

## Question 6

Green's Grocery Outlet ("Green's") sponsors a lawful weekly lottery. For one dollar, a player picks six numbers. All persons who select the six winning numbers drawn at random share equally in the prize pool.

Each week, for the past two years, Andrew has played the same numbers—3, 8, 10, 12, 13, and 23—which represent the birth dates of his children.

On June 1, Andrew purchased his weekly lottery ticket. Barney, a clerk employed by Green's, asked, "The usual numbers, Andrew?" Andrew replied, "Of course."

Barney entered the numbers on the computer that generates the lottery ticket and gave the ticket to Andrew. Without examining the ticket, Andrew placed it in his pocket. Unbeknownst to either Andrew or Barney, Barney had accidentally entered the number "7" on the computer rather than the number "8."

The winning lottery numbers that week were Andrew's "usual" numbers. Much to his horror, Andrew discovered Barney's error when he showed his wife the "winning" ticket. Andrew filed suit against Green's seeking to reform his lottery ticket by changing the "7" to an "8." Green's cross-complained seeking rescission.

1. At trial, Green's objects to Andrew's testimony about (a) Barney's question, (b) Andrew's answer, and (c) Andrew's attempt to explain what the phrase "the usual numbers" means. Should the court admit the testimony? Discuss. Answer according to California law.

2. How should the court rule on each party's claim for relief? Discuss.

## **Answer A to Question 6**

1. How will the court rule on Green's objection to

a) Barney's question "The Usual Numbers, Andrew"

### Relevant

All evidence must be logically and legally relevant.

Logical: Under California Rules of Evidence, evidence is relevant if it tends to prove or disprove a disputed fact. In this case, Green is disputing the fact that there is a contract or the terms of the contract. Therefore, Andrew's testimony regarding Barney's statement tends to prove that Andrew bought the ticket from Barney and that the terms were for the usual numbers. Andrew can show this is logically relevant.

Legal: To be legally relevant the probative value should outweigh the prejudicial effect. The probative value in this case is that this tends to show Andrew bought the ticket and that he had a usual set of numbers. While this may be prejudicial, the probative value is high and outweighs the prejudice because it establishes the facts of the situation.

### Hearsay

Green will object that the evidence is inadmissible hearsay. Hearsay is an out-of-court statement made by a declarant used to prove the truth of the matter asserted.

### Out-of-Court Statement by a declarant

In this case Barney's question was made out-of-court and by Barney, therefore meeting this element.

### Truth of the Matter Asserted

The statements presented to prove what the statement is asserting. In this case Green will argue that Andrew is introducing Barney's statement to show that Barney knew about the usual numbers and that Andrew asked for the usual numbers.

### Act of Independent Legal Significances

Andrew will argue he is not introducing to prove the truth of the matter asserted, but rather to show that there was a contract created when Andrew got the ticket. At this point this statement does not provide a contract.

### Knowledge of facts stated

Andrew may also be using it to prove that he always purchased the same numbers and that Barney knew about his practice or habit. It is likely that Andrew can show this is not hearsay, but being used to show Barney had the knowledge of his usual numbers.

Even if this is being introduced for the truth of the matter asserted Andrew can see if it falls under an exception to the hearsay rule.

### Party-opponent admission

Admissions by a party-opponent are an exception to the hearsay rule. Vicarious admissions by an agent are only attributed to the principal if the statement was made in the scope of the agency and the principal would be liable.

In this case Green will argue Barney made a mistake, but Barney was doing his job within the scope of the agency and principals are liable for the mistake of their agents.

Andrew can show this was a party-opponent admission.

### Conclusion:

Barney's question is admissible evidence and the court should admit Andrew's testimony on this issue.

a) Andrew's answer

Relevant (see rule above)

Logical: (See previous rule.) Green may argue that the creation of a contract is not in dispute and Andrew's testimony only tends to prove the existence of a contract. Andrew will argue the testimony also refers to the question Barney asked and that he wanted his usual numbers. Andrew can likely show this is logically relevant because it tends to prove a disputed fact.

Legally: See previous rule: This is similar to the previous piece of evidence and tends to establish the facts of the incident and therefore the probative value outweighs the prejudicial effect.

Hearsay

Green will object that this testimony is hearsay. See previous rule. Green will assert that this is an out-of-court statement by Andrew to prove that he assented to the purchase of the lottery ticket which is the contents of his statement.

Independent Legal Significance

Andrew can show in this case as previously discussed that his statement created a contract and is therefore not being used to prove the truth of the matter asserted, but rather to prove the formation of a contract. Andrew's assent in this case does form a contract and is therefore not hearsay.

Party-opponent Exception (See previous rule)

In this case the statement is by Andrew and not a party-opponent because Andrew is testifying and Andrew is not the opponent against Andrew himself. So this exception does not apply.

## Conclusion

Andrew's testimony about his own statement should be ruled admissible because it is not hearsay and is relevant.

### b) Andrew's explanation of "usual numbers"

#### Relevant:

Logical: This is the issue in dispute. Therefore Andrew's testimony is highly relevant.

Legal: In this instance, this testimony is highly prejudicial to Green and therefore might be excluded. However it is also the main issue of the case and its probative value outweighs its prejudicial effect.

#### Character Evidence

Evidence of a person's character cannot be used to show they acted in conformity therewith on a particular occasion.

In this case Green will argue that the introduction of this evidence is trying to show Andrew acted similarly as he had on other occasions.

#### Habit

Evidence that shows specific instances of conduct to prove that they have a regular habit are allowed. Andrew will argue that in this case he is establishing a habit he has had every week for the past 2 years. Andrew can likely show this is habit evidence and not character.

#### Parol Evidence

Green may argue that the evidence violates the parol evidence rule because it is evidence prior to formation of an integrated contract to contradict the terms of that contract.

Andrew will likely be able to introduce this because he is trying to show a mistake and not to contradict the terms of an integrated contract. In this case there was a mistake Barney made and Andrew is trying to prove the mistake.

### Conclusion

The court should rule that this evidence is admissible.

## 2. How should the court rule on each party's claim for relief?

### Reform

The court will grant reformation of a contract when each party knew what the terms were and they both had the same mutual mistake.

Green will argue that Andrew had the opportunity to look at the ticket and negligently failed to do so and therefore assumed the risk of the ticket being wrong. Andrew will argue the prior course of dealing with Barney and Green establishes that lottery ticket was supposed to contain a seven instead of an eight.

### Rescission

The court will assert rescission when there is evidence the contract was not valid or lacked assent on a material term.

Green will make the same argument that there was no meeting of the minds and as such the contract should be rescinded. Andrew will argue that this was just a transcription error and does not rise to a level warranting rescission of the contract.

### Conclusion

The court should reform the contract because there is evidence that the mistake was mutual, but the mistake was a transcription rather than the objective belief of the parties. Both Barney and Andrew thought that the ticket should contain one number eight and not seven. The court should reform the contract.

## **Answer B to Question 6**

(1) Green's (G) objections to Andrew's (A) Testimony

### **(a) A's testimony re Barney's (B's) question**

Green will object to A's testimony re B's question as irrelevant and inadmissible as hearsay.

Under California law, evidence is relevant if it has any tendency to make a disputed fact of consequence to the action more or less likely to be true. In this case, A is suing Green for breach of contract, and there is a dispute between the parties as to the terms of that contract (i.e., the lottery numbers A picked). As a result, A's testimony about B's question is relevant because it goes to whether A & B agreed about the numbers that should be on A's lottery ticket, and if so, what A & B agreed to, both of which are disputed facts in this case.

Under California law, a relevant statement may nonetheless be excluded if it is substantially more prejudicial than probative, a waste of time, or likely to confuse the jury. The probative value of B's question here outweighs any potential prejudice or confusion.

Under California law, hearsay is an out-of-court statement offered for the truth of the matter asserted. In this case, B's question to A is an out-of-court statement because it was made before the suit on the day that A bought the lottery ticket in question. But A will argue, persuasively, that he is not offering B's question for the truth of the matter asserted. A will argue that he is offering B's statement to establish a verbal act -- the fact that B asked A the question, "The usual numbers, Andrew?" As such, the statement is being offered for a non-hearsay purpose because it is not being offered to prove the truth of the matter that Andrew asked for the usual numbers.

A could also argue that B's question should be admitted for the truth of the matter because B's question shows B's then-existing mental condition, an exception to the hearsay rule. A will argue, persuasively, that B's questions shows that B knew that A wanted A's usual numbers.

A could also argue that B's question is offered for the effect it had on A, the listener, another non-hearsay purpose. Under this argument, A is offering B's question to show that A inferred from B's statement that B knew A's usual numbers.

A could also argue that B's statement is admissible hearsay in California because it is an admission of a party. Green will argue that B is not a party to the case, but A can persuasively respond that Green should be bound by B's statements because B was acting within the scope of his employment when he made them, i.e., part of B's job is to sell lottery tickets to customers.

**(b) A's testimony re A's answer**

B will argue that A's answer is irrelevant and inadmissible hearsay.

A will argue that his answer is relevant because it goes to the disputed facts of whether A & B agreed to the numbers in A's lottery ticket, and what those numbers were. Moreover, A will argue that his answer has great probative value because [it] is directly related to a key disputed fact in the case, i.e., what numbers A & B agreed to put in A's lottery ticket. A's answer is relevant for those reasons.

B will argue that A's statement was made out of court -- on June 1 -- and is being offered to prove the truth of the matter asserted, that A asked for his usual numbers.

A will also argue, persuasively, that his answer is not offered for hearsay purpose because he is not offering it for the truth of the matter asserted. Rather, it is being offered as a verbal act -- agreement to the offer from B. Alternatively, A could argue



that A's answer is being offered for the non-hearsay purpose of showing the effect on the listener B, i.e., that B understood that A wanted his usual numbers.

A's answer will be admissible on these grounds.

**(c) Andrew's attempt to explain what "the usual numbers" means**

B will argue that A is attempting to offer parol evidence regarding the terms of the contract in violation of the parol evidence rule.

The parol evidence rule excludes evidence extrinsic to a contract where that contract is considered a final, or integrated writing. There are exceptions to the parol evidence rule, including to show a clerical error.

Here Green will argue that any testimony regarding what "the usual numbers" means is extrinsic evidence because the lottery ticket is the contract, and there is no evidence within the ticket regarding what A's usual numbers are.

A will argue, persuasively, that parol evidence should be admitted in this case to prove that B made a clerical error in entering A's numbers into the computer that generated A's ticket, the contract. A's testimony on this point will be allowed under the clerical error exception to the parol evidence rule.

(2) The parties' claims for relief

**Reformation**

Reformation is an equitable remedy that is available where one party can show, among other things, a unilateral mistake of material fact that caused A irreparable harm.

In this case, A will argue that he is entitled to reformation because he suffered irreparable harm as a result of B's unilateral mistake -- a clerical error in entering his

usual lottery numbers. A will argue that Green should be bound by B's error because B is Green's agent and was acting within the scope of his employment at the time of B's mistake. And A will argue that he was irreparably harmed by B's mistake because but for B's mistake he would have won the lottery, and that A's harm was foreseeable because only a ticket that has all the winning numbers will win the lottery, and it is foreseeable that a clerical error in entering one number could cause a party to lose a lottery he otherwise would have won.

Green will argue that A is not irreparably harmed, because Green can refund A the price of the lottery ticket, and that there was no mistake because the numbers A paid for are the numbers that are clearly printed on his lottery ticket. Moreover, Green will argue that A does not have clean hands, because he could have and should have confirmed that the right numbers were on his ticket, and that by failing to do so, A waived his right to complain after the fact that he got the wrong numbers.

### **Rescission**

Green will argue for rescission because there was no meeting of the minds as to a material term of the contract. Rescission is an equitable remedy available where one party can show, among other things, mutual mistake of fact. Here Green will argue that there was a mutual mistake of fact as to what numbers A wanted on his lottery ticket, and that therefore there was no meeting of the minds required to form a valid contract. Green will argue that B thought A wanted the number 7 on his ticket, and A wanted the number 8 on his ticket, and that the numbers on the ticket were material elements of the contract between Green and A. As a result, there was no meeting of the minds as to a material term of the contract, and the contract should be rescinded.

A will argue that there was a meeting of the minds based on the question and answer between B and A -- "The usual numbers, Andrew?" "Of course." A will argue that B's question shows that B knew A's usual numbers and offered A a ticket with those numbers. A will argue that A accepted B's offer of those numbers, and that there was

consideration in A's payment of the price of the lottery ticket and Green's promise to pay A the winnings if the numbers of A's ticket matched the winning numbers.

This is a close question, but in this case, because all of the testimony discussed above is admissible and support's A's position, a court would likely find that A is entitled to reformation and B cannot rescind the contract. A wins the lottery.