

Reporter not required to testify in R. Kelly trial even without federal shield law in place

Although reporter Jim DeRogatis could have been forced to testify in the recent R. Kelly trial in Chicago, a federal judge declined to make him, deciding that defense attorneys had not made their case.

It was a surprise—and a relief—for DeRogatis, who broke the R. Kelly sexual-abuse story in 2000 and has reported on it for the Chicago Sun-Times, BuzzFeed and The New Yorker for more than two decades.

There are no shield laws for reporters in federal cases, which means U.S. District Judge Harry Leinenweber could have forced DeRogatis to testify and potentially reveal his anonymous sources.



Chicago Sun-Times music critic Jim DeRogatis (Courtesy of Jim DeRogatis)

The chart-topping R&B singer faced 13 counts, including production child pornography, enticing minors to engage in

sexual acts, and conspiring to defraud the United States by rigging his 2008 trial that resulted in an acquittal. On Sept. 14, he was found guilty of six counts that had to do with producing child pornography and enticing minors to engage in sexual acts and found not guilty of the seven remaining charges which included the conspiracy charge. Co-defendants Milton Brown and Derrel McDavid were found not guilty of all charges against them.

DeRogatis' first story about the allegations against R. Kelly, co-authored with reporter Abdon Pallasch, ran in the Chicago Sun-Times on Dec. 21, 2000, and DeRogatis remained one of the few reporters who stayed on the story, even after Kelly's 2008 trial. Along the way, he earned the trust of more than four dozen women who say they were victimized by the former superstar.

The subpoena DeRogatis received from the attorneys for Kelly's former business manager Derrel McDavid, who was on trial with Kelly for allegedly conspiring to hide his crimes, was alarming to him because he feared he would have to betray the trust of several of the abuse survivors and name names or risk being imprisoned himself.

Reporters are protected by shield laws or reporter privilege statutes on a state level in 48 states, plus the District of Columbia. But there is no such protection on the federal level. On the state level, only Wyoming does not have a shield law or recognize reporter's privilege. Shield laws for reporters allow them to invoke their right to not reveal confidential information such as sources and where information was obtained, much the same way doctors and therapists have privilege when it comes to testifying about patients and lawyers have attorney/client privilege.

Outside the courtroom, minutes after he was excused from testifying, DeRogatis characterized Leinenweber's decision as a victory for the press.

"I'm pleasantly surprised and I'm glad," DeRogatis said. "Reporters will be able to continue working on complicated stories without this layer of fear that they will be dragged into court," DeRogatis said.

On Sept. 6 before the jury entered the courtroom at the Everett M. Dirksen U.S. Courthouse in downtown Chicago, McDavid's attorney Beau Brindley addressed DeRogatis's motion to quash his subpoena, saying that they were not interested in asking him about his sources or the information they provided him. Rather, they said they planned to ask if the videotape that the Chicago Sun-Times editors turned over to the Chicago Police Detective Dan Everett in 2001 was the same physical tape that was in evidence in the trial. Brindley said he was planning on showing DeRogatis the physical tape to either confirm or refute that it was the same tape. Additionally, Kelly attorney Jennifer Bonjean said she intended to have DeRogatis confirm that he began reporting on the Kelly allegations before he received any videotapes.

DeRogatis, who appeared in court the next morning wearing a short sleeve, black Bermuda shirt and black trousers, stayed silent while his attorney Seth Stern made an argument in support of his motion that his client should not have to testify. Stern told Leinenweber that both issues could have been resolved by an affidavit instead of testimony and that it was well known through DeRogatis's reporting that he received an unmarked videotape in 2001 and that he had begun reporting on the allegations against Kelly the year before.

Abdon Pallasch, the former reporter who shared bylines with DeRogatis on many of Kelly stories while both worked at The Chicago Sun-Times, was in the courtroom gallery to support his former colleague. After the hearing, he said he was happy with Leinenweber's decision.

"The judge called it right. Either one of those issues could have been handled by stipulation," Pallasch said. "It's a

victory for the First Amendment.”

Had Leinenweber denied the motion from DeRogatis, it would not have been the first time he’s had to testify.

In 2008, when Kelly was on trial in Cook County, Illinois, for 14 counts of child pornography, (he was acquitted in that [trial](#)), DeRogatis had to testify after being subpoenaed by the defense but because it was a state trial, he was allowed to invoke shield laws and did – citing both the 1st and 5th amendments. Additionally, despite the common misconception that DeRogatis testified in open court, he actually testified in a closed hearing absent of the jury at the 2008 trial, according to Damon Dunn, an attorney who has served as outside counsel to the Chicago Sun-Times since the early 1980s and is currently advising DeRogatis.

DeRogatis said he invoked the First Amendment to cite free speech rights as a reporter and the Fifth Amendment to protect his right against self incrimination at the 2008 trial after viewing two videotapes that he received anonymously that contained footage of Kelly having sexual relations with what appeared to be underage girls. DeRogatis has long maintained that he viewed the videos because he did not know what they contained when he received them and proceeded to copy one of them before turning it over to police because his paper needed to report on it and verify its content. On Aug. 26, in his first piece for the [Chicago Sun-Times](#) since leaving the paper 12 years ago, DeRogatis wrote about the origins of the story and how he received two videotapes not long after first being tipped to Kelly’s alleged behavior by a random fax on the Wednesday before Thanksgiving of 2000.

In an interview before the motion was decided on, Dunn said he could see no valid reason for McDavid’s attorneys to have DeRogatis testify, noting that in the 2008 trial, the victim at the center of the trial did not testify and prosecutors were seeking all the help they could get. “The first time they

didn't have Jane. Now, there's not much reason to call a reporter," Dunn said.

Kevin Goldberg, a First Amendment Specialist with the Freedom Forum, said subpoenas to reporters are "often fishing expeditions that waste everybody's time."

He added that while he doesn't support the use of confidential sources as a rule, their use is important in stories of a touchy nature, especially stories about alleged sexual contact with minors.

"If a journalist cannot use a confidential source on a very important story, it's the public that loses out, not the journalist," Goldberg said.

McDavid's attorneys may not agree with Dunn and Goldberg, however. Two weeks before Kelly's trial began, attorneys for McDavid filed a six-page motion that alleged the former lead prosecutor on the case engaged in "surreptitious" communications with DeRogatis. In the motion, McDavid attorneys Beau Brindley and Vadim Glozman alleged that Assistant U.S. Attorney Angel Krull used a private email account and fake name to engage in "surreptitious" communications with DeRogatis in April 2019. DeRogatis told GJR that he has never shared anything with prosecutors that hasn't been published.

In response to the motion, Federal prosecutors acknowledged that a private email account using a fake name was created by Krull to obtain an advance copy of DeRogatis's 2019 book about Kelly, but they said that "none of the emails exchanged using the account were in any way deceptive."

Krull has since left the U.S. attorney's office in Chicago to care for a family member with cancer and is currently based in the U.S. attorney's office in Connecticut, prosecutors told the court.

As for shield laws on the federal level, multiple efforts since the 1970s have failed, but a current proposal called the Protect Reporters from Exploitive State Spying Act passed the House Judiciary Committee [unanimously](#) on April 6. It now must pass the full House before moving to the Senate. However, if passed, it would not protect someone like DeRogatis because he was subpoenaed by defense attorneys in the current Kelly case. The proposed PRESS Act only addresses subpoenas from the government, according to Trevor Timm, executive director of the Freedom of Press Foundation.

“If the subpoena is from the defense or if it’s in a civil trial, the law wouldn’t apply. There needs to be a separate law to address private parties subpoenaing journalists.”

As for the chances of the PRESS Act passing in both houses of Congress, Goldberg said he’s “realistically pessimistic and cautiously optimistic.”

“The climate is favorable but it’s reached the precipice many times and always dies in the senate,” Goldberg said, noting that if the act isn’t enacted by the end of the current congressional term it will have to be reintroduced again.

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