

Memorandum 2016-49

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Certification Requirements

The Commission¹ is in the process of preparing a tentative recommendation that would propose a new exception to California’s mediation confidentiality statute (Evid. Code §§ 1115-1128) to address attorney malpractice and other misconduct in the mediation process.² As a possible component of that proposal, the Commission has been investigating ideas for preliminary *in camera* filtering of a legal malpractice case that alleges mediation misconduct.³ The goal is to find “an early way to eliminate claims that have no basis and should not result in public disclosure of mediation communications.”⁴

At the July meeting, the Commission directed the staff to “further investigate the possibility of creating a specialist certification requirement or a self-certification requirement for a legal malpractice case that alleges mediation misconduct.”⁵ This memorandum addresses the possibility of creating a specialist certification requirement. Unless the Commission otherwise directs, a future memorandum will discuss self-certification possibilities.

The following materials are attached as exhibits:

	<i>Exhibit p.</i>
• Code of Civil Procedure Section 411.35	1
• Mark-Up Showing Deviations from Existing Section 411.35	3

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. For further information about the exception that the Commission is drafting, see Memorandum 2016-18, pp. 4-5.

3. See Memorandum 2016-27 (discussing five possible filtering mechanisms); Memorandum 2016-38 (discussing Civil Code Section 1714.10 and early neutral evaluation); First Supplement to Memorandum 2016-38 (briefly discussing specialist certification and self-certification requirements). See also Minutes (April 2016), p. 5; Minutes (June 2016), pp. 4-5; *Draft Minutes* (July 2016), pp. 3-4.

4. Minutes (April 2016), p. 5.

5. *Draft Minutes* (July 2016), p. 4.

- Former Code of Civil Procedure Section 411.30 (1986 Cal. Stat. ch. 247, § 1)6
- Code of Civil Procedure Section 340.18
- Health & Safety Code Section 25249.7 13

SPECIALIST CERTIFICATION REQUIREMENT

California has used specialist certification requirements for several different types of lawsuits. Other jurisdictions also have such requirements.

We begin by discussing Code of Civil Procedure Section 411.35, which Commissioner King suggested as a possible model in July. We then describe several other contexts in which California has imposed a specialist certification requirement. After examining the California provisions, we take a look at what other jurisdictions have done.

We next consider possible constitutional challenges to a specialist certification requirement for a legal malpractice case that alleges mediation misconduct. Finally, we discuss the pros and cons of creating such a requirement, and raise some specific issues about implementation.

Professional Negligence Claim Against an Architect, a Professional Engineer, or a Land Surveyor (Code Civ. Proc. § 411.35)

Code of Civil Procedure Section 411.35 requires a plaintiff or cross-complainant to file and serve a certificate of merit on or before serving a complaint or cross-complaint for professional negligence of an architect, professional engineer, or land surveyor. For convenient reference, the full text of this lengthy provision is shown at Exhibit pages 1-2. The statutory framework includes some complexities, as described below.

Statutory Framework

Paragraph (1) of subdivision (b) is the core of Section 411.35. It states that the plaintiff’s attorney in a professional negligence case against an architect, professional engineer, or land surveyor must execute a certificate of merit declaring that

the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is

knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action.

The person that the attorney consults cannot be a party to the litigation.⁶ That person “shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.”⁷

The above requirement is inapplicable in the following circumstances:

- If the statute of limitations is about to run, the attorney may instead provide a certificate declaring that “the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action.”⁸ If the attorney provides such a certificate, “the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.”⁹
- If the attorney is not able to obtain the required consultation, the attorney may instead provide a certificate declaring that “the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.”¹⁰ If the attorney does this, “the court may require the attorney to divulge the names of architects, professional engineers, or land surveyors refusing the consultation.”¹¹
- It is only necessary to file one certificate, “notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.”¹²
- If the attorney intends to rely solely on the doctrine of *res ipsa loquitur*, or solely on a failure to inform of the consequences of a procedure, or both, the attorney may instead provide a certificate to that effect.¹³

6. Code Civ. Proc. § 411.35(b)(1).

7. *Id.*

8. Code Civ. Proc. § 411.35(b)(2).

9. *Id.*

10. Code Civ. Proc. § 411.35(b)(3).

11. Code Civ. Proc. § 411.35(e).

12. Code Civ. Proc. § 411.35(c).

13. Code Civ. Proc. § 411.35(d).

Failure to file a certificate of merit in accordance with Section 411.35 is grounds for a demurrer or a motion to strike.¹⁴ Under both of these procedures, “leave to amend is routinely and liberally granted to give the plaintiff a chance to cure the defect in question.”¹⁵ For example, leave to amend was appropriate where a plaintiff signed the required certificate of merit (instead of the plaintiff’s attorney) and filed the certificate late.¹⁶ In reaching that conclusion, the court of appeal did “not agree that merely filing a belated certificate cures the defect, because the statute requires the certificate to be filed before the complaint is served.”¹⁷ The court explained, however, that “by granting leave to file an amended complaint the [trial judge] can give the plaintiff an opportunity to fully comply with the statutory requirements for filing a certificate of merit.”¹⁸ Thus, the court rejected the idea that “the only cure for [plaintiff’s] failure to file a certificate before serving her original complaint was dismissal of the action without prejudice, followed by service of a new complaint after a properly filed certificate of merit.”¹⁹

When an attorney submits a certificate of merit declaring that the attorney has consulted with an architect, professional engineer, or land surveyor as statutorily required, the attorney “has a privilege to refuse to disclose the identity of the architect, professional engineer, or land surveyor consulted and the contents of the consultation.”²⁰ The architect, professional engineer, or land surveyor also holds that privilege.²¹

If a defendant obtains a “favorable conclusion”²² of a claim subject to Section 411.35, however, the trial court may, on motion of a party or on its own motion, verify compliance with the statute by ordering the plaintiff’s attorney “to reveal the name, address, and telephone number of the person or persons consulted ... that were relied upon by the attorney in preparation of the certificate of merit.”²³

14. Code Civ. Proc. § 411.35(g).

15. *Price v. Dames & Moore*, 92 Cal. App. 4th 355, 360, 112 Cal. Rptr. 2d 65 (2001); see also *Apex Directional Drilling LLC v. SHN Consulting Engineers & Geologists, Inc.*, 119 F. Supp. 3d 1117, 1130 (N.D. Ca. 2015) (noting that “California courts grant generous leave to amend to cure noncompliance with the certificate provision.”).

16. See *Price*, 92 Cal. App. 4th at 360.

17. *Id.*

18. *Id.*

19. *Id.* at 359-60.

20. Code Civ. Proc. § 411.35(e).

21. *Id.*

22. Code Civ. Proc. § 411.35(h). A settlement is not a “favorable conclusion” for this purpose. See *Korbel v. Chou*, 27 Cal. App. 4th 1427, 1432, 33 Cal. Rptr. 2d 190 (1994).

23. Code Civ. Proc. § 411.35(h).

That information “shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present.”²⁴ According to a bill analysis describing the procedure, “[t]he moving party was kept out of the in-camera proceeding to protect the confidentiality of consultants who might otherwise become reluctant to offer consultations if their identities are revealed.”²⁵

If a trial judge finds a failure to comply with the certificate of merit requirement, the judge “may order a party, a party’s attorney, or both, to pay any reasonable expenses, including attorney’s fees, incurred by another party as a result of the failure to comply”²⁶ Such an award may include paralegal fees, so long as those fees were not incorporated as overhead in an attorney’s billing rate.²⁷ An award may also include attorney’s fees incurred in seeking the award.²⁸ In addition, a violation of Section 411.35 “may constitute unprofessional conduct and be grounds for discipline against the attorney”²⁹

However, “[w]hat is immediately apparent from the text of subdivision (h) of section 411.35 is the discretionary nature of the sanction” for failure to file a certificate of merit as required.³⁰ “The statute *permits*, but does not mandate, verification by directing the party to disclose identifying information about the consultant the attorney used; and if the court finds that the attorney failed to comply with section 411.35, it *may* order a party (or a party’s attorney) to pay the attorney fees that the other party incurred as a result of that noncompliance.”³¹ Thus, for example, it is not an abuse of discretion to deny sanctions where there is “no harm to [defendant] in the form of additional expenditures caused by the lack of a certificate.”³²

Legislative History and Intent

Section 411.35 was enacted in 1979 for “the purpose of discouraging frivolous professional negligence suits” against architects, professional engineers, and land

24. *Id.*

25. Senate Committee on Judiciary Analysis of SB 934 (May 9, 1995), p. 11.

26. Code Civ. Proc. § 411.35(h).

27. See *Guinn v. Dotson*, 23 Cal. App. 4th 262, 267-70, 28 Cal. Rptr. 2d 409 (1994).

28. See *id.*

29. Code Civ. Proc. § 411.35(f). “[F]ailure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.” *Id.*

30. *UDC-Universal Development, LP v. CH2M Hill*, 181 Cal. App. 4th 10, 28, 103 Cal. Rptr. 3d 684 (2010).

31. *Id.* (emphasis in original).

32. *Id.* at 28-29.

surveyors.³³ Since then, the Legislature has repeatedly amended the statute to improve its effectiveness in achieving that objective without impeding meritorious claims.³⁴

Major stakeholder organizations such as the Consumer Attorneys of California (“CAOC”) and the Civil Justice Association of California (“CJAC”) have paid close attention to the development of the statute. To give just a few examples:

- Among other things, the original version of a 1995 bill would have required the person consulted pursuant to Section 411.35 to review relevant documents and prepare a written report. CAOC objected that these requirements would be “unduly burdensome and unworkable since many of the documents would not necessarily be in a plaintiff’s possession before the suit is filed and discovery is completed.”³⁵ CAOC viewed this as “a ‘catch-22’ situation for plaintiffs where the consultant cannot render an opinion without the relevant documents but the plaintiff cannot obtain those documents from defendants.”³⁶ CAOC further contended that Section 411.35 should be repealed because it “serves only to increase the costs of litigation as well as its complexity”³⁷ The bill was enacted with support from various construction groups, but only after CAOC withdrew its opposition and the bill “was amended to eliminate the document review and written report requirements”³⁸
- The original version of a 1999 bill proposed to revise Section 411.35 in a number of respects. Of particular note, the bill would have required a certificate of merit to include the name of the person consulted.³⁹ The bill was enacted with support from CJAC and the American Institute of Architects, but only after revisions to address concerns raised by CAOC, including elimination of the name disclosure requirement.⁴⁰
- Under certain circumstances, a 2002 bill supported by CJAC, some construction groups, and the Chamber of Commerce would have

33. *Guinn*, 23 Cal. App. 4th at 270; see 1979 Cal. Stat. ch. 973, § 1. Section 411.35 was originally supposed to sunset in 1984, but the Legislature extended the sunset date several times and eventually removed it.

34. See 1983 Cal. Stat. ch. 414, § 1; 1986 Cal. Stat. ch. 1231, § 1; 1988 Cal. Stat. ch. 1070, § 1; 1990 Cal. Stat. ch. 204, § 1; 1991 Cal. Stat. ch. 272, § 1; 1995 Cal. Stat. ch. 241, § 1; 1999 Cal. Stat. ch. 176, § 1.

35. Senate Committee on Judiciary Analysis of SB 934 (May 9, 1995), p. 8.

36. *Id.*

37. *Id.* at 7.

38. *County of Riverside v. Yeager Skanska*, 2012 Cal. App. Unpub. LEXIS 8598, *42 (2012); see 1995 Cal. Stat. ch. 241, § 1.

39. See AB 540 (Machado), as introduced on Feb. 18, 1999.

40. See 1999 Cal. Stat. ch. 176, § 1; Senate Committee on Judiciary Analysis of AB 540 (May 6, 1999).

permitted a court to review the opinion of a person consulted under Section 411.35. CAOC opposed the bill, which was not enacted.⁴¹

A 1987 study commissioned by the California Council of Civil Engineers and Land Surveyors reportedly concluded that Section 411.35's certificate of merit requirement "operated successfully to weed out frivolous litigation."⁴² More specifically, the study apparently found:

- (a) Fewer malpractice suits are filed against design professionals as a result of the law.
- (b) More malpractice suits filed against design professionals are dismissed as a result of the law.
- (c) The law is generally complied with, and noncompliance appears to be related more to ignorance of the statute than to willful disregard of the law.⁴³

The next year, the Legislature "strengthen[ed] the certificate of merit requirement by allowing the assessment of reasonable expenses, including attorney fees, as sanctions against the noncomplying party."⁴⁴ This sanctions provision (Section 411.35(h)) is intended to "encourage compliance with the statute's requirements."⁴⁵

Although it is clear that the Legislature takes the statute and underlying policy seriously, a federal court recently concluded that Section 411.35 is a procedural hurdle rather than substantive law:

California's section 411.35 is ... an odd duck. On one hand, the law has a weighty aim: "to protect architects and engineers from frivolous malpractice lawsuits." Consistent with this goal, noncompliance with the statute's requirements is grounds for demurrer.

Yet other facets of the statute indicate it is nothing more than a procedural hurdle. First, in lieu of obtaining a professional's opinion on the merits of a claim, a plaintiff can simply file a certificate stating that it has "made three separate good faith attempts with three separate [professionals] to obtain this consultation and none of those contacted would agree to the consultation." This escape clause suggests that the certificate

41. See AB 2713 (Cox) (2001-2002 Reg. Sess.); Assembly Committee on Judiciary Analysis of AB 2713 (May 7, 2002).

42. Senate Committee on Judiciary Analysis of SB 934 (May 9, 1995), p. 5.

43. *Id.*

44. *Guinn*, 23 Cal. App. 4th at 270-71; see also *Price*, 92 Cal. App. 4th at 361; *Korbel*, 27 Cal. App. 4th at 1432.

45. *Guinn*, 23 Cal. App. 4th at 271.

requirement is more in the nature of a formality. It is also notable that ... California courts grant generous leave to amend to cure noncompliance with the certificate provision. Because its requirements may be surmounted through amendment, the California rule is not truly “outcome determinative.”⁴⁶

The court thus concluded that the requirements of Section 411.35 “do not apply in this diversity case.”⁴⁷

The staff is not aware of any recent empirical research on the effect of Section 411.35. **We welcome information on that point.**

Commissioner King’s Suggestion Based on Section 411.35

In July, Commissioner King raised the possibility of creating a certificate of merit requirement for a legal malpractice case that alleges mediation misconduct. He suggested modeling that requirement on Section 411.35. To facilitate discussion, he provided some draft language for the Commission to consider, while cautioning that this was just for discussion purposes and might not be the best language or approach.

More specifically, Commissioner King suggested adding a new provision to the codes, along the following lines:

Code Civ. Proc. § 411.36 (added). Certificate of merit in action against attorney for professional misconduct in mediation

411.36. (a) In every action alleging attorney liability for misconduct or professional negligence in the context of a mediation, before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one State Bar certified legal malpractice specialist who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice law in this state or any other state, and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted

46. *Apex Directional Drilling, LLC v. SHN Consulting Engineers & Geologists, Inc.*, 119 F. Supp. 3d 1117, 1130 (N.D. Cal. 2015) (citations omitted).

47. *Id.*

may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant, in the context of a mediation, (i) had engaged or not engaged in misconduct or (ii) was negligent or was not negligent in the performance of the applicable professional services.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three certified legal malpractice specialists to obtain this consultation and none of those contacted would agree to the consultation.

(c) Where a certificate is required pursuant to this section, only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of “*res ipsa loquitur*,” as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of “*res ipsa loquitur*” or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the certified legal malpractice specialist and the contents of the consultation. The privilege shall also be held by the certified legal malpractice specialist so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the certified legal malpractice specialist, the court may require the attorney to divulge the names of certified legal malpractice specialists refusing the consultation.

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court's own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section.

(i) For purposes of this section, "action" includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."

(j) This section shall not be applicable to State Bar disciplinary action.⁴⁸

As shown in the attached mark-up (Exhibit pp. 3-5), this new provision would closely track the language of Section 411.35.

In considering whether to recommend such an approach to the Legislature, the Commission might find it helpful to consider some information about other certificate of merit requirements. We start by examining the ones used in California in the following contexts:

- Medical malpractice claim (former Code Civ. Proc. § 411.30).
- Statute of limitations for a tort claim based on childhood sexual abuse (Code Civ. Proc. § 340.1).
- Proposition 65 warning requirement for hazardous chemicals (Health & Safety Code § 25249.7).

Medical Malpractice Claim (Former Code Civ. Proc. § 411.30)

The prototype for a certificate of merit requirement in California was former Code of Civil Procedure Section 411.30, which applied to medical malpractice

⁴⁸. Email from V. King to B. Gaal (6/18/16, #1). In the first sentence of paragraph (b)(1), the staff made a few technical revisions of Commissioner King's suggested language. The staff also drafted the boldface leadline (which would not become law) and determined where to locate the proposed provision in the codes (adjacent to Code of Civil Procedure Section 411.35).

claims. It was enacted in 1978,⁴⁹ subject to a sunset date that was extended several times. It was also amended in various other ways before it was repealed by its own terms (i.e., sunsetted) on January 1, 1989.⁵⁰

A 1987 bill was “introduced by its author, Senator Lockyer for the purpose of extending the provisions of ... section 411.30” beyond January 1, 1989.⁵¹ However, that bill was gutted and amended late in the 1987 legislative session, being replaced by the “Willie L. Brown, Jr. — Bill Lockyer Civil Liability Reform Act of 1987,” which was “a compromise agreement on procedural and substantive civil liability reforms which has been reached between competing interests such as the plaintiffs’ trial lawyers, insurers, doctors, and manufacturing and business groups.”⁵² A 1991 effort to revive former Section 411.30 (as part of a package of healthcare reforms) was unsuccessful.⁵³

In content, former Section 411.30 was quite similar to Section 411.35. For convenient reference, the text of former Section 411.30 is reproduced at Exhibit pages 6-7.

A notable difference between the two provisions is that former Section 411.30 was expressly inapplicable to “a plaintiff who is not represented by an attorney.”⁵⁴ In contrast, “[t]he plain language of section 411.35 does not exempt a *propria persona* plaintiff from the certificate of merit requirement.”⁵⁵

Former Section 411.30 also extended the time for filing a certificate of merit if the plaintiff requested the defendant’s records pursuant to Evidence Code Section 1158 and the defendant failed to timely comply with that request.⁵⁶ In essence, the plaintiff was entitled to a limited amount of discovery before preparing the certificate of merit.

Like Section 411.35, former Section 411.30 was intended to curb frivolous claims. “The manifest policy of section 411.30 [was] to require that a plaintiff provide some independent support of the merits of the action before [pursuing] the action”⁵⁷ As a court of appeal explained:

49. 1978 Cal. Stat. ch. 1165, § 1.

50. See 1979 Cal. Stat. ch. 988, § 1; 1982 Cal. Stat. ch. 1040, § 2; 1983 Cal. Stat. ch. 429, § 1; 1984 Cal. Stat. ch. 1705, § 1; 1986 Cal. Stat. ch. 247, § 1.

51. *American Tobacco Co. v. Superior Court*, 208 Cal. App. 3d 480, 487 n.3, 255 Cal. Rptr. 280 (1989).

52. *Id.*

53. See AB 755 (Hansen), as amended on Feb. 26, 1991.

54. See former Code Civ. Proc. § 411.30(i).

55. *Jackson v. Doe*, 192 Cal. App. 4th 742, 751 n.5, 121 Cal. Rptr. 3d 685 (2011).

56. See former Code Civ. Proc. § 411.30(e).

57. *Strauch v. Superior Court*, 107 Cal. App. 3d 45, 49, 165 Cal. Rptr. 552 (1980).

According to the analysis of the Assembly Committee on the Judiciary of the bill containing the original version of the statute, “the bill merely seeks to assure that before an attorney files a complaint against a physician for medical malpractice that he does *a minimal amount of investigation* to determine that there is a reasonable basis for the filing of such complaint.” In most professional malpractice cases, it cannot be established that the defendant’s conduct fell below the applicable standard of care without the testimony of an expert familiar with that standard. Therefore, compliance with section 411.30 normally ensures that suit will not be filed unless counsel has located an expert qualified to express such an opinion.⁵⁸

An equal protection challenge to former Section 411.30 was unsuccessful. Justice Gilbert, writing for Second District Court of Appeal in *Adams v. Roses*,⁵⁹ provided the following analysis of the statutory purpose and its constitutionality:

We ... hold that section 411.30 is rationally related to the legitimate legislative purpose of ameliorating a malpractice insurance crisis.

Section 411.30 ... represents an attempt to curtail frivolous and insubstantial medical malpractice suits by requiring that the claimant file a certificate of merit prior to service of suit. Section 411.30 followed the Medical Injury Compensation Reform Act of 1975 (MICRA), legislation that in part sought to reduce the cost and increase the efficiency of medical malpractice litigation by revising the law pertaining to such litigation.

Under traditional equal protection analysis, the court must consider the correspondence between the classifications created by the legislation and the goals of that legislation. Our Supreme Court has upheld the classifications created by MICRA because those classifications were related to a national and legitimate legislative objective.

The retention of adequate medical care and the preservation of adequate and reasonable insurance coverage are reasonable legislative goals. The Legislature could properly restrict the necessity of filing a certificate of merit to malpractice cases because of the problems in that field....

We think a certificate of merit could reasonably be applied across the entire tort system. The equal protection guarantees, however, do not restrict the Legislature from implementing a reform “one step at a time.”⁶⁰

58. *Ammon v. Superior Court*, 205 Cal. App. 3d 783, 790, 252 Cal. Rptr. 748 (1988) (citations and footnote omitted).

59. 183 Cal. App. 3d 498, 228 Cal. Rptr. 339 (1986).

60. *Id.* at 506-07 (citations omitted).

Statute of Limitations for Tort Claim Based on Childhood Sexual Abuse (Code Civ. Proc. § 340.1)

Code of Civil Procedure Section 340.1 (reproduced at Exhibit pp. 8-12) governs the limitations period for a tort claim based on childhood sexual abuse. In 1990, the Legislature amended the section “to specify that causes of action for childhood sexual abuse against direct perpetrators could be brought within eight years of majority (i.e., to age 26) *or* within three years of the time the plaintiff discovered that psychological injury was caused by childhood abuse, *whichever occurs later.*”⁶¹ At the same time, “the Legislature also added a certificate of merit requirement”⁶² That requirement applies only “where the plaintiff is 26 years old or older,”⁶³ and thus must show delayed discovery of psychological injury attributable to childhood abuse.

Unlike Section 411.35, Section 340.1 requires not just one but two certificates of merit:

- A certificate in which the plaintiff’s attorney declares that “the attorney has reviewed the facts of the case, that the attorney has consulted with at least one mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action.”⁶⁴
- A certificate from a mental health practitioner selected by the plaintiff, in which the practitioner declares that he or she “is licensed to practice and practices in this state and is not a party to the action, that the practitioner is not treating and has not treated the plaintiff, and that the practitioner has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of his or her professional opinion there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.”⁶⁵

In general, the plaintiff must file these certificates “before the running of the statute of limitations.”⁶⁶

61. *Doe v. San Diego-Imperial Council*, 239 Cal. App. 4th 81, 87, 190 Cal. Rptr. 3d 755 (2015) (emphasis added).

62. *Id.*

63. *McVeigh v. Doe 1*, 138 Cal. App. 4th 898, 904, 42 Cal. Rptr. 91 (2006); see Code Civ. Proc. § 340.1(g).

64. Code Civ. Proc. § 340.1(h)(1).

65. Code Civ. Proc. § 340.1(h)(2).

66. *Doyle v. Fenster*, 47 Cal. App. 4th 1701, 1703, 55 Cal. Rptr. 2d 327 (1996). If the plaintiff’s attorney submits a declaration stating that it was not possible to consult a mental health

Section 340.1 also differs from Section 411.35 in other important respects. Among other things, the plaintiff must file a separate certificate of merit for each defendant.⁶⁷ Further, “no defendant may be served, and the duty to serve a defendant does not attach, until the court has reviewed the certificates of merit ... with respect to that defendant, and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action against that defendant.”⁶⁸ Once the court makes such a finding, “the duty to serve that defendant with process shall attach.”⁶⁹ In addition, “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.”⁷⁰ The statute specifies details regarding this corroborative fact requirement.

“The overall goal of section 340.1 is to allow victims of childhood sexual abuse a longer time period in which to bring suit against their abusers.”⁷¹ “[T]he certificate of merit requirements in section 340.1 have a purpose, too, to prevent frivolous and unsubstantial claims” by plaintiffs who are 26 years old or older.⁷² To effectively serve that purpose, those requirements apply to all plaintiffs, including pro pers. “To excuse propria persona plaintiffs from the certificate of merit requirements would create a cavernous loophole in the statute, a loophole that would defeat its salutary goal: to allow revival of time-lapsed claims upon a minimal showing of merit.”⁷³

Private Action to Enforce Proposition 65 Warning Requirement for Hazardous Chemicals (Health & Safety Code § 25249.7(d))

Another California statute that includes a certificate of merit requirement is Health and Safety Code Section 25249.7 (reproduced at Exhibit pp. 13-18), which is in the Safe Drinking Water and Toxic Enforcement Act (also known as Proposition 65). The Act was approved by the voters in 1986, but the certificate of

practioner before the limitations period would expire, the above-described certificates of merit can be filed up to sixty days after the filing of the complaint. See Code Civ. Proc. § 340.1(h)(3).

67. Code Civ. Proc. § 340.1(i).

68. Code Civ. Proc. § 340.1(j).

69. *Id.*

70. Code Civ. Proc. § 340.1(m).

71. *McVeigh*, 138 Cal. App. 4th at 94.

72. *Id.*; see also *San Diego-Imperial Council*, 239 Cal. App. 4th at 87 (noting that purpose of certificates of merit is to impose pleading hurdles aimed at decreasing frivolous claims).

73. *Jackson v. Doe*, 192 Cal. App. 4th 742, 752, 121 Cal. Rptr. 3d 685 (2011).

merit requirement (subdivision (d)) was not added until 2001, in a bill authored by Senator Byron Sher.⁷⁴

The certificate of merit requirement under Section 25249.7 only applies when a private party wants to bring a suit for violation of the Act's warning requirement (Health & Safety Code § 25249.6). It "operates as a brake on improvident citizen enforcement."⁷⁵ To bring such a suit, a private party must first give at least 60 days advance notice to the Attorney General and local prosecutor, as well as to the alleged violator.⁷⁶ The notice "shall include a certificate of merit executed by the attorney for the noticing party, or by the noticing party, if the noticing party is not represented by an attorney."⁷⁷

The required certificate of merit shall

state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action.⁷⁸

In addition, "[f]actual information sufficient to establish the basis of the certificate of merit ... shall be attached to the certificate of merit that is served on the Attorney General."⁷⁹

If the private party satisfies the certificate of merit requirement and neither the Attorney General nor a local prosecutor files suit before the 60-day notice period elapses, then the private party may proceed with the action.⁸⁰ In doing so, the private party must comply with various special requirements.⁸¹

74. 2001 Cal. Stat. ch. 578, § 1 (SB 471 (Sher)).

75. *Center for Self-Improvement & Community Development v. Lennar Corp.*, 173 Cal. App. 4th 1543, 1551, 94 Cal. Rptr. 3d 74 (2009).

76. Health & Safety Code § 25249.7(d).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* The certificate of merit requirement "is a mandatory *precondition* to bringing a citizen enforcement suit." *Lennar*, 173 Cal. App. 4th at 1554 (emphasis added); see also *Physicians Committee for Responsible Medicine v. KFC Corp.*, 224 Cal. App. 4th 166, 179, 168 Cal. Rptr. 3d 334 (2014). Late service is impermissible because it "would reduce the effectiveness of prelitigation efforts by the Attorney General to discourage filing the frivolous suit in the first place." *DiPirro v. American Isuzu Motors, Inc.*, 119 Cal. App. 4th 966, 975, 14 Cal. Rptr. 3d 787 (2004).

81. See Health & Safety Code § 25249.7(e)-(f).

In general, the basis for a certificate of merit under Section 25249.7 “is not discoverable.”⁸² The statute does not, however, preclude discovery of information “solely on the ground that it was used in support of the certificate of merit.”⁸³

Moreover, if the private party loses the action and the court determines that there was no actual or threatened exposure to a hazardous chemical, the court may review the basis for the certificate of merit *in camera*, including the consultant’s identity and the materials reviewed by that person. The statute mandates:

Upon the conclusion of an action brought pursuant to subdivision (d) with respect to a defendant, if the trial court determines that there was no actual or threatened exposure to a listed chemical, the court may, upon the motion of that alleged violator or upon the court’s own motion, review the basis for the belief of the person executing the certificate of merit, expressed in the certificate of merit, that an exposure to a listed chemical had occurred or was threatened. *The information in the certificate of merit, including the identity of the persons consulted with and relied on by the certifier, and the facts, studies, or other data reviewed by those persons, shall be disclosed to the court in an in-camera proceeding at which the moving party shall not be present.* If the court finds that there was no credible factual basis for the certifier’s belief that an exposure to a listed chemical had occurred or was threatened, then the action shall be deemed frivolous within the meaning of Section 128.7 of the Code of Civil Procedure. The court shall not find a factual basis credible on the basis of a legal theory of liability that is frivolous within the meaning of Section 128.7 of the Code of Civil Procedure.⁸⁴

Thus, although the certificate of merit requirement in Section 25249.7 was modeled on the previously discussed provisions for certain types of malpractice claims (Code Civ. Proc. § 411.35 and former Code Civ. Proc. § 411.30), it “is stronger than” those provisions.⁸⁵ Unlike those provisions, “it allows the court to review the underlying basis of the certificate (not just whether the certificate was obtained), and allows the Attorney General to review the materials before litigation.”⁸⁶

82. Health & Safety Code § 25249.7(h)(1).

83. *Id.*

84. Health & Safety Code § 25249.7(h)(2) (emphasis added).

85. Assembly Committee on Environmental Safety & Toxic Materials Analysis of SB 471 (July 10, 2001), p. 3.

86. See *id.*

The Legislature included these features because it considered “the problem of suits with no factual basis” especially acute in Proposition 65 warning cases.⁸⁷ When a later bill sought to include a similar court review process in Section 411.35, the effort failed and a bill analysis explained that Proposition 65 warning cases were unique:

First, the concerns that prompted SB 471 were unique to Proposition 65 litigation. Unlike malpractice actions against architects and engineers, there was ample evidence of frivolous actions in Proposition 65 “warning” cases. Importantly, unlike design professional malpractice actions, Prop. 65 warning cases may be filed without evidence that there is any aggrieved person. In addition, Prop. 65 cases allow for an award of attorney’s fees. Moreover, Prop. 65 violations are uninsurable because they involve intentional conduct. Defendants therefore were vulnerable to unscrupulous attorneys who sought to leverage nuisance settlements by filing a large volume of actions.

It is important to note that SB 471 applied only to these “warning” cases because of their unique problems, not to other types of Prop. 65 cases. It is also worth noting that ... SB 471 permits an inquiry into the basis for the certificate of merit not in every circumstance where the plaintiff is unsuccessful but only in the extreme case where the court has first determined that the chemical said to be involved in the alleged exposure was in fact not even present. Obviously, the nonexistence of such a fundamental element of an alleged toxic exposure case strongly suggests an *egregiously frivolous* case that may warrant further inquiry by the court in the context of a motion for sanctions.⁸⁸

The staff suspects that the Legislature would be similarly unreceptive to including such an invasive review process if the Commission proposes a certificate of merit requirement for a legal malpractice case based on mediation misconduct.

Specialist Certification Requirements in Other Jurisdictions

Certificate of merit requirements are used in many states, not just in California. One source claims that “about half of the states in the U.S. have a law in place that requires medical malpractice plaintiffs to file an affidavit along with their lawsuit,” which typically “needs to be a sworn statement in which an attorney or an expert medical witness states that [the] malpractice claim meets certain threshold requirements in terms of the defendant’s alleged wrongdoing

87. *Id.*

88. Assembly Committee on Judiciary Analysis of AB 1713 (2002), pp. 6-7 (emphasis added).

and the strength of [the plaintiff's] allegations.”⁸⁹ The staff has not done sufficient research to confirm that assertion, but it is clear that many states have sought to address a perceived medical malpractice insurance crisis by creating certificate of merit requirements for medical malpractice cases. Some of those statutes have been repealed,⁹⁰ while others remain on the books.⁹¹

The Obama administration favors the use of certificate of merit requirements in the medical malpractice context. A version of the national healthcare reform legislation would have provided substantial financial incentives to states to enact such a requirement. That version did not become law, but the Obama administration took executive action to achieve the same result.⁹²

While most certificate of merit requirements pertain to medical malpractice claims, some such requirements pertain to other types of claims.⁹³ Examples include other professional malpractice claims,⁹⁴ product liability claims,⁹⁵ residential foreclosure claims,⁹⁶ and certain sexual abuse claims.⁹⁷

There is considerable variation in the specifics of these certificate of merit requirements. For example, “[s]tandards differ as to who undertakes certification; the form and content of the expert opinion; when the expert opinion must be submitted, if at all; whether formal discovery or other information gathering techniques may be compelled prior to any certification; and what sanctions may or must follow noncompliance.”⁹⁸

89. See <http://www.nolo.com/legal-encyclopedia/the-affidavit-merit-medical-malpractice-lawsuits.html>.

90. See, e.g., former Ohio Rev. Code Ann. § 2307.42; former Okla. Stat. tit. 63, § 1-1708.1E.

91. See, e.g., Ark. Code Ann. § 16-114-209; Conn. Gen. Stat. § 52-190a; Del. Code Ann. tit. 18, § 6853; 735 Ill. Comp. Stat. 5/2-622; Mich. Comp. Laws § 600.2912d; Minn. Stat. § 145.682; Mo. Rev. Stat. § 538.225; N.Y. C.P.L.R. § 3012-a; Tex. Civ. Prac. & Rem. Code Ann. § 74.351; Vt. Stat. Ann. tit. 12, § 1042; Wash. Rev. Code § 7.70.150; W. Va. Code § 55-7B-6; see also Vt. Stat. Ann. tit. 12, § 7012 (certificate of merit for request for presuit mediation of medical malpractice claim).

92. See Benjamin Grossberg, *Comment: Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 189 U. Pa. L. Rev. 217, 220 (2010) (detailing relevant history of national healthcare reform legislation and noting that Obama administration put “stamp of approval” on certificate of merit statutes).

93. See, e.g., Jefferey Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 B.Y.U. L. Rev. 537, 539 (1997) & sources cited therein.

94. See, e.g., Md. Code Ann., Courts & Judicial Proceedings § 3-2C-02; N.J. Stat. Ann. § 2A:53A-27; former Okla. Stat. tit. 12, § 19; Pa. Cons. Stat. § 1042.3.

95. See, e.g., 735 Ill. Comp. Stat. 5/2-623.

96. See, e.g., N.Y. C.P.L.R. § 3012-b.

97. See, e.g., Haw. Rev. Stat. § 657-1.8.

98. Parness & Leonetti, *supra* note 93, at 539; see also *id.* at 567-76. For further discussion of ways in which certificate of merit statutes vary, see Grossberg, *supra* note 92, at 222-24.

For present purposes, it does not seem necessary to delve into the details of these statutes. Rather, we focus on cases interpreting them and articles discussing them, particularly cases and articles that might shed light on:

- (1) The constitutionality of certificate of merit requirements.
- (2) The pros and cons of creating a certificate of merit requirement for a legal malpractice case based on mediation misconduct.

Constitutional Challenges to Specialist Certification Requirements

Aside from *Adams v. Roses* (the previously described case holding that former Section 411.30 did not violate equal protection guarantees), the staff did not find much discussion of the constitutionality of California's certificate of merit requirements. We did, however, find more constitutional analysis in the scholarly literature and cases from other jurisdictions.

Litigants have brought the following types of constitutional challenges to statutes that require the plaintiff to submit a certificate of merit (or similar document) regarding consultation with a specialist before filing suit or early in the litigation process:

- Separation of powers.
- Right of access to courts.
- Right to a jury trial.
- Equal protection.
- Due process.⁹⁹

We discuss each type of constitutional challenge in order below.

99. A few cases have involved other types of constitutional challenges to a statute requiring a specialist's certificate of merit or similar document. For example, an Illinois plaintiff unsuccessfully argued that such a statute violated Illinois' constitutional guarantee of a remedy. See *McAlister v. Schick*, 147 Ill. 2d 84, 588 N.E.2d 1151, 1157-58 (1992).

In another case, the Illinois Supreme Court struck down an Illinois certificate of merit requirement because it was not severable from other provisions that were constitutionally infirm. See *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (Ill. S.Ct. 1997). The Court declined to rule on the constitutionality of the certificate of merit requirement itself. See *id.* at 1104-05.

In two other cases, the Oklahoma Supreme Court found that an expert requirement violated Oklahoma's unique provision prohibiting enactment of special laws in 28 subject areas. See *Wall v. Marouk*, 302 P.3d 775, 781 (Okla. S.Ct. 2013); *Zeier v. Zimmer*, 152 P.3d 861 (Okla. S.Ct. 2006).

These cases do not warrant further discussion here. They are not of concern, because the constitutional challenges were either unsuccessful or based on unique constitutional provisions.

Separation of Powers

In a number of cases, a plaintiff has contended that a certificate of merit statute or a similar requirement intrudes on the role of the judiciary and thus violates separation of powers under the state constitution.

Some of these challenges have been successful. For example, in *Putman v. Enatchee Valley Medical Center*,¹⁰⁰ the Washington Supreme Court considered a Washington statute that required a medical malpractice plaintiff to file a certificate of merit from a medical expert along with the complaint. The plaintiff contended that the statute violated Washington's separation of powers doctrine, because it conflicted with court rules governing the pleading process. The Washington Supreme Court agreed. It explained that (1) if a Washington statute conflicts with a court rule, Washington's separation of powers doctrine dictates that "the court rule will prevail in procedural matters,"¹⁰¹ (2) Washington court rules establish a notice pleading system,¹⁰² and (3) Washington's certificate of merit requirement for a malpractice case (Wash. Rev. Code § 7.70.150) conflicts with the notice pleading system because it "essentially requires plaintiffs to submit evidence supporting their claims before they even have an opportunity to conduct discovery and obtain such evidence."¹⁰³

Likewise, the Mississippi Supreme Court determined that Mississippi's statute requiring an attorney's certificate of consultation (or an expert disclosure in lieu of the certificate) in a medical malpractice case violated separation of powers because it conflicted with Mississippi court rules.¹⁰⁴ The Arkansas Supreme Court reached a similar result with regard to an Arkansas statute that required a medical malpractice plaintiff to file "an affidavit of reasonable cause" within 30 days after filing the complaint.¹⁰⁵ The Court explained that the statute conflicted with a court rule and "[t]he Arkansas Constitution is clear that rules of pleading, practice, and procedures for our courts *fall within the domain of this court*."¹⁰⁶

100. 216 P.3d 374 (2009).

101. *Id.* at 377.

102. *Id.* at 378-79.

103. *Id.* at 379. The Washington Supreme Court also concluded that the statute unduly burdened the right of access to courts." See *id.* at 376-77.

104. See *Wimley v. Reid*, 991 So.2d 135 (Miss. 2008).

105. See *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (Ark. 2007).

106. *Id.* at 238 (emphasis added).

Other courts have rejected such separation of powers challenges. For example, *DeLuna v. St. Elizabeth's Hospital*¹⁰⁷ involved an Illinois statute that required a medical malpractice plaintiff to “attach to the complaint both an affidavit declaring that the attorney or pro se plaintiff has consulted with a health professional who believes that there is merit to the action, and the report of the professional stating the basis for that determination.”¹⁰⁸ The plaintiff argued that the statute “violates the separation of powers clause of the Illinois Constitution because it improperly grants a judicial power to health care professionals.”¹⁰⁹

The Illinois Supreme Court was unpersuaded.¹¹⁰ It pointed out that the function of the health professional under the statute “is essentially no different from the parallel requirement generally applicable in malpractice cases that the plaintiff in such an action present expert testimony to demonstrate the applicable standard of care and its breach.”¹¹¹ The Court further explained:

[T]he health professional consulted ... *issues no ruling and decides no legal question*. The statute merely requires a litigant to submit, in a timely manner, certification declaring the meritorious basis for the alleged cause of action.¹¹²

In a companion case involving a similar challenge, the Court observed that judging the legal sufficiency of the complaint “is the court’s responsibility,” not that of the health professional.¹¹³

Similarly, in *Mahoney v. Doerhoff Surgical Services, Inc.*,¹¹⁴ the Missouri Supreme Court held that Missouri’s affidavit requirement for a medical malpractice case (Mo. Rev. Stat. § 538.225) complied with Missouri’s separation of powers doctrine because [i]t is a judge that decides that the case may not proceed, not a health care provider.”¹¹⁵ The Missouri Supreme Court also stressed that Section 538.225 is intended to eliminate groundless suits from the court system.¹¹⁶ The Court thus concluded that it “*works to unburden rather than burden* the administration of justice, ... and so does not unconstitutionally

107. 147 Ill. 2d 57, 588 N.E.2d 1139 (1992).

108. *Id.* at 1141.

109. *Id.* at 1143.

110. One of the justices dissented. See *id.* at 1147-51 (Clark, J., dissenting).

111. *Id.* at 1146.

112. *Id.* at 1145 (emphasis added).

113. *McAlister*, 588 N.E.2d at 1157.

114. 807 S.W.2d 503 (1991).

115. *Id.* at 510.

116. *Id.*

encroach upon that inherent function of the judiciary.”¹¹⁷ More recently, a Texas appellate court reached a similar conclusion with regard to a Texas statute that “imposes a threshold procedural requirement aimed at filtering out meritless ... lawsuits from proceeding until a claimant makes a good-faith effort to demonstrate that at least one expert believes that a breach of the applicable standard of care caused the claimed injury.”¹¹⁸

It seems reasonably likely that California courts would reach a similar result with regard to a statute like Code of Civil Procedure Section 411.35 (the certificate of merit requirement for a malpractice claim against an architect, professional engineer, or land surveyor, which Commissioner King suggested using as a model). A separation of powers challenge could not be based on a conflict with court rules, because the California Constitution only gives the Judicial Council authority to adopt rules that are not inconsistent with statute.¹¹⁹ As compared to legislatures in other states, California’s legislature plays a strong role in shaping judicial procedures. In addition, it may be significant that Section 411.35 does not require a court to dismiss a case for failure to comply with the certificate of merit requirement. Unlike some of the provisions discussed above, it only says that such a failure is grounds for a demurrer or a motion to strike. In other words, the statute leaves it up to the court to decide whether the standard for sustaining a demurrer or granting a motion to strike is met, and, if so, whether to dismiss the case outright or give the plaintiff leave to amend. Section 411.35 is thus relatively respectful of judicial power, and a statute modeled on it may well withstand a separation of powers challenge.

Right of Access to Courts

Certificate of merit statutes have also been challenged on the ground that they violate a constitutional right of access to the courts. A 2004 article summed up the situation this way:

Perhaps the most apparent challenge to the certificate of merit is rooted in the theory that these certificate of merit statutes are constitutionally infirm because the expert report requirement, either before or in conjunction with the pleadings stage, effectively

117. *Id.* (emphasis added).

118. See *Hebert v. Hopkins*, 395 S.W.3d 884 (Tex. Ct. App. 2013) (“Though the Heberts contend chapter 74 ‘prohibits the courts from using the rules of procedure and directs the courts in every respect,’ in actuality, the courts retain the judicial power to determine whether a timely served report is adequate in this regard and to render a decision accordingly.... {W}e reject the Heberts’ separation-of-powers constitutional challenge.”).

119. Cal. Const. art. VI, § 6(d).

bars plaintiffs from access to the courts. However, these challenges typically fall short as many courts hold that certificates do not add an additional burden on the plaintiff. Rather, because plaintiffs are required in the overwhelming majority of medical malpractice cases to produce an expert report at some point even without the certificate of merit requirement, the acceleration of this process is not seen as constitutionally suspect.¹²⁰

Since that article was written, the Oklahoma Supreme Court has invalidated both

- (1) A statute that required a medical malpractice plaintiff to attach an affidavit attesting that “the plaintiff has obtained a written opinion from a qualified expert that clearly identifies the plaintiff and includes the expert’s determination that, based upon a review of the available medical records, facts or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the health care provider against whom the action is brought constituted professional negligence ...;”¹²¹ and
- (2) A later-enacted statute in which “the Legislature reenacted the affidavit requirement in a different title using the words professional negligence rather than medical liability but otherwise left the language essentially the same.”¹²²

Both decisions were based not only on Oklahoma’s constitutional right of access to courts, but also on Oklahoma’s unique provision prohibiting enactment of special laws in 28 subject areas.

With regard to the constitutional right of access to courts, the Oklahoma Supreme Court pointed out that the cost of the required expert opinion “may range from \$500 to \$5000” and even rose to \$12,000 in at least one instance.¹²³ The Court further wrote:

Although statutory schemes similar to Oklahoma’s Health Care Act do help screen out meritless suits, the additional certification costs have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs. The affidavit of merit provisions front-load litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price. They also prevent meritorious medical

120. Mitchell Nathanson, *It’s the Economy (and Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 Penn. St. L. Rev. 1077, 1115-16 (footnotes omitted).

121. Former Okla. Stat. tit. 63, § 1-1708.1E. See *Zeier*, 152 P.3d 861. One justice declined to join in the right of access analysis. See *id.* at 875 (Taylor, J., concurring).

122. *Wall*, 302 P.3d at 781 (referring to former Okla. Stat. tit. 12, § 19). Two justices dissented.

123. *Zeier*, 152 P.3d at 873.

malpractice actions from being filed. The affidavit[t] of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being settled out of court during discovery. Rather than reducing the problems associated with malpractice litigation, these provisions have resulted in the dismissal of legitimately injured plaintiffs' claims based solely on procedural, rather than substantive, grounds.

Another unanticipated result of statutes similar to Oklahoma's scheme has been the creation of a windfall for insurance companies who benefit from the decreased number of causes they must defend but which are not required to implement post-tort reform rates decreasing the cost of medical malpractice insurance to physicians. These companies happily pay less out in tort-reform states while continuing to collect higher premiums from doctors and encouraging the public to blame the victim or attorney for bringing frivolous lawsuits.¹²⁴

In the later of the two cases, the Court acknowledged that the affidavit of merit statute included an indigency exemption, but said the exemption was inadequate to comply with the right of access to courts because it entailed a nonrefundable application fee of \$40, which "is still a hurdle to the indigent."¹²⁵

Similarly, the Washington Supreme Court found a right of access violation in the *Putman* case previously discussed. In addition to ruling that Washington's affidavit of merit statute violated separation of powers, the Court said that "[r]equiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs' right of access to courts."¹²⁶

Other courts have rejected right of access challenges to statutes that require a plaintiff to submit a specialist certificate of merit or similar document. For example, the Missouri Supreme Court took such a position in the *Mahoney* case discussed above. It explained:

The right of access "means simply the right to pursue in the courts the causes of action the substantive law recognizes." The substantive law requires that a plaintiff who sues for personal injury damages on the theory of health care provider negligence prove by a qualified witness that the defendant deviated from an

124. *Zeier*, 152 P.3d at 869-70 (footnotes omitted).

125. *Wall*, 302 P.3d at 786.

126. *Putman*, 216 P.3d at 377. Two justices disagreed with this point. See *id.* at 380-82 (Madsen, J., concurring, joined by Johnson, J.).

An intermediate appellate court in North Carolina reached a similar result, but the case was appealed to the North Carolina Supreme Court, which held that the intermediate appellate court should not have reached the constitutional right of access issue. See *Anderson v. Assimos*, 553 S.E.2d 63 (N.C. Ct. App. 2001), *vacated in part & appeal dismissed*, 572 S.E.2d 101 (N.C. S.Ct. 2002).

accepted standard of care. Without such testimony, the case can neither be submitted to the jury nor be allowed to proceed by the court. The affidavit procedure of § 538.225 serves to free the court system from frivolous medical malpractice suits at an early stage of litigation, and so facilitate the administration of those with merit. Thus, it denies no fundamental right, but at most merely “redesigns the framework of the substantive law” to accomplish a rational legislative end. The affidavit procedure neither denies free access of a cause nor delays thereafter the pursuit of that cause in the courts. It is an exercise of legislative authority rationally justified by the end sought, and hence valid against the contention made here.¹²⁷

Along the same lines, the Illinois Supreme Court wrote in *DeLuna*:

The provision challenged here merely requires a litigant to obtain, before trial, a certificate from an appropriate health care professional stating that the alleged cause of action is meritorious. As we have already demonstrated, the provision *is essentially no different* from the parallel requirement generally applicable in malpractice cases that the plaintiff in such an action present expert testimony to demonstrate the applicable standard of care and its breach.¹²⁸

In a companion case, the Court pointed out that “the legislature may impose reasonable limitations and conditions upon access to the courts,”¹²⁹ and “[t]he medical malpractice plaintiff who finds the court house door locked because his complaint is not in conformity with [the certificate of merit requirement] need only ask a qualified health care professional for the key.”¹³⁰ A Texas intermediate appellate court likewise concluded that the right of access to courts is not violated by statutorily requiring an expert report “sooner rather than later.”¹³¹

There is thus a split of opinion on whether certificate of merit statutes and similar requirements unduly impede access to the courts. If the Commission proposes such a requirement for a legal malpractice case that alleges mediation misconduct, the specific nature of that requirement might affect whether it would survive a challenge based on the constitutional right of access to the courts.¹³²

127. *Mahoney*, 807 S.W.2d at 510 (citations omitted).

128. *DeLuna*, 588 N.E.2d at 1146 (emphasis added).

129. *McAlister*, 588 N.E.2d at 1156.

130. *Id.* at 1157.

131. See *Hebert*, 395 S.W.3d at 901 (internal quotation marks omitted).

132. Under California law, “the right of access to courts is an aspect of the First Amendment right to petition.” *Jarrow Formulas, Inc. v. LaMarche*, 31 Cal. 4th 728, 736 n.5, 74 P.3d 737, 3 Cal. Rptr. 3d 636 (2003).

In particular, **it might be important to incorporate key features found in Section 411.35** (the certificate of merit requirement for a malpractice claim against an architect, professional engineer, or land surveyor), **such as:**

- Only requiring a consultation with a qualified expert about the case,¹³³ not preparation and presentation of an expert's written report, which would be more costly and thus more burdensome on the plaintiff's right of access to courts.
- Allowing the plaintiff to file the certificate of merit late if the plaintiff's attorney does not have an adequate opportunity to obtain one before the statute of limitations runs.¹³⁴ Without such an exception, a certificate of merit requirement could impede access to the courts by preventing a meritorious case from being timely filed.
- Excusing compliance with the certificate of merit requirement if the plaintiff's attorney makes three separate good faith attempts with three separate experts to obtain the required consultation and none of those contacted would agree to the consultation.¹³⁵ Without such an exception, a "conspiracy of experts" could impede access to the courts by preventing a meritorious case from being filed.¹³⁶

It might also be helpful to **propose the creation of a fund to assist indigent litigants comply with the certificate of merit requirement.** On initial consideration, this seems preferable to excusing indigent litigants from complying, which would impede the screening function of the certificate of merit requirement. If the Commission decides to further pursue the certificate of merit concept, **input on funding possibilities would be particularly useful.**

With such features, there seems to be a reasonably good chance that a certificate of merit requirement for a legal malpractice case based on mediation misconduct would survive a constitutional challenge based on the right of access to courts. As Commissioner Kihiczak mentioned in July, legal malpractice cases are typically brought on a contingent fee basis with the plaintiff's attorney advancing out-of-pocket costs (which potentially could include the fee for obtaining a certificate of merit). For that reason, and because the plaintiff must present expert testimony on the standard of care to prevail in such a case, providing a certificate of merit might not be much of an additional burden on the

133. See Code Civ. Proc. § 411.35(b)(1).

134. See Code Civ. Proc. § 411.35(b)(2).

135. See Code Civ. Proc. § 411.35(b)(3).

136. See *Adams*, 183 Cal. App. 3d at 504.

plaintiff. It is also worth noting that such a requirement might have some advantages for a plaintiff:

- It would help the plaintiff's attorney get a jumpstart in case preparation, before the defendant even knows a case will be filed. Although the plaintiff's attorney would routinely do some research before filing a complaint anyway, a certificate of merit requirement may enhance the level of such preparation, to the plaintiff's benefit.
- By consulting an expert for purposes of obtaining the required certificate, the plaintiff's attorney might learn strategic considerations that would not otherwise come to mind. Having multiple minds on a problem and bouncing ideas off each other might create good synergy, which might not occur, or might not occur as early, absent the certificate of merit requirement.

Such synergy might be especially important in the context of a legal malpractice case that alleges mediation misconduct, because such a case involves twin complexities: the difficulties normally inherent in proving legal malpractice and the special considerations relating to the potential disruption of mediation confidentiality.

- If the statutorily required consultation draws attention to weaknesses in the plaintiff's case, the plaintiff's attorney probably will inform the plaintiff and the plaintiff will have an opportunity to assess those risks and take them into account before filing suit. The required consultation might thus enable the plaintiff to more effectively evaluate whether pursuing the litigation will be worth the effort, emotional stress, and other costs it would entail. If the plaintiff decides to go forward despite the weaknesses in the case, the plaintiff will have time to prepare to deal with them. If the plaintiff decides not to go forward, the plaintiff will be spared the trauma of litigation and potential liability for the other side's costs of suit.

Such considerations would cut against finding that a certificate of merit requirement unduly burdens the plaintiff's right of access to the courts. It is possible, however, that California courts would nonetheless find such a constitutional violation.

Right to a Jury Trial

The staff found two cases, one from Maryland and one from Missouri, in which a plaintiff contended that a certificate of merit statute or similar requirement violated the right to a jury trial. Neither challenge was successful.

In the Maryland case, the court explained:

[I]t is not the statute that has denied [plaintiff] a jury trial. It has amply provided an opportunity to be heard, as well as the right to trial by jury. That there exist certain prerequisites to that jury trial does not render the statute unconstitutional; the exercise of the right is always subject to “reasonable regulation.”¹³⁷

Similarly, the Missouri Supreme Court said the following in *Mahoney*:

A petition ... without possibility of *prima facie* proof of malpractice for want of expert medical testimony ... will not go to the jury. Such a petition has no chance of success under the precedents and is subject to summary disposition.... Thus, it is not the “screening” procedure of § 538.225 that impedes the progression of their petition to the jury, as the plaintiffs argue, but their failure to meet a requirement of substantive law. The affidavit condition of § 538.225 is a reasonable means to hinder a plaintiff whose medical malpractice petition is groundless from misuse of the judicial process in order to wrest a settlement from the adversary by the threat of the exaggerated cost of defense this species of litigation entails. It is an exercise of the police power rationally related to the end sought — the preservation of an adequate system of medical care for the citizenry — by the control of ungrounded medical malpractice claims. As such, the statute is valid and constitutional.¹³⁸

If California had a certificate of merit requirement for a legal malpractice case based on mediation misconduct, and a plaintiff argued that the requirement violated the constitutional right to a jury trial, it is possible that a California court would rule differently than the Maryland and Missouri courts did in the above cases. But that seems less likely than a successful challenge based on separation of powers or the right of access to courts.

Equal Protection

A number of court decisions have rejected an equal protection challenge to a certificate of merit statute or similar requirement.¹³⁹ Among these is the Second District Court of Appeal’s opinion in *Adams*, which we have already discussed.¹⁴⁰

137. *Robinson v. Pleet*, 76 Md. App. 173, 544 A.2d 1, 5 (Md. App. 1987) (citations omitted).

138. 807 S.W.2d at 508 (citations omitted).

139. See, e.g., *Hebert*, 395 S.W.3d at 897-900; *DeLuna*, 588 N.E.2d at 1146-47; *McAlister*, 588 N.E.2d at 1153-54; *Mahoney*, 807 S.W.2d at 511-13; *Hodge v. Cheek*, 581 N.E.2d 581, 583-85 (Ohio Ct. App. 1989).

In *Anderson*, an intermediate appellate court applied heightened scrutiny and ruled that North Carolina’s certificate of merit requirement for a medical malpractice case violated equal protection. The case was appealed to the North Carolina Supreme Court, which held that the intermediate appellate court should not have reached the equal protection issue. See 572 S.E.2d at 102-03.

140. See discussion of “Medical Malpractice Claim (Former Code Civ. Proc. § 411.30)” *supra*.

Under equal protection analysis, the degree of constitutional scrutiny (i.e., whether a statute is subject to rational basis as opposed to heightened scrutiny) depends on the nature of the classification used in the statute. If a statute differentiates on the basis of race or another suspect classification, there must be a compelling justification for the differentiation.¹⁴¹ Similarly, if a statute impinges on a fundamental right, a strong justification is needed.¹⁴²

In other circumstances, however, it is only necessary to show that a statutory classification scheme is rationally related to a legitimate legislative purpose.¹⁴³ That is a relatively easy standard to meet.

It seems likely that the rational basis test would apply to a statute requiring a certificate of merit in a legal malpractice case that alleges mediation misconduct. Courts probably would say that such a statute does not involve a suspect classification or impinge on a fundamental right.

Moreover, if the rational basis test were to apply, courts probably would uphold the statute. There is ample authority establishing that a certificate of merit requirement is a rational means of achieving the legitimate objective of deterring frivolous claims.¹⁴⁴ While those cases arose in other contexts (mostly medical malpractice), there is no reason to think that the result would be different in the context of a legal malpractice case that alleges mediation misconduct. Making a special effort to deter frivolous claims in that context seems readily justifiable, because such cases pose a danger of disrupting mediation confidentiality and the policies it furthers.

Due Process

In almost all of the cases that involved an equal protection challenge to a certificate of merit statute or similar requirement, the plaintiff also contended that the provision in question violated due process. Those challenges were not

141. See, e.g., *Hebert*, 395 S.W.3d at 898 & n.12.

142. See, e.g., *id.*

143. See, e.g., *Hebert*, 395 S.W.3d at 898; *DeLuna*, 588 N.E.2d at 1146; *Mahoney*, 807 S.W.2d at 512.

144. See, e.g., *DeLuna*, 588 N.E.2d at 1147 (“[W]e have no difficulty in concluding that section 2 — 622 is rationally related to a legitimate governmental interest... By requiring litigants to obtain, at an early point, the opinion of an expert who agrees that a meritorious case of action exists, the [affidavit of merit] statute will help ensure that only claims with some merit are presented.”); *Hodge*, 581 N.E.2d at 584 (“R.C. 2307.42 is rationally related to the government’s legitimate interest of keeping health care affordable by quickly dismissing frivolous claims. By requiring plaintiff’s attorney or plaintiff to consult with a qualified expert prior to filing a medical malpractice claim, claims having no *bona fide* merit can be weeded out without commencing an action. The affidavit of the attorney ensures that careful consideration has been given to the claim to ascertain that there is a good faith basis for a belief that there is good ground to support the claim.”).

successful; the courts concluded that the statutory requirements satisfied the rational basis test and thus there was no arbitrary or capricious governmental action violating the constitutional guarantee of due process.¹⁴⁵

In other words, the courts applied the same test to the due process challenges as to the equal protection challenges. Unsurprisingly, they reached the same result, upholding the statutory requirements in question. Thus, if the Legislature were to enact a certificate of merit requirement for a legal malpractice case that alleges mediation misconduct, the requirement probably would withstand a due process attack just as well as it would withstand an equal protection attack.

Pros and Cons of Creating a Specialist Certification Requirement for a Legal Malpractice Case That Alleges Mediation Misconduct

Some commentary favors the use of specialist certificates of merit,¹⁴⁶ while other commentary does not.¹⁴⁷ Below are some of the pros and cons of using such an approach for a legal malpractice case that alleges mediation misconduct.

145. See, e.g., *Hebert*, 395 S.W.3d at 897-900; *DeLuna*, 588 N.E.2d at 1146-47; *McAlister*, 588 N.E.2d at 1153-54; *Mahoney*, 807 S.W.2d at 512; *Hodge*, 581 N.E.2d at 583-84.

146. See, e.g., Andrea Davulis, *Note: Tired of Tribunals: A Proposal to Combine Section 60L's 'Notice of Claim' Requirement with Certificates of Merit in Massachusetts Medical Malpractice Litigation*, 48 *Suffolk U. L. Rev.* 867 (2015); Kyle Miller, *Note, Putting the Caps on Caps: Reconciling the Goal of Medical Malpractice Reform with the Twin Objectives of Tort Law*, 59 *Vand. L. Rev.* 1457, 1488 (2006) (“[I]mplementing a certificate of merit requirement coupled with strict restrictions on who can serve as the certifying expert will eliminate truly frivolous claims.”); Gregory Garrett, *Comment: The Maryland Certificate of Qualified Expert Requirement: A Flimsy Shield for Corporations Engaged in Architecture and Professional Engineering*, 34 *U. Balt. L. Rev.* 241, 264 (2004) (contending that court should “grant corporations practicing architecture or professional engineering the protection offered by the certificate of a qualified expert requirement”); Nathanson, *supra* note 120, at 1111 (“The certificate of merit requirement appears to succeed where other methods of reform have failed.”); Peter Stackpole, *The Maryland Survey: 1996-1997: Recent Decisions: The Maryland Court of Appeals*, 57 *Md. L. Rev.* 925, 948 (1998) (“[T]he only provision in [Maryland’s Health Care Malpractice Claims Act] with any substance is the certificate of merit requirement.”). See also Carrie Vine, *Comment: Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps*, 26 *N. Ill. U. L. Rev.* 413, 426 (2006) (“Although the requirement of certificates of merit may have some beneficial effect on the medical malpractice insurance crisis, it is not, on its own, a satisfactory means of stabilizing the medical malpractice insurance field.”).

147. See, e.g., Amy Widman, *Liability and the Health Care Bill: An “Alternative” Perspective*, 1 *Calif. L. Rev. Circuit* 57, 67-68 (2010); Brett Blank, *Note: Trap for the Unwary: The 2005 Amendments to Connecticut’s Certificate of Merit Statute*, 31 *W. New Eng. L. Rev.* 453 (2009); Jerry Phillips, *Comments on the Report of the Governor’s Commission on Tort and Liability Insurance Reform*, 53 *Tenn. L. Rev.* 679, 683 (1986) (“The additional requirement of certifying that the plaintiff has an expert witness who will testify where such testimony ‘is required’ could be very troublesome ... and could generate more transactional costs than it would ever be worth.”). See also Parness & Leonetti, *supra* note 93, at 541 (“American lawmakers should be wary of these special certificates and implement them for certain civil claims only after finding that there are adequate empirical bases and inadequacies in other civil procedure laws ... In any implementation, the components of these special certificates, including the expert opinion, the timing of any release, the opportunity for information gathering, and the sanctions for noncompliance, should be carefully crafted to ensure that access to a judicial remedy is not significantly imperiled for deserving claimants and that large unnecessary costs are not borne by successful claimants.”).

Pros

- Obtaining a specialist certificate of merit would only require disclosure of mediation communications to the plaintiff's attorney and an expert selected by the plaintiff, not to a judge or any other person who lacks a relationship to the plaintiff.
- Specialist certificate of merit requirements are designed to deter frivolous suits in two ways. They provide a basis for sanctions and thus act as a deterrent; they also discourage filing of unmeritorious suits in the first place by requiring investigation, effort, and analysis before suit is filed.¹⁴⁸

The magnitude of such effects is not altogether clear. There appears to be some supportive empirical evidence, but not a lot.¹⁴⁹ We found one article presenting empirical evidence that perhaps indicates that specialist certificates of merit have relatively little impact (the staff does not have sufficient statistical background to fully understand the results).¹⁵⁰ **Input on relevant empirical evidence would be helpful.**

A bill analysis relating to Section 411.35 (the certificate of merit requirement for a professional negligence claim against an architect, professional engineer, or land surveyor) noted that “[m]alpractice actions against design professionals typically arise in construction defect litigation, which is highly expensive for plaintiffs’ attorneys to prosecute.”¹⁵¹ Consequently, plaintiffs’ attorneys “already have a powerful financial incentive to ensure

148. See *In re Vaccine Cases*, 134 Cal. App. 4th 438, 456-57, 36 Cal. Rptr. 3d 80 (2005).

149. See, e.g., Art Heinz, *Medical Malpractice Case Filings Drop 45 Percent in Pennsylvania*, 15 *Lawyers J.* 9 (2013) (reporting that number of medical malpractice cases in Pennsylvania declined and decline correlated with implementation of two reforms: a specialist certificate of merit requirement and a venue restriction); Miller, *supra* note 146, at 1487 (“Following the imposition of the state’s certificate of merit requirement, Maryland experienced a 36 percent decrease in medical malpractice claims. While the statistical decrease does not indicate whether the claims that were not filed in the years subsequent to the certification requirement were meritorious, arguably, the 36 percent decrease may be reflection of the 67.7 percent of medical malpractice cases that are dropped or dismissed annually without payment.” (Footnote omitted)); Vine, *supra* note 146, at 426 (referring to Maryland data); Nathanson, *supra* note 120, at 1111 (“In 1987, the year after the certificate of merit requirement was adopted in Maryland, medical malpractice filing rates dropped in the state by 36%. As such, it has been hailed as the single best deterrent to the filing of frivolous claims in Maryland.” (Footnotes omitted)); Stackpole, *supra* note 146, at 930 (relying on Maryland data, author asserts that certificate of merit requirement “has proven to be a strong impediment to frivolous suits.”). See also discussion of “Legislative History and Intent” *supra* (describing 1987 study reportedly concluding that Section 411.35’s certificate of merit requirement successfully weeds out frivolous litigation). But see Vine, *supra* note 146, at 426-27 (noting that “[d]espite ... strict requirements for certificates of merit, Illinois faces a severe medical malpractice insurance crisis.”); Parness & Leonetti, *supra* note 93, at 577 (“More fruitful public debate and reforms would result if empirical studies were more objectively conducted and more comprehensively considered. Empirical data may reveal there is no need for certificates of merit.”).

150. See Myungho Paik, Bernard Black & David Hyman, *The Receding Tide of Medical Malpractice Litigation: Part 2 – Effect of Damage Caps*, 10 *J. Empirical Legal Stud.* 639 (2013).

151. Assembly Committee on Judiciary Analysis of AB 2713 (May 7, 2002), p. 4.

that the case has merit at the outset.”¹⁵² The bill analysis therefore concluded that plaintiffs’ attorneys probably take certification of merit consultations seriously; they are unlikely to engage in “only perfunctory compliance with the pre-suit consultation requirement” (i.e., so-called “cocktail consultations”).¹⁵³

The same reasoning would seem to apply equally well with respect to a certificate of merit requirement for a legal malpractice case that alleges mediation misconduct. This tends to suggest that such a requirement might be an effective screening mechanism.

- By screening out frivolous claims, a specialist certificate of merit requirement would help protect against unwarranted disclosure of mediation communications.
- Screening a legal malpractice case based on mediation misconduct through a specialist certificate of merit mechanism generally would not require court involvement and would thus safeguard judicial resources.
- By screening out frivolous claims, a specialist certificate of merit requirement would conserve judicial resources for meritorious claims.¹⁵⁴
- If the Legislature were to enact a specialist certificate of merit requirement for a legal malpractice case that alleges mediation misconduct, and that requirement was closely modeled on Section 411.35 as Commissioner King suggests, it seems reasonably likely (but by no means certain) that the requirement would withstand constitutional attack.

If the Commission decides to include a certificate of merit requirement in its proposal, **it could protect against the possibility of a successful constitutional challenge by including a severability clause.** Before doing so, however, the Commission should carefully consider whether it would be sound policy to preserve effectiveness of the remainder of the proposal upon invalidation of the certificate of merit screening mechanism.

- Section 411.35 has been carefully crafted and fine-tuned over the years, through intense debates in the legislative process. Many problems and issues have already been worked out and addressed. If the Commission uses it as a model, there might be relatively few problems in implementation of a certificate of merit requirement for a legal malpractice case that alleges mediation misconduct.
- Professor Nathanson (Villanova University School of Law) says “[p]erhaps the most attractive aspect of certificate of merit statutes

152. *Id.*

153. *Id.* at 3; see also Christopher Green, *Comment: The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 *Animal L.* 163, 226 (2004) (“Currently, 16 states have adopted the certificate of merit requirement, which trial lawyer’s associations do not seem to mind.”).

154. Stackpole, *supra* note 146, at 942.

is that they succeed in reducing the percentage and costs associated with litigating meritless claims without affecting the amount paid to legitimately injured plaintiffs¹⁵⁵ According to him, “the legitimate plaintiff is ultimately unaffected by them,” and “[t]he only individuals who feel the sting of these requirements are those who present doubtful claims and who should be deterred from the malpractice litigation system in any event — the meritless plaintiffs.”¹⁵⁶

Cons

- A specialist certificate of merit requirement might be a trap for the unwary.¹⁵⁷ “It is certainly possible to have a viable claim yet not to be aware that additional documentation is required.”¹⁵⁸ In other words, a specialist certificate of merit requirement might constitute a “procedural booby-trap” that “allows potentially meritorious claims to be decided on procedural grounds.”¹⁵⁹ But if a plaintiff is not sophisticated enough to comply with a certificate of merit requirement, the plaintiff might have great difficulty prevailing in legal malpractice case anyway, because such a case typically requires sophisticated analysis and proof.
- A specialist certificate of merit requirement would be an additional burden on a plaintiff.¹⁶⁰ Compliance with such a requirement might unfairly hinder a plaintiff in the litigation process (perhaps by diverting scarce funds away from other litigation activities), or even deter a plaintiff with a potentially meritorious claim from litigating at all.¹⁶¹ As discussed earlier in this memorandum, however, such a requirement might not be that much of an additional burden and might have some advantages for a plaintiff.¹⁶²
- A filtering mechanism such as a specialist certificate of merit requirement might not be necessary, because plaintiffs’ attorneys are already selective about which cases to take.¹⁶³
- In some instances, it might be difficult for a plaintiff to obtain a specialist certificate of merit before having an opportunity to

155. Nathanson, *supra* note 120, at 1120.

156. *Id.*

157. *Id.*

158. Blank, *supra* note 147, at 480.

159. *Id.* at 479, 481.

160. See *id.* at 481-82; see also discussion of “Right of Access to Courts” *supra*.

161. See discussion of “Right of Access to Courts” *supra*.

162. See *id.*

163. See generally Blank, *supra* note 147, at 482 (“As the costs of litigation have risen, malpractice attorneys have become increasingly selective about the cases they take on.”); see also Assembly Committee on Judiciary Analysis of AB 2713 (May 7, 2002), p. 4.

conduct some discovery.¹⁶⁴ Assuming that the Commission models any certificate of merit requirement on Section 411.35, however, a plaintiff facing such a situation might be able to invoke the exception that applies when a plaintiff makes three separate good faith attempts to obtain a consultation and none of those contacted would agree to the consultation.¹⁶⁵

- If the Legislature were to enact a specialist certificate of merit requirement for a legal malpractice case that alleges mediation misconduct, there could be satellite litigation over whether that requirement is satisfied.¹⁶⁶ That would be a potential drain on court and litigant resources. There could also be disputes over whether the requirement applies in a federal case.¹⁶⁷
- According to one commentator, a specialist certificate of merit requirement might “drive up the cost of experts, possibly foreclosing some cases due to a plaintiff’s inability to afford the expert certification.”¹⁶⁸
- If the Legislature were to enact a specialist certificate of merit requirement for a legal malpractice case that alleges mediation misconduct, the new requirement might lead some attorneys to become professional experts for purposes of providing the required certificates, which might lead to various problems.¹⁶⁹ This concern is speculative and seems unlikely to arise, as there might not be a sufficient volume of cases subject to the requirement to support a professional.
- The pool of suitable experts might not be sufficient to satisfy plaintiffs’ needs, particularly in some counties. Suppose, for instance, that the Commission proposes to require a certificate attesting that the plaintiff’s attorney consulted with a certified legal malpractice specialist. There are less than a hundred such specialists in the State Bar database, very few of whom are located in rural areas.¹⁷⁰

It seems likely, however, that the size of the available pool of specialists would grow to meet the demand created by enactment of a specialist certificate of merit requirement. In addition, the use of new communication technologies makes it less critical for a plaintiff to be able to consult a specialist in a particular location.

164. See Parness & Leonetti, *supra* note 93, at 588 (“Without an opportunity for formal discovery, or without mandatory prefilng information disclosure, a claimant may be incapable of procuring a required certificate.”).

165. See Code Civ. Proc. § 411.35(b)(3).

166. See generally *Zeier*, 152 P.3d at 870-72.

167. See generally *Apex*, 119 F. Supp. 3d 1117.

168. Widman, *supra* note 147, at 68.

169. See generally Miller, *supra* note 146, at 1486, 1489.

170. See https://members.calbar.ca.gov/search/ls_results.aspx?county=All+Specialists&specialty=11.

DECISION TO MAKE

A specialist certificate of merit requirement is essentially a requirement to seek knowledgeable advice before taking the serious step of commencing a lawsuit. Such a requirement has strong common sense appeal when the type of lawsuit in question presents complex and difficult challenges, such as proving legal malpractice and assessing the risks of disrupting mediation confidentiality. But there would also be associated costs.

The Commission needs to decide whether to include this type of filtering mechanism in its proposal to create a new mediation confidentiality exception addressing mediation-related attorney misconduct. If it decides to do so, the Commission will need to resolve some specific implementation issues as the staff drafts the proposed new requirement.¹⁷¹

Alternatively, the Commission could defer a decision on proposing a specialist certificate of merit until after the staff presents research and analysis on self-certification possibilities. Unless the Commission otherwise directs, the staff will cover that topic in its next substantive memorandum in this study.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

171. E.g., whether the person consulted for purposes of a certificate of merit in a legal malpractice case based on mediation misconduct must be a certified legal malpractice specialist; if so, whether to excuse a certified legal malpractice specialist from having to consult with another certified legal malpractice specialist; whether the certificate of merit requirement should apply to a pro per litigant; whether the certificate of merit requirement should apply to a legal malpractice case based on mediation misconduct only if the plaintiff wishes to introduce confidential mediation communications.

Code Civ. Proc. § 411.35. Certificate of merit in professional negligence action against architect, professional engineer, or land surveyor

411.35. (a) In every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code on or before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.

(c) Where a certificate is required pursuant to this section, only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur," as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be

inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of “res ipsa loquitur” or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the architect, professional engineer, or land surveyor consulted and the contents of the consultation. The privilege shall also be held by the architect, professional engineer, or land surveyor so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the architect, professional engineer, or land surveyor, the court may require the attorney to divulge the names of architects, professional engineers, or land surveyors refusing the consultation.

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court’s own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party’s attorney, or both, to pay any reasonable expenses, including attorney’s fees, incurred by another party as a result of the failure to comply with this section.

(i) For purposes of this section, “action” includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms “professional negligence” or “negligence.”

MARK-UP SHOWING DEVIATIONS FROM EXISTING SECTION 411.35

Commissioner King raised the possibility of creating a certificate of merit requirement for a legal malpractice case that alleges mediation misconduct. He suggested modeling that requirement on Code of Civil Procedure Section 411.35.¹ His suggested new provision would deviate from Code of Civil Procedure Section 411.35 as shown in ~~strikeout~~ and underscore below:

(a) ~~In every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code on or~~ alleging attorney liability for misconduct or professional negligence in the context of a mediation, before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one ~~architect, professional engineer, or land surveyor~~ State Bar certified legal malpractice specialist who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice law in this state or any other state, ~~in the same discipline as the defendant or cross-defendant~~ and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant, in the context of a mediation, (i) had engaged or not engaged in misconduct or (ii) was negligent or was not negligent in the performance of the applicable professional services.

1. See email from V. King to B. Gaal (6/18/16, #1). In the first sentence of paragraph (b)(1), the staff made a few technical revisions of Commissioner King's suggested language.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three ~~separate architects, professional engineers, or land surveyors~~ certified legal malpractice specialists to obtain this consultation and none of those contacted would agree to the consultation.

(c) Where a certificate is required pursuant to this section, only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur," as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of "res ipsa loquitur" or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the ~~architect, professional engineer, or land surveyor consulted~~ certified legal malpractice specialist and the contents of the consultation. The privilege shall also be held by the ~~architect, professional engineer, or land surveyor~~ certified legal malpractice specialist so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the ~~architect, professional engineer, or land surveyor~~ certified legal malpractice specialist, the court may require the attorney to divulge the names of ~~architects, professional engineers, or land surveyors~~ certified legal malpractice specialists refusing the consultation.

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court's own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section.

(i) For purposes of this section, "action" includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."

(j) This section shall not be applicable to State Bar disciplinary action.

Former Code Civ. Proc. § 411.30 (1986 Cal. Stat. ch. 247, § 1)

411.30. (a) In any action for damages arising out of the professional negligence of a person holding a valid physician's and surgeon's certificate issued pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or of a person holding a valid dentist's license issued pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code, or of a person holding a valid podiatrist's certificate issued pursuant to Article 22 (commencing with Section 2460) of Chapter 5 of Division 2 of the Business and Professions Code, or of a person licensed pursuant to the Chiropractic Act, on or before the date of service of the complaint on any defendant, the plaintiff's attorney shall file the certificate specified in subdivision (b).

(b) A certificate shall be executed by the attorney for the plaintiff declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one physician and surgeon, dentist, podiatrist, or chiropractor who is licensed to practice and practices in this state or any other state or teaches at an accredited college or university and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is reasonable and meritorious cause for the filing of such action.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations, including the provisions of Article 2 (commencing with Section 583.210) of Chapter 1.5 of Title 8, would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after service of the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate physicians and surgeons, dentists, podiatrists, or chiropractors to obtain such consultation and none of those contacted would agree to such a consultation.

(c) Where a certificate is required pursuant to this section, only one such certificate shall be filed notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur", as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of "res ipsa loquitur" or failure to inform of the consequences of a medical procedure or both, and for that reason is not filing a certificate required by this section.

(e) If a request by the plaintiff for the defendant's records has been made pursuant to Section 1158 of the Evidence Code, and if the defendant has failed to produce such records within the time limits specified by that section, the time for filing the certificate of merit shall be extended for the period by which the time for furnishing records set forth in Section 1158 of the Evidence Code is exceeded by the defendant to a maximum of 60 days after which the requirement for the certificate is voided.

(f) For purposes of this section, and subject to Evidence Code Section 912, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the physician or surgeon, dentist, podiatrist, or chiropractor consulted and the contents of such consultation. Such privilege shall also be held by the physician or surgeon, dentist, podiatrist, or chiropractor so consulted, provided when the attorney makes a claim under paragraph (3) of subdivision (b) that he was unable to obtain the required consultation with the physician and surgeon, dentist, podiatrist, or chiropractor, the court may require the attorney to divulge the names of physicians and surgeons, dentists, podiatrists, or chiropractors refusing such consultation.

(g) A violation of the provisions of this section may constitute unprofessional conduct and be grounds for discipline against the attorney.

(h) The failure to file a certificate required by this section shall be grounds for a demurrer pursuant to Section 430.10.

(i) The provisions of this section shall not be applicable to a plaintiff who is not represented by an attorney.

(j) This section shall remain in effect until January 1, 1989, and on that date is repealed unless a later enacted statute deletes or extends that date.

Statute of Limitations for Tort Claim Based on Childhood Sexual Abuse
(Code Civ. Proc. § 340.1)

340.1. (a) In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or 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, whichever period expires later, for any of the following actions:

(1) An action against any person for committing an act of childhood sexual abuse.

(2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

(3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

(b)(1) No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday.

(2) This subdivision does not apply if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and 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. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard.

(c) Notwithstanding any other provision of law, any claim for damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003. Nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not time barred as of January 1, 2003.

(d) Subdivision (c) does not apply to either of the following:

(1) Any claim that has been litigated to finality on the merits in any court of competent jurisdiction prior to January 1, 2003. Termination of a prior action on the basis of the statute of limitations does not constitute a claim that has been litigated to finality on the merits.

(2) Any written, compromised settlement agreement which has been entered into between a plaintiff and a defendant where the plaintiff was represented by an attorney who was admitted to practice law in this state at the time of the settlement, and the plaintiff signed the agreement.

(e) "Childhood sexual abuse" as used in this section includes any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by Section 266j of the Penal Code; Section 285 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 286 of the Penal Code; subdivision (a) or (b) of Section 288 of the Penal Code; paragraph (1) or (2) of subdivision (b), or of subdivision (c), of Section 288a of the Penal Code; subdivision (h), (i), or (j) of Section 289 of the Penal Code; Section 647.6 of the Penal Code; or any prior laws of this state of similar effect at the time the act was committed. Nothing in this subdivision limits the availability of causes of action permitted under subdivision (a), including causes of action against persons or entities other than the alleged perpetrator of the abuse.

(f) Nothing in this section shall be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this section.

(g) Every plaintiff 26 years of age or older at the time the action is filed shall file certificates of merit as specified in subdivision (h).

(h) Certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, setting forth the facts which support the declaration:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with at least one mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and that the attorney has concluded on the basis of that review and consultation that there is reasonable and meritorious cause for the filing of the action. The person consulted may not be a party to the litigation.

(2) That the mental health practitioner consulted is licensed to practice and practices in this state and is not a party to the action, that the practitioner is not treating and has not treated the plaintiff, and that the practitioner has interviewed the plaintiff 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.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificates required by paragraphs

(1) and (2) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificates required by paragraphs (1) and (2) shall be filed within 60 days after filing the complaint.

(i) Where certificates are required pursuant to subdivision (g), the attorney for the plaintiff shall execute a separate certificate of merit for each defendant named in the complaint.

(j) In any action subject to subdivision (g), no defendant may be served, and the duty to serve a defendant with process does not attach, until the court has reviewed the certificates of merit filed pursuant to subdivision (h) with respect to that defendant, and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action against that defendant. At that time, the duty to serve that defendant with process shall attach.

(k) A violation of this section may constitute unprofessional conduct and may be the grounds for discipline against the attorney.

(l) The failure to file certificates in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(m) In any action subject to subdivision (g), 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.

(n) 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, as follows:

(1) The application shall be accompanied by a certificate of corroborative fact executed by the attorney for the plaintiff. The certificate shall 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.

(2) Where the application to name a defendant is made prior to that defendant's appearance in the action, neither the application nor the certificate of corroborative fact by the attorney shall be served on the defendant or defendants, nor on any other party or their counsel of record.

(3) Where the application to name a defendant is made after that defendant's appearance in the action, the application shall be served on all parties and proof of service provided to the court, but the certificate of corroborative fact by the attorney shall not be served on any party or their counsel of record.

(o) The court shall 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.

(p) The court shall keep under seal and confidential from the public and all parties to the litigation, other than the plaintiff, any and all certificates of corroborative fact filed pursuant to subdivision (n).

(q) Upon the favorable conclusion of the litigation with respect to any defendant for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the court may, upon the motion of a party or upon the court's own motion, verify compliance with this section by requiring the attorney for the plaintiff who was required by subdivision (h) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (h) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in camera and in the absence of the moving party. If the court finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by the defendant for whom a certificate of merit should have been filed.

(r) The amendments to this section enacted at the 1990 portion of the 1989-90 Regular Session shall apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby reviving those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991.

(s) The Legislature declares that it is the intent of the Legislature, in enacting the amendments to this section enacted at the 1994 portion of the 1993-94 Regular Session, that the express language of revival added to this section by those amendments shall apply to any action commenced on or after January 1, 1991.

(t) Nothing in the amendments to this section enacted at the 1998 portion of the 1997-98 Regular Session is intended to create a new theory of liability.

(u) The amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session, shall apply to any

action commenced on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999. Nothing in this subdivision is intended to revive actions or causes of action as to which there has been a final adjudication prior to January 1, 1999.

(Amended by Stats. 2002, Ch. 149, Sec. 1. Effective January 1, 2003.)

Enforcement of Safe Drinking Water and Toxic Enforcement Act
(Health & Safety Code § 25249.7)

25249.7. (a) A person who violates or threatens to violate Section 25249.5 or 25249.6 may be enjoined in any court of competent jurisdiction.

(b)(1) A person who has violated Section 25249.5 or 25249.6 is liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) per day for each violation in addition to any other penalty established by law. That civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction.

(2) In assessing the amount of a civil penalty for a violation of this chapter, the court shall consider all of the following:

(A) The nature and extent of the violation.

(B) The number of, and severity of, the violations.

(C) The economic effect of the penalty on the violator.

(D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.

(E) The willfulness of the violator's misconduct.

(F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.

(G) Any other factor that justice may require.

(c) Actions pursuant to this section may be brought by the Attorney General in the name of the people of the State of California, by a district attorney, by a city attorney of a city having a population in excess of 750,000, or, with the consent of the district attorney, by a city prosecutor in a city or city and county having a full-time city prosecutor, or as provided in subdivision (d).

(d) Actions pursuant to this section may be brought by a person in the public interest if both of the following requirements are met:

(1) The private action is commenced more than 60 days from the date that the person has given notice of an alleged violation of Section 25249.5 or 25249.6 that is the subject of the private action to the Attorney General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator. If the notice alleges a violation of Section 25249.6, the notice of the alleged violation shall include a certificate of merit executed by the attorney for the noticing party, or by the noticing party, if the noticing party is not represented by an attorney. The certificate of merit shall state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action, and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. Factual information sufficient to establish the basis of the certificate of

merit, including the information identified in paragraph (2) of subdivision (h), shall be attached to the certificate of merit that is served on the Attorney General.

(2) Neither the Attorney General, a district attorney, a city attorney, nor a prosecutor has commenced and is diligently prosecuting an action against the violation.

(e) A person bringing an action in the public interest pursuant to subdivision (d) and a person filing an action in which a violation of this chapter is alleged shall notify the Attorney General that the action has been filed. Neither this subdivision nor the procedures provided in subdivisions (f) to (k), inclusive, affect the requirements imposed by statute or a court decision in existence on January 1, 2002, concerning whether a person filing an action in which a violation of this chapter is alleged is required to comply with the requirements of subdivision (d).

(f)(1) A person filing an action in the public interest pursuant to subdivision (d), a private person filing an action in which a violation of this chapter is alleged, or a private person settling a violation of this chapter alleged in a notice given pursuant to paragraph (1) of subdivision (d), shall, after the action or violation is subject either to a settlement or to a judgment, submit to the Attorney General a reporting form that includes the results of that settlement or judgment and the final disposition of the case, even if dismissed. At the time of the filing of a judgment pursuant to an action brought in the public interest pursuant to subdivision (d), or an action brought by a private person in which a violation of this chapter is alleged, the plaintiff shall file an affidavit verifying that the report required by this subdivision has been accurately completed and submitted to the Attorney General.

(2) A person bringing an action in the public interest pursuant to subdivision (d), or a private person bringing an action in which a violation of this chapter is alleged, shall, after the action is either subject to a settlement, with or without court approval, or to a judgment, submit to the Attorney General a report that includes information on any corrective action being taken as a part of the settlement or resolution of the action.

(3) The Attorney General shall develop a reporting form that specifies the information that shall be reported, including, but not limited to, for purposes of subdivision (e), the date the action was filed, the nature of the relief sought, and for purposes of this subdivision, the amount of the settlement or civil penalty assessed, other financial terms of the settlement, and any other information the Attorney General deems appropriate.

(4) If there is a settlement of an action brought by a person in the public interest under subdivision (d), the plaintiff shall submit the settlement, other than a voluntary dismissal in which no consideration is received from the defendant, to the court for approval upon noticed motion, and the court may approve the settlement only if the court makes all of the following findings:

(A) The warning that is required by the settlement complies with this chapter.

(B) The award of attorney's fees is reasonable under California law.

(C) The penalty amount is reasonable based on the criteria set forth in paragraph (2) of subdivision (b).

(5) The plaintiff subject to paragraph (4) has the burden of producing evidence sufficient to sustain each required finding. The plaintiff shall serve the motion and all supporting papers on the Attorney General, who may appear and participate in a proceeding without intervening in the case.

(6) Neither this subdivision nor the procedures provided in subdivision (e) and subdivisions (g) to (k), inclusive, affect the requirements imposed by statute or a court decision in existence on January 1, 2002, concerning whether claims raised by a person or public prosecutor not a party to the action are precluded by a settlement approved by the court.

(g) The Attorney General shall maintain a record of the information submitted pursuant to subdivisions (e) and (f) and shall make this information available to the public.

(h)(1) Except as provided in paragraph (2), the basis for the certificate of merit required by subdivision (d) is not discoverable. However, nothing in this subdivision precludes the discovery of information related to the certificate of merit if that information is relevant to the subject matter of the action and is otherwise discoverable, solely on the ground that it was used in support of the certificate of merit.

(2) Upon the conclusion of an action brought pursuant to subdivision (d) with respect to a defendant, if the trial court determines that there was no actual or threatened exposure to a listed chemical, the court may, upon the motion of that alleged violator or upon the court's own motion, review the basis for the belief of the person executing the certificate of merit, expressed in the certificate of merit, that an exposure to a listed chemical had occurred or was threatened. The information in the certificate of merit, including the identity of the persons consulted with and relied on by the certifier, and the facts, studies, or other data reviewed by those persons, shall be disclosed to the court in an in-camera proceeding at which the moving party shall not be present. If the court finds that there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened, then the action shall be deemed frivolous within the meaning of Section 128.7 of the Code of Civil Procedure. The court shall not find a factual basis credible on the basis of a legal theory of liability that is frivolous within the meaning of Section 128.7 of the Code of Civil Procedure.

(i) The Attorney General may provide the factual information submitted to establish the basis of the certificate of merit on request to a district attorney, city attorney, or prosecutor within whose

jurisdiction the violation is alleged to have occurred, or to any other state or federal government agency, but in all other respects the Attorney General shall maintain, and ensure that all recipients maintain, the submitted information as confidential official information to the full extent authorized in Section 1040 of the Evidence Code.

(j) In an action brought by the Attorney General, a district attorney, a city attorney, or a prosecutor pursuant to this chapter, the Attorney General, district attorney, city attorney, or prosecutor may seek and recover costs and attorney's fees on behalf of a party who provides a notice pursuant to subdivision (d) and who renders assistance in that action.

(k) Any person who serves a notice of alleged violation pursuant to paragraph (1) of subdivision (d) for an exposure identified in subparagraph (A), (B), (C), or (D) of paragraph (1) shall complete, as appropriate, and provide to the alleged violator at the time the notice of alleged violation is served, a notice of special compliance procedure and proof of compliance form pursuant to subdivision (l) and shall not file an action for that exposure against the alleged violator, or recover from the alleged violator in a settlement any payment in lieu of penalties or any reimbursement for costs and attorney's fees, if all of the following conditions have been met:

(1) The notice given pursuant to paragraph (1) of subdivision (d) was served on or after the effective date of the act amending this section during the 2013–14 Regular Session and alleges that the alleged violator failed to provide clear and reasonable warning as required under Section 25249.6 regarding one or more of the following:

(A) An exposure to alcoholic beverages that are consumed on the alleged violator's premises to the extent onsite consumption is permitted by law.

(B) An exposure to a chemical known to the state to cause cancer or reproductive toxicity in a food or beverage prepared and sold on the alleged violator's premises primarily intended for immediate consumption on or off premises, to the extent of both of the following:

(i) The chemical was not intentionally added.

(ii) The chemical was formed by cooking or similar preparation of food or beverage components necessary to render the food or beverage palatable or to avoid microbiological contamination.

(C) An exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises.

(D) An exposure to chemicals known to the state to cause cancer or reproductive toxicity in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged

violator and primarily intended for parking noncommercial vehicles.

(2) Within 14 days after service of the notice, the alleged violator has done all of the following:

(A) Corrected the alleged violation.

(B)(i) Agreed to pay a civil penalty for the alleged violation of Section 25496.6 in the amount of five hundred dollars (\$500), to be adjusted quinquennially pursuant to clause (ii), per facility or premises where the alleged violation occurred, of which 75 percent shall be deposited in the Safe Drinking Water and Toxic Enforcement Fund, and 25 percent shall be paid to the person that served the notice as provided in Section 25249.12.

(ii) On April 1, 2019, and at each five-year interval thereafter, the dollar amount of the civil penalty provided pursuant to this subparagraph shall be adjusted by the Judicial Council based on the change in the annual California Consumer Price Index for All Urban Consumers, published by the Department of Industrial Relations, Division of Labor Statistics, for the most recent five-year period ending on December 31 of the year preceding the year in which the adjustment is made, rounded to the nearest five dollars (\$5). The Judicial Council shall quinquennially publish the dollar amount of the adjusted civil penalty provided pursuant to this subparagraph, together with the date of the next scheduled adjustment.

(C) Notified, in writing, the person that served the notice of the alleged violation, that the violation has been corrected. The written notice shall include the notice of special compliance procedure and proof of compliance form specified in subdivision (l), which was provided by the person serving notice of the alleged violation and which shall be completed by the alleged violator as directed in the notice.

(3) The alleged violator shall deliver the civil penalty to the person that served the notice of the alleged violation within 30 days of service of that notice, and the person that served the notice of violation shall remit the portion of the penalty due to the Safe Drinking Water and Toxic Enforcement Fund within 30 days of receipt of the funds from the alleged violator.

(l) The notice required to be provided to an alleged violator pursuant to subdivision (k) shall be presented as follows:

NOTICE OF INCOMPLETE TEXT: The Proof of Compliance form appears in the published chaptered bill. See Sec. 1, Chapter 828 (pp. 7–8), Statutes of 2014.

(m) An alleged violator may satisfy the conditions set forth in subdivision (k) only one time for a violation arising from the same exposure in the same facility or on the same premises.

(n) Nothing in subdivision (k) shall prevent the Attorney General, a district attorney, a city attorney, or a prosecutor in whose jurisdiction the violation is alleged to have occurred from filing an action pursuant to subdivision (c) against an alleged violator. In any such action, the amount of any civil penalty for a violation shall be reduced to reflect any payment made by the alleged violator for the same alleged violation pursuant to subparagraph (B) of paragraph (2) of subdivision (k).

(Amended by Stats. 2014, Ch. 828, Sec. 1. Effective January 1, 2015. Note: See published chaptered bill for complete section text; the Proof of Compliance form appears on pages 7 to 8 of Stats. 2014, Ch. 828. Note: This section was added on Nov. 4, 1986, by initiative Prop. 65.)