Armed Citizens' LEGAL DEFENSE NETWORK, INC.

Introducing Character Evidence

An Interview with James Fleming

Introduction: Court admissible evidence has taken center stage in many of this publication's Attorney Question columns. One question not addressed in print often comes up during quieter, personal inquiries by members and candidates for membership who wonder to what extent incidents from the past may affect the chances of being acquitted of murder or manslaughter charges if one who has lived a clean life in recent years has to use deadly force in self defense.

With Network Advisory Board James Fleming's 30-year career as a criminal defense attorney, it was natural to turn to him with questions about the lingering issue of past bad acts and the related question of admissibility of character evidence to suggest an armed citizen is guilty of a crime of violence. We switch now to our familiar Q & A format, and ask Fleming to address this complex topic.

eJournal: Some of today's best citizens have turned their lives around but have histories of past illegal violence. Is there a time line after which one's past isn't considered relevant to whether current acts constitute a violent crime or self defense?

Fleming: Gila, this is a very difficult question to answer accurately, because the rules vary so much from state to state, and in the Federal courts. Under the Federal Rules of Evidence, for example, a conviction that is over ten years old can only be used under certain limited circumstances, and an analysis must be done to determine whether the probative value of the evidence substantially outweighs its prejudicial effect.

This is also true in some states, such as my home state of Minnesota. In other jurisdictions that I have reviewed, such as California and Florida, this rule does not appear to apply. So, obviously, it is going to be the task of the defense attorney involved to know, not only the applicable rules of evidence, but to also have a very thorough understanding of the client's existing criminal history.

eJournal: Jim, in talking with you and researching this subject, you have also used the term "character evidence" and talked about its admissibility. Can you tell us what is and how (if at all!) character evidence is presented when a District Attorney or Prosecutor argues that self defense was assault, manslaughter or murder?

Fleming: Well, Gila, when we use it in the legal context, "character evidence" is a term found in the law of evidence to describe testimony or documents offered by a party for the purpose of proving that a person acted in a particular way on a particular occasion, based on the character or disposition of that person.

Character evidence is specifically addressed in Rule 404 of the Rules of Evidence, both in the Federal Rules of Evidence, and in the Rules of Evidence adopted by each of the states. The basic rule states that evidence of a person's character or of a character trait is not admissible in court to prove that on a particular occasion the person acted in accordance with the character or trait.

It is tricky because you have to distinguish "fixed" behavior from a "tendency" to behave in certain ways. Fixed patterns of behavior are called habits that fall under Rule 406 and are admissible. Character evidence under Rule 404 is evidence of a general tendency to behave in certain ways, which make up and distinguish one person from another. The definition includes both the aggregate of a person's qualities (a "good" person) and individual traits such as recklessness or violence.

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There are exceptions crafted into Rule 404 that apply in criminal cases for both the accused and the alleged victim, as well as for witnesses. For example, the accused is allowed to offer evidence of a pertinent trait of his or her own character. But, if the court allows it, the prosecutor is then allowed to offer evidence to rebut it.

That makes it dangerous for defendants because very few of us live perfect lives and rebuttal evidence used by the prosecutor may really have a negative impact on a jury. That is the biggest reason why its use by the accused is such a gamble for the defense attorney. Very few of us know our clients so intimately that we can know all of the little things they might have done in their past that a prosecutor might find out about and use, to the attorney's complete surprise.

Another example is that a defendant has a limited ability to use evidence of an alleged victim's pertinent trait. Those limitations relate to sex offense cases and are found in another Rule of Evidence, specifically Rule 412. If the victim evidence is admitted, the prosecutor again has the right to offer evidence to rebut it; and also (and this is important) to offer evidence of the defendant's same trait.

In a homicide case, which of course might include self-defense cases, if the accused argues that an alleged victim was the "first aggressor," the prosecutor is allowed to offer evidence of the alleged victim's trait of peacefulness to rebut that first aggressor evidence.

eJournal: This seems to cut both ways–both for and against defendants who acted in self defense. You briefed me on the conviction and successful appeal by Harold Fish, the AZ school teacher. Could we review some of what you shared to help explain why sometimes a reputation for violence or peacefulness may be admitted as evidence and not allowed other times? One issue addressed in Mr. Fish's appeal was the trial court's exclusion of his attacker's past violent reactions when people had trouble with his dogs, which was what happened the day he was killed. Since Mr. Fish had not previously met the man he killed, how would that history warrant his use of deadly force?

Fleming: This needs some background, so stick with me. At Fish's trial, the State filed a motion in limine (a trial motion made by either party to seek admission or exclusion of some type of evidence – they are common in trials, particularly criminal trials) seeking an order from the court to exclude evidence of the victim's character as to violence and the victim's prior acts of violence.

Fish's attorney argued that evidence of specific aggressive acts of the victim, especially when related to his dogs, was admissible under a number of theories under Rule 404(a), including to show the defendant's justifiable fear of the victim and that the victim was the first aggressor. He also argued that the prior act evidence was admissible under Rule 404(b) to show the victim's motive and intent in attacking the defendant and defendant's credibility.

Fish's attorney provided detailed affidavits from a number of witnesses that showed specific instances of violent confrontation by the victim similar to the conduct Fish claimed he encountered–that when confronted about his dog, the victim became irrationally aggressive and threatening, got a wild look in his eyes and began thrashing the air as if to attack the person he was relating to or physically pushing that person.

The trial court stated that evidence of specific acts of prior aggressive behavior to prove the victim's conduct on the day of the shooting, while relevant to self defense, was generally inadmissible because it had slight probative value compared to the risk of misuse by the jurors. Moreover, in homicide cases, such specific act evidence was only admissible if a defendant had been aware of such evidence prior to the alleged crime. The court then concluded that the specific act evidence was not relevant to the self-defense claim and on a practical basis could not have influenced Fish's mind because he was unaware of such acts prior to the shooting.

However, the court held that general reputation or opinion evidence as to the victim's character for violence was admissible even if not known by Fish prior to the shooting to establish whether the victim or Fish was the first aggressor. The court held that such general evidence would be admitted to help the jury decide issues about the victim's conduct prior to the shooting and to corroborate Fish's description of the events. The court also held that such general opinion testimony should be admitted under Rule 403.

eJournal: Nonetheless, Fish was convicted and the ruling in his appeal, I believe, had a big influence on current AZ case law.

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Fleming: On appeal, Fish's attorney argued that under Rule 402(a)(2), evidence of the victim's specific prior acts of violence and aggression, unknown to Fish at the time of the shooting, should have been admitted to show the victim was the probable first aggressor. The appellate court agreed, but limited this evidence to the victim's general reputation under Rule 405 because this was not an essential element of the defense of self defense.

When offered to show that the victim was the probable first aggressor, evidence of the victim's violent or aggressive character is offered to prove conduct in conformity with that character. Such evidence encourages the judge or jury to infer aggressive conduct by the victim in conformity with the victim's aggressive character. In turn, "the inference that a victim's conduct conformed to character traits for violence, aggression, or quarrelsomeness may make more probable the defendant's claims that the victim was the first aggressor," the appellate court stated.

So, since this evidence was offered to prove an objective fact (that the victim was the first aggressor), not Fish's subjective state of mind, whether the defendant knew of the victim's character is irrelevant.

This is important and it is something that many self-defense trainers do not seem to understand. Who gets to determine what the defender's subjective state of mind was at the time of the use of deadly force? THE JURY AND ONLY THE JURY - So experts coming in to testify that because of this training, or that training, the defendant would have or should have believed "X" is not going to be allowed because it invades the province of the jury, which is the language we commonly see in reported cases from all around the country.

eJournal: If what the attacker had done previously cannot influence the defender's state of mind, can we, as seems to be implied by the rulings in Fish's case, ask a jury to consider past violent actions as indications that the person shot did, indeed, attack first? How does this work?

Fleming: Fish attempted to argue that evidence of the victim's prior violent or aggressive acts should have been admitted to show the reasonableness of his belief that he was in imminent danger of death or serious injury. However, in Arizona, as well as the vast majority of other jurisdictions, courts have ruled that specific act evidence is not admissible to show a defendant's state of mind unless the defendant was aware of the victim's prior acts at the time of the altercation.

The appellate court ruled that the specific act evidence was relevant to corroborating Fish's version of the events leading up to the shooting, but only by balancing it against the possible prejudicial effect the evidence would have on the jury.

eJournal: Now, applying these rules to bad acts by the defendant, not the victim, I've often wondered how a prosecutor might show it is more likely than not that someone initiated a fight because in the past, he has been known to be a brawler. How does character evidence work if the defendant, the man or woman who acted in self defense, is the one with the history of past violence?

Fleming: Well, there are any number of cases in which these issues have come up. I think of one from Colorado that gives us the opportunity to see how the issues might be handled by the courts.

In 2009, the Colorado Supreme Court ruled in a case entitled *State v. Kaufman,* 202 P.3d 542 (Colo. 2009). Kaufman had been earlier convicted of first-degree murder, attempted second-degree murder, and a crime of violence. He was sentenced to incarceration for life without parole plus twenty years.

I think a look at some of the character evidence issues involved in that case and how they were handled will help answer your questions.

The charges stemmed from a fight in Denver back in May of 2003 between two groups of people: Kaufman, his girlfriend and another friend, and two males–Kettle and Walko, one of whom died of stab wounds to his liver and a puncture to his heart The other suffered stab wounds to his chest and hand.

Kaufman had pleaded not guilty, raising the affirmative defense of self defense. In his appeal, Kaufman raised a number of issues, including the trial court's admission of "other act," or "character evidence" together with Kaufman's ownership of brass knuckles, a machete, and eight knives his training in the use of bayonets and defense against the use of knives, training in martial arts, training in self-defense law, possession of reading

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materials on martial arts and the use of knives and his alleged involvement in two prior bar fights.

At trial, the prosecutor wanted to offer evidence that Kaufman was known by his friends to "always" carry a knife on his person, that he was "fluent in martial arts" (an odd choice of words), that he took classes in martial arts and had taken a knife class; and that he possessed numerous reading materials about martial arts and knives. The prosecution argued that such evidence was admissible as *res gestae*.

eJournal: Oh, boy, a new term. Meaning what?

Fleming: That is a term meaning the overall start-to-end sequence of the charged crime. The prosecutor argued that this evidence, that would otherwise be nothing more than character evidence, was part of the evidence of the crime. The prosecutor also argued that it was admissible under Rule of Evidence 404(b), but the notice they served on the defense did not list a specific purpose in support of CRE 404(b) admissibility, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. They just sort of threw it at the wall to see if it might stick.

Kaufman's attorney objected to the admission of evidence on these points, arguing, among other things, that the unfair prejudice would outweigh any minimal relevance and that this was merely an attempt to show actions in conformity with a claim of bad character.

The trial court ruled that the evidence was not admissible as *res gestae*. Some state courts in other jurisdictions might well allow this, however. It did admit evidence that Kaufman always carried a knife, finding that such evidence was logically relevant for the purpose of identifying Kaufman as the assailant who stabbed the victims.

eJournal: Wait just a minute! He did not deny stabbing the two men; I thought only his justification for doing that was in dispute.

Fleming: Kaufman conceded to stabbing Kettle and Walko; he presented a theory of self-defense, thus negating any challenge to identity. The evidence therefore could not have been independently relevant to the case for that purpose.

In addition, the court ruled that evidence that Kaufman was, as the prosecutor had oddly put it, "fluent in martial arts" was not relevant, and thus was inadmissible. Evidence of specific training in knife combat, however, would be allowed because it was "relevant on the issue of whether the assailant intentionally maneuvered the knife to inflict extraordinary and grievous injury to the victim." The court of appeals found no abuse of discretion in the trial court's ruling to admit evidence of knife training.

Now, at this point, I want to emphasize that it is precisely this type of reasoning by the court that makes me extremely leery of seeing evidence of self-defense training admitted during trial.

Everybody wants to be on that bandwagon, I hear it all the time. People get mad or disgusted at me when I suggest training is probably not going to be admitted for the purposes for which people want it admitted. The vast majority of them have never conducted a jury trial and had something like this explode in their faces.

The Colorado Supreme Court ruled that such evidence "was relevant to show Kaufman's familiarity with knives and ability to manipulate them," even though the evidence did not indicate that the victim had been stabbed in any unusual manner which was indicative of martial arts training. They reasoned that the prejudicial effect of the evidence did not outweigh its probative value because it was not presented in an inflammatory way, there was no indication that the defendant had ever used the skills to harm anyone so the evidence of Kaufman's training in knives was properly admitted.

Okay, so now substitute "guns" for "knives" and think about the implications of that. I've often heard, "I want my training records admitted into evidence! I want my shooting scores and IDPA scores and records all admitted into evidence!" If I am your trial attorney, I sure as heck don't and this is exactly why. It is important to understand that in a trial, when evidence comes in, everybody gets to use it, and for whatever purpose they can make of it!

eJournal: If you choose to discuss training, is every gun class you've taken open for scrutiny? At which point does it become ridiculous to suggest that something you may have mostly forgotten influenced what you did?

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Fleming: At trial, it was the defense that objected to testimony by Kaufman's self-defense instructor concerning self-defense law in Colorado and the means by which such information might have been communicated to Kaufman when he was a student in the self-defense class. The prosecution wanted to introduce such evidence to show Kaufman's state of mind and awareness of self-defense law.

The court found a significant risk to the integrity of the jury instructions if the instructor was permitted to testify as to the law on self defense. As a result, the court allowed the instructor solely to testify that self-defense law was part of the class, but excluded any testimony as to the substance of that information. The instructor's testimony was consistent with this ruling.

Then on cross-examination, Kaufman testified that during the self-defense class, he was instructed as to when the use of deadly force was appropriate and when it was permissible to use force to defend himself or others. However, Kaufman was forced to admit as a result of the thorough questioning by the prosecutor, that his memory was vague as to the specifics of the course material.

On review, the court of appeals stated, "We perceive no particular relevance in the fact that defendant took a self-defense class and learned the law of self defense." The Supreme Court ruled that evidence that Kaufman took a self-defense class and learned about the law of self defense was irrelevant to the case at hand.

Relevant evidence is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The court reasoned that because the evidence of self-defense legal training does not tend to make any of the material facts in this case more or less probable, it should not have been admitted.

The trial court did exclude evidence that Kaufman had in his possession general martial arts information and knife information. The court reasoned that such information could only be relevant if it specifically related to one of the permissible uses as outlined by CRE 404(b). For example, if Kaufman possessed information regarding the particular type of knife used in the altercation and its design features, such evidence might be relevant as to identity or intent.

eJournal: At the beginning, we talked about good guys who have bad acts in their background. It sounds like they hit Kaufman pretty hard about training, but I thought the bar fights would have been a bigger problem.

Fleming: Kaufman did challenge the admission of evidence regarding his alleged involvement in two prior bar fights. The Supreme Court ruled that the two alleged fights were entirely unrelated to the facts of this case. The evidence served no purpose but to paint Kaufman as an individual with a proclivity to fight, particularly in light of the substantial quantity of other act evidence already admitted. The court held that evidence of Kaufman's alleged involvement in two prior bar fights should not be admitted at re-trial.

To sum it all up, the Colorado Supreme Court held that some of the other act evidence was improperly admitted under CRE 404(b), prejudicing the defense by painting a picture of Kaufman as an evil individual and allowing the jury to draw impermissible inferences of action in conformity with that nature.

I think the most valuable lesson to take away from this is that the Rules of Evidence can create a vast difference between the way that the average citizen thinks a self-defense case is going to proceed at trial and the reality of the situation. Many other trial courts have confronted very similar situations and arguments. Some of them have ruled consistently with the decision of the Colorado court. Some of them have not.

eJournal: It's disturbing that long-past details of the armed citizens' life are up for examination when indicting or acquitting him or her, not just the actions that are the basis for the crime charged. However, you've explained that getting evidence admitted or excluded at a trial is significantly more complex.

Fleming: As we have been discussing there are a number of ways in which the details of an armed citizen's life might become admissible in a trial. We have talked about Evidence Rule 404(b), which allows evidence to be admitted for the purposes of proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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We also know that if the defendant seeks to establish his reputation in the community for good character, that the prosecutor has the right to rebut that, if he can. But, in addition to all of this, there are rules of impeachment that might apply as well.

Impeachment, or the process of challenging the credibility of a witness can be done in a number of ways. This might include proof of prior inconsistent statements made outside of court, evidence of prejudice or bias, bad character, or a prior criminal conviction.

So, as you can easily imagine, details of a defendant's prior life may show up in the hands of a prosecutor who is willing to use them in the event that the defendant elects to give up his constitutional right to remain silent during the trial and testify in his/her own behalf.

eJournal: How might that play out?

Fleming: Imagine that "Tom" has used deadly force in self defense. Now, Tom wants to get up on the stand and tell the good jurors what a good person he is, how much self-defense training he has had, and how he had to shoot because he was afraid for his life. The problem is, back when Tom was in high school, he got caught having sex with his girlfriend after a football game. And Tom got charged with statutory rape, or criminal sexual conduct as it is often known these days. The prosecutor is going to find out about that during a routine records check and so you know he is just waiting for Tom to take the stand.

"Wait a minute!" you say, "He was a juvenile! His juvenile record is sealed, that can't be brought up!" Well, yes it can and is routinely, literally every day in courtrooms across the country. And on the jury hearing Tom's case, we might have the father of a girl who wound up pregnant in high school because of a guy like Tom. Or a girl who gave up her virginity to a guy like Tom, who then promptly dumped her and told every one at school about her, and she carried the embarrassment of that with her every day for years. Or a mother who had to raise a child out of wedlock because of a guy just like Tom.

Now they have the power to make somebody pay and Tom is a really convenient target. The problem is, if they are out there hiding on our jury, we are not going to know about any of these things until it is too late. Are you scared yet? If not, you ought to be. We trial attorneys are scared every day. These are some of the reasons why.

eJournal: Playing the devil's advocate, in light of the rules of evidence, why should we be cautious about what we post on social media or comments made around the water cooler?

Fleming: The most practical reason is that these rules are subject to interpretation, applied in many different fact situations, and therefore there is no hard and fast rule as to their application. One judge in a given situation might rule very differently than another judge in another case. People should avoid risks of that sort at all costs.

And, for another very good reason, while at first glance something posted on social media may seem both harmless and inadmissible, if the defense wants to introduce evidence of the defendant's reputation for peacefulness, the prosecutor is allowed to introduce any evidence that he/she can find to rebut that. That might be something that the defendant had previously posted on social media.

But people might want to argue, "Well, then we just won't try to introduce evidence of my reputation for peacefulness in any trials I might be involved in." But your defense attorney, in a given situation in the future that you cannot foresee, might very much want to introduce such evidence, and your reckless comments on social media will tie his hands, making it impossible for him to do that without jeopardizing your defense case. That is really not a good idea.

eJournal: In the months leading up to trial, if disparaging "facts" are aired/printed in news and social media, what recourse, if any, is available to the attorney representing the client in a self-defense case?

Fleming: I have an iron clad practice rule drummed into my head by my mentors, years ago from which I do not deviate. My mentors were very seasoned trial attorneys with decades of experience. I do not try my cases in the press–ever. Of course, other attorneys can and often do engage in that battle with the news media if they choose to do so. I believe it to be a very, very bad idea.

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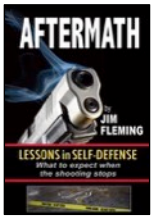
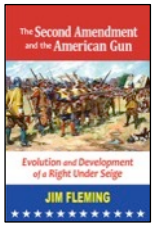
In a recent case of mine, the subject of my client's shooting of a burglar was thrown about in the news, and on news blog sites and social media sites for months, with literally hundreds of posts, both pro and con. I was repeatedly contacted by reporters for "comments." I refused, politely, but firmly.

Luckily, the client and his family were very intelligent, highly-disciplined people, and they stayed out of the mess, and took the high ground. Often times people don't listen to their attorneys, or the attorneys fall to the temptation to join in. Sometimes they simply want the notoriety for marketing purposes. But, once you start down that slippery slope, you cannot climb back out. So, in my opinion, the best recourse is to stay out of it, and try your case in the courtroom, where it counts.

eJournal: Jim, once again, as is often true for when you and I visit, I'm sobered by the unintended consequences of raising a self-justifying point during a trial. You are often the warning voice, the guy waving the red flag, and that is not always a popular role. Thank you for talking about all these possibilities with us during this interview.

Attorney and Network Advisory Board member Jim Fleming is an attorney of more than 30 years trial and appellate court experience in MN, NE and has argued both civil and criminal appellate cases in the State appellate courts as well as before the Eighth Circuit Court of Appeals. He is the author of several books: *Aftermath: Lessons in Self-Defense* and *The Second Amendment and the American Gun: Evolution and Development of a Right Under Siege*. Jim and his wife Lynne Fleming operate the firearms training school Mid-Minnesota Self-Defense, Inc. where Jim is the lead instructor. Learn more about Fleming and his law practice website at http://www.jimfleminglaw.com/about-1.html.





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President's Message

by Marty Hayes, J.D.

NRA Board of Directors

The ballots for the National Rifle Association Board of Directors election have arrived in the NRA membership magazines. I will be voting for the following candidates for election to the Board of Directors.

Adam Kraut, Esq.
Timothy Knight, currently on the NRA Board
Julie Golob
Il Ling New
Wayne Anthony Ross, Network member, currently on the NRA board
Owen "Buz" Mills, currently on the NRA Board

This is my personal opinion; it is not an official endorsement from the Network. But, since this is an opinion column, knowing whom I am voting for to set policy for the NRA might be of some interest to our members and guest readers.

When you get your ballot, remember that you do not have to vote for 25 nominees. In fact, doing so lessens the impact of voting for people you really want to serve. By voting for 25 nominees, you'd increase the vote count of 20 or so folks about whom you really don't know much and might give them enough votes to defeat the people you really want to serve on the board.

First, of course, learn what you can about the choices. You can find out about the candidates I listed above by Googling their names and "NRA Board" or searching on Facebook for the same. There is a lot of information out there, so if you are an NRA voting member, I encourage

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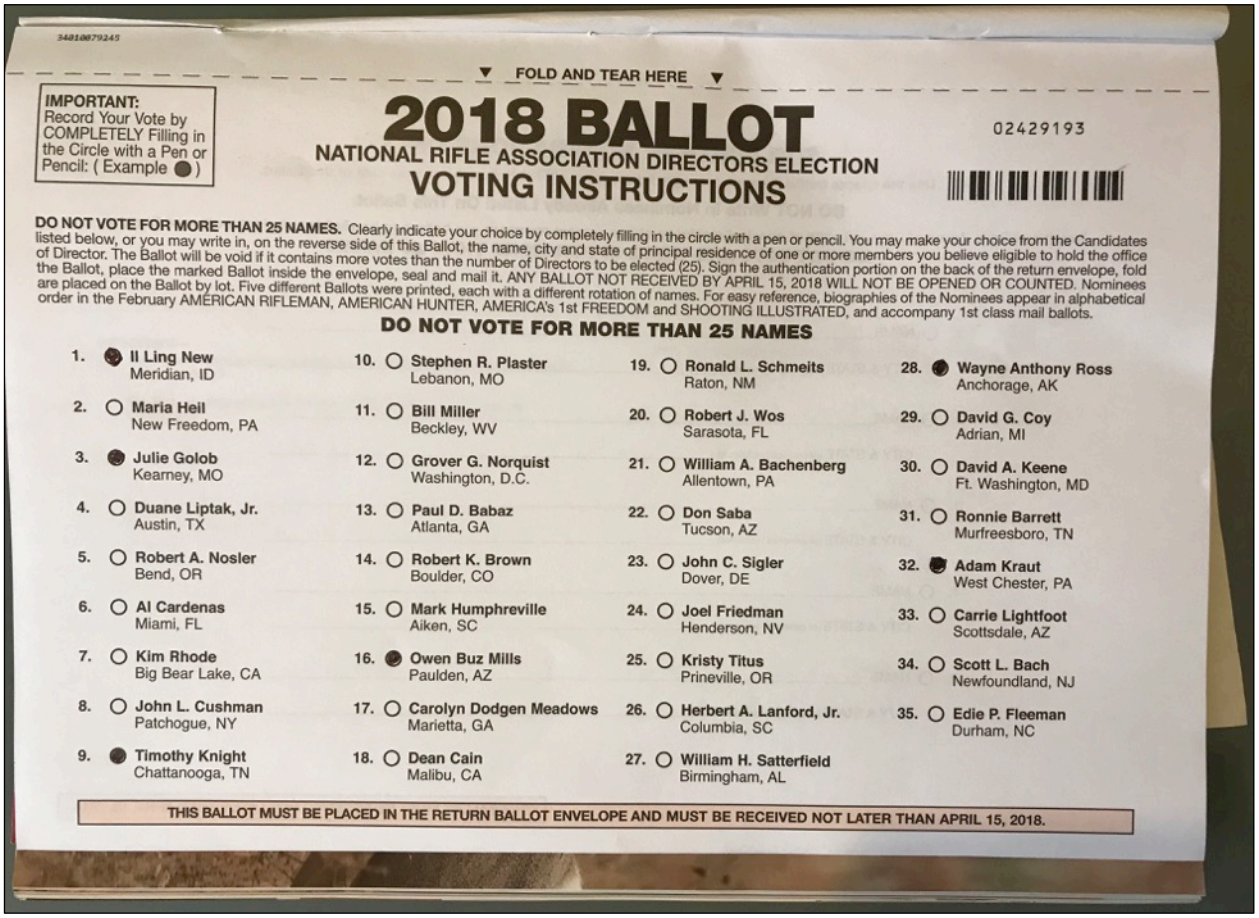

FOLD AND TEAR HERE

IMPORTANT: Record Your Vote by COMPLETELY Filling in the Circle with a Pen or Pencil: (Example ●)

2018 BALLOT
NATIONAL RIFLE ASSOCIATION DIRECTORS ELECTION
VOTING INSTRUCTIONS

02429193

DO NOT VOTE FOR MORE THAN 25 NAMES. Clearly indicate your choice by completely filling in the circle with a pen or pencil. You may make your choice from the Candidates listed below, or you may write in, on the reverse side of this Ballot, the name, city and state of principal residence of one or more members you believe eligible to hold the office of Director. The Ballot will be void if it contains more votes than the number of Directors to be elected (25). Sign the authentication portion on the back of the return envelope, fold the Ballot, place the marked Ballot inside the envelope, seal and mail it. ANY BALLOT NOT RECEIVED BY APRIL 15, 2018 WILL NOT BE OPENED OR COUNTED. Nominees are placed on the Ballot by lot. Five different Ballots were printed, each with a different rotation of names. For easy reference, biographies of the Nominees appear in alphabetical order in the February AMERICAN RIFLEMAN, AMERICAN HUNTER, AMERICA's 1st FREEDOM and SHOOTING ILLUSTRATED, and accompany 1st class mail ballots.

DO NOT VOTE FOR MORE THAN 25 NAMES

1. ● **Il Ling New** Meridian, ID	10. ○ **Stephen R. Plaster** Lebanon, MO	19. ○ **Ronald L. Schmeits** Raton, NM	28. ● **Wayne Anthony Ross** Anchorage, AK
2. ○ **Maria Heil** New Freedom, PA	11. ○ **Bill Miller** Beckley, WV	20. ○ **Robert J. Wos** Sarasota, FL	29. ○ **David G. Coy** Adrian, MI
3. ● **Julie Golob** Kearney, MO	12. ○ **Grover G. Norquist** Washington, D.C.	21. ○ **William A. Bachenberg** Allentown, PA	30. ○ **David A. Keene** Ft. Washington, MD
4. ○ **Duane Liptak, Jr.** Austin, TX	13. ○ **Paul D. Babaz** Atlanta, GA	22. ○ **Don Saba** Tucson, AZ	31. ○ **Ronnie Barrett** Murfreesboro, TN
5. ○ **Robert A. Nosler** Bend, OR	14. ○ **Robert K. Brown** Boulder, CO	23. ○ **John C. Sigler** Dover, DE	32. ● **Adam Kraut** West Chester, PA
6. ○ **Al Cardenas** Miami, FL	15. ○ **Mark Humphreville** Aiken, SC	24. ○ **Joel Friedman** Henderson, NV	33. ○ **Carrie Lightfoot** Scottsdale, AZ
7. ○ **Kim Rhode** Big Bear Lake, CA	16. ● **Owen Buz Mills** Paulden, AZ	25. ○ **Kristy Titus** Prineville, OR	34. ○ **Scott L. Bach** Newfoundland, NJ
8. ○ **John L. Cushman** Patchogue, NY	17. ○ **Carolyn Dodgen Meadows** Marietta, GA	26. ○ **Herbert A. Lanford, Jr.** Columbia, SC	35. ○ **Edie P. Fleeman** Durham, NC
9. ● **Timothy Knight** Chattanooga, TN	18. ○ **Dean Cain** Malibu, CA	27. ○ **William H. Satterfield** Birmingham, AL	

THIS BALLOT MUST BE PLACED IN THE RETURN BALLOT ENVELOPE AND MUST BE RECEIVED NOT LATER THAN APRIL 15, 2018.

you to research the candidates, as I have done and continue to do. As I learn more, I will likely be voting for a few more in addition to those I mentioned.

Speaking of the NRA

The Network is planning to meet current and future Network members in our booth at the NRA Annual Meeting and Exhibits, to be held in Dallas May 4 to 6, 2018. Several of our Advisory Board members will be there too and we are planning an informal meet and greet on Saturday afternoon at the booth. With hundreds of our members also in attendance, this provides a great chance to get our members and Advisory Board together. More on this in a later *eJournal*.

Upcoming Fundraising Gun Auctions

In November, a Network member who wishes to remain anonymous called me and asked if he could donate some guns for us to auction off to build up the Legal Defense Fund. We were touched by his kind generosity and for thinking of us. He said he doesn't use these guns anymore and wanted to see something good become of them. Starting up next month, we'll announce the auction details for the first one, a slick little Colt .380 with a small compensator. It's perfect for the person who is recoil sensitive. Its sale has the potential to benefit any Network member who may need help paying legal expenses after self defense at some point in the future.

I'm sorry, it will be a short message this month, as I prepare to head to Austin, TX to teach a Deadly Force Instructor course with Massad Ayoob and I am tied up in two expert witness cases at the moment, too. I hope this is enough of my witty riposte. Enjoy the rest of this *eJournal!*

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Attorney Question of the Month

This discussion with our Network affiliated attorneys is based on a hypothetical scenario: An armed citizen is arrested after use of force in self defense and his or her state-issued license to carry a concealed handgun is revoked. We asked our Affiliated Attorneys to comment on the following:

1) If charges are dropped before trial, in your state what is involved in getting the citizen's license to carry reinstated?

2) How (if at all) does that differ from pursuing carry license reinstatement after defending self defense in a trial and being found "Not Guilty?"

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First – we assume for this question that an appeal of the revocation was requested timely. If it was not, they need to reapply because the revoked permit is closed out after the permit revocation appeal period closes.

Dismissal – In Connecticut there are two ways a criminal case terminates without a trial, a Nolle Prosequi or a Dismissal. A dismissal is a formal termination of the case while the Nolle Prosequi is just the state declining to pursue it further.

A dismissal erases the records after 20 days, so I wait 21 days, then ask for the reinstatement. As the records of whatever the charges were are now no longer accessible by law to anyone (even the police) the revocation is based on nothing. Permit restored because the grounds for the revocation are no longer in existence. Poof!

Nolle prosequi – the records are kept available for 13 months, so, in most cases, because I have a good professional relationship with the firearms unit, I make phone calls, drink coffee and spend time on hold, then ask very nicely to have the permit restored because the detectives can see what happened that led to the revocation.

They usually call me back in a few days after reviewing the records (2 detectives – they are swamped, so I wait and do not piss them off) telling me the permit is restored. Then they ask me to confirm the mailing address of the permit holder. Then I ask the client to confirm their mailing address, wait nine days for the client to respond to multiple emails and phone calls (Yeah, who would respond quickly when the lawyer getting their permit reinstated is trying to contact them…I know, right?) then they get their permit in the mail.

In the rare event that it is not easy, I find out what the detectives are looking for in terms of making them comfortable to reinstate the permit, find out if the client is willing to disclose that information, then if so, provide it. That usually gets the job done.

In the rare event the State Police say no, I either request a hearing or, if it was very bad, have the client wait until the records are erased by statute, then have them apply again. If asked if they were ever arrested, they can answer "no" pursuant to our erasure statute. If asked if they have ever had a permit revoked or suspended, I would have them answer yes, then say "records unavailable." If they are rejected, request a hearing.

After a not guilty – same as a dismissal. Wait 21 days, call firearms unit. Get permit back. Drink coffee.

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Maryland's permits to carry are administered by the licensing division of the Maryland State Police. Permits are either valid or revoked–there is no middle ground such as a suspension. However, they are not automatically revoked in a use of force incident.

Maryland law specifies the reasons for which an issued permit can be revoked. There are only two: it can be revoked if you are caught carrying a handgun and do not have your permit in your possession or it can be revoked if you no longer meet the qualifications for a permit.

Of relevance here is that in order to qualify for a permit you must not exhibit "a propensity for violence or instability that may reasonably render the person's

[Continued next page…]

possession of a handgun a danger to the person or to another." (Public Safety 5-306(a)(6)). These are the grounds under which the state police would seek to revoke your permit in a use of force incident. This determination would be made by the state police and usually without the permit holders input or sometimes even knowledge.

If the decision is made to revoke, then the state police has to notify the permit holder in writing and state the reasons the permit was revoked. A person whose permit is revoked has the right to appeal the revocation to the Handgun Permit Review Board. Upon such an appeal they would have the right to have a hearing and be represented by a lawyer. At the hearing you can cross examine the state police's witnesses, and present your own evidence and witnesses.

At the conclusion, the board, which consists of five members appointed by the governor, can sustain or overturn the state police's decision. Both sides then have the right to appeal a decision of the board to the circuit court in the county in which the permittee resides. This whole process can be quite lengthy and the law does not specify what happens to your permit during this process.

Once your permit is revoked, it is gone. You would have to go through the whole application process again whether or not you were acquitted of the underlying charges. It is possible you still could be found to have a "propensity for violence or instability" since criminal charges are judged using the beyond a reasonable doubt standard and administrative actions are determined by the lesser preponderance of the evidence standard.

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If charges are dropped before trial, in your state what is involved in getting the citizen's license to carry reinstated?

It is a fairly simple process in Florida if the license was suspended, not revoked, and has not expired. All that is required is a certified copy of the disposition showing that the state has nolle prossed the charges. Most clients get their license back in a week to ten days.

How (if at all) does that differ from pursuing carry license reinstatement after defending self defense in a trial and being found "Not Guilty?"

The procedure after an acquittal is the same.

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In California, it is typically an investigatory agency such as the sheriff or the police who are on the arrest and trial. Even though the CCW may be approved by the local constabulary, it is the attorney general's office who determines the revocation and reinstatement process. That office is not sympathetic to gun owner's rights. While either scenario should ultimately result in a restoration of rights with time and patience, you have no friends in our capitol. You may anticipate a frustrating process.

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We have not had that problem in my area. Getting the gun back is a perennial problem. I sue under 42 USC Section 1983; we get the gun, damages, punitive damages and attorney fees.

The license is a right under statute. I could go to our small claims court and get an order to return it. In other places a motion in mandamus (to require that a legal responsibility be done). No money.

I don't see any difference in going to a "not guilty" verdict.

_____

A big "Thank You!" to our affiliated attorneys for their contributions to this interesting and educational discussion! Please return next month when we have a new Question of the Month for discussion.

News from Our Affiliates

by Josh Amos

Well, folks, 2018 is off and running. It looks like this year will be better than ever for all of the members and affiliates who make up the Armed Citizens' Legal Defense Network.

Affiliate Coupons

This past year we have really been pushing our armed citizens' affiliate coupons out to all of our affiliated instructors. The coupons give new members a little discount on their first-year dues and work hand in glove with our Foundation's booklet *What Every Gun Owner Needs to Know About Self Defense Law,* to bring trained armed citizens into the Network. Since each coupon is individually coded, so they also help us identify the affiliates who are working extra hard to promote the Network. Some affiliates operate in sparsely populated regions and I find it very satisfying to see even our smaller-volume affiliates getting recognized by new members who use the coupon when they join.

One of my coupon success stories gives recognition to Scott Giesick from Practical Shooting Instruction. Scott trains in Western Montana, which doesn't have a large population to draw from as well as some pretty harsh winter seasons when folks are less likely to come out to a gun class, but Scott has been solid in passing out coupons, our booklets and information about the Network to his students. The results have been great! If you are in the Missoula, MT area and are looking to do some quality training – from beginner to advanced, defensive or competition, pistol or long gun, contact Scott Giesick and Practical Shooting Instruction: https://www.practicalshootinginstruction.training

Our coupon program has been active for several years. If an affiliate wants a coupon to share with students, or needs us to reissue your coupon, just call me at 360-978-5200 or drop me a line by email at josh@armedcitizensnetwork.org.

The Polite Society Podcast

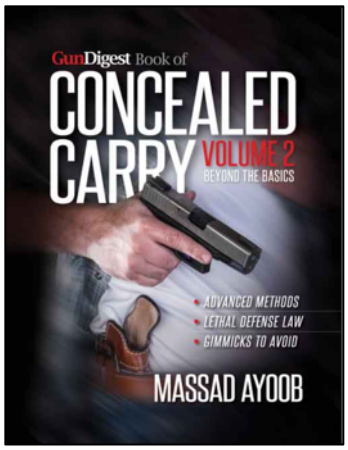
I am proud to have Paul Lathrop as a friend, as is true for all of us here at the Network. In 2012, Paul started a podcast called *The Polite Society Podcast* where he addresses guns, politics, training, women and guns, guest speakers, and a myriad of other topics related to the Second Amendment and the topic of self defense. If you haven't yet run across the Polite Society Podcast, you are in for a treat. Paul has banked a large archive of podcasts that make perfect listening material for long drives and long hours spent reloading or cleaning guns.

Please check out *The Polite Society Podcast* here http://politicsandguns.com and on Facebook at https://www.facebook.com/PoliticsAndGunsPodcast/?ref=br_tf

Now for a bonus that I am happy to share with Paul Lathrop's permission, knowing that some of our newer members came recently to the armed citizen family, before we talked about Paul's story during the fall of 2016. Paul makes his living as a long haul trucker, and in early 2016 he fell prey to a bizarre set of circumstances. He was falsely charged and jailed over an alleged gun incident. Ultimately, Paul's story has a happy ending, but the story is harrowing. Give a listen here http://www.handgunworld.com/episode-381-falsely-charged-paul-lathrop-speaks-publicly-for-the-first-time/.

Paul has since landed squarely on his feet and overcame his ordeal. He recommends the Network to his listeners in nearly every podcast. We appreciate his recommendations! If you are an affiliate and you are out doing great things, drop me an email. I would love to showcase your efforts in one of these columns.

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



Book Review

Concealed Carry Vol. 2

By Massad Ayoob 8x10 soft-bound, 255 pages, B&W illustrated $29.99 at https://www.gundigeststore.com/product/gun-digest-book-concealed-carry-volume-ii/

Reviewed by Gila Hayes

Five years ago, we eagerly reviewed Massad Ayoob's first volume of the *Gun Digest Book of Concealed Carry* in this electronic journal. It taught us as much about "why" we carry concealed handguns as "how"—different ways to do it, to name only a few high points, and we gave it top recommendations. Of course, it contained plenty of instruction about guns, various calibers, different types of holsters, and a great variety of related topics. Who but Massad Ayoob, 60-some years into his experience carrying guns for personal defense, could find more to update, highlight and explain?

Well, as it turns out, in addition to more options and variations on holster and carry methods, experiences gathered by Ayoob and those in his circle, there is more than enough to fill a second, equally interesting 250 page 8x10 heavily illustrated edition. By way of introduction to *Concealed Carry Volume 2,* Ayoob urges his readers to dig in and learn from the experiences of others, to avoid having to painfully repeat the lessons! Good advice!

In the first chapter the reader is treated to a review of carry optics, as quantified by Karl Rehn, including his opinion that as a sighting aid, the green laser is under-rated. Pros and cons of carrying pistols in the appendix position features Network President Marty Hayes counter-balanced by AIWB proponent and holster designer Spencer Keepers. Ayoob further discusses both equipment innovations and physical procedures to avoid accidentally discharging a pistol during holstering.

The next chapter goes back to basics, illustrating the draw stroke from strong side belt holsters, shoulder holsters, ankle holsters and cross-draw holsters, as well as what to do if blocked while trying to draw. Additional topics include drawing while seated in a car, using a pocket holster, and refinements to presenting the gun from the holster to target. Refinements and advanced knowledge are the themes in *Concealed Carry Volume 2,* as this segment amply illustrates.

Pros and cons of hip holsters, more on appendix carry, inside the waistband and outside holsters, all are enumerated. Ayoob analyzes the time required to accomplish the various steps of drawing, then observes that the most time-intensive element—and the one most subject to fumbles—entails getting the gun out of the holster. "Weaselcraft" practitioners surreptitiously get a shooting grip on the holstered gun while keeping it out of sight. The result is a draw stroke that takes less than half the time ordinarily needed to draw and fire, he accounts. He gives pocket carry, ankle holsters and shoulder holsters similar study and commentary.

The chapter, *Hardware to Avoid,* explains why single action revolvers aren't optimum for self defense, and outlines reasons that novelty guns aren't the best choice, either. Ayoob comments on minimum cartridge capacity and offers a long discussion of light trigger pulls. He debunks popular myths including suggestions that no one but you will know your gun's trigger is dangerously light, that a justifiable shooting won't lead to a detailed investigation and inspection of the weapon used, that "there has never been a conviction resulting from the hair trigger allegation," that light trigger pulls aren't a problem if you keep your finger off the trigger until you need to shoot, or that justifying a light trigger pull by claiming it let you shoot more accurately so was safer for bystanders will pacify the trier of fact. This he wraps up with a discussion of acceptable trigger pull weight ranges. Likewise, frivolous or novelty gun décor like skull or zombie artwork and bloodthirsty engravings all provide "red herrings" with which an attorney can distract a jury from the justification of self defense, Ayoob stresses.

Under the title of *CCW Social Issues,* Ayoob addresses the contentious issue of open carry. He even-handedly comments that he does not oppose open carry, explaining, "I would like to see open carry made legal nation wide without specific license, for any adult with a clean criminal record who has not been adjudicated

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mentally incompetent." Even a short waiting period to get a carry license is too long when being stalked or otherwise threatened, he explains.

Ayoob advocates legal open carry for practical reasons, not for political statements, noting, "I've never met an anti gunner who became pro-gun after seeing someone with a firearm where they weren't accustomed to seeing one. The idea that flaunting guns brings converts to the 2A cause has never been substantiated, and probably never will be." Many oppose open carry and Ayoob addresses these arguments, too. He cites reports of guns taken forcibly from open carry practitioners, and notes that hatred has resulted in 9-1-1 calls to report a mass murderer about to start killing people when in reality, the cause of the fear was an unconcealed firearm.

Other pitfalls for armed citizens that arise in social situations include alcohol use. Ayoob notes that each state has various stands on what constitutes intoxication. Know the law, he urges, giving an interesting study of Texas law as an example. Other "social" topics includes carrying at home, about which he comments that studying reports documenting home invasions underscores that quickly-executed break ins are best stopped by a gun carried on-body and he highlights carry methods to help keep a gun with you while at home.

Much of *Concealed Carry Volume 2* focuses on myth busting, including a chapter that asks whether center of mass really is the best aiming point, whether it is better to land the hit first or to hit where most likely to incapacitate, the need to carry enough ammunition, why the caliber debates are so misleading, why just having a gun is not enough, the rationale for carrying extra ammunition on your person, aimed vs. point shooting, and more. He does a great job of showing why popular "sound bite" and myths are overly simplistic. For example, discussing aimed fire v. point shooting, he opines, "As with so many questions of gunfight survival, it is not a question of this or that; it is a mandate for this AND that."

Caliber and ammunition performance earns its own chapter, with lots of history. Ayoob notes, "The same experts who argue that medium calibers equal larger calibers (particularly at similar velocities) tend to also say that 'energy' is meaningless in the wound ballistic context…yet we are discussing how to deliver a powerful blow that disrupts an opponent's ability to harm, and 'powerful impacts' and 'physics' cannot be entirely separated…'energy' by itself does not determine the outcome of a gunfight, but when rating the power of a given cartridge to cause fight stopping damage, it turns out to be one good way to keep score," he explains, having quoted a wealthy man's quip that money wasn't everything but was a good way to keep score. Other issues include controllability, and the side benefits of speed and accuracy, all of which Ayoob discusses in detail.

One of Ayoob's great talents is teaching the history of our art. Through these stories, the reader learns how the world of the gun reached certain conclusions and why. For example, discussing ammunition effectiveness, he draws on studies by such diverse experts as the FBI's Patrick Urey, to Jack O'Connor and Elmer Keith. From the wisdom of Keith and O'Connor, Ayoob summarizes, "The mechanism of wounding and destroying tissue takes second place to shot placement; not how the bullet damages tissue, but what tissue is rendered inoperable."

Concealed Carry Volume 2 epitomizes Ayoob's instructional style. In early chapters, he mentions a principle or pro-tip, then a later chapter will reiterate and expand upon the idea. It works well: the idea is planted early, then later details build upon other discussions to cement the lesson. Avid students will find segments of the Volume 2 that they have read elsewhere. Consider it review, and hope you never have to actually "take the test," although if called on to use a gun in self defense, I doubt anyone will ever feel over-prepared!

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

Editor's Notebook

Everything but the Kitchen Sink

by Gila Hayes

If you were buying a gun (something most of us have done multiple times, so this is a shared experience), would you go for the Old Reliable Basic Blaster that has been serving serious gun buyers for ten years, with a price tag of $525? It is just a plain-jane, rock-solid pistol without many frills. Would you instead fork out $800 for a sleek, brightly chromed Herferdorfer Mark II model that offered several color schemes and different patterns and artwork on the grip panels from which to choose?

Before you decide, consider the high-capacity "Herf" Mark III that comes with even more features and accessories, including interchangeable optics, a detachable battery-powered light/strobe/laser combo, and a custom finish on the slide that includes an engraving of your choice of a patriotic or inspiring message. All this, for just 200 bucks more.

But wait, there's more: don't fail to look at the flagship Herferdorfer Mark IV, the top of the line. It can be yours if you'll just plunk down another pair of Franklins (now you are up to $1,400). The ultimate Mark IV includes an under-the muzzle mini camera that activates and records when you draw the Mark IV from its custom holster. For only a little more money, it connects to your smartphone to record and store the whole incident from muzzle view point. My, oh, my.

At the gun counter stand Joe, Mary and Pete, three potential crime victims. Perhaps each has comforted a grief-stricken neighbor who lost a loved one to violent crime, or sat up nights with a terrified family member after a vicious home invasion. The threat and the danger is very real to Joe, Mary and Pete, and they have taken steps toward being more capable of preserving innocent life. Now, they need to make one more choice. Which one will buy the Old Reliable Basic Blaster? To whom will the Herferdorfer's bright chrome finish appeal? Which one will plop down $1,400 for the iPhone compatible Bluetooth muzzle camera?

Impulse buying and fear marketing is alive and well in the firearms industry (Do you doubt me? Just ask one of the thousands who flocked to Las Vegas last week for the Shooting, Hunting and Outdoor Trade Show). This kind of marketing is also alive and well in the self-defense post-incident support plan field.

When Network Founder Marty Hayes first envisioned a membership organization to assist with legal expenses after self defense, his greatest concern was how many good armed citizens could not afford solid legal representation in the critical, early days after self defense and on through trial. Before we started the Network, options were limited to traditional insurance to reimburse you if you could afford your own legal team to get to a Not Guilty verdict, or prepaid legal services plans that would assign an attorney, but did not include additional and often expensive case needs like expert witnesses and private investigators. He knew that armed citizens needed another choice.

Bringing this vision into reality, we introduced the Armed Citizens' Legal Defense Network, Inc. in 2008. Look-alikes soon began springing up. Like the hypothetical Herferdorfer Gun Company, competitors were quick to pile on features to distract from the Network's up-front funding to assure a vigorous legal team to defend our members' use of force. The many features tossed into the marketplace included crime scene clean up, paid days in court, psychological counseling, gun replacement, and other eye-catching enticements.

Almost immediately, competitors also began offering various levels of cost with subsequent limits to post-incident support. The new offers sold tiers starting at, for example, $125 for a "Basic" that funded up to $50,000 criminal defense expenses, $275 for "Better" that offered $100,000 for criminal defense and $100,000 for civil law suit defense plus $100,000 civil judgment insurance, and $400 for the "Best" support with $200,000 for criminal defense, $200,000 for civil law suit defense and $250,000 insurance coverage against losing a civil lawsuit. Of course, these tiers also included different enticements, too.

Now, Joe, Mary and Pete sit at their desks trying to make sense of all the options sold by post-incident support programs. Pete, who is a truck driver with a passel of small children at home being raised by a wife who has her hands full caring for their kids, can only

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afford a $125 "Basic" from one of our competitors, but realistically, in order to get to a not guilty verdict, he will actually need upwards of $200,000 criminal defense assistance. Pete can't afford the competitor's top tier plan with all the frills and options and still pay for his kids' school lunches. He needs a tightly focused, reliable plan that will fund his greatest legal defense needs without wasting precious money on lesser details.

Talking to Real People

Joe, Mary and Pete may be imaginary, but the questions they have about post-incident support are not. Last week, a caller said he would join the Network if membership included a magazine sent to him by mail; the previous week, a caller stressed that she was not interested unless we provided crime scene clean up and another wanted paid days in court as part of his post-incident support. Then, just a couple of days later, I spent quite a lot of time clarifying that insurance to cover a civil judgment assessing damages is not part of our membership benefits package, because we don't sell insurance. Instead, our membership benefits provide up to one-half of the balance of the Legal Defense Fund for the legal expenses of defending self defense use of force and assistance with bail.

We are not reselling insurance policies, and that is a really good thing, because decisions about serving our members are not governed by the whims of an insurance company. There's no insurance executive who may decide to cancel coverage and notify you that your policy won't be renewed; there's no underwriter in a high-rent office in a big city to abruptly raise your premiums by 25%, and then won't take your call to explain why.

By comparison, the Network is a group of armed citizens looking out for other armed citizens. We pool our strength to protect individual members who are singled out for prosecution or lawsuit after righteously defending themselves against criminal attack. In ten years since introducing the Network, fifteen members have needed and received that support, and still, the Legal Defense Fund blossomed from zero on day one to $1,245,000.

While we take satisfaction in welcoming each new member who joins our Network and stands with us, we don't focus our efforts entirely on membership growth or make "being the biggest, baddest company" in the field our top priority. Our top priority is building membership with like-minded armed citizens who share our values and who know that biggest isn't always best and that sometimes Old Reliable is the choice that will see you through.

To each member of the Network, thank you for joining your strength with ours, thank you for sharing our vision. And to our staunch friend and Advisory Board member John Farnam who coined the funny gun model name Herferdorfer many, many years ago, thank you for teaching us to laugh at the silly things that happen in our industry. If we couldn't laugh now and then, it would just be too much.

[End of February 2018 eJournal.
Please return for our March 2018 edition.]

About the Network's Online Journal

The ***eJournal*** of the Armed Citizens' Legal Defense Network, Inc. is published monthly on the Network's website at http://www.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:
Marty Hayes, President
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Gila Hayes, Operations Manager

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 360-978-5200.

Armed Citizens' LEGAL DEFENSE NETWORK, INC.