

Rule 405. Methods of Proving Character

(a) Reputation or Opinion. In all cases in which evidence of a person's character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.

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

"Do You Know" and "Have Your Heard" Questions: Cross-Examination Under Rule 405(a)

"Do you know" questions are permissible under Tex.R.Crim.Evid. 405(a) and 404(a)(1). Rule 404(a)(1) now allows an accused to offer general reputation or opinion testimony to prove character. *Thomas v. State*, 759 S.W.2d 449, 452 (Tex.App.-- Houston [14th Dist.] 1988, pet. ref'd). However, the old general limits on cross-examination still apply. Specifically, while reputation witnesses are asked "have you heard" questions, opinion witnesses are asked "do you know" questions. *Id.* The exception to this rule is where a witness "converts himself from a reputation witness to an opinion witness and vice versa." *Id.* The rationale is that reputation witnesses may be asked "have you heard" questions in order to test the weight of their testimony. *Id.* Opinion witnesses are asked "do you know" questions to test the basis of their personal opinions. *Id.*

Tex.R.Crim.Evid. 405(a) also allows "do you know" questions to be asked of opinion witnesses. Rule 405(a) states that "[i]n all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct." See *Lancaster v. State*, 754 S.W.2d 493, 495 (Tex.Civ.App.--Dallas 1988, pet. ref'd). However, the "right to cross-examine a character witness on specific instances of a defendant's conduct is subject to two limitations: first, there

must be some factual basis for the incidents inquired about; and second, those incidents must be relevant to character traits at issue in the trial." *Id.* at 496. The foundation for inquiring into the specific instances of conduct must be laid outside the jury's presence. *Reynolds v. State*, 848 S.W.2d 785, 788 (Tex. App. -- Houston [14th Dist.] 1993, pet.ref'd).

What is an "Essential Element?"

A victim's character is not an essential element of a claim of self-defense. "Character per se is almost never an element of a charge or defense in criminal cases." Goode, Wellborn, & Sharlot, *Guide to the Texas Rules of Evidence: Civil and Criminal* § 405.2 (2nd ed.1993). See *Gilbert v. State*, 808 S.W.2d 467, 473 (Tex.Crim.App.1991); *Purtell v. State*, 761 S.W.2d 360, 370 (Tex.Crim.App.1988), cert. denied, 490 U.S. 1059, 109 S.Ct. 1972, 104 L.Ed.2d 441 (1989) (the victim's character is not an essential element of the offense of capital murder, nor is it an essential element of a defense to capital murder); *U.S. v. Keiser*, 57 F.3d 847 (9th Cir.1995). *But compare U.S. v. Thomas*, 134 F.3d 975, 980 (9th Cir.1998), in which it was held that predisposition is in fact an essential element of the defensive theory of entrapment and evidence of predisposition is admissible under Rule 405(b). *Tate v. State*, 981 S.W.2d 189, 193 (Tex.Crim.App. 1998).

For self-defense (first aggressor & defendant's state of mind), use Rule 404(a). The character of the victim is not one of the elements under Tex. Penal Code 9.31, thus Rule 405(b) does not apply.