

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

## **Miscellaneous Hearsay Exceptions: Present Sense Impression**

February 2008

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
[www.clrc.ca.gov](http://www.clrc.ca.gov)

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Miscellaneous Hearsay Exceptions: Present Sense Impression*, 37 Cal. L. Revision Comm'n Reports 407 (2007). This is part of publication #229.

STATE OF CALIFORNIA

---

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335

SIDNEY GREATHOUSE, Chairperson  
PAMELA L. HEMMINGER, Vice Chairperson  
DIANE F. BOYER-VINE  
SENATOR ELLEN CORBETT  
ASSEMBLY MEMBER NOREEN EVANS  
FRANK KAPLAN  
SUSAN DUNCAN LEE  
EDMUND L. REGALIA  
WILLIAM E. WEINBERGER

February 14, 2008

To: The Honorable Arnold Schwarzenegger  
*Governor of California*, and  
The Legislature of California

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.

Respectfully submitted,

Sidney Greathouse  
*Chairperson*

MISCELLANEOUS HEARSAY  
EXCEPTIONS: PRESENT SENSE  
IMPRESSION

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

Both in California and under federal law, there are many exceptions to the hearsay rule.<sup>6</sup> Federal law recognizes an exception for a present sense impression, which is a statement that describes or explains an event or condition that the speaker is perceiving, or has just perceived.<sup>7</sup> The Law

---

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:

Revision Commission recommends that California adopt a similar exception.

### **Present Sense Impression**

A good example of a present sense impression is a radio announcer's play-by-play description of a baseball game.<sup>8</sup> The announcer describes the events as they transpire, without time for reflection or deliberation.

Under federal law, a present sense impression is admissible as an exception to the hearsay rule.<sup>9</sup> Thirty-nine states have a statute or a court rule on a present sense impression that is identical to the federal exception,<sup>10</sup> or very similar.<sup>11</sup> Five

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).

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

states have a hearsay rule exception for a present sense impression as a matter of common law.<sup>12</sup> Six states do not

---

Virginia (W. Va. R. Evid. 803(1)), Wisconsin (Wis. Stat. Ann. § 908.03(1)), Wyoming (Wyo. R. Evid. 803(1)).

11. 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).

12. 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).

have a hearsay rule exception for a present sense impression.<sup>13</sup>

An exception similar to the present sense impression exception was proposed when the Evidence Code was first drafted in 1965.<sup>14</sup> That proposed exception was narrowed and became Evidence Code Section 1241, which permits admission of hearsay known as a “contemporaneous statement.”<sup>15</sup>

### **Contemporaneous Statement**

The contemporaneous statement exception covers a statement by a declarant that (1) explains, qualifies, or makes understandable the declarant’s conduct, and (2) was made while the declarant was engaged in such conduct.<sup>16</sup> For example, this provision would apply where one person gives another a pen, and simultaneously makes a statement about the transfer (e.g., “You can borrow my pen” or “I want you to

---

13. The following states do not have a hearsay rule exception for a present sense impression: California, Connecticut, Minnesota, Nebraska, Oregon, Tennessee. Although Minnesota does not have a hearsay rule exception, it does allow admission of a present sense impression as *non-hearsay*, so long as the declarant is a witness subject to cross-examination on the statement. See Minn. R. Evid. 801(d)(1)(D).

14. *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.

15. 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”).

16. Evid. Code § 1241.



have this pen”).<sup>17</sup> The statement determines the legal impact of the event — whether the speaker made a gift as opposed to a loan.<sup>18</sup>

Technically, however, the statement is not hearsay but rather a verbal act, a statement that has legal significance and is offered for that purpose.<sup>19</sup> The Comment to Section 1241 acknowledges that some writers “do not regard evidence of this sort as hearsay evidence.” The Legislature nonetheless included the exception to eliminate “any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule.”<sup>20</sup>

The Federal Rules of Evidence do not have a contemporaneous statement exception.<sup>21</sup> The exception is not needed under the federal rules because the hearsay definition under those rules does not include statements that fall under the contemporaneous statement exception (i.e., verbal acts).<sup>22</sup>

---

17. See Méndez Hearsay Analysis, *supra* note 15, at 367.

18. *Id.*

19. *Id.*

20. Evid. Code § 1241 Comment.

21. See Méndez Hearsay Analysis, *supra* note 15, at 367.

22. The advisory committee’s note to Federal Rule of Evidence 801(c) explains:

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

(Emphasis added, citations omitted). See also Méndez Hearsay Analysis, *supra* note 15, at 367.

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

California's exception for a contemporaneous statement, Evidence Code Section 1241, focuses on verbal acts. The federal exception for a present sense impression, Federal Rule of Evidence 803(1), does not address verbal acts; the federal rules do not even treat such acts as hearsay.<sup>23</sup>

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

- (1) Under the federal exception, the declarant's statement can describe the conduct of another person, while under the California exception, the declarant's statement must explain the declarant's own conduct.
- (2) Under the California exception, the conduct the declarant explains must be equivocal in nature and need explanation, but, under the federal exception, the declarant's statement may describe an event or condition that is unequivocal and unambiguous in nature.
- (3) Under the federal exception, the declarant's statement may be made immediately after the event or condition has been completed, while, under the California exception, a declarant's explanation of conduct must be simultaneous with the conduct, not made afterwards.<sup>24</sup>

---

23. See *id.*

24. 1 B. Jefferson, *Jefferson's California Evidence Benchbook Spontaneous and Contemporaneous Statements* § 13.14, at 213 (3d ed. & March 2007 update).

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

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

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

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

As a result, evidence admitted under a hearsay rule exception for a present sense impression may actually be more reliable than in-court testimony. As one commentator put it, "a statement made at the time of an event is preferable to a reconstruction of the occurrence at trial, when the witness' memory has almost certainly altered ...."<sup>27</sup>

#### ***The Likelihood of Insincerity Is Diminished***

A second justification for admitting evidence of a present sense impression is that there is little or no time for a deliberate deception.<sup>28</sup> The exception applies only to a statement describing an event that the declarant is in the midst

---

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

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

27. 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").

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

of perceiving, so there is no opportunity to reflect and distort the facts.<sup>29</sup>

The federal exception for a present sense impression is based upon this rationale. The advisory committee's note explains that the "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."<sup>30</sup> The requirement of contemporaneity preserves "the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate."<sup>31</sup>

Accordingly, the present sense impression satisfies the hearsay concerns relating to memory and sincerity, leaving only the risks of ambiguity and misperception. For these reasons, it is considered sufficiently reliable to warrant an exception to the hearsay rule.<sup>32</sup>

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

In many but not all cases, there is an additional justification for admitting evidence of a present sense impression. Such a statement usually will be made to another person who has equal opportunities to observe the event and thus to check a misstatement.<sup>33</sup> Testimony by such a witness helps the fact-finder gauge the trustworthiness of the out-of-court statement.

---

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

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

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

32. 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).

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

The witness' own account of the event can be used to shed light on the out-of-court description of the event.<sup>34</sup>

Further, if the witness testifying to the out-of-court statement is the declarant, the factfinder may evaluate the demeanor of the declarant-witness. In addition, cross-examination on the statement can probe into its credibility.<sup>35</sup>

Such corroboration thus reduces the risks of ambiguity and misperception, which are the two key hearsay concerns not addressed by contemporaneity.<sup>36</sup> When such corroboration is coupled with contemporaneity, all of the key concerns underlying the hearsay rule are addressed, at least to some extent.

### *Utility*

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

The exception's main utility would be to allow admission of an immediate impression of an event that was not startling.<sup>37</sup> A different hearsay exception, known in California as the spontaneous statement exception and in the federal

---

34. 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).

35. 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.

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

37. See, e.g., *Booth v. State*, 306 Md. 313, 324, 331, 508 A.2d 976 (1986); Mueller & Kirkpatrick, *supra* note 32, § 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).

system as the excited utterance exception, already allows admission of a statement that was made under the stress of excitement, whether at the time of an exciting event or afterwards.<sup>38</sup> A statement made about an event that was not startling is not admissible under the spontaneous statement exception.<sup>39</sup> However, the statement would be admissible under the present sense impression exception.<sup>40</sup> Such an exception would be especially useful when the declarant makes an observation just before an exciting event.<sup>41</sup>

The drafters of the federal rules concluded that including both an exception for a present sense impression and an exception for an excited utterance was needed to avoid “needless niggling.”<sup>42</sup> Presumably, the drafters did not think it profitable for courts to spend significant effort differentiating between an excited utterance and a present sense impression. For that reason, and because of the distinctions in coverage, the federal courts and 44 states have a present sense impression exception to the hearsay rule, *in addition to an*

---

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

39. 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)).

40. See *id.*

41. Mueller & Kirkpatrick, *supra* note 32, § 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).

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

excited utterance exception, that is codified in court rule or statute,<sup>43</sup> or recognized as a matter of common law.<sup>44</sup>

---

43. For a list of the states with a hearsay exception for a present sense impression, see *supra* notes 10-12. 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) (Wisconsin); Wyo. R. Evid. 803(2) (Wyoming).

44. 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).

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

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

A few courts and commentators have criticized the hearsay rule exception for a present sense impression on a number of different grounds. Their criticisms largely focus on specific aspects of the exception. They do not question the basic premise of the exception (the idea that a description given while perceiving or just after the event described is sufficiently reliable to be introduced into evidence without an opportunity for cross-examination).<sup>45</sup>

By contrast, the California Public Defender's Association and the Los Angeles Public Defender's office (hereafter, the "public defenders") sent the Commission a comment

- 
- 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.).

45. 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* has limited application in the context of a present sense impression. See discussion of "Testimonial Statement" *infra*.



opposing the concept of a present sense impression exception.<sup>46</sup>

The criticisms are unpersuasive, as explained below.

### *Necessity*

The public defenders do not believe that an exception for a present sense impression is necessary.<sup>47</sup> They say that nearly every statement that would be admissible as a present sense impression is already admissible as a spontaneous statement.<sup>48</sup>

Although there is some overlap between the spontaneous statement exception and the present sense impression exception,<sup>49</sup> the overlap is incomplete, as discussed above.<sup>50</sup> Because of the potential utility of the exception,<sup>51</sup> the Commission believes the exception would be a valuable addition to California evidence law.

### *Cumulative Evidence*

A related criticism by courts and commentators is that present sense impression statements are often “merely

---

46. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 1.

47. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 4.

48. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 1.

49. The Commission’s former consultant, Prof. James Chadbourn (then of UCLA Law School), acknowledged this overlap long ago. See *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). He nonetheless recommended that California adopt a present sense impression exception to the hearsay rule. See *id.* at app. 471.

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

51. *Id.*

cumulative.”<sup>52</sup> This claim seems to assume that an out-of-court statement and in-court testimony about the same event are repetitive.

However, the two types of evidence are different. As discussed above, an out-of-court statement about a present sense impression may be more reliable than an in-court statement about a past event, because the former statement is not based on the witness’ distant memory.<sup>53</sup>

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

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

### *Eyewitness Identification*

Another scholarly criticism is that the hearsay rule exception for a present sense impression is not clear on whether it would admit a pretrial identification (e.g., at a lineup, a declarant’s statement “that’s the one who robbed me”).<sup>54</sup> It has been argued that the exception should not operate to admit such a statement.<sup>55</sup>

---

52. See Beck, *supra* note 27, at 1075; U.S. v. Parker, 491 F.2d 517, 523 (8th Cir. 1973).

53. See Beck, *supra* note 27, at 1075; Waltz *Iowa L. Rev.* article, *supra* note 27, 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).

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

55. *Id.*

It appears, however, that a pretrial identification would not be admitted as a present sense impression because the statement actually relates to a past event, i.e., a pre-lineup identification of the person who is identified at the lineup.<sup>56</sup> In fact, a different federal rule specifically addresses the admissibility of a pretrial identification.<sup>57</sup>

Likewise, California has a provision specifically addressing the admissibility of a pretrial identification.<sup>58</sup> The Commission's Comment to the proposed new exception for a present sense impression would refer to that provision.<sup>59</sup> That would help prevent confusion over the proper treatment of a pretrial identification.

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

Another issue discussed by courts and commentators is whether the exception for a present sense impression should allow admission of a statement in the form of an opinion.<sup>60</sup> This issue arises often, as present sense impression statements

---

56. 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).

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

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

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

60. See McFarland, *supra* note 32, at 929 n.132.

tend to characterize what is observed in language that is, or appears to be, an opinion.<sup>61</sup>

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

absurd to insist that the statement must not be phrased in terms of inference or opinion. People speaking without reflection usually talk in terms of inference in describing what they have seen or heard. So long as the language does not indicate a conscious deduction, rather than a shorthand method of statement, the opinion rule should have no application.<sup>62</sup>

However, it appears that the courts are divided on the admissibility of a present sense impression in the form of an opinion.<sup>63</sup> The majority view rejects an opinion if it allocates blame.<sup>64</sup> If it does not, the courts are split more evenly.<sup>65</sup>

The Commission believes that the admissibility of a present sense impression that is in the form of an opinion would be best determined by the courts as the issue arises in the context of actual cases.<sup>66</sup>

### *Testimonial Statement*

The public defenders maintain that in many factual contexts a present sense impression will be a testimonial statement<sup>67</sup>

---

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

62. E. Morgan, *Basic Problems of State and Federal Evidence* 343 (1963); see also Waltz *Iowa L. Rev.* article, *supra* note 27, at 881 n.74.

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

64. *Id.* at 326.

65. *Id.*

66. *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).

67. Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 3.

and thus constitutionally inadmissible under the doctrine of *Crawford v. Washington*.<sup>68</sup> They say that since *Crawford* will preclude admissibility, it would be pointless for California to adopt a hearsay exception for a present sense impression.<sup>69</sup>

That conclusion is misguided for a number of reasons. First, *Crawford* involved the Confrontation Clause of the federal Constitution,<sup>70</sup> which only applies to a criminal defendant.<sup>71</sup> The limitations of *Crawford* do not apply to a civil case, nor do they apply to evidence that is offered against the prosecution in a criminal case.

Second, *Crawford* only restricts the admissibility of a testimonial statement.<sup>72</sup> Courts have usually found present sense impressions to be non-testimonial.<sup>73</sup> The criteria for a testimonial statement are not fully defined, but focus on factors such as whether the statement was made for the purpose of providing evidence for use in prosecution,<sup>74</sup> whether the statement was given under a degree of formality or solemnity similar to testifying under oath,<sup>75</sup> and whether the statement was made in a non-emergency setting.<sup>76</sup> A

---

68. 541 U.S. 36 (2004).

69. Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 3.

70. U.S. Const. amend. VI.

71. See *id.* (“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....”).

72. See *Crawford*, 541 U.S. at 53-54.

73. 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).

74. *Davis v. Washington*, 547 U.S. 813 (2006).

75. *Id.*

76. *Id.*

present sense impression is not likely to have been given for the purpose of providing evidence for prosecution. There is no time to formulate such a purpose when a statement is made spontaneously. Nor is there time to impart a degree of formality or solemnity similar to testifying under oath. Although some present sense impressions are made in a non-emergency setting, others are made during an ongoing emergency.

Third, even if a court considers a particular present sense impression testimonial and the evidence is offered against a criminal defendant, *Crawford* might not compel exclusion of the evidence. The doctrine of *Crawford* would not preclude the admission of a present sense impression if the declarant testifies at trial, or if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.<sup>77</sup>

Finally, if California adopts a hearsay exception for a present sense impression, it would not be necessary to codify *Crawford's* constitutional requirements in that exception. If a particular present sense impression was considered testimonial and the other requirements of *Crawford* were met, the federal Constitution would automatically override any state statute.<sup>78</sup> In addition, the Evidence Code already includes a mechanism for ensuring that courts construe hearsay rule exceptions in accordance with the federal Confrontation Clause.<sup>79</sup>

---

77. 541 U.S. at 53-54.

78. See U.S. Const. art. VI, cl. 2 (Supremacy Clause).

79. See Evid. Code § 1204 (“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.”).

### *Time Lapse Between Statement and Event*

Another issue raised in cases and commentary on present sense impressions relates to the amount of time that elapses between an event and a statement describing the event. Federal Rule of Evidence 803(1) encompasses a statement made about an event while the declarant was perceiving the event, “or immediately thereafter.” The advisory committee’s note states that with respect to the time element, the rule “recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable.” This slight lapse is described as “substantial contemporaneity” between the event and statement, which “negate[s] the likelihood of deliberate or conscious misrepresentation.”<sup>80</sup>

Applying these guidelines, one widely-cited case states:

[B]ecause the presumed reliability of a statement of present sense impression flows from the fact of spontaneity, the time interval between observation and utterance must be very short. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought.<sup>81</sup>

Some commentators criticize courts for admitting statements made after there was ample time for fabrication, memory loss, and confabulation.<sup>82</sup> Several commentators

---

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

81. *Booth*, 306 Md. at 324; see also Waltz *Iowa L. Rev.* article, *supra* note 27, 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).

82. See, e.g., McFarland, *supra* note 32, 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 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

maintain that the exception should require strict contemporaneity (i.e., only enough “time to get the words out of the mouth”), not “substantial” contemporaneity, between the event and statement, because mere seconds are enough time for fabrication.<sup>83</sup>

Prof. Douglas McFarland supports the concept of a present sense impression exception to the hearsay rule.<sup>84</sup> To achieve strict contemporaneity, he suggests that the exception should not include the phrase “or immediately thereafter.”<sup>85</sup> Provisions in two states, Colorado and Kansas, are drafted that way.<sup>86</sup> Neither state, however, appears to require strict contemporaneity.<sup>87</sup>

---

(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).

83. See, e.g., McFarland, *supra* note 32, at 916, 931; Beck, *supra* note 27, at 1060-61; Note on Contemporaneity and Corroboration, *supra* note 81, at 669. Prof. McFarland 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 32, at 916-17.

84. First Supplement to Commission Staff Memorandum 2008-6 (Feb. 11, 2008), Exhibit p. 1.

85. *Id.* at Exhibit pp. 1-2; see also McFarland, *supra* note 32, at 931.

86. See Colo. R. Evid. 803(1); Kan. Stat. Ann. § 60-460(d)(1).

87. 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).



Prof. McFarland alternatively suggests that if the phrase “or immediately thereafter” is included in the exception, an accompanying comment should include strong language explaining that the phrase is to be read narrowly.<sup>88</sup> The public defenders maintain that any attempt to ensure a narrow reading of the phrase is likely to fail.<sup>89</sup>

Another commentator supports requiring strict contemporaneity, but would allow a longer time lapse if other evidence indicates that the statement is trustworthy.<sup>90</sup> Other approaches have also been taken:

- The New Jersey exception permits a statement made “immediately after” the declarant perceived the event, so long as the declarant had no “opportunity to deliberate or fabricate.”<sup>91</sup> The note to this provision explains that “statements made immediately after the event must be so close to the event as to exclude the likelihood of fabrication or deliberation.”
- Florida follows the federal approach on what is a permissible time lapse. However, Florida’s exception only applies to “[a] spontaneous statement,” and it bars admission when the statement “is made under circumstances that indicate its lack of trustworthiness.”<sup>92</sup>
- Ohio also follows the federal approach on what is a permissible time lapse. Like Florida, however, Ohio adds a clause aimed at ensuring trustworthiness of the statement.<sup>93</sup>

---

88. See First Supplement to Commission Staff Memorandum 2008-6 (Feb. 11, 2008), Exhibit p. 2.

89. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit pp. 1-2.

90. See Waltz *Iowa L. Rev.* article, *supra* note 27, at 880.

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

92. See Fla. Stat. § 90.803(1).

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

It appears that the federal rule and these other formulations are essentially trying to address the same considerations: (1) It might take a moment to utter a statement about an event perceived, but (2) there should not be enough time to concoct a lie.

Even commentators who argue for strict contemporaneity acknowledge that there must be some “passage of time to get the words out of the mouth,” a “split-second to form words.”<sup>94</sup> It is unrealistic to insist that a statement be made at exactly the same time that an event occurs. The Commission therefore advises that the phrase “or immediately thereafter” be included.<sup>95</sup>

Inclusion of the phrase “or immediately thereafter” would provide uniformity with federal law and the law of many other states. To illustrate the proper application of the new exception, the Commission’s Comment would stress that the permissible time lapse is strictly limited to the moment required to verbalize what has just been perceived.<sup>96</sup> The Comment would also give examples of acceptable and unacceptable time lapses.<sup>97</sup>

### ***Corroboration***

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

Corroborative evidence may provide support that (1) the event or condition about which a statement was made actually occurred, (2) the declarant actually perceived the event or

---

94. See, e.g., McFarland, *supra* note 32, at 931.

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

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

97. *Id.*

condition described, or (3) the statement's description of the event or condition is accurate.

The text of the federal rule is silent on the need for corroboration. The accompanying advisory committee's note mentions the subject, but is largely inconclusive. There is extensive disagreement over whether the federal rule requires, and whether it should require, corroboration.<sup>98</sup>

If California adopted an exception based on the federal provision, however, it would be clear that corroborative evidence would be required to show that (1) the event or condition actually occurred and (2) the declarant actually perceived the event or condition described. Unlike a federal court, a California court may *not* consider inadmissible evidence in determining admissibility.<sup>99</sup> Thus, a California court could not consider a proffered present sense impression in determining whether that statement should be admitted. To establish that the provision applied, the proponent of a present sense impression in California necessarily would have to present other evidence showing that (1) the event or condition

---

98. *Booth v. State*, 306 Md. 313, 327, 508 A.2d 976, 983 (Md. 1986); *Graham*, *supra* note 81, § 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").

99. 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. 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).

actually occurred, and (2) the declarant actually perceived the event or condition.

The public defenders argue that these corroborative requirements should be included in the text of the exception itself.<sup>100</sup> The Commission does not recommend that approach. First, it is unnecessary because these requirements would apply automatically, as a consequence of the general rule that a judge may not consider inadmissible evidence in determining admissibility. Second, if the need for corroboration was expressly stated in only one exception (the present sense impression exception), it would misleadingly create a negative inference that such a requirement no longer applies to other hearsay exceptions. It would thus create confusion and lead to an erosion of the general rule that a judge may not consider inadmissible evidence in determining admissibility.

Although it would be necessary to corroborate that the event or condition occurred and that the declarant perceived the event, corroboration of the *accuracy* of the declarant's description of the event or condition would not necessarily be required if California adopted a provision like the federal exception for a present sense impression. A statement could meet the criteria for admissibility as a present sense impression even if the description given is not completely accurate.

It is generally agreed that the federal provision for a present sense impression does not require corroboration of the accuracy of the declarant's description.<sup>101</sup> Commentators,

---

100. Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 3.

101. See, e.g., Graham, *supra* note 81, § 803:1, at 68-69; Passannante, *supra* note 8, at 100 n.67; Beck, *supra* note 27, at 1069; Waltz *Litigation* article, *supra* note 54, at 24.

however, are divided as to whether such corroboration should be required.<sup>102</sup>

Because a present sense impression has indicia of reliability besides corroboration, the Commission believes that corroboration of the description's accuracy should not be required. As previously explained, the likelihood of memory loss is diminished,<sup>103</sup> as is the likelihood of insincerity.<sup>104</sup> The probability that a present sense impression will be corroborated merely reinforces these other justifications for creating an exception to the hearsay rule. For that reason, and because conformity with the federal rule would be desirable, corroboration of a description's accuracy should not be a prerequisite to admissibility as a present sense impression.

The proposed legislation would take that approach. To provide clarity, however, the Comment to the proposed new exception would address the matter of corroboration. It would

---

102. Some commentators argue that corroboration of a description's accuracy 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).

Other 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 27, 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 27, at 1071 (declarant should be required to testify regarding present sense impression if declarant is available).

Similarly, the public defenders express concern that an inaccurate statement could be admitted under a present sense impression exception. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit pp. 2-3. They illustrate this point with a hypothetical. See *id.* For discussion of why this hypothetical is unpersuasive, see Commission Staff Memorandum 2007-53 (Dec. 10, 2007), pp. 5-6.

103. See discussion of "The Likelihood of Memory Loss is Diminished" *supra*.

104. See discussion of "The Likelihood of Insincerity is Diminished" *supra*.

explain that corroboration of the accuracy of the statement is not required, but corroboration of the event or condition and of the declarant's perception must necessarily be provided under the normal procedure for determining admissibility in California.<sup>105</sup>

### **Weighing the Justifications and the Criticisms**

There are persuasive justifications for creating a hearsay rule exception for a present sense impression. Because a present sense impression is expressed at or immediately after an event or condition occurs, the likelihood of memory loss is diminished,<sup>106</sup> as is the likelihood of insincerity.<sup>107</sup> In some cases, corroboration of the present sense impression is possible, providing additional assurance of reliability.<sup>108</sup> An exception for a present sense impression would be a useful supplement to the existing provisions in the Evidence Code. It would further the pursuit of truth by enabling a factfinder to consider trustworthy evidence that might otherwise be excluded.<sup>109</sup>

Although there have been criticisms of such an exception, most are directed at specific aspects of the exception, and do not challenge its underlying merits. The criticism that the exception is unnecessary is not persuasive.<sup>110</sup> Neither is the criticism regarding cumulative evidence,<sup>111</sup> nor the concern

---

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

106. See discussion of "The Likelihood of Memory Loss is Diminished" *supra*.

107. See discussion of "The Likelihood of Insincerity is Diminished" *supra*.

108. See discussion of "Corroboration as an Additional Safeguard of Trustworthiness in Some Cases" *supra*.

109. See discussion of "Utility" *supra*.

110. See discussions of "Necessity" *supra* and "Utility" *supra*.

111. See discussion of "Cumulative Evidence" *supra*.

relating to *Crawford*.<sup>112</sup> The proper treatment of a pretrial identification is evident from the existing provision on that subject, which would be referenced in the Comment to the proposed new exception.<sup>113</sup> The proper treatment of a present sense impression in the form of an opinion would properly be left to the courts.<sup>114</sup> The concerns relating to the proper time lapse would be addressed by providing guidance and examples in the Comment,<sup>115</sup> as would the concerns relating to corroboration.<sup>116</sup>

Based on the sound justifications for the exception, the Commission recommends that California adopt a hearsay rule exception for a present sense impression. To promote uniformity, the Commission further recommends that the new exception be modeled on the federal rule.<sup>117</sup>

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

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

It is true that the federal exception for a present sense impression applies not only when a declarant describes the conduct of another person, but also when a declarant

---

112. See discussion of “Testimonial Statement” *supra*.

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

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

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

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

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

describes the declarant's own conduct.<sup>118</sup> On initial consideration, that might make the exception for a contemporaneous statement seem superfluous.

However, the federal exception for a present sense impression is not meant to apply to a verbal act. Under the Federal Rules of Evidence, a verbal act is not regarded as hearsay.<sup>119</sup>

Consequently, a California provision modeled on the federal exception for a present sense impression probably would not be construed to apply to a verbal act. To ensure that a verbal act remains admissible, California should retain its hearsay rule exception for a contemporaneous statement.<sup>120</sup>

---

118. 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).

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

120. 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

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

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

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

**Comment.** The heading “Article 4. Spontaneous, Contemporaneous, and Dying Declarations” is amended to reflect the addition of Section 1243 (present sense impression).

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

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

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

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

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

**Comment.** Section 1243 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 two reasons. First, there is no problem concerning the declarant’s memory because the statement is simultaneous with or immediately after the event. Second, there is little or no time for calculated misstatement. Additionally, in some cases, the statement is made to one whose proximity provides an immediate opportunity to check the accuracy of the statement in light of the physical facts. Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm’n Reports 401, 467 (1963); see also Fed. R. Evid. 803(1) advisory committee’s note.

Section 1243 applies to a statement “made while the declarant was perceiving the event or condition, or immediately thereafter.” The phrase

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

Under Rule 803(1), some courts have admitted a statement made after the time necessary to convert an observation into words. See, e.g., *United States v. Montero-Camargo*, 177 F.3d 1113, 1124 (9th Cir. 1999) (upholding admission of motorist’s statement to agents made “about a minute” after motorist observed event), *amended by*, 183 F.3d 1172 (1999), *withdrawn and reh’g en banc granted*, 192 F.3d 946 (1999), *reh’g en banc*, 208 F.3d 1122 (2000); *United States v. Parker*, 936 F.2d 950, 954 (7th Cir. 1991) (upholding admission of railroad worker’s statement made after walking about 100 feet from event); *United States v. Obayagbona*, 627 F. Supp. 329, 339-40 (E.D.N.Y. 1985) (admitting statement made over two minutes after event, and stating that “[a] few minutes’ pause after the moment at which the statement could have been made is within the period contemplated in Rule 803(1)”; see also McFarland, *supra*, at 919-20 (criticizing several cases for admitting statement despite time lapse in which there was time to deliberate or fabricate). Section 1243 does not allow admission of such a statement.

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

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).

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

---

