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Rule 803(1): Present Sense Impression

RULE 803(1): PRESENT SENSE IMPRESSION

Federal Rule of Evidence 803(1) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> (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.[1]

The law of evidence was slow to recognize an exception to the hearsay rule for present sense impressions.[2] The primary reason for this hesitation was the belief that statements made about an event without an accompanying nervous stimuli might be unreliable.[3] The courts felt that, unlike the exception for excited utterances,[4] present sense impressions lacked a sufficient indicia of reliability because they were sought to be admitted based solely upon the contemporaneous making of the statement.[5]

In 1942, a state appellate court recognized the inherent reliability of such statements in *Houston Oxygen Co. v. Davis*.[6]

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1. FED. R. EVID. 803(1).

2. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(1)[01], at 87-88 (Joseph M. McLaughlin ed., 1995) (stating that the reluctance to admit these statements was largely based upon the fact that many courts relied upon the criticized phrase of "res gestae"); *see also* JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE §1757, at 238 (James H. Chadbourn ed., 1974) (maintaining that a startling event is a necessary prerequisite to admitting spontaneous exclamations to ensure their trustworthiness).

3. The courts believed that out of court statements made under the influence of an exciting event were reliable because they were less likely to be the product of fabrication. *See* FED. R. EVID. 803 advisory committee's note.

4. FED. R. EVID. 803(2). The hearsay exception for excited utterances is defined as: "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

5. *See* WEINSTEIN & BERGER, *supra* note 2, § 803(1)[01], at 87-88.

6. 161 S.W.2d 474 (Com. App. Tx. 1942). In this case, the plaintiffs sought recovery for injuries sustained as a result of a collision between the plaintiff's automobile and the defendant's truck. *Id.* at 475. Defendant sought to admit statements made by a motorist who, after witnessing the plaintiff's car "zig zagging" and traveling at an excessive speed, stated that the driver "must

In *Houston*, the court found that the statement's reliability was ensured by factors other than the excitement of the event, including the close proximity between the event and the statement, and the fact that the statements were made to a third person who was at the scene and who was subject to cross-examination.[7] The Commission of Appeals of Texas stated that the time factor offered two safeguards: (1) the avoidance of errors because of the declarant's clear memory, and (2) the lack of time to make a calculated misstatement.[8]

After the *Houston* case, courts gradually began to accept this exception to the hearsay rule; however, "[t]he principal impetus for recognition of the hearsay exception for unexcited statements of present sense impressions came through the rulemaking process."[9] The rule was recognized by its inclusion in the Model

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have been drunk" and could have caused the accident. *Id.* at 476. The Commission of Appeals of Texas reversed the trial court's decision and held that the statement should be admitted because of its exceptional reliability under the hearsay exception for spontaneous declarations. *Id.* at 477. The court further stated that the decision to admit the evidence was not within the discretion of the trial court when the circumstances under which the statement was made fell within an established rule of evidence. *Id.*

7. *Id.* at 476-77.

8. *Id.* at 477. Though there were virtually no federal cases which recognized the present sense impression exception before the promulgation of the Federal Rules of Evidence, some cases seemed to support this exception. Emens v. Lehigh Valley R. Co., 223 F. 810 (N.D.N.Y. 1915), *cert. denied*, 242 U.S. 627 (1916). *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 803(1)[01] at 89. In *Emens*, a car and a train collided. 223 F. at 812. There was inconsistent testimony as to whether or not the train had blown its whistle before it crossed the highway and caused the accident. *Id.* at 815-19. A witness who was in close proximity to the collision was allowed to testify that his wife said, "[d]o you suppose the people in that automobile see the train?" and "[w]hy don't the train whistle?" *Id.* at 825. Though the evidence was admitted only to show whether the husband's attention was directed to the sounding or the non-sounding of the bell, the court stated that the wife's testimony "might be competent" on the issue of whether the train actually did signal. *Id.* at 826. The court further stated that since the wife's statement "was entirely disinterested, and it was spontaneous (drawn out by the conditions existing), and there was no premeditation . . . it was relevant". *Id.*

9. MCCORMICK ON EVIDENCE § 271, at 475 (John William Strong ed., 4th ed. 1992).

Code of Evidence and the Uniform Rules.[10] Rule 803(1) allows for the admission of out of court statements, even absent a startling event, under the following conditions: (1) the declarant must have personally witnessed the described event; (2) the declaration must be an explanation or description of the event; and (3) the declaration must be contemporaneous with the event or made immediately thereafter.[11] As stated in the rule, the availability of the declarant to testify or to be cross-examined is immaterial.[12]

In addition, courts have read the language of 803(1) plainly to indicate that the rule does not require corroboration before the statement may be admitted.[13] In *U.S. v. Medico*,[14] for example, the Second Circuit affirmed the lower court's decision to admit certain evidence at trial under Rule 804(b)(5),[15] the "catch-all"

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10. *Id.*

11. FED. R. EVID. 803(1). *See* U.S. v. Mejia-Velez, 855 F. Supp. 607, 613 (E.D.N.Y. 1994) (finding that tapes of emergency "911" telephone calls made by eyewitnesses contemporaneously to a shooting were admissible since all three requirements were satisfied).

12. FED. R. EVID. 803(1).

13. *See* U.S. v. Medico, 557 F.2d 309, 315-16 (2d Cir.), *cert. denied*, 434 U.S. 986 (1977).

14. *Id.* at 309. In *Medico*, which involved a prosecution for armed robbery of a bank, a bank employee was given information through the bank's front door regarding the getaway car and license plate number from two witnesses outside the bank. *Id.* at 311. This employee's testimony was allowed at trial even though the government could not locate these witnesses. *Id.* at 313-16.

15. FED. R. EVID. 804(b)(5) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the

exception used to admit statements which are not specifically outlined by the rules but which the court finds equally trustworthy.[16] In dicta, the Second Circuit stated that the "testimony meets all the specific requirements for admission as a present sense impression under Rule 803(1)" even though there is no direct corroboration by an equally percipient witness.[17] Thus, the Second Circuit impliedly rejected corroboration as a predicate to admission of present sense impressions under Rule 803(1), which clearly does not indicate such a requirement on its face.

Although the present sense impression exception is recognized on the federal level, until recently, this exception to the hearsay rule was not recognized by the New York courts.[18] However, in the 1993 case of *People v. Brown*,[19] the New York Court of Appeals recognized the formal existence of the present sense impression exception in New York.[20] *Brown* involved a "911" call and was an important use of the present sense impression rule.[21] In *Brown*, the court found that the testimony of the police officers who arrived promptly at the crime scene and apprehended suspects fitting the description given in the "911" telephone calls, was sufficient corroboration for tapes of the "911" calls to be admitted.[22] The *Brown* court held that "spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the

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proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

16. *Medico*, 557 F.2d at 316. *See* FED. R. EVID. 804(b)(5).

17. 557 F.2d at 315.

18. *See* People v. Watson, 109 Misc. 2d 71, 437 N.Y.S.2d 1016 (Sup. Ct. Kings County 1981), *rev'd*, 100 A.D.2d 452, 474 N.Y.S.2d 978 (2d Dep't 1984) (reversing lower court's decision to allow present sense impressions even though New York had yet to formally recognize such a hearsay exemption).

19. 80 N.Y.2d 729, 610 N.E.2d 369, 594 N.Y.S.2d 696 (1993).

20. *Brown*, 80 N.Y.2d at 731, 610 N.E.2d at 370, 594 N.Y.S.2d at 697. In *Brown*, the court held that two "911" telephone calls describing a burglary in progress were properly "admitted under the present sense impression hearsay rule." *Id.*

21. *Id.*

22. *Id.* at 736-37, 610 N.E.2d at 374, 596 N.Y.S.2d at 701.

descriptions are sufficiently corroborated by other evidence."[23] The court further stated that the statements do not have to be made by a participant in the event, and the identity of the declarant does not have to be known.[24] Corroboration at trial of an equally percipient witness is, therefore, not required,[25] but some form of corroboration is required.[26] The sufficiency of the corroboration depends on the specific facts of each case and is left to the discretion of the trial court.[27] Although it resolved the corroboration issue, *Brown* left open the question of whether the declarant must be unavailable.

This question was resolved in *People v. Buie*.[28] In *Buie*, a "911" tape of a homeowner describing, in detail, a figure departing his home immediately following a burglary was held admissible under New York's present sense impression hearsay exception.[29] In affirming the lower court's decision, the Court of Appeals held that New York does not require the declarant to be unavailable in order to admit evidence under the present sense hearsay exception.[30] Thus, when seeking to admit evidence under the present sense impression hearsay exception in either the federal or New York courts, the unavailability of the declarant is not necessary.[31]

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23. *Id.* at 734, 610 N.E.2d at 373, 594 N.Y.S.2d at 700.

24. *Id.* at 734-35, 610 N.E.2d at 373, 594 N.Y.S.2d at 700.

25. *Id.* at 736, 610 N.E.2d at 373, 594 N.Y.S.2d at 700.

26. *Id.* at 736, 610 N.E.2d at 374, 594 N.Y.S.2d at 701. *See* GARY SHAW, CANUDO ON EVIDENCE LAW OF NEW YORK § XIV(g)(6), at 228 (1995).

27. *Brown*, 80 N.Y.2d at 737, 610 N.E.2d at 374, 596 N.Y.S.2d at 701.

28. 86 N.Y.2d 501, 658 N.E.2d 192, 634 N.Y.S.2d 415 (1995) (holding that a declarant does not have to be unavailable in order to admit evidence under New York's present sense impression hearsay exception).

29. *Id.* at 503-04, 658 N.E.2d at 193, 634 N.Y.S.2d at 416.

30. Id. at 506, 658 N.E.2d at 195, 634 N.Y.S.2d at 418.

31. FED. R. EVID. 803(1); *Buie*, 86 N.Y.2d at 506, 658 N.E.2d at 195, 634 N.Y.S.2d at 418. The *Buie* court noted that, while the declarant's unavailability is not required for admissibility, trial judges still retain the power to deny admission of evidence under the present sense hearsay exception in instances where the probative value of such evidence is outweighed by undue prejudice via its admission. *Id.*

Rule 803(1) and the New York common law rule are similar in application. However, there is one primary distinction: the requisite corroboration necessary for admission. According to Rule 803(1), corroboration is not a requirement. The theoretical foundation of Rule 803(1) renders present sense impressions reliable even though further corroboration is not present. As stated in the Advisory Committee's Note, "[t]he underlying theory of Exception (1) is that substantial contemporaneity of event and statement [negate] the likelihood of deliberate or conscious misrepresentation."[32] Conversely, after *Brown*, the New York State courts require corroboration to some degree:[33]

> The court [in *Brown*] declined to rule what level of corroboration will be sufficient to permit admissibility of a present sense impression. It expressly declined to adopt the "equally percipient witness" rule, by which the present sense impression must be corroborated by a witness who was at the scene and had an equal opportunity to perceive the event, and who will be subject to cross-examination as to the accuracy of the declarant's statement. It also expressly declined to adopt a no corroboration rule. Instead, it stated what corroboration will be sufficient will depend on the circumstances of each case and must be left largely to the sound discretion of the trial court.[34]

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32. FED. R. EVID. 803(1) advisory committee's note.

33. *See Brown*, 80 N.Y.2d at 736, 610 N.E.2d at 374, 594 N.Y.S.2d at 701.

34. *See* SHAW, *supra* note 26, § XIV(g)(6), at 228.