



Social Lawyers

Avoiding the Ethical Pitfalls of Using Social Media

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Social Lawyers

Why do Lawyers Get
Into Trouble on
Social Media?

Introduction

The Four Social Media Traps For Lawyers



Click on the twitter icon to
tweet slide contents

The Four Social Media Traps

1.

The Myth of the Privacy Bubble



The Four Social Media Traps

2.

Forgetting the Rules



The Four Social Media Traps

3.

Misusing Social Media as a Discovery or Investigatory Tool



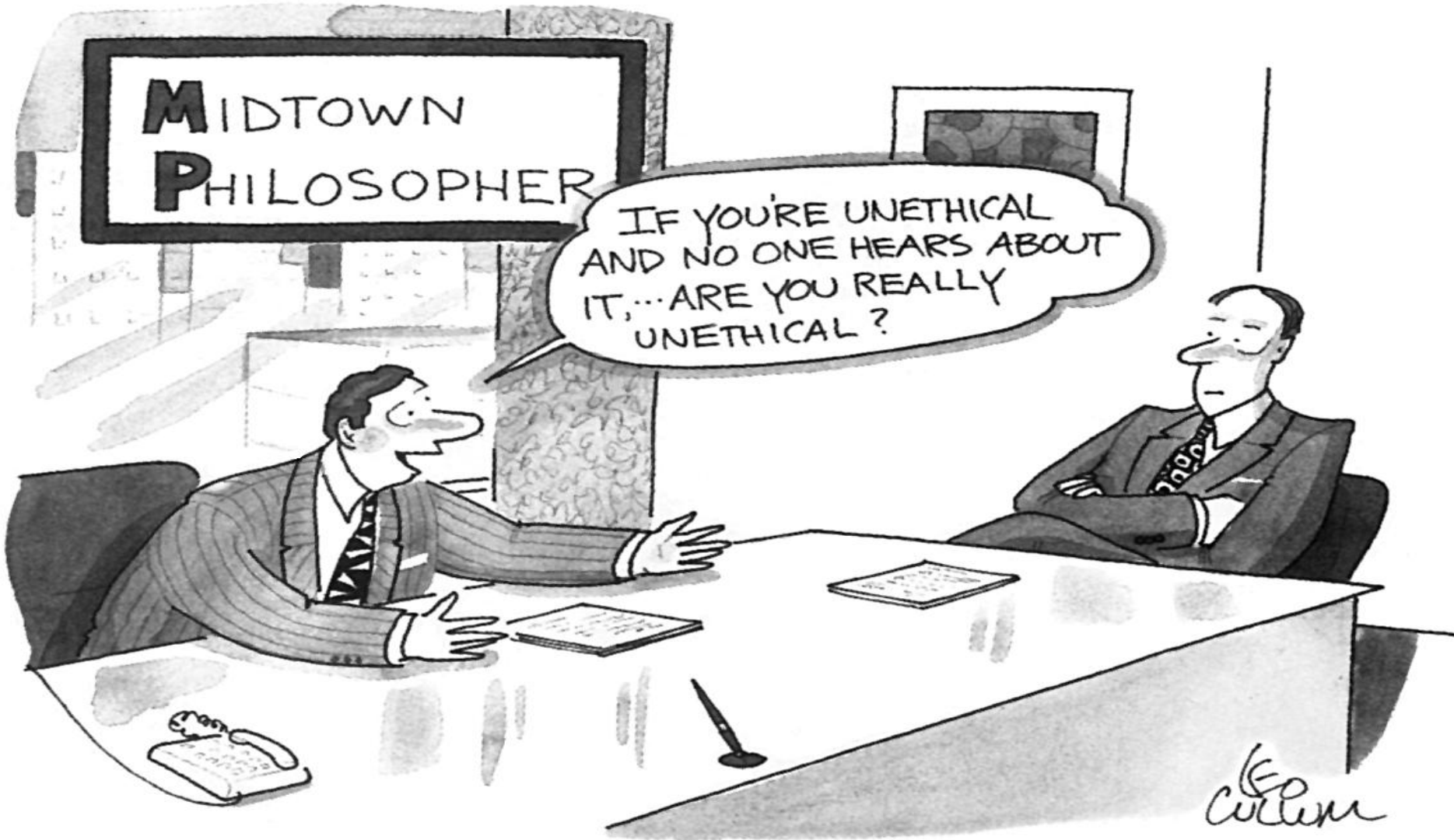
The Four Social Media Traps

4.

**Failing to Counsel Clients on
Their Social Media Use**



Myth of the Privacy Bubble



“... proper attire for trial.”



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

Result:

Motion for mistrial -
granted

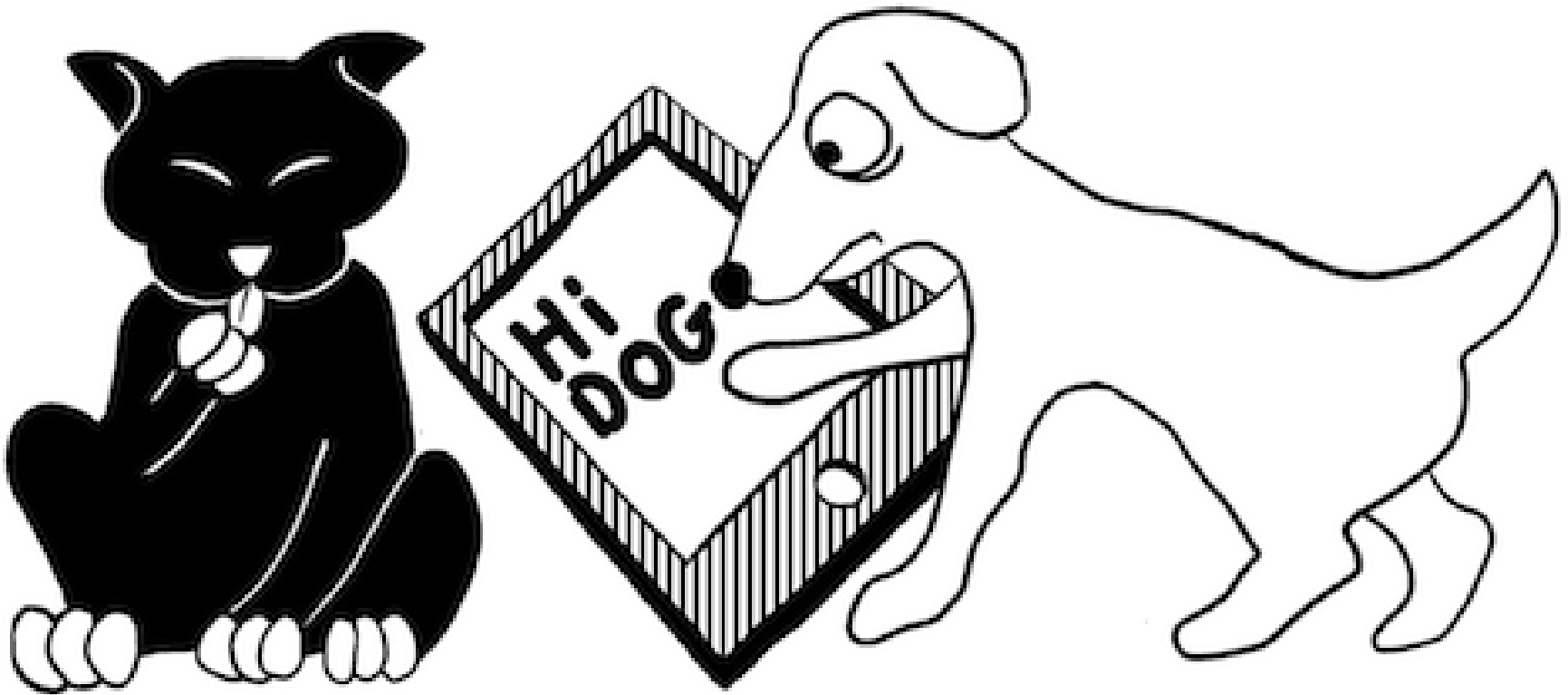
Lawyer fired

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.

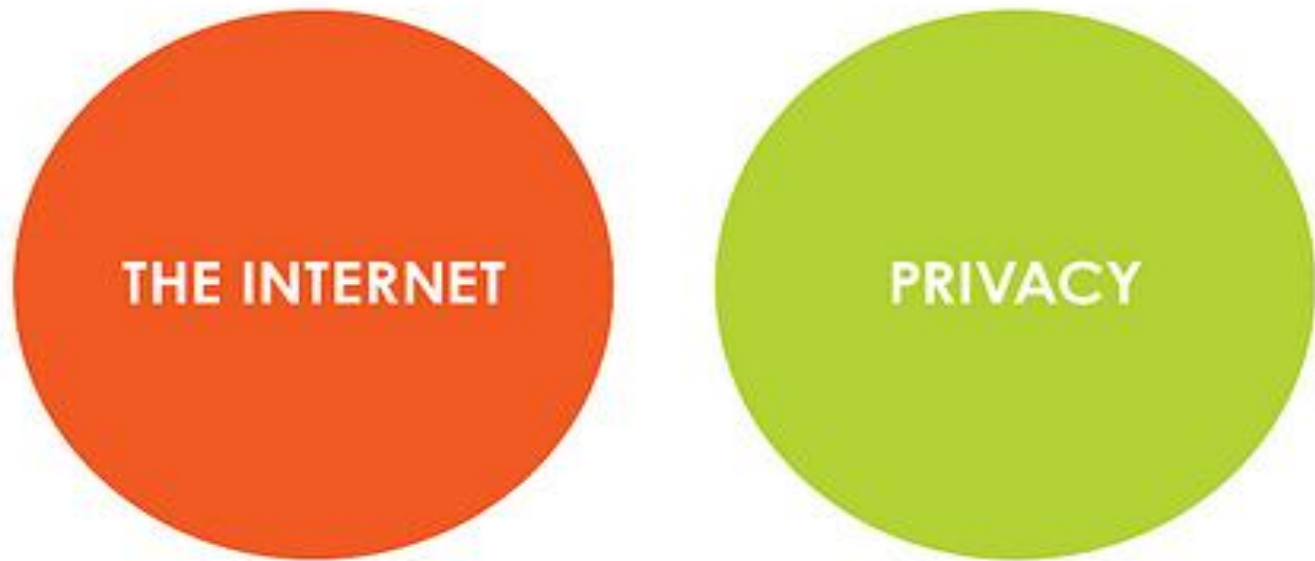
The Myth of Privacy

“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)

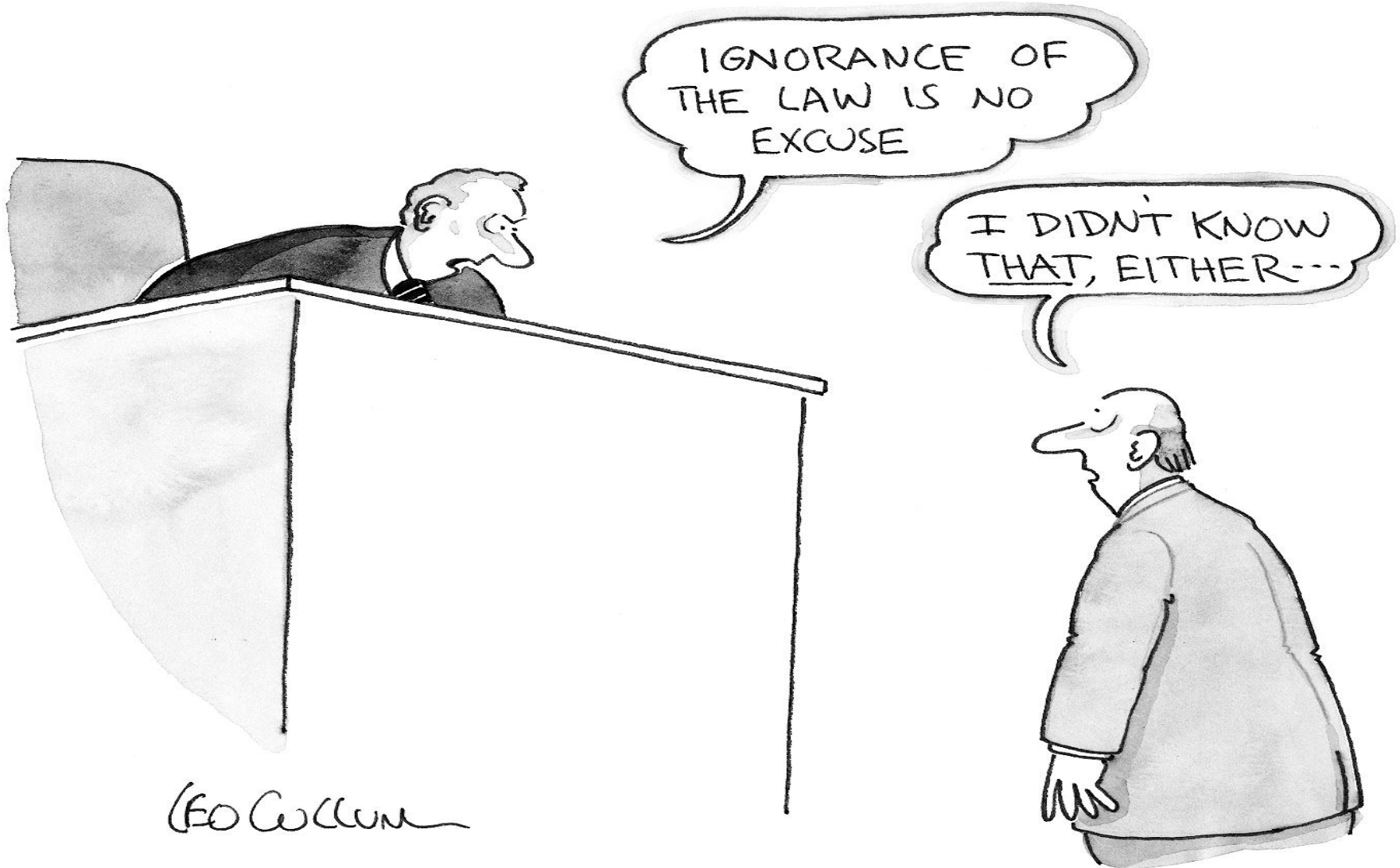


The Myth of the Privacy Bubble (Summarized)



A HELPFUL VENN DIAGRAM

Knowing the Rules

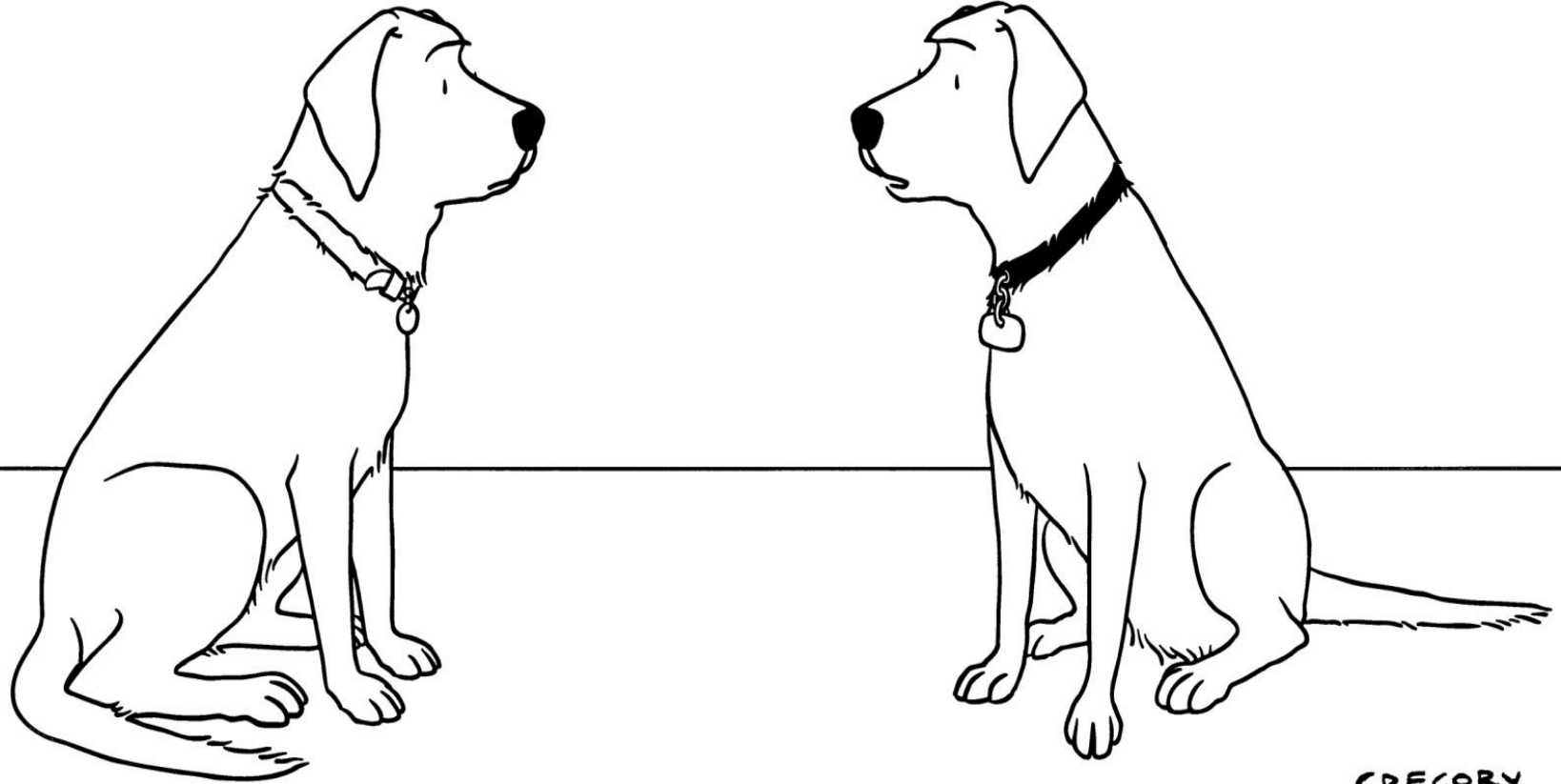




Knowing the Rules

- Ethics Rules
- Platform's Terms of Service
- Employer's Social Media Policy
- Netiquette
- Substantive Law

Examples From the Blogosphere



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



Impugning Judges

“Evil, unfair witch”

“Ugly, condescending
attitude”

“Seemingly mentally ill”

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

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.”

Result

Public Reprimand on Consent

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

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)



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)

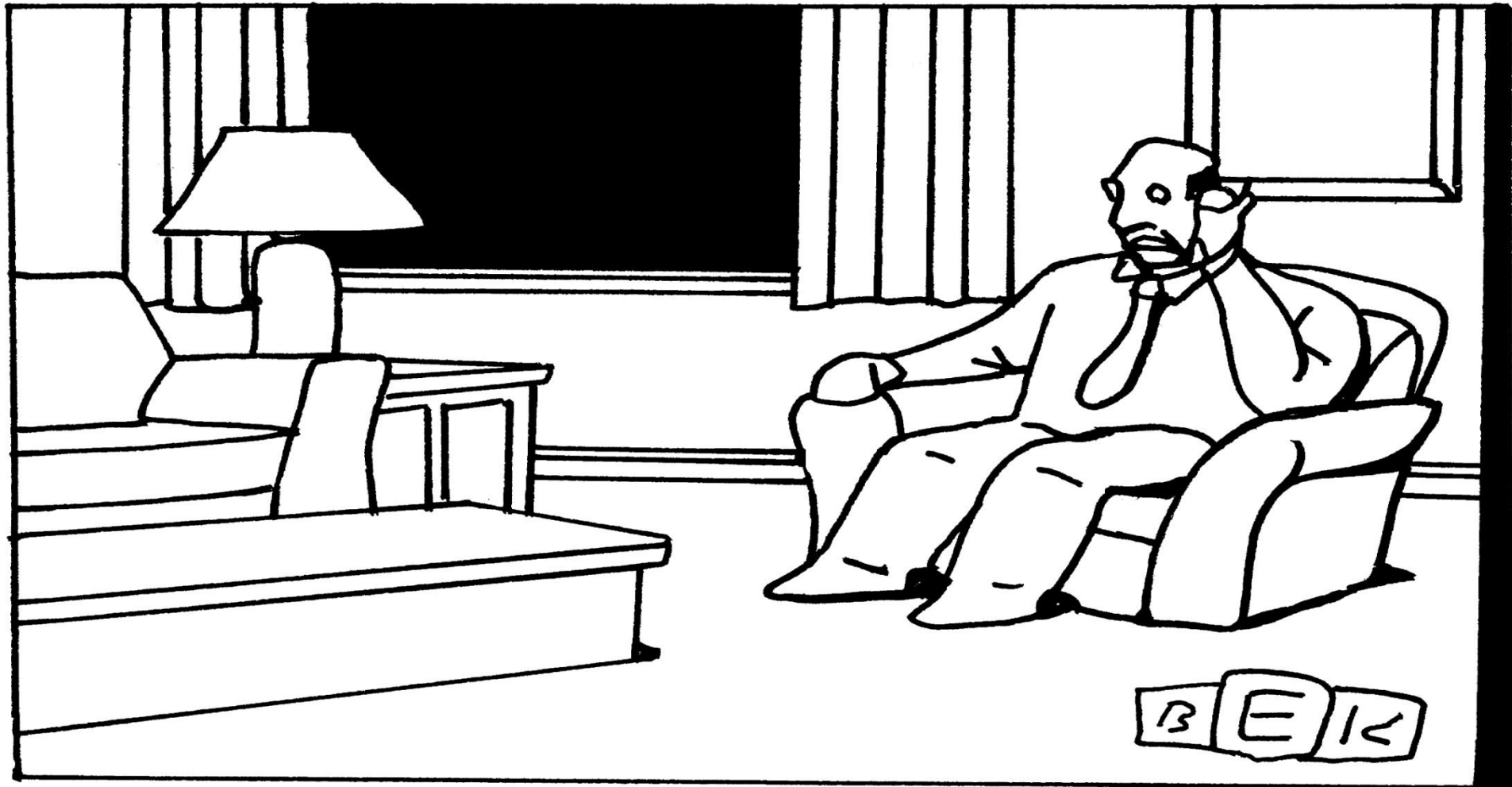
Result

Suspended from practice
for 60 days

Fired after 19 years
in PD office

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

Facebook, LinkedIn, Twitter, etc.



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

Advertising

- 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

- 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 Dickey* (South Carolina 2012)



Advertising

“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)

NYSBA Op. 972 (2013)

- Lawyer may identify practice areas
- Lawyer may not list services under “Specialties” heading unless certified as a specialist (R. 7.4)
- No opinion on whether lawyer can list services under “Skills and Expertise” heading
- Problem?

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.”



Ex Parte Communications

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)

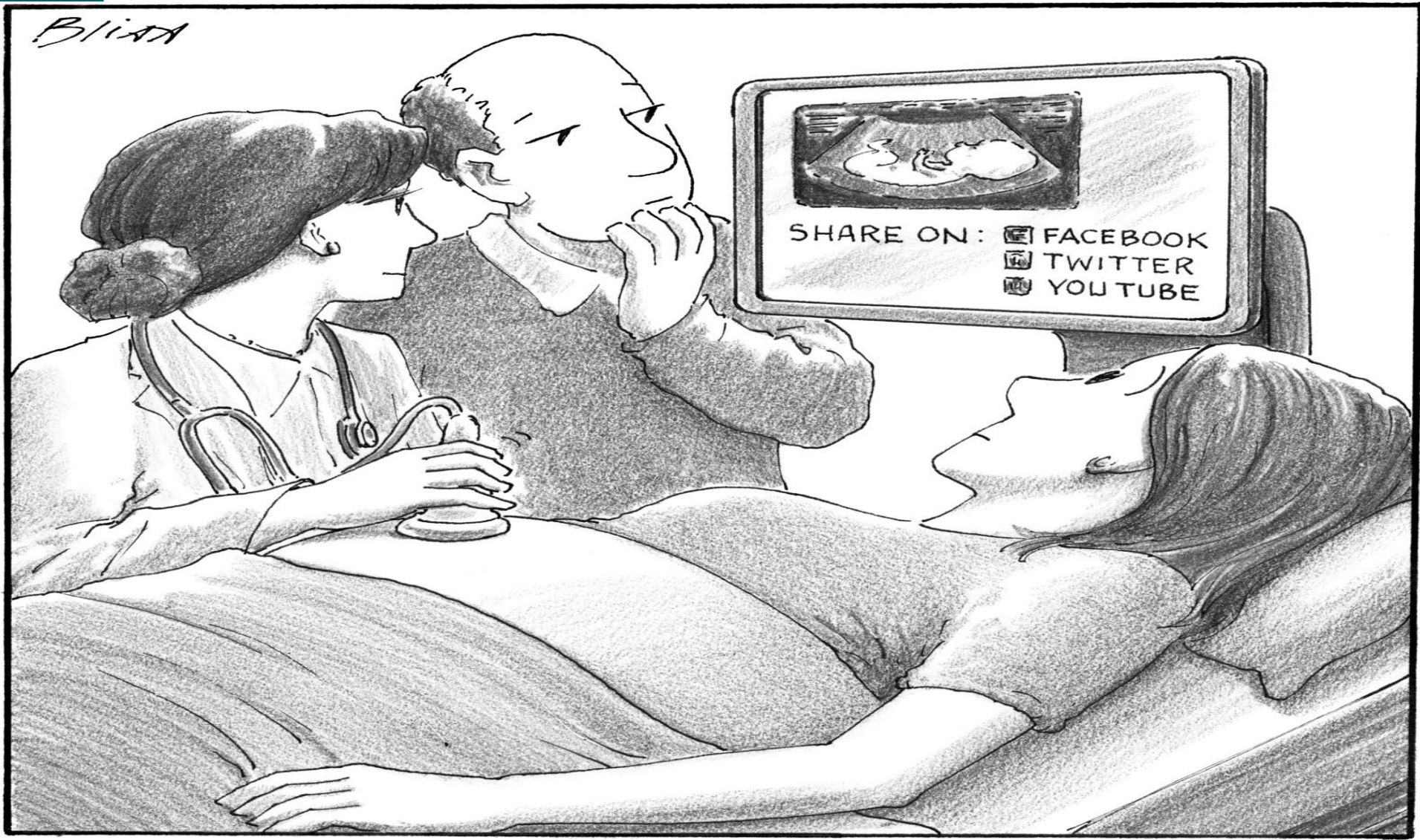
However ...

“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))

Discovery and Investigation



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)



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)

Four Guidelines for a Social Media Discovery Plan

1

Include Social Media at an Early Stage in Your Discovery Plan



Four Guidelines for a Social Media Discovery Plan

2

Update Your Definition of Electronically Stored Information (ESI) to Include Social Media



Four Guidelines for a Social Media Discovery Plan

3

Include Social Media in Your Document Preservation Letters (Both to Adversaries and Clients)



Four Guidelines for a Social Media Discovery Plan

4

Request Social Media Content in Your Document Requests and Third Party Subpoenas



“Passive” Viewing of Social Media

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

“Friending” Represented Parties

- “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” Unrepresented Persons

- Communicating with unrepresented party (Rule 4.3)
- Use of Deception (Rules 4.1(a) and 8.4)
- Duty to Supervise (Rule 5.3)
- “Friending” allowed as long as lawyer uses real name and no deception (NY City Bar Op. 2010-02)

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)

Counseling Clients Regarding Social Media



“O.K.—let’s review what you didn’t know and when you didn’t know it.”



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

NYCLA Op. 745 (2013)

- 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**)

Should we just leave the internet to the cats?



Do's and Don'ts of Social Media Use



"If it's any help, your sentence was the most e-mailed story of the week."

Do's of Social Media Use

Do Know the Rules Relevant to Social Media Use

**(including ethics rules, TOS,
employment policies, netiquette,
and substantive law)**



Do's of Social Media Use

**Do Stay Current on Ethics
Opinions and Court
Decisions Regarding Social
Media Use**



Do's of Social Media Use

Do be Professional and Classy on Social Media



Do's of Social Media Use

Do Safeguard Client Confidentiality on Social Media



Do's of Social Media Use

**Do Vet LinkedIn
Endorsements to Make
Sure They Are Appropriate**



Do's of Social Media Use

**Do Use Appropriate
Disclaimers on Social
Media Sites**



Do's of Social Media Use

**Do Counsel Your Clients
Appropriately About Their
Social Media Use**



Do's of Social Media Use

**Do Use Social Media as an
Investigatory and
Discovery Tool
(But Follow the Rules)**



Don'ts of Social Media Use

**Do Not Try to Hide
Behind Anonymity on
Social Media**



Don'ts of Social Media Use

Do Not Misrepresent or Exaggerate Your Qualifications



Don'ts of Social Media Use

**Do Not Communicate With
Represented Parties in
Violation of the Rules**



Don'ts of Social Media Use

**Do Not Communicate With
Jurors on Social Media
(or elsewhere)**



Don'ts of Social Media Use

Do Not Engage in *Ex Parte* Communications With Judges on Social Media (or elsewhere)



Don'ts of Social Media Use

**Do Not Insult or
Disparage Judges (or
Anyone Else) on Social
Media**



Don'ts of Social Media Use

**Do Not Give Legal Advice
on Social Media**



Don'ts of Social Media Use

Do Not Solicit Potential Clients on Social Media



Don'ts of Social Media Use

**Do Not Overlook the
Significance of Social
Media Evidence**



Don'ts of Social Media Use

**Do Not Destroy Social
Media Evidence
(or counsel your client to do so)**



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