

One Minute Brief

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TOPIC: Impeaching Witnesses

ISSUE: What is the difference between impeaching and “Greening” a witness?

When a witness is reluctant to testify fully and completely in open court and, as a result, alters their testimony, that altered testimony typically manifests in one of two ways: 1) the witness testifies inconsistently with prior out-of-court statements; or 2) the witness feigns lack of recall regarding the events in question.

When a witness testifies inconsistently with prior out-of-court statements, those prior statements are admissible under Evidence Code § 1235 if the appropriate foundation is laid pursuant to Evidence Code § 770. Section 770 requires that either:

- a) the witness was examined regarding the statement while testifying and given the opportunity to explain or deny it; or
- b) the witness has not been excused from giving further testimony (i.e. is subject to recall).

Under section 1235, the prior out-of-court statement is admissible to impeach the witness's credibility. When the foundation under section 770 is established, the statement is also admissible for the truth of the matter asserted. (*People v. Green* (1971) 3 Cal.3d 981, 985.)

However, “[t]he right of impeachment does not exist where the witness states he has no recollection of the fact concerning which he is examined.” (*People v. Sam* (1969) 71 Cal.2d 194, 210.)

In *People v. Green*, witness Porter, when called to testify, suffered a memory lapse about his marijuana purchase from defendant. Strangely, he remembered every event before and after the acquisition of marijuana. Porter claimed his memory was impaired by LSD use. He had to be admonished more than once during his testimony to speak up. He stated that he “always had a not very good memory” and was generally evasive and uncooperative on direct examination. When his prior testimony from the preliminary hearing was read, Porter grudgingly agreed that it refreshed his recollection. On cross-examination, when defense counsel sought to “rehabilitate” Porter’s asserted lapse of memory by asking whether the reading refreshed his recollection as to the testimony or the actual event, Porter replied, “mostly my testimony, I guess.”

On appeal, the California Supreme Court found that, based on a dispassionate appraisal of Porter’s “markedly evasive and uncooperative” testimony, the trial court could properly disbelieve his claim of memory loss. The

Court explained: "In normal circumstances, the testimony of a witness that he does not remember an event is not 'inconsistent' with a prior statement by him describing that event." (*Green* at 988.)

However, when a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. (*Green*, at p. 989.) Porter's deliberate evasion was deemed an implied denial, rendering his prior statements materially inconsistent and properly admissible under section 1235.

So how is a court to determine—and how must a prosecutor lay the proper foundation (i.e., "*Greening*" a witness)—when a witness feigns a lack of memory?

As long as there is a reasonable basis in the record for the court to conclude that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. (*People v. Ledesma* (2006) 39 Cal.4th 641, 711–712; *People v. Ervin* (2000) 22 Cal.4th 48, 84–85.)

In *Ledesma*, the witness—a friend of the defendant—admitted she was reluctant to testify, had failed to appear at a prior hearing, and claimed, even before reviewing her prior testimony or recorded interview, that neither would refresh her recollection.

In *Ervin*, the witness denied memory of the events in question. When her preliminary hearing testimony was read to her, she denied remembering that testimony as well. She also claimed inability to identify either defendant or his codefendant, who she nonetheless acknowledged as the father of her child.

Example of facts that can support a court's finding that a lack of recall is feigned:

- Witness's failure to appear on subpoena.
- Demeanor or attitude toward testifying.
- Refusal or inability to have memory refreshed.
- Selective memory (before, after, but not during the critical time frame).
- Expressed reluctance to testify.
- Relationship to the accused.

BOTTOM LINE: The foundation for introducing prior out-of-court statements depends on the nature of the witness's testimony. If a witness denies making a prior statement or offers testimony that is inconsistent, impeachment is permitted under Evidence Code section 1235, and per section 770.

When a witness feigns a lack of recollection, the first step is to question the witness thoroughly to create a record establishing a reasonable basis for the court to conclude that the claimed memory loss is not genuine. Once that foundation is established, the prior statement may be admitted under Evidence Code sections 1235 and 770, either by confronting the witness with the statement or by excusing the witness subject to recall.

The statement(s) can be introduced through another witness or with a transcript of prior testimony.

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