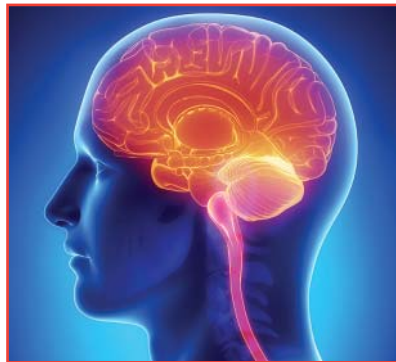
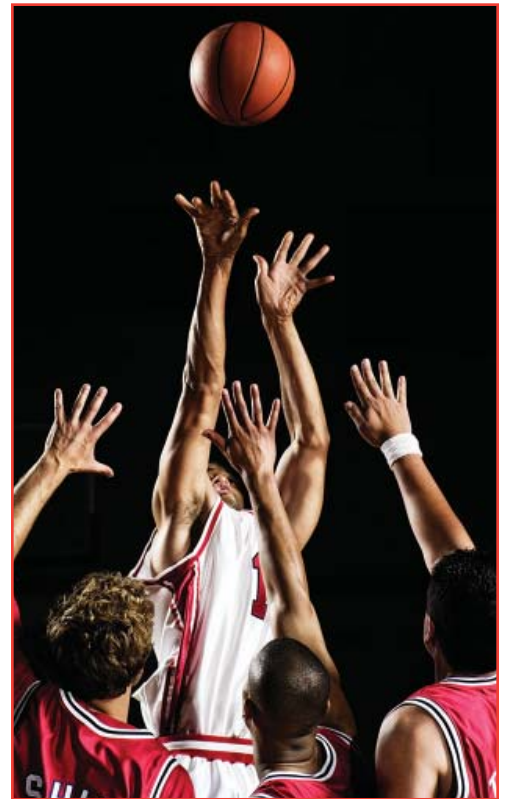


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Notoriety, Exclusivity, and the First Amendment: What's the Value of a High-Profile Crime?

By Ethan Bordman

There are always high-profile criminal cases in the news. O.J. Simpson, Casey Anthony, George Zimmerman, and Jodi Arias have all captured the attention of the national media and the public. As these cases develop, we often learn that the accused has received offers from publishers, television networks, and movie studios to tell his or her story for a large sum of money. Can these individuals keep the money, potentially profiting from the alleged crime? "Son of Sam" laws may lead one to believe the answer is "No." In fact, however, the answer is: "It depends."

Can Criminal Activity Result in a Financial Windfall?

Individuals have attempted to benefit from their crimes for more than a century. One of the first such documented cases is *Riggs v. Palmer*.¹ In 1889 Elmer E. Palmer poisoned his grandfather, Francis Palmer, upon learning that Francis was planning to change his will and disinherit Elmer. In addition to Elmer, Francis Palmer's two daughters were each to receive an inheritance. Upon Francis' death his daughters filed to have Elmer eliminated from the will as a result of his actions and criminal conviction. The trial court disallowed Elmer's inheritance, ruling that it would be offensive to public policy for him to receive it.² However, in a dissent, Judge John Clinton Gray stated that the demands of public policy were satisfied by Elmer's criminal punishment and that the law was silent on whether or not he could benefit from his crime.³

Between July 1976 and August 1977, David Berkowitz terrorized New York City, killing six people and injuring numerous others.⁴ Berkowitz called himself the "Son of Sam," explaining that the black Labrador retriever owned by his neighbor, Sam Carr, told him to commit the killings. Once captured, Berkowitz received numerous offers to have his story published. In an effort to thwart criminals' attempts to profit from their crimes, New York State passed the first "Son of Sam" law, N.Y. Exec. Law § 632-a, authorizing the state Crime Victims Board to seize any money earned from entertainment deals to compensate the victims. The issue of profiting from a crime was not an issue here as Berkowitz, for whom the law was named, was deemed incompetent to stand trial and voluntarily paid his own book royalties to the Crime Board.

The issue of free speech and "Son of Sam" laws appeared in 1987 when Simon & Schuster published a book written by Nicholas Pileggi, titled *Wiseguy: Life in a Mafia Family*.⁵ The book was about ex-mobster Henry Hill,

whose 26-year career involved a variety of crimes, including the 1978 \$6 million Lufthansa Airlines heist. Hill's story was subsequently turned into the 1990 Martin Scorsese film *Goodfellas*, starring Ray Liotta as Henry Hill, Robert De Niro, and Joe Pesci. The New York Crime Victims Board determined that the book violated the state's "Son of Sam" law, and that the publisher was required to turn over all monies to the crime board for victims' compensation. Simon & Schuster filed suit under 42 U.S.C. § 1983,⁶ arguing that the law violated the First Amendment. At the time, the law had only been invoked a few times for individuals; among them Jean Harris, who was convicted of killing "Scarsdale Diet" Dr. Herman Tarnower; Mark David Chapman, John Lennon's assassin; and R. Foster Winans, a *Wall Street Journal* columnist convicted of insider trading.⁷ The U.S. Supreme Court unanimously ruled in 1991 in Simon & Schuster's favor, stating: "[t]he Government's power to impose content-based financial disincentives on speech, surely does not vary with the identity of the speaker."⁸ The Court further stated the law was "significantly overinclusive" and the statute's broad definition of a "person convicted of a crime" would allow the Crime Victims Board to take monies from any author who admitted to committing a crime, regardless of whether that author was ever accused or convicted.⁹ The Court noted that these provisions would have affected hundreds of authors, including Dr. Martin Luther King, Jr. (arrested during a sit-in at a restaurant),¹⁰ Sir Walter Raleigh (convicted of treason), and Henry David Thoreau (jailed for refusal to pay taxes).¹¹ The Court noted that should a prominent figure, in writing his or her autobiography, include a brief recollection of having stolen a worthless item as a youthful prank the Crime Victims Board could take the income from the book and make the income available to his or her creditors despite the fact that the statute of limitations on the crime had long since run.¹² The Court stated that "the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime."¹³ In 1992 the New York state legislature amended the law in an attempt to bring it into conformity with the Supreme Court ruling.

In 2002, California addressed the constitutionality of the state's "Son of Sam" law in the case of *Keenan v. Superior Court of Los Angeles County*,¹⁴ which involved the sale of a story on the kidnapping of Frank Sinatra, Jr. In 1963 Barry Keenan, Joseph Adler, and John Irwin kidnapped Frank Sinatra, Jr., then 19, from Harrah's casino in Lake Tahoe. The three kidnapers were later caught and, in 1998, after serving time in prison, they met with a reporter from the Los Angeles *New Times* newspaper for an interview. The

article entitled “Snatching Sinatra” generated interest and Columbia Pictures bought the motion picture rights for \$1.5 million. In 1983, two decades after the crime, but prior to the sale of the movie rights, California passed its “Son of Sam” law, California Civil Code § 2225,¹⁵ modeled after the original New York statute. Frank Sinatra, Jr. asked Columbia Pictures to withhold payment; the studio refused barring a court order. Sinatra, Jr. then stated the payment violated § 2225 and the money received should be placed in trust for his benefit as the victim of the crime. In tendering its 2002 decision, the Supreme Court of California stated that the *Simon & Schuster* decision governed the case because of similarities between the New York and California statutes. The court was persuaded by Keenan’s argument that, like the New York statute, California’s § 2225 was overinclusive as it confiscated all of a convicted felon’s income from expressive activity, which included more than a passing mention of the crimes. The court said this financial disincentive “discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one’s criminal misdeeds.”¹⁶ The opinion further stated:

[a] statute that confiscates all profits from works which make more than a passing, nondescriptive reference to the creator’s past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in non-exploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*.¹⁷

The state Supreme Court ruled that § 2225 was invalid, thus reversing the lower court’s decision. The following year, the film *Stealing Sinatra* was released, starring David Arquette as Barry Keenan and William H. Macy as his co-conspirator John Irwin.

New York Executive Law § 632-a defines “crime” as “any felony defined in laws of the state” or “an offense in any jurisdiction which includes all of the essential elements of any felony defined in the laws of the state.”¹⁸ “Profits from a crime” include 1) “any property obtained through or income generated from the commission of a crime of which the defendant was convicted,” 2) income generated from the sale of proceeds from the commission of a crime or 3) assets obtained through the unique knowledge gained during the commission or preparation of a crime.¹⁹ “Funds of a convicted person” includes “all funds and property received from any source by a person convicted of a crime or by the representative of such a person as defined.”²⁰ A “representative” includes an inmate serving a sentence with the department of correctional services, serving a sentence of probation or conditional discharge, or was within the last three years an inmate or on probation.²¹ The difficulty in applying the

law regards the traceability of what is considered “commission of a crime.”

Profiting from Notoriety

When an individual is not compensated to recount his or her criminal act but rather uses the notoriety or popularity resulting from the accusation or conviction, he or she may be entitled to keep any money received. This is where the “commission of a crime” is not associated with the act or event for which the individual is being compensated. In 2010, former Illinois governor Rod Blagojevich was removed from office and later convicted of lying to federal authorities amid corruption charges alleging that he plotted to sell the U.S. Senate seat vacated by Barack Obama.²² While awaiting trial, Blagojevich served as a paid spokesperson for Wonderful Pistachios in the “Get Crackin’” advertising campaign, a move designed to capitalize on his notoriety.²³ Despite Illinois’ “Elected Officials Misconduct Forfeiture Act”²⁴—a “Son of Sam” bill for politicians designed to “recover all proceeds traceable to the elected official’s offense”—Blagojevich was allowed to keep the money because the ads were not “traceable” and made no mention of the criminal charges against him. Moreover, federal law 18 U.S.C.S. § 3681, “Special Forfeiture of Collateral Profits of Crime,” establishes that proceeds “relating to a depiction of such crime” can be forfeited upon a motion by the United States attorney after conviction. Although he was later convicted, Blagojevich kept the money from these ads as enjoying pistachios was not considered a “depiction” of lying to federal authorities.

Another example of profiting from notoriety; 17-year-old Amy Fisher was accused in 1992 of the attempted murder of Mary Joe Buttafuoco, the wife of Fisher’s 36-year-old alleged boyfriend.²⁵ Fisher received \$80,000 for a bail payment from a television production company in exchange for the rights to her story.²⁶ This was permitted since she had not yet been convicted of a crime.

There Is No Monopoly on Anyone’s Life Story

Purchasing the rights to someone’s life story **does not** prevent other individuals from writing about that person, a fact that is often misunderstood. The First Amendment permits anyone to write about newsworthy events or another person’s life story—with or without that person’s permission—provided the information is truthful. This was recognized in *Rosemont Enterprises vs. Random House*²⁷ in which Howard Hughes, upon learning that Random House was going to write his unauthorized biography, wrote the biography himself and registered the copyright in his book to prevent Random House from releasing its book. Hughes then sued for copyright infringement and violation of his right of privacy under New York’s Civil Rights Laws. The court ruled in favor of Random House

stating: “[a] public figure, whether he be such by choice or involuntarily, is subject to the often-searching beam of publicity and, in balance with the legitimate public interest, the law affords his privacy little protection.”²⁸ The court concluded: “a public figure (has) no right to suppress truthful accounts of his life”²⁹ and “a public figure can have no exclusive rights to his own life story, and others need no consent or permission of the subject to write the biography of a celebrity.”³⁰

Additionally, the First Amendment’s freedom of speech regarding “newsworthy” events does not obligate the individual being profiled from receiving any compensation unless contracted to tell his or her story. In 1993, television networks ABC, NBC, and CBS each broadcast its own version of Amy Fisher’s story, marking the first time any topic was made into a movie by all three networks.³¹ NBC produced Fisher’s version and CBS produced the Buttafuocos’ side of the story. Interestingly, ABC’s “unofficial” version, which incorporated multiple viewpoints, received the highest ratings of the three versions—a 19.4 representing over 18 million households. A network show has an average rating of 12. As no contract existed between ABC and Fisher or the Buttafuocos, the network was not required to share its profits with either party.

In 2000, the Court of Appeals in the state of Washington ruled that Mary Kay Letourneau, a schoolteacher convicted of two counts of second-degree child rape, could keep monies from movies and book deals.³² In 1997, Letourneau, then 34, had a sexual relationship with her 12-year-old student Vili Fualaau.³³ After being sentenced to six months in jail, she received offers to have her story published. The Court of Appeals ruled that Letourneau could profit from her story in spite of Washington’s “Son of Sam” law. In defending Letourneau’s right to profit from book and movie deals, her attorney asked the court, “[i]s there any possible way we can argue with a straight face that our law is meaningfully different than the Son of Sam law in New York that was struck down?”³⁴

A French publisher contacted Letourneau’s attorney, who brokered the agreement, and paid her a \$200,000 advance for the rights to the story.³⁵ The book, *Un Seul Crime, L’Amour* (Only One Crime, Love), was co-authored by Letourneau and Fualaau, and included a prologue by Vili’s mother, Soona Fualaau. There was no issue with allowing Vili Fualaau and his mother to accept proceeds from the sale of the book because they were never convicted of any crime.

Many versions of Mary Kay Letourneau’s story were produced, each by a different creator. Gregg Olsen’s book, *If Loving You Is Wrong: The Shocking True Story of Mary Kay Letourneau*, has been translated into 11 languages. *The Mary Kay Letourneau Affair* by James Robinson was also

published. USA Network later produced the made-for-TV movie, *All-American Girl: The Mary Kay Letourneau Story*, starring Penelope Ann Miller as Letourneau and Mercedes Ruehl as Letourneau’s psychologist. A&E Television Networks’ cable program *Biography* produced an episode titled *Mary Kay Letourneau: Out of Bounds*. Letourneau would have no valid claim to any of the revenue derived from these titles unless a contract existed between her and the author, publisher, or network.

In March 2013, a New York Supreme Court Judge issued an injunction that prevented the airing as well as the promotion of a television movie in response to allegations by the film’s subject that the story is “fictionalized.”³⁶ Lifetime Network’s telefilm *Romeo Killer: The Christopher Porco Story*, based on the true story of Christopher Porco—convicted of the 2004 murder of his father, Peter, and the attempted murder of his mother, Joan—was enjoined by Judge Robert J. Muller. Christopher Porco sued Lifetime Network, claiming the film violated New York Civil Rights § 51, the state’s publicity rights, which allows redress if an individual’s “name, portrait, picture or voice is used...for advertising purposes or for the purposes of trade without the written consent first obtained.”³⁷ Porco had not viewed the film before its scheduled broadcast but alleged the movie was a “substantially fictionalized account...about plaintiff and the events that led to his incarceration.”³⁸ In response, Lifetime argued “the essential elements of the movie are true and accurate and based on court and police records, interviews with persons involved, and historical and other documents.”³⁹ The network further pointed out that other versions of the story had appeared on CBS’ *48 Hours Mystery* and the TruTV series *Forensic Files*. The injunction issued by Judge Muller stated: “defendant appears to concede that the movie is fictionalized.”⁴⁰ Moreover, the judge stated he was not concerned that the injunction represented a “prior restraint” on free speech rights.⁴¹ Lifetime immediately filed an emergency appeal to vacate or stay the injunction, claiming “the (New York) Supreme Court’s order is unprecedented and would cause grave and irreparable damage not just to Lifetime but to the constitutional protections for speech.”⁴² Lifetime further stated that this “prior restraint” of free speech is not a case where national security is in jeopardy, nor does it involve irreparable injury from disclosure of trade secrets or confidential information; it is a movie based on the public facts of a murder prosecution.⁴³ The network emphasized that the film fits into the “newsworthy” exception to New York’s publicity rights law and that claims of a story being “fictionalized” do not overcome that.⁴⁴ Lifetime specified: “while plaintiff may not want the story of his crime repeated in a television movie, the constitutional protection of speech and press on matters of public concern flatly prevent the issuance of an order enjoining the broadcast of the movie.”⁴⁵ The network further stated the injunction would

adversely affect its reputation and finances as it “will lead to a reluctance among cable affiliates and advertisers to spend money on Lifetime.”⁴⁶ It also expressed a fear that TV viewers will view the network as “unreliable and not trustworthy” if a program does not air as scheduled.⁴⁷

The injunction issued by Judge Muller did not last long. A day later, New York’s Appellate Division granted Lifetime’s emergency appeal and issued a stay on the injunction, ordering Porco to show cause why the injunction should not be lifted.⁴⁸ Before the ruling, each side presented its case. Attorneys for the Lifetime network claimed the movie was a “docudrama”; while some scenes were fictionalized, the overall story was based on trial transcripts, interviews, and other information from this heavily publicized case. They emphasized: “the United States Supreme Court has never affirmed an injunction against newsworthy speech and that’s what Judge Muller has done here.”⁴⁹ Porco, who argued his case by phone from prison, alleged that the network “made up characters...made up situations...made no effort to interview anyone that I know...didn’t contact me...and made no effort to make sure [the film] is historically accurate.”⁵⁰ Porco claimed that the film’s producers fictionalized some events, such as involving him in a sexual relationship with the daughter of the movie’s fictional lead detective. Lifetime responded that the material facts of the case and the trial—including the charges against Porco as well as details of both the investigation and trial—were all taken from trial transcripts; although some dialogue was invented, First Amendment protection still applies.⁵¹ Lifetime used the publicity to its advantage, promoting the film as “the Lifetime Original movie Chris Porco doesn’t want you to see.”⁵²

Paying for the Rights Pays Off

Though it is not necessary to write the story, purchasing the rights to tell someone’s life story has several advantages. The contract between the author and the individual being profiled will state that the individual agrees to speak exclusively with the author, which establishes the work as the “official” or “authorized” story. The profiled individual also agrees to contact friends, family, former classmates, and co-workers to encourage them to speak with the author. The First Amendment gives people the right to speak or not to speak; no one is obligated to cooperate with an author even if the story is deemed “newsworthy.” Though an author and his or her subject may have an exclusive agreement, it does not prohibit other individuals from researching and writing about the same subject. However, an author who does not have exclusive rights will have to conduct his or her research without the cooperation of the subject. Most importantly, the exclusivity encourages “full and open disclosure,” for which the profiled individual agrees to share information that may not yet be known to the public.

Following the Law Can Yield Profits

Following the letter of the law can also result in avoiding “Son of Sam” laws. In July 2010, Colton Harris-Moore—named “America’s Most Wanted Teenage Bandit” by *Time*⁵³—was captured and accused of committing more than 70 crimes including theft of airplanes, luxury vehicles, and pleasure boats totaling more than \$3 million.⁵⁴ At the time Harris-Moore had 75,000 Facebook followers,⁵⁵ learned how to fly a plane by reading an aviation manual, and avoided capture for two years. In Washington, the state from which Colton Harris-Moore escaped a halfway house, where he was serving a sentence for burglary, the “Payment for reenactments of crimes” statute⁵⁶ applies. The statute prohibits the receipt of money to the individual who committed a crime for the portrayal of the “accused or convicted person’s thoughts, feelings, opinion or emotions regarding such crime,” stipulating that any such revenue should be “for the benefit of and payable to any victim or the legal representative of any victim of crimes committed.”⁵⁷ The statute defines a “victim”⁵⁸ as “a person who suffers bodily injury or death as a proximate result of a criminal act of another person.” There were, however, no allegations that Harris-Moore hurt anyone physically;⁵⁹ therefore the state’s “Son of Sam” law should not apply to him.

In cases where the law allows a convicted person to keep the money, prosecutors typically offer a plea bargain to a lesser charge or recommend less jail time in exchange for turning over the money to compensate victims and their families. As part of a plea deal, Colton Harris-Moore gave up the rights to the proceeds from entertainment deals on his story.⁶⁰

One New York case, which followed the “Son of Sam” law to the letter, had an unexpected twist. In January 2011, 24-year-old Brandon Palladino was charged with the 2008 killing of his mother-in-law Dianne Edwards.⁶¹ A year after the killing, Palladino’s wife, Deanna, the victim’s only child—and the sole beneficiary of her mother’s entire estate—died of an alleged drug overdose. As Palladino and Deanna had no children, he stands to inherit the entirety of Edwards’s estate through his wife after he is released from prison. The “Son of Sam” law does not apply here, because Palladino’s inheritance will not come directly from his victim or the “commission of the crime,” but rather from his wife—who had inherited it from the victim. Moreover, there were no allegations that Deanna had anything to do with her mother’s death. According to a news source, the Suffolk County District Attorney’s office asked Palladino, who pled guilty to manslaughter, to give up the inheritance as part of a plea bargain, but he refused.⁶² The value of the estate was estimated at \$241,000. Furthermore, the victim’s daughter had used an additional \$190,000, which was inherited from her mother’s savings account, to pay for her husband’s de-

fense. Therefore, the victim, in effect, paid for her accused killer's defense and left him a substantial inheritance.

The "Son of Sam" law does not apply to Palladino; however, in 2012, Suffolk County Circuit Court Surrogate John M. Czygier, Jr. held that under the "Slayer Rule" Palladino—as an intentional killer—forfeited his right to inherit from the estate of his victim and the estate of the victim's post-deceased legatee.⁶³ The "Slayer Rule" establishes that a person who commits an intentional killing cannot benefit by inheriting under the deceased individual's estate.⁶⁴ This trusts and estates law stands in contrast to the "Son of Sam" law, as under the "Slayer Rule" the individual does not need to be convicted of a crime. The court explained: "but for Brandon Palladino's actions, there would be no inheritance through his wife, Deanna."⁶⁵ Regarding the "but for" analysis, the court stated: "the direct result therefrom (decedent's death) should prohibit him from obtaining the fruits of such act even though they may be obtained through an intervening estate."⁶⁶

In 2008, Long Island mother Leatrice Brewer slashed her six-year-old daughter Jewel's throat and drowned her two sons, Michael, age five, and Innocent, age one, believing she was saving them from the deadly effects of voodoo.⁶⁷ Several hours after the killings, but before authorities were alerted to the events, Brewer made two attempts at suicide—the first by swallowing home cleaning fluids and the second by jumping from a second-story window—both of which she survived. She was subsequently found not guilty by reason of mental disease or defect, and committed to a state psychiatric hospital. It was stated that caseworkers visited the household two days before the killings; they found no one at home, but neglected to schedule an immediate follow-up. Innocent Demesyeux, the father of the two boys, settled a wrongful death lawsuit against Nassau County for \$250,000.⁶⁸ A separate wrongful death lawsuit for the death of Brewer's daughter was settled for \$100,000.⁶⁹

In 2013, Brewer sought to obtain a portion of the \$350,000 collected in the lawsuit from the children's estates.⁷⁰ New York's "Son of Sam" law does not apply, because Brewer was never convicted of a crime; she pleaded not responsible to killing her children by reason of mental disease or defect. Nassau County Judge Edward McCarty III's decision, dubbed the "Brewer Rule," stated that although Brewer was not criminally responsible for the act, she was morally responsible and could not financially benefit from her actions. The decision stated: "but for her killing Jewel, Innocent and Michael there would be no funds to allocate."⁷¹ Even if Brewer had won, any money would have gone to the state to defray the more than \$1 million in costs for her treatment and confinement.⁷²

In May 2012, after Brewer had committed the killings, the New York State Senate passed legislation Bill

S4393A-2011 titled "an act to amend the executive law, in relation to defendant profiting from his or her crime" that would include *any* plea or conviction to be included in the state's "Son of Sam" law.⁷³

Can Media or Literary Rights Serve as Payment for Legal Services?

Discussions of the "Son of Sam" laws often give rise to questions about whether attorneys may receive the client's media or literary rights as payment for legal services. This issue arose in *State of Florida vs. Casey Marie Anthony*, the 2011 case of the Florida mother who was ultimately found not guilty of killing her two-year-old daughter, Caylee. The prosecution was concerned that Anthony's attorney, Jose Baez, was being compensated with book or movie deals, which could influence his actions and direction in the representation of Anthony.⁷⁴ Baez and Anthony filed affidavits and swore in court that there was no agreement for the sale of her story by Baez. During an "in camera" meeting, Judge Stan Strickland of Florida's Ninth Circuit Court ruled there was no conflict of interest because nothing in the retainer agreement allowed Baez to financial gain based on selling the rights to the story, nor did it give the defense or any third party the rights to Anthony's story.⁷⁵

The American Bar Association (ABA) Model Rules of Professional Conduct on Conflicts of Interest with Current Clients, Rule 1.8(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."⁷⁶ The ABA *Comments* to the rule state:

[a]n 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 person interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation.⁷⁷

One such detraction is that a lawyer may be tempted to subordinate the client's best interests by pursuing a course of conduct that will enhance the value of the story to the client's detriment. One illustration, not provided in the *Comments*, is that the value of a client's story is most likely worth more if a verdict occurs—as opposed to reaching a quiet or confidential settlement—even though the latter might be in the client's best interests. The *Comments* also distinguishes that it is permissible for an attorney's fee to consist of a share in ownership when representation of a client in a transaction concerns a literary property—so long as the fee conforms to Rule 1.5.⁷⁸

New York's Rule of Professional Conduct 1.8(d) is similar to the ABA Rule stating:

[p]rior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with (1) a client or prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or (2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.⁷⁹

Under the *Comments* section, the New York rule explains that “[t]he lawyer may be tempted to subordinate the interests of the client to the lawyer’s own anticipated pecuniary gain.”⁸⁰ In one example, a lawyer who obtains the television, radio, motion picture, newspaper, magazine, book, or other literary rights regarding a case “may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of the literary or media rights to the prejudice of the client.”⁸¹ The *Comments* conclude that attorneys *themselves* should not enter into arrangements with third parties to sell *their* stories about the representation until all aspects of representation have concluded.⁸²

From Local Case to National Sensation... Overnight

A local criminal case can become a national story overnight—when it does, offers to tell an individual’s story appear immediately. The answer to the question of whether individuals may keep the money—and potentially profit from alleged crimes—is “it depends.” Considerations include the particular circumstances of the act, the laws of the jurisdiction in which the act occurred, whether the prosecutor chooses to enforce the state’s “Son of Sam” law, and—if litigated—the court’s decision. The First Amendment is fundamental in allowing the story to be told—regardless of whether anyone is being compensated—granting the accused individual, as well as the entertainment industry, the right to tell the story.

Endnotes

1. 115 NY 506, (1889).
2. *Id.* at 511-12.
3. *Id.* at 519.
4. Marilyn Bardsley, *David Berkowitz: The Son of Sam*, trutv.com, located at: http://www.trutv.com/library/crime/serial_killers/notorious/berkowitz/17.htm.
5. *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).
6. 42 U.S.C. § 1983 (1996).
7. *Simon & Schuster*, 502 U.S. 105, 111.
8. *Id.* at 117.
9. *Id.* at 121.
10. *Id.* at 121-22. The Supreme Court did not state the reason why Dr. King’s autobiography would be excluded under the existing “Son of Sam” law. Dr. King was arrested 30 times in his championing of civil rights including a sit-in at a restaurant in Atlanta, Georgia in 1960. See “About Martin Luther King, Jr. Day of Service,” The Corporation for National & Community Service, located at: <http://mlkday.gov/about/serveonkingday.php>.
11. *Simon and Schuster*, 502 U.S. 105, 121-22.
12. *Id.* at 123.
13. *Id.* at 122.
14. 27 Cal. 4th 413 (Feb. 21, 2002).
15. Cal. Civ. Code § 2225.
16. *Keenan v. Superior Court*, 27 Cal. 4th 413, 432.
17. *Id.* at 435.
18. New York Executive Law §632-a 1(a)(i) & (ii).
19. N.Y. Exec. Law §632-a 1(b)(i), (ii) & (iii).
20. N.Y. Exec. Law §632-a 1(c).
21. N.Y. Exec. Law §632-a 1(c)(i), (ii) & (iii).
22. Associated Press, *Blagojevich gets 14 years in prison*, CBS News, December 7, 2011, located at: <http://www.cbsnews.com/news/blagojevich-gets-14-years-in-prison/>.
23. Natasha Korecki, “Rod Blagojevich goes nuts,” *Chicago Sun-Times*, November 1, 2010.
24. Illinois HB 4078, located at: http://blogs.suntimes.com/blago/2010/11/rod_blagojevich_goes_nuts.html. Text of the Bill is located at: <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=76&GA=96&DocTypeId=HB&DocNum=4078&GAIID=10&LegID=&SpecSess=&Session>.
25. Joe Treen, *Sex, Lies & Videotapes*, *People*, October 12, 1992, located at: <http://www.people.com/people/archive/article/0,,20108804,00.html>.
26. *Id.*
27. 58 Misc.2d 1 (N.Y. Sup. Ct. 1968).
28. *Id.*
29. *Id.*
30. *Id.*
31. Bill Carter, *Amy Fisher Story a Surprise Smash in 3 TV Movies*, *The New York Times*, January 5, 1993, located at: <http://www.nytimes.com/1993/01/05/movies/amy-fisher-story-a-surprise-smash-in-3-tv-movies.html>.
32. *Literary loopholes*, CNN, June 14, 2005, located at: <http://www.cnn.com/2005/LAW/06/14/grace.excerpt.01/>.
33. *Id.*
34. *Id.*
35. *Id.*
36. Eriq Gardner, *Judge Bans Airing of Lifetime TV’s Chris Porco Movie*, *The Hollywood Reporter*, March, 20, 2013, located at: <http://www.hollywoodreporter.com/thr-esq/lifetimes-chris-porco-movie-banned-429988>.
37. *Id.*
38. *Id.*

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. Brendan J Lyons, *Porco: "Life is full of errors,"* Times Union, March 22, 2013, located at: <http://www.timesunion.com/local/article/Porco-Life-is-full-of-errors-4373942.php>.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. Tim McGirk, *America's Most Wanted Teenage Bandit,* Time, December 21, 2009, located at: <http://content.time.com/time/magazine/article/0,9171,1946950,00.html>.
54. Jackson Holtz, *After two years, one chapter of Colton Harris-Moore's escape comes to a close,* The Herald, July 12, 2010, located at: <http://www.heraldnet.com/article/20100712/NEWS01/707129947>.
55. Ryan Owens and Sarah Netter, *"Barefoot Bandit' Busted: Arrest Draws Cheers, Sympathy,"* ABC News, July 12, 2010, located at: <http://abcnews.go.com/GMA/TheLaw/barefoot-bandit-busted-colton-harris-moore-expected-extradited/story?id=11141460>.
56. Wash. Rev. Code § 7.68.200 (2009).
57. *Id.*
58. Wash. Rev. Code § 7.68.020 (15) (2009).
59. Gene Johnson, *Could feds keep Barefoot Bandit, mom from profit?*, Associated Press, July 19, 2010, located at: <http://www.king5.com/news/local/Could-feds-keep-Barefoot-Bandit-mom-from-profit-98765834.html>.
60. *Barefoot Bandit' pleads guilty to seven federal charges,* CNN, June 17, 2011, located at: <http://www.cnn.com/2011/CRIME/06/17/washington.barefoot.bandit/>.
61. Kieran Crowley, *Att'y backs 'heir' raid,* New York Post, January 4, 2011, located at: <http://nypost.com/2011/01/04/atty-backs-heir-raid/>.
62. *Id.*
63. *Matter of Edwards*, 2012 NY Slip Op. 22102, decided March 28, 2012, Surrogate's Court, Suffolk County, located at: <http://law.justia.com/cases/new-york/other-courts/2012/2012-ny-slip-op-22102.html>.
64. The Legal Information Institute at Cornell University Law School, *Slayer Rule*, located at: http://www.law.cornell.edu/wex/slayer_rule.
65. *Matter of Edwards* at 6.
66. *Id.* at 8.
67. Associated Press, *Killer mom might get around Son of Sam law,* The New York Post, October 14, 2013, located at: <http://nypost.com/2013/10/14/killer-mom-might-get-around-son-of-sam-law/>.
68. Bridget Murphy, *Leatrice Brewer has no right to estate of kids she killed, judge rules,* Newsday, November 6, 2013, located at: <http://www.newsday.com/long-island/nassau/leatrice-brewer-has-no-right-to-estate-of-kids-she-killed-judge-rules-1.6392700>.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. New York State Senate, *"Senate Passes Bill to Close Loophole in 'Son of Sam',"* Law, May 30, 2012, located at: <http://www.nysenate.gov/press-release/senate-passes-bill-close-loophole-son-sam-law-0>.
74. WFTV.com, *"Jose Baez succeeds in blocking prosecution from learning how the Dream Team is being paid,"* March 25, 2009, located at: <http://itsamysterytome.wordpress.com/2009/03/25/jose-baez-succeeds-in-blocking-prosecution-from-learning-how-the-dream-team-is-being-pid/>.
75. *Id.*
76. Model Rules of Prof'l Conduct R. 1.8 (d) (1983), (2002).
77. Model Rules of Prof'l Conduct R. 1.8 (d) cmt. (1983), (2002).
78. *Id.*
79. N.Y. Rules of Prof'l Conduct R 1.8 (d) . As amended through December 20, 2012.
80. N.Y. Rules of Prof'l Conduct R 1.8 cmt . As amended through December 20, 2012.
81. *Id.*
82. *Id.*

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