

## Slow Burn: Defending Matthew Cooper

Richard Sauber, lawyer for the embattled *Time* writer, talks about how Karl Rove let his client off the hook.

*Richard Sauber, a partner in Fried, Frank, Harris, Shriver & Jacobson's D.C. office, has been at the forefront of one of the biggest First Amendment cases in years: special counsel Patrick Fitzgerald's investigation into the leaking of CIA agent Valerie Plame's name to the news media. Sauber's client, Time magazine reporter Matthew Cooper, was subpoenaed by a federal grand jury to testify about conversations he had with a confidential source. Cooper, along with New York Times reporter Judith Miller, challenged the subpoenas, although the parties eventually split over strategy. Last month, after losing the court battle, Cooper testified his source was Karl Rove, adviser to President George W. Bush. Legal Times reporter Emma Schwartz spoke with Sauber about what took place behind the scenes.*

**LT:** Did Matt hire you right after he got the subpoena?

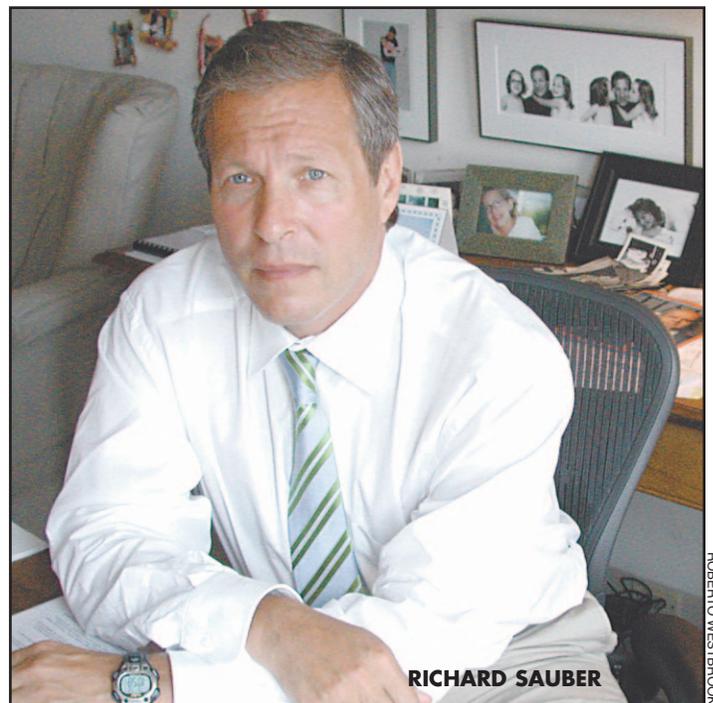
**RS:** No. When he got subpoenaed *Time* hired Floyd Abrams to represent him. I'm not entirely sure when. I think it was in the winter or very early in 2003. I became involved a little bit later when the prospect of Matt going into contempt [of court] became a reality. Matt had informed Floyd he was not going to testify. The machinery, the briefs were started to be written. That's when the reality that he might have to face jail time led him to call me.

**LT:** How did he find out about you?

**RS:** I had been friendly with Matt for five or six years. We were just personal friends.

**LT:** What did you make of [*Time* magazine Publisher Norman] Pearlstine's decision? Did you make any arguments for or against it to him?

**RS:** Matt and I both had the opportunity to speak to Norm Pearlstine extensively beforehand. ... There was a great deal of weight given to the fact that we had taken this case all the way to the Supreme Court—and the Supreme Court essentially let stand a unanimous court of appeals panel—and lost. And as a lawyer, in my world, that means you comply. But again, I didn't



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have to advise Norm. ... I was hopeful that by getting the documents, which I knew at the time included the identity of Matt's source, Rove, and the substance of the conversation, there was a chance—a slim chance—that Pat Fitzgerald would say, "I have this and I don't need Matt."

Fitzgerald got documents on Friday, July 1. I spoke to Fitzgerald on Sunday, July 3. I was in Alaska on a family vacation ... and he said, "No, I need Matt to testify." And I told him I needed to check with Matt, but that my sense was that he was going to go into contempt of court. So I called Matt, and he said, "I just can't testify under those circumstances." So I made arrangements to fly back.

**LT:** Did you agree with Matt's decision?

**RS:** I advised him to follow the law and to testify. I told him I understood his decision to go into civil contempt. My duty under

the law is to explain to him what would happen, but my advice to him was to comply with the order.

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**LT:** Did you ever think of trying to negotiate a release with Rove beforehand?

**RS:** Since I got into this case, I knew that Rove was Matt's source. And we knew for a year that we were headed toward the possibility that Matt was going to have to testify. So the question was, should we call Rove?

We were pretty clear we should not. One, I was very concerned about Matt calling Rove directly because I was concerned about two grand jury witnesses having a conversation about his testifying. I thought it would be potentially interesting to a grand jury, and I was really uneasy about that. So I strongly advised him not to.

The problems with my calling Rove's lawyer [Robert Luskin] were, first, we had no indication that they were interested in giving a direct personal release, where that was different with [Vice President Dick Cheney's chief of staff, I. Lewis "Scooter"] Libby. Karl Rove had never acknowledged speaking to Matt on that subject. If I were to call Rove's lawyer and tell him Matt had had a conversation with Rove and would he release him, that conversation would reveal Matt's source. And that conversation was not covered by any privilege. I was reluctant to launch into that when nobody had acknowledged Rove as a source.

Also, I didn't want Karl Rove's lawyer to feel that I was trying to box him in, in any way ... here is a fairly strict set of rules that no one can do anything to discourage anyone from testifying before a grand jury. ... I felt I would be trapping Karl Rove's lawyer in.

What changed is that I'm flying back on the red eye Tuesday night, on the night of July 5, directly from Anchorage to Chicago. I get off the plane and buy a copy of *The Wall Street Journal* and *The New York Times*. I get on the plane, and then I read in *The Wall Street Journal* a quote from Karl Rove's lawyer acknowledging that Karl Rove was one of Matt's sources. He acknowledged that, yes, Karl had spoken with Matt, but he had never asked for confidentiality. Well, to me, that was virtually an invitation ... so my calling him would not reveal any secret. I called Matt from the plane and said, "Read this article. It changes everything."

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**LT:** Why wasn't the *Newsweek* article [reporting that Cooper's notes named Rove as his source] enough to release you from the secret?

**RS:** Rove never came out and said, "Yes, I did [speak with Matt]." That happened a few days later. What was different then was that [Rove's lawyer] Luskin said he didn't expect Matt to keep that conversation confidential, and "if he's going to jail, he's not protecting Rove."

**LT:** So tell me about the conversation you had with Luskin.

**RS:** I called him. I know him. We've met before. I called him and said, "I saw your remarks today. Would you be interested in giving Matt a direct and personal waiver?"

He said, "I don't have to; he's already signed a general waiver." I said, "That's not good enough. I need you to represent to me that Karl Rove has personally released Matt Cooper from any claim of confidentiality to any conversation in July 2003." Luskin said, "Let me talk to Rove." I said, "So if you want to say the general waiver was always in effect, that's OK."

He called me back at 12:30 p.m. We had to be in court at 2 p.m. And he said he also talked to Pat Fitzgerald. And he said, "My client authorizes me to do that." We drafted a letter together on the phone, and I sent the letter over to him, and he initialed it.

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**LT:** From all that you've heard and all of the people you have spoken to, what do you think Fitzgerald is aiming for?

**RS:** I spent a lot of time on the phone [with Fitzgerald] and in person. He was so careful not to give away anything—even with body language—any indication of what he was looking at or where he was going. It was quite astonishing how uncommunicative he was. So the short answer is, I don't know.

But the only clue is that he submitted some fairly extensive material under seal.

Every judge who has commented on that [has said] how impressive the showing is and how important this case is to national security. All I can surmise is that he has a substantial amount of evidence to continue a fairly robust investigation. And it does involve classified material.

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**LT:** There has been a lot of talk about a federal shield law. Would that law have helped your client, or would there be some limitation?

**RS:** I don't know. Judge [David] Tatel [of the U.S. Court of Appeals for the D.C. Circuit], in his concurrence, said that even if there was a federal common law, that the showing that the special prosecution made is so impressive that it wouldn't make a difference. None of these shield laws are absolute.

The larger issue is that it would have helped Matt in that there would be some guidance and some certainty in his thinking in what was covered and what was not. It would have lessened the burden on Matt, and certainly maybe on Judy Miller, to sort of be able to guess what the law is and not to have to go into contempt to have a ruling to what the law is and is not.

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**LT:** What comes next? Is it really all over for Matt? What if there is an indictment?

**RS:** Depending on the investigation, there is a chance that he could be a witness. But I think we're a long way off from this. ■