
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 2078 **Hearing Date:** June 19, 2018
Author: Daly
Version: February 7, 2018
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Sex Offenses: Professional Services*

HISTORY

Source: Orange County District Attorney's Office

Prior Legislation: AB 860 (Daly), 2015, held in Senate Appropriations
AB 59 (Evans), Ch. 282, Stats. 2013
AB 65 (Achadjian), Ch. 259, Stats. 2013
SB 765 (Achadjian), Held in Senate Public Safety, 2011
AB 2049 (Saldana), Amended to become a new bill, 2008
SB 1421 (Romero), Ch. 302, Stats. 2002

Support: The Arc; California Attorneys for Criminal Justice; California District Attorneys Association; California State Sheriffs' Association; United Cerebral Palsy California Collaboration

Opposition: None known

Assembly Floor Vote: 76 - 2

PURPOSE

The purpose of this bill is to expand the crimes of sexual battery, rape, sodomy, oral copulation, and sexual penetration to include non-consensual, sexual touching by a person who has been engaged by the victim for a professional purpose.

Existing law states that any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. (Pen. Code, § 243.4, subd. (a).)

Existing law states that any person who touches an intimate part of another person for the purpose of sexual arousal, sexual gratification, or sexual abuse, and the victim is at the time unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose, is guilty of sexual battery. (Pen. Code, § 243.4, subd. (c).)

Existing law punishes a violation of sexual battery by imprisonment in a county jail for not more than one year, and by a fine not exceeding \$2,000; or by imprisonment in the state prison for two, three, or four years; and by a fine not exceeding \$10,000. (Pen. Code, § 243.4, subd. (a)-(c).)

Existing law defines battery (non-sexual) as any willful and unlawful use of force or violence upon the person of another. (Pen. Code, § 242.)

Existing law punishes battery by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment. (Pen. Code, § 243.)

Existing law provides that rape is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator,¹ under any of the following circumstances:

- 1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act;
- 2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another;
- 3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused;
- 4) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief;
- 5) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat; or
- 6) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. (Pen. Code, § 261, subds. (a)(1)-(a)(3), and (a)(5)-(a)(7).)

Existing law states that rape also occurs where the victim is unconscious of the nature of the act, and this is known to the accused. (Pen. Code, § 261, subd. (a)(4).)

Existing law defines "unconscious of the nature of the act" as incapable of resisting because the victim meets one of the following conditions:

- 1) Was unconscious or asleep;
- 2) Was not aware, knowing, perceiving, or cognizant that the act occurred;
- 3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact; or
- 4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose. (Pen. Code, § 261, subd.

¹ Spousal rape is criminalized separately at Penal Code Section 262.

(a)(4.)

Existing law punishes rape by imprisonment in state prison for three, six, or eight years. (Pen. Code, § 264, subd. (a).)

Existing law states any person who commits an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 286, subd. (c)(2).)

Existing law states that any person who commits an act of sodomy where the victim is unconscious of the nature of the act, and this is known to the accused, shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 286, subd. (f).)

Existing law states that any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 288a, subd. (c)(2)(A).)

Existing law states that any person who commits an act of oral copulation where the victim is unconscious of the nature of the act, and this is known to the accused, shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 288a, subd. (f).)

Existing law states any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 289, subd. (a)(1).)

Existing law states that any person who commits an act of sexual penetration where the victim is unconscious of the nature of the act, and this is known to the accused, shall be punished by imprisonment in the state prison for three, six, or eight years. (Pen. Code, § 289, subd. (d).)

This bill expands the crime of sexual battery to apply to a person who performs professional services that entail having access to another person's body, who touches an intimate part of that person's body while performing those services and the touching was against the person's will and for the purpose of sexual arousal, sexual gratification, or sexual abuse.

This bill punishes this form of sexual battery by either imprisonment in the county jail for not more than one year and a fine not exceeding \$2,000, or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding \$10,000.

This bill expands the crimes of rape, sodomy, oral copulation, and sexual penetration to include when any of those acts are performed against a victim's will by a professional whose services entail having access to the victim's body, if the conduct is performed by the professional in the course of the services.

COMMENTS

1. Need for This Bill

According to the author:

This bill would ensure that perpetrators can be punished proportionally for sexual battery and other sexual offenses that they commit during the course of a professional service. The punishment will apply when the victim is conscious of the nature of the act, consent is not given or obtained fraudulently, and the conduct is not related to the professional service.

2. Existing Law Arguably Fails to Establish Felony Liability for Unwanted Sexual Touching in the Context of Professional Services

Under current law, providers of specified professional services who sexually assault their clients can be charged with a felony sex crime if *any* of the following conditions occur:

- 1) ***Fraud in fact*** (e.g., informing a client that they will be examined by a medical instrument causing penetration, obtaining their consent, and then performing the “examination” using their own body part)
- 2) ***Fraud by inducement*** (e.g., informing a client that sexual penetration served a professional purpose when it did not)
- 3) Or if the victim was unaware, unconscious, restrained, or unable to perceive the essential characteristics of the sexual act.

-However-

A perpetrator of these types of crimes can only be tried for misdemeanor sexual battery if all of the following occur:

- 1) During a session, there is touching which is clearly not related to the professional service, which the victim cannot reasonably believe was said service; and
- 2) The victim was conscious of the nature of the act in terms of its sexual nature; and
- 3) The victim did not consent to the act under fraudulent means (fraud in fact or inducement).

For example: An individual receives facial treatments, and the service provider begins to massage other parts of his or her body sexually without asking the victim for consent (or misleading the victim by claiming that the act was part of that service). If the provider then stops when the victim objects, the provider could only be charged, under current law, with misdemeanor sexual battery.

Because these acts are not committed while the person is impaired or unconscious of the actions of the provider, they can object to it and are able to perceive the essential characteristics of the sex act. Their consent is not considered to have been obtained by fraudulent misrepresentation

during the course of the treatment. In this instance, the rape by fraud in fact or inducement statutes do not apply.

As a consequence, some individuals who have committed a felonious sexual assault can only be charged with less serious crimes.

3. Penalties Provided in Existing Law

This bill provides any massage therapist, physical therapist, holistic healer, chiropractor, or other professional service provider who touches an intimate part of another's body against his or her will for sexual gratification while in the practice of the profession is guilty of one of the enumerated sex crimes. Lack of consent is the foundation of most prosecutions for sexual assault and may be proven many ways. The victim objects to the conduct and the defendant disregards the objection by force, duress, threat of force, or threat of future retaliation. (See Pen. Code §§ 261(a)(2), 286(c)(2), and 288a(c)(2).) The penalty for most forcible sex offenses is three, six or eight years in state prison. However, there are instances in which the defendant may be guilty of a sex offense even where the victim did not specifically object. Lack of consent is implied if the victim is not able to object because he or she is unconscious, unaware the act occurred, or was not aware of the essential characteristics of the act because of fraud. (See Pen. Code §§ 261(a)(4) and 288a(f)(1) to (4).) This includes a perpetrator who fraudulently claims the act is necessary for some professional purpose or otherwise convinces the victim to consent to one act but then does another. The courts have distinguished between "fraud in fact" and "fraud in inducement." Fraud in fact "appears to be limited to those narrow situations in which the victim consented to the defendant's act, but because the victim believed the essential characteristics of the act consented to were different from the characteristics of the act the defendant actually committed, the victim was incapable of resisting the act actually committed because the victim was ignorant of the true nature of the act permitted. In contrast, when the victim consents to the defendant's act with the full knowledge of the essential characteristics of the act, a conviction was induced the unconscious-due-to-fraud-in-fact concept cannot stand even though the victim was induced to consent by fraudulent representations as to the benefits resulting from the act." (*People v. Stuedemann* (2007) 156 Cal.App. 4th 1, 7; *People v. Cook* (1964) 228 Cal.App. 2nd 716, 718; *People v. Harris* (hereinafter *Harris*) (1979) 93 Cal. App. 3rd 103, 114.) In *People v. Harris*, the defendant's conviction for rape was overturned under a "fraud in fact" theory. In that case, the victim agreed to sexual intercourse with the defendant if she lost a bet, but was unaware the bet was rigged to ensure she lost. (*Harris* at 111).

In affirming the rape conviction of a physician, the California Appellate Court stated, "It is settled that a victim need not be totally and physically unconscious in order for the statute defining rape as an act of sexual intercourse accomplished with a person who is at the time 'unconscious of the nature of the act' to apply (citation omitted). In this context, unconsciousness is related to the issue of consent, which, in prosecution under Penal Code Section 261 (rape) is 'defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction.'" (Penal Code Section 261.6). (*People v. Ogunmola* (hereinafter *Ogunmola*) (1987) 193 Cal.App 3rd 274, 279; see also *People v. Minkowski* (1962) 204 Cal.App. 2nd 832.) In *Ogunmola*, the defendant was a gynecologist who raped patients while performing examinations. Neither of the two victims knew the defendant was engaged in the criminal conduct until he committed the act of penetration. Neither victim objected at the time of the examination. The Appellate Court held:

"Similarly, in the present case, the trier of fact could reasonably conclude from the testimony of the victim gynecological patients, who reposed great trust in their physician in placing themselves in positions of great vulnerability from which they could not readily perceive his conduct toward them, that neither was aware of the nature of the act, i.e., neither consciously perceived or recognized that defendant was not engaged in an examination, but rather in an act of sexual intercourse, until he had accomplished sexual penetration, and the crime had occurred. Each of the victims, who had consented to a pathological examination, with its concomitant manual and instrumental intrusions, was 'unconscious of the nature of the act' of sexual intercourse committed upon her by defendant, until the same was accomplished, and cannot be said to have consented thereto. Defendant's conduct on each occasion was clearly within the scope of Penal Code Section 261(a)(4) (rape of an unconscious person), and constituted rape." (*Ogunmola* at 280, 281.) The *Ogunmola* case likely proceeded under a theory that the victims were not aware or cognizant of the act when it occurred and does not seem to deal with fraud in fact. (Penal Code Section 261(a)(4)(B).)

Penal Code Section 263 states, "The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however, slight, is sufficient to complete the crime". It is unclear how this bill will provide more protection to the victims because it requires the specified sex offense be committed against the will of the victim. In instances where the victim objects or there is no opportunity for consent because he or she is "unconscious", as specified, the offender is guilty of the substantive offense (rape, sodomy, oral copulation, rape with a foreign object or sexual battery).

People v. Stuedemann: The sponsor points to *People v. Stuedemann* (hereinafter *Stuedemann*) (2007) 156 Cal.App. 4th 1 as evidence of infirmity in the law that must be remedied. In *Stuedemann*, the People charged the defendant, a massage therapist, with sexual penetration of an unconscious person and oral copulation of an unconscious person, as specified. Penal Code Section 288a(f)(3) is oral copulation of a person who is "unconscious of the nature of the act" because the victim was not aware of the essential characteristics of the act due to the perpetrator's fraud in fact. Penal Code Section 289(d)(3) is sexual penetration under the same circumstances. The defendant was convicted of both charges at trial and appealed. The theory presented by the People was that the defendant was guilty oral copulation and sexual penetration because the victim was unconscious of the essential characteristics of the act due to the defendant's fraud in fact. (*Stuedemann* at 6.) Therefore, the appellate court reviewed the case pursuant to a fraud in fact claim. However, the court was not persuaded by the fraud in fact theory and stated, "Applying this framework here [defining fraud in fact], the evidence does not support a conviction under the unconsciousness provisions of oral copulation and sexual penetration. There is no evidence Griselda [the victim] consented or cooperated (was 'incapable of resisting') because of her ignorance of the true nature of the acts performed by Stuedemann. To the contrary, she did not permit Stuedemann to orally copulate or digitally penetrate her believing the copulation or penetration was something other than a sexual copulation or penetration; instead, she immediately recognized the acts for what they were and expressed her non-consent." (*Stuedemann* at 11.)

The court distinguished the *Ogunmola* case explained above because the victim in this case was not consenting to a full on medical examination where penetration for some legitimate purpose might occur. The court concluded, "Unlike *Ogunmola* and its predecessors, there was no evidence Griselda consented to anything resembling the acts undertaken by Stuedemann. Although Griselda consented to a massage, the result of

which made her vulnerable to Stuedemann's acts that overstepped the boundaries of her consent, the evidence showed she was fully aware of the nature of Stuedemann's acts when those acts transgressed the boundaries and was capable of (and did) express her non-consent and resistance to the conduct. We conclude that Stuedemann's 'conduct, reprehensible though it was', did not violate [sections on oral copulation and sexual penetration] because Griselda was not unconscious due to Stuedemann's fraud in fact, the only theory asserted by the prosecution.] If there is a statutory oversight in this area of the penal law, the Legislature may address it (*citation omitted*)." (*Stuedemann* at 14.)

Additionally, the court offers under existing law to re-sentence the defendant for battery, as specified; however, the parties reject the court's invitation. It is unclear if charging the defendant under a different statute - one not based on fraud - would have resulted in a different outcome. Although, as the court points out, this case is somewhat troubling, there are factual issues of consent. The only remedy is to craft a statute that would remove the consent element where the victim is in a state of undress or is otherwise in a semi-vulnerable position. However, this may inadvertently punish consensual conduct or fail to protect persons who are fully clothed or not necessarily in a semi-vulnerable position. As noted above, this bill's language still requires the action be committed against the person's will. If that were the case in *Stuedemann* if the defendant had disregarded the victim's objections, the defendant would be guilty of oral copulation and sexual penetration and no discussion of consent would have been necessary.

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