SUPREME COURT OF PENNSYLVANIA
CRIMINAL PROCEDURAL RULES COMMITTEE
NOTICE OF PROPOSED RULEMAKING

Proposed Revision of the Comment to Pa.R.Crim.P. 578

The Criminal Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the revision of the *Comment* to Rule 578 (Omnibus Pretrial Motion for Relief) for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635
fax: (717) 231-9521
e-mail: criminalrules@pacourts.us

All communications in reference to the proposal should be received by **no later than Friday, February 24, 2017.** E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

January 10, 2017 *BY THE CRIMINAL PROCEDURAL RULES COMMITTEE:*

Charles A. Ehrlich
Chair

RULE 578. OMNIBUS PRETRIAL MOTION FOR RELIEF.

Unless otherwise required in the interests of justice, all pretrial requests for relief shall be included in one omnibus motion.

COMMENT: Types of relief appropriate for the omnibus pretrial motions include the following requests:

(1) for continuance;
(2) for severance and joinder or consolidation;
(3) for suppression of evidence;
(4) for psychiatric examination;
(5) to quash or dismiss an information;
(6) for change of venue or venire;
(7) to disqualify a judge;
(8) for appointment of investigator;
(9) for pretrial conference;
(10) challenging the array of an indicting grand jury; and
(11) for transfer from criminal proceedings to juvenile proceedings pursuant to 42 Pa.C.S. § 6322 **[.]** **;**
(12) proposing or opposing the admissibility of scientific or expert evidence.

The omnibus pretrial motion rule is not intended to limit other types of motions, oral or written, made pretrial or during trial, including those traditionally called motions *in limine*, which may affect the admissibility of evidence or the resolution of other matters. The earliest feasible submissions and rulings on such motions are encouraged.

***See* Pa.Rs.E. 702 and 703 regarding the admissibility of scientific or expert testimony. Pa.R.E 702 codifies Pennsylvania's adherence to the test to determine the admissibility of expert evidence first established in *Frye v. United States*, 293 F. 1013 (App. D.C. 1923) and adopted by the Pennsylvania Supreme Court in *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977). Given the potential complexity when the admissibility of such**

evidence is challenged, such challenges should be raised in advance of trial as part of the omnibus pretrial motion if possible. However, nothing in this rule precludes such challenges being raised in a motion *in limine* when circumstances necessitate it.

See Rule 556.4 for challenges to the array of an indicting grand jury and for motions to dismiss an information filed after a grand jury indicts a defendant.

NOTE: Formerly Rule 304, adopted June 30, 1964, effective January 1, 1965; amended and renumbered Rule 306 June 29, 1977 and November 22, 1977, effective as to cases in which the indictment or information is filed on or after January 1, 1978; amended October 21, 1983, effective January 1, 1984; *Comment* revised October 25, 1990, effective January 1, 1991; *Comment* revised August 12, 1993, effective September 1, 1993; renumbered Rule 578 and *Comment* revised March 1, 2000, effective April 1, 2001; *Comment* revised June 21, 2012, effective in 180 days; *Comment* revised July 31, 2012, effective November 1, 2012 **[.] ; *Comment* revised , 2017, effective , 2017.**

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COMMITTEE EXPLANATORY REPORTS:

Report explaining the October 25, 1990 Rule 306 Comment revision published at 12 Pa.B. 1696 (March 24, 1990).

Report explaining the August 12, 1993 Comment revision published at 22 Pa.B. 3826 (July 25, 1992).

Final Report explaining the March 1, 2000 reorganization and renumbering of the rules published with the Court's Order at 30 Pa.B. 1478 (March 18, 2000).

***Final Report* explaining the June 21, 2012 revision of the Comment referencing indicting grand jury rules published with the Court's Order at 42 *Pa.B.* 4153 (July 7, 2012).**

***Final Report* explaining the July 31, 2012 Comment revision adding motions for transfer published with the Court's Order at 42 Pa.B. (, 2012).**

Report explaining the proposed Comment revision regarding pretrial challenges to the admissibility of expert evidence published for comment at 47 Pa.B. (, 2017).

REPORT

Proposed Revision of the Comment to Pa.R.Crim.P. 578

RULE 578: PRETRIAL RESOLUTION OF ADMISSIBILITY OF EXPERT TESTIMONY

The Committee recently examined the question of the pretrial determination of the admissibility of expert testimony. This was prompted by a dissenting opinion penned by Justice Dougherty in the case of *Commonwealth v. Safka,* 141 A.3d 1239 (Pa. 2016). *Safka* was a vehicular manslaughter case in which there was a dispute over the admissibility of evidence of the vehicle's speed from the vehicle's Event Data Recorder (EDR). Although there was no pretrial challenge to this evidence, the defense, at trial, questioned the reliability and accuracy of the data retrieved from the EDR. After provisionally admitting the EDR evidence, following closings, the trial judge *sua sponte,* reopened the record for the limited purpose of providing the parties the opportunity to present expert testimony to address the reliability of the manner in which data was recorded in the EDR. The Commonwealth subsequently produced an expert on the question and the trial judge confirmed the original tentative decision to admit the EDR evidence.

On appeal to the Supreme Court, the majority upheld the trial court and Superior Court decisions, finding that it was not improper for the trial court, *sua sponte*, to allow the Commonwealth to establish the reliability of the scientific evidence after the Commonwealth had rested, particularly when the parties are permitted to seek a reopening under similar circumstances. In his dissent, Justice Dougherty maintained that, since the Commonwealth bears the burden of establishing the reliability of its evidence, the record should not have been reopened on this issue. More importantly from a procedural standpoint, he noted that this issue could have been avoided had the EDR's reliability been challenged earlier than at trial as it had been. Acknowledging that the defense did nothing improper under the current rules, he recommended that the Committee examine rule changes that would encourage the pretrial resolution of these types of challenges.

Frye v. United States, 293 F. 1013 (App. D.C. 1923) is the seminal case establishing the test for the admissibility of scientific evidence. The *Frye* test requires the proponent of scientific evidence to establish that the theory and method used by the expert witness were generally accepted within the relevant scientific community. Although modified in a number of jurisdictions by acceptance of the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), Pennsylvania still adheres generally to the *Frye* test and this standard is recognized in Rule of Evidence 702. Rule of Evidence 703 also enumerates the bases for expert opinion testimony.

Neither of these rules of evidence addresses procedures for raising such challenges. Rule of Civil Procedure 207.1 provides specific procedures for raising challenges to scientific evidence. However, as Justice Dougherty notes, the civil rule does not provide for specific timing but is primarily a content rule. In fact, paragraph (b) of Rule 207.1 states that a party is not required to raise the admissibility of expert testimony pre-trial unless the court so orders. There is language in the Official Note to Rule 207.1 providing some guidance as to the pretrial determination of such issues:

> In deciding whether to address prior to trial the admissibility of the testimony of an expert witness, the following factors are among those which the court should consider: the dispositive nature or significance of the issue to the case, the complexity of the issue involved in the testimony of the expert witness, the degree of novelty of the proposed evidence, the complexity of the case, the anticipated length of trial, the potential for delay of trial, and the feasibility of the court evaluating the expert witness' testimony when offered at trial.

However, this guidance is directed toward the judge in deciding the issue and not toward the parties regarding the time for raising such issues.

The Rules of Criminal Procedure do not provide specific procedures for raising *Frye* issues. *Frye* challenges generally are raised as motions *in limine* but the rules do not provide for any specific timing for raising these motions. Rules 578 and 579 require an omnibus pretrial motion to be served within 30 days of arraignment and a court to determine all pretrial motions before trial. However, motions *in limine* are distinguished from the omnibus pre-trial motion (and its timing provisions) in the Rule 578 *Comment*.

The Committee noted that the federal system encourages the pretrial determination of challenges to expert testimony. For example, the Third Circuit has emphasized the importance of conducting *in limine* hearings under Fed. R. Evid. 104 (resolution of preliminary questions) when making reliability determinations required by Fed. R. Evid. 702 and *Daubert. Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417 (3d Cir. 1999). However, this is based heavily on the gatekeeping function that is placed on the trial court by *Daubert* and such motions may still be brought during trial. *See, e.g., Smoot v. Mazda Motors of America, Inc.*, 469 F.3d 675, 676 (7th Cir. 2006).

Based on a review of the foregoing, the Committee concluded that the rules should encourage the pre-trial determination of the admissibility of expert testimony. However, the Committee believes that it would not be effective to create a specific deadline by which time the motion must be filed, given the wide variations of the types of evidence involved and the circumstances under which the evidence is discovered. The Committee decided that the question would be best addressed by adding a general provision to encourage pre-trial determination of these issues. The Committee is proposing a revision to the *Comment* to Rule 578 that contains a list of suggested types of pretrial motions to be included in the omnibus pretrial motion by adding to that list those motions that would "establish a challenge to the admissibility of scientific or expert evidence."

One of the issues that the Committee discussed was the question of whether or not adding these types of motions to the Rule 578 *Comment* list of suggested motions would now tie them to the time limitations for omnibus pretrial motions. The Committee first noted that the time limitations for filing omnibus motions often are treated more flexibly by most courts, given the wide variations of issues raised. More specifically, the Committee believes that if there is a legitimate question concerning the reliability of scientific evidence, a trial judge would permit it to be raised even if it was after the Rule 578 time limit. The Committee discussed removing the Rule 578 *Comment* language referring to motions *in limine* but decided that there are motions *in limine* unrelated to *Frye* issues that should continue to be exempt and did not want to confuse the issue.

The Committee ultimately agreed to add language to the *Comment* that would state that the pre-trial determination of *Frye* issues should be encouraged but that

raising these issues in a later motion *in limine* is permissible as well. The Committee concluded that a cross-reference in the Rule 578 *Comment* to Rules of Evidence 702 and 703, which address more substantive aspects of the admissibility of expert testimony, would be helpful. Additionally, the *Comment* should also contain a cross-reference to *Frye* and the chief Pennsylvania cases applying it.