

BAR BULLETIN

MARYLAND STATE BAR ASSOCIATION NEWSLETTER

JUNE 15, 2018

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Truffer Poised to Become President



By Patrick Tandy

Baltimore County Circuit Court Judge Keith R. Truffer will be installed as the 125th President

of the Maryland State Bar Association (MSBA) on Saturday, June 16, 2018, during the general business meeting of the membership that will conclude the MSBA Legal Summit & Annual Meeting in Ocean City, Maryland.

Truffer leads a slate that includes President-Elect nominee and current Secretary Dana O. Williams, a trial attorney and partner in the Towson law firm of Heisler, Williams & Lazzaro, LLC; Deborah L. Potter, a partner in the Bowie firm of Potter Burnett Law, LLC, for Secretary; and current Treasurer Judge Mark F. Scurti.

After obtaining his juris doctorate from the University of Baltimore School of Law in 1982, Truffer

went to work for the Towson law firm of Royston, Mueller, McLean & Reid, LLP, where he spent more than three decades representing both plaintiffs and defendants in matters of complex civil litigation, until Governor Larry Hogan appointed him to the Baltimore County Circuit Court bench in February 2016.

Truffer's key priorities as President include MSBA's wellness initiatives, especially the Lawyer Assistance Program. Truffer will lay out his extended vision for the coming year when he is installed as President on June 16.

MSBA's elective officers consist of the President, President-Elect, Secretary, Treasurer, one or more

District Governors elected from each district, and three Young Lawyer Governors. The Board of Governors (BOG) consists of all of the Association's elective officers, as well as the Immediate Past President, three Section representatives, the State Delegate to the House of Delegates of the American Bar Association, and the Chair of the Young Lawyers Section.

The BOG has full power and authority over the affairs of the Association between its membership meetings and performs such other duties as specified in the MSBA Bylaws. For more information on the MSBA's Leadership, visit MSBA.org.

2018 - 2019 Officer Slate



Dana O. Williams,
President-Elect



Deborah L. Potter,
Secretary



Judge Mark F. Scurti,
Treasurer

MSBA's Volunteer and Executive Leadership Host Open Member Forum

MSBA's volunteer and executive leadership hosted an open member forum on May 15, 2018, at Bar Headquarters in Baltimore. MSBA President Sara H. Arthur and the Executive Committee fielded questions regarding fiscal responsibilities, communications with the general membership, governance, and more.



20th Annual Maryland Partners for Justice Conference

By Jaclyn Jones

The Maryland State Bar Association's pro bono arm, the Pro Bono Resource Center of Maryland (PBRC), hosted the 20th Annual Maryland Partners for Justice Conference at the Baltimore Convention Center on April 26th. This was the most well attended conference of the decade with over 275 lawyers, pro bono managers, judges and non-profit representatives gathered to discuss cutting edge issues around access to justice.

The morning plenary and afternoon luncheon speakers offered inspiring and informative remarks. PBRC honored Baltimore City Mayor Catherine Pugh for her initiatives in preventing homelessness, offering safe harbor to immigrants, and taking water only bills out of the tax sale process. Maryland's Public Defender, Paul DeWolfe, addressed the inequity in the bail system among other issues, and Chief Judge Mary Ellen Barbera, of the Maryland Court of Appeals, applauded the work of legal services lawyers and public interest advocates, who assist the underrepresented on a daily basis.



L to R – Blair Franklin, Ciera Dunlap (both from Youth Empowered Society), Hon. Cathy H. Serrette, Attorney General of MD, Brian Frosh.

This year, several members of the judiciary served as panelists and moderators, as well as guest speakers throughout the day. The panel *"Human Trafficking in the Courtroom: Important Insights for the Bench and the Bar"* featured Hon. Barbara Baer Waxman, District Court for Baltimore City, and Moderator Rebecca Reimer, Administrative Office of the Courts. *"Maximizing Resources to Reduce Barriers to Access to Justice,"* featured the Maryland Judicial Council's Court Access & Community Relations Committee (CACR), showcasing resources available for

the public, including self-help centers and phone/Live chats; panelists included Hon. Pamela J. White, Circuit Court of Baltimore City, CACR Chair; Hon. Mark F. Scurti, District Court for Baltimore City, CACR Self Represented Litigant Sub-Committee Chair, and, Pam Cardullo Ortiz, Access to Justice Department, Administrative Office of the Courts. The last panel that included a member of the judiciary was "Impact Sentencing on Children", which was moderated

See Justice Page 16



Taken by Patrick Tandy, MSBA

L to R: Chief Judge Mary Ellen Barbera of the MD Court of Appeals; Dave Pantzer, PBRC; MD Attorney General Brian Frosh (keynote speaker); Sharon E. Goldsmith, Executive Director, PBRC; MD Public Defender Paul De Wolfe; Stephanie Joseph, Office of the Public Defender; Blair Franklin, (guest speaker) Youth Empowered Society.

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The Litigation Section
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The award will be presented
at the Litigation Section’s
Annual Meeting in Ocean City
on June 15 at 8:00 a.m.

DATELINE

JUNE

21 You are invited to the **MSBA’s Animal Law Section** free mixer to honor service animals, mingle with past and present section members, and discuss the future of the section. The event will be held at Pratt Street Ale House, 206 West Pratt Street, Baltimore, MD from 6:00 p.m. - 9:00 p.m. This is a free event with a cash bar. For further details, contact Angela Munro at angela@msba.org

22 Homeless Persons Representation Project (HPRP) sponsors *Youth Homelessness: What Lawyers Need to Know* - a training that will provide an understanding of youth homelessness (local statistics, causes, experiences of youth), cultural competency for working with youth experiencing homelessness, and an overview of HPRP’s Homeless Youth Legal Network pro bono initiative. This training is intended for attorneys with previous experience in one of more of the following areas: family law, landlord-tenant,

name change, SSI, child welfare, criminal record expungement, civil rights, employment, or other civil legal practice. Scheduled from 1:00 p.m. - 4:00 p.m. at University of Baltimore School of Law, 1401 North Charles Street, Baltimore 21201. Register and learn more at <https://probonomd.org/event/youth>.

AUGUST

22-23 MSBA hosts a *CLE Institute* at University of Baltimore – Thumel Business Center, 11 West Mt. Royal Ave., Baltimore, MD 21201, where you can develop your skills and expand your brand. Do you want to deliver clear, compelling presentations at your next event or panel? The MSBA CLE Institute is designed to improve your speaking and presentation skills to engage and connect with your audience. **Apply by June 29!** Learn more and apply at <https://www.msba.org/product/msba-cle-institute>.

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JUNE

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Members should address their written ethics inquiries to Patricia Weaver, Chair, Ethics Committee, 4800 Hampden Lane, Suite 700, Bethesda, MD 20814, or call (301) 951-9360, or e-mail tweaver@paleyrothman.com. Opinions of the Ethics Committee are available online at www.msba.org. Please consult the Rules and MSBA Ethics Opinion Website before calling.

The McCammon Group

is pleased to announce our newest Neutral

Hon. Gerald Bruce Lee (Ret.)

Retired Judge, U.S. District Court, Eastern District of Virginia

The Honorable Gerald Bruce Lee (Ret.) admirably served for nineteen years on the bench of the U.S. District Court for the Eastern District of Virginia. Prior to his appointment to the federal judiciary, Judge Lee served for over six years as a judge for the Fairfax Circuit Court, and before that, he was a trial lawyer representing individuals and businesses in complex civil disputes. Throughout his illustrious career, Judge Lee served his community on various boards and committees, including the Board of Directors of the Metropolitan Washington Airports Authority, as Chairman of the Virginia Judicial Conference Judicial Education Committee, and as a member of the Virginia Circuit Court Judges Benchbook Committee. Judge Lee now brings his record of excellence and achievement to The McCammon Group to serve the mediation, arbitration, special master, and judge pro tempore needs of lawyers and litigants in Maryland, DC, and Virginia.



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Davis Receives 2018 MBF Curran Award for Public Service

By Patrick Tandy

The Maryland Bar Foundation honored the Hon. Andre M. Davis, Baltimore City Solicitor and former U.S. Circuit Judge of the U.S. Court of Appeals for the Fourth Circuit, with its 2018 J. Joseph Curran, Jr. Public Service Award during the MBF's annual spring Open Meeting and Curran Award Reception on May 3, 2018, at Cunningham's in Towson.

The nearly 50 attendees included the award's namesake and inaugural recipient, former Maryland Attorney General J. Joseph Curran. Established in 2007, the Curran Award recognizes government or public interest attorneys known for their selfless service to the public good and furthering the goals of better government and societal standards.

"What a wonderful thing it is to get an award for doing what you love, and what you would do

absolutely for free," said Davis. "It is just such an incredible blessing to be a lawyer; I know everybody in here knows that. All of us are seeking justice - in our own way, for our own clients, under often difficult circumstances - but that's what we're after."

Previous Curran Award recipients have included current Deputy U.S. Attorney General Rod Rosenstein and Howard County Solicitor Margaret Ann Nolan.

As part of MBF's rebranding efforts, MBF marketing committee chair Elizabeth S. Morris also used the occasion to unveil a brand-new MBF logo intended to modernize the Foundation's image and enable it to more effectively promote its mission of maintaining "the honor and integrity of the profession of law, to improve and facilitate the administration of justice, to promote the study and research of law, and the diffusion of knowledge," according to MBF President Natalie McSherry.



For more information, visit www.MarylandBarFoundation.org. View photos of the event online at <https://www.flickr.com/photos/marylandbar/albums/72157668573513978>.



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Marguerite E. Lanaux

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Matthew Schroll

Sharnae Smith

Mack Julio Berrios Swan

Bryan Upshur

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Kayla Williams

Maya Zegarra

PRO BONO Profile.....

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SHORT TERM VOLUNTEER OPPORTUNITIES FOR ATTORNEYS:



CONSUMER PROTECTION PROJECT

Volunteer attorneys are needed to provide brief, **limited scope** consultations and negotiate settlements on behalf of pro se defendants facing **debt collection lawsuits** in district court *No prior consumer law experience required*

Participating volunteers will have access to malpractice insurance, **FREE** online training, and consumer law mentors.

TO REGISTER for consumer law training, to volunteer, or for other questions contact Pro Bono Resource Center of Maryland's Consumer Protection Project Manager, **Sydney Dunning, Esq.**, at sdunning@probonomd.org.



TENANT VOLUNTEER LAWYER OF THE DAY PROGRAM

Pro Bono Resource Center of Maryland (PBRC)

Volunteer attorneys are needed to provide brief, **limited scope** consultations and negotiate settlements on behalf of pro se tenants in **tenant/landlord lawsuits** in district court - Tuesdays through Fridays *No prior tenant/landlord law experience required*

Participating volunteers will have access to malpractice insurance, **FREE** online training, and tenant/landlord law mentors.

TO REGISTER for rent court training, to volunteer, or for other questions contact **Dean Fleyzor, Esq.**, at dfleyzor@probonomd.org.

For other volunteer opportunities contact:
Annie Speedie -- aspeedie@probonomd.org, or visit
PROBONOMD.ORG/VOLUNTEER-OPPORTUNITIES

*Pro Bono Resource Center (PBRC) thanks you
for an inspiring, and successful 20th Annual
MARYLAND PARTNERS FOR JUSTICE CONFERENCE
We had record attendance this year with over
275 people partnering for justice.*

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Liens for Unpaid Wages: New Rules and Why They Matter

By Joseph Dudek and
Samantha Gowing

The prudent business owner or business attorney knows that Maryland takes its employment and wage laws seriously. Penalties for failure to pay lawful wages are steep and should be avoided. But even the cautious businessperson may not know of recent changes to Circuit Court procedures that increase the urgency and options when confronted with employee wage disputes. These new rules create an opportunity for corporate and litigation counsel to coordinate on business and litigation strategy in new ways.

Maryland established liens for unpaid wages in 2013, allowing an employee to obtain a lien against property of an employer for the value of unpaid wages. Md. Code, Lab. & Empl. § 3-1101 *et seq.* The employee must serve a notice on the employer with information regarding the unpaid wages. *Id.* at § 3-1102. Upon receiving the notice, the employer has 30 days within which to file a complaint disputing the lien. *Id.* at § 3-1103. If the employer fails to respond within 30 days, the lien will be established—and, if against real property, the employee may record the lien in the land records. *Id.* at § 3-1104.

The statute delegates substantive details, such as the specific content that must be included in the notice or complaint, to the Department of Labor, Licensing, and Regulation. *See* COMAR 09.12.39.01. Until recently, however, there existed little guidance on court procedure once the lien notice is served and employer disputes the notice. Can the employee file a response to the employer's complaint? Under what circumstances will an established lien be released? This January, the courts set new rules to answer these questions and others.

1. Notice Served Under Oath

Under the new court rules, an affidavit must accompany the employee's initial lien notice, certifying under oath that the employee has personal knowledge of the facts relating to the amount of

wages unpaid. Rule 15-1402. This oath requirement, easily missed by an attorney consulting only the statute and not the Rule, provides businesses a safeguard against unfounded wage theft claims. But because of the evidentiary value of the affidavit, businesses must take sworn notices especially seriously.

After proper notice, the employer has 30 days in which to file a complaint disputing the notice. This has not changed, but it is a critically important deadline.

2. Response to Complaint

The 2013 statute required the court to resolve a complaint within 45 days after the employer files. Lab. & Empl. § 3-1103. During that timeframe, the employee now has ten days after the complaint's filing to respond. Rule 15-1403(d). The employee's options are to (1) answer the complaint, (2) move to dismiss the complaint, or (3) withdraw the notice. *Id.* If the employee does not respond, the Court can still address

the merits. *Id.* The rules do not set a time limit on the employee's request for an evidentiary hearing, but regardless, a lot happens in a short amount of time. Both the business and the employee need to be ready to act quickly and decisively.

3. Costs and Attorneys' Fees

The new Rules include fee-shifting mechanisms, from which employer and employee alike have the chance to benefit. If the court orders that the lien will be established in favor of the employee, then it *must* award the employee attorneys' fees and court costs. Rule 15-1403(g)(1). The fee-shifting rule in favor of the employer is less generous. To award the employer attorneys' fees, the court must find that the lien notice was frivolous or made in bad faith. *Id.* at (2). If the court finds the claim unsubstantiated because of an innocent miscommunication, for example,

the employee would lose but the employer may not be awarded attorneys' fee and costs.

4. Lien Release

If the court orders that the lien is to be established, employers have a few options for getting the lien released, each of which has business and litigation consequences. First, the employee must release the lien if the employer pays the employee the full amount of the lien. Rule 15-1405(b). From a business perspective, this clears title to property and may help the business's creditworthiness. From a strategic perspective, this money may wind up funding the employee's further litigation efforts and increasing the business's headaches.

Second, the employer may file bond in the amount of the lien. *Id.* A business worried about its creditworthiness may prefer this option, because lenders may care more about property liens than court bonds when evaluating a

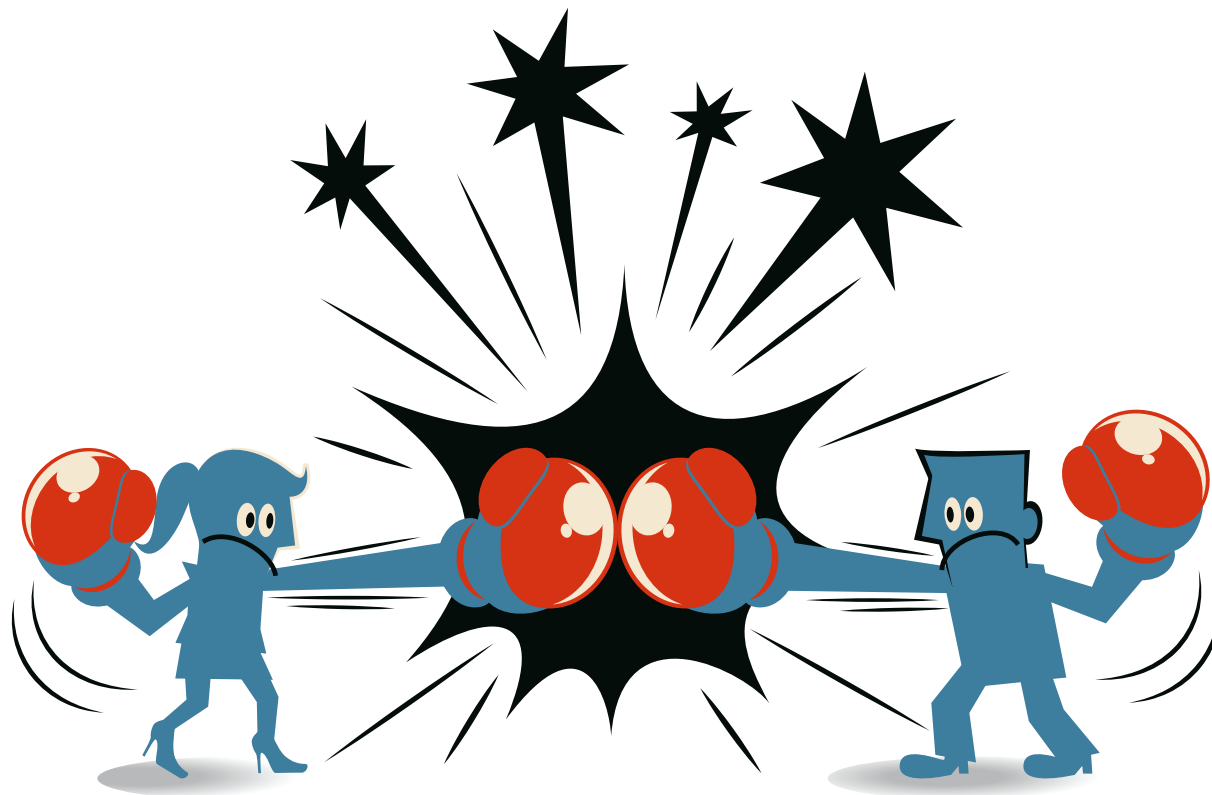
potential borrower. A business planning to sell property to fund business operations may also want to take advantage of this new option provided by the Rules. If the business has a relationship with a bond surety, filing bond may simply be the cheapest option. These are deeply business-oriented decisions that affect litigation strategy.

Importantly, employers are not the only ones who might benefit from the availability of a bond mechanism. An employee has a higher chance of collecting any judgment after trial if the employer/defendant remains solvent. Should the lien threaten business operations, both employer and employee may be worse off.

Joseph Dudek is an attorney at Gohn Hankey & Berlage LLP, whose practice focuses on civil litigation and civil appeals. Samantha Gowing is a prospective law student and paralegal at the firm.



Lost Profits Calculations: Common Battleground Issues Business Litigators Should Consider



By Zach Reichenbach

Have you ever been involved in litigation where lost profits was the remedy of damages, but the experts' lost profits calculations did not line up? For many of these cases, you probably remember the analyses differing so drastically that there was no way to reconcile the amounts. These types of cases can be highly contested, and the legal and expert fees are often high, since each damages expert can have dramatically different opinions. Your job as the litigator is to make sure your expert has the appropriate information to make their calculations with supportable data.

There are common battleground issues to be aware of in cases where the remedy of damages is lost profits. Two of the more common issues are the variable versus fixed cost determination, and the income and expense projections.

The calculation of lost profits is revenue minus variable costs, where fixed costs are not subtracted from revenue in the calculation. Experts are aware of the differences between variable and fixed costs, and also understand that this difference can have a significant impact on the lost

profits calculation. As an example, one expert could determine variable costs to be \$4,000,000, including salaries and benefit expenses, while the other expert does not include salary and benefit expenses and determines the variable costs to be \$2,000,000. There is now a \$2,000,000 difference between the two experts' calculations because they differ on how to classify salaries and benefits expense. The determination of who is right and who is wrong usually depends on whose analysis is more fully supported by data and research.

There are many sources of information that an expert can rely on when researching information on lost profits. One expert might rely on a certain set of financials, whereas another expert may have access to the company's controller, and be able to fully understand the differences in expenses. Having a mix of both of these sources, in addition to the experts' own experience and analysis, usually results in a supported opinion. But this scenario takes place in a perfect world, and having everything available in the record is usually not the case. This is why it is critical for counsel to work with the expert to get them the nec-

essary documentation, sometimes obtaining documentation through subpoena or deposition. Ultimately, counsel should communicate with the expert during the analysis and report writing stage to understand which areas of the expert's analysis are not fully supported, and what ways counsel can help to provide the necessary documentation.

revenue and variable costs, and this results in damage opinions that are very different from expert to expert. For instance, one specialist may project revenue to be \$15,000,000 a year, while another projects revenue at \$7,000,000 a year. The difference in revenue is significant, and most likely will result in a damage amount that varies to some degree.

the financial performance of competitors.

There can be many battleground issues in litigation cases where lost profits is the remedy of damages. Each case will be different, but the variable versus fixed cost issue and the revenue and expense projection issue are two of the most common. The bottom line is that the expert opinions need to be supported with facts and reasonable assumptions. These cases are commonly lost because one expert does not have the necessary facts to support their opinions. With millions of dollars potentially at stake, knowing what to do ahead of time can make a dramatic difference.

Expert opinions need to be supported with facts and reasonable assumptions.

The other common issue when the remedy of damages is lost profits, is determining the revenue and variable cost projections in the analysis. Companies that suffer lost profits may continue to lose profits well after the trial date, so it is important for the expert to consider future lost profits that the damaged company may incur. Each expert will have a different opinion on the projected

These differences in expert opinions can be the result of a variety of factors, but a common one is the documentation used to support the opinions. The typical documentation used to support these opinions may include projections prepared by the company, discussions with the company's controller/CFO, historical financial performance, market and economic trends and

As a principal in Ellin & Tucker's Forensic and Valuation Services Group, and member of the firm since 2008, Zach Reichenbach, CFA, CPA / ABV has extensive experience providing expert testimony in federal court and providing litigation services for domestic and international commercial damage and valuation engagements. He specializes in complex commercial damages, valuation, intellectual property, and forensic accounting assignments.

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Is pleased to announce that

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A Baltimore Magazine Super Lawyer [2013-2018], Mr. White brings to the firm extensive experience in the areas of medical negligence and personal injury litigation. Mr. White will be engaged in the practice of plaintiffs' personal injury litigation focusing on serious and wrongful death matters involving medical negligence, nursing home negligence, motor vehicle accidents and defective products.

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By Kenneth A. Vogel

Accidental Arbitration occurs when a party enters into a contract which has an arbitration provision hidden within the fine print. After a dispute arises, the unhappy customer or employee discovers that he has given up his right to a court trial without intending to do so.

Arbitration provisions are typically found in form contracts of commercial vendors. Credit card issuers; cell phone providers; banks; insurance companies; office supply stores; and a great many other companies with whom your client does business, often have mandatory arbitration clauses. This keeps the dominant party from being hauled into court in the large number of jurisdictions where they do business. Construction contracts often have arbitration provisions. They might be between the owner developers and the general contractors; between homeowners and home inspection companies; or between contractors and their subs. Arbitration provisions can limit, by contract, the risk of class action lawsuit, and it gives vendors control over how and where a customer dispute will be resolved. The company's legal fees are more predictable in resolving cases through arbitration. Arbitration also provides secrecy in the proceedings. This prevents the public and investors from learning about widespread problems which may be prevalent in the business practices or conduct of companies.

Equifax in 2017 had a massive data breach which potentially exposed personal information of 143 million people to hackers. Consumers were outraged when they discovered that Equifax's free credit monitoring contained an arbitration clause coupled with a waiver for class action suit status.

Arbitration provisions in contracts are upheld in the courts. If one party to a contract files a lawsuit, the other side can compel the other side to arbitrate.

The California Supreme Court ruled in 2005 that forcing people to arbitrate certain disputes was "unconscionable" and should not be enforced. However, the U.S. Supreme Court found that the Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 1, was to be liberally applied over state laws limiting

arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). The Supreme Court also upheld the arbitration provision in a DirecTV lawsuit over termination fees for customers who canceled its service. *DirecTV v. Imburgia*, 135 S.Ct. 1547, 191 L.Ed.2d 636 (2015). The Supreme Court upheld mandatory arbitration clauses in employment contracts. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012). In a case where the National Labor Relations Board split with the Trump administration (a change in policy from the Obama administration) the Supreme Court held that businesses can prohibit workers from creating a class and compelling individualized mandatory arbitration in disputes over pay and conditions in the workplace, a decision that affects an estimated 25 million non-unionized employees. *Epic Systems Corp. v. Lewis*, No. 16-285, decided May 21, 2018.

However, some courts limit mandatory arbitration. The US District Court for the District of New Jersey, applying New Jersey state law interpreting labor contracts, on May 18, 2018 denied Bob's Discount Furniture motion to stay class action litigation and to compel arbitration in an unpublished decision regarding the Plaintiff's status as an independent contractor and overtime pay. Bob's contended that the delivery men were independent contractors. The court first found that the court, and not the arbitrator, should decide arbitrability of the dispute if the agreement is ambiguous. The court then found that the claims themselves were not subject to arbitration in the employment contract. *Espinal v. Bob's Discount Furniture, LLC*, Case 2:17-cv-02854-JMV-JBC (NJ 2018).

Some members of Congress seek to reduce the scope of forced arbitration clauses. The Arbitration Fairness Act of 2017, H.R. 1374, seeks to prohibit arbitration agreements from being valid or enforceable in employment; consumer; antitrust; and civil rights disputes. The Arbitration Transparency Act of 2017, H.R. 832, would permit mandatory arbitration in matters involving consumer financial products and services, but would require that the proceedings be open to the public. The Safety Over Arbitration

Act of 2017, H.R. 542, would prohibit the use of arbitration to resolve claims alleging facts relevant to public health or safety unless all parties consent in writing after the controversy arises.

Lyft ride sharing's Terms of Service (Feb. 6, 2018 update) is 44 pages long and contains a binding arbitration provision with a waiver of class action eligibility. This applies to all of its customers who use their app to get a ride. Lyft permits arbitration to occur in whatever jurisdiction the driver provided services. This is different from some arbitration provision as to choice of venue. Some companies limit the arbitration to the location of the company's main office or some other place selected by the company. Public pressure sometimes convinces companies to relax their arbitration requirements. On May 15, 2018, under pressure from victims who were allegedly assaulted by Uber drivers, Uber removed the mandatory arbitration provision from its contract with their users (passengers) with respect to sexual harassment and assault allegations. Lyft followed Uber's lead the same day. Uber's new "driver partner agreement" still requires its drivers to agree to arbitration. Drivers who sign it are then excluded from participating in current or future class-action lawsuits.

In response to their students' demands, Yale Law School and 13 other top law schools are issuing a survey asking law firms to disclose whether or not they require summer associates to submit to forced arbitration and non-disclosure agreements. Several major law firms including Orrick, Herrington & Sutcliffe and Skadden, Arps, Slate, Meagher & Flom subsequently announced that they were dropping mandatory arbitration as a condition of employment.

Parties need to be diligent when signing contracts. They might find that they are agreeing to a binding dispute resolution provision which is not to their liking.

Kenneth A. Vogel, Esq. practices business law 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.

The Enforceability of Forum Selection Clauses in the Fourth Circuit— A Franchise Attorney's Perspective

By Jordan M. Halle

Franchise agreements, like most significant commercial agreements, often contain forum selection clauses that attempt to set the venue for litigation in a pre-negotiated jurisdiction. The enforceability of forum selection clauses is a frequent subject of litigation, particularly where the underlying agreement is between parties of unequal bargaining power. In *ServiceMaster of Fairfax, Inc. v. ServiceMaster Residential/Commercial Services, L.P.*, 2017 WL 3023342 (D. Md. July 17, 2017), the United States District Court for the District of Maryland opined on an important issue: whether a mandatory forum selection clause becomes permissive in light of a state-law addendum to a franchise agreement permitting a venue different from that set forth in the franchise agreement.

The current leading case on the

enforceability of a forum selection clause is the U.S. Supreme Court's decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*. The Court opined in that case that when an agreement contains a valid forum selection clause that is bargained for by the parties, if a plaintiff who brings a suit in a forum other than the one agreed upon bears the burden of establishing that any motion to transfer to the agreed upon forum should be denied.

However, the forum selection clause at issue in *Atlantic Marine* was "mandatory," i.e., it clearly required that litigation be brought only in the specified forum. Conversely, a "permissive" forum selection clause is one that merely permits jurisdiction in the selected forum without precluding it elsewhere. The Court did not address whether its analysis in *Atlantic Marine* applied equally to a "permissive" forum selection clause.

The District of Maryland resolved this issue in the negative in *ServiceMaster of Fairfax, Inc. v. ServiceMaster Residential/Commercial Services, L.P.* In that case, plaintiff ServiceMaster of Fairfax, Inc. (Franchisee) had entered into four franchise agreements with defendant ServiceMaster Residential/Commercial Services, L.P. (Franchisor). Each agreement contained a forum selection clause setting Memphis, Tennessee as the venue for all litigation. One of the franchise agreements, for a franchised location in Maryland, contained an addendum which provided that the Maryland Franchise Registration and Disclosure law allows a franchisee to bring a lawsuit in Maryland. Franchisee brought suit in Maryland state court, the Franchisor removed the case to the District of Maryland, and then moved to transfer the matter to the U.S. District Court for the Western District of Tennessee.

The court in *ServiceMaster*

observed that although the Fourth Circuit had yet to address whether *Atlantic Marine* applied to permissive forum selection clauses, the majority of post-*Atlantic Marine* cases have decided against extending *Atlantic Marine's* application to permissive forum selection clauses, and that it would do the same.

The *ServiceMaster* court, therefore, had to determine whether the forum selection clauses at issue were mandatory or permissive. Facially, said the court, the forum selection clauses were mandatory, because each stated that "all litigation . . . must and will be venued exclusively in Memphis, Tennessee." The court continued, however, that the franchise agreement contained other provisions that needed to be addressed in determining whether the forum selection clause was mandatory or permissive. First, the forum selection clause was qualified by a lead-in providing that "unless the law applied in Paragraph 25.1 of

this Agreement provides otherwise." Second, Paragraph 25.1 provided that the laws of Tennessee apply unless the state in which the franchisee was doing business requires that the law of *that* state applies. Third, and finally, the Maryland addendum to the franchise agreement stated that a franchisee may bring a lawsuit in Maryland for claims arising under the Maryland Franchise Law.

Nonetheless, the *ServiceMaster* court concluded that the forum selection clauses were mandatory, because the addendum provided only a permissive exception for a subcategory of claims arising under Maryland law, which does not alter the mandatory nature of the forum selection clause. The court observed that the language merely "allows" a franchisee to maintain a suit in Maryland, but does not require it to do so, and the forum selection clause otherwise precluded maintenance of an action in any other jurisdiction.

In deciding the motion to transfer, the District of Maryland relied solely on public interest considerations. Such factors included administrative difficulties of court congestion, local interest in having localized controversies decided at home, and the interest in having the trial of a diversity case in a forum that is at home with the law. The court did not find in favor of Franchisee with regard to any of these factors, and, therefore, ordered the transfer of the case to the U.S. District Court for the Western District of Tennessee.

For Franchisors, this case provides solace that forum selection clauses in valid franchise agreements will be enforced by their terms, despite an addendum to the contrary, so long as the addendum presents the sole exception to the forum selection clause for a specified class of claims.

Jordan M. Halle is an attorney at Whiteford, Taylor & Preston LLP, and extends her thanks to the Franchise and Distribution Law Committee for their help with this article.



High Court Strikes Down Part of Deportation Statute

By John F. Maclean

In a case of first impression, the U.S. Supreme Court held that part of a statute used to define whether a felony is a crime of violence for deportation of aliens was unconstitutionally void for vagueness.

The Court not only set precedent for limiting the government's ability to deport aliens convicted of felonies once living in the United States, but also set further precedent that the exacting standard in determining void for vagueness issues in criminal cases can be applied to civil cases if certain criteria is met.

In *Sessions v. Dimaya*, the defendant, a Philippines native, accrued two convictions for first-degree burglary while lawfully living in the United States. The government sought to deport him; both an Immigration judge and the Board of Immigration Appeals determined that first-degree burglary was a deportable crime of violence under 18 USC section 16B. The Ninth Circuit held that the statute was void for vagueness based upon

new Court case law. The Court accepted certiorari for the case.

The Court opinion, written by Justice Elena Kagan, began analysis by citing that the Immigration and Nationality Act (INA) under 8 USC section 1227(a)(2)A(iii) and (b)(1)(c) determined that aliens convicted of aggravated felonies after entering the United States were deportable without relief from cancellation of removal. Specific aggravated felonies under the INA were listed in 18 USC section 1101(a)(43), including a catch-all for crimes of violence, the term defined in 18 USC section 16, with imprisonment for at least for one year.

Analyzing 18 USC section 16, sections A & B respectively, the Court under Section A defined a crime of violence as an offense with the element of the use, attempted use, or threatened use of physical force against the person or property of another. Section B stated that the definition included any other felony that involved a substantial risk that physical force against the person or property of another could

be used in the course of committing it. Section B required analysis of whether an ordinary case of the offense posed the required risk, not that the specific elements of the crime addressed the required risk, as in section A.

Examining its 2015 decision in *Johnson v. U.S.*, in which the residual definition of a violent felony in the Armed Career Criminal Act (ACCA) under 18 U.S.C. section 924(e) was held to be unconstitutionally void for vagueness because it included acts that involved potential risk of physical injury to another, the Court applied the reasoning in *Johnson to Dimaya*.

The Court held that the standard that the prohibition against vagueness in criminal statutes requires fair notice of the conduct proscribed, and guarded against arbitrary or discriminatory law enforcement governing the actions of police officers, prosecutors, juries and judges, as established in the Court decisions *Kolender v. Lawson* in 1983, *Connally v. General Constr. Co.* in 1926, and *Papachristou v.*

Jacksonville in 1972.

The Court disregarded the government's argument that since Immigration court was civil, a lesser standard was required to determine if 18 U.S.C. A section 16 b was not void for vagueness. Citing their 1982 decision in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, their 2012 decision in *Arizona v. U.S.*, their 1951 decision in *Jordan v. De George*, their 2017 decision in *Jae Lee v. U.S.*, and their 2013 decision in *Chaidez v. U.S.*, the Court held it was established that deportation is a severe penalty which can be of a greater concern to a convicted alien than any potential jail sentence. Therefore, the criminal standard for determining void for vagueness should be used in immigration cases.

Using the analysis in *Johnson*, the Court found that 18 U.S.C. section 16B produced more unpredictability and arbitrariness than was constitutionally allowed when requiring the imagining of conduct that the crime involved in an ordinary case, and by not stating a specified level of risk to use in that

analysis. Section 16B was held void for vagueness.

The Court differentiated from the dissents and other government arguments by holding that possible alternate standards of using analysis based upon the defendant's particular conduct, or using a categorical approach to the crime of conviction, holding that those arguments don't address the unconstitutionality of ordinary-case analysis or the vague risk threshold.

In *Dimaya*, the Court established a basis for challenging the removal of aliens under section 16B. The Court set further precedent to applying the criminal standard for determining if a statute was void for vagueness to civil cases that rise to the severity of the effect of imposition of jail sentences, which can be applied to civil cases other than immigration.

John F. Maclean is an assistant public defender practicing in Frederick County. Mr. Maclean's views do not represent the views of the Maryland Office of the Public Defender.

The Federal Circuit Provides Patent Applicants With Another Argument for Contesting Patent-Ineligibility Rejections

By David S. Taylor

In the May 15, 2018 Maryland *Bar Bulletin*, I wrote about the U.S. District Court of Maryland's reliance on the U.S. Supreme Court's case of *Alice Corp. v. CLS Bank Int'l*, 134 S.Ct. 2347 (2014) ("Alice"), to hold that patent claims directed to networked electric vehicle charging stations were invalid under 35 U.S.C. § 101 as directed to a patent-ineligible abstract idea. *ChargePoint, Inc. v. SemaConnect, Inc.*, No. MJG-17-3717, 2018 WL 1471685 (D. Md. Mar. 23, 2018).

Since the *ChargePoint, Inc.*

decision, the U.S. Patent & Trademark Office ("USPTO") has issued a memorandum ("the Berkheimer memo") based on a recent decision of the U.S. Court of Appeals for the Federal Circuit, *Berkheimer v. HP Inc.*, 881 F.3d 1360, 125 USPQ2d 1649 (Fed. Cir. 2018), that swings the pendulum of patent eligibility with respect to abstract ideas back towards the patentee. The Berkheimer memo gives patent applicants and their attorneys new hope and ammunition for responding to Section 101 patent-ineligibility rejections raised by a patent examiner during examina-

tion of a software-based patent application at the USPTO.

As a refresher, in *Alice*, the Supreme Court fashioned a two-step test for determining whether an invention is directed to patent-eligible subject matter. First, the court determines whether a claim is directed to a patent ineligible concept, such as an abstract idea. If it is not, the claim contains patent-eligible subject matter. If it is, the second *Alice* step involves a determination of whether the elements of the claim, considered both individually and as an ordered combination, add enough to trans-

form the nature of the claim into a patent-eligible application. *Alice*, 134 S.Ct. at 2355; *Berkheimer*, 881 F.3d at 1366.

In *Berkheimer*, the Federal Circuit vacated, in part, a district court's grant of summary judgment holding certain claims of a patent invalid under 35 U.S.C. § 101. The Federal Circuit agreed with the district court's finding that the claims were directed to an abstract idea under the first step of *Alice*. *Id.* at 1367. The Federal Circuit summarized the second step of *Alice* as being satisfied by the accused infringer proving by "clear and convincing evidence"

that additional claim element(s) "involve more than performance of 'well-understood, routine, [and] conventional activities previously known to the industry.'" *Id.* at 1367-68 (citations omitted). According to the Federal Circuit, the district court's grant of summary judgment of patent invalidity under Section 101 as to claims 4-7 was inappropriate because there were underlying issues of fact as to whether claims 4-7 of the patent described well-understood, routine, and conventional activities. *Id.* at 1369. Significantly, the Federal

See Patent Page 16

By Andrea Terry

The MSBA Elder and Disability Law Section invites you to its annual update “Hot Topics in Elder Law”, where you’ll get an overview of new state and federal legislation including the new guardianship rules, a power of attorney update, ethical issues in elder law matters, and a Medicaid and Medicare update.

The CLE Department is also launching a CLE Institute scheduled for August 22-23 at the University of Baltimore that will enable potential CLE presenters to develop their teaching skills. Led by national trainer Steve Hughes, attendees will work on public speaking skills, adult learning styles, developing good powerpoints and more. For more information visit msba.org.

LIVE IN-PERSON & LIVE WEBCASTS

- JUNE 21, 2018. 2018 Hot

Topics in Elder Law. Columbia, MD. Registration is open. *webcast

- JUNE 25, 2018. *Pesky and Persistent Evidentiary Issues in Estate and Trust Litigation.* Baltimore, MD. Registration is open. *webcast

- AUGUST 9, 2018. *Family Practice Update.* Columbia, MD. Registration is open. *webcast

- SEPTEMBER 24-28, 2018. *40 Hour Mediation.* Baltimore, MD. Registration is open.

- OCTOBER 9, 2018. *Advanced Real Property Institute.* Columbia, MD. Registration opening soon.

- NOVEMBER 12-16, 2018. *Advanced Tax Institute.* Baltimore, MD. Registration opening soon.

NEW ONLINE, ON-DEMAND

- *Hot Tips in Family Law: What NOT to Do!*

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- *What is New in Handling Drinking and Driving Cases in Maryland*

- *2018 Employment Law Institute*

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- *Immigration Law Update: Creative Lawyering Strategies in Times of Uncertainty*

- *Advanced Estate Planning Institute*

VIDEO REPLAYS

- JUNE 19, 2018. *Adult Guardianships in Maryland—the New and Improved Process!* Baltimore, MD.

- JUNE 21, 2018. *Adult Guardianships in Maryland—the New and Improved Process!* Rockville, MD.

- JUNE 26, 2018. *Immigration Law Update: Creative Lawyering Strategies in Times of Uncertainty.* Baltimore, MD.

- JUNE 28, 2018. *Immigration Law Update: Creative Lawyering Strategies in Times of Uncertainty.* Rockville, MD.

- JULY 3, 2018. *2018 Hot*

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RECENT PUBLICATION UPDATES—NOW AVAILABLE

PLEADING CAUSES OF ACTION IN MARYLAND, SIXTH EDITION

Paul Mark Sandler and James K. Archibald

UP-TO-DATE—The *Sixth Edition* adds discussions of pertinent court decisions issued since the *Fifth Edition* by the Court of Appeals of Maryland, the Court of Special Appeals of Maryland, and the United States District Court for the District of Maryland, and is current as of December 31, 2017. While including discussions from prior editions, it picks up where the *Fifth Edition* left off. It examines and analyzes cases, statutes, treatises and other reference sources on Maryland law and pleading. Included is an updated chart of statutory provisions that provide for the award of attorney’s fees. It has been revised to address evolving requirements in various areas of practice, such as

claims against government entities under the Maryland Tort Claims Act and Local Government Tort Claims Act, claims for protective orders in domestic cases, claims for workers compensation benefits, and claims under the Maryland Human Rights Act and local county ordinances governing human rights.

GIBBER ON ESTATE ADMINISTRATION, SIXTH EDITION

Allan J. Gibber, Esq.

The *NEW 6th Edition* significantly expands the treatise with thorough references to new case law and statutory amendments through 2017. The revised text also reflects new rates and statutory amounts, and includes new and updated samples of all the official forms throughout the volume.

Gibber’s NEW 6th Edition is an indispensable resource for the bar, the bench, and the Registers of Wills of this state, and will guide you to being a better estate attorney.

See Publications Page 19

MSBA LAWYER ASSISTANCE PROGRAM WELLNESS TIPSHEET

Gambling: The Hidden Addiction

By Lisa Caplan

A gambling addiction, also known as compulsive gambling, has been referred to as the “silent” or “hidden” addiction because, unlike alcoholism and drug addiction, it does not present with as many outward signs, and there are no physical symptoms. Compulsive gambling can cause problems with your relationships, work, financial security, and can cause legal problems. Gambling is an obsession, and can consume a compulsive gambler, who cannot control the impulse to gamble, no matter how much it is affecting their life.

Facts about a Compulsive Gambler:

- You don’t need to gamble daily to have a problem. If your gambling is causing problems in your life, you have a problem.

- Financially bailing out a gambler just enables the gambler to continue gambling and not get help. If you financially bail out a gambler, they won’t feel the consequences of their behavior, and are not likely to seek help for their problem.
- Compulsive gamblers do not take responsibility for their behavior, and they often blame others for their own gambling.
- If you think you have a problem, you probably do.

You may have a gambling problem if you:

- are unable to stop thinking about gambling.
- are always chasing the win to be able to pay back your debts.
- are unable to walk away once you have started gambling.
- hide or lie about how much money you are gambling or how

often you gamble.

- gamble when you do not have the money. This is a red flag, and compulsive gamblers often resort to using credit cards, using money set aside for bills or family, or even stealing. Compulsive gamblers often continue to gamble more money to try to win back what has been lost.
- family and friends have expressed concern.
- are unable to stop regardless of the consequences.
- have trouble controlling the impulse to gamble.

If you need assistance, please contact the Lawyer Assistance Program for free, confidential assistance. Jim Quinn, Lawyer Assistance Director, (443) 703-3041, jim@msba.org or Lisa Caplan, LCSW-C, Lawyer Assistance Counselor, (443) 703-3042, lisa@msba.org. Toll free (800) 492-1964.

Lisa Caplan is a Licensed Certified Social Worker at the clinical level (LCSW-C), has over 20 years’ experience in her field, and extensive

experience providing wellness workshops and working with lawyers and judges in the areas of mental health, substance abuse and trauma.



Is Your Online Face Bringing in Clients or Sending Them Away?

By **Tatia L. Gordon-Troy**

Not long ago, most websites for law firms were cold and uninviting, existing solely for the purpose of having a “web” presence. But as in other professions, times change and competition heats up.

Today, your website is your “online face.” It is your firm’s introduction to the world. It could be the most important piece of your marketing strategy, but not if it fails to convert a visitor to a client.

With a critical eye, look over your website. Is it devoid of helpful, educational content? Is it riddled with typos or poor grammar? Is there an existing blog that hasn’t seen a post in six months?

Your website needs to provide useful tools to the types of clients

you seek.

The “Know, Like, and Trust” Factor

People don’t do business with firms, they do business with people. When potential clients land on your firm’s website, they aren’t looking for a synopsis of your firm’s practice areas and a cluster of awards they’ve never heard of. These people are looking to find an attorney who will understand and solve their problem. The law firm’s name doesn’t really matter; it is the relationship an attorney builds with the client that matters most. The website is simply how that all-important “know, like, and trust” relationship starts.

How to Improve Your Website

- Rewrite your bio to let your per-

sonality shine. Do not lead with the law school from which you graduated or whether you served on law review; this carries little to no weight with potential clients. Add your hobbies and interests; tell why you chose law practice as a profession. Be yourself.

- Display your competence in key areas by discussing the nuances of a particular case you handled. Mention accomplishments tied to client representation more prominently than accolades received from your peers. List relevant speaking engagements and published articles.
- Display more than just a head shot; using a professional photographer, be creative with how you present yourself. Consider a more casual look using an indi-

rect upper body shot or a photo of you interacting with a client. The objective is to show your personality in a way that will attract your ideal client.

- Provide educational content explaining the nuances of your practice. Define key terms, offer comparisons, or provide “know your rights” summaries. Use laymen’s terms and keep it simple and informative. Use Google’s free keyword tool for SEO research to find keywords and phrases to use throughout your articles; but avoid sounding stilted. Include links in your articles to internal pages on your website so visitors can find relevant content more easily.
- Include a call to action on every page. Use “Sign up for a free

...”; “Talk to an expert now ...”; “Schedule an appointment ...” Include an online form to collect a potential client’s information for immediate and ongoing outreach.

American society is saturated with attorneys, so it is imperative that you do whatever you can to stand out from the crowd.

Tatia L. Gordon-Troy, Esq. is a member of the Maryland Bar and helps attorneys publish independently, as a way to market themselves and their practices affordably, and with the same high-quality as traditional publishing. She runs her own firm, Ramses House Publishing LLC. Copyright ©2018. Ramses House Publishing LLC, www.publishingforlawyers.com.

Baltimore Community Foundation
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Ms. Alford-Cooper, Mr. Eisner and Mr. Lidinsky join the ranks of professional advisors who demonstrate a commitment to the community by working to encourage charitable giving across Baltimore. We thank them for their dedication to advancing philanthropy.

To learn more about the Professional Advisor Recognition Society visit www.bcf.org/pars.



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Health & Wellness Corner

Create Change for a Healthy and Happy Body

By Haley Shaw

Finding time to work out is hard - and coming up with a fitness routine can be even more challenging when you're crunched for time, and in a rush. Sound familiar? As a wellness coach, I understand that sometimes it can be quite challenging to select exercises, and then to find the time to perform them. To start, don't over think the workout. For example, each of us already lives a busy life. Focus on compound movements to target either upper body, lower body, or abdominals. Start simple. Squats, push-ups, lunges, jumping jacks are a few basic exercises to get you started. Set a timer for 60-seconds and see how many you can perform in that time. Squats and lunges target your lower body and your core stability; push-ups work upper body and core stability; and jumping jacks focus on increasing heart rate for cardiovascular fitness. Once you nail down these prime movements, increase your intensity and add weight, or combine these with one new exercise.

Download my infographic from msba.org/WorkoutMoves to discover five exercises. Keep reading to learn about these exercises you can do anywhere, anytime, and in as little as 60-seconds each. Sound too good to be true? Well, it isn't. Each exercise can serve as a starting point for any beginner, or can replace your routine on days you just can't squeeze in a full workout.

Squats, push-ups, planks, jumping jacks, and mountain climbers are the five exercises we will stick with to start creating change for a healthy and happy body.

Five facts about these exercises:

- They can be performed anywhere and anytime;
- Each exercise focuses on creating symmetry, balance, and core stability/strength;
- Doing the exercises creates consistency, which causes positive change in your physical and mental well being;



- You don't need equipment or much space to perform them;
- Each exercise can be modified to target beginners, and intensified for the advanced.

Create Change with these Suggestions

1. Next time you are at the office, or working at home, take a stand! Take your call or respond to emails standing up. Reason: you will burn 50 percent more calories, and "good cholesterol" levels decrease by 20 percent when standing. **Tip:** Start by taking calls in the standing position in intervals. Try standing for morning calls. Switch to sitting for afternoon calls when energy levels start to decrease.
2. Set your alarm 10 minutes early. This will allow you time to stretch, perform a quick walk, and/or make a healthy breakfast to kickstart your day.
3. Every 30 minutes, get up from your desk and stretch, grab a glass of water and then get back to work. You will come

back motivated, and ready to finish your work.

Adopting new, healthier habits may protect you from serious health problems like obesity or diabetes. Healthy eating and regular physical activity may also help you manage your weight and have more energy.

After a while, if you stick with these changes, they may become part of your daily routine.

Start with the five exercises outlined in the infographic found at msba.org/WorkoutMoves. When you are ready, increase repetitions, sets and/or weight to intensify your workout.

Remember, one small change a day will create lasting results.

Haley Shaw specializes in corporate wellness programs, and partners with corporations throughout the United States. Her mission is to help employees become more confident, and ready to take on anything in life. Contact Haley at Haley@AmpUpFitness.com with questions, comments, or ideas of what you would like to see in the Bar Bulletin's next Wellness Corner.



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The First Maryland Disability Trust, Inc., a Non-Profit organization.

JUSTICE...Page 2

by Hon. Cathy Serrette, Prince George's County Circuit Court.

The conference further offered ample opportunities for legal services providers and other advocates to converse and strategize on cutting edge issues. The "Death by a Thousand Cuts: How Wage Theft Keeps Families in Poverty" panel included Sulma Guzman of Public Justice Center, Celine McNicholas of Economic Policy Institute, Daniel A. Katz of Washington Lawyers' Committee for Civil Rights and Sally Dworak-Fisher of Public Justice Center. The "Justice for a Multicultural Maryland: Language Access Planning" panel was presented in Spanish with simultaneous English translation through headsets provided. Panelists included Spencer Larkin of PBRC, Tatiana Sandoval of Maryland Multicultural Youth Center, David Steib of Ayuda, and Maria Idrovo a LEP service seeker. There were also various teambuilding and fundraising-centered panels including the "Twist and Shout: We All Need A Little Teambuilding" panel coordinated by Amy Petkovsek of Maryland Legal Aid, featuring panelists Amanda Wahle of Maryland 4-H Program, and Bekah Carmichael of Family League of Maryland, all of whom led hands on activities outside the classroom to practice teambuilding; and "Everyone's a Fundraiser," with Deb Seltzer of Maryland Legal Services Corporation, Kristine Dunkerton of Community Law Center and Jennifer Pelton of Public Justice

Center. Participants discussed the progression of issues that legal services programs have focused on for systemic change as well, including the "Fair Housing Act: New Frontiers After 50 Years," "Home Buying Scams: The Evolution of the Foreclosure Crisis," and "Post (In)Equality: An Exploration of Legal Issues Impacting LGBTQ Marylanders."

Attorney General for Maryland, Brian Frosh, the keynote speaker, motivated the audience by quoting President John F. Kennedy stating "What we need in the United States is not violence or lawlessness but love, wisdom and compassion."

Guest speakers, Ciera Dunlap

and Blair Franklin from Youth Empowered Society (YES), further encouraged attorneys to "acknowledge racism in the legal system, examine the values of your organization and make sure it's informed by the people you serve," as well as offering perspective on the resilience of young people and how vital it is to empower young people through legal services.

PBRC receives significant funding from the Administrative Office of the Courts, the Maryland Legal Services Corporation, and the MSBA. Stay tuned for information on next year's Partners for Justice Conference. A request for panel topics will be opening up soon!



Mayor of Baltimore, Catherine Pugh, speaks during the morning plenary.

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Circuit stated that whether something is well-understood, routine, and conventional requires more than a mere showing that a claim limitation "was simply known in the prior art." *Id.*

The Berkheimer memo instructs patent examiners that they may conclude that an additional element or combination of elements represents well-understood, routine, conventional activity "only when the examiner can readily conclude that the element(s) is widely prevalent or in common use in the relevant industry." While finding the additional element(s) in a single patent or publication may be sufficient to support a novelty rejection under 35 U.S.C. § 102 or obviousness rejection under 35 U.S.C. § 103, such a finding alone is insufficient to support a Section 101 rejection. Instead, an examiner must support an *Alice* second step analysis of a Section 101 rejection with a showing of one or more of the following: (1) a citation to an express statement in the specification or admission by the applicant in the prosecution that demonstrates the well-understood, routine, conventional nature of the additional element(s); (2) a citation to one or more court decisions discussed in the Manual of Patent Examining Procedure (MPEP) as

noting the well-understood, routine, conventional nature of the additional element(s); (3) a citation to a publication that demonstrates the well-understood, routine, conventional nature of the additional element(s); and/or (4) official notice taken by the examiner of the well-understood, routine, conventional nature of the additional element(s). With respect to official notice (4), the applicant has the right to challenge the examiner's position, in which case the examiner must then provide one of the items (1) through (3).

The Berkheimer memo represents a significant change in patent examining procedures, that places a higher evidentiary burden on the examiner to show not only that claim elements are known, but that they are widely prevalent or in common use in the relevant art. This added burden on the examiner should improve applicants' outlook for successfully prosecuting software-based patent applications and patentees' chances of successfully enforcing their patents.

David Taylor is a partner with the law firm of Berenato & White, LLC in its Bethesda office. The firm concentrates its practice in the area of intellectual property.

Have a Young CSI Enthusiast at Home?

CLREP's Summer Law Academy is still accepting applications!

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2018 Leadership in Law Awards

MSBA teamed with The Daily Record to serve as Presenting Sponsor of the 2018 Leadership in Law Awards on May 17 at the BWI Hilton.

"We're very proud of all the honorees tonight, all of whom are part of the MSBA," said MSBA President Sara H. Arthur. Arthur, herself a past Leadership in Law honoree, told the crowd of more than 300 attendees that "I know how significant [the Award] is for lawyers and judges in Maryland."

"As the home for legal professionals in Maryland, [MSBA] serves member interests in every practice segment of a very diverse profession," said Daily Record Publisher Suzanne Fischer-Huettner. "They promote access to justice, service to the public, and respect for the rule of law."



Past Presidents Committee

MSBA President Sara H. Arthur joined nearly two dozen of her predecessors for a dinner meeting of the Past Presidents Committee on May 22, 2018, at Gunther & Co. in Baltimore. The Committee, chaired by Past President Judge Pamela J. Brown, convenes twice yearly to discuss issues of importance to the MSBA, such as strategic initiatives and the continued participation of Past Presidents in the ABA House of Delegates and the National Conference of Bar Presidents.



ET ALIA

M. Natalie McSherry has been selected a recipient of the Maryland Daily Record 2018 Leadership in Law Lifetime Achievement Award.



M. Natalie McSherry

Michael Joseck has joined Joseph Greenwald & Laake as an associate attorney to the firm's Estate and Trusts practice.



Kevin Kelehan

Kevin Kelehan of CarneyKelehan has received a Housing Legacy Award from Heritage Housing Partners.

Christina Hassan has joined Morris, Manning & Martin, LLP's Hospitality Practice Group as Partner.

Carrie Blackburn Riley and **Lisa D. Sheehan** of The Law office of Blackburn Riley, LLC have moved their office to Bosley Hall, 222 Courthouse Court, Suite 2F, Towson, Maryland 21204.

Michelle Marzullo has opened Law Office of Michelle J. Marzullo, LLC., concentrating primarily on acting as general counsel for small to mid-sized businesses, including formation, transactional work, contract analysis and defending employment actions. www.mjmlsolutions.com.



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Richard H. Melnick (left) and MSBA Treasurer Judge Mark F. Scurti embrace their sweet tooth on May 12 in Hershey, Pennsylvania.

St. Mary's County Bar Honors Volunteers

The St. Mary's County Bar Association honored the following members for volunteering their time and expertise at the St. Mary's Senior Centers in honor of

Law Day on May 1, 2018: Dan Armitage, Alycia Stack, Kathleen McClernan, Sam Wiest, Anjelica Harden, John Weiner and Marsha Williams. These volunteers spent

the day helping local seniors draft Advanced Medical Directives as a component of their comprehensive health plans.



Pictured from left to right: Retired Judge Karen Abrams congratulating the volunteers: Alycia Stack, Kathleen McClernan, Sam Wiest, Anjelica Harden, John Weiner, Marsha Williams; who were given proclamations by SMC Bar President Jaymi Sterling and SMC President-elect Kevin Hill. (award recipient not pictured: Daniel Armitage).

Louise Phipps Senft, Gary C. Norman, & Debra Hamilton invite you to join them at an opportunity for interesting networking at their next...

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Tips in Workers' Compensation. Baltimore, MD.

■ **JULY 5, 2018.** *2018 Hot Tips in Workers' Compensation.* Rockville, MD.

■ **JULY 17, 2018.** *Advanced Estate Planning Institute.* Baltimore, MD.

■ **JULY 19, 2018.** *Advanced Estate Planning Institute.* Rockville, MD.

■ **JULY 24, 2018.** *Fiduciary Litigation: Contested Wills, Trusts, Inter Vivos Transfers and Guardianships.* Baltimore, MD.

■ **JULY 26, 2018.** *Fiduciary Litigation: Contested Wills, Trusts, Inter Vivos Transfers and Guardianships.* Rockville, MD.

■ **JULY 30, 2018.** *2018 Hot Topics in Elder Law.* Baltimore, MD.

■ **AUGUST 2, 2018.** *2018 Hot Topics in Elder Law.* Rockville, MD.

■ **AUGUST 7, 2018.** *Pesky and Persistent Evidentiary Issues in Estate and Trust Litigation.* Baltimore, MD.

■ **AUGUST 9, 2018.** *Pesky and Persistent Evidentiary Issues in Estate and Trust Litigation.* Rockville, MD.

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