

**5-8**

1. Yes, because this is cross-examination and he is a character witness so this is allowable under 405(a). Therefore it is generally allowed for him to discuss this specific instance of conduct.
2. Yes, again this would be a specific instance of his conduct that would speak to what his reputation might or should be and it is cross-examination so it is admissible under 405(a).
3. Yes, again this is cross examination – 405(a) – would affect the reputation of the defendant and is something of general knowledge that it would be expected for the warden to know.
4. No, this is a specific instance of conduct that is unrelated to his potentially violent nature and would serve only to call into question his character as a rule-abiding inmate. Therefore it should not be allowed under 404(b) and is not relevant for admission under 405(a).

**5-10**

1. Yes, because now that the defense has offered evidence about the victim's character the prosecution may do so to rebut the same under rule 404(a)(2).
2. Yes, again this is a rebuttal of the evidence offered by the defense that she was the first aggressor and is admissible as character trait evidence under 404(a)(2).
3. No, this is evidence of act propensity and is not admissible under 404(b) to show action in conformity with. This would not speak to motive, opportunity, intent, etc. which are the exceptions under 404(b).

Problem 5-8: The Warden Cross-Examined

1. As defense counsel I would object to this question as it is trying to introduce evidence banned in 404(b) of a prior bad act to show action and conformity therewith. I would argue that the prosecution is trying to argue that because he was written for fighting in the past he is more likely to have assaulted an inmate in this case, which is improper character evidence. Further as the witness is a warden and probably does not spend much time with prisoners, I would also question whether or not the witness has knowledge of the specific acts took place. If I were to lose this objection, I would make a motion that the jury be instructed that just because he was written up for fighting does not mean that a fight actually occurred or that my client started it.

As a prosecutor I would argue that the defense opened the door by offering character evidence under 404(a)(1). As the prosecutor, under 404(a)(1), I am allowed to rebut that evidence. Here the question is not being used to show action and conformity therewith but rather to test the witness' knowledge and judgment. If the witness is going to personally say that he believes the accused is peaceful and has a peaceful reputation then I should be able to question those beliefs in light of the two write-ups.

Problem 5-10: The Violent Victim

1. As defense counsel I would object to this question as it is seeking character evidence from too small a group. Reputation evidence must be within the community at large. The fact that she was quiet in class says nothing about how violent she may be. Therefore not only is it improper but irrelevant.

As the prosecution I would defend my objection as under 404(a)(2) I am allowed to rebut evidence on the character of the victim if it is introduced. If the defense is going to say she is violent, then I am allowed to rebut with evidence of a pertinent trait of character. Further, the defense has asserted a defense of self defense. In doing so it has made the victim's violent character an issue in the case that I am permitted to submit evidence for.

**5-8 (1):** *Is the following question proper despite defense objections? "Wasn't Quinn written up twice for starting fights in the mess hall?"*

As long as the question is asked on cross-examination it should be permitted. Although questions regarding specific acts are not usually permitted under rule 404(b), it can be permitted as evidence on cross to show the credibility of the witness. In this example, the question is testing the warden's credibility as a person that would have adequate or accurate knowledge of the defendant's reputation. There would also have to be a good faith basis on the part of the cross-examiner that these write up actions actually happened in order to ask the question.

**5-10 (1):** *Can the prosecution offer evidence that the victim, Margie, had a reputation among students in her night-time GED program as a peaceful woman?*

It seems that this question would not be allowed under 404(a) because it goes to act propensity. Just because Margie is generally a peaceful person does not mean that in this instance she was not the aggressor. By giving evidence that Margie is peaceful in general, it could lead the jury down a stream of logic that if she is usually peaceful in class, then she must have been peaceful in this instance.

Problem 5-8:

1. FRE 405(a) states that “proof may be made by testimony as to reputation or by testimony in the form of an opinion.” It also notes, however, that “on cross-examination, inquiry is allowable into relevant specific instances of conduct.” This appears to apply to the present situation, wherein the opinions of the warden are admissible, and therefore on cross-examination he is exposed to questions from the prosecution pertaining to relevant specific acts on the part of the defendant.

Problem 5-10:

1. FRE 404(a)(2) makes it clear that in a criminal case, evidence of a “pertinent trait of character of the alleged victim” is admissible by both the defense – in proving a propensity toward first acts of aggression, for example – and the prosecution – “to rebut the same.” In the present case, the prosecution would be offering up character evidence in rebuttal to claims made by the defense, and therefore the evidence would likely be admitted.

5-8 (1)

Yes, similar to the rabbi example, if the Warden is testifying about his character without being aware of these previous incidents then he does not have an appropriate knowledge to be commenting on Quinn's character. If he is aware of the previous incidents and maintains his opinion that Quinn is a peaceful person, it calls into question his judgment if he believes someone twice cited for starting fights qualifies as "peaceful." Either way, his answer is directly relevant to his previous testimony. Questions about specific acts are permitted to rebut a general assertion of character, under 608(b).

5-10 (1)

Yes, the defense has called into question the character of the victim, asserting that she was the first aggressor, under 404(a)(2), the prosecution is permitted to introduce evidence of her "peaceful" nature to rebut that accusation.

Problem 5-8

Part 1: The question might be allowed because it goes to rule 405(a) that allows inquiry into relevant specific instances of conduct. However since the prosecution phrased it as "wasn't" the judge might sustain the objection. The question might be better phrased, "Have you heard..." or "Didn't you know..."

Problem 5-10

Part 1: The prosecution would be allowed to offer evidence that Margie had a reputation among students in her night-time GED program as a peaceful woman under rule 405 (a)-because you can offer testimony on reputation in the form of opinion. Also, under Rule 404(a)(1)-the prosecution has already offered evidence of Margie's trait so the defense should be allowed to rebut it.

Problem 5-8

- I object to the question under Rule 403 which states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues.." Allowing the introduction of evidence concerning the defendant's prior fights might confuse the jury as to the current charge, and its probative value does not outweigh its prejudicial effect.

Problem 5-10

- I object to the introduction of her reputation as "peaceful woman" under Rule 404(a) which states that "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."