

## APPROSHEETS | EVIDENCE

### If California criminal case: Set up Proposition 8 preamble before anything else

Proposition 8 is part of the CA Constitution. Prop 8 makes all relevant evidence in a criminal case admissible, even though objectionable under the California Evidence Code, unless it falls under certain exceptions.

- Does an EXCEPTION (CHOP SUR) apply? If yes (likely), analyze admissibility per ordinary CA rules

### First things to check for each item of evidence

- Describe logical relevance for admissibility (not judicial notice or jury instructions) of each item:

Evidence must be relevant for it to be admissible. It is relevant if it tends to prove or disprove a material fact ([CA]: "a material fact *in dispute*").

- Describe legal relevance (FRE 403 / CEC 352): *Probative value vs. unfair prejudice*
  - Exclusions based on public policy: subsequent remedial measure, offers to settle/pay meds, etc.
- Documentary evidence? Must meet authentication and best evidence rule ([CA] secondary evidence rule)

### Did someone testify?

- Who spoke? Judge & jurors are not competent to testify. Judge may provide proper judicial notice
- Did the witness have competency (personal knowledge)?
- Did the witness have an opinion? Lay witness vs. expert witness
- Was there an examination of a witness (transcript, question & answer)? [See [2009 FEB 3](#)]
  - If so, analyze both the question and the statement as one item of evidence
    - Discuss any objections to form of question/answer: leading, nonresponsive, speculative...
      - If a part of an answer is improper, note that counsel should assert motion to strike

### Is the evidence a statement (he said... she said... out of court)?

Hearsay is an out-of-court statement made by the declarant offered to prove the truth of the matter asserted. It is inadmissible upon proper objection unless an exemption or exception applies.

- Other purpose: Admissible if offered to show (instead of truth of the matter asserted): legally operative facts, effect of statement or state of mind, nonhuman source (e.g., animal, machine)
- Non-hearsay exemptions (party admission, prior inconsistent statement, prior consistent statement, prior ID) ([CA] These are still called "exceptions")
- Exceptions, applicable where declarant is unavailable (via PRISM: privilege, refusal, incapacity, someplace else, memory lacking)
- Exceptions, applicable where declarant is available or unavailable
- Multiple hearsay (X said Y said Z)? Check admissibility for each level of hearsay
- See if declarant can be impeached (discredited) based on: bias, motive to lie, defective memory or senses, prior inconsistent statement, prior bad act (dishonesty), poor reputation/opinion for truthfulness, convictions
- May also be character evidence, see below

### Does the evidence substantively (not to impeach) go to a person's traits (e.g., witness, defendant, victim)?

Character evidence: Character describes one's disposition with respect to general traits (good driver, trustworthy, etc.). Character evidence is inadmissible to prove conduct in conformity therewith. Just because [Δ] did [specific bad things showing similar character] before does not mean he did [charged act] in this case.

- Are there exceptions to introduce character evidence anyway (w/ reputation, opinion and/or specific acts)?
  - In a criminal case only:
    - After Δ opens the door (offers character evidence first)
    - MIMIC: to show other purpose (instead of to prove conduct in conformity)
  - Character is an element at issue (e.g., defamation, self-defense, child custody)
- Habit evidence? Look for words like "always," "every day" or "frequently"

### Is there a special relationship between a declarant and another person?

- Check your privilege: attorney-client, spousal testimonial vs. marital communications, therapist-patient
- Co-defendant: Any coconspirator admissions? A6 confrontation clause (overrides hearsay exceptions)?

