



No, Jack, That Blog Post Doesn't Make Your Butt Look Fat

April 6, 2010 By Mark Bennett 9 Comments

[L]awyers like Turkewitz are forbidden by their ethics rules (Rule 8.4, to be exact) from engaging in intentional misrepresentation or dishonesty, and there is no April Fool's Day exception.

They didn't have a *thing*, didn't lay a glove on me, although they appear to think they did. What the collected protests, rationalizations and insults (to me) *did* show—and this has great value—is the warped and inadequate way far too many lawyers think about ethics. This is why lawyers often get in trouble; it is a major reason why the public has a low opinion of the profession; and it is a big reason why I make my living the way I do.

April Fools Day is designed for individual practical jokes, not mass deception and political dirty tricks.

Defining what is unethical is my business.

Mu job is to let lawyers know what is and what isn't ethical.

Ethics is the study of right and wrong. Someone has to make a line before we can decide whether we need to move it.

All linkless quotes are from Jack Marshall (who eagerly dishes out the sneering condescension but can't take it) here and here.

Just as you should never trust a man who lets anyone else (governments and state bars included) define what is ethical, you should never trust a man who thinks he's in the business of defining ethics for other people. Ethics questions are not questions of what the law requires or allows, but rather philosophical questions. How others have answered those questions is something to consider, but it isn't dispositive—there are things that are against the law (or the rules) but ethical and things that are allowed by the law (and the rules) but unethical.

Here, in relevant part, is New York Rule of Conduct (PDF of Rules with NYSBA Comments) 8.4, which is the rule that Marshall accused Eric Turkewitz of violating with his April Fools gag:

A lawyer . . . shall not. . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Marshall's contention is that this proscription governs lawyers outside their professional lives. At first his position seemed black and white—that any conduct involving misrepresentation ("What a lovely gift!") was a violation of the rules and unethical. When pressed in comments, however, he backed off from that position:

Obviously some things, like white lies and culturally accepted falsehoods, are not covered.

(To which Eric Turkewitz responded, "I suppose, then, that's it's a good thing that April Fool's Day is culturally accepted.")

So it's *not* a black-and-white rule; lawyers are allowed to engage in *some* conduct involving dishonesty, deceit, and misrepresentation without putting their licenses in jeopardy. Whew. Now I don't have to drop out of the poker game or tell the judge what I really think of his new toupee.

Still, Marshall says that Turkewitz "clearly violated the legal profession's ethics standards" with his April Fools joke. Since the rule is not clear, the clarity must come from elsewhere. Where? Marshall is adamant that he needs no authority beyond the rule to make his point.

Marshall's answer to the question, "why is Turkewitz's April Fool's joke not the sort of culturally accepted falsehood excepted from Rule 8.4?" would, I suppose, be, "because I said so."

But "because I said so" is no way to persuade anyone other than those who already agree with you.

Then Marshall forges ahead and proposes six rules of April Fools Day ethics. Which is like the punchline to a joke about what you get when you cross a former prosecutor and a professor wannabe (H/T Brian Tannebaum). He should have held that post for another 360 days.

People have been thinking, talking, singing, and writing about ethics for as long as there have been people, and there is damned little that everyone agrees on. Even the simplest principles prove suspect (if I'm a masochist, should I really do unto others as I would have them do unto me? should I follow Kant's categorical imperative?).

I've been trying to write this blog post since this afternoon; the target keeps shifting. I left for dinner, and came back to find that now Marshall says:

I did not say that all lies are 8.4 violations. Stop putting words in my mouth. I did say that the spirit of 8.4 is that lawyers shouldn't lie, as lawyers, in public, or in private. That is true.

So, instead of trying to respond to Marshall's continual clarifications, in the immortal words of Iñigo Montoya (no ethics slouch), "Let me explain. No, it is too much. Let me sum up."

The disciplinary rules provide answers to the ethically retarded. They are a committee's efforts to simplify what should be sublimely complex questions. Relying on the disciplinary rules to tell you what is ethical is like relying on the dictionary to tell you what Robert Frost's "The Road Not Taken" means.

All ethical choices involve choosing between competing goods. Boring ethical questions involve clear choices. Interesting ethics decisions involve closely competing goods.

An ethics expert will acknowledge and discuss the competing goods, can explain the various theories for making a choice (deontology, utilitarianism, and so forth), and can explain and justify his own choice; he may even be able to convince people that his choice is the right one for them.

A "legal ethics expert," by contrast, thinks his job is to define what is and isn't ethical, and let lawyers know what he has defined. He can tell you what the disciplinary rules say, what the caselaw says, and the public policy behind the rules and the caselaw. He'll hand down his decision, and get offended if you challenge him—"I don't have to prove," he'll say, the rules mean what he says they mean.

Telling the truth is good. Not hurting people unnecessarily is also good. Those who think that the latter is sometimes the greater good will tell white lies—"what a beautiful baby." Those who think the former is always the greater good are not "wrong"; they're just self-righteous assholes.

Entertaining people is good. Most people agree that it is sometimes a greater good than telling the truth (if it weren't, we might live in the world of **The Invention of Lying**. Those who think that telling the truth is always a greater good than entertaining people are not "wrong"; they're just lousy company.

Punking political bloggers or the New York Times is, to all but the most worshipful, good. Whether entertaining people and punking the New York Times are, in a given situation, greater goods than telling the truth is not a question that can be answered by reference to the disciplinary rules. It might be an interesting ethical question, but probably not.

April Fools Day is good. That's a decision our society has made—it would no longer exist if it weren't. Whether April Fools Day is sometimes a greater good than telling the truth is an ethical question that our culture has answered affirmatively.

Whether an entertaining April Fools Day prank punking the New York Times is a greater good than telling the truth might be subject to discussion. Those who think that it never can be are not wrong; they're just humorless.

There is no linkage between "unethical" and "violative of the rules."

Accusing another lawyer publicly of violating ethical rules or acting unethically is not something to be done lightly. If you do it, you'd better be able to back it up with authority and reasoning. Your blog might be "not directed primarily at a legal audience," but when you poke a good lawyer with your ethics schtick you're going to get a legal audience, and unlike your non-legal audience they're going to see that you're all hat and no cattle.

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About the Author: Mark Bennett got his letter of marque from the Supreme Court of Texas in May 1995. He is famous for having no sense of humor when it comes to totalitarianism.



Ethics and Professionalism

9 Comments

JennaMcWilliams April 6, 2010 at 9:18 pm: Wait—it can't possibly be right to assert that something is good merely on the basis that we continue to agree to allow it to happen. On that logic, you'd have to agree that the death penalty, cosmetics testing on animals, and using up our natural resources are all good. I don't know much about the law, but I do know that 'majority rules' can be an absolutely heinous way to talk about ethics. Or maybe (probably) I misunderstand the point.

Mark Bennett April 6, 2010 at 9:24 pm: The death penalty is good because it takes a killer out of society, makes us feel butch, prevents vigilantism, and so forth. But that good has to be weighed against other goods—compassion, mercy, not killing innocent people.

JennaMcWilliams April 7, 2010 at 6:34 am: Okay, then I'd like to problematize how you define "good." Not all people agree that cosmetics testing on animals is good, and I bet that many of the people who do think that it's good would change their minds if they saw in such a way that a) passive distaste isn't enough to lead to change, because b) our society is set up in such a way that absent a critical mass of outrage, the corporations rule the day; mainly because c) they, and the government, and other institutions (including the legal system) have been very good at creating a narrative about what "we" believe to be good.

Mark Bennett April 7, 2010 at 7:03 am: I agree with you 95%. Our society could do with a whole lot more critical ethical thought, and a whole lot less "because we say so." We're a very young culture, and as a society we think and behave in many ways like a young child. We—as a society—are too eager to hand our power over to institutions.

Ken April 6, 2010 at 9:50 pm: I can't help but think we're all just helping this guy sell his power-point presentations.

Mark's Dad April 7, 2010 at 7:18 am: April Fools' Day.

Mark Bennett April 7, 2010 at 7:46 am: And I'm corrected again.

Clay S. Conrad April 7, 2010 at 10:10 am: Reading the original post, and the responses, and Mr. Marshall's petulant responses to the responses, gave me a few laughs. It was also a waste of a good 45 minutes.

Joseph Marchelewski April 7, 2010 at 4:33 pm: It sounds like someone just got their feelings hurt and went crying to mommy, doesn't it?

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- UberEats delivers anything I want to eat. Use my code **eats-nw0pp**, and they will give you \$20 off your first order.
- Nootrobox. Two GoCubes have as much caffeine as a cup of coffee, along with L-Theanine and other sparklies. They don't taste half bad either.

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