

## REPORT FROM COUNSEL

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### WHAT HAPPENS TO YOUR E-MAIL AFTER YOU DIE?

When a young Marine died in Iraq and his parents wanted to retrieve his e-mail as a memorial to him, they came up against the privacy policy of the Internet service provider (ISP), which declined to provide the information. Ultimately, a probate court ordered that the parents be allowed to retrieve the e-mails.

When a prominent poet died without leaving the password for his e-mail account, where he kept virtually every significant piece of personal information, his daughter had no means of gaining access to that information so that she could notify others of her father's death. Citing privacy concerns, the ISP for the account refused to divulge the information to the daughter.

These real-life stories are the leading edge of what may become a wave of litigation concerning ownership of e-mail information upon the death of the account holder. The competing interests are the privacy of the account holder, coupled with the ISP's interest in preserving that privacy, and the survivors' rights to the property of the deceased.

Most of us think of e-mail as the modern equivalent of a box of letters belonging to us, when, technically, e-mail is an intangible form of property owned by the ISP. Nonetheless, if it is possible to spot an early trend on the issue, that tendency is to treat e-mail information as the account holder's property upon his or her death. In most states, the issue is still unresolved and without clear case precedents. At least one state has passed a law directing ISPs to turn over the e-mail of a decedent

to the personal representative for the decedent's estate.

### Steps to Take Now

It will be some time before legislatures and courts catch up with the reality that millions of people use their e-mail accounts as repositories for all sorts of information having sentimental, historical, or economic value. In the meantime, there is some practical advice for facilitating access to e-mail information "left behind":

- Read your ISP's privacy policy to determine what your survivors may have to contend with to get access to your e-mails. The policies run the gamut from providing e-mails to next of kin upon showing a power of attorney over the account and a death certificate, to treating e-mail accounts as non-transferable and with no right of survivorship.
- As strange as it may sound, consider dealing directly with the issue in your estate planning by including e-mails specifically in your will, especially if they have monetary value. In connection with this, you should archive the information to your hard drive and be sure that your survivors have any necessary passwords. Conversely, if you want to take your e-mails with you, in effect, stipulate in your will that no one is to have access to your account.
- Get good legal advice, including information as to whether there are any new laws in your state on the subject. They could trump, or at least affect, whatever arrangements you have made or may be considering for disposing of your e-mails after your death.

## BEWARE OF FAKE CHECKS

You have responded to a work-at-home offer in which you will be an account manager for a foreign company, depositing checks from its U.S. customers. It seems simple: You deposit the checks, take your pay out of them, and send the remainder to the foreign company. Or . . . you have reason to believe you have won a sweepstakes or lottery prize. You receive a check for your winnings, with instructions to cash it, then return a portion of the money to cover taxes or other fees. Or . . . having sold something through a newspaper ad or online, you receive a check for much more than the purchase price. Calling it an accounting error, the buyer apologizes for the mistake and asks that you return the excess amount.

If these scenarios activate your fraud antennae, there is a good reason for that. Each is a typical example of circumstances in which people are victimized by fake checks. This is a growing problem, perhaps because of the ways in which strangers are brought together for transactions by new technologies and the Internet. If there is a single best piece of advice for not becoming a victim, it is to accept no check if it is accompanied by a request that you return some of the money.

Of course, the sting from the scam occurs when the victim deposits the check he receives, then withdraws funds and sends off money or merchandise before his bank discovers that the deposited check is fraudulent. Even when the bank is vigilant, that discovery could take days, or even weeks. Your first reaction might be to blame the bank, but, generally, the depositor is on the hook, as he is considered to have taken responsibility for the funds spent or sent before the fraud is discovered.

In addition to the big red flag in the form of being asked to return part of the money sent by check to you, here are some more warning signs and protective measures:

- Upon receiving a check from a stranger, explain the situation to your bank manager and ask

the manager when the check is likely to be considered “good.” Then wait until you get the go-ahead before using the funds. If, in the meantime, the check writer pesters you about the delay, that may just be one more sign that you were targeted to be a fake check victim.

- Scam artists are often clever and skillful, making it difficult to detect a false check from the check itself. This makes it all the more important to pay attention to, and to be guided by, suspicious circumstances. Some of these include offers that defy common sense (if you really won a prize, wouldn't they just deduct taxes or fees from the check for your winnings?); being asked to send money outside of the U.S. (thus making it harder to find the culprit and the money); and being warned not to discuss the transaction with anyone else.
- Consider accepting payment not by personal check, but only in the form of a money order or a cashier's check drawn on a local bank, so that you can take it there to ensure that it is legitimate. Another option is a money order from the U.S. Postal Service.
- Especially when dealing with a stranger over the Internet, try to confirm the person's name, address, home phone number, and work number through some independent means, such as directory assistance or an online database.

If the worst happens, and you have reason to believe that you have been had by the writer of a fake check, contact your bank and the local office of the FBI. Then resolve to keep an eye out for the red flags next time.

## DOES THE ADA APPLY TO WEBSITES?

Recently a federal trial court became the first court to find that a commercial website must

be accessible to the disabled, and to blind customers in particular, because of the prohibition against disability discrimination by places of public accommodation contained in the Americans with Disabilities Act (ADA). Whether the retailer would, in fact, be liable on the particular facts of the case remained to be decided, but the court declined to dismiss the class action complaint.

Requiring businesses to make their websites fully accessible by the blind will likely involve adding computer code for “alternative text” that permits screen-reading software used by blind individuals to vocalize the text and describe the contents of the webpage. Using this code when the site is initially designed is less expensive than retrofitting a website later.

The retailer argued to no avail that the demands of the ADA do not apply, because a website, since it is not really a physical place at all, is not a “place of public accommodation” within the meaning of the ADA. The court reasoned that the ADA requires full and equal enjoyment of the services “of” any place of public accommodation, not services “in” a place of public accommodation. The ADA is not only about physical access to places.

The court found that the retailer’s many brick-and-mortar stores constituted the “places” of public accommodation. The retailer’s website serves as a “gateway” to such stores, especially for blind customers. If the website is not fully accessible to them, it impedes those customers from coming through the gateway, that is, from having the “full and equal enjoyment” of the stores’ goods and services that the ADA mandates. The court drew an analogy to a case in which a telephone screening process for prospective contestants for a television game show violated the ADA by discriminating against the hearing disabled, even though the discrimination took place away from the studio where the show was produced.

Although the decision broke new ground in ADA jurisprudence, the court’s “gateway” reasoning relied on the connection between the business’s website and its many retail stores. The

court did not have occasion to address the variation on the same issue posed by the websites of retailers who have no brick-and-mortar stores. Such a situation presents a closer question as to whether the ADA applies. For a website-only business to come within the ADA, a court would have to find that a “place of public accommodation” does not have to include a physical place at all, but can, instead, be the virtual world in which website transactions occur.

### WATCH YOUR LANGUAGE, DEBT COLLECTORS

In a letter to a debtor intended to prompt payment of \$250 in debts, a collection agency’s choice of words entangled it in protracted litigation under the federal Fair Debt Collection Practices Act (FDCPA). The theme of the dunning letter was honesty, or the lack thereof, on the debtor’s part. In all capital letters, the letter informed the debtor: “YOU ARE EITHER HONEST OR DISHONEST YOU CANNOT BE BOTH.” It proceeded to question the debtor’s good intentions in allowing the account to become past due and in supposedly ignoring all prior requests for payment.

The debtor struck back with a lawsuit under the FDCPA that was at first dismissed by a federal trial court, but then reinstated when the debtor appealed. The letter violated the FDCPA in more than one respect. A debt collector may not falsely represent or imply, in order to “disgrace” the consumer, that the consumer committed any crime or other misconduct. It was true that a check written by the consumer did not clear, but there was no evidence as to why this happened, or that the debt collector had, in fact, previously made communications to the consumer that were ignored.

Since there could have been an innocent, or at least honest, explanation for the unpaid bills,

the letter's comments impugning the consumer's honesty and claiming that other collection attempts were ignored could be shown to be both false and intended to shame the debtor into payment. This violated not only the letter of the FDCPA, but also its underlying rationale that even defaulting debtors deserve to be treated in a reasonable and civil manner.

The same letter also ran afoul of the prohibition in the FDCPA against using "unfair or unconscionable" means to collect or to attempt to collect a debt. By way of example, the Act lists eight forms of conduct that constitute unfair or unconscionable means. The letter in question did not fit neatly into any of the examples, but the debtor's claim could still proceed because the list was not meant to be exhaustive.

It was conceivable that impugning a debtor's honesty and good intentions could be regarded as an unfair or unconscionable collection method. Since, by law, a court views a claim under the FDCPA through the eyes of an unsophisticated debtor, the plaintiff was planning to support her claims by conducting a consumer survey to determine if such debtors would find the letter she received to be false, misleading, unfair, or unconscionable.

The practical lesson to be derived from this case is that debt collectors should steer away from any inclination they may have to try to enhance the impact of collection communications by casting aspersions on the debtor's character and intentions. Collection letters should stick to the provable facts and should be direct and simple. Opting for spicy language over plain vanilla only invites legal indigestion.

The federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) provides that the government may not implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates two things: that imposition of the burden on that person, assembly, or institution is both in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest.

In applying the standards of the Act, courts have held that various activities, whether or not central to an individual's belief system, are a "religious exercise" within the meaning of the RLUIPA. If individuals are forced to modify the religious exercise, courts have tended to find that the governmental regulation has created a substantial burden within the meaning of the Act. Nevertheless, where an individual is still left with the ability to choose another method that will not seriously affect the religious practice, or the action taken only tangentially impacts the religious exercise, courts have held that there is no substantial burden.

#### Compelling Interest?

In deciding whether or not to uphold the governmental regulation, courts have analyzed the interest the governmental unit had in creating the regulation to see if it is a compelling one. For example, significant health and safety considerations may be found to be compelling public interests. Even a finding of a compelling interest does not end the analysis. The regulation employed must be the least restrictive means to meet that interest, as required by the Act.

The governmental entity may change its regulations to alleviate the burden on religious exercise and thereby avoid the prohibitory effects of the Act. For example, the government may escape the prohibitions by retaining most of its land use policies or practices, but adding exemptions

for applications that substantially burden the exercise of religion. In addition, the RLUIPA will not apply in the first place if the governmental unit acted pursuant to some authority other than a law on zoning or the designation of landmarks.

### In the Courts

A recent case demonstrates that it is not enough to invoke the protections of the RLUIPA that a proposed land use is connected in some way with a church or religious group. A church brought an action under the RLUIPA challenging a municipality's refusal to permit it to operate a day-care facility with a component of religious instruction in a low-density residential neighborhood.

According to the federal court that decided the case, the RLUIPA does not require the religious activity that was substantially burdened by the land use regulation at issue to be "fundamental" to a religion. Still, the church's claim failed because the jury found that the church did not prove that it was engaged in a "sincere exercise of religion" in seeking a variance to operate the day-care center.

The church's case was hurt by its bishop's admissions, in a letter responding to the church pastor's request for help, that the day-care center appeared to be more of a traditional commercial venture and less of a religious function.

### UNSIGHTLY APPEARANCES

A property owner operated a business variously described as a flea market, a second-hand store, and a repair service for lawnmowers and tillers. After the city inspected his property, it cited

him for violating a public nuisance ordinance, listing a variety of items ranging from baby strollers to automobile seats. The property owner argued that the city ordinance against an “unsightly appearance” was so hard to pin down as to be unenforceable. The state supreme court, however, rejected his argument.

The challenge to the ordinance rested on the contention that the term “unsightly” is so vague that a reasonable person could not know which conditions were prohibited and which were not. The city’s winning response to this argument was that the court was not to look at the ordinance section on “unsightly appearance” in a vacuum, but was required to consider it in the context of the entire public nuisance ordinance.

The city had the power to prohibit conditions that debase the appearance and character of its neighborhoods. An ordinance regulating aesthetic conditions must use some general terms because it is impossible to describe every conceivable circumstance that the ordinance is meant to address.

Ugliness, like beauty, is in the eye of the beholder.