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Natalie Weatherford
TAYLOR & RING

Sonya Ostovar
TAYLOR & RING

Protecting your plaintiff in sexual-misconduct cases

A PLAINTIFF IN A SEXUAL-MISCONDUCT CASE CAN GO THROUGH THEIR CASE WITH DIGNITY AND EMERGE FEELING EMPOWERED

Victims of sexual abuse, assault and harassment will have serious questions and concerns about how filing a civil lawsuit will affect their privacy. The decision to bring a lawsuit – especially a lawsuit arising out of sexual misconduct – is often difficult.

Many victims of sexual misconduct are reluctant to come forward out of fear that the most personal, intimate details of their life will be put on display in court or that they will be re-victimized by opposing counsel through aggressive and invasive discovery, deposition, and trial tactics.

Our legislature and courts have recognized this very legitimate concern and enacted laws to protect victims from unnecessary harassment.

Discussed in detail below are several automatic protections for victims of sexual abuse and sexual harassment aimed at protecting them from irrelevant and unnecessary violations of privacy.

Plaintiffs with a legitimate privacy concern may file under a pseudonym

One fundamental protection available to a victim of sexual abuse is to file their lawsuit under a pseudonym. Commonly used pseudonyms are: John Doe or Jane Doe, first and last initials only, or first name and last initial only.

Courts generally allow the use of a pseudonym where a "legitimate privacy concern" exists and pseudonyms are particularly common in cases involving victims of sexual misconduct, assault or abuse. (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1452.)

A pseudonym *must* be used in the pleadings or it is waived. If a case is filed under a plaintiff's real name, and the plaintiff later decides that they would like to use a pseudonym, they risk having the court deny the request. (*Taus v. Loftus* (Cal. 2007)151 P.3d 1185.) However, upon stipulation between all parties, and upon approval by the Court, late requested use of a pseudonym may be approved. (*Doe v. Brown* (Cal. Ct. App. 2009) 99 Cal. Rptr. 3d 209.)

Sexual history of the plaintiff is off limits absent a court order

While most discovery procedures are available as a matter of right, in a sexual-abuse, assault, or harassment case, a court order is required *before* attempting to conduct discovery into a plaintiff's sexual conduct with individuals other than the perpetrator of the abuse. (Code Civ. Proc., § 2017.220.)

Section 2017.220 requires the party seeking sexual-history information to *first* obtain a court order by demonstrating the extraordinary circumstances justifying such discovery including: (1) specific facts showing good cause for such discovery; and (2) that the information sought is relevant to the subject matter of the action. A heightened standard of "relevancy" is also required. (See *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 578 [refusing to allow discovery into a plaintiff's sex life where defendant's claim of "relevance" appeared speculative and remote.].)

In many cases, the defense will argue that the need for a plaintiff's sexual history is related to causation of emotional-distress damages and the need to determine what, if any, sexual traumas existed before the subject incident.

Bare causation arguments are generally insufficient to overcome the requirements of section 2017.220. (*Barrenda L. v. Superior Court* (1998) 65 Cal.App.4th 794 ["The mere fact that a plaintiff has initiated an action seeking damages for extreme mental and emotional distress arising out of conduct of a sexual nature does not ipso facto provide 'good cause' for discovery of other sexual conduct."].)

Knoettgen v. Superior Court explained the legislative intent behind section 2017.220: "The discovery of sexual aspects of complainant's lives . . . has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendants' . . . inquiries, is unnecessary and deplorable." (*Knoettgen v. Superior Court* (Cal. Ct. App. 1990) 224 Cal.App.3d 11, 13.) The use of evidence of a plaintiff's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial. (*Ibid.*)

In addition to discovery of sexual history, special evidentiary rules protect against the improper use of sexual-history evidence at trial.

First, Evidence Code section 1106 prohibits the use of opinion evidence, reputation evidence, and evidence of specific instances of a plaintiff's sexual conduct in order to prove consent by a plaintiff or the absence of injury to a plaintiff.

Second, Evidence Code section 783 prohibits a defendant from attacking the credibility of a plaintiff with evidence of a plaintiff's sexual conduct unless and until certain stringent measures are fulfilled. (See *Venus B. v. Venus A.* (1990) 222

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Cal.App.3d 931, 937 [affirming the trial court's decision to foreclose the defendant from inquiry into a child's sexual history for purposes of attacking the child's credibility - "[Defendant] failed to demonstrate the type of 'extraordinary circumstances' in which inquiry into the minor's sexual behavior might be permitted."].)

Consent evidence is not admissible in childhood sexual-abuse cases

The majority of childhood sexual-abuse cases do not involve physical force, violence, or threats. More often, the victim is "groomed" by the perpetrator over time, and the perpetrator gains the victim's trust with the intent to manipulate and exploit the victim into a sexual "relationship."

Consent evidence at trial can be damaging to your ability to win your case as well as emotionally damaging to a plaintiff and his or her family. This issue was directly addressed by the California legislature in 2015 and led to the enactment of two important code sections: Civil Code section 1708.5.5 and Evidence Code section 1106, subdivision (c).

The crucial language of Civil Code section 1708.5.5 states, "[c]onsent shall not be a defense in any civil action [for sexual battery] if the person who commits the sexual battery is an adult who is in a position of authority over the minor." Civil Code section 1708.5.5, subdivision (b) further states, "an adult is in a 'position of authority' if he or she, by reason of that position, is able to exercise undue influence over a minor. A 'position of authority' includes, but is not limited to, a natural parent, stepparent, foster parent, relative, partner of any such parent or relative, caretaker, youth leader, recreational director, athletic manager, coach, teacher, counselor, therapist, religious leader, doctor, employee of one of those aforementioned persons, or coworker."

This position was further solidified with the addition of subsection (c) to Evidence Code section 1106, which states "evidence of the plaintiff minor's sexual conduct with the defendant adult shall not be admissible to prove consent by the plaintiff or the absence of injury to the plaintiff."

A motion in limine preventing the defense from making comparative fault and consent arguments is the best offense to keep these issues from surfacing at trial.

Adult plaintiffs cannot be "comparatively" at fault for intentional sexual assault

Typically, a consent defense will be used in sexual-misconduct cases involving adult victims, however, for intentional sexual-assault claims, the general principles of California law hold that comparative-fault principles do not apply to intentional tort claims. (See *Li v. Yellow Cab Co*. (1975) 13 Cal.3d 804, 825-826 ["it has been persuasively argued" that comparative negligence should apply to all "misconduct which falls short of being intentional"]; see also *Heiner v. Kmart Corp*. (2000) 84 Cal.App.4th 335, 349 [plaintiff's negligence not a defense to battery – intentional torts are "excluded" from the comparative-fault system and allowing comparative fault in the intentional-tort system "would be contrary to public policy"].)

Marsy's Law

If your plaintiff's civil case has a companion criminal case for sexual assault or abuse, they are permitted certain rights under the California Victims' Bill of Rights Act, also referred to as "Marsy's Law."

A civil attorney is generally precluded from participating in a victim/plaintiff's criminal case. However, under Marsy's law, civil attorneys are permitted to "represent" victims in the criminal process and protect the victim/plaintiff from unnecessary disclosure of their private information. The California Constitution article I, § 28, section (b)(4), provides that a crime victim has a right to "prevent the disclosure of confidential information or records to the defendant, the defendant's attorney, or any other person acting on behalf of the defendant, which could be used to locate or harass the victim or the victim's family or which disclose confidential communications made in the course of medical or counseling treatment, or which are otherwise privileged or confidential by law."

In practice, a civil lawyer walks a delicate line when involving themselves in an ongoing criminal case. However, if necessary, Marsy's law is a tool for civil lawyers to lawfully support and participate in their plaintiff's criminal case, while at the same time, understanding the importance of respecting the boundaries that are necessary between the two parallel cases.

Limits on depositions of vulnerable victims

If your plaintiff is a child or person with an intellectual disability, you will want to place limitations on the plaintiff's deposition either through stipulation or a protective order.

"[F]or good cause shown," the court may grant a protective order to control the deposition proceedings or the information obtained thereby. (See Code Civ. Proc., § 2025.420.) The court is empowered to issue whatever order "justice requires" to protect a party or deponent against "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Code Civ. Proc., § 2025.420(b); see *Nativi v. Deutsche Bank Nat'l Trust Co.* (2014) 223 Cal.App.4th 261, 316.) Additionally, a protective order may also be granted to restrict the frequency or extent of use of any discovery method if "[t]he discovery sought is unreasonably cumulative or duplicative" or "[it] is obtainable from some other source that is more convenient [and] less burdensome…" (Code Civ. Proc., § 2019.030, subd. (a)(1)-(2).)

Code of Civil Procedure section 2025.420, subdivision (b) allows for the

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imposition of terms and conditions on which a deposition may proceed and it is plaintiff's burden to demonstrate the "good cause" for the requested conditions.

Time limits on vulnerable or young plaintiffs should be sought to protect a plaintiff from oppression and the undue burden a longer deposition would place upon them.

In support of the motion for protective order, a note from a treating psychologist is often helpful to demonstrate the vulnerability or limitations of the plaintiff.

Limits on defense mental examinations

The vast majority of damages in a sexual-misconduct case will be mental, emotional and psychological in nature. Accordingly, your plaintiff will likely be subject to a defense mental examination. You are not allowed to be present at this examination, so it is important to establish clear limitations for the examination in writing through a stipulation before confirming the plaintiff's attendance.

Limits on the length of the examination, the number of hours spent on testing versus interviewing, and the scope of the examination should be set. Further, pursuant to Code of Civil Procedure section 2032.340, if a plaintiff in a case involving allegations of child sexual abuse is less than 15 years of age, the mental examination *shall not exceed* three hours, inclusive of breaks.

Always demand that the interview portion of the examination be audio-recorded and that a copy of the recording be produced after the examination.

Without appropriate parameters in place, the defense will use the interview portion of the examination to conduct a second deposition of plaintiff and inquire into the areas that were off-limits at the deposition. Before the examination, confirm in writing that the examiner is not permitted to inquire into prohibited areas (such as plaintiff's sexual history with anyone other than the perpetrator of the abuse) and that plaintiff is permitted to end the examination if the examiner inquires into prohibited areas. Prepare your client before the examination regarding what is off-limits and be available by phone on the day of the examination so that you can respond to any issues that may arise.

Confidentiality in settlement agreements

Finally, confidentiality clauses in settlement agreements for sexual-misconduct cases have been an important issue in the #MeToo era. The California Legislature recently addressed this issue. For settlement agreements entered into on or after January 1, 2019, Code of Civil Procedure section 1001 prohibits provisions in settlement agreements that prevent disclosure of factual information relating to claims involving sexual misconduct. A provision within a settlement agreement that prevents the disclosure of factual information related to the claim would be void as a matter of law and against public policy. However, Code of Civil Procedure section 1001, subdivision (e) does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the *amount* paid in settlement.

Conclusion

It is possible for a plaintiff in a sexual-misconduct case to go through their case with dignity and emerge feeling empowered. The role of the plaintiff's attorney in ensuring this outcome is to understand and advocate for the protection of their plaintiff's privacy.

Natalie Weatherford and Sonya Ostovar are trial attorneys at Taylor & Ring *in Manhattan Beach, California. They represent both children and adults in sexual abuse, sexual harassment and sexual misconduct cases throughout California.*