Needing the Doe

People with HIV, confidentiality and the courts

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Faced with the discrimination and complications that life with HIV can bring, a sobering number of people with HIV have had to turn to the courts to enforce their rights. Meanwhile, far from the cutting-edge world of HIV law, others are engaged in everyday legal proceedings which involve their health status only indirectly or not at all. But regardless of whether the legal action is HIV-related, potential HIV positive litigants need to consider whether going to court might result in the disclosure of their status. While many PWAs go public with their health status in the belief that keeping it private tacitly endorses stigmatization, the continuing reality for many more is that disclosure places a job, insurance and even safety at risk. But choosing between rights and privacy is not required.

David Webber, editor of the text *AIDS and the Law*, notes that any attorney representing clients with HIV should consider in advance the ways in which health status might be disseminated as a consequence of involvement in legal proceedings. However, sometimes a client living with HIV is better able to anticipate disclosure issues than an attorney unfamiliar with representing PWAs or insensitive to the consequences of disclosure. It is helpful to be an educated consumer.

When disclosure of HIV status is likely, as in any case in which HIV-related discrimination is an issue, a pseudonym (usually “Jane Doe” or “John Doe”) is the primary way to make sure that third parties do not get access to HIV status and other related information.

Most courts will allow a plaintiff to file a lawsuit using a pseudonym when the plaintiff clearly sets forth the reasons why confidentiality is necessary, although working this out in advance with the defendant’s lawyer generally is a good idea. It has become fairly common practice for litigants with HIV to choose this route, and the occasional defendant who tries to “out” the plaintiff with HIV as a form of intimidation (as the law firm defendant in the Philadelphia lawyer case, *Scott Doe v. Kohn Nast*, did) is more likely to earn a rebuke from the court than to succeed. To accomplish this, the attorney for the client with HIV can file court papers using initials or a pseudonym, together with a request for a court order protecting the client’s identity.

Use of a pseudonym is not an airtight guarantee of confidentiality, however. Publicity about a case may negate the effects of any precautions. Although administrative proceedings such as Equal Employment Opportunity Commission (EEOC) investigations generally are not public documents, even these agencies can inadvertently cause the harm they exist to prevent. In one such case, a

person who complained about HIV-related employment discrimination to the New York City Commission on Human Rights had his expectations about confidentiality shattered when the Commission issued a press release about the settlement of the case.

Although the press release did not identify him by name, it provided sufficient information to allow his co-workers to recognize him. He sued the Commission for the disclosure, and the subsequent federal appeals court ruling, *Doe v. City of New York* (1994), reaffirmed the complainant's reasonable expectation that the settlement would be kept private.

Because cases, particularly those involving HIV-related discrimination, may rely on documents that would identify the party, a request to the court for an order sealing the case record also may be worth considering. This usually can be worked out in advance with the attorney for the other side, and then the lawyers for both sides file a stipulation to that effect with the court. If the other side is uncooperative, the party trying to maintain privacy can file a request for a protective order with the court.

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