

Concealed Carry Compromises

An Interview with Massad Ayoob

Interview by Gila Hayes

Violent crime increases when summer temperatures soar. With so many potential victims out and about, opportunistic criminals go to work. It is our hope that members will be ready to save their own lives, so we're distressed when folks admit that when it's hot, they find it too difficult to carry a concealed gun for self defense. Network advisory board member Massad Ayoob recently shared some hot weather concealed carry strategies, based on experiences gathered over about six decades, coupled with historical perspectives on holsters, guns and concealment clothing. I think Network members will enjoy the casual discussion as much as I did, so let's switch to question and answer format so readers can enjoy learning from Mas directly.

eJournal: When it is hot, people have more trouble carrying concealed handguns but ironically, crimes against persons increase in hot weather. While carrying a gun has always required compromises, I'm in search of suggestions about how our members can maintain a high level of preparation even when it is hot.

Ayoob: I hear you! In my younger days, starting when I was 12 working part-time in my dad's jewelry store, I carried a cocked and locked 1911 inside the waistband behind the right hip which was legal in that time and place. It was my dad's custom and practice that when you were behind the counter, you wore a professional-looking white lab coat. We didn't really need air conditioning there in northern New England so we didn't have it, but it could still get pretty warm there in the summers. On the really hot days, I took off the 1911 and carried my dad's Colt Cobra .38 in a pocket. It was a 2-inch with the hammer shroud, the first of the lightweight aluminum-framed revolvers.

I got my permit to carry out in the great big world at the age of 21. My dad gave me a nice Chief's Special Model 36 for that birthday and I carried that in an MMGR belly holster: the first of the belly bands. In the early 1960s, John Bianchi had shown a prototype of a belly band in Gun World magazine but he did not bring it out at that

time. The MMGR people in Brooklyn, NY also saw it and they did bring it out. It had the option of Velcro®, which had just come out, or hooks and eyes. Not trusting new things, I went with the hooks and eyes. Within a year I had rusted the darn hooks. I found out that one day of salt sweat going through nothing but cloth, turns a blue steel revolver red. I managed to get the rust off of it, but it kept happening. I still have the gun and it is all pitted, since you can get the rust off but you can't grow back the steel.

As time went on, I found that it was okay to wear what today you might call an untucked sport shirt. We called them bowling shirts and they were quite a bit like the Cuban guayabera. The guayabera-style shirt came from a culture accustomed to carrying concealed weapons. The guayabera's buttons would stop above the navel so if you need to pull a gun from underneath, it doesn't catch and snag.

I still used the belly band at times. In my mid 20s I was an off-duty cop dropping by the department to fill out some paperwork, when I got there just seconds after they had discovered that two felons who were in for armed robbery had escaped from our jail. Everybody was mobilized! I had a stainless-steel Security Industries copy of the J-frame in .357 Magnum.

Security Industries only lasted a few years, but for the first few years they were excellent guns and literally the action was smoother than a Model 60's. It was the first of the baby magnums, but the company was undercapitalized and within a few years they started taking all sorts of shortcuts, the quality went down and the company went under. That is the gun I had that particular day in the MMGR belly band.

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I grabbed a fistful of rounds out of a box I had in the glove box of my car and I jumped in one of the patrol cars. I was involved in catching the first guy. A state trooper had him but he sprained his ankle in the struggle. I was searching the guy and about to cuff and stuff him in the back of the state police car when I heard one of the other officers, a friend of mine, yell, "I think he is under the bridge."

I remember yelling back, "Wait for us!" This took place at the Merrimack River Bridge in Hooksett, NH. It has a very steep incline down to the river. A very narrow pathway by the bridge—about 100 yards from where we were—was the only place the guy could have been. Just as I was opening the car door to put suspect number one into the car, I heard my brother officer yell, "Police! Don't move!" I just threw that guy in back of the patrol car.

Thank God the bridge and bridge struts were there—I had to clamber down a very steep bank with one hand on a bridge strut the whole way. I came out above where Bobby had the guy at gunpoint and was still yelling "Don't move! I mean it! Don't move!" As I ran up, the guy reached down and grabbed a fist full of sand to throw in Bobby's face like in a western movie.

I was about 10 feet above him when I ended up pulling out the J-frame and snarling, "Do what he says!" The guy looked up—at the .357 Magnum looking down at him. I had my finger on the trigger, because I thought I was going to have to kill him. He very slowly, carefully and meticulously emptied his hands and raised them. That was the last time I considered myself well-armed with a five-shot revolver and no spare ammunition. I started putting a little more thought into carrying a full-sized gun.

eJournal: Well, that's the end of the easy days with a five-shot in a belly band. Before moving on, I've got to ask—was that MMGR belly band you mentioned amongst the first inside the waistband (IWB) carry methods?

Ayoob: Inside the waistband holsters actually go back to the 19th century. Dwight Eisenhower was an early adopter appendix carry IWB. During World War II, he carried a Colt Detective Special inside the waistband under his patented Eisenhower jacket. He was president of Columbia University in New York City after he retired from being supreme commander of the Allied forces in 1945 and ascending to the presidency in the early 50s. He told one of his biographers that he carried that gun whenever he set foot on the streets of New York.

eJournal: How fascinating! I knew none of that.

Ayoob: Yes, inside the waistband holsters have been around for a while.

eJournal: I'm sorry I interrupted how you moved toward carrying full sized guns. Picking up where you'd decided you should carry more than a five-shot revolver, as your gun choices evolved, did your wardrobe change, too?

Ayoob: I found it useful to wear untucked sport shirts, one size too large in an opaque, checkered or patterned fabric. A lot of the guys like the Hawaiian shirts because the color distracts from the outline of the gun underneath. Just make sure if you don't have the guayabera type that the bottom button has been removed or you may not have enough flex to pull it up and draw the gun from inside the waistband.

When using inside the waistband holsters, we found out the hard way that sweat can turn blued guns brown. That is the history behind the concept of the sweat guard on so many of today's holsters. I always order mine without the sweat guard, because if the holster is made of soft leather, with a lot of wear, it tends to fold over the gun and that makes the draw difficult, but with Kydex® you can't get the thumb in place to take a drawing grasp until the rest of the hand starts to clear the holster. I just take care to wipe the gun down. Even stainless-steel rusts under sweaty conditions but it's a lot more forgiving and goes a lot longer between wipe downs. While nothing is impervious, modern finishes, most notably the Tenifer® on the original Glocks, are vastly more resistant.

If you want to wear a gun against bare skin, you really need to make sure that your gun doesn't have any sharp or abrasive edges. I discovered the hard way that I am allergic to Cocobolo wood that apparently has an unusual resin in it as do other exotic woods and nobody thinks to get tested for allergies before buying grips! You can wind up with a very nasty, uncomfortable rash, in the shape of your pistol grips!

eJournal: *[chuckling]* Try passing that off to your physician as a simple case of shingles.

Ayoob: I think it was Otto von Bismarck who said, "Experience is the collected aggregate of all our mistakes, but wisdom is found in learning from the mistakes of others."

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eJournal: True, and the same applies to self defense. We decry restrictions when people are killed, unable to defend themselves when attacked where carrying guns is illegal, so it seems to me that where it's legal to carry, being prepared to fight back is an obligation we owe to ourselves and those who love us. When you share what has and has not worked for carrying guns in hot weather, you are helping people who might use the "It's too hot" excuse.

Ayoob: You need to just put a little bit of thought into it. A very common garb in the deep south where I now live is the T-shirt under a light cotton Columbia-style shirt, generally worn unbuttoned. People like having the pockets and in which to put their pens, phones, notepads and such. I'll wear that style a lot with a T-shirt beneath to keep the sharp edges of the gun off bare skin and I blend in with everyone else. Under a Columbia shirt, an IWB or a good tight-to-the-body outside the waistband holster will conceal a full-sized gun just fine. If it is a double stack, I'll carry just one spare magazine; two if it is a single stack. I have found no problems with that at all.

eJournal: Now, there are people who may need alternatives because of dress codes or other needs. What do you think of belly bands, kangaroo pouch/ groin holsters, bra holsters, undershirt holsters, and even holsters sewn into compression shorts and yoga pants?

Ayoob: I believe Greg Kramer (<https://www.kramerleather.com>) was the first when he brought out the undershirt holster he called the *Confidante*. It works! You have to be able to reach in and get the gun, so like I always did with the bellyband, leave a button unbuttoned, sew a button to the outside and secure the opening with a piece of Velcro. For a right-handed person, that is a very fast cross draw. Then to draw, the hand can just spear hand in and grab the gun.

Don't discount the belly bands—they still work. I thought the best one ever was the Bianchi Ranger, because it had a pocket that doubled as a money belt, which was very handy, but they stopped making it. What used to be Mail Order Video, now Magill's Glockstore, (<https://www.glockstore.com/The-Original-Belly-Band>) has a good one and Gould & Goodrich (<https://gouldusa.com/products/products-type/?type=The+Body+Guard&line=other>) makes a good belly band, too.

eJournal: What about holstering in one of these alternative devices? Is needing to be able to holster after a critical incident a real concern?

Ayoob: Definitely! When police are coming, because there has been a shooting or someone has reported there is a person here now with a gun, you are the person there with the gun. You do not want to set it down where some kids could grab it, or where the suspect could grab it, especially not when you might need it again in a heartbeat. I would say, plan on putting it into the waistband or into the pocket.

I think the return of pocket carry is great and we now have lots of little guns that fit in pockets. If you don't feel the need to be a hipster with skinny jeans, we have the very common cargo shorts that are popular with all age groups. Those are baggy enough and generally have pleated side pockets. I carry a 2-inch J-frame in one of the side pockets and clip a flashlight in the cell phone pocket in front of it. If anyone sees the bulge, they think it's just the flashlight.

The gun is right there, and if there's a problem you can have your hand on the gun as you say, "Excuse me sir, is there problem? You have come close enough." No one but you knows, but the gun is already in your hand. You can literally draw and get a shot off from the hip in half a second. That is one more option that we have today.

If you carry in a pocket, you have got to have a pocket holster and, folks, you have got to have nothing else in the pocket but the gun in the holster! I tend to use the Safariland pocket holster, but there are a lot of good ones out there.

eJournal: Gun students are frequently told, "Don't get an itty-bitty gun. Carry a full size, fighting handgun," but here we sit talking about five-shot revolvers. Where's the middle path?

Ayoob: Today, it is not much over 80 degrees here at the Firearms Academy of Seattle so the Beretta I'm carrying is a Model 92 compact. The butt is short with a 13 round magazine and it conceals extremely well. In the summer, I'll wear an oversized opaque or patterned

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shirt over a T-shirt and carry a 1911 Government Model and in an Ayoob Rear Guard holster made by Mitch Rosen (American Rear Guard at <https://mitchrosen.com/products/holsters/inside-waistband-holsters/>) or the LFI rig from Ted Blocker (https://www.tedblockerholsters.com/LFI-RIG-IWB-Concealment-Holster_p_36.html), both inside the waistband designs, and to my knowledge, I have never been “made.” You really want to make sure you have a forward, FBI tilt to the holster, so if you lean forward a little bit the butt is not going to protrude.

eJournal: When we talk about carrying in hot weather, one of the challenges is the very great variety of summer recreation–like watersports.

Ayoob: Well, when I go to the beach, I have a Magna-Trigger revolver. That is the modification by Rick Devoid of Tarnhelm Supply (<http://www.tarnhelm.com/magna-trigger/gun/safety/magna1.html>) He typically takes a K-frame or larger Smith & Wesson and modifies it so it can only fire when held in the hand of one wearing a magnetic ring on the middle finger.

If I go to the beach with the kids, I'll put the Magna-Trigger revolver in a fanny pack or attaché case that I will keep right with me. If I go in the water, the other adults will take turns shepherding the bag. If a stranger should grab the bag, without the magnetic ring on their finger, there's not a damn thing they can do with the gun. It costs a few hundred bucks for the modification, but I see people paying thousands of dollars for a custom 1911 that will shoot a 1-inch group instead of two at 25 yards. Why not pay a few hundred bucks for a gun no one but you can make go off? By the way, if you do that modification on a K-frame Smith & Wesson it will shoot under two inches at 25 yards. All things considered, I think the Magna-Trigger is very useful for a special-purpose handgun.

eJournal: Before we wandered into bigger guns and options to make off-body carry safer, we started to talk about carrying very small guns. When we start shrinking guns, at what point is it too small, and the caliber too large for such small guns?

Ayoob: Many of the small guns “hit above their weight class” in terms of shootability. That applies to the Sig Sauer P938, the Springfield EMP, and certainly applies to the baby Glockes. If you are comfortable with the thickness, the Glock Models 26 and 27 introduced in 1996 are amazingly shootable. For about five years now

the only 9 mm that I take to a Glock match is my Model 26. I shoot about the same scores with my Model 26 that I do with a 17 or a 19 and have won guns shooting it against Glock 17s in the stock events. That is one or two fewer guns that I have to take to the match, and by the time I get to the subcompact match, I am really warmed up.

I like how the Model 26's backstrap—with that sharp curve at the bottom—is shaped differently than any other Glock. In my hand, it seems to lock it into my palm. I love that gun! Now, the other thing I've found is that the baby Glockes in 9, .40 and .45 group better than their full-sized counterparts off the bench in slow fire. I think there are several reasons: the shorter barrel is relatively thicker, and the double recoil spring tends to guarantee that the gun stays in battery until the bullet has left the muzzle when it unlocks, so you do not get that small element of deviation.

eJournal: What's the practical limit on how large of a caliber for a super-compact?

Ayoob: I draw the line at the really small .45s. The Glock 30 is an excellent pistol, but although it's called a subcompact, it is really the same size as compacts from other brands and has a virtually identical footprint to a Glock 19.

eJournal: Absent in all of this discussion has been any mention of derringers [Ayoob makes a cross of his fingers and hisses] so while that is not a compromise either you or I would believe necessary, it raises concern about what is an acceptable ammunition capacity? I couldn't begin to estimate how many people carry five-shot revolvers. Does that market dominance speak to the sufficiency of the five shot?

Ayoob: Ed Lovette in his classic book on snubbies said the five shot snub-nosed .38 is the derringer of our time. The snubby is a good example of what Bill Aguiar—an outlaw martial artist of the 70s—meant when he coined the phrase, “the gun you carry when you are not carrying a gun” although, he carried a Colt or a Browning .25 auto.

eJournal: With extremely small hideout-style guns generally chambered in .22 or .25, we have to ask sincerely if that caliber is sufficient to stop a dedicated attacker?

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Ayoob: I draw the line at .38 Special. The .380's are coming out with better loads every year, But frankly when I am testing the carry qualities of a .380 ACP for an article, I carry it as another backup to my .38 back up. That's where I have drawn my personal line, but a lot of people carry a .380, particularly very recoil-sensitive people, like we old farts with really bad arthritis. The Glock 42 .380 is as close to recoilless as you are going to get and still have a round that is going to do something. It is not what I would want, but it still beats a .45 left at home in the night table drawer.

I have seen so many cases and studies showing that the majority of defensive gun uses end when the good guy pulls a gun on the bad guy. When someone tells me, "Well, they won't be scared of a .25, but they will be scared of a 12 gauge," I have to say that the single most terrified response I ever saw from anybody I pointed a gun at was when I only had a 2-inch .38. He believed I was about to kill him, and he started bleating like a sheep.

In contrast, there was a guy I thought I was about to have to kill who stared down the barrel of a 12 gauge because with his two-digit IQ, he thought that since he had hidden his gun in his car, police couldn't shoot him. Right at the end, he realized that was a terrible mistake and I let the pressure off of the trigger of the Ithaca Model 37 on which I was taking up the slack.

Understand that they are not scared of the gun, they are scared of the resolutely armed man or woman pointing a gun at them. So, first, have a gun. Have a gun you know is reliable and will work. Have a gun with which you are confident you can hit what you are aiming at. That does not mean hit a six-foot tall man; it means hit a fist sized heart. Have a gun you can keep hitting with from when the stimulus starts until it's over. Only after that, will it matter whether it was a .45 or a 9 mm.

eJournal: Let's switch topics, if I may, and talk about carrying a reload. With all the discussions we've had about five shot revolvers, ammunition capacity is the elephant in the room. Even with a semi-automatic like a Glock 30, should I try to find a spot for that fat double stack magazine?

Ayoob: I always carry at least one spare magazine because the concerns are not just firepower. The gun is emergency lifesaving equipment, so I have to be able to keep it up and running. Most of the malfunctions that occur with an auto pistol are ammo or magazine related.

If I need a fresh battery to make a device work, it would really help if I have a new battery to put in it.

With the backup J-frame, I always carry a five-shot Speed Strip in the cargo pocket and Speed Strips also slide very well into the watch pocket of a pair of jeans. Most men's sportscoats and suitcoats will have a little business card pocket sewn inside another pocket, usually on the right side, that's just the right size for a Speed Strip.

The cell phone pocket on cargo shorts and pants is exactly the right size for the Comp 3 sized speed loader and using it is faster than hell. The finger tips grasp the top of that tall loader, and it comes right out into the hand very quickly, and anybody who sees a lump in that pocket assumes it is a cell phone.

eJournal: There's another trend when the weather gets really hot and sticky—at least in climates with four distinct seasons. We carry full-sized guns from about October through April and then we switch out for hot weather and now someone who may have been carrying a 5-inch cocked and locked .45 switches to a small revolver or other gun with an entirely different manual of arms. Does this raise any serious concerns?

Ayoob: The analogy I give is this: if your family had several cars and one had the stick shift on the floor, one had the new Chrysler dial on the dashboard and one had the gear shift on the steering column, you could drive any of them. You do not panic and stay trapped in the driveway. You figure out which one you're sitting in. It is kind of the same with the guns. The more you shoot with both, I think the more you will be competent with both. Obviously, make sure if you own any semi-autos at all that you do not get into the habit of the thumb cross over grip with your revolver, because on the first shot with your auto, not only will you cut your thumb, you will jam your pistol, too. Because of that, I use a thumb down grip on every gun.

Think about this, too: you have a wardrobe of clothes for different seasons. You can also have a wardrobe of guns. When the police department I served with went to the Gen 3 Smith & Wesson auto in 1988, I committed whole hog. As soon as they came out, I got a Model 3913 9 mm that I carried in the real hot summer, and then I got a model 4013 light weight that I carried spring and fall, and I carried the full-size, boat anchor 4506 in the winter.

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The different sizes adapted to my clothing, and the manual of arms and the round count was exactly the same between the three pistols.

eJournal: We could certainly do that today, although the decocker Smith & Wesson autos are not as prominent as they were in '88, so we are probably looking at different models.

Ayoob: Exactly. With the 1911s and with most of the striker fired pistols there is a wardrobe of different sized guns available now.

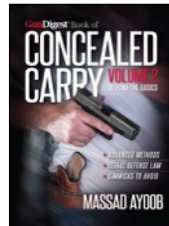
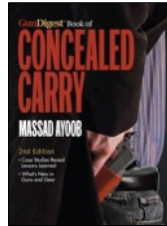
eJournal: Although many of us have more guns than we can realistically carry regularly, how important do you think it is that we carry only similarly-operating guns?

Ayoob: There are two ends to the bell curve. If you hardly ever practice, every gun you have should probably work the same because you will not have built up enough reps to have automaticity for more than one. If you are absolutely dedicated to maximum performance with, say, your department-issued gun—the one you are most likely to need 40 hours a week—make sure the other guns work the same way. The same would be true if you are gunning for the national championships with your 1911 pistol. If you're doing that, every pistol you carry should be the 1911 type, because all those reps work and 1911s are available in any size and caliber range and that will suit a four-season wardrobe.

eJournal: You've given us a lot of good ideas in this conversation and quite a variety of options to fit in various budgets, various lifestyles, and various skill levels. This has gone in some directions I didn't expect, and that was fun, too. I wonder, as we wrap up this topic, what questions did I fail to ask you?

Ayoob: The key thing, as expressed in the classic statement by Mark Moritz, is, "The first rule of gunfighting is to always have a gun." Good choices exist. The wardrobe is not that difficult to adapt. If looking like you just stepped off the cover of this month's Gentleman's Quarterly magazine or your physical comfort is more important to you than being able to save your family's life or preserve your own life so you can return to your family, that is your decision. You make your decision. I have made mine.

*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**.*



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. 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/>.

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President's Message

by Marty Hayes, J.D.

As most of you know, the State of Washington Office of Insurance Commissioner (OIC) investigated the NRA Carry Guard Insurance program, and eventually found that the NRA was selling insurance without

a certificate of authority to sell insurance in WA State. Ultimately, the NRA along with Lockton Risk (the agency selling the actual insurance policies) closed down selling its program in WA State. Recently, we learned that the Carry Guard program has been discontinued nationwide <https://www.thetrace.org/rounds/the-nra-ends-its-carry-guard-insurance-program/>.

Now, I am not ready to immediately believe what the Trace writes, given it is a Michael Bloomberg news outlet, but from what I have heard from other sources it is likely to be true. I followed the link to the NRA Carry Guard website <https://www.nracarryguard.com> and there was no mention of insurance. They are still promoting their training program, but they have no classes listed. If it is viable, it is on life support. RIP Carry Guard.

The Network has been notified by the Washington OIC that it has opened an investigation into the Network, alleging that we are also selling self-defense insurance. We have, from day one, stressed to members that Network assistance to members who have had to defend themselves is not provided through insurance. The OIC began asking us questions a couple months ago, and we have been diligently working towards a defense against their claim. After hiring a law firm, and hashing out the issues, going back and forth with them, we now believe that we will likely prevail

against the OIC's claim. Since it is too early to know with 100% certainty, we will not divulge our legal strategy or particulars of the investigation.

Having said that, here is the process as far as I know it. First, at this time, the Network is only being investigated and is under no requirement to stop enrolling new members or renewing members from Washington. After completing their investigation, the OIC will decide if the Network membership benefits constitute "insurance." If they claim we are selling insurance, then the Network has the right to a hearing to contest this finding. I am sure we would pursue the legal recourse of getting a judicial decision on the OIC's claim. If the hearing, which would be conducted in front of an administrative law judge, went against us, we would have the right to appeal to a Superior Court in WA State. That process would include full discovery on both sides which should prove interesting.

When this started, I had the law firm representing us submit a Freedom of Information Act request and through the documents that were provided, I learned that in addition to investigating the Network and, as we knew, taking action against the NRA Carry Guard, the Washington State Office of Insurance Commissioner is also investigating other companies, including United States Concealed Carry Association and their captive

insurance provider, Shield Indemnity, Firearms Legal Protection and US Law Shield/Texas Law Shield.

In a perfect world, the investigation by the OIC will be done fairly and objectively, with the perfect world result that they come to understand that the Network does not sell

insurance and thus lose interest in us. But this is not necessarily a perfect world, and so we are taking steps to protect our legal rights.

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**BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER**

<p><i>In the Matter of</i></p> <p>Armed Citizens' Legal Defense Network, Inc.</p> <p style="text-align: center;">Respondent.</p>	<p>No. 19-0333</p> <p>SUBPOENA DUCES TECUM</p>
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FROM THE INSURANCE COMMISSIONER OF THE STATE OF WASHINGTON TO:

Name: Armed Citizens' Legal Defense Network, Inc.

August 2019



Attorney Question of the Month

This month's Attorney Question comes from members who, reading the statistics on self defense, understand that often the verbal threat of use of deadly force backed up by gripping a holstered gun can convince an attacker to break off. This action is not without legal concerns, though, and this correctly worries members. Condensing several questions along this line of inquiry, we asked our Network Affiliated Attorneys for their thoughts on the following questions--

In many states, a person has committed the crime of assault when he or she verbalized a threat of force accompanied by threatening actions.

This can create a problem when an armed citizen only puts his or her hand on the grip of the holstered pistol and gives verbal commands to stop a threat without actually drawing the gun. If a citizen in your area does that, with what crime are they likely to be charged? If convicted, what is the likely punishment?

What should a Network member do to avoid facing charges after that kind of situation?

We received so many responses from Affiliated Attorneys that the following is only the first installment of multiple answers to these questions.

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The answer to this question actually underscores a big issue in my home state of GA. An assault in GA can be accomplished in one of two ways. The first is the common law definition of assault, which existed at the time of the Founding. A common law assault was an attempt to commit a battery. The stereotypical example was to swing one's fist at another as if to punch him. (Once the fist connects with the other's face, it becomes a battery. If the swing misses, it is only an assault). The second way of committing an assault in Georgia is to commit an act that places another in reasonable apprehension of immediately receiving a violent injury.

This addition made a whole collection of actions an assault based, not on the intention of the "perpetrator," but on the perception of the "victim." In Georgia, an assault is a misdemeanor, punishable by a maximum of one year in jail and a \$1,000 fine.

But with the question in the example, things get even dicier. An assault committed with a deadly weapon, such as a firearm, is an aggravated assault, a felony punishable by up to 20 years in prison. In the example, placing one's hand on a firearm and giving verbal commands is, in many instances, going to place the other person in reasonable apprehension of immediately receiving a violent injury. Because it is done with a firearm, it is an aggravated assault. In practice, it makes little or no difference whether the gun is drawn or not, because the apprehension of the other person is not going to be much, if at all, different.

Of course, GA has a self-defense statute, so that a person is justified in threatening force reasonably necessary for the defense of self or others. So, a prosecution for aggravated assault can be defended on self-defense grounds if placing the hand on the gun and the verbal commands were reasonably necessary to defend the person (or another).

What a defendant can convince a jury was "reasonably necessary" is going to vary from county to county (and even from jury to jury). Under current law, therefore, I think the most prudent course of action is to refrain from displaying, touching, or otherwise drawing attention to the fact that one is armed during a confrontation, unless using the firearm has become necessary. If one is openly carrying (which is perfectly legal with a weapons carry license), nothing more should be done to display it (such as touching it, mentioning it, or turning one's body to make the gun more prominent or visible). If one is carrying concealed (also legal with a weapons carry license), the gun should not be mentioned, touched, or purposefully unconcealed.

The foregoing is especially true in public, when the parties are on equal footing. I would be more comfortable with my client overtly introducing the gun into the equation if the confrontation were on my client's own turf (his home or car).

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August 2019

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In ME, threats of bodily injury are potentially criminal, unless justified. However, the threatened use of deadly force is the “equivalent of non-deadly force.” Neighboring NH is similar. Thus, while you cannot shoot a person to stop a simple theft, you “might” be able to threaten to shoot them. It depends if a jury or prosecutor decides that threat is a “reasonable” level of non-deadly force (or rather, that the state hasn’t disproved that you reasonably believed that level was necessary).

Given the greater number of instances where non-deadly force is justified, training to properly threaten is important. Since there are “degrees” of non-deadly force, one can easily conceptualize different levels of threat, from stating that you are armed, all the way to pointing a loaded firearm at a person (which our Law Court has said is, if unjustified, enough to justify a conviction for reckless conduct with a firearm).

Crimes committed with the use of a dangerous weapon against a person have enhanced sentencing and, if it is a firearm, mandatory minimum one-year sentence. Otherwise, garden variety criminal threatening and terrorizing, absent aggravating circumstances, are punishable by a maximum of six months in jail.

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In WI, there is no crime of assault. However, Disorderly Conduct or Harassment or another low-level offense could come into play. It’s very risky to place your hand on the gun and verbalize; that invites an escalation. I recognize that in some situations there is no choice. Recording the encounter or having someone else do it would be helpful as would be calling the police immediately and informing them clearly of what has occurred.

I’ve dealt with these cases and almost always the other person will claim you pointed the firearm at them. That could bring more serious charges. Your call to 911 is recorded and that is why it’s important to be specific and

calm. Next step, call a lawyer on the Network. Getting contact information of witnesses, even license plates will help. Be careful in these situations and avoid them by walking away if possible, even if you don’t feel you have to. Best to deal with it another day.

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In TN, an “assault” occurs when an individual “intentionally or knowingly causes another to reasonably fear imminent bodily injury.” In general, an assault is a Class A misdemeanor which can result in fines and incarceration of up to 11 months and 29 days. However, if the individual engages in an assault which involves the “use or display of a deadly weapon” then the potential criminal charge elevates to an “aggravated assault.” An aggravated assault is a Class C felony which carries a sentence range of 3-15 years and a fine of up to \$10,000.

Under TN law, the concept of “self defense” is classified as a justification or defense to a criminal charge. Essentially, if the state can establish the elements of the crime, the criminal act may be excused by the jury and the defendant found “not guilty” if the defendant’s conduct falls within the range of excusable or justifiable action. Under current TN law, deadly force may be used, with some exceptions, in instances where there is an “an imminent danger of death or serious bodily injury” that is founded on reasonable grounds and for which the threat of death or serious injury is real. If all of the statutory elements of self defense are established, the defendant may be found not guilty of the assault or aggravated assault.

It is important to note, however, that under TN law deadly force, which includes the facts giving rise to a potential aggravated assault involving the use or brandishment of a weapon, may not be used to stop a property crime, to stop a trespass or in numerous other instances that do not involve an imminent threat of death or serious bodily injury to the individual or certain third parties. Thus, if someone makes a demand to leave their yard or to stop breaking into their car and in so doing uses or displays a firearm, what might have been a justified use of force without involvement of the deadly weapon becomes an unjustified use of deadly force.

[Continued next page]

Setting aside the academic issues of whether the conduct of giving a warning and placing your hand on a holstered gun is a crime and whether there is a defense to such crime, the practical problem in TN is that these issues are not required to even be considered by law enforcement or district attorneys before criminal charges are brought. Instead, law enforcement can bring the criminal charges and the issue of self-defense or legal justification is often left for the jury.

The practical problem for the gun owner who thought that they were avoiding a criminal act is that they will potentially face the full burdens of criminal prosecution, trial and potentially an appeal which can involve significant legal defense costs and fees even if they are ultimately found innocent of the charges. Under TN law, the wrongfully accused and those found not guilty at trial are not entitled to have the state reimburse them their bond, attorneys fees or other defense costs.

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The question presented: Is it lawful to display a holstered handgun (with hand on it), together with the issuance of a verbal command to desist, in response to an assault? FL law is a bit muddled. As a consequence of statutory amendment (which some believe was a failed attempt to address gun-pointing and/or warning shots), the justified use of force statutes are not entirely harmonious with longstanding case law.

Under FL case law, firearm display, including gun-pointing, is non-deadly force as a matter of law. Non-deadly force is justifiably used or threatened when a person reasonably believes that such is necessary to defend himself or herself or another against the imminent use of unlawful force, which includes an assault. Display of a handgun with some verbal suggestion of intended use might be considered the threatening of deadly force under the current Chapter 776 statutes. The statutes on deadly force provide that

the use of deadly force may be threatened only when a person reasonably believes that threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another, or to prevent the imminent commission of a forcible felony. "Simple" assault is not a forcible felony. The foregoing addresses the defense of justification against a likely charge of aggravated assault (third degree felony, incarceration up to five years), or the lesser misdemeanor charge of "simple" assault (incarceration up to 60 days). Time in prison is very likely on conviction of the felony.

The other side of the FL prosecutor's coin where someone has displayed a firearm is this: In FL, it is a misdemeanor (incarceration up to one year) to exhibit a handgun in a rude, careless, angry, or threatening manner, "not in necessary self-defense." "Improper exhibition" may be charged alone or come into play as a lesser included to a charge of aggravated assault.

Whether the act described is considered the use of non-deadly force or the threatening of deadly force also affects the duty to retreat. When threatening or using deadly force, in order not to have a duty to retreat (more properly described an attempt to retreat), a person must not be engaged in a criminal activity and must be in a place where he or she has a right to be. Those predicates are not required for the use of or threatening the use of non-deadly force.

Based on the above principles, I observe that cautious, knowledgeable FL attorneys and firearms instructors advise that one should only threaten deadly force when the actual use of deadly force would be lawful, notwithstanding that the state legislature may have intended something else.

A big "Thank You!" to our affiliated attorneys for their comments. Please return next month for more commentaries from our affiliated attorneys on this interesting question.

Book Review

Prairie Defender: The Murder Trials of Abraham Lincoln

By George R Dekle, Sr.

248 pages

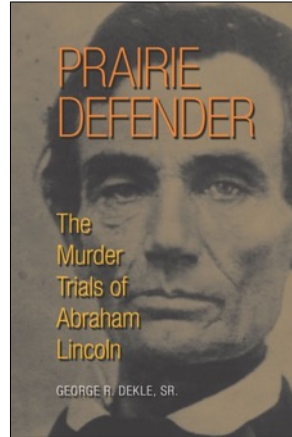
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eBook \$18.98



Reviewed by Gila Hayes

This month's book review isn't specifically focused on self defense, but rather takes a look back at trial law from earlier times, through the lens of Abraham Lincoln's law practice. Stories and outright myths about Lincoln are common and opinions run the gamut of reverential to disparaging. *Prairie Defender's* author, a retired assistant state attorney who investigated and prosecuted hundreds of homicide cases during his 30-year career, proposes to dispel both excessive praise and the undue criticism by analyzing a half dozen of Lincoln's most famous cases, many of which had self-defense elements.

I was intrigued by the stories in *Prairie Defender* about the criminal justice system in the frontier era. Lawyers and judges worked a circuit, delaying justice for months because there was no court regularly in session in the small settlements. When the judge and lawyers came through, a flurry of legal work ensued. I was interested to learn that Lincoln was sometimes called into service to prosecute, although he more often defended clients charged with crimes. In one story, Lincoln, drafted as prosecutor pro tem, counteracted a community's inclination to lynch a child rapist. The trial ended with a sentence of 18 years hard labor and one year in solitary confinement. Other cases are mentioned throughout the book in which Lincoln filled in when help was needed prosecuting crimes, as well.

In such sparsely populated communities seating an unbiased jury was all but impossible. A repeating theme in *Prairie Defender* is requests to change venue in hopes of getting a fair trial. This creates complications, however, because the stories often relate that key witnesses were not available once trials were underway.

Another interesting theme is how often Lincoln participated in petitions for pardons in cases after he lost. Dekle explains, "Throughout his career, Lincoln continued to advocate for his clients even after they were convicted at trial. His forum of choice for that advocacy was not, however, the Supreme Court of Illinois. He seems to have preferred to take his pleas to a forum where he did not have to make legal arguments—the Governor's Mansion," Dekle writes.

In these pleas for clemency, Lincoln joined other leading citizens and sometimes even the judges who handed down the sentence, in asking the governor to intervene. Lincoln once sought the pardon of a notorious horse thief before completion of his sentence with the stipulation that the thief leave Illinois. Dekle suggests Lincoln did this because vigilantes planned to kill the thief when he completed his 18-month sentence. This illustrates Lincoln's philosophy of "persuad[ing] your neighbors to compromise whenever you can," Dekle observes. In another case, Lincoln petitioned for clemency, then asked the prosecutor to enter a *nonleprosequi* so the defendant would not be tried yet again.

Dekle tells another story in which a man is prosecuted twice for the same crime, with the prosecution arguing substantially different facts. Edward B. Tinney was accused of killing John Kelsey with a single shot June 22, 1840 in one incident, but it was also alleged that he killed the same man June 22, 1844 and in a different county. He was indicted for murder on both. In one indictment the pistol shot was said to have penetrated four inches into the deceased's skull. In the other, the shot was supposed to have grazed his head, contributing to his drowning when he fell into a river. Lincoln moved for dismissal on both counts, but the judge dismissed only one and Tinney was tried for manslaughter. A jury found in favor of Lincoln's client.

These are not just stories of skill and success. In many, Lincoln is one of several attorneys on a team and often he does not control the trial strategy. Dekle tells of a time Lincoln was on a team defending a storekeeper against manslaughter charges. The merchant had thrown a scale weight and killed the town drunk who was threatening him with a shovel. The storekeeper was convicted when Lincoln's arguments failed to comport with those made by the rest of the defense team.

The reasons behind killings in the 1800s are quite parallel to today's interpersonal troubles. In one story, a
[Continued next page]

August 2019

young man named Crafton repeatedly threatened a small, frail man named Harrison. His threats became well-known around the community as a lengthy feud developed, culminating in a multi-person brawl in which Harrison stabbed Crafton to death and slashed his persecutor's brother, who had joined in the attack.

Lincoln believed Harrison acted in self defense and was astonished when he was indicted for murder. He went to work preparing for trial. "The defense...had four objectives: to establish from eyewitness testimony that Crafton was the aggressor and Harrison tried to avoid the fight, to establish by 'earwitnesses' that they had heard Crafton make numerous threats to seriously injure Harrison, to establish that Harrison was physically incapable of fighting Crafton hand-to-hand, and to prove that Crafton made a dying declaration accepting responsibility for his own death," Dekle relates.

Lincoln had some difficulty convincing the court to allow testimony about the threats. He faced the same problem with admissibility of the dying declaration, in which the deceased accepted responsibility for what had happened. Lincoln eventually prevailed in both challenges and won an acquittal.

Newspapers told of Lincoln's closing "speech of two hours, examining the evidence with great skill and clearness, discussing the law and replying to the positions assumed by the counsel for the prosecution with a subtle and resistless logic, and frequent illustrations of singular fitness. It was delivered in an earnest, natural and energetic manner." He presented an "inescapable conclusion that Harrison had acted in self defense and should be acquitted. This is the sort of 'merciless logic' that Lincoln was renowned for as a practicing lawyer." Dekle comments.

Detractors suggest that Lincoln disliked defending clients accused of crimes and critics impugned his skill

at criminal defense, which Dekle refutes, citing multiple murder trials and their outcomes. "The depth and breadth of Lincoln's criminal trial experience cannot be gauged by merely counting cases, nor can the significance of his criminal practice be gauged by a mere case count. Lincoln tried homicide cases at the rate of approximately one per year for his entire career, not a shabby number for a general practitioner in a sparsely populated jurisdiction," he writes.

Critics suggest Lincoln was incompetent because of the number of murder cases he lost and one source said that of seven murder cases Lincoln tried, he lost ten. Dekle retorts, "One problem with counting 'trials' is that there are many different ways to count them. A more revealing way to count Lincoln's trials would be not to count a proceeding as a trial unless a jury returns a verdict. How many murders did Lincoln defend by this count? He litigated, but did not try, eighteen murder cases," Dekle writes, adding later that "his colleagues sought [Lincoln] out to assist them in criminal trials." He closes *Prairie Defender* with a ringing contradiction of the common myth that before entering politics, Lincoln had a lackluster law career in which he really only shone as an orator. History proves differently, he asserts.

As a reader, I was more entranced by the history and the comparisons to legal problems faced today than Dekle's defense of Lincoln. If you're like me, you'll enjoy the very lengthy bibliography from which to learn about further reading, much of it online including a blog site of which I was previously unaware, <http://almanac-trial.blogspot.com> and <http://www.lawpracticeofabrahamlincoln.org> that gave much of the basis for Dekle's defense of Lincoln.

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



Editor's Notebook

by Gila Hayes

I should probably stop reading the news. It drives me to bang my head against the wall so hard that I may have dislodged the cerebral cortex and now logical thought eludes me—but then again, perhaps it is those

about whom the news is written logic eludes.

Imagine that!

Look what I read a few days ago on the news feeds: “Baltimore Police Deputy Commissioner, Danny Murphy, was robbed at gunpoint in the city’s southeast area on Friday night.” Apparently, the ban on so-called assault weapons and against magazines holding more ammunition than some faceless bureaucrat believes a regular citizen needs hasn’t stopped crime in Maryland. The Firearm Safety Act of 2013 didn’t make MD citizens any safer. Imagine that!

A Ray of Sunshine

I enjoy reading Bob Adelman’s columns at <https://www.thenewamerican.com/usnews/constitution/it/mlist/user/51-bobadelmann> where he artfully mixes commentary about economics, politics and the law. After all the bad-to-awful news the month of July brought, I was heartened to read his July 16 column about President Trump’s judicial nominations. Although Supreme Court confirmations get all the news coverage, Adelman suggests that the president’s appointments to courts of appeal are cause for even greater optimism than getting Gorsuch and Kavanaugh on the U.S. Supreme Court. Only about 1 percent of the 7,000 cases

filed are heard by the Supreme Court, so the real potential to correct a nation veering off the course of liberty and personal responsibility rests in the lower courts.

Since taking office in January 2017, Trump has appointed 127 judges, Adelman points out, and his appointees “account for some 14 percent of the federal judiciary and more than 22 percent of the judges on the nation’s courts of appeal. If Trump is reelected there is every likelihood that he will be able to nominate close to 40 percent of the country’s federal judges.”

Although I am not personally strongly aligned with one political party over the other, I was heartened by the suggestion that the experience, education, and credentials of these newer judges are considerably greater than some of the earlier appointees. Could America actually return to an era in which the Constitution sets the standard for what citizens can expect from the government more than the feelings and whims of politicians and bureaucrats?

Not everyone agrees with every decision handed down by Trump-appointed judges, of course. Still, it is encouraging to hear that the latest crop of judicial appointments brings strong scholastic achievements, extensive legal experience, and conservative political viewpoints that are likely to oppose political forces bent on finishing off and burying the U.S. Constitution once and for all.

The political pendulum swings hard to the left, hard to the right, but now and then it hovers in the center. I am guardedly optimistic that these judicial appointments might buffer us from the worst of both extremes.

*[End of August 2019 Journal.
Please return for our September 2019 edition]*

August 2019

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August 2019