

Silha Forum Addresses Ethics of Shielding Sources

The ethical issues raised when journalists are forced to choose between serving time in jail for contempt or face the consequences of revealing the identity of a source provided the basis for a Spring Forum sponsored by the Silha Center for the Study of Media Ethics and Law, "Confidential Sources: Where Ethics and Law Collide," on April 27, 2005, in the McNamara Alumni Center on the University of Minnesota campus.

The event, which was cosponsored by the national Society for Professional Journalists (SPJ) and the local Minnesota Pro Chapter of SPJ, featured a three-person panel discussing the ethical and legal issues reporters face when dealing with confidential sources. The panel featured David Kidwell, a reporter for *The Miami Herald* and a finalist for the 2004 Pulitzer Prize. Other panelists were Kerri Miller, the host of Minnesota Public Radio's "Midmorning" and a former investigative journalist, and Paul Hannah, a media lawyer at Kelly & Berens who has helped to defend journalists and publishers in confidential source cases. The panel was moderated by Jane Kirtley, the Silha Professor at the University of Minnesota School of Journalism and Mass Communication and director of the Silha Center.

Kirtley began the forum by noting that journalists in the United States are largely unregulated, and there are no requirements or tests one must pass before becoming a reporter. This fact, combined with a spate of cases in which reporters have been subpoenaed to testify before grand juries recently has increased public attention to the question of who is a journalist. Congress has also entered this discussion, in the context of a proposed federal reporter's shield law. (See "Reporter Privilege News: Federal Shield Law Introduced in 109th Congress" in the Winter 2005 issue of the *Silha Bulletin*.)

Kidwell brought a unique perspective to the panel discussion, because he served 15 days of a 70 day jail sentence in 1996 after he refused to testify about a jailhouse interview he had with John Zile, charged with murder of his seven-year-old stepdaughter. Kidwell had been writing about the developing case, but wanted to get Zile's side of the story in the interest of balanced reporting. Because Florida law bars reporters from speaking with inmates, Kidwell concealed his identity as a reporter when he went to jail to interview Zile. During the interview, Kidwell discovered that Zile had provided a confession to a state prosecutor after he had requested a lawyer, but before he had been given the opportunity to meet with one. Kidwell subsequently reported this fact. Meanwhile, Zile's first trial resulted in a hung jury.

During the second trial, Zile's lawyer asked the court to suppress the evidence of the confession. Kidwell speculated he was subpoenaed to testify by the prosecutor to ensure that evidence was not excluded. Kidwell fought the subpoena unsuccessfully before the trial court and was sentenced to 70 days for contempt of court. While Kidwell was appealing the ruling, he was released from jail by a federal court judge, but not before he had served 15 days for refusing to give any information about his interview with Zile. Zile was convicted of first degree murder in 1997 and Kidwell's sentence was reduced to time served after several years of litigation.

Kidwell said that the subpoena was nothing out of the ordinary for him at the time, adding that he had been subpoenaed about a dozen times since he has been a reporter.

“Usually when you get a subpoena,” he said, “you toss it to the media lawyers and you forget about it . . . and it goes away.” That regular practice, Kidwell said, led him to take for granted his role as a reporter; he never considering the extent of his ethical responsibilities until he faced jail time in the Zile case.

Kidwell said he made an ethical decision to adhere to his promise. “It wasn’t about the law,” he said, “it was about a promise I made.” Kidwell said the promise was to his source and it meant that “I am who I say I am, I am going to be fair and impartial, and I am not going to allow myself to be used as a tool by one side or the other.” Kidwell explained that was a decision he made separate from the legal ramifications; one he was willing to back up with time in jail rather than breach the promise to his source. He described it as a profoundly personal decision, but one he made on his own. He cautioned the audience, “Don’t ever let a publisher, an editor, or a media lawyer define your ethics. You need to define your ethics now.”

In her comments, Kerri Miller emphasized the fact that as a broadcast journalist, she often faced different issues when dealing with sources than do print journalists. Although broadcast journalists use anonymous sources in their reporting, Miller said that the need for video means those sources are rarely seen on camera and consequently they do not become a focal point of the story. However, she noted that all journalists face the similar pressures. Discussing an article in the *Columbia Journalism Review* about the Judith Miller and Cooper cases by Bob Woodward, one of the journalists who helped expose the Watergate cover-up in 1972, Miller said that Woodward “didn’t think this was the kind of situation that [Judith] Miller and Cooper should go to the wall on. He did not think they should go to jail for [refusing to reveal their sources].”

Miller added that the sources themselves can also be problematic, especially in the political arena where sources often provide tips to reporters to advance their own agenda. Divisions between reporters and their editors and managers can provide additional pressure, Miller told the audience. “The real world [situation is] that most of the management does not want to pay legal fees [for reporters]. The last thing they want is a reporter to make a stand.”

Hannah agreed with Miller, saying, “There is always going to be tension – lots of tension – between the reporters, and their editors, and the managers because their interests are not the same.” He said that it was often a difficult task for courts to resolve reporter shield law questions. That task is made more difficult by the fact that the relationship between a journalist and a source is normally a very personal one, far removed from the legal world. “Ultimately, the question of whether or not a reporter decides to testify is not based on the law,” he said. “It comes down to a question of ethics.” Hannah added, “When the relationship between a reporter and a source are being established . . . there’s no lawyer there.” Lawyers only come into the picture once the promises of confidentiality are being discussed in court, he said, typically after a source has gotten into trouble for the information provided to a journalist.

Kidwell acknowledged that, “It’s really difficult to blame Pat Fitzgerald,” the prosecutor in the Judith Miller and Cooper cases, “when four out of five reporters who have been subpoenaed in this case have somehow cut a deal to testify in this case. Every time a reporter cuts a deal, to rationalize away his promise, that hurts me [as a reporter]. The time has come to say, ‘No.’”

Making a stand, Kidwell said, ensures that the law will follow. After Kidwell had served his time in jail, the Florida Legislature passed a shield law in 1998, giving reporters a qualified privilege to refuse to divulge sources. More importantly, the experience proved to his current sources, and any sources he might have in the future, that he is willing to uphold his promises. Additionally, Kidwell pointed out that he has not been subpoenaed since he went to jail because prosecutors and other lawyers also expect him to keep his sources and their information confidential.

Kidwell urged aspiring journalists at the presentation to seriously consider the topics of the discussion and left with one final word of advice on thinking about their ethics and their sources. “One of the main problems that we have is people coming to journalism for the wrong reasons. We really, really need people who have it squared away in their head that this is an important function and without it, democracy can’t survive.”

The panel discussion was attended by approximately 90 students, faculty, and members of the local journalism and legal communities. Silha Center events are designed to stimulate research and debate on topics related to the convergence of ethical and legal principles, media accountability, the First Amendment, and freedom of information. The Silha Center was established in 1984 with a generous endowment from Otto and Helen Silha.

—ANDREW DEUTSCH, SILHA RESEARCH ASSISTANT