

SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

Proposed Amendment of Rule of Evidence 803.1(1)

The Committee on Rules of Evidence is publishing for comment a proposal to amend Rule of Evidence 803.1(1), as more fully discussed in the accompanying Report. This proposal has not been submitted to the Supreme Court of Pennsylvania for review.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel:

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no later than January 2, 2013.

By the Committee on Rules of Evidence,

CHRISTOPHER H. CONNORS, ESQ. –
CHAIR

Rule 803.1. Hearsay Exceptions; Testimony of Declarant Necessary.

The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement:

- (1) Inconsistent Statement of Witness. A statement by declarant that is inconsistent with the declarant's testimony **or concerns a matter the declarant cannot recall**, and (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.

Comment

Pa.R.E. 803.1(1) is consistent with prior Pennsylvania case law. See *Commonwealth v. Brady*, **510 Pa. 123**, 507 A.2d 66 ([Pa.]1986) (seminal case that overruled close to two centuries of decisional law in Pennsylvania and held that the recorded statement of a witness to a murder, inconsistent with her testimony at trial, was properly admitted as substantive evidence, excepted to the hearsay rule); *Commonwealth v. Lively*, **530 Pa. 464**, 610 A.2d 7 ([Pa.]1992). To qualify as a "verbatim contemporaneous recording of an oral statement," the "recording" must be an electronic, audiotaped, or videotaped recording. See *Commonwealth v. Wilson*, **550 Pa. 518**, 707 A.2d 1114 ([Pa.]1998). Inconsistent statements of a witness that do not qualify as exceptions to the hearsay rule may still be introduced to impeach the credibility of the witness. See Pa.R.E. 613.

REPORT

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Courts have struggled in criminal cases with the turncoat or intimidated witness - a witness who, at the trial, testifies inconsistently with his or her prior statement or who testifies that he or she cannot remember the matters contained in a prior statement given under reliable and trustworthy circumstances. See also 42 Pa. B. 4131, 4153 (July 7, 2012) (Criminal Procedural Rules Committee Report discussing reported witness intimidation in the First Judicial District); *Free to Tell The Truth - Preventing and Combating Intimidation in Court: A Bench Book for Pennsylvania Judges*, (Harrisburg, Pennsylvania: Pennsylvania Commission on Crime and Delinquency, 2011).

While the current version of Pennsylvania Rule of Evidence 803.1(1) establishes a remedy for witnesses who might be inclined or persuaded to change their testimony from prior statements, the Rule does not explicitly address claims of memory loss. In the absence of such specificity, the bench and bar are required to consider the common law to determine matters of admissibility when a witness asserts a failed recollection of matters contained in prior statements.

In *Commonwealth v. Reid*, 533 Pa. 508, 626 A.2d 118 (1993), a victim of a gunshot gave police three statements identifying the defendant as the shooter. At trial, the witness-victim denied the defendant was the perpetrator and claimed that he could not remember many of the questions or his answers given in his prior statements. See also *Commonwealth v. Bibbs*, 970 A.2d 440 (Pa. Super. 2009) (citing *Commonwealth v. Sherman*, 488 A.2d 348, 350 (Pa. 1985)) (partial memory loss allows witness' prior inconsistent statements to be admitted as substantive evidence). The Court held that his prior statements were admissible as substantive evidence. See also *Commonwealth v. Burgos*, 530 Pa. 473, 610 A.2d 11, 14 (1992) (quoting *Commonwealth v. Brady*, 510 Pa. 123, 507 A.2d 66 (1986)). Although the corresponding Federal Rule of Evidence, F.R.E. 801(d)(1), is not identical to Pennsylvania Rule of Evidence 803.1(1), some federal courts have adopted a similar approach to claimed memory loss and inconsistent statements. See, e.g., *U.S. v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980) (“[I]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.”); *U.S. v. Gajo*, 290 F.3d. 922, 930-932 (7th Cir. 2002).

The Committee has endeavored to propose an amendment to Rule 803.1(1) codifying the case law by incorporating claimed memory loss into the inconsistent statement hearsay exception:

Inconsistent Statement of Witness. A statement by declarant that is inconsistent with the declarant's testimony **or concerns a matter the declarant cannot recall**, and (a) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) is a writing signed and adopted by the declarant, or (c) is a verbatim contemporaneous recording of an oral statement.

The Committee acknowledges that some jurisdictions have attempted to parse claimed memory loss into two further categories, which can be described as genuine versus feigned memory loss, with the latter resulting in the admission of the prior statements as inconsistent with present testimony. See, e.g., *U.S. v. Mornan*, 413 F.3d 372, 379 (3d Cir. 2005); *State v. Just*, 675 P.2d 1353, 1365 (Az. Ct. 1984); *Corbett v. State*, 746 A.2d 954, 960-964 (Md. App. 2000). The proposed amendment does not distinguish between feigned and genuine memory loss.

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*, 530 Pa. 464, 471, 610 A.2d 7, 10 (1992); see also *Commonwealth v. Chmiel*, 558 Pa. 478, 503, 738 A.2d 406, 419 (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*, __ Pa. __, __ n. 15, 30 A.3d 426, 445 n. 15 (2011) (describing Rule 803.1(1) as mirroring *Lively*).

Further, a witness with a failed recollection is still available to be cross-examined, including "the very fact that he has a bad memory." *U.S. v. Owens*, 484 U.S. 554, 559 (1988) (discussing in terms of the Confrontation Clause that a claimed lack of memory does not deny the opportunity to cross-examine); *Commonwealth v. Mollett*, 5 A.3d 291, 308 (Pa. Super. 2010) (same); see also *Commonwealth v. Brown*, __ A.3d __, 2012 WL 3570661 (Pa. 2012) (discussing the availability of the declarant of a prior statement, later recanted at trial, for cross-examination).

The Committee observes that Rule 803.1(3) serves a complementary purpose when the memory of a witness, who cannot independently recall a prior statement, can be refreshed with the prior statement. See Pa.R.E. 612. If the witness continues to have insufficient recollection, then the proponent can offer the prior statement as a recorded recollection, provided the witness vouches for the accuracy of the written memorandum. See Pa.R.E. 803.1(3); *Commonwealth v. Cargo*, 498 Pa. 5, 10, 444 A.2d 639, 641 (1982). As an aside, it should be noted that Rule 803.1(3) does not distinguish between feigned or genuine memory loss.

The operative effect of proposed Rule 803.1(1) is to permit the admission of certain prior statements (e.g., previously given under oath at a proceeding, signed and adopted by declarant, or a verbatim contemporaneous record) regardless of whether the witness can vouch for their accuracy given the reliability ascribed to the manner of memorialization.

Notwithstanding the inherent reliability of the prior statements, the Committee recognizes that the prior statements would need to be authenticated if the declarant is unwilling or unable to do so as witness. Absent the declarant's testimony, authentication is intended to assure that the prior statement is what the proponent claims. See, e.g., Pa.R.E. 901(a).

Of course, nothing in this Rule is intended to preclude a challenge to a witness' competency to testify because of mental condition or immaturity that has impaired memory. See Pa.R.E. 601(b)(3); see also, e.g., *Commonwealth v. Counterman*, 553 Pa. 370, 393, 719 A.2d 284, 295-296 (1998); *Commonwealth v. Boich*, 982 A.2d 102, 109-110 (Pa. Super. 2009).