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Elder Law

The newsletter of the Illinois State Bar Association's Section on Elder Law

Legal Considerations of Cryptocurrency Ownership for Senior Citizens: Tax Considerations—Part 3

BY IMAN EIKRAM

There are three primary considerations for attorneys with elderly clients holding crypto assets: responsible management and security practices, estate planning, and tax implications. This is the last article of a three-part series.

"Cryptocurrency" is a catch-all phrase used to describe digital assets such as Bitcoin, Litecoin, Ethereum, Dogecoin, and thousands of other virtual currencies. By their very nature cryptocurrencies have certain inherent complexities, notably the nature of their ownership and the methods by which they are transferred. Despite these issues, the increasing popularity

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Gathering and Using Social Media Evidence

BY NICOLE M. ONORATO & JUDGE KAREN J. BOWES

There are more than 4 billion active social media users worldwide—and this figure includes active user accounts for the big players like Facebook (over 2 billion), Instagram (over 1 billion), Snapchat (498 million), Twitter (330 million), LinkedIn (260 million).[5] Other social media platforms—such as YouTube, TikTok, Reddit, and Twitch—are constantly emerging, evolving, and gaining millions of active users. Mobile apps for social media platforms allow constant contact and interaction between users no matter where their physical location.

The omnipresence of social media makes it impossible to ignore. Even if you are one of the few who do not personally use social media, as a lawyer, you have an obligation to be aware of its effects and the implications for your cases. The Illinois Rules of Professional Conduct instruct practitioners that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of

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Legal Considerations of Cryptocurrency Ownership for Senior Citizens: Tax Considerations—Part 3

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of cryptocurrencies have helped them find a place in many investors' portfolios. Consequently, attorneys must now be prepared to handle the legal questions that arise with cryptocurrency ownership, particularly, when dealing with older clients.

Unlike other assets, cryptocurrencies are not supposed to be stored on a central database or in a physical location. Typically, after purchase, cryptocurrencies are moved from a cryptocurrency exchange to a digital "wallet" where they are held anonymously on a decentralized block chain that can only be accessed by an individual holding the access credentials for that specific wallet.

Tax Considerations of Crypto Assets for Attorneys With Elderly Clients

Many people believe that because cryptocurrencies rely on anonymous transactions, they are not subject to taxes, or that the Internal Revenue Service (IRS) cannot prove that crypto holders owe taxes on their digital assets. This is false. Cryptocurrency exchanges, where most cryptocurrencies are purchased, report users who have more than $20,000 in proceeds and at least 200 transactions in a crypto exchange to the IRS.[1] All cryptocurrency holders are required to disclose crypto currency ownership and reportable cryptocurrency transactions on Form 1040. Failure to disclose ownership of cryptocurrencies or pay necessary taxes may result in hefty fines.[2]

As cryptocurrencies are a relatively new form of investment, the methods by which they are taxed is still evolving. Presently, digital assets are treated as personal property rather than fiat currency.[3] In most cases, the tax principles that apply to property transactions apply to transactions involving cryptocurrencies. Certain cryptocurrency transactions may result in tax liability in the form of capital gains or losses. Holders of cryptocurrencies should be mindful to track all cryptocurrency transactions to accurately report these gains or losses to the IRS.

Inherited crypto currencies are includible in a decedent's gross taxable estate for federal estate tax purposes and may incur federal and state estate taxes. Additionally, like stocks, cryptocurrencies are subject to a stepped-up cost basis to the fair value on the donee's day of death. To reduce tax liability, clients should consider making gifts or donations of cryptocurrency to reduce estate taxes or receive charitable deductions on income taxes.

Donors of crypto gifts have no tax obligations on gifts of crypto currencies under $15,000; however, if the value of the crypto gift is more than $15,000, the donor must file a gift tax return.[4] Recipients of crypto gifts will not owe taxes on their gifts until they choose to sell the digital assets.

When a recipient sells a digital asset, the recipient's gain for tax purposes depends on the donor's basis, plus any gift tax the donor paid on the gift. Conversely, a recipient's cost basis for a loss is equal to the lesser of the donor's basis or the fair market value of the crypto currency at the time the recipient received the gift. If a donee does not have any documentation to substantiate the donor's basis, the recipient's basis will be zero.

Donations of digital assets held for more than one year entitle donees to tax deductions equal to the fair market value of the asset at the date of the donation. Donations of digital assets held for less than one year are eligible for a deduction that equals the lesser of the fair market value of the asset at the time of the donation or the cost basis of the asset.

In the alternative, grantors seeking to minimize estate or inheritance taxes on digital assets may also want to consider transferring their cryptocurrencies to beneficiaries via trusts or annuities. While assets held in trusts are considered part of a decedent's estate, appreciation on those assets is not. Because cryptocurrencies are prone to sudden and dramatic increases in value, they have the potential to substantially change the tax liability of an estate if not properly managed.

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Practice Tip: Trustees responsible for making distributions of digital assets should be mindful to know the tax basis of any cryptocurrency distributions as well as their values on the date of transfer to comply with reporting requirements. Additionally, as blockchain transactions are anonymous, trustees should confirm, in writing, the details of every distribution to beneficiaries. For more details on how to responsibly handle risks associated with crypto currencies held in trusts, see Part 1 (Responsible Management and Security Practices) of this series, Legal Considerations of Cryptocurrency Ownership for Senior Citizens; Management and Security.

Regardless of how clients chose to transfer digital wealth, attorneys should be aware that while the field of crypto oversight is nascent, the tax consequences of passing cryptocurrencies to the next generation are developing rapidly. As these digital assets become more popular, it becomes more likely that attorneys will need to be prepared to handle the complications of crypto currency ownership. Failure to stay updated on the financial implications of crypto ownership and management could result in serious harm to client assets and claims of mismanagement against attorneys. ■

1. Laura Saunders, *The IRS is Coming for Crypto Investors Who Haven't Paid Their Taxes*, May 14, 2021, https://www.wsj.com/articles/bitcoin-irs-comes-for-cryp-to-investors-who-havent-paid-their-taxes-11620937095.
2. *IRS Reminds Taxpayers to Report Virtual Currency Transactions,* March 23, 2018, https://www.irs.gov/newsroom/irs-reminds-taxpayers-to-report-virtual-currency-transactions.
4. https://www.irs.gov/pub/irs-drop/n-14-21.pdf.
5. https://www.irs.gov/pub/irs-pdf/f709.pdf.

Gathering and Using Social Media Evidence

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changes in the law and its practice, engage in continuing study and education…to which the lawyer is subject,"[6] which, arguably, includes social media evidence given how often this type of evidence arises in family law cases.

Social media can be a key source of significant information in almost every family law case. Social media content can provide relevant, discoverable evidence on issues relating to cohabitation (see, *e.g.*, *In re Marriage of Miller*, 2015 IL App (2d) 140530 and *In re Marriage of Aspan*, 2021 IL App (3d) 190144), income for support (*In re Parentage of I.I.*, 2016 IL App (1st) 160071), civil contempt (*In re Marriage of Weddigen*, 2015 IL App (4th) 150044), and other matters. Practitioners should be sure to not only keep up with new social media trends and technologies, but also to ensure that your discovery requests are tailored to capture relevant social media evidence and, once you have this information, that you are able to effectively use it in your case.

Dos and Don'ts for Gathering Social Media Evidence: Social media evidence can be harvested directly from the source—the user's Facebook, Instagram, Twitter, etc. content—or via a Rule 214 discovery request.

A person's profile on social media platforms can often be set for different levels of privacy. If a profile is public, anyone and everyone can see what the user has posted online, whereas a private profile allows the user to select specific people who can see their online content. You should advise your client of the potential consequences of having readily accessible social media content, including that any of their posts and other content could potentially be used against them in the litigation. Clients should make sure that their profile settings across all social media accounts are set to private as soon as possible and they carefully review the list of people who can see their social media content. Advise your client to be mindful about what they post and/or comment on their own or other's social media accounts. As a rule of thumb, clients should assume that any communication (social media content, e-mail, text, etc.) could be read or reviewed by their Judge at some point and they should consider that before writing or posting anything related to any aspect of their case.

Even with social media accounts set to private, past posts may come back to haunt a client. More likely than not, both parties have had (or still have) access to the other's social media postings. If your client has access to the other party's social media, they will undoubtedly have posts, comments, photos, and other content that they can download and provide to you. Further, a party's privacy settings may include mutual friends and family who may download the social media content and forward it to the other party.

Can you, the lawyer, gather additional information about the opposing party from social media? If the opposing party's social media account is public, then yes. It's a good idea to do your opposition research early on in a case. Search the internet for the opposing party's social media presence and, if their information is public, review it carefully. Any relevant posts should be saved immediately.

If the opposing party does not have public social media content, then your options for gathering information form this source are limited to what your client is able to access and what may be tendered by the other party during discovery. Do not try to access the other party's social media content by sending a friend or follow request. Per Illinois Rule of Professional Conduct Rule 4.2, a lawyer cannot communicate with a person that the lawyer knows to be represented by another lawyer unless the first lawyer has obtained the consent of the lawyer representing the other party. Something as simple as sending a friend request on Facebook or asking to follow an opposing party's Instagram account clearly constitutes an improper communication if the person is represented. Even the nature of a "friend" request is in and of itself, is somewhat misleading. Self-represented or unrepresented parties may be easily confused as to the nature of your relationship with them as the opposing party's counsel, and such a request further muddies the waters.

In addition to gathering relevant information and evidence directly from a party's social media content, relevant social media evidence can be obtained via discovery. Social media content falls under the scope of "electronically stored information" (ESI) to be disclosed pursuant to a discovery request. ESI is defined in Rule 201(b)(4) as including "any writings, *** photographs, sound recordings, images, and other data or data compilations in any medium from which electronically stored information can be obtained either directly, or if necessary, after translation by the responding party into a reasonably useable form." A Rule 214 discovery request to an opposing party for that party's social media information may include: content posted by that party during the relevant time period of the discovery request or copies of any posts, updates, videos, stories, and/or photos made by the opposing party and/or in which the opposing party is "tagged" that relate to any relevant issue in the case (i.e., cohabitation, allocation of parental responsibilities, etc.). Be sure to specify the various social medial platforms (Facebook, Instagram, LinkedIn, Twitter, etc.) for which the opposing party has an account.

Assume that a party may scrub their social media presence once a case is filed, or soon thereafter. A Rule 214 request puts recipient on notice that information is not to be destroyed, so be sure to send out your Rule 214 requests early to avoid spoliation.

Making the Most of Your Social Media Evidence: Now that you have the smoking gun Instagram post that shows the other party on a luxury vacation in the Maldives when they claim to have no money to pay past-due support, what do you do with it?

Rule 901 of the Illinois Rules of Evidence requires that to be admissible in evidence, the social media post must be authenticated. Proper authentication requires evidence sufficient knowledge to satisfy the trial court that the item is what its proponent claims it to be. Authenticating evidence can include testimony of a witness who has sufficient personal knowledge of the item—for example, the testimony of the person(s) pictured in the social media post or testimony from the person who took the photograph that was posted.

The opposing party can authenticate their own social media content if they are the author of the post or other content. Thorough trial preparation should include questioning the opposing party at their deposition about any social media posts that you intend to submit as evidence in your case. If, under oath at their deposition, the party acknowledges authorship of the post or that the post came from their social media profile or that they are pictured in the post, then that testimony can be used for impeachment purposes if they later try to disavow knowledge of the post at trial. Another good rule of thumb: never ask a question during adverse or cross-examination for which you do not know the answer. Deposing a party about their social media content can help you prepare to get that evidence admitted at trial and save you the panic and headache of trying to figure out your evidentiary strategy on the fly at trial.

Of course, an opposing party may not readily admit authorship of a particularly incriminating post or that they are the person "tagged" in a Facebook or Instagram photo. Practitioners should be prepared with more than one method to authenticate their evidence. *People v. Kent*, 2017 IL App (2d) 140917, provides a non-exhaustive list of possible means of authenticating social media content including: (1) the purported sender admits authorship, (2) the purported sender is seen composing the communication, (3) business records of an Internet service provider or cell phone company show that the communication originated from the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone, (4) the communication contains information that only the purported sender could be expected to know, (5) the purported sender responds to an exchange in such a way as to indicate circumstantially that he was in fact the author of the communication, or (6) other circumstances peculiar to the particular case may suffice to establish a *prima facie* showing of authenticity. *Kent* at ¶ 118. Other circumstantial facts that could help authenticate a social media post an opposing claims to have no knowledge could include charges on bank or credit card statements from the same general time and location of the post, testimony of another witness who was present at the event or in the photograph depicted in the post, testimony from a witness who "tagged" the opposing party in the post, comments on the post from the party's known family, friends, coworkers, or from the party.

Social media has opened a whole new area of discovery which can and should be used. Failing to keep informed of changes in the law regarding social media or changes in social media platforms, may result in your client's position not being fully presented to the court. ■

1. www.pagefreezer.com and www.dreamgrow.com/top-15-most-popular-social-networking-sites.
2. Comment 8 to Illinois Rule of Professional Conduct 1.1.

Respecting Powerful Words—Names and Pronouns

BY DANIEL KEGAN

We have a long tradition of respecting the power of words. From magicians' "spells,"[7] and Gandalf's "Speak Friend and Enter,"[8] through George Carlin's Seven Dirty Words.[9] Some religions don't speak the name of their deity, but use synonyms or drop letters in writing. Criminal defendants receive "sentences." Schoolyard bullies and some politicians taunt others with demeaning nicknames[10]

Wartime enemies may become subhuman creatures, although who's the ally or who the enemy among Eurasia, Oceania, and Eastasia changes, as Orwell's Ministry of Truth "rectifies" history to align with current policy.[11] Our pejorative wartime names for declared enemies become offensive shortly after peace, and economic interdependence. Some common words of high society and the courts appear stingingly improper, if attended to a century later. Some words have become so socially offensive they are replaced by an initial letter and "-word."

Folklore admixes lasting truths and lasting falsehoods.

Sticks and stones may break my bones
But words shall never hurt me.[12]

That's often false.[13]

Since the term was created in 1970, microaggressions are increasingly recognized: casual degradation of any socially marginalized group.[14] The persons making the comments may be otherwise well-intentioned and unaware of the potential impact of their words—brief everyday exchanges that send denigrating messages to certain individuals because of their group membership. The microaggression concept, and its popularization, "were never meant to give a vernacular that then makes it OK to stop talking; it was to ask people to be flexible in their thinking and to be open-minded to the concept that we don't all walk through the world in the same shoes."[15]

Trademark Infringement and Name Rights

There is long established trademark law against calling your product or service a name confusingly similar to that of a prior user's product or service.[16] More recently, the state law right of publicity warns against using without authorization the name, image, or likeness of another for commercial benefit.[17] But there is little law against calling someone a name they dislike.[18]

Social norms both persist, and change, sometimes slowly, sometimes rapidly. Until *Matal v. Tam* (THE SLANTS trademark registrable for a musical group),[19] "scandalous and immoral trademarks" were denied federal Lanham Act registration.[20] Some marginalized communities have sought to reclaim previously stigmatized names: Queer, Black, Cripple.

Our early colonists frequently intermingled with the nearby indigenous tribes, both learning survival skills from them while also, at times, considering them unchristian savages.[21] Schools, sports teams, and diverse businesses have appropriated numerous Indian names and symbols, recently to increasing objection by federally recognized tribes and members and supporting others.[22]

Responding to changing public concerns, the Cleveland Indians baseball team, established 1894, announced this year that after the 2021 season it will change its name to the Cleveland Guardians. The team has had many successive names and nicknames: Grand Rapids Rustlers, Cleveland Lake Shores, Cleveland Bluebirds, Naps, Spiders, Tribe, Wahoos, Indians, and soon Guardians.[23]

It's one thing to change your own name, but quite another to have others call you a name you disfavor.[24] Historian Mann's resolution of the naming question can be instructive: "In referring to particular groups of Indians—the Wampanoag or the Maya—I use a simple rule of thumb: I try to call groups by the name preferred by their members."[25]

Dichotomies Unstructured

Just as U.S. census forms have broadened from dichotomous White and Black to multiple categories,[26,27] the differences between sex and gender and the non-binary nature of both are increasingly recognized.[28] The USA will join over a dozen other nations in issuing passports with an X gender classification.[29] "Sex is a trait that determines an individual's reproductive function, male or female, in animals and plants that propagate their species through sexual reproduction."[30]

Sexologist John Money introduced the terminological distinction between biological sex and gender as a role in 1955. Before his work, it was uncommon to use the word gender to refer to anything but grammatical categories. … Today, the distinction is followed in some contexts, especially the social sciences and documents written by the World Health Organization (WHO). Both physiologists and biologists agree that gender is distinct from sex.[31]

"Terminology within the health care field and transgender and gender nonconforming (TGNC) communities is constantly evolving[32]. The evolution of terminology has been especially rapid in the last decade,[33] as the profession's awareness of gender diversity has increased, as more literature and research in this area has been published, as style guides adapt,[34] and as voices of the TGNC community have strengthened[35]. Some terms or definitions are not universally accepted, and there is some disagreement among professionals and communities as to the "correct" words or definitions, depending on theoretical orientation, geographic region, generation, or culture, with some terms

seen as affirming and others as outdated or demeaning."[36]

"Sex (sex assigned at birth): sex is typically assigned at birth (or before during ultrasound) based on the appearance of external genitalia. When the external genitalia are ambiguous, other indicators (e.g., internal genitalia, chromosomal and hormonal sex) are considered to assign a sex, with the aim of assigning a sex that is most likely to be congruent with the child's gender identity. For most people, gender identity is congruent with sex assigned at birth (see cisgender); for TGNC individuals, gender identity differs in varying degrees from sex assigned at birth."[37]

Gender expression: the presentation of an individual, including physical appearance, clothing choice and accessories, and behaviors that express aspects of gender identity or role. Gender expression may or may not conform to a person's gender identity.

Gender identity: a person's deeply felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; or an alternative gender (e.g., genderqueer, gender nonconforming, gender neutral[38]) that may or may not correspond to a person's sex assigned at birth or to a person's primary or secondary sex characteristics. Because gender identity is internal, a person's gender identity is not necessarily visible to others. "Affirmed gender identity" refers to a person's gender identity after coming out as TGNC or undergoing a social and/or medical transition process.

Gender role: refers to a pattern of appearance, personality, and behavior that, in a given culture, is associated with being a boy/man/male or being a girl/woman/female. The appearance, personality, and behavior characteristics may or may not conform to what is expected based on a person's sex assigned at birth according to cultural and environmental standards. Gender role may also refer to the social role in which one is living (e.g., as a woman, a man, or another gender), with some role characteristics conforming and others not conforming to what is associated with girls/women or boys/men in a given culture and time.

Sexual orientation: a component of identity that includes a person's sexual and emotional attraction to another person and the behavior and/or social affiliation that may result from this attraction. A person may be attracted to men, women, both, neither, or to people who are gender queer, androgynous, or have other gender identities. Individuals may identify as lesbian, gay, heterosexual, bisexual, queer, pansexual, or asexual, among others.

Cisgender: an adjective used to describe a person whose gender identity and gender expression align with sex assigned at birth; a person who is not TGNC. (The prefix *cis-* derives from Latin meaning *on this side of*.[39]

Transgender: an adjective that is an umbrella term used to describe the full range of people whose gender identity and/or gender role do not conform to what is typically associated with their sex assigned at birth. Although the term "transgender" is commonly accepted, not all TGNC people self-identify as transgender.

Emerging Minorities

Conflating poverty with moral illness, many societies have initially discriminated against immigrant groups. The United States, by its residents and by its official government actions, has discriminated against Chinese, Italians, Germans, Jews, religions other than that of the Colony, and others.

Lawrence v Texas held that a Texas law classifying consensual, adult homosexual intercourse as illegal sodomy violated the privacy and liberty of adults to engage in private intimate conduct under the 14th Amendment.[40] Diverse areas of legal, and common, discrimination against gay and lesbian behaviors persisted. The Stonewall rebellion, June 1969, has been seen as a watershed for an emerging gay rights movement.[41]

Recognition of a transgender and gender nonconforming community is manifest in the addition of pronouns to signature blocks in email: (she, her, hers; he, him, his; them, them, their's). Merriam-Webster Dictionary now includes "they" as "a single person whose gender identity is nonbinary, or intentionally not revealed.[42]

Traditional current English grammar assigns one of three genders to some nouns: male, female, and neutral.[43] Some other languages, such as Spanish, assign gender to proportionally more words than does English.

The existence of transgender individuals is recognized by such mainstream organizations as Starbucks, "Starbucks offers expanded benefits for trans people,"[44] Kroger, the "largest US supermarket chain, offers transgender workers full health benefits,"[45] and federal[46] and state court decisions.[47] Tips for employers are becoming more common.[48] The New York Times lead opinion column proclaims "Gender Pronouns Are Changing. It's Exhilarating" (21Sep2021).[49]

Some individuals identify with a gender that differs from the sex assigned at birth, and wish to be identified with gender pronouns differing from their birth gender marker (M, F) imposed. Apart from gender identification issues, some individuals prefer to be called by other than their legal name.[50]

Internal Firm Procedures

Organizations, whether industrial, commercial, non-profit, or professional, including law firms, may wish to respect their members, whether in the midst of gender affirming medical treatment (surgery, hormones) or simply having a preference for the name to be called. Beyond courtesy, a few laws should inform and constrain the organizational response.

The American Bar Association recently presented a continuing legal education (CLE) seminar, "Why Inclusion Matters: Creating Cultures that Retain & Support All of Your People," 16Dec2020. Recent research surfaces many law firms are not healthy places for lawyers, with disturbingly high attorney problems with alcohol, depression, stress, anxiety, and suicide. An inclusive organization supports belonging, authenticity and participation—cultural traits benefiting mainstream employees and managers as well as the traditionally marginalized.

For decades, if not centuries, there have been efforts for more readily understandable laws and legal documents.[51] Kati Pajak provides a guide "How to Write Gender-Neutral Contracts.[52] Heidi Brown advises one can honor good grammar and societal change with inclusive legal writing.[53]

One need not be a defrocked politician

or celebrity to be harmed by unconscious bias and questionable language. The ABA Litigation Section presented a CLE program, "Eliminating Racist or Offensive Catch Phrases and Other VernacularIn Front of a Jury or Otherwise."

Attorneys deal with words. "A lawyer's time and advice are his stock in trade."[54] Lawyers generally seek to write well, persuasively, and with good grammar. Using the plural "they" to refer to a singular individual may initially feel improper. Between a person's feeling of acceptance or rejection versus a fading grammar rule, perhaps the rule needs flexibility—or historical perspective. Some historical years ago, "the singular second person pronoun was thou and the plural was you. During the 1600s, thou fell out of use to be replaced by the formerly plural you, which still uses the plural versions of verbs. Obviously, I would never say, "You needs more pie," when talking to one person, even though "needs" is the singular version of the verb."[55]

Some functions of the organization need to maintain the legal name of the person and the cross-reference to their name as used. Access to this information should be restricted on a strict need to know basis, and as may be required by HIPAA, state privacy laws, and personally identifiable information (PII).[56]

Police issues and background checks are two areas when use of the legal name will typically be required. Employment applications practicality likely depends on the prospective employing organization and the type of job. Patent attorneys needing security clearances differ from legal advice to a musical band.

Iron Pyrite

Kurt Vonnegut offered a QuickStart guide to life on earth: "Hello babies. Welcome to Earth. It's hot in the summer and cold in the winter. It's round and wet and crowded. On the outside, babies, you've got a hundred years here. There's only one rule that I know of, babies–"God damn it, you've got to be kind."[57]

Perhaps necessary, but insufficient. Likewise, the ancient, multi-cultural Golden Rule has limitations, for it assumes others' preferences mirror one's own.[58] Partly true, partly false, as evidenced by consumer choices at a multi-flavor ice cream store. A person is like all others, like some, and like no others.[59]

People tend to consider what is kind by *their* understanding of the world, not the understanding and experience of the *other* person. European "explorers" from Columbus on believed they were helping the "New World" savages by seeking to convert them to Christianity. A century ago children were sequestered from their families and community to be resocialized in Indian Schools.[60] The explorers and subsequent colonists may have considered much Indian territory as unoccupied, due to the lack of fences (marking English property lines) and non-checkerboard Indian agricultural practices, growing the Three Sisters (maize, squash, and climbing beans) together.[61]

Organizational diversity and governmental inclusion are often recognized as promoting productivity and morale.[62] The American Bar Association promotes its Model Diversity and Inclusion Plan for ABA Entities,[63] as does the Illinois State Bar Association, for Diversity & Inclusion.[64]

Another anthropologist answered an audience question, have we made any progress since the Greeks, affirmatively: we have a broader acceptance of the other as a human.[65]

We may have made progress; we still have issues to recognize and transcend. Our Twenty-First Century brains use past experience and assumptions to speed our perceptions and cognitive interpretations—speeding our reactions to perceived dangers while also exposing us to diverse cognitive biases.[66] The words we use not only affect others, they also affect ourselves.[67] Even being aware of a potential bias does not immunize us from some of its effects.[68]

As a perceptive psychologist has reflected, to understand another often takes moving outside yourself and understanding how other people, their identities and their needs, are made visible and supported and affirmed, especially when aspects are outside one's own experience. It takes intentional focus, energy, and commitment to slow down and interrupt the automatic assumptions created by our brains, training, and own experience.

Acknowledgement

The author has benefited from the December 2020 presentation on Trans Inclusion and Pronouns by Matt Abtahi, Assistant Director for Multicultural Student Affairs at Northwestern University, mentioning the University now allows student ID cards to show the student's preferred name rather than the legal name, and from helpful psychologists. The author remains responsible for errors of omission and comission.■

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10. 15 USC §1114, §1125 [43(a)].
11. https://www.inta.org/topics/right-of-publicity/; https://rightofpublicity.com.
12. "Muhammad Ali," Round Two: What's My Name, film by Ken Burns, Sarah Burns & David McMahon, Public Broadcasting Service, 20Sept2021; *Also see, Clay aka Ali v United States*, 403 US 698 (1971).
13. 582 US ___, 137 SCt 1744, 198 Led2d 366; 122 USPQ2d 1757.
14. 15 USC § 1052(a).
15. "Historically speaking, both 'Indian' and 'Native American' are remote from the way America's first peoples thought about themselves. Much as the inhabitants of the tenth-century Carolingian Empire did not describe themselves as 'Europeans,' a name coined in the seventeenth century, the inhabitants of the Western Hemisphere in that same era did not think in terms of 'Indians,' 'Native Americans,' or any other collective hemispheric entity. Instead they regarded themselves as belonging to their immediate group—the Patuxet village in the Wampanoag confederation, for instance."
Charles C Mann, 1491: New Revolutions of the Americas Before Columbus, p 474, Vintage, 2006.
Mann reports "only one experience united the diverse peoples of the Americas: being flattened by European incursions."
16. Karen Schwartz, "Is Travel Next in the Fight Over Who Profits From Native Indian Culture?" NY Times, 3Aug2021.
17. https://en.wikipedia.org/wiki/Cleveland_Indians; cf. *ProFootball v Blackhorse* 113 USPQ2d 1749 (ED VA 2014).

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Legal Mechanisms for Family Involvement in Caring for Persons With Serious Mental Illnesses

BY MARK J. HEYRMAN

Continuity of care for adults[1] with serious mental illnesses remains a problem in Illinois, particularly for persons who may, from time to time, be admitted to an inpatient psychiatric facility. For a variety of reasons, inpatient stays are usually quite brief. During these brief stays, hospitals are often unable to obtain information about the history of the treatment of the patients' illnesses, including what medications patients have received, whether those medications have been effective, and what side-effects the persons may have experienced. Hospitals may also lack information about what types of discharge plans have been found to be successful or unsuccessful in the past.

This lack of information has many causes. Persons who are so seriously ill that they need inpatient care are often unable or unwilling to provide the needed information and/or unable or unwilling to identify the places where they have previously been treated or to give informed consent to obtain written records of previous treatment.[2] Often, even with written consent, there just is not time for the hospital to obtain those records before the person must be discharged.

Finally, some patients may require involuntary commitment and/or court-ordered psychotropic medication or electro-convulsive therapy (ECT) under the Mental Health and Developmental Disabilities Code, (the Mental Health Code) 405 ILCS 5/1-100, *et seq*. Here too, the courts need information about the history of the person's illness and treatment. The involuntary commitment standard expressly requires consideration of the patient's "behavioral history" and "evidence of the person's repeated past patterns of specific behavior and actions related to the person's illness." 405 ILCS 5/1-119. The statute governing court-ordered medication and ECT also requires proof "[t]hat the illness... has existed for a period marked by the continuing presence of ...symptoms or the repeated episodic occurrence of these symptoms." 405 ILCS 5/2-107.1 (a-5)(4)(c). The evidence needed to help the court make these important determinations is often unavailable to the state's attorneys who are charge by statute (405 ILCS 5/3-101) with pursuing involuntary commitment and court-ordered medication or ECT.

Fortunately, many persons with serious mental illnesses have family members who are actively involved with caring for them. For example, it is not unusual for an adult with a serious mental illness to live with her or his parents or other relatives and/or be financially dependent on relatives. Family members often have substantial relevant information about the history of the person's illness and treatment and may even be in possession of the person's psychiatric records. Despite this, family members often find that various laws[3] prevent them from helping their loved one to get appropriate care and making sure that mental health providers and the courts have the information that they need to make good decisions. This article is intended to outline the legal mechanisms that family members may use to assist mental health providers and the courts in making decisions correctly and improving patient outcomes.

1. **Written consent to obtain records under the Mental Health and Developmental Disabilities Confidentiality Act**. 740 ILCS 110/1, *et seq*. A person who is or has received mental health services may give written consent to any other persons to access her or his mental health records or communications. 740 ILCS 110/5. Family members may ask their loved ones for consent to obtain mental health records.
2. **Guardianship of the Person**, 755 ILCS 5/11a-1, *et seq*. A family member may petition the court to be appointed guardian of the person of an adult who "because of ...disability...lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person." 755 ILCS 5/11a-3(a)

Advantages

- Access to all health care records including mental health records
- Control over most health care decisions
- Must be notified seven days in advance of a patient's discharge from an inpatient mental health facility. 405 ILCS 5/3-903(a)

Disadvantages

- Expensive and time consuming
- Not useful for most persons with mental illnesses who generally lack decisional capacity for only brief periods
- Cannot be used to obtain psychiatric hospitalization–must use commitment proceedings under the Mental Health Code. (See Section 4 below.)
- Cannot be used to consent to psychotropic medications over the ward's objections–must

use involuntary treatment hearing provisions in the Mental Health Code. 405 ILCS 5/2-107.1(b). (See Section 5 below.)

3. **Advance directives**. Illinois has two laws which allow competent adults to designate someone to make decisions for them should they lose the ability to make decisions due to a serious mental illness (or other reason).

- Mental Health Treatment Preference Declaration Act. 755 ILCS 43/1, *et seq*.

Advantages

- Irrevocable once principal becomes disabled. 755 ILCS 43/50
- Allows access to records. 755 ILCS 43/30 (3).

Disadvantages

- Only applies to hospitalization, psychotropic medication and ECT. 755 ILCS 43/75.
- Only permits 17 days of hospitalization. 755 ILCS 43/75.

- Durable Power of Attorney for Healthcare. 755 ILCS 45/4-1, *et seq*.

Advantages

- Applies to all health care decisions.
- Allows access to records. 755 ILCS 45/4-10.

Disadvantages

- Revocable by ward even though s/he lacks decisional capacity. 755 ILCS 45/4-10.

- Durable power of Attorney for Health Care--with delayed revocation option. 755 ILCS 45/4-6(a-5) This provision gives persons the option to create an advance directive which remains in effect for 30 days after the person decides to revoke it.

Advantages

- Allows agent to consent to treatment for 30 days following a revocation by the patient.
- Allows access to mental health records during this period.

4. Involuntary commitment proceedings

- Family members may petition to have a loved one committed to a hospital if involuntary inpatient care is needed to prevent harm to the person or others. 405 ILCS 5/3-701.[4]
- As a petitioner, a family member may request to be notified if a commitment petition is dismissed in favor of an informal or voluntary admission and has the right to object to the dismissal. 405 ILCS 5/3-801(b).
- If the petition is dismissed the petitioner has right to be notified when the patient is being discharged. 405 ILCS 5/3-801(b) and 405 ILCS 5/3-902(d).
- Petitioner has the right to hire her/his own counsel and participate in a commitment hearing. 405 ILCS 5/3-101.
- Family participation may be helpful in obtaining the commitment of someone who needs it, but also in preventing the inappropriate commitment of someone who does not. The latter may occur because a person may not be committed if she or he will not come to harm if released to family or friends who are willing to help. 405 ILCS 5/1-119(2). The court may not be aware that such family members exist.
- Family members may also petition to have a loved one committed to outpatient care under 405 ILCS 5/3-751, *et seq*.[5]

5. **Court-ordered psychotropic medication and ECT**. Family members may petition the court to order psychotropic medication or ECT for a loved one whether or not the loved one is in a hospital. 405 ILCS 5/2-107.1.[6]

6. Special provisions concerning access to information about hospitalization

- Hospitals are required to ask a person at the time of admission if s/he wants anyone notified of the hospitalization and provide such notice if requested. 405 ILCS 5/2-113(a).
- Anyone may ask a mental health facility if a person is hospitalized in that facility and the facility must notify the recipient of the request. If the recipient consents, the hospital must advise the person how to contact the recipient. 405 ILCS 5/2- 113(b), (c) and (d).
- If a person lacks decisional capacity and the treating physician determines that disclosure would benefit her or him, disclosure of the fact that a person is in the hospital may be made to a relative involved in the person's treatment. 740 ILCS 110/5.5 effective 1-1-2022.

7. **Participation in treatment planning.** At the beginning of treatment a mental health facility is required to create an individual treatment plan in consultation with the patient. A guardian, anyone designated under an advance directive (See Section 3 above) or anyone else designated by the patient must be permitted to participate in the creation of the treatment plan. 405 ILCS 5/2-102(a) Family members may ask their loved ones to designate them to participate in this important process.

8. **Notice of restriction of rights.** Upon admission, every patient must be notified of her or his right to designate someone to be notified if she or he is subjected to restraint, seclusion or the restriction of any other right in Chapter II of the Mental Health Code. 405 ILCS 5/2-200 and 201 Family members may ask their hospitalized loved ones to designate them under this provision.

9. **Access to discharge plan**. Allows relatives who are actively involved in the patient's treatment to receive notice that the patient will be discharged and a copy of the discharge plan if and only if the patient lacks decisional capacity and the disclosure is in the patient's best interest. 740 ILCS 110/5.5 effective 1-1-2022.
10. **Providing records and other information to the hospital.** Although this is not required by law, many hospitals will accept records and information about a patient from family members and friends in order to ensure appropriate care. This is important because hospitals are often unable to obtain records and information about past treatment in a timely manner, even with the patient's full cooperation. Depending on the circumstances, if the hospital refuses to accept records offered to them in person, it may be appropriate to send them by certified mail or some delivery services which will confirm to the sender that the hospital has received them.■

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1. This article refers only to the laws governing adults with mental illnesses. The laws governing family involvement in the care of minors are substantially different.
2. In *Zinermon v. Burch* 494 U.S. 113, 110 S. Ct. 975; 108 L. Ed. 2d 100 (1990), the United State Supreme Court explained that, while the law presumes that people are competent, that presumption cannot be relied upon when someone is being admitted to an inpatient psychiatric facility.
3. These laws exist for the important purpose of protecting patient privacy and autonomy.
4. The detailed standard for involuntary inpatient commitment is set forth in 405 ILCS 5/1-119.
5. The detailed standard for involuntary outpatient commitment is set forth in 405 ILCS 5/1-119.1.
6. The detailed standard for court-ordered medication and ECT is set forth in 405 ILCS 5/2-107.1(a-5)(4).

Updates & Resources

Aging My Way

May is Older Americans Month and the theme for 2022 is "Aging My Way." Its observance an opportunity for all to explore the many ways older adults can remain in and be active in their respective communities. Aging is perhaps a more important topic than ever before since approximately 10,000 people now turn age 65 every day in the United States.

For more information, visit https://acl.gov/oam/2022/older-americans-month-2022.■

Mark Your Calendars...

May

Asian American/Pacific Islander Heritage Month

Mental Health Awareness Month

National Foster Care Month

Older Americans Month

1: Law Day
5: Cinco de Mayo
6: National Nurses Day
7: Kentucky Derby
8: Mother's Day
9: National Women's Checkup Day
21: National Memo Day
30: Memorial Day ■

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Interested in submitting an article for the newsletter? Everything you need to know about the publication process is posted at https://www.isba.org/publications/sectionnewsletters. Please submit your draft **and** signed a release form to us via email **by May 6, 2022**:

- Karen Kloppe - Karen.Kloppe@Illinois.gov

Let us know if there are any topics you would like to see covered in the future.■