Bar Bulletin

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Maryland State Bar Association Newsletter — September 15, 2016

MSBA Updates Employment Law Deskbook, Criminal Pattern Jury Instructions

By Patrick Tandy

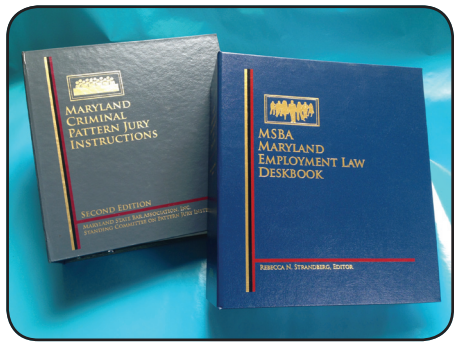
MSBA announces the publication of a new *2016 Replacement Volume* for its popular *Maryland Employment Law Deskbook*.

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 Discrimination; 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 Pamila 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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What's the Scoop on Binding Mediation?

By Kenneth A. Vogel

Binding Mediation? ADR comes in many flavors; the chocolate and vanilla of ADR are Mediation and Arbitration. In Mediation, the parties sit down with a trained mediator. The mediator engages the litigants in a conversation which, the parties hope, will result in a negotiated resolution of their dispute. In Arbitration, the arbitrator acts as a private judge. S/he hears evidence and decides for the parties how the dispute will end.

There are new flavors of ADR. This author penned a feature article entitled *Alternative ADR for Construction Disputes: A Litigator's Perspective*, MD Bar Journal, Volume XLV, No. 2, March/April 2012. In that article, one flavor discussed was Binding Mediation.

Binding Mediation means that the parties begin their session in a traditional mediation format. They meet. They discuss. They caucus. They negotiate. During the caucus sessions, the parties and the mediator discuss the strengths and weaknesses of their respective cases and their negotiation positions. By definition, caucus discussions are *ex parte*. A party in a mediation may reveal things to the mediator that they do not want the other side to know. They may tell the mediator things that they would not tell a judge. Even though the mediator acts as a neutral, the parties try to convince the mediator that their side has merits and that the other side's legal or factual positions are weak.

Assume that the parties are unable to settle their dispute. The mediation ends. The parties continue down the litigation track to trial or arbitration. However, the mediation does not have to end. What if the parties, perhaps suffering from litigation fatigue, develop trust and confidence in the mediator? They can decide to let the mediator resolve their case. Presumably the mediator has developed a rapport with the litigants. The mediator has become familiar with some of the facts of the dispute and perhaps even with the governing law. When the parties make the decision to switch to binding mediation, the mediator becomes the decision maker. S/he resolves the dispute. It is a one way street. Once a mediator becomes a decision maker, s/he should never go back to a peacemaker role.

Binding mediation is different from Med/Arb. Med/Arb leads to a formal arbitration process. It concludes with a formal arbitration award. The award is enforceable under the Maryland Arbitration Act, Md. Courts and Judicial Proceedings Code Ann. §3-202 *et seq*. Binding mediation is an enforceable contractual agreement, but it is not controlled by a statutory mechanism. Binding mediation is not limited by or enforceable under the Arbitration Act. For example, CJP §3-214 provides that the parties at an arbitration hearing have many of the same rights as litigants in a courtroom. On the other hand, binding mediation can be as informal as the parties wish. The parties can dream up their own flavors and make up their own rules. Whatever they want to do to resolve their dispute is fair game as long as they all agree.

The California Fourth District Court of Appeal considered an appeal of a $5 million decision entered in a binding mediation. In *Bowers v. Raymond J. Lucia*, 12 C.D.O.S. 5876 (2012), the parties set up their own process. They referred to it using phrases such as "mediation/binding baseball arbitration"; "mediation with a binding arbitration component" and "binding baseball arbitration." The mediator himself described it as a "Med/Arb, baseball high-low atmosphere." While the names used by the parties varied, the parties were clear as to the process. They agreed to first spend a full day in mediation attempting to resolve their dispute. If they could not reach an agreement, they submit their bottom line figures to the mediator. Each side puts forth a single amount - a demand or an offer. Liability was not in dispute. The parties each picked a figure ranging from a low of $100,000 to a high of $5 million. This is called bracketing. The mediator then makes the decision. The mediator has to pick one of the two figures which he feels most closely reflects the plaintiff's damages. By agreement the binding mediation decision would become a legally enforceable judgement in San Diego County California Superior Court. In theory, the parties' numbers would be tempered by reasonableness. If, hypothetically, one side put forth a $200,000 offer and the other side put forth a $2 million demand, and if the arbitrator felt that it was a $1 million case, the $200,000 offer would prevail because $200,000 is closer to $1 million than is the $2 million figure. On the other hand, had the demand been $1.2 million, the party tendering that figure would have received $1.2 million as it is closer to the arbitrator's $1 million valuation. In baseball arbitration, the arbitrator calls balls and strikes. There is no such thing as a compromise award. One side or the other gets exactly the amount that they proposed.

In *Bowers*, both parties took extreme positions in the binding mediation. One offered the minimum - $100,000. The other demanded the maximum - $5 million. The mediator-turned-decision maker selected the $5 million figure and issued his binding decision for

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$5 million. Naturally the party against whom the $5 million decision was entered appealed to the courts. There were multiple attacks on the process in the appeal, but the process was upheld. The mediator's decision became the final court judgment.

In another binding mediation case, cited in *Bowers*, CA Fourth District Justice David Sills opined about *Lindsay v. Lewandowski*, 139 Cal.App.4th 1618 (2006) that he could "think of nothing more self-contradictory than 'binding mediation.'" A concern is that the parties will not exhibit openness and candor if the mediator will at the end of a failed mediation determine the winner and the loser.

The parties in *Bowers*, so said the losing side, did not fully map out how they wanted the process to unfold. There was no evidentiary hearing. The mediator was instructed in the ADR agreement to decide the case at the conclusion of the mediation. Therefore, the mediator only had the information about the underlying dispute that the parties told him about during their caucuses. He did not hear any evidence. He saw no documents. He heard no witnesses. None of the formalities of a traditional arbitration hearing were afforded the parties. The mediator's knowledge of the case was limited to what the parties told him or withheld from him.

The *Bowers* trial court served up a victory to the winner of the baseball arbitration. The appellate court affirmed. The courts found that the parties were fully cognizant of what they were agreeing upon. There was mutual consent. The parties were clear and unambiguous in their written agreement creating their own recipe for an ADR process. The parties had only themselves to blame if they did not provide for an arbitration hearing with evidence and testimony at the conclusion of the mediation. The decision was binding and enforceable.

When litigants select their own flavor of ADR, they need to know the ingredients. Otherwise, the taste of the outcome might not be to their liking.

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