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## **Emerging Second Amendment Jurisprudence**

By Bobbie K. Ross

Everyone loves a trend. And after the Supreme Court’s decisions in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010), the practice area of firearms law has become much more intriguing to lawyers at all levels of experience.

Most of us are familiar with the wording of the Second Amendment, which states “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. And, while we may all have an opinion on whether the right to bear arms should be treated as an “individual” or a “collective right,” the Supreme Court recently declared in *Heller* that the Second Amendment guarantees an individual’s right to possess a firearm unconnected with his or her service in a militia, and that individuals have the right to use firearm for traditionally lawful purposes, such as self-defense within the home. In fact, the Court said that “[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.” *Heller*, 128 S.Ct. at 2799.

*Heller* involved a Second Amendment action seeking to enjoin the District of Columbia from enforcing statutes that banned handgun possession in the home and prohibited the rendering of any lawful firearm in the home operable for the purpose of self-defense. In *Heller*, the Supreme Court invalidated both statutes and held that the Second Amendment conferred an individual right to keep and bear arms. *See* 128 S.Ct. at 2821–22.

*McDonald* dealt with a challenge to the handgun bans and related ordinances in the cities of Chicago and Oak Park, Illinois. After the *Heller* opinion was issued, several lawsuits were filed in federal court against various cities and townships in the state of Illinois that had handgun bans. One of these cities was Oak Park. The National Rifle Association (NRA) filed a case entitled *NRA v. Village of Oak Park* and another action against Chicago’s ordinance (*NRA v. Chicago*). The two NRA cases and *McDonald* were deemed related at the district court level but were never actually consolidated despite all three being heard by the same federal trial court judge and same Seventh Circuit Court of Appeals panel. The Supreme Court granted certiorari in *McDonald* and, after issuing the opinion in that case, granted certiorari in the two NRA cases and then remanded all three in light of the *McDonald* opinion.

In *McDonald*, the plaintiffs claimed that the ordinances violated their Second and Fourteenth Amendment rights. Justice Alito wrote the decision in *McDonald*, which held that the Second



Amendment right to keep and bear arms is a fundamental individual civil right fully applicable to the states through the Due Process Clause of the Fourteenth Amendment.

In *Heller* and *McDonald*, the Supreme Court confirmed that the Second Amendment was no longer the red-headed stepchild of the Bill of Rights. But the decisions also left plenty of confusion in their wake and opened the door for a slew of lawsuits attempting to define the newly acknowledged right.

One of the primary questions left unanswered by the Supreme Court was the standard of review. Although the Court's rulings in *McDonald* and *Heller* did not establish a level of scrutiny to be used when reviewing Second Amendment cases, they did provide some guidance.

*Heller* expressly rejected the rational-basis test. *See Heller*, 128 S. Ct. at 2818 n.27. Justice Breyer's infamous interest-balancing test was rejected as well. *See id.* at 2821. By referring to the right to keep and bear arms as "fundamental," the Court seemed to imply that strict scrutiny should be used, as is the case with other fundamental rights. *See McDonald*, 130 S.Ct. at 3050 ("[A] provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*"). However, the Court never actually stated a level of scrutiny to be applied

Strangely enough, one of the most important cases in Second Amendment jurisprudence—*Nordyke v. King*—was actually filed years before *Heller* or *McDonald*. The *Nordyke* case has an extremely convoluted history, but the condensed version is that it involves an Alameda County ordinance, which prohibits gun shows from taking place on the Alameda County Fairgrounds. The Nordyke family had promoted gun shows at the Alameda County Fairgrounds for years, and when the ban was passed, they sued, challenging the ordinance on multiple constitutional grounds. This case—which has played out over the last decade and still has not been finally resolved, as the Ninth Circuit's May 2, 2011, opinion affirmed in part, reversed in part, and remanded the case back to the district court—has played a role in helping to define a level of scrutiny. The *Nordyke* panel applied a substantial burden test as opposed to strict scrutiny, analogizing the Second Amendment right to keep and bear arms to that of a woman's right to obtain an abortion. Now, in all Ninth Circuit jurisdictions, regulations that substantially burden the right to keep and to bear arms will trigger heightened scrutiny under the Second Amendment.

The *Nordyke* panel cited to a Eugene Volokh law review article, "Implementing the Right to Keep and Bear Arms for Self-Defense", 56 *UCLA L. Rev.* 1443 (2009), for the idea that "it is easier to determine whether a law substantially burdens the right to bear arms than to figure out whether a law "will reduce the danger of gun crime," and thus instructed courts within its jurisdiction to "use the doctrines generated in [the] related contexts" of abortion and content-neutral speech restrictions "for guidance in determining whether a gun-control regulation is



impermissibly burdensome.” *Nordyke v. King*, No. 07-15763, 2011 WL 1632063 at \*6. Second Amendment lawyers on both sides must now look to abortion and free speech jurisprudence to find that guidance.

The effect that the *Nordyke* opinion will have on the numerous lawsuits throughout the federal courts in the Ninth Circuit’s jurisdiction, many of which are (or were) stayed pending the issuance of the opinion in *Nordyke*, remains to be seen. There is a good chance that, as happened after *Heller* and *McDonald*, there will be even more suits filed attempting to determine what exactly constitutes a “substantial burden” on the right to keep and bear arms.

While *Heller*, *McDonald*, and *Nordyke* may be considered by some to be the big three of Second Amendment jurisprudence, the practice area will continue to be defined on a daily basis through ongoing litigation across the nation. This litigation seems to fall into three primary categories: challenges to restrictions on the right to carry concealed weapons (CCW), challenges to restrictions on places where firearms may be allowed, and challenges to restrictions on the groups of people allowed to carry a firearm.

### CCW Restrictions

Currently, the bulk of post-*McDonald* Second Amendment litigation appears to fall into the category of challenging restrictions on CCW.

*Peruta v. County of San Diego*, No. 09-cv-02371, 2010 WL 5137137 (S.D. Cal. Dec. 10, 2010), *appeal docketed*, No. 10-56971 (9th Cir. Dec. 16, 2010), involves a challenge by residents of San Diego County and the California Rifle & Pistol Association (suing on behalf of its members). The suit challenges the San Diego Sheriff William Gore’s CCW permit issuance policies, asserting that under the Second Amendment, self-defense must constitute “good cause” for the issuance of a CCW, and that Sheriff Gore’s requirement that an applicant demonstrate some special need or a specific threat in order to get a CCW permit is an unconstitutional restriction on the right to keep and bear arms; specifically, the right to carry a loaded firearm in public for self-defense.

Similarly, *Richards v. Prieto*, No. 09-01235 (E.D. Cal. filed May 5, 2009); *Muller v. Maenza*, No. 10-06110 (D. N.J. filed Nov. 22, 2010); *Mehl v. Blanas*, No. 08-15773 (9th Cir. Apr. 8, 2008);, *Rothery v. Blanas*, No. 09-16852 (9th Cir. Aug. 25, 2009); *Peterson v. LaCabe*, No. 11-1149 (10th Cir. Jan. 12, 2010); *Palmer v. District of Columbia*, No. 09-01482 (D.D.C. filed Aug. 6, 2009); and *Birdt v. Beck*, No. 10-08773 (C.D. Cal. filed Nov. 4, 2010) all challenge the CCW permit issuance policies in their respective jurisdictions.

### Place Restrictions

*Bonidy v. United States Postal Service*, No. 10-02408 (D. Colo. filed Oct. 4, 2010), is a challenge to the U.S. Postal Service’s complete ban of firearms on postal service property.



*GeorgiaCarry.Org v. Georgia*, No. 11-10387 (11th Cir. Aug. 13, 2010), challenges the state of Georgia’s prohibition on carrying firearms into places of worship. *Baker v. Biaggi*, No. 10-00426 (N.D. Nev. filed July 13, 2010), challenges restrictions on the ability to have firearms in a tent at a campground.

### **People Restrictions**

*NRA v. McCraw*, No. 10-00141 (N.D. Tex. filed Sept. 8, 2010), is a challenge to the Texas state prohibition keeping those aged 18–20 from obtaining CCW permits. Its companion case, *Jennings v. BATFE*, No. 10-00140 (N.D. Tex. filed Sept. 8, 2010), is a challenge to the federal ban on the ability of those aged 18–20 to purchase a handgun. *Fletcher v. Haas*, No. 11-10644 (D. Mass. filed Apr. 15, 2011) challenges a Massachusetts law that prohibits legal resident aliens from possessing handguns and buying ammunition. *Enos v. Holder*, No. 10-02911 (E.D. Cal. filed Oct. 29, 2010), is a challenge to the ban of Second Amendment rights of those convicted of misdemeanor domestic violence.

While the cases mentioned above do not constitute an exhaustive list of all Second Amendment–related cases in the country, it is clear that (for the time being, at least) the trend of firearms law being the new “it” practice area after *McDonald* will continue. However, if not handled carefully, firearms cases can be a minefield for the unwary or inexperienced practitioner—especially in states such as California where the laws governing firearms and ammunition are complicated at best and insurmountable at worst. Firearms cases are not simple or cheap to litigate and can require substantial financial and human resources. Any attorney considering filing a case to enforce rights under the Second Amendment would be wise to consult with other counsel with experience in the area of firearms law. Well-intentioned newcomers can easily do more harm than good. The individual and collective rights of Second Amendment advocates everywhere may depend on it.

Bobbie K. Ross is an attorney with the firm Michel & Associates, P.C. in Long Beach, California.

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## **Influence Your Verdict by Changing Jurors' Perceptions of Expert Witnesses, Part One**

By Joseph M. Hanna

At the moment of accountability, when many jurors engage in the deliberation process, the critical factor that most significantly influences how they analyze the case is their long-standing predispositions rather than anything else.



Determining what those long-standing predispositions are and what themes will influence jurors the most are reasons defendants in catastrophic injury cases find more and more that there is great value in engaging in mock jury exercises. A studied review of many such exercises leads us to believe that in any jury pool, one will likely find jurors who are either predisposed toward plaintiff's themes or defendant's themes. One will also find centrist jurors. One of the premises of this article is that to the extent that the centrist can be won over to the defendant's camp, the likelihood that the pro-plaintiff jurors will be won over by the logical discussion and peer pressure that occurs during the deliberative process is greater.

An essential component of achieving this goal is to successfully undermine the jurors' perception of plaintiffs' expert witnesses and to maximize the favorable impression a defense expert makes. Since the early 1990s, achieving this goal has been particularly challenging for defense counsel.

### **The Role of Jurors**

Even before the Enron scandal, a survey found "that a majority of jurors are pre-disposed to believe an individual's version of events in any dispute with a corporation." *Wall St. J.*, Nov. 13, 1991 at B5. After the litany of scandals that followed Enron, the problem was compounded. The *Wall Street Journal* verified what many trial lawyers have recognized; increasingly, we are confronted with a new class of jurors.

The members of this class have been displaced by economic chaos—environmental disasters and downsizing—and they are now feeling insecure, vulnerable, and bitter. They blame, among others, Corporate America for their plight. These individuals contribute significantly to the volatility of jury verdicts.

Jurors from this group of individuals will deliberate and consider how a corporation should be judged for its alleged errors and tortious conduct. This is the group that the corporation must win over if it is to defend its case successfully.

The success of defense counsel under these circumstances depends, in large part, upon his or her ability to develop a high degree of empathy for the plight of the typical juror in a lawsuit against a corporation. Among other things, counsel should be sensitive to the following:

- Most jurors will be the quintessential "average citizen"—a person who may or may not have graduated from high school. In some jurisdictions, exemptions and other available ploys virtually ensure that few, if any, professionals will sit on the jury.
- Law students take separate courses in tort law, products liability, civil procedure, and evidence. Imagine the difficulty the average juror confronts in attempting to make an appropriate determination based on an understanding of the evidence and law in a given case during the two or three weeks of trial.



- In many jurisdictions, jurors are not permitted to take notes and, thus, must remember the significant amount of factual information that accumulates over the course of a trial. Perceptions and impressions often may be more important than the evidence itself.
- The jurors are in a stressful environment with many novelties and distractions, which may limit their ability to appreciate the subtleties of the case.

Keeping the foregoing factors in mind, it is no wonder that some jurors are overly impressed by a polished expert's demeanor rather than suspect the lack of substance of the expert's testimony.

### **Anger Management**

The adversarial legal system is dependent on the assumption that decision makers are rational, unbiased, and not strongly predisposed. The plaintiffs' bar recognizes to the extent that this paradigm can be altered by their trial strategy that the plaintiff's case benefits mightily.

In recognition of this fact, the plaintiffs' bar has developed aggressive discovery initiatives, questioning techniques, order of proof strategies, and expert witness presentations, which, among other things, are geared toward capitalizing on the tarnished reputation of Corporate America.

The plaintiff's goal is to capitalize on the tarnished image of Corporate America by creating anger and suspicion on the part of the jurors toward the defendant. With the arguments developed from the implementation of these strategies in hand, plaintiffs' counsel angle to try to generate as much anger against the corporation as they can. They recognize what we all intuitively know from our own experiences: What is rational is often overcome when anger holds sway. In our own lives, we have all observed time and again how passion overwhelms reason.

A number of the studies discussed below shed light on juror psychology and how to avoid this distinct danger. For a defense to be effective, timing is critically important. Plaintiff's effort to generate anger and, in turn, irrational behavior and closed-mindedness on the part of jurors has to be addressed aggressively and as early in the trial as possible. The more that can be accomplished early in plaintiff's case the better.

Structuring the cross-examination of plaintiff's experts to articulate mitigating information that undermines plaintiff's themes is critically important. Similarly, suggesting during the cross-examination facts that justify and shed a more charitable light on the corporate conduct in question has the potential to pay big dividends as the trial progresses.

### **The Quality of Jurors**

Professor Samuel Gross from the University of Michigan outlined the "essential paradox" of expert testimony, noting that "We call expert witnesses to testify about matters that are beyond the ordinary understanding of lay people (that is both the major practical justification and a



formal legal requirement for expert testimony), and then we ask lay judges and jurors to judge their testimony.” Samuel R. Gross, "Expert Evidence," *W. L. Rev.* 1113–1232, 1182 (1991).

Some jurors are not prone to simply accept an expert’s testimony. Instead, they tend to view experts with a great deal of skepticism. Factors that jurors in civil trials identified as important to evaluating expert credibility have been examined and analyzed. Sanja Kutnjak Ivkovic & Valerie P. Hans, "Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message," 28 *Law & Soc. Inquiry* 441 (2003). Ivkovic and Hans interviewed 55 jurors from seven civil trials and developed a comprehensive model of the key factors that jurors used to evaluate expert witnesses and their testimony. The interviews were conducted as part of a larger study that examined the reactions of 269 jurors in cases with business and corporate parties. The jurors were interviewed separately and asked to give their reactions to the parties, attorneys, and evidence in the case. *Id.* at 452.

Seventy percent of the jurors either agreed or strongly agreed with the statement “Lawyers can always find an expert who will back up their client’s point of view, no matter what it is.” Only 10 percent of the respondents disagreed. The result supports the jurors’ view of experts as hired guns. *Id.*

Seventy-six percent of the jurors surveyed agreed that “there’s a lot of disagreement among experts in most professions.” The jurors’ response to this question may suggest that jurors are not as gullible as one might believe. Moreover, this may show that jurors have a more positive view of the role of experts than what we would prefer to believe.

### **Pro-Defendant Jurors v. Pro-Plaintiff Jurors**

What are the attributes of a pro-defendant juror versus a pro-plaintiff juror? A pro-defendant juror will not be influenced by the plaintiff’s attorney’s gamesmanship. He or she will show an open mind and will be skeptical of posturing. In our justice system, the pro-defendant juror is willing to follow the rule of law. The jurors in the study who showed the greatest suspicion of experts also believed that there were many illegitimate lawsuits. Jurors who had a more cynical point of view, or who regularly doubted the fairness of the world, also seemed to be more dubious about the expertise claims of professionals. *Id.*

On the flip side are pro-plaintiff jurors. Jurors who see themselves as efficacious and view the world as a basically agreeable place are more likely to grant legitimacy to claims advanced by litigants and, in turn, be more supportive of a plaintiff’s expert witness. Other pro-plaintiff juror characteristics include individuals who believe that the world has treated them poorly or those who view themselves as socially and economically vulnerable.

### **Jurors’ Characterizations of Good and Bad Expert Witnesses**

Ivkovic and Hans’s study also analyzes the ways in which jurors characterized good and bad

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expert witnesses. *Id.* at 455. The jurors' responses showed that being a good expert did not solely depend on only one characteristic. As the following examples show, a number of characteristics must blend together.

In a medical malpractice case that featured conflicting expert testimony, several jurors explained why they trusted one medical expert more than the other.

- “She had backup documents to go along with everything she was saying.” *Id.*
- “She seemed to me a very intelligent person. She was the one I felt was the most credible.
- “She was able to field the answers very well from the defendants and to have information to prove that what she was saying was the way it was...I put more credibility in what she said.” *Id.* at 456.

Several jurors in another cases evaluated one medical doctor as being an extremely good expert witness. The jurors listed the following as being characteristics of a good expert witness:

- “He was just excellent and convincing, he could speak to the court and the jury in lay terms. . . . He really made things very clear.” *Id.*
- “He was so interesting. He explained everything to us at our level, at a layman's level. He was an excellent teacher. We could understand, so it really helped.” *Id.*

The following are examples of characteristics of bad expert witnesses:

- “The economist . . . was really deep and really boring, but you could tell from his testimony that he was definitely being paid by the plaintiffs.”
- “The surgeon . . . he was a disaster . . . because he got flustered and would have to ask for questions to be repeated, which . . . was just a stalling technique because the questions were turning the screw and putting him very much on the defense.”

An expert may be labeled as a bad witness because of the lawyers too. In one case, a juror complained that the lawyers in the case did not explain the connection of the expert's testimony to the case. Several jurors in another case reported that one expert, an economist, whose analysis was supposed to help the jury determine the award, experienced serious problems because the lawyers did not provide all of the information to him.

## Conclusion

Throughout every trial, jurors are always searching for the essential meaning contained within the evidence, arguments of the attorneys, and the expert witnesses' interpretation of the facts and their opinions regarding the key issues of the case. It is thus imperative that an effective cross-examination of a plaintiff's expert witness debunk the expert's credibility. Defense counsel must create an atmosphere during cross-examination that enhances the likelihood the jury will



discount the plaintiff's expert's testimony by showing that the expert's opinions are flawed, the expert does not know the facts of the case, the expert is biased, and finally, the expert is not considering applicable standards.

Experts who are willing to reach a firm conclusion are deemed more readily believable by jurors. Therefore, it is important to establish that the expert's methodology and opinions are not generally accepted in the discipline involved. This can be decisive at the trial level or on appeal.

[Joseph M. Hanna](#) is with Goldberg Segalla LLP in Buffalo, New York.

Part two of this article will be featured in the next issue of *Minority Trial Lawyer* and will address expert characteristics, jurors' impressions of expert witnesses, and strategies for attacking experts' credentials.

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## The Fundamentals of Mediation Practice: A Brief Refresher

By Sarah X. Fang

Achieving a successful result in mediation requires that an attorney consider and understand the distinctions between the traditional legal process and alternative dispute resolution (ADR). With litigation, the participants experience significant costs, emotional or psychological burdens, interruption of their daily lives, and, quite often, prolonged resolution of the underlying problems. Those matters that proceed to trial result in a verdict for one side and against the other. The costs are significant.

In contrast, mediation is generally less expensive and is capable of an expedited disposition of the entire case. Mediation affords the participants an opportunity to participate actively and with a degree of engagement that is not always possible at trial. In litigation, the rules of evidence and civil procedure limit the materials that are submitted to a fact finder for disposition. Mediation, however, provides the parties with the opportunity to identify the issues and generally to present as much evidence as they deem fit to support their case. In the end, parties to mediation can either accept or walk away from a proposed resolution, thus empowering them to a degree seldom achieved in the trial process.

The decision to proceed with mediation involves consideration of multiple factors, including, but certainly not limited to, expense, relative strength and weakness of your client's case, the desire for an early resolution, and the availability of a qualified neutral to hear the case. Within the past decade, the number of private firms offering ADR services has grown significantly. They may be found in every major metropolitan area and often include a network of offices in surrounding counties. As a general rule, the panel of available neutrals includes well-known litigators and



retired jurists from both the state and federal bench. While the reputation of such individuals is quite often well-established and equally well-publicized, counsel should always undertake independent research of the qualifications of proposed candidates and give particular consideration to recent results as reported by lawyers who have appeared before the potential mediator. It is not unusual to learn during such investigations that a given candidate may not be the best choice for personal reasons, such as health or unrelated professional concerns, which may undermine his or her ability to fully engage in the ADR process.

Candidates for a potential mediation should conduct a conflict of interest search to assure the litigants that they have no personal or professional relationships that would impact their ability to hear the matter in a truly disinterested fashion. The fact that a conflict of interest search has been undertaken and that no conflict has been found should be expressed in writing by the mediator at or prior to the time of retention.

In a similar respect, when a former judge is considered for ADR, the attorneys on all sides should undertake research of the judge's published decisions to identify any potential bias or extrajudicial attitude that could impact upon their client's case. Judges, of course, routinely address thousands of disputes during their judicial tenure. It is helpful but not necessary for attorneys considering the retention of such jurists to analyze a significant body of such precedent to properly inform themselves of the judge's qualifications. Such information, and the general leanings of any specific judge, can generally be determined by means of telephone calls and off-the-record discussions with lawyers who have appeared in the courtroom or retained them in an ADR setting.

As noted above, it is quite common for lawyers in larger metropolitan areas to have a broad range of private firms available that specialize in ADR services. The field of potential candidates is quite often impressive and varied in both professional and personal backgrounds. Counsel should also consider, however, the availability of potential neutrals in more remote locations who may have expertise or experience ideally suited to a particular case. While the retention of a neutral from a distant city or state may increase the cost of his or her services, the parties may benefit in the final analysis from the informed guidance of a specialist. The same logic that recommends retention of specialists in various disciplines of law often applies with equal force in the retention of a neutral.

Once the parties have agreed upon the selection of a mediator, counsel should confer with the mediator on key issues, such as pre-mediation statements, the procedure or format for the mediation, the manner in which a decision will be issued, and the specific requirements and expectations of the parties as they engage in the hearing process itself. The great majority of mediations involve submitting a mediation statement in advance of the hearing. While it is not absolutely necessary to submit such materials to facilitate a successful resolution of the litigation, most mediators believe that the opportunity to thoughtfully consider the views of each party and



weigh their competing strengths and weaknesses is a valuable tool leading to a successful outcome.

Recognizing the potential significance of a pre-mediation statement, counsel are well-advised to devote all necessary resources and time to create the best possible brief on behalf of their clients. While this statement is true in every case and should apply with equal force on behalf of every client, there are certain characteristics of the mediation process that underscore the importance of a well-written pre-mediation statement. The rules of evidence are relaxed in mediation, and, accordingly, materials and evidence that might otherwise be excluded in the judicial process can be freely available to the mediator. Counsel should consult their clients for input as well, as evidence they would submit to support their case in mediation may well exceed the range of evidence permitted by a court of law.

The structure of a mediation brief is limited only by the imagination of its creator. The type of commentary and analysis consistent with a “Brandeis Brief” is appropriate for a pre-mediation statement, whereas such materials are not always admissible or appropriate for a brief filed in litigation. Documentary exhibits and more sophisticated graphics should be considered to strengthen a client’s case. Attorneys who favor the mediation process often state that the potential to utilize their imagination and creativity is one of the most enjoyable aspects of the ADR process, as the limitations imposed by rules of evidence and civil procedure do not necessarily apply.

Equal consideration should also be given to your opponent’s case by addressing your client’s weaknesses and the opposition’s strong points. As the arguments’ pros and cons are developed, it is essential that every recital of facts be accurate and, if necessary, corroborated by evidence in the record. During the mediation process, a lawyer’s credibility is an essential, fundamental aspect of his or her client’s cause. Mediators learn early on in the process whether the words of an advocate can be accepted at face value or whether they need to be challenged and verified. Credibility is as essential to the counselor or advocate in the mediation process as it is in a court of law.

The mediation process affords litigants the opportunity to control the outcome of a case more so than the judicial process. It is important to prepare a client for mediation, explain the manner in which you will proceed, and carefully develop the extent to which the client will participate in the process. There are some clients who will insist on complete freedom of expression, whether in the presence of their opponent or in a private conference room with the mediator. Other clients will follow the advice of their counsel. While communications made behind closed doors to a mediator outside the presence of opposing parties are less problematic, it is essential that statements made in the presence of the opposing side be very carefully considered and discussed in advance of the mediation. Often, the attorneys and mediator will address this issue prior to the hearing and establish the ground rules. If there is an unusually adversarial relationship between



the parties, the mediator may suggest that opening statements be limited or eliminated altogether. Of course, certain clients are beyond control and even the most extensive preparation will not guarantee success at mediation. In all of this, the personal skills of the mediator are a vital element and essential to the overall success of the process. Indeed, the personal qualities and character of different mediators should be considered throughout the selection process. In cases where strong-willed advocates are involved, an experienced and self-assured mediator is often a necessity. In mediation, unlike the judicial process, the parties and their counsel have the opportunity to select a neutral whose character, common knowledge, and experience most strongly fit both the issues of the case and the personalities of the parties involved.

The manner in which mediation will proceed is usually agreed upon in advance of the hearing by the mediator and participating counsel. The timing of mediation statements, whether or not opening arguments will be presented, the identification of issues to be resolved, and other relevant issues are appropriate for discussion before the session takes place. Most experienced litigators have a format that they believe to be both effective and comfortable for the litigants themselves. In many mediations, following the opening session, the parties divide into breakout rooms and the mediator begins what may be referred to as “shuttle diplomacy”—traveling from one room to the other and engaging the parties in the dispute resolution process. Certain basic rules apply to these sessions that are familiar to every mediator and should always be explained to the participants. All information is deemed confidential except information that the parties expressly permit the mediator to share with their opponents. The entire process is considered under the umbrella of settlement negotiations and cannot be admitted into a court of law in any respect. In addition, the mediator cannot be compelled to testify as a witness at trial. The process is designed to insulate and protect the parties, permit freedom of expression, invite open discussion of all key issues, and, through this process, work to narrow the differences between the litigants. Ultimately, the goal is to achieve a resolution that is acceptable to all. It is this final element of control—that a party can accept or simply reject and walk away from a proposed outcome—that is perhaps the most vital to the mediation process. Litigants are empowered in a manner that is not often observed in a court of law.

As discussions continue, one common issue that may arise is whether the mediator should meet privately with one or all attorneys outside the presence of their clients. The answer to this question depends on the personalities involved and the degree of trust between client and lawyer and between lawyers and the mediator. When clients are excluded from the process, they may become defensive or resentful. To the extent they are full participants in all essential communications, they are again empowered and, perhaps, more trustful of the process.

At the end of the day, cases may settle or may continue to litigation. When the parties are unable to reach an agreement, mediators often urge them to keep an open mind about further discussions and negotiations. The mediation process may narrow their differences. Often in these



circumstances, it remains the burden of counsel for the litigants to determine whether future discussions are warranted.

Those cases that are settled should include a written memorandum, however informal, reciting the essential aspects of the settlement. Generally, mediators confirm the result of the process in a format agreed upon by the parties. As with any settlement, the failure to reduce the final agreement to a written memorandum can be fatal. Counsel should confirm the result in writing and complete the steps necessary to effectuate the settlement as expeditiously as possible.

[Sarah X. Fang](#) is an associate in Goldberg Segalla LLP's Princeton, New Jersey, office.

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## Ronald Dworkin's Insightful, but Flawed, Unified Theory of Justice

By Peter Wesley Nye

### **Justice for Hedgehogs**

By Ronald Dworkin

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Legal philosopher and constitutional law scholar Ronald Dworkin's latest book, *Justice for Hedgehogs*, sports an odd title and a correspondingly odd cover design, which shows a hedgehog looking calmly at the reader. The title's significance is due to the fact that this book presents Dworkin's integrated ethical and moral theory of basic rights, morality, and political issues. A hedgehog, per the Greek poet Archilochus, is an intellectual who "knows one big thing," which in this case is Dworkin's integrated theory of value. Ronald Dworkin, *Justice for Hedgehogs* 1 (2011). The alternative to unity of value is plurality of value, that is, several good, incommensurate values that one cannot simultaneously satisfy. For example, people who believe in plurality of value often think that one's happiness and one's duty to others are both good values that one must sometimes choose between. Dworkin, at the reader's expense, goes to great lengths to intellectually impress. The result is an intellectually interesting, although in some respects unsupported, unified ethical and moral theory.

Ronald Dworkin is arguably the most influential legal scholar in the United States. People cite him more often than they cite any other legal scholar except Richard Posner. Reviewers praised Dworkin's 1997 book *Taking Rights Seriously* as the most important American contribution to

philosophy of law. His central idea, law as integrity (as it is commonly known), is that judges ought to interpret the law according to moral principles that are consistent with one another. After having taught at Yale and the University of Oxford, Dworkin is an endowed professor at New York University and University College London.

*Justice for Hedgehogs* is prohibitively highbrow and often flashy. The flashiness starts with the first word: The overview at the beginning is titled “Baedeker,” which literally refers to a nineteenth-century series of guidebooks (and, here, figuratively means “guide to the rest of the book”). Obscure references fill the book: “Gibraltar” as a slang term for an important fixed concept, a hypothetical subject of sympathy named “Hecuba” (after the Queen of Troy who famously laments her family members’ deaths), and the choice of the word “otiose” to mean “useless.” *Id.* at 16. These pretentious references serve no purpose that plain language would not; rather, they are an example of Dworkin showing off. Even a lawyer or law student well-versed in the humanities may need to utilize reference books to navigate this book.

*Justice for Hedgehogs* indirectly criticizes conservatives. For example, Dworkin hypothetically asks whether “voting for a vice presidential [sic] candidate because one finds her sexy” is morally irresponsible; despite his not naming the candidate, the Sarah Palin reference is obvious. Also obvious is the knock on George W. Bush: “a leader who takes his country to war pretending to follow principles that have no grip on him.” *Id.* at 104. Some opine that put-downs like these lack a place in serious moral philosophy; however, put-downs have played important roles in many philosophical works, including Plato’s dialogues, the Revelation to John, and Samuel Johnson’s works—especially Johnson’s dialogue as Boswell reported it. Part of philosophy is cleverness (and speaking the truest words in jest), which Dworkin excels at.

Despite its ostentatious references and style, *Justice for Hedgehogs* uses a philosophically sound framework to skillfully explain many opinions. The framework is that ethics and morality are matters of interpretation. Dworkin establishes that morality lacks an external justification, i.e., that “Morality stands or falls on its own credentials.” *Id.* at 79. He establishes this principle by refuting the alternatives. One alternative is that “moral facts” cause people to have certain moral opinions: He argues that luck influences moral opinions and that one cannot test this issue because “we cannot vary moral attributes except by varying the ordinary facts that make up the case for claiming those attributes.” *Id.* at 73. He concludes the book’s theoretical groundwork by positing that even though morality lacks a rigorous external (external to morality) justification, moral opinions can have logically sound internal (internal to morality) justifications, which are good moral opinions. In other words, morality is “acting responsibly in reaching [one’s] opinions and acting on them.” *Id.* at 101. He refutes interdeterminacy—the idea that no one can meaningfully compare moral and ethical opinions—by establishing that ethical and moral arguments have many qualities that one can persuasively, if not definitively, evaluate. Therefore, one moral opinion on an issue can arguably be better than another.



Within this framework of moral responsibility, Dworkin cleverly comments on moral issues. For example, he refutes the utilitarian view that one ought to sacrifice oneself whenever the sacrifice would increase net utility. He explains that a good life is a matter of individual interpretation, so one ought not to treat everyone's life and opportunities as equal (which utilitarianism, because it treats all happiness as equal, does). When choosing whether to risk or sacrifice oneself for others, he opines, multiple opinions can be morally responsible; opinions based on immoral prejudice or arbitrary factors are morally irresponsible.

An issue that Dworkin ingeniously, but unhelpfully, reasons about is liberty. Because the most important liberty, he opines, is the liberty to make one's own ethical and moral decisions, restricting people's lifestyles (e.g. sexuality, saluting a flag) therefore severely restrains liberty, whereas campaign finance restrictions "enhance [liberty] because they provide something at least closer to self-government for all citizens than politics can drenched in money" *Id.* at 354. This reasoning is logically sound, but Dworkin fails to establish why the most important liberty is ethical liberty; the closest that he comes is stating that other forms of liberty "[are] not foundational," which seems untrue for people who are unconcerned with ethics (e.g., people who live mainly according to emotion). *Id.* at 370. In the chapter on liberty, he throws in controversial opinions that he does not justify, for example, that some countries ought to tax more and provide more services and that women ought to have abortion rights because the decision of whether to have an abortion is "an ethical, and not a moral judgment," and therefore ought to be an individual judgment. *Id.* at 378. This reasoning is logical—he defines ethics as how to live one's life well, whereas he defines morality as how one ought to treat others—but it does not meaningfully comment on abortion, because it does not address the central issue of what, if any, rights a fetus has, and what, if anything, is the importance of the fetus's welfare.

In addition to these insightful writings about ethics and morality, *Justice for Hedgehogs* contains interesting asides about aesthetics. For example, Dworkin reflects on aesthetic value, explaining that the best way to evaluate artists is by their response to a particular artistic tradition so one can meaningfully argue about an artist's or a piece's relative value within a genre or medium, but that "no precise ranking makes sense among evident geniuses at the very highest levels of different genres." *Id.* at 93. He summarizes an important part of the history of critical theory: the rise and fall of the "author's intention" theory. He disagrees with this theory because he thinks that people often lack clear motives and that works of literature, statutes, and the like often have values beyond what their authors intended.

*Justice for Hedgehogs* is a struggle to read but is ultimately worth reading for its insights. It is not a landmark of moral or ethical philosophy, but it does belong in a dialogue about ethical and moral issues.

Peter Wesley Nye is a 2011 graduate of the University of Kansas School of Law.



**NEWS & DEVELOPMENTS**

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## **Project for Attorney Retention: Fewer Promotions Among Female Lawyers**

According to the latest report from the Project for Attorney Retention (PAR), female lawyers still lag behind their male counterparts in becoming partners. Although this is not a recent trend, the [PAR report](#) highlights the growing disparity between the two groups. According to the report, new male partners outnumbered new female partners more than two to one in 2011. The promotion rate of women at the 123 large law firms surveyed decreased two percentage points this year, from 34 percent to 32 percent. Such findings are in accord with recent data from other organizations tracking women in the legal profession. The National Association of Women Lawyers, for example, reported that while women made up 60 percent of staff attorney positions, a non-partnership track tier, they made up only 15 percent of equity partners at large firms.

—[Brian Josias](#), *Cotsirilos, Tighe & Streicker, Chicago, IL*

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## **ABA Advocates Solutions to Overburdened Immigration Court System**

In a recent Senate Judiciary Committee hearing, Senator Patrick Leahy expressed that the pace of justice in the immigration courts is too slow. Senator Leahy, chairman of the Senate Committee on the Judiciary, stated that he called the hearing to have a constructive discussion about how the immigration courts can be improved. Karen Grisez, chair of the American Bar Association Commission on Immigration, stated at the hearing that the “immigration system is in crisis, overburdened, and under-resourced.” Both Senator Leahy and Grisez believe that the courts do not operate fairly and efficiently. Grisez stated that underfunding the courts endangers the due process of immigrants who appear before them. In the past several years, the number of non-citizens removed from the United States has increased more than 450 percent from 69,680 in fiscal year 1996 to 393,289 in fiscal year 2009.

The Executive Office for Immigration Review has implemented a number of measures to improve the courts. These measures consist of expanding non-citizen access to legal counsel, increasing the use of prosecutorial discretion to reduce unnecessary litigation, allowing asylum officers to handle immediate claims raised as a defense to expedited removal, and removing the



requirement that asylum seekers file their claim within one year of their arrival in the United States. Grisez pointed out that there are still further steps that can be taken to improve the system, as highlighted in the [ABA's 2010 report](#) entitled "Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases."

—[Brian Josias](#), *Cotsirilos, Tighe & Streicker, Chicago, IL*

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## **Proposition 8 Supporters Fail in Attempt to Have Ruling Vacated Due to Alleged Judicial Bias**

On June 13, 2011, another hearing was held regarding the embattled [Proposition 8 ban on same-sex marriage](#) in California. Proposition 8 supporters are trying to have the ruling of former Chief Federal District Judge Vaughn Walker that struck down the ban vacated. They base their appeal on the grounds that Judge Walker, who after his retirement confirmed that he is in a long-term same-sex relationship, should have either removed himself from the case or disclosed his position on same-sex marriage in relation to his own relationship. Proposition 8 supporters allege that because he is in a same-sex relationship, Judge Walker would personally benefit from his own ruling.

Judge James Ware, who presided over the hearing, grilled the supporters' counsel by asking him why he assumed Judge Walker had any intention of getting married just because he was in a 10-year relationship. Judge Ware pointed out that if Judge Walker did not wish to marry, he would not be in the same position as the same-sex couples who brought the lawsuit. On June 14, 2011, Judge Ware issued his decision upholding Judge Walker's ruling. Judge Ware determined that there was no evidence that suggested that Judge Walker was going to marry his long-term partner. Judge Ware concluded that the judge's relationship did not require him to remove himself from the case nor was he obligated to disclose his relationship.

—[Brian Josias](#), *Cotsirilos, Tighe & Streicker, Chicago, IL*

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**ASK A MENTOR**

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## **What Can Young Lawyers Do to Make Their Writing Stand Out?**

Dear Ask a Mentor,

Are there any quick tips for young lawyers to improve their legal writing skills and really make their writing stand out?

—Desperate Drafter

Dear Desperate Drafter:

Good writing is hard. There is no quick fix to ensure good writing, but here are 10 tips that will help you immediately improve your writing.

- Read widely—not just books on legal writing, but read fiction also and think about what works. Read the *New York Times* and think about why its articles are so readable. Read briefs of lawyers you respect, and analyze their techniques.
- Outline first. This is the single best technique to improve your written work product. Outlining forces you to organize your thoughts.
- Avoid footnotes. They break the reader’s train of thought. Never use them to respond to tough substantive points. Confront those points in text.
- Avoid legalese and jargon. Cut to the chase and use simple words that even a layperson will be able to understand.
- Avoid overstatement. Don’t take on a burden of persuasion you don’t need to take on to win. Learn the value of understatement. It can be powerful.
- Embrace brevity. I try not to use more than three sentences in a paragraph. People can grasp arguments better when they absorb them in short chunks.
- Edit, edit, and edit some more. Don’t fall in love with your own words; ruthlessly edit them. Regardless of what your page or word limit is, once you have an almost final draft, mentally set your own limit of a certain number of words less than you presently have. Then edit to eliminate that number of words. Doing this exercise will help you get rid of unnecessary adjectives and adverbs and will change the passive voice to active. It will get rid of repetition and make your written work crisper and more persuasive.
- Ruthlessly eliminate repetition. Saying it twice is not as good as saying it effectively one time. Saying the same thing over again doesn’t persuade; it irks



## Minority Trial Lawyer

FROM THE SECTION OF LITIGATION MINORITY TRIAL LAWYER COMMITTEE

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the reader. The phrase “in other words” is a red flag indicating that you did not say it very well the first time. Edit until you have made your point clearly and powerfully, and then eliminate repetition of the point.

- Do your last edit in hard copy. Don’t do it on your computer. You will be surprised at what you spot when you edit on hard paper.
- Have good writers who are cold to the case read and critique your writing. This is the toughest thing of all to do, but it will help you the most. No one likes to see their writing edited. It is hard on your ego. But subject yourself to this scrutiny; it will make you a better writer.

[Silvia H. Walbolt](#) is a shareholder with Carlton Fields P.A. in Tampa, Florida.

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ABA Section of Litigation Minority Trial Lawyer  
[apps.americanbar.org/litigation/committees/minority/home.html](http://apps.americanbar.org/litigation/committees/minority/home.html)

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