

## First Amendment

### Defying a shield

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By: Forrest Norman

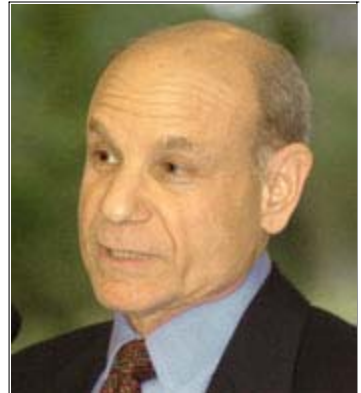
**D**espite a state shield statute that makes it hard to force reporters to testify in civil or criminal cases, South Florida prosecutors, criminal defense lawyers and civil lawyers are continuing to summon local journalists to compel testimony or obtain their notes or recordings.

Lately, such efforts locally have not been successful in forcing testimony, and no South Florida reporters have gone to jail recently because they defied subpoenas, in contrast to cases elsewhere in the country.

But these moves have cost South Florida news organizations a significant amount of money in legal fees. And they raise questions about why prosecutors and lawyers are taking this tack.

South Florida news organizations are fighting these subpoenas at the same time as local and national news organizations in other parts of the country are contesting high-profile efforts by federal and local law enforcement agencies to obtain testimony or evidence from journalists.

That includes controversial subpoenas issued by special prosecutor Patrick Fitzgerald in Washington to obtain information from reporters in his investigation of alleged White House leaks to the media that revealed the covert status of CIA undercover agent Valerie Plame. Subpoenas to reporters were also upheld in the civil lawsuit of former government scientist Wen Ho Lee, who sought to compel reporters from the New York Times, the Los Angeles Times, the Associated Press and Cable News Network to identify confidential sources who allegedly illegally leaked Lee's personal information during an investigation into whether he gave secret nuclear technology to the Chinese government.



Michael Satz

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Earlier this month, the South Florida Sun-Sentinel succeeded in quashing subpoenas of reporters Sally Kestin and Paula McMahon by attorneys for an ex-employee of Donald Trump who is being sued by the hotel magnate.

The reporters were subpoenaed because the former Trump employee, Richard Fields, wanted to know how they learned about another subpoena, this one for Broward County Sheriff Ken Jenne. The subpoenas were withdrawn Oct. 4, when Fields' lawyers obtained the information they wanted from another source.

Bob Norman, a columnist for New Times Broward-Palm Beach, was subpoenaed earlier this year by Broward State Attorney Michael Satz's office after writing a story about efforts by the Broward Sheriff's Office to target reputed Bonnano crime family associates.

"The subpoena is completely bogus," said Norman, who declined to discuss the specifics of the subpoena. "I've got a small-time mobster admitting he played some cards and ate some cannoli. I don't think the prosecutors can meet any of the requirements for compelling my testimony."

Bob Norman is not related to the reporter of this article.

Daily Business Review reporter Julie Kay recently was repeatedly subpoenaed by Satz's office. The Review succeeded in quashing the subpoena — but only after spending \$10,710 in legal fees.

Miami media law specialist Sanford Bohrer, a Holland & Knight attorney who represents the Review, says lawyers subpoena reporters for the same reason they subpoena anyone else. "They're looking for information," he says. "It's that simple. What's not always simple is balancing the need for information with the protections afforded journalists."

Ron Ishoy, a spokesman for Broward State Attorney Satz, said his office has only subpoenaed reporters three times in the last 10 years. "We clearly understand that reporters have their jobs to do and we have ours and we respect that separation," Ishoy wrote in an e-mail to the Daily Business Review.

Ed Griffith, spokesman for Miami-Dade State Attorney Katherine Fernandez Rundle, said prosecutors in his office think long and hard before subpoenaing reporters.

"You guys love subpoenas when you can write about other people getting them, but you tend to hate them when you get them," Griffith said. "We know how hard news organizations fight subpoenas, and we know the law regarding subpoenaing reporters. We calculate this very carefully, because we do not want to end up needlessly and endlessly tied up in court."

### National upsurge

Nationally, reporters have spent time in jail recently for refusing to divulge sources' identities. Two examples are former New York Times reporter Judith Miller, who refused to identify who fed her Plame leaks, and Josh Wolf, a San Francisco independent journalist who remains in jail after 55 days for refusing to turn over video he shot of an altercation between police and demonstrators during which a police officer was seriously injured.

This week, a federal district judge in Virginia ordered the New York Times Co. to disclose the confidential sources used by Times columnist Nicholas D. Kristof in columns discussing whether a former Army scientist was responsible for the deadly 2001 anthrax attacks. The ruling came in a defamation suit filed by the former scientist.

That was the latest defeat for news organizations trying to shield news-gathering activities from the legal process. Another recent defeat came in a case involving baseball's steroid scandal.

Lucy Dalglish, executive director of Reporters Committee for Freedom of the Press in Arlington, Va., said the practice of subpoenaing reporters is damaging to a free press. That's why her group and other media organizations are lobbying for a federal shield law enabling journalists to keep sources confidential unless there are urgent national security concerns.

"Subpoenas affect the ability of reporters to do their job, because they make people more cautious about talking to reporters," she said. "They slow the information flow to the public, and that's never a good thing. But you guys in Florida have it pretty good since they passed the shield law."

In Florida, it's been difficult to successfully subpoena reporters since 1998, when the Legislature passed a law granting reporters a qualified privilege protecting sources' identities.

The shield law was enacted two years after Miami Herald reporter David Kidwell spent 15 days in jail for refusing to testify about a jailhouse interview he had with a defendant in a notorious child murder. Kidwell said testifying would damage his ability to convince story subjects to be interviewed. A federal judge released Kidwell, saying Florida law was vague on the issue.

The 1998 statute requires the issuer of the subpoena to prove that the information sought from the reporter is relevant and material to unresolved issues in the civil or criminal case, and that the information can't be obtained from alternative sources.

In South Florida, subpoenas seem to be issued to reporters in the course of civil litigation as often as they are issued by prosecutors.

"We've been very successful in getting these subpoenas quashed," said Bohrer, who has also represented the Miami Herald and Miami New Times.

### **No way of predicting**

Despite the high bar set by the 1998 law, South Florida reporters keep receiving those dreaded papers summoning them to court.

In January 2005, the Review's Kay was subpoenaed by State Attorney Satz's office after writing a December 2004 article about a criminal case against Coral Springs attorney Scott Salomon. The lawyer was accused of fraud and grand theft for allegedly fleeing two clients.

In March, Broward Circuit Judge Marc Gold quashed the subpoena.

Trevor Aaronson, until recently a reporter for New Times in Miami and Fort Lauderdale, was subpoenaed three times in three years, twice by private attorneys in civil lawsuits and once by the Hollywood city attorney.

Bohrer handled all three cases for Aaronson and New Times. None got so far as a hearing. "Generally, I try to avoid even getting to the hearing stage," Bohrer said. "As cases progress, attorneys will find that they have sources for information other than reporters, or they realize how difficult it will be once they get to the hearing."

Aaronson said there's no way of predicting what type of stories will lead to a subpoena. "The stories I was subpoenaed for were all stories that I considered minor," he said.

Kay agreed. "It's not something I thought about before I was subpoenaed, and it's not something I think about now."

Norman, who has often been critical of Satz's office in his columns, doesn't read any conspiracy into his subpoena. "I don't think it's out of malice," he says. "I genuinely think they're trying to cover all the bases."

Norman said, however, that there are circumstances in which he would testify based on his reporting work.

"If I'd witnessed a murder, or if I was the only one who had really important information, I'd have to make a tough decision," he said. "If there was a greater public good, as corny as that sounds, I'd do it. But in the case of the subpoena I'm fighting now, there isn't."

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**Michael Satz photo by Aixa Montero**

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