

Maryland Authorities on Lawyers and Social Media¹

Paul J. Notarianni²

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¹ Version 1.0 10/10/16

² Licensed to practice law in Maryland. Author may be contacted at paulnotarianni@gmail.com

Table of Contents

An Open Letter to Maryland Lawyers Regarding Social Media (Page 3)

Maryland Disciplinary Proceedings Regarding Social Media (Page 4)

Table of Selected Maryland Authorities on Social Media (Page 7)

Checklist of Maryland Rules Commonly Applicable to Social Media (Page 9)

An Open Letter to Maryland Lawyers Regarding Social Media

To Other Maryland Attorneys:

When I decided to start using social media, I wanted to make sure that I was operating in compliance with the Maryland Rules of Professional Conduct. I became discouraged. I felt there was a lack of specific instruction available. Much of what I did find were warnings that the Maryland Rules of Professional Conduct apply to social media activity (which I had already assumed) and that attorneys should “proceed with caution” (which I already was).

This article is a collection of Maryland specific social media rulings and authorities I came across.

I also looked to jurisdictions outside of Maryland. Of these, the most comprehensive authority I could find was the *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association*.³ These guidelines cover the topics Attorney Competence; Attorney Advertising; Furnishing of Legal Advice Through Social Media; Review and Use of Evidence from Social Media; Communicating with Clients; Researching Jurors and Reporting Juror Misconduct; and Using Social Media to Communicate with a Judicial Officer.⁴

I came to the following conclusion. No matter the form, all social media can be controlled in four ways. 1) You can control what you put online. 2) You can control which service providers you use. 3) If you receive a communication, you control what, if any, response you make. 4) You may have control and/or constructive knowledge of content placed online by third parties. To the degree you have control, you may be liable.

Good luck.

-Paul N.

³ *NYSBA Social Media Ethics Guidelines of the Commercial and Federal Litigation Sections of the New York Bar Association*, available online at www.nysba.org/socialmediaguidelines/ (Version June 9, 2015).

⁴ *Id.*

Maryland Disciplinary Proceedings Regarding Social Media

This author is aware of at least three complaints made against Maryland Attorneys (and one Bar applicant) regarding online conduct with social media.⁵ One complaint resulted in a commission reprimand against an attorney “for making false and misleading statements with reckless disregard for the truth on his Facebook page concerning the qualifications and/or integrity of a State’s Attorney.”⁶ In the other two matters, the Maryland Court of Appeals issued opinions.

In *Attorney Grievance Commission of Maryland v. Merkle*, the Court of Appeals found in favor of the accused attorney.⁷ The facts of *Merkle* that relate to social media are as follows. The attorney and the complainant had first met in October of 2008 in the office of the Clerk of the District Court in Prince George’s County.⁸ The attorney noticed that the complainant was incorrectly filling out a protective order and gave her his card for a possible divorce action.⁹ In March of 2010, the attorney and complainant executed two retainer agreements for legal services.¹⁰

During the time between the first meeting and the execution of the retainer agreements, the two exchanged multiple emails and Facebook messages.¹¹ The reported portions of emails and online communications were as follows: On November 18, 2008, the attorney sent an emailing stating “Dear Tahlibah, when I heard that you went to a jazz club, this is what I thought of. I have been on the emailing list for Shore Jazz for years and keep them in mind;” an email from December 10, 2009 which had the statement “[the complainant should] not hesitate to consult another lawyer, if you are not satisfied with my approach or have any reservations about working with me, including that I might call you when I’m working on your case at 11:00 p.m. . .

⁵ *Attorney Grievance Commission of Maryland v. Merkle*, 440 Md. 609 (2014); *In the Matter of the Application of Otion Gjini to the Bar of Maryland*, Maryland Court of Appeals Misc. No. 32, Sept. Term, 2015; and *Discipline and Actions Affecting Attorneys (FY 2016)* at page 4, www.courts.state.md.us/attygrievance/sanctions.html, (Last Accessed 10/10/16).

⁶ *Id.*

⁷ *Merkle* 440 Md. at 614.

⁸ *Id.* at 615-616.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 616-619.

. I will, of course, defer to your instructions.¹²” (Note: the complainant “offered no evidence that [she] accepted [the attorney’s] offer of representation which was inherently contained in this email.”¹³ After they became Facebook friends, in August of 2009 the complainant posted two pictures to her Facebook page.¹⁴ One picture had the caption “Erica Shirrell . . . , myself, and Mr. Tolbert . . . we were at a black tie affair.”¹⁵ In November of 2009, the attorney posted a message on Facebook stating “Maybe that’s me on Shirrell’s tattoo!”¹⁶ Later the same day, the complainant responded “Funny! Please pardon me I missed that appointment in D.C.”¹⁷ Also in August of 2009, the complainant posted a picture on her Facebook account “depicting guests at an all-white” party.”¹⁸ The Attorney responded to the picture by saying “This looks more like an All-Black Party to me!”¹⁹ There were two other Facebook comments made by the Attorney in 2009, not quoted in the opinion.²⁰ “In the months immediately prior to the execution of the retainer agreement [in March 2010], there was a great deal of email traffic between [the attorney] and [complainant].”²¹ Once the Retainer agreements were executed in March of 2010, all Facebook communication ceased.²² There were additional facts in the reported opinion, but none directly related to social media.

As far as social media is concerned, Bar Counsel alleged that the attorney violated Rule 7.3 Direct Contact with Prospective Clients.²³ They argued that the attorney’s “communications... following their informal meeting [October of 2008] is akin to a cold call by a lawyer initiating contact with train crash victims in their hotel where they were placed following the accident.”²⁴ The Court of Appeals disagreed finding “Plainly, from the very beginning of their communication, [the attorney] simply became a person known to [complainant] who was a lawyer, who was accessible to her by phone and email, and with whom

¹² *Id.*

¹³ *Id.* at 616.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 616-620.

²¹ *Id.* at 617.

²² *Id.*

²³ *Id.* at 627.

²⁴ *Id.* at 625.

she could discuss her situation with no obligation on either party's part."²⁵ The Court stated "a lawyer has discretion to communicate with clients or prospective clients through social media."²⁶

The third case is *In the Matter of the Application of Otion Gjini to the Bar of Maryland*.²⁷ Ultimately, the Court of Appeals denied the applicant from being admitted to the Bar of Maryland for reasons other than his social media conduct.²⁸ However, in the opinion, specific mention is made of the Applicant's social media postings.²⁹ The Character Committee's investigation revealed "several statements . . . [the Applicant] had posted to various chat-rooms on the internet as recently as his last semester in law-school. Those postings included . . . 'This guy is a dipshit;' 'Yo, shut the fuck up so we can watch the video;' 'The both fight like hoes;' 'The bully kid was a pussie;' 'That girl is hot as fuck;' 'Who is the faggot that made this video?;' 'Just keep games like they are with a PS3 controller. None of this gay shit;' and 'Straight NUTT in that bitch.'"³⁰ The Character Committee Report stated "the substance and nature of the postings may reflect something of a chasm between persons of [the Applicant's] generation and the undersigned members of the Hearing Committee."³¹ The language employed . . . certainly is not to be applauded . . . [n]onetheless, it appears no worse than that which is commonly found on the internet."³² The Character Committee found "on balance, we do not believe that the postings, however unsavory they may be, should prevent . . . [the Applicant] from practicing law."³³

However, Maryland lawyers may want to take note of the Committee's statement that, although the postings alone would not justify precluding the Applicant from practicing law, *the language "would tend to 'breed disrespect for the courts and for the legal profession' if associated with an attorney, in or out of the courtroom* and whether or not it was uttered in a professional setting."³⁴

²⁵ *Id.* at 624.

²⁶ *Id.* at 637.

²⁷ Maryland Court of Appeals, Misc. No. 32, Sept. Term 2015.

²⁸ *Id.* at pages 8 and 12.

²⁹ *Id.* at pages 7-8.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at page 8.

³⁴ *Id.* at page 13 (emphasis added.)

Table of Selected Maryland Authorities on Social Media

Griffin v. State, 419 Md. 343 (2011). Griffin was convicted of multiple offenses, including second-degree murder. The conviction was based in part on evidence admitted from pages printed from the defendant's girlfriend's profile on a social-networking site. The Court of Appeals held that the state failed to sufficiently authenticate the pages printed from the website and that their admission was reversible error. As a side note, when the matter was before the Maryland Court of Special Appeals, the court opined, "It should now be a matter of professional competence for attorneys to take the time to investigate social networking sites." (192 Md. App. 518, 535 (2010)).

Sublet v. State, 442 Md. 632 (2015). The Maryland Court of Appeals consolidated three matters for this ruling (*Sublet v. State*, *Harris v. State*, and *Monge-Martinez v. State*). "All three cases involve the same legal issues, those being the elucidation and implementation of our opinion in *Griffin v. State*, 419 Md. 343 (2011), in which we addressed the admissibility of a screenshot of a MySpace page, and its application to the authentication of screenshots of messages allegedly sent through social networking websites; in *Sublet*, via a Facebook timeline; in *Harris*, on Twitter through "direct messages" and public "tweets;" and in *Monge-Martinez*, through Facebook messages. We shall hold that, in order to authenticate evidence derived from a social networking website, the trial judge must determine that there is proof from which a reasonable juror could find that the evidence is what the proponent claims it to be." (*Id.* at 638).

Maryland Judicial Ethics Committee Opinion 2012-07 *Judge Must Consider Limitations on Use of Social Networking Sites*.

MSBA Ethics Docket 1997-26 *Propriety of Use of Internet to Promote Law Firm*.

MSBA Ethics Docket 2000-43 *Legal Services; Providing Legal Services to Consumer by Entity Not Controlled by Lawyers*.

MSBA Ethics Docket 2001-03. *Internet Solicitation of Clients and Sharing Fees*.

MSBA Ethics Docket 2002-18 *Hypothetical Necessity for Including Attorney's Name in Internet Domain Name*.

MSBA Ethics Docket 2007-01 *Re: Attorney Advertising, online attorney listing.*

MSBA Ethics Docket 2012-02 *PROPOSAL for Referral Fees*

MSBA Ethics Docket 2014-05 *Opinion addressing the ethical Issues relating to Attorney's use of Social Media, specifically the website LinkedIn.*

MSBA Ethics Docket 2015-03 *The use of Listservs and the Rule on Confidentiality and the Duty to Report Misconduct of Others.*

Alvin I. Frederick and Erin A. Risch. *Avoiding a Black Hole While Navigating in Cyberspace; Risk Management for Attorneys*, 47-Feb Md. B.J. 12 (January/February 2014).

Checklist of Maryland Rules Commonly Applicable to Social Media

All of the Maryland Rules of Professional Conduct apply to an attorney's activities. The ones below are some of the ones most commonly involved with Social Media.

1.1 Competence

1.4 Communication

1.6 Confidentiality of Information

1.7 Conflict of Interest

1.8 Conflict of Interest: Current Clients: Specific Rules

1.9 Duties to Former Clients

1.15 Safekeeping Property

3.1 Meritorious Claims and Contentions

3.3 Candor Towards the Tribunal

3.4 Fairness to Opposing Party and Counsel

3.5 Impartiality and Decorum of the Tribunal

4.1 Truthfulness in Statements to Others

4.2 Communication with Person Represented by Counsel

4.3 Dealing with Unrepresented Person

5.3 Responsibilities Regarding Nonlawyer Assistants

5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

7.1 Communication Concerning a Lawyer's Services

7.2 Advertising

7.3 Direct Contact with Prospective Clients

7.4 Communication of Fields of Practice

8.2 Judicial and Legal Officials

8.4 Misconduct