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Essay 5

Question 1

Admissibility of a photocopy of the advertisement as evidence

- **Best Evidence Rule**

Evidence are testimonies, documents, scripts, videos or tangible things that are provided to the court or tier of truth to assert the truth that the claimant is trying to establish. Based on the nature of evidence, there are rules which set forth what evidence must be submitted in which form to courts to be admissible. Under the best evidence rule (BER), if evidence is submitted where the document is presented to establish to the truth of the facts contained therein, the original document must be submitted as evidence. In cases where the original cannot be presented, it is possible to submit an authenticated copy of said evidence, including a photocopy.

- **Hearsay**

Under the FRE, an out of court statement made by a declarant to prove the truth of the fact asserted is inadmissible hearsay unless it falls within an exception category. Out of court statements may be brought to court with reasons other than proving their truth, in which case they may fall within hearsay exemptions (meaning they are non-hearsay). Hearsay applies to declarations of a declarant and not to real evidence. Evidence which is inadmissible as hearsay to prove the truth of the content it contains may regardless be admissible for the impeachment of witnesses. The opposing statement of a party is not considered hearsay and is admissible for the truth of its statement, not just for impeachment.

Here, Pedro is submitting into evidence a photocopy of the Gallery's advertisement which states that the Gallery misrepresented the painting as the only original painting by a noted 17th century artist available for sale in the world. Pedro aims to establish his claim of fraud, namely the Gallery's intentional misrepresentation of the nature of the painting, through the advertisement. The advertisement contains a declaration of the Gallery as to the characteristics of the painting. Here, the advertisement is an opposing party statement, since it is the Gallery openly endorsing the painting as being an original 17th century artist painting. While this is an out of court declaration, it is not hearsay. Additionally, if Pedro is unable to obtain the original of the advertisement, based on the BER, he may provide a duly authenticated photocopy to court. The court should admit the photocopy of the advertisement into evidence.

Question 2

- **Layman opinion witnesses**

A witness to a case is permitted to provide their own perceptions or opinions regarding questions asked when being direct or cross examined. Furthermore, witnesses may be called to provide opinions in cases. A witness may provide a layperson opinion, meaning they provide their own understanding and perception of an issue. On the other hand, expert witnesses may

also be called to testify. Expert witnesses are persons who have technical, scientific, artistic or professional knowledge about a specific subject and may provide opinions based on such specialized knowledge. In both cases, experts who provide opinions must appear in court as witnesses to testify and be available for cross-examination.

Here, Pedro is being asked what he believes the painting is worth, and he states that based on appraisal of the painting by art dealers, his personal valuation is that the painting is worth \$10,000. Pedro's statement as to the valuation of the painting, even if based on appraisals by dealers is his personal opinion and should be considered a layman expert witness. Pedro is not required to have specific expertise as his personal opinion of the valuation of the painting, and his testimony as to the value of the painting should be admissible, as he is not asserting the truth of what the out-of-court three appraisals brought forth but rather his personal opinion based on such information. The trier of truth in this case could reasonably agree with Pedro's personal valuation. Pedro is also available at trial and can be cross-examined by the opposing party, so his testimony should be admitted.

Question 3

- **Expert witnesses**

See above for rule on expert witnesses. In cases where an expert witness applies a scientific method to come to a conclusion about an issue at hand, the court must ensure that the following criteria are met: (i) the scientific method is widely accepted within the scientific community as standard for similar assessment, (ii) the method is peer-reviewed, (iii) the implementation of the method has been conducted in a manner acceptable based on the standard, (iv) the expert has implemented the method before and there is no reason that would lead the expert to believe the standard would lead to an incorrect assessment of the question at hand.

Here, Rex is providing expert witness based on his scientific evaluation of the age of the painting. He states that the XYZ method is reliable and used by most experts and he has used this method to come to the conclusion that the painting had been painted within the last 50 years, satisfying overtly and impliedly the points above. In addition, Rex was available for cross-examination by the Gallery. Therefore, Rex's expert witness testimony as to the age of the painting should be admitted by the court.

Question 4

- **Pleices (scientific/technical reliable authorities)**

See above for rule on hearsay. In cases where there is an authoritative document which has been widely accepted as an authority on a specific scientific, technical, professional matter, it is possible to read into evidence an excerpt of said authority without such reading being inadmissible hearsay. This exception is provided to be able to give the trier of fact the opportunity to ingest objective information regarding a scientific, technical, professional matter straight from the expert source, as said document/book is accepted as authority. In such cases, a witness may read an excerpt from such a reliable source into evidence. Both the reading into evidence, and the excerpt from the authoritative source may be admitted as evidence. If the excerpt has been submitted into evidence to impeach a previous witness, then the previous witness must be given the opportunity to rebut such impeaching evidence, and if not provided, while the reading

of the witness may be accepted into evidence, the excerpt may not.

Here, Marie, an expert witness of the defendant Gallery has read an excerpt from an authoritative publication entitled "The Science of Dating Works of Art" into evidence. This evidence was submitted to disprove Rex's witness opinion by discrediting his technique. It is permissible for the evidence to be submitted but since the aim is to discredit and ultimately impeach Rex, Rex must be able to take the stand to respond to the contents of the evidence submitted. Here, Rex has been excused and left the courtroom. Therefore while the reading into evidence by Marie should be admitted into evidence, the excerpt should not be admitted unless Rex has the opportunity to reestablish his credibility.

Question 5

- **Prior inconsistent statement**

A prior inconsistent statement is an statement made by a declarant, either in the same trial or as an out of court statement. Prior inconsistent statements may be used to impeach a witness, or in cases where it is not an out of court statement, or if it is it falls within a hearsay exception, may be used to assert the truth of the statement contained. A prior inconsistent statement of a witness must be used during cross-examination of the witness unless the statement is only obtained by the using party after the witness's testimony and reasonably could not have been found earlier.

Here, the Gallery is offering into evidence a journal article authored by Rex to prove that the XYZ technique was not reliable for determining the age of works of art. This statement is inconsistent with Rex's expert witness testimony that he used XYZ technique to determine that the painting was a reproduction. The facts do not state that the Gallery could not have obtained this journal article before Rex's testimony at court when he was also cross-examined by the Gallery. The Gallery was required to bring for this article, alleged prior inconsistent statement, during Rex's testimony to either impeach Rex or assert the truth contained therein. As the Gallery had ample time to cross examine Rex and this statement is an out of court statement of a declarant, Gallery effectively waived their right to offer this statement into evidence. The article should not be admitted into evidence by the court as it is inadmissible hearsay.

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