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Vonnegut: The New Estate Planning That's Critical for Clients

People need a plan for how their online presence will be handled at death and financial advisers should step up to help them

Digital-estate planning has become critical as people spend more time online and use computers to manage more of their financial affairs. *PHOTO: ISTOCKPHOTO*

By NORB VONNEGUT

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Last month a social-media website alerted me that a friend was celebrating over 30 years on the job at the company she founded. It was a nice thought. But she passed away several years ago after succumbing to cancer.

Digital echoes occur all the time on the Internet. After pausing a moment with a warm memory of my friend, I wondered what to do, whether it was my place to notify someone. Apparently, she had neglected to leave instructions with her executor.

In this case it was no harm, no foul. But "cyber intestacy"—or the failure to provide for one's online presence at death—can cost families real money, just as when someone dies without a will, or "intestate." That's especially so as wealth management goes paperless and there are fewer, visible clues about the financial decisions of others.

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Financial advisers should get out in front of this problem. That is what clients expect from advisers in the first place—the planning, the preparation for the unforeseen. Because at its core, wealth management is a business of tomorrows.

And the tomorrows can get complicated when clients haven't planned for their online estates or left clear records about their digital footprints. Automatic payments continue to repeat after their deaths. Or credit cards go unpaid. Or good-until-cancelled orders execute. Or heirs struggle to access treasured photographs, domain names and medical records.

By including digital estate plans as a topic in your practice, you help clients determine who makes decisions after they die. Which is a good thing. Because if they fail to plan, the vagaries of digital intestacy take over. And given the changing regulatory landscape, it isn't clear who will be calling the shots: fiduciaries, Joe Dotcoms or, perhaps, somebody entirely unexpected.

Regulatory background

Believe it or not, the principles governing digital estates trace back to the 4th amendment, which guarantees U.S. citizens the right "to be secure in their persons, houses, papers, and effects..."

Computer users have the same expectation of privacy, says Suzanne Brown Walsh, an estate-planning attorney with Murtha Cullina LLP. But computer networks aren't necessarily protected by the 4th amendment, she says.

To fill this gap, Congress and state legislatures have enacted laws that protect user privacy and penalize unauthorized access. But they are almost all silent on allowing fiduciaries to act on your behalf after your death.

Uh-oh.

In their terms-of-service agreements, the stuff we never read and to which we robo-click "yes," digital businesses define who has access to user accounts and under what circumstances.

Many companies forbid access by someone other than the account holder without the company's prior consent. And their contracts enable them to resist when, say, executors request access to the emails of a decedent.

Break the law to help clients?

To protect against the unexpected, family members sometimes share passwords with each other or their fiduciaries. It's easy. It's effective most of the time. Almost everybody does it at one time or another.

So what's the big deal?

Sharing passwords is likely to be illegal, says Ms. Walsh, who explains that some terms-of-service agreements flatly prohibit it.

Legislators recognize, however, that executors require access. Last year, the Uniform Law Commission, an organization that tries to standardize laws across the 50 states, completed the model Revised Uniform Fiduciary Access to Digital Assets Act, which would grant fiduciaries the right to manage digital estates.

Ms. Walsh, who chaired the committee that drafted the act, says, "It represents a reasonable compromise between privacy advocates, tech companies, and the trusts and estates bar."

But so far only 10 states have approved the bill. Only 18 more have introduced it into their legislatures. Which means digital estate plans are still a movable feast, and control over online rights is a function of state law or terms-of-service agreements or friends and family members, who simply share passwords with each other.

What advisers should do

Here's what I recommend:

1. Check whether your home state has introduced or approved the act. The Uniform Law Commission website shows the state-by-state status.

2. Ask clients whether their wills contain digital-asset clauses. While these provisions grant access to executors in theory, service providers may still resist them depending on the laws of the state.

3. Ask attorneys whether they recommend forms that give digital authority to fiduciaries. In her practice, Ms. Walsh uses a form entitled, "Authorization for Release of Electronically Stored Information."

4. Recommend that your clients take an inventory of their digital assets with real value, such as frequent flier miles. It's worth calling companies to understand their policies.

5. If you don't have a "chief technology officer" on your team, go find a millennial and recruit him or her to your practice.

Back to my friend, whose digital echo started this column. The social-media site uses a thoughtful form, which enables members to notify administrators about the deaths of other members. After considerable deliberation and as a matter of respect, I submitted a link to her obituary, taking care to indicate that I wasn't a close friend nor a representative of the family. I hope it was the right thing to do.

—Norb Vonnegut built his wealth-management career in New York and now writes thrillers about financial malfeasance. Email him at norbert.vonnegut@dowjones.com. Twitter: @NorbVonnegut