

Hello, My Name Is . . .

By Peter R. Jarvis and David J. Elkanich

Recently, the Connecticut Supreme Court upheld discipline of an associate for committing a knowing misrepresentation.<sup>1</sup> The associate did not himself misrepresent a material fact but was disciplined for failing to correct the misstatements of another lawyer (his employer) who misspoke at an ex-parte hearing. The associate knew his employer made false statements, and the court believed the associate had a duty to correct them.

Oregon would reach—indeed arguably has already reached—the same conclusion. *See, e.g., In re Hoffman*, 14 DB Rptr 121 (2000) (stipulation for discipline by a lawyer who failed to correct an unknowing misrepresentation by prior counsel that the lawyer subsequently learned to be false, and who arguably furthered the misimpression to opposing counsel and to the court); *In re Jenson*, 1 DB Rptr 107 (1986) (disciplining an attorney who represented that an individual was his client when she was not in order to procure a mistaken identification by a prosecution witness and thereby cause his client’s acquittal). In fact, even proposed new Oregon RPC 5.2, which provides that a subordinate lawyer is not subject to discipline for following a supervisory lawyer’s “reasonable resolution of an arguable question of professional responsibility” would not help this associate: knowing misstatements of material fact must be corrected, and any contrary conclusion is, at this late date, unreasonable and unarguable.

Nevertheless, the case raises interesting questions about the extent to which lawyers are, or at least should be, subject to discipline for affirmative misrepresentations or for not correcting misrepresentations or misimpressions left by others. Present Oregon DR 1-102(A)(3), like the parallel rule in most states, broadly prohibits “conduct involving dishonesty, fraud, deceit, or misrepresentation.” By its terms, and as applied by the Oregon Supreme Court and other courts, this rule is not limited to dishonest conduct in the course of a lawyer’s legal practice but includes knowing misrepresentations or concealments of material facts in a lawyer’s private life as well.<sup>2</sup> On the other hand, one positive development in the proposed new Oregon rules is the proposed addition of the words “that reflects adversely on the lawyer’s fitness to practice law” after the word “misrepresentation.” *See* Proposed Oregon RPC 8.4(a)(3). But how will this new language be interpreted?

Consider whether hip-hop artist Eminem would be disciplined if he were an attorney. Eminem may be his stage name, but his true name is Marshall Bruce Mathers III. And on one of his more popular songs, Marshall Mathers declares: “Hello, my name is Slim Shady.” It is easy enough to say that art is art and that stage names and musical or literary performances cannot constitute material misrepresentations or concealments of material facts, but how slippery is this slope?

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<sup>1</sup> *Daniels v. Alander*, 844 A2d 182 (Conn 2004).

<sup>2</sup> *See, e.g., In re Hiller*, 298 Or 526, 533-34, 694 P2d 540 (1985). *See also* Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule—A Rule with a Future*, 74 OR L REV 665 (1995).

Suppose that in order to get away for a quiet weekend and avoid his fans, Marshall Mathers were to register at a hotel under a different pseudonym—say, Michael Miller. Hopefully, we can all agree that Mr. Mathers’ desire for privacy would not reflect adversely on his fitness to practice even if legions of fans might be misled into looking for him elsewhere and the hotel lost an extraordinary opportunity for free publicity.

But now suppose that the poseur is not Eminem seeking to avoid publicity but John Q. Attorney seeking to come by a restaurant reservation that is hard to obtain. So when he calls up, he represents himself to be Marshall Mathers III in the hope that the person taking the reservation will think he is Eminem and bump him to the front of the line. And suppose his strategy works. Or suppose that he simply shows up at the restaurant and that due to a passing physical resemblance, a hostess who is an Eminem fan thinks that he is Eminem and that while seating him ahead of others, she asks for his autograph. What if an *Oregonian* columnist finds out about this “deception” and writes a column, with the result that someone files a Bar complaint? Was John Q. obligated to answer the rhetorical/artistic question that Eminem did in his song: “Will the real Slim Shady please stand up?”

A line is going to have to be drawn somewhere, and we are not sure where that “somewhere” will ultimately be. Although we believe that lawyers should not generally be subject to sanctions as lawyers for conduct in their private lives that would not lead to civil or criminal liability if performed by non-lawyers, this may not always be the case.