

Beyond Black Letter Law An Interview with Attorney Rob Keating

In our January Attorney Question of the Month, Texas attorney Rob Keating concluded his comments by observing, "Even with good laws, it is important to understand how those statutes are interpreted by the courts." I responded that he'd really hit the nail on the head, which led to a conversation about how appellate court decisions affect enforcement of statutory law. We switch now to Q&A format to share his explanations about case law with members who will likely find it as interesting as I did.

eJournal: Can we start by establishing definitions? What is case law?

Keating: When the courts interpret the law and determine how it should be applied in certain situations, they create what is called case law.

eJournal: Is that the same thing as common law?

Keating: Common law is case law. The term common law refers to precedents set by prior court decisions. The system originated in England and is primarily used to resolve ambiguities in the statutes or codes.

eJournal: I have also read the term "judge-made law." What does that mean?

Keating: Yes, it is also called judge-made law, although I haven't heard that term used much since I left law school. That's probably because it sounds a lot like "legislating from the bench" which has a negative connotation. I know that over the past few years I've heard a lot of people complain about activist judges not following the law and creating their own spin on things.

eJournal: I hadn't picked up on that nuance in my reading, so I am glad you put it in context. Is there anything else about definitions that we should establish before exploring the effect of case law on our everyday lives?

Keating: There are additional factors like *stare decisis* that will help you understand.

eJournal: It's interesting that you mention that term, because I recently read an article that stated, "Common law systems follow the doctrine of *stare decisis*, by which most courts are bound by their own previous decisions in similar cases. According to *stare decisis*, all lower courts should make decisions

consistent with the previous decisions of higher courts..." Why is that?

Keating: Consistency is the reason courts are bound to follow their own decisions and the decisions of courts that are directly above them. If you have judges interpreting the law, and saying, "This is what the law really means," then you should be able to count on that and not worry that maybe a different judge is going to look at it differently.

eJournal: I can see how essential that would be when you go to trial...

Keating: It's important not just for me taking things to trial, but it is also important for people who are just out there living their lives. A lot of times the difference between something being legal or not is based on some of the court decisions that have been made.

eJournal: Exactly as you say, and that is why we are having this conversation. With state statutes easily accessible by Internet, it is easy to read the current black letter law, but I think the difficulty arises in how those words have been interpreted and applied by the courts.

Keating: I do this all day, every day, and it is difficult for me to keep up with all the developments in case law. For someone without a legal education, and without doing it all the time, keeping up with case law is a pretty daunting task.

eJournal: How far reaching are these court decisions we're calling case law?

Keating: Case law is binding on all the courts who fall beneath the court that made the case law. For example, the United States Court of Appeals for the Fifth Circuit is over all of the federal district courts in Texas, Louisiana, and Mississippi. So,

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any federal district court in those states is bound to follow case law from the Fifth Circuit. However, a federal district court in Kentucky would be under the Sixth Circuit and does not have to follow the holdings of the Fifth Circuit. Of course, they all have to follow the holdings from the US Supreme Court.

eJournal: Is there any influence from one circuit court to another? For example, my home area is served by the Ninth. Do I also need to pay attention to decisions by other circuit courts?

Keating: Using your example, a lot of times if the Ninth Circuit has not dealt with an issue but the Fifth Circuit has, then the first time that issue comes up in the Ninth, many times they will look at what other circuits have done, and may say, "Well, this circuit did this." Now, they do not have to follow that. It has what we would call "persuasive authority," not "mandatory authority." A circuit court's decision can be relevant, but another circuit court does not have to follow it.

eJournal: How important are the decisions of courts below the circuit court of appeals to your work as a defense attorney – and for that matter, how much attention do trial judges pay to lower courts of appeal?

Keating: In addition to the Supreme Court and the Federal Fifth Circuit, I also pay attention to all of the decisions that come out of the Texas Court of Criminal Appeals, which is the highest court in Texas for criminal cases. Underneath the Court of Criminal Appeals there are 14 appellate districts in Texas. I practice primarily in the Dallas-Fort Worth area, so I need to pay attention to the districts that cover my area because as we have said, the trial courts are bound to follow those decisions. I also try to keep up with decisions from the districts that are further away and are only persuasive authority, like Houston or Austin ... but there's only so much time in the day.

Fortunately, I am a member of various bar associations that publish summaries of court cases periodically which is a big help.

You asked how much attention judges pay – I think trial court judges pay attention, too, because they don't like to get overturned on appeal. They want to make decisions that are in line with what the appellate courts have said so I think they pay pretty close attention, as well.

eJournal: How do decisions from higher courts trickle down to trials at the grassroots level?

Keating: Here's an example: the Fourth Amendment provides for a great illustration of the role of case law in the United States. The Fourth Amendment provides that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." But what does that really mean? And what happens if the police violate that right? That's where case law comes into play.

In 1914, the US Supreme Court decided the case of *Weeks v. United States*. This was a case in federal court in which police officers and a US Marshal searched Mr. Weeks' home without first obtaining a warrant. The court held that if illegally obtained evidence is used against a defendant at his trial in federal court and he is convicted, the conviction must be overturned. This created what we now call the exclusionary rule.

It is important to understand that the protections afforded by the Bill of Rights are federal in nature. In other words, the federal government cannot infringe on your right to free speech or free exercise of religion. But the protections provided by those amendments don't automatically apply to the states.

In 1949, the US Supreme Court heard the case of *Wolf v. Colorado*. Like the Weeks case, law enforcement officials obtained evidence illegally, used it at trial, and Wolf was convicted. The big difference here is that Wolf was on trial in state court. Wolf appealed his conviction and said that the due process clause of the 14th Amendment meant that the exclusionary rule established in the Weeks case should also apply to the states. The Supreme Court flatly rejected his argument and refused to extend the Fourth Amendment protections against unreasonable search and seizure to the states.

It wasn't until 1961 that the US Supreme Court reversed its stance on this and incorporated the Fourth Amendment to apply to the states. In the case of *Mapp v. Ohio*, the court overturned its decision in *Wolf* and held that all evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in a state court.

Most of the protections in the Bill of Rights have now been incorporated under the 14th Amendment through various Supreme Court decisions and apply to the states as well as the federal government, but not all of them.

eJournal: Does case law remain in effect forever?

Keating: Cases don't ever expire unless the law changes. Then, obviously, the cases that dealt with the old law will now need to be looked at again. It will be a new case. Here in Texas, we have some cases from way back, like 1888, and they are still good. They have not ever been overturned.

The more recent a case is, the more the doctrine of *stare decisis* is going to apply. If the court just decided something

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two years ago, it is less likely that they are going to reverse course and issue a different decision. If it is a case from 100 years ago, they are going to be more willing to say, "Well, things have changed and the reasoning that was behind that decision no longer applies."

eJournal: If an appellate court makes one bold, groundbreaking decision, does that single redirection affect verdicts from there on out?

Keating: It does. If a court reverses a previous decision, they are generally pretty clear about it and might say, "This is why we are reversing that decision." They are typically pretty specific if they are getting rid of an old rule and replacing it with a new one. What you will see a lot more frequently, is courts saying, for example, "Well, the Blockburger case is still relevant here, but these facts are a little bit different, so it is not the same situation, therefore the analysis is a little bit different." They can fine-tune a very general rule and have some follow-on cases that flesh out a few different subsets of that rule. Does that make sense?

eJournal: Yes, it does, and the example gives context to how the courts use previous decisions while acknowledging that no two sets of circumstances are identical. In all fairness how can people in 2021 be held to rules that were fair in 1890? There are a few stories in the history books about some pretty bizarre appellate decisions.

Keating: Right, and that is how cases sometimes get overturned. Sometimes they look back and they say, "We made a bad decision in that one." Other times they say, "Things have changed, and it is time for a new rule on that."

eJournal: When a court says, "We made a bad decision," does that ever come from a lower court taking a courageous stand against a decision made by a higher court?

Keating: I cannot think of any cases in which a lower court has simply rejected mandatory authority from a higher court and said that they were not going to follow it. Usually, you see courts overturning their own decisions. For example, you might see the Supreme Court saying we are overturning our decision, but you would not see the Fifth Circuit Court rejecting a Supreme Court decision or saying, "We think the Supreme Court is wrong, so we are going to rule in this guy's favor."

eJournal: If new legislation changes statutory law, what happens to previous case law?

Keating: Starting at the trial court, where they are dealing with the issue in the first place, if it comes up, then they may say, "Well, under the old statute, the case law said we would have to do this. The new statute is essentially the same, so we think

that rule still applies," or they might say, "The new statute removes this element of the offense, which was really what that case law was all about, so that rule no longer applies." Then, a lot of times, it is an entirely new question and there is no case law to rely on. Sometimes that happens when a statute changes; other times, a statute is close enough that you can directly apply the old case law, or you can start your analysis with, "This is how the old case law would have handled it, but because of this difference, we think the new rule should be this."

eJournal: How many appellate court decisions are needed to make strong case law? I ask, because I've read that case law is defined as "The collection of past legal decisions [plural] written by courts...in the course of deciding cases, in which the law was analyzed using these cases to resolve ambiguities..." Would you rely on a single appellate decision or does it take a series of decisions before you'd cite a previous decision when you're defending someone?

Keating: If it is a case that is good for us, we jump on it right away. We pay close attention to cases that we know are going up on appeal and we wait for those decisions and sometimes we start citing a decision days after it comes out because we have watched it and waited for it to come out. We have a lot of those kinds of decisions here in Texas about warrants and blood draws for DWIs from the search and seizure aspect. There has been a lot of new case law in the past several years in Texas, so it has been interesting to follow and see the new case law come out.

I mentioned that in TX, the court of criminal appeals is the gold standard, but if I am in a case in Tarrant County and the Fort Worth Court of Appeals, which is one of our 14 appellate courts, has made a decision, the judges in Tarrant County do have to follow that even though it is only from the first level of appeals courts.

You asked if case law starts getting applied right away. There was a case called *Martinez* that came out and in Dallas County we were relying on it to show that the warrants the officers were using were not valid under that decision. We got a lot of blood cases thrown out.

If I had made exactly the same argument with very similar facts in Tarrant and Parker County, in which I also practice, those judges would say, "Are you crazy? We are not throwing out these cases for that." They would say, "We don't think that case means what you are saying it means." That is how judges will disagree with case law. They won't say, "We disagree with it," instead they will say, "We don't think the case means what you say it means," and in that respect, sometimes you do have to

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get a couple of cases in which the court comes back and says, "Yes, that is actually what we did mean in *Martinez*."

eJournal: What a useful perspective, as well as a fascinating peek into the world in which defense attorneys work! What resources can the ordinary man or woman access to be better informed about case law and how it changes?

Keating: One of the reasons I think the Network is so valuable is because you put out information about questions like that.

eJournal: Thank you, but the compliment is coming right back to you because you and I would not have explored this topic were it not for your commentary in a recent Network online journal's *Attorney Question of the Month* column. What other resources should we access for current information on case law?

Keating: Take classes with trainers like Massad Ayoob. When he teaches, he is telling people about case law and how laws are interpreted. It is really, really valuable to take classes like that. Before I was in law school, I attended a MAG 40 and I learned more from him about the use of force than I did from my criminal law professors. People should take advantage of training.

A lot of lawyers will sit down with you for 30 minutes, and you pay them a certain fee, and then you can ask them questions like, "What do I need to know?" You can do that kind of a consultation and the lawyer can give you advice.

Legal blogs are another resource for keeping up with some of the case law. Do a Google search for legal blogs about the laws in your state or search for a blog about defensive use of force. Follow that blog and that way you will find out about important decisions coming up.

eJournal: What is the bottom line? What do you hope our members will take away from this interesting and educational conversation?

Keating: I'd like to emphasize just how simple a thing can become a matter of case law. In Texas, there are some restrictions on where you can carry a knife with a blade over 5 ½ inches. There was a case in which the issue was what constituted the blade. Is it only the sharpened portion, or does the blade also include any non-sharpened portion before the handle starts – in other words, do you measure the ricasso?

That ended up being an appeals case, because there was a guy who had a knife where the sharpened portion was about 5 ¼ inches but the whole blade measured 5 ¾ inches. If you read that statute one way the knife was legal, if you read it the other way, it wasn't, so just understand that even if there is a definition in the statute, we can still fight over it. That is the kind of things that get resolved in case law.

eJournal: If we ever wondered whether it is important for us to know our state's case law, that pretty much answers that question. Thank you, Rob, for all the time you've spent with me today, for your answers, examples and this interesting discussion. Please know, also, that I appreciate your services to members as a Network affiliated attorney.

The Network's relationship with attorney Rob Keating is unusually varied. Many years ago, Rob joined the Network as a rank and file member. After he started a shooting school, he participated as a Network affiliated instructor until he quit that line of work to go to law school. After graduating and establishing his criminal defense practice, we were delighted to renew acquaintances when he became a Network affiliated attorney. Learn more about Rob at <https://www.dfw.law/robert-keating> and <https://www.dfw.law/self-defense>.



President's Message

by Marty Hayes, J.D.

I started writing this month's message on the day that I heard Rush Limbaugh lost his battle with lung cancer. As an avid listener, I am, of course, saddened but not surprised by his passing. He was open about his fight and as he dealt with it, we all saw an example of his graciousness. I remember

the first time I heard him. I was driving from Dallas to Houston to teach a self-defense seminar. I listened to one program and I was hooked. R.I.P, Rush, you were an example to all of us.

I find a little reflection on how fragile life is to be in order. Rush was only 70 years old, four years older than I am and, of course, many readers here are older than 70. We do not know what the future holds for any of us and any of us could go at any time. I treat each and every day like it might be my last, because it just might. If I do not wake tomorrow, then I hope not to have left things outside the norm of human life undone for my wife, family and/or friends to try to finish. I take as my example my father, who in his later years came to live with Gila and me because he had Parkinson's disease and was unable to take care of himself. He had decided to move into an assisted living home, and I objected. He and I had an awesome two years together, until one day, while he was out working on the range on our tractor, he had a massive stroke. He passed away a few days later. I like to say he basically had the same philosophy as I do. I know from my conversations with him, he lived each day as fully as he could and passed with no regrets. As the saying goes, "He died with his boots on."

My reflections lead me to my next topic – the future of the Network. What would happen to the Network if either Gila or I were to pass suddenly? Gila runs day to day operations, and I think it would be extremely difficult to replace her. Shutting the doors of the Network is not an option, Not only do 19,000+ members rely upon us to be there if they need us, but a half a dozen good people also rely upon the Network for their livelihoods. I fully admit it would be easy to replace me, and I designed my job that way. I do a lot of stuff, of course, but I am replaceable by someone with a law degree and an ability to write and do legal research, who also has a passion for our cause. But still, let's ponder what is in store for the Network in the long run.

When we formed the Network, we set it up as a for-profit corporation, with equal shares of corporate stock owned by Gila, Vincent Shuck and me. We did it that way for a couple really valid reasons. First, I had seen first-hand what can happen to a membership organization if the wrong people are elected to the board of directors and either mismanage or allow mismanagement of the organization. I believe there is a big gun rights organization suffering this fate at the moment. I had

seen boards of directors ruin other organizations, too, so when founding the Network, I opted to create a private organization, with a firm hand on the rudder. That seemed like the best way to go. I believed that the people making decisions about the organization needed, ultimately, to bear responsibility for those decisions, a factor I'd seen as lacking in other organizations that had failed.

At the same time, I also believed that the long-term future of the Network would be best served if it was a member-owned company, with the member/shareholders hiring a small executive team to run the organization. Of course, the shareholders would be financially responsible for the success of the Network. To transition to this type of organization, Gila, Vincent and I would need to sell our shares of the Network to our members. We are going through the legal steps to set this up. The process is going to take the better part of a year to get all the ducks in a row, and until we get further along in the process, I really cannot give any particulars, nor make any promises as to rate of return to investors, benefits to shareholders, etc. I tell you this, just to assure you that we do have the long-term viability and success of the Network at the forefront of our minds.

Back on the Radio!

We quit our overt outreach for new members when we first got involved fighting with the WA Insurance Commissioner. We did not know how that was going to turn out, or what resources it would take to fight it. While those two questions are still pertinent, we have decided to go back into a little radio advertising. First, we are back on Gun Talk Radio with Tom Gresham, starting in March. Today I taped a new radio advertisement and I'm scheduled for a guest spot on Gun Talk the first Sunday of March. More info at <https://www.guntalk.com/gun-talk-radio>.

I was sitting at my Dillon 1050 one Sunday in January, when a radio program came on which I felt would be a really good fit for the Network. As a result in March, we will start sponsoring a new-to-us radio program, *Frontlines of Freedom*, with Lt. Col. (Ret.) Denny Gillem. Col. Gillem is a Vietnam veteran who later served in Germany, then the US Readiness Command as a Mideast war planner. I enjoyed listening to the program (although I am not a veteran), especially the segment on armed citizens that is part of their two hour show. If you can find *Frontlines of Freedom* on a local station, try to tune in, and if nothing else, you can listen to archived broadcasts on their website at <https://frontlinesoffreedom.com/category/podcast/>.

Are you a Prepper?

If you are a prepper and if you live in Texas, you are probably very thankful that you prepared in advance for a catastrophe. I must admit, both Gila and I could be considered preppers, although not to an extreme extent. We do have our house set up so we can walk out to the power pole and disconnect the

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house from the power grid and then plug in the generator and light up the house. We'd have enough power to run our mini-split heat pump but, we likely would turn off the electric heat, just light the wood stove and keep it burning. We enjoy a fire in the evenings, and occasionally on a weekend morning I will get up early and go start a fire and warm the house up before Gila gets up. There's nothing nicer than a warm fire greeting a person in the morning.

We are also on a well, so if the power is out, we have no running water without the generator to run the well pump. We would not run the generator full-time, but only long enough to take a quick shower and run some water in some extra pots. I also recently installed a propane-fired cook top, so we can boil water and cook if we needed to and, of course, there are oil-burning lamps, battery-powered lights and a good supply of candles for lighting.

The Network is basically set up the same way probably because the office building is our former home on the Firearms Academy of Seattle range. That location sees five people report for work every day at the Network and the same emergency planning applies for outages there – turn off the connection to the electrical grid, fire up the 5,000 watt generator and continue running the Network on auxiliary power. It is impossible to work without electricity, considering all the computers, phones, printers, Wi Fi and lighting needed to run a business, so we've had these provisions in place for many years.

We have never had a problem up here in WA State like our 1200+ Network members in Texas are going through. I sure hope that by the time this is published the crisis will be over, but I know a lot of the people there will still be dealing with the aftermath. We do get power outages here occasionally, usually from windstorms following heavy rains or ice storms. The longest outage I remember happened many years ago and lasted 3-4 days, which was miserable because we were NOT prepared. Our preparation for handling these emergencies started after that.

For our Texas friends, please know that we are thinking of you and know what you are going through, and hope you come out of this okay.

Small Update on Insurance Commissioner Fight

I know members, especially members in WA state, want to know what is going on. As you know, we lost the fight with the Office of Insurance Commissioner at the administrative level, but that was only the first step to fight what we believe is a grossly misapplied definition of insurance by the Insurance Commissioner. They first fined us \$200,000 for selling insurance without a license, but the last thing that occurred was a reduction in the fine to \$50,000. That was much appreciated, by the way, but of course we do not think even the \$50K fine is warranted. We pursued our right to appeal this administrative ruling. We filed a request in our local court for a stay of the fine until we get a ruling from the judge. The judge agreed, so we did not have to pay that fine right away.

We are beginning the discovery process of the civil court action and this is not a quick process. We have the anti-gun Attorney General defending the anti-gun Insurance Commissioner, so we expect a drawn-out fight, but fight we will! Some have asked, "Why not just pay the fine and end the bleeding?" We won't, because that would leave our Washington friends unable to enroll in the Network (current members can continue to renew, by the way). I started the Network because I wanted our friends and my students to have the ability to fight an unmeritorious prosecution or civil suit. How would it look if I just decided to roll over out of financial considerations? Not me! Vincent and Gila are in total agreement.

I found out today that we just received a \$500 donation to fight the fight from a couple who hail from southwestern Washington. That is so much appreciated, thank you. It is for these people and the rest of the members of the Network that we continue the fight.



Attorney Question of the Month

We're starting to hear questions from Network members who are planning cross country summer vacations.

Naturally, they're particularly concerned about the potential for violating weapon restrictions and self-defense laws once they leave home where they are familiar with the law. Their concern extends beyond guns and includes worry about restrictions on pepper spray, Taser®s, knives and other non-gun self-defense tools, too.

In hopes of aiding these intrepid travelers, we presented the following question to our affiliated attorneys:

When armed citizens vacation in your state, what weapon and self-defense laws are they most likely to be unaware of and may inadvertently violate?

If a Network member is planning to vacation in your state, what advice would you offer about their self-defense weapons and provisions?

Our Affiliated Attorneys responded with interesting and varied commentaries of such length that we will run the first half this month then wrap up in April's edition.

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Far too many innocent mistakes place law-abiding citizens in the criminal justice system – mistakes as innocent as not cleaning out your gym bag.

There are many applications for gym bags. Gym bags are typically known to store gym clothes, your gym lock, workout powder, water jugs, and so on. Those same gym bags are also optimal for transporting clothes and items for other activities, such as transporting your lawfully-owned firearm and ammunition to and from your home to a local gun range.

This is where the innocent mistake comes in, which has landed numerous people in the criminal justice system after being arrested, for violating New York State gun laws, whether a New York state resident, or not.

If you are one of those people who use your gym bag to transport your firearm and ammunition, as responsible as you may

be, ask yourself, "How easy would it be for one ammunition shell to fall out of the box and end up in a crevasse of the bag without your knowledge?"

Now think about this – that same gym bag is also optimal for traveling. How many times have you used your gym bag for a weekend trip, or as a carry-on with your luggage?

In New York, if you fly through one of the two airports in New York City, you are subject to both the New York State gun laws, and the even more strict New York City gun laws. For a mistake as innocent as unknowingly going through airport security with one bullet in your gym bag, you can find yourself being arrested, facing criminal prosecution, a criminal record and penalties as serious as jail time. Several of our clients, well-established wealthy business men and proud (legal) gun owners, who have never had any issues with firearms, ammunition or law as a whole, found themselves arrested and needing a criminal defense attorney, after the gym (travel) bag was found with a bullet inside, while going through airport security. Ultimately in their cases, we were able to get them resolved with a dismissal, but there was no guarantee these cases would be dismissed for this innocent mistake, which is why it is important to retain an attorney who knows both the criminal justice system and the New York State gun laws.

As an attorney for the Armed Citizens' Legal Defense Network, Inc. for over 10 years, I am happy to offer free consultations for anyone charged with a new gun-related offense in the New York metropolitan area.

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With great ski resorts and national parks, Utah is home to many tourists. Visitors to Utah should be aware that with a blood alcohol content limit of 0.05 percent, Utah has the strictest driving under the influence (DUI) laws in the country. An individual who is arrested for DUI who has a weapon, such as a firearm anywhere in the vehicle, can also be charged with a separate offense for carrying a dangerous weapon under the influence of alcohol or drugs in violation of Utah Code 76-10-528, a class B misdemeanor, punishable up to six months in jail. Often prosecutors will request forfeiture of any firearms in the vehicle as part of sentencing. Even one alcoholic drink can put a person over the 0.05 level. While most states have a 0.08 BAC level, Utah has adopted a 0.05 BAC level, which some vis-

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itors to Utah may inadvertently violate. Visitors to Provo, Utah should also be aware that a city ordinance prohibits throwing a snowball. Throwing a snowball, or any other projectile, that results in bodily injury to another person or property damage is a misdemeanor.

Make sure not to drink and drive, especially with a firearm in the vehicle. If you are going to carry a weapon, do not drink any alcohol. If you are going to drink alcohol, do not carry or possess any type of weapon. If visiting a bar or restaurant to drink alcohol, consider leaving your weapon secured in your hotel room.

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Tennessee has a law found in Tenn. Code Annotated Section 39-17-1351(r) which provides that under most circumstances Tennessee will honor a permit issued by another state provided, however, that Tennessee only honors such permits with respect to handguns. Thus, if a permit from another state is a “weapons” permit or a “firearms” permit, Tennessee will not honor it for long-arms. Under this statute, there is no concealment requirement so a nonresident permit holder may carry in Tennessee openly or concealed. Tennessee does have a law addressing vehicle transport which will allow someone who is legally in possession of a motor vehicle and also legally in possession of a firearm to transport that firearm, including long arms, loaded or unloaded in the vehicle. See TCA 39-17-1307(e).

Tennessee unfortunately has created a lot of confusion about where a permit holder may carry a firearm. In some instances, such as public parks the possession of a permit is a “defense” to a charge of illegally possessing a firearm. There are similar complexities and risks related to public buildings, courtrooms, schools, public parks/greenways, campgrounds, waterways, state wildlife management properties, lake property controlled by the Tennessee Valley Authority or the Corps of Engineers, etc. Tennessee also allows any property owner to post the property as a gun free zone. TCA 39-17-1359. Violations of the posting of private property can result in misdemeanor charges or worse depending on the circumstances.

On the issue of use of deadly force, Tennessee only allows the use of deadly force to the extent it is determined by a criminal court to be reasonably necessary to protect against an imminent risk of death or serious bodily injury to a human.

TCA 39-11-611. In Tennessee, a person cannot use deadly force to protect real or personal property, to protect their home, to protect their business, to aid in making a citizen’s arrest or to terminate a trespass. Further, Tennessee is partially a “no retreat” state. Whether there is a duty to retreat before using deadly force depends on the facts of each case and in some instances will turn on facts that have no connection to why the threat of death or serious injury arose.

The simple advice is that if you are in Tennessee as a nonresident with a permit from your home state, you are OK on most public roads and most public sidewalks. Beyond that, the needlessly confusing and inconsistent Tennessee prohibitions on where you can carry and when you can use deadly force create a risk of being charged with a crime.

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Alabama is generally “gun friendly.” It is a “SHALL ISSUE” concealed carry state. There are approximately five million residents over the age of 18. There are over a million (22% plus) concealed carry permits issued by the sheriffs of the 67 counties. Only qualified military non-residents can obtain an Alabama Concealed Carry Permit.

Alabama’s concealed carry law (See Ala. Code 13A-11-52 through 85) honors the concealed carry permits of at least 48 other states (including New York State-BUT NOT New York City).

Anyone over 18 years of age who may legally possess a firearm may OPEN CARRY in the State of Alabama.

Though Alabama is an open carry state, a handgun concealed in the passenger compartment of a motor vehicle is considered a concealed weapon. So, if one does not possess a concealed carry permit in his or her state of residence, a handgun possessed by “non-permitted” visitors should be kept unloaded and in the trunk or other locked storage compartment.

Any place one spends the night, including a motel room, RV or camp tent is considered a dwelling for the purposes of defending a dwelling. There is no duty under Alabama law to retreat from one’s dwelling.

Concealed carry permits are honored in highway rest areas, state parks and wildlife management areas. This is a fairly

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recent positive change to the law. There is a state preemption law; so municipalities cannot enact more restrictive laws in their parks.

Firearms may NOT generally be legally carried in court houses or the office of the local district attorney, public schools or psychiatric facilities. They may not be carried in state trooper posts, sheriffs' offices and police stations without the explicit permission of the senior law enforcement official of such a facility.

While concealed firearms are allowed in bars and restaurants, they should be kept concealed. Owners of such establishments may, by law and generally do, forbid open carry in their businesses. Honor all posted notices by private businesses.

Under Alabama Criminal Code 13A-11-9, it is a misdemeanor (loitering) to remain in a public place while wearing a mask. This is not being enforced currently, but the legislature has not made any provision for those wearing COVID-19 masks. It is recommended that firearms be concealed at all times in public places so there is no confusion about the motive of those legally carrying.

Some common sense thoughts for those carrying firearms for self defense in the State of Alabama:

Make sure your Armed Citizens' Legal Defense Network dues and membership are current. Rule No. 1 of Murphy's Law is "If something can go wrong, it will go wrong ... and at the worst possible moment."

If you have a concealed carry permit from your state of residence, make sure it is current before leaving home. Bring it with you.

Be thoroughly familiar with any self-defense firearms you bring with you. Make sure they are working properly. If you can "qualify" with them, do so.

There are no Alabama state laws governing magazine capacity or self-defense ammunition/bullet types for firearms possessed by private citizens in Alabama. All federal firearms laws do apply and may be enforced by super-vigilant officers.

There is no duty under Alabama state law to inform officers that you are legally carrying concealed. However, do not surprise an officer by suddenly displaying a firearm if he is investigating a crime or a complaint about improper use of firearms.

If police officers are called to the scene of a domestic dispute or other suspected criminal activity, it is better to not greet officers with a gun in hand if it can be avoided. So, if you are not holding a suspect for arrest, holster or render safe and lay your firearm down when officers arrive.

Guns and alcohol (or illicit drugs) do not mix. The best way to get the negative attention of police officers is to misuse either while in possession of firearms and believe it is going unnoticed.

Discretion is the key to not interacting with law enforcement when they are not needed. There are private citizens in our state who are not accustomed to firearms or who have had negative experience with guns. It is recommended that you not display, brandish, "accidentally" point firearms at others in public and semi-public areas. It is easy for "concerned citizens" to dial 911. If they lodge a complaint, expect to see troopers, deputies or local police arrive to investigate the complaint. Minimally, it will impede any activities you have planned for that day.

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

Book Review

Seconds to Live or Die: Life-Saving Lessons from a Former CIA Officer

By Robert Montgomery

Published by Guard Well Defense
(August 18, 2020)

Paperback : 278 pages

ISBN-13 : 978-1544509488

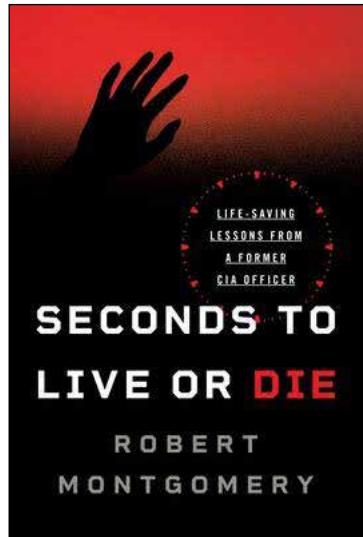
\$15 softbound at <https://www.guard-welldefense.com/shop>; \$5.99 eBook on Amazon.com

Reviewed by Gila Hayes

A few months ago, I started reading *Seconds to Live or Die: Life-Saving Lessons from a Former CIA Officer* by Robert Montgomery and, liking the instruction on awareness, avoidance and preparation, I picked it back up this month. While there's little in Montgomery's book that will be new to our most dedicated training enthusiasts; that is not the reason it interested me. I am always hunting for books that can be gifted to friends and family members I'd like to prepare to defend themselves. Free of the jargon and bluster common to a lot of self-defense books, the first half of *Seconds to Live or Die* is an engaging and educational introduction.

In *Seconds to Live or Die*, Montgomery emphasizes that being thrown into a life-threatening emergency accelerates heart rate and can take reasoned thinking off-line. Learn to get through the "denial/deliberation/action cycle – then get into action as quickly as possible," he urges, recommending breathing exercises to lower heart rate and regain cognitive abilities quickly. Preparation is a vital countermeasure against freezing in terror, and as an example, the author describes his family's home defense walk through and recommends visualization as a training aid.

More important is prior acknowledgment of dangers and practicing awareness to detect hazards before your life is at risk. Montgomery introduces his book with the promise to show readers, "How to mentally and physically prepare yourself for the worst fifteen seconds of the worst day of your life. Those seconds could be when you are at home, at the ATM machine, at school, on a date, on a plane, at a five-star resort, at the office, at a place of worship, or simply driving home from work and witnessing or becoming part of a horrific car crash. Sometimes, there is no apparent rhyme or reason to violence. Other times, however, there is ample reason: you represent something



someone hates enough to kill you for it, or you possess something a sociopath wants."

The term "situational awareness" gets a bad rap, but Montgomery defines it as "simply being in a higher-than-normal state of alert," and later, he uses an even better definition, "sifting out the abnormal from the normal." He relates career experience to underscore the mental exhaustion of being continuously alert and constantly assessing one's surroundings. "There have been times in my life when I was more situationally aware for extended periods, such as in war zones or in particularly dangerous locales. So it would make sense to say that there are degrees of awareness," he explains.

Montgomery discusses moving from zones of safety into the unknown, "Working in the counter-terrorism realm for as many years as I did, I understand that two potential choke points for me as a target are in the vicinity of my home and my workplace. I will eventually always end up there...As I drive, I start to scan the road, looking for signs that something is not normal. This could be other cars, people loitering, or objects along the road that weren't there before. This is the state of being situationally aware...my focus is on everything around me. I basically know what is normal for the environment I am traversing, so I ignore that which is normal."

He suggests maintaining the same alertness when out in public on foot, explaining that with practice, identifying escape routes, assessing people and conditions around you becomes habitual.

I found this chapter an echo of Ed Lovette's April 2019 interview in this journal <https://armedcitizensnetwork.org/beneath-the-radar> in which he talked about chokepoints and other situations that increase risk.

Sometimes when trying to raise self-defense awareness in those we care about, we inadvertently create a sense of dread that scares off the person we're hoping to coach. Montgomery, writing matter-of-factly, avoids that pitfall, in my opinion. In one chapter, he discusses taking his college-age son on a walk around the college neighborhood, warning of the hazards of earphones and smart phone use in public, and other tidbits of wisdom. He advised, "This is the way you should navigate the street. If you see something that gives you pause, avoid it. If you turn your back to retrace your steps, make sure you check behind you. If you observe someone taking an interest in you, and he starts to mirror your movements, consider it a blessing—now you can plan a course of action, whether it's walking into a store, changing your direction, walking to the nearest police station, or preparing to fight for your life."

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I am impressed by the phrase “Consider it a blessing.” The idea of being grateful for detecting a predator’s interest really spoke to me. I’d never heard threat detection described that way, and I like it. Montgomery makes the distinction between acting on intuition and paranoia. “Being paranoid makes you fearful of everything real and imagined, whereas listening to your instincts and being situationally aware puts your mind on alert when something doesn’t feel right.”

Specific advice about weapons in *Seconds to Live or Die* is, from my viewpoint, a mixed bag, and I’m sure experienced readers drawing on their training’s particular focus won’t find every aspect of the second half of the book to their liking. In many ways, I wished I could share just the first half with my loved ones. Teaching physical skills in a book is at best an iffy prospect. Montgomery really shines on what some call “soft skills,” but I had much more difficulty picking through his chapters on gun, knife, chemical deterrents and empty hand defenses.

I was, though, motivated to dredge through the entirety of the book because I agree without reservation with Montgomery’s observation that most people have considerable difficulty with the idea of inflicting physical, hands-on damage on another human. This is a mental block anyone who contemplates self defense must confront. He emphasizes, “The brain can only go where the brain has gone before,” pointing out that self-defense training has to include mental preparation and physical practice that imagines inflicting serious injury to incapacitate an attacker and the possibility of causing death, applied across the spectrum of force on force training, using photorealistic targets of human beings during firearms training, visualization and a lot more.

Montgomery covers knife attacks, improvised weapons for stabbing or striking, pepper spray, and closes this section with the observation that it’s foolish to become over-invested in a single defense weapon or technique. Mental toughness remains the most important weapon. Montgomery emphasizes, “Pro-

gram yourself, starting now, that if you get stabbed, you still have a lot of fight left in you,” adding later, “Going for a debilitating injury in the midst of being attacked by a person with a knife obviously requires considerable mental discipline, but you can start to ingrain it into your DNA through slow practice. Focus on achieving one injury to buy precious seconds to inflict the next injury—and the one after that followed by the one after that—until the threat is unconscious or dead. Slow deliberate practice will ingrain proper targeting. Speed will come with experience.”

Those skilled in the various physical fighting styles might voice objections to Montgomery’s illustrated sections on empty-hand defenses. That kind of criticism is inevitable when only words and pictures try to convey the dynamics of movement and there is neither time nor room to fully explain underlying principles and tactics. Frankly, this part of the book serves best to ignite the reader’s interest in training, not to teach specific techniques through printed word and pictures. Likewise, calling pepper spray Mace®, or suggesting that the home defense shotgun is effective without aiming, are little details that will sit poorly with readers coming from various training backgrounds. Adhering to the adage about not throwing out babies with bathwater, I’m not ready to discard the entire book over those details.

The people we want most to reach with the message of personal safety and responsibility often are not ready to stand up again society’s campaign of prejudice about guns, but these folks need to survive the daily dangers that may be present while they’re commuting to work, grocery shopping or undertaking other regular activities. They need the voices of people they feel understand how they live and think. Several decades ago, *Strong on Defense* filled that niche admirably, but for a while after it went out of print, copies became scarcer than hen’s teeth. Nowadays, its 1997 examples and scenarios come across a little dated, especially when presented to a loved one you just want to wake up to the dangers around them. That’s why I’m happy I stumbled across and read *Seconds to Live or Die*.



Editor's Notebook

by Gila Hayes

Because armed citizens are so alarmed about anti-gun legislation, Network members have been calling and emailing to ask what we are doing to stop firearms restrictions from becoming law and if enacted, to overturn them. Some questions have come from members

who joined within the past few months and may not have studied our outline of membership assistance as closely as we might like. When that becomes apparent in conversation or email, we are happy to spend time clarifying what the Network does and does not do. Recently, questions find me regularly reminding members that the Network's mission is exclusively focused on the legal defense of legitimate use of force in self defense by members.

In answer to requests that the Network involve itself in politics either in the member's own state or in Washington D.C., I have to explain that expanding into pro-gun lobbying would necessitate major reallocations of money away from member education and the Legal Defense Fund.

As necessary as it is, lobbying is not the Network's mission. Our mission is the education of members and defense of legitimate use of force in self defense by members. While my personal politickin' includes letter writing and donations to pro-gun voices over a diverse spectrum, as an organization, the Network's resources are strictly committed to the legal defense of individual members after self defense.

Due to our diverse membership – some members lean toward liberal beliefs and others embrace conservative politics – involving the Network in political activism would expose us to considerable pitfalls. As just one example, it is entirely possible that not all members are as comforted as I am by the past few years' appointments to the US Supreme Court, a positive factor that's foremost in my mind when I question the constitutionality of all the current anti-gun legislation. Last month, while doing some Internet reading about HR 127, I stumbled across commentary about *Caniglia v. Strom*, a Supreme Court case dealing with warrantless search and seizure of firearms.

While reading about the case, I gratefully thought that when the Court considers it later this month, the newer Justices Barrett, Gorsuch and Kavanaugh will be shoring up the conservative wing of the Court. I have to remember, though, that there are others who are unhappy with the composition of the USSC. I ponder those political issues because inside the Network—just as in life in general—we encountered angry differences of opinion during the last presidential election, and part of that un-

pleasantness was the fact that a president's most long lasting influence derives from Supreme Court appointments.

The 2020 election certainly reinforced that our Network membership's political leanings run the gamut from moderate liberals to no-compromise conservatives. Inevitably, in a family made up of more than 19,200 individuals, one member may find another's political leanings contrary to their own or even offensive. Although my family of origin is small, I have relatives who rabidly hated President Trump and rarely missed an opportunity to express their disgust. I would be surprised if you, dear reader, haven't experienced the same discord, so that doesn't make me special. Those kinds of differences are mirrored in our big Network family, too, but whether we're dealing with blood relatives or our big Network family, we all manage to get along and pull together for the common good, even if we inadvertently ruffle each other's feathers now and again.

That's why when members ask the Network to engage in lobbying and political activism, I shudder as I imagine the impossibility of finding and supporting one school of political thought that all members would find acceptable!

I inadvertently ruffled feathers with the February edition of this journal, as I learned from a member in Pennsylvania who expressed the following reaction to our recent journals:

"I read the Jan. and Feb. journals including the president's message and feature on Rallies, Riots and Protests. It is amazing that you managed to discuss your political views affirming your support for Trump and present an interview on 2020 protests (some riotous) but made ZERO mention of the violent, treasonous, terroristic insurrection on Jan. 6th. This is the behavior that people on the right exhibit all the time that shreds their credibility with 'the middle.'"

In contrast, a member in Michigan called Marc MacYoung's interview, *Rallies, Riots and Protests*, "One of the best, most complete 'how to' articles I have read in a long time."

He added, "I am 75 now, still in decent shape for my age, but over many years I have changed from being somewhat socially aggressive to a much calmer personality. Everything MacYoung discussed with you is useful information. I have three 'rules' that I use when out and about.

1. Nothing good happens after midnight.
2. Avoid dark alleys.
3. Always know where exits are.

"These rules have pretty much helped my wife and me have enjoyable outings. One thing I can add: when in a vehicle at

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stop light or stop sign always keep a car length between you and the vehicle in front. This gives you an escape option."

A member in Rhode Island found MacYoung's comments about evading attack while in cars evocative of his youth. He wrote, "Interesting article on evading mobs and going in reverse in cars.

"When I was 18 years old, I was driving down this dark desolate road and a car comes up which looks like it wants to pass so I pull on the shoulder and slow down. It was a hot summer night and my window was down. A guy jumps out the side door and punches me in the face through my window. I immediately put the car in reverse and backed up until I saw a side road, put it in drive and drove down that road, then entered a random driveway and immediately shut my lights off so if they were following, they wouldn't see my car or lights.

"I didn't grow up in a 'violent' part of NY, in fact it was mostly peaceful suburbs, but as a teen growing up on eastern Long Island you did have a tough crowd to deal with from time to time. As someone who was never violent, as myself and my friends were not, we learned evasion and to avoid detection by traveling at times lengthy distances (miles even) without using any established means of travel. I got into a few situations in my teens with local rivals (not gangs, just other teens) that involved having to make escapes through backyards or the random

patches of woods and forest. I became very good at situational awareness and evasion techniques, especially at night. Trying to escape situations or avoid them by following the roads or sidewalks was out of the question.

"I think a lot of people forget, even in situations where highways are becoming blocked by rioters and protesters, that the whole world is not roads and sidewalks. If you get stopped up on a highway or road and it looks like it has potential for danger, run off the road, run into the woods, behind stores and behind houses to get away. Don't run down the road or sidewalk—that's where everything is occurring."

Wasn't that an interesting variety of responses, all to the same interview? Members, hearing from you reminded me that when feathers get ruffled and emotions are running high, we need to focus on the things we share in common, which vastly outnumber the issues about which we disagree.

These messages from members emphasize what's most important: While we certainly don't all vote the same way, Network members are all intent on living more safely, on understanding our interaction with the criminal justice system if we use force in self defense, and in spite of political differences, we remain committed to making sure that no individual member suffers injustice at the hands of the criminal justice system after doing nothing more than defend himself, herself or loved ones.

About the Network's Online Journal

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

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

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

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

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

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