Good Counsel

Pseudonym Applications

By Barbara J. Hart and Samuel Mukiibi

If your client's claim involves a sensitive matter, your client may seek to proceed under a pseudonym. Plaintiffs who are considering filing a pseudonym application should know at the outset what to expect. The Federal Rules of Civil Procedure state that "the title of the complaint must name all the parties" and "an action must be prosecuted in the name of the real party in interest."[1] However, courts "approve[ ] of litigating under pseudonym in certain circumstances" to protect plaintiffs who appear in federal court.[2] "[T]he decision whether to allow a plaintiff to proceed anonymously rests within the sound discretion of the court."[3]

Plaintiffs who want to litigate under pseudonym typically have experienced trauma. Or perhaps they wish to spare elderly parents, protect children, or avoid professional stigma. Plaintiffs must demonstrate "a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings."[4] The question of whether a plaintiff may use a pseudonym to protect their identity from the public has been approached differently, depending on the court. This article focuses on federal courts, but some state courts have procedural rules[5] on seeking pseudonymity, and other states have adopted approaches similar to that of the federal courts.[6] When filing a pseudonym application, you should advise your client what factors courts consider, make the case that the court's and the defendant's concerns are addressed, and be aware of the risks.

Factors courts consider. While the procedural mechanisms remain unsettled, circuit courts in the United States have generally applied the same analytic framework for requests to proceed under a pseudonym. The current balancing test weighs the plaintiff's privacy interest against the public interest in knowing the plaintiff's name and any unfairness to the defendant.[7] Jurisdictions analyze pseudonym applications differently, and some are more lenient than others.[8] Consider which of the following factors support your client's application:

- Does the case involve a highly sensitive or personal issue?
- Is the plaintiff particularly vulnerable to the harms of disclosure?
- Is the plaintiff a child (one end of the spectrum) or an adult public figure (the other end)?
- Does identification pose a risk of retaliation or mental or physical harm?
- How severe are other potential harms of identification?
- Does disclosure amplify the injury at issue in the case?
- Is it fair to the defendant, or is there a risk of prejudice?
- Does the plaintiff have ulterior motives—whether personal or political—that are not visible from the court papers?
- What is the magnitude of the public's interest in the case?
- Are there other ways to protect the plaintiff's identity?
- Is the issue purely legal, such as a challenge to the government's actions (for example, abortion in *Roe v. Wade*)?
- Does the public have an interest in allowing the plaintiff to proceed anonymously?

A trauma-informed approach. Trauma-informed lawyers consider whether their client should proceed with a pseudonym at the very beginning of a case. Clients should understand that because our legal system favors naming parties, they have the burden of showing why their case warrants pseudonymity. Inform your client that the decision is at the court's discretion and that if the court denies the request, they must either proceed with their full name or drop the case to avoid public attention. Make sure the client knows that even if permission to proceed with a pseudonym is granted, it may be revoked later. In any event, the court and the defendant will know your client's identity whether the pseudonym application is granted or not.

Practice pointers. Instead of requesting to proceed pseudonymously in the complaint itself, file a pseudonym motion along with the complaint, using the plaintiff's pseudonym. This reduces the risk of the complaint being dismissed for failing to conform to party pleading requirements. You should consider how to pseudonymize the plaintiff before initiating an action, whether by using an unrelated name or initials. Check the court's local rules for guidance.

A pseudonym motion should offer to disclose to the court the plaintiff's identity under seal and to the defense counsel under a protective order or confidentiality agreement. This

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allows the judge and defense counsel to clear any conflicts and minimizes defense arguments of prejudice. Submit with the pseudonym motion a declaration signed by the plaintiff in their pseudonym, in which the plaintiff specifies the factual basis for anonymity and any present-day consequences if forced to publicly disclose their identity.

To increase the likelihood the court will grant the motion at the start of the litigation, limit the pseudonym request to pretrial filings with leave to revisit use of the pseudonym at trial. This is because the right of public access extends to "pretrial court records" as much as to trial proceedings.[9] Maintaining your client's pseudonym may require redacting or sealing court documents. Redact records where applicable, and monitor filings by opposing counsel, whose focus is likely not redacting the plaintiff's identity. React quickly to remedy any inadvertent disclosure, including seeking court intervention.[10]

Risks of seeking anonymity. Plaintiffs risk telegraphing their vulnerabilities to the defense when disclosing the basis for anonymity. In fact, any such disclosures can invite discovery or deposition notices that may not have occurred otherwise. For example, if the vulnerability does not go toward the injury in the case, such as a fear of reputational damage in a suit against a prior employer or disclosure of a mental illness that is not publicly known, these may become topics of the defendant's discovery requests. This is especially concerning in cases where the court ultimately denies pseudonymity and the vulnerability has been made known to the defense.

Cases with anonymous plaintiffs increase the difficulty of investigation for attorneys. Be mindful when issuing subpoenas or contacting potential witnesses. For example, in actions against the Catholic Church under the Child Victims Act—which often involve adult men who are years removed from the child sexual abuse and are speaking out for the first time—even those close to the plaintiff, such as parents, spouses, or friends, may not know of the abuse. It is constructive to notify the client of the steps the attorney will take during their investigation to substantiate the client's claims. Thus, pseudonymous plaintiffs may require more client management. It is also important to advise clients to take measures to keep their identity secret and to avoid publicity. The right to anonymity is weakened when the plaintiff seeks to publicize the case without even their name.

Plaintiffs seeking anonymity have a path forward, but it can be complicated. Make sure your clients understand the risks and difficulties they may encounter if they choose to file a pseudonym application. T

Notes

1. Fed. R. Civ. P. 10(a) & 17(a)(1).
2. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008); *see also Roe v. Wade*, 410 U.S. 113, 124 (1973) (hearing case with pseudonymous plaintiff without criticism); *Doe v. Bolton*, 410 U.S. 179, 187 (1973) (same).
3. *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 371 n.2 (3d Cir. 2008).
4. *Macinnis v. Cigna Grp. Ins. Co. of Am.*, 379 F. Supp. 2d 89, 90 (D. Mass. 2005) (internal quotation marks and citations omitted); *cf. Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 72 (1st Cir. 2011).
5. *See, e.g.*, Cal. R. Ct. 2.550–2.551 (2016); 1 Wesley W. Horton, Karen L. Dowd, Kenneth J. Bartschi, & Brendon P. Levesque, Superior Court Civil Rules Ann., Conn. Practice Series §11-20A(h)(1) (2021 ed.); Pa. Stat. & Cons. Stat. §1018 (West 2019); Va. Code Ann. §8.01-15.1 (2022).
6. *See, e.g., Doe v. Empire Ent., LLC*, 2017 WL 1832414, at *4 (Minn. Ct. App. May 8, 2017); *Doe v. Hewitt*, 2016 WL 10860914, at *2 (Vt. Super. Ct. Dec. 6, 2016).
7. *Sealed Plaintiff*, 537 F.3d 185 at 189–90; *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Doe v. Stegall*, 653 F.2d 180, 185–86 (5th Cir. 1981); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *In re Sealed Case*, 931 F.3d 92, 97 (D.C. Cir. 2019). The Seventh and Tenth Circuits have not articulated specific factors but have recognized that pseudonymity is an exception and have identified some cases in which the exception is justified. *Doe v. Village of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016); *M.M. v. Zavaras*, 139 F.3d 798, 802–03 (10th Cir. 1998). The First, Eighth, and Federal Circuits have not opined on pseudonymity but have announced a broad presumption of public access and against sealing. *Nat'l Org. for Marriage*, 649 F.3d at 70; *IDT Corp. v. eBay*, 709 F.3d 1220, 1223 (8th Cir. 2013); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011).
8. *Cf.* Donald P. Balla, *John Doe Is Alive and Well: Designing Pseudonym Use in American Courts*, 63 Ark. L. Rev. 691, 692 (2010) (noting the lack of uniformity).
9. *Mokhiber v. Davis*, 537 A.2d 1100, 1119 (D.C. Cir. 1988); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) ("there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion"); *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 56 (D.N.J. 1991) ("public access to court records is protected by both the common law and the First Amendment").
10. Fed. R. Civ. P. 5.2 and 10(a) provide that minors are to be pseudonymized, as are the personal identifiers of adults (SSNs, DOBs, and account numbers) other than the adult's name. Even so, these identifiers would rarely be in a public filing.