

# Estate Planning Council of Greater Miami

## Professional Responsibility & Ethics Program

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# ACT I

## Technology: Blessing or Curse?



# Using a Flash Drive

## Florida Bar Rule:

- 4-1.6(c) Confidentiality of Information

### *Factors:*

- Sensitivity of Information
- Likelihood of disclosure
- Cost of using more safeguards
- Difficulty of implementing safeguards
- Interference with ability to represent clients



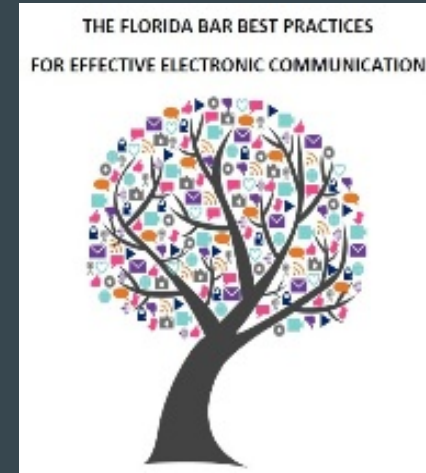
# Using Public Wi-Fi for E-Mail

## Ethics Opinions:

- California Bar Op. 2010-179 (2010)

## Resources:

- The Florida Bar Best Practices for Effective Electronic Communication (2015)



# Subscribing to a Cloud Service

## Florida Bar Rules:

- 4-1.1 Competence
- 4-1.6 Confidentiality of Information
- 4-5.3 Responsibilities Regarding Nonlawyer Assistants



# Amendment to Florida Bar Rule 6-10.3

## New CLE Hours Requirement:

- Minimum CLE credit hours:
  - 33 hours every 3 years
- “Approved Technology Programs”
  - 3 CLE hours required



# Amendment to Florida Bar Rule 4-1.1



## Added to Rule 4-1.1 Competence:

- “Competent representation may also involve:
  - Association or retention of a non-lawyer advisor of established technological competence.
  - Safeguarding confidential information relating to the representation, including electronic transmissions and communications.”

# Amendment to Florida Bar Rule 4-1.1

## Amended already existing comment:

“[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, ***including an understanding of the benefits and risks associated with the use of technology***, and comply with all continuing legal education requirements to which the lawyer is subject.”



# Access to Client's Information

## Need Unlimited Access to Your Client's Information:

- Without Third Party Access to Information
- Ability to Grant Access to Third Parties
  - Can Limit Third-Party Access

## Ethics Opinions:

- Florida Ethics Op. 12-3
- Iowa Ethics Op. 11-01
- Maine Bar Op. 207

## Consider the Provider's:

- Reputation
- Location
  - Including Backup Servers
- Agreement
- Forum
- User rights



# Accessing the Cloud Service from Public Wi-Fi

## Florida Bar Rules:

- 4-1.6 Confidentiality Of Information

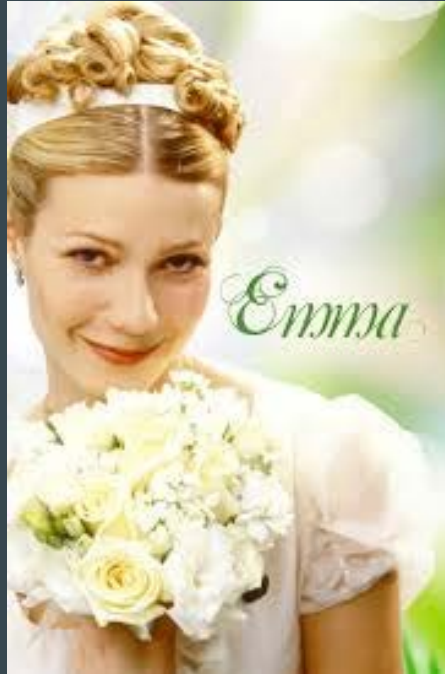
## Ethics Opinions:

- California Op. 2010-179



## ACT II

# Social Media: Marketing Opportunity or Ethical Landmine?



# LinkedIn: Adding Connections & Endorsements

## Resources:

- The Florida Bar Best Practices for Effective Electronic Communication (2015)



# Twitter: A Marketing Channel



## Florida Bar Rule:

- 4-7.12 Required Content
  - (a) Name and Office Location
  - Comment: disclaimer

# Blog Linked to Website

## Florida Bar Rules:

- 4-7.11(a) Applies to All Forms of Communication
- Specific Invitation to Retain?



## Ethics Opinions:

- California Opinion 2016-196
- New York Ethics Opinion 967

# Paying Tribute to Jayn on His Blog



## Florida Bar Rule:

- 4-1.6 Confidentiality of Information



## ACT III

# Digital Assets: Facebook Legacy or Liability?





# Digital Assets

## Florida Bar Rules:

- 4-1.1 Competence
- 4-1.3 Diligence

## Related Laws:

- Stored Communications Act
- Uniform Fiduciary Access to Digital Assets Act
- Florida Fiduciary Access to Digital Assets Act (FFADAA)



# Florida Fiduciary Access to Digital Assets Act (FFADAA)

Provides fiduciaries with ability to access digital assets of decedent or trust

- Gives fiduciaries legal authority
- Provides custodians legal authority



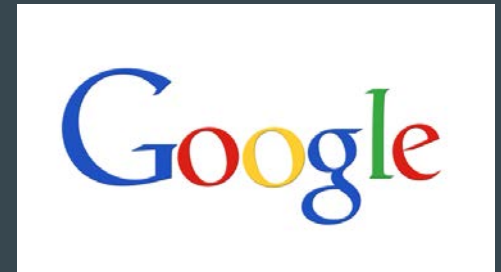
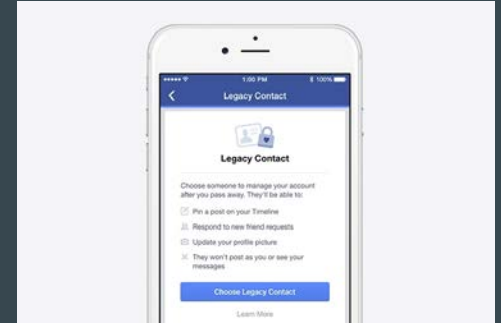
Act Allows User to Direct Disclosure of Digital Assets

- Criminal law
- Privacy law

# Florida Fiduciary Access to Digital Assets Act (FFADAA)

## “Online Tools”

- Provide directions for disclosure of digital assets
- Must be distinct from Term of Service Agreement (TOSA)
- Examples:
  - Facebook Legacy Contact
  - Google’s Inactive Account Manager



# Order Under the Florida Fiduciary Access to Digital Assets Act

1. User Direction in an “Online Tool” Trumps Everything!
2. If No “Online Tool”, Then . . .  
User Written Direction in a Will, Trust, Power of Attorney, or Other Record
  - Trumps blanket TOSA
3. If No Written Direction, Then . . .
  - TOSA controls
4. If no TOSA...
  - Court Order



# Power of Attorney

## When You Have Explicit Authorization:

- Access to Communications' Content
- Access to Cloud Based Services



## When You Do Not Have Explicit Authorization:

- Access to the catalog of principal's electronic communications
- Access to other Digital Assets
- Unless otherwise directed by Principal, Court, or Power of Attorney

# Trustee

## Needs explicit authorization *unless*

- Trustee is the original user (and trust does not prohibit)
- Trustee is *not* the original user but trust consents to disclosure



# Personal Representative

## Needs Explicit Authorization or Court Direction:

- However, the custodian may request a court order...
- Specifically Identify the Account,
- Finding Consent,
- Or Finding that Access is Reasonably Necessary for Estate Administration.



## Without Explicit Authorization:

- Allowed to Access All Noncontent of Digital Assets

# Florida Fiduciary Access to Digital Assets Act (FFADAA)

Fiduciary Type	Access to Content of Electronic Communications	Access to Other Digital Assets or Noncontent Communications
Personal Representative	Allowed only if decedent consented to disclosure online or in will, trust, power of attorney or other record, or a court directs disclosure	Allowed unless decedent opted out or prohibited (or court directs otherwise)
Guardian	Allowed only if ward consented prior to incapacity	Allowed if authorized by letters of guardianship or court order
Attorney-in-Fact / Agent	Allowed only if principal expressly authorized online or in power of attorney	Allowed under a grant of general or specific authority in power of attorney unless prohibited by principal or court
Trustee	Allowed when trustee is original user unless trust prohibits or, if trustee not original user, when authorized by trust or user	Allowed unless prohibited by user, trust, or court



Thank You!