Study K-600 February 11, 2008

First Supplement to Memorandum 2008-6

Miscellaneous Hearsay Exceptions: Present Sense Impressions (Draft Recommendation)

The Commission has received comments from Professor Douglas D. McFarland (Hamline University School of Law, Visiting Professor of Law at Phoenix School of Law) on the Tentative Recommendation on *Miscellaneous Hearsay Exceptions: Present Sense Impressions* (Oct. 2007). Exhibit pp. 1-2. He supports the concept of adopting a present sense impression exception to the hearsay rule. Exhibit p. 1.

He agrees that California's adoption of the federal rule would be a beneficial change. Exhibit p. 1. But, he believes an even better change would be to adopt the federal rule *without* the phrase "or immediately thereafter." See Exhibit p. 1.

His suggestion stems from a concern that the exception might be used to admit statements not strictly contemporaneous with the event or condition about which they are made. See Exhibit p. 1.

STRICT CONTEMPORANEITY

To ensure strict contemporaneity, Professor McFarland suggests that the Commission follow the approach used in Kansas and Colorado. See Exhibit p. 1. These states have a present sense impression exception, but omit the phrase "or immediately thereafter." See Exhibit p. 1. As discussed in a previous memorandum, however, these states do not appear to require strict contemporaneity. See Memorandum 2007-40, p. 15.

In his comments, Professor McFarland summarizes points he made in his article, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. Rev. 907 (2001). Exhibit pp. 1-2. He argues that the phrase "or immediately thereafter" should be deleted to prevent admission of a statement that is made after time to concoct a lie. See *id.* Due to this concern, the Commission included a staff note in its tentative recommendation to especially solicit comment on whether the

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language of the proposed provision "would be sufficient to encompass only those statements made without time for deliberation and fabrication." See *Tentative Recommendation*, p. 15; see also Memorandum 2007-40, pp. 13-16 (discussing Professor McFarland's article).

Apparently in response to the staff note, the California Public Defenders Association and the Los Angeles Public Defender's Office commented that courts would inevitably interpret the phrase "or immediately thereafter" too broadly. See Memorandum 2007-53, p. 8.

At the meeting in December, the Commission discussed the defense attorneys' concern and further grappled with the time-lapse issue. See Minutes (Dec. 2007), pp. 14-15; see also Memorandum 2007-53, p. 9. The Commission decided to keep the phrase "or immediately thereafter," mirroring the federal rule, but to revise the Comment to emphasize that the phrase must be read narrowly. Minutes (Dec. 2007).

At the meeting in January, the Commission considered a draft recommendation, which included a revised Comment emphasizing a narrow reading of the phrase "or immediately thereafter." See Minutes (Jan. 2008), p. 3. The Commission concluded that the draft recommendation properly reflected its current views, but it welcomed further comments. *Id.* If the Commission sticks with this decision, and if the Legislature adopts the Commission's recommended legislation, this Comment will be official legislative history entitled to great weight in construing the provision. See, e.g., *Sullivan v. Delta Air Lines, Inc.*, 15 Cal. 4th 288, 935 P.2d 781, 63 Cal. Rptr. 2d 74 (1997).

In support of his suggestion to delete the phrase "or immediately thereafter," Professor McFarland adds that, without the phrase, he doubts a court would exclude a statement made within a second or two of the event. See Exhibit p. 2. But that would *require* a court to stretch the language to admit a statement made immediately after an event. Memorandum 2007-53, p. 9. Also, it could even require a court to stretch the language to admit a statement made while perceiving an event, as it takes a split-second to articulate what is perceived. See *id.* This would be undesirable, especially when trying to effectuate a strict reading of language. See *id.*

Although Professor McFarland prefers that the Commission delete the language "or immediately thereafter," he alternatively suggests including a "clear, strong advisory comment." Exhibit pp. 1-2. He suggests that this comment explain "that the exception is intended to require a contemporaneous

statement ... strictly limited to the length of time needed to form and utter a thought" i.e., "time to get the words out of the mouth." Exhibit p. 2.

The draft recommendation does not adopt Professor McFarland's preferred approach of omitting the phrase "or immediately thereafter," but it does follow the approach he suggests as an alternative. If the Commission is inclined, it could revisit its decision to include the phrase "or immediately thereafter."

THE PRESENT SENSE IMPRESSION IN MINNESOTA

Professor McFarland reports that evidence law in Minnesota, his home state, recognizes a present sense impression, but not as a hearsay exception. Exhibit p. 2. Instead, Minnesota treats a present sense impression statement as non-hearsay if the statement is a prior statement by a witness who is subject to cross-examination. Minn. R. Evid. 801(d)(1)(D) (providing that statement is not hearsay if a witness is subject to cross-examination on "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter").

The draft recommendation attached to Memorandum 2008-6 does not list Minnesota as a state that recognizes the present sense impression exception. That is correct, but the draft should explain that a present sense impression is admissible in Minnesota as a prior statement by a witness. The staff recommends **revising the preliminary part along these lines.**

Respectfully submitted,

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PHOENIX
SCHOOL OF LAW

February 5, 2008

Members of the California Law Revision Commission
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Re: Proposal to adopt present sense impression hearsay exception

Ladies and Gentlemen:

Thank you for this opportunity to send my comments on your proposal to add the present sense impression to the hearsay exceptions recognized under the California Evidence Code. I support the proposal.

As your Tentative Recommendation of October, 2007, points out, the overwhelming majority of states–44 of 50–recognize a hearsay exception for the present sense impression. The number can be increased to 45. My home state of Minnesota also recognizes the present sense impression, although it is found not as a hearsay exception in rule 803(1) but rather with the additional safeguard of requiring it to be a prior statement of a witness in rule 801(d)(1)(D).

Your proposal is to adopt the exact language of Federal Rule of Evidence 803(1), which has also been adopted in most states. I do generally agree with uniformity of rules to achieve the benefit of common interpretation. Adoption in California of the federal rule language will be a beneficial change in the law.

At the same time, I do suggest that even a better change would be to follow the lead of the states of Colorado and Kansas to delete the words "or immediately thereafter." As you know from your Tentative Recommendation, I wrote the article *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907 (2001), in which I recommended this amendment to the federal rule. The reasons developed in that article for requiring strict contemporaneity will be briefly summarized here.

First, the theoretical underpinnings of the hearsay exception are based on a strictly contemporaneous statement. Such a statement eliminates entirely the hearsay danger of memory loss and eliminates almost entirely the danger of insincerity. As soon as a slight time delay is allowed, the dangers re-appear. My article, as recognized by your Tentative Recommendation p. 10 n. 57, points out that a lie can form in the mind in a second or two.

Still, the argument goes, the mind and mouth take a second or so to process and blurt out what is being perceived. That is why the federal rule includes the phrase "or immediately thereafter." The federal advisory committee attempted to make clear that only this tiny amount of time was intended to be included in the phrase. I would agree with that interpretation.

EX 1

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Unfortunately, the history of decisions under the federal rule shows that federal courts have not paid attention to this intent (and the theoretical underpinning of the exception) and instead have admitted statements made long after the event described; often these "present sense impressions" have been made by a declarant with a motive to fabricate. See Tentative Recommendation p. 9 n. 56 (summarizing pages 918-929 of my article). The words "immediately thereafter" grant license to a generous judge to admit a statement made long after the event.

Removal of the words "or immediately thereafter" from the rule would better follow the intent of the drafters of the federal rule, which was to allow only a split-second for the declarant to form a thought in the mind and to state it out loud. I cannot believe a court would exclude a statement made within a second or two of an event on the ground that the statement was not made "while the declarant was perceiving the event or condition."

In the event that the Commission decides to proceed to adopt the federal rule intact, I then suggest that the Commission include a clear, strong advisory comment that the exception is intended to require a contemporaneous statement, and that the phrase "or immediately thereafter" should be strictly limited to the length of time needed to form and utter a thought, which cannot be more than a few seconds, or as your Tentative Recommendation p. 10 states "time to get the words out of the mouth."

Respectfully yours

Douglas D. McFarland
Visiting Professor of Law