

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

Top portion of form to be completed by the Provider

It is preferred that the form is pre-printed with the attendee's name and bar number.

Provider Name: Ventura County District Attorney's Office

Provider Number: 1130

Title of Activity: Opening Statement

Date(s) of Activity: October 11, 2018

Time of Activity: 8:30 a.m. to 10:30 a.m.

Location of Activity (City/State): Ventura, CA

This Activity qualifies for: Participatory ☒ Self-Study ☐

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

- Legal Ethics: _____
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

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 claim the following California MCLE credit hours:

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

- Legal Ethics: _____
- Recognition and Elimination of Bias: _____
- Competence Issues: _____

(You may not claim credit for the subfields above unless the provider is granting credit in those areas above.)

Print Your Name (clearly): _____

Your California State Bar Number: _____

Signature: _____

* partial participation hours must be pro-rated

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: Opening Statement

Date(s) of Activity: October 11, 2018

Time of Activity: 8:30 a.m. 10:30 a.m.

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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 |
|--|--|------------|
| Michael K. Frawley / Opening Statement | 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 | — |

OPENING STATEMENT

Chief Deputy Michael K. Frawley
Handout – October 11, 2018

FIRST RULE: PRESENT YOURSELF AS A PROFESSIONAL

- Be yourself
- Be sincere
- Be positive and confident
- Be organized (no clutter, no exasperated searching for a document or exhibit)
- Make eye contact
- Use repetition, use repetition, and use repetition
- get points across with testimony, photos, diagrams, demonstrations (use of photos and tape recordings you intend to later admit into evidence is appropriate (P. Wash (1993) 6 Cal.4th 215, 257) (note: it is only when evidence is “so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted” that a remark made in opening statement as to evidence not later admitted would constitute misconduct (P. v. Dykes (2009) 46 Cal.4th 731, 762))
- Direct words and strong imagery
e.g. “The defendant committed an ADW when he hit the victim with a bar” vs.
“The defendant chose to pick up that piece of steel, that 4-foot bar, that 15-pound weapon, and slam it into Mr. Victim once, twice, three times, four times and each time would like you as a jury to say it was proper, it was prudent, it was reasonable, it was responsible, it was justifiable.”
- Project a passion for truth
- Dress so that jurors remember you were well-dressed, not necessarily what you wore
- Every argument, every issue, every chart, every list, every exhibit is framed for maximum effect
- Vary your tone, volume and pace

- Don't violate the jury's personal space
- Don't stare
- Don't turn your back on a speaking witness, especially your witness
- Don't read your notes to a jury; refer to them to keep yourself on track

I. PROCEDURE

After jury selection is complete, the judge will turn to you and ask if you would like to make an opening statement. Always make an opening statement. The defense may or may not make their opening statement immediately after you do. The best ones do, but some wait until after you have finished presenting your case.

II. SHOULD OPENING STATEMENT SIMPLY SUMMARIZE WHAT YOUR WITNESSES WILL SAY ON THE STAND?

You are an advocate for your case in everything you say and do once you walk into the courtroom. Opening statement should be a persuasive presentation aimed at instilling in jurors the desire to vote guilty as you speak. Your challenge is to present your case in the most compelling manner possible. The crafting of your opening statement deserves a great deal of thought and creativity. If you merely give a monotone recitation of what you expect your witnesses to say, you will have squandered a tremendous opportunity.

The "rule of primacy" gives the prosecution a tremendous advantage. Jurors tend to remember and relate to the first thing they hear. Impressions formed first are the strongest and last the longest. Studies estimate that people do 75% of their learning through seeing and 13% through hearing. More disheartening, it is estimated that people retain a mere 30% of what they learned seeing and 20% of what they learned hearing. Prosecutors must maximize the retention ability of jurors by presenting both visual and auditory arguments. Descriptions of testimony should be accompanied by photographs and diagrams whenever possible. Preconceptions developed

during opening statement can guide jurors to hear evidence in a manner consistent with the beliefs they form during opening statement.

This is the second most important part of the trial. The only thing more important is picking the right jurors. Jurors are anxious to hear if you have a good case. They have endured a great deal of boredom up to now, sitting around with little idea of what the case is about. Importantly, jurors will quickly deduce how much you believe in your case during your opening statement. You must make a powerful, persuasive presentation and frame the evidence to your best advantage. You are an advocate. Avoid bland and neutral openings. A dynamic opening statement along with a persuasive closing argument is a winning combination.

A. PURPOSES OF OPENING STATEMENT

- Establish:
1. Themes
 2. Your Credibility
 3. Strength of your case

“Give to us clear vision that we may know where to stand and what to stand for, because unless we stand for something, we shall fall for anything.”

Peter Marshall, Senate Chaplain

1. THEMES

Give your theory of the case with words carefully chosen so a memorable theme stays with jurors throughout trial. Your theme(s) must be interwoven with the story of the case. Word choice is important. Descriptive words play a significant role and aid the memory of the listener. Be yourself and try to tell a story and create anticipation. Write out your opening statement and practice it out loud and standing up. This exercise will force you to improve your phrasing as well as allow you to rely less on your notes when you actually deliver it to the jury. Edit, edit, edit. Avoid filler comments and anything that does not further your objectives.

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

Oliver Wendell Holmes

If your case is getting covered by the media, you should be able to predict the quotes from your opening statement that the reporter will use in the article. The reporter is attempting to gain the reader’s attention and will attempt to report in the most succinct and compelling way the essence of your case. That sentence or two should be part of your opening and closing statements. Attention spans are getting shorter and shorter. You must craft pithy phrases to frame your points.

What is your moral imperative? Emphasize facts that drive home why this defendant must be held accountable.

What are going to be the most difficult issues for your jury to deal with, both legally and factually? For example, in a DUI, you don’t have to prove that the person was drunk; you just must prove that he could not drive as safely as a sober person.

If the case is going to trial, chances are there is something about it that cuts in favor of the defense, e.g. an undesirable victim, no one was hurt, an alibi, self-defense, etc. You must hammer on facts that minimize those defenses without actually stating the defenses.

2. YOUR CREDIBILITY

Remember that first and foremost the jury must see that you are a sincere person who wants them to do the right thing. You are not about winning, you are about justice. Once the jurors sense that about you, they will be comfortable following your lead. Every trial is played out on two levels and you must appeal to the jury on both. The first level is the “facts and the law.” The second level is that of “emotions and values.” The first level is what is necessary to make the conviction stand on appeal. Emphasis on the second level results in a conviction.

3. STRENGTH OF YOUR CASE

Studies show that 80% to 90% of jurors make up their mind about a case during or after the opening statement and stick to that decision. Jurors should want to convict after your opening statement if you have done your job well. They will want to convict if you are sincere, direct, and articulate, and give them a reason to care. Show a command of the facts and organize them so the case can be easily understood. Remember, at the point you are giving the opening statement, you have had a long time to become assimilated to the cases and absorb it. You now must lay it out, so the jury can absorb it very quickly.

III. GUIDELINES

1. Relate the facts to pertinent legal principles. Descriptions of facts relevant to the elements of the crime should incorporate the key language from the jury instructions. The judge will give the jury legal definitions of the elements of the crime. For example, part of the definition of battery is “a touching in a rude or angry manner.” Incorporate those words into your description of the facts and also tell the jury the elements of the crime. If you are prosecuting a terrorist threat, you should incorporate the words “sustained fear” in your description of the facts because that is an element you must prove. Rarely will the judge sustain an objection to a succinct recitation of the elements of the crime. This gives focus to an opening statement.

2. Anticipate the defense and without clearly stating the defense, discuss facts that weaken the defense.

3. Speak clearly, simply, directly and use everyday verbiage. Avoid cop-ese and lawyer-ese.

Avoid: “exited the vehicle”

OK: “got out of the car”

Avoid: “surveilled the suspect’s residence”

OK: “watched the defendant’s apartment”

Avoid: "defendant related to Officer P that"
OK: "defendant admitted"

Unclear: "I wish to underscore the significance of analyzing the witness' conduct at that point."

Clearer: "I want to stress the need to think about the witness' conduct at that time."

Clearest: "It's important to look at what Mr. Smith did."

4. Watch the jury as you speak. Make your notes in oversize print to more easily transition from looking at your notes, to the jury, and back.

5. Use evidence, charts, maps, photographs, PowerPoint, etc... P. v. Green 47 C2d 209. If you are playing a tape (e.g. 911 call), CD, or video, be prepared to handle this smoothly. Physical evidence is powerful imagery so use it whenever possible.

6. Introduce key witnesses and explain key relationships.

7. Speak at a moderate rate.

Unrelenting fast pace = hostile jury.

Unrelenting slow pace = suicidal jury.

8. Vary your volume.

9. Phrasing. Craft your words and delivery like a speechwriter/speechmaker crafts a speech. Do not underestimate the power of the pause. Words are your tools of persuasion.

10. Clothing – the jury should remember you were dressed nicely, not necessarily what you wore.

11. Posture – wide stance is more relaxed, easy-going. Forward leaning connotes interest and involvement but excessive forward leaning should be avoided as you don't want to appear to be

getting in someone's face. Lean forward for emphasis. Rigidity suggests detachment. Posture denotes confidence, or a lack thereof.

12. Use of space and the podium – physical expression is important in providing emphasis. Use the podium for notes but not as something to hide behind. Move around.

13. Alert jurors to witnesses who you think will lie and tell them what you will do if they lie. It is okay to explain why they will lie. Don't be stiff about it, be real and explain in human terms why witness will not tell the truth.

14. When possible and appropriate, use PowerPoint in your presentation. However, be careful to avoid using PowerPoint to simply read your opening statement to the jury. PowerPoint should be used to organize the case for the jury and to emphasize key points. For example, a timeline shown via PowerPoint would be quite helpful.

15. Weave together evidence that establishes motive, method, intent and moral imperative. Moral imperative makes the jury care. Often the moral imperative is self evident. However, in a victimless crime, it bears pointing out. The intoxicated driver who was pulled over merely for rolling through a right hand turn at a stop sign at 2:00 a.m., obviously didn't hurt anyone and committed an infraction many of us commit everyday while completely sober. Don't minimize or be afraid of these facts. Humanize the story you are telling.

E.g. DUI case: Explain how the defendant had been working hard and long hours and was intent on going out that night to wind down by using alcohol. What he did not think about was whether he was going to be able to drive as safely as a sober person by the time he needed to drive his car again. He allowed himself to become a danger to others and it is fortunate that Officer Smith noticed him before he hurt someone.

IV. DON'Ts

1. Don't try to impress with your vocabulary, talk down to jurors, dazzle or perform.

2. Don't go into too much detail or try to summarize the expected testimony of every witness. One can only absorb so much. You are trying to get a story and theme across, not make sure they know every subtle fact of the case when you are done. Beyond the name of the victim, names of witnesses are rarely helpful at this stage. The jury can absorb an interesting story, but they won't remember the names of all the characters at this stage, so just leave most of the names out.

3. Don't speak in monotone or read. Look down at your notes periodically to keep yourself on track. If you have practiced your opening statement, it will flow much better and you will need your notes less.

4. Don't overstate your case or promise anything you are not prepared to back up with evidence.

5. **Can you argue in the opening statement?** The technical answer is "no," however, that does not mean you do not further your purpose as an advocate. You can say anything you want to if you preface it with the words "The evidence will show." However, don't employ that phrase unless the court is sustaining "argumentative" objections to your opening statement. Those four words (the evidence will show) take away from the force of what you are communicating.

In a concurring opinion in *U.S. v. Dinitz*, 424 U.S. 600 (1976), Chief Justice Burger wrote:

An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof, is, if it relates to significant elements of the case, professional misconduct.

However, our California Supreme Court described the purpose of an opening statement as follows: "It is difficult to conceive of how the prosecutor can accomplish [the] function of [opening statement] if he is not entitled to state his theory of the case in terms of the requisite elements of the crime." (*P. v Ramos* (1982) 30 Cal.3d 553, 575) Nothing prevents the statement from being presented in a story-like manner that hold the attention of lay jurors and ties the facts and governing law together in an understandable way." (*P. v. Seumanu* (2015) 61 Cal.4th 1293, 1342. In fact, there is nothing wrong with using epithets in describing defendant's conduct as long as they are "reasonably warranted by

the evidence and “not inflammatory and principally aimed at arousing the passion or prejudice of the jury.” (P. Farnam (2002) 28 Cal.4th 107, 168 (prosecutor described defendant as “monstrous, cold-blooded, vicious, predator” and called the evidence “horrifying” and more horrifying than your worst nightmare”))

6. Don’t waste the first minutes of the opening statement lecturing the jury about the function of opening statement, thanking the jury, telling you are going to give them a roadmap, telling of your duty to prove the case beyond a reasonable doubt, etc. If you do, you waste the time you have the jurors’ most rapt attention. Lawyers engage in the afore-described rituals more for their own benefit and comfort than the jurors. It is like nervous small talk and fails to advance your position.

7. Don’t fumble with exhibits or charts.

8. Don’t ever tell jurors this is a complex or complicated case. It can be a lot of things, but it is never complicated. Complicated or confusing translates too often to reasonable doubt. Your job is to make is simple.

V. IDEAS FOR GETTING STARTED

1. Avoid the too common opener; “Good morning ladies and gentlemen, I am Joseph Prosecutor and I’d like to thank you for being here today. I am going to use this opportunity referred to as opening statement to provide you with a roadmap. What I have to say is not evidence. Evidence comes in bits and pieces and by giving you a summary now, you can see how it all fits together even as you are getting it one piece at a time.”

You can work that type of explanation in later. Instead, jump straight into the story behind the case, without any introduction. A great deal of thought and organization should go into the development of your opening statement. This is your opportunity to organize and channel the jurors’ way of thinking consistent with the prosecution theory of the case. For example, don’t start at a place that makes the victim or witness look bad. You won’t be able to hide the fact you

have an unlikable victim or witness, but you need to make sure the first negative thoughts a juror has about the case are directed at the defendant.

2. In the appropriate case, tell the jury the trial is probably going to be different than they expect. This will really pique their interest.

3. Without undue drama, tell the story in a powerful way.

Don't start with:

“Officer Smith here (pointing), caught John Doe burglarizing a home in broad daylight and when Mr. Doe ran from him, Officer Smith caught him and hit him in the head with his flashlight.”

Improved version:

This is Mr. Smith (pointing) and this case is about how Mr. Smith abused his authority and the respect the public gave him in his position as a police officer. Mr. Smith chose to use his flashlight as a deadly weapon on an unarmed man, Mr. Doe, who had surrendered to him. Mr. Smith did this because he was angry. In full view of another officer, Mr. Doe raised his hands in submission (demonstrating) to Mr. Smith, but Mr. Smith took this flashlight (demonstrating) and whacked Mr. Doe on the forehead. He missed the temple by just a quarter inch and opened a cut which took 9 stitches to close. Mr. Doe continues to suffer headaches today as a result of that assault.

DUI case

MAKE SURE THE SHOE FITS. Most DUI offenders are normal people who drank too much and drove, so you don't want to come at them like they are Osama Bin Laden in your opening. A drunken idiot who picks a bar fight and slashes someone in the face with a beer bottle merits

some fire and brimstone, while your typical DUI defendant needs something a little more low key and down to earth.

Typical DUI opening:

On the early evening of September 21, 2006, the DEF had at least four beers to drink at a bar. With at least the equivalent of four beers worth of alcohol still in his system, he decided to get behind the wheel of his car and try to drive home.

CHP Officer Dudley Do-Right, a trained, professional peace officer, was on routine patrol that evening. He noticed a vehicle that was weaving a bit on PCH, and he pulled the car over. He contacted the DEF, and when he did, he smelled the odor of an alcoholic beverage coming from the car, and noticed the DEF had red, watery eyes, and his speech was slightly slurred. The DEF told him he had drank just two beers, and Officer Do-Right asked him to step outside his car so he could conduct some field sobriety tests.

This case will be interesting because you are going to get to learn about all the latest tools that law enforcement uses when they are investigating someone they suspect has been driving under the influence of alcohol. You will learn that Officer Do-Right had the DEF perform . . .

You will learn about the PAS device . . .

You will learn about blood tests, and how the blood alcohol test in this case confirmed and corroborated Officer Do-Right's belief that the DEF had driven while under the influence of alcohol . . .

You will learn that the DEF made a choice to drive when he could not drive as safely as a sober person. At the end of this trial I will be asking you to hold the defendant accountable for his decision and his actions that night, and force him to accept responsibility for driving while having a blood alcohol level above .08, and for driving while under the influence of alcohol.

VI. THE CONCLUSION

1. Have a planned exit line. e.g. “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 will be asking you to simply hold the defendant accountable for his actions, which means returning a verdict of guilty for the defendant’s decision to drive under the influence of alcohol.

2. 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 attempt to will you to it. Finish strong and with conviction.