



Plea Bargaining: When, Why and Why Not

An Interview with Attorney Kevin E. J. Regan

Interview by Gila Hayes

Imagine being swept along in a dynamic situation in which justification for use of deadly force that was present at the beginning of the confrontation has diminished or is no longer present at the time the gun is brandished or fired. Maybe all but one of a group of multiple attackers disengage and run away; how strong is your justification for use of deadly force now faced with only one? Perhaps the fight moves from public property onto the private property of the person against whom you were initially defending. Maybe you disarm the assailant, so he or she no longer has a deadly weapon. When self defense is no longer clear cut, the attorney's job of defending you changes. We discussed these issues with Network Affiliated Attorney Kevin E. J. Regan, of Kansas City, Missouri.

For over 33 years, Regan has worked as an attorney, starting as Assistant District Attorney in the Johnson County, Kansas District Attorney's Office for several years, after which he became trial team leader and senior trial attorney for the Jackson County, Missouri Prosecutor's Office. He started litigating early when, as a third-year law student, he tried his first murder case. "I was believed to be the first law school student in the country to try to win a murder case while still in school. I was first chair counsel on a firearms case, a shooting, actually, with self defense at issue."

He has won verdicts for the prosecution and the defense in many homicides involving use of firearms. He was the first member of his class to argue a case before the Kansas Supreme Court and one of the first-ever appointed special federal prosecutors for the District of Kansas. He also acted as a special prosecutor for the Missouri Attorney General's office, handling several major cases throughout the state.

"I prosecuted and defended some of the higher-profile battered women's syndrome cases in my jurisdiction," Regan adds, noting that he is an avid supporter of women's rights to self defense. He recalls an unpopular decision he made, refusing to prosecute a

woman who shot the husband who had abused her for years, stuck there by the learned helplessness, a condition that is acknowledged today but was only being introduced at the time.

Moving into private practice in the late eighties, Regan has since defended a wide variety of cases ranging from criminal defense, Second Amendment issues and civil litigation. He is a sworn fellow of the American College of Trial Lawyers, an exclusive association limited to the top 1% of trial lawyers in America into which one is invited only after a thorough vetting. "You can't buy your way in to it or apply for membership. You have to be selected, vetted, investigated and then chosen," Regan explains.

"I have successfully defended to jury verdict many self-defense cases involving use of deadly force," he told us. "Last year alone, I had two cases where I was able to have no charges filed. I tried one case to verdict where my client was charged with homicide with a firearm where the jury was out less than ten minutes before they said, 'Not guilty.' Actually, they said, 'Not guilty' on their way up the stairs to deliberate, but the bailiff said you can't say, 'Not guilty' so soon because the judge has ordered you pizza. So they ate their pizza and they came back and said 'Not guilty,'" he chuckles.

Readers of this journal will recognize Regan as a frequent contributor to our *Attorney Question of the Month* column and firearms students in the Kansas City, Missouri area may also recognize him as an instructor. He explains, "I'm a true believer in the Second Amendment and the American citizens' rights under that amendment and I try to encourage those getting into that life style to get the appropriate training so they can confidently and competently—that's the crucial part—practice that Second Amendment right. I enjoy speaking at no charge to self-defense, shooting and CCW classes to explain legal issues to the students.

"There are many, many people who are misinformed about what their true legal rights and legal obligations

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are, yet they are carrying a firearm. I try to lay out what their legal rights are, what their legal options are, and give them all the information so that they can make informed choices about how they practice the right to bear arms.

"My main influence in the shooting sports has been Tom Berry, founder of Defensive Handgun Enterprises in Kansas City, Missouri," Regan continues. "Tom is a retired Navy veteran and law enforcement officer and is one of the finest shooting instructors in the country. Tom teaches all of his students the importance of membership in the Armed Citizens' Legal Defense Network."

Speaking with Regan is always instructional and interesting, so let's switch now to the interview format so readers, too, can learn in his own words about defending self defense.

eJournal: I'm especially interested in your views on negotiated pleas and settlements, because you are experienced both as the defense and the prosecution. First, do you defend many cases with self-defense issues?

Regan: At any given time, I am handling several self-defense cases involving use of force or deadly force. In my jurisdiction, Kansas City, Missouri, charges are filed fairly often against individuals where there is a claim of self defense. Sometimes it is successful; sometimes it is unsuccessful, depending on how the case is handled by the lawyer, the judge, the jury and the prosecutor.

Self-defense cases are among my favorites because they are challenging, they are fact-oriented and there is a lot at stake for the citizen who has been charged with that type of crime.

eJournal: As you know, I'm interested in learning about the legitimate use of plea bargaining. Without violating client confidences, have you negotiated pleas where the clients weren't repeat offenders, drug dealers or career burglars? In other words, does negotiated justice work well for the good guys?

Regan: Yes, I have negotiated pleas on my clients' behalf when it was in their best interests; when I thought was the best way to go.

When I take a case, I first put a microscope on the law. Was the law followed on how my client was arrested, were search warrants properly issued with probable

cause, and was my client properly Mirandized before questioning? If the law was not followed, I look at a trial strategy of filing motions to suppress, to ask the judge to exclude from evidence the illegally received evidence or statements or both. I won two of these for my clients last year.

Then, I move on to the facts, which become intensive in a self-defense case. I want to find out if there are witnesses and circumstantial evidence to justify my client's claim of self defense, defense of others and defense of home. For instance, we have a fleeing felon doctrine here in Missouri. I've won a case of that nature. A fleeing felon defense is actually more generous to the defender than a self-defense instruction, so I look at the facts.

When I realize that there are facts available to the client that merit the possibility of a trial, we go over the possibilities. We discuss strengths and weakness of their case, the strengths and weakness of our opponent, the tendencies of the judge, the tendencies of the jurisdiction of the jury where you might be. I practice in a five- or six-county area, so something that might be defensible in Wyandotte County, Kansas may not fly in Johnson County, Kansas, with a different jury demographic. You need to be aware of the strengths of your own case, your opponent's case and know the battlefield on which you will fight so you can competently advise your client should he or she go to trial or not.

Only when the facts against my client are strong and the law against my client is strong, do we go to the third approach in the case, which is exploring the possibility of plea negotiations. In gun cases where we are, for instance, someone charged with murder in the first degree has only two penalties available: life in prison or death.

For someone charged with murder in the second degree, the possible penalties are 10 to 30 years or life imprisonment and under a relatively new Missouri law you have to serve 85% of your time. Even if a judge or jury gave you the minimum, you have eight and a half years before you get out.

We have an accompanying statute called armed criminal action, which provides if a deadly weapon is used in a commission of crime, the judge or jury can impose a second sentence on you for three years with no parole to life imprisonment. That means three hard years without seeing the parole board as a minimum sentence

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for that offense. So on a bad day, even a first offender can be looking at a minimum of eight and a half years plus three years consecutively.

Then you get to voluntary manslaughter, which in our state carries five to 15 years in prison with no mandatory minimums, and then you go down to involuntary manslaughter which carries one day to one year in the county jail or one to seven years in prison and/or a fine of up to \$5,000 with no mandatory minimums.

So sometimes, depending on the law and the facts of the case and the client's wishes, it has been in their interests to ask me to try to negotiate a plea to manslaughter for instance or for probation.

eJournal: When is that appropriate?

Regan: No case is perfect. I've had clients come to me saying they were 100% certain that the person they were shooting at had a gun themselves. But it took place in the inner city and by the time the police get there, the body's been picked over and the gun's gone, so we have no gun to show a judge or a jury that the other guy had a gun.

Sometimes my client will tell me they had great witnesses to verify their self defense or other viable legal defense. Those witnesses die, move, take the Fifth and don't want to get involved for fear of violence from the other side. A case that may look strong on its face at the outset becomes weaker over time because evidence disappears or dissipates.

Sometimes you may have a case where a defendant shoots at someone he has a right to shoot at, but he misses and hits an innocent bystander in the crowd. Sometimes the strengths of the case diminish and merit further investigation. Sometimes what the client thought was true at the time, really wasn't. Sometimes he shoots at a guy he thought was pulling a gun on him and the deceased is found holding a cell phone or a pager.

Rare is the case that is tailor made for jury trial from the minute you take the case. A case is only right for jury trial after the lawyer is convinced that the facts and the law support a verdict of not guilty more often than not. Otherwise, if you can find a reasonable way to dispose of the case in the client's favor, the case should not be tried.

eJournal: Can you explain the alternatives, especially for situations where no shots were fired?

Regan: Lower level cases are eligible for diversion in the State of Kansas at the prosecution's discretion. I've had gun cases that have been diverted there. For instance, my client gets involved in a road rage situation, he pulls a gun and realizes he maybe shouldn't have, but the other side is scared to death and wants the book thrown at the guy. Under Kansas law if a firearm is used in a felony assault, that triggers prison time. To avoid those consequences on occasion, my clients have accepted diversion.

What diversion means, is you keep your nose clean for a year, stay out of trouble, follow certain conditions of the diversion, and at the close of the diversionary time frame, the case is dismissed which allows the client to indicate on job, credit, loan applications and things of that nature, that they've not been convicted of a crime. Diversion can be expunged several years later after its completion to where the whole thing gets wiped away.

In Missouri, we do not have diversion; we have suspended impositions of sentence. The defendant would be on probation for a term of one to five years, stay out of trouble, follow whatever the conditions are, then at the close of the probation, the case will be dismissed or closed, and that individual is allowed upon closure of probation to indicate that he or she has not been convicted of a felony.

The problem with both of those situations is that while those cases are still active, an Internet search engine may indicate that you still have an open case, which can affect employment, getting into certain graduate schools and things of that nature.

eJournal: Still, in the long term a suspended imposition of sentence could be a Godsend for someone who misunderstood a situation or made a mistake.

Regan: Diversion and suspended imposition of sentence are good vehicles for closure and certainty. In contrast, a jury trial is experimental surgery at best. The outcome is uncertain, the expense is great, and the emotional toll is gut wrenching, painful and permanent. There are no guarantees of a successful outcome. The federal prosecutor's office here has a 94% conviction rate; the state office's conviction rate is 85%. Those are horrible odds against you if you choose to undergo experimental surgery!

Sometimes when the facts, law, and tendencies of the judges and juries in your jurisdiction are strong against

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your client, a negotiated plea that is acceptable to your client, is the way to go.

eJournal: You say “negotiate” not “accept a plea offer.” How active is the attorney in negotiating the best deal possible for the client?

Regan: You need to understand that over 90% of criminal and civil cases are settled. Civil cases are settled out of court for dollar damage amounts. Criminal cases are settled with negotiated pleas nine out of ten times nationally the statistics show. That means the prosecution and the defense have agreed upon a desirable result. Both parties give in to find something agreeable in the middle.

It is my practice to find out what my client's wish list is and if it is legal and appropriate in our jurisdiction, I put together a tailor-made suit for the client's situation. Every client is different. Every client's needs are different. You can't cookie cut justice. You can't mass produce cases, especially cases of this nature, because they are BIG cases. When I'm out running, biking, swimming, shooting or in my quiet time, I'm always thinking how can I find the right legal or factual approach to bring home the right result for my client. Frankly, the difference between a great lawyer and a good lawyer is the great lawyer will out-think, out-imagine and out-work his opponent.

I try to create a set of requests or demands in a plea agreement that will fit the client: things such as a non-conviction type of probation, a non-felony conviction so a client will not lose his or her job, and in Kansas they have expungeable offenses. The state of Missouri does not allow expungements but Kansas does, so in Kansas you would want to have an expungeable offense.

If plea negotiating is appropriate for the client, I try to make it so the consequences of the plea agreement are less burdensome on the client and on their future, too. You have got to be thinking of future consequences of this type of plea. A felony conviction will bar you from jury service, voting and the right to bear arms—you have to get rid of your firearms. There are significant consequences, so you need to be careful before you get involved in pleading anyone to a felony conviction.

eJournal: Through what means might we avoid a felony?

Regan: Every charge for use of force has a lesser included offense; many felonies have lesser included

misdemeanors. For instance, assault in the first degree carries with it a lesser included offense of assault in the third degree, which is a misdemeanor.

When an incident occurs and the state's witnesses say this and that happened, sometimes the case is overcharged. After a good and thorough defense investigation which may mitigate the facts that the state initially alleged, a good lawyer with a good approach and the right set of facts and legal precedents may be able to get the prosecution knocked down to a misdemeanor with probation, which would be desirable for the client and much less burdensome for their future.

eJournal: Is overcharging deliberate to force plea bargaining?

Regan: I don't see that terribly often. There are some folks who won't overcharge and then there are some who will overcharge to leave room for negotiation. I think it is actually abuse of the process to do that and I do not see much of it anymore.

To be fair to the prosecution, quite often all they have available to them is one side of the story. Police quite often talk to folks who were friendly or partial to the complaining witnesses' side of things or the deceased's side of things if it is a fatality. When the prosecution files the case, they don't know about the four or five witnesses that the defense team has available who say there were prior threats of violence against the defendant or his family or that prior assaults have been committed against the defendant. Those are things that a good defense lawyer would bring to the table.

I will give you a “for instance.” A man was found killed with numerous gunshot wounds to the head and body. The alleged murder weapon was a double-barreled shotgun, which fires only two rounds. Therefore, the suspect had to initially load once and reload several times. So, we know that gun was loaded numerous times with two rounds each, right? That would certainly go to the issues of premeditation and of deliberation. The suspect was acquainted with the deceased. That's what we had.

The client was charged with murder in the first degree and facing life imprisonment or death. When we got involved in investigating the case, we were able to uncover a prior history of violence of the deceased directed toward our client. We also were able to come up with exonerating character evidence regarding our

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client and violent and turbulent character evidence relative to the deceased.

When the case was over our client was vindicated. It was a clear-cut case of self defense, but on the face, all the prosecutor was given was no witnesses, a guy with six holes in him and a gun that only shot two rounds. On the day the prosecutor had to charge the case based on the investigation that had been done, they were doing the right thing with all the information they have been given. The defense's job is to paint the rest of the picture.

As my grandfather used to say, no matter how thin you pour it, there're always two sides to every pancake. Well, it is the defense's job to show the prosecution, judge and the jury the other side.

eJournal: Can the real victim's story be evaluated without the ordeal of a trial?

Regan: There are innovative ways to approach that. The better lawyers think outside the box and use their imagination to be creative problem solvers. In my opinion, a good lawyer is a good problem solver; a great lawyer is someone who can solve difficult problems consistently.

In Missouri, we are allowed to take depositions; in Kansas you're not, so I have a retired FBI agent who does my private investigative work. In a Kansas matter, I would have him take statements from all my witnesses about the violent nature of the deceased, the nonviolent nature of my client, self-defense nature of the case and the strength of our self-defense claim.

In Missouri I would depose every witness against me, which is a recorded statement under oath. I would get all the witnesses testimony and shore up all the strength and value of my self-defense claim. When the depositions were concluded, I would bring them to the prosecution and show them that the case was not what they thought they had initially and that my client is deserving of either dismissal or a mitigated plea of some sort with probation.

eJournal: Do prosecutors welcome a defense attorney bringing them this information before a trial?

Regan: The Jackson County, Missouri Prosecuting Attorney's Office has been one of the greatest training grounds for great lawyers in the country. From that office have come many very prominent judges, a United

States senator, a lot of governmental leaders and successful trial lawyers. In Jackson County, Missouri, the prosecution's door is always open and they are open to vigorous and frank discussions of the value of evidence and the appropriate disposition of the case. Most jurisdictions are that way. Very few are less open to that approach.

eJournal: Those few are what we fear. What then?

Regan: If the prosecution's position is so unreasonable and so painful for the client, then sometimes the client has nothing to lose but to try the case. The lines in the sand are drawn. You go and you try the case. I had a case recently in which my client was charged with assaulting two guys with a baseball bat. He was looking at two life sentences, losing his job, his pension, his marriage, everything.

Well, it turns out that a gang of thugs had threatened a member of his family and that they had circled around his vehicle. They had armed themselves with iron rods and baseball bats and were coming after him and his family member. He went outside the vehicle with a baseball bat and asked that they stop. They refused. He was Mickey Mantle. He took care of business: laid them down. He was defending himself and others in his vehicle from the imminent use of force—and perhaps deadly force—by the aggressors.

The plea offer in that case was so substantial that we were forced to go to trial. We tried the case and in relatively short order my client was found not guilty on two counts of assault in the first degree. But first, that took a year's work. That took interviews of witnesses. That took listening to the 9-1-1 calls. That took investigating the wrong-doers back to the day they were born for violent things they've been doing since they were kids.

eJournal: What must be considered before rejecting a prosecutor's inadequate offer, standing up straight and going to trial?

Regan: Standing tall in the saddle and going to trial on principle is honorable and I commend it, but the lawyer is not the person who is going to suffer the consequences if things don't go well. The lawyer is not going to do the time for the client. Before going to trial, here are some things to consider.

If I'm the client on the way to the lawyer's office and I've

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been charged with a felony involving use of a firearm, I'm concerned about—

1. Am I going to prison?
2. Am I going to jail?
3. Am I going to be a convicted felon?
4. If someone was injured or killed, am I going to lose my assets or my family's assets?
5. Am I going to be listed on some type of dangerous offender's list? That is required in Kansas and is coming to other jurisdictions, too.
6. How is my overall quality of life going to suffer after this event that has just transpired?

When I entrust that heaviest of legal matters there is to my attorney, I want to make sure that attorney can address those priorities in that order.

eJournal: And how does all this look from the attorney's view?

Regan: When my client goes to trial, my job is to make sure that that he or she is going to trial for the right reasons, that they have been properly informed of the evidence against them, that they have been properly informed of the law, that they are informed of the risks that they run as well as the rewards of the trial which is a not guilty verdict. They must have every bit of information possible for them to make the decision, because the lawyer should not be making that decision, it should be the client's decision on advice of counsel.

For me, every case starts as a blank canvas or a big hunk of clay. You have maybe one or two pieces of paper to start with, then you build your case, build your defense, build your facts over time—which in a big case could be a year or two, a smaller case takes six to twelve months—into a sculpted final piece or final painting the details of which you are ready to weave through voir dire, opening statements, direct examination, cross examination of the prosecution's witness, and closing argument.

eJournal: That can take a year or two of someone's life.

Regan: The client needs to ask, do the risks of a jury trial outweigh the rewards? Can I win my jury trial at least 50% of the time? There are times to play hardball and go to trial and there are times to be more circumspect about what your client is facing. These are things a good lawyer must consider.

I recommend you read *The Art of War* by Sun Tzu, one of the most well-read books in the world. All of our

generals read it. There's a saying in there: The general who knows the strengths of his army and doesn't know the strengths of the other army, the terrain, the battlefield and the weather, will win 50 battles. A general who knows the strengths of the other troops, battlefield and the weather, but doesn't know the strengths and weaknesses of his own troops, will win 50 battles. But the general who knows the strengths of his own troops, the opposition troops, the nature and extent of the terrain, the forthcoming weather, the history in battle of his own troops and the other troops, will win 100 battles.

So, a lawyer telling his client to go to trial needs to consider venue, judge, opponent, strengths of the case, and precedents. If your client has a prior conviction from even 20 years ago, in some jurisdictions the jury is going to hear about it through impeachment by the prosecutor, so maybe your client cannot testify, depending on the nature of the prior convictions. Any witness, including a defendant, may be impeached on cross-examination about their prior criminal convictions.

To go to trial, your client has to have broad shoulders, a tough mental approach and a strong backbone to put up with what is going to be thrown their way. Before I ask them, do they think they can get through the process, I tell them what the process will be. I liken it to a doctor getting a patient ready for surgery. I tell what is going to happen, where it will happen, how it will happen, when it will happen, how to dress, how to act and "dos and don'ts" of personal conduct throughout the trial. Most of the time, I actually take my clients to the courthouse well in advance of the trial so that they can familiarize themselves with the environment in which they will be tried. Then as it is happening, they say, "I was told this would happen," so they can be comfortable in that environment.

Some people will tell you they do not have the mental health or the physical strength to go to trial. If that's the case, you can't force them to go to trial. Even with a strong case, some clients will say they do not want to go to trial because they cannot stomach the risk. Ethically, you are bound by doing what your client wants you to do.

eJournal: From the viewpoint of the man or woman hiring an attorney, it appears there are two extremes and neither is good: an attorney who starts the first meeting by suggesting that they negotiate a plea or an attorney who is determined to take the case to trial at all costs. Of what do we need to beware?

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Regan: I think prospective clients should be very wary of an attorney that is talking “deal” and plea bargaining in their first session together. A good attorney is going to presume their client to be innocent and explore every avenue to sustain that belief.

In contrast, I think any lawyer who does not ethically and morally discuss settlement negotiations with their client after all the evidence has been gathered is not being fair to their client. The client deserves to know what the last, bottom line plea offer is on the table before they run the risk of going to trial. I would never want to see a lawyer putting his ego and desire to be in the newspaper for arguing a big case over the desires and needs of the client to possibly avoid that.

A true travesty would be a client who was offered suspended imposition of sentence and probation, whose lawyer recommended trial instead, who was found guilty of an A felony in Missouri to where they've got to do eight and a half years minimum before they are eligible for parole. Incarceration of that length is a life changer. That takes away a decade of someone's life, that takes away the childhood of a child, that takes away the formative years of ones' career, that ruins marriages. Plea negotiations are an important part of legal representation in any major case.

eJournal: May we return to something you said at the very beginning of this interview when you were describing strategies you employ after weighing the application of the law and the facts of the case? Under what circumstances might we avoid either a trial or a plea?

Regan: If you get the case soon enough and with some good lawyering, you can help your client avoid time, expense and heartache of charges being filed. For instance, one poor man was held up at gunpoint by two assailants, both armed, while he was out running a family errand. He shot both of the guys. I was able to convince the prosecutor that as a matter of fact and a matter of law, my guy was entitled to use the force he used to stave away the imminent use of deadly force, the imminent threat of bodily harm to him by those guys. The prosecution agreed with me and did not file the case.

A girl was out jogging when some jackleg was walking a pit bull and let the pit bull off the leash. The pit bull started coming at her in a violent, threatening way. This little girl didn't even weigh 100 pounds. She was carrying a pistol for protection when she was running

because there had been some sexual molestations on these trails. She was properly trained and she drew her trusty, dusty pistol and shot the dog. The police and dog owner wanted her charged with criminal damage to property and felonious use a firearm in public and I went to the prosecution and stopped that one from going forward.

In another case, an employee in a retail establishment was apprehending someone that committed criminal acts in the store. The assailant turned on him with a weapon and the gentleman drew his firearm and shot the bad guy a number of times. The town was crying for charges to be brought. There were signs put around town, calling it a murder. There was tremendous political pressure brought to bear.

We did our investigation of the facts to show who was the initial aggressor, the record of the deceased, the nonviolent record of my client and the dangerous, deadly situation in which my client was really presented with no way out. No charges were filed.

I have represented police officers that have used deadly force and was able to show the grand jury that it was warranted.

eJournal: You mentioned the value of getting the case soon after the incident. How quickly?

Regan: It is advantageous to your members to get with their attorney if not immediately after an event, then within 24 hours or 48 hours at least, if possible. Beyond that, the sooner, the better, because the crime scene is deteriorating, the value of the evidence is deteriorating, crime scenes change with weather. If there is rain or snow, you want to get out there and get what evidence you need! The sooner the better, is my advice for someone who finds themselves in harm's way and in the criminal justice system.

eJournal: You have given us a lot to think about. Before we close, what is your bottom-line advice to Network members?

Regan: There are things you can do. There are things you should do. There are things you cannot do and things you should not do.

When I am speaking with new shooters, while I tell them things they can do under the law, I give them all the food for thought that I can about things they should and

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should not do. If you can, it is a whole lot easier, not be the defendant in a criminal case than it is if you become the defendant in a criminal case.

I once had an intruder trying to get in my back door. I yelled at him to stop. I told him I was going to call the police; he didn't stop. Many people say I could have shot him right through the door. Instead, I went outside, around to the back door, got the drop on the guy, and asked him what he was doing in my house. It turned out he was drunk and he thought he was home. I got his identification and it turned out he was the younger brother of a high school friend of mine.

If I had done what I could have done, I would have senselessly taken the life of a friend's little brother who was drunk and at the wrong house, unarmed and harmless to me. I covered myself that night with what should I have done.

When taking self-defense classes and studying self-defense doctrine, one should ask the question, what should I do and what should I not do, instead of what can I do. I would urge your readers to ask themselves that before pulling that gun out of the holster.

I will tell you, all the individuals I have represented who have taken a life, or who compromised the quality of a life, putting someone in a wheelchair or causing brain damage, to a person they carried long-standing sorrow, remorse, flash backs and nightmares. It is not a glorious situation to find oneself in—even when you are right.

eJournal: Thank you for reminding us that life's realities extend beyond what's legal. What a great way to close! I want you to know how much I appreciate all the time you've put into this article so armed citizens can learn these principles through your knowledge and experiences. Thank you!

Regan: In closing, I wanted to say, I appreciate what you and Marty have done in organizing and caring for this informative and wonderful organization.

eJournal: We wouldn't have the Network without you and our other Affiliated Attorneys and of our great members. Each of you makes the Network the valuable resource that it is, so in my opinion, we are all in this together.

Regan: Thank you.

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



President's Message

by Marty Hayes, J.D.

In last month's discussion of mental health and guns, I posed a question which went like this: "If a person voluntarily takes drugs that are federally regulated and strictly controlled, AND those

drugs are known to produce suicidal or violent tendencies, might it not be a reasonable thing to require the psychiatrist to report the prescription to the National Instant Check System people, and to red-flag that person until they get off the drugs for a logical period of time?" When asked for your thoughts in answer to this question, boy did I ever get responses!

Resoundingly, our members were not in favor of such a mental health check process. The following comments were just a sample of responses I received regarding the subject:

"I can see the logic behind such a measure, but I am extremely leery of its potential for abuse or unintended consequences. I would like to proffer this thought: The real question is NOT whether persons of questionable sanity who are undergoing treatment with psychiatric drugs should be denied access to guns. Rather it is: Who gets to decide what constitutes questionable sanity and what constitutes a psychiatric drug?"

"Working in a pharmacy I can tell you that there are MANY, MANY people (all ages and walks of life) using psychiatric medications. A quick Google search said that 13% of the US population is on antidepressants. That's a lot of people and obviously a broad statement that they should be denied firearms is absurd. And antidepressants are just one of many classes of medications that fall under the category of 'psychiatric.' Sometimes violent tendencies can be treated successfully with medications but this can also be more of an ingrained behavioral pattern than a mental illness (in my opinion)."

Another member writes, "For about 20 years I worked ten to 15 hours a day, six days a week. That is what it took to get the job done. One day my wife said she was tired of being a work widow. I like my wife, a lot. I cut

back office hours to ten hours a day five days a week and started taking vacation from time to time. That is when the insomnia started. Micro sleep at stoplights convinced me I had to fix the problem...I am not and never have been either suicidal or violent. I have six years of experience on a medication and 50 years of experience with firearms. I have never threatened or injured anyone. I am not a danger to anyone. There are millions of people in similar situations, who are also not a danger to anyone."

Others echoed those concerns:

"While I, too, am concerned about violent, psychotic people possessing firearms, I do not believe the use of 'psychiatric drugs' should be a deciding factor in restricting a mental patient's right to self defense. Additionally, the medical community with whom I have had contact could not be characterized as the most 'gun friendly' group out there. I believe their default position would be to restrict first, ask questions later."

"I have wondered about this before and in some ways like it, but shouldn't the doctor then be required to tell the person all of the side effects of the drugs, including that they cannot buy guns? This would keep some people from agreeing to take the pills."

"I do not trust any individual shrink to make unilateral decisions about the enumerated rights of other people who aren't doing anything wrong at the time, even if they are well educated and acting with honor."

"The proliferation of mental illnesses defined by the *Diagnostic and Statistical Manual of Mental Disorders*, (5th Edition, the American Psychiatric Association) standard for such things, is particularly troubling in this regard. For that reason, a mere report of treatment from some politically correct healthcare provider should never be sufficient to restrict firearms access. At a bare minimum there must be legal proceedings required in such cases, not just some bureaucrat putting a person's name on a list."

"I definitely believe that anyone showing signs of violence and a history of mental illness should be flagged and a notice sent to the local state police so that a temporary block could be entered into the system barring them from purchasing any firearms."

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"The answer to your question is an emphatic NO. I personally take a drug that many claim has been linked to several of the mass shootings. It is a common antidepressant. I have never had violent tendencies, episodes or any thought of self-harm. In short I love my family, my life and my right to protect them. To my knowledge every state has a procedure to identify and adjudicate persons who are threats to themselves or others. A blanket ban on anyone who takes one of a list of specific medications is a brush too broad. In fact such restrictions would likely prevent many, including myself from obtaining the help they need. The doctor-patient privilege is as important as the attorney-client privilege. To deny such a fundamental right with no due process would eviscerate the very meaning of the Second Amendment."

"Let me answer your question simply by saying, 'NO NO AND NO!' It is a dangerous, slippery slope to recommend that people on psychiatric medication be labeled or additionally stigmatized. In historical contexts, you can find many examples where tyrants and their governments have disarmed the population or sought to persecute their opponents by 'labeling them crazy,' and subsequently sending them off to the gulag for political reasons (think Russia, or the Jews in WWII)."

Obviously, my comments struck a chord with our members, and the above is only a sampling of comments I received. Please understand that by asking the question, it didn't mean I agreed with the premise, but also obviously, after seeing what has occurred lately with nut jobs going on rampage killings, there is something wrong. I don't know the answers, but I do know there is a problem. If restricting gun purchases by people taking "psychiatric drugs" isn't the solution, what is?

Open Carry Comments

While people were in the mood to write me, several others commented on my thoughts regarding open carry. Here are several notes I received:

"I am in total agreement with you that open carry is not only stupid and dangerous, it is just insane. I saw that somewhere last year, maybe in Roanoke VA, that a young man walked into a grocery store carrying an AR15 just because he had the right. Needless to say, his actions caused panic from the store customers and a police response. If I had been there, I would have assumed he meant to shoot people, but like you, I would have taken cover and observed him. But I would have understood if some citizens had tackled and beat the snot out of him for being stupid in public! I totally understand that people like this idiot give every responsible gun owner a black eye."

"Just finished reading the June newsletter, and I'd like to thank you for your sensible and reasonable comments regarding open carry. I expect you'll get some angry emails from some of the more militant of our members, but you are completely correct. All too often people with whom we *generally* agree become so obsessed and polarized, that they take completely unreasonable stands on issues which barely deserve serious debate, such as demanding the right to open carry, and then exercising this 'right' in a fashion which only damages the real cause for which we all fight: our 2nd Amendment right to possess and carry concealed for self defense."

"Just wanted to alert you that Chili's and Sonic restaurants have now banned law-abiding citizens who choose to carry firearms. I heard their announcement on the news tonight. I would really like to see our organization make mention of this in an e-mail mailing. If they want to spit in the face of law abiding citizens, that's their Constitutional right. It is also our right to refuse to do business with them."

Let me close with a sincere thank you to our members who took the time to write to me regarding these topics. From time to time, it is nice to hear and see that I am not the only voice crying out for common sense.

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

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Vice President's Message

Membership Survey Update

by Vincent Shuck

As noted in last month's *eJournal*, we announced our first-ever membership survey and invited everyone to share their opinions about the

nature of the Network and its future. A sincere thank you to those who responded to the survey and shared information.

Access to the survey is now closed. Just over 10% of the membership responded and provided information that we are now compiling. The information will be used in our strategic planning process to identify areas for improvement, where we can build on our achievements and perhaps even set new directions. But please don't let the "new directions" concept scare you because in our preliminary review of your input, we can tell you like what we are doing and it's obvious that many of you are suggesting that we continue doing what we do best and not try to become all things for all people. Good advice.

Information was sought about length of membership, respondent's age, reasons for joining, affiliation with an attorney, and the need for new or expanded activity. All of this is being tabulated and analyzed. Due to the fact that the survey was only offered online, the views of members who do not have ready or reliable Internet access may be slightly under-represented. But based on our survey experience, we do not see this contributing to a skewed result.

There were three questions that contained open-ended response options and many members elected to offer comments. Not surprisingly, many of the comments addressed complaints about having to assign a ranking number to each possible ranked response. I feel your pain and we have already decided to confront our survey company to provide a resolution, or change survey agencies when we solicit your input in the future.

The survey was a success, thanks to you, and we will carefully look for important themes to enhance our efforts or gain additional strength. We will report on our analysis in the near future.

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

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Attorney Question Of The Month

For this column, Network President Marty Hayes asked our Affiliated Attorneys about the use of blood alcohol content tests—

If a defender has been drinking lightly and he/she is involved in a self-defense shooting, would you advise the person to ask to take a Breathalyzer to prove they are not legally intoxicated?

The responses were so numerous that we'll need to continue this topic forward to the August edition of this journal, so enjoy the first half of this discussion this month, then be sure to come back next month for its conclusion.

John P. Sharp

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This is far from a simple yes or no question. You ask if someone were “drinking lightly.” As attorneys with a very extensive DUI practice, the term “drinking lightly” can have as many meanings as there are individuals who use it. I cannot begin to count the times a client who was “drinking lightly” and told an officer he or she only had “a couple of beers” went on to submit to a Breathalyzer and blew far above the legal limit.

A large or heavy person “drinking lightly” may consider six or more drinks light drinking, or may regularly consume far more but not consider themselves impaired, when in reality they are well over the legal limit.

A small person, for example, a 105 pound woman, who consumes three drinks with dinner, could conceivably be approximately .09 one hour after her last drink. She might well believe she was “drinking lightly.”

There is also a difference between alcohol intoxication levels and levels at which a person is presumed to not be under the influence. In Illinois, a person stopped for Driving Under the Influence who tests .049 or less is presumed to not be under the influence. A person who blows .08 or above is presumed to be impaired.

In over twenty-six years of practicing DUI law, I have only seen a small number of defendants, probably less

than ten, who ever blew under .049. The vast number of people blow over the legal limit, despite their personal belief that they were “drinking lightly.” People, as a general rule, have no concept of how their bodies metabolize alcohol, absorption rates, or elimination rates. Most people we see for DUI are shocked to see how little alcohol is required for them to reach .08.

The type of alcohol being consumed would also be a factor. A person may consume light beer and have a lower BAC level than a person consuming high alcohol content import or micro-brew beer in the same amounts.

To err on the side of caution, I would not advise someone to willingly submit to a Breathalyzer. If the police believe the defender to be impaired, they will, in all likelihood, seek a search warrant for a blood draw. A blood draw is more accurate than a Breathalyzer, and can be far more revealing as to what a defender has in his or her system, such as drugs (prescription or illegal) and cannabis.

One should keep in mind, prosecuting authorities may feel more inclined to charge someone who tests over the limit for alcohol, or who presents blood with illegal drugs and cannabis, and even legal drugs if they do not have a prescription, or if they are a form of drug that could affect the person's physical abilities or mental faculties.

The defender would become the defendant in short order if a prosecutor notes any type of impairment. Not being impaired could be a mitigating factor or an aggravating factor depending upon the outlook of the individual prosecutor.

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I am presently defending two individuals who are charged with “drunk with gun” in Aurora, CO. Basically, the police ginned up a report that says they appeared intoxicated to create a basis for the charge. Aurora is pretty gun sensitive and their actual “crime” was open carrying at 10:00 a.m. No alcohol test.

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For trial purposes, I will ask why no test but it would have been better if they did a breath test. So, the upshot is take the test if you are positive you won't blow over .05. Kind of a crap shoot.

Monte E. Kuligowski

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I cannot stress enough that when carrying in public places the consumption of any alcohol must be avoided. If the defender becomes the subject of an investigation after having fatally shot a deadly aggressor, the odor of an alcoholic beverage from defender, alone, could be enough to shipwreck an otherwise valid defense.

That is because the term "legally intoxicated" is subjective. The standard for drunk in public (public intoxication), for example, in my state of Virginia is lower than the standard for operating a motor vehicle under the influence. Arrests for drunk in public are routinely upheld in Virginia based on a police officer's testimony that the defendant had an odor of alcoholic beverage about his person, red or bloodshot eyes and slurred (even slightly) speech. No field sobriety or breath tests are required for arrest and conviction. In Virginia, a 0.08 blood alcohol content (BAC) creates a "permissive inference" that a suspect was "under the influence" in a DUI case. But even in DUI cases, one may be convicted without a breath or blood analysis, and, in some cases, without field sobriety tests.

The problem with presenting indications (odor of alcoholic beverage, bloodshot eyes, etc.) of alcohol impairment while armed is that regardless of the defender's actual level of sobriety and BAC, the indications of impairment may be used against the defender. There is no law in Virginia (and I suspect, in most states) that gives an armed defender/suspect the right to take a breath test to prove she is sober.

If a defender is arrested with indications of alcohol impairment without the benefit of a breath test, the police will supply the evidence for the court to decide whether the person was impaired, intoxicated, under the influence or whatever the term of art is in the relevant jurisdiction. Odor of alcoholic beverage and red eyes are commonly associated with alcohol consumption and impairment. Of course, some people have red eyes by nature and many people have some degree of eye redness late at night or early in the morning. And speech

that an officer is not familiar with may easily be mistaken for "slurred" speech, especially when an assumption exists (because of odor) that the defender is intoxicated.

If a defender had consumed one 12 ounce beer the easy answer is, yes, he should ask for a breath test to prove an inconsequential BAC level. But there is no guarantee the defender will get a breath test. And the assumption should be that he will not get one.

With that in mind, be careful to never drink and carry.

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This is a risky area, in my view, but if the defender has REALLY only been drinking lightly, taking a Breathalyzer MIGHT be a good idea. One of the risks involved is that someone who has been drinking, and has then been involved in a shooting, may not have the world's best judgment about whether or not they have only been "drinking lightly."

I would opt against the Breathalyzer if I knew there was other solid evidence showing how much alcohol had been consumed, over what time period. For instance, if I'd just spent the three hours immediately preceding the shooting having dinner with two nuns, respected clergymen of three different major faiths, a U.S. Supreme Court justice, and the president of Mothers Against Drunk Driving, all of whom would testify that I had had one beer at the beginning of the meal, in addition to which the tab from the restaurant would support this same fact, I wouldn't ask for the Breathalyzer.

Far and away the best approach, however, is not to have anything alcoholic to drink, especially not when in public, when carrying a gun or when you're going to be driving. Nothing good can come of having alcohol on one's breath when police arrive after a shooting, or after a car accident. Avoiding the situation altogether is clearly the safest approach.

I have heard there are now some states that prescribe a maximum blood alcohol level if one is going to legally carry a gun in public, and in some places it may possibly be less than the DUI limit. So "drinking lightly" may,

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again, be a somewhat risky threshold. Carrying a gun in public after drinking may not be exactly the same as carrying a gun in public while wearing a shirt with a large swastika on it, but there are certain similarities which an intelligent person would seek to avoid.

Again, while I understand it may not always be pleasurable, convenient, or easy to achieve, the best approach is to avoid drinking at all when one is going to be carrying a gun in public.

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Breathalyzer tests are notoriously inaccurate. If the police are serious enough that they want to get a blood draw, that is different, because BAC is measurable in blood. But breath? No. I would not advise a client to volunteer for a Breathalyzer.

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I would not advise a client to take a Breathalyzer for the following reasons:

The test question presumes that the client has been "drinking lightly." However, those who have been drinking are seldom the best judge of their own state of sobriety or intoxication. Thus, the client might well get it wrong as far as his level of intoxication and do himself great harm in trying to prove his innocence.

Wisconsin has various separate criminal charges dealing with intoxicated use of a firearm—most of which require some sort of chemical test as an element of proof. A bad Breathalyzer result would give a prosecutor an opportunity to couple a more serious gun related charge—say for instance reckless or intentional homicide—with something for which alcohol consumption is an element of the defense. The lesser alcohol-related charge would pollute any potential defenses on the greater charge. This would make most prosecutors very happy. However, if the prosecutor cannot muster sufficient evidence to put an alcohol-related charge before the jury, perhaps any mention of alcohol could be suppressed as irrelevant to the charges the prosecutor can bring.

In terms of attacking the defender's judgment and steady hand (should mention of alcohol be deemed relevant), a prosecutor could do as much damage with a .03 as with a .06 even if a higher blood alcohol content were the threshold for a separate and distinct alcohol-related charge. If the prosecutor were reliant purely on the officer's lay observations or the defender's admissions, this gives the defense far more room to maneuver and weakens evidence which the prosecution could use to damaging effect.

In short, I see nothing good coming from any attempt on the defender's part to "prove his innocence" by blowing in the machine.

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On Breathalyzer tests after a defensive gun use: No. Next question.

Examples of inaccurate Breathalyzer results abound. Nobody will believe you if you say the machine was wrong. In this society at this time, the machine rules. Besides, you don't have the burden of proof on whether you were intoxicated. If someone thinks you were, let them prove it the old fashioned way that prevailed before the current drunk driving hysteria began. That way was a lot more accurate.

Of course, if there are witnesses who saw you drinking or smelled alcohol on your breath, that evidence may come in at a trial or it may influence a prosecutor's discretionary decision on whether to charge you with a crime. But that evidence, if it's relevant, is likely to come in anyway. Throwing the dice on a Breathalyzer test hoping it will show you weren't intoxicated is too risky. You may be certain it's going to exonerate you only to find that it has convicted you.

The legal limit of .08 was not decided on the basis of science. It is purely political. When anything even slightly scientific was used years ago to determine what amount of alcohol impaired drivers of automobiles, the limit was set at .15. Accident data still tend to show that most alcohol-caused car crashes involve a BAC of .15 or higher. Very few crashes result from a .08 driver, and

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when they do the cause of it being alcohol is usually speculative.

It is possible for some people to be impaired at even less than .08 but also possible (and much more likely) for others to not be impaired in any significant way at a BAC much higher than .08. We are all different in our response to alcohol and how we metabolize it. Until accurately measured BAC reaches a certain point and above (probably .15), the "one size fits all" method results in much injustice. But you will never convince a jury of that. Most people in America believe that .08 is magic and conclusively determines guilt or innocence. I believe it is not magic and often not accurately measured.

For boatloads of information on Breathalyzers and their mistakes and inaccuracies, check out Lawrence Taylor's DUI Blog.

It's not just that the machines sometimes don't work properly. The whole idea of a Breathalyzer test for determining blood content is flawed. The whole idea that blood alcohol content affects everyone in the same way is flawed. Nearly every one of us, using our own senses and faculties, is better than the machines at knowing when someone else has had too much to drink. Even though nearly every one of us, given the right circumstances, may be prone to lie about someone else's level of intoxication, it's still foolish to rely on a Breathalyzer machine in hopes it may refute false testimony. It's own false testimony becomes conclusive and irrefutable in a courtroom.

Besides, everyone can do what I do and the question of alcohol should never come up. I don't drink a drop when carrying a firearm. It means no wine with a fine dinner and that's unfortunate but it's the wisest choice. It's what all good firearm instructors advise.

My answer above is for those who choose differently, or relax their own rule once in a while. Most of us are probably going to drink sometime somewhere and we have no control over the events that may be forced upon us. We may not be carrying the firearm but unforeseen events may force us to go get it. A non-drinking companion may have been disabled and we are forced to use his firearm.

Anything can happen.

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Under Florida law, Ch. 790 provides for three presumptions: less than .05, .05 to .10 and greater than .10. In each instance if the victim used the firearm in self defense or to protect property, the criminal penalties do not apply in any instance. I see many in the defense bar suggesting "no," such as in a DUI.

As a self-defense attorney, I don't care one way or another, but for the fact that the victim must have spoken to a law enforcement officer, which does concern me.

A big "Thank you!" to all the Network Affiliated Attorneys for their many responses to this question. So many opinions came in that we will wrap up the question of voluntary Breathalyzer testing in the August, 2014 edition of this journal. We deeply appreciate the contributions all of our Affiliated Attorneys make to this column, as well as their other services to Network members.

Book Review

False Justice: Eight Myths That Convict the Innocent

By Jim and Nancy Petro
 ISBN-13: 9781607144670
 Publisher: Kaplan Publishing
 January 2011
 304 pages

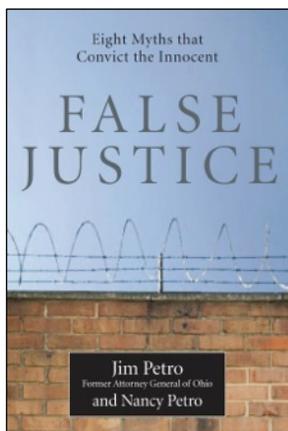
Reviewed by Gila Hayes

In 2003 when Jim Petro became Ohio's Attorney General he made DNA testing of anyone incarcerated in Ohio a goal of his administration. He had already served in a variety of political offices, was known as a staunch Republican conservative, a law and order candidate, and came into office at a time when DNA tests had become more reliable. The stunning number of cold cases solved in Ohio after Petro's DNA-testing initiative got underway led him to changes in his views about innocence and wrongful convictions.

Attorneys general are more often aligned with those prosecuting crimes (as well as overseeing a myriad of civil matters), Petro writes, so it was quite unusual to see him leading an effort to clear the names of convicts who persisted in claiming innocence. It all started when a political ally asked him to review a case in which DNA testing showed the state had incarcerated an innocent man. When local county prosecutors dug in and refused to reconsider the case that first brought the issue to his attention, Petro took the battle to the press, earning both criticism and support for his advocacy.

As I seem to be doing more and more frequently, I read *False Justice* as an eBook, but it is available in hardcover for about \$20-28 for those who prefer paper. A new edition is due later this July and its advance promotions promise additional web links to wrongful conviction data. The former AG coauthors this book with his wife, Nancy Petro, but it is written in the first person and in Jim Petro's own words.

I spent quite a bit of time dredging through the 300-plus page book, parts of which wander down related but not specifically on-topic paths. While they make for interesting reading, some are purely autobiographical and others like the long digression in lengthy Chapter 19 consider the death penalty in light of the statistical likelihood of a wrongful conviction.



Petro has identified eight commonly held "truths" that are anything but the truth, and cites a number of sources to show why these ideas are false.

First, the book asserts, contrary to popular belief, everyone in prison does NOT claim innocence. Investigation into cases where prisoners steadfastly refused to repudiate their claim of innocence sometimes turned up proof that not only was the wrong man in prison, but that failing to arrest and punish the real wrong doer let him go on to hurt more people, so the damages and losses were compounded.

Next, the author debunks the popular belief that the American criminal justice system rarely convicts an innocent defendant of a crime they did not commit, asserting that thousands of innocent people are punished due to misidentification by witnesses, lies told at trial by a snitch, or after making a false confession in hopes of lenient sentencing or other promises held out by investigators. "There are many more innocent people in prison than most Americans believe," Petro alleges.

DNA has been the basis for most of the noteworthy conviction reversals, he reports. "Unfortunately, in the vast majority of cases—an estimated 90 percent or more of all criminal convictions—there is no biological evidence." He expresses surprise that so few citizens are concerned about innocent people serving prison sentences and sometimes facing death penalties. He exclaims, "The error rate in the justice system—whether the most conservative or the most liberal calculation—would not be even remotely tolerated in the U.S. food industry or the U.S. pharmaceutical industry, for example. Why we have accepted it in the justice system is another question."

In a later chapter, Petro uncovers intentional abuses that lead to wrongful convictions, with a lot of attention given to the *Brady v. Maryland* ruling that requires prosecutors to disclose exculpatory evidence to the defense. He complains that judges and appeals courts fail the innocent when they stonewall pleas for retrials because they do not believe the ultimate outcome would have been any different had full disclosure been practiced.

This is a repeated theme in a later chapter that challenges the idea to which some conflicted jurors cling, that if mistakes are made in the first trial, conviction

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errors will be overturned on appeal. "Opportunities to reverse a verdict are limited," Petro stresses. Not only is an appeal difficult to obtain, the appeal can only address "what was raised in trial," or the defendant must convince the court that new evidence uncovered is of such significance as to merit a new trial. Both are extremely high bars, he explains.

The power of a confession, without scrutinizing the circumstances under which it was obtained, is another reason innocent people end up in prison. Petro notes that sleep deprivation, extremely long interrogations (he cites an average of over 16 hours in false confessions he has reviewed), psychological techniques used to extract confessions, failure to inform a detainee of Miranda rights, and pressuring juveniles or suspects with mental illnesses to confess, all will result in confessions to crimes the suspect did not commit. In addition, a stressed suspect may offer a confession or waive their Miranda rights because they know they are innocent, and they cannot believe that the system will fail them. Petro urges that any interrogation should be videotaped to assure its integrity, a recommendation that's been forwarded for a long time by Network Advisory Board member Massad Ayoob.

Eyewitness testimony is among the most powerful presented in a trial, yet, Petro argues, it is the most prone to error. Eyewitness reports rely on the fragile and easily corrupted memories of people involved in stressful events, and is vulnerable to suggestions from a host of influences, all of which contribute to a witness who is thoroughly convinced of facts, timelines, identities and other facts they go on to present as irrefutable evidence. Few will challenge an eye witness' veracity! In relating the numerous stories through which he illustrates his assertions, Petro shows how witnesses can be led to faulty conclusions, how their memories may be wrong, and how victims become convinced of a misidentification of the perpetrator or other crucial facts.

Similarly, expert witness testimony on the scientific interpretation of evidence can be used to sway a jury to return a conviction when none is merited, Petro explains. Not only have poorly-qualified experts testified that unproven theories are scientific fact, but sometimes the

scientific studies cited were misinterpreted or entirely unreliable.

Public sentiment that questioning a conviction somehow dishonors the victim of the crime presents a parallel problem. The author cites the arguments of prosecutors who decline to reopen problematic cases because they believe it will further traumatize the victim or the victim's surviving loved ones. It is an atrocity, Petro emphasizes, to fail to pursue the real perpetrator of a crime, leaving them free to continue to commit crimes unhindered.

Another contributing factor is callous attitudes of judges and prosecutors, supported by the electorate that puts them in positions of power. If those in charge of the criminal justice system are untroubled by the knowledge that a few innocent people will go to jail for crimes they did not commit, are willing—even eager—to avoid retrying contested cases, arrogantly refuse to reconsider evidence that is misinterpreted, refuse to punish failure to disclose exculpatory evidence or will not look at newly discovered evidence, they need to be removed from positions of public trust. Instead, Petro suggests, citizens find it easier to believe that if there are failures of the justice process, those to whom we have entrusted the system will fix their own mistakes. "We—everyday Americans—are best positioned to change the system," Petro counters. "We get the judges and prosecutors we elect; we set the expectations and the priorities; and we ultimately determine the justice system that serves us."

Petro summarizes, "False confessions, use of unreliable informants and snitches, bad lawyering, unreliable science, government misconduct and mistaken eyewitness testimony," are the most common reasons innocent people are convicted for crimes committed by others. While his experience and thus the book's focus is the use of DNA evidence to reverse convictions of innocent people, the principle danger areas he highlights also serve as warning flags for anyone concerned about the state of justice in our country. For more information about Jim and Nancy Petro, visit <http://www.falsejustice.com>

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



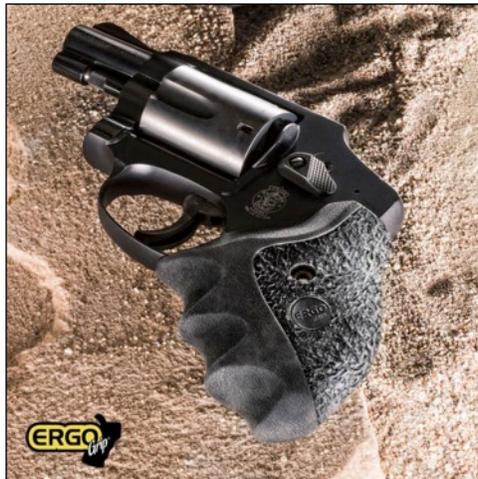
Networking

by Brady Wright

For a fun change of pace, I am going to start this month's column with a product review. It is something I don't normally do, but this one is too good to pass up! If, like most every shooter I ever knew, you own a J-frame revolver, the folks

at Ergo Grips have a new product called the Delta Grip that is ridiculously good. I won't do a big technical or descriptive yak because this picture is self-explanatory.

What isn't immediately evident is just how comfortable the grip is! I put about 200 rounds through a gun equipped with it this afternoon before writing this. The grip indexes the gun in my average-sized hand so well that it felt like a part of me. It is a bit different during the load/unload process, but not negatively so, just new and different. For \$19.99, experimenting with it is a worthwhile project. I'm going to carry and use it for a few months, but so far it's a winner! You can learn more at www.ergogrips.net



Now, back to our main topic, the fun our Network members and affiliates have been sharing with us! We're always happy to hear from our friend Phil in PA who, as regular readers will know, never misses a chance to say good things about the Network to anyone on the East Coast who will listen. A while back, he had a guy come in to spray his house for ants and they began talking about other projects. The guy gives Phil a card and it's for the Smoketown Gun Shop. The pest guy runs the gun shop in the evening. Before you know it, Phil had him very interested in learning more about the Network and our membership benefits. Phil gave him a handful of booklets and hooked him up with our website at www.armedcitizensnetwork.org. Thanks, Phil! That's how it's done!

As you may also be aware, Alecs Dean has been providing the Network booklets, *What Every Gun Owner Needs to Know About Self-Defense Law*, and membership applications to each student and each certified firearms instructor he trains. Alecs also distributes the books to no fewer than two dozen large retail outlets throughout Florida so they may provide our educational message to their own customers.

Alecs just shared with me that in response to a request from firearms attorney Eric Friday in Jacksonville, Florida, he drew up some research on the many self-defense insurance plans that have popped up nationwide—mostly as a result of the George Zimmerman case. Mr. Friday, who is also a Network Affiliated Attorney, in turn used this research for a presentation he made to Second Amendment Foundation.

Alecs very kindly ranked the Network at the top – Number 1 – even though Network membership benefits are not actual insurance. Alecs considered a number of factors, including:

- 1) How long has the company been in business?
- 2) Is it available in all 50 states?
- 3) Does it provide assistance for all means of defense (or just defense with a gun)?

- 4) Does it cover just attorney fees (or expert witnesses, depositions, investigators, re-constructions, filing fees, etc.)?
- 5) Do you get to pick your own lawyer?
- 6) Is a lawyer available 24/7?
- 7) Does it pay up front or simply reimburse?
- 8) Does it cover both criminal and civil representation?
- 9) Is there a cap on benefits?
- 10) What specific firearm and self-defense cases have any specific attorney been involved in?
- 11) If an insurance company, what are the reserves?

Overall, Alecs listed the Network in the Number 1 position and we very humbly thank Alecs for the unsolicited endorsement!

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Our friend Tom D. has been a member of the Network for a couple of years. In reading the most recent column in the monthly online journal, he noticed that we'd revamped the booklet and, since he likes to carry copies of the booklet to hand out at his local gun club range (especially when other shooters notice him wearing his Network ball cap), he asked for a new supply. It was great to hear from him, and this provides a great opportunity for me to remind all of our Network members that I have booklets and brochures to send to you; you only need to ask.

In the same vein, one of our ten-year members also noticed my new booklet offer and asked about getting it in PDF format. Links for both ordering a paper copy or a downloadable PDF version are at

<http://armedcitizensnetwork.org/learn/what-every-gun-owner-needs-to-know>.

We are always happy to provide the booklets and brochures. As usual, if you need any materials to give to your friends, clients or customers, call 360-978-5200 or email me at brady@armedcitizensnetwork.org especially if you have news to share, or a win we should celebrate. Just call or email me and I'll take care of it personally!

I can't believe we've already gone past the longest day of the year. Stay safe out there!

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

July 2014



Editor's Notebook

Closing Thoughts

by Gila Hayes

I invested a lot of time this month into the extra long lead article, knowing how important the lessons from Attorney Kevin Regan are for Network members. It was

well worth the effort! I'm extremely pleased with his balanced analysis of plea bargaining, a topic about which I have wanted to write for many months. I started the article concerned about a hostile criminal justice system wielding a power so biased toward the government that only through great expense and effort could a defendant prove their innocence.

It is a hard subject to consider without losing perspective due to prejudice. Have police officers abused their powers? Have prosecutors misused discretionary powers to persecute one who acts in self defense? Have judges misapplied the law to punish those of whom they do not approve? Of course, all those abuses and worse have occurred and will likely continue.

It is all too easy to dredge up stories proving any particular bias we're motivated to substantiate. Sadly, many of the horror stories inflame our prejudice, but do nothing to explain how the "little guy" crushed in a political prosecution or entangled in an aggressive prosecutor's agenda could have negotiated a better resolution.

We need to strike a balance between unrealistic optimism that "nothing bad will happen to me" and suspicions so profound as to render us unable to interact effectively with the justice system. The old axiom that people fear and hate what they do not understand applies. This month's interview with Attorney Regan joins our other educational articles and knowledge shared by other Network Affiliated Attorneys, all focused on making Network members more effective through increased knowledge. What valuable members of the team our Affiliated Attorneys are!

I was encouraged when Regan told me that he does not believe that prosecutors in his area charged defendants with worse crimes than merited: first degree murder

when the facts point to manslaughter, for example. He countered my suspicion about over-aggressive prosecutions by explaining that the prosecutor has to start the process by filing charges based on the evidence she or he is given. Without filling in the blanks by making sure factors justifying your actions are also made clear to the prosecutor, how can we expect the system to work justly?

This discussion also provides an opportunity for each reader to think through and evaluate how much information and which details they will be best served telling police officers investigating a use of force in self defense. If you're not sure how you should behave on this point, please review the Network member education DVD *Handling the Immediate Aftermath of a Self-Defense Shooting*, a lecture given by Massad Ayoob.

Regan's interview also pointed out the many mitigating steps the attorney can make on behalf of the defendant, especially if their services are engaged quickly after the incident. Often the horror stories of innocents crushed by the system should start with the caveat, "This poor man waited until the week before his hearing to find an attorney," or "This poor woman didn't have the money to get an experienced attorney working on her behalf until it was too late."

That explanation should never be given for a member of the Network because of the deposit against attorney fees we pay a member's attorney as soon as we are told that the member has had a self-defense incident. I'm so pleased that the Legal Defense Fund is strong, healthy and ready to pay a good attorney to be a member's advocate to accomplish the various tasks that Regan described.

Let me close on a proactive note inspired by this month's book review. Don't forget that at the local and state level, we put our prosecutors and state's attorneys general in office. When a prosecutor overcharges, she or he must be held to account, and it is we, the constituents and voters, who must voice complaints about that official's actions and if abuses of power go unchecked, we must see to it that a better "people's lawyer" is awarded that position of trust in the next election.

*[End of July 2014 eJournal.
Please return next month for our August 2014 edition.]*

July 2014

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.

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