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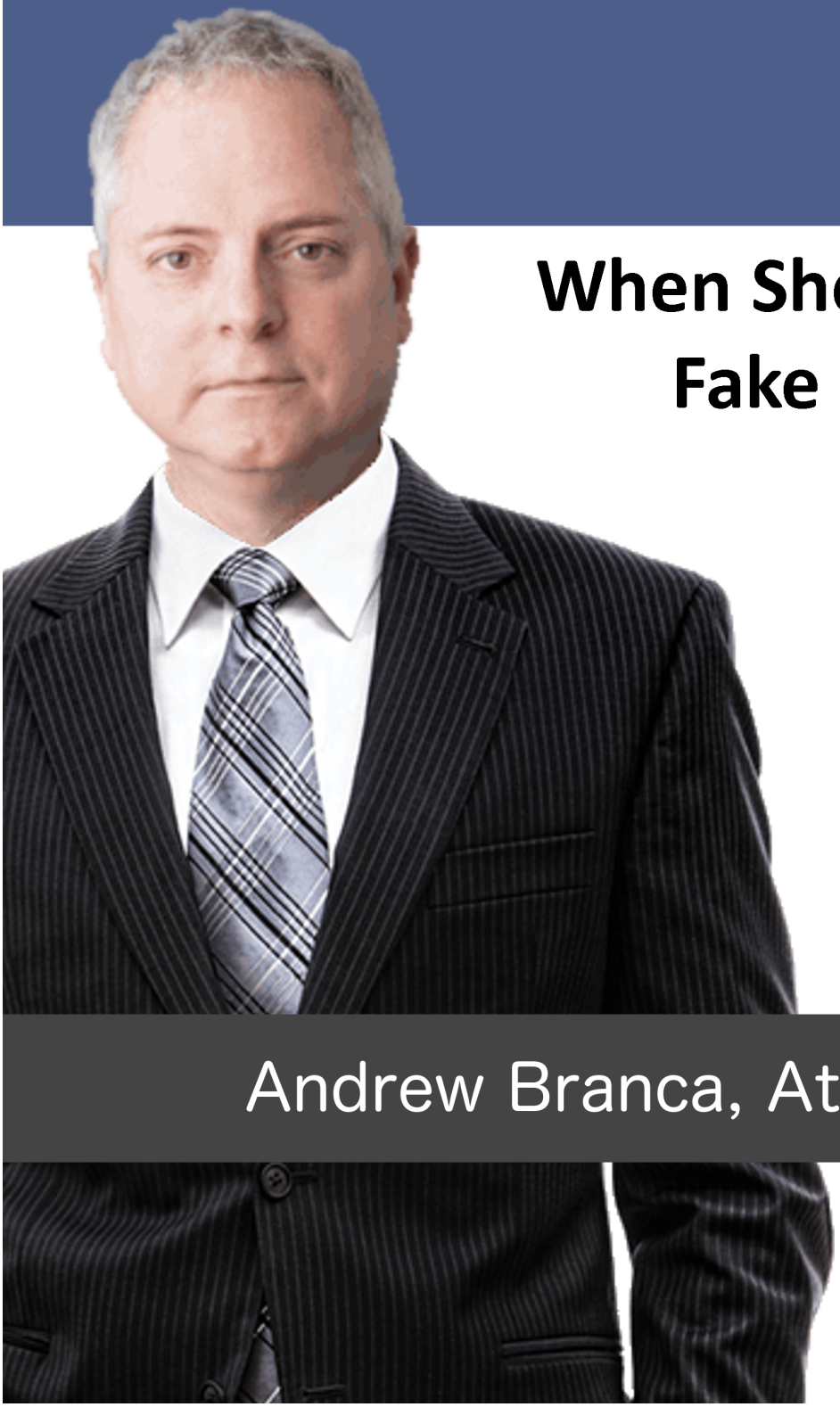

When Sheepdogs with Fake Badges Make Poor Choices In Churches

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Fake Badge & Falsely Assumed Authority Equals Disaster

In March 2018 a Pennsylvania Superior Court (the Commonwealth's mid-level appellate court) issued a decision, *Commonwealth v. Storms*, that placed considerable emphasis on the appellants "sheepdog-like" conduct in affirming his conviction for voluntary manslaughter, rejecting the appellant's argument that the evidence at trial was insufficient to sustain his conviction.

In addition, the Superior Court also affirmed the prison sentence assigned by the trial judge that was roughly two to three times greater than that called for by the Commonwealth's sentencing guidelines, rejecting the appellant's argument that the trial judge abused his discretion in sentencing.

Appellate Court Reviews the Facts

It is generally not the role of the appellate courts to weigh the credibility of evidence—that job is properly assigned to the trier of fact at trial. This trier of fact is usually a jury, as in this case, but could be the trial judge in the case of a bench trial.

When an appellant argues that there was insufficient evidence to support his conviction, they are in effect claiming that no rational jury could have arrived at a verdict of guilty based on the evidence presented, meaning that the evidence presented was simply not sufficient to convince a rational jury of guilt beyond a reasonable doubt.

In such an appeal the appellate court is naturally called upon to evaluate whether there existed sufficient evidence consistent with guilt from which a jury could find that the defendant had been proven guilty beyond a reasonable doubt. In doing so a recounting of the trial evidence is

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necessarily part of that process, and as we will observe in this decision. We'll summarize those facts here, along with selected quotes from the decision. (The decision itself is linked here.)

A Disturbance at A Church Service

The Decedent in this case was 27-year-old Robert Braxton, a person apparently somewhat mentally disturbed, who would ultimately be shot and killed by the Appellant Mark Storms. The events took place at the morning service of the Keystone Fellowship Church.

The Decedent entered the church shortly after morning service had begun, apparently already in an agitated state. When he sat in a pew near the back of the church another parishioner tapped him on the shoulder to indicate that the Decedent had just taken the seat of someone who had stepped away only momentarily.

The Decedent took sharp offense at this interaction, telling the person not to touch him, and creating a verbal disturbance involving obscene language. Several church ushers attempted to calm the Decedent, but this appeared only to incense him, and he told everyone who attempted to intervene to leave him alone.

> An associate pastor, seeing that the ushers' efforts only exacerbated [Decedent]'s agitation, had them back away and directed someone to call the police.
>
> *Commonwealth v. Storms*, PA Superior Court (March 2018)

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So far we have a unpleasant, but apparently transient and at least potentially resolved, verbal disturbance at a Sunday morning church service. Naturally, given that the matter ends up in a human death, events promptly go severely sideways.

Cry Havoc and Let Slip the Sheepdog with a Fake Badge

Suddenly we have the intervention of the Appellant, Mark Storms, who was sitting nearby with his wife and young son. The Appellant decides to take it upon himself to inject himself into these events. He did so solely on his own initiative, and despite the fact that the Appellant had no position of authority in the church, was not a law enforcement officer, and simply had no grounds on which to presume to step into this apparently quieted situation.

Indeed, witnesses at trial would testify that prior to the Appellant approaching the Decedent, the Decedent had calmed down and was no longer yelling.

The Appellant, having observed the disturbance and its apparent resolution, felt that that there was not enough "being done," and decided to approach the Decedent and intervene. The Appellant would later tell investigators that he didn't believe that the Decedent would leave the church without violence, a perception entirely at odds with the testimony of other witnesses to these events. (Recall that a mistaken, but reasonably perceived, threat of harm may justify the use of defensive force, but a merely speculative or imaginative apprehension of harm will not.)

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The Appellant chose to approach the Decedent until the two were separated by a row of chairs. He then asked the Decedent to go outside with him. The Decedent refused, and once again became agitated and started yelling. Witnesses would tell police that it was their perception that the Appellant's "actions escalated the situation more than what it had to be."

With the Appellant now having re-triggered the Decedent, and with the Decedent non-compliant with the Appellant's request to step outside, the Appellant decided to escalate matters: He "flashed his unofficial concealed weapon permit badge."

Recall that the Appellant was not a law enforcement officer, and that therefore this badge intended as a representation of official authority—the only reason for the Appellant to be displaying it in his interaction with the Decedent—was an utter fake.

Unfortunately, the display of the fake badge did not have the authoritative effect the Appellant must have expected.

> [Decedent] recognized it as a fake, telling [Appellant] as much in colorful language.
>
> *Commonwealth v. Storms*, PA Superior Court (March 2018)

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Transitioning From Fake Badge to Real Gun

Having had his fake badge called out, the Appellant had a couple of choices. He could disengage from the interaction, and leave matters in the hands of the church staff, or he could escalate matters further.

I expect that if the Appellant had been of the former temperament he'd have neither intervened in the first place, nor been carrying around a fake badge. Whatever his reasoning, the Appellant decided to escalate matters further.

The Appellant did so by displaying to the Decedent his 9mm pistol, which the trial court describes in some detail, as courts are wont to do.

> [The Appellant] was armed at the time with a loaded 9-millimeter semi-automatic pistol concealed in a holster on his right hip.
>
> *Commonwealth v. Storms*, PA Superior Court (March 2018)

The Decedent responds to the Appellants threat of deadly force by promptly punching the Appellant in the face, then advancing towards him. The Appellant appeared to absorb the blow with no substantial negative effects.

Although the Appellant had an open aisle behind him, and was surrounded by several hundred people who could have assisted in controlling the Decedent using only non-deadly force, the Appellant neither backed away from the Decedent nor called for the assistance of others.

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Instead, with the Decedent approximately 8 feet away, the Appellant did the following:

> [The Appellant] squared himself into a ready fire stance and shot the unarmed [Decedent] twice. One of the bullets pierced [Decedent]'s heart and he died soon thereafter despite life-saving efforts by fellow parishioners and emergency medical responders.
>
> *Commonwealth v. Storms*, PA Superior Court (March 2018)

The Criminal Charges

The Appellant was arrested and charged with voluntary manslaughter for the killing of the Decedent. He was also charged with reckless endangerment with respect to the other parishioners present.

The Legal Defense

The Appellant raised the legal defense of self-defense, meaning that once he'd met his burden of production (which he did successfully) the Commonwealth would be bound to disprove self-defense beyond a reasonable doubt in order to secure a conviction.

The Appellant argued in part that the Decedent was "younger, bigger, faster, and stronger" than himself. The Appellant also argued that because of these physical advantages the admittedly "unarmed" Decedent could have killed him, taken his gun, and used it against the Appellant and others present. He further argued that he had no opportunity to retreat after being punched (self-serving testimony that was inconsistent with that of many other witnesses.)

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A Note on PA Stand-Your-Ground Law

The appellate court decision does not touch upon the matter of Pennsylvania's law on a legal duty to retreat before using force in self-defense, but the Commonwealth's law in this area is sufficiently unusual it warrants some discussion.

Prior to a law change in 2011, Pennsylvania was a rather traditional duty-to-retreat state, at least in the context of deadly defensive force. Before one could use deadly force in self-defense, there was a legal duty to first retreat if a safe avenue of retreat was available. (No such duty to retreat applied, however, if one was using merely non-deadly force in self-defense.)

We can find the relevant language in Pennsylvania Consolidated Statutes (Pa.C.S.) §505 Use of force in self-protection:

> §505. Use of force in self-protection.
> (2) The use of deadly force is not justifiable … if:
> …
> (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating …

In 2011, however, the §505 was modified in such a manner as to effectively making Pennsylvania a Stand-Your-Ground state—with some important caveats, however.

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The new statutory language can be found in paragraph (2.3) of the same §505 Use of force in self-protection (emphasis added):

> §505. Use of force in self-protection.
>
> (2.3) An actor … *[important caveats]* … who is attacked in any place where the actor would have a duty to retreat under paragraph (2)(ii) ***has no duty to retreat and has the right to stand his ground*** and use force, including deadly force, if:

The reference to *[important caveats]* that I've inserted above, and the final "if:" suggests that Pennsylvania imposes conditions on Stand-Your-Ground privileges, a not uncommon state of affairs.

Roughly half of Stand-Your-Ground states simply apply Stand-Your-Ground in a blanket, unconditional way—there is no legal duty to retreat from an attacker, period. These are largely the Stand-Your-Ground states in which the absence of a duty to retreat is found in court decisions rather than in legislation.

In the other roughly half of Stand-Your-Ground states, however, this public policy was the creation of the legislative process, and any time legislation is being crafted one must expect there to be compromises and accommodations made. Stand-Your-Ground statutes are no exception, and making such statutes conditional is the norm.

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Two of Pennsylvania's conditions on Stand-Your-Ground are fairly common in such statutes:

(1) That the defender is ***not engaged at the time in criminal activity*** (PA also adds somewhat redundantly the requirement that the defender was not in illegal possession of a firearm).
(2) That the defender is i***n a place he has the right to be***.

A third condition imposed by the Commonwealth on Stand-Your-Ground is, to my knowledge, unique to Pennsylvania (emphasis added):

> §505. Use of force in self-protection.
> (2.3) An actor … *[important caveats]* … has no duty to retreat and has the right to stand his ground and use force, including deadly force, if:
> …
> (iii) the ***person against whom the force*** is used ***displays or otherwise uses***:
> (A) ***a firearm or replica of a firearm*** …; or
> (B) ***any other weapon*** readily or apparently ***capable of lethal us***e.

In many cases, of course, a deadly force attack *will* involve the use of a firearm or other weapon readily or apparently capable of lethal use, in which case this condition of Pennsylvania Stand-Your-Ground law will have been met, and the privilege to stand one's ground will have been triggered.

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That said, the use of a deadly weapon is not *required* for an attack to qualify as a deadly force attack—all that's required for that threshold to be achieved is that the attack is readily capable of causing death or grave bodily injury.

Under circumstances of, say, disparity of strength or numbers or a particularly intense bare hand attack, this deadly force threshold can be achieved even absent an attacker's "firearm or replica of a firearm … or any other weapon readily or apparently capable of lethal use." In such a scenario, however, Pennsylvania's Stand-Your-Ground privilege *would not be triggered*.

In the case of interest here, there was no evidence whatever that the Decedent had any visible weapon, a fact to which even the Appellant himself would testify:

> [Appellant] testified that [Decedent] did not have a visible weapon and no trial witness stated they ever saw [Decedent] in possession of a weapon.
>
> *Commonwealth v. Storms*, PA Superior Court (March 2018)

Accordingly, under these facts Pennsylvania's Stand-Your-Ground privilege *was not triggered*, and the Appellant *did have a legal duty to retreat* before using deadly force in self-defense, if a safe avenue of retreat was available to him.

Although the Appellant would testify that "he had no opportunity to retreat after being punched," other witnesses would testify that "no one and nothing impeded Appellant's ability to retreat from the situation," and "no person and no thing was impeding Appellant from leaving the area." The jury is then free to decide which of this conflicting testimony they find most credible.

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The Verdict and Sentence

After a three-day trial the jury found the Appellant guilty of both the voluntary manslaughter and reckless endangerment charges.

The trial judge, in preparing for sentencing, then conducted a PSI (pre-sentence investigation) and held a sentencing hearing.

The court also consulted the Pennsylvania sentencing guidelines, which recommended a sentence of 4.5 to 6 years for conviction on these charges. As the name suggests, of course, sentencing guidelines are guidelines, and a Pennsylvania trial judge has the discretion to sentence outside the recommended range.

In this case the trial judge sentenced the Appellant to 10 to 20 years in prison, well beyond the guideline sentence.

Basis for Appeal

The Appellant appealed both his conviction and his sentence, meaning that even if his conviction was affirmed he nevertheless sought separate relief on the sentence. In effect, the Appellant's basis for appeal was:

1. The evidence at trial was insufficient to disprove, beyond a reasonable doubt, the Appellants legal defense of self-defense.
2. The trial judge had no rational basis on which to so greatly exceed the sentencing guidelines, and in particular had failed to give "adequate consideration to mitigating factors such as

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Appellant's clear remorse, his cooperation with law enforcement, and character evidence of the Appellant as an otherwise peaceable man of good character.

Insufficiency of the Evidence

In considering the first basis for appeal, that there was insufficient evidence from which a rational jury could conclude that self-defense had been proven beyond a reasonable doubt, the appellate court simply disagreed.

Recall that there are up to five elements of a claim of self-defense—innocence, imminence, proportionality, and reasonableness—and that these are cumulative, meaning that a prosecution can overcome a claim of self-defense by disproving any one of these elements beyond a reasonable doubt.

The appellate notes trial evidence sufficient to disprove at least two of the five required elements: innocence and avoidance.

On innocence, the legal standard in Pennsylvania is that the slayer must be free from fault in provoking or continuing the difficulty. Here, however, there was sufficient evidence that the Appellant provoked/continued the difficulty with the Decedent. Witnesses testified that before the Appellant intervened the Decedent had calmed down, and that after the Appellant intervened with the Decedent was once again aggravated.

On avoidance, as already discussed the Appellant did not qualify for Pennsylvania's Stand-You-Ground privilege, and therefore had a legal duty to retreat before using deadly defensive force if a safe avenue of retreat was available to him. Witnesses testified that the Appellant could, in

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fact, have safely retreated. Although Appellant himself testified to the contrary, the jury is free to decide whom it wishes to believe.

The appellate court therefore concludes that there was sufficient evidence presented at trial from which a rational jury could conclude that the prosecution had disproved either the element of innocence or that of avoidance, and thus to have disproven self-defense.

No Rational Basis to Exceed Sentencing Guidelines

Of perhaps particular interest to the Law of Self Defense Community, the trial judge appeared to have based his sentence—which as noted was vastly beyond the guidelines—in large part on conduct by the Appellant that we might characterize as putting the Appellant into the "Sheepdog" faction of the self-defense community.

In particular, the trial judge seemed to place particular weight on the Appellant's own "Sheepdog"-like statements in the pre-sentencing statement the Appellant provided the court as part of the broader PSI. For example, the appellate court observed that:

> According to the court … Appellant discussed ***three different occasions*** in which he "***interjected [himself] into a circumstance*** which could have caused [his] death to save others." The court stated that Appellant's actions during those occasions were "problematic" because ***Appellant perceived himself "as some type of hero that injects himself into certain situations[.]***".
>
> *Commonwealth v. Storms*, PA Superior Court (March 2018)

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The appellate court, apparently moved by the trial judge's precise words at sentencing, then quotes those words directly:

> "Certainly, this time, [intervening] didn't work out. No luck here. Or did these never happen and ***this was an opportunity to carry out that fantasy of yours.*** I don't know. That is a mystery. I guess we'll never know. ***All I know is that I believe you are a danger to society."***
>
> *Commonwealth v. Storms*, PA Superior Court (March 2018)

The appellate court concluded that the trial judge did not abuse his discretion in sentencing the Appellant so greatly outside the sentencing guidelines, and affirmed the Appellants 10-20 year sentence.

Reference to the Appellant's apparent "Sheepdog"-like behavior is mentioned only in reference to sentencing, and not to the verdict of guilt during the trial process itself, but it certainly seems possible (assuming this evidence was admitted) that such considerations could have contributed to the juror's sense that this killing need not have happened but for the Appellant's aggressive tendency to intervene in situations in which he had neither any particular authority nor need to do so.

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Making Informed Decisions

It's not my place to tell people to not intervene in events where they firmly believe their intervention is just, necessary, and lawful. Only the person on the spot can make that call. I've personally met people at all levels of the "Sheepdog" faction of the self-defense community, and the large majority have been well intentioned and intent only on protecting the weak and helpless from acts of aggression.

Similarly, it's not my place to tell people that they can't carry around a fake badge—and here my hesitation isn't because I think there's ever any good reason for them to be doing something so silly, but merely the fact that I'm not their parent and their bad decision-making is not my responsibility.

All I can do is to try and help you all make well informed decisions on such matters, and to help you recognize and balance the risks that go along with such choices. I hope I've contributed in a small way to that mission with this report.

--Attorney Andrew F. Branca

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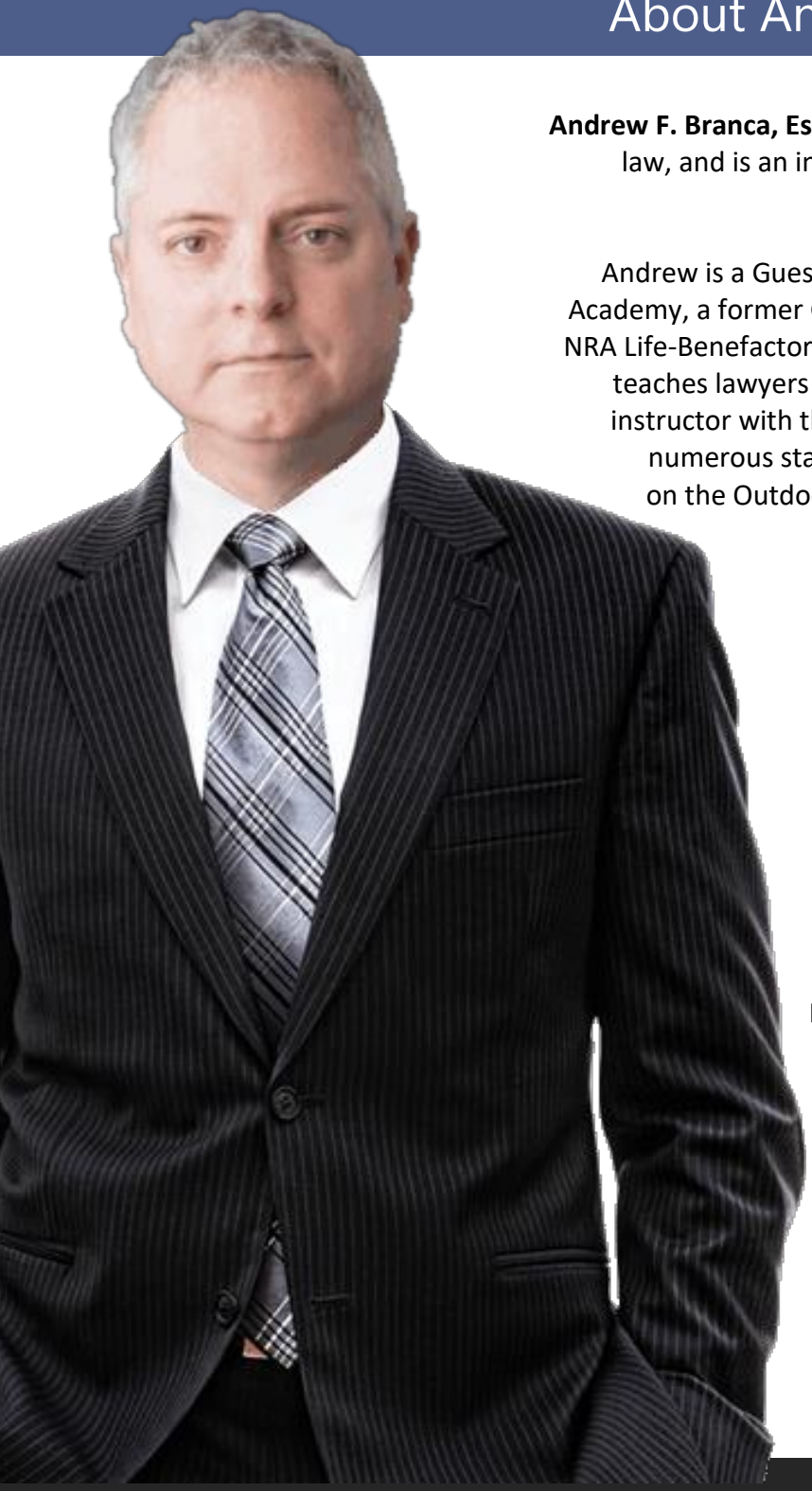
About Andrew Branca



Andrew F. Branca, Esq. is currently in his third decade of practicing law, and is an internationally-recognized expert on the law of self-defense of the United States.

Andrew is a Guest Lecturer at the FBI's Investigation's National Academy, a former Guest Instructor at the Sig Sauer Academy, an NRA Life-Benefactor Member, and an NRA Certified Instructor. He teaches lawyers how to argue self-defense cases as a certified instructor with the Continuing Legal Education (CLE) system in numerous states around the country. Andrew is also a host on the Outdoor Channel's TV show "The Best Defense" and contributor to the National Review Online.

Andrew has been quoted by the Wall Street Journal, the Chicago Tribune, the Washington Post, and many other media, including nationally syndicated broadcast media. Recently, Andrew won the UC Berkeley Law School debate on "Stand-Your-Ground," and spoke at the NRA Annual Meeting Law Symposium on self-defense law. He was also a founding member of USCCA's Legal Advisory Board.

In addition to being a lawyer, Andrew is also a competitive shooter, an IDPA Charter/Life member (IDPA #13), and a Master-class competitor in multiple IDPA divisions.

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