

**OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF VENTURA**

MCLE AGENDA

Closing argument/rebuttal

November 9, 2016

Ventura Hall of Justice

Instructor: Chief Deputy Michael Frawley

8:30 a.m. to 9:30 a.m.	Closing argument
9:30 a.m. to 9:45 a.m.	break
9:45 a.m. to 10:45 a.m.	Rebuttal argument

CLOSING

Chief Deputy Michael K. Frawley
November 9, 2016

Everything you do either adds to or distracts from your message.

I. HAVE YOU EVER WONDERED WHY SOME JURIES TAKE SO LONG TO REACH A VERDICT?

Certainly there are plenty of reasons. They include, but are not limited to:

- (a) Personality conflicts among jurors causing them to resist coming to a unanimous verdict even when guilty is the one thing they can agree on,
- (b) A belief that a guilty verdict will result in more severe consequences to the defendant than they are comfortable with,
- (c) A juror who disagrees with the law,
- (d) A juror who simply cannot pull the trigger for moral or religious reasons (i.e. cannot sit in judgment),
- (e) The jury is confused about how to go about their job,
- (f) The jury is confused about how the facts apply to the law, and
- (g) The jury is confused about what the facts are or is simply overwhelmed by the complexity of the case.

Problems (a) through (d) should have been rooted out by you in jury selection. Problems (e) through (g) can be avoided by how you try and argue your case. If you project less than certainty, conviction and first class organization, how can you expect this from your jury? If you fumble through your closing and fail to demonstrate exactly how the jury should arrive at a guilty verdict, expect the jury to fumble their way through their job also.

The same principles that apply to a persuasive opening statement also apply to closing argument. Jurors have extremely short attention spans. Consider that many make important decisions on political questions based on 15 second political commercials. Today's environment has created

people who are bored easily. Visual aids and demonstrations are critical to maintain jurors' interest. Studies have shown that people learn 75% of their information from seeing it and 13% from hearing. People then retain 30% of what they see and 20% of what they hear. This means you must prepare your closing so that you drive home your message both verbally and with charts, photographs, PowerPoint, etc.

II. PREPARATION

1. Your closing should be outlined before the trial. This will help focus you on what you need to prove and what evidence you must introduce.
2. Take copious notes during the defense opening statement.
3. Summarize each witness at the end of the day while you still recall it well.
4. Know law and facts and produce charts and lists.
 - Defendant's lies or excuses
 - Legal element charts
 - Evidence of each element
 - List of key pieces of evidence that prove a point
5. Ask the court to number jury instructions prior to your argument so you can cite specific instructions to the jury by page number.

III. BEGINNING

“Once more speak clearly if you speak at all; carve every word before you let it fall.” Oliver Wendell Holmes

1. The rule of primacy is in effect again here. Don't waste your opening remarks thanking the jury for their attention. They will know you are a respectful person by the way you conduct yourself in trial. Besides, thanking them is so obviously ingratiating and you are wasting precious moments of their keenest attention. It has been awhile since you have spoken to them

and they are interested in what you have to say. The way to speak and be remembered is to speak in shorter phrases.

There is no need to tell the jury of the purpose of closing argument or to reintroduce yourself. Take the opportunity to reinforce your theme, or remind the jury of a particularly strong statement by a witness or the victim, that highlights your theme.

2. Consider beginning with something riveting, e.g. 911 tape, admission by the defendant, particularly compelling/damaging quote from testimony, photographs, display of weapon. If your facts lend themselves to it, begin with rhetoric that engages the jury and grabs their attention. For example:

- a. "Would it horrify you to know..."
- b. "Would it amaze you to know..."
- c. "Would it disgust you to know..."

3. Walk them through the crime again so they are in the victim's shoes. Remember that the evidence came to them in bits and pieces and they need you to put it all together again for them. Jurors have not had the advantage of discussing the case with anyone or reviewing reports to get the story straight. When you tell it to them, weave your themes in with the story. Do not review the facts by reviewing the testimony witness by witness.

IV. THE MIDDLE

1. In every case, it is especially important to go through the relevant jury instructions with the jury. Tell them that how they go about their job is entirely up to them, but that you are going to suggest a logical and organized way they should consider following. Tell them:

You should go back into the deliberations room, pick a foreperson, and then pull out the jury instruction relative to count 1, which is page number X (holding it up) in the packet the judge will give you, discuss each element as I am about to do with you here, and find out, element by element if everybody

agrees with whether it has been proved. When you all agree that each element has been proved, you can vote on this particular count. Then you can move on to the next count. Let's get started.

2. Show the law (PowerPoint or chart) and read it to jury. Paraphrasing is okay. Remember, everything you do is designed to make their job easy. Tell them the page number of each jury instruction you think they may need to look at. As you go through each element, stop and describe the evidence that proves that element of the crime. Conclude the discussion of each element by noting that that is how the evidence has proved that element.

3. Don't think you are going to hold their attention with your spell-binding rhetoric. Grab physical pieces of evidence and photographs in the course of the discussion about how each element has been proved. Use charts where applicable. If you have damaging admissions or testimony, highlight key quotes on a chart or with PowerPoint.

It is your job to be the organizer and synthesizer of the information. Confusion equals a defense verdict. Show them the relevant documents; tell them the number of any relevant exhibit you are discussing in case anyone wants to write it down for reference. If you do this, you will have done their work for them.

4. Frame the issues to be resolved.

- a) describe the significant factual issues which are undisputed
- b) describe factual issues which are disputed

5. This is when you argue **credibility** issues. There are usually credibility issues in a trial and you must lead jurors to decide who told the truth. In most cases someone is lying, it is not a mere mistake of perception or memory. Remind jurors that they agreed in voir dire to decide who is telling the truth.

- Explain the meaning of testimony that was not obvious
- Explain **corroboration** of several witnesses proves the point
- Explain the significance of a witness testifying against their own interests

- Explain how minor inconsistencies don't affect the truth of material facts: why a witness might have appeared confused
- Explain why a witness should be believed and possibly use jury instruction
- Deal with defense witnesses head on, explaining their motive to lie, deceive or have convenient memory loss
- Defense witnesses often present you the opportunity to compose a lengthy list of all the alleged facts and relatively minor details they supposedly "remember" and then compare it to their loss of memory about a significant event

Don't be afraid to come down hard on a lying witness, especially the defendant. You must show the same conviction and passion for truth you expect of your jury. CALCRIM 226 instructs the jury that they can believe all, part, or none of a witness's testimony. Life experience has taught you that the best liars include bits of truth into what they say to gain credibility. Remind jurors of these life lessons we have all learned. Usually you will be able to catch a defendant in a lie no one can explain away. Defense attorneys usually minimize such lies with a wave of the hand and an off-hand explanation that the defendant clearly said that only because he was nervous.

Short, pithy illustrations of your point are sometimes appropriate. Example:

If you find a fly in your soup or a rat in your hamburger, you don't just take the fly or rat out and eat the rest. You discard the whole dish because you now distrust the server and the cook.

6. Focus on the "The Innocence Argument." Articulate the innocence scenario, then:

- a) dwell on how absurd innocence is
- b) show inconsistencies
- c) point out unanswered questions
- d) missing evidence that would support the innocence theory

7. Argue the reasonableness of guilt.

I cannot emphasize enough the pains you should take to make it simple for the jury. The moment they start to flounder because they are confused about how to proceed is the moment they become a hung jury or an acquitting jury.

Relate your key evidence to “reasonableness” arguments. For example: “It is reasonable to believe defendant was under the influence because he stumbled three times getting out of the car. It is unreasonable to believe defendant was sober since he stumbled three times getting out of the car.”

V. THE CONCLUSION

1. Review your theme so the jury is reminded why they should care.
2. Remind them to focus on the facts, the law and justice.
3. Remind them of the moral imperative in your case. In every case, there is some. Remind the jury this case is *People of the State of California v. Joe Criminal*, and that the reason for that is that a crime against one person is a crime against the entire community.

In the appropriate case, you can suggest to them that criminals cloaked in the respectability of a businessperson or tradesperson are worse really than the street thugs of society, because these con artists are harder to spot and their offenses often don't get reported due to the embarrassment and ignorance of the victim.

You've got to get their attention and make them care. Logic makes you think, emotion makes you act. Your challenge:

If the jury thinks this is a case of a simple, unfortunate misunderstanding or is de minimus with no victims, they are going to walk the crook. No one wants to saddle someone with a criminal conviction over a mere misunderstanding. That is why you must get the jury

emotionally involved - so they recognize this defendant's conduct is about purposeful deviousness or he has somehow caused another pain or put someone in danger.

If appropriate, emphasize the victim's vulnerability and that the victim will suffer long after the crime - fear and shame do not dissolve away so easily. It's about destroying trust and leaving fear.

4. Have a planned exit line. Examples:

a. That is what happened. The defendant is guilty of driving under the influence of alcohol and driving with a blood alcohol level of more than .08%, and you will find both proven beyond a reasonable doubt. I am asking you to simply hold the defendant accountable for his actions, which means returning a verdict of guilty for defendant's decision to drive under the influence of alcohol.

b. You have the power to do justice, now is the time to exercise that power. The defendant has earned convictions for battery and vandalism. Please deliver justice for this community.

Do not start walking back to your seat until you have finished uttering your last word.

5. Do not linger with the jury and start repeating yourself. The worst way to finish is to do so in such a way that you have given everyone in the room the idea you are uttering your last sentence, and then you meander for another five minutes, like you don't know how to quite say good-bye. It is unprofessional and jurors stop listening to your content and focus on the difficulty you are having finding your seat as they will you to it. Finish strong and with conviction.

VI. REBUTTAL ARGUMENT

1. Do not try to respond to every silly defense point in rebuttal. The jury is going to recognize much for what it is without you spending any time on it. You do need to address the high points

and set the record straight on important issues. As in any presentation before a jury, the rule of primacy applies so choose carefully what you address first. You should again make use of visuals. Do not think of rebuttal as the one part of the trial where you simply wing it in response to what the defense says in closing. It is wise to address some issues only after the defense has brought them up in their argument. Parts of rebuttal argument are outlined in advance because you can anticipate many defense arguments. For example:

a) You know the defense will make an issue of any questions that cannot be answered, any gaps in the evidence. You will be prepared to remind the jury that not every question can be answered nor should anyone expect it so, after all, the defendant did not make a videotape of the crime. Examples to demonstrate the point are limited only by your imagination. "I could show you a map of California with some cities missing. You would still recognize it as a map of California. You could show a four year old a jigsaw puzzle of a horse with a couple of pieces missing. The four year old will still recognize it as a picture of a horse."

b) Many defense attorneys like to ridicule a case because it is based on "**circumstantial evidence**" and remind the jury that if there are two reasonable interpretations of the circumstantial evidence, one for guilt and the other for innocence, you must find the defendant not guilty. They usually leave out the balance of the instruction which reads "**However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.**" (CALCRIM 224) You need to read the jury this part of the instruction, cite the page number of the instruction, and make the point that just because an argument is made does not mean it is reasonable. The jury is free to and should reject all unreasonable arguments.

c) The defense commonly offers "reasonable" explanations to explain away individual pieces of evidence and then claims the jury has been provided reasonable doubt. However, the jury instruction reads "... you must impartially compare and consider **all** the evidence that was received" The evidence looked at as a whole, only points to one **reasonable** conclusion.

Example:

Evidence offered

Erratic driving

.08 blood alcohol

Excuse offered

Fumbling with cell phone

Machine calibrated incorrectly

Red and watery eyes	Make-up irritation
Slurred speech	Nervousness
Failed FSTs	Poor athlete and stupid

d) Prosecution witnesses cannot remember certain details. You must appeal to jurors' reason with meaningful examples. Would it be more believable if the witness recounted every detail? What did you have for lunch 10 days ago? What were the first words you said to your spouse after breakfast that day? Some minor gaps and/or discrepancies actually lend the ring of truth. Even the law recognizes this:

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. CALCRIM 226

e) Witnesses give slightly different stories. Point out that we all use different words to describe what we see. We also have different vantage points and attach more or less significance to different aspects of an event, resulting in varied accounts. You might hold up a quarter to the jury. The jury sees the "heads" side of the coin. You see the "tails" side. You both recognize it as a quarter, though you have different views of it.

2. Take copious notes during the defense argument. What you are certain you will remember to rebut when you hear it at the beginning of his/her argument, you will likely forget as you turn your attention to the ridiculous arguments made later.
3. You must be organized. Number/outline the points you want to make and strain not to repeat yourself.
4. Deal head on with defense smokescreens, red herrings and misstatements of facts and law.
5. Point out and emphasize what the defense ignored.

6. REASONABLE DOUBT. This is the appropriate time to deal with reasonable doubt, rather than during your opening argument. **Emphasize that doubt must be based on reason when considering all the evidence.** Lists of evidence are particularly powerful. If the defense counsel persists in talking about the presumption of innocence, carefully cut the legs out of that nonsense by making the point that the presumption of innocence was rebutted when the jury heard the testimony. *Do not actually state that there is no longer a presumption of innocence, as that would be error.* The question before the jury is whether the charges have been proved beyond a reasonable doubt.

Illustrations of “reasonable doubt” are plentiful and prosecutors often develop favorites and repeat them to juries. Not every case calls for an example. Here are a few:

- a. You are with your family and about to drive through an intersection. You see a large truck approaching the intersection from the cross street in front of you. You have the green light. You cannot see the color of the light facing the truck. You proceed through the intersection anyway. You put your entire family at risk when you couldn’t see the color of the light for the truck. You did so because you did not have a reasonable doubt about the truck stopping. You saw that you had a green light and made a reasonable deduction that the truck had a red light.
- b. You see a child walking toward you from a pool. The child is dripping wet head to toe. It is not raining. There are no hoses nearby. You ask the child if he was in the pool. The child says no. Despite the denial, you do not have a reasonable doubt the child was in the pool.
- c. You put a tray of freshly baked chocolate chip cookies on the counter. You tell your child not to eat any. A few minutes later you go into the kitchen and see that a couple of cookies are missing. Your child is there and the area around his lips is stained with chocolate and crumbs. You ask “Did you eat any of those cookies?” The child says no, someone else must have. Do you have a reasonable doubt that child ate one of those cookies?

7. You will have cases about which you and the jury will be scratching your heads trying to figure out where the friction in the evidence is or why you are all assembled. In many cases, it

bears reminding the jury that in our system, everyone is allowed to have a jury trial. A person need only utter two words, **“not guilty,”** when asked how they plead to the charge, and they can have a jury trial. It does not matter if the crime is on videotape. This serves to disabuse the jury of the notion that it must be a close question if we are having a trial.

8. What to do if defense uses a chart listing a number of non-legal standards to make the point that “reasonable doubt” is an impossible standard to prove?

First, you have every right to see in advance all charts the defense is going to show the jury. If you see this chart, you can object on the basis that it confuses the jury regarding the legal standard applicable in the case. Your colleagues can tell you in advance usually what judges agree to keep the chart out. However, you may choose not to object and instead embrace the opportunity to expose the specious argument of the defense.

Just as the defense can create a number of lower standards (e.g. possibly guilty, maybe guilty, probably guilty, likely guilty, etc...), the prosecution could create a chart in which “reasonable doubt” is the low bar, surpassed by shadow of a doubt, speculative doubt, imaginary doubt to absolute certainty. Ask the jury:

“Is that really helpful? I don’t think so. The law defines reasonable doubt. We all have seen people make unreasonable arguments to advance their point. When we see this in everyday life, we ignore those unreasonable arguments. Please don’t leave your common sense outside the courtroom. If after considering all the evidence, you actually have a reasonable doubt that defendant is guilty, so be it. But if the defendant is guilty, justice requires you to do your duty and convict.”

One of my favorite lines in closing argument, when you have facts that don’t make it seem overly dramatic, is:

There can be no justice until those who are untouched by crime become as indignant as those that are.

VII. GUIDELINES TO AVOID ERROR

1. All reasonable inferences from the facts can and should be argued, however, be careful not to argue facts not in evidence.
2. It is error to express your personal opinion. However, the jury should have no doubt what you think if you are a good advocate. They should feel your conviction. Just leave the words “I believe” out of your delivery.
3. It is improper to comment on the defendant’s failure to testify. Doing so is often referred to as *Griffin* error. Unless the defense attorney opens the door by discussing the defendant’s failure to testify, you must refrain from commenting on the failure. You should not even do so in an indirect manner, e.g. it is error to tell the jury “The defendant is hiding from you.” *P. v. Sanchez* (2014). If you believe the defense has opened the door, it is best to approach the bench before you argue to advise the court of your intention to comment on defendant’s failure to testify and obtain a ruling permitting you to do so. You may point out to the jury that the “**power of the subpoena**” works both ways. This usually comes up when the defense chastises you in their argument for not calling certain witnesses. Just be sure not to infer that the defense has any type of burden to prove anything.
4. A prosecutor commits misconduct by arguing defendant’s sexual orientation was relevant to establish motive. Motive describes a person’s reason for committing a crime. For example, arguing that a female defendant molested a female child because she is gay is improper because it asks the jury to convict based on who the defendant is rather than on what she did. *People v. Garcia* (2014) (DCA).
5. A prosecutor commits misconduct by arguing to the jury about potential community reaction to their verdict. *P. v. Shazier* (2014) (CASC).
6. A prosecutor commits misconduct by urging jurors to convict in order to feel comfortable. *P. v. Biter* (2014) (Ninth Circuit)

7. A prosecutor cannot tell the jury that the presumption of innocence is “over” in argument. The presumption of innocence continues into deliberations and is not “over” until the jury concludes guilt was proven beyond a reasonable doubt. *P. v. Dowdell* (2014) (DCA).

VII. POST-ARGUMENT

The court may allow additional argument even after the case has been submitted to the jury. For example, this might come up after the jury begins deliberations and informs the judge that it is having difficulty reaching a verdict because jurors are confused about the law or how to apply it. The judge may choose to (1) do nothing, (2) give further instruction on the law to jurors, and/or permit additional closing argument. If additional argument is permitted, the court may allow both sides to argue and allow the prosecutor to rebut. *P. v. Salazar* (2014) (DCA), Penal Code section 1140, California Rules of Court 2.1036.

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ACTIVITY EVALUATION FORM FOR CALIFORNIA MCLE

Please complete and return to Provider (Please Print)

Provider Name: Ventura County District Attorney's Office Provider Number: 1130

Title of Activity: Closing Argument/Rebuttal

Date(s) of Activity: November 9, 2016

Time of Activity: 9:00 - 11:00 am

Location of Activity: HOJ: MDB Conference Room

Please indicate your evaluation of this course by completing the table below

Question	Yes	No	Comments
Did this program meet your educational objectives?	<input type="checkbox"/>	<input type="checkbox"/>	
Were you provided with substantive written materials?	<input type="checkbox"/>	<input type="checkbox"/>	
Did the course update or keep you informed of your legal responsibilities?	<input type="checkbox"/>	<input type="checkbox"/>	
Did the activity contain significant professional content?	<input type="checkbox"/>	<input type="checkbox"/>	
Was the environment suitable for learning (e.g., temperature, noise, lighting, etc.)?	<input type="checkbox"/>	<input type="checkbox"/>	

Please rate the instructor(s) of the course below

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
Mike Frawley, Chief Deputy	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

Instructor's Name and Subject Taught	On a scale of 1 to 5, with 1 being Poor and 5 being Excellent, please rate the items below	Rate 1 – 5
	Overall Teaching Effectiveness	—
	Knowledge of Subject Matter	—

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

Top portion of form to be completed by the MCLE Provider

Provider Name: Ventura County District Attorney's Office

Provider Number: 1130

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Date(s) of Activity: November 9, 2016

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Location of Activity (City, State): HOJ: MDB Conference Room

Total California MCLE Credit Hours for the above activity are 2.00, including the following sub-field credits:

- Legal Ethics _____
- Elimination of Bias in the Legal Profession _____
- Prevention, Detection and Treatment of Substance Abuse/Mental Illness that Impairs Professional Competence _____

Bottom portion of form to be completed by the Attorney after participation in the above-referenced activity

By signing below, I certify that I participated in all, or some*, of the activity described above and am therefore entitled to the following MCLE credit hours -

Total California MCLE Credit Hours 2.00, including the following sub-field credits

Legal Ethics _____

Elimination of Bias in the Legal Profession _____

Prevention, Detection and Treatment of Substance Abuse / Mental Illness that Impairs Professional Competence _____

(You may not claim credit for sub-fields unless the Provider is granting credit in those areas and you participated in those portions of the activity)

Print Your Name _____

Your California State Bar Number _____

Signature _____

* partial participation hours must be pro-rated