

**Proposed Adoption of Pa.R.Crim.P. 574
Proposed Amendment of Comment to Pa.R.E. 802**

INTRODUCTION

The Criminal Procedural Rules Committee is considering a recommendation to the Supreme Court of Pennsylvania adopt Rule of Criminal Procedure 574 (Forensic Laboratory Report; Certification in Lieu of Expert Report) to provide procedures for the admissibility of forensic laboratory reports in lieu of expert testimony. The Committee on Rules of Evidence is considering a recommendation to the Supreme Court to amend the Comment to Rule of Evidence 802 to identify and describe Rule of Criminal Procedure 574. This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The following explanatory Report highlights the Committees' considerations in formulating this proposal. Please note that the Committees' Reports should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt a Committee's Comments or the contents of the explanatory Reports.

The text of the proposed amendments to the rule precedes the Report. Additions are shown in bold and are underlined; deletions are in bold and brackets.

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

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Criminal Procedural Rules Committee
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no later than Monday, February 18, 2013.

December 26, 2012

*Hon. Nancy L. Butts, Vice Chair
Criminal Procedural Rules Committee*

*Christopher H. Connors, Chair
Committee on Rules of Evidence*

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RULES OF CRIMINAL PROCEDURE

(This is an entirely new rule.)

RULE 574. FORENSIC LABORATORY REPORT; CERTIFICATION IN LIEU OF EXPERT TESTIMONY

(A) In any trial, the attorney for the Commonwealth may seek to offer into evidence a forensic laboratory report supported by a certification, as provided in paragraph (D), in lieu of testimony by the person who performed the analysis or examination that is the subject of the report.

(B) Notice

(1) If the attorney for the Commonwealth intends to offer the report as provided in paragraph (A) as evidence at trial, the attorney for the Commonwealth shall serve upon the defendant's attorney, or if unrepresented, the defendant a written notice of that fact at the time of the disclosure of the report but no later than 20 days prior to the start of trial.

(2) A copy of the report shall be provided to the defendant prior to or contemporaneously with the notice.

(3) Except as provided in paragraph (C), the report and certification are admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified.

(C) Demand

(1) No later than 10 days following receipt of the notice provided in paragraph (B), the defendant's attorney, or if unrepresented, the defendant may serve upon the attorney of the Commonwealth, a written demand for the person who performed the analysis or examination that is the subject of the report to testify at trial.

(2) If a written demand is filed, the report and certificate are not admissible under paragraph (B)(3) unless the analyst testifies.

(3) If no demand for live testimony is made to the use of the laboratory report and certificate within the time allowed by this section, the report and certificate are admissible in evidence.

(D) Certification

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(1) The analyst who performed the analysis or examination that is the subject of the report shall complete a certificate in which the analyst shall state:

(a) that he or she is qualified by education, training, and experience to perform the analysis;

(b) a description of his or her regular duties;

(c) the name and location of the laboratory where the analysis was performed; and

(d) that the tests were performed under industry-approved procedures or standards and the report accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis.

(2) An analyst employed by a laboratory that is accredited by a state, national, or international accreditation entity may, in lieu of the required certificate under paragraph (D)(1), submit a copy of the laboratory's accreditation certificate.

COMMENT: This rule was adopted in 2013 to address the issues raised by the U.S. Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), that held that the 6th amendment confrontation right precluded presentation of laboratory reports without a live witness testifying in the trial. In *Melendez-Diaz*, the U.S. Supreme Court noted with approval the use of "notice and demand" procedures as a means of permitting routine laboratory reports to be admitted without the expense of supporting the admission by live expert testimony while protecting a defendant's confrontation rights.

This rule provides a "notice and demand" procedure for Pennsylvania. Under the rule, the attorney for the Commonwealth may seek to admit a forensic laboratory report as evidence without the testimony of the analyst who performed the testing that was the subject of the report if notice requirements are met and no demand for the presence of the analyst is made. If the defendant makes such a demand, the analyst would be required to testify before the report could be admitted into evidence.

Nothing in this rule is intended to preclude a stipulation agreed to by the parties for the admission of the laboratory report without the analyst's presence.

For cause shown, the judge may extend the time period of filing a demand for live testimony or grant a continuance of the trial.

For purposes of paragraph (D)(2) of this rule, a laboratory is "accredited" when its management, personnel, quality system, operational and technical procedures, equipment and physical facilities meet standards established by a recognized state, national, or international accrediting organization such as the American Society of Crime Laboratory Directors/Laboratory Accrediting Board (ASCLD/LAB) or Forensic Quality Services - International (FQS-I).

NOTE: New Rule 574 adopted _____, 2012, effective _____, 2012.

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COMMITTEE EXPLANATORY REPORTS:

Report explaining new Rule 574 providing for notice and demand procedures regarding forensic laboratory reports published for comment at 43 Pa.B. (_____, 2013).

RULES OF EVIDENCE (RESTYLED)

Rule 802. The Rule Against Hearsay

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

Comment

Pa.R.E. 802 differs from F.R.E. 802 in that it refers to other rules prescribed by the Pennsylvania Supreme Court, and to statutes in general, rather than federal statutes.

Often, hearsay will be admissible under an exception provided by these rules. The organization of the Pennsylvania Rules of Evidence generally follows the organization of the Federal Rules of Evidence, but the Pennsylvania Rules' organization of the exceptions to the hearsay rule is somewhat different than the federal organization. There are three rules which contain the exceptions: Pa.R.E. 803 Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness, Pa.R.E. 803.1 Exceptions to the Rule Against Hearsay – Testimony of Declarant Necessary, and Pa.R.E. 804 Exceptions to the Rule Against Hearsay - When the Declarant is Unavailable as a Witness.

On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C.P. No. 4020, or a video deposition of an expert witness may be admitted pursuant to Pa.R.C.P. No. 4017.1(g). In preliminary hearings in criminal cases, the court may consider hearsay evidence pursuant to Pa.R.Crim.P. 542(E) and 1003(E). **In criminal trials, Pa.R.Crim.P. 574 provides a procedure for the admission of forensic laboratory reports supported by a certification.**

Also, hearsay may be admitted pursuant to a state statute. Examples include:

1. A public record may be admitted pursuant to 42 Pa.C.S. § 6104. See Comment to Pa.R.E. 803(8) (Not Adopted).
2. A record of vital statistics may be admitted pursuant to 35 P.S. § 450.810. See *Comment* to Pa.R.E. 803(9) (Not Adopted).

3. In a civil case, a deposition of a licensed physician may be admitted pursuant to 42 Pa.C.S. § 5936.
4. In a criminal case, a deposition of a witness may be admitted pursuant to 42 Pa.C.S. § 5919.
5. In a criminal or civil case, an out-of-court statement of a witness 12 years of age or younger, describing certain kinds of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5985.1.
6. In a dependency hearing, an out-of-court statement of a witness under 16 years of age, describing certain types of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5986.
7. In a prosecution for speeding under the Pennsylvania Vehicle Code, a certificate of accuracy of an electronic speed timing device (radar) from a calibration and testing station appointed by the Pennsylvania Department of Motor Vehicles may be admitted pursuant to 75 Pa.C.S. § 3368(d).

On rare occasion, hearsay may be admitted pursuant to a federal statute. For example, when a person brings a civil action, in either federal or state court, against a common carrier to enforce an order of the Interstate Commerce Commission requiring the payment of damages, the findings and order of the Commission may be introduced as evidence of the facts stated in them. 49 U.S.C. § 11704(d)(1).

Hearsay Exceptions and the Right of Confrontation of a Defendant in a Criminal Case

The exceptions to the hearsay rule in Rules 803, 803.1, and 804 and the exceptions provided by other rules or by statute are applicable both in civil and criminal cases. In a criminal case, however, hearsay that is offered against a defendant under an exception from the hearsay rule provided by these rules or by another rule or statute may sometimes be excluded because its admission would violate the defendant's right "to be confronted with the witnesses against him" under the Sixth Amendment of the United States Constitution, or "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

The relationship between the hearsay rule and the Confrontation Clause in the Sixth Amendment was explained by the United States Supreme Court in *California v. Green*, 399 U.S. 149, 155-56 (1970):

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception....

Given the similarity of the values protected, however, the modification of a State's hearsay rules to create new exceptions for the admission of evidence against a defendant, will often raise questions of compatibility with the defendant's constitutional right to confrontation.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court, overruling its prior opinion in *Ohio v. Roberts*, 448 U.S. 56 (1980), interpreted the Confrontation Clause to prohibit the introduction of "testimonial" hearsay from an unavailable witness against a defendant in a criminal case unless the defendant had an opportunity to confront and cross-examine the declarant, regardless of its exception from the hearsay rule, except, perhaps, if the hearsay qualifies as a dying declaration (Pa.R.E. 804(b)(2)).

In short, when hearsay is offered against a defendant in a criminal case, the defendant may interpose three separate objections: (1) admission of the evidence would violate the hearsay rule, (2) admission of the evidence would violate defendant's right to confront the witnesses against him under the Sixth Amendment of the United States Constitution, and (3) admission of the evidence would violate defendant's right "to be confronted with the witnesses against him" under Article I, § 9 of the Pennsylvania Constitution.

Pennsylvania Rule of Criminal Procedure 574 provides a mechanism for the admission of a forensic laboratory report supported by a certification. This Rule provides a defendant an opportunity to exercise the right of confrontation and to object to the report on hearsay grounds. Following pre-trial notice by the prosecution, and in the absence of a demand by defendant for declarant's live testimony, the Rule permits the admission of a properly certified forensic laboratory report at trial. See Pa.R.Crim.P. 574.

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Committee Explanatory Reports:

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Final Report explaining the _____, 2013 revision of the Comment
published with the Court's Order at 43 Pa.B. (_____ . 2013).

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JOINT REPORT

Proposed New Pa.R.Crim.P. 574 and
Proposed Revision of the Comment to Pa.R.E. 802

FORENSIC LABORATORY REPORT; CERTIFICATION IN LIEU OF EXPERT TESTIMONY

Background

The Criminal Procedural Rules Committee and the Committee on Rules of Evidence were requested by the Pennsylvania District Attorneys Association to consider a “notice and demand” rule of criminal procedure or evidence.

This request arose from the 2009 United States Supreme Court case of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) in which the Court held that the evidentiary use of a report of a forensic test on an alleged controlled substance violated the defendant’s right to confront the witness against him because the preparer of the report did not testify at the defendant’s trial. The Court rejected the prosecution’s argument that the report was admissible as a business record or official record, and the argument that compelling the appearance of the person who performed the test was time consuming and wasteful since, in the overwhelming majority of cases, the defendant would not contest the accuracy of the test.

The Court in *Melendez-Diaz* noted with approval “simple” notice-and-demand procedures that require the prosecution to give notice to the defense of its intent to introduce evidence without calling the necessary witnesses under the Confrontation Clause. The defense then must give notice to the prosecution that it is demanding that the witness testify and be subject to cross-examination.

After discussing the Association’s letter at their respective meetings, the Committees formed a joint subcommittee to investigate whether and how to proceed. The subcommittee found merit in a “notice and demand” procedure that would provide a mechanism for defendants to exercise their rights under the Confrontation Clause and

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to provide for the admissibility of forensic laboratory reports in lieu of expert testimony. The claimed benefit of a notice and demand procedure would be a lesser burden on the Commonwealth in scheduling these witnesses, fewer expenses associated with attendance of these witnesses at trial, and increased availability of these analysts and technicians to perform lab/field work rather than appearing in court. Additionally, the procedure would provide a timely and structured mechanism for defendants to raise a Confrontation Clause demand. See *Melendez-Diaz*, 557 U.S. at 327.

Based upon the recommendations of the joint subcommittee, the Committees approved for publication proposed new Rule of Criminal Procedure 574 and correlative amendment of the Comment to Rule of Evidence 802.

Proposed Rule of Criminal Procedure 574

In developing proposed new Rule of Criminal Procedure 574,¹ a number of other jurisdictions' "notice and demand" statutes and rules were considered, including recently adopted Michigan Court Rule 6.202. Proposed new Rule 574 is modeled on portions of the Michigan rule and provides for the prosecution's admission of forensic laboratory reports at a criminal trial in lieu of the live testimony of the person who performed the laboratory analysis or examination. This admission would be predicated on compliance with three elements: 1) notice; 2) demand; and 3) certification.

Unlike the Michigan rule that requires notice to be given in every case, use of this procedure would be optional with the prosecution. The Committees have concluded that mandatory use of the notice procedure would not be efficient in many cases, especially in larger counties where stipulations of admissibility are common and producing an expert to testify is relatively easy in those cases in which a stipulation

¹ Currently, Rule 574 is not an active rule number, the previous version of that rule having been rescinded in 2004. As part of this proposal, new Rule 574 would be placed in the more general, introductory portion of Part F (Pretrial Procedures) rather than in its current location in Part F(1) (Motions Procedures) since the proposed notice and demand procedures would not be considered motions.

cannot be reached. In other words, a live witness would be necessary in order to have forensic reports admitted but the Commonwealth could rely on either traditional stipulations or the new notice procedures to be able to introduce the report without a witness. The new rule is not intended to preclude or discourage the use of stipulations.

In order to utilize the proposed notice procedure, the attorney for the Commonwealth would be required to serve defense counsel, or defendant if unrepresented, written notice of the intention to invoke Rule 574 to admit the report without accompanying live testimony. This notice, together with the forensic laboratory report if not already provided, must be given at least 20 days before the start of defendant's trial. The Committees anticipate that the practice in many judicial districts will be to provide the notice and report during the discovery process, which generally occurs prior to the 20-day notice deadline.

No later than 10 days after receiving the prosecution's notice, the defendant's attorney, or the defendant if unrepresented, would have the option of serving a written demand on the prosecution that the witness appear and testify at trial. Such a demand would preclude the admission of the forensic laboratory report or certificate absent an analyst's testimony. This is unlike the Michigan rule that speaks in terms of a defense "objection" rather than "demand," with the implication that the trial judge could overrule the objection.

If no demand is made, then the report and certificate are admissible without witness testimony. However, as noted in the *Comment* to Rule 574, for cause shown, the judge would have the discretion to extend the time period of filing a demand for live testimony or grant a continuance of the trial.

The new rule also would require that the analyst who performed the analysis or examination to complete a certificate detailing his or her qualifications, job description, laboratory information, and the procedures and standards in which the analysis or examination were conducted. However, if the laboratory is properly accredited, a copy of the accreditation certificate may be submitted in lieu of the analyst's certification. The *Comment* would contain a definition of "accreditation."

Proposed Revision of the *Comment* to Rule of Evidence 802

As explained in the *Comments*, the Rules of Evidence do not attempt to codify requirements under the Confrontation Clause. See Pa.R.E. 802, *Comment*. Moreover, the Rules of Evidence acknowledge that evidentiary rules may exist in other bodies of rules. *Id.* Proposed Criminal Rule of Procedure 574 would operate both as a “notice and demand” mechanism to satisfy the requirements of the Confrontation Clause and as a new rule of evidence that would permit the admission of laboratory reports in criminal trials.

Accordingly, the *Comment* to Rule of Evidence 802 is proposed to be amended to recognize this new Rule and describe its operation.