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What's Inside

MSBA Expands Lawyer Assistance Program Across Maryland

State Bar Now Offers Counseling in Every County

BY PATRICK TANDY

The stress inherent to the practice of law renders the legal profession at least three times as susceptible as the general population to problems stemming from issues such as depression and substance abuse. According to a 2016 report generated by the American Bar Association's Commission on Lawyer Assistance Programs in conjunction with the Hazelden Betty Ford Foundation, between 21 and 36 percent of the nearly 13,000 practicing lawyers surveyed qualified as "problem drinkers", as compared with just 7 percent of the general public.

Moreover, the study, titled *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, reports that "approximately 28 percent, 19 percent, and 23 percent are struggling with some level of depression, anxiety, and stress, respectively."

Sadly, Maryland lawyers are not immune to these trends.

"Today, throughout the state, too many of our members - lawyers, judges, and law students - are suffering from problems with depression, alcohol, and drug abuse," MSBA President Judge Keith R. Truffer noted in his September 2018 video President's Message. Indeed, during his installation as MSBA President in June of this year, Truffer lamented how "the insidious nature" of alcoholism and substance abuse "demands from those afflicted by it an extraordinary degree of secrecy and denial, conditions which hamper diagnosis and treatment."

"As leaders of our profession, we must act," he said, noting that those suffering from these conditions require "treatment and compassion, not ostracism and scorn." To this end, Truffer counted the Baltimore-based MSBA Lawyer Assistance Program (LAP) among the key focal points of his Presidency.

Now, as part of this presidential initiative, LAP has announced the biggest expansion of services in its 37-year history. Partnering with CorpCare, a nationally recognized provider of counseling services, LAP will now have a network of counselors on the ground throughout the state. With this added muscle, LAP Director Jim Quinn hopes to effectively double the roughly 125 new cases LAP currently handles each year.

Quinn says that LAP's experience with lawyers makes it uniquely suited to address the needs of attorneys for a variety of reasons. In having nuanced understanding of the demands of a legal practice, "we can accommodate professional responsibilities while a lawyer is undergoing treatment," he explains. LAP, he adds, can also help navigate the complex and often frustrating world of health insurance and, in some cases, even provide financial assistance.

"Fortunately, there is hope, and there is *help*."

Hon. Keith R. Truffer, MSBA President

"People often don't have the financial means, or they're in Western Maryland and say they can't come to Baltimore," says Baltimore City Circuit Court Judge Charles H. Dorsey III. "We're trying to stop giving people reasons to say they can't."

Dorsey speaks from experience; some 15 years ago he sought and received help from LAP. In turn, he has spent much of the interim since serving on LAP's oversight committee. The new statewide expansion of counseling services, he says, marks a key evolutionary step for the program.

"It's so hard to help someone with an A Type Personality," notes Dorsey. The adversarial nature of the profession, stress, anxiety, and the challenges of maintaining work-life balance can often seem insurmountable, and generate fears of disciplinary measures, or even disbarment. "LAP understands the profession."

"Lawyers are extremely busy, which adds to their stress," says LAP Counselor Lisa Caplan, LCSW-C. "Through the Lawyer Assistance Program we have a lot of experience in helping the legal profession. Lawyers don't need to

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I Didn't Sign It!
Compelling Non-Signatories to Contracts into Arbitration

BY KENNETH A. VOGEL, ESQ.

"But I did not sign the contract!" the client exclaims. "How can I be forced into arbitration?" This question may occur when a claimant initiates an arbitration proceeding against someone who did not sign a contract which has an arbitration provision.

Arbitration is a voluntary procedure. Parties agree to binding arbitration by contract before the dispute arises. How can someone be involuntarily compelled to arbitrate a dispute? One can enter arbitration either as a claimant (plaintiff) or as a respondent (defendant) including becoming a counter-claimant.

Voluntary joinder is available. If two parties sign a contract which requires arbitration, and if the claimant wants to pursue his claim against a non-signatory, as a general rule he cannot. For example, assume that the claimant wants to go after a LLC and its managing member based on a piercing the corporate veil theory or other theory of relief. The Claimant would have to file an arbitration and also file a separate lawsuit against the managing member to seek either a judicial order to compel the managing member to join the arbitration. Or, the claimant can file a lawsuit to obtain relief against the managing member in a separate court proceeding. The managing member might decide to voluntarily join the arbitration as a co-respondent in order to avoid the expense of defending against two separate legal actions - one in the arbitration and one in court. Joining the arbitration also avoids public knowledge of the dispute, privacy not afforded in civil lawsuits.

Non-signatories may be joined in matters where multiple independent contracts or multiple parties are involved. This can occur when some of the parties to an agreement containing an arbitration clause and the contracting party are members of a group of companies, or where the parent or its subsidiaries are involved in the same commercial transaction, even though they are not all parties to the specific contract at issue.

Involuntary joinder is rare. It occurs when a party is dragged into arbitration without his explicit consent. For example, the author acted as the arbitrator in a construction dispute. The contractor company filed an arbitration demand against a homeowner who refused to pay its bill. The homeowner responded by filing a counter-claim against the contractor and its corporate president personally. In addition, the homeowner respondent filed a complaint against the company and the corporate president individually with the Maryland Home Improvement Contractor Commission (MHIC). The contractor's response to the MHIC was that an arbitration was pending which would resolve all disputes against all parties. In other words, the contractor used the company's arbitration demand to shield its president individually from MHIC's investigation of the homeowner complaint. The contractor also filed an answer to the counterclaim, and actively defended against the counterclaim.

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The tide of the arbitration was going against the contractor. After much litigation, and a replacement set of attorneys, the contractor moved to dismiss the arbitration against him personally based on his not being a signatory to the construction contract in his individual capacity. As the arbitrator, I issued an Order in which I noted that the contractor misled MHIC about the nature of the arbitration and that the contractor participated in the litigation for an extended period of time without ever raising the defense that he was personally not a party to the contract. I found that he had voluntarily submitted himself to the jurisdiction of the proceeding. The legal theories behind this decision are assumption and waiver. My decision was upheld on the contractor's appeal to the Montgomery County Circuit Court.

The American Arbitration Association (AAA) Construction Rule 9(a) and JAMS Rule 8(b) purport to give an arbitrator the authority to determine jurisdictional disputes as to who is a proper party to the arbitration. But can he? Just because an arbitrator decides that a non- consenting non-party to a contract can be forced into arbitration does not make it so.

Only a court can compel a non-signatory to a contract to arbitrate. An arbitrator does not have the authority to decide the issue of arbitrability when the parties have not "clearly and unmistakably" agreed to submit that issue to the arbitrator. The question of arbitrability is to be decided by courts, not the arbitrators themselves. The Supreme Court stated that absent an agreement to the contrary, the question of arbitrability should be decided by the court, rather than the arbitrator, just as it would decide any other question that the parties did not submit to arbitration, namely, independently.

A court might compel a non-signatory to arbitrate if the non-signing person has personally guaranteed performance under a contract with an arbitration clause. Courts can look at other legal theories such as third-party beneficiary and veil piercing/alter ego. Arbitrators cannot.

When a party is involuntarily brought into an arbitration against its will, it needs to immediately decide if it wants to participate in the arbitration, or contest jurisdiction. Unless the protest is fast, loud and clear, the reluctant respondent may find itself stuck in that forum against its will. ●

The author wishes to thank members of the MSBA Construction Law Section e-mail discussion list for their invaluable insights on this topic. He also thanks his editor, his wife.

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