The Legal Perils of Social Media: Avoiding Landmines in Cyberspace

Jan L Jacobowitz, Ms., University of Miami School of Law

Available at: https://works.bepress.com/jan_jacobowitz/3/
Robots at War

Who is to blame when robots kill? Professor A. Michael Froomkin's conference probes implications of virtually autonomous machines.
decided Douglas v. Independent Living Centers, in which the state emphasized national-state bureaucratic interaction in the Medicaid program, one might have thought that it would have had some impact on the way the court envisioned the challenge to the Medicaid expansion. Though there is legitimate concern about the institutional competence of the federal judiciary in federalism enforcement, such concerns should not undermine the responsibility to take the world, as it exists, seriously. The court’s failure to articulate a framework that equates sovereignty with “freedom,” and that fails to take state and national administrative interaction seriously, is a form of federalism enforcement that distorts the real nature of contemporary federalism. For this reason, attempts to protect the state governments will always be seen as pitched battles that must constrain congressional authority, as though nothing else matters. Reading federalism jurisprudence, including National Federation, leaves one with the conclusion that this is not far off the mark.

The Legal Perils of Social Media
Avoiding Landmines in Cyberspace

By Jan L. Jacobowitz

In a tragic accident, a cement truck destroys the car of a young married couple. The woman dies, her husband survives. A lawsuit ensues, and takes a surprising turn when counsel for the truck driver sends the husband’s attorney a picture of the supposedly bereaved widower, taken shortly after his wife’s death and posted on Facebook, clutching a beer at a social gathering and wearing a T-shirt with the legend “I love hot moms.”

The man’s astonished attorney instructs his paralegal to have the client “clean up” his Facebook page because “we don’t want blowups of this stuff at trial” — a comment revealed later in an e-mail stream. The widower closes his Facebook account. Responding in writing to a request from the defense, he asserts that he does not have a Facebook page “on the day this is signed,” without denying or confirming that an account had existed previously.

But defense counsel then compels discovery of the closed Facebook account. The widower reactivates his page and deletes sixteen photos, an act of which the trial court in Charlottesville, Va., is later made aware. Although the widower and his attorney ultimately win the wrongful death case and receive a $4.4 million verdict, they are ordered to pay $722,000 in sanctions to the defendants’ lawyers because of the extra work incurred by their “deceptive response” in the Facebook matter, as well as other misconduct. The judge also alerts the Virginia Bar to the defense lawyer’s conduct and refers the widower’s duplicity about his Facebook account to the state attorney’s office.

Without social media, would the attorney and his client have simply enjoyed a successful result in what appeared to be a relatively straightforward wrongful death case? It is difficult to know, but one insight emerges from the case: Because social media outlets like Facebook have become ubiquitous, lawyers need to be acutely aware of their potential ethical pitfalls.

Technology is evolving so rapidly that state bar associations and courts are continually being confronted with new situations upon which to rule. Ethics opinions have begun to emerge to provide some guidelines as to the use of social media in the practice of law. Some of the main issues to consider involve client confidentiality, interaction with witnesses and judges, and advertising constraints.

Client confidentiality is sacrosanct in the attorney-client relationship, as all law students are well aware. Any information learned in the course of representation is confidential unless it falls under one of the limited exceptions to the rule. But compliance with the confidentiality mandate proved problematic for a public defender in Illinois who referred to her clients on her blog by prison number or on a first-name basis. She lost her job and was disciplined by both the Illinois and Wisconsin Bars. The attorney learned the hard way that regardless of whether her work life blended into her personal life, client confidentiality must not be sacrificed.

Just as some attorneys take risks by revealing client information on social media, clients also may compromise their cases by posting information about themselves on social media. Indeed, attorneys report that Facebook often contains treasure troves of evidence. At the same time, attorneys can gain insight about jurors from viewing
their Facebook pages. Guidelines for using social media in these instances are governed primarily by individual Facebook users’ privacy settings. Ethics opinions to date generally indicate that if an individual’s information is on a public page, then the page is fair game to be viewed and used by anyone.

The slope becomes slippery when a page is available only to “friends” of the person whose information is being sought. Generally, the ethics rules allow neither an attorney nor someone on the attorney’s behalf to use misrepresentation or pretense to gain information. Consistent with the rules, ethics opinions have held that an attorney is prohibited from sending a “friend request” to a witness without identifying himself accurately and explaining his reason for contacting the person. In any case, under well-established ethics rules, an attorney is not allowed to contact an opposing party who is represented by counsel. Thus, an attorney may not send a friend request to a represented opposing party, regardless of whether the attorney has identified himself. Similarly, because ethics rules prohibit attorneys from contacting jurors, attorneys may not ask jurors to be friends on social media sites.

Also under scrutiny is the interaction of judges with social media sites. Several state Bars have opined that judges may be online friends with lawyers as long as they do not discuss cases that are both pending before the judge and in which the “friending” lawyer is a participant. Other states, notably Florida, have concluded that judges should not be Facebook friends with any lawyer who may appear before that judge. Meanwhile, blogging about judges has spurred disciplinary action against an attorney in at least one notable case in Florida. The attorney had protested that courtroom procedures were violating the defendant’s speedy trial rights, but was reprimanded for impugning the integrity of the presiding judge after referring to her as “an evil unfair witch” who was “clearly unfit for her position” and “seemingly mentally ill.”

Blogging may cause additional problems for attorneys. Without an appropriate disclaimer on one’s blog, which would indicate that an attorney is merely providing information and not case-specific legal advice, an attorney may find herself inadvertently in an attorney-client relationship by responding to questions and comments from readers. An attorney’s blog may also prove to be impermissible advertising if it runs afoul of a state bar’s advertising regulations, as was the case of a Virginia attorney’s blog. In Florida, moreover, the bar has issued guidelines to the effect that social-media pages that advertise an attorney’s services are subject to the bar’s advertising regulations.

Whether an attorney is marketing his or her services or actually litigating a case, social media is becoming a regular part of the legal landscape. Awareness of both the advantages and ethical challenges of incorporating social media into the practice of law has arguably become a requirement for the competent and diligent lawyer. One might ponder whether a failure to use social media ethically might one day provide the basis for a claim of malpractice or ineffective assistance of counsel. The technological tea leaves suggest that we are headed that way.

Jan L. Jacobowitz is a Lecturer in Law and the Director of the Professional Responsibility and Ethics Program, and a 2012 Smythe E. Gambrell Award recipient. Jacobowitz co-developed and teaches Mindful Ethics: Professional Responsibility for Lawyers in the Digital Age. She received her J.D. from George Washington University. Jacobowitz practiced law for 20 years, including a stint as Nazi hunter at the Department of Justice.

---

**Immigration Law’s Forgotten Past**

**When States Had Power**

**By Kunal M. Parker**

Undocumented aliens have been in the crosshairs of legislation in recent years. Law enforcement officials in states such as Alabama, Arizona, Georgia, Indiana, South Carolina and Utah have been allowed to detain people suspected of being there in violation of immigration law. In response, immigrant advocacy groups argued that such practices inevitably prompt racial profiling of Latinos, farmers have seen a flight of Mexican laborers, and the Obama administration resorted to suing the state of Arizona, claiming that its laws encroach upon federal authority over immigration.

In June, the U.S. Supreme Court struck down key parts of the Arizona law but let stand a provision that permits police officers to check a person’s immigration status while enforcing other laws. Significantly, the court’s 5-3 ruling upheld the federal government’s authority to set immigration laws and policy.

We are so accustomed to thinking of immigration as a federal matter that important aspects of immigration history in the United States have been obscured. If it seems that states such as Arizona have trampled upon an exclusive federal