

The **Ethics** of Using Social Media For Litigation

PRESENTED BY:

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SOCIAL MEDIA

It's not a fad



SOCIAL MEDIA FACTOID #1:

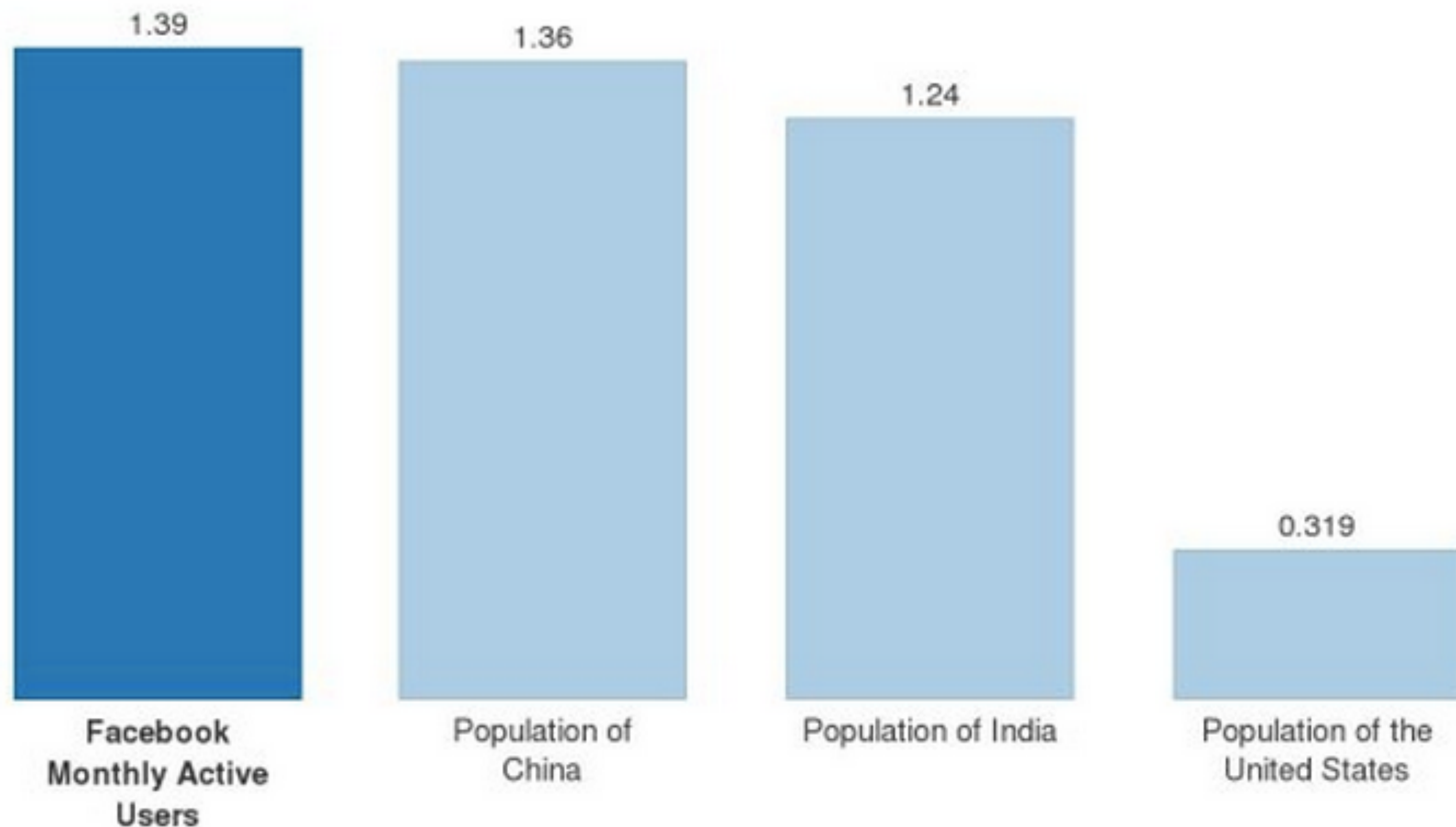
Social Media has overtaken [porn](#) as the #1 activity on the Web

SOCIAL MEDIA FACTOID #2:

If Facebook were a country it would be the
[world's largest](#)

How Big Is Facebook?

Facebook has more active users than China has people (figures in billions)

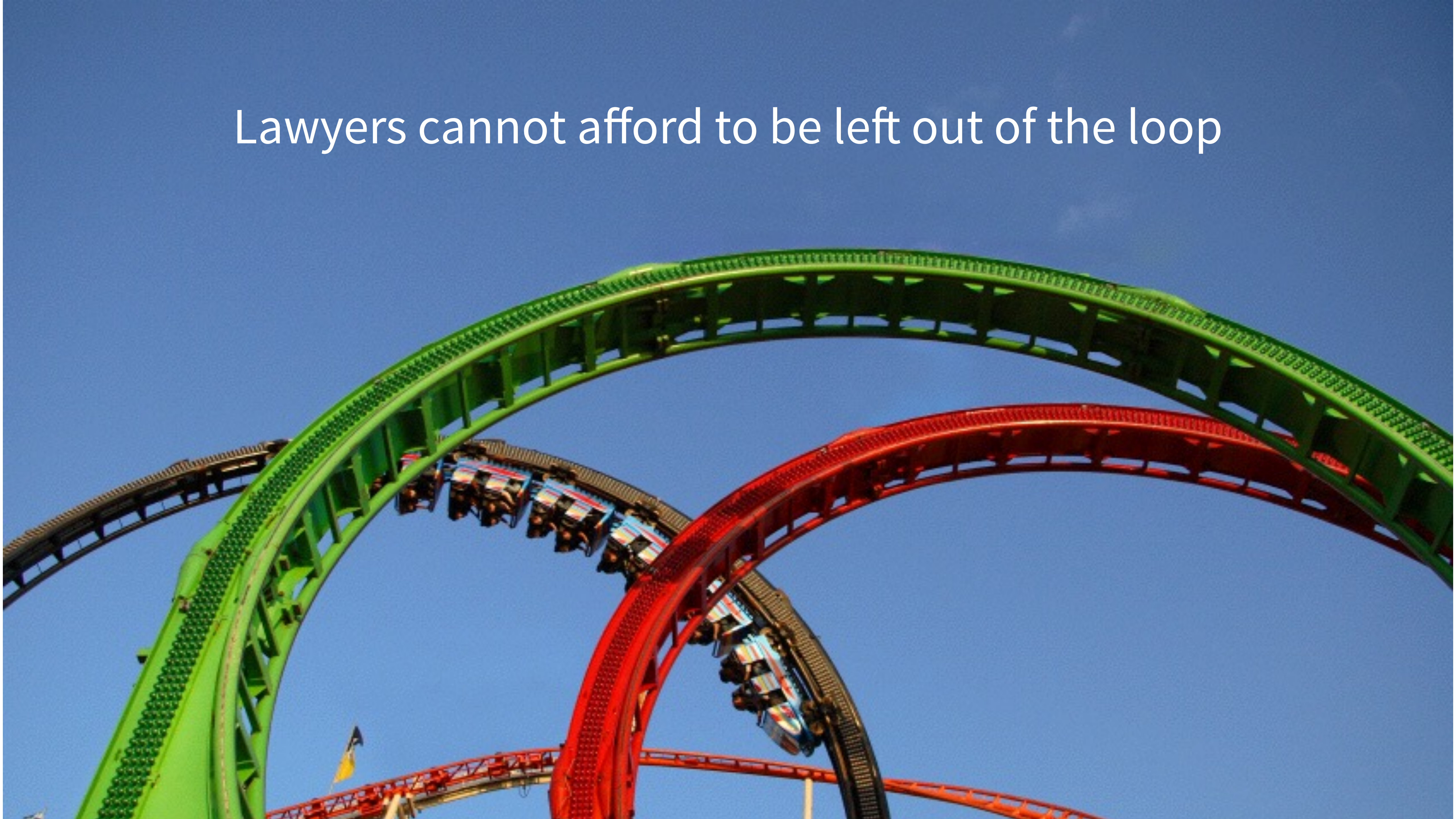


Source: Facebook, CIA World Factbook

SOCIAL MEDIA FACTOID #3:

Every second [2](#) new members join LinkedIn

Lawyers cannot afford to be left out of the loop

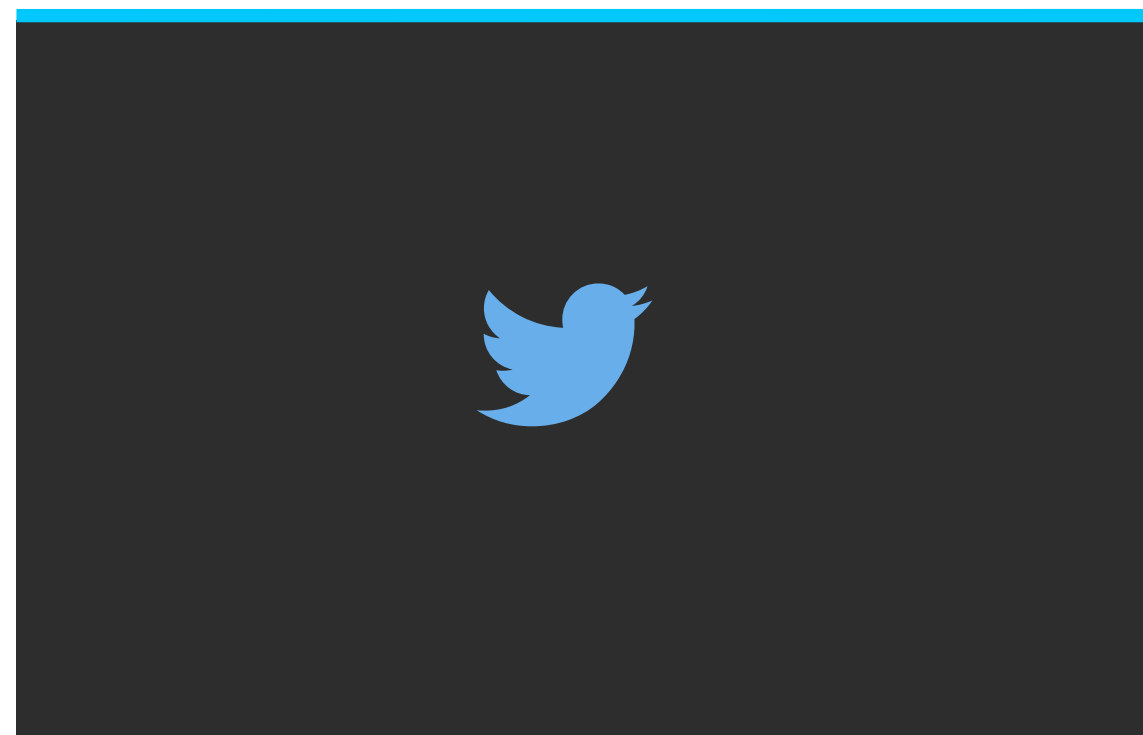


A man with a beard and short hair is sitting at a desk, looking at a laptop. He is wearing a light-colored button-down shirt. The background is a simple office setting with a desk lamp and a whiteboard. The image is dimmed and has a dark overlay.

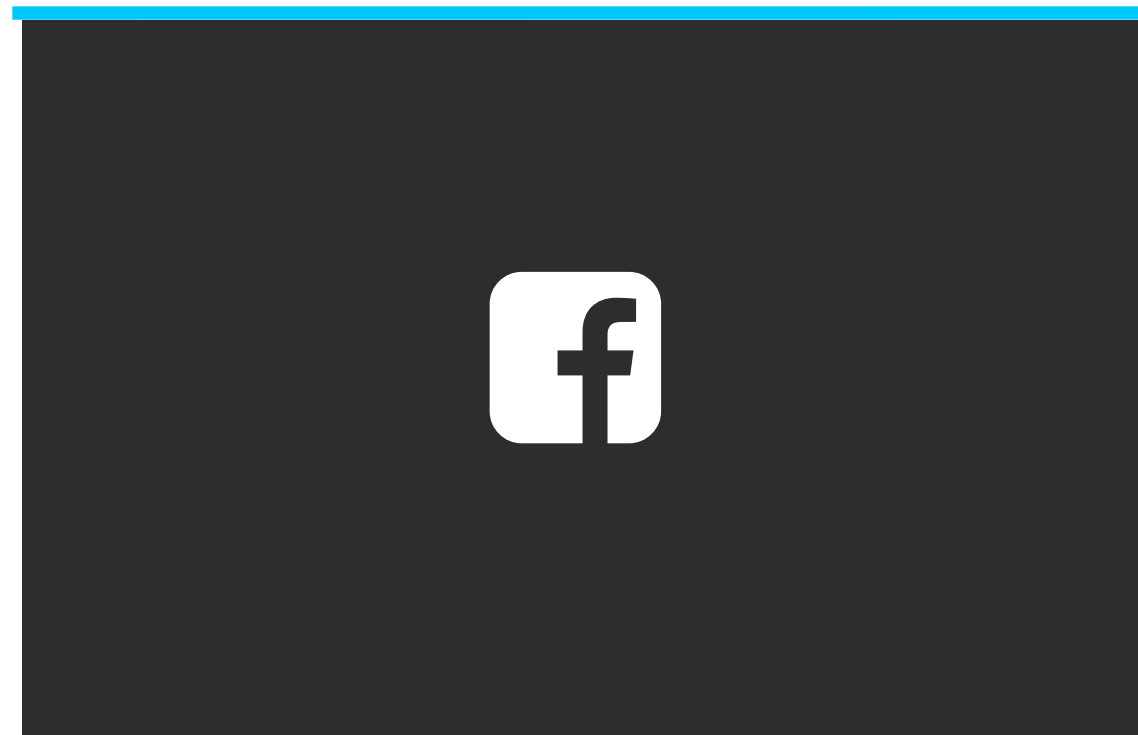
HOW DO YOU GET
STARTED?

BE CURIOUS AND LEARN

THE PLATFORMS



PUBLIC BY DEFAULT



OFTEN PROTECTED



IT DEPENDS

—
BE AWARE OF PASSIVE
NOTIFICATIONS

Sometimes the online world will feel like a maze



A lot of people will
tell you what you
can't do.





**DO NOT
SIT ON
FENCE.**



www

Social media simply
changes the medium, not
the message



Spying: Sometimes ok



MINING FOR EVIDENCE.

Two key themes:

1. Whether the social media postings sought are **publicly viewable**
2. Whether the person being researched is **represented by counsel**.

THE GENERAL CONSENSUS

General consensus:

1. Most jurisdictions agree that it is *improper* to attempt to connect with an individual known to be *represented by counsel* but that viewing **publicly viewable profiles** is **fair game**.
2. Majority of **jurisdictions** hold that lawyers **must disclose the reason for seeking to connect with unrepresented party**.

Deception: Not ok



Passive notifications:
Depends on who you ask



RESEARCHING JURORS.

Differing opinions on passive notifications.

ABA Standing Committee on Ethics & Responsibility Opinion 466 (2014):

- **Unethical to communicate with jurors**
- Attempts to access jurors' social media information behind a privacy walls impermissible
- **Publicly available information is fair game**, & does not constitute improper communication in violation of Rule 3.5(b). It's similar to observing a juror from a car while driving by the juror's home

- If improper juror conduct is discovered, "lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal."
- Notably, ABA Committee departed from the New York Committee's rationale regarding **passive online notifications do not constitute a communication** and thus are not problematic: "The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b)."

THE NEW YORK DECISIONS.

NYC Bar Committee on Professional Ethics Formal Opinion 2012-2 (6/12):

- **Lawyers can use social media to research jurors**, so long as jurors unaware of research .
- **Passive notification is communication.** If attorney knew juror would be aware of monitoring, then it's unethical. Even if attorney unaware notification would be sent, if juror later learns of monitoring, then it could be prohibited communication in violation of RPE 3.5.
- **Attorneys/agents must avoid deception,**
- "In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research."

NY County Lawyers Association Formal Opinion No. 743 (1/12):

- Attorney or agent may **monitor jurors' public postings** and accounts on social media, **but connecting with jurors** in order to view social media postings that are **not viewable by the public is unethical**
- **Lawyers must have a thorough understanding** of the workings of the different social media platforms in order to avoid improper communication with jurors
- Passive notifications are communications
- **If improprieties** on the part of a juror are **discovered**, the **court must be notified** and the discovery of the improprieties cannot be used to gain a tactical advantage.

DON'T BE **THAT GUY**

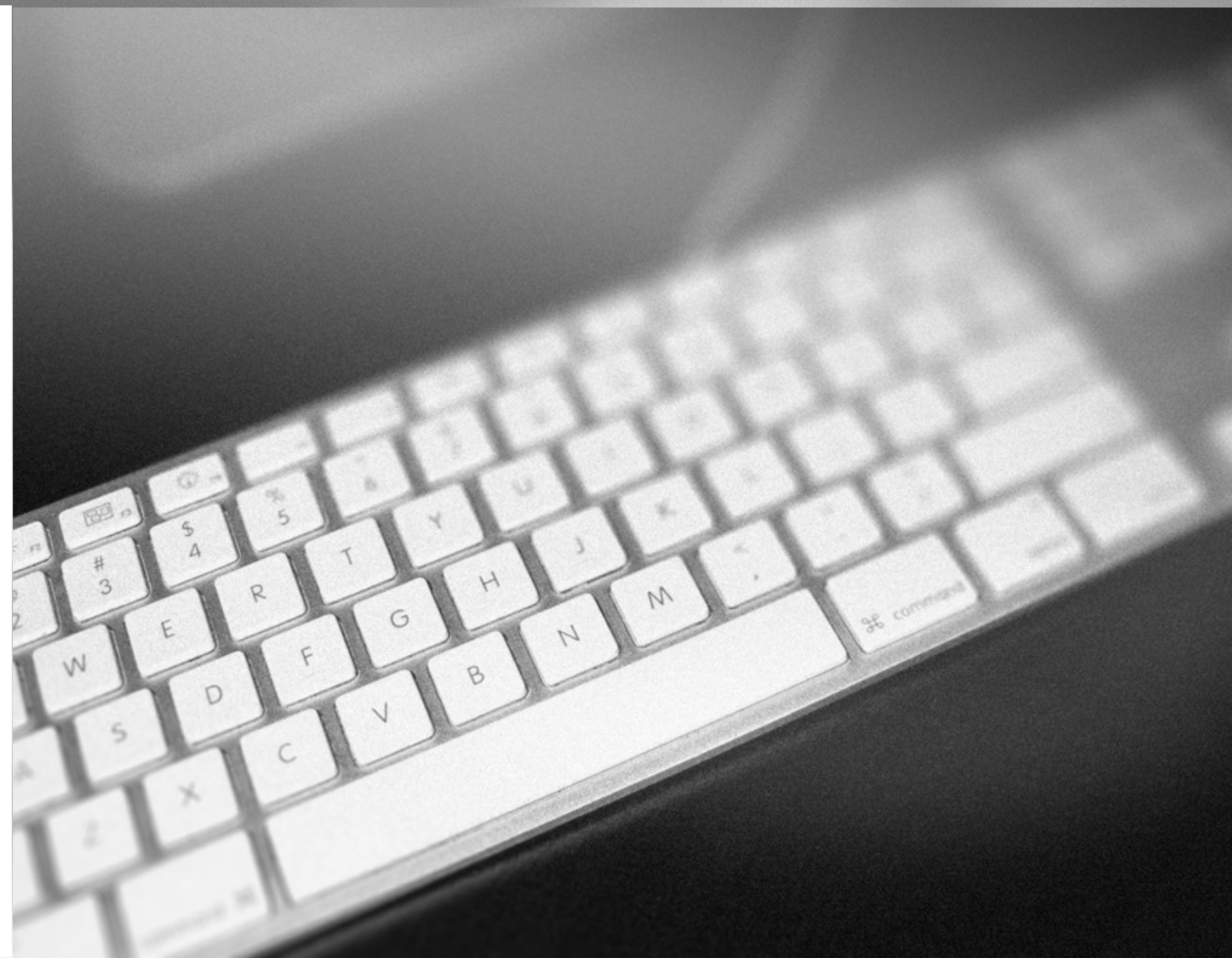
YOUR OPPONENTS
ARE USING IT. **SO**
SHOULD YOU.



BE CURIOUS.

LEARN.

THINK.





← BUS

PENGUINS →

CAUTION
PROTECT YOUR VALUABLES.
DO NOT USE HOOK TO
HANG YOUR PURSE.



PLACE PURSE
HERE



BE PREPARED.



The more you **learn**,
the more you **know**.

- ✓ IMPRESS YOUR COLLEAGUES.
- ✓ IMPRESS YOUR CLIENTS.
- ✓ IMPRESS YOUR KIDS!



Thanks for listening!

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