JAMS DISPUTE RESOLUTION
ALERT
An Update on Developments
in Mediation and Arbitration

Summer 2014

Experts Predict ADR Will Help Resolve Affordable Care Act Claims

IN DEPTH

The use of ADR to resolve healthcare-related claims will increase with implementation of the Patient Protection and Affordable Care Act (PPACA). Experts predict the increase will be due to the need to reduce costs as well as the healthcare provider groups that will bring with them new and novel disputes ripe for resolution.

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WHAT'S INSIDE

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ADR CONVERSATIONS

Bienvenidos a Miami! A New Destination for International Arbitration

Some might say that the recent International Conference for Commercial Arbitration (ICCA) congress in April signaled host city Miami's coming out party as one of the world's top locations for international arbitration. Watch out New York, London, Paris and Singapore. Miami is competing with these cities as an attractive location for international arbitration, and the future for the "Magic City" is promising.

See "Bienvenidos a Miami" on Page 4

Experts Predict ADR Will Help continued from Page 1

Dr. Leonard Fromer, Assistant Clinical Professor, UCLA School of Medicine

Dr. Leonard Fromer, an assistant clinical professor at the UCLA School of Medicine and a board member of TransforMED, LLC, said the passage and implementation of the PPACA is "moving healthcare from a volume-based system to one based on the value of the healthcare provided and their outcomes." The establishment and projected growth of Accountable Care Organizations (ACOs) is the main component that comes from the PPACA that will change the types of disputes that will arise and the manner in which they are handled and resolved, he explained.

ACOs are groups of doctors, hospitals or other healthcare providers that come together voluntarily to form practice groups that coordinate patient care from the general practitioner to specialists and hospital visits. They share both financial and healthcare responsibilities for their patient population. ACOs were established by the PPACA as part of the overall effort to control healthcare costs while elevating the level of care and health outcomes of doctor and hospital visits.

> **"Mediation is particularly good when parties are looking for something other than a monetary result."**
>
> –Katherine Benesch

Under the old system, parties brought cases based on billing disputes or the meaning of contract terms, Fromer said. However, with the advent of the PPACA and ACOs, cases will begin to shift toward disputes over the metrics used by insurance companies and the federal government in Medicare cases to determine reimbursement, quality of health outcomes and value. "These types of disputes are very appropriate for ADR," he suggested.

> **"ADR could grow in use because it is seen as a cost-saving measure since outside legal costs will count as administrative costs under the PPACA."**
>
> –Michael D. Roth

Michael D. Roth, an attorney and ADR neutral in Los Angeles who specializes in healthcare disputes, echoed Fromer's suggestion that new disputes will arise within the context of ACOs and provide fertile new ground for the use of ADR. "Doctors will have more interaction with providers in the system, which could lead to disputes over payments based on outcome or how payment is determined and applied when a patient goes outside an ACO for treatment," he said.

Michael D. Roth, Attorney and ADR Neutral

"Disputes also will arise over patients' ratings of doctors, too-high readmission rates and reimbursement rates when an ACO serves an especially unhealthy population," he added.

Another factor that could lead to an increased reliance on ADR is the changes in the PPACA, which require that a higher percentage of revenue go directly to medical care and not administrative costs, he noted. "ADR could grow in use because it is seen as a cost-saving measure since outside legal costs will count as administrative costs under the PPACA," Roth suggested.

"Mediation also may take a foothold in ACOs because of the complex nature of medical disputes in general and the fact that many of these will be new or novel," he said. "Parties are going to want neutrals to have the expertise necessary to help them resolve the dispute. The last thing hospitals, insurance companies and doctors want

> **"Disputes also will arise over patients' ratings of doctors, too-high readmission rates and reimbursement rates when an ACO serves an especially unhealthy population,"**
>
> –Michael D. Roth

Katherine Benesch, Attorney, Benesch & Associates

is bad press, so confidentiality is a key factor in their desire to use mediation."

Roth said California may lead the way with institutionalizing ADR use in healthcare disputes because included in Covered California contracts is a provision for a two-tiered mediation procedure for resolving disputes. This procedure would provide the disputant, most likely a doctor, with the opportunity to mediate his or her claim with a mid-level administrator such as a claims administrator; if that does not work, the dispute would be moved up the ladder, and mediation would be attempted between the doctor and a senior-level person such as a senior VP or CEO of a medical group, he explained. "California will be a trendsetter in the use of ADR to resolve healthcare disputes," he concluded.

"These types of disputes are very appropriate for ADR."

–Dr. Leonard Fromer

Katherine Benesch, an attorney with Benesch & Associates in Princeton, New Jersey, specializing in health-care law and ADR, said a factor that will encourage the use of ADR more often "is the repeat-business nature of contract relationships in the healthcare sector. Parties understand that they will most likely have to do business with each other again, and in the context of ACOs, they will certainly have an ongoing business relationship. Using mediation or arbitration to resolve a dispute will result in a settlement or decision in "less time for less money," and the parties will "have had a say in the process," which goes a long way toward allowing the parties to move on from the dispute and resume their business relationship, she suggested.

According to Benesch, "Mediation is particularly good when parties are looking for something other than a monetary result. In a doctor/hospital dispute or medical practice shareholder dispute, parties are most amenable to mediation because they want something other than just money and can use mediation to craft a settlement that incorporates non-monetary aspects," she added.

David L. Douglass, Attorney, Sheppard Mullin

ADR use in the healthcare industry will continue to grow as the population of insured people continues to grow under the auspices of the PPACA, she predicted.

David L. Douglass, an attorney with Sheppard Mullin in Washington, DC, who specializes in healthcare litigation, said that in his area of practice, healthcare fraud disputes, ADR is often used in civil cases and "has become more popular with industry and government," he noted.

According to Douglass, parties to healthcare fraud cases understand that "investigations can take years and are expensive, which makes ADR a very attractive vehicle to cut through the investigations and reach a settlement. Mediation is the more popular option because it allows parties in very complex cases involving numerous statutes to craft confidential settlements and resolve wide-ranging claims in one process."

Parties also favor mediating rather than arbitrating fraud cases because they can ensure that the mediator has the requisite expertise to assist them with a complex case. They also favor mediation because parties can design a mediation agreement that allows parties with ongoing business relationships to continue to do business without the bitterness that can accompany court or arbitral rulings, he said. "ADR is now part of any litigation practice in law firms," he added. ●

"...ADR is a very attractive vehicle to cut through the investigations and reach a settlement."

–David L. Douglass

Bienvenidos a Miami! continued from Page 1

John Barkett, Partner, Shook Hardy & Bacon LLP

The following interview was conducted with several individuals from the legal arbitration community in Miami, including John Barkett, partner at Shook Hardy & Bacon LLP; Gary Davidson, partner at Diaz Reus LLP; Donald Hayden, partner at Berger Singerman; Eduardo Palmer, secretary of the Miami International Arbitration Society (MIAS); Maria Eugenia Ramirez, counsel at Hogan Lovells; and Raquel A. Rodriguez, Miami Managing Member at McDonald Hopkins.

What types of international arbitration cases take place in Miami?

John Barkett: "Typically, they are international commercial disputes like the $1.6-billion dispute between the Panama Canal and the consortium of construction companies that will be heard in Miami."

> "Even when arbitrations are conducted in English, folks from Central and South America are very comfortable in Miami, and there are plenty of translators if you need them."
>
> –John Barkett

Maria Ramirez: "We typically see a lot of breach of contracts that range from telecommunications disputes between telecom parties to construction disputes that can be anything from

Maria Ramirez, Counsel, Hogan Lovells

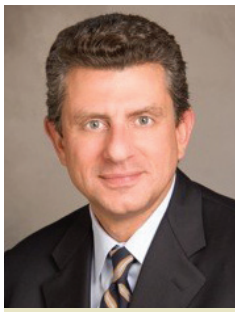
building of power plants to building hydroelectric plants, and these can be in different parts of the world, in [countries like] Chile, Costa Rica or El Salvador."

Why the growth in international arbitration? And why Miami?

Eduardo Palmer: "With the advent of globalization, international arbitration has grown immensely, and the numbers back that up."

Nearly 150 arbitrations were filed in Miami in 2013, compared to only 49 in 2010, according to data acquired from ADR providers including JAMS and ICDR.

Donald Hayden: "There were almost three times as many arbitrations with a Miami venue last year than two years before."



Eduardo Palmer, Secretary, Miami International Arbitration Society (MIAS)

JB: "Since the economic crisis, you are seeing more arbitrations; the numbers are up generally all around the world."

Gary Davidson: "When you bring cultures together, many things result in terms of economic benefit. I see this as propelling not just the general economy, but the legal community as

Donald Hayden, Partner, Berger Singerman

well, particularly in the area of international arbitration."

All agree that the other main reason that Miami has become so popular as a locale for arbitration is the lower cost.

Raquel Rodriguez: "It's less expensive to spend a week here than in New York, London or Paris, and attorney fees are significantly lower as well."

One more advantage to arbitration in Miami is the efficiency and fairness of the U.S. court system.

DH: "The court systems in many jurisdictions—Brazil for example—are backlogged, slow, inefficient or ineffective. As a result, more and more Brazilian companies are going to arbitration because their own court system is not set up in a way that can efficiently handle business disputes."

> "With the advent of globalization, international arbitration has grown immensely, and the numbers back that up."
>
> –Eduardo Palmer

How big of a factor is language in Miami?

EP: "Spanish is spoken more than English. There are more bilingual

> "We've worked hard to assure that Florida law is favorable to allowing international arbitrations to be venued here."
>
> –Donald Hayden

professionals per capita than anywhere else in the U.S. There are more Spanish-speaking lawyers, accountants, engineers who are fully bilingual in Miami than anywhere else. Our market is primarily Latin America. That's who we are; that's our niche."

RR: "When you have Latin American parties, then you need a good group of lawyers who can handle the arbitration completely in Spanish. This means that everything from the opening statement to the cross-examination of witnesses during the hearings has to be done in Spanish, and the written aspect—such as the memorials, fact witness statements, all the expert reports, the documents—everything is going to be in Spanish."

JB: "Even when arbitrations are conducted in English, folks from Central and South America are very comfortable in Miami, and there are plenty of translators if you need them."

What else has Miami done to encourage international arbitration?

EP: "In 2010, Florida adopted the UNCITRAL (United Nations Commission on International Trade Law) model law with the 2006 amendments. Florida was the first [state] in the U.S. to adopt it, and it's what international arbitration considers

Gary Davidson,
Partner, Diaz Reus LLP

the gold standard for statutes that govern the procedures for international arbitration proceedings.

The formation of the Miami International Arbitration Society [MIAS] has also played a role in bringing the local community together to push for Miami to be arbitration-friendly. The local legal community has also created a special court in Miami within the court system that will hear any disputes that stem from international arbitration proceedings."

> "The most exciting part of Miami in international arbitration is yet to come."
>
> –Gary Davidson

DH: "We've created a special panel of judges in state court who can handle arbitration issues, confirm arbitration awards, provide interim relief to an arbitration panel in the middle of an arbitration. We've worked hard to assure that Florida law is favorable to allowing international arbitrations to be venued here."

Are there other benefits of arbitrating in Miami?

DH: "In the past, Miami was seen as a vacation spot. That has changed. It has become not only a business center, but has matured into a true global, urban city that's advanced in the arts, architecture and culture."

Raquel A. Rodriguez,
Miami Managing Member, McDonald Hopkins

RR: "It all sounds like it happened overnight, but it's really been an effort of more than 20 years. It's been a work in progress, and it's finally taking off, and that's one of the reasons why all of these national and international law firms are establishing offices in Miami."

GD: "Given the growth we've experienced in the last 10 years, we are on track over the next 10 years to surpass cities like New York, London and Singapore as a center for arbitration. The most exciting part of Miami in international arbitration is yet to come." ●

> "When you have Latin American parties, then you need a good group of lawyers who can handle the arbitration completely in Spanish."
>
> –Raquel Rodriguez

FEDERAL CIRCUIT COURTS

Substantial Litigation around Validity of Arbitration Clause Results in Waiver of Delegation Clause

In re Checking Account Overdraft Litigation

2014 WL 2750115
C.A.11 (Fla.), June 18, 2014

David Johnson sued KeyBank in a class action for alleged overcharges. Key's motion to compel arbitration was denied as unconscionable under state law. Shortly thereafter, the U.S. Supreme Court issued opinions that rendered state law in violation of the Federal Arbitration Act. Key brought successful motions for reconsideration, and the arbitration clause was revived.

Key then brought motions that would have required that the arbitrator, not the court, determine threshold questions, like arbitrability. Key argued that the arbitrator should have ruled on arbitrability in the first instance and that the court should have refrained from acting on the prior motion. The trial court granted the motion.

The U.S. Court of Appeal for the Eleventh Circuit reversed, finding that Key's delay in bringing the motion about the validity and effect of the so-called "delegation clause" was untimely and that by pursuing litigation for years and waiting until after the reinstatement of the arbitration clause, it had waived its right to seek relief under the clause. "KeyBank substantially participated in litigation in a way that was inconsistent with an intent to have an arbitrator determine the enforceability of the arbitration provision…Instead of pressing the delegation clause from the start, KeyBank took Johnson two trips around the pretrial-motion-and-appeal carousel: first to litigate the threshold question of arbitrability in the district court and second to double back and reconsider who should decide the threshold question. KeyBank invoked the district court's litigation machinery to decide the gateway issue, forcing Johnson to spend resources opposing the original motion and contesting its appeal—precisely the kind of litigation costs that the delegation provision intended to alleviate."

County Waived Right to Mediation Confidentiality

Wilcox v. Arpaio

2014 WL 2442531
C.A.9 (Ariz.), June 2, 2014

Maria Rose Wilcox sued Maricopa County for alleged retaliation for actions opposing the work of the county sheriff. Other people filed similar claims, and the county created a mediation protocol for handling the complaints. The county appointed a retired judge to oversee the claims. The judge settled many claims via mediation.

Wilcox filed an action to enforce a settlement of $975,000. She submitted emails and other writing from the mediation as evidence of the settlement. The court asked that the mediator-judge and other officials from the county appear. The mediator-judge did not appear, but the hearing went on through live testimony, affidavits and documents, including the documents used and produced in mediation. The court granted Wilcox's motion to enforce the settlement.

The county appealed, arguing the motion judge erred in admitting privileged information that should have been excluded under Arizona's mediation privilege. The U.S. Court of Appeal for the Ninth Circuit affirmed the motion to enforce the settlement. The Court first found that in cases like this one—which involved both state and federal law questions—federal privilege law applies and state law does not. The Court applied federal law and concluded that "the County waived any argument that the contested evidence should be privileged under federal law. Before the district court, the County specifically distinguished its position from cases in which a party urged the court to recognize a federal mediation privilege, and disavowed any intent to urge the same. In its opening brief on appeal, the County again assumed that Arizona privilege law governed and failed to argue that the evidence admitted should be privileged under federal law."

District Court to Determine Whether High-Low Agreement Is Enforceable

Bryan v. Erie County Office of Children and Youth

2014 WL 2085335
C.A.3 (Pa.), May 20, 2014

Paul and Bonnie Bryan adopted a child through the Erie County Office of Children and Youth (ECOCY). After their adopted son raped and abused other members of the household, the Bryans discovered that the ECOCY knew of the son's history of similar behavior and did not disclose it. The Bryans sued.

During trial, the Bryans and the ECOCY agreed to a high-low agreement, according to which the minimum award would be $900,000 and the maximum $2.7 million. The jury awarded $8.6 million. The defendants tendered the $2.7 million and requested that the Bryans terminate the action. The Bryans refused, asserting that the defendants breached the confidentiality clause and the deal was unenforceable.

The parties brought the dispute to the district court, which held that it lacked subject matter jurisdiction to decide between the jury verdict and the contract. The judge declared the contract to be a product of interaction between the parties without the court's intervention or knowledge.

The U.S. Court of Appeal for the Third Circuit reversed, finding that the district court erred in concluding that it lacked jurisdiction. "A district court's jurisdiction does not terminate at the moment the jury's deliberations do…In ongoing litigation, district courts have the jurisdiction to decide whether the parties have settled the action or have satisfied the judgment."

Trial Court Failed to Honor Clear Delegation of Authority to Arbitrator

Tiri v. Lucky Chances, Inc.

2014 WL 1961845
C.A. App 1 Dist., May 15, 2014

Lourdes Tiri worked for Lucky Chances (LC) as a cook. Three years after she began her employment, she was presented with an arbitration clause containing the following language: "The Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable." She signed.

After she was terminated, Tiri sued and LC moved to compel arbitration. Tiri argued that the clause was unconscionable and that unconscionability is a question for the court. The trial court denied the motion to compel, finding that the clause was unconscionable because it was a take-it-or-leave-it contract and that the rules according to which the arbitration would be governed were not attached to the contract containing the arbitration clause.

The California Court of Appeal reversed. They focused on the validity of the clause delegating the arbitrability question to the arbitrator. The Court summarized the relevant test as follows: "First, the language of the clause must be clear and unmistakable. Second, the delegation must not be revocable under state contract defenses such as fraud, duress or unconscionability."

The Court found that the delegation clause was clear and unmistakable. As to the second point, the Court concluded that "the trial court's ruling must be reversed because, although its implied finding that the delegation clause was procedurally unconscionable was correct, its implied finding that the delegation clause was substantively unconscionable was incorrect."

The Court determined that there was no showing that the confidentiality clause rendered the delegation clause unconscionable, therefore, the argument is reserved for the arbitrator. They concluded by stating that "having determined that the delegation clause was valid, we conclude that the trial court's denial of Lucky Chances' petition to compel arbitration was improper."

Dodd-Frank Arbitration Exceptions Limited to Whistleblowers

Santoro v. Accenture Federal Services, LLC

2014 WL 1759072
C.A.4 (Va.), May 5, 2014

Santoro worked for Accenture as a senior account manager. His contract contained a clause requiring arbitration of all disputes, including those related to statutory claims.

When Santoro was replaced with a younger man, he brought a complaint alleging age discrimination and violations of ERISA, FMLA and other statutes. Accenture moved to compel arbitration. Santoro opposed the motion, arguing that the "whistleblower" provisions of the Dodd-Frank act voided the arbitration clause.

The district court ruled that the Dodd-Frank whistleblower exceptions apply only when a Dodd-Frank claim is before the court. Finding that Santoro's claim was not a Dodd-Frank claim and that no valid exception applied, the court granted the motion to compel arbitration.

The U.S. Court of Appeal for the Fourth Circuit affirmed. The Court wrote, "In Santoro's view, Dodd-Frank invalidates in its entirety and all arbitration agreements by publicly traded companies that lack a carve-out for Dodd-Frank whistleblower claims, even if the plaintiff is not a whistleblower. Accenture contends that Dodd-Frank's scope is limited to plaintiffs bringing whistleblower claims…We agree with Accenture's interpretation of the statute…It does not follow that Dodd-Frank prohibits the arbitration of non-whistleblower claims simply because an arbitration agreement does not carve out Dodd-Frank whistleblower claims. Instead, we think the language, context and enactment of the statute lead to the opposite conclusion." ●

Supreme Court Ruling Expands Whistleblower Protections

Kimberly Morris, Partner, Winston & Strawn LLP

When the Supreme Court issued its recent ruling on *Lawson v. FMR LLC,* it expanded the whistleblower protections provisions of the Sarbanes-Oxley Act (SOX) and, in the process, potentially affected the possibility for arbitrating whistleblower claims.

"The new ruling expands the reach of SOX," explains Kimberly Morris, a partner at Winston & Strawn LLP. "It increases the volume of whistleblower cases now that section 1514's reach has been extended to employees of privately held companies that provide services for publicly held companies." Previously, SOX applied only to employees of public companies.

Morris continues, "The new ruling expands the reach of section 1514 in two respects: One, it extends whistleblower protections to employees of private companies, and two, it expands coverage to other types of fraud." The original purpose of SOX was to prevent the type of investment-related fraud that occurred at public companies such as Enron and WorldCom.

The Court was divided over the decision, and the dissent "provides the example of a babysitter who works for an employee of a publicly held company being authorized to bring a federal claim against the employer if the babysitter's services are terminated after he expresses concern that the parents' teenage son may have engaged in an Internet purchase fraud," said Morris.

Clark Freshman, Professor, UC Hastings

"According to the dissent, this is beyond the scope of the original intent of SOX."

Professor Clark Freshman, professor of law at UC Hastings who specializes in ADR, concurs with Morris and says that the ruling "expands the number of people who can bring these claims under SOX." What is significant in terms of ADR, says Freshman, is that SOX was amended recently so that "one cannot have a pre-dispute arbitration agreement. It's possible to suggest arbitration after the dispute arises, but there's no way of writing an agreement or part of an employee manual that will prevent the person from going to court." He adds, "The law specifically says you can't force employees to arbitrate those claims." As a result, companies need to resort to some other type of dispute resolution.

"The practical implications of this decision," explains Morris, "is that private employers that provide services to public companies need to implement effective compliance policies and procedures and review their internal whistleblower reporting procedures to insure compliance with Section 1514."

In short, private companies need to catch up with what public companies already have in place. For example, Morris says, "Public companies must have anonymous whistleblower hotlines, manager training and robust compliance policies and procedures. Private companies providing services to public companies now have to do the same thing."

Morris speculates that while private companies "come to grips with the Lawson decision and its implication for their business, they may seek to avoid the courts until they are confident that their compliance programs are fully compliant with section 1514. This could lead to an increase in arbitration and mediation in the near future for employment-related litigation involving potential whistleblower allegations."

Freshman says that employers need to be "much more comprehensive in thinking about ADR. This is, in my opinion, a harbinger of a much larger sea change that we're seeing." He said that there was an initial sea change when courts expanded arbitration from between two large companies to something that could be imposed on employees as a condition of employment. "I think the days of mandatory arbitration for employees may be coming to an end."

Morris adds that as a result of this decision, "private employers need to be more vigilant on the maintenance of personnel files in order to document legitimate, non-discriminatory business reasons for termination in order to defeat potential whistleblower claims."

Freshman argues that the most significant issue is not the *Lawson* case itself, as people with non-publicly traded companies could have other employment claims brought against them under state or federal or contract law. "The bigger deal is it reminds us there's a statute that explicitly says one can't impose mandatory arbitration on employees for these types of claims."

As a result, companies need to be thinking about other ways to resolve disputes, says Freshman. "One way is

See "Whistleblower" on Page 12

JAMS Foundation Partners with NAFCM

David Brandon,
Managing Director,
JAMS Foundation

In its ongoing work to support the growth of ADR in the United States and abroad, the JAMS Foundation designed a new approach to grant funding and initiative support. The new direction will focus on supporting and developing community mediation, student and youth initiatives, ADR on a global scale and other societal issues where ADR can play a role.

"Now in our 12th year, the Foundation has evolved to the point where we recognize the need to focus our energy and resources in areas where we think we can have the greatest and most lasting impact," said David Brandon, managing director of the JAMS Foundation. "In discussions among our Board and with other leaders in the field, there was a general consensus that support for community-based mediation programs constitutes a core part of the Foundation's mission and vision."

As a way of maximizing the reach of its grants program, the JAMS Foundation sought to partner with an organization with established national roots, which led them to National Association for Community Mediation (NAFCM).

"NAFCM's national reach and reputation make them an ideal bridge between the JAMS Foundation and the hundreds of mediation centers that are NAFCM members," said Brandon.

Through NAFCM, the JAMS Foundation will provide two-year mini-grants of $12,000 to $15,000, primarily funding staff time at grantee organizations. The first year's budget is set at $85,000 and will expand to $150,000 in subsequent years.

For each mini-grant funding cycle, the JAMS Foundation and NAFCM will convene community mediation leaders from across the country to determine areas of promising and innovative programming.

"At this time, based on our work in the field, several promising areas include services for veterans and their families, bullying prevention, restorative justice, homelessness prevention, working with prisons, elder dialogue and decision making, municipal leadership training and collaborative governance and using multi-party processes to build civic engagement," said Matt Phillips, executive director of NAFCM.

Perhaps the most important benefit of the program will be from the connections it will forge between disparate groups working in community mediation, said Phillips.

"This groundbreaking partnership will, for the first time in the field of community mediation, connect resources, support and funding in one program," added Phillips. "Grant recipients will not only receive funding to strengthen their programs, but will also be part of a working group of other funded programs in that same focus area."

These working groups will allow the JAMS Foundation grants to make a significant and lasting contribution to community mediation, said Phillips.

"This innovative framework will aid development of best practices that will in turn provide new tools and resources for everyone working in community mediation," he said.

Matt Phillips,
Executive Director,
NAFCM

This end result is also important to the JAMS Foundation, said Brandon.

"We are very excited about this model of grantees collaborating, learning from each other and then sharing that knowledge more widely," he said. "We look forward to creating a network and infrastructure that will allow information and best practices to be shared nationally and ultimately globally.

The partnership will also help address the isolation experienced by those working in community mediation.

"Funded programs would no longer be working alone, but would have a cohort of centers that they would be collaborating with within the same strategic focus area," said Phillips. "Further, not only will funded centers be sharing, replicating and growing in their cohort groups, but [they] will also be receiving national support and resources from NAFCM."

The building and strengthening of these relationships among the JAMS Foundation, NAFCM and local mediation centers is key to the success of this new partnership, said Brandon.

"While JAMS clearly has considerable experience in dispute resolution, we also recognize and honor the expertise of others in the field whose contributions and commitment to effecting lasting change through ADR will help the Foundation fulfill its mission." ●

Irish, Brazilian Courts and Lawmakers Push to Expand Mediation

Ireland and Brazil's courts and politicians are drafting codes and laws aimed at growing the use of mediation beyond family and small claims to civil claims and private sector business disputes.

Paul Tweed, head of JAMS Ireland, said, "In recent years, the judiciary in both Irish jurisdictions have actively encouraged mediation, which has led to a gradual increase in the use of mediation, primarily in matrimonial and general commercial disputes."

Paul Tweed, JAMS Ireland

"The Irish Mediation Bill, which is currently the subject of debate, and which should become law before the end of this calendar year, has certainly focused minds, even before coming into law," he suggested. "The Bill is based on the fundamental requirement to be imposed on lawyers, requiring them to inform their clients as to the financial benefits of mediation as opposed to full-blown litigation."

According to Tweed, the Law Societies of Ireland and Northern Ireland and the respective Bar Councils "have recently been extremely active in encouraging mediation and setting up ADR services for their members. More and more lawyers are seeking accreditation as mediators, and more judges are actively encouraging mediation."

"Following initial reluctance and resistance, the legal profession is finally beginning to embrace mediation, and when the Irish Mediation Bill becomes law, I believe that mediation will become the first port of call for most lawyers," he predicted.

Looking to the future, "I would like to see a situation where mediation becomes not only a statutory requirement, but is also recognized by the legal profession as the preferred option to litigation," he concluded.

Gabriela Asmar, founder of ADR firm ProAcordo in Rio de Janeiro, said, "Family mediation has been growing in Brazil at a considerable speed for the last 10 years. Eight years ago, the Judiciary started to develop mediation inside the courts, and three years ago, the National Council of Justice developed a public policy to further develop judicial mediation, mainly focusing on family and small claims cases."

Gabriela Asmar, Founder, ProAcordo

However, "Corporate mediation, among partners, mostly in family businesses, workplace mediation and systems design, is getting some traction now," she said. "But commercial mediation is still rare in Brazil, due to the lack of an adequate statutory framework."

Giuseppe De Palo, president of ADR Center in Rome, said that while "there is currently no law authorizing mediation in Brazil, the Brazilian Senate has created several commissions aimed at creating a mediation law and drafting an extrajudicial mediation law for mediations conducted under private auspices. Currently, there is a Resolution from the National Council of Justice, a law project going to the final phase in the Congress and a new Civil Code of Process also in the final phase," he added.

"There is a big change going on with the new Civil Code process to be approved in the Congress and the law project for mediation inside and outside the courts," said De Palo, adding that "2014 is a year of changes in this area. The point is how fast and with what quality it will grow."

According to De Palo, "Brazil's Patent and Trademark Office launched a mediation center to resolve IP disputes in April 2013, and the Brazilian National Supplementary Agency has run a mediation program for certain types of disputes between healthcare carriers and customers since 2010. The agency has a success rate of more than 80 percent in resolving conflicts, and as a result, they have recently decided to expand their mediation services to cover more types of conflicts," he noted.

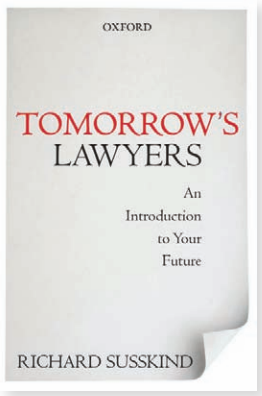
Giuseppe De Palo, President, JAMS ADR Center, Rome

Another factor driving the increasing use of mediation and other forms of ADR is that "the Brazilian court system is extremely overburdened; oftentimes lawsuits take around 10 years to reach closure," De Palo explained. "The court system has recently been fostering several partnerships with entities such as bar associations, law schools and NGOs," he said. "These partnerships seek new ways to expedite the resolution of cases. One of the ways

See "Irish, Brazilian Courts" on Page 12

Tomorrow's Lawyers: An Introduction to Your Future

Written by Richard Susskind **REVIEWED BY RICHARD BIRKE**



In his book *Tomorrow's Lawyers*, Richard Susskind writes, "Tomorrow's legal world, as predicted and described here, bears little resemblance to that of the past. Legal institutions and lawyers are at a crossroads, I claim, and are poised to change more radically over the next two decades than they have over the last two centuries."

Susskind sees three major forces driving change in how legal services are provided. The first is something he calls the "more-for-less challenge." As the name suggests, this driver involves clients asking lawyers to deliver more services for less money. One simple example of this principle is found in large corporate clients who demand that their in-house counsel reduce expenses—sometimes by as much as 30 to 50 percent—at a time when the amount of compliance work and due diligence is increasing. Susskind sees this as a factor that will "irreversibly change the way lawyers work."

The second driver is liberalization, non-lawyers doing work formerly done exclusively by lawyers. Accountants, real-estate brokers, insurance adjusters and others have long been doing work that was once the exclusive province of members of the bar, and Susskind sees this trend continuing. Banks will take over work, lawyers' assistants in Second World and Third World countries will take over work and legal "partnerships" involving many non-lawyers will take over lawyers' work.

The third driver is information technology. Computers have already revolutionized the way discovery is handled, and document searches are now more likely to be conducted by electronic means. Many legal documents are available online, and with the continued growth of computing power, it is likely that pseudo-legal reasoning will soon become part of the future of technology.

However, despite the potentially dire future predicted by these three drivers, Susskind is not entirely pessimistic about the future of lawyers. He sees a world in which most lawyers will occupy different roles in the future than those they had in the past. In Susskind's world, new lawyers will guide clients through form filling more often than form creation. Lawyers will sell and provide more routine services than they will create novel approaches to the resolution of common and age-old problems (like writing a will or renting an apartment).

In the midst of this rather unexciting world of form filling, Susskind sees some remaining role for lawyers to act as negotiators and researchers. He describes transactions and litigation as "decomposed." Transactions decompose into nine categories: due diligence, legal research, transaction management, template selection, negotiation, bespoke drafting, document management, legal advice and risk assessment. Litigation similarly decomposes into eight categories: document review, legal research, project management, disclosure, strategy, tactics, negotiation and advocacy. It is notable that only legal research and negotiation appear in both realms.

No one is left untouched. There are cautions and advice for educators, older lawyers, newer lawyers, managers of law firms, consumers of legal services, paralegals and others. For the older lawyers, the advice is simple: Change or die. For the younger, the advice is stark: "You will find most senior lawyers to be of little guidance in this quest [to shape the new practice]. They will resist change and will often want to hang on to their traditional ways of working, even if they are well past their sell-by date."

And then, in the next-to-last line, Susskind reveals the last bit of advice he has for tomorrow's lawyers. He says, "In truth, you are on your own."

The book is short, fewer than 170 pages. It's challenging, to existing practices and the future of law. It's well-written and entertaining. But is it accurate? Certainly, the trends Susskind has identified are real, but there's no certainty that the future will come as quickly as Susskind suggests. But one thing is certain, it's worth the short investment in time that it will take to discover Susskind's prognostications. Even if 10 percent of them turn out to be right, that represents a huge change. Personally, I think the ideas are right on target, but I think the timeline is a bit too short. Nonetheless, *Tomorrow's Lawyers* is well worth reading. ●

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mediation. OSHA (Occupational Safety and Hazard Administration), which handles certain types of SOX claims, had a pilot program starting in 2013 to have a limited number of complaints go to mediation before the federal mediation organization."

"I would suggest employers think more broadly about other ways to solve disputes," said Freshman. "That might mean having an ombudsperson who is in-house and [having] broader training of managers in negotiation and preventing conflict from arising in a litigation kind of way." ●

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it has done so is through stimulating the use of mediation and other ADR methods."

De Palo said, "CONIMA, (a private national council for mediation and arbitration institutions), has a fundamental role in setting standards and has been a representative voice for the politics and also for many organizations all over the country," he said. "It is the only countrywide institution for the moment," he explained. "NCJ and the courts of Brasilia and Porto Alegre are taking the management standards for ADR programs, while there is a growing movement to pledges in Brazil, with the biggest industry associations—FIESP and CIESP—having signed it already," he added.

Asmar said members of the legal profession were initially resistant to mediation, "mostly due to the lack of knowledge. However, most state bar associations are now interested in providing mediation training to their members because they are aware of the draft law moving fast in Congress and also because even the lawyers can't bear the backlog of the courts."

"Big companies are giving more attention to mediation, law departments are training their members in this area and the Ministry of Education is fostering law schools to have ADR disciplines added as an item to the education evaluation system," De Palo said.

As to future growth, De Palo said, "The recent establishment of commissions and the draft laws on mediation are steps in the right direction, but the idea of mediation has to spread so it is recognized as a useful alternative tool in dispute resolution. Brazil seems to be at a turning point is this area, with courts still leading the use of mediation for the next three years, and then companies will use it before most trials. We will see also a boom in the use of mediation for the small business setting," he predicted.

Asmar suggested that future growth will depend on the draft law now in Congress and the presidential elections this coming October. ●

HAVE A BRIGHT IDEA FOR A STORY?

The *Dispute Resolution Alert* is always looking for new and interesting article ideas and suggestions. Please email them to Victoria Walsh at vwalsh@jamsadr.com. We hope to hear from you.

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