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Social Media

Where Social Media Meets the First Amendment

Best Practices for Online Reputation Management

What Every Employer Needs to Know About Social Media

Use of Social Media in Preparation for and During Trial

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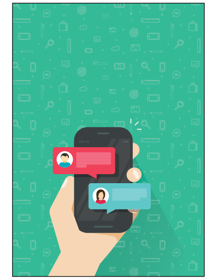
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What Happens to My Emails, Social Media Content, Cloud Storage and Online Accounts When I Die?

Look to the UFADAA and Federal Law

by Richard L. Ravin

New Jersey's Uniform Fiduciary Access to Digital Assets Act (UFADAA) became effective Dec. 12, 2017.[1] As of early 2019, a total of 41 states have enacted a version of the uniform law.[2] The purpose of the act is to facilitate a fiduciary's access to, and administration of digital assets belonging to a decedent, incapacitated person, settlor of a trust, or the principal of a power of attorney, while respecting the privacy and intent of the owner of those digital assets. Critically, however, the federal Stored Communications Act (SCA)[3] stands in the way of fiduciaries having the ability to compel online service providers to provide access to electronic communications.

Despite the inherent limitations of the UFADAA in the face of federal law, it is important for attorneys to understand the act because it contains default provisions that will take effect even if no reference is made to the UFADAA when drafting fiduciary powers, such as in wills, trusts, powers of attorney and guardianships, or if no such fiduciary powers are created. This article explains the basic provisions of the act and the reason for conflict between it and the SCA, and provides practice pointers.

The UFADAA recognizes four types of fiduciary relationships: 1) the personal representative (an executor or administrator) of a decedent's estate, 2) a guardian of an incapacitated person, 3) agents acting pursuant to a power of attorney, and 4) trustees.[4] The act defines digital asset as "an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record."[5] Examples of digital assets that would be covered by the UFADAA are emails, texts, photos, videos, social media content and accounts, tweets, cloud storage, computer files, documents, virtual currencies, domain name registrations, online payment records and other online records and accounts.

Basically, the UFADAA allows fiduciaries to manage digital property, but restricts a fiduciary's access to electronic communications such as email, text messages, and social media accounts. The act distinguishes between a "catalogue of electronic communications" (information that identifies each person with whom a user had an electronic communication, and the time and date of the communication) and the "content of an electronic communication" (the communication itself or information concerning the substance or meaning of the communication). The act provides generally that a fiduciary shall have access to a catalogue of the user's communications,[6] but *not* the content, unless the user consented to disclosure of the content.

Practically speaking, most digital assets in the custody of an online service provider[7] will be claimed by the service provider as being subject to the SCA because of the expansive definitions in the SCA.[8] Contrary to what attorneys unfamiliar with the SCA might infer from the UFADAA, neither the act nor the uniform laws adopted by the other states establish any right in a fiduciary to compel a service provider to provide access to all of the digital assets in the service provider's custody. Indeed, it is counterintuitive that federal law would interfere with the administration of a decedent's estate or trust property (*see, e.g.* the federal E-Sign Act,[9] which exempts wills, codicils and testamentary trusts),[10] but such is the case, at least when those digital assets contain electronic communications.

Congress enacted the SCA as an amendment to the federal Wire Tap Act in 1986 as part of the Electronic Communications Privacy Act, thereby giving people expectations of privacy in their stored electronic communications. The SCA, which is a criminal statute, prohibits unauthorized access to electronic communications by third parties (subject to exceptions),[11] regulates when service providers may voluntarily disclose stored electronic communications,[12] and states when a government entity (*i.e.*, law enforcement) may compel disclosure.[13] Significantly, under the SCA, service providers are not required to disclose

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any communications to the accountholder or owner of digital assets, but may *voluntarily disclose* electronic communications "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient,"[14] or "*with the lawful consent of the originator or an addressee* or intended recipient of such communication, *or the subscriber* in the case of remote computing service." (Emphasis added.)[15]

Recently, the Supreme Court of Massachusetts, in the case of *Ajemian* v. *Yahoo!, Inc.,* interpreted Section 2702 of the SCA to permit voluntary disclosure to a fiduciary, holding that "the SCA does not prohibit [ ] disclosure. Rather, it permits Yahoo to divulge the contents of the email account where, as here, the personal representatives lawfully consent to disclosure on the decedent's behalf."[16] In so holding, the Massachusetts Court observed that federal preemption doctrine did not preclude such a result: "nothing in the language of the 'lawful consent' exception evinces a clear congressional intent to preempt State probate and common law allowing personal representatives to provide consent on behalf of a decedent."[17] It is noted that the *Ajemian* Court held that a personal representative did not fall within the agency exception of the SCA, because a personal representative of a decedent is not under the control of the decedent and, therefore, is not the agent of a decedent.[18]

The *Ajemian* Court held only that Yahoo! could lawfully, *voluntarily* disclose the electronic communications to the fiduciary of the decedent under the SCA, but that it was *not required* to disclose the content. Even though the uniform law was not at issue before the Massachusetts Court, the case nonetheless highlights limitations imposed upon fiduciaries by the SCA, which would include fiduciaries acting under authority of the act.[19]

While the issue in the *Ajemian* case centered on emails subject to the SCA, online service providers routinely raise the SCA as an objection to civil subpoenas in response to a broad range of electronically stored information discovery requests. The service providers often take the position that any content transmitted by the accountholder to the service provider is protected by the SCA, which would include social media content, posts, comments, tweets, and cloud storage, to name a few. The battle as to what data can be compelled by the fiduciary versus what data the service provider is permitted to disclose voluntarily will be fought over the interpretation of 'electronic communication' under the SCA.

Although the SCA defines 'electronic communication,'[20] there is no definition for 'communication,' and no express requirement that the communication be between two or more people. The SCA defines 'electronic communication' as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted by [an electronic system]...."[21] In a New York Surrogate's Court case,[22] the court ruled that a fiduciary acting under that state's version of the uniform law[23] was entitled to the decedent's calendar and contact list stored by Google, because there is no transfer of information between two or more parties when calendar or contact entries are made and, therefore, those transfers were not a communication that is prohibited from disclosure by the SCA.[24] Notably, the court relied on a comment by the Uniform Law Commission describing electronic communication to include "email, text messages, instant messages, and any other electronic communication *between private parties*." (Emphasis added by the court.)[25]

The UFADAA provides protection to fiduciaries when accessing the digital assets saved on the personal property of a decedent, settlor, principal or incapacitated person, such as personal computers and devices that are not held by a custodian or subject to terms of service (TOS).[26] Without this protection, a question could arise whether a fiduciary had exceeded his or her authority in accessing the computers and devices, and thus be exposed to violating the federal Consumer Fraud and Abuse Act,[27] New Jersey's Computer Related Offenses,[28] and other similar state and federal criminal statutes.

The UFADAA gives internet users the ability to plan for the management and disposition of their digital assets similar to the way they can make plans for their tangible property. In the event there are conflicting instructions, the act provides a three-tiered system of priorities:

1. If the service provider furnishes an online tool, separate from the general TOS, that allows the accountholder to identify a designated recipient who will have access to the user's digital assets or be able to direct the custodian to delete the user's digital assets, the act provides that such instructions are legally enforceable. It is noted that a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record (even if made subsequently).[29]
2. If the service provider has not provided an online tool, or the accountholder has not used the tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.[30]
3. A user's direction under paragraphs 1 or 2 above overrides a contrary provision in a TOS.[31] However, if the user has not provided any direction, either online or in a will, trust, power

of attorney or other record, then the TOS of the user's account will determine whether a fiduciary may access the user's digital assets. If the TOS is silent as to fiduciary access, then the default rules of the act would apply.[32] Some service providers have a policy that indicates what will happen upon the death of an accountholder, or provide an online tool to allow designation of a person to manage the account upon the death of the accountholder.[33]

Under the UFADAA, the default rule is to deny access to the "content of electronic communications" in the custody of service providers, but allow the fiduciary access to a "catalogue of electronic communications." In this way, the act attempts to balance the user's privacy interest with the fiduciary's need for access. The accountholder may give broader or more restrictive access to the fiduciary.[34]

The default rule allows a fiduciary to access a catalogue of electronic communications, which could be useful in compiling an inventory of estate assets as part of the estate administration process. Thus, if the executor finds the decedent received a monthly email message from a particular bank or credit card company, the executor can contact that company directly and request a statement of the decedent's account.[35]

Under the UFADAA, the legal duties imposed upon a fiduciary charged with managing tangible property also apply to the management of digital assets. For instance, a personal representative may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. Management of digital assets may also be restricted by other law, such as not copying or distributing digital files in violation of copyright law, and not exceeding the user's authority under the account's TOS.[36]

In order to gain access to digital assets, the act requires a fiduciary to send a request to the custodian, accompanied by a certified copy of the document granting fiduciary authority, such as a letter of appointment, court order, or certification of trust.[37] Custodians of digital assets that receive an apparently valid request for access are immune from any liability for acts done in good faith compliance.[38]

Any direction in a will, trust, power of attorney, or other record, must expressly state that the fiduciary has authority to access and manage the digital assets of the original user (*i.e.*, accountholder). While no magic words are required *per se*, it would be advisable to state that the term 'digital assets' is given the same meaning as used by the UFADAA, as same may be amended from time to time.[39]

Because of the "lawful consent" requirement in the SCA,[40] if an accountholder desires the fiduciary to have access to the content of the electronic communications in the custody of a service provider (*e.g.*, emails, photos, videos, posts, comments, social media pages, etc., and not merely the catalogue of electronic communications), then the accountholder should expressly provide such consent to the fiduciary in a will, trust, power of attorney, or other record.[41] Thus, the accountholder should specify that he or she expressly authorizes disclosure to the fiduciary of all digital assets of the accountholder, including content of electronic communications sent or received by the accountholder, and that he or she gives consent to the fiduciary to access, manage and control such digital assets, including the authority to copy and delete. The accountholder should further expressly state that he or she authorizes the fiduciary to access and manage all said content of electronic communications and other digital assets, and that such authority is intended to give 'lawful consent' to the fiduciary to the fullest extent possible under federal and state law, including the Electronic Communications Privacy Act, as amended, and the Uniform Fiduciary Access to Digital Assets Act, enacted in New Jersey, as amended, and such other similar laws as may be enacted and applicable in other jurisdictions, as amended.

It is noted that with respect to the devise in a will (or trust), thought should be given to whether the electronically stored information belonging to the testator (or settlor), such as emails, texts, photos, videos, social media content, cloud storage etc., should be treated the same as all other personal property, or whether the digital assets should be treated differently, both in terms of access by the fiduciary and who should be the beneficiary of those digital assets.

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Clients should be made aware that no matter what is stated in a will, trust, power of attorney or other record regarding fiduciary access, under UFADAA the client's direction to a service provider in an online tool (that is separate from the TOS) takes precedence, notwithstanding that the will, trust, power of attorney or other record is made after the designation in the online tool.

Even absent the power of a fiduciary to compel a service provider to provide access to, and allow management of the contents of electronic communications of the accountholder, it would be nonetheless prudent for clients to authorize their fiduciaries under the UFADAA to access their digital assets when he or she dies or becomes disabled (if so desired) for the following reasons: the service providers may voluntarily comply by providing the content of electronic communications to the fiduciary; some courts may be willing to narrowly interpret SCA's electronic communication definition to require that an electronic communication be between two or more people; and service providers can be compelled under the act to provide access to other digital assets, such as a catalogue of electronic communications, domain name accounts, virtual currencies, online payment records and other online records and accounts. Moreover, the UFADAA gives the fiduciaries the authority to access the computers and devices of the accountholder that are not in the custody of service providers or subject to TOS, including the digital assets saved on such computers and devices, even if communications. Finally, Congress could amend the SCA to empower fiduciaries with the ability to compel service providers to provide access to and disclosure of the contents of electronic communications, thereby giving full force and effect to the UFADAA and the uniform laws passed by 40+ other jurisdictions. ⚖

Endnotes

1. N.J.S.A. 3B:14-61.1 *et seq.* In 2015, The Uniform Law Commission finalized and passed the Revised Uniform Fiduciary Access to Digital Assets Act (Revised UFADAA), uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=72ff7acc-30f2-ac4d-787e-4d71070a065b&forceDialog=0 (accessed Jan. 21, 2019). With a few minor exceptions, New Jersey's act is the same as the Revised UFADAA.
2. California, Delaware, Kentucky, Louisiana, Massachusetts, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, and the District of Columbia have not enacted a version of the Revised UFADAA, https://my.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22 (accessed on Jan. 20, 2019).
3. Stored Communications Act, 18 U.S.C. Chapter 121 (§§ 2701–2713), provides for voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by online service providers.
4. N.J.S.A. 3B:14-61.4, .7, .8, .9, .10, .11, and .12.
5. N.J.S.A. 3B:14-61.2.
6. *See, e.g.,* N.J.S.A. 3B:14-61.7 and .8; *see, also,* N.J.S.A. 3B:14-61.2.
7. This article uses the term 'service provider,' generally, to mean custodian under the act (N.J.S.A. 3B:14-61.2), and 'remote-computing service' under the SCA (18 U.S.C § 2711(2)). *See, Ajemian v. Yahoo!, Inc.,* 478 Mass. 169 (2017), at 175, note 13 (although the SCA distinguishes between electronic services, namely, electronic communication services (18 U.S.C. § 2510(15)), and remote computing services (18 U.S.C. § 2711(2)), most service providers provide both services, and "the restrictions against voluntary disclosure of the contents of communications to private parties apply to both equally. *See* 18 U.S.C. § 2702." *See, also,* the ACT: N.J.S.A. 3B:14-61.2 definitions for 'custodian,' meaning "a person that carries, maintains, processes, receives, or stores a digital asset of a user," and 'electronic-communication service,' meaning "a custodian that provides to a user the ability to send or receive an electronic communication"; *See, also*, SCA: 18 U.S.C § 2711(2), 'remote computing service' means "the provision to the public of computer storage or processing services by means of an electronic communications system."
8. *See, e.g.* 18 U.S.C. § 2711(2) 'remote computing service,' preceding note; *See, also,* Title I of the Electronic Communications Privacy Act, pertaining to interception of electronic communications (as distinct from stored communications governed by Title II (SCA), but which definitions are also applicable to SCA per 18 U.S.C. § 2711(1)): 18 U.S.C. § 2510(15) 'electronic communication service' means "any service which provides to users thereof the ability to send or receive wire or electronic communications," and 18 U.S.C. § 2510(14), 'electronic communications system' means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications; and 18 U.S.C. § 2510 (12) 'electronic communication,' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelec-

tronic or photooptical system that affects interstate or foreign commerce, but does not include—(A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device (as defined in section 3117 of this title); or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.
9. 15 U.S.C. § 7001 *et seq.*
10. 15 U.S.C. § 7003(a)(1).
11. 18 U.S.C. § 2701.
12. 18 U.S.C. § 2702.
13. 18 U.S.C. § 2703.
14. 18 U.S.C. § 2702(b)(1).
15. 18 U.S.C. § 2702(b)(3): "(b) Exceptions for disclosure of communications. A provider described in subsection (a) may divulge the contents of a communication-…(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service…."
16. *Ajemian v. Yahoo!, Inc.*, 478 Mass. 169, 170 (2017).
17. *Ajemian*, 478 Mass. at 182.
18. *Ajemian,* 478 Mass. at 176.
19. The decedent died intestate, leading to the appointment of a personal representative pursuant to the state's Uniform Probate Code, G. L. c. 190B, § 1–201 (37), *Ajemian*, 478 Mass. at 172, and note 7. UFADAA was not at issue, as the state had not adopted a version of the uniform law (see note 2, above).
20. 18 U.S.C. § 2510 definitions are in Title I of the Electronic Communications Privacy Act, but are applicable to Title II, the Stored Communications Act by 18 U.S.C. § 2711(1).
21. 18 U.S.C. § 2510(12).
22. *In re Estate of Serrano*, 56 Misc.3d 497, 498-99 (2017).
23. Article 13–A of the Estates, Powers and Trusts Law (EPTL), modeled after the Revised UFADAA.
24. 18 U.S.C. § 2701.
25. *In re Estate of Serrano,* 56 Misc.3d at 499, "[Revised UFADAA], § 2, comment at 7 (2015) (describing 'electronic communication' to include 'email, text messages, instant messages, and any other electronic communication *between private parties'*" (emphasis added by court)).
26. N.J.S.A. 3B:14-61.15(c),(d), and (e).
27. 18 U.S.C. § 1030.
28. N.J.S.A. 2C:20-23 *et seq.*, and N.J.S.A. 2C:20-2.
29. N.J.S.A. 3B:14-61.4.a.
30. N.J.S.A. 3B:14-61.4.b.
31. N.J.S.A. 3B:14-61.4.c; Uniform Law Commission, Summary of the Revised UFADAA, uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=91127209-1ee6-6702-9b80-bfb086ab2961&forceDialog=0 (accessed Jan. 21, 2019).
32. Uniform Law Commission Comment to Section 4, Revised UFADAA.
33. *See, e.g.,* Facebook's legacy contact tool, facebook.com/help/1568013990080948 (accessed on Jan. 23, 2019); Google allows an inactive account manager to be set up, and permits requests from family members and representatives of deceased accountholders to close the account. In certain circumstances, Google may provide content of a deceased user's account; https://support.google.com/accounts/troubleshooter/6357590?visit_id=636836230100488911-1018134481&hl=en&rd=2 (accessed Jan. 20, 2019). The inactive account manager will become 'activated' after the user's account is inactive for a period of three, six, nine or 12 months, as determined by the user. The user can also determine what will happen to his or her data in advance of the account becoming inactive.
34. N.J.S.A. 3B:14-61.8.
35. N.J.S.A. 3B:14-61.4.c; Uniform Law Commission, Summary of the Revised UFADAA, uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=91127209-1ee6-6702-9b80-bfb086ab2961&forceDialog=0 (accessed Jan. 21, 2019).
36. N.J.S.A. 3B:14-61.15.
37. N.J.S.A. 3B:14-61.7 to .14.
38. N.J.S.A. 3B:14-61.16.
39. N.J.S.A. 3B:14-61.4.
40. 18 U.S.C. § 2702(b)(3).
41. Senate Judiciary Committee Statement With Committee Amendments, Assembly Bill No. 3433 (Second Reprint); L.2017, c. 237, dated June 26, 2017 (N.J.S.A. 3B:14-61.1 *et seq.).*