

## Question MEE 3 – February 2024 – Selected Answer 1

### **1. The issue is whether the trial court erred by denying Dana an opportunity to be heard before it took judicial notice of the weather conditions on October 18.**

Under FRE 201, when a party requests that the court take judicial notice of an adjudicative fact, the opposing party has a right to be heard. When the party requests an opportunity to be heard, FRE 201 states that the court "must" give the party opposing the judicial notice an opportunity to be heard. Therefore, the trial court erred when it denied Dana that opportunity to be heard before it took judicial notice.

### **2. The issue is whether the trial court took judicial notice of the weather conditions on October 18.**

Under FRE 201, a party can request the court to take judicial notice of an adjudicative fact (as opposed to legislative facts) that is either (1) a commonly known fact in the jurisdiction (e.g., that IH-35 runs through Austin) or (2) a readily ascertainable and verifiable fact from a trusted or accurate source. When the court takes judicial notice in a civil trial, it must instruct the jury that it "must" accept the fact as true.

In this case, Cara asked the court to take judicial notice of the weather conditions as they were on October 18 based on a certified public record from the federal government's National Weather Service agency. The weather on a specific date is an adjudicative fact that can be decided by the jury but it is not a commonly known fact in a given jurisdiction. But the weather is a readily ascertainable and verifiable fact that can be proven by a trusted or accurate source such as the National Weather Service Agency. The data must be based on the jurisdiction that the court sits and the court must have sufficient evidence that the source is on the same day and time. Here, the weather data was for the gym located in the court's jurisdiction and at the time the data is for. Therefore, the trial court did not err by taking judicial notice that the weather on October 18 was rainy and the high temperature was 41 degrees in the area of the gym.

### **3. The issue is whether Dana's testimony that Cara was "careless" is inadmissible as character evidence.**

Under FRE 404, evidence is inadmissible to prove that a party acted in conformity with a particular character trait. In other words, evidence that shows that a party has a propensity to act in one way is inadmissible to prove that they acted in conformity with that character trait on the day and issue in question.

Here, Dana testified that Cara is "pretty careless." This testimony that Cara is "careless" is evidence of Cara's character trait to prove that Cara probably acted careless on the day on the day her phone was stolen or misplaced.

In a criminal case, character evidence may be admissible for other limited purposes such as to prove that a defendant's motive, intent or plan, or to show there was opportunity or absence of mistake. However, this case, this is a civil suit and so character evidence is not available for these limited purposes.

**4. The issue is whether Dana's testimony that Cara often misplaced or forgot her cell phone was inadmissible character evidence or whether it was admissible as habit evidence.**

Under FRE 404, evidence is inadmissible to prove that a party acted in conformity with a particular character trait. In other words, evidence that shows that a party has a propensity to act in one way is inadmissible to prove that they acted in conformity with that character trait on the day and issue in question. In this case, Dana testified that Cara often misplaced her phone or "forgot it in the conference room after a meeting or in the break room after lunch" is being offered to show that Cara acted in accord with her character trait on the day she claims her phone was stolen by Dana. Because it is being used to show Cara's propensity to act a certain way, the evidence is inadmissible character evidence.

But evidence that a person acted in accordance with their routine is admissible as habit evidence. To constitute habit evidence, the person's actions must be of an involuntary nature such that they act in a similar fashion without thinking (e.g., a person puts on their seat belt every time they get in the car and drives a specific route to work would be admissible as habit evidence). Here, Dana testified that Cara "often misplaced" her phone or "forgot it in the conference room after a meeting or in the break room after lunch." Though this is an involuntary act such that Cara would do it without realizing it, the fact pattern does not provide enough facts to suggest that this was a habit that occurred every work day. Instead, Dana testified that this "often" happened, meaning it probably does not constitute a habit because it probably did not happen every single time that they had a meeting. Consequently, the testimony is not admissible as evidence of Cara's habits.

**Question MEE 3 – February 2024 – Selected Answer 2**

**1. The trial court did err by denying Dana an opportunity to be heard before it took judicial notice of the weather on October 18.**

The issue is whether the trial court could take judicial notice of the weather on October 18 before giving Dana an opportunity to be heard.

Under the law, judicial notice occurs when courts instruct the jury to take something as fact without wasting precious court time proving something to be true, either through the course of witness testimony or by presenting some other evidence at trial. Courts are permitted to take judicial notice of certain pieces of information that are not subject to reasonable dispute in the geographic region.

Such information can include the weather on a date, what day a date falls under, or any other analogous fact that would not be subject to reasonable dispute. Judicial notice is permitted in civil cases but judicial notice is not allowed to be taken immediately based solely on one party's unilateral representations. The trial court must give the other side an opportunity to be heard, and if the other party does not object to the other party's representations for why judicial notice is proper, then the court can take judicial notice of a fact.

Here, the court took judicial notice of the weather on October 18 without giving Dana an opportunity to be heard. It is stated that Dana had an objection and asked to present an argument for why the court taking judicial notice of the weather on October 18 would be improper. It is not stated what Dana's argument would be so it is not clear whether the argument is frivolous or would have succeeded which would be important considerations if the court had heard her argument at all.

However, what is dispositive here is that the trial court did not allow Dana an opportunity to be heard on this issue at all. The court did not hear Dana's argument then overrule her objection based on her argument. The court could have heard that Cara fraudulently fabricated the certified report or that some error was discovered and relayed. However, the error is not that they overruled Dana's objection, whatever the grounds for her argument. The error is that the trial court denied her an opportunity to be heard altogether.

Therefore, the trial court erred by denying Dana an opportunity to be heard before it took judicial notice of the weather on October 18.

**2. The trial court did not err by taking judicial notice of the weather on October 18, assuming it was proper for the court to deny Dana an opportunity to be heard.**

The issue is whether it was proper of the court to take judicial notice of the weather on October 18, assuming that the trial court did not err by denying Dana an opportunity to be heard.

Under the law, judicial notice occurs when courts instruct the jury to take something as fact without wasting precious court time proving something to be true, either through the course of witness testimony or by presenting some other evidence at trial. Courts are permitted to take judicial notice of certain pieces of information that are not subject to reasonable dispute in the geographic region. Judicial notice is permitted in civil cases when it can be shown that the fact is not subject to reasonable dispute which would make "proving up" that fact at trial a needless waste of time and resources.

Here, Cara presented a certified public record from the federal government's National Weather Service Agency. Certified public records would be a sufficient method of demonstrating that a certain fact is not subject to reasonable dispute. This certified report by a federal agency qualified in making weather reports would likely, barring any specific evidence showing that the evidence should not be trusted, be sufficient for judicial notice. The report was specific in providing a weather report for October 18 in the area where the gym was located at the time Cara testified that she was present at the gym.

Granted, the trial court did not give Dana an opportunity to be heard--but assuming that this denial was not erroneous--there are no facts indicating that a certified public weather report for a specific time, date, and location from a federal agency should not be sufficiently trustworthy to be worthy of judicial notice. This is also a civil trial so the court is allowed to take judicial notice and require the jury to take the fact as true, unlike in a criminal case.

Therefore, the trial court did not err by taking judicial notice of the weather on October 18.

### **3. Dana's testimony that Cara was "careless" was inadmissible character evidence.**

The issue is whether describing Cara as "careless" qualifies as inadmissible character evidence.

Under the law, character evidence is prohibited. Character evidence is proffered evidence that shows a person had a propensity to commit a certain act because of their character. A propensity argument tends to show that "because a person is X" they are "likely to do Y" which biases a jury against them without providing sufficient evidence to support the elements of a claim. There are permissible exceptions to the character rule if it is not being used to show propensity. The exceptions are motive, identity, absence of mistake, and common scheme.

Here, Dana is offering testimony that Cara is "careless." Carelessness alone qualifies as character evidence because it demonstrates that a person has a propensity to be careless so they must always be careless. She is also clearly using it to show propensity, instead of using it for a non-propensity purpose. There are no facts showing a motive for Cara losing her phone, just that she must have been careless in losing her phone. There is no evidence that the carelessness was related to uncovering Cara or the perpetrator's identity. There is no evidence that this is an absence of mistake, based on previous occurrences, or some sort of common scheme. It is simply being offered that Cara has a propensity for "carelessness" so she must have been careless with her phone.

Therefore, Dana's testimony that Cara is "careless" is inadmissible character evidence.

#### **4. Dana's testimony that Cara often misplaced or forgot her cell phone was inadmissible character evidence.**

The issue is whether describing Cara as "careless" qualifies as inadmissible character evidence.

Under the law, character evidence is prohibited. Character evidence is proffered evidence that shows a person had a propensity to commit a certain act because of their character. A propensity argument tends to show that "because a person is X" they are "likely to do Y" which biases a jury against them without providing sufficient evidence to support the elements of a claim. Character evidence can be distinguished from habit evidence.

Habit evidence is permissible but it requires a showing that a person does a certain act so routinely under certain conditions that it becomes "semi-automatic." Habit evidence shows that a person performs a particular act under specific circumstances instead of showing they had a general propensity to do or be something.

Here, Dana tried to offer testimony that Cara "often misplaced" her phone or that Cara would forget it in a conference or break room. Dana's explanation of Cara "often misplacing" her phone is not sufficiently particular enough to qualify as habit evidence. Making broad statements of Cara forgetting her phone in conference or break rooms may have been an attempt to show habit evidence but it does not rise high enough to the standard of her habit being "semi-automatic."

Dana did not say that Cara, for example, always misplaced her phone on the conference room table on Wednesday afternoons after the weekly budget meeting. This sort of example may likely rise to the level of habit evidence. However, the

testimony provided that Cara often misplaced her phone on random occasions at random times under no particular set of circumstances is not enough to overcome the prohibited character "careless" remark.

Therefore, Dana's testimony that Cara often misplaced or lost her phone was inadmissible character evidence.

### **Question MEE 3 – February 2024 – Selected Answer 3**

#### **1. The trial court erred by denying Dana an opportunity to be heard before it took judicial notice of the weather on October 18.**

Even though the court is able to take judicial notice of a fact that is common knowledge or in easily-available public record - such as the weather in a particular place on a particular day - the trial court erred by denying Dana an opportunity to be heard before it took judicial notice of the weather at the gym on October 18. For the court to take judicial notice of a fact, it must be established that the fact is common knowledge and is not subject to dispute or a plurality of opinions and interpretations. In order to do so, the other side must be given an opportunity to object and be heard so the court can properly determine whether judicial notice is appropriate or the fact is genuinely in dispute. It would be inappropriate for the court to take judicial notice of a fact and thereby accept it as true without allowing both sides an opportunity to be heard as to why judicial notice should or should not be taken. Here the court did not give Dana's objection an opportunity to be heard and therefore erred.

#### **2. The trial court did not err by taking judicial notice of the weather on October 18 after considering the evidence of the certified public record of the weather conditions from the federal government's National Weather Service agency.**

The court may take judicial notice of a fact that would be within the body of common knowledge and not open to plurality of opinions or interpretations. Facts such as what the weather conditions were on a particular day in a particular and reasonably specific location such as the gym where the alleged theft of Cara's cellphone is claimed to have occurred would be just such a fact that the court would be within its right to take judicial notice of. By taking judicial notice the court is accepting the information presented as fact and would instruct the jury to do the same. It would not be plain error or an abuse of discretion for the trial court to take judicial notice of the weather of the gym's location on October 18.

**3. Dana's testimony concerning Cara's "carelessness" is too broad and all encompassing of an adjective to provide useful information to the fact finders and does not meet any of the exceptions to impermissible character evidence under the Federal Rules of Evidence.**

The Federal Rules of Evidence generally do not permit evidence of a party's character to be introduced for the purpose of trying to establish that a party acted in a particular way on a particular occasion, subject to a few exceptions. Some examples of exceptions to the bar of character evidence are if the evidence is introduced to show a party's motive or intent, their identity, the absence of a mistake on their part, or that the incident at issue was part of a common scheme. At times, party's may also be permitted to introduce evidence of a witness' character for truthfulness in order to establish their testimony as credible or not credible.

Carelessness, however, is not one of the permitted exceptions to the bar against character evidence. It is too broad and all encompassing of a description to show motive, identity, etcetera, to meet any of the exceptions permitted by the Federal Rules. Dana's testimony that Cara was "careless" is inadmissible character evidence and an improper attempt to show that Cara operated in a particular way on a particular occurrence.

**4. Dana's testimony of Cara's frequent practice of misplacing or forgetting her cellphone behind her would not fit the exception to the bar on character evidence under the Federal Rules of Evidence for habitual behaviors.**

One of the narrow exceptions to impermissible character evidence under the Federal Rules of Evidence is evidence concerning a person's habitual behavior. In order to meet the standard for this exception, the behavior must be so ingrained as to be almost automatic, such as a person washing their hands every time they use the restroom, or putting on gloves every time they enter the laboratory. If permitted, this evidence could be used to show that it is more likely than not that the person acted according to their habit, even if witnesses may not have a specific recollection of the habit on a particular date.

Here, Dana's testimony that Cara "often misplaced" her phone at work, "or forgot it in the conference room after a meeting or in the break room after lunch" is too general to fit this narrow exception for habits. The gym is not the same environment as work, so even if it is true that Cara often misplaced or lost her phone at the office, it does not logically follow that she would behave in the same way at the gym. Similarly, just because someone does something "often" is not the same as having a habit consistent enough to be an exception to the bar on character evidence permitted

by the Rules. In order to be a permitted exception, the evidence would need to be of Cara always leaving her phone behind her when she leaves a room, or would need to be something habitual that she did specifically at the gym.

Dana's testimony concerning Cara's actions of often misplacing her phone or forgetting it behind her at work is not specific or predictable enough to meet the standard for evidence of habits that is excepted from the bar of character evidence under the Federal Rules. It would be improper for the trial court to permit this testimony to be considered.