

## EVIDENCE (IS IT ADMISSIBLE?)

### Attack

#### IF CALIFORNIA CRIMINAL CASE, SET UP PROPOSITION 8 PREAMBLE BEFORE ANYTHING ELSE

- Proposition 8 is part of the CA Const. Prop 8 makes all relevant evidence in a criminal case **ADMISSIBLE**, even though objectionable under the California Evidence Code (CEC), unless it falls under certain exceptions.
- **[CHOP SUR]** Exceptions to Prop 8
  - Constitution – exclusionary rules based on U.S. Constitution (Confrontation Clause, Miranda violation)
    - The 14<sup>th</sup> Amendment DPC may prevent application of a hearsay rule when the rule would restrict the Δ's ability to mount a defense.
  - Hearsay – hearsay evidence remains inadmissible, and exceptions to hearsay are still admissible
  - Open the door – prosecution still prohibited from offering evidence of Δ's or V's character before Δ opens the door
  - Privilege – Attorney-client, spousal witness and marital communication, physician-patient, and all other privileges still apply
  - Secondary evidence rule – CA's version of Best Evidence Rule still applies
  - Unfair prejudice – preserves CEC 352, giving judge discretion to exclude if probative value is substantially outweighed by dangers
  - Rape shield statute – prevent Δ from offering evidence of V's sexual conduct to prove behavior, unless V's prior sexual conduct was with Δ. If P asks V about prior sexual conduct, Δ may x-exam and rebut
- **APPROACH** – If California court + criminal case → state Prop 8 → does an exception apply?
  - If exception applies, Prop 8 does NOT apply → analyze admissibility of evidence under ordinary CA rules
  - If exception does NOT apply, Prop 8 applies → evidence admissible under Prop 8 → analyze judge's CEC 352 discretion to exclude evidence if probative value is substantially outweighed by the danger of unfair prejudice.

#### FIRST THINGS TO CHECK FOR EACH ITEM OF EVIDENCE

- **Relevance**
  - Logical relevance for admissibility (not judicial notice or jury instructions) of each item
    - **FED:** Evidence must be relevant for it to be admissible. Evidence is logically relevant if it tends to make a material fact more or less probable than it would be w/o the evidence.
    - **[CA]:** Evidence must be relevant for it to be admissible. Evidence is logically relevant if it tends to make a material fact in dispute more or less probable than it would be w/o the evidence.
  - Legal relevance (FRE 403 / CEC 352) – Logically relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence.
- **Public policy exclusions to relevance**
  - Public policy – Subsequent remedial measures – Public policy encourages remedial measures (repairs or precautionary measures following a harm to prevent a similar incident. Evidence of subsequent remedial measures is **INADMISSIBLE** to prove fault, negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction; but **ADMISSIBLE** to (1) prove ownership or control, (2) demonstrate feasibility of precautionary measures, (3) demonstrate destruction of evidence, or (4) impeach a witness.
  - Public policy – Settlement offers – Public policy encourages people to settle disputes w/o fear that a settlement offer will be used as evidence against them in litigation. A settlement offer is **INADMISSIBLE** to prove (1) liability for, (2) invalidity of, or (3) amount of a (4) disputed claim, or (5) to impeach through a prior inconsistent statement.
  - Public policy – Offer to pay medical expenses
    - **FED:** Under the FRE, payment of, or an offer to pay, medical expenses are **INADMISSIBLE** to prove liability for injury, but admissions of fact in conjunction w/ an offer to pay medical expenses are **ADMISSIBLE**.
    - **[CA]:** In CA, an offer to pay medical expenses and admissions of fault in conjunction w/ an offer to pay medical expenses are both **INADMISSIBLE**.
  - Public policy – Liability insurance – Public policy encourages people to have insurance. Evidence that a person was or was not insured is **INADMISSIBLE** to demonstrate Δ acted negligently or wrongfully or has the ability to pay a substantial judgment; but **ADMISSIBLE** (1) to prove ownership or control, (2) to impeach, or (3) as an admission.
  - Public policy – Compromise and offers to compromise – Compromises and offers to compromise are **INADMISSIBLE** to prove liability for, or the invalidity of, a claim.
  - Public policy – Pleadings and plea discussions

# Past Bar Exam Answers California

**Sabine Zange**



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