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The Above Law Firms And Legal Service
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Aid And Editorial Support

New National Arbitration Forum Executive Eyes Growth Prospects For Administrated ADR

*The Editor interviews Michael Kelly,
Chief Operating Officer and General
Counsel, National Arbitration Forum.*

Editor: Mr. Kelly, would you provide our readers with some background on your career?

Kelly: I transitioned from a broad-based corporate practice at the Faegre & Benson law firm in Minneapolis to the position of Executive Vice President of the Minnesota Vikings Football Club (the NFL football team). I was responsible for all of the business operations of the football club and managed its legal affairs. Most recently I served as Senior Vice President for outdoor equipment and apparel retailer Gander Mountain and was primarily responsible for strategy and business development. Since this May I've been on duty as COO and General Counsel at the FORUM. I have profit and loss responsibility over operations and manage the company's legal affairs. It is a role for which I think my background makes me particularly qualified.

Editor: Technology is playing a bigger role in both courts and ADR. In what ways is the FORUM utilizing technology in its business?

Kelly: One of the primary reasons I joined the FORUM was because of its unique industry-leading applications. The FORUM is clearly in the vanguard of utilizing technology to make ADR more efficient for our users. We employ information technology in many different ways. The most obvious example is online filing, where we have the most advanced e-filing system in the ADR business. Parties submit literally tens of thousands of ADR matters to us each year using the web. Our New Jersey No-Fault dispute resolution program takes this a step further, allowing parties to log in to review and manage the status of their case online. We also use online calendaring that is intelligent enough to schedule parties with multiple matters to appear in front of the same arbitrator on the same day in order to conserve party and arbitrator resources.

Technology also makes a large impact behind-the-scenes in ways that are invisible to users of our systems but that greatly increase the efficiency of our operations. We are probably the only ADR administrator to electronically



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scan all paper submissions and use a sophisticated document management system to manage case workflow. This means, in some of the ADR programs we administer, that we enable arbitrators with secure online access to their case files. Ensuring that arbitrators have instant access to the up-to-date case files means that parties don't endure delays due to missing documents or delayed shipping. It keeps our operations efficient, allows us to scale for increasing case loads, and keeps costs down.

Finally, technology can also improve access to arbitration hearings. We offer in-person, document, and telephonic hearings. We are also using web conferencing technology to offer online hearings where the arbitrator and parties can together interactively review case documents in real-time.

Editor: As private ADR expands, what is the role of ADR practitioners vis-a-vis the courts?

Kelly: There is no doubt that the American justice system remains the envy of the world. And we in the ADR community have great respect for due process and the right to trial. It is important to remember that private ADR serves as an adjunct to the court system and complements rather than usurps the judicial function. Courts also continue to be creative in their search for procedural innovations that will allow them to fulfill their missions. Increasingly, this means that courts are creating programs calling for referrals to mediation or arbitration. Cases often come to private ADR administrators via judicial referrals or through court enforcement of contracts calling for the arbitration of disputes. Courts have learned that they can confidently refer cases to the major ADR administrators, and we at the FORUM work hard to continue to earn that trust. When we do our jobs correctly, we are able to eliminate significant delay and

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costs from the court system and leave the judiciary better able to perform its most important functions.

The benefits of the relationship between the judicial and ADR systems flow the other way as well. All of our neutrals have deep roots in judicial systems. Many are retired judges and all have extensive legal practice experience. It is also important to note that FORUM arbitration rules require that decisions be based on the applicable substantive law. Incidentally, we are the only major ADR provider to make such a requirement, which eliminates one of the significant historical complaints about ADR. As a result, judicial opinions are constant touch points for our neutrals. We strive to provide the same substantive outcome that the parties would have received in court, but to provide that result more quickly, more efficiently, and at less cost to the parties.

Editor: A couple of years ago, some suggested that ADR was a cause of trials vanishing. What are your thoughts?

Kelly: There has been ongoing scholarly debate both about whether trials are, in fact, vanishing and, if they are, about the potential causes. It is important to note that the number of lawsuits filed each year continues to increase while the number of cases resolved in litigation – the actual number of trials – may be decreasing. This shows that the issue is not in initial access to court, but rather in the ability or willingness to bring a case to completion in court. And it suggests that the cost and delay associated with litigation is most likely the real driving force behind any decrease in the number of trials. In other words, ADR isn't actively diverting parties away from litigation. The delay associated with crowded court dockets and the extraordinarily high cost of litigation is influencing parties to seek earlier resolution to their disputes than they can find in court. Most of the debate has at least recognized that courts themselves divert vast numbers of legal claims to informal or formal dispute resolution.

Editor: You can't turn on a TV or read a paper without seeing a story about rising healthcare costs. Is there an ADR component to this crisis?

Kelly: We certainly view our service as part of the solution. There is a lot of pain associated with rising healthcare costs. A large component of these costs is administrative overhead and extensive litigation activity which increases the percentage of healthcare dollars that must be allocated to administration instead of to areas with a direct impact on improving patient care.

It is important to note that the problem goes far beyond the medical malpractice claims that hit the headlines. Something like seven out of ten claims in court involve billing disputes and the

healthcare area sees its share. Many of these problems arise as persistent billing and coding disputes between health insurers and healthcare providers. In many cases, the doctor or hospital has a contract with the health insurer laying out reimbursement rates for different types of procedures. However, coding and billing procedures can be complex, and the two sides often do not see eye-to-eye on the appropriate rate to apply to particular situations. If the contract calls for arbitration of billing disputes, the parties have a path to resolve these problems. If it does not, the providers likely do not have the time or resources to litigate each and every payment dispute.

The other face of the healthcare costs problem is the direct impact on patients. When payor-provider disputes remain unresolved, the patient may be deemed responsible for the unpaid amount. In other situations, patients may be directly responsible for certain payments and full-blown litigation is not the model that best fits the resolution of these disputes. Litigation is costly and time-consuming. Arbitration has none of these problems and, in fact, can provide a fair resolution process that is much less intimidating for parties. Arbitration simply fits much better with these types of disputes and the FORUM is well-positioned to offer dispute resolution services for healthcare payment disputes either as a part of a contractual arrangement between the parties or a regulatory program offered by a state. We have studied the litigation in this space in considerable detail and we believe that we have a resolution procedure that would significantly benefit insurers, providers and patients.

Editor: The FORUM seems to have cut out a niche in dispute resolution on a large scale. How does the future look?

Kelly: I would not be here if I didn't honestly believe that the FORUM is the future of ADR. We have studied all of the major difficulties parties have experienced with ADR and have addressed them. If you use our system you will not see cumbersome, expensive hearings leading to awards that are not supported by the case law. Our rules and procedures prevent such inequities. All of the components are in place for the FORUM to be a major part of the future growth of alternate dispute resolution. We're affiliated with over 1,500 expert neutrals who are either attorneys with over 15 years of practice experience or retired judges. We've got a court-tested body of arbitration rules in place that provides access to all legally-available remedies, requires cases to be decided under the applicable substantive law, and provides ample discovery that is tailored to the size of the claim. Finally, we have the administration experience and technological capability to administer very large case loads.

I'll just point to a couple of specific examples of dispute resolution programs that we think show great promise. First, our FORUM Dispute Management operation has successfully

launched a mediation program that targets construction defect disputes. We have mediators with deep expertise in resolving these disputes and mediation rules and procedures in place that ensure compliance with statutes or regulations that require that mediations be held under tight timelines. Our New Jersey No-Fault arbitration program has been a great success. We stepped in and immediately lowered fees and are now resolving close to 40,000 cases per year in a quarter of the time it would take in court. Finally, we continue to see increases in the number of claims filed by parties who have contractually agreed to resolve their disputes under the FORUM Code of Procedure. And these cases are also resolved in a fraction of the time it would take to reach a court disposition.

Whether arising under private contracts or a state-sponsored dispute resolution program, we have the know-how and technology to make sure the program is run fairly and efficiently. That's why I think the future looks very bright indeed.

Pro Bono Adoption

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York City Family Court. At the adoption of one of the children helped by volunteer lawyers through the Pro Bono Adoption Project, the judge asked the adoptive mother if she knew what it meant to adopt the child. The mother dutifully recited the legal responsibilities attendant on becoming an adoptive parent. The judge then turned to the young child and asked "What does the adoption mean to you?" The child responded with one word – "Everything." There was not a dry eye in the courtroom.

Nonprofit boards benefit from diverse membership and having in-house counsel on the board brings the resources of corporations to bear on the issues of scarce legal services. A Pfizer attorney, Margaret Madden, was recruited to join MFY's Board of Directors. Ms. Madden co-chaired the 2006 MFY's Spring Dinner Theater Benefit with Timothy G. Reynolds of Skadden Arps ensuring a successful event in support of MFY's work.

Our organization has benefited from partnering with Pfizer. Pfizer's commitment to the problems facing children awaiting adoption was simply extraordinary. From conceiving of the project, to bringing together nonprofit partners, to recruiting law firms, to hosting trainings and motivational parties for the Family Court to handling individual cases, Pfizer was there. Our organization has really benefited from working with Pfizer and now, with an attorney from Pfizer on our Board of Directors, we look forward to a longstanding relationship.

Pfizer thanked us for providing them with "an opportunity to make a difference in the lives of New York City children." We all benefited from working together with corporate counsel, law firms, the court and the legal services program.

Lynn Kelly is Executive Director, MFY Legal Services, Inc.

Pfizer Seminar Series

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legal workshops and publications for nonprofit executives and directors.

In addition, many lawyers from at least 25 law firms have served as faculty in the seminar series. Those firms include:

Arnold & Porter
Barbara B. Lindsay, LLC
Butzel Long
Covington & Burling
Day, Berry & Howard LLP
Dickstein Shapiro Morin & Oshinsky LLP
DLA Piper Rudnick Gray Cary
Donovan & Yee
Epstein Becker & Green P.C.
Hale and Dorr LLP
Holland & Knight
Jackson Lewis LLP
Kaye Scholer LLP
Mayer, Brown, Rowe & Maw LLP
Morgan, Lewis & Bockius LLP
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Powers & Frost, LLP
Proskauer Rose LLP
Reid & Riege, PC
Robinson & Cole
Schulte Roth & Zabel LLP
Shook, Hardy & Bacon L.L.P.
Simpson Thacher & Bartlett LLP
Skadden Arps Slate Meagher & Flom LLP
Willkie Farr & Gallagher

Occasionally, speakers from other fields, such as the accounting firm Eisner LLP or the Nonprofit Risk Management Center, are recruited to assist in the presentations.

In 2006, the "Strategic Legal Thinking" seminar series was dramatically expanded to reach not-for-profits in seven other cities (Chicago, Detroit, Houston, Kansas City, New Orleans, San Francisco, and Washington, DC) via videoconference. Lawyers Alliance assisted Pfizer in this national expansion of the seminar series by identifying nonprofits which offered transactional legal advice to nonprofits in those cities, and outside counsel from those cities helped to organize the technology, logistics, and local content for the nonprofits attending in each city.

In 2003, Pfizer Senior Vice President and General Counsel Jeffrey B. Kindler accepted a Cornerstone Award from Lawyers Alliance for outstanding pro bono service in presenting the "Strategic Legal Thinking Seminar Series." The Cornerstone Awards honor outstanding contributions in *pro bono* service to nonprofit organizations by New York's legal community to improve the quality of life in New York City, and recognize members of the legal community whose pro bono services has had a positive and far-reaching impact. Seldom has a Cornerstone Award been so deserving, because the "Strategic Legal Thinking" seminar series has improved the accountability, capacity, and effectiveness of hundreds of nonprofit groups that are making New York City and the metropolitan area a better place to live and work.

Sean Delany is Executive Director, Lawyers Alliance for New York.

Please email the interviewee at mkelly@arb-forum.com with questions about this interview.