

# Emerging Issues For Fiduciaries

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“Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.” *Meinhard v. Salmon*, 164 N.E. 545–546 (1928).

## **A. Introduction**

1. The quotation above from Justice Benjamin Cardozo of the New York Court of Appeals has set the standard for fiduciary conduct since it was written many years ago. Although the quotation arose out of a question of trustee loyalty and is cited to hold fiduciaries to a standard requiring that the beneficiary's interest be placed first, it is an example of the high standards to which fiduciaries are held. In performing its duties, any fiduciary should be aware that the standards to which it is held should include not only looking backward at past and recent court decisions, but also looking forward to issues yet to be litigated.
2. This paper initially discusses some recent cases that may provide some guidance to fiduciaries. Then, it attempts to look forward to questions fiduciaries are beginning to see or may be facing in the future, including responding to discovery requests for electronically stored information and locating and securing records or assets held in electronic form or in "cyberspace."

## **B. Recent Issues Confronted By Fiduciaries**

1. *Investment Decisions*
  - a. Beneficiaries continue to challenge their fiduciaries' investments. In the recent economic environment of sharply reduced equity and other investment values, beneficiaries may be scrutinizing trustee investment decisions with increased vigor. The following recent cases identify trustee investment issues that are creating friction between trustees and beneficiaries.
  - b. A theme running through the cases is that a trustee may not handle trust property as if it belonged to the trustee. Beneficiaries in *In re the Matter of Sronzenski* (N.Y. Surrogate's Court, November 18, 2008), sought an accounting and complained that their trustee had cashed in a mutual fund to invest more than 70 percent of the trust corpus in a single stock. That investment, which was part of the trustee's day trading activity, resulted in a loss. The court cited authorities indicating that a fiduciary may not speculate with property in its charge, even if the fiduciary might do the same for its own account. The court observed that, although there was no fraud or embezzlement, a fiduciary must act prudently. The choices the trustee made in managing this trust reflected an "opposite perspective." The funds in the corpus were not to be used as the trustee's "experiment, toy or hobby"; they were meant to be managed reasonably, for the interest of the beneficiary. The court concluded that the actions of the trustee showed speculation, risk, and a complete disregard for prudence. The trustee was surcharged because his actions were a step beyond mere negligence and crossed into gross carelessness and indifference to duty, amounting to bad faith.
  - c. Although retaining an investment adviser may not be required for every trust, such a step can protect the trustee if investments take an adverse turn. The trustee in *Parker v. Shullman*, 983 So.2d 643 (Fla. D. Ct. App. 2008), invested trust property with the advice of an investment adviser and established that he reasonably relied on Comerica as his adviser in managing the trust portfolio. He interviewed and retained the adviser and met regularly to review trust requirements. Despite the beneficiary's complaints, the court concluded that the trustee did not violate the prudent investor rule. It noted that the fiduciary's decisions are to be judged under the facts and circumstances

“at the time of the decision or action” and that the test is one of “conduct rather than resulting performance.” *Parker* at 647.

- d. The question of diversification of trust assets continues to arise when a trust holds a business or single valuable asset that originally enriched the settlor or the settlor’s family. A bank trustee retained stock in Steelcase, a company founded by the testator in *In re Peter Martin Wege Trust*, 2008 WL 2439904 (Mich Ct. App. June 17, 2008). When the beneficiaries sought to surcharge the bank trustee for losses resulting from lack of diversification required by Michigan’s prudent investor rule, the court commented that it looked to the trust instrument to determine the powers and duties of the trustees and the intent of the settlors regarding the purpose of a trust. Although the prudent investor rule generally required diversification, the governing instrument could expand, modify, or alter that rule. The will in this case contained a general provision, without specific reference to Steelcase, that authorized the trustee to:

[H]old and retain any bonds or shares of stock or other securities or other properties held or owned by me at my death, if in their discretion they shall deem it prudent and for the best interest of my estate so to do, notwithstanding the fact that the retention of such investments might, except for this express direction, be in violation of the laws of this State governing trust investment.

- i. Reviewing this language, the court concluded that the will exempted the trustee from its obligation to diversify because the trustee subjectively deemed it prudent and in the best interest of the estate to retain the stock. There was no evidence presented that the trustee acted other than in a manner it thought was in the best interest of the estate.
- e. A beneficiary in *Heimitsh v. Wachovia Bank*, 665 S.E.2d 541 (N.C.Ct. App. 2008), challenged a corporate trustee’s decision to invest assets in a money market fund during litigation. An estate, and later a trust, was funded with an interest in Lake Toxaway Company in Transylvania County, North Carolina. Disputes arose regarding funding of the trust and regarding distinction between trust principal and income. The trustee invested the proceeds of sale of the company in money market funds during the pendency of the dispute and was sued by the beneficiary for failing to invest the retained funds in more productive assets. The court stated that it was not persuaded that the trustee breached a fiduciary duty by retaining funds in a money market account while awaiting the resolution of litigation. In that case, the trustee was focused on keeping the retained funds in a liquid investment vehicle and preventing any diminution of the funds. It chose to invest the funds in a liquid form and in what the court described as a “virtually risk-free money market account.” *Id.* at 545. The court concluded that there was no breach because the trustee demonstrated reasonable care by investing to protect the funds until litigation over distributions was concluded.

## 2. *Attorney-Client Privilege*

- a. The question of who holds the attorney-client privilege should be of interest to any trustee—whether the original named fiduciary or a successor fiduciary.
- b. In cases of corporate trustees that have changed names or ownership resulting from mergers or acquisitions, the structure of the combination or acquisition could affect the continuation of the

privilege. For instance, if stock is acquired and the entity continues with a name change, the former privileges continue because the entity remains the same.

- c. A change of trustee from one person to another or one entity to another raises the question of who holds the privilege. The attorney-client privilege was found to belong to the successor trustee when the original trustee was replaced in *In re Estate of Catherine M. Fedor*, 811 A.2d 970, 972 (N.J. Super. Ct. Chanc. Div. 2001). The court in that case cited to the California case of *Moeller v. Superior Court*, 947 P.2d 279 (1997), stating:

It is logical that those who currently operate the corporation must know its history, including the prior advice given by the corporation's attorneys and accountants. Likewise, they must have the right to decide, in the best interest of the corporation, whether to waive any of the corporation's privileges. The same common-sense approach should apply to the new trustee of an estate who takes over from a former trustee. As the Supreme Court of California recognized in *Moeller v. Superior Court*, 16 Cal. 4th 1124, 69 Cal.Rptr.2d 317, 947 P.2d 279 (1997): "To allow for effective continuous administration of a trust, the right of access to these communications and the privilege to prevent their disclosure must belong to the person presently acting as trustee, because that person has the duty to conduct all pending trust business. Therefore, for a trust to continue to operate smoothly when a change in trustee occurs, the power to assert the attorney-client privilege must pass from the predecessor trustee to the successor."

- d. When confronted with beneficiaries' claims against trustees and the claim that the trustee's attorney-client privilege should be waived, the cases in various states remain mixed. In some instances, courts have attempted to distinguish between advice sought for administration of the trust and advice sought to protect the trustee from claims of mismanagement. The beneficiaries in *Follansbee v. Gerlach*, 56 Pa. D. & C.4th 483 (Allegheny County Ct. 2002), sought documents from a bank trustee, which was not a party to the case. The defendants in that case were counsel for the trust. In response to a subpoena, the bank trustee, asserting the privilege, refused to produce certain documents. The court concluded that the trustee could not withhold documents relating to management and administration of the trust.
- e. Although not directly faced with the same issue as in *Follansbee*, a California court, in *Wells Fargo Bank v. Superior Court of Los Angeles County*, 990 P.2d 591 (Cal. 2000), suggested that it would have reached a different conclusion regarding any documents that are subject to the attorney-client privilege, whether relating to administration or to potential trustee liability. In that case, the trustee had already produced "privileged" documents relating to trust administration, in the mistaken good faith belief that the law required the trustee to produce them. The court observed that an honest mistake, when the law is unsettled and debatable, does not result in a waiver of the attorney-client privilege for documents on other subjects.
- f. In the *Wells Fargo* case, the court relied on a California statute and concluded that there is no authority in California law for requiring a trustee to produce communications protected by the attorney-client privilege, regardless of their subject matter. Although the beneficiaries argued that the trustee had a duty to report about the trust and its administration, the privilege, which was a statutory creation, could not be expanded or limited by the court. Nor was there an implied common law exception arising from cases requiring a trustee to provide complete and accurate information about the trust to its beneficiaries.

### C. Information Stored In Electronic Form

1. As with all other individuals and businesses, trustees have been confronting issues arising out of storage of, access to, and production of information held in digital or electronic form. This medium, electronically held information, can provide significant benefits. For instance, trust beneficiaries may now access their statements online, and in some cases are able to see up-to-date account information for their trusts. For fiduciaries not in the same locale as their beneficiaries, e-mail and online account statements permit communication of information as if the trustees had a presence in the beneficiary's community.
2. When there are disputes requiring production of trustee records, however, trustees could be faced with requests beyond the scope of discovery requests that they have seen in the past. Responding to a request for all communications with a grantor in the case of a dispute over the construction or interpretation of a trust instrument, or a request for all documents relating to internal consideration of an investment strategy in the case of a claim against a corporate trustee, no longer consists of pulling out a paper file. Rather, a sufficiently complete search of trustee records may require checking all e-mail correspondence and information stored electronically. Review of the following sample of recent cases, not involving trustees, identifies issues that fiduciaries also may face in future litigation.
3. In *Gutman v. Klein*, 2008 WL 4682208 (E.D. N.Y. Oct. 15, 2008), defendants faced sanctions of a default judgment recommended by a magistrate. The defendants had deleted relevant files, manipulated a laptop system clock, reinstalled an operating system, and copied thousands of files onto the hard drive prior to court-ordered imaging.
4. In *Bianco v. GMAC Mortgage Corp.*, 2008 WL 4661241 (E.D. Pa. Oct. 22, 2008), plaintiffs sought to compel production of the defendant's general counsel's laptop for imaging. There was no evidence of discovery misconduct and the defendant had extensively searched for and produced documents responsive to the plaintiffs' requests. The search sought was intrusive and would likely have led to disclosure of privileged and confidential information. The court denied the motion and noted that Rule 34 does not create a "routine right of direct access to a party's electronic information system, although such access may be justified in some circumstances."
5. In *Goodbys Creek, LLC v. Arch Ins. Co.*, 2008 WL 4279693 (M.D. Fla. Sept. 15, 2008), the defendants produced documents as converted TIFF images. In response to the plaintiff's complaints, even though the plaintiff did not originally specify the production format, the court granted a motion to compel reproduction of the documents and identified three options for the format of production. *See also White v. Graceland Coll. Ctr. For Professional Dev. & Lifelong Learning, Inc.*, 2008 WL 3271924 (D. Kan. Aug. 7, 2008) (conversion to pdf files and production in paper format did not comply with Rule 34's option to produce in "reasonably usable form").
6. In *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 242 F.R.D.139 (D.D.C. 2007), a motion to compel production of e-mail from back-up tapes was granted.
7. In *Integrated Serv. Solutions, Inc. v. Rodman*, 2008 WL 4791654 (E.D. Pa. Nov. 3, 2008), the court denied the plaintiff's motion to compel production of search "hits" from the laptop of a non-party. An agreed-on neutral third party had conducted the search and counsel had reviewed the hits, concluding

that none were relevant. The plaintiff had provided no showing of bad faith or indicia of unreliability in what had been produced.

8. In *Cantrell v. Cameron*, 195 P.3d 659 (Colo. 2008), an appellate court found that the trial court had abused its discretion by ordering production of a laptop for inspection but declining to incorporate restrictions or narrow the scope of inspection, despite defendant's motion for a protective order to address concerns about attorney-client privilege and proprietary business information.
9. For a fiduciary, these cases raise the specter of costly, time-consuming production of documents in the event of litigation and provide incentive to consider and implement practices that will help respond more effectively in the event of discovery requests. Whether the fiduciary is an individual or a corporate entity with numerous offices and employees, some of the following simple steps should be considered.
  - a. Develop and observe a reasonable records retention policy under the facts and circumstances. This policy should not have the objective of culling documents or information that the document holder does not want to be discoverable.
  - b. Use e-mail and other electronic communications properly. Employees should be sensitized about the discoverability of personal, improper, or simply embarrassing e-mail.
  - c. If a discovery request is received, impose a litigation hold on electronic records, as well as paper files.

#### **D. Fiduciaries And Issues From Cyberspace**

1. The availability of electronic means of transferring information continues to evolve. Telephones and telegraphs were once cutting edge technology for communications. Computers and the worldwide web have grown into use by the general public within the lifetimes of most individuals who are serving as fiduciaries or currently working with corporate trustees. Three years ago, the article attached below in the appendix was written for estate planning attorneys, and at that time, few would have predicted that a President of the United States would have web pages on Facebook, MySpace, Twitter, and YouTube.
2. For purposes of identifying potential issues for fiduciaries arising in a changing world of technology, the web, and cyberspace, the following discusses how new technology may affect common fiduciary duties and practices. (According to Wikipedia: cyberspace enables “the interdependent network of information technology infrastructures (ITI), telecommunications networks—such as the Internet, computer systems, integrated sensors, system control networks and embedded processors and controllers common to global control and communications. As a social experience, individuals can interact, exchange ideas, share information, provide social support, conduct business, direct actions, create artistic media, play simulation games, engage in political discussion, and so on”)
3. *Identifying Trust Documents*
  - a. *In re Estate of Furst*, 55 P.3d 664 (Wash. 2002). The testator, whose documents were at issue in this case, executed a revocable living trust agreement and transferred property to the trust, the Robert

J. Furst Revocable Trust. Sometime later, the testator consulted with a new attorney and signed a will prepared by that attorney. He failed to tell his new attorney that he had executed the living trust and that all of his assets had been transferred to that living trust. The provisions for disposition under the living trust agreement and under the new will were substantially different. After the testator's death, the beneficiaries under the will argued that the will was an amendment of the living trust agreement. The trial court agreed. The court of appeals disagreed and found that the living trust agreement controlled disposition of the estate.

i. Some jurisdictions have enacted statutes that attempt to remedy these situations by treating revocable trusts like wills for many purposes. See, for example, Pa. Cons.Stat. Ann. §7752(c), which provides:

**(c) How to revoke or amend.** The settlor may revoke or amend a revocable trust only:

(1) by substantial compliance with a method provided in the trust instrument; or

(2) if the trust instrument does not provide a method or the method provided in the trust instrument is not expressly made exclusive, by a later writing, other than a will or codicil, that is signed by the settlor and expressly refers to the trust or specifically conveys property that would otherwise have passed according to the trust instrument.

- b. *In re Estate of Tosh*, 920 P.2d 1230 (Wash. 1996). The trust instrument in this case stated that an amendment to the revocable trust agreement could be accomplished by filing with the trustee “a duly executed instrument” amending the trust. The settlor executed the original document in his attorney's office. Thereafter, he sought to amend the trust agreement to give an interest in a duplex to a person with whom he shared a long relationship. The amendment was sought to be accomplished by changing page 6 of the original document and simply inserting a new page 6 in the original document. The court found that the amended page was not a duly executed instrument prepared with the appropriate formalities and therefore was not a valid amendment.
- c. Could a document sent electronically be used to amend a trust agreement? What if a revocable trust agreement provides that it may be amended “in writing delivered to the then serving trustee” and the following events transpire: The settlor/trustee names a corporate trustee as the successor trustee and communicates regularly with her private banker at that institution by e-mail; there is no question that e-mail from that address is always sent from an iPhone used only by the settlor (who never lets it out of her personal possession); and the settlor sends an e-mail direction stating: “If anything happens to me, do not make the distribution to [John Doe] despite paragraph 5 of my living trust agreement. I will print and leave a copy of this e-mail with my copy of the trust agreement. Please make sure that you retain a copy for your records, too.” This is a writing and its authenticity is not in question, but there is no signature. These facts have not yet been tested in a court, but would raise questions about what is intended by a “writing.”
- d. Some corporate bylaws and limited liability company operating agreements now permit decision-making through electronic communications (mostly e-mail) and no longer require minutes signed by a corporate officer. Although the notion of amending a trust agreement or testamentary instrument electronically seems fraught with issues, this concept may well be accepted by a generation accustomed to online banking, electronic court filings, and paperless files.

e. Some banks offer a “digital safe” for their customers. These allow electronic copies of documents to be uploaded and available electronically for the customer who elects to store documents in that manner. What if the amendment described above were instead typed, signed, and loaded in the digital safe (or even a scanned copy on the customer’s hard drive), but the original signature cannot be found? Should the successor trustee honor that document as an amendment to the trust agreement? In any event, the availability of electronic means of storage suggests that the fiduciary should look not only in the safe deposit box at a bank or the decedent’s home, but should also consider possible electronic storage of documents.

#### 4. *Identifying Assets*

- a. Upon appointment, a personal representative or executor generally has the right to immediate possession of the real and personal estate of the decedent. *See, e.g.*, Wash. Rev. Code §11.48.020. As a fiduciary, the personal representative is responsible for identifying assets and preparing an inventory. The law is relatively settled with respect to ownership of assets such as real estate, securities, personal property, and intellectual property rights, and there are no questions with respect to the personal representative’s ability to list them on an inventory.
- b. What if, however, the decedent banked and maintained accounts online? If the decedent left a list of the accounts and passwords, the personal representative should be able to access information and identify assets. But if there is no such list and the account is not identifiable from other sources (such as income tax returns), there is a risk that a significant asset could be missed. Therefore, a fiduciary, when marshalling a decedent’s assets, should always consider inquiring about the possibility that such accounts exist. To the extent that corporate trustees offer services as personal representatives, they should not only request a copy of their customer’s will and living trust agreement, but also alert the customers to the need to identify these types of accounts.
- c. In most instances, personal e-mail and individual websites are of value for personal or sentimental reasons. When the decedent is a figure of public interest, that information may have historical and monetary value. Should information that is electronically available be identified as an asset of an estate or trust? For instance, are the e-mail accounts of such a person sufficiently valuable that they should be maintained, and who owns the accounts and all of the information contained in them? Should the account holder and the heirs control and benefit from the decedent’s writings? Or is a service provider such as Yahoo or gmail or RIM analogous to photographer Bert Stern, who recently sued for and recovered images of Marilyn Monroe? Just as there is developing law regarding the ownership of images and the “right of publicity”—for example, Cal. Civil Code §3344.1; Ind. Code §§32-36-1-1 to -20; Wash. Rev. Code §63.60.030—eventually there may be statutory guidance regarding ownership of electronically maintained images and information. In the meantime, fiduciaries who are responsible for collecting and preserving assets for heirs should consider whether steps can or should be taken to preserve rights in electronic information that may have current or future value.



## **E. Conclusion**

1. Basic notions of fiduciary duties and responsibilities have and are likely to remain the same or very similar. Duties to invest prudently, to act without self-interest or conflict, and to serve beneficiaries impartially are inherent aspects of a fiduciary's job. Changes in technology, however, such as the growing use of cyberspace for communication and information, will change the circumstances in which fiduciary principles are applied.

## **APPENDIX**

### **WHERE ARE THE CYBER ASSETS?**

#### Challenges for Estate Planners in the Digital Age

Patricia H. Char and Scott David

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## **I. INTRODUCTION**

### **A. A Time Of Change**

Computers have radically altered the conduct of commerce, communications, the sources used for obtaining information, and an increasingly broad range of elements in each of our business and personal interactions.

Consider:

- How many of you have used e-mail at work?
- How many of you have used business e-mail for personal purposes?
- How many of you have other e-mail accounts? Family websites?
- How many of you have taken digital pictures? Do you have them stored in your camera? Your computer? Your firm-owned computer? Your firm network? A commercial photo service website?

- How many of you have copied music, a movie, computer software, or other digital work? Of those who have done so, how many of you have gotten permission to duplicate to avoid an infringement of federal copyright law?
- How many of you have downloaded music, movies, or other content? Where is such content stored?
- How many of you have an online brokerage account? An online bank account?
- How many of you have lost data due to a hard drive crash?
- How many of you have received notice of a possible loss of personal data from a bank or other financial institution?
- How many of you use a digital cell phone? BlackBerry? Instant messaging? Are you aware that use of these devices enables service providers to pinpoint your location and that the data transmitted can, in theory at least, be captured by the service provider and your device and network?

The questions above are intended to encourage consideration of the broad application of computing, telecommunications, online services, and data processes in our everyday lives and in the lives of our clients. Each of the examples involves new digital products and services which have made our lives easier, but brought new and sometimes subtle challenges to our lives and considerations in estate planning.

### **B. The Effect Of Digital Products And Services On Estate Planning**

The changes that have been initiated by the pervasive use of these technologies affects an increasingly broad range of social and economic activity. As a corollary, the broad use of digital and electronic products and services has myriad implications for estate planning. In addition to changing the way estate planners work—such as creating and saving documents or doing legal research—these trends have forced estate planners to consider steps their clients must take to preserve, transfer, and otherwise deal with “cyber assets” and other related digital information. In addition, the rising prominence of the digital, electronic, and online economy has affected other non-electronic assets in ways that must also be addressed in an estate plan.

Although the changes that are touched on in these materials are pervasive, there is very little established law offering guidance as to either the commercial law or the estate planning implications of these changes. As such, the effort here will be to survey the issues to help provide a context for dealing with this increasingly important area.

### **C. Overview Of Our Approach**

The following discussion is divided into separate sections addressing the following:

1. What are the assets?
2. What are the assets worth?
3. Where are the assets?
4. Who can access the assets?
5. Who is responsible for the account?
6. What is an estate planning counselor to do to cope with these changes?

## II. WHAT ARE THE ASSETS?

### A. A Paradigm Shift

Historically, estate planners and other financial and legal professionals dealt with two broad groups of assets: tangible property (including tangible personal and real property) and intangible property (typically including accounts, stocks, bonds, etc.). Occasionally, estate planners that dealt with artists (such as writers, musicians, etc.) and inventors were faced with issues arising in copyright or patent law. These situations were, however, outside of the area of practice of most estate planning professionals.

The nature of the assets that estate planning professionals dealt with was a reflection of the traditional elements of value and drivers of the economy. Most businesses were involved in either owning, using, or supplying tangible property and most wealth was held in the form of tangible assets and intangible assets such as cash, stocks, bonds, etc. (each of which is, in reality, a token or intrinsically worthless paper that “stands in” for things of value).

In the past decade and continuing through today, there have been fundamental changes in both the traditional elements of value and in the drivers of the economy. These changes have resulted from the addition of new elements of value in business and new economic drivers. The traditional elements are still present and important (note, for example, the attention to and impacts of rising oil prices, the effect of infrastructure costs associated with Hurricane Katrina, etc.). There are, however, new types of assets and new economic drivers that are increasingly important. Some of these are recognized and protected by statute, such as copyright, patent, and trademark, while others, such as “data” and information services, are not.

Among the fundamental differences between these new assets and traditional assets are:

- The new assets can be created, defined, transferred, etc. by contract.
- Several of the new assets are creations of and affected by statute.
- The new assets can be infinitely duplicated.
- The new assets have no specific location and can have multiple locations.
- The new assets are usually licensed, not sold, and the license rights are often not transferable.
- Inappropriately dealing with the new assets can create an infringement by the executor (in addition to any infringement by the deceased).

### B. Examples Of “Cyber Assets” And Related Issues

#### 1. Decedent’s “Papers”

Increasingly, computer records are replacing paper records. As a result, many records will not be stored in a decedent’s home or safety deposit box. They will be in electronic form and they will be held by *third parties* such as employers and online service providers. How should attorneys and other estate planning professionals deal with that? For example, each third party provider of electronic and online services will have required users to sign some form of contract and will usually have a privacy policy.

Consideration should be given to what impact these contracts and policies will have on the estate. For example, an employer’s computer usage policy may provide that the employer, not the decedent, owns

everything on or utilizing the employer's equipment. Consideration should be given to situations in which only the decedent knows or "had" the password (biometric or otherwise).

Consideration should be given to the impact under community property laws. For example, even if an online account is viewed under applicable law as a community account that the spouse may access, what if the contract or policy (or employer) provides that only the decedent may access it? Further, even an insurance analysis may differ. Consideration should be given to what is insured under traditional insurance policies, that is, the hardware or the information.

Other issues that may affect such "papers" are not new, but may require a slightly different analytic approach. These include issues such as whether there is trade secret protection, commercial proprietary information, government secrecy, or other contractual or statutory limitation associated with the content of the papers.

Consideration should also be given to whether the decedent would have wanted the records to be deleted or not accessed (for example, of all e-mails in decedent's "sent mail" archive, what would he have thrown away)? For example, many people keep personal e-mails on their work computer and most computer usage policies permit that activity. If Johnny Cochran's executor asked his law firm for all of his e-mails and other e-records, what would the firm say? Some employers legally might not allow third parties to plow through documents (in the example, asserting attorney-client privilege); others will simply not be willing to give up certain documents (such as a salesperson's list of customers that the family wants for the ongoing family business—assume the list was on a third party's computer because the decedent was hired as an independent contractor); and others won't care. Most businesses will have "computer usage" policies stating that anything on company computers can at least be examined by the company (and some will assert ownership of anything that resides on their network). These issues should be addressed in estate planning as possible.

Consideration should be given to whether clients keep personal records at work because they don't want their spouse or family to have access. What will result if an employer hands over the records (for example, spouse sees e-mails evidencing an affair or secret investments, etc.)?

Estate planners may wish to inquire as to whether their clients use encryption (at work or home) to protect sensitive records. A proper questionnaire should ask if encryption is used and consideration should be given to establishing an escrow for the "encryption key" (perhaps at the law firm) for future use by the executor. The difficulty with an escrow is that the key and passwords will change over time.

There are additional concerns associated with authentication and notarization in the context of electronic records. Consideration should be given to the relevant formal rules (for example, requirements associated with creating a codicil to a will, etc.) and the effect of other documents (for example, situations such as contracts entered into by the decedent when such information may be admitted as "parol" evidence to interpret or modify terms of a contract). Both the law and the technology associated with electronic signatures and document authentication are slowly developing, posing challenges for estate planning professionals.

## **2. Domain And Sub-domain Names**

Family-owned businesses, families, and individuals all may have created domain or sub-domain names. For example, assume Mr. Smith, a father, obtained the name [www.SmithFamily.com](http://www.SmithFamily.com) or has a page at "

[aol.com/Smith](http://aol.com/Smith),” and the Smiths and their friends and relatives all post baby pictures and news, etc. In addition to questions associated with the content of that website, consider also:

- If the father dies, what happens to that URL?
- Would the decedent have cared?
- Does the decedent or family care?
- Is there a family business associated with the URL that changes the analysis?

More specifically, estate planning professionals may wish to consult with their clients to examine issues such as whether the name (URL) is transferable. If it is not, consideration should be given to whether this kind of “ongoing” asset should be put into, or established in the first place by, a “family trust” or other entity that can endure beyond the death of the individual so that the domain name won’t be lost.

Consideration should also be given to issues associated with other indirect, housekeeping matters, such as whether the executor can arrange, in the proper circumstances, for a “notice of transfer” page with the service provider (for example, a person logs onto [www.SmithFamily.com](http://www.SmithFamily.com) and either is automatically transferred to a new URL or sees a notice showing the new URL). Planning for these issues may be important for small, online businesses (such as the many small businesses that sell on online auction websites).

Importantly, there is an ongoing legal debate over whether a domain name is “property” for various purposes (for example, can a secured creditor seize it or can it be the subject of an *in rem* action), including with respect to issues of estate planning. It may be important for estate planning professionals to stay apprised of developments in this area.

### **3. Digital Assets**

A very important element of estate planning revolves around identifying the client’s information or digital information assets and determining whether special handling is required. Note that in the “valuation” discussion below, a distinction is made between those assets with intrinsic value and those with value that is primarily sentimental. Before engaging in a discussion of that distinction and the issues particular to each group of assets, consideration should be given to identification of the range of assets and special issues.

In the case of the Jimmy Hendrix estate, for example, there was a significant battle over rights to music. Music is protected by copyright law, and hence there were certain guideposts to identifying the types of assets that were involved and the rights associated with those assets. What if, for example, Hendrix had received e-mails from Janis Joplin and other e-mail correspondence? What would be the legal issues associated with this type of data? Would it be considered an asset of the estate? Who would have access and the ability to determine how the data was used after the death of the account holder?

Other examples of “digital assets” that need to be reviewed include a family genealogy database, a musical archive, a film archive, a digital photo archive, writings, personal journals, and the like. Does the archive include counterfeit works (that is, how did the client get them)? Is the archive transferable or did the license expire with the decedent? The answer can involve “first sale” and other issues under copyright law.

Estate planning professionals should consider whether to modify their digital asset planning checklist to warn or ask clients about infringement. If a decedent's archive includes infringing works (for example, the decedent didn't get licenses for all of those movies), the archive is not as valuable an asset (and may in fact be a liability). Is it appropriate for a client to provide a warranty against infringement to the executor of the estate (if client wants the estate to generate ongoing revenues by licensing aspects of the archive, how can the estate do that if the archive contains infringing works)? Consideration should be given to what the executor should do with respect to potentially infringing material. For example, if the decedent had a library of unlawfully copied movies, would the executor or the estate be liable for causing another transfer of the library?

As a further example of the unique issues raised by digital assets, consider a decedent who leaves a film archive to his two children. If the executor makes a copy of the archive for each child, the executor could be infringing the copyright absent a fair use defense. These issues would not arise with respect to more traditional assets, such as movies on reels, in which case the executor would merely transfer the physical reel. Digital assets are easily copied, which enables different activities on the part of transferors, including executors. Notwithstanding the ease with which such assets may be copied, digital assets are also different because of intellectual property laws and other laws that may limit their duplication and transfer. In the example, it is the *copying* that creates the potential infringement, and disclaimers won't help to address violations of rights arising under federal law.

These issues must be analyzed based on the particular asset and intellectual property right involved. For example, under the copyright "first sale doctrine," the decedent typically will own each copy of his physical books and be able to transfer them. The question of the scope of the first sale doctrine is currently evolving in this era of information assets, embedded software, smart goods, etc. Also, contracts (licenses) typically will accompany the item when obtained but may be long gone (misplaced) by the time of death, yet the contract remains important and will need to be found.

What would be the treatment of the transfer of the decedent's personal computer, with its hard drive intact? Would the answer be different depending on whether both licensed and unlicensed content resided on the hard drive? Consider the transfer of a personal computer that did not contain infringing material (first sale doctrine?) and one that did (no duplication, but a retransfer of the infringing material). These issues are complex, and estate planning professionals will increasingly be called on to consider them in their practices.

Should or can the executor do something the decedent failed to do? For example, assume that Rose Kennedy scans into an online archive 50 years of family photos (accessible only by her registered family members), which no one misuses during her life because of the force of her personality, but after she dies, various family members use their access or copies to start selling pictures to earn money or embarrass family members. How can the decedent's wishes be gauged in this context. Should the estate plan anticipate these issues and provide for how the archive is to be handled? What is typically done with respect to family albums or diaries to protect the wishes of decedents? How should those practices be handled in the case of digital assets? Other issues to be considered include:

- What express or implied contract governed *access* to the archive and the archive itself?

- Did she have rights in the first place (for example, under copyright law, rights in the photos are likely in the photographer, although she might have owned the copy she scanned in, and the database may or may not be protected by IP law)?
- If she left the archive to her estate, who really owns it (that is, who owned the copies she scanned in, who owns the copyrights, and did she have a right to create a copy by scanning)?
- Is the scanned (or digitally photographed) archive a “work” for copyright law purposes different from the paper photos or negatives that someone else holds?
- Can each family member start selling or posting pictures (for example, starting their own online site) via use of the archive? What if they have in their possession their own paper copy of a photo and use that instead? Note that if a “fair use” defense is available for some activities, that defense may disappear if sales will be made.

Executors and advisers will also need to be aware of how digital assets should be handled in special circumstances. For example, Ansel Adam’s executor would have known that a negative had particular value and that proper attention should be paid to how it is accessed and transferred. If instead, valuable digital photographs are held by an executor, will the executor realize that the one copy he e-mails to brother Jack (the black sheep of the family) is equivalent to a negative (since it can be copied infinitely and without loss of quality) and that Jack could ruin the value of the asset by posting it online or threatening to do so, or by selling it?

Given the unique issues surrounding the creation and transfer of digital assets, it may be appropriate, when an estate planning adviser is aware of substantial or potentially valuable assets, to include counseling of clients on these issues during life.

These types of assets are owned by every family, not just wealthy or famous families. Some of the assets could become valuable, though many or most may not. One approach to planning could, for example, include a license by the owner to other family members entered into during life that could survive the death of the owner. There would still, however, be the issues of who owned the work after death, who enforces the license, and how the behavior of each licensee might affect the asset.

#### **4. Accounts The Executor Will Need To Access**

An “online” banking or brokerage account might be treated like any other traditional account for certain federal and state law purposes because the fact that the account may be accessed and that account activity may be initiated online will not change its fundamental nature as a repository of cash, stocks, bonds, etc. Such accounts are, however, affected under evolving provisions of law directed at electronic commerce and by developments in contract law.

It is helpful, in analyzing such accounts, to separate the object of the account (deposits, stock, etc.), which arise under and have value as a result of a separate body of law, from the elements of the account that are directly affected by contract (such as trading histories, data, results of prior services, retirement related records of transactions, etc.). Online services, websites, and similar services are generally governed by an “access contract,” that is, a mere personal license for access that is not necessarily a property or other transferable right (such as to an executor). The terms of such a contract will affect many aspects of the account, including ownership of various elements of data, transferability, access, and the like. Sometimes

the accounts relate to valuable assets (such as bank and brokerage accounts); other accounts may merely include data (such as personal e-mail accounts). Similar issues may exist for stored cell phone voicemails, other stored information services, and the like.

Access to decedent account information may also be affected by who owns the servers on which such information is stored. For example, information stored on servers maintained by a company may contain proprietary and confidential information, to which the company limits access. Information stored on government computers (such as e-mail accounts of deceased soldiers) may contain governmental secrets or other confidential or restricted information. Each type of digital assets has unique elements. Certain of the unique elements are valuable, which is the subject of the next section.

### **III. WHAT ARE THE ASSETS WORTH?**

As with other estate asset planning, the digital assets can be grossly grouped into those assets with intrinsic value and those without such value. Assets in the former category are objectively valuable; those in the latter category may be important to family and other objects of one's bounty. In addition, assets may move from one category to another (personal writings, pictures that take on value later, etc.).

Traditionally, substantial time was spent planning for the valuable assets, but less attention was paid to assets with less intrinsic value. With the increasing prevalence of electronic assets, it is still important to attend to valuable assets, but the question of value has become more slippery, and the value of a digital asset will be affected by elements (such as contracts, statutory law, etc.) that are extrinsic to the asset.

There is also an increase in the need for diligence and attention to formerly less valuable assets, such as certain data. For example, even though medical information regarding the decedent or the decedent's family may not have significant intrinsic value, it may have relevance in connection with personal injury claims or will contests. The transfer of such information in violation of the Health Insurance Portability & Accountability Act of 1996 ("HIPAA"), may carry significant penalties. There are also various federal and state laws that limit the ability to transfer personally identifying information. Thus, the landscape of what requires attention in the process of engaging in estate planning, probate, and related activities has changed.

New "objects" of value have arisen. For example, individuals are currently selling, in online auctions, credits that they have generated in online role-playing games. These credits are also the subject of barter arrangements for products and services both within and outside the game environment. Value generated in a game, for example by robbing a bank in the game, can now be sold in the real world for actual money. In a further twist, many gamers are hiring workers in India and other countries to play the game for them, generating credits that are then sold. In other words, online gamers are outsourcing the playing of role-playing games to generate value. The question of how such credits and accounts should be treated for estate purposes has not yet been established.

Additional valuation issues involve the issue of infinite duplication (which can dilute value or increase it), potential infringement, international issues (intellectual property protection may not be the same in other countries), how pre-existing licenses affect value, whether there are limitations on use (such as patents, lists containing personally identifying data, limited copyright licenses, etc.), and, with respect to software,



whether open source software was used in its creation. To the extent that the value of an asset is affected, it can affect estate planning.

It may be increasingly appropriate for every client or estate to do an “Information Asset Audit” of the type done for due diligence purposes in acquisitions. For example, if the decedent’s family business distributes open source software, to the extent that the value of the business is dependent on the software, the value of that business can be decreased for estate tax purposes. This is because open source and other similar licenses grant relatively open ended rights to other parties that cannot be terminated by the user of the open source software.

#### **IV. WHERE ARE THE ASSETS?**

By their very nature, intangible assets have no independent existence. As a result, they cannot be readily identified with a particular location or jurisdiction. In addition, digital assets can be infinitely duplicated, which means that copies of the assets can be located in multiple jurisdictions. Which law to apply in estate planning for digital assets is discussed in a later section. There is, however, an additional consideration of where digital assets are located for purposes of estate administration.

Online accounts (accounts that are electronically accessible with respect to information or transaction activity) are frequently “hosted” on a server that is maintained by the person providing the account service. This server may be in another state or country. The service provider may not even have an office in the same state in which the decedent resided. Merely locating the digital assets that are associated with such accounts is a significant challenge, and one that can only be addressed through advance planning.

Some digital assets will be stored on the decedent’s personal computer. Consideration should be given to understanding in advance what the client has and how such assets are to be accessed and distributed.

#### **V. WHO CAN ACCESS THE ASSETS?**

##### **A. Accounts That The Decedent Wants The Executor To Access**

Access to an online banking or brokerage account may be limited under federal law. The Graham Leach Bliley Act, 15 U.S.C. §§6801–6809, provides that each financial institution has an “affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ nonpublic personal information.” Privacy concerns and caution about identity theft may hinder a personal representative’s or attorney-in-fact’s ability to obtain access to an account that a decedent or principal accesses primarily online.

As noted above, access to online accounts is generally subject to terms and conditions set forth in a “user agreement” or other similar document. Estate planning should include consideration of whether the relevant contracts allow (whether on the form or by the manner in which it is completed) transfer to or access by anyone other than the client. The recent drama that played out in the press involving a family’s attempt to access the private account of a soldier, who was killed in Iraq, is an example of how these issues can lead to conflict, which might be mitigated by proper planning.

In addition, the documentation associated with online accounts will include a privacy policy. If the policy forbids access to anyone but the decedent, there is a question of whether the service provider will allow

access. Consideration should be given to how an executor will deal with such accounts and the possibility that access may be refused.

Even if the executor has a legal right of access, planning should include consideration of how the executor will get the password or answer the “secret questions” absent consent for access by the service provider. For example, assume that your client is a building contractor with access to an online government forms filing service for building contractors. If the client dies, how will the executor access stored records or shut down authorities previously established with respect to the account? Who in the decedent’s company has access and use privileges in the account that should be eliminated?

Even if the executor has the password, it may still be unable to access the decedent’s account. For example, the executor may not be able to access even personal data and digital assets stored (properly or not) by decedents that were government employees on government networks, as a result of restrictions such as security or classification issues associated with access.

Planning should include inquiries about what accounts exist (both accounts associated with investments or other financial assets and accounts associated with individual information and data) and which are or should be transferable and/or how to access them. Consideration might be given to setting up such accounts to allow joint access shared by the client and the client’s future executor. The standard questionnaire that is provided to clients to solicit personal and asset information could be modified to include detailed queries about such accounts and the client’s interests in them.

As is the case in estate planning generally, appropriate consideration should be given to issues of undue influence and duress with respect to arrangements made to provide access to a person other than the account owner. The difference is that in the case of online accounts, it might be worthwhile to seek a mechanism to witness or provide for other contemporaneous confirmation of competency, absence of undue influence, etc. at the time access is granted.

### **B. Accounts That The Decedent Might Not Want The Executor To Access**

In certain circumstances, the decedent may have created accounts that he or she would not want others to access. Consider, for example:

A decedent’s Hotmail e-mail account (such as a personal, not a work, account) may contain: commercial communications the executor should see; complaints about family members, children, or spouses that the decedent didn’t intend anyone but the recipient to see; and revelations about things the family wasn’t supposed to know (agony over illness, evidence of an affair, and other personal information that is not necessary to finalize the decedent’s affairs or identify the objects of the decedent’s bounty or assets). Consideration should be given to whether digital asset planning should include an inquiry of the client with respect to what accounts people should be able to see.

A decedent may have “panel” or “pay me for ads” accounts (through which the decedent receives prizes or gets paid for evaluating products); such accounts require vast personal information to match client to the right evaluation panel, such as one on abortion or AIDS trauma). The decedent might not want the executor to be able to see their account profile.

A decedent's shopping accounts might even contain information others should not see (e.g., [Amazon.com](#) account shows purchase of "How to Commit Suicide;" [Sex.com](#) account; [Tiffany.com](#) account showing jewelry purchases that did not go to the spouse, etc.).

The decedent's e-mail account may contain information that is not appropriate for family members to see (for example, "sanitizing" soldiers' information, proprietary or confidential employer information, etc.).

### **C. State Laws Limiting Access**

Under state and federal laws, unauthorized access or exceeding an authorized access to a computer is a criminal act and can also provide grounds for a civil action. How should planners help clients avoid this kind of exposure (for example, one heir charges the executor with exceeding access or using the decedent's password without permission, such as in a will contest)? Consideration should be given to creating accounts for which the decedent was the sole account holder and accounts that can be accessed by multiple parties.

Although some communications are privileged during a decedent's lifetime, many jurisdictions provide that the executor/personal representative or heirs may be the holders of such privileges. *See, e.g., Glover v. Patten*, 165 U.S. 394 (1897); *Estate of Thomas*, 165 Wash. 42, 4 P.2d 837(1931); ABA Formal Opinion 91. Thus, executors and personal representatives should be permitted access to all of a decedent's communications without regard to privilege concerns, and any such privilege should not be a basis to deny access to electronic communications or accounts. Consideration should be given to whether third parties will accept that, particularly in light of risks such as those concerning identity theft.

### **D. Other Issues**

Many other issues relating to access should be considered. Security of an account is a major consideration, particularly when it is associated with other valuable assets (such as an online banking or brokerage account). It is well known that one of the best protections against identity theft is the detection of unauthorized activity in the account. How can a representative track unauthorized activity if it does not have access and is not aware of the account and the trading history. In addition, a personal representative/executor has a duty to identify creditors and potential claims against an estate and to locate all of a decedent's assets. To perform such a duty, identification and review of digital accounts and records may be important.

## **VI. WHO IS RESPONSIBLE FOR THE ACCOUNT?**

In addition, there are issues that arise with respect to account maintenance. For example, many online accounts are subscription services that automatically renew and charge fees to the subscriber's credit card or debit a bank account. Consideration should be given to whether, as part of the planning exercise, such accounts are identified so that the executor can stop (or continue) the renewals? Some accounts may be established for a set number of years absent payment of a cancellation penalty. How will the executor identify such accounts? One problem is that subscribers may or may not print the contracts governing these kinds of accounts. As a result, they will not necessarily be in a client's file, and the version presented online at the time of death might not reflect the version applicable to the decedent. Consideration should be given to suggesting to clients that they print and retain contracts for online accounts and services.

## **VII. WHAT IS AN ESTATE PLANNING COUNSELOR TO DO TO COPE WITH THESE CHANGES?**

In addition to the issues described above affecting the assets and accounts of the decedent, the pervasiveness of digital assets and accounts has implications for legal and other advisors.

### **A. Preparation Of The Last Will**

The federal Electronic Signatures in Global and National Commerce Act, which is federal law that confirms the validity of electronic signatures used in commerce and business transactions, does not provide for such use in connection with execution of a last will or codicil. But it does not preempt “a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts.”

The Uniform Electronic Transactions Act (1999) provides that it applies to transactions involving electronic signatures, except that it does not apply if there is “a law governing the creation and execution of wills, codicils, or testamentary trusts.”

Nevada appears to be the only state that permits electronic means to authenticate last wills. It provides a glimpse of where other states may go on this issue. Nev. Rev. Stat. §133.085 provides:

1. An electronic will is a will of a testator that:
  - (a) Is written, created and stored in an electronic record;
  - (b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
  - (c) Is created and stored in such a manner that:
    - (1) Only one authoritative copy exists;
    - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
    - (3) Any attempted alteration of the authoritative copy is readily identifiable; and
    - (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.
2. Every person of sound mind over the age of 18 years may, by last electronic will, dispose of all of his estate, real and personal, but the estate is chargeable with the payment of the testator’s debts.
3. An electronic will that meets the requirements of this section is subject to no other form, and may be made in or out of this state. An electronic will is valid and has the same force and effect as if formally executed.
4. An electronic will shall be deemed to be executed in this state if the authoritative copy of the electronic will is:
  - (a) Transmitted to and maintained by a custodian designated in the electronic will at his place of business in this state or at his residence in this state; or
  - (b) Maintained by the testator at his place of business in this state or at his residence in this state.
5. The provisions of this section do not apply to a trust other than a trust contained in an electronic will.
6. As used in this section:
  - (a) “Authentication characteristic” means a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person.

Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.

(b) “Authoritative copy” means the original, unique, identifiable and unalterable electronic record of an electronic will.

(c) “Digitized signature” means a graphical image of a handwritten signature that is created, generated or stored by electronic means.

As Nevada gains experience with its statute, other states may adopt the same provisions. In any event, a probate attorney should be alert to the possibility that an electronic will may exist and should ask about the possibility before assuming that a decedent died intestate.

## **B. Jurisdictional Issues**

Where will a decedent’s online or other information and electronic assets be considered to be located? Will the location of the server on which they are stored be dispositive, or will they be considered “present” at the primary residence of the decedent? Which local law will apply to the disposition of the electronic and information assets by the estate? Consideration should also be given to the possibility of both domestic and international issues. The resolution of these issues will affect both the client issues and the manner in which the attorney handles the estate. If a law governs other than the law where the attorney that represents the estate is located, what are the responsibilities of the attorney with respect to compliance with that other state’s laws?

## **C. An Executor’s And Advisor’s Compliance With Law**

Increasingly, state and federal legislators are taking steps to limit certain activities involving data that are perceived as having public policy implications. Examples include the limitations imposed by HIPAA with respect to medical information and the various state (and possibly upcoming federal) law relating to limitations on the transfer of personally identifying information in certain circumstances. Consideration should be given to such questions as: Will privacy issues prevent the transfer of the decedent’s information and electronic assets? What if the information contains identifying personal information relating to other people? Are there implications associated with the transfer of health-related information by the executor (with respect to the decedent or others)?

## **D. Publication**

Personal representatives may be required to give notice to creditors or to publish notice to creditors so that claims may be asserted. Claims that are not timely made are barred. Consideration should be given to whether the content and manner of the publication should be expanded. Consider, for example:

EBay sellers seldom use their real or full names—if client John Doe is an eBay seller, his seller account can be anything (for example, “[Flatsigned.com](#)” (bookseller)). If a buyer has a claim against your client because of an eBay transaction, is publishing “John Doe” in the local paper notice to claimants who only know him as Flatsigned?

John Doe uses aliases in chat rooms and the like. If John is the subject of a potential defamation claim (as a result of having libeled someone in the chat room), or has committed an infringement by posting a copyrighted work without permission and the owner wants to sue John for infringement, those claimants will not recognize a notice about “John Doe” when they know him as “Quantum3.”

Consideration should be given to how “doing-business-as” names are handled in estate planning currently.

### **E. Record Retention**

Because electronic logs or records of a decedent could be relevant for future matters, such as a creditor claim dispute or a will contest, the personal representative should be advised that such records should be maintained for a period of time after the decedent’s death. Although a personal representative may be inclined to dispose of a decedent’s furniture and personal items as soon as possible after death, consideration should be given to retaining a computer or computer records at least during the period for a will contest to be commenced or a creditor claim to be filed. Note also that some “electronics” laws may speak to this question.

### **F. Expansion Of The Estate Planning Process**

There are several steps that planners may wish to consider in addressing the issues identified above and other similar digital assets and accounts issues. These include the following:

- i. Review standard client questionnaires to call out accounts (such as those accessed online without printed periodic statements) and digital assets.
- ii. Contact existing clients to suggest a review of accounts and digital assets (any estate plan put in place more than five to seven years ago is likely not addressing some of these issues; many of the digital assets and accounts did not exist then).
- iii. Consider client businesses and whether digital assets and data are a significant element of them. Consider who owns the assets and what legal agreements are in place that affect their value, transferability, etc.
- iv. Consider additional services to clients to assist with digital assets, such as password and encryption key escrow, etc.
- v. Consider involving “information,” “e-commerce,” and “intellectual property” counsel or advisors in estate planning.
- vi. Consider gathering other information (such as passwords and personal question information) needed to permit an attorney-in-fact serving under a power of attorney to access account information.