

# 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 attendees name and bar number.

Provider Name: Ventura County District Attorney's Office  
Provider Number: 1130  
Title of Activity: Uncooperative Witnesses  
Date(s) of Activity: February 23, 2018  
Time of Activity: 1:30 p.m. to 2:30 p.m.  
Location of Activity (City/State): Ventura, CA

This Activity qualifies for: Participatory  Self-Study   
Total California MCLE Credit Hours for the above activity: 1 hour, 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.)*

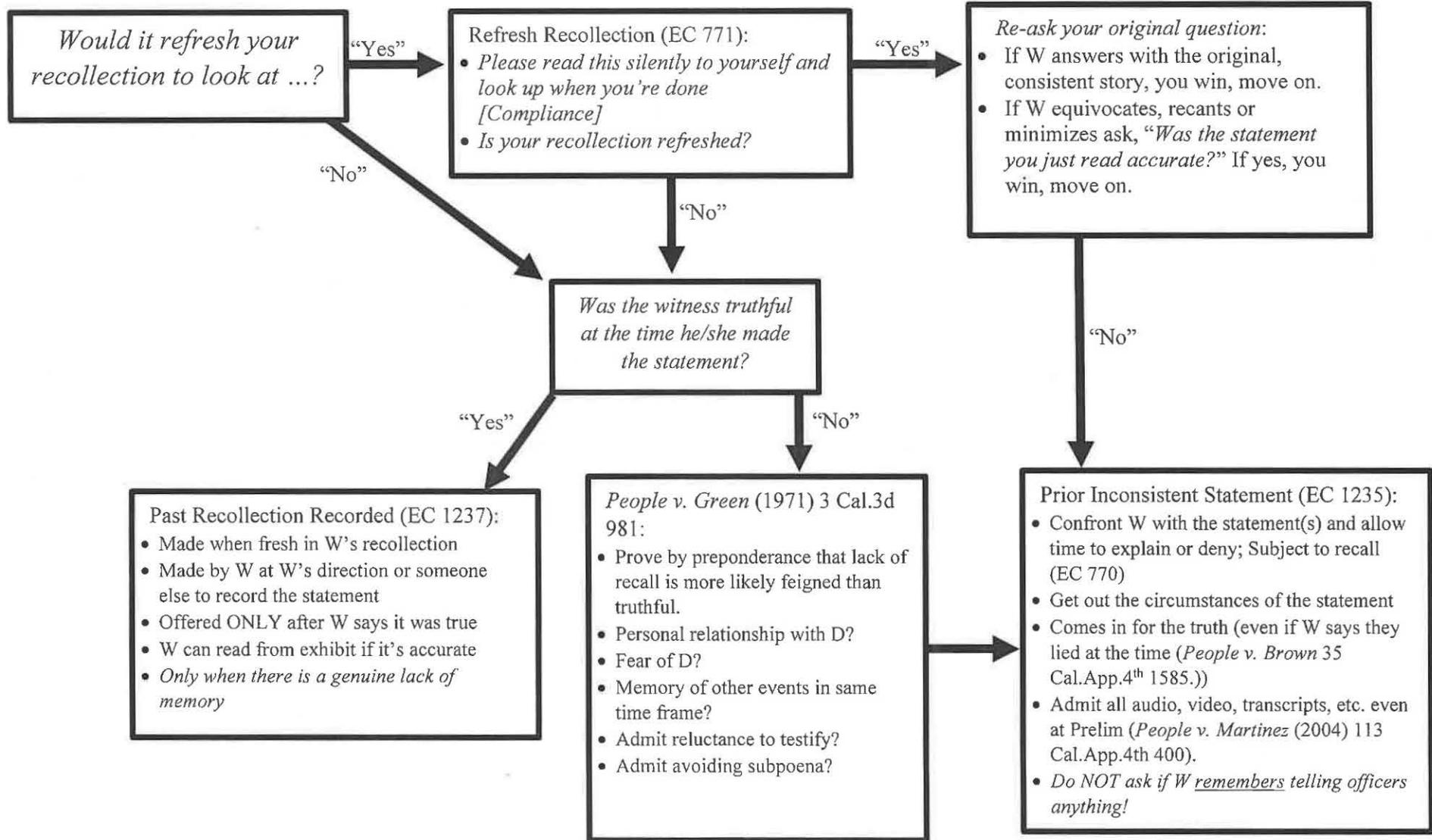
Print Your Name (clearly): \_\_\_\_\_

Your California State Bar Number: \_\_\_\_\_

Signature: \_\_\_\_\_

\* partial participation hours must be pro-rated

## So, your witness doesn't remember/ recall...



## EVIDENCE CODE SECTIONS:

### **770. EVIDENCE OF INCONSISTENT STATEMENT OF WITNESS EXCEPTION**

Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action.

### **771. REFRESHING RECOLLECTION**

(a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness.

(c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:

- (1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and
- (2) Was not reasonably procurable by such party through the use of the court's process or other available means.

### **1235. PRIOR INCONSISTENT STATEMENT**

Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

### **1237. PAST RECOLLECTION RECORDED**

(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

- (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
- (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
- (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
- (4) Is offered after the writing is authenticated as an accurate record of the statement.

(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

### **1238. PRIOR IDENTIFICATION**

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

- (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
- (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and
- (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

### **1291. FORMER TESTIMONY**

(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

- (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
- (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

- (1) Objections to the form of the question which were not made at the time the former testimony was given.
- (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

1  **DEALING WITH UNCOOPERATIVE WITNESSES**

Deputy District Attorney Amber Lee  
and  
Senior Deputy District Attorney Andrew Sullivant

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4  **REFRESHING RECOLLECTION**

Governed by Evidence Code § 771

- ✓When a witness says they "do not remember" this is Step 1 – must attempt to refresh
- ✓You can use anything to refresh recollection but the defense has the right to see it
  - Do not mark it as an exhibit

5  **REFRESHING RECOLLECTION**

- If you know you have a squirrely witness before the trial start consider requesting a 405 hearing to determine if their lack of recollection is a ploy or genuine
  - "Why am I under subpoena, I don't remember anything?"
  - "You can ask but I don't remember."
  - "What if I say I don't remember?"
  - Refusal to come in for witness prep

6  **REFRESHING RECOLLECTION**

Procedure:

1. Give the document to the witness
2. Direct witness to the relevant portion
3. Ask witness to read it silently and look up when they're done
4. Allow witness time to comply
5. Ask if their recollection is refreshed
6. If they say yes, re-ask your question

7  **REFRESHING RECOLLECTION**

Procedure:

7. If the witness says their recollection is refreshed but they are evasive when you re-ask your question, ask if what they just read is accurate.
- ✓Many witnesses will use this question as their cue to unload all of the excuses they have thought of. Don't panic.
8. If they say no, ask if additional time to review the document would help.
9. If nothing is successful in refreshing recollection attempt to lay foundation for Past Recollection Recorded.

8  **REFRESHING RECOLLECTION**

❖Be aware– If the witness' lack of recollection is a ploy they will often try to stop you from confronting them with prior statements to police, use the time they should be reading to come up with excuses or they will look for favorable portions of the police report and claim that you're taking things out of context.

❖All of this is okay as long as they're talking.

9  **REFRESHING RECOLLECTION**

Things to keep in mind:

Pay attention on cross examination!

➤Defense attorneys can't leave well enough alone and witnesses (usually with a relationship with the defendant) will be more open with the defense

➤Make note of everything the witness can now remember

➤Confront them on re-direct

If the witness is using an interpreter ask the interpreter to read the portion you're using to refresh the recollection

10 11  **PAST RECOLLECTION RECORDED**

Governed by Evidence Code § 1237(a)

Applicable when the witness honestly can't remember

Requires the following foundation be laid:

(1) Statement was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(2) Statement was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;

(3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the exhibit is authenticated as an accurate record of the statement.

If you can establish this, then the writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

12  **PAST RECOLLECTION RECORDED**

Procedure:

1. Witness cannot remember

2. Refreshing recollection was ineffective

3. Witness says that they were truthful when speaking to police

4. Witness says they made the statement when the incident/ facts were fresh

13  **PAST RECOLLECTION RECORDED**

Procedure:

5. Witness says the statement was made at their own request or by someone else for the purpose of memorializing the statement (officers can lay this foundation for you)
6. After review, witness says the exhibit is accurate
7. Witness can read their statement directly from the exhibit into the record (officer can also read it if the civilian witness lays the requisite foundation)

14  **PAST RECOLLECTION RECORDED**

Things to keep in mind:

- If the witness who cannot remember anything is the complaining victim or the witness you need to make ID, you will need to use Evidence Code § 1238 – Prior ID
  - ✓ Evidence Code 1238 requires: substantive evidence e.g., ID was made when crime was fresh in their memory and the witness made the identification at a time when it was a true opinion
  - ✓ Prior ID is admissible and sufficient even if the witness cannot make ID in court ... officer who took the prior ID should be able to connect the dots
  - ✓ If their ID was based on a photo lineup, in-field lineup or photo ID the circumstances must be fair and the burden is on you to show that it was
  - ✓ Description of defendant is also admissible under E.C. 1238
- If your witness cannot lay the foundation for Prior Recollection Recorded, it becomes a matter of impeachment

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16  **PEOPLE V. GREEN**

- Getting from refreshing “recollection” to prior inconsistent statement
- Does witness really not remember?
- Preliminary fact for judge to decide (EC 405) – Know your judge!
  - Preponderance standard
  - Comes in without any jury findings, unless fact is in issue for the jury (i.e. credibility)

17  **PEOPLE V. GREEN**

- Minor gives one statement at prelim, another statement to officer, another during trial ... all inconsistent
- At trial not “absolutely sure” of anything
- Can't remember details surrounding defendant's culpability
- Reluctantly admits to refreshing recollection ... as to giving the statement

18  **PEOPLE V. GREEN**

- Remembered every event *before* and *after* he obtained the marijuana, but couldn't remember *how* he got it.
- ❖ Court found that his “evasions are ... inherently incredible [and] ... must be deemed to constitute an implied denial that defendant furnished him with the marijuana.”

19  **PEOPLE V. GREEN**

- Steps to Establish Implied Denial
  - ✓ Bias or relationship with defendant
    - Friend, family, fellow gang member?
  - ✓ Fear or reluctance to testify against Def
    - Admit reluctance, FTA in court?

20  **PEOPLE V. GREEN**

- ✓ Refreshing recollection doesn't help
- ✓ Recalls details about everything else
- ✓ Lack of memory implausible
  - Something witness is unlikely to forget

Lack of memory is now an implied denial ... Impeach with prior inconsistent statement

21 22  **IMPEACHMENT**

Things to keep in mind:

- Somebody may read your prelim transcript to a jury down the road – do a good job!
- Don't save any ammunition – you may not get another chance to use it!
- Be prepared with any extrinsic evidence you would plan to use for impeachment in front of a jury: recordings, transcripts, etc.

23  **IMPEACHMENT**

- EASY: That never happened . . . I hit myself in the face . . . I wasn't there . . . I didn't see anything . . . I didn't talk to the police . . . I've never seen the defendant before.
- HARDER: 50% truth, 50% lie . . . I was there with defendant, we just had a verbal argument
- HARDEST: Minimization . . . He didn't hit me with the object, we were both pulling for it and when he let go, it hit me in the face.

24  **IMPEACHMENT**

- Evidence code section 1235: Prior inconsistent statements come in FOR THE TRUTH.
- Evidence Code section 1294: Prior inconsistent statements of unavailable witness is admissible at trial ONLY if it was admitted at prelim or prior trial.
  - People v. Martinez (2004) 113 Cal.App.4th 400.
  - But see Evidence Code 1370 (DV Cases)

25  **IMPEACHMENT**

- Only get to impeach the inconsistent parts
- Ask questions directly and with specifics:
  - "Did the defendant punch you in the face?"
  - "Did you tell officer Smith that the defendant punched you in the face?"

➤ NOT "Do you recall . . . "

Make sure you get a DIRECT answer

➤ Do not accept equivocal or nonresponsive answer

26  **IMPEACHMENT**

Evidence Code section 770

➤ Extrinsic evidence is inadmissible unless:

1. Opportunity to explain or deny the statement; or
2. Witness subject to recall

Do Both:

➤ Confront wit with prior inconsistent statement (statement, audio, bodycam, transcript, etc.)

➤ Keep the witness subject to recall

➤

27  **IMPEACHMENT**

Steps to properly impeach:

1. Let witness tell narrative
2. Flush out entire story
3. Go back through story and confront witness with prior statements
4. If witness does not admit statement, IMPEACH with prior statement

➤

28  **IMPEACHMENT**

EXAMPLE:

➤ Q: On February 23, 2018 did the defendant punch you in the face?

➤ A: I don't remember

...

➤ Q: Did that refresh your recollection?

➤ A: Yeah, I was mad at him that day.

➤

29  **IMPEACHMENT**

EXAMPLE:

➤ Q: So did he punch you in the face on February 23?

➤ A: No

➤ Q: Did you call the police on February 23?

➤ A: Yes, because I was mad.

➤ Q: Did the police arrive at your location on February 23?

➤

30  **IMPEACHMENT**

EXAMPLE:

- A: Yes
- Q: Did you talk to an officer?
- A: Yes
- Q: Did you tell the officer that defendant punched you in the face?
  - ❖READ DIRECT QUOTES
- A: I don't remember saying that
  - NOT AN ACCEPTABLE ANSWER
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### 31 **IMPEACHMENT**

#### EXAMPLE:

- Refresh recollection? Green? Clarify.
- If witness does not admit making the statement, prove it up with the best evidence you have: prior testimony (judicial notice), Audio/video, transcript, officer testimony, etc.
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### 32 **FORFEITURE BY WRONGDOING**

- Governed by Evidence Code 1390:
- Where a defendant engages in wrongdoing that was intended to, and did procure the unavailability of a witness, the right to confrontation is forfeited. (*Giles v. California* (2008) 554 U.S. 353)
- "One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation" (*Davis v. Washington* (2006) 547 U.S. 813, 833)
- Burden of proof is preponderance of evidence
- "The exception applies not only when the defendant intends to prevent a witness from testifying in court, but also when the defendant attempts to dissuade the witness from cooperating with law enforcement." (*Giles* at 377; *People v. Banos* (2009) 178 Cal.App.4th 483, 491)
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### 33 **FORFEITURE BY WRONGDOING**

- Remember!
- FBW is an exception to the Confrontation Clause and Hearsay
- If forfeiture is found, all evidence should come in, including 1109, 1101(b) evidence, etc.; and all statements, recordings and impressions of the victim
- Know your judge!
- Forfeiture requires some evidence of dissuading or attempts
  - Jail calls, mail op, social media posts
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### 34 **STRATEGIC DECISIONS**

- Make an effort to develop a good relationship with your victims/witnesses
- Start with concessions or establish hostile witness?

- Concessions – likely to get more cooperation/concessions
- Hostile witness – get to lead through concession questions

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35  **STRATEGIC DECISIONS**

- Don't be afraid to ask your witness the common sense questions, you're smarter than they are!
- If they refuse to answer a question, ask them why
- If they pause or look at defense counsel or the defendant, say it for the record and ask why
- Circle back to issues or answers and confront them
- Protect your record! Act like this is the last time this witness is going to testify... because it may be

36  **STRATEGIC DECISIONS**

- In preliminary hearings... to call your witness or not to call your witness?

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37  **STRATEGIC DECISIONS**

- Pros:
- ✓ In D.V. cases you have Evid. Code 1370, so if your witness disappears but you called them in prelim and the defense had the opportunity to cross examine, prior statements are admissible.
- ✓ In other felonies you have Evid. Code 1291 which allows prelim testimony to be read into evidence
- Cons:
- ✓ Second, third, fourth version of events?
- ✓ Not properly prepared with extrinsic evidence

38  **CONCLUSION**

- If you take only one thing from this lecture, remember this:

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