

Comment,
**PROTECTING THE PRIVACY OF
DIVORCING PARTIES: THE MOVE
TOWARD PSEUDONYMOUS FILING**

Divorce actions are intensely personal proceedings. It is difficult to imagine a contested divorce proceeding without also imagining the airing of dirty family laundry. The issues that are central to divorce may have great import for the parties and their families but have little or no effect on the public at large. For these reasons, pseudonyms are frequently requested. Courts, however, rarely grant such requests in matters pertaining to divorce.¹

Pseudonymous filing may be requested when the parties want to protect their privacy. Historically, "John Doe" designations were used in pleadings to temporarily name a defendant whose identity had not yet been determined.² Use of pseudonyms or initials in place of legal names has been expanded in recent years, however, for the purpose of preventing public identification of the parties.³

The Supreme Court has ruled on the right to privacy in a number of cases, setting a constitutional standard in the process. Divorce issues should meet the constitutional privacy standard. The institution of marriage is most certainly constitutionally protected, and the issues that arise within the institution of marriage encompass our most protected privacy rights - those of procreation, birth control, decision-making in child-rearing, and the like. At some point, however, these matters seem to lose their private status when a divorce is sought.

I. Reasons for Requesting Anonymity

There are many reasons why parties wish not to reveal their names. The desire to protect their identity is due to a combina-

¹ See Wendy M. Rosenberger, Note, *Anonymity In Civil Litigation: The "Doe" Plaintiff*, 57 NOTRE DAME LAW. 580 (1982).

² See Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 18 (1985).

³ See *id.*

tion of factors. “Parties often seek to sue under fictitious names when the matters in the suit are particularly private, stigmatizing, or so unpopular that plaintiffs fear retaliation.”⁴ People may request anonymity in court proceedings less out of a desire for secrecy than out of a desire to define their own “circle of intimacy.”⁵

Privacy is a consensual issue for most people. They share personal information with friends or family members that they would not want mere acquaintances to have. Privacy in everyday life seems to be guided by a “need to know” type of standard. People believe they “own” that information, in a sense, and have a right to choose with whom they share it.

Many requests for anonymity are based purely on the party’s desire to protect his or her reputation. People generally protect, and enhance, their reputations by pointing to their desirable qualities while downplaying undesirable ones.⁶ “A man with a lover may portray one set of facts [about himself] to his wife, another to his lover, and assert a right to privacy as a barrier to information flow between these two worlds. In other words, privacy is often not an end in itself but an instrumental mechanism to facilitate the misleading of others.”⁷ Other reasons for guarding privacy include shame, embarrassment, and “a desire to avoid future disturbance.”⁸ Private facts that have absolutely no impact on the public may be of devastating importance to the parties who want to protect those facts from public knowledge.

Privacy concerns have increased steadily over the past twenty years. A set of surveys done in 1978, 1990, 1991, 1992, and 1994 demonstrated the public’s growing concern for loss of personal privacy.⁹ From 1978 to 1994, the number of people

⁴ See *id.* at 1.

⁵ See Kunoor Chopra, *Peeping Press v. Private Persecution: A Resolution of the Conflict Between Freedom of the Press and Freedom from the Press*, 19 LOY. L.A. ENT. L.J. 253, 253 (1999).

⁶ See Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2384-5 (1996).

⁷ See *id.* at 2385.

⁸ See *id.* at 2386.

⁹ See *id.* at 2303 (citing THE EQUIFAX REPORT ON CONSUMERS IN THE INFORMATION AGE (1990); HARRIS-EQUIFAX CONSUMER PRIVACY SURVEY 27-28 (1991); HARRIS-EQUIFAX CONSUMER PRI-

“concerned with threats to their privacy” steadily rose from 47% to 84%, and those who were “very concerned” rose from 31% to 51%.¹⁰ The Supreme Court recognized this growing concern when it included a right to “control of information concerning an individual’s person,” in the list of previously-recognized privacy rights.¹¹

II. When Do the Courts Permit the Use of Pseudonyms? Pseudonyms and the Law

The use of pseudonyms has grown significantly, particularly by plaintiffs filing civil litigation.¹² Some courts permit plaintiffs to file anonymously depending on the facts of the particular case. Others refuse to allow pseudonyms for any reason.

“The common law generally takes an objective approach to privacy. It demarcates certain privacy preferences as ‘legitimate,’ and bars disclosures that would be ‘highly offensive to a reasonable person.’¹³ Pseudonymous filing seems to fly in the face of long-established policies and rules which generally require that legal filings and the subsequent litigation be publicly accessible. “In addition to being inconsistent with the long tradition of identified parties, pseudonymous litigation to some extent undermines the values served by open civil proceedings.”¹⁴

Federal Rule of Civil Procedure 10(a) provides that “[i]n the complaint the title of the action shall include the names of all the parties.”¹⁵ No exceptions are noted in the rule or in the associated commentary. Courts have, however, permitted excep-

VACY SURVEY 32-36 (1992); HARRIS-EQUIFAX CONSUMER PRIVACY SURVEY 45-47 (1994)).

¹⁰ See *id.* at 2404-5 (1996) (citing THE EQUIFAX REPORT ON CONSUMERS IN THE INFORMATION AGE (1990); HARRIS-EQUIFAX CONSUMER PRIVACY SURVEY 27-28 (1991); HARRIS-EQUIFAX CONSUMER PRIVACY SURVEY 32-36 (1992); HARRIS-EQUIFAX CONSUMER PRIVACY SURVEY 45-47 (1994)).

¹¹ See Murphy, *supra* note 6, at 2381 (citing United States Dep’t of Justice v. Reporters’ Comm. For Freedom of the Press, 489 U.S. 749, 763 (1989)).

¹² See Colleen E. Michuda, *Defendant Doe’s Quest for Anonymity - Is the Hurdle Insurmountable?*, 29 LOY. U. CHI. L.J. 141, 141 (1997).

¹³ See Murphy, *supra* note 6, at 2393 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 652D (1976)).

¹⁴ See Steinman, *supra* note 2, at 18.

¹⁵ See Rosenberger, *supra* note 1.

tions based on their interpretation of the rule. Courts that strictly construe Rule 10(a) will not let a case proceed unless the parties are identified in the complaint. Any complaint that is filed without proper party identification is considered “ineffective to commence an action.”¹⁶ Requiring complaints to include names of parties coincide with the public’s interest in knowing what the dispute is about and who is involved in the dispute.¹⁷

As an alternative to filing pseudonymous complaints, parties may seek a protective order under Federal Rule of Civil Procedure 26(c), which “gives the trial court discretion over litigants’ requests for protection from annoyance, embarrassment, or oppression in the discovery process.”¹⁸ Courts may interpret this rule as permitting deviation from Rule 10(a) in appropriate cases.¹⁹

III. How the Law Is Applied

Courts have held that the First Amendment provides the press and the public the right to access information in both criminal and civil cases.²⁰ This recognition is noted by Justice Stewart’s concurring opinion in *Richmond Newspapers, Inc. v. Virginia*.²¹ The Supreme Court did not begin to recognize pseudonymous plaintiffs until the 1960s, and then, it was with little fanfare.²² The Court recognized the use of pseudonyms but

¹⁶ See *id.* (quoting *Roe v. New York*, 49 F.R.D. 279 (S.D.N.Y. 1970)).

¹⁷ See *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992) (citing *Doe v. Rostker*, 89 F.R.D. 158, 160 (N.D. Cal. 198 1); *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974)). See also *Rosenberger*, *supra* note 1, at 583.

¹⁸ See *Rosenberger*, *supra* note 1.

¹⁹ See Carol M. Rice, *Meet John Doe: It’s Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. Pitt. L. Rev. 883, 914 (1996).

²⁰ See *Steinman*, *supra* note 2, at 3.

²¹ See *id.* at 13 (citing *Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555, 599 (1980) (Stewart, J., concurring)).

²² See *Rice*, *supra* note 19, at 908.

failed to comment on that use, first in *Poe v. Ullman*,²³ and then again in *Roe v. Wade*.²⁴

The Supreme Court has discussed the rights of public access to party names in a number of recent criminal cases, but those discussions have been viewed as equally applicable to civil proceedings.²⁵ The Court noted, in *First Nat'l Bank of Boston v. Belotti*,²⁶ that “[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”²⁷

The public also has a long-recognized common law right to information concerning court proceedings.²⁸ The Court explained, in *Craig v. Harney*,²⁹ that “[a] trial is a public event.”³⁰ The courts have no special dispensation to “suppress, edit, or sensor” court proceedings.³¹ “The request for pseudonym status . . . implicates important rights that the public has to full access to information about court proceedings.”³² Thus, courts must balance the public’s right to disclosure against the parties’ rights to privacy.³³

In *Doe v. Stegall*,³⁴ the Fifth Circuit isolated and catalogued the circumstances common to the “Doe cases” collected in its

²³ See *id.* (citing *Poe v. Ullman*, 367 U.S. 497 (1961)). Professor Rice explains that *Poe v. Ullman* unsuccessfully challenged state birth control laws prior to *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold*, however, did not use pseudonyms. See *id.*

²⁴ See Rice, *supra* note 22. The Supreme court noted and tacitly accepted the use of pseudonyms, both in *Poe v. Ullman*, 367 U. S. 497 (1961) and later, in *Roe v. Wade*, 410 U.S. 113 (1973).

²⁵ See *Doe v. Diocese Corp.*, 1994 WL 174693, *3 (Conn. Super.).

²⁶ 435 U.S. 765 (1978).

²⁷ See *Doe v. Diocese Corp.*, 1994 WL 174693, *3 (Conn. Super.) (citing *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 783 (1978)).

²⁸ See Steinman, *supra* note 2, at 11 (citing *Gannett Co. v. DePasquale*, 443 U.S. 363, 384-91 (1979)). See also *Doe v. Diocese Corp.*, 1994 WL 174693, *3 (Conn. Super.).

²⁹ 331 U.S. 367 (1947)

³⁰ *Doe v. Diocese Corp.*, 1994 WL 174693, *3 (Conn. Super.) (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

³¹ See *id.*

³² See *id.* at *4 (citing *Buxton v. Ullman*, 147 Conn. 48, 60 (1959)).

³³ See *Doe v. Diocese Corp.*, 1994 WL 174693, *3 (Conn. Super.).

³⁴ 653 F.2d 180 (5th Cir. 1981).

prior opinion, *Southern Methodist University Ass'n v. Wynne & Jaffe*.³⁵ Those circumstances, not dispositive but deserving of consideration, included “challenges to governmental activity,” protection of private information “of the utmost intimacy,” and admissions of “intent to engage in illegal conduct, thereby risking criminal prosecution.”³⁶

Anonymity can be justified only in cases involving a “substantial privacy interest.”³⁷ “The ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs ‘the customary and constitutionally embedded presumption of openness in judicial proceedings.’”³⁸ Embarrassment and humiliation do not, in themselves, create a substantial privacy interest - there must be a highly-sensitive subject matter, the disclosure of which may lead to social stigmatization or danger of physical harm.³⁹ The most common situations in which courts have allowed use of pseudonyms have involved subject matter previously determined by the Supreme Court to trigger privacy protections: birth control, abortion, religion, and issues involving care, custody, and parentage of children.⁴⁰ Federal courts have also permitted pseudonymous filing in cases involving “homosexuality and transsexuality; mental illness or deficiency; drug use; criminality and unprofessional conduct; juveniles, including delinquents, neglected, abused, and illegitimate children; [and] public aid.”⁴¹

At times, the unproven allegations may harm the individual or an institution’s reputation by the disclosure of their identity more than the lawsuit itself, because such allegations would undermine and damage the public’s trust in the individual and/or the institution.⁴² In a case where the defendant, a clergyman, had sexually abused an adolescent boy years before the filing of

³⁵ See *Doe v. Frank*, 951 F.2d 320, 323 (1992) (citing *Southern Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979)).

³⁶ See *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).

³⁷ See *Doe v. Diocese Corp.*, 1994 WL 174693 (citing *Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D. Cal. 1981)).

³⁸ See *Doe v. Diocese Corp.*, 1994 WL 174693 (citing *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992)).

³⁹ See *id.*

⁴⁰ See *Doe v. Diocese Corp.*, 1994 WL 174693, at *5 (Conn. Super.).

⁴¹ See Steinman, *supra* note 2, at 43.

⁴² See *Doe v. Diocese Corp.*, 1994 WL 174693 at *2.

the lawsuit, the court refused to order pseudonym status for the defendant, despite the unproven nature of the allegations and the pain and embarrassment they would pose to the defendant and his family.⁴³

Courts have recognized that any civil action filed might affect the parties' way of life causing damage to their good name and possibly resulting in economic harm.⁴⁴ Even so, the courts seem to agree that only in rare cases, involving special circumstances, should pseudonyms be permitted. An example of pseudonym usage is due to "plaintiffs' ignorance of defendants' names."⁴⁵

The majority of lawsuits are public events, however the courts have carved out a few exceptions when cases involve matters of an extreme sensitive nature or that excess injury would occur if the identity of the plaintiff is revealed.⁴⁶ Merely suffering embarrassment does not count.⁴⁷ As a general rule, the courts "allow pseudonymity in cases that raise a substantive right-to-privacy issue and often involve intimate issues."⁴⁸ However, both plaintiffs and defendants must demonstrate that protection of their identity outweighs the public's interest.⁴⁹

Courts must carefully balance the competing concerns between parties seeking anonymity and the public's right to know. The federal system has not yet dictated guidelines to be used in making such a determination.⁵⁰ Whether to permit the use of pseudonyms is within the individual court's discretion. The Fourth Circuit has established the factors to be considered by courts in its jurisdiction in determining, on a case-by-case basis, whether pseudonyms will be allowed. These factors are:

- whether the justifications asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;

⁴³ See *id.* at *1-2.

⁴⁴ See *id.* at *3 (citing *Southern Methodist University Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979)).

⁴⁵ See Steinmnan, *supra* note 2, at 1, n.2.

⁴⁶ See *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992).

⁴⁷ See *id.*

⁴⁸ See *Rice*, *supra* note 19, at 912.

⁴⁹ See Steinman, *supra* note 2, at 34.

⁵⁰ See *Rice*, *supra* note 19, at 911.

- whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically to innocent non-parties;
- the ages of the persons whose privacy interests are sought to be protected;
- whether the action is against a governmental or private party;
- and relatedly, the risk of unfairness to the opposing party from allowing an action to proceed anonymously.⁵¹

IV. Should Anonymity be Further Expanded into the Family Law Arena

Divorce is distinctly different from other types of civil litigation. From a legal standpoint, the standard of proof bears consideration. Spousal allegations are not subjected to a standard of proof higher than a preponderance of the evidence. Nearly everything about a person is relevant - particularly if children are involved - and there may be little proof of “innocence” or “guilt.” In other types of civil litigation, the judicial system is “designed to lead to public exoneration” if groundless accusations are made during open proceedings. This may not be so in divorce cases, where the abiding harm to the accusing spouse is most often emotional.

The anticipated outcome of divorce litigation is tremendously different than other civil suits. The divorcing parties are not subject to imprisonment, but their very lifestyles are threatened. Their “freedom of action, or liberty, is subject to court orders and their property is at risk.”⁵² At the end of the proceeding, no real determinations are made of guilt or innocence; what follows is, instead, a change in legal status and living arrangements. Respondents to civil litigation “stand accused of committing or threatening civil wrongs . . . to the detriment of one or many individuals.”⁵³ In divorce and child custody actions, the publicly aired accusations often include social and moral wrongs. Such accusations may be even more harmful and embarrassing than civil or criminal accusations. Thus, in the civil realm, as in the criminal, a great deal may be at stake.⁵⁴

⁵¹ See *id.* (citing *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)).

⁵² See Steinman, *supra* note 2, at 16.

⁵³ See *id.*

⁵⁴ See *id.*

Requests for anonymity in the area of family law fall into two categories; “to protect [one or both parties] from a threatened harm or to prevent public disclosure of intimate information.”⁵⁵ Threatened harms may be physical, financial, or social.⁵⁶ “In evaluating whether the threatened harm warrants shielding the [party’s] identity, courts should consider three factors: (1) the nature of the threatened harm; (2) the probability that the threatened harm will actually occur; and (3) the nexus between shielding identity and avoiding the harm.”⁵⁷

Divorce actions are unlikely to engender physical harm of a type that anonymous filing can guard against, but the risks of financial and social harm are great. Threatened financial and social harm do not carry the weight that physical harm does. If the threatened harm includes loss of employment or social ostracism, a court might allow pseudonymous filing, but the courts generally have said that embarrassment and financial loss in themselves are not enough to warrant exceptions to the “open proceedings” rule.⁵⁸ Additionally, the court must evaluate the likelihood that the threatened harm will actually occur. Anonymity will not be permitted unless a high likelihood exists that the harm will occur.⁵⁹ Further, if the harm is likely to occur whether or not the parties are identified, no justifiable reason exists to permit anonymity.

Divorce, by its very nature, is likely to result in some social and financial harm to one or both parties. The financial harm is largely unavoidable since the parties must divide their property and financial resources according to the rules governing that jurisdiction; the financial harms, then, are caused by each opposing party. Such financial harm is not avoided by pseudonymous filing. Social harms will, in most cases, also come largely from those who know or are related to the parties. Since the allegations made by the parties against each other are often shared outside of the courtroom with those close to them, anonymity would not prevent the effects the disclosures may have. Undoubtedly cases occur where the information presented to the

⁵⁵ See Rosenberger, *supra* note 1.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See Rosenberger, *supra* note 1.

114 *Journal of the American Academy of Matrimonial Lawyers*

court in a contested divorce may cause ostracism, job loss, or retaliation, but those cases are the exception and not the rule, and the request for anonymity would have to be judged on its own merits.

Divorces involving child custody issues are viewed in a different light. Anonymity is much more likely to be granted in these cases since much more is at stake where children are involved. The judicial system has traditionally protected the privacy of children, and party names cannot be disclosed without causing the children to be readily identified. This creates something of a disparity in treatment. Simply by having children the parties may receive protection of their privacy that would not otherwise be permitted. As unfair as it may seem, the guiding factor in these proceedings must be the welfare of the children who are innocent parties to the matter and who are unable to protect themselves.

A significant determinant of the availability of anonymity is how much of the plaintiffs' personal life is involved in the lawsuit.⁶⁰ Nowhere are more deeply personal details at issue than in the realm of family law. In *Roe v. Wade*, the Supreme Court found a fundamental right of privacy under the Constitution in matters "relating to marriage, procreation, contraception, family relationships, child rearing, and education."⁶¹ If the intimate facts have already been publicized in some manner, or if the public is likely to have access to the information some other way, then no justification exists for anonymity in the proceeding. Unless pseudonymous filing will actually prevent the dissemination of the information, "the presumption of judicial openness should override the plaintiff's privacy interest."⁶²

In *Wolf v. Hamilton*,⁶³ the Delaware Family Court permitted the parties to protect their privacy in ancillary proceedings related to their divorce.⁶⁴ This proceeding dealt with property division, alimony, and attorney's fees, none of which seem to trigger

⁶⁰ See *id.*

⁶¹ See Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 746, N. 6 (1987) (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

⁶² See Rosenberger, *supra* note 1.

⁶³ See 1993 WL 332453 (Del. Fam. Ct. 1993).

⁶⁴ See *id.* at *1

any substantial privacy concerns.⁶⁵ Those who read the case may therefore assume that anonymity was permitted throughout the divorce proceedings because custody of a minor child was involved,⁶⁶ or one might wonder whether the husband's status as a prominent attorney was a factor in the court's decision. Therein lies one of the problems with permitting the use of pseudonyms; the public may assume facts that are not provided, casting doubt on the integrity of the court.

The public's interest in knowing the identity of the parties must be considered by the courts in weighing the parties' privacy interests. The public is said to have little interest in the identities of individual litigants against each other unless the litigation affects the public at large in some way. This issue has provoked some recent disagreement. One author has noted that much of the literature praises the necessity of privacy and criticizes the lack of protection for it.⁶⁷ Increased public awareness and availability of court proceedings via media coverage has led to an increased public interest in knowing the details of the litigation thus raising the stakes in pursuing anonymity. Interest, however, should not be confused with the right to that knowledge. Unfortunately, today many are desensitized and respect for personal privacy diminishes each day.⁶⁸

Where should the line be drawn to distinguish legitimate public interest from prying into private lives? The Restatement indicates that such a line should be drawn when the fact is for the satisfaction of prying, itself, and not for the purpose of public well-being.⁶⁹ However, it has been debated that gossip does serve the well-being of the public at one end of the spectrum and at the other, freedom to gossip outweighs the freedom of being the object of the gossip.⁷⁰

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See Murphy, *supra* note 6, at 2381.

⁶⁸ See Murphy, *supra* note 6, at 2381.

⁶⁹ See Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 444 (1996).

⁷⁰ See *id.* at 444.

V. Weighing the Public's Right to Know: The Tradition of Open Court Proceedings

The public is obviously very interested in knowing what goes on in civil proceedings.⁷¹ While the public may still attend trials brought under false names, people are prevented from knowing the identity of the parties.⁷² Party identities have been traditionally recognized as part of the information to which the public has a right of access, except in rare cases. "Filing a complaint under one's true name is not only a procedural formality, but is also an acknowledgement of the openness of the American judicial process. Any departure from this practice of full disclosure must overcome the strong presumption against shielding identity from opposing parties and the public."⁷³

A number of policy reasons support the openness of court records and proceedings. Openness to public scrutiny "protects against judicial abuse" because the presence of spectators "guards against corruption, bias, or partiality on the part of the court"; trust in the judicial system is promoted when the public can see with their own eyes that proceedings are fair and that judicial decisions are based on the facts before the court and the applicable law.⁷⁴ Conversely, any secrecy in the proceedings promotes suspicion and distrust. The public often believes that facts hidden from them indicate dishonesty of some sort. This applies to the names of the parties as well as to the evidence itself.

The public must have faith in and respect for the judicial system if the system is to function as it is intended.⁷⁵ "As in the criminal realm, the judicial system seeks to assure civil litigants a fair and accurate determination of the relevant facts and governing law. Public scrutiny serves these interests."⁷⁶ Open proceedings permit members of the general public to observe court proceedings and, hopefully, gain a better understanding of the court system.⁷⁷ This understanding dispels myths of unfairness

⁷¹ See Steinman, *supra* note 2, at 10.

⁷² See *T.S.R. v. J.C.*, 671 A.2d 1068 (N.J. Super. 1996).

⁷³ See Rosenberger, *supra* note 1.

⁷⁴ See Steinman, *supra* note 2, at 15.

⁷⁵ See *id.* at 17.

⁷⁶ See *id.* at 16.

⁷⁷ See *id.*

and encourages parties to obey court orders.⁷⁸ Additionally, “proper identification of a party assures against misidentification of some other party as being involved.”⁷⁹ Public speculation may cause an innocent person to suffer the very harm that the actual parties were trying to avoid in seeking anonymity. The New Jersey Superior Court noted, in *T.S.R. v. J.C.*,⁸⁰ that “[r]egardless of any inconvenience defendant may face in these civil proceedings, it must be remembered that’ the law is not compelling the parties to do anything but disclose the truth.”⁸¹

VI. Balancing the Right to Privacy with the Rights of the Public

Opponents of pseudonymous litigation suggest that a plaintiff automatically waives any right to privacy by initiating litigation.⁸² The counter-argument is that plaintiffs should not have to choose between their privacy rights and their right to seek justice in a court of law.⁸³ “The ‘either-or’ approach interferes with plaintiffs’ constitutional right to have claims adjudicated by the court, and minimizes the practical value of substantive rights accorded by legislatures and courts.”⁸⁴

Courts have yet to establish standards to determine when litigants are allowed to use fictitious names.⁸⁵ One suggestion for dealing with requests for anonymity is to have the courts utilize a balancing test, thus avoiding “pseudonymous litigation on demand nor categorically disallow it.”⁸⁶ Professor Steinman⁸⁷ reasons that the public’s interest and right to access increases as the litigation progresses; the public “need to know” is much less at

⁷⁸ *See id.*

⁷⁹ *T.S.R. v. J.C.*, 671 A.2d 1068, 1072-73 (N.J. Super. 1996).

⁸⁰ 671 A.2d 1068.

⁸¹ *Id.* at 1075 (quoting *Shaw v. Riverdell Hospital*, 376 A.2d 228 (N.J. Super. 1977)).

⁸² *See Steinman, supra* note 2, at 33.

⁸³ *See id.* at 33-4.

⁸⁴ *See id.*

⁸⁵ *See id.* at 1.

⁸⁶ *See Steinman, supra* note 2, at 36.

⁸⁷ *See id.* In her article, Professor Steinman proposes a multi-step approach to how and when the courts should consider the privacy interests of the requesting parties.

the time of filing than it may be when a litigated action comes into the courtroom.⁸⁸ Therefore, the balance will shift throughout the litigation, gradually increasing the burden on the pseudonymous party to prove a need to retain this special status.⁸⁹ By such demonstration the parties interests would not undermine the First Amendment and truly justify pseudonymity.⁹⁰ It is important to remember, however, neither the First Amendment nor any precedents demands publication of private information of one's daily life.⁹¹ Concerns for public interest and the right to know has been given too much consideration, thus depriving the litigants of attention to the real issues.⁹²

The judiciary needs a consistent standard to use as a guideline in deciding whether to permit the use of pseudonyms, but the courts must maintain enough "flexibility to account for unpredictable situations."⁹³ Aside from consideration of a set of enumerated factors, each court should be permitted, in its discretion, to prohibit disclosure of party names upon a showing of good cause.⁹⁴ The burden of showing good cause for anonymity must rest with the requesting party.⁹⁵

Courts have consistently held the avoidance of professional embarrassment or financial consequence or threat of public hostility do not amount to the need for anonymity.⁹⁶ Courts have also recognized general areas in which anonymity is appropriate,⁹⁷ including issues of marriage, sexuality, religion, or the care and custody of children. Cases that do not fall within one of these two broad areas are generally evaluated under the "Stegall test" of weighing privacy interests against the customary pre-

⁸⁸ See Steinman, *supra* note 2, at 36.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See Arthur R. Miller, *Private Lives or Public Access?*, 77 A.B.A. J. 65 (Aug. 1991).

⁹² See *id.*

⁹³ See Chopra, *supra* note 5, at 274.

⁹⁴ See *id.* at 254.

⁹⁵ See *id.*

⁹⁶ See Mark Albert Mesler II, *Civil Procedure — Doe v. Frank: Determining the Circumstances Under Which a Plaintiff May Proceed Under a Fictitious Name*, 23 MEM. ST. U. L. REV. 881, 885 (1993).

⁹⁷ See *id.*

sumption of openness in judicial proceedings.”⁹⁸ The *Stegall* test “has become the standard for determining if a party may proceed under a fictitious name.”⁹⁹ In keeping with the need for case-by-case analysis¹⁰⁰ in making such determinations, the standard of review is abuse of discretion.¹⁰¹

VII. Protecting the Privacy of Divorcing Parties: Suggestions for the Future

Divorce is unique among the types of civil litigation that may be publicly attended. As a general rule, more privacy should be afforded in this realm than in any other. Rather than placing the burden on the parties to show that their privacy interests override the public’s right to access, there should be a rebuttable presumption of privacy.¹⁰² The same factors and guidelines will apply to divorce cases, but the focus will be different.

The typical allegations contained in a divorce proceeding are by their very nature embarrassing. Accusations of poor house-keeping, personal habits, sexual dysfunction or unusual tastes, adultery, mishandling of family assets, and emotional abuse may be aired in the pleadings, during the open court proceedings, and, frequently, to acquaintances and extended family members by the warring spouses. The neighbor next door, the parties’ supervisors and coworkers, and the various other people who may have an *interest* in knowing the details of the breakup have no real business, professional, economical or familial need for this information. When divorcing spouses verbally share the details of their most intimate lives, the remarks may be taken lightly. Court documents, however, somehow lend an air of credibility to the accusations, whether or not they possess any credence. Serious accusations involving the public welfare, such as physical or

⁹⁸ *See id.*

⁹⁹ *See id.* *See also*, Southern Methodist University Ass’n v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979); Doe v. Stegall, 653 F.2d 180 (5th Cir. Unit A 1981); Doe v. United States Dep’t of Justice, 93 F.R.D. 483 (D. Colo. 1982); Doe v. Deschamps, 64 F.R.D. 652 (D. Mont. 1974); Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980); Free Market Compensation v. Commodity Exchange, Inc., 98 F.R.D. 311 (S.D.N.Y. 1983).

¹⁰⁰ *See Mesler, supra* note 96, at 889.

¹⁰¹ *See id.* at 885.

¹⁰² *See Steinman, supra* note 2, 83-88.

120 *Journal of the American Academy of Matrimonial Lawyers*

sexual abuse, are crimes that should be made public in another legal arena.

Additionally, dissemination of such information may cause embarrassment or more far reaching harm into the future. One such example is the person who later becomes a public figure. Public figures do not have the same level of privacy rights as do private citizens. If a public figure sues for divorce, the proceedings are likely to be front-page news. Public figures are aware of this when they initiate court proceedings. The private citizen who divorces, and years later becomes prominent is faced with a different dilemma.¹⁰³ A second possibility of future harm arises when children are involved. Twenty years ago, it would have seemed unlikely that a grown child might seek the court records of his or her divorced parents. Such a case is not beyond the realm of possibility today. In such an event, the resultant harm encompasses not only the divorcing parties, but the seeker of the information as well.

The suggested presumption of privacy in divorce should not extend to the divorce itself. Because divorce denotes a change in legal status, the public does have a substantial right to know of the divorce. This right does not generally extend to the private or salacious details in each pleading, however. Parties who seek to protect their privacy through pseudonymous filing should also seek orders of protection to prevent public access to transcripts and pleadings without a showing of good cause by the seeking party.

The general rule requiring openness of court proceedings, including the names of the litigants, should not be swallowed up by widespread pseudonymous filing in civil litigation. Divorce, however, is a special case requiring elevated privacy protection of the details of marital life. When divorcing parties seek to hide these details from public view, they should be accommodated, barring a showing of the public's need, rather than interest in, the information.

Gale Humphrey Carpenter

¹⁰³ Whether the entire life of a person who somehow becomes a public figure is within the public venue is beyond the scope of this article.