

# Striking OUT

By Randall D. Elison

The BALCO reporters shielded a lying lawyer. They are no heroes.

A recent case involving two San Francisco journalists has been widely cited as evidence that we need a federal reporter's shield law. In fact, their story may suggest just the opposite.

The *San Francisco Chronicle* reporters had been threatened with jail for refusing to identify a confidential source for some of their reporting on the Bay Area Laboratory Co-operative steroids investigation. As their case was about to be argued in the U.S. Court of Appeals for the 9th Circuit, their source, defense lawyer Troy Ellerman, was identified by other means. On Feb. 15, Ellerman pleaded guilty to obstruction of justice and related charges. As a result, prosecutors have withdrawn their subpoenas of the reporters.

For the past year, journalists and their supporters have assailed the BALCO investigation as a case of prosecutors run amok. Critics have warned that it exemplifies a troubling new era of government attempts to stifle the free press by compelling reporters to reveal their sources.

Now that the case is over, it is clear that it does indeed raise troubling issues—but those issues concern journalists and their practices, not overreaching prosecutors. The BALCO saga should give pause to those who would enshrine a privilege for reporter-source relationships in federal law.

In 2002, a federal grand jury in San Francisco began investigating allegations that BALCO employees had illegally supplied anabolic steroids and other performance-enhancing drugs to a number of professional athletes. On Feb. 12, 2004, the grand jury indicted the head of BALCO, Victor Conte, and three other defendants for illegal distribution of steroids and other offenses. Troy Ellerman represented one of the defendants.

The *Chronicle* reporters, Mark Fainaru-Wada and Lance Williams, had been reporting on the BALCO investigation for some time and had written dozens of articles about it. In June

and December of 2004, however, they wrote articles that included verbatim excerpts from the confidential grand-jury testimony of several star athletes, including sprinter Tim Montgomery and Major League Baseball sluggers Barry Bonds and Jason Giambi. It was clear from the articles that the reporters had been given unlawful access to material that was subject to a federal judge's protective order.

After the first articles appeared, all parties and lawyers involved in the case—including Ellerman—filed sworn declarations with the court denying responsibility for the leaks. In October 2004, the defense lawyers—including Ellerman—filed a motion accusing the government of leaking the grand-jury information to the press. They claimed that the resulting publicity had made it impossible for their clients to obtain a fair trial, and they argued that the court should dismiss the indictment based on this “outrageous government misconduct.” The court ultimately denied their motion, and the BALCO defendants later pleaded guilty to various charges.

The BALCO judge asked the Justice Department to investigate the illegal leaks. During that investigation, the reporters refused to testify before the grand jury, citing their obligation as journalists to protect the identity of a confidential source. They were held in contempt and were prepared to go to jail rather than comply with the court's order, until Ellerman's guilty plea made that unnecessary.

It's now clear exactly what the *Chronicle* reporters were protecting. Ellerman had illegally allowed Fainaru-Wada to review copies of the grand-jury testimony on two occasions.

Ellerman thus leaked the grand-jury information to the media himself, denied doing so in a sworn statement to the judge, and then tried to get his client's criminal case dismissed by citing the *Chronicle* articles and blaming the government for the leaks. This is the scheme that last month

resulted in Ellerman's guilty plea to obstruction, contempt, and filing a false declaration.

### EXECUTING THE FRAUD

The *Chronicle* reporters knew that Ellerman had committed a fraud on the court. What's more, they knew that he had used their own reporting as a means to execute that fraud.

Did they come forward to expose this criminal use of their work? Did they, at the very least, refuse to have any further dealings with Ellerman once they saw how he had used them in a criminal scheme to obstruct justice?

Far from it. In fact, after Ellerman had lied to the judge and filed his motion falsely accusing the government of the leaks, Fainaru-Wada met with him again in November 2004, reviewed more grand-jury transcripts, and published more articles with Williams disclosing additional grand-jury information.

Fainaru-Wada and Williams also wrote a successful book about the BALCO scandal. They accepted prestigious journalism awards for their reporting. When they refused to identify their source and were held in contempt, journalists and members of Congress rallied to their defense. They were accorded rock-star treatment in the journalism community for their valiant battle against the federal prosecutors. Sympathetic articles and TV documentaries detailed their plight.

Now the truth has been revealed, and to say the reporters no longer look quite so noble would be an understatement. Their source was not some selfless whistle-blower intent on informing the public (albeit illegally) about the evils of steroids, but a defense lawyer who manipulated the media and committed perjury in an unlawful attempt to thwart a criminal prosecution. The prosecutors, at the request of a federal judge, were doing their best to investigate this serious offense, not merely trying to plug a grand-jury leak.

And the reporters, for their part, were going to great lengths to prevent Ellerman from being brought to justice, while profiting from his crimes and portraying themselves as victims.

This was not a case where a source merely confessed past, or even ongoing, criminal conduct to a reporter. Ellerman's leaks to the reporters were themselves criminal acts, in which the reporters willingly participated. He used the resulting articles to commit additional crimes, while the reporters continued to work with him. The reporters' own actions were an integral part of the criminal scheme.

### SELF-SERVING ARGUMENTS

Despite the facts that have now come to light, supporters of a federal reporter's privilege continue to point to the BALCO case as evidence that the law is needed. Sympathetic members of Congress intend to reintroduce their proposed federal shield law, citing BALCO as a prime justification. These lawmakers should take a hard look at what really happened in BALCO and ask themselves whether this is conduct that should be encouraged by federal legislation.

The *Chronicle* reporters argue, of course, that they were only protecting the public's right to know. They claim that because this was such an important story, it was appropriate for them to encourage Ellerman to break the law and then help to conceal his crimes.

This "ends justify the means" argument is more than a little self-serving. After all, Williams and Fainaru-Wada wrote more than 100 articles about BALCO that did not contain illegally leaked grand-jury information. The public was already receiving a wealth of information about BALCO from these articles, the ongoing criminal case, and other sources.

Even the particular details from the grand jury about big-name athletes using steroids almost certainly would have come to light eventually. Information that explosive does not stay buried forever. There were (and are) multiple investigations, hearings, civil suits, and criminal proceedings exploring the facts related to BALCO. The lead defendant, Victor Conte, even began giving TV interviews about his conduct.

Publishing the leaked grand-jury information was not essential to the public's ultimate right to know. It did, however, allow these reporters to get the scoop by reporting it first and to obtain exclusive material and greater publicity for their book. All of this advanced their careers considerably.

Invoking the public's right to know likewise cannot justify continuing to resist once the prosecutors, having exhausted all other alternatives, subpoenaed the reporters to identify their source. At that point, the public already had all of the information. The only issue was whether Ellerman would be punished for his crimes.

The reporters would no doubt respond, as they have argued in the past, that if they had revealed their source, future sources would refuse to confide in them. But this argument presupposes that sources are fools, unable to draw distinctions easily recognized by anyone with even a rudimentary sense of right and wrong.

By refusing to protect Ellerman, the reporters would not have been signaling that legitimate confidential sources could not trust them to keep their word. They simply would have been demonstrating that they would not allow an unscrupulous source to use them as tools to commit a crime. This seems like a message that responsible journalists would want to send.

Instead, the message conveyed to sources by the conduct of the *Chronicle* reporters is this: "Give me information, and I will protect your identity no matter what you do. If you want to use me and my work to commit a crime, I won't say a word. In fact, if it becomes necessary, I'll even go to jail so that you don't have to."

It's hard to imagine what public interest could possibly be served by providing legal cover for such an agreement. Indeed, such actions approach aiding and abetting a crime or participating in a criminal conspiracy.

Proponents of a reporter's privilege like to project an image of the confidential source as an innocent whistle-blower, motivated by a desire to benefit the public and bring important information to light. The reality is often something quite different. The Valerie Plame leak investigation revealed White House sources using the media to attack a critic of the administration; in BALCO, the source used reporters as part of a criminal scheme to obstruct justice.

Yet many journalists steadfastly refuse to recognize any such distinctions among sources. They insist on shielding all

sources, all the time, lest we start sliding inexorably down what they claim is a slippery slope leading to the demise of the free press. In the BALCO case, this leaves them in the untenable position of arguing that the actions of the *Chronicle* reporters were heroic, when in fact they were deplorable.

The truth is, some sources don't deserve to be protected. The public interest—and the profession of journalism—would be better served if sources understood that abusing their relationship with a reporter will mean they forfeit whatever right they had to expect confidentiality.

Of course, many sources have mixed motives, and many are less than angels. But surely at some point journalists have a responsibility not to safeguard those who manipulate the

media for their own improper—or even illegal—purposes. And just as surely, wherever that line is drawn, the actions of Williams and Fainaru-Wada fall well on the wrong side of it.

Advocates of a federal shield law should find themselves some new poster children. It will be an uphill battle to convince Congress that a federal law protecting actions like those of the *Chronicle* reporters is indeed in the public interest.

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