



***GOVERNMENT LAWYER CONDUCT IN  
AN EVOLVING VIRTUAL UNIVERSE***

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With the help of Xi Chen, Law Student Intern**

# TOPICS TODAY

- Legal Ethics Annual Review and Update
- Social Media and the Rules of Professional Conduct



# UNTIL 2 WEEKS AGO...



Quiet year for decisions relevant  
to public sector lawyers, see  
[http://www.mebaroverseers.org/discipline/  
disciplinary\\_decisions.shtml](http://www.mebaroverseers.org/discipline/disciplinary_decisions.shtml)



# Board of Overseers of the Bar

STATE OF MAINE

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## Board of Overseers of the Bar v. Mary N. Kellett, Esq.

**Download** [Download Decision \(PDF\)](#)

**Docket No.:** BAR-13-10

**Issued by:** Maine Supreme Judicial Court

**Date:** July 16, 2013

**Respondent:** Mary N. Kellett, Esq.

**Bar Number:** 007576

**Sanction:** Suspended Suspension

**Misconduct:** Conduct Prejudicial to Admin. of Justice; Failure to Use Reasonable Skill & Judgment in Performance of Prof. Services; Failing to Use Before a Jury Means Only Consistent w/ Truth; Prosecutor's Failure to Make Timely Disclosure to Def. of Exculpatory Evidence

### JUDGEMENT

#### M. Bar R. 7.2(b)

This disciplinary matter was initiated with the Court by the Board of Overseers of the Bar through the filing of an information dated April 24, 2013, pursuant to Maine Bar Rule 7.2(b)(1). Mary N. Kellett's Answer was submitted on May 20, 2013.

After appropriate notice, the Court conducted a disciplinary proceeding on July 15, 2013. The Board of Overseers of the Bar was represented by Bar Counsel J. Scott Davis, and Kellett appeared with her attorneys, Assistant Attorneys General Ronald W. Lupton and William R. Fisher. The Board's complainant, Vladek Filler, was also in attendance. He explained to the Court how ADA Kellett's actions had affected him and presented his response to the parties' proposed sanction Order.

bar-13-10\_kellett\_jud....pdf

Show all downloads... x

## BOARD V. KELLETT

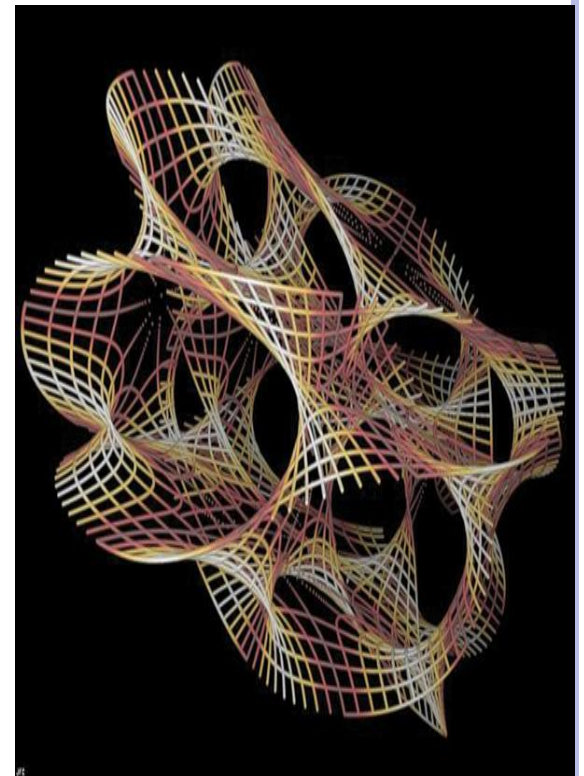
- “This case is the first disciplinary proceeding ever filed with the Court by the Overseers of the Bar against a member of Maine’s prosecutorial bar that is based upon the prosecutor’s representation of the State.”

- *(emphasis added)*



# BOARD V. KELLETT

- Special Duty of Prosecutor
- To the Bench
- To Opposing counsel
- To opposing parties
- To people of the State of Maine



# BOARD V. KELLETT

- “A prosecutor must always act in an effort to do justice . . .”



## BOARD V. KELLETT

- The only outcome towards which prosecutors should work is “one that involves the creation of a fair trial process and outcome.”





# LEGAL REPRESENTATIVES OF A SOVEREIGN ENTITY

- The State's "obligation to govern impartially is as compelling as its obligation to govern at all."
- *Kellett* (quoting *Berger v. United States*, 295 U.S. 79 (1935))



# HIGHER STANDARD

- “prosecutors are held to a higher standard regarding their conduct during trial because they represent the State . . . and because they have an obligation to ensure that justice is done....”

- KELLETT, CITING STATE V. YOUNG, 2000 ME 144, ¶6



UH, NORA, HELLO? THE CLE  
COMMITTEE ASKED YOU TO TALK ABOUT  
ETHICS AND SOCIAL MEDIA . . .



facebook

 LIVEJOURNAL™

 myspace.com

facebook

 LIVEJOURNAL™

Google+

 myspace.com

Google+

You Tube  Tube

facebook  LIVEJOURNAL™  
myspace.com  myspace.com  
Google+  Google+  
YouTube  YouTube  
LinkedIn  LinkedIn  
twitter  twitter  
Instagram  Instagram  
reddit  reddit

Pinterest  Pinterest

LinkedIn  in

twitter  

Instagram 

 reddit

LinkedIn  in twitter 

 Instagram

 reddit

twitter 

 Instagram

# FIRST, LET'S TRY TO DEFINE SOCIAL MEDIA

- Electronic Communication
- Social Interaction
- Highly Accessible from MANY Devices
- Results in IMMEDIATE Publishing
- No control of material after publication
- Creates a PERMANENT RECORD



# IT ALLOWS EVERYONE TO . . .

- CREATE USER GENERATED CONTENT
- SHARE WITHIN DEFINED VIRTUAL COMMUNITIES
- RE-PUBLISH EXTERNALLY TO UNLIMITED VIRTUAL COMMUNITIES



# TAKE AWAY THIS MESSAGE

- IMMEDIATE PUBLISHING

- PERMANENT RECORD



# THE MATH

- “A study of 200 14-to-18-year-olds in 55 schools found three-quarters had 200 or more Facebook and Twitter followers, while a third had more than 500.”

<http://www.dailymail.co.uk/news/article-2272656/>

- If you have 100 in your online community  $\times$  100 for each of those individuals = 10,000 in moments.







THE INTERNET NEVER FORGETS . . .



○ For Example...

End user posts

Picture and comments

Image & Comment become popular & widely distributed via Social media.

End user deletes content and associated account.

It's still there.



# AND THERE ARE NO RULES



WELL . . .

- There are end user licensing agreements generated by the commercial owners of the software . . .



AND FOR LAWYERS . . .

## Maine Rules of Professional Conduct “follow you on line”



# AND FOR PUBLIC SECTOR LAWYERS

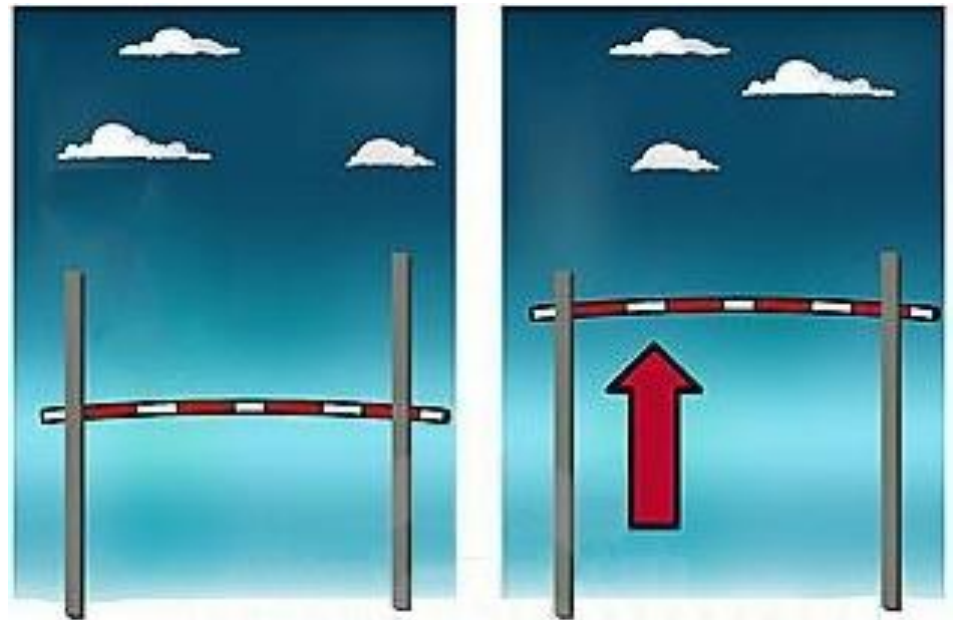
- Standard of conduct is heightened
- Because of special duties to:

-People of the State of Maine

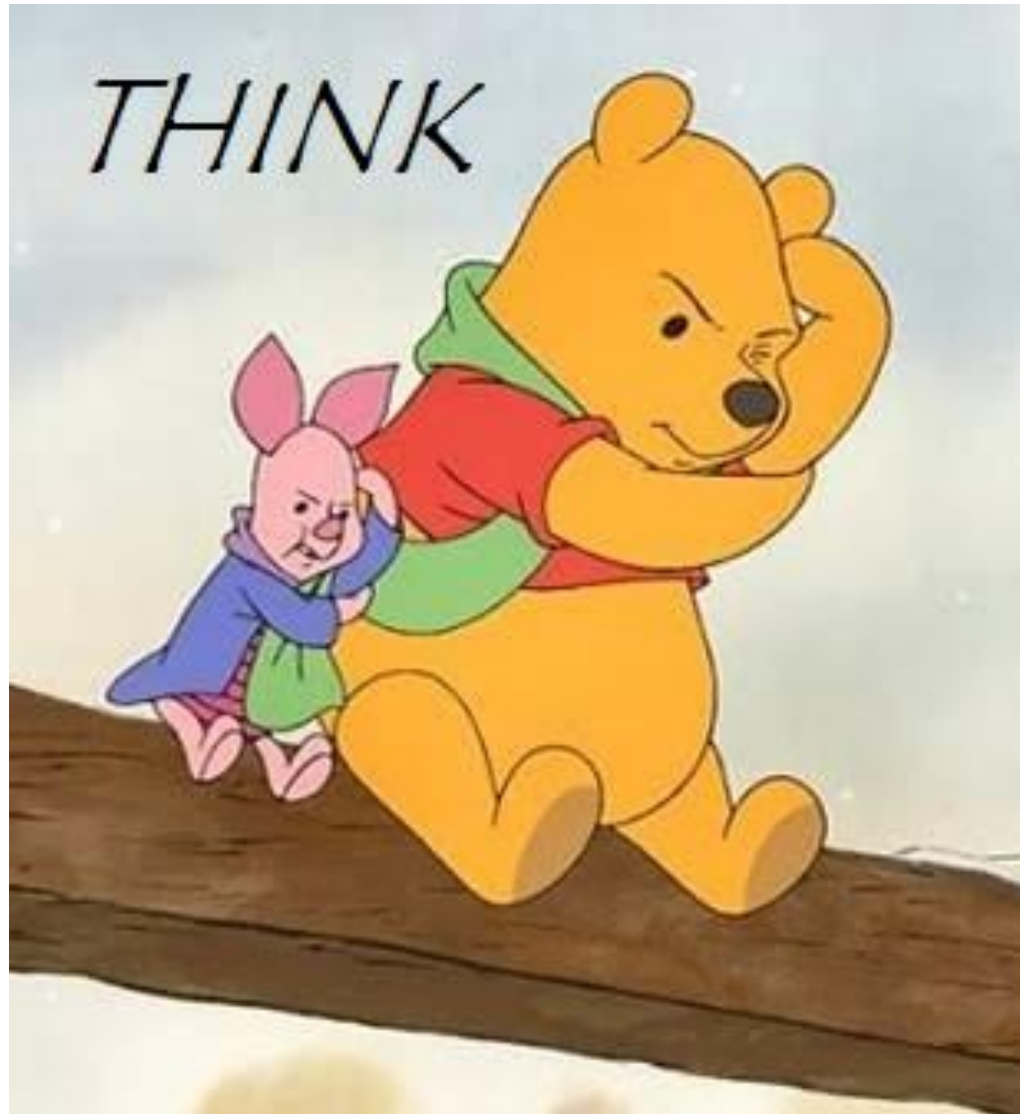
-Bench

-Bar

-Opposing parties

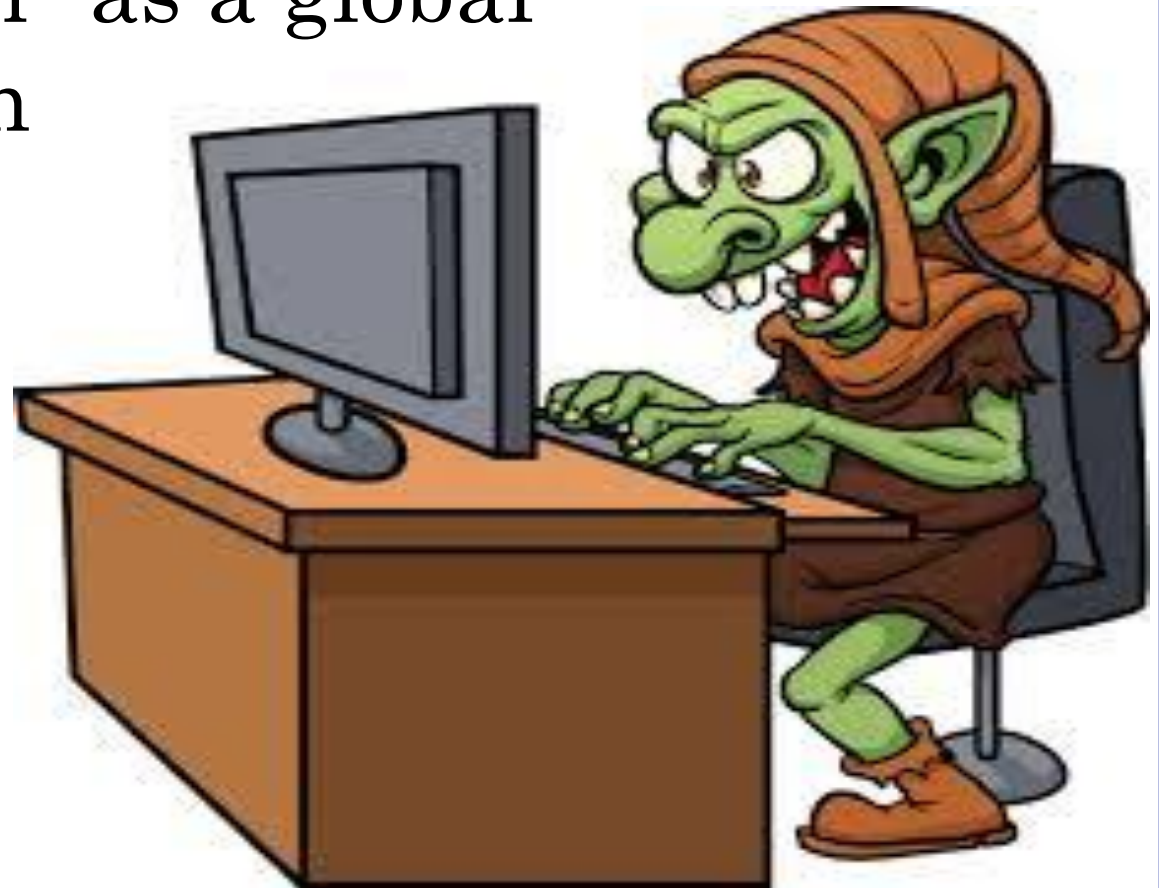


# TAKE AWAY THIS MESSAGE



# ONLINE DISINHIBITION

- Strong evidence of “online disinhibition” as a global phenomenon





# ORIGINS OF ONLINE DISINHIBITION?

- 1. Anonymity
- 2. Invisibility
- 3. Creation of an Imaginary World
- 4. Absence of Rules



# ONLINE DISINHIBITION

ALSO AN OPPORTUNITY FOR DOING GOOD



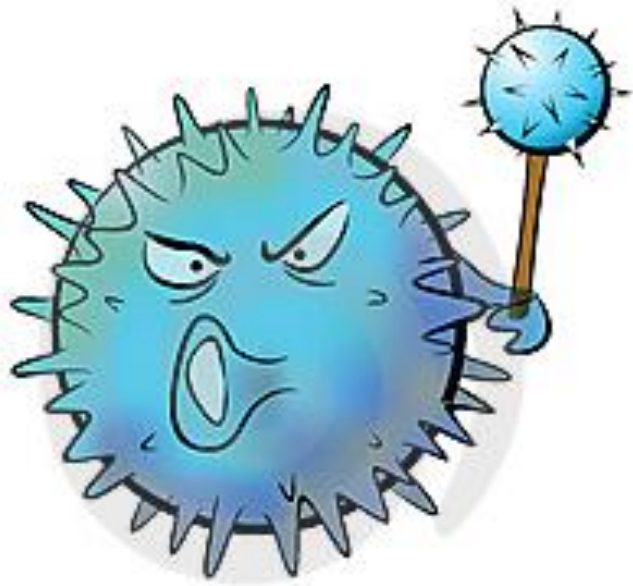
COMMON SENSE IS ADVISED . . .



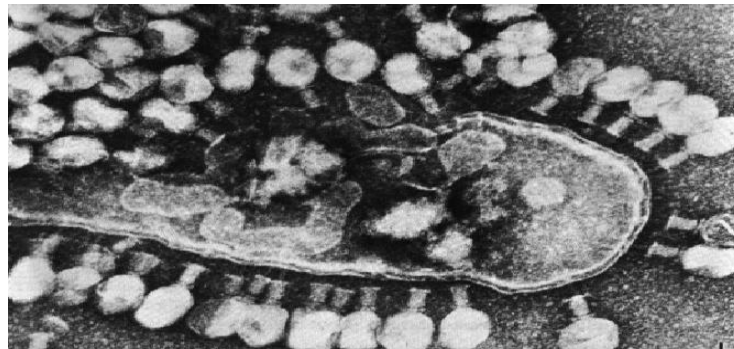
# GOING VIRAL



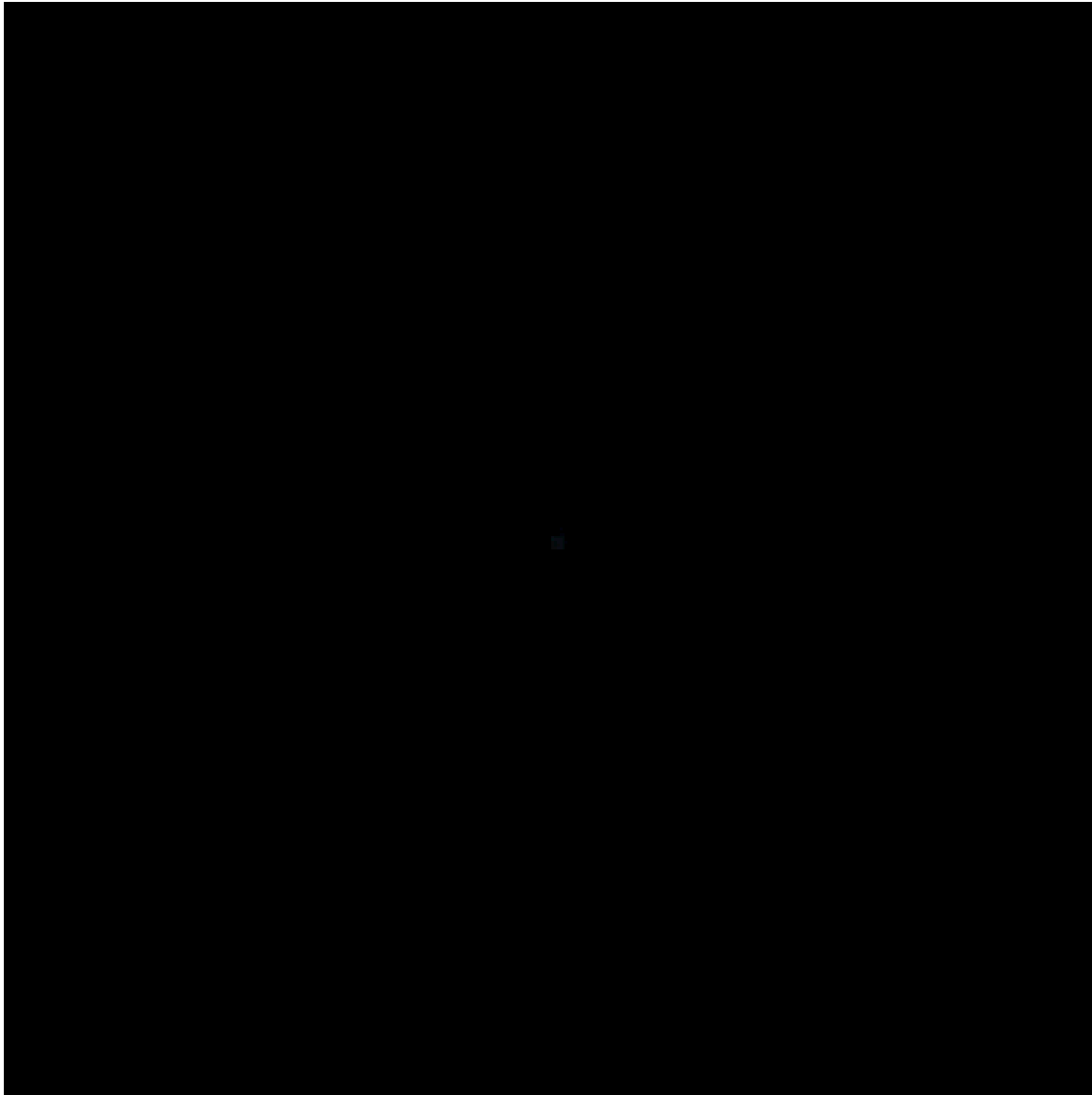
# THE PERCEPTION



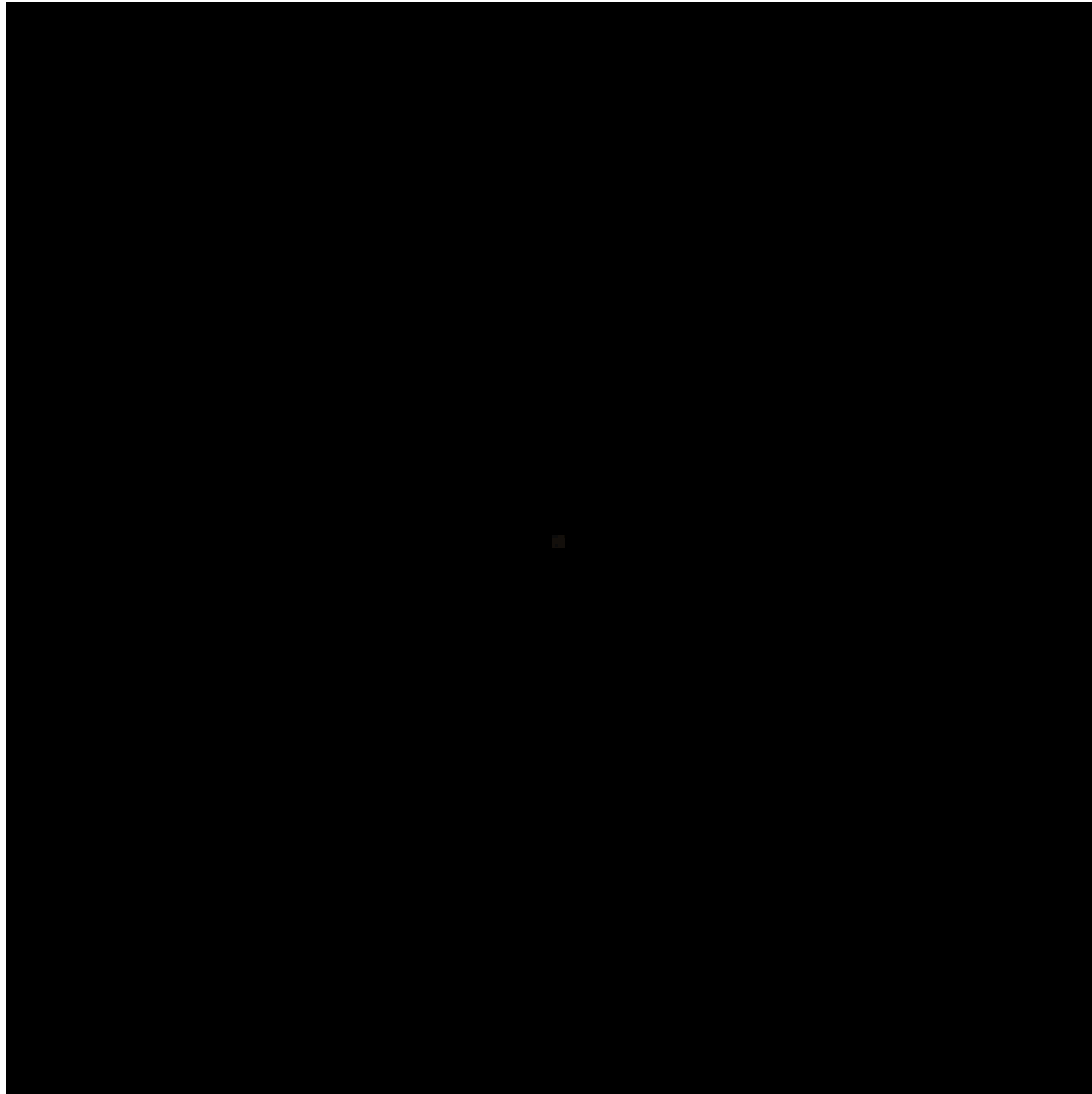
# THE REALITY



THEN

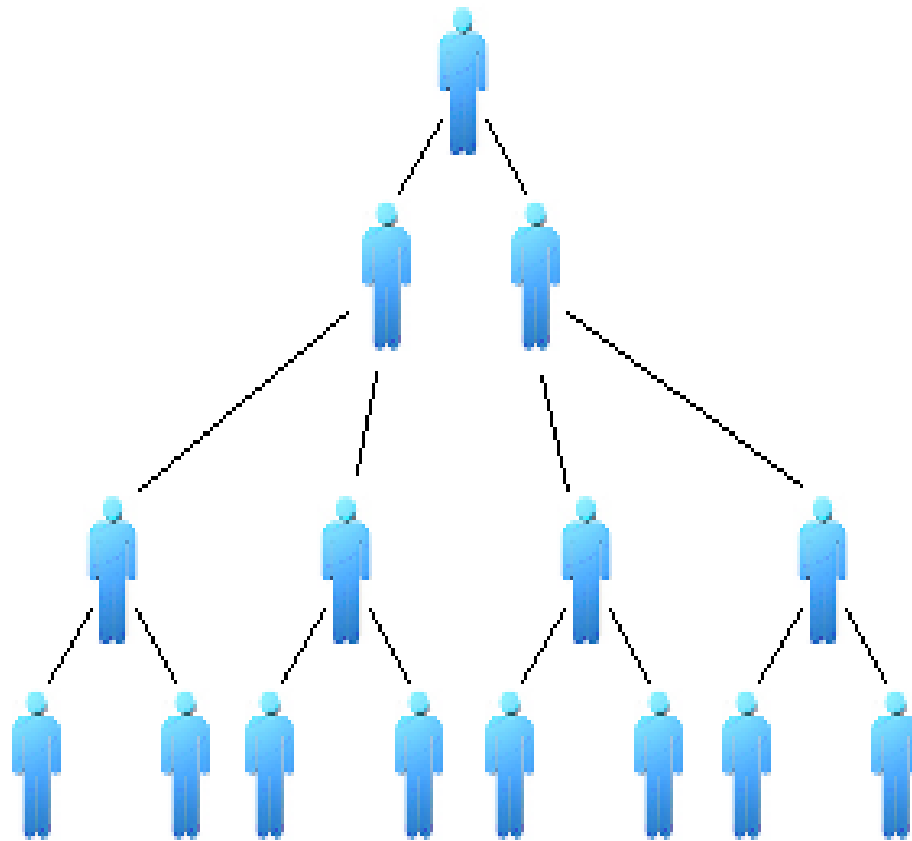


Now

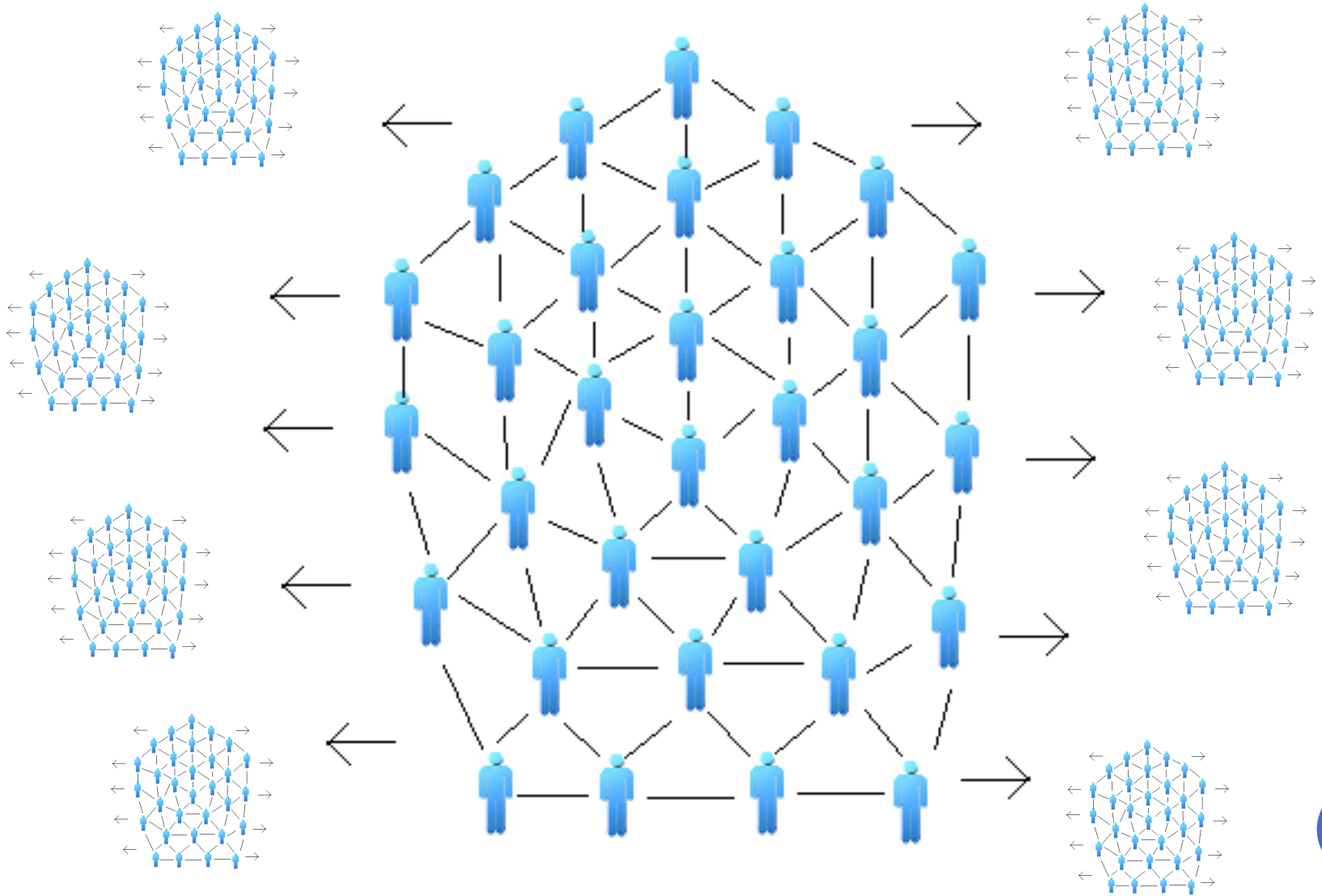




# THEN



# Now



# YOU ARE NOT TRAINED FOR COMMUNICATION WITHOUT RULES!



Whatever

Tell  
someone  
who  
cares...



# MAINE'S PROFESSIONAL ETHICS COMMISSION

- Opinion # 207 – Cloud Computing
- Opinion # 196 – Metadata
- Opinion # 195 – Unencrypted e-mail
- Opinion # 194 – Confidential data and 3d party technicians



# PEC OPINIONS GEARED TO CONCERNS OF PRIVATE BAR

- Rule 1.6 - Confidentiality
- Their challenge is how to keep client data secure in the digital age.



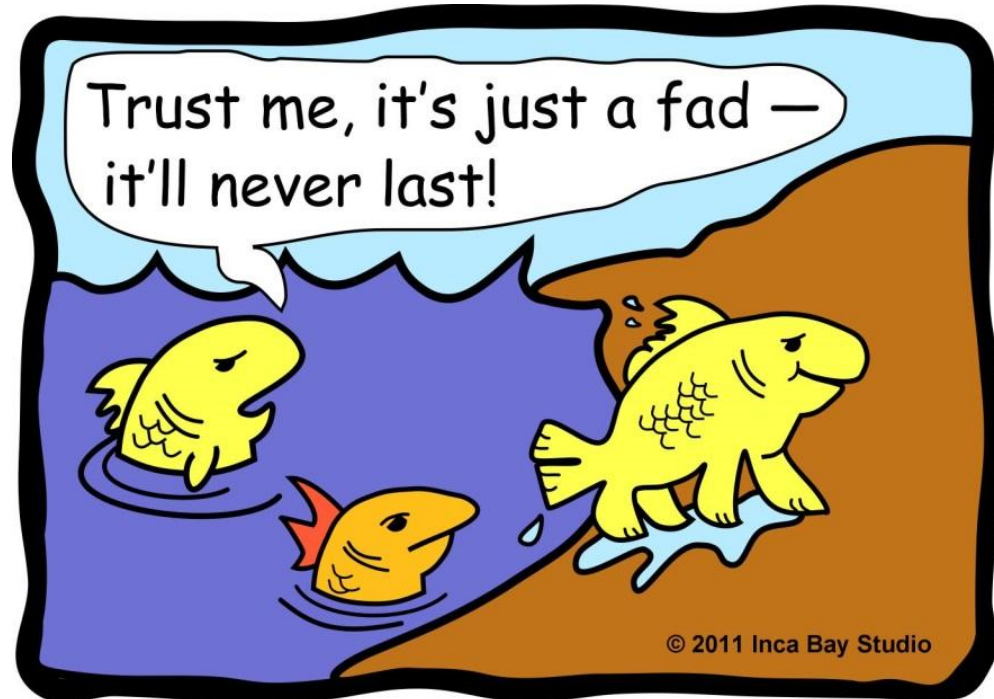
# NONETHELESS, THERE IS GUIDANCE FOR GOVERNMENT ATTORNEYS

- All attorneys must maintain a “basic understanding” of
  - “features of the software used by the attorney” and employ
  - “practical measures” to prevent various ethical violations
- See ME PEC Op.# 196.



# TIME TO GET UP TO SPEED . . .

- “[T]he reasonable care standard for ethical conduct requires attorneys’ periodic education on computer technology as it changes and as it is challenged by and reacts to . . . indirect factors.”
- (ME PEC #207)



## AND STAY UP TO SPEED . . .

- “With the pervasive and changing use of evolving technology in communication and other aspects of legal practice, particular safeguards which might constitute reasonable efforts in a specific context today may be **outdated** in a different context tomorrow.”
- (ME PEC #194)





# RULES THAT COULD BE IMPLICATED

- When you thought you were just blowing off steam after a long day . . .



## *RULE 1.1 “COMPETENCE”*

- “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”



## 1.6 CONFIDENTIALITY OF INFORMATION

- A lawyer shall not reveal a confidence or secret of a client ....



## 2.1 ADVISOR

- ... In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, emotional and political factors, that may be relevant to the client's situation.



## RULE 3.6 TRIAL PUBLICITY

- A lawyer involved in the prosecution or defense of a criminal matter or in representing a party to a civil cause shall not make or participate in making any extra-judicial statement which poses a substantial danger of interference with the administration of justice.



# RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

- A lawyer shall not . . .
- communicate ex parte with [judge, juror, prospective juror or other tribunal official], directly or indirectly, during [a] proceeding, concerning such proceeding . . .
- communicate with a juror or prospective juror after discharge of the jury if . . .
- the communication involves misrepresentation



# RULE 3.5 IN CONTEXT OF CONDUCT

- Lawyer trying a jury case may passively monitor jurors' postings on public social network sites as long as the lawyer's visits to these sites cannot be tracked by the authors.
- No friending, no tweeting, no following.
- Must notify the court of juror misconduct, with or without client consent.
- New York County, NY Opinion 743 (2011)



# RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

- In the course of representing a client a lawyer shall not knowingly:
- Make a false statement of material fact or law to a third person.





## RULE 4.2 COMMUNICATIONS WITH PERSON REPRESENTED BY COUNSEL

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.



# REPRESENTED PERSON

- If I just connect on social media with the person
- Am I really “*communicating about the subject of the representation*”?





## RULE 4.2

- If the communication to the represented party is motivated by the quest for information about the subject of the representation,
- the communication with the represented party is *about* the subject matter of that representation.
- San Diego County Bar Legal Ethics Committee May 24, 2011 (Op. 2011-2)



## 4.3 DEALING WITH UNREPRESENTED PERSON

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.



# WHAT IF I JUST LOOK?



- Stay in the public viewing area
- Don't interact
- If you have no business there other than to further your representation in a legal matter



## 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

4.4(a): In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.



# INSULTING TWEETS & POSTS BY DEFENSE BAR

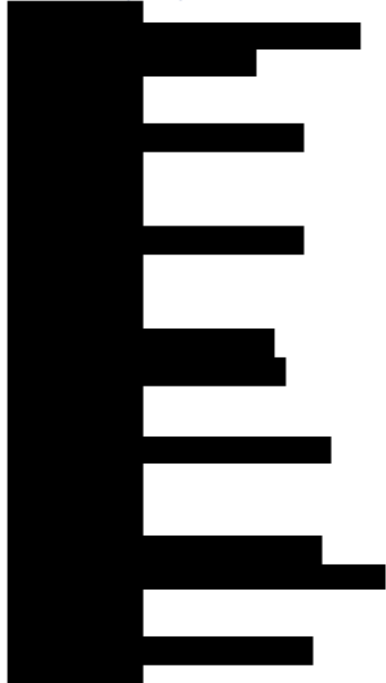


# DEFENSE BAR GONE TOO FAR . . .



- Wall
- Info
- Friends

## Friends (263)



## Joseph Rakofsky

+1 Add as Friend

Has worked at Rakofsky Law Firm Studied at Touro College From Miami, Florida

### Wall



**Joseph Rakofsky**  
1st-Degree Murder...MISTRIAL!

March 31 at 2:05pm via BlackBerry

7 people like this.

[Redacted] I think I saw so many ID recently...MURDER, maybe normal here lol  
March 31 at 3:08pm

[Redacted] Btw, r u on defense side?  
March 31 at 3:09pm

**Joseph Rakofsky** Yes, ma'am!  
March 31 at 3:16pm

[Redacted] Wow....awesome;)   
March 31 at 3:26pm

[Redacted] wow!! I'm very proud of you. yaya. hugs. Keep it up. love you.  
March 31 at 7:14pm

**Joseph Rakofsky** Thanks, bro! How's life?  
March 31 at 7:19pm · 1 person

[Redacted] Your welcome. Life is great. my girlfriend Jillian is doing very well. Hope to see you this month or in May.  
March 31 at 7:21pm

[Redacted] lets file for habias corpus  
March 31 at 10:17pm · 1 person

[Redacted] I knew you could do it!  
Friday at 8:20am · 1 person





## 4.4 INADVERTENT DISCLOSURES

- 4.4 (b) : A lawyer who receives a writing and has reasonable cause to believe the writing may have been inadvertently disclosed and contain confidential information or be subject to a claim of privilege or of protection as trial preparation material:
  - (1) shall not read the writing ...
  - (2) shall notify the sender...
  - (3) shall promptly return, destroy or sequester the specified information and any copies....



## 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORS

- (a) A ... lawyer who ... possesses ... managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.



## 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

- [A] lawyer who ... possesses .... managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the ... conduct [of non-lawyers employed in the law office] is compatible with the professional obligations of the lawyer[s]...



# STAY TUNED

- Social Media Policy for Office of the Attorney General is in the works.
- Please contact me with your thoughts and input.



# IN THE LIMELIGHT

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MONDAY, JULY 29, 2013

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*July 17*

## ACLU says new Fairfield social media policy violates free speech rights



## 8.4 MISCONDUCT - CATCHALL

- It is professional misconduct for a lawyer to...
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official ...



# PROFESSIONAL WORK: INVESTIGATING ON SOCIAL MEDIA

- Be transparent about your identity
- Stay in the public viewing area. (Do not expand your online “community” on pretense to access info.)
- Take screen shots (or otherwise capture data before it is removed.)
- Avoid using your personal computer or device or risk having them implicated in public record retention/disclosure rules.





facebook

December 2010



- 1 out of 1,000,000 seem like pretty good odds, until it becomes the one in a Million.

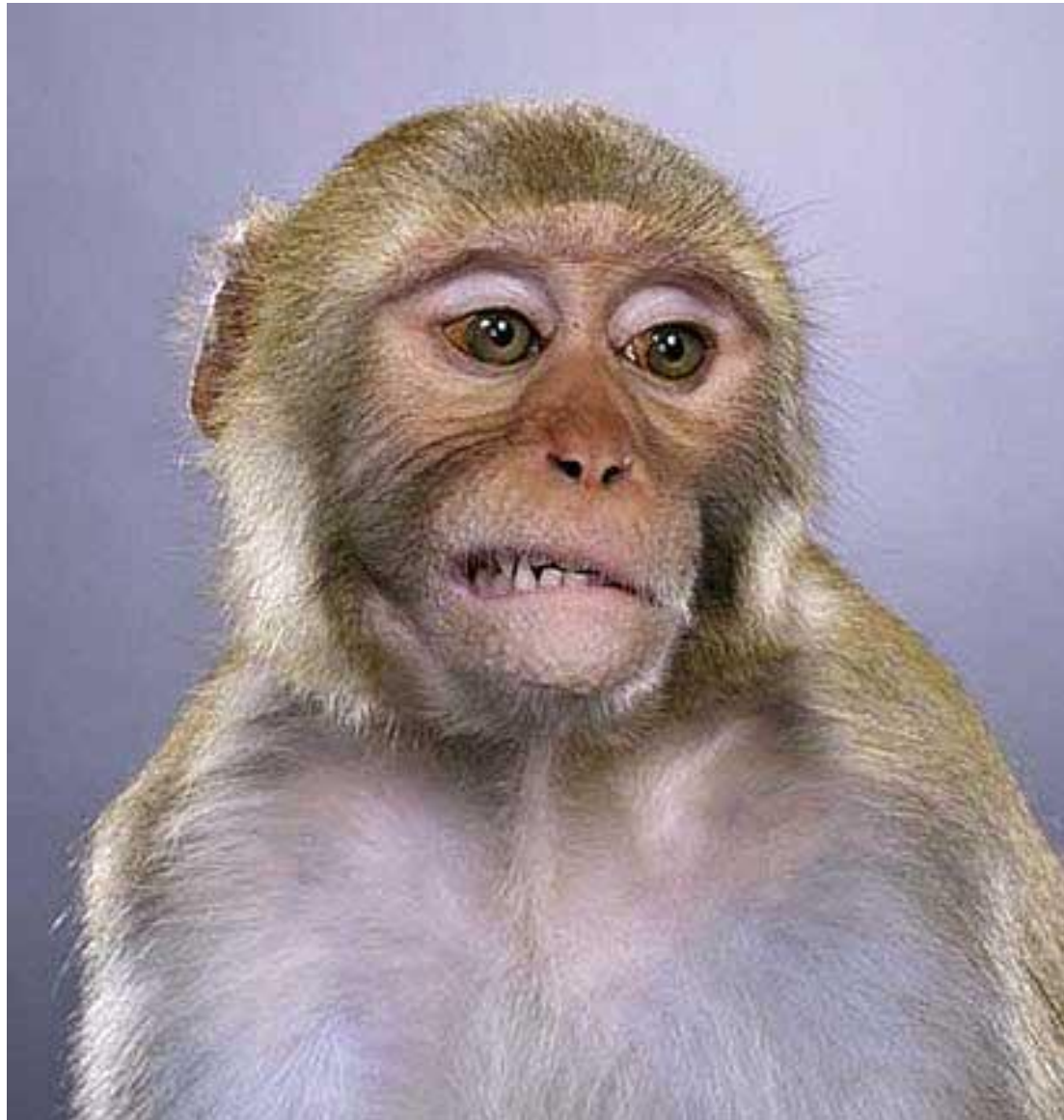
-Long Lost Intern Proverb



# THE MATH 201

- If a user has 1,000 “friends” or others in online community
- And every “friend” has 1,000 “friends”
- And you maybe didn’t stop to think before you posted
- 1,000,000 people could see the communication within moments – only one person has to take a screen shot to preserve it forever, no matter how quickly you delete it . . .





○ QUESTIONS?

