

After a fire destroyed her home, a plaintiff sued the insurance company that insured the home for the proceeds of her policy. The company claimed that the policy had lapsed.

At trial, the plaintiff admits that she failed to make a timely premium payment; however, she cites a policy provision that required the company to give her notice that it had not received the premium by a specified date and testifies that she never received such a notice. The company then calls its chief billing clerk, who is prepared to testify that, because of the plaintiff's unusual name, the clerk remembers preparing the plaintiff's notice and placing it in the "out" box on his desk, and that an employee from the company's mailroom daily picks up all mail from office "out" boxes and places it in a U.S. mail deposit box.

How should the court rule on the admissibility of the billing clerk's testimony?

- A. It is admissible only if the company produces corroborative evidence, such as a mailing checklist.
- B. It is admissible without more, because it is evidence of the routine practice of a business.
- C. It is inadmissible, because evidence of the mailroom employee's general practice does not prove the particular mailing.
- D. It is inadmissible, because the billing clerk lacks personal knowledge of the actual mailing.

### **Explanation:**

Evidence of a person's habit or an **organization's routine practice** (eg, sending daily mail) is **admissible to prove** that the person or organization **acted in accordance** with that habit or practice on a particular occasion (eg, mailed plaintiff's notice of nonpayment) **(Choice C)**. Both habit and routine practice can be proven by evidence of:

specific instances of conduct that tend to show a regular response to a specific, recurring situation *or*

opinion testimony of a witness with **personal knowledge** of the habit or routine practice.\*

This evidence is admissible regardless of whether it is corroborated (eg, by a mailing checklist) or an eyewitness was present on the particular occasion **(Choice A)**.

Here, the billing clerk testified to placing the plaintiff's notice in the "out" box on his desk. And he had personal knowledge of the mailroom's daily process for picking up mail from "out" boxes and placing it in a U.S. mail deposit box. Therefore, the clerk's testimony is admissible without more as evidence of the company's routine business practice.

\*The proponent of habit or routine practice evidence has the burden of establishing that the habit or practice is inflexibly regular by demonstrating an adequate and representative sample.

**(Choice D)** The billing clerk need only have personal knowledge of the company's routine mailing practice—not the actual mailing of the plaintiff's notice—for his testimony to be admissible.

### **Educational objective:**

Evidence of a person's habit or an organization's routine business practice is admissible to prove that the person or organization acted in accordance with that habit or practice on a particular occasion—even if the evidence is not corroborated and no eyewitness was present on that occasion.

### **References**

Fed. R. Evid. 406 (habit and routine practice).

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**Proving typical response to recurring situation**  
(FRE 406)

*Person's habit*



FRE = Federal Rule of Evidence

*Business's routine practice*



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