WHOSE LIFE IS IT, ANYWAY?
MEDIA RIGHTS AND THE MODEL RULES

By Kip Purcell

Trial lawyers are riveting storytellers – and outside the courtroom, at least, their tales tend to revolve around the lawyers themselves. As überlawyer Bernie Nussbaum recently remarked during an ABA Journal interview, "We're discussing my favorite subject – me."[1] But the story of a lawyer's professional life is oftentimes inextricably intertwined with the stories of his clients. When a lawyer decides to capitalize on his life experiences by selling his story, what part of that story does he really own? And what can he ethically do to secure rights to the rest?

The Model Rules of Professional Conduct explicitly address a piece of this problem, but only a small piece. Rule 1.8(d) provides that "[p]rior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation."[2] According to commentators, "[t]he policy served by the Rule is obvious":

> A lawyer holding media rights to the story of the very case in which he is involved has an interest in seeing the case sensationalized. The lawyer also has the means of sensationalizing it, by his choice of tactics and by the recommendations he makes to the client (not to plead guilty to a lesser charge, for example). Thus, the risk that the lawyer will succumb to these temptations and actually provide less than vigorous representation is not trivial.[3]

Historically, the need for a categorical ban on a lawyer's negotiation of media rights contracts during the pendency of a representation has not been "obvious" to everyone. In Maxwell v. Superior Court,[4] for example, the California Supreme Court suggested that lawyers' egos – and their solicitude for their own professional reputations – are the best insurance against the risk that an advocate holding an interest in the media rights to his own client's case will undermine the quality of the representation by taking steps to maximize publicity values. "A quiet strategy that succeeds," the court mused, "may well make a better story than a flamboyant failure."[5] In other words, the lawyer's natural desire to win – or at least to achieve the best possible compromise – would ordinarily trump the temptation to play for the cameras. At the same time, as the Maxwell court and other Rule 1.8(d) critics have pointed out, conflicts of interest are inherent in many fee arrangements; a lawyer paid by the hour may be motivated to prolong his client's dispute, while a lawyer paid a flat fee may have an incentive to dispose of the matter too hastily.[6] The Rules of Professional Conduct, far from forbidding these compensation schemes, merely enjoin lawyers to be sensitive to the ensuing conflicts and to resolve them in the clients' favor.[7]

But beyond the borders of California, the dissenters from Rule 1.8(d) have been few and far between. It is no exaggeration to state that "courts, scholars and organizations of the bar … have uniformly denounced the execution of literary and media rights fee arrangements between

attorneys and their clients during the pendency of a representation."[8] The issue appears to be completely settled. (On the other hand, "hardly any" courts have held that the mere existence of such a contract requires reversal of the client's criminal conviction.)[9]

If the concern underlying Rule 1.8(d) is that attorneys trafficking in literary rights will throw their clients under the media bus, it is by no means clear why "media rights fee arrangements between attorneys and their clients"[10] should be the rule's only subject. What about media rights arrangements between the attorney and others? Might these arrangements not create equally powerful inducements to enhance a representation's publicity value at the possible expense of the client?

Perhaps because the precursor to Rule 1.8(d) focused exclusively on "arrangement[s] or understanding[s] with a client by which [the attorney] acquire[d] an interest in publication rights,"[11] attorneys accused of violating the rule have sometimes raised an "it's all about me" defense. Thus, in Harrison v. Mississippi Bar,[12] the attorney explained: "The contract was for my life story, not that of my client. The title of the story was 'The Garnett Harrison Story' and it was my understanding that the events surrounding [my client's] case were to constitute only a small portion of the story."[13] But the attorney's defense foundered on the facts – because, in conjunction with contracting to sell her own life story, she had obtained a release from her client – and the Mississippi Supreme Court proceeded to disbar her, on that and other grounds.[14] The court's conclusion that the attorney had run afoul of Rule 1.8(d) seems correct, though the court's stated rationale for disbarring her – that "[r]ealization of personal profit from representation of a client creates an appearance of impropriety that the profession can ill afford"[15] – will send a chill down the spine of any lawyer who has ever worked for a living.

More recently, and on more sympathetic facts, the District of Columbia Bar Association has reexamined the question whether a lawyer can market the rights to his own life story during the pendency of a high-profile representation without contravening Rule 1.8(d). The lawyer in question (who wisely sought an advisory opinion from his local ethics committee before inking any deals) represented a pro bono client in litigation that had drawn extensive media attention – and as far as the lawyer was concerned, the media's "primary interest" was "in the lawyers who are conducting the litigation rather than the client."

> The media representatives would like to discuss an arrangement under which the [lawyer] would receive compensation from them for the [lawyer's] cooperation and the rights to the [lawyer's] story; the client, while not the primary focus of the media's interest, would also receive compensation "for his life rights." The [lawyer] would not divulge any confidential information protected by Rule 1.6 ....[16]

In the ethics committee's view, such arrangements would not implicate Rule 1.8(d):

> That provision prohibits a lawyer from "mak[ing] or negotiate[ing] an agreement giving the lawyer literary or media rights to a portrayal or account" based on the representation (emphasis

> added). We believe the rule prohibits a lawyer from acquiring media rights from the client or otherwise; it does not, however, prohibit the lawyer from making an agreement with media representatives with respect to his own media rights.[17]

By contrast, when F. Lee Bailey struck a book deal with G.P. Putnam during his defense of Patricia Hearst, the Ninth Circuit had little difficulty concluding that Rule 1.8(d) – which was then in draft form – would have "explicitly … prohibited" the contract had the rule been in force, even though "the contract itself was not an acquisition from the client of an interest in publication rights."[18] And while the District of Columbia Bar's ethics committee found Rule 1.8(d) inapplicable to such situations, the committee emphasized that the scenario did raise a "serious issue" with respect to personal-interest conflicts under Rule 1.7 – because "any agreement made by a lawyer with media representatives presents a conflict of interest if, as a practical matter, its value to the lawyer might fluctuate depending on later events in a related matter in which the lawyer is representing a client."[19] The lesson is that any lawyer contemplating an agreement to sell "his" story with respect to an ongoing representation would be well advised either to await the representation's termination or else to seek the bar's blessing in advance.

By its terms, Rule 1.8(d) ceases to constrain a lawyer's conduct after "the conclusion of [the] representation" to which the media seek rights. Rule 1.7 also becomes inapplicable then. But the lawyer must at that point pay close attention to Rule 1.9, concerning duties to former clients. In particular, the lawyer may not

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit … with respect to a client, or when the information has become generally known; or
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> (2) reveal information relating to the representation except as these Rules would permit … with respect to a client.[20]

"[W]ith respect to a client," of course, the rules would permit the disclosure of such information, or its use to the client's disadvantage, only with the client's "informed consent."[21]

It is Rule 1.9 that should impress upon a lawyer how little of the story of his professional life he truly owns. Anyone with a modicum of literary talent can do the research necessary to write engagingly about the lawyer's cases. The incremental value that the lawyer himself might hope to bring to the process would stem from his inside knowledge and insight. Yet those are precisely the commodities that Rule 1.9 prohibits him from cashing in on, except with the ex-client's informed consent.

Lawyers understand the point well enough with respect to privileged communications. We all recognize that the privilege belongs to the client and that it lasts forever, even beyond the grave.[22] We realize that we enjoy no right of self-actualization through the unilateral disclosure of privileged information.[23]

But what about our "mental impressions, conclusions, opinions, [and] legal theories"[24] concerning the representation? Do we not exercise exclusive dominion over them? It may well be true that core work product belongs to the lawyer and that no court can compel him to divulge it – not even to the client himself, in some jurisdictions. But the lawyer's property right in his own mental processes is limited. Absent his former client's informed consent, he is never free to disclose his thoughts about the case to the public, because they constitute "information relating to the representation" within the meaning of Rule 1.9.

Suppose, however, that the lawyer plans to betray no privileged communications and no private thoughts, but only to make use of publicly available information in telling the story of his own representation. What could be wrong with that? Yet even information in the public domain appears to be protected by Rule 1.9:

> Unlike the evidentiary attorney-client privilege …, a lawyer's ethical duty of confidentiality … applies to all information relating to representation of a client, protecting more than just "confidences" or "secrets" of a client. The ethical duty of confidentiality is not nullified by the fact that information is part of a public record or by the fact that someone else is privy to it.[25]

Indeed, the involved lawyer is arguably the one person in the world who may not be completely at liberty to disseminate the public information that came to his attention, or that he himself generated, while he was representing a client.

To be sure, a lawyer is free to use information about a concluded representation that has become "generally known."[26] But "Rule 1.9(c)(2) prohibits any disclosure (as opposed to use) of former-client information that would not be permitted in connection with a current client, regardless of whether the information has become public knowledge."[27] While commentators have complained that the model rules are "overprotective" of such information,[28] and while Rule 1.9(c)(2) itself may be subject to the common-sense gloss that it proscribes only disclosures "to the disadvantage of the client,"[29] there is no surefire escape from the duty of confidentiality other than the client's informed consent. A lawyer's unflattering observation about his former client, or even an entirely laudatory account that elevates the client's legal problems out of the practical obscurity of a court file, may violate that duty. Thus, unless he plans to withhold or fictionalize so many of the details that "there is no reasonable likelihood that [his audience] will be able to ascertain the identity of the client or the situation involved,"[30] the prudent lawyer preparing to tell "his" story always seeks his ex-client's permission first.

What does "informed" consent entail in this context? Generally speaking, because a lawyer may not reveal confidential information to the former client's disadvantage, a lawyer soliciting the client's consent to such disclosures must anticipate – and explain as clearly as possible – the risks to which the disclosures expose the client. Thus, for example, if the lawyer seeks consent to the revelation of privileged communications, he must warn the client that waivers of attorney-client privilege may have unpredictable and unfortunate consequences in pending or future litigation – and that, while some courts have reasoned that "the extrajudicial

disclosure of an attorney-client communication … does not waive the privilege as to the undisclosed portions of the communication,"[31] other courts may disagree.

Finally, what – if anything – must the lawyer say or do about compensating the former client for relinquishment of the client's right to insist on the lawyer's continued silence? Drawing on principles of agency, the Restatement (Third) of the Law Governing Lawyers takes the position that "a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made."[32] Although this rule apparently concerns the problem of secret profit-taking – and although the Restatement adds that "[t]he duty is removed by client consent" under § 62[33] – it is difficult to imagine how such consent could be "informed" without some discussion of the background doctrine. What is more, while the average former client would probably understand from the very fact of the request for his consent that he possesses some market power in the matter, the Restatement goes a step further by suggesting that "the terms and circumstances of the transaction [must be] fair and reasonable" to him and that he must be "encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction."[34] (The model rules are less clear on the existence of any such duties to former clients.)[35]

To be honest with ourselves is to admit that the public's interest in what we do derives in large measure from the clients we are privileged to serve. It is no easier to divide the lawyer's story from the client's than to separate the dancer from the dance. The Rules of Professional Conduct force us to confront that truth and to act accordingly.

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[1] Mark Curriden, Lions of the Trial Bar, ABA J., Mar. 2009, at 20, 26.
[2] Model Rules of Prof'l Conduct R. 1.8(d) (2007); accord Restatement (Third) of the Law Governing Lawyers § 36(3) (2000). Likewise, the forerunner to Rule 1.8(d) – Disciplinary Rule 5-104(B) of the Model Code of Professional Responsibility – provided that "[p]rior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment." Disciplinary Rule 5-104(B) was promulgated in response to the news that Melvin Belli's fee for defending Jack Ruby against a murder charge in the shooting death of presidential assassin Lee Harvey Oswald had included the media rights to Ruby's story. "The bar thought that was awful," recalls ethics expert Geoffrey Hazard. "And there was great antipathy toward Jack Ruby." John Gibeaut, Defend and Tell: Lawyers Who Cash in on Media Deals for Their Clients' Stories May Wish They'd Kept Their Mouths Shut, ABA J., Dec. 1996, at 64, 66.
[3] 1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, The Law of Lawyering § 12.10, at 12-28 to -29 (3d ed. 2008). But cf. Beets v. Scott, 65 F.3d 1258, 1273 (5th Cir. 1995) (en banc) ("Succinctly, a media rights contract is offensive because it may encourage counsel to misuse the judicial process for the sake of his enrichment and publicity-seeking, and it necessarily trades on the misery of the victim and his family.").
[4] 639 P.2d 248 (Cal. 1982).
[5] Id. at 255 n.8.
[6] See id. The Maxwell court appeared to be impressed by the attorneys' "extensive disclosure of possible conflicts and prejudice" created by the media-rights contract in that case, including the possibility that the attorneys might wish to "see him convicted and even sentenced to death for publicity value." Id. at 250; see id. at 257 ("Yet [the defendant knowingly] insisted on proceeding with [these] counsel.").
[7] See, e.g., Model Rules of Prof'l Conduct R. 1.1, 1.3, 1.5, 1.7 (2007).
[8] Beets v. Scott, 65 F.3d at 1273.
[9] Id.
[10] Id.

[11] Model Code of Prof'l Responsibility DR 5-104(B) (1980).
[12] 637 So. 2d 204 (Miss. 1994).
[13] Id. at 224.
[14] See id.
[15] Id. at 227.
[16] D.C. Bar Ethics Op. 334 (2006) (available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion334.cfm).
[17] Id.; accord Am. Bar Ass'n, Annotated Model Rules of Professional Conduct 144 (6th ed. 2007).
[18] United States v. Hearst, 638 F.2d 1190, 1191-92, 1197 & n.6 (9th Cir. 1980).
[19] D.C. Bar Ethics Op. 334.
[20] Model Rules of Prof'l Conduct R. 1.9(c) (2007).
[21] Model Rules of Prof'l Conduct R. 1.6(a), 1.8(b) (2007).
[22] See Swidler & Berlin v. United States, 524 U.S. 399 (1998).
[23] See, e.g., Am. Motors Corp. v. Huffstutler, 575 N.E.2d 116, 118, 120 (Ohio 1991) (rejecting argument that in-house counsel who assisted in the defense of his employer's products liability cases had a First Amendment right to "create a market for his unique talents" by consulting with plaintiffs' attorneys after his employment ended).
[24] Fed. R. Civ. P. 26(b)(3)(B).
[25] Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861-62 (W. Va. 1995); see also, e.g., In re Anonymous, 654 N.E.2d 1128, 1129 (Ind. 1995) (judgment contained in publicly available court file was "confidential" information because attorney learned of it while consulting with potential client).
[26] Model Rules of Prof'l Conduct R. 1.9(c)(1) (2007); see Restatement (Third) of the Law Governing Lawyers § 59 cmt. d (2000) ("generally known in the relevant sector of the public").
[27] Am. Bar Ass'n, supra note 17, at 169. Contra Restatement (Third) of the Law Governing Lawyers §§ 59-60 (2000).
[28] 1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, supra note 3, § 13.12, at 13-32; accord id. § 9.15, at 9-60 ("probably a drafting oversight").
[29] Model Rules of Prof'l Conduct R. 1.9 cmt. 8 (2007).
[30] Model Rules of Prof'l Conduct R. 1.6 cmt. 4 (2007).
[31] In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987) (concerning impact of Alan Dershowitz's Reversal of Fortune on his consenting client's privilege).
[32] Restatement (Third) of the Law Governing Lawyers § 60(2) (2000).
[33] Id. cmt. j. Section 62 provides that "[a] lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure."
[34] Id. § 126; see id. § 36 cmt. d ("[A]n informed client … [may] sign[] a publication contract after the lawyer's services have been performed …. As a transaction between a former client and a lawyer arising out of the representation, such a contract is subject to § 126.").
[35] See, e.g., Am. Bar Ass'n, supra note 17, at 140-41 ("[I]t is the pendency of the [representation] … that triggers application of … Rule [1.8 concerning business transactions between lawyer and client].").