



A REPORTER'S CONFIDENTIAL SOURCE . . . REVEALED?

Fernando M. Pinguelo, Esq.

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The June 2007 sentencing of Lewis “Scooter” Libby who was convicted on federal charges of lying and obstructing an investigation into the Bush administration's actions leading into the Iraq war reminds us of how far reporters will go to protect their sources of information and the consequences of such confidentiality.

New York Times reporter Judith Miller's life changed dramatically on July 6, 2005 when a federal judge ordered her jailed for her continued refusal to give evidence in a grand jury investigation into the disclosure of the identity of a covert CIA operative.

Miller's imprisonment culminated from a series of events that began with President George W. Bush's January 28, 2003, State of the Union address wherein it was revealed that British intelligence had learned that Saddam Hussein sought significant quantities of uranium from Africa. The President's statement, given at a time when an Iraqi invasion was looming, stirred public controversy. The most damaging report calling into question the accuracy of the President's statement occurred on July 6, 2003, when former Ambassador Joseph Wilson's op-ed piece in the *New York Times* disclosed that his investigation found no credible evidence that Iraq had been seeking to purchase uranium from Niger. A few days later, columnist Robert Novak's *Chicago Sun-Times* column revealed that two senior administration officials disclosed the circumstances surrounding Wilson's 2002 investigation and the role Wilson's wife, Valerie Plame, played in the assignment. Novak referred to Plame as a CIA “operative on weapons of mass destruction.” Thereafter, other media reports followed and reiterated Plame's status in the CIA.

By December 2003, an investigation ensued and a special prosecutor was appointed to determine whether government officials unlawfully disclosed the identity of a covert agent. Grand jury subpoenas were served upon several reporters, including Miller. Although Miller did not write about Plame, she was reportedly in possession of evidence relevant to the investigation. Initially, the reporters refused to reveal their sources primarily on the grounds of First Amendment and federal common law privileges protecting communications from confidential sources. However, after a district court judge rejected the reporters' arguments, all but one lone reporter – Miller – ended their fight and succumbed to the rule of law. Miller – who spent 85 days in jail – was

eventually released after speaking with [Lewis Libby](#) who reaffirmed an earlier release of confidentiality that he had given her.

Miller paid the ultimate price for her silence – imprisonment. Her case presents two fundamental questions: (1) Under what circumstances can a reporter legally withhold the identity of a source? (2) Are reporters under an ethical obligation to explain to their sources that they may not be able to protect the information or their identity in certain circumstances?

Reporters can generally safeguard their sources' anonymity without fear of compelled disclosure. However, once litigation is instituted, especially in the criminal context, the rules change. Here's some information reporters need to know to protect not only their confidential news sources, but also their personal reputations.

Competing Interests

For Confidentiality:

From a reporter's perspective, confidential sources often provide access to crucial information necessary for the exposure of illegalities and other corruption in society. One need only glance back to the Watergate scandal, a story that has been in the forefront of media coverage again because of the revelation of the identity of “Deep Throat,” to appreciate these benefits. Protection against disclosure helps assure that knowledgeable yet reluctant sources of sensitive information will come forward and provide information to reporters without fear of retaliation or embarrassment.

For Disclosure:

From a legal public policy perspective, a source's identity can be of critical importance to a criminal investigation, especially at the grand jury stage, where prosecutors investigate whether a serious crime has been committed (as is the case in Miller's situation). Or, from a criminal defense perspective, defendants have a right to confront their accusers. Revelation of a source's identity also plays an important role in civil cases, in particular defamation lawsuits alleging the publication of false information. For public figures, a source's identity may be even more critical to their defamation cases because of their heightened burden to not only prove falsity, but also malice.

The Foundation of Reporter's “Privilege”

The U.S. Supreme Court addressed the issue of a reporter's "privilege" in 1972. In *Branzburg v. Hayes*, the Court held that the First Amendment did not give journalists the right to refuse to testify in a grand jury proceeding. With facts similar to the ones implicated in Miller's case, the Supreme Court made it clear that it would not accept the premise that “the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and thus deterring the commission of such crimes in the future.” However, the Supreme Court did acknowledge that newsgathering is not without protection and left it to the states and the federal courts to decide when newsgathering interests could reasonably support the reporter's claim of privilege.

Despite repeated attempts, Congress has not enacted a law recognizing the reporter's privilege to date. However, the Senate Judiciary Committee has conducted hearings on the issue of proposed legislation that would afford some protection to journalists. While enactment of such a law is far from guaranteed, public outcry has again brought the issue to the forefront of debate.

Notwithstanding limited federal protection, most state courts have recognized the existence of a qualified privilege in both the civil and criminal contexts. In fact, more than thirty states have gone so far as to enact "Shield Laws," recognizing the important protection required by reporters. Each state's protections vary, with some states protecting only the "source," while others afford protection to both the source and the unpublished information.

The Balancing "Test"

In states where the reporter's privilege is recognized, the privilege is usually not absolute, and various competing interests will be balanced when a court considers a reporter's refusal to reveal the identity of his or her source. To tip the scale in favor of disclosure, this balance often includes a showing that: (1) the information is unavailable and cannot be obtained elsewhere; (2) the information is not cumulative and is "of central importance" to the case; and (3) the need for the information weighs in favor of disclosure.

Be Sure to Assert It and Don't Waive It!

When faced with a subpoena compelling disclosure, a reporter cannot simply turn a blind eye or refuse to cooperate. A few procedures must be followed to validly assert the privilege. They include (1) responding to the request and immediately invoking the privilege; (2) asserting that the information was revealed in confidence; and (3) asserting that the confidentiality is essential to the satisfactory maintenance of the relationship between the parties.

In addition, it is crucial that a reporter not inadvertently waive the privilege. Waiver occurs when the reporter voluntarily discloses the information or acts in a way contrary to the purposes of the privilege. Waivers most frequently occur when reporters commence lawsuits alleging damage to their ability to use sources, or when reporters unwittingly use third parties as vehicles of communication with their sources.

Don't Make Promises You Can't (or Won't) Keep

According to the Journalism Statement of Principles: "Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly." This principle reflects the ethical or moral obligation reporters often feel to protect certain information or a source's identity irrespective of the law. However, as we saw with Miller, pledges of confidentiality cannot always legally be honored.

Given the highly sensitive nature of the information, the reporter has an ethical obligation to explain the nature and consequences of the privilege to a source at the outset. In doing so, reporters are encouraged and well-advised to make any promises of confidentiality sparingly

because a reporter's interest in protecting the identity of the source may, in fact, yield to the public interest in disclosure.

Remember, it's your reputation that's on the line. Knowing the parameters and pitfalls of the privilege can help you make the right call in any given situation.

This article is written to provide readers with a very general overview of the topic discussed. The information contained herein should not be construed as providing legal advice and it should not be relied on for that purpose. If you have specific legal questions, the author suggests seeking the advice of a qualified attorney.

About the Author

Fernando M. Pinguelo is a trial lawyer licensed to practice law in New York, New Jersey, and Washington, D.C. He devotes his practice to entertainment law, complex litigation, and employment matters. Fernando has extensive experience in all facets of litigation in both the federal and state courts. In the area of entertainment law, Fernando counsels a host of diverse talent. He also serves as a regular article contributor for the National Association of Television Arts and Sciences (New York Chapter), TVSpy, *Next Generation TV*, and *Shop Talk*. Fernando has published several articles and lectures on a variety of topics including copyright, contracts, entertainment, employment law, and information technology. He has appeared on television several times as a legal commentator on various high-profile trials, and has been quoted in many newspapers and magazines, and on radio and television broadcasts regarding high-impact cases he has handled.

Fernando welcomes questions and/or feedback on any related issues and can be reached either by phone, (908) 722-0700, or via email, fmp@nmmlaw.com. He invites you to visit his website to learn more about similar topics:

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