There has been a small flurry of attention in the media recently addressing the disposition at death of so-called "digital assets" (i.e, email accounts, social networking profiles, webpages, blogs and domain names). Despite this clamor, most estate planners still do not address the disposition of a client's digital assets in the estate planning process. Wrong move.

<u>The Disposition of Digital Assets: Estate Planning Potential NOT Just Propaganda</u>

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Many estate planning attorneys would be surprised to learn the value (both emotional and monetary) of certain "digital assets" such as email accounts, websites, social networking profiles, online store credits and other digital media.

For example, when a family member who operated a small business suffered a stroke earlier this year, I learned first-hand how valuable his email account was to his business. He maintained contact with his customers and suppliers solely through email, and when his family and business partners could not access his email account during his disability, a significant amount of business was lost. The sophisticated business succession plan that his estate planning attorney had created did not help to resolve that problem.

When we contacted the internet service provider, we still did not get the information we needed. Many internet service providers (such as Yahoo) will refuse to share an individual's password absent a court order. This policy is understandable in light of the stringent privacy laws imposed on such companies. Other internet service providers such as Gmail (Google) require a copy of a death certificate prior to turning over a decedent's email password. But even these less stringent procedures can lead to an unnecessary and costly delay.

As more and more people move the important components of their lives onto the computer, it becomes necessary to devise a safe and secure method for a person's loved ones to access digital information in the event of death or disability. This we know, we've heard it all before. Despite these warnings, it appears that most estate planners are doing little or nothing to address the disposition of digital assets with their clients. Perhaps because estate planners don't believe there is yet a fail-safe solution to this problem. I've heard several concerns discussed by estate planners. Easy solutions like giving passwords and other digital information to a trusted individual have their obvious shortcomings – the information could be (even accidentally) misappropriated or misplaced. I have heard several estate planners express reluctance to hold the client's passwords themselves, believing that doing so could expose the estate planning attorney to undeserved blame in the event that information is stolen or misappropriated by a third party. It also appears that many estate planners shun the use of paid service providers such as legacylocker.com and assetlock.net (formerly known as youdeparted.com) that store passwords and other digital information online for a small fee, perhaps because they are not yet confident that these sites appropriately safeguard the information.

While there may be no perfect solution to this problem, for many individuals, especially those that are technologically oriented, doing nothing is the least perfect solution of all. The true monetary cost of doing nothing may only be that a few thousand dollars of online store credits, pay pal monies and similar value is lost forever. However, the much greater cost may be that many of the decedent's precious memories (e.g., photos, email messages and social networking profiles) are inaccessible to those left behind. Even worse, as my family recently discovered, the cost of failing to address a client's digital assets may be devastating for a small or family owned business.

There may be no way to know if your client is a "techie" unless you address the topic directly with the client. If it becomes clear that the client prefers to keep all his or her important information off-line and insists that he has no digital assets of value, then the conversation can end there. However, if many of the important elements of the client's financial and personal life reside online, then the client deserves some guidance. Perhaps the client is married and would feel comfortable creating a list of his passwords for his spouse. Even better, the client and the attorney may find (as I have) that some websites that store passwords and other digital information have state-of-the-art security and can effectively make relevant information quickly and readily accessible to trusted persons in the event of death or disability.

Just as the estate planner would not hesitate to address a complicated generation-skipping transfer tax problem staring him in the face (and may be liable for malpractice for failing to do so), he should also not hesitate to find an appropriate method for the client to dispose of his valuable digital assets at the time of this death. After all, many everyday estate planning techniques such as GRATs and sales to grantor trusts have inherent risks and are not perfect solutions to the tax problems faced by clients. But estate planners nonetheless readily employ these techniques to assist their clients. I am not suggesting that estate planners recommend that clients post their passwords on a billboard or engage in any other unnecessarily risky technique. However, many viable options are available for disposing of digital information in the event of death or disability that do not place the client in an inordinate amount of danger.

As with many problems created by advances in technology, further technological developments may come along to provide a perfect solution to this problem. While we wait for these developments, the best solution for now may be to have an open and honest discussion with your client about the solutions available, rather than remaining silent on the issue, and to encourage the client to select the most appropriate method for storing digital information.