Armed Citizens' Legal Defense Network, Inc.

The Expert Witness and Trial Strategy

Part II of an Interview with Massad Ayoob

Interview by Gila Hayes

In the September 2021 edition of this journal, we talked with Massad Ayoob about the role of the expert witness in defending use of force in self defense, cases where he has testified and the many lessons learned from those cases. With over 40 years as a use of force and violence dynamics expert (in addition to authoring a huge number of books, articles, videos and teaching or speaking on self-defense issues), it is not surprising that our interview last month ran so long that we chose to pause half way through and now we pick back up where we left off. If you missed the first segment, please return to https://armedcitizensnetwork.org/september-2021-front-page to set the context for completion of this final segment with Massad speaking about use of force issues and the expert witness's work with the legal profession.

eJournal: Of your expert witness cases, what has been the ratio between police use of force and self defense by private citizens?

Ayoob: It has averaged about half police, half private citizens. Right now, I have twelve or thirteen going and more of those are for private citizens. I try not to have that many cases going, but the courts were backed up before the pandemic and then we had 18 months of the courts being closed and now the floodgates have opened. I try to limit it and I only take cases in which I feel like the guy is on the side of the angels. I tell the attorneys right up front, "Look, it is going to cost you X number of dollars for me to look at the discovery and there is no guarantee I will take the case," and that weeds out a whole lot of the weak ones, right there.

I have had a few plaintiff's lawyers who still hired me after I told them on the phone, "It does not sound like I am going to be able to help you. If you are serious, I would have to charge you X amount of money just to look at it, and I am telling you right now, I will probably tell you I am not taking the case." A few of them actually did hire me for the reason that they knew, too, that it was an untenable case, but they had great sympathy for a grieving family. They thought it was worth it to be able to tell the family, "Look, read this report by the expert. Here is why the expert says you can't prove it. We have got to put it behind us."

eJournal: What's the ratio of your cases involving firearms use compared to other means of defense?

Ayoob: Most of them are guns, but not all.

eJournal: Still, I know from our association over these many years that you have been the expert witness for a number of cases where the person charged used other weapons, maybe improvised weapons or physical force. Is it a different challenge to explain how a client's use of force was reasonable and was necessary if it was a bare hands case, a knife defense case, or a gun defense case to suggest only a few possibilities?

Ayoob: Not really. You need to be able to show how much harm the other person could have done. If there are vulnerability issues on the part of your client, you have to explain, "Look, this was a 200-pound man in top physical condition, attacking a 135-pound person who was much older, whose leg was in an ankle brace."

We had one in Texas where they said, "Why did you shoot the unarmed man who was coming at you in a car when all you had to do was step out of the way?" I explained to the grand jury that taking a big step out of the way is a gross motor movement. The other person was driving a Ford Taurus. All he had to do was flick his hand this much [demonstrates, moving fingers 2-3 inches] on the steering wheel, and he is coming right at you; he has re-directed at you. You could try to run away, but in our case, we had documentation that our guy was a heart patient who was on Inderal beta blockers and sudden physical exertion would have caused him to pass out. He would have been unconscious when the car ran over him!

Finally, the other man had multiple, stolen firearms on the right front passenger seat. As he turned toward the defendant with his left hand on the steering wheel, his right hand was seen to go toward the front seat. The grand jury reacted like, "Got it!" They returned no true bill and cleared the defendant.

eJournal: Until now, we have talked about defending use of force in self defense from criminal charges. How often do you serve as an expert witness in civil litigation when, after defending themselves, the client is sued for damages related to his or her use of force?

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Ayoob: Quite often.

eJournal: Are the facts and realities that you need to explain substantively different in that venue?

Ayoob: Not really. The only real difference that I find is in the police cases where the plaintiff will generally be trying to establish that in the particular department there was a culture of violence and a culture of neglecting training which is something that doesn't really come up much in the criminal side. Other than that, it is not really a heck of a lot different. In either case, we show, "Here is the danger that was presented to the person who used the force; here is how quickly that person could have been killed or crippled or the person they rescued could have been killed or crippled if they had not done so." Whether it is criminal or civil, the issues are the same; the actual dynamics of what happened are the same. Was it right or wrong to shoot him? That is still the same question and requires the same answers.

eJournal: As I understand it, though, you can't directly address the question of whether it was right or wrong to shoot him. You explain the facts that lead to that conclusion, and that art makes this such an interesting topic.

Ayoob: We cannot, as the phrase goes, "invade the province of the jury." The province of the jury is the determination of guilt or innocence and that is what is called the ultimate issue. We cannot come in and address that.

We saw classically how that failed recently in a case in Texas of the young female police officer who walked into the wrong apartment in a cookie cutter apartment complex and ended up killing the occupant of the wrong apartment, when he rushed toward her. They had tried to bring in expert testimony. Outside the hearing of the jury, the defense attorney asked the expert, "So, in your opinion, do you think it was reasonable for her to shoot?" The man said, "Yes, it was," and the judge said, "I am not allowing this! Whether or not it was reasonable is the province of the jury." The judge was absolutely correct and she limited them to a few points, to things like tunnel vision and that sort of thing.

It is amazing how often a defense lawyer will ask you to do that kind of thing. Basically, what I tell them is, "I can't! Dude, I can't!"

eJournal: Do you actually know more about the trial process than the attorney knows?

Ayoob: Well, sure, because most attorneys have not done these kinds of cases and the expert in the field will have done more of those kinds of cases than the average, practicing lawyer. I tell the lawyers, "From the beginning, both in the motions in limine where they invariably try to keep your experts out prior to trial, and when you put the expert on the stand in direct, you explain that we are not here to tell you what is right and what is wrong. The jury's function is to determine if they did what a reasonable and prudent person would do in the same situation.

The best analogy is to compare it to a medical malpractice case. An uncommon disease has killed the patient and the allegation is that the patient was mis-diagnosed and was not given state of the art treatment. Well, most of the people on the jury have never even heard of disease X and so someone has to explain to the jury what disease X is, what the diagnostic parameters are, and what is the best practice in our field is for the treatment of disease X. That is what we as experts do.

We say, "Here is how rapidly someone could have reached this other person. Here is the type of wound that could have been inflicted with the type of weapon that the deceased was carrying. Here is what the training protocols say should be done to stop such an attack." Then we leave it up to the jury to decide whether the actions that they have heard from the fact testimony fit the parameters that were described by the expert.

eJournal: Are you revealing all of this before you ever get in front of the jury, so you get the judge's permission about what you can and can't say?

Ayoob: Oh, yes, absolutely! During the pre-trial motions, the motions in limine, about what evidence will and will not be allowed, very commonly the other side will try to keep out anything that will help the defense. You have got to be able to explain to the judge why it should be allowed. If your attorney says, "I bring this witness in to say he is innocent," PBBT! [derisive snorting noise] You are out of there.

eJournal: Do judges ever tell you, "No, Mr. Ayoob, we do not recognize your expertise?" How often has that happened?

Ayoob: It has happened three times that I can recall.

eJournal: In an entire 40-year career, right?

Ayoob: 42 years now—I started in 1979. One was a handcuffing case in Florida. The judge said, "I am sure this guy is an expert at what he does, but I do not believe there is such a thing as an expert in handcuffing. I am not going to allow it."

eJournal: I'd bet that judge never had to handcuff someone.

Ayoob: The defendant was convicted and the judge was held in error by the higher court. I had one in California. The defense attorney was a solo practitioner. I always worry about that, because if anything happens to your lawyer, you are in a boat with no oars. At the beginning of the trial, his brother, his only

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sibling, was in a very bad car crash and not expected to live. He spent his weekends shuttling up to Colorado, I think that was where it happened, consoling the soon-to be widow and the kids, and trying to help out financially. When I got to CA to testify and I met him, he was literally in a daze. He had been surviving on black coffee, unfiltered Camel cigarettes, and when I asked him, "When was the last time you ate?" he said, "I can't remember."

I had told him to get a psychologist to explain certain things, and I found out he had not gotten a psychologist. We got into court, and while I can't say he was zombified, the lights were on but no one was home. When he was trying to get me qualified, outside the hearing of the jury, he started giving me the questions from the list for the psychologist I had asked him to get. I kept trying to steer it back, and saying, "Well, we do some of that in my field, but what we do more of is…"

The judge says, "Are you a psychologist, Mr. Ayoob?"

"No, your honor, I am not."

The judge looked at the attorney and said, "I am not sure I would allow a psychologist to testify to that in a California court; I certainly can't allow a non-psychologist."

That day, on the way home from trial, the attorney pulled over to a convenience store, staggered inside, collapsed and was rushed to the hospital where he was diagnosed with pneumonia. The trial was postponed for a couple of weeks. The client was convicted and the higher court held the judge in error, stating that because some of the things I was going to talk about in court were in fact taught in law enforcement where I teach, should have been allowed.

There was another one in New York where a battered woman had stabbed her husband. The husband had tried to stab her, but he dropped the knife and she picked it up and nailed him. The prosecutor charged her with attempted murder. They had brought in someone from the local cutlery shop to say that the knife in question was a "deadly fighting knife that was designed to kill people." I was brought in as an expert on knife dynamics. I have designed two knives that were manufactured and I have taught and been extensively trained in knife fighting. The judge said, "No knife fighting experts!" and she was convicted. The court of appeals said, "No, you should have allowed it. Give her a new trial!" I testified in the new trial and she was acquitted.

That's three times.

eJournal: That's not as often as I expected, but it brings up the next point. When the judge is reversed, is it expected that you then go back and serve as the expert for the retrial?

Ayoob: I did in New York. In the California and the Florida cases they found what is called, "harmless error." They said the judge should have allowed it, but there was enough evidence for convictions anyway, so neither got a new trial. I respectfully disagreed. It was prejudicial error in the New York case and that was what got her back out of jail and allowed me to testify. The other two did not get a second trial.

eJournal: Some of those rulings must have been bitter disappointments. Outside of not being allowed to testify, what have been some of the more difficult outcomes of your many expert witness cases for you to stomach?

Ayoob: Occasionally, a defendant will hang himself. We had one in Kansas where the guy was a loose cannon, but I believed his shooting was justifiable. He had shot a man who was in his home. I testified about the gunshot angles and explained they were not back to front, but were front to back and why.

When I was done, the lawyer puts his client on the witness stand and the guy turns into a werewolf. He hated the prosecutor, and the prosecutor said, "If I walked into your house, would you shoot me?" he snarls, "If you walk into my house, you had better wear a bulletproof vest!" After that, I asked the attorney, "Do you want your money back? There is nothing I can do for this." *[Laughing]* If I had known that he was going to say that I would not have wasted my money going out to Kansas.

eJournal: How selective are you to avoid that kind of lunacy?

Ayoob: You don't have to like the defendant to speak for them if you feel they did the right thing. If I feel they did the right thing, I will speak for them. If I don't, I won't. I turn down way more cases than I take.

eJournal: Is that because the facts you are shown really are not consistent with self defense or is it a loser on the face of it?

Ayoob: If it was justified, I would do the best I could for a client even if I thought it was a loser, but it is only going to be a loser if he was not justified. I get asked to do a whole lot of plaintiff's cases. I have lost track of the number of times I have told a plaintiff's lawyer, "Look, I would have shot him myself. There is nothing I can do for you." One was getting a little abrasive and told me I had a duty to speak for the innocent or guilty in the name of justice, and I said, "No, that is you as a defense lawyer."

eJournal: I suppose there are other experts who will work for that abrasive lawyer and maybe even say what he wants them to say, which raises an ugly question: What do you do if the opposing side also has an expert and you become convinced that the other expert either a) is entirely incorrect, or b) is lying and knows it?

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Ayoob: In general, that is one thing that will give you the leverage to kill the case before hand. We had an officer-involved shooting in Colorado. The guy was trying to disembowel a police officer with a short-bladed knife. Our client shot and killed him. He was certainly cleared by the criminal justice system. The family of the deceased hired a guy who I used to respect, who testified in deposition that there was no need to shoot him. A 2 ½ inch blade knife is not a deadly weapon, he said, and furthermore, they should have just knocked it out of his hand with their issue PR 24 baton.

The defense lawyer showed me that and I said, "OK, you might want to share this fact with plaintiff's counsel – and I will be happy to discuss this in deposition – I know who their expert is. He has claimed that he taught advanced PR 24 techniques to master instructors, which in the Monadnock PR 24 baton system would be the instructor trainers and international instructors. The international instructors are the ones who create the policy, develop or analyze new techniques to determine if they'll be approved or not, determine new curriculum for training, etcetera.

eJournal: Remind me, what position did you hold in the Monadnock system?

Ayoob: *[laughing]* Strangely enough, I was an international instructor. I polled all of the other international instructors, and they said, "Hell no, I might have taught him a couple of things. He didn't teach us anything. He is not certified to use a PR 24 baton." Furthermore, one guy said, "Here is his curriculum from when he taught knife defense," and in that curriculum, that expert had made the point that the smallest knife can kill you because any place that you can take a pulse you are a couple of millimeters from severing an artery.

I shared all of that with defense counsel, who shared it with plaintiff's counsel, who decided they didn't want to pursue this losing case any further. They withdrew from the case.

eJournal: Was the case ever litigated by another law firm?

Ayoob: No, and like I said, a lot of times you can kill the case before hand. Particularly in the federal lawsuits against police departments after use of force, a common complaint is that under 42 U.S. Code § 1983 you conspired under color of law to deprive so-and-so of his rights to life, liberty, and the pursuit of killing of policemen.

It is not uncommon for a jury to show their contempt for a plaintiff by finding for the plaintiff and awarding them one dollar. What the jury does not know is that then the plaintiff is seen as having prevailed and under 42 USC § 1983 if they prevail, the defense is responsible for paying all their legal fees, which will, of course, be very substantial.

That is why the Colorado guys were so motivated to fabricate a case. Once lawyers have started doing that, if they realize they are going to get humiliated, they will have to pay up to several thousand dollars for their lying, prostitute expert witnesses. They realize what's going to happen in court, and they say, "We're not going to throw good money after bad. We are out of here!"

Now, in my experience, the federal courts are more backed up than the state and municipal courts. Federal judges are insistent with the litigators to settle out of court and let them know they will not have a sympathetic heart on the bench if they don't at least make an effort.

The police defense will make some token offer of settlement, usually insultingly low and that is still on the table on the other side realizes they can't win. So, they will take our offer which came with the proviso that we will not try to get our fees out of this. They think the $100,000 is cheaper than trial, so take the $100,000. The individual officer says, "Wait a minute, everybody but law school graduates and cops are going to think that is an admission of guilt!" and the lawyers tell them, "That is too damn bad because we are the ones who make the decision."

eJournal: That is really difficult for the innocent defendant. I have also heard of lawyers balking at hiring an expert witness. Many armed citizens know of your many decades of work teaching use of force and may say to his or her attorney, "I'll really need an expert, and Massad Ayoob is the expert that I want." Is the attorney going to get riled up and say "You don't get to make those decisions. I have got this under control." If that happens, what can the client do?

Ayoob: First, if you are the paying client, the attorney works for you, so instruct him, "I want you to at least talk to this expert." If your lawyer is worth the tuition that put him through law school and you have a competent expert, once he has talked to the expert, he should realize, "OK, this should help the case."

eJournal: How vital is timeliness? Is there an optimum time span in which you as the expert can most effectively give input on the case?

Ayoob: The sooner the better! I have had lawyers literally call me two weeks before trial, and I have had to say, "There is no way in hell I can familiarize myself with this and do a decent job for you in that time-frame." Plus, by that time, I am probably booked somewhere else for the dates of that trial.

With private counsel, another thing you have to worry about is what will happen if they offer you a package deal. The lawyer might say, "I will take care of everything for $75,000 or $100,000." Well, any money they paid the expert witness,

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is now coming out of their pocket and that tends to drive the words, "Oh, we don't need an expert! I've got this!"

eJournal: By that time the client really has a problem because he or she agreed, usually quite some time back, to that flat fee. Fortunately, having to negotiate a bargain for legal representation isn't an issue for Network members, but non-members read our interviews, too, and people who have had little to no experience hiring lawyers, wouldn't understand the dynamic a flat fee agreement creates. The thing is, a lawyer might look at your case as being simply a low-level felony because you displayed your firearm defensively, and he thinks, "This is no big deal, no one was shot," while you are thinking, "If I have to plead or get convicted, I may never be allowed to own guns or will never get a concealed carry permit in this or any other state again."

Ayoob: The Network journal is largely about things most people never think about. I guess that is why we are both here having this conversation.

eJournal: *[laughing]* You are right! If you're dealing with lying or experts who are flat-out wrong, can you resolve those problems by motions in limine or is it common for you to be listening to the other side's testimony and realize, "That testimony is entirely incorrect," or worse, "That expert is lying!" Do you have to humiliate another expert in front of a jury?

Ayoob: I don't have to humiliate the other guy in front of a jury. That is the attorney's job. There are prostitutes out there. There are a whole lot of retired cops, usually like under-sheriff or captain level, who, because they had command over various units, will testify, "I am an expert in all these specialties. I have never been an investigator, but I was the commander of the detective unit!" or "I was in charge of training." He can't shoot his way out of a sandwich bag, and he never was a certified firearms instructor, but he will say, "I had instructors working for me." *[Laughing]* Well, I have a cleaning lady who works for me, but I can assure you that doesn't make me an expert on housekeeping.

We see some of those "experts" and we see people with the fake PhDs from the diploma mills, but we know where all the diploma mills are, and that is just devastating when that comes out in court. There are folks out there who are what one lawyer I know calls, "taxis," because if you give them the money, they will take you wherever you want to go. The good news is that those people have generally contradicted themselves so often and have said so many stupid things in open court, that if we are up against them, we can give the attorney the Consumer's Guide to Impeachment.

eJournal: Does opposing counsel routinely try to trip you up, as if you were one of the illegitimate experts?

Ayoob: Oh, yeah, all the time! One of the things they do is look for what they perceive as your weakest link, and then pretend that is the strongest thing you have got going. In my case, I was a part-time cop for 43 years, and I loved doing it. I don't really base a lot of my expertise on it because I was part time. My expertise comes from the training, the court room experience, and from having been a full-time instructor since 1982.

Watch out for this if you are ever in court as an expert: the other side will say, "We will stipulate that he is an expert." That keeps your attorney from establishing all of your credentials to the jury and then they will come in on cross-examination, in my case, they'll say, "Well, you are only a part-time cop."

One of the best cops I ever knew worked in one of the busiest suburbs around Chicago. He is retired now, after working his whole career as a patrolman. He never so much as applied for promotion to sergeant. I asked him why, and he said, "The further you go up the ladder the more you are a manager behind a desk, and you are getting paid half of what any middle manager in the private sector would be getting for the same responsibilities. I love being a cop! I love taking bad guys off the street. That is what I am here for; that is what I am going to do until the day I retire."

For 33 years that is what he did. He published numerous textbooks that are standard in police academies today, and he earned a PhD. He would be a splendid expert on use of force! Put him on the stand and if you fall for it when the other side says, "We will stipulate to his qualifications" now the jury doesn't know any of that, and then they say later, "After 33 years, you are only a patrolman?!" implying to the jury that he was not smart enough or good enough to get promoted.

Don't fall into that trap! Even if the other side stipulates, tell the attorney to say, "Thank you. I am glad you agree with me that I have an excellent expert, but I need the jury to know why he is an excellent expert."

eJournal: It has been fun talking about what you've learned in your various cases. When did you first testify as an expert?

Ayoob: In 1979 in *New York vs Harold Braunhut.* My book *Fundamentals of Modern Impact Weapons* had come out the year before, published by Charles C. Thomas Publishers. Braunhut had manufactured and advertised a product called the Kiyoga Stick – a totally made-up term but it sounds Japanese and has a samurai ring to it. It was an expanding spring whip. Instead of an expanding baton it was a coiled spring.

He had these ads in all of the men's magazines reading, "Stun, Stagger, Stop!" with a picture of a guy waving this thing and a criminal running away, screaming. He has got some of these

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things in an attaché case as he is boarding an airplane at La Guardia to go on a sales trip. The cry was, "Eecck! Weapons! He has weapons!" and the airport cops jumped on him, and he was arrested for illegal possession of a weapon, to wit, a bludgeon.

He goes into court in Queens County, New York, and his attorney says, "Where the heck do I get an expert on bludgeons?" and does whatever was the equivalent of a Google search in 1979. He gave me a call and says, "Hey, are you the author of *Fundamentals of Modern Impact Weapons?"*

"Yes, I am."

"Well, do you know where there is an expert witness?"

"Yes, kind of."

And he says, "Well, I want you to be one" and he gives me the details and the discovery materials. When I was in court and he asked, "Is this a weapon?"

I said, "No, it is not a weapon, a weapon is something that is designed for you to hurt people with. This thing is harmless; you can't hurt anyone with it," and that really pissed off the guy who made it. I rolled up my sleeve and I whacked myself on the arm with it as hard as I could. I said, "Your Honor, there is some very slight redness, I feel a little bit of a sting, but that is it."

The prosecutor jumps up and says, "He was not hitting himself hard enough!"

The judge snapped at him, "The court observed how hard he hit himself." He found Mr. Braunhut not guilty, and the guy never spoke to me again! I walked out of the courtroom and said, "Well, that was easy!"

eJournal: I'm glad that got you started because the stakes were a lot higher in the difficult cases you shared with us in this interview's two segments than they were for the Kiyoga Stick inventor.

I appreciate you sharing your experiences and some of the lessons about how attorneys should use experts and what a use of force expert can bring to a trial team. More than that, though, Mas, thank you for being there for our members. We're very fortunate to have you on the Network team.

Network Advisory Board member Massad Ayoob is author of Deadly Force: Understanding Your Right to Self Defense which is distributed in the member education package for all Network members. He has additionally authored several dozen books and hundreds of articles on firearms, self defense and related topics. Of these, Massad has authored multiple editions of Gun Digest's Book of Concealed Carry and Gun Digest Book of Combat Handgunnery.

Since 1979, he has received judicial recognition as an expert witness for the courts in weapons and shooting cases, and was a fully sworn and empowered, part time police officer for over forty years at ranks from patrolman through captain. He recently became the president of Second Amendment Foundation. Ayoob founded the Lethal Force Institute in 1981 and served as its director until 2009, and now trains through Massad Ayoob Group. Learn more at https://massadayoobgroup.com or read his blog at https://backwoodshome.com/blogs/MassadAyoob/.

President's Message

by Marty Hayes, J.D.

This has been an extremely busy month at the Network and especially for me. This column will be somewhat personal in that I am going to tell you about a medical issue that I have been dealing with for six months. I have worked around an increasing serious spinal issue that took more and more of my left arm function and created considerable pain. In the late summer, I began preparing for and recently underwent spinal surgery. That's the bad news!

The good news is that surgery took place three weeks ago and I am now on the mend and to all appearances, I am doing pretty good and should end up with an interesting scar once the staples come out. Also, in the "good news" column is the fact that I was able to work through the pain and fulfill my responsibilities, so no one had to step in and take care of my Network duties for me.

Working Through the Pain

Part of my work entailed going to Live Oak, FL at the end of August to teach a five-day Use of Deadly Force Instructor course with Massad Ayoob. This course is one of the highlights of my teaching career. I sincerely hope that our efforts to help to prepare new instructors will pay off in the months and years to follow.

Over the past several months, I've also continued to write my monthly column, along with an occasional feature article for Gun Digest (https://gundigest.com/gun-digest-magazines#). The monthly column is entitled "Drawing Conclusions" – the title is not my choice – and it deals with issues that I see in the armed citizen's response to stimuli and subsequent use of deadly force. Many of the cases that I choose to highlight are basically examples of poor decision making. I pick apart what went wrong and why. I would rather be teaching and writing about how to do it right, but at times negative examples are really the best way to pinpoint a problem.

Thoughts During Recovery

Over the past three weeks, as I have been sitting and recuperating from surgery, I have been giving more and more thought to the endgame and how to phase out my day-to-day duties at the Network. I have identified the need to look for my replacement to take over my daily duties here and, of course, to carry a healthy and active Network forward into the future, assuring its sustainability beyond the efforts and successes of just one or two individuals.

Good plans are firming up, although Gila, Vincent and I are not yet ready to announce these changes. I wish we could! I am confident that when we do announce the next phase of the Network's evolution, you will share our anticipation of strong, continuing success for the Network and fulfillment of its mission long after the three of us are no longer involved in day-to-day work on behalf of our members.

Until then, don't forget about me, and stay tuned as I champion our organization into what we have jokingly been calling Network 2.0. I look forward to being able to share all the details with you in the months to come.

Attorney Question of the Month

As our Network President Marty Hayes indicated in his column last month, we often turn to our Affiliated Attorneys for a broader understanding of how various principles of law are applied across the nation. Looking more deeply into one of the issues the Washington Office of Insurance Commissioner originally raised but later dropped, we asked our affiliated attorneys to share their knowledge and experience with innocent clients who plead guilty when given an attractive plea offer. We asked--

Why might an innocent person choose to plead guilty to a crime they did not commit? Have you seen this occur first-hand?

So many attorneys wrote in to share their thoughts that while we anticipated wrapping up this question in this edition, we will have more commentaries from attorneys practicing in different states in our November journal.

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In the case of a person who has used force in defense of property, self, or another, "innocent" is probably an inaccurate description. A defendant who asserts justification for the use of force admits all the elements of the charged crime(s). The force user has "committed" the crime; the defense is an affirmative assertion of avoidance. Reasonable belief, imminence, and/or necessity are usually in play and thus, a force user who goes to trial submits him/herself to the judgment (or impulses) of a jury. Reasons a person might plead guilty to a crime while believing they could be acquitted at trial:

- Good plea offered (misdemeanor, Alford or nolo contendere) which avoids collateral consequences
- Bad advice from lawyer
- Being held in jail pretrial without bond
- Health or family concerns
- Plea likely to result in probation
- Prosecutor has more serious crime(s) that could be charged which will be resolved by a plea to what is already charged
- Lack of resources to fund trial costs
- Client has to testify to be acquitted but makes a terrible witness
- Client made inculpatory or socially unacceptable statements before or after using defensive force which are admissible
- Defendant lost a pretrial immunity motion and the judge's order tanks the defense factually or legally
- An unfriendly petit jury has been seated
- The jury is out and the state is looking to deal, expecting an acquittal
- A new trial has been granted after conviction and the prosecutor is now reasonable.

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An innocent person might be found guilty of a more serious crime for which they will not be prosecuted if they enter the guilty plea in a less serious case.

This can also be the case if they have cases pending in several different places, in which case they are not entirely pure as the driven snow, even if they didn't commit one particular crime.

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When I began practicing an experienced lawyer described going to trial as "rolling the dice." The old maxim is "The odds favor the house." When you go to trial you are gambling with your future, your reputation and a great deal of your money.

A client of mine took a ride with new friends. They stopped at a gas station and one of the new friends decided to improve the visit by robbing the place. He ran out with a pistol in one hand and cash in another. He thrust the cash at her with the order to hide it. She was in the back seat of a two-door car and had no means of escape. The car got 100 yards away before all the badges in the world descended on it.

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My client was charged with accessory to robbery. I told her that there was no possible way for them to prove this charge. She was unable to bond out and as time went on other passengers pled guilty and left the jail; with probation and a felony record. She demanded the same deal. I advised against it and she wrote to the prosecutor demanding to plead guilty. The prosecutor was happy to indulge her and we went before the judge. As part of the procedure she was required to recount what she had done. When she finished the judge looked at me and asked if that account supported the charge. I admitted it did not. The judge refused to accept the plea and we were set for trial.

My client continued to demand to plead guilty. The prosecution amended the charge to concealing evidence (the cash). She had done so at the command of a man with a gun. I advised her that we could beat that charge. She insisted on pleading guilty. This time the judge accepted the plea. A young innocent suddenly had a felony record.

Prisons are considered better places to do time than county jails. A client contracted hepatitis in a county jail; another COVID. Boredom beats down the resistance of other defendants. A reduced charge with no prison time can become awfully attractive. On rare occasions I advise against a plea. In the end it is the client's decision, not mine. I go home imagining how I might have presented a defense.

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A person might find himself/herself in a situation where circumstantial evidence strongly points to guilt and there is not enough objectively verifiable evidence to create reasonable doubt. The State may rely upon circumstantial evidence in arguing that the defendant is guilty, and that such finding may be made beyond a reasonable doubt. Classic example used by prosecutors in closing statement: You go into the courthouse and the street/sidewalk is dry. There are no clouds in the sky. You come out several hours later and the sidewalk and street are wet, the air smells like desert rain, but there are still no clouds. You can conclude, beyond a reasonable doubt, that it rained while you were inside even though you did not see the rain, and you did not talk to anyone who did. This is circumstantial evidence.

On occasion, a person accused of a crime will have a justification defense, such as self defense, defense of a third party or crime prevention. An affirmative defense requires that the defendant proffer some proof that his or her conduct that would otherwise be regarded as criminal (use of a weapon to assault or kill someone, for example). Usually such proof need only be sufficient to create reasonable doubt as to the issue, but some jurisdictions (including Arizona until a number of years ago) require proof of such justification by a preponderance of the evidence. The essence of an affirmative defense is the necessary admission to the act (assault, homicide, display of a firearm, etc). Thus, if the justification is not accepted by the jury, a conviction is likely to follow, along with usually severe consequences. Those lawfully employing deadly force are often charged with serious criminal offenses, even where justification is available as a defense.

If a person is faced with the possibility of conviction, however slight, a decision may be made to accept a plea if the consequences of conviction are severe (mandatory and lengthy prison term usually). Classically, in Arizona, this is called an Alford Plea (see *State of Arizona v. Alford*), and is actually a plea of "no contest" to a lesser charge with less severe consequences. This does not require an admission of guilty, but rather an acknowledgment that a jury might accept the State's evidence as sufficient proof of guilt. A plea of "no contest" does not have to be an "Alford plea," which weighs the consequences of conviction. It may simply be an admission that conviction is likely, and a plea to a lesser charge is reasonable.

I have practiced as a criminal defense attorney for over 30 years. In that time, I have seen clients plead guilty to crimes they say they did not commit. Usually, however, I will not permit this since pleading guilty requires admission of a "factual basis" that supports the conclusion that the person committed the crime. If the client is not able to truthfully admit those facts, the guilty plea is not possible. In those instances where I have permitted clients to enter such pleas after they privately denied liability, the facts have been so overwhelming as to render the client's story disclaiming liability incredible. Therefore, I regarded the admission as truthful.

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Yes. Clients typically will plea down to something that the prosecutor is offering because they don't want to have to deal with the court system. The pleas I'm talking about are mostly minor traffic offenses and misdemeanors.

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Why would a defendant plead guilty to an offense they did not commit?

1. The defendant cannot financially afford to contest the charges.
2. Despite innocence, the defendant fears possible conviction, and so prefers a no-jail plea rather than risk conviction and imprisonment.
3. The defendant wants the case to go away quickly so that other people will not find out about the charges (ie: wife, friends, boss).
4. The defendant cannot endure the emotional stress that the case is causing them, and just wants it all to end.
5. The defendant believed that by pleading guilty, it might lessen the anger of people who were wronged by the defendant, and would cause those people to leave the defendant alone and/or perhaps not pursue a civil case against the defendant. ("He's learned his lesson, and is being punished.")
6. The defendant was counseled poorly by their attorney, and did not understand the possible ramifications of pleading guilty (ie: employment, professional licensing, business licensing, gun licensing or loss of gun rights, apartment rental [landlords do background checks today], etc.).
7. The defendant mistakenly believed, or was mis-advised, that a later expungement would totally clear their record. While private persons ordinarily cannot obtain an expunged record, expungement does not eliminate the ability of the government to access the record under certain circumstances. In New York and New Jersey, the government can access expunged or sealed records in matters regarding law enforcement employment and gun licensing.

I have seen all of these scenarios, and more.

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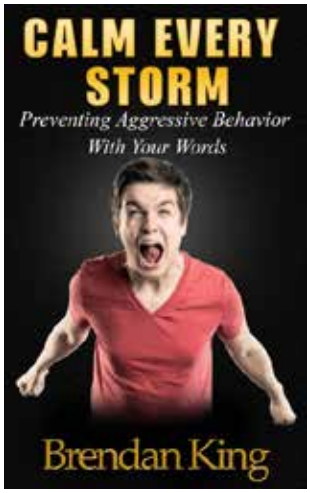
We extend a hearty "Thank you!" to our affiliated attorneys who contributed comments about this topic. Reader, please return next month for the conclusion of answers to this question from our affiliated attorneys.

Book Review

Calm Every Storm

Preventing Aggressive Behavior With Your Words



By Brendan King
Independently published (June 22, 2015)
215 pages, Paperback $12.95
eBook $7.45 on Amazon
ISBN-13: 979-8706694418

Reviewed by Gila Hayes

"I didn't do anything! He just went off on me." A lot of interpersonal conflict could be avoided if we were better at recognizing how our words and actions elicit what seems to be out-of-proportion reactions. I am always interested to learn how to better disengage, how to avoid increasing an upset person's likelihood of lashing out, and in that study, to uncover unconscious behaviors that escalate instead of calming.

The titles of two books by Brendan King, caught my attention this month, and, while written from the perspective of police and mental health workers, it gave a number of insights into how verbal and non verbal communication can calm or enrage a potential attacker. I first read King's more recent book, *The 15 Fundamental Laws of De-escalation* but it was his earlier book, *Calm Every Storm,* that contained gems of experience that address de-escalating people in crisis, lashing out and hurting themselves or another person. It also addresses a lot of professional development issues for professional first responders, so not every chapter directly covered de-escalation. Enough material was directly applicable, though, that I'd like to highlight King's strongest points in this review.

Some of our community of armed citizens believe standing unyielding and uncompromising is superior to negotiating to reduce hostility. In many situations, that only escalates tensions and leads to violence. King, writing in short chapters titled by old advertising jingles, starts by selling the value of de-escalating. "In order to successfully de-escalate somebody in crisis, you first have to identify what's in it for you, weighing the best case and worst case alternatives, and deciding deescalation is worth it," he writes. "Secondly, determine why should you try to de-escalate the situation? Thirdly, what do you have to gain by not ignoring it?"

Having decided to try to lower tensions, if only to earn a window to escape, you have to demonstrate you're not a threat to the potential attacker, King writes, acknowledging that not all readers will agree. "If the other person perceives you as a threat, be it verbal, psychological, or physical, the reality is their anxiety is going to increase. They're already in crisis, and you don't want to make it worse by demonstrating a threat before it's required. Too often that power and threatening body language, tone, approach, etc. is used as the first approach," he warns.

"You don't have to come off as Mr. Tough Guy with the mentality that people had better do what I say, or else. If you're confident in your abilities, and your skills, you know you have the ability to go hands-on if you have to. Using the loud authoritarian approach isn't always necessary. Saying things like, 'I'm not going to ask you again,' or, 'Hey, you better step back and calm down, or else!' 'You can do this one of two ways, the easy way, or the hard way!' often only results in the 'or else.'"

Instead, "find an in" with a person in crisis and demonstrate that you're not a threat, King writes. In his experience, he says, "I'm going to try to redirect them away from how angry they are at whatever the situation is you're dealing with, identify something where that person and I can relate, and build a small bit of rapport in those few seconds."

Can you offer compromise on one area of conflict to get a result that increases safety? King writes, "I'm going to give somebody something if they're asking me for it, because they're in crisis, and they're yelling at me to 'Get out my face'... whatever they think they want in the heat of the moment. I might give them one of those things they think they want, but I'm not going to give it to them without getting something that I need in return," be that stopping yelling, breaking off without violence, or what ever resolves the conflict. "Basically, I tell them what I am willing to do for them, and I explain what I expect from them in return."

Armed citizens rightly pursue training for lethal force skills. Learning people management skills is of equal or greater importance. Lest readers worry that *Calm Every Storm* is weak on personal safety or puts those who employ its lessons at risk, having read and pondered its pages, I concluded it is balanced between options to prevent an agitated person from acting out violently weighed against choosing to apply force immediately. There is a lot of human interaction that has to be handled between those two extremes!

When engaged with a person in crisis, King warns against losing your broader danger scan to tunnel vision. If more than one person is present, focused effort to deescalate conflict with one creates risk if an onlooker or member of the group jumps into the fray. "Make sure you stay alert, you keep a high sense of awareness, and you're cognizant of not just the individual

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in crisis, but other surrounding areas, as well. The person in crisis might be just causing a distraction, so the real crisis can happen behind your back," he warns.

King writes that people in crisis are sensitive to deception whether spoken or demonstrated through body language and will detect negativity, untruthfulness and lack of respect. If you have to say no, be direct, he counsels. "It's better to tell them the truth, 'You know what? I'm sorry, but I'm not going to be able to do that' ... or 'There might be another option we can figure out, but I'm not going to be able to do that.'" If you make a mistake, "be honest with them and admit it," because only through trust can you "influence thought and behavior," he says.

The phrase "You need to ..." is not a negotiating tool, he states. Reserve it only for emergencies where someone is going to get hurt if you don't intervene. "Nobody wants to hear anyone telling them what they need to do when they go into crisis. Saying things like, 'You need to calm down, you need to take a deep breath, you need to take a time out, you need to lower your voice,' etc. often only create a power struggle and invite challenge." Trying to convince someone in crisis that you're right becomes a power struggle, he notes, adding that "when you enter a power struggle, you've already lost."

Have reasonable expectations and understand that the disturbed person isn't necessarily going to like the options you offer. A person with a weapon may not be willing to drop it, he comments, but you may be able to get them to lower it until you can move to a safer position. De-escalation relies on salesmanship, King writes, repeating the essential role of empathy and listening skills coupled with asking questions to reach a safe outcome.

King also addresses maintaining emotional control when verbally abused, determining when de-escalation is failing and violence is imminent, doing the right thing and having confidence in your own decisions. "One of the most difficult, yet powerful tools you can develop in your de-escalation arsenal is to learn to separate yourself" from reacting emotionally to another's words or actions, he urges.

Crisis intervention is not just for first responders! King writes, "We all encounter conflict of some type outside our workplace. We have conflict at home, with family, with kids, maybe even with friends...Any opportunity to build your crisis intervention skills is only going to benefit you." I agree! I read a fair number of books that aren't entirely applicable to how I live or what I do and I take away useful information. *Calm Every Storm* teaches how first responders deal with conflict and although outside that line of work, I found it packed with techniques and advice to borrow for every day life.

Editor's Notebook

Looking Forward and Back

by Gila Hayes

February 2008 marked the first edition of the Network's online journal, our way of staying in touch with our members and reaching out to prospective members. For the ensuing 152 months, our monthly journal has shared our viewpoints, concerns and raison d'être for forming the Network as an organization of like-minded men and women banding together to look out for one another in the legal aftermath that follows use of force in self-defense.

We have enjoyed the support and generosity of many of the self-defense education leaders who have written commentaries, answered thousands of questions through our Q & A lead articles from viewpoints spanning uber-conservative military veterans to sophisticated intellectuals with less time in the trenches but gifted in analytical and instructional skills that help laypersons like me understand issues like human physiology under extreme stress, as only one example. Not only have these subject matter experts generously shared the time to answer questions, but they also reviewed the resulting articles for accuracy and completeness before release for the edification of our readers.

Many of those sharing their knowledge comprise the senior echelon of our armed citizen community's influencers. I feel the pressure of passing time, knowing that eventually we must face the loss of these great minds.

We were swamped with the detail work required to launch the Network 14 years ago when in July of 2007, I was staggered by the unexpected death of my mentor and friend Jim Cirillo. He'd informally agreed to serve on our Network Advisory Board, but we lost him before that became reality. His death really emphasized the need to spend time talking with those who have built the very foundations of American firearms training and use of force doctrine, creating in me an urgency learn from the masters.

Last year, Chuck Taylor died just weeks after a long phone visit in which he contributed to our report on preparing armed teachers in TX (see second half of https://armedcitizensnetwork.org/defending-against-school-shooters), and as I work on this column, I see in the news that we have lost another of the elders, Elden Carl. It would be hard to study the defensive use of firearms, pistol equipment and accessories and dabble in competitive shooting without indirectly feeling his influence, so while not personally acquainted, I recognize the depth of what we have lost.

I wonder sometimes if I'm erring by not sharing Q & A with the upcoming tier of men and women who will guide the next generation of armed citizens. Still, I remain painfully aware that many of those contributing their knowledge to our educational outreach are of the older generation – like me. There's only so much time and only so much room in the monthly journal!

Fortunately, we've enjoyed instruction from both young and old viewpoints in the Attorney Question of the Month column that we started in the spring of 2009. Our Affiliated Attorneys voluntarily contribute their knowledge and experience, giving regional and state-level input to our national readership. You couldn't ask for a better bunch of men and women stepping up to help our members better understand the criminal justice system and the law and how we are all affected by laws and their enforcement.

I've written reviews of 152 books and videos since our first journal. This material, I devoutly hope, expands our learning opportunities to a broader variety of voices – many younger and from more diverse backgrounds. The book reviews have provided opportunities to cover the mental aspect of self-defense, as well as other topics that while not specifically focused on the legal defense of self defense, play a role. Still, we have assiduously avoided becoming just one more online "gun magazine" and have avoided covering guns and holsters in favor of giving our attention to issues bearing on self defense and its legal defense. More than enough gun writing is available; that is not our area of concern.

Ironically, I left behind over a decade's effort as a gun writer to join the Network's team of three founders. I had reviewed hundreds of guns and many holsters and related products. If there is one negative characteristic that plagues the firearms industry it is what is sarcastically termed "vapor wear." A manufacturer or designer makes a promising prototype and before you know it, glossy pictures of the prototypes adorn magazine covers; trade shows display the single, precious experimental copy and consumers begin haranguing retail outlets for the opportunity to purchase the latest and greatest. Sometimes the prototype never even makes it into production. The whole charade would be enormously amusing were it not so frustrating.

I am going to close this month by hinting broadly at a new voice I expect to introduce to our readers in the months to come. A friend and Network affiliated instructor has very recently graduated from law school. This overachiever has agreed to help me with book reviews, to guide the Attorney Question of the Month column, and contribute as his time allows by conducting some of our lead interviews. This hint is the closest I am going to come to being part of the dreaded "vapor wear" business model, as we have not yet developed writing assignments, nor are there any finished articles in hand.

Still, I am so excited by the opportunity to add a fresh voice to mine that I couldn't help but tell our readers to hold on, there's a new viewpoint coming, and it is going to add interest and depth to this monthly journal. As the range officers say at shooting matches, "Stand by!" The fun is just beginning.

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. 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:

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