One of the many lessons learned from Hurricane Katrina was the vulnerability of personal and business records and documents. Ernest (Ernie) Svenson and Loyola University College of Law Professor Dane S. Ciolino recently presented a CLE program on maximizing the use of technology in the practice of law. Leading into his portion of the presentation, Ciolino said it was during the course of his evacuation to Shreveport that he began the transition to a “paperless” law practice of storing and backing up files online.
The lesson underscored by catastrophic loss in Katrina served to reinforce a trend which is now mainstream — the digital storage of everything from recipes and photos to financial statements and tax documents. Service providers, including banks, insurance companies and various utility agencies, encourage their customers to switch to paperless statements and online account management. Money is transferred, bills are paid, and loans are obtained all online. While at first glance this may seem convenient and environmentally friendly, what are the ramifications as they relate to estate planning or the incapacity of an account holder?

Sharon Nelson, noted electronic evidence blogger at Ride the Lightning and co-host of the American Bar Association’s podcast series called The Digital Edge: Lawyers and Technology, shared a specific example. In this case, a husband, who had handled all of the family finances and paid bills online monthly, died without providing for anyone else to have access to the usernames or passwords for the various accounts. His widow, in addition to dealing with the loss of her spouse, was now unable to determine what bills were due or keep accounts current; as a result, her credit was wrecked.

Most traditional wills provide for an executor who is charged with marshaling the assets and taking care of the business of the estate. It used to be that important documents were stored in file cabinets or safety deposit boxes. If an individual died and failed to leave a list of important accounts and documents, such information could largely be compiled by rifling through a desk and reviewing incoming mail for account information. Now, much of this information is stored and communicated electronically.

What happens to the digital assets of individuals when they become incapacitated or die? In an increasingly paperless world, failure to provide for the transfer of account access and other online records could leave family members and business associates unable to keep finances current or continue a business.

What are Digital Assets?

Digital assets include any file, email, document, image or video stored on digital devices including desktops, laptops, tablets, smart phones, or other electronic storage devices. Also included are online accounts such as:

- LinkedIn
- Facebook
- Twitter
- Google+
- Multiple email accounts
- Cloud-based photo sharing or storage accounts
- Personal and professional website or blogs
- Bank accounts
- Cloud-based document and client files (Dropbox, SugarSync, Evernote, etc.)
- Shopping or e-commerce accounts with stored credit card or bank information (eBay, PayPal, etc.)

Beyond personal and financial accounts, attorneys have additional concerns and obligations regarding online file access as it relates to client matters. In years past, when an attorney became incapacitated or died, another attorney could review and inventory physical files to contact clients, assume cases and wind down the practice. Now much of this information is stored electronically, behind various levels of passwords and data encryption, and in multiple cloud storage systems. These files fall within the ambit of digital assets for which succession planning is a necessity.

Legal Uncertainty in the Digital World

In general, the law provides for succession administration whether testate or intestate. But how do these laws integrate with the digital world and online accounts? In the absence of specific laws to the contrary, what happens to your digital assets and online records when you die is largely controlled by the Terms of Service that accompany the different websites or companies with which you have accounts. (See sidebar article on page 211.) A quick review of various sites’ Terms of Service reveals what a cumbersome and complicated process lies ahead if an individual has multiple accounts and has failed to plan properly.

Only five states have adopted laws specific to rights of access to digital assets. Connecticut and Rhode Island provide for an executor’s access to email accounts. Oklahoma, Idaho and Indiana provide for a personal representative to have access to social networking sites and email accounts.
Since 2011, the Uniform Law Commission (ULC) has focused on addressing the void of clear authority related to fiduciary access and management of online accounts and digital assets. In July 2012, the ULC accepted the recommendation of the study committee and appointed a drafting committee to compose model legislation to be added to the Uniform Probate Code or adopted as free-standing legislation. The proposed legislation would grant fiduciaries specific powers and authority to gain access to an individual’s online accounts and digital property during incapacity and after death.

What to Do?

Waiting for legislation to catch up with rapidly evolving technology and the explosion of digital assets is not the answer. While legislation can provide predictability and ease the transition, in the meantime, here are some practical steps you can take to ensure a smoother transition for your digital assets.

► Inventory your digital accounts.
Consider the following questions. If your computer and all your electronic devices, including smart phone, backup and flash drives, were stolen, what valuable or sentimental digital assets would you lose? If all of your online accounts and passwords were deleted, what valuable and sentimental digital assets would you lose? If you were to become incapacitated today, would anyone be able to access your digital assets and continue to pay your bills online? As an attorney, would anyone be able to access and inventory your current client matters and notify your clients to arrange for their continued legal representation?

By identifying your digital assets, you save your estate time and expense and minimize the possibility that your client’s files, as well as your personal online photo and cloud-based blogs (today’s version of photo albums, diaries and shoeboxes full of love letters), will be lost forever. Considering these scenarios, it is worth investing half an hour now to document your online accounts and passwords. Going forward, it would be wise to review this list on at least a quarterly basis as your passwords may change and additional accounts are created.

► Provide for access.
There are a variety of options for inventorizing your online accounts and passwords. You could create a list in spreadsheet, or there are several websites, accessible through a master password, which will store your passwords and account information for any of your other online accounts and profiles. If you elect this option, again you must provide some means of conveying that “master password” to another individual in the event of your death or incapacity.

There may be various solutions for planning for digital assets, but typically a will is not the best place to record the access information for online accounts and file storage sites. This is because a will, once probated, becomes part of the public record. Additionally, amending a will every time a new account is added or a password is changed is not a practical solution.

Therefore, a separate document identifying accounts, passwords, security questions and answers would seem to be the better practice for listing access information for online accounts. Such a document once created could be printed out or stored on a USB flash drive and stored in a safe location.

Another option would be a Digital Asset Trust or DAP (Digital Asset Protection) Trust. One of the particular benefits of a trust is that it can provide a vehicle for uninterrupted account access and continued rights to music, movies and books which are typically granted in license form only.

► Provide for instructions as to what you want to happen with your digital assets.
With respect to client matters, you need to make arrangements for the access and transfer of the digital assets related to their cases. As for your individual accounts, there are some which you will want closed, and others that you will want the data (photographs, scanned notes, memoirs, etc.) downloaded and preserved for your family and loved ones. If you fail to provide the information necessary to access them in the event of your incapacity or death, then they will probably be lost forever.

Conclusion

The digital revolution has changed the way people interact, conduct business and store personal information. The composer Leonard Bernstein prepared a draft of his memoir, entitled Blue Ink,
and left it password-protected online. 5 He died in 1990 and, unfortunately, told no one the password. Today, 22 years after his death, his memoir is still inaccessible and unavailable.

Whether as estate planners or as individuals, it is imperative that we implement some form of digital succession plan. Although new laws are certainly necessary to provide for uniformity and predictability in the transfer of digital assets, as individuals and attorneys, we can do a great deal to provide guidance to our clients and continuity for our own families and loved ones. By inventorying our assets, providing appropriate access, and leaving instructions, we can ensure that the gap between paper and digital does not result in the loss of critical business information and personal family treasures.

FOOTNOTES