

**Testimony in Support of SB 54  
Before the Senate Judiciary Committee**

February 11, 2013

Chair, Senator Floyd Prozanski, and vice chair, Senator Betsy Close, members of the Senate Judiciary Committee, my name is Victoria Blachly. I am an attorney from Portland, Oregon, that focuses on fiduciary litigation: dealing with family fights and disputes over trusts and estates and contested proceedings involving protected persons and vulnerable Oregonians. I am here today as the Chair of the Oregon State Bar Digital Asset Work Group to testify in favor of SB 54, which is sponsored by the Estate Planning and Administration Section of the Oregon State Bar. I am on the board of the OSB Elder Law Section Executive Committee, which voted in favor of SB 54.

My law partner, Jeff Cheyne, is also a member of OSB Work Group and chair-elect for the OSB Estate Planning and Administration Section Executive Committee. He represents individuals and businesses in the areas of estate, tax, business and real estate planning and will also be testifying in favor of SB 54.

Karen Williams of Beaverton will also be testifying in favor of SB 54. After her son died in a motorcycle accident, the Williams had to hire an attorney and sue Facebook to get copies of digital assets.

I became interest in this issue when I lost a young niece to a car accident and I learned firsthand that her social media account was much more of an asset to all of us grieving her untimely death than had she left untold piles of cash. The very idea that a terms-of-service agreement may have allowed her account to be deleted was abhorrent.

Do you or someone you know have bank or investment account statements delivered to you online, because businesses are pressuring customers to go paperless? Do you or someone you know have hundreds or thousands of photographs of your family or adorable pets stored online? Do you or someone you know post to any online social media accounts that tell part of the story of your personal or professional lives? What happens to those accounts or assets when you die or become incapacitated? Does the personal representative have the legal right to access those accounts and try to put the pieces of a financial picture together? Can those photographs be copied and delivered to the family left behind? Should certain accounts or information be deleted, particularly if a protected person is being targeted online? Even if a user has the password and the decedent's permission to access an online account, is that a fraudulent cybercrime by misrepresenting to the end user who you are?

A personal representative to an estate, a conservator for a protected person, or a trustee for a trust – has a *legal duty* to marshal and protect assets of the decedent or protected person; however they face significant roadblocks when dealing with online providers. SB 54 proposes to clarify, confirm and authorize these fiduciaries to fulfill their responsibilities in connection with online assets. This is not a cutting-edge new legal concept, but rather a natural extension of the responsibilities a fiduciary has always had in connection with online assets. But without statutory changes, online providers often hold all of the power, including sometimes the power to hit the delete button and destroy irreplaceable financial or personal information.

Under SB 54 a personal representative with court issued letters testamentary, a conservator with court issued letters of conservatorship, and a trustee with a statutory trust certification would have the ability to do their job: collect digital assets and information.

This is not a privacy issue. Fiduciaries routinely deal with private or personal documents and issues. There is a well-established body of law in Oregon that advises fiduciaries in the performance of their special relationships – such as the duty of loyalty, the duty to administer prudently, and the duty of confidentiality. That is to say, just because a fiduciary has authority under SB 54 to access online accounts or information, that does not require a fiduciary to do so in all situations nor does it require a fiduciary to broadcast such information to the world. In fact, it is not hard to imagine that a fiduciary would subject themselves to claims for breaching their fiduciary duty if they went rogue with online access. There are already laws in place that govern the proper performance of a fiduciary, once they have access to online assets and information. SB 54 is a necessary law to open the door so that fiduciaries can perform their jobs appropriately.

This is an important policy issue: a fiduciary should have access on behalf of a decedent or protected person even though such access may not comply with a terms-of-service agreement. Banks have safe deposit boxes, yet a personal representative has the legal authority to access the same safe deposit box when a person dies, regardless of the contract. Online accounts are just information stored in a different box – an electronic box.

It is interesting to note that fiduciaries have the right to complete access to U.S. mail addressed to a decedent or protected person. But some online companies take the position that fiduciaries do not have the same rights to digital information and assets.

A fiduciary has always had access to personal and perhaps sensitive information, including finding that long lost box of love letters to a flame nobody knew about or incriminating photos or documents in the far reaches of the bottom drawer of the decedent's desk at the home office. The challenge of how a fiduciary handles private or sensitive information is not a new challenge.

Since 2010, several states have enacted laws addressing digital assets or accounts: Connecticut, Idaho, Indiana, Oklahoma, and Rhode Island. To date, none of these laws have been challenged or overturned, despite new focus by online providers in arguing that federal law prohibits production of online information. (the SCA "Stored Communications Act" was enacted in 1986, well before many online providers existed.) Additional states have been actively reviewing the issue and working on legislation: Massachusetts, Nebraska, New York, Virginia, New Jersey, and now, Oregon.

The Uniform Law Commission is also working on proposed legislation called FADA: Fiduciary Access to Digital Accounts. The Uniform Law Commission ("ULC" or also known as the National Conference of Commissioners on Uniform State Laws), is a non-profit unincorporated association, established in 1892, that seeks to provide states with non-partisan proposed legislation regarding state laws.

The goal of the FADA committee is: "The Committee will draft a free-standing act and/or amendment to ULC acts, such as the Uniform Probate Code, the Uniform Trust Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Power of Attorney Act, that will vest fiduciaries with at

least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets.”

I am an observer on the FADA committee and have been involved in the study committee and now the drafting committee. The next meeting will be February 15 in Washington D.C. However, it may be years before the ULC approves proposed legislation on digital assets and accounts.

Waiting to see what the ULC does or does not do in the future fails to help Oregon fiduciaries currently dealing with these issues. Additionally, if or when the ULC approves its proposed legislation, Oregon may consider whether adoption of the ULC should be considered in Oregon. That is, it does not have to be either the ULC or SB 54, but waiting does not service the citizens of Oregon.

A 2011 survey by McAfee, a security-software company, of ten countries showed that the average estimated financial value Americans would place on their online assets was just under \$55,000. The emotional value for the final online comments of a child or loved one lost unexpectedly is incalculable. Most parents have no idea that social media companies take the legal position that they do not have to share minor's accounts with their parents. Some online providers take the position that the civil courts have no ability to compel them to produce online access or account information.

SB 54 clarifies that a fiduciary has the legal right, as an authorized user, to access online accounts and information. In short, SB 54:

1. Defines digital accounts and assets.
2. Confirms a fiduciary has the right to access, take control of, possess, handle, conduct, continue, distribute, dispose of or terminate digital assets and digital accounts.
3. Instructs the custodian of a digital asset as to the process by which a fiduciary can access or possess information.
4. Provides indemnification so that a custodian can provide information without liability.

The Estate Planning and Administration Section Executive Committee believe changes are necessary to insure that Oregon fiduciaries can perform their legal responsibilities appropriately without inadvertent legal liability when accessing online accounts or assets of a decedent, protected person, or to fulfill the obligations owed by a trustee.

We urge the Senate Judiciary Committee to move this bill to the full Senate with a “do pass” recommendation. Thank you for the opportunity to testify before you today. We would be happy to answer any questions.

Additional online videos on this topic:

KATU news interview: <http://www.wealthlawblog.com/2012/04/articles/estate-planning/syk-attorney-victoria-blachly-discusses-virtual-assets-with-katus-problemsolver/>

KATU news interview: <http://www.katu.com/news/specialreports/99297799.html?tab=video>

KGW news interview: <http://www.kgw.com/news/local/Mother--143264036.html>

MSNBC interview: <http://video.msnbc.msn.com/newsnation/46786630/#46786630>

Ricky Rash Virginia new interview: <http://wtvr.com/2011/11/04/facebook-sends-family-information-about-sons-page-before-his-suicide/>

Ricky Rash: [http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles\\_n\\_2245397.html](http://www.huffingtonpost.com/2012/12/07/death-facebook-dead-profiles_n_2245397.html)