

## The clash of ethics and law

### The Rolling Stone report, and how professional journalism standards get mixed up in libel cases

Feature

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As controversy swirled around *Rolling Stone* in the wake of its story about rape at the University of Virginia, the magazine quickly sought to publicly examine what happened. It commissioned the Columbia University School of Journalism to perform an audit of the journalistic process involved, and the resulting report carefully picked through every aspect of the story.

But immediately after the report's release, the fraternity implicated in the story threatened to sue, and a school dean whose supposed lack of sympathy for the victim was portrayed in the article has now filed suit for defamation. As *Rolling Stone* confronts at least one plaintiff who quotes the Columbia report in her complaint, it now faces a tricky situation: the report examining the conduct of journalists against the aspirational standards of ethics codes is being used in the lawsuits that face a completely different legal standard.

When reporters and editors make mistakes, most would say that the only responsible thing for them to do is to assess what went wrong so that similar blunders can be avoided in the future. Even before mistakes occur, many publications and journalism organizations have professional ethics codes to show journalists what they should be striving for as they practice the trade. But while these efforts undoubtedly help to elevate the quality of journalism, they can also be used by libel plaintiffs to point out mistakes or shortcomings that support their lawsuits.

### Rolling Stone faces the music

When *Rolling Stone* asked Columbia Journalism School dean Steve Coll to examine the reporting of "A Rape on Campus," it was clear that mistakes had occurred during the writing and editing of what it thought would be a bombshell story, but was ultimately centered around a false narrative. When the report, authored by Coll, academic dean Sheila Coronel, and postgrad scholar Derek Kravitz, was released in April, it was an indictment of the many points in *Rolling Stone's* process where the system broke down: the writer, Sabrina Rubin Erdely, had not spoken to several of the victim Jackie's maligned "friends;" she didn't give the fraternity enough information to comment and defend itself; her editors didn't push back on the failure to investigate the alleged rapists, and more. *Rolling Stone* promptly retracted the article. Soon after, Phi Kappa Psi, the fraternity accused in the story of having a pledge process that involved the gang rape of the alleged victim, announced that it was exploring legal options against Erdely and *Rolling Stone*.

"The report by Columbia University's School of Journalism demonstrates the reckless nature in which *Rolling Stone* researched and failed to verify facts in its article that erroneously accused Phi Kappa Psi of crimes its members did not commit," fraternity chapter president Stephen Scipione said in a statement. "This type of reporting serves as a sad example of a serious decline of journalistic standards."

The fraternity's statement illustrates the issue at the heart of debate over use of such reports and ethics codes in lawsuits: the conflation of legal standards with professional ethical standards. By saying that the report demonstrated the "reckless" nature of the reporting, the fraternity appeared to be referring to the legal standard for defamation of a public figure, under which a plaintiff must show that the defendant acted with actual malice, which can be proven by reckless disregard for the truth. On the other hand, by pointing to the "serious decline of journalistic standards," the fraternity brought up ethical standards, which do not directly address the issue of legal culpability.

While Phi Kappa Psi has not yet taken legal action, another subject of the article has. On May 12, Dean Nicole Eramo filed suit against Erdely, *Rolling Stone*, and publisher Wenner Media, asking for \$7.85 million in compensatory and punitive damages. Her suit alleges that Erdely cast her as the "chief villain of the story," describing her as indifferent to the victim and other students' rape allegations, and saying she was discouraging when they tried to make official complaints.



The Rolling Stone article.



Eramo's complaint cites the Columbia Journalism School report seven times to provide support for the dean's claims. She first points to the report's conclusion that the article was a "journalistic failure." She then refers to interviews that the report's authors conducted with Erdely and several of the article's subjects. The complaint states that Erdely told Coll that she chose UVA with an agenda in mind of portraying a shocking rape and rape culture that were inadequately addressed by the school administration, and that even though Erdely admitted to Coll that she was "incredulous" when she heard Jackie's story, she "ignored countless red flags" in going ahead with publishing it. The complaint cites the Columbia interviews with others portrayed in the article, who told Coll that Erdely had not contacted them and that they would have set the record straight if she had. Finally, the complaint states that "Erdely admitted to the Columbia Journalism School that she had serious doubts about Jackie's credibility" a week after the story was published, but that she continued to generate publicity for the story.

Like Phi Kappa Psi's threat of legal action, Eramo's complaint uses the evidence and conclusions of the report as fodder for libel suits. They are benefiting from the impetus behind the report, the desire to assess the journalistic practices employed and to learn from the mistakes that were made. In that spirit, Erdely and her editors spoke honestly about their thought processes and actions, and Coll was candid in his assessment. He used no legal terminology in the report, avoiding any conclusions that Erdely and Rolling Stone had been negligent or reckless. Instead, his analysis that the article fell short was based on professional ethical standards.

For Jane Kirtley, University of Minnesota professor and former director of the Reporters Committee for Freedom of the Press, "this is not a distinction without a difference."

"I really think it's important to keep the line between law and ethics very firmly drawn," she said.

But in the courtroom, when plaintiffs' attorneys are trying to convince the jury that the defendant was negligent or acted with actual malice, shown by knowledge of falsity or recklessness, evidence of unethical behavior is often raised, sometimes successfully.

### Ethics codes in the courtroom

Howard Cooper, a Boston attorney who has represented plaintiffs in several high-profile libel cases against the media, said he has often used the Code of Ethics of the Society of Professional Journalists to cross-examine reporters. He has referred to two provisions in particular to raise concerns about the professional conduct of these defendants — a provision on the use of anonymous sources and another recommending that the reporter should care about the subject of their story and the impact that the story will have on that person. While Cooper says he uses reporters' noncompliance with the SPJ code as "some evidence on issues of negligence and actual malice," he acknowledges that the code is not binding on SPJ members.

Indeed, the aspirational and non-binding nature of the SPJ code is perhaps its most important caveat. The code comprises four principles of ethical journalism: seek truth and report it, minimize harm, act independently, and be accountable and transparent. Each principle contains numerous recommendations, including avoiding conflicts of interest and balancing the public's need for information against potential harm or discomfort. But the organization warns prominently that the code is not binding:

The code "is not a set of rules, rather a guide that encourages all who engage in journalism to take responsibility for the information they provide, regardless of medium. ... It is not, nor can it be under the First Amendment, legally enforceable."

In spite of what Kirtley describes as the efforts of some SPJ members to make the code enforceable, SPJ has never set up a system for judging whether members have adhered to the code or for removing offenders.

"[A]s a practical matter, professional enforcement of standards for news reporting would require a body of more detailed provisions and case law that are far beyond our resources to provide, even if that were desirable," the code reads. "Nor could any set of rules, however detailed, possibly apply to all the nuances and ambiguities of legitimate expression."

Despite the code's non-enforceability, plaintiffs' lawyers such as Cooper still bring it up in court to show that the reporter engaged in practices that others in the profession would look



AP PHOTO/CRAIG RUTTLE

**Columbia Journalism School Dean Steve Coll discusses findings of his report on Rolling Stone magazine's story on sex assaults at the University of Virginia.**



AP PHOTO/STEVE HELBER

askance on. But as far as proving actual malice, noncompliance with the code cannot be dispositive because of the subjective nature of the actual malice standard: the reporter must have subjectively possessed knowledge of falsity or reckless disregard for the truth. It is not enough to say that a reasonable reporter would not have acted as he did. If the publication expressly adopted the code, it is slightly more probative, but still not conclusive proof of liability.

**The Phi Kappa Psi fraternity house at the University of Virginia in Charlottesville, Va., which was described as the site of a gang rape.**

Therefore, Kirtley said, “it’s up to the lawyers representing these [media] organizations to make sure judges and juries know the ethics codes aren’t directly relevant.”

Longtime First Amendment lawyer Floyd Abrams of Cahill Gordon & Reindel LLP has defended libel cases in which plaintiffs attempted to use lack of compliance with journalistic guidelines against media defendants.

“Arguments followed from the journalistic perspective about the impropriety and harmful societal impact of allowing those standards to be used,” Abrams said. “Harmful in the sense that if the price tag of having them was that they would be used against journalists in litigation, that it might not be worthwhile to have them.”

### **The confusion of legal standards with ethical guidelines**

Ensuring the broad protections given to journalists under the First Amendment is the fundamental reason why ethical guidelines should not be enforced as legal standards, Kirtley said.

“The law gives journalists a lot of leeway to do a lot of things that as an ethical matter would be questionable,” she said, citing as an example the clear legality in many states of tape-recording a telephone conversation without the knowledge of the other participant, a practice that many ethicists would frown upon.

The dividing line is not always so clear. Rolling Stone’s ordeal is reminiscent of another high-profile journalism snafu that resulted in a third-party assessment and indictment. But in the case of CNN’s broadcast on Operation Tailwind, it was Abrams, along with CNN’s inside counsel, who did the post mortem, not a journalist like Coll.

When serious questions were raised about CNN’s 1998 “Valley of Death” report on the alleged use of nerve gas in Laos during the Vietnam War, Abrams reviewed interview outtakes and did interviews to get to the bottom of the problems. His conclusion that “CNN should retract the story and apologize” was based on findings that the evidence could not sustain the broadcast’s central thesis, despite the journalists’ deeply held faith in their reporting.

The report makes his point of view clear, starting out by saying, “We are lawyers, not journalists, and it must rest with journalists to determine how best to avoid in the future the pitfalls illustrated by this broadcast. We do offer the following thoughts that have occurred to us as we reviewed the broadcast.”

Abrams avoided legal terminology in his report, as Coll did — there is no mention of negligence, recklessness, or libel. That was deliberate, he said.

“I sought as carefully as possible not to get into anything specifically conclusory about the potential legal consequences of the report,” Abrams said. “I was really passing on fairness and the degree to which I concluded that the report had been substantiated.”

Yet at the time, Kirtley and others raised questions about the wisdom of having a lawyer perform the assessment.

“I say this with the massive respect I have for Floyd,” Kirtley said. “The issue that I had with a lawyer preparing the Tailwind report was that I was afraid it was going to send the message that it was a legal analysis even though that wasn’t what it was intended to be.”

Kirtley said she would prefer that lawyers stuck to asking reporters whether they broke the law, such as by making illegal surreptitious recordings, rather than making editorial and ethical judgments about the propriety of newsgathering and editing techniques.

The Tailwind report, which meticulously laid out CNN’s journalistic errors, was followed by several defamation suits. Abrams said that there is always a risk that libel suits will follow such evaluations, but that he felt he could, with his body of experience reviewing and assessing journalistic products, carefully articulate his conclusions in a way that would ultimately be very helpful to CNN.

### **The impact on Rolling Stone**

It remains to be seen how the *Rolling Stone* plaintiffs use the report to their advantage. Observing that Eramo’s complaint makes much use of statements made during the course of the Columbia investigation, Cooper said that it is a fair use of the report for it to serve as an investigatory aid in establishing facts that can be asked about in depositions or at trial. But he said it would be problematic and generally inadmissible in court as evidence, unless *Rolling Stone*

commissioned the report and adopted its conclusions by way of an admission.

“I think the report will be a tremendous guide during discovery,” Cooper said. “It may serve to nail down the testimony of witnesses who are quoted and who are referenced, but it may not be usable in its findings against *Rolling Stone*.”

The report could support the *Rolling Stone* team's assertions that they thought they had a good story and that as soon as there were doubts, they did the best they could, including commissioning the report, to fix mistakes. On the other hand, by showing that there were many sources who were not interviewed, the report could point to possible negligent failure to investigate, if not actual malice.

*Rolling Stone* may have handed potential plaintiffs a gift by committing fully to the Columbia report, but the careful analysis of its internal editorial standards as well as the transparent public accounting will benefit both the magazine and other journalists as a cautionary tale for the future. Likewise, the existence of ethics codes have surely more often prevented journalistic failures than they have caused journalists to be found liable.

“With respect to a flawed journalistic effort, I think having an outside entity have a look at it can have a cleansing impact which can lead to better journalism, and more careful journalism, in the future,” Abrams said.

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