

Possible Jeffrey Epstein tape contempt ruling could send reporter George Rush to jail

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Could *New York Daily News* gossip columnist George Rush be the next Judith Miller?

Miller, a Pulitzer Prize-winning *New York Times* reporter, spent 85 days in a federal detention center in 2005 for defying a court order to reveal a confidential source.

A federal court ruling is pending on whether Rush's taped interview with convicted sex offender Jeffrey Epstein must be given to attorneys representing Epstein victims.

Epstein, 57, served 13 months in jail for soliciting prostitution and soliciting a minor for prostitution. Nearly two dozen young women have filed lawsuits against the billionaire money manager, all alleging he sexually abused them as minors at his El Brillo Way home.

After conducting a 22-minute taped phone interview with Epstein, Rush played portions of the tape for three people outside of his news organization and divulged the essence of the tape to two others.

The *New York Daily News* is fighting the subpoena, citing reporter's privilege.

Representing victim Jane Doe, attorneys Brad Edwards and Paul Cassell have subpoenaed the tape and other communications between Epstein and Rush. They say any privilege was waived when Rush disclosed the contents of the "off-the-record" interview to others outside of the news organization.

The attorneys maintain Doe cannot obtain the information anywhere else, and she has a "compelling need to obtain Jeffrey Epstein's own words about his sexual abuse and lack of remorse."

Neither side wants to discuss the possible repercussions of a contempt order.

In a word: jail.

At a May 4 hearing in Manhattan, U.S. District Judge Lawrence M. McKenna made a passing reference to bringing pajamas to court when the conversation turned to the possibility of a contempt order. McKenna most likely would issue a contempt order if he rules against the paper and the paper fails to turn over the tape. Another possible sanction is a monetary fine.

"We're still considering our options," Daily News attorney Anne Carroll said Tuesday.

If the ruling goes against the paper, Carroll said there are three options: turn over the tape; take a contempt order and ask for a stay while appealing the order; or appeal by seeking a "writ of mandamus," saying the district court erred.

The two appeal procedures are similar, Carroll said. However, going into contempt mandates the appellate court hear the case, while a mandamus can be denied without being heard.

Doe attorney Cassell said he and Edwards are "assessing their options" depending on the ruling.

“If we win the case, we expect the Daily News to comply and give us the information,” Cassell said. “We have a lawful subpoena. We made our argument last week and we’re hoping for a favorable ruling.”

A ‘murky part of the law’

Clint Hendler, a staff writer for the Columbia Journalism Review, writes extensively about transparency, media law and First Amendment issues.

Hendler said there is an array of appellate rulings dealing with reporters’ privilege.

“But it’s a patchwork ... a really murky part of the law,” Hendler said.

Regarding the Rush case, Hendler said, “It does strike me that the reporter weakened his case considerably by sharing the information and the tape itself with people outside of the news organization. I think it would be a much stronger case if the tape just sat in a box and wasn’t communicated to anyone.”

In a second sworn affidavit, Rush disputes statements from Edwards and private investigator Michael Fisten.

Rush said Epstein did not make a “damning admission” on the tape about Jane Doe and that Epstein never said he may have crossed a line or come too close to the line. Rush said Fisten’s claims that he had compiled “very negative information” on Epstein about his exploits with underage girls are false. Rush also said his publisher did not kill the Epstein story.

“Forcing me to testify and to give up the tape of my off-the-record interview would compromise my reporting by deterring other sources from speaking with me out of fear that they will become involved in third-party litigations and force me to change the way I go about my work,” Rush said in his affidavit.

Seeking federal shield law

Although journalists have been fighting for years to get a federal shield law, Congress has yet to sign off on one, although there is a version pending before the Senate that has already been passed in the House. Most states have reporter shield laws, which vary in degrees of protection from state to state.

Miller was found in contempt when she refused to reveal the confidential source who disclosed the identity of undercover CIA agent Valerie Plame. She has left the New York Times and has become an advocate for a federal shield law, so that other reporters won’t face the same sanctions.

The problem with not having a federal shield law is that state shield laws don’t apply in federal court, said Sandra Baron, executive director of the Media Law Resource Center, based in New York City. Baron said there is no black and white answer in cases involving reporter’s privilege.

“The amount of protection a reporter is going to get depends on federal common law within the specific federal court where the information is being sought,” Baron said.

The second circuit, which covers New York City, has held that there is privilege for confidential and non-confidential sources, Baron said.

David Hudson is a law professor and First Amendment scholar at the Freedom Forum First Amendment Center at Vanderbilt University.

“If the press can’t protect their information, their sources aren’t going to speak to them and it chills the newsgathering process,” Hudson said.

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