

# The Mentor

THE NEWSLETTER OF THE STATE BAR OF MICHIGAN'S  
MASTER LAWYERS SECTION



*"The voice of trust through experience."*

Summer 2019

## Message from the Chair

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Happy summer, Section Members.

In this issue of the *Mentor*, I wish to reach out to all current members and request your support to this valuable section of the Bar. The section will be discontinued as the Master Lawyers Section (MLS) at the end of this fiscal year, September 30, 2019.

If you have been following developments on the dissolution of the section via the *Mentor* publication, various posts and e-blasts, you will know that the current MLS Council is prepared to submit its request to the Board of Commissioners to organize a new voluntary section for senior lawyers. The current council is working toward the goal of having the new section fully operational by October 1, 2019. Please support this valuable section of the Bar as an important pipeline of information and dialogue to this very special demographic of the SBM that represents in excess of 19,000 members as the current MLS.

A successor MLS will be on the horizon with a different name. However, it will continue to address programming and activities of interest to its members that are relevant to the needs and interests of senior lawyers demographic. An e-blast regarding the status of dissolution was sent to all current members expressing the need to continue the vital work of this section and soliciting your support by joining the new section. Our current council appeals to you as current members to support this effort.



Kathleen Williams Newell, Chair

—Kathleen Williams Newell, Chair

2018-2019

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## News from the Editor

Summer is officially here. It says so on the calendar. And, it's heating up and the daylight hours are getting shorter, which makes the change of season official. There is also a change in the Master Lawyers Section. Without your help, it will cease to exist. The article by Charles Fleck gives the facts and tells you how you can help.

We have some great articles. David Barnes writes of his experience in Jackson Hole, Wyoming; James Johnson gives us an update on patent reform; and John P. Warren, Jr. writes of Michigan's approach to *force majeure* clauses in contracts.

I write of my experiences in Transnistria, a narrow strip of land between the Republic of Moldova and Ukraine that claims to be a country while still officially part of Moldova. Our chair, Kathleen Williams Newell, writes of our hopes and plans for the future.

We hope you enjoy this issue and please consider sending your name to Vince Romano as one who wants the section to continue.

—Roberta



Roberta M. Gubbins, Editor



# The Master Lawyers Section Needs You

By Charles Fleck



Charles Fleck

The State Bar of Michigan Board of Commissioners (BOC) has begun the implementation of the Strategic Plan which is an outgrowth of the work of the 21<sup>st</sup> Century Task Force. As part of that process, the BOC decided to discontinue the Master Lawyers Section and its SBM subsidy. Because the Master Lawyers Section Council believes that there is need for a section equipped to address the needs of and provide appropriate programming for the senior members of the SBM, an ad hoc committee to address the issue was created by Chair Kathleen Newell.

The committee met on March 6, 2019. The members developed the following statement of need for a Master Lawyers Section: The Master Lawyers Section intends to promote its members' interests by:

- Planning and carrying out programs, publications and activities of interest to its members;
- Coordinating programs with local, affiliate, and national bar associations;
- Protecting the public by providing resources on the ethical and practical issues related to transitioning from the practice of law including succession planning and the education and training of interim administrators;
- Serving as a resource for attorneys as they plan their retirement;
- Acting as mentors for the younger leadership of the SBM; and
- Expanding volunteer opportunities for its members to contribute to their community and its public interest.

The committee proposed that the new section adopt the bylaws recently redrafted with the addition of a clause providing for \$25.00 membership dues. In order for the new Master Lawyers Section to appear as an option for membership in the fall dues notice, we need 50

active members of the SBM who have signed statements that they will apply for membership in the new section.

Please support this valuable section of the Bar. If you haven't signed up yet, please send the following Statement of Interest in joining the Master Lawyers Section to Vince Romano at [varomano@comcast.net](mailto:varomano@comcast.net).

**My name is \_\_\_\_\_, my P number is \_\_\_\_\_, and I am a member in good standing of the SBM. Should the Board of Commissioners approve a request to form a voluntary section for senior lawyers, I will join that section and pay dues thereto in an amount not exceeding \$25 per year.**



# Spring Skiing and Gaping at Jackson Hole

By David Barnes

*Jackson Hole.* Two words that strike double-black-diamond terror in the hearts of many skiers—young and old alike. But they shouldn't. Sure, half of the runs are black diamonds, including one called Corbet's Couloir that's more akin to a cliff than a ski run. But the other 50 percent of the mountain's runs are blue and green, making for a welcome ski experience for any senior skier. I first skied Jackson Hole in the late '80's, with my new wife whose great aunt and uncle lived at the base of Rendezvous Mountain in Teton Village. At 72 years old, Uncle Warren took me on the old aerial tram, up 4,139 vertical feet to the 10,450-foot summit. The wind was howling, the air was thin, and the run was steep. "Ready?" grinned Uncle Warren. I swallowed hard, clicked into my bindings, squeezed the poles hard, and nodded like a rodeo cowboy on a wild bull waiting for the gate to open and release the snorting, bucking beast. I was 30 years old and quickly realized I was being out-skied by a 72-year-old. When we'd reached the bottom, I declared I wanted to be like Warren when I grew up.

Since then, we've had the privilege of visiting Jackson Hole a dozen times or so, including the last week of skiing (first week of April) for the last three years. This is thanks to my mother-in-law, who owns a fraction of the Teton Club, a beautiful and massive log structure near the base of the tram. Does this make me an expert

on spring skiing at the Hole? Not exactly. But I've learned enough to understand that skiing the Hole in early April makes for a different experience. Generally, the weather

is warm—sometimes too warm at the lower elevations; later in the week, the snow conditions at or near the bottom can be mashed potatoes. But the upper elevations typically provide good snow conditions.

In addition, there's a fun day. April 1 is Gaper Day at the Hole. What's Gaper Day? If you have to ask, you are one. I had to ask. Gaper Day is a chance for locals to poke fun at tourists by dressing up in kooky outfits on April Fools' Day. You'll see everyone from Uncle Sam, girls in bikinis and dudes in shorts and Hawaiian shirts with old film cameras hanging around their necks. And for some reason on this particular day—and only this day—every chairlift spouts a prominent sign reading, "Absolutely No Alcohol on Lifts." The signs didn't seem to be 100 percent effective....

Finally, the moose. Jackson Hole Mountain Resort is just south of the Grand Teton National Park, which in turn is just south of Yellowstone. Hence, wildlife is abundant in the area—including moose. We saw a number of them this year—some on the mountain and some right in Teton Village at the base of the mountain. Most people are wise enough to keep their distance from the moose. Some don't, either deliberately or by accident. My wife, for example, took a walk around the village one morning. As she turned a corner, she saw the back end of a large brown animal close by. As she



approached what she assumed was a cute stuffed moose, it slowly turned its big head and looked at her. Wide-eyed, my wife slowly backed away and then hot-footed it back around the corner, where she nearly ran into a Jackson Hole Mountain Resort employee. “It’s REAL!” stammered my wife. The employee gave her a dispassionate look. “Oh no,” thought my wife as she watched the employee amble away. “I’m a gaper...”

### About the Author

*David Barnes is an investment advisor in Bloomfield Hills, Michigan, a member of the SBM’s Master Lawyers Section and author of the book Blood, Sweat & Gears. The Story of the Gray Ghost and the Junkyard Firebird. He looks forward to skiing the summit at Jackson Hole when he is 72.*

*This article was originally published in SeniorsSkiing.com.*



## Patent Reform

By James A. Johnson ©2019

As of March 2019, there is a new sheriff in town and his name is Chief Judge Scott Boalick. The deputy chief judge is Jackie Bonilla. After a hearing or trial they have the power to invalidate your patent. Enter the Patent Trial and Appeal Board, a component of the U.S. Patent and Trademark Office based in Alexandria, Virginia.<sup>1</sup> Prior to joining the USPTO in 2007, the new chief was a patent attorney with the U. S. Navy. Boalick holds a law degree from Georgetown University Law Center and B.S.E & M.S.E in engineering from University of Pennsylvania. Deputy Chief Judge Bonilla graduated from the University of Virginia School of Law and holds a Ph.D in pharmacology from the University of Virginia and a B.A. in biochemistry from University of California at Berkeley.

The Patent Trial & Appeal Board is the newest “rocket docket” for intellectual property disputes. The America Invents Act of 2011 created the board and it opened its doors on September 16, 2012. The board rivals the District of Delaware and U.S. District Court for the Eastern District of Texas in patent filings. The board’s mandate is only to decide if patents are valid and not whether they have been infringed. It must

resolve cases within a year, and under extraordinary circumstances 18 months.

The first satellite office of the USPTO is in Detroit, Michigan named after Elijah J. McCoy.<sup>2</sup> He is an African-American inventor who was born in 1844 and died in Detroit in 1929. McCoy has 57 U.S. patents dealing with the lubrication of steam engines. His automatic lubricator was patented in 1872.

The USPTO in Detroit is located at 300 River Place South, Ste. 2900, Detroit, Michigan 48207. It serves the midwest region that includes Ohio, Michigan, Illinois, Indiana, Iowa, Kentucky, Wisconsin and Minnesota. The director is Damian Porcari, previously director of licensing and enforcement for Ford Global Technologies LLC in Dearborn, Michigan. The Midwest Regional Office hosts a variety of events such as workshops, training, interview rooms, and a bevy of other helpful information.<sup>3</sup>

The Detroit Public Library is a Patent & Trademark Resource Center. The library offers beginner orientation sessions on searching for patents and trademarks.

Continued on the next page

## Duties

The duties of the board are as follows:

1. On written appeal of an applicant, review adverse decisions of examiners upon applications for patents pursuant to section 134(a);
2. Review appeals of reexaminations pursuant to section 134(b);
3. Conduct derivation proceedings pursuant to section 135; and
4. Conduct inter partes reviews and post-grant reviews pursuant to chapters 31 and 32.<sup>4</sup>

The three types of post grant challenges (PGCs) available at PTAB are Inter Partes Review (IPR), Covered Business Method review (CBM), and Post-Grant Review (PGR). PGR can only be petitioned for in the first 9 months after a patent has been issued. IPR has to be filed within the first 12 months. CBM does not have a time limit.

## The Board

The chief administrative patent judge is Scott Boalick who took office on March, 14, 2019. There are approximately 200 judges hearing cases, all of whom are lawyers with a science or engineering degree. Each case is heard by a panel of three who are dressed in business suits and not robes. The dialogue with the lawyers is polite yet the questions asked by the judges go right to the heart of the dispute. The board does not automatically agree to hear every case filed. The petitioner in the initial filing must show that it is more likely than not to prevail. The three administrative law judges issue a decision on whether they will be taking the case and on what grounds of invalidity will be addressed in the proceeding. Trial will only be granted on key substantive issues that are likely to control the written decision. Redundancy in the prior art will not be considered. If you are not specific in stating why reliance in part is better and why reliance in whole is better in other instances you risk the ground of being dismissed for redundancy. Success is preparation, deep knowledge of the prior art and adherence to the rules. For example, 35 U.S.C. § 315 (b) (1) provides that an IPR may not be instituted if the petition is filed more than one year

after the date on which the petitioner was served with a complaint alleging infringement of the patent.

Lead counsel must be a registered patent attorney or on motion pro hac vice demonstrating that counsel is an experienced litigating attorney and has established familiarity with the subject matter at issue in the proceeding.<sup>5</sup>

In a game changing development, on May 22, 2017, in *TC Heartland LLC v Kraft Foods Group Brands LLC*, the U. S. Supreme Court reversed the federal circuit. It held that the word “resides” in the patent statute, 28 U.S.C. §1400(b), refers only to the State of Incorporation of the alleged infringer. For example, a domestic corporation not organized under Texas law and without a regular and established place of business in the Eastern District is no longer amenable to suit there. The ruling will bar many patent owners from filing cases in the Eastern District of Texas, a patent friendly jurisdiction where in 2018 only 15 percent of patent suits are now filed. The so-called non-practicing entities (NPEs) also known as patent trolls should be particularly impacted by this decision.

## Conclusion

The Patent Trial and Appeal Board conducts inter partes review (IPR) and post-grant review (PGR) of U.S. patents. The membership includes the director, deputy director, and commissioner for patents, commissioner for trademarks, and the administrative patent judges. Each appeal, derivation proceeding, post-grant review including covered business method patent review and inter partes review must be heard by at least three members of the board, who shall be designated by the director.

The advantage of PGCs is speed because the statute requires the proceeding must be completed in 12 months after institution, subject to a good cause extension to 18 months. The claim construction standard has been changed from the “broadest reasonable interpretation” to the *Phillips* standard. Another benefit is that the PTAB judges better understand patent issues.

In short, the Patent and Appeals Board corrects errors—patents that should not have been issued in the first place. There is no money if you win at the patent board. You simply get confirmation that your patent is

valid. If you lose at the patent board it is likely to hurt or destroy any parallel infringement case in district court. But, if the board upholds the patent, the inventor is in a much stronger position to prevail in winning money damages in district court.

### About the Author

**James A. Johnson** is a trial lawyer ranging from insurance coverage under the CGL policy to civil & criminal RICO. He is an active member of the Michigan, Massachusetts, Texas and Federal Court bars. Jim can be reached at [www.JamesAJohnsonEsq.com](http://www.JamesAJohnsonEsq.com)

### Endnotes

- 1 35 U.S.C. § 6(a)
- 2 PL 112-29 §24
- 3 <http://www.uspto.gov/about-us/uspto-locations/detroit-michigan>
- 4 [35 U.S.C. § 6\(b\)](#)
- 5 37 CFR 42.10(c)

## Force Majeure=Act of God

By John P. Warren, Jr.

“The lake, it is said, never gives up her dead when the skies of November turn gloomy”

Gordon Lightfoot—The Wreck of the Edmund Fitzgerald

### Explanation and Application

In 2015, the Michigan Court of Appeals heard the case of *Kyocera Corporation v. Hemlock Semiconductor, LLC*<sup>1</sup> in which *force majeure* was alleged as a defense. The Court stated, “This Court has observed that there is a paucity of cases interpreting *force majeure* clause in Michigan law. See *Erickson*,<sup>2</sup> 189 Mich. App at 686, and that remains the case today.” This is a good time to look at the meaning and effect of the *force majeure* clause in a contract or purchase order. It is in the boilerplate language probably reviewed quickly at the last minute with all those other standard clauses. Michigan recognizes parties have a right to include *force majeure* clauses in their contracts, but does not limit, restrict, or define that clause.

### Definition

The Michigan Court of Appeals opined, “Generally, the purpose of a *force majeure* clause is to relieve a party from penalties for breach of contract when circumstances beyond its control render its performance

untenable or impossible.” *Force majeure* is often referred to as an act of God, and this wording is usually included in a contract’s general terms and conditions. However, there are other terms, such as fire, strike, hurricanes, floods, equipment failure, governmental actions, or any other cause not listed, but which is beyond the reasonable control of the party whose performance is affected. It is instructive to note that the Texas Court of Appeals recently ruled in *TEC Olmos, LLC v. Conoco Phillips*<sup>3</sup> that not only must the event be beyond the reasonable control of the party, but was not foreseeable. Therefore, when reviewing the clause, attorneys must list events that might prevent performance even though out of your control. For example, a reduction in oil prices was considered foreseeable and the party should have included it in the *force majeure* clause. This is in line with the Michigan Court of Appeals statement that “*Force majeure* clauses are typically narrowly construed, such that the clause ‘will generally only excuse a party’s nonperformance if the event that caused the party’s nonperformance is specifically identified.’

*In re Cablevision Consumer Litigation* 864 F Supp 2d 258,264 (ED NY, 2012), citing *Reade v. Stoneybrook Realty, LLC*, 63 AD3d 433,434; 882 N.Y.S. 2d 8(2009); see also *Great Lakes Transmission Ltd Partnership v. Essar Steel Minnesota, LLC*, 871 F Supp 2d 843.854 (D Minn, 2012).”

### Requirements

*Force majeure* is a temporary excuse for failure to perform all or a part of a contract. This allotted time allows a reasonable time to repair damage and then promptly resume performance after the affected party's business is operational. Some clauses provide for termination of the contract if performance cannot be resumed within a reasonably specified period. Of course, there may be many other variations depending on local contextual variables and requirements.

### Steps

Based on a defined *force majeure* event, a party unable to perform must give notice within a specified number of days or defined, reasonable time period. Even before sending a formal notice, it is advisable to speak with the other party or send an email. It is also wise to have a template prepared in advance so that this requirement can be met in a timely fashion. The notice should identify the event, effect on the business, anticipated delay, and reference to the *force majeure* clause.

After the event concludes and you have a date to resume performance, attorneys' notice must be sent to the other party, so they can prepare to receive those goods or services. The other party may also have been forced to suspend performance or enter into other contracts to cover a party's inability to perform. They will also need to take appropriate actions to meet their contractual obligations.

### Conclusion

Now is an excellent time to review the *force majeure* clauses in your client's contracts and discuss any necessary changes with your client. It is also important to prepare a checklist of actions to be taken, as a plan for alternate suppliers if such an event does occur. While we

all hope never to send such a notice, living in Michigan means unexpected effects from weather, mechanical failures, delayed shipments, and other events can affect the ability of our clients to perform their contracts.

### About the Author



**John P. Warren, Jr.** was the senior legal counsel for Petrobras America Inc. and its subsidiaries. He was responsible for legal matters related to the United States subsidiary of Petrolio Brasileiro, one of the largest NYSE listed oil and gas companies in the world prior to establishing JP Warren Law, LLC. He advises energy companies on upstream, downstream, trading, commercial, corporate governance, compliance matters and all related activities. He is admitted in Florida, Michigan, New Jersey, New York, Texas, and England & Wales, a member of the Chartered Institute of Arbitrators and an international arbitrator with the American Arbitration Association International Centre for Dispute Resolution as well as the AAA Energy Panel.

### Endnotes

- 1 *Kyocera Corporation v. Hemlock Semiconductor, LLC*, Court of Appeals of Michigan, Docket No. 327974 decided December 3, 2015.
- 2 *Erickson v. Dart Oil & Gas Corp.*, 189 Mich App. 679,689;474 NW2d 150(1991).
- 3 *TEC Olmos, LLC v. Conoco Phillips*, No. 01-16-00579, 2018 WL 2437449 (Tex App.—Houston May 31, 2018).





# An American in Transnistria

By Roberta M. Gubbins, Esq.

Transnistria, or Transdnistria, officially the Pridnestrovian Moldavian Republic, is a primarily unrecognized state that split off from the Republic of Moldova after the dissolution of the USSR and mostly consists of a narrow strip of land between the river Dniester and the territory of Ukraine. It seeks to become annexed to Russia.

In August 2002, when I was part of a group of three American lawyers and our Moldovan assistants entering the region to complete a study of the Moldovan judiciary, the prime concern of the region's leaders was maintaining its status as a "country."

The government's intent was clear as we sat in our van in a long line of vehicles rumbling and spewing exhaust waiting to cross the guarded checkpoint to enter Transnistria. Our driver pulled out of the line at the behest of a young soldier in Russian camouflage gear with a Kalashnikov assault rifle slung across his chest. At his signal, we stopped.



Alena, my assistant, opened the door and handed him our passports and the required letters of invitation. Seeing something he questioned, he strode off. He returned with an older guard, who, holding our documents, peered into the van, looking at each of us in turn and then at the picture on our passports. He fired off some questions, and a heated discussion in Russian followed.

Finally, our documents were returned along with the bottom halves of several small official looking forms, our names, citizenship, and the date and time of entry written on each piece, which we had to present when we returned. Alena took the documents, closed the van door, the gate lifted, and we were on our way to Tiraspol, the region's capital.

Handing us our documents, she explained, "The guard said you Americans can only be in the region for three hours. If you stay any longer, you'll have to register with the police and that process can take hours. We'll have to hurry to meet the deadline."

We estimated our time in the region would be five or six hours.

After a brief silence, Sally, American lawyer and country director for Moldova, said, "I'm sure we'll be fine. Someone will give us permission to stay longer."

We Americans nodded in agreement, putting the issue aside. The Moldovans were silent.

When we arrived in Tiraspol, Sally suggested Alena and I take the American entrance forms and ask the judge we were interviewing to give us permission to extend our visit. We agreed.

Shortly, we were ushered into an elaborate office in a modern building where we met the judge. Unlike most judges in Transnistria and Moldova, who were in crumbling ancient buildings, he had a clean office, a large desk, bookcases with law books, and local art on the walls. He also had a computer, rarely seen in judges' chambers, which he proudly displayed.

During the interview, he explained the court system and, if we raised a question, he had a ready answer. He told us about his position and functions of the Constitutional Court, which didn't as yet exist since the law creating it needed the approval of the then vacationing parliament. As our discussion continued, the three-hour window passed. Alena explained our predicament.

"No problem," he said. "I can fix that."

He wrote a note on each paper form and signed his name and title, handing them back with a smile. I wondered about the value of the signature of a judge, appointed president of a court that didn't legally exist, in a self-proclaimed country not recognized by anyone, but let it go.

Alena and I met up with the others, announcing proudly that we had solved the time problem. Sally looked pleased. The others looked dubious.

We completed our last interview with the only lawyer in the country willing to speak with us and started back up the highway. We were hungry but the Moldovans, worried about the time problem in spite of the judge's intercession, urged us to keep going.

When we arrived at the border we were again in a long line and more than two hours beyond our allotted time. The same guard saw us. Frowning, he motioned

us forward. He opened the van door. Alena handed him our forms with the notes from the judge.

After reading the notes, he said, "Who is this judge? He has no power over me. What is the Constitutional Court? There is no such court." Thinking he was technically right, I watched him leave, walking with long purposeful strides seeking a higher authority. We waited silently.

Soon two more armed guards and an individual in civilian clothes appeared. A long discussion in Russian followed. I couldn't understand a word, but I felt the tension. The civilian did most of the talking. Alena spoke for us. When their voices lowered, his shoulders dropped and Alena turned and smiled at me, I figured we would be allowed to pass.

The soldiers walked away, and the civilian said, "Have a good trip."

The gate lifted and we were off. Spotting a small farm stall on the side of the road, we stopped.

After a repast of freshly baked Moldovan bread, recently harvested fruit and bottled water, eaten at a tiny table with a mixed lot of rickety chairs, we were refreshed and soon on our way back to Chisinau, our home base.

Sally was right. We acted and solved the problem, a normal response for us Americans. The Moldovans, who continually encounter bureaucratic entanglements, were surprised and relieved.



### Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death

[This handbook](#) was created for attorneys and their staffs to help you fulfill your ethical obligations to protect your clients' interests in the event of your death, disability, impairment, or incapacity. Although it is hard to think about events that could render you unable to continue practicing law, freak accidents, unexpected illness, and untimely death do occur. Following the guidelines in this handbook will help to protect your clients' interests and will help to make your practice a valuable asset that can be sold to benefit you or your estate. In addition, it will simplify the closure of your office—a step your family and colleagues will very much appreciate.