Study K-600 October 24, 2007

First Supplement to Memorandum 2007-40

Miscellaneous Hearsay Exceptions: Present Sense Impressions

Attached for Commission members and other interested persons to review is a draft of a tentative recommendation on present sense impressions. As discussed in Memorandum 2007-40, the draft proposes enactment of a hearsay rule exception for a present sense impression, which would be modeled on the federal rule (Fed. R. Evid. 803(1)).

At page 13, the attached draft discusses whether to retain the hearsay rule exception for a contemporaneous statement (Evid. Code § 1241). For the reasons stated in the draft, the staff recommends that **the hearsay rule exception for a contemporaneous statement be left intact.**

Respectfully submitted,

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#K-600

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Miscellaneous Hearsay Exceptions: Present Sense Impressions

[Date To Be Determined]

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN _____.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

A present sense impression is a statement that describes an event or condition that the speaker is perceiving, or has just perceived. For example, a bystander might say, "Look, there's a masked man running out of the bank carrying a black briefcase!"

In this tentative recommendation, the Law Revision Commission proposes that California adopt an exception to the hearsay rule for a statement of present sense impression.

The Federal Rules of Evidence and a vast majority of states have a hearsay exception for a present sense impression. The Evidence Code currently includes an exception for a contemporaneous statement, but not for a present sense impression. After weighing the justifications for a present sense impression exception against criticism of various aspects of the exception, the Commission tentatively recommends legislation to adopt such an exception.

The Commission solicits comment on the proposal.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

MISCELLANEOUS HEARSAY EXCEPTIONS: PRESENT SENSE IMPRESSIONS

The hearsay rule precludes admission of an out-of-court statement into evidence to prove the truth of the matter stated.[1] Hearsay is generally excluded because (1) the opposing party has no opportunity to question the person who made the out-of-court statement ("the declarant"),[2] (2) the declarant typically did not make the statement under oath,[3] and (3) the factfinder cannot observe the declarant's demeanor.[4] Such safeguards permit evaluation of a person's memory, veracity, and ability to perceive and clearly describe an event. These are the chief concerns of the hearsay rule.[5]

Both in California and under federal law, there are many exceptions to the hearsay rule.[6]

Present Sense Impressions

Federal law recognizes an exception for a present sense impression, which is a statement that describes or explains an event or condition that the speaker is perceiving, or has just perceived.[7] A good example of a present sense impression is a radio announcer's play-by-play description of a baseball game.[8] Forty-four states have an exception for a present sense impression that is similar, if not identical, to the federal exception.[9]

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1. See Evid. Code § 1200; Fed. R. Evid. 802. For example, suppose a witness to a car accident says, "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, which is subject to the hearsay rule.

2. See Evid. Code § 1200 Comment; People v. Fries, 24 Cal. 3d. 222, 231, 594 P.2d 19, 155 Cal. Rptr. 194 (1979).

3. See C. McCormick, Handbook of the Law of Evidence § 224, at 457 (1954).

4. M. Méndez, Evidence: The California Code and the Federal Rules 165-66 (3d ed. 2004) (hereafter, "Méndez Treatise").

5. 2 K. Brown, McCormick on Evidence § 245, at 125 (6th ed. 2006).

6. See, e.g., Evid. Code §§ 1220-1380; Fed. R. Evid. 803-807.

7. The federal present sense impression exception is:

> 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.

8. 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).

9. The following 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

An exception similar to the present sense impression exception was proposed when the Evidence Code was first drafted in 1965.[10] That proposed exception was narrowed and became Evidence Code Section 1241, which permits admission of hearsay known as a "contemporaneous statement."[11]

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)).

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)) (differing from federal rule by not including phrase "or immediately thereafter"), Florida (Fla. Stat. § 90.803(1)) (expressly barring admission of a statement if circumstances indicate that statement lacks trustworthiness), Kansas (Kan. Stat. Ann. § 60-460(d)(1)) (differing from federal rule by not including phrase "or immediately thereafter"), New Jersey (N.J. R. Evid. 803(c)(1)) (precluding admission of statement made after time to "deliberate or fabricate"), Ohio (Baldwin's Ohio R. Evid. 803(1)) (expressly barring admission of statement if circumstances indicate that statement lacks trustworthiness).

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)).
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> 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").
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> 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, 700 (1993), and that exception requires corroboration).
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> 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).

The following states do not have a hearsay rule exception for a present sense impression: California, Connecticut, Minnesota, Nebraska, Oregon, Tennessee.

10. *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1, 237-38 (1965). Unlike the federal rule, however, the draft exception required that the declarant be unavailable to testify at trial.

11. Since then, two Commission consultants have recommended adoption of a hearsay exception for a present sense impression: Prof. Friedenthal (then of Stanford Law School) in 1976 and Prof. Méndez (Stanford Law School) in 2003. 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); Méndez,

Contemporaneous Statements

The contemporaneous statement exception covers a statement by a declarant that (1) explains, qualifies, or makes understandable the declarant's conduct, and (2) was made while the declarant was engaged in such conduct.[12] For example, 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").[13] The statement determines the legal impact of the event — whether the speaker made a gift as opposed to a loan.[14]

Technically, however, the statement is not hearsay but rather a verbal act, a statement that has legal significance and is offered for that purpose.[15] The Comment to Section 1241 acknowledges that some writers "do not regard evidence of this sort as hearsay evidence." The Legislature nonetheless included the exception to "remov[e] any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule."[16]

The Federal Rules of Evidence do not have a contemporaneous statement exception.[17] The exception is not needed under the federal rules because the hearsay definition under those rules does not include statements that fall under the contemporaneous statement exception (i.e., verbal acts).[18]

Differences Between Present Sense Impressions and Contemporaneous Statements

California's exception for a contemporaneous statement, Evidence Code Section 1241, focuses on verbal acts. The federal exception for a present sense impression, Federal Rule of Evidence 803(1), does not address verbal acts; the federal rules do not even treat such acts as hearsay.[19]

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, 368 (2003) (hereafter, "Méndez Hearsay Analysis").

12. Evid. Code § 1241.
13. See Méndez Hearsay Analysis, *supra* note 11, at 367.
14. *Id.*
15. *Id.*
16. Evid. Code § 1241 Comment.
17. See Méndez Hearsay Analysis, *supra* note 11, at 367.
18. The advisory committee's note to Federal Rule of Evidence 801(c) explains:

> The definition [of hearsay] ... includ[es] 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.). See also Méndez Hearsay Analysis, *supra* note 11, at 367.

19. See *id.*

Three other major differences between the California exception for a contemporaneous statement and the federal exception for a present sense impression are:

(1) Under the federal exception, the declarant's statement can describe the conduct of another person, while under the California exception, the declarant's statement must explain the declarant's own conduct.

(2) Under the California exception, the conduct the declarant explains must be equivocal in nature and need explanation, but, under the federal exception, the declarant's statement may describe an event or condition that is unequivocal and unambiguous in nature.

(3) Under the federal exception, the declarant's statement may be made immediately after the event or condition has been completed, while, under the California exception, a declarant's explanation of conduct must be simultaneous with the conduct, not made afterwards.[20]

Justifications for a Present Sense Impression Exception to the Hearsay Rule

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

The Likelihood of Memory Loss Is Diminished

A person's comment about what the person perceives through sight or other senses *at the time* of receiving the impression is safe from the problem of memory loss.[21] Because no time elapses between the statement and the event, there is no opportunity to forget the event and thus no need for concern that the person's memory is faulty.[22]

As a result, evidence admitted under a hearsay rule exception for a present sense impression may actually be more reliable than in-court testimony. 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 ...."[23]

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 a deliberate deception.[24] The exception applies

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20. 1 B. Jefferson, Jefferson's California Evidence Benchbook *Spontaneous and Contemporaneous Statements* § 13.14, at 207 (3d ed. & March 2007 update).

21. See McCormick, *supra* note 3, § 273, at 584 (emphasis in original).

22. Gardner v. U.S., 898 A.2d 367, 374 (D.C. 2006).

23. 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, 880-81 (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").

24. McCormick, *supra* note 3, § 273, at 594 (1954).

only to a statement describing an event that the declarant is in the midst of perceiving, so there is no opportunity to reflect and distort the facts.[25]

The federal exception for a present sense impression is based upon this rationale. The advisory committee's note explains that the "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."[26] The requirement of contemporaneity preserves "the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate."[27]

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 considered sufficiently reliable to warrant an exception to the hearsay rule.[28]

Corroboration As Additional Safeguard of Trustworthiness

A third reason for admitting evidence of a present sense impression relates to the likelihood of corroboration. Such a statement usually will be made to another person who has equal opportunities to observe the event and thus to check a misstatement.[29] 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.[30]

Further, if the witness testifying to the out-of-court statement is the declarant, the factfinder may evaluate the demeanor of the declarant-witness. In addition, cross-examination on the statement can probe into its credibility.[31]

Such corroboration thus reduces the risks of ambiguity and misperception, which are the two key hearsay concerns not addressed by contemporaneity.[32] When such corroboration is coupled with contemporaneity, all of the key concerns underlying the hearsay rule are addressed, at least to some extent.

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25. Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 Loy. U. Chi. L.J. 299, 313, 316-317 (1979); see also Gardner v. U.S., 898 A.2d 367, 374 (D.C. 2006).

26. Fed. R. Evid. 803(1) advisory committee's note.

27. Booth v. Maryland, 306 Md. 313, 320, 324, 508 A.2d 976 (1986).

28. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907, 913-14 (2001); see also 4 C. Mueller & L. Kirkpatrick, Federal Evidence § 8:67, at 569-570 (3d ed. 2007).

29. McCormick, *supra* note 3, § 273, at 584; see also Passannante, *supra* note 8, at 98 n. 58.

30. 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).

31. 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).

32. Mueller & Kirkpatrick, *supra* note 28, § 8:67 at 560.

Utility

Apart from allowing admission of trustworthy statements, the main utility of the present sense impression exception is that it allows admission of an immediate impression of an event that was not startling.[33] A different hearsay exception, known as the excited utterance or spontaneous statement exception, allows admission of a statement that was made under the stress of excitement, whether at the time of an exciting event or afterwards.[34] An exception for a present sense impression would be especially useful when the declarant makes an observation just before an exciting event.[35]

The framers of the federal rules concluded that including both an exception for a present sense impression and an exception for an excited utterance was needed to avoid "needless niggling."[36] 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 would be useful to allow admission of a statement made during an event, which relates to the conduct of someone other than the declarant. Such a statement is not admissible as a contemporaneous statement under Evidence Code Section 1241.[37]

Criticism of the Present Sense Impression Exception to the Hearsay Rule

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 be introduced into evidence without an opportunity for cross-examination.[38]

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33. Mueller & Kirkpatrick, *supra* note 28, § 8:67 at 567; *cf.* Evid. Code § 1240 (admitting hearsay statement spontaneously made about event or condition while under stress of excitement caused by the event or condition).

34. Fed. R. Evid. 803(2) (excited utterance); Evid. Code § 1240 (spontaneous statement).

35. Mueller & Kirkpatrick, *supra* note 28, § 8:67 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).

36. Fed. R. Evid. 803(1) advisory committee's note.

37. 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)).

38. Although the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004), called into question *all* hearsay rule exceptions based on notions of reliability (at least as applied to a defendant in a criminal case), the decision did not single out the present sense impression exception.

Crawford held that under the federal Confrontation Clause (U.S. Const. amend. VI), a "testimonial statement" is not admissible against a criminal defendant (1) unless the declarant testifies at trial or (2) the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 53-54.

Cumulative Evidence

One criticism is the claim that present sense impression statements are often "merely cumulative."[39] 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.[40]

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

Another 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").[41] It has been argued that the exception should not operate to admit such a statement.[42]

It appears, however, that a pretrial identification would not be admitted as a present sense impression because the statement actually relates to a past event, i.e., a pre-lineup identification of the person who is identified at the lineup.[43] In fact, a

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If California adopts a hearsay exception for a present sense impression, it will not be necessary to codify *Crawford's* constitutional limitations in that exception. The federal Constitution would automatically override any state statute. See U.S. Const. art. VI, § 2 (Supremacy Clause). Further, the Evidence Code already includes a mechanism for ensuring that hearsay rule exceptions are construed in accordance with the federal Confrontation Clause. Specifically, 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."

39. See Beck, *supra* note 23, at 1075, *citing* U.S. v. Parker, 491 F. 2d 517, 523 (8th Cir. 1973).

40. See Beck, *supra* note 23, at 1075; Waltz *Iowa L. Rev. article, supra* note 23, 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).

41. Waltz, *Present Sense Impressions and the Residual Exception: A New Day for 'Great' Hearsay?*, 2 Litig. 22, 24 (1976) (hereafter, "Waltz *Litigation* article").

42. *Id.*

43. 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

different federal rule specifically addresses the admissibility of a pretrial identification.[44]

Likewise, California has a provision specifically addressing the admissibility of a pretrial identification.[45] If California enacts a hearsay exception for a present sense impression, the provision on pretrial identification could be referenced in the Law Revision Commission's Comment to the new exception.[46] That would help prevent confusion over the proper treatment of a pretrial identification.

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.[47] 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.[48]

Professor Morgan, who was instrumental in the adoption of the federal provision on present sense impressions, argues 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.[49]

However, it appears that the courts are divided on the admissibility of a present sense impression in the form of an opinion.[50] The majority view rejects an opinion if it allocates blame.[51] If it does not, the courts are split more evenly.[52]

The Commission believes that the admissibility of a present sense impression that is in the form of an opinion would be decided best by courts.[53]

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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).

44. See Fed. R. Evid. 801(d)(1)(C) (pretrial identification is not hearsay).

45. See Evid. Code § 1238 (if pretrial identification satisfies certain conditions, it is not inadmissible under hearsay rule).

46. See proposed Evid. Code § 1240.5 Comment *infra*.

47. See McFarland, *supra* note 28, at 930 n. 132.

48. See Booth v. Maryland, 306 Md. 313, 325, 508 A.2d 976 (1986).

49. E. Morgan, Basic Problems of State and Federal Evidence 343 (1963); see also Waltz *Iowa L. Rev.* article, *supra* note 23, at 881 n. 74.

50. See *Booth*, 306 Md. at 325.

51. *Id*. at 326.

52. *Id*.

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."[54]

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.[55]

Some commentators criticize courts for admitting statements made after there was ample time for fabrication, memory loss, and confabulation.[56] 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.[57] Another commentator agrees that strict

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53. *Cf.* People v. Miron, 210 Cal. App. 3d 580, 584, 258 Cal. Rptr. 494 (1989) (holding that opinion rule applied to spontaneous exclamation that appeared to allocate blame); see also Evid. Code § 800 (opinion rule).

54. Fed. R. Evid. 803(1) advisory committee's note.

55. Booth v. Maryland, 306 Md. 313, 324, 508 A.2d 976 (1986); see also Waltz *Iowa L. Rev*. article, *supra* note 23, 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).

56. See, e.g., McFarland, *supra* note 28, 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").

Confabulation is the filling in of gaps in memory with fabrications that one believes are facts. The American Heritage Dictionary of the English Language (4th ed. 2006).

57. See, e.g., McFarland, *supra* note 28, at 916, 931; Beck, *supra* note 23, at 1060-1061; Note on Contemporaneity and Corroboration, *supra* note 56, at 699.

Arguing for strict contemporaneity, Prof. Douglas McFarland (Hamline University School of Law) cites a study finding that some "spontaneous, manipulative liars" are quicker than "nonmanipulative truthtellers," and 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* note 28, at 916.

contemporaneity should be required, but he would allow a longer time lapse if other evidence indicates that the statement is trustworthy.[58]

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."[59] 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."[60]
- 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.[61]

It appears that the federal rule and these 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 commentators who argue for strict contemporaneity acknowledge that there must be some "passage of time to get the words out of the mouth," a "split-second to form words."[62] It is unrealistic to insist that a statement be made at exactly the same time that an event occurs.

Thus, if California enacts a hearsay exception for a present sense impression, the Commission recommends that the exception use the language of the federal rule on the matter of the timing.[63] That would afford the advantage of uniformity not only with federal law, but also with the law of many other states.

To achieve strict contemporaneity, he suggests deleting "immediately thereafter" from the exception. *Id*. at 931. 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 state appears to require strict contemporaneity. See, e.g., Colo. R. Evid. 803(1) Comment (focusing on *spontaneity* as guarantee of trustworthiness); State v. Blake, 209 Kan. 196, 197, 201-02, 495 P. 2d 905 (1972) (applying Kansas exception to require only *substantial* contemporaneousness); see also Slough, *Some Evidentiary Aspects of the Kansas Code of Civil Procedure*, 13 U. Kan. L. Rev. 197, 197 (1964) (interpreting then newly enacted Kansas provision as only requiring "substantial contemporaneousness" between statement and event); Gard, *Survey of Kansas Law*, 12 U. Kan. L. Rev. 239, 250 (1964) (same).

58. See Waltz *Iowa L. Rev*. article, *supra* note 23, at 880.

59. See N.J. R. Evid. 803(c)(1).

60. See Fla. Stat. § 90.803(1).

61. See Baldwin's Ohio R. Evid. 803(1).

62. See, e.g., McFarland, *supra* note 28, at 931.

63. See proposed Evid. Code § 1240.5 & Comment *infra*.

Corroboration

A final area of criticism relates to corroboration of a present sense impression. The issue is whether corroboration (i.e., evidence other than the present sense impression itself) is necessary to obtain admission of a present sense impression.

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.

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.[64]

If California adopted an exception based on the federal provision, however, it would be clear that corroborative evidence would be required to show that (1) the event or condition actually occurred and (2) the declarant actually perceived the event or condition described. Unlike a federal court, a California court may *not* consider inadmissible evidence in determining admissibility.[65] Thus, a California court could not consider a proffered present sense impression in determining whether that statement should be admitted. To establish that the provision applied, the proponent of a present sense impression in California necessarily would have to present other evidence showing that (1) the event or condition actually occurred, and (2) the declarant actually perceived the event or condition.

Corroboration of the *accuracy* of the declarant's description of the event or condition, however, would not necessarily be required if California adopted a provision like the federal exception for a present sense impression. A statement could meet the key criteria for a present sense impression even if the description given is inaccurate.

It is generally agreed that the federal provision for a present sense impression does not require corroboration of the accuracy of the declarant's description.[66] Commentators, however, are divided as to whether such corroboration should be required.[67]

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64. Booth v. Maryland, 306 Md. 313, 327, 508 A.2d 976 (1986); Graham, *supra* note 55, § 803:1; Passannante, *supra* note 8, at 105 (observing that the courts "apply dissimilar tests," and cannot even agree "as to what has to be corroborated").

65. See Fed. R. Evid. 104(a) advisory committee's note; Méndez Treatise, *supra* note 4, at 598-99.

66. See, e.g., Graham, *supra* note 55, § 803:14; Passannante, *supra* note 8, at 100 n. 67; Beck, *supra* note 23, at 1069; Waltz *Litigation* article, *supra* note 41, at 24.

67. Some commentators argue that the exception should require corroboration of a description's accuracy, at least to some extent. See, e.g., Waltz *Iowa L. Rev.* article, *supra* note 23, at 889, 892, 896, 898 (corroboration of description's accuracy should be required); Foster, *supra* note 25, at 333-34 (exception should require declarant or "equally percipient witness" to be subject to cross-examination on statement); Beck, *supra* note 23, at 1071 (declarant should be required to testify regarding present sense impression if declarant is available). Other commentators argue that such corroboration should not be required. See, e.g.,

Because a present sense impression has indicia of reliability besides corroboration, the Commission believes that corroboration of the description's accuracy should not be required. 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 would be preferable not to make corroboration of a description's accuracy a prerequisite to admissibility as a present sense impression.

Nonetheless, if California enacts a hearsay exception for a present sense impression, it would be helpful to address the matter of corroboration in the Law Revision Commission's Comment to the new exception. To provide clarity, the Comment would explain that no corroboration of the accuracy of the statement is required, but corroboration of the event or condition and of the declarant's perception must necessarily be provided under the normal procedure for determining admissibility in California.[68]

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 be a useful supplement to the existing provisions in the Evidence Code.

Although there have been criticisms of such an exception, they are largely directed at various aspects of the exception and generally do not challenge the merits of having an exception for a present sense impression. The criticism regarding cumulative evidence is not persuasive. The concern relating to pretrial identifications could be addressed in a Law Revision Commission Comment, as could be the concerns relating to corroboration. The proper treatment of a present sense impression in the form of an opinion would be properly left to the courts. The criticism relating to the timing of a proffered statement only raises questions about how the exception should be drafted.

Based on the sound justifications for the exception, the Commission recommends that California adopt a hearsay rule exception for a present sense

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Brown, *supra* note 5, § 271, at 254 (Although corroboration adds further assurance of accuracy, a "general justification for admission is not the same as a requirement."); Passannante, *supra* note 8, at 106 (corroboration goes to weight, not admissibility, of statement).

68. See proposed Evid. Code § 1240.5 Comment *infra*.

impression. To promote uniformity, the Commission further recommends that the new exception be modeled on the federal rule.[69]

Retention of the Hearsay Rule Exception for a Contemporaneous Statement

A final issue is whether the hearsay rule exception for a contemporaneous statement should be retained if a new exception for a present sense impression is enacted. The Law Revision Commission recommends that the contemporaneous statement exception be left intact.

It is true that the federal exception for a present sense impression applies not only when a declarant describes the conduct of another person, but also when a declarant describes the declarant's own conduct.[70] On initial consideration, that might make the exception for a contemporaneous statement seem superfluous.

However, the federal exception for a present sense impression is not meant to apply to a verbal act. Under the Federal Rules of Evidence, a verbal act is not regarded as hearsay.[71]

Consequently, a California provision modeled on the federal exception for a present sense impression probably would not be construed to apply to a verbal act. To ensure that a verbal act remains admissible, California should retain its hearsay rule exception for a contemporaneous statement.[72]

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69. See proposed Evid. Code § 1240.5 & Comment *infra*.

70. See, e.g., Jonas v. Isuzu Motors, Ltd., 210 F. Supp. 2d 1373 (M.D. Ga. 2002) (declarant's statement that he had fallen asleep at wheel, killed his father, and wanted to die was admissible as present sense impression); United States v. Campbell, 782 F. Supp. 1258 (N.D. Ill. 1991) (police officer's 911 call, recounting officer's ongoing chase of suspect, was admissible as present sense impression).

71. Fed. R. Evid. 801(c) advisory committee's note.

72. The Truth-in-Evidence provision of the Victims' Bill of Rights (Cal. Const. art. I, § 28(d)) provides a further reason for retaining the exception for a contemporaneous statement. Unless it can be said with certainty that the exception is 100% superfluous, repealing the exception would restrict the admissibility of relevant evidence in a criminal case. Under the Truth-in-Evidence provision of the Victims' Bill of Rights, that cannot be done except by statute "enacted by a two-thirds vote of the membership in each house of the Legislature ...."

PROPOSED LEGISLATION

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).

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.

☞ **Staff Note.** The Commission is particularly interested in receiving comment on whether subdivision (b), which would permit a statement made "immediately thereafter," would be sufficient to encompass only those statements made without time for fabrication or deliberation.

The Commission is also particularly interested in receiving comment on whether the new provision should require, as a condition of admission, corroboration of the accuracy of the declarant's description of the event or condition perceived.