

ANSWER TO QUESTION NO. 6

"Other Acts" evidence is admissible per MRE 404(b) (1):

MRE 404(b) (1) provides:

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or assisting in doing an act, knowledge, identity or absence of a mistake or accident when the same was material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

As the Michigan Supreme Court explained in *People v Sabin (After Remand)*, 463 Mich 43, 56 (2000):

"404(b) (1) does not require the exclusion of otherwise admissible evidence. Rather, the first sentence of MRE 404(b) (1) reiterates the general rule, embodied in MRE 404(a) and MRE 405, prohibiting the *use* of evidence of specific acts to prove a person's character to show that the person acted in conformity with character on a particular occasion. The second sentence of MRE 404(b) (1) then emphasizes that this prohibition does not preclude using the evidence for other relevant purposes. MRE 404(b) (1) lists some of the permissible uses. This list is not, however, exhaustive." (Emphasis in original).

Evidentiary safeguards employed when admitting "Other Acts" evidence:

The state has the burden to establish that the evidence it seeks to introduce is relevant to a proper purpose in the non-exclusive list contained in MRE 404(b) (1) or is probative of a fact other than the character or criminal propensity of the defendant. *People v Crawford*, 458 Mich 376 (1998). The fact that the evidence may reflect on a defendant's character or propensity to commit a crime does not render it inadmissible if it is also relevant to a non-character purpose. "Evidence relevant to a non-character purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only if* it is relevant *solely* to the defendant's character or

criminal propensity." *People v Mardlin*, 487 Mich 609, 615-616 (2010). (Emphasis in original).

For "other acts" evidence to be admissible, the state has the burden of establishing that the evidence: (1) is offered for a proper purpose (not propensity) within MRE 401; (2) is relevant under MRE 402 to an issue or fact of consequence at trial under MRE 401; and (3) the danger of unfair (undue) prejudice does not substantially outweigh the probative value of the evidence under MRE 403 in view of the availability of other means of proof and other facts. A limiting instruction by the court can be given upon request under MRE 105.

The state must establish a proper purpose for the admission of the evidence within MRE 401:

The state argues that the "other acts" evidence is admissible to show Dan's scheme, plan or system in doing an act and absence of mistake or accident. Since the grounds articulated by the prosecution establish a permissible purpose for admission, the state's initial burden is satisfied and the next inquiry is whether the evidence is relevant to the theories identified by the prosecution.

The state must establish that the evidence is admissible under MRE 402:

The fact that the prosecution has identified a permissible theory of admissibility does not automatically render the "other acts" evidence relevant in a particular case. *Sabin* at 60. The trial court must determine "whether the evidence, under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence." *Id.*

Under the facts presented here, an examinee could appropriately conclude that the prior acts evidence will be deemed relevant under a theory that Dan had devised a plan which he used repeatedly to carry out separate but very similar crimes, wrongs or acts.

Such acts of similar misconduct have been held by the Michigan Supreme Court to be logically relevant and admissible if the charged and uncharged acts are "sufficiently similar to support an inference that they are manifestations of a common plan, scheme or system." *Sabin* at 63. With respect to the sailboat and house fires, the following facts support the prosecution's theory: (1) the first erupted immediately after Dan left the premises; (2) Dan's personal property was damaged and Dan sought and collected insurance proceeds; (3) the fires were started by a seemingly

careless act which any adult would recognize as a fire hazard; and (4) Dan was responsible for the act that caused the fire. The car engine fire, on the other hand, is sufficiently different from the other fires that it likely would not be deemed admissible under the theory of a common plan, scheme or system.

The evidence of all three prior fires could be found admissible to prove the absence of mistake under the theory known as the "doctrine of chances." "Under this theory, as the number of incidents of an out-of-the-ordinary event increases in relation to a particular defendant, the objective probability increases that the charged act *and/or* the prior occurrences were not the result of natural causes." *People v Mardlin*, 487 Mich 609, 616 (2010) (emphasis in original). "If a type of event linked to the defendant occurs with unusual frequency, evidence of the occurrences may be probative, for example, of his criminal intent or of the absence of mistake or accident because it is objectively improbable that such events occur so often in relation to the same person due to mere happenstance." *Id* at 617. See also *Crawford*, 458 Mich 367, 392-393. Here, an examinee could appropriately argue that the past fires are logically relevant to the objective probability that the fire now at issue was intentionally set since three prior fires involving Dan's property in the past five years is out-of-the-ordinary. Additionally, Dan benefitted from two of the three prior fires and was responsible for the acts, which Dan chalks up to carelessness, that started the fires. An examinee could also argue that the prior uncharged acts should not be admitted under the doctrine of chances because they are not similar to the charged act and Dan has not been involved in such incidents more frequently than the typical person.

The state must establish that the evidence is admissible under MRE 403:

Unfair prejudice is defined as the "danger that marginally probative evidence will be given undue or pre-emptive weight by a jury." *Crawford*, 458 Mich at 398. The court must determine whether the danger of unfair prejudice substantially outweighs the probative value of the proposed evidence in view of other means of proof and other facts. Here, there is a potential for prejudice but the evidence of the prior fires (with the possible exception of the car engine fire) is probative in rebutting Dan's defense that the fire for which he is now being charged was an accident. It is also the only means of proof for the prosecution since the expert's report was inconclusive. Additionally, if the occurrence of the other fires is admitted, the jury can consider Dan's explanation for those events and give each incident whatever weight it deems appropriate. The defense can also require that the trial court

issue a limiting instruction to mitigate the potential for prejudice. While the prosecution likely has the stronger argument under MRE 403 for admission of the evidence at issue, an examinee could also argue--and deserve credit for--the opposite result.