



MSBA BAR BULLETIN

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What's Inside

President's Message

Page 3

How Private Practitioners can Promote their Business and Access to Justice through Limited Scope Representation

Page 4

MSBA Raises \$20K for Oyster Recovery Partnership

Page 5

Bar Bulletin Focus : Solo & Small Firm Practice

Pages 8-12

Lowering Your Anxiety by Tackling Procrastination

Page 14

Truffer Addresses Judicial Reception



▶ Watch the video online at msba.org/MVLS-reception

On September 12, 2018, The Maryland Volunteer Lawyers Service (MVLS) brought together judges and magistrates from the Maryland Judiciary with their Board of Directors, staff, and attorney volunteers at DLA Piper's Mount

Washington, Baltimore office for an evening of networking. MSBA President Hon. Keith R. Truffer addressed the crowd and spoke to the importance of legal representation in the courtroom.

Ensuring access to justice for Maryland's most vulnerable

citizens is a lofty goal. Without the work of pro bono attorneys across the state, many Marylanders would not be able to defend their most basic rights. The Maryland Volunteer Lawyers Service (MVLS) is one of the organizations at the heart of

this struggle.

During the event, MVLS also demonstrated their new online pro bono portal, which allows lawyers to easily sign up for volunteer opportunities online. ●

MSBA and Judicial Events™ Present *2018 Legends of the Boardroom*

BY PATRICK TANDY

Overlooking Baltimore's scenic Inner Harbor, roughly 100 attorneys packed the 15th floor of the Downtown Hyatt Regency on September 28, 2018, for a one-of-a-kind

opportunity to learn from leading general counsel on hot-button issues facing their field.

The MSBA teamed up with Judicial Events™ to present "2018 Legends of the Boardroom",

which featured a powerhouse of in-house counsel who spoke to the "In's and Out's of the Corporate M&A", "Cyber Security and Compliance", "International Arbitration", and "A View from the

'C' Suite: What General Counsels Want You to Know About Billing!"

Other event sponsors included Womble Bond Dickinson;

CONTINUED ON PAGE 16

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📷 PHOTOS

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Business Contracts and ADR Provisions

BY KENNETH A. VOGEL

Attorneys who write and review contracts need to consider how to provide for possible future disputes. The contract provisions will determine the parties' rights and remedies. Addressing topics such as choice of law, choice of venue and who will decide the case are a normal part of contract drafting. Arbitration as a form of conflict resolution is frequently selected for business disputes.

Arbitration is a voluntary procedure. Parties agree to arbitration by contract, generally before the dispute arises. Or, the parties may agree to settle their differences by arbitration after the dispute arises, and waive going to court.

Arbitration is generally found in a business context. It is provided for in contracts which are either business-to-business (B2B), or an arbitration provision may be found in contracts between a business and a member of the public, business-to-consumer (B2C). In theory, contracts between sophisticated parties with equal bargaining power. The business law attorney representing a small company and its vendors and customers can negotiate the terms of their contractual dispute resolution clauses up front. A mom and pop home improvement contractor might use an off the shelf form for all of its construction jobs, big and small. These forms should be reviewed by the business's attorney and discussed with the client. Mediation and/or arbitration clauses may be modified or entirely crossed out as the parties agree. If the contract is between parties of uneven bargaining power – a large corporation and its small business customers, for example, then there is not much negotiation that can take place either before or after the contract is signed. It's take-it or leave-it. The courts and legislatures will generally not interfere with B2B contracts.

On the other hand, contracts between a business and its con-

sumer customers, or contracts between a business and its employees, are much more likely to have legal restrictions imposed when the business can or cannot impose an arbitration provision on its consumer customers and its workers.

Many contracts to consumer contracts have mandatory arbitration clauses as the built-in dispute resolution method. These agreements might be for credit cards; employment; home improvement contractors; goods; travel tickets; or services, such as Uber or Lyft. Large companies write non-negotiable contracts. They pre-select the arbitration providers and impose a venue of the company's own choosing. Bank of America is not going to negotiate their dispute resolution procedures in their credit card agreements with each cardholder.

An attorney representing a small business should discuss with his or her client available options for different types of dispute resolution provisions. Should the parties require mediation as a pre-condition to arbitration or litigation? Is the nature of a dispute that might arise better resolved by an arbitrator or by a court? Arbitration may resolve the dispute faster than a court. It is also more confidential. On the other hand, arbitration may be more expensive than a court case because the parties have to pay the arbitrator. Most business contracts provide for the arbitrator cost to be split equally between the litigants. Some consumer contracts have the business shouldering more of the cost of arbitration as the quid pro quo of the consumer giving up his or her rights to litigate, including to join in class action suits.

The arbitrator can be any person of the parties' choice. Individuals contracted with directly may act as arbitrators. Or, the parties might go to an ADR provider which maintains a roster of arbitrators, including lawyers, retired judges, architects, engineers and the like.

The business attorney should consider what type of arbitrator would be best for his or her client. If the issues are complex, selecting an arbitrator who is a specialist in the subject matter may be preferable to trying a case before a judge, who is a generalist.

There is a large disparity in prices charged by arbitrators, both in terms of administrative fees, as well as the cost of the arbitrator him/herself. The pre-designated arbitration service can be changed upon mutual consent of the parties. For example, if the parties to a contract specify arbitration by AAA or JAMS, both reputable providers, the parties have a right to mutually agree to select a different arbitration service provider, even after the dispute arises. Arbitration is a contractual provision. The parties can agree to change the contract whenever they wish. It may be that parties in a construction dispute prefer someone with certain subject matter expertise. If the parties want an architect or a structural engineer to be the arbitrator, some panels offer those specialists.

The Better Business Bureau (BBB) will mediate or arbitrate complaints both between consumers and vendors, and disputes between two businesses, if at least one of the companies is a member of the BBB. The parties may use BBB's services even if the use of BBB is not specifically required by their contract. BBB does not handle certain types of cases. Employment cases, discrimination allegations and disputes between two individuals (not companies) are outside of BBB's mission. BBB offers both general mediation and binding arbitration, as well as informal conciliation and non-binding arbitration decisions. Specialty BBB programs currently consist of automobile warranty disputes (Autoline); moving and storage; manufactured housing; and marketing and advertising practices.

Attorneys should discuss

CONTINUED ON PAGE 19

Business Contracts

CONTINUED FROM PAGE 10

with their clients what type of dispute resolution provisions best meet their needs - mediation, arbitration or litigation. And, just as parties to business contracts regularly waive their rights to a jury trial, so may an aggrieved party contractually give up his or her day in court. ●

Kenneth A. Vogel, Esq. practices business law and civil litigation in Maryland and Washington, DC. Ken is also the Maryland and DC state representative for Construction Dispute Resolution Services, an international provider of mediation and arbitration services.