

October 2016

Lex | Brevis

WESTERN NEW ENGLAND UNIVERSITY SCHOOL OF LAW

Who do you protect?





AMARA RIDLEY
LEX BREVIS Editor-in-Chief

“I have learned over the years that when one’s mind is made up, this diminishes fear; knowing what must be done does away with fear.”

-Rosa Parks

Who do YOU protect?

This month we take a broad look at one of the core facets of this profession. Protection. Whether we litigate or practice transactional law, we have an interest to keep safe. There will be clients who need to know their rights and it will be our job to ensure they are not taken advantage of or misused.

We learn to put others before ourselves. Although it is rarely about what we, personally, need or want, the importance is in protecting the client’s goals and desires. In order to do this, we must have a desire to serve others, to protect another entity.

This month we see protection as a tool to not only help an individual client but larger populations and causes. We take a look at protecting through activism and water rights, what it takes to protect clients in sports and entertainment law, protecting patents and intellectual property, end of life issues, and family and probate clients who may not otherwise have a voice.

I hope you enjoy this month’s issue and it leaves you inspired to keep on this journey.

With Warm Regards,

Amara Ridley

Editor-in-Chief

Lex|Brevis

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We, at Lex Brevis, are always looking for ways to improve. We would love feedback to better serve our law school community. Enjoy the issue.

Email Amara at LexBrevis@gmail.com

Protecting Water and Culture

Native American activism and the Dakota Access Pipeline



by **AMARA RIDLEY**
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“You can’t drink oil! Keep it in the ground!” echo protesters’ vocal demands to keep the Dakota Access Pipeline from being built in close proximity to the Missouri River and the Standing Rock Sioux tribal reservation. Much of the pipeline has already initiated construction, but that hasn’t stopped the self-described ‘water protectors’ from advocating for keeping the pipeline from further construction. The primary concern is what damage could come from a leaked or burst oil pipeline.

The pipeline route spans approximately 1,172 miles and if completed would transport approximately 470,000 (with a maximum capacity of 570,000) barrels of crude oil from the Bakken region of North Dakota



through South Dakota, Iowa and Illinois.¹

Since April of 2016, advocates for environmental safety, Native American tribal sovereignty, and allies have held camp at the Standing Rock Sioux tribal encampment protesting the construction. Largely made up of Indigenous people, the mass protest has become part of a larger global movement for

indigenous rights and an effort to combat global warming, a cause in which Indigenous people have been on the forefront of combating. Tribes from across the country and even international indigenous groups have come together in solidarity with the Standing Rock Sioux Tribe to oppose continued construction of the pipeline.²

¹ www.daplpipelinefacts.com

² <http://standingrock.org/news/call-to-action-update>

The principal argument is that the pipeline's construction poses an environmental hazard if the pipeline were to rupture. Additional issues relate to tribal sovereignty, religious freedom, environmental impact of an oil spill and possible violations of the UN Declaration of Rights of Indigenous People, to be covered in more depth at a later time.

SO WHAT IS THE STANDING ROCK SIOUX TRIBE ASKING FOR?

The tribe issued a media statement on September 23, 2016 in response to the federal government's invitation to a "government-to-government consultation" scheduled for October 11, 2016. The meeting invites tribes, but only those that are federally recognized, for a formal consultation regarding future tribal input when it comes to infrastructure projects.³ At present, the tribe is calling for construction of the pipeline to halt until a full Environmental Impact Statement (EIS) can be conducted by the U.S. Army Corps of Engineers.

WHAT IS AN ENVIRONMENTAL IMPACT STATEMENT?

According to the Environmental Protection Agency's website, "Federal agencies prepare an Environmental Impact Statement (EIS) if a proposed major federal action is determined to significantly affect the quality of the human environment."⁴

An Environmental Impact Statement is a process that would take more than two months and multiple stages. *Id.* Under the Environmental Protection Agency standards, and EIS consists of drafting a Notice of Intent to the public followed by a review and comment period by the public for at least 45 days. *Id.* An EIS is then published in response to substantive comments followed by a mandatory 30-day wait period before the agency decides what action to take. *Id.*

Continued p. 10

"The Obama Administration's call for national reform on this issue is a historic moment. We welcome the Administration's invitation to all tribes to consult on the process for decision-making on infrastructure projects. The Standing Rock Sioux Tribe are fighting for our lives, our people and our sacred places because of a failed process for approval of the Dakota Access Pipeline. The U.S. Army Corps of Engineers did not hold meaningful consultation with our Tribe before approving construction of this pipeline. They did not conduct a survey of cultural resources. They have not conducted a full Environmental Impact Statement (EIS).

We have already seen the damage caused by a lack of consultation. The ancient burial sites where our Lakota and Dakota ancestors were laid to rest have been destroyed. The desecration of family graves is something that most people could never imagine.

The Army Corps must conduct a full EIS. Our water, our resources and our lives are at risk because of this pipeline. Our sacred places that we have lost can never be replaced. The Army Corps and all federal agencies have a responsibility to our Tribe, and all tribes, to honor the treaties. This invitation is a good start but the government has a lot more to do to permanently protect the millions of people who rely on the Missouri River for water and who are put at serious risk because of this pipeline. They can start by stopping construction until the EIS is complete."

-Standing Rock Sioux Media Statement on September 23, 2016

³ *Standing Rock Sioux Tribe Responds To Consultation*, (2016), <http://Standingrock.Org>.

⁴ <https://www.epa.gov/nepa/national-environmental-policy-act-review-process#EIS>

Professor Sudha Setty



by **Marketia Wright**
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**What's your favorite thing about the law?
Least favorite?**

At its best, I see the law as a reflection of human efforts to organize society and decide disputes in a way that is just and fair, and in a way that reflects our better values as people. Perhaps my least favorite aspect of the law is seeing the failure of those efforts to come to fruition. It's constantly a source of both frustration and hope.

Did you always want to go to law school? If not, what made you want to go to law school?

I started thinking about the possibility of becoming a lawyer in 7th or 8th grade. In middle school, I participated in my school's debate team, and in high school I participated on the mock trial team, and just loved both experiences. I thought about other possible career paths throughout college, but nothing interested me as much as becoming a lawyer.



What did you enjoy most about law school? Least?

My favorite academic experience in law school was participating in a mediation clinic. I thoroughly enjoyed the training, as well as the challenge and reward of helping people entrenched in landlord-tenant cases and small claims court cases to resolve their disputes. I also gained skills from that clinic that have served me well in all types of legal work, as well as in my professional life in general.

My least favorite part of law school was taking exams. Isn't that the case for everyone? In particular, my first semester in law school, our exams were scheduled for early January, meaning that everyone was stressed and studying throughout the December break. It was terrible.

If you had to do it all again, would you?

Absolutely.

As a law professor, you are now where your professors used to be, what is one thing that is done in law schools now, that you wish was done when you were in law school?

I really like the fact that our faculty is committed to a student-centered environment. I had a few professors with that attitude in law school, but I would have really appreciated it if that approach were more widespread.

What do you like most about teaching? Least?

Hands down, working with students is the best part of this job. My least favorite part is probably the length of faculty meetings!

My mother has been a nurse for 38 years and when she watches a medical show of any kind, she will often critique the show about its "realness" factor. Do you find yourself doing the same with legal shows?

All the time. It's gotten to the point where I can't watch most legal shows because I find myself shouting at the screen about how painfully unrealistic they are.

Tell us something we would never be able to guess about you? What is your guilty pleasure?

Would people be able to guess that I am a huge fan of James Bond movies? I've watched my favorite ones many, many times.

Tell us about your first experience in court.

My first trial was as counsel to a pro bono client—a prisoner alleged that prison guards had physically abused him. It was a four-day trial that required months of intense preparation, and it was both nerve-wracking and exhilarating. I was extremely lucky to have a kind judge who offered guidance throughout the trial. Two moments were particularly memorable. The first was conducting a really effective cross-examination in which I was able to impeach a witness on a crucial point with dramatic video evidence (the jury actually gasped when they saw the video). The second was when I concluded a direct examination and turned around to return to the counsel table, only to see various family members of mine in the gallery, waving to me and giving me the thumbs up. I think the judge got a good laugh from that.

Color of Law

Roundtable Discussion Series



Maurice Powe '01

Career Path: General Practitioner

**Wednesday
October 19, 2016
12:00 noon**

Blake Law Center Faculty Lounge

**Please join us for this
inspiring speaker.**

Free and Open to the Public

Lunch will be served.

Seating is limited.

**Reservations required by
contacting Professor
Bridgette Baldwin at**

baldwinwneclaw@hotmail.com.

Attorney Maurice Powe '01 received his bachelor's degrees from the University of Massachusetts in both Political Science and Social Thought and Political Economy. He is a 2001 graduate of the Western New England University School of Law and was a member of the Western Massachusetts Legal Services Clinic.

Attorney Powe has his own practice, which includes criminal defense, police misconduct, civil rights claims, and insurance coverage for first and third party claimants. He has represented individuals and businesses in corporate and real estate transactions, and practices estate planning and general litigation.

Currently, Attorney Powe serves as Risk Manager of the Children International Summer Village (CISV) Chapter of Greater Springfield, Secretary of the Brethren Community Foundation, Chairperson of the Springfield NAACP Legal redress committee, and Director for the Hampden County Lawyers for Justice, and is on the Board of Directors of the Urban League of Springfield.



Gender & Incarceration Symposium

An interdisciplinary discussion related to contemporary issues facing incarcerated individuals.

October 14, 2016

Light refreshments will be served at 11:00 AM.

Discussions will begin at 12:00 PM.

Dinner will be served at 6:00 PM.

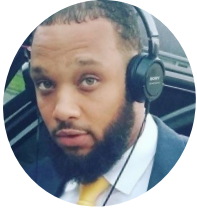
Location: Western New England University School of Law Commons

The *Review* is proud to host Prof. Brenda Smith, Prof. Gabriel Arkles, Rachel Roth, Carol Strickman, Dr. Terry Kupers, and Prof. Jen Manion as featured speakers.

This event is free and open to the public. Please visit our Facebook page for additional and updated information.

Narrowing the playing field

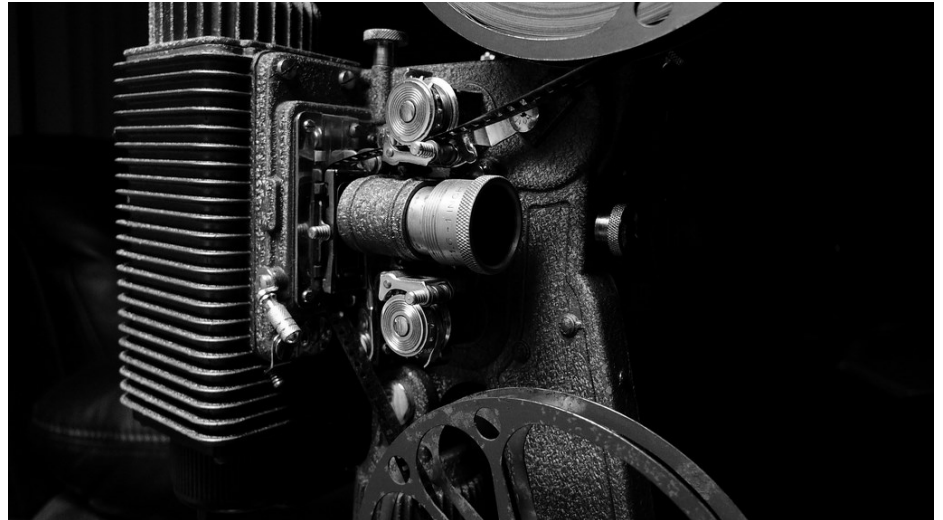
Sports and Entertainment Law



by **KEDAR ISMAIL**
LEX BREVIS Staff Writer
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So you're thinking of becoming a sports and entertainment lawyer? Are you sure this is what you really want to get into? When most people hear sports and entertainment law, they tend to imagine a cushy life of rubbing elbows with high-profile stars, access to the finest skyboxes, and whatever perks associated with these respective industries the mind can conjure. For some attorneys that practice in these arenas, your imagination couldn't be any more precise. However, the sobering truth is sports and entertainment law have substantive components that are as far away from *Ballers* as *SVU* is from general forensics.

In many instances, sports and entertainment law intersect each other rather frequently. The structure and "engine" that essentially make these indus-



tries run as smooth as conveyed to the public may never cross the mind of the average fan. Pertinent issues such as branding, arena leasing, contract structure and fair use are just a small window into these respective industries. Americans spend billions of dollars a year on sports and entertainment, ranging from live events such as games and concerts, to novelty items and applications. These ventures are governed by contracts that require the types

of remedies law provides should any obligations be left unfulfilled. For example, when a league amends or institutes a new collective bargaining agreement, or there is some discrepancy as to the property rights of an artist/company, sports and entertainment lawyers are using their skills and knowledge to craft accurate results. Think about your favorite team jacket or jersey; who do you think negotiated the rights to use the logo? Exactly.

IN-HOUSE

Lawyers that choose to practice sports and/or entertainment law may land the coveted “in house” position for companies and organizations. In-house counsel are hired by a corporation's law department to handle a range of legal issues affecting the company, among them employment, policy, tax, and regulatory matters. They are responsible for the day-to-day operation of their organization with tasks ranging from insurance matters to venue acquisition and negotiation. These lawyers' roles are more managerial based; they are responsible for being the business “overseers” for their organization.

AGENT v. LAWYER

It is imperative to note the difference between a lawyer and an agent. Agents focus exclusively on the talent itself. Due to the length and complexity of contracts, many agents are lawyers or have a background in contract law. Agents are expected to be competent in an array of business matters, and are also expected to be experts in applying these concepts within their industry. In agency, excellent communication and negotiation skills are key elements to successful representation. Agents must be highly motivated, willing to work long hours, and capable of multitasking. It is very common for agents to be in negotiations on behalf of several clients at one time. Issues such as contract negotiation, marketing, and public relations are a few of the responsibilities that fall into the purview of an agent. With this great responsibility, there are many rules and ethics that must be followed. Although agency in the entertainment field is “fair game” so to speak, there are much more stringent rules in am-

ateur and professional sports. Unwitting mistakes or conscious efforts to gain an upper hand may cost your client dearly (e.g., North Carolina Athletic Department Scandal, SMU Football).

While many lawyers wear both hats, lawyers and agents have different roles. Unlike agents, entertainment and sport lawyers have different obligations and duties to their clients. Additionally, as a sports and entertainment lawyer, it is vital to remain abreast of the ever changing rules and ethical guidelines. For instance, laws have changed

that allow high school baseball players to employ agents; however, a lawyer may not be present at negotiations. It is for these, and similar reasons that knowledge of the most relevant laws are key to compliance for your client.

If it's the glitz and glamour you seek, ultimately be prepared to shift your focus into agency, or being one hell of a character in the courtroom.

“If it's the glitz and glamour you seek, ultimately be prepared to shift your focus into agency, or being one hell of a character in the courtroom.”

WHAT IS ENTERTAINMENT LAW?

Entertainment lawyers provide a unique and diverse set of legal services for artists, employees, companies and individuals involved in all areas of the entertainment industry, including film, radio, television, music, publishing, theater, and multimedia entertainment like your favorite video game. As an entertainment lawyer you may find yourself handling matters such as contracts for minors, sampling rights, negotiating for television time slots, and a host of other tasks relative to the industry.

The principal aspects of Entertainment Law generally overlap with the conventional field of intellectual property law. Entertainment law will also involve employment law, labor law, immigration, the First Amendment, securities law, bankruptcy law, security interests, agency regulation, trademarks, copyrights, the right of publicity, right of privacy, clearance of rights, product placement, and advertising. What this ultimately means is that lawyers need to be experts in a large number of legal categories as well as to have extensive knowledge of how a certain sector of the entertainment industry works.

Similar to torts and other substantive legal concepts, entertainment law sets forth various tests to arrive at predictable and equitable legal conclusions. For example, courts employ a “transformative test” that balances the First Amendment with the right of publicity for video games, imaging, and other marketing models. The intricacy of such a test requires as much attention to detail as the “long arm statute”. While the work may be more entertaining or familiar than most other areas of law, do not be misled, these areas of law are no easier to grasp or apply because of their “lighter” nature.

WHAT IS SPORTS LAW?

Sports Law is a combination of various areas of law including, but not limited to, contracts, labor law, anti-trust, business associations, trademark, and tax law. Its fabric is comprised of many central tenants from these respective fields. A sports lawyer is an attorney who handles legal matters pertaining to amateur and professional athletes and sports organizations. Lawyers that choose this route will represent athletes, universities, national

& international federations, international athletes, and of course the “in house” position amongst others. As you can imagine contract drafting and negotiating are major responsibilities of this profession that require expert knowledge on the lawyer’s part. Setting up charities and foundations, as well as criminal defense matters fall within the purview of a sport lawyer.

As a fan of sports myself, I quickly recognized sports law isn’t just the seemingly flawless presentations

As a fan of sports myself, I quickly recognized sports law isn’t just the seemingly flawless presentations on the weekends (and Mondays) we’ve come to expect from our favorite leagues.

on the weekends (and Mondays) we’ve come to expect from our favorite leagues. For instance, anti-trust is an integral part of sport and interleague cohesion that has absolutely

nothing to do with the actual sport itself. However, in its absence, there would be no drafts, trades, and players would potentially have to stay with the team that signs them for the duration of their careers. The complexities involved are no walk in the park. These and other areas of law lend themselves to the structure of sports and help them carry on in the most cohesive manner possible.

There are major implications that come along with sport cases that affect other industries. Many would be surprised to know these cases get argued all the way to the Supreme Court. One of the recent major Sports Law cases handed down by the Supreme Court is *O’Bannon v. NCAA*, which in short, guarantees a retroactive “trust fund” to be set up for players whose name, image and likeness appeared in video games, specifically collegiate sports. This has single handedly cancelled the long standing production of virtually all collegiate sport video games albeit multi-million dollar products.

IMMIGRATION FOR ATHLETES & ENTERTAINERS

As an athlete, an artist, or an entertainer, gaining access to the United States is often critical for your career advancement. Unfortunately, the immigration process can be confusing and time consuming. Immigration is a niche field attorneys looking to practice in either sports or entertainment law should consider. Athletes and entertainers seeking to enter the United States to continue their careers are in dire need of zealous advocates to guide them through the specific process. There are immigration classifications reserved for those who have risen to the top of their field of endeavor to gain citizenship to the United States. Finding the right classification and crafting a persuasive narrative are critical for the success of the client. Lawyers who specialize in this area will spend a considerable amount of time preparing persuasive petitions to qualify their clients for immigration.

CONCLUSION

Sports and entertainment law provides a myriad of opportunities for lawyers wishing to break into these industries. Along your path you are sure to hear caveats and personal opinions about the difficulty involved in succeeding in these arenas. Yes, it will take some investing and believing in yourself. Yes, there will be obstacles. Remember that while some warnings may be worth heeding, others will be rooted in self perceived limitations and/or a lack of understanding. The onus is on you to create a paper trail of expertise by attending seminars, networking, and searching for relevant internships. The more you understand the nuts and bolts of the profession, the more you have to offer an organization, or your own business should you decide to fly private. Regardless of what specific road you choose in the sport and

entertainment law world, it is a fun and rewarding journey you are sure to enjoy.

Lastly, know your limits. No attorney can be an expert in all areas of the law. In order to achieve the best possible legal outcome from your client, you may have to refer them to an attorney that specializes in a specific area of law. Stay tuned to my next article on networking.

Continued from FRONTLINES p. 2

Amidst the mass protest are appeals on a global scale to garner support and attention to the situation. LaDonna Bravebull Allard, founder of the Sacred Stone Camp addressed the United Nations on October 3, 2016 on behalf of the Standing Rock Sioux Nation calling for international action:

“The organization hereby invokes the Universal Declaration of Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples, ILO 169 to be enforced and brought to life to put an immediate stop to the Dakota Access Pipeline. We request that an observer and media team be sent immediately and permanently to Standing Rock until this issue is resolved to protect the water. This situation with Dakota Access has been going on for 6 months now. It has endured Spring, Summer, Fall and heads into Winter as we protect and defend our right to water. We demand immediate assistance and protection for our Lakota, Dakota, and Nakota sisters and brothers.”⁵

It appears the resistance is far from over and the unified front of indigenous activists and allies will continue the fight to protect water.

⁵ <http://sacredstonecamp.org/blog/2016/10/3/ladonna-bravebull-allard-urges-un-to-halt-dakota-access-pipeline>

SNAPCHAT

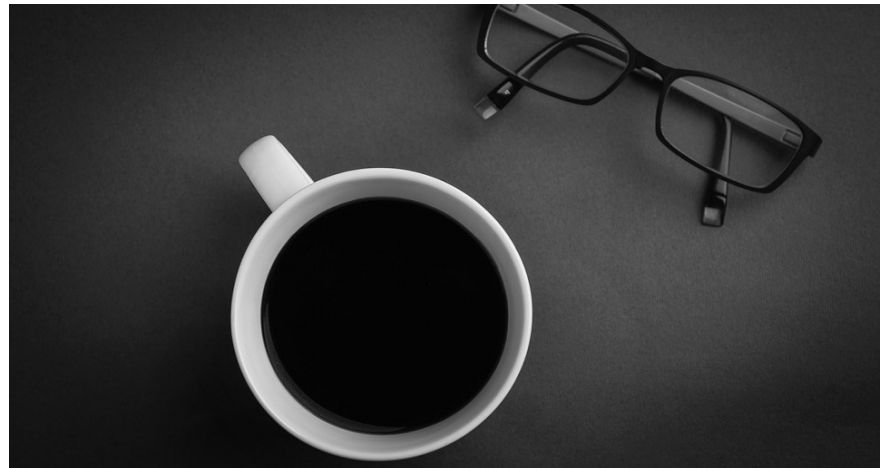
Innocent fun or a statutory bar to patentability?



by **CHRIS MUTCHLER**
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As technology evolves, so too must our laws—or at least our interpretation of them. Patent law is no different. A fascinating instance of this arises in the popular app “Snapchat.” For those who may be unfamiliar with the app, Snapchat is a social media network where users can share multimedia files with other users (“Snaps”). Snapchat is different from most other social media networks in that users can set a duration for which these files can be viewed. This duration can either be between one and ten seconds, or 24 hours, depending on the mode by which the message is sent.

As a recent engineering graduate with many classmates working in the field, and a Snapchat enthusiast myself, it is particularly interesting to me when engineers send Snaps of projects that



they are working on. Engineering firms exist to generate profit (as do all businesses), and much of this profit is generated through patent protection. Title 35 of the United States Code sets out limitations on what is protectable by patent. Section 102 bars patent procurement if an invention is used publicly. Thus, young engineers who send their friends Snaps of the interesting projects they are working on could potentially cost their employer a lot of money.

For those unfamiliar with basic tenets of patent law, “public use” is a term of art that comes directly from the text of 35 U.S.C. 102(a). In pertinent part, the statute reads, “a person shall be entitled to a patent unless ... the claimed invention was ... in public use.” What specific actions constitute public use are set forth by common law¹, but in general, the term means pretty much what its wording implies: using an invention publicly.

Snapchat creates potential public use issues because images of inventions that are made available to the public are routinely found to constitute public use. While it may seem absurd that an invention could be denied patent protection based on a short viewing, the Federal Circuit—responsible for reviewing challenges to findings of validity, and where many patents are lost—has at times dealt harsh rulings regarding Section 102. This, combined with the fact that a large amount of money is likely at stake if an invention gets to this point, has led to some strange challenges.

For example, in *Moleculon Research Co. v. CBS, Inc.*², the well-known Rubik’s Cube had the validity of its patent challenged based on the inventor’s use of his device at work, where it was visible to co-workers. While the challenge ultimately failed (essentially due to the innocence of the use), the cost of patent litigation is quite substantial, and the fact that the issue was able to get that far is worrisome. Additionally, in *Egbert v. Lippmann*³, a patent for an undergarment actually *was* invalidated under Section 102 after the inventor gave a sample of the garment to a lady friend. While this case is typically thought to be a strange exception to the norm, it is still potentially impactful.

Many cite the privacy of Snaps as a defense against invalidity. What constitutes public use, however, is—like most areas of patent law—not that clear cut. In the case of *In Re Leo M. Hall*⁴, a doctoral thesis long forgotten in the store rooms of

a university library were found to be a 102 bar. Though the public certainly did not know of its existence—let alone what it disclosed—the document was still determined to be a public disclosure within the scope of Section 102. While Snaps *do* “disappear” once viewed, the similarity of the server on which they are stored to the forgotten university store room is potentially damaging.

In litigation, the issue would likely come down to not the time the image is available in and of itself, but rather the completeness with which the Snap discloses the invention. While a simple invention with relatively few parts may be adequately disclosed (i.e., to the extent that it could be replicated—a very low threshold) in a Snap, a more complex invention having many parts may be found not to have been disclosed to the requisite extent in the few short seconds a Snap lasts, although this argument may be moot if the image is saved for more detailed viewing via screenshot.

While there is no way to say for certain whether a Snapchat disclosure would be grounds for invalidity, it is probably best that employees not send Snaps of their inventions. With the rising costs of litigation, a company could easily lose a substantial amount of money even if it were to prevail on the merits. Though Snapping on the job may not be a statutory bar to patentability, it is far from innocent fun.

¹While Section 102(b) grants certain exceptions to this bar—one in particular of which is relevant—for simplicity, these exceptions will be ignored herein.

²See *Moleculon Research Co. v. CBS, Inc.*, 872 F.2d 407 (Fed. Cir. 1989).

³See *Egbert v. Lipman*, 104 U.S. 333 (1881).

⁴See *In Re Leo Hall*, 781 F.2d 897 (Fed. Cir. 1986).

October 11

Career Services Lunch and Learn: Family Law

Noon - 1:00 p.m.

Please join us for an informal conversation with Attorney Michael Greenberg (L'89) about establishing and maintaining a successful family law practice. Food and drinks will be served.

Event Contact: Amy Feliciano

October 14

Gender and Incarceration Symposium

11:00 a.m. - 7:30 p.m.

Law School Common

Event Contact: Amy Feliciano

October 15

SBA Charities Committee: Annual Ambulance Chase 5K for a Cause

Registration is now open. Register at ambulancechase@gmail.com

October 19

Color of Law Roundtable Discussion Series:

Attorney Maurice Powe

Noon

Faculty Lounge. Seating is limited. RSVP Bridgette Baldwin at Baldwinwneclaw@hotmail.com

October 28

Naturalization Ceremony

12:15 p.m., Moot Court Room

U.S. District Court, Judge Mark G. Mastroianni presiding

Reception sponsored by HCBA:

Law Common (immediately following)

Event Contact: Awilda Cardona

October 31

Clason Speaker Series: Professor Frank Cooper

12:00 Noon

Law Common

during Public Interest Law Week

(Monday, Oct. 24 - Friday, Oct. 28)

Event Contact: Awilda Cardona

Law Library: Legal Tech Program (Room 329)

Wednesday, Evening sessions at 9:30 p.m.; **Oct. 19, Nov. 2, Nov. 9**

Thursday, Day sessions at Noon; **Oct. 20, Oct. 27, Nov. 3**

A series of three 45-minute classes. Sign up for this crash course on document formatting using some of the advanced features in Microsoft Word.

Sunday	Monday
30	31 Clason Speaker Series
2	3
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16	17
23	24

OCTOBER EVENTS

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18	19 Color of Law Roundtable Discussion	20	21	22	
25	26 MassBar: Dial-A-Lawyer	27	28 Naturalization Ceremony	29	

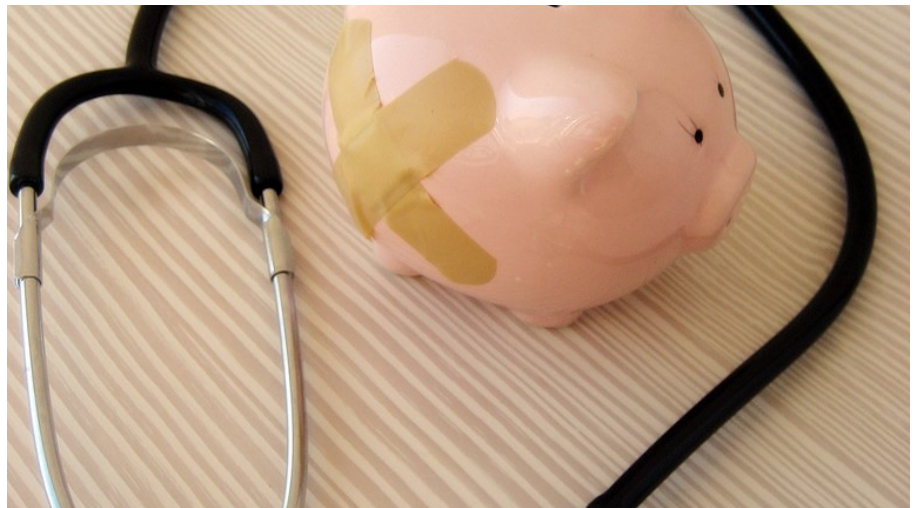
How should people deal with their end of life issues?



by **RABIA HAMID**
LEX BREVIS Staff Writer
Rabia.Hamid@wne.edu

The Supreme Court's landmark decision in *Cruzan v. Commissioner, Missouri Department of Health* (1990) set the stage on contemporary healthcare decision-making policies. Since that case, significant change has occurred in the state legislation on health care decision making. For example, every state has legislation authorizing the use of some sort of advance health-care directive. Only a few states do not authorize the use of a living will. Almost all states have statutes authorizing the use of powers of attorney for health care. Additionally, a majority of states have statutes allowing family members, and in some cases, close friends, to make healthcare decisions for adult individuals who lack capacity.

As people get older and their health issues are more life threatening, they should consider living wills, health care directives, health care proxies, health care power of attorneys, Massachusetts Medical Orders



for Life-Sustaining Treatments (MOLSTs), and Do Not Resuscitate (DNR) orders.

LIVING WILLS

A Living Will is a legal document that a person signs that permits them to state their wishes regarding life-support systems in the event that he or she is terminally ill or permanently unconscious and unable to communicate, including the withholding or withdrawal of life support systems. It provides what a person wants in terms of all available life supports, or alternatively,

that a person wishes to forgo certain or all life supports. Before preparing a Living Will, a person should consult with trusted advisors, such as their spouse or life partner, family, friends, doctors, and lawyers. A person should sign a Living Will: after he has thought about what they want and what their wishes are; after speaking with trusted advisors such as his spouse or life partner, family, friends, doctors or a lawyer; before he is in a crisis situation; and at any time he is mentally capable of understanding what he is doing.

HEALTH CARE DIRECTIVES AND MASSACHUSETTS MEDICAL ORDERS FOR LIFE-SUSTAINING TREATMENTS (MOLSTS)

As a preliminary matter, an “advanced healthcare directive” is an individual instruction or a power of attorney for health care. This section discusses health care directives; health care powers of attorney are discussed below. An “agent” is an individual designated in a power of attorney for healthcare to make healthcare decision for the individual granting the power. The “principal” means the person appointing the agent. Additionally, “capacity” means the individual’s ability to understand the significant benefits, risks, and alternatives to proposed healthcare and to make and communicate a healthcare decision.

The Elder Lawyer discloses client confidences only when essential to taking protective action and to the extent necessary to accomplish the intended protective action, in the case of a Massachusetts Medical Orders for Life-Sustaining Treatment (MOLST). A MOLST is a life-sustaining treatment and a medical order that say “do not resuscitate.” MOLSTs include what treatments to administer and what treatments to withhold.

HEALTH CARE PROXIES

The “Health Care Proxy” is a simple legal document that allows a person to name someone he knows and trusts to make health care decisions for a person if, for any reason and any time, a person becomes unable to make or communicate those decisions. The “Health Care Proxy” includes both the choices a person makes about their healthcare and also the relationships a person has with his physician, family, and others who may be involved with his care. Additionally, Health Care Proxies indicate the Agent’s authority is activated when the doctor says the Principal cannot

act, and also has witnesses who affirm the Principal is of sound mind and under no undue influence.

A Health Care Proxy is a signed, written agreement that authorizes the Agent to make health care decisions for the Principal, and is not an emergency document. The Proxy needs to identify the Principal and the Agent, and needs to show that the Principal intends the Agent to have authority to make healthcare decisions on the Principal’s behalf. A Health Care Proxy gives the Agent authority all healthcare decisions for Principal and becomes effective when attending physician determines the Agent’s lack of capacity. Every competent person has a power of right to appoint a Principal. Moreover, a Health Care Proxy provides simple and clear direction to the Agent of the Principal’s wishes based on simple assessment of the Principal.

Under the Health Care Proxy Law (*Massachusetts General Laws, Chapter 201D*), any competent adult eighteen years of age or over may use this form (see footnote 1) to appoint a Health Care Agent. As the Principal, a person can appoint any adult except the administrator, operator, or employee of a healthcare facility such as a hospital or nursing home where he or she is a patient or resident, unless that person is also related by blood, marriage, or adoption. A person’s Agent can act for a person if a person is temporarily unconscious, in a coma, or have some other condition in which a person cannot make or communicate health care decisions. A person’s Agent cannot act for a person until the doctor determines that the person lack the ability to make health care decisions. Ultimately, Health Care Proxy Capacity is the ability to understand the risks and alternatives that come with the Proxy. Healthcare Proxies rank above Do Not Resuscitate (DNR) Forms. The Court appoints the Guardian for a DNR. A Guardian cannot obtain a DNR for the Principal, but can have an existing DNR implemented.

According to the Massachusetts Medical Society, a person's Agent can make any health care decision that the person could, acting with that person's authority. If an individual's Agent is given full authority to act for a person, he or she can consent to or refuse any medical treatment, including treatment that could keep that person alive. An individual's Agent can and will only make decisions for a person only after talking with that individual's doctor or health care provider, and after fully considering all the options regarding diagnosis, prognosis, and treatment of that person's illness or condition. Additionally, an individual's Agent has the legal right to get any information, including confidential medical information, necessary to make informed decisions for that person.

An individual's Agent will make health care decisions for an individual according to that individual's wishes or assessment of the individual's wishes, including religious and moral beliefs. Moreover, if an individual's Agent does not know what the individual's wishes would be in a particular situation, the individual's Agent will decide based on what he thinks would be in the individual's best interests. After an individual's doctor has determined that an individual lacks the ability to make health care decisions and if an individual still objects to any decision made by his Agent, the individual's own decisions will be honored unless a Court determines that the individual lacks capacity to make health care decisions.

POWERS OF ATTORNEY

There are two versions of health care Power of Attorneys: (1) durable power of attorney and (2) "springing" power of attorney. Durable power of attorney takes effect the moment you sign it, and

lasts until its revoked, either by your actions or by your death. This means that if an individual creates and signs a durable power of attorney and then becomes mentally incapacitated, the Power of Attorney remains in effect, and the individual's Attorney-in-Fact continues to have the authority to manage the individual's finances and assets. "Springing" power of attorney becomes activated when the Principal can no longer act. It cannot be used until the Principal is mentally incapacitated or disabled. A Power of Attorney by which a Principal designates another Attorney-in-Fact in writing and the writing contains the words "this Power of Attorney shall not be affected until the subsequent disability or incapacity of the principal, or lapse in time," or "this Power of Attorney shall become effective upon the disability or incapacity of the Principal."

The Power of Attorney Healthcare Form does not require a formal acceptance by an Agent. Formal acceptance by an Agent has been omitted not because it is an undesirable practice, but because it would add another stage to executing an advancing health care directive, thereby further reducing the number of individuals who will follow through and create directives. (*The Uniform Healthcare Decisions Act*). Requiring formal acceptance reduces the risk that a designated Agent will decline to act when the need arises. Formal acceptance also makes it more likely that the Agent will become familiar with the Principal's personal values and views on health care. While the form does not require formal acceptance, the explanation of the form encourages Principals to talk to the person they have named as Agent to make certain that the designated Agent understands their wishes and is willing to take the responsibility. (*The Uniform Healthcare Decisions Act*).

DO NOT RESUSCITATE FORMS

A DNR is a doctor's instruction to staff and/or emergency medical technicians that cardio-pulmonary resuscitation (CPR) should not be administered if a person experiences cardiac arrest. Any DNR order that is made should be consistent with the wishes that a person expresses in a living will. DNR Forms come in three varieties: (1) a written order that is placed in a medical chart of a patient of a healthcare facility; (2) a written form that accompanies an individual who is being transferred from one healthcare facility to another; and (3) a bracelet worn by an individual who is being discharged to the community. A DNR is an order written by Connecticut-licensed physician to withhold cardiopulmonary resuscitation. In Connecticut, an individual must have a DNR bracelet on their wrist in order to enforce it.

THE ROLE OF AN ELDER LAW ATTORNEY

End of Life decisions are a very serious issue. A person should make decisions for what type of health care and treatments they need down the line before they lose their capacity and are unable to assign an Agent. An individual should meet and discuss these issues with an Elder Lawyer in order to help carry out their wishes during the last stages of their life. Therefore, deciding between a Living Will, DNR, or MOLST is highly important in order to resolve these issues and to smoothly facilitate the End of Life process.

The Elder Lawyer develops and utilizes appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand. It

is the Elder Lawyer's responsibility to document observations that support the attorney's conclusion that capacity is an issue for their client, and they must also respect the client's autonomy and right to confidentiality, even with the client's onset of diminished capacity.

The Elder Lawyer recommends guardianship or conservatorship only when all possible alternatives will not work. In representing a fiduciary for a person with diminished capacity, the Elder Lawyer is guided by the known wishes and best interests of the person with diminished capacity, and may disclose otherwise confidential information, in the event a conflict arises between the fiduciary and the person with diminished capacity, if necessary to avoid substantial harm to the interests of the person with diminished capacity.

The Elder Lawyer plays an essential role in End of Life decisions for a client, as the Elder Lawyer develops and utilizes appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.

ALUMNI PROFILE



ROCHELLE DUYAN, Esq.

DUYAN LAW, LLC

Area of Law: Probate

Alum, Class of 2014

What does your work entail?

Representing clients in probate matters, including conservatorship hearings and acting as conservator of the estate and person.

What is the most fulfilling part of your work?

I feel as if I am actually helping someone who would otherwise not be able to access representation, specifically in the cases where I represent the Respondent in a conservatorship hearing. The right to make decisions for yourself is a huge right many take for granted. I help bring my client's voice to the table when they cannot speak for themselves.

During law school, what kind of work did you do that helped enhance your skills?

I was an extern at the Connecticut Attorney General's Office, the New York County District Attorneys Office and in the Federal Court for the Federal District of Connecticut. I wanted to try different areas of the law other than what I thought I was interested in.

What was the most difficult aspect in school and how did you overcome that obstacle/experience?

I am a parent, had a full-time job and the law school was an hour and a half away from my home/work in Connecticut. My husband, family and workplace all offered great support. I could not have done it without them.

Are there any specific programs, committees, clubs that you suggest current students to join? Either for classes, studying, fun, networking etc.

Yes, a local bar association. You would be amazed at the wealth of knowledge and experience attorneys are willing to share with law students. I was part of the Connecticut Asian Pacific American Bar Association (CAPABA) for all four years of law school and beyond. Through this affiliation I had the opportunity to be a student speaker on a panel and able to obtain some scholarships for law school.

How did you network or if you didn't how do you wish you had? How can students benefit from meeting other attorneys and others within the legal profession?

I networked a lot. Through CAPABA I participated in multiple networking events, many which were free or low cost. Again, most times at attorney events, there are not very many law student, so attorneys are more than happy to share their wisdom and experience with the next generation of law students and future attorneys.

What is something you did or advice you were given that was helpful?

Network early and often, you never know who you will meet that will lead you to your first or next job. My first attorney job I obtained at a firm where I worked in college. My last two jobs I obtained because I knew someone who was hiring and thought I would be a great fit for a position they were looking for. You do not know what is out there unless you are out there asking and discussing what it is you are looking for.

Was there a class or area of law you studied that has proven particularly helpful now?

The externships were invaluable. They help you stand out from your competition. Real world experience is helpful, not just grades. You need to show you can do the work, not just theorize about it.

What was your favorite part of attending Western New England University School of Law?

I enjoyed the supportive environment. All I had to was ask if I wanted to try something.

How did the skills you learned in law school transition into the legal profession?

WNE provided a great foundation for the practice of law. The greatest skill I was taught was how to do

legal research and writing. This has proved invaluable to me in all of my jobs after law school, regardless of practice area.

Are there any law or regulations that have a strong impact on your area of law?

Changes in forms, tax codes and reporting. Continuing to educate yourself about your area of law, either by networking with seasoned attorneys or attending seminars is important to keep on top of changes.

What surprised you most about Practicing?

Most of what you do is common sense. I always thought there was a certain way you had to be as attorney, i.e. stuffy and boring and straight to the point. However, I have found that my clients respond better to me when I am genuine and compassionate and demonstrate that I truly care and have their best interest in mind.

What have you enjoyed most in being an attorney?

The ability to help those who need legal counsel or advice.

What advice would you give current students to prepare them for practice?

Obtain as much real world experience as you can. Law school ends and real life begins and you have to be able to deal with a multitude of challenges. A world does exist beyond the law school, even though during your time there that is your life and you cannot see past it. School and the bar will soon be a memory and you will be working on your career. Enjoy school, learn, seek knowledge, but know there is so much more.

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