

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

REPORT

Proposed Amendment of Pa.R.E. 803.1 and Pa.R.E. 804

By notice of proposed rulemaking at 42 Pa.B. 6781 (November 3, 2012), the Committee on Rules of Evidence sought to recommend amendment of Pa.R.E. 803.1(1) to except from the rule against hearsay a prior statement by a witness when the witness is unable to recall the prior statement. The Committee received comments expressing concern that the proposal did not discern between feigned and genuine memory loss. The proposal raised an additional concern as to whether the admission of prior statements by a declarant-witness having a genuine memory loss might implicate a defendant's right of confrontation in a criminal trial.

In light of these concerns, the Committee proposes amendment of Pa.R.E. 803.1 to add new paragraph (4). This amendment is intended 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) would exempt from the hearsay rule certain prior statements when the declarant-witness claims an inability to remember the substance of the statement and the claim is unsubstantiated. Whether the witness's claimed inability to remember is substantiated is a preliminary question to be resolved by the court pursuant to Pa.R.E. 104(a). It is anticipated that claims of memory loss can often be evaluated based upon the witness's demeanor and explanation for the memory loss. Factors in evaluating the genuineness of claimed memory loss may involve:

- The apparent mental acuity of the witness at the time of testimony.
- The extent or selectivity to which memory loss is claimed.
- The existence of an interceding illness, injury, or condition that may affect the witness's ability to recall past matters.
- The length of time between the matter witnessed and the testimony.
- Whether the matter witnessed was commonplace or extraordinary.
- The significance of the matter later impressed upon the witness.

- The existence of any motive for the witness to feign memory loss.

Additionally, new paragraph (4) would require the prior statement to be given under circumstances identical to paragraph (1). The Court has previously held that hearsay declarations under circumstances such as Rule 803.1(1)(a), (b), and (c) “are demonstrably reliable and trustworthy.” *Commonwealth v. Lively*, 610 A.2d 7, 10 (Pa. 1992); see also *Commonwealth v. Chmiel*, 738 A.2d 406, 419 (Pa. 1999) (describing *Lively* as holding that a prior inconsistent statement of a non-party witness may be used as substantive evidence only if it was given under highly reliable circumstances); *Commonwealth v. Hanible*, 30 A.3d 426, 445 n. 15 (Pa. 2011) (describing Rule 803.1(1) as mirroring *Lively*).

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. This requirement is not solely rule-based; it is also a principle recognized in case law and constitutional analysis. Therefore, the Committee proposes a Comment to Pa.R.E. 803.1 referencing cases wherein witnesses have been found to be unavailable for cross-examination.

“Ordinarily a witness is regarded as ‘subject to cross-examination’ when he is placed on the stand, under oath, and responds willingly to questions.” *U.S. v. Owens*, 484 U.S. 554, 561 (1988) (discussing F.R.E. 801(d)(1)(C)). This Committee wishes to illuminate that the required scope for which the witness must be available for cross-examination under Pa.R.E. 803.1 is the prior statement, not the subject matter at issue. Cf. Pa.R.E. 804(a)(3) (witness does remember the subject matter). Cross-examination of the witness may include the circumstances in which the statement was given, the witness’s state of mind, and other matters that may have bearing on the weight and credibility of the prior statement.

The Committee also proposes to amend 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. By reference to Pa.R.E. 803.1(4), the amendment would create an exception to this criteria when the witness’s claim to not remember the subject matter of a prior statement is unsubstantiated. A witness with a genuine or substantiated inability to remember the subject matter at issue would remain subject to Pa.R.E. 804(a)(3).

The Committee invites all comments, objections, and suggestions concerning this proposal.