



## Implementing Best Practices & Educating Lawyers: Teaching Skills and Professionalism Across the Curriculum

### Workshop 4E

## Life After Langdell: Simulations, Role-Plays, Writing Exercises, and “Uncasebooks” in Large Upper Level Courses

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Ric Simmons is an associate professor at the Moritz College of Law, The Ohio State University. He teaches Evidence, Criminal Law, Legal Writing, & the Prosecution Clinic. Along with co-author Deborah Merritt, Simmons wrote *Learning Evidence: From the Federal Rules to the Courtroom* (West 2009), an innovative “uncasebook” on Evidence. He also wrote an article about innovative methods of teaching Evidence, entitled *The Audience for an Evidence Class: Teaching to Litigators, Scholars, or Bar-Examinees?* (50 ST. LOUIS UNIV. LAW JOURNAL 1063 (2006)). His other scholarship includes articles on expert testimony, the Fourth Amendment, & private systems of criminal justice. Simmons graduated from Columbia Law School in 1994 & clerked for Judge Laughlin E. Waters of the Central District of California. He then spent 4 years as an assistant district attorney in New York City & taught at New York Univ. School of Law before joining Moritz in 2003. At Moritz, Simmons has won numerous teaching awards, including Morgan Shipman Outstanding Professor of the Year (2006), & Student Bar Association Upper Level Professor of the Year (2006 & 2008).

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Professor Christensen received her undergraduate degree from the University of Chicago, with High Honors, majoring in Chinese.

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## **Life After Langdell: Simulations, Role-Plays, Writing Exercises, and “Uncasebooks” in Large Upper-Level Courses**

Deborah Jones Merritt, Ric Simmons, and Leah Christensen

How can we teach upper-level courses without cases? To explore the possibilities, we reproduce here part of a chapter from *Learning Evidence*, a new “uncasebook” for the basic Evidence course. The full chapter is available as the sample chapter on [www.merrittevidence.com](http://www.merrittevidence.com).

Before our session, think about how you would build upon this text to stimulate student learning. At the workshop, we will demonstrate some of the techniques we have used, including simulations, written assignments, and “clicker questions.” To support post-workshop experimentation, we will give participants copies of the full Merritt & Simmons Teacher’s Manual. That manual contains additional teaching suggestions that can be used directly in the Evidence course or adapted for other courses. Participants who are unable to attend the live workshop may download a pdf version of the manual at the above website; simply register for access to the Teacher Resources.

### **Learning Evidence: From the Federal Rules to the Courtroom**

Deborah Jones Merritt & Ric Simmons (West 2009)

Excerpts from Chapter 40: Hearsay Exceptions—Present Sense Impressions  
And Excited Utterances

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**A. Introduction and Policy.** In this chapter we turn to Rule 803, which collects twenty-three different exceptions to the hearsay rule. Those exceptions share a common characteristic: a litigant may invoke them whether or not the declarant is available to testify. Parties who offer statements under Rule 803 need not call the declarant to the stand as Rule 801(d)(1) requires. Nor need they prove that the declarant is unavailable to testify, a hurdle that parties must clear when invoking the Rule 804 exceptions.

Rule 803’s first two exceptions are colorful ones. Rule 803(1) exempts “present sense impressions” from the hearsay ban, while 803(2) governs “excited utterances.”

Present sense impressions are statements that describe an event as it unfolds. Sportscasters specialize in these statements: whatever the sport, most of them note the athletes’ movements as they occur. Generations of baseball fans have heard monologues like: “He’s stepping up to the base, tapping his bat on the plate, and getting in position. The pitcher is winding up, and now here comes the pitch....”

Excited utterances come from excited people responding to a startling event. These statements are as familiar to us as sports broadcasts. Common excited utterances are: “Touchdown!” “Watch out for the car!” and “Ouch!”

Present sense impressions and excited utterances arise frequently in litigation. When a crime or accident occurs, the victim and eyewitnesses make numerous statements about the event. Someone may call 911 to report the trauma, others may exclaim to one another about what they see. Victims and bystanders also talk about the incident to police, rescuers, and family members. Parties often offer these statements in court as present sense impressions or excited utterances. Witnesses who did not perceive the event may testify about what the victims and bystanders said: “She shouted that a man in a red shirt was pulling out a gun!” “I heard him cry that the stairway was collapsing and crushing a young girl!”

The Rules of Evidence permit parties to introduce present sense impressions and excited utterances because these statements have special indicia of reliability; as a class, each type of statement is more reliable than the usual out-of-court statement. A person who describes an event as it unfolds before her lacks time to formulate a lie; the words match the events one by one. A present sense impression, therefore, is likely to offer the speaker’s accurate report of what he saw.

Similarly, a person responding to a startling event has little opportunity to concoct falsehoods. In the words of the Advisory Committee, the “condition of excitement...temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.”<sup>1</sup>

Although present sense impressions and excited utterances carry these indicia of reliability, we know from everyday experience that these statements are not *always* reliable. A wrongdoer confronted with evidence of her guilt may be startled, but immediately protest “It wasn’t me!” Under at least some circumstances, stress generates spontaneous reactions that are false rather than true. But the rationale behind hearsay exceptions does not assume that certain kinds of statements are *always* reliable, only that they are more reliable than most other hearsay statements, so that on balance it is better for the jurors to hear the statements than not to hear them. The jurors are free to reject the information if the circumstances persuade them that the declarant was lying or mistaken.

**B. The Rule.** Rule 803 opens with an introductory clause stating that all of its exceptions apply regardless of the declarant’s availability. This provision, as noted above, relieves parties of the burden of either producing the declarant or proving that he is unavailable. The rule then articulates the straightforward exceptions for present sense impressions and excited utterances.

**Rule 803: Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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<sup>1</sup> FED. R. EVID. 803(2) advisory committee note.

(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.

(2) **Excited utterance.** 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. . . .

**Rule 803(1)** imposes two conditions that define present sense impressions. **First**, the exception applies only to descriptions or explanations of an event, not to more complex analyses or interpretations. The latter statements involve more complex mental processes that, because they incorporate reflection, also allow time for deception.

**Second**, for a statement to qualify as a present sense impression, the declarant must make it while perceiving the event or “immediately thereafter.” We will explore the latter language further in the Courtroom section, but it usually provides no more than a few seconds of leeway. The time lapse must be short enough that the speaker has no time to create a lie.

**Rule 803(2)** contains a different set of prerequisites. **First**, the declarant must speak while excited by a startling event. The standard is subjective rather than objective: the particular declarant must have been excited by the event. The circumstances that support admission of an excited utterance, therefore, vary widely. Some people suffer extensive shock after witnessing a highway accident or homicide. Others, particularly professionals who respond to these incidents, are more controlled. The subjectivity of this standard relates to the rule’s underlying rationale: The excitement must be great enough that the particular declarant would have had difficulty formulating a lie while speaking.

**Second**, an excited utterance must “relate to” the startling event. This condition is easier to satisfy than 803(1)’s requirement that the statement describe or explain an event. An excited utterance may move beyond description by analyzing or interpreting the event. But the utterance still must relate to the provoking event. Unrelated comments are not admissible under this exception, even if the declarant makes them while still excited.

We will explore all of these requirements more fully in the next section. Meanwhile, note that some statements fall within both 803(1) and 803(2), some fall in just one category, and some—although occurring close in time to a startling event—fall in neither. . . .

**C. In the Courtroom.** In this section, we’ll first explore the prerequisites that parties must satisfy to introduce statements under 803(1) or 803(2). We’ll then examine the question of *how* parties establish these foundational facts and *who*—judge or jury—decides if they have been met.

**1. Description or Analysis?** A present sense impression must describe or explain, rather than analyze, a contemporaneous event. Analysis invokes more complex mental processes that may

provide an opportunity for deception; 803(1) excludes that type of observation. Here is a case that helps illustrate the distinction:

**Example:** Cargill, a company that grows and processes “Honeysuckle White” turkeys, received consumer reports that some its turkeys had spoiled. To investigate the spoilage, Cargill sent Everett Fine to check the turkeys at several stores supplied by Cargill. Fine examined the turkeys at these stores and made contemporaneous notes of the production codes on the labels of any spoiled turkeys. Cargill ultimately determined that Boag Cold Storage, a warehouse that stored the turkeys before distribution, had allowed a batch of turkeys to thaw and spoil. In a lawsuit against Boag for damages, Cargill attempted to introduce Fine’s notes to establish the distribution chain for the spoiled turkeys. Boag objected to the notes as hearsay.

**Analysis:** Fine’s notes were hearsay, but they fell within Rule 803(1)’s exception for present sense impressions. Fine recorded the production codes of the turkeys as he examined them in the store display cases. This contemporaneous recording of the notes described simply what Fine saw at the time he saw it.<sup>2</sup>

It is easy to imagine Fine including more than a simple list of production codes in his field notes. He might, for example, have jotted down his thoughts about why the turkeys had spoiled. A batch of spoiled turkeys with consecutive production codes might have prompted him to write: “Warehouse thaw? Check shipping dates & destinations.” This type of comment is not admissible as a present sense impression. A judge would redact statements like this unless the proponent could find another hearsay exception supporting admission.

The line between description and analysis can be blurry; it depends on the declarant’s words and the context. To distinguish these two categories, think about the policy motivating that exception. Statements of present sense impression should stick closely to the unfolding facts; the absence of analysis suggests that the speaker is not engaging the mental processes that might support deception. Critical commentary, analysis, and other more complex observations all imply a degree of mental engagement that could include deception.

**2. “Immediately Thereafter.”** The second prerequisite for statements admitted under Rule 803(1) is immediacy. The fact that these descriptions occur as an event unfolds enhances their reliability; the declarant has little time to reflect or fabricate.

Most present sense impressions occur contemporaneously with the events they describe. But Rule 803(1) grants a small amount of flexibility in timing: descriptions made “immediately” after an event may also be admissible.

This window is always small: usually only a few seconds, and never more than a few minutes. Courts, however, seem to tie the permissible amount of time to what the declarant was doing during those intervening minutes or seconds. If the declarant spent that time searching for a way

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<sup>2</sup> Cargill, Inc. v. Boag Cold Storage Warehouse, 71 F.3d 545, 554-55 (6th Cir. 1995).

to communicate information to others, a judge is more likely to admit the statement as occurring “immediately” after an event.

This makes some psychological sense. A bystander who spends a few minutes searching for a pen to record a license plate number, or for a phone to notify police about an accident, may stay focused on the task of remembering the critical information. The event may stay fresh in the bystander’s mind, and the effort to remember the event while finding a communication tool may keep the bystander too busy to fabricate. The jurors, moreover, can judge how the brief elapsed time might have affected the bystander’s memory of details.

Here is a case in which the court stretched “immediately thereafter” to eight minutes in order to accommodate an eyewitness’s search for a phone. This seems near the upper limit of what courts will accept as a time gap under Rule 803(1):

**Example:** David Miller was helping a stranded motorist on the shoulder of Interstate 95 when a trailer truck sideswiped them and their vehicles. The truck killed the stranded motorist and injured Miller. The truck driver did not stop, and Miller did not see the truck that hit him. County police, however, received an anonymous 911 call about eight minutes after the accident. The caller said:

“Good afternoon, I’m on Highway 95 South and I was in quite a bit of heavy traffic, when we noticed a truck which was pulling a trailer, but I couldn’t get a license number because of the trailer and the heavy traffic, but it said ‘Crown Amusements’ on the side of the truck and as he went by a broken down truck . . . he sideswiped and hit one of the young men. He made no attempt to stop. This was in the area of mile marker 99 or 98, perhaps between the two. Ah, this is my first opportunity to reach a phone.”

Miller sued the Crown Amusements Company for his injuries and moved to admit the recorded 911 statement to support his claim that the company’s driver caused his injuries. Crown Amusements objected to the recording as hearsay.

**Analysis:** The trial judge noted that the 911 call came from a gas station located at the highway exit closest to the accident scene. The timing of the call fit perfectly with a driver witnessing the accident and driving immediately to the nearest exit to make a call. No closer rest stops or call boxes existed on that stretch of Interstate 95, and this accident occurred before cell phones became common. Finding that the content of the statement showed the caller’s direct perception of the event and that the 8-minute gap stemmed entirely from the speaker’s focused search for a phone, the court admitted the statement as a present sense impression.<sup>3</sup>

Without the caller’s search for a phone, the court would have rejected this eight-minute gap as too long to accommodate a present sense impression. Even with the search, the rationale in cases like this rests on somewhat shaky grounds. Some eyewitnesses may concentrate on

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<sup>3</sup> Miller v. Crown Amusements, Inc., 821 F. Supp. 703 (S.D. Ga. 1993).

remembering the details of an event while they locate a means of communication, but others could use that interval to modify their account. Depending on local precedent, a persuasive attorney might persuade the trial judge to reject delayed reports of present sense impressions like the one in *Miller*.

**3. Startling Events and Excited Declarants.** Why wasn't the 911 call in the previous example an excited utterance? Many motorists, after seeing a large truck hit a person standing on the side of the road, would be distressed and excited. Even after eight minutes, they most likely would convey a sense of panic, urgency, and distress.

The 911 caller who aided Miller, however, was not particularly excited. She spoke calmly and related the details she had seen. She concluded the call by checking with the dispatcher to make sure he had all of the necessary information and thanking him for his assistance. She spoke as a concerned citizen doing her civic duty, not as someone making an excited utterance.

To gain admission under Rule 803(2), the declarant must make a statement with genuine excitement or stress. The reliability of these statements rests on the spontaneity prompted by startling events and the difficulty most people would have lying while responding to them. It is not enough, therefore, that an event would have excited a reasonable person; the declarant must have been subjectively excited while making the statement.

Conversely, some events are startling to particular people under specific circumstances. Statements made under those circumstances may be admissible under Rule 803(2), even though most individuals would have found the occurrence routine:

**Example:** Lois Marren, a secretary for the Metropolitan Sanitary District, suspected one of the District's purchasing agents, Thomas Moore, of rigging bids. Marren regularly searched Moore's office looking for evidence to support her suspicions. One day Marren called her colleague, Irene Marszalek, into Moore's office after Moore had left for the day. According to Marszalek, Marren was "just like jumping up and down" and talking "as if she had won a million dollars in a lottery." Marren told Marszalek, "I've found the evidence I've been waiting for for a long time." Marren had found some extra bid sheets, which demonstrated Moore's illegal behavior, in his wastebasket.

The government prosecuted Moore for fraud, but Marren died before trial. To establish the connection between Moore and the incriminating bid sheets, the prosecutor called Marszalek to testify about Marren's statement. Moore objected to this testimony as hearsay.

**Analysis:** Searching a wastebasket rarely leads to excitement, but in this case it did. The trial court properly admitted Marren's statement as an excited utterance. The court of appeals affirmed this ruling, rejecting Moore's claim that Marren could not have been excited because she had been searching for evidence of Moore's wrongdoing for a long time. Although Marren had been looking for evidence of this nature, the successful conclusion of a search can still be

exciting. “This is like panning for gold,” the court concluded. “Discovery may to one degree or another be expected; but it is always exciting.”<sup>4</sup>

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**5. How Long Does Excitement Last?** Rule 803(2) does not limit excited utterances to statements that occur during the startling event or “immediately thereafter.” Instead, the declarant must speak while still in an excited state. The duration of this excited period depends on the characteristics of the declarant, as well as of the startling event. Attacks, serious accidents, and similar events may generate stress that lasts for thirty minutes or longer:

**Example:** Xavier Giles was standing on a sidewalk near Earl Edwards. Giles watched as a van pulled up near Edwards, three men exited the van, and the men began speaking to Edwards. One of the men pulled out a gun and shot Edwards, killing him. Giles started to flee, and the gunman shot Giles in the hip. Giles continued to run until he collapsed a few blocks from the scene. An ambulance took Giles to the hospital, where police detective Jeremy Rosenberg interviewed him in the emergency room. When Rosenberg talked to Giles, about 40 minutes had elapsed since the shooting. Giles was lying on a bed in the emergency room, connected to both intravenous fluids and medical monitors; he was still bleeding from his gunshot wounds. The government prosecuted Ricardo Delvi for the shooting and moved for permission to call Rosenberg as a witness. Rosenberg intended to testify about comments Giles made to him in the emergency room; these comments helped link Delvi to the crime.

**Analysis:** The trial judge admitted Giles’ statement as an excited utterance. Although the statement occurred forty minutes after the shooting, Giles had suffered a series of traumatic events: He had witnessed a murder, suffered a serious wound, run several blocks from his assailants, and been transported to an emergency room. At the time he made his statement, he was still bleeding from his wounds and a witness described him as excited. Under these circumstances, Giles was not in a mental state where he was likely to fabricate a statement.<sup>5</sup>

In other cases, a similar amount of time may be enough to eliminate the declarant’s excited condition:

**Example:** John McCrery, a hospital patient, suffered a cardiac arrest while in the hospital. His attending physician, Dr. Lucy Goodenday, resuscitated him, intubated him, and connected him to a respirator. Except for a few moments, McCrery remained conscious during these events. After McCrery stabilized, Goodenday left him to attend other patients. She returned two hours later

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<sup>4</sup> United States v. Moore, 791 F.2d 566, 571 (7th Cir. 1986).

<sup>5</sup> United States v. Delvi, 275 F. Supp. 2d 412 (S.D.N.Y. 2003). The defendant in *Delvi* also objected that Giles had snorted heroin while he was running from his assailant. The district judge, however, found that this did not affect Giles’ level of excitement. Giles was a heroin addict; his use of the drug shortly after the shooting was an automatic response to his stress and pain. Many victims of accidents or assaults make statements that count as excited utterances after receiving narcotics for pain. The fact that Giles had administered his own medication, the court concluded, did not affect the nature of his excited utterance.

and, after ascertaining that McCrery appeared calm and had a normal pulse, she asked him whether he had received any medications before the heart attack. McCrery nodded yes and, in response to further questions, indicated that he had received medication intravenously. When Goodenday asked who had given McCrery the medication, he wrote the first name of his nurse, “Pia,” on a piece of paper.

The government prosecuted Pia Narciso for killing or attempting to kill McCrery and numerous other patients. McCrery died before trial, and the prosecutor attempted to introduce his handwritten note, arguing that it was an excited utterance.

**Analysis:** The trial judge properly rejected this argument. Although McCrery suffered a very stressful event—a heart attack and resuscitation—he appeared to have recovered from that event by the time Goodenday talked with him two hours later. He appeared calm and his pulse was normal. Under these circumstances, he had sufficient opportunity for reflection and his note did not bear the indicia of reliability that excited utterances convey.<sup>6</sup>

The existence of excitement sufficient to support an excited utterance, like most of the other predicates for admission of statements under 803(1) and (2), depends on the facts of each case. Thoughtful advocacy may sway the decision in close cases.

**6. Foundation, Foundation, Foundation.** The key to winning admission of an excited utterance or present sense impression is to lay the proper foundation. How does a proponent persuade the judge that a statement conveys a present sense impression or constitutes an excited utterance? What types of evidence establish these facts?

Remember that the Rules of Evidence do not apply to preliminary determinations. The proponent, therefore, has considerable leeway in establishing foundation facts. In particular, the proponent may offer the statement itself as evidence that the declarant was excited or reciting a present sense impression. Indeed, the content of the statement alone may be sufficient to establish one of these foundation facts.

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Look back at the examples summarized in this chapter and consider what types of evidence the parties might have introduced to support or oppose admission of the hearsay statement in each case.

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<sup>6</sup> United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977). The *Narciso* case, which included two nurses as defendants, was a notorious prosecution in the 1970s. The FBI investigated deaths at an Ann Arbor hospital when the number of fatalities jumped suspiciously in 1975. Their investigation led to prosecution of two Filipina nurses, Narciso and Leonora Perez. The case against the nurses was circumstantial and tainted by racist comments. A jury convicted Narciso and Perez of poisoning, although not of murder. After lengthy consideration, the trial judge set aside the verdicts and ordered a new trial in the interests of justice. The government then dropped the case.