
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 341 **Hearing Date:** June 8, 2021
Author: Boerner Horvath
Version: March 25, 2021
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Credibility of witnesses: sexual conduct: social media content*

HISTORY

Source: Crime Victims United of California
San Diego County District Attorney's Office

Prior Legislation: AB 1996 (Bogh), Ch. 225, Stats. 2006
AB 3839 (Bogh), Ch. 61, Stats. 2004

Support: Alameda County District Attorney; California District Attorneys Association; California Law Enforcement Association of Records Supervisors; California Women's Law Center; County of San Diego; End Violence Against Women International; Peace Officers Research Association of California

Opposition: None known

Assembly Floor Vote: 74 - 0

PURPOSE

The purpose of this bill is to define "evidence of sexual conduct" to include the portions of a social media account about the complaining witness that depict sexual content, as specified, unless the content is related to the alleged offense, for purposes of the Rape Shield Law that requires such evidence to first be presented to the judge to determine admissibility in specified sex offense cases.

Existing law states that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, §§ 350, 351.)

Existing law defines "relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

Existing law authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

Existing law provides that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, subject to the existing statutory role of evidence relating to privilege or hearsay, or inadmissibility. (Cal. Const., art. I, § 28, as adopted June 8, 1982.)

Existing law allows the credibility of a witness to be attacked or supported by any party including the party calling him. (Evid. Code, § 785.)

Existing law states that except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- His or her demeanor while testifying and the manner in which he testifies;
- The character of his or her testimony;
- The extent of his or her capacity to perceive, to recollect, or to communicate any matter about which he or she testifies;
- The extent of his or her opportunity to perceive any matter about which he or she testifies.
- His or her character for honesty or veracity or their opposites;
- The existence or nonexistence of a bias, interest, or other motive;
- A statement previously made by him or her that is consistent with his or her testimony at the hearing;
- A statement made by him or her that is inconsistent with any part of his or her testimony at the hearing;
- The existence or nonexistence of any fact testified to by him or her;
- His or her attitude toward the action in which he or she testifies or toward the giving of testimony; or
- His or her admission of untruthfulness. (Evid. Code, § 780.)

Existing law states, except as provided, that in the prosecution of specified sex offenses, the introduction of opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, is not admissible by the defendant in order to prove consent by the complaining witness. (Evid. Code, § 1103, subd. (c)(1).)

Existing law states, except as provided, that evidence of the manner in which the victim was dressed at the time of the commission of the offense shall not be admissible when offered by either party on the issue of consent in any prosecution for the specified sex offenses, unless the evidence is determined by the court to be relevant and admissible in the interests of justice. The proponent of the evidence shall make an offer of proof outside the hearing of the jury. The court

shall then make its determination and at that time, state the reasons for its ruling on the record. For the purposes of this paragraph, “manner of dress” does not include the condition of the victim’s clothing before, during, or after the commission of the offense. (Evid. Code, § 1103, subd. (c)(2).)

Existing law provides for the following procedure if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness in specified sex offense cases:

- A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of the evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.
- The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing. After that determination, the affidavit shall be resealed by the court.
- If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
- At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant and is not inadmissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the court’s order.
- An affidavit resealed by the court shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and the appellate counsel for the defendant access to the sealed affidavit. If the issue is raised on collateral review, the court shall allow the district attorney and defendant’s counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding.

(Evid. Code, § 782, subd. (a).)

Existing law defines a “complaining witness” for purposes of the above procedures to mean the alleged victim of one of the specified sex crimes listed in this section; and, an alleged victim offering testimony. (Evid. Code, § 782, subd. (b).)

This bill provides that “evidence of sexual conduct” for purposes of the above described procedure, which is also known as the Rape Shield Law, includes those portions of a social media account about the complaining witness, including any text, image, video, or picture, which depict sexual content, sexual history, nudity or partial nudity, intimate sexual activity, communications about sex, sexual fantasies, and other information that appeals to a prurient interest, unless it is related to the alleged offense.

COMMENTS

1. Need for This Bill

According to the author of this bill:

In recent years, social media accounts have become a space for stories about sexual harassment and sexual assault. However, for women who file criminal charges, sharing these experiences can be a barrier for their search for justice. In some cases, defense attorneys use these social media posts to undermine an accuser's credibility in court.

This bill will not impact the defense attorneys' access to the social media evidence. AB 341 would simply add a victim's social media posts to the Rape Shield Law to determine the admissibility of the content of a sexual assault victim's social media accounts by a judge in a manner that protects the privacy of the victim, reducing blatant attempts to embarrass, shame or discourage a victim from testifying against his or her perpetrator.

2. California's Rape Shield Law

The Rape Shield Law was passed in California in 1974. The Legislature created limitations on the introduction of evidence in specific sex-related cases to recognize that victims of sex-related offenses deserve heightened protection against "surprise, harassment, and unnecessary invasions of privacy." (*People v. Fontana* (2010) 49 Cal. 4th 351, 362-63, citing *People v. Rioz* (1984) 161 Cal.App.3d 905, 916-17.) The crimes that implicate the Rape Shield Law are: sexual battery, rape, unlawful sexual intercourse with a minor, spousal rape, incest, sodomy, oral copulation by force, sexual abuse of a child under 14 or a dependent person, continuous sexual abuse of a child, forcible penetration with a foreign object, indecent exposure, and annoying or molesting a minor.

The Rape Shield Law generally prohibits the introduction of evidence against an alleged victim about that person's prior sexual conduct, sexual reputation, or manner of dress in order to show that the person consented to the sexual act in question. (Evid. Code, § 1103, subd. (c).) However, impeachment evidence of an alleged victim, or a witness, that relates to sexual conduct may be introduced by following a specified procedure — filing a written motion with the court in a criminal jury trial where the judge will make a ruling on admissibility of that evidence. (Evid. Code, § 782.) Other impeachment evidence intended to attack the credibility of a witness that is not sexual in nature is not required to be vetted first by a judge.

This bill defines "sexual conduct" for purposes of the procedure that requires such evidence to be first vetted by a judge to include those portions of a social media account about the complaining witness, including any text, image, video, or picture, which depict sexual content, sexual history, nudity or partial nudity, intimate sexual activity, communications about sex, sexual fantasies, and other information that appeals to a prurient interest, unless it is related to the alleged offense. The purpose of this clarification is to recognize that sexual conduct exhibited on a social media account present the same concerns as any other type of evidence of sexual conduct introduced against a victim of sex crimes.

3. Argument in Support

According to County of San Diego:

In prosecutions of sexual assault, current law requires a separate hearing, outside the presence of a jury, if the sexual conduct of the complaining witness is to be offered as evidence to attack the credibility of the complaining witness. At the conclusion of the hearing, the court may make an order stating what evidence may be introduced by the defendant.

AB 341 would require a procedure to screen admissibility when the defense seeks to admit social media evidence to attack a victim's credibility.

Social media is a common way for individuals to communicate and share pictures and videos from their everyday lives. The bill, sponsored by San Diego County District Attorney Summer Stephan, would help prevent a sexual assault victim's social media account from being used to unfairly discredit their case in a sexual assault prosecution. The aim of the County of San Diego is to advocate for policies that create a system that is equitable, fair, and just. This legislation would protect victims of sexual assault and ensure that sexual assault victims feel empowered to come forward in sexual assault cases without fear of their social media account being used against them.

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