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Jesse Creed
PANISH, SHEA & BOYLE

Nathan Werksman
PANISH, SHEA & BOYLE

The quirky but plaintiff-friendly statute of limitations for childhood sexual-abuse actions

A DETAILED LOOK AT CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 340.1

With the advent of the #MeToo movement, sex-abuse mass torts have exploded. Harvey Weinstein in Hollywood, Dr. Lawrence Nassar of USA Gymnastics, and Dr. George Tyndall of the University of Southern California are now notorious household names. This article takes on a specific, but complex issue related to sex-abuse cases that is full of traps for the unwary: the quirky statute of limitations for *childhood* sex-abuse lawsuits.

In the representation of victims of childhood sex abuse by Larry Nassar against USA Gymnastics and the U.S. Olympic Committee, plaintiffs' counsel had to surmount the rigors of relying on the delayed-discovery rule for childhood sex-abuse cases.

While the statute is quirky, it provides huge advantages to plaintiffs. It extends the statute of limitations until a plaintiff's 26th birthday and has a forgiving three-year delayed-discovery rule. However, failure to exercise care in complying with its requirements could result in a successful demurrer, attorney-misconduct proceedings, waiver of attorney work product and attorney-client privilege, and the premature disclosure of expert identities and opinions. (See, e.g., *Jackson v. Doe* (2011) 192 Cal.App.4th 742, 753 ["[P]laintiff's failure to comply with section 340.1 is fatal to her claim and the court properly sustained defendant's demurrer without leave to amend."); Code Civ. Proc. § 340.1, subd. (k) [failure to follow section 340.1 "may constitute unprofessional conduct and may be the grounds for discipline against the attorney"].) A lot is at stake. It is important to get it right.

Background

Before 1986, childhood sex-abuse claims were subject to a strict one-year statute of limitations for assault and battery. (Code Civ. Proc., § 335.1). The statute would start to run when the victim turned 18. Therefore, victims of childhood sex abuse were barred from bringing claims after they turned 19.

In enacting section 340.1 of the Code of Civil Procedure, the California Legislature recognized the well-established prevalence of repressed memories among victims of childhood sex abuse. The Legislature likewise recognized the inability of minors to identify acts of sex abuse by people they trust or have a special relationship with. Unlike victims of vehicle accidents, research showed that victims of childhood sexual abuse repressed memories of their assaults, told no one, and did not understand the wrongful nature of the acts committed against them until years later, if ever. Thus, based on this research, the Legislature recognized the need to tailor the statute of limitations in childhood sexual-abuse cases to ensure justice and a remedy for the victim.

Made up of twenty-one subparts, section 340.1 appears complex and indecipherable to the uninitiated. It separates perpetrators (e.g., Weinstein, Nassar, Tyndall) from other responsible parties (e.g., employers, schools, sports organizations, youth organizations, etc.). It prohibits certain plaintiffs from naming the defendants in the complaint. Most surprisingly, it requires attorneys to divulge attorney work product and attorney-client privileged communications at the outset of the litigation, potentially setting up an argument by defense for waiver. It is important to understand the statute and exercise care in meeting its requirements.

Does section 340.1 apply to the action?

Section 340.1 explicitly applies solely to "an action for recovery of damages suffered as a result of childhood sexual abuse." Thus, the first issue is whether your action is a "childhood sexual abuse" action. The statute does not explicitly define "childhood sexual abuse." Instead, it states that such term "*includes*," though is not limited to, an action satisfying two conditions: (1) the act of abuse must occur while the plaintiff is under the age of 18, and (2) the act of abuse was criminalized as rape, abduction, carnal abuse of children, bigamy, incest, sodomy, child molestation, or sex abuse. (Code Civ. Proc., § 340.1 subd. (e) [citing various Penal Code sections as examples of criminal abuse].)

The statute states that "childhood sexual abuse" includes these criminal acts, but it also extends to any "childhood sexual abuse" action. Moreover, while these criminal prohibitions may apply solely to the perpetrator, the statute is explicit that its protections extend to more than the perpetrator, including employers, youth-based organizations, sports organizations, and other responsible parties. Thus, "[n]othing" in the definition "limits the availability of causes of action permitted under [this section], including causes of

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action against persons or entities other than the alleged perpetrator of the abuse." (Code Civ. Proc., § 340.1 subd. (e).)

What are the benefits of section 340.1?

The benefits of having a childhood sexual-abuse action are clear and concrete. If your action qualifies, the plaintiff gets at least eight years to file suit. Specifically, the commencement of the action before the plaintiff turns 26 means the action is timely. If the plaintiff is under 26, he or she can file suit against the perpetrator and the responsible party in the same manner as any other kind of action. But if the plaintiff is older than 26 at the time of suit, the statute gets complicated and burdensome.

Despite the complications and the burdens, the benefits of Section 340.1 are substantial. Section 340.1 allows for a generous extended statutory-discovery rule. A plaintiff who is older than 26 must file the action "within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse." (Code Civ. Proc., § 340.1 subd. (a).)

For example, in the Larry Nassar cases, many of the gymnasts were in their thirties or older. But the gymnasts had literally no idea that Dr. Nassar's "medical treatments" were sexual abuse. Without knowing that the treatments were sexual abuse, the clients would have no reason to know that any psychological injury or illness was caused by something they were completely unaware of.

Section 340.1 does require specific conditions to be met before the delayed-discovery rule applies to many defendants, including employers, schools, and youth and sports organizations. Specifically, section 340.1 requires that the employer, school, or other responsible party (1) "knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent," and (2) "failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment." (Code Civ. Proc., § 340.1 subd. (b)(2).)

In other words, there is an actual-notice or constructive-notice standard that must be pled before the delayed-discovery rule applies to employers, schools, sports organizations and other responsible parties. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549.)

Ground rules for section 340.1's delayed-discovery rule

If a plaintiff is older than 26 and was the victim of childhood sexual abuse by a perpetrator employed by an organization, it is important to follow the requirements of the statute closely. The employer or other responsible party must know or should have known of the perpetrator's crimes, and proof of this may come, in part, from the extraordinary number of victims of the perpetrator and there was a cover-up. (Code Civ. Proc., § 340.1 subd. (b)(2).)

But even if this is the case, section 340.1 prevents a plaintiff from filing suit, naming the defendants in a complaint, and serving the defendant. The plaintiff must meet specific requirements to do each of these three case-initiating acts. A violation of the requirements "may constitute unprofessional conduct and may be the grounds for discipline against the attorney." (Code Civ. Proc., § 340.1 subd. (k).)

First, a plaintiff is barred from naming the defendants in the initial complaint. Section 340.1 provides that "no defendant may be named except by 'Doe' designation in any pleadings or papers filed in the action until there has been a showing of corroborative fact as to the charging allegations against that defendant." (Code Civ. Proc., § 340.1, subd. (m).) These Doe designations are different than Doe Defendants that are commonplace in personal injury actions, as the victim of childhood sexual abuse knows the name of the perpetrator and responsible parties. But the Legislature sought to avoid public accusations of stale child-molestation or sex-abuse without an initial showing of merit to the court.

Second, a plaintiff is barred from serving the defendants until a court enters an order allowing the complaint to be served. (Code Civ. Proc., § 340.1, subd. (j).)

Filing under section 340.1's delayed-discovery rule

To file a section 340.1 action subject to delayed discovery, the plaintiff must file (1) a complaint (with Doe designations for the defendants) and seek to file under seal (2) a "Certificate of Merit" signed by a licensed mental-health practitioner, and (3) a "Certificate of Merit" signed by the attorney for the plaintiff as to each defendant. (Code Civ. Proc., § 340.1 subd. (g).) The Certificates of Merit contain attorney work product, privileged information, and the identity and opinions of experts protected against premature disclosure. Thus, the Certificates of Merit should all be filed under seal to protect them from review by defendants pursuant to the process outlined below. Because some trial courts require a separate application for the sealing process, the initial filing should also include an ex parte application seeking to seal the Certificates of Merit.

The Certificate of Merit from a mental-health practitioner must state that the licensed mental-health practitioner has interviewed the client and "is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of his or her knowledge of the facts and issues, that in his or her professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse." (Code Civ. Proc., § 340.1, subd. (h)(2).) The mental health practitioner must be "licensed to practice and practices in this state." (*Id.*) Thus, if the client is out-of-state, the client will need to travel to California

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to conduct the interview, since mental-health practitioners are typically restricted under their licenses from providing services outside California. The licensed mental-health practitioner must also be independent of the plaintiff and the action. He or she must not be a party to the action and must neither be treating nor ever have treated the plaintiff. (*Id.*) All of these qualifications must be stated in the Certificate of Merit. (Code Civ. Proc., § 340.1, subd. (h)(2).)

In addition, the attorney for the plaintiff must sign a Certificate of Merit as to each defendant. (Code Civ. Proc., § 340.1 subd. (i).) The attorney must state that (1) the attorney has "reviewed the facts of the case," (2) has consulted with the licensed mental-health practitioner, and (3) has concluded (based on the review and consultation) that there is a "reasonable and meritorious cause for the filing of the action." (Code Civ. Proc., § 340.1, subd. (h)(1).)

If the three-year statute of limitations is about to expire, the plaintiff can be excused from filing the Certificates of Merit at the same time as the complaint. In this situation, the attorney must file a Certificate of Merit explaining that the attorney was unable to obtain a mental-health practitioner consultation for the plaintiff and that the Certificates of Merit could not be obtained before the statute runs. (Code Civ. Proc., § 340.1 subd. (h)(3).) The plaintiff then has *60 days* after filing the action to obtain the Certificates of Merit from the mental health practitioner and the attorney. (*Id.*)

A California Court of Appeal has held that the Certificates of Merit need not be made under penalty of perjury. (*Rubenstein v. Doe No. 1* (2016) 245 Cal.App.4th 1037, reversed on other grounds by *Rubenstein v. Doe 1*, 3 Cal.5th 903 (2017).) While this holding was not specifically superseded by the California Supreme Court, it is unclear if the Court of Appeal decision in *Rubenstein* is citable. (See *Doe v Roe,* No. MSC15-02233, 2016 WL 7467123, at *1 (Cal.Super. June 20, 2016) (refusing to rely on the Court of Appeal's decision in *Rubenstein* because "[a]lthough a new Rule of Court recently was adopted that provides that "review granted" opinions may be cited pending the decision by the Supreme Court, the new rule applies only to cases in which review was granted after July 1, 2016.").) To play it safe, attorneys should make their declarations under penalty of perjury, but indicate that all facts contained therein are made on information and belief only.

How to seal the Certificates of Merit

Because Certificates of Merit contain attorney-client privileged and attorney work product material, it is imperative to file them under seal. In our experience, courts have been sticklers for allowing the Certificates of Merit to be filed under seal. The reason is that some judges have latched on to how section 340.1 specifically requires Certificates of Corroborative Fact (which are described in detail below) to be filed confidentially and under seal. (Code Civ. Proc., § 340.1 subd. (p).) Thus, the courts reason that the absence of a similar provision for Certificates of Merit suggests that they are to be sealed in the same manner and to the same extent as any other court record. Even with this skepticism, in our experience, the courts recognize the privileged and protected nature of the information contained in Certificates of Merit and will thus allow them to be filed under seal if the plaintiff seeks to seal them under the California Rules of Court.

To seal the Certificates of Merit under the California Rules of Court, the attorney must not actually file the Certificates of Merit with the complaint. Instead, the attorney should *lodge* them at the time of filing and seek to seal them by ex parte application under Rule 2.551. (See Cal. Rules of Court, rule 2.551(d) [procedure for "lodging" the record under seal].) Once the court grants the ex parte application, the record will be filed under seal. (Cal. Rules of Court, rule 2.551(e).) In most cases, a sealing order permits inspection by all parties to the action, so it is essential that the sealing order specifically exclude the ability of the defendants from inspecting the Certificates of Merit. (Cal. Rules of Court, rule 2.551(e)(3) ["The order must state whether any person other than the court is authorized to inspect the sealed record."].)

The ex parte application should make three arguments for sealing the Certificates of Merit:

First, because the Certificates of Merit are reviewed in camera by the Court without the participation of any defendant, Rule 2.585 of the Rules of Court automatically seals such records. Rule 2.585 automatically seals all court records in a "confidential in-camera proceeding . . . in which a party is excluded from being represented." Such records are automatically sealed unless disclosure is ordered by court: "Records examined by the court in confidence under (a), or copies of them, must be filed with the clerk under seal and must not be disclosed without court order." (Cal. Rules of Court, rule 2.585(b).)

The proceeding at issue here is such an in-camera proceeding. Section 340.1, subdivision (j) requires the Court to make the necessary finding "in camera." The proceeding is "confidential" under Rule 2.585 because (1) the statute precludes service on the Doe Defendants absent such a judicial finding and (2) the statute ensures the identity of the Doe Defendants are confidential in these proceedings to protect them from "frivolous and unsubstantial claims." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 552, n.6.) The Doe Defendants are "excluded from being represented" in these proceedings under Rule 2.585 because they have not been served and are not even permitted to be served at the time of the proceeding. They are also prohibited from participating in the proceeding because the Certificates of Merit come within the penumbra of the attorney-client privilege and attorney work product protections (as explained below). (*Cf.* Evid. Code § 915, subd. (b) [when performing an *in camera* review of information claimed to be privileged, court must conduct the review "in chambers out of the presence and hearing of all persons" except privilege holder].)

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The Doe Defendants are also "excluded from being represented" in a section 340.1 Certificate of Merit proceeding because the structure of section 340.1 assumes that defendant is excluded from the in camera proceeding. Section 340.1, subd. (q) gives a prevailing defendant in a childhood sexual-abuse action a remedy for bad-faith Certificates of Merit. After defendant prevails, the court may, upon defendant's request, require plaintiff's counsel to "reveal the name, address and telephone number of the person or persons consulted to the Court "*in camera and in the absence of the moving party*." (§ 340.1, subd. (q).) If defendants cannot participate in that proceeding after the case has been resolved in defendant's favor, they clearly are not intended to be part of the pre-litigation in camera proceeding in which the court reviews the Certificates of Merit.

Second, even if the court finds the records are not automatically sealed under Rule 2.585, it should seal the Certificates of Merit under Rule 2.550 of the Rules of Court. That rule provides: "The court may order that a record be filed under seal only if it expressly finds facts that establish:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court 2.550).

The court must "identify the facts supporting its issuance [but] the findings themselves, however, may be set forth in fairly cursory terms." (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 487). The court need not even make these findings if it finds the Certificates of Merit to be protected under a statutory privilege like attorney work product, attorney-client, or patient-psychotherapist privileges. "A document which is protected by [a statutory privilege] is not subject to the rule 243.1 et seq. findings requirements." (*Huffy CorProc. v. Superior Court* (2003) 112 Cal.App.4th 97, 108). Rule 243.1 is the predecessor to Rule 2.550. The *Huffy* court quoted the provision of Rule 2.550 that the rule does "not apply to records that are required to be kept confidential by law." (*Id.* n. 6.)

All Certificates of Merit are protected as attorney work product or attorney-client privileged materials. They reflect plaintiff's counsel's "impressions, conclusions, opinions, or legal research or theories" that are absolutely protected from disclosure under the attorney work product protections. (Code Civ. Proc., § 2018.030 subd. (a).) This is self-evident from section 340.1 itself, as section 340.1 requires that the attorney Certificate of Merit state an attorney's "conclu[sion]" based on a review of the facts and a consultation with the licensed mental health practitioner that there is a "reasonable and meritorious cause for the filing of the action." (Code Civ. Proc., § 340.1, subd. (h)(1).)

The Certificates of Merit also reflect some privileged information because plaintiff's counsel obtained such information in the course of the attorney-client relationship. The Certificate of Merit executed by the licensed mental health professional is also protected as attorney work product. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 297 ["The opinions of experts who have not been designated as trial witnesses are protected by the attorney work product rule. Their identity also remains privileged until they are designated as trial witnesses."].) The mental health practitioner is usually retained by plaintiff's counsel to assist with the evaluation of the case and to enable plaintiff's counsel to execute his or her own Certificate of Merit. Accordingly, the licensed mental health practitioner's identity and opinions should be absolutely protected from disclosure. The declaration signed by the attorney that accompanies the ex parte application should state the foregoing facts to support the sealing of the Certificates of Merit under Rules 2.550 and 2.551 of the California Rules of Court.

The ex parte application seeking to seal the Certificates of Merit should also state that even if the Certificates of Merit are not automatically protected under statutory privileges, plaintiffs can show that the five-part findings under Rule 2.550 have been met.

Third and finally, the ex parte application should explain that, even if the court does not seal the Certificates of Merit under the above rules, the Court is absolutely prohibited from disclosing the Certificates of Merit under California Evidence Code scetion 915. That section provides: "If the judge determines that the information [submitted to the Court] is privileged [under any statutory privilege, including attorney-client privilege, attorney work product, and psychotherapist privilege], neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers."

Serving a defendant under section 340.1's delayed-discovery rule

While the Certificates of Merit must be filed under seal at the time the complaint is filed, courts do not review them automatically under this section. The plaintiff must call the court's attention to the Certificates of Merit and request in-camera review of the Certificates. Because defendants are not even allowed to be served at this point, a noticed motion would be pointless. Thus, the plaintiff must seek review by ex parte application. (*Rubenstein*, 245 Cal.App.4th at p. 1037.) A plaintiff can file, at the same time, the complaint with Doe designations, lodge the Certificates of Merit under seal with the court, and file ex parte applications seeking to seal the Certificates of Merit and seeking the required judicial finding by the Court. There is nothing requiring the plaintiff to sequence these filings in a specific order.

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The ex parte application seeking review of the Certificates of Merit should request the court to make the required judicial finding and explain how plaintiff has complied with all statutory requirements. Specifically, the ex parte application should argue: (1) that section 340.1 applies because this action is a "childhood sexual abuse" action, (2) that plaintiff is above the age of 26 years old, triggering the Delayed Discovery Rule requirements, and (3) the Certificate of Merit requirements have been met and are ready for an in-camera review by the Court. Courts are not generally familiar with this specialized statute. Thus, it is imperative to educate the court in great detail so the court feels comfortable ruling on the motion.

Ultimately, the plaintiff is seeking an order from the Court stating: "The Court hereby FINDS that there is a reasonable and meritorious cause for the filing of the action against each of the Doe Defendants and hereby ORDERS that Plaintiff be authorized to serve each Doe Defendant." This is the language we use in our proposed order lodged with the Court. With this judicial finding and order entered by the Court, the plaintiff can then serve the complaint on each of the Doe defendants. The plaintiff should also serve the order related to the Certificates of Merit on each of the defendants as well to show compliance with the statutory prerequisites.

Naming a defendant under section 340.1's delayed-discovery rule

As explained above, a plaintiff is barred from identifying the true names of any defendants in a childhood sexual abuse action relying on the Delayed Discovery Rule. A plaintiff could potentially prosecute the action without ever seeking to identify the true names of the defendants. However, prosecuting an action against fictitiously designated defendants may hamper discovery efforts. A plaintiff would not be able to seek third-party discovery easily, if at all, without being able to disclose the identity of the defendants. Thus, plaintiffs should comply with the requirements necessary to amend the complaint and replace the fictitious designations of the Doe Defendants with their real names.

To do so, a plaintiff must seek permission from the court. "At any time after the action is filed, the plaintiff may apply to the court for permission to amend the complaint to substitute the name of the defendant or defendants for the fictitious designation." (Code Civ. Proc., § 340.1, subd. (n).) A plaintiff should seek to amend the complaint before serving the defendants. If the defendants have not been served at the time the plaintiff seeks amendment, the plaintiff is not required to serve the defendants with the application to amend the complaint. (Code Civ. Proc., § 340.1 subd. (n)(2).) But if the defendants have been served at the time the plaintiff seeks amendment, the plaintiff must serve the defendants with the application, but is prohibited from serving the defendants with the certificate of corroborative fact accompanying the application. (Code Civ. Proc., § 340.1, subd. (n)(3).)

The application to the Court seeking to amend the complaint to identify the defendants must be "accompanied by a certificate of corroborative fact executed by the attorney for the plaintiff." (Code Civ. Proc., § 340.1, subd. (n)(1).) A Certificate of Corroborative Fact must:

> declare that the attorney has discovered one or more facts corroborative of one or more of the charging allegations against a defendant or defendants, and shall set forth in clear and concise terms the nature and substance of the corroborative fact. If the corroborative fact is evidenced by the statement of a witness or the contents of a document, the certificate shall declare that the attorney has personal knowledge of the statement of the witness or of the contents of the document, and the identity and location of the witness or document shall be included in the certificate. For purposes of this section, a fact is corroborative of an allegation if it confirms or supports the allegation. The opinion of any mental health practitioner concerning the plaintiff shall not constitute a corroborative fact for purposes of this section.
>
> (*Ibid.*)

There is no evidentiary standard for the corroborative facts. Thus, there is no explicit requirement that the corroborative facts be admissible or that the certificate establish their foundation. In fact, the examples included in the statute suggest otherwise, as they could be considered inadmissible hearsay ("statement of a witness") or a document that the attorney has had no opportunity to establish its foundation ("contents of a document"). Indeed, the statement of a witness is not required to be made under penalty of perjury.

While the Certificate of Corroborative Fact need only corroborate a single fact, it is good practice to include the attorney's personal knowledge of several corroborative facts in case the court finds one or more forms or methods of corroboration to be disqualified. Also, while the certificate need not attach any documents or witness statements, it is imperative to explain the "nature and substance of the corroborative fact." Thus, the attorney must do more than state in a conclusory manner that the attorney has personal knowledge of the corroborative fact. Even better, the attorney should identify precisely which charging allegation is being corroborated.

The ex parte application should request that the Court "review the application and the certificate of corroborative fact in camera and, based solely on the certificate and any reasonable inferences to be drawn from the certificate, shall, if one or more facts corroborative of one or more of the charging allegations against a defendant has been shown, order that the complaint may be amended to substitute the name of the defendant or defendants." (Code Civ. Proc., § 340.1, subd. (o).)

Because Certificates of Corroborative Fact contain attorney work product and privileged materials, the ex parte application should likewise seek an order sealing the records. This request is far simpler than the request for

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sealing Certificates of Merit, because the statute explicitly provides for the confidentiality and sealing of Certificates of Corroborative Fact. (Code Civ. Proc., § 340.1, subd. (p).) Because confidentiality and sealing are required by statute, there is no need to follow the procedures set forth in Rule 2.550 of the California Rules of Court. (See Cal. Rules of Court, rule 2.550(a)(2) ["These rules do not apply to records that are required to be kept confidential by law"].)

Summary

If a plaintiff brings a childhood sexual-abuse action before turning 26 years old, the action is timely and can proceed in the same manner as any other action. The plaintiff simply files a complaint and serves the defendants. However, if the plaintiff brings such an action after turning 26 years old and is seeking to rely on the three-year Delayed Discovery Rule in Code of Civil Procedure section 340.1, the process for filing such action is heavily regulated, complex, rigorous, and full of technicalities and potential foot faults.

The plaintiff must undergo two confidential court proceedings – one for review of the Certificates of Merit and the other for review of the Certificates of Corroborative Fact – before the plaintiff can prosecute the action in the same manner as any other action. The failure to follow these detailed rules and the practices recommended by this article could result in a sustained demurrer, attorney misconduct proceedings, waiver of attorney work product and attorney-client privilege, and the premature disclosure of expert identities and opinions.

Jesse Creed is an attorney at Panish, Shea & Boyle LLP *in Los Angeles, CA. His principal area of practice is in personal injury and consumer cases with an emphasis on mass torts, class actions, and complex litigation. He is a graduate of Columbia Law School.* Panish Shea & Boyle *is plaintiffs' counsel for several victims of Dr. Larry Nassar.*

Nathan Werksman is a Fellow at Panish, Shea & Boyle LLP *in Los Angeles, CA. His principal area of practice is in personal injury with an emphasis on trial work. He is a graduate of Stanford Law School.*