



Prudent Social Media Practices

Presented by

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Four General Mistakes

1. Clinging to the false dichotomy between public and private
2. Forgetting that social media activities are subject to the rules
3. Misusing social media as an investigatory/discovery tool
4. Failing to counsel your clients about *their* social media use

1. Professional v. Private



“... proper attire for trial.”



Result:

Motion for mistrial - granted

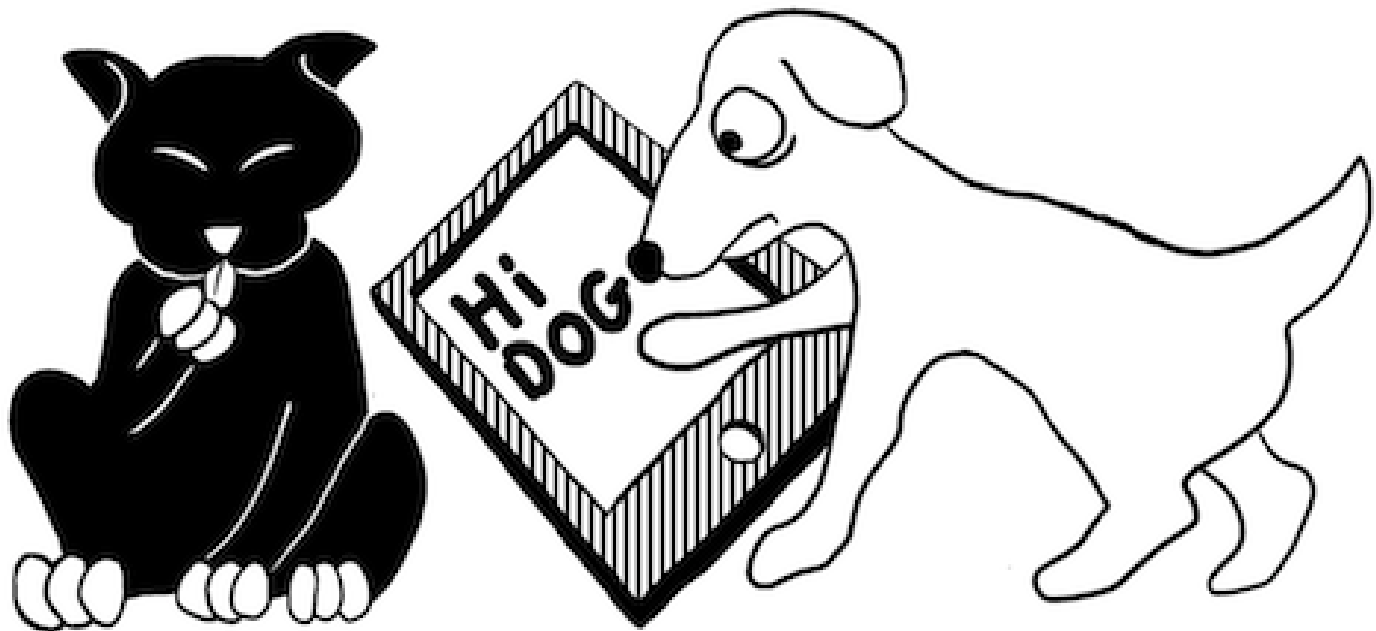
Lawyer fired

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 smiling? There is nothing to smile about, douchebag.”

Tweets by Sarah Peterson Herr, a court research attorney, at an ethics hearing



Statement by Herr after suspension from her job

“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.”

“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 Internet is for cats ...



2. Know the Rules





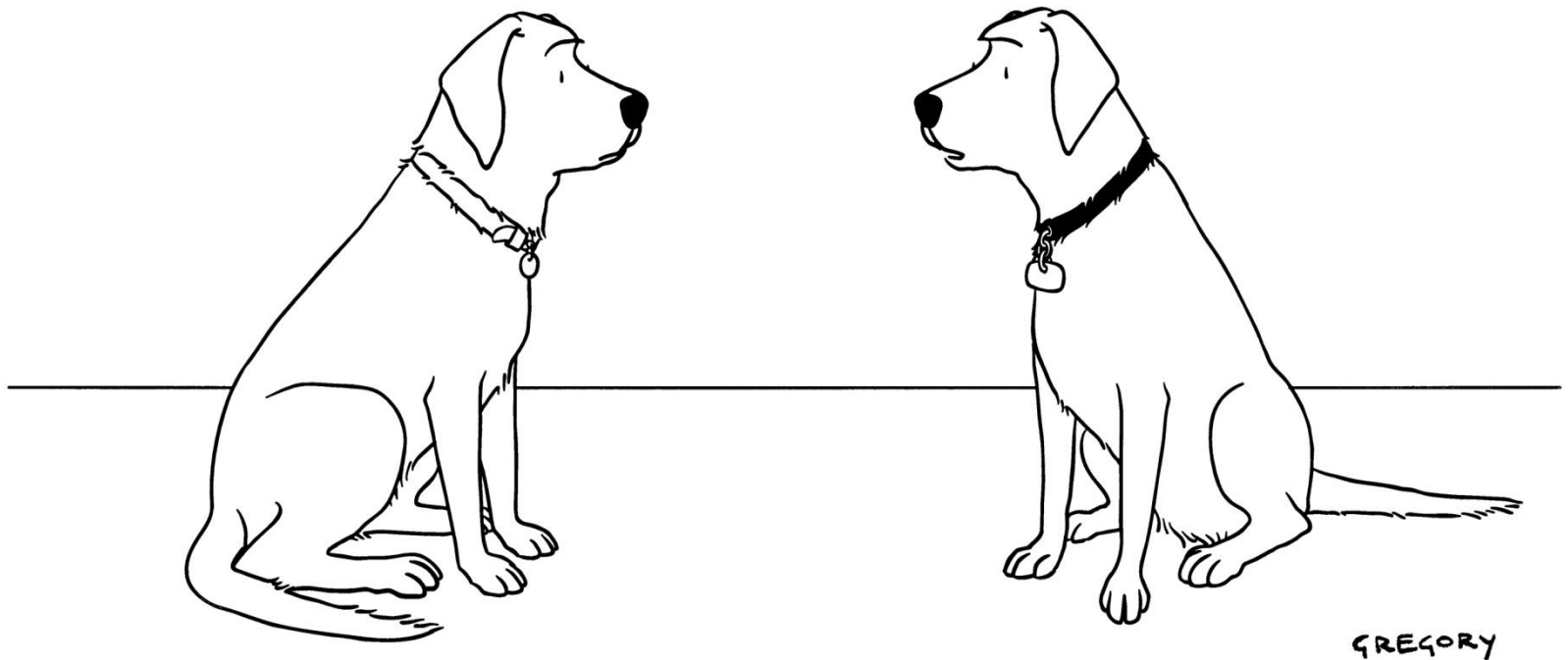
Know the Rules

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

Social Media Pitfalls (non-exhaustive)

- Revealing confidential information
- Embarrassing your client, yourself, your employer, others
- Violating advertising/solicitation rules
- Violating “no contact” rule
- Pretexting
- *Ex Parte* communications with judges
- Inadvertently entering into an attorney-client relationship (or triggering 1.18)
- Committing unauthorized practice of law
- Getting caught in a lie
- Violating substantive law (infringement, defamation, etc.)

Blogging



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

Blogging — Impugning a Judge (Rule 8.2)

“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)

Blogging – Confidentiality (Rule 1.6)

“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 – Confidentiality (Rule 1.6)

“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)

Blogging — Dishonesty, Impugning (Rules 8.2, 8.4)

“This probate proceeding boils down to garden variety theft, embezzlement, malpractice and malfeasance by attorneys and the court...”

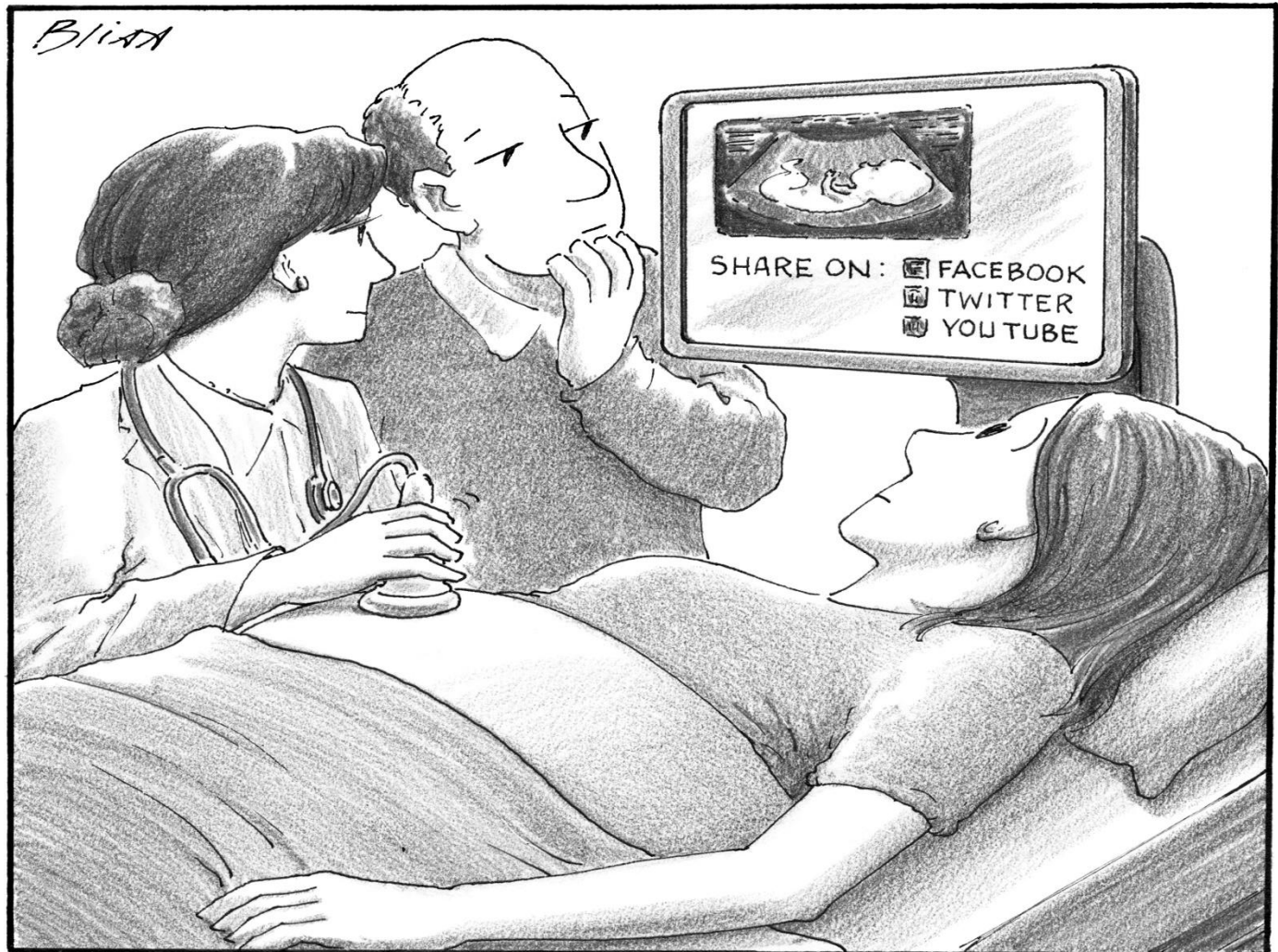
Complaint, *In the matter of Denison*
(Illinois 2013)

Blogging — Dishonesty, Impugning (Rules 8.2, 8.4)

“Sorry, but portions of this blog have to be entertaining so we can get the word out. There is most certainly a great deal of (stinging) truth in it, esp. for the GAL’s (sic), the probate court and a society that ignores (thereby condoning) the sleazy world of probate, and in particular the 18th floor of the Daley Center in Chicago, but everyone needs to understand, **these are not pleadings** ...”

Complaint, *In the matter of Denison* (Illinois 2013) (emphasis added)

Facebook, Twitter, LinkedIn





Facebook – *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

LinkedIn, Websites — Advertising (Rule 7.1 et seq.)

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

LinkedIn, Websites — Advertising (Rule 7.1 et seq.)

“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

3. Investigation and 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. 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)

Social Media as an Investigatory Tool

- “No Contact” Rule (Rule 4.2)
- Supervision Rule (Rules 5.1, 5.3)
- Pretexting (Rules 4.1(a), 8.4; NY City Bar Op. 2010-02)
- Competence (Rule 1.1)

- M. Gallagher, *Hostile Use of ‘Friend’ Request Puts Lawyers in Ethics Trouble*, N.J. Law Journal (Aug. 30, 2012).

Social Media as a Discovery Tool

- *Guzman v. Farrell Building Co.*
(Suffolk Cty, Oct. 2012) (Don't miss the boat on social media discovery)
- Update your definition of ESI
- Include social media in your document preservation letters

4. Counseling Clients about Social Media



“At this time the family is grieving and suing.”



Be Careful What You Post

“It's my birthday and I'll get drunk if I want to.”

“I'm starting to love my scar.”

Result:

Client sued for \$1.1 million
for car accident injury.

Awarded \$142,000.



Be Careful What You Delete

“I Love Hot Mamas.”



Result:

\$600,000 fine for spoliation
in wrongful death action



Robert Zimmerman Jr
@rzimmermanjr

Follow

@NatJackEsq - My Life's work = you WILL be held accountable for your words/actions. You A'INT seen NOTHIN' yet... I will see U disbarred.

Reply Retweet Favorite More

13
RETWEETS

6
FAVORITES



12:40 AM - 9 Oct 12

Reply to @rzimmermanjr @NatJackEsq



Preston Shuman @415guysf 9 Oct
@rzimmermanjr @NatJackEsq You and Crump = Nifong 2012
Details



Natalie Jackson @NatJackEsq 9 Oct
@415guysf @rzimmermanjr Please see my Rule #1: Never argue with a fool, onlookers may not be able to tell the difference. #BLOCKED
Details



Natalie Jackson @NatJackEsq 9 Oct
@rzimmermanjr Please see my Rule #1: Never argue with a fool, onlookers may not be able to tell the difference -

Response by G. Zimmerman's Lawyer:

“Regarding Robert Zimmerman Jr.’s media campaign and Twitter comments, Robert is acting on behalf of his family, and he is not acting with the approval or the input of the defense team.”

“The Zimmerman family has been through a lot, and they have been frequently misrepresented in the media, so we do not begrudge Robert for wanting to speak out and set the record straight.”

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:

- Know the Rules (ethics, TOS, employment, netiquette, substantive)
- Stay current on relevant ethics opinions and decisions
- Be professional and classy
- Check conflicts
- Guard client confidentiality
- Vet endorsements and recommendations
- Use appropriate disclaimers
- Counsel your clients 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
- Communicate with clients about their legal matters
- Try to hide behind anonymity
- Misrepresent or exaggerate your qualifications
- Communicate with represented parties
- Communicate with jurors
- Engage in *ex parte* communications with judges
- Insult or disparage judges (or anyone)
- Engage in pretexting
- Give legal advice
- Encourage or accept confidential information from clients or third parties
- Overlook social media evidence
- Destroy social media evidence

Contact

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