Representing the Anonymous Client

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So, what did you do for your summer vacation? Last year, I spent 10 days of mine fighting one of the largest media companies in Britain on behalf of an anonymous Twitter user whom I have never met but whom I defended against claims of defamation, computer hacking, and impersonation. In the process, I watched as the case became an object of repeated media and blogosphere comments about how the issues of anonymity should apply to social media sites.

If you've never represented a party whose anonymity is the key issue in the dispute, it presents some interesting problems, starting with the question: Do you as counsel have to know the identity of the party you're representing?

It all started at lunch on July 26, 2012, as I was idly running through the BBC feed on my smartphone while waiting for the waiter. An article caught my eye: "Twitter to reveal identity of spoof newspaper boss account." (*BBC News*, July 25, 2012). In brief, an anonymous Twitter user had set up an account mocking the chief executive officer (CEO) of a British media company, Northcliffe Media Ltd., and the company had just filed suit in California federal court to have subpoena power over Twitter.

Twitter in turn had notified the account holder that, absent a motion to quash by August 1, it would turn over the requested material. I was caught by the following from the anonymous Tweeter: "What I need at the minute is a very good pro-bono California lawyer. As it stands, they will hand over my details."

I was hooked, and the appetizer hadn't even arrived.

Client: Receiving the Subpoena

On July 12, as I was idling away an evening, my email sparked into life. I looked down to see I had received an email from "Twitter Legal," directed to the account I was using to mock Northcliffe Media Ltd's CEO, Steve Auckland, under the rubric of "UnSteveDorkland."

Twitter Legal informed me that Northcliffe had served Twitter with a subpoena seeking all information connected to the various accounts I had been using. It stated that, unless I managed to file a motion to prevent it from answering, it would turn over the information by August 1. So how had it come to this?

By the spring of 2012 I had been a casual user of Twitter for a few months with my own personal account. It was fun to occasionally check what personal friends and professional colleagues and acquaintances here in the UK were up to via the medium, but I was not, in any way, what might be termed a prolific user.

I certainly had paid little attention when signing up to the "ground rules" under which Twitter operated. I'll admit this may make many of you in the legal profession wince, but when accepting Twitter's terms and conditions upon sign-up I blindly ticked "yes."

Interestingly, a few of my favourite "Tweeters" were folks who were clearly operating "spoof" accounts. For example, the Twitter feed conducted by someone calling herself "Elizabeth Windsor" using the handle @Queen_UK is patently not this country's sovereign—unless, that is, she is partial to ending her week by tweeting to the nation "The UK is now closed for the weekend. Gin hats on. #ginoclock"

These parody accounts amused me and convinced me that Twitter offered the occasional chance to mock those in power and/or point out the absurdities of their actions. Which brings me to Steve Auckland.

Auckland is the CEO of Northcliffe Media Ltd, the UK division of the Daily Mail and General Trust plc (DMGT). While the controversial and never understated *Daily Mail* national newspaper and its booming website are the "jewels in the crown" of the DMGT Empire, Northcliffe languishes some way behind in the pecking order.

The UK, like many countries, is experiencing a grinding consolidation and/or downsizing of newspapers, both national and regional, as the Internet, among other things, puts ever-increasing pressure on their revenues. Northcliffe Media is among the most prominent of the UK's regional media companies to suffer this fate. It owns dozens of local newspapers that face challenging times in an ultra-competitive media landscape.

About a year ago, the bosses at DMGT installed Mr Auckland as the new CEO of Northcliffe. He was quick off the mark to announce he was going to make changes and this he proceeded to

Illustration by Darren Gygi

do, principally around the issue of cost-cutting, to ensure the company maintained profit levels that would keep the parent company happy.

One can argue forever about the scope and nature of the cost-cutting—and I have my own thoughts as to its short-term nature—but if Auckland was installed to "get the job done," then, possibly, one cannot argue with the fact that he did.

This was a powerful story about the new realities for corporations in a social media-driven world.

But as a wry observer of both Northcliffe and the wider UK regional newspaper industry, what struck me was the manner in which he set about the task.

Auckland hails from the U.K. county of Yorkshire, known over here for producing plain-speaking, one might say blunt, men who stand little on ceremony and have a certain way about them in terms of attitude, diction, and phraseology. They are as instantly recognizable to us as Texans are reputed to be in the U.S.

Auckland somewhat lived up to the stereotype, both in word and deed. Memos, public pronouncements, incentive schemes for staff, conversations retold from meetings or company gatherings he had attended—all attested to the fact the man appeared to be truly A Professional Yorkshireman, with a giant-sized ego to match. Anyone who offers staffers the prize of a mug emblazoned with his own image (albeit couched as a joke) or "jokes" that he is mistaken for George Clooney in the looks department, is clearly extremely self-absorbed. And, it seemed to me, ripe for parody.

So I started a special Twitter account devoted to Auckland to, as we say here, "take the piss out of him." Run under the moniker "Steve Dorkland" (first using Twitter handle "@SteveDorkland," and then, after the suit started, "@UnSteveDorkland" when Twitter flinched at the first and took it down), it contained regular joke postings about fake meetings, spoof conversations, made-up decisions he had involved himself in—the works. It was labeled as a parody and behaved as such—frankly, some of the postings were so ludicrous you would have to have taken leave of your senses to believe it was the man himself posting.

It created a little reaction and some amusement for people in the know and carried gently on its way. Perhaps the key phrase here is "a little reaction" because before things turned nasty I had, at most, 270 followers for the spoof.

So that is where things stood when I received the Twitter Legal notice. Wow. Had it truly come to this? Indeed it had. A prospect which was at the same time absurd and scary. Having zero knowledge of the Californian legal system and not counting any U.S. attorneys among my contacts, this looked like a battle I could not win.

And yet, and yet . . . a sense of outrage burned inside me at this "sledgehammer to crack a nut" approach. What on earth was Northcliffe playing at and did it realize the ramifications not only for my case, but for the wider issue of Twitter and parody accounts? Surely, this needed fighting, but how? I had little or no recourse to funds, no idea where to turn, and was bewildered at the scale and complexity of the problem. So, I turned to the only weapon I felt I had at my disposal—publicity.

I quickly tweeted the news of the subpoena and, Twitter being Twitter, it wasn't long before the topic was being retweeted around the world. It became something of a cause célèbre among the Twitterati. My followers grew at the rate of something like 20 an hour, and the issue went global, with commentators around the world piling in with their thoughts, both on Twitter and in separate blogs and articles. And, most importantly, a number of journalists took an interest in the story.

One of these was Dave Lee, technology writer for the BBC. He made contact with me via Twitter to see if I was prepared to talk to him. It was a risk, actually talking to someone, as my cloak of anonymity would at least partly be lifted. But on condition he promised not to record my voice, I agreed to speak. The interview allowed me to outline my wish to fight this case but express my inability to do so. I handed Dave the line, "What I need at the minute is a very good pro-bono Californian lawyer. As it stands they'll hand over my details." This went live on the BBC News website just moments later.

Attorney: Reading the BBC at Lunch

So there I was at lunch, staring at my phone. I had just finished arguing with a local journalist that anonymity in social media spaces encouraged bullying and worse. (I was against anonymity.) I had, however, conceded that social activists in "edgy" countries such as Syria had a compelling argument in favor. So I felt impelled to step up to the plate and put my money where my mouth was. The first question was how?

The BBC post cited a UK blog that was covering the dispute, "GuidoFawkes." So I clicked through to GuidoFawkes and said that I was interested in helping. I asked if "Guido" could put me in touch with "UnSteveDorkland." I also noted that the anonymous blogger might/should be concerned that my offer could be a phishing attempt by Northcliffe to induce him to reveal his identity. I sent my website and cell phone as possible references

and clean contact methods. I then ate my lunch and went back to make sure that my law partner was willing to get embroiled in this mess. I also hit the Web to see what else was being said about the story.

Client: So Here's My Lawyer—Now What?

The UK satire website GuidoFawkes had been among those to champion my story and my cause online. So, when I opened an email from "Guido" with the subject line "May have found you a lawyer" I was suitably intrigued. And there it was: the name of Frank Sommers and a telephone number.

I called the number, somewhat unsure how to introduce myself! Real names were obviously out—for now—so I settled for "Hi, this is the author of the Steve Dorkland account."

Pleasantries were exchanged, but soon enough Frank and I were onto the bones of the subject: He would be happy to consider representing me pro bono, but he was insistent that I would need to sign a contract and that would mean giving over my real name and address. This was a thorny issue for us both, we could tell, and so after an initial 30-minute exploratory chat about the matter, we agreed to reconvene on the phone the following day to discuss further. In the interim, he asked me to send him what I had from Twitter.

Attorney: The Phone Call

After getting my partner's agreement, I tried to research the issue of representing an anonymous client. It turns out to be less clear than you might think. I hadn't gotten any further than Federal Rule of Civil Procedure 10(a)—"The title of the complaint must name all the parties"—when the phone rang: "Steve Dorkland calling for you."

An English voice on the other end introduced himself as the author of the tweets in issue. We first discussed how he came to be the anonymous tweeter who had managed to irritate the CEO of Northcliffe sufficiently to cause him to engage U.S. counsel and file an action in federal court. I then outlined the stringencies of Rule 11, and we began discussing how I could represent him. (Both the issue presented and our brief conversation had crystallized my initial vagrant impulse into a strong desire to help.)

I told him that I thought I would ultimately need to know who he really was, even though I would file responsive papers as representing defendant "John Doe." I asked him for everything that Twitter had sent him and said that I would contact him after reviewing them.

What I received was a form subpoena seeking everything conceivable that Twitter might have:

> All records relating to the Twitter accounts associated with the usernames "@UnSteveDorkland," "@SteveDorkland" and "@northcliffestev" and any associated accounts, including real names, physical addresses, telephone numbers, email addresses, screen names, account status, login logs, account activity logs, billing records, and messages sent or received, in connection with the accounts.

Just as important, the case number on the subpoena allowed me to log in to ECF-Pacer and download a copy of the complaint itself in *Northcliffe Media Ltd. v. John Doe*, No. CV 12 3536 MEJ (N.D. Cal. filed July 6, 2012). That provided a cornucopia of factual assertions and omissions, the most notable being the following contentions, all unsupported by any facts:

1. Steve Dorkland had hacked the Northcliffe computer systems, else he could not have had the information set out in his tweets;
2. Steve Dorkland must be surveilling Northcliffe employees (for the same reason);
3. Steve Dorkland was impersonating "Plaintiff's CEO" (Steve Auckland, whose name never appears in the complaint) and thereby harming both the company and its employees; and
4. The tweets were false and defamatory, causing injury to the CEO and other unnamed employees.

On the omissions front, the complaint contained not one syllable of the tweets themselves; rather, it merely characterized them repeatedly as defamatory and injurious. It baldly asserted claims for violations of federal and state computer abuse statutes and for defamation/libel, and then finished with a claim for "online impersonation," a California Penal Code violation. So Northcliffe was alleging both that UnSteve was mocking them and that he was successfully impersonating the CEO. Fascinating.

Elated at openings presented by the complaint, I emailed it to UnSteve, along with an engagement agreement and a request for a call. (He promptly forwarded the complaint to a media blogger in the United Kingdom, who posted it for discussion. I subsequently had a brief but forceful discussion with him about the attorney-client privilege and possible resultant waiver, as a counterweight to his desire to hit back online as to what was happening to him.)

Client: Decision Time

When Frank and I spoke again it became clear that he was insisting on proof of who I was before he would agree to represent me. Frank was fastidious in his assurances that he would not be

breaking client confidentiality at any stage by handing over my details to a third party, but he insisted on knowing who I was. We agreed on the documentation I would have to send him to accomplish that. (Given the serious nature of Northcliffe's allegations regarding my supposed actions, he also "put me to the question" [properly, in my view] of whether I had, in fact, hacked or otherwise broken into Northcliffe in aid of my tweets.) Once I both satisfied him on those issues and returned his engagement agreement, I was "lawyered up."

Attorney: Time to Stand and Deliver

I could not find any law that allowed an attorney to submit pleadings on behalf of a party whose identity was not known to the counsel, although, as set out below, concealing the identity from the court as part of keeping it secret from the other side is permitted, in certain circumstances. So I determined that I had to have evidence that UnSteve was the author of the piece, and of who he was, really. Let me say only that I received documents that convinced me. (And, perhaps overly mindful of the then-current publicity surrounding the UK media and its propensity for hacking, I put them on hard drives inaccessible to the network.)

Engagement in hand, I had less than a week to prepare the motion to quash. I dug in and discovered there was significant law on the issue of whether the identity of an anonymous critic would be protected on First Amendment grounds. Nevertheless, a daunting amount of work remained.

At that point, a deus ex machina appeared in the form of the Electronic Frontier Foundation (EFF), which represents parties or files amicus briefs in situations where it perceives that developments in the electronic arena are impinging on individual privacy or other rights. My client was contacted by EFF staff counsel Matt Zimmerman, literally minutes after we had been engaged, and learned that EFF was offering to represent him. When he learned that UnSteve was already represented, Mr. Zimmerman nonetheless generously offered access to EFF's work-product archives and gave permission to use them as needed in our brief. This proved to be a godsend.

Client: Fighting Back

Once Frank had outlined to me the basis on which he would be fighting my case, it seemed Twitter should have a piece of it and I duly tweeted a little 'come-on' to my ever-burgeoning band of followers, stating that "I have today hired a US attorney and this case will be fought."

The reaction was almost overwhelmingly positive, with many, many retweets and a growing sense in the online community that this was a powerful story about the new realities for corporations in a social media-driven world. Matters became even more high profile when the issue made the front page of the UK edition of the *Financial Times*. To see my story featured in the "Pink 'Un," chosen reading material of many of the business community's key boardroom decision-makers, was surreal and heartening in equal measure. This story was indeed now global.

Behind the scenes a great many emails were flying backwards and forwards between Frank and me, together with a number of transatlantic telephone calls, often late-ish at night for me and an early start for Frank as we worked our way around the difference in time zones.

Frank was calmness and order itself as he went through the preparatory work he was conducting but, for me, the deadline of Wednesday, August 1, when Twitter was due to hand over my details to Northcliffe loomed ever larger on the calendar. This was a complex and piecemeal case having to be stitched together in a matter of days. Would we do enough to convince the court of my right to remain anonymous?

Attorney: Researching, Writing, and Filing

The more work I did, using EFF's briefs liberally, the better our case looked.

The basic issue was that fictitious parties were discouraged, starting with Rule 10's requirement for "naming." Courts had, however, decided generally that anonymity could be protected under a balancing test that took into account the harm to the anonymous party, the prejudice at each stage in the litigation to the opposition, and the public's interest in knowing the litigants' names. They generally required the party seeking anonymity to seek leave to proceed via motion, in which these issues could be discussed and analyzed. My impression was that the court would be inclined against anonymity, unless serious harm could be shown.

In our factual situation, however, the law was much less nuanced. The identity of anonymous authors of satiric or critical publications was constitutionally protected (unless they were defamatory). Moreover, the court had to review the text of the publications to determine whether they were in fact defamatory. Because Northcliffe had failed to include any of the tweets in its complaint, I started to see, if not sugarplums, at least Fig Newtons. I also understood why the complaint led with causes of action for computer hacking—an attempt to sweep the omission of the tweets themselves under the rug by arguing that the defendant had committed a crime. In that case, his identity would be discoverable, whether or not the tweets were themselves defamatory.

My ardor was only increased when I considered filing a counterclaim under the Strategic Lawsuit Against Public Participation

(SLAPP) law. Simply put, California law, like that of many other states, protects public comment by permitting a SLAPP motion to attack a complaint or other pleading on the grounds that it improperly seeks to inhibit public discussion of important issues by casting them as defamatory or otherwise actionable. SLAPP was originally created to protect citizens protesting public issues from being suppressed by deep-pocketed entities (e.g., developers suing those opposing wetlands development for interfering with contracts, or election committees suing citizens claiming that a candidate was corrupt for defamation). To date, the doctrine has grown like kudzu in California and now covers a host of claims, many arguably well beyond what the drafters intended. However, the California SLAPP statute would clearly apply here, where the allegedly defamatory tweets were mocking the CEO of a media conglomerate about the way it was cutting costs at local papers countrywide.

Its attraction is simple: The loser pays attorney fees. (How delicious—volunteering to do good and then ending up getting paid for it!) Under state law, a SLAPP counterclaim freezes the pleadings in place and requires the claimant to prevail by proving a prima facie case based on those pleadings. It becomes a summary judgment based on the initial pleadings.

Unfortunately, further research cooled my exuberance. Federal courts had agreed that state SLAPP statutes created substantive rights that could be enforced in federal court. However, the parts of the statutes that froze the pleadings, and precluded the SLAPP-ed party from amending or dismissing, were deemed procedural and, hence, not binding on the federal courts. So the plaintiff could dismiss in the face of a SLAPP motion.

In addition, our status as attorneys for a Doe defendant complicated matters. Although less clear than the SLAPP decisions, the research into leave to proceed under fictitious name suggested that, while we could appear for a Doe defendant and move to quash the subpoena without being required to reveal UnSteve's identity, filing a SLAPP claim—that is, seeking affirmative relief—would require, at a minimum, seeking leave to appear on behalf of a fictitious party. There was a strong possibility that the court would deem us to have waived Doe's right to anonymity by seeking such affirmative relief. I called the court clerk and learned that merely appearing for a "Doe" would be permitted, because the plaintiff had sued him as such, and/but that the "court would deal with that at the first hearing." This wasn't a ringing endorsement, and it added to my concerns about a SLAPP claim.

Time pressure also helped. It was by now Thursday evening and our papers were due the following Wednesday, so we concluded that the SLAPP claim would be a "follow-on," preceded by appropriate motions for leave to file without waiving UnSteve's identity. That question resolved, I dug in for the finish line. (It's amazing how deciding to drop work that you should have always known was too much to accomplish by your deadline nevertheless produces a lifting of spirits.)

We had agreed that, even though UnSteve had announced to the twitterverse that he had counsel, he would not disclose my identity immediately. On Monday, July 30, however, I sent Twitter's legal department a letter announcing the incoming motion to quash and requesting that they make sure that the left hand did not produce while the right hand was opening the mail. I almost immediately received a letter stating that Twitter would make sure not to produce anything inadvertently and asking when I intended to file. I replied that, due to being a Pacer subscriber, I could file as late as Wednesday evening, so they should make sure not to produce on Wednesday.

As it happened, I finished Tuesday and filed that afternoon. I expected that Northcliffe would defend its claim either by offering to amend and pleading some of the tweets it objected to or by simply filing declarations with their content. So I was ready for the circus to continue, at least long enough to decide whether or not we were going to file the SLAPP motion and related papers.

Client: Comfort in Words

When Frank's draft brief landed in my inbox, I finally felt like I had something substantial with which to slap down Northcliffe's heavy-handed attempts to 'out' me. Northcliffe's pages and pages of legal submission and allegations—preposterous though they were—still felt alarming and sickening to a legal ingénue such as me. To see the clear, ordered words on our submission staring back at me was a real comfort. I avidly read the details, page after page, and a confidence came over me that we were fighting fire with fire. "File it," I told Frank, the kind of dramatic phrase I am probably only ever going to be able to use once in my life!

Once Frank had filed our response with the court, I again went to town on Twitter, posting links to the documentation, which were subsequently retweeted by a great many of my followers. On the subject of followers it is worth now noting that, thanks to the publicity of the case, my lowly band was now well over 2,500, another indication that this case was proving of great interest to the Twitterati.

Given the level of media interest too, I made contact with the many journalists who had been following my case and conducted a number of interviews with them, stating that this case was now being contested and outlining the reasons why. This subsequently led to a great deal of media coverage online and in print, producing yet further comment from the online community.

Attorney: Dismissal—Game Over

Having filed, I was busy with the SLAPP papers. I was also fascinated by whether the ongoing media eruption would influence Northcliffe's conduct. The coverage was almost universally in agreement that the tweets were satirical, or "spoofs," a fact that I had cited in my motion to quash. On a broader front, opinion seemed strongly censorious of the Daily Mail Group's regional media arm in even pursuing the case. Some accounts, deliciously, cited an earlier instance in which the *Daily Mail* newspaper—national flagship of the entire empire—had chided a local council that had spent more than £75,000 in legal fees to discover the Twitter identity of a council critic. In that case, the account owner had not been able to contest the Twitter subpoena. The slapdash nature of the complaint suggested to me that Northcliffe may have assumed that no one would appear in this case either.

Then we were interrupted. Ironically, it again happened at lunch. By this time, I had become a personal digital assistant addict, checking the BBC and blogs incessantly. So there I was, pecking away at this site and the other, when I received a PACER notification: "Dismissal Filed by Plaintiffs."

This case was as much fun as I've had in years.

Northcliffe had simply folded its tent—no declaration, no amendments, no defense of its procedural errors. Just gone. It issued a short press release concerning its desire to protect its employees. I'll leave it to you to decide how it sounded.

So there it was. Victory. I had become so caught up in the novelty of trying to both litigate and anticipate the media reaction that it took a while for the letdown to set in. During that period, I consoled myself by reading the Web discussions, which almost uniformly berated Northcliffe.

So what's the takeaway? As counsel, I'm proud to have stepped up pro bono and provided a defense that could have required a huge commitment of time. I was also lucky to have volunteered to represent a client whom I came to like and respect the more we spoke. My research had made it clear that there were many anonymous bloggers whom I would not have been so happy defending.

In addition, however, had the case proceeded, life would have become more complicated. The deeper into discovery the court had let us get, the stronger the argument for revealing John Doe's identity, "if only to counsel," would have been. There is no question, however, that I'm glad that I had been checking out the BBC while waiting for the waiter. This case was as much fun as I've had in years.

From the opposition side, the case demonstrates how unwise it is to let critics get under your skin. Northcliffe would have been far better off had they let it pass without comment.

Client: The End of an Ordeal

Wow. What a 10 days that was. And not necessarily one I'd want to repeat, save for the extreme feeling of vindication and elation I felt when I returned to my home late one Thursday night after a trip to the pub (yes, I am that much of a stereotypical Englishman) to find a message on the answerphone from Frank, which contained the immortal line: "Congratulations, you've won."

I still have it preserved on my answerphone, by the way.

If I thought too much about what happened to me, I probably wouldn't sleep. The enormity and absurdity of it all seems to rail around in my mind in equal measure. I guess my initial, gut reaction when posting a statement to the media on news that Northcliffe had withdrawn, stands the test of time: "They underestimated me, they underestimated my lawyer Frank Sommers and they underestimated the power of the worldwide internet community."

There were those immediately following my victory who expected, indeed some demanded, that I start to tweet again as Steve Dorkland. That was an understandable point of view, but for me the desire had gone. Simplistically, this was supposed to be something fun and the fun had gone out of it in a major way. Since those heady days of victory when I was content to post news of the conclusion to the case all over the account, I have tweeted only in a limited way. I'll 'never say never' to starting up again—and why should I? But the spirit went out of the thing when that email from Twitter first hit me.

As one of my closest confidants responded to me when I forwarded it to him, "Is this for real?" Indeed it was very real. And it's only thanks to the happenstance of one attorney's lunchtime reading, coupled with his generosity of spirit and tenacity, that I am able to write this article today.

A character in Shakespeare's *Henry VI* states: "The first thing we do, let's kill all the lawyers."

Kill 'em? There's one on your side of the pond I would have knighted. ■

To view the tweets and other documents related to this story, visit http://bit.ly/10PnnJE.