Armed Citizens' LEGAL DEFENSE NETWORK, INC.

Lessons About Appealing Verdicts

Part II of an Interview with Lisa J. Steele, Esq.

by Gila Hayes

In last month's journal, we discussed the process of building an appeal on behalf of a client wrongly convicted by a trial court. Appellate attorney Lisa Steele, a lawyer of 26 years' experience, explained in detail how an appellate brief is crafted and the process of arguing it before an appeals court. Because the information is so detailed, we broke the interview with her into two segments, returning this month to discuss what happens after the appellate court has published its decision.

eJournal: We left off last month with the appellate court having returned a decision on your appeal. I suppose that might be good or bad. What's next?

Steele: Let me back up slightly. Many states, including MA and CT have two levels of appellate courts, the intermediate appellate court and the state's supreme court. The intermediate appellate court hears the vast majority of cases. Only a few cases are heard first by a state's supreme court.

So now I have the court's decision sitting in front of me. Let's assume it is from the intermediate appellate court. If it is good news, I call the client and tell them. And then I have to say, but this isn't the end of the story. The state can and will file a petition to the state supreme court and say, "I think the appeals court got it wrong. I want you to look at it." They lose a lot less often so they are more likely to get review.

If it is bad news, I will often send the decision to the client and then call them a day or two later, when (hopefully), they have had time to get the decision by mail and look at it as we talk. Now, I will say that I can petition the state supreme court and say, "I think the appeals court got it wrong. Please look at it."

If the supreme court says, "Yes, we are going to review it," we do the whole thing over again, and so we are going to have another round of briefs and another round of arguments, but it is going to have a tighter focus because we both are familiar with it, and we address just the specific question the court wants to look at. We are mostly arguing about whether the appeals court made the wrong decision, or sometimes, was it forced to make that decision because of some earlier decision by the state supreme court (precedent) that only it can change or re-interpret.

If the state supreme court says "no," then the appeal is done in that state. The defendant may be able to go to state habeas, or in very, very rare circumstances to the U.S. Supreme Court.

Either side can also ask either the appellate court or supreme court to reconsider. If they made a significant mistake, there are ways to go back to the court and say, "Um, um, this isn't right." Maybe they'll change it and maybe they won't. A motion to reconsider may be the only option if it's a decision by the state's supreme court.

eJournal: I want to step back to the appellate court's decision. What's the likelihood of a murder or manslaughter conviction being overturned by a state appellate court?

Steele: Reversal is complicated. As a whole, if you look at CT and MA and look across the board at all the criminal defense cases done by all of us–private counsel that do appeals, the public defenders, the assigned counsel who do what I do–maybe we get something useful for the client in one in ten-ish of the cases.

Something useful does not necessarily mean the client goes home. That is relatively rare. It may mean that the court says, "You were convicted of two robbery offenses, but there's really just one robbery, so we are going to merge them and you only get sentenced for just one robbery." Well, that's nice, but it is not sending you home and it may not change your time at all.

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A number of years ago I had an OUI case–a drunk driving case–in which the client was convicted under two different provisions in the drunk driving statutes. The court came back and said, "Really, the legislature intended these to be alternatives, so you can get sentenced to one or the other, but you cannot get sentenced on both." They can send it back for resentencing and, depending on the original sentence, the judge may still impose the same total time.

eJournal: In self-defense cases, what common trial errors might lead to a reversal?

Steele: There could be any number of legal errors–

- How the defendant was questioned;
- What searches were done;
- How the jury was selected;
- What evidence was admitted or excluded from trial; and
- What instructions the judge gave the jury.

Those are some of the most common, broad areas.

You might also see cases like *Caetano v. MA* or *State v. DeCiccio* in CT that are about whether a state ban on certain kinds of weapons is legal.

eJournal: Some of those are specific issues that influence jurors. What are examples of issues you look for when reading trial transcripts that alert you to trial errors?

Steele: Sometimes the record will show issues about–

- What questions can prospective jurors be asked about their opinions on weapons and self-defense;
- What evidence can be offered about what the defendant said that's consistent with the self-defense claim;
- What evidence can be offered about the aggressor's prior record and/or reputation for violence;
- What evidence can be offered about the defendant's past, social media posts, training, membership in organizations and ownership of other weapons;
- Whether the defendant can offer expert testimony about self-defense training, practice and procedures;
- Whether the defendant can offer expert testimony about perception, memory, and reaction time issues specific to self defense;
- Mis-statements by the prosecutor about how guns work or about self-defense; and
- The self-defense instruction to the jury.

eJournal: Even if those mistakes happen at trial, it seems that going back for a retrial only makes it harder to prevail.

Steele: First, and foremost, I want to say that you really want to win this thing at trial. Remember that most cases don't go to trial. The vast majority of criminal cases are resolved by plea. Your self-defense case may be different because you have someone saying, "No, I won't plead, I won't agree that I did anything wrong here."

But you may have cases that plead out to reckless manslaughter, criminally negligent homicide, something that's a much lower level of culpability with a much shorter sentence. Particularly in a homicide case, you may be in jail for the entire pretrial. You may be in a place where you are not getting bail. That time may be credited to you if you're ultimately convicted, but if you're acquitted, you're just losing that time.

Clients look at this and say, "I'm going to be in jail for a year before I even get to trial. I have a family, but I'm not earning any money while I'm sitting here. I'm not seeing my kids, I'm not caring for my elderly grandmother, so if there's a plea, I'm just going to take it because my family is more important than anything else. Just get me out of here." That is 100% the client's decision and if the client tells me that is what we are going to do, I say OK I will try to make it happen.

eJournal: In earlier conversation, you commented on the difficulty of appealing a negotiated sentence. I was shocked because I thought plea bargains stipulate that you can't appeal.

Steele: You'll probably get a less good agreement from the prosecutor, but in some states you can. I had one a few years back where the issue was whether the search warrant was valid. All the evidence came out of the search warrant. They reserved the constitutional issue of the search warrant in the plea, so that was the only appellate issue.

eJournal: Searches are only one aspect of evidence. There is so much detail being gathered that it is a tall order to ask the defense attorney to keep track of it all.

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Truly intending no offense–I'm surprised that more cases aren't reversed over mistakes by attorneys.

Steele: In a well-investigated case, the attorney is drowning in information. There are going to be police reports and lab reports; they are going to have sent the firearm out and they are going to have tested it; there is going to be gunshot residue testing from the deceased and from the defendant; there is going to be a massive pile of stuff that the attorney has to keep track of. Occasionally, things will fall through the cracks, but a good trial attorney has staff to keep track of it all.

eJournal: Isn't all this detail good so long as it corroborates the statement of the accused?

Steele: Let me speak about confirmation bias from my firearms trainer perspective: let's say you've walked into an armed robbery in progress at a convenience store. You see someone with a weapon threatening the clerk, who is an utter stranger to you, and you choose to engage the robber. There are two or three video cameras recording and the clerk backs up your story entirely, "This guy was pointing a gun at me, demanding all of my money, and I thought he was going to kill me." This is a case that is probably not even going to end in arrest; it is probably not going to get an indictment; it probably is never going to show up on my desk because exactly what happened is so clear.

A case that may show up on my desk is where you're at a bar, and you and the other guy have some history together. You're both drinking and both being argumentative and disruptive. One of you shoves the other one and you take it outside and somebody gets shot.

It is a lot muddier because you've been drinking and everybody's perceptions and memories are going to be muddled. It happened outside so there probably is no video, so now it is going to be you and your buddies' word against what was seen by the buddies of the deceased. It is probably dark so if the deceased had a weapon, maybe the police will find it but maybe they won't; or maybe the deceased's buddies hide it or wander off with it. Now the case is muddy, messy and complicated.

Once the police have formed the opinion that you did it, they've made an arrest and they're building a case. Now the tunnel vision can start kicking in. That's going to be hard to break. Confirmation and tunnel vision are part of human nature – you pay more attention to, and weigh more heavily, the things that confirm what you expect, and tend to ignore things that are in conflict. This is where your attorney may be able to get somewhere with a plea, or you may reach the place where the prosecutor looks at you and says, "This may be a hard case to take to trial, but this office doesn't dismiss gun cases. I can plead it but I can't dismiss it."

There are prosecutors who won't dismiss a drunk driving case because they fear that five minutes after they dismiss your charges, you'll have some champagne to celebrate and go run into a school bus. The gun cases tend to run the same way.

You are going to get media attention. Gun cases attract press and they are going to dig up stuff. That may also influence how the detectives see the case and how the prosecutor sees the case. Once the momentum hits, even if you've got a really good witness who wants to come forward and say, "I saw this and it really didn't happen that way," to what extent will the institutional momentum not want to believe that witness?

eJournal: Are crime investigation misdeeds generally acknowledged and treated as important by appellate courts?

Steele: I think the court will always treat what comes before them with great seriousness. But sometimes, the judges don't know a lot about either self defense or about weapons. Ideally, the problems all need to be clearly explained by the trial attorney before the appeal so it is all in the trial record. There are limits on what I'm allowed to tell the appellate court. I'm not allowed to tell them new things.

In an actual case, the defendant used a hollow point bullet, and the state's firearm expert–not the medical examiner, the firearm expert–went off on a tear about hollow points, and essentially gave enough basis that the prosecutor began calling it a flesh-ripping, killer bullet in the closing arguments. I said this was factually wrong, and an improper appeal to the jury's biases. The problem was that the trial attorney hadn't objected to what she said. They probably didn't know very much about ammunition and didn't look at the expert and say something to the effect of, "Mr. Firearms Examiner, you're an appointee of the State Police, right?"

"Yes."

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"You're familiar with the firearm and the ammunition issued to the State Police?"

"Yes."

"What is the standard ammunition issued to the state police?"

To which the response would have been, "The exact same bullets the defendant used." Then the prosecutor couldn't have made that argument, but the defendant needed an attorney who knew about ammunition.

In closing arguments, everything the attorneys say should be supported somewhere in the transcripts or be a reasonable inference from the transcripts or be something that you can argue is common knowledge. The problem is that the attorneys are working from notes and memory and they get stuff wrong. Now the question for the court is, "Was the prosecutor off-record?"

The trial court is somewhat forgiving of little mistakes because the court knows the attorney didn't have a transcript to check, so they're going to call it "rough and tumble" or argument or talk about the improvisational nature of argument. That is functionally what happened in this case. The appellate court affirmed and said, "Well, the expert was talking about how much more damaging this particular kind of bullet was, so the prosecutor's claim was based in evidence. Affirmed."

I had a case where the prosecutor elicited testimony from the witness about the trigger pull weight. In closing arguments, they started talking about lifting a bag of sugar and how you can't lift a bag of sugar by accident. If somebody doesn't know that the mechanics of pulling a trigger is completely different from the mechanics of lifting an object, they don't know that's not a fair comparison. If they didn't know that, didn't object, didn't put that information in at trial, it's hard to explain it for the first time in the appellate court and say, "This is wrong!"

The bane of the appellate attorney's life is a concept called "harmless error." Here, the court says, "Yes, it is a mistake. Yes, it shouldn't have happened but the evidence against the client is so overwhelming that even though there is a mistake, it didn't make a difference, and we are not going to overturn the conviction."

The appellate attorney is left looking at the client and the client is saying, "But they made a mistake! It was important!" But, the court didn't see it as important.

eJournal: Is the state court of appeals the final recourse?

Steele: Most convictions can be appealed in the state system. If it is a federal constitutional claim, we can try to go to the U.S. Supreme Court. If we are dealing with a self-defense case we may have Second Amendment or possession issues, so there may be a federal constitutional issue and it may be the kind of issue that the court, as it is currently configured, may be interested in. The problem is that the U.S. Supreme Court gets tens of thousands of applications every year of which they take, I think, fewer than 100 these days. It is going to be a rare case that you look at and say, "I think this has some chance of success."

eJournal: Switching to the positive for a moment, if you appeal a verdict and the court agrees that you did not get a fair trial, what's the likely outcome?

Steele: The most common relief we ask for is a new trial. The case starts over somewhere at the pre-trial stage, depending on what specifically was the error. Rarely, are there errors that can cause an entire count to be dismissed.

This depends a lot on what the result is and how many charges there are. In a self-defense case, you may have the homicide charge itself. If the person is not legally in possession of the weapon, there may be weapons charges. Depending on this person's interaction with other people at the scene there may be assault charges. You will sometimes see possessory offenses combined, like possession of a firearm while intoxicated.

There are a frightening number of my cases that generally result from young people at a bar. There is alcohol and there are drugs and there is often–let's phrase it as "hurt feelings." And the next thing you know there's a fist fight and somebody says, "Let's step outside." Then things get really complicated.

Then there may be a whole bunch of secondary offenses. The question may be, "What's the threshold for intoxication under the carrying while intoxicated statute? Is it the same as drunk driving? Is it different?" We may ask, "Did you prove the level of intoxication?"

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That's usually a small part of the case, but I've had small details sometimes become the important part of the appellate case.

I had a case with a young college student who got himself into a tussle with another college student. The whole thing was recorded by security video that showed the other kid hitting my client, pushing him down the hall, kicking him in the head. You're looking at this video and saying, "Good Lord!" The kid finally had enough. He pulls out a knife and stabs the kid that's attacking him. He wins the assault case but he loses on the possession of the weapon charge because he's carrying a switchblade–on a college campus. Neither of the attorneys were focused on the switchblade possession. They were all worried about the assault case. This possessory thing was the tail of the dog and it became the central appellate issue. It came down to a question of whether the corridor of the dormitory was part of his house. There are statutory exemptions in some cases for having a weapon where you live.

Things get complicated when we get into cases where people share common areas. If I live in an apartment house and I want to go down to the scary, little dark laundry room in the basement to do my laundry and I have my firearm or my knife or my pepper spray with me, am I in my house? That's one of those not-easy answers. That tiny thing in a case suddenly becomes incredibly important on the appeal.

eJournal: What if none of the issues you raise get traction with the court? If we aren't granted a retrial, are we at a dead end?

Steele: From there, the case will typically go into the state counterpart to habeas where the defendant can challenge mistakes made by trial counsel. This is also the place for claims of actual innocence based on new forensic science or new witnesses unknown at the time of trial. After state habeas, and state habeas appeal, then the defendant may be able to file for federal habeas.

eJournal: May we clarify the terminology? Doesn't a habeas petition claim that the person is being unjustly detained? Are we going to a higher court and asking for a ruling on guilt or innocence?

Steele: Sometimes. There are different flavors. Only talking about MA and CT habeas petitions, and only at a state level, one kind of habeas is ineffective assistance of counsel. It is a different procedural argument. When the court comes back and says, your issue wasn't preserved, the attorney didn't make the objection properly, the record is inadequate, habeas is where you go to address that. You say, "I lost this case because my attorney didn't object; a competent attorney would have made that objection, now I want the court to find that my attorney was incompetent and that it mattered." That is one level of habeas. Habeas is also the place where you go to say, "My attorney didn't deal with this alibi witness, my attorney never talked to them and I wanted to present that alibi witness," or, "My attorney never had this piece of evidence tested."

It happens! In the case I'm working on now, the attorney never had a firearms examiner do a casing comparison. The habeas attorney is going to hire an expert to do a casing comparison and if it matters, the attorney will say to the habeas judge, "Look, the attorney was inadequate because they didn't do this test. I did, and here are the results and, if the jury had heard them they would have reached a different verdict."

The second distinct flavor of habeas is actual innocence. Think of the DNA exoneration cases. That is the case where you're saying, there is new evidence that was not available at the time of my conviction that shows that I didn't do it. For your typical self-defense case, this one is not going to be particularly applicable.

Self-defense cases are different! They're fundamentally different because the logic of self defense is that the defendant is admitting, "I was there, I did it, I meant to do it and I was justified in doing it." It is not a who-done-it case that is going to turn on forensics. It is not going to turn on DNA to show you were not the one who was there and that somebody else was holding the gun. It may turn on witnesses that weren't found; it may turn on some security video that was just found; but it is more likely to turn on ineffective assistance.

The habeas attorney gets to complain about everybody; they even get to complain about me. Remember last month when I said if I couldn't do what the client wants for an appeal they would get a long letter from me explaining why I won't do it?

In addition to wanting the client to understand, the reason they are getting that long letter that I heard and understood them is to document why I think it is a bad idea. I want the client to understand why I think it is a

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bad idea. Then, when the habeas attorney asks, I want that attorney to understand my reasoning.

If the attorney looks at it and says, "I see your reasoning, but damn, you're wrong about this part here," then it is documented. It is not a matter of having to remember five years later, "Now, why did I think that was a bad idea?" I can say, "This is what I was looking at." If the habeas attorney finds a key case I missed, I might have to say "I didn't see that case that you're talking about. You're right." It hasn't happened yet, but it certainly could.

Sometimes when I write that letter, the process of having to set out the reasoning on paper may make me think, "I missed this the first time I thought about it, and the idea is looking better and better," so that letter can make me change my mind.

eJournal: Returning momentarily to habeas court, how often does the client get the desired result?

Steele: I am not habeas counsel, but I get the impression it is not successful very often. After the habeas hearings, there can be a habeas appeal, and we can go through the whole process again.

eJournal: Who hears the habeas appeal?

Steele: It goes back to the appellate court to say the habeas court got it wrong. Those generally don't get far, but occasionally the court will say, "No, no, wait…we see this, there was a problem." We have had years and years and decades of fighting in exoneration cases where that does happen.

We had a homicide case out of CT in which a fellow was convicted with really, really bad arson science that has long since been replaced with a much better understanding of how fires work and a bunch of things in psychology and how people can be induced to give statements that are not true. There was probably 15 years' worth of fighting before that guy finally walked out of jail. It went through appeal, it went through habeas, it went through habeas appeal, and I think it was on the second or third round of habeas before the court finally said, "Dang, you're right!"

eJournal: You mentioned earlier that an awful lot of the time, the client will run out of money before exhausting all the possible appeal avenues. Playing the devil's advocate, let's say the client has a rich uncle who "wants to fight this all the way to the U.S. Supreme Court…" At what point does the government step in and say "Enough, already! This is settled!"?

Steele: Generally, it can go on a long, long time. You can have multiple rounds of habeas, and sometimes that is what it takes to get somebody to listen to the proof that you really did not do it. At each stage, it is getting harder and harder and harder. You are building up more momentum from all of the courts that said you were wrong. It makes it more likely that the court will say, "We've already heard this before." It makes it much harder to find a court that says, "Gee, you're right!"

At court, there are all kinds of complicated rules about exhausting your possible remedies and when something's been brought up and whether you can ask something to be reconsidered. Again, that is all habeas counsel's area.

eJournal: Are there attorneys who specialize in habeas pleas?

Steele: Yep. Because there are going to be court hearings with witnesses and investigators, you really want an attorney with trial experience. You really want somebody who has got the investigators, knows the experts, and who can say, "OK, this is what's wrong with this case; go get 'em."

eJournal: Thank you for all the time you've taken with us explaining these complex and often misunderstood topics. You've been so generous with your time and knowledge, and while our Network members will likely never meet you, I want you to know how much I appreciate it and I know our members do, too.

Steele: With luck, Network members are never going to see my end of the process. But it can happen and I do talks for my local firearms organization because there have been several good self-defense cases that lost. I had the case for the kid who lost because he had a poor choice of weapon. If he'd had anything other than the switchblade, he probably would not have a criminal record. He didn't know. He got it from some other buddy because he thought it looked cool; he didn't realize what he'd gotten himself into.

I had the young lad with the alleged flesh-ripping killer bullets.

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I had another one where the trial court just would not let the self-defense expert testify. The expert's primary area of expertise was in training police officers and the court said, "Your client is not a police officer. Your experience is irrelevant to this case. You're not testifying." The appellate court looked at it and said, "You didn't make a record about why this guy was qualified to talk about civilians, so the trial judge was within his discretion to say no."

I had a case of an incident with a fellow at a bar that was a combination of how the jury instructions were structured, the closing argument, the evidence itself and the duty to retreat. He's in the bar and another fellow had threatened him. He had flashed his legal revolver, saying, "Back off, quit hitting me." He had gone into the bar kitchen to clean himself up because he had a bloody nose and had gotten scratched up a bit, and the guy he had been fighting with chased him into the kitchen, charged him and got shot five times.

At court, there was a whole discussion about whether retreating to the kitchen actually complied with the duty to retreat or whether he should have gone outside to the parking lot. There was an unmarked door in the kitchen that led outside and they asked whether he should have retreated through that door. How far do you have to go? When do you have to go?

eJournal: It seems like the trial attorney might have found a way to show how fast a charging attack like that happens.

Steele: That case didn't have an expert either. Sometimes, it can be hard to interest self-defense experts in criminal cases. A lot of our trainers tend to be law enforcement or former law enforcement and they may not want to get involved in something where the facts are muddy enough that it is going to trial.

eJournal: You've emphasized that the straight-forward cases often are not charged at all. However, smart people also plan for disasters and messy, complicated cases certainly fit that description. Thank you for teaching us about the process that makes some of the legal remedies work.

About our source:
Lisa J. Steele is a widely published legal author, an appellate attorney, and helps teach concealed carry classes. She explains that appeals differ from a trial in the immense amounts of research and writing involved. It's not unusual for her to get an apparently small legal problem that takes 40 to 50 billable hours to research. The results are compiled into a brief, but if the court turns down the appeal, she likes to offer the research to the National Association of Criminal Defense Lawyers' publication The Champion or one of the law reviews and write an article so other attorneys may be able present her research in a different court. This may open the door to revisit the appeal in later years with the original court that turned it down, she explains. For armed citizens, articles by Ms. Steele that are sometimes reprinted in various websites that provide a rich resource for further learning from a trusted source. Web searches are recommended to readers wishing to learn more from her writings.

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Please enjoy the next article.]

President's Message

by Marty Hayes, J.D.

I have to admit, I am at a loss for a timely and energizing topic to write about this month. So, how about I give the "State of the Network" message a month early?

The condensed version is that the Network has never been stronger!

The detailed version is that we have $1.7 million in our Legal Defense Fund, with a healthy cash reserve for unexpected operating expenses. Despite this success, we continue to operate our business very conservatively, so as to not be over extended and put this cash reserve at risk. In fact, we operate on a cash basis. If we want or need something, we decide if we can afford it, and if we really do need it we make the purchase. We do not borrow any money ever, never have, and don't expect to in the future.

We have only two Network members with cases that are active. One is very new, and we do not expect the other to be resolved any time soon. (There are reasons; obviously with the case ongoing, we won't discuss it.) We have recently finished a couple of other cases, with one, a shooting, going to a grand jury which determined it was a justifiable homicide. We have finished up another where the member displayed a firearm in the face of threatened unlawful force. In that case, our member was never charged, and the statute of limitations has run out, so it is now officially over.

We are blessed with a membership that takes use of force in self-defense seriously. We are averaging only two to three member-involved self-defense incidents per year, despite the growing membership numbers. Our success largely hinges on the Network Affiliated Instructor program, where over 300 instructors continue to recommend membership in the Network to their students.

Since we're discussing membership numbers, we are now over 17,000 members and continue to grow at a steady pace. Part of that success has to do with the Network's phenomenal renewal rate of over 80%! This is unheard of in a membership organization, especially one which doesn't do automatic renewal payment withdrawal. We looked into auto-renewal a few years, and unfortunately, the cost of implementing it for the $7.92 monthly charge on a credit card didn't pencil out and we chose not to jack up dues to implement it. I am not saying we will never do this, but at the moment, it is not on the horizon.

One on-going frustration we face, and one you all could help out with, is that the Network keeps being erroneously called "self-defense insurance" and gets lumped in with the other companies who compete in this marketplace but have a traditional insurance component attached. This insurance component either insures the parent company against a member's claim for financial assistance, or they are selling insurance policies. I NEVER wanted to get involved with the insurance concept, because insurance companies are regulated by 50 different insurance commissions. In fact, I know of three of these companies that have had to stop selling their product in at least one, if not in two or three different states. So, where you could help us out, is that if you see us referred as "self-defense insurance" on the Internet or described in person as insurance, please politely make the correction. We are a "member benefits program" not self-defense insurance.

Okay, that pretty much sums up my State of the Network message for this year. As I write things like this, I often wonder if people wonder why we share so many details of our business, details which could possibly benefit the competition. Here's the reason: we have always run the Network like an association with a large membership, not as a private company. Try to get some of these kinds of details from some of the competition, such as details about membership growth, renewal rates, financial stability, etc. Probably won't happen. But I believe our members, especially the multi-year members, deserve to know just how solvent we are, and if we are going to be around for a while. It is kind of like the old adage that if you tell no lies, you never have to worry about what you told someone. That is us in a nutshell.

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Attorney Question of the Month

The Network has long recommended that armed citizens get to know an attorney before needing legal representation after use of force in self defense. A client who wants to meet with an attorney absent a pending legal issue is unusual for many criminal defense law firms and as a result acting on this advice can be difficult. With this in mind, we asked our Affiliated Attorneys to comment on the pre-need consultation with this question–

We understand that law firms are busy places focused on defending people with current legal problems. How do you recommend a Network member who does not have a pending legal issue connect with an attorney for a brief consultation to be sure the member understands their state's self-defense laws, while getting to know the attorney they'll call to protect their rights after self defense?

Our affiliated attorneys responded–

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Lawyers and law firms–well, good ones–stay busy. Many have schedules that are often planned months if not years in advance if they handle complex business and commercial litigation, particularly in federal courts. Yet, members are correctly advised that they can and should know who they will call if a need suddenly arises involving a possible self-defense scenario. Indeed, to help guard against the potential that a member will even have to call on an attorney in response to suddenly being thrust into a situation involving law enforcement and potential criminal investigations, it is prudent for a member who plans to carry a firearm on a regular basis to meet with an attorney and discuss the specifics of the law because, unfortunately, the training that is required in some states, such as Tennessee, simply is not enough and is too often written and designed by state officials who may not even carry a firearm themselves.

It is sound advice that a member seek proper training and counsel to prepare for the "what if" that we all hope never materializes. While that may include the right kind of training, it should also include the right measure of discussion and understanding of the maze of laws and cases which could suddenly come into play if the situation arises. That kind of preparation really only comes from a one-on-one or perhaps small group session with an experienced attorney.

On a regular basis, I will receive calls from armed citizens wanting to know if I "still handle" cases involving self defense and firearms possession. Frequently, these calls are not looking for a true consult but are just wanting to mark off an item on the "to-do" list. Frequently, all that call does is confirm that the phone number or email address is still good but it does not result in the kind of relationship or exploration of issues that comes with an office or small group session with the attorney.

As the attorney, what do I recommend? Make the appointment and take it seriously. Have a list of questions or concerns that you want to discuss. But also, be prepared to address other topics such as "if you think you have a need or desire to carry a gun for self defense, do you also have an estate plan should something go wrong?" Take the time to make an appointment to spend thirty minutes to an hour with an attorney. You might find you have needs or even misunderstandings that you were not aware of. You might also find that knowing an attorney in advance of having a need is time well spent that may help you avoid ever needing the "self-defense" services in the future.

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This is a valuable question for the Armed Citizens' Legal Defense Network journal to delve into. There is so much bad information out there on the issues, and often

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times, inexperienced attorneys do not understand what they are getting into with a true self-defense case. Attorneys do not need to have an in-depth understanding of all the issues (firearms, cutting instruments, impact weapons, ballistics, human physiology, crime scene investigation, the effects of adrenaline on perception and short-term memory, the unreliability of eye-witness testimony, etc.) but they do need to have sufficient background and understanding of all of these issues to recognize when any of these issues arise in a given case–and when they don't–and they need to have a resource of known and reliable experts that they can reach out to who can address these issues–that is if they intend to do any sort of a proper professional job of providing legal representation to their clients.

For example, over the last five years, I have truly spent twice as much time working as an expert/consultant for other attorneys around the country on a number of these issues, than I have representing my own clients in self-defense cases and I have still dealt directly with seven of my own cases. But, I have worked hard to build my quiver of experts, in the event that I need them in some new case that pops up, whether it is my case, or that of a colleague who needs help.

Once the member has identified an attorney as one who holds themselves out as having experience in dealing with self-defense cases, either from the criminal, or civil side, (for they are not the same areas of law at all), then contact the office and ask to set up an appointment for an hour-long consultation. Attorneys will most likely charge for that hour; our time and expertise are all we have to sell. So, come prepared with a concise list of questions that you can present to the attorney to be covered at that initial meeting.

Modernly, attorneys do not charge "retainers" which historically were fees paid to ensure that the attorney would be available to take your case. Make sure that you have a complete understanding of the attorney's fee structure, hourly rates, and policies on fee deposits, minimum fees and payment of various defense costs. Attorneys may not ethically advance money to clients for the payments of costs such as expert fees, independent laboratory fees, and other case-associated out of pocket expenses that MAY come up in a given case.

Make sure that a discussion is held during which the attorney advises the member of his/her expectations of how the member will respond to ANY initial questioning that law enforcement attempts to conduct prior to the attorney showing up to assist the member. And cover the issue of who will be responsible for communicating with the attorney in the initial post-incident call, seeking to bring the attorney to the member's location, to begin providing legal services.

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I suggest asking the member to contact the Network directly for a referral. *[Editor's note: While the Network does not refer members to attorneys, our members may log in to our website to view our affiliated attorney listings which may assist them in attorney selection.]*

Making contact with and meeting the lawyer prior to your defensive encounter seems imperative. You don't want to try and establish that all-important relationship under the pressure of potential pending legal proceedings.

In my office I do not charge for initial half hour consults with ACLDN members or my concealed carry students.

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Call or email the attorney via the contact information provided on his/her firm's website or bar directory. If s/he does not promptly respond with information about how to schedule an appointment then you have your answer. If a prospective client cannot reach an attorney within a reasonable period of time then that client cannot be assured the attorney will be available on short notice during their time of need. Our firm measures our response time in minutes, not days. If I agree to a prospective representation then I will give the client my cell phone number to reach me on nights and weekends.

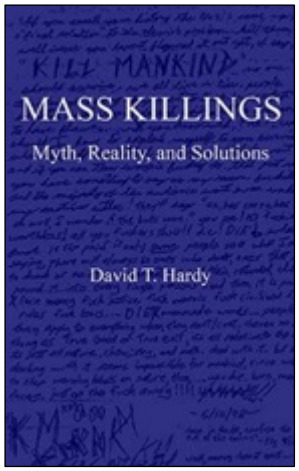
A big "Thank You!" to our affiliated attorneys for their contributions to this column. Please return next month when we share the rest of the responses to this question from our affiliated attorneys.

Book Review

Mass Killings: Myth, Reality, and Solutions

by David T. Hardy
68-page paperback
ISBN-13: 978-1718142244
44 page eBook sold at Amazon Digital Services LLC

Reviewed by Gila Hayes



I have been a regular reader of David Hardy's *Of Arms and the Law* blog for many years, so recently when I stumbled across his analysis *Mass Killings: Myth, Reality, and Solutions,* I added it to my e-book library immediately. I've always liked the plain-spoken Hardy's blog commentaries, although he is more rightly famous for his work as an attorney and legal scholar.

In his introduction, Hardy writes that reports on mass killer attacks range from serious scientific studies to news soundbites. He draws lessons from 21 mass killer attacks between 1966 to 2018 in "an attempt to bridge the gap by condensing and organizing the work that has been done on the subject by criminologists, psychologists, psychiatrists, and others."

Myths and outright lies he debunks include the claim that mass killer attacks are a uniquely American problem tied to firearms. He points out, "The record death toll from a mass shooting came in Norway, in 2011: 67 deaths. The record death toll from a mass killing of any type came in China, in 2001; the killer used bombs to take 108 lives. In 1982 a berserk South Korean policeman killed 56 (the same number that died in our worst shooting, in Las Vegas), in 2007 two Ukrainians killed 25 with a hammer and a pipe, in 1986 a Columbian used a six-shot revolver to kill 29 in a Bogota restaurant...(Neither America's worst mass slaying or its worst school slaying were shootings. The man who torched the Happy Land nightclub in 1990 killed 87; the one who blew up the Bath, Michigan schoolhouse in 1927 killed 44)."

Is access to firearms the reason behind mass killings? No, Hardy points out, illustrating his conclusion by citing the multiple deaths from knife attacks in China, bombings in various nations, and mass killings by terrorists driving automobiles.

Are mass shootings on the rise? Hardy writes that they are not. The media creates that impression by manipulating the data and the definitions of mass killings to include suicides, gang violence, shootings over drug deals and other crimes unrelated to a mass killer's desire for notoriety. He also addresses the mistaken idea that spree killers "snap" and kill without warning, noting long periods of preparation, methodically developed plans, and acquiring and stockpiling weapons and other supplies that investigators turn up in the aftermath.

Are mass killers pushed into madness by having been bullied? Not so, Hardy says, explaining that normal folks grasp at any explanation, including this popular theme. His research suggests that the mistaken notion about bullying was launched at Columbine. He comments, "The sound bite coverage…focused on [the killers] as innocent victims of a toxic teen culture in which they were persistently harassed. This one-sided view has become fixed in many people's minds…"

In reality, Hardy observes, mass killers are narcissistic, are themselves frequently bullies, and often are psychopathic or sadistic. "All these are classes of people accustomed to inflicting verbal and emotional abuse to get what they want from others...When the killers are loners, it's not usually a cause of their condition, but its effect." He later adds, "Apart from the psychotic ones...virtually all mass killers are extreme cases of narcissistic personality disorder. They have grandiose views of themselves and of their importance, and expect everyone to share this self-appraisal."

Hardy continues, "Narcissism and psychopathy make a dangerous combination." He calls, "A conscienceless person with no regard for laws or their fellow humans, coupled with a burning need for recognition in the form of fame or infamy, and anger that this recognition, this entitlement, has been denied him," the "recipe for creating a mass killer." The characteristic of sadism is another common factor shared by mass killers, he adds. Others have shown symptoms of depression, he acknowledges, while some post-incident manifestos reveal seriously disordered thinking suggesting schizophrenia, delusional thinking, and in one example a psychotic break, although he adds that these mental

[Continued next page…]

disorders are less to blame than narcissism, psychopathy and sadism.

In chapter 3, Hardy spotlights the news media's fascination with mass shootings and how it serves mass killers. The Virginia Tech killer sent NBC news pictures, videos and long, rambling writings; reporters fought to provide the most dramatic details about the Columbine killers, a campaign that persisted for most of the year after the murders and included two Time magazine covers featuring the murderers' faces. He cites several interrupted attacks in which investigators found detailed plans specifically patterned on Columbine, showing how the next crop of psychopaths drew on the frenzied reporting, much of which simply was not true like the reporter who gushed that Columbine students found the "sadistic psychopath and his sidekick who dreamed of killing hundreds of children" sweet or adorable boys, highly intelligent, and loyal to friends.

Hardy argues that news media should deny mass killers the celebrity they seek by refusing to name them or run their photo. Experts suggest minimizing "images of terrified or grieving survivors," to avoid portraying them as powerful to would-be copycats, he adds. Refuse to publish their manifestos or videotapes and never blame the murders on persecution the killer endured. Statistics prove that "publicity given mass killers generates more mass killings," in that they "tend to come in clusters following a heavily-publicized one," he adds. At the book's end, he recommends making mass killers nameless and faceless, as the cure with the greatest potential to prevent others from following suit.

Hardy may be bucking a trend when he advises improving the mental health system as part of the solution. He suggests that in most cases, involuntary commitment and treatment is needed, although that is difficult to achieve in today's society. The man who shot Gabrielle Giffords was "known to be insane and dangerous," but no one called authorities to intervene. He encourages increased public willingness to report warning signs by killers who post their ideas on social media, are known to be collecting supplies for an attack, or message their friends about what they're going to do.

Gun control, waiting periods, background checks, banning private party gun sales, bans on military-style guns, magazine capacity limits and other popularly acclaimed measures would not have prevented the mass killings in past years. Hardy instead recommends increased security measures, noting that schools have benefitted from having school resource or security officers, and he extends that concept to include volunteer armed teachers. "We know that mass shooters consider security in choosing a target," he writes, noting that the Aurora theater killer wrote that he thought about airports for his killing spree, but ruled it out because of security. The Orlando nightclub shooter abandoned one location after seeing security officers there and focused his attack instead on the Pulse nightclub. Create uncertainty in the would-be shooter's mind about success, Hardy recommends, asking rhetorically, "What does such a narcissist dread most? Failure. Failure means he dies and is forgotten."

Hardy urges readers not to view spree killer threats as unsurmountable. "There are things that we can do to reduce mass and school killings. We can moderate the publicity that comprises their motivation. We can provide better, much better, mental health care and reduce the legal barriers to providing it to those who need it but will not seek it. We can harden the schools. The hardening does not need to be perfect; just raising the risk of failure will deter school killers," he urges.

Hardy's book concludes with a list of articles and books by a variety of experts and a substantial set of footnotes to support the assertions in this concise little book. The 24-hour news cycle spouts so much fear mongering that it is easy to think change is impossible. If David Hardy's book has one key message, it is this: there are solutions to spree killer attacks. Several, in fact. I was encouraged and inspired by his book.

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

Editor's Notebook

by Gila Hayes

When backlash from mass killings results in useless, restrictive laws, it is easy to think the causes are too big for any individual to affect, so we do nothing and continue to suffer decay of the freedom America has enjoyed for so long. The problem is not too big, nor will it ever be solved without individual change. So long as we human beings possess free will, the ability to choose our own thoughts and actions, to choose between good and bad, we each continue to affect our world.

I've been mulling the gulf between individual activism and big-picture change ever since the Pittsburgh synagogue murders when the news media bombarded us with the name and picture of the killer along with reports about how many guns he owned, his political leanings, and comments from his neighbors, who had seen him around his home, but didn't interact with him. The news portrayed an isolated, angry man who communicated through hate-filled opinions posted on an extreme social media site.

The comparisons between this bitter, disassociated man and conservative, gun owning Americans inevitably began almost immediately, as is common after all mass shootings. That man's insanity was unfathomable, so a fearful public focused not on his mental state but on the surface attributes like the guns he owned and his opposition to immigration. In the process, eclipsed were millions of day-to-day positive interactions between gun owners and clerks at grocery stores, the janitor at work, the mail carrier, the utility meter reader and co-workers who, in a best-case scenario, should consider their armed citizen associates the person they trust and look to when things get rough.

So, we have to ask ourselves: are we that rock-solid safe harbor to those around us? Sometimes, yes; but sometimes, no. So today, I'd like to challenge each Network family member to become that trusted rock in your community. That starts with treating others with respect and consideration–even when the snippy little voice inside us says they don't deserve it.

Here's the thing: we can't fully control big problems like mass killer attacks. We can and must address the knee-jerk response that paints all gun owners as potential mass killers. That's a big task that starts with small changes. We have to ask, what can I, as just one individual, control? Only my own thoughts and behavior: what I do, what I think, what I say. At the core, what each person, as an individual, can influence is whether or not he or she will be a decent human.

Sounds easy, but it's hard to do when we're regularly bombarded by angry and self-serving voices. The instinctive response is to react in the same, offensive ways. As humans, we're still genetically encoded with survival instincts that kick in when non-deadly insults and challenges to our perceived control make us do and say stupid, defensive things that are entirely unwarranted. We have to be smarter than our inner caveman.

While a pledge every morning to "be nice" might be a good starting place, just trying to behave more nicely quickly leads to smarmy, self-virtuous "look at me being good" displays. Instead of talking about being kind, we need a core-level change that makes us better human beings and better neighbors and that starts internally, with how we think.

For me, that ideal is encapsulated in the apostle Paul's words in Philippians 4:8: "Whatsoever things are true, whatsoever things are honest, whatsoever things are just...if there be any virtue, and if there be any praise, think on these things." I know, though, that not everyone will be able to adopt and internalize that advice, so I've been looking for other words to express that ideal. It turns out that a lot of different philosophical outlooks have expressed the ideal of being a decent human being through a lot of different words. Consider these–

- Buddhism's Eightfold Path, focuses on right doing, right thinking and acting upon what is right.
- Benjamin Franklin, who was a deist, but endorsed no religion, strove to live by his 12 Principles, including:
  - Silence ("Speak not but what may benefit others or yourself);

[Continued next page…]

  - Sincerity (Use no hurtful deceit; think innocently and justly, and, if you speak, speak accordingly)
  - Justice (Wrong none by doing injuries or omitting the benefits that are your duty).
- And finally, here's even a very big paraphrase of Dave Eggers words from a 2000 Harvard Advocate interview: invest more energy into doing good than criticizing the absence of it in others.

If I started this line of thought by acknowledging that the admonitions of the apostle Paul won't speak to everyone, I'll close it by observing that to put it mildly, the writer Dave Eggers isn't for everyone, either, but the principle is the same as the foundational tenets of Buddhism, Christianity, and the life rules Ben Franklin embraced.

There are a hundred ways to express it: Be a decent human being. We each must exemplify the solid, trustworthy citizen that your neighbors trust and look up to.

This is the season of trite holiday greetings and we're already being bombarded with Merry Christmases, Happy Holidays, Season's Greetings, and many more throw-away phrases. I'd like to see us as the armed citizens community take it a lot further–be decent human beings, bite back that impatient gesture, the irritated comment, and illustrate to those around us that we're the solution, not the problem.

[End of December 2018 eJournal.
Please return for our January 2019 edition.]

About the Network's Online Journal

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

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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.

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