouldn't that influence how hard it is to meet your deadlines?

Steele: At least for MA and CT, the briefing deadline doesn't start to run until the transcription's done. Sometimes I will be assigned the case before the transcript is finished, which means I can start the running around gathering documents running around waiting for the transcript. I can go to the trial court, I can look at things, I can talk to the client, I can talk to the attorney, I can ask the trial attorney to send me their files, so now I have all those exhibits and all the discovery and I can start poking through it.

By the time the transcript shows up, I can know a fair amount about the case. Other times the box just shows up on my desk and I'm looking at maybe two linear feet of paperwork in a box that once held 20 pounds of blank paper.

Transcripts sometimes are easier to read than you'd think because it is conversation. It is not as dense as a novel, so while it still is not going to be fast, it is easier than it looks when you first open that box. I have to read everything, but I know through experience which places I have to read really carefully because I know where something is most likely to go wrong. Sometimes the attorney or the client has told me, "Hey, I really didn't like that jury instruction," or "This piece of evidence came in and I objected to it and the court did it anyway," so I know to pay special attention to that. I'm still going to look at everything.

I'm going to do my best to make sure that record is as perfect as I can get it, so the court doesn't come back and say, "No, we're not going to reverse the conviction because the judge's ruling is ambiguous and since the ruling is ambiguous and we'll interpret the ambiguity in favor of the trial court having gotten it right."

Sometimes I'm going to get to the end and think, "Oh, no, I've got nothing." This will happen now and then. I don't like what happened in the case, but sometimes there really is nothing I can work with. At that point, I'm

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going to start working backwards, in reverse chronological order and I'll go through nitpicking it and looking at every single objection, every single ruling, every single decision point and asking, "Was this right?" If I still can't find anything, then each state has a procedure for what to do when there's no meritorious issue to appeal.

eJournal: Do the deadlines to submit the appellate brief give enough time to get through all that?

Steele: The court knows that it takes time. If I go to the court and I give a good reason why I need extra time, within reason, the court's going to give me that time. I might say, "This video exhibit was played for the jury and it is not adequately transcribed. I need to sit down with the trial attorneys and figure out what was said. It is going to take a month." The court is going to say, "OK, that is important. We need that answer. Go ahead."

Sometimes, there will be various other motions involved in dealing with that record. One of the ways appeals will founder is if the court says that the record is not adequate for review. It's ambiguous, its missing something, there is something about which a court might say it's not good enough. There are ways to ask the trial court to resolve some of those ambiguities and those also take time.

eJournal: Then you're in a bad spot since you didn't make the mistakes at trial, but the client, sitting in a jail cell, is asking you to fix it. Is there any way to throw a "Hail Mary pass?"

Steele: The courts have rules for what you can do. I am not allowed to bring up an issue that I believe is legally frivolous. "Frivolous" is a legal term–it doesn't mean the issue won't win; it doesn't mean I think the client really did it; it means that there is an unfixable, inadequate record or absolutely no supporting case law and no good argument to change the existing case law. Sometimes, I'll write up whatever you have that is least bad of the non-frivolous issues because I don't want to leave the client completely hanging. Sometimes you go to the client and say, "Look, I got nothing. Do you want me to continue or do you want to dismiss the appeal and go straight into habeas court?" [*We'll discuss the "habeas" option later, in the next installment, when Ms. Steele tells us about what happens if your appeal is denied. –Editor]*

There are downsides to having an appeal. The biggest downside is almost everything the appeals court does is public. Even if it is an unpublished decision, it is in the legal database, so it is findable. You may not want the facts of your case to be public, particularly if you are not likely to win.

Sometimes, when the facts are really bad, I have to say to the client, "Look, if we lose this, the facts of your case are going to be public. The appeal is going to be searchable and the prisons have law libraries and the guys in your unit may find out what you're accused of. Are you 100% sure you want me to go forward with this?"

eJournal: What if the client insists, but there are no issues you can argue in good faith?

Steele: In some states and in the Federal system, I can file a sealed a motion to withdraw. The underlying explanation is sealed so the state never sees it. I explain to the court, "Here's what happened in the case. Here's all of the possible issues; here's all the objections, here's what I've looked at and here's why I think I have nothing." The judge may allow me to withdraw from the case, which means the client is now representing himself and functionally, the appeal is going to end at that point. In other states, I write up the facts and law about the issue the client most wants to raise, and let the court decide it.

eJournal: Let's return to writing the appellate brief. We were talking about the massive amount of material you had to comb through. What do you have to create from all that information?

Steele: When I'm assigned the appeal, I get that huge pile of stuff and I figure out what I'm going to do with it. I write a document that is about 40 pages of double-spaced text, which is the brief. It explains for the court what happened, what went wrong and why the court needs to fix it. It is accompanied by an appendix with anything that the court needs to know from the record that they need to have right in front of them in the courtroom. That might be a picture of an exhibit, it might be a portion of the transcript, it might be the language of the statute, it might be a motion. It is going to be appended to the brief so the court has it sitting right there in front of them.

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Then opposing counsel gets the case and the same box of stuff I got. They also start with a very short amount of time to work with it. They will ask for and get typically five to seven months but they won't be working on it for five months, it just means they have four months' worth of work ahead of my case. They're backlogged. They are going to write a similar-sized response, saying, "No, no, no! Everything's fine; the trial court did what it was supposed to do; your record is terrible; and besides, it is all harmless error because the guy is obviously guilty."

In most states, the defendant gets to respond, so I'll usually get about ten pages to respond to whatever the state brought up. I can at least get the last word on whatever their arguments were.

Now, all of this goes to the court. The court is busy, so our briefs go into a pile of cases that is going to be assigned for argument. Usually the older cases get argued first. In some states, they are busy enough that the court may say, "No, we don't want to hear this case. We think it is routine and we don't want to hear the argument. We want to do it on the paper." If they do that, I can object and most of the time, I am going to object. If I feel strongly enough about the case to write the brief, I feel strongly enough about the case to want to argue it. I will go to the court and say, "This really is serious. You should hear it," and then they will decide whether or not they want to. Most criminal cases and any homicide cases are going to get court arguments.

eJournal: I'm curious how much of this process takes place in person and how much is written?

Steele: The appeal itself may involve only one actual court appearance which will be when I am arguing the case in front of the judges. Any request for an extension of the deadline is going to be done on paper; trying to fix the record is all done on the paper. Every once in a while, I have to go into the trial court because we are trying to sort something out and the judge needs to hear from me and from the prosecutor in person. With the appeals court, generally the only time I'm physically in front of the court is going to be the arguments.

So now we are at court. The case is going to arguments. It's been three or four months since I wrote the brief. I am going to spend the week or more coming up to arguments rereading everything because I need it all fresh in my brain. I need to think, "If I'm a judge and all I know about the case is what I'm reading in these papers, what are my questions?" I need to make sure I have answers for them so when the judges ask me questions, I'm not fumbling, I can say, "The answer to that is found on this page of the transcript where the witness says…" and in a perfect world, I have the transcript right there and can turn to the page and read what was said. That's in an ideal universe. Sometimes it is more like, "Well, I think they said 'X' but the transcript will give you the answer."

eJournal: If you write a good brief, what is the point of oral arguments?

Steele: The entire point of the court arguments is for the judges to ask questions. The judges should have already read the briefs. They are going to be at least vaguely familiar with all of the relevant case law. Now they are going to have questions.

Sometimes the questions are going to be about the record, so they may ask, "I don't understand what happened here. Can you tell me what was said? What was the context?" The prosecutor and the attorneys have the full context when writing the briefs. Sometimes there are questions that we didn't answer because the answers seemed really obvious to us when we had the transcript. Sometimes the question is going to be about other cases. If we do this, how does it affect other cases? We'll get into those discussions, too, but we are there for questions.

Questions are good! I want questions! Questions tell me what is on the judges' minds and tell me that the judges are interested. I go to court ready with a few minutes of what is essentially my canned presentation. If the judges say nothing, and all I can hear is crickets in the background, this presentation will hit all the high points. I don't ever want to give that, because it means that the judges have no questions and that is never good. I expect to get a couple of sentences out and then we are going to talk about whatever it is that the judges want to talk about.

Then the opposing counsel is going to get up and hopefully the judges will ask them tons of questions. Depending on the court, I may or may not have been able to save some time for rebuttal, to get up and tie it all together. Then the judges will thank us for our time and wish us a nice day and go back into their chambers.

eJournal: Is it common for the appellant to be present when you give oral arguments? What other people might attend? Do those attending wield any influence?

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Steele: If the defendant is incarcerated, they are almost never there. The appellate courts generally are in a separate building from the trial courts. They don't have holding facilities and they don't have the same security ability to transport somebody who is in custody. I tell the defendant that their family and friends are welcome at oral arguments.

The courts can't take in new information, so in theory, the judges are supposed to ignore anything that happens in the courtroom. Their focus is the record. I like having the families there because it helps humanize the client. The brief is just a piece of paper, but a person in the courtroom is a mom, a dad, the client's sister or girlfriend or wife.

I tell them, "Dress for church and whatever happens, keep a poker face. Whatever happens, whatever they do, don't react." I like having these people in the courtroom in part because they can go tell the client, "This is what happened." The client hears it from me but hearing it from your mom is completely different. I want the client to hear and understand it. The victim's and complainant's family are rarely there. I think the prosecutor tells them about it, but I've almost never seen them.

Sometimes we'll get press; occasionally there's a courtroom full of students who are there for their school field trip. Every once in a while, the court will go on the road and we'll be arguing in front of a whole bunch of law students. Often, the only people in the room are the attorneys.

eJournal: Moving forward, what happens after you complete oral arguments? Does the court ever research the case itself or are they only relying on the briefings?

Steele: Now the judges are going to think about the case and they are going to talk about it. The judges are going to decide amongst themselves what to do and they are going to pick one of the judges to write the decision.

The judge who is writing it will be the one who will read everything. That judge is going to get the transcripts, look at the exhibits, read all the cases and write the opinion. They circulate that among all the judges who either sign off on it or if there's disagreement, do like the U.S. Supreme Court does and you get four or five different written opinions about what the heck happened here.

Then, in the fullness of time, the decision is published. That can take four to six months, sometimes a year. The longest I ever waited was around 18 months. Long is good, although after about six months the client is usually climbing the walls. I have to tell them that the court can say the trial judge did it right really quickly; that doesn't require a lot of explanation. If they're going to say, "There was a mistake, and here is how not to do it again," that takes time to explain.

eJournal: Do the judges seek further input from the attorney or the state? Do they ever ask you to answer additional questions?

Steele: I've never had them do it, but in theory they can. The judges sometimes ask for supplemental briefings. Every once in a while, something will change in the middle of an appeal. Maybe I'm making a Federal Constitutional argument and the U.S. Supreme Court comes down with a decision that changes the focus of the case. I can either go to the court and request permission to give them a briefing, "Hey, there's this brand-new case. We have to talk about it," or they will come back to us and say, "Hey, we want you to talk about this." This will happen now and again, and then my life gets exciting.

eJournal: The process of an appeal is complex and work intensive. I guess that's a good thing! We're out of space for this month, so let's postpone what happens after the decision is handed down until next month. Readers, it just gets more interesting from here, so come back next month to find out about what can happen if the appeal goes in the defendant's favor and what recourse exists if it does not.

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Please enjoy the next article.]

President's Message

by Marty Hayes, J.D.

If you read my column last month, you heard about my pending trip to Gunsite Academy, and my invitation for Network members to meet and shoot the Gunsite Alumni Shoot together. While we were pleased to stop and chat with a number of our members throughout match day, we only managed to organize three of us into an informal Network shooting team consisting of Mike Martin, Gila and me. If you are one of the thousands of Network members who did not make it to the Gunsite Alumni Shoot, I will fill you in on how it went.

I have said for many years that the Gunsite Alumni Shoot is the most honest shooting match in the country. Why? Because there are no arcane rule violations to avoid, and just a few logical rules to follow, that's why. Each stage has a stage briefing that spells out the simple rules to complete the task. Guns used are simply good self-defense guns. This was a 10-stage match, with each stage designed and worked by the Gunsite instructor cadre.

One of my favorites was the stage designed by Lew Gosnell, called "So Close, but So Far," a very simple stage. Seen above, right, Mike Martin is taking it on with aplomb. The shooter drew and fired at a steel plate on a spring and hinge. You had to hit the plate to flip it open, revealing a second target. You immediately followed up the first hit with a shot through the hole to strike a pepper popper, before the hinged steel plate closed. This pair was at about 10 yards. Once you hit the popper, you immediately transitioned to a 50-yard steel target. Very easy, but also difficult if you didn't have the ability to follow up the first shot with an immediate, accurate second shot. I managed to shoot this in 4.58 seconds, which put me in fourth place for the stage.

Another stage which was simple in theory, but difficult in practice was set up and run by Network member and Gunsite Academy instructor Freddie Blish. It started with the shooter firing a Robar Industries AR-15 carbine at a steel rotator target, then transitioning to their handgun and continuing to engage the rotator target until it rotated fully. This target was designed and built by another Network member, Steve Camp, from Ravelin Industries. Network Advisory Board member John Farnam uses these targets in his training courses, and at my school, we have a couple of these to use for training. It is shown below, to the left. To effectively engage the rotating steel plates, one has to time the strike on the plate to exactly when the plate is either top dead center or bottom dead center, meaning that you shoot before it gets to that point.

Larger caliber handguns have a distinct advantage, so I was happy to get the thing to rotate over with my 9mm Les Baer Custom 1911, in 14.2 seconds for a 15th place showing out of over 200 shooters.

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Another fun stage was called "How Good are You?" Aptly named, the target was a "head" shot next to a hostage target. The shooter started at 10 yards and could keep trying to make the head shots in 10-yard increments all the way back to 50 yards if he or she could make the shot. For each successful shot, 10 seconds was deducted from a start time of 50 seconds, resulting in a perfect score of "0" if you made all the shots. Hitting the hostage target was trouble, though, as a 50-point penalty was added to your score. Scores ranged from 0 points to 80. I managed to shoot four targets, and then I quit, figuring I was pushing my luck at the 40-yard head shot! My 10-second time was tied for second place.

These three were my best stages, but more importantly to my overall placement in the match, I had no really bad stages. Well, actually, I did have one kind of bad stage, called "Target Subtraction." On this stage, you had to remember how many times you fired at a specific target, because the next one was one less shot, etc. I took about 40 rounds and 40 seconds to get through the stage because I lost count, so had to start over, I came in a humbling 67th on that stage.

Fortunately, my placement in the other nine stages was sufficient to be called to the podium to pick up the third-place overall trophy. I was pretty shocked to have placed that high, especially given the issues I had on stage six! That means I just have to go back next year and try again. I hope to see more Network members there next year. See http://gunsite.com/classes/gunsite-alumni-shoot/ and make your plans now.

This gathering wasn't just about shooting. It is said that the Gunsite Alumni Shoot is a "social event interrupted occasionally by gunfire" and I know that to be true. Gila and I saw many old friends and made some new ones, but we also got a re-charge for the old enthusiasm batteries by simply going back to Gunsite.

Much is said these days about the idea of "Tribalism" and if there is one "tribe" I am proud to be a part of, it is the Gunsite Family. Not only are the Gunsite staff and alumni the type of people I want to associate with, but also Gunsite Academy is high on my list of the most patriotic places to visit. For example, the shoot was opened by a Marine color guard presenting the American flag while the national anthem played. We followed the presentation of the flag by saying the pledge of allegiance, led by Gunsite's Ken Campbell. And here is a shocker, NOBODY KNELT during the anthem!

After the shooting, while the scores were being crunched, Sheriff Jim Wilson, who most recently agreed to take on Network as a sponsor on his popular blog at sheriffjimwilson.com, entertained the group with his fabulous guitar planning and singing.

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He has produced three CDs over the last several years, and if you are a fan of old-style country music you would very much enjoy them. Jim's songs kept me company driving back and forth to Gunsite this trip. You can buy them at his website http://sheriffjimwilson.com/the-general-store/. The CDs would make a great, unique Christmas present.

Shooters were then treated to a trip to the prize table, which was very generous. The prize table included some gift certificates for memberships in the Network, too. We are happy to be a sponsor for this match.

In other news, I also stayed on and took two week-long classes. I completed 499, the third in the Gunsite series of handgun classes, and a new class they added this year, Instructor Development. I typically take a class or two each year as a student to keep my skills sharp, and the 499 did just that. I will be writing an article for SWAT Magazine about the Gunsite Instructor Development course, which I took alongside Network affiliated instructor Don Larson, who owns Frontline Firearms Training out of Minnesota and Tom and Diane Walls, Network affiliated instructors from my school The Firearms Academy of Seattle, Inc.

A couple of years ago I left a gun with Freddie Blish at Robar to upgrade with his NP3 finish. This year, I left two guns with him, one a pristine barely-used Colt Lightweight Commander in .38 Super, a gun which he will be customizing to my specifications and one about which I will later write an article discussing customizing guns for self defense. I decided to reward the Les Baer Custom 9mm 1911 that performed so well for me at the match by re-finishing it, too, since the bluing was getting worn. I am looking forward to getting them back in a couple of months, just in time for next year's shooting season.

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

Attorney Question of the Month

In recent discussions with Network members about preparing their family members to notify the Network on the member's behalf after a self-defense incident we've been surprised how many members had contact details stored in their smart phones and had not considered that the phone could be taken by law enforcement after a shooting. We reached out to our affiliated attorneys for more input on the likelihood of a personal cell phone being available once a shooting investigation has commenced. We asked our affiliated attorneys–

Is it common for investigating police officers to take cell phones from armed citizens involved in use of force in self defense, even if the armed citizen is not taken into custody after the incident? If this is common procedure in your area, how long does it usually take for retrieval of personal items seized during an investigation? How does this vary if the person is or is not charged with a crime?

So many weighed in on procedures in their locales, that we now continue with the second half of our Affiliated Attorneys' responses, having published the first half in October's journal.

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The issue of whether and to what extent law enforcement officials can seize electronic devices (cellular phones, iPads, etc.) as part of a criminal investigation is an unsettled yet evolving area of the law nationally and in Tennessee. It is clear that trial courts, attorneys and citizens have been arguing over this issue as these devices have become commonplace in society. The problem frequently involves what is the reasonable expectation of privacy that an individual has with respect to their personal devices and data that may be intentionally or even unintentionally (GPS tracking data) stored on them.

The United States Supreme Court held in *Riley v. California,* 134 S. Ct. 2473 (2014) that law enforcement must have a search warrant to seize the device and search it. That decisions sets a threshold standard applicable nationally but some states may have higher standards that must be met.

Tennessee enacted Tennessee Code Annotated § 40-6-110 which provides no "law enforcement officer shall search, examine, extract or duplicate any cellular telephone data, even if incident to a lawful arrest, unless: (1) The officer has obtained a search warrant issued pursuant to this part or Rule 41 of the Tennessee Rules of Criminal Procedure; (2) The owner of the cellular telephone or the person in possession of the cellular telephone at the time it is seized gives the officer informed consent for the officer to search the cellular telephone; or (3) Exigent circumstances exist at the time of the seizure requiring the officer to search the cellular telephone." At this time, there are no reported cases in Tennessee that address two key topics to this statute – what is required to obtain the search warrant and alternatively what constitutes exigent circumstances under this statute.

The statute does prohibit any law enforcement use of the device or data, including information discovered as a result of such access, if the protections in the statute are violated. It is also notable that the statute in Tennessee only protects a "cellular telephone" which suggests that other non-cellular electronic devices like "Fitbits," smart watches, iPads, etc., may not be protected under this statute.

In Tennessee at present there is no affirmative duty on law enforcement to assess whether an incident is justifiable self defense. Under Tennessee law, the concept of "self defense" is actually a statutory defense to a charge of a violent crime and it is one that is not required to be considered until the trial of the case. Thus, a citizen could be exposed to tens of thousands of dollars in legal expenses and court hearings in which the issue of self defense is legally irrelevant. Efforts to

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legislatively change that law and to require law enforcement to evaluate on the front end the issue of self defense have been rejected by the Republican controlled Tennessee legislature (for more information please check the legislative reports issued by the Tennessee Firearms Association at www.tennesseefirearms.com).

If any item is seized by law enforcement, whether the person is a witness, a victim or the accused, it is not uncommon that law enforcement can and will retain possession of the item until the criminal proceedings are finally concluded if it is possible that the item may be evidence of or relating to a crime. That could span years in Tennessee.

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It is almost universal that a phone would be seized from someone who was arrested, but pretty rare to seize someone's phone without a warrant. In order to seize the phone, the police would have to have probable cause to believe it is evidence of a crime, yet they have not made an arrest (even though they presumably know who the shooter was). If there is not sufficient evidence to make an arrest, the phone is not likely to contain anything to push the quantum of evidence over the edge. They always can get phone records and texts later.

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If the person is arrested, the cell phone is always confiscated. If the person is not arrested it will almost certainly be confiscated. In both cases a warrant is required to access the phone. The person will be asked to give written permission. Government hackers will open the phone lacking permission. It will take longer if permission is not given. Anything found on the phone will be evidence of something and it should be kept clean of secrets and vices.

The phone will be kept as long as it might possibly be needed. Even if there is no charge it can easily be held for six months or a year. It may take the prosecution that long to decide.

At the end of the festivities the detective must tell the property room that it is no longer required. This does not happen automatically. It must be requested of the detective.

When buying a cell phone, see if the insurance policy's definition of "lost" includes confiscation. As a practical matter it does.

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Whether or not your cell phone is taken is going to depend greatly on the apparent credibility of your self-defense claim and also on the jurisdiction where the act of self defense takes place. In southern Indiana, where we are located, most prosecutors recognize the legitimacy of the right to self defense with a firearm. This means that, in many counties in southern Indiana, you are unlikely to be arrested where self defense seems apparent. In situations where you are not arrested, it is unlikely that your cell phone will be taken.

In fact, when I spoke to one of the local prosecutors about this subject, he indicated that it is not standard practice to take cell phones where self defense seems apparent. However, if the self-defense claim is questionable, the investigating officers will keep your cell phone until further investigation is completed. They will keep the cell phone until the prosecutor decides not to file charges or, if charges are filed, until the charges are dropped, a plea is entered, or a trial is concluded. The cell phone would be given back immediately after a finding of not guilty or a dismissal of the charges. However, achieving the dismissal can sometimes take a long time.

Obviously, the particular circumstances surrounding the incident will determine whether self defense seems "apparent" or "questionable" as dictated by the local prosecutor or law enforcement. That is why it is very important to have a firm grasp of how to handle the aftermath of a self-defense encounter. How you handle

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the aftermath will have a great impact on whether your self-defense claim seems credible or not. There are many things you can do to support the credibility of your claim of self defense, including how you handle the 9-1-1 call, how you handle interactions with potential witnesses, how you handle interactions with the responding officers and so forth. Many of these topics are covered by Network educational materials and other attorney question responses and are extremely important to understand.

For those of you who are worried that your cell phone will be taken and lose important contact information, you should take the advice given by Gila Hayes in her September article, *Good Planning for Bad Times*, which details the importance and contents of an "In Case of Emergency" file for you and your loved ones in the event you do lose your cell phone. This file should contain all of the important information you would have saved on your cell phone. By the way, it also is extremely important to make sure your cell phone is encrypted.

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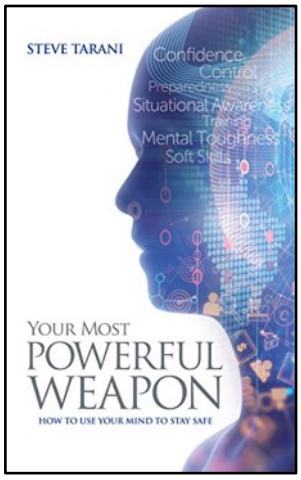
A big "Thank You!" to our affiliated attorneys for their contributions to this column. Please return next month when we have a new topic of discussion to take up with our affiliated attorneys.

Book Review

Your Most Powerful Weapon:

Using Your Mind to Stay Safe

by Steve Tarani
168 pages
$18.95 paper back; $9.99 eBook at Amazon.com ISBN 978-1532354564



Reviewed by Gila Hayes

I like to study books that offer awareness tune ups along with training about how violence slips inside the guard of even watchful people. One of my favorite authors for this kind of reality check is Steve Tarani, who has trained personnel for the US Department of Defense, FBI, Homeland Security, low profile intelligence agencies, and other security organizations.

In *Your Most Powerful Weapon* Tarani explores why people so often fail to detect or even react to threats. Desensitized to violence by news about crime and terrorism, we still manage to convince ourselves that we'll not be targeted. That disables our ability to react effectively. When people face danger, the phenomenon of normalcy bias creates disbelief he continues and, "you...greatly underestimate the severity and the most likely consequences. This, in turn, causes you to reinterpret the event, instead of taking evasive or decisive action."

Another common reaction, Tarani writes, is "temporary mental paralysis" from an over load of "new, unfamiliar and threatening information." Before you can react, you need to decide what to do, but that requires comprehension. How, without knowledge and understanding of what you are seeing, is that possible? John Leach, he quotes, suggests eight to ten seconds is a very good "processing time" to go from perception to action, but under stress that time increases considerably.

Tarani outlines cognition, perception, comprehension, decision, implementation and movement as the steps of recognizing and reacting to an emergency. He cites the findings of two Tokyo University researchers that people who survived disasters had done so by preparing for the worst-case scenario–"planning and running drills, responses and repetitions." Practice, he notes later, is not only physical but can include visualization, too. "Running drills preloads information in your conscious and subconscious mind. It creates a familiarity, so the process is no longer complex and cumbersome, which frees your mind from paralysis and allows you to act," he summarizes.

Tarani breaks self-defense skills into two categories: hard skills, which he designates as reactive–physical responses to attack–and soft skills, which, are proactive, and allow you to see danger coming. While he calls each necessary, he notes that soft skills should comprise 90% of self defense, while shooting and other physical defenses make up only 10%.

This Tarani parallels with a scale of human aggression. Low level is illustrated by a "scuffle" accompanied by verbal aggression; mid-level is the more serious bar fight or a fight at a sports event; at the highest level is the fight for your life that "minimally results in one or more combatants landing in intensive care with a very high probability of death or permanent bodily injury." Along these scales are levels of injury ranging from very minor to broken bones to permanent injury to death. He adds that, "injuries are a tactical consideration," since physical harm could leave you or those in your care defenseless.

He continues, "Although few people will ever encounter extreme physical violence in their lifetime, there are some truly bad people out there, who kill other human beings for a paycheck, street creds, or just for fun. These are the likes of war-hardened terrorists, religious extremists, hardened convicts, inner-city gangs and the criminally insane. We are merely tourists in their world." Counter their willingness and experience with your own mindset, mental toughness, being a hard target and taking control, Tarani advises. He has trained government agents who are sent where they are exposed to all of the above hazards but cannot carry firearms. These attributes keep them alive, he writes, and goes on to discuss developing each of the four characteristics.

Each chapter in *Your Most Powerful Weapon* builds on the last. In the next chapter, Tarani introduces being a hard target by having readers acknowledge that we could have to defend ourselves at any time. This calls for the will to act added to a third facet–having "a plan

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proactively thought out that you will execute if a threat presents itself. Executing the plan grabs back control of the situation that threatened you."

Tarani categorizes sensory input into "Event Indicators" and "Threat Indicators," illustrating how we regularly use experience and intuition to predict what's coming in daily life. *Quoting Left of Bang*, he advises readers to know the baseline of non-threatening situations in order to recognize threat indicators. He illustrates how crowds on the edge of an attack move, showing how a perceptive person can avoid getting caught up in a mass attack.

"The key to managing any active threat is not waiting to be caught in the middle of an attack, and then come up with a solution on the fly," he urges. "It is, instead, to widen your scope of awareness prior to the attack, with the intent to predict or prevent your involvement." While acknowledging the efficacy of guns in reaction to an attack, he stresses that, "Just because you carry a gun doesn't mean it's your first and only line of defense regardless of the situation. In fact, it should be your last." If you have to go to guns, "you've been pushed back on your heels reacting to the situation," he explains. Those taking proactive measures have the better chance to control the situation.

Violent crime follows a blueprint, Tarani writes. He outlines steps an attacker must complete, highlighting where to interrupt and where to take physical action when left no other options. He shows how much broader the range of choices is in the first 90% of the timeline when avoidance, evasion or interruption can prevent an attack from reaching the deadly, final 10%.

If it gets physical, he writes, "the greatest number of casualties usually occur in the first five minutes," later adding, "In personal combat, time is a critical factor. The longer you wait to control the fight, the deeper you fall into the rabbit hole, as it becomes increasingly more difficult to take control."

He discusses exploiting the reactionary gap, using obstacles, explaining the relationship between injury and proximity, and moving to a more advantageous position. Movement and balance, a stable fighting platform and getting out of harm's way are critical to survival, he details, going on to discuss improvised weapons, and running resource assessments as a regular habit.

Personal choices affect how much exposure to threat we accept, and while complete avoidance would seem to indicate complete safety, most will end up at some large public venues where large groups of spectators make an attractive target. Use positioning to increase safety, choosing seating near "readily accessible cover and/or exit points," and be aware of cover you can quickly reach if a mass attack starts. Dress to accommodate unimpeded, carry a trauma treatment kit and know how to use it. Most of all, recognize your exposure, "set your baseline" of what is ordinary and what is a threat indicator, and adjust your personal radar to pick up on dangers, he advises.

Your Most Powerful Weapon includes a chapter on managing fear, addressing breathing, humor and preparatory steps to manage reactions to fright. Just as first responders are "conditioned, inoculated and accustomed" to the threats their jobs entail, training to expect the unexpected helps you control your interpretation and the emotions generated by an attack, he teaches. First responders learn to separate themselves from their emotions, he continues, describing training's desensitizing effect. The values of cognitive rehearsal, and physical conditioning are noted, as well.

The book ends with a fast-moving synopsis, a few sentences summing up the topics explored in earlier chapters, and it provides a nice tune up for occasional review and reminders. I recommend *Your Most Powerful Weapon*.

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

Editor's Notebook

Keeping Track of Details

by Gila Hayes

The Network keeps procedures fluid because we've found flexibility essential to providing members the most help in the briefest time possible after self defense. That flexibility is a tough concept for potential customers who call or email asking for detailed policy statements; charts of how much money is available "at different levels," rules mandating how much money will be provided for different types of self-defense situations or paid for different tasks attorneys undertake along the legal process; detailed flow charts of who handles what, and lists of exclusions or situations that would limit or negate assistance. In short, a lot of questions suggest that much of the public thinks that the Network is just one more insurance reseller because many of the questions asked aren't even applicable to the Network's membership benefits.

The expiration and beginning date of your membership is printed along with your name and membership number on the plastic wallet card we mail to each member. Additionally, the card has a space to write in your attorney's contact info (an indelible marker works well for this task) and the back of the card includes phone numbers for reaching the Network both during business hours and for emergencies after hours.

Flash back to 2008, when Network President Marty Hayes explored different business models in preparation to establish a structure for our then-embryonic organization. He was determined to put a structure in place that would give members the most help, immediately and throughout the legal aftermath, in the amounts needed and at the times of need. He concluded then, and our experience has since proven, that the membership benefits approach lets us protect members' legal rights and lift the burden of how to pay for legal representation after self defense. Our standard of maintaining a simple, direct strategy for service to members influences other parts of our operation.

We adhere to the ideal that the less complexity we bring to Network membership the better! If there is an exception, it is steps taken to maintain security of member information. For example, while Network members log in access to member-only information like affiliated attorney lists and the after-hours emergency contact information, we've avoided storing membership details like expiration dates and personal member information online. I've never thought I was particularly backwards, but perhaps this proves that I am actually a closet Luddite.

Here's my reason: Internet users who remember the Heartbleed bug a little under five years ago likely also remember scrambling to disable accounts or change passwords on all the online sites they used. I remember that we fielded a lot of that kind of calls in the weeks surrounding that panic. While we were able to reassure members that the Network has never stored member account info like credit card numbers on our website, we sympathized with the concern of savvy Internet users. Of course, our IT contractor patched our website although any stolen usernames and passwords wouldn't have earned a thief anything of value beyond our Network President's personal phone number. I suppose Marty appreciated knowing we protected that as soon as the alarms were raised.

Now, there is a downside to what some call our rather backwards dislike of online account detail accessibility. People these days are programmed and conditioned to expect to access and modify their own account details online. I never say never, and perhaps the day will come when I can be convinced that we can give that level of user control while maintaining unhackable security. Until then, members, bear in mind that we are always happy to provide your membership account details by phone or if you request, we can share what you want to know by email.

When members call or email to ask where they can find their membership's expiration date, we often share a friendly chuckle when we ask them to pull their membership card out of their wallets since it hadn't occurred to them to look for their membership dates there.

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Now, having said that, if your Network membership card has been lost or gone missing, please just email us at info@armedcitizensnetwork.org and we will happily make and mail you a replacement.

Why don't you take a minute to check your wallet now and let us know if you need a replacement? If your membership comes up for renewal within 30 days, we may ask if now might just be a good time to take care of the upcoming renewal dues and then can we make up the replacement card with your next renewal date, since it doesn't make sense to make and mail a replacement card for just a couple of weeks. Sound fair?

Good Friends, Old and New

While we are always excited to meet new Network members, we are equally appreciative of the Network family members who renew year after year. Folks, you are the backbone of this Network and much like senior members in any family, you and all the rest of us who have been around for the past decade are creating a stable, supportive organization to help the newer members. Our new members are often people who've only recently come into the ranks of armed citizenry and they look to all of us for guidance. The Network is proud to be able to help launch these good men and women on their lives as armed citizens, and we hope you, our long-time supporting members, share that satisfaction with us.

Speaking of support—What a banner month October was for individual Network members putting a little extra money in the Legal Defense Fund! The Fund is the resource from which attorney and trial expenses are paid on behalf of members after self defense. We have always had strong member donations–gifts of funding above and beyond the 25% taken right off the top of each membership dues dollar and put in the Legal Defense Fund.

We make a low-key invitation for additional donations on our membership renewal requests and at the end of online renewal dues payments, although beyond that, we just don't hit members up for donations. We know how vigorously other groups solicit your charity and have chosen not to take that route. In spite of our low-key approach, members really outdid themselves in October with extra donations of $1,300 which we added to the roughly $27,000 I was already transferring into the Legal Defense Fund from the monthly dues income.

Most months, our Network Vice President Vincent Shuck auctions items donated from our friends in the firearms industry. That always increases the dollars I add to the dues percentage going into the Fund, often by about $1,000. In October, Vincent had other concerns consuming his time, so there wasn't an auction, and you, our amazing Network family members, put in an extra $1,300 all on your own, without the auction of a donated gun, a case of ammunition or other shooting accessory. I am impressed. Thank you, for every additional dollar donated to the Fund!

While I may not be able to remember what I ate for lunch yesterday, I can clearly remember starting the Network with Marty and Vincent in January of 2008 with little more than a good idea and a small amount of startup money, having pledged not to go into debt to get started. I also remember about a year later, thinking we were off to a good start when the Legal Defense Fund topped $25,000. Then it reached $250,000 a few years later, we knew we were sharing our mission with a body of like-minded folks who were serious about fighting post-incident legal complications–not only for themselves, but for other less-fortunate Network members. We watched with growing thankfulness as the Fund topped milestones of half a million, and then a million dollars. Today, the Fund is approaching another milestone of one and three quarters million, and we'll be there with just a little more growth on top of today's balance of $1,650,000. After that, can two mil be too hard to reach?

Bear in mind that during these past ten years, another quarter million has been spent from the Fund for the various legal defense needs of 19 Network members. The mission of the Network comes first and the Fund bank balance is only the tool accomplishing that mission. When we started asking members to join together to protect one another against malicious prosecution or civil law suit, we knew the need was very real. We anticipated that you would see the benefits of banding together and are so very grateful that you have shared our vision.

[End of November 2018 eJournal.
Please return for our December 2018 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 e-mail sent to 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.
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