

## Texas Broadcasters Resist Grand Jury Subpoena for Unaired Footage

By Thomas J. Forestier

Media lawyers and their clients across the country know that the lack of a reporter's privilege in Texas creates an uphill battle for news media who resist local state prosecutors' attempts to obtain evidence for criminal investigations.

Recently, KPRC-TV, a Post-Newsweek Station and the NBC affiliate in Houston, Texas, challenged several grand jury subpoenas issued by the Harris County District Attorney's Office, succeeding in getting the subpoenas quashed in part.

### Background

Prosecutors in the Consumer Fraud Division of that office served multiple grand jury subpoenas duces tecum on KPRC-TV seeking to obtain unaired videotape footage created by KPRC-TV during two separate investigations regarding predatory home lending practices and a fraudulent dog consignment business.

While KPRC-TV had cooperated with the District Attorney's Office in the past by providing videotape on stories that had aired, KPRC-TV concluded that the District Attorney had gone too far in demanding production of raw unedited video footage from a story that was not yet fully developed and had not been broadcast.

KPRC-TV argued that the Harris County District Attorney's Office was abusing its grand jury subpoena power and was improperly attempting to conduct trial discovery by using a grand jury subpoena in lieu of a trial subpoena or search warrant.

Upon receipt of the subpoenas, KPRC-TV attempted to negotiate a resolution with the District Attorney's Office by offering to allow prosecutors to view the raw unaired footage and take notes in lieu of having to turn over the videotape. KPRC-TV also offered to preserve the tapes for potential production in the future in the unlikely event the case proceeded to trial.

The District Attorney's Office rejected the proposal and continued to demand copies of all raw video footage. One prosecutor stated that he needed physical possession of the raw unaired footage for trial and that he could not rely on a "hearsay peek" of the footage and face the possibility of a protracted fight for it later on the eve of trial.

Arguing that the District Attorney's Office had admitted they were really seeking this footage for trial purposes rather than the grand jury process, KPRC-TV challenged this abuse of the grand jury subpoena process and filed motions to quash the subpoenas. KPRC-TV argued that the Texas Legislature, by enacting a statute that restricted the use of search warrants on the media

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(see TEX. CODE CRIM. PROC. ANN. art. 18.01(e)), had recognized the need to provide some level of protection and privacy to newsrooms, reporters and their work product.

KPRC-TV relied on *Thurman v. State*, 861 S.W.2d 96 (Tex. App.—Houston [1st Dist.] 1993, no writ) and *Healey v. McMeans*, 884 S.

W.2d 772 (Tex. Crim. App. 1994), in which the courts recognized the potential for prosecutors to abuse their grand jury subpoena power and the inconsistency and dangers of allowing a prosecutor to use a grand jury subpoena to obtain evidence that could not be seized through the use of a search warrant.

KPRC-TV argued that allowing prosecutors to obtain unaired material would severely disrupt the newsgathering process and discourage sources from speaking with television station reporters, who would face the risk of being perceived as acting as investigators for the government.

KPRC-TV also argued that the state was improperly using grand jury subpoenas to obtain evidence for trial, which according to a December 2005 study commissioned by the Texas Supreme Court, would likely never occur. That study indicated that less than two out of a 100 criminal cases filed in Texas state courts proceed to

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trial. KPRC-TV argued that the state was imposing a premature and unnecessary burden on the media to turn over evidence for a trial that statistically was unlikely to occur.

#### ***Subpoena Quashed in Part***

After conducting an in camera inspection of the subject videotapes, State District Judge Mark Kent Ellis of the 351st District Court conducted a hearing on January 10, 2006 and granted KPRC-TV's motions to quash in part by ruling that KPRC-TV did not have to release the raw video footage for the story that had not aired.

Judge Ellis ordered that KPRC-TV only had to produce certain outtakes relating to previously broadcast stories. Judge Ellis explained that he could only partially quash the subpoenas because Texas' highest criminal court, the Court of Criminal Appeals, had ruled in the *Healey* decision that a grand jury subpoena could not be quashed based on a reporter's privilege.

However, recognizing the importance of the freedom of the press and the increasing erosion of media independence, Judge Ellis concluded that KPRC-TV should not have to produce the raw video footage for the investigative report that had not yet aired. Judge Ellis stated, "Ever

since the Constitution was issued, its been chipped away at. I'm sympathetic with the needs of a press to be free."

A representative of the Houston Chapter of the American Civil Liberties Union attended the January 10, 2006 hearing to express support for KPRC-TV. He argued that allowing the District Attorney access to the unaired raw footage would ultimately harm law enforcement because it would decrease the willingness of individuals to come forward with information to the media.

According to published reports, the District Attorney's Office was not pleased with the ruling but decided not to appeal the ruling. KPRC-TV was pleased with the decision because the court agreed with KPRC-TV that its investigative reporter and her work product were entitled to some level of protection based on freedom of the press concerns even though Texas did not recognize a traditional reporter's privilege.

*Thomas J. Forestier, a shareholder in the Woodlands, Texas office of the law firm of Winstead, Sechrest & Minick, P.C., and his associate, Kyle R. Watson, represented KPRC-TV in these proceedings. Valerie Turner and Russel Turbeville, assistant District Attorneys, represented the Harris County District Attorney's Office.*



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