

The Hearsay Rule:

Present Sense Impressions and Excited Utterances

This monograph will explain the difference between Present Sense Impressions and Excited Utterances. Both are exceptions to the Hearsay Rule, and while they are similar and often advanced together (or in the alternative), there are important distinctions.

A Present Sense Impression is a statement of a declarant (who may or may not be an available witness or even identified), which describes or explains an event or condition (e.g. robbery in progress, hit-and-run accident), as it is unfolding or immediately thereafter. (*People v Brown*, 80 NY2d 729 [1993]). The key to admissibility is timeliness of the declarant's personal observations because the more contemporaneous the declaration is to the event observed, the less opportunity there is for reflection, faulty memory or fabrication. In *People v Vasquez*, 88 NY2d 561, 575 (1996), the Court observed, "although...there must be some room for a marginal time lag between the event and the declarant's description of that event, ...the communication (must reflect) ... a present sense impression rather than a recalled or recast description of events that were observed in the recent past." In *Vasquez*, the defendant's 911 call made after the entire sequence of events had come to a final and fatal end and defendant fled the scene was inadmissible as untimely. What constitutes substantial contemporaneity is determined case-by-case, but it's unlikely to be much more than a matter of minutes. (See. For example, *People v Demand*, 268 AD2d 901 [3d dep't 2002], seven-minute delay after the event is over deemed too long).

A useful analogy of present description vs recent past recollection may be to compare a play-by-play announcer's description of a play ("Kelly in the K-Gun formation, empty backfield, Reed and Lofton split wide, quick snap-count, Kelly drops back, pumps left, throws right to Reed who's got it at the 40, to the 20, 10 ... TOUCHDOWN...CANYOUBELIEVEIT?"), to the post- game recap and analysis.

In order for a present sense impression to be admissible, there must also be independent corroborating evidence supporting both the accuracy of the statement and the fact that it was made contemporaneously with the event or immediately thereafter. How much is enough is also determined on a case-by-case basis (*People v Brown supra* at 734-735, 737).

An excited utterance is a statement about or relating to a startling or exciting event made by a participant in or a bystander to the event. As with a Present Sense Impression, the declarant may or may not be available or identified, but to

be admissible, the statement must have been made while the declarant is still under the stress of nervous excitement precipitated by the event. In that way, there is less chance that the statement is the product of studied reflection and possible fabrication. (*People v Johnson*, 1 NY3d 302 [2003]).

Excited Utterances are arguably less time sensitive than Present Sense Impressions, but the more time that passes and, more importantly, the more opportunity the declarant has to come under the influence of other people, the less likely will the statement be admitted. The idea is that a person who is still operating under the stress of excitement brought about by a startling event unaffected by too much time or the influence of others lacks sufficient capacity for deliberation and fabrication.

In assessing admissibility, courts will consider the nature of the event, the condition and demeanor of the declarant, the amount of time between the event and the statement and the declarant's activities in the interim. (See *People v Edwards* 47 NY2d 496 (1986), *People v Nieves* 67 NY2d 125 [1986], *Matter of Odalis F.* 85 AD3d 441 [1st dep't 2011]). Courts will also consider whether the statement is based on the declarant's personal knowledge. In *People v Cummings*, 31 NY3d 204 (2018), the Court of Appeals held that it was error to admit a 911 call reporting a drive-by shooting where an unidentified voice (not the caller's) could be heard saying in the background, "yo, it was Twanek," (defendant's first name) because the basis of knowledge underlying the statement had not been established. (See also *People v Hutchinson* 167 AD3d 653 [2d dep't 2018], statements made by the victim's wife on personal knowledge in kidnapping/robbery case admissible as excited utterances. Statements made to her by her husband were admitted for their effect on her state of mind).

Though excited utterances are usually spontaneous, the fact that a statement is made in response to a question will not necessarily render it inadmissible. In *People v Martinez* 166 AD3d 1292 (3d dep't 2018), for example, the court admitted statements of the victim made 30 minutes after he was shot to a police officer who accompanied him in the ambulance to the hospital. After the victim asked, "am I gonna die," the officer (who described the victim as "really upset... in a panic state...sweating really bad"), asked him, "who shot you?" The victim replied by naming the defendant. In the court's view, under these circumstances, the officer's question did not eliminate the stress of the excitement caused by the shooting. (In contrast, see *People v Santiago* 156 AD3d 1386 [4th dep't 2018], a murder case, in which the court admitted statements of the victim identifying the defendant as the shooter before the police and rescue personnel arrived on the scene).

In *People v Vasquez*, supra, the Court of Appeals distinguished Excited Utterances and Present Sense Impressions thusly:

“Excited utterances are the product of the declarant’s exposure to a startling or upsetting event that is sufficiently powerful to render the observer’s normal reflective processes inoperative. Present sense impressions..., in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant’s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory... Thus, while the key components of excited utterances are their spontaneity and the declarant’s excited mental state, the key components of present sense impressions are contemporaneity and corroboration.” (88 NY2d 561, 574-575).