Litigating Civil Subpoenas to Identify Anonymous Internet Speakers

by Paul Alan Levy

In September 2007, Arizona resident Justin Leonard received subpoenas seeking to identify every member of the public who had posted comments about "Video Professor" on message boards he maintained about companies selling products or services through infomercials. The theory? That Video Professor had been defamed by some of the criticisms that appeared on Leonard's message boards. The message board posts at issue claimed that Video Professor's TV ads promising "free" lessons on the use of computer software constituted a bait-and-switch technique. Several posts asserted that Video Professor used its ads to extract consumers' credit card numbers, purportedly so that shipping and handling could be charged, but that Video Professor actually billed customers for additional software that the consumers never ordered. Video Professor had filed suit against "John Does 1 to 100" in its home court—the U.S. District Court for the District of Colorado. In that court, Video Professor obtained leave ex parte to use third-party subpoenas to identify the defendants and serve them with process.

Leonard faced a dilemma deciding how to respond to these subpoenas. He did not know for sure whether the criticisms of Video Professor that had been posted on his message boards were valid. But he knew that if users of his message boards learned that the price of criticizing infomercial purveyors was being identified on demand—and thus being swept up in a defamation lawsuit far from home—his users would be intimidated from offering their criticisms publicly, albeit anonymously. And for some of the critics, the price could be even higher if they were "insiders" who were willing to share their knowledge of a given infomercial purveyor's practices only if they could be sure that the purveyor could not easily learn their identities and retaliate against them.

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Leonard also recognized that what Video Professor really wanted was an injunction against the continued posting of the criticisms. Its complaint admitted as much. Because such relief was barred by section 230 of the Communications Decency Act, 47 U.S.C. § 230, which makes the host of a message board immune from liability for content posted by third parties, Leonard worried that Video Professor was trying to use its lawsuit to impose expensive discovery burdens on him, thereby making the hosting of critical messages too expensive. Leonard felt that if Video Professor's effort succeeded, other infomercial purveyors would be emboldened to try the same tack.

Instead of complying with Video Professor's demand, Leonard served a response to the subpoena under Rule 45 of the Federal Rules of Civil Procedure. He explained that the First Amendment protects the right of the posters on his message boards to speak anonymously and that Video Professor had presented no evidence showing that anything posted in criticism was false. Indeed, Video Professor had not even identified which of the hundreds of posts about Video Professor were the subjects of its defamation action. Nor had Video Professor taken any steps to ensure that the anonymous posters were aware that their right to remain anonymous was at risk, so that they could, if they wished, retain their own counsel to oppose the subpoena. For these reasons, Leonard explained, he would not produce any documents potentially identifying any of the posters (such as the email addresses that users had given when registering to post on his message boards or the "Internet Protocol" (IP) addresses that were used to post the messages and that, in turn, could be used to track down the posters through the Internet Service Providers (ISPs) through which they had gained Internet access at the time they were posting).

However, Leonard offered to consider any evidentiary showings Video Professor might be able to make in support

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of its complaint's underlying allegations, before definitively deciding whether he would respond in any manner to the subpoenas. In doing so, Leonard identified several flaws in Video Professor's contentions and specified the documents that he would need to see, such as the telephone scripts given to Video Professor's telemarketers and the recordings that Video Professor claimed it had made of every call. Leonard explained that such documents and recordings would allow him to assess the basis for Video Professor's claims that the criticisms were false.

At the same time that Leonard responded by invoking the protections of Rule 45, he also publicized his response. As a result, the main business columnist for the *Denver Post* reported that he had been receiving similar complaints about Video Professor from readers over the years, and he slammed Video Professor for suing its customers instead of fixing the problem. A consumer magazine conducted its own investigation, including making several calls to Video Professor's 800 number, and its reporter found that the anonymous complaints about improper credit card use were borne out by its investigators' experience. Several bloggers addressed the quality of Video Professor's lessons (an issue largely ignored on Leonard's message boards) and found them wanting. In short, Video Professor ultimately found that it had a public relations disaster on its hands, and it recognized that it could not make a satisfactory showing of falsity. Seeking to cut its losses, it withdrew its subpoenas and dismissed the lawsuit.

The Need for a Standard to Govern Subpoenas Seeking to Identify Anonymous Speakers

The Internet permits a grand illusion of anonymity. Email addresses may be self-identifying—first initial followed by last name, or first name dot last name—but they need not be. When Internet users register to post on a message board or blogging system, they may use their real names, but more commonly they use the name of a sports team or a child or a familiar mnemonic. And some systems allow posting without any registration at all. Thus, Internet users often do not think about the possibility that what they say online can be traced back to them.

And users often have good reason to want anonymity. They may fear retaliation from other users, employers, or others with economic clout in their lives. They may fear ostracism in their community for speaking their minds. They may want to speak free from identification with a socio-economic characteristic or employer. For example, readers, you might even discount this article because I am Jewish, or live in Washington, D.C., or work for Public Citizen.

To be sure, from the reader's perspective, my characteristics may be important in assessing my credibility (or discounting my implied biases), but as the Supreme Court said in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995), "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."

Yet, as a general matter, everything we do or say online can be traced back to us if the seeker tries hard enough and has unlimited access to subpoena power. If the ISP through which I gain Internet access can be identified, it in turn can identify me because I give a real name and address when I sign up and use a credit card or check to pay for service. My ISP can normally be identified if I gave that email address when registering to post. Perhaps I tried to hide my tracks a bit when I signed up for the email address that I used to register, using Gmail or Hotmail or some other email address unconnected with my identity, but web servers typically record the IP address and time of each online action—the precise computer that was used to access a message board when I posted. So if there were no obstacle to the use of subpoenas to identify Internet users, there would be little chance for true anonymity. And if the rule of law were that anybody could get access to the identity of a poster, even if the poster did nothing wrong, then much useful speech would be deterred. Of course, abusive speech would be deterred as well.

Development of a Standard

Leonard's objections drew on a line of authority that had been developed by a litigation campaign by several public interest groups led by Public Citizen and including the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation. Back at the turn of the century, Megan Gray, a junior associate at Baker and Hostetler's Los Angeles office, had begun to argue on behalf of several Doe defendants that it was unfair to order the release of their identities without some showing that the cases had real merit, but actual rulings on these arguments were few. And many early courts simply granted discovery to identify anonymous defendants as a matter of course, reasoning that a plaintiff cannot proceed with his case against an anonymous defendant if the plaintiff doesn't know where to send the summons; these courts treated discovery to identify the perpetrator of an allegedly tortious statement much like discovery to identify the manufacturer of a machine that caused a workplace injury.

But this automatic allowance of discovery failed to recognize that there is a significant constitutional interest in preserving the anonymity of Internet speakers. The effort to craft a more exacting standard took off after a trial judge in New Jersey's equity part, Kenneth MacKenzie, responded to a motion for leave to take discovery to identify four anonymous posters on a Yahoo! financial message board. Judge MacKenzie ordered the plaintiff, a software company called Dendrite International, to post a notice on the message board itself, warning the anonymous defendants that their anonymity was at risk. The court-ordered notice included the address and telephone number of the local bar referral service to help the Doe defendants find lawyers to protect their interests; two of the Does took advantage of the notice to file oppositions to disclosure. Because Judge MacKenzie's sua sponte order implied an understanding of the First Amendment and due process issues at stake, we decided that the case could be a good one for advancing the law. Consequently, Public Citizen and the ACLU's New Jersey affiliate filed an amicus brief with Judge MacKenzie, and, after he protected the anonymity of two of the posters, the Appellate Division affirmed. Both courts allowed me to argue as amicus curiae.

Our argument rested on the long-standing Supreme Court precedent established in civil rights cases dating from 1958 and 1960 (*NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); and *Talley v. California*, 362 U.S. 60 (1960)), as well as on the more recent *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), which recognized that the right to remain anonymous is among the authorial choices protected by the First

Amendment. As Justice John Paul Stevens wrote in *McIntyre*, "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." 514 U.S. at 357.

We argued that only a compelling government interest can overcome such First Amendment rights and that the mere filing of a lawsuit does not make the identification of the defendant a compelling interest unless there is good reason to believe that the suit has a realistic chance of being successful. We also pointed out that the identification of an anonymous speaker is a form of relief to the plaintiff (because it can enable extra-judicial self-help) and that relief is not customarily given without some proof of wrongdoing. Indeed, particularly in the early days of the Internet, some lawyers were amazingly candid, advertising their services to pursue subpoenas to identify critics and extolling the use to which the information could be put without the plaintiff having to commit to the expense of full litigation. And we have seen cases in which plaintiffs obtained identifying information by claiming that they wanted to pursue a lawsuit, then fired or outed the critic and did nothing with the case itself. Finally, if the rule allows anonymous speakers to be identified any time someone is willing to pay the filing fee for a lawsuit, it will create a significant chilling effect on anonymous speakers who are worried about the improper consequences of having their identities revealed.

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Nevertheless, we acknowledged that the protection of anonymity should not be so great that plaintiffs with meritorious legal claims are unable to obtain redress of their grievances. If the rules made it too difficult to identify anonymous speakers, even when their speech abused the rights of others, the rules would unduly encourage irresponsible online speech. The need, therefore, was to formulate a legal and procedural standard that balances the rights of the anonymous speaker who claims to have done no wrong and the rights of the allegedly wronged subject.

Drawing closely on our argument, in *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (N.J. Super. App. Div. 2001), the New Jersey Appellate Division formulated a five-part scheme that requires plaintiffs seeking discovery to identify an anonymous defendant to take the following steps:

- Provide notice to the Does and allow time for the Does to find counsel and respond;
- Specify the words on which the causes of action are based and articulate the causes of action;
- Plead the elements of those causes of action;
- Provide evidence sufficient to create a prima facie case on the elements of the claim; and
- Once those four steps have been taken, persuade the court that, on balance, the plaintiff's interest in going forward with the action outweighs the defendant's interest in remaining anonymous.

The *Dendrite* ruling was a watershed for several reasons. Although other courts had occasionally articulated a test for discovery of anonymous speakers, this was the first time an appellate court had done so, and it was the first time the articulated test had been a basis for denial of discovery to identify anonymous speakers. At the same time, however, in *Immunomedics v. Doe*, 342 N.J. Super. 160, 775 A.2d 773 (2001), a companion case to *Dendrite* argued before the same panel, the court ordered that the anonymous speaker be identified. Even in *Dendrite* itself, two of the four Does had been identified while two had been protected against discovery. To be sure, the two who were identified were the ones who did not appear to object to discovery, but even for those identities, Judge MacKenzie had set an important example by applying the balancing test to both of them sua sponte, thus underlining the judge's responsibility to protect against misuse of the subpoena power regardless of whether there has been an adversarial presentation on the issue.

Dendrite's main argument against our position had been that an evidentiary requirement would prevent plaintiffs with meritorious claims from getting their day in court. But the fact is that a plaintiff is going to have to prove its case to get relief, and plaintiffs are never able to explain why, as defamation plaintiffs, they should not be expected to have evidence in hand showing how the allegedly defamatory speech is false or how it has injured them. In our experience, plaintiffs with meritorious cases frequently manage to surmount the proof hurdle and succeed in obtaining the identity of the anonymous speaker even in the face of opposition.

I have always found it quite telling that when we enter an appearance to oppose efforts by plaintiffs seeking discovery into the identities of anonymous defendants, the most common response on the part of the plaintiffs' lawyers is either to drop the case or to file no opposition and hence allow the motion to quash to be granted. The second most common response is for the plaintiffs to simply argue that no proof should be required, without submitting evidence to support their claims just in case they should lose on their legal argument. What this tells me is that these plaintiffs sought discovery to identify their critics without having any real intention of going forward with a libel case.

Dendrite also argued that the anonymous speakers waived their First Amendment right to speak anonymously by posting on a message board whose terms of service allowed the web host to release personally identifying information in a variety of circumstances, such as when a subpoena was received. It is regrettable that the Appellate Division did not address this point because the argument keeps cropping up in other cases, even though it is circular—the question in the case is whether the subpoena is a valid one. Courts usually just ignore that argument, although it was squarely rejected in *Sedersten v. Taylor*, 2009 WL 4802567 (W.D. Mo. Dec. 9, 2009).

In the years following *Dendrite*, several other state appellate courts, as well as trial courts in several federal districts, weighed in on the issue in reported opinions, and although the courts differed in several respects in the tests that they formulated, all of them embraced the basic *Dendrite* principles of (1) notice and a chance to respond, (2) a requirement of legal

sufficiency, and (3) an evidentiary showing of the basis for believing that the plaintiffs had a reasonable chance of prevailing on the merits. Some courts have articulated the evidentiary showing as a prima facie case on the elements of the claim, while others have said that the plaintiff must show that it has enough evidence to withstand summary judgment. (And not just the elements of the claim because defenses have frequently led to denial of discovery, such as when a defamation claim is based on criticisms posted long before the limitations period would allow suit.)

Moreover, courts generally agree that the evidentiary requirement should be relaxed, or even eliminated, for aspects of a claim on which plaintiffs could not reasonably be expected to have evidence at the outset of a case. For example, in a libel case, although it is reasonable to expect a public figure plaintiff to allege actual malice, it is normally not reasonable to expect a factual showing on that issue, and certainly not a showing sufficient to defeat summary judgment, when the identity of the speaker is unknown and there has been no opportunity to depose the speaker on his or her mental state when making the statement.

The biggest difference that has emerged among jurisdictions is whether a balancing test should be applied after an evidentiary case for the discovery has been made. Some courts, such as appellate courts in Delaware (*Doe v. Cahill*, 884 A.2d 451 (Del. 2005)), California (*Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231 (Cal. App. 6 Dist. 2008)), and Texas (*In re Does 1-10*, 242 S.W.3d 805 (Tex. App.-Texarkana 2007)), have said that an explicit balancing test is unnecessary because the requirement of a legal and evidentiary showing *provides* the necessary balancing and because it seems wrong to deny the right to proceed with a claim to a plaintiff that shows that it can survive a motion for summary judgment. Federal courts that have followed this approach include the courts in *Doe I and Doe II v. Individuals Whose True Names Are Unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008), and *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006).

Other courts, such as those in Arizona (*Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. Div. 1 2007)), Maryland (*Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (Md. 2009)), New Hampshire (*Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010)), and Pennsylvania (*Pilchesky v. Gatelli*, 2011 WL 17520 (Pa. Super. Jan. 5, 2011)), have agreed with *Dendrite*'s explicit balancing requirement. They reached this conclusion in part because they consider the grant of discovery to be akin to a preliminary injunction ruling, where a balancing of equities is appropriate, and in part because a balancing approach allows more consideration of the peculiar circumstances of individual cases, where, for example, the anonymous speaker has made a showing that extra-judicial retaliation is likely or where the plaintiff has a particularly strong interest in redress. Some federal courts have adopted that approach, too.

Raising the Need for Anonymity Protection

In most of the reported cases deciding whether to enforce subpoenas to identify Doe speakers, the speakers themselves litigated the First Amendment balancing test. The speaker is the ideal party to raise these rights—the speaker will be best able to articulate the reasons why disclosure could be harmful, raising issues that can be considered at the balancing stage of the *Dendrite* test. And, of course, it is the speakers themselves whose First Amendment rights are at issue. On the other hand, an individual speaker who has been sued may be least able to afford representation, and the cases hold that an ISP has standing to defend the First Amendment rights of its users. (*In re Subpoena Duces Tecum to AOL*, 52 Va. Cir. 26, 2000 WL 1210372 (Va. Cir. 2000), *rev'd on other grounds*, *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (Va. 2001)).

As an advocate seeking to develop the law protecting online anonymity, I generally prefer to represent an ISP or, indeed, to file as a friend of the court, rather than representing the individual users. That is because we advocate a balancing test, rather than a test that protects the anonymity of the user in all circumstances, and it is often simpler to advocate dispassionately a good standard when we don't have to be concerned about how that standard will apply to our own client. In a number of cases, we have represented Doe defendants themselves, but we have to choose those cases very carefully to make sure that the standard that we have historically advocated will be able to protect our client.

Most of the larger and more responsible ISPs regard themselves as stakeholders in these cases—they give notice to their users as best they can but leave it up to the users themselves to file a motion to quash. A coalition of organizations advocating online privacy has proposed a model policy and model form of notice for ISPs to use when they receive subpoenas to identify their users. (The model policy and notice are available at www.cyberslapp.org/about/page.cfm?pageid=6.) Some ISPs, however, take a more pro-active role and actively defend the First Amendment rights of anonymity of their users. And a few ISPs make so little effort to protect their users that they neither give notice nor wait before complying with subpoenas to identify anonymous users. That is one reason why, when the plaintiff has to apply for permission to seek discovery (and in most jurisdictions that is true for discovery sought before defendants have been served), we have urged courts to demand proof that notice has been given before any authorization for discovery is granted.

Other ISPs stand strong against such subpoenas, hiring counsel to defend against their enforcement or finding a pro bono lawyer to do so. They do this out of principle or because they understand that a challenge to anonymous posting threatens their ability to attract users. Thus, as in Justin Leonard's case, if the web host operates a message board that is designed to carry criticism of companies that may well be litigation-happy, he may justly worry that consumers will be unwilling to speak up if the ISP gives in to subpoenas too easily. And, of course, the availability of pro bono legal services from privacy-oriented nonprofit law firms like my own may also provide an incentive to resist subpoenas. Newspapers also commonly have a heightened sensitivity to the disclosure of confidential sources and often feel that a speaker on a blog attached to the paper is akin to a source even if the local shield statute does not apply to such speakers. (Sometimes the shield statute is broad enough to support a defense.)

In our experience, not only do most ISPs not give in to intimidation by such plaintiffs, but being sued often leads an ISP to resist the subpoena instead of simply acting as a stakeholder and waiting for the anonymous speaker to file a motion to quash. Indeed, when our ISP clients face lawsuits of this sort, they fight back by seeking awards of attorney fees for

having been forced to defend against a groundless circumvention of the immunity granted to them under 47 U.S.C. § 230 (immunizing ISPs and website hosts from being sued over posted content).

In other cases, plaintiffs have tried to evade the foundational *Dendrite* requirements by filing pre-litigation petitions for discovery instead of filing lawsuits against Doe defendants and then seeking discovery so that they know on whom the process must be served. In some jurisdictions, to be sure, a lawsuit cannot be filed against a Doe defendant, so the pre-litigation petition is the only procedural device available to plaintiffs. But in jurisdictions that do allow a Doe to be named as the defendant, the prerequisites for pre-litigation discovery normally will not be met. Following the example of Rule 27 of the Federal Rules of Civil Procedure, state court pre-litigation petitions for discovery can commonly be used only when the would-be plaintiff cannot file a complaint.

There remain ISPs that are startlingly ignorant of the law that has developed in this area.

We have begun to seek attorney fees for frivolous litigation against lawyers and parties who file pre-litigation petitions in an effort to evade *Dendrite*-like requirements in their states. When lawyers file ex parte motions, both court rules and disciplinary considerations require the lawyers to take extra care to call potentially contrary authority to the court's attention. Ultimately, however, the first line of defense in such cases ought to be alert judges who recognize that notice and a preliminary showing of merit are needed before such discovery can be granted. Those who represent Doe defendants have struggled with ways to call the *Dendrite* principle to the attention of trial judges who receive ex parte motions from lawyers who, in turn, are less than candid about the state of the law.

Some jurisdictions, however, do not allow suit to be brought against unidentified defendants. In those jurisdictions, pre-litigation discovery petitions are the plaintiff's only option. But even those states commonly employ *Dendrite*-like rules and require an evidentiary showing before anonymity may be violated, as in *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. Ct. 2007).

Judges' lack of awareness of the consensus rule might be less significant if ISPs generally were cognizant of the law and hence could be counted on to insist on notice to their users so that accused wrongdoers have a chance to object to the discovery by showing a lack of support for a plaintiff's claim. Many major ISPs show great responsibility in this area, including, for example, web hosts like Google, Yahoo!, and Go Daddy, and Internet access providers like AOL, AT&T, Comcast, and Verizon. However, there remain ISPs that are either startlingly ignorant of the law that has developed in this area or at least unwilling to stand up for their users' rights. Some ISPs simply give up identifying information with no objection, while others grudgingly give only a few days' notice, which is often not enough time for an anonymous speaker to find a lawyer and file a motion to quash the subpoena.

We thus have to count on lawyers to be honest with judges when they go to court on an ex parte basis seeking pre-litigation or pre-service discovery, and count on judges to look up the law instead of just granting the ex parte request because it seems reasonable that you can't pursue a lawsuit against an anonymous critic without knowing who that critic is and where to send the summons and complaint. And it is worth noting that, in many jurisdictions, the ex parte nature of a proceeding creates a heightened obligation to bring adverse facts and adverse precedent to the court's attention. Failure to do this may eventually support an award of attorney fees against the plaintiff, as in *Career Agents Network, Inc. v. Careeragentsnetwork.biz*, 722 F. Supp. 2d 814, 822–23 (E.D. Mich. 2010).

One recent development in the law governing discovery to identify anonymous Internet critics is the result of work by the pioneering New Jersey Doe lawyer Richard Ravin. Those of us who often represent Does worry that it is sometimes too easy for plaintiffs to submit a general affidavit articulating the elements of their claims—for example, that statements are false or that information disclosed on a blog is confidential and hence must have come from an insider breaching an employment agreement. We have struggled for ways to counteract such claims. In Pennsylvania's seminal case, *Melvin v. Doe*, 149 Pitts. L.J. 12, 49 Pa. D. & C.4th 449 (2000), *appeal dismissed*, 789 A.2d 696 (Pa. Super. 2001), *rev'd*, 575 Pa. 264, 836 A.2d 42 (2003), Judge R. Stanton Wettick allowed the Doe's attorneys to take the plaintiff's deposition to try to pierce her affidavit. In a few cases, affidavits have been submitted, with the Doe's name redacted. Such a submission was recently upheld on appeal in New Jersey, albeit in an unpublished ruling. *A.Z. v. Doe*, 2010 WL 816647 (N.J. Super. App. Div. Mar. 8, 2010). In that case, discovery sought to identify the sender of a whistleblowing email that accused a high school honor student of engaging in underage drinking. The subpoena was defeated by an affidavit authenticating photographs showing the student apparently engaged in beer pong. Because the student did not dispute the authenticity of the photographs, the affidavits were accepted, and the order quashing the subpoena was affirmed.

Practical Considerations at the Outset of Cases

When a potential Doe case comes into our office, the first thing I consider is whether there is good appellate precedent on the *Dendrite* issue in that jurisdiction; if not, the case is of great potential interest; if so, the case is less interesting to us unless it presents a novel issue or an attempted evasion of the rule that might be worth litigating.

The second issue I consider is one that any paid or unpaid defense lawyer ought to consider even though it is specific to the role of attorneys as impact litigators, and that is whether our approach to the problem holds out significant hope of avoiding identification. For example, if the plaintiff's claim is for defamation, is the statement non-actionable opinion, or is the statement one of fact? And if the statement is factual, can the Doe establish its truth, by reference to publicly available documents? After all, if the only way the Doe can show truth is by testifying to what he or she saw or by providing copies of correspondence with the plaintiff, the testimony will effectively reveal the Doe's identity, and a motion to quash will be fruitless. And if the real issue in the case

will be actual malice—with the Doe arguing that she made the statement with a sincere belief in its truth—that is another reason a motion to quash could be hopeless. Perhaps there are some cases in which the lack of actual malice could be shown without a deposition of the plaintiffs, because the anonymous speaker simply repeated widely reported facts about a public figure. Even if the public figure puts the truth of the reports at issue by swearing that they are false, actual malice is impossible. But courts have commonly assumed that the issue of actual malice is not one about which the plaintiff can be expected to make a showing without knowing who the defendant is.

Judges' lack of awareness of the consensus rule might be less significant if ISPs were cognizant of the law.

As a practical matter, then, there will be many cases in which the Doe may well prevail on the merits of the litigation but likely will not succeed in protecting his or her anonymity. In such cases, Doe would be wise not to bother with a motion to quash. Most defendants in Doe cases have limited resources, and very often they will be better served by conserving their resources for the merits. In such cases, only if the Doe faces a very serious danger of retaliation or other grave consequences from being identified will it be sensible for the Doe to pay private counsel to oppose discovery seeking his or her identity.

Another thing that a Doe—or a defense lawyer—needs to consider when faced with a subpoena to identify an anonymous critic is whether to escalate the dispute by going public with the subpoena. Frequently, the party serving the subpoena is simply hoping to suppress criticism, and when the blogosphere or even the mainstream media lights up with discussion of the controversy, that can be enough to persuade a plaintiff who never really intended to pursue a defamation claim that the subpoena is not worth pursuing. However, this course of action is tantamount to playing with fire because the further publication of a defamatory statement can increase the plaintiff's damages. The decision whether to help spread the allegedly defamatory criticism can thus be a delicate one.

And by the same token, concern about the prospect of calling more attention to criticism—a phenomenon known in blogging circles as the "Streisand effect"—should be one of the first considerations for would-be plaintiffs and their lawyers in deciding whether to pursue subpoenas to identify authors of allegedly tortious speech. Individuals and companies manage to persuade themselves that just because some criticism by an anonymous speaker has appeared on a blog or message board, or just because the criticism comes up in a Google search, Internet users are paying attention to the criticism, taking the criticism seriously, and crediting the comments. But once the proceeding to identify the anonymous commenter is disclosed, the comments are much more likely to draw public attention, and in fact the plaintiff is dignifying the comments and implicitly telling the public that the comments *are* being credited (and hence are hurting the target's reputation or business). To be sure, there are cases in which anonymous accusations have done real harm and where the libel laws are needed as a remedy. But lawyers do their clients a real disservice if they fail to consider the adverse practical consequences of bringing a case at all.

A lawyer approached by a prospective plaintiff should also give careful consideration to the question of how many anonymous speakers to sue. Very often we get asked for help in a case in which one of the statements at issue in the case is truly egregious and indefensible, either at the anonymity stage or on the merits, but where the plaintiff has chosen to sue on many other statements that are either pure opinion, or so old as to be outside the statute of limitations, or probably true. Some argue that the filing of a complaint against hundreds of Doe speakers will send a stronger message, but when a plaintiff throws everything but the kitchen sink into the complaint and hence into the subpoena, he or she just increases the risk that one of the Does will find a lawyer who is willing to move to quash and to publicize the controversy.

Conclusion

During the 10 years since the seminal New Jersey decision in *Dendrite*, a consensus has emerged in the state and federal courts requiring both procedural and substantive protections for anonymous Internet speakers without unduly restricting those who have truly been wronged by anonymous speech from obtaining judicial redress. In my view, the greatest needs that remain are (1) for more judges to notice the problem when motions for discovery are brought ex parte, (2) for more lawyers to be willing to step up to protect the right to speak anonymously when it is challenged without a sufficient basis, and (3) for more lawyers who are approached by the targets of anonymous speech to give their clients sensible advice about whether litigation is the right way to address the client's valid concerns.