

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Comment to Pa.R.E. 803(1) and 803(2)

The Committee on Rules of Evidence proposed the amendment of Pa.R.E. 803(1) and 803(2) governing the present sense impression and excited utterance exceptions to Pa.R.E. 802 for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **January 15, 2018**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Committee on Rules of Evidence,

John P. Krill, Jr.
Chair

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

REPORT

Proposed Amendment of Pa.R.E. 803(1) & 803(2)

The Committee on Rules of Evidence is considering amendment of Pennsylvania Rule of Evidence 803(1) and 803(2) to reflect additional requirements established by case law.

The Committee received a request for rulemaking seeking to abolish the present sense impression and excited utterance exceptions to the rule against hearsay. See Pa.R.E. 802, 803(1), and 803(2). The basis for that request was the lack of scientific evidence to prove that such statements are inherently reliable. See also *U.S. v. Boyd*, 742 F.3d 792, 799 (7th Cir. 2014) (Posner, J. concurring). The Committee was not inclined to undertake the requested rulemaking.

During consideration of this request, the Committee reviewed the case law in Pennsylvania regarding the necessity of corroborating evidence for these exceptions. In *Carney v. Pennsylvania Railroad Company*, 240 A.2d 71 (Pa. 1968), a case predating the Pennsylvania Rules of Evidence, the Court addressed the admissibility of an unidentified bystander's statement as an excited utterance pursuant to the *res gestae* exception to the hearsay rule. In *Carney*, a civil action was filed against a railroad company as the result of an accident where a railroad-switching engine struck an automobile in which the decedents were passengers. At trial, the statement of an unidentified bystander that the engine came out too fast and had no lights on was admitted into evidence through testimony of the investigating police officer.

Upon review, the Court stated: "It would be mere speculation and surmise on the part of the court and the jury as to whether or not the declarant, who was not present in court for cross-examination or subject to deposition or interrogatories by opposing counsel, actually perceived the engine coming out fast with no lights on it." *Id.* at 74. The Court held that the out-of-court assertion by the unidentified bystander did not demonstrate that the declarant actually viewed the event of which he spoke and, as such, that the admission of the statement constituted reversible error. In reaching its decision, the Court reasoned:

[T]he fundamental basis for admitting purely hearsay statements under the *res gestae* exception is the recognition that under certain circumstances, based on our experience, the utterances may be taken as particularly trustworthy and as an accurate reflection of what the declarant actually observed. See Wigmore, Evidence § 1747 (3d ed.) (1940). We are of the

opinion that out-of-court assertions made by unidentified bystanders who may or may not have actually witnessed the litigated event are not properly admissible as part of the *res gestae* because their admission would not be consonant with the underlying philosophy of the hearsay rule and the *res gestae* exception. The mere fact that the police officer inferred from the statements that the declarant must have witnessed the collision, or that the declarant said he witnessed the collision, does not lend any more credence or trustworthiness to the out-of-court statements. In order to justify the admissibility of such testimony, it is incumbent upon the party seeking its admission to persuasively and convincingly demonstrate by the use of other corroborating evidence that the declarant actually viewed the event of which he speaks.

Id. at 75. The excited utterance exception was later codified in 1998 as Pa.R.E. 803(2).

In *Commonwealth v. Upshur*, 764 A.2d 69 (Pa. Super. 2000) (*en banc*), the Superior Court considered whether a statement made to a police officer by an unidentified motorist who, within minutes after a shooting, provided a description of the perpetrator could be admitted as an excited utterance. Relying on *Carney*, a majority held that the exception was inapplicable because there was no independent evidence that the motorist actually witnessed the shooting. Notably, the court observed that a statement by the declarant that he saw the event was not sufficient. The dissent argued that the Supreme Court softened the “actually witnessed” standard via *Commonwealth v. Pronkoskie*, 383 A.2d 858, 861-62 (Pa. 1978) when it stated that “generally the proponent of the evidence need only establish that a declarant was in a position to view an incident.” The dissent went further and argued that the only matter that needed to be corroborated was whether the event itself occurred.

In sum, with *Upshur*, the state of the law is that the proponent of an excited utterance by an unidentified declarant needs to establish by independent evidence that the declarant actually witnessed the event or condition being perceived. Additionally, this is consistent with the requirement of Rule 602 for personal knowledge. Of note, the Comment to Rule 602 references both *Carney* and *Pronkoskie*. However, Rule 602 does not require other or independent evidence to prove that the witness possessed personal knowledge; rather, the witness can testify as to the basis of his or her personal knowledge.

In *Commonwealth v. Hood*, 872 A.2d 175 (Pa. Super. 2005), the proponent sought to admit two 911 calls from two unidentified callers that identified the shooter in a homicide based upon the excited utterance exception and, alternatively, the present sense exception pursuant to Pa.R.E. 803(1) (“A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”). This

case is remarkable insofar as the Superior Court extended the holding of *Upshur* requiring independent corroborating proof that the unidentified declarant actually viewed the event to the present sense impression exception. The court's analysis relied upon *Carney's* applicability to *res gestae* exceptions and the fact that the present sense impression was a *res gestae* exception prior to codification. Further, it would be consistent to require collaborative proof if the exception applies to matters that the unidentified declarant is "perceiving."

Currently, the strict application of Pa.R.E. 803(1) and Pa.R.E. 803(2) is independent of whether the declarant is identified. However, the case law, *supra*, has added a requirement of independent corroborating evidence that the declarant actually viewed the event when the declarant is unidentified. Accordingly, the Committee proposes amending Pa.R.E. 803(1) and Pa.R.E. 803(2) to reflect this requirement.

All comments, concerns, and suggestions concerning this proposal are welcome.

Rule 803. Exceptions to the Rule Against Hearsay - Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

Rule 803(1). Present Sense Impression

- (1) **Present Sense Impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it. **When the declarant is unidentified, the proponent shall show by independent corroborating evidence that the declarant actually perceived the event or condition.**

Comment

This rule [is identical to] **differs from** F.R.E. 803(1) **insofar as it requires independent corroborating evidence when the declarant is unidentified.** **See Commonwealth v. Hood, 872 A.2d 175 (Pa. Super. 2005).**

For this exception to apply, declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The trustworthiness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chance of premeditated prevarication or loss of memory.

Rule 803(2). Excited Utterance

- (2) **Excited Utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. **When the declarant is unidentified, the proponent shall show by independent corroborating evidence that the declarant actually perceived the startling event or condition.**

Comment

This rule [is identical to] **differs from** F.R.E. 803(2) **insofar as it requires independent corroborating evidence when the declarant is unidentified.** **See Commonwealth v. Upshur, 764 A.2d 69 (Pa. Super. 2000).**

This exception has a more narrow base than the exception for a present sense impression, because it requires an event or condition that is *startling*. However, it is

broader in scope because an excited utterance (1) need not describe or explain the startling event or condition; it need only *relate* to it, and (2) need not be made contemporaneously with, or immediately after, the startling event. It is sufficient if the stress of excitement created by the startling event or condition persists as a substantial factor in provoking the utterance.

There is no set time interval following a startling event or condition after which an utterance relating to it will be ineligible for exception to the hearsay rule as an excited utterance. In *Commonwealth v. Gore*, [262 Pa. Super. 540, 547,] 396 A.2d 1302, 1305 (Pa. Super. 1978), the court explained:

The declaration need not be strictly contemporaneous with the existing cause, nor is there a definite and fixed time limit.... Rather, each case must be judged on its own facts, and a lapse of time of several hours has not negated the characterization of a statement as an “excited utterance.” ... The crucial question, regardless of the time lapse, is whether, at the time the statement is made, the nervous excitement continues to dominate while the reflective processes remain in abeyance.

* * *

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised May 16, 2001, effective July 1, 2001; amended November 2, 2001, effective January 1, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013; amended November 7, 2016, effective January 8, 2016; **amended _____, 2018, effective _____, 2018.**

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions to the Comment for paragraph 25 published with the Court’s Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 revision of the Comment for paragraph 25 published with the Court’s Order at 30 Pa.B. 1641 (March 25, 2000).

Final Report explaining the May 16, 2001 revision of the Comment for paragraph 18 published with the Court’s Order at 31 Pa.B. 2789 (June 2, 2001).

Final Report explaining the November 2, 2001 amendments to paragraph 6 published with the Court’s Order at 31 Pa.B. 6384 (November 24, 2001).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 620 (February 2, 2013).

Final Report explaining the November 7, 2016 amendments to paragraph 6, 8, 10, and revision of the Comment for paragraph 7 and 9 published with the Court's Order at **46 Pa.B. 7436 (November 26, 2016)**.

Final Report explaining the _____, 2018 amendments to paragraph 1 and 2 published with the Court's Order at Pa.B. (_____, 2018).