

Date of Hearing: March 23, 2021
Counsel: Nikki Moore

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 341 (Boerner Horvath) – As Introduced January 28, 2021

As Proposed to be Amended in Committee

SUMMARY: Defines evidence of “sexual conduct,” to mean “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” with respect to the application of the Rape Shield law, when impeachment evidence about sexual conduct is offered against a victim or witness.

EXISTING LAW:

- 1) In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:
 - a) 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 evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness. (Evid. Code, § 782, subd. (a)(1).)
 - b) 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 pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court. (Evid. Code, § 782, subd. (a)(2).)
 - c) 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, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant. (Evid. Code, § 782, subd. (a)(3).)
 - d) 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 pursuant to Section 780, and is not inadmissible pursuant to Section 352, 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 order of the court. (Evid. Code, § 782, subd. (a)(4).)

- e) An affidavit resealed by the court pursuant to paragraph (2) 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 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)(5).)
- 2) As used in this section, "complaining witness" means: the alleged victim of the crime charged, the prosecution of which is subject to this section; and, an alleged victim offering testimony. (Evid. Code, § 782, subd. (b)(1)-(2).)
- 3) Establishes the procedure for introducing specified evidence in any of the following circumstances: 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. (Evid. Code, § 782, subd. (c)(1)-(3).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Victims of sexual assault should not have to relieve the trauma of their attack in a courtroom by allowing the use of their social media posts to embarrass them and purposefully shaming or discouraging them from testify against their perpetrators. AB 341 would provide additional protections under the Rape Shield Law to victims of sexual assault by requiring evidence mined from their social media accounts to first be evaluated by a judge to demonstrate relevance and admissibility before being introduced in open court to attack the victim's credibility in a sexual assault prosecution."
- 2) **The Rape Shield Law and Relevant Crimes:** 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. Rios* (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 prevents the introduction of evidence against an alleged victim about that person's prior sexual conduct in order to show that the person consented to the sexual act in question. However, impeachment evidence of an alleged victim, or a witness, that relates to sexual conduct *may* be introduced by following a 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. 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.

According to the sponsors of the bill, the law needs to be clarified and updated to recognize that sexual conduct exhibited on a social media account presents the same concerns as any other type of evidence of sexual conduct. This bill defines “sexual conduct” for the purpose of the Rape Shield Law to include portions of such social media posts that are sexual in nature. This action preserves the right to submit, without a motion, any other relevant social media content that does not implicate sexual conduct. This bill is narrow so as not to impede on the introduction of relevant impeachment evidence, so that it does not run afoul of a defendant’s rights under the Sixth Amendment Confrontation Clause. (U.S. Const. amend XI.)

- 3) **Argument in Support:** According to the *San Diego County District Attorney*, “Since then, California’s Rape Shield Law has been amended several times as awareness increased and the need for further protection for survivors was recognized. The defense has challenged these laws on a variety of grounds including that the evidentiary rules violate the right to confront one’s accuser and the right against self-incrimination, and that these laws are too vague. However, the courts have overwhelmingly rejected these challenges. Evidence Code section 782 currently protects sexual assault victims from being discredited due to their sexual history. The section further provides a procedure for the defense to make an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of that complaining witness. As an additional safe-guard for survivors, this motion shall be made under seal, with the court having the final say as to whether the evidence is admissible. These protections are deemed critical to protecting the survivor’s reputation and credibility. Now in 2021, these protections are no longer sufficient. AB 341 requests that this Legislature update this statute in light of the exploding online socialization occurring on digital platforms.

“Social media has become ubiquitous. In sexual assault cases, defense lawyers are mining the social media accounts of sexual assault victims to discover information that can be used against the victim. Most adults now have social media history going back nearly two decades. Never before has there been such an intimate record of one’s actions, words, photos and videos. And never before has there been a greater need to protect which specific evidence cherry-picked from these electronic platforms may be used against a survivor of rape in a criminal proceeding. This bill would require a procedure, similar to existing law, to determine the admissibility of the content of a sexual assault victim’s social media account in a manner that protects the privacy of the victim, reducing blatant attempts to embarrass, shame or discourage a victim from testifying against the person who assaulted her.

“AB 341’s proposed amendment to Evidence Code section 782 will not impact the defense access to social media evidence. It will simply require a procedure to screen admissibility when the defense seeks to admit the social media evidence to attack the survivor’s credibility. At the conclusion of the hearing, if the court finds that the social media evidence proposed ‘to be offered by the defendant regarding the content of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating that evidence may be introduced by the defendant, and the nature of questions permitted.’”

4) Prior Legislation:

- a) AB 1996 (Bogh), Chapter 225, Statutes of 2006, extended Rape Shield Law procedures that apply when the sexual history of a testifying witness is offered to attack the credibility of the witness, to witnesses testifying about prior sexual offenses of a defendant.
- b) AB 2829 (Bogh), Chapter 61, Statutes of 2004 required that an affidavit in support of a motion to introduce evidence of sexual conduct of the complaining witness be filed under seal.

REGISTERED SUPPORT / OPPOSITION:

Support

Crime Victims United of California (Co-Sponsor)
San Diego County District Attorney's Office (Co-Sponsor)
California District Attorneys Association
California Law Enforcement Association of Records Supervisors
California Women's Law Center
End Violence Against Women International
Peace Officers Research Association of California
County of San Diego

Opposition

None

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