THE DESERVING DEAD

Dealing with the Deceased's Bad Character in Murder Cases Involving Self-Defense

What If the Dead Guy "Had It Coming?"

As socially unacceptable as this may sound in our hypersensitive age, those of you who have practiced criminal trial law before Texas juries know that, given the right facts, juries *will* consider this question. Indeed, given the right facts, a jury might even resolve this issue in your client's favor. Nowhere is this issue more pressing than in murder cases involving self-defense. The purposes of this article are:

(1) to explain the law of self-defense and its limitations in cases involving deadly force;

(2) to put forth the paradigm for analyzing which bad acts of the deceased may be admissible; and

(3) to help you determine the proper method for bringing these acts to the attention of the jury.

Self-Defense in Texas Murder Prosecutions

"Self-defense is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the laws of society."[1] Quotes such as this memorialize that which is self evident: A person has the right to resort to self-defense to protect himself against the unlawful use or attempted use of force by another. Most Texans do not need a lawyer to so enlighten them. What they may need a lawyer for, however, is to help them appreciate the important facets of Texas self-defense law concerning proportionality and retreat. This section will delineate the various aspects of self-defense and its limitations.

A. Justified Conduct

Self-defense is statutorily regarded as a "justification" in Texas. Tex. Penal Code Ann. §§9.02, 9.31. Justification defenses have been traditionally reserved for conduct by the accused that society deems objectively reasonable given the circumstances with which the accused was faced. When a person engages in justified behavior, he acts in a way the "the law does not condemn, or even welcomes." H.L.A. Hart, Punishment and Responsibility 13 (Oxford University Press 1968).

Thus, when a jury is given an instruction on self-defense and proceeds, based on the evidence and the instruction, to find a defendant "not guilty," it is as if the jury has said, "We are with you. What you did was the right thing in that situation."

B. An Ordinary Defense

There are two types of defenses in Texas: affirmative and ordinary. Tex. Penal Code Ann. §§2.03, 2.04. All things being equal, an accused would rather have an ordinary defense than an affirmative defense. The salient difference is that when an affirmative defense, such as insanity, is relied upon the accused must actually prove the affirmative defense by a preponderance of evidence. Tex. Penal Code Ann. §§8.01(a), 2.04. The state has no burden to disprove the affirmative defense, although it must still prove its case beyond a reasonable doubt. *Saxton v. State,* 804 S.W.2d 910, 913 (Tex.Crim.App. 1991). The accused bears the full burden of proof with affirmative defenses. *Zuliani v. State,* 97 S.W.3d 589, 594 n.5 (Tex.Crim.App. 2003).

Such is not the case with ordinary defenses. Indeed, with an ordinary defense, such as self-defense, an accused must only meet a burden of production, while the prosecution maintains the burden of persuasion. *Alford v. State*, 806 S.W.2d 581, 584 (Tex. App.–Dallas 1991), *aff'd*, 866 S.W.2d 619 (Tex.Crim. App. 1993). Thus, so long as an accused raises some evidence on self-defense, "regardless of its substantive character," he will be entitled to a jury instruction on that issue, and the burden to persuade the jury beyond a reasonable doubt that the accused did *not* act in self-defense is still shouldered by the prosecution. *Brown v. State,* 955 S.W.2d 276, 279 (Tex. Crim.App. 1997); *Luck v. State*, 588 S.W.2d 371, 375 (Tex. Crim.App. 1991) (holding the jury charge properly placed the burden on the State to show beyond a reasonable doubt the defendant had not acted in self-defense).

C. Sections 9.31 and 9.32: "Home Base" for Self-Defense

The codification of the right to self-defense in Texas is found in section 9.31(a) of the Texas Penal Code: "[A] person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force." Tex. Penal Code, §§9.31, 9.32.

As is evident from the language of the statute, the hallmark of one's right to self-defense in Texas is that he resort to only the amount of force necessary to repel the actual or perceived attack. The classic example of the underlying rationale is the old adage that one is not allowed to bring a gun to a fist fight. It sounds quaint, but it colorfully and deftly describes the appropriate degree of proportionate force allowed in self-defense cases.

Texas law differentiates between ordinary force used in self-defense and the use of deadly force in self-defense. The primary distinction is that before someone resorts to deadly force in self-defense, he must be threatened or reasonably perceive to be threatened with deadly force, and the threat must be such that a reasonable person in his situation would not have retreated.[2] Tex. Penal Code Ann. §9.32. Thus, if a would-be murder defendant is planning on claiming self-defense, he had best reasonably feel he is about to be on the receiving end of some deadly force and hope that a reasonable person in his shoes would not have bugged out. As Professor Moses of South Texas College of Law has written regarding this aspect of the law, "[i]t may be better to make a good run than a bad stand[.]" Ray E. Moses, Guns 'n Moses: A Guidebook of Anger, Lust & Greed for Students of Criminal Law §N-12-21 (Azimuth Press 8th ed. 1998).

Theories of Admissibility Regarding Bad Character of the Deceased

With the law of self-defense law in mind, it is appropriate to examine the theories under which you may be able to attack the character of the deceased when your client is claiming self-defense. This attack may be in the form of either reputation

or opinion testimony, but it can and should also come from evidence regarding specific instances of misconduct. It is vital to note that there are two completely separate theories under which this evidence will come in: (1) the reasonableness of the accused's belief that he must resort to self-defense (also known as "state of mind" and "apprehension of danger") and (2) the likelihood that the deceased was the first aggressor. There are important differences between these two theories that will be discussed later, but for now simply note that what the judge will allow you to get into will largely be a function of:

(1) what your theory of self-defense is; and
(2) what the accused knew about the deceased; and
(3) when he knew it.

A. The Reasonableness of Accused's Belief That He Must Resort to Deadly Force

(i) The *Dempsey* rule

It has long been the rule in Texas that an accused claiming self-defense at his murder trial may introduce evidence of specific acts of violence or misconduct by the deceased under the theory that those acts clarify the reasonableness of the accused's belief that he must resort to deadly force. *Dempsey v. State,* 266 S.W.2d 875, 877 (Tex.Crim.App. 1954). Although the *Dempsey* rule has since been replaced, its spirit lives on in those rules. *See Mozon v. State,* 991 S.W.2d 841, 845 (Tex. Crim.App. 1999) (noting the *Dempsey* rule was superceded by the Texas Rules of Evidence). When an accused claiming self-defense wishes to raise the evil deceased and his acts for the jury to behold, one arrow in his quiver is the fusion of *Dempsey* and its progeny into Texas Rule of Evidence 404(b).

(ii) Connection to 404(b)

Many of you are, no doubt, familiar with Texas Rule of Evidence 404(b) and its often disastrous effects on your clients. A prosecutor's argument that your client's lengthy criminal history amounts to a "common scheme or plan" might be the last words your client hears before being run over by the State's bus of otherwise inadmissible character evidence. But, as with many clients, 404(b) is not all bad, and for the following application, it may well be your client's strongest ally. This is a good place recite the relevant part of the much feared but often misunderstood 404(b):

> "(b) Other crimes, Wrongs or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *It may, however, be admissible for other purposes*[.]" (emphasis added)

It has been stated that 404(b) is an "inclusionary" rule of evidence intended to provide a springboard for admissibility of otherwise inadmissible character evidence. *Tate v. State,* 981 S.W.2d 189, 193 (Tex.Crim.App. 1998). The gist of it is that if character evidence is relevant when viewed against Rule 401's requirements, it may be admissible provided it is not solely being offered to show that the person in question (in this case, the deceased) acted in conformity with his lousy character. *See id.* There must be some other relevant purpose for which the character evidence is being offered. *See id.*

The "other purpose" for this scenario is that the accused offers the evidence, which must have been known to him at the time he killed the deceased, in order to show the effect that knowledge had on his state of mind at the moment he undertook the act that caused the death. *Mozon,* 991 S.W.2d at 846. Then, after the jury has heard what effect the accused's knowledge of the deceased's bad acts or threats had on the accused's state of mind, it can better assess whether his decision to resort to deadly force was reasonable. *See id*. This theory for admissibility will be referred to as "reasonableness" throughout the remainder of this article.

(iii) What Your Client Knew, When He Knew It, and How He Knew It

A crucial limitation on evidence offered under this theory is that its introduction is limited to violent acts by the deceased known to the accused at the time of the homicide. *Mozon,* 991 S.W.2d at 845. In other words, if your theory of admissibility as to this evidence is that it helps the jury understand the reasonableness of your client's belief that he resorted to deadly force in self-defense, then your client must have actually heard or otherwise learned about the violent act prior to the time he pulled the trigger, plunged the knife, etc. This is an important distinction for reasons that will be discussed later in the section on "first aggressor."

A stunningly beautiful caveat to this limitation is that although your client must have known about the prior bad act when he killed the deceased, his knowledge may be from hearsay. *Dixon v. State,* 634 S.W.2d 855, 857 (Tex.Crim.App. 1982). And not just ordinary hearsay, but hearsay, upon hearsay, upon hearsay. One recalls the scene in Ferris Bueller's Day Off in which Ferris' teacher (played by Ben Stein), is conducting roll call and is monotonously repeating "Bueller" for Ferris, who is absent from class. Ferris Bueller's Day

Off (Paramount Pictures 1986). The teacher received a reply from a student in the form of "[m]y best friend's sister's boyfriend's brother's girlfriend heard from this guy who knows this kid [.]" You can use this approach, if you must, to get this evidence in because the relevance of the evidence is the effect on your client, not necessarily whether it is true. Bear in mind, however, that it will almost certainly involve your client having to testify. But, hey this is a self-defense case; conventional wisdom is that your client will probably have to testify anyway if he wants the jury to find that his killing of another human being, however lowly that human might have been, was justified.

(iv) Some Act of Aggression by the Deceased Required

Another important limitation on the introduction of the accused's violent acts under this theory is the prerequisite that there be some evidence in the record concerning an "act of aggression" by the deceased in the instant case, which ultimately set in motion the chain of events resulting in his death. *See Fry v. State,* 915 S.W.2d 554, 561 (Tex. App.–Houston [14th Dist.] 1995, no pet.) (noting that certain acts create "apprehension of danger" which support self-defense). This limitation, while given some lip service in Texas cases, does not appear to be as well-defined or rigorously enforced as its sister limitation involving "first aggressor" cases that are discussed later in this article. Suffice it to say that if you have a self-defense homicide case, before you seek to admit prior violent acts by the deceased, make sure you have some sort of aggressive act by the deceased in the case for which your client is charged before offering the prior bad acts under the reasonableness theory. If you are having trouble identifying an act of aggression by the deceased, you probably ought to consider a different defense anyway.

B. Likelihood That Deceased Was First Aggressor

You may also introduce evidence concerning prior violent acts or threats of the deceased under the theory those prior bad acts made it more likely the deceased was the first aggressor in the situation that ended in his death. *Tate v. State*, 981 S.W.2d at 192-94. This theory will be referred to as "the first aggressor" throughout the remainder of this article, and its underlying rationale is that the jury should hear about those acts that make it *inferentially* more likely that the deceased acted as the aggressor in the event that led to his (un)timely death. *See Mozon,* 991 S.W.2d at 845. For a refresher on inferences, Black's Law Dictionary defines "inference" as "[a] conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 313 (Pocket ed. 1996).

(i) The *Dempsey* Rule (Again)

This rationale also has its genesis in the celebrated case of *Dempsey.* And while the reasonableness theory was later advanced within the rubric of 404(b), at the time the *Dempsey* rule was superceded, the first aggressor came to find at least two different statutory adoptive parents. *Id.*

(ii) Connection to 404(a)(2) and, Perhaps Incorrectly, 404(b)

The first aggressor prong of what the Court of Criminal Appeals has described as the "twin aims" of *Dempsey* was clearly adopted by Texas Rule of Evidence 404(a)(2), which states in pertinent part:

> (a) Character Evidence Generally. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (2) Character of victim. In a criminal case ... evidence of a pertinent character trait of the victim of a crime offered by the accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

Tate, 981 S.W.2d at 193.

Despite what appears to be the clear statutory intent to make Rule 404(a)(2) the home for first aggressor evidence, the Court of Criminal Appeals has vacillated on the statutory bases for first aggressor evidence in the post-*Dempsey* era. Compare *Tate*, 981 S.W.2d at 193 (holding that first aggressor evidence admissible under Rule 404(b) because it tended to show deceased's "state of mind"), with *Mozon*, 991 S.W.2d at 845-46 (holding that first aggressor evidence admissible under Rule 404(a)(2)). The proper statutory basis for its admissibility seems to be Rule 404(a)(2) with its specific language concerning "first aggressor." Tex. R. Evid. 404(a)(2). The difference in the statutory vehicle for admissibility is really just academic, provided you are able to get the evidence admitted.

(iii) Accused Does Not Need to Know about Deceased's Prior Bad Acts

The most important difference between the reasonableness and first aggressor section is that, under first aggressor, the accused need not know of the prior bad acts in order for them to become admissible. Consider the consequences of that

for a moment. Any violent act by the deceased that makes it inferentially more likely he was acting as the aggressor, will – subject to exceptions stated below – be admissible to help bolster your client's claim of self-defense. The possibilities for this application are limited only by one's imagination, and you should be creative in collecting evidence if you plan on using this argument. A later section will specifically address the modes of presenting this evidence.

(a) *Hayes:* The Stray Cat

There is one potential limitation on this aspect of the first aggressor theory. In an inexplicable opinion, a Houston court of appeals held in order for prior bad acts of the deceased to come in under first aggressor, those bad acts must have implicated the defendant. *Hayes v. State,* 124 S.W.3d 781, 786 (Tex. App.–Houston [1st Dist.] 2003), *aff'd*, 161 S.W.3d 507 (Tex.Crim.App. 2005). This decision contradicts prior case law on this issue and represents a general misunderstanding or disregard for precedent, some of it binding. *Torres v. State,* 117 S.W.3d 891, 895 (Tex.Crim.App. 2003) ("Because the specific act is probative of the deceased's state of mind or intent, the witness must know, but the defendant need not know of the act."); *Mozon*, 991 S.W.2d at 845 ("[T]he evidence was relevant even if the defendant was unaware of the deceased's violent character."); *Fry v. State,* 915 S.W.2d at 560 ("[S]uch evidence is admissible whether or not the defendant was aware of the victim's violent disposition.")

Fortunately, the Court of Criminal Appeals was asked to review the Court of Appeals' decision in *Hayes.* Review was specifically granted on whether the first aggressor theory requires that the prior bad acts implicated the accused. *Hayes*, 161 S.W.3d at 507. Also fortunate is the remark by the Court of Criminal Appeals that its prior holdings on this topic "[do] not require that a defendant have been 'implicated' by the victim's prior bad act before such evidence can be admissible[.]" *Id*. at 509. Somewhat less fortunate for criminal defense lawyers and their clients is that this remark, while encouraging, appears to have been merely dictum as the Court of Criminal Appeals went on in that opinion to dodge the issue as moot and affirm the judgment of the Court of Appeals. *See id.* Whatever the precedential status of the intermediate appellate decision in *Hayes,* you need to know it is out there, know that it is the only case of its kind, and know that prosecutors will cling to it in their attempts to keep your evidence out.

(iv) An "Ambiguous" Act of Aggression Required?

A significant restraint on your ability to introduce prior bad acts under a first aggressor theory lies in the requirement that, before you may delve into specific misdeeds by the deceased, there must first be "some evidence of aggression" by the deceased during the acts that gave rise to his death. *Torres v. State,* 117 S.W.3d at 895. Sounds easy enough, right? Not so fast. In a recent decision from the Fort Worth Court of Appeals, the court held if an accused wants to rely on first aggressor to admit prior violent acts of the deceased, the deceased's aggressive act in the instant case must be only "ambiguously aggressive," not patently aggressive. *Reyna v. State*, 99 S.W.3d 344, 347 (Tex. App.–Fort Worth 2003, pet. ref'd). The Court reasoned that if the deceased's first aggressive act was patently aggressive, then his conduct would need no explaining, thereby rendering any attempt under first aggressor to introduce specific bad acts the forbidden fruit of the exclusionary language in Rule 404(b). *Id.*

This logic seems like a dare. It plays out like this: A defendant in a murder trial relies on self-defense; he puts on good evidence of aggression by the accused, something solid like flashing a gun. *Id.* Then, because he has put on that evidence, he is forbidden from eliciting evidence of which he had no personal knowledge regarding the prior violent acts of the accused. The faulty premise in all this is the concept that just because the defendant has testified or otherwise elicited evidence of a patently aggressive act, the jury will believe his story about that act and say, "Well, that's that." On to whether to whether the defendant's response was proportionate.

In reality, the jury is free to believe or disbelieve evidence about the deceased's act of aggression, and they are more likely to believe it if they hear the first aggressor evidence. *See Saxton,* 804 S.W.2d at 914 ("[C]redibility determination of such evidence is solely within the jury's province and the jury is free to accept or reject the defensive evidence.") The jury could just as easily disbelieve the evidence concerning the deceased's aggressive act and decide instead that the accused was the first aggressor. Then you are suddenly spirited into the bizarre world of "provoking the difficulty" and all its odd judicial children.

Currently, *Reyna* has only been followed in Fort Worth, as opposed to the statewide authority for the proper predicate for cases involving first aggressor which is *Torres*, 117 S.W.3d 891. *Torres* mentions that ambiguously aggressive acts *may* give rise to the introduction of other bad acts, but does not appear to limit this application only to "ambiguous" acts. *Mai v. State,* 189 S.W.3d 316 (Tex. App.–Fort Worth 2006, pet. ref'd). Should *Reyna* and *Mai* ever clear the cattleguard of the Fort Worth Stockyard's, they threaten to stampede the accused's right to introduce evidence to support his claim that the deceased was the first aggressor. Be aware that these rulings are out there, and if the judge shuts you down

on first aggressor, and if your client knows about the prior bad act, try to go with the reasonableness argument that has been decidedly less litigated in this respect regarding the ambiguity of the act.

(v) Beware of the Concession

Somewhat in line with *Reyna's* aberrant holding is a Houston Court of Appeals' decision in *Ceasar v. State*, 939 S.W.2d 778 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd). The *Ceasar* court held that when there is no contested issue as to who was the first aggressor, then no specific bad act evidence under first aggressor is allowed. *Id.* at 779. In that case, the court noted that the State had "expressly conceded that [the deceased] was the first aggressor." *Id.* One wonders how this concession occurred: Was it a stipulation offered and received into evidence and read to the jury? Just know that if you see the prosecutor in some form "conceding" to the judge that the deceased was the first aggressor, s/he is not benevolently relieving you of part of your burden; s/he are setting you up. As always, if it seems too good to be true, it probably is.

If the State convinces the court that, under *Ceasar*, there is no dispute as to who the first aggressor was and that your bad act evidence should therefore be excluded, make them stipulate in front of the jury that the victim was the first aggressor. Do not let them have their cake and eat it, too. Then, after having made an offer of proof on all your first aggressor evidence of which your client need not have had personal knowledge, see what you can get in under reasonableness if there are bad acts your client heard or otherwise knew about.

Making the Jury Hate the Deceased (Tastefully)

Now that you know the relevant law concerning admissibility of this type of evidence, it is time to examine the various ways this evidence may arise at trial.

A. Repeat after Me: SPECIFIC BAD ACTS ARE ADMISSIBLE!

Whether you are proceeding under either the reasonableness theory or the first aggressor theory, it is imperative to remember that, assuming the applicable predicate has been met, you can and should ALWAYS teach the jury about the deceased and his life by showing them his specific prior, violent acts. *Torres* instructs that "Specific acts of violence may be introduced to demonstrate the reasonableness of the defendant's fear of danger or to demonstrate that the deceased was the first aggressor." 117 S.W.3d at 894. Confusion seems to abound on this issue: For some reason, most practitioners, well-versed in Texas Rule of Evidence 405(a)-(b), tend to believe they are limited to opinion or reputation evidence concerning the deceased. Fortunately, this specific issue was specifically litigated in *Tate,* 981 S.W.2d 189, wherein the Court of Criminal Appeals addressed the apparent conflict between Rule 405(a)'s mandate that bad character be introduced only through reputation and opinion and the *Dempsey* family creed that specific acts are admissible under reasonableness or first aggressor. *Id.* at 191-93. The *Tate* court noted the conflict, but went on to hold that, for these applications, Rule 404(b) and the *Dempsey* line of cases allow the specific bad acts, despite the language of Rule 405. *Id.* at 193.

The moral to this part of the story: When you have a client accused of murder and he is claiming self-defense, forget everything you ever learned about the statutory limitations on the introduction of specific bad acts, at least so far as those limitations might apply to the bad acts of the deceased. The path has been cleared for those bad acts to be admitted, and you should vigorously admit them, assuming you have laid the requisite predicates. Indeed, your failure to introduce specific acts of violence when they exist may result in a finding that you rendered ineffective assistance of counsel. *See Smith v. Dretke,* 417 F.3d 438, 441-43 (5th Cir. 2005) (noting a first aggressor case in which defense counsel failed to offer evidence of specific acts, "failed to achieve a rudimentary understanding of the well-settled law of self-defense in Texas," and "neglected the central issue in his client's case.")

(i) Form a Line to the Right

The best way to get these specific bad acts before the jury is through live testimony from witnesses to such acts. As the French philosopher Albert Camus noted, "Life is a sum of all our choices." Let the jury hear from these witnesses and then add up the deceased's choices. Get an investigator, if resources permit, to locate witnesses from the deceased's prior charges or uncharged conduct. Hit the street and ask around yourself. If he was young when he was killed, subpoena his high school records, which — if you have ever done so in a case like this, you will know — may very well prove that teenage indiscretions often do become a part of your "permanent record." Ex- spouses and former significant others are usually a wealth of negative information about the deceased. Whomever you choose to have do this work for you, make sure he investigates the criminal history of these potential witnesses on publicdata.com or some other criminal history database. There is nothing worse than calling one of these folks to the stand in order to blast the deceased only to learn on cross that the witness' criminal history is at least as bad, if not worse, than that of the deceased.

Of course, there is always the option of having your client

testify as to the specific violent acts of the deceased. As discussed earlier, if yours is a self-defense case, your client will probably have to testify anyway in order to sell your theory to the jury, or so conventional wisdom holds. If you do decide to put your client on the stand, consider reserving the portion in which he will recite the laundry list of violent acts — assuming you have laid the appropriate predicate — until the end: Do not allow those sweet, juicy details to get lost in the middle of your client's testimony.

B. It's My Opinion and It's a Good One

Even though specific bad acts are admissible and are better, more persuasive proof, you may want to also pose an opinion or reputation question to someone who is familiar with the deceased's character for violence. Tex. R. Evid. 405. A particularly effective witness for this purpose might be the police investigator who collected the evidence against your client. This usually only works well in small town cases where, often times, the police tend to know the neighborhood thugs quite well. If you know the investigator has some knowledge of the deceased (perhaps he arrested him in the past), give the State the unwelcome surprise of turning their witness into a reputation or opinion witness regarding the deceased.

However, be careful here: Unless you have a chance to speak with the investigator ahead of time, this might be a little risky as you never know what answer the investigator may give. Even if you cannot, or choose not to, call the investigator, there may well be others in the community who are aware of the deceased's bad reputation or who have a negative opinion of him. A family member can be particularly effective, assuming you can find one willing to get onboard. Remember if you are asking opinion or reputation questions, you will be limited to questions pertaining to the accused's violent or dangerous nature. *See Tate v. State*, 981 S.W.2d at 192.

C. Certified Copies

If you should be so lucky, there may be legal documents on file pertaining to the deceased and what sort of life he led. Get copies of any such documents, have them certified, and pay close attention to those detailing crimes of violence. Admit the certified copies into evidence under Texas Rule of Evidence 902. And when you are gathering these certified documents for admission, do not limit yourself to cases in which the deceased was finally convicted within the last 10 years. *See Ceasar,* 939 S.W.2d at 779 (upholding denial of accused's attempt to introduce records of deceased's deferred adjudication, but only because proper predicate had not been met). You are not in the impeachment world of Rule 609 and thus nothing in the case law suggests you must adhere to the limitations of Rule 609. After all, you are not attacking the credibility of the deceased; instead, you are trying to show that his bad acts either affected your client's mind set or that those bad acts made it more likely that the deceased started the trouble. The court records may also contain names of former victims of the deceased whom you may call to testify regarding specific bad acts.

This Is the End

Selling a jury on self-defense is a difficult proposition, especially when there is a dead body involved. Luckily, the deceased is often as violent, or even more violent, than the accused. The Rules of Evidence and case law surrounding the admission of bad character evidence by the deceased allow you to exploit this fact of life. Do so relentlessly.

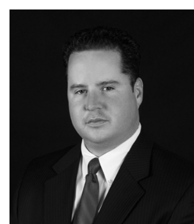
If it is a reasonableness defense, bring in every violent act of which your client is aware, regardless of how your client may have obtained such knowledge. If it is a first aggressor case, admit everything under the sun, assuming you can meet the predicate described in such cases as *Torres* and *Reyna*. If you are not sure which type of case it is, or if it is a combination of both types (as many are), get all possible scenarios lined up and see how the judge rules. Object to the exclusion of any of this type of evidence and make offers of proof. Whichever type theory is in play, do not forget the specific acts! Turn the case into a trial about the deceased and his choices as opposed to a trial about your client.

Be prepared for Rules 402 and 403 objections to any of this type of evidence you may offer. *See Ceasar,* 939 S.W.2d at 779. It seems that Rule 403 should rarely be a proper basis for excluding otherwise admissible reasonableness or first aggressor evidence. Your client is on trial for his life, and this type of evidence goes right to the heart of the matter: The deceased just deserved killing.

endnotes

1 3 William Blackstone, Commentaries *4
2 One may also resort to deadly force to prevent the commission of several enumerated felonies. *See* Tex. R. Evid. 9.32(a)(3)(B).

:: ABOUT THE AUTHOR



John L. Venza, Jr. is a criminal defense lawyer in Sugar Land, Texas. Before opening the Law Office of John L. Venza Jr., John was a prosecutor for five years.