JUSTICE OR MENTAL HEALTH . . . SHOULD LITIGANTS HAVE TO CHOOSE? MENTAL HEALTH AS A REASON TO PROCEED ANONYMOUSLY

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INTRODUCTION

Suppose you are a plaintiff with a civil claim against another party involving your struggle with bipolar disorder, the details of which will necessarily be revealed in the course of litigation. You have only revealed the fact that you suffer from mental illness to your immediate family, your medical providers, and your attorney, and you fear that making the specifics of your mental illness public may jeopardize your personal and professional relationships. You filed a motion to proceed anonymously, but the court has denied it, so you are left with two options: divulge your highly sensitive mental health information or abandon your claim in order to protect your privacy. This is the predicament faced by civil litigants suffering from mental illness under the current laws for proceeding anonymously.

Rule 10(a) of the Federal Rules of Civil Procedure requires that, among other things, "[e]very pleading . . . must name all the parties."[1] Despite this rule, some courts recognize that in certain circumstances, it is appropriate to allow a party to proceed anonymously.[2] Anonymity has been consistently granted to protect "children, rape victims, and other particularly vulnerable parties or witnesses"[3] and in cases that involve particularly sensitive and personal matters such as "birth control, abortion, or homosexuality."[4] However, courts have not demonstrated the same consistency in granting anonymity when a litigant's reason for wishing to proceed anonymously involves the litigant's mental illness.[5] For purposes of this Note, a litigant's mental illness is "involved" in litigation when it will be an important aspect of either party's claims or defenses, or when the details of the

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1. FED. R. CIV. P. 10(a).

2. *See generally* Francis M. Dougherty, Annotation, *Propriety and Effect of Use of Fictitious Names of Plaintiff in Federal Court*, 97 A.L.R. FED. 369 (1990).

3. Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997).

4. Dougherty, *supra* note 2, at § 2a.

5. *See, e.g.*, Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464 (E.D. Pa. 1997) (finding pseudonymity justified where very few people knew of plaintiff's mental illness and he feared being stigmatized); Doe v. Gallinot, 486 F. Supp. 983 (C.D. Cal. 1979) (allowing plaintiff to proceed anonymously in case involving his involuntary commitment). *But see* Doe v. Ind. Black Expo, Inc., 923 F. Supp. 137, 141 (S.D. Ind. 1996) (not allowing plaintiff to proceed anonymously even though his mental health history, including hospitalization, would be part of the litigation).

mental illness will be revealed in discovery and discussed in the course of litigation.

Federal circuit courts vary in how they treat a litigant's request to proceed anonymously for reasons associated with mental illness. Most courts rely on some form of multi-factor test that weighs the litigant's privacy interest against the public interest in knowing who is using the court.[6] Generally, under such multi-factor tests, the presumption favors public hearings.[7] However, the application of various multi-factor tests and the uneven weight given to the factors by different courts has resulted in varying outcomes on motions for anonymity in litigation involving mental illness.[8]

The dispositive issue in cases involving a plaintiff who wishes to proceed anonymously (because her private mental health information will be revealed in the course of litigation) is generally whether the case presents an exceptional circumstance. The court in these cases considers whether the plaintiff has demonstrated an "exceptional" circumstance wherein her "substantial privacy right . . . outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.'"[9] Despite this established method of analysis, there are no standards for determining what makes a case "exceptional" or which privacy interests are "substantial" enough to outweigh the presumption of openness.[10] Although the terms "exceptional circumstance" and "substantial privacy interest" are not clearly defined, there are both public and private interests that favor a more liberal and clearly defined rule on this issue.[11] The public has an interest in protecting the privacy of litigants so that plaintiffs are not deterred from pursuing otherwise valid claims.[12] Private parties—the litigants themselves—have an interest in proceeding anonymously in order to protect the confidentiality of their health information.[13] Additionally, mental illness is still stigmatized in society, and revealing this sensitive information could have negative effects on a plaintiff's social and professional life, as well as on her continued mental well-being.[14]

Part I of this Note provides a brief explanation of mental illness—the

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6. *See* EW v. N.Y. Blood Ctr., 213 F.R.D. 108, 110-11 (E.D.N.Y. 2003).

7. *See, e.g.*, Doe v. Frank, 951 F.2d 320, 323-24 (11th Cir. 1992); Doe v. Stegall, 653 F.2d 180, 186 (5th Cir. Aug. 1981).

8. *See, e.g.*, Does I-IV v. City of Indianapolis, 1:06-cv-865-RLY-WTL, 2006 U.S. Dist. LEXIS 54877, at *7-8 (S.D. Ind. Aug. 7, 2006); *N.Y. Blood Ctr.*, 213 F.R.D. at 112-13.

9. *Frank*, 951 F.2d at 323 (citation omitted).

10. *See, e.g.*, Anon. v. Legal Servs. Corp. of P.R., 932 F. Supp. 49, 51 (D.P.R. 1996) (allowing plaintiff to proceed anonymously in case involving a treatable mental illness). *But see Ind. Black Expo, Inc.*, 923 F. Supp. at 141 (denying plaintiff's petition to proceed anonymously even though his mental health history would be part of the litigation).

11. Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464, 467 (E.D. Pa. 1997).

12. *Id.*

13. *Id.*

14. Bethany A. Teachman et al., *Implicit and Explicit Stigma of Mental Illness in Diagnosed and Healthy Samples*, 25 J. SOC. & CLINICAL PSYCHOL. 75, 77 (2006).

individuals affected, how they are affected, and the types and effectiveness of treatment. This section also briefly explains statutory treatment of health information as well as the general history of proceeding anonymously and courts' treatment of the practice. Part II examines how different jurisdictions have treated mental illness as a cause for proceeding anonymously. Part III discusses necessary considerations for a general rule regarding mental illness as a cause for proceeding anonymously in federal court and proposes a new general rule. Finally, Part IV advocates for a rule to be used across jurisdictions—one that incorporates the strengths of the existing rules and advocates for a generally more tolerant approach to the unique interests at stake in cases involving mental health information.

I. BACKGROUND

A. Mental Illness

To completely understand what is at stake in the issue at hand, it is necessary to be aware of the pervasiveness of mental illness in society. Mental illnesses "are medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others and daily functioning . . . [and] often result in a diminished capacity for coping with the ordinary demands of life."[15] One in seventeen Americans lives with a serious mental illness.[16] However, in a given year, as many as one in four American adults will experience mental illness.[17] People of any race, culture, or income may be affected by mental illness,[18] although manifestations vary based on these factors.[19] Additionally, people of all ages are susceptible to mental health disorders, "but the young and the old are especially vulnerable."[20] In fact, mental illness most often strikes during adolescence or young adulthood.[21]

Mental illnesses fall into two general categories: anxiety disorders and mood disorders.[22] Examples of anxiety disorders include obsessive-compulsive disorder and post-traumatic stress disorder; examples of mood disorders include bipolar

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15. *What Is Mental Illness: Mental Illness Facts*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Feb. 5, 2011).

16. *Id.* "Serious mental illness" includes major depression, schizophrenia, bipolar disorder, obsessive-compulsive disorder (OCD), panic disorder, post-traumatic stress disorder (PTSD), and borderline personality disorder. *Id.*

17. *Id.*

18. *Id.*

19. OFFICE OF THE SURGEON GEN., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL ch. 2, *available at* http://www.surgeongeneral.gov/library/mentalhealth/chapter2/sec2_1.html (last visited Feb. 5, 2011).

20. *What Is Mental Illness: Mental Illness Facts*, *supra* note 15.

21. *See id.*

22. OFFICE OF THE SURGEON GEN., *supra* note 19.

disease and schizophrenia.[23] Generally, mental illnesses manifest as "clusters of symptoms and signs" that impair a person's ability to function and are often triggered by a combination of biological, psychological, and socio-cultural factors.[24] The presence of these risk factors, which come together in a complex chain of causation (often triggered by a stressful life event), increases the probability that a person will develop a disorder.[25] Common manifestations of mental illness include phobias, panic attacks, hallucinations, delusions, depression, and mania.[26]

Although mental illness is prevalent in our society, the treatments available for mental illness have come a long way in recent decades. Mental illness was once viewed as a lifelong deterioration with little hope for improvement.[27] Today, however, new medications treat even severe mental illness and allow most afflicted individuals some relief from their symptoms.[28] In fact, most people suffering from mental illness—seventy to ninety percent—can experience a reduction of symptoms and an improved quality of life with a combination of medication, therapy, and support.[29] Available support options for those suffering from mental illness include self-help, mental health consumer, and advocacy groups.[30] Unfortunately, society's understanding of mental illness does not always reflect the same advancements.

The stigmas that have long been associated with mental illness remain staunchly in place today. In fact, at least one commentator argues that "society's continued stigmatizing response to mental illness makes it one of the most marginalized conditions in modern Western societies."[31] The stigmatization that individuals with mental illnesses experience often results in "decreased life opportunities and a loss of independent functioning over and above the impairments related to mental disorders themselves."[32] There is still significant evidence that "the label 'mentally ill' makes it more difficult to obtain work and housing, and to gain acceptance from peers and co-workers, regardless of the individual's behavior."[33] Thus, despite the improved understanding of the causes, manifestations, and treatments for mental illness in the scientific community, being labeled "mentally ill" continues to have significant negative connotations and consequences in professional and social life.

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *See id.*
28. *What Is Mental Illness: Mental Illness Facts*, *supra* note 15.
29. *Id.*
30. OFFICE OF THE SURGEON GEN., *supra* note 19.
31. Teachman, *supra* note 14, at 92.
32. Stephen P. Ninshaw & Andrea Stier, *Stigma as Related to Mental Disorders*, 4 ANN. REV. CLINICAL PSYCHOL. 367, 367 (2008).
33. Teachman, *supra* note 14, at 77.

B. Treatment of Health Information Generally

In order to fully appreciate the treatment of motions to proceed anonymously for reasons related to mental illness in federal courts, it is important to understand how other areas of the law treat health information. In the area of health information regulations, health records are generally considered to be confidential.[34] The federal government and many state governments have passed legislation to ensure this confidentiality.[35] One of the most well-known and widely applicable health information privacy statutes is the Health Insurance Portability and Accountability Act (HIPAA), enacted by the Congress in 1996.[36] The HIPAA Privacy Rule "gives . . . [individuals] rights over . . . [their] health information and sets rules and limits on who can look at and receive . . . [this] health information."[37]

HIPAA requires certain health care entities—including health plans, most health care providers, and health care clearinghouses—to protect health information by putting safeguards in place, reasonably limiting disclosure of health information to the minimum necessary to accomplish the purpose of the disclosure, and limiting who can view and access personal health information.[38] If an entity covered by HIPAA is required to disclose protected health information for litigation purposes, the entity "must make reasonable efforts to limit the protected health information disclosed to the minimum necessary" for the purpose of the disclosure; "this could involve de-identifying the information or stripping direct identifiers from the information to protect the privacy of individuals."[39] Thus, HIPAA provides important protections and rights to consumers regarding the privacy of their health care information.

In addition to the federal HIPAA regulations, states can pass additional and more stringent statutes regarding the privacy of health information that will not be preempted by HIPAA unless they are contrary to the objectives of the federal statute.[40] To date, a number of states have passed such additional health information privacy statutes that are "more protective of the records of mental patients than they have been of medical records generally."[41] The Indiana

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34. 62A AM. JUR. 2D *Privacy* § 183 (2010).

35. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 101 Stat. 1936; *see also* IND. CODE § 16-39-3-10 (2010).

36. *See Health Information Privacy*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/ocr/privacy/index.html (last visited Feb. 5, 2011).

37. *Health Information Privacy for Consumers*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html (last visited Feb. 5, 2011).

38. *See id.*

39. *Health Information Privacy: Frequently Asked Questions*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.hhs.gov/ocr/privacy/hipaa/faq/judicial_and_administrative_proceedings/705.html (last visited Feb. 5, 2011).

40. *See* 39A C.J.S. *Health & Env't* § 4 (2009).

41. 56 C.J.S. *Mental Health* § 17 (2009).

legislature, for example, passed Indiana Code section 16-39-3-10 regarding the confidentiality of mental health information that reflects this common practice. Indiana Code section 16-39-3-10 states, "If a patient's mental health record or testimony related to a patient's mental health is offered or admitted into evidence in a legal proceeding, the court shall maintain the record or transcript of the testimony as a confidential court record."[42] The Indiana Code addresses the release of mental health records in investigations and legal proceedings, recognizing the privacy interest at stake and the need for confidentiality as well as the concern that disclosure of these records may have negative repercussions on a patient's mental health rehabilitation.[43]

These federal and state statutes clearly recognize that health information—especially information relating to mental health—is considered an important individual privacy interest that should be guarded by the government. Accordingly, the government generally affords health information special protection and takes steps to keep such information confidential.

C. Proceeding Anonymously

The ability to proceed anonymously in a trial "provides the plaintiff in many cases with the only means to pursue important substantive rights" by allowing plaintiffs to protect their privacy while pursuing meritorious claims they might otherwise give up.[44] The practice of proceeding anonymously using the pseudonym "John Doe" began in the seventeenth century, but it was not until the 1960s, when the Supreme Court recognized the right to privacy under the Constitution, that plaintiffs began to use the pseudonym to hide their identities.[45] Jurisdictions allowing plaintiffs to proceed anonymously cite reasons associated with recognized privacy rights under the Constitution.[46] In general, these jurisdictions first recognize that plaintiffs may want to remain anonymous due to fears of "public stigma, personal safety, and economic retribution."[47] Second, they acknowledge that the information plaintiffs will have to disclose may be "too intimate to disclose publicly."[48] Third, and most importantly, these jurisdictions appreciate that plaintiffs may forgo their meritorious claims because they fear revealing their private information.[49]

Jurisdictions that do not allow plaintiffs to proceed anonymously generally

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42. IND. CODE § 16-39-3-10 (2010).

43. *See id.* § 16-39-3-9.

44. Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 886 (1996).

45. *See id.* at 889-94.

46. *See id.* at 908.

47. *Id.*

48. *Id.*

49. Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 219 (2004).

rely on reasoning based on ideas of fairness to the public and the defendant.[50] These jurisdictions often cite the argument that the presumption in favor of open judicial proceedings and the public's right to be informed regarding the proceedings, found in the First Amendment, are the primary interests that conflict with a plaintiff's ability to proceed anonymously.[51] Second, these jurisdictions argue that the use of pseudonyms may prejudice the defendant by making it difficult to perform discovery and form defenses and counterclaims.[52] Third, they rely on the rule that is cited most often in opposition to a plaintiff's motion to proceed anonymously—Federal Rule of Civil Procedure Rule 10(a) ("FRCP 10(a)").[53]

II. ANONYMITY IN FEDERAL COURTS

A. In General

The test used by many federal courts to determine when an exception to FRCP 10(a) is appropriate and whether a plaintiff should be allowed to proceed anonymously has evolved through case law over the last three decades.[54] In *Doe v. Stegall*,[55] the Fifth Circuit identified three characteristics common to "those exceptional cases in which the need for party anonymity overwhelms the presumption of disclosure mandated by procedural custom." The court listed the factors as follows: "(1) plaintiffs seeking anonymity were suing to challenge governmental activity; (2) prosecution of the suit compelled plaintiffs to disclose information 'of the utmost intimacy;' and (3) plaintiffs were compelled to admit their intention to engage in illegal conduct, thereby risking criminal prosecution."[56] The court did not intend for these characteristics to form a "hard and fast formula;" rather, it hoped for a balancing of considerations.[57] Later, the Fifth Circuit elaborated on its *Stegall* test in *Doe v. Frank*, clarifying that the "ultimate test . . . is whether the plaintiff has a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of

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50. *See id.* at 212; *see also* Mark Albert Mesler II, *Civil Procedure*—Doe v. Frank*: Determining the Circumstances Under Which a Plaintiff May Proceed Under a Fictitious Name*, 23 MEM. ST. U. L. REV. 881, 882 (1993).

51. *See* Ressler, *supra* note 49, at 212.

52. *See* Mesler, *supra* note 50, at 882.

53. *See* FED. R. CIV. P. 10(a), which states: "Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties."

54. *See generally* Doe v. Frank, 951 F.2d 320, 323-24 (11th Cir. 1992); Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981); EW v. N.Y. Blood Ctr., 213 F.R.D. 108 (E.D.N.Y. 2003).

55. *Stegall*, 653 F.2d at 180.

56. *Id.* at 185.

57. *See id.* at 186.

openness in judicial proceedings.'"[58] Further, the court concluded that the three factors laid out in *Stegall* were factors for a court to consider in making its determination.[59]

In *EW v. N.Y. Blood Center*,[60] the court pulled from *Stegall*, *Frank*, and other cases across jurisdictions to create a six-factor test to determine "whether a plaintiff's privacy right outweighs the public interest in open proceedings and any possible prejudice to the defendant."[61] The six-factor test involved the determinations of:

> (1) whether the plaintiff is challenging governmental activity or an individual's actions;
> (2) whether the plaintiff's action requires disclosure of information of the utmost intimacy;
> (3) whether the action requires disclosure of the plaintiff's intention to engage in illegal conduct;
> (4) whether identification would put the plaintiff at risk of suffering physical or mental injury;
> (5) whether the defendant would be prejudiced by allowing the plaintiff to proceed anonymously; and
> (6) the public interest in guaranteeing open access to proceedings without denying litigants access to the judicial system.[62]

Most recently, in *Does I-IV v. City of Indianapolis*,[63] the court adopted the "ultimate test" from *Doe v. Frank*—weighing the plaintiff's substantial privacy right against the presumption of open court proceedings—and adopted the six-factor test from *New York Blood Center* to assess the balance of the two opposing interests.[64]

The series of tests used by courts over the past three decades and the policy underlying each of them—allowing plaintiffs to proceed anonymously when their privacy interests outweigh public interests—has worked fairly well to protect certain groups of plaintiffs. For example, women seeking abortions, homosexuals,[65] children, and rape victims[66] are generally able to proceed anonymously under the various tests discussed above. However, a large block of the population is not consistently protected under these analyses and should be.

Plaintiffs suffering from mental illness—or who have mental health issues in their past which litigation will reveal—make up one group of individuals this author believes should be afforded the protection of proceeding anonymously.

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58. *Frank*, 951 F.2d at 323 (quoting *Stegall*, 653 F.2d at 186).
59. *Id.*
60. 213 F.R.D. 108 (E.D.N.Y. 2003).
61. *Id.* at 111 (citations omitted).
62. *Id.* (internal citations omitted).
63. 1:06-cv-865-RLY-WTL, 2006 U.S. Dist. LEXIS 54877 (S.D. Ind. Aug. 7, 2006).
64. *Id.* at *4.
65. *See, e.g.*, Dougherty, *supra* note 2, § 29.
66. *See* Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997).

Plaintiffs with mental health issues have a unique and significant interest in protecting this highly sensitive information, as there are still stigmas in our society associated with mental illness.[67] Additionally, having to make this private information public may be a stressful life event that could re-trigger a plaintiff's mental illness or negatively affect her rehabilitative process.[68] These privacy implications are even greater today given the increased accessibility of information, including judicial opinions, through the Internet.[69]

As it relates to this issue, the law should be clarified so that all groups that need the protection of anonymity in the courtroom are entitled to it. The question, however, is how best to achieve this protection. The common law rule that has evolved over the past three decades needs to be reevaluated to take the unique issues associated with mental illness into consideration. But should courts or Congress determine when an exception to FRCP 10(a) is appropriate? Courts are arguably not the most suitable forum for creating a general rule or policy regarding mental illness as a cause to proceed anonymously. Thus far, common law has produced a jumble of rules that often lead to inconsistent results. Additionally, courts may not be the appropriate body to take on the task of challenging the well-entrenched stigmas in our society associated with mental illness. Congress, however, also may not be the ideal forum for determining which situations justify allowing a plaintiff to proceed anonymously, as many members of Congress may not have the legal experience necessary to know what kinds of procedural rules are realistic in a courtroom setting.

The Judicial Conference of the United States ("Judicial Conference"), which was created by Congress in 1922 to make policy for the U.S. courts, provides a perfect forum for creating a new rule for determining whether a plaintiff should be allowed to proceed anonymously when she must reveal mental health information in litigation. The Judicial Conference is the ideal forum because it combines the strengths that courts and Congress each have in creating policy.[70] Moreover, it addresses and advises courts on a variety of subjects including rules of practice and procedure.[71] Like Congress, the Judicial Conference may hold hearings and take sworn testimony to inform its policymaking.[72] The opportunity for the Judicial Conference to hear from advocacy groups and experts on mental

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67. *See* discussion *supra* Part I.A.

68. *See id.*; *see also* IND. CODE § 16-39-3-9 (2010) (requiring judges to limit release of patients' mental health information to protect the rehabilitative process).

69. *See* Joel M. Schumm, *No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions*, 42 GA. L. REV. 471, 475-76 (2008).

70. *See Judicial Conference of the United States*, U.S. COURTS, http://www.uscourts.gov/judconf.html (last visited Feb. 5, 2011). The Conference, as originally created in 1922, was called the Conference of Senior Circuit Judges. Congress enacted 28 U.S.C. § 331 in 1948, which changed the name to the Judicial Conference of the United States. *Id.*

71. *See Judicial Conference of the United States: Organization*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/JudicialConference/Organization.aspx (last visited Feb. 5, 2011).

72. 28 U.S.C. § 331 (2006).

illness as it pertains to litigation would be beneficial in formulating a new procedural rule regarding when the release of mental health information justifies allowing a plaintiff to proceed anonymously. Additionally, because the Judicial Conference is comprised of the Chief Justice of the United States Supreme Court as well as circuit and district court judges, the people who will eventually apply this new rule will also be instrumental in making it.[73] Thus, the Judicial Conference is in a position to consider the unique interests of plaintiffs who are concerned about the privacy of their mental health information—as well as the realities of litigation—as it formulates a new rule of procedure to address plaintiff anonymity in situations involving the plaintiff's mental health information.

B. Mental Illness as Cause for Proceeding Anonymously

1. Federal Circuits That Allow Mental Illness as a Cause to Proceed Anonymously.—District courts in four federal circuits—the First, Second, Third, and Eleventh—have consistently allowed plaintiffs to proceed anonymously due to mental health implications.[74] In the Eastern District of New York case *Doe No. 2 v. Kolko*,[75] the plaintiff moved to proceed anonymously, claiming that he suffered from post-traumatic stress disorder, bipolar disorder, and depression, and that he would suffer psychological harm if his identity was revealed in litigation.[76] The court applied a five-factor test to determine whether the plaintiff's need for anonymity outweighed the "prejudice to the opposing party and the public's interest in knowing the party's identity."[77] Ultimately, the court found that the intimate nature of the complaint, which involved sexual abuse along with the plaintiff's fragile psychological condition, "established special circumstances to warrant authorization to proceed anonymously."[78]

This trend in district courts in the Second Circuit allowing plaintiffs to proceed anonymously in cases involving their mental health was also demonstrated in two earlier cases. In *Doe v. New York University*,[79] the plaintiff claimed New York University had discriminated against her on the basis of her mental illness despite the fact that she had undergone psychiatric treatment and had "regained sufficient emotional stability to return to school."[80] In *Doe v.*

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73. *Judicial Conference of the United States: Membership*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx (last visited Feb. 5, 2011).

74. *See, e.g.*, L.C. v. Olmstead, 138 F.3d 893 (11th Cir. 1998); Doe No. 2 v. Kolko, 242 F.R.D. 193 (E.D.N.Y. 2006) (Second Circuit); Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464 (E.D. Pa. 1997) (Third Circuit); Anon. v. Legal Servs. Corp. of P.R., 932 F. Supp. 49 (D.P.R. 1996) (First Circuit).

75. 242 F.R.D. 193 (E.D.N.Y. 2006).

76. *See id.* at 194-95.

77. *Id.* at 195 (citation omitted).

78. *Id.* at 196, 198.

79. 442 F. Supp. 522 (S.D.N.Y. 1978).

80. *Id.* at 522.

Harris,[81] the plaintiff sought review of a decision of the Department of Health and Human Services that denied his application for disability benefits despite the fact that he had been committed to mental institutions several times and had been diagnosed with schizophrenia.[82] In both of these cases, the plaintiffs were allowed to proceed anonymously. However, neither opinion provided any explanation for the court's decision to grant anonymity.[83]

In the Third Circuit, district courts have also demonstrated a trend of granting motions to proceed anonymously in mental health cases. In *Doe v. Provident Life & Accident Insurance Co.*,[84] the District Court for the Eastern District of Pennsylvania found that the plaintiff had sufficiently justified his pseudonymity because he had only revealed his mental illness to his immediate family.[85] Furthermore, the plaintiff feared being stigmatized by his community, which could include damage to his professional life, if his illness became public.[86] The standard applied by the district court stated that the "public's . . . right of access should prevail unless . . . [the party requesting pseudonymity] demonstrates . . . that his interests in privacy or security justify pseudonymity."[87] The court applied a multi-factor test to weigh the public and private interests involved.[88] In granting the plaintiff's motion to proceed anonymously, the court gave great weight to the possibility that litigants with mental illnesses could be stigmatized and that fear of stigmatization may deter people whose mental illness will be an important aspect of litigation from pursuing claims.[89] Subsequently, district courts in the Third Circuit have allowed plaintiffs in many other cases—all involving details of a plaintiff's mental illness—to proceed using pseudonyms in order to protect the plaintiff's identity.[90]

Likewise, courts in the Eleventh and First Circuits have allowed plaintiffs to proceed anonymously when details of their mental illnesses were part of the litigation.[91] In *L.C. by Zimring v. Olmstead*, an Eleventh Circuit Court of Appeals case involving the plaintiff's involuntary confinement for mental illness, the court allowed the plaintiff to proceed anonymously.[92] The court did not discuss this decision in any detail, as it was deferring to the decision made by the district court to allow the plaintiff to proceed using a pseudonym in order to protect her

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81. 495 F. Supp. 1161 (S.D.N.Y. 1980).

82. *See id.* at 1163-66.

83. *See id.* at 1161; *New York Univ.*, 442 F. Supp. at 522.

84. 176 F.R.D. 464 (E.D. Pa. 1997).

85. *See id.* at 468.

86. *Id.*

87. *Id.* at 467 (citation omitted).

88. *See id.* at 468-69.

89. *See id.* at 468.

90. *See, e.g.*, PAS v. Travelers Ins. Co., 7 F.3d 349 (3d Cir. 1993), Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979), Doe v. Hartford Life & Accident Ins. Co., 237 F.R.D. 545 (D.N.J. 2006).

91. *See* L.C. v. Olmstead, 138 F.3d 893 (11th Cir. 1998); Anon. v. Legal Servs. Corp. of P.R., 932 F. Supp. 49 (D.P.R. 1996).

92. *Olmstead*, 138 F.3d at 895 n.1.

identity.[93] In *Anonymous v. Legal Services Corp.*, the court allowed the plaintiff to proceed anonymously because her allegations involved a treatable mental illness, which was a privacy interest sufficient to justify pseudonymity.[94]

The circuits that allow mental illness as a cause to proceed anonymously base their decisions on two primary policy considerations.[95] First, federal courts traditionally permit parties to proceed anonymously when the parties have a strong privacy interest in doing so.[96] For example, a mental illness that could harm one's profession would be considered one such privacy interest.[97] Second, these courts recognize that cases involving mental illness require special consideration because of the stigma surrounding mental illness.[98] This consideration can be further divided into the interests of litigants and the interests of the public, both of which—contrary to the argument used in circuits that have disfavored plaintiff anonymity—support allowing plaintiffs to proceed anonymously. One interest is that litigants with mental illness have a strong interest in protecting their privacy while retaining the ability to vindicate their rights through litigation.[99] The second is that the public has a strong interest in preventing the stigmatization of litigants and protecting plaintiffs' privacy so that plaintiffs are not discouraged from pursuing their claims.[100]

2. Federal Circuits That Do Not Allow Mental Illness as a Cause to Proceed Anonymously.—Two federal circuits—the Seventh and the Tenth—have consistently denied plaintiffs permission to proceed anonymously in cases involving a plaintiff's mental health. In *Doe v. Blue Cross & Blue Shield United*,[101] the Seventh Circuit Court of Appeals found that the plaintiff should not have been permitted to proceed anonymously because the use of fictitious names was "disfavored" and the plaintiff's obsessive-compulsive disorder was not so uncommon or humiliating that it should have been an automatic ground for proceeding anonymously.[102] Similarly, in *Doe v. Indiana Black Expo*,[103] a district court in the Seventh Circuit held that although litigation of the plaintiff's claims would require detailed consideration of his history of mental health hospitalization and substance abuse, the plaintiff's privacy interest was not sufficient to overcome the strong presumption in favor of open court

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93. *See id.*

94. *Legal Servs. Corp.*, 932 F. Supp. at 51.

95. *See generally* Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464 (E.D. Pa. 1997); *Legal Servs. Corp.*, 932 F. Supp. at 49.

96. *See, e.g.*, *Provident Life & Accident Ins. Co.*, 176 F.R.D. at 468; *Legal Servs. Corp.*, 932 F. Supp. at 50.

97. *Legal Servs. Corp.*, 932 F. Supp. at 50.

98. *See Provident Life & Accident Ins. Co.*, 176 F.R.D. at 468.

99. *Id.*

100. *Id.*

101. 112 F.3d 869 (7th Cir. 1997).

102. *See id.* at 872.

103. 923 F. Supp. 137 (S.D. Ind. 1996).

proceedings.[104] Similarly, in the Tenth Circuit case *Raiser v. Brigham Young University*,[105] the court of appeals found that the plaintiff's mention of a history of mental illness in his motion to proceed anonymously was not sufficient to create an "exceptional" case justifying pseudonymity.[106]

Both the Seventh and the Tenth Circuits, which disfavor allowing plaintiffs to proceed anonymously,[107] base their reasoning on four primary policy considerations. First, these circuits believe that making common mental disorders an automatic ground for proceeding anonymously would propagate the stigma surrounding mental illness and "the view that mental illness is shameful."[108] Second, they argue that allowing plaintiffs to proceed anonymously would hamper defendants' ability to defend themselves.[109] Third, there is a common belief that when a plaintiff's claims make allegations about the defendant's integrity and reputation, the plaintiff should defend those claims publicly rather than "use his privacy interests as a shelter from which he can safely hurl these accusations."[110] Finally, these jurisdictions rely on the longstanding argument that "[l]awsuits are public events."[111]

The decisions made in the Seventh and Tenth Circuits have implications far beyond the outcomes of each individual case. The result of the laws used in these circuits is that plaintiffs with mental illnesses they wish to keep private are left with two options. One option is for the plaintiff to divulge the details of her mental illness, risking stigmatization by the community, social and professional consequences, and even her own mental health. The second option is for the plaintiff to abandon her claim in order to protect her highly sensitive and personal health information, thereby forgoing meritorious claims and rights. These options leave plaintiffs with a choice between two extremes: a day in court or privacy. The pervasive stigmas associated with mental illness, the inconsistent treatment of mental illness as a cause to proceed anonymously among jurisdictions, and the problematic options that many plaintiffs with mental illness face indicate that this issue must be addressed with more careful consideration of the unique issues involved.

C. A Current Controversy: Doe v. The Individual Members of the Indiana State Board of Law Examiners

In July 2009, plaintiff "Jane Doe" filed a claim against the Indiana State Board of Law Examiners in the United States District Court for the Southern

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104. *See id.* at 141-42.

105. 127 F. App'x 409 (10th Cir. 2005).

106. *See id.* at 410-11.

107. *See, e.g.*, Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000); *Blue Cross & Blue Shield United*, 112 F.3d at 869; *Ind. Black Expo, Inc.*, 923 F. Supp. at 137.

108. *Blue Cross & Blue Shield United*, 112 F.3d at 872.

109. *Ind. Black Expo, Inc.*, 923 F. Supp. at 141.

110. *Id.* at 142.

111. *Femedeer*, 227 F.3d at 1246 (quoting Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992)).

District of Indiana.[112] The plaintiff was an attorney admitted to the Illinois bar who wanted to sit for the Indiana bar exam.[113] She claimed that the Indiana State Board of Law Examiners' extensive questioning and requirements for applicants with psychological disorders violated the Americans with Disabilities Act.[114] Having previously been diagnosed with an anxiety disorder and post-traumatic stress disorder, she sought to proceed anonymously because she feared she would suffer injury and stigmatization if her mental health history became public knowledge.[115] The issue in this case was whether exceptional circumstances existed such that the harm to the plaintiff in revealing her mental health history exceeded the likely harm—namely, the harm that departing from the presumption that parties' identities are public information would cause.[116]

On August 8, 2009, U.S. Magistrate Judge Tim Baker denied the plaintiff's motion to proceed anonymously and seal the affidavit containing her actual name.[117] The court applied the six-factor test used in *Does I-IV v. City of Indianapolis* and reasoned that the plaintiff's anxiety disorder and post-traumatic stress disorder were common and, consequently, should not be considered shameful.[118] The court went on to explain that litigants often have to disclose sensitive information, noting that this is the reality of the "sometimes gritty world of litigation."[119] Furthermore, Judge Baker relied on the fact that the Seventh Circuit has "repeatedly expressed disapproval of anonymous litigants."[120]

The plaintiff subsequently filed an objection to the judge's order and a motion to review and reverse his decision. On January 4, 2010, U.S. District Judge William Lawrence denied her objection.[121] Judge Lawrence explained that the standard of review for discovery-related decisions made by the magistrate judge was extremely deferential.[122] He concluded that while "this . . . [was] certainly a close case, the Court . . . [could not] find that the Magistrate Judge's order was clearly erroneous or contrary to law."[123] Judge Lawrence gave the plaintiff fourteen days to file an amended complaint identifying herself by name.[124]

When the plaintiff's motion and subsequent objection were denied, she was

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112. Doe v. Individual Members of the Ind. State Bd. of Law Exam'rs, No. 1:09-cv-0842-WTL-TAB, 2009 U.S. Dist. LEXIS 69609 (S.D. Ind. Aug. 8, 2009).

113. *Id.* at *1.

114. *Id.*

115. *Id.* at *1, *5.

116. *See id.* at *10-11.

117. *Id.* at *11.

118. *Id.* at *2-5.

119. *Id.* at *6.

120. *Id.* at *10.

121. Doe v. Individual Members of the Ind. State Bd. of Law Exam'rs, No. 1:09-cv-842-WTL-JMS, 2010 U.S. Dist. LEXIS 1001, at *1 (S.D. Ind. Jan. 4, 2010).

122. *Id.* at *1-2.

123. *Id.* at *5.

124. *Id.*

left with the two options discussed above. She could divulge her mental health history, risk stigmatization in both her social and professional life, and possibly jeopardize her own mental health by reversing the recovery steps she had made thus far. Alternatively, she could drop the case, thereby ensuring the privacy of her mental health history but forgoing her claim. Evidently, the plaintiff chose the first of these two options—a subsequent entry on an amended motion for class certification was captioned *Perdue v. The Individual Members of the Indiana State Board of Law Examiners*, and the entry identified the plaintiff as Amanda Perdue.[125]

III. Necessary Considerations and a Proposal for a New Rule Regarding Mental Illness as a Reason to Proceed Anonymously

As illustrated by the cases discussed above, a new rule that directly addresses the issue of mental illness as a cause to proceed anonymously is necessary. Currently, there is little consistency regarding when courts grant anonymity, but on a more basic administrative level, the courts are also inconsistent in how they treat motions to proceed anonymously.[126] Some courts require that a plaintiff seek leave of the court before submitting a pleading using a pseudonym.[127] Other courts require the moving party to make a good faith effort to resolve the issue with the opposing party before submitting the motion to the court;[128] others allow plaintiffs to amend their pleadings to provide their full names.[129] Some courts simply dismiss the case if the plaintiff does not include her full name.[130] This procedure for judicial treatment of litigants' motions needs to be consistent across courts and jurisdictions so that litigants and their attorneys know how to proceed when requesting anonymity. Additionally, courts should be deciding this often dispositive issue on the specific facts of each case rather than arbitrarily throwing out cases for failure to comply with an individual judge's preferences. Ideally, all federal courts would adopt a new rule, similar to the one proposed below, to determine whether a plaintiff should be allowed to proceed anonymously. The adoption of a single, new rule by all federal courts would make the administrative and substantive treatment of this issue consistent.

Once the procedure for judicial treatment of motions to proceed anonymously is consistent across jurisdictions, the Judicial Conference needs to create and implement a consistent rule regarding when an exception to FRCP 10(a) is

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125. Perdue v. Individual Members of the Ind. State Bd. of Law Exam'rs, No. 1:09-cv-842-WTL-JMS, 2010 WL 412028, at *1 (S.D. Ind. Jan. 29. 2010).

126. *See* Rice, *supra* note 44, at 918.

127. *See id.* at 918-19.

128. *E.g.*, M.M. v. Zavaras, 139 F.3d 798, 799-800 (10th Cir. 1998).

129. *See, e.g.*, Doe v. Individual Members of the Ind. State Bd. of Law Exam'rs, No. 1:09-cv-0842-WTL-TAB, 2009 U.S. Dist. LEXIS 69609, at *10 (S.D. Ind. Aug. 8, 2009) (denying plaintiff's motion to proceed anonymously but allowing her fourteen days to file an amended complaint identifying herself by name).

130. *See* Rice, *supra* note 44, at 918-19 & 919 n.123.

appropriate. No satisfactory test currently exists in the federal court system to determine when a plaintiff is allowed to proceed anonymously in civil lawsuits involving the plaintiff's mental health information. However, as discussed above, state and federal governments have passed legislation putting safeguards in place to protect the confidentiality of this information.[131] Although this legislation admittedly addresses different circumstances than those discussed in this Note, the safeguards from these statutes may be helpful in determining what the test for proceeding anonymously should look like. After all, citizens' privacy rights in their health information comprise the central issue in these health information privacy statutes as well as in determining whether a plaintiff should be allowed to proceed anonymously. Accordingly, it makes sense to look at the well-developed statutes already in place to inform the discussion of how to formulate a new test for federal judges to apply.

A. Necessary Considerations for a New Federal Rule

A number of factors must be taken into consideration in a new rule determining when plaintiffs are allowed to proceed anonymously in cases involving their mental health information. For instance, the language commonly used in the existing rules—"exceptional" circumstance and "substantial privacy right"[132]—is very general and does not take into consideration the unique issues at stake when one's mental health information is involved. Accordingly, this language must be carefully redefined to make it more consistent with the federal and state health information privacy statutes.

Under the current rules, "exceptional" circumstance usually requires that a particular plaintiff's need for anonymity be so substantial that it outweighs the presumption in favor of open court proceedings.[133] HIPAA, the Indiana Code, and other laws relating to mental health information suggest that the opposite should be true—an exceptional circumstance should be required to allow an exemption to the confidentiality of medical information.[134] Admittedly, confidentiality should "yield to the needs of justice, or in the face of a countervailing public interest,"[135] but these should be situations in which the person wishing to proceed anonymously is a danger to the public or herself.[136] The public interest in open proceedings, which is often cited as an important factor in these cases, should not be considered an "exceptional" circumstance because allowing a plaintiff to proceed anonymously does not interfere with the

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131. *See* discussion *supra* Part I.B.

132. Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992).

133. *See id.*

134. *See, e.g.*, IND. CODE § 16-39-3-10 (2010) (requiring courts to keep mental health records or testimony related to a patient's mental health confidential); *Health Information Privacy: Frequently Asked Questions*, *supra* note 39 (requiring health care entities to make reasonable efforts to protect health information, including de-identifying it).

135. 56 C.J.S. *Mental Health* § 17 (2009) (internal citation omitted).

136. *Id.*

public's ability to stay informed about what is going on in the court.[137] "Party anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them. . . . [The] crucial interests served by open trials are not inevitably compromised by allowing a party to proceed anonymously."[138] Thus, this public interest should not be considered so "exceptional" that it justifies an exemption to the confidentiality of medical records.

The current common law rules are similarly vague about what should be considered in determining whether a "substantial privacy interest" exists in a particular case. The Indiana Code requires judges authorizing the release of mental health information to "limit disclosure for the protection of the patient . . . and the rehabilitative process."[139] Correspondingly, federal judges should consider the protection of the patient and the patient's rehabilitative process when determining whether a substantial privacy interest exists. In other words, if disclosure of mental health information may reasonably be expected to harm a patient or her mental health rehabilitation process, the court should find that a substantial privacy right exists and should consequently protect that privacy right by allowing the plaintiff to proceed anonymously.

Another factor the Judicial Conference must consider in formulating this new rule is the court's general approach to mental illness. Federal courts should adopt an approach that is more tolerant of mental illness and the unique issues mental illness raises for those who suffer from it. Federal and state statutes governing the privacy of health information, especially when it involves mental health, provide good examples for a more tolerant approach because they favor protecting the confidentiality of this sensitive information.[140] This need for a more tolerant approach is particularly relevant to the conflict between open judicial proceedings and the requirement that a plaintiff divulge her mental health information without anonymity. Federal courts should follow the lead of Indiana Code section 16-39-3-10, which requires confidentiality where there is potential harm to the patient without any mention of, or concern for, the need for open court proceedings.[141]

A third factor that should be considered is the likelihood that the plaintiff will proceed with her case if anonymity is not granted as well as the likely consequences if the plaintiff abandons her claim. The plaintiff's particular community or profession may make it especially likely that the plaintiff will suffer stigmatization or damage to her professional reputation. These specific considerations may influence a plaintiff's decision whether or not to proceed with her claim, and accordingly, they should be considered by the court when

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137. *See* Doe v. Provident Life & Accident Ins. Co., 176 F.R.D. 464, 468 (E.D. Pa. 1997) (stating that the plaintiff's use of a pseudonym did not interfere with the public's right or ability to follow the proceedings and that the court intended to keep the proceedings open to the public while maintaining the plaintiff's confidentiality).

138. Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981) (internal citation omitted).

139. IND. CODE § 16-39-3-9(3).

140. *See* 56 C.J.S. *Mental Health* § 17.

141. IND. CODE § 16-39-3-10.

determining whether anonymity should be granted.[142] Additionally, the court should consider who is responsible for compensating the plaintiff for damage caused by the defendant should the plaintiff choose to abandon her claim.[143]

A fourth consideration is the possible problems the plaintiff's anonymity may create for the defendant. For example, if the plaintiff is allowed to proceed anonymously, it might be difficult for the defendant to conduct discovery and establish defenses.[144] Additionally, granting the plaintiff anonymity may make it impossible for the defendant to assert counterclaims and avoid the effects of res judicata.[145]

A fifth consideration should be whether the patient's own actions regarding her mental health information should affect how a federal court treats this information. Arguably, a plaintiff who has only informed her immediate family of her illness and who has gone to great lengths to ensure that friends, colleagues, clients, and others are unaware of her disorder deserves the opportunity to continue to protect this information during litigation. By contrast, a plaintiff who has made her mental illness well-known should not necessarily get the same protection.

B. A Proposal for the Judicial Conference

Once the factors that must be considered in creating a new rule have been identified, it is necessary to determine the form this new rule should take. One plausible option is to adopt the approach used by the court in *N.Y. Blood Center*, where the plaintiff filed a complaint using her real name under seal but was allowed to use a pseudonym in the complaint in the public record.[146] This approach to allowing a plaintiff to proceed anonymously has many benefits because it allows the plaintiff to maintain the confidentiality of her mental health information while disclosing her identity to the party who would benefit from knowing it—the defendant. This rule would directly address the concerns cited in jurisdictions where pseudonymity is disfavored; the disclosure would prevent prejudice to the defendant in discovery as well as mitigate any risks to defendants losing their claims due to res judicata. A new rule adopting this approach would allow a plaintiff to file a complaint containing her real name under seal. With her sealed complaint, the plaintiff should be required to file a petition for leave to proceed under a pseudonym in all documents contained in the public file. The court would then treat such a petition similarly to a motion for a protective order under Federal Rule of Civil Procedure 26(c)—granting the petition when the

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142. *See Provident Life & Accident Ins. Co.*, 176 F.R.D. at 468-69.

143. *See, e.g.*, *id.* (stating that if the plaintiff chose not to pursue his claim against his insurer because of a fear of stigmatization, the federal government would have to support him financially through welfare "despite the fact that defendant may be liable to plaintiff for monthly benefit payments under the terms of the insurance policy upon which plaintiff paid premium payments").

144. Mesler, *supra* note 50, at 882.

145. *Id.*

146. EW v. N.Y. Blood Ctr., 213 F.R.D. 108, 113 (E.D.N.Y. 2003).

party demonstrates good cause.[147]

"Good cause," under this approach, could be based on the five considerations discussed above. These considerations can be evaluated through the following questions, to be considered by the judge in light of the particular facts of each case:

(1) whether the plaintiff's mental health information will be an important part of the case, requiring that details of her mental illness be divulged;
(2) whether an exceptional circumstance, such as danger to the public, justifies an exemption to the general rule of confidentiality of mental health information;
(3) whether a substantial privacy interest exists such that revealing the plaintiff's confidential mental health information may harm the plaintiff or her mental health rehabilitation process;
(4) whether the likely harm to the plaintiff's mental health or rehabilitation process is greater than the likely harm to the public's right to know what transpires in the courtroom if the plaintiff is allowed to proceed anonymously;
(5) whether the plaintiff is likely to proceed with litigation if she is not allowed to proceed anonymously, and the significance of the claim she will be abandoning if she chooses not to proceed; and
(6) whether the plaintiff has taken care to maintain the confidentiality of her health information up to the time she filed her complaint.

When considering the answers to these questions, judges should look to HIPAA and state health information privacy statutes for help determining the weight given to the different factors and interests at stake. For example, both HIPAA and the Indiana Code balance similar interests to those at stake in determining whether a plaintiff should be allowed to proceed anonymously when her mental health information will be an important part of the litigation—privacy and public interests. HIPAA requires entities who must disclose health information to disclose the "minimum necessary for the purpose of the disclosure."[148] According to HIPAA, this amount of disclosure could mean "de-identifying the information or stripping direct identifiers from the information to protect the privacy of individuals."[149] Similarly, Indiana Code section 16-39-3-9 requires that disclosure of mental health records be limited "for the protection of the patient . . . and the rehabilitative process."[150] These statutes privilege privacy over public interests, which is how these two interests should be balanced. Arguably, the potential effects of revealing private mental health information will generally have severe consequences for a plaintiff, while the effects of excluding the plaintiff's name from court documents will have only minor effects on the public's right to open access to the courts.

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147. *See* FED. R. CIV. P. 26(c) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.").

148. *Health Information Privacy: Frequently Asked Questions*, *supra* note 39.

149. *Id.*

150. IND. CODE § 16-39-3-9 (2010).

Accordingly, the Judicial Conference needs to step in as soon as possible to identify and address the issues and interests at stake in litigation involving a plaintiff's mental health information. The Judicial Conference has the ability to seek input from two groups who will be directly affected by this rule—people who suffer from mental illness and the judges who will have to consider this issue in their own courtrooms. Ideally, the Judicial Conference will take the issues discussed here as a starting point from which to collect further input from the affected parties and to perfect a rule that provides protection—in the form of privacy and continued mental health—to those who need it when bringing cases in federal court.

Such a rule will help guide judges in how to weigh the private and public interests involved in determining whether a plaintiff should be allowed to proceed anonymously; thus, it leaves less room for inconsistency. Accordingly, attorneys will be able to advise their clients from the outset about how likely it is that a court will grant anonymity, which may help the client determine whether to pursue her claim in the first place (rather than after litigation has been initiated). This rule will also increase judicial efficiency in that it provides a straightforward procedure and analysis for judges to apply when mental illness is the reason a plaintiff wishes to proceed anonymously.

A new rule modeled after the one proposed above would address both the procedural and substantive inconsistencies that currently cause problems in federal courts. By requiring all plaintiffs who wish to proceed anonymously in order to protect their mental health information to file a petition requesting anonymity along with their sealed complaint, this rule simplifies the process. The rule makes it easier for litigants, attorneys, and judges to focus on the actual issue of whether the plaintiff deserves anonymity rather than whether the plaintiff complied with a particular judge's procedural preferences. Substantively, this rule puts the focus of the judge's determination on the unique implications involved when the plaintiff's privacy interest is based on her mental health information. Moreover, this rule leaves less room for a particular judge's opinions about how common a certain mental illness is or whether it is a valid cause for embarrassment or humiliation to affect whether she will grant anonymity.

CONCLUSION

The treatment of a plaintiff's ability to proceed anonymously, as it currently functions, provides protection in the form of anonymity for many groups that need it in federal civil litigation. Children, rape victims, and homosexuals are among the groups that are likely to suffer harm by revealing their names in association with the private information they reveal in the courtroom, and they are consistently granted anonymity as a result.[151] However, there is one group that deserves to be protected which is not consistently granted the safeguard of proceeding anonymously in court. This group consists of plaintiffs who suffer

151. *See supra* notes 1-14 and accompanying text.

from mental illness—or who have suffered from a mental illness in the past—and wish to bring a cause of action which will require that the details of their mental health be disclosed and examined by the court and the opposing party, possibly in great detail.

Most federal courts addressing whether a plaintiff may proceed anonymously apply some form of multi-factor test to weigh the litigant's privacy interest against the public interest in open court proceedings. However, judges in different federal circuits weigh the various factors unevenly. Thus, while most courts generally apply a multi-factor test, there remains a significant lack of consistency among circuits in how plaintiffs whose claims involve their mental health information will be treated in the courtroom.[152]

This lack of consistency is problematic because mental illness is still highly stigmatized in our society.[153] Being labeled "mentally ill" often makes it more difficult to obtain employment and housing, and it can have negative repercussions on professional and social relationships.[154] Consequently, plaintiffs who suffer or have suffered from a mental health disorder often have legitimate reasons for wishing to keep their mental health information private. This significant privacy interest and the lack of consistency in whether plaintiffs are granted anonymity when their mental health information will be revealed in the course of litigation often means that plaintiffs are left with two unacceptable options. First, the plaintiff can proceed with litigation and divulge the details of her mental health information, risking stigmatization and social or professional consequences. Second, the plaintiff can abandon her claim in order to protect very personal mental health information, thereby forgoing the opportunity to pursue what may well be a valid claim. In determining whether to grant a particular plaintiff's motion to proceed anonymously, a court should have the flexibility to consider the potential negative repercussions of denying the motion as well as the plaintiff's reasons for wanting to keep this information private.

The common law rule that has evolved in the federal courts to determine whether a plaintiff should be allowed to proceed anonymously when mental health information is involved has produced jumbled results that are inconsistent with our country's usual approach to health information. Federal and state health information privacy statutes provide safeguards to protect citizens' medical records and demonstrate the very high value we generally place on privacy interests related to health information.[155] However, when it comes to allowing a plaintiff to proceed anonymously in a case that involves her mental health information, courts in some jurisdictions are quick to find that the public interest in open court proceedings outweighs the litigant's privacy interest.

But why is personal health information that comes out in the course of litigation any less worthy of protection than the health information contained in a person's medical records and explicitly protected by federal and state health

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152. *See* discussion *supra* Part II.B.

153. Teachman, *supra* note 14, at 77.

154. *See* discussion *supra* Part I.A.

155. *See* discussion *supra* Part I.B.

information privacy statutes? Because the same privacy interests are involved, it only makes sense to treat medical information that comes out in litigation the same way we treat medical information in other circumstances.

The best policymaking body to take on the task of creating a new federal rule making the treatment of health information confidentiality consistent across forums is the Judicial Conference of the United States.[156] Accordingly, the Judicial Conference should adopt a new set of procedures, rules, and factors for courts to weigh in determining whether a plaintiff should be allowed to proceed anonymously when her mental health information is involved. Such procedures, rules, and factors should consider the specific implications of mental illness and the sensitivity of a plaintiff's mental health information as well as the realities of judicial "openness."

A central tenet of this new rule should be that the right of plaintiffs to maintain confidentiality regarding their mental illnesses by proceeding anonymously and the right of the public to open trials are not necessarily as dichotomous as they are made out to be. Thus, the rights and interests of both plaintiffs and the public can and should be protected by a new rule that recognizes the unique implications in issues as private and sensitive as mental illness. The rule proposed in this Note does precisely that by allowing plaintiffs to file their complaints under seal and to proceed using a pseudonym in the public file. This approach protects the plaintiff's privacy and the confidentiality of her mental health information—consistent with federal and state health information privacy statutes—and protects the public's right to know what transpires in the courtroom. Ultimately, the system is preserved because all court proceedings remain public; only the plaintiff's name is withheld.

156. *See* discussion *supra* Part II.A.