



Social Media Ethics

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Introduction

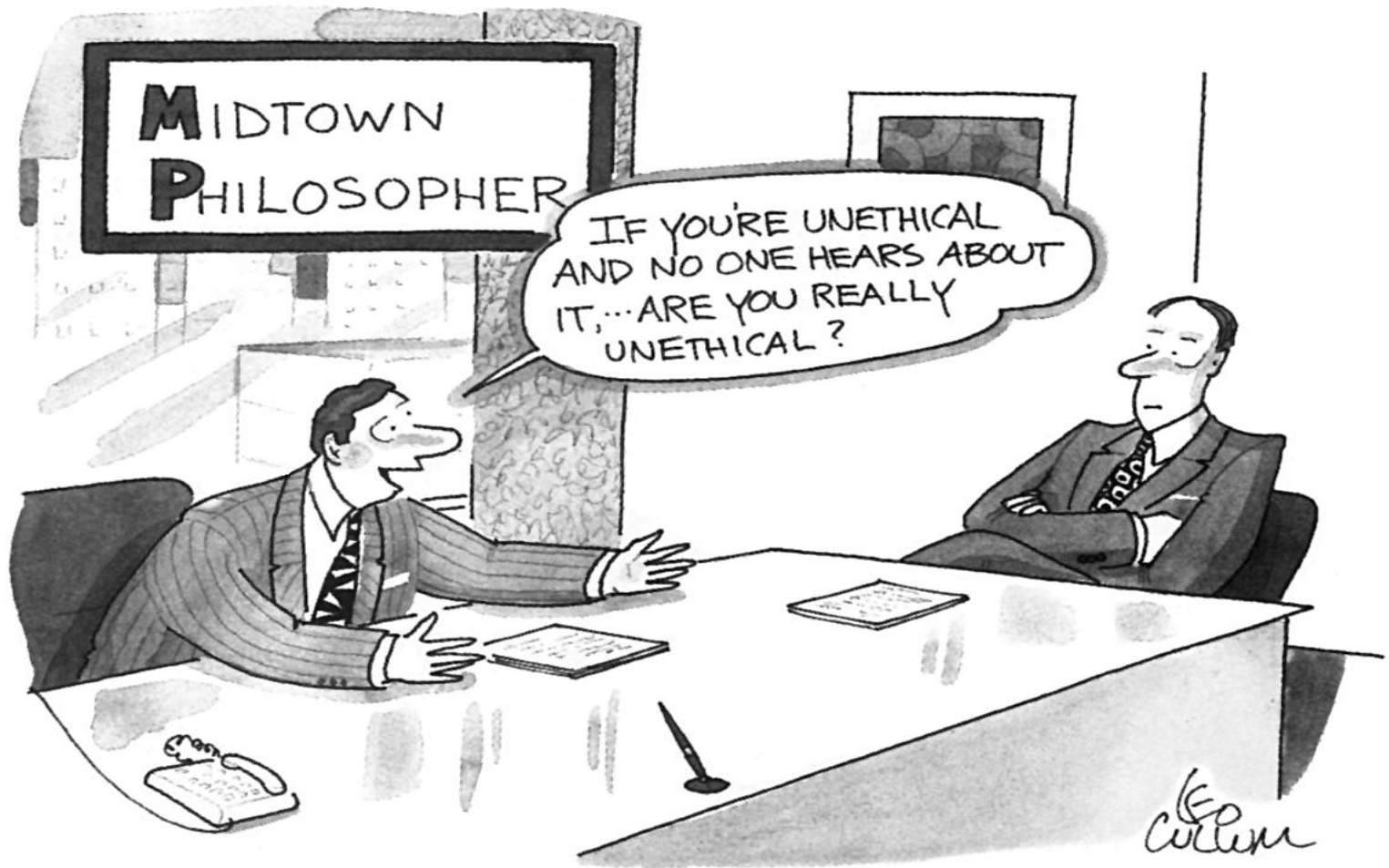
Why do Lawyers Get
Into Trouble on
Social Media?



Four Social Media Traps

- The Myth of the Privacy Bubble
- Forgetting the Rules
- Misusing Social Media as a Discovery or Investigatory Tool
- Failing to Counsel Clients about Social Media

The Myth of the Privacy Bubble



“... proper attire for trial.”



**Facebook post by Public Defender Anya Citron Stern
(Fl. 2012)**

Result:

Motion for mistrial -
granted

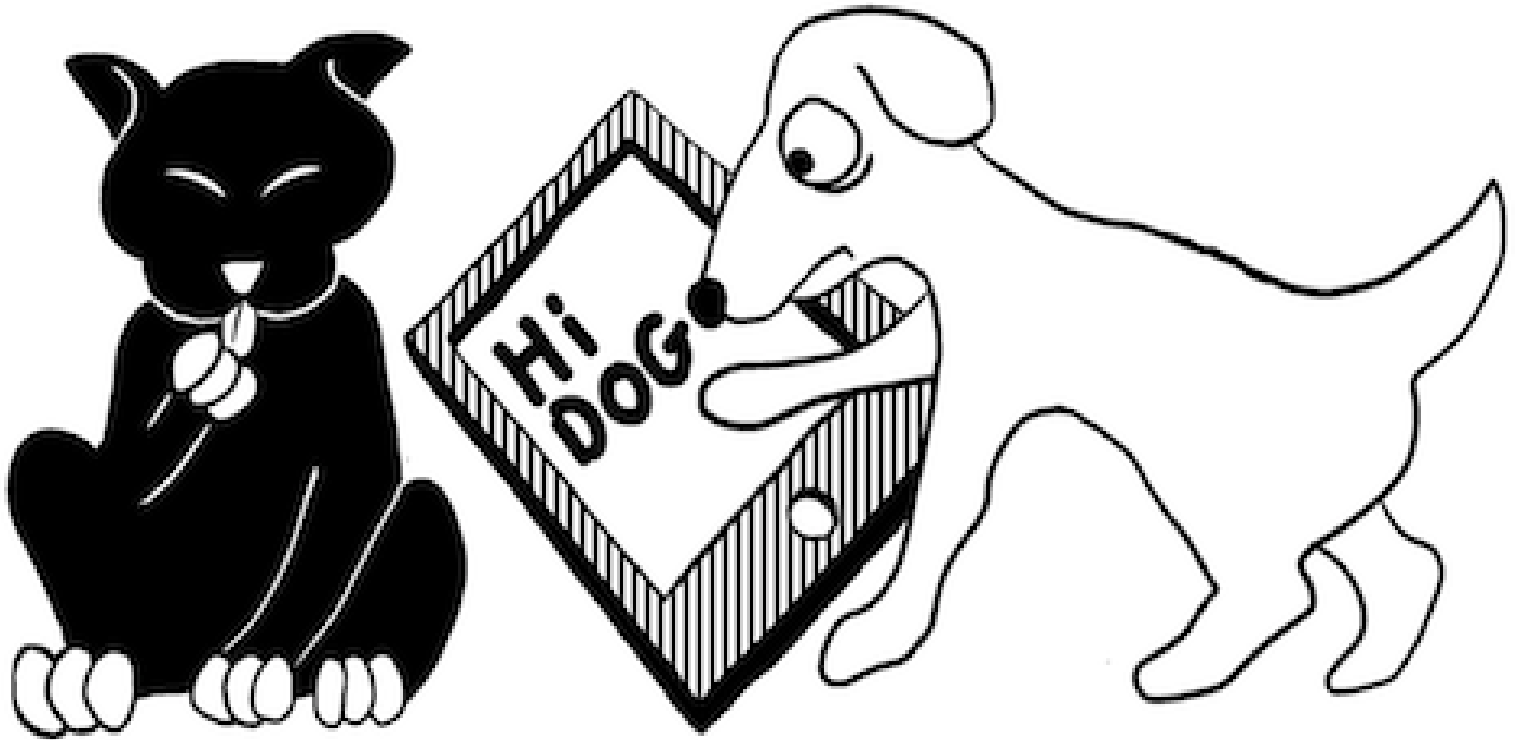
Lawyer fired

Internet *Circa* 1993



“On the Internet, nobody knows you’re a dog.”

Internet *Circa* 2012



I don't know about the Internet,
but I'd say that iPad knows you're a dog.



Look before you tweet

“Naughty, naughty boy”

“Why is Phil Klein (sic) smiling? There is nothing to smile about, douchebag.”

- Tweets by Sarah Peterson Herr, a research attorney with the Kansas Court of Appeals



Public Statement by Herr

“I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also ***communicating with the public*** at large, which was not appropriate for someone who works for the court system.”



Statement by Herr (Cont.)

“I apologize that because the comments were made on ***Twitter*** – ***and thus public*** – that they were perceived as a reflection on the Kansas courts.”

Result:

Suspended from job,
pending investigation

Subsequently, fired.

The Myth of Privacy

“There can be ***no reasonable expectation of privacy in a tweet*** sent around the world.”

- *People v. Harris* (N.Y. Crim. Court 2012)
(denying motion to quash subpoena to Twitter for information relating to Defendant’s account)

The Internet is for cats ...



To Summarize ...

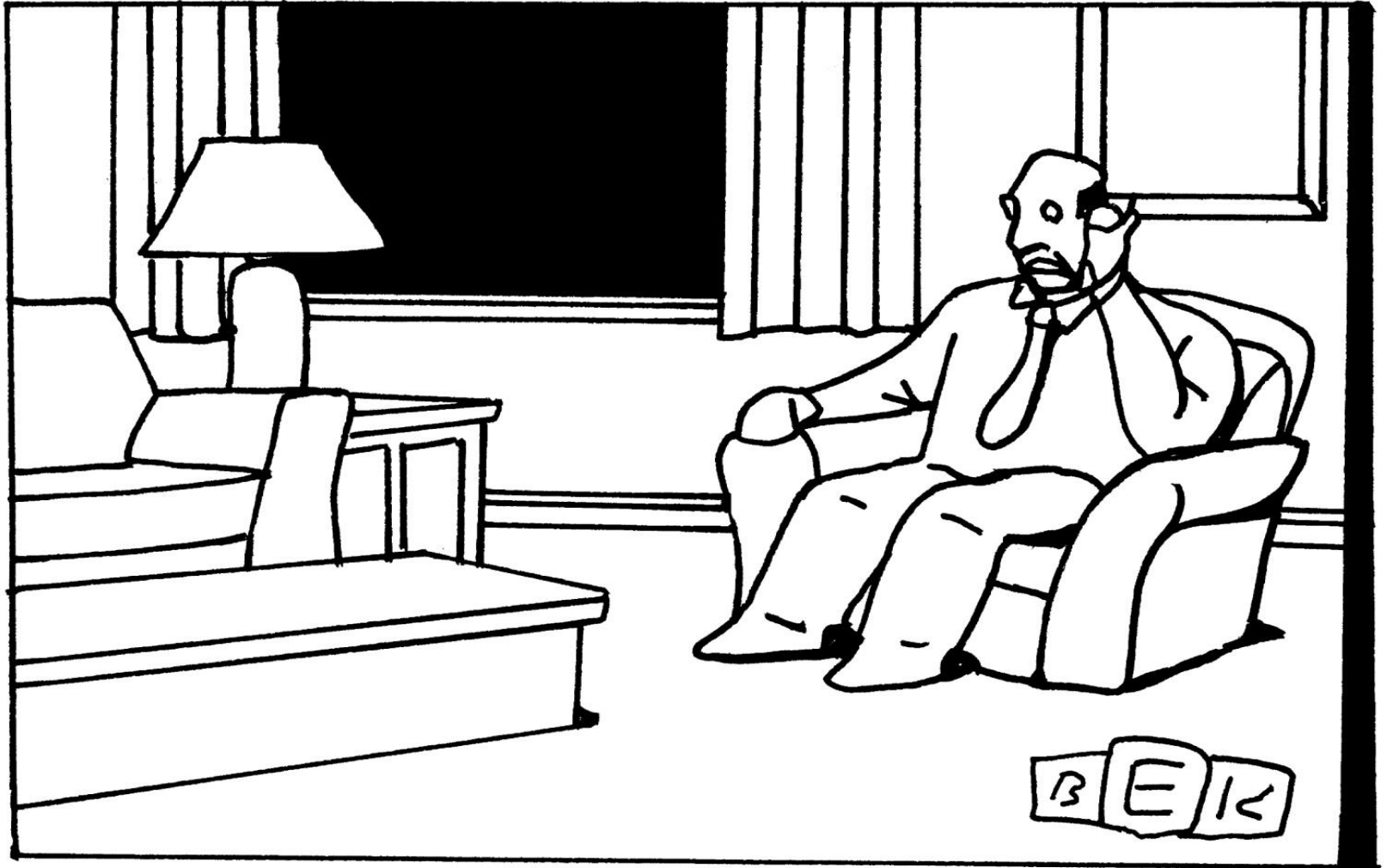


THE INTERNET

PRIVACY

A HELPFUL VENN DIAGRAM

Social Media Hypotheticals



“Just sitting here waiting for Facebook to go away.”



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Hypothetical A

Social Media as a
Discovery or
Investigatory Tool

Social Media as Evidence

“The great virtue of a laptop is that it can be used on one’s lap, while sitting on a sofa, or perhaps while in bed. Indeed, we note that the **Facebook page for ‘Using the laptop in bed’ . . . has nearly one million ‘Likes.’**”

-Ferraro v. Hewlett-Packard Co.
(7th Cir. 2013)

Social Media as Discovery

“[I]t is reasonable to infer from the limited postings on plaintiff's **public** Facebook and MySpace profile pages that her **private** pages may contain material and information that are relevant to her claims or that may lead to the disclosure of admissible evidence.”

- *Romano v. Steelchase*, 30 Misc.3d 426
(N.Y. Sup. Ct. 2010)

Social Media as Discovery

“To deny defendant an opportunity to access these sites not only would go against the liberal discovery policies of New York favoring pretrial disclosure, but would condone plaintiff's attempt to hide ***relevant information behind self-regulated privacy settings.***”

-*Romano v. Steelchase*, 30 Misc.3d 426
(N.Y. Sup. Ct. 2010)



Delay in Seeking Social Media

Defendant's motion to compel discovery concerning plaintiff's social media accounts denied due to unexplained delay.

-Guzman v. Farrell Building Co.
(Suffolk County 2012)



Incorporating Social Media Into Your Discovery Plan

- Include social media at an early stage in your discovery plan
- Update your definition of ESI
- Include social media in your document preservation letters
- Discovery Requests and Subpoenas



Hypothetical B

Investigating Social Media Ethically



“Passive” Viewing of Social Media

- Lawyers may view public areas of social media accounts
- NYSBA Opinion 843 (2010)
- SDCBA Ethics Op. 2011-2

“Friending” a Represented Party

- “No Contact” Rule (Rule 4.2)
- Passive viewing of public pages vs. “friending” (NYSBA Opinion 843)
- Lawyer can’t “friend” high-ranking executives of represented corporation (SDCBA Ethics Op. 2011-2)

“Friending” an Unrepresented Person

- Communicating with unrepresented party (Rule 4.3)
- Use of Deception (Rules 4.1(a) and 8.4)
- Duty to Supervise (Rule 5.3)

“Friending” an Unrepresented Person

- “Friending” allowed as long as lawyer uses real name and no deception (NY City Bar Op. 2010-02)
- Compare with Phil. Op. 2009-2 and SDCBA Ethics Op. 2011-2: Lawyer must disclose objectives



Hypothetical C

Preserving Social Media



Preserving Social Media

“I Love Hot Mamas.”

- *Lester v. Allied Concrete* (Virginia
2013)

Result:

Client and lawyer ordered
to pay sanction of
\$722,000



Consequences for Lawyer

- Paid \$542,000 in sanctions
- Resigned from law firm
- Suspended for five years



Preserving Social Media

Plaintiff sanctioned with an adverse inference instruction, allowing jury to infer that social media evidence destroyed by Plaintiff would have been harmful to his case.

- *Gatto v. United Airlines* (N.J. 2013)

Counseling Clients re Social Media



“If it’s any help, your sentence was the most e-mailed story of the week.”



Counseling Clients re Social Media

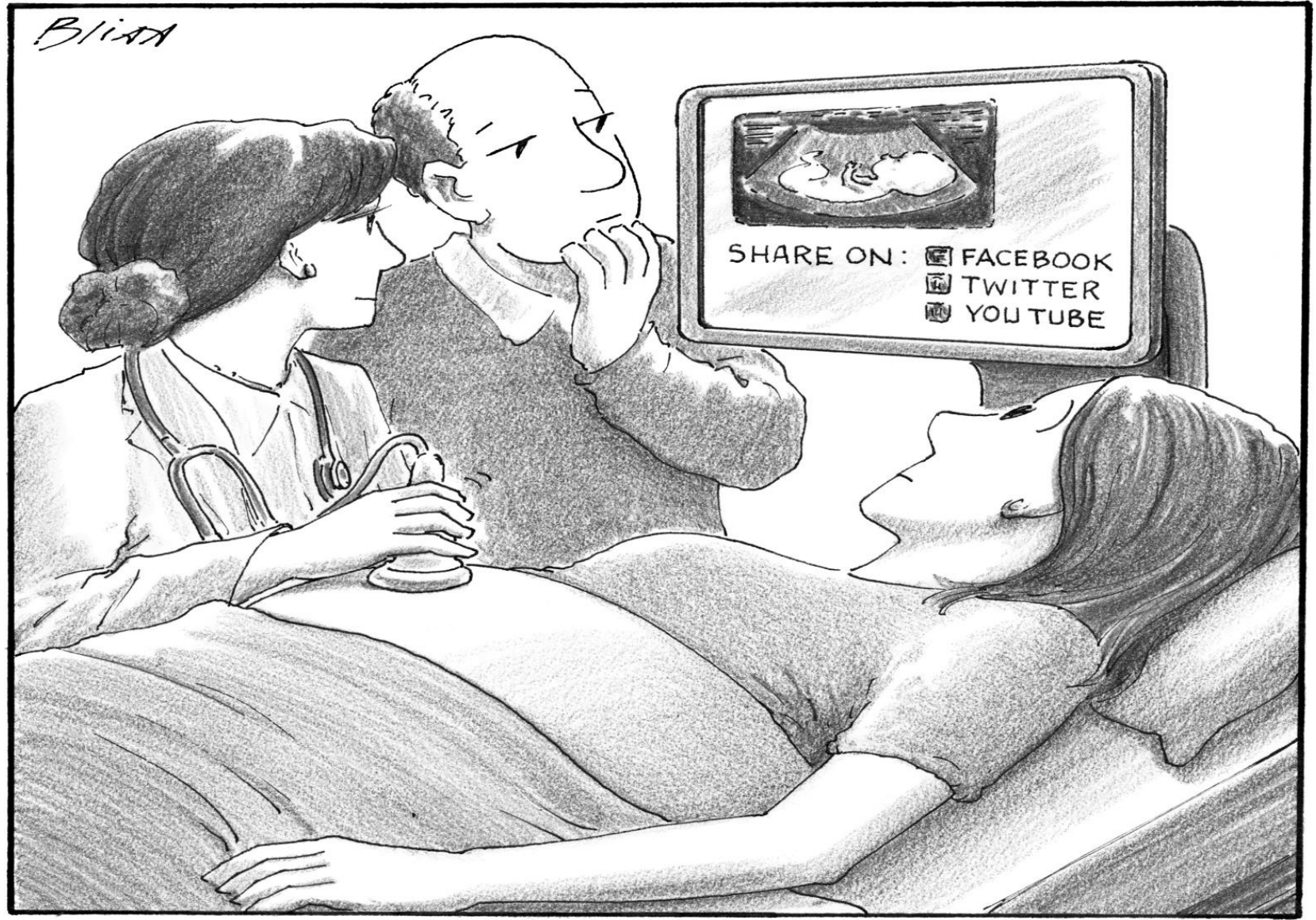
- You may counsel clients about what they post on social media
- You may counsel your clients about the legal implications of their social media activity
- You may advise your clients to “take down” social media postings (**with a big caveat**)



Hypothetical D

Using Common Sense

Look before You Tweet





Hypothetical E

Researching Jurors

Researching Jurors

- Communicating with Jurors (Rule 3.5(a)(4))
- “Unreasonable” for court to prevent lawyer from researching jurors on-line during voir dire (*Carino v. Muenzen* (N.J. 2010))

Researching Jurors

- Attorneys may research jurors on social media as long as no communication occurs (NYCBA Op. 2012-2)
- Lawyers may search jurors' social media sites provided there is no contact or communication and lawyer does not seek to friend or follow jurors (NYCLA 743)



Hypothetical F

Impugning Judges



Impugning Judges

“Evil, unfair witch”

“Ugly, condescending
attitude”

“Seemingly mentally ill”

- *Florida State Bar v. Conway* (2008)

Result:

Public Reprimand on Consent

- *Florida State Bar v. Conway* (2008)



Impugning a Judge (Rule 8.1(a))

“A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.”



Hypothetical G

Juror Misconduct

Juror Misconduct

- Lawyer must *promptly* report juror misconduct (Rule 3.5(d))
- Attorneys must use best judgment to determine if Juror has acted improperly; may not consider whether conduct benefits attorney (NYCBA Op. 2012-2)
- “[L]itigants should endeavor to prevent retrials by completing an early investigation” of jurors. *Johnson v. McCullough* (Mo. 2010)

Hypothetical H

Ex Parte Communications with Judges



The Wrong Way to Handle It

Lawyer: “I hope I'm in my last day of trial.”

Judge: “You are in your last day of trial.”

- *Matter of Terry* (North Carolina 2009)

Result:

Judge Publicly Reprimanded

- *Matter of Terry* (North Carolina 2009)

The Right Way to Handle It

Judge in criminal case was
Facebook friends with victim's
father

Father sent Facebook message to
Judge asking for leniency towards
criminal defendant

Judge disclosed message and
reported to judicial conduct
commission

Result:

No showing of bias:

“Merely designating someone as a friend on Facebook `does not show the degree or intensity of the judge’s relationship with a person.””

- *Youker v. Texas* (quoting ABA Op. 462 (2013))



Hypothetical I

Social Media as Advertising



Advertising Violations (LinkedIn)

- Mischaracterized legal skills and prior successes
- Falsely stated he handled matters in federal court
- Falsely stated he graduated from law school in 2005

-In the Matter of Dannitte Mays Dickey (South Carolina 2012)



Advertising Violations (LinkedIn)

- Listed 50 practice areas in which he had little or no experience
- Used the word “specialist” even though not certified as a specialist

- *In the Matter of Dannitte Mays Dickey* (South Carolina 2012)



Advertising Violations (LinkedIn)

“Respondent began using these websites without adequate review of the relevant provisions of the South Carolina Rules of Professional Conduct.”

- *In the Matter of Dickey* (South Carolina 2012)

Result:

Public Reprimand

-In the Matter of Dickey (South Carolina
2012)



California Op. 2012-186

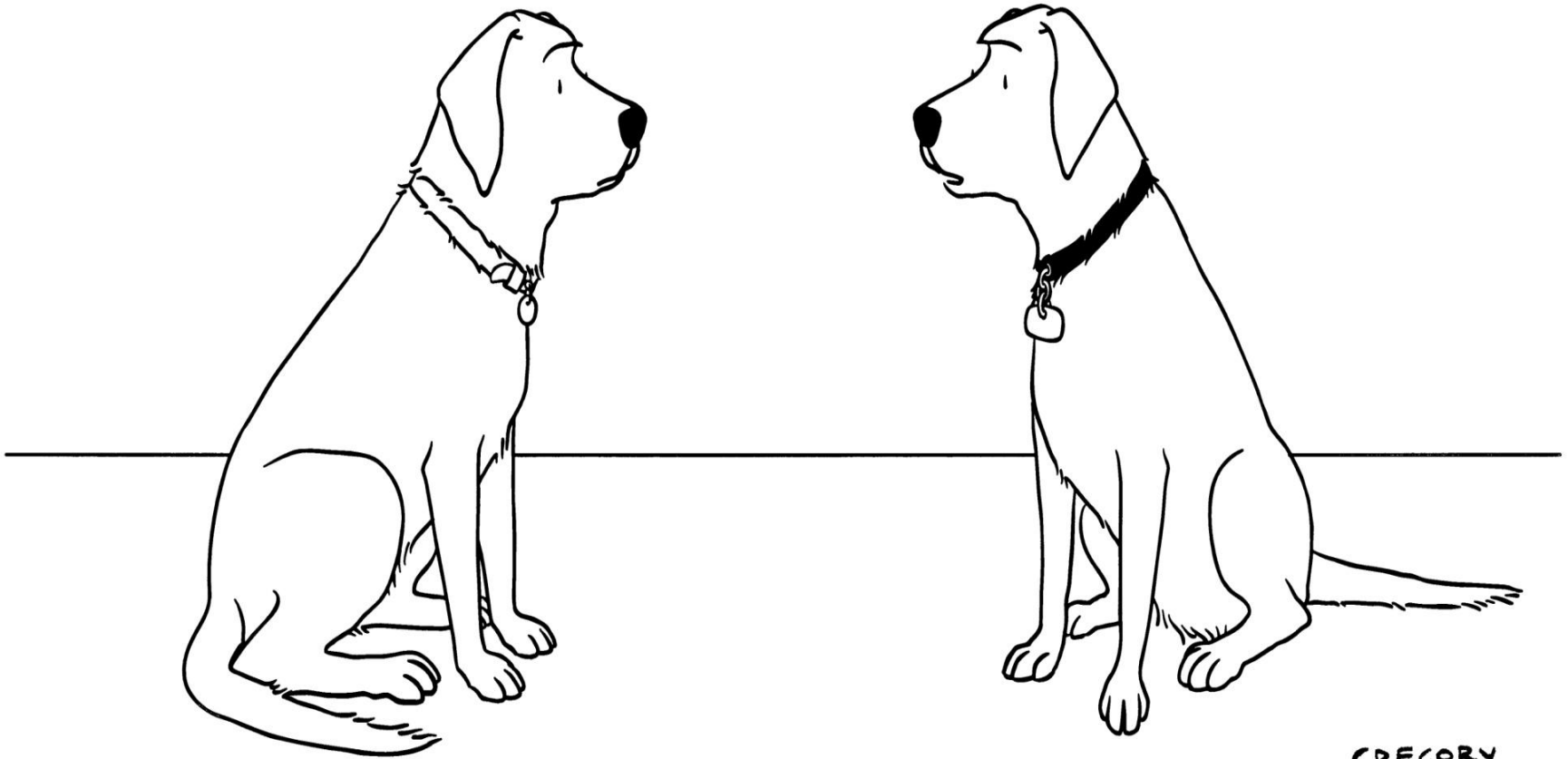
- “Case finally over. Unanimous verdict! Celebrating tonight.”
- “Another great victory in court today? Client is delighted! Who wants to be next?”
- “Won a million dollar verdict. Tell your friends and check out my website.”
- “Just published an article on wage and hour breaks. Let me know if you would like a copy.”



Hypothetical J

Blogging and Confidentiality

Blogging and Confidentiality



GREGORY

“I had my own blog for a while, but I decided to go back to just pointless, incessant barking.”



Duty of Confidentiality (Rule 1.6(a))

Lawyer shall not knowingly reveal “confidential information” or use such information to the disadvantage of a client or for the advantage of the lawyer or a third party (absent consent or other exception).



“Confidential Information”

Information gained during or relating to the representation of the client, whatever its source that is:

- Protected by the attorney-client privilege;
- Likely to be embarrassing or detrimental to the client if disclosed; or
- Information that the client has requested be kept confidential



Blogging and Confidentiality

“This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because “he’s no snitch.” . . . My client is in college. Just goes to show you that higher education does not imply that you have any sense.”

- Complaint, *In the Matter of Peshek* (Illinois)

Blogging and Confidentiality

“He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean.”

- Complaint, *In the Matter of Peshek* (Illinois)

Result:

Suspended from practice
for 60 days

Fired after 19 years in
Public Defenders office

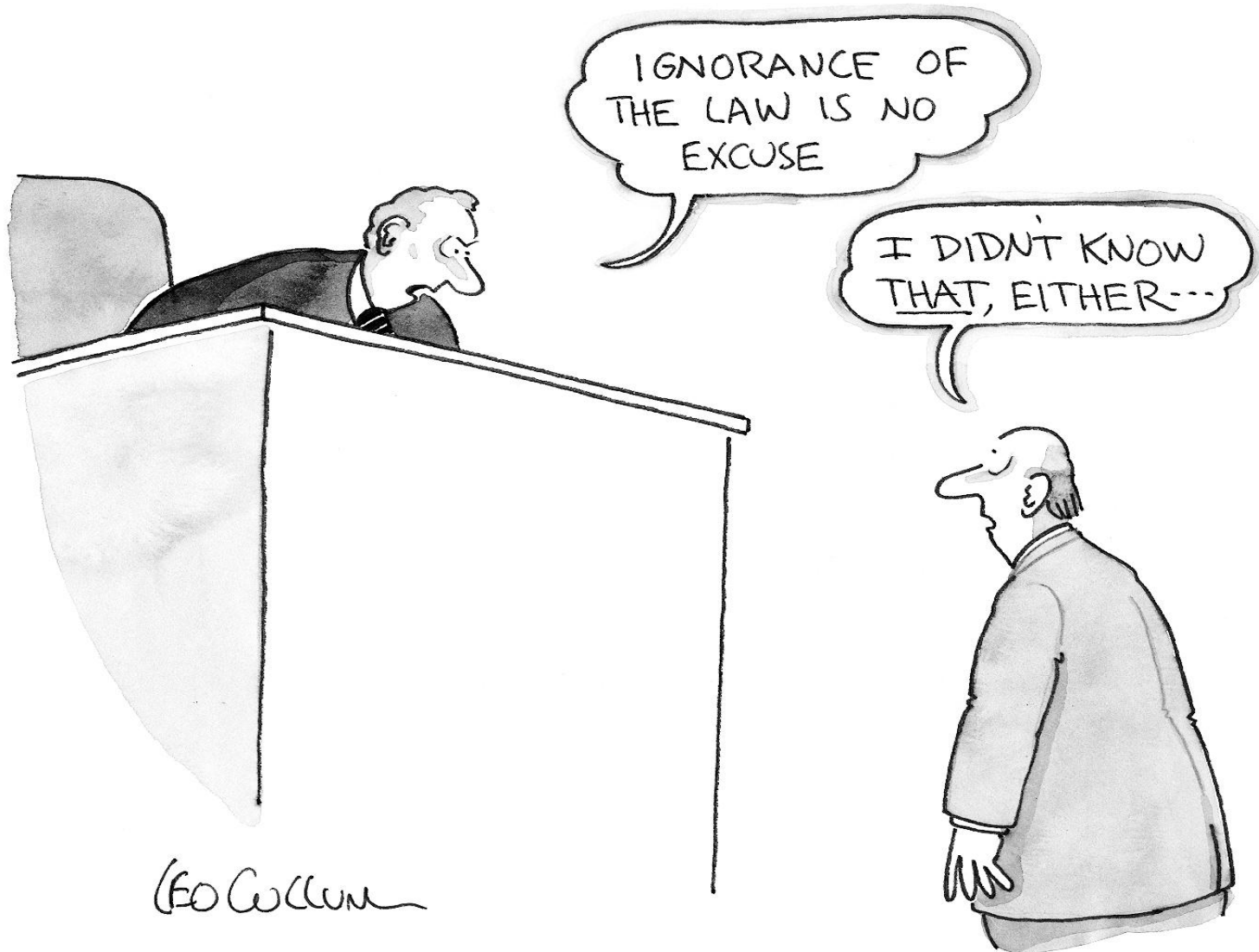
- *In the Matter of Peshek* (Illinois 2010)

What About the First Amendment?

- *Hunter v. Virginia State Bar*
- Held: Attorney's Blog Constitutes *Commercial* Speech; Disclaimer Required
- Also Held: Attorney Permitted to Blog About Completed Cases

To Summarize ...

Social Media Do's and Don't's





Do:

- Know the Rules (ethics, TOS, employment, netiquette, substantive)
- Stay current on relevant ethics opinions and decisions
- Be professional and classy
- Guard client confidentiality

Do:

- Vet endorsements and recommendations
- Use appropriate disclaimers
- Counsel your clients *appropriately* about social media
- Take advantage of social media as an investigatory and discovery tool. But be transparent and follow the rules.



Don't:

- Embarrass your client, yourself, your firm, or others
- Disclose confidential information
- Try to hide behind anonymity
- Misrepresent or exaggerate your qualifications
- Communicate with represented parties
- Communicate with jurors

Don't:

- Engage in *ex parte* communications with judges
- Insult or disparage judges (or anyone)
- Engage in deception
- Give legal advice
- Overlook social media evidence
- Destroy social media evidence