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In digital age, anything you do online can and may be used against you

We all know that our privacy ship has sailed. What may be less obvious is that our privacy was literally pirated by the phenomenon of social media.

It turns out that we and our clients not only gave ourselves away with disclosures on Facebook and Twitter, but our cell-phones, keystrokes and even our color printers were storing or disseminating what we otherwise assumed were private thoughts and transactions.

E-mail past

Early on, the technology problems we attorneys faced were relatively simple. We had to be sure our e-mail communications were confidential and attorney-client privileges protected. And we needed good data storage systems, servers and password protections — all of which we still need.

We educated ourselves and others to the fact that e-mails were NOT phone calls but, from the court's perspective, were actually documents with evidentiary consequences. We learned to work with clients regarding what were and were not fair expectations of privacy on a home or office computer.

Ethics related to e-discovery posed the next set of challenges and we are still developing some of the guidelines on that issue. As complicated as some of those situations were, and still are, they at least involve problems that we can identify and contain, if not always resolve.

Overexposed present

Currently, we are faced with the innumerable and inadvertent ways our clients self-incriminate themselves on social media. Family law, which our firm practices,

always produces the most scintillating "sex, lies and social media" stories, but technology has ramped up the drama and the digital evidence.

We have seen marriages end based on the infamous pocket or purse cellphone calls made from compromising places or situations. Many a spouse has found his or her allegedly faithful husband or wife profiled on the numerous online dating sites. Almost none of us needs private investigators any more with the advent of Facebook, LinkedIn, YouTube and endless sites recording not only what we choose to "publish" about ourselves but what others choose to post which we cannot control.

There are custody cases where the custody seeker's picture has been posted online appearing drunk and disorderly, where allegedly "broke" spouses have been "tagged" in luxury destinations and where the allegedly "down-and-out" payor's profile in a custody case has been updated with a recent job promotion.

Almost every husband or wife involved in divorce litigation has come to see the darker side of the digital world if they ever, even once, posted something they would like to forget.

Today, in the era of Edward Snowden and his revelations, privacy concerns have been magnified. Snowden, the National Security Agency whistle-blower, leaked the level of surveillance activities carried out by that organization. Regardless of our personal opinions on what he did, the Snowden episode makes us realize how very exposed and vulnerable both we and our clients are.

Big Data/Big Brother future

The term Big Data has been



GEMMA B. ALLEN

Gemma B. Allen is a partner at the family law firm of Ladden & Allen Chartered. She represents clients in the areas of marriage, divorce, mediation, financial settlements and custody matters.

around for years and, according to a widely quoted IBM statistic, we create 2.5 quintillion bytes of data daily. Thanks to modern technology and social media, all that Big Data is digitized, "out there" and amazingly available. The notion of Big Data at first seemed benign and vaguely helpful in terms of surveying political opinions, track-

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ing health or other crises worldwide, marketing our law practices or even being marketed to by online stores and sites.

What Big Data is turning out to be is more than vaguely intrusive and, in fact, potentially threatening should it fall into the wrong hands. Whose hands are actually the wrong hands will be the legal and social question for years. Even in the right hands, digitized information can be taken out of context and misused.

Think of the numerous times that you have researched rare diseases or odd issues that came up in your cases but which had nothing to do with your personal health or life. A service that is simply tracking your online movements would not be able to differentiate between what you are doing for the law practice compared to what you are doing in your own — formerly private — life.

If a client has researched a country or policies that are out of favor, and is accused of a crime, can his or her entire online history somehow be made relevant or admissible? We may need new *Miranda* warnings: "Whatever you search can and may be used against you."

Social media is here to stay and presumably in ever-more sophisticated formats.

Luckily, so is the law with its ability to impose limitations on the use of its byproducts and the Big Data it generates. However, I raise two important questions: Has the seduction of our online lives diverted us from the importance of legal activism? And, are we merely reacting to technological advances rather than trying to rein in Big Brother? We all know what George Orwell would say about that.