

# Value and Risks of Self-Defense Incident Video

## An Interview with Attorney Penny Dean

Interview by Gila Hayes

*Cell phones, video, social media, YouTube and amateur video aired regularly on TV news casts all contribute to familiarity with individual use of videography, sometimes to the extent that we forget to ask if video of a critical incident is legal, advisable, or even the response of a reasonable person believing him- or herself in danger of physical attack or death. The prevalent belief is that because "everyone else video records anything they want, doing it is no big deal."*

*New Hampshire attorney Penny Dean is a proponent of video with audio used to create a record of events but warns that its use in defending against criminal charges may not be a foregone conclusion. She observes how little blackletter law specific to video recordings exists in the self-defense context and points out that much of the law about permission to record was written for audio recordings, not videography. Whether or not a video of one's self-defense incident would ultimately help or harm arguments about justification is extremely situational. She stressed that any benefit would be contingent on the client's phone having large enough memory capacity to record and store the video, plus the phone must be consistently password protected so the video could be held back from initial police investigators for attorney input on its appropriate use.*

*In other words, video provides no quick and easy answers to proving justification for using force in self defense! This complex concern was the topic of an interesting conversation I recently enjoyed with Penny, in which she expressed concerns about how a defense attorney should handle client-created videos in a use of force case. I asked her permission to share our discussion because I believe members will find her observations, warnings, and suggestions for further research informative. She agreed to "go on the record" with the caveat that any of the information she provides must be checked by the individual with his or her own local attorney due to variations in the law from one locale to the next, and applicability from one set of individual circumstances to another.*

*We switch now to our familiar question and answer format to preserve the tone of this conversation.*

**eJournal:** [Laughing] I will start with a question I ask all the people I interview: may I record this interview? Considering our topic today, that's rather amusing.

**Dean:** Sure!

**eJournal:** But the serious side, I think, is just how many armed citizens ideate making video of a critical incident with

the expectation that the video record will save their bacon by proving their actions justified. In previous conversations, you've impressed on me the tremendous number of related concerns we ought to consider before whipping out a cell phone and hitting "record." Can we explore the overlap between what is legal and what is judicious? When do we need permission to record, and when is permission not necessary?

**Dean:** Although I do not believe courts have enunciated a standard in this context other than "public place," I would argue that in order to be on solid legal ground for obtaining consent to record from an adult, the standard for video and audio recording permission is a lot like the standard for pleas. You have to show that the agreement to plead was knowing, voluntary and intelligent. I have a couple of cases right now, where the plea was not knowing, voluntary and intelligent, and I will likely be asking the court to undo these people's pleas. So, applying that to our topic today, if you had called me – and this wouldn't happen because, I am not a drinker – but if you had called and found me stone-cold drunk and asked permission to record, I could not have given permission intelligently, because I might not have understood what you wanted to do with the recording.

Public officials, whether in uniform or not, can generally be recorded in public performing their public duties at all times. What may become a sticky issue is what is public? This is not always an easy answer. Is the back storeroom of the store where you work "public?" Is one of the many treatment rooms at a massage therapist's office a "public place?" What about the employee break room at TJ Maxx? What about an orthodontist's office where patients are treated in an open room with a circle of patients in chairs placed in a semi-circle next to each other? One need only Google self-defense shootings to see that it is possible you may have to defend your life in any of these places.

Much of the law pertaining to audio recordings is found in federal law, 18 U.S.C. § 2511 and pertains to the interception and disclosure of wire, oral or electronic communications being prohibited. Now, before all of you budding Perry Masons pipe up, those terms are defined at 18 U.S.C. § 2510 with the issue in this context being –

"(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such

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communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication..." 18 U.S.C. § 2510(2)<sup>1</sup>

How many times have bystanders all taken out their phones to record an unfolding event? Why aren't those individuals facing criminal charges? Likely because they are not trying to enter those recordings as a defense exhibit at their trial!

There is wiretapping vs. eavesdropping; there are one-party consent states and all-party consent states. Both federal and state law may apply. Many state law provisions were enacted in the domestic relations context with custodial combatants recording the conversations in hopes of getting a tactical advantage, but the law still applies to recordings of "conversations." So, if you think that the drunk at the bar that is threatening your friend isn't having a "private conversation" with his companions...well, a judge may decide that it was private when a defense lawyer tries to introduce the recording in your friend's self-defense case.

That's a long-winded answer to your question, but think about it: you're walking down the street and have to pass by some people (those over 18) who are so blown away that they could not, as my dad would say, find their butts with both hands. You sense there is going to be trouble so you ask, "May I record you?" and they say, "Yes." I think the court is going to find that their permission was not given intelligently, because they were not capable of giving consent at that point, I think you need to ask, "Where could recording create more problems?" Remember, a minor cannot give consent: they are presumed not to have the capacity to do so, but determining who is over 18 is a landmine, just ask those who work in the shop n' robs who must ask for ID to sell cigarettes.

**eJournal:** One value of hashing this out with you is your experience defending people who inadvertently made mistakes. You can warn us about where the dangers lie. We try to avoid making mistakes by reading statutory law, but when I tried to research the question of legality of recordings it seemed to me that much of what I was reading addressed audio recordings. Do you think the existing law is more heavily weighted towards audio than today's more common video with sound?

**Dean:** Absolutely, I do think the law is more heavily weighted toward audio but that is precisely where those who make "video" recordings that include audio get in trouble. Many stores have signs at the entrance reading, "Activities are audio and video recorded." The keyword, by the way, is "recorded" instead of "monitored." The words matter, because monitored is much different than recorded.

<sup>1</sup> 18 U.S.C. §2510 *et. seq.* For example of a state law, see *New Hampshire RSA 570-A:2 (1-a)*.

So, the sign has put you on notice that you're being audio and video recorded. If you do not want to be recorded, you need to remove yourself from the premises. If you walk in, you are on notice that you will be audio and video recorded, but that does not mean that you expect to be recorded in the "public" bathroom or the "public" changing rooms, trying on clothing. Just like when you telephone your credit union, and they say, "This call will be recorded for quality assurance," if you stay on the phone, that is considered implied consent. At the store, because of the sign, I know if I go inside, I will be audio and video recorded. I gave implied consent when I went inside.

As you go about your public life – in saying "public," I am not talking about in the men's room or the ladies' room – you have got to expect to be recorded. If you go to any major city, there are cameras everywhere. Even go to a doctor's office: there will be audio and video equipment running. Their argument is that people have to expect to be audio and video recorded, but especially people who are public servants to whom we are paying our tax dollars have to expect to be recorded, because it is the modern way of holding them accountable.

**eJournal:** Moving outside and beyond a privately-owned store, let's imagine the recording was made in the city park. Correct me if I'm wrong but isn't there a presumption in a public place, that I might be photographed or recorded; I don't have the same privacy rights as in my home or office.

**Dean:** Yes, in many, many states the law allows people to photograph or record others in public places. You are in the city park, and there is one bench on the far side of the park, isolated from the other benches, and you see a couple having a very intense conversation. The conversation gets louder and angrier. Either being voyeuristic or gallant you think you are going to come to the assistance of the female and want the recording to back you up in case things go South (they will), so, you set your phone to record "movie," clip it to your pocket and walk over. Many of these scenarios require a gamble and you're playing for all of the marbles.

The law is only going to be enforced in cases where the recording is problematic for one side or the other. It's a little different, but there are states where it's illegal to audio record someone coming into a store, but the law is not enforced so people act like it is legal.

A related example: before it was specifically legal to record law-enforcement officers in the performance of their duties in New Hampshire, I had a client who audio and video recorded a law enforcement officer who had stopped them. I was allowed to show the video to a number of people for evaluation, and every single one of them said the same thing I had said: "Oh, my, the officer is in a 'roid rage."

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Because at that time the law about recording police was not clear, the client did not want to take a chance, and we never used that video. I think using it would have made a night and day difference, but using it was not my call to make. Shortly after that case, the First Circuit Court of Appeals came down with [Glik v. Cunniffe](#), holding that the private citizen has the right to record video and audio of police carrying out their duties in public places.

**eJournal:** That raises another question about recording after self-defense incidents. Will the responding officer tolerate a suspect recording their interaction with him or her? Are there different rules about recording police?

**Dean:** There are different rules about recording police, but at least from the First Circuit Court, there is good news. We have broader rights when it comes to videoing public officials in the performance of their duties than we do for private citizens. The public policy argument is that law enforcement expects to be viewed by, and accountable to, the public. The courts have said – only half sarcastically but truthfully – these days, even five-year-olds have smart phones, for goodness' sake.

A “fight” avoided in any arena is a fight won, meaning if the officers do not know you are recording the encounter, they cannot tell you to stop recording. Rather than holding your phone in front of you clearly recording, buy a \$5 clip and clip the phone on your belt or shirt pocket and, where legal, let it record just like a police body camera does. Avoiding some of the uneducated police, who will sometimes demand, “Stop recording us” or “Shut that off,” if I were in that situation, I would ignore the police and keep recording. That is a very fact- and situation-specific decision that should be made after consultation with local knowledgeable counsel.

**eJournal:** If I understand, the expectation of being recorded broadly applies to citizens when in public places, so if we are queuing up to board public transit, for example, most would expect to be on camera. Presumably, all those cameras are intended to discourage or record crime, and are, for that reason, allowed. Does that permission extend to the private citizen who would video an incident for the same reasons?

Suppose I become fearful in the early stages of a confrontation and a companion records video as I try to resolve the problem. Realistically, what should I expect to be able to accomplish with the video? Show it to responding police and say, “Look what I faced?” Conversely, don't I need to be careful not to admit to committing a crime of which I was not aware through the video's documentation of what happened?

**Dean:** As you know, I often say prior planning prevents piss-poor performance. Something you have long recommend is

that if you are going to carry a firearm or other self-defense weapon you should already have an attorney. You should call your attorney and ask them these questions, so that when the time comes, which is going to be stressful enough, you already know what you can or cannot record.

I do not claim to know what is legal and what is not legal in the many states; I don't know everything the various circuit courts have decided. Here is the thing I do know: when any person sees someone take out a cell phone and pan the crowd, they are at least videoing and potentially audio recording whatever is happening. The argument has been, and I am comfortable saying the argument would be, if you do not want to be audio or video recorded, you had better get your body out of the area.

When people see professional photographers setting up their bulky tripods and cameras and start taking pictures, then later complain, the courts have said, “Listen, anybody who has not been living under a rock for the last 30 years who sees photographers with cameras pointing in your direction, know if you do not want to be photographed you need to leave.” Of course, the courts said it a little more judiciously, but that is the general consensus.

There is another way to present this. If a person thinks there is going to be a problem, they might say, “I am getting on my phone and I am going to call the cops, and then I am going to video this and if you have a problem with being videoed, you should leave.”

**eJournal:** Presumably this is taking place while you are trying to get away.

**Dean:** Yes, and here is something else I would do. There was an organization called the [Free State Project](#). For a period of time, 2006 to about 2018, they provided a database to which you could upload and preserve the recordings of rights violations and emergency encounters. (See <https://www.youtube.com/watch?v=FgoBFM8echk>) and I would presume that the proliferation of smart phones and expansion of recording laws made their upload site (called PORC 411) at \$15 per month less desirable so it no longer exists.

**eJournal:** Nowadays, we have parallel concern about having video destroyed that involves an entirely different situation. The Internet is full of very carefully edited videos by BLM/Antifa rioters. While your concern entails confiscation by police, do you really think that a victim caught by a mob, whipping out his or her phone to record their version of events is going to be allowed to leave with their phone? I expect the mob would go to some lengths to destroy the phone and the video.

**Dean:** That's why I thought the Free State Project's PORC 411

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was a brilliant idea. By archiving that video immediately to their database, the images would not be lost.

**eJournal:** Perhaps [Parachute](#) could do the same thing for personal security. I do worry, though, about how much tech we can realistically manage while facing a life and death threat.

**Dean:** I want to address the planning that has to come before the threat. I'll make a joke about a stereotypical old farmer who, although he lives in the country, is realistic about what to expect when he goes to the big city. I tell that guy that he needs to buy a smart phone, and he looks at me and says, "Yeah, right, are you crazy?"

I say, if you carry a gun and you do not carry a smart phone, you are crazy. There may be a day that you have to defend yourself. You don't have to like the smart phone; you don't have to use the smart phone; you do have to carry a smart phone and you need to know how to use it. If you need it, you don't want to be fumbley bumbley. You have to know how to use it.

One guy I said this to asked, "Well, how much does a smart phone cost?" I asked, "How much is your life worth?" A good phone with lots of memory may be the same price as a gun, so go buy a phone and be quiet about it.

**eJournal:** A smart phone costs a fraction of Penny's billable hours if she has to defend your use of force with conflicting he-said/she-said witness statements that no one can prove.

**Dean:** [Laughing] That is exactly right! I tell them, just go buy a smart phone with the biggest memory capacity you can afford and you will thank me someday. The second thing you must do is password protect that phone. Now, I understand that when you need it in a hurry, you will have to use that password, so let me tell you why you want it password protected.

If you are involved in an altercation, the cops are going to take the phone along with everything else. You want it password-protected so that nothing accidentally happens to the video and no one sees it before you decide they should. There are a million reasons you want the phone password protected. So, that is task number one, get the phone and make it password protected. Is figuring out how to do that a pain? Yep, but you should not do anything with it until it is password-protected.

It takes about five minutes for the police to prepare a subpoena for a person's phone or RING security system records (maybe an hour for a search warrant) and a faxed subpoena or court order and voilà the phone companies and RING hand the police your records on a silver platter within minutes sometimes.

If you took 360-degree pictures of the scene rather than video (which is a safe idea if you have not done your homework on

a given State's recording laws or are traveling) and you have your phone set up to store your pictures in your phone's cloud (something I NEVER recommend) the police can get your pictures, too. You would be shocked to see all of your data given to the police in an electronic drop box within minutes—including whom you called, when you called, copies of all your texts. Think about this before you text about the incident. If you think you can delete the texts, that's a nonstarter. The phone company still has them, trust me.

Get the smart phone, then start learning how to use it and practice in the dark. How many people in the military had to take their firearms apart in the dark and put them back together in the dark and were made to do it 4,400,442 times, right? That was purposeful – it was part of their training, education and experience. In a dark and a panicked situation, you have got to know how to unlock your cell phone and start recording video and audio. That has to be fluid and easy, so you have to practice. That is just as important as shooting – and I am really serious about that, because there are two kinds of survival.

With all due respect to the countless individuals who have dedicated their lives to teaching others how to physically survive and avoid lethal encounters, anybody can teach somebody who wants to learn how to shoot. Teaching them to survive the legal aftermath is harder, and that is what I am doing. Buy and learn to use a smart phone, talk to an attorney and learn if you can legally record audio and video in your jurisdiction. I don't claim to know all the answers because, as I said, the law may be different in different jurisdictions. Our readers are going to have to check with lawyers in their state to know what they are legally able to do.

When you travel, keep in mind that what is legal can change in different jurisdictions. If it turns out it is illegal to record audio, video is still better than nothing. But you need to know, so you check it out before you go. Before I go anywhere, I check out the jurisdiction's laws. If you're an armed citizen, figuring out what's what is part of your job.

**eJournal:** Returning to our "what if" scenario in which you took video of threats, your escape or your defense. Do you turn over the video to police investigators? Should you show the video to your attorney? In earlier conversations, you mentioned that video that shows wrongdoing puts the attorney in a terrible quandary. Will my attorney be willing to view that video?

**Dean:** I would hope to goodness that you have had time to email a link to the video to your attorney, to a drop site or to yourself, so that it doesn't get lost if the phone is taken by police. You should never, ever, ever tell the cops that you video-recorded the scene before you talk with an attorney. I am not

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suggesting you lie, never lie, but expect to be asked if you took video if anyone saw you recording and THEY tell the police. If asked, my answer is, “I want an attorney and I will remain silent until one is provided.”<sup>2</sup> The United States Supreme Court has, in 2012 said that in order to have the protections of the Fifth Amendment you must TELL the police you are remaining silent. Repeat as necessary! Ever see a two-year-old that wants ice cream? Nothing will dissuade them, “I WANT ICE CREAM!” That is how you must respond to any police questioning in that instance. Do not lie, but do not answer the question.

Now, let’s say you had not spoken with an attorney so you don’t know what you can and cannot legally do. When you do speak with an attorney, you need to phrase your statement hypothetically, when you say that you took the video.

**eJournal:** What do you mean?

**Dean:** Let me give you a parallel example. I work with people all the time who have lost their gun rights and many times I am successful in restoring their gun rights. Sometimes deliberately, and sometimes accidentally, these people did not know that they had lost their gun rights, so they have been buying guns and shooting and have a house full of guns, ammunition, and if they’re a reloader, there are primers, powder, bullets and cases, too.

They want me to help them, and I say to them, “I want you to listen to me very carefully. I cannot aid or abet you in breaking the law or hiding the evidence of a crime, but I will give you legal information. I will say, listen for a minute and DO NOT tell me anything about what you may or may not possess. I do not want you to tell me anything. If you have hypothetical questions, I want you to ask me.” I am trying to get their rights back to put them on a legal footing, but meanwhile they have a whole bunch of stuff that could, first of all, derail my efforts and send them back to jail.

**eJournal:** Forgive me for asking, but if revealed in court, would that strategy hold up?

**Dean:** [Soberly] It is the best I can do. I have never had to test it, and this is probably where I go out on a thinner limb than most lawyers do, but think about this from the client’s side—from the perspective of one who truly did not know that one of their convictions took their gun rights away, because their previous lawyer didn’t do their god-darned job, right? This person did not know! Their lawyer did not explain all of the consequences of their plea. Think about this poor person who has come to me and said, “What am I going to do with all of my guns and all of my ammo?”

<sup>2</sup> [https://www.supremecourt.gov/opinions/12pdf-12-246\\_7148.pdf](https://www.supremecourt.gov/opinions/12pdf-12-246_7148.pdf) *Salinas v. Texas*.

Am I supposed to just wash my hands and walk away? I have to help them somehow. If I tell them, “Turn yourself and your guns in”<sup>3</sup> they are going to go to jail forever and are not ever going to get their gun rights back. If they have come to me for help, and I hurt them, I wouldn’t feel very good about that. How could I treat people that way? Your question is not wrong, but what else can I do?

**eJournal:** Let’s apply that to the topic of the videos that we take to our lawyers and ask, “What should I do? I may have done something while being attacked that now, upon calmer reflection, puts me in a very bad light.” What position have I put the lawyer in by admitting to having evidence that shows I did wrong. Are you duty-bound to rat out the client?

**Dean:** Two things: I cannot advocate for destruction of evidence. That is what it would be if I told you to erase the video. Instead, I think you should tell the lawyer, “I know there are different rules in different jurisdictions. I have not done the research, so hypothetically, if I had made a video, would you want to know about it?” That lets the lawyer determine how to proceed.

There’s a second thing to consider: if there is a shooting, there is likely to be a civil suit later and a video would be prime evidence in a civil case. It would also be evidence for the criminal case, but you can’t have it both ways: you cannot hide it in one trial and disclose it in the other. There are a million different things you’ve got to know and that is why I say it is best if you talk to an attorney.

I would like to be more helpful, but the laws are different in different states, and about the best we can do in this interview is to raise questions to which members need answers from local lawyers. Sometimes it is hard to know what is the right question that you need to ask.

**eJournal:** An attorney’s time is expensive; we don’t want to waste it on irrelevant chatter. Members need to distill their questions to the most important points. What questions about cell phone video do armed citizens need to ask attorneys?

**Dean:** Make sure the attorney you are asking shoots, carries, and understands and handles self-defense cases. Ask them –

- Can I record both audio and video without the permission of the parties being recorded?
- If not both audio and video, can I record video only without the permission of the recorded parties??

<sup>3</sup> *Charges under various provision so 18 U.S.C. provide for a charge for each gun and each round of ammunition with potential penalties of many years per charge.*

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- Give me examples of public and private places. Tell the attorney what you do for a living, places you go and examples of places where you might have concerns, your hobbies and to where you travel for real world, practical examples of places you may be.
- Can I video AND audio record the police and other public officials while on duty (so long as I am not in their way) or must I ask their permission first?
- Are there any places or people that I am prohibited by law from recording? If so, list them. (Ask for citations to the law, as well. You can never be too educated.)
- What are the differences (if any) in the laws for video vs. video and audio recording of people without their permission?
- What do I say if the police ask me if I recorded something?
- What do I do if the police want to take my phone?
- What do I do if the police demand I give them my password or unlock my phone? (If the attorney tells you to give up your password, I say seek a second opinion.)
- What would YOU do if an altercation broke out and your friend was involved, should you video or not?

The kinds of questions I would ask are a little like law school exams, where they give you a little story then ask what torts apply and what criminal laws may have been violated. So, a man might ask: "I walk into the men's room and some guy I am having a dispute with comes in after me. A cop is also in there, so do I press the record button on my smart phone (carried unobtrusively on a belt clip) and video the dispute?" I say in New Hampshire that you very carefully weigh the risks (RSA 644:9 Violation of Privacy), NOT recording anyone's lower body parts and focus on the threat. You may be charged with a criminal violation of the "bathroom law." Worse yet, would this mean that since you were allegedly breaking the law that the court will [wrongfully, in my mind] refuse to let you raise the affirmative defense of self defense? Of course, you should always try to get out of where the dispute is happening, but the main question is when it is legal for you to record video? Fact patterns like this are fraught with legal peril and make case law (both good and bad), something you do NOT want to do.

**eJournal:** It is very circumstantial, and no one-size-fits-all can apply. The armed citizen has got to be thinking all the time, but unfortunately, people think more clearly after the stress abates, and so I must ask if you had video you feared portrayed you in a negative light, would you even mention it to anyone?

**Dean:** That is a good question. [Pauses] I don't think it is illegal

for me not to volunteer it, because I have a Fifth Amendment right. I can't lie about it, so here's the problem: I never presume that the other side is stupid! They may be less skillful, but I never presume that they are stupid. That is why I am always prepared.

If it is a self-defense case, as a practical matter, we are going to need to take the stand. If we are going to raise an affirmative defense, we are going to have to testify. If I was the prosecutor, I would ask everybody who took the stand for the defense, "Did you take any audio or video of the event?"

**eJournal:** Oh, dear, you are under oath...

**Dean:** You cannot lie, so you tell the truth. If the answer is yes, the prosecutor is going to ask for a sidebar and ask the judge for a recess and an order to turn over the video, because, "We ain't seen it; we didn't even know it existed until right now." Depending on the reciprocal discovery court rules the defense attorney is now going to have a very, very bad day, which may affect the defendant's day.

**eJournal:** With the prevalence of video these days, that seems like a question we really ought to expect.

**Dean:** It is a very reasonable question that no judge would shut down. Judges won't let you go on fishing expeditions but asking if there is video is a reasonable question. If I was the prosecutor, my next question would be, "Are you aware of any person, whether you know their name or not, who took any audio or video of the incident?" because if you were traveling with family or friends and said, "Passenger, start taking a video of this." Later, you determine, oh, no, I should not have done that. But you've already done it and it is on video, right? The prosecution always makes a big deal that if the witness is an employee, a brother, sister they're going to lie for you, right?

If I am the prosecutor, I am going to ask you if anyone took video, and when you say "Yes, my mother," I am going to ask if you turned it over to the prosecutor. I will ask, "Did you tell your mother not to?" That is a bad question to be asked. If you asked her not to show it, you'll be asked, "Did you tell your mother it would be better if people did not see it?" The prosecutor can go on and on and on and unless you are really careful or truly said nothing about it, I think there is going to be a problem about withholding evidence with very serious sanctions. You have got to be ready for that.

In cases like this, as the attorney, I have got to really think things over and sometimes have my whole team look at it. Sometimes my investigator, my experts, and I all look at the same piece of video, and each of us sees it differently. When that happens, we decide as a team, does the good outweigh

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the bad? Discussion is good and healthy. I don't want someone who always agrees with me. All of us have different backgrounds: I even have a therapist I sometimes ask to review things for clients. Sometimes, I bring in all of us to discuss things because we will see different weaknesses and we want to know what those are now, not when the prosecutor asks a witness about them.

If there is video, typically video from discovery from the State, we need to go through it very carefully, because if we don't rip these things apart, trust me, the other side is going to, and if they do, the middle of trial is a really bad time to be figuring out what to say.

**eJournal:** Let's imagine you had client-created video you thought was misleading and would only create misunderstandings about what took place. You keep quiet about it and your client is found not guilty. Why might you want the video for the civil trial but not for the criminal trial?

**Dean:** In civil and criminal cases, we have different standards: beyond a reasonable doubt versus a preponderance of the evidence. You have the same evidence, if you will, but put before different triers of fact. You also have a different evidentiary burden. The classic example is OJ Simpson who won his criminal case. Not guilty. They couldn't make beyond a reasonable doubt. Then, he lost the civil case and I think the judgment was \$33.5 million. Both juries looked at pretty much the same evidence, but the facts came up much differently. When you look at that, you have to ask, "Why did that happen?" The answer is, there were different burdens of proof.

**eJournal:** If civil litigation follows the criminal trial, and you then decide the video supports your side of the story and you trot it out, do you risk punishment for withholding it in the criminal trial?

**Dean:** Yes, in New Hampshire, we have reciprocal discovery. Depending on the facts I may be forced to disclose the video. That alone is a good reason to have that mega memory card and store it all on your phone, password protected, so it is controlled by you.

**eJournal:** If you decided to reveal the video tape so you could beat the civil litigation, is there any risk that the state, watching the civil trial, may say, "Whoa! We were not told about this! We are going to go back and re-file criminal charges?"

**Dean:** I can't imagine how the state could retry the case; it would be double jeopardy. I have never had a case like that, nor am I aware of one. If I did have that problem, I would help the client find a different lawyer to handle the civil case. While I cannot imagine that would pass double jeopardy, you can bet they would find something with which to charge the client.

Depending on the facts, the lawyer's license to practice law could be in jeopardy, sadly the State is virtually bulletproof from *Brady* violations. *Brady v. Maryland*, 373 U.S. 83 (1963) requires prosecutors to disclose materially exculpatory evidence in the governments' possession to the defense. The definition of "materially" and "exculpatory" is the subject of many multi-volume legal treatises. There is a double standard: a defense attorney would be crucified. This is why I say, as a practical matter, you have to make a choice of whether you are going to use the video or not and do a very careful and thorough analysis as to whether it must be turned over to the State regardless.

I have never had this question come up in the self-defense video context; it has come up in marital cases. Husbands and wives, and people who have lived together, regularly record phone calls which is illegal in New Hampshire without two-party consent, so that is different than the rules about video.

I don't do a lot of marital cases as of late, but if I take one, I start my conversations with the client, by saying, "Let me explain to you what is illegal. Do not even think of bringing me something illegal, because I will not use it and you will put me in a very bad position. If you are even thinking about recording phone calls, etc. without the other person's consent, don't think that under any circumstances I am going to use it, or would maybe use it. I won't." Usually that stops them.

Now, there is a way that I tell them that they can get around it legally. Think about this: what if every time you called me – I would never do this – but you called and heard, "Hi, this is Penny, and because I am so tired of having these pissing matches over what was said, anything you say during this phone time could be monitored and recorded, and by staying on the line, you hereby consent." If the person stays on the phone after that statement, they're presumed to have consented. About self-defense video, if you decide to take out your phone and tell the crowd, "I am calling 9-1-1 then recording this," anybody who stays is now put on notice they're being recorded. Terminology may be very important here, if you say VIDEO vs. "record," one could reasonably believe that VIDEO does not include AUDIO and you want permission for both. I think the other thing that it does is sometimes it creates a sentinel affect. Being put on notice can wake people up and change their behavior.

**eJournal:** I'd agree with you if you were dealing with sane people. I am not sure it would work against a mob, for example.

**Dean:** I agree, I don't think it applies to mobs at all; they would be more like, "Yay! We are going to be famous on YouTube and on Facebook!"

**eJournal:** Outside of such explosive contexts, let's explore your decisions about video and audio recording self-defense

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incidents. How extensive should that video be? Are you trying to capture as much of the buildup, perhaps verbal conflict, precursor situations, the actual violence and your counter-violence, the aftermath, the police response? There are all kinds of questions that apply to each element of a situation.

**Dean:** The minute you think there is going to be trouble in paradise you need to start videoing. Of course, that takes second place to trying to get out of there! Don't get caught up trying to get it on video. But here is something I have never seen done, and I would like to THINK it might work, or at least not hurt: a video letter to my lawyer, written explanation to follow, that is what you start the video with. Communication to your attorney is privileged, and modern forms of communication include e-mail, texts, Zoom call, FaceTime and even arguably a video with accompanying verbal letter or a verbal or written letter to follow.

But let's say you have a pretty good idea what is going to happen, but the crowds are super thick and you are having trouble getting through them. I would have the smart phone out and recording video because the video shows also that you are trying to get out of there, but you can't get through what amounts to a wall of people. The video will show that you are doing the very best you can. It could also show witnesses you might not see. As we all know there are more ear-witnesses than eyewitnesses and this "preserves" the scene. It also may catch license plates of ear witnesses that do not want to be involved, for PI follow up.

**eJournal:** What if responding police tell you to turn that darn video off?

**Dean:** In the First Circuit you do not have to, so long as you are not impeding the police, meaning you are several feet away and not interfering with police movement. That question was settled in the case [Glik v. Cunniffe](#), in which the person continued to video. Now, as you know, you have to follow lawful police instructions, and if you choose to, you sue them later. The reason you do not have to stop recording is the whole purpose of recording the police is to document what the police are doing and saying.

Think about this: by the time the cops get there, this person has likely stopped doing whatever they were doing. Then I might choose to stop videoing, and here is why. If I stop, then my phone goes back to be password protected, and police cannot get in it. I don't want them in my phone because then they are going to know all of my contacts and who I am calling. More importantly, the police are now likely "detaining" you (not "arresting" you, as that is when the constitutional rights such as a *Miranda* warning, time for arraignment and other procedural time clocks start ticking), and they have all of your contacts to

call and interview, asking them questions about you after telling them a slanted version of what happened, to ask about "bad" things you have said or "bad" things they think you are capable of.

I'm doing a case right now that brings another point to mind. If you have an incident, and you think an entity or somebody else has video, you need to get busy preserving that video right away or it will get lost. Often for private security video, the recycling happens within 24 or 48 hours, three days, seven days, and the part you need will be recorded over. You've got to get that video preserved right away. You need to understand how important the video can be, and you must document putting the correct person in charge of the video on notice to preserve it.

**eJournal:** I guess that serves as a reason for taking the video yourself if you can do so legally and safely. I have a question about introducing video as evidence – whether that video came from the 7-Eleven security system, from a by-passer's cell phone, or you took it yourself. Can the prosecutor say, "Well, you only videoed the part you wanted seen. You started the video after you had already hit the other guy." Or, if you have been in possession of the video, so it's not part of the police evidence, it could be said, "You had the ability and the time to delete part of that video that you didn't want anyone to see. This video does not prove a thing." What does the attorney do?

**Dean:** Almost all of those kinds of issues are raised pre-trial during evidentiary hearings. You have given the other side all the stuff. So, the other side has the stuff, and they have made pretrial motions to exclude, because of this reason or that reason, but sometimes the judge just won't listen to you. Maybe the judge has said, this is the way we are going to do it you can like it or lump it. As to the allegation of altered video, first, even if the Pope or the prosecutor's own mother was there as a witness, the prosecution is going to try to throw dirt on the video; second, I have great expert witnesses, the techno geeks I call them. I might have my expert examine the video as a prophylactic measure before I turned it over to the State. I cannot imagine any judge would allow the prosecutor to make such an allegation at trial without expert testimony from the State, which would have been disclosed pretrial.

**eJournal:** If you're at one of those hearings fighting to introduce video that you really, really want to show at trial, how do you argue to get it admitted? What do you say? What persuades the court to see your side?

**Dean:** For me to get it admitted, number one, the video has to be genuine, with a clear chain of custody, if you will. I have to know who took it, when they took it, on which device they took

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it, and that it has not been altered or edited in any way and that it is relevant. Hopefully, the person who took the video is not a person with credibility issues. Number two, the court will ask if it is confusing or misleading to the jury. Let me tell you why trial attorneys have to be able to think on their feet. Some judges will say, "I am not going to decide issues regarding video admissibility until the time comes in the trial. I am not going to give a ruling until I see how the trial is going, how the jury is responding and what is happening."

The defense attorney has got to work out many different ways to respond, based on what the judge says. You can stomp and scream and yell, but the judge's answer will be, "Move on, counsel." From my perspective, the bottom line is that we have got to be able to plan for all of those possibilities.

My clients like to very actively participate in all aspects of the trial, so they will ask, "What's going to happen?" I believe that I allow my clients to make many more trial decisions than most lawyers do, but I tell them, "You have to give me all of your decisions now, because when the judge rules, he is not going to give us time to have a two-hour meeting to decide what you want to do; you need to have thought this over. We will have to decide right then." However, I always reserve the right to override them in tactical trial decisions. I explain they hired me for my knowledge and experience and if they disagree, they can fire me.

**eJournal:** One last question. When we research laws affecting legality of recording, we often see Federal statutes cited. Do Network members need to be concerned about the Federal rules about making recordings?

**Dean:** Yes, they do, but understand that Federal law is about wiretapping and eavesdropping, and as with everything else in the law, we consult the statutes, case law and *Black's Law Dictionary* and not Webster's dictionary, by which I mean that seemingly common words do not always mean what you might think they mean.

I am presuming in our conversation, that none of this topic pertains to recording telephone calls. We are discussing incidents that are happening in person that we are watching and seeing and hearing. For that reason, the big question is what is public and what is private? Two very simple words with enormous, life changing implications.

Here, though, is another question that I want you to think about. During COVID-19, we held a tremendous number of Zoom-type hearings. How often does what people say in a meeting get out of hand? With people in separate places, what if one is video recording the screen of the Zoom meeting on a smart phone? We had Zoom-type trials and hearings with courts issuing rulings of what could be recorded of the recordings.

What about the political meetings that have been held via Zoom? What if one person is recording all of it on their phone or with a video recorder pointed at their monitor? It would be easy to do because no one could see you.

**eJournal:** It is a brave new world, and we have to feel our way through it.

**Dean:** I wish I could find a website with reliable, current information about what's legal from state to state. The way I like to use those Internet sites, is to be able to say, "Look, I don't claim to know it all, and this website also may not be the be-all end-all. Do not rely on it without asking an attorney, but use it for guidance."

**eJournal:** Some of the websites you and I checked out during our initial chats on this subject didn't distinguish between the current information and what had been posted many years ago.

**Dean:** Without endorsing the website, <https://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations> has a January 2021 date stamp, but I am also going to give you a general guideline I rely on. When I find a law review article that was published within the past 10 years, I consider it current. In law review, five years or even 10 years is up to date in many areas of the law.

I think the question about when it is legal to video, is going to have to be treated a lot like the answers we give when people ask when it is legal to shoot. We are going to have to give people principles as a framework through which they can analyze their questions.

**eJournal:** Any kind of adult education, in my opinion, has to be principle-based because we cannot know what circumstances an individual who has read and absorbed these ideas may encounter. If we have done well, we hope to have provided principles the reader can encode into their decision-making, and then, spend time working through what is right for them to do so they have a pre-built foundation from which to generate reactions if they are ever attacked. Thank you, Penny, for contributing your knowledge and wisdom to that educational process.

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*Attorney Penny Dean is a well-known name in Northeast U.S. gun rights litigation, and has been a Network affiliated attorney since 2008. She practices law in NH, ME and MA and is admitted to all federal and state courts in those states as well as the First Circuit Court of Appeals, the United States Supreme Court and the D.C. Circuit. In addition to her busy law practice, Penny is a frequent media consultant on gun rights and firearms issues, and is well known by students of firearms courses at which she teaches the legal segments of the instruction. Enjoy her blog posts at <http://www.pennydean.org>.*

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## President's Message

by Marty Hayes, J.D.

I hope this message finds everyone surviving the unusually high heat this summer. We in the Pacific Northwest have just recently survived the first set of high temps, and everything seems to be okay.

We have some news regarding the fight with the WA Office of Insurance Commissioner (WA OIC) I wanted to inform you about.

We have recently moved into the "discovery stage" of the lawsuit, where we can ask for otherwise private information. We have received 4,000+ pages of documents from the state (they sure want us bad). I will not share most of the particulars, but I will share the following. In the discovery package was 500+ pages of correspondence between our members and the insurance commission staff.

Our members, for the most part, commented on the "persecution" of ACLDN. I was very thankful that, to a person, everyone who wrote to the Insurance Commissioner understands that we are not selling insurance, as these letters reflect. I didn't count the letters, but I think there were over 100. I'd like to share a few of those letters (names withheld, of course) with you. I wanted for you to see how well your fellow ACLDN members who cared to write Commissioner Kreidler conducted themselves, and how much of a grasp on the situation they had.

We expect to receive a second batch of information soon, along with taking the depositions of several of the key players at the OIC. I will share more when I can.

"I am a licensed attorney in Seattle WA, a resident of Seattle, and a member of the Armed Citizens' Legal Defense Network. I see your cease and desist order as a bureaucratic and inappropriate attack on the 2nd Amendment. Please withdraw it promptly. Focus on big insurance companies. Not citizens that band together to stay educated, and protect ourselves from frivolous litigation. If you fail to withdraw it, I intend to fund the political campaign of your replacement."

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*"Why would you classify Armed Citizens' Legal Defense Network as insurance when it explicitly is not? A member-funded network which provides legal assistance to those levied with firearm related charges? And why would you call this type of assistance as 'murder insurance' when our legal system dictates*

*that a person is 'innocent until proven guilty.' Your assumption, aside from not being correct, is not legal and prejudicial. Please reconsider your policy and the effect it will have on law abiding citizens and constituents."*

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"I'm writing you to request that you cease your legal attacks against the ACLDN. They are not an insurance company, nor do they provide insurance. They do not reimburse anyone for damages, nor do they sanction or condone any illegal use of force, and they very explicitly state in their membership agreement that no resources may be used for the defense of same. What they do offer is financial and legal assistance if one is forced to defend oneself in the courts after a justified use of force occurs. It is unfortunate that defending oneself may require funding that might bankrupt the average individual, especially those who are underprivileged, after one has already been put through the trauma of a life-threatening situation.

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*"Opposing a completely voluntary pooling of resources is yet another attack on citizens' rights. I am well aware that this state has grown very cold to the idea that citizens have the right to protect themselves, and there is even a move to require insurance to exercise one's basic rights (actual insurance, that would pay damages for wrongdoing or negligence—which again, the ACLDN does \*not\* do), and yet, when responsible citizens do the responsible thing and try to protect their own futures, the state tries to stand in the way of that."*

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"Why do you continue to harass law-abiding citizens?"

"1. The Armed Citizens' Legal Defense Network does not sell insurance and you have no jurisdiction.

"2. If I want information about how to best preserve my legal right to protect those whom I love without being falsely prosecuted by a bunch of power-hungry bureaucrats who don't value the lives of their law-abiding voters, what's your problem with that? You're arrogant and I will not only vote against you, but I will tell others the truth about you and encourage them to vote against you as well."

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*"Re: Armed Citizens' Legal Defense Network I've been a member since the early days (#57) and have always thought of this organization as first an educational source. We receive many materials that are worth the membership price alone. Although I understood that monies could be made available in the event*

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*of a justified self-defense use of force, that these funds are paid directly to the attorney and perhaps bail and not to me personally. I never thought of it as insurance since I had no guarantee that anything would be paid. I'm not a lawyer so don't understand the distinction of 'insurance' but can only comment that this fine organization goes a long way to educate its members and the public about the proper and safe use of firearms."*

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"RCW 48.01.040 defines insurance as a contract wherein one undertakes to indemnify another or to pay a specified amount upon determinable contingencies. As far as I know, the Armed Citizens' Legal Defense Network has no defined schedule of benefits, which is a primary characteristic of any insurance policy I'm familiar with. Our vehicles are insured to certain limits as to their value or to certain limits of liability - i.e. 'a specified amount.' Our homes, properties, and businesses are similarly insured, based on pre-determined limits - i.e. 'a specified amount.' Under the provisions of the agreement members of the ACLDN operate under, there is the distinct possibility that no funds will be used from the fraternal monetary pool to assist in the legal defense of a given alleged act of self defense. Hardly the terms and conditions that define 'insurance.'"

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*"It seems to me that the actions taken against ACLDN and the recent 'cease and desist' order are an extension of the decidedly hostile attitude of the present State administration toward those of us who choose to legally take the responsibility of the defense of ourselves and our loved ones into our own hands. Unfortunately, our hard-working police can't be constantly at our side to protect us from criminals, so when seconds count, they are minutes away, often long minutes. Our government exists to serve and protect its citizens. Doing your job well is to protect us from fraudulent insurance practices. Your job is not to deny us seeking help with the legal costs that often follow a righteous act of self defense."*

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"I am a retired detective after serving 30 years in the King County Sheriff's Office. I also spent 14 years as the Vice President of the King County Police Officer's Guild. In that capacity, I assisted in negotiating large contracts, lawsuits, discipline cases and represented officers in shooting investigations. I understand that you are investigating ACLDN, Inc. in regards to practicing Insurance without a license. I am not sure where this complaint came from or out of, but I suspect that down the road that will come out. I have been a strong supporter of the Washington State Insurance Commission and your mission. On this particular investigation though, I really think you are incorrect for several reasons.

"First, although members pay yearly dues, representation after an incident is not an absolute given. A 'Scope Call' most certainly is reviewed by ACLDN Inc. management prior to coverage being given. The scope would be if the use of force was reasonable or could be considered lawful. If, under your theory, they are practicing insurance, the ACLDN, Inc would then be forced to represent, say, a bank robber who joined ACLDN and was involved in a shooting or a man who shoots his wife in a fit of rage. Because this is not Insurance, they are not required to cover or represent these situations.

"Also, dues paid by members also cover training articles, supplies in the form of training videos, and interviews with various people in the field of defense both physical and legal. Often, this training can help prevent the use of force situations before they are used. This could potentially save lives as well as thousands of dollars in costs for the state. I am a member of ACLDN, Inc. and joined upon my retirement from the Sheriff's Office. Although I have never had to use the benefit, I most certainly have learned a lot from their monthly newsletters as well as their training videos and interviews.

"Another thing for you to consider is that this organization is very transparent and keeps members informed of the status and amounts of the organization's financial status. I would request that you re-evaluate your position on this matter and find that they are not practicing insurance."



## Attorney Question of the Month

Occasionally, members ask for information about the rights of a legally armed citizen who resides with a person who is prohibited by court order from possessing firearms. This month, we asked our affiliated attorneys this question--

**If the spouse of an armed citizen is under court order that makes it illegal for the spouse to own or possess firearms, in your state may the armed citizen have his or her firearms in their shared residence?**

**If so, what safeguards do you suggest to prevent a claim that the prohibited spouse was in possession of firearms? What advice would you offer a young mother whose husband is ineligible to possess a firearm, for example, who wanted a gun to defend herself and her family?**

We were delighted to receive a good number of responses from a variety of states. We will share the responses to this interesting question over the next two months' journals.

### John I. Harris III

Schulman, LeRoy & Bennett PC  
3310 West End Avenue, Suite 460, Nashville, TN 37203  
615-244-6670 Ext. 111  
<http://www.johniharris.com>  
<http://www.slblawfirm.com>

In Tennessee, each spouse is, absent other circumstances, fully vested with the rights under the Second Amendment. The fact that one spouse may have his or her rights suspended or terminated does not impair the right of the other spouse to continue to own firearms, possess firearms, carry firearms, or obtain civilian permits. This is true even if the spouses have a shared residence.

However, there are potentially additional risks that each spouse must be aware of and address. These involve frequently the issue of whether the disqualified spouse has either actual or constructive access to the firearms. Thus, if the spouse whose rights are not impaired keeps the firearm in easy access on a dresser, a nightstand, perhaps in an unsecured closet then an argument could be made if those facts become known that the disqualified spouse had actual or constructive possession of the firearm and that the other spouse aided, abetted or was negligent in allowing that access to occur. A similar problem arises when the spouses are traveling together and the spouse who can possess a firearm leaves a firearm unsecured with the other spouse in a motor vehicle, boat or RV, for example, while

the possessory spouse exits the vehicle perhaps to pay for fuel, run in a store or even go to a rest stop. In all of these instances, it is import that both spouses take steps to make sure that any firearm is secured in a safe or locked device to which the disqualified spouse does not have the key, the combination or the access code.

If a family is dealing with this situation, it is strongly encouraged because of the potential felony consequences that they consult with an attorney on their specific facts and circumstances.

### Steven M. Harris

Attorney-At-Law

14260 W. Newberry Road #320, Newberry, Florida 32669-2765  
[prosafa@bellsouth.net](mailto:prosafa@bellsouth.net)

The July attorney question inquires about keeping a firearm in shared premises where the firearm owner is under legal disability, i.e., a state court order requiring dispossession, but the non-owner inhabitant (spouse) desires the availability of the firearm for lawful purposes. Of note is that such court orders and statutory disability provisions affect the right of possession, not ownership. I suspect state law varies greatly – whatever the judge who issued the disability order will allow.

I think the paramount concern would be what is known as “constructive possession” under Federal law (see 18 USC § 922(g)), if the state court order is one to which the statute applies. Unfortunately, the United Supreme Court punted by unanimous decision when it had the chance to explain or refute that ill-conceived judicial concept. See *Henderson v. United States*, 575 U. S. \_\_\_\_ (2015). So, counsel will have to examine the cases of the appropriate Court of Appeals and their District Court for guidance. A call to an attorney experienced in Federal criminal practice or the U.S. Pretrial Services or Probation Office may provide helpful information.

For counsel representing the unencumbered spouse, something like this could be considered: The spouse seeking to have the firearm available for his or her use should file a motion (under seal if possible) to have the state court judge approve a plan for lawful access by unencumbered third party. The proposal should state under oath that the disabled spouse will not have access because a single programmed fingerprint activated device (storage lock box) has been purchased by the affiant and the firearm will be stored in it; that no key or combination will be functional on the storage device, or if functional, be available to or known by the disabled spouse; that if required by the court, the disabled spouse will transfer ownership of the firearm to the affiant (through an FFL if necessary); that when the unencumbered spouse is not present in the residence the said storage lock box will be placed in a larger safe whose contents cannot be accessed by the disabled spouse; that the affiant will promptly notify the court should the disabled spouse request or attempt to gain access to the firearm.

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**Brian Craig**

Law Office of Brian Craig, PLLC  
95 West 100 South, Suite 106, Logan, UT 84321  
(435) 760-3101  
<http://www.briancraiglaw.com>

*If the spouse of an armed citizen is under a court order that makes it illegal for the spouse to own or possess firearms, in your state may the armed citizen have his or her gun(s) in their shared residence?*

Courts and legislatures must balance Second Amendment rights of non-restricted household members with the public safety goal in restricting firearm access to individuals convicted of certain crimes. Provided the restricted person does not “possess, use, or have under the person’s custody or control” the firearm, a non-restricted person in the same household may have a gun in the State of Utah. Utah’s statute placing restrictions on the possession of a firearm by certain persons, such as those convicted of a crime of domestic violence, is found in Utah Code § 76-10-503.

Utah Code § 76-10-503 states that a restricted person can be convicted when that individual “intentionally or knowingly purchases, transfers, possesses, uses, or has under the person’s custody or control” any firearm. The question boils down to interpretation of the words to “possess” or have under the person’s “custody or control.” When interpreting a statute, courts in Utah give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve; the court need look beyond the plain language only if it finds some ambiguity. See *State v. Norton*, 2003, 67 P.3d 1050 (Utah 2003).

In one Utah case, a claim that the defendant’s companion was the owner of the gun did not conclusively determine possession and control of the handgun and the Utah Supreme Court held that the jury was free to decide whether the defendant actually “possessed” the gun. See *State v. Davis*, 711 P.2d 232 (Utah 1985) (overruled by *State v. Sanders*, 2019 UT 25, 445 P.3d 453 (Utah 2019) on another issue).

While there is little case law in Utah state courts interpreting the meaning of “possess” in the context of Utah Code § 76-10-503, decisions by federal courts construing the companion federal criminal statute in 18 U.S.C. § 922 prohibiting possession of a firearm by a restricted person are helpful. Utah is located in the Tenth Circuit where decisions by the U.S. Court of Appeals for the Tenth Circuit are binding in Utah federal courts. Tenth Circuit decisions may be particularly persuasive in Utah state courts.

The Tenth Circuit has held that possession under the federal

statute in 18 U.S.C. § 922(g)(1) can be actual or constructive. Actual possession occurs where “a person has direct physical control over a firearm at a given time.” Thus, to convict on actual possession, the defendant must have held the firearm “for a mere second or two” during the time specified in the indictment. *United States v. Adkins*, 196 F.3d 1112, 1115 (10th Cir. 1999). Constructive possession occurs “when a person not in actual possession knowingly has the power and intent to exercise dominion and control over [a firearm].” *United States v. Little*, 829 F.3d 1177, 1182 (10th Cir. 2016). Knowledge, dominion, and control can be inferred when a defendant has exclusive control over the premises in which the firearm was found. When a defendant jointly occupies the premises on which the firearm is found, the Tenth Circuit requires the government to show a “nexus between the defendant and the firearm.” *United States v. Benford*, 875 F.3d 1007, 1015 (10th Cir. 2017).

In *United States v. Samora*, 954 F.3d 1286, 1291 (10th Cir. 2020), the government presented expert testimony that the firearm contained DNA from at least three individuals and that the defendant contributed the most DNA to the firearm, making his DNA the “major profile” on the gun. Because the defendant’s DNA matched the major profile on the firearm, the DNA expert concluded the defendant likely handled the gun at some point. The Tenth Circuit affirmed the conviction concluding that the DNA on the gun combined with defendant’s proximity to the firearm—as he was the sole occupant of the vehicle on the day the firearm was found in the center console of a vehicle—was sufficient to establish the defendant’s constructive possession of the firearm.

Therefore, a non-restricted person, such as a spouse, who lives in the same household as a restricted person, may own and possess a firearm as long as the restricted person does not “possess” the firearm.

*If so, what safeguards do you suggest to prevent a claim that the prohibited spouse was in possession of firearms? For example, what advice would you offer a young mother who wanted a gun to defend herself and her family, but whose husband is ineligible to possess a firearm?*

First of all, the restricted person should never hold or physically touch any firearm or ammunition. If the restricted person has touched the firearm, the firearm should be thoroughly cleaned with the removal of all DNA and fingerprints. Consider selling or trading the gun that the restricted person has physically touched. The non-restricted household member with guns should consider purchasing a gun safe that only the non-restricted person can access. A biometric gun safe that only the non-restricted person can access is best. In the alternative, a combination gun safe or combination trigger lock could be

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used if the restricted person does not know the combination. A key safe should be avoided because keys can be copied or easily accessed by other household members. A biometric safe that only the non-restricted household member can access and where all guns are safely secured would provide a viable defense in a criminal prosecution that the restricted person “possessed” a firearm.

**Timothy A. Forshey**  
Timothy A. Forshey, P.C.  
1650 North First Ave., Phoenix, AZ 85003  
602-495-6511  
<http://tforshey.com/>

This issue seems to come up more often than you would think. It's important to recall that you do not lose your Second Amendment (or Fourth Amendment, for that matter) rights when the person you share your life with gives up theirs. That said, the ice can be pretty thin here, so let's tread carefully.

Leaving a firearm where a prohibited possessor can “readily access” (and guess who defines that—here's a hint—it ain't you) it can get both them and you in serious trouble. Felony, prison-type trouble. Here in Arizona, that would be a Class 4 felony for the prohibited possessor, with their sentence (presuming a prior felony, which is likely why they were a prohibited possessor in the first place) from 6-10 years. Strangely enough, it's even more serious for the provider of the firearm—a Class 3 felony, which, even with no priors in Arizona will still net you between 2-8.75 years in prison. Serious stuff.

I feel the best advice here is to keep all firearms (except the one legally on your hip) verifiably and always locked in (a) safe(s) with the combination unknown to the prohibited possessor, with both of you able to readily pass a polygraph verifying that fact. If you keep your carry gun in a purse, briefcase, etc., get home from a long day, casually leave it on the table to make

dinner when your partner's probation officer drops by for a warrantless site check, you may really regret having been so cavalier. I have a client who is still incarcerated for just that.

If you share your life with someone who is legally handicapped in this manner, make sure they are worth it!

**Kevin L. Jamison**  
Jamison Associates  
2614 NE. 56th Terrace, Kansas City, MO 64119  
816-455-2669  
<http://www.kljamisonlaw.com/About/>

I would advise that the gun be in a locked container and only the innocent spouse have the key/combination. Property of the convicted spouse must not be in the same locked box as that would create suspicions. All cases I've seen have involved knowledge of the firearm presence and access. I saw one case where the defendant was not convicted of guns in his wife's purse, seemingly on the theory that no man knows what is in his wife's purse.

This is not a point where chances should be taken. These are easy cases for prosecutors to win and thus add to their conviction statistics. There was a probation officer who declared that if guns were in a locked safe in a locked room that was not sufficient. I advised the gun owner of cases on the subject and did not hear back. I hope that justice prevailed but probation officers can be unreasonable and get away with it. Persons on probation are considered to be in a very large and lightly supervised prison and the rules are correspondingly arbitrary.

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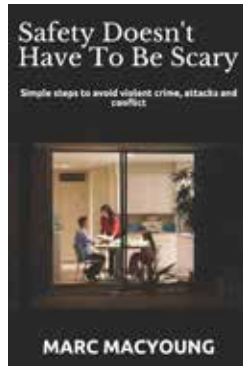
*We extend a hearty “Thank you!” to our affiliated attorneys who contributed comments about this topic. Reader, please return next month when we publish the second half of all the various responses to this question.*

## Book Review

# Safety Doesn't Have To Be Scary:

## Simple steps to avoid violent crime, attacks and conflict

By Marc MacYoung  
Publisher Amazon Digital Services LLC  
ISBN 9798710227503  
Length 272 pages



\$19.99 paperback at [https://www.amazon.com/Safety-Doesnt-Have-Be-Scary/dp/B08WZ8XLLQ/ref=tmm\\_pap\\_swatch\\_0?encoding=UTF8&qid=&sr=](https://www.amazon.com/Safety-Doesnt-Have-Be-Scary/dp/B08WZ8XLLQ/ref=tmm_pap_swatch_0?encoding=UTF8&qid=&sr=)

Reviewed by Nancy Keaton

I know my situational awareness stinks. I know I need to work on it. I've looked for information and found some useful ideas, but I still felt like something was lacking. I wasn't finding specific enough details to tell me what to look for.

This book fills that void for me. It is chock full of not only specific details to look for but also explains why the bad guy is doing them and why those details and signs are important to recognize.

So how do you know which situations to avoid? How do you know what to look for? Advice to just "keep your head on a swivel" or "be situationally aware" is just dandy except what exactly does that advice mean?

It's like when you tell your child to "behave." It's important to explain what that means and in what situations. "Behave" in a library (speak quietly, sit calmly) is completely different from "behave" in a park (run and play, make noise, just don't bother people). As adults we need the same kind of in-depth explanation to know how to be situationally aware. We need details.

This book is for those all along the self-defense spectrum – those who carry a firearm to those who choose not to use any kind of weapon. This book is for those who are willing and prepared to use violence to defend themselves but even more so for those who have decided they are not willing or able to fight, in which case you MUST know how to avoid bad situations to begin with. This book is for anyone who simply wants to stay safer and just need to know how.

As MacYoung states, "This isn't a 'self-defense' book. Think of it more as all the things you can do before things get to self-defense and violence."

He understands that, "If you're like most people, you don't want to take martial arts or carry a gun around with you. So is there anything you can do to stay safe and not have to go to those extremes?" He clearly answers this question throughout the book.

MacYoung talks about so much more than just the typical advice of crossing the street if you see some scary-looking guys up ahead. He teaches us about how emotions, attitude, childhood experiences, and yes, sorry, how even your own ego, plays a role in situations you may encounter, how you react to them and how the person you are interacting with may behave and why.

MacYoung starts with explaining various physical areas where you may encounter trouble, such as "robbery corridors" which are areas within a mile of a highway or freeway, and discusses other "transition" or "fringe" areas such as parking lots and buildings with only one way in or out.

He explains how criminals think and how you think and advises, "Criminals and violent people use how you normally think against you." This is an important concept to understand. Thinking that the bad guys have the same morals and values as you do is what gets a lot of people into a bad situation. Just because you are incapable of doing something horrible to another human does not mean they aren't. MacYoung says that to the criminal, we are simply ATM's with legs. Nothing more. Expecting them to have empathy and compassion is setting ourselves up for a bad day.

Next we learn how to recognize who is paying attention to us and what they are looking for in their next victim. One of his best, easiest pieces of advice to follow is, "At an event or location, leave when the families with small children leave. Why? Because that's when the troublemakers show up." MacYoung says that this is known as shift change. Knowing this simple solution is a piece of advice that is easy to follow every day in basically every situation.

We get an in-depth look at the types of criminals out there and what their purpose and goal is. MacYoung details specifically how to avoid bad situations, such as simply not being alone in a dark alley late at night or not responding emotionally to someone else's actions or manipulations.

Advice is also given on how not to respond if you are faced with someone who may attack you. Emotions, ego, power, and control all affect how we respond to bad situations and whether we even end up in them. He tells over and over that controlling the need to get in the last word or having the last say or challenging the criminal can keep you safe.

*[Continued next page]*

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MacYoung asks you to think about whether you are willing to use force to defend yourself. If not, there are specific things you can do. If you think you can use force, then there are other specific things you MUST be willing and able to do.

This book teaches us how to recognize “normal,” “abnormal,” and “dangerous” behavior and how to react to each of them.

We learn about our “inner monkey” and how it can react without thinking, more out of ego and emotion than logic, and what’s necessary at the moment to preserve our life. It’s entertaining but also enlightening to recognize it within ourselves, as well as how to control it to keep ourselves safe.

An added bonus is that beyond just looking at criminals and their behaviors, MacYoung discusses our everyday interactions with family and friends. He explains how we understand and participate in socially accepted behaviors in differing situations, and why things may go sideways based on our background and even our childhood experiences.

The education provided in this book about the types of criminals that are out there and why they behave the way they do, along with the simple detailed steps to be situationally aware are very clear and very do-able with very little effort. This information is exactly what I have been in search of and I highly recommend this book that is applicable to people of all ages and backgrounds.





## **Editor's Notebook**

### **Very Briefly**

*by Gila Hayes*

Treasure the brevity of this month's editorial; those who know me know that I cannot write "short" to save my life. Need proof? Consider this edition's lead article. The longer I explored the topic, the lengthier my list of questions became. I was learning just how much I did not know!

When Penny and I reviewed the first draft, so help us, we found more questions to explore.

While I have been known to let interviews run as two-part installments, I was worried that the continuity of this complex subject would suffer, so with that, I am trading my commentary for Penny's wise words this month.

I close by wishing you a pleasant Independence Day celebration. I am in the middle of reading an interesting biography about the father of our country which I intend to focus on July 4th. We for whom they sacrificed need to keep in mind the nearly unimaginable risks the Founders took, as well as hardships they endured in order to free themselves their fellow Americans and all the following generations from the British monarchy.

May we prove worthy of their sacrifices.

## ***About the Network's Online Journal***

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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](mailto:editor@armedcitizensnetwork.org).

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

Marty Hayes, President

J. Vincent Shuck, Vice President

Gila Hayes, Operations Manager

We welcome your questions and comments about the Network.

Please write to us at [info@armedcitizensnetwork.org](mailto:info@armedcitizensnetwork.org) or PO Box 400, Onalaska, WA 98570 or call us at 360-978-5200.