

ETHICAL CONSIDERATIONS OF HANDLING SOCIAL MEDIA REQUESTS  
NJAJ BOARDWALK 2017

K. Raja Bhattacharya  
Bendit Weinstock, P.A.  
80 Main Street, Suite 260  
West Orange, NJ 07052

- I. Advice to Clients Pre-Litigation
  - A. At initial meeting with clients, inform clients that social media requests will likely become part of the discovery requests by defendants
  - B. Advise clients not to post anything related to their litigation and/or injuries on social media
  - C. Advise clients that anything that is accessible through a search online will get in the hands of the defendants
  - D. Advise clients that there are ways to ensure that their privacy is maintained, such as by making their pages "private"
    - i. New York and New Jersey Courts have found that a reasonable expectation of privacy does NOT attach to social media posts (See Beye v. Horizon Blue Cross Blue Sheild of NJ, 2007 U.S. Dist. LEXIS 100915 (D.N.J. 2007))
    - ii. NYSBA Ethics Opinion 843 (2010) held that lawyers can access the social media posts of litigants as long as the information is open to the public and the lawyer does not deceptively obtain the information, such as by "friending" the litigant
    - iii. Furthermore, N.Y. City Bar Form Ethics Opinion 2010-2 stated that if a lawyer sends a friend request to an un-represented litigant, that also is not considered unethical
- II. Handling a Social Media Document Production Request
  - A. Send the request to your client and find out if their profile is "private" - if so, then advise the adversary that the profile is private and therefore non-discoverable and that you will not produce it
  - B. If your client's profile is open to the public, you will need to produce the materials
  - C. DO NOT tell your client to now make it private
  - D. DO NOT tell your client to delete his/her social media page, this can constitute spoliation of evidence. (See Gatto v. United Air Lines, Inc., 2013 U.S. Dist. LEXIS 41909 (D.N.J. 2013))
  - E. In opposition to any motion to compel information contained on a "private" social media page, argue the right to privacy and also argue that the information is not relevant (if your client followed your advice). Submit the information for an in camera review for the Judge the ultimately make a decision on these basis.
- III. Takeaways
  - A. DO tell your client at the outset of your representation not to post anything at all about the incident or his/her injuries

- B. DO tell your client before suit is filed to make his/her accounts "private"
- C. DO NOT tell your client to delete his/her page or accounts
- D. DO NOT tell your client to change the status of his/her page, accounts, etc. after a request for social media requests have been made