

Memorandum 2007-53

**Miscellaneous Hearsay Exceptions: Present Sense Impressions
(Comments on Tentative Recommendation)**

The Commission's tentative recommendation proposing a present sense impression exception to the hearsay rule was distributed for comment approximately a month ago. The Commission received a comment from Michael Judge, the Public Defender of Los Angeles County. Exhibit pp. 1-4. Mr. Judge comments not only on behalf of his office (hereafter, "LA Public Defender's office"), but also on behalf of the California Public Defender's Association (hereafter, "CPDA"). *See id.* at 4. This memorandum discusses that comment.

Thus far, the Commission has not received any other comments on its tentative recommendation, despite efforts to distribute the proposal to evidence experts, key stakeholders, and other knowledgeable persons. The lack of other comments probably is due to the unusually short comment period (one month as opposed to the normal three months) and the decision to frame the December 3 due date as the optimal date for receipt of comments, not as a firm deadline.

The staff will present additional comments for the Commission's consideration as they arrive. The Commission's final report on present sense impressions is not due until March 1, 2008. That means the Commission can consider the topic at its upcoming December and January meetings before approving a final recommendation at the February meeting.

The staff recommends that the Commission **use the December meeting primarily as an opportunity to hear from interested persons and discuss the issues among the members of the Commission.** The Commission can wait until January to make decisions regarding the content of its final recommendation. The staff will then prepare a draft of a final recommendation, which the Commission can refine as needed at the February meeting.

COMMENTS OF THE LOS ANGELES COUNTY PUBLIC DEFENDER AND THE
CALIFORNIA PUBLIC DEFENDERS' ASSOCIATION

CPDA and the LA Public Defender's office "oppose the adoption of a present sense impression exception to the hearsay rule." Exhibit p. 4. On behalf of these organizations, Mr. Judge explains that such an exception "is not necessary and its adoption will likely cause vexing problems in the criminal justice system." *Id.*

Mr. Judge makes five main points in support of the position taken by CPDA and the LA Public Defender's office:

- (1) A present sense impression exception to the hearsay rule is unnecessary.
- (2) Such an exception would result in admission of unreliable evidence.
- (3) In many factual contexts, admission of a present sense impression would violate the Confrontation Clause, so it would be futile and ill-advised to attempt to create an exception for such evidence.
- (4) If a present sense impression exception is adopted and includes the phrase "or immediately thereafter," the exception inevitably will be interpreted too broadly.
- (5) If such an exception is adopted, it should expressly require corroboration.

Each of those points is discussed below.

Whether the Proposed Exception Is Needed

CPDA and the LA Public Defender's office say that a present sense impression exception to the hearsay rule "is not necessary" Exhibit p. 4. They explain that most litigation regarding admission of hearsay "involves 911 calls and statements made to police responding to the scene of an alleged crime." *Id.* at 1. Those statements are sometimes admissible under the spontaneous statement exception to the hearsay rule (Evid. Code § 1240), which applies to a statement that was made under the stress of excitement caused by an event or condition. In the experience of Mr. Judge's staff, "[s]tatements which fail to qualify as spontaneous statements would almost never ... qualify as present sense impressions." Exhibit p. 1.

Based on this assessment of overlap between the exceptions, CPDA and the LA Public Defender's office conclude that the main impetus for proposing a present sense impression exception "is not that there are many cases — or even a few cases — where such evidence is reliable and essential but inadmissible under

current law.” *Id.* They say that the main impetus must instead be the existence of a comparable federal rule. *Id.* They find this justification inadequate and point out that the Commission has not provided “any actual data” showing a need for a present sense impression exception. *Id.*

Demonstrating a need for reform is critical in developing any legislative proposal. Prospective authors and policy committees often ask at the outset whether a proposed change in the law is necessary.

There is clearly overlap between the spontaneous statement exception and the present sense impression exception, as the Commission’s former consultant, Prof. James Chadbourn of UCLA Law School, acknowledged long ago. *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm’n Reports app. 401, app. 468 (1962). But the overlap is not complete.

For example, in *People v. Hines*, 15 Cal. 4th 997, 1034 n.4, 1035-36, 938 P.2d 388, 64 Cal. Rptr. 2d 594 (1997), the California Supreme Court determined that certain evidence was not admissible as a spontaneous statement but *would have been admissible as a present sense impression* if California had a hearsay exception for a present sense impression. Unlike the spontaneous statement exception, a present sense impression exception would allow admission of evidence that *was not exciting* to the observer. *See, e.g., Booth v. Maryland*, 306 Md. 313, 324, 331, 508 A.2d 976 (1986). Thus, a present sense impression exception would allow admission of a statement made *just before* an exciting event. *See, e.g., Houston Oxygen Co. v. Davis*, 139 Tex. 1, 5-6, 161 S.W.2d 474 (1942) (admitting statement about passing car minutes before accident). The spontaneous statement exception would not apply in this situation. These distinctions in coverage are sufficiently significant that 44 states and the federal courts have a present sense impression exception to the hearsay rule, *in addition to* an excited utterance exception, which is comparable to California’s spontaneous statement exception.

Although a statement during a 911 call or emergency response may often qualify as a spontaneous statement, in some instances that may not be true and a present sense impression exception would be useful. Perhaps more importantly, a statement of present sense impression may also be made in other contexts, such as a situation pertinent to civil litigation. **We encourage further input on the extent to which, and the contexts in which, a hearsay exception for a present sense impression would have an impact.**

CPDA and the LA Public Defender's office further point out that either the declarant or an equally percipient witness might be available to testify about the event that is the subject of a present sense impression. Exhibit p. 2. They say this is an additional reason why admission of the hearsay evidence is unnecessary.

This view overlooks the differences between a present sense impression and in-court testimony. The present sense impression may be more reliable than an in-court statement — by either the declarant or an equally percipient witness — because the in-court statement is based upon the person's memory of the event, which may have diminished or changed since the event. A statement made while the event is happening is not prone to such memory problems. See Beck, Note, *The Present Sense Impression*, 56 Tex. L. Rev. 1053, 1075 (1978) ("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"); 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).

Also, a statement made at the time of the event, unlike an in-court statement based on memory of the event, is made before time for deliberation, fabrication, or confabulation (gap-filling).

Admission of Unreliable Evidence

CPDA and the LA Public Defender's office say that a present sense impression exception would cause harm by permitting admission of unreliable evidence. Exhibit pp. 1-2. They observe that "many, if not most" statements describing a present sense impression "will be made to 911 operators or to someone that the declarant calls on the telephone." *Id.* at 2. They correctly note that a person "on the other end of a telephone obviously cannot correct any misperception." *Id.* They maintain that unless a statement describing a present sense impression is made when someone else is on the scene to check its accuracy, "reliability cannot be assured." *Id.*

As the proposed Comment explains, however, a statement describing a present sense impression has other assurances of reliability. In particular, the Comment points out that "there is little or no time for calculated misstatement" and "there is no problem concerning the declarant's memory because the statement is simultaneous with the event." Those factors address two of the four

chief concerns of the hearsay rule — memory and veracity. The other concerns — ability to perceive and clearly describe an event — are not addressed unless the statement is made when someone else is on the scene to check its accuracy.

The issue is whether the two other assurances of reliability, without more, are sufficient to justify admissibility. Notably, although the federal court system and 44 states have a present sense impression exception, none of these jurisdictions seem to condition admissibility on proof that someone else was on the scene to check the accuracy of evidence offered pursuant to the exception. If the Commission similarly concludes that the two other assurances of reliability suffice, **it might want to revise the proposed Comment to make that point more clear:**

Comment. Section 1240.5 is drawn from Rule 803(1) of the Federal Rules of Evidence. A present sense impression is sufficiently trustworthy to be considered by the trier of fact for ~~three~~ two 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,~~ Additionally, in some cases, the statement is ~~usually~~ made to one whose proximity provides an immediate opportunity to check the accuracy of the statement

Similar changes could be made in the preliminary part (narrative portion) of the Commission's proposal.

To illustrate that a present sense impression exception would allow admission of unreliable evidence, CPDA and the LA Public Defender's office posit the following hypothetical:

[A]ssume that person A says to person B, standing nearby, "Look, there's a masked man running out of the bank carrying a black briefcase; he just robbed the bank!" Person B replies, "No, it's a commercial." At a trial where B testifies but A does not, B could testify that no bank robbery occurred. *But adoption of the present sense impression hearsay exception would make person A's statement admissible, even though that statement was wrong and corrected by B on the spot, and even though A isn't around to admit his error.* Thus, the exception would provide for admission of a statement which is wholly unreliable and which in fact was challenged as being misperceived the instant it was articulated.

Exhibit p. 2 (emphasis added).

CPDA and the LA Public Defender's office thus say that A's statement is inaccurate, but that it would be admissible if the proposed present sense

impression exception were adopted. However, the conclusion that A's inaccurate statement would be admissible is not necessarily correct. To establish admissibility, the proponent would have to show that the statement meets the criteria for a present sense impression *using evidence other than the statement itself*. See proposed Evid. Code § 1240.5 Comment. There would have to be other evidence, apart from A's statement, that shows that the event about which the statement is made *actually occurred*. *Id.* Thus, if the only evidence of a bank robbery was A's statement, A's statement would not be admissible for the purposes of proving that a bank robbery occurred. Also, without other evidence that a robbery occurred, it seems unlikely that there would be a case litigating whether a robbery occurred. Even if there was litigation over whether a robbery occurred, and even if A's statement could be admitted, its inaccuracy would be exposed by B's statement as well as other evidence showing no bank robbery occurred.

Furthermore, if A's statement were offered for a different purpose, the statement may be accurate as to that issue. For example, if a man starring in a commercial fell while acting out a robbery, and civil liability for his injury was at issue, then A's statement about the incident would tend to show that the actor had been running while performing the fake bank robbery.

Finally, suppose neither A nor B are available to testify, only person C, who heard both A's statement and B's statement but did not observe the event. A bank teller testifies to having been robbed; the defendant testifies to having been solicited to participate in a fake robbery for purposes of a commercial. A's statement would be admissible as a spontaneous statement, because it was made under the stress of observing a perceived robbery in progress. B's statement would just be a present sense impression, not a spontaneous statement. If B's statement was admissible as a present sense impression, that might help to exonerate the defendant, who may not have intended to commit a robbery.

As with other evidentiary rules, there may thus be situations in which the exception could be used to admit unreliable evidence that would otherwise be excluded, and other situations in which the exception could be used to admit reliable evidence that would otherwise be excluded. The question for the Commission, and ultimately the Legislature, is **whether, on balance, the truth is more likely to be discerned if there is a present sense impression exception than if there is no such exception.**

Effect of *Crawford v. Washington*

CAPD and the LA Public Defender's office state that "in many actual factual contexts, admission of the present sense impression would violate *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354." Exhibit p. 3. *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." *Id.* at 53-54.

The contours of what constitutes a testimonial statement are still being fleshed out. A review of cases from other jurisdictions shows, however, that a statement of present sense impression is usually held to be non-testimonial. Some of these cases involve a statement that was made during a 911 call. *See, e.g., U.S. v. Thomas*, 453 F.3d 838, 841, 844 (2006); *Salt Lake City v. Williams*, 128 P.3d 47 49-50, 53-54, 54 n.6 (2005); *People v. Coleman*, 16 A.D.3d 254, 254-55, 791 N.Y.S.2d 112 (2005); *but see People v. Dobbin*, 6 Misc. 3d 892, 898, 791 N.Y.S.2d 897 (2004). Other such cases arose in different contexts. *See, e.g., People v. Herrera*, 952 So.2d 112, 121 (2006); *U.S. v. Danford*, 435 F.3d 682, 687 (2005).

As an analytical matter, it seems probable that most, if not all, statements that meet the criteria for a present sense impression — i.e., the statement is made during, or immediately after, the event described — would be non-testimonial. It is hard to imagine a present sense impression given with the *purpose* of testimony — i.e., to establish or prove some past fact for possible use at a criminal trial. There is no time to formulate such a purpose when a statement is made spontaneously. Nor is there time to impart the formality and solemnity characteristic of an oath, a key step in eliciting testimony for purposes of prosecution. And, if a statement is given primarily to enable a law enforcement official to deal with an ongoing emergency, *Davis* makes clear that the statement is not testimonial.

CAPD and the LA Public Defender's office nonetheless state that "*Crawford* would invalidate" a present sense impression exception. Exhibit p. 3. *Crawford*, however, would not "invalidate" the exception.

In many cases, admission of a present sense impression would not violate the Confrontation Clause because the statement is nontestimonial. Admission of a testimonial statement would not necessarily violate that right either, provided the witness is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *See Crawford*, 541 U.S. at 68.

If these conditions are not met, and the defendant objects under *Crawford*, the evidence would simply be excluded pursuant to the Confrontation Clause and Evidence Code Section 1204, which says that hearsay evidence cannot be admitted against a criminal defendant if that would be unconstitutional. The present sense impression exception could still be used as a basis for admissibility of other evidence in that particular case, as well as for evidence proffered in other criminal cases and in civil cases.

For these reasons, **the expressed concerns about *Crawford* do not strike us as a persuasive ground for jettisoning the Commission's proposal.**

CAPD and the LA Public Defender's office correctly note, however, that the tentative recommendation only discusses *Crawford* in footnote 38. If the Commission thinks it would be useful, **we could add further discussion of *Crawford* to the preliminary part and perhaps to the proposed Comment.**

Time Lapse Between the Statement and the Event Described

In the tentative recommendation, proposed Evidence Code Section 1240.5 reads:

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.*

(Emphasis added.) A note indicates that 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."

CPDA and the LA Public Defender's office consider it inevitable that the phrase "immediately thereafter" will be interpreted too broadly. They write:

In the real world, it is apparent how the exception will be used. Prosecutors who are unable to lay a sufficient foundation to justify admission of a hearsay statement as a spontaneous statement will revert to a claim that the statement is a present sense impression. In support of this claim, prosecutors will seek a broad reading of the requirement that the statement was made while perceiving the event "or immediately thereafter." While it is apparent that the Commission prefers the phrase "immediately thereafter" be read very narrowly, it is inevitable that a prosecutor who sees his or her

case collapsing will urge a very broad reading of that phrase. Surely, some courts will adopt a broad reading as well. It is plausible that even appellate courts will adopt a broad and expansive reading. *Thus, the Commission's attempt to write a very narrow hearsay exception may well fail, and a much broader exception will end up being the law.*

Exhibit pp. 1-2 (emphasis added). For these reasons, CPDA and the LA Public Defender's office would "strongly oppose adoption of the 'immediately thereafter' language" if a present sense impression is to be enacted. *Id.* at 2.

The concerns expressed by CPDA and the LA Public Defender's office are not unfounded. The Commission especially sought comment on this issue because examples from federal courts show that the phrase "immediately thereafter" has been stretched, allowing admission of a statement made after ample time for fabrication and deliberation. *See* McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907, 908, 915, 919, 931 (2001) (disapproving of several federal 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"); *see also* Note, *the Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 Nw. U. L. Rev. 666, 670 (1977) (stating that courts have allowed statements after unacceptable delays and arguing that exception should only allow "the natural and inevitable time lag between any perception and its verbal description").

Even though there is valid concern that the language "immediately thereafter" would be misinterpreted, eliminating the language altogether could make application of the exception impracticable, unless the language "while ... perceiving" is stretched. This is because a short lapse, although maybe only a second or a partial second, is needed to articulate what is being observed. Thus, the proposed solution of how to avoid stretching "immediately thereafter" could require stretching other language. That is not desirable. The exception should not be drafted so that it could not apply unless the language is stretched.

A variety of different approaches are discussed at pages 9-11 of the tentative recommendation. **A further possibility would be to emphasize in the Comment that the phrase "or immediately thereafter" is to be read narrowly.**

The Comment begins by stating that the provision is "drawn from" the federal rule, which allows "substantial" contemporaneity. It might help to state that unlike the federal rule, the California provision requires "strict"

contemporaneity. That would encourage a narrow reading of “immediately thereafter.”

The Comment could cite with approval cases that properly interpreted the language, and cite with disapproval other cases that did not. Also, the Comment could explain that “immediately thereafter” is included only to allow for the time needed to articulate the event or condition perceived, no more. Otherwise, there would be time for deliberation and fabrication, and the guarantor of trustworthiness — spontaneity — would be missing.

Commission Comments are official legislative history and are given great weight in construing legislation enacted on Commission recommendation. See, e.g., *Sullivan v. Delta Air Lines, Inc.*, 15 Cal. 4th 288, 935 P.2d 781, 63 Cal. Rptr. 2d 74 (1997); *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 36, 34 Cal. Rptr. 3d 520 (2005); *2006-2007 Annual Report*, 36 Cal. L. Revision Comm’n Reports 1, 18-24 (2006). Courts at all levels of the state and federal system rely on Commission Comments and reports as an aid in interpretation. *Annual Report, supra*, at 20-21. Thus, a Comment urging a narrow interpretation of “or immediately thereafter” might be effective.

We encourage comment on this idea and on other means of drafting proposed Section 1240.5 to effectively convey how much time can elapse between the declarant’s statement and the event described.

Express Requirement of Corroboration

In the tentative recommendation, the Comment to proposed Section 1240.5 explains:

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 the accuracy of the declarant’s description of the event or condition. 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. Broun, *McCormick on Evidence* § 271, at 254 (6th ed.

2006); Passannante, Note, *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).

CPDA and the LA Public Defender's office say that to "assure adequate corroboration, the requirement should be written into the actual section itself." Exhibit p. 3. They warn that "failure to do so risks erosion by trial and appellate courts, which may well adopt a rule that no corroboration is required." *Id.*

The staff disagrees with this assessment. As explained above, courts accord great weight to Commission Comments in interpreting legislation enacted on Commission recommendation. It is unlikely that proposed Section 1240.5 would be interpreted contrary to what the Comment says about corroboration.

There is no need to place the corroboration requirements in the text of the exception itself, because they derive from a general rule applicable to all hearsay exceptions and in other evidentiary contexts. As the sources cited in the Comment and in footnote 65 of the tentative recommendation indicate, a court can only consider admissible evidence in determining whether a hearsay statement or other evidence is admissible. In other words, in determining whether a hearsay statement meets the criteria of an exception, the court cannot rely on the hearsay statement. Instead, the court must rely on other evidence showing that the proffered statement meets the criteria of the exception (e.g., that the declarant's statement about an event or condition was made while observing that event or condition, or immediately thereafter).

Not only is it unnecessary to expressly state the corroboration requirements in the present sense impression exception itself, it would be inadvisable. It would beg the question why the general rule applicable to all exceptions was expressly stated in the text of one, but not the others. It could undermine the general rule, especially since that rule is not expressly codified, but implicit in the fact that the opposite rule was not adopted.

The staff therefore recommends against revising proposed Section 1240.5 to expressly address corroboration. **It is better to address corroboration in the Comment**, as the Commission did in the tentative recommendation.

NEXT STEP

Further input is needed before the Commission can finalize a recommendation on present sense impressions. The staff will continue its

efforts to alert knowledgeable sources to the tentative recommendation and ask them to share their views. We encourage other persons to do the same.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel



MICHAEL P. JUDGE
PUBLIC DEFENDER

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EXECUTIVE OFFICE

November 26, 2007

The California Law Revision Commission has formally pronounced its recommendation that a new hearsay exception for present sense impression be adopted. The Commission has solicited comment on the proposed exception. I am writing to express opposition to the adoption of any such new hearsay exception.

Preliminarily, my staff is mystified by the stated reasons used to explain the need for adoption of this new hearsay exception. Most of the litigation on the admission of hearsay involves 911 calls and statements made to police responding to the scene of an alleged crime. Those statements sometimes qualify as spontaneous statements and are then admitted into evidence. Statements which fail to qualify as spontaneous statements would almost never, in our experience, qualify as present sense impressions.

It appears that the main impetus for adoption of a present sense impression hearsay exception is not that there are many cases – or even a few cases – where such evidence is reliable and essential but inadmissible under current law. It appears that the main impetus for adoption of a present sense impression is that there is a comparable federal rule.

There is no reason why California is obliged to match up to a federal procedural rule. Certainly, there is no justification for changing California law merely to make it conform to federal law where there is no actual need to do so. Nor does the Commission claim any such need or provide any actual data justifying such a change.

It might be argued that the adoption of a present sense impression hearsay exception would do no harm. We disagree. In the real world, it is apparent how this exception will be used. Prosecutors who are unable to lay a sufficient foundation to justify admission of a hearsay statement as a spontaneous statement will revert to a claim that the statement is a present sense impression. In support of this claim, prosecutors will seek a broad reading of the requirement that the statement was made while perceiving the event “or immediately thereafter.” While it is apparent that the Commission prefers that the phrase “immediately thereafter” be read very narrowly, it is inevitable that a prosecutor who sees his or her case collapsing will urge a very broad reading of that phrase. Surely, some courts will adopt such a broad reading as well. It is plausible that even appellate courts will adopt a broad and

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expansive reading. Thus, the Commission's attempt to write a very narrow hearsay exception may well fail, and a much broader exception will end up being the law. For this reason, we strongly oppose adoption of the "immediately thereafter" language if this exception is in fact adopted.

There are severe reliability problems in adopting a present sense impression hearsay exception. The Commission comment states that reliability is ensured because the person hearing the statements (presumably the person actually testifying) was present at the time, saw the same event, and so can correct any misstatements. However, there are fatal problems with this view.

First, the view assumes that the statement is being made to a live person who is located next to the declarant. In the real world, many if not most of these statements will be made to 911 operators or to someone that the declarant calls on the telephone. A person on the other end of a telephone obviously cannot correct any misperception. If the basis for the claim of reliability is the actual presence of the person hearing the statement, the hearsay exception should itself require that such a person be present. In the absence of such a requirement, reliability cannot be assured.

The Commission's recommendations could lead to untoward results. For example, assume that person A says to person B, standing nearby, "Look, there's a masked man running out of the bank carrying a black briefcase; he just robbed the bank!" Person B replies, "No, it's a commercial." At a trial where B testifies but A does not, B could testify that no bank robbery occurred. But adoption of the present sense impression hearsay exception would make person A's statement admissible, even though that statement was wrong and was corrected by B on the spot, and even though A isn't around to admit his error. Thus, the exception would provide for admission of a statement which is wholly unreliable and which in fact was challenged as being misperceived the instant it was articulated.

Of course, to admit the hearsay, the prosecution needs some witness, presumably, it would be person B in the above hypothetical example. But if B actually saw the event at issue, B can testify to the event. Then there would not be any need for hearsay from A. If B did not actually see the event, then A's claims about it would not be subject to the correction by B, completely undermining the claim that the hearsay statement is reliable because it can be corrected on the spot.

If, on the other hand, A is testifying, why do we need the exception at all? A can surely testify to what he saw. Why is his statement at the time more reliable than his statement on the witness stand?

To ensure reliability, the Commission comment states that there must be corroboration of the claim being made. However, the corroboration requirement appears only in the comment to the proposed hearsay exception. The hearsay exception itself only requires that the statement describe an event and that the statement was made while the declarant was perceiving the event or immediately thereafter. Here is the full text of the proposed hearsay exception, to be enacted as Evidence Code section 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.

To assure adequate corroboration, the requirement should be written into the actual section itself. The failure to do so risks erosion by trial and appellate courts, which may well adopt a rule that no corroboration is required. This would further undermine the reliability of the rule.

Finally, in many actual factual contexts, admission of the present sense impression would violate *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354. The United States Supreme Court held in *Crawford* that, “Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” (*Id.* at p. 1374.)

The Commission comment about *Crawford* is limited to a footnote, in which it is claimed that it will not be necessary to codify *Crawford*'s limitations because, “The federal constitution would automatically override any state statute,” and the Evidence Code already provides (in § 1204) that hearsay which violates the United States Constitution is inadmissible. Perhaps some present sense impressions might be nontestimonial, but many others would be, rendering their admission violative of the Confrontation Clause. If *Crawford* would invalidate this exception, why should it be adopted anyway, subjecting convictions to reversal.

In sum, we oppose the adoption of a present sense impression exception to the hearsay rule. The exception is not necessary and its adoption will likely cause vexing problems in the criminal justice system. Should members of the Commission or its staff need any further information, I have appointed Albert Menaster of my staff who can be reached at (213) 974-3058 to act as my liaison on this issue.

A handwritten signature in black ink that reads "Michael P. Judge". The signature is written in a cursive, flowing style with some loops and flourishes.

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA
AND CHAIRPERSON, CALIFORNIA PUBLIC
DEFENDERS' ASSOCIATION, LEGISLATIVE
COMMITTEE