

EXAMINERS' ANALYSIS OF QUESTION NO. 13

1. Evidence of the trait of aggression is admissible per MRE 404(a)(2).

MRE 404(a)(2) provides:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . [w]hen self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by the accused, or evidence offered by the prosecution to rebut the same. . . .

The Michigan Supreme Court explained in *People v Harris*, 458 Mich 310, 315-316 (1998):

It is now widely accepted that a defendant may show a pertinent trait of character of the alleged victim that bears on whether the victim committed an act of aggression on the particular occasion in conformity with that trait. 1A Wigmore, Evidence (Tillers rev), § 63, p 1350. This is so because, when a controversy arises regarding whether the deceased was the aggressor, a jury's persuasion may be affected by the character of the deceased because it will shed light on the probabilities of the deceased's action. *Id.* The sole purpose for which evidence of this type is admissible is, from the victim's general turbulent or violent character, to render more probable the evidence that tends to show an act of violence at the time he was killed.

Bob's testimony that Victor had a reputation for aggressive behavior is offered in support of Daniels' theory of self-

defense that Victor was the aggressor and Daniels was defending himself before Victor could again shoot the lethal weapon at Daniels. Therefore, this proffered testimony falls precisely within the exception set forth in MRE 404(a)(2). Similarly, the sister's testimony that Victor once pulled a gun on her in a fit of anger might be considered evidence of a character trait for aggression under MRE 404(a)(2). It, however, fails under MRE 405, as explained below.

**2. Reputation evidence is admissible under MRE 405 but specific acts evidence is not.**

MRE 405 governs the methods by which a character trait, such as aggression, may be proved:

(a) **Reputation or Opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Because Bob is to testify only as to Victor's reputation for aggression - an admissible character trait under MRE 404(a)(2) - his testimony is allowable under MRE 405(a). He may not testify on direct examination concerning specific instances of Victor's conduct, however, as the aggressive character of the victim is not an essential element of self-defense pursuant to MRE 405(b). Bob could, however, be cross-examined by the prosecutor about relevant specific instances of conduct rebutting Victor's alleged aggressive character.

As to Victor's sister, Daniels intends to call her for the sole purpose of testifying to a specific act of aggressive behavior - Victor pulling a gun on her. Daniels cannot question

her about a specific act of aggression on direct exam, since it is not an essential element of Daniels' defense.

The court should overrule the objection to Bob's testimony and sustain the objection to the sister's testimony under MRE 405.