

WHEN SHOULD ADULT CIVIL LITIGANTS BE PUBLICLY ANONYMOUS?

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© December 1, 1993

Indiana Law needs an approved procedure for an adult party in civil litigation who wants to remain anonymous to the public. In cases alleging sensitive matters, a common practice has developed where plaintiffs seek leave to file as John Doe or Jane Doe. An order is sought allowing plaintiff's true identity to be given to the clerk under seal and to be provided to the defendant on the condition that it not be revealed except as strictly necessary to prepare the defense. Specifically, the plaintiff's name is not made available to the media via pleadings and never appears in the trial court's file or in the case reporters on appeal. This practice appears to be most widely used in cases alleging sexual misconduct.

The problem is that currently there is no approved Indiana procedure regarding when an adult civil litigant can remain publicly anonymous. Indiana Rules of Procedure, Trial Rule 10(A) require that the complaint "...*shall* include *the names* of all the parties..." (emphasis added). Trial Rule 17(A) requires the "[e]very action *shall* be prosecuted in *the name* of the real party in interest" (emphasis added). Similarly, there is no provision in the Federal Rules of Civil Procedure allowing public anonymity for adults in civil litigation.

Nevertheless, some federal courts have allowed individuals to sue under fictitious names where the issues involved are sensitive and highly personal. *See, Annotation, Propriety and Effect of Use of Fictitious Name of Plaintiff in Federal Court*, 97 A.L.R. Fed 370 (1990).

Many United States Supreme Court decisions regarding anonymity are criminal cases. In deciding the anonymity issue in those cases, the Supreme Court has discussed the First Amendment, the common law tradition of open trials, and the policy grounds for public access to

the plaintiff's name. See, Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?* 37 Hastings L.J. 13 (1985).

Under exceptional circumstances federal courts have allowed anonymity to protect litigants from "...psychological injuries, ostracism, and other negative reactions, including adverse economic ramifications." *Id.* at 83. Some examples of these cases are: *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Doe v. Deschamps*, 461 F.Supp 682 (D.C. Mont. 1974) (abortion); *Poe v. Ullman*, 81 S.Ct. 1752 (1961) birth control); *Doe v. Levine*, 347 F.Supp. 357 (S.D. N.Y. 1972) (mothers of illegitimate children contesting welfare requirements); *Doe v. Gallinot*, 486 F.Supp 983 (C.D.Cal.1979) (mental illness); *Doe v. Lally*, 467 F.Supp 1339 (D. Md. 1979) (personal safety); *Doe v. Chafee*, 355 F.Supp 112 (N.D. Cal. 1973) (homosexuality); *Doe v. McConn*, 489 F.Supp 76 (S.D. Tex. 1980) (transsexuality); *Roe v. Borup*, 500 F.Supp 127 (E.D. Wis. 1980) (alleged sexual abuse).

"The common thread through these cases is a presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record." *Doe v. Rostker*, 89 F.R.D. 158, 161 (N.D. Cal. 1981).

Whether to permit fictitious names in federal court appears to be left to the trial judge's sound discretion. See, e.g., *Roe v. Borup*, 500 F.Supp 127, 130 (E.D. Wis. 1980); *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979), *cert. denied*, 444 U.S. 856 (1970).

Despite the above examples, the right to proceed anonymously is not routinely granted in federal court. A case to consider is *Doe v. Hallock*, 119 F.R.D.640 (S.D. Miss. 1987). There the plaintiff alleged that defendants sexually harassed her in a derogatory and humiliating manner. The plaintiff in *Hallock* sought to avoid disclosing her true name in order to protect herself against embarrassment and unwanted invasion of her personal privacy. *Id.* at 365. The

court noted that “...by filing her complaint the plaintiff has leveled serious charges against the defendants and has specifically identified them in the complaint.” *Id.* at 366. The court quoted with approval from *Southern Methodist University Association v. Winne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) as follows:

The mere filing of a civil action against other private parties may cause damages to their good name and reputation and may also result in economic harm. Defendants stand publicly accused of serious violations of federal law. Basic fairness dictates that those among the defendants’ accusers who wish to participate in the suit as individual party plaintiffs must do so under their real names.

Hallock, at 366.

The court in *Hallock* concluded too that to proceed with her lawsuit the plaintiff had to “reveal her true identity as a matter of basic fairness and consistent with the policy of disclosure of party’s identities.” *Id.* at 367.

Of course, there are reported Indiana civil cases where an adult plaintiff has remained anonymous to the public. *E.g.*, *Doe v. Shultz-Lewis Child and Family Services, Inc.*, 604 N.E.2d 1206 (Ind. Ct. App. 1992) *trans. granted*. However, in *Shultz-Lewis* the propriety of the plaintiff remaining anonymous was never raised or decided. Similarly, this writer does not know of any reported Indiana Appellate civil cases which have addressed and decided this issue.

It has been suggested that the issue of public anonymity was resolved in *Miller’s Estate v. St. Joseph County Home*, 87 N.E.2d 886 (Ind. Ct. App. 1949). In *Miller’s Estate* the “St. Joseph County Home” filed a claim in the estate. Although it was a name of a place, the “St. Joseph County Home” was not a legal entity. The appellate court held for the defendant. The court stated “[a] party plaintiff must have an actual legal existence and he must in addition thereto have the legal capacity to sue. Courts sit to settle actual disputes between existent parties. No right of action resides in a non-existent plaintiff.” *Id.* at 887 (citations omitted).

The applicability of *Miller's Estate* to the present issue is questionable because of its procedural posture and because of the holding in the federal cases since *Miller's Estate* was decided.

To protect plaintiffs and defendants, and to protect the concept of a public forum in which to resolve disputes, Indiana law needs an approved procedure to follow where a party wishes to proceed anonymously. Recently I was defending a local professional accused of sexual assault and battery under the guise of professional treatment. The professional knew the true identity of the person making the accusations, categorically denied them, and had corroborating eye witness testimony.

When plaintiff's settlement demand was rejected, the plaintiff filed suit under a pseudonym while stating the professional's true identity. As expected, the allegations of the complaint were reported in the local media as having happened "...according to court documents", which simply meant the complaint. Unfortunately, the order allowing plaintiff to proceed anonymously was granted *ex parte*, upon motion filed at the time the complaint was filed.

It was fundamentally unfair to allow the plaintiff to remain publicly anonymous while publicly naming the defendant and thus damaging the defendant's personal and professional reputation. This seemed especially so since the plaintiff's allegations were hotly contested, and this fact was known to plaintiff's counsel before suit was filed. If the plaintiff desired to remain anonymous to the public, then fundamental fairness dictated that both parties should have remained anonymous, at least until there was an opportunity to be heard regarding the matter. Although the court vacated its anonymity order upon defendant's motion, and after a hearing, the damage had been done.

Despite that, I suggested to opposing counsel that before I took action on the court's grant of defendant's motion that the case be dismissed and refiled in another venue with both parties to remain publicly anonymous. Defendant would waive any procedural arguments. This would have allowed plaintiff to retain the anonymity apparently so desired.

The plaintiff's counsel declined this offer. It appeared that the tactical advantage of having the professional's name in the media was more important to the plaintiff than plaintiff's anonymity.

Without doubt, an argument can be made that no party should ever be allowed to proceed anonymously. This policy of open adjudications is to discourage perjury, induce witnesses to come forward, and to cause all trial participants to perform their duties more consciously.

Pseudonymous Parties, supra, at 16.

"As in the criminal realm, the judicial system seeks to assure civil litigants a fair and accurate determination of the relevant facts and the governing law. Public scrutiny serves these interests. It is in the interest of effective and proper judicial administration that defendants not be "persecuted", and that no litigant be victimized by abuses of judicial power." *Id.*

Despite the above, there is obviously federal case law and strong policy arguments in support of allowing a plaintiff to proceed under a fictitious name in very specific, limited, and exceptional circumstances. In addition, without the protection of a pseudonym many people, such as those who have been sexually assaulted, might never sue the wrongdoer for fear of public repercussions.

On the other hand, there are equally strong policy arguments against allowing a plaintiff to proceed anonymously while publicly accusing and thereby harming an innocent defendant. Obviously, sexual assault and battery does occur. However, it is contrary to our system of

jurisprudence to accept the filing of a complaint as proof that a sexual assault has occurred as alleged. In addition, one would have to be very naive to believe that all plaintiffs alleging sexual assault really have been victimized and that all defendants sued are guilty as accused.

Whether there is proof by a preponderance of the evidence that a defendant is such a wrongdoer will not be known until after the verdict. It is doubtful the traditional remedies of malicious prosecution, abuse of process, and fees for a frivolous lawsuit adequately protect innocent defendants from erroneous allegations of sexual misconduct. Without the protection of defamation law in litigation matters, allowing a plaintiff to sue anonymously while destroying a defendant's personal and professional reputation before a judgment has been entered is unacceptable.

If a plaintiff desires to file suit while remaining anonymous to the public, then all parties should remain anonymous of record, until there is an opportunity to be heard regarding the matter. Plaintiffs should be granted public anonymity only in specific, limited, and exceptional circumstances, and only after an *in camera* hearing with all parties present. If the plaintiff is granted anonymity, then all defendants should be granted anonymity until the judgment can no longer be appealed. Then, the names of the parties could be made public at the option of the prevailing party. This would serve society's interest in publishing a wrongdoer's identity while protecting the innocent defendant and while protecting the victim who would not otherwise have sued.

The Indiana Supreme Court should amend Trial Rule 10(A) to provide for the above procedure.

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