

A construction company sued a developer for money owed on a cost-plus contract that required notice of proposed expenditures beyond original estimates. The developer asserted that it never received the required notice. At trial the construction company calls its general manager to testify that it is the construction company's routine practice to send cost overrun notices as required by the contract. The manager also offers a photocopy of the cost overrun notice letter to the developer on which the construction company is relying, and which he has taken from the construction company's regular business files.

On the issue of giving notice, is the letter copy admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because it is not the best evidence of the notice.
- C. Yes, because of the routine practices of the company.
- D. Yes, though hearsay, under the business record exception.

Explanation:

Under Federal Rule of Evidence 406, evidence of an **organization's routine practice** is **admissible to prove** that the organization **acted in accordance** with that practice on a particular occasion. Any witness who is familiar with the organization (eg, the construction company's manager) can testify regarding the existence of a routine practice (eg, the company routinely sends cost overrun notices). And that testimony can supply the basis for the introduction of evidence consistent with that practice (eg, the copy of the cost overrun notice letter).

(Choices A & D) Hearsay is an out-of-court statement offered to prove the truth of the matter asserted therein and is inadmissible absent an exclusion or exception. Here, the letter copy is *not* hearsay since it is being offered to prove that the company gave notice—not that there was a cost overrun (the matter asserted). But it would probably be admissible under the [business records exception](#) if it *were* being offered to prove the truth of the matter asserted.

(Choice B) The best evidence rule generally requires that an original writing or a reliable [duplicate](#) (eg, the letter copy) be produced to prove its contents. As a result, this rule would not block the introduction of the letter copy. Additionally, this rule does not apply since the letter copy is being used to prove notice—not its contents.

Educational objective:

Under Federal Rule of Evidence 406, evidence of an organization's routine practice is admissible to prove that the organization acted in accordance with that practice on a particular occasion.

References

Fed. R. Evid. 406 (habit; 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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