



The Legal Aftermath of Defense Against Road Rage An Interview with Jim Fleming

*Interview by Gila Hayes – Armed Citizens Legal Defense Network
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After fielding a series of questions about legal defense against road rage, I realized that I needed to clarify some of the concerns in my own mind. Fortunately, I knew just whom to ask! I took the questions to our Advisory Board member James Fleming, a former law enforcement officer, who now works as a criminal defense attorney. His answers were clear warnings and in the interest of sharing his message accurately, we switch now to our Q & A format.

eJournal: Jim, you've been practicing law for three decades, but before that, you were a law enforcement officer, so you have an excellent knowledge and experience base from which to advise members on concerns pertaining to use of force in self defense during a road rage incident.

When an armed citizen uses a gun to defend against someone who attacks them after a real or perceived wrong occurring between drivers on the road, a study of those stories often shows that the attack didn't "just come out of the blue" and that in fact, both drivers exchanged insults via gesture or word prior to the shooting. Today, I greatly appreciate the opportunity to discuss defense of self defense associated with a driving incident so our members more clearly understand the issues in defending these cases.

In general, does shaking a fist or making the obscene gesture of the raised middle finger at someone in traffic constitute an invitation to fight—to engage in mutual combat?

Fleming: Depending upon the jurisdiction in which the action takes place, it certainly can be viewed in that way. Your readers need to understand that the laws governing these types of interactions will change from state to state, and the application of the principles embodied as rules of evidence, as well. You and I have previously talked about examples such as TX, where evidence of aggression can be used to defeat the argument that the defendant claiming self defense is entitled to a presumption of reasonableness. In the right circumstances, that can be fatal to a claim of self defense.

In IL, evidence of aggression on the part of a defendant can defeat the ability to argue that the defendant acted in self defense. Folks need to know that in many jurisdictions the defense of self defense is not a given in a criminal case. In many jurisdictions the defendant will not even be allowed to argue self defense and have the jury instructed on self defense unless he or she can meet certain threshold showings to the court.

At the same time, actions of this type are extremely dangerous, even if you ignore the legal ramifications. I've reviewed dozens of cases where a raised fist, a shouted insult or a middle-finger salute have been returned with gunfire, having someone smash into a car at high speed, a thrown brick or other violent response that resulted in the death of the person making the gesture, insult, etc., or of another passenger in their vehicle.

Such behavior, no matter what the provocation, is an extremely dangerous, irresponsible act.

eJournal: Is it any different if car windows are open and one driver screams at the other, "Stop and face me like a man! I will break your face!"

Fleming: No, it is not. For the same reason. Many jurisdictions employ the concept of "fighting words."

Fighting words are defined as “those, which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” To utter those words is an invitation to both actual and legal disaster. To respond to such words thrown at you by someone else by engaging in a confrontation that could turn deadly in a split second is totally irresponsible and will most often defeat any claim that a defendant acted in self defense.

Do you notice how I used the words “most often?” That is because the law is unpredictable, despite what most people like to think. What will a prosecutor do with your words and actions? What damage will a judge decide your words and actions do to your claim of self defense? What will a jury decide, irrespective of the law? To anyone who would argue that the law is certain, the law is predictable, I simply say, “Go read fifty cases on self defense from across the country, then come back and talk with me about ‘predictability.’”

eJournal: Do the actual words matter? What about, “I’ll kill you for ... [what ever the driving offense is]” ...or what about, “Pay attention and drive! I’ve got a gun/knife/weapon I’ll use on ya if ...[again, add the imagined offense]!”

Fleming: No, I do not believe the actual words matter. And, who is yelling them? If it’s the other idiot, get away from them without response as quickly as possible and call 911.

If it is you, stifle the desire to yell anything, to gesture, to respond in anyway. There is nothing going on out there that is worth dying over, or spending a substantial part of your life behind bars over, or giving your life savings to an attorney who is going to have to fight to keep you out of prison. Keep your mouth shut, your temper in check and walk away if you can, and run away if you must.

eJournal: From the law’s viewpoint, do either gestures or verbal threats equal responsibility for starting or willingly participating in a fight?

Fleming: Here is how that can play out. Gestures and verbal threats are most often considered disorderly conduct. Next thing you know, you have a prosecutor arguing that you cannot claim self defense if you have been engaged in the crime of disorderly conduct. Here is language drawn from one such case:

“The district court appropriately instructed the jury that, if appellant initiated the assault [by engaging in disorderly conduct], self defense was still available to him only IF he declined to carry out the assault, honestly tried to escape, and clearly informed the victim that he desired peace.”

That’s a lot of “ifs” to cover in the space of a few seconds down at Third and Vine Streets in the heat of the moment. Don’t go there, don’t do that, don’t say that. Use your head.

eJournal: In your experience, what if any criminal charges might I incur if I flipped off a dangerous driver, then stopped in traffic and had to fend off a deadly force attack with which that driver responded?

Fleming: That is entirely fact driven and may span the gamut from first degree murder to simple misdemeanor assault. Without facts to apply, it is impossible to predict.

eJournal: What if I flip them off, then they pursue me off the freeway and we stop and fight. Am I responsible for starting it? At what point, if ever, do I stop being seen as a willing participant? Can I regain [as Massad Ayoub would teach] my mantle of innocence?

Fleming: Again, not enough facts here, but in general terms, using the language from the case I noted above: *“... self defense was still available to him only IF he declined to carry out the assault, honestly tried to escape, and clearly informed the victim that he desired peace.”*

This is going to make people angry, because they want certainty. I can’t help that; I can’t offer them certainty. That prosecutor may do all in his/her power to destroy that “mantle of innocence.” The judge may disregard it. The jury may ignore it.

eJournal: What, if any, actual physical action must accompany a verbal threat to rise to the level of what, for example, CA calls Criminal threats (California Penal Code Section 422) and other states call making

terroristic threat? Does a verbal statement alone constitute assault or is a clenched fist and rush to physical proximity required to fulfill the elements of assault?

Fleming: A terroristic threat is not an assault. It is a threat to commit a future crime of assault, and again it is unpredictable. I was once called upon to defend an individual charged with uttering a terroristic threat because while an officer had him on his knees, cuffed, on the ground, he yelled, "Somebody shoot this sonofabitch!"

In most jurisdictions, no physical action is necessary to create a terroristic threat. But remember, too, as discussed above, the verbal statements may also constitute a disorderly conduct, which can hamper your ability to use self defense as a justification for the use of force.

eJournal: We live in the real world! Every one gets angry—even good people. In your study of applicable law, is there any way we can separate words or actions occurring several minutes before the other driver begins his or her assault against you?

Fleming: Not realistically. In the sterile atmosphere of the law school classroom, perhaps. In the world of imperfect people sitting as judges and juries, relying upon such an argument is extremely risky. That is the real world.

eJournal: In earlier discussions, you pointed out TX jury instructions discussing "evidence of aggression" and how that affects our argument of justification by reason of self defense, or getting a self-defense jury instruction, if I'm not reading too much into it. Ditto for IL...does flipping someone off during a dangerous driving situation create an initial aggressor issue? Where is the line drawn? Does that also vary from state to state?

Fleming: In the law, that "line" is referred to as a "bright line" rule: "*A clearly defined rule or standard, composed of objective factors, which leaves little or no room for varying interpretation.*" The purpose of a bright-line rule is to produce predictable and consistent results in its application.

In this context there is no such thing as a bright line rule. Because the situations are so heavily fact dependent, and, the horse I am not quite done beating to death, the law varies from jurisdiction to jurisdiction, as does its interpretation by judges and juries.

In a New Mexico case, two drivers became involved in a "road rage" confrontation over some trivial right of way contest. They yelled at each other, exchanged single digit salutes, shook their fists and started chasing each other through traffic. Their reckless conduct resulted in a third driver losing control of her car and she was killed in a collision with yet a fourth driver. Both of these idiots were charged with motor vehicle homicide. Both drivers tried to defend themselves arguing that the other driver started the altercation with gestures, etc. Nobody cared, and they were both convicted and sent to prison.

If there is a bright line rule, it is: "Do not engage in such stupid, irresponsible and risky conduct, no matter what the provocation."

eJournal: I get a certain amount of feedback from members and potential members who define themselves as being the kind of person who never backs down, you know, manly men who aren't afraid to fight, never walk away, stand up for themselves, etc. As an attorney who has had to work like a maniac to get defendants out of silly situations that started with a simple aggressive statement or gesture and then devolved into assault or manslaughter, what is your advice to members if cut off in traffic or otherwise threatened while driving?

Fleming: If you are the type of individual who defines yourself as "one who never backs down," it is time to grow up and flush out your headgear. There is no situation out there that is worth dying over, killing another over, ending up wasting away in prison over, or ruining your family and your family's financial future by getting involved in one of these mindless confrontations.

I grew up in Western Nebraska, and worked as a street cop in metro areas and out west where cowboys still ride horseback for long hours to make a living—tough cowboys and equally tough cowgirls. I was involved in a lot of fights, and I won most of them and survived the ones I lost. So, my opinion here is not based upon

unfamiliarity with fists and boots. It is based upon 45 years of experience as a cop and a lawyer.

If you are involved in an incident out on the road, and you can do so safely, drive away without response, without retort, without gestures. If you are pursued, try to get to a public place, a restaurant, a service station, a government building, where you can surround yourself with witnesses.

Flag down a cop, do all and everything in your power to avoid the confrontation that may result in you having to use deadly force to stay alive. And call 911 just as soon as humanly possible demanding to have an officer come to your location to take a report.

Deadly force is not an “I get to shoot” situation. Deadly force is an “I must shoot to save my life” situation.

eJournal: Putting your former law enforcement officer’s cap on for a moment: What do you teach as best options if someone is standing at your window screaming threats at you? If they are holding an impact weapon and screaming? If they prepare to hit your car window?

Fleming: Lock your doors, keep your windows up, do not exit the vehicle and, if you can, drive away. If they carry through with an attack and you can still drive away, drive away.

Firing through safety glass, you may hit them, you may miss them and hit some innocent bystander, but the moment you fire through that glass, you will no longer be able to see through the glass to know what is going on outside.

You will also be deafened by the report, which is going to disadvantage you in the critical moments that follow (I’ve experienced this, it is one of the reasons I wear a hearing aid today). Shooting in such a situation is a last ditch effort.

eJournal: What if our automobile injures them if we try to escape without resorting to deadly force?

Fleming: It is very likely that your use of your vehicle will be argued as the use of deadly force. However, if you can prove that you used the vehicle as a defensive means of avoiding an imminent deadly threat or threat of crippling injury, you will be able to argue that it was self defense. Self defense is not always an attack, sometimes it is something else, such as an avoidance technique.

eJournal: If we’re not sure what our individual state laws are governing our actions in response to other drivers, how do we research our own state laws? Are there any particular search terms we might use like “aggressor,” or “initial aggressor,” “reasonableness,” “self defense?” What bread crumbs might lead us through the scads of info on the Internet to the pertinent sections in our state laws that dictate what we’re allowed to do in response to road rage?

Fleming: I seriously doubt that you will find anything in the laws of any state that will relate specifically to road rage. You will only find those statutory sections that deal with self defense and the use of force and deadly force. The application of those laws to the road rage situation will only be found in case law unless and until some legislator introduces a bill specific to the road rage situation, and I don’t see that happening any time soon.

Legal research by individuals not trained in the law is always risky. Part of the problem is the reliability of your sources. The Internet contains a wealth of accurate information. It also contains a wealth of garbage and really bad information. For example, I just ran across an article where some idiot stated that “...being shot in the abdomen with a load of #4 buck shot is like being punched by a professional boxer. It won’t penetrate the body, but it will stagger you.”

Understanding the nuance, the application, interpretation of legal principles and concepts takes years of experience. And then, even lawyers and judges will often disagree.

If the member has already identified self-defense legal counsel (a practice I strongly encourage), take your questions to your lawyer for the best advice. For those folks who just have to do it on their own, you are going to have to look at case law, and a lot of it. You are going to have to be sure that you understand the

issues in the case, understand that the application of the law is often altered by differences in fact patterns, understand the differences in cases dealing with substantive law and procedural law. And be sure that the cases you are reading have not been overruled by later cases.

Frankly, most people have better things to do with their time. That is why it is often said, “If you do not know the law, know a lawyer.”

eJournal: And from your viewpoint as an experienced attorney, being considerably better versed in what one is allowed to do in response to a driver in the grip of road rage who thunders out of his car to enact a little road-side justice, how would you handle it yourself?

Fleming: I am going to stay in my car, and get away from the situation, driving as safely as I can. If I am followed, I will drive defensively, and I will not go home for obvious reasons. I will drive to the nearest public place that I can find, and I will go there and surround myself with witnesses.

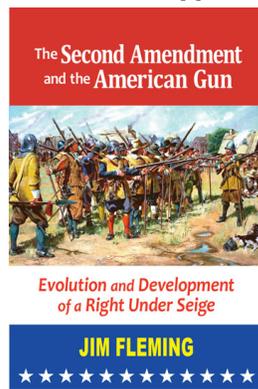
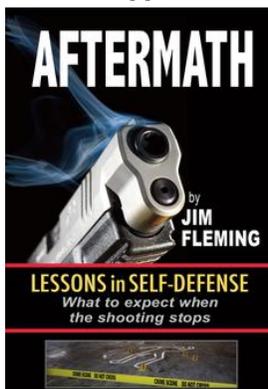
If someone is with me, they will be speed dialing 911 while I concentrate on driving. They will be reporting the 5 W’s and requesting immediate LEO assistance. If I am fired upon while driving (and that actually shows up in a number of these cases) I will take evasive action as best I can to get to a public place. I will NOT engage in a rolling gunfight. That nonsense is for the movies. I will focus upon driving to get to cover. Realize that an automobile offers concealment, it does not offer cover.

There are too many scenarios to cover adequately. What about if I am alone, on a lonely stretch of road in the dark of night, miles from anywhere? I might, under such circumstances, decide to leave the car and move into the darkness to avoid a confrontation, or if need be, make my fight in the dark, where I can use its concealing qualities as an advantageous defensive tool. But, such situations are ruled by the facts, and not by the law.

eJournal: That's a good reminder of a point you've stressed in your earlier answers—no one can give exact answers about what to do because each situation is different. You've also given us a great reality check about self discipline and staying cool behind the wheel as well as explaining how gestures and words can remove our ability to argue self defense.

There's a lot to go back and read over in your answers and think over. Thank you so much for sharing your knowledge and experience with us. I really appreciate it!

Attorney and Network Advisory Board member Jim Fleming practices law in MN, an attorney of more than 30 years trial and appellate court experience in Minnesota and Nebraska and has argued both civil and criminal appellate cases in the State appellate courts as well as before the Eighth Circuit Court of Appeals.



He is the author of several books: [Aftermath: Lessons in Self-Defense](#) and [The Second Amendment and the American Gun: Evolution and Development of a Right Under Siege](#).

Jim and his wife Lynne Fleming operate the firearms training school [Mid-Minnesota Self-Defense, Inc.](#) where Jim is the lead instructor.

Learn more about author Jim Fleming at <http://www.authorjimfleming.com> and his law practice website at <http://www.jimfleminglaw.com/about-1.html>.