NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

A self-defense case is fundamentally different from most other criminal prosecutions. The essence of the defense is that the defendant is the victim of an attempted or completed violent felony such as assault, rape, or homicide which, but for the defendant's lawful actions, would have resulted in the defendant's death or in serious bodily harm. The complainant is, in fact, a violent aggressor who, but for the defendant's lawful actions, would be the one standing trial. The defendant is the "good guy" and the victim is the "bad guy," despite the prosecution's efforts to portray the converse.

Many assumptions about trial tactics are inverted in a self-defense case. If the defendant presents some evidence on each of the elements of self-defense, then he or she is entitled to a jury instruction on the issue, which places the burden of proof squarely on the prosecutor to disprove self-defense beyond a reasonable doubt. If the prosecution fails to disprove self-defense, the client is acquitted. In practice, however, the defense attorney has a great deal of work to do in order to convince the jurors that the client's conduct fell within the common law of self-defense or within applicable state statutes.

This article is a starting point for attorneys representing clients in a self-defense case. It is focused on the common law of self-defense, using Massachusetts as its primary example, but the general principles are applicable in any state. It also introduces attorneys to some of the research regarding use of force conducted by police and self-defense instructors.

A self-defense case often requires counsel to understand a moderate amount of technical information about weapons and crime scene reconstruction. Such knowledge is needed in order to: (1) review and challenge the prosecutor's experts, and (2) understand eyewitness memory issues and how the client, the deceased, and bystander witnesses were affected by the stress of the incident.

When Is It a Self-Defense Case?
"It is well settled that, if a man is attacked, he has the right to defend himself. If the attack is of such character that, and made under such circumstances, as to create a reasonable apprehension of great bodily harm, and he acts under such apprehension, and in the reasonable belief that no other means will effectively prevent the harm, he has the right to kill the assailant."
– Com. v. Barnacle, 134 Mass. 215, 215 (1883).

In the vast majority of states, the basic elements of self-defense by means of deadly force (firearms and other weapons) include:

- The client had reasonable grounds to believe he or she was in imminent danger of death or serious bodily harm. Heated words, vague threats, and the possibility of future harm are not enough. The harm must be serious and imminent.
- The client actually believed that he or she, or a third person, was in such imminent danger. Establishing this subjective belief often requires the client to testify.
- The danger was such that the client could only save himself or herself by the use of deadly force. Some states do not require the defendant to retreat, even if he or she can do so safely.1 Most states do not require the defendant to retreat if he is in his own home defending against someone who is unlawfully present. Law enforcement officers are not required to retreat.

- The client had to use no more force than was necessary in all the circumstances of the case.
- The standards for the use of non-deadly force (bare hands and feet) and force used in the defense of property are usually similar.
- At a minimum, the defense must include some evidence, generally viewed in the light most favorable to the defense, on each of these factors in order to receive an appropriate jury instruction.

When Isn't It a Self-Defense Case?

Self-defense is all-or-nothing. In order to establish it, the client has to admit being at the crime scene, with a weapon, which he or she used to intentionally harm the aggressor. The client has to admit that he injured the aggressor. The client has to convince the jury that if a reasonable person had been standing in his shoes, the reasonable person would have done the same thing. In effect, the aggressor invited his fate by threatening or inflicting serious bodily harm, or by threatening to kill the client.

In one fell swoop, the client has given up alibi and mistaken identity defenses. He or she has given up any claim that the wound was made by accident. Generally, the client must give up provocation (heat of passion or extreme emotional disturbance). Logically, provocation implies an unreasonable response to a situation, and mitigates murder to manslaughter. Self-defense implies a rational response to a very dangerous situation and, if successful, results in an acquittal. Similarly, the client must give up claims of mental illness or insanity and defenses based on intoxication or drug use.
Thus, it is not a self-defense case if:

- Counsel cannot present some minimal evidence on all of the self-defense factors.
- The client denies responsibility for the crime or claims it was an accident. (This is especially important if the client has given the police a statement in which he or she tries to minimize the offense by agreeing with the interrogator that it was an accident or denies responsibility for the crime2.)
- The client was the initial aggressor (the first to use force). If the client has unlawfully invaded the complaint's home or is committing an armed robbery, the client is, in effect, an initial aggressor, and he must attempt to withdraw before he can use force to defend himself.
- The client and the complainant were engaged in mutual combat upon agreed-to terms.3 If, however, the aggressor escalates an agreed-to fistfight by drawing a deadly weapon, then the mutual combat preclusion for self-defense may no longer apply, although the client is still required to retreat where possible if the state so requires.
- The client continued to use force after the aggressor fell unconscious, surrendered, or began to flee. Self-defense has to cover every wound inflicted on the deceased.

The Client

The client does not have to be a clean-cut pillar of the community who carries a lawfully-owned firearm in order to qualify for self-defense, but it is helpful. Often, the defendant will need to testify in order to establish his subjective belief about the threat and need to respond defensively. This can be done through circumstantial evidence, but it is difficult.

Ideally, the client will also have some formal training in the use of deadly force which will allow the client's teacher to testify about the client's training in order to show that the client's actions were subjectively reasonable. If the client has not had any formal training, counsel may still seek an expert to testify about use of force issues. However, the attorney may encounter difficulty showing that the expert's opinion is relevant if it was not the basis for the client's subjective decision. The attorney could offer expert testimony to show that the client's actions were objectively reasonable.

Unfortunately, the most difficult self-defense cases come from clients involved in gang- or narcotics-related homicides and assaults. The client generally has a criminal record for violent offenses; illegally carries a

weapon; has a history of problems with the complainant (making it difficult to sort out who was the aggressor); fled from police; discarded the weapon; and made incriminating statements when questioned. The attorney will be very reluctant to put the client on the stand, especially if the client's record can otherwise be kept out of the case. Experts are often very reluctant to get involved in such cases.

A Theory of the Facts
"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."
– John Adams, 1773
(summation in the
Boston Massacre case)

Once the attorney has settled on a self-defense strategy, he or she will need to think about what facts should be established and challenged in order to successfully defend the case. There will be some facts which the prosecution and police investigators believe are inconsistent with self-defense. Counsel will have to wrestle with these facts and be able to explain to the jury why they do not disqualify the client from self-defense.

Perception, Memory, and the Eyewitness
A lengthy discussion about eyewitness memory and perception is outside the scope of this article. The nature of a self-defense situation generally means that the client and the witnesses will not be able to accurately recall what happened.4 This is normal.

Self-defense situations develop very quickly. Bystanders who were not paying attention to the situation may not take notice until after a loud noise or sudden movement. Thus, they may miss important cues that led the client to believe he or she was in imminent danger. Once a weapon has been displayed, weapon focus will cause the witnesses to watch it, and perhaps miss other important events during the incident.

Eyewitnesses may significantly overestimate or underestimate distance and event duration. They may get the sequence of events wrong. Unfortunately, the jury may regard the misperceptions of neutral witnesses as more persuasive than the client's testimony, or even regard conflicts between the testimony of the client and the witness as a sign that the client is lying. The attorney needs to keep in mind the usual issues of stress, lighting, distance, contrast, and event duration when questioning witnesses. Here, as in eyewitness identification cases, a certain witness is not necessarily an accurate one.

When the client is under life-threatening stress, he or she cannot calmly engage in a conscious, deliberative, and analytical reasoning process. Instead, the client will react automatically, which will produce fragmented memories and reasoning based on past experience, intuition, and emotion. Simple habits are easier to follow than complex responses that require integrating multiple thought processes. This automatic reaction is one reason why it is important to find out whether the client has had any self-defense training and talk to the client's trainer.

Some authors suggest that the stress-triggered hormones affect the client's memory, and that a client can provide more accurate statements if he or she waits 24 hours and gets some sleep before giving a formal statement.5 The attorney should ask about the investigating department's officer-involved shooting policy. If, like New York City, it requires that officers be given 24 hours and bed rest before giving a statement, and the client was pressured to give a statement sooner, the attorney may have good fodder for cross-examination.

The second problem the attorney will encounter with witnesses and the client is the effects of after-acquired information on memory. The attorney should look very carefully at the timing of interviews, statements, media reports, and other information which may cause the memory of a witness to change in order to match after-acquired knowledge. The new memories, while they may not be more accurate, effectively overwrite the original memory. The attorney should explain how suggestion can cause a memory to be inaccurate. Again, the attorney needs to show the jury that witness confidence is not an accurate predictor of witness reliability.

Hindsight bias is related to the after-acquired knowledge problem. A witness who knows the outcome of an event may retroactively feel that the outcome was obvious. A witness who learns after the event that the aggressor was unarmed or had only drawn a wallet from his pocket may retroactively believe that he clearly saw

that no weapon was present and that the defender overreacted.
Some prosecutors may argue to the jury that the details of the incident have been “indelibly etched” into the memory of the witness and can be relied upon like a videotape. (The implicit corollary is that the client also has this etched memory, but is lying.) Often, the prosecutor will refer to the jurors’ own memories of the Kennedy Assassination, Challenger explosion, or Twin Towers collapse. The “indelible memory for shocking events” theory is widely believed, but generally considered untrue by memory experts. The attorney may need to explore this belief in voir dire and be ready to challenge any prosecutorial closing argument making this claim.

Physical Evidence — Distance and Wounds
The prosecutor will also try to reconstruct the scene using photographs, blood spatter analysis, sketches, and possibly analysis from physicians, medical examiners, and gunshot residue experts. For the most part, the attorney should confirm that photographs accurately reflect the scene and, where possible, the lighting. Sketches should be to scale, with evidence locations triangulated from fixed points. If the attorney can determine where the client was standing when the incident occurred, it may be useful to have photographs taken from his or her point of view to show what escape routes the client could have reasonably perceived. Even where retreat is not legally required, the jury may be more sympathetic to a defendant cornered by an aggressor.

Carefully look at statements and police reports about who had access to the scene before it was sealed and photographed. If a bystander or first responder tripped over a body in a dark scene, for example, a reconstruction expert may mistake the resulting spatter and footprint for a vicious kick delivered by the client. Bullet casings may roll or be accidentally kicked. Weapons may be moved (or removed) by bystanders or the aggressor’s friends. Doors which were closed and locked when the client was facing the aggressor may be opened to help police find the right entrance or to let bystanders leave. Lights that were turned off will likely be turned on during photography; additional lighting may also be used by the crime scene technicians.

If a medical expert is giving an opinion about entry and exit wounds or how the aggressor was standing based on the wound channel, the attorney needs to carefully explore the basis for the expert’s opinion. Be skeptical about testimony by emergency room doctors. A 1994 study showed that hospital trauma specialists misinterpreted the number of gunshot wounds and mis-identified entry and exit wounds in 52.2 percent of cases studied (i.e., slightly worse than if they had guessed randomly).6 The attorney should ask specific questions about how the expert was trained to identify such wounds and what physical findings and documentation support the expert’s conclusion.

If a firearm was used and its muzzle was within two to three feet of the victim, an expert can estimate the distance between the muzzle and the victim by examining the wound and the area around it for gunshot residue. The medical examiner can testify about his or her findings and the general characteristics of contact, near contact, intermediate range, and distant gunshot wounds. However, the actual distances can vary significantly depending on the type of firearm and ammunition. If the firearm has been recovered, a firearms identification expert may make muzzle-to-victim range determinations by using photographs and measurements of the wounds and then by firing test ammunition at white blotting paper. The attorney should not accept an expert’s bare statement that he or she did not find evidence of gunshot residue if that finding conflicts with the client’s version of the case.7 Ask specifically what tests were done to find residue, and what factors could have caused a false negative on those tests.

Seemingly Excessive Force — the Reaction Gap
Another set of troublesome facts involves a client who seemingly used excessive force by shooting an aggressor after the aggressor fell, began to run, or turned away. Explaining these facts to the jury involves explaining reaction time
.
The client must, by the logic of self-defense, react to the aggressor’s threatening actions. Unfortunately, reaction is slower than action. Self-defense trainers call this “the reaction gap.”8 The attorney may need to explain to the jury the differences between anticipated stimulus and simple reflexive response; unanticipated stimulus and simple reflexive response; and unanticipated stimulus and complex response.

Drawing and firing a handgun takes time. A client who waits to see whether the aggressor (who is making a sudden movement) is actually drawing a gun will likely be shot before the client can react. A client who waits

until a charging aggressor is within 20 feet of her to draw a gun is likely to be tackled before she can fire. Moreover, a client who pauses between each shot — to see if the aggressor is surrendering, falling down, or trying to turn and flee — risks being killed during those pauses by an aggressor who has not yet given up.

Distance
With the reaction gap in mind, distances that seem large in a self-defense case suddenly look objectively reasonable. Self-defense experts teach their students that an aggressor, armed with a knife or fist, can close a distance of 21 feet between the aggressor and the student in 1.5 seconds, which is faster than the student can draw and fire a handgun. This is called the Tueller drill.9

Number of Wounds
Human beings are, fortunately, hard to kill instantly. A person can incur a single fatal gunshot wound and walk, run, or continue an attack. A person can also be fatally stabbed in the heart, get in his car, and drive away. In a self-defense situation, the client's lawful goal is to stop the aggressor from threatening him. The client should not be trying to kill the aggressor. If the aggressor falls down, surrenders, or runs away, the client cannot continue the fight. Stopping an aggressor may take one blow or several blows. And the client will not have time during the midst of a chaotic struggle to stop after each blow or shot to evaluate its effects. This is particularly important if the aggressor is armed with a firearm, which takes little effort to fire, even after serious wounds. Some courts imply that firing multiple shots is evidence of intent to kill or is a sign of excessive force, which disqualifies the defendant from self-defense. Look carefully at police use-of-force cases. The jury needs to understand how fast shots are fired and how long it takes the defender to realize that the threat is over. Appellate courts can hardly be faulted for their reasoning when they are rarely presented with testimony and studies explaining reaction times.
An attorney will find that in many cases, police officers have to fire many bullets before the suspect is stopped from continuing dangerous behavior.10 Police officers also fire many more shots than actually hit — 42 to 80 percent of shots fired miss at typical ranges of zero to 10 feet.11 Police officers cannot be sure, until the aggressor falls down or flees, whether they have even hit the aggressor. The same problem confronts clients who are not law enforcement officers. The client may have perceived a need to fire multiple shots until he saw that the aggressor had fallen or surrendered and had time to react to that action.

Wounds in the Back
This is a very troubling fact for many juries. The medical examiner may find that the client has shot (or stabbed) the aggressor in the side or back, leading to an argument that the client shot the aggressor while he or she was trying to flee. A moderately healthy person can turn his or her torso 180º in .53 seconds and can turn his or her entire body 180º in .667 seconds.12 This is very close to the amount of time it takes a trained police officer to fire a handgun. Thus, it is possible that at the moment the client began to fire at the aggressor, the aggressor was facing him. By the time the client completed firing the handgun, the aggressor had turned around, resulting in a shot in the back.

Was the Client's Belief Reasonable?
"[D]etached reflection cannot be demanded in the presence of a knife."
– Brown v. United States,
256 U.S. 335, 343, 41 S.Ct. 501, 65 L.E.2d 961 (1921).

What is Reasonable?
Most states employ a subjective and objective test for reasonableness. Once the attorney has analyzed the witness' testimony and the experts' reports and developed a theory about the facts in the incident, he or she can begin to develop a theory about the client's intent and why his or her conduct was objectively reasonable.13

The AOJ Triad
Reasonableness can be hard to quantify. The attorney may wish to look at the factors self-defense trainers teach their students. Self-defense trainers refer to adversaries or aggressors who have the ability and opportunity to cause harm, and reasonable people who, observing the aggressive conduct, believe they are in immediate jeopardy of death or serious injury. Essentially, these factors (called the AOJ triad) restate the common law of self-defense.

Ability means the aggressor has the capacity to kill or seriously injure the defender. The attorney should ask

the jury to consider relative age, strength, gender, training, level of aggressiveness, weapons, number of aggressors versus number of defenders, etc.

Opportunity means the aggressor is in a position to use his ability. Look at distance, obstacles between the aggressor and defender, cover, and escape routes. An aggressor armed with a firearm has a greater opportunity to harm a defender at range than one armed with a baseball bat.

Jeopardy means that the aggressor's behavior would lead the defender, and a reasonable observer, to conclude the defender is in imminent danger. Look to threats, gestures, and sudden movement towards the defender. Also consider the defender's age, fitness, and health. If the defender was injured or was unable to flee due to ill health or disability, he or she might have been in jeopardy earlier than a healthy or uninjured person.14

Experts who train civilians (non-police officers) also include a fourth factor — preclusion. The defender must be precluded from retreating in complete safety. (See "Duty to Retreat" below.)
In questioning the client, the attorney is not looking for the client's conclusion that he was in danger from the aggressor. Instead, the attorney is looking for the observations that led the client to that conclusion. What did the aggressor say and do that showed he or she was dangerous? Members of the jury should come to see the situation as it appeared to the client. They should come to the conclusion that the aggressor intended to seriously injure or kill the client, and that there was no option other than the use of deadly force.

When presenting the client's subjective intent, the attorney should address any post-incident behavior such as flight or initial denial that the prosecutor may argue exhibits consciousness of guilt. Clients involved in shootings often feel guilty, even when they acted appropriately.15

The client may also experience one or more effects of "Post Shooting Trauma" including nightmares, sleep disturbance, social withdrawal, and various personality changes.16 If the client is being psychologically evaluated for competence, the attorney should make sure the expert involved in the evaluation (1) is familiar with the studies on police officer responses in the aftermath of shootings, and (2) considers whether the client is having a similar response.

Would a Reasonable Person Believe the Client Was In Imminent Danger?
"The question of whether a man has reason to apprehend danger from an attack must depend in some measure upon the size and strength of the assailant. . . . [I]t may be shown that he is armed by nature with a superior size and strength, which makes his attack irresistible and dangerous."
— Com. v. Barnacle,
134 Mass. 215, 216 (1883).

If deadly force was used, the client will only succeed in a self-defense claim if he or she believed there was imminent danger of death or serious bodily harm.17

The relative height, weight, and build of the client and the aggressor are important. If the weight and build of the client and a living aggressor have significantly changed, make sure that the attorney establishes this on the record. If the aggressor is deceased, the attorney may want to have an investigator of similar size and build present to show the jury what the client saw facing him or her.
The attorney needs to establish that the danger was imminent. Insults do not pose a danger. Threats, even credible ones, do not constitute an immediate danger. Claiming to have a weapon is not an imminent danger. In addition, there is no imminent danger if the aggressor starts to get a weapon from his house or car. (The client should not stand his or her ground; call the police and seek safety.) However, drawing a weapon creates an imminent danger.

A more common problem arises when the client says he saw the aggressor reaching for a weapon, but no weapon was found. One possibility is that there was no weapon. If the client is looking the aggressor in the eye, and waits until the aggressor completes a sudden movement to see if the object in hand is a firearm or just a wallet, he could be shot at least twice before he can fire in response.18 The client cannot afford to wait to be certain. An untrained aggressor with a handgun in his waistband can draw the handgun, bring it to eye level, and fire in one-tenth of a second.19 A trained police officer, his service handgun already drawn, pointed at the aggressor, and with his finger on the trigger, needs an average of .30 seconds to recognize the threat and

The other possibility is that there was a weapon which was not recovered. Look at the time interval between the incident and the first police response to the scene. Look at how the responding police officers described the scene. Were there many people there? Were there friends of the deceased present? Is it possible that someone removed the deceased's weapon before police arrived? Did police check the deceased's hands for gunpowder residue?21 Are there any bullet holes or casings that did not come from the client's firearm? Does the client have any injuries or defensive wounds?
If it becomes clear that the aggressor was not armed and the client knew it, or a reasonable person would have realized it, the client who has used deadly force may still be entitled to a self-defense instruction. "While weapons may be used to inflict [great bodily harm], it is often the case that an opponent who is physically large, powerful, or skilled at fighting will inflict great bodily harm upon a weaker adversary."22

Evidence About the Aggressor's Character and Threats
Testimony about the aggressor's character and threats that were known to the client before the incident is generally admissible, and need not be admitted through the client's testimony. In many states the aggressor's reputation for violence may be admissible, even if it was unknown to the client, to show that the complainant was the first aggressor.

Threats against the client which he or she does not know about may also be admissible to show that the person hurt or killed was actually attempting to carry out his threat.
The attorney needs to be careful how he or she impeaches the character of the aggressor. Attacking the deceased or injured can backfire. Courts are not sympathetic to the "he needed killing" theory of self-defense, although it may be a viable tactic with some juries.

Duty to Retreat
"The law is well settled that, while a man may kill another in self-defense, he may not do so if he has other probable means of escape. When his back is to the wall, and the question is whether he shall die or his assailant, he may slay his assailant to preserve his own life; but, if he has probable means of escape without doing so, he must resort to such means before he is justified in killing his adversary. Human life is too sacred to be taken unnecessarily."
– Comm. v. Ware,
137 Pa. 465, 479, 20 A. 806 (1890).

"A stubborn unwillingness to walk away, even in the face of a perceived affront to the defendant's manhood, does not equate with an inability to retreat."
– Com. v. Toon,
55 Mass. App. Ct. 642, 654 (2002).

Unless the client is in his or her own dwelling confronting someone unlawfully within that home, many states impose a duty to retreat from a potential confrontation if the client can do so without increasing his or her own peril. He or she must continue to retreat until there is no probable means of escape.

A growing number of states do not impose a retreat requirement. Indeed, Colorado holds that, if the defendant is not the initial aggressor or engaged in mutual combat, he "is not obliged to retreat or flee to save his life, but may stand his ground, and even, in some circumstances, pursue his assailant until the latter has been disarmed or disabled from carrying into effect his unlawful purpose; and this right of the defendant goes even to the extent, if necessary, of taking human life."23 A few states take a middle course: retreat is not required, but a failure to retreat, together with all the other circumstances, can be considered by the jury in determining if there was a case of true self-defense.

If the state does not require retreat, as a practical matter it may still be useful to explain to the jury why retreat was not practical or why the client was unaware of an escape route. If retreat is required, the attorney needs to put on evidence about why it was not possible or safe.

Appellate courts sometimes offer odd ideas about possible avenues of retreat. The attorney needs to establish the client's physical limitations, if any. Reasonable retreat for a young, healthy person may not be so for

someone who is overweight, injured, or disabled. The attorney should establish whether or not the client knew, or should have known, that a possible avenue of retreat existed. In addition, the attorney should establish whether the avenue of retreat was available at the moment the duty to retreat arose. In some jurisdictions, it does not arise until the immediate necessity to use deadly force arises. Under those cases, a client need not retreat until he or she is actually in peril. At that moment, it may not be possible for a client to turn his or her back on the aggressor and flee, especially if there is a firearm involved.

As noted earlier, reconstructing the crime scene for the jury will be very important. The attorney should carefully examine photographs, videotape and sketches. The prosecutor may try to reconstruct the movements of the combatants using witnesses, trace evidence, and blood spatter analysis. Challenge the technical evidence using Daubert and defense experts if necessary. Challenge witnesses' estimates about distance with expert testimony or, if eyewitness experts are not allowed, with assertions of common knowledge that witnesses are not good at estimating distances.

Is a Warning Required?

It is not clear whether the client must give an attacker a verbal warning before using deadly force. Police officers are required to give "some warning," "where feasible" before using deadly force on a dangerous escaping suspect.24 They are not required to give a warning before using deadly force in self-defense or defense of another. It is a good idea for the defender to give a warning, and for counsel to show why a warning was not feasible when none was given. However, counsel should resist allowing the prosecutor to create or imply a warning requirement.

Displaying or brandishing a weapon without firing it is often unwise. It may be construed by a prosecutor or a jury as illegally threatening the use of the firearm or weapon, i.e., common law assault, threatening, or other similar offenses. It is also tactically unwise because it may encourage the aggressor to attempt to disarm the client.

There is no reason for a client to fire a warning shot. It would be contrary to public policy for the courts to require, or even encourage, warning shots.25 First, most handgun bullets are capable of penetrating standard building materials with enough force to injure or even kill someone on the other side of a wall or window. No one should be encouraged to place a bystander at risk by firing such a shot. Second, even if there is an appropriate surface at which to shoot, the client has to take his or her eyes off the aggressor at least for a moment to choose an appropriate target. During that time, the aggressor can attack the client before he or she can bring the firearm back on target. If the client is justified in shooting at all, he or she is justified in shooting at the aggressor.

Initial Aggressors

If the client initiates the attack, he or she is the "initial aggressor." However, if the client was only the first to use deadly force in response to an imminent danger of serious injury or death, he or she is not necessarily the initial aggressor. Some jurisdictions hold that a defendant who deliberately places himself in a position where his presence will provoke trouble is a kind of initial aggressor and cannot claim self-defense. In states that have not adopted this view, attorneys should be wary of prosecution claims that the client was looking for trouble.
In order to use self-defense, the initial aggressor must abandon his attack and give the then-defender reasonable notice of his retirement from the conflict. At that point, the client's right to defend himself is restored. If the client draws a weapon and merely hesitates, the then-defender may not be privileged to attack in self-defense.

Mutual Combat

In some states, if the client agreed to a fight with the aggressor, he cannot claim self-defense unless the character of the fight deviates from the agreement. The "mutual combat" preclusion is not found in the Model Penal Code; however, it is found in several state statutes.26 If the client agrees to a fistfight with a single person and is confronted with a weapon or ambushed by multiple foes, then the client may claim self-defense. The client is still required to retreat, if possible. If the client appears to agree to the raised stakes, however, he may not claim self-defense. In common law jurisdictions, mutual combat may reduce murder to manslaughter by means of provocation.

Mutual combat is most likely to be a difficult issue in cases where the aggressor and the client have a history of

disagreements or are members of rival gangs or similar groups. The case may turn on a convoluted history of disagreements and feuds between the parties, and on membership in amorphous youth groups. Attorneys should also be wary of prosecution efforts to interject prejudicial gang membership evidence into the case in the guise of rebutting self-defense using mutual combat.

Third-Party Defense
Things become more complex when a defender attacks an aggressor to protect a third-party. In some states, the defender stands in the shoes of the defendee. If the defendee is, for example, an initial aggressor or involved in mutual combat, then the defender acts at his or her peril. In at least one state, the defender may reasonably defend someone who he reasonably believes to be in danger regardless of the defendee's rights. Counsel will need to look carefully at the relationships between the parties and state law. If the law is unclear, counsel may argue that a rule allowing a defender to act reasonably, rather than discouraging a defender by fear of criminal prosecution for his or her good deed, is the best policy for society.

Excessive Force
Excessive force issues appear to allow the jury and court to distinguish between kinds of deadly weapons if the client had multiple options available. This is a place where the common law may differ from the Model Penal Code and from other states which do not distinguish between different kinds of deadly or dangerous weapons.

The attorney needs to clearly establish the speed with which the client made his or her decision about what kind of force to use, and the consequences if he or she used a lesser amount of force which did not stop the aggressor. If the client has met the AOJ criteria described above, then the evidence should support the client's decision.

Firearms and Unarmed Aggressors
As noted above, if the client used a deadly weapon, especially a firearm, to defend himself against an unarmed attack, the attorney will have a difficult time convincing the jury that the client acted in self-defense.

If the client is armed with a firearm, and the aggressor is aware of the firearm and tries to close in on the client, the client is justified in firing before the parties begin wrestling over the firearm. Many police officers are killed with their own firearms.27 Officers are trained in specific retention techniques to avoid having their service firearms taken away and used against them; a client will rarely have the benefit of this training. Police react to an effort to grab an officer's handgun as an attempt to kill the officer with that handgun; the client should be able to do so too.

Police use-of-force doctrine also allows officers to shoot unarmed aggressors running towards them. As the U.S. Court of Appeals for the Third Circuit noted: "A reasonable officer would not be expected to take the risk of being assaulted by a fleeing man who was so close that he could grapple with him and seize the gun. Our recitation of these events is a discussion in slow motion of an incident that took place in a matter of seconds. [The officer] had no time for the calm, thoughtful deliberation typical of an academic setting."28 Similar logic should apply to citizens as well.

'Killer' Bullets and Hair-Triggers
The attorney should research the weapon and ammunition the client used. Ask the client why he purchased and carried that specific weapon. Research its self-defense uses.

The client will be in the strongest position if he or she used a firearm and ammunition similar to that issued to local police departments. Many police departments issue semi-automatic pistols chambered for 9mm or larger caliber with jacketed hollow-point (JHP) ammunition. If the client has used hollow-point ammunition, the attorney should understand and be able to quickly explain to a judge or jury why JHP ammunition is widely recommended for self-defense use.29 The attorney should have a gunsmith or other expert check the amount of pressure required to pull the trigger on a recovered firearm for the first shot and any subsequent shots, and check its safety devices to make sure they were functioning.

Shooting to Wound
If the prosecutor is arguing that your client should have been shooting to wound the aggressor or aiming for a limb, he or she has seen too many Lone Ranger episodes. The client is reacting immediately to a life-

threatening situation. He or she is not an actor on a set.

There are two problems with shooting to wound. The first is actually hitting the target. Under life-threatening stress, some trainers say that the client's aim will be diminished by stress hormone affects on his or her fine muscle control and vision.30 Even if the client is an expert shot on the range, he or she may not be able to reliably duplicate that feat in a dim alleyway. As discussed above, there is a small reaction gap between deciding to fire and doing so. In that time, the torso can turn 180º; a hand, arm, or leg could move anywhere.31

The second problem is over-penetration. The client is responsible for every shot fired. Bullets recommended for police work and self-defense are generally designed to reliably penetrate 12" of flesh covered with light clothing. Limbs and hands are much thinner. A bullet which strikes a limb or hand is likely to pass through with enough force to penetrate any standard building material behind the aggressor — which endangers the public at large. Police aim for the center of mass (the torso); the client should not be faulted for doing the same.

Why Was the Client Armed?

Although lawful possession of a weapon is not a formal requirement for self-defense, many court opinions mention the reason the defendant was armed. This is an important question to discuss with the client, especially if the client will testify at trial. If the client armed himself or herself in anticipation of the fight, this can be evidence of premeditated murder. A prosecutor might also argue that bringing a weapon to a confrontation is evidence of mutual combat or that the client was an initial aggressor.

Self-defense or necessity generally will not protect the client from being convicted for unlawful possession of a firearm or other weapon, but the possession charge is a small price to pay for avoiding death or serious bodily harm in a genuine self-defense situation.

Conclusion

Law enforcement officers cannot protect citizens at all times. The right of citizens to protect themselves is critically important to our society. It is a right, enshrined in many state constitutions, that needs to be zealously protected by the vigorous efforts of criminal defense attorneys. If the right becomes uncertain, murky, or counter-intuitive, citizens will be reluctant to take action to protect themselves and others for fear of criminal prosecution. That fear, and the consequent passivity, will "lead to the alienation of people from one another, an alienation symbolized for our time by the notorious Genovese incident. To the fear of 'involvement' and of injury to oneself if one answered a call for help would be added the fear of possible criminal prosecution."32

The right of self-defense is most endangered when it is inadequately defended in cases where the client is unsympathetic, has a long criminal record, or is a gang member or narcotics dealer who defended himself in a quarrel with a rival gang or dealer. Here, courts and police will be most willing to restrict the right of self-defense in an effort to curb urban violence. The decisions in these cases have a long reach and often unforeseen consequences. They affect the ability of law enforcement officers to use force in defense of the communities. They affect the ability of law-abiding citizens who lawfully own and carry defensive weapons to protect themselves, loved ones, and their community. Ultimately, the decisions in these cases affect every citizen in this country.

The right of self-defense deserves an attorney's most vigorous efforts. Using this article, attorneys may find ways to represent their clients more effectively.

Notes

1. See Ariz. Rev. Stat. § 13-411 (2001); Fla. Stat. ch. 776.013; Ga. Code. Ann. § 16-3-23.1;Tenn. Code Ann. § 39-11-611(a); Tex. Penal Code Ann. § 9.32(a)(2); Utah Code Ann. § 76-2-402(3); People v. Humphrey, 13 Cal.4th 1073, 56 Cal.Rptr. 2d 142, 921 P.2d 1, 20 n.1 (1996); People v. Garcia, 28 P.3d 340, 348 (Colo. 2001); Johnson v. State, 253 Ga. 37, 315 S.E.2d 871, 873 (1984); State v. McGreevey, 17 Idaho 453, 105 P. 1047, 1051-52 (Idaho 1909); People v. Rodriguez, 187 Ill.App.3d 484, 175 Ill. Dec. 89, 543 N.E.2d 324, 328 (1989); Page v. State, 141 Ind. 236, 40 N.E. 745, 745-46 (1895); State v. Scobee, 242 Kan. 421, 748 P.2d 862, 867 (1988); Sikes v. Com., 304 Ky. 249, 200 S.W.2d 956, 960 (1947) overruled on other grounds, White v. Com. 360 S.W.2d 198 (1962); Cook v. State, 467 So. 2d 203, 211 n.7 (Miss. 1985); State v. Merk, 164 P. 655, 658 (Mont. 1917); Runion v. State, 116 Nev. 1041, 13 P.3d 52, 59 (2000); State v. Horton, 57 N.M. 257, 258 P.2d 371, 373 (1953); Kirk v. Territory, 10 Okla. 46, 60 P. 797, 805 (1900); State v. Hatcher, 167 Vt. 238, 706 A.2d

429, 435 (1997); State v. Allery, 101 Wash.2d 591, 682 P.2d 312, 316 (1984). Connecticut requires the defender to retreat before using deadly force, but not before using non-deadly force. State v. Anderson, 227 Conn. 518, 529 (1993).

See also Aggergaard, Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the Law and Cries out for Alteration, 29 Wm. Mitchell L. Rev. 657 (2002); Dressler, Understanding Criminal Law 226 (3d ed. 2001).

2. It is possible that such statements are a product of a coerced confession. The "Reid method" encourages interrogators to suggest excuses for deeds in order to convince the suspect to confess. See Inbau, et als., Criminal Interrogation and Confessions 249, 286-87, 357-58, 426-27 (4th ed. 2001). Critics of the Reid method note that "the poorer the subject's recall, the more suggestible he or she is likely to be." Gudjonnsson, The Psychology of Interrogations, Confessions, and Testimony 384-85 (2003). "It was an accident" is one of those suggested excuses. Inbau, et als, Criminal Interrogation and Confessions 495 (4th ed. 2001). See also Kassin & Fong, "I'm Innocent": Effects of Training on Judgments of Truth and Deception, 23 L & Human Behav. 499 (1999); Ofshe & Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979 (1997).

3. The "mutual combat" preclusion is not found in Model Penal Code § 3.04(1); however, it is found in several state statutes. See Ark. Code. Ann. § 5-2-206(b)(3); Colo. Rev. Stat. § 18-1-704(3)(c); Conn. Gen. Stat. § 53a-19; Ga. Code Ann. § 16-3-21(b)(3); Me. Rev. Stat. Ann. tit. 17-A, § 108(1)(c); N.H. Rev. Stat. Ann. § 627:4(I)(C); N.D. Cent. Code § 1-05-03(b); and N.Y. Penal Law § 335.15(1)(c). Under the common law, the mutual combat exclusion has two effects: it precludes self-defense, but it also mitigates murder to manslaughter by reason of provocation. It is not clear whether it has the same effect in states where the preclusion is created by statute. See Knight v. State, 73 Ga. App. 556, 37 S.E.2d 435 (1946); People v. Garcia, 165 Ill. 2d 409, 429, 209 Ill. Dec. 172, 651 N.E.2d 100 (1995).

4. Artwohl, Perceptual and Memory Distortion During Officer-Involved Shootings, FBI L. Enforcement Bull. 18, 18 (Oct. 2002); Ayoob, Lethal Force: Investigating the Officer-Involved Shooting, Police Product News 36 (Aug. 1986); Condor, Walk on Through?, 28:6 Police Marksman 21, 22 (Nov./Dec. 2003); Lewinski, Stress Reactions Related to Lethal Force Encounters, 27:3 Police Marksman 23 (May/June 2002); Rivard, Dietz, Martell & Widawski, Acute Dissociative Response in Law Enforcement Officers Involved in Critical Shooting Incidents: The Clinical and Forensic Implications, 47:5 J. For. Sci. 1093 (2002).

Although a great deal of this work is used by police departments as part of their use-of-force training, it may be vulnerable to a prosecutor's Daubert challenge. Many self-defense training methods are based on experience, not peer-reviewed scientific studies. An attorney must pay careful attention to credentials of the authors relied on and the materials underlying their articles.

Sadly, without expert testimony, the prosecutor is likely to argue "common sense" notions of indelible memory and that your client is lying about his lack of memory. See e.g., State v. Coney, 266 Conn. 787, 800 n. 26, 835 A.2d 977 (2003). Compare State v. Briley, 55 Conn. App. 258, 742 A.2d 363 (1999) ("indelible memory" argument must be challenged as prosecutorial misconduct at trial) with State v. Vazquez, 79 Conn. App. 219, 830 A.2d 261 (2003) ("indelible memory" argument not misconduct).

5. Artwohl, Perceptual and Memory Distortion During Officer-Involved Shootings, FBI L. Enforcement Bull. 18, 18 (Oct. 2002) citing Grossman & Siddle, Critical Incident Amnesia: The Physiological Basis and Implications of Memory Loss During Extreme Survival Stress Situations (PPCT Management Systems, 1998). See Remsberg, Telling the Truth about Police Shootings, 29:6 Police Marksman 18, 19 (Nov./Dec. 2004) (discussing sleep and psychological distance from event as improving recall).

6. DiMaio, Gunshot Wounds 256-57 (2d ed. 1999).

7. See generally DiMaio, Gunshot Wounds 2d Ed. 65-121 (1999); Glattstein, Vinokurov, Levin, & Zeichner, Improved Method for Shooting Distance Estimation, Part 1, Bullet Holes in Clothing Items, 45:4 J. For. Sci. 801 (2000); Glattstein, Zeichner, Vinokurov, & Shoshani, Improved Method for Shooting Distance Estimation, Part 2 — Bullet Holes in Objects that Cannot be Processed in the Laboratory, 45:5 J. For. Sci. 1000 (2000);Glattstein, Zeichner, Vinokurov, Levin, Kugel, & Hiss, Improved Method for Shooting Distance Estimation, Part 3 — Bullet Holes in Cadavers, 45:6 J. For. Sci. 1243 (2000); Vinokurov, Zeichner, Glattstein, Koffman, Levin, Rosengarten, Machine Washing or Brushing of Clothing and Its Influence on Shooting Distance Estimation, 46:4 J. For. Sci. 928 (2001).

8. See generally Lewinski & Hudson, Time to Start Shooting, Time to Stop Shooting, the Tempe Study, 28:5 Police Marksman 26 (Sept/Oct 2003); Lewinski & Hudson, The Impact of Visual Complexity, Decision Making, and Anticipation, the Tempe Study, 28:6 Police Marksman 24 (Nov./Dec. 2003).

9. See e.g., Ponzi, But He Only Had a Knife, 11:6 Am. Police Beat 1 (2004); Hontz, Justifying the Deadly Force Response 2:4 Police Q. 462, 472-73 (1999); Branca, The Law of Self-Defense: A Guide for the Armed

Citizen 31 (1998). See also Sigman v. Town of Chapel Hill, 161 F.2d 782 (4th Cir. 1998) (referring to the 21' rule in the context of a knife-wielding suspect). For a video which includes this drill, see ALI-ABA, The Use of Lethal Force: What Prosecutors, Defenders and Policy Makers Should Know (2001).
10. See Pinzzotto, Kern, & Davis, One Shot Drops; Surviving the Myth, 73:10 FBI L. Enforcement Bulltn 14 (Oct. 2004); Deering v. Reich, 183 F.3d 645 (7th Cir. 1999) (11 shots fired, 2 hit suspect's back and killed him).
11. Appi, Marksmanship & Tactics, 27:5 Police Marksman 48, 48 (Sept./Oct. 2002).
12. Tobin & Fackler, Officer Reaction - Response Times in Firing a Handgun, 3:1 Wound Ballistics Rev. 6, 9 (1997). See also Bates, Do Shots in the Back Imply Excessive Force?, 14:3 Women & Guns 53 (2004) for a summary of research with useful graphics; Lewinski, Why is the Suspect Shot in the Back?, 27:6 Police Marksman 20 (Nov./Dec. 2000); Remsberg, Telling the Truth about Police Shootings, 29:6 Police Marksman 18, 19 (Nov./Dec. 2004) (turn from frontal stance to running, back to officer in .14 seconds).
13. See Heller, Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases, 26 Am. J. Crim. L. 1, 1-5 (1998) (discussing the reasonable person standard in multiple jurisdictions).
14. If the client has been battered by the aggressor, he, or more often she, may be able to introduce expert testimony on the effects of battering on his or her perceptions of jeopardy. See e.g., Smith v. State, 268 Ga. 196, 486 S.E.2d 819 (1997); Boykins v. State, 116 Nev. 171, 995 P.2d 474 (2000); State v. Gartland, 149 N.J. 456, 694 A.2d 564 (1997); People v. Emick, 103 A.D.2d 643, 481 N.Y.S.2d 552 (1984).
It is not clear, however, that introducing such testimony is a viable trial tactic; see Parrish, Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases, 11 Wis. Women's L.J. 75 (1996), nor whether a duress or necessity defense might be more successful. See Burke, Rational Actors, Self-Defense, and Duress: Making Sense, not Syndromes, Out of the Battered Woman, 81 N.C.L. Rev. 211 (2002).
If the defendant has given a statement, bear in mind that suspects who are accused of murdering someone close to them are often especially vulnerable during police interrogation because of grief and bereavement. Gudjonnson, The Psychology of Interrogations, Confessions, and Testimony 313 (2003).
15. Ayoob, Post Shooting Trauma: Part One, Police Marksman 15, 15 (May/June 1982).
16. Ayoob, Post Shooting Trauma: Part One, Police Marksman 15 (May/June 1982); Ayoob, Post Shooting Trauma: Part Two, Police Marksman 9 (July/Aug. 1982).
17. A "highly active imagination" does not create a reasonable apprehension of imminent physical harm. Com. v. Alebord, 49 Mass. App. Ct. 915, 916, 733 A.2d 169 (2000). If the client was intoxicated, this does not lower the standard for reasonable belief. Com. v. Ramirez, 44 Mass. App. Ct. 799, 801, 694 N.E.2d 46 (1998).
18. Lewinski, Stress Reactions Related to Lethal Force Encounters, 27:3 Police Marksman 23, 26 (May/June 2002). See Weeg, What You Need to Tell The Prosecutor in Your Next Use-of-Force Case, 27:3 Police Marksman 45 (May/June 2002).
19. Williams, Combat Realities: Defensive Tactics, 28:3 Police Marksman 41, 41 (May/June 2003). (This is the time for that movement only. It does not include the time it takes the aggressor to decide to act, nor does it assume any effort to aim.) See Remsberg, Telling the Truth about Police Shootings, 29:6 Police Marksman 18, 19 (Nov./Dec. 2004) (draw and fire in .07 seconds).
20. Williams, Combat Realities: Defensive Tactics, 28:3 Police Marksman 41, 41-42 (May/June 2003); Tobin & Fackler, Officer Reaction - Response Times in Firing a Handgun, 3:1 Wound Ballistics Rev. 6, 7 (1997).
21. A lack of residue does not mean that the deceased did not fire a weapon. See Reed, McGuire & Boehm, Analysis of Gunshot Residue Test Results in 112 Suicides, 35 J. Forensic Sci. 62 (1990) (GSR tests in suicides by firearm only found residues consistent with firing a gun in 38 percent of the cases.); Stone, Capabilities of Modern Forensics Laboratories, 25 Wm & Mary L. Rev. 659, 666 (1984) (GSR residue found on only 40 percent of Dallas suicides by firearms over 10-year period).
22. State in Interests of D.S., 694 So.2d 565 (La. App. 1997).
23. Boykin v. People, 22 Colo. 496, 45 P. 419 (1896).
24. Tennessee v. Garner, 471 U.S. 1, 11-12 (1984).
25 See Deveaugh v. State, 575 So.2d 1373 (Fla.App. 1991) (firing of a warning shot into the air constitutes use of deadly force as a matter of law).
26. See Ark. Code. Ann. § 5-2-206(b)(3); Colo. Rev. Stat. § 18-1-704(3)(c); Conn. Gen. Stat. § 53a-19; Ga. Code Ann. § 16-3-21(b)(3); Me. Rev. Stat. Ann. tit. 17-A, § 108(1)(c); N.H. Rev. Stat. Ann. § 627:4(I)(C); and N.D. Cent. Code § 1-05-03(b); N.Y. Penal Law § 335.15(1)(c).
27. The Uniform Crime Report for 2000 notes that in the past 10 years, 51 police officers were killed with their own firearms. FBI, Uniform Crime Reports 18, Table 5 (2001). One authority estimates that 90 percent of suspects who succeed in disarming a police officer, end up attempting to kill them. Adams, McTernan & Remsberg, Street Survival 142 (1980). Police departments train officers in weapons retention, and in not letting

a suspect get close enough to wrestle their weapon away.
28. See Carswell v. Borough of Homestead, 381 F.3d 235, 243 (3rd Cir. 2004). The Carswell court also noted that “we must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.”
29. See Kelly, Premium HST, Ballistically Enhanced Performance in a Law Enforcement Pistol Bullet from Federal Cartridge, 27:4 Police Marksman 32 (Jul./Aug. 2002); Steele, No Bad Bullets, 37 Crim. L. Bull. 263 (2001); Sanow, Why NYPD Changed to Hollowpoints, Handguns 68 (Oct. 2000).
30. See Siddle & Breedlove, How Stress Affects Vision and Shooting Stances, Police Marksman (May-June, 1995) at 30.
31. Remsberg, Why Shooting to Wound Doesn’t Make Sense, 31:3 Police Marksman 18, 18 (May/June 2006) (noting, for example, that an average suspect can move his hand from hip to shoulder in 18/100th of a second). Hontz, Justifying the Deadly Force Response 2:4 Police Q. 462, 473 (1999) (trying to hit a small stationary target increases reaction time and decreases accuracy significantly).
32. Com. v. Martin, 369 Mass. 640, 649, 341 N.E.2d 885 (1976). The Supreme Judicial Court is referring to the brutal murder of Catherine “Kitty” Genovese in Queens, New York, in 1964, where 38 neighbors heard her cries for help while being attacked, yet not a single neighbor came to her aid or even called the police.
Thanks to Masaad Ayoob, Lyn Bates, and a number of other self-defense instructors and writers for their thoughts which contributed to this article.

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