

TO: FADA Drafting Committee

FROM: Suzanne Brown Walsh, Chair

CC: Professor Naomi Cahn, Reporter

DATE: February 22, 2013      SUBJECT: Summary of February 15-16,  
2013 Meeting and Status

---

Naomi and I thank all those who participated in our work on the second draft by commenting on it, before and during the meeting, with particular thanks to all those who attended the meeting in person. We accomplished quite a bit in just two days.

We thought it would be helpful to all to summarize our deliberations, the decisions we made, and what will now happen before we read the act for the first time at the ULC's upcoming annual meeting in Boston in July.

A. What happens next

Naomi and I will be preparing a revised (third) draft of the act by the beginning of April for the ULC's Style Committee to review at its April meeting. Style then submits its changes to us, and the "styled" Annual Meeting Draft will be distributed to all of the commissioners, and posted as a public document on the ULC website, in advance the Annual Meeting (probably sometime in May). As we discussed at our meeting, that draft will be read (reviewed and edited) for the first time, and will NOT be up for approval of the Committee of the Whole, or by the states, at this meeting. "First read" acts are scheduled after final acts, and ours has been scheduled for July 10, 2013.

There will be an official transcript of the comments made during our reading, and we will also most likely receive written suggestions and comments, in addition to those made from the floor. Naomi and I will share those with you, and use them to produce the third draft of the act to be considered at our Fall 2013 meeting (no date yet). Depending on how the first reading goes, and then the fall meeting, we may or may not need to meet for a fourth and final time in the spring of 2014. Because this is a relatively short act, my hope would be that we can finish our work this fall, to be read as a final draft in July, 2014 without a spring 2014 meeting, but much will depend on how things go this summer at the annual meeting.

We heard from some observers at the meeting that at least one state bar group is using language from our drafts and misrepresenting it as a ULC draft or approved language. As you all know, the cover page of every ULC draft says that it has not been endorsed or approved by the ULC, and may not be viewed or used as such. They are what

they say they are: drafts. I will do my best to remind folks of this when I speak about our work and I ask all of you to do the same.

**B. Summary of Major Decisions We Made (not in any particular order)**

1. Definitions: Most were revised somewhat, and we eliminated “interested persons” and “property” altogether. The definitions of “digital asset,” “digital account,” and “digital property” will be revised with the need to account for electronic communications covered under ECPA. We discussed that “custodian” does not include employers who do not have terms-of-service agreements with their employees because the employer who provides the e-mail or other account for business purposes own the employee’s digital property.

2. Personal representative authority: This will be default, and the authority will be the same, regardless of whether the personal representative is formally or informally appointed.

3. Conservator authority: This is not default and must be expressly granted by the court, and the court must consider the protected person’s intent. Some providers continue to express concern about a conservator being given ongoing authority to manage certain digital property, as opposed to merely accessing it.

4. Agent authority: As with conservators, this would have to be expressly granted by the principal and would not be implied by a general grant of authority over the principal’s property. The committee does not want to restrict an agent’s authority over bank or financial accounts accessible online, once the principal has granted the agent authority over digital property.

5. Digital property “recovery” in current Section 8. The providers believe that the act should be restructured to clarify the difference between fiduciary authority over digital property other than electronic communications protected by ECPA and authority over those electronic communications. For electronic communications, we discussed that the next draft should set out procedures that cover: first, logs and records that providers may release without consent under ECPA; and second, ECPA-covered communications (fiduciary will have consent). Given that the authority of each fiduciary is different (some have it by default, the authority of some must be expressly granted), we will need to retain the separate sections that apply to each fiduciary. However, we anticipate moving current 8(a) into section 3, and expanding it to add a new provision, similar to current 8(a), that allows the fiduciary to step into the shoes of the decedent, settlor, principal or protected person for purposes of the state Computer Fraud and Abuse Acts. This would protect a fiduciary who needs access to the contents of a digital device, such as password-protected material on a hard drive, in order to carry out the fiduciary’s duties.

6. We will eliminate Section 9 as it is unnecessary.

7. Custodian immunity: We left this mostly as is, and discussed the providers’ concern that they not be held liable when a joint account holder deletes the content, without any fault or action of the provider.

8. Severability: We will add the Conference provision.