MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 13, 2018, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Kelly L. Andersen*
Jay Beattie
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer Gates*
Hon. Timothy C. Gerking*
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. David E. Leith
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Sharon A. Rudnick
Derek D. Snelling
Hon. Douglas L. Tookey*
Hon. John A. Wolf
Deanna L. Wray

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. Lynn R. Nakamoto
Margurite Weeks

Guests:

Matt Shields, Oregon State Bar

Council Staff:

Shari C. Nilsson, Executive Assistant
Mark A. Peterson, Executive Director

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Moved to Publication Docket this Biennium	ORCP/Topics to be Reexamined Next Biennium
Fictitious Names ORCP 23 ORCP 27 ORCP 34 ORCP 55 ORCP 79	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 68 ORCP 71 ORCP 79	ORCP 22 ORCP 43	

I. Call to Order

Mr. Keating called the meeting to order at 9:31 a.m.

II. Administrative Matters

A. Approval of December 9, 2017, Minutes

Mr. Keating asked whether any Council members had comments or concerns about the draft December 9, 2017, minutes (Appendix A). Hearing none, he asked for a motion to approve those minutes. Judge Roberts made a motion to approve the December 9, 2017, minutes. Mr. Crowley seconded the motion, which was approved unanimously with no abstentions.

III. Old Business

A. Committee Reports

1. Discovery Committee

Mr. Beattie reported that he and Justice Nakamoto had made suggestions regarding expert discovery and that the committee will review those proposals and decide whether to present them to the entire Council. Mr. Crowley noted that the committee has been most productive with regard to the subject of expert discovery, but he stated that there is still a lot of work to do regarding electronic discovery. He explained that a small group of lawyers from the committee, with members representing both the plaintiffs' bar and the defense bar, will be meeting to attempt to craft language that is neutral and agreeable to both sides. That language will then be presented to the committee.

2. Fictitious Names Committee

Mr. Crowley reported that the committee had met on January 8 and that committee members have been moving along with research and sorting out what is going on around the bar and in other jurisdictions. He stated that the committee had received more input from Judge James Hargreaves (Appendix B) that it will also need to examine.

Ms. Payne asked if the committee's research had revealed whether other jurisdictions have been dealing with this issue through procedural rules or by enacting statutes. Ms. Holley replied that most of her research indicates that the issue is dealt with through statutes or is addressed by common law. Judge Norby

stated that it is interesting is that statutes started appearing around 2003 in other states and that those were some of the most succinct and clear. Ms. Payne asked whether, based on the fact that other jurisdictions are using statutes, the Council might ultimately decide that the issue is substantive and needs to be handled by the Legislature. Mr. Crowley agreed that this is a legitimate question, particularly with the new material from Judge Hargreaves, and added that the committee has not looked at that in great detail yet. He stated that Ms. Holley had drafted a research memo about this issue (Appendix C).

Judge Norby pointed out that the rules promulgated by the Council effectively become statutes, so she was not sure that deferring the question to the Legislature would be the best way to handle it. Mr. Eiva stated that he was not so sure that the rules become statutes, but observed that this is a debate for another time. He expressed concern about making a rule that might potentially prevent victims from keeping their names from the public record without allowing lobbying groups a chance to provide their input about the impact on certain constituencies of people, including rape victims and child sex abuse victims.

Mr. Keating observed that the problem that brought the issue to the surface in the first place is that there is no existing statute or rule that says that filing under a fictitious name is allowed and there is Oregon's constitutional open courts provision to contend with. He stated that he has been involved in different circumstances where the court has relied on that constitutional provision to prevent the sealing of a record with regard to the amount provided for in a settlement agreement. He agreed that the Council clearly does not have authority to amend the constitution, but opined that it can at least obtain a little feedback from the bar whose clients are affected by the use of fictitious names in order to help clarify the issue. Mr. Keating stated that he believes that such cases will begin to be challenged. He stated that he has defended cases prosecuted under a fictitious name and, while he was always sure to identify the true identity of the plaintiff, he has honored that confidentiality. He is not aware of anyone who has challenged the right of a plaintiff to employ the use of a pseudonym, but expressed the opinion that someone may well do that some day.

Ms. Rudnick stated that, to her, the first question is the constitutional question. She pointed out that other jurisdictions with rules that allow filing under fictitious names will not matter if their constitutions allow it but Oregon's does not. She stated that federal laws allow it subject to a showing of good cause, but the federal constitution does not have that open courts provision. She stated that she has done a lot of work in this area and she is pretty convinced that the Oregon Constitution does not allow it. She stated that she does not disagree with the policy underlying it, but observed that the committee might waste a lot of time

and energy if it ultimately decides filing under a fictitious name is unconstitutional.

Judge Norby agreed and stated that the committee has been discussing that very question. Ms. Holley explained that her memo addresses this question. She stated that her reading of the law is that the open courts clause applies to adjudications which are pretty clearly defined in the case law. Judge Norby explained that the committee did not reach a conclusion, other than that it would like to continue its research. She stated that there are states with open court provisions in their constitutions that have also enacted statutes allowing for filing cases under fictitious names, and those options might be helpful to the Council. She stated that several state statutes use a process where a litigant has to fill out a form to apply for the ability to use a pseudonym, and those applications are kept in a place where they can be accessed but it is a little more difficult.

Ms. Holley agreed that the Council may ultimately decide that a rule change may tend to impact a substantive right. Judge Roberts pointed out that there is a distinction between whether it is procedural or substantive. She stated that she would be very cautious of paying undue attention to whether another state has a similar open court provision in its constitution because Oregon's constitution is very much a living constitution that the Supreme Court has applied separately and with vigor, which is not true in most states. Judge Norby stated that the counter argument to that is that Oregon's constitution has a victim's rights section written into it because the public voted for it. Judge Roberts pointed out that the topic under discussion does not fall under the victims' rights provision. Judge Norby observed that, with a living and breathing constitution, different provisions frequently cause interactions with other provisions.

Judge Hill noted that there is already a statutory procedure in juvenile cases where the courtroom is open but the records are sealed, and he wondered how that fits with the open courts provision. Ms. Holley explained that the thought is that there is no difference between juvenile and adult courts, so the courtroom is open if someone is giving testimony but other procedures are not. Mr. Eiva asked whether juvenile cases use pseudonyms. Judge Hill stated that this only happens in juvenile appellate cases, with the rationale apparently being that the written documentation is sealed. He wondered if the Oregon Supreme Court has ruled about the constitutionality of keeping documents sealed. Ms. Holley stated that the court did not rule on that issue, just on the issue of keeping a newspaper out of a hearing in juvenile court, which it ruled was unconstitutional. She explained that the court had also examined the issue in adult cases and decided that the court had the discretion to seal records. Judge Roberts pointed out that this discretion must be exercised under very limited conditions and that it is not the

general rule. Ms. Payne asked whether the court has ruled that it does not violate the open courts provision to seal documents under limited circumstances. Ms. Holley stated that it has made that ruling and, in those cases, there was good cause shown.

Judge Leith asked whether Ms. Rudnick's conclusion was that there were no circumstances where the use of initials or pseudonyms would be appropriate. Ms. Rudnick stated that she had not looked at that particular issue. She noted that she was not suggesting shutting down the committee but, rather, that the constitutionality is the threshold question. If the committee determines that filing under a fictitious name is permissible under Oregon's constitution, it can then attempt to define what it believes are the parameters. She stated that she suspects that those parameters would be very narrow. Judge Leith wondered whether the Council only needs to come to terms with the question of whether it is ever constitutionally permissible to use a pseudonym. If so, the rule would not be speaking to the constitutionality of it but, rather, speaking to the procedure to be used in the cases where it is permissible. Ms. Rudnick suggested that the Council could delineate the parameters by which the court could decide. She stated that the rule could define the burden that would need to be met. Judge Leith posited a structure similar to the "long arm" provision of Rule 4 where the rule not only lists items to consider but also states that the constitutional minimum must be met. Ms. Rudnick stated that she felt that, if the Council decides that it is able to write a rule that is constitutional, it would not be necessary to include in the rule that the constitutional minimum must be met. She noted that the Council's legislative history will be helpful to practitioners.

Judge Leith observed that one reason the Council is examining the issue now is that there is currently no uniformity as to how the process happens. Ms. Rudnick agreed that there is currently a void. Judge Hill asked whether Ms. Rudnick's concern is that she does not want to vote on an amendment unless she is convinced it is constitutional. Ms. Rudnick agreed. Judge Hill stated that he feels the same way and that it would be helpful for the committee to really focus its efforts on this question. Mr. Crowley stated that the challenge is that there is so little actual constitutional case law that addresses this point. He stated that there is some law in Oregon that allows for pseudonyms in limited cases, such as children in foster abuse cases. He observed that, in practice, the procedure is being handled in different ways in different counties. Multnomah County and Clackamas County each have supplemental court rules, with Multnomah County using its rule fairly regularly and Clackamas County not using its rule at all. Mr. Crowley stated that practitioners are coming to court in other counties and asking to file under a fictitious name, with some courts allowing the practice and some not allowing it. He stated that privacy concerns are very sensitive, but that it

would be helpful for the state to have uniform practices.

Prof. Peterson acknowledged that the ORCP are not statues. He stated that a former Council Executive Director, Fred Merrill, had written a law review article [*The Oregon Rules of Civil Procedure–History and Background, Application, and the "Merger" of Law and Equity*, 65 OR. L. REV. 527, 582-88 (1986)] with some history of Oregon's establishment of procedural rules. The Legislature either had that power or usurped that power and enacted statutes, but then delegated that power to the Council. Prof. Peterson stated that the ORCP are published in the Oregon Revised Statutes and that a fair reading is that the last amendment to a rule, whether made by the Council or by the Legislature, is what is currently in effect. He then addressed the issue of substance versus procedure and stated that this can sometimes be a gray area. *See, Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). To his mind, a rule that allows fictitious names in pleadings, or forbids the practice, does not mean that the rule is barring someone from a remedy; rather, it just means that there is a procedure to allow a party to file or defend a case with a pseudonym and some kind of regularized procedure for it. Prof. Peterson acknowledged that there is still the constitutional issue to address. He stated that, if the Council decides that allowing the procedure would require a statute or a constitutional amendment, Oregon's constitution is subject to being amended and the Council can give the benefit of its thought to the Legislature in the transmittal letter that accompanies the promulgated rules at the end of the biennium. He noted that there is precedent for this.

Ms. Holley stated that other statutes the committee has examined include the balancing the that the court is required to engage in and what the considerations are, so they may impact substantive rights. Judge Norby stated that there are already instances where pseudonyms are allowed that are covered in the ORCP that were created by this Council, so interplay between rules and statutes on the question exists already.

Mr. Bundy asked whether there was a consensus in the committee about whether a rule change regarding this issue would be substantive or procedural. Judge Norby stated that there was not. Ms. Rudnick stated that it would be interesting to look at the legislative history of statutes that allow for pseudonyms in a juvenile context to see if the legislature addressed the constitutional issue. She noted that there may be something there that gives the Council some comfort that there is a window to make such a change. She stated that such history might be found in Legislative Counsel opinions. Judge Norby asked Ms. Rudnick to send the committee an e-mail outlining her suggestion.

Mr. Crowley stated that the committee will continue its work, proceeding with caution. Mr. Shields stated that, if the ultimate conclusion is that some sort of legislative remedy is needed, the Council can talk to the Bar to see if some assistance can be provided.

3. ORCP 7 Committee

Judge Norby reported that the committee had not met since the last Council meeting but did have a meeting scheduled soon.

4. ORCP 15 Committee

Judge Gerking stated that the committee met on January 9 and successfully drafted suggested amendments to the remaining portions of the rule. However, there was not enough time to get it on the docket for today's meeting. He stated that the committee's plan is to re-circulate the language one more time among committee members before the February Council meeting and to bring the draft amendment to the Council at that time.

5. ORCP 23 C/34 Committee

Ms. Wray reported that she and Judge Leith had met but that other committee members were unable to join in. She reminded the Council that the issue concerned whether the Council should do anything about a problem arising from a Court of Appeals case [*Worthington v. Estate of Davis*, 250 Or App 755, 282 P3d 895 (2012)] where a plaintiff waited until the last day to file a personal injury case and sued a defendant without knowing that the person had passed away. She stated that the Court of Appeals held that, in such instances, it is an issue of misidentification rather than misnomer and, therefore, the plaintiff had missed the statute of limitations and the case did not relate back under ORCP 23 C. The Council was asked to examine whether a rule change would be appropriate.

Ms. Wray stated that Judge Leith and she are convinced that this would be a substantive change and they do not see any way that the Council could make such a change. Judge Hill stated that he did not understand the distinction, as the issue the court was construing in *Worthington* was a rule of civil procedure. Mr. Eiva noted that the defendant's right to the statute of limitations is substantive. Mr. Keating pointed out that Rule 23 C is the relation back of amendments provision. Ms. Wray agreed that *Worthington* is case law interpreting an ORCP, but wondered whether it is really in the purview of this Council to address a Court of Appeals case under a long line of precedents. Ms. Payne stated that the issue in *Worthington* was the application of a particular rule to circumstances presented

therein. She stated that the ruling was that the estate is not the same person as the dead person. In *Worthington*, the court held that when the plaintiff served the dead person's wife with the claim, the estate did not get notice of the claim and, therefore, the ability to amend the complaint under Rule 23 C to add a new party, the estate, was not available. The case's result was that the new party had not received notice of the claim within the time provided in the statute of limitations, so it could not relate back. She stated that the committee could not think of a way to amend Rule 23 without adding some sort of substantive provision to apply to the *Worthington* circumstances because it would require changing the substantive right of the defendant to enjoy the statute of limitations.

Ms. Payne stated that Rule 34 relates to the substitution of a party where, if the party dies during the litigation, the estate can be substituted within a certain amount of time. She noted that this happens if the case is filed before the defendant passes away, and the personal representative or successor must provide notice, so these circumstances are inapplicable to the *Worthington* case. Ms. Payne observed that the *Worthington* case presented rather unique circumstances and she is not sure how often this happens. Mr. Eiva stated that the plaintiffs' bar sees this situation as a known trap and discusses it a lot. He stated that plaintiffs' lawyers frequently ask staff to check on whether an estate has been opened before filing a suit. He explained that he would appreciate an amendment to avoid the result in *Worthington*, but he agreed that such a change would be substantive. Ms. Wray noted that the Oregon Trial Lawyers Association (OTLA) did not file an amicus brief on the case in question. Ms Payne explained that the fact that OTLA did not file an amicus brief does not necessarily mean anything as there is no mechanism by which OTLA is placed on notice of appeals of general interest to its members. She again emphasized that she does not necessarily see a procedural fix to the rule for this fact pattern.

Mr. Beattie wondered how ORCP 34 became part of the committee's charge. That rule provides that actions continue either in favor of a plaintiff or against a defendant who dies after the filing of a claim, and the *Worthington* situation involves death before the filing of the claim. Ms. Payne explained that the rule did not come up in this particular case, but that the committee was going to examine the rule to see if any changes needed to be made, and that the committee did not find anything to change there either.

Mr. Beattie observed that the Council finds itself in somewhat of a conundrum, since the rules, as originally promulgated, were a collection of statutes taken from the Oregon Revised Statutes, which were written by a Legislature that did not care about procedure versus substance. He noted that the result is a collection of rules that clearly involve substance, coupled with a restriction on the Council's ability to

modify substance. Whatever Rule 23 provides now, Mr. Beattie stated that he does not believe the Council can expand or contract that to the extent that it will affect the application of the statute of limitations.

Mr. Andersen stated that this is a problem that comes up for plaintiffs more frequently than many would realize and that it is a trap for the Professional Liability Fund. He stated that there is no easy way to avoid the problem – the only way to be absolutely sure to not get caught in this trap is to do periodic searches of every county in the state to see if a defendant has died. He stated that he feels that the problem deserves further study and that he believes that there is a way to modify the ORCP to address it. Mr. Andersen suggested keeping the committee active for full debate and disclosure. Ms. Wray agreed that it is a problem, but stated that the question is whether it is a problem that only the Legislature can fix. Mr. Eiva suggested that the committee could discuss the possibility of sending a suggestion to the Legislature. Mr. Beattie stated that this issue involves ORS chapters 30 and 109 and issues like probate, survival of actions, and claims against dead defendants, which are beyond the scope of what the Council can address. Judge Roberts noted that the problem could be easily solved by an extension of the statute of limitations in certain cases, which is clearly beyond the Council's purview. She stated that the critical question is whether the estate is the same person as the dead person, and the fix seems to her to be legislative.

Mr. Andersen opined that the problem could be solved by changing the rule to the effect that the statute of limitations is met by establishing notice. He stated that, if the plaintiff named the wrong party, the plaintiff should be able to amend to insert the proper party if the proper party knew of the action before the statute had expired, even if service on the proper party was not complete. He again stated that he would like the opportunity to examine the issue more carefully to see if there is a procedural rather than a substantive fix. Mr. Eiva noted that, even if the committee decides that it is a substantive fix, the Council would likely have to do a procedural fix to accommodate it, so there is a reason to have a conversation with the Legislature about it. Ms. Rudnick stated that it seems to her that the core problem is that the Court of Appeals said that the dead person and the estate are not the same person. She stated that the Legislature could fix this by saying that the estate is the same party as the dead person.

Judge Conover stated that, if the issue is considered further, the Council will need to look at the other ramifications of saying that the estate is the same person as the dead person. He explained that he has a before him case now that involves the termination of a business entity and the beginning of a new business entity, and stated that rules about dead people and estates might be analogized to dissolved business entities and new business entities. He expressed concern that

any rule change by the Council would need to be narrowly tailored so as not to affect this type of case or it could have some unintended consequences.

Mr. Keating stated that it sounds like there are things the committee should continue to discuss. Mr. Andersen agreed to join the committee.

6. ORCP 55 Committee

Judge Gerking stated that the committee had met on January 10 to discuss Judge Norby's complete re-draft of ORCP 55. At that meeting, the committee members reviewed her work and were extremely impressed. Judge Gerking explained that the draft is a clear improvement in terms of clarity and organization but stated that the committee did not have adequate time to review the draft carefully. The committee will meet again on February 12 to carefully examine the changes provision by provision, but that may take more than one meeting. He stated that it is possible the committee may have something to share with the Council by March, but it may not happen until the April meeting. Judge Gerking stated that he was optimistic that the committee would have something to present, and he would not have said that two or three months ago.

Judge Norby stated that the committee's goal was to retain all of the content of the rule without substantive change – to reorganize and rewrite the rule so that it is more understandable and cohesive. She stated hat her draft is divided into four sections: 1) general definitions and description; 2) subpoenas to testify, whether at deposition or trial or hearing; 3) subpoenas for production that do not have to do with protected health information; and 4) subpoenas that have to do with protected health information. She noted that, as she went through the rule, there were sections that even she could not understand, so she will be relying on the committee for help during its review. She mentioned that she did her best to keep similar material together so that practitioners would not have to jump around in the rule to find what they need.

Both Mr. Keating and Judge Wolf agreed that the draft is impressive. Mr. Eiva asked whether non-committee Council members can look at a copy of the draft. Judge Gerking stated that he would prefer not to circulate the draft until the committee has had a chance to further study and discuss the draft within the committee.

7. ORCP 79 Workgroup

Mr. Crowley stated that the committee had met by telephone the previous Thursday and had come to the conclusion that the group should wind down. He explained that the workgroup's initial mission was to look at Rule 79 regarding temporary restraining orders (TRO) and preliminary injunctions because a question had been raised in the Council's survey about the clarity of the rule and standardization. He noted that the Council had not looked at the rule in some time. Mr. Crowley stated that the committee began with the idea that it wanted to get input from practitioners as to whether the rule needed to be modified. However, the committee had some difficulty getting input from practitioners.

The committee is aware that attorneys sometimes tend to rely on the federal rule, which is not the same as the state rule. Mr. Crowley noted that a recent article by Dallas DeLuca of Markowitz Herbold PC (Appendix D) addresses this problem. He stated, however, that he is not sure whether problems with the rule arise often in the courts. The committee heard from an attorney in the Special Litigation Unit of the Department of Justice who provided concerns that, when TRO are entered, it is sometimes difficult for courts to meet the deadlines for setting and holding preliminary injunction hearings and there are sometimes delays in receiving a decision. Mr. Crowley stated that perhaps this is more of a practical issue for the courts to address with training or a change in scheduling procedures rather than something for the Council to address, because the rule itself is fairly clear about the timelines.

Mr. Crowley stated that the workgroup feels that it should disband and, if more concerns are raised in the future, it can be re-formed. The Council agreed.

IV. New Business

Prof. Peterson stated that Holly Rudolph of the Oregon Judicial Department (OJD) had raised a potential issue regarding Rule 27 (Appendix E). She expressed concern that House Bill 2673 that passed last session regarding name and gender changes may conflict with the guardian ad litem requirements of Rule 27. Prof. Peterson stated that his e-mail exchange with Ms. Rudolph seemed to indicate that she believes that a guardian ad litem is more like a guardianship and would be intrusive on the decision making of the minor. He noted that a guardian ad litem frequently is a parent, but that the Council had made changes to Rule 27 because there was a problem with the rule being abused by individuals taking advantage of their relatives. Prof. Peterson wondered if anyone on the Council with more experience in this area thought that there is a problem. He stated that there seems to be two paths to the remedy the minor is seeking: getting a court order or completing a process with the State Registrar of the Center for Health Statistics. He asked Council members to take a closer look at his correspondence with Ms.

Rudolph and the House Bill and to let him know if they have any further insights. He stated that he would circulate any further correspondence with Ms. Rudolph.

Judge Wolf stated that the concern seems to be whether a guardian ad litem needs to be appointed on name and gender changes that are going to court. He explained that the packet that the OJD provides used to include forms to appoint a guardian ad litem, under the assumption that one needed to be appointed. Apparently some courts found that the statutes do not require that it be the child that applies for the name change but, rather, that the parent can apply, in which case the parent is the party and no guardian ad litem is required. The OJD therefore removed the guardian ad litem forms from the packets. Judge Wolf stated that courts that interpreted the statute differently then complained because the form was no longer included. Judge Wolf noted that the new forms even use the language"I, parent/guardian, am applying for the name change," which leaves the child out of the litigation.

Prof. Peterson stated that, according to the Council's last change to Rule 27, it seems clear that a minor as a party needs a guardian ad litem appointed. Judge Wolf agreed that this is the practice in a civil case where a child is suing someone, but in a name change the statute is fairly brief and he does not see that the statute requires the child to be the party that applies. If the child is not the party, there is no need for a guardian ad litem. However, if the child is the party, a guardian ad litem is needed. He stated that, from his perspective, no rule change is necessary. However, if a change were needed, he felt that it would be a legislative fix that makes it clear that a parent can apply for a name change on behalf of a child.

Mr. Keating stated that the Council would wait to hear further from Ms. Rudolph on the subject.

V. Adjournment

Mr. Keating adjourned the meeting at 10:35 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 9, 2017, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

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Hon. Douglas L. Tookey*
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Members Absent:

Travis Eiva
Sharon A. Rudnick
Margurite Weeks

Guests:

John Bachofner, Jordan Ramis PC*
Matt Shields, Oregon State Bar

Council Staff:

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I. Call to Order

Mr. Keating called the meeting to order at 9:33 a.m. He apologized for only being able to attend the prior two Council meetings by telephone and thanked Ms. Gates for stepping in to fill the chair role at those meetings.

II. Administrative Matters

A. Welcome New Members

Mr. Keating welcomed two new members, both of whom had been previously introduced at earlier meetings: Margurite Weeks and Justice Lynn Nakamoto. Prof. Peterson explained that Ms. Weeks, the Council's new public member, had attended the November Council meeting as a guest but that she had not been formally appointed by the Supreme Court until shortly after that Council meeting. Ms. Nilsson stated that Ms. Weeks was unable to attend today's meeting due to the very recent birth of her son a few days prior. Prof. Peterson explained that Justice Nakamoto had also not been formally appointed until very recently, although Council staff was under the impression that she had been.

Mr. Bachofner stated that he had been contacted by a number of people who applied for a position on the Council who had not received any notification that they had not been chosen. Prof. Peterson replied that such replies would be a part of the Bar's appointment process and that the Council has never been responsible for that task in the past. Mr. Bachofner stated that he would check with the Bar's liaison to the appointment committee.

B. Election of Treasurer per ORS 1.730(2)(b)

Prof. Peterson stated that he had spoken to Ms. Weeks about the position of treasurer and that she had indicated via e-mail that, if nominated, she would run and, if elected, she would serve in that capacity. Judge Wolf nominated Ms. Weeks for the position of treasurer. Judge Gerking seconded the motion, which passed unanimously without abstention.

C. Approval of November 11, 2017, Minutes

Mr. Keating asked whether there were any suggestions or concerns regarding the November 11, 2017, minutes (Appendix A). Hearing none, he asked for a motion for approval of the minutes. Judge Gerking made a motion to approve the November 11, 2017, minutes. Mr. Anderson seconded the motion, which passed unanimously without abstention.

D. Committee Membership

Prof. Peterson referred the Council to the most current committee roster (Appendix B) and asked Council members to review it. He reminded the Council that the bulk of its work is done in committees and asked members who are on a committee who have not yet attended a meeting to reach out to the chair of the committee. He also asked members who would like to join a committee of which they are not yet a member to check with the chair.

E. Contacting Legislators

Prof. Peterson stated that he had sent a draft e-mail template that Council members could modify and send to the legislators whom they had agreed to contact. He asked any member who had not received it to contact him or Ms. Nilsson. He stated that the goal is to ensure that legislators on committees that are significant to the Council (e.g., Ways and Means, Judiciary) are kept up to speed on the Council's activities. There are two reasons for this contact: 1) blatant self-interest, in that the Legislature funds the Council; and 2) the Legislature has ceded the power to promulgate court rules to the Council and, when the Legislature receives the Council's transmittal letter and rule amendments at the beginning of a legislative session, it should not be a surprise to them. Prof. Peterson asked those members who have not yet signed up to contact a legislator to do so.

Justice Nakamoto stated that she had received a response from Rep. Greenlick, who expressed great interest in the Council's work and asked a question about whether some of the rule changes were related to the expense of discovery. Prof. Peterson stated that this is a great case in point for the importance of reaching out to legislators. He stated that he will be sure to emphasize in his future draft templates that the Council's meetings are open to the public and that legislators are always invited to attend.

III. Old Business

A. Committee Reports

1. Discovery Committee

Judge Bailey stated that the committee had met the previous week and had a lively discussion and debate, particularly around the issues of e-discovery and proportionality. He stated that Mr. Crowley and Ms. Rudnick had been working with members of the plaintiffs' bar to draft potential language that will satisfy all parties and that some good suggestions had been made but that there is no formal language to bring to the full Council yet. Judge Bailey reported that there had also been a lively discussion of the possibility of requiring, 10 days before trial,

discovery of the names and files of experts and the potential subject matter to which they may testify. There was also a good discussion about whether it is Oregon's God-given right to trial by surprise. Judge Bailey stated that he and Mr. Beattie would try to come up with some language to bring to the Council regarding expert discovery. He stated that the committee would be meeting again in early January.

Mr. Bachofner asked whether the committee had discussed the distinction between testifying experts and experts. Mr. Beattie stated that the amendment being considered would require disclosure of witnesses only so, if a party was not calling an expert as a witness, that expert would not be required to be disclosed. Mr. Bachofner stated that he is personally a fan of Oregon's unique trial by ambush, even though it is more difficult on defendants, but that he sees a benefit to identifying testifying experts by the first day of trial and making arrangements for the exchange of files for the purpose of expediting the trial itself. He stated that it would still preserve the privacy and privilege of the testifying expert. He stated that he feels that, if it is not a testifying expert, there is no obligation to disclose. He noted that, in Washington, only disclosure of testifying experts is required. Mr. Beattie noted that the goal is a very simple provision and that he and Judge Bailey would circulate it to the committee for evaluation before bringing it to the Council.

Mr. Anderson agreed that there should be disclosure at the beginning of trial, but stated that requiring it 10 days before is just another deadline to worry about. He argued that it just adds to the expense of trial, but at the beginning of a trial when the parties have to disclose their witnesses anyway is a good time. Ms. Payne recalled that someone had brought up that it might be a Uniform Trial Court Rules (UTCR) issue and she wondered whether the UTCR address it. Mr. Beattie stated that they do not. Judge Gerking explained that Jackson County has a custom of the court requiring disclosure of witnesses prior to voir dire so that potential jurors can be asked whether they know any of the witnesses. Mr. Keating recalled that Multnomah County Judge Robert Jones promulgated his own rule about 20 years ago that any expert witnesses who lived or practiced within the tri-county area had to be disclosed and it bloomed from there. He stated that the first 20 years of his practice was 100% trial by ambush and he liked that best. He pointed out that what devolved from disclosing experts on the day of trial was that the plaintiff would disclose the experts he or she was going to call in two hours, whereas the defendant would disclose the experts he or she was going to call in two weeks, when it came time for the defense's case, giving the plaintiff much more time to prepare. He also recalled that Judge Jones had prohibited lawyers from researching the experts who were disclosed under his rule, which was very unrealistic and to which no one seemed to adhere. He noted that requiring

disclosure 10 days ahead of trial at least puts everyone on the same playing field.

Judge Bailey stated that he had asked members of the committee to try to explain Oregon's unique system because, as a judge, he strives for transparency and openness and he struggles to understand the benefits of "expert by ambush." He stated that he understands the costs of litigation and Judge Hill's worry that requiring disclosure could be a slippery slope leading to deposing experts. He appreciates that and he agrees with Judge Hill that there should not be deposition of expert witnesses, only fact witnesses. However, he asked any Council members if they could help further explain why the issue is so important. Judge Gerking stated that he feels that it has a lot to do with experienced trial lawyers feeling pride that they are capable of thinking on their feet and dealing with sudden changes in the trial process, and this includes dealing with unknown expert witnesses, a lot better than colleagues who practice in other states. Mr. Keating reported that colleagues from other jurisdictions are appalled by this Oregon practice, and their first question usually involves how lawyers get ready to try cases. His answer is that it forces counsel to understand the merits of their cases and to examine the witness on the facts of the case instead of what he or she may have said 15 years ago.

Mr. Beattie agreed that knowing the merits of the case is important, but he stated that knowing who the adversary's witnesses are increases the effectiveness of invaluable cross-examination, which in turn increases the accuracy of the outcome of the case. He noted that the process works in other states and in the federal system, and that Oregon is the only state that he knows of that does not have expert discovery. He stated that he is proposing a very a very simple change to make it easier for judges, and pointed out that some judges are already requiring disclosure, Oregon Evidence Code (OEC) Rule 104 hearings, and production of files prior to trial. Mr. Beattie pointed out that *State ex rel Union Pacific Railroad v. Crookham* [295 Or 66, 68-69, 663 P2d 763 (1983)] held that the judge was not allowed to require the disclosure of fact witnesses, but that begs the question of whether judges can permissively do what they are currently doing. He stated that it would be valuable to have a rule that spells it out and that such a rule would speed things up, increase accuracy, and not increase a burden on either plaintiffs or defendants. He opined that, 10 days before trial, all parties should know who their witnesses are.

Judge Hill stated that making such a change to the rule could raise questions about how to define what an expert is. He posited a situation where an attorney calls a traffic officer as a fact witness to talk about what happened in an auto accident case, but asks questions that rely on the officer's experience and training. He wondered, if that witness was not disclosed 10 days before trial, whether that

non-fact-based evidence would be stricken. Mr. Beattie replied that this is an issue that the committee needs to discuss further. He stated that his proposal was disclosure of all witnesses 10 days before trial, both expert and non-expert, and a short statement as to the subject matter of their testimony. Judge Hill stated that, if such an amendment were made, an attorney might feel an obligation to seek a continuance once the disclosure of experts has been made because he or she did not expect that expert and feels that they need more time to prepare. Judge Roberts replied that, if the disclosure is not for the purpose of discovery, and it is not, this could be handled by stipulation. Judge Gerking wondered what the purpose of disclosure is, if not discovery. Judge Roberts replied that, with respect to expert witnesses, the issue of OEC Rule 104 hearings is pretty important because, when a party requests hearings for each witness on the day of trial, it disrupts the trial schedule. Mr. Beattie noted that, if the desire is to address just experts, the committee can do that and include a working definition of what an expert is. Judge Roberts stated that, if there is concern about a slippery slope, any amendment can explicitly state that there will be no depositions of expert witnesses. Judge Leith stated that the rule could also say that there will be no continuances granted based on the disclosures. Mr. Keating observed that the rationale that has always been articulated for disclosing experts is for the purposes of voir dire, and that was the reason for the tri-county rule when Judge Jones started it, but that it quickly ballooned beyond that.

Mr. Anderson stated that he had recently spoken with attorneys who practice in both Idaho and Oregon. He pointed out that Idaho has expert discovery and that these particular attorneys hate it when compared to Oregon. Mr. Anderson opined that, if an attorney knows the case thoroughly, there is no need to depose an expert. In the case of medical experts, he pointed out that the medical profession is already annoyed at how attorneys interrupt their lives, so the possibility of depositions of medical doctors ahead of trial in addition to testifying at trial could be problematic. He worried that this is a slippery slope and agreed with Mr. Keating's concern that it gives an advantage to the plaintiff. Mr. Anderson suggested that the better way to solve the problem is to ratchet it the other way with no disclosure at all for either side. Judge Roberts pointed out that this is not feasible and that there is a need for disclosure of the names of expert witnesses for the purposes of jury selection. She stated that, when she asks potential jury members about whether they know any of the people named as possible witnesses, the hands that go up are always regarding the expert witnesses. Judge Bailey reported that there was a recent mistrial in Washington County for that reason – a new expert was presented after trial began and two jurors knew the expert. The judge ultimately felt it would have been a miscarriage of justice to have barred the expert from testifying, so he declared a mistrial. Unfortunately, that wasted two days of time on the tight Washington County docket. Judge Norby

stated that she has had cases where potential jurors were professionals who had studied under expert witnesses in other states, so it is not just a local question. Mr. Beattie reiterated that the intent was not to allow depositions or expert discovery except for names and the general area of testimony. He raised another area of concern for the committee to address: that experts may, in some cases, be disclosing privileged information about the patient pretrial, which is impermissible without a waiver.

Mr. Bundy stated that another issue is whether there will have to be a second disclosure ultimately, because he will disclose his people and the opposing party will see an expert that he or she was not expecting and feel that he or she needs to get an expert in that area as well. He stated that sometimes there is no way of anticipating what the evidence is going to be and what the trial plan is going to be, so there cannot be one 10-day notice where all witnesses are disclosed. In his experience he really, really gets to know a case about two weeks before trial, once he determines whether the case will really be going to trial, rather than settling. He expressed concern that there is more to it than just a 10-day notice, especially in complex cases. Judge Roberts agreed that Mr. Bundy made a good point, but she stated that there is no reason that the amendment could not have some built in flexibility to allow for such circumstances.

Judge Hill conceded that it is sometimes difficult to articulate, but that one of the things that makes him proud to be an Oregon lawyer is that things are different here. He stated that there is a tradition of civility and appropriate conduct that does not exist in other jurisdictions. He opined that it is not merely a function of size, but that it is cultural. Judge Hill noted that one of the things that makes Oregon unique is a system whereby everyone actually tries their cases. He stated that, when he started practicing in the mid-1970s, it was relatively inexpensive and cases actually went to trial. There has been an evolution, for completely logical reasons, but the new standard is that civil trials are three to four days instead of one day, there are expert witnesses, and trials are more expensive. He expressed concern that the change proposed by Mr. Beattie would be an even further cultural change and stated that it is an important demarcation.

Judge Bailey noted that the proposal is not anything new, that Judge Jones did it years ago, and that different jurisdictions and different judges are currently doing it in different ways. He stated that the goal of the committee is to attempt to create some consistency and that 10 days was just a suggestion that can be adjusted or changed. He asked the Council to let the committee attempt to draft some language, and stated that the committee would not even bring language to the Council if the committee could not agree among itself. The Council agreed that this was a good way to proceed.

2. Fictitious Names Committee

Mr. Crowley reported that the committee had not met but that members were doing research and would meet again in the beginning of January. Judge Norby stated that Mr. Crowley had circulated to committee members an article (Appendix C) about the transparency of the courts that had traced the history of fictitious names in lawsuits back to Britain where landlords had to adopt a fictitious name to evict tenants. She stated that the article then segued into the practice in America and explored whether cases can be filed under fictitious names consistent with a transparent, legitimate court system. Mr. Crowley stated that Ms. Rudnick had found the article, and stated that he would share it with the entire Council.

3. ORCP 7 Committee

Judge Norby stated that the committee met on November 21 (Appendix D). She stated that the committee first discussed the proposal by attorney Jay Bodzin about embracing e-mail as a viable method of alternative service, creating a particularized process that guards against pitfalls in its use, and ensuring that it is reasonably calculated to result in actual notice. At the beginning of the committee's discussion she wanted to determine whether the only problem was ensuring that a defendant actually gets notice or trying to create a process in a rule that the committee would propose to the Council that would be best calculated to ensure that actual service would occur. Prof. Peterson had reminded the committee that Judge Roberts had expressed concern about the issue raised in *Pennoyer v. Neff*, 95 US 714 (1878): the risk that a court would take personal jurisdiction over a party who does not have even a transitory presence in the state. The committee talked about the fact that publication is not necessarily in the jurisdiction and that follow-up mailings are not required to be within the jurisdiction, and the committee asked Mr. Snelling to do some research on the matter.

Mr. Snelling stated that he was a little bit cautious to say that he completely understands the issue, but he did look for articles and cases related to it. He noted that it is sometimes called "tag jurisdiction," and pointed out that jurisdiction under ORCP 4 A(1) is only established by the fact that the defendant was present in the state at the time he or she was served. He did not find any research that he thought was particularly helpful, and pointed out that the same problem exists with publication and service by mail; in all of those cases there is not really an actual requirement that the defendant receive service. While that may be the intent, there is no way to actually verify receipt unless someone is personally served. He stated that the committee did not think this was something that should

prevent e-mail as a method of alternative service.

Judge Norby stated that the only other problem the committee could think of was the more obvious problem of trying to find measures that would come as close as possible to assuring actual receipt. She stated that the committee had briefly discussed the idea of service by Facebook or other social media. Judge Norby stated that the committee had asked Ms. Wray to look into research with other states and jurisdictions about rulings on the use of e-mail and social media for service and the development of rules on that. Ms. Wray noted that, surprisingly, Oregon is a little behind the curve on the social media and e-mail service issue and that there is much to learn from other jurisdictions. She stated that she found articles indicating that the courts are allowing it and that it makes a lot of sense to take a hard look at the issue. Ms. Wray stated that she would be doing further research, including examination of two particular cases she found. Ms. Payne asked whether other states' rules are like publication, where a court order is required to serve by e-mail or social media. Ms. Wray stated that this is the case. Judge Norby noted that, in one of the cases Ms. Wray presented to the committee, the court found that e-mail service did not provide an assurance of receipt and was therefore invalid, but the other case found that it did provide assurance of receipt. Curiously, in the case where e-mail service was not allowed, the reason that service by e-mail was sought was because the lawsuit was against an internet educational organization with no geographic offices. However, the court still found that there was not enough assurance of receipt by e-mail. Judge Norby stated that the committee is still doing research and working with Prof. Peterson's initial language and that it will keep the Council posted.

The committee also discussed the proposal from Holly Rudolph of the Oregon Judicial Department (OJD) to update the presumptive alternative method of publication. Judge Norby reminded the Council that, at the last Council meeting, she had proposed the idea of using a website rather than publication in a newspaper. She and other newer Council members were informed that this idea was proposed in the Legislature a few years ago as a less expensive and more efficient service method than publication, but there was objection from publishers that make their living from publishing these notices. Judge Norby stated that, after that Council meeting, she and Prof. Peterson had spoken privately as well as with the committee to see if there was some compromise that could be reached. She noted that, when publication was accepted as the presumptive alternative service method, litigation through attorneys was the rule and not the exception and most parties who filed lawsuits had the means to afford service by publication. However, because times have changed enough for the OJD to have created a committee that looks out for the interests of self-represented litigants, it is clear that there are now a lot of parties who do not have the means to afford service by

publication. Judge Norby expressed concern that this is, in some cases, preclusive of litigation at all and that people are being denied a remedy simply because of their lack of means.

Judge Norby proposed modifying ORCP 7 by adapting it to meet the needs of low-income litigants who are precluded from pursuing relief by their lack of means. She explained that carving out an exception for those litigants would not diminish the returns for the small business owners who publish notices, because these litigants would not have the means to publish anyway. Judge Norby stated that Prof. Peterson had suggested that the Oregon State Bar could perhaps create and manage a sort of hybrid website to be used as a sometimes-alternative method to publication for low-income litigants and a sometimes-adjunct method for litigants who can afford publication costs. She suggested that this could be a good step in the right direction and a real boon to justice for low-income people. Judge Norby acknowledged that Mr. Snelling had expressed concern that no other ORCP is tailored to a particular socioeconomic group. However, she pointed out that no other ORCP of which she is aware creates a financial obstacle to litigation like ORCP 7's requirement to publish a summons.

Ms. Payne wondered how a website would give notice like publication does. Judge Norby replied that it would be similar to posting in a courthouse, but that people would need to learn that the website exists. Judge Roberts expressed skepticism that people would look at a website once a day to see if they had been sued. Judge Bailey pointed out that people do not come to the courthouse every day to see if they have been sued either. Judge Roberts observed that the purpose of service is to bring notice and that, whatever form it takes, there has to be some realistic hope of it doing so. Judge Hill noted that the website idea would be of value all of the time. He stated that, if the website were created, it might be a good idea to require that everyone use it under Rule 7. Judge Bailey wondered why the Council would make such a rule when the goal is to choose the method with the best potential to provide notice. He expressed doubt that very many people are currently looking at publications such as the Business Journal but that it is apparent that the Legislature's policy decision was to be more worried about the publications' welfare than getting notice to people who are litigating cases. Judge Norby stated that there are many people who care about litigants getting notice, but they are not necessarily the same people who are making money from publishing legal notices. She pointed out that a proposal that was completely well-intended had evaporated because of business interests. She stated that the Council has to acknowledge and recognize that there are other people involved in making these laws who have political constraints and requirements that they have to deal with to stay in their jobs. However, the Council needs to find a way to move closer to better justice in a way that is feasible to the Legislature.

Mr Beattie observed that most publication of summonses involves property and probate issues and wondered how often the courts order publication in connection with the service of a summons and complaint in other civil cases. Judge Hill stated that he orders publication quite frequently. Judge Leith stated that he orders publication when there is a demonstrated difficulty or impossibility of serving an actual named defendant. Judge Gerking explained that it happens often in domestic relations cases. Judge Leith observed that the rule, as currently written, allows judges to require a diligent search and, if the plaintiff has not demonstrated that they have looked for electronic contact information, he will deny the motion for alternative service. If the plaintiff has an alternative electronic contact for the defendant, Judge Leith will require that the plaintiff use it as opposed to just publishing or posting the summons. Judge Hill wondered whether a judge needs some standards to determine what is effective service once he or she has allowed a plaintiff to serve electronically. Ms. Holley noted that this is a function of e-court. Judge Leith observed that his goal is to find a better fit to potentially achieve better service, but that it does not necessarily mean that it will succeed. However, it is a better calculated effort than publication. Judge Hill summarized that, for e-mail service as with publication, a plaintiff would have to have some showing of why they think it is the most likely method to succeed.

Judge Bailey suggested that the way to promote the rule would be to say that the website is carving out something in addition and that publication is not going away. He noted that the whole idea is to give the best possible chance of getting notice to someone, and the website is just another, more realistic, modern-day opportunity to get notice. He pointed out that people are on their media devices all of the time and that judges are actually starting to take defendants' social media account information in order to send them notices. Judge Norby asked whether Judge Bailey was proposing promoting a website as an adjunct in all cases instead of a necessity in some cases and an adjunct in others. She observed that this could be a first step toward potentially using the website as a sole means of providing notice that might have an appeal for legislators and their constituents. Judge Bailey stated that he thought it would just be one of the alternative ways in which service could be done. Prof. Peterson suggested that a website could be similar to the one currently run by the Bureau of State Lands for unclaimed property. He explained that he has actually received calls from people who have seen his name on that website and that the idea of the service website would be similar.

With regard to electronic service, Prof. Peterson stated that he drafted language in a potential amendment, but that service by e-mail or social media scares him a bit. He stated that he and Ms. Nilsson had looked into various social media and found that some social media apps allow for PDF files to be sent but some do not, so that

may be a limiting factor as to which apps would be useful in terms of service.

Judge Norby explained that the committee had not discussed the issue of follow-up mailing after substituted or office service again because there was not enough time. The committee will take up that issue again at a later time. She invited Mr. Anderson to join the committee due to his experience with social media. Mr. Anderson agreed.

Mr. Keating observed that the committee has much to discuss and that nothing would be resolved today, but that the Council looks forward to the committee's next report.

4. ORCP 15 Committee

Judge Gerking stated that the committee had met on November 28 and discussed section D of the rule. He reminded the Council that, at the October meeting, the Council had agreed on the committee's suggested modifications to section A but had agreed that section D is very confusing and needs work. Judge Gerking stated that Prof. Peterson had determined that the language in section D was borrowed from the repealed statute, ORS 16.050. The rule appears to address the need to file a motion to enlarge the time to file a pleading or a motion or to do some other act both when the deadline has not yet passed and when the deadline has passed. Judge Gerking stated that one question the committed discussed was whether this rule would require a late pleader, after the 30 days has run for filing the answer, to file a motion with the court to allow the answer to be filed after the 30 days have run and before default has been entered. He stated that this seems nonsensical and would create more problems than it would solve. Prof. Peterson drafted options for the committee to look at, but nobody was very happy with any of them. Judge Gerking stated that he had come up with a different option and nobody liked it either, but that discussions are ongoing. He included the options that the committee is thinking about (Appendix E) just for the Council's information. He stated that the committee will meet again and report back to the Council in January.

Ms. Payne stated that she and Mr. Bundy believe that the rule works the way it is. She observed that counsel will agree to move the deadline and, if the rule was changed to require a motion, an attorney would have to file a motion every time the parties agree to move a deadline, if it does not impact the hearing date. As it is worded now, it says that the court may allow it, but there is no mention of any motion being required to do it. Prof. Peterson agreed that, the way it appears to work now, it is up to the plaintiff to move to strike if a party files something late. He stated that the existing language seems to say that the court *may allow*, which

would imply that the late filer would ask the court to allow it. He stated that he is not a fan of adding more motion practice and that the Council may wish to change this. Judge Gerking stated that it is somewhat redundant because there are other rules that include a motion to enlarge, including Rule 47 and Rule 68.

Mr. Bundy pointed out that, the way it is interpreted now, the rule allows a lawyer to look at the other lawyer and say "you know the judge is going to allow me to do this, right?" and avoids the whole issue of having to bring the court into something where one side knows the other side is going to lose on the issue of the late filing. Prof. Peterson stated that he has received calls from former students or from lawyers using the Bar's lawyer-to-lawyer referral service who say,"I just realized I'm in default, but the other side hasn't taken a motion for default. What should I do?" He stated that the language of the rule says "the court may allow," so he tells them, "You need to file something, get off the phone!" Prof. Peterson stated that it is not 100% clear whether one needs to ask permission or forgiveness. Judge Roberts observed that it is always easier to ask for forgiveness. Prof. Peterson agreed that his has been his advice but he was uncertain as to whether it was correct.

Prof. Peterson noted that section D's lead line includes the phrase "to plead or do other act," language that was carried over from ORS 16.050. He wondered whether there are any "other acts" allowed under section D. His sense is that the language had to do with the timing of filing pleadings and motions and that the language got carried over for reasons he does not know. He suggested that this language could be eliminated from the lead line. Judge Norby observed that, with self-represented litigants, it can be difficult to ascertain pleadings from other actions. Judge Hill wryly noted that self-represented litigants are usually asking him to do an impossible act.

5. ORCP 22 Committee

Mr. Beattie reported that the committee had not met again but, rather, that he had circulated a proposal via e-mail that he then presented to the Council (Appendix F). He explained that he had used Judge Hill's recommendation for simplicity in subsection C(1) and eliminated the language requiring agreement of the parties to file a third-party complaint after 90 days. Prof. Peterson reminded the Council that an alternative discussed by the Council was agreement of the parties or leave of court. He stated that this is the only rule where the parties or the court can exercise a veto. He explained that the logic of using "or" was that sometimes the lawyers in a case have a better feel for what is going on than the judge does and, if the lawyers agree that it would be better to add a party now, rather than to have ancillary litigation, it may be appropriate to allow them to

make that decision. Mr. Beattie stated that this was his initial proposal but that Judge Hill had made the point that allowing the parties to make that decision would be expanding the docket of the court without the permission of the court. Judge Hill stated that, most of the time, if all of the parties agree the court will allow it, but he is uncomfortable creating a unique situation where the parties can control the court's docket.

Mr. Beattie made a motion to put the amendment to ORCP 22 on the publication docket for the September Council meeting. Judge Roberts seconded the motion, which passed by majority vote with one dissenting vote (Ms. Payne).

6. ORCP 23 C/34 Committee (Ms. Wray)

Ms. Wray stated that the committee had not yet met but that a meeting was scheduled for the following week.

7. ORCP 55 Committee (Judge Gerking)

Judge Gerking stated that the committee has been examining Rule 55 to see if there are ways to make it more clear. The committee met in late November and agreed that the following would be helpful: reorganization; improving lead lines; breaking apart some sections because they address more than one subject; and eliminating redundancies. He explained that this is a longer-term project and that he anticipates having a draft for the Council in February. He pointed out that the mission of the committee is not to change anything but, rather, just to make the rule read more clearly.

8. ORCP 79 Workgroup (Mr. Crowley)

Mr. Crowley reported that the committee had a telephone conference set up but that only he, Judge Roberts, and Judge Wolf were able to attend so not very much of substance was accomplished. He stated that the committee would meet again before coming back to Council with any recommendations. Mr. Crowley noted that Prof. Peterson is still waiting to get input from the OSB's Consumer Law Section but that the committee had received decent input from lawyers who deal with temporary restraining orders and preliminary injunctions. He stated that an article on that subject has also been circulated to the committee that suggests that the Oregon rule is different from Rule 65 of the Federal Rules of Civil Procedure. Mr. Crowley observed that, at this point, there does not seem to be a groundswell to make big changes to this rule, and stated that the committee will also discuss that at its next meeting.

IV. New Business (Mr. Keating)

No new business was raised.

V. Adjournment (Mr. Keating)

Mr. Keating adjourned the meeting at 10:50 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Oregon Council on Court Procedure

Fictitious Names Committee

January 8, 2017 – Meeting Report

Members Participating: Ken Crowley (Chair), Meredith Holley, Hon. Susie Norby, Hon. Curtis Conover.

The meeting was held by phone conference, and began with a discussion of our tasks carrying over from the last meeting. The discussion picked up on our continuing efforts to research use of fictitious names.

(1) Our inquiry began with Judge Hargreaves letter raising questions about the use of fictitious names in Oregon pleadings.
(2) We then took a look at the Clackamas County and Multnomah County SLRs, what were their origins, how are they used, how often are they relied upon. We agreed that lack of uniform practice could be a concern.
(3) Meredith Holly added to our materials with a research memo in support of broader use of fictitious names. (attached) We discussed and agreed that there is value in having protections for highly sensitive, private embarrassing information in limited situations.

Our next angle is going to be looking at how other jurisdictions have addressed this issue. We are gathering state statutes and will be reviewing and discussing these at our next meeting.

After that we will talk about whether there should be a fix in the Oregon rules and if so what that should look like.

Shari Nilsson <nilsson@lclark.edu>

Re: Council on Court Procedure and fictitious party pleading in Oregon

Mark Peterson <mpeterso@lclark.edu> Fri, Dec 29, 2017 at 11:02 PM
To: Jim Hargreaves <jrhdks@gmail.com>
Cc: Shari Nilsson <nilsson@lclark.edu>

Judge Hargreaves,

Thank you for noticing that the Council is discussing the use of fictitious names in pleadings issue that you raised. I will share your thoughts with the committee that is considering the issue. It appears that the practice is somewhat limited but whether it should be allowed and, if so, under what circumstances and with what procedures is the issue. There may be very solid reasons for allowing the practice in limited circumstances but, even if this is so, there appears to be no uniformity as to when the use of fictitious names should be allowed and what procedural safeguards should be in place. At the first instance, the state constitutional issues will be sorted out. Even a good idea cannot be implemented if it cannot pass constitutional muster.

I do not predict how the Council will ultimately come down on most of the issues that it undertakes. However, I continue to be impressed by the thoughtful deliberations that are evident in the decision making of its diverse and experienced membership.

Best,

Mark

--
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On Fri, Dec 29, 2017 at 10:13 AM, Jim Hargreaves <jrhdks@gmail.com> wrote:

> Professor Peterson
>
> Having started this discussion about the use of fictitious party names in Oregon, I was quite interested to read the minutes of the November meeting of the Council on Court Procedure relating to this topic. I am very pleased to see this matter being given a substantial review.
>
> In reading through the minutes, a couple of things caught my eye upon on which I thought I would comment. One such eye-catcher was, to quote the minutes, “Mr. Anderson stated that he is pretty sure that fictitious names were used many times even dating back to colonial times. He stated that the Federalist Papers were written with fictitious names and important cases such as Roe v. Wade were litigated in that manner as well. He stated that it is hard to imagine constitutional problems if the history of filing under fictitious names goes back to colonial times.”
>
> When researching for the paper I presented that started this discussion, after working with Oregon law, I in fact did substantial searching looking for “old” cases to see if there was in fact some precedent for fictitious name pleading. I could find nothing to substantiate Mr. Anderson’s belief that such pleading went back to colonial times. I did find that some states, by statute, allow fictitious name pleading. I also found that several of the federal circuits have processes for using fictitious name pleadings. As far as I could find, these processes have always arisen out of

torturing some of the language in various parts of the Federal Rules of Civil Procedure. I could find no case where there was a discussion regarding the Constitution of the United States and this issue. In fact, I don't remember finding any cases at the state level where constitutional issues were discussed. With all of that said, I am not about to claim that I found or read every case that might be out there. There may be some lurking out there I missed.

Next, as to Mr. Anderson's use of Roe v. Wade to bolster his position, I would simply point out that this issue was never raised in that case and I suspect, just as has happened in the past here in Oregon, the Supreme Court found the need to decide the case compelling and simply chose not to open a procedural door that the parties had not opened themselves.

The second issue that caught my eye was the amount of discussion around how often fictitious party pleading was used. It left me with the impression that some thought that if it was only a "small" problem, it was not worth talking about. To me, that is sort of like the concept of being "a little bit pregnant". There is no halfway. Fictitious name pleading in Oregon is either allowed or not allowed under current law.

Finally, I agree with those who see potential Oregon constitutional issues in this matter. I considered diving into that arena when I was working on my paper and chose not to. I thought it better to just stick to pointing out the conflict with ORCP and Oregon statutes, since the prohibition seemed so clear at that level. If the Commission determines to pursue changes to ORCP around this issue then some serious constitutional law research and analysis will certainly be needed.

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Jim

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Shari Nilsson <nilsson@lclark.edu>

Re: A little reading for your fictitious party work group

Mark Peterson <mpeterso@lclark.edu> Thu, Jan 4, 2018 at 8:39 AM
To: Jim Hargreaves <jrhdks@gmail.com>, Shari Nilsson <nilsson@lclark.edu>

Jim,

Thank you for the two articles. I'll see that the fictitious names committee gets them. These are in addition to a the articles that I am aware that committee members have shared. Stay tuned.

Best,

Mark

--
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On Sun, Dec 31, 2017 at 11:30 AM, Jim Hargreaves <jrhdks@gmail.com> wrote:

> Hello Mark
>
> Having seen that your group really is interested in this topic, I decided to dig back into my research and see what I could find that might that might accelerate the learning curve for the group. I came up with two documents that I think they might find to be of interest.
>
> One document is a Notre Dame Law Review article from 1982 that, in my opinion, takes a fairly sympathetic view toward the use of fictitious names. The other is a white paper from 2015 produced by an outfit called The News Media and the Law. As the name implies, is directed to the news media.
>
> Both of these pieces discuss most of the same issues but I found them both to be of value in looking at this issue.
>
> I hope your folks find these interesting.
>
> Jim
>
> Jim Hargreaves
> Legal Observer & Commentator
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White Paper: Anonymous Civil Litigants

A Problem of Court Access
Feature
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Plaintiffs are often allowed to proceed anonymously in the Fairfax, Va., courts under a state law.

By Tom Isler, McCormick Foundation Legal Fellow. This is adapted from a longer "white paper" that will be available on our web site soon.

Last June, a jury in Fairfax County, Va., awarded $500,000 to a medical patient who alleged that, while he was undergoing a colonoscopy, two doctors disparaged and defamed him to each other and to the medical staff in the operating room. The patient, who was fully anesthetized for the procedure, never would have heard the doctors' running commentary — joking that he suffered from syphilis and tuberculosis, which he did not; ridiculing his masculinity; suggesting that doctors found him tiresome and annoying — except that he had recorded the audio of the entire operation on his cell phone because, he claimed, he thought he would have difficulty understanding or recalling post-procedure instructions and wanted to record them. The patient was awarded $100,000 for defamation (for the comments about syphilis and tuberculosis), $200,000 for medical malpractice, and $200,000 in punitive damages.

The case and verdict garnered widespread media attention. *The Washington Post* even obtained and posted excerpts of the audio recording on YouTube.[1] But in all of the media coverage, one detail was absent: the patient's name.

In his complaint, the patient identified himself only by his initials, "D.B.," and stated that he was "commencing suit anonymously pursuant to Code of Virginia § 8.01-15.1," a provision of state law that sets out the criteria for challenging the "propriety" of maintaining "anonymous participation" in a "proceeding commenced anonymously." D.B. never sought the court's permission to proceed anonymously. He didn't file any motion to withhold his full name, and the defendants never formally challenged his anonymity. The court never entered any order, written or oral, addressing anonymity. The issue simply never came up. D.B. decided he didn't want to reveal his name, and that was that. (The lawsuit and *The Washington Post* both named the doctor, Tiffany M. Ingham.)

Throughout the country, anonymous or pseudonymous litigation[2] is generally disfavored, but courts have considerable discretion to permit it. Frequently, as in D.B.'s case, courts permit the arrangement without explanation or analysis. While some jurisdictions now have local rules or statutes that articulate a standard for pseudonymous litigation and factors for the courts to weigh, the case law related to anonymity is far less developed than doctrine concerning courtroom access or sealed documents. As recently as 2007, an appellate court in Indiana wrote that "[a]lthough anonyms have appeared in Indiana state cases, there is no reported Indiana decision

where the use of anonym has been challenged. Hence, we have no specific criteria to apply." *Doe v. Town of Plainfield*, 860 N.E.2d 1204, 1206–07 (Ind. Ct. App. 2007). Federal case law is more abundant, but not all circuit courts of appeals have yet ruled on the standards governing anonymity.[3]

Reasons for this disparity may be that anonymity requests are less common than sealing or closure orders, or that litigants and the press do not challenge anonymity as much as they do other protective orders, resulting in fewer court orders and opinions. Another reason may be that, when the issue is addressed, it is frequently resolved in oral or written orders that do not end up in published reporters or searchable legal databases like Westlaw or Lexis, making the precedent harder to find.[4] And even when the issue is addressed in writing or formal opinions, the discussion is frequently without analysis.[5] Courts may simply be less focused on the issue because they do not view a litigant's identity as an important aspect of court transparency, because no courtroom is being closed to the public and no document is being sealed.

But anonymity or pseudonymity *is* a form of court closure, a kind of redaction or sealing that withholds from the public potentially valuable information about pending litigation, and should be treated as such by the courts. The benefits of an open and transparent court system and the press's ability to report on legal proceedings — subjecting all players to extensive scrutiny, guarding against a miscarriage of justice, giving assurance that proceedings are fair, discouraging perjury and decisions based on bias, providing context to the legal proceedings[6] — are all potentially undermined when the public and the press cannot tell who has invoked the power of public courts to resolve disputes. And when parties are permitted to litigate under pseudonyms, other secrecy tools_ — sealed documents, gag orders, courtroom closures — often will be employed as well, further limiting public oversight of those matters.[7]

Individuals are not the only civil litigants who request to use pseudonyms. Corporations also seek anonymity, raising different and potentially broader issues of public concern. For example, baby carrier manufacturing company ErgoBaby unsuccessfully tried to remain anonymous while suing the U.S. Consumer Product Safety Commission to keep a government safety report about one of its products out of the Commission's online database.[8] Anonymity raises still other questions when invoked by, or bestowed upon, a criminal defendant, whose prosecution and imprisonment may be shrouded in secrecy.[9]

There may well be situations where a litigant's anonymity should be maintained, for example, when there is an imminent risk of physical harm to the litigant if his or her identity is revealed, or if revealing the litigant's identity would expose him or her to criminal liability. But courts should recognize that anonymity is a form of closure, redaction or sealing, and require litigants seek permission to use a pseudonym, so that the parties themselves do not solely determine whether to withhold their identity from the public. Courts should be required to enter specific findings on the record justifying the use of a pseudonym, in recognition of the public interest in the openness of court proceedings. Anonymity should be permitted only if the litigant demonstrates a compelling need and if less restrictive measures would not protect the harm to be avoided, consistent with First Amendment principles.

Norma McCorvey, right, may be the most famous anonymous plaintiff ever; she was Jane Roe in the landmark 1973 abortion rights lawsuit *Roe v. Wade*.

Overview of case law regarding pseudonymous litigation

It is difficult to quantify how prevalent pseudonymous litigation is, because courts employ an endless array of pseudonyms beyond the popular monikers "John Doe" or "Jane Roe." There are many variations on the "Doe" theme: Boe, Coe, Foe, Hoe, Koe, Loe, Moe, Noe, Poe, Soe, Voe, Woe, and Zoe.[10] Some pseudonyms are descriptive ("Pseudonym Taxpayer," "Patient A"),[11] while others are more evocative ("Jane Endangered," "Unwitting Victim").[12] Still others fail to announce their fiction: "Alfred Little," "David Becker."[13] And then there are litigants who proceed only by their initials.

The U.S. Supreme Court has never addressed when parties should be permitted to litigate without using their real names, although cases like *Roe v. Wade[14]* and, more recently, *Adoptive Couple v. Baby Girl*,[15] appear to show tacit approval of the practice in certain situations.

Courts generally reject a categorical approach to anonymity and instead weigh the circumstances of each case.[16] Courts tend to allow the use of pseudonyms when the interests favoring anonymity outweigh the public interest in disclosure. Although some courts, including the Third Circuit, consider the "magnitude of the *public interest* in maintaining the confidentiality of the litigant's identity," *Doe v. Megless*, 654 F.3d 404, 409 (3d Cir. 2011) (emphasis added), more federal circuit courts ask whether "the *plaintiff's* interest in anonymity" outweighs "the public interest in disclosure and any prejudice to the defendant." *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (citing cases from the Fifth, Ninth, Tenth and Eleventh Circuits) (emphasis added).

In practice, courts often grant anonymity "when identification creates a risk of retaliatory physical or mental harm," "when anonymity is necessary 'to preserve privacy in a matter of sensitive and highly personal nature," or "when the anonymous party is 'compelled to admit [his or her] intention to engage in illegal conduct, thereby risking criminal prosecution.'" *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). Some federal circuit courts have attempted to identify more specific factors to assess the strength of the litigant's need for anonymity and the likelihood and severity of harm that would result from disclosure.[17] But even within this framework, courts' discretion is broad.

Anonymity is most prevalent in cases involving juveniles or victims of sex crimes. Many states have statutes or court rules specifically addressing anonymity in these subcategories.[18] Pseudonyms are also frequently requested and granted in matters involving reproductive rights (such as abortion), mental illness, or other cases in which the litigant must disclose conduct or a medical condition or an immutable characteristic that carries significant social stigma.[19]

Courts generally refuse to grant anonymity when the litigant seeks only to prevent unwanted publicity, personal embarrassment or economic harm.[20] But others have held that "an adequate threat of personal embarrassment and social stigmatization" is proper grounds for granting

anonymity. *See Jane Roes 1-2 v. SFBSC Mgmt., LLC*, --- F. Supp. 3d ---, No. 14-3616, 2015 WL 163570, at *3 (N.D. Cal. Jan. 12, 2015) (allowing two exotic dancers to use pseudonyms in a Fair Labor Standards Act class action lawsuit against a nightclub operator).

Although many courts speak of permitting pseudonyms only in "exceptional circumstances,"[21] in practice, courts tend to conduct simple balancing tests to resolve disputes about pseudonyms.

Unfortunately, those balancing exercises tend to systemically undervalue the somewhat abstract benefits of court transparency in favor of more immediate, concrete harms alleged by litigants. *See Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 551 (D.N.J. 2006) (discounting the public interest in openness because "this interest exists in some respect in all litigation and does not outweigh the strength of the factors in favor of Plaintiff's use of a pseudonym"). A better approach would be to require compelling reasons for anonymity. Under such a system, courts would still have discretion to grant anonymity in appropriate cases, but would resolve issues in favor of openness when litigants do not have substantial privacy interests to protect and who merely seek to avoid publicity, notoriety, or embarrassment.

Ergobaby, a manufacturer of baby carriers, fought to keep its name anonymous as it sued the Consumer Product Safety Commission over a report about one of its products.

Making the case for disclosure

Journalists who find themselves covering a proceeding with an anonymous litigant and who want to challenge the use of a pseudonym, may want to seek to intervene or more informally invite the court to review the use of pseudonyms. The following are arguments that could be made against anonymity.

Disclosure is the default; pseudonyms are disfavored. Most courts have rules that require parties to provide their names on complaints and court filings. Notably, according to the Federal Rules of Civil Procedure, in federal court the "title of the complaint must name all the parties . . . ." Fed. R. Civ. P. 10(a). A presumption of disclosure should be the starting point for anonymity analysis, and those seeking to use a pseudonym should have to justify any departure from the normal procedure. *See, e.g., Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (noting the presumption against anonymity). Granting anonymity to litigants is actively "disfavored." *See, e.g., Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.).

Pseudonymity is a form of court closure, sealing or redaction. Permitting anonymity has the effect of shutting the public out of the courtroom for any discussion of the litigant's identity, or placing a litigant's name under seal in every document filed, or redacting every reference to a litigant's name, all of which implicate the First Amendment and common law rights of access to civil proceedings and documents.[22] Although some courts resist this analogy, because the public is not physically barred from the courtroom or denied access to any court documents, access cases turn on access to *information* and the ability to scrutinize the judicial process, not on gaining physical entry to a courtroom or access to pieces of paper or digital files. Withholding names of litigants denies access to information and inhibits the public's ability to scrutinize the

judicial process. Invoking this familiar and established doctrine may help to underscore the public interests at stake and the effect pseudonyms have on the public's understanding of a lawsuit. It may also signal to the court the need to justify any order granting anonymity.

Pseudonymity should be analyzed under a First Amendment standard. Withholding a litigant's identity should be subject to the U.S. Supreme Court's First Amendment test for denying public access to court proceedings or records, which requires "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. Co. v. Superior Court*, 487 U.S. 1, 9 (1986) ("*Press-Enterprise II*").[23] The Supreme Court employs an "experience and logic test" to determine whether a First Amendment right of access attaches by asking "whether the place and process" at issue "have historically been open to the press and general public," as well as "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 8.

• *Historically, litigants' names have been public.* Both experience and logic dictate that the public have presumptive access to litigants' names. The use of pseudonyms in litigation "is without precedent in English or early American common law, when the pseudonym 'John Doe' was used only to designate a defendant in the pleadings until his real name could be ascertained or to designate the fictitious plaintiff in the action of ejectment." Steinman, *supra*, at 18. In fact, only within the last 50 years has the practice of suing anonymously, or proceeding as an identified, pseudonymous defendant, become more common. *See id.* at 1 n.2 ("federal decisions concerning Doe plaintiffs or known Doe defendants are rare prior to 1969"). Because "historically both civil and criminal trials have been presumptively open," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), and because the use of pseudonymity is a modern invention, a presumptive right of access to litigants' identities enjoys the favorable judgment of experience.

• *Access to litigants' names helps the judiciary functions properly.* Access to a litigant's identity helps the press fulfill its beneficial role that the courts have described in access cases. Openness, generally, gives assurance that the court is fulfilling its public duty appropriately. Transparency also discourages perjury and bias, and heightens public respect for the judiciary. The benefits of public scrutiny are more limited when the public does not have access to a litigant's name, because pseudonymity makes it more difficult for the press or the public to root out perjury or bias.[24] Knowledge that court documents and proceedings are open to the public should encourage truthfulness and discourage frivolous lawsuits or unsupportable claims or assertions. In addition, disclosure of a litigant's identity may be necessary to conduct jury selection properly.[25]

The common law standard for court closures and sealing should prevent the use of pseudonyms in many cases. Courts do not analyze all sealing or redaction requests under a First Amendment standard. Instead, some requests are analyzed under a less rigorous common law standard, which effectively requires a balancing of interests. Many existing tests for the use of pseudonyms also adopt this kind of balancing test. By invoking the benefits of openness from court access and sealing cases, one can argue that public benefits in openness outweigh private desire for anonymity. Challengers also may ask the court to look not at the private need for anonymity but

the societal interest in permitting the litigant to proceed under a pseudonym. Only in the face of compelling, countervailing societal needs should the presumption of openness be overcome.

Pseudonymity denies the public valuable information about the use of public courts. Although a legal case may not turn on the particular identity of a litigant, that information may be central to the public's broader understanding of the case, the law, and the functioning of the judiciary. Anonymity greatly hinders, for example, a journalist's ability to research the litigant's background, including business interests or political interests. Anonymity also prohibits journalists from identifying family members, friends, employers, coworkers, classmates and other acquaintances who may help the journalist put a given dispute in context. Knowing a litigant's identity may help illuminate such details as the motivation for suing; his or her relationships with defendants, other trial participants, or the court; or the litigant's credibility, among other things. Such information may be instrumental to the public's understanding of how the legal system works and to advocate for changes in the law — even if the information does not make a legal difference in a particular lawsuit.

The public has a right to know who is using the public court system. Courts are funded with public money, and litigants who invoke the power of the courts are seeking a public benefit. One tradeoff for receiving that public benefit should be disclosure of one's identity.[26] This rationale is particularly strong when litigants are challenging democratically enacted laws, because the public has an interest in knowing who seeks to disrupt the legal status quo.

Critics of this "waiver" rationale argue that forcing plaintiffs to reveal their identity may discourage them from filing suit at all, effectively precluding them from vindicating their own rights. But surely a stringent standard for permitting the use of pseudonyms would still permit courts enough discretion to permit anonymity when absolutely essential to a plaintiff's ability to vindicate their own legal rights (after all, the public has an interest in allowing individuals to pursue enforcement of their rights), while making it more difficult for plaintiffs who merely wish to avoid publicity, criticism, or embarrassment.

Openness may discourage frivolous or harassing lawsuits. Disclosure and public scrutiny may simultaneously discourage plaintiffs from bringing frivolous, harassing or unnecessary suits.

Openness promotes the appearance and reality of fairness in the courts. The public is more apt to believe that courts are performing their duties responsibly when key facts, such as a litigant's identity, are not hidden from view. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

Litigants should not be permitted to reverse the default presumption of openness. Many litigants seeking anonymity attempt to flip the framework of the analysis by arguing that disclosure is not necessary for the lawsuit to progress or that there is little or no public interest in ascertaining the plaintiff's identity. These arguments obfuscate the fact that the court system has a default preference for openness, and those seeking anonymity must justify any departure from that practice. By focusing on whether the particular defendant or the public has compelling reasons

for disclosure, litigants sidestep the main issue of whether there is a strong private or societal interest in anonymity that outweighs the recognized interests in openness.

Litigants may lack compelling reasons for pseudonymity. Mere embarrassment or a desire to avoid publicity should not be sufficient to justify anonymity. Neither should the mere presence of sensitive information, or general or conclusory assertions of a threat or risk of physical or pecuniary harm. Many plaintiffs might prefer anonymity, but they should demonstrate a sufficiently compelling need, and courts should document that need with specific findings. If the court system permitted anonymity whenever a litigant could avoid embarrassment, humiliation, or ridicule, anonymity likely would be rampant, in each instance making it harder for the public and press to monitor court proceedings and accept the work of the courts as unbiased and trustworthy.

Less restrictive means may be available to prevent the perceived risk. In many cases, narrowly tailored sealing or redaction will be able to protect truly sensitive and highly personal data, or other information comprising the basis for the anonymity request.

Conclusion

The use of pseudonyms has been consistently permitted in litigation without the proper level of attention from the courts, given that anonymity is a form of court closure, sealing or redaction. Courts should require litigants seeking to proceed under a pseudonym to justify the need to depart from the normal practice of disclosure, and should grant or deny its use after making specific findings on the record that a compelling interest outweighs the public interest in disclosure, and that less restrictive alternatives would not prevent the harm to be avoided.

The news media, whose newsgathering stands to improve with disclosure, should be attentive to the casual, unjustified use of pseudonyms, and place pressure on the courts to justify secrecy. Requiring litigants and courts to walk through these procedural steps, and paying close attention to the validity of claims for the need for anonymity, should reduce unnecessary anonymity while permitting it in justified cases.

Endnotes:

[1] *See* The Washington Post, *Audio: Anesthesiologist trashes sedated patient*, YouTube (June 24 2015), https://youtu.be/Kar52idHgho.

[2] These terms are used mostly interchangeably throughout this paper to refer to litigation being brought or defended by known individuals identified in court papers only by a pseudonym or by their initials, rather than their full names. The use of "John Doe" or other pseudonyms in litigation to refer to individuals who have not yet been identified is outside the scope of this paper. It likewise does not address anonymous juries (examined by the Reporters Committee in a previous paper, available at https://www.rcfp.org/secret-justice-anonymous-juries) or the subcategory of anonymous parties defending anonymous speech online (see https://www.rcfp.org/category/tags/anonymous-speech), or the issue of criminal prosecutions against known, pseudonymous defendants.

[3] The First, Eighth, D.C., and Federal Circuits do not appear to have addressed this issue.

[4] *See, e.g.*, Order, *Doe v. Corr. Corp. of Am.*, No. 3:15-cv-68 (M.D. Tenn. Jan. 27, 2015), ECF No. 11 (placing the words "ORDER: Motion granted," with the magistrate judge's signature, in the upper-right-hand margin of Plaintiff's Motion for Protective Order); Order, *Patient A v. Vt. Agency of Human Servs.*, No. 5:14-cv-206-GWC (D. Vt. Oct. 27, 2014), ECF No. 3 (granting the plaintiff's motion to proceed under a pseudonym in a text order on the docket, without analysis).

[5] *See, e.g.*, *United States v. Doe*, Nos. 13-50614 & 14-50015, 2015 WL 3483962, at *1 n.1 (9th Cir. Jun. 3, 2015) (stating "[w]e grant defendant appellant's motion to refer to him by a pseudonym in this disposition," without further analysis); *see also* Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 Hastings L.J. 1, 43 n.179 (1985) ("In the vast majority of pertinent cases the courts have allowed, and perhaps sometimes disallowed, pseudonymity without analysis and consideration of the competing interests in access. If analysis was done, it was not reflected in published opinions.")

[6] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (describing benefits of openness); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (same).

[7] See, for example, the case of *Dwyer v. United States*, No. 14-4387 (2d Cir. Feb. 26, 2015), in which a reporter is challenging extensive secrecy in a criminal case against a John Doe defendant. The Reporters Committee submitted an amicus brief in support of the reporter's appeal, which is available at http://rcfp.org/x?rfn. As of this writing, the matter is still pending.

[8] *See Company Doe v. Public Citizen*, 749 F.3d 246, 254 (4th Cir. 2014); Alison Frankel, *How 'Company Doe' — now revealed as ErgoBaby — triggered 1st Amendment case*, Reuters, May 8, 2014, *available at* http://goo.gl/fjvwVg, *archived at* https://perma.cc/6ASW-AG39.

[9] *See United States v. Doe*, 778 F.3d 814, 817 n.1 (9th Cir. 2015) (granting defendant's motion for pseudonymity because "the defendant may face 'a risk of serious bodily harm if his role on behalf of the Government were disclosed to other inmates'").

[10] *See, e.g.*, *Foe v. Cuomo*, 892 F.2d 196 (2d Cir. 1989) (using pseudonyms Frank Foe, Walter Woe and Wilma Woe).

[11] *See Pseudonym Taxpayer v. Miller*, 497 F. Supp. 78 (D.N.J. 1980); *Patient A v. Vt. Agency of Human Servs.*, No. 5:14-cv-206-GWC, 2015 WL 589367 (D. Vt. Feb. 11, 2015).

[12] *See Jane Endangered v. Louisville/Jefferson Cnty. Metro Gov't Dep't of Inspections*, No. 3:06CV-250-S, 2007 WL 509695 (W.D. Ky. Feb. 12, 2007) (using pseudonyms "Jane Endangered" and "Jane Imperiled"); *Unwitting Victim v. C.S.*, 47 P.3d 392 (Kan. 2002).

[13] *See Deer Consumer. Prods., Inc. v. Little*, 938 N.Y.S.2d 767 (N.Y. Sup. Ct. 2012); *In re State v. Becker*, No. 0809008237, 2009 WL 2424659 (Del. Fam. Ct. Jun. 25, 2009).

[14] 410 U.S. 113 (1973).

[15] 133 S. Ct. 2552 (2013).

[16] *See, e.g.*, *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) ("We advance no hard and fast formula for ascertaining whether a party may sue anonymously."); *Doe v. Howe*, 607 S.E.2d 354, 356 (S.C. Ct. App. 2004) ("We believe the better practice is one which avoids a rigid, formulaic approach, thereby allowing the trial courts a degree of flexibility in this fact-sensitive area.").

[17] The Third Circuit, for example, has identified nine factors:

(1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; . . . (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives. . . . [(7)] the universal level of public interest in access to the identities of litigants; [(8)] whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and [(9)] whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

Megless, 654 F.3d at 409. *See also Does I thru XXIII*, 214 F.3d at 1068 (identifying several factors); *Sealed Plaintiff*, 537 F.3d at 190 (collecting factors from federal case law).

[18] *See, e.g.*, California Rules of Court, rule 8.401 (providing for anonymity of juveniles in court proceedings); Fla. Stat. § 92.56(3) (permitting pseudonyms for certain categories of victims of crimes against children or certain sexual offenses); Tex. Civ. Prac. & Rem. Code § 30.013(c)(3) (providing for pseudonyms for sexual abuse of a minor).

[19] The privacy organization Without My Consent has a useful round-up of case law, court rules, and statutes from around the country related to pseudonymous litigation on its website, http://www.withoutmyconsent.org/50state. The group approaches pseudonymity from a different perspective than I do. It describes itself as "seeking to combat online invasions of privacy" and "empower[ing] individuals to stand up for their privacy rights and inspire meaningful debate about the internet, accountability, free speech, and the serious problem of online invasions of privacy." *Who We Are*, Without My Consent, http://www.withoutmy consent.org/who-we-are (last visited Aug. 19, 2015), *archived at* http://perma.cc/78MS-E63K.

[20] *See Megless*, 654 F.3d at 408 ("That a plaintiff may suffer embarrassment or economic harm is not enough."); *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) ("the fact that Doe may suffer some personal embarrassment, standing alone, does not require the granting of his request to proceed under a pseudonym"); *Roe v. Bernabei & Wachtel PLLC*, --- F. Supp. 3d ---, No. 14-cv-1285-TSC, 2015 WL 1733648, at *4 (D.D.C. Mar. 26, 2015) ("Personal embarrassment is

normally not a sufficient basis for permitting anonymous litigation.") (citing cases); *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573 (S.D.N.Y. 2004) (denying anonymity when the party sought only to prevent economic harm).

[21] *See, e.g.*, *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.).

[22] As the U.S. Court of Appeals for the Fifth Circuit stated in *Doe v. Stegall*, "[p]ublic access to this information is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." 653 F.2d 180, 185 (5th Cir. 1981). The court acknowledged that the "equation linking the public's right to attend trials and the public's right to know the identity of the parties is not perfectly symmetrical," but, "[n]evertheless, there remains a clear and strong First Amendment interest in ensuring that '(w)hat transpires in the courtroom is public property.'" *Id.*

[23] The *Press-Enterprise* standard was applied by the Supreme Court in criminal cases; the Court has not directly addressed whether the constitutional right applies to civil proceedings. However, the California Supreme Court noted that "every lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials." NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 358 (Cal. 1999).

[24] *See* Brett Lake, *Deputy state's attorney gave false testimony, records show*, Carroll County Times, Apr. 25, 2012, *archived at* http://perma.cc/HKS2-LJ5D (reporting on evidence obtained by the newspaper that contradicted testimony given by a law enforcement officer). The deputy later lost a lawsuit against the newspaper for defamation. *See* Chuck Tobin & Drew Shenkman, *Report That Prosecutor Gave 'False Testimony' Not Actual Malice*, MLRC Media Law Letter, August 2013, *archived at* http://perma.cc/EN6Q-Z2FB.

[25] *See A.B.C.*, 660 A.2d at 1204 ("in order to question potential jurors on *voir dire* about their knowledge of any of the parties, including possible connection with the corporate defendant as a possible employer of a prospective juror or a juror's family member, or even as a stockholder, the names of the parties would have to be disclosed in open court to the jurors").

[26] Justice Scalia made an analogous point in *Doe v. Reed*, in which the Supreme Court held that disclosure of referendum signatures did not violate the First Amendment rights of the signatories. *See Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) ("There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.")

Notre Dame Law Review

Volume 57 | Issue 3 Article 6

1-1-1982

Anonymity in Civil Litigation: The Doe Plaintiff

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Anonymity in Civil Litigation: The "Doe" Plaintiff

In recent years, an increasing number of case captions feature "Roe" and "Doe" plaintiffs. Although the most prominent of these cases involve abortion, birth control, or other controversial and sensitive issues, plaintiffs have maintained anonymity in a wide variety of other contexts. All of these cases share a need to forego the usual procedure of disclosing identity in the complaint to protect plaintiffs from a threatened harm or prevent public intrusion into an area of utmost intimacy.

The Supreme Court of the United States, though tacitly approving anonymous plaintiff practice,[1] has yet to decide a case where the right to proceed anonymously is at issue.[2] Lower courts have discussed competing policy considerations, but have not established standards for determining when plaintiffs may use pseudonyms. This note examines Doe plaintiff practice and the policy considerations that courts must balance when plaintiffs seek anonymity. Part I treats the mechanics of Doe plaintiff practice; Part II discusses the policy of full disclosure; Part III examines circumstances warranting anonymity; and Part IV integrates competing policy interests to provide courts with specific analytical guidelines for determining when to permit plaintiffs to use fictitious names.

I. The Mechanics of Doe Plaintiff Practice

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." Although this rule appears to prohibit Doe plaintiff practice, courts have nonetheless permitted pseudonyms in limited circumstances. The proper procedure for obtaining such court approval depends largely on the particular court's construction of Rule 10(a).

Strict judicial construction of Rule 10(a) is illustrated in *Roe v. New York*,[3] where the district court ruled "that if a complaint does not identify any plaintiff in the title or otherwise, then its filing is

1 The Supreme Court implicitly recognized Doe plaintiffs in Poe v. Ullman, 367 U.S. 497 (1961); Roe v. Wade, 410 U.S. 113 (1973); and Doe v. Bolton, 410 U.S. 179 (1973).

2 Doe v. Stegall, 653 F.2d 180, 189 (5th Cir. 1981). (Gee, J., dissenting).

3 49 F.R.D. 279 (S.D.N.Y. 1970).

ineffective to commence an action."[4] Plaintiffs R. Roe, M. Moe, S. Soe, and J. Joe filed a complaint seeking an injunction and money damages after receiving inadequate care in state training schools. When the defendants moved to dismiss, plaintiffs' counsel offered to divulge the plaintiffs' true names under protective provisions. Plaintiffs also submitted affidavits revealing their true names. Despite this limited disclosure of identity, the court dismissed the plaintiffs' complaint on the ground that they had not commenced an action. The court reasoned that "[i]f no action had been commenced by the filing of this complaint, then the subsequent disclosure of the true names of plaintiffs did not change the situation."[5]

Not all decisions share *Roe v. New York's* mechanical construction of Rule 10(a). Liberally interpreting Rule 10(a), many courts recognize the commencement of an action when plaintiffs file anonymously.[6] Emphasizing that fictitious names present "real and specific aggrieved individuals,"[7] these courts allow anonymous plaintiffs who demonstrate a particular need to conceal their identity.

Courts permit Doe plaintiff practice by issuing a protective order. Federal Rule of Civil Procedure 26(c) gives the trial court discretion over litigants' requests for protection from annoyance, embarrassment, or oppression in the discovery process,[8] and this dis-

4 *Id.* at 281.

5 *Id.* at 282.

6 *See* Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980). In *Borup*, the court rejected the "highly mechanical interpretation of the Federal Rules of Civil Procedure . . . [that] would have the court elevate form over substance, without any reason for doing so." *Id.* at 129. Further rejection of the Roe v. New York formalistic interpretation was contained in Doe v. Deschamps, 64 F.R.D. 652, 653 (D. Mont. 1974), which noted that since Roe v. New York, "a host of cases have been prosecuted under fictitious names. Sometimes the fact of the fictitious name is noted and other times it is not, but it is clear that a practice has developed permitting individuals to sue under fictitious names where the issues involved are matters of a sensitive and highly personal nature."

7 Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973). The requirement that the pseudonyms represent real and specific aggrieved individuals reflects concerns of justiciability. To have standing, the plaintiff "must allege some threatened or actual injury resulting from the putatively illegal action." Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). The court also should acquire a sufficient basis to continually ensure that the case has not become moot.

8 Federal Rule of Civil Procedure 26(c) provides:

> **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .

cretion includes the authority to protect plaintiff anonymity.[9] After filing under a pseudonym, a plaintiff may request a protective order to maintain anonymity throughout the litigation. Often courts grant limited permission to initiate the suit anonymously, and then consider the merits of the anonymity claim presented in submitted memoranda before granting a more permanent protective order.[10]

Although more liberal courts have recognized plaintiffs who file anonymously, the plaintiff who employs a pseudonym gambles on how the court will interpret Rule 10(a), and risks dismissal without even the opportunity to demonstrate why he must conceal his identity. *Roe v. New York* suggests three alternatives that allow plaintiffs desiring anonymity to avoid the risk of dismissal:

(1) filing a complaint under the plaintiff's true name, and then requesting a protective order or leave to amend the complaint to shield the plaintiff's identity;

(2) using pseudonyms in the complaint but setting forth the plaintiff's true name in an attached letter; or

(3) using a fictitious name in the complaint but verifying the complaint by signing the plaintiff's true name.[11] These alternatives avoid a purely procedural bar to proceeding anonymously, and allow the court to consider whether the circumstances warrant the use of fictitious names.

Beyond the procedural hurdles to protecting identity, plaintiffs face a difficult burden of substantively justifying their anonymity. Courts grant permission to proceed anonymously only in rare instances, and Rule 10(a) continues to dictate a general practice that plaintiffs sue by their true names.

II. Policy of Full Disclosure

Anonymous plaintiff practice goes contrary to the basic princi-

9 Although the federal rule does not explicitly authorize plaintiff anonymity, courts have extended the rule and exercise broad discretion to shield plaintiffs' identities. *See* Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981).

10 For example, in Gomez v. Buckeye Sugars, 60 F.R.D. 106 (N.D. Ohio 1973), the district court allowed the plaintiffs to proceed tentatively under pseudonyms. It then required the parties to submit memoranda addressing whether a permanent protective order should be granted. Similarly, in Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980), the court permitted the plaintiffs to use pseudonyms for ten days after filing, and then fully considered the plaintiffs' request to maintain anonymity throughout the litigation.

11 *See* Roe v. New York, 49 F.R.D. 279, 281 (S.D.N.Y. 1970). Plaintiffs using the third alternative should provide a reason for the procedure, or the court may substitute the plaintiff's real name for the fictitious name in the case caption. *See, e.g.*, Male v. Crossroads Assocs., 320 F. Supp. 141, 143 (S.D.N.Y. 1970).

ple that one who commences a lawsuit avouches the cause before the court and the public. Fundamental fairness dictates that when a plaintiff sues a defendant by name, and thereby identifies the defendant to the public, the plaintiff should likewise reveal his or her own identity.[12] Even when the defendant is not a private party, but rather the government, "there is something to be said . . . for the notion that one who strikes the king should do so unmasked or not at all."[13]

Both the defendant and the public have definite interests in knowing the plaintiff's identity. The defendant needs to know the plaintiff's identity to fully use the discovery process and establish appropriate defenses. Plaintiff pseudonyms can effectively preclude defendants' access to vital information and unfairly insulate plaintiffs' claims from valid defenses.[14] In addition, proceeding anonymously creates a possible inability to determine the res judicata effect of judgment.[15]

Besides the defendant's interest in knowing the opposing litigant's identity, the public has a "legitimate interest in knowing all the facts and events surrounding court proceedings."[16] The Supreme Court in *Richmond Newspapers, Inc. v. Virginia*,[17] though specifically holding that the first amendment guarantees public access to *criminal* trials,[18] noted that "historically both civil and criminal trials have been presumptively open."[19] Because of the presumption of openness, any attempt to restrict public scrutiny of judicial proceedings implicates the first amendment guarantee of access to trial.[20]

Use of fictitious names does not bar the public from attending trials, but does bar public dissemination of information. This bar contravenes the Supreme Court's declaration that "[a] trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before

12 Southern Methodist Univ. Ass'n v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979).

13 Doe v. Stegall, 653 F.2d 180, 189 (5th Cir. 1981) (Gee, J., dissenting).

14 This consequence may be avoided if the court discloses the plaintiff's true name to the defendant, and merely bars public disclosure of the plaintiff's identity. *See, e.g.*, Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981).

15 Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973).

16 Doe v. Rostker, 89 F.R.D. 158, 160 (N.D. Cal. 1981).

17 448 U.S. 555 (1980).

18 *Id.* at 580.

19 *Id.* at n.17.

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

it."[21] Rule 10(a), requiring plaintiffs to sue by their true names, reflects the presumption of public access to information arising from a trial. 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.

III. Circumstances Warranting Anonymity

Notwithstanding the strong presumption of judicial openness, particular cases have presented circumstances warranting plaintiff anonymity. These cases may be divided into two groups: (1) cases where concealed identity is necessary to protect the plaintiff from a threatened harm; and (2) cases where concealed identity is necessary to protect the plaintiff's privacy in matters of utmost intimacy.

A. *Threatened Harm*

One of the strongest justifications for proceeding anonymously arises when disclosure of identity would cause the harm that the plaintiff's action seeks to prevent. *Roe v. Ingraham*[22] presented such a situation. Plaintiffs in *Ingraham* were doctors who prescribed and their patients who received medication that the New York State Controlled Substances Act[23] classified as "Schedule II drugs."[24] The Act required prescribing physicians to file with the state a copy of an official New York State prescription form that included the patient's name and address. Plaintiffs, filing under pseudonyms, alleged that the Act "by requiring disclosure of the identity of certain patients . . . invades the patient's right of privacy and confidentiality."[25] The district court allowed the patients to proceed anonymously, observing that "if plaintiffs are required to reveal their identity prior to the adjudication on the merits of their privacy claim, they will already have sustained the injury which by this litigation they seek to

21 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492-93 (1975), *quoting* Craig v. Harney, 331 U.S. 367, 374 (1947).

22 364 F. Supp. 536 (S.D.N.Y. 1973).

23 N.Y. PUB. HEALTH LAW § 3300 (McKinney Supp. 1972).

24 Schedule II drugs are defined as "those substances which have a high potential for abuse, but also have an accepted or restricted medical use. Abuse of a Schedule II substance may lead to severe physiological dependence." 364 F. Supp. at 538, *quoting* INTERIM REPORT OF THE TEMPORARY STATE COMMISSION TO EVALUATE THE DRUG LAWS at 13.

25 *Id.* at 540.

avoid."[26]

The federal district court for the Northern District of California, in *Doe v. Rostker*,[27] set limits to the *Ingraham* rationale for shielding identity. The plaintiffs in *Rostker* were nineteen-year-old males who were required to register with the Selective Service. Filing as Doe, Roe, and Moe, the plaintiffs alleged that the mandatory registration violated their right of privacy. The plaintiffs echoed the *Ingraham* argument in contending that "compelled disclosure of their identities would vitiate the interests they seek to protect."[28] The court rejected this argument and dismissed the complaint with leave to amend by stating the parties' true names.

The court in *Rostker* distinguished *Ingraham* by reasoning that identification in *Ingraham*, revealing use of controlled substances, would bear "an element of stigmatization" not found in *Rostker*.[29] Furthermore, the court emphasized a more fundamental shortcoming in the asserted justification for anonymity in *Rostker*: the threatened injury to the plaintiffs was neither substantial nor certain. The court observed:

> Plaintiffs argue they should be allowed to proceed anonymously because they fear retaliatory conduct or other reprisals which may jeopardize their attempts to obtain conscientious objector status in the future. This feared retaliation is both speculative and prospective. . . . The court fails to see what real injury would inure to plaintiffs by proceeding under their own names.[30]

The court in *Rostker* refused to permit anonymity essentially because the plaintiffs failed to show imminent retaliatory conduct or injury. Where plaintiffs have successfully shown actual threatened harm, courts have demonstrated greater receptiveness to requests to maintain anonymity. Actual threatened harm that warrants anonymity may be physical, social, or economic.[31]

Doe v. Lally[32] graphically illustrates the need for anonymity

26 *Id.* at 541 n.7.

27 89 F.R.D. 158 (N.D. Cal. 1981).

28 *Id.* at 161.

29 *Id.* at 162.

30 *Id.*

31 *See, e.g.*, Doe v. Lally, 467 F. Supp. 1339 (D. Md. 1979) (threatened physical harm); Glover v. Johnson, 85 F.R.D. 1 (E.D. Mich. 1977) (threatened physical harm); Doe v. Hodgson, 344 F. Supp. 964 (S.D.N.Y. 1972) (threatened economic harm); Gomez v. Buckeye Sugars, 60 F.R.D. 106 (N.D. Ohio 1973) (threatened economic harm); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (threatened social and physical harm).

32 467 F. Supp. 1339 (D. Md. 1979).

when physical harm is threatened. The plaintiff, confined to a state diagnostic center, sought injunctive and declaratory relief after he was homosexually raped.[33] The district court recognized rape victims' fear of reprisal and the stigma attaching to a known rape victim that "serves to single out an inmate as an easy mark, thereby increasing the likelihood of further sexual assaults."[34] This harm likely to result upon disclosure of the plaintiff's identity warrant the plaintiff's use of a pseudonym.

Threatened harms short of the physical harm in *Lally* may nevertheless be substantial enough to justify plaintiff anonymity. In *Doe v. Stegall*,[35] plaintiffs challenging the constitutionality of prayer and Bible reading in Mississippi public schools feared social harassment and violence should their names be publicly disclosed. To support their fears, the plaintiffs presented documentary exhibits demonstrating hostile community sentiment toward their suit. The United States Court of Appeals for the Fifth Circuit allowed the plaintiffs to sue anonymously, but emphasized that in granting the plaintiffs' request, it had not merely considered the threatened social harm.

> The threat of hostile public reaction to a lawsuit, standing alone, will only with great rarity warrant public anonymity. But the threats of violence generated by this case, in conjunction with the other factors weighing in favor of maintaining the Does' anonymity, tip the balance against the customary practice of judicial openness.[36]

Besides physical and social harm, threatened employer reprisal or economic harm may warrant plaintiff anonymity. In *Gomez v. Buckeye Sugars*,[37] migrant farmworkers sued their employers for failing to comply with the Fair Labor Standards Act and other federal statutes. Plaintiffs filed under the fictitious names of Juan Gomez and Richardo Lopez "in order to safeguard against any possible reprisals by their employers that might result from the filing of this lawsuit,"[38] and sought a protective order to conceal their true names. The defendants argued that such a protective order was unnecessary since persons alleging violations of the Fair Labor Standards Act are

33 The plaintiff alleged that the rape was a direct result of prison officials' failure to maintain proper security and control in the institution.

34 467 F. Supp. at 1348-49. Because of fear of reprisal, few inmates report homosexual assaults. *Id.* at 1349.

35 653 F.2d 180 (5th Cir. 1981).

36 *Id.* at 186. The "other factors" weighing in favor of anonymity included the plaintiffs' privacy interest in their religious beliefs. *See* text accompanying note 74 *infra*.

37 60 F.R.D. 106 (N.D. Ohio 1973).

38 *Id.* at 106.

protected against employer reprisals.[39] The court nonetheless issued the protective order, observing that "[t]he method proposed by the plaintiffs affords them a higher degree of security than does the statutory provision."[40]

The *Gomez* court's willingness to allow plaintiffs seeking protection from employer reprisal to maintain anonymity is sharply contrasted in *Southern Methodist University Ass'n v. Wynne & Jaffe*.[41] The SMU Association of Women Law Students and four female lawyers brought Title VII sex discrimination suits against two Dallas law firms, alleging that the firms' hiring practices discriminated against women. The four lawyers requested a protective order to proceed anonymously, fearing economic and social harm should their participation in the suit become known. In sealed affidavits, the lawyers stated that they would "be eased out" or "assigned less desirable matters" if their names were publicly disclosed.[42] One lawyer asserted "that her firm would likely lose business should her identity become known."[43] The court denied the protective order, and stated that the lawyers "face no greater threat of warranted retaliation than the typical plaintiff alleging Title VII violations."[44]

The Fifth Circuit in *SMU* narrowly limited justifications for proceeding anonymously, and identified factors common to cases permitting plaintiff anonymity that were not present in the *SMU* case.

> [T]he cases affording plaintiffs anonymity all share several characteristics missing here. The plaintiffs in those actions, at the least, divulged personal information of the utmost intimacy; many also had to admit that they either had violated state laws or government regulations or wished to engage in prohibited conduct. . . . Furthermore, all of the plaintiffs previously allowed in other cases to proceed anonymously were challenging the constitutional, statutory or regulatory validity of government activity.[45]

Not all cases allowing plaintiff anonymity share the "common"

39 29 U.S.C. § 215(a)(3) (1976) makes it unlawful:
> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or cause to be instituted any proceeding under or related to this chapter [Fair Labor Standards Act of 1938], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

40 60 F.R.D. at 107.
41 599 F.2d 707 (5th Cir. 1979).
42 *Id.* at 711.
43 *Id.*
44 *Id.* at 713.
45 *Id.*

characteristics listed in *SMU*.[46] For example, in *Gomez v. Buckeye Sugars*, plaintiffs did not divulge intimate or personal information, did not admit engaging in illegal conduct, and did not challenge government activity. The *SMU* court did not need to articulate missing characteristics to disallow plaintiff pseudonyms, for the court essentially held that the gravity of the threatened harm simply was insufficient to justify shielding identity. No court has yet set forth criteria explaining when threatened harm becomes grave enough to warrant anonymity, and the determination of whether to allow plaintiff pseudonyms continues to be an ad hoc process.[47]

B. *Matters of Utmost Intimacy*

The court in *SMU* recognized that many actions successfully maintained by Doe plaintiffs involve "personal information of the utmost intimacy."[48] When the nature of a lawsuit forces a plaintiff to disclose highly personal information, the implicated right to privacy[49] may justify shielding identity. The right to privacy, guaranteed by emanations from the Bill of Rights,[50] "encompasses and protects the personal intimacies of the home, the family, marriage,

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46 Discussing the *SMU* analysis, the court in Doe v. Stegall, stated, "[W]e think it would be a mistake to distill a rigid, three-step test for the propriety of party anonymity from the fact-sensitive holding in *Southern Methodist University Ass'n*. The opinion never purports to establish the three common factors it isolates as prerequisites to bringing an anonymous suit." 653 F.2d 180, 185 (5th Cir. 1981).

47 Although each court must exercise discretion, the lack of uniform standards in evaluating requests for anonymity offers little predictability and notice to prospective Doe plaintiffs.

48 599 F.2d at 713.

49 The right to privacy was first suggested in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Although the Constitution does not expressly provide for a right of privacy, the Supreme Court has based the right of privacy upon various guarantees of the Bill of Rights. In Roe v. Wade, 410 U.S. 113, 152 (1973), the Court explained:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), *Katz v. United States*, 389 U.S. 347, 350 (1967), *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

50 In Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Connecticut law forbidding use of contraceptives held unconstitutional), Justice Douglas explained that "specific guarantees

motherhood, procreation, and child rearing."[51] Courts balance the plaintiff's privacy interest against the consequences to the defendant and to the public resulting from plaintiff anonymity. Plaintiffs do not have an absolute right to use pseudonyms, but cases that expose the plaintiff's personal intimacies strongly justify anonymity.

The Supreme Court has stated that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[52] In accordance with this fundamental privacy interest, plaintiffs who bring cases involving pregnancy and childbearing are commonly permitted to employ pseudonyms. The Supreme Court has never discussed the merits of plaintiff anonymity, but has tacitly acknowledged the propriety of Doe plaintiffs when unmarried and pregnant women anonymously challenged criminal abortion statutes in *Roe v. Wade*[53] and *Doe v. Bolton*.[54] The Court's most explicit approval of plaintiff anonymity is contained in *Poe v. Ullman*,[55] where the Court merely noted that the Connecticut court had approved plaintiff pseudonyms in the special circumstances.[56]

The Connecticut Supreme Court of Errors more fully discussed the special circumstances in *Ullman* when it ruled on the case.[57] One Dr. Buxton and five of his patients, Jane Doe, Paul and Pauline Poe, and Harold and Hanna Hoe, challenged the constitutionality of Connecticut's statutory ban on contraceptives. Dr. Buxton prescribed contraceptives to the female plaintiffs, for whom pregnancy would seriously endanger health. The Connecticut court allowed the patients to maintain anonymity, observing that "[b]ecause of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would

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in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."

51 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973).

52 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (Massachusetts statute prohibiting distribution of contraceptives to unmarried persons held unconstitutional).

53 410 U.S. 113 (1973). The plaintiff's alias affidavit filed with the district court satisfied the Supreme Court that the plaintiff was not fictitious. *Id.* at 124. Except for acknowledging that the plaintiff was a real person, the Court did not discuss plaintiff anonymity.

54 410 U.S. 179 (1973). The Court noted that, as established in *Roe v. Wade*, "despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state." *Id.* at 187.

55 367 U.S. 497 (1961).

56 *Id.* at 498 n.1.

57 Buxton v. Ullman, 156 A.2d 508 (Conn. 1959).

wish to be anonymous."[58]

Doe v. Deschamps[59] similarly discussed anonymity for matters of utmost intimacy. Plaintiffs Jane Doe and John Moe, a pregnant woman and her doctor, challenged the constitutionality of Montana's abortion statute. Because the complaint contained detailed information about the woman's personal life, the district court allowed the woman to use a pseudonym. The court explained, "We think that as a matter of policy the identity of the parties to a lawsuit should not be concealed except in the unusual case. The intensely personal nature of pregnancy does, we believe, create such an unusual case."[60] However, unlike its revelation of the woman's private life, the complaint merely exposed the doctor's professional or economic life. Because the doctor did not present a similarly compelling personal privacy interest, the court required the doctor to proceed under his true name.[61]

Besides pregnancy and childbirth, circumstances involving sexual conduct and family relations have also warranted plaintiff anonymity. In *Roe v. Borup*,[62] a minor child and her parents sought damages after the state temporarily removed the child from the parents' custody. The removal action was founded on allegations that the parents had sexually abused the child, and the district court regarded it "beyond argument" that the matters involved were highly sensitive.[63] Particularly because public revelation of the allegations of sexual abuse would subject the plaintiffs to substantial social harassment and embarrassment, plaintiff pseudonyms were found to be appropriate.

Courts have also acknowledged homosexuality and transsexuality to be matters of the utmost intimacy. In *Doe v. Commonwealth's Attorney*,[64] the Virginia district court allowed homosexuals challenging the constitutionality of Virginia's sodomy statute to use pseudonyms. Similarly, in *Doe v. McConn*,[65] anonymous transsexuals challenged a Houston city ordinance which prohibited transvestites from appearing publicly in women's clothing.[66] The district court

58 *Id.* at 514-15.
59 64 F.R.D. 652 (D. Mont. 1974).
60 *Id.* at 653.
61 *Id.*
62 500 F. Supp. 127 (E.D. Wis. 1980).
63 *Id.* at 130.
64 403 F. Supp. 1199 (E.D. Va. 1975).
65 489 F. Supp. 76 (S.D. Tex. 1980).
66 Section 28-42.4 of the Code of Ordinances of the City of Houston provides, "It shall be unlawful for any person to appear on any public street, sidewalk, alley, or other public thor-

stated that the plaintiffs, "in various stages of sexual transition, are suing under fictitious names to insulate themselves from possible harassment, to protect their privacy, and to protect themselves from prosecution resulting from this action."[67]

The need for anonymity in both *Commonwealth's Attorney* and *McConn* was especially pronounced since disclosure of identity might subject plaintiffs to public harassment or criminal prosecution. By contrast, in *Lindsey v. Dayton-Hudson Corp.*,[68] where the plaintiff had already been tried and acquitted on criminal charges of offering to engage in an act of lewdness,[69] the Tenth Circuit stated that the plaintiff "had already suffered the worst of the publicity,"[70] and denied permission to use a pseudonym in the subsequent civil action. *Lindsey* indicates that when matters of personal privacy have already been publicly divulged in other contexts, the asserted privacy interest yields to the presumption of judicial openness.

Courts have recognized compelling privacy interests in non-sexual contexts, including cases involving mental illness[71] and abandoned or illegitimate children.[72] An example of a judicially recognized privacy interest far removed from matters of sexual intimacy was presented in *Doe v. Stegall*,[73] where plaintiffs challenged the constitutionality of prayer and Bible reading in public schools. Besides acknowledging threatened social harassment and violence, the

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oughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex." *Id.* at 79.

67 *Id.* at 77.

68 592 F.2d 1118 (10th Cir. 1979).

69 Lindsey had allegedly attempted to persuade a Target store employee to engage in a homosexual act. *Id.* at 1120.

70 *Id.* at 1125.

71 *See, e.g.*, Doe v. Gallinot, 486 F. Supp. 983 (C.D. Cal. 1979) (plaintiff who had been involuntarily committed to state hospital challenging civil commitment statute); Doe v. Harris, 495 F. Supp. 1161 (S.D.N.Y. 1980) (plaintiff who had been hospitalized for paranoid schizophrenia applying for disability benefits); Doe v. Colautti, 592 F.2d 704 (3rd Cir. 1979) (plaintiff who had been hospitalized in a private psychiatric institution challenging medical assistance statute); and Doe v. N.Y. Univ., 442 F. Supp. 522 (S.D.N.Y. 1978) (plaintiff who left medical school because of a mental disability seeking readmission to medical school).

72 *See, e.g.*, Doe v. Carleson, 356 F. Supp. 753 (N.D. Cal. 1973) (state welfare recipient challenging statute requiring recipients' cooperation in prosecuting spouses for non-support of children); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972) (mothers of needy and illegitimate children challenging statute requiring mothers' cooperation in identifying the father); Doe v. Hursh, 337 F. Supp. 614 (D. Minn. 1970) (applicants for Aid to Families with Dependent Children challenging rule denying benefits until a parent has been continuously absent from home for 90 days); and Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) (mothers of illegitimate children challenging regulation providing for termination of welfare payments on mother's failure to identify the father).

73 653 F.2d 180 (5th Cir. 1981).

Fifth Circuit recognized a privacy interest in personal religious beliefs, stating that "religion is perhaps the quintessentially private matter."[74] The court considered this privacy interest as one factor in a balancing process which led the court to protect plaintiff anonymity. The court reasoned:

> We advance no hard and fast formula for ascertaining whether a party may sue anonymously. The decision requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings. We emphasize the special status and vulnerability of the child-litigants, the showing of possible threatened harm and serious social ostracization based upon militant religious attitudes, and fundamental privateness of the religious beliefs, all of which are at the core of this suit to vindicate establishment clause rights. We conclude that the almost universal practice of disclosure must give way in this case to the privacy interests at stake.[75]

IV. A Suggested Approach

The *Stegall* court's balancing test is the most definitive standard to date for determining whether plaintiffs may proceed anonymously. However, Judge Gee, dissenting in *Stegall*, argued that this balancing process provides little guidance for future decisions concerning Doe plaintiff practice. Judge Gee writes:

> The majority tells our courts below little more than that, in future, we will decide the matter when it gets to us. Nothing objective is offered, "no hard and fast formula." But it is just such formulas, or at least a sketching of their outlines, that we sit to provide.[76]

Although there is no hard and fast rule that could apply to every case, certain guidelines may provide an analytical framework for determining when to allow plaintiff anonymity. Courts should evaluate both the particular justifications for shielding the plaintiff's identity and the countervailing interests in disclosure to make a principled determination of whether a pseudonym is appropriate.

A. *Justifications for Shielding Identity*

A court faced with a plaintiff's request to maintain anonymity should initially determine whether the pseudonym serves to protect

74 *Id.* at 186.
75 *Id.*
76 *Id.* at 188 (Gee, J., dissenting).

the plaintiff from a threatened harm or to prevent public disclosure of intimate information. Either purpose may warrant the use of pseudonyms, and cases substantially presenting both justifications particularly merit plaintiff anonymity.

1. Evaluating Threatened Harm

In evaluating whether the threatened harm warrants shielding the plaintiff's identity, courts should consider three factors: (1) the nature and gravity 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.

Different kinds of harm should receive varying consideration in evaluating justifications for anonymity. Threatened physical harm presents the strongest justification for proceeding anonymously. When disclosure of identity would endanger the plaintiff's personal safety or physical well-being, courts should customarily permit plaintiff pseudonyms.

Threatened social and economic harm, as opposed to threatened physical harm, present less persuasive justifications for using pseudonyms and require a closer examination of the gravity of the potential harm. The gravity of the threatened harm may vary greatly from case to case. Certainly, harm as severe as losing one's job or suffering oppressive social ostracism should receive considerable weight in allowing plaintiffs to maintain anonymity. Because litigants commonly risk financial setbacks and social disapproval, however, courts should not permit a plaintiff to thwart the policy of judicial openness merely because the suit may bring financial loss or social embarrassment.

No matter how severe the harm which a plaintiff claims will result from public disclosure of identity, the court must also evaluate the probability that the harm will actually occur. If the harm is merely imagined or speculative, the court should deny permission to proceed anonymously.[77] Plaintiffs should present affidavits or other evidence to demonstrate a probability of harm. Unless the court is convinced that harm is actually threatened, it should not protect the plaintiff's anonymity.

Shielding the plaintiff's identity would be meaningless unless the measure successfully prevents the threatened harm. Plaintiffs must, therefore, demonstrate a substantial nexus between maintaining ano-

77 *See, e.g.*, Doe v. Rostker, 89 F.R.D. 158 (N.D. Cal. 1981), and text accompanying note 30 *supra*.

nymity and avoiding the harm. Where the harm will likely occur despite the pseudonym, or where the plaintiff has already suffered the harm,[78] the court should not approve the unusual procedure of employing fictitious names.

2. Evaluating Matters of Utmost Intimacy

Though evaluating threatened harm is necessarily subjective, determining when an asserted privacy interest justifies shielding identity is even less amenable to a rigid formula. In evaluating the plaintiff's privacy interest, courts should ask: (1) whether the plaintiff's personal life is brought into the suit; (2) whether the matter is one of utmost intimacy; and, (3) whether a pseudonym would effectively prevent public access to the intimate information. Affirmative answers to all three questions present strong justification for proceeding anonymously.

A threshold determination is whether each plaintiff seeking anonymity brings his or her personal life into the lawsuit. When the action involves not the plaintiff's, but rather someone else's, personal life, the court should not shield the plaintiff's identity.[79]

Once determining that the suit involves matters broadly within the plaintiff's personal life, the court must determine whether these matters are of utmost intimacy. The plaintiff must demonstrate that the asserted privacy interest falls within a realm of personal privacy that the public and the judicial process have little reason to enter. This realm of privacy includes "personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[80] There is no absolute formula that delineates "personal intimacies." Courts should maintain flexibility to recognize privacy interests in one's body, emotions, needs, feelings, beliefs, and integral human relationships.

If the matter presented is indeed of the utmost intimacy, the plaintiff must demonstrate that proceeding anonymously would effectively block public access to the intimate information. If the information has already been subjected to public scrutiny, either through pretrial publicity or a prior judicial proceeding,[81] little justification

78 *See, e.g.*, Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (10th Cir. 1979), where the plaintiff had already suffered the publicity of a criminal trial.

79 For example, in Doe v. Deschamps, 64 F.R.D. 652 (D. Mont. 1974), the court refused to permit the doctor to proceed anonymously when the suit involved only his patient's personal life. *See* text accompanying note 61 *supra*.

80 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973).

81 *See, e.g.*, Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (10th Cir. 1979).

remains for shielding identity. Similarly, if in spite of the pseudonym, the public would still gain access to the information through other means, the presumption of judicial openness should override the plaintiff's privacy interest.

B. *Countervailing Concerns*

The interest in disclosing the plaintiff's true identity is not merely a statement of general policy, but rather entails specific concerns that vary with the facts of each case. The court should evaluate the consequences of shielding the plaintiff's identity and the need for disclosure as they relate particularly to justiciability, discovery, the enforceability of relief, and the public interest in knowing the plaintiff's identity.

1. Justiciability

Plaintiff anonymity affects two important aspects of justiciability: standing and mootness. The court must initially find that the plaintiff has standing to bring the suit. Specifically, the court must ascertain that the fictitious name represents a real person who was in fact injured by the law or conduct at issue. Courts that require the plaintiff to file a sealed alias affidavit receive assurance that the plaintiff is a real person.[82] Courts might also require the plaintiff to reveal his or her true name *in camera*. A judge's active participation in the pretrial process may lead to further confirmation that the plaintiff has standing to bring the suit. The court should require the continuing existence of real parties with standing as a condition to maintaining anonymity.

Besides ensuring that the plaintiff has standing, the court must continually ensure that the case has not become moot. For example, a court hearing a case brought by an inmate must confirm that the plaintiff remains confined at the time of trial.[83] The court must ob-

82 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 124 (1973).

83 Release from confinement or transfer to another institution does not moot claims for money damages, however. Doe v. Lally, 467 F. Supp. 1339, 1343 (D. Md. 1979). A prisoner's transfer or release also does not moot claims for injunctive relief if the alleged deprivation is capable of repetition yet evading review. In *Lally*, for example, the plaintiff was homosexually raped while confined to a temporary prison facility and was transferred to another institution by the time of trial. Because the plaintiff was no longer subject to the alleged deprivation, the defendant argued that the plaintiff's suit for declaratory and injunctive relief was moot. The Court ruled that the case was not moot. It stated that "[u]nless courts adopt a liberal attitude towards mootness aspects of civil rights claims brought in connection with alleged deprivations occurring at temporary prison facilities, such claims will continue to recur and escape adjudication." *Id.* at 1342-43.

tain sufficient facts, through sealed affidavits or *in camera* revelation of the plaintiff's true name, to monitor mootness throughout the litigation.

2. Discovery

Courts should not allow plaintiff pseudonyms to preclude defendants' full use of the discovery process. Where the pseudonym becomes an offensive means to thwart the opposing litigant's defenses, rather than a protective measure, courts should require the plaintiff to reveal his or her true name to the defendant. This limited disclosure still protects the plaintiff from outside harm and public invasion of personal privacy while maintaining fairness in the litigation.[84]

3. Enforceability of Relief

When an anonymous plaintiff seeks specific relief, any remedy ordered by the court may require the court, and sometimes also the defendant, to know the plaintiff's true name. In such cases, the court should require limited disclosure of the plaintiff's identity. A plaintiff seeking anonymity must realize that such limited disclosure is necessary if the desired remedy is to be effective.

4. Public Interest in Knowing the Plaintiff's Identity

The public interest in knowing the facts surrounding a trial is relatively constant. The public enjoys a historical presumption of full access to judicial proceedings and information.[85] However, the public interest in knowing a particular plaintiff's identity varies from case to case. For example, the public may have little interest in knowing the identity of a private plaintiff challenging action directed only at the plaintiff.[86] Conversely, where the plaintiff raises issues which affect the public at large, the public may have a heightened interest in knowing the plaintiff's identity. Especially where the plaintiff is a public official and owes the public a special fiduciary duty, the court should not allow a plaintiff's pseudonym to block public scrutiny.

84 *See, e.g.*, Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (plaintiffs agreed to disclose their true names to the court and to the defendant).

85 *See* text accompanying note 19 *supra*.

86 *See, e.g.*, Roe v. Borup, 500 F. Supp. 127 (E.D. Wis. 1980) (parents sought damages after the state temporarily removed their child from parental custody).

V. Conclusion

Courts should allow plaintiffs who file anonymously to present justifications for their use of pseudonyms, and should not mechanically interpret Rule 10(a) to dismiss anonymous complaints. Although a plaintiff never has the *right* to use a pseudonym, a plaintiff may justify the privilege of anonymity by demonstrating threatened harm or a substantial privacy interest. After the plaintiff presents justifications for concealing identity, the court must determine what measure of concealment is appropriate. Courts should consider alternatives to total concealment, such as *in camera* revelation of the plaintiff's true name, whenever concerns of justiciability, discovery, or enforceability of relief are implicated.

The ultimate determination of whether to shield the plaintiff's identity remains within the court's discretion. However, the suggested analytical guidelines facilitate a reasoned determination of when circumstances warrant plaintiff anonymity. Concealing the plaintiff's identity should remain a highly unusual procedure, and only exceptional circumstances should prompt courts to shield the Doe plaintiff.

Wendy M. Rosenberger

MEMORANDUM

FROM: Meredith Holley

TO: Council on Court Procedures

DATE: December 15, 2017

RE: Open Courts and Fictitious Names

ISSUE PRESENTED: Does the use of fictitious names in Oregon pleadings violate the Oregon Constitution, Article I, section 10?

SHORT ANSWER: Very likely, no. The "Open Courts" clause of Oregon's Constitution, Article I, section 10, only applies to "adjudications." *State v. Macbale*, 353 Or 789, 806 (2013) (citing *Oregon Pub. Co. v. O'Leary*, 303 Or 297, 303 (1987)).

FACTS

Senior Judge Hargreaves presented the Oregon Council on Court Procedures with the question of whether use of fictitious names by individuals, rather than business entities, in pleadings and discovery violates the ORCP and Oregon Constitution. The Council is considering whether to amend the ORCP to provide explicit instruction regarding use of fictitious names for individuals in pleadings and discovery.

Senior Judge Hargreaves' points to the case *John Roe, v. Jane Doe*, 161 Or. App. 477(1999), as an example of a case in which both the plaintiff and defendant used fictitious names. Since Judge Hargreaves raised this issue in the Oregon State Bar Litigation Section Judge's Corner, it appears that judges have begun denying motions to use fictitious names and there is a developing split in the trial courts. Multnomah and Clackamas Counties have SLRs giving direction on how to file using fictitious names, but other counties in Oregon do not.

OTLA provided examples of cases in which the courts will face this issue. Those examples include victims of sex abuse, who live in small towns and are bringing claims against influential community leaders or whose jobs and livelihoods would be otherwise affected by having their names associated with stigmatizing claims. Other examples are individuals where claims involve sexually transmitted diseases, childhood abuse, or parties with vulnerable conditions like intellectual disabilities.

DISCUSSION

1. Pleadings and discovery are not "adjudications," and therefore the Oregon Constitution, Article 1, section 10, likely does not apply to them.

The "Open Courts" clause of Oregon's Constitution, Article 1, section 10, very likely does not apply to pleadings or discovery because they are not "adjudications." The "Open Courts" clause states, "No court shall be secret, but justice shall be administered, openly and without purchase . . . ."

The Oregon Supreme Court, en banc, in *Oregonian Pub. Co. v. O'Leary*, 303 Or 297 (1987), explained that there is no "individual right" under Article I, section 10, that would adhere to the media or the public, but rather it "is one of those provisions of the constitution that prescribe how the functions of government shall be conducted." *Id.* at 301 (quoting *State ex rel. Oregon Pub. Co. v. Diez*, 289 Or 277, 288 (1980)). The "open courts" clause of Article I, section 10, only applies to "adjudications." *Jack Doe 1 v. Corp. of Presiding Bishop*, 352 Or 77, 99 (2012) (citing *O'Leary*, 303 Or at 303).

a. An adjudication determines "legal rights based upon presentation of evidence and argument."

An "adjudication" refers to "'the fundamental function of courts,' which is 'to determine legal rights based upon a presentation of evidence and argument.'" *Jury Service Resource Center v. Carson*, 199 Or App 106, 116 (2005) (quoting *O'Leary*, 303 Or at 303), *rev'd on other grounds, Jury Service Resource Center v. De Muniz*, 340 Or 423, 429 (2006).

The Oregon Supreme Court, in *O'Leary*, explained:

> To the extent that adjudications are not involved, the administration of justice is not governed by [Article I, section 10]. Section 10, for example, does not require that police investigations of crime, although a part of the administration of justice, be open to public scrutiny. In addition, this court has noted that judicial proceedings that were closed to the public by well-established tradition at the time of the adoption of the Oregon Constitution may be exceptions to section 10. Deiz, 289 Or. at 284, 613 P.2d 23 (jury deliberations and collegial court conferences are historical exceptions to the command of section 10 that justice be administered openly).

O'Leary, 303 Or at 303.

b. Sealing or redacting admitted trial exhibits does not violate Article I, section 10, and trial courts have discretion over protective orders under ORCP 36 C.

In *Jack Doe 1*, the Oregon Supreme Court, again en banc, held on mandamus review that Article I, section 10, does not require a trial court to release exhibits after trial, and it would not violate that provision for the trial court to redact the names of child abuse victims and persons reporting suspected child abuse from the records disclosed to the media after trial. 352 Or at 101. The Court reasoned,

> We will not attempt to catalogue here the complete range of circumstances in which a court permissibly may exercise its authority to limit the disclosure of exhibits, as discussed above, at the close of a trial. We agree with the trial court, however, that among those circumstances is the need to protect those who have been victims of child sexual abuse and those who have reported suspected child sexual abuse to others with authority to investigate, from embarrassment, retaliation, or other harm.

Id. The Court distinguished Article I, section 10's prohibition of secret adjudications from the court's authority over managing trial. *Id.* at 86. Affirming the trial court's discretion to withhold from the public or redact exhibits that had been admitted at trial, the Court said, "The issuance and vacation of protective orders are matters of a trial court's discretion. *See* ORCP 36 C (granting court discretion to make any discovery order 'which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense')." *Jack Doe 1* 352 Or at 86. That case did not challenge the use of fictitious by the plaintiffs, but the Court adopted the use of fictitious names at the appeals level.

c. A hearing to decide admissibility of evidence is very likely an "adjudication" under Article I, section 10, but a hearing to decide whether evidence is *presumptively inadmissible* is not an "adjudication."

Article 1, section 10, does not apply differently to any particular type of adjudication, whether juvenile, criminal, or civil. In *State ex rel. Oregon Pub. Co. v. Diez*, for example, the Oregon Supreme Court held it violated Article 1, section 10, to exclude the public from a juvenile court hearing, where the defendant judge argued that "the public has no interest in (juvenile) proceedings." *Diez*, 289 Or 277, 283 (1980). *See also State v. Macbale*, 353 Or 789, 114 (2013) ("The defendant trial judge responded that juvenile hearings ought to be closed to the public, because the public has no interest in juvenile proceedings. This court rejected the judge's argument, holding that Article 1, section 10, 'does not recognize distinctions between various proceedings; it applies to all") (quoting *Deiz*, 289 Or at 283). Likewise, in *O'Leary*, the Oregon Supreme Court held that it violated Article I, section 10, for a statute require an *in camera* hearing. *O'Leary*, 303 Or at 304.

By contrast, in *State v. Macbale*, the Oregon Supreme Court, again en banc, held that OEC 412, Oregon's rape shield law, does not violate Article 1, section 10, even though it requires judges to excluded the public from hearings to determine the admissibility of evidence of a sex crime victim's past sexual history. 353 Or at 809. The purpose of the rape shield law is to protect the victim from "degrading and embarrassing disclosure of intimate details about [the victim's]

private li[fe].” *Id.* at 807 (quoting *State v. Lajoie*, 316 Or 63, 69 (1993) (internal quotations and citations omitted) (brackets in *Macbale*). Because the OEC 412 hearing was only to determine whether the sexual history evidence was “presumptively *irrelevant*,” it was not a determination of guilt or innocence or administering justice, and therefore was not an “adjudication” under Article I, section 10. *Id.* at 807.

2. **The Oregon Supreme Court’s rulings support the conclusion that Article 1, section 10, does not apply to pleadings, discovery, or hearings to determine whether evidence is presumptively inadmissible.**

Both *Jack Doe 1* and *Macbale* consider issues directly on point to the question before the Council. In *Jack Doe 1*, the Oregon Supreme Court impliedly validated the use of fictitious names by incorporating them into its pleadings. It also affirmed the trial court’s decision to withhold information from the public in order to protect victims of sex abuse from embarrassment and retaliation. In *Macbale*, the Oregon Supreme Court once again reasoned that even hearings, sometimes, are not “adjudications” under the meaning of the “Open Courts” clause of Article I, section 10, and may be held outside of the public to protect victims of sexual crimes, where the hearing’s purpose is to determine whether evidence is presumptively inadmissable.

CONCLUSION

The Oregon Constitution, Article I, section 10’s Open Courts clause only applies to “adjudications,” and very likely does not apply to pleadings or discovery. The case law is clear that Article I, section 10, applies equally to juvenile, criminal, and civil cases, but it only applies to determinations of legal rights based on presentations of evidence and argument. Like the exhibits in *Jack Doe 1* and the rape shield hearing in *Macbale*, pleadings and discovery are very likely not “adjudications” and therefore Article I, section 10, very likely does not apply to them.

Article

BUY LOCAL: RELY ON OREGON LAW, NOT FEDERAL PRECEDENT, WHEN SEEKING A TRO OR PI IN STATE COURT

Authors: Dallas DeLuca

When moving for a preliminary injunction or temporary restraining order under ORCP 79 A(1), evidence that a party is likely to succeed on the merits should be irrelevant. Federal Rule of Civil Procedure 65's requirement that the movant must make such a showing is not part of Oregon law.

Here is ORCP 79 A(1), which sets forth the standards a court must use to determine whether to issue a PI or a TRO:

> Subject to the requirements of Rule 82 A(1), a temporary restraining order or preliminary injunction may be allowed under this rule:

> (a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief; or
>
> (b) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual. This paragraph shall not apply when the provisions of Rule 83 E, F(4) and H(2) are applicable, whether or not provisional relief is ordered under those provisions.

In contrast, FRCP 65(a) has no similar text and provides only that "[t]he court may issue a preliminary injunction only on notice to the adverse party."

Although there are other parts of ORCP 79 and FRCP 65 that are parallel and substantively similar,[i] the Oregon Rule setting forth the criteria to decide whether to grant a PI or TRO has no parallel in that federal rule.

Instead, ORCP 79 A is substantively similar to pre-ORCP Oregon statutes stretching back to the Deady Code. Section 407 of Title III of the Organic and Other General Laws of Oregon (1874) is the progenitor of ORCP 79 A(1). Section 407 provides as follows:

> When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in retraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of plaintiff's rights, concerning the subject of the suit, and tending to render the decree ineffectual[.]

The overlap between ORCP 79 A(1) and Section 407 is not a coincidence. The Council on Court Procedures commentary to ORCP

79 (1979-1981 biennium) states that "The grounds spelled out in subsection A.(1) are identical to [former] ORS 32.040" with one exception not relevant here.[ii] And *former* ORS 30.040 was nearly identical (with a comma or two omitted) to Section 407. To the extent that there are slight differences between ORCP 79 A(1) and *former* ORS 32.040, we should presume that those are not substantive, because the Commentary states that the "grounds * * * are identical[.]"

ORCP 79 A(1) has its own case law stretching back to the 19th century, decades before Federal Rule 65 was promulgated in the 1930s. And "those [Oregon] cases remain good law." *Or. Educ. Ass'n v. Or. Taxpayers United PAC*, 227 Or App 37, 45-46 n4, 204 P3d 855 (2009); *also* Or. Civ. Pleading and Prac. § 34.6 (same, citing *Or. Educ. Ass'n*).

The case law for ORCP 79 A(1) differs substantially from the familiar four-part balancing test from federal case law. Most significantly, ORCP 79 A(1) does not require a mini-trial to determine who is most likely to succeed on the merits at a later trial. *Compare with Winter v. NRDC, Inc.*, 555 US 7, 20 (2008) (under FRCP 65, the movant must establish that she "is likely to succeed on the merits"). A motion under ORCP 79 A(1) is not a mini-trial on the merits; instead, courts determine whether the complaint entitles the plaintiff to the relief sought.

The Oregon Supreme Court in an early case stated that when deciding whether to grant a preliminary injunction, the trial courts should do so without making any determination on the ultimate merits.

> A preliminary injunction is only a provisional remedy, the sole object of which is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. In granting or refusing temporary relief by preliminary injunction, courts of equity should in no manner anticipate the ultimate determination of the question of right involved.

Helms v. Gilroy, 20 Or 517, 520, 26 P 85 (1891) (citation omitted). *Helms* states explicitly that a preliminary injunction can issue before "a hearing upon the merits[.]" *Id.* *Helms*'s interpretation of Section 407 is supported by the text and the margin notes for the statute. Section 407

used the phrase "When it appears *by the complaint* that the plaintiff is entitled to the relief demanded[.]" (Emphasis added.) The margin notes cite *Woodruff v. Fisher*, 17 Barb. 224 (Sup. Ct. NY 1853). *Woodruff* states that to obtain an injunction the plaintiff needs only a verified complaint (one not on information and belief) and, if the plaintiff has that, it does need a separate affidavit before obtaining a preliminary injunction. *Id.* at 225.

A half-century after *Helms*, the rule had not changed: "Hearing had on motion to show why preliminary injunction should not issue was not one on the merits." *Fleming v. Woodward*, 180 Or 486, 488, 177 P2d 428, 429 (1947) (citations omitted). "'[T]he essential conditions for granting such temporary injunctive relief are that the complaint allege facts which appear to be sufficient to constitute a cause of action for injunction[.]'" *State ex rel. Tidewater Shaver Barge Lines v. Dobson*, 195 Or 533, 580, 245 P2d 903, 924 (1952) (quoting 28 Am. Jur. Injunctions, 207, § 14).

The most recent appellate case to look at the question does not differ. In *Oregon Education Ass'n v. Oregon Taxpayers United PAC*, 227 Or App 37, 45, 204 P3d 855, 860 (2009) (Landau, J), the court stated in *dicta*, citing *Fleming*, that "a hearing on whether a preliminary injunction should issue is not a hearing on the merits, but is merely to determine whether the party seeking the injunction has made a sufficient showing to warrant the preservation of the status quo until the later hearing on the merits." (citations omitted). The moving party has to make a "sufficient showing" that without the PI or TRO the status quo is in jeopardy and that the status quo is worth preserving. "The office of a preliminary injunction is to preserve the status quo so that, upon the final hearing, full relief may be granted." *Id.* (internal quotation marks, alterations, and citation omitted).

Lawyers should not rely on federal precedent to contend that TRO and PI motions under ORCP 79 A(1) require a movant to show that it is likely to succeed on the merits. Practitioners may cite *Von Ohlen v. German Shorthaired Pointer Club of America, Inc.*, 179 Or App 703, 710–711 & n13, 41 P3d 449 (2002), for the proposition that federal decisions interpreting FRCP 65 are persuasive authority when interpreting ORCP 79 A.[iii] *See State ex rel Eltrym Historic Theater LLC v. The City of Baker City*, 2006 WL 6204550, Baker Cty. Cir. Ct. (Aug. 15, 2006) (citing both federal and state precedent to decide a

TRO, and citing to *Von Ohlen v. German Shorthaired Pointer Club* for basis to rely on federal cases); *see also* Or. Civ. Pleading and Prac. (2012 rev.), Chap. 34, Permanent Injunctions, Temporary Restraining Orders, and Preliminary Injunctions, §34.6-2 (stating parties may rely on federal precedent when arguing TRO and PI motions based on citation to *Von Ohlen*).

But *Von Ohlen* is irrelevant to ORCP 79 A(1). That case interpreted the provisions in ORCP 79 D, which addresses whether a non-party is bound by an injunction. In *Von Ohlen*, reliance on federal precedent was appropriate to interpret ORCP 79 D because it is substantively similar to FRCP 65(d)(2). In contrast to ORCP 79 D, ORCP 79 A(1), quoted above, does not have a counterpart in the federal rule.

Although courts should not look at evidence of the merits of the claim, courts must consider other factors in addition to the allegations in the complaint. "'[T]he essential conditions for granting such temporary injunctive relief" include "that on the entire showing from both sides it appear[s], in view of all the circumstances, that the injunction is reasonably necessary to protect the legal rights of the plaintiff pending the litigation * * *.'" *Tidewater Shaver Barge Lines*, 195 Or at 580-81 (quoting 28 Am. Jur. Injunctions, 207, § 14). Courts, in deciding whether to grant a preliminary injunction or a temporary restraining order, "exercise * * * discretion in balancing conveniences, in affording protection against needless injury, in preserving the subject matter of the suit, and not infrequently in preserving the status quo." *State ex rel. Pac. Tel. & Tel. Co. v. Duncan*, 191 Or 475, 500, 230 P2d 773, 784 (1951).

The precedent interpreting ORCP 79 A(1) does not include the "likely to succeed on the merits" prong from the four-part balancing test that federal courts must use when considering motions for a TRO or PI. That changes what should be argued in TRO and PI hearings. Evidence supporting which party is likely to succeed on the merits should be irrelevant and inadmissible at the PI and TRO hearings. All the plaintiff needs (in addition to showing irreparable harm or the need to preserve the status quo) is a pleading that can survive a motion to dismiss. That may make ORCP 79 A more plaintiff-friendly than FRCP 65, and the bench and bar should open a conversation about the costs and benefits of the Oregon standard and whether ORCP 79 A should be changed to expressly include the "likely to succeed on the merits"

part of the federal balancing test.

Originally published in the Spring 2017 edition of the Oregon State Bar's Bar Bulletin.

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[i] ORCP 79 B, concerning when to grant a TRO without notice to the adverse party, is substantively similar to FRCP 65(b). ORCP 79 D, concerning the form of the TRO and the PI and the parties bound by them, is similar to FRCP 65(d).

[ii] The commentary to ORCP 79 from the 1979-1981 biennium is available at http://www.counciloncourtprocedures.org/Content /1979-1981%20Biennium/ORCP%20Rules%201981/Rule%2079.pdf (http://www.counciloncourtprocedures.org/Content /1979-1981%20Biennium/ORCP%20Rules%201981/Rule%2079.pdf) .

[iii] This article is not implying that all lawyers and judges are using federal precedent when considering ORCP 79 A(1) motions. Given the limited number of trial court decisions and briefs readily accessible, it is hard to determine the proportion of such motions where the parties contend that federal precedent applies.

Shari Nilsson <nilsson@lclark.edu>

Fwd: Happy new year!

Mark Peterson <mpeterso@lclark.edu> Fri, Jan 12, 2018 at 4:22 PM
To: Shari Nilsson <nilsson@lclark.edu>

--
Mark A. Peterson
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---------- Forwarded message ----------
From: **Mark Peterson** <mpeterso@lclark.edu>
Date: Fri, Jan 12, 2018 at 4:19 PM
Subject: Re: Happy new year!
To: Holly.Rudolph@ojd.state.or.us

Holly,

I will place your concern before the Council at tomorrow's meeting. However, I do not see a problem. First, the GAL appointment process remains rather informal and the parent could be appointed as GAL, unless there was a reason that the court had a concern about the parent. There is no appointment of a visitor to interview the person. So, I do not see a concern about someone extra questioning the minor about the requested relief. Further, HB 2673 (3)(a) states that the minor's parent, legal guardian, or legal representative may make the request of the state registrar as an alternative to a court order.

Am I missing your point?

Mark

--
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On Mon, Jan 8, 2018 at 3:31 PM, <Holly.Rudolph@ojd.state.or.us> wrote:

> Thoughts in red below. This is fun!
>
> thanks!

Holly C. Rudolph, JD
OJD Forms Manager
Communication, Education, & Court Management (CECM)
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"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

Mark Peterson ---01/05/2018 05:47:55 PM---Holly, Always good to hear from you! You help hone the rules by asking those

From: Mark Peterson <mpeterso@lclark.edu>
To: Holly.Rudolph@ojd.state.or.us
Cc: Shari Nilsson <nilsson@lclark.edu>
Date: 01/05/2018 05:47 PM
Subject: Re: Happy new year!

Holly,

Always good to hear from you! You help hone the rules by asking those basic "when the "rubber meets the road" questions that cause us to think.

In typical lawyer fashion, let me answer your query with a question or two to tease out the issue. Rule 27 refers to parties in litigation. If a minor files his or her own action to change a legal name or gender, the minor is a party. Yes - and in this case there is no issue - a GAL would have to be appointed if the minor petitions on their own behalf. I believe that this would be true even if the petitioner in the caption is, as is sometimes done, "Susie Smith by her mother and next friend, Dottie Smith." However, if the name change is only a part of the prayer for relief, i.e., a parent's dissolution petition seeking to change a name of his or her minor child to a previous name. then the minor is not a party and no GAL would be required. Also no issue here.

I am not clear on the first of your options. What other provision, other than the guardianship statutes in ORS, chapter 125, create a legal guardian? This is not something I have assembled much background info on, but I there are guardianship provisions in 419A and B for juvenile cases (the ones we cite to for dependency are 419B.365 and .366), and I believe there's something in 107 or 109 that creates a legal guardianship for a child (comes up sometimes for family caring for a child whose parents are transient/in prison/in treatment and need to enroll in school or something but don't have standing for custody orders)? I may be off base about the source provisions for that, but 419 has guardianships. A grandparent or older sibling may or may not be acting in the best interest of the minor and the amendments to Rule 27 were designed to put the appropriate persons on notice and, thereby, prevent abuses. How has this grandparent or sibling "taken guardianship" of the minor? Family law is not my area of expertise and section A of Rule 26 allows for other means of appointing a GAL if the appointment is pursuant to an order of the court or "if a statute provides for a procedure that varies"

from Rule 26.

In response to your second inquiry, I do not believe that a parent qualifies as a guardian. This is the main crux of the question. Why? The rule is written so that 'guardian' is not included in the cross-reference, so I read that as holding its regular meaning and not as a term of art, such that a parent *is* a child's legal guardian. What would be the basis for assuming that the parent is not acting in the child's best interest as a matter of course?

In this context, appointing a GAL where a parent or other guardian exists seems counter to the intent of the bill which is to streamline and simplify identity record changes and prevent undue intrusion into the petitioner's life. Appointing a GAL to represent the child's best interest would therefore necessarily involve the GAL questioning the child about their identity in order to make that determination, correct? That's one of the main aims of this bill - to avoid putting petitioners in situations where they have to justify themselves to the court. So I would argue that, even if the rule is intended to be read as excluding parents, that this bill necessitates an exception for identity record proceedings in order to meet the bill's intent.

Secondary interesting point - R27(B)(1) only has 2 options to appoint a GAL - by application by the minor if 14 or older, or by application by someone else if under 14. That seems to argue against compulsory GAL, doesn't it? That reads to me as permissive or instructive, not compulsory. "The person shall appear by GAL pursuant to this rule" (which then permits the minor or interested party to apply). There's no "and if no one applies, the court will pick someone" closing / bracketing clause to throw sua sponte authority to the court.

I would point out that section H allows for a request to waive the fairly onerous notice requirements where there is no need to provide the fully range of notice and protections.

I will run your questions by the Council to see if the collective wisdom of that body, can better answer your concerns.

Let me know if I have misstated, or missed, your point.

Best

Mark

--
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On Thu, Jan 4, 2018 at 1:02 PM, <Holly.Rudolph@ojd.state.or.us> wrote:

Hope you enjoyed the holidays! I have a new question on a new rule for me and a new bill for all of us.

HB 2673 changed the statutes and processes for name and sex change filings (ORS 33.410+). I've got a bit of disagreement regarding the impact of ORCP 27 on minor filings. It's not critical, but something I will need to resolve before I can put the minor application into Guide & File.

In a nutshell, the question is: Does ORCP 27 require that a GAL be appointed in every identity change case where a minor is the subject regardless of whether the filer is a parent, other legal guardian, or the minor?

We retained the perspective that if the minor files on their own behalf, obviously a GAL would be required. However, the rule is phrased as requiring a GAL in cases where the minor is not already represented by a legal guardian. So I see two branches of the question here. Is a GAL required if:

(1) the petition is filed by a legal guardian appointed under some other provision besides GAL? Perhaps a grandparent or sibling who has taken guardianship of the child, for example.
and
(2) does a parent qualify as a 'guardian' for purposes of the rule (either generally or in this instance) such that a filing by a parent would not require a GAL?

In practical terms, application of the GAL rule is not consistent among courts for cases other than a self-rep minor (in this context). In addition, the other provisions of the bill dealing with administrative processes are clearer about granting specific standing to file for the minor and the intent of the bill was to streamline the process and avoid judicial scrutiny. I'd like to know what the committee's view is regarding parent or non-GAL guardian filings for name or sex change of a minor.

Thank you!

Holly C. Rudolph, JD
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"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

Enrolled
House Bill 2673

Sponsored by Representatives NOSSE, GREENLICK, Senator MONNES ANDERSON, Representative WILLIAMSON; Representatives FAHEY, GOMBERG, KENY-GUYER, LININGER, MARSH, MCLAIN, PARRISH, POWER, SMITH WARNER, Senators BURDICK, DEMBROW, DEVLIN, GELSER, MANNING JR, RILEY, ROBLAN, STEINER HAYWARD, TAYLOR (at the request of Basic Rights Oregon) (Presession filed.)

CHAPTER .....

AN ACT

Relating to processes required to change information by which a person may be identified; creating new provisions; amending ORS 33.420, 33.460, 109.360, 432.235 and 432.245; and prescribing an effective date.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 432.235 is amended to read:

432.235. (1) A vital record registered under this chapter must be amended or corrected in accordance with this section or rules adopted by the State Registrar of the Center for Health Statistics for the purpose of protecting the integrity and accuracy of vital records.

(2)(a) A vital record that is amended **or corrected** under this section shall indicate that it has been amended **or corrected**, except as otherwise provided in this section or by rule of the state registrar.

(b) The state registrar shall keep and maintain:

(A) Documentation that identifies the evidence upon which an amendment or correction is based;

(B) The date of the amendment or correction; and

(C) The identity of the individual authorized by the Center for Health Statistics that made the amendment or correction.

[*(3) Upon receipt of a certified copy of an order of a court of competent jurisdiction changing the name of a person born in this state, and upon the request of a person 18 years of age or older or, if a person is younger than 18 years of age and is not an emancipated minor, by the person's parent, legal guardian or legal representative, the state registrar shall amend the record of live birth to show a new name.*]

(3)(a) Upon the request of an applicant who is 18 years of age or older or an emancipated minor, or if the applicant is not 18 years of age or older or an emancipated minor, upon the request of an applicant's parent, legal guardian or legal representative, the state registrar shall amend a record of live birth that occurred in this state to change the name of the applicant if:

(A) The state registrar receives a certified copy of an order from a court of competent jurisdiction changing the name of the applicant; or

(B) The state registrar receives a request, on a form prescribed by the state registrar, from the applicant to change the name that includes:

(i) Documentation sufficient, as prescribed by the state registrar by rule, to allow the state registrar to confirm the identity of the applicant and identify the correct record of live birth to be amended; and

(ii) A statement signed by the applicant in which the applicant attests, as prescribed by the state registrar by rule, to making the request for the purpose of affirming the applicant's gender identity.

(b) Upon request, the state registrar shall amend a record of live birth that occurred in this state to change the sex of an applicant if the applicant is 18 years of age or older or an emancipated minor, or if the applicant is not 18 years of age or older or an emancipated minor, the applicant's parent, legal guardian or legal representative makes the request, and if:

(A) The state registrar receives a certified copy of an order from a court of competent jurisdiction changing the sex of the applicant; or

(B) The state registrar receives a request, on a form prescribed by the state registrar, from the applicant to change the sex that includes:

(i) Documentation sufficient, as prescribed by the state registrar by rule, to allow the state registrar to confirm the identity of the applicant and identify the correct record of live birth to be amended;

(ii) A statement signed by the applicant in which the applicant attests, as prescribed by the state registrar by rule, to making the request for the purpose of affirming the applicant's gender identity; and

(iii) Any other documentation as required by the state registrar by rule.

[*(4)*] **(4)(a)** When an applicant to amend a vital record does not submit the minimum documentation required to make an amendment, or when the state registrar has cause to question the validity or adequacy of [*the*] **an** application **to amend a vital record**, the state registrar, in the state registrar's discretion, may refuse to amend the vital record**.** [*and shall enter an order to that effect, stating the reasons for the action. The state registrar shall advise the applicant of the right to appeal under ORS 183.484.*] **If the state registrar refuses to amend a vital record under this subsection, the state registrar shall:**

(A) Enter an order denying the amendment and stating the reasons for the denial; and

(B) Advise the applicant of the applicant's right to appeal the order under ORS 183.484.

(b) The state registrar may not amend a record of live birth to change the name of an applicant under subsection (3)(a)(B) or the sex of an applicant under subsection (3)(b)(B) of this section more than once.

(5) When an amendment is made to a record of marriage or a record of domestic partnership by the county clerk or other county official who issues marriage licenses and registers domestic partnerships [*or, if*]**, or when** an amendment changes the name, date of birth or birthplace of a party[*, by the court that entered the*] **to a** judgment or final order of **a** dissolution of marriage or dissolution of domestic partnership **by a court of competent jurisdiction**, copies of the amendment must be forwarded to the state registrar **and the state registrar shall amend the related record**.

(6) If a judgment or final order of dissolution of marriage or dissolution of domestic partnership is set aside by [*the court that entered the judgment or order*] **a court of competent jurisdiction**, a copy of the notice setting aside the judgment or order must be forwarded to the state registrar and the state registrar shall void the related record.

SECTION 2. ORS 432.245 is amended to read:

432.245. (1) For a person born in this state, the State Registrar of the Center for Health Statistics shall amend a record of live birth and establish a replacement for the record **of live birth** if the state registrar receives one of the following:

(a) A report of adoption as provided in ORS 432.223 or a certified copy of the judgment of adoption **from a court of competent jurisdiction**, with the information necessary to identify the original record of live birth and to establish a replacement for the record **of live birth**, unless the court ordering the adoption requests that a replacement for the record **of live birth** not be established;

(b) A request that a replacement **for the** record of live birth be prepared to establish parentage, as prescribed by the state registrar by rule**,** or **as** ordered by a court of competent jurisdiction [*in this state*] that has determined the **parentage or biological** paternity of a person;

(c) A written and notarized request[,] **that a replacement for the record of live birth be prepared to establish parentage, if the request includes an acknowledgment of paternity** signed by both **biological** parents[*, acknowledging paternity; or*]**;**

(d) A certified copy of a judgment [*that indicates that an individual born in this state has completed sexual reassignment and that the sex on the record of live birth must be changed.*] **from a court of competent jurisdiction changing a person's sex and, if applicable, name; or**

(e) A request approved by the state registrar under ORS 432.235 (3)(b)(B).

(2) To change a person's name under subsection (1) of this section, the request or court order must include **both** the name that [*currently*] appears **on** the record of live birth **at the time of the request** and the [*new*] name to be designated on the replacement for the record **of live birth**. The [*new*] **designated** name of the person [*shall be shown*] **must appear** on the replacement for the record **of live birth**.

(3) Upon receipt of a certified copy of a court order to change the name of a person born in this state as authorized by 18 U.S.C. 3521 et seq., the state registrar shall create a replacement for [*a*] **the** record of live birth to show the new information as specified in the court order.

(4) When a replacement for a record of live birth is prepared, the city, county and date of live birth must be included in the replacement **for the record of live birth**. The replacement for the record **of live birth** must be substituted for the original record of live birth. The original record of live birth and all evidence submitted with the request or court order for the replacement for the record **of live birth** must be placed under seal and is not subject to inspection, except upon the order of a court of competent jurisdiction in this state or as provided by rule of the state registrar.

(5) Upon receipt of an amended judgment of adoption, the record of live birth shall be amended by the state registrar as provided by the state registrar by rule.

(6) Upon receipt of a report of annulment of adoption or a court order annulling an adoption, the original record of live birth must be restored. The replacement for the record of live birth is not subject to inspection, except upon the order of a court of competent jurisdiction in this state or as provided by rule of the state registrar.

[*(7) If there is no record of live birth for a person for whom a replacement for the record is sought under this section and the court issues an order indicating a date of live birth more than one year from the date submitted to the Center for Health Statistics, the replacement for the record of live birth shall be created as a delayed record of live birth.*]

[*(8)*] **(7)** The state registrar shall prepare and register a record of foreign live birth for a person born in a foreign country who is not a citizen of the United States and for whom a judgment of adoption was issued by a court of competent jurisdiction in this state if the court, the parents adopting the child or the adopted person, if the adopted person is 18 years of age or older, requests the record. The record must be labeled "Record of Foreign Live Birth" and shall show the actual country of live birth. After registering the record of foreign live birth in the new name of the adopted person, the record must be placed under seal and is not subject to inspection, except upon the order of a court of competent jurisdiction [*in this state*] or as provided by rule of the state registrar.

(8) If there is no record of live birth for a person for whom a replacement for the record of live birth is sought under this section, and if the court order indicates a date of live birth more than one year from the date submitted to the Center for Health Statistics, the replacement for the record of live birth must be created as a delayed record of live birth.

(9) A replacement **for the** record of live birth may not be created under this section if the date and place of live birth have not been [*determined by the*] **indicated in the** court order.

SECTION 3. ORS 33.460 is amended to read:

33.460. (1) [*A court that has jurisdiction to determine an application for change of name of a person under ORS 33.410 and 33.420*] **Application for legal change of sex of a person may be heard and determined by any circuit court in this state. A circuit court** may order a legal change of sex and enter a judgment indicating the change of sex [*of a person if the court determines that the individual has undergone surgical, hormonal or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed.*] **if the individual attests that the individual has undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of affirming gender identity.**

(2) The court may order a legal change of sex and enter the judgment in the same manner as that provided for change of name of a person under ORS 33.410 [*and 33.420*].

(3) If a person applies for a change of name under ORS 33.410 [*and 33.420*] at the time the person applies for a legal change of sex under this section, the court may order change of name and legal change of sex at the same time and in the same proceeding.

SECTION 4. ORS 33.420 is amended to read:

33.420. [*(1) Before entering a judgment for a change of name, except as provided in ORS 109.360, the court shall require public notice of the application to be given, that all persons may show cause why the same should not be granted. The court shall also require public notice to be given of the change after the entry of the judgment.*]

[*(2)*] **(1) Except as provided in ORS 109.360,** before entering a judgment for a change of name in the case of a minor child**,** the court shall require that[*, in addition to the notice required under subsection (1) of this section,*] written notice be given to the parents of the child, both custodial and noncustodial, and to any legal guardian of the child.

[*(3)*] **(2)** Notwithstanding subsection [*(2)*] **(1)** of this section, notice of an application for the change of name of a minor child [*need not*] **does not need to** be given to a parent of the child if the other parent of the child files a verified statement in the change of name proceeding that asserts that the minor child has not resided with the other parent and that the other parent has not contributed or **has not** tried to contribute to the support of the child.

[*(4)(a) Upon the request of an applicant, the court shall waive the requirement of public notice of the application for or judgment for a change of name under subsection (1) of this section if the applicant is a certified adult program participant in the Address Confidentiality Program under ORS 192.826, unless the court issues an order pursuant to a finding of good cause under ORS 192.848.*]

[*(b) If the court grants an applicant's request to waive the public notice requirement under this subsection, the court shall seal the record of the case.*]

[*(c) If the court denies an applicant's request to waive the public notice requirement under this subsection, the court shall seal the record of the case unless the court finds that the interest of the public in the case outweighs the safety concerns of the applicant.*]

(3)(a) In a case to determine an application for change of name of a person under ORS 33.410, if an applicant who is a certified adult program participant in the Address Confidentiality Program under ORS 192.826 requests the court to seal the record of the case, the court shall seal the record of the case unless the court issues an order pursuant to a finding of good cause under ORS 192.848.

[*(d)*] **(b)** This subsection does not apply to an adult applicant appearing as a guardian ad litem for a minor child.

(4) In a case to determine an application for legal change of sex of a person under ORS 33.460, if an applicant requests the court to seal the record of the case, the court shall seal the record of the case.

SECTION 5. ORS 109.360 is amended to read:

109.360. If in a petition for the adoption of a child a change of the child's name is requested, the court, upon entering a judgment granting the adoption, may also provide in the judgment for the change of **the** name without the [*notices*] **notice** required by ORS 33.420.

SECTION 6. The amendments to ORS 33.420, 33.460 and 109.360 by sections 3, 4 and 5 of this 2017 Act apply to proceedings commencing on or after the operative date specified in section 7 of this 2017 Act.

SECTION 7. (1) The amendments to ORS 33.420, 33.460, 109.360, 432.235 and 432.245 by sections 1 to 5 of this 2017 Act become operative on January 1, 2018.

(2) The Oregon Health Authority and the circuit courts of this state may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the authority and the courts to exercise, on and after the operative date specified in subsection (1) of this section, all the duties, powers and functions conferred on the authority and the courts by the amendments to ORS 33.420, 33.460, 109.360, 432.235 and 432.245 by sections 1 to 5 of this 2017 Act.

SECTION 8. This 2017 Act takes effect on the 91st day after the date on which the 2017 regular session of the Seventy-ninth Legislative Assembly adjourns sine die.

Passed by House March 15, 2017

.....
Timothy G. Sekerak, Chief Clerk of House

.....
Tina Kotek, Speaker of House

Passed by Senate May 10, 2017

.....
Peter Courtney, President of Senate

Received by Governor:

.....M.,....., 2017

Approved:

.....M.,....., 2017

.....
Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2017

.....
Dennis Richardson, Secretary of State