

THE END GAME: JURY CHARGES IN DV PROSECUTION

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SUPPORT

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LEARNING OBJECTIVES

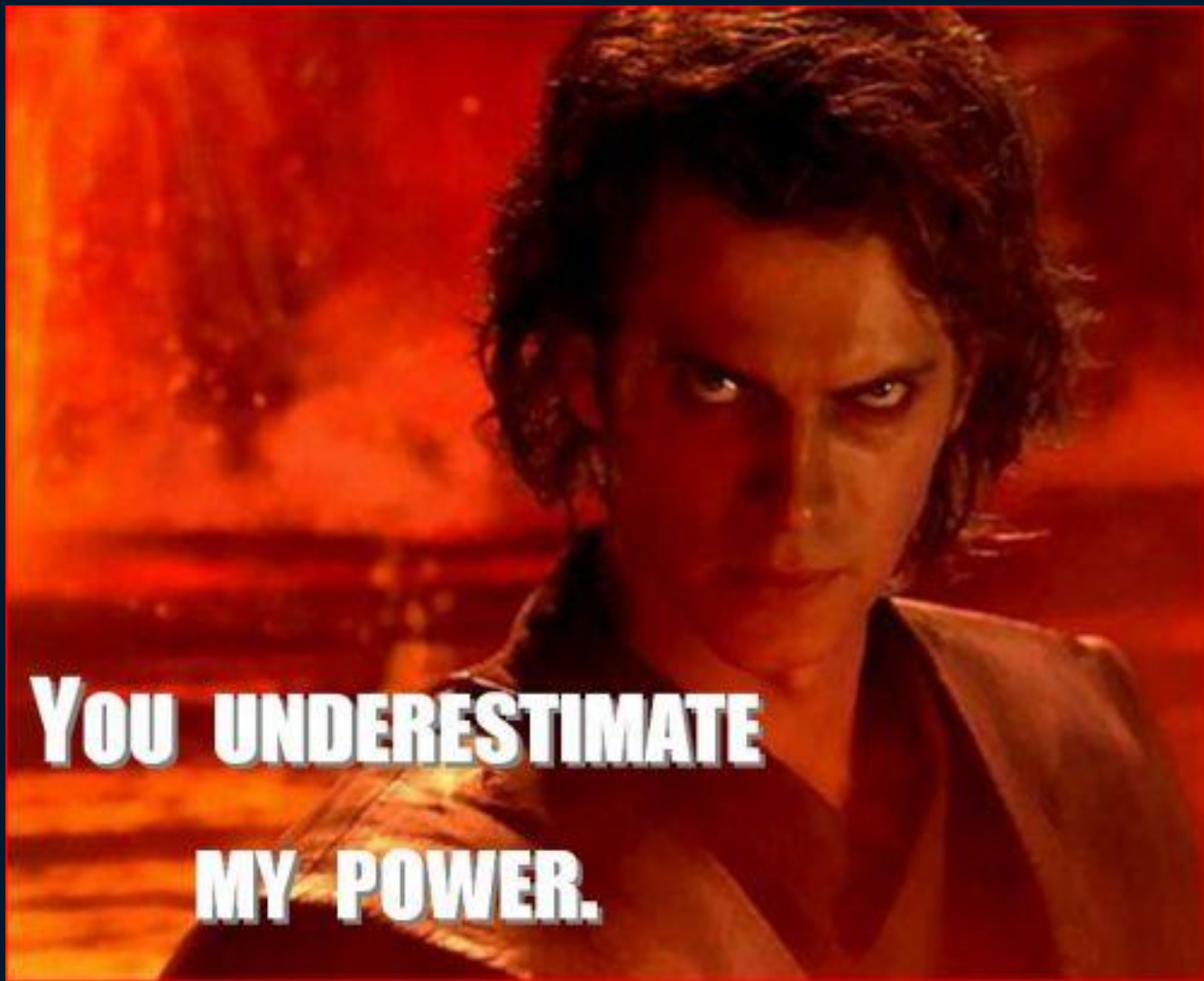
- Identify essential jury charges
- Create clear and helpful instructions based on model charges
- Present case with charges in mind
- Protect the record for appeal

INSTRUCTIONS/CHARGES

- Explain to the jury:
 - How the trial will be conducted
 - Roles of the participants
 - What is expected of jury (conduct)
 - How to consider the evidence
 - How to apply the law to the facts

IN ADDITION

- Focus on critical issues
- What can and cannot be considered
- Resolve credibility issues



**YOU UNDERESTIMATE
MY POWER.**

WHY WORRY?

- Jury's deliberations will be guided by the instructions
- Jury *has* to follow them
- Evidence and argument must be geared to the instructions
- Jury instructions amount to the “end game”

WHAT CAN GO WRONG?

- Juror confusion
- Juror misconduct
- Losing a case you might have won
- Reversal on appeal

NEVER TOO SOON

- Have “end game” in mind from the beginning
- Hasty drafting = errors & confusion
- Judges need time to consider

MODEL JURY CHARGES

- Available on many judiciary websites—each has its own
- Federal model charges by circuit
- Google: “model jury charges criminal 9th circuit”

MODEL CHARGES—PROS

- Based on input from prosecution, defense and judiciary
- Incorporate relevant caselaw
- Comprehensive
- Judges feel “safe”

MODEL CHARGES—CONS

- Often too generic/vague
- Long-winded, full of “legalese”
- May include irrelevant detail
- Repetitious
- May not cover all issues
- May not be up to date

USE AS “MODEL”

- Model charges as basis/template
- Make it relevant
- Delete extraneous language
- Short, easy-to-follow sentences
- Plain English
- Update with recent caselaw

NO MODEL CHARGE?

- ⦿ Then it's up to you to draft one
- ⦿ Sources for ideas:
 - Judiciary websites in other jurisdictions
 - WestLaw/Lexis
 - Court opinions
 - AEquitas

PROTECT THE RECORD

- File proposed jury charges with court
- Be prepared to argue
- Place any objections on the record

PRE-TRIAL CONFERENCE

- Particularly novel charges
- Charges affecting presentation of evidence
- Charges you want to allude to in opening

TYPES OF INSTRUCTIONS



WHEN THEY ARE GIVEN

Prior to *voir dire*



After jury is sworn



During trial as evidence is received



Prior to deliberations



During deliberations

PRELIMINARY INSTRUCTIONS

PRIOR TO VOIR DIRE

- Explain *voir dire* process
- Emphasize candor/truthfulness
- Reduce personal embarrassment

AFTER JURY SWORN

- Presumption of innocence/burden of proof/reasonable doubt
- How trial will be conducted
- Role of participants
- Assessing credibility
- Direct/circumstantial evidence
- Conduct of jurors during trial

DURING THE TRIAL

404(b) EVIDENCE

Give

Immediately after testimony and again at end

Explain

Limited purpose for which jury can consider

Emphasize

Not to be considered as propensity

EXPERT WITNESS

- Explains purpose of expert testimony
- Just because witness is “expert” doesn’t mean jury must believe
- Reminds jury of its duty to determine credibility/facts

CAUTIONARY/CURATIVE

- Improper testimony
- Disruption in courtroom
- Improper comment by counsel
- Impeachment with conviction
- Sometimes waived to avoid calling further attention

FINAL JURY INSTRUCTIONS

FINAL CHARGE CONFERENCE

- Before summations
- New charges/changes resulting from evidence at trial
- Lesser-included offenses
- Verdict sheet

GENERAL CHARGE

- Echoes preliminary charge
- How to deliberate:



Order of
Charges

Verdict
Sheet

Jury
Questions

Read-
backs

SPECIFIC OFFENSES

- Elements that must be proved beyond a reasonable doubt
- Definitions of statutory terms
- Explanation of mental element required (purposeful, knowing, reckless, etc.)

UNITED STATES v. CASTLEMAN

Interpreted federal prohibition on firearms possession for persons convicted of “misdemeanor crime of domestic violence”

134 S.Ct. 1405 (2014)

18 U.S.C. § 922(g)(9) REQUIRES

- Conviction of misdemeanor under federal, state, or tribal law with following elements
 - use or attempted use of “physical force,” or the threatened use of a deadly weapon
 - committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

CASTLEMAN

Issue

- How “violent” must the “physical force” be, to qualify?

Court's holding

- Any physical force, even indirect force (e.g., forcing someone to drink poison or jump out a window)
- *INCLUDES offensive touching*

Dictum

- “Use” of force implies intentional or knowing conduct (not recklessness/negligence) See 134 S.Ct. at 1414-15 & n.8)

CASTLEMAN OFFENSES

- Charge only applicable subsections with force/injury
- Relationship not an element
- Charge purposeful/knowing where evidence will support

LESSER-INCLUDED

- ◉ If jury arguably could find not guilty of greater offense but guilty of lesser
- ◉ Sometimes even over defense objection
- ◉ Offenses with additional element(s) are *not* lesser-included
- ◉ Check your caselaw

SPECIAL INSTRUCTIONS

Only where case calls for them:

Flight

Consciousness of guilt

“Prior bad acts”

Expert witnesses

Curative instructions

FIFTH AMENDMENT

- “No adverse inference” charge
- *Must* be given if requested
- *Must not* be given if defendant does not want it

“FAILURE TO PRODUCE” EVIDENCE

- ◉ Sometimes available to defense; *rarely* to prosecution
- ◉ Resolve this before resting case
- ◉ Inferences are only permissive
- ◉ This can be a minefield—use caution

“FALSE IN ONE, FALSE IN ALL”

- ◉ Defense likes this one—resist it
- ◉ If court insists, soften it

STAY ALERT DURING CHARGE

- ◉ Minor mistakes/omissions can result in reversal on appeal
- ◉ Bring errors to court's attention immediately after charge

PRINTED CHARGE FOR JURY?

- Court rules vary
- Traditionally, only read-back of charge permitted
- Pro: Less need for read-back
- Con: Jury can get stuck in weeds

DURING DELIBERATIONS

END OF DELIBERATION DAY

- ◉ Standard charges
 - No media
 - No discussion (including social media)
 - No research

RESPONSE TO JURY QUESTIONS

- ◉ Court should never respond without reading question and getting input from both sides
- ◉ No exhibits that were not admitted
- ◉ Limit read-backs to what's asked for
 - Usually both direct and cross

JUROR SUBSTITUTION

- Newly-constituted jury
- Instruct jury to begin deliberations from beginning

IMPROPER INFLUENCE

- Jurors should be questioned individually for taint
- Each situation is unique
 - Substitution may be enough
 - Mistrial may be required

DEADLOCK

- Availability of “Allen” charge depends on jurisdiction
- Avoid coercion at all costs
- Partial verdicts may be accepted if unanimous

GOING FORWARD

- Think about the “end game”
- Help court craft clear, helpful jury charges
- Give jury tools it needs to convict
- Protect the record



ÆQUITAS

**THE PROSECUTORS' RESOURCE
ON VIOLENCE AGAINST WOMEN**

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