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## Don't Forget About Digital Assets in Your Estate Plan

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For many of us, our primary means of communication is email. Some of us like to keep in touch with friends and family by sending "tweets" or updating our Facebook and LinkedIn accounts. We store family photos and other important information online, on a website or in the "Cloud." We access our financial assets, such as bank accounts and brokerage accounts, over the Internet, and in some instances only receive online statements. We pay our bills electronically. We own Internet domain names. We conduct business online.

Despite this, when we talk about estate plan assets, many people only think of their homes and other real estate, money and physical personal property. But as we become more dependent on computers and the Internet, we also are acquiring, accessing and storing more and more electronic information online. In doing so, we are creating valuable digital assets that often can be passed on to our loved ones. But these assets only become part of our estate plans if we specifically include them.

What are digital assets? Digital assets include our email accounts, social media accounts like Facebook, Twitter and LinkedIn, electronic bank accounts and statements, credit card statements, photographs and music stored online. Collectively, our digital assets have tremendous aesthetic, emotional and financial value.

The online accounts we use every day are protected by passwords to protect our privacy and confidentiality. Often, when the account holder passes, no one has access to the passwords, or worse, no one even knows the account exists! Without the essential login information, obtaining access to these online accounts may require hiring a computer-forensics expert or obtaining a court order. Complicating matters is that accessing the deceased's online account (even for a spouse, parent or child) may run afoul of terms of service agreements and federal anti-hacking laws.

If an estate fails to identify and collect all of one's digital assets, it's the decedent's beneficiaries who suffer. According to the Wall Street Journal, there are currently $32.9 billion worth of unclaimed assets held in state treasuries across the country. As ownership of digital assets continues to expand, and we conduct more of our financial business online, the amount of unclaimed property will undoubtedly increase substantially.

There are some simple steps to take to prevent depriving your loved ones and estate of the benefit of your digital assets, regardless of value. The first step is to create an inventory of all digital assets, and store an updated list of passwords in a safe place. Once an inventory has been completed, you will then be in a position to make decisions about how to dispose of these digital assets upon death. An experienced estate plan attorney can assist you in drafting the appropriate language in your estate plan documents to ensure that your digital assets are identified and passed on according to your wishes. If you would like more information about incorporating digital assets into your estate plan, please contact me.

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# Minimizing Litigation Headaches by Preserving Electronic Data

Companies embroiled in litigation today are increasingly finding that the requirements and burdens of litigation discovery today bear little resemblance to litigation fifteen, or even ten, years ago. As reliance on technology—e-mail, texting, electronically stored data, etc.—continues to grow, discovery has become more time consuming, expensive, confusing and difficult. Courts have begun to impose new requirements on businesses and their counsel to ensure that electronically stored documents and information that may be relevant to potential litigation is protected and preserved. Where companies have, either inadvertently or intentionally, failed to preserve electronic records and data, courts have not hesitated to impose harsh sanctions.

While the exact rules and requirements vary between jurisdictions—and some jurisdictions have yet to establish any clear rules at all—there are certain minimum practices that companies and their counsel should be prepared to follow whenever they find themselves faced with potential litigation.

Whenever a business becomes aware of potential litigation, an obligation is triggered to preserve documents and information that may be relevant to the litigation. Spoliation, as the destruction or failure to preserve relevant materials is known, can result in sanctions against that party, including the court making findings as to what the evidence presumably would have shown, that can decide a case.

The obligation to preserve documents and information extends to electronically stored data and meta-data. To satisfy its obligation, not only can a company not actively delete or destroy relevant electronically stored data, but it must take steps to ensure that such data is not inadvertently deleted. Thus, for example, if the company has in place practices, policies and/or automated processes to delete certain data, over-write back-up tapes, etc., after a certain period of time, it must take affirmative steps to ensure that those policies are not followed for the relevant data.

**Obligations of Counsel**

Business counsel, whether in-house or outside, also bears certain responsibilities for preserving electronically stored data. Courts in a number of states have held that as soon as counsel for a defendant learns of potential litigation, that counsel should prepare and send the company a "litigation hold" or "preservation" letter outlining the obligation to preserve evidence and explaining the steps that should be taken to fulfill that obligation. Counsel should work with the client to make sure those obligations are satisfied.

Conversely, many plaintiffs' attorneys send their own "preservation letter" to defendants. These letters serve to notify the company of the existence of a dispute and potential litigation. The letters typically set forth the obligation to preserve electronically stored data, and identify specific steps that should be taken to preserve that data, such as removing and preserving back-up tapes, cancelling automated procedures to delete data, etc. These letters serve a dual purpose: (1) they help to ensure that a plaintiff will be able to obtain the evidence it is looking for, and (2) they increase the chance that a judge will issue sanctions, including possible default, against a defendant that fails to protect relevant data even after receiving specific notice and request to do so.

Though no business wants to deal with the headaches of litigation, businesses that plan ahead for the possibility of litigation, by putting in place practices and processes to preserve information and data should a dispute arise, will greatly minimize their headaches if and when litigation does occur.



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# Sex is Notice: The Cure for Every Adoptive Parent's Nightmare

As an adoptive parent, I know that the biggest nightmare for parents after finalization of the adoption is the possibility of a birth parent challenging the adoption.

Recently, I had the opportunity to help a couple that had adopted several years earlier, and that was potentially facing just such a challenge. Fortunately, in that case, the court files confirmed unequivocally that the birth partners' rights were terminated properly, and the adoption could not be overturned. While these types of challenges are rare, there are circumstances where this nightmare can come true. The most common of these circumstances likely is a birth father challenging an adoption because his rights were improperly terminated without his knowledge.

While a lack of notice, often caused by an adoption agency's breach of their duty of due diligence, and disregard of information that would have led to the birth father, will not automatically invalidate an adoption, the recourse for the adoptive family is a costly one. In Massachusetts, in order to maintain the adoption, the adoptive family has the burden to prove by clear and convincing evidence that:

"because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal;" M.G.L.Ch. 210 §3(c) (vii).

That goal is often out of reach for many families, because lawyers and experts result in huge legal bills and costs. Even if it is not, what a tragedy for everyone involved. There has got to be a better way to prevent this heartbreak! Fortunately, there is: a National Responsible Father Registry. Many states have such a registry, others *claim* they do and other states just do not. A Responsible Father Registry places the supposed father in control. If he believes he may have fathered a child, the supposed father registers. If the mother makes an adoption plan, an inquiry at the Registry is mandatory and he will get notice. Making it a national registry will allow the various registries to "talk" with each other. As New York says: sex is notice!!! Think about it.

## It's All in the Strategy

Brad A. Compston was victorious when the Massachusetts Appeals Court recently affirmed a lower court decision. Our client successfully sought to intervene in an action in the Superior court. The Court then ordered the release of funds in excess of $100,000 to our client. The funds were being held in the Superior Court pursuant to a Reach and Apply Order which had been obtained by the Defendant.

Out-of-state representation by Konowitz & Greenberg on unpaid wage and commissions resulted in a successful outcome. Brad Compston represented the Defendant in litigation in Minnesota where Plaintiff sought to recover unpaid expenses, wages, bonuses and commissions. Case settled for approximately five percent of the value of the claims.

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# The Final Word by Steven Konowitz

## As Crosby, Stills and Nash Sang: "So We Change Partners, Time to Change Partners, You Must Change Partners!"

Let me tell you a story of two companies: "Transco," the savvy, cost-conscious, transactional company whose leadership team relies on their expertise to see them through both challenges and good times, and "Stratco," a long-range-thinking company that focuses on building relationships to advance their business goals through good times and bad.

It just so happens that Transco and Stratco enter agreements to buy certain assets of different companies at about the same time. While their stories begin the same, however, they have very different outcomes.

Transco, of course, hires a transactional attorney to help with the acquisition. After the transaction, since there is no further need for the transactional attorney, Transco ends the relationship and has no other legal representation going forward. Following the acquisition, a creditor/debtor controversy arises, with several difficult issues, including whether the debt is even a debt of Transco.

Transco does not seek legal advice, but, being astute business people, decide they can handle the situation themselves. When that strategy fails and Transco is sued, Transco hires yet another specialist: a "litigator." The litigator proceeds to take all the requisite steps, as any qualified litigator would, and professionally defends the case. The litigation continues until Transco's bank account is attached. Now, the most likely outcome is that Transco will be going out of business.

Stratco, in contrast, hired an attorney with experience acting as the general counsel for companies like it and dealing with all of the issues those companies face to help it through the initial transaction, and it retained that attorney after the transaction as well. When, like Transco, Stratco was faced with debtor/creditor issues raising the same difficult issues, it was able to turn to its attorney, who understood its business, its needs, and its financial circumstances, to help it develop a strategy for dealing with the claims as part of its overall business operations that was proactive rather than reactive. With this approach, Stratco continues to be in active discussions with the creditor concerning their dispute, and it continues to grow and expand its business.

The key lesson to be learned from these examples is clear: Transco never understood the importance of finding an attorney who can work with them as a partner.

I am happy to be able to say that "Stratco" relies on me to understand their business, thoroughly think about their business goals and apply my years of experience to provide advice based on principled thinking that not only has their back, but their future as well. Stratco relies on me to be a listener, a mentor, and to learn the nuts and bolts of their business. By being actively involved with Stratco, I am able to be in a position to know what truly matters to Stratco's business and give unvarnished advice at critical junctures, while keeping an eye on the full spectrum of their legal issues.