Study K-600 October 18, 2007

Memorandum 2007-40

Miscellaneous Hearsay Exceptions: Present Sense Impressions

The Law Revision Commission has been directed to study whether California should enact a hearsay rule exception for a present sense impression. This memorandum introduces the topic, which the Commission previously examined to some extent in 2003, as well as in its study culminating in the 1965 enactment of the Evidence Code. A communication from attorney John Armstrong is attached as an exhibit. Exhibit pp. 1-3. A chart showing which states have a hearsay rule exception for a present sense impression is attached as Exhibit pp. 4-6.

The Commission's report on this matter is due by March 1, 2008. See CLRC Memorandum 2007-28. **To meet that deadline, the Commission should approve a tentative recommendation at the October meeting if possible.** If the Commission waits until the December meeting to approve a tentative recommendation, there will not be enough time to circulate the proposal for comment and consider the comments before the Commission has to finalize its report. In light of these time constraints, the staff plans to prepare a draft of a tentative recommendation along the lines discussed in this memorandum, and include it in a supplement for the Commission to consider at the October meeting.

The memorandum is organized as follows:

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

SCOPE OF MEMORANDUM

Hearsay evidence is evidence of an out-of-court statement that is offered in court to prove the truth of the matter stated. Evid. Code § 1200(a). For example, a person at the scene of a car accident might say, "The driver of the blue car ran the red light." If evidence of that statement is later offered in court to prove that the driver of the blue car ran the red light, the evidence is hearsay.

In California, hearsay evidence is inadmissible, except as provided by law. Evid. Code § 1200(b). This is known as the hearsay rule. Evid. Code § 1200(c). As in California, hearsay evidence is inadmissible in the federal courts, except as provided by law. Fed. R. Evid. 802.

The main reasons for excluding hearsay evidence are: (1) the opposing party has no opportunity to question the person who made the statement (also known as "the declarant"), (2) the declarant typically did not make the statement under oath, and (3) the factfinder cannot observe the declarant's demeanor. For a fuller discussion of these points, see CLRC Memorandum 2007-41, pp. 3-4.

Both in California and under federal law, there are many exceptions to the hearsay rule. See Evid. Code §§ 1220-1380; Fed. R. Evid. 803-807. This memorandum focuses on the federal exception for a present sense impression (Fed. R. Evid. 803(1)) and California's exception for a contemporaneous statement (Evid. Code § 1241), both of which apply to statements made by a declarant at the time of an event that is the subject of the statement.

The memorandum does not discuss the federal exception for an excited utterance (Fed. R. Evid. 803(2)) or California's comparable exception for a spontaneous statement (Evid. Code § 1240). Those exceptions apply to a statement that was made under the stress of excitement caused by an event or condition, but was not necessarily made at the time of the event or condition. For discussion of those exceptions, see CLRC Memorandum 2003-26, pp. 6-9.

Further, the memorandum does not discuss the federal exception for evidence of a declarant's then-existing mental or physical state (Fed. R. Evid. 803(3)) or the corresponding California exception (Evid. Code § 1250). For discussion of those exceptions, see CLRC Memorandum 2003-26, pp. 9-25.

EXISTING LAW

The Federal Rules of Evidence include a hearsay rule exception for a present sense impression, but the Evidence Code only includes an exception for a contemporaneous statement. Those exceptions are described below.

Federal Approach

Federal Rule of Evidence 803(1) creates a hearsay rule exception for a present sense impression, which is a statement that describes or explains an event or condition that the speaker is perceiving or recently perceived:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> ....

Uniform Rule of Evidence 803(1) is almost identical to the federal rule.

"A perfect example of a present sense impression is a radio announcer's play-by-play description of a baseball game." Passannante, *Res Gestae, The Present Sense Impression and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 Fordham Urb. L.J. 89, 99 (1989). "While earlier commentators, codes, and cases hinted or suggested that the statement of a witness describing an event while perceiving it should be admissible over a hearsay objection, the present sense impression was not generally recognized as an exception to the hearsay rule until the enactment of the Federal Rules of

Evidence in 1975." McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907, 907 (2001) (footnote omitted).

Other U.S. Jurisdictions

A total of 44 states have a present sense impression exception to the hearsay rule similar or identical to Federal Rule of Evidence 803(1). See Exhibit pp. 4-5. Of these 44 states, 38 have adopted the exception as a statute or a court rule. *Id*. Five states recognize the exception as a matter of common law. *Id*. at 5. The remaining state with such an exception is Georgia, which has a statutory res gestae exception that has been interpreted to include an exception for a present sense impression. See Ga. Code § 24-3-3; *Gordon County Farm v. Malony*, 214 Ga. App. 253, 254, 447 S.E.2d 623 (1994), *rev'd on other grounds*, 265 Ga. 825, 462 S.E.2d 606 (1995). Six states, including California, do not have a hearsay rule exception like Federal Rule of Evidence 803(1). See Exhibit p. 6.

California Approach

As originally proposed by the Law Revision Commission in 1965, the Evidence Code included a provision that would have been similar to the later-enacted federal provision regarding present sense impressions, but would only have applied if the declarant was unavailable as a witness. *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1, 237-38 (1965). It appeared that this might be an extension of the law as it existed at that time, both in California and elsewhere. *See id.*; *see also* McFarland, supra, at 907.

While the legislation was pending, a joint committee of the Judicial Council and the Conference of California Judges strongly urged the Commission to "confine the exception to the one recognized in existing law for statements accompanying acts that are offered to explain such acts." CLRC Memorandum 65-4, pp. 16-17. Previously, a State Bar committee (the Special Committee of the State Bar to Consider the Uniform Rules of Evidence) had suggested that the provision be deleted altogether, because no compelling necessity for it had been shown and it would apply to many statements "the accuracy of which may be subject to substantial doubt." CLRC Memorandum 64-101, Exhibit I at 30 (item 55).

In light of these objections, the provision was narrowed to cover only what is known as a "contemporaneous statement." See First Supplement to CLRC Memorandum 65-4, p. 31. As it was enacted in 1965 and continues to read today, Evidence Code Section 1241 provides:

> 1241. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
> (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and
> (b) Was made while the declarant was engaged in such conduct.

In a background study he prepared for the Commission, Prof. Miguel Méndez of Stanford Law School pointed out that this provision would apply where one person gives another a pen, and simultaneously makes a statement about the transfer (e.g., "You can borrow my pen" or "I want you to have this pen"). The statement determines the legal impact of the event — whether the speaker made a gift as opposed to a loan. See Méndez, *California Evidence Code — Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351, 367 (2003) (hereafter, "Méndez Hearsay Analysis").

Technically, however, the statement is not hearsay but rather a verbal act, a statement that has legal significance and is offered for that purpose. *Id*. The Comment to Section 1241 acknowledges that "[s]ome writers do not regard evidence of this sort as hearsay evidence." The Legislature nonetheless included the exception in the Evidence Code, to "remov[e] any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule." Evid. Code § 1241 Comment.

Differences Between the California Approach and the Federal Approach

"The Federal Rules do not contain a hearsay exception for contemporaneous statements, most likely because there is no need for an exception for these kinds of statements." Méndez Hearsay Analysis at 367. The advisory committee's note to Federal Rule of Evidence 801(c) explains that verbal acts are not treated as hearsay under the federal rules:

> The definition [of hearsay] follows along familiar lines in including only statements offered to prove the truth of the matter asserted. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.*

(Emphasis added; citations omitted.)

Thus, Evidence Code Section 1241 focuses on verbal acts, while such acts are not even treated as hearsay under the federal rules. There are other distinctions between Section 1241 and Rule 803(1) as well. As Justice Bernard Jefferson explains in his well-known treatise, the California exception for a contemporaneous statement differs from the federal exception for a present sense impression in three major respects:

- Under Rule 803(1), the declarant's statement can be that of describing the conduct of another person, while under Evid C § 1241, the declarant's statement must be that of explaining *the declarant's own conduct*;
- Under the contemporaneous-statement exception of Evid C § 1241, the declarant's conduct that is explained must be equivocal in nature and need explanation, but, under the present-sense-impression exception of Rule 803(1), a declarant's statement may be one describing an event or condition that is unequivocal and unambiguous in nature;
- Under Rule 803(1), the declarant's statement may be made immediately after the event or condition has been completed, while, under Evid C § 1241, a declarant's statement made after his or her conduct has been completed is inadmissible.

1 B. Jefferson, Jefferson's California Evidence Benchbook *Spontaneous and Contemporaneous Statements* § 13.14, at 207 (3d ed. & March 2007 update) (emphasis in original).

PRIOR DECISIONS OF THE COMMISSION

In late 2002, the Commission began a study comparing the Evidence Code to the Federal Rules of Evidence. Between then and early 2005, the Commission did considerable work on hearsay issues, using Prof. Méndez's background study and materials prepared by the staff. Before the Commission issued a tentative recommendation, however, the study was put on hold. See CLRC Memorandum 2006-36, pp. 9-10.

One topic the Commission considered in its study was present sense impressions. Prof. Méndez recommended adding an exception for a present sense impression to the Evidence Code, similar to the federal provision. Méndez Hearsay Analysis at 368. Many years earlier, Prof. Jack Friedenthal (then of Stanford Law School) had made the same recommendation to the Commission. See Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 55 (on file with the Commission).

For purposes of a tentative recommendation, the Commission decided that a hearsay rule exception for a present sense impression should be added to the Evidence Code, along the following lines:

> 1240.5. Evidence of a statement is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:
>
> (a) The statement is offered to describe or explain an event or condition.
>
> (b) The statement was made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> **Comment.** Section 1240.5 is drawn from Rule 803(a) of the Federal Rules of Evidence. A present sense impression is sufficiently trustworthy to be considered by the trier of fact for three reasons. First, there is no problem concerning the declarant's memory because the statement is simultaneous with the event. Second, there is little or no time for calculated misstatement. Third, the statement is usually made to one whose proximity provides an immediate opportunity to check the accuracy of the statement in light of the physical facts. Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 401, 467 (1963); see also Fed. R. Evid. 803 advisory committee's note.

CLRC Minutes (Sept. 18-19, 2003), p. 18.

The Commission directed the staff to examine federal case law to determine whether Evidence Code Section 1241 (contemporaneous statement) would be subsumed in the proposed new exception for a present sense impression. *Id*. The Commission thought that Section 1241 should be repealed if it would be duplicative of the proposed new provision. *Id*.

POLICY ANALYSIS

Should the Commission now proceed with its previous decision to propose a hearsay rule exception for a present sense impression? In answering that question, the Commission should consider the justifications that have been advanced for such an exception, as well as the criticisms that have been raised.

Justifications for a Present Sense Impression Exception

A number of different justifications have been advanced for making evidence of a present sense impression admissible despite the hearsay rule.

The Likelihood of Memory Loss Is Diminished

If a person observes a situation that is not at all startling or shocking, the person may nonetheless have occasion to comment on what the person perceives through sight or other senses *at the very time of receiving the impression*. C. McCormick, McCormick on Evidence § 273, at 584 (1954). "Such a comment ... does not have the safeguard of impulse, emotion, or excitement, but ... there are other safeguards." *Id*. Among other things, "the report at the moment of the thing then seen, heard, etc. is safe from any error from defect of *memory* of the declarant." *Id*. (emphasis in original). Because no time elapses between the statement and the event, there is no opportunity to forget the event and thus the "immediacy of the statement eliminates concern for lack of memory ...." *Gardner v. U.S.*, 898 A.2d 367, 374 (D.C. 2006).

As a result, evidence admitted under a hearsay rule exception for a present sense impression may actually be more reliable than in-court testimony. An out-of-court statement that was made while the event was happening (or immediately after) may be more accurate than an in-court witness's testimony based on the witness's memory of the event. As one commentator put it, "a statement made at the time of an event is preferable to a reconstruction of the occurrence at trial, when the witness' memory has almost certainly altered ...." Beck, *The Present Sense Impression*, 56 Tex. L. Rev. 1053, 1075 (1978); *see also* Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 Iowa L. Rev. 869, 880-881 (1981) (statement of present sense impression is different in kind and character than in-court testimony based on distant memory) (hereafter, "Waltz *Iowa L. Rev.* article").

In fact, the exception for a present sense impression has been called "an ideal version of the excited utterance exception." Passannante, *supra,* at 106. That is because a present sense impression has the trustworthiness associated with contemporaneity, but without the distorted perception caused by excitement. *Id.*; *see also* Hutchins & Slesinger, *Some Observations on the Law of Evidence*, 28 Colum. L. Rev. 432 (1928) (citing studies showing correlation between excitement and factual inaccuracies in observations).

The Likelihood of Insincerity Is Diminished

A second justification for admitting evidence of a present sense impression is that "there is little or no *time* for calculated misstatement ...." McCormick, *supra,* § 273, at 594 (emphasis in original). The exception applies only to a spontaneous

statement, i.e., a statement describing an event "of which the declarant acquires knowledge through his sensual faculties," without "intrusion of rational thought or personal will." Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 Loy. U. Chi. L.J. 299, 313, 316-317 (1979). "The immediacy of the statement ... precludes time for intentional deception." *Gardner v. U.S.*, 898 A.2d 367, 374 (D.C. 2006).

The federal exception for a present sense impression is based upon this rationale. The advisory committee's note to Rule 803(1) explains that the "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." The requirement of contemporaneity thus preserves "the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate." *Booth v. Maryland*, 306 Md. 313, 320, 324, 508 A.2d 976 (1986).

Accordingly, the present sense impression satisfies the hearsay concerns relating to memory and sincerity, leaving only the risks of ambiguity and misperception. For these reasons, "it is thought reliable enough to warrant an exception to the hearsay rule." 4 C. Mueller & L. Kirkpatrick, Federal Evidence § 8:67 (3d ed. 2007); *see also* McFarland, *supra,* at 913-14.

Corroboration As Additional Safeguard of Trustworthiness

A third reason for admitting evidence of a present sense impression relates to the likelihood of corroboration. "[T]he statement will usually be made to another (the witness who reports it) who would have equal opportunities to observe and hence to check a misstatement." McCormick, *supra,* § 273, at 584; *see also* Passannante, *supra*, at 98 n. 58.

Testimony by such a witness helps the fact-finder gauge the trustworthiness of the out-of-court statement. The witness' own account of the event can be used to shed light on the out-of-court description of the event. *See* Fed. R. Evid. 803(1) advisory committee's note; Wohlsen, *The Present Sense Impression to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 Dick. L. Rev. 347, 355 (1977).

Further, if the witness testifying to the out-of-court statement is the declarant, the factfinder may evaluate the demeanor of the declarant-witness, and cross-examination on the statement can probe into its credibility. *See* Fed. R. Evid 803(1) advisory committee's note; Kraus, Comment, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, Wis. L. Rev. 1525, 1532 (1985).

Such corroboration thus reduces the risks of ambiguity and misperception. Mueller & Kirkpatrick, *supra*, § 8:67. Those are the two key hearsay concerns not addressed by contemporaneity. *Id*. When such corroboration is coupled with contemporaneity, all of the key concerns underlying the hearsay rule are addressed, at least to some extent.

Utility

Apart from allowing admission of trustworthy statements (which every hearsay exception should do), the main utility of the present sense impression exception is that it allows admission of a contemporaneous statement about an event that was not startling. Mueller & Kirkpatrick, *supra,* § 8:67, at 567. This is especially true when the declarant makes an observation *just before* an exciting event. *Id.* at 567-68; *see, e.g., Houston Oxygen Co. v. Davis*, 139 Tex. 1, 5-6, 161 S.W.2d 474 (1942) (admitting spontaneous statement about passing car minutes before accident).

The framers of the federal rules concluded that including both an exception for present sense impression and an exception for excited utterance was needed to avoid "needless niggling." Fed. R. Evid. 803(1) advisory committee's note. Presumably, the framers did not think it profitable for courts to spend significant effort differentiating between an excited utterance and a present sense impression.

In California, a hearsay rule exception for a present sense impression exception would be useful to allow admission of a contemporaneous statement that explains the conduct of someone other than the declarant. Such a statement is not admissible as a contemporaneous statement under Evidence Code Section 1241. See e.g., *People v. Hines*, 15 Cal. 4th 997, 1032, 1034 n. 4, 1035-36, 938 P.2d 388, 64 Cal. Rptr. 2d 594 (1997) (determining that statement was not admissible as contemporaneous statement under Section 1241 but that it would have been admissible as present sense impression under Fed. R. Evid. 803(1)).

Criticism of the Present Sense Impression Exception

Courts and commentators have criticized the hearsay rule exception for a present sense impression on a number of different grounds. Importantly, these criticisms largely focus on specific aspects of the exception. They do not question the basic premise of the exception, the idea that a description given while perceiving the event described is sufficiently reliable to introduce in evidence without an opportunity for cross-examination.

A notable exception is the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004), which called into question all hearsay rule exceptions based on notions of reliability, at least as applied to a defendant in a criminal case. That decision did not specifically focus on the exception for a present sense impression. The implications of *Crawford* will be discussed later in this memorandum.

Cumulative Evidence

Aside from *Crawford,* the criticism that comes closest to attacking the existence of the exception for a present sense impression is the claim that present sense impression statements are often "merely cumulative." *See* Beck, *supra,* at 1075, *citing U.S. v. Parker*, 491 F. 2d 517, 523 (8th Cir. 1973). This claim seems to assume that an out-of-court statement and in-court testimony about the same event are repetitive.

However, the two types of evidence are different. As discussed above, an out-of-court statement about a present sense impression may be more reliable than an in-court statement about a past event, because the former statement is not based on the witness' distant memory. See *id.*; Waltz *Iowa L. Rev.* article, *supra,* at 880-81 (rejecting argument that present sense impression statements are cumulative because they are different in kind and character than in-court testimony based on distant memory).

Moreover, any problem of cumulative evidence can be addressed through Evidence Code Section 352. That provision permits a court in its discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... necessitate undue consumption of time ...."

For these reasons, **the criticism concerning cumulative evidence is not persuasive.**

Eyewitness Identification

A further criticism is that the hearsay rule exception for a present sense impression is not clear on whether it would admit a pretrial identification (e.g., at a lineup, a declarant's statement "that's the one who robbed me"). Waltz, *Present Sense Impressions and the Residual Exception: A New Day for 'Great' Hearsay?*, 2 Litig. 22, 24 (1976) (hereafter, "Waltz *Litigation* article"). It has been argued that the exception should not operate to admit such a statement. See *id.*

It appears that a pretrial identification would not be admitted under the exception for a present sense impression. As one court explained,

> The essence of an identification such as at a photo array or a lineup ... is a comparison between what the witness is contemporaneously viewing and the witness' recollection of a prior event, in this case the bank robbery. As the district court aptly noted: "The heart of a photographic identification [is that] you are asking someone about their perception of a past event.... [Y]ou are asking them to recall[,] by definition[,] what happened in the past." [The defendant's] characterization of observations made during the viewing of a photo array as "highly trustworthy because they were made simultaneously with the event being perceived, namely, the photo array", ignores the vital element of memory.

U.S. v. Brewer, 36 F.3d 266 (2d Cir. 1994).

In fact, a different federal rule specifically addresses the admissibility of a pretrial identification. See Fed. R. Evid. 801(d)(1)(C) (pretrial identification is not hearsay). Likewise, California has a provision specifically addressing the admissibility of a pretrial identification. See Evid. Code § 1238 (if pretrial identification satisfies certain conditions, it is not inadmissible under hearsay rule).

If the Commission proposes a hearsay rule exception for a present sense impression, **it might be helpful to draw attention to these points in the Comment, perhaps by including the following paragraph:**

> This section does not apply to a pretrial identification. See generally U.S. v. Brewer, 36 F.3d 266 (2d Cir. 1994). For the admissibility of a pretrial identification, see Section 1238.

Statement in the Form of an Opinion

Another concern is whether the exception for a present sense impression should allow admission of a statement in the form of an opinion. *See* McFarland, *supra,* at 930 n. 132. This issue arises often, as present sense impression statements tend to characterize what is observed in language that is, or appears to be, an opinion. *Booth*, 306 Md. at 325.

Professor Morgan, who was instrumental in the adoption of the federal provision on present sense impressions, argued that it is

> absurd to insist that the statement must not be phrased in terms of inference or opinion. People speaking without reflection usually talk in terms of inference in describing what they have seen or heard. So long as the language does not indicate a conscious deduction, rather than a shorthand method of statement, the opinion rule should have no application.

E. Morgan, Basic Problems of State and Federal Evidence 343 (1963); *see also* Waltz *Iowa L. Rev.* article, *supra*, at 881 n. 74.

However, it appears that the courts are divided on the admissibility of a present sense impression in the form of an opinion. *See Booth*, 306 Md. at 325. The majority view rejects an opinion if it allocates blame. *Id.* at 326. If it does not, the courts are split more evenly. *Id.*

One commentator argues that some present sense impression statements expressing an opinion should be admitted, suggesting the following test:

> If the out-of-court declaration is not the sort of conscious deduction which the conditions attaching to the present sense impression exception would themselves prohibit, it should be receivable as a shorthand fact description.

Waltz *Iowa L. Rev.* article, *supra,* at 881-82. That test has been used in Maryland. *See Booth,* 306 Md. at 327.

In California, it has been held that a spontaneous exclamation, admissible under Section 1240, is subject to the opinion rule. *People v. Miron*, 210 Cal. App. 3d 580, 584, 258 Cal. Rptr. 494 (1989); *see also* Evid. Code § 800 (opinion rule). However, that case dealt with a statement that appeared to allocate blame ("[T]hat guy is trying to kill us."). *Miron*, 210 Cal. App. 3d at 582. It is difficult to predict whether a California court would apply the same approach to a statement that does not allocate fault, especially if the statement were offered pursuant to a new exception for a present sense impression, instead of as a spontaneous exclamation.

This is an interesting issue. If the Commission proposes a hearsay rule exception for a present sense impression, however, **it might not be advisable to address the proper treatment of a statement of opinion in the exception.** It might be better to leave the matter for the courts to resolve, in the context of actual cases.

Time Lapse Between Statement and Event

A fourth criticism relates to the amount of time that elapses between an event and a statement describing the event. Federal Rule of Evidence 803(1) encompasses a statement made about an event while the declarant was perceiving the event, or "immediately thereafter." The advisory committee's note states that with respect to the time element, the rule "recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight

lapse is allowable." This slight lapse is described as "substantial contemporaneity" between the event and statement, which "negate[s] the likelihood of deliberate or conscious misrepresentation." Fed. R. Evid. 803(1) advisory committee's note.

Applying these guidelines, one widely-cited case states:

> [B]ecause the presumed reliability of a statement of present sense impression flows from the fact of spontaneity, the time interval between observation and utterance must be very short. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought.

Booth, 306 Md. at 324; *see also* Waltz *Iowa L. Rev.* article, *supra*, at 880. For a compilation of federal cases discussing the permissible time lapse, see 4 M. Graham, Handbook of Federal Evidence § 803:1 at n. 5 (6th ed. 2006).

Some commentators criticize courts for admitting statements made after there was ample time for fabrication, memory loss, and confabulation (subconscious gap filling). *See, e.g.,* McFarland, *supra,* at 908, 915, 919, 931 (disapproving of several cases admitting statements despite time lapse between statement and event ranging from a "few seconds, one minute, three to five minutes …, at least eighteen minutes," to "twenty-three minutes"); Note, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 Nw. U.L. 666, 670 (1977) (stating that courts have allowed statements after unacceptable delays and arguing exception should only allow "the natural and inevitable time lag between any perception and its verbal description") (hereafter, "Note on Contemporaneity and Corroboration").

Several commentators maintain that the exception should require strict contemporaneity (i.e., only enough "time to get the words out of the mouth"), not "substantial" contemporaneity, between the event and statement, because mere seconds are enough time for fabrication. *See, e.g.,* McFarland, *supra,* at 916, 931; Beck, *supra,* at 1060-1061; Note on Contemporaneity and Corroboration, *supra,* at 669. In support of this approach, Prof. Douglas McFarland (Hamline University School of Law) cites a study finding that some "spontaneous, manipulative liars" are quicker than "nonmanipulative truthtellers," as well as another study showing it takes only .8029 seconds to tell a prepared lie, 1.6556 seconds to tell a truthful statement, and 2.967 seconds to tell a spontaneous lie. McFarland, *supra,* at 916.

To achieve strict contemporaneity, Prof. McFarland suggests that the phrase "immediately thereafter" be deleted from Federal Rule of Evidence 803(1). *Id* at 931. The provisions in two states, Colorado and Kansas, are drafted that way. Colo. R. Evid. 803(1); Kan. Stat. Ann. § 60-460(d)(1).

However, neither of those states appears to follow a strict contemporaneity approach. Instead of focusing on contemporaneity as a guarantee of trustworthiness, Colorado focuses on *spontaneity*, which might often, but not necessarily, coincide with strict contemporaneity. *See Denver City Tramway Co. v. Brumley*, 51 Colo. 251, 253, 116 P. 1051 (1911); Colo. R. Evid. 803(1) Comment. In Kansas, omission of the phrase "or immediately thereafter" appears to stem from historical differences, not from an effort to ensure strict contemporaneity. Slough, *Some Evidentiary Aspects of the Kansas Code of Civil Procedure*, 13 U. Kan. L. Rev. 197, 197 (1964); *see also* Unif. Code Evid. § 63(4). From the outset, the Kansas provision has been interpreted as only requiring "*substantial* contemporaneousness" between the statement and event. Slough, *supra,* at 222-223; *see also State v. Blake*, 209 Kan. 196, 197, 201-202, 495 P. 2d 905 (1972); Gard, *Survey of Kansas Law*, 12 U. Kan. L. Rev. 239, 250 (1964).

Another commentator agrees with Prof. McFarland that strict contemporaneity should be required, but he would allow a longer time lapse if there is other evidence indicating that the statement is trustworthy. See Waltz *Iowa L. Rev.* article at 880. Other approaches have also been advocated:

- The New Jersey exception permits a statement made "immediately after" the declarant perceived the event, so long as the declarant had no "opportunity to deliberate or fabricate." See N.J. R. Evid. 803(c)(1). The note to this provision explains that "statements made immediately after the event must be so close to the event as to exclude the likelihood of fabrication or deliberation."
- Florida follows the federal approach to what is a permissible time lapse. However, Florida's exception only applies to "[a] spontaneous statement," and it bars admission when the statement "is made under circumstances that indicate its lack of trustworthiness." See Fla. Stat. § 90.803(1).
- Ohio also follows the federal approach relating to what is a permissible time lapse. Like Florida, however, Ohio adds a clause aimed at ensuring trustworthiness of the statement. See Baldwin's Ohio R. Evid. 803(1).

The staff believes that the federal rule and all of the other formulations are essentially trying to address the same considerations: (1) It might take a moment

to utter a statement about an event perceived, but (2) there should not be enough time to conjure up a lie. Even Prof. McFarland acknowledges that there must be some "passage of time to get the words out of the mouth," a "split-second to form words." McFarland, *supra,* at 931. It is unrealistic to insist that a statement be made at exactly the same time that an event occurs.

The question is what statutory language is best suited to address these two considerations. At this point, the staff is not aware of any clear evidence that one of the other formulations is superior to the federal rule. Thus, if the Commission proposes an exception for a present sense impression, we recommend that it **stick with the language of the federal rule on the matter of the timing.** That would afford the advantage of uniformity not only with federal law, but also with the law of many other states. To ensure that the issue is fully aired, however, **the tentative recommendation should perhaps include a note soliciting comment on the issue of timing.**

Corroboration

A final area of criticism relates to corroboration of a present sense impression. Should it be necessary to present additional supporting evidence, not just the present sense impression itself, to obtain admission of a present sense impression?

The text of the federal rule is silent on the need for corroboration. The accompanying advisory committee's note mentions the subject, but is largely inconclusive. There is extensive disagreement over whether the federal rule requires, and whether it should require, corroboration. *See, e.g., Booth*, 306 Md. at 327; Graham, *supra,* § 803:1. As one commentator puts it, the courts "apply dissimilar tests," and cannot even agree "as to what has to be corroborated." Passannante, *supra,* at 105.

Corroborative evidence may provide support that (1) the event or condition about which a statement was made actually occurred, (2) the declarant actually perceived the event or condition described, or (3) the statement's description of the event or condition is accurate. Each of these points is discussed separately.

First, is it necessary to corroborate that the event or condition about which a statement was made actually occurred? With regard to the federal rule on a present sense impression, this is a significant issue, because a court can consider inadmissible evidence in determining admissibility. Fed. R. Evid. 104(a) & advisory committee's note. A court could thus consider a proffered present sense

impression in determining whether to admit that evidence. That raises the question whether, for purposes of determining admissibility, the proffered present sense impression by itself can suffice to show that the event or condition to which it supposedly relates actually occurred. Some commentators argue that corroboration of the event or condition should be required. Waltz Litigation article, *supra,* at 24; Note on Contemporaneity and Corroboration, *supra*, at 679 n. 39; *but see* Passannante, *supra,* at 89.

While that is a matter of debate with regard to the federal rule, the situation is different in California. Under the Evidence Code, a court *cannot* consider inadmissible evidence in determining admissibility. *See, e.g.,* Fed. R. Evid. 104(a) advisory committee's note; M. Méndez, Evidence: The California Code and the Federal Rules 598-99 (3d ed. 2004) (hereafter, "Méndez Treatise"); Friedenthal, *supra,* at 6-7. Thus, if California had a hearsay rule exception for a present sense impression, a court could not consider a proffered present sense impression in determining whether that evidence should be admitted as a description of an event or condition "made while the declarant was perceiving the event or condition, or immediately thereafter." Necessarily, the proponent of the evidence would have to present other evidence of the event or condition to show that the statement should be admitted. Consequently, **the issue of whether to require corroboration of the event or condition would not arise,** at least not unless California changes its codewide approach to the use of inadmissible evidence in determining admissibility.

The second corroboration issue is whether to require corroboration that the declarant actually perceived the event or condition described. Again, this is a matter of debate in the federal context, where a court may consider the proffered statement in determining its admissibility. *See, e.g.*, Fed. R. Evid. 803(1) advisory committee's note (suggesting that corroboration of perception is required if declarant's identity is unknown, but not if declarant's identity is known); Note on Contemporaneity and Corroboration, *supra*, at 676 (corroboration that declarant was in proximity to event should be required and sufficient); Passannante, *supra*, at 115-16 (corroboration of perception is unnecessary).

In California, however, a court could not consider the proffered statement in determining its admissibility. To establish its admissibility, the proponent of a present sense impression necessarily would have to present other evidence that the declarant perceived the event or condition described or explained. **Whether**

to require corroboration of perception would not be an issue; a hearsay rule exception for a present sense impression would not have to address this point.

Finally, there is the issue of whether to require corroboration of the accuracy of the declarant's description of the event or condition perceived. Unlike the other corroboration issues, *this issue would arise* if California adopted a provision like the federal rule on present sense impressions. To establish that the provision applies, the proponent of a present sense impression in California necessarily would have to present other evidence showing that the event or condition actually occurred, and that the declarant perceived the event or condition. But that is different from having to prove that the declarant's description of the event or condition is accurate. A statement could meet the key criteria for a present sense impression even if the description given is inaccurate. That makes it necessary to consider whether to require some corroboration of the description's accuracy as a condition of admissibility.

It is generally agreed that the federal rule on present sense impressions does not require such corroboration. *See, e.g.,* Graham, *supra,* § 803:1; Passannante, *supra,* at 100 n. 67; Beck, *supra,* at 1069; Waltz *Litigation* article, *supra,* at 24. However, commentators disagree over whether such corroboration *should* be required.

Some commentators would require corroboration of a description's accuracy, at least to some extent. *See, e.g.,* Waltz *Iowa L. Rev.* article, *supra,* at 889, 892, 896, 898 (corroboration of description's accuracy should be required); Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 Loy. U. Chi. L.J. 299, 333-334 (1979) (exception should require declarant or "equally percipient witness" to be subject to cross-examination on statement); Beck, *supra,* at 1071 (declarant should be required to testify regarding present sense impression if declarant is available). Other commentators would not require corroboration of the declarant's description of the event or condition perceived. *See, e.g.,* 2 K. Brown, McCormick on Evidence § 271, at 254 (6th ed. 2006) (Although corroboration adds further assurance of accuracy, a "general justification for admission is not the same as a requirement."); Passannante, *supra,* at 106 (corroboration goes to weight, not admissibility, of statement); Note on Contemporaneity and Corroboration, *supra,* at 673-674 (for several reasons, corroboration of description's accuracy should not be required).

Which of these views is more sound?

Based on the research we have done so far, the staff currently believes **it should *not* be necessary to corroborate the accuracy of a declarant's description.** A present sense impression has indicia of reliability besides corroboration. As previously explained, the likelihood of memory loss is diminished, as is the likelihood of insincerity. The probability that a present sense impression will be corroborated merely reinforces these other justifications for creating an exception to the hearsay rule. For that reason, and because conformity with the federal rule would be desirable, it seems preferable not to make corroboration of a description's accuracy a prerequisite to admissibility as a present sense impression.

Nonetheless, if the Commission proposes a hearsay rule exception for a present sense impression, **it might be helpful to address the matter of corroboration in the Comment, perhaps by including the following paragraphs:**

> To establish that a statement is admissible as a present sense impression, the proponent of the evidence must present other evidence that (1) the event or condition described in the statement actually occurred, and (2) the declarant perceived the event or condition and made the statement while doing so or immediately thereafter. The proponent cannot rely on the proffered statement itself. See generally Fed. R. Evid. 104(a) advisory committee's note (California does not allow judge to consider inadmissible evidence in determining admissibility); M. Méndez, Evidence: The California Code and the Federal Rules 598-99 (3d ed. 2004) (same).
>
> The proponent need not, however, present evidence corroborating that the declarant's description of the event or condition is accurate. It is up to the trier of fact to assess the accuracy of the description. The existence of evidence corroborating the description's accuracy goes to its weight, not its admissibility. See, e.g., 2 K. Brown, McCormick on Evidence § 271, at 254 (6th ed. 2006); Passannante, *Res Gestae, the Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 Fordham Urb. L.J. 89, 106 (1989); Note, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 Nw. U.L. 666, 673-74 (1977).

The Commission could also **include a note in the tentative recommendation, soliciting comment on whether to require corroboration of the accuracy of the declarant's description of the event or condition perceived.**

Weighing the Justifications and the Criticisms

There are persuasive justifications for creating a hearsay rule exception for a present sense impression. Because a present sense impression is voiced at the time an event or condition occurs, the likelihood of memory loss is diminished, as is the likelihood of insincerity. Corroboration of the present sense impression is often possible, providing additional assurance of reliability. An exception for a present sense impression would also be a useful supplement to the existing provisions in the Evidence Code.

Although there have been criticisms of such an exception, they are not insurmountable. The criticism regarding cumulative evidence is not persuasive. The concern relating to pretrial identifications could be addressed in the Comment, as could the concerns relating to corroboration. The proper treatment of a present sense impression in the form of an opinion could be left to the courts to resolve. The criticisms relating to the timing of a proffered statement do not undercut the justifications for creating an exception, they just raise questions about the best wording to use in drafting that exception.

As early as 1965, the Commission proposed to create a hearsay rule exception for a present sense impression. Two consultants have since recommended that approach to the Commission: Prof. Friedenthal in 1976 and Prof. Méndez in 2003. The Commission itself considered the matter in late 2003 and tentatively decided to propose such an exception. The Commission has also received a recent letter from attorney John Armstrong, a civil trial attorney who primarily practices in the California state courts, urging the Commission to propose such an exception. Exhibit pp. 1-3.

Based on the above policy analysis, it appears that the Commission **should proceed with its previous decision to propose a hearsay rule exception for a present sense impression.** The provision should be drafted to incorporate the various recommendations made above. **That could be done as follows:**

> **Evid. Code § 1240.5 (added). Present sense impression**
>
> 1240.5. Evidence of a statement is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:
>
> (a) The statement is offered to describe or explain an event or condition.
>
> (b) The statement was made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> **Comment.** Section 1240.5 is drawn from Rule 803(a) of the Federal Rules of Evidence. A present sense impression is

sufficiently trustworthy to be considered by the trier of fact for three reasons. First, there is no problem concerning the declarant's memory because the statement is simultaneous with the event. Second, there is little or no time for calculated misstatement. Third, the statement is usually made to one whose proximity provides an immediate opportunity to check the accuracy of the statement in light of the physical facts. Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 401, 467 (1963); see also Fed. R. Evid. 803 advisory committee's note.

To establish that a statement is admissible as a present sense impression, the proponent of the evidence must present other evidence that (1) the event or condition described in the statement actually occurred, and (2) the declarant perceived the event or condition and made the statement while doing so or immediately thereafter. The proponent cannot rely on the proffered statement itself. See generally Fed. R. Evid. 104(a) advisory committee's note (California does not allow judge to consider inadmissible evidence in determining admissibility); M. Méndez, Evidence: The California Code and the Federal Rules 598-99 (3d ed. 2004) (same).

The proponent need not, however, present evidence corroborating that the declarant's description of the event or condition is accurate. It is up to the trier of fact to assess the accuracy of the description. The existence of evidence corroborating the description's accuracy goes to its weight, not its admissibility. See, e.g., 2 K. Brown, McCormick on Evidence § 271, at 254 (6th ed. 2006); Passannante, *Res Gestae, the Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 Fordham Urb. L.J. 89, 106 (1989); Note, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 Nw. U.L. 666, 673-74 (1977).

This section does not apply to a pretrial identification. See generally U.S. v. Brewer, 36 F.3d 266 (2d Cir. 1994). For the admissibility of a pretrial identification, see Section 1238.

IMPACT OF *CRAWFORD* AND *DAVIS*

A further matter to consider is the potential impact of the United States Supreme Court's recent decision in *Crawford* and its follow-up decision in *Davis v. Washington*, __ U.S. __, 126 S.Ct. 2266 (2006).

For many years before *Crawford*, the Court used a two-part test to determine whether a hearsay statement had "adequate indicia of reliability" and thus could be admitted against a criminal defendant in the declarant's absence without violating the Confrontation Clause of the United States Constitution (U.S. Const.

amend. VI). To meet this test, the hearsay statement had to either (1) fall within a "firmly rooted hearsay exception," or (2) have "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

In *Crawford*, the Court harshly criticized the *Roberts* test. *See* 541 U.S. at 59, 63. The Court drew a distinction between a "testimonial statement" and other types of hearsay offered against an accused in a criminal case. It made clear that the *Roberts* test no longer applies to a testimonial statement. Under the Court's new approach, if the prosecution offers a testimonial statement as substantive evidence in a criminal case and the declarant does not testify at trial, the statement is admissible only if the declarant was "unavailable to testify, and the defendant had ... a prior opportunity for cross-examination." *Id*. at 53-54. If those conditions are not met, admission of the statement would violate the Confrontation Clause.

Significantly, the Court did not define the term "testimonial statement." *Id*. at 51-52, 68. It just said that at a minimum, the term encompasses a statement taken by a police officer in the course of an interrogation, and prior testimony at a preliminary hearing, grand jury proceeding, or former trial. *Id*. at 68.

In *Davis*, the Court provided guidance on when statements taken by police officers and related officials, such as 911 operators, constitute a testimonial statement. The Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

126 S.Ct. at 2273-74. The Court also made clear that a nontestimonial statement is "subject to traditional limitations upon hearsay evidence, [but] is not subject to the Confrontation Clause." *Id*. at 2273.

What are the implications of those decisions with respect to the possibility of proposing a hearsay rule exception for a present sense impression?

Crawford and *Davis* did not resolve what rules apply to the admission of hearsay evidence in a civil case, or to the admission of hearsay evidence proffered by a defendant in a criminal case. It is as yet unclear whether the Court will substantially change its approach to such evidence, or to the admission of a

nontestimonial statement against a defendant in a criminal case. The Court's comment that a nontestimonial statement is "subject to traditional limitations upon hearsay evidence," suggests that such evidence may be treated much as it was in the past.

Although it would be possible to wait for further guidance on these matters before proposing a new California exception to the hearsay rule, it is not clear that such guidance will be forthcoming in the near future. Absent indications that the Court plans to address these points soon, **we do not think the Commission should wait for such guidance before proposing a hearsay rule exception for a present sense impression.**

Crawford does make clear that if a statement were proffered against a criminal defendant as a present sense impression and the statement was considered testimonial, the statement could not be admitted unless the declarant was unavailable to testify, and the defendant had a prior opportunity for cross-examination. Attorney John Armstrong therefore suggests that "to ensure the constitutionality of the exception, it would be wise to add that in criminal cases, a non-testifying hearsay declarant's present sense impression is admissible if (1) the declarant is unavailable to testify at trial, AND (2) the defendant is given the opportunity to cross-examine the declarant about the statement before trial." Exhibit p. 2.

If the Commission is inclined to add language like this, it may want to clarify that the limitations only apply to a testimonial statement. The staff believes, however, that such language is not necessary. In the first place, it seems likely that most, if not all, present sense impressions will be considered nontestimonial, because they are made contemporaneously with the event described. More importantly, the federal Constitution would override any state statute, so it is not necessary to state the *Crawford* limitations in any statute the Commission might propose. Further, the Evidence Code already includes a mechanism for ensuring that hearsay rule exceptions are construed in accordance with the federal Confrontation Clause. Evidence Code Section 1204 provides: "A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California." In light of that safeguard, **it seems reasonable to draft the new exception for a present**

sense impression as shown above, rather than incorporating language that is meant to codify the limitations of *Crawford*.

RETENTION OF THE EXCEPTION FOR A CONTEMPORANEOUS STATEMENT

A final issue relates to the existing hearsay rule exception for a contemporaneous statement (Evidence Code Section 1241). If the Commission proposes a new exception for a present sense impression, should Section 1241 be repealed? That issue will be discussed in the supplement to this memorandum, which will present a draft of a tentative recommendation.

Respectfully submitted,

Catherine Bidart
Staff Counsel

Barbara Gaal
Chief Deputy Counsel

Exhibit

COMMENTS OF JOHN ARMSTRONG

John Armstrong <jarmstrong@mmnt.com> submitted the following feedback form on the Law Revision Commission website on August 21, 2007:

Dear Mr. Hebert:

As a civil trial attorney primarily practicing in the California state courts, I was surprised to learn that the present impression hearsay exception that we all learned in law school was not adopted by the California legislature despite the California Law Revision Commission's recommendation that it be adopted. (See 6 Cal. L. Rev. Comm. 471 (1964).)

In practice, I've had witnesses testimony admitted over a hearsay exception by arguing that the evidence showed the witness's hearsay statement was admissible as "not being hearsay" (i.e, not offered for its truth, but the witness saw or heard), as a present sense impression, as a contemporaneous statement by the declarant, and/or as spontaneous statement/excited utterance. In my experience, trial courts find that one of the foregoing exceptions applies to this kind of evidence.

My research indicates only one case expressly discussing the application of the present sense exception, but that case was unpublished.

In People v. Delgado 2002 WL 1554450, *7 (Cal.App. 4 Dist.) (Cal.App. 4 Dist., 2005, the unpublished decision, the appellate court found that the trial court did not err in admitting evidence of a witness's present sense impression in a criminal trial because this hearsay exception was so well rooted in the common law that it did not violate the constitutional guarantees provided under the U.S. Constitution's Confrontation Clause, holding as follows:

"The confrontation clause precludes admission of hearsay evidence unless the prosecution demonstrates that the statement possesses adequate indicia of reliability." (People v. Roberto V. (2001) 93 Cal.App.4th 1350, 1373, 113 Cal.Rptr.2d 804.) The unnamed facilitator's statement would not have violated the confrontation clause because it would be admissible in the federal courts under the "[p]resent sense impression" exception to the hearsay rule as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." (Fed. Rules Evid., rule 803(1); see also People v. Hines (1997) 15 Cal.4th 997, 1036, 64 Cal.Rptr.2d 594, 938 P.2d 388.) "Reliability may be inferred, without

more, if the evidence is admitted under a firmly rooted hearsay exception." (People v. Roberto V., supra, 93 Cal.App.4th at p. 1373, 113 Cal.Rptr.2d 804.) "[W]here proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." (White v. Illinois (1992) 502 U.S. 346, 356, 112 S.Ct. 736, 116 L.Ed.2d 848; see also People v. Duke (1999) 74 Cal.App.4th 23, 29-30, 87 Cal.Rptr.2d 547 ["When statements are admitted under a firmly rooted exception to the hearsay rule or when they contain particularized guarantees of trustworthiness such that adversarial testing would be expected to add little, if anything, to their reliability ..., their admission does not violate the confrontation clause"].)

The U.S. Supreme Court recently denied review of the issue whether the U.S. Constitution's 6th Amendment's Confrontation Clause was violated by admission of a present sense impression in Roy v. U.S. (No. 05-971, May 30, 2006) 126 S.Ct. 2346, 164 L.Ed.2d 839, 74 USLW 3667, 74 USLW 3668. Roy directly challenged whether the present sense impression was "firmly rooted" in the common law. Roy heavily relied on Crawford v. Washington (2004) 541 U.S. 36, 124 S.Ct. 1354, which held that the State's failure to allow a criminal defendant cross-examine his wife about statements she made to the police violated the Sixth Amendment's Confrontation Clause.

In Crawford v. Washington (2004) 541 U.S. 36, at 66, 124 S.Ct. 1354, at 1373, the U.S. Supreme Court held that the Confrontation Clause was violated by a defendant's wife's statement to police because the defendant/husband was unable to cross-examine his wife at trial because she claimed the marital and spousal privileges. In holding that admission of the wife's statements to police at trial violated the Confrontation Clause, the Court observed as follows: "The Framers would be astounded to learn that ex parte testimony could be admitted against a criminal defendant because it was elicited by 'neutral'government officers. But even if the court's assessment of the officer's motives was accurate, it says nothing about Sylvia's perception of her situation. Only cross-examination could reveal that."

The Supreme Court summarized its analysis by holding that, "Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (Crawford v. Washington, supra, 541 U.S. at 59, 124 S.Ct. at 1369.)

At least one published California appellate court has implicitly recognized the present sense impression hearsay exception as applicable to criminal cases. As noted in Scallen & Weissenberger's California Evidence Courtroom Manual on Evidence Code section 1241, "...[A]t least one California court has treated section 1241 as substantially similar to Federal Rule of Evidence 803(1), the present sense impression exception. (See People v. Marchialette (1975) 45 Cal.App.3d 974 [979-982], 119 Cal.Rptr. 816 (statements overheard by witness during telephone conversation with victim that described conduct of declarant while declarant was engaged in that conduct [held admissible]).

Accordingly, it would seem wise to make explicit that which is implicit; namely, that California law recognizes a hearsay exception for present sense impressions. In criminal cases, to ensure the constitutionality of the exception, it would be wise to add that in criminal cases, a non-testifying hearsay declarant's present sense impression is admissible if (1) the declarant is unavailable to testify at trial, AND (2) the defendant is given the opportunity to cross-examine the declarant about the statement before trial.

Sincerely,

John Armstrong

John R. Armstrong
Murtaugh Meyer Nelson & Treglia LLP
2603 Main Street, 9th Floor
Irvine, CA 92614
Telephone: (949) 794-4000
Fax: (949) 794-4099

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STATES WITH A STATUTE OR COURT RULE IDENTICAL TO FEDERAL RULE OF EVIDENCE 803(1)

The following 33 states have a statute or court rule identical to Federal Rule of Evidence 803(1):

Alabama: Ala. R. Evid. 803(1)
Alaska: Alaska R. Evid. 803(1)
Arizona: Ariz. R. Evid. 803(1)
Arkansas: Ark. R. Evid. 803(1)
Delaware: Del. R. Evid. 803(1)
Hawaii: Haw. Rev. Stat. § 626-1, rule 803(b)(1)
Idaho: Idaho R. Evid. 803(1)
Indiana: Ind. R. Evid. 803(1)
Iowa: Iowa Ct. R. 5.803
Kentucky: Ky. R. Evid. 803
Louisiana: La. Code Evid. Ann. Art. 803
Maine: Me. R. Evid. 803(1)
Maryland: Md. R. Evid. 5-803(b)(1)
Michigan: Mich. R. Evid. 803(1)
Mississippi: Miss. R. Evid. 803(1)
Montana: Mont. R. Evid. 803(1)
Nevada: Nev. Rev. Stat. § 51.085
New Hampshire: N.H. R. Evid. 803(1)
New Mexico: N.M. R. Evid. 11-803(A)
North Carolina: N.C. Gen. Stat. ch. 8C-1, rule 803(1)
North Dakota: N.D. R. Evid. 803(1)
Oklahoma: 12 Okl. St. Ann. § 2803(1)
Pennsylvania: Pa. R. Evid. 803(1)
Rhode Island: R.I. R. Evid. 803(1)
South Carolina: S.C. R. Evid. 803(1)
South Dakota: S.D. Codified Laws § 19-16-5
Texas: Tex. R. Evid. 803(1)
Utah: Utah R. Evid. 803(1)
Vermont: Vt. R. Evid. 803(1)
Washington: Wash. R. Evid. 803(1)
West Virginia: W. Va. R. Evid. 803(1)
Wisconsin: Wis. Stat. Ann. § 908.03(1)
Wyoming: Wyo. R. Evid. 803(1)

STATES WITH A STATUTE OR COURT RULE SIMILAR TO FEDERAL RULE OF EVIDENCE 803(1)

The following states have a statute or court rule similar but not identical to Federal Rule of Evidence 803(1):

Colorado: Colo. R. Evid. 803(1). This rule does not include the phrase "or immediately thereafter," which is included in Federal Rule of Evidence 803(1).

Florida: Fla. Stat. § 90.803(1). This rule expressly bars admission of a statement if circumstances indicate that the statement lacks trustworthiness.

Kansas: Kan. Stat. Ann. § 60-460(d)(1). Like the Colorado rule, this rule does not include the phrase "or immediately thereafter," which is included in Federal Rule of Evidence 803(1).

New Jersey: N.J. R. Evid. 803(c)(1). This rule precludes admission of a statement made after time to "deliberate or fabricate."

Ohio: Baldwin's Ohio R. Evid. 803(1). Like the Florida provision, this rule expressly bars admission of a statement if circumstances indicate that the statement lacks trustworthiness.

STATES WITH A COMMON LAW RULE LIKE FEDERAL RULE OF EVIDENCE 803(1)

The following states recognize a hearsay rule exception for a present sense impression as a matter of common law:

Illinois. See *People v. Alsup*, 869 N.E. 2d 157, 167 (Ill. App. 5th Dist. 2007) (stating that Illinois recognizes present sense impression exception, citing People v. Stack, 311 Ill. App. 3d 162, 175-76, 243 Ill. Dec. 770, 724 N.E. 2d 79 (1999), and repeating text of Fed. R. Evid. 803(1)).

Massachusetts. See *Com. v. Capone*, 39 Mass. App. Ct. 606, 610 n. 2, 659 N.E. 2d 1196 (1996) (stating that "judge properly admitted the statement relying on what he termed a 'present sense impression' exception to the hearsay rule, cf. Liacos, Massachusetts Evidence § 1.1, at 2-3, an 'exception not [yet] known to Massachusetts practice.'"). This case indicates that the exception has been accepted in Massachusetts courts, although it is not widely used (at least as of ten years ago).

Missouri. See *Lindsay v. Mazzio's Corp.*, 136 S.W. 3d 915, 923 (2004) (stating that present sense impression exception applies to "a declaration uttered simultaneously, or almost simultaneously, with the occurrence of the act").

New York. See *People v. Herrera*, 11 Misc. 3d 1070(A) (2006) (stating that court of appeals of New York adopted present sense impression in *People v. Brown*, 80 N.Y. 2d 729, 594 N.Y.S. 2d 696 at 700 (1993), and that exception requires corroboration).

Virginia. See *Clark v. Com.*, 14 Va. App. 1068, 1070, 421 S.E. 2d 28 (1992) (stating that Virginia's present sense impression exception extends to statement describing any act of any person when act is relevant).

STATES THAT DO NOT HAVE A HEARSAY RULE EXCEPTION LIKE FEDERAL RULE OF EVIDENCE 803(1)

The following states do not have a hearsay rule exception for a present sense impression:

California
Connecticut
Minnesota
Nebraska
Oregon
Tennessee