

# BAR BULLETIN

MARYLAND STATE BAR ASSOCIATION NEWSLETTER

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## MSBA Updates Employment Law Deskbook, Criminal Pattern Jury Instructions

By Patrick Tandy

MSBA announces the publication of a new *2016 Replacement Volume* for its popular *Maryland Employment Law Deskbook*.

The *Deskbook's* most significant updates include three brand-new chapters addressing the areas of Whistleblower Law; Issues Affecting Gay, Lesbian, Bisexual, and Transgender Employees; and Religious Discrimination. The *2016 Replacement Volume* also features new sections on Lifetime Employment and Continuous For-Cause Contracts; Prevailing and Minimum Wage Requirements; Legislation Prohibiting Employers from Asking Applicants About Criminal History; Montgomery County's Earned Sick and Safe Leave Act; and much more.

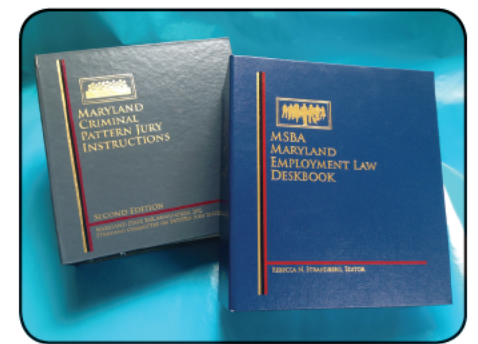
The *2016 Replacement Volume* also expands and updates discussion on additions to the State Law section on Disability Dis-

crimination; administrative procedures under Maryland's Fair Employment Practices Act; the state's minimum wage and domestic service workers; rule changes; prohibited conduct by employers and unions; and more.

First published in June 2014, the *Maryland Employment Law Deskbook* is designed to "offer compelling, practical, cost-effective advice in representing plaintiffs and defendants in federal and state causes of action, including claims alleged under the National Labor Relations Act, Federal Fair Labor Standards Act, and the Maryland Labor & Employment Code." The book's more than two dozen contributors, led by Editor Rebecca N. Strandberg, cover topics including at-will employment relationships; discrimination on the basis of age, sex, disabilities, and more; the Family Medical Leave Act (FMLA); the Occupational Safety and Health Administration (OSHA) and the Maryland

Occupational Safety and Health Act, as well as an immigration primer for employment law practitioners.

In her foreword, Court of Appeals of Maryland Judge Lynne A. Battaglia (ret.) writes that the *Maryland Employment Law Deskbook* ably "gives the novice a primer and the experienced practitioner a reminder about potential claims to be explored, as well as expenses to be juxtaposed when an employment relationship is jeopardized." Upon the book's initial publication, Strandberg told the *Bar Bulletin* that ever-evolving state discrimination laws as well as "knowing that attorneys were representing clients without the necessary knowledge" of employment law, particularly those "new lawyers hanging out shingles without experience," drove her to push the project forward.



### Criminal Pattern Jury Instructions Supplement

Also on deck is the *2016 Supplement to Maryland Criminal Pattern Jury Instructions, Second Edition* (2012), the volume's first update in three years. The new *Supplement* includes 20 brand-new instructions, as well

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## Brown Named President-Elect of State Bar Caucus

By Patrick Tandy

The Honorable Pamela J. Brown, an Associate Judge on the District Court for Howard County and MSBA Immediate Past President, has been named President-Elect of the National Caucus of State Bar Associations (NCSBA). Brown's nomination and election to the post took place in early August during the Annual Meeting of the American Bar Association (ABA) in San Francisco.

Established in 1993, the nonprofit, unincorporated National Caucus of State Bar Associations provides a forum in which state bars across the country may discuss issues of mutual concern, particularly those that come before the ABA House of Delegates, itself largely composed of state and local bar

association representatives.

NCSBA consists of two delegates from every state and the District of Columbia, as well as those territorial bar associations represented in the ABA House of Delegates, and the nation's six regional state bar conferences: the New England Bar Association; the Mid-Atlantic Bar Conference; the Southern Conference of Bar Presidents; the Western States Bar Conference; the Great Rivers Bar Leaders Conference; and the Association of the Bars of the Northwest Plains and Mountains (Jackrabbit Bar Conference). Two delegates from each of the six regional state bar conferences comprise the organization's Executive Committee.

"Maryland has the unusual distinction of being a member of both the Mid-Atlantic

Bar Conference as well as the Southern Conference of Bar Presidents," notes MSBA Executive Director Paul V. Carlin. The NCSBA Presidency rotates among the six regional conferences, he continues, adding that Brown will represent the Mid-Atlantic Bar Conference when its turn in the rotation arrives.



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# A Perfect Hand: Arbitrating New Home Warrantees

By Kenneth A. Vogel

## A Perfect Hand.

### What is a perfect hand?

The first contracts class taught in law school is the hairy hand case. *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (N.H. 1929). The jury had to decide if a skin graft which gave the plaintiff a hairy hand was a breach of the doctor's 100% guarantee that Mr. Hawkins would have a perfect hand. In the matter of poor Dr. McGee, it was up to the jury to decide if a hairy hand is a perfect hand.

## A Perfect Floor.

### What is a perfect floor?

Maryland law requires builders to warrant their new home workmanship against defects for one year. This gives the buyer time to discover items which are wrong or have gone bad, and compels the builder to fix them. By law, systems defects are warranted for two years.

Montgomery County imposes on builders a 10 year structural warranty on new home contracts, which exceeds State law. Many builders elsewhere in the State voluntarily offer an extended 10 year structural warranty. To comply, or if the marketplace demands it, the builder purchases a warranty issued by a third party security program, such as 2-10 HBW, Home Warranty of America or RWC. The third party stands behind the builder in case the builder goes out of business or does not honor its warranty to the homeowner. It also acts as the exclusive dispute resolution arbiter.

Just as automobile warrantees provide less coverage over time, so do builder warrantees. Your shiny new car might be covered for the first 12 months bumper to bumper. For year 2, fewer items are covered. Perhaps just general mechanical problems? By year 3, only the engine and transmission are covered.

Home warrantees are similar.

They take effect beginning in year 2 when the builder's full warranty expires. Year 2 covers the house's systems: mechanical, plumbing and electrical. Almost everything else falls away. Manufactured items, such as appliances, are only covered by the manufacturers' warrantees. Years 3 to 10 only provide a major structural defect coverage.

Home warrantees have mandatory arbitration clauses. If the buyer feels that his new house has a defect, and if the builder does not voluntarily fix it, the buyer can have an arbitrator decide if the claim is covered. Builders too can demand arbitration. If the builder contends that there is no defect, or that the defect has been repaired, and if the homeowner is not satisfied, then the builder may initiate arbitration so that a third-party, the arbitrator, will determine if a complaint is covered or not. Both parties are bound by the arbitrator's decision.

Arbitration is provided by an

independent ADR company which specializes in construction disputes, such as Construction Dispute Resolution Services (CDRS). For homebuyer warrantees, the parties are bound by the rules established in the warranty contract itself.

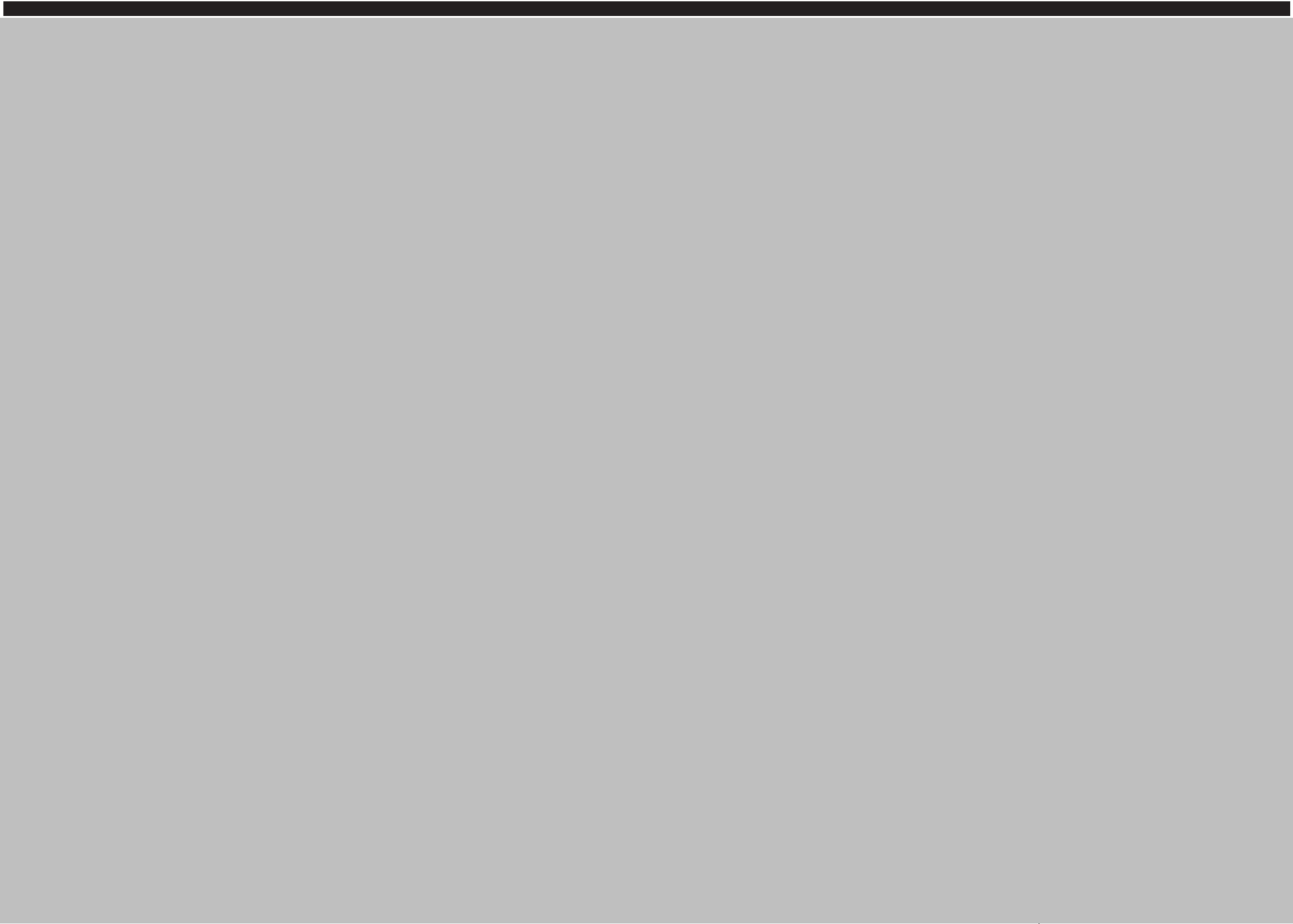
Arbitration is not free. Both the homeowner and the builder pay a fee when arbitration is initiated. This covers the cost of the arbitrator paying a site visit to the residence to meet the parties and discuss the alleged defects. The arbitrator inspects the property and hears testimony from the parties on site. Afterwards, he issues a written award. If there is a defect, the finding is either "yes" a covered defect or "no" not a covered defect. Only specific items identified in the request for arbitration may be considered. If additional items of defects are alleged, another arbitration request must be made, new fees paid and the process begins anew.

For Mr. Hawkins and his hairy hand, a jury had nothing but their

experience and common sense to guide them on whether or not his hand was perfect. Fortunately for construction arbitrators, there are performance standards in the home warranty book which define industry standards. The National Association of Home Builders publishes Residential Construction Performance Guidelines. Noncompliance with these construction guidelines calls for corrective action by the builder. Where an item is not described, locally accepted trade practices of the construction industry will be used.

This brings us to our question "What is a perfect floor?" A floor might be concrete, flagstone, marble, slate or ceramic tile. Other flooring materials are found elsewhere in the home. These materials are generally resilient (vinyl); finished wood or carpeting. Every item has a performance standard.

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Our homeowner might believe that his vinyl floor was installed incorrectly. But was it? The owner points to visible seams or gaps showing at the joints. Performance guidelines under the builder's 1 year workmanship coverage state "Gaps in excess of 1/32-inch in width in resilient floor covering joints are deficiencies. Where dissimilar materials abut, a gap in excess of 1/8-inch is a deficiency." After the first year, there is no coverage for this item at all. At an arbitration site visit, if defects in resilient flooring are claimed, the arbitrator is expected to measure the identified gaps. There is no discretion. Either the item is covered or it is not.

The Hawkins jury used subjective standards in defining a perfect hand. Construction arbitrators have the benefit of objective definitions to guide their decision making process.

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