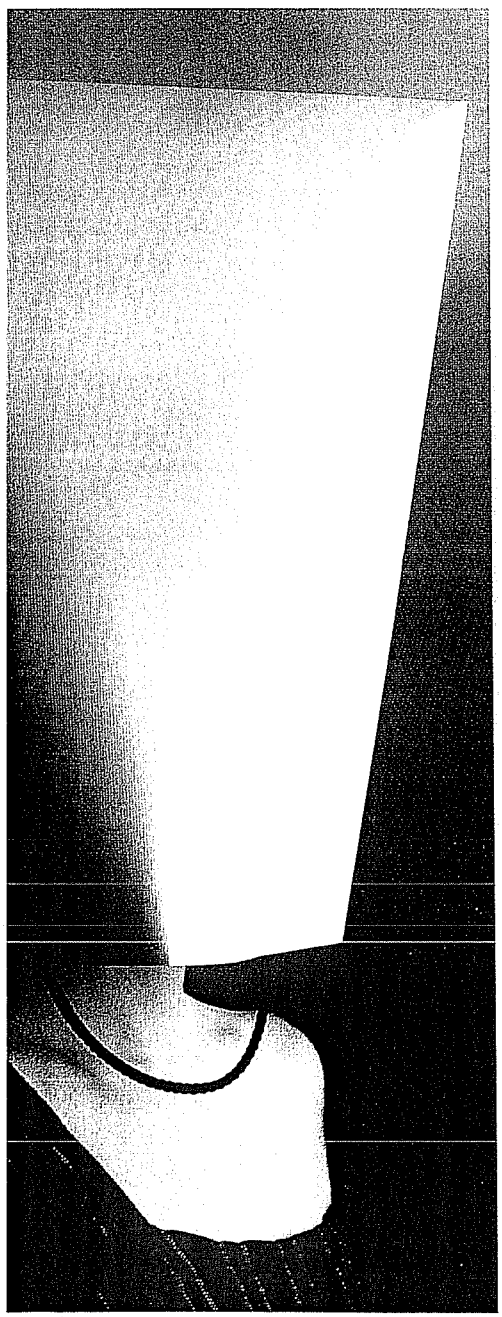
Pseudonymous Parties in Connecticut

Meet John and Jane Doe

By Sally A. Roberts



The Connecticut Practice Book rules regarding closure of the courtroom and sealing of documents were substantially revised in 2003.[1] Prior to July 1, 2003, Practice Book *§ 11-20* read: "Exclusion of the Public; Sealing Files Limiting Disclosure of Documents." It currently reads: "Closure of Courtroom in Civil Cases," and the newly created Practice Book *§ 11-20A* reads: "Sealing Files or Limiting Disclosure of Documents in Civil Case." The revisions to the rules are a key to the opening of Connecticut courts for proceedings and files that were once closed to public view in the erstwhile era of murkiness and sealed files. Recent Connecticut decisions interpreting the new rules serve as both a beacon and a guidepost to the bench and bar.

Vargas v. Doe

The Appellate Court addressed the application of Practice Book *§ 11-20A* for the first time in *Vargas v. Doe,* a decision released on June 5, 2006.[2] In *Vargas*, the plaintiff had brought suit to recover damages for personal injuries sustained from defendants' alleged negligence in accusing plaintiff of sexual abuse. The trial court granted motions to seal portions of the file and permitted the use of pseudonyms on the part of defendants, several minor children and their parents, and the plaintiff.[3]

The *Vargas* Court looked to *Doe v. Connecticut Bar Examining Committee*[4] for guidelines. In *Doe v. Connecticut Bar Examining Committee*, the Supreme Court recognized that: "The presumption of openness of court proceedings, which is implicated in applications to proceed anonymously, is a fundamental principle of our judicial system."[5] This policy of openness is not to be abridged lightly. In fact, the legislature has provided for very few instances in which it has determined that, as a matter of course, certain privacy concerns outweigh the public's interest in open judicial proceedings.[6] "For situations that do not fall within these specified exceptions, and yet in which a limit on disclosure is requested, the trial court must consider whether a substantial privacy interest exists to override the public's interest in open judicial proceedings."[7]

Other Jurisdictions

"The public and press enjoy a right of access to attend trials in civil as well as criminal cases...Though not as critical as access to the proceedings, knowing the litigants' identities nevertheless tends to sharpen public scrutiny of the judicial process, to increase confidence in the administration of the law, to enhance the therapeutic value of judicial proceedings, and to serve the structural function of the

First Amendment by enabling informed discussion of judicial operation. *See Doe v. Burkland*, 808 A.2d 1090 (R.I. 2002)" (Citations omitted) *Doe v. Johnson*.[8]

Many federal courts have permitted parties to proceed anonymously when special circumstances justify secrecy.[9] For example, "In the Ninth Circuit, parties are allowed to use pseudonyms in the 'unusual case' when nondisclosure of the party's identity is necessary...to protect a person from harassment, injury, ridicule, or personal embarrassment." *United States v. Doe*.[10]

In *Doe v. Advanced Textile Corp.*[11] 214 F.3d 1058 (Ninth Circuit, 2000), the plaintiffs filed suit under pseudonyms against their employers alleging multiple violations of the Fair Labor Standards Act. The court noted that a plaintiff's use of fictitious names runs afoul of the public's common law right of access to judicial proceedings but that nevertheless, many federal courts, including the Ninth Circuit, had permitted parties to proceed anonymously when special circumstances justified secrecy.

"We join our sister circuits and hold that a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity. We further hold that in cases where, as here, pseudonyms are used to shield the anonymous party from retaliation, the district court should determine the need for anonymity by evaluating the following factors: (1) the severity of the threatened harm....; (2) the reasonableness of the anonymous party's fears...; and (3) the anonymous party's vulnerability to such retaliation.[12]"

In the Eleventh Circuit, in *Doe v. Frank*,[13] the plaintiff, a government employee challenging government activity, was denied permission to proceed under a pseudonym that he sought due to his alcoholism. The court concluded that a plaintiff should be permitted to proceed anonymously only in exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough. The need for anonymity must outweigh the presumption of openness.[14]

"Apart from any constitutional basis, there is a common law right for the public to have access to the courts and court proceedings. 'One of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access...appears to have been the rule in England from time immemorial.' E. Jenks, *The Book of English Law* (6th Ed. 1967), 73-74. In *Craig v. Harney*, 331 U.S. 367, 374 (1947), the court said: "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 it' " *Doe v. Diocese Corp.*[15]

The common law right of access to civil as well as to criminal proceedings has been recognized. "The Connecticut Supreme Court recognized this right when, in permitting the use of fictitious names in a civil proceeding, it said that this 'privilege' ought to be 'granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.' "[16] [17]

Practice Book *§ 11-20A* provides the procedure that courts must follow when considering both motions to seal and motions to permit parties to proceed anonymously.[18] The procedures outlined in § 11-20A(h)(1) provide a road map for what long has been understood as "a high threshold for granting applications to proceed anonymously." *Doe v. Connecticut Bar Examining Committee*.[19] "A [party's] desire to avoid economic and social harm as well as embarrassment and humiliation in his professional and social community is normally insufficient to permit him to appear without disclosing his identity."[20]

As discussed by the appellate court in *Vargas*, "[t]he most compelling situations [for granting a motion to proceed anonymously] involve matters which are highly sensitive, such as social stigmatization, real danger of physical harm, or where the

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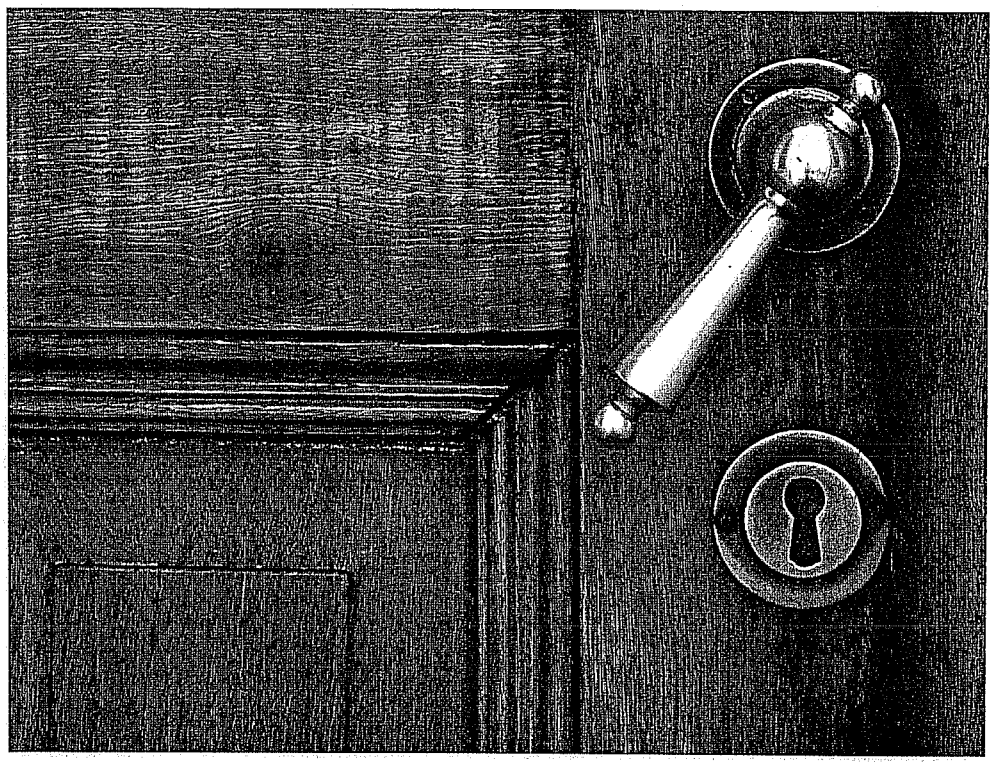
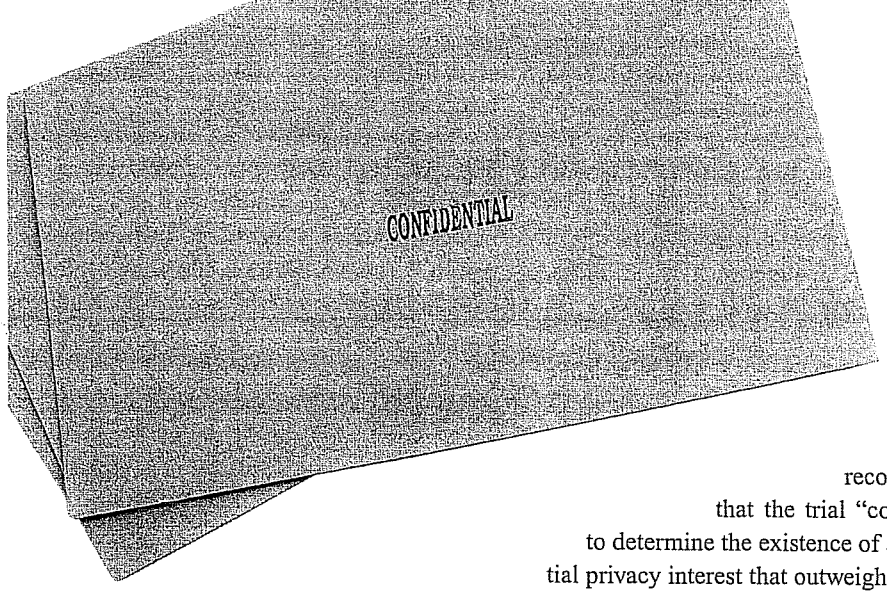


Recent court decisions interpreting new Practice Book rules regarding closure of the courtroom and sealing of documents serve as both a beacon and a guidepost to the bench and bar.



injury litigated against would occur as a result of the disclosure of the [party's] identity...There must be a strong social interest in concealing the identity of the [party]."[21] The court recognized that "when allegations of sexual assault are involved, those who are alleged to be victims, especially minors, may have strong privacy interests in having the allegations and surrounding circumstances concealed from public scrutiny...."[22] The court cautioned, however, that "the procedures that [Connecticut] rules of practice provide do not permit automatic approval of the use of pseudonyms by the party or parties involved."[23]

In *Doe v. Diocese Corp.*, the court allowed the plaintiff to proceed anonymously in an action against clergymen for past sexual abuse. In doing so, the court determined that the plaintiff had a substantial privacy interest at stake. The court reasoned that "[o]ne's sexual history and practices are among the most intimate aspects of a person's life. When one has a sexual history falling outside the realm of the conventional, that privacy interest is enhanced greatly, whether one has created that history voluntarily or it is forced upon a person as a result of abuse."[24]

In addition to *Doe v. Diocese Corp.*, other superior courts have granted the privilege of proceeding anonymously in cases arising out of sexual abuse or assault. See, e.g., *Doe v. Super 8 Motels, Inc.*,[25] *Doe v. Town of Fairfield*,[26] *Doe v. Firn*,[27] *Adgers v. Doe*,[28] *Doe v. Coe*,[29] *Doe v. East Haven Assoc.*,[30] *Doe v. Minor Female One*,[31] *Doe v. Johnson*.[32]

The *Vargas* court, after reviewing the record, found that the trial "court failed to determine the existence of a substantial privacy interest that outweighs the public interest in open judicial proceedings and to articulate any factual findings that would support such a conclusion."[33] Thus, the court vacated the order allowing the use of pseudonyms.[34]

Although *Vargas* focused on the subsections of Practice Book *§ 11-20A* dealing with the use of pseudonyms, the same standard applies to sealing documents.[35] Practice Book *§ 11-20A(d)* requires that "the judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order."

Conclusion

Amidst much fanfare and publicity, the Connecticut court system has been ushered into a long overdue era of openness to the public. **CL**

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Notes

1. Amended May 14, 2003, to take effect July 1, 2003; amended June 21, 2004, to take effect January 1, 2005.
2. *Vargas v. Doe*, 96 Conn. App. 399 (2006), *cert. denied* 280 Conn. 923 (2006). The Connecticut Supreme Court denied review on September 27, 2006.
3. The plaintiff's petition for review was filed pursuant to Practice Book *§ 77-1*, Expedited Review of an Order Concerning Court Closure, or an Order That Seals or Limits the Disclosure of Files, Affidavits, Documents or Other Material. Interlocutory review is authorized by Conn. Gen. Stat. *§ 51-164x*, which gives any person affected by a court closure order in a civil action the right to the review of such order by filing a petition for review with the appellate court within 72 hours from the issuance of the order.
4. 263 Conn. 39 (2003).
5. *Id.* at 65.
6. *Vargas v. Doe*, *supra*, at 406. The legislature has identified several areas where, due to the sensitivity of the topic, the extremely personal nature of the issues, or the age of the participants, the policy of open proceedings has been abridged by overriding privacy concerns. *See, e.g.*, § 12-242vv (pertaining to taxpayer information), §§ 19a-583(a)(10)(D) pertaining to court proceedings as to disclosure of confidential HIV-related information, § 36a-21(b) pertaining to court proceedings at which certain records of the Department of Banking are disclosed, § 46b-11 pertaining to hearings in family relations matters. Permitting closed hearings and sealing of records in "family relations matter" where court determines "the welfare of any children involved or the nature of the case so requires," § 46b-49 permitting closed hearings in divorce, separation, and annulment proceedings when "in the interests of justice and the persons involved," § 46b-122 exclusion from courtroom in juvenile matters of "any person whose presence is, in the court's opinion, not necessary," § 46b-142 requiring omission of name of minor child involved in appeals taken from termination of parental rights, § 52-146c *et seq.* pertaining to the disclosure of psychiatric records, § 54-56g pertaining to the pretrial alcohol education program), § 54-76c sealing of court file during investigation to determine whether defendant "is eligible to be adjudged a youthful offender," § 54-76h requiring that all youthful offender proceedings except those under § 54-76c be private, § 54-86c(b) pertaining to the disclosure of exculpatory information or material, § 54-86f holding in camera hearing concerning evidence of sexual conduct of victim in prosecution for sexual assault, § 54-86g permitting taking of child's testimony in child abuse cases outside of courtroom.
7. *Vargas v. Doe*, 96 Conn. App. 399, 407 (2006), *cert. denied* 280 Conn. 923 (2006).
8. 2003 Conn. Super. LEXIS 3330 (J.D. New Haven, Arnold, J.).
9. The U.S. Supreme Court has implicitly endorsed the use of pseudonyms to protect plaintiffs' privacy. *See Roe v. Wade*, 410 U.S. 113, 705 (1973) (abortion); *Doe v. Bolton*, 410 U.S. 179 (1973) (abortion); *Poe v. Ullman*, 367 U.S. 497 (1961) (birth control).
10. 655 F.2d 920, 922 n.1 (9th Cir. 1981), cited

by *Doe v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir.2000).

11. 214 F.3d 1058 (9th Cir. 2000).
12. *Id.* at 1068.
13. 951 F.2d 320 (11th Cir. 1992).
14. *Doe v. Frank,* 951 F.2d 320 (11th Cir. 1992).
15. 43 Conn. Supp. 152, 157 (1994) (Corradino, J.)
16. *Buxton v. Ullman*, 147 Conn. 48, 60 (1959), *appeal dismissed sub nom Poe v. Ullman*, 367 U.S. 497 (1961). The parties who were medical patients of the plaintiff were allowed to use pseudonyms due to the intimate and distressing details alleged in the complaint regarding the prevention of contraception.
17. *Doe v. Diocese Corp*, 43 Conn. Supp. 152, 158 (1994).
18. Practice Book *§ 11-20A(h)(1)* provides: Pseudonyms may be used in place of the name of a party or parties only with the prior approval of the judicial authority and only if the judicial authority concludes that such order is necessary to preserve an interest which is determined to override the public's interest in knowing the name of the party or parties. The judicial authority shall first consider reasonable alternatives to any such order and any such order shall be no broader than necessary to protect such overriding interest. The judicial authority shall articulate the overriding interest being protected and shall specify its findings underlying such order and the duration of such order. If any findings would reveal information entitled to remain confidential, those findings may be set forth in a sealed portion of the record. The time, date, scope and duration of any such order shall forthwith be reduced to writing and be signed by the judicial authority and be entered by the court clerk in the court file. The judicial authority shall order that a transcript of its decision be included in the file or prepare a memorandum setting forth the reasons for its order. An agreement of the parties that pseudonyms be used shall not constitute a sufficient basis for the issuance of such an order. The authorization of pseudonyms pursuant to this section shall be in place of the names of the parties required by § 7-4A.
19. 263 Conn. 39, 69 (2003).
20. *Id.* at 70 (internal quotation marks omitted).
21. *Vargas v. Doe*, 96 Conn. App. 399, 411 (2006).
22. *Vargas v. Doe*, 96 Conn. App. 399, 411, 413 (2006).
23. *Vargas v. Doe*, 96 Conn. App. 399, 411, 413 (2006).
24. *Doe v. Diocese Corp.*, 43 Conn. Supp. 152, 160 (1994) (internal quotation marks omitted). *See also Doe v. Maher*, 40 Conn. Supp. 394 (1986) (Berdon, J.) (plaintiff authorized to proceed anonymously in action involving regulations restricting funding of abortions under state Medicaid program); *Doe v. Lasaga*, 2004 Conn. Super. LEXIS 496 (Arnold, J.) (Plaintiffs, parents and a minor daughter who was sexually assaulted by her tutor, who had been criminally convicted, sued defendant's tutor and school board. Plaintiffs moved to seal (1) documents, video cassettes, photographs, and DCF records, and (2) the courtroom. The trial court did not close the trial to the public, but ordered the items in (1)[above] to be sealed, pursuant to statutes, after being entered as exhibits and used in the trial. The courtroom was ordered to stay open for the presentation of sexually graphic photographs and videotapes during trial, but the documents were otherwise sealed.)
25. 2006 Conn. Super. LEXIS 2342 (J.D. New Haven; Aug. 3, 2006; Pittman, J.) (Mentally disabled minor child and mother allowed to proceed anonymously in action alleging sexual assault by three unknown males at motel.)
26. 2006 Conn. Super. LEXIS 3163 (J.D. Fairfield; Gilardi, J.; Oct. 24, 2006) (Plaintiff's mother filed suit on behalf of her minor child, who was allegedly sexually assaulted while a passenger on a school bus. At the commencement of the action, the mother filed an ex parte application for permission to use a pseudonym, pursuant to Practice Book *§ 11-20A*. The court found that the mother had a substantial privacy interest that was best served by the continued use of a pseudonym for herself and her minor child. There was a strong social interest in protecting the privacy rights of minor sexual assault victims. Moreover, even though the alleged sexual assault had received some media attention, defendants had failed to show that the public had been made aware of the mother or her minor child's name. The one newspaper article provided to the court disclosed neither identity. The court found that the mother had met her burden of establishing the existence of a substantial privacy interest that outweighed the public interest in open judicial proceedings. The details of the sexual assault and the subsequent damages were highly sensitive and would have likely led to further injury and social stigmatization to the minor child and her family if her name were disclosed. The use of a pseudonym was the most reasonable alternative, and was not broader than necessary to protect the privacy interests of the mother as balanced against the public's interest in open judicial proceedings.)
27. 2006 Conn. Super. LEXIS 2860 (J.D. Ansonia, Brian T. Fischer, J.; Sept. 22, 2006) (Plaintiff, a former student, brought an action against the school superintendent, the Milford Board of Education, and the City of Milford for negligence. The student alleged that she was sexually assaulted numerous times by a basketball coach employed by the school. The coach was the defendant in an ongoing criminal action, but was not a party to the instant action. The court found that there was a strong social interest in concealing the identity of the student. The action involved claims of a highly sensitive and personal nature. The student testified that she would be devastated if her name became public. The court also held that the public could not readily identify the student from her Internet postings. The court held that the social policy engendered in Conn. Gen. Stat. § 54-86e should apply no less in a civil case.)
28. 2005 Conn. Super. LEXIS 3633 (J.D. Hartford; Dec, 22, 2005; Bryant, J.) (Victim of sexual assault in spousal relationship allowed to substitute name with pseudonym.)
29. 2005 Conn. Super. LEXIS 785 (J.D. New Haven; March 18, 2005; Pittman, J.) (Minor child's parents and defendant allegedly falsely accused of sexual abuse were allowed to use pseudonyms).
30. 2004 Conn. Super. LEXIS 2214 (J.D. New Haven; Aug. 4, 2004; Pittman, J.) (minor plaintiff and her mother entitled to maintain lawsuit using pseudonyms wherein alleged tort involved sexual assault).
31. 2002 Conn. Super. LEXIS 3428 (J.D. New Haven; Oct. 25, 2002; Silbert, J.) (The court relied on the plain language of Conn. Gen. Stat. § 54-86(e) and its legislative history to find that § 54-86(e) is not limited to criminal trials. The statute specifically held that given the plain language of the statute, the clear intention of the legislature to protect victims of sexual assault from having their names made public, and the sweeping remarks in the legislative history, it does no appear that the legislature intended to limit § 54-86(e)'s protections to criminal cases.)
32. 2003 Conn. Super. LEXIS 3330 (J.D. New Haven, Dec. 2, 2003; Arnold, J.) (Minor plaintiff and her father permitted to proceed anonymously in action arising out of repeated acts of sexual assault and abuse.)
33. *Vargas v. Doe*, 96 Conn. App. 399, 412 (2006).
34. *Id.* at 414. *See also Vargas v. La Bella*, 2007 Conn. Super. LEXIS 83 (J.D. Fairfield; Jan. 2, 2007; Gilardi, J.) On October 19, 2006, the defendants again petitioned the court to proceed by pseudonyms. The court held that the defendants had not met their burden to demonstrate that their privacy interests outweighed the public's interest in open judicial proceedings. The court noted that media publicity had already substantially reduced the defendants' privacy interests, as the matter had already been publicized with the defendant's name appearing in at least seven newspapers, including the *Connecticut Post*, the *New York Times,* the *New Haven Register*, the *Connecticut Law Tribune*, the *Journal News* (New York), and the *Advocate* (Stamford, CT). *See Vargas v. Doe*, 96 Conn. App. 399, 414 n.11 (2006).
35. *See, e.g., Carabetta v. Carabetta*, 2006 Conn. Super. LEXIS 1902 (J.D. New Haven; June 22, 2006; Dewey, J.); *see also Kozlovich v. Kozlovich*, 2006 Conn. Super. LEXIS 3291 (J.D. Waterbury, Oct. 26, 2006; Resha, J.)