

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

SB 1386 (Caballero)  
Version: March 19, 2024  
Hearing Date: April 9, 2024  
Fiscal: No  
Urgency: No  
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**SUBJECT**

Evidence: sexual assault

**DIGEST**

This bill extends the Rape Shield Law's prohibition on evidence of a plaintiff's past sexual conduct to include introduction for purposes of attacking the credibility of a plaintiff's testimony regarding consent or the amount of harm suffered. The bill extends the restrictions to cover admission for lack of harm and reworks provisions governing civil actions for sexual battery involving a minor.

**EXECUTIVE SUMMARY**

California's Rape Shield Law restricts introduction of opinion evidence, reputation evidence, and evidence of specific instances of a plaintiff's sexual conduct in order to prove consent by the plaintiff or the absence of injury, as specified. This applies in civil actions alleging conduct constituting sexual harassment, sexual assault, or sexual battery. However, the statute also provides that these provisions do not make inadmissible such evidence when used to attack the credibility of the plaintiff's testimony, which is subject to specified procedures and considerations.

In the wake of a California Supreme Court decision interpreting the statute, the author and sponsors seek to strengthen California's Rape Shield Law. This bill extends the law to prohibit evidence regarding the plaintiff's sexual conduct to be introduced in order to attack the plaintiff's credibility as to consent or the lack of harm suffered by the plaintiff. The bill also extends these restrictions from covering absence of injury to lack of harm. It also amends the balancing test triggered when a defendant seeks to introduce such evidence to attack the credibility of a minor plaintiff in an action for sexual battery. This bill is co-sponsored by Equal Rights Advocates and the Consumer Attorneys of California. It is supported by several other organizations. No timely opposition was received by the Committee.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Provides 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 the witness' testimony at the hearing. (Evid. Code § 780.)
- 2) Provides that in any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium. This does not apply to evidence of sexual conduct between the plaintiff and alleged perpetrator. (Evid. Code § 1106.)
- 3) Provides that notwithstanding the above, in a civil action brought for sexual battery involving a minor and adult, as specified, evidence of the plaintiff minor's sexual conduct with the defendant adult shall not be admissible to prove consent by the plaintiff or the absence of injury to the plaintiff. Such evidence of the plaintiff's sexual conduct may only be introduced to attack the credibility of the plaintiff in accordance with Section 783 of the Evidence Code or to prove something other than consent by the plaintiff if, upon a hearing of the court out of the presence of the jury, the defendant proves that the probative value of that evidence outweighs the prejudice to the plaintiff consistent with Section 352. (Evid. Code § 1106(c).)
- 4) Authorizes the defendant, if the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, to cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff. (Evid. Code § 1106(d).)
- 5) Provides that the above shall not be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783. (Evid. Code § 1106.)
- 6) Requires the following procedures to be followed in any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780:

- a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.
  - b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
  - 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 plaintiff regarding the offer of proof made by the defendant.
  - 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 plaintiff 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 § 783.)
- 7) Authorizes the court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code § 352.)

This bill:

- 1) Provides that in any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not only inadmissible by the defendant in order to prove consent, but also to:
  - a) Prove lack of harm suffered by the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.
  - b) Attack the credibility of the plaintiff's testimony on consent or the lack of harm suffered by the plaintiff.
- 2) Modifies the provision of Section 1106(c) to make the relevant evidence inadmissible to prove absence of harm, rather than injury. It also removes the specified procedure for weighing such evidence when used to attack credibility.
- 3) Clarifies in Section 1106 that Section 783 controls evidence offered to attack credibility of the plaintiff's testimony as to something other than consent or lack of harm.

## COMMENTS

### 1. California's rape shield laws

Generally, public policy disfavors the exclusion of relevant evidence at trial and, accordingly, the Evidence Code begins with a general presumption that all relevant evidence is admissible. (Evid. Code § 351.) A judge may, however, exclude otherwise relevant evidence based upon the undue prejudice that the evidence would pose to the party against whom it is sought to be introduced. Specifically, Section 352 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.

In 1985, California extended the rape shield laws applicable in the criminal context, to civil actions. Section 1106 provides that in a civil action alleging sexual harassment, sexual assault, or sexual battery, specified evidence of the plaintiff's sexual conduct is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium. This does not apply to other instances of sexual conduct between the plaintiff and defendant, except where the plaintiff is a minor and the action is for sexual battery.

In passing the law, the Legislature declared:

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. . . . [T]he use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have.

However, relevant here, Section 1106(e) also specifically states that it shall not be construed to make inadmissible such evidence when presented to attack the credibility of the plaintiff as provided in Section 783. Section 783 lays out the procedures for offering such evidence in these actions to attack the plaintiff's credibility. It provides for a motion and offer of proof by the defendant, which the court shall consider. If the court finds it sufficient, it shall order a hearing outside the presence of any jury and

determine if the evidence is relevant and whether it is admissible pursuant to Section 352. The court can then allow for the introduction of the evidence, or some form of it.

## 2. Using previous sexual conduct to attack a plaintiff's credibility

Concerns regarding the permissiveness of Section 1106(e) in allowing for evidence of specific instances of a plaintiff's sexual conduct in sexual harassment, sexual assault, or sexual battery actions to be used to attack a plaintiff's credibility were heightened in the wake of a recent opinion interpreting the statute by the California Supreme Court. In *Doe v. Superior Court* (2023) 15 Cal. 5th 40, 54-56, the plaintiff sued a school district for sexual abuse committed by a fourth-grade teacher when she was eight years old. "The District, seeking to undermine plaintiff's claim for emotional distress damages resulting from the teacher's conduct, planned to introduce evidence that plaintiff had been molested a few years later by another person—and that this subsequent molestation caused at least some of plaintiff's emotional distress injuries and related damages."<sup>1</sup>

The plaintiff sought to exclude evidence of the subsequent molestation, but the trial court ruled that "the challenged evidence was (1) not protected by any shield statute, and (2) relevant and admissible with regard to whether plaintiff's emotional distress was caused solely by the teacher's conduct or by a combination of his conduct and the subsequent molestation."<sup>2</sup> The appellate court found the evidence regarding the subsequent molestation admissible and the Supreme Court granted review to address the interrelationship of the statutory provisions and the admissibility of the challenged evidence. The Supreme Court concluded:

[S]ection 1106, subdivision (e), *may* permit admission of evidence that would otherwise be excluded under section 1106, subdivision (a). But such admissibility is subject to the procedures set out in section 783 and especially careful review and scrutiny under section 352. . . . [T]he Legislature devised section 783 to protect against unwarranted intrusion into the private life of a plaintiff who sues for sexual assault, by identifying and circumscribing evidence that may be admitted to attack such a person's credibility. Correspondingly, section 352, as applied in this setting, requires special informed review and scrutiny, designed to protect such a plaintiff's privacy rights and to limit the introduction of evidence concerning such a person's sexual conduct.<sup>3</sup>

While the Supreme Court ultimately found this heightened scrutiny lacking in this case, the author and sponsors argue that this "ruling underscore[s] the need for further clarification in the rape shield laws." They state:

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<sup>1</sup> *Doe*, 15 Cal. 5th at 46.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id* at 47.

Rape shield laws are designed to protect survivors from unnecessary and intrusive inquiries into their personal lives and sexual histories. Forcing survivors to disclose details about their intimate life or to relive traumatic incidents unrelated to the case in order to undermine their credibility can be as traumatizing as the assault itself. Allowing such evidence will have a chilling effect on survivors who come forward to hold perpetrators accountable, but who now fear having their personal sexual histories revealed if they do.

### 3. Extending the protections of California's rape shield law

In response to these concerns, this bill enhances and extends the restrictions in Section 1106. The bill provides that evidence of the plaintiff's sexual conduct is not admissible in order to attack the credibility of the plaintiff's testimony with regard to consent or the lack of harm suffered by the plaintiff.

The bill also extends the protections restricting the evidence to prove the "absence of injury" to now prohibiting it to prove the "lack of harm." This latter change is also made in the provision prohibiting evidence of sexual conduct between a minor plaintiff and a defendant adult in an action for sexual battery. The sponsors indicate this change is in response to oral argument in the *Doe* case discussed above that expressed some uncertainty with regard to this language. The Consumer Attorneys of California explain: "By changing the language from 'absence of injury' to 'lack of harm,' the intent is to clarify that Section 1106, subdivision (a), prohibits a defendant from introducing evidence of other sexual conduct to prove alternative sources for the harm suffered."

Currently the provision applying to minors provides a special procedure for introducing the sexual conduct evidence to attack the credibility of the minor plaintiff. The bill removes this special provision in light of the change highlighted above, thereby subjecting any such evidence to attack credibility to the procedures in Section 783.

According to the author:

Rape shield laws create a legal environment that prioritizes justice, fairness and the protection of survivors of sexual abuse. The legislature must protect the dignity of survivors and foster a supportive environment for them to come forward and seek the justice they deserve. SB 1386 will preserve the integrity of the civil rape shield law by protecting survivors and safeguarding their rights. As a society, we should make sure that victims of rape and sexual assault are protected to ensure the opportunity for fairness and justice within our legal system.

4. Stakeholder positions

The Consumer Attorneys of California and Equal Rights Advocates, co-sponsors of the bill, write:

Rape shield laws are designed to protect survivors from unjustifiably intrusive inquiries into their personal lives and sexual histories during legal proceedings. Engaging in the legal system can create new trauma for survivors in addition to—and compounding—the trauma of the underlying incident. For many survivors, having details about their intimate life unnecessarily thrust into the spotlight or being forced to relive other harm they endured can be as traumatizing as the assault itself, if not more so, deterring reporting and opening the door to harassing cross-examination when survivors do come forward. The trauma associated with sexual violence and related legal proceedings can affect every aspect of a survivor’s life, including their ability to work or learn. Because of the important function of these laws, the federal government and the overwhelming majority of states have passed some form of rape shield legislation.

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SB 1386 brings greater clarity to Evidence Code Section 1106, particularly the interaction between subsections (a) and (e). This clarification is necessary following a recent California Supreme Court ruling that created new uncertainty in civil rape shield protections. In *Doe v. Mountain View School District, Real Party in Interest* (2023) (“Mountain View”), the Court held that evidence of a survivor’s other sexual conduct may be admissible under Section 1106(e) for the purposes of impeaching their credibility as to consent or injury, even if that evidence would be otherwise excluded under Section 1106(a). This holding is inconsistent with the intent of the Legislature in enacting California’s civil rape shield law. Because the Supreme Court’s analysis was based on the statutory construction of Section 1106, clarity of the statute is now necessary.

Writing in support, the California Sexual Assault Forensic Examiner Association (CalSAFE) states:

CalSAFE represents the 48 sexual assault forensic examiner teams in California. We meet with victims in their most vulnerable hours post assault and then testify on these cases in court. We see first hand the court’s harsh treatment of victims. It takes so much courage for a survivor to take the stand about their assault. Our laws should support the brave survivors that do come forward more through the entire criminal justice process. SB 1386 will clarify that evidence of a victim’s other sexual conduct is not admissible to impeach their testimony as to consent or

damages. This bill will help protect the dignity of survivors by fostering a supportive environment for them to come forward and seek justice.

### SUPPORT

Consumer Attorneys of California (co-sponsor)  
Equal Rights Advocates (co-sponsor)  
California Sexual Assault Forensic Examiner Association  
Californians for Safety and Justice  
Oakland Privacy

### OPPOSITION

None received

### RELATED LEGISLATION

Pending Legislation: SB 894 (Min, 2024) removes the defense of consent in an action for sexual battery where the alleged perpetrator is a member of the clergy who is in a position of trust or authority over the victim, as provided. It also provides that a member of the clergy who is in such a position of trust or authority over an adult parishioner and who engages in specified sexual conduct with that adult parishioner is guilty of sexual exploitation by a member of the clergy, a criminal offense. Consent is not a defense in such an action. SB 894 is currently in the Senate Public Safety Committee.

Prior Legislation: SB 14 (Lara, Ch. 128, Stats. 2015) prohibits the use of consent as a defense in any sexual battery civil action involving a minor victim where the person committing the sexual battery is an adult who is in a position of authority, as defined. It prohibits the use of evidence of the minor's sexual conduct with the adult perpetrator, except in limited circumstances.

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