

Memorandum 2008-1

Present Sense Impressions (Comments on Tentative Recommendation)

In October, the Commission approved a tentative recommendation proposing enactment of a hearsay rule exception for a present sense impression. Such an exception already exists in the federal courts and in 44 states. The Commission proposed an exception like this when it drafted the Evidence Code in the early 1960s, but the exception was not enacted. Two Commission consultants have since recommended that California adopt a present sense impression exception: Prof. Jack Friedenthal (then of Stanford Law School) in 1976 and Prof. Miguel Méndez (Stanford Law School) in 2003. Attorney John Armstrong also submitted a comment last summer suggesting such an exception.

In response to the tentative recommendation, the Commission received a comment on behalf of the California Public Defenders Association (“CPDA”) and the Los Angeles Public Defender’s Office (“LA Public Defender’s Office”). Those organizations oppose the adoption of a present sense impression exception to the hearsay rule.

At the December meeting, the Commission considered the arguments raised by CPDA and the LA Public Defender’s Office. The Commission was inclined to:

- Proceed with the proposed reform.
- Revise the Comment to the proposed new exception to make clear that the two main reasons for admitting a present sense impression (no time for memory to fade; no time to concoct a lie) are sufficient to justify the exception. If another person is at the scene to check the accuracy of the present sense impression, that is an additional, but not necessary, assurance of reliability.
- Make similar revisions in the preliminary part (narrative portion) of the proposal.
- Further revise the Comment to emphasize that the phrase “or immediately thereafter” is to be read narrowly.

These were merely preliminary decisions, based on the input then at hand.

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.

After the December meeting, the staff made efforts to obtain additional comments on the tentative recommendation. Thus far, we have not received any further input, except a suggestion from a legislative staffer to number the proposed new exception as Evidence Code Section 1243 instead of Evidence Code Section 1240.5.

Attached for the Commission's consideration is a draft of a final recommendation, which incorporates the decisions made at the December meeting. As suggested, we have renumbered the proposed new exception as Evidence Code Section 1243. That will avoid the use of a decimal, while still placing the exception in close proximity to the exception for a spontaneous statement (Evid. Code § 1240) and the exception for a contemporaneous statement (Evid. Code § 1241), which apply in circumstances similar but not identical to those covered by the proposed new exception.

In renumbering the exception, we noticed that the article heading also needs adjustment. In the attached draft, it would be revised to read: "Article. 4. Spontaneous, Contemporaneous, Dying, and Present Sense Declarations."

Commission members and interested persons should carefully review the attached draft and consider whether any further changes should be made. Written comments are still welcome and interested persons are encouraged to share their views at the Commission meetings on January 17 and February 14. **So as to allow maximum opportunity for comment, the Commission should not approve a final recommendation until the February meeting.**

Respectfully submitted,

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#K-600

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Miscellaneous Hearsay Exceptions:
Present Sense Impression

January 2008

California Law Revision Commission
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SUMMARY OF 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!”

If evidence of that statement were later offered in court to prove that a masked man ran out of the bank carrying a black briefcase, the evidence would be hearsay — an out-of-court statement offered to prove the truth of the matter asserted.

Under the hearsay rule, hearsay evidence is generally inadmissible. However, the Federal Rules of Evidence and a vast majority of states recognize an exception to the hearsay rule for a present sense impression. The Evidence Code does not include such an exception.

The Law Revision Commission proposes that California adopt an exception to the hearsay rule for a present sense impression.

There are sound justifications for such an exception and proffered criticisms are unpersuasive. Adopting an exception for a present sense impression would further the pursuit of truth in court proceedings. It would also bring California into conformity with federal law and the law of many other states. That would promote consistent results and help to prevent confusion when an attorney practices in multiple jurisdictions.

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

MISCELLANEOUS HEARSAY EXCEPTIONS:
PRESENT SENSE IMPRESSION

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

9 Both in California and under federal law, there are many exceptions to the
10 hearsay rule.⁶ Federal law recognizes an exception for a present sense impression,
11 which is a statement that describes or explains an event or condition that the
12 speaker is perceiving, or has just perceived.⁷ The Law Revision Commission
13 recommends that California adopt a similar exception.

14 **Present Sense Impression**

15 A good example of a present sense impression is a radio announcer’s play-by-
16 play description of a baseball game.⁸ The announcer describes the events as they
17 transpire, without time for reflection or deliberation.

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. Broun, *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, 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, 99 (1989).

1 Under federal law, a present sense impression is admissible as an exception to
2 the hearsay rule.⁹ Forty-four states have an exception for a present sense
3 impression that is similar, if not identical, to the federal exception.¹⁰

4 An exception similar to the present sense impression exception was proposed
5 when the Evidence Code was first drafted in 1965.¹¹ That proposed exception was

9. Fed. R. Evid. 803(1).

10. 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. Unif. R. Evid. 803(1)), Hawaii (Haw. R. Evid. 803(b)(1)), Idaho (Idaho R. Evid. 803(1)), Indiana (Ind. R. Evid. 803(1)), Iowa (Iowa R. Evid. 5.803), Kentucky (Ky. R. Evid. 803), Louisiana (La. Code Evid. Ann. art. 803), Maine (Me. R. Evid. 803(1)), Maryland (Md. R. 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. R. Evid. 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), Georgia (Ga. Code Ann. § 24-3-3 (creating *res gestae* exception, which has been construed to include present sense impression); 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 (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, 168 (Ill. App. Ct. 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, 89-90 (Ill. App. Ct. 1999), and repeating text of Fed. R. Evid. 803(1)).
- Massachusetts. See *Commonwealth v. Capone*, 39 Mass. App. Ct. 606, 610 n.2, 659 N.E.2d 1196 (Mass. App. Ct. 1996) (stating that “judge properly admitted the statement relying on what he termed a ‘present sense impression’ exception to the hearsay rule”).
- Missouri. See *Lindsay v. Mazzio’s Corp.*, 136 S.W.3d 915, 923 (Mo. Ct. App. 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), No. 05-208, 2006 WL 758544, at *14 (N.Y. Sup. Ct. Rockland County Mar. 22, 2006) (stating that court of appeals of New York adopted present sense impression in *People v. Brown*, 80 N.Y.2d 729, 735, 594 N.Y.S.2d 696, 700 (1993), and that exception requires corroboration).
- Virginia. See *Clark v. Commonwealth*, 14 Va. App. 1068, 1070, 421 S.E.2d 28, 30 (Va. Ct. App. 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.

1 narrowed and became Evidence Code Section 1241, which permits admission of
2 hearsay known as a “contemporaneous statement.”¹²

3 **Contemporaneous Statement**

4 The contemporaneous statement exception covers a statement by a declarant that
5 (1) explains, qualifies, or makes understandable the declarant’s conduct, and (2)
6 was made while the declarant was engaged in such conduct.¹³ For example, this
7 provision would apply where one person gives another a pen, and simultaneously
8 makes a statement about the transfer (e.g., “You can borrow my pen” or “I want
9 you to have this pen”).¹⁴ The statement determines the legal impact of the event —
10 whether the speaker made a gift as opposed to a loan.¹⁵

11 Technically, however, the statement is not hearsay but rather a verbal act, a
12 statement that has legal significance and is offered for that purpose.¹⁶ The
13 Comment to Section 1241 acknowledges that some writers “do not regard
14 evidence of this sort as hearsay evidence.” The Legislature nonetheless included
15 the exception to eliminate “any doubt that might otherwise exist concerning the
16 admissibility of such evidence under the hearsay rule.”¹⁷

17 The Federal Rules of Evidence do not have a contemporaneous statement
18 exception.¹⁸ The exception is not needed under the federal rules because the
19 hearsay definition under those rules does not include statements that fall under the
20 contemporaneous statement exception (i.e., verbal acts).¹⁹

11. *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.

12. 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, *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”).

13. Evid. Code § 1241.

14. See Méndez Hearsay Analysis, *supra* note 12, at 367.

15. *Id.*

16. *Id.*

17. Evid. Code § 1241 Comment.

18. See Méndez Hearsay Analysis, *supra* note 12, at 367.

19. 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.*

1 **Differences Between a Present Sense Impression and a Contemporaneous Statement**

2 California’s exception for a contemporaneous statement, Evidence Code Section
3 1241, focuses on verbal acts. The federal exception for a present sense impression,
4 Federal Rule of Evidence 803(1), does not address verbal acts; the federal rules do
5 not even treat such acts as hearsay.²⁰

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

- 9 (1) Under the federal exception, the declarant’s statement can describe the
10 conduct of another person, while under the California exception, the
11 declarant’s statement must explain the declarant’s own conduct.
- 12 (2) Under the California exception, the conduct the declarant explains must be
13 equivocal in nature and need explanation, but, under the federal exception,
14 the declarant’s statement may describe an event or condition that is
15 unequivocal and unambiguous in nature.
- 16 (3) Under the federal exception, the declarant’s statement may be made
17 immediately after the event or condition has been completed, while, under
18 the California exception, a declarant’s explanation of conduct must be
19 simultaneous with the conduct, not made afterwards.²¹

20 **Justifications for a Present Sense Impression Exception to the Hearsay Rule**

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

23 ***The Likelihood of Memory Loss Is Diminished***

24 A person’s comment about what the person perceives through sight or other
25 senses *at the time* of receiving the impression is safe from the problem of memory
26 loss.²² Because little or no time elapses between the statement and the event, there
27 is no opportunity to forget the event and thus no need for concern that the person’s
28 memory is faulty.²³

29 As a result, evidence admitted under a hearsay rule exception for a present sense
30 impression may actually be more reliable than in-court testimony. As one
31 commentator put it, “a statement made at the time of an event is preferable to a

(Emphasis added, citations omitted). See also Méndez Hearsay Analysis, *supra* note 12, at 367.

20. See *id.*

21. 1 B. Jefferson, Jefferson’s California Evidence Benchbook *Spontaneous and Contemporaneous Statements* § 13.14, at 213 (3d ed. & March 2007 update).

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

23. Gardner v. United States, 898 A.2d 367, 374 (D.C. 2006).

1 reconstruction of the occurrence at trial, when the witness’ memory has almost
2 certainly altered”²⁴

3 ***The Likelihood of Insincerity Is Diminished***

4 A second justification for admitting evidence of a present sense impression is
5 that there is little or no time for a deliberate deception.²⁵ The exception applies
6 only to a statement describing an event that the declarant is in the midst of
7 perceiving, so there is no opportunity to reflect and distort the facts.²⁶

8 The federal exception for a present sense impression is based upon this
9 rationale. The advisory committee’s note explains that the “substantial
10 contemporaneity of event and statement negate the likelihood of deliberate or
11 conscious misrepresentation.”²⁷ The requirement of contemporaneity preserves
12 “the benefit of spontaneity in the narrow span of time before a declarant has an
13 opportunity to reflect and fabricate.”²⁸

14 Accordingly, the present sense impression satisfies the hearsay concerns relating
15 to memory and sincerity, leaving only the risks of ambiguity and misperception.
16 For these reasons, it is considered sufficiently reliable to warrant an exception to
17 the hearsay rule.²⁹

18 ***Corroboration as an Additional Safeguard of Trustworthiness in Some Cases***

19 In many but not all cases, there is an additional justification for admitting
20 evidence of a present sense impression. Such a statement usually will be made to
21 another person who has equal opportunities to observe the event and thus to check
22 a misstatement.³⁰ Testimony by such a witness helps the fact-finder gauge the
23 trustworthiness of the out-of-court statement. The witness’ own account of the
24 event can be used to shed light on the out-of-court description of the event.³¹

24. Beck, Note, *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”).

25. McCormick, *supra* note 3, § 273, at 584.

26. See *Gardner*, 898 A.2d at 374.

27. Fed. R. Evid. 803(1) advisory committee’s note.

28. *Booth v. State*, 306 Md. 313, 320, 324, 508 A.2d 976, 981 (Md. 1986).

29. 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 559-60 (3d ed. 2007).

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

31. See Fed. R. Evid. 803(1) advisory committee’s note; Wohlsen, Comment, *The Present Sense Impression to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 Dick. L. Rev. 347, 355 (1977).

1 Further, if the witness testifying to the out-of-court statement is the declarant,
2 the factfinder may evaluate the demeanor of the declarant-witness. In addition,
3 cross-examination on the statement can probe into its credibility.³²

4 Such corroboration thus reduces the risks of ambiguity and misperception,
5 which are the two key hearsay concerns not addressed by contemporaneity.³³
6 When such corroboration is coupled with contemporaneity, all of the key concerns
7 underlying the hearsay rule are addressed, at least to some extent.

8 *Utility*

9 By allowing admission of trustworthy statements, a present sense impression
10 exception would further the pursuit of truth in court proceedings. When evidence
11 is both relevant and trustworthy, it should be admissible, so that the factfinder is
12 fully informed and able to correctly assess the situation at issue.

13 The exception's main utility would be to allow admission of an immediate
14 impression of an event that was not startling.³⁴ A different hearsay exception,
15 known in California as the spontaneous statement exception and in the federal
16 system as the excited utterance exception, already allows admission of a statement
17 that was made under the stress of excitement, whether at the time of an exciting
18 event or afterwards.³⁵ A statement made about an event that was not startling is not
19 admissible under the spontaneous statement exception.³⁶ There is thus a need for a
20 present sense impression exception.³⁷ Such an exception would be especially
21 useful when the declarant makes an observation just before an exciting event.³⁸

22 The drafters of the federal rules concluded that including both an exception for a
23 present sense impression and an exception for an excited utterance was needed to
24 avoid "needless niggling."³⁹ Presumably, the drafters did not think it profitable for
25 courts to spend significant effort differentiating between an excited utterance and a
26 present sense impression. For that reason, and because of the significant

32. See Fed. R. Evid. 803(1) advisory committee's note; Kraus, Comment, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, 1985 Wis. L. Rev. 1525, 1532.

33. Mueller & Kirkpatrick, *supra* note 29, § 8:67 at 560.

34. See, e.g., *Booth v. State*, 306 Md. 313, 324, 331, 508 A.2d 976 (1986); Mueller & Kirkpatrick, *supra* note 29, § 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).

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

36. 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 spontaneous statement under Section 1240 or contemporaneous statement under Section 1241 but that it would have been admissible as present sense impression under Fed. R. Evid. 803(1)).

37. See *id.*

38. Mueller & Kirkpatrick, *supra* note 29, § 8:67 at 567-68; see, e.g., *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 5-6, 161 S.W.2d 474, 476-77 (Tex. Comm'n App. 1942) (admitting spontaneous statement about passing car minutes before accident).

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

1 distinctions in coverage, the federal courts and 44 states have a present sense
 2 impression exception to the hearsay rule, *in addition to* an excited utterance
 3 exception.⁴⁰

4 Adoption of a present sense impression exception would bring California into
 5 conformity with federal law and the law of the many states that recognize such an
 6 exception. That would help prevent confusion over applicable evidentiary rules
 7 when an attorney practices in multiple jurisdictions. Such conformity would also
 8 promote consistent results when a dispute involves litigation in multiple
 9 jurisdictions.

10 **Criticism of the Present Sense Impression Exception to the Hearsay Rule**

11 A few courts and commentators have criticized the hearsay rule exception for a
 12 present sense impression on a number of different grounds. Importantly, these

40. For a list of the states with a hearsay exception for a present sense impression, see *supra* note 10. Each of those states also has a hearsay exception for an excited utterance. See Ala. R. Evid. 803(2) (Alabama); Alaska R. Evid. 803(2) (Alaska); Ariz. R. Evid. 803(2) (Arizona); Ark. R. Evid. 803(2) (Arkansas); Colo. R. Evid. 803(2) (Colorado); Del. Unif. R. Evid. 803(2) (Delaware); Fla. Stat. § 90.803(2) (Florida); Haw. R. Evid. 803(b)(2) (Hawaii); Idaho R. Evid. 803(2) (Idaho); Ind. R. Evid. 803(2) (Indiana); Iowa R. Evid. 5.803(2) (Iowa); Kan. Stat. Ann. § 60-460(d)(2) (Kansas); Ky. R. Evid. 803(2) (Kentucky); La. Code Evid. Ann. art. 803(2) (Louisiana); Me. R. Evid. 803(2) (Maine); Md. R. Evid. 5-803(b)(2) (Maryland); Mich. R. Evid. 803(2) (Michigan); Miss. R. Evid. 803(2) (Mississippi); Mont. R. Evid. 803(2) (Montana); Nev. Rev. Stat. § 51.095 (Nevada); N.H. R. Evid. 803(2) (New Hampshire); N.J. R. Evid. 803(c)(2) (New Jersey); N.M. R. Evid. 11-803(B) (New Mexico); N.C. R. Evid. 803(2) (North Carolina); N.D. R. Evid. 803(2) (North Dakota); Ohio R. Evid. 803(2) (Ohio); 12 Okla. St. Ann. § 2803(2) (Oklahoma); Pa. R. Evid. 803(2) (Pennsylvania); R.I. R. Evid. 803(2) (Rhode Island); S.C. R. Evid. 803(2) (South Carolina); S.D. Codified Laws § 19-16-6 (South Dakota); Tex. R. Evid. 803(2) (Texas); Utah R. Evid. 803(2) (Utah); Vt. R. Evid. 803(2) (Vermont); Wash. R. Evid. 803(2) (Washington); W. Va. R. Evid. 803(2) (West Virginia); Wis. Stat. Ann. § 908.03(2); Wyo. R. Evid. 803(2). States that recognize the excited utterance exception in common law are:

- Georgia. See *Walthour v. State*, 269 Ga. 396, 397, 497 S.E.2d 799 (1998) (“Included in our Code’s *res gestae* exception to the rule against hearsay is an exception for excited utterances.”); see also Ga. Code § 24-3-3 (*res gestae* exception).
- Illinois. See *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968, 972 560 N.E.2d 888 (1990) (“The contemporary hearsay rule recognizes ‘spontaneous declarations’ or ‘excited utterances’ as properly admissible exceptions to the rule.”).
- Massachusetts. See *Com. v. Sellon*, 380 Mass. 220, 229 & n.14, 402 N.E.2d 1329 (1980) (stating that judge correctly admitted statements because they were spontaneous exclamations); see also 20 W. Young et. al., *Massachusetts Practice Evidence* § 803.2 (2d ed. 2007).
- Missouri. See 22A W. Schroeder, *Missouri Practice Missouri Evidence* § 803(2).1 & nn.1-4 (2d ed. 2007) (stating that Missouri has long recognized the exception as part of *res gestae*, and now exception is referred to as “excited utterance” exception and has been brought into line with the federal exception).
- New York. See *People v. Caviness*, 38 N.Y.2d 227, 342 N.E.2d 496 (1975) (“Spontaneous declarations, frequently referred to with some inexactitude as *Res gestae* declarations ... form an exception to the hearsay rule.”).
- Virginia. See *Chappell v. White*, 182 Va. 625, 633, 29 S.E.2d 858 (1944); *Virginia Practice Trial Handbook Hearsay Evidence* § 28:10, ch. 28 (2007 ed.).

1 criticisms largely focus on specific aspects of the exception. They do not question
 2 the basic premise of the exception (the idea that a description given while
 3 perceiving or just after the event described is sufficiently reliable to be introduced
 4 into evidence without an opportunity for cross-examination).⁴¹

5 *Cumulative Evidence*

6 One criticism is the claim that present sense impression statements are often
 7 “merely cumulative.”⁴² This claim seems to assume that an out-of-court statement
 8 and in-court testimony about the same event are repetitive.

9 However, the two types of evidence are different. As discussed above, an out-of-
 10 court statement about a present sense impression may be more reliable than an in-
 11 court statement about a past event, because the former statement is not based on
 12 the witness’ distant memory.⁴³

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

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

41. 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.

If California adopts a hearsay exception for a present sense impression, it will not be necessary to codify *Crawford*’s constitutional requirements in that exception. *Crawford* has limited application in this context, because its requirements only apply when a testimonial statement is offered against a criminal defendant. A present sense impression usually does not constitute a testimonial statement. See, e.g., U.S. v. Thomas, 453 F.3d 838, 841, 844 (7th Cir. 2006); U.S. v. Danford, 435 F.3d 682, 687 (7th Cir. 2005); State v. Price, 952 So.2d 112, 121 (La. App. 2006); People v. Coleman, 16 A.D.3d 254, 254-55, 791 N.Y.S.2d 112 (N.Y. App. Div. 2005); Salt Lake City v. Williams, 128 P.3d 47, 49-50, 53-54, 54 n.6 (Utah Ct. App. 2005); *but see* People v. Dobbin, 6 Misc. 3d 892, 898, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004).

Further, if a particular present sense impression were considered testimonial, the federal Constitution would automatically override any state statute. See U.S. Const. art. VI, cl. 2 (Supremacy Clause). In addition, 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.”

42. See Beck, *supra* note 24, at 1075; U.S. v. Parker, 491 F.2d 517, 523 (8th Cir. 1973).

43. See Beck, *supra* note 24, at 1075; Waltz *Iowa L. Rev. article*, *supra* note 24, 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).

1 ***Eyewitness Identification***

2 Another scholarly criticism is that the hearsay rule exception for a present sense
3 impression is not clear on whether it would admit a pretrial identification (e.g., at a
4 lineup, a declarant’s statement “that’s the one who robbed me”).⁴⁴ It has been
5 argued that the exception should not operate to admit such a statement.⁴⁵

6 It appears, however, that a pretrial identification would not be admitted as a
7 present sense impression because the statement actually relates to a past event, i.e.,
8 a pre-lineup identification of the person who is identified at the lineup.⁴⁶ In fact, a
9 different federal rule specifically addresses the admissibility of a pretrial
10 identification.⁴⁷

11 Likewise, California has a provision specifically addressing the admissibility of
12 a pretrial identification.⁴⁸ The Law Revision Commission proposes to reference
13 that provision in its Comment to the proposed new exception for a present sense
14 impression.⁴⁹ That would help prevent confusion over the proper treatment of a
15 pretrial identification.

16 ***Statement in the Form of an Opinion***

17 Another concern is whether the exception for a present sense impression should
18 allow admission of a statement in the form of an opinion.⁵⁰ This issue arises often,
19 as present sense impression statements tend to characterize what is observed in
20 language that is, or appears to be, an opinion.⁵¹

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

23 absurd to insist that the statement must not be phrased in terms of inference or
24 opinion. People speaking without reflection usually talk in terms of inference in

44. Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for “Great” Hearsay?*,
2 Litig. 22, 24 (1976) (hereafter, “Waltz Litigation article”).

45. *Id.*

46. 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.” Brewer’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.

United States v. Brewer, 36 F.3d 266, 272 (2d Cir. 1994).

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

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

49. See proposed Evid. Code § 1243 Comment *infra*.

50. See McFarland, *supra* note 29, at 929 n.132.

51. See Booth v. State, 306 Md. 313, 325, 508 A.2d 976, 982 (Md. 1986).

1 describing what they have seen or heard. So long as the language does not
2 indicate a conscious deduction, rather than a shorthand method of statement, the
3 opinion rule should have no application.⁵²

4 However, it appears that the courts are divided on the admissibility of a present
5 sense impression in the form of an opinion.⁵³ The majority view rejects an opinion
6 if it allocates blame.⁵⁴ If it does not, the courts are split more evenly.⁵⁵

7 The Commission believes that the admissibility of a present sense impression
8 that is in the form of an opinion would be best determined by the courts as the
9 issue arises in the context of actual cases.⁵⁶

10 ***Time Lapse Between Statement and Event***

11 A fourth criticism relates to the amount of time that elapses between an event
12 and a statement describing the event. Federal Rule of Evidence 803(1)
13 encompasses a statement made about an event while the declarant was perceiving
14 the event, or “immediately thereafter.” The advisory committee’s note states that
15 with respect to the time element, the rule “recognizes that in many, if not most,
16 instances precise contemporaneity is not possible, and hence a slight lapse is
17 allowable.” This slight lapse is described as “substantial contemporaneity”
18 between the event and statement, which “negate[s] the likelihood of deliberate or
19 conscious misrepresentation.”⁵⁷

20 Applying these guidelines, one widely-cited case states:

21 [B]ecause the presumed reliability of a statement of present sense impression
22 flows from the fact of spontaneity, the time interval between observation and
23 utterance must be very short. The appropriate inquiry is whether, considering the
24 surrounding circumstances, sufficient time elapsed to have permitted reflective
25 thought.⁵⁸

26 Some commentators criticize courts for admitting statements made after there
27 was ample time for fabrication, memory loss, and confabulation.⁵⁹ Several

52. E. Morgan, Basic Problems of State and Federal Evidence 343 (1963); see also Waltz *Iowa L. Rev.* article, *supra* note 24, at 881 n.74.

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

54. *Id.* at 326.

55. *Id.*

56. *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).

57. Fed. R. Evid. 803(1) advisory committee’s note.

58. *Booth*, 306 Md. at 324; see also Waltz *Iowa L. Rev.* article, *supra* note 24, 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).

59. See, e.g., McFarland, *supra* note 29, at 908, 915, 919-20, 931 (disapproving of several cases admitting statements despite time lapse between statement and event ranging from a “few seconds, one

1 commentators maintain that the exception should require strict contemporaneity
 2 (i.e., only enough “time to get the words out of the mouth”), not “substantial”
 3 contemporaneity, between the event and statement, because mere seconds are
 4 enough time for fabrication.⁶⁰ Another commentator agrees that strict
 5 contemporaneity should be required, but he would allow a longer time lapse if
 6 other evidence indicates that the statement is trustworthy.⁶¹

7 Other approaches have also been advocated:

- 8 • The New Jersey exception permits a statement made “immediately after” the
 9 declarant perceived the event, so long as the declarant had no “opportunity
 10 to deliberate or fabricate.”⁶² The note to this provision explains that
 11 “statements made immediately after the event must be so close to the event
 12 as to exclude the likelihood of fabrication or deliberation.”
- 13 • Florida follows the federal approach to what is a permissible time lapse.
 14 However, Florida’s exception only applies to “[a] spontaneous statement,”
 15 and it bars admission when the statement “is made under circumstances that
 16 indicate its lack of trustworthiness.”⁶³
- 17 • Ohio also follows the federal approach relating to what is a permissible time
 18 lapse. Like Florida, however, Ohio adds a clause aimed at ensuring
 19 trustworthiness of the statement.⁶⁴

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. Rev. 666, 670 (1976) (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 385 (4th ed. 2000).

60. See, e.g., McFarland, *supra* note 29, at 916, 931; Beck, *supra* note 24, at 1060-61; Note on Contemporaneity and Corroboration, *supra* note 58, at 669.

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 truth-tellers,” 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 29, at 916-17.

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, 909-10 (Kan. 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, 223 (1964) (interpreting then newly enacted Kansas provision as only requiring “*substantial* contemporaneousness” between statement and event); Gard, *Evidence*, 12 U. Kan. L. Rev. 239, 250 (1964) (same).

61. See Waltz *Iowa L. Rev.* article, *supra* note 24, at 880.

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

63. See Fla. Stat. § 90.803(1).

64. See Ohio R. Evid. 803(1).

1 It appears that the federal rule and these other formulations are essentially trying
2 to address the same considerations: (1) It might take a moment to utter a statement
3 about an event perceived, but (2) there should not be enough time to conjure up a
4 lie. Even commentators who argue for strict contemporaneity acknowledge that
5 there must be some “passage of time to get the words out of the mouth,” a “split-
6 second to form words.”⁶⁵ It is unrealistic to insist that a statement be made at
7 exactly the same time that an event occurs.

8 Thus, if California enacts a hearsay exception for a present sense impression, the
9 Commission recommends that the exception use the language of the federal rule
10 on the matter of the timing.⁶⁶ That would afford the advantage of uniformity not
11 only with federal law, but also with the law of many other states. To illustrate the
12 proper application of the new exception, however, the Commission’s Comment
13 would point out that the permissible time lapse is strictly limited to the moment
14 required to verbalize what has just been perceived.⁶⁷ The Comment would also
15 give examples of acceptable and unacceptable time lapses.⁶⁸

16 **Corroboration**

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

20 Corroborative evidence may provide support that (1) the event or condition
21 about which a statement was made actually occurred, (2) the declarant actually
22 perceived the event or condition described, or (3) the statement’s description of
23 the event or condition is accurate.

24 The text of the federal rule is silent on the need for corroboration. The
25 accompanying advisory committee’s note mentions the subject, but is largely
26 inconclusive. There is extensive disagreement over whether the federal rule
27 requires, and whether it should require, corroboration.⁶⁹

28 If California adopted an exception based on the federal provision, however, it
29 would be clear that corroborative evidence would be required to show that (1) the
30 event or condition actually occurred and (2) the declarant actually perceived the
31 event or condition described. Unlike a federal court, a California court may *not*
32 consider inadmissible evidence in determining admissibility.⁷⁰ Thus, a California

65. See, e.g., McFarland, *supra* note 29, at 931.

66. See proposed Evid. Code § 1243 & Comment *infra*.

67. See proposed Evid. Code § 1243 Comment *infra*.

68. *Id.*

69. Booth v. State, 306 Md. 313, 327, 508 A.2d 976, 983 (Md. 1986); Graham, *supra* note 57, § 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”).

70. Fed. R. Evid. 104(a) advisory committee’s note (California does not allow judge to consider inadmissible evidence in determining admissibility); Méndez Treatise, *supra* note 4, at 598-99 (same); J.

1 court could not consider a proffered present sense impression in determining
 2 whether that statement should be admitted. To establish that the provision applied,
 3 the proponent of a present sense impression in California necessarily would have
 4 to present other evidence showing that (1) the event or condition actually
 5 occurred, and (2) the declarant actually perceived the event or condition.

6 Corroboration of the *accuracy* of the declarant’s description of the event or
 7 condition, however, would not necessarily be required if California adopted a
 8 provision like the federal exception for a present sense impression. A statement
 9 could meet the criteria for admissibility as a present sense impression even if the
 10 description given is not completely accurate.

11 It is generally agreed that the federal provision for a present sense impression
 12 does not require corroboration of the accuracy of the declarant’s description.⁷¹
 13 Commentators, however, are divided as to whether such corroboration should be
 14 required.⁷²

15 Because a present sense impression has indicia of reliability besides
 16 corroboration, the Commission believes that corroboration of the description’s
 17 accuracy should not be required. As previously explained, the likelihood of
 18 memory loss is diminished,⁷³ as is the likelihood of insincerity.⁷⁴ The probability
 19 that a present sense impression will be corroborated merely reinforces these other
 20 justifications for creating an exception to the hearsay rule. For that reason, and
 21 because conformity with the federal rule would be desirable, corroboration of a
 22 description’s accuracy should not be a prerequisite to admissibility as a present
 23 sense impression.

Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code 6-7* (1976) (on file with the Commission) (same). Compare Tentative Recommendation and a Study relating to *The Uniform Rules of Evidence: Article 1. General Provisions*, 6 Cal. L. Revision Comm’n Reports 1, 19-21 (1964) (proposing provision that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility) with Evidence Code Section 402 (mirroring proposed provision in some respects, but omitting language that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility).

71. See, e.g., Graham, *supra* note 57, § 803:1, at 68-69; Passannante, *supra* note 8, at 100 n.67; Beck, *supra* note 24, at 1069; Waltz *Litigation* article, *supra* note 43, at 24.

72. 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 24, 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, 333-34 (1979) (exception should require declarant or equally percipient witness to be subject to cross-examination on statement); Beck, *supra* note 24, 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., Broun, *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).

73. See discussion of “The Likelihood of Memory Loss is Diminished” *supra*.

74. See discussion of “The Likelihood of Insincerity is Diminished” *supra*.

1 The proposed legislation would take that approach. To provide clarity, however,
2 the Comment to the proposed new exception would address the matter of
3 corroboration. It would explain that corroboration of the accuracy of the statement
4 is not required, but corroboration of the event or condition and of the declarant's
5 perception must necessarily be provided under the normal procedure for
6 determining admissibility in California.⁷⁵

7 **Weighing the Justifications and the Criticisms**

8 There are persuasive justifications for creating a hearsay rule exception for a
9 present sense impression. Because a present sense impression is expressed at or
10 immediately after an event or condition occurs, the likelihood of memory loss is
11 diminished,⁷⁶ as is the likelihood of insincerity.⁷⁷ In some cases, corroboration of
12 the present sense impression is possible, providing additional assurance of
13 reliability.⁷⁸ An exception for a present sense impression would be a useful
14 supplement to the existing provisions in the Evidence Code. It would further the
15 pursuit of truth by enabling a factfinder to consider trustworthy evidence that
16 might otherwise be excluded.⁷⁹

17 Although there have been criticisms of such an exception, they are largely
18 directed at specific aspects of the exception, and do not challenge its underlying
19 merits. The criticism regarding cumulative evidence is not persuasive.⁸⁰ The
20 proper treatment of a pretrial identification is evident from the existing provision
21 on that subject, which would be referenced in the Comment to the proposed new
22 exception.⁸¹ The proper treatment of a present sense impression in the form of an
23 opinion would properly be left to the courts.⁸² The concerns relating to the proper
24 time lapse would be addressed by providing guidance and examples in the
25 Comment,⁸³ as would the concerns relating to corroboration.⁸⁴

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

75. See proposed Evid. Code § 1243 Comment *infra*.

76. See discussion of “The Likelihood of Memory Loss is Diminished” *supra*.

77. See discussion of “The Likelihood of Insincerity is Diminished” *supra*.

78. See discussion of “Corroboration as an Additional Safeguard of Trustworthiness in Some Cases” *supra*.

79. See discussion of “Utility” *supra*.

80. See discussion of “Cumulative Evidence” *supra*.

81. See discussion of “Eyewitness Identification” *supra*; see also proposed Evid. Code § 1243 Comment *infra*.

82. See discussion of “Statement in the Form of an Opinion” *supra*.

83. See discussion of “Time Lapse Between Statement and Event” *supra*; see also proposed Evid. Code § 1243 Comment *infra*.

84. See discussion of “Corroboration” *supra*; see also proposed Evid. Code § 1243 Comment *infra*.

1 impression. To promote uniformity, the Commission further recommends that the
2 new exception be modeled on the federal rule.⁸⁵

3 **Retention of the Hearsay Rule Exception for a Contemporaneous Statement**

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

8 It is true that the federal exception for a present sense impression applies not
9 only when a declarant describes the conduct of another person, but also when a
10 declarant describes the declarant's own conduct.⁸⁶ On initial consideration, that
11 might make the exception for a contemporaneous statement seem superfluous.

12 However, the federal exception for a present sense impression is not meant to
13 apply to a verbal act. Under the Federal Rules of Evidence, a verbal act is not
14 regarded as hearsay.⁸⁷

15 Consequently, a California provision modeled on the federal exception for a
16 present sense impression probably would not be construed to apply to a verbal act.
17 To ensure that a verbal act remains admissible, California should retain its hearsay
18 rule exception for a contemporaneous statement.⁸⁸

85. See proposed Evid. Code § 1243 & Comment *infra*.

86. See, e.g., *Jonas v. Isuzu Motors, Ltd.*, 210 F. Supp. 2d 1373, 1378-79 (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, 1262 (N.D. Ill. 1991) (police officer's 911 call, recounting officer's ongoing chase of suspect, was admissible as present sense impression).

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

88. 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

1 **Heading of Article 4 (commencing with Section 1240) (amended)**

2 SECTION 1. The heading of Article 4 (commencing with Section 1240) of
3 Chapter 2 of Division 10 of the Evidence Code is amended to read:

4 Article. 4. Spontaneous, Contemporaneous, ~~and~~ Dying, and Present
5 Sense Declarations

6 **Comment.** The heading “Article 4. Is amended to reflect the addition of Section 1243 (present
7 sense impression).

8 **Evid. Code § 1243 (added). Present sense impression**

9 SEC. 2. Section 1243 is added to the Evidence Code, to read:

10 1243. Evidence of a statement is not made inadmissible by the hearsay rule if
11 both of the following conditions are satisfied:

12 (a) The statement is offered to describe or explain an event or condition.

13 (b) The statement was made while the declarant was perceiving the event or
14 condition, or immediately thereafter.

15 **Comment.** Section 1243 is drawn from Rule 803(1) of the Federal Rules of Evidence. A
16 present sense impression is sufficiently trustworthy to be considered by the trier of fact for two
17 reasons. First, there is no problem concerning the declarant’s memory because the statement is
18 simultaneous with or immediately after the event. Second, there is little or no time for calculated
19 misstatement. Additionally, in some cases, the statement is made to one whose proximity
20 provides an immediate opportunity to check the accuracy of the statement in light of the physical
21 facts. Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of*
22 *Evidence*, 4 Cal. L. Revision Comm’n Reports 401, 467 (1963); see also Fed. R. Evid. 803(1)
23 advisory committee’s note.

24 Section 1243 applies to a statement “made while the declarant was perceiving the event or
25 condition, or immediately thereafter.” The phrase “or immediately thereafter” is included in
26 recognition that it requires a few seconds to convert an observation into words. See McFarland,
27 *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907, 918 (2001). The
28 permissible time lapse between the event and the statement is strictly limited to the moment
29 required to verbalize what has just been perceived. After that moment, there is time for
30 deliberation and fabrication, undermining the justification for allowing admission of the hearsay
31 statement. See *id.* at 914-17.

32 Under Rule 803(1), some courts have admitted a statement made after the time necessary to
33 convert an observation into words. See, e.g., *United States v. Montero-Camargo*, 177 F.3d 1113,
34 1124 (9th Cir. 1999) (upholding admission of motorist’s statement to agents made “about a
35 minute” after motorist observed event), *amended by*, 183 F.3d 1172 (1999), *withdrawn and reh’g*
36 *en banc granted*, 192 F.3d 946 (1999), *reh’g en banc*, 208 F.3d 1122 (2000); *United States v.*
37 *Parker*, 936 F.2d 950, 954 (7th Cir. 1991) (upholding admission of railroad worker’s statement
38 made after walking about 100 feet from event); *United States v. Obayagbona*, 627 F. Supp. 329,
39 339-40 (E.D.N.Y. 1985) (admitting statement made over two minutes after event, and stating that
40 “[a] few minutes’ pause after the moment at which the statement could have been made is within
41 the period contemplated in Rule 803(1)”; see also McFarland, *supra*, at 919-20 (criticizing

1 several cases for admitting statement despite time lapse in which there was time to deliberate or
2 fabricate). Section 1243 does not allow admission of such a statement.

3 A radio announcer's play-by-play description of a baseball game is a classic example of a
4 present sense impression. See D. Binder, *Hearsay Handbook* 89 (2d ed. 1983 & 1985 Supp.). For
5 an example of a statement made after the event described but still soon enough to be admissible
6 under this section, see *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 5-6 (1942). For an example of a
7 statement made simultaneously with the event described, see *Booth v. Maryland*, 306 Md. 313,
8 316, 331 (1986).

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

16 The proponent need not, however, present evidence corroborating the accuracy of the
17 declarant's description of the event or condition. It is up to the trier of fact to assess the accuracy
18 of the description. The existence of evidence corroborating the description's accuracy goes to its
19 weight, not its admissibility. See, e.g., 2 K. Broun, *McCormick on Evidence* § 271, at 254 (6th
20 ed. 2006); Passannante, Note, *Res Gestae, the Present Sense Impression Exception and Extrinsic*
21 *Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 *Fordham*
22 *Urb. L.J.* 89, 106 (1989).

23 This section does not apply to a pretrial identification. See generally *United States v. Brewer*,
24 36 F.3d 266 (2d Cir. 1994). For the admissibility of a pretrial identification, see Section 1238.