Contracting for Publication Rights in Lieu of Attorney's Fees in Criminal Cases

Keith Noel Bond
CONTRACTING FOR PUBLICATION RIGHTS IN LIEU OF ATTORNEY'S FEES IN CRIMINAL CASES

INTRODUCTION

This Comment will discuss ethical problems associated with an attorney contracting with a criminal defendant for book and movie publication rights in return for legal representation. This discussion will address the concerns surrounding such retainer agreements reflected in the Code of Professional Responsibility as well as recent case law on the subject. In view of the many problems created by an attorney-client book and movie publication agreement, this Comment will suggest a per se rule requiring disqualification of any attorney who contracts for such a fee arrangement.

The Code of Professional Responsibility and the new proposed Model Rules of Professional Responsibility specifically prohibit an attorney from entering into a book and movie publication rights agreement in return for his services. In such an agreement, the client assigns the attorney an interest in the book and movie publication rights relating to his alleged criminal acts. These publication rights can unconsciously influence an attorney's judgment so that he acts contrary to the best interests of his client. The legal profession has recognized the potential for conflict inherent in this type of retainer agreement and has chosen to prohibit these

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (amended 1981) [hereinafter cited as MODEL CODE].

483
relationships.

Canon Five of the current Code of Professional Responsibility states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Further, Disciplinary Rule 5-104(B) states:

Prior to the 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.

An American Bar Association Commission on Evaluation of Professional Standards has recently published the Final Draft of the Model Rules of Professional Conduct. Rule 1.8, "Conflict of Interest: Prohibited Transactions," incorporates some of the concerns addressed by Canon Five of the present Code. Subdivision (d) states: "Prior 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."

Despite the absolute prohibition against these agreements in Disciplinary Rule 5-104(B), defense attorneys have continued to

---

5. Model Code Canon 5.
6. Id., DR 5-104(B). The corresponding Ethical Consideration provides:
   If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

   Model Code EC 5-4. The preliminary statement of the Code states: "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." The Disciplinary Rules are mandatory in character and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id.
7. Model Rules.
8. Id. at Rule 1.8.
9. Id. at Rule 1.8, ¶ (d). This rule does not prohibit an attorney representing a client in a transaction concerning literary property from acquiring an ownership interest in such property. Id. at Rule 1.8 comment.
enter into fee arrangements for literary rights.\textsuperscript{10} It appears that the threat of possible disciplinary sanctions imposed by an ethics committee of one's peers is not a sufficient deterrent in view of the potential financial benefits to be derived.\textsuperscript{11} In that the Code of Professional Responsibility and the disciplinary process have failed to adequately discourage these retainer agreements, the courts have been forced to adjudicate their propriety. Litigation of this issue has occurred most frequently in the form of habeas corpus proceedings which allege that the literary contract retainer agreement created such a conflict of interest between the attorney and client that the defendant was denied effective assistance of counsel as guaranteed by the sixth amendment.\textsuperscript{12} In examining these claims, the courts have paid little attention to the existence of Disciplinary Rule 5-104(B). Instead, the courts have noted an "apparent" violation of the rule, requiring the defendant to prove that the conflict of interest had an adverse or prejudicial effect on the outcome of the defendant's trial. While the Disciplinary Rule imposes the threat of punishment on the defense attorney, the defendant may be imprisoned as a consequence of the attorney's unethical behavior.\textsuperscript{13}

This Comment encourages the creation of a per se rule of disqualification to advance the ethical standards sought by the Code of Professional Responsibility. The use of the Professional Code of Responsibility as a set of procedural rules has been frowned upon.

\textsuperscript{10} A District of Columbia attorney, Sol Rozen, has been charged with unethical conduct in relation to a literary retainer agreement. He was allegedly to receive $50,000, which had been placed in trust, from the sale of his client's story. In his own defense, Mr. Rozen claimed that his client drew up the clandestine trust agreement so that he could claim conflict of interest and petition for a new trial if convicted. Nat'l L. J., Dec. 21, 1981, at 5.

\textsuperscript{11} Each state has adopted a provision similar to Rule 5-104(B). Georgia has the only state code which refers to possible disciplinary sanction. The \textit{Georgia Code of Professional Responsibility} states: "A violation of this standard may be punished with a public reprimand." \textit{Ga. Code Ann.} tit. 9, pt. 4, ch. 1, Rule 4-102, Standard 34 (Supp. 1982). An ethical opinion rendered by the New York County Lawyers Association makes no reference to appropriate disciplinary action for violating Rule 5-104(B). N.Y. County No. 582 (Oct. 23, 1970). The possibility of disciplinary action has been recognized by the courts. \textit{See infra} note 60.

\textsuperscript{12} The sixth amendment of the United States Constitution as applied to the states through the fourteenth amendment provides an accused with the right "to have the Assistance of counsel for his defense." \textit{U.S. Const.} amend. VI.

\textsuperscript{13} No apparent stance has been adopted by the American Bar Association as to how courts should consider a defendant's appeal based on a claim of ineffective counsel due to the existence of a literary retainer agreement.
One commentator has urged that the Code and its rules be applied only in disciplinary proceedings against attorneys.\(^4\) Such a retrospective and passive application of the Code serves to emasculate much of the underlying ethical policy within the Code.

I. PREVIOUS JUDICIAL ENCOUNTERS WITH LITERARY RETAINER AGREEMENTS

The most recent examination of a literary retainer agreement occurred in *Maxwell v. Superior Court of Los Angeles*.\(^5\) This Section will discuss the *Maxwell* decision and previous judicial encounters with literary retainer agreements. These prior cases include *People v. Corona*,\(^6\) in which the existence of a literary retainer agreement was found to have sufficiently influenced an attorney's conduct to render his representation ineffective. However, in two other cases, *Ray v. Rose*\(^7\) and *People v. Fuller*,\(^8\) the defendants were unable to establish a showing of ineffective assistance of counsel to the satisfaction of the court. Finally, *People v. Hearst*\(^9\) will be examined, in which one court appeared to adopt a new standard to be applied in determining the existence of potentially ineffective assistance of counsel arising out of a conflict of interest. An examination of these cases reveals many of the problems that arise from attorney-client literary rights contracts. In this Section, the *Maxwell* cases will be discussed in relation to prior literary contract cases\(^20\) in order to illustrate the need for a per se rule of disqualification in this area.

Bobby Joe Maxwell was arrested on April 4, 1979 and charged with ten separate counts of murder. Maxwell retained private counsel to represent him. On April 26, 1979, Maxwell's defense

---


19. 638 F.2d 1190 (9th Cir. 1980).

20. *See* cases cited *supra* note 3.
requested the Superior Court Magistrate to appoint an investigator to assist the defense at the government's expense due to the defendant's indigency. At this time, defense counsel disclosed to the magistrate the fee arrangement established between counsel and his client. In return for legal representation by the attorney, up to and including trial, Maxwell "transferred irrevocably and unconditionally to the attorneys all literary rights and interest in the story of his life and in the pending criminal prosecution and trial." Maxwell was allowed to retain fifteen percent of the net profits derived by his attorney from the literary rights.

Prior to the preliminary hearing, the magistrate questioned the defendant's comprehension of the fee arrangement. Maxwell expressed an understanding of the conflicts of interest created by the agreement and a willingness to accept them. Subsequent to that inquiry, Maxwell was arraigned in Superior Court and entered a plea of not guilty.

On September 14, 1979, the trial court held a special hearing, sua sponte, to determine the propriety of the literary rights retainer agreement. The trial court was particularly concerned with the provision of the retainer agreement labeled "Disclosure of Conflicts of Interest." The provision pointed out that the agreement

21. The name of Maxwell's defense attorneys were not given in the court's opinion. This is a common form of protection used in the legal profession when referring to possible violations of ethical standards. See Rani, Appealing a Lawyer's "Mistakes," Nat'l L. J., Oct. 5, 1981, at 18.
22. Id. at 851. This information appears to have been disclosed voluntarily to the magistrate or in the course of the request for an appointed investigator.
23. Id.
24. Id. at 852.
25. Id. at 852. The text of the paragraph reads:

IT IS HEREBY DISCLOSED BY THE LAWYERS TO MAXWELL that the provisions of this agreement may create a conflict of interest between Maxwell and the Lawyers and that the provisions of this agreement may give to the Lawyers a monetary interest adverse to the interests of Maxwell. This conflict of interest may manifest itself in many ways including but not limited to the following: (a) The Lawyers may have an interest to create publicity which would increase the money which they might get as a result of this agreement, even if this publicity hurt Maxwell's defense. (b) The Lawyers may have an interest not to raise certain defenses which would question the sanity or mental capacity of Maxwell because to raise these defenses might make this agreement between the Lawyers and Maxwell void or voidable by Maxwell. (c) The Lawyers may have an interest in having Maxwell be convicted and even sentenced to death so that there would be increased publicity which might mean that the Lawyers would get more money as a result of this agreement. (d) The Lawyers may have other interests
could possibly create conflicts of interest between Maxwell and his attorney. For example, the agreement anticipated that conflicts could arise in relation to the attorney's interest in increased trial publicity, failure to raise certain defenses, and the increased saleability of Maxwell's story should he be convicted and sentenced to death. Defense counsel declared that none of these potential conflicts would influence his representation of the defendant. Further, the trial court was troubled by the advance waiver of the attorney-client privilege (perhaps discouraging the defendant from fully confiding in his attorney) and by the fact that the retainer agreement only applied to the trial itself with no reference to any appeal process.

At the special hearing, defendant Maxwell again indicated that he understood the potential conflicts of interest raised by the retainer agreement but wished his present counsel to continue to represent him. Despite the defendant's requests, the trial court which are adverse to Maxwell's interests as a result of this agreement. The Lawyers affirm that they will not be influenced in any way by any interest which may be adverse to that of Maxwell. The Lawyers will raise every defense which they, in their best judgment based upon their experience feel is warranted by the evidence and information at their disposal and which, taking into consideration the flow of the trial and trial tactics, is in Maxwell's best interests. The Lawyers will conduct all aspects of the defense of Maxwell as would a reasonable competent attorney acting as a diligent, conscientious advocate.

Id.

26. See supra text accompanying note 25. The contract included provisions designed to ensure counsel's right to receive and exploit confidential material about petitioner's life. In paragraph 37, Maxwell agreed to waive, on counsel's demand, his attorney-client privilege and "any and all other privileges and rights which would prevent the full and complete exercise" of counsel's interests. In paragraph 33 he promised to (1) give counsel all materials he has "pertaining to [his] life and experiences," (2) use his best efforts to obtain and turn over such materials in the hands of others, and (3) "confer with [counsel] . . . as often as [they] shall reasonably require so as to enable [them] to elicit from [him] all details" of his life. Maxwell, 30 Cal. 3d at 610 n.1, 639 P.2d. at 250 n.1, 180 Cal. Rptr. at 179 n.1.

27. Maxwell's attorneys contended that this contract complied with Rule 5-101 of the California Rules of Professional Conduct. Rule 5-101 requires any attorney acquiring a pecuniary interest adverse to his client to meet the following requirements: (1) full disclosure of the interest to the client in writing (provided the terms are fair and reasonable to the client); (2) the client must be given the opportunity to seek advice of independent counsel; and (3) the client's consent in writing must be obtained. Cal. Bus. & Prof. Code § 501 (West 1981). The Maxwell court ruled that the agreement could not be considered "fair and reasonable" to the interests of the client.

28. The court also believed that the advance waiver of the attorney-client privilege violated the requirements of Rule 5-101 of the California Rules of Professional Conduct. 161 Cal. Rptr. at 852.
ruled that the retainer agreement created conflicts of interest so serious as to deprive the defendant of the effective assistance of counsel.\textsuperscript{29} Defendant filed a petition for a writ of mandate with the California Supreme Court contesting the court's removal of his private counsel. The supreme court transferred the proceedings to the court of appeal which affirmed the trial court's order.

The California Supreme Court subsequently vacated the trial court's order recusing Maxwell's private attorneys.\textsuperscript{30} In doing so, the court stated, "[t]he mere possibility of a conflict does not warrant pretrial removal of competent counsel in a criminal case over defendant's informed objection."\textsuperscript{31} The supreme court held that Maxwell had made a knowing and intelligent waiver of the potential conflicts of interest.

The Maxwell decisions raise for discussion the weight and impact courts should afford the ABA's pronouncement of ethical standards,\textsuperscript{32} the appropriate standards for determining ineffective assistance of counsel, and the degree to which the judiciary can encroach upon a criminal defendant's right to counsel of his choice. The court of appeal examined these concerns through careful scrutiny of the circumstances before it and the needs of the defendant and the judicial system,\textsuperscript{33} while the California Supreme Court, in reversing the court of appeal, focused narrowly on the defendant's right to counsel of his choice. The supreme court held that: "When the possibility of significant conflict has been brought to the court's attention and the danger of proceeding with chosen counsel has been disclosed generally to the defendant, he may insist on retaining his attorneys if he waives the conflict knowingly and intelligently for purposes of the criminal trial."\textsuperscript{34}

\textsuperscript{29} Id.
\textsuperscript{30} 30 Cal. 3d at 620, 639 P.2d at 255-56, 180 Cal. Rptr. at 185 (1982).
\textsuperscript{31} Id. at 619 n.10, 639 P.2d at 256 n.10, 180 Cal. Rptr. at 185 n.10.
\textsuperscript{32} See supra note 11.
\textsuperscript{33} Maxwell, citing Faretta v. State of California, 422 U.S. 806 (1975), argued that he had an absolute right to represent himself and, by analogy, an absolute right to counsel of his choice. The court, however, refused to accept this analogy, relying on the distinction that self-representation precludes the possibility of a sixth amendment ineffective counsel appeal whereas exercise of one's right to choice of counsel does not. 161 Cal. Rptr. at 857-58. The California Supreme Court allowed Maxwell to exercise the claimed absolute right to choice of counsel.
\textsuperscript{34} 30 Cal. 3d at 623, 639 P.2d at 257, 180 Cal. Rptr. at 187. The impact of this "knowing and intelligent" waiver is explained more fully by the court in a footnote. The court explained:
The court of appeal, in upholding the trial judge's order recusing Maxwell's attorney, based its decision upon the California case of People v. Corona. In Corona, the defendant filed a petition for habeas corpus seeking review of his conviction for twenty-five counts of first degree murder. The petitioner claimed he had been deprived of effective assistance of counsel in violation of the sixth and fourteenth amendments. Corona had been represented by attorney Richard Hawk. In return for his services, Hawk received exclusive literary and dramatic rights to the defendant's life story, including his criminal prosecution. Corona was also required to waive his attorney-client privilege. Even before the commencement of trial, Hawk hired a professional writer and entered into a book contract with MacMillan Publishing Company. At trial, the prosecution produced more than one hundred witnesses, while defense counsel failed to call a single witness and never raised the defenses of mental incompetence, diminished capacity, or legal insanity.

Corona's appeal alleged a denial of effective assistance of counsel based upon Hawk's incompetence as well as the conflict of interest created by the literary retainer agreement. Corona asked the court to rule that his representation was ineffective, as required by the sixth and fourteenth amendments, either per se or through a showing of prejudice. The court stated:

When a conflict is validly waived, defendant may still argue on appeal that he received ineffective assistance for reasons unrelated to the conflict. Because of the difficulty of isolating errors motivated by conflicts and because defendant has created the problem by his knowing insistence on conflicted counsel, the burden should be on him to show that deficiencies he later asserts did not arise from the conflict.

30 Cal. 3d at 620 n.11, 639 P.2d at 256 n.11, 180 Cal. Rptr. at 177 n.11.
36. See supra note 12.
37. The book, entitled Burden of Proof, The Case of Juan Corona, authored by Ed Cray and supplemented by Hawk's afterword, was published in 1973, just a few months after the completion of the trial.
38. The twenty-five victims had all been killed with a bolo machete. There was some indication that the crimes were sexually motivated. Hawk was aware of the defendant's past history of mental illness, yet failed to inquire as to the defendant's mental competence. Perhaps he was concerned with the validity of the contract entered into between himself and Corona should an insanity defense be accepted by the court. The possibility of the mental incapacity of the defendant to enter into a legally binding contract was also recognized by Maxwell's attorneys. See supra note 25, subd. (b). Note that the standards for determining legal sanity in a civil case are not the same as in a criminal case.
39. The court recognized rulings by a minority of courts which have held that divided
The case at bench, however, meets both of the aforementioned criteria. One, it is indisputable that by entering into a literary rights contract, trial counsel created a situation which prevented him from devoting the requisite undivided loyalty and service to his client. From that moment on, the trial counsel was devoted to two masters with conflicting interests—he was forced to choose between his own pocketbook and the best interests of his client, the accused. Two, the record, as a whole, abundantly demonstrates that the conflict of interests unanimously condemned by the case law and proscribed by the canon of ethics resulted in obvious prejudice to appellant. . . .

The Corona court reversed the conviction and ordered a new trial.

The judiciary has been continually groping for the appropriate standard to apply when faced with such conflict of interest claims. In two other cases, Ray v. Rose and People v. Fuller, the courts required the defendant to show that the literary rights retainer agreement created a conflict of interest between the attorney and the defendant and that the conflict actually prejudiced the defendant's case. In Ray v. Rose, James Earl Ray alleged that the financial interest of his attorney in the publication rights of Ray's story created a conflict of interest that rendered his counsel ineffective and induced his attorney to coerce Ray into pleading guilty to the murder of Dr. Martin Luther King, Jr. Ray filed a petition...
for a writ of habeas corpus, alleging constitutional violations. His request for an evidentiary hearing was originally denied," but was later granted. An evidentiary hearing was held at which the court found no factual basis to support the allegations that the criminal defendant was actually prejudiced by his attorney's actions. Among the facts presented were the following alleged improprieties committed by the defendant's attorney: a refusal to hire an investigator and, instead, allowing a writer involved in the publication contract to conduct the investigation; a refusal to allow Ray to take the stand at trial; and, a refusal to seek a continuance due to adverse publicity because the book contract called for the case to go to trial within a certain time period. In dismissing Ray's assertions, the court focused on the economics of the situation and noted that Ray's guilty plea greatly reduced the value of the publication rights.

In discussing the issue of effective counsel, the Ray court stated that the contractual arrangement was "a violation of the Disciplinary Rule 5-104(B) of the Code of Professional Responsibility of the ABA, which was adopted after Ray entered his plea. Despite our disapproval of such a fee arrangement, however, its existence does not necessarily mean that Ray was denied effective assistance of counsel." It was held that Ray had not sustained the burden of showing actual prejudice arising from the conflict of in-

44. 373 F. Supp. 687 (M.D. Tenn. 1973).
45. 491 F.2d 285.
46. While Ray was awaiting extradition in England, he contacted attorney Arthur Hanes of Alabama and asked him to represent him. Before Hanes visited Ray, he was approached by a writer, William Bradford Huie, about the possibility of Ray selling his story. On Hanes' advice Ray signed two agreements, one of which gave Hanes complete power of attorney, the other assigning Hanes 40% of all monies that Ray would receive as a result of the subsequent agreement with Huie. A subsequent agreement was reached whereby Huie was given exclusive rights to receive information on Ray's participation in the King assassination, for which Ray and Hanes would each receive 30% of the gross receipts of all literary works. Later Ray fired Hanes and hired Percy Foreman. At first Foreman took the position that he would not get involved with any literary rights contract until after trial. However, within two months Ray assigned all of his rights in the Huie proceeds to Foreman. 535 F.2d at 969, 970.
47. Ray thought that at trial it would be necessary for him to take the stand in his own defense so that he could explain his actions on the day of the murder. This idea was rejected by Hanes and Huie. Hanes allegedly said, "Why give testimony away when we can sell it." 491 F.2d at 287.
48. 535 F.2d at 974.
In searching for prejudice, the court ruled out the existence of a prejudicial effect due to the book contract, since Ray had pleaded guilty, and did not address the issue of possible prejudice had Ray gone to trial. The court continued to rely on Ray's attorney's assertion that he had not been influenced by the book contract and that he would have made more money from the contract if Ray had gone to trial. In *People v. Fuller*, the Appellate Court of Illinois refused to apply a per se rule of reversal in a conflict of interest case arising out of a literary rights retainer agreement. At the time this case arose, Illinois had generally adhered to a per se rule that did not require a showing of prejudice and mandated reversal of a criminal conviction if the defendant could show an actual conflict of interest existed between the defendant and his attorney at the time of trial. The *Fuller* court chose to narrow the application of this per se rule to those situations in which the attorney's conflict of interest arises from a commitment to a third party, and not to himself.

The dissent in *Fuller* noted that the distinction between an attorney's commitment to his own advantage and an attorney's commitment to a third party's advantage did not support the rejection of the per se rule in this context. The dissent could discover no rational reason for imposing different standards of review for a conflict of interest in relation to a literary rights retainer agreement and a conflict of interest due to a commitment to a third party.

In following the state appellate court's decision, the United States District Court seemed to justify the rejection of the per se rule by relying on the unique facts of the *Fuller* case. Throughout the course of the criminal proceedings, the defendant had been represented by both William Cherikos, a public defender, and Whitney Hardy, a private attorney appointed as co-counsel. Hardy obtained beneficial ownership in the publication rights relating to

---

49. *Id.* The court relied on the Supreme Court decision in *Glasser v. United States*, 315 U.S. 60 (1942), which required a showing of actual prejudice.

50. The court did note that had the sale of Ray's story been profitable, Foreman's fee of $165,000 would have been unconscionable. 392 F. Supp. 601, 607 (W.D. Tenn. 1974). See infra text accompanying note 71.


Fuller's life story and criminal prosecution. This contract was later terminated upon the defendant's request. The termination of the literary rights contract, however, occurred after the defendant had pleaded guilty. In order to support its finding that Fuller had not been denied effective assistance of counsel, the court felt compelled to point to the competent involvement of Cherikos, who had no interest in the publication rights. The court stated:

It is unquestionably true that the contractual agreement involving the Petitioner, his parents, and Hardy placed Hardy in a potential conflict of interest situation. However, despite the repeated disapproval of such contracts by both the bench and bar, evidence of the existence of the contract alone is insufficient to prove ineffective assistance of counsel. It is significant to note from the time of his arrest to the time of his sentencing, Petitioner was represented by Cherikos against whom no allegations of impropriety are directed.54

The court also noted that Fuller failed to contend that an actual conflict of interest had existed between himself and Hardy, that Hardy's representation was incompetent, or that his plea had been coerced. The court seemed to differentiate vaguely between not having to prove prejudice and not, at least, alleging prejudice.55

In United States v. Hearst,56 the Court of Appeals for the Ninth Circuit held that the defendant was required to establish the existence of an actual conflict of interest at trial which had an adverse effect on the adequacy of representation in order to support a claim of ineffective assistance of counsel. This test, derived from the Supreme Court's decision in Cuyler v. Sullivan,57 reduced the defendant's burden from a showing of prejudice to a showing of adverse effect.58

54. Id. at 585.
55. Id. at 584. The district court noted the following statement of the Illinois appellate court:
   
   It is as important to recognize what the defendant does not claim as it is to realize that which he does contend. He does not contend that attorney Cherikos had any conflict of interest or that his representation was anything other than competent . . . . He does not contend that his plea was coerced, that the taking of the plea was involuntary in any sense, or that any constitutional infirmity of any sort surrounded the taking of the plea or the decision to plead, nor does he urge any constitutional deprivations obtaining prior to or after arrest.

Id.

56. 466 F. Supp. 1068 (N.D. Cal. 1978), aff'd, 638 F.2d 1190 (9th Cir. 1980).
57. 446 U.S. 335 (1980). Cuyler involved an ineffective assistance of counsel claim based upon a conflict of interest due to multiple representation.
58. A showing of adverse effect is an easier standard for a petitioner to meet. The requirement of prejudice demanded a concrete showing of an error that significantly altered
The defendant in *Hearst* alleged that "in order to remove vast areas of her story from the attorney-client privilege, and to heighten public attention to her trial, defense counsel demanded that she take the stand to testify, even though he realized that her repeated invocation of the fifth amendment would ultimately doom her cause."\(^{59}\) She contended that this decision, by her attorney, F. Lee Bailey, was made with his personal benefit in mind, rather than her best interests. While not condoning the existence of literary retainer agreements, the court ruled that the defendant did not state a claim for relief absent a showing of *prejudice*. On appeal, the court of appeals applied the *Cuyler* test and remanded the case for the purpose of determining whether F. Lee Bailey pursued his own interests at the expense of his client's and whether that pursuit adversely effected the quality of his representation.\(^{60}\)

II. **Abuses of Publication Rights Retainer Agreements**

The abuses that have developed from literary retainer agreements have been numerous. They range from distortion of the traditional attorney-client relationship to the semblance of a contingent fee in criminal cases. The potential influence on the attorney cannot be assessed, nor can the resulting effect on his client.

Frequently, the literary retainer agreement requires the defendant to waive his attorney-client privilege in advance of trial. Any information that the defendant discloses to his attorney then becomes subject to publication regardless of the nature of that information.\(^{61}\) In *People v. Corona*, the book involved was published a

---

the outcome of the trial: "For example, overwhelming evidence of guilt might make almost impossible a showing that a relatively minor error resulted in actual prejudice. But such evidence would be completely irrelevant to an inquiry whether the same error, if caused by an actual conflict of interest, showed an adverse effect on counsel's performance." United States v. Hearst, 638 F.2d at 1194. See also Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978).

59. 466 F. Supp. at 1083. Patty Hearst agreed not to publish any account of her ordeal until a certain period after the release of Bailey's book. Bailey's book was rejected by the publisher and Ms. Hearst was released from this agreement. *Id.*

60. The results of this evidentiary hearing have not yet been reported. The court of appeals did suggest that the district court issue an order to F. Lee Bailey "to show cause why he should not be disciplined . . . in his capacity as a member *pro hac vice* of the bar of the United States District Court for the Northern District of California." 638 F.2d at 1199.

61. Maxwell v. Superior Court of Los Angeles County, 30 Cal. 3d at 610, 639 P.2d at 248, 180 Cal. Rptr. at 177 (1982). Maxwell waived all defamation and invasion-of-privacy claims against his counsel which might arise from the literary contract.
few months after the completion of trial and before appeal was perfected. A similar occurrence may arise out of the Maxwell agreement since the contract makes no reference to representation by his attorneys for an appeal of a conviction.

This waiver of the attorney-client privilege may do no more than distort the traditional view of the attorney-client relationship. Yet, it evokes an atmosphere in which the attorney is not functioning solely as an attorney. Instead, he is motivated to plan the publication and promotion of a book or movie as well as to represent his client. There is also the possibility that the immediate publication of a book could affect later judicial proceedings. Certainly, a prosecutor reading such a book could gain insight into the defendant's case and thereby enhance the possibility of conviction or the affirmance of a conviction.

The potential for financial benefit can also lead an attorney to coerce a defendant to plead guilty. James Earl Ray alleged his family was offered money to discourage Ray from going to trial and testifying. In Wojtowicz v. U.S., the defendant alleged his guilty plea was involuntary because of coercion by his family members and the promise of a lenient sentence from his attorney. The de-

62. See supra note 37.

63. Justice Richardson of the California Supreme Court, dissenting, recognized this possibility in the Maxwell case. 30 Cal.3d at 625, 639 P.2d at 260, 180 Cal. Rptr. at 189.

Finally, another inescapable fact remains—attorneys have agreed to represent Maxwell only during trial. What is to prevent them from publicly utilizing every bit of information that they have gleaned during trial preparation and trial at the same time that defendant is appealing from a judgment of conviction? The appellate briefs of the second attorney may be filed simultaneously with a book of the first attorneys aimed at the best seller list. Aside from the profound implications such a situation would have for the judicial system in general, what is there to protect defendant's rights during the appellate process and any subsequent retrial? At that point he will no longer be the "owner" of his life story, which will instead be in the hands of his former attorneys whose only remaining interest may be the promotion of sales.

64. California Supreme Court Chief Justice Bird, in his concurring and dissenting opinion, posited one such consequence to this type of literary contract.

To one trained in law, a host of legal problems come easily to mind. Suppose, for example, that petitioner is convicted, but the conviction is reversed on appeal and remanded for retrial. Under the terms of the agreement, these counsel are not obligated to represent him at any stage beyond the present superior court proceedings. If they decide not to represent him in the retrial proceedings, they may demand that he waive his privilege prior to the retrial.

30 Cal. 3d 606, 625, 639 P.2d 248, 259, 180 Cal. Rptr. 177, 189 (Bird, J., concurring and dissenting).

65. 550 F.2d 786 (2d Cir. 1977).
fendant's attorney had negotiated a contract for movie rights. The resulting proceeds were, in part, to pay for attorney's fees. The defendant stated he had pleaded guilty to receive contract money to finance a sex change operation for his male paramour. The court rejected defendant's conflict of interest allegation, but granted an evidentiary hearing to determine whether the defendant had been competent at the time of sentencing.

Justice Richardson of the California Supreme Court, dissenting in Maxwell, argued that the terms of the literary contract contained both the reality and appearance of fatally conflicting interests. Justice Richardson elaborated on the scope of the conflicts of interest inherent in literary retainer agreements, particularly in considering tactical decisions which may confront trial counsel.

Suppose that before trial, through a plea bargain, defendant's life may be saved by an informed entry of a guilty plea to certain of the multiple counts, including murder, with which he is charged. Should counsel recommend such a bargain? Perhaps they should, but would they, knowing that the sales value of a book or television manuscript would decline if there was no dramatic trial testimony elicited? How really objective will counsel be in exploring the opportunities for avoiding trial without any attendant publicity if the commercial value of defendant's life story is thereby reduced or destroyed? If defendant is tried, should he be called as a witness to tell his "story," or exercise his constitutional right to remain silent, thereby putting "the prosecution to its proof"? Surely, the sales value of defendant's story would be affected by the decision. If defendant takes the stand during trial would the areas of his direct examination be affected, however subtly, perhaps unknowingly, by counsel's financial interest in the drama and saleability of his testimony? As anticipated in paragraph 14(b), would the existence of the contract affect a decision to assert an insanity defense with its inherent threat to the validity of the agreement?

In addition to creating a situation in which attorney and client have competing interests, literary retainer agreements also violate public policy by allowing an attorney to enter into an arrangement for what is essentially a contingent fee for representing a defendant in a criminal case. Contingent fees in criminal cases are prohibited by the Code of Professional Responsibility and the Model Rules of Professional Conduct. Literary retainer agreements are not contingent in the usual sense as relating to the success or fail-

---

66. Defendant's story appeared in dramatic form in the movie "Dog Day Afternoon."
67. 30 Cal. 3d at 629, 639 P.2d at 262, 180 Cal. Rptr. at 191 (Richardson, J., dissenting).
68. See Model Code Canon 2 n.30.
69. Id. at DR 2-106(C); Model Rules Rule 1.5(c).
ure of the litigation. However, the attorney’s fee is contingent upon
the success of the book or movie, which may be affected by the
outcome of the criminal prosecution.

In Ray v. Rose, the Tennessee District Court, after an eviden-
tiary hearing granted to James Earl Ray on his sixth amendment
ineffective counsel claim, characterized the attorney’s fee as con-
tingent. The court went on to indicate that had Ray’s attorney
received the $150,000 called for in the literary contract “the fee
would have been unreasonable. . . .[T]he fee would have been subject to
an attack limiting the amount of the fee to a recovery based upon
a quantum meruit.” In a separate action, Ray sought preliminary
and permanent injunctive relief against his attorney’s further dis-
closure of facts surrounding the King assassination and declaratory
judgment rendering the several contracts null and void. The gra-
vamen of Ray’s complaint was an alleged conspiracy to deprive
him of his civil rights. The court in dismissing Ray’s allegation
noted:

We need not decide the interesting question whether, under Tennessee law,
Contracts of the kind involved here, are void as a matter of public policy on
the grounds that they tend to create conflicts of interest between attorney
and client and tend to create incentives to undermine the judicial process
itself because of the publicity value of sensational tactics and disruptions of
trials.

On their face, literary retainer agreements appear contrary to
public policy. The attorney’s financial rewards are totally unre-
lated to the quality of his services and the amount of time he has
spent on the case. The defense attorney is not compensated in pro-
portion to his efforts, but rather is compensated in proportion to
the heinous nature of his client’s alleged crime. That inherent
character of these contracts, along with the other numerous abuses
that have occurred and continue to occur, establishes the need for
the control or elimination of literary retainer agreements.

III. Judicial Standards of Review: Maxwell and Hearst

The most recent decision concerning literary retainer agree-

71. Id. at 620.
73. Id. at 1267.
ments is Maxwell,74 where the California Supreme Court chose to allow Maxwell to “knowingly and intelligently” waive the conflicts created by the retainer agreement.75 In so holding, the court failed to discuss the potential harm to the defendant or the ethical problems raised by these contracts. The court-elevated the right of a defendant to retain counsel of his choice over sixth amendment concerns for the effective assistance of counsel and the integrity of the judicial system and the legal profession.

By examining the court of appeal decision in Maxwell76 in conjunction with the Hearst77 decision, it becomes apparent that the courts should address the propriety of these literary retainer agreements and the many problems that ensue when such a contract exists. The practical and ethical difficulties that arise cannot be resolved by a summary decision that ignores these underlying issues by characterizing a defendant’s waiver as “knowing and voluntary.”78 Maxwell addresses the propriety of these agreements before trial begins, when a conflict of interest indeed exists and when there is only a potential for adverse effect. Hearst addresses the problem after trial and, applying Cuyler v. Sullivan,79 requires the defendant to show that the defense attorney’s performance was adversely affected by the conflict of interest. While these decisions may appear to be contradictory, a closer examination reveals that they can be factually and theoretically reconciled.

Cuyler v. Sullivan stated that “the possibility of conflict is insufficient to impugn a criminal conviction.”80 A defendant is not to be allowed to engage in a speculative search for a reason for reversal without some support of his or her contentions. With the trial court’s record before it, the Hearst court required the defendant to show that the conflict of interest and potential for harm inherent in these agreements actually crystallized at trial. However, a retrospective requirement that a defendant show an adverse effect does not prohibit a court, as in Maxwell, from noting the existence of a

74. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).
75. Id. at 621, 639 P.2d at 257, 180 Cal. Rptr. at 186.
76. 161 Cal. Rptr. 849 (1978).
77. 638 F.2d 1190 (9th Cir. 1980).
78. 30 Cal. 3d at 621, 634, 639 P.2d at 257, 264-65, 180 Cal. Rptr. 186, 194. See supra note 34.
79. 446 U.S. 335 (1980).
80. Id. at 350.
literary rights contract in advance of trial. The court should then consider the high probability of a prejudicial influence on a defense attorney, and may conclude, in the interests of the defendant and the judicial system, that such an attorney-client relationship should not be allowed.

In considering the potential for harm to the defendant, the Maxwell court of appeal noted, "[i]t is the reasonable probability of such inherently pervasive conflicts of interest—necessarily involved in the kind of retainer agreement that exists in the instant case—that precludes the agreement from being considered 'fair and reasonable' to a client . . . ." The court determined that the great potential for unfairness to the defendant as well as the integrity of the judicial process warranted the removal of defense counsel against defendant's wishes. Maxwell argued that the removal of the attorney of his choice would violate his constitutional rights. The court refused to allow Maxwell to assert his right to counsel of his choice when that choice would undermine his sixth amendment right to effective counsel.

It is our conclusion that the inherent nature of the retainer agreement before us negates the existence of Maxwell's constitutional right to effective assistance of counsel by reason of the constitutional requirement that "the services of the attorney be devoted solely to the interest of his client undiminished by conflicting consideration." A conflict of interest which arises from the fee interest of the retainer agreement here is so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation as a matter of law.

The court of appeal held that the right to counsel of one's choice must yield to considerations of ethics and preservation of the integrity of the judicial process. The rights of the defendant must be balanced against other principles inherent in the judicial system. In these literary rights retainer cases, courts must: (1) protect the defendant from the possible consequences of his own decision; (2) consider the interests of the public in the judicial system; and (3) exercise the necessary discretion to control the conduct of attorneys. The Maxwell court considered these factors and concluded:

---

81. 161 Cal. Rptr. at 855.
82. Id. at 856 (citation omitted).
In light of the retainer agreement executed by Maxwell and his lawyers—which can only be described as unconscionable and outrageous—it would constitute a substantial contribution to the utter prostration and malfunctioning of our criminal justice system to permit these lawyers to represent Maxwell at his forthcoming trial.84

The California Supreme Court failed to look beyond Maxwell's waiver to the inherent conflict of interest created by the literary retainer agreement. The court concluded that "the mere possibility of a conflict does not warrant pretrial removal of competent counsel in a criminal case over defendant's informed objection."85 However, the conflict of interest and its resulting effect cannot accurately be characterized as a "mere possibility of conflict."86 These retainer agreements impinge upon the quality of justice and distort the attorney-client relationship.

IV. Per Se Rules of Disqualification

The court of appeal in Maxwell ruled that the retainer agreement entered into between the defendant and his attorney amounted to a denial of the defendant's right to effective representation as a matter of law. A per se rule of disqualification would eliminate literary retainer agreements by recusing any defense attorney who was involved in such a contract. Disqualification is the only appropriate remedy for the problems created by literary retainer agreements.87

Per se rules of disqualification have often been enforced in relation to violations of Canon Nine and Canon Five of the Professional Code of Responsibility. Canon Nine88 deals with the appearance of professional impropriety on behalf of an attorney. This

84. Maxwell, 161 Cal. Rptr. at 861.
85. 30 Cal. 3d at 619, 639 P.2d at 255-56, 180 Cal. Rptr. at 185.
86. Id. at 619, 639 P.2d at 255-56, 180 Cal. Rptr. at 185.
87. Chief Justice Bird would probably find a per se rule of disqualification to be unduly restrictive of an indigent defendant's right to secure counsel of his choice. In dissenting and concurring in Maxwell, Bird stated, "For this court to hold any 'life story' agreement, regardless of its contents, impermissible would be to foreclose to the indigent perhaps the only opportunity he may have to secure counsel of his choice." Id. at 624, 639 P.2d at 259, 180 Cal. Rptr. at 188 (1982) (Bird, C.J., concurring and dissenting). This statement overlooks the possibility of an indigent defendant retaining a separate attorney to handle literary contract rights with a percentage of the proceeds going to the defense attorney, or other similar alternatives. See infra Section V of text.
88. Model Code Canon 9 states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."
Canon has been the basis for a per se rule of disqualification in denying approval of counsel for a class action. In *Kramer v. Scientific Control Corp.*, the court required the removal of a law firm representing plaintiffs in a class action on the mere appearance of impropriety. The court in *Zyistra v. Safeway Stores, Inc.*, also imposed a per se rule of disqualification in disallowing an attorney from serving as counsel in a class action where his wife and law partners were members of the class of plaintiffs. The court stated:

> Whenever an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents there is a reasonable possibility that some specifically identifiable impropriety will occur. Furthermore, the public suspicion of such a conflict is sure to outweigh any public benefit from having the attorney continue.

The tendency of courts to avoid application of per se rules fashioned from the concerns reflected in the Code is based on a fear of possible abuse by those wishing to hinder their opponent’s case by seeking disqualification of opposing counsel. In *International Electronics Corp. v. Flanzer*, a retired attorney, a defendant in a shareholder case, hired members of his old firm to represent him. The plaintiff moved for disqualification of the firm representing the defendant since the defendant would be called as a witness in violation of Canon Five. The court cited the Connecticut Bar Association amici curiae brief in rejecting plaintiffs’ request.

It behooves this court, therefore, while mindful of the existing Code, to examine afresh the problems sought to be met by that Code, to weigh for itself what those problems are, how real in the practical world they are in fact, and

---

89. It must be noted that approval of an attorney to represent a class is governed by specific requirements as established by Rule 23 of the Federal Rules of Civil Procedure. Rule 23 encourages close scrutiny of the attorney-class relationship by the court. The existence of a literary retainer agreement should also evoke close scrutiny by the courts.
91. 578 F.2d 102 (5th Cir. 1978).
92. Id. at 104.
93. 527 F.2d 1288 (2d Cir. 1975).
94. Id. at 1290-91. The plaintiff asserted representation of the defendant by his law partners would violate DR 5-101(B), 5-102(A), 5-105(A) and 5-105(B) of the Model Code. DR 5-101 reads in part: "(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness. . . ." Model Code DR 5-101 (emphasis added).
whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring the client and the judicial system to sacrifice more than the value of the presumed benefits.95

The application of a per se rule of disqualification of any attorney who enters into a literary contract with a criminal defendant would not be “productive of more harm than good.”96 The application of such a rule would not lend itself to the possibility for abuse apparent in other per se situations. The potential for abuse as a delay tactic or to hinder the development of the opponent’s case would not come into play in a criminal case.97 The factual circumstances behind these literary rights contracts and the problems associated with them are sufficiently uniform so as to allow a blanket rejection of these agreements.

Per se disqualification in advance of trial based upon ineffective assistance of counsel would greatly deter attorneys from entering into these agreements. If it were known that disqualification would result immediately upon discovery of this attorney-client relationship, the potential for financial gain would be reduced. Any attorney who entered into a literary retainer agreement would be risking discovery and disqualification nullifying the value of his contract rights. Discovery of these agreements would not be difficult. Only the more sensationalized crimes which captivate the public’s attention lend themselves to the establishment of a literary rights contract. In appropriate cases, the courts would be expected to take it upon themselves to question the defendant and his attorney to determine if such an agreement exists. The prosecutor could also assume some responsibility in requesting the court to make such an inquiry.

Per se disqualification in advance of trial protects the rights of the defendant and the interests of the public as well as eliminating the burden of such a conflict on an attorney. The inherent conflict of interest created by such a retainer agreement should not be allowed to manifest itself in the attorney-client relationship and al-

95. 527 F.2d at 1293.
96. Id.
97. A prosecutor is bound by certain time considerations (e.g., the defendant’s sixth amendment speedy trial rights) which could conflict with such delay. Additionally, criminal defendants are more likely to seek delay themselves. Such tactical maneuvers are recognized means of encouraging settlement, delaying the litigation process, or instigating the removal of an opponent’s (learned) counsel in civil cases.
ter the defendant's right to effective counsel. These agreements provide little if any benefit and may improperly shape the attorney-client relationship.

V. OTHER POSSIBLE SOLUTIONS

The California Supreme Court decision in Maxwell may forestall the application of a per se rule of disqualification where a literary retainer agreement exists. There are, however, other alternatives which may eliminate these agreements or reduce their potential harm. The alternatives can be effectuated by the American Bar Association, the legal profession itself, or the legislature.

The continual violation of DR 5-104(B) by attorneys should encourage the American Bar Association to take a stance against the existence of these agreements. The purpose and legitimacy of a code of ethics is placed in question when blatant violations continue without disciplinary sanctions. Disciplinary action should be instituted against violating attorneys and the consequences ought to be harsh enough to deter attorneys from entering into these agreements. If the American Bar Association is not willing to enforce its standards, there is little likelihood that the courts will do so.

The attorney who enters into a literary retainer agreement can reduce the inherent conflict of interest by involving an independent attorney to handle the publication rights. This would allow the defense attorney to receive a set fee and concentrate solely upon the interests of his client. While this would not eliminate all of the evils associated with these agreements, it would serve to reduce the possible adverse effect upon the quality of the attorney's representation.

The contracting attorney should also clearly inform his client of the potential conflicts of interest that may arise. A framework for providing such notice is found in Rule 5-101 of the California Rules of Professional Conduct—Avoiding Adverse Interests. Rule 5-101 allows an attorney to acquire an interest adverse to his client's interest if: there is full disclosure to the client in writing (pro-

98. See supra note 11.
99. Lawyers for Atlanta slayer Wayne B. Williams, Jr. indicated that they would not participate in any negotiations over the sale of the defendant's life story and planned to hire another attorney to represent the accused killer for that purpose. Nat'l L.J., Monday, Aug. 24, 1981, at 1.
vided the transaction and terms are fair and reasonable); the client is given a reasonable opportunity to seek advice of independent counsel; and the client's consent is in writing. Ideally, the attorney should require that his client consult independent counsel and allow that independent counsel to handle all publication contracts.

Finally, many state legislatures have acted to restrict the ability of a criminal defendant to enter into a literary retainer agreement with an attorney. The first state to enact such legislation was New York with its so-called Son of Sam Law. This law requires that any monies received by a criminal defendant arising from the sale of publication rights be paid over to the Crime Victims Compensation Board. The money is placed in an escrow account for a period of five years during which victims or their legal representatives can seek a civil judgment against the criminal.

The New York statute, § 632-a Executive Law—Distribution of Moneys Received as a Result of the Commission of Crime, allows one-fifth of the amount in escrow to be paid for legal fees. However, subdivision (9) states:

Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

This subdivision appears to prohibit the existence of a separate literary retainer agreement between the attorney and defendant since it would "defeat the purpose of this section."

100. See supra note 27.
101. N.Y. Exec. Law § 632-a (McKinney 1977). Many people have questioned the constitutionality of such statutes as possibly violating the defendant's first amendment right to express his views and depriving the defendant of property without due process of law. See Comment, Criminals-Turned-Authors: Victim's Rights v. Freedom of Speech, 54 Ind. L.J. 443 (1978).
103. Id. Federal legislation to encourage all states to adopt Son-of-Sam laws was introduced in 1981 before both the House and Senate judiciary committees. Lieberman & Stewart, Making Money Off Murder, Student Lawyer, Feb., 1982, at 23.
105. Id. at § 632-a(9).
106. See id. A separate media rights contract between an attorney and his client would be an attempt to circumvent this statute. The statute prescribes the proportion of the proceeds from the sale of publication rights available for legal fees. Any contract granting an attorney greater rights would be rendered unenforceable by the statute.
CONCLUSION

The stringency of the “adverse effect” requirement imposed in United States v. Hearst has yet to be determined. Regardless of the burden of proof required, a per se rule would eventually serve to eliminate the need to adjudicate the propriety of a literary retainer agreement in retrospect. Enforcement of a per se rule of disqualification in this area would discourage attorneys from creating such contracts and would also lead to the discovery of these fee arrangements during the course of judicial proceedings. In light of the Supreme Court’s stance in Cuyler v. Sullivan, there seems to be no constitutional mandate for a per se rule requiring reversal of a conviction where a literary rights agreement exists. However, Cuyler does not prohibit courts or states from affirmatively formulating steps that eliminate these agreements.

The nature of these literary retainer agreements places a defense attorney in the precarious situation of having to ignore the temptation of financial gain in favor of his client’s best interests. A per se rule of disqualification does not imply that only unethical attorneys enter into these agreements. Rather, the per se rule eliminates the possibility of unethical behavior in a situation where it is likely to occur. It is too difficult to determine if an attorney was, consciously or subconsciously, compelled toward personal financial gain to his client’s detriment. Alternatively, no one can say that such an agreement will alter the quality of the attorney’s representation. Yet the cases discussed above do not reflect well upon the legal profession. The claims of the defendants in these cases may not have satisfied the legal criteria for reversal, but each raised for examination questionable behavior by attorneys.

The necessity for a per se rule of disqualification before trial, at the time when only a high probability of adverse effect exists, is supported by an examination of the marginal benefits that flow to defendants from such literary contracts. The sale of book or movie rights may provide funds not only for attorney’s fees, but also to cover additional expense incurred in the course of the defense. Yet a defendant can independently market his story to provide these funds and thereby avoid serious ethical entanglements for his defense counsel. Additionally, a defense attorney should be compen-

sated for his services in proportion to his efforts and not in propor-
tion to the bizarre or tragic nature of his client's alleged crime.

Statutory enactments by the states restricting publication
agreements reflect the public outrage aroused by a criminal
benefiting financially from the commission of a crime. Public out-
rage should be equally aroused when a defense attorney unduly
benefits from the exploitation of a criminal defendant through a
literary retainer agreement. The attorney not only participates in
this exploitation, but in doing so violates the Code of Professional
Responsibility and jeopardizes the defendant's sixth amendment
right to effective counsel. A per se rule of disqualification of all
attorneys entering into such contracts would add to both the integ-
rity of the legal profession and the quality of representation. Such
a rule should be enforced by the courts.

Keith Noël Bond