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NOTES


I. INTRODUCTION

Heated discussions among attorneys concerning the ethical implications of fee contracts which give attorneys exclusive rights¹ to a criminal client's life story are probably rare. The average attorney cannot afford to spend a great deal of time worrying about the ethical dilemmas surrounding a situation with which he never expects to be confronted. It is not, however, just the celebrated attorneys with an eye toward writing books who should ponder the effects of this extraordinary type of fee agreement. As the use of these contracts—whereby the client totally surrenders all rights to the story of the crime and his trial—becomes more commonplace, the need for a critical and ethical evaluation of this practice by the legal community also increases.

The recent case of Maxwell v. Superior Court,² decided by the Supreme Court of California, serves as a good backdrop for exploring the various concerns over these contracts. Maxwell is significant for two reasons. First, the case highlights the variety of tensions which life story contracts can inflict upon the attorney-client relationship. All of these tensions are manifestations of the basic underlying conflict of interest inherent in these contracts. The attorney's pecuniary self-interest in the publicity value of the trial is at odds with his ethical obligations³ to plan his strategy and conduct his representation with independent, professional judgment, undivided loyalty, and in the best interests of the client.

The second significant facet of Maxwell is that the particular

1. The contractual "rights" referred to include all variations of literary and dramatic rights; i.e., reenactment of a crime by movie, book, article, radio or television presentation, or live entertainment.
2. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).
3. See infra notes 163-89 and accompanying text.
facts of this case ideally illustrate the far-reaching effects which such contracts have even outside of the attorney-client relationship. A more complex combination of issues resulted in Maxwell because it involved a judge’s pre-trial order disqualifying defense counsel on the basis of a conflict of interest related to counsel’s fee contract, rather than the more common situation of a claim of conflict of interest arising at the stage of a post-conviction appeal. The pre-trial status of events in Maxwell made consideration of two surfacing issues crucial: the role of the judiciary and a defendant’s constitutional right to counsel of his choice.4

This casenote stands in clear opposition to the Maxwell decision. The court, in declaring this type of contract to be a permissible means of retaining an attorney,5 has knowingly encouraged unethical behavior by attorneys.6 Not only is this a step backward from the goal of strengthening the public’s confidence in lawyers and the judicial process,7 it is also a denial of an attorney’s fiduciary obligations to his client.8 The damaging effects of these contracts far outweigh the importance of a defendant’s ability to retain counsel of his choice.

Unfortunately, there is a very slim body of precedent regarding

4. Although the breadth of the sixth amendment right to counsel is an issue crucial to the Maxwell decision, this casenote will not attempt an in-depth, separate analysis of that constitutional right—nor the related issue of waiver. The note will deal with these rights only to the extent necessary for comprehension of their effect upon the situation in Maxwell. Instead, the analysis of Maxwell and relevant case law has been limited to a discussion of the interplay between the conflicting interests, ethical standards, and policy considerations surrounding these contracts. For extensive discussions of the impact of life story fee agreements upon the concepts of right to counsel and waiver, see Comment, Conflicting Interests in Lawyer-Client Publication Rights Agreements—The Story of Bobby Joe Maxwell, 42 U. Prrr. L. REv. 869 (1981); and Uelman, Conflicts and Criminal Malpractice, 54 CAL. ST. B.J. 504 (1979).
5. 30 Cal. 3d at 622, 639 P.2d at 266, 180 Cal. Rptr. at 196.
6. See id. at 636, 639 P.2d at 266, 180 Cal. Rptr. at 196 (Richardson J., dissenting). The court’s stamp of approval given to attorney-client life story fee agreements is even more disconcerting when the possibility of their widespread use in California is considered. Since it is the country’s base for entertainment and media industries, that state offers the greatest exploitation opportunities.
7. "The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount. . . . [The client’s recognizably important right to counsel of his choice] must yield, however, to considerations of ethics which run to the very integrity of the judicial process.” Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975); see, e.g., People v. Superior Court, 19 Cal. 3d 255, 268, 561 P.2d 1164, 1173, 137 Cal. Rptr. 476, 485 (1977) (quoting People v. Rhodes, 12 Cal. 3d 180, 185, 524 P.2d 363, 367, 115 Cal. Rptr. 235, 239 (1974)).
8. See, e.g., H. DRINKER, LEGAL ETHICS 89-189 (1953); Kindregan, Conflict of Interest and the Lawyer in Civil Practice, 10 VAL. U.L. REV. 423, 426 (1976) (discussions of duties owed to a client based on the fiduciary nature of the attorney-client relationship).
the issue of judicial enforceability of these contracts. The courts are currently struggling in attempts to balance the clashing interests. There can be no compromise struck—the contract must either be judicially recognized or invalidated. So far, the courts have uniformly looked to ethical codes for guidance. Some have been reluctant, as was the Maxwell court, to rely on a code of ethics as the sole criterion for its decision. But other courts have refused to turn their backs on flagrant breaches of professional ethics and have shown their willingness to support the ABA Model Code of Professional Responsibility's explicit prohibition of these contracts by judicially declaring them invalid.

II. Analysis of Maxwell

The procedural facts of Maxwell are as follows. Bobby Joe Maxwell, allegedly the "Skid Row Stabber," was arrested on April 4, 1979 and charged with four counts of robbery and ten counts of murder. Because several of the counts involved "special circumstances," he faced a possible death sentence. At his arraignment, Maxwell pleaded not guilty and reserved the right to plead not guilty by reason of insanity. Although Maxwell was found indigent and could have had court-appointed counsel, Maxwell instead retained private counsel by means of a life story fee contract. As payment for representation, Maxwell irrevocably assigned to counsel all right, title and interest to the story of his entire life and the pending criminal prosecution, including exclusive entertainment and commercial exploitation rights.

10. See infra note 52 and text accompanying notes 53-78.
11. See infra text accompanying note 167.
12. See supra note 51 and text accompanying notes 101-14.
14. 30 Cal. 3d at 610, 639 P.2d at 249, 180 Cal. Rptr. at 179.
15. Id.
16. Id. at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.
17. Id. at 609-12, 639 P.2d at 249-51, 180 Cal. Rptr. at 178-80.
18. Id. at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179. The critical provisions of this nineteen-page retainer agreement must be known in order to fully appreciate the ethical dilemma created. Under the contract, Maxwell stood to receive 15% of the net proceeds realized by any exploitation; the remaining 85% would go to his lawyers as their fee. Id. In return, Maxwell waived all defamation and invasion of privacy claims which might arise against counsel. Id. As an extra precaution, the attorneys got Maxwell to agree to waive his attorney-client privilege. Id. n.1. It was contended by Maxwell's lawyers that all possible prejudice and conflicts of interest arising from the contract were cured by a combination of the above-named waivers and the extensive disclosure made to Maxwell.
On April 26, 1979, defense counsel notified the trial court of the existence of this fee arrangement. The judge then reviewed the nineteen-page agreement and questioned Maxwell as to its contents in order to ascertain his understanding of the conflicts of interest present. After finding that Maxwell did indeed knowingly and willingly agree to the contract, and although counsel's competency was not an issue, the trial judge nonetheless found the conflict intolerable and ordered the pre-trial disqualification of Maxwell's counsel. When substitute counsel was appointed over Maxwell's protest, a mandate proceeding was brought in the court of appeals to review the superior court's recusal order. In denying a writ of mandate, that court expressed wholehearted approval of the disqual-

in paragraph 14 of the contract. In essence, paragraph 14 "declares that counsel may wish to (1) create damaging publicity to enhance exploitation value, (2) avoid mental defenses because, if successful, they might suggest [Maxwell's] incapacity to make the contract, and (3) see him convicted and even sentenced to death for publicity value." Id. at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179. Counsel attempted to de-emphasize these bold admissions by closing the paragraph with a contradictory provision assuring Maxwell that they would "raise every defense . . . warranted" and would act as "diligent, conscientious advocate[s]." Id. (emphasis added). It is also important to note, especially in light of Maxwell's waiver of the attorney-client privilege, that counsel was not obligated, under this contract, to undertake an appeal or represent him at any stage subsequent to the initial trial. Id. at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179.

19. Id. at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.

20. Id. at 611, 639 P.2d at 250-51, 180 Cal. Rptr. at 180. The judge's inspection of the contract and his questioning of Maxwell was appropriate because a judge has a strict duty to ensure that every defendant truly comprehends the significance and effect of waiving his constitutional right to conflict-free representation. Id. at 620-21, 639 P.2d at 256-57, 180 Cal. Rptr. at 185-86. Though Maxwell possessed only an eighth-grade education, he was literate and insisted that he was capable of a knowing and intelligent waiver of those conflicts. Id. at 611-12, 639 P.2d at 250-51, 180 Cal. Rptr. at 179-80. A different trial judge inquired into this contract, sua sponte, and again tested Maxwell's comprehension on September 14, 1979. Id. Maxwell reiterated his waiver as well as his satisfaction with his present counsel. Id.

21. Id. at 612, 639 P.2d at 251, 180 Cal. Rptr. at 180. In ruling that the retainer agreement created such a conflict of interest that Maxwell would be deprived of effective assistance of counsel, the trial judge relied upon People v. Corona, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978). In Corona, a murder conviction was reversed because post-trial examination of a similar literary rights contract showed a conflict of interest which resulted in ineffective representation. Id. at 727, 145 Cal. Rptr. at 920. The basic conflict of interest referred to is the same in all cases involving royalty contracts: the attorney's pecuniary interest in a lengthy, sensational trial will necessarily taint his judgment as to what trial tactics are in his client's best interests. See, e.g., id. at 719-20, 145 Cal. Rptr. at 915; Maxwell, 30 Cal. 3d at 627-31, 639 P.2d at 261-63, 180 Cal. Rptr. at 190-93 (Richardson, J., dissenting).


23. A recusal order is one which disqualifies an attorney on the basis of interest or prejudice.
Saying that counsel had violated ethical standards in creating the contract, and that maintaining the integrity of the judicial process was a concern paramount to a defendant’s right to counsel of choice, the court of appeals urged judicial disapproval of these “unconscionable and outrageous” contracts.

The Supreme Court of California disagreed and issued a writ mandating that the trial judge’s recusal order be overturned and that Maxwell’s original counsel be reinstated. It was held that when only a mere possibility of prejudice is created by a conflict of interest and a defendant knowingly waives all consequences of the potential conflicts, pre-trial removal of counsel is not warranted. The court’s insistence upon the need for actual prejudice and its deference to Maxwell’s waiver reveal the great significance which that court attached to a defendant’s right to demand particular counsel, even potentially “deficient” counsel. The court did not ignore, however, the contrasting view “that life-story fee contracts are inherently prejudicial, unethical, and against public policy. . . .” The very fact

25. Id. at —, 161 Cal. Rptr. at 853-55.
26. Id. at —, 161 Cal. Rptr. at 855-61. See supra text accompanying note 163 for the wording of the relevant ethical standard applicable in Maxwell.
27. Maxwell v. Superior Court, 101 Cal. App. 3d 736, —, 161 Cal. Rptr. 849, 856 (1980). “A conflict of interest which arises from the fee-interest potential 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.” Id. (emphasis added).
28. Id. at —, 161 Cal. Rptr. at 861.
29. 30 Cal. 3d at 622, 639 P.2d at 258, 180 Cal. Rptr. at 187.
30. Id. at 610, 639 P.2d at 249, 180 Cal. Rptr. at 178. As support for this holding, the majority relied on Smith v. Superior Court, 68 Cal. 2d 547, 440 P.2d 65, 68 Cal. Rptr. 1 (1968), and Ingram v. Justice Court, 69 Cal. 2d 832, 447 P.2d 650, 73 Cal. Rptr. 410 (1968).
31. 30 Cal. 3d at 612, 639 P.2d at 251, 180 Cal. Rptr. at 180.
32. “[T]he involuntary removal of an attorney is a severe limitation on a defendant’s right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed.” Id. at 615, 639 P.2d at 253, 180 Cal. Rptr. at 182 (quoting Cannon v. Commission on Judicial Qualifications, 14 Cal. 3d 678, 697, 537 P.2d 898, 911, 122 Cal. Rptr. 778, 791 (1975)).
33. Id. at 616, 639 P.2d at 253, 180 Cal. Rptr. at 182. The court examined a number of decisions, including the following, in which this opposing view was found persuasive and prevailed. Wojtowicz v. United States, 550 F.2d 786, 793 (2d Cir.), cert. denied, 431 U.S. 972 (1977); Ray v. Rose, 535 F.2d 966, 974 (6th Cir.), cert. denied, 429 U.S. 1026 (1976); United States v. Hearst, 466 F. Supp. 1068, 1083 (N.D. Cal. 1978), vacated, 638 F.2d 1190 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981); People v. Corona, 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894, 915 (1978). Ultimately, the Maxwell court rejected the argument that preservation of “the integrity of a trial and thus, confi-
that the court did consider the many ethical and public policy concerns involved, and yet was not convinced of their overriding importance, makes its cautious closing remark all the more contradictory to its holding.36

Chief Justice Bird, concurring and dissenting, defended these contracts on the additional ground that they might be the only means by which an indigent defendant could ever secure counsel of his choice.38 He dissented from Maxwell's result, however, concluding in the judicial process were concerns that "outweigh a single defendant's interest in chosen counsel." 30 Cal. 3d at 616, 639 P.2d at 253, 180 Cal. Rptr. at 182.

34. 30 Cal. 3d at 616-17 nn.5-6, 639 P.2d at 253-54 nn.5-6, 180 Cal. Rptr. at 183 nn.5-6; see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-4 & DR 5-103(A) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(d) (Discussion Draft 1980) (current version of MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(d) (1983)); CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-101 (1975). For further discussion of these rules, see supra notes 163-89 and accompanying text.

35. A major public policy concern which was quickly dismissed by the majority is the existence in many states of so-called "Son of Sam" statutes. These laws provide "that any proceeds from commercial exploitation of one's crimes shall be paid into state-supervised escrow funds for disbursement to victims and for legal defense. . . A similar proposal failed in the California Legislature." 30 Cal. 3d at 617 n.7, 639 P.2d at 254 n.7, 180 Cal. Rptr. at 183 n.7. See, e.g., ARIZ. REV. STAT. ANN. § 13-4202 (1978); GA. CODE ANN. § 17-14-31 (1982); Criminal Victim's Escrow Account Act of 1979, §§ 1-10, ILL. ANN. STAT. ch. 70, §§ 401-410 (Smith-Hurd Supp. 1983-1984); MASS. GEN. LAWS ANN. ch. 258A, § 8 (West Supp. 1983-1984); N.Y. EXEC. LAW § 632-a (McKinney 1982). Such statutes reveal the public's disdain for contracts involving exploitation rights to reenact a crime, regardless of who the other contracting party is. But since these statutes require only those proceeds which would otherwise go to the criminal under the contract to be paid into the account, Maxwell's lawyer could retain his profits even if California had chosen to adopt such legislation. Nonetheless, such statutes single these contracts out as being against public policy because they allow the offender to monetarily profit from his crime while his victims go uncompensated. It seems similarly inequitable to allow an attorney to become unjustly enriched as a direct consequence of an atrociously violent crime.

36. "We stress that our opinion connotes no moral or ethical approval of life-story fee contracts." 30 Cal. 3d at 622, 639 P.2d at 257, 180 Cal. Rptr. at 187.

37. The dissent was disturbed at the majority's attempt to deny its ethical and moral approval of such contracts while at the same time allowing their existence regardless of numerous unethical implications. "With due respect, it seems to me inescapable that the majority does approve and sanction the agreement." Id. at 636, 639 P.2d at 266, 180 Cal. Rptr. at 196 (Richardson, J., dissenting) (emphasis in original). Justice Kaus, although concurring, was also disappointed and "had hoped that our opinion would find harsher language respecting the 'life story' contract's propriety as well as its enforceability." Id. at 622-23, 639 P.2d at 258, 180 Cal. Rptr. at 187 (Kaus, J., concurring).

38. Id. at 623-24, 639 P.2d at 258-59, 180 Cal. Rptr. at 188 (Bird, C.J., concurring and dissenting). This is indeed quite an elevation of the right to choose one's counsel. Indigent criminal defendants are already guaranteed free court-appointed counsel. Arguably, such protection for indigents satisfies the constitutional guarantee of effective assistance of counsel if all lawyers are to be presumed competent. To say that an indigent defendant has a constitutional right to secure a more famous attorney not only...
Justice Richardson, however, wholly dissented. Focusing upon the particular provisions of Maxwell's contract, its troubling features, and the numerous conflicts of interest created by it, he found the conflicts to be irreconcilable. After exploring all pertinent ethical guidelines in greater detail than did the majority, Justice Richardson found these collective judgments extremely persuasive. In addition to the erosion of judicial integrity, he deplored two other results of these contracts: the breach of an attorney's fiduciary obligations to his client, and the delay in the trial on the merits. In response to the majority's jealous protection of a defendant's right to choose his counsel, Justice Richardson pointed out that because Maxwell faced the possibility of a death sentence, he especially required "counsel whose allegiance to him is total and unalloyed, free of the subtle, opposing magnetic pull of self-interest or adverse pecuniary advantage. This, the majority refuses to assure."

III. RELEVANT CASE LAW

Case law in this area is limited because the use of a life story contract by an attorney as a fee arrangement is an extraordinary and makes the right to counsel of choice an absolute one, but also suggests that court-appointed counsel would provide ineffective representation.

39. Id at 624-25, 639 P.2d at 259-60, 180 Cal. Rptr. at 188-89 (Bird, C.J., concurring and dissenting). Chief Justice Bird asserted that the inadequacy flowed from several facts: no layman could possibly understand the magnitude and ramifications of the conflict; Maxwell was not specifically informed of his inability to raise consequences of the waived conflicts of interest on appeal; and the impact of waiving the attorney-client privilege was not explained to Maxwell. Chief Justice Bird would have ordered an additional hearing to advise Maxwell of this information and then see if he still preferred to make the waivers. Id

40. Id at 626, 639 P.2d at 260, 180 Cal. Rptr. at 189 (Richardson, J., dissenting).
41. Id at 631-33, 639 P.2d at 263-64, 180 Cal. Rptr. at 193-94.
42. Id at 633, 639 P.2d at 264, 180 Cal. Rptr. at 194.
43. Id at 631-32, 639 P.2d at 263, 180 Cal. Rptr. at 193.
44. Id at 632, 639 P.2d at 264, 180 Cal. Rptr. at 193.
45. Id at 628, 639 P.2d at 261, 180 Cal. Rptr. at 190.
46. Id at 627, 639 P.2d at 261, 180 Cal. Rptr. at 190. This important point went unaddressed by the majority. It is likely that most defendants who sell their life story rights to attorneys are persons who have been charged with committing a crime so violent as to bring them national notoriety. Therefore, the client-party to these contracts will almost invariably face a harsh sentence if convicted. Protection of his constitutional rights is crucial in such a situation and therefore a conflict of interest involving the lawyer's financial interests should not be tolerated. By analogy, it is for this very reason that contingent fees are disallowed in criminal cases.
fairly recent phenomenon. The result is that clearly defined legal guidelines concerning such use have yet to be developed. Patterns, however, have emerged from the various cases and courts.

Most courts analyze the conflict of interest created by these contracts in terms of the same test applied to conflicts stemming from multiple representation: some proof of actual prejudice is required. The other pattern which has emerged is that nearly all of the courts considered defense counsel's violation of or compliance with ABA and other ethical standards as a factor. Occasionally, these ethical standards were regarded as outcome-determinative, but often were deemed only pertinent and not controlling of the conflict of interest issue. Notwithstanding these two patterns, the cases reveal a definite lack of uniformity with regard to application of law, analysis, and result.

A. Federal Cases

Most of the federal case law on the issue of conflicts of interest stemming from attorney-client life story agreements developed out of factual settings significantly different from that in Maxwell. Unlike the pre-trial situation of Maxwell, the conflict of interest issue in these cases was not presented until the stage of a post-conviction appeal based on ineffective assistance of counsel. Nonetheless, they are important cases since the basic conflict involved is the same, and the Maxwell court looked to these cases for guidance.

47. See Annot., supra note 9, for an overview of federal cases involving such royalty agreements.

48. See United States v. Hearst, 466 F. Supp. 1068, 1083 (N.D. Cal. 1978), aff'd, 638 F.2d 1190 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981) (dicta that any difference between a conflict of interest based on multiple representation and one based on an attorney's private financial interests is immaterial).


51. Annot., supra note 9, at 158; see, e.g., United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978); United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974); People v. Corona, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978).

52. Annot., supra note 9, at 158; see cases cited supra note 49.

53. See infra text accompanying notes 144-56 for a discussion of the significance of this difference.
Ray v. Rose was an early case involving a lawyer's acquisition of exploitation rights. The defendant, James Earl Ray, was convicted of first-degree murder for the slaying of civil rights leader, Martin Luther King, Jr. Ray had entered into a pre-trial contract with his attorney which made the attorney Ray's exclusive agent for purposes of publishing and filming his life story. Further contracts were then made with an established author for the publication of both magazine articles and a book, with most proceeds to go to the author and the attorney. Ray was advised to plead guilty and did so, but on appeal claimed that such plea was made involuntarily. Ray's contention was that his attorney's conflicting financial interest in the publication proceeds caused him to improperly advise Ray to plead guilty.

The Ray court applied a test enunciated in Beasley v. United States to Ray's claim of ineffective assistance of counsel. That test first requires that counsel perform as well as any lawyer "with ordinary training and skill in the criminal law." In denying Ray's petition for relief, the court held that Ray had failed to establish that his attorney's performance was not at least of this caliber. It also considered the strong possibility that the death penalty would have been imposed had the case gone to trial. The second half of the test is that the lawyer "must conscientiously protect his client's interest, undeflected by conflicting considerations." Interpreting this to imply that conflicting considerations must additionally be found to result in actual prejudice, the Ray court found only potential con-

55. Id. at 603-04.
56. Id. at 604.
57. Id. at 604-05. Under the original contract, both Ray and his attorney were each to receive 30% of the proceeds. In a second contract, Ray further agreed to give 40% of his share to his attorney as additional payment of fees. This second contract was later amended to require instead a payment of $20,000 plus expenses. Id.
58. Id. at 603.
59. Id. at 607, 618-20. The basis of this contention was that his attorney desired to rush a guilty plea, thereby avoiding a lengthy trial, in order to meet a publication deadline. Id.
62. Id. at 618.
63. Id.
64. Id. at 619.
65. Id. at 618.
conflicts of interest arising from the contract. 66

The Roy court also considered the contract in light of the ABA Code of Professional Responsibility and conceded that Disciplinary Rule 5-104(B) 67 had been violated. 68 This factor alone, however, was deemed insufficient to warrant a reversal. 69 Taking a "totality of the circumstances" approach, 70 the court even suggested that disclosure within the contract of the attorney's adverse financial interests constituted a waiver by Ray of any conflicts. 71 Significantly, the court also mentioned its reluctance to intrude upon the privacy of the attorney-client relationship. 72

The very same issue was brought to another federal court not long after Roy was decided. The facts of Fuller v. Israel 73 are quite similar to those of Roy and, indeed, the analysis and result run parallel. In Fuller, a defendant convicted of murder sought habeas corpus relief alleging that counsel's financial interest in the defendant's unpublished writings and video tapes (relating to the murder offense) created a conflict of interest which rendered his representation ineffective. 74 In particular, the defendant claimed that his attorney encouraged a guilty plea in order to keep the unpublished documents from becoming public records at a trial. 75 This court, similar to Roy, held that although the contract giving the attorney such financial interests had violated Disciplinary Rule 5-104(B), such violation did not, in itself, justify a per se rule mandating reversal. 76 Rather, some actual prejudice must be shown, and "the existence of the contract alone is insufficient to prove ineffective assistance of counsel." 77 Applying a test similar to the one enunciated in Beasley and Roy, the Fuller court also found counsel's performance to be within the acceptable range of competence. 78

In Wojtowicz v. United States, 79 the defendant and his confed-

66. Id. at 620.
67. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(B) (1981). For the text of DR 5-104(B), see infra text accompanying note 167.
68. 392 F. Supp. at 620.
69. Id.
70. Id. at 621.
71. Id. at 619-20.
72. Id. at 621.
74. Id. at 583.
75. Id.
76. Id. at 584-85.
77. Id.
78. Id. at 585-86.
ates had held hostages in a New York bank after committing an armed robbery. The police laid seige to the bank but then agreed to transport the robbers to the airport where they were finally arrested. Wojtowicz was later convicted of armed robbery. Wojtowicz's attorney was to be paid his fee and expenses from a fund created by the sale of movie rights to the crime. Counsel had participated in negotiating such sale. In accord with both Ray and Fuller, the Wojtowicz court denied the defendant's post-conviction plea for relief. In response to Wojtowicz's claim that counsel's financial interest in the movie caused him to urge a guilty plea, the court said, "while we do not regard the practice [of attorneys acquiring literary or dramatic rights] as worthy of emulation, we cannot say that it rendered counsel's representation constitutionally defective."

Another federal decision on point dealt with a crime that was even more publicized than Dr. King's assassination: the Patty Hearst case. In United States v. Hearst, the defendant appealed her conviction for armed robbery, alleging ineffective assistance of counsel. She contended that her attorney, F. Lee Bailey, motivated by his own interests in a contract to write a book concerning the trial, put her on the stand in order to remove vast areas of her story from the veil of the attorney-client privilege. Hearst also alleged that Bailey's advising her to take the stand was designed to draw further attention to the trial. This trial strategy was claimed to be a manifestation of the conflict between Bailey's personal goals and the interests of his client.

On appeal, the court denied Hearst's motion for an order vacating her sentence. Admitting that Bailey's financial interests ren-
dered his performance suspect, and even conceding that acquiring literary rights was a practice deserving of judicial condemnation, the court nonetheless followed the federal precedent of Ray, Fuller, and Wojtowicz, and required a showing of actual prejudice to render the representation constitutionally deficient. The court discerned no such prejudice from the record and viewed the putting of Hearst on the stand as a reasonable tactic.

The United States Court of Appeals for the Ninth Circuit vacated the district court opinion and remanded, holding that such a denial of relief without a hearing was an error. The court further ordered that the United States Supreme Court decision of Cuyler v. Sullivan, decided after the district court's denial, be applied on remand. Although Cuyler involved a conflict of interest arising from multiple representation, the Hearst court held that any difference was immaterial. The holding in Cuyler had required a convict seeking a writ of habeas corpus to show an actual rather than merely a potential conflict of interest. This requirement, however, is not the same as a showing of prejudice. For example, in the face of overwhelming evidence of guilt, it would be almost impossible to show prejudice if the end result, a conviction, would most likely have been the same without the conflict. Instead, all that Cuyler requires, according to the court of appeals in Hearst, is a showing that the alleged potential conflict did ripen into an actual conflict as evidenced by some adverse effect on the attorney's performance.

In drawing such a distinction between "conflict" and "prejudice," the Hearst court was the first to deviate from the pattern of analysis which had emerged from Ray, Fuller, and Wojtow-

92. Id. at 1083.
93. Id.
95. 446 U.S. 335 (1980).
96. 638 F.2d at 1193.
97. Id.
98. 446 U.S. at 350.
99. 638 F.2d at 1194.
100. Id. Under such a test, an actual conflict could be established by proving that the attorney's advice to plead guilty or to take the stand, or his withdrawal of a crucial defense was motivated by his own financial interests rather than by what course of action would be in the client's best interests. It would be unnecessary to prove that the attorney's action prejudiced the outcome of the case. See id.
101. This same distinction was drawn much earlier in Glasser v. United States, 315 U.S. 60, 76 (1942) (holding that the test of ineffective assistance of counsel is whether the representation would have been more effective had it not been for the conflict of interest). See also United States v. Hurt, 543 F.2d 162 (D.C. Cir. 1976).
Also, the court of appeals in *Hearst* was far more outraged by the contract involved than were those previous courts. The Ninth Circuit not only criticized Bailey's conduct as being violative of ethical rules and unbecoming a member of the bar, but also encouraged the initiation of disciplinary proceedings against Bailey.

**B. California Precedent**

In addition to the federal cases, the *Maxwell* court examined its own state law. A decision directly on point, and decided not long before *Maxwell*, is *People v. Corona*. Juan Corona was convicted of twenty-five counts of first-degree murder for the killing of twenty-five migratory farmworkers. The murders, all occurring between February and May of 1971 and under bizarre circumstances, were naturally the focus of national media attention. Corona retained a private, solo practitioner and contracted for his services by surrendering exclusive literary and dramatic rights to his life story. Under this contract, Corona waived the attorney-client privilege and was not entitled to any income derived from his attorney's exercise of the relinquished rights. The attorney hired a writer to sit at the defense table throughout the trial, and a book was published just a few months after completion of the trial.110

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102. Prior to *Hearst*, the federal courts occasionally departed from the requirement of actual prejudice, but usually only in situations where the conflict of interest was flagrant. *E.g.*, United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978); Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974). In *Alvarez*, the defendant's attorney had also represented co-indictees who pleaded guilty and testified against the defendant. 580 F.2d at 1253-54. In reversing the conviction, the court ruled that such conflict-laden representation was invidious and not susceptible to fine gradations. *Id.* at 1256-57. Therefore, once an actual conflict of interest is established, no showing of prejudice is necessary because the representation is tantamount to a denial of counsel itself. *Id.* In *Castillo*, the defendant's attorney represented not only the defendant in a theft trial, but represented the theft victim as well in a civil suit. 504 F.2d at 1244-45. It was held that such conflicting loyalties were sufficient for a reversal without specific prejudice. *Id.* at 1245.

103. 638 f.2d at 1198. "Potential and actual conflicts of interest always bring disrepute upon the bar, the court, and the law. They do so to an even greater degree when the case is a *cause célèbre* and the attorney has the reputation of being an outstanding lawyer." *Id.*

104. *Id.* at 1199.


106. *Id.* at 693, 145 Cal. Rptr. at 897-98.

107. *Id.*

108. *Id.* at 703, 145 Cal. Rptr. at 903.

109. *Id.* at 703, 145 Cal. Rptr. at 903-04. This contract is very similar to Maxwell's except that Maxwell retained an interest in 15% of the profits.

110. *Id.* at 703, 145 Cal. Rptr. at 904; see E. CRAY, *BURDEN OF PROOF, THE CASE OF JUAN CORONA* (1978).
On a petition for habeas corpus, Corona alleged two separate grounds for reversal. The first was ineffective assistance of counsel due to counsel's prejudicial withdrawal of crucial defenses; the second was that the conflict of interest created by the contract rendered the trial so inherently unfair as to justify a reversal per se.\(^{111}\) Corona's conviction was reversed and proceedings remanded, based upon a combination of both grounds.\(^{112}\)

The court first declared that effectiveness of counsel included not only professional competence but also undivided loyalty of services, undiminished by conflicting considerations.\(^{113}\) The court then held that the contract involved created a conflict of interest so inherently conducive to divided loyalties as to amount to a denial of effective representation as a matter of law.\(^{114}\)

Although the court placed great emphasis on the question of divided loyalties,\(^{115}\) the manner and quality of the legal representation were also in issue. Due to the attorney's blatantly inadequate trial performance, the court also stressed the fact that the conflict of interest had resulted in actual prejudice to Corona.\(^{116}\)

This latter finding has caused some courts to give sole import to Corona's language regarding prejudice and to then conclude that actual prejudice is still required for a reversal.\(^{117}\) A comprehensive analysis of Corona, however, reveals that the court gave both arguments equal importance and so the existence of the contract alone

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111. 80 Cal. App. 3d at 704-05, 145 Cal. Rptr. at 905.
112. Id. at 730, 145 Cal. Rptr. at 922. Corona's retrial came to a close in September of 1982. Corona was again convicted of first-degree murder on all twenty-five counts. This second trial lasted seven months and cost the taxpayers of California an estimated $5 million. It was the most expensive trial for a single defendant in California history. His first trial cost only $415,000. N.Y. Times, Sept. 24, 1982, at 16, col. 1. In light of the strong case against Corona, and thus the predictable outcome of a retrial, the exorbitant cost of the retrial, and the waste of judicial time involved, it is hard to justify allowance of life story agreements. Their effects are simply too costly.
113. 80 Cal. App. 3d at 719-20, 145 Cal. Rptr. at 915.
114. Id. (citing Glasser v. United States, 315 U.S. 60 (1942); and Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974)) (emphasis added); see supra notes 101-02 and accompanying text.
115. 80 Cal. App. 3d at 719-20, 145 Cal. Rptr. at 915. "From that moment [of the contract's inception] on, 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." Id.
116. Id. at 721-25, 145 Cal. Rptr. at 915-19. Actual prejudice was evidenced by the withdrawal of crucial defenses, counsel's failure to perform adequate investigation, counsel's trying the case to the press to inflame passions, and the empty, unfulfilled promises of counsel's opening statement. Id.
117. The Hearst court, for example, interpreted Corona in this manner. 466 F. Supp. at 1083.
would probably have been sufficient to require a reversal per se, regardless of whether or not actual prejudice had resulted.

The confusion as to the correct interpretation of *Corona* is best illustrated by the conflicting decisions reached in *Maxwell*. The court of appeals, in deciding *Maxwell*, chose to rely heavily on *Corona’s* language concerning divided loyalties and affirmed the disqualification of Maxwell’s counsel.118 The Supreme Court of California, on the other hand, stressed only *Corona’s* discussion of prejudice and reinstated a requirement of actual prejudice in *Maxwell*.119 The court chose not to read *Corona* as holding that life story contracts constitute a per se denial of effective representation, notwithstanding abundant language in *Corona* that would support such a conclusion.

C. *Subsequent Applications of Maxwell*

In holding a defendant’s right to choose his own counsel to be of sacred importance, even at the cost of likely harm to the client and the judicial process, the *Maxwell* court has opened the door to dangerous extensions of this notion. Faced with the task of applying *Maxwell* as precedent, a California court, in *People v. McKenzie*,120 cited *Maxwell* for the proposition that a defendant’s right to choose his counsel is paramount even to effectiveness of representation.121 Consequently, the *McKenzie* court held that an attorney’s clearly incompetent representation and total dereliction of duty did not constitute per se reversible error, even though it was an ethical violation.122 The defendant in *McKenzie* was charged with rape, robbery and assault with a deadly weapon.123 Throughout the trial, the appointed public defender did nothing more to participate than to sit mute at the defense table.124 This behavior was in reaction to the judge’s pre-trial denial of his request to withdraw from representation of the defendant.125 Because the defendant himself had not objected to the representation and because the attorney’s threat to remain mute at trial constituted only a potential conflict of interest at the pre-trial stage, the court applied *Maxwell’s* logic and held paramount the de-

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118. 101 Cal. App. 3d at —, 161 Cal. Rptr. at 856.
119. 30 Cal. 3d at 612-14, 639 P.2d at 251-52, 180 Cal. Rptr. at 180-81.
120. 130 Cal. App. 3d 73, 181 Cal. Rptr. 496 (1982).
121. *Id.* at —, 181 Cal. Rptr. at 503.
122. *Id.* at —, 181 Cal. Rptr. at 504.
123. *Id.* at —, 181 Cal. Rptr. at 497.
124. *Id.* at —, 181 Cal. Rptr. at 499.
125. *Id.* at —, 181 Cal. Rptr. at 498.
fendant's right to choose his own counsel, however incompetent.126 Appealing his conviction, the defendant claimed ineffective assistance of counsel. Though this certainly seems to be a valid claim, the court, in applying Maxwell, refused to reverse on this ground.127 Instead, they looked to the record for actual prejudice, as suggested by Maxwell, and found none.128 As to the attorney's blatantly unethical behavior, that matter was left to the hands of the State Bar.129 The defendant had not received anything even close to the loyal, competent representation required by ethical standards,130 nor did he receive a judicial remedy131 for that abrogation.

A federal court in Florida reached an opposite result, though, in United States v. Hobson,132 when it chose an analysis similar to the dissent's approach in Maxwell. The criminal defendant's attorney in Hobson was disqualified for allegedly violating an ethical rule.133 The defendant was being prosecuted for drug trafficking and it was alleged that his attorney had prior knowledge of the marijuana smuggling scheme.134 As in Maxwell, the defendant had attempted to waive the ethical conflict and insisted upon retaining the counsel of his choice.135 The Hobson court, relying on the same strong public policy argument offered in Maxwell's dissent,136 held that a defendant was not free to waive any ethical problems because the public's perception of the attorney and the legal system was involved; vindication of the right to counsel of choice would create a serious risk of undermining the public's confidence.137 As to the appropriateness of immediate disqualification, the court added that proof of actual wrongdoing was not needed; the mere likelihood of public suspicion outweiged the interest of counsel's continued partic-

126. Id. at __, 181 Cal. Rptr. at 502-03.
127. Id. at __, 181 Cal. Rptr. at 504.
128. Id.
129. Id.
130. Id. —, 181 Cal. Rptr. at 501. "Here we do not seek to hide the fact that defendant was actually denied by his own attorney effective assistance which could have been rendered . . . ." Id.
131. Id. at __, 181 Cal. Rptr. at 502. "]the choice by defense counsel to deny his client effective representation was not of the court's making. . . ." Id. Obviously, the court is not willing to enforce a lawyer's duties, and yet, the court is ignoring its own duty to ensure the fairness of all judicial proceedings. See infra note 154.
132. 672 F.2d 825 (11th Cir.), cert. denied, 103 S. Ct. 208 (1982).
133. Id. at 826.
134. Id.
135. Id. at 829.
136. Id. at 827-28. The Hobson majority did not, however, cite to Maxwell. The Hobson dissent did.
137. Id.; see also H. Drinker, supra note 8, at 120.
Judge Kravitch, dissenting in part, admonished that "[d]isqualification of counsel in a criminal case on the 'appearance of impropriety' should be a remedy sparingly used." He then cited to Maxwell as a decision which held that erosion of public confidence in the judicial system could never transcend one's interest in counsel of choice.

D. Different Posture of Maxwell

With the exception of Hobson, the federal and state cases discussed have a significant common aspect which Maxwell does not have: they all considered the conflict of interest issue at the post-conviction appellate stage of the proceedings. A case such as Maxwell, involving the unusual posture of preventive disqualification in anticipation of prejudice, cannot possibly be analyzed in terms of the "actual prejudice" standard applied in post-conviction cases, even though the underlying issue is indeed the same. Thus, the initial issue facing the Maxwell court was the proper role of the judiciary in a pre-trial situation. First, does a judge have the discretion to balance the interests of ensuring a fair trial and the probability of prejudice against a defendant's right to waive conflicts and retain particular counsel? Second, is it within a judge's supervisory powers to disqualify an attorney for an ethical violation? Although the Maxwell court answered both of these questions in the negative, it was only able to do so after distinguishing a relevant California case, Comden v. Superior Court, which had previously answered these questions in the affirmative.

While superficially distinguishing Maxwell from Comden on the facts, the Maxwell court hinted at its real reason for not following Comden: it believed that Comden was becoming weak law in light of subsequent liberalizing of ethical standards by the State Bar of California. Although a civil case, the issue in Comden was similar to that in Maxwell. An attorney was disqualified because of a

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138. 672 F.2d at 828.
139. Id. at 831 (Kravitch, J., concurring and dissenting).
140. Id. n.7.
141. 30 Cal. 3d at 612-17, 639 P.2d at 251-54, 180 Cal. Rptr. 180-83.
142. Id.
143. 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978).
144. 30 Cal. 3d at 618, 639 P.2d at 255, 180 Cal. Rptr. at 184. "None of those cases compels or authorizes a dismissal [of the attorney] here." Id.
145. 30 Cal. 3d at 619 n.9, 639 P.2d at 255 n.9, 180 Cal. Rptr. at 184-85 n.9.
146. The distinguishing fact that Maxwell is a criminal case should not render Comden useless as precedent. Comden's emphasis on maintaining uncompromised ethi-
potential conflict of interest: it was likely that a member of his firm would be called as a witness in violation of a California ethical rule. Comden held that "[f]ailing voluntary withdrawal by trial counsel in such situation a trial court is vested with broad discretion to order withdrawal." Not only was a timely disqualification within the court's power, such disqualification was necessary in order to both minimize the prejudice caused by delay, and "ensure that the standards of ethics remain high." But the Maxwell court chose to ignore the explicit recognition in Comden that a judge has discretion to perform a pre-trial balancing of interests which may result in a disqualification of counsel.

The Maxwell court would probably disapprove, then, of a similar recognition of these judicial powers in United States v. Dolan, a federal case decided post-Maxwell. The Dolan court went beyond merely authorizing a judge's discretionary pre-trial balancing. Defendant's retained attorney was disqualified for breaching an ethical standard. Specifically, in representing multiple criminal defendants, the attorney became unable to adequately represent the separate interests of each defendant once he put one defendant on the witness stand. This disqualification was upheld as a valid exercise of the court's supervisory powers, notwithstanding the other defendant's attempted waiver of the conflict of interest. The Dolan court ultimately held that when an attorney will be unable, in a judge's opinion, to conform with the ABA Code of Professional Responsibility's requirement of adequately representing the interests of each client, the judge should not be forced to tolerate an inadequate representation of that defendant. Breaches of professional ethics in-

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147. 20 Cal. 3d at 912, 576 P.2d at 973, 145 Cal. Rptr. at 11.
148. Id. at 915-16, 576 P.2d at 975, 145 Cal. Rptr. at 13.
149. Id. at 913-14, 576 P.2d at 974, 145 Cal. Rptr. at 12.
151. 570 F.2d 1177 (3rd Cir. 1978).
152. Id. at 1178-79.
153. Id. at 1182, 1184.
154. Id. at 1184. Pre-trial disqualification of an attorney who has breached an ethical obligation to his client seems to be wholly justified by Canon 1 of the ABA Code of Judicial Conduct which states: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." Model Code of Judicial Conduct Canon 1 (1972). In fact, every judge has a duty to "take or initiate appropriate
vite disrespect for the integrity of the court.\textsuperscript{155} Thus, *Dolan* can be interpreted to call for a per se judicial rule of disqualification whenever an attorney has clearly violated an ethical standard,\textsuperscript{156} without the formality of a case-by-case balancing of interests.

**IV. Proposal: A Judicially-Enforced Per Se Rule**

The proposal offered in this casenote is not as wide in scope as those suggested by *Dolan* and other authorities which encourage judicial enforcement of all ethical standards. This certainly would be a heavy burden to place upon an already clogged judicial system. Because this article is limited to an analysis of the conflicts of interest inherent in life story agreements, the proposal offered is similarly narrow: a per se rule of invalidating such contracts is justifiable and should be applied by the courts on a uniform basis. Several reasons supply the justification for strict judicial enforcement of such a rule.

These types of contracts can only vary in degrees as to their unconscionability and inherent conflicts of interest. Every single contract of this type creates at least potential conflicts that immediately do harm to the public's image of the bar and the judiciary. Thus, there is no need to impede judicial efficiency by compelling the judge to inquire into the particular provisions of these contracts. A case-by-case balancing of interests is unnecessary when the same interests will conflict in every situation. Neither is it feasible to believe that a judge is able to predict accurately, in the pre-trial stage, the likelihood of a potential conflict ripening into actual harm to the defendant.\textsuperscript{157}

Further, this inability to predict accurately the probability of such ripening does not justify a "wait and see" approach. As demonstrated in the case law discussed, when the conflict of interest issue is not raised until a post-conviction appeal, the defendant then has the burden of showing actual prejudice. This is extremely hard to prove. First, a judge is naturally reluctant to give relief to an already convicted criminal unless there is concrete proof of prejudice.

\begin{itemize}
  \item disciplinary measures against a . . . lawyer for unprofessional conduct of which the judge may become aware." *Id.* Canon 3(b)(3).
  \item \textsuperscript{155} 570 F.2d at 1184.
  \item \textsuperscript{156} See Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 150-51 (1977-1978) (similar advocacy of disqualification of an attorney before a potential conflict culminates in a clear impairment of his independent, professional judgment).
  \item \textsuperscript{157} 30 Cal. 3d at 630, 639 P.2d at 262, 180 Cal. Rptr. at 192 (Richardson, J., dissenting).
\end{itemize}
from an actual conflict. Second, actual harm caused by divided loyalties or reduced zeal is difficult to detect from a record, and so it is more likely that a court will label most of the attorney's decisions as "reasonable tactics." Also, if the state's evidence is overwhelming, and thus the outcome of a retrial with different counsel would most likely be another conviction, the judge might not grant a reversal even if he discerns actual harm caused by the contract's existence. Therefore, it would be an injustice to "play the odds" and conduct the trial in the hopes that the conflicts will not actually prejudice the client. Not only does the client stand to suffer irreparable harm from such a gamble, but his right to effective assistance of counsel will have been violated at the outset by the initial allowance of the conflict-ridden representation.

Neither is it an appropriate argument that a lawyer should be given the benefit of the doubt and that the public should faithfully trust in his ability to maintain independent judgment and undivided loyalty, even in the face of temptations to act in his own financial interests. Lawyers are no less human than anyone else, and, therefore, no less vulnerable to subtle temptation. As pointed out in the Maxwell dissent, an opportunity for pecuniary advantage can cause even an unconscious swaying of the lawyer's decisions. Therefore, the per se rule would not be a pessimistic or an overinclusive one. Rather, the rule is a prophylactic one which seeks to avoid prejudice to a client in a situation where such harm is extremely likely to occur, even if the lawyer involved has honest intentions. It is the nature of the contract itself which mandates a per se rule prohibiting them, not the personal attributes of the particular contracting lawyer.

Besides protecting the client from probable harm, a per se rule would have other beneficial effects. Congestion of the courts would be eased somewhat by the abolition of the need for judicial review of these contracts at the pre-trial stage, and by a reduction in the number of habeus corpus petitions alleging a conflict of interest. Also, the rule would destroy a potential device for "built-in reversal." Although the Maxwell majority noted that a defendant who waived all disclosed conflicts of interest would be unable to assert

158. See United States v. Hunt, 543 F.2d 162 (D.C. Cir. 1976) (if attorney's pecuniary interests are solely speculative, we should presume the lawyer will subordinate his interests).

159. 30 Cal. 3d at 628, 639 P.2d at 261, 180 Cal. Rptr. at 191 (Richardson, J., dissenting).

160. Id. at 636, 639 P.2d at 266, 180 Cal. Rptr. at 195 (Richardson, J., dissenting).
those conflicts on appeal.\textsuperscript{161} Justice Kaus, in his concurrence, disagreed and stated he had no doubt but that the defendant would raise those very conflicts on appeal.\textsuperscript{162}

V. ETHICAL RULES VIOLATED BY MAXWELL'S LIFE STORY AGREEMENT

A. California Rules of Professional Conduct

Because the California State Bar chose to draft its own code of ethics rather than to simply adopt the ABA Model Code of Professional Responsibility, Maxwell's lawyers were bound only by the California Rules of Professional Conduct. In determining whether the life story agreement involved in Maxwell violated that code, the relevant rule to interpret is Rule 5-101 which provides:

A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are \textit{fair and reasonable} to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.\textsuperscript{163}

This rule is quite liberal and the Maxwell majority found no violation. The dissent, however, argued that the terms of the contract violated the "fair and reasonable" requirement.\textsuperscript{164} But if the terms of a life story agreement are truly fair to the client, and disclosure of, and consent to conflicts are in writing, then presumably the creation of such a contract by a California attorney is not an unethical or prohibited practice.

B. ABA Model Code of Professional Responsibility

The ABA Model Code of Professional Responsibility (ABA Code)\textsuperscript{165} has taken quite a different approach to life story fee agree-

\textsuperscript{161} Id. at 619 n.11, 639 P.2d at 265 n.11, 180 Cal. Rptr. at 185 n.11.
\textsuperscript{162} Id. at 623, 639 P.2d at 258, 180 Cal. Rptr. at 187 (Kaus, J., concurring).
\textsuperscript{164} 30 Cal. 3d at 630-31, 639 P.2d at 263, 180 Cal. Rptr. at 192 (Richardson, J., dissenting) (compelled waiver of attorney-client privilege is both unfair and unreasonable).
\textsuperscript{165} Since Maxwell, the ABA has officially adopted the Model Rules of Profes-
ments. Aside from general cautions to avoid adverse interests (similar to California's Rule 5-101), the ABA Code specifically prohibits life story fee agreements in Disciplinary Rule 5-104(B), which states:

Prior 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.

Clearly, Maxwell's contract would be a prohibited transaction under this Disciplinary Rule (DR). Its mere creation would be a per se ethical violation because the Disciplinary Rules of the ABA Code are mandatory in character. Deviations from "shall not" proscriptions constitute misconduct. Ethical Considerations (EC), however, are merely aspirational in character and were designed to provide guidelines to a lawyer. They are also helpful in understanding the rationale behind some of the Disciplinary Rules. For example, EC 5-4 articulates the justification for the per se prohibition of DR 5-104(B):

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.
A life story agreement such as Maxwell's, in which the client waives the attorney-client privilege, would give the lawyer the right to reveal his client's secrets and confidences.\textsuperscript{172} Although the ABA Code allows an attorney to reveal secrets and confidences with the consent of his client after full disclosure,\textsuperscript{173} EC 4-1 suggests a loftier standard of conduct: "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him."\textsuperscript{174} Additionally, EC 4-5 adds: "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client. . . ."\textsuperscript{175} These guidelines provide further justification for the ABA Code's condemnation of life story agreements.

Further, these contracts violate the ABA Code's requirement that an attorney represent his client zealously.\textsuperscript{176} DR 7-101(A)(3) states: "Representing a Client Zealously. (A) A lawyer shall not intentionally: . . . (3) Prejudice or damage his client during the course of the professional relationship. . . ."\textsuperscript{177} Divided loyalties and diminished zeal are inevitable results of the contract's inherent conflicts.

Because the integrity of the judicial process is directly implicated by the creation of life story agreements, the Ethical Considerations relating to Canon 9 of the ABA Code also provide support for DR 5-104(B)'s explicit prohibition. EC 9-1 states: "A lawyer should promote public confidence in our system and in the legal profession."\textsuperscript{178} According to EC 9-6, this responsibility means that an attorney owes a duty "to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."\textsuperscript{179}

C. \textit{ABA Proposed Model Rules of Professional Conduct}

The drafters of the Model Rules chose to retain the prohibition

\textsuperscript{172} For definitions of "secrets" and "confidences", see \textit{id}. DR 4-101(A).
\textsuperscript{173} \textit{id}. DR 4-101(C)(1).
\textsuperscript{174} \textit{id}. EC 4-1.
\textsuperscript{175} \textit{id}. EC 4-5.
\textsuperscript{176} "This obligation, in its fullest sense, is the heart of the adversary process."
\textsuperscript{177} \textsuperscript{\textit{Thode, The Ethical Standard for the Advocate}}, 39 TEX. L. REV. 575, 584 (1961).
\textsuperscript{178} \textit{id}. EC 7-1.
\textsuperscript{179} \textit{id}. EC 9-1.
\textsuperscript{179} \textit{id}. EC 9-6.
against life story fee agreements in what is now the "new" ABA Code.\footnote{180} An approach similar to that of the ABA Code was taken. The Model Rules first provide a general rule concerning conflicts of interest.\footnote{181} This rule allows continued representation if the lawyer reasonably believes the representation will not be adversely affected and the client consents.\footnote{182}

The Model Rules continue, however, to set apart life story agreements as a distinct exception to the general rule. Rule 1.8, entitled "Conflict of Interest: Prohibited Transactions," provides in subsection (d) that: “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.”\footnote{183} The comment made by the drafters relating to this “shall not” provision indicates their distaste for a practice which would be so potentially harmful to a client:

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interest of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation.\footnote{184}

It seems that the drafters’ underlying concerns were with the element of temptation and the need to assure the independence of a lawyer’s professional judgment. In a subsequent note to the rule, the drafters made it clear that “[t]his Rule deals with certain transactions that per se involve conflict of interest.”\footnote{185}

D. \textit{ABA Standards Relating to the Administration of Criminal Justice: The Defense Function}

The Defense Function sets out minimum standards of conduct for defense attorneys. In addition to a general rule on conflict of interest, there is a separate provision which expressly refers to the issue at hand. Standard 4-3.4, entitled “Obtaining Publication Rights from the Accused,” states that:

\cite{180} The Model Rules, proposed by the Kutak Commission, were finally adopted by the ABA on August 2, 1983.
\cite{181} \textit{MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983)}.
\cite{182} \textit{Id}.
\cite{183} \textit{Id}. Rule 1.8(d).
\cite{184} \textit{Id}. Rule 1.8(d) comment.
\cite{185} \textit{Id}. Rule 1.8(d) note on code comparison.
It is unprofessional conduct for a lawyer, prior to conclusion of all aspects of the matter giving rise to his or her employment, to enter into any agreement or understanding with a client or a prospective client by which the lawyer acquires an interest in publication rights with respect to the subject matter of the employment or proposed employment.\footnote{ABA Standards Relating to the Administration of Criminal Justice: The Defense Function 4-3.4 (1983).}

It is quite clear that the ABA, if not the State Bar of California, is genuinely concerned with the specific issue of an attorney’s acquisition of literary rights. In declaring it to be a per se conflict of interest, and in treating this issue separately from other conflict of interest situations, the ABA has taken a strong and decisive stand. It is now up to the courts to give meaning to the ABA’s action by enforcing at least this one per se ethical prohibition. It does little good to revise an outdated code of ethics if the new code will have no more of a regulatory effect than the old. The legal profession has taken it upon itself to regulate the conduct of its members. This is a laudable goal but an empty one if lawyers continue to ignore the rules, hoping to escape disciplinary action. The misconception of many is that the rules of the profession state only ethical guidelines, not legal standards.\footnote{Patterson, A Preliminary Rationalization of the Law of Legal Ethics, 57 N.C.L. Rev. 519, 521-23 (1979); see Comment, The Lawyer’s Moral Paradox, 1979 Duke L.J. 1335, 1335.} The ABA Code was designed to be essentially regulatory and mandatory in effect, but this legal function has been obscured by the label “code of ethics.”\footnote{Comment, supra note 187, at 1357-58.} It has been promised that “the new rules will comprise collectively the ‘law of legal ethics.’ ”\footnote{Id. at 1335 (quoting Patterson, supra note 187, at 555). Patterson advocates recognizing an attorney’s duty of loyalty as a legal, rather than ethical, rule because, to do otherwise, is to “vest in private lawyers . . . a vast amount of untutored discretion.” Patterson, supra note 187, at 554-55.}

VI. Conclusion

An attorney’s pledge of undivided loyalty is immediately broken at the creation of an attorney-client contract giving the attorney exploitation rights to the client’s life story. This pledge stems not only from the attorney’s fiduciary duties but from the Constitution as well.\footnote{“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. It has long been settled that such “assistance” must also be “effective.”} The Constitution’s guarantee of effective assistance of coun-

188. Comment, supra note 187, at 1357-58.
189. Id. at 1335 (quoting Patterson, supra note 187, at 555). Patterson advocates recognizing an attorney’s duty of loyalty as a legal, rather than ethical, rule because, to do otherwise, is to “vest in private lawyers . . . a vast amount of untutored discretion.” Patterson, supra note 187, at 554-55.
190. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. It has long been settled that such “assistance” must also be “effective.”
self must be read to require undivided loyalty and devotion to the client's interests. When the pledge of loyalty is broken by a conflict of interest that was deliberately manufactured and has only financial motives at its core, effective representation must be presumed an impossibility. Such an open-ended invitation of prejudice defies both ethical and constitutional standards. And if two constitutional rights must clash, surely the right to "effectiveness" must be deemed more crucial to ensuring fairness than the right to counsel of "choice."

For these reasons, a per se rule of judicial invalidation of these contracts is a justifiable remedy. The stakes are simply too high to engage in speculation as to the amount of actual harm likely to result. The situation demands more than a middle-of-the-road approach. The ABA has done its part in seeking to curb a fast-growing, serious problem. It is now up to the courts to shoulder the remaining responsibility; if not to help maintain the integrity of the private bar, then to maintain the integrity of the judiciary.

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