BAR BULLETIN

MARYLAND STATE BAR ASSOCIATION NEWSLETTER — JUNE 15, 2018

Truffer Poised to Become President

By Patrick Tandy

Baltimore County Circuit Court Judge Keith R. Truffer will be installed as the 125th President of the Maryland State Bar Association (MSBA) on Saturday, June 16, 2018, during the general business meeting of the membership that will conclude the MSBA Legal Summit & Annual Meeting in Ocean City, Maryland.

Truffer leads a slate that includes President-Elect nominee and current Secretary Dana O. Williams, a trial attorney and partner in the Towson law firm of Heisler, Williams & Lazzaro, LLC; Deborah L. Potter, a partner in the Bowie firm of Potter Burnett Law, LLC, for Secretary; and current Treasurer Judge Mark F. Scurti.

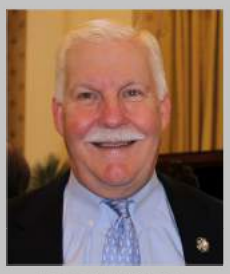
After obtaining his juris doctorate from the University of Baltimore School of Law in 1982, Truffer went to work for the Towson law firm of Royston, Mueller, McLean & Reid, LLP, where he spent more than three decades representing both plaintiffs and defendants in matters of complex civil litigation, until Governor Larry Hogan appointed him to the Baltimore County Circuit Court bench in February 2016.

Truffer's key priorities as President include MSBA's wellness initiatives, especially the Lawyer Assistance Program. Truffer will lay out his extended vision for the coming year when he is installed as President on June 16.

MSBA's elective officers consist of the President, President-Elect, Secretary, Treasurer, one or more District Governors elected from each district, and three Young Lawyer Governors. The Board of Governors (BOG) consists of all of the Association's elective officers, as well as the Immediate Past President, three Section representatives, the State Delegate to the House of Delegates of the American Bar Association, and the Chair of the Young Lawyers Section.

The BOG has full power and authority over the affairs of the Association between its membership meetings and performs such other duties as specified in the MSBA Bylaws. For more information on the MSBA's Leadership, visit MSBA.org.

2018 - 2019 Officer Slate



Dana O. Williams, President-Elect

Deborah L. Potter, Secretary

Judge Mark F. Scurti, Treasurer

MSBA's Volunteer and Executive Leadership Host Open Member Forum

MSBA's volunteer and executive leadership hosted an open member forum on May 15, 2018, at Bar Headquarters in Baltimore. MSBA President Sara H. Arthur and the Executive Committee fielded questions regarding fiscal responsibilities, communications with the general membership, governance, and more.

Accidental Arbitration

By Kenneth A. Vogel

Accidental Arbitration occurs when a party enters into a contract which has an arbitration provision hidden within the fine print. After a dispute arises, the unhappy customer or employee discovers that he has given up his right to a court trial without intending to do so.

Arbitration provisions are typically found in form contracts of commercial vendors. Credit card issuers; cell phone providers; banks; insurance companies; office supply stores; and a great many other companies with whom your client does business, often have mandatory arbitration clauses. This keeps the dominant party from being hauled into court in the large number of jurisdictions where they do business. Construction contracts often have arbitration provisions. They might be between the owner developers and the general contractors; between homeowners and home inspection companies; or between contractors and their subs. Arbitration provisions can limit, by contract, the risk of class action lawsuit, and it gives vendors control over how and where a customer dispute will be resolved. The company's legal fees are more predictable in resolving cases through arbitration. Arbitration also provides secrecy in the proceedings. This prevents the public and investors from learning about widespread problems which may be prevalent in the business practices or conduct of companies.

Equifax in 2017 had a massive data breach which potentially exposed personal information of 143 million people to hackers. Consumers were outraged when they discovered that Equifax's free credit monitoring contained an arbitration clause coupled with a waiver for class action suit status.

Arbitration provisions in contracts are upheld in the courts. If one party to a contract files a lawsuit, the other side can compel the other side to arbitrate.

The California Supreme Court ruled in 2005 that forcing people to arbitrate certain disputes was "unconscionable" and should not be enforced. However, the U.S. Supreme Court found that the Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 1, was to be liberally applied over state laws limiting arbitration. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). The Supreme Court also upheld the arbitration provision in a DirecTV lawsuit over termination fees for customers who canceled its service. DirecTV v. Imburgia, 135 S.Ct. 1547, 191 L.Ed.2d 636 (2015). The Supreme Court upheld mandatory arbitration clauses in employment contracts. CompuCredit Corp. v. Greenwood, 132 S.Ct. 665, 181 L.Ed. 2d 586 (2012). In a case where the National Labor Relations Board split with the Trump administration (a change in policy from the Obama administration) the Supreme Court held that businesses can prohibit workers from creating a class and compelling individualized mandatory arbitration in disputes over pay and conditions in the workplace, a decision that affects an estimated 25 million non-unionized employees. Epic Systems Corp. v. Lewis, No. 16-285, decided May 21, 2018.

However, some courts limit mandatory arbitration. The US District Court for the District of New Jersey, applying New Jersey state law interpreting labor contracts, on May 18, 2018 denied Bob's Discount Furniture motion to stay class action litigation and to compel arbitration in an unpublished decision regarding the Plaintiff's status as an independent contractor and overtime pay. Bob's contended that the delivery men were independent contractors. The court first found that the court, and not the arbitrator, should decide arbitrability of the dispute if the agreement is ambiguous. The court then found that the claims themselves were not subject to arbitration in the employment contract. Espinal v. Bob's Discount Furniture, LLC, Case 2:17-cv-02854-JMV-JBC (NJ 2018).

Some members of Congress seek to reduce the scope of forced arbitration clauses. The Arbitration Fairness Act of 2017, H.R. 1374, seeks to prohibit arbitration agreements from being valid or enforceable in employment; consumer; antitrust; and civil rights disputes. The Arbitration Transparency Act of 2017, H.R. 832, would permit mandatory arbitration in matters involving consumer financial products and services, but would require that the proceedings be open to the public. The Safety Over Arbitration Act of 2017, H.R. 542, would prohibit the use of arbitration to resolve claims alleging facts relevant to public health or safety unless all parties consent in writing after the controversy arises.

Lyft ride sharing's Terms of Service (Feb. 6, 2018 update) is 44 pages long and contains a binding arbitration provision with a waiver of class action eligibility. This applies to all of its customers who use their app to get a ride. Lyft permits arbitration to occur in whatever jurisdiction the driver provided services. This is different from some arbitration provision as to choice of venue. Some companies limit the arbitration to the location of the company's main office or some other place selected by the company. Public pressure sometimes convinces companies to relax their arbitration requirements. On May 15, 2018, under pressure from victims who were allegedly assaulted by Uber drivers, Uber removed the mandatory arbitration provision from its contract with their users (passengers) with respect to sexual harassment and assault allegations. Lyft followed Uber's lead the same day. Uber's new "driver partner agreement" still requires its drivers to agree to arbitration. Drivers who sign it are then excluded from participating in current or future class-action lawsuits.

In response to their students' demands, Yale Law School and 13 other top law schools are issuing a survey asking law firms to disclose whether or not they require summer associates to submit to forced arbitration and non-disclosure agreements. Several major law firms including Orrick, Herrington & Sutcliffe and Skadden, Arps, Slate, Meagher & Flom subsequently announced that they were dropping mandatory arbitration as a condition of employment.

Parties need to be diligent when signing contracts. They might find that they are agreeing to a binding dispute resolution provision which is not to their liking.

Kenneth A. Vogel, Esq. practices business law in Maryland and Washington, DC. He is also the Maryland and DC State Representative of Construction Dispute Resolution Services, an international provider of mediation and arbitration services.