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## Protecting Victims' Privacy Rights: The Use of Pseudonyms in Civil Law Suits

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A minor is included in a sexually explicit commercial video that is widely available across the country. A young boy is molested by his teacher. A wife is raped by her husband. If these victims file a civil lawsuit against their perpetrators using their real names the most intimate details of the crimes and their lives, as recounted in court documents, would be available to the public at large, including through a simple Google search. The availability of this information could not only embarrass the victim, but also cause emotional harm, affect job and educational prospects, and more. Too often, victims are put to this Hobson's choice: seek justice but open one's life to public scrutiny or let injustices stand while preserving one's privacy. While it is well-recognized that there is a presumption in favor of naming parties to a lawsuit stemming from the common law doctrine of open courtrooms, this presumption is not absolute. This paper discusses the propriety of victims using pseudonyms in civil litigation and the importance of victim privacy, while alerting the reader to potential arguments that may be raised when moving to proceed by pseudonym or anonymously in a civil suit. Although this paper relates to civil suits, much of this analysis is also applicable to criminal law. Please contact NCVLI for resources in the criminal context.

### I. Use of Pseudonyms: Why It Matters

A crime victim may need to bring a civil suit in order to, among other reasons, recover damages for emotional distress; gain public acknowledgment of the seriousness of defendant's conduct that is not reflected in the crime of conviction or in a prosecutor's discretionary decision not to spend resources on prosecution; and reveal facts not allowed into evidence in a criminal trial. Requiring victims to disclose their identities when pursuing this avenue of justice inflicts two harms.

First, social scientists have long recognized that victims can experience harm at the hands of the justice system.<sup>1</sup> Refusing victims the opportunity to access justice without sacrificing privacy is one form of re-victimization at the hands of the justice process. "The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which,

his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others.”<sup>22</sup> As one Connecticut court summarized, “[t]o force the plaintiff to proceed without the protection of the pseudonym Jane Doe could only subject the plaintiff to additional psychological harm and emotional distress.”<sup>23</sup> Re-victimization and harm is particularly acute, and extends beyond mere embarrassment and humiliation, when victims of sex crimes have their identities or other private information revealed when they want it to remain private.<sup>4</sup> As one court stated, “for many victims of sexual abuse . . . public revelation of the abuse, if not sought by them, victimizes them yet again.”<sup>25</sup>

Second, putting victims to the Hobson’s choice may dissuade many victims from filing meritorious civil claims involving sexual activity.<sup>6</sup> This could impinge on victims’ fundamental right to access the courts,<sup>7</sup> and the public’s interest in seeing cases decided on the merits.<sup>8</sup>

## II. Courts will Allow the Use of Pseudonyms if the Victim’s Privacy Considerations Outweigh the Presumption of Openness

The right to privacy is a constitutionally protected interest under the federal Constitution<sup>9</sup> and, in many jurisdictions, state constitutions.<sup>10</sup> This right to privacy encompasses a victim’s interest in the non-disclosure of personal information relating to a crime of a sexual nature.<sup>11</sup> A corollary to the right of non-disclosure of personal information is the right to non-disclosure of identifying information when disclosure of private facts is necessary, such as in the prosecution of a civil suit.<sup>12</sup>

Despite the right to privacy, and the merits of proceeding by pseudonym, there are still

hurdles to clear. The most important hurdle is the presumption of open courts.<sup>13</sup> Although the Supreme Court has not explicitly held that there is a constitutional right to public access to court proceedings in civil proceedings, it has implied that it attaches.<sup>14</sup> Other courts have similarly found.<sup>15</sup> Regardless of a First Amendment right to open proceedings, there is a common law presumption of openness.<sup>16</sup> The Federal Rules of Civil Procedure, which many states have used as a model in drafting their own procedural rules, also contemplate open judicial proceedings.<sup>17</sup>

The rationales for open proceedings are four-fold. First, open proceedings help ensure fairness in proceedings and discourage “perjury, the misconduct of participants, and decisions based on secret bias or partiality.”<sup>18</sup> Second, open proceedings aid administrative convenience.<sup>19</sup> Third, the public has a legitimate interest in knowing “which disputes involving which parties are before the federal courts that are supported with tax payments and that exist ultimately to serve the American public.”<sup>20</sup> Fourth, courts express concerns with “basic fairness” if plaintiffs are permitted to proceed by pseudonym but defendants are not.<sup>21</sup>

Be sure to determine whether your jurisdiction has statutory authority or court rules expressly allowing the use of pseudonyms in civil suits. States that statutorily allow pseudonyms include Alaska, Connecticut, Delaware, Florida, Illinois, New Jersey, and Texas.<sup>26</sup>

The presumption of openness is not absolute, however. “[A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial.”<sup>22</sup> As one court stated, the presumption of openness “operates only as a presumption, and not as an absolute, unreviewable license to deny.”<sup>23</sup> The presumption can be overturned if the court finds that privacy considerations outweigh the interest in open proceedings.

Nearly every Circuit and several state courts have decided the issue of whether civil plaintiffs may proceed anonymously or by pseudonym.<sup>24</sup> In nearly all instances, the courts apply a balancing

test, whereby the court considers the need for anonymity against the presumption of public openness.<sup>25</sup> In other words, a pseudonym may be used if the victim's privacy rights outweigh the presumption of openness.

In conducting the balancing test, a number of factors are considered. These factors vary by jurisdiction but often include whether plaintiffs are required to disclose information of the "utmost intimacy" or that is "highly sensitive and of a personal nature."<sup>27</sup> Courts are most likely to find information is of the "utmost intimacy" in cases involving abortion,<sup>28</sup> the well-being of children,<sup>29</sup> and religion.<sup>30</sup> In some circumstances, courts also find that cases involving the plaintiff's sexual history,<sup>31</sup> claims of sexual harassment or discrimination,<sup>32</sup> and discussions of the plaintiff's medical conditions<sup>33</sup> allow for the use of pseudonyms. Generally, the mere threat of embarrassment is insufficient to allow a plaintiff to proceed anonymously.<sup>34</sup> However, disclosure rarely results in "mere" embarrassment: commentators have recognized that disclosure of information, without the victim's consent, in sexual assault cases can "slow the victim's healing process . . ." <sup>35</sup> Given the victims' right to privacy and the importance of it, courts may validly exercise their discretion in finding that victims' privacy rights outweigh the presumption of openness.

<sup>1</sup> See, e.g., Dean J. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 25 (1987) (describing victims' further victimization by the justice system); see also Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that "secondary victimization" by the justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world").

### Practice Pointers

If you are representing a victim in a civil suit that involves a sensitive matter, always consider the use of pseudonyms.

- Determine whether your jurisdiction has a state constitutional right to privacy.
- Determine whether your jurisdiction has statutory authority allowing the use of pseudonyms. (If it does not, contact NCVLI for help crafting model legislation to propose.)
- Remember that the presumption of openness is not absolute!
- Put into evidence that disclosure is not "merely" embarrassment.
- Contact NCVLI for further resources on how best to litigate the issue in civil and criminal courts.

<sup>2</sup> See *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) (internal citation omitted).

<sup>3</sup> *Doe v. Firn*, No. CV065001087S, 2006 WL 2847885, at \*5 (Conn. Super. Ct. Sept. 22, 2006).

<sup>4</sup> See, e.g., *id.*; *United States ex. rel. Latimore v. Sielaff*, 561 F.2d 691, 694-95 (7th Cir. 1977) ("The ordeal of describing an unwanted sexual encounter before persons with no more than a prurient interest in it aggravates the original injury."); Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule that Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. Cin. L. Rev. 125, 155-56 (1998) ("There is nothing more intimate than childhood sexual abuse, and nothing as

potentially devastating to a plaintiff than to have that abuse publicly exposed.”).

<sup>5</sup> *Globe Newspaper Co. Inc. v. Clerk of Suffolk County Superior Court*, No. 01-5588\*F, 2002 WL 202464, at \*6 (Mass. Super. Feb. 4, 2002).

<sup>6</sup> See *EW v. N.Y. Blood Center*, 213 F.R.D. 108, 113 (E.D.N.Y. 2003) (granting plaintiff’s motion to proceed anonymously because the facts of the case provided no basis for “imposing [the] invasion of privacy as the price for litigating a legitimate private complaint”).

<sup>7</sup> See *Chappell v. Rich*, 340 F.3d 1279, 1282 (11th Cir. 2003) (“Access to the courts is clearly a constitutional right, grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment.”); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) (noting access to courts is a fundamental right). Courts and legal scholars alike have recognized that violations of privacy rights implicate an individual’s Constitutional right to access courts. See, e.g., *Globe Newspaper Co. Inc.*, 2002 WL 202464, at \*6 (noting “[i]f the identit[ies] of these victims are not protected by the courts, then their access to the courts will be severely diminished, because they will not be able to turn to the courts for relief from or compensation of their emotional injuries without aggravating those same injuries.”). In essence, as Law Professor Jayne Ressler noted, the result of involuntary loss of privacy is a loss of access to the courts. Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. Kan. L. Rev. 195, 219 (2004) (noting that potential plaintiffs may forfeit the opportunity to seek justice out of fear of disclosure and other would-be plaintiffs may not even initiate litigation).

<sup>8</sup> See, e.g., *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1073 (9th Cir. 2000) (finding district court abused its discretion in collective FLSA action in denying permission to proceed anonymously to Chinese employees working in garment industry in Mariana Island). This is because victims are more likely to proceed to the merits if they may do so without threat of exposure. See, e.g., *Roe v.*

*Providence Health System-Oregon*, Civil No. 06-1680-HU, 2007 WL 1876520 at \*4 (D. Or. June 26, 2007) (noting that the public had an interest in seeing a case decided on the merits, which might be undermined if plaintiffs were mandated to provide their true identity and were thereby deterred from continuing the lawsuit); *L.H. A.Z., K.K., & D.R. v. Schwarzenegger*, No. CIV. S-06-2042 LKK/GGH, 2007 WL 662463, at \*18 (E.D. Cal. Feb. 28, 2007) (noting that “[w]hen the willingness to file suit is chilled by fear of retaliatory action, the public interest in seeing the suit move forward on its merits outweighs the public interest in knowing the plaintiffs’ names”).

<sup>9</sup> See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (recognizing that “a right of personal privacy . . . does exist under the Constitution”); *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (noting cases finding protected privacy interests include an “individual interest in avoiding disclosure of personal matters”).

<sup>10</sup> See, e.g., Alaska Const. art. I, § 24 (“the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process”); Conn. Const. art. I, § 8(b)(1) (“the right to be treated with fairness and respect throughout the criminal justice process”); Idaho Const. art. I, § 22 (“the following rights: (1) to be treated with fairness, respect, dignity and privacy”); Ill. Const. art. I, § 8.1(a)(1) (“[t]he right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process”); Ind. Const. art. I, § 13(b) (“the right to be treated with fairness, dignity, and respect throughout the criminal justice process”); La. Const. art. I, § 25 (“shall be treated with fairness, dignity, and respect”); Md. Const. art. 47(a) (“shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process.”); Mich. Const. art. I, § 24(1) (“the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.”); Miss. Const. art. III, § 26A (“shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process”); N.J. Const. art. I, P 22 (“A victim of crime shall be treated with fairness, compassion and respect by the criminal justice system.”); N.M. Const. art.

II, § 24(A)(1) (“the right to be treated with fairness and respect for the victim’s dignity and privacy throughout the criminal justice process”); Ohio Const. art. I, § 10a (“Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process...”); Okla. Const. art. II, § 34 (“To preserve and protect the rights of victims to justice and due process, and ensure that victims are treated with fairness, respect and dignity, and are free from intimidation, harassment or abuse, throughout the criminal justice process, any victim or family member of a victim of a crime has the right to know ....”) (listing information rights); Or. Const. art. I, § 42(1) (“[T]o accord crime victims due dignity and respect... the following rights are hereby granted...”) (listing rights); R.I. Const. art. I, § 23 (“A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process.”); S.C. Const. art. I, § 24(A) (“To preserve and protect victims’ rights to justice and due process..., victims of crime have the right to: (1) be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal and juvenile justice process.”); Tenn. Const. art. I, § 35 (“To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights.... 2. the right to be free from intimidation, harassment and abuse.”); Tex. Const. art. I, § 30(a) (“A crime victim has the following rights: (1) the right to be treated with fairness and with respect for the victim’s dignity and privacy throughout the criminal justice process.”); Utah Const. art. I, § 28(1) (“To preserve and protect victims’ rights to justice and due process, victims of crime have these rights, as defined by law: (a) to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process.”); Va. Const. art. I, § 8-A (“[I]n criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth....”); Wash. Const. art. I, § 35 (“To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.”) (listing rights); Wis. Const.

art. I, § 9m (“This state shall treat crime victims ... with fairness, dignity and respect for their privacy.”) (taken from Douglas E. Beloof, *The Third Wave of Crime Victims’ Rights: Standing, Remedy, and Review*, 2005 B.Y.U. L. Rev. 255, 262 n.19).

<sup>11</sup> See, e.g., *Michigan v. Lucas*, 500 U.S. 145, 149 (recognizing a state’s legitimate interest in protecting rape victims’ privacy may outweigh defendant’s constitutional right to confrontation); *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998) (concluding that “a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of rape where no penological purpose is being served”); *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) (holding that rape victim has a constitutionally protected privacy interest in videotape depicting her rape).

<sup>12</sup> See generally *Plaintiff B. v. Francis*, 631 F.3d 1310, 1316-18 (11th Cir. 2011) (finding trial court’s order mandating disclosure of victims’ names in civil lawsuit involving their participation in the *Girls Gone Wild* videos to be in error given the sensitive and highly personal nature of the issues in the suit).

<sup>13</sup> The use of pseudonyms is seen as contrary to the doctrine of open proceedings. See *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997) (“Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts.”); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000) (noting that the use of fictitious names “runs afoul of the public’s common law right of access to judicial proceedings”).

<sup>14</sup> *Richmond Newspapers, Inc., et al. v. Virginia et al.*, 448 U.S. 555, 580 n.17 (1980) (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”).

<sup>15</sup> See *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) (“First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings.”); *Luckett v. Beaudet*, 21 F.

Supp. 2d 1029, 1029 (D. Minn. 1998) (“There is a First Amendment interest in public proceedings and identifying the parties to an action is an important part of making it truly public.”).

<sup>16</sup> See, e.g., *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979) (discussing the common law rule of open civil and criminal proceedings); *Doe v. Diocese Corp. et al.*, 647 A.2d 1067, 1070 (Conn. Super. Ct. 1994) (noting the common law right of public access to the courts).

<sup>17</sup> See Fed. R. Civ. P. 10(a) (“The title of the complaint must name all the parties . . . .”); *Id.* at Rule 17(a)(1) (“An action must be prosecuted in the name of the real party in interest . . . .”). But see Ressler, *supra* note 16, at 215 (“The Rule calls for ‘the names of all the parties’ but it does not state that the names must be the true and correct legal names of all parties. If that is what the Rule intended, the drafters could have said so specifically.”).

<sup>18</sup> *Richmond*, 448 U.S. at 569.

<sup>19</sup> See *Doe v. Indiana Black Expo, Inc.*, 923 F. Supp. 137, 139 (S.D. Ind. 1996) (noting that the interest in public proceedings, in part, stems from considerations of administrative convenience); *A.B.C. Plaintiff-Appellant v. XYZ Corp.*, 600 A.2d 1199, 1201 (N.J. Super. Ct. 1995) (stating that open proceedings aid in aspects of the judicial process such as discovery and the enforcement of money judgments and protects against misidentification of some other party as being involved).

<sup>20</sup> *Black Expo*, 923 F. Supp. at 139; see also *Doe v. Doe*, 668 N.E.2d 1160, 1164 (Ill. App. Ct. 1996) (requiring parties to identify themselves “protects the public’s legitimate interest in knowing all of the facts involved in the case, including the identities of the parties”).

<sup>21</sup> See, e.g., *Southern Methodist Univ. Assoc. of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) (“Defendant law firms stand publicly accused of serious violations of federal law. Basic fairness dictates that those among the defendants’ accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names.”); *Black Expo*, 923 F. Supp. at 141-

42 (“Basic fairness requires that where a plaintiff makes [accusations going to defendant’s integrity and deliberate wrongdoing] publicly, he should stand behind those accusations, and the defendants should be able to defend themselves publicly.”).

<sup>22</sup> *Richmond*, 448 U.S. at 581 n.18. See also *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (stating that openness “operates only as a presumption and not as an absolute, unreviewable license to deny”); *Plaintiff B. v. Francis*, 631 F.3d 1310, 1315 (11th Cir. 2011) (noting the presumption of openness is “not absolute” and vacating and remanding district court’s decision refusing to allow victims who engaged in sexually explicit acts as minors in the *Girls Gone Wild* films to proceed anonymously).

<sup>23</sup> *Jacobson*, 6 F.3d at 238.

<sup>24</sup> The Supreme Court has not yet ruled on whether civil plaintiffs may proceed anonymously or by pseudonym. However, it has implicitly approved the practice in a number of cases. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>25</sup> See, e.g., *Sealed Plaintiff v. Sealed Defendant #1*, 537 F.3d 185, 189 (2d Cir. 2008) (balancing the plaintiff’s interest in anonymity against public interest and disclosure and prejudice to defendant); *Schuldiner v. K Mart Corp.*, 284 Fed. Appx. 918, 921 n.2 (3d Cir. 2008) (discussing need for balancing test in determining whether a plaintiff may proceed by pseudonym); *James v. Jacobson*, 6 F.3d 233, 238-39 (4th Cir. 1993) (same); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (same); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) (same); *Coe v. Cook County*, 162 F.3d 491, 498 (7th Cir. 1998) (noting that a justified interest in privacy may overcome the public’s right to openness); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68 (9th Cir. 2000) (employing a balancing test to determine if the need for anonymity outweighs the presumption of public openness and unfairness to the other party); *Femedeer v. Haun*, 227 F.3d 1244, 1246-47 (10th Cir. 2000) (employing a balancing test to determine if the plaintiff’s interest in using a pseudonym outweighed the public’s interest in openness, among other factors); *Doe v. Frank*, 951 F.3d 320, 323 (11th Cir. 1992)

(using a balancing test to determine if the plaintiff's privacy interests outweighed the presumption of openness). *See also, e.g., Unwitting Victim v. C.S.*, 47 P.3d 392, 398 (Kan. 2002) (conducting balancing test to determine that victim could proceed anonymously); *Doe v. Howe*, 607 S.E.2d 354 (S.C. Ct. App. 2004) (same); *Doe v. Shady Grove Adventist Hospital*, 598 A.2d 507, 512 (Md. Ct. Spec. App. 1991) (same).

<sup>26</sup> Alaska R. of Admin. 40(b); Conn. Practice Book § 11-20(c); Del. Sup. Ct. Rule 7(d); Fla. Stat. § 92.56(3); 735 Ill. Comp. Stat. 5/2-401(e); N.J.S.A. 2A:61B-1(f); Tex. Civ. Prac. & Rem. Code § 30.013(c)(1)-(4). Hawaii is also in the process of making Jane Doe legislation law. *See* S.B. 288, 26th Leg. (Haw. 2011).

<sup>27</sup> *See, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Advanced Textiles*, 214 F.3d at 1068; *Frank*, 951 F.3d at 323. Other factors include: (1) whether plaintiffs are challenging governmental activity (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Frank*, 951 F.3d at 323); (2) whether plaintiffs are compelled to admit their intention to engage in illegal activity (*see, e.g., Porter*, 370 F.3d at 560; *Advanced Textiles*, 214 F.3d at 1068; *Frank*, 951 F.3d at 323); (3) whether plaintiffs are particularly vulnerable to harm, and especially whether they are children (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Blue Cross & Blue Shield*, 112 F.3d at 872); (4) whether identification poses a risk of retaliation or mental or physical harm (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; *Stegall*, 653 F.3d at 185; *Porter*, 370 F.3d at 560; *Blue Cross & Blue Shield*, 112 F.3d at 872); (5) whether identification presents other harms including whether the injury litigated against would be incurred as a result of disclosure (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textiles*, 214 F.3d at 1068); (6) whether the defendant is prejudiced by allowing plaintiffs to proceed anonymously, and whether any prejudice can be mitigated by the court (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238); (7) whether the plaintiffs' identities have been kept confidential thus far (*Sealed Plaintiff*, 537 F.3d at 190); (8) the strength of the public interest in disclosure (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textiles*, 214

F.3d at 1068); and (9) whether there are alternative mechanisms for protecting the plaintiff's identity (*see, e.g., Sealed Plaintiff*, 537 F.3d at 190; *Advanced Textiles*, 214 F.3d at 1068).

<sup>28</sup> *See Doe v. Deschamps*, 64 F.R.D. 652, 653 (D. Mont. 1974) (stating that the "intensely personal" nature of pregnancy justified the use of a pseudonym); *see generally Roe v. Wade*, 410 U.S. 113 (1973) (allowing plaintiff to proceed by pseudonym in action challenging validity of anti-abortion law without discussion).

<sup>29</sup> For instance, in *Jacobson*, 6 F.3d at 238, a couple sought to proceed anonymously in a case in which the mother was artificially inseminated with her doctor's sperm, rather than her husband's, in order to protect their children's well-being. In *Stegall*, plaintiffs who challenged the constitutionality of prayer and bible readings at a public school in Texas were allowed to proceed anonymously out of fear of retaliation and violence against their children. *Stegall*, 653 F.2d at 185. *But see Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036 (9th Cir. 2010) (noting the need for a balancing test in determining whether plaintiffs may proceed anonymously, but finding district court did not abuse its discretion in finding minor plaintiffs did not have a reasonable fear of harm, despite the many threats made against them as a result of their suit alleging race discrimination in the admission process of a school).

<sup>30</sup> In *Porter*, plaintiffs brought an action seeking to enjoin the board of education at a local college from permitting the teaching of the bible as a religious truth, in violation of the First Amendment. The Sixth Circuit affirmed the lower court's determination that plaintiffs could proceed by pseudonym, noting that religion is a "quintessentially private matter." *Porter*, 370 F.3d at 560 (citing *Stegall*, 653 F.3d at 186).

<sup>31</sup> In *New York Blood Center*, 213 F.R.D. at 113, the court allowed a plaintiff to proceed by pseudonym after having contracted Hepatitis B as a result of a blood transfusion, since the case would likely delve into the plaintiff's sexual history given that Hepatitis B is a sexually transmitted disease. *See also Diocese Corp.*, 647 A.2d at 1071-72 (allowing plaintiff, who was abused by a priest as a child, to

proceed anonymously, and noting that “[o]ne’s sexual history and practices are among the most intimate aspects of a person’s life”); *Howe*, 607 S.E.2d at 357 (allowing plaintiff, who was sexually abused by a school employee, to proceed anonymously); *Doe v. Bodwin*, 326 N.W.2d 473, 476 (Mich. Ct. App. 1982) (finding trial court was in error in denying plaintiff’s request to proceed anonymously in civil action arising out of the plaintiff’s therapist having a sexual relationship with her during therapy). However, in a Kansas case, the court refused to allow plaintiff to proceed anonymously who sued for money damages after allegedly contracting herpes from defendant. *Unwitting Victim*, 47 P.3d at 398.

<sup>32</sup> See, e.g., *E.E.O.C. v. ABM Indus., Inc.*, 249 F.R.D. 588, 593-94 (E.D. Cal. 2008) (allowing plaintiffs to proceed anonymously in sexual harassment case because plaintiffs faced a greater fear of retaliation than the typical plaintiff); *Advanced Textiles*, 214 F.3d at 1073 (overturning lower court’s determination that plaintiffs could not proceed by pseudonym in FLSA action in which plaintiffs faced harm including termination, deportation, and imprisonment). However, unless additional factors, such as retaliation, are shown, courts typically do not allow plaintiffs to proceed anonymously in these types of cases. See, e.g., *Southern Methodist*, 599 F.2d at 713 (not allowing law students to proceed anonymously in case alleging illegal sex discrimination in hiring practices of summer law clerks); *Luckett*, 21 F. Supp. 2d at 1030 (not allowing plaintiff to proceed by pseudonym in sexual discrimination and coercion case against former landlord).

<sup>33</sup> In *Shady Grove*, a Maryland court found that a plaintiff could proceed anonymously in a case arising out of breach of confidentiality in medical records relating to the plaintiff’s status as having AIDS. 598 A.2d at 512. In *Doe v. Blue Cross & Blue Shield*, 794 F. Supp. 72, 75 (D. R.I. 1992), the court allowed a plaintiff to proceed under pseudonym who was attempting to recoup medical expenses from an insurance company relating to a sex change operation. However, in *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d at 872, the Seventh Circuit did not allow a plaintiff to proceed anonymously in a case in which the plaintiff, who had a psychiatric disorder, was denied benefits allegedly due to him under his medical plan, noting “[t]he fact that a case involves a

medical issue is not a sufficient reason for allowing the use of a fictitious name, even though many people are understandably secretive about their medical problems.” See also *Frank*, 951 F.2d at 322-23 (not allowing plaintiff to proceed anonymously in employment discrimination case relating to his alcoholism); *Black Expo*, 923 F. Supp. at 141-42 (not allowing plaintiff to proceed anonymously in employment discrimination suit in which plaintiff alleged he was fired for taking time off to receive mental health treatment).

<sup>34</sup> See, e.g., *Frank*, 951 F.3d at 324 (“[T]he fact that Doe may suffer some personal embarrassment, standing alone, does not require the granting of his request to proceed under a pseudonym. . . . The risk that a plaintiff may suffer some embarrassment is not enough.”); *Black Expo*, 923 F. Supp. at 142 (noting that economic well-being and possible embarrassment or humiliation are insufficient bases to proceed by pseudonym); *Doe v. Doe*, 668 N.E.2d at 1088 (same). But see *ABM Indus.*, 249 F.R.D. at 592 (stating, in overruling defendants’ objections to plaintiffs’ motion to proceed anonymously, that the “[u]se of pseudonyms by plaintiffs is uncommon, but nevertheless allowed in the unusual case where nondisclosure of a party’s identity is necessary to protect a person from harassment, injury, ridicule, or personal embarrassment”).

<sup>35</sup> Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims’ Identities*, 64 S. Cal. L. Rev. 1020, 1049 (1991). See also Suzanne M. Leone, *Protecting Rape Victims’ Identities: Balance Between the Right to Privacy and the First Amendment*, 27 New Eng. L. Rev. 883, 910-11 (1993) (“Each victim has a unique healing process and the public disclosure of her identity could disrupt that process before the victim is ready.”).

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## NCVLI's Tools: Legal Advocacy, Training & Education, and Public Policy



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**Training & Education.** We train nationwide on the meaning, scope, and enforceability of victims' rights through practical skills courses, online webinars, and teleconferences. We also host the only conference in the country focused on victim law.

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