MSBA
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What's Inside

Scurti Named 2019-2020 President-Elect Nominee

The MSBA Board of Governors has named the Honorable Mark F. Scurti as the Association's President-Elect Nominee for the 2019-2020 bar year. Scurti tops a slate of nominees that includes Maryland State Delegate Erek L. Barron as Secretary-Elect and Kramon & Graham PA Principal and Maryland Bar Foundation President M. Natalie McSherry as Treasurer-Elect.

Scurti, an Associate Judge of the District Court of Baltimore City, has served as Treasurer since 2016. His past MSBA service includes the Board of Governors and Executive Committee, as well as the Committees on Audit and Budget & Finance. He has also actively participated in the Sections on Alternative DIspute Resolution, Consumer Bankruptcy, Delivery of Legal Services, and Family & Juvenile Law.

A Baltimore native, Scurti procured his J.D. from the University of Baltimore School of Law and was admitted to the Maryland Bar in 1991. He spent over a decade in solo and small firm practice before joining Pessin Katz Law, P.A., in 2007. There, Scurti focused his practice on family law, LGBTQ legal issues, mediation, corporate startups, estate planning, and bankruptcy before then-Governor Martin O'Malley appointed him to the bench in 2013.

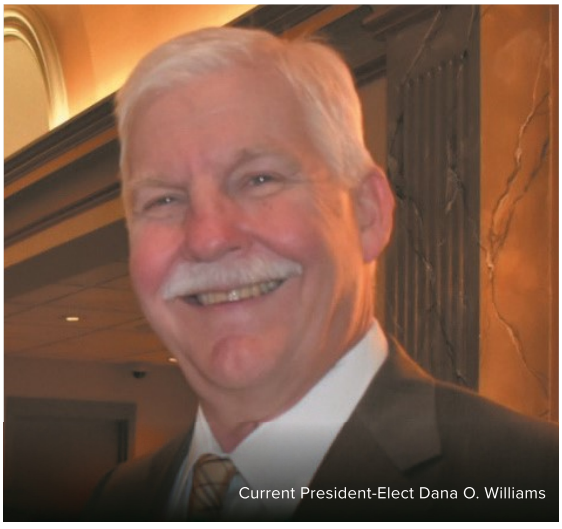
Scurti's extensive service to the legal profession has also included the Bar Association of Baltimore City, of which he served as President during the 2006-2007 bar year, and the Board of Directors of the Pro Bono Resource Center of Maryland. His professional affiliations also include, among others, the American Bar Association, the Federal Bar Association, the District of Columbia Bar, the Baltimore County Bar Association, the LGBTQ Bar Association of Maryland, the Maryland Trial Lawyers Association, and the Maryland Bar Foundation, which presented its Edward F. Shea Professionalism Award to Scurti in 2000. Maryland Volunteer Lawyers Service recognized Scurti in 2011 as its Volunteer of the Year, and again in 2017 with its Pro Bono Service Award.

Current President-Elect Dana O. Williams, a trial attorney and partner at the Towson law firm of Heisler, Williams & Lazzaro, LLC, will be installed as MSBA President on Saturday, June 15, 2019, at the MSBA Legal Summit & Annual Meeting in Ocean City, Maryland. Scurti is slated to succeed Williams as President for the 2020-2021 bar year.


2019-2020 President Elect Hon. Mark F. Scurti


Secretary-Elect Erek L. Barron


Treasurer-Elect M. Natalie McSherry


Current President-Elect Dana O. Williams

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Arbitrate the Bastard!
Waiving Arbitration Provisions

BY KENNETH A. VOGEL, ESQ.

Arbitrate the Bastard! Somehow, it just doesn't have a ferocious ring to it. How does one get into arbitration? How can one get out?

Construction contracts typically have arbitration provisions as the mandatory dispute resolution procedure. In a past article, this author discussed cases in which non-parties to an arbitration contract can be compelled to arbitrate. ("I Didn't Sign It!" MSBA Bar Bulletin, Nov. 2018). This article looks at how a party who signed a contract with an arbitration provision can nonetheless avoid mandatory arbitration.

Arbitration is a voluntary procedure. Parties agree to arbitration by contract. After a dispute arises, parties to a contract with an arbitration clause might decide that they would rather have the court resolve their dispute. The parties can simply agree to opt out of arbitration. They have a right to mutually and voluntarily waive the arbitration provision by amending their contract. There are a number of reasons why they might do this. Arbitration can be expensive. Large ADR providers such as the AAA and JAMS charge administrative fees which greatly exceed court filing fees. The arbitrators on their panel charge from $600 to $800 or more per hour, generally split between the parties. On the other hand, judges are paid by the taxpayers. These high arbitration fees exclude some matters such as home warranty arbitrations and the like, which are done by panels providing a reasonable pre-determined flat fee.

For a large construction case, the cost of arbitration is not much compared with the amount of money at stake. But for a small case, perhaps under $50,000 to $100,000, the cost of an arbitration proceeding can become disproportionate to the amount in dispute. Going to court might be much cheaper.

This is easier said than done. The arbitration clause was inserted in the contract by one or both sides for a reason. Parties might be hesitant to modify their contract once the dispute has arisen. Thus, high arbitration costs may very well act as a deterrent to a party filing for the arbitration. Ironically, this might even deter the very party who put the arbitration provision in its contract in the first place!

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Arbitrate the Bastard

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The arbitration requirement may be modified, limited, waived or abandoned by the conduct of the parties. If one side to a contract with an arbitration clause elects to file a lawsuit, the other side, the defendant, has a choice. If it prefers to arbitrate, the defendant can file a motion in court to stay the litigation and to compel arbitration. These motions are generally granted as arbitration agreements are enforceable. However, a defendant has the option to file his preliminary motions in court, to answer the complaint, to make his counterclaim and to proceed with the court case as if the contractual arbitration clause did not exist.

Assume that the court proceeding is not progressing in the way one side wishes it had because of unfavorable court rulings. Can an unhappy side in court then change its mind and demand that the litigation be stayed pending arbitration? Probably not! When addressing waiver, courts consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established. Prejudice is the largest factor. The courts will determine if the opposing party is procedurally and substantially harmed by enforcing the arbitration clause and whether the opposing party will incur excessive costs and delay by shifting to arbitration. Obviously the party that filed the court action waived arbitration. Some courts have held that the mere filing by a defendant of a Fed. R. Civ. P. 12(b) or MD Rule Civ. 2-322 motion to dismiss on legal or procedural grounds might constitute its waiver of arbitration.

Waiver may also be used as a contract defense. A party argues that the court should not enforce that contractual provision against it. Under the Federal Arbitration Act, the rights and liabilities of the parties are controlled by the state law of contracts. Waiver occurs when a party takes actions inconsistent with an intention to enforce the arbitration clause. The arbitration clause can also be attacked using general contract defenses, such as fraud, coercion, or lack of capacity.

A general contractor seeking to collect its fee against its customer needs to be careful about who it uses as its debt collector. The Maryland Court of Appeals in 2017 found that a debt collector waived the arbitration provision of a credit card contract by filing a small claims action in MD District Court. The debt buyer was unlicensed under the Maryland Collection Agency Licensing Act. The debtor collaterally attacked the District Court judgment against him. The debt purchaser's judgment was therefore invalidated due to its lack of a state license. The filing of the lawsuit also precluded it from seeking arbitration as an alternative method to collect on the debt. Put another way, you can't dip your foot in the pool without taking a swim.

In class action suits, the 11th Circuit found that the court has no jurisdiction over unnamed putative plaintiffs as to waiver. The defendant could not file a conditional arbitration motion against possible future adversaries as the court did not have jurisdiction over those potential members of the class.

Public policy or state law might permit a party to avoid an arbitration provision. For example, a proceeding which puts an unfairly high cost on a participant might not be enforceable. So might a clause which requires that arbitration take place out of state.

Home improvement contractors who sign construction agreements with elderly homeowners might find that a court will not enforce the arbitration provision in its agreement under the right set of circumstances. This can profoundly affect the cost of the litigation for a general contractor who might have otherwise planned on being self-represented in an arbitration forum. The company might then be compelled to engage an attorney to represent it in court. ●

Kenneth A. Vogel, Esq. practices business law and civil litigation 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. *He wishes to thank his wife for her patience and tireless reading of many edits to his articles.*