

**Tulsa Estate Planning Forum**  
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**Estate Planning and Digital Assets**

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**I. Introduction**

**A. Estate Planning and the Individual's Assets**

1. A primary objective of estate planning is to achieve for an individual who is a property owner, and his or her family members, during his or her lifetime, the maximum economic benefits available from the possession and use of his or her property (assets).

2. Estate planning is also intended to enable the individual to transfer his or her property (assets) to the surviving members of his or her family or other desired beneficiaries, to include trusts, with minimal reduction of value from taxes and other property transfer costs. Streng, 800-3rd T. M., Estate Planning, Introduction.

3. The development of an appropriate estate plan for a client depends on a full and complete understanding of the client's family situation, assets, liabilities and personal net worth position, and fundamental estate planning objectives. *Id.*, ¶ II. A.

**B. Estate Planning; Fiduciaries, Duties and Powers**

1. Estate planning usually involves an individual making of a will or the creation of a trust, and frequently involves the selection and naming of an executor or personal representative of the individual's estate in the will, and a trustee of a trust created. In addition, an estate plan will often include the individual signing a durable power of attorney designating another person to act on his or her behalf if he or she becomes ill or for any reason incapacitated.

2. Persons who are designated and act in the capacity of personal representative of an estate, and trustee of a trust in such circumstances are usually considered to be fiduciaries that have particular legal duties with respect to the estate or the beneficiaries of an estate or trust. This usually includes a duty to identify and prudently collect, manage and protect the assets of the estate or trust.

3. In the case of a power of attorney, the person designated and acting as the attorney-in-fact, or agent, on behalf of an individual who has designated him or her as attorney-in-fact is usually also considered to have a fiduciary duty to act with prudence to obtain or keep control of and protect the property and assets of the individual.

### **C. Digital Assets**

The increased use of the Internet has given rise to the existence of what is now referred to as and considered to be the “digital assets” of an individual, usually meaning information, records and data in electronic form that is created and stored on the Internet that the individual has a right to access and use. A new proposed uniform state law, mentioned below, includes a definition of the term “digital assets.”

## **II. Fiduciary Access to and Management of Digital Assets**

### **A. Privacy laws, Electronic Communications Privacy Act, Stored Communications Act, State computer crimes laws.**

1. The development of the law in this context has indicated conflict has arisen in large part because of concerns expressed by Internet service providers that their allowing access to electronic information in an individual’s online account that is governed by the terms of a service agreement containing privacy provisions may directly or indirectly fail to comply with that agreement, federal or state privacy laws, or criminal laws on unauthorized access to computer hardware and data stored in computer systems.

2. The privacy and computer access laws considered to have possible application include the federal Stored Communications Act and Computer Fraud and Abuse Act.

3. Similar state laws also exist, including the Oklahoma Computer Crimes Act.

### **B. Terms-of-Service Agreements - electronic/digital asset service providers and custodians.**

The right of a third person, including a fiduciary, to access the online account and digital assets involved may be limited or disallowed by a terms of service (“TOS”) agreement governing the account that has been entered into by the individual and the Internet service provider.

### **C. Fiduciary access and powers under existing state laws.**

1. The increase in use of the Internet and the recognition or the existence of digital assets has resulted in a corresponding interest in how that may affect the possession, use, transfer and management of digital assets in connection with an individual’s estate, a trust, or an individual who has signed a durable power of attorney.

2. The terms of the laws of most states, including Oklahoma, that are most directly involved in the administration of a decedent’s estate, a trust or a durable power of attorney, were written prior to the creation of the Internet and the ways in which it is used today. The judicial interpretation and application of those laws in court cases, for the most part, do not contemplate or deal with the Internet in this context of the administration of estates and trusts.

a. Oklahoma Personal Representative. Oklahoma law, by a statute enacted in 2010, does specifically provide that service providers are required to provide access to or copies of the contents of emails to the executor or personal representative of a deceased individual's estate, and the personal representative has the power and authority to take control of, conduct, continue, or terminate any accounts of a deceased individual on any social networking website, any microblogging or short message service website or any e-mail service websites. The statute provides such access and control as to decedent's estate to the extent indicated, but does not appear to cover or specifically provide for giving binding authority to a fiduciary in various other situations. 58 O. S. 2011, §269.

b. Oklahoma Trustee. Oklahoma statutes providing for powers and authority of a trustee, and for a person acting on behalf of a trust beneficiary, do not appear to specifically provide authority with respect to Internet online account access to digital assets of an individual or trust, although a trustee that has created an online account in the name of a trust containing digital assets of the trust may have access under the terms of service for the account. 60 O. S. §§ 175.1-175.603.

c. Oklahoma Power of Attorney. The Oklahoma statutory forms for power of attorney does not explicitly mention or cover digital assets of an individual completing and signing it to appoint a person as an agent and attorney-in-fact. The form does provide for special instructions to be given to extend, increase or add to the powers granted. The statutes also state that a power of attorney can authorize a person to whom it is given to demand, receive, and obtain a thing of value to which the principal claims to be entitled, and in general, do any other lawful act with respect to the subject. 58 O. S. §§1071-1077; 15 O. S. §§1001-1020.

d. For an individual that has used the Internet to establish an online account for email or other electronic information services with a service provider or financial institution, Oklahoma law does not appear to specifically authorize or permit access to the online account or an avenue for superseding or being reconciled with conflicting provisions in a TOS agreement or privacy laws.

### **III. Revised Uniform Fiduciary Access to Digital Assets Act (2015)**

#### **A. Background, Purpose.**

1. The Revised Uniform Fiduciary Access to Digital Assets Act (2015) ("RUFADAA") has recently been proposed by the Uniform Law Commission ("ULC") to expressly resolve these kind of digital asset access legal issues.

2. The stated purpose of the law is to more clearly give fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, and to give custodians of digital assets and electronic communications legal authority to deal with fiduciaries acting for other persons using the Internet.

## **B. Principle Features and Provisions of the RUFADAA**

1. The RUFADAA generally provides for fiduciaries to have access to digital assets of an individual by defining persons and relationships that will exist in most circumstances where it is needed and then prescribing methods by which that access must be provided and allowed.

2. Some key definitions contained in the Act used in application of its provisions are:

“Account” - an arrangement under a terms-of-service agreement in which a custodian performs its digital asset services for the user;

“Agent” - an attorney-in-fact granted authority under a durable or nondurable power of attorney;

“Catalogue of electronic communications” - information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

“Content of an electronic communication” means information concerning the substance or meaning of the communication which:

- (A) has been sent or received by a user;
- (B) is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and
- (C) is not readily accessible to the public.

“Custodian” - a person that carries, maintains, processes, receives or stores a digital asset for a user;

“Digital asset” - an electronic record in which an individual has a right or interest (but not an underlying asset or liability unless it is itself an electronic record);

“Fiduciary” - an original, additional, or successor personal representative, guardian, agent or trustee;

“Online tool” - an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

“Power of attorney” - a record that grants an agent authority to act in the place of a principal;

“Principal” - an individual who grants authority to an agent in a power of attorney;

“Terms-of-service agreement” - an agreement that controls the relationship between the user and the custodian; and

“User” - a person that has an account with a custodian.

3. In an example of an online account maintained for the individual by an institution or firm; the individual would be the user; the electronic and digital information about the account would be the individual’s digital assets (but not the underlying stocks and bonds owned by the individual); the financial institution or firm would be the custodian of those digital assets; the terms-of-service agreement would be whatever agreement has been entered into by the individual and the institution or firm to control their relationship; the online tool would be a separate electronic form of authorization, if any, by which the institution or firm would allow the individual, as the user, to direct the institution or firm to disclose digital assets of the account to the individual’s child (*e.g.* a link by which the individual could designate the child as a third person having authority to access the electronic records of the account maintained by the institution or firm); and the individual would be a principal that has given a power-of-attorney to the individual’s child as the individual’s agent, who is therefore also a fiduciary.

4. In an overview, the RUFADAA, if enacted by a state, would specifically set out by statute how access to digital assets (*e.g.* electronic records, accounts) can be legally required to be provided by a custodian of an online account to a fiduciary.

a. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user’s digital assets or to direct the custodian to delete the user’s digital assets, RUFADAA makes the user’s online instructions legally enforceable.

b. If the custodian does not provide an online planning option, or if the user declines to use the online planning tool provided, the user may give legally enforceable directions for disposition of digital assets in a will, trust, power of attorney or other written record.

c. If the user has not provided any direction, either by an online tool provided by a custodian or in a traditional estate plan, the terms of service for the user’s account will determine whether the fiduciary may access the user’s digital assets. If the terms of service do not address fiduciary access, default rules of RUFADAA will apply.

5. The Act basically provides for fiduciary access to be accomplished through establishing this three-tiered statutory system of priorities. It would apply to the example given above as follows:

a. If a financial institution, as custodian, has provided such an online tool for the account (separate and distinct from a terms-of-service agreement) that can be used by the individual as the user of the account, to give directions to the institution or firm, as custodian, that for example, the individual’s child, as a fiduciary, shall have access to the

account and digital assets in it, then instructions given to the institution or firm, as custodian, by the individual using that online tool will be legally enforceable, and will control, irrespective of what is provided about access by a fiduciary to the account in a terms-of-service agreement, and irrespective of any contrary instructions and authority stated in the power of attorney given by the individual to the individual's child, as a fiduciary, as to access to the account and digital assets in it.

b. If a financial institution, as custodian, has not provided such an online tool for the individual, as user, to give directions as to allowing a fiduciary to have access to the account, or if the individual, as user, declines to use an online tool that has been provided by the institution or firm, as custodian, for that purpose, then directions and authority to access an online account and digital assets stated in the power of attorney given by the individual, as user, to the individual's child, as a fiduciary, would be legally enforceable as to the institution, as custodian, with respect to the account and digital assets in it, irrespective of what is provided about access to the account and digital assets in a terms-of-service agreement.

c. If the individual, as user, has not provided any direction as to access of the account through use of an online tool offered by the financial institution, as custodian, for that purpose, or in estate planning documents, such as a power of attorney, then the terms-of-service agreement for the account will determine whether the individual's child, as holder of a power of attorney, and a fiduciary, will be allowed access to the account and digital assets in it. If the terms-of-service agreement does not address fiduciary access to the account, then certain "default rules" under RUFADAA would apply, which provide for limited disclosure of a listing of electronic communications related to the account while not disclosing the content of emails and social media conversations.

6. RUFADAA limits the access to content of an individual's digital assets (*e.g.* emails) by a fiduciary in particular situations unless consent to and authorization of disclosure is established and/or specifically given by the individual. This should allow for flexibility and choices in an individual's planning and giving digital asset access authority to a fiduciary.

7. RUFADAA also gives importance to carefully considering and specifically stating in estate planning documents the extent to which access to online accounts and disclosure of digital assets to a fiduciary is intended and desired.

### **C. Adoption of Uniform Act by States and Effect**

1. Approximately half of the states in the U.S. have introduced legislation to enact RUFADAA. A bill to enact RUFADAA in Oklahoma has been introduced in the Oklahoma legislature in 2016.

2. A bill to enact RUFADAA in Oklahoma, was introduced in the Oklahoma Legislature in 2016, but not enacted. SB 1107, 2nd Session, 55th Legislature (2016)

3. The terms and provisions of RUFADAA, and the ULC recommending it be made a uniform law in all states, indicate the importance of now specifically providing in estate planning documents for a fiduciary to have the authority to access and act with respect to digital assets.

#### **IV. Estate Planning for Digital Assets**

##### **A. Digital Assets Now a Part of an Estate Plan**

The terms and provisions of the Act, and the ULC recommending it be made a uniform law in all states, and underlying reasons, indicate the importance of now specifically providing in estate planning documents for a fiduciary to have the authority to access and act with respect to digital assets.

##### **B. Digital Assets Identification, Inventory and Instructions**

1. The new presence of digital assets as a part of an individual's property and assets that can and hopefully will be provided for in an estate plan logically suggests that some method be adopted by the individual and those providing estate planning advice to try to assure that the digital assets are known, located, used and transferred.

2. The published commentary on this new part of estate planning has included the suggestion that an individual be advised to create, maintain and periodically update a hard copy paper document that specifically identifies and lists his or her digital assets. The approaches suggested have included a "virtual asset instruction letter," a "digital audit" instrument that includes a listing of computers, email accounts, social media accounts and financial accounts by which the individual uses the Internet, and the user name and password for each of those items. It is also suggested that a computer "flash memory drive" or CD be made containing this information. These ideas and suggestions are joined with advice to maintain the document and information in safe keeping, such as a safe deposit box or electronically, so that access to the digital assets is not obtained by others inadvertently or by means of misappropriation.

##### **C. Planning for Use and Disposition of Digital Assets**

1. RUFADAA provides for an individual to give legally enforceable directions so that a fiduciary would be allowed to have access to an online account and the digital assets in it.

2. Because of the order of the priorities given by RUFADAA, it would seem that in planning for giving legally enforceable directions and authority for a fiduciary to be able to access online accounts and digital assets, an individual, as a user of an account, should generally make a decision to either (i) use such an online tool, if one is provided for an account, or (ii) use traditional estate planning documents, such as a will, trust, or power of attorney, to give such directions and authority to a fiduciary to gain access to the account and digital assets in it, but not try to use both methods.

3. Because the adoption and recommendation for enactment of the RUFADAA is relatively recent, the concept of an online tool and how it is to be implemented for online accounts reportedly may not yet be widely recognized and understood. That suggests choosing traditional estate planning documents, such as a will, trust, or power of attorney, to expressly direct and authorize a fiduciary to have access to online accounts and digital assets, rather than trying to use such an online tool, may be the preferable approach at this time.

4. RUFADAA also appears to provide that an individual may give directions and authority to access all or only part of digital assets. It contains provisions that distinguish between the *content* of electronic communications (emails) and other digital assets, such as what is referred to as a “*catalogue of electronic communications*” sent or received by an individual, other than the content thereof. That term is defined in RUFADAA, as stated above, and means information that identifies each person with which an individual has had an electronic communication, the time and date of the communication, and the electronic address of the person; and the term “electronic communication” is defined to have the meaning given in the federal Electronics Communications Privacy Act of 1986.

#### **D. Implementing an Estate Plan for Digital Assets**

1. An individual who has “digital assets,” or can be anticipated to have them, should prepare and retain with his or her estate planning documents a digital asset list and a digital asset instruction letter in a form that can be useful in most or all events in which the estate planning documents will be followed and used. The commonly recommended and suggested approaches to this mentioned above should be considered and one selected that is feasible and practicable for the individual and persons designated as fiduciaries. The methods, described above, such as a hard copy paper document that specifically identifies and lists the individual’s should be considered and used in digital assets. The document (or documents) used should be completed, signed and dated, and be kept in a manner and at a place where it will be found and accessible to the individual’s personal representative, trustee or attorney-in-fact under a power of attorney, as applicable. Streng, 800-3rd T. M., Estate Planning, ¶ III. E. 7.

2. An individual with appropriate professional advice should prepare and sign his or her estate planning documents, including a will, trust and power of attorney, in a form that contains specific and clear provisions giving authority and directions to the fiduciary named to access and take action with respect to the individual’s digital assets.

a. This presumably should most often be stated in the part of the document that describes the powers and authority which the individual directs and authorizes the fiduciary to have and exercise, such as the powers of a personal representative named in a will, the trustee designated and appointed in a trust instrument, and attorney-in-fact appointed in a power of attorney.

b. A seemingly most advisable approach to providing for this power and authority would be to state it in general and broadly applicable terms to better assure that the fiduciary will be able to access digital assets in different settings and when confronted by different custodians and their particular terms of service.



c. However, if it is intended that the fiduciary's power and authority be limited as to access, as between the existence of a digital asset and its content, this should be stated in the document.

d. Also, if the individual intends or desires that certain digital assets be transferred to a particular person or subject to specific terms and conditions this should be stated in the document. This kind of provision would seemingly be stated in the part of the document (a will or trust) that provides for the transfer and disposition of assets of the estate or trust.

## **V. Fiduciary and Estate Planning Advisor Recommended Policies/Actions Regarding the Internet and Protection of Digital Assets**

### **A. Before Death**

1. Prior to the death of a client, educate him or her (including family members who may have access to the client's digital assets after death) on basic cybersecurity principles to avoid loss or corruption of such assets before and after the client passes. These include practices such as the following:

a. Choose strong passwords and keep them secure (i.e., never share passwords or place written passwords where they can be found). Different passwords should be used for different devices/websites.

b. Shut down computers at least once a week to ensure any automatic updates are applied.

c. Do not click random links online or in emails, either from unknown individuals, with strange subject lines, or containing errors.

d. Turn off wi-fi on devices unless intending to connect, and do not use public wi-fi networks, even if provided a security passcode.

e. Do not upload information from external hard drives/thumb drives without first pre-scanning them.

f. Watch for particular threats (see below).

2. Identify the various service providers utilized by the client and review the terms of service/terms and conditions of the providers. If the client has taken any steps already to address his or her death (such as setting up Google's Inactive Account Manager), ensure those are consistent with the client's plans given the change in Oklahoma law. Consider confirmation of the treatment of assets after death (such as media files in iTunes) and, for those assets that may not transfer, communicate this to the client in the event the client may wish to stop purchasing them.

3. Consider a VAIL (virtual asset instruction letter) from the client, including one or more of the following steps (*from* Michael Walker and Victoria D. Blachly, *Virtual Assets*, ST003 ALI-ABA 175, 177 (2011), steps created by Jeffrey Cheyne):

- a. Identify each internet account owned and determine how each company handles an account when the account holder dies.
- b. Determine which accounts the representative should maintain and access, and prepare a written and electronic list with passwords.
- c. Determine which accounts should be deleted and provide instructions to do so.
- d. Consider saving this information on a secured device and store it safely, with access instructions provided to the representative or fiduciary.
- e. Backup any important files stored on the internet (*e.g.* photos) and store securely, with instructions to the representative or fiduciary as to access/location.
- f. Update power of attorney, trust, will, and other documents to provide to the representative, fiduciary or other selected party with access to electronic information.

## **B. After Death**

1. Take affirmative steps to protect the deceased client's identity, including cancelling credit cards and charge accounts as soon as possible, notifying the three major credit reporting bureaus (Equifax, Experian, and TransUnion) and requesting reports from each to ensure no activity after the client's death, and cancelling the client's driver's license (with instructions to refuse requests for duplicate copies).

2. The following basic steps have also been suggested to address digital assets (*from Virtual Assets, id.*):

- a. Get technical help if necessary.
- b. Consolidate virtual assets to as few platforms as possible by having multiple e-mail accounts set to forward to a single e-mail account.
- c. Obtain statements or data of the prior 12 months of the decedent's important financial accounts.
- d. Consider notifying the individuals in the decedent's e-mail contact list and other social media contacts.

- e. Change passwords to those that the fiduciary can control.
- f. Keep all accounts open for some period of time to make sure all relevant or valuable information has been saved and all vendors or other business contacts have been appropriately notified, and so all payables can be paid and accounts receivable have been collected.
- g. Remove all private and personal data from on-line shopping accounts or close them as reasonable possible.
- h. Plan on archiving important electronic data for the full duration of the relevant statutes of limitations.

### **C. Threats to Guard Against**

1. *Phishing* – using a fraudulent request or website to defraud someone
2. *Spearphishing* – a type of phishing that uses particular information about the individual target
3. *Spoofing* – sending an e-mail that appears to be from one site but is actually from another
4. *Hacked e-mails from legitimate addresses*
5. *Ransomware*: a malicious program that encrypts files on a system
  - a. It may lock a user out of a device or block access to files, requiring a ransom be paid
  - b. Looks for network drives – encrypting files on a network device could affect an entire organization
  - c. Also may move among files on multiple systems

May be mitigated by safe and sensible cybersecurity – assets may be digital, but their worth is real; their electronic nature may make them easy to access, but that ease can translate to the wrong parties if appropriate care is not taken.

## **VI. REFERENCES**

This outline is based in part upon comments and information published in a number of articles on the topic. Some of which are the following informative and helpful references and sources.

Steve R. Akers, Bessemer Trust, Heckerling Musings 2016 and Current Developments, February 2016, [www.bessemer.com](http://www.bessemer.com).

Victoria Blachly, Uniform Fiduciary Access to Digital Assets Act, What UFADD Know, American Bar Association, Probate and Property, July/August, 2015.

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Laura McCarthy, Digital Assets and Intestacy, 21 B. U. J. Sci. & Tech. L. 384.

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Sharon D. Nelson, John W. Simek, When You Die, Will Your Digital Assets Go to Hell?, 76 Or. St. B. Bull. 22, May, 2016.

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## APPENDIX

### Revised Uniform Fiduciary Access to Digital Assets Act 2015 (RUFADAA)

#### Summary Individual Internet User Power to Plan for Management and Disposition of Digital Assets Under RUFADAA *Tiered System of Priorities*

1. **Internet Custodian provides *online tool* separate from Terms of Service Agreement:**
  - Individual may use *online tool* provided by Internet custodian to give legally enforceable directions that name another person to have access to his/her digital assets or direct the deletion of digital assets.
2. **Internet Custodian does not provide online tool:**
  - Individual may give legally enforceable directions for the disposition of his/her digital assets in a *will, trust, power of attorney*, or other written record.
3. **Individual chooses not to use online tool provided by Internet Custodian:**
  - Individual may give legally enforceable directions for the disposition of his/her digital assets in a *will, trust, power of attorney*, or other written record.
4. **Individual has not provided direction by online tool or traditional estate planning documents:**
  - The Internet custodian *terms of service agreement* for the individual's account with the will determine a fiduciary's access to the individual's digital assets.
5. **Terms of Service Agreement of Internet Custodian does not address fiduciary access to digital assets:**
  - RUFADAA "*default rules*" will apply to determine fiduciary access to the individual's digital assets.



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Title 58. Probate Procedure

## Oklahoma Statutes Citationized

### Title 58. Probate Procedure

#### Chapter 4 - Executors and Administrators - Powers and Duties

#### Section 269 - Executor or Administrator - Control of Social Media Networks and Online Services of Deceased Person

Cite as: 58 O.S. § 269 (OSCN 2016)

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The executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites.

#### **Historical Data**

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Laws 2010, HB 2800, c. 181, § 1, eff. November 1, 2010.

#### **Citationizer<sup>®</sup> Summary of Documents Citing This Document**

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Cite	Name	Level
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None Found.

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None Found.



A Few Facts about  
**THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT (2015)**

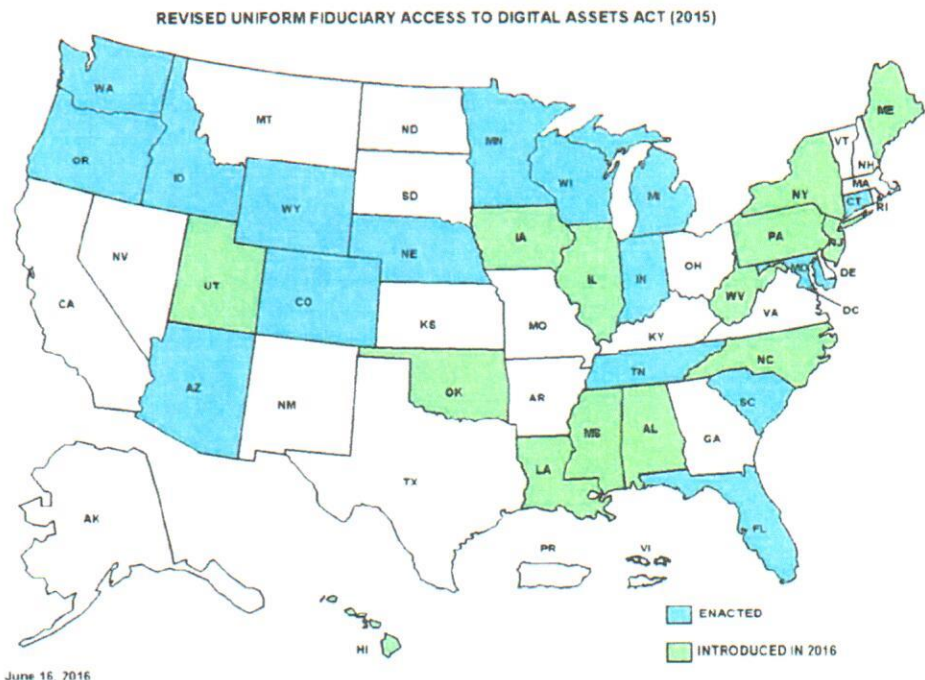
**PURPOSE:** The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) updates state fiduciary law for the Internet age. When a person dies or loses the capacity to manage his or her affairs, a fiduciary receives legal authority to manage or distribute the person's property as appropriate. Most people now own a great variety of digital assets, including photographs, documents, social media accounts, web sites, and more, some of which present special privacy concerns. Revised UFADAA provides the legal authority for a fiduciary to manage digital assets in accordance with the user's estate plan, while ensuring that a user's private electronic communications remain private unless the user consented to disclosure.

**ORIGIN:** Completed by the Uniform Law Commission in 2014 and revised in 2015.

**ENDORSED BY:** AARP, National Academy of Elder Law Attorneys, Facebook, Google, The Center for Democracy and Technology.

**APPROVED BY:** American Bar Association

**ENACTED BY:**



For further information about Revised UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or [borzeske@uniformlaws.org](mailto:borzeske@uniformlaws.org).



## THE REVISED UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT

### *- A Summary -*

In the Internet age, the nature of property and our methods of communication have changed dramatically. A generation ago, a human being delivered our mail, photos were kept in albums, documents in file cabinets, and money on deposit at the corner bank. For most people today, at least some of their property and communications are stored as data on a computer server and accessed via the Internet.

Collectively, a person's digital property and electronic communications are referred to as "digital assets" and the companies that store those assets on their servers are called "custodians." Access to digital assets is usually governed by a terms-of-service agreement rather than by property law. This creates problems when Internet users die or otherwise lose the ability to manage their own digital assets.

A fiduciary is a trusted person with the legal authority to manage another's property, and the duty to act in that person's best interest. The Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA) addresses four common types of fiduciaries:

1. Executors or administrators of deceased persons' estates;
2. Court-appointed guardians or conservators of protected persons' estates;
3. Agents appointed under powers of attorney; and
4. Trustees.

Revised UFADAA gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property. In case of conflicting instructions, the act provides a three-tiered system of priorities:

1. If the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable.
2. If the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record.
3. If the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply.



Revised UFADAA's default rules attempt to balance the user's privacy interest with the fiduciary's need for access by making a distinction between the "content of electronic communications," the "catalogue of electronic communications", and other types of digital assets.

The content of electronic communications includes the subject line and body of a user's email messages, text messages, and other messages between private parties. A fiduciary may never access the content of electronic communications without the user's consent. When necessary, a fiduciary may have a right to access a catalogue of the user's electronic communications – essentially a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.

For example, the executor of a decedent's estate may need to access a catalogue of the decedent's communications in order to compile an inventory of estate assets. If the executor finds that the decedent received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.

Other types of digital assets are not communications, but intangible personal property. For example, an agent under a power of attorney who has authority to access the principal's business files will have access under Revised UFADAA to any files stored in "the cloud" as well as those stored in file cabinets. Similarly, an executor that is distributing funds from the decedent's bank account will also have access to the decedent's virtual currency account (e.g. bitcoin).

Under Revised UFADAA Section 15, fiduciaries for digital assets are subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. A fiduciary's management of digital assets may also be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not exceed the user's authority under the account's terms of service.

In order to gain access to digital assets, Revised UFADAA requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust. Custodians of digital assets that receive an apparently valid request for access are immune from any liability for acts done in good faith compliance.

Revised UFADAA is an overlay statute designed to work in conjunction with a state's existing laws on probate, guardianship, trusts, and powers of attorney. It is a vital statute for the digital age, and should be enacted by every state legislature as soon as possible.

For further information about Revised UFADAA, please contact ULC Legislative Counsel Benjamin Orzeske at 312-450-6621 or [borzeske@uniformlaws.org](mailto:borzeske@uniformlaws.org).



## Estate Planning, Wills and Trusts

### *Importance of Considering the Internet and “Digital Assets” in Estate Planning*

#### *The Revised Uniform Fiduciary Access to Digital Assets Act*

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*“Forgot your ID or password?”*

Everyone using the Internet has probably been asked and answered “Yes” to this question.

That usually means having to take the time to answer questions or search for information needed to ultimately be able to log in, get access to and use the website or service as planned.

For a person who is a fiduciary, such as a personal representative of an estate, trustee, guardian, or holder of a power of attorney, getting Internet access for or about another person can be more difficult and challenging. This is because legal standards and requirements on privacy, electronic storage of information and computer systems may need to be satisfied and reconciled with those that govern the duties, powers and authority of a fiduciary.

This has made the Internet and its use a more important factor to consider in estate planning. Preparing and signing estate planning documents of an individual that give specific directions as to the authority of a fiduciary to access Internet online accounts and electronically stored information is now advisable.

### **The Internet and “Digital Assets” of an Individual**

The increased use of the Internet has given rise to the existence of what is now referred to as and considered to be the “digital assets” of an individual, usually meaning information, records and data in electronic form that is created and stored on the Internet that the individual has a right to access and use. A new proposed uniform state law, discussed below, includes a definition of the term “digital assets” and specifically provides for how a fiduciary can be given legally enforceable authority to gain access to an individual’s digital assets.

## **Issues Involved in Fiduciary Access to an Individual's Digital Assets**

As indicated, the use of the Internet and online account, and existence of digital assets, can raise a possible legal issue for a fiduciary that has responsibility to act in a representative capacity on behalf of another individual. If that other individual owns digital assets stored in an online account or a website maintained with an Internet service provider, the fiduciary may experience difficulty accessing them. Besides not knowing or remembering that individual's user name or password, the fiduciary also may not be considered the owner of the digital assets, nor to have the legal authority or right to require that access to the online account and digital assets be given to the fiduciary. The right of a third person, including a fiduciary, to access the online account and digital assets involved may be limited or disallowed by a *terms of service agreement* governing the account that has been entered into by the individual and the Internet service provider.

This fiduciary access to digital assets problem stems from conflicting policies often involved with estate planning, and laws furthering them, which are (1) a fiduciary, such as a trustee or person who has been given a power of attorney, often needs to identify and/or take possession and control of the assets of an individual in order to act on that individual's behalf, and (2) that individual's privacy should be protected as to the electronic communications and records maintained by the service providers for Internet online accounts, and an unauthorized disclosure and access to computer system data can be unlawful.

The development of the law in this context has indicated conflict has arisen in large part because of concerns expressed by Internet service providers that their allowing access to electronic information in an individual's online account that is governed by a terms of a service agreement containing privacy provisions may directly or indirectly fail to comply with that agreement, federal or state privacy laws, or criminal laws on unauthorized access to computer hardware and data stored in computer systems. The privacy and computer access laws considered to have possible application include the federal Stored Communications Act and Computer Fraud and Abuse Act. Similar state laws also exist, including the Oklahoma Computer Crimes Act.

## **Present Law Uncertainty as to Digital Assets in an Estate Plan**

The applicable state laws governing the powers and authority of fiduciaries may not yet contain terms and provisions that clearly indicate that authority is given to a fiduciary to access and use electronic information and the digital assets in an Internet online account of an individual for whom the fiduciary is otherwise authorized and required to act. In addition, the provisions of a *terms-of-service agreement* entered into for an Internet online account may limit or interfere with a fiduciary getting access to digital assets involved.

Oklahoma law, by a statute enacted in 2010, does specifically provide that service providers are required to provide access to or copies of the contents of emails to the executor or personal representative of a deceased individual's estate, and the personal representative has the power and authority to take control of, conduct, continue, or terminate any accounts of a deceased individual on any social networking website, any microblogging or short message

service website or any e-mail service websites. The statute provides such access and control as to decedent's estate to the extent indicated, but does not appear to cover or specifically provide for giving binding authority to a fiduciary in various other situations.

Oklahoma statutes providing for powers and authority of a trustee, for an individual to give a power of attorney to another person, and for a person acting on behalf of a trust beneficiary do not appear to specifically provide authority with respect to Internet online account access to digital assets of an individual. The Oklahoma statutory form for power of attorney does not explicitly mention or cover digital assets of an individual completing and signing it to appoint a person as an agent and attorney-in-fact. The form does provide for special instructions to be given to extend, increase or add to the powers granted. The statutes also state that a power of attorney can authorize a person to whom it is given to demand, receive, and obtain a thing of value to which the principal claims to be entitled, and in general, do any other lawful act with respect to the subject. This, at least by implication, could be interpreted to include power and authority to act and deal with respect to any digital assets. But, by the absence of specific mention of Internet online accounts and digital assets, the authority provided for by these laws in the present form could leave doubt as to their meaning and effect if considered in connection with a *terms-of-service agreement* containing specific and restrictive provisions concerning privacy and nondisclosure of the electronic information involved, and what is required or can be done in order to not be subject to restrictions stated.

Also by way of example, the Oklahoma statutes do provide specific procedures that govern rights, authority and liability where an individual has a safe deposit box at a bank or financial institution in Oklahoma and pursuant to a signed power of attorney instrument authorizes another person, such as the individual's child, to have access to the safe deposit box. In such a case, if the individual became ill or incapacitated, then the bank or financial institution would be authorized to allow access to the safe deposit box to the individual's child, acting pursuant to the power of attorney, unless the lease of the safe deposit box or power of attorney provided otherwise.

However, if in such a case the individual also had used the Internet to establish an online account for email or other electronic information services provided by a firm there could be less certainty as to the individual's child gaining access to the online account under existing law. The requested allowance of access to the online account and electronically stored information in or about it may be subject to conflicting provisions in a *terms-of-service agreement* made by the individual with the firm or under a privacy law that may appear to directly or indirectly apply. As a result, the firm may be reluctant to give the child, even as a fiduciary acting for the individual, access to the online account and the digital assets involved.

As a practical matter, a fiduciary initially faced with these questions or challenges as to access to online accounts and electronically stored information may be able to work through them with service providers or others involved by contacting them by telephone, traditional paper correspondence, or even meeting with them in person. Financial institutions and service firms providing online accounts for investment, management and other services may want to continue to provide those services as to assets involved with the account. They may conclude that the particular online account information requested is not subject to privacy laws and/or that

it may be disclosed and provided to a fiduciary under applicable federal or state laws governing financial institutions and records or statements of accounts therein. In addition, obtaining a court order in probate and administration of a decedent's estate, or for a trust or a guardianship, could, if necessary, be a way for a fiduciary to obtain access to an online account and digital assets. However, considering online accounts and digital assets and specifically providing authority to a fiduciary to obtain access to them in estate planning documents may now be the best way to avoid this potential problem and whatever uncertainty, inconvenience and expense might be involved with it.

### **Revised Uniform Fiduciary Access to Digital Assets Act to Clarify State Laws**

The Revised Uniform Fiduciary Access to Digital Assets Act (2015) ("RUFADAA") has recently been proposed by the Uniform Law Commission ("ULC") to expressly resolve these kind of digital asset access legal issues.

The stated purpose of the law is to more clearly give fiduciaries the legal authority to manage digital assets and electronic communications in the same way they manage tangible assets and financial accounts, and to give custodians of digital assets and electronic communications legal authority to deal with fiduciaries acting for other persons using the Internet.

Approximately half of the states in the U.S. have introduced legislation to enact RUFADAA. A bill to enact RUFADAA in Oklahoma has been introduced in the Oklahoma legislature in 2016.

The terms and provisions of RUFADAA, and the ULC recommending it be made a uniform law in all states, indicate the importance of now specifically providing in estate planning documents for a fiduciary to have the authority to access and act with respect to digital assets.

The law contains definitions intended to identify and define the persons, activities and relationships involved with planning by an individual for his or her digital assets. Some of the key definitions are:

*"Account"* - an arrangement under a terms-of-service agreement in which a custodian performs its digital asset services for the user;

*"Agent"* - an attorney-in-fact granted authority under a durable or nondurable power of attorney;

*"Custodian"* - a person that carries, maintains, processes, receives or stores a digital asset for a user;

*"Digital asset"* - an electronic record in which an individual has a right or interest (but not an underlying asset or liability unless it is itself an electronic record);

“*Fiduciary*” - an original, additional, or successor personal representative, guardian, agent or trustee;

“*Online tool*” - an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

“*Power of attorney*” - a record that grants an agent authority to act in the place of a principal;

“*Principal*” - an individual who grants authority to an agent in a power of attorney;

“*Terms-of-service agreement*” - an agreement that controls the relationship between the user and the custodian; and

“*User*” - a person that has an account with a custodian;

So in the example of the online account mentioned above, the *account* would be the online account maintained for the individual by the institution or firm; the individual would be the *user*; the electronic and digital information about the account would be the individual’s *digital assets* (but not the underlying stocks and bonds owned by the individual); the financial institution or firm would be the *custodian* of those digital assets; the *terms-of-service agreement* would be whatever agreement has been entered into by the individual and the institution or firm to control their relationship; the *online tool* would be a separate electronic form of authorization, if any, by which the institution or firm would allow the individual, as the user, to direct the institution or firm to disclose digital assets of the account to the individual’s child (e.g. a link by which the individual could designate the child as a third person having authority to access the electronic records of the account maintained by the institution or firm); and the individual would be a *principal* that has given a *power-of-attorney* to the individual’s child as the individual’s *agent*, who is therefore also a *fiduciary*.

In an overview, RUFADAA, if enacted by Oklahoma or another state, would specifically set out by statute how access to *digital assets* (electronic records) can be legally required to be provided by a *custodian* of an online *account* to a *fiduciary*. This is generally done through establishing a *three-tiered statutory system of priorities*. It would apply to the example given above as follows:

1. If the financial institution or firm, as *custodian*, has provided such an *online tool* for the *account* (separate and distinct from a *terms-of-service agreement*) that can be used by the individual as the *user* of the *account*, to give directions to the institution or firm, as *custodian*, that the individual’s child, as a *fiduciary*, shall have access to the *account* and *digital assets* in it, then instructions given to the institution or firm, as *custodian*, by the individual using that *online tool* will be legally enforceable, and will control, irrespective of what is provided about access by a *fiduciary* to the *account* in a *terms-of-service agreement*, and irrespective of any contrary instructions and authority stated in the *power of attorney* given by the individual to the individual’s child, as a *fiduciary*, as to access to the *account* and *digital assets* in it.

2. If the institution or firm, as *custodian*, has not provided such an *online tool* for the individual, as *user*, to give directions as to allowing a *fiduciary* to have access to the *account*, or if the individual, as *user*, declines to use an *online tool* that has been provided by the institution or firm, as *custodian*, for that purpose, then directions and authority to access an online account and digital assets stated in the *power of attorney* given by the individual, as *user*, to the individual's child, as a *fiduciary*, would be legally enforceable as to the institution or firm, as *custodian*, with respect to the *account* and *digital assets* in it, irrespective of what is provided about access to the *account* and *digital assets* in a *terms-of-service agreement*.

3. If the individual, as *user*, has not provided any direction as to access the *account* through use of an *online tool* offered by the institution or firm, as *custodian*, for that purpose, or in estate planning documents, such as a *power of attorney*, then the *terms-of-service agreement* for the *account* will determine whether the individual's child, as holder of a *power of attorney*, and a *fiduciary*, will be allowed access to the *account* and *digital assets* in it. If the *terms-of-service agreement* does not address *fiduciary* access to the *account*, then certain "default rules" under RUFADAA would apply, which provide for limited disclosure of a listing of electronic communications related to the *account* while not disclosing the content of emails and social media conversations.

The provisions of RUFADAA would therefore allow an individual to give legally enforceable directions so that a *fiduciary* would be allowed to have access to an online *account* and the *digital assets* in it. Because of the order of the priorities given by the law, it would seem that in planning for giving legally enforceable directions and authority for a *fiduciary* to be able to access online *accounts* and *digital assets*, an individual, as a *user* of an *account*, should generally make a decision to either (1) use such an *online tool*, if one is provided for an *account*, or (2) use traditional estate planning documents, such as a will, trust, or *power of attorney*, to give such directions and authority to a *fiduciary* to gain access to the *account* and *digital assets* in it, but not try to use both methods. Because the adoption and recommendation for enactment of RUFADAA is relatively recent, the concept of an *online tool* and how it is to be implemented for online *accounts* reportedly may not yet be widely recognized and understood. That suggests choosing traditional estate planning documents, such as a will, trust, or *power of attorney*, to expressly direct and authorize a *fiduciary* to have access to online *accounts* and *digital assets*, rather than trying to use such an *online tool*, may be the preferable approach at this time.

RUFADAA also appears to provide that an individual may give directions and authority to access all or only part of *digital assets*. It contains provisions that distinguish between the content of electronic communications (emails) and other *digital assets*, such as what is referred to as a "*catalogue of electronic communications*" sent or received by an individual, other than the content thereof. That term is defined in RUFADAA to mean information that identifies each person with which an individual has had an electronic communication, the time and date of the communication, and the electronic address of the person; and the term "*electronic communication*" is defined to have the meaning given in the federal Electronics Communications Privacy Act of 1986. The law limits the access to *content* of an individual's digital assets (e.g. emails) by a *fiduciary* in particular situations unless consent to and authorization of disclosure is established and/or specifically given by the individual. This should allow for flexibility and

choices in an individual's planning and giving *digital asset* access authority to a *fiduciary*. It also gives importance to carefully considering and specifically stating in estate planning documents the extent to which access to online *accounts* and disclosure of *digital assets* to a *fiduciary* is intended and desired.

### **Considering and Providing for Digital Assets in Estate Planning**

If RUFADAA is enacted and becomes statutory law in Oklahoma it should help clarify how digital assets and online accounts of individuals can be accessed and managed by fiduciaries. The law would be a source of statutory authority and guidance for individuals to rely on and use in their estate planning and the written documents providing for it.

Even if Oklahoma does not enact RUFADAA to be part of the Oklahoma statutes, individuals making and signing estate planning documents and their advisors should consider the terms and provisions of this new uniform law and take into account the practical and legal issues that have resulted in it being adopted and recommended by the ULC.

If an individual desires and intends his or her designated fiduciary to be able to access needed electronically stored information, such as in the example of a child given a durable power of attorney, then it would seem advisable for directions and authorization for that access to be expressly stated in estate planning documents appointing the fiduciary. This should at least eliminate doubt or uncertainty about what the individual wants and intends and could help gain cooperation and granting of access by Internet custodians and service providers that control and administer electronic information involved with online accounts.

It seems without question that every individual who intends to sign estate planning documents should consider if and how digital assets may be involved.

An individual should review options available for directing and authorizing fiduciary access to and disclosure of digital assets, and how this can most effectively be done. Then it would be advisable for the written provisions of pertinent estate planning documents to specifically describe and recognize the existence of digital assets, and to include terms and provisions to carry out the planning for them intended by the individual. If it is desired and intended by the individual, the documents should include specific provisions authorizing a designated fiduciary (personal representative, trustee, person given a power of attorney) to access and use his or her online accounts and digital assets, and the extent of this access.

RUFADAA and ULC published commentary on it provide useful guidance for determining the extent to which access can be authorized, and drafting and building provisions into estate planning documents to do so effectively.

Estate planning documents that have been previously signed should be reviewed, and amended if necessary, to contain terms and provisions needed to assure access to and use of digital assets.



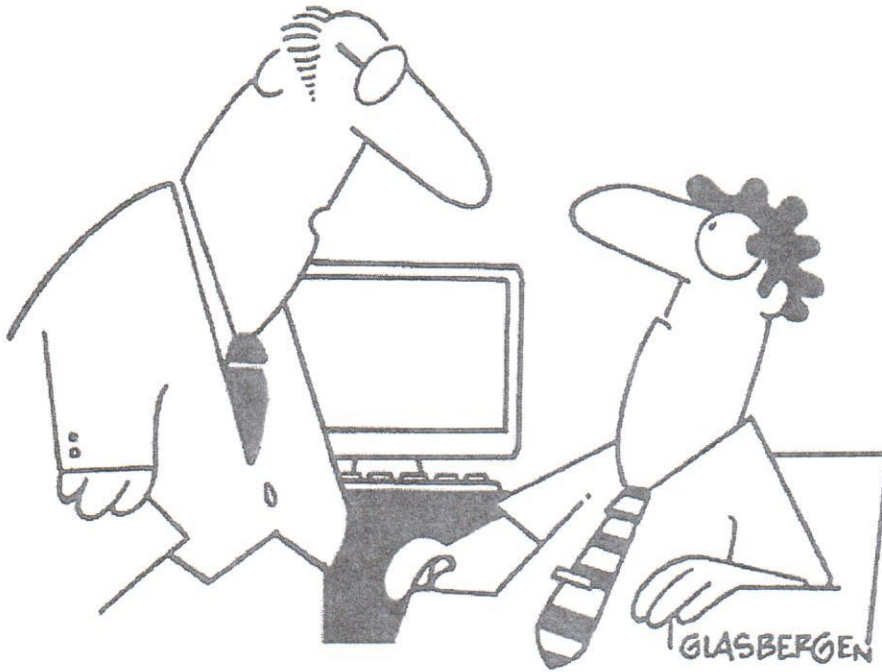
To the extent an Internet service provider allows users to designate another person to have access to information and electronic records by what RUFADAA refers to as an “online tool,” or otherwise, any directions given by an individual to the provider in that way should be considered and coordinated with what the individual intends to authorize and accomplish through the individual’s estate planning documents in order to avoid conflict and unexpected results.

This article is provided for educational and informational purposes only and does not contain legal advice or create an attorney-client relationship. The information provided should not be taken as an indication of future legal results; any information provided should not be acted upon without consulting legal counsel.

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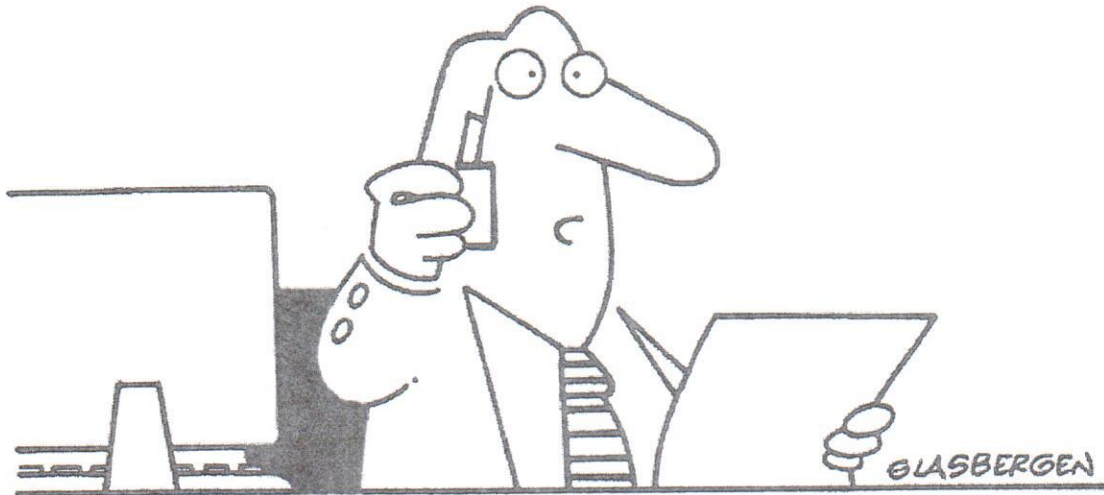
**INTERNET AND DIGITAL ASSETS**  
**ANECDOTAL OBSERVATIONS AND INFORMATION**



**“I’d like you to do a presentation on business ethics. If you don’t have time to prepare something, just steal it off the Internet.”**



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**“I sent my bank details and Social Security number in an e-mail, but I put ‘PRIVATE FINANCIAL INFO’ in the subject line so it should be safe.”**



*"One question: If this is the Information Age, how come nobody knows anything?"*