

Victims of sexual violence can use the law to take back their power

How plaintiffs can best use the law to bring suit while at the same time protecting their privacy during litigation

By Sonya Ostovar & Afnan Shukry

Sexual misconduct has serious short-term and long-term impacts on the physical, economic, and psychological wellbeing of victims. The impact is felt throughout society, but especially among women and children. Bringing a lawsuit against those responsible can be a way for victims to empower themselves. While it can feel intimidating to do so, the law provides protections for victims of sexual abuse and assault.

Sexual violence is common

Sexual violence is disturbingly common, and women are disproportionately victimized. According to the Centers for Disease Control and Prevention, when it comes to women, over *half* reported experiencing some type of sexual violence in their lifetime, 25% reported completed or attempted rape, and one third reported sexual harassment in a public space.

Though the Centers for Disease Control and Prevention's reporting of rape and harassment among men shows markedly fewer occurrences with 4% reporting attempted or completed rape and 11% reporting sexual harassment in public spaces, one-third of men have experienced sexual violence involving some type of physical contact.

Sexual violence starts early. While women make up 90% of rape victims, over 50% of female rape survivors were raped as minors. RAINN, the country's largest anti-sexual violence organization, reported that over 80% of childhood sexual-abuse victims are females.

Children who experience childhood sexual abuse are four times more likely to develop symptoms of Post Traumatic Stress Disorder. They are also three times more likely to experience major depression as adults. Keep in mind that these numbers only reflect instances that have been reported. Real numbers are likely to be much higher.

How long do victims have to file a lawsuit?

Often, filing a lawsuit against a perpetrator and those responsible for abuse is a way for the victim to empower themself. However, it is important to ensure that a case is timely filed. Below are guidelines regarding the

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statutes of limitations that govern this area of law.

For childhood sexual assault

For claims arising before January 1, 2024, victims have until the age of 40, or within five years of discovering the abuse. (Code. Civ. Proc., § 340.1.)

For claims arising after January 1, 2024, there is *no time limit* for bringing an action for childhood sexual assault. (Assembly Bill 452.)

As a side note, the definition of sexual assault was recently expanded to include child victims of child pornography crimes. (Senate Bil 558.)

For adult sexual assault

Adults who experienced sexual assault after turning 18 have 10 years from date of the last act, or within three years of discovery of an illness or injury related to the sexual assault. (Code. Civ. Proc., § 340.16.)

Claims involving public entities

Unless you are exempt from doing so (see "Exceptions" below), if a claim is being brought against a public entity, you must bring a government tort claim. The timeframe for doing so can be as short as six months. If a victim fails to do so, they may be barred from bringing an action.

Exceptions

Victims of childhood sexual abuse are *exempt* from the requirement to bring a government tort claim. (Gov. Code, § 905, subd. (m).)

Victims of sexual assault perpetrated by a law enforcement officer are also *exempt* from following state and local government tort claim requirements if the assault occurred while the officer was employed by a law enforcement agency. (Gov. Code, § 945.9.)

The legal protections for victims of sexual assault

Even when a victim's claims are timely, there are roadblocks that can prevent victims from bringing a lawsuit against those responsible for the abuse. Victims tend to worry about exposing their personal identity and are often fearful that they will be met with negative stigma and possible retaliation from their abusers or other defendants who were involved. Fortunately, California law recognizes the challenges victims face when making the decision to pursue this kind of legal action and provides protections to help alleviate their concerns.

Pseudonyms

Victims of sexual abuse, misconduct, or assault are allowed to protect their personal identity by filing a lawsuit using a pseudonym. Common pseudonyms include John or Jane Doe, or the victim's first name and last initial. Courts generally allow a plaintiff to file a suit using a pseudonym where the plaintiff has a "legitimate privacy interest." Privacy interests are commonly recognized in cases of a sexual nature, and in cases involving minors, health care patients and staff, victims deliberately infected with sexually transmitted diseases, and where intimate or sexual imagery of a person is distributed without consent. (Cal. Rules of Court, rule 8.401, Civ. Code, § 3427.3; Health & Saf. Code, § 120291; Civ. Code, § 1708.85.)

To best protect a plaintiff's interest in using a pseudonym, it is imperative to use a pseudonym in the original pleadings. Not doing so may be considered a waiver. (*Taus v. Loftus* (Cal. 2007) 151 P.3d 1185.)

Consent evidence

In childhood sexual abuse cases where the sexual battery was perpetrated by an adult in position of authority over the minor, consent may not be used as a defense and evidence of "consent" is not permissible. An adult is in a "position of authority" if they, by reason of that position, can exercise undue influence over a minor. This includes a broad array of people including relatives, caretakers, coaches, teachers, religious leaders, youth leaders, counselors, and employees thereof. (Code Civ. Proc., § 1708.5.5.)

Along those same lines, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, are not admissible to prove consent by the plaintiff or *the absence of injury to the plaintiff*, unless the injury alleged is loss of consortium. (Evid. Code, § 1106.)

Sexual history

In any civil action alleging sexual harassment, sexual assault, or sexual battery, a victim's sexual history with individuals other than the perpetrator is generally not discoverable. (Code Civ. Proc., § 2017.220.) The reason being that, "The discovery of sexual aspects of complainant[s'] lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendant or respondent inquiries, is unnecessary and deplorable. Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the 'Catch-22' of invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery, and in open quasi-judicial or judicial proceedings." (Senate Bill No. 1057 (1985-1985 Reg. Sess.), Stats. 1985, ch. 1328, § 1, pp. 4654-4655.)

Many defense attorneys will try to bypass section 2017.220 by arguing that there is a need to discover a plaintiff's sexual history to determine whether other sexual traumas existed before or after the abuse at issue that may have contributed to plaintiff's damages. However, bare causation arguments are generally insufficient to overcome the requirements outlined below. (*Barrenda L. v. Superior Court* (1998) 65 Cal.App.4th 794 ["The mere fact that a plaintiff has initiated an action seeking damages for extreme mental and emotional distress arising out of conduct of a sexual nature does not ipso facto provide

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'good cause' for discovery of other sexual conduct"].)

A party who seeks to inquire about a victim's sexual history must first obtain a court order by demonstrating *extraordinary* circumstances justifying such discovery. (Code Civ. Proc., § 2017.220.) They must establish *specific* facts showing: 1) there is good cause for that discovery; and 2) that the information sought is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. (*Ibid*.)

A party may *only* be able to introduce evidence of a victim's sexual history at trial to attack the credibility of a plaintiff or to prove something other than consent after first complying with Evidence Code section 783, which requires a motion, an affidavit accompanied by an offer of proof, and a hearing outside the presence of the jury. In complying with section 783, a party must demonstrate to the court that the probative value of that evidence outweighs the probability of: 1) undue consumption of time or 2) creating a substantial danger of undue prejudice to the plaintiff, confusing the issues, or of misleading the jury. (Evid. Code, § 352.) If the evidence is allowed, the court must make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. (Evid. Code, § 783, subd. (d).)

Protective orders

Defense attorneys commonly use protective orders in childhood sexual abuse cases to limit their clients' exposure. Many times, these protective orders are overbroad, over-inclusive and are meant to limit the amount of information the public has access to regarding who is responsible and the extent of their negligence. However, the public has a right to this information and recently enacted statutes that recognize the public's interest in this information.

In a civil action regarding *childhood sexual assault*, a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of relevant factual information. (Code Civ. Proc., § 1002, subd. (b).) The intensity of the public policy behind this statute is illustrated in its final provision, whereby attorneys *may be disciplined* by the State Bar for permitting secrecy over the factual information related to child abuse. (Code Civ. Proc., § 1002, subd. (e).) As such, the argument can be made that a defendant's insistence upon an overbroad protective order violates clear public policy applicable *to childhood sexual abuse cases* and invites error given the edict of the Legislature in Code of Civil Procedure section 1002, subdivision (b). (See, also, *Copley Press, Inc., v. Superior Court* (1998) 63 Cal.App.4th 367, 376 [holding that sexually abused minor's settlement with school district should not be sealed].)

The argument can be made that defendants who seek a protective order seek to preclude the use of any information produced in discovery outside the scope of litigation in clear violation of this policy. While courts have had mixed responses to this argument, it is worth making as some courts have denied a defendant's motion for protective order on this basis.

Another way to prevent a defendant from forcing a plaintiff to enter a protective order is by making the more commonly accepted argument that the defendant has failed to show good cause warranting a protective order over any particularized material.

Code of Civil Procedure section 2031.060, subdivision (b) regarding document demands, requires "good cause shown" before a protective order may be entered. (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255.) Good cause must be demonstrated in declarations. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223-224.)

This argument can be used where a defendant's moving papers fail to identify any information or document with particularity sufficient to warrant protection. "Secrecy agreements and protective orders impair the public's access to discovery records as well as the parties' First Amendment right to disseminate information to the public." (*Westinghouse Electric Corp. v. Newman & Holtzinger* (1995) 39 Cal.App.4th 1194, 1208.) As such, strict adherence to the good cause requirement directed to particular documents is necessary. (See, *e.g., Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 374.)

If the documents at issue contain privileged information, such as a social security number, medical information, or financial information, a good compromise would be to suggest redactions pursuant to a privilege log. This will help address individual privacy concerns presented by the defendant without violating the public's interest in accessing information.

Conclusion

While the litigation process can be challenging for victims of sexual violence, it can also be profoundly rewarding for those who take on the challenge because it allows victims an opportunity to work through their trauma while holding those responsible accountable.



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