MORE True confessions of a Legal Writing Professor

BY DIANA J. SIMON

Down the Rabbit Hole with Doe

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It bothers me when my students ask questions I can't answer. Usually, it is because they are questioning something that lawyers have done for ages, and no one really knows why—it is just done that way. But "just because" is not an optimal answer. One solution could be to prohibit my students from asking questions, but they might find that approach slightly objectionable. In any event, recently, it happened again—I did not know an answer. I had the students complete an exercise using a hypothetical scenario (based on a real case) involving an anonymous "Jane Doe" party. I explained why the party was named Jane Doe, but then the dreaded follow-up question came: How did that practice get started? The truth? I had no idea. To satisfy my student's curiosity (and my own), I took a research trip down the Doe rabbit hole.[1]

When I emerged, I had some answers and, of course, by then, my students had moved on to other issues. Having done the research, though, I had to share it with someone—you.

First, Doe has a history. Second, the use of Doe parties has exponentially increased over time, and many courts have adopted a test to determine whether a party can proceed anonymously. Third, while the Doe reference is common, parties have used many other labels when proceeding besides John or Jane Doe.

Let's begin with my student's question about how this all came about. If the Does were to fill out DNA kits and submit them to Ancestry.com, Ancestry.com would conclude they have their origins in England. Some say the practice of using "Doe" as a substitute name for anonymous parties began in the 1700s,[2] while others say it began only 160 years ago[3]—suffice it to say, it is old.

To get around English common law technicalities, British landowners used an action of ejectment (be forewarned that this is not going to make much sense) to evict defaulting tenants. Rather than bringing an action directly, a landowner would make the claim on behalf of a fictitious tenant as against a fictitious evictor. The court would then decide the rightful owner of the property and, assuming it wasn't the tenant, the landowner could be declared the legal property owner.[4]

The names for the fictitious parties were typically John Doe (the tenant) and Richard Roe (the evictor). John and Richard were common names at the time, and Doe and Roe referred to deer. A doe is a female deer (if you didn't already know from *The Sound of Music*), and roe is a species of deer widespread in Europe, as well as a name for fish eggs.[5] Why did the tradition use deer instead of horses or foxes? One lexicographer speculated that because the landowners bringing these actions often hunted deer and fish—some of their favorite English foods—they adopted the doe and roe names.[6]

Today, though the use of fictitious names in litigation is generally disfavored,[7] the practice has burgeoned.[8] It is disfavored, among other reasons, because of the public's right of access to the courts, and defendants' rights to confront the parties they oppose.[9] Prior to 1960, there were only 89 John Doe litigants; today, however, there have been more than 10,000 Doe litigants.[10]

This is so despite the procedural rules that seem to prohibit pseudonymity. For example, Rule 10(a) of the Federal Rules of Civil Procedure requires that the title of the complaint "name all the parties."[11] Similarly, Rule 10(a) of the Arizona Rules of Civil Procedure requires, "The title of the complaint must name all the parties."[12] And Rule 17(a) of the Federal Rules of Civil Procedure (as well as its Arizona counterpart) requires that an action be prosecuted "in the

name of the real party in interest."[13]

When do courts allow parties to proceed anonymously? In general, when the matter involves a sensitive and highly personal issue, parties can proceed anonymously. For example, in cases where the plaintiff is a victim of childhood sexual harassment, molestation, and abuse, the plaintiff can generally remain anonymous.[14]

On the other hand, when an issue does not trigger these concerns, a court will not allow a party to proceed under a pseudonym. For example, in *Doe v. HireRight LLC*,[15] the Arizona district court denied a plaintiff's motion to proceed by pseudonym when the plaintiff sued a prospective employer for allegedly violating the Fair Credit Reporting Act by running a criminal background check on the plaintiff, which revealed his prior felony convictions. The plaintiff wanted to remain anonymous because he did not want the lawsuit to publicly identify him as a felon. The court found this harm did not warrant anonymity because the plaintiff did not face retaliation because of the lawsuit, and any harm the plaintiff faced stemmed from his prior convictions, which were already public information. Thus, the court held if the plaintiff wanted to continue the case, he would have to file a complaint under his own name.

Interestingly, while there are several Arizona cases in which a party has proceeded under a pseudonym, the state courts have allowed the practice without much, if any, discussion.[16] In fact, as far back as a 1969 paternity action where the father was denying paternity, the case was captioned *Anonymous v. Anonymous.*[17] The court simply noted, "In consideration of the welfare of the child herein involved, we have refrained from naming the parties in this decision."[18]

More recently, in *Doe v. Arpaio,*[19] the plaintiff, an inmate in state prison, sued the prison for refusing to allow her to leave jail to get an abortion. On appeal, the court's only comment was "The trial court allowed plaintiff Jane Doe to proceed pseudonymously. We continue that usage."[20] Similarly, in *Doe v. Roe*,[21] involving a claim against parents for sexual abuse, the court acknowledged that the parties were proceeding using fictitious names but only noted, "To protect the parties, the trial court amended the caption to use fictitious names and sealed the record."[22]

In contrast, federal courts grappling with the issue have articulated a multifactor balancing test. For example, the Ninth Circuit has declared that parties may proceed using a pseudonym only "in the 'unusual case' when nondisclosure 'is necessary … to protect a person from harassment, injury, ridicule or personal embarrassment.'"[23] The court considers five factors: (1) severity of the threatened harm, (2) reasonableness of the anonymous party's fears, (3) the anonymous party's vulnerability to such retaliation, (4) prejudice to the opposing party, and (5) the public interest.[24]

Recently, a federal district court applied these factors and concluded the plaintiff could not proceed under the name Johnny Doe in *Doe v. Epic Games, Inc.*[25] There, a minor child brought a class action against

a video game creator using a pseudonym. The defendant filed a motion under Rule 10(a) to compel the plaintiff to proceed under his initials. Although the plaintiff argued that his gaming habits constituted highly sensitive personal information and he feared retaliation from the community if his identity was revealed, the court disagreed. It granted the defendant's motion because the plaintiff's fear of social stigmatization was speculative, and information about plaintiff's use of the video games was distinguishable from the types of cases involving the permissible use of pseudonyms—those involving sexual abuse, human trafficking, mental illness, or similarly sensitive subjects. The court also concluded that the public's interest in the openness of the proceeding weighed in favor of granting defendant's motion to compel compliance with Rule 10(a).

Not content with using just five factors, the Second Circuit has promulgated a non-exhaustive list of 10 factors to consider when balancing a litigant's privacy interest against the customary and "constitutionally-embedded presumption of openness in judicial proceedings."[26] For example, in *Rapp v. Fowler*,[27] the court denied the plaintiff's motion to proceed by pseudonym in a suit against Kevin Spacey for sexual assault, battery, and intentional infliction of emotional distress taking place when the plaintiff was a minor. The court held the plaintiff C.D.'s privacy interest did not outweigh the prejudice to Spacey and the presumption of open judicial proceedings. Although the court agreed the claims were highly sensitive and personal, it also noted C.D. had spoken about the matter with many people, including a magazine, without mandating confidentiality and was no longer a child but an adult in his 50s. The court also reasoned that Spacey would be prejudiced because of difficulties in conducting discovery, concluding, "Fundamental fairness suggests that defendants are prejudiced when required to defend themselves publicly before a jury while plaintiffs make accusations from behind a cloak of anonymity."[28]

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Beyond the common law, certain statutory provisions allow pseudonyms.[29] Examples include rules providing that appeals from juvenile cases involve pseudonyms, requiring

minors to be identified by their initials, or mandating pseudonymity for sex crime victims, revenge porn victims, and in certain family law cases.[30] In Arizona, for example, while proceedings relating to dependent children and termination of parental rights are open to the public, a court can order any proceeding to be closed under certain circumstances, such as when doing so is in the child's best interest.[31]

While both Jane and John Doe enjoy most of the notoriety, they have lots of competition. First, there are many variations on the Doe theme, such as Boe, Coe, Foe, and Zoe. Second, some names are descriptive, such as Anonymous, Pseudonym Taxpayer, Unwitting Victim, Jane Imperiled, Patient A, or Jane Endangered. Finally, some parties are referred to by just their initials, such as D.B.[32]

Now the next time a student (or anyone else) asks how the practice of using Doe as the go-to pseudonym came about or how courts evaluate whether a party can proceed using a pseudonym, you can provide an answer.

endnotes

1. One of the fun facts I learned is that is that there are real people named John Doe; you can imagine the problems they have convincing people they are real. One person named John Doe was grilled by airport security before every flight because the agents thought he might have been hiding some dark past. Alison Leigh Cowan, *Meet John Doe. No. Really!* N.Y. Times (July 29, 2009), https://archive.nytimes.com/cityroom.blogs.nytimes.com/2009/07/29/a-name-only-a-lawyer-could-love/.
2. William Safire, *On Language; Who's John Doe?* N.Y. Times Mag. (June 4, 1995), www.nytimes.com/1995/06/04/magazine/on-language-who-s-john-doe.html; Wikipedia, *John Doe*, http://en.wikipedia.org/wiki/John_Doe (noting usage originated during the Middle Ages).
3. Daniel Ganninger, *Who are John and Jane Doe?* Knowledge Stew, Medium (June 29, 2020), https://medium.com/knowledge-stew/who-are-john-and-jane-does-7bc4a4d11b58.
4. *Id.*
5. Safire, *supra* note 2.
6. *Id.*
7. Jennifer A. Brobst, *The Modern Penny Dreadful: Public Prosecution and the Need for Litigation Privacy in a Digital Age*, 96 Neb. L. Rev. 281, 296–97 (2017).
8. *Id.* at 299.
9. *Id.* at 297. *See also* Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 Hastings L.J. 1353, 1367 (2022) ("A strong presumption against party pseudonymity is generally well settled."); *Doe v. Krogh*, No. CV-21-08086-PCT-DWL, 2021 WL 1967165, at *1 (D. Ariz. May 17, 2021) (internal citation omitted) ("Generally, the use of fictitious names runs afoul of the public's common law right of access to judicial proceedings and Rule 10 (a)'s command that the title of every complaint 'include the names of all the parties.'").
10. Brobst, *supra* note 7, at 299.
11. Fed.R.Civ.P. 10(a).
12. Ariz.R.Civ.P. 10(a).
13. Fed.R.Civ.P. 17(a)(1); Ariz.R.Civ.P. 17(b)(1).
14. *Krogh*, 2021 WL 1967165, at *1–2 (allowing plaintiffs to proceed under pseudonyms during the pretrial phase of the case because it involved allegations of sexual abuse and molestation of plaintiffs as children).
15. No. CV-23-00493-PHX-SMM, 2023 WL 2648134 (D. Ariz. Mar. 27, 2023).
16. Without My Consent, *Filing Pseudonymously: Arizona*, https://withoutmyconsent.org/50state/filing-pseudonymously/by-state/arizona/. Arizona is not unique. Many jurisdictions have not promulgated rules on when a litigant can proceed using a pseudonym. One author speculated that the reason is that the issue may be disposed of in an oral or written order that does not appear on any database, or the courts are not that focused on the issue because they do not view the identity of the litigant as important—no courtroom is being closed to the public and no document is being sealed. Tom Isler, *White Paper: Anonymous Civil Litigants*, Reps. Comm. for Freedom of the Press, www.rcfp.org/journals/news-media-and-law-fall-2015/white-paper-anonymous-civil-l/.
17. 460 P.2d 32 (Ariz. Ct. App. 1969).
18. *Id.* at 33.
19. 150 P.3d 1258 (Ariz. Ct. App. 2007).
20. *Id.* at 1259 n.1.
21. 931 P.2d 1115 (Ariz. Ct. App. 1996), *vacated on other grounds*, 955 P.2d 951 (1998).
22. *Id.* at 1117 n.1.
23. *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980).
24. *Doe v. Epic Games Inc.*, 435 F. Supp. 3d 1024, 1053 (N.D. Cal. 2020) (citing *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068–69 (9th Cir. 2000)).
25. *See generally id.*
26. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (internal citation omitted).
27. 537 F. Supp. 3d 521 (S.D.N.Y. 2021).
28. *Id.* at 531–32.
29. Volokh, *supra* note 9, at 1425.
20. *Id.*
31. A.R.S. § 8-525(B).
32. Isler, *supra* note 16.