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Swimming with Shark

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Swimming with Shark

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Lawyers in Your Living Room!: Law on Television
(Michael Asimow ed. 2009)

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Lawyers in Your Living Room!

Law on Television

Michael Asimow, Editor



CHAPTER 14

Swimming with *Shark*

NANCY B. RAPOPORT

I am mourning the cancellation of CBS's show, *Shark*, for many reasons: I love the name of the show;¹ I love watching James Woods act;² I found the writing compelling; and I teach law students about legal ethics. Why is that last reason important? Because Sebastian Stark (James Woods's character) provides me with more ethical missteps than I could ever use in a single semester. What makes *Shark* even better is that Sebastian Stark isn't one-sidedly bad. He's a "reformed" criminal defense attorney trying to do the right thing. Unfortunately, his reformation has not improved his ethics. He is way over on the wrong side of the ethical line. (Part of the reason that Stark is so ethically challenged, of course, is that a show featuring ethical lawyers probably wouldn't draw large audiences.³) Fortunately for those of us who love watching TV shows about lawyers—even about ethically challenged lawyers—*Shark* drew large enough audiences to justify two seasons. I just wish that it had been renewed for a third season.

Early on,⁴ we learn why Stark is working for the District Attorney's Office. Stark was an extremely successful criminal defense lawyer—one of the best—and in the case that opens the pilot, he gets a celebrity acquitted of attempted

Shark

Aired:

- September 21, 2006–
May 20, 2008, CBS

Cast:

- James Woods
(Sebastian Stark)
- Danielle Panabaker
(Julie Stark)
- Jeri Ryan
(Jessica Devlin)
- Sophia Brown
(Raina Troy)
- Sarah Carter
(Madeleine Poe)
- Sam Page
(Casey Woodland)

Awards:

- Emmy nomination for
Outstanding Art Direction
for a Single Camera Series
(2007)
- James Woods, Satellite
Award nomination for Best
Actor in a Series Drama
(2007)



Courtesy of Photofest.

SHARK

Sebastian Shark (James Woods) instructs his associates in the finer points of ignoring legal ethics.

murder charges on the grounds that the celebrity meant to beat his wife up, but not to kill her. Later, when the celebrity does kill her, Stark retreats from his criminal defense practice and has a month-long crisis of conscience. During this hiatus from practice, the Los Angeles mayor approaches Stark and asks him to head a new high-profile crimes unit in the District Attorney's Office. Stark agrees, and he becomes a Deputy DA.

Joining Stark's new team is a collection of junior attorneys. Of all of the lawyers on Stark's team, only one has volunteered to work in his unit; the rest of the lawyers are on their way out the door for various reasons, and working for Stark is a last-ditch effort to save their jobs.

In the pilot episode, Stark makes it clear to his staff that he plays by three simple rules.

My cutthroat manifesto. These rules guide every decision I make on every single case. Rule number one: Trial is war; second place is death. Rule number two: Truth is relative. Pick one that works. Rule number three: In a jury trial, there are only 12 opinions that matter, and, Miss Troy, yours most decidedly is not one of them.

To me, the point of *Shark* (aside from the sheer enjoyment of watching Woods) is watching how the junior attorneys who work for Stark

slowly but surely change their ethics to conform more closely to his dubious sense of right and wrong. In fact, they have very little choice: if they do not reorient their ethics to fit into his “ends justify the means” ethos, they will be out on the street, looking for new jobs.

And there’s the rub. Presumably, these new attorneys know the basic ethics rules. Don’t lie to the court. Don’t break the law. Don’t abuse third parties. But those rules often conflict with Stark’s manifesto for winning cases, and the members of Stark’s team almost immediately start breaking those rules, rationalizing their decisions as they go.

The pilot episode highlights the clash between the ethics rules and Stark’s rules. Stark fires Billie Willis, one of his junior attorneys, because she fails to prepare him for some surprises at trial. But the divide between the two of them was clear even at the beginning of the episode. When Stark is doling out assignments to prepare for trial, another member of Stark’s team, Casey Woodland, finds himself without an assignment.

WOODLAND: [eagerly] What about me?

STARK: Oh, yeah. I want you to go down to Jensen’s and get a double order of cheese fries.

WOODLAND: [laughs] You’re joking, right?

STARK: Did I chuckle? You’re gonna bring the fries to Jurors’ Bailiff Ray Sabado. Ray’s in charge of the jurors on this case. Two things he loves more than life itself: He loves yakking with the jurors and he loves to eat. That bag of fries is gonna buy us more insight than 10 jury consultants, okay?

WILLIS: Uh, that’s prosecutorial misconduct.

STARK: [acting scared] Well, we’ll just have to be brave on this one. [normal voice] We have to prove that Terrence Rourke was a victim of murder. We need to make that jury hear his voice.⁵

See how Stark begins the process of manipulating his subordinates’ ethical sensibilities? He simply implies that they are all cheating for a good cause. And his protégés learn quickly.

It is possible, of course, that the reason that Stark cheats is that he knows, from personal experience, that some defense lawyers cheat. He knows that *he* cheated. Perhaps, from his perspective, he is just leveling the playing field. But from watching his character evolve over two

seasons, I got the sense that he moved from wanting to win just for winning's sake to wanting to win in order to put dangerous people behind bars. Unfortunately, though, he never changed his own ethics rules as part of that evolution. He never evolved to understand that "the good guys" *do* need to play by the rules.

Here is another example of how quickly Stark's team supplants legal ethics with Stark's own ethics rules. In an early episode, two of Stark's team members, Madeleine Poe and Casey Woodland, fudge their way into obtaining a search warrant, although the evidence obtained in that search later gets suppressed:

POE: According to the M.E., the slug they took out of Rodriguez "appears to be nine millimeter."

WOODLAND: Ransom has a 9-millimeter handgun registered in his name. [They enter the High Profile Crimes Unit office.]

POE: The report's vague. We need a conclusive finding to have a shot at a warrant.

WOODLAND: Partner's statement puts Ransom at the scene.

POE: Judge Pearlman is a Fourth Amendment freak. We have no gun. She won't grant our search warrant petition unless the bullet's a solid match. [sits at her desk]

WOODLAND: [sits at his desk] Ballistics'll confirm the caliber of the slug in a few days.

POE: We don't have a few days. We need to get into Ransom's condo now.

WOODLAND: It's not like we can misstate the M.E.'s report.

POE: [deadpan] Of course not. That would be unethical. Unless . . . it was a simple oversight made under time pressure.

WOODLAND: [smiles] Forget it.

POE: Fortune favors the bold.

WOODLAND: And what's that supposed to mean?

POE: Sometimes you got to have some balls.

WOODLAND: [chuckles] Well, I've never had any complaints.

POE: So I hear. [They look at each other.]

WOODLAND: [agreeable shrug] So, it was an oversight.

POE: [smiles] Happens all the time.⁶

After the court excludes evidence from the faulty search, the DA (Jessica Devlin) orders Stark to reprimand Poe and Woodland. Instead, he play-acts their reprimand in the DA's presence:

DEVLIN: Well, you dodged a bullet.

STARK: That wasn't even a BB, everything's under control.

DEVLIN: I want Poe and Woodland reprimanded.

STARK: I'm . . . gonna read them the riot act.

CUT TO: [Courthouse hallway. Day. The team stands quietly. Stark strides up to them.]

STARK: [loudly] Listen up! Everybody stop talking and listen to me! [Jessica stands at a distance, watching the "riot act reading" unfold.]

STARK: [quietly] Everybody nod your heads, pretend I just kicked your puppy, okay. You understand me, [loudly to Casey] right, GQ? [The kids bow their heads, looks of shame on their faces. Jessica seems to like how Stark is handling this.]

STARK: Thank you. [quietly] Good, we're in great shape. All we have to do is break down Ransom's alibi and we are home free, all right. [to Casey] GQ, I want you to go over to the girlfriend's house, I want you to use that million-dollar smile, and I want you to knock her off-her story. [loudly] Do you understand me? Say yes!

WOODLAND: Yes.

STARK: Thank you! [stabs his finger towards Madeleine and Martin] You and you! [quietly] Talk to Ransom's Venice neighbors and see what they know. [loudly] Got it? [He starts to leave.]

WOODLAND: So you're not mad about the petition thing?

STARK: [stops, looks at Jessica, loudly] Almost forgot! Consider this a lesson! The next time that you cheat, [quietly] don't get caught. [yells] Got it?! [He looks at Jessica, a world-weary look on his face. Jessica seems mollified.]

But Stark is far from one-dimensional. He lives by a moral code, although not the one governed by normal rules of legal ethics. He obviously loves his daughter, even though his workaholic nature means that

he ignored her for most of her first 16 years. I love the fact that Stark is clearly a perfectionist about his work—and I wish that more lawyers emulated his work ethic.⁸ As Stark explains, “I never make an argument in open court before it has been PERFECTED in this room.”⁹ Moreover, Stark does not suffer fools, firing one of his junior attorneys after this exchange:

- STARK: [restrained] You missed [the evidence about] rehab?
- WILLIS: [defensive] It was a voluntary commitment. If I'd had more time. . .
- STARK: [gesturing angrily] Anita had one day on this case and she came up with it. What were you thinking?
- WILLIS: I'm sorry. I did the best I could.
- STARK: You know what, it's not your fault, it's my fault. In between writing three briefs, putting together my witness list, formulating my direct, I should have found time to do your job, too.
- WOODLAND: [knight in shining armor] Look, she apologized. . .
- STARK: [mad] Do you mind?
- WILLIS: I don't need you to defend me.
- STARK: There is no defense for mediocrity.
- WILLIS: [pissed] I've been up for 32 hours. I interviewed his friends, his family, his teachers.
- STARK: You want a merit badge? In jury trials, you don't get a second chance. Your incompetence has put us in a major hole.
- WILLIS: [quietly, on the verge of tears] If I'm such a major screw-up. . .
- STARK: Mm-hmm.
- WILLIS: . . . why don't you fire me?
- STARK: That's the first helpful suggestion you've had. Good luck with the rest of your career.¹⁰

Most of all, I love the fact that Stark really, truly wants to do the right thing: put the bad guys behind bars. (Let's leave aside the question of how someone can do the right thing when he does it 100 percent the wrong way. I am writing about a fictional character here.) He has become

a true believer in the DA's mission, so much so that when his boss loses the election, he asks her to consider coming to work for him:

STARK: You really think you're gonna be happy wining and dining clients and falsifying your billable hours?

DEVLIN: Didn't hurt your bottom line.

STARK: It cost me plenty. There's no free lunch, Jess. [beat] You know, I could always use another good prosecutor.

[She looks at him apprehensively.]

DEVLIN: [laughs] You're offering me a job?

STARK: [laughs as well] Ironic, huh? But I've said it before. You're a natural-born trial attorney. You belong on the front lines putting away the bad guys.

[They stop walking and face each other.]

DEVLIN: You want me to give up a million bucks a year and house seats to the Philharmonic to make 80 grand working in a crappy office for a control freak who is eventually gonna wind up disbarred?

STARK: [smiles] That is the glass half-empty version. [seriously] Here's the thing. You can sell out, Jess. God knows I did. And for a while, everything will be okay. But then one day, you're gonna wake up and you're gonna realize you're the bad guy.

[Jessica seems to agree, yet shakes her head.]

DEVLIN: It would never work. We'd kill each other.

STARK: But you've gotta admit, we make a hell of a team.¹¹

Later, we learn just how serious Stark was about switching from defense lawyer to Deputy District Attorney. When one of his earlier ethics violations catches up with him, the California State Bar disbars him, and Stark goes to Las Vegas to drown his sorrows. While he licks his wounds there, one of his former clients pressures him into returning to defense work. Stark soon discovers that he no longer has the stomach for that work. After a few more creative plot twists, Stark's willingness to frame his own client puts him back in the good graces of the California Bar, and he gets his license back. (As I watched this episode, I wondered if my criminal defense counsel friends viewed *Shark* with the same gritted-teeth resignation with which I used to view *Ally McBeal*.)

Shark is one of my guilty pleasures. I love the characters but hate their constant rationalizing. I especially hate the extent to which Stark

forces his team to loosen their grip on the rules of legal ethics. When I see Stark give his team orders, I see every defendant in a corporate scandal over the past decade. ("He told me to 'make the numbers,' so I just made them up.")¹² Smart people, even very smart people, are capable of tricking themselves into doing very stupid things. Just because Stark himself manages to get out of his various ethics mishaps does not mean that his young team members will be able to avoid their own disciplinary hearings down the road.

And Stark's ethics missteps are not just a little over the line. They're outrageous. In the season one finale, Stark has spent weeks brooding over the fact that he failed to convict Wayne Callison, a serial murderer who represented himself. Stark is now determined not to let Callison get away again. Was it the fact that Stark let a guilty person get away or the fact that he was beaten by someone without a law degree? While Callison embarks on a book tour (*The Hunted Man: How I Beat the Toughest Prosecutor in America*), Stark prepares to prosecute him for a recently discovered murder that appears to have the same M.O. as Callison's prior murders. Not only does Stark want his team to "manufacture" probable cause in order to get a search warrant, but he instructs them to suppress what might very well be exculpatory evidence.¹³ Suppressing exculpatory evidence is not just "bad"; it is, quite literally, one of the worst things that a prosecutor can do.

But wait! In the immortal words of TV pitchman Ron Popeil, there's more.¹⁴ Not only does Stark actually destroy that exculpatory evidence by burning it, but late in the episode, Stark gets Callison alone and (spoiler alert!)¹⁵ confesses to him that the murder for which Callison has just been convicted wasn't even a murder at all. (This confession, of course, comes as no surprise to Callison, who knows full well that he didn't commit the murder.) Stark explains to Callison that Stark found a suicide victim, talked to the victim's mother about using the body as a way to convict a serial killer, persuaded a young medical examiner (who owed his job to Stark) to cut up the body to make it look like Callison's M.O., and then got the medical examiner to opine that Callison had probably committed the murder. Stark then simultaneously exhibits his knowledge of, and contempt for, the rules of legal ethics.

CALLISON: [shaking his head in disbelief] And they say I'm crazy.

STARK: Trust me, you are crazy.

CALLISON: Well, I will be sure to bring all this up on appeal.

STARK: Go for it. But I've got another big one for you. Loose ends, Wayne. There's not a single scrap of paper. Not one e-mail to confirm what I just told you. Hannah Morton's remains have been cremated. None of my lawyers knows a thing, and the people who do aren't saying a word.

When a real lawyer becomes a member of any state's bar, he or she swears to uphold the law. But in TV land, Stark commits the ultimate lawyer taboos: he destroys evidence, fakes a murder, and lies to the court in order to put a serial killer in prison. And that's just in season one. Fast forwarding to the series finale at the end of season two, we find that Stark's decision to frame Callison has come back to haunt him. Callison escapes from prison, kidnaps Stark's daughter Julie, and demands that Stark present his best argument for why Callison should return Julie to Stark unharmed. During Stark's argument, Callison forces Stark to admit to Julie that he faked a murder in order to put Callison in prison.

The irony of Callison's demand ("prove to me that you deserve to get your daughter back") is that Stark, who has been an absentee father for most of Julie's life, has managed to avoid imprinting his daughter with his own lack of ethical boundaries. Stark has, however, imprinted two seasons of relatively new lawyers with the understanding that violating the ethics rules is perfectly fine as long as a higher purpose—putting the criminals away—is served. These lawyers will become the next generation of district attorneys, law firm partners, and legislators. Thanks to Stark, they have learned that they can safely substitute their own views of right and wrong for those that the legal system has put in place. They, in turn, will send forth their own trainees, also imprinted with Stark's "ends justify the means" mentality, and so on, and so on, until some brave lawyer decides that ethics must trump expediency.

In a way, Stark teaches his legal team in much the same way that the fictional Harvard law professor, Charles Kingsfield, teaches his impressionable first-year contracts students in the movie *Paper Chase*. ("You come in here with a skull full of mush and you leave thinking like a lawyer.")¹⁶ Kingsfield teaches his students to love competition—to thrive under extreme pressure—as a way of winning Kingsfield's (temporary) approval. But the way that Kingsfield teaches his students to think like a lawyer robs them of their individuality and their compassion. They leave

law school thinking in terms of rules and exceptions, not in terms of right and wrong.¹⁷

This whole idea of imprinting impressionable lawyers is not just fiction. In one of my favorite studies, Professor (and now Dean) Larry Hellman asked students who were enrolled in one of his professional responsibility courses to keep track of ethics violations that they spotted as they worked for lawyers during that semester.¹⁸ As these law students were busily learning the standard ethics rules in his class—don't lie, don't steal, don't cheat, don't fake knowledge—they were also watching real lawyers violate each and every one of those rules. The students in his course reported instances of neglect, incompetence, conflicts of interest, and other equally nightmarish real-life ethics abuses.¹⁹ Which do you think made the more powerful impression on the students—the law professor (who wasn't making a living by practicing law) talking about the "thou shalt nots," or the lawyers (with the fancy cars and houses) telling the students that the real world was very different from how things work in the ivory tower of academia?

Shark makes for mighty entertaining viewing, but the lesson is clear: when it comes to teaching right from wrong, it's what people do, not what they say, that counts.

Endnotes

1. Who wouldn't love the name of a lawyer show called *Shark*? It's obviously a play on the traditional joke about a lawyer who's been in a shipwreck and has to swim to shore in shark-infested waters, but who arrives on land untouched because the sharks line up on either side of him to guide him safely to land. Why? Professional courtesy.

2. I am not alone in thinking that James Woods is an extraordinarily good actor. After all, he has been nominated twice for an Academy Award, nominated six times for an Emmy (with two wins), and nominated eight times for the Golden Globes (with one win). For the full list of his awards, see <http://www.imdb.com/name/nm0000249/awards>.

3. See Terry Carter, *Why Are TV Lawyers Ethically Challenged? That's Hollywood, Writers Say*, http://abajournal.com/news/why_are_tv_lawyers_ethically_challenged_thats_hollywood_writers_say/ (Feb. 9, 2008) ("[Bill Fordes, a *Law & Order* writer], points out that if you want, you can watch honest lawyers on Court TV, which gets only about 600,000 viewers at most and thus nowhere near the dollars for 30- and 60-second commercials flowing to L&O."]).

4. Spike Lee directed the pilot (2006).
5. <http://www.twiztv.com/scripts/shark/season1/shark-101.htm>.
6. <http://www.twiztv.com/scripts/shark/season1/shark-102.htm>.
7. *Id.*
8. When he was a rich defense lawyer, Stark built a replica courtroom inside his house so that he could rehearse his arguments and prepare his examinations of witnesses at home. And it's not just any old courtroom replica. Stark has floor panels taken from the U.S. Supreme Court building (I don't want to know how he managed to get them), Clarence Darrow's former chair, and Judge Lance Ito's desk lamp.
 9. <http://www.twiztv.com/scripts/shark/season1/shark-101.htm>.
 10. <http://www.twiztv.com/scripts/shark/season1/shark-101.htm>.
 11. <http://www.twiztv.com/scripts/shark/season1/shark-122.htm>.
 12. The push to "make the numbers" by making the numbers up is what happened at Enron, WorldCom, Tyco, etc. I have just read Cynthia Cooper's book describing her experience uncovering the fraud at WorldCom, and it is fascinating. CYNTHIA COOPER, EXTRAORDINARY CIRCUMSTANCES: THE JOURNEY OF A CORPORATE WHISTLEBLOWER (2008).
 13. The failure to disclose potentially exculpatory evidence to the defense is commonly called a *Brady* violation. "[T]he term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (footnote omitted).
 14. *See, e.g.*, <http://www.npr.org/programs/morning/features/2002/june/ronco/> ("But wait! There's more!").
 15. I've always wanted to say that.
 16. <http://www.imdb.com/title/tt0070509/quotes>.
 17. For an intriguing take on the "bleaching out" of lawyers, see David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998).
 18. Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991).
 19. *Id.* at 601–05.