



# Preparing for your ‘digital afterlife’

**Question:** A professional counselor colleague told me that I should be planning for my “digital afterlife.”

Beyond my personal online accounts, does this really affect my counseling practice?

**Answer:** Most likely, the answer is a resounding “yes.” If you use a computer or smartphone and have any online accounts, you likely have digital assets or property that may consist of emails, text messages, documents and records, intellectual property, social media accounts, online bank accounts and accounts with large online companies such as Google, Facebook, Yahoo, PayPal, Quicken and Square.

Some of these accounts may even include substantial amounts of money that your personal representative would need to retrieve in the event of your death or disability. Likewise, you may want the records custodian for your professional practice to access your practice-related digital property or electronic health records to help your clients make the transition to new behavioral health providers and to assist in closing your private practice.

This sounds relatively easy. You would develop an inventory of your digital assets and provide it (along with passwords, etc.) to your personal representative or records custodian with instructions on how to access the needed assets. The difficulty arises in the muddy legal waters that currently surround these seemingly simple tasks. As we’ve seen in the recent litigation involving the FBI and Apple concerning unlocking the iPhone of one of the mass shooters in December’s San Bernardino, California,

homegrown terrorist attack, there are competing considerations of access versus privacy when it comes to electronic devices and digital assets.

So, what’s the rub? Existing federal and state laws are not entirely clear. Counselors’ records custodians or personal representatives could face potential criminal and civil liability if they access a deceased counselor’s accounts in violation of terms of service agreements established by large computer companies, online banks and Internet-based companies. This scenario could play out even if the counselor provided the records custodian or personal representative with specific written instructions regarding access to passwords, online accounts and so on.

One legal commentator succinctly explained this complicated issue as follows:

“Unfortunately, the fact that a fiduciary is ‘authorized’ by the owner or state law to use a computer or to act for an account user may not be a bar to CFAA [Computer Fraud and Abuse Act] prosecution, even though it should be. The analogy would be that using, or even hacking into, the computer is no more illegal than a fiduciary using a locksmith to get into a building owned by an incapacitated person, principal or decedent. Accessing a hard drive, however, may be different from accessing the decedent’s, incapacitated person’s or principal’s digital accounts or assets. By accessing another’s digital accounts or assets online, the fiduciary may be violating the account provider’s terms-of-service agreement (TOSA) and, in turn, the federal CFAA.” (See “Uniform Fiduciary Access to Digital Assets Act:

What UFADAA Know” by Victoria Blachly in *Probate & Property* magazine.)

The good news is that numerous states are likely to introduce legislation within the next year to clarify issues pertaining to access to digital accounts after death or incapacity. This effort resulted from joint meetings composed of estate and trust attorneys and representatives from major computer and online companies. Under the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA), state laws based on this model act would govern how the user’s expressed instructions may be incorporated in wills, trusts or other online tools such as Google’s Inactive Account Manager.

If a conflict were to arise, the user’s expressed intention via an online tool would outweigh the expressed intention provided in one’s estate planning documents. Affirmative opt-ins might be required to disclose content of electronic communications to a fiduciary, but unless the user instructs otherwise, the fiduciary may obtain a catalog of electronic communications. (For more, see “Update on Fiduciary Access to Digital Assets” by Anne W. Coventry.)

On the surface, this current hot topic might seem like a lot to digest, but there are some important takeaways for counselors to ensure that their digital assets, estates and clients are protected in the event of death or disability. The following is a list of some of these crucial action items:

- ❖ Work with an attorney in your state who has experience in trusts and estates. Ask if your state is considering enactment of RUFADAA or is one of the handful of states that already has adopted