

## FINAL REPORT<sup>1</sup>

### REVISION OF THE COMMENT TO RULE OF EVIDENCE 613 AMENDMENT OF RULES OF EVIDENCE 803.1 & 804

On March 1, 2017, effective April 1, 2017, upon the joint recommendation of the Committee on Rules of Evidence, the Court adopted a revision of the Comment to Pa.R.E. 613 and amendment of Pa.R.E. 803.1 to add a new paragraph (4) and Pa.R.E. 804(a)(3).

As described in the Publication Report, the Committee proposed amendments to protect against the “turncoat witness” who once provided a statement, but now seeks to deprive the use of this evidence at trial by feigning memory loss. “[T]he unwilling witness often takes refuge in a failure to remember.” 3A J. Wigmore, Evidence § 1043, at 1061.

New paragraph (4) to Pa.R.E. 803.1 excepts from the hearsay rule a prior statement when the declarant-witness claims an inability to remember the substance of the statement and the prior statement was given under circumstances identical to paragraph (1).

Pa.R.E. 804(a)(3), which considers a declarant unavailable to testify as a witness if the declarant testifies to not remembering the subject matter at issue, has been amended to recognize the new exception in Pa.R.E. 803.1(4). However, this new exception is not applicable if the court finds the claimed inability to remember to be credible. A witness with a credible inability to remember the subject matter at issue may be subject to Pa.R.E. 804.

Notwithstanding a witness’s claimed memory loss about the subject matter of the prior statement, the witness must still be subject to cross-examination about the statement pursuant to Pa.R.E. 803.1. Further, readers should note that these amendments do not attempt to codify or reflect requirements under the Confrontation Clause. See Pa.R.E. 802, *Comment*.

Relatedly, the Comment to Pa.R.E. 613 was revised to clarify that the criteria set forth in Pa.R.E. 803.1(1)(A)-(C) is not applicable to the use of inconsistent statements for impeachment pursuant to Rule 613.

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<sup>1</sup> The Committee’s Final Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee’s Comments or the contents of the Committee’s explanatory Final Reports.