

**Legal and Ethical Issues in Memoir Writing—  
Interview with Robert Pimm, Literary Attorney**

Robert Pimm, Literary Attorney  
&  
Linda Joy Myers, President of NAMW



**Linda Joy Myers:** This is Linda Joy Myers and I'd like to welcome everyone to our National Association of Memoir Writers telesummit. I'm glad that you can be with us today. Today, we're going to start off the day with something so important to memoir and personal writers, and that's all the legal questions that seem to come up in people's minds. I want to welcome Bob Pimm. Bob is an attorney with more than 25 years experience in the book industry, and he does consulting with people in the creative arts. Bob, I'll let you say more about what you do. We met a few years ago when I needed some consultation about a legal issue, and he really helped me a lot. So thank you, Bob, and welcome.

**Bob Pimm:** Thank you very much for having me, and welcome to everybody who's participating today.

**LJM:** The topics today are the **legal and ethical issues in creative nonfiction and memoir**. All of us know that these issues really do come up, because there really are questions that are important to solve and resolve as we think about putting our very private work—perhaps work that we started in a journal or just wrote in our writing group, out into the world. Many people who do this kind of personal writing have some either traumatic or difficult stories to tell, and some of them might involve legal issues like criminal activity that they're writing about that they observed in the family, which might include abuse—even sexual abuse. So there's a lot of questions, Bob has noticed and has heard, and so have I, so we've compiled a list today and we're going to go through some of the topics and issues that come up for memoir writers. So Bob, you work with people a lot—is there any main question that you'd say is the one that you get the most, or do you see it that way?

**BP:** I think there's a range of questions that people ask me about related to writing memoirs. I like to put those questions into the context, though, of where the memoir may or may not be published. For example, one of the issues arises when somebody is offered a contract from a mainline publisher, and that contract has in it a warranty and indemnity clause. In that clause, you're warranting that you're not publishing anything that is **defamatory**. It's a very difficult area of law because it's very complicated; it changes a lot. It's extremely fact-based, and so if you're making a commitment in a publishing agreement that you're not publishing anything that is defamatory and then in addition you're indemnifying the publisher for any claim—oftentimes they ask you to indemnify them for any claim, whether that claim is valid or not. The exposure can be quite significant.

**LJM:** Can we define “defamation” and then define “indemnify” for people who don't know those terms very well?

**BP:** Sure. **Defamation** encompasses two types of statements: one is commonly called **libel**, which is when it's in a printed or visual form, and the other is **slander**, which is an oral

statement or gesture. However, in today's world of online communications and so forth, a lot of times these two sort of separations are kind of one under **defamation**. In law, what we do is we take a term like this and we break it out into certain elements and then try to find facts that fit each element. Regrettably, that kind of technical approach is quite extensive in defamation. For example, the **first part of defamation is that the statement has to be a false statement**. It has to be, secondly, defamatory. And **defamatory means that it's related to a living person and that it holds that person up to ridicule or shame or something that would harm their reputation**. Usually it has to be somebody making a statement of fact about that person which turns out to be a false statement of fact. And it has to be understood to be about the individual who's complaining about being defamed, so they have to be **identifiable**.

**LJM:** The person being spoken about or the writer?

**BP:** The person being spoken about.

**LJM:** Has to be identifiable—that's important to know.

**BP:** The legal phrase is it has to be understood to be of and concerning the plaintiff. So if what you said was false and it was about a living person and it ridiculed somebody and it harmed their reputation and it was a statement of fact, not a statement of opinion, but you couldn't tell exactly who it was about, that would be a problem for the plaintiff.

It has to attach to the plaintiff. And then, of course, it has to be published, right? So it has to be heard or read, or you could perhaps cause it to be published by being negligent and so forth. It's got all of these different elements to it, and there are different burdens of proof for each of these elements. **Basically, if you wanted to summarize it, defamation is saying something about somebody or writing something about somebody that hurts their reputation and is false.**

**LJM:** This is where we get into it with memoir writers, right? The memoir writer says, "this is true. This is my truth. This is what happened to me." But everybody else in the family—perhaps Ashley Judd's family; I don't know—she's in the news—says no, it didn't happen. So then who can prove what to whom?

**BP:** That's getting right down to the nitty-gritty of one of the elements, which is **whether the statement is true or not**. When you start to look at defenses to defamation, truth is, of course, the first defense that somebody would raise. And as it turns out, in most cases, the **burden of proving that the statement was false is going to fall on the plaintiff**. There are circumstances where if the plaintiff proves everything else, such as it's defamatory, it's a statement of fact, it's applied to them, it was published negligently, whatever—all those kinds of things, it could shift the burden. But that issue of truth, then, becomes one where people are going to fight about whether it is true or not.

So if you were the memoir writer and you were trying to defend yourself about that claim, you would want to have as many sources backing up your claim as you could possibly have and you would want to have high-quality sources backing up your claim. Of course, regrettably, in the situation of a memoir writer, if—what you mentioned before, it's an issue of sexual abuse by a member of the family that was not witnessed by anybody—

**LJM:** Which is usually the case.

**BP:** That becomes a difficult thing to prove. On the one hand, as being false, like that's hard for the plaintiff to prove it was false, and it's also hard for the defendant to do it. Or if the defendant were—

**LJM:** The writer is the defendant in this.

**BP:** Right. If the writer is then trying to prove this, it may lead down a further path of unpleasantness in trying to produce medical records or other kinds of—

**LJM:** And, of course, most abuse cases are not ever reported or told to anyone.

**BP:** Right. Also, there are instances where abuse is not a one-time event and in there, there may be additional opportunities for the person to be found out.

**LJM:** This is very complex for our memoir writers, then, because ... for instance one woman wrote about her sexual abuse; she didn't begin writing her memoir until two weeks after her parents died. That's Sue William Silverman. As I understand it—of course, this is tricky because a lot of people are writing when people are alive, but to cover this first—if the person is not alive, does any of this apply?

**BP:** Not strictly, because one of the requirements is that the person has to be a living person or a corporation or an association or something deemed in law to be some type of entity. So if the person is—

**LJM:** What we're going to run into is people who are struggling with families where the perpetrator, the accused, the person in the book, is alive and they will find out this accusation if it's published and disagreements will be happening in the family about the truth of it.

**BP:** Right. And strangely enough, one could take the approach of trying to get consent to write about it. One of the things that people might do is they might approach the family member and say that they want to interview them for a book that they're writing and to have them sign some

type of release agreement or consent to allow what's discussed in the interview to be published. That doesn't necessarily cover all the bases if you sort of hit them from the side with something they didn't expect you to dare to ask them.

So that could be problematic, where they feel like they've been tricked into releasing or consenting to do it. But let's say they do agree to talk about it, but then after it is published it seems to be so upsetting to them that then they turn around and attack you for doing so. If, at least, you did have them sign some type of agreement consenting to have what was in the interview published, then at least you have that to support you as a defense. **Because not only is truth a defense, but consent is a defense.**

**LJM:** Truth is a defense, and consent. I see. This certainly assumes that you've got a healthy enough family that they're actually willing to sit down and talk to each other.

**BP:** Right. And that's a big assumption when it comes to one of the examples that you gave, which is such a delicate, difficult subject and it would really depend on the person's position in society and whether they have a lot to risk by agreeing to consent to this information or they are already towards the end of life and it won't affect them.

**LJM:** It sounds like this is closely related to rights of privacy and then I think you called it rights of publicity, like it's in the public interest to know something. Can you touch on those things?

**BP:** Yeah, we talked about the sort of main way that people challenge something that's been published about them. But let's say that what's been published is true and therefore defamation isn't a good cause of action for them because not only is it true, but they have the information to back it up. So the plaintiff might say, well, I have a reasonable **expectation of privacy** and now you have intruded in my privacy by publishing this. So they might bring a cause of action in that realm or, as you mentioned, something in the area of the right of publicity, but that will be more a situation for celebrities and famous people.

**LJM:** Let's look at privacy issues, then, for a moment. Tell us more about what kind of rights anyone else—I also have talked to people who have been in memoirs themselves as a character and how uncomfortable that was for them. They didn't feel like suing the author, but they felt pretty—

**BP:** Invaded.

**LJM:** Exposed and all that. So let's touch on that, because this is a huge thing too for most people.

**BP:** A lot of privacy law is relatively new and being developed very rapidly. There's this basic concept of the right to be left alone, and it really evolved from media corporations intruding on people's lives to make profits and create scandal and so on. But there are basically four types.

Maybe the first two are more applicable to memoir writing, and the other two not so much, so we'll just quickly go through. The first one is something called the **public disclosure of private facts**, and the next part under privacy law would be **holding someone up to false light**. The next one would be **intrusion**, and then **commercial appropriation**, which is really the same kind of concept as the right of publicity. So if we go to public disclosure of private facts, that picks up on what you said a little bit earlier. There you're actually publishing private facts; they're truthful, but they're very private and they would be very embarrassing. They'd be highly offensive to a reasonable person if they heard about them. And the key there is that they would not be of legitimate concern to the public.

**LJM:** So it's not of concern to the public.

**BP: If it were a legitimate concern to the public, that's where most people win or successfully defend themselves against this type of claim.** One example that a writer often talks about would be a newspaper report about somebody who did something very common, like they were at the county fair and they won the hot dog eating contest, and then the article goes on to say, by the way, the person who won the hot dog eating contest also has a thousand dollars worth of outstanding parking tickets.

So there's something there where the person might say, well, what do my parking tickets have to do with winning my prize? And then, of course, the defense of "this is of public interest" probably wouldn't work, but what might work in a situation like that is that's not really private because it's a matter of public record. I could go find out your tickets. But the courts don't really like it when people are reporting on or writing about one thing and then inserting something kind of gratuitous on the side. But in the case of the memoir, there have been situations where somebody has written a book talking about sexual abuse and the argument they made is that sexual abuse is a matter of public concern. So that would be their defense and there have been instances where writers have been able to defend themselves from that claim within privacy for that.

**LJM:** Not to scare everybody too much, but have you—most of us wouldn't know this, and I don't know if you can say—but do you think there are a lot of lawsuits filed against people that write about sexual abuse? I don't know what "a lot" means, but what's your general sense of the issue coming up?

**BP:** I think that there probably are instances—I would say that there are reported cases and there are cases where that issue is brought up, but it's also, if you look at it from the point of view of the person being written about, it can also be sensitive from their point of view. If there's no question it's about this person and there's been no effort to disguise that person, that's more likely to lead to somebody wanting to defend themselves even when they're lying, because their name is on the line and it's out there.

**LJM:** Sure, their real name.

**BP:** But I'm talking about some cases where, well, gee, if you do the kinds of things you need to do to try to reduce or minimize your exposure to this type of claim, would somebody who's pretty well disguised but maybe three or four people important to them know about it, would they really want to risk bringing attention to this to the wider public by bringing a claim?

**LJM:** It would be like saying, "I'm guilty."

**BP:** Yeah, exactly. There's a problem and the risk that more information will come out than just what was revealed in the memoir. So, for example, take a church that wants to defend itself against accusations of clergy abuse. When those churches tried to do that, what happened was a lot of other people came out of the woodwork and it created a bigger problem. So now their tactics are probably more related to settlements. And that's one of the reasons why I brought up the context, because if you're doing a mainstream publishing thing and you've signed a warranty and an indemnity clause, a lot of times those clauses—it's not changed if you just sign the boilerplate.

They may expose you to having to pay the publisher's legal fees when they're settling a claim. Even when you don't want them to settle the claim, they'll say, I'm going to settle it anyway because my policy is to settle and move on to reduce exposure or whatever their policy might be. And so that's why, if the book is being published in that context and you have that type of clause or **even if you're using a self-publishing service company and they've adapted that type of information to their agreement, you need to be very careful to examine those closely to make sure you understand what your exposure is.**

Because if you agree to let the publisher do all of the defending of these claims and they have literally a blank check to settle whatever they want to do and then turn around and say, OK, you agreed to indemnify us for any claims even if it's not proven to be true. We spent all this money defending ourselves and you, so here is the bill. They don't usually ask you to pay it right there; what they do is they take it out of your royalty statement and therefore you'll never see any money.

**LJM:** So it sounds like from you—and I know you’re not advertising yourself, so I will—or any other literary attorney—it sounds like **good advice would be for people, no matter how they’re published, to run their contract by a literary attorney** and make sure that in the correct context, they are agreeing to the correct things.

**BP:** Yeah, and right there I want to say of course somebody who practices literary law is going to want people to use their services because we can help people. But it’s interesting for lawyers, because a lot of times when people don’t use an attorney on the way into the process, they end up using an attorney on the way out of the process. But it’s much more complicated and more difficult than if they had used an attorney at the beginning. Of course, somebody like myself is one of many people who are out there, and I want to mention that there are different kinds of organizations all throughout the United States, one of which I work with called **California Lawyers for the Arts**. There are different volunteer Lawyers for the Arts organizations where you can contact those folks and they can provide a referral out to a panel attorney, and oftentimes those attorneys will provide a half hour of free consultation to sort of set the bearings of what your situation is. And a lot of times they will offer reduced rates to folks who come through those referral services. I think that’s something to keep in mind, too.

**LJM:** Thank you for mentioning that. I think people need to know that, because most people just don’t have a lot of money and want to spend it in the right way and in the right place. So if the free consultation that they could get leads to someone saying, look, you really do need to take this further, then at least they’d have that information from the beginning.

**BP:** Yeah, they’d have their bearings. And there’s also an organization called **medialaw.org** which has information on defending yourself from defamation claims, but that’s an organization really created by the large media organizations.

**LJM:** I want to come back to something that was brought up as we were discussing if the person is named. So these are questions you get and I get all the time. There’s two parts to it—one is, is changing the name of the so-called guilty party in writing about abuse or anything that could be deemed as criminal or negligent or that kind of thing—is changing the name enough for protection? And then part two of the question will have to do with how much “fictionalizing” still allows a book to be a memoir. You can go in at either angle on that.

**BP:** Let’s talk about **defamation**. Remember before, we were saying it has to—the false defamatory statement of fact has to attach to the plaintiff. In other words, it has to be understood to be of and concerning the plaintiff. That’s not actually related to naming the person. If you change the name and you try to change certain elements of this individual but you haven’t succeeded in breaking that connection—

**LJM:** But they can be identified.

**BP:** They can be identified. Then you have a problem. And regrettably, when we talked about it has to be published to a third party—it only has to be published to one person, the defamatory thing, and only one other person needs to know it's them. But then, of course, then the next issue is one of the things we didn't talk about before because we got into the issue of truth—was did it actually cause any damages?

There are certain kinds of defamatory statements that are called defamation per se, and they fit certain things that you make statements about such that they don't even need to prove any damages. So you can have a situation where you've done all of these bad things and then there's really no damages, so they win their defamation case and the court gives them a dollar for their trouble. Of course, that's very costly and you don't want to go there. So this issue about what and how much you change becomes an important issue to break that element so that the chain is broken at that point. A lot of writers are encouraged, when they're getting up to this, to start changing things. But the more you change, the less effective it may be for the story's impact.

For example, obviously if the perpetrator of the bad behavior was a male and you change the gender to female, that might completely ruin the point of the story. But obviously changing gender, age, appearance, location, behavior traits, all those kind of things—the more of those you change such that it makes it extremely difficult for the person to be identified. Because if they go to court and say, the writer changed all these things, but I know it's about me, that won't work. Plaintiffs have tried that, and then what happens is, well, who else knew it was you?

They might go to court and say, I can tell that this is about me. And that's not enough; it has to be something that someone else would know. **And then you ask how far can a memoir be changed so that it's still a memoir but it becomes more a fiction than a memoir.** I think that folks who do that, that's a whole separate kind of work. I think the phrase for it is a “faction book.” It's a work of “faction”—it combines facts and it's fiction. And therefore, one would put disclaimers at the beginning of the book and would also have to convince a publisher that that mixed story is something that they would like to publish or that they feel a marketplace would be interested in that story.

**LJM:** As I understand the convention—I did a lot of research because I'm writing a new book called which enters the territory of a lot of these questions. There's really a huge debate in the different fields.

There's like a continuum, it seems, of what's called creative nonfiction. And one end are people who are journalists or are part of the new journalism, as they call it, which is the journalists are all about fact, fact, fact; that's their profession. That's their training, and their reputation is based

on that. But a lot of times they're called creative nonfiction because they use stories to deliver the information; it isn't just a listing of facts anymore. At the other end is memoir and personal essay, of a rather large arc that includes all these personal kinds of writing. At the journalist end of it, they say don't change anything or it's fiction.

At the other end, most—I haven't read any—well, I've read a couple of memoirs who say if you change anything it's fiction—but there seems to be a general agreement in the field and I'd like to know if you think that this is so. My perception is there's a general agreement that memoirs really do need to change things like the identity and the ability to accuse somebody directly who's still alive so that they can avoid lawsuits and being embarrassed on Oprah's couch or whatever form it might take. I'd just like to know what your perception is of this continuum.

**BP:** I would agree that creative nonfiction is a burgeoning art form and that more and more people are approaching writing nonfiction in that way because they have found that it's more salable because there is more story built into it. Regrettably, many factual stories are just not as interesting and strangely enough, sometimes don't deliver the message as effectively as creative nonfiction can deliver the message—the underlying theme and so forth. So I would say on the one hand, yes, that's happening more, but I don't think it's really done for legal reasons. I would say it's done more for commercial salability reasons.

**LJM:** What's done? The changing of things?

**BP:** The use of creative nonfiction as a way of writing stories of this kind.

**LJM:** Right, the story form.

**BP:** It's being done more because it sells better. And I think, for example, that famous situation where a memoir writer was found out to have invented the book and that it wasn't a memoir. And Mr. Frey's situation probably was that he tried to sell it as a factual story and it wouldn't sell.

**LJM:** Actually, what I have heard is that he tried to sell it as fiction and they thought it would sell better as a memoir and they forgot to go in there and look at the parts he exaggerated.

**BP:** And that's interesting too, because memoir is a very hot field right now, but it's hit this bumpy road where now people are concerned that the stories are far more or totally fiction.

**LJM:** Right, and it's huge—memoirs have a bad reputation too, no matter what they try to do. And so it really gets into writer's block, in a sense, where if all these bad things could happen to me because I'm writing my truth, forget it. What can we say to those people to encourage them?

**BP:** I would say that the word you used, which was “truth,” has a lot of power to it. So since you used that phrase, let’s talk a little bit about that. If what you’re writing is true and you are diligently keeping track of how it is true—in other words, you’re building proof into it—one of the recommendations I was going to make to folks, which is not unique to me but commonly offered, is to—throughout the process of writing a book of nonfiction—to be **annotating and cross-referencing two sources in the manuscript itself, almost as if you have two manuscripts**. One is a heavily annotated, footnoted version so that if anybody were to come back and say, why did you say this about that and what do you have to support that claim or statement, you’ve got an annotated version with footnotes referring to all of your supporting materials which are filed away and marked and correlated back to the manuscript.

So if you’re telling the truth and you can provide supporting documents, then what you’re really then entering into is something that we enter into a lot in **analyzing a publishing project**. It’s a balancing of risk and reward. So now you’re sitting there with a business proposition, not a strictly legal proposition, which is, OK, I’ve written this book. It’s the truth; I have supporting documents. Now what is the risk that the people I’m writing about are going to turn around and attack me and try to stop this process? Sometimes they try to stop it before it is even published, and that enters into the calculus for a major publishing company. And sometimes they attack it after it’s been published if they didn’t know it was coming.

So you would just do a **risk analysis** and look at things like do I have adequate resources to defend myself? Do I have insurance or access to insurance through a mainstream publisher that has that kind of insurance? What is the deductible that the insurance is, such that I know what my exposure is under the indemnity clause, up to what amount?

**LJM:** What kind of insurance would this be?

**BP:** I guess one phrase used to describe it is media perils insurance or errors and omissions insurance. And many of the large publishers carry that kind of insurance and some even—

**LJM:** What if you’re self-published?

**BP:** Well, trying to get the insurance is difficult. Also the price of it is very, very high—the cost to acquire it is very high, and then after that, even once it’s been acquired, the deductibles are quite significant. For example, let’s say you had a publishing agreement from Random House. It might say in it, Dear Author, we are going to kindly cover you under our errors and omissions insurance.

However, please note the deductible on our insurance is one million dollars. And therefore, under the indemnity clause, if the person wins, then you're still going to be on the hook for a million dollars. And by the way, the largest defamation claim jury award in the United States is 222 million dollars, but that was against a major corporation.

**LJM:** Before we run out of time, I want to get to **self-published authors and what do they need to be watching out for?** We were talking about with the self-publishing through a self-publishing service or self-publishing where, as I did, I self-published—I created my own press and self-published that way. And what do people need to know? I know you can't say everything, but what could help them sort through those choices?

**BP:** I think people should be very careful when working with a self-publishing service provider. Strangely enough, a lot of the work that I do and people at CLA and other DLAs do is helping people work through these self-publishing service agreements. There are a lot of issues that arise there where people have purchased these services without fully comprehending what they mean and how they work.

**LJM:** That's what I've noticed; people just don't know what they're getting into.

**BP:** Yeah, and unfortunately some of the service companies disguise their agreements to look like a traditional mainstream publishing agreement. Here you are, you're paying for their services, and yet they're treating you as though they had made the investment. And therefore they've balanced the rights and obligations of the agreement such that it is as though they had made the investment. That might be an OK balance, a business proposition when you did invest a lot of money in printing and binding and distributing, but if in fact you're not doing that and the author is the one who's making that investment, then the balance of rights and obligations should be different. So that can be a problem, especially when they import language from mainstream publishing agreements that place a lot of burden on the author.

So I think that's something to be very careful about and getting good advice going through those agreements is important. However, when you're doing everything yourself—in other words, you're hiring a designer and maybe you're hiring an editor and you're hiring someone to print and bind and you're signing some kind of distribution agreement yourself. All of those agreements need to be looked at carefully too to make sure that you have some of those agreements, because when a self-published book becomes highly successful, if you don't have agreements with people—let's say like an editor or a designer—sometimes they will say that they had a much bigger role in writing the book. They can come along and say, well, I was the editor, but really I made this into a book. So that means I'm really the co-author. And if you don't have things tied up properly, you could run into problems. And so editorial agreements or agreements that are drafted in a way such that someone is providing a service in return for a fee

and all of the intellectual property ownership guides of the author—those can be very important, especially when you're doing it yourself. They also play into the issue of self-publishing service providers, because occasionally they will claim ownership of the rights and if people don't catch that, they've accidentally transferred ownership of the work to one of these service providers.

**LJM:** What I've found out is that if you publish with the service providers, most of the time they have the ISBN number, which does suggest that the book is theirs.

**BP:** That's a very practical question that you raise, because the first part of an ISBN number does describe the publisher in that numerical system. It is true that if you stop using them and you go and use another service provider, sometimes the marketplace is very confused when they're searching databases as to which version of the book am I getting and why is it now—

**LJM:** It happened to me because I changed how I published my first book, *Becoming Whole*, as you know, and that was complicated but I learned a lot. I learned a lot the hard way, but it was really good because I never forgot my lessons and grew a respect for the needing to pay attention to the legal aspects of publishing.

And from what I understand, some of my students in workshops, they say, oh, no problem, I've got this self-publishing service and they said this, this, and this, and it's that, that, and that, and here I go, bye. I say, wait a minute—why don't you run the contract by a literary attorney. I try to slow them down and give them a little warning. But people are so excited about getting their book published, it's really hard sometimes to get them to sit down and look at the practical piece because there's not a lot of information. I'm sure there are books on it. Can you recommend any reference materials for memoir writers?

**BP:** I don't think I can recommend something specifically just to writers, but there are a lot of books available on literary law, sort of in straightforward versions. One of the best ones is produced by Allworth Press, which produces actually a lot of books for the creative arts. The main author of that book is Tad Crawford, but it's published in conjunction with the Author's Guild.

**LJM: Author's Guild**—that's another good organization to know about.

**BP:** The Author's Guild has been in the news with the Google Books settlement.

**LJM:** Yes, that's true. We're almost ready to ask people to ask questions. I wonder if there are a couple more things you want to say before we move into the questions.

**BP:** I just wanted to quickly touch on the issue of blogging, because—

**LJM:** Everyone's doing it.

**BP:** Yeah. If you're starting to sort of share your book online as you're writing it or those kinds of things, there is exposure to doing that on the Internet and you won't be able to rely on the Internet service providers being held liable for letting you do that. You must take responsibility for that. But it also introduces another topic, which is **the use of copyrighted material**. And we didn't talk about copyright and that, of course, could take hours—

**LJM:** I know we could spend another whole seminar on that, and maybe we will later in the year.

**BP:** But one of the interesting things about the topic we've been talking about is you can study these topics for whole semesters or whole years and go into the law library and see volume after volume. So these are big, big topics and we're just really skimming the surface. But using copyrighted material is a big problem that people feel that it's up or posted on the Internet, therefore it's free to take and use to the extent that someone might integrate that material into their memoir writing. That can be a serious problem.

**LJM:** Are you talking about quotes from other sites, putting them in our sites? Is that what you're saying?

**BP:** Yeah, I'm talking about just using any material that you either don't own the copyright to or you haven't gotten permission to use it.

**LJM:** A lot of times, people—there are whole poems and songs that there's really strict copyright laws on them in that you're not supposed to use really any of it without permission, and yet whole poems are on the Internet, so now people are copying those whole poems into their text.

**BP:** Right, and I think what I'm trying to say is just because it's been posted on the Internet, even if it doesn't have a copyright notice on it, even if it's been posted by—you can say, well, I got permission from so-and-so to post this poem—

**LJM:** They're not the publisher.

**BP:** They don't have the right to let you have permission. You have to get to the bottom of who owns it. But the other way to look at this, too, is to imagine it from the other point of view, which is when you've created something original that you don't want to let anybody use it without your permission. You at least want the respect of being able to give permission. Even

though you do want to share it, but you want to be given the respect of being asked before it's taken. So looking at it from that point of view can sometimes change your perspective when you're going through the search on the Internet and saying, oh, that's a cool poem. Let me just put that in. Or, look, Rolling Stones lyrics. That would be great to use those at the beginning of each chapter; I'll just do that.

**LJM:** I know. I was Googling the title of my new book, *The Power of Memoir*, and I came upon a site that had my book copied in it. And I didn't know who these people were, so I immediately contacted my publisher, Jossey-Bass, and said, did you give these people permission to use my book—quote complete sections of it? And they hadn't, so they went in there and got them to shut it down. I do hope you can come and do one of our monthly teleseminars, because I know people are going to want to hear much more from you, Bob. And what I'd like to do is open it up to take some questions now

**LJM:** So those of you who are on the line who have a question, ask Bob. A caveat is he can't give you personal legal advice, but he can answer questions about the things we've been talking about.

**Meredith:** Hi, this is Meredith.

**LJM:** Hi, Meredith.

**Meredith:** Hi. I do have a question that is key to something that I've done. I won't go into any details or expect recordable advice as it were, but I did make a decision while writing a recent memoir that is now self-published to be honest about a certain stepmother in my family. She is still alive; she's 88 and in assisted living. And I've been hoping, anyway, that no one would show her this because I didn't do it to hurt her, but I did it because it's part of our family's story. So now I'm wondering, if she were to see it—if someone didn't like her and showed her to be mean and show her or something—and she went to her lawyer to sue under that category of public disclosure of private fact but embarrassing and not a concern for the public. Might her lawyer advise her to leave it alone because by suing she'll be bringing more attention to it?

**BP:** That's an interesting strategy question which we did touch on a little bit. That's kind of in the risk analysis portion of when you decide to do something like that, because I think you're absolutely right that there are situations where the person so identified would choose not to bring a claim because all the bringing of the claim will do is spread the information to a far wider audience and create a problem that they don't really want to create. So in some instances, that might be the decision that's made by somebody in that predicament.

**Unnamed:** I have a quick question—hello? I'm the co-writer of a memoir of a popular Latin music musician, and I'm writing the book with him. And in the book, he wants to write sort of a tell-all about one of the record label owners who never paid royalties. And this guy actually sued them. He had an accountant come in; he has copies of the cooked books. Anyway, the record label owner has passed on but his family is still alive, and he also has very intimate details of other dealings with people like Tito Puente—these are names that are known out there. So my question is can a book like that be stopped by the family, or since they're already deceased, it doesn't matter?

**BP:** When we were talking about defamation, one of the key elements of a defamation claim is that if it's a defamatory statement about an individual, they have to be alive. If they're dead, then that wouldn't work. But if this also is about a corporation or a company that's still around, then that could be a problem. Or associations, unions, those kinds of things. So that could be a problem if it's about a still-extant corporate entity. And that's, of course, if the claim were a claim under defamation. We didn't really go into detail about the issue of commercial appropriation, and this doesn't sound like it's that type of situation, but when you want to talk about what type of claim can be brought by somebody who's dead—obviously they, as a deceased person, cannot do it, but heirs can bring claims under right of publicity where a famous person or celebrity's persona and notoriety is being used in some way for commercial gain. I think that the facts that you've described probably don't fit that area and they don't seem to fit defamation. But again, we cannot, in this type of setting, explain the exact answer that would be appropriate because there's so much that goes into it that needs to be analyzed.

**LJM:** So in other words, get a literary attorney to go over the situation.

**BP:** Well, let me just throw one quick thing in there. Something like this that may be a major thing with a mainstream publisher, there may be part of that—if you attracted a publisher like that, they would probably vet the manuscript themselves and they would be offering you advice from their point of view. And their point of view might say you've got to take this out, take this out, take this out, and then you have to say whether you want to go ahead with those kinds of things taken out. But you should always—even if they have a vetting system in place, you should always seek your own advice about this because just because they've vetted it, if something were to arise later, it's not going to protect you to say, well, the publisher's legal team vetted it, so it must be OK, right? If it's not OK, it doesn't matter who vetted it.

**LJM:** Good questions. Does somebody else have a question?

**Unnamed #2:** Yeah, I do, about circulating managed draft prior to publication with all living characters—all the characters in the memoir are living. In your experience, do you ever advocate that authors go that direction to avoid tons of problems later?

**BP:** Do you mean sharing it with the people who are being written about?

**Unnamed #2:** Yes.

**BP:** I think that's a very interesting approach, because that could be part of an approach to acquiring consent, right? Because one of the defenses is for truth, but another part of it is consent. And if you can circulate it on the basis of you're seeking consent, you want to share with them what it is you're writing because you don't want anybody's feelings to be hurt, but you also want it to be the truth. And sometimes that can be part of consent, because someone—remember the example I gave before was when you go and interview them, so they don't know what it is you're going to write. Here you're saying, OK, I've already written it, now I'm showing it to you for your comment before publication.

**Unnamed #2:** Do publishers ever request that that step happens—that the author pursues consent—or do they just step back and figure that the author can defend themselves if they run into defamation?

**BP:** Mainstream publishers don't take a casual approach like that if they feel that there is a potential liability. They're always very proactive in that respect. Where you run into problems is when you're using a self-publishing service company pretending to be a mainstream publisher, and you think that you're relying on their expertise to identify whether there's an issue or not and they're not doing anything. They have language in their agreement that makes it look like they're going to do that, but they really don't. And so that can be a problem.

But the main ways that mainstream publishers ask you to go and talk to people is when they feel that you are using something that's copyrightable and that they want to see permission. And a lot of times the best way to do that is to make sure you use the permission form that is acceptable to the publisher. Because I have seen instances where the author will go out and get permission or even in the case of getting consent, and they turn those in in the delivery process and the publisher says, nice try, but these are not in the form that we find acceptable. Here, go out and use this and go back again. But then the person's changed their mind, and now they don't want to give you consent. But now the publisher won't accept the consent you've got and then now you have to take that out if you want the publisher to go ahead with the project.

**LJM:** It's a thicket of questions and problems, isn't it, that need to be solved?

**BP:** The regrettable thing about being a lawyer is you always see all the things that go wrong. So people tend to say to you, gee, you seem rather negative about this whole process. It's not really that; what we're trying to do is help people build in mechanisms or identify where problems

usually arise even though you would not think they would, normally. And then build in mechanisms so that those problems, when they do arise, are solved in a way that people decided ahead of time they would like to solve those problems.

**LJM:** That's a good point. We need to end on that note, and thank you for addressing what could sound like negative or "oh my gosh, there's just so many things to worry about" idea, because most of the time things work out fine and very well and people handle them in a really good way. But I think there's a lot of hope and let's just hope that this will turn out fine attitude, and I think that you've shared with us things that we really need to pay attention to if we write a book and publish a book. We need to act in a professional manner and take it seriously and so I really appreciate everything you've shared with us today, Bob.

**BP:** I was happy to participate.

**LJM:** And thank you so much for being here. Would you like to give people your website address in case they want to reach you directly?

**BP:** Sure. My website address is [rgpimm.com](http://rgpimm.com), and also for those in California, you may want to look at California Lawyers for the Arts, and that's [calawyersforthearts.org](http://calawyersforthearts.org).