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**MIDDLESEX SUPERIOR COURT**

Trial Court of the Commonwealth Superior Court Department

Civil Docket NO. 1781CV02701

**MOTION TO DISMISS WITH PREJUDICE**

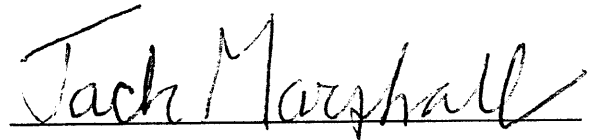
**Walter Tuvell, plaintiff**

v.

**Jack Marshall, defendant**

Pursuant to Superior Court Rule 9A, Defendant hereby moves to dismiss Plaintiff's Complaint with prejudice. The justifications for this Motion are set forth in the accompanying memorandum.

Dated this 16th Day of October, 2017

A handwritten signature in black ink that reads "Jack Marshall". The signature is written in a cursive style and is positioned above a horizontal line.

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**MEMORANDUM In SUPPORT OF  
MOTION TO DISMISS WITH PREJUDICE**

**Walter Tuvell, plaintiff  
v.  
Jack Marshall, defendant**

**FACTS**

1) Plaintiff Walter Tuvell contacted Defendant Jack Marshall (that is, me) via my personal email on August 26, 2017. The email regarded Ethics Alarms (<https://ethicsalarms.com/>), my personal and professional blog, which discusses ethics issues daily and has since October of 2009. The blog also encourages free-wheeling discussions and arguments regarding the issues raised, which I moderate and actively participate in.

I am a professional ethicist specializing in professional ethics and legal ethics particularly. I am a licensed attorney in the Commonwealth [BBO # 321760], and for the past three years I have taught the legal ethics section of MCLE's mandatory Practicing with Professionalism course for new Massachusetts Bar admittees, and teach a similar course in the other jurisdiction where I have an active license to practice law, Washington D.C.

2) Participants in the blog are presumed to have read and agree to the terms of blog use linked to the Home page. In the ABOUT section (<https://ethicsalarms.com/about/>), I explain that the site is an ethics blog, and is constituted of my opinions, It reads in part,

“I will usually make strong statements and espouse definite positions in the posts here. The objective isn’t to be “right,” though if I post an opinion, I believe it. The objective is to provoke thought about the issue that isn’t controlled by biases, pre-conditioned reflexes, ideology or rationalizations. This is the same successful formula I employ in the ethics seminars I facilitate across the country for corporations, associations, non-profits, student groups and law firms. I don’t need you to agree with me; there are often many legitimate ways to judge an ethical problem. I do need you to follow the Comment Policies. Check them out, please.”

The Comment Policies page (<https://ethicsalarms.com/comment-policies/>) describes what is expected of commenters, and conditions under which they may be banned from commenting.

3) The Plaintiff’s email to me read...

Jack —I’ve been following your website (<https://ethicsalarms.com/>) since I "discovered" it a couple of months ago. Its About page is especially lucid and luring.

The problem is, your posts don't live up to the About advertisement. Specifically, the About page speaks only about whole-life ethics (a very laudable goal, what I was looking for), but says nothing about partisan/political rants. Yet, it seems like that's what the website does, and only that. Further, everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad).

Is that the way you really see things? Or am I missing something? Thx.— Walter Tuvell (PhD, Math, MIT & U.Chicago — i.e., “not-a-crank”)

4) As I have on occasion with other private emails I receive regarding the blog and the issues it covers, I referred to the Plaintiff’s email in a post titled, Morning Ethics Warm-Up: 8/27/17 (<https://ethicsalarms.com/2017/08/27/morning-ethics-warm-up-82717/comment-page-1/#comment-464837>), using it as to begin a discussion of my efforts to be objective and unbiased, since the issue is often raised. I did not use the Plaintiff’s name. The post began,

“I received a nice, polite e-mail from a new reader here who accused me of engaging exclusively in ‘partisan/political rants.’ Further,” he wrote, “everything you say appears to be entirely one-sided (right/conservative/republican is good, left/liberal/democrat is bad).”

The man is an academic, so one might expect a little fairness and circumspection, but then, the man is an academic. His description is in factual opposition to the contents of the blog. (I'm trying to think of the last Republican leader, conservative or otherwise, I designated as "good"), but I know from whence the impression arises:..."

5) Following this post, the Plaintiff began posting a series of comments on this and other posts, primarily pushing his claims that the blog was partisan in nature, and falsely represented itself as covering other ethics areas, such as judicial misconduct. His first comment, which took umbrage at the fact that I mistakenly had called him an "academic," [I immediately apologized, writing, "*And sorry for the mistake regarding your erudition. I come from a tradition where only scholars and academics attach their degrees and alma mater to their name. I know I don't.*" I concluded with this paragraph,

*"Third: I maintain a website documenting a major cultural/governmental (but not "political/partisan") phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (<http://JudicialMisconduct.US>). THAT'S the sort of thing I wonder what a non-political/partisan (though legally trained/savvy) ethicist thinks about. Start, say, with the "Smoking Gun" at <http://JudicialMisconduct.US/CaseStudies/WETvIBM/Story#smokinggun>."*

I did not check his website at first, nor did I read it.

6) By the next day, August 28, 2017 the Plaintiff's comments had become increasingly irrelevant to the topics of discussion and continued to impugn my integrity. At this point, I finally did visit his website. It was not, as he had represented, on the general topic of judicial misconduct, but was actually a single-minded attack on the integrity of Denise Jefferson Casper, United States District Judge of the United States District Court for the District of Massachusetts, the former Deputy District Attorney for the Middlesex District Attorney's Office in Cambridge, Massachusetts. Her offense was ruling against the Plaintiff in one of his frivolous lawsuits, *Tuvell v. IBM*, in the Plaintiff's words, "falsely granting IBM's Motion for Summary Judgment and dismissing the case."

7) It then became clear to me that the Plaintiff's initial contact and subsequent involvement in the blog was undertaken under false pretenses. He wanted free, expert assistance in his vendetta against a Massachusetts judge in a legal matter involving his personal interests, but was neither candid nor honest about this. As a Massachusetts lawyer and a legal ethics specialist, I knew that Commonwealth lawyers are bound by R.P.C. Rule 8.2: Judicial and Legal Officials:

“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate, or of a candidate for appointment to judicial or legal office.”

Adopted March 26, 2015, effective July 1, 2015.

It is my professional opinion that associating myself in any way with the Plaintiff's vendetta would violate the spirit, and perhaps the letter of this rule.

8) On August 28, 2017 at 6:07 PM, I announced to the blog readers that I had banned the Plaintiff, as I had every right to do as proprietor of the site. As is my practice, I explained the reasons why this was done:

**ATTENTION: Walt Tuvell is banned from commenting here.** I don't even care to spend any more time on him, but I'll give some background. He sandbagged me. He submitted nothing but whiny posts denying that he had accused Ethics Alarms of being obsessed with partisan political topics, then denied he had done that, then said the all he was looking for was a discussion of a judicial conduct issue (but did this initially with a link in a comment to another commenter, causing me to miss it) then just posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't (there are dozens of judicial ethics posts), and THEN, when I finally get the link to the ethics issue he says he was seeking a reaction to— HINT: if you want a reaction to a specific issue, the best way is to write me at [jamproethics@verizon.net](mailto:jamproethics@verizon.net), and ask, “What do you think about this?” If it's a good issue, I'll respond like a good little ethicist and jump through your hoop.

But no, Walt began by accusing me of pure partisan bias, and issued bitching comment after bitching comment until, finally, he actually revealed his agenda, and GUESS WHAT? Come on, guess! Walt's “issue” is about his own case, and the link goes to his single issue website, which you can try to wade through [here](#). The case is *Tuvell v. IBM*, and skimming his messy post that teeters on the edge of madness, I discern that the reason Walt is interested in judicial misconduct is that the judge decided that his case was lousy, and dismissed it. That obviously means to him that the judge is unethical. I was going to, as a favor to Walt, because I am a nice guy, show my good faith by addressing his issue even though he didn't have the courtesy or honesty of fairness to come right out and say what he wanted. Then I read as much of the entry

on his blog – which purports to be about judicial misconduct in summary judgments generally, but is in fact only about his case — as I could stand, and realized that Walt is, in technical terms — this is an opinion, Walt, not an assertion of fact, you can't sue me: put down the banana — a few cherries short of a sundae. This became clear in this passage.

Tuvell suffered severe shock/dismay/devastation, and worse. For, Tuvell was/is a long-term victim of whistleblowing/bullying-instigated PTSD, stemming from previous defamatory/abusive workplace incidents he'd experienced more than a decade previously while at another employer, but which was since in remission (“passive”/“dormant” phase). Knabe/Feldman's accusation immediately caused/“triggered” Tuvell to reexperience an acute/“active” PTSD flashback”/relapse.

I used to get letters from people like this, long rambling things with court cites and exclamation points. I answer phone calls from people like Walt, and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the calls. And I get e-mails with long, rambling court documents. This is the first time, however, someone has abused Ethics Alarms for a personal agenda. I'm sorry for Walt's troubles, but he was not honest, and misrepresented his purpose by the charming device of insulting my integrity. Obviously, he wanted to check and see whether my sympathies would be with his cause before submitting it for consideration. As I tell my clients, I can't be bought, and you take your chances. Walt was also obviously looking for a cheap, as in free, expert opinion that he could use in his crusade against the judge.

What an asshole! The fact that he may be a desperate asshole doesn't justify wasting my time, and others who responded to him and misrepresenting his motives.

For this, Walt earns the ultimate ban. He will not be re-instated, and if he submits one more comment having been so warned, I will delete every one of his comments so the stench of his abuse no longer lingers here. Can you tell that I'm ticked off?

- 9) Because the Defendant had been permanently banned and no reinstatement would be considered, I blocked any further e-mail contact from him. Admittedly, I did not anticipate that he would be making demands and threatening a lawsuit, because there was and is no grounds for any.
- 10) On September 13, 2017, the Plaintiff swore out a summons and a complaint alleging defamation based on the exchanges in the Ethics Alarms comments from August 16-August 28, and demanding \$100,000 in damages.

## ARGUMENT

### 1. Plaintiff's claim involved insufficient service of process.

A) As a complaint regarding alleged harm done by a website operated by a Virginia corporation in Massachusetts, the Plaintiff was required to give Defendant 30 days to respond to a Chapter 93A Demand letter. No such letter was ever received or sent. If it had been sent, the Summons and Complaint was still issued before 30 days could have elapsed.

B) The Summons received by Defendant was not delivered by registered mail, not was Defendant able to sign for it. Indeed, Defendant is not even sure exactly when it arrived.

### 2. Plaintiff's complaint fails to state a claim for which relief can be granted.

“Defamation is the publication, either orally or in writing, of a statement concerning the plaintiff which is false and causes damage to the plaintiff. McAvoy 40\*40 v. Shufrin, 401 Mass. 593, 597, 518 N.E.2d 513 (1988). To establish a claim of defamation, a plaintiff must satisfy the following elements:

First, the defamatory statement must "hold the plaintiff up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community, at least to his discredit in the minds of a considerable and respectable class in the community." Tartaglia v. Townsend, 19 Mass.App.Ct. 693, 696, 477 N.E.2d 178 (1985) (quotation omitted).

Second, the statement must have been to at least one other individual other than the one defamed. Brauer v. Globe Newspaper Company, 351 Mass. 53, 56, 217 N.E.2d 736 (1966).

Third, where the speech is a matter of public concern, a defamation plaintiff must prove not only that the statements were defamatory, but also that they were false. Dulgarian v. Stone, 420 Mass. 843, 847, 652 N.E.2d 603 (1995); see also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776, 106 S.Ct. 1558, 89 N.Ed.2d 783 (1986) (holding that where plaintiff is a private figure and newspaper articles are a matter of public concern, there is a "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages").

Finally, the plaintiff must show that he suffered special damages and must set forth these damages specifically. Lynch v. Lyons, 303 Mass. 116, 119, 20 N.E.2d 953 (1939). Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

The Defendant stipulates that the statements that form the basis of the Plaintiff's complaint were published. However, none of the other elements required can be shown, even with unusual leeway.

A) Although the statements alleged to be libelous under the Plaintiff's complaint fail by the lesser standard, Mr. Terrell qualifies as a "limited public figure" under the holding in *LaChance v. Boston Herald, Inc.*, 78 Mass. App. Ct. 910 (2011). Through his own website, he has "actively sought the attention of those visiting the site...and thus "voluntarily inject[ed] himself . . . into a particular public controversy."

The Plaintiff stated at <https://ethicsalarms.com/2017/08/27/morning-ethics-warm-up-82717/comment-page-1/#comment-464837>:

" I maintain a website documenting a major cultural/governmental (but not "political/partisan") phenomenon affecting many thousands of Americans yearly, namely Judicial Misconduct (<http://JudicialMiscoduct.US>)

As a limited public figure, Plaintiff has the burden of showing actual malice, meaning that the alleged defamatory statements must be shown to be made with knowledge that they were false or with reckless disregard of whether they were false or not." He does not meet this burden

B) None of the statements Plaintiff has alleged to be defamatory meet any accepted definition of the term, in online discourse through blog comments or any other medium. All statements erroneously claimed to be defamatory are either...

- **Opinion.** [See *Scholz v. Delp*, 473 Mass. 242 (2015), which held that it was not defamation for a newspaper to publish opinions based on disclosed facts that did not imply that the writer had knowledge of undisclosed defamatory facts. Such opinions are not defamatory.],
- **Statements that were arguably inaccurate.** [Inaccuracy by itself does not make a statement defamatory. It is inconceivable that this inaccurate account of Yohe's Special Forces training could hold Yohe "up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community." See *Tartaglia*, 19 Mass. App.Ct. at 696, 477 N.E.2d 178.]



- **Insults.** [An "expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is." *Id.* Consequently, Chief May's opinion about Yohe's mental state is not actionable. *Dulgarian*, 420 Mass. at 850-51, 652 N.E.2d 603, quoting *Lyons*, 415 Mass. at 266, 612 N.E.2d 1158.
- **Other statements that no objective observer or reader could believe** "hold the plaintiff up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community, at least to his discredit in the minds of a considerable and respectable class in the community." *Tartaglia v. Townsend*, 19 Mass.App.Ct. 693, 696, 477 N.E.2d 178 (1985)

[Above from *Yohe v. Nugent* , 321 F.3d 35 (1st Cir., 2003)]

Here is the Plaintiff's complete list, noting that it is hard to determine what the complaint is alleging in many cases:

Paragraph 7, pg. 5. Plaintiff complains that Defendant did not notify him of the initial reference to his email on the blog, and that in the post, which never mentioned the Plaintiff by name, I misrepresented his message. This is not defamation, falling under the excluded statements enumerated in *Yohe v. Nugent* , 321 F.3d 35 (1st Cir., 2003): "(2) statements which — although likely false — could not reasonably be considered offensive to the average person in the community."

Paragraph 8, pg. 5. Plaintiff claims that the post mistakenly referring to him as "an academic," a mistake I immediately apologized for (see pg. 4, above) constituted an intentional slur and was defamatory. This is not defamation. Authority: "(2) statements which — although likely false — could not reasonably be considered offensive to the average person in the community."

Yohe v. Nugent , 321 F.3d 35 (1st Cir., 2003)

Paragraph 8, pg. 5. Plaintiff attributes text in the post that began with a reference to his e-mail query as an attack on him personally. He wasn't named in the post, and second, no rational person could

read what was written to be in reference to the Plaintiff at all. This is not defamation. Authority: “(2) statements which ...could not reasonably be considered offensive to the average person in the community.” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

**Paragraph 9, pg. 6.** Plaintiff complains that various commenters read the post and commented on it, “falsely attacking Plaintiff.” Plaintiff makes no offer of proof that alleged “attacks” were false, and consented to submitting to criticism by participating in the blog after reading the conditions and rules, as he admitted that he had at <https://ethicsalarms.com/2017/08/27/morning-ethics-warm-up-82717/comment-page-1/#comment-464837>.

**Paragraphs 10-12, Pg. 7.** Plaintiff complains that other commenters criticized him. He consented to this when he commented on the blog.

**Paragraph 13, Pg. 8.** Plaintiff complains about a rebuttal of his arguments in the thread, alleging that it was false that he complains about can be fairly summarized as “You are wrong.” That is not defamation. Authority: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

**Paragraph 14, pg. 8-14.** Here the Plaintiff lists the primary statements, “A –Q” that he considers defamation.

A) “I just banned Walt .... He's special.”  
The Comment policies stated clearly that I could and would ban commenters. Not Defamation.

Authority: “(1) unrefuted statements of fact.....[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

B) “I have already spammed two more posts by the jerk.

- Spamming a Comment is not defamation, Stating truthfully that a comment has been spammed is not defamation. Authority: “(1) unrefuted statements of fact.....[do not

provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- “Jerk’ is an insult, but opinion, and not defamation. Authority: “...insult, but an opinion, and not defamation.” *Dulgarian*, 420 Mass. at 850-51, 652 N.E.2d 603, quoting *Lyons*, 415 Mass. at 266, 612 N.E.2d 1158.

C) “ATTENTION: Walt Tuvell is banned from commenting here .... He sandbagged me.”

“Sandbagged,” as used here, means to gain an advantage by concealing something. This accurately refers to my discovery that the Plaintiff had solicited my views on Judicial Misconduct without revealing his motives. Not defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

“He submitted nothing but whiny posts...” Not defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

...denying that he had accused Ethics Alarms of being obsessed with partisan political topics.”

Not defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

D) “[He] posted a comment saying that the blog advertised itself as covering judicial misconduct and doesn't...” Not defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- Plaintiff writes, “Defendant (falsely) confuses judicial Misconduct with judicial ethics, which are two distinctly/obviously different areas of concern...” Not defamation: “(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

E) “Walt issued bitching comment after bitching comment.”

Characterizing a complaint as “bitching” is not defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

F) “[H]e finally revealed his agenda.”

Not defamation. “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

G) “[W]hen I finally get the link to the ethics issue he says he wants a reaction to...”

Not defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

H) “GUESS WHAT? Come on, guess! Walt's "issue" is about his own case..”

This is not a defamatory statement: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- “and the link goes to his single issue website”

Calling a website “single issue” is not defamation, and with every other characterization in my comment, any reader has the opportunity to check my sources. Authority: “Inaccuracy by itself

does not make a statement defamatory. It is inconceivable that this inaccurate account of Yohe's Special Forces training could hold Yohe "up to contempt, hatred, scorn, or ridicule or tend to impair his standing in the community." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003):

"(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action..." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

I) "The case is Tuvell v. IBM, and skimming his messy post..."

I hurt the Plaintiff's feelings by calling his post messy. It is messy. But even if it were not, that isn't defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

- "that teeters on the edge of madness." This is not defamation: "insult, but an opinion, and not defamation" Dulgarian, 420 Mass. at 850-51, 652 N.E.2d 603, quoting Lyons, 415 Mass. at 266, 612 N.E.2d 1158. And "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

Moreover, this statement and the entire comment post that forms the bulk of the Plaintiff's complain was framed by this disclaimer: "...this is an opinion, Walt, not an assertion of fact, you can't sue me." Not defamation: "To determine whether or not a statement is an opinion, a court "must `examine the statement in its totality and in the context in which it was uttered or published. The court must consider all the words used ... [and] must give weight to cautionary terms used by the person publishing the statement.' Finally, the court must consider all of the circumstances surrounding the statement." Lyons v. Globe Newspaper Co., 415 Mass. 258, 263, 612 N.E.2d 1158 (1993), quoting Fleming v. Benzaquin, 390 Mass. 175, 180-81, 454 N.E.2d 95

(1983). Here, the qualified language of the statement ("it was *his belief*") makes clear that May was expressing his own opinion about Yohe's mental state on May 11 and 12, 1997. ..." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

- "Walt is interested in judicial misconduct is the judge decided the case was lousy"

Not Defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003).

J) "I was going to, as a favor to Walt, because i [sic] am a nice guy, show my good faith by addressing his issue even though he didn't have the courtesy or honesty to come right out and say what he wanted."

Again, Plaintiff claims that this is a false characterization. It is how I interpreted his actions, and how I still do. If the Plaintiff had "come right out and said what he wanted," I would have read, "I am challenging the ethics of a judge who dismissed my lawsuit. Would you be willing to review the matter and offer your professional opinion?" My statement was not defamation: "(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action..." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

K) "Then I read as much of the entry on his blog.."

Plaintiff says that calling what he regards as a website a blog is defamatory.

It isn't: "(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action..." Yohe v. Nugent, 321 F.3d 35 (1st Cir., 2003)

- "which purports to be about judicial misconduct in summary judgments generally but is in fact only about his case"

Not Defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

L) “[I] realized that Walt is, in technical terms ... a few cherries short a sundae.”

Not Defamation:

“insult, but an opinion, and not defamation”. . *Dulgarian*, 420 Mass. at 850-51, 652 N.E.2d 603, quoting *Lyons*, 415 Mass. at 266, 612 N.E.2d 1158.

“(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

“To determine whether or not a statement is an opinion, a court "must `examine the statement in its totality and in the context in which it was uttered or published. The court must consider all the words used ... [and] must give weight to cautionary terms used by the person publishing the statement.' Finally, the court must consider all of the circumstances surrounding the statement." *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263, 612 N.E.2d 1158 (1993), quoting *Fleming v. Benzaquin*, 390 Mass. 175, 180-81, 454 N.E.2d 95 (1983). Here, the qualified language of the statement ("it was *his belief*") makes clear that May was expressing his own opinion about Yohe's mental state on May 11 and 12, 1997. ...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003) .

M) I characterized the plaintiff's own words, and my opinion is obviously an opinion. Since the opinion involved words are published for all to see (as were all the words prompting all the comments alleged to be defamatory), my characterization cannot be defamation: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...”

*Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

N) “I used to get letters from people like this, long rambling...”

The implication that the Plaintiff's blog reminds me of the letters I received from disturbed people is an opinion, and not defamatory: “insult, but an opinion, and not defamation.” *Dulgarian*, 420 Mass. at 850-51, 652 N.E.2d 603, quoting *Lyons*, 415 Mass. at 266, 612 N.E.2d 1158, and “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

- “..things with court cites and exclamation points. I answer phone calls from people like Walt and try to help them if possible, but it's usually futile, and often they keep calling and calling until I have to just duck the phone calls. And I get e-mails with long-rambling documents.”

See above.

- “This is the first time, however, someone has abuse Ethics Alarms for a personal agenda.”  
Plaintiff offers no proof that others have similarly abuses Ethics Alarms for a personal agenda:  
“1) unrefuted statements of fact.....[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)
- “I'm sorry for Walt's trouble, but he was not honest and misrepresented his purpose by the charming device of insulting my integrity.” - “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003). Plaintiff says he was “scrupulously honest.” Withholding material information---that he was seeking advice as he tried to impugn a judge -- is dishonesty by omission. I teach this professionally.
- Plaintiff says that my statement “falsely suggests Plaintiff was involved in some sort of bribe/fraud.” My statement was “As I tell all my clients, I can't be bought.’ This is true. There is no assertion about the Plaintiff being made here whatsoever, and certainly no defamation.
- Plaintiff alleges “defamation” because my characterization that he would use the information he was seeking from me in “his crusade against the judge. Using the information in the Plaintiff's “crusade” simply meant including anything by or from me on his anti-judge website.



My statements were not defamatory: “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

P) “What an asshole! The fact that he may be a desperate asshole..”

Stipulated: such invective, like “jerk” above, is an insult, but insults like “asshole” are not defamatory. From the Mass Law blog:

(<https://masslawblog.com/what-were-they-thinking/is-it-defamatory-to-call-someone-a-dumb-ass/>):

“In dismissing a defamation suit by two politicians who were listed as numbers one and two on a list of “Top Ten Dumb Asses,” the Court observed:

The accusation that plaintiffs are top-ranking “Dumb Asses” cannot survive application of the rule that in order to support a defamation claim, the challenged statement must be found to convey “a provably false factual assertion.” . . . A statement that the plaintiff is a “Dumb Ass,” even first among “Dumb Asses,” communicates no factual proposition susceptible of proof or refutation. It is true that “dumb” by itself can convey the relatively concrete meaning “lacking in intelligence.” Even so, depending on context, it may convey a lack less of objectively assayable mental function than of such imponderable and debatable virtues as judgment or wisdom. To call a man “dumb” often means no more than to call him a “fool.” One man’s fool may be another’s savant. Indeed, a corollary of Lincoln’s famous aphorism is that every person is a fool some of the time.

Here defendant did not use “dumb” in isolation, but as part of the idiomatic phrase, “dumb ass.” When applied to a whole human being, the term “ass” is a general expression of contempt essentially devoid of factual content. Adding the word “dumb” merely converts “contemptible person” to “contemptible fool.” Plaintiffs were justifiably insulted by this epithet, but they failed entirely to show how it could be found to convey a provable factual proposition.”

*Vogel v. Felice*, 2005 WL 675837 (Cal. Ct. App., March 24, 2005).

Though this is a California case and not binding in Massachusetts, particularly as it applies to online arguments, the conclusion seems irrefutable. “Asshole” is not, moreover, sufficiently unambiguous to constitute an assertion of fact.

- “[who] doesn't justify wasting my time,”

The Plaintiff argues that this is defamatory because he says he wasn't wasting anyone's time. I believe every individual is entitled to determine what he or she regards as a waste of time. This is not defamation: “(2) statements which ...could not reasonably be considered offensive to the average person in the community...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003), and “(3) statements of opinion based upon disclosed facts...[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

Q) Finally, the Plaintiff argues that banning him from Ethics Alarms is defamatory. Plaintiff read the rules, and consented by participating in the blog discussions. It is my website, and I can ban whoever I want for whatever reason I deem appropriate. Moreover, the statement that I had banned him was true, and cannot be defamatory as a matter of law: “(1) unrefuted statements of fact.....[do not provide] a basis for a defamation cause of action...” *Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

**Conclusion:** In the entire complaint there is not one statement that meets the Massachusetts standards for defamation, as defined by statute, case law, and common sense.

### **3. The Plaintiff's Complaint Fails To State Any Harm or Damages from the Conduct Alleged.**

“The plaintiff must show that he suffered special damages and must set forth these damages specifically.” *Lynch v. Lyons*, 303 Mass. 116, 119, 20 N.E.2d 953 (1939).  
*Yohe v. Nugent*, 321 F.3d 35 (1st Cir., 2003)

In his complaint. Plaintiff fails to show any damages at all. Plaintiff asks for damages “well in excess” of \$100,000, while offering no support for that claim whatsoever. Ethics Alarms has an elite readership, and averages approximately a thousand visitors a day. There have been 8009 views of the

8/27 post that is the subject of the complaint, which means no more than 250 individuals read it. Many of those did not read the comments: I do not have the means to determine the number. Even if the statements I made were defamatory as Plaintiff claims, and they were not, there is no way that less than 250 strangers scattered across the world (Ethics Alarms has readers in over a hundred nations), few if any who know who the Plaintiff is, could conceivably cause Plaintiff \$100,000 of damages, or any tangible harm at all

Moreover, the Plaintiff, far from mitigating damages, deliberately published his complaint on his own website, and through links, sent readers to the very posts he claims are defamatory.

### Conclusion

For the reasons stated, Defendant's Motion To Dismiss with Prejudice should be granted.

### ATTACHMENTS

EXHIBIT 1: About Ethics Alarms

EXHIBIT 2: Ethics Alarms Comment Policies

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC

[Exhibit 1]

# About Ethics Alarms

*Updated 2016*

[ **Note: relevant sections are highlighted. On-line version at <https://ethicsalarms.com/about/>**]

Welcome!

*The content published here, just to get this out of the way, is copyrighted and original unless otherwise noted. If you want to use it for any purpose, I expect a link and attribution, both on ethical and legal grounds.*

My name is **Jack Marshall**. I'm an ethicist, which means I make my living teaching, consulting, speaking and writing about ethics, and a lawyer, and the president of ProEthics, Ltd. I write this blog. If you want to know more about me, there is a biography below.

Ethics Alarms is *not* about me, however. It is about *ethics*, defined as the study of right and wrong, and how to become better at telling the difference. **Although I will frequently discuss issues involving law and the legal system, none of the opinions here should be taken as legal opinions, because they aren't.** My field is ethics, I specialize in legal ethics, but with rare exceptions, I no longer practice law.

**Ethics Alarms** are the feelings in your gut, the twinges in your conscience, and the sense of caution in your brain when situations involving choices of right and wrong are beginning to develop, fast approaching, or unavoidable. The better your alarms work and the sooner they start sounding, the more likely you are to do the right thing, or at least to use good ethical reasoning to decide what to do. This is a blog that aspires to help keep everyone's ethics alarms in good working order....including mine.

**How?** By pointing out ethical problems and dilemmas from all segments of society, professions and experiences of life. By applying principles of ethical analysis, and reaching conclusions about what is right, what is wrong, and what remains uncertain. By developing tools, terms and approaches to solving ethics conflicts and dilemmas, and by discussing, arguing, disagreeing, opening doors of perception and closed minds, and by helping us be more alert to ethical issues in our own lives.

**I will usually make strong statements and espouse definite positions in the posts here. The objective isn't to be "right," though if I post an opinion, I believe it.** The objective is to provoke thought about the issue that isn't controlled by biases, pre-conditioned reflexes,

ideology or rationalizations. This is the same successful formula I employ in the ethics seminars I facilitate across the country for corporations, associations, non-profits, student groups and law firms. **I don't need you to agree with me; there are often many legitimate ways to judge an ethical problem. I do need you to follow the Comment Policies. Check them out, please.**

**Ethics Alarms is a project of ProEthics, LTD**, an ethics training and consulting firm based in Alexandria, Virginia. The firm emerged to counter the widespread belief that ethics had to be boring and technical, and stands for the proposition that most people are engaged by ethics and care about the resolution of right and wrong when the issues are discussed directly and dynamically.

**Ethics Alarms** is the blog successor to The Ethics Scoreboard, the ethics commentary website that will continue to serve as an ethics archive and resource.

**Like the Scoreboard, Ethics Alarms is dedicated to starting discussions, not ending them, despite the tone of certitude that often invades its commentary.** Creating an ethical culture is the shared obligation of everyone, and each of us needs to think critically about what is right and wrong, make our opinions known, and never hesitate to communicate those opinions for fear of being “judgmental.” We *should* be judgmental—civil, fair, open-minded, and also willing to hold ourselves to the highest standards of conduct. Living ethically is not always easy, but it becomes easier with thought, debate and practice.

**This blog takes positions, attempting to be bold without being reckless. When there is an error or misstatement, I will correct it. When I am wrong, I will admit it. When I have made a mistake, I will apologize for it.**

As with the Scoreboard, I will attempt to reply to as many comments as possible. Please keep yours civil and on topic, without foul language or political rants. **Ethics Alarms** takes the position that anonymous posts are unethical, and discourages them, but will begin by allowing them if they abide by the rules of the blog and there is a name of some kind attached to the comment. If you are determined to use a name other than your own, I request that you send me an e-mail with your real name. I can be reached for this and any other purpose at **[jamproethics@verizon.net](mailto:jamproethics@verizon.net)**

[Exhibit 2]

# Ethics Alarms

## Comment Policies

Revised, July 9, 2017

[ **Note: relevant sections are highlighted. On-line version at**  
**<https://ethicsalarms.com/comment-policies/>**

Ethics Alarms has now been active for seven full years, and there have been more than 160,000 comments on the posts here. It is time to revise the Comment Policies based on what I have learned, and based on what the blog has become and what I want it to accomplish.

This site exists to encourage an ongoing, rigorous and engaging inquiry about ethics, from the perspective of events large and small, in the United States and the world. **Ethics** evolves as societal standards and norms evolve. We accomplish that evolution, usually in enlightened directions, through advocacy, disagreement and debate, using logic, values, principles, systems and facts. The comment section should be a moderated colloquy among intelligent and open-minded readers, and me, as the host and moderator. I have learned a great deal from the site's readers, and hope to continue to do so.

**Ethics Alarms offers the following 20 guidelines and rules to advance this mission:**

1. **Before you comment for the first time**, check the terms and concepts page if you can. It will avoid misunderstandings
2. **I prefer full names attached to comments.** If you want to use a screen name, I have to know who you are. You can e-mail me your name at [jamproethics@verizon.net](mailto:jamproethics@verizon.net), and it will not be divulged. You must enter an e-mail address, and it must be real. If you use a fake e-mail address, your comment will be deleted. No comment signed "anonymous" will be posted. Ever. (Well, hardly ever) If you use a URL as your screen name, I will treat the comment as spam no matter how trenchant your observations are.
3. **I have to approve every first time commenter**, and as with bar associations and Harvard College, the standards used to screen applicants are tougher than the standards applied once you pass. If your initial foray here is gratuitously disrespectful, nasty, snotty, disparaging, obnoxious, or just plain stupid, your comment won't make it out of moderation. Similarly, non-substantive comments expressing approval or disapproval without more are worthless, and I'll reject them. Initiating your relationship on Ethics Alarms with snark, sarcasm, nastiness or ridicule is a bad strategy—as I noted above, you have to earn the privilege of talking to me like that. You may not get a second chance.

**4. Regular commenters have special privileges.** They can engage in tough rhetoric bordering on insult, as well as brief comments that would not pass muster with a first-timer. But always remember that you are a guest here. Guests are obligated to prove their trustworthiness and good will before they are extended special privileges, and even those privileges have their limits.

**5. Political rants are not welcome.** In addition, efforts to muddle genuine objective ethical analysis by pressing ideological talking points and bombarding me with links are not appreciated, and won't be tolerated for long, if at all..

**6. Keep comments as civil as possible.** Ethics Alarms does, at its discretion, permit vulgarity and profanity for style and emphasis. I will show limited tolerance for rude and abusive comments and commenters, depending on the combatants. At my sole discretion, I may extend special dispensation for regular, substantive commenters here who have accumulated good will and trust, even when they cross lines that I would not permit to be crossed by a less-credentialed visitor [*See below*]. While a verdict of "you are an idiot," may occasionally be justified, I may ding comments that include gross personal attacks, subject to the exceptions noted above, unless it has an extremely impressive substantive argument accompanying it. In the heat of debate, Ethics Alarms will tolerate the occasional insult. If commenters become overly nasty and personal in their exchanges with each other or habitually so, I will intervene.

**7. Ethics Alarms discourages text jargon and abbreviations.** "LOL", in particular, is guaranteed to annoy me. Also disfavored are popular slang words designed to denigrate a belief, an individual or political groups, like "Repugs," or juvenile name-calling like "The New York Slimes" or "The Washington Compost."

**8. I'm very likely to respond to your comments.** Don't try hit-and-run tactics here, and don't think you can get away with an unsupported, badly-reasoned or purely emotional argument and not get called on it. On the other hand, if I don't respond, don't take it personally.

**9. Re Links: Relevant links are appreciated. Irrelevant links will cause a comment to be deleted as spam.** (*Remember that if you include more than one link, your comment gets automatically stalled in moderation.*) Links to your related blog posts must be supported by a substantive comment on the topic as well: this isn't your bulletin board. Similarly, the URL of your blog is not going to make it into the comment, and if you persist in trying to slip it through, I will start marking the comments as spam. I am happy to plug, including a link to your blog, if you write me first and explain why it is relevant and useful to Ethics Alarms readers, and I concur. Your comment, however, is not a vehicle for spreading your blog information around the web...not here, anyway.

**10. Typos: I regret that WordPress has yet to install a good editing function for comments. Please proof yours.** I will endeavor to fix obvious typos, and if you e-mail me a request to delete or otherwise repair a mis-typed section of a legitimate comment, I will try to reply. I will respect style choices like eccentric punctuation, capitalization, syntax or spelling, but comments that are careless and difficult to read or understand risk being rejected.

**11. Me: I reserve the right to sharply express my annoyance with comments that I regard as careless, poorly argued, based on partisan hackery, stupid, unethical or ignorant.** I am prone to be testy at comments that fall into any of the following categories:

1) *Those that say I should be writing about "more important things."* I do. But I don't have to write *every* post about the earth-shattering, and trivial incidents can still teach important lessons.

2) *Comments that include "lighten up," "calm down," "get a life," or anything similar.* Please don't presume to gauge my emotional state or dictate it.

3) *Comments that accuse me of ignoring topics* or not making arguments when in fact other posts on the site *covered* those topics and *did* make those arguments. I don't require that you read everything, but do not make allegations when a simple key word search on the site would disprove them.

4) *Putting words in my mouth,* or ascribing opinions to me that I have not stated. I hate that.

5) *Being snotty about typos.* I make mistakes, and appreciate being told about them. Nicely.

6) *Mockery without substance.*

7) *Racist, misogynist and otherwise bigoted rants.*

**12. On occasion my annoyance may cause my reply to seem excessively severe.** In such cases, please point this out, and I may well apologize. I may not, too. If a comment is especially ignorant or dumb, I have been known to bluntly describe it as such, and diagnosis the commenter as the kind of individual inclined to so express himself or herself. I will continue to do so. This is part of my effort to elevate the discussion through negative reinforcement. This is not a site where you can just dash off a barely considered statement and get away with it.

**13. DO NOT accuse me of an *ad hominem* attack** if I judge your intellectual prowess or ethical proclivities based on the quality your post, and state that judgment. That's not what an *ad hominem* attack is, and I'm sick of explaining it.

**14. If and when I break my own rules,** please call me on it. Politely. I reserve the right to break my rules, but I don't want to do it unintentionally.

**15: Ethics Alarms Discipline:** Discipline for inappropriate comments is meted out in several ways. If you cross a line, you will usually be warned not to do it again. Occasionally I will insist on an apology to avoid some form of discipline.

**16. Banning:** If you obliterate a standard here, you may be banned. If you are banned, you can apply for reinstatement by contacting me off-site and sincerely apologizing. Again, I reserve the right to decide who is banned and when. Am I entirely consistent? No, not always. Since the blog launched in 2009, the following offenses have resulted in commenters being banned:



*...Repeating the same arguments over and over again while not acknowledging or rebutting counter arguments from others.*

*...Relying on partisan talking points*

*...Exhibiting racism or other bias*

*...Insulting me, in particular by questioning my integrity, honesty, objectivity, intentions, motives, qualifications, or credentials*

*...Denying the assumptions of the blog, which are that there are ethical standards, that we all have an obligation to help define them, and that right and wrong is usually not situational and subjective.*

*...Violating **the Stupidity Rule**, which holds that some people are just too ignorant or stupid to take part in the discussion here, and interfere with the orderly exchange of opinions and ideas.*

*...Ignoring warnings*

*...Lying, or using fake authorities and sources.*

**17. Other Penalties:** Ethics Alarms also has more limited punishments. If it is clear that a commenter is obsessed or over-heated on a certain topic, indicated by repeated re-statements of the same points, I may ban them from posting any more comments on that topic. This is a “**time out**.” I am also, with this revision, instituting a **suspension policy**. A suspension of commenting privileges, usually for 30 days, will be issued when I deem a comment from a regular commenter so disrespectful and outrageous that my head explodes.

**18. Three Strike Rule for Regulars:** Occasionally an esteemed commenter will make a comment that embarrasses him or her with uncharacteristic excess. Their status here earns them three such mistakes, unless it is so egregious that I feel it requires immediate redress. This usually occurs when the comment insults me.

**19. Grandstanding:** If you make grand and indignant exit, and announce your permanent withdrawal from the blog, you are gone for good. An e-mail to me with an appropriate apology and a request to be reinstated will occasionally work if you change your mind. Maybe. Don’t count on it.

**20. The Comment of the Day:** Especially excellent or provocative comments are sometimes re-published as a “Comment of the Day.” Whether such a comment is actually awarded this distinction is somewhat arbitrary and dependent on too many factors to list. Many wonderful comments do not get selected. Again, if yours is one of them, don’t take it personally.

**Finally, PLEASE don’t write comments on this page. Nobody will see them. If you have a comment on the comment policies, e-mail me directly at [jamproethics@verizon.net](mailto:jamproethics@verizon.net), or make them on a current post, where I will see them.**

**Affidavit of Jack Marshall, Attorney at Law**  
**(Massachusetts and District of Columbia)**

In the Commonwealth of Virginia, City of Alexandria

The undersigned, **Jack Marshall**, being duly sworn, hereby deposes and says,

Regarding the information stated in the attached Motion to Dismiss in the case of

Walter Tuvell, plaintiff v. Jack Marshall, defendant (Civil Docket NO. 1781CV02701)

Filed in Middlesex Superior Court, Massachusetts, Trial Court of the Commonwealth Superior Court Department,

I declare that, to the best of my knowledge and belief, the information herein is true, correct and complete.

EXECUTED THIS 16 DAY OF Oct, 2017

Jack Marshall

**Certification of Acknowledgment of Notary Public**

State of Virginia

City of Alexandria

The foregoing instrument was acknowledged before me, a Notary Public, the 16 day of OCTOBER, 2017, by JACK MARSHALL, the person whose name is subscribed to within the instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person or entity upon which the person acted, executed this instrument.

CHECK ONE OF THE FOLLOWING (REQUIRED):

Personally known to me - OR -  Produced identification

Type of Identification Produced: VIRGINIA DRIVERS LICENSE

WITNESS my hand and official seal

Marshall  
Signature of Notary Public

REX MARSHALL  
Print Name of Notary Public



REX MARSHALL  
NOTARY PUBLIC 7025520  
COMMONWEALTH OF VIRGINIA  
MY COMM. EXPIRES DECEMBER 31, 2020

My Commission expires: 12-31-20