Armed Citizens' Legal Defense Network, Inc.

When "Self-Defense" Arguments Fail

An Interview with Marty Hayes, J.D.

by Gila Hayes

We read often about defendants in court who say, "It was self defense!" in cases involving drug deals gone bad, brawls in which both combatants were willing participants, and I even read about a teen who shot a teacher and several classmates at school who said he acted in self defense.

Clearly, sometimes decisions about how self-defense trials are conducted don't always involve good, decent citizens like Network members, so the poor judge has to decide whether to let the lawyers lay it all out for a jury, refuse to give a self-defense instruction to the jury after all the evidence is presented, or as I understand it, the judge can refuse to admit evidence and testimony or even prohibit any mention of self defense. We turned to Network president Marty Hayes to explore why a court might disallow a self-defense argument.

For those who prefer streaming video, enjoy our less formal interview with Network President Marty Hayes at https://youtu.be/9geTva7NWFg .

eJournal: Marty, tell us about your background and then I wonder if you could identify common factors that you and others who work in the criminal justice system see time and time again when defendants would like to but are not allowed to argue self defense.

Hayes: I've been a cop for the first part of my life from the late 1970s to the early 1990s and of course, as a police officer, I interacted with many people that were involved in using force. I also had the education that law enforcement officers get. In addition, I have worked as an expert witness in court cases since the mid-1990s to present. I looked at my curriculum vitae the other day and noted I've been involved in more than 20 self-defense legal cases. They didn't all go to court, but many of them did. A lot of times the charges were dropped either through a plea bargain or when the prosecutor realized that they didn't have a winning case.

In 2008, after I spent four years completing a part-time law school program, we started the Armed Citizens' Legal Defense Network of which I am president. That's my background in this discipline.

eJournal: I expect we will draw on all of that today. Let's move on to the reasons a judge might not allow self-defense arguments even if the defendant claims self defense. How and why?

Hayes: The court has a right – when I say the court I'm talking about the judge – the judge has a right to disallow a self-defense discussion in court and disallow a self-defense jury instruction. That happens for several reasons: first, the defendant committed some type of crime or was in a place he wasn't supposed to be or otherwise doesn't have the right to argue self defense at trial. This varies state by state based on statutory law and case-law and so I'm not going to go further with that reason.

The second reason is the defendant committed an act that would lead a reasonable person to believe that they started the altercation. It doesn't have to be a physical fight. It can be verbal, physical gestures, and that kind of thing. Those are the two primary times when a person won't even get the chance to argue self defense. I should add that there's a third time: when there's no evidence presented at trial that this was a case of self defense.

That typically happens if a defendant is represented by criminal defense attorney who believes that the defendant should not take the stand and should not discuss what was happening to him that caused him to believe his life or the life of someone else was in danger of death or serious bodily injury. If the defendant doesn't take the stand, and if there's no evidence to believe that his life was in danger, the judge will say, "You have not given us any credible evidence that self defense was warranted and thus I'm not going to allow you to argue self defense."

Evidence that self defense was warranted is one of the things that we expect to hear from our members who are involved in acts of self defense. I want to know if they're willing to take the stand because if they're not willing to take the stand, then there's a pretty good chance they're going to be convicted. While we would still pay for their representation, I have to break

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the news to them, "You're probably not going to have a very successful self-defense case."

eJournal: Returning to the overview that you gave before talking about testifying at trial, you mentioned provoking the incident. I wonder if or how that overlaps with being a willing participant.

I remember an infamous quote from the Rittenhouse prosecutor's closing statements. He said, "You cannot claim self defense against the danger that you create." Obviously, that didn't work out too well for that prosecutor. I suppose he would have preferred the jury not receive a self-defense instruction. How does willing participation differ from provoking the incident?

Hayes: The standard example is where two guys get into a fist fight and they're both willing participants, as long as they're beating each other up with reasonably equal force. If it escalates and one of them grabs his knife at one point and says, "You sucker, I'm going to stab you!" and the other guy grabs his gun and says, "No, you're not!" neither is not going to be allowed to argue self defense because he was willingly involved in that incident to begin with.

Another example is if you are committing a crime and then have to resort to physical self defense. Say you're committing a bank robbery. You're standing there at the teller's window waving your gun around when the bank security guard steps out of the restroom and sees you. He pulls out his gun and there's a gunfight. Well, the bank robber isn't going to be able to claim, "I only shot in self defense! I wasn't going to shoot otherwise."

The third example is if you started the fight – if you were the initial aggressor. We see a lot of cases where you're driving down the road fat, dumb and happy and you inadvertently cut somebody off who then has a huge problem with you. He comes up behind you or beside you and starts yelling at you and cussing and flipping you off. While you didn't start that altercation – he did – if you pull over and he wants to claim self defense because you pulled out a gun and said, "Dude, just back away," it's still the first driver who started the road rage incident.

eJournal: Those are so difficult because many times people say, "Mistakes happen." I know I've pulled into traffic and wondered, "Where the heck did that car come from?" Most people understand that we're human and we make mistakes. What happens if a genuine mistake leads to escalating threats and violence? Who started it? The guy who made the initial driving mistake or the guy who reacted violently? Those chains of events get really hard to untangle and that clouds the initial aggressor question.

Hayes: If the people viewing this are not getting a clear picture in their mind, that's because it's not a clear subject. I recommend you get on Google Scholar, go to your own state's case law, type in "self defense, initial aggressor" and related search parameters and start reading those cases. They're typically reported when a self-defense instruction is not given and the defendant is convicted, appeals and the appellate court says, "No we think that the trial court should have given them a self-defense instruction, so we're going to send it back to the trial court for a do-over." The appellate court explains why the person should have gotten a self-defense instruction.

One of the foremost examples in Washington state is the case *State v. Janes.* The defendant, Janes, was an abused child. He grew up being abused and at some point in his late teens, I believe, he killed his abusive stepfather but not in the act of abuse. It was because he feared in the fairly immediate future that the abuse was going to happen again, so he grabbed a shotgun, went in the bedroom and killed his stepfather. The judge failed to give a self-defense instruction and did not allow him to talk to the court about the abuse that he suffered. The appellate court said, "No, the jury had a right to know what the defendant knew and know what the defendant saw at the time. Go back, try this over, and let the defendant explain the type of abuse that he suffered, why he felt that he was going to be abused again, and why he took matters into his own hands."

eJournal: There've been a lot of parallels nationwide in domestic abuse cases. They're tough because you don't have an immediate, right-here-and-now fear, so it raises questions. A term that comes up when there's doubt that the force was used to stop an immediate danger of death is "unreasonable fear." Sometimes we read about people who were scared something was going to happen and used force unnecessarily. What's the situation when it was unreasonable to believe that something bad was going to happen to you, so you don't get to argue self defense?

Hayes: It's not that you don't get to argue self defense; it's that the self-defense argument isn't going to work. The jury is going to hear what you knew at the time and they're going to be thinking, "Was it reasonable for him to use a gun and blow off the head of the perpetrator?" If they say, "No, that really wasn't reasonable. He should have just walked away," while he had a right to stay there, it was stupid that he did.

It's going to be the jury that decides whether your actions were not reasonable, or if you had a reasonable belief that you needed to take action. That's going to be case-specific. Every case is different.

eJournal: We're trying to learn principles to govern our actions and avoid becoming the defendant. A minute ago, you mentioned failure to withdraw or sometimes, a person escapes but then returns for unfathomable reasons, so the jury reaches the conclusion that they wouldn't have done that. It raises questions about what a jury is told, and judges have a lot of discretion! First, what are jury instructions?

Hayes: Jury instructions are basically the rules that the jury has to go by to find either a guilty or not-guilty verdict. Typically,

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jury instructions may be weighted towards the defense, but not necessarily. Judges don't like to be appealed and they don't like to be overturned, so often they're going to kind of give the defense a fair shake but there are also plenty of times when they don't believe in self defense, or they are anti-gun or simply have a political agenda. They're going to let that outweigh jurisprudence.

eJournal: To get back to the factor of imminence, before acting, we have to ask ourselves, is the threat immediate, right now? Can I withdraw? Why would I go back into the fight? Otherwise, someone else is going to ask, did I keep it going or did I try to stop it?"

Hayes: You know, that was the argument in the Spencer Newcomer case which we've written about (https://armedcitizensnetwork.org/anatomy-of-a-self-defense-shooting) and which is back on TV on the Oxygen Channel (https://www.oxygen.com/kill-or-be-killed/crime-news/david-wintermyer-fatally-shot-by-neighbor-after-feud-over-dogs). There was a discussion during the case whether Spencer had a chance to drive away.

He was in his car driving away when the deceased started yelling and screaming at him. At one point the deceased says, "I'm going to kill your dogs!" Spencer stopped and backed up and said, "Nope, this is going to stop right here." If he had just driven away, then obviously nothing would have happened. At that moment, Spencer didn't know whether the guy was actually serious about getting his dogs. The threats extended out to his girlfriend, who would protect the dogs, so he stopped and got out. The prosecution said, "He didn't have to do that." Spencer said he did, and the jury believed it was reasonable for him to do that.

eJournal: His girlfriend's possible involvement in defending the animals must surely have influenced the jury, because that concerns a human life. I'm not sure it is related to the Newcomer case, but maybe you should clarify what is imperfect self defense. Is it a defense against a murder or manslaughter charge? How does that work?

Hayes: Imperfect self defense is basically where you screw up one of the factors we've already talked about. Yeah, it was self defense but you started the fight and thus you didn't have the right to finish it. You shot the bank guard and called it self defense because he shot at you first. You don't get to argue self defense. That was imperfect self defense. Do a Google search on imperfect defense.

eJournal: One term that comes up when we're talking about making a self-defense argument is excessive force. I tend to associate that charge with police-involved incidents, but what happens to private citizens if the force used exceeds that used against the defendant?

Hayes: That's not a case where the defense won't be allowed to argue self defense but it is likely the self-defense argument will not prevail with the jury. A perfect example is a case I had a couple years ago concerning two co-workers who didn't really get along with each other and were arguing in the cab of a big Ford F350 crew cab. The defendant stated that the driver reached over to take the defendant's gun out of his waistband. The defendant countered that and after little bit of struggle, pulled out his gun and shot.

I was brought in as a weapons retention expert to show how easily that could have happened. The problem though – and this is the reason why he's still sitting in one of the prisons in Washington state – arose because he shot the deceased 10 times. One time might have been very defensible, but not 10 times, including a shot to the brain from the top after the deceased got hit in the torso and as he fell over. The defendant kept shooting, including the last couple of shots in the top of the head and in the neck.

That was a case of excessive force because he didn't have to shoot that many times. Unfortunately, we're seeing it more and more in real world self-defense cases because the vast majority of people are using high-capacity firearms now which aren't necessarily powerful enough to stop somebody with one or two shots. They end up perceiving that they need to shoot more than a couple of times.

eJournal: I doubt there's rarely an immediate effect from a pistol caliber, so the threat doesn't cease immediately. The problem you just explained relates to stopping after the threat is no longer imminent or has broken off the attack. Sometimes people chase assailants who give up and try to run away from them. Can they pass scrutiny over whether they were still threatened?

Hayes: Another case I had was where this lady was assaulted in her bedroom by her boyfriend. She got to the gun and used it and continued to use it as she chased him outside the house. She shot half a dozen or a dozen times and with one or two shots hitting him as he's going down the front steps and yeah, that was excessive force.

eJournal: You brought up a concern early on to which we ought to circle back because it is the nuts and bolts of this discussion. Does the individual who used force need to testify to explain to the jury and the judge why their actions were so necessary? I've heard many reasons given by attorneys for not wanting to put their defendant on the stand. Some seemed quite straightforward. I remember talking to the late Jim Fleming about this and without giving specifics, he talked about clients who, while you wouldn't say they were mentally impaired, they were pretty scattered. He felt like they would come across as maybe even mentally incompetent on the stand and he thought it cruel to even expose them to cross examination. I remember that so well and conclude that we can't paint with a broad brush and say criminal defense attorneys are wrong when they say don't put the defendant on the stand. Is there a risk benefit analysis?

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Hayes: I am reminded of the Kayla Giles case. She had a cognizable, perhaps reasonable right to shoot her ex-husband, but the jury never heard what was going through her mind at the time she pulled the trigger. Of course, the defendant always has a right to testify but defense attorneys can be pretty persuasive, so Kayla chose not to testify. The jury never heard that he had hit her before. They never heard about his martial arts background. They didn't hear the fact that he threatened her, and he grabbed and opened up the car door before she decided she had to shoot. They did not hear any of that because she didn't get a chance to talk. All the defense could do was to try to stab holes in the prosecution case and it wasn't enough.

Having seen case after case after case after case where their criminal clients get up on the stand and just totally blow it and basically convict themselves defense attorneys say, "Don't ever take the stand." I argued with my law school professor in criminal law about this over the internet when she lectured on self-defense law and talked about the witness not taking the stand. I said if you're a good attorney you would be putting him or her on the stand. You obviously have not done self-defense cases and she blew up. She wasn't a very experienced criminal defense attorney but at that point I knew that what the students get in law school isn't necessarily cutting edge.

eJournal: Law school notwithstanding there's also that experience factor. Harking back to conversations with Jim Fleming and other attorneys, if your criminal clients have erred so badly a dozen times, you probably would get gun shy and conclude that there's a lot of risk to letting your client talk. Add to that natural human aversion to risk. Then we must factor in the very public prosecution of George Zimmerman by the state of Florida that we all watched, in which the defendant did not testify. Why was he exonerated?

Hayes: He was not convicted because he already told his story to the police on videotape and the police prosecution played that for the jury. Zimmerman was basically able to testify in his own defense without having to subject himself to cross-examination. That was brilliant.

I don't think he thought it out that way; he was just trying to help the police investigate. He was just truthful and told them what was going on. The witnesses in the area heard and vaguely saw what was happening, so they backed up his story. It was very credible. Now, we don't recommend that you sit down with the detectives and give a two-hour taped statement.

eJournal: I found it remarkable that the state didn't ask the judge to suppress showing the Zimmerman videos. What limits can a judge impose, presuming the prosecution would say, "No, we really don't want the jury to see this." Can a judge limit a defendant's testimony whether in person or via video?

Hayes: There's pretty much no time where a judge would not allow the defense to introduce prosecution audio or videotapes. If they did, it would very likely be overturned on appeal and judges don't like to be overturned on appeal.

eJournal: That creates the very records we're learning from, since the decisions of appellate courts are accessible to us as laypersons who want to learn when mistakes are identified and remanded back to a lower court. I've always wondered if the same judge has to hear the same material or do retrials go back to another judge who might see things differently?

Hayes: They're usually remanded back to the first judge. I'm sure there are cases where it wasn't, but from what I've seen, it goes back to the trial court, which is the first judge.

eJournal: I'm reminded of an Attorney Question of the Month we ran last year highlighting how hard it is to win on appeal https://armedcitizensnetwork.org/august-2023-attorney-question.

Marty, can you draw a bottom line or distill for us the takeaway about being allowed to argue self defense in court? What do we need to keep in mind? What's paramount for us to know?

Hayes: The courts pretty much allow you to argue self defense if there is credible evidence that this was a case of self defense to present to the jury.

eJournal: What's credible?

Hayes: Credible means that a reasonable person would believe it or likely believe it or even possibly believe it. If there's no way that anyone would believe that nonsense, then it's not credible and the judge might disallow it. Then again, judges don't like to leave issues open for appeal and so they may say, "I'll allow it."

eJournal: That's good. Thank you for the explanation and examples, Marty.

Marty Hayes, J.D. is president and a founder of Armed Citizens' Legal Defense Network. He brings 30 years experience as a professional firearms instructor, 30 years of law enforcement association and his knowledge of the legal profession both as an expert witness and his legal education to the leadership of the Network.

President's Message

by Marty Hayes, J.D.

April was very interesting! My month included a month-long motorhome journey with my dog to Oklahoma to attend a training course, which has what I believe could possibly be profound implications in self-defense cases. I'll tell you more about that course next month. The trip started with a week in North Idaho visiting my 91-year-old mother, who is doing great, I am happy to note.

During the first days of my visit with Mom, I was sucker-punched by Marc J. Victor, an Arizona attorney who runs a unique self-defense legal program called Attorneys on Retainer. I wasn't physically sucker-punched mind you, but attacked by a competitor in the legal arena who I thought was a friend, trying to make profit by telling mistruths and making misleading statements on YouTube about the Network. In case you didn't see his video, it is at https://www.youtube.com/watch?v=7ngh2gNISI8 where it is titled *Armed Citizens' Legal Defense Network (ACLDN) Policy Review By Attorney Marc J. Victor*. I continue to work while traveling, so we put together a make-shift film studio at my mom's and filmed a response that we posted at https://www.youtube.com/watch?v=yQIFdh2tqUY and titled *ACLDN Responds to Marc J Victor.*

When Victor first started presenting on YouTube, he was exposing the self-defense insurance programs for their lack of candor about how the insurance underwriter actually controls their funding for a self-defense case. I felt this was a good move. This type of promotion is not personally my style, but I can say I welcomed public discussion of those issues. He had a program which on first blush seemed like a reasonable approach to the need to get legal representation after an incident.

I was interested in his approach but came to change my mind. It seems that not too many other people believed what he said about the Network, either. We decided to keep track and counted six members who dropped out of the Network after his attack. Although none named his video as the reason, the timing makes it seem possible. We did find it a little funny when several new members cited the Attorneys on Retainer video as their reasons for joining us.

Members have asked me if it is possible to sue for Victor's conduct in the video. Perhaps. When I was taking tort law in law school, we studied the concept of intentional interference with contractual relationships. (To learn more, read https://www.clearcounsel.com/intentional-interference-with-contractual-relations/ which explains it pretty well.)

When a competitor misleads people in order to interfere with another's business, and does in fact interfere with a contractual relationship, that opens the potential for a lawsuit. In our case, there is very little in the way of damages, so it is not worth the time and energy to pursue a claim. I wonder about some of the other companies which took larger hits, who likely are pondering lawsuits.

At one time, I explored forming some type of working relationship with Attorneys on Retainer, although I couldn't find enough common ground for us to work together. Of course, that's off the table now. Network members living in Arizona have access to many other good attorneys who in my opinion would do a good or better job for them. Whether you live in Arizona or elsewhere, the advice we've given from the beginning to find a good attorney who is local to your area still has merit.

After a self-defense incident, you do not need a voice on the phone giving you "legal advice." What you need is the attorney who can show up at the police station (or even as we saw happen in one of our member-involved cases, an attorney speaking for you at the shooting scene) to interact with the police, news media and later the prosecution. Network members should already know how to handle the immediate aftermath of a self-defense incident, but it is a good time for a refresher, so browse to https://www.youtube.com/watch?v=zIJ4wLP_0UM and watch *Don't Talk to the Police? Massad Ayoob's 5 Points after a Self-Defense Shooting.*

I could go on, but since the Network's work on behalf of members remains as solid as ever, there's no need for repetition. Let's call it good.

I hope to see you all at the Dallas NRA Annual Meeting, where we will once again have a booth. Please come visit with us in Booth 8247 in the exhibit hall of the Kay Bailey Hutchison Convention Center in Dallas, TX from May 17-19, 2024.

Are You Attending the NRA Annual Meeting in Dallas?

Traditionally, the Network's biggest new member recruitment expenditure is exhibiting at the National Rifle Association's Annual Meeting, where according to the NRA, we enjoyed access to upwards of 85,000 armed citizens who attend. If you are one of the many members we first met at an NRA Annual Meeting, you can attest that it has been a good opportunity to meet like-minded men and women, hear about your concerns and those of other armed citizens and talk about what the Network does to alleviate member troubles after use of force in self defense.

Despite the considerable issues and problems of the NRA management, the rank and file members remain our friends, our peers and in the vernacular, our people. We're going back to Dallas May 17-19, 2024 to talk face to face with our people, the men, women and families trundling up and down the long aisles in the exhibit hall. The Network team will be in booth 8247, which the exhibit hall map indicates is across the aisle from Dillon Precision and CrossBreed Holsters.

In a fit of nostalgia, we looked up the report from the first time the Network exhibited at an NRA Annual meeting in May 2009 (https://armedcitizensnetwork.org/our-journal/2009-journals/936-june-2009-network-journal#nra). While much has changed, one thing has not. Relating his experience as a first-time exhibitor at the 2009 Annual Meeting, Marty wrote: "The highlight of the show was meeting our current members as they stopped by the booth to get acquainted. It was fun to put faces to names, and get to know our members a little."

In the years to follow, we would connect with authors, podcasters, magazine editors and others who were interested in telling the Network's story to their audiences, and our attendance at the Annual Meetings became broader than meeting and chatting with members, although that remains the most pleasant part of what is, frankly, a grueling three days.

Still, we look forward to the fellowship and visits with new and long-time Network members, with Advisory Board members John Farnam, Emanuel Kapelsohn, and Marie d'Amico, and other armed citizens who are in Dallas that weekend. If you're there, please come by and reconnect with us. You're the reason we go.

Below: Network President Marty Hayes enjoyed meeting a lot of people he'd only known by name at the first NRA Annual Meeting he attended in 2009.

Above, right: Early NRA events provided valuable publicity opportunities like a guest appearance on Tom Gresham's Gun Talk Radio at 2010's NRA Annual Meeting in Charlotte, NC.

Attorney Question of the Month

This column focuses on demystifying legal defense issues so members better understand what they may face if they defend themselves or their families. This month, we discuss the legal defense of self defense.

Traditionally, criminal defense attorneys suggest clients should not testify in court, hoping instead that the presumption of innocence and holes in the State's case will lead to acquittal. When an armed citizen uses force in self defense, he or she has committed elements of a violent crime, and justification for those actions needs to be explained to a jury's satisfaction.

When representing a client who has used force to defend themselves, what has been your experience if the defendant testifies or does not testify at trial?

Our affiliated attorneys had this to say—

John R. Monroe
John Monroe Law, PC
156 Robert Jones Rd., Dawsonville, GA 30534
678-362-7650
http://johnmonroelaw.com

If the only or main theory of defense is self defense, somebody has to testify to the facts constituting self defense. In an ideal world, there is a third party witness neutral or friendly to the defense who can do so. But frequently that is not available. If not, it is all but impossible to get a jury to acquit if the defendant doesn't take the stand.

Manasseh Lapin, Esquire
Lapin Law Group, P.C.
539 West Commerce St., Ste. 1950, Dallas, TX 75208
972-292-7425
http://www.ArmedDefenseLaw.com

When analyzing the issue of whether a defendant in a self-defense criminal case should testify, two major concerns should be considered. The first concern deals solely with the factual and legal issues presented by the case, without regard to issues relating to the particular defendant; the second concern relates to issues involving the particular defendant.

The analysis that follows assumes a hypothetical case in which the evidence is likely to show that a criminal defendant acted lawfully, in self defense, and that the defense team reasonably believes the defendant should (if everything goes well at trial) be found not guilty.

I. Legal Issues

Conventional criminal defense "wisdom" is for attorneys to counsel their clients to not testify at trial. The primary reason for this is because the U.S. Constitution protects the right of criminal defendants to not be compelled to be a witness against themselves, which has been held to include a prohibition against prosecutors bringing to the jury's attention that the defendant exercised his right to not testify at trial. This strategy forces prosecutors to "prove their cases" in order to obtain criminal convictions.

Criminal defendants in self-defense cases have exactly the same constitutional rights – including the right against self-incrimination – as do defendants in non-self-defense cases.

The substantive plea that a defendant enters at the outset of every criminal case is always the same: "Guilty" or "Not Guilty."

A plea of "Not Guilty" can mean many different things, most of which do not apply to self-defense cases. A "Not Guilty" plea can mean the defendant is claiming: (i) factual innocence (e.g., "I didn't do it"); (ii) insufficient evidence exists to support a conviction (e.g., "you [the government] can't prove – through admissible evidence – that I committed a crime"); (iii) the statute under which the defendant is being prosecuted is unconstitutional; (iv) prosecution is barred by the statue of limitations, or (v) there is legal justification for commission of the charged acts (e.g., "I committed the acts which constitute the offense, but some other fact(s) negates criminal liability (e.g., I acted in self-defense)"). This type of defense is what's known as an "affirmative" defense, "affirmative" because the defendant admits committing the acts, but alleges having been legally justified in doing so.

To obtain a conviction, the government – in every criminal prosecution – bears both the burden to prove the defendant's guilt beyond a reasonable doubt and the burden to present evidence.

In every criminal case, the government is the first party to present evidence. For example, in a hypothetical murder case, the government would likely present evidence that the defendant was armed and that the defendant shot and killed the decedent (e.g., "victim"). The defense, during cross-examination of government witnesses (both lay witnesses and expert witnesses), might challenge the government's evidence by, for example, trying to show that witnesses for the prosecution are not credible or that the physical evidence offered by the prosecution isn't reliable or simply doesn't prove what the prosecution would like it to prove, thus creating reasonable doubt as to the defendant's guilt.

After the government has finished presenting its case, the defendant is given an opportunity to present his defense. In non-self-defense cases, such evidence might include calling defense witnesses (both lay witnesses and expert witnesses)

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whose testimony (further) brings into question the reliability of, or directly contradicts, the evidence that was offered by the prosecution. Just as the defense had an opportunity to cross-examine the prosecution's witnesses, so too, the prosecution is given an opportunity to cross-examine defense witnesses.

Up to this point, trial procedure for non-self-defense and self-defense cases is identical.

But now, procedurally, things change. The defendant in our hypothetical murder case, by alleging the affirmative defense of self defense has, by definition, admitted that he used a firearm to shoot and kill the decedent (e.g., "victim").

Because the self-defense defendant, as compared to the government, has superior access to evidence relating to self defense (e.g., defendant's potential testimony), the burden to produce evidence on the issue of self defense – but not the burden to prove innocence – shifts from the government to the defense.

The government, in the presentation of its case, might very well have (inadvertently) offered evidence that the defendant acted in self defense. However, in the abstract, it is much more probable that the defendant will be better situated to offer evidence of self defense. The best form of such evidence is often the defendant's testimony.

After the defendant produces evidence of self defense, the burden to produce evidence then shifts back to the government, requiring the government to negate, if it can, any reasonable doubt as to whether the defendant acted in self defense.

What constitutes appropriate or sufficient evidence of self defense will be determined by the law of the jurisdiction (e.g., state) in which the defendant is being tried.

Thus, we see that, unlike in non-self-defense cases, where the default position is that defendants do not testify, the default position in self defense cases is that such defendants do testify.

II. Issues Relating to the Defendant

A. Testimonial Skills:
One of the major considerations in deciding whether a self-defense defendant should testify is whether the defendant is capable of giving persuasive testimony.

Giving persuasive testimony is a skill, like many other skills. It requires, of course, the ability to give truthful testimony; however, not all truthful testimony is persuasive.

The ability to give persuasive testimony does not mean a person must be highly educated. Police officers, many of whom have little or no college education, often give highly persuasive testimony. Almost all police officers have received at least some training to develop their skills as a witness.

Some highly educated, knowledgeable, and degreed individuals, on the other hand, lack the skills needed to give persuasive testimony. This, however, does not describe the expert witnesses whom the government can be expected to call in support of their case. Such witnesses are almost always quite skilled in giving persuasive testimony.

A self-defense defendant's defense team will likely try to prepare the defendant to testify. Such preparation is intended to prepare the defendant to give truthful, persuasive testimony. It is not intended, as the saying goes, to prepare the defendant to "Test-A-Lie" (as opposed to "testify").

Some people possess a greater innate ability to provide persuasive testimony, as compared to others. Nevertheless, the ability to develop a degree of skill which enables one to give persuasive testimony is easily within the capability of most people.

B. Bad and/or Collateral Facts:
Another consideration relates to the issue of "bad" or "collateral" facts and whether, as mentioned above, the self-defense defendant can give truthful, persuasive testimony which is reasonably likely to mitigate or overcome these facts.

Such "bad" or "collateral" facts might include:

1. Modifications to the firearm that was used in the self-defense incident;
2. Evidence that the defendant has what might reasonably be perceived as an anger management problem;
3. Controversial pre-incident statements made by the defendant (e.g., social media posts, etc.);
4. Controversial slogans on the defendant's clothing, bumper stickers, etc.

The government can be expected to attempt to exploit anything it can in its attempt to paint a self-defense defendant as some type of gun nut, reckless person who was looking for an excuse to shoot someone, or the like. A prudent person who carries a firearm for self defense will, through their everyday conduct, consciously refrain from supplying the government with this type of inflammatory, albeit questionably relevant, evidence.

Conclusion

The general "rule" is that most (non-self-defense) criminal defendants should probably not testify at trial. In self-defense cases, on the other hand, the general "rule" is that most defendants probably should testify at trial, as such defendants are likely the only source of certain evidentiary facts.

Nevertheless, general rules are just that. Both the facts and people involved in each case are different from every other such case. Accordingly, whether a defendant should testify in any particular criminal case is a decision that must be made on a case-by-case basis.

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Steven F. Fairlie, Esq.
Fairlie & Lippy, P.C.
1501 Lower State Road, Ste 304, North Wales, PA 19454
215-997-1000
https://fairlielaw.com/

There is no uniform answer for whether a defendant should testify in a self-defense case or not. In Pennsylvania, the law permits proof of self defense by other evidence, and does not require the defendant to testify.

Generally, we examine whether our case is more compelling with the defendant's testimony, or without, and then make a decision. There are lots of wild cards. For instance, in one case, a judge ruled that he would not instruct the jury on self defense unless our client testified and the client then chose to testify against my advice. It would have been better if he didn't testify, although that may have involved waiting out an appeal while incarcerated.

Adam C. Russell
Criminal Defense Lawyer
309 Washington St., Brighton, MA 02135
617-858-6841
https://www.russelldefensefirm.com/

Testifying in your own defense can help jurors feel you were facing deadly force.

Steve Wells
Attorney at Law
431 W. 7th Ave. Ste. 107, Anchorage, AK 99501
907-279-3557
steve@alaskalegaldefense.com

I am generally of the opinion that the client should testify. The jury wants to hear from the person – what they saw, what they thought, what they were feeling. I lean toward putting clients on the stand but there are the cases in which I would absolutely put a client on the stand absent extremely unusual circumstances: self defense and consent in a sexual assault case. This really applies when there are no defense witnesses other than your client.

Having said that, it is imperative to prepare your client and it is imperative that your client follow your instructions. If a client cannot adequately follow your instructions on how to testify, they can devastate your case. You'd be better off with keeping a client off the stand than putting on one who won't follow your advice.

I had a case like that. My client stabbed a drunk guy coming at him while my client was standing outside a bar smoking a cigar. If the client had followed the advice of me and my investigator, he would have been fine. But instead, he started going off while on the witness stand, embellishing and making himself the hero. We were telling him he would win if he could show that his actions were more instinctive, that he shoved the guy while still holding the pocket knife he had just used to cut his cigar. And that fit the evidence. But our client started this long narrative trying to make himself Bruce Lee. Our client's long narrative, despite many, many meetings and attempts to prepare him, established that he had effectively disabled the drunk guy coming at him before client stabbed him. We had practiced the testimony many, many times and he had been fine. On the stand, though, he went completely off script and my not-so-subtle reminders did not help him. It's to the point that my investigator and I now use that client's last name as code for "a client who hoses himself with his testimony," as in, "that client really [Smith]'d himself," or "prep that client so he doesn't [Smith] himself."

In other cases, though, clients have followed my advice, listened to questions and answered the questions presented. In so doing, they came across very well and I got two acquittals and one very public hung jury with no re-trial for clients using deadly force in self defense (one homicide, two first degree assaults and/or attempted homicide charges).

So generally, put your client on the stand, but ONLY after extensive preparation in which your client demonstrates that client can be a good witness. Feel free to use this story as an example of a client whose failure to follow legal advice got him years in prison he could have avoided if he'd paid attention.

Laura A. Fine
Law Office of Laura A. Fine, P.C.
PO Box 1240, Veneta, OR 97487
541-341-4542
attorneylaurafine@gmail.com

The decision of whether clients testify on their own behalf is ultimately the client's decision. This decision should be made in concert with the client's attorneys. Each case is unique.

There may be a case where it is better for a client to avoid testifying. However, self defense is an affirmative defense. This means that the defendant has the burden to prove the need to use self defense. The proof is based on the objective and subjective perceptions of the threat. The client's knowledge of the complainant's reputation for violence or prior instances of violence or aggression is a critical fact to present at trial. This is usually best presented by the actual client.

Thank you, affiliated attorneys, for sharing your experience and knowledge. Members, please return next month when we share the second half of our affiliated attorneys' responses this question.

NETWORKING

Training with Massad Ayoob

by Gila Hayes

This column highlights the work of our affiliated instructors. Few firearms instructors active in America today have touched as many lives as our mentor, Advisory Board member and affiliated instructor Massad Ayoob.

One characteristic that sets a class with Ayoob apart is his focus on the laws and ethics of use of force. In fact, some classes he teaches aren't focused on shooting skills at all, and yet have the greatest personal impact on many of us. We spoke with Mas recently about his Deadly Force Instructor course, which, interestingly, is not just for instructors. It was a fun and thought-provoking conversation that I expect Network members might enjoy "sitting in on."

For those who prefer streaming video, we offer a less formal version of this interview with Massad Ayoob about his Deadly Force Instructor class at https://youtu.be/SIl40dGKjC4 .

eJournal: By way of introduction, how did you get started teaching and why has your curriculum developed that very different focus from what's common to mainstream shooting instruction?

Ayoob: I started shooting and carrying guns at an early age. Due to a quirk in the local law which allowed it, I started carrying at age 12 in my dad's jewelry store. Realizing the gravity of it, I sat down with the chief of police in the community, one very patient judge and a couple of lawyers and they told me what I needed to know and where to learn more.

That sent me into the state legal library, and I practically haunted the place. It didn't occur to me until later how the librarians might have felt about a teenager who kept looking up homicide law!

I remember thinking, "Why doesn't somebody write a book about this for the armed citizen?" There had been books on how to win a gunfight that went back in the 19th century and absolutely nothing in the gun magazines or in the bookstores that would guide you on when can you use deadly force in self defense.

Time went on and in 1972, I became a police firearms instructor at age 21. A year earlier, I'd started writing for the gun magazines and during the 1970s, I put together a book called *In the Gravest Extreme* that explained lethal force to private citizens for the first time. It turned out to be a bestseller.

I started teaching private citizens in 1981 with Ray Chapman at Chapman Academy in Columbia, Missouri. Ray encouraged me to start my own school. At the time, I was a full-time writer specializing in guns, law enforcement, professional journals, and martial arts. I thought I'd teach part-time as a lark, do a class once a month and need to travel less than I was as a writer.

That year, I opened Lethal Force Institute and within a year it became the tail that wagged the dog. I became a full-time instructor, part-time cop, and part-time writer. We were the first school to teach in depth the law of deadly force as it relates to the private citizen. We don't give legal advice, of course. We give practical advice.

I had started as an expert witness in 1979 and quickly found out a whole lot of trial tactics aren't in the law books. Attorneys will tell you that law school teaches you the law; you learn trial tactics on the job, in trial, or in continuing legal education from other attorneys. I spent a couple of years as co-vice chair of the forensic evidence committee for National Association of Criminal Defense Lawyers which gave me access to some of the best defense lawyers in the country who were doing self-defense cases.

I met Marty Hayes in 1990 when I started teaching for him and in the late '90s, he said, "You know, neither of us is going to live forever! How about we start doing courses on how to teach deadly force in the private sector?" We did the pilot program with Marty at Firearms Academy of Seattle and ever since, we've been doing one or two a year. We did one earlier this year in Phoenix that was very successful, and we have another one coming up this summer at Firearms Academy of Seattle.

We've both been to many instructor courses, and one thing that's always bothered us is how instructor courses teach how to do a technique, give you some drills, then you shoot a qualification and they say, "dóminus vobíscum, thou art an instructor," so at Deadly Force Instructor, each student teaches a 10- or 15-minute block in front of forgiving peers who give constructive criticism, not in front of unforgiving students.

eJournal: Better also to work out issues through feedback from instructors and avoid miscommunications that cause a technique to fail when it is needed for real. Teaching instructors brings its own special challenges, but one is the absolute necessity to connect on a mental and emotional level.

Ayoob: Very much so.

eJournal: Interestingly, there is also an entirely different facet to the Deadly Force Instructor course and something you men-

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tioned doing early in your career: giving expert witness testimony at trial and being a subject-matter expert for attorneys.

Ayoob: Over the years, Marty and I have been appalled to see how often the instructors who had trained the defendants refused to testify for them, were ordered by their bosses for political reasons not to testify, or could not competently testify, so we teach how to testify as material witnesses to the training that their student received.

Here's how the course goes: the first two days, we hammer out all the material, the third day, we start getting into the subtleties of adult education in high liability areas. I've been an expert witness for 45 years; Marty has for 30 years. We teach elements like the importance of bringing in demonstrative evidence and the different ways to present it to the jury. A trial tends to focus on the actions of the defendant. We emphasize telling the attorneys who hire us as experts to let us show the jury what the deceased would have done to the defendant if the defendant hadn't pulled the trigger. That tends to get lost at trial.

We can demonstrate speed of closure, how quickly a knife can be deployed, how quickly someone can be disarmed. We also show students how to do it on video because some judges will not allow live demonstrations in their courtrooms. They'll say, "This is a dignified courtroom, not Shakespeare in the park. You're not going to dance around in front of my jury! You want to show them something, put it on video and I'll let them see it." Then you have other judges who are the exact opposite. "Look, I know about CGI; I know about AI. Nobody's going to play any video tricks on juries in my courtroom. Counselor, if you want to show something, you and your expert get in front of the jury box and show them!" We show students how to handle both.

eJournal: People think, and maybe even judges believe, "Of course everybody knows how quickly you can close the distance across a room and make contact with somebody." Well, have they experienced it? In Spencer Newcomer's trial, Attorney Chris Ferro briefly played some video images on a big screen and asked the jury, "Could you really draw an accurate conclusion out of what you just saw, in the time it was visible?" Ferro's skill at presenting demonstrative evidence was really a huge factor in that trial.

Expert witnesses also face scrutiny if they testify. For many, the idea of being cross examined on the witness stand is daunting: something to be avoided at all costs!

Ayoob: In DFI, we cover the dirty tricks of cross-examination. One of our graduates, the great instructor John Murphy, said the Deadly Force Instructor course was like a preview of what the prosecutor was trying to do to that poor kid on the witness stand in the Rittenhouse trial.

I call it quicksand. You might be told, "This is solid, step on it, go ahead and put your weight on it." Suddenly, you find yourself being sucked down. The two rules of quicksand are, one, know where the quicksand is and how to avoid it. Two, know how other people have found themselves up to their butts in quicksand and have gotten out of it. Be prepared to do that if you must. We've had very good success.

eJournal: The defendant needs an expert identifying where it is safe to put your weight, or standing by to help the attorney pull you out if you fall in.

Ayoob: Marty and I both feel that expert witnesses are underutilized in both criminal and civil trials.

eJournal: My sense of it is that the top-tier deadly force experts – you and Emanuel Kapelsohn come to mind – are overworked. There aren't that many people who really know the deadly force material.

Ayoob: Many of our DFI graduates, like Karl Rehn and Kaery Dudenhofer, have gone on to give very successful expert witness testimony. After-class evaluations from students like Kevin Davis and Lee Weems, who were already doing expert witness testimony, said they found our class very useful.

I'm very pleased to say that every single attorney who's been through that class has said they learned more about deadly force the first day than they did in three years of law school. That's because law school is a sea of tort law, civil law, maritime law, family law, contract law and so deadly force is a drop in the bucket. Three hours is the average answer when I ask attorneys how much of their three years of law school were spent on deadly force law. Marty told me he got less in law school.

eJournal: If the number is an average, yes, some programs are even stingier. Moving away from expert witness work, a huge subject we could discuss for hours, I know that some of your DFI students are just good, common citizens; people who come to class never intending to expose themselves to cross examination so they're not going to work as either expert witnesses or as instructors. What do these men and women come for and what benefit does the class give them?

Ayoob: There are a number of people who carry a gun and feel they're not truly competent with something until someone who knows what they're doing has certified them to teach it. I've really found that to be true in life. We get to where we can meet a certain standard or score an expert or master rating, therefore we must be an expert or a master, but I found it is not until you start teaching something have you really, truly master it. When you know that people are going to be asking you: "Why do we do it this exact, particular way? What are the pros and cons of this other competing theory?" You've got to be able to answer confidently. Being certified to instruct and being experienced in teaching is the final imprimatur that double stamps your mastery. Teaching sharpens your own technique and your own confidence in your abilities.

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History shows that competence and confidence intertwine. Confidence comes from being competent; part of the competence is the confidence that you can do it that allows you to carry out whatever the task may be.

eJournal: Like a Venn diagram, both attributes overlap. One thing Deadly Force Instructor course offers is the experience of moot court. Experience contributes to confidence before possibly going up against someone intent on imprisoning you, perhaps like Rittenhouse faced in prosecutor Thomas Binger, as you referenced earlier.

Ayoob: Moot court is the aftermath equivalent to force-on-force training with Simunitions®. When you're on the witness stand and somebody's actually firing questions at you, it's a whole lot different than theory.

eJournal: How stressed out do you think your students are when testifying as an expert in moot court? One even gets to act as defendant! How stressful is that for your students?

Ayoob: They've told me afterwards it was stressful as hell because while they knew they weren't going to go to prison, if they lost, they knew their peers were watching to see how they handled themselves.

eJournal: Stress inoculation is a term you taught us years ago and it is a proven concept. Of course, whether we are training with Simunitions®, or practicing in moot court, it's not like being on the witness stand in front of the real judge and the real jury, but I don't think that you can overstate the confidence factor you referenced a few minutes ago. I don't think you can overstate the value of the mind being able to say we've worked through a shadow model of this previously. Watch out for this, be careful and avoid that.

Ayoob: If you think about it, essentially training should be, as much as possible, authentically replicated experience. That's why we included the moot court in Deadly Force Instructor. The evaluations students turn in at the end of class tell me that moot court is some of the most profound time in that 40-plus hours of training.

eJournal: In my experience, profound is a good word for pretty much any Massad Ayoob class. It changes lives; seeing a tiny fraction of how bad it can be changes our risk-aversion. If we're smart, we base future behavior on what you teach. You have taught thousands of classes to tens of thousands of students, but I find it charming that what you and I are talking about today is a return to the original venue in which you launched Deadly Force Instructor. Tell us a little, please, about class prerequisites, tuition costs and possible discounts, how to sign up and all of those important details so we can print them for reader convenience.

Ayoob: It's an intense program that's 40 hours long over five days, but if you count the evening work, the study groups, and the preparation, it's between 40 and 50 hours. Prerequisites include showing proof you can pass a criminal record background check. It certainly would be helpful if you had taken a Massad Ayoob Group class prior to the instructor course, so we give a discount to people who show MAG 20 or MAG 40 certificates. They're already grounded on the topic, so we tend to assign them to be the leaders of the study groups. If they're not MAG grads, there's a discount for Network members. Call Firearms Academy of Seattle at 360-978-6100 or read more online at https://firearmsacademy.com/guest-instructors/deadly-force-instructor-washington and my own website https://massadayoobgroup.com/deadly-force-instructor-class/.

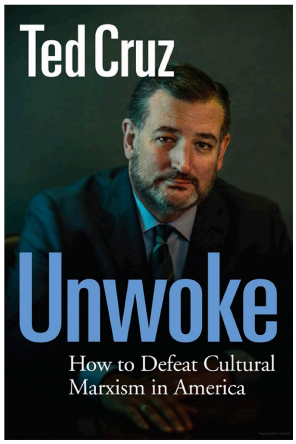
eJournal: It would be great to bring you and Network members together in that class. The Network owes you a debt of gratitude for all the members who, on the strength of your recommendation, joined and made us the strong member support group that we are. Your guidance and instruction have been so integral to who we are and what we do! Thank you, Mas.

Ayoob: Well, thank you Gila and Marty and the whole team there at the Network. You literally created something that didn't exist before – a member mutual support group for people who get in trouble doing the right thing to save their lives and their family's lives. God bless you for doing that.

Network Advisory Board member Massad Ayoob is author of several dozen books and countless articles. Ayoob founded the Lethal Force Institute in 1981 and now teaches through Massad Ayoob Group of which he is the director. 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. Learn more at https://massadayoobgroup.com or read his blog at https://backwoodshome.com/blogs/MassadAyoob/ .

Book Review

Unwoke: How to Defeat Cultural Marxism in America



By Ted Cruz
368 pgs., $22 paper; $13.49 eBook
Published by Regnery, Nov. 7, 2023

Reviewed by Gila Hayes

April's news was full of stories about antisemitic agitators protesting on and around campuses, raising safety concerns. Current events coincided with a book I was reading by US Senator Ted Cruz. *Unwoke* begins with the story of his father, who immigrated to the United States in the late 1950s and endorsed Castro. After Castro showed his true colors, the elder Cruz saw that he had been wrong and publicly apologized. Too bad we can't say the same for American leaders in politics, business, education and entertainment, who grew up reading Karl Marx's writings and continue to view life as "a battleground between oppressed people and their oppressors." Today, the idea of oppressed classes extends beyond workers to encompass race, gender and sexual orientation.

In Cuba, Castro took children from parents and raised them at boarding schools. Our schools also teach Marxism, indoctrinating even young children in Critical Race Theory, Cruz continues. Most of *Unwoke's* chapters end with "how to fix it" sections. "Most people would be surprised at how many friends and allies they can make by simply showing up at a rally or a school board meeting to protest what their children are being taught in schools. They would also be surprised at the extent to which they can come up with better things to teach when they put their heads together and discuss their values," he writes.

Giant news corporations and social media platforms owned by a few huge tech companies control what is released as news. No where is that so vividly illustrated than by proliferation of the phrase "peaceful protests" introduced in 2020 by CNN and parroted by others to describe rioting, looting, burning and violent mobs. Silencing independent news sources was an early step when communists came to power in the Soviet Union and Cuba, Cruz writes. Today's neo-Marxists achieve the same effect through tremendous pressure to report only approved views exerted in newsrooms by peers and management alike. To do otherwise results in job loss – a fear mirrored in business, entertainment and even scientific research, he highlights later.

On social media, censorship hides behind "fact-checking" and anonymous algorithms that control what's "shared." Cruz explains that antitrust laws exist along with consumer protection laws and laws mandating a "neutral public forum" free of censorship and indecent content, but he does not believe Democrats will enforce the laws; a Republican administration might, he writes.

Big business is infamous for playing at Woke politics, Cruz continues, citing Bank of America and Citigroup's antigun policies that create restrictions politicans aren't able to pass into law. "For the past few years, whenever Democrats lose at the ballot box or fail to get their way in Congress, many of the major corporations of this country have stepped up and tried to implement radical, Marxist change anyway, often against the will of the American people," Cruz explains, adding that bankers found harming American gun owners less of a problem than "being attacked by the woke mob." On other issues, major league baseball and Coca Cola took business out of states like Texas and Georgia when they passed election integrity legislation that the corporations labeled "racist."

Fortunately, consumers still wield the power of the boycott. When Bud Light chose an ambassador that targeted children with transgender messages, the resultant boycott cost Anheuser-Busch billions of dollars. Historically, conservatives haven't been able to rally effective boycotts, Cruz observes, but reactions to Bud Light and Target's forays into "extreme transgender" influence peddling suggest that is changing.

Political control over science has perhaps the longest history of riding rough-shod over truth, Cruz continues, citing the persecution of Copernicus in the early 1600s. Hitler purged "non-Aryan" scientists, and Stalin also eradicated scientists. "Today, many on the woke Left speak about 'The Science' as if they're talking about their religion, reciting the slogans of their faith and shaming anyone who expresses even mild skepticism or disagreement—two things that were once hallmarks of the scientific method," he writes, but genuine science thrives on challenging accepted conclusions. Climate change and medicine provide examples of suppression of scientific inquiry. In the wake of Covid-19, citizens are less willing to blindly behave as dictated by popular beliefs peddled as "science," he suggests. A thick skin is needed to stand up for the truth. "Resistance to insults and attacks from the Left is what has allowed me to question scientists, most notably Dr. Fauci and numerous left-wing environmentalists, with such rigor in the Senate...While other people may have doubts about the validity of what these people are saying, too many of them are afraid to speak out."

Cruz closes *Unwoke* with a chapter detailing the extensive influence the Chinese Community Party has over American government, financial matters, education and entertainment. For example, Hollywood carefully avoids scripts that may offend the Chinese and Democrats vote down legislation intended to wean Americans off of Chinese goods, reliance on Chinese pharmaceuticals, and other supply line dependencies.

Marxism withers under scrutiny, Cruz concludes. Clear, truthful investigations lead Cruz's *"How to Fight Back"* segments found at the end of nearly every chapter. As a role model, he highlights what may have been President Ronald Reagan's greatest strength, courageously speaking the unvarnished truth to the Soviet Union. We must do the same today, he admonishes readers.

Editor's Notebook

by Gila Hayes

It's interesting when questions from non-members and members show a clear trend. First, of course, it often alerts me to clarifications and explanations that we can provide on our website. Second, trending questions indicate topics under discussion on gun boards, on YouTube channels, and amongst armed citizens in general of which we should be aware.

April was no exception with a lot of requests for specific limits on how much assistance Network members would be granted after a self-defense incident. In our litigious society, nearly everyone buys insurance for indemnification against everything from liability for the parcel delivery man slipping and falling on our porch to car accidents, so folks tend to view the world through the lens of insurance. As a result, many questions are couched in insurance terminology that doesn't apply to the Network's assistance for members. Questions about policy limits, exclusions, and recoupment are often posed that also don't apply to what we do for members after self defense.

Specified limits are one of the identifying features of insurance. The Network serves members as a supportive membership organization, and does not sell insurance policies or coverage, so we do not set arbitrary limits on funding to prevent or defend against criminal charges or civil litigation a member may face following use of force in self defense. Our limits are more of the practical sort and funding for member legal needs after self defense is restricted only by the necessity of maintaining a sufficiently robust Legal Defense Fund to provide for the next member with post-incident legal needs. My hogwash detector always goes off when I am promised that something is unlimited, so I avoid that word in answers to questions or explanations of Network assistance.

Long-time members likely remember the many years during which our practical limit was up to one half of our Legal Defense Fund for all the expenses of defending against unmeritorious prosecution or lawsuit following a member's self-defense incident. In all those years, the total paid in attorneys' fees, expert witnesses costs, funding for consultants and private investigators never came close to half of the Fund. While we stand ready to fund defense against civil lawsuit, expense of filing an appeal and defending our member during a retrial, that has not yet been the plight of a Network member yet.

These past few years, we've moved away from the half-of-the-Fund limit now that the Legal Defense Fund is fully funded with a balance that exceeds $4,000,000. Even during our formative years, we were proud to have been able to fully fund all of our 34 member-involved cases as has been our history since opening the Network in 2008.

Do You Watch the Supreme Court?

It can be interesting, to say the least. There are almost always cases under discussion that have big implications for our dwindling freedoms as Americans. Still, you wouldn't think there would have been much of interest in arguments the court heard earlier this year that were about commercial fishing.

I sat up and started paying attention when a columnist I follow wrote that arguments presented before the USSC on January 17 discussed our nation's bloated administrative state. Internet searches the next weekend subsequently turned up articles and blogs predicting the court might overthrow long-accepted doctrine, which asserts "that courts should defer to an agency's reasonable interpretation of an ambiguous statute" (SCOTUSblog at https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/). I was particularly interested by the second part of the question put before the USSC which asked, "Should the Court overrule *Chevron v. Natural Resources Defense Council* or at least clarify whether statutory silence on controversial powers creates an ambiguity requiring deference to the agency?" That word, "deference," hooked my attention.

The 1984 Chevron doctrine has reverberated through many cases in which "we the governed" have asked judges to fix harms inflicted by the heavy hand of administrative agencies. While the question in front of the supreme court is national, let us not forget that accepted practices at the national level are mirrored in lower courts. The issue echoes an early blow to the Network's fight over the restriction against enrolling new members who live in Washington State. The state's insurance commissioner alleged that the Network's assistance to members constituted insurance; the Network retorted that none of the Network's assistance matches WA State's legal definition of insurance and sought a decision from an independent judge. Sadly, the superior court judge dodged the issue by stating that judges are allowed to defer to agencies on issues that fall outside the judge's knowledge, and he chose to do just that.

When reading about the January supreme court arguments, I learned that our judge's deference to the insurance commissioner, which I decried at the time as profound intellectual slothfulness, has been accepted practice nationally for nearly 40 years. During the arguments in January, Chief Justice Roberts observed that the Court hasn't relied on the Chevron doctrine for some time, but I wonder if he misses the point, because clearly many, many lower courts are delighted to shrug off their responsibilities by rubber stamping whatever administrative agencies think the law means.

To be clear, in our situation, instead of independently interpreting the law, a judge lazily deferred to what an elected insurance commissioner thought. Still, I hope the US Supreme Court will make the right decision. It's not personal. It won't change the WA problem for the Network; we are working to resolve that problem differently. Nonetheless, concern over legitimate government makes this a topic anyone who's worried about our diminishing freedoms should watch.

About the Network's Online Journal

The ***eJournal*** of the Armed Citizens' Legal Defense Network, Inc. is published monthly on the Network's website at https:// armedcitizensnetwork.org/our-journal.

Do not mistake information presented in this online publication for legal advice; it is not. The Network strives to assure that information published in this journal is both accurate and useful. Reader, it is your responsibility to consult your own attorney to receive professional assurance that this information and your interpretation or understanding of it is accurate, complete and appropriate with respect to your particular situation.

In addition, material presented in our opinion columns is entirely the opinion of the bylined author and is intended to provoke thought and discussion among readers.

To submit letters and comments about content in the eJournal, please contact editor Gila Hayes by e-mail sent to editor@armedcitizensnetwork.org.

The Armed Citizens' Legal Defense Network, Inc. receives its direction from these corporate officers:

Marty Hayes, President

J. Vincent Shuck, Vice President

Gila Hayes, Chief Operating Officer

We welcome your questions and comments about the Network.

Please write to us at info@armedcitizensnetwork.org or PO Box 400, Onalaska, WA 98570 or call us at 888-508-3404.