

RESOLUTION 06-01-2018

DIGEST

Evidence: Ban Questions Relating to and Admission of Prior Gender Identity as Prejudicial
Amends Evidence Code section 1103 to ban the admission of information regarding a complaining witness' prior gender identity into evidence.

STATEMENT OF REASONS

The Problem: Questioning and evidence regarding prior gender identity are being used to prejudicial effect in cases involving transgender individuals as complaining witnesses, despite the fact that questions about prior gender identity have little or no probative effect on these cases.

For example, in a case of assault and battery on a transgender woman by a male perpetrator, the line of questioning by the Public Defender or defense attorney can include questions regarding prior gender identity directed towards the transgender woman / complaining witness, such as: “Isn’t it true you were born a man?”; “Isn’t it true that some studies have shown that individuals can’t change their birth gender, and therefore, you are not a woman (man)?”; “Are you really a woman underneath?”, What kind of genitalia do you really have?; “Aren’t you really a man in a dress?”

These types of irrelevant questions are highly likely to cause the jury to be affected by undue prejudice, and they occur all too frequently in California courtrooms. No protections such as those offered by Evidence Code § 1103 for a complaining witness’s prior sexual history exist for prior gender identity, even though the same type of undue prejudicial effect arises from the questioning. This type of questioning unjustly shifts blame to and insults the dignity of complaining witnesses who are transgender individuals, thus discouraging transgender victims of criminal assault from being able to get relief from crime and injustice in the criminal justice system, even to the point of not seeking prosecution against their perpetrators, and making fair justice in transgender victimization cases brought before the court almost impossible to occur. To allow victim-blaming such as this to occur is contrary to justice and corrosive of our judicial system. These irrelevant and prejudicial questions work to deny transgender victims of criminal assault the protections of the laws.

The Solution: This resolution would prohibit prior gender identity questioning of transgender individuals by expressly prohibiting the introduction of unduly prejudicial evidence of information regarding prior gender identity in California court cases.

As far as a counterargument that a Motion In Limine to bar prior gender identity evidence as a pretrial motion is concerned, the nature of the prior identity questions in the case of transgender complaining witnesses must be considered. Many of the transgender victims of criminal assault in California are on the lower end of the economic scale, and such individuals may have no legal representation other than a day lawyer provided by the court, or pro per representation. Court-appointed counsel in this example may have no idea of the status of the transgender individual they are representing. A pro per transgender victim of assault may not understand what a Motion in Limine is, and how to petition the court about it.

Underneath all of these considerations is that transgender victims of assault don’t want to be “outed” and “trans-shamed” in court any more than victims of any type of sexual assault want to be “slut-shamed”. This resolution is designed to “trap” this demeaning line of prior gender identity questioning before it poisons the court cases of transgender victims with dire prejudicial effect.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Evidence Code Section 1103 to read as follows:

1 § 1103

2 (a) In a criminal action, evidence of the character or a trait of character (in the form of an
3 opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime
4 for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence
5 is:

6 (1) Offered by the defendant to prove conduct of the victim in conformity with the character or
7 trait of character.

8 (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

9 (b) In a criminal action, evidence of the defendant's character for violence or trait of character
10 for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of
11 conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to
12 prove conduct of the defendant in conformity with the character or trait of character and is offered after
13 evidence that the victim had a character for violence or a trait of character tending to show violence
14 has been adduced by the defendant under paragraph (1) of subdivision (a).

15 (c) (1) Notwithstanding any other provision of this code to the contrary, and except as provided
16 in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under
17 Section 286, 288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit,
18 or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to
19 have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined
20 in Section 4504, opinion evidence, reputation evidence, evidence of specific instances of the
21 complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in
22 order to prove consent by the complaining witness, and any evidence of the prior gender identity of the
23 complaining witness is not admissible by the defendant in order to prove consent, complicity, or
24 provocation by the complaining witness.

25 (2) Notwithstanding paragraph (3), evidence of the manner in which the victim was dressed at
26 the time of the commission of the offense shall not be admissible when offered by either party on the
27 issue of consent in any prosecution for an offense specified in paragraph (1), unless the evidence is
28 determined by the court to be relevant and admissible in the interests of justice. The proponent of the
29 evidence shall make an offer of proof outside the hearing of the jury. The court shall then make its
30 determination and at that time, state the reasons for its ruling on the record. For the purposes of this
31 paragraph, "manner of dress" does not include the condition of the victim's clothing before, during, or
32 after the commission of the offense.

33 (3) Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual
34 conduct with the defendant.

35 (4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining
36 witness as a witness gives testimony, and that evidence or testimony relates to the complaining
37 witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and
38 offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor
39 or given by the complaining witness.

40 (5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to
41 attack the credibility of the complaining witness as provided in Section 782.

42 (6) As used in this section, “complaining witness” means the alleged victim of the crime
43 charged, the prosecution of which is subject to this subdivision.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Evidence Code section 1103 to ban the admission of information regarding a complaining witness’ prior gender identity into evidence. This resolution should be approved in principle because an individual’s current or prior gender identity has no bearing on the individual’s consent to a criminal act.

Evidence Code section 1103 is commonly called the “Rape Shield” law and it prevents certain information, namely prior sexual conduct, from being presented to the jury regarding the consent of the victim to the alleged criminal acts. Evidence Code section 1103 does not necessarily preclude evidence of prior sexual conduct between the victim and defendant, but it does require that only relevant, pertinent facts are presented to the jury regarding the specific event in question and is intended to help prevent victim blaming or allowing extraneous information (e.g. what the victim was wearing, prior promiscuity) into evidence when the issue of consent is being determined.

Given the social stigma that often plagues the victims of rape or sexual assault, it makes sense to preclude the admission of evidence of the victim’s prior sexual conduct. It also makes sense to preclude the admission into evidence of the victim’s prior or current gender identity. An individual’s prior or current gender identity has no bearing on the consent of the victim to the criminal act and should be excluded. Introduction of this evidence would only confuse the jury and possibly cloud the issue with extraneous and irrelevant information.

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCIATION

This resolution seeks to amend Evidence Code section 1103 by adding to subdivision (c)(1) the bar to introduce any evidence of prior gender identity of the complaining witness “by the defendant in order to prove consent, complicity, or provocation by the complaining witness.” This proposed statutory prohibition is simply unnecessary. Proponents suggest that such evidence is not relevant in most criminal prosecutions where a transgender individual is the victim of a crime. Assuming arguendo that this premise is true, Evidence Code section 350 already mandates that only relevant evidence is admissible. Further, even if such evidence had some probative value, Evidence Code section 352 permits a court to exclude such evidence where it is unduly prejudicial or inflammatory. As an additional safeguard from the jury hearing such evidence, the admissibility of this evidence or even mention by way of counsel’s argument can be raised outside the presence of the jury through a motion in limine pursuant to Evidence Code section 402.

In support of this resolution, the proponents appear to imply that prosecutors are inept at raising the appropriate objections to this evidence, defense counsel does not conduct cross-examination in good faith and the court is unwilling to exercise its discretion when requested to do so. This is mere speculation on the part of the proponent. Many crime victims are members of a vulnerable class of individuals. All victims of a criminal offense are already entitled to protection and dignity in the criminal justice system. There is need no need to add another blanket statutory prohibition given the ample procedural and evidentiary safeguards already in place.