Include wishes for digital afterlife in your estate plan

By Christina Couto

Who inherits your social media accounts after you die, and what happens to your digital assets?

No one and nothing, Unless you made a plan for your digital afterlife. "Planning what happens to your digital assets not only eases the burden on survivors and the executor, it helps reduce the chances of identity theft," said Jill Choate Beier, a trusts and estates law attorney who is a partner with the McGlashan Law firm in New York City. Choate Beier was the keynote speaker at a continuing legal education program, "The Tangled Web of Planning for Digital Assets," at the State Bar on June 4.

Identity theft

The identities of nearly 2.5 million deceased Americans are stolen each year, according to a study by ID Analytics, a consumer-risk management company.

Because there is so much personal information on social media sites and in obituaries, identity thieves can easily collect information, such as a deceased person’s birth date, middle or maiden name, for fraudulent purposes.

"There is lots of information in obituaries—identity thieves can have a field day," said Choate Beier, who is an expert in helping clients plan for their online presence after they are gone. It’s also important that an executor request the deceased’s credit reports and have the credit bureaus suppress their credit file for all three credit agencies, she said. In addition, all cards with identification information should be destroyed. "Anything with identification information on it—even a gym membership."

As crucial, as it is to destroy identifying information, it also is important to preserve memories of the deceased. “Preserving the individual’s life story is important,” she said.

Personal digital assets

Heirs likely will want to have access to digital content, such as photos, video, documents or even email messages from the deceased. But with privacy policies, gaining access to the files can be difficult or even impossible without a death certificate and a document that names the executor.

Create an inventory of all online accounts and back up all data stored on the cloud, so that the executor has access, Choate Beier suggested. Discuss with clients the most appropriate method for maintaining an up-to-date inventory of accounts, passwords and log-in information to share with the executor, she added.

As for digital assets with value—virtual “property” such as Facebook credits, PayPal accounts, eBay accounts, blogs, click-through fees (advertising fees that generate income) and domain names. Virtual property also can be participation programs, such as airline or credit card miles, gaming sites with avatars, Bitcoin and digital music and books. The digital afterlife plan should include provisions for distribution of all of these assets.

“Digital assets are becoming more and more prevalent,” Choate Beier said, noting that specific provisions should be made in the estate planning documents to ensure that the executor has the proper skills to access the technology or the power to engage a technology specialist. The other option is to appoint a digital executor.

Facebook and Google

In February, Facebook began allowing users to add “legacy contacts” to manage parts of their accounts posthumously. Members also can choose to have their presence deleted entirely. The legacy contact can be designated in the member’s profile, and have the authority to report a deceased user and create a memorial page. A legacy contact cannot edit what the deceased posted while alive, or what his or her friends post on the page. A legacy contact can also delete an account.

"I would encourage you to have your clients use this feature," Choate Beier said.

Google first allowed users to select representatives for its Gmail, cloud storage and other services in 2013.

The fine print

Even though most people have significant amounts of digital property, federal legislation regarding digital property does not exist. Most states rely on trust and estate laws providing the executor with the power to distribute the decedent’s assets, Choate Beier explained. New York and other states are working on legislation.

Nine states have enacted laws attempting to address access to digital assets for deceased account holders. Delaware was the first state to grant an estate’s executor complete access to digital assets.

Its Fiduciary Access to Digital Assets Act is based on an early version of the Uniform Law Commission’s proposed law, which suggests that online accounts are akin to traditional assets, such as paper files.

Many online service provider agreements prohibit users from sharing account information, and when users agree to the terms of service, most indicate that they are not transferable. Choate Beier explained. In addition, most service providers are based in California, where there is no digital asset legislation.

The State Bar, in a June 9 update to its Social Media Ethics Guidelines, drafted by the Commercial and Federal Litigation Section, encourages all attorneys to be knowledgeable about how social media works.

(See related article, below.)

Couto is NYSBA's senior media writer.

Section’s new ‘Social Media Ethics Guidelines’ helpful tool

By Andrea Gage-Michaels

The Social Media Committee of the State Bar’s Commercial and Federal Litigation Section has issued a new report that guides lawyers on how to ethically use social media as legal practitioners.

The informational report, presented by Committee Chair Mark Arthur Berman of New York City (Ganfer & Shore LLP) to the House of Delegates at its meeting in Cooperstown in June, features updates to the section’s 2014 Social Media Ethics Guidelines. The 2014 version received national recognition and has been cited in ethics opinions of bar associations throughout the country.

The guidelines, which are advisory in nature, were updated this year to include new ethics opinions and sections on emerging issues, such as how lawyers identify themselves online, both intentionally and unintentionally.

“The predicate for many lawyers’ problems is that when they get in trouble when communicating over social media is that they don’t know what they don’t know about a social media platform, and thus the guideline on compliance was added,” said Berman in his presentation.

While the constant evolution of social media might leave some attorneys wary of even treading onto platforms like LinkedIn, Twitter and Facebook, ignoring those platforms is becoming increasingly risky.

Be careful; review often

The guidelines state that a “lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the use of social media,” calling competence “a serious matter” well.

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Using social media—Mark Arthur Berman, chair of the Social Media Committee of the Commercial and Federal Litigation Section, discusses some of the highlights contained in the section’s updated Social Media Ethics Guidelines at the June 20 House of Delegates meeting. (Photo by Marty Kavris, Jr.)