# EVIDENCE (IS IT ADMISSIBLE?) Attack

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

- <u>Proposition 8</u> 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
  - <u>Constitution</u> 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
  - <u>Privilege</u> 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
  - <u>Unfair prejudice</u> 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 <u>probative value</u> is substantially outweighed by the danger of <u>unfair prejudice</u>, 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) <u>disputed</u> claim, or (5) to impeach through a <u>prior inconsistent</u> 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.
  - <u>Public policy Compromise and offers to compromise</u> Compromises and offers to compromise are INADMISSIBLE to prove liability for, or the invalidity of, a claim.
  - Public policy Pleas and plea discussions

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#### Table of Contents Past Bar Exam Answers California

- 1. Understanding the eBook Past Bar Exam Answers California
  - The Rise of Digital Reading Past Bar Exam Answers California
  - Advantages of eBooks Over Traditional Books
- 2. Identifying Past Bar Exam Answers California
  - Exploring Different Genres
  - o Considering Fiction vs. Non-Fiction
  - Determining Your Reading Goals
- 3. Choosing the Right eBook Platform
  - Popular eBook Platforms
  - Features to Look for in an Past Bar Exam Answers California
  - User-Friendly Interface
- 4. Exploring eBook Recommendations from Past Bar Exam Answers California
  - Personalized Recommendations
  - Past Bar Exam Answers California User Reviews and Ratings
  - Past Bar Exam Answers California and Bestseller Lists
- 5. Accessing Past Bar Exam Answers California Free and Paid eBooks
  - Past Bar Exam Answers California Public Domain eBooks

- Past Bar Exam Answers California eBook Subscription Services
- Past Bar Exam Answers California Budget-Friendly Options
- 6. Navigating Past Bar Exam Answers California eBook Formats
  - ∘ ePub, PDF, MOBI, and More
  - Past Bar Exam Answers California Compatibility with Devices
  - Past Bar Exam Answers California Enhanced eBook Features
- 7. Enhancing Your Reading Experience
  - o Adjustable Fonts and Text Sizes of Past Bar Exam Answers California
  - Highlighting and Note-Taking Past Bar Exam Answers California
  - Interactive Elements Past Bar Exam Answers California
- 8. Staying Engaged with Past Bar Exam Answers California
  - Joining Online Reading Communities
  - Participating in Virtual Book Clubs
  - Following Authors and Publishers Past Bar Exam Answers California
- 9. Balancing eBooks and Physical Books Past Bar Exam Answers California
  - Benefits of a Digital Library
  - o Creating a Diverse Reading Collection Past Bar Exam Answers California
- 10. Overcoming Reading Challenges
  - Dealing with Digital Eye Strain
  - Minimizing Distractions
  - Managing Screen Time
- 11. Cultivating a Reading Routine Past Bar Exam Answers California
  - Setting Reading Goals Past Bar Exam Answers California
  - Carving Out Dedicated Reading Time
- 12. Sourcing Reliable Information of Past Bar Exam Answers California
  - Fact-Checking eBook Content of Past Bar Exam Answers California
  - Distinguishing Credible Sources
- 13. Promoting Lifelong Learning
  - Utilizing eBooks for Skill Development
  - Exploring Educational eBooks

#### 14. Embracing eBook Trends

- Integration of Multimedia Elements
- Interactive and Gamified eBooks

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