



Simple Justice

A Criminal Defense Blog

Jack Marshall Can't Take A Joke

I've gotten some ribbing from lawyers because of [my representation](#) of the defendant in [Stern v. Bluestone](#), the New York Court of Appeals case that held that lawyers still had first amendment rights, even when their writing could be construed as marketing. After all, few in the blawgosphere have argued against lawyer marketing as much as I have, and here I am with my laboring oar stroking as hard as I can.

The two positions are not, at least as far as I'm concerned, inconsistent in the least. Ironic, sure, but not inconsistent.

This leads me to Jack Marshall's [Ethics Alarms](#), where he argues that Eric Turkewitz's [April Fools Day joke](#) isn't merely ethically dubious, but:

No doubt about it, the Times was fooled, and should have checked the story. Then again, lawyers 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. The Times and other trusted Turkewitz to behave professionally and ethically, and he did not; and he is criticizing them? Web hoaxes are unethical, always, every day of the week, and web hoaxes perpetrated by lawyers are professional misconduct,

Well, not exactly. Actually, not even close. To avoid any potential allegation of misrepresentation, let me be more specific: Marshall's dead wrong.

Eric offers [his own explanation](#) for why Marshall missed the boat, but because such knee-jerk punditry so completely misapprehends the nature of the a lawyer's ethical duty, and itself is likely to mislead people, some further discussion seems warranted. I didn't fight to establish that lawyers don't give up their right to free speech upon admission to the bar only to have self-proclaimed ethicists seek to turn us into truthy automatons.

We're still human. We are not, by dint of Rule 8.4, forbidden from telling our spouse that those pants don't make her butt look fat. And we can have some fun by playing April Fools jokes without risking disbarment. Marshall's absolutist assertion is just plain wrong.

As lawyers, we may not make material misrepresentations for the purpose of deceiving others. Not that this doesn't happen all the time, but getting nailed for it isn't the *sine qua non* of our obligations. But that doesn't extend to our every breath. As Eric notes, we can pretend we advise space aliens, because no reasonable person would believe it to be factual. We can tell someone how much we like their tie even if it's butt ugly, because it's not a material fact even though it may be an outright lie. Heck, we can even use the word "respectfully" to judges we don't truly respect, even though we're "officers of the court."

We maintain the right to express ourselves, to use the rhetorical mechanisms available to the rest of society, to have opinions and to be silly and frivolous, as in having some fun. We retain the right to be human, even though we're lawyers.

Marshall lays at Eric's feet the responsibility to behave "professionally and ethically" toward the Times because the Times trusted him. That it was April Fools Day doesn't enter into the mix for Marshall. That Eric is a notorious April Fools prankster is ignored. The Times trusted Eric, so Eric is now obliged to wipe that silly smile off his face?

I am a huge proponent of ethical behavior by lawyers. But I am not a proponent of those who would impose bizarrely unrealistic and simplistic ethical prescriptions that would strip lawyers of their human nature, not to mention their freedom to have some fun. No one was harmed, nor was there any potential for harm. It might [be argued](#), as did [Eric Goldman](#) in reaction to the Turk's prank, that it doesn't help the credibility of the blawgosphere to engage in practical jokes like this, but that's a pragmatic argument. I disagree, and suggested that Eric needed to lighten up, but I can't fault his reasoning.

That Jack Marshall may not have found Turk's prank funny is another matter. I did, but humor is personal and not everyone finds it in the same place. But his complaint isn't that the joke was lousy, but that it was unethical. That's a horse of a different color. Marshall, [whose bio says](#) he's a graduate of Georgetown Law and a former criminal defense lawyer, is the proprietor of a business called 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.

It's unclear what makes Jack Marshall an ethicist, beyond the same qualifications that make someone a social media guru. But if one is going to set oneself up as an authority on a subject like ethics, then it's incumbent upon such an expert to do a far better job of thinking than appears here. Of course, if Marshall is only posting these provocative half-baked accusations to draw business to his ethics consulting firm, well then, maybe his superficial and mistaken opinion on the Turk's prank can be better understood.

But would that be ethical?

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14 comments on "Jack Marshall Can't Take A Joke"

Ken
April 5, 2010 at 1:19 pm

Based on Jack Marshall's column, today I had no ethical option — I told my wife that yes, those pants do make her look fat.

BRIAN TANNEBAUM
April 5, 2010 at 1:26 pm

Turk, and I mean Lawyer Turk, has the same obligation not to deceive the New York Times with his joke as he does not to show up to a kids birthday party dressed up as a clown.

Turk
April 5, 2010 at 2:22 pm

Turk, and I mean Lawyer Turk, has the same obligation not to deceive the New York Times with his joke as he does not to show up to a kids birthday party dressed up as a clown.

Good thing Marshall didn't see me dressed up like a turkey for a Thanksgiving Turkey Trot 5-miler last year. He might have thought I was trying to deceive other runners, though I thought it was clear that I wasn't an actual turkey based on the cigar I was chomping.

SHG
April 5, 2010 at 2:38 pm

That was you?

Stephen
April 5, 2010 at 3:27 pm

And you were absolutely right to do so.

The only ethical honesty rule I'm currently bound by is that I can't present false claims in court which seems to be the sort of thing that you want to really restrict anyway. It's not that lawyers can't lie, they just can't lie for a living.

Sojourner
April 5, 2010 at 4:09 pm

Bravo everyone. Words to live by: Keepa Senza Huma

My Shingle
April 5, 2010 at 5:21 pm

I'll Take Turkewitz on Ethics Over Jack Marshall Any Day of the Week

Over at his sparsely populated and impossible to navigate blog, Ethics Alarm, American University Washington College of Law adjunct ethics professor Jack Marshall accuses wildly popular New York Personal Injury Law Attorney Law blogger Eric Turkewitz of violating Ethics Rule...

Turk
April 5, 2010 at 6:19 pm

I knew that cigar was a clever disguise.

Hull
April 5, 2010 at 11:39 pm

I for one was very envious of ET's 4-1 ruse. Wish I'd thought of that. Very elegant. I can see why Ashby Jones loved it. Other than that, I am reminded of what a talented but hopelessly demented female senior M&A partner in DC once said back in the day: "Lighten up, Golden Boy. I got something ethical for you right here."

Jack Marshall
April 6, 2010 at 2:17 am

Eric's defense compared intentionally deceiving his readers and the media—and crowing about it—to lawyer advertising, a completely false comparison. You, like Eric, seem to also confuse the right to make a false statement under the Constitution with the ethics of doing so, which is completely different. The anti-gay fanatics who disrupt military funerals are, the courts say, within their rights, but it sure is unethical conduct. Sorry: lawyers can't, for example, surreptitiously tape a conversation according to many Bar Rules, because it is "misrepresentation," even though it may be legal for them to do so.

Your over-the-top argument that my assessment "would impose bizarrely unrealistic and simplistic ethical prescriptions that would strip lawyers of their human nature, to mention their freedom to have some fun" is really laughable, especially since my own niche in the legal ethics training world is that my seminars include humor and whimsy. I'm saying that lawyers don't have the option of setting loose web hoaxes. The Horror. Your defense of "No one was harmed, nor was there any potential for harm" is 1) a hoary rationalization that appeals to consequentialism. Whether someone is harmed by an unethical act comes down to moral luck; it has no bearing on the ethics of the act itself. 2) You're wrong. Ask the NYT if someone was harmed. Ask the people who had to take the time deny the story. Time is money, and mistakes are credibility. 3) I write about the ethics of humor and comedy frequently, as I have written comedy material for a living in the past. Whether a hoax is funny or not, however, is irrelevant to the legal ethics issue.

Finally, though I am used to people who have nothing better in their arsenal to use the "self-appointed ethicist" canard, it's a pretty pathetic tactic, and unjustified. You are welcome to my full CV if you can lift it; I have made my living teaching, studying training and testifying on legal ethics for more than a decade. Ethics Alarms is not directed primarily at a legal audience, because there are many fine resources on the topic. I've been reading similar gratuitous insults all day, yet none of the insulters have managed to come up with an ethically valid defense for what Eric did, just rationalizations and non sequiturs.

SHG
April 6, 2010 at 2:46 am

And yet you're wholly unpersuasive. By the way, nothing like being just-a-wee bit unbearably narcissistic.

Addendum: Since you've rushed around the blawgosphere writing long and tedious responses to most of the lawyers who posted about how you're wrong (and if there's any practicing lawyer who agrees with you, I've yet to see it), and then posted a lengthy post trying to [resurrect your honor](#) after this marketing fiasco, I felt compelled to note your efforts. This one really nailed it for me:

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.

I have to give you credit for your perseverance in the face of universal condemnation. Missing from your effort is the ability for self-examination. Screaming "I'm right and everybody else is wrong," is not an argument. Screaming "the fact that everybody else disagrees with me proves that I'm right and everybody else is wrong," is also not an argument. It's a cry for help. Remember, self-absorption isn't the same as self-examination.

Turk
April 6, 2010 at 3:17 am

OK, that comment has 385 words. Not one of which was used to reference an actual case or ethics opinion to support your claim.

Mark Bennett
April 7, 2010 at 3:00 am

I wonder if part of the problem is that Jack is used to writing for a non-legal audience that accepts his pronouncements *ex cathedra*.

SHG
April 7, 2010 at 10:56 am

Possibly, though it's hard to believe that he's grown so disconnected from rational thinking that the weight of universal condemnation didn't have some impact.

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SCOTT H. GREENFIELD

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SHG

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THAT'S RIGHT. WE BAD. KINDA.

