

THEODORE ROOSEVELT AMERICAN INN OF COURT

Social Media: Implications on the Practice of Law

November 19, 2015

Program presented by:

Richard K. Fischl, Esq.

Richard D. Saul, Esq.

Amanda L. Perry, Esq.

Adam Solomon (J.D. 2017)

Glenn R. Jersey III (J.D. 2017)

Social Media: Implications on the Practice of Law

AGENDA

- I. SOCIAL MEDIA – Introduction and Overview (5 Minutes)**

- II. Skit #1 – ISSUES RAISED IN CRIMINAL MATTERS (10 Minutes)**

- II. DISCUSSION POINTS RAISED IN SKIT #1 (10 Minutes)**

- IV. OVERVIEW OF SOCIAL MEDIA IN CRIMINAL MATTERS (5 Minutes)**

- V. Skit #2 - CIVIL LITIGATION (10 Minutes)**

- VI. DISCUSSION POINTS RAISED IN SKIT #2 (10 Minutes)**

- VII. OVERVIEW OF SOCIAL MEDIA IN CIVIL MATTERS (5 minutes)**
 - (A) NEW YORK 2-PRONG TEST FOR DISCOVERABILITY OF PRIVATE ONLINE ACTIVITY: (5 Minutes)**

 - (B) Skit #3 – ETHICS ALERT: WHAT ATTORNEYS SHOULD KNOW (15 Minutes)**

- VIII. DISCUSSION POINTS RAISED IN SKIT #3 (15 Minutes)**

**IX. FURTHER ETHICAL CONSIDERATIONS AND QUESTIONS
(20 Minutes)**

BIOGRAPHIES

Richard K. Fischl, Esq., is a charter member of this Inn. Mr. Fischl is in private practice and has been in private practices since 1994. His practice includes litigation in the fields of personal injury, matrimonial, criminal as well as estate litigation. Prior to opening his own practice, Mr. Fischl was an Assistant District Attorney in the Nassau County District Attorney's Office for eleven years. He graduated from Hofstra Law School, where he was an Articles Editor of the first Hofstra Labor Law Forum, now the Hofstra Labor & Employment Law Journal. Mr. Fischl is admitted to practice before all of the Courts of the State of New York and, the United States District Court for the Eastern District of New York and the District Court for the Southern District of New York. He is additionally admitted the practice before the Court of Military Appeals, the District of Columbia and the State of Florida. He has been admitted Pro Hac Vice to the Eastern District of Virginia and has argued before the Second Circuit Court of Appeals.

Richard D. Saul, Esq. is a litigation partner with **The Saul Law Firm, LLP**. The firm concentrates in the areas of Plaintiff's Personal Injury, Matrimonial and Family Law. Mr. Saul received his Bachelor's Degree from the State University of New York at Buffalo. He received his Juris Doctor Degree from Touro-Jacob D. Fuchsberg Law Center where he was a member of the Touro Moot Court. He is admitted to practice law in all New York State Courts, United States District Court of the Eastern District of New York and United States District Court of the Southern District of New York. He is also admitted to practice in the State of Connecticut. Mr. Saul is a member of the New York State Trial Lawyers' Association, New York State Bar Association, Nassau County Bar Association, Theodore Roosevelt American Inn of Court and the Huntington Lawyers' Club.

Amanda L. Perry, Esq., is an associate with the law firm Perry, Van Etten, Rozanski & Primavera, LLP, a civil litigation defense firm with offices in Melville, Long Island and Downtown Manhattan. She earned her Bachelor of Arts from Villanova University and her

Juris Doctorate from Widener University School of Law. In 2012, she was admitted to the New York State Bar and to the United States District Courts for the Southern and Eastern Districts of New York and has since concentrated on representation of physicians, physician's assistants, nurses, hospitals and rehabilitation facilities in the defense of medical malpractice claims commenced in both State and Federal Courts. She is a member of the American Bar Association, the New York State Bar Association, the New York County Lawyer's Association, the New York Women's Bar Association and The Association for Healthcare Risk Management of New York, Inc. serving on its publications committee for The Risk Management Quarterly. Ms. Perry is also a new member of Theodore Roosevelt American Inn of Court.

Adam Solomon is a second year law student at the Maurice A. Deane School of Law at Hofstra University and Candidate for J.D., 2017. He graduated from Utica College with a B.S. in Criminal Justice. In the spring of his first year at Hofstra, Adam competed in the 1L Intramural Moot Court Competition. As a rising 2L, Adam is currently a junior staff member of the Hofstra Labor & Employment Law Journal, Vol. 33, Casebook Editor on the Moot Court Board, Vice President of the Real Estate Law Association, Treasurer of the Elder Law Society, Mentor in the 1st Generation Law Society, and was named a Dean's Scholar after consecutive semesters on the Dean's List. Over this past summer, he interned for the Law Offices of Elan Wurtzel P.C., and is currently working part-time as a Judgment Clerk at the Nassau County Clerk's Office.

Glenn R. Jersey III is a second year law student at the Maurice A. Deane School of Law at Hofstra University Candidate for J.D., 2017. He received his Undergraduate Degree in History from Adelphi University in 2012. He spent the summer of his first year of law school at The Safe Center LI (formally the Nassau County Coalition Against Domestic Violence) where his interest in Family and Matrimonial Law was solidified. He is the President of the Columbian Student Lawyers' Association, Marketing Coordinator for the Veteran's Legal Assistance Program, a member of the Dean's Student Advisory Council, Family Law Society and various other law school organizations as well as active involvement with the Nassau County Columbian Lawyers' Association, the Nassau County

Bar Association's Matrimonial & New Lawyers (Young Lawyers) Sub-Committees, and the
New York Family Law American Inn of Court.

Social Media: Implications on the Practice of Law

I. SOCIAL MEDIA – Introduction and Overview

- a. Social Media is generally defined as forms of electronic communication (as Web sites for social networking and micro-blogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).
- b. There are many social media platforms:
 - i. Facebook
 - ii. Twitter
 - iii. LinkedIn
 - iv. AVVO
 - v. Instagram
 - vi. Periscope
 - vii. Vine
 - viii. Youtube
 - ix. Match.com
- c. Each platform allows their users to do and post certain things.
 - i. Message Posting
 - ii. Pictures
 - iii. Video
 - i. Recorded video
 - ii. Live Stream
 - iv. Live Messaging
 - i. Chat room
 - ii. Personal Messaging
- d. How Social media has changed society
 - i. Social Media is now part of everyday life:

- i. News
 - ii. Communication
 - iii. Family
 - iv. Colleagues
 - v. Marketing
- e. Facebook
 - i. Facebook is a social networking website that makes it easy for you to connect and share with your family and friends online. Originally designed for college students, Facebook was created in 2004 by Mark Zuckerberg while he was enrolled at Harvard University. By 2006, anyone over the age of 13 with a valid email address could join Facebook. Today, Facebook is the world's largest social network, with more than 1 billion users worldwide.
 - ii. Platform Supports
 - i. Message Posting
 - ii. Pictures
 - iii. Video
 - iv. Links
 - v. Live Chat
- f. Media Sharing:
 - i. Twitter
 - i. Twitter, and 'tweeting', is about broadcasting daily short burst messages to the world, with the hope that your messages are useful and interesting to someone. Conversely, Twitter is about discovering interesting people online, and following their burst messages for as long as they are interesting. Messages are 140 characters or less
 - ii. Platform Supports
 - i. Message Posting
 - ii. Private Messaging
 - iii. Pictures

- iv. Video

- v. Links

- g. Instagram

- i. Instagram is a social networking app made for sharing photos and videos from a smartphone. Similar to Facebook or Twitter, everyone who creates an account has a profile and a news feed. When you post a photo or video on Instagram, it will be displayed on your profile. Other users who follow you will see your posts in their own feed. Likewise, you'll see posts from other users who you choose to follow. Mainly used on a mobile device. You can access certain features using a web browser.

- ii. Platform Supports

- i. Message Posting

- ii. Private Messaging

- iii. Pictures

- iv. Video (15 second)

- h. Youtube

- i. Youtube is a free video sharing website that makes it easy to watch online videos. You can even create and upload your own videos to share with others. Originally created in 2005, YouTube is now one of the most popular sites on the Web, with visitors watching around 6 billion hours of video every month. If you've ever watched a video online, there's a good chance it was a YouTube video. For example, almost all of the video tutorials on our website are actually YouTube videos

- ii. Platform Supports

- i. Message Posting

- ii. Private Messaging

- iii. Uploaded Video

- iv. Video (Live)

- i. Periscope
 - i. Periscope enables you to “go live” via your mobile device anytime and anywhere. The app enables you to become your own “on the go” broadcasting station, streaming video and audio to any viewers who join your broadcast. Once a broadcast is over, others can watch a replay, and even provide feedback, within Periscope for up to 24 hours. After that, the broadcast is removed from the app. Each of your broadcasts can be saved to your mobile device and, once you’ve got it there, it can be published and shared online just like any other video.
 - ii. Platforms:
 - i. Message posting
 - ii. Private messaging
 - iii. Video (live)
- j. Vine
 - i. Vine is a short-form video sharing service where users can share six-second-long looping video clips. The service was founded in June 2012, and American microblogging website Twitter acquired it in October 2012, just before its official launch. Users' videos are published through Vine's social network and can be shared on other services such as Facebook and Twitter. Vine's app can also be used to browse through videos posted by other users, along with groups of videos by theme, and trending, or popular, videos.
 - ii. Platforms
 - i. Message Posting
 - ii. Private Messaging
 - iii. Video
- k. Flickr
 - i. Flickr is an image hosting and video hosting website, and web services suite that was created by Ludicorp in 2004 and acquired by Yahoo in 2005. In addition to being a popular website for users to share and embed personal photographs, and effectively an online community,

the service is widely used by photo researchers and by bloggers to host images that they embed in blogs and social media.

- ii. Platforms:
 - i. Message posting
 - ii. Private messaging
 - iii. Videos

1. LinkedIn

- i. LinkedIn was started in 2002, and it officially launched on May 5, 2003. It currently has the world's largest professional network with 300 million members in over 200 countries and territories around the globe. Its mission is to connect the world's professionals to make them more productive and successful. When you join LinkedIn, you get access to people, jobs, news, updates, and insights that help you be great at what you do.
- ii. Uses and Products
 - i. Employment
 - i. Job seekers a
 - ii. Employers
 - ii. Marketing
 - iii. Networking

m. Avvo

- i. Avvo was founded in Seattle, Washington by lawyer Mark Britton to make legal easier and help people find a lawyer. Avvo's mission is to provide the public with detailed information on lawyers and legal issues so that they can make informed decisions. According to Avvo 97% of US attorneys are rated on their site. It also provides detailed attorney profiles, client reviews and AVVO ratings.
- ii. Avvo also offers over 8 million searchable legal questions and answers
- iii. For \$39 Avvo clients can speak with a top-reviewed Avvo attorney for 15 minutes.

n. Activity Tracking

- i. These platforms like Fitbit, FourSquare, and Yelp. These services allow users to record and broadcast certain activities, such as running a certain distance or visiting a certain restaurant. They track what you have done, and where you have been.
 - i. It's hard to say you weren't in a particular place, when your comments about the service you received, or your experience are made a public record on these forums.
 - ii. Similarly, having a Fitbit on your wrist, may bring about enough of a reason for a defendant in your personal injury claim to obtain discovery of its data regarding your activities and possibly disprove your claim of not being able to stand or walk or get around, when the record logs clearly depict the 10,000 steps you have taken daily for the past several weeks.

II. Skit #1 – ISSUES RAISED IN CRIMINAL MATTERS

- a. Moderator's Introduction into Scenario
 - i. In our first scene we are going to look at implications of social media in a criminal matter.... client- Mr. Michael Anger and his attorney, Charles Wright.
- b. Skit – Opens with Mr. Wright holding the intake sheet- Mr. Anger, I see where you are charged with a violation of Penal Law Section 215.50, Criminal Contempt of Court for violating an Order of Protection and that the basis of that violation is that you called Mrs. Anger a bitch and have made other disparaging comments about her in the public domain.

Mr. Anger starts to speak to discuss what he has said and how he has said disparaging comments about Mrs. Anger; however, Mr. Wright cuts him off.

Mr. Anger before you tell me anything about your version of events, there are a few things that I have to tell you. If you called your wife a bitch, and that

allegation can be proven beyond a reasonable doubt than you could be convicted. Shortly, we will discuss the details of that allegation. With respect to other disparaging comments about her in the public domain, that could include newspapers, letters, texts, emails, postings on-line such as tweets, Facebook, etc. If such posts exist that would be a real problem for you. The prosecutor would want access to all your on-line postings and your Fifth Amendment rights would not be implicated as the postings if they exist would be public postings. Now, I want to be clear Mr. Wright, I am not telling you what to say or what to do BUT you should not call Mrs. Anger a Bitch and I certainly hope that there is no public record that can be viewed by anyone of derogatory posts about Mrs. Anger.

Mr. Wright, are you suggesting that I delete posts? No, Mr. Anger, that would be ethically improper for me to suggest to you. I am shocked that you took my comment about a public record to mean deleting posts. If you did delete posts, I would deal with that issue, but what I was suggesting was that you might wish to deactivate your account where these derogatory posts, if they exist, would be preserved but unavailable for viewing.

In order that I may present the best possible defense for you, I will need copies of all of your posts as they presently exist. I would like those by next week. If there are any derogatory posts among the package that you bring in, we will attempt to explain them as justified in view of the actions that Mrs. Anger has been consistently taking towards you and your children.

Do you have any questions? Please leave your retainer check with my secretary.

III. DISCUSSION POINTS RAISED IN SKIT #1

- a. Discoverability/ Accessibility in Criminal Case
 - i. Social Media as the crime
 - ii. Social media as additional evidence in prosecuting a crime
- b. Client/Attorney Communications
 - i. Advising clients on social media content
 - i. Delete v. Deactivate
 - ii. Past v. Future Posts
 - ii. Clients removal or destruction of social media content

IV. OVERVIEW OF SOCIAL MEDIA IN CRIMINAL MATTERS

Robert K. Fischl, Esq.

- a. Social Media in the practice of criminal matters
 - i. Social Media is omnipresent. Social media can help to shape and change events instantaneously. Social media is more than access to your computer; it is your smart phone. Most cell phones are no longer just telephones; they are computers with the capability for making telephone calls, having access to texts, tweets, all of your health, financial information, business information, and personal contacts; your Facebook, LinkedIn, twitter page, periscope, Snapchat or any other page that you desire.

The impact on any aspect of the practice of law of social media cannot be overstated. Social Media can change the manner in which potential clients, find, evaluate and communicate with their lawyers. It has changed the nature in which lawyers seek to gain clients. This is true for all fields of law not just criminal law.

As computers and smartphones have become essential parts of our daily lives, new methods of crimes have developed. Identity theft and other manner of frauds have always been crimes; they are more common place today. Thefts can now take place thorough the use of the computer rather than in a physical confrontation.

The Fourth Amendment to the United States Constitution protects an individual's right to be secure in his person, house, papers and effects against unreasonable searches and seizures. The Fifth Amendment of the Constitution contains the right against self-incrimination. The use of social media in the commission, acknowledgement or in the accumulation of evidence to prove the commission of a crime by an individual defendant implicates both of these fundamental constitutional rights.

Social Media and its use can implicate both of those rights. The implication thereof should not be taken to mean that the postings on a social media page will be suppressed. Recently, the Appellate Division decided *In re 381 Search Warrants Directed to Facebook, Inc.*, 132 A.D.3d 11, 13 N.Y.S. 3D 23 (N.Y. App. Div. 2015). In that case, Facebook challenged a search warrant directing it to produce all postings for 381 account holders. Facebook lost its challenge on both procedural and substantive grounds. The court held that the search warrant could not be challenged by Facebook, prior to the execution of the warrant as it was the holder of the records but the records did not belong to Facebook, but rather to the subjects and that protections existed for the account holders after the execution of the warrant.

The most significant case with fourth and Fifth Amendment implications is not actually directly about social media; it is about your smartphone. Last year the Supreme Court decided the case of *Riley v.*

California, 134 S. Ct. 2473, 189 L.Ed. 2d 430. In Riley, the police had arrested an individual driving a car and for their safety they searched the driver. On his person they found and seized his cell phone. When an officer saw a text that appeared to contain a phrase that the officer believed to be gang related, the police searched all the texts on the phone, the contacts in the phone and the phone numbers called and received. There are many who would call the actions of the police, intelligent and diligent police work. The court in an opinion by Chief Justice John Roberts suppressed the evidence seized as a result of the search. The court went on to discuss the intrusion into person's privacy, which is momentary and brief in a physical search and extensive in the search of the enormous data contained on the smart phone.

In New York State, the motion to suppress pursuant to Criminal Procedure Law 710.20 is the vehicle to challenge evidence that a defendant believes to be illegally obtained. Whether an arranged corporeal identification of the defendant by the police, statement made by the defendant to the police or to agents of the police, a breath sample, blood or other evidence seized from the defendant, the prosecution will seek to offer these items as direct evidence of the defendant's guilt. The defendant must challenge these items through a motion to suppress. Whether any item of evidence will be suppressed can only be addressed on a case by case basis.

In California, about two weeks ago, a young woman was in a bar in the process of getting intoxicated and broadcast that fact on Periscope. She continued to broadcast her operation of a motor vehicle in an intoxicated condition and someone who saw her on periscope called the authorities and the woman was arrested. No one compelled the operator to become intoxicated or to broadcast that she was

intoxicated. Under these circumstances, I cannot imagine any court granting suppression of any tape of her performance.

Likewise, with the use of Twitter, any tweet is a public statement, subject to the view and knowledge of any twitter user or follower. You can in fact stumble on someone's twitter page completely accidentally and have access to all of their tweets. The use of the information contained in a tweet would not be subject to a viable suppression motion. Material broadcast through the use of social media as evidence in a criminal case

The use of evidence contained on Facebook has larger implications. Facebook allows users to have both public and private pages. The private pages are limited to individuals that the holder of the account chooses to allow access. In re 381 Search Warrants Directed to Facebook, Inc., 132 A.D.3d 11, 13 N.Y.S. 3D 23 (N.Y. App. Div. 2015), the New York County District Attorney sought access to the public and private pages of individuals whom prosecutors believed were committing fraud on the social security disability system. Predominantly this involved retired police officers and fire fighters. While Facebook lost its challenge to the warrant prior to its execution, it will be interesting to see the results to challenges to the warrant and its execution from any subsequent arrestee.

Technology brings with it many changes. The computer and the smartphone have been used to help organize masses in demonstrations and revolutions that have overthrown governments. The computer and the smartphone did not create the conditions that made those governments unpopular with their peoples. The Computer, the Smartphone, its social media apps have created new platforms to potentially obtain evidence of the commission of a crime. This may

make for greater challenges for the defense attorney in seeking suppression of evidence but it does not change the manner in which suppression is sought.

V. Skit #2 - CIVIL LITIGATION

- a. Moderator – In our second skit we are going to look at social media’s role in civil litigation Hercules Sampson, DDS, a 32 year old orthodontist is a client of the firm of Money, Moore and Money. According to the pleadings, Mr. Samson, was a high school star athlete, the quarterback of the state championship football team, small forward and captain of the basketball team and also lettered in track. While at Dartmouth, he was an inveterate skier, who almost qualified for the U.S. Olympic ski team and played on his college golf team as well. In 2011, forty-eight hours after a major snow storm, Dr. Sampson is severely injured in a slip, twist and fall on the grounds of a hospital where he was working but not employed. Doctor Sampson has an active on-line presence in which he mixes his personal and professional life experiences. He has photos, videos and links to articles concerning his athletic prowess and his professional accomplishments, activities and awards. At the time of his slip, twist and fall, Dr. Sampson complained of leg pain, and it was believed that he had a lisfranc fracture. One month later, it was discovered that he did not have a lisfranc fracture but instead required disc surgery. Subsequent to the surgery, the pain did not subside and a second surgery was performed. Thereafter Dr. Sampson had countless epidurals. He has been unable to perform as an orthodontist since the accident.

The case is now on the trial calendar and Dr. Sampson has come to the office to review the case in contemplation of trial.

- b. Skit - Hello, Hercules, how are you feeling?

Well, Mr. Money, I am still having back and leg issues. I still can't work as I am unable to stand for long periods of time. Other than those complaints things are good. I am sorry that I was not available to come in last week, but I was away at Park City.

Was that a dental convention that you attended?

Oh No, Mr. Money, I do not know of any ADA conventions out there. My new girlfriend and I went for a little ski trip. As a matter of fact, I posted some video from my trip on my Facebook page as well as YouTube. Would you like to see it?

Mr. Money, you look a little green. What's the matter?

I am a little less green than I was before I heard about this trip. Yes, I do want to see the video.

Ok, Mr. Money. We will go online so I can show them to you. By the way, would you like to see some photos? I have a bunch on my phone that I copied off my girlfriend's Facebook page.

I do want to see the photos as well, but first, how long have these videos been on-line? Who has access to it? Why did you post it? I told you not to post anything online! Do you have any idea as to how it is going to impact your claims in this case?

Mr. Money, we had such a nice trip I just wanted to share it. Should I remove the postings? Look, it is very easy.....there! I just erased the photos.

Keep erasing the photos from your phone, definitely delete the YouTube video and you better privatize your Facebook page. In fact, you better just deactivate Facebook completely!Mr. Money invites Mr. Moore into the

conference, and after briefing him inquires, what do you think our next move should be in view of this news?

Look Money.....I definitely agree with your instruction about Facebook but we also need to instruct him to delete all pictures from his phone and get the girlfriend to deactivate her Facebook page as well.

Mr. Moore, are you sure we are allowed to tell him to do that?

[Mr. Moore responds] This is about money, Money!....our money! We better call the defense firm and quickly try to settle before anyone on their team gets a chance to view his pages.

VI. DISCUSSION POINTS RAISED IN SKIT #2

- a. Discoverability/ Accessibility in Civil Matters
 - i. Specificity of Demand
 - ii. Supporting evidence required
- b. Client/Attorney Communications
 - i. Advising clients on social media content
 - i. Delete v. Deactivate
 - ii. Past v. Future Posts
 - ii. Clients removal or destruction of social media content

VII. OVERVIEW OF SOCIAL MEDIA IN CIVIL MATTERS

Richard D. Saul, Esq.

- a. Discovery in a Civil Matter : Pre-Social Media
- b. Discovery in a Civil Matter : Post-Social Media
- c. A View from the Bench : The Current State of Law in New York
 - i. People v. Harris, 36 Misc.3d 868 (Crim Ct., N.Y. Co., 2012).

- i. Twitter sought to quash a subpoena of the District Attorney which sought all of Defendant's "tweets" covering the period of time alleged in the crime. The court held that discovery was permissible, as a "tweet" is set into the public domain, similar to just screaming it out loud, and therefore, not entitled to the same protection as a private e-mail, message or chat.
- ii. Fawcett v. Altieri, 38 Misc.3d 1022 (Sup. Ct., Richmond Co., 2013).
 - i. Defendants, in a personal injury action, sought discovery of Plaintiff's private social media postings, including those on Facebook, My Space, Friendster and Flickr. The Supreme Court denied defendants' request with leave to renew following depositions. The court reasoned that CPLR 3101(a) applies to "any fact bearing on the controversy that will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity." However, the court went on to state that if the information sought was secured through a closed or private setting, the party seeking the information must first demonstrate, through explicit and relevant facts, a sufficient need for discovery to justify disclosure.
- iii. Richards v. Hertz Corp., 100 A.D.3d 728 (2nd Dept., 2012).
 - i. Defendants, in a personal injury action, appealed from an order of the Supreme Court, Kings County, which denied their request for access to Plaintiffs' "private" postings on Facebook, which request was based upon their discovery of a photograph of Plaintiff on skis that was posted on her "public" Facebook wall. The court held that it was reasonable to expect that more "relevant and material" postings, similar to that on plaintiff's public wall, existed on the private wall as well. Therefore, disclosure was permitted, but an *in camera* review was

employed in an effort to protect plaintiff's privacy as to unrelated information.

- iv. Romano v. Steelcase, Inc., 30 Misc.3d 426 (Sup. Ct., Suffolk Co., 2010). Defendants, in a personal injury action, sought discovery of Plaintiffs' "private" postings on Facebook and My Space, based upon Plaintiff's "public" postings of an active lifestyle including several indications of out-of-state travel. The court permitted discovery of the private portions of Plaintiff's social media site since competent evidence existed to show a likelihood of additional relevant evidence. However, unlike Richards, *an in camera inspection was not ordered*. The court stated "to deny defendants 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."

d. NEW YORK 2-PRONG TEST FOR DISCOVERABILITY OF PRIVATE ONLINE ACTIVITY:

- i. The content in the profile must be material and necessary; **and**
- ii. There must be a balance between production of the content and a violation of a litigant or user's privacy rights.

If there is evidence that suggests the existence of additional information stored on a private wall that is "material and necessary" to a litigant's position in a claim, the courts are leaning towards ordering the disclosure.

b. Skit #3 – ETHICS ALERT: WHAT ATTORNEYS SHOULD KNOW

a. Moderator - Recently, Ms. A started her own practice after 4 years at a large personal injury defense firm. She has been advertising in journals but has also been responding to questions on AVVO's interactive website. AVVO users can post questions on the site and attorneys may answer those questions without exchanging any personal information. Ms. A has also become more active on LinkedIn and has been connecting with anyone who will accept her request. Ms. A has also been posting a weekly blog for anyone on LinkedIn to access. She usually analyzes a recent news story and discusses any important decisions for the week. Ms. A is hoping that this blog will help her bring in some potential clients.

b. Skit –

Client Mr. C walks into Attorney Ms. A's office...

Ms. A – (looking up at Mr. C) Hello. Can I help you?

Mr. C – I need a lawyer. An attorney that can make a recent DWI charge against me go away.

Ms. A – (eagerly) Sure! Piece of cake. Let me ask you how you heard of my practice.

Mr. C - Well its funny that you ask. You actually sent me some sort of invitation asking if I would become a connection and I just hit accept.

Ms. A – Wow I can't believe that actually worked!!!

Mr. C – Anyway I am glad.....because a few days later I was arrested for a DWI. Thankfully I remembered that other LinkedIn members had endorsed your criminal litigation skills.

Moderator interjects - Ms. A had actually never tried a case in her life and had absolutely no experience representing defendants in criminal matters.

Ms. A – To be completely honest.... I have NEVER had a client who was unhappy with the way their DWI case turned out.

Mr. C – I doubt then I will be your first. Thank you!

Ms. A – I doubt that also and in fact I am so sure that you will be thrilled with me as your attorney that I will offer to you a \$50 credit toward my fee if you take the time to rate me on AVVO.

Mr. C – Absolutely - Now just in case – I also saw on LinkedIn that she handle matrimonial cases?

Ms. A – Oh sure all the time!

Mr. C – Good because after my wife finds out that I was arrested there is a good chance that I will also be in need of a divorce attorney.

VIII. DISCUSSION POINTS RAISED IN SKIT #3

- a. Advertisement - Blogging about various legal issues on LinkedIn. Is a blog written by an attorney and posted on LinkedIn which is accessible to anyone considered an advertisement?

- i. Rule 1.0 - Advertisement is any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. Does not include communications to existing clients.
 - ii. Rule 7.1 - A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:
 - i. contains statements or claims that are false, deceptive or misleading; or
 - ii. violates a Rule.
 - iii. Rule 7.1(f) requires that most lawyer advertising be labeled "Attorney Advertising." Specifically Rule 7.1(f) states in part that:
 - i. "every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any website related thereto) or made in person under Rule 7.3(a)(1) must be labeled "Attorney Advertising" on the first page or on the home page in the case of a website...in the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."
 - iv. Advertisements must also comply with:
 - i. Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation," and
 - ii. Rule 7.4 ("Identification of Practice and Specialty"), which prohibits a lawyer or law firm from stating that the lawyer or law firm is a specialist or specializes in a particular field of law except in special circumstances." N.Y. State 841 (2010).
- b. What is considered Solicitation?
- i. Rule 7.3 states that "Not all advertisements are solicitations within the meaning of this Rule." Solicitation is defined in Rule 7.3(b) as follows:

- i. “Solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.
- c. Ms. A – (eagerly) Sure! Piece of cake.
 - i. Rule 8.4 – Lawyers should not engage in conduct involving dishonesty, fraud.....
 - i. Misrepresentation by Ms. A that she can make it “go away”
 - ii. Rule 1.1(b) A lawyer should not handle a legal matter that the lawyer knows or should know that the layer is not competent to handle.....
 - i. No experience handling criminal matters and no litigation experience
- d. Ms. A requesting to connect with Mr. C although they did not know each other.
 - i. Advertising v. solicitation
- e. LinkedIn endorsements
 - i. New York County Lawyers Association Professional Ethics Committee Opinion Issued in March 2015
 - i. Any attorney who chooses to include information such as practice areas, skills, endorsements or recommendation must treat his/her profile as attorney advertising and include the appropriate disclaimers where appropriate.
- f. AVVO rating/credit
 - i. Ethics Opinion 1052
 - i. The issue is whether giving clients a \$50 credit against their legal bills if they rate the lawyer would raise any potential ethical issues?

- i. Rule 7.2(a), which provides, in pertinent part, as follows: A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client
 - ii. Rule 7.2(a) also has certain exceptions that do not apply here. Rule 7.2(a) does not apply because the inquirer is asking for a rating, not a recommendation.
 - ii. What if the attorney made the credit contingent on receiving a positive review or high scores?
 - i. In that case the credit **would** violate Rule 7.2(a). Those are not the facts before us.
- ii. Rules 7.1(a), (d) and (e) and Rule 8.4(c):
 - i. Testimonials from clients. Rule 7.1(d)(3) allows lawyers to advertise testimonials from current and former clients – but Rule 7.1(e)(4) requires that “in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.” The term “testimonial” is not defined in the Rules of Professional Conduct, but the term “advertisement” is defined in Rule 1.0(a) as follows: “Advertisement” means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. A client’s freely given review or rating is not an “advertisement” within the definition in Rule 1.0(a) because the review is not made “by or on behalf” of the lawyer.
 - ii. If the inquirer were to coerce or compel a client to rate the lawyer with respect to a pending matter, then the rating (i.e.,

testimonial) would be “on behalf of the lawyer, and would hence be an “advertisement” subject to Rule 7.1(e)(4). And if the lawyer, rather than the client, were to write the review or fill in the ratings, then they would be “by ... the lawyer,” and would be advertisements under Rule 1.0(a) subject to Rule 7.1(a), which prohibits advertisements that are “false, deceptive or misleading.” A rating that purports to be made by a client but was actually made by the lawyer would be deceptive and misleading (and perhaps false as well). See N.Y. State 661 (1994) (“a dramatization using a fictional client testimonial is unethical because it is inherently false, deceptive and misleading”).

IX. FURTHER ETHICAL CONSIDERATIONS

- a. The Jury, Social Media and Zealous Advocacy
 - i. Voir Dire – Researching potential jurors
 - ii. Time frame for juror research
 - iii. Juror Misconduct
 - iv. Research and Competency