Armed Citizens' Legal Defense Network, Inc.

Experiences with Eyewitness Testimony

An Interview with Attorney James Oliver

by Gila Hayes

In our current Attorney Question column, Network Advisory board member Jim Fleming asked about the accuracy of statements given by witnesses to violent events. A response from attorney Jim Oliver led to an interesting discussion about the fragility of memory and inaccuracies in eyewitness testimony. I'm sharing that conversation, because I think readers will find it as informative as I did.

Jim has been a Network affiliated attorney since 2010. After 20 years as a criminal defense practitioner, Jim has stepped back to serve in an "of counsel" capacity at the Law Offices of Durflinger Oliver & Associates, Tacoma, WA, in order to spend more time with his family, and participate in legal assistance projects in developing nations including the Republic of Palau as well as traveling in Europe.

We switch now to a Q and A format to share the experiences of defense attorney Jim Oliver in his own words.

eJournal: Thank you for talking to me about the accuracy of eyewitness testimony. During your years defending clients after use of force incidents, how accurate were the memories of people who had used force?

Oliver: It is hard to know, because everybody has a different perspective. In every case I've worked, each person has perceived and recounted what happened to them differently. I would say overall, though, the people I defended after use of force situations recounted the major points pretty accurately. Their stories had been documented almost immediately after the incident, typically by experienced detectives or officers who had written lots of reports, who were pretty good about getting information out of witnesses. My general sense, based on what other witnesses claimed to have viewed at the time, is that the guys I've defended have generally been pretty accurate in recounting what happened.

eJournal: Wait a minute–you said police debriefed your clients almost immediately after the incident. We recommend that members wait 48-72 hours before making a statement to police, and then to do so only with counsel present. Have most of your clients not been afforded that consideration?

Oliver: No, I have never had a defendant as a client who has ever been afforded time after an incident to collect themselves. I have never seen that outside of my cases, either.

eJournal: Is it because these defendants were not represented by counsel before they started speaking to police?

Oliver: I think that is primarily the reason. I have represented a number of people about whom the police were initially on the fence whether it was a self-defense shooting or whether they were in the wrong when they shot. Now, obviously, if the person of interest is under arrest, the cops do a great job of Mirandizing them and advising them of their right to have an attorney.

It is really rare that somebody actually exercises that right, especially in a self-defense scenario where they think–reasonably or otherwise–that their best course of action is to work with the police. A lot of times, that works out just fine and when it does not, that's when people end up getting charged with crimes and then I end up getting involved on the defense side. Overall, it is kind of rare that people "lawyer up" after a shooting.

eJournal: That part of the story should be different when a Network member needs representation, because we pay for an attorney to attend to the

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member's needs as soon as possible after an incident. How do memories of the person who used force align to or disagree with testimony from witnesses?

Oliver: When I am trying to assess the accuracy of statements from the sheepdog–the guy with the gun who a lot of times is doing the right thing–I find that the things he focuses on are completely different than the witnesses, so, yes, they will be different. Some guys are more sophisticated and have better training and more real-world experience in identifying threats and see things differently than a suburban housewife who has never been in a fight, much less witnessed a shooting. The lay witnesses will most often be focused on the weapon to the exclusion of other important pieces of information. There are always going to be differences and there will be things that nobody is very clear about, at least not to anybody's satisfaction. It's similar to what has been called the "fog of war."

eJournal: While we who study use of force understand that the totality includes actions leading up to and necessitating use of force in self defense, bystanders may only remember seeing a gun fired. I worry that judges and juries, also lacking any self-defense training, become mistrustful if the defender's statement differs radically from that of the attacker and eyewitnesses. How do you reconcile differences between statements?

Oliver: Realistically, there are always going to be discrepancies, so you have got to know your facts! Witness A will see something differently and recount it differently than Witness B. If you know your facts, then you have a plausible explanation for those differences. You have got to have the facts of your case absolutely down cold and know them better than anyone else, otherwise, you will not be able to see the discrepancies.

Then there are going to be times that you just throw your hands up, shrug and say, "I have no idea why this person got these facts right and this person got them so wrong." In situations in which witnesses get major things wrong that damage your case, you have to acknowledge it and then move on. That is just part of a use of force incident; that is just part of litigation.

eJournal: What is the cause of differences or inaccuracies in eyewitness testimony?

Oliver: There are a number of things that can muck up recollections during the three phases of memory. Those phases are: acquisition–while you are actually seeing something; retention–when you register it after you've seen it; and retrieval–later, when you remember it.

Stress affects memory horribly! Everybody deals with stress differently. Some people are high-level professionals for whom getting shot at is just another day at the office. For other people, witnessing a shooting is very stressful and they are not going to see many of the details that the experienced force professional would.

Cross-cultural issues are another factor affecting memory. We are better able to identify people from our own racial group. For example, when witnessing a situation in which we have to identify persons of different national origin, African Americans find it easier to identify other African-Americans; whites find it easier to identify other whites.

eJournal: How big might discrepancies be between witness recollections? In your career as a defense attorney have witnesses commonly given entirely opposite statements?

Oliver: It is rare when witnesses completely disagree with every element of what another witness has seen. Usually, there is a pretty big overlap; sometimes there are a few significant areas of disagreement.

When looking at the accuracy of what an eyewitness remembers there are a lot of different things you are trying to assess. I have used Dr. Mark Reinitz, a professor at the University of Puget Sound, as an expert. Dr. Reinitz focuses on memory and recall.

In one case, we had one witness say that the driver of a car clearly was a dark-skinned African-American male. We had another witness who said he was a light-skinned person, probably Samoan. The witness who identified the driver as a light-skinned Samoan, told me, "There is no way that was a black person," but the other witness said, "No! There is no way that was a light-skinned Samoan." That was the only time I have ever seen two witnesses really diverge on such a basic fact. Usually, there is a fair amount of overlap and consistent stories because people have seen the same thing.

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eJournal: Did Dr. Reinitz testify at trial? What was he allowed to testify about?

Oliver: Yes, Dr. Reinitz did get on the stand, but we were not allowed to get into the issue of cross-cultural misidentification. The judge thought that issue would be more confusing for the jury than if we did not bring it up, so Dr. Reinitz testified about memory. He testified that every time we revisit a memory, we change that memory a little bit and it becomes a little bit less accurate. He also testified about how memory can be corrupted and how perceptions can be affected by stress, lack of sleep, use of alcohol or marijuana, and by our own internal biases. There are all kinds of things that keep us from being as accurate as we might be otherwise.

The case, which we lost by the way, involved a drive-by shooting at a mall in Lakewood, WA. We had a number of witnesses who were interviewed by police before the case went cold. Later, the State interviewed the witnesses again, then I interviewed them and then, they testified in the trial. Dr. Reinitz's testimony went to the fact that these witnesses' stories had changed over time. He testified that their memories were probably best right after the shooting, before the memories could be corrupted. The statements they gave right after the shooting probably held more probative value then what they came in and testified about in court.

That was a tough sell with the jurors. They saw the witness sitting there, looking confident and recounting what happened. They were so believable, but confidence can be misleading because people can be confident but still be absolutely wrong.

eJournal: Did any of those witnesses have loyalties or affiliations with the defendant or the victim?

Oliver: None of the witnesses really had a dog in the fight. One guy just happened to be driving by, but one witness was married to a firefighter and had a lot of police and firefighter friends. At the time of the shooting, she called 911 and reported that she saw a black male do a drive-by shooting, but by the time trial rolled around, that morphed into having seen a light-skinned Mexican American–which was my client's description. I think she may have been very suggestible. I personally like the detective who interviewed her, but I also think that he often seeds a little more information to witnesses than he probably should. Witnesses often glom on to details given by the police officer, and in this case, I think that when the detective talked to her, he may have said, "We caught a guy in the car with the gun, but he is not a black guy. He is a Mexican guy." Although her 911 call identified a black guy, when she testified at trial it not only became a Mexican guy, but she testified it was the Mexican guy sitting there at the table.

eJournal: Did you attack how much she had changed her statement?

Oliver: Yeah, but at the end of the day, the jury could not get past the fact that my client was rolling around in the car identified at the time of the shooting and that the gun used in the shooting was in the glovebox.

eJournal: I am more interested in the firefighter's wife's changing testimony. In your response to the attorney question column published a few pages later in this journal, you provided a research link in which one cause of eyewitness error is identified as the way police interview witnesses. It suggests that police may not be able to frame questions from a completely neutral position. Few people have witnessed shootings, so they're stressed and then police question them–another new and stressful experience for many. Is it any wonder if their witness statements are unreliable? That echoes the firefighter's wife's changing account.

Oliver: I have friends who are cops and I routinely use retired detectives to do investigative work, so I know that police have got a tough job. Humans have confirmation bias and, because they are human, so do the law-enforcement officers. They get a certain set of facts that are just like situations they have seen before, so they feel a certain confidence in their theory, probably more than they should. Then officers go and they talk to the witnesses.

I have seen video tapes and transcripts of interviews where the officers are asking clearly leading questions. I do not think that they are corrupt or doing anything that they think is wrong. I think they have a pretty solid idea about what they think happened and are looking for answers to support that.

Some witnesses really, really want to be liked. It does not matter to whom they are talking, they want to be

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liked. I see officers asking questions directed toward a certain answer in the videos and transcripts. The witness really wants to be liked and wants to help police solve the crime, so they give some information that may not be the most accurate. Now, that becomes part of the record.

By the time these things roll over to trial a year later, people have forgotten a lot of details so if the mistake is in writing and they use their earlier statements to refresh their recollections, they really believe they remember things that probably did not happen. That all starts with poor choices during questioning by police officers and then it takes on a life of its own.

eJournal: The research suggests another human characteristic: filling in the unknown when what we see does not make sense. If the witness has never been present during a violent act, so what they see and hear doesn't make sense. It is well-documented that people confabulate facts to try to make sense of the senseless.

Oliver: That is true: humans want to make sense of things. That's why we see faces in pictures of rock formations on Mars. We just really want to make sense of things. When that happens with witnesses, you really have to know the case facts. You have to know what each witness is going to say so when you see something in part of one witness statement that just does not ring true against the backdrop of all the other facts, you can turn to your other witness statements and say, "Well, Witnesses A, B, and C all said it was a pipe, but now this guy says it was a pistol. Based on what the other witnesses saw, obviously he was wrong, it was not a pistol, it was a pipe." You try to use other witnesses to attack credibility at least on a particular point with which you disagree.

eJournal: What do you do if your client's memories are inaccurate or untruthful?

Oliver: Because that happens fairly frequently, the first thing we do in my office is summarize what is in the police report–which officers created the reports, the facts of the report, the witnesses identified by the police and what each of those witnesses is going to provide factually. At the end of all that, you have a pretty good idea of what the facts are and then it is time to interview your client and figure out what happened.

I try not to talk to the witness about anything too terribly in-depth until I have gotten the police report. Clients are stressed out and so suggestible! They have got a lot riding on this. It is scary and they do not know what is going to happen, so they feel overwhelmed. The defense attorney has to be very careful not to make any suggestions, intentionally or otherwise, that might cause the client to alter their recounting of the event.

I get to know the events, I get to know the facts, or at least what people are going to say or testify to, then I talk to the client and I figure out, "OK, this is what is going on. Now let's hear your side of the story." Some clients are incredibly honest and articulate, with a good command of the facts. They can recount things accurately and convincingly. Sometimes you have to reality check your client.

Other clients, even when I'm pretty confident they were telling the truth, have just seemed shady and I thought, "My goodness, I do not want you within a mile of the witness stand!" If I could get the story out of them, those clients still helped me know what was going on so I could develop the case. Some clients were raised to believe that you have to lie and if you have done something wrong you have got to figure out how to get away with it. If I have a good reason to believe someone is not being honest, I could not put them on the stand even if I wanted to. I cannot put somebody on the stand who I know is going to lie.

Once you get all that out of the way, you start working with the client in a way that does not inject anything that might cause the client to alter their story away from what really happened.

eJournal: I'm more concerned about someone for whom violence is so foreign that they pretty much can't give a cogent statement about something they truly cannot understand. If what they are telling you simply cannot be accurate, are there techniques you can use that may help their recall?

Oliver: The most helpful thing for me is a statement taken or an observation made close in time to the event. To help people remember, I have used all kinds of methods ranging from reviewing Facebook posts, reading text messages, looking at calls that were made

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that day and anything else that might trigger additional recollection.

Seemingly unrelated memories sometimes bring up other recollections. Memory is funny: it's like we put memories in drawers in our heads. Something that seems unrelated might even cause you to remember to open a particular drawer. For instance, somebody may not have much of a recollection about a day, but if they will go back and read their Facebook posts they might say, "Oh, my, I had forgotten that was my friend's birthday. That's right! We did go out that night and we did do or see this." Spending a bunch of time talking about things that may seem completely irrelevant is tedious but can help people remember things that they may have forgotten or did not realize were important.

Sometimes it is little things like which way a door opened, or whether a car window was down. I had a case where my client allegedly threw a gun out the window while he was eluding police. In talking to the car's owner, I learned that there were service records showing that the motor that moves the front driver side window was defective, so a mechanic had put in wedges to keep the window from falling down. That window could not be opened.

That detail was something that the guy who was borrowing the car would not have known about but talking to him turned me onto the right person and when I talked to the owner, she remembered that she'd had this repair done the year before. It was a weird story, but it illustrates the value of getting as much information as possible. Even seemingly irrelevant details can help witnesses recall other relevant and important pieces of information.

eJournal: Our belief has long been that memories accrete after two to three sleep cycles. Wouldn't that make witness statements given 48 to 72 hours after an event more reliable than those given immediately afterwards?

Oliver: I know from my own studies, too, that memories are locked in place during REM sleep cycles. In contrast, my experience from a bunch of trials during the last 20 years is that people are much, much more accurate immediately after an event. Small but important details get lost when people are processing information after a traumatic event.

Here's an example of a statement about a traumatic event. The witness might say, "I just watched somebody hold a gun out and shoot another man in the chest." That statement gives the high points, but not the little things that may really matter. Who else was around? Were there cars around? Where were people positioned? How was the victim standing? How was the shooter standing? Where were people's hands? Those little details, against the backdrop of the big event–which is somebody shooting and somebody getting shot–make all the difference.

My experience is that those little details do not get locked into memory with time and they are details which can be very important and are quickly lost. Although I do not have any science to base it on, that is my experience. I do know that freshness of the memory is critical to an accurate witness statement. My experience is that interviews conducted immediately after an incident are much more accurate than interviews that are conducted later. I have always been much more confident in witness interviews that were conducted immediately after an event.

eJournal: When you have had to work with the testimony of witnesses who gave statements long after the event, was much credence given to the late statements? I hate to suggest this but it just seems that late statements are more likely to be improperly influenced. How often do you have to deal with witness statements by friends, family members or people with close affiliations to the opposing side who aren't reliable because of such strong loyalties?

Oliver: *[chuckling]* Yeah, it happens. Earlier this year we got a favorable verdict for a client charged with first-degree assault. A woman with a wound channel starting on the inside of her left thigh, running from just above her knee diagonally toward the back of her upper leg, ending high up toward her buttocks said my client shot her. The wound angle suggested that the shot came from below the knee and angled up.

A doctor who works at Joint Base Lewis-McChord, a former Ranger, a really bright guy who has probably worked on thousands of gunshot wounds, testified that the wound channel indicated the direction of the bullet's travel. That was really great for us–because the

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allegation was that my client was standing face-to-face with this gal and that he shot her in the leg. The wound channel did not match the allegation.

My client's story was, "No, she pulled the gun on me. I grabbed the barrel of the gun and tried to jerk it out of her hand. That didn't work, so I turned the gun sideways." He said that she lifted her leg, either for balance or to knee him, and with her knee raised, the gun went off with the barrel pointing down. That perfectly explained the wound channel. We reenacted that for the jury and they liked it, too. When you get witnesses that say weird things, you have to be ready to point to the evidence undercuts their position.

In addition, literally every cop who testified in that case, told a story that was significantly different than what was in the police report and added details that were not in the reports. The first time around, the trial was almost a year after the event. In that trial, one cop testified, "I heard the defendant say if we came to the apartment, he was going to kill us all and he was threatening us in the doorway." That statement did not appear in any police report.

If my client had threatened to kill a cop, that would have been another crime in and of itself, in addition to the first-degree assault charges for the shooting! The cop who was saying that is about my age, he's about 52. He was in the stairwell with a 28-year-old cop and a 35-year-old cop and the old guy was the only one who heard these threats.

At that trial, we had a lot of testimony that just really did not make sense, but I really wanted the jury to hear some of what that cop said: that he was in the stairwell, he did not hear any gunshots, he did not hear any fighting and he did not see the alleged victim walk out of the place. We got that information out, but then we had to shoot down the idea that the cop heard those threats.

We tried that case twice, because the jury was hung six to six on the first go around. The judge told the prosecutor, "I think this is going to hang again. You guys should work something out," so I went to the prosecutor and I made a couple of offers and he said, "No, I think my case is actually getting stronger." I am sure he thought he could coach his police officers to do a more effective job the next go around. Well, it did not work out that way.

At the next trial, that older cop testified differently again. I cross-examined him and I asked, "You did not hear any threats or anything?" and he said, "I do not remember hearing anything from the apartment." Two months before he had testified that my client had threatened to kill any cops that came in the door, and then the next round, he is saying, "I do not remember hearing anything."

I think the prosecutor talked to him and said, "Hey, man, you lost some credibility when you said you heard something that did not make it into your report." That prosecutor had just been moved up to prosecuting felonies from prosecuting misdemeanors and I think that he was still figuring things out. I confronted him after the trial and said, "Whenever I see that many cops trotting out things that they did not disclose in their police reports, it looks like maybe they are being improperly coached," and he said, "Well, they probably are saying what they think I want to hear, but I am not telling them to say those things."

I have only had that happen a few times, but that's a pretty recent case so comes quickly to mind. The other time it happened was about 15 years ago and I have not seen that particular prosecutor do anything weird since then.

eJournal: Is there any solution to problems with eyewitness testimony that is given a year or sometimes several years after an incident?

Oliver: It is really important to get high-quality interviews that are then reduced to a written form to accurately recount what witnesses said. Later on, the witnesses are going to use that writing to refresh their recollections about what happened at that time.

eJournal: I've known people who felt they never got the chance to give police a full statement–that they were cursorily questioned, then booked and charged. How does someone in that situation bring a full set of the facts into the record?

Oliver: After the interview with the police, you should write out everything you can remember, starting how ever long before the event that you think is important. Include all kinds of details. Where did you eat? What did you smell? What were you feeling? What was the

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weather? Write down anything that you can think of. Put it in writing. It is a rare person who actually, on their own, documents things that happen to them. Most people rely on the police to do it.

eJournal: Will a statement written down privately be judged as less reliable than a statement given to police? How can equal value be assigned to those later recollections?

Oliver: Ideally, what should happen is that the witness writes down a bunch of details, and as a lawyer, I can ask police to incorporate that material into the supplemental report, so you have a stamp of authority of the police. That makes the writing a lot more credible.

I also find that people who have written things down immediately after the incident, who have tried to recall everything that they could about the scenario, do a better job remembering details later on. They also have a better means of refreshing the recollection through the writing in their own words to capture what has happened to them. If I ask about a detail during their trial and they say they don't remember, I can say, "Did you make notes or write down anything near to the time of the incident that might refresh your recollection? Would you like to read that to refresh your recollection?"

I would have the exhibit marked, hand it to the witness and ask them to read it silently and then ask, "Does that help to refresh your recollection?" I have never heard a jury say they thought a witness was incredible because they refreshed their recollection from writings they made after they gave a police interview.

I could see where a prosecutor could effectively cross-examine someone and might say, "You did not tell police this, and now you are coming in and telling the jury this?" Obviously, that is going to carry some weight. It will make people wonder, "Well, why didn't you get back to the police with that additional information?"

eJournal: Having the attorney submit it as a supplemental report suggests a very useful tool for a person who remembers details that need to be reflected in the official record as their minds settle. This is a big subject! Were there other facets to the problems with eyewitness testimony that you have wished we could address with our readers?

Oliver: I think the one takeaway that I would suggest for anybody who has been in any self-defense or a use of force incident, is that after you talk to the cops, get home and have a cup of tea and immediately write out in as much detail as you can every aspect of what happened. Write down every detail. What were you wearing? Did you feel a breeze on your face? Did you hear the wind in the trees? Whatever the details, write down as much as possible. Talk to an attorney and they can decide whether to provide that information to the investigating officer. I think that recording that information will be really valuable later on.

eJournal: This discussion also underscores how very important it is to have legal counsel as quickly as possible so the lawyer can guide what is shared with the police and what is held back privately to help later with recollections.

Oliver: If someone is forced to defend themselves, the only thing out of their mouths to police should be, "I was afraid I was going to be killed or other innocent people were going to be harmed. I want to give a statement, but I want to talk to a lawyer first," then talk to a lawyer and lay out what happened. Understand that you probably will not be using that lawyer for a defense attorney should you be charged, but you will protect yourself by having a lawyer early in the process. I have seen officers jump to the wrong conclusions. That starts you down the wrong path and even the guy who did everything exactly by the book, and really did protect the lives of innocent people, may end up getting charged with a crime. Talk to a lawyer: that is important, but it is also essential that you write down what happened.

eJournal: This visit has gone off in a couple of directions I did not anticipate. I'm very grateful for all the experiences you've shared with us about how witness testimony can help, hurt and be improved for a better outcome for an armed citizen who is just trying to defend themselves or their family and need to explain it all to a court. Thank you very much for your time and for being there for our members if the need ever arises.

About our source: To learn more about Jim Oliver and the Durflinger Oliver law firm, browse to https://www.durflingeroliver.com/.

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President's Message

Red Flag Laws

by Marty Hayes, J.D.

It is time to set the record straight regarding the Network's stance on Red Flag Laws, also known as Extreme Risk Protection Orders. This is a topic we are frequently asked by members and prospective members alike.

Extreme Risk Protection Orders are the latest and not so greatest attempt to legislate additional burdens on to the law abiding gun owner and is facially an attempt to address the real concern about people who exhibit tendencies towards violence against others, and what to do about their right to keep and bear arms. Members will remember that an earlier Attorney Question of the Month gave our Network Affiliated Attorneys a chance to discuss Extreme Risk Protection Orders with their commentaries published at https://armedcitizensnetwork.org/april-2019-attorney-question and https://armedcitizensnetwork.org/may-2019-attorney-question .

Studying one state's example gives good overview of the national situation. The State of Washington has had its version of Extreme Risk Protection Orders in place for a couple of years now (RCW 7.94.010 https://app.leg.wa.gov/RCW/default.aspx?cite=7.94) and while there's been considerable commentary and erroneous reports about its use, it is interesting to read news stories about it now that the politicking has calmed down. Examples at https://www.seattletimes.com/seattle-news/crime/extreme-risk-seattle-police-have-seized-43-guns-from-people-deemed-to-be-a-danger-under-year-old-law/ , https://q13fox.com/2019/10/21/washingtons-red-flag-law-allows-authorities-to-seize-neo-nazis-guns/ and https://www.nytimes.com/2019/11/18/us/gun-seizures.html are just a few stories about ERPOs during the Washington law's history which spans several years. I would urge the reader, whether or not a Washington resident, to read these varied stories. Doing so will give you a clearer picture of the issue.

The Network gets a lot of questions about providing members with funding to pay an attorney if the member is served with an Extreme Risk Protection Order. We have studied this question at length, concluding that there are two major reasons that the Armed Citizens' Legal Defense Network, Inc. does not extend any benefits to our members to assist if they are served with an Extreme Risk Protection Order.

First, the Network was founded to assist members after use of force in self defense, not to fight incursions into gun rights. Although we have often been asked for funding outside of self-defense law, we have never drawn down the Legal Defense Fund to assist with problems like unjust refusal to grant or renew concealed carry licenses, restoration of gun rights, to fight gun rights restrictions stemming from domestic problems, or other non-self-defense issues. The Network was not founded to get involved in any of those concerns.

It is also likely that it is not beyond the financial capabilities of the vast majority of our members to hire their own attorney to take an Extreme Risk Protection Order to court. I spoke with an attorney from WA State who recently handled an ERPO hearing. This attorney indicated to me that a $3,000 to $5,000 retainer is what he takes to start work on a defense, the difference being location and details of the case. And while you might not have $5K sitting in your gun safe, most attorneys take credit card payments, so if you have an open VISA card, you should be able to mount a defense.

Secondly, as you know, the Network is embroiled in a legal issue with the Washington Office of Insurance Commissioner, which alleges that the benefits the Network extends to our members constitute insurance. The definition of "insurance" in Washington State is, according to RCW 48.01.040: "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

The key parts of that definition are the words "determinable contingency." In simple terms, if we (the

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Network) indemnified or paid specific benefits based upon the occurrence of a determinable contingency (for purposes of this discussion, being served with an Extreme Risk Protection Order), then the Network would be offering insurance and would fall under the jurisdiction of insurance commissioner.

Since any request for assistance from the Network hinges on a voluntary act by the member–an intentional act of self-defense–we do not come under the commissioner's jurisdiction, because our benefits are not linked to a determinable contingency. Consequently, and primarily because of this, we will not assist a member who has been served an ERPO.

In this determination, the Network is not alone. Of the five remaining self-defense protection plans (other than ourselves), three are in line with the Network on this, and two say they will provide assistance. Speaking frankly, I would recommend the best course of action is to study your state's laws regarding ERPOs and make sure you do not commit any acts that might allow someone to make a case to take away your guns.

Criminal Acts Prohibition

As you know, one of the requirements before we can pay an attorney to represent a Network member is the member was not otherwise involved in a criminal act while using force in self defense. Because this is such a common question from prospective members, let me clarify.

First, a member cannot be involved in breaking the law regarding ownership and possession of firearms and expect Network assistance with legal expenses. We are mostly concerned about unlawful concealed carry, i.e. carrying a handgun concealed without a valid permit for the location in which you are carrying concealed. The reason for this is that the Network does not want to enable illegal activity. If you want to carry a gun illegally, do not expect the Network to be available to help you.

Second, when we take a look at a case to determine whether or not the incident the member was involved in constitutes a case of self defense, we have to consider the surrounding circumstances. For example, if the member shot and killed someone after being threatened with a knife, but the member was the one who started the altercation, then we would likely turn down a request to assist that member. In the same vein, if the member used force against a family member (either current or former), then we are going to look at the facts very closely before we agree to assist the member. Another situation where we would very likely not assist a member is if they used force resisting arrest and then made a claim of self defense against the police officer. This is a matter of public policy. The courts have determined the proper way to gain redress against excessive force by law enforcement is not by fighting back, but through the civil tort process.

I hope this clears up questions about Network assistance to members. Remember, the Network was formed to assist law-abiding citizens who chose to use force voluntarily to stop a criminal act against them. The member's concurrent actions need to be squeaky clean if they want our assistance in proving their claim of innocence and expect a positive, successful outcome in court.

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Attorney Question of the Month

This month's question concerns witnesses at the scene of a defense shooting and comes to us from those involved in armed security for churches, although the question has broader implications.

Police officers involved in shootings are rightly advised to wait for 48 to 72 hours before making a statement to investigators. This is well established. Armed citizens are similarly advised for the same sound reasons. Should the same 48 to 72 hour principle apply to witnesses closely involved in a defense shooting? We asked our Network Affiliated Attorneys for their thoughts on the following–

If a Network member uses deadly force in defense in the presence of family, close associates, or in a workplace or church, what concerns would you as the member's attorney have about accuracy of witness statements given by those in close proximity to the incident?

If the incident is witnessed by co-workers or church members or others who are present during a defense shooting, would you recommend witnesses request time to gather their wits before giving a witness statement? How can the witnesses be advised of that protection without impeding investigation of the incident?

In a related matter, it is well-established that the person using force in self defense should have an attorney present when making a statement. May a spouse or child of a self-defense shooter be attended by legal counsel during questioning?

We got a great variety of responses from our affiliated attorneys. We began sharing those commentaries in our November edition last month, and continue sharing their responses this month–

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I would have all witnesses that you have any control over be represented by counsel for a couple of reasons.

1. The lawyer would know what is being said.
2. It documents the response.
3. It provides the lawyer notice as to what might be an issue.

Witnesses often add to a story but just as often fail to convey important facts. For example, a witness doesn't know what a furtive movement is. The absence of facts in a statement matter.

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Delaying Eyewitnesses Interviews

I don't believe that there is an effective way of delaying police interviews of witnesses to a shooting. It's generally best for witnesses to immediately recount what they saw to officers. Even though eyewitness accounts can be very wrong, eyewitness testimony in court is generally more persuasive than any other evidence. Shooter recollections–sheepdog, not perpetrator–should be taken after appropriate decompression.

Eyewitness testimony is a leading cause of wrongful convictions. I've seen it first-hand in trials here in the States and overseas. I believe that even though eyewitnesses often get it wrong, there are some best practices for receiving and preserving information, starting with getting witness statements as soon as possible.

Eyewitnesses, even experienced police officers, can be profoundly wrong in their recollections. The California

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Innocence Project has a pretty good primer on the problems with eyewitnesses and their later testimony. See https://californiainnocenceproject.org/issues-we-face/eyewitness-identification/. The short story is that over 2/3 of wrongful convictions involve faulty eyewitness testimony.

Stress is to memory what smoking is to lungs: damaging. There are dozens of studies documenting the effects of stress on human observation and recall. Numerous studies have concluded that people often misperceive events or later misremember critical details of an incident. The more stressful the event or, the more stress felt by the witness, the higher the likelihood of later error in talking to police or while testifying in a trial. Time can also be a factor.

Memory is not fixed like a video of an event. Our recollections change a little bit each time we recall them. They are distorted slightly with every visit. See https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4183265. That also means, somewhat paradoxically, that memory is typically better early on after an event. I have had experts testify as much, and that testimony generally jibes with the individual juror's common sense.

Jurors are also often concerned that a delay between an event and the later police interview allows for manipulation, intentional or otherwise. Most of us would be skeptical of a defendant or witness that did not make a statement until after speaking with a lawyer. We are all at least a little cynical about whether the resulting report represents "facts" or some narrative developed by a lawyer.

I would focus, however, on the fact that seemingly innocuous details are quickly shed from memories or altered as time passes.

Officers who discharge their firearms wait 48-72 hours before issuing a statement. Here's what the International Association of Chiefs of Police says about the matter:

"Investigations of officer-involved shootings are critically important; the results affect not only the involved officers but also the department and the community. The findings of the investigation inform any criminal charges or administrative discipline that may ensue, as well as liability that may attach to the officers, the department, or the parent jurisdiction. Ultimately, the impact of the investigation extends well beyond the single incident, affecting department-wide risk management strategies.

"The IACP Police Psychological Services Section recommends delaying personal interviews from 48 to 72 hours to provide the officer with sufficient recovery time to help enhance recall. (https://www.theiacp.org/sites/default/files/2018-08/e051602754_Officer_Involved_v8.pdf) This interval is particularly recommended for officers who were directly involved in the shooting, but it may also be necessary for officers who witnessed the incident but did not discharge their firearms."

Many experienced attorneys believe that the 48-72 hours between a police shooting and the interview with the involved officers has less to do with improving recall than with getting everybody's stories straight. In any event, officers have very different considerations than other witnesses. Officers risk lawsuits, criminal charges, and public outrage. Police departments, really the cities or counties that they represent, also risk lawsuits and political backlash. Thus, law enforcement agencies and governmental entities have a lot of incentive to slow the process and ensure that they control the narrative and the facts that come out.

Officers are generally also protected by union rules that outline when and how to interview officers following the use of force incidents. Lay witnesses do not have these luxuries and are, as a rule, questioned immediately after a shooting. If I were to tell any of my prosecutor or cop buddies that a witness to a shooting, likely a friend to the shooter, needed time to decompress after the event, I would get a very suspicious sideways glance. I think prosecutors, cops, and jurors would wonder about conspiracy and witness tampering if any observers to the event declined to submit to a LEO interview.

Witness Statement Timing

After a shooting, police are excellent about controlling the scene, which limits witness contact with anyone who might advise them to take time to gather their wits before speaking with police. For that reason, I believe it would be challenging, as a practical matter, to communicate with witnesses before officers have conducted interviews.

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One might be tempted to train up security to advise witnesses post-shooting that they should take some time before giving statements to authorities. I think that in Washington State, that would expose security personnel to possible obstruction or witness tampering charges. It would also likely guarantee that the police and prosecutors' offices would view the otherwise hero as something less noble.

Theoretically, churches, for example, could brief their congregations in advance of shootings to take time before speaking with authorities, but that seems unrealistic. I also doubt that the average civilian would heed the advice to wait before speaking with the police. Police enjoy constant training, union leadership, and legal counsel, all of which they quickly deploy following a shooting. Police leadership have a basic rule for officers who've shot someone: "Shut up until we know more." Civilians don't get that advice. That means that they will see no harm in immediately providing a detailed statement. Most witnesses believe that they must provide an interview with detectives.

In any event, I would probably advise witnesses to work with authorities by sharing what they witnessed immediately. They can supplement their statements later to reflect newly remembered facts, but, in my experience, they are likely to capture more details more accurately sooner after the event than later.

Right to Counsel

In Washington State, everyone has a right to have an attorney present during police interviews. As a practical matter, however, that can be almost impossible to arrange as almost no witness ever has the foresight or desire to use an attorney in a police interview.

Still, I believe that an independent witness should attend every police interview. I suggest using an independent witness because an attorney should not make himself a witness in police interviews if he plans on representing the sheepdog. Doing otherwise creates a potential conflict that would get the lawyer kicked off of the case.

Our office usually sends a private investigator to record witness interviews. That ensures a clear record even if the investigator can't provide legal advice to the witness.

In summary, most witnesses to a shooting should immediately submit to an interview with law enforcement. Witness memories are imperfect, and details are lost and altered with time. Immediate preservation is, therefore, essential. If there were a practical way of advising witnesses to decompress before speaking with police, I might suggest that they do so, but they would be subject to attack by law enforcement and prosecutors who would likely view any delay as suspect.

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All persons are entitled to access legal counsel before and during any questioning, be they mere witnesses or suspects. Indeed, everyone, even suspects, start off as mere witnesses. Only when cops gather enough facts to decide which witness is guilty of something, does their status change from witness to "defendant."

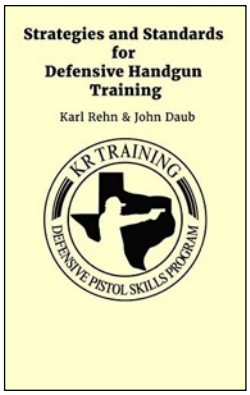
What any witness should do is advise investigators and others who ask them to "tell us what happened" is that they want to cooperate but insist on talking to a lawyer first. That should buy 24-72 hours of time to "collect their wits" and take more care in relating the facts known to them. It also prevents the story from getting mangled by police, who often make mistakes taking information down. If you control the delivery, you can record yourself when you give a statement, so you know exactly what you said and how you said it.

My only concern about off-the-cuff comments made at the scene or shortly afterward is that such comments often are carelessly made in an emotional state before a person really thinks things through in a logical fashion. I wish I could give a good example, but none come to mind. Here is a not-so-good example: Witness says at the scene, "He just came barging in here like he owned the place." After considering all details, a day later the same witness says, "He was very insistent on coming in, and it turns out he had a good reason to be so insistent, and he really needed to come inside."

A big "Thank You!" to our affiliated attorneys for their comments. Please return next month for more of our affiliated attorneys' responses to this question.

Book Review

Strategies and Standards for Defensive Handgun Training



By Karl Rehn and John Daub
Published by KR Training March 6, 2019
ISBN-13: 978-1798865798
154 pages
$9.97 for Kindle; $20 paperback at
https://www.amazon.com/Strategies-Standards-Defensive-Handgun-Training-ebook/dp/B07PGLGZFR/ref=sr_1_1?

Reviewed by Gila Hayes

"How can we motivate more people with carry permits, or guns for home defense, to attend training beyond the state minimum?" ask Karl Rehn and John Daub in their book *Strategies and Standards for Defensive Handgun Training.* It is a good question and one not only of concern to instructors but, as they wisely note, to armed citizens, as well. Untrained gun owners make deadly mistakes that result in public outrage and domino into knee-jerk legislative restrictions that apply against even the most well-trained, responsible among us.

"If you are an armed citizen, these questions matter to you. If you aren't motivated to do more than the state minimum, this book will explain the gap between that minimum and our preferred standards, and the reasons behind those standards. If you are motivated to practice, this book can provide some guidance to a progression of skills and performance standards you can use as a simple training program," authors Daub and Rehn explain.

Strategies and Standards starts with a little history of KR Training, an enterprise started a few years before the state of TX passed its concealed carry license legislation. Rehn notes that when he started his school in 1991, he was the only instructor in Austin, TX teaching to armed citizens. The 1995 passage of a license to carry law in TX mandated training and Rehn and his instructors began to see a chasm grow between those completing coursework only to meet the requirement and those who avidly pursue mastery of firearms skills. Because Rehn comes from an academic background with a strong statistical bent, and Daub is a software developer, they approached this puzzle by analyzing reports to learn how many people own guns, how many participate regularly in training, competition or simply going to the range for target shooting.

Research about why people go target shooting is compared against Maslow's hierarchy of human needs. With little in the way of scientific study about the motivations driving shooters who achieve high levels of skill, Rehn analyzes studies about video gamers' motivations and concluded that "achievement, social interaction, and immersion" drove them; he extrapolates that "the gun school/competition subculture" is driven by the same motivations.

"Perception of the need for skills affects motivation to train and selection of courses to attend," the authors explain. "The biggest thing I learned from my personal experiences and from my research was a greater awareness of the divide between the noble motives claimed by most who attend training and their actual motivation," Daub later writes. Honest evaluation of risks to life and safety and the solutions to dangers ranging from car wrecks to bombs lead to the authors' frank observation: "Interestingly, defensive gun use is not high on the list of anti-crime skills."

The authors report that beginners should, but fail to, ask, "What minimum level of competence do I need to have reasonable odds of surviving a deadly force incident? What do I need to know to be ready for the legal and psychological aftermath?" In addition, though many enjoy plinking, drills designed to gauge skills are rarely performed. The authors comment, "People do not include measurement of skill using standards in practice... shooting standards are like taking tests, and nobody likes taking tests, particularly tests for which one feels unprepared or on which one expects to do poorly."

They had 118 shooters perform a simple 1.5 second, one shot competency test using a variety of sighting methods. The shooters had little difficulty with the 1.5 second time limit, but the authors suggest that reducing the time to 1.25 or less would result in significantly higher incidences of unsafe gun handling and poor marksmanship, both of which are corrected through continuing an advanced level training. They add, "The real value of training, though, is that it improves competence, which leads to a higher level of

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confidence...Training and the resultant confidence can reduce many of the negative outcomes that can occur: failure to engage; gun accidents; legal consequences of poor defensive decisions; or injury or death due to lack of speed or ineffective hits."

A chapter on instructor standards serves instructors and those who would like to be firearms instructors as well as students. Anyone who is teaching or would like to teach will find Rehn and Daub's observations an important self-evaluation tool. Those seeking instructors should note important attributes that are too often eclipsed by glitzy websites, flashy YouTube videos and social media popularity. "Social media and marketing skills help build training programs but do not guarantee competent instructors," they astutely observe.

How should students and those who carry guns for self defense set standards of skill? The authors start by critiquing standards they've run across, weighed against data that attempts to define the average defensive gun use. There are two extremes: such high standards that few reach that level of accomplishment or such low standards that sub-par performers falsely believe themselves qualified. They suggest a modified version of the TX License to Carry test as preferable.

Rehn and Daub discuss self-guided practice, advising, "Untimed, unstructured target practice is not the same as practicing the drills run in the training, particularly if the practice does not include evaluation of current skill level via any kind of scored drill compared to a standard or goal score." Skill development and maintenance is thoroughly discussed, with the high-level performer's automaticity explained as well as its role in skill retention. "Don't assume because you reached a particular level once, for a short period, that the skill is available at that level if you don't maintain it."

The book closes with a number of practice drills, comparing the shooter's skill level against scores by IPSC grand master level shooters. The authors discussed achieving varying levels of proficiency and acknowledge that while most shooters will not become Grand Masters, everyone needs a scale against which to measure. Skill improvement is stunted when only compared against one's previous accomplishments.

Strategies and Standards for Defensive Handgun Training opens with the problem of how few gun owners and concealed carry licensees pursue skill development beyond that required to pass their state's concealed carry licensing requirements. Throughout the 154 pages, that idea grows from moving beyond state-mandated minimums to an inspiring call to pursue skill growth that is fostered by regular practice using the drills outlined and measured against top level shooters.

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

Editor's Notebook

by Gila Hayes

By the time members read this month's journal, the great holiday of Thanksgiving will be over. The idea of celebrating a day of gratitude predates the pilgrim's celebration in 1621, I'm told. Nonetheless, we traditionally like to think of that first harvest feast as the starting point for the Thanksgiving holiday we now observe. I was amused to read that in 1777 the Continental Congress established the first national day of Thanksgiving, declaring that it should be a "solemn occasion," on which it was "unbecoming" to take part in "servile labor" and "recreations [that were] at other times innocent."

That sounds like a good reason to close the office to me, so I find it ironic that these past few years big retailers in ever-increasing numbers are staying open for business on Thanksgiving day. I understand the reason Walgreens and CVS stores stay open–sometimes you just gotta go out and buy a bottle of antacid! I am, however, a little puzzled when Dick's Sporting Goods, Bass Pro Shops, Cabela's, clothiers and toy stores drag staffers away from their families for a day of commerce.

At the Network, we stepped back and counted our blessings on Thursday. Friends and valued associates head the list–ranging from our staff who keep the Network running smoothly to our valued members, without whom the Network would not exist.

As we move toward our twelfth year, I am gratified that an armed citizen in Montana can, through Network membership, alleviate the post-incident burden of a fellow member a thousand miles away in Maine–or other equally-distant locales. The tables can turn abruptly, and Network family members in hostile states who figured if things went bad, it would be there, get to see our Legal Defense Fund going to help a member who is being unjustly prosecuted in one of the states conventionally considered gun friendly. Facts can be distorted and public opinion can run against any one of us and when that happens prosecutors often decide to let the courts sort it out.

I am regularly humbled and touched by members who consider the well-being of other Network members just as important as their own. I've lost track of the times a member I have thanked for joining, renewing or for making a contribution to the Legal Defense Fund, has replied, "Well, I just pray I never need your help," to which I respond, "I hope none of us ever suffer that misfortune, but we know a few of our members will and you are making a difference for them."

Network members come from all walks of life and all levels of financial ability–men and women with good-paying jobs, single moms just squeaking by, retirees who worked hard their whole lives and as a result have a nice retirement, and people who have had some hard knocks along the way and rely on fixed incomes to make it from month to month. Keeping Network membership a viable option for those who struggle to make ends meet is a priority. We work hard to keep Network expenses low so the dues needed to operate remain as affordable as possible. When Network members round up their dues or add a generous additional donation, it helps us hold the line on dues rates to keep membership viable for those who have less. It is an extension of the basic Network ideal of many members helping one who is facing legal jeopardy. Our members touch my heart and inspire me when they donate to the Legal Defense Fund–a resource they hope to never tap.

Our corporate sponsor members also generously provide merchandise contributions for auction, and the auction proceeds join the largesse of individual donations. In addition, survivors of members who have unfortunately passed away generally ask us to move their loved one's unused dues 100% into the Legal Defense Fund instead of asking us to return it to the estate. While we keenly feel the loss of departed members, at the same time, we find it heartwarming that they will continue to help assure a good legal outcome for a Network member who needs our help later.

Although I am writing this on Thanksgiving Day, feeling grateful that each of our members has chosen to be part of our Network family and share our dream of armed citizens helping their fellow armed citizens weather the aftermath of self defense is our frame of mind every day at the Network. Thank you for making it possible.

[End of December 2019 Journal.
Please return for our January 2020 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 https://armedcitizensnetwork.org/our-journal.

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:
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