

THE VOICE OF EXPERIENCE

A Publication of the American Bar Association Senior Lawyers Division

Tipping the Scales of Justice: The Rise of ADR

By John M. Barkett



To anyone who has been doing trial work for more than thirty years, the ascent of alternative dispute resolution (ADR) processes—especially mediation—is unsurprising; litigation is costly. Combine high cost and high risk, and reasonable litigants are finding alternatives to trial, tipping the scales of justice in favor of mediation, arbitration, and hybrid forms of ADR processes.

Mediation Works

Mediation is a major contributing factor to the vanishing trial phenomenon because it works. If there is an

outcome-determinative legal issue, a good mediator can work with the parties before discovery dollars are incurred to assist the parties in evaluating the likelihood of success and the associated settlement value of the case. If there are material factual disputes during mediation, a good mediator can assist the parties in outlining possible outcomes and determining the settlement value of a case. The “silver bullet” in mediation is to get the parties to the courthouse steps without spending the money to get there. Every trial lawyer knows that by the time of trial, a matter will funnel down to a few

key issues, often just one or two. In a well-conducted mediation, the funneling process will be expedited. Key issues will be identified quickly and confronted fairly so that parties can meaningfully decide whether there is a mutually acceptable way to resolve differences.

Mediation is not always successful, but to give it the best chance of success, parties have to overcome certain obstacles. First is lack of preparation. When the mediator knows the case better than the advocates, there is a problem. A second obstacle is confusion over the amount in controversy. Parties demanding relief have to be able to articulate the relief being sought. A third obstacle is failure to have decision makers in the room. Often a mediator’s first task is to address complaints by one party that another party will not be represented by a person with “full settlement authority.” Mediation works best when no one in the room has to make a telephone call or reconvene with management to authorize a settlement on behalf of a party.

Creative ADR Processes

What I call “mediation plus” works for intrepid parties. In this process, the mediator first facilitates the

continued on page 14

FROM THE TOP

By T. Maxfield Bahner

Where Did the Coffee Pots Go?

When I was a young lawyer, it was rare for any firm to have a coffee pot in the office. We would meet for coffee in mid-morning and again in mid-afternoon at one of the small watering holes. Although we were from different firms with different emphases in our practice, our times together were convivial. We looked forward to wide-ranging conversation and laughter. We talked about what was going on at the Bar, in the courts, and in the community. We got to know each other. In the courtroom or negotiations about a contract, we could fight hard for our clients. After the battles, we would relax and enjoy the camaraderie of fellow lawyers.

Mondays were motion days. The trial bar would go from courtroom to courtroom and hear the motions as they were argued. About noontime, when this was finished, we would adjourn across the street to Harper's Drug Store, where we would enjoy coffee and discuss some of the motions that were argued that day—and a lot else!

I remember once, when I was at a table with Charlie Goins, a much older lawyer for whom I had a great deal of respect, who talked to me about a motion that I had argued that morning. He complimented me, which, of course, made me feel very good. Then, he said, "Max, had you thought about this?" He began to point out things, which, if I had taken time to think about them beforehand, would have made my argument more effective. Over the years, I have used his suggestions. So, in the camaraderie over coffee, I have learned from skillful trial law-



T. Maxfield Bahner

yers as well as my peers, and reveled in the relaxed pleasure of their company.

Most lawyers in our country today practice by themselves or in small firms. So it was when I began to practice. I enjoyed the small firm in which I learned about being a lawyer. The camaraderie of the Bar, the willingness to

help each other even when we were on opposite sides of bitterly fought cases, was characteristic of the way law was practiced. Even when we were fighting in court, we had generally good feelings for our adversaries. This carried over into our social contacts outside the courtroom.

It was a sad day when we moved the coffee pots into our offices. We stopped having frequent gatherings for conversation. Today, we do not even have enough relaxed conversation with colleagues in our own firms, but repair with our cups to the hermitages of our own offices.

The number of lawyers has increased. We are scattered all across this great country of ours in towns small and large. Sometimes law practice is lonely. Certainly, it is lonely when a lawyer takes on the whole world on behalf of his client. But we are never alone, living as we do as successors to those who have taught us and been our contemporaries.

The American Bar Association came into being in Saratoga Springs, New York, in 1878 for important reasons. The same important reasons impelled the organization of state and local bar associations. Lawyers must have this collegiality and work together if we are to continue to fulfill our highest aspirations and those of the law.

continued on page 15

THE VOICE OF EXPERIENCE

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Should You Consider Transferring Your Retirement Fund to a Roth IRA?

By The Investment Strategies Committee

2010 is being called the year of the Roth Individual Retirement Account (IRA) in retirement planning circles. What a Roth IRA is and whether senior lawyers should consider transferring their retirement assets to one is discussed by Walter Burke (WTB), former chair of the Senior Lawyers Division, in response to questions posed by Bruce Mann (BAM), chair of the SLD Investment Strategies Committee.

BAM: A traditional IRA, like other qualified retirement plans, permits you to make deductible contributions to a retirement plan, avoid taxes on the income or gains in your plan portfolio, and only pay taxes at ordinary income tax rates when you withdraw assets or money from the plan. How is this different from the way a Roth IRA works?

WTB: Both the Roth IRA and traditional IRA are similar in the fact that they are great investment vehicles to save for retirement. However, beyond that, there are some major differences.

The biggest difference between the traditional IRA and Roth IRA is the way the U.S. government treats the taxes. Contributions and earnings in a traditional IRA are tax deferred until withdrawn (early withdrawal penalties may apply if you are under age 59½). The distributions out of a Roth IRA, whether contributions or earnings, are tax free, provided certain requirements are met.

In a traditional IRA, contributions may be tax deductible depending on your modified adjusted gross income and other factors. Contributions to a Roth IRA are not tax deductible.

There is no limit on making contributions to a traditional IRA; however, you must have earned income to contribute. To be eligible to make contributions to a Roth IRA, your modified adjusted gross income must be below certain limits and also depends on your tax filing status.

Mandatory distributions are required from a traditional IRA after the age of 70½; however, distributions are not required from a Roth IRA.

BAM: I understand that Roth IRAs have been an available investment option since 1998. Why the sudden interest in them? Has the law changed to make them more attractive?

WTB: It is correct that Roth IRAs were first introduced in 1998. The renewed interest has to do with changes in the tax legislation making them more attractive. The changes were enacted in 2006 under the Tax Increase Prevention and Reconciliation Act of 2005. All taxpayers, regardless of taxable income, will be able to convert a traditional IRA, whose earnings will be taxed,

to a Roth IRA, whose earnings are not taxed after a five-year holding period.

In 2010, the single biggest change is in the ability to readily convert funds from retirement accounts to a Roth IRA. That is called a *conversion*. However, the new tax law did not change the existing provisions for Roth *contributions*. The difference is that to be considered eligible to make a Roth contribution, income levels must meet certain IRS guidelines discussed later.

BAM: In a previous issue of *The Voice of Experience*, I discussed taking some of the equity out of your home to invest for your retirement. If I decide to do this or have other funds available for investment that aren't already in a qualified retirement plan, can I contribute them too without paying tax on the amount I contribute? If not, does it make sense for me to contribute them to a Roth IRA before investing them?

WTB: First, let's be clear on the rules for contributions versus conversions. As of January 1, 2010, anyone can convert a retirement plan regardless of income, thanks to the aforementioned tax legislation. Before the rules changed, only people with modified adjusted gross incomes of \$100,000 or less could convert their accounts. However, contribution eligibility is still based on income levels. Individuals can make a nondeductible contribution to a Roth IRA, provided they have earned income in the amount of the contribution, and can even do this if they choose to take equity from their home, as you stated. However, they must meet income-eligible guidelines and are subject to the IRS Roth IRA phase-out rules. Tax filers will be able to contribute less to their Roth IRA when they have a MAGI (modified adjusted gross income) above \$105,000, or above \$167,000 for married couples filing jointly (up \$1,000 from last year). Single filers with a MAGI above \$120,000 or those who are married filing jointly with a MAGI above \$176,000 are not eligible for Roth IRA contributions.

Furthermore, in 2010, Roth IRA contribution limits are set at \$5,000. For taxpayers over the age of 50, they can contribute up to \$6,000, which is commonly referred to as the catch-up contribution.

BAM: Because the annual limit on total contributions to IRAs has been either \$5,000 or \$6,000, but there has been no limit on tax-free transfers from a qualified retirement plan, such as a law firm's 401K, profit sharing, money purchase or defined benefit plan to a traditional IRA, many of us have a large part of our retirement funds in a "rollover IRA," where we can direct individual investments rather than rely on the decisions of the plan's advisor. Do you have the same flexibility in mak-

ing investment decisions in a Roth IRA that you have in a traditional IRA?

WTB: An investor does have the same flexibility in making investment decisions in a Roth IRA as a traditional IRA. The only difference is the actual registration or type of IRA. The investment choices available should be virtually identical if held on the same investment platform. As an example, if you have both an IRA account and a Roth IRA account held at the same custodian, such as a discount brokerage firm like Charles Schwab, you will have the ability to invest in the same types of assets within each type of IRA.

BAM: I understand that it may make sense to transfer investment assets I own that are not in a qualified retirement plan to a Roth IRA, but what about the assets I have in my rollover IRA? If I transfer money from my existing rollover IRA to a Roth IRA, I'll have to pay income tax now on the amount I withdraw to make the transfer, rather than only paying the tax when I take it out as part of the minimum amount I have to withdraw each year after I reach 70½. I'll also have to pay income taxes on any amount I transfer to the Roth IRA. Why would it make sense to do this?

*2010 is being called
the year of the Roth IRA
in retirement planning circles.*

WTB: It might make sense to consider paying the taxes on the conversion from other assets if this will not impact or deplete other savings and assets needed for your own retirement. In this case, paying the taxes now leaves a great tax savings legacy for your heirs whereby they inherit a tax-free asset that is allowed to continue to grow tax free. When they choose to take withdrawals presumably at a much later stage, they will be able to take this without the tax burden. Additionally, if you expect your income tax bracket to be higher in retirement, you may want to pay the taxes now at a lower rate. And because Roth withdrawals are not counted as income, it will not affect whether your Social Security benefits are taxed as it would if it were coming from a taxable IRA.

BAM: I understand that it may make sense to withdraw funds from my traditional IRA and make contributions to a Roth IRA now if I expect income tax rates to go up in the future, but I anticipate that much of my IRA will be part of my estate when I die. How does the estate tax impact my decision whether to withdraw assets from my traditional IRA or transfer them or other assets I have that aren't in a qualified retirement plan to a Roth IRA?

WTB: Assets held outside retirement accounts, such as taxable brokerage accounts, are not eligible for a Roth conversion. The taxable assets would have to be consid-

ered a Roth IRA contribution. In this case, the contributions to the Roth IRA are limited to the annual amounts of \$5,000 or \$6,000, as discussed.

Retirement assets, whether they are converted to a Roth or not, are still part of the overall estate and will be taxed accordingly. The benefit lies in the timing of the conversion. If converted much later in life, the assets used to pay the taxes for the conversion are essentially removed from the individual's taxable estate and effectively reduce the amount of the estate tax. However, if the conversion is done years before the estate tax is a consideration, the Roth IRA may have had time to accumulate earnings and grow to a sizable estate asset once again. The worst-case scenario in estate planning is having a large taxable estate that also holds a large tax-deferred retirement asset. Without proper planning, the combined estate tax and income tax on that amount can exceed 80 percent.

For many people, the driving force may be whether you can afford to pay the taxes on the conversion, rather than consideration for estate taxes. If it is affordable and you don't necessarily need the money for retirement, the option to convert is more attractive.

BAM: To summarize, what are some factors that should be considered before converting to a Roth IRA?

WTB: I'd start out by considering whether you need the money for retirement. For people who are unsure whether they will need all of their retirement money, it could pay to convert a portion of their IRA for large or unanticipated expenses later in life. Roth IRAs do not require account owners to withdraw money, and this essentially could be considered a savings account. The Roth IRA, after a number of years of growth, may provide a hedge against longevity and also be used to offset medical expenses. And, if you never have to tap into the Roth IRA, it can become an attractive legacy.

BAM: If you don't need the money for retirement and want to maximize the amount passed on to your heirs, is there a benefit in converting a traditional IRA to a Roth IRA?

WTB: A Roth IRA is a good way to fund a family legacy. Let's discuss an example of creating a legacy by funding a Roth IRA. An individual funds a Roth IRA and lists his eight-year-old granddaughter as the beneficiary. (If the individual makes too much money to make the initial Roth IRA contribution, he can fund a nondeductible IRA and then convert that to a Roth IRA.)

If the conversion is on a nondeductible contribution to an IRA, the contribution amount will not be taxed in the conversion, only the earnings in the IRA are taxed, and if the conversion is done shortly after funding, there are essentially no taxes at all. High earners can make nondeductible contributions to traditional IRAs and convert them to a Roth IRA each year and pay little in taxes.

Let's assume the Roth IRA starts with a balance of \$5,000. At some point, the granddaughter will inherit the IRA and can continue its tax-deferred status in a beneficiary Roth IRA, also commonly referred to as a stretch

IRA. If left alone, invested at a modest 4 percent rate of return for sixty years until she is age 68, this account could grow to a value of over \$52,598 (or to \$506,285 at an 8 percent rate of return). This small contribution over time can grow into a significant family legacy and is a compelling reason to convert, allowing the tax-free stretch of the IRA over the lifetime of the beneficiary.

BAM: Okay, but what if the conversion is from a traditional IRA or other retirement plan to a Roth IRA and the contributions to the traditional IRA or retirement plan were deductible? Won't I have to pay taxes in the year of the conversion?

WTB: Yes, but for Roth IRA conversions executed in 2010 only, the tax bill may be paid over the following two tax years. To split the taxes owed on a 2010 Roth IRA conversion over two years, you must file IRS Form 8606 with the tax return. For individuals in the top tax brackets, choosing to pay the tax in 2010 may make more sense to avoid the higher income tax rates scheduled for 2011.

If you are planning on doing the conversion, you may want to do it sooner rather than later while the market is still in the recovery phase, with the benefit of converting while your account balances are lower and therefore the tax bill will be lower. If this strategy backfires and the market goes down, you have the ability to do a Roth IRA recharacterization, essentially undoing the conversion.

BAM: If the conversion is taxable, what will I have to pay?

WTB: The taxes on a Roth conversion are based on your current marginal tax rate. Be careful to consider the *new* marginal tax rate that the conversion will bump you up into. Remember, the conversion amount will be included in your current income; therefore, you may be bumped into a higher tax bracket. Secondly, if you are using the IRA assets to pay the taxes and are under the age of 59½, you must be prepared to pay the 10 percent early-withdrawal penalty on those assets utilized for taxes (not the full conversion amount).

Let's consider the costs to convert a \$50,000 IRA with no additional contributions (see chart below). It is always important to run the numbers to understand the full conversion cost.

BAM: If I elect to split the tax between 2010 and 2011,

do I run the numbers based on my 2010 marginal tax rate for both years? What if there's an increase in the marginal tax rate for individuals in 2011?

WTB: If you elect to split the tax, the 2010 marginal tax rate would only be used for the first half. Therefore, half of the tax will be due with your tax return filed in 2011. The second half would be due on your tax return filed in 2012. This is not only a function of your individual tax rates but also a function of governmental policy and where tax rates will be in the future.

Considering the current budget deficits and the costs of the bailouts and stimulus, many believe tax rate increases are inevitable. If you share that belief, you may want to realize all income from the conversion in 2010 and pay the tax at the presumed lower rate when filing in 2011.

BAM: If I convert a traditional IRA to a Roth IRA, can I withdraw earnings from the Roth IRA immediately without paying taxes?


WTB: No, the five-year holding period applies to Roth conversion amounts as well as regular Roth IRA accounts. You must wait until January 1 of the fifth year before you can have tax-free access to any of the earnings on the Roth conversion account. If you will need the money before then and still want to convert, keep enough in the traditional IRA to cover those withdrawals.

BAM: If I roll over a traditional IRA to a Roth IRA, some of the amount converted may represent contributions made by me with "after tax dollars" because they weren't deductible when they were made. Do I have to pay the conversion tax on that amount as well as the amount contributed to the traditional IRA on a deductible basis?

WTB: Be careful not to pay the tax twice. It may make sense to work with a tax advisor to compute the percentage that will be taxable. If all of your contributions have been after tax, then your conversion on the contribution amounts are not taxed, but earnings may be.

In conclusion, there are a number of factors to be considered before making a decision. The decision to convert may rest on your preference for paying taxes as well as expected income in retirement. There are many pros and cons, all of which need to be examined. Working with a tax advisor can help with this decision, and using a financial calculator is a desirable tool as well. [VOE](#)

Marginal Tax Rate	IRA Balance	Money Withdrawn to Pay Taxes	Balance Converted to Roth
28%	\$50,000	\$14,000	\$36,000
Years Required to Restore Original Account Balance			
4% Rate of Return		8% Rate of Return	
8.2 years		4.09 years	



Richard L. Thies Honored Again



Three generations of Thies lawyers. From left: Dick, John, and Dan.

John E. Thies is the third vice president of the Illinois State Bar Association and will become president in 2012. His grandson, Daniel Thies, is a third-year student at Harvard Law School, and in his first year of law school founded and was president of the Harvard Student Bar Association affiliated with the ABA Law Student Division.

The Founders Award was presented to Richard “Dick” L. Thies, a past chair of the Senior Lawyers Division (SLD) and now a delegate for the SLD in the ABA House of Delegates as awarded by Honorable Ronald D. Spears, president of the Illinois Judges Association (IJA), during its luncheon at the Joint Meeting of the IJA and the Illinois State Bar Association (ISBA) on December 11, 2009, in Chicago.

The Founders Award recognizes a long-term commitment by an individual, not a member of the judiciary, to creating and maintaining an independent judiciary. Among his many contributions, Thies, ISBA past president (1986–87), was to begin the series of joint midyear meetings when he invited the IJA to hold its winter meeting in conjunction with the ISBA. The two groups

have been holding their December meetings together since 1986. In 2005, Thies received the Award of Merit, the ISBA’s highest honor. He also served as Illinois State Delegate from 1994–2005 and on the ABA Board of Governors 1988–91 and is a former chair of the Fellows of the ABA Foundation (1993–94) and a Life Patron Fellow. He also served as chair of the American Bar Association Retirement Funds.

He is the senior partner at Webber & Thies, P.C., Urbana, Ill. He received his Juris Doctor from the University of Illinois in 1955 and served as Captain, U.S. Air Force on Active Duty, 1956–58, Judge Advocate General’s Department. Among his many civic contributions, he is also an active member and elder of the First Presbyterian Church of Urbana. [VOE](#)

SAVE THE DATE

ABA SENIOR LAWYERS DIVISION

ANNUAL MEETING

THURSDAY, AUGUST 5 – SATURDAY, AUGUST 7, 2010
SAN FRANCISCO MARRIOTT HOTEL

DIVISION MEETINGS

Friday, August 6

9:00 a.m.–5:00 p.m. • Committee Meetings

Saturday, August 7

7:30–8:30 a.m. • Joint Committee on Senior Judges

8:30–11:30 a.m. • Division Council Meeting

11:30 a.m.–12:00 p.m. • Annual Business Meeting
and Election of Officers and Council Members

SPECIAL EVENT

Thursday, August 5, 2010 • 6:30–9:30 p.m.

Annual Reception and Dinner and Presentation
of the John H. Pickering Achievement Award

*Join us for the Division's Annual Reception and Dinner and
Presentation of the John H. Pickering Achievement Award at
the St. Francis Yacht Club.*

• **Reservations Required**

• **Tickets: \$125**

(Registration and Tickets Available Online Now)



Senior Lawyers Division Report of Nominating Committee for Election at the 2010 Annual Meeting, August 7, 2010

For a 1-year term as Chair	Ruth L. Kleinfeld, Manchester, NH, Chair-Elect Automatically becomes Chair
For a 1-year term as Chair-Elect	Bruce A. Mann, San Francisco, CA Will automatically succeed to Chair in 2011
For a 1-year term as Vice-Chair	Edward J. Schoenbaum, Springfield, IL Will automatically succeed to Chair-Elect at Annual Meeting in 2011
For a second 2-year term as Budget Officer	Richard J. Podell, Milwaukee, WI
For 4-year terms as members of the Council	Francis J. Larkin, N. Dartmouth, MA Ellen F. Rosenblum, Salem, OR Jeffrey J. Snell, Sagamore Hills, OH Carole Lynch Worthington, Knoxville, TN
For a 2-year term as a member of the Council to fill the balance of the term of William T. Robinson, III, whose is now President-Elect of the ABA	Saul A. Wolfe, Livingston, NJ
For a 1-year term as a member of the Council to fill the balance of the term of Bruce A. Mann	James D. Rogers, Minnetonka, MN
For a 1-year term as a member of the Council to fill the balance of the term of Edward J. Schoenbaum	Michael A. Kirtland, Colorado Springs, CO
For a second 2-year term as an honorary Council member	L. Stanley Chauvin Jr., Louisville, KY
For a 1-year term as Historian	S. Shepherd Tate, Memphis, TN
For a 1-year term as Assistant Historian	Stephen N. Maskaleris, Florham Park, NJ

Nominating Committee:

Malinda C. Allen • Walter T. Burke • Theodore A. Kolb
Richard M. Leslie • John K. Uilkema • Charles A. Collier Jr., Chair

News From the ABA Commission on Law and Aging

The ABA Commission on Law and Aging, chaired by Jeff Snell, is moving into the spring of 2010 with several exciting projects bearing fruit. For example:

- The Commission serves as one of the five partners in the U.S. Administration on Aging National Legal Resource Center (NLRC), managing the *Elderbar* Listserv; preparing legislative updates on guardianship and health decisions; publishing our e-journal *Bifocal*; and conducting research, support, training, and technical assistance on issues of interest to the aging network. The NLRC recently unveiled a new Web site for legal support to the aging network at www.nlrc.aoa.gov.
- The Commission just released the *Legal Guide for the Seriously Ill: Seven Key Steps to Get Your Affairs in Order*, funded by the National Hospice and Palliative Care Organization (NHPCO). The guide is available free online at NHPCO's Web site: www.nhpco.org/i4a/pages/index.cfm?pageid=6145.
- Assistant Commission Director Erica Wood is coauthor of a newly released critical examination of the use of public guardianship by the states entitled *Public Guardianship: In the Best Interests of Incapacitated People?* The book is published by Praeger and is the result of research funded in part by the Retirement Research Foundation.
- Senior Commission staff are completing the final stage of a project funded by the National Institute of Justice, assessing five existing court-focused elder abuse initiatives (the "Elder Protection Court" in Alameda County, California; the "Elder Justice Centers" in Hillsborough County and Palm Beach County, Florida; the "In-Home Emergency Protective Order Initiative" in Jefferson County, Kentucky; and the "Elder Protection Order Project" in Brooklyn, New York). Expect to see release of a final report this year.

- In 2009, the Commission completed an outreach and education initiative to support adoption by the states of the new Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007). The initiative was funded by the American College of Trust and Estate Counsel; the Real Property, Trust and Estate Law Section of the ABA; and the Uniform Law Foundation. By the end of 2009, thirteen jurisdictions had adopted the act and ten more states had bills under consideration. Education and technical assistance to support state adoption of the Act remain a priority for 2010.
- The Commission is collaborating with Rush Medical School of Chicago to prepare an online curriculum for primary care physicians on Assessment of Capacity of Older Adults. Primary care physicians are often relied upon to make determinations of capacity, yet often have little or no training in the task. The curriculum, funded by the Retirement Research Foundation, will be pilot tested and released by the end of 2010.
- Commission staff are beginning a new project, funded by AARP's Public Policy Institute, to provide a roadmap and policy guidance to states considering adoption of Physician Orders for Life-Sustaining Treatment (POLST). A dozen states have adopted some version of POLST, and each faced a variety of legal, political, and clinical issues that had to be resolved. The goal is to help states anticipate and resolve the objections, resistance, and other challenges that are likely to arise.

The mission of the ABA Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training. For more news and a wealth of resources, see the Commission's Web site at www.abanet.org/aging. [VOE](#)

Help Us Help You!

We encourage all of our readers to assist us in making *The Voice of Experience* newsletter and the Senior Lawyers Division Web site, www.abanet.org/srlawyers/home.html, even more useful. By sharing news of what is happening with your committee, in your city or state, or in your practice area, we can provide a valuable member benefit from our Web site and can even help nonmembers do a better job in elder law; career transitioning; and servicing clients, agencies, courts, and the public.

Please send your articles, reports, or suggestions to judgeeds@gmail.com.

Nordic Scotland

By Joseph A. Woods



The Ring of Brodgar

Photo courtesy of Paddy Patterson (<http://commons.wikimedia.org>)

Following the 2008 ABA Annual Meeting in New York, my wife Virginia and I flew from JFK to Inverness, where we joined a chartered coach that took us north to the M.V. Hebridean Princess for our trip about the Northern Isles of Scotland. Such is the comfort and personality of the ship that the very living on her for a week affords much of the pleasure of the cruise. (A few years ago, the British government concluded that maintenance and operation of the royal yacht Britannia was not a wise application of national resources; she is now a popular tourist attraction, tied up at Leith in the Firth of Forth near Edinburgh. Not having the Britannia for the family outing, Queen Elizabeth chartered the Princess for the occasion—giving you some idea of what a pleasant ship she is.) There are no tiaras in evidence when we are there, not even on gala night, but the comfort and appointments of the facilities, the graciousness and efficiency of the staff, and the qual-

ity of the cuisine suggest that the Princess probably did quite well by the Queen.

We had sailed on the Princess some years before, mainly in the Hebrides, so we had a fairly clear idea of what to expect, though, of course, there had been some changes—generally, for the better. One notable improvement concerns beverages. Formerly, house wines, beers, and ales had been included in the tariff, but spirits were not. On that earlier voyage, I had tried the eighteen-year-old Macallan, to compare it with the ten-year-old Macallan, and had discovered that I, at least, could not appreciate the difference. I asked a fellow passenger, a Scot about my age, what he thought was the difference. “The price,” he said. I then quickly decided against further comparison with the twenty-five-year-old, saving much sterling in the process. Now, however, there is a “Hebridean Princess” single malt, it is excellent, and it is covered by the tariff. Thus, a great hazard of the trip is that one might be overly

impressed by the economy of it all and miss the marvels that a clear eye can see in the Northern Isles.

The Princess accommodates forty-nine passengers, all of whom can be seated comfortably together in her dining salon, mostly at tables for two, though tables for larger groups can be arranged, and there are communal tables, primarily for passengers traveling alone. The dining salon is on the same deck as the reception lobby; the lounge, on the deck above. There is no elevator. Several destinations lack wharf facilities for ships, so the Princess anchors and transfers ashore are by the ship's boats. There is no bingo, no limbo, no entertainment, except for one night when we are joined by the Orkney Strathclyde and Reel Society, expert fiddlers whose performance leaves no doubt at all about the origins of the music that propelled the Great Frontier in America and is to be found in Nashville in our own time, or at least was before the electric guitar and the amplifier.

There are only four Americans among the passengers, the remainder being British, about half English and half Scots. It is a convivial group, with much interesting conversation (perhaps facilitated somewhat by the changed beverage policy), and one readily imagines that he is a guest in a well-modulated floating country house.

Scrabster lies in the northeast corner of mainland Scotland, just west of the wondrously named John O'Groats. (Early in the years of the international trade in herring, a large part of the Scottish economy of the time, a prominent figure was the Dutch factor, Jan DeGroot. "John O'Groats" is thought to be a corruption of that name.) For each, the main reason for going there is the leaving of it: to take the ferry or a cruise ship for the Northern Isles, the Orkneys, or the Shetlands, or, between them, Fair Isle, where all those sweaters come from. From Viking times, these places have been more Nordic than Scottish. It was in 1468 that they first came under Scottish rule. Margaret, Princess of Denmark, was to be married to King James III of Scotland, but her father couldn't come up with the cash for her dowry, having just engaged in a costly war with Sweden, so he pledged the lands as security. The pledge was never redeemed. Place names evidence that Nordic heritage. Even now, there are vestiges of a separate language, Norn.

When the Greek geographer Pytheas of Marsalia visited in 330 BC, he called the place Ultima Thule, the outer limit of the known world. To us now it's the Shetland Islands. People had lived here for thousands of years before that visit from Pytheas. At Jarlshof ("the Earl's house") there are at a single site fragments of a Stone Age village, remains of houses of the Bronze Age, an Iron Age broch (modified to become the center of a wheelhouse), Viking long houses, the ruins of a thirteenth century farm house, and a Laird's house dating from the sixteenth and seventeenth centuries. (A broch is a circular stone tower, double-walled and flared out near the base, with stairways and storage bins between the walls. The enclosed center was divided into levels by

timbered floors, supported by niches in the inner wall. The broch at Jarlshof includes a water well. A wheel house is a circular hut, divided radially into rooms, as if by the spokes of a wheel, each room shaped like a piece of pie after the first few bites off the tip, the center being a communal space.)

Near the northeastern tip of Mainland in the Shetlands, is Lunna Voe (pronounced "Lūn'-nah Vo"). ("Voe" is one of those vestigial Norse words, meaning "narrow inlet.") Aside from its isolation, it is notable for its small but ancient kirk and for a large manor house that served in World War II as the headquarters for a daring operation known as the Shetland Bus. A fleet of small vessels, largely Norwegian fishing boats, plied a regular trade, ferrying arms and other supplies (and the occasional agent) to Norway in support of the Resistance there. Clearly, this was a dangerous venture, but it was conducted with considerable success, all those verboten items carried along with the fish and the herring barrels. (Its interesting, even inspirational, story is well told by a young Royal Navy Officer, David Howarth, in "The Shetland Bus," now available in paperback, published by The Shetland Times Ltd., of Lerwick, Shetlands.)

Generally speaking, the Orkney Islands rise high from the sea and are bordered by steep cliffs. The Shetland Islands are more rounded and low-lying, and thus are less impressive landscapes. Some confusion comes from the fact that the principal island of each group bears the same name: Mainland. The contrasting topography is most notable at Hoy, in the southwest quarter of Orkney. One sees off-shore there the towering sea stack, the Old Man of Hoy, a shaft that looms some 450 feet above the sea.

The Ring of Brodgar on Mainland in the Orkneys is an ancient and enigmatic construction, much like Stonehenge—testimony to the skill and industry of Neolithic peoples, but posing the tantalizing and ultimately unanswerable question of its purpose. It appears once to have been a circle of sixty monoliths, twenty-seven of which remain standing. Stumps and fragments mark the former locations of the others. One of the missing has been fragmented by lightning within recent recorded memory.

Nearby is Skara Brae, the partially excavated remains of a Neolithic community, dating from about 3100 BC. It had been covered by sand long ago, lying unnoticed near the manor house of the Laird of Skail. It was uncovered in 1850 by a violent storm that stripped off the turf and carried off the sand that had protected it for centuries. Now roofless, of course, but otherwise remarkably well preserved, its layout is clearly defined, including built-in bunks, dressers, hearths, and stone tubs for holding crab catches, fishing bait, or the like. The tomb at Maes Howe is thought to be related to Skara Brae. The central chamber of the cairn is entered through a narrow tunnel. We are told that the tunnel is 39 feet long, but it seems much longer, as one must be bent over almost double to squeeze through it, the overhead being as low as it is. The chamber itself is bare, except for graffiti (largely Norse),

the contents having been plundered by the Norsemen centuries ago.

Kirkwall is the principal city of the Orkneys. St. Magnus cathedral (erected 1152) stands in the middle of the city, looming red sandstone rife in these islands, with the bustle of the community all around it. The Orkneys are said to contain the greatest concentration of Neolithic remains in all of Europe. Readily believable: Not long ago a parishioner leaving St. Magnus found a prehistoric axe head lying on the pavement near the steps.

Mainland and its outlying islands encircle a vast harbor, Scapa Flow, for many years the principal base of the British Navy. The great battleship H.M.S. Royal Oak was anchored there early in World War II, when a German submarine found its way at high tide through a narrow channel between islands, sinking the Royal Oak and managing to escape the way it came—a remarkable feat, with tragic consequences, including loss of 833 British sailors. Oil still bubbles up from the submerged hulk, much as from U.S.S. Arizona at Pearl Harbor. Unlike the Arizona with its elaborate viewing platform, however, the Royal Oak's grave is marked by a simple buoy, viewable only from a distance. In reaction to the loss of the Royal Oak, concrete structures ("the Churchill Barriers") were built across the channels between the outlying islands. These are still there as roadbeds connecting the islands for motor traffic. The naval presence is now largely historical, and this splendid harbor is used mainly as a major depot for North Sea oil.

Westray is the largest of the northerly islands of Orkney. In its northwest quadrant lies Noup Head, with its extensive gannetry. Large numbers of gannets nest crowded together, giving the cliffs a quilted appearance,

much like the effect gardeners achieve by closely clustering succulents to make those floral clocks one sometimes sees in municipal gardens. Mostly, the topography being what it is, gannetries are to be seen from the sea. Noup Head is unusual, as there are points and indentations in the jagged face of its cliffs, so that one can look back on the gannet nests from close aboard, seeing the birds fly in and out, landing at their nests (How do they find the right one?), sitting on their eggs. There are several Neolithic sites on Westray, only partially excavated, one of which is believed to be even more ancient than Skara Brae. At the Heritage Center, a small museum, one sees the remarkably carved Westray Stones, slabs said to be the finest known examples of Neolithic sculpture.

And so, one returns to another mainland, mainland Scotland, the part now called "Sutherland" (to the Norse, "Sunderland," "the land to the South"), and one is reminded just how far north one has been.

What's left before the return to Inverness is the Captain's Farewell Dinner. In his travel memoir of many years ago, "In Search of Scotland," H.V. Morton notes: "You either like haggis or you give it up and try to hide it under the potatoes. It is no good persevering." But care for it or not (and it happens that I do) there is no denying the spectacle of its proper presentation, the dramatic recitation of Robert Burns' poem, the plunging of the dagger into the steaming "great chieftan of the puddin' race." Try it, you might like it. **VOE**

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The Senior Lawyers Division

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WASHINGTON SCENE

By Warren Belmar

Principle Over Partisan Politics

The Easter Recess is over and Congress returned to Washington to find that the battle scars from the fight over health care reform are still open wounds, and that the upcoming legislative and confirmation battles will likely ensure that those wounds will not heal anytime soon.

Regardless of one's position on the merits of the new health care reform law, one has to be saddened and concerned about the ways in which the legislative process is now operating. What were once rarely used exceptions to the rules by which Congress conducts its business have now become accepted and readily invoked approaches to pass or oppose legislation and Senate action on presidential nominations.

Among the practices that have become integral parts of the current process are instances in which members of the House and Senate are called upon to vote virtually immediately on voluminous bills containing provisions neither they nor the public have had adequate time to review; a willingness to

resort to "deemed passage" of legislation; the avoidance of the Conference Committee as a means of finalizing legislation for submission of the same bill to both Houses; the use of the reconciliation process for purposes beyond budget reconciliation matters; and the use of filibusters in the Senate to avoid votes on legislation and nominations. While the arguments supporting or opposing resort to these procedures have been advanced time and again in recent years, it seems that the identity of members and interest groups on each side of the debate keep changing, depending on which party is in control of the House, Senate, or White House.

Whatever goodwill remains among the members of Congress and the Administration will be further frayed over the coming months if there is regular resort to exceptions to the rules in the upcoming debates over reform of the financial markets, climate change and energy legislation, taxation and budget deficit proposals, immigration reform, and judicial confirmations.

As lawyers, we should be especially

concerned with the way in which the Senate conducts itself when it decides whether to confirm President Obama's nominee to succeed retiring Supreme Court Justice John Paul Stevens. During the last Administration, Democrats in the Senate, including then Senator Obama, eloquently explained that it was entirely appropriate for a Senator to engage in a filibuster of a nominee deemed to be outside the legal mainstream rather than to allow the Senate to proceed to an up or down vote. At the same time, Republicans eloquently argued that resort to filibusters to block up or down votes on nominees for the Supreme Court and the Circuit Courts was improper and perhaps even unconstitutional. Whether we see the Democrats and the Republicans recycling each other's speeches will depend on how controversial or uncontroversial President Obama's nominee turns out to be.

As senior lawyers, we should participate in the upcoming legislative and confirmation debates. Your wisdom and experience are needed to advance principle over partisan politics. [VOE](#)



Older Americans Month

On April 28, 2010, the president issued a proclamation declaring May 2010 "Older Americans Month" and called upon citizens of all ages to honor older Americans during the month with appropriate ceremonies and activities.

The Rise of ADR

continued from page 1

exchange of information. The mediator then interviews witnesses who can be directed by a party or persuaded by the neutral to appear for the interview. Under the supervision of the mediator, expert presentations are then made to the mediator, counsel, and decision makers for all parties. Sometime thereafter, the mediation is held. A thoughtful process agreement that gives the mediator authority to police the process and to adjust deadlines as reasonably necessary is an important step to ensuring a resolution.

The “silver bullet” in mediation is to get the parties to the courthouse steps without spending the money to get there.

Nonbinding arbitrations, or what some call “early neutral evaluations,” can also be effective ways to assist parties in resolving environmental or other disputes. If there are sufficient amounts in controversy or if there is a pressing need for development of a testimonial record because there are no documents available, an ADR process approved under a case management order (CMO) might make sense.

In a Superfund allocation context, the CMO might, for example, contain the following features: (1) appointment of a third-party neutral to gather evidence, write a report, and mediate the dispute; (2) questionnaires and a process to follow up with individual parties to ensure that questionnaire responses feature equivalent levels of due diligence; (3) creation of a document repository; (4) depositions taken by a neutral with some mechanism to provide for cross-examination of witnesses; (5) preparation of “position papers” and rebuttal or reply papers; (6) an “opt

in” or “opt out” provision depending on a court’s determination of how best to manage the process; (7) a schedule with a mechanism to extend deadlines; (8) hearing processes where oral argument is heard by the neutral; (9) preparation of a preliminary allocation report that will typically address shares of “orphans” or non-ADR participants; (10) a comment period followed by preparation of a final report; (11) a facilitation session with the neutral to attempt to effect a final resolution of the matter; (12) equal contributions to a trust fund by each participant to pay the costs of the process; (13) if appropriate, expert report exchanges and expert presentations; and (14) flexibility in permitting the neutral to issue a nonbinding ruling on liability issues.

Alternatively, similar to litigants who use mock juries to prepare for trial, one side, both sides, or all sides to a dispute may elect to present their cases to a neutral for a written evaluation within limits prescribed by the parties.

Arbitration

Historically, arbitration is the most common ADR process. Arbitration is increasingly used to ensure the involvement of neutrals with experience in the areas to be arbitrated with the expectation that knowledgeable neutrals will give parties the best justice.

A just, speedy, and relatively inexpensive arbitration begins with a good arbitration clause. There are a number of topics contracting parties should think about in drafting an arbitration clause. First is the number of arbitrators, their qualifications, and the selection process. Generally, the arbitrator or the arbitration panel represents the most important component of a successful arbitration process. Scheduling is another checklist item for an arbitration clause. One issue here is whether a failure of a party to abide

by the schedule should have consequences. Choice of law issues could become material in the outcome of an arbitration and merit attention. Another question is whether the arbitrators will have the authority to issue sanctions for any reason. Although arbitral processes are confidential, confidentiality may still need to be addressed. If an arbitral institution’s rules govern the proceeding, the parties should determine whether the award will be confidential under those rules. The type of award is another topic that needs to be considered. The choices include an award without reasons, an award stating the reasons without discussion, or an award with a detailed analysis of the reasons underlying the award. The question of deposition discovery is another potential contracting topic. Most arbitral institutions limit discovery, except as allowed by the tribunal. If arbitration parties want to ensure broad discovery rights, they should provide for them in the underlying contract.

The conduct of the arbitration hearing will differ from that of a trial. For example, Rule 12.2 of the Center for Public Resources’ Rules for Non-Administered Arbitration provides that the tribunal “is not required to apply the rules of evidence used in judicial proceedings” but will apply “the lawyer-client privilege and the work product immunity.” A major difference between a trial and an arbitration relates to appellate review. The Federal Arbitration Act provides that an arbitration award may be vacated only where the award was “procured by corruption, fraud, or undue means”; there was “evident partiality or corruption in the arbitrators, or either of them”; the arbitrators were “guilty of misconduct” in refusing to postpone the hearing “upon sufficient cause shown,” or in refusing to hear evidence “pertinent and material” to the controversy, or

of “any other misbehavior by which the rights of any party have been prejudiced”; or “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

Win or lose, those who have had arbitration experience almost universally endorse the process if the sole arbitrator or the panel is thoughtful, timely, efficient, respectful, fair

and minded, hard working, and renders a well-reasoned award. Finding these qualities is the challenge. **VOE**

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“Tipping the Scales of Justice: The Rise of ADR,” by John M.

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From the Top

continued from page 2

One of the pleasures my wife and I have had over the years that we have been attending ABA meetings is getting to know new people. We have found that when we listen and ask questions about what is important to them, we learn good things. More important than that learning are the bonds of friendship which have continued for years, in many instances for decades. What happens to these friends is important to us. We know that what happens to us is important to them. There is so much wisdom in the lawyers and spouses we meet. I would rather be with a group of lawyers than with a group from any other discipline—medicine, business, education, and so forth.

The Annual Meeting of the American Bar Association this year will be August 5–7 in San Francisco, one of the great cities of the world. There are other good reasons for us to gather in San Francisco. We need to

meet other lawyers from across our land, get to know them, and talk. We each will be enriched and strengthened by these experiences.

The organization of the American Bar Association is important and conducive to making new friends. Although large, through its various sections, divisions, and the many fine CLE programs, people can get to know other people with similar interests.

The Senior Lawyers Division will hold its Annual Meeting on August 5, 6, and 7 at the San Francisco Marriott Hotel. Join us for the Division’s annual reception, dinner, and presentation of the John H. Pickering Achievement Award on Thursday, August 5, 2010, at the St. Francis Yacht Club. Reservations are required. Call 312/988-5565 to make your reservation.

The Division meeting and CLE program begin Friday, August 6, at 9:00 a.m. with committee meetings,

which you are invited to attend. On Saturday, August 7, from 7:30–8:30 a.m., there will be a joint committee meeting with senior judges. The Division Council meeting will be from 8:30–11:30 a.m., and the annual business meeting and election of officers and Council members will be at 11:30–12:00 p.m. I encourage you to participate. It is fun. You will find it worthwhile.

Lawyers are a friendly group. In spite of all the changes that have occurred in our profession, our basic humanity and instincts for friendship continue. Come participate! Be a part of what we are doing. Make it a point to come to events with the Senior Lawyers. Get to know other lawyers who have experiences to share.

Please join us in San Francisco. Participate in the first-class CLE, participate in the social gatherings, make new friends, and learn about them—and let them learn about you. **VOE**

Submit Articles to *The Elder Law E-News Listserv*

The Elder Law E-News Listserv is transmitted electronically to SLD members every two weeks. Members are asked to submit newsworthy articles that are of interest to lawyers. Topics should be relevant to the practice of elder law, possibly including court cases and opinions, Medicare, and health law issues.

Articles should be faxed or sent by e-mail with a direct link to the article to Angela Boykin (fax: 312/988-6033, e-mail: boykinaa@staff.abanet.org). Each article should note the article title, source, date, and issue number.

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- **Transferring Your Retirement Fund to a Roth IRA**
- **News From COLA**
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