

SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

Title 225 - Rules of Evidence
[225 Pa. Code ART 1]

Proposed Amendment of Pa.R.E. 104 and Revision of Comment

The Committee on Rules of Evidence is planning to recommend that the Supreme Court of Pennsylvania approve the Amendment of Pa.R.E. 104 and Revision of Comment.

This proposal has not been submitted for review by the Supreme Court of Pennsylvania.

The text for the proposed changes precede the Report. Additions are **bold and underlined**, and deletions are in **[bold and brackets]**.

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 July 30, 2010

By the Committee on Rules of Evidence

PROFESSOR SANDRA D. JORDAN, CHAIR

REPORT

Proposed Amendment of Pennsylvania Rules of Evidence 104 (Preliminary Questions) and Revision of Comment

Often the admissibility of evidence is conditioned upon the proof of foundational facts. Pennsylvania Rule of Evidence 104, modeled after Federal Rule of Evidence 104, adopted a process whereby preliminary questions concerning foundational facts are to be decided by the judge before the evidence can be admitted.

To illustrate, a statement by a co-conspirator of a party made during the course and in the furtherance of a conspiracy may be admissible and not excluded as hearsay. However, a preliminary question must be answered before the statement can be admitted as a hearsay exception, to wit, whether there was a conspiracy. See *Commonwealth v. Pinkins*, 525 A.2d 1189, 1191 (Pa. 1987). Case law has established that the proponent of the statement has the burden of proof of proving the conspiracy and the measure of persuasion is by a preponderance. See, e.g., *id.*

The co-conspirator hearsay exception was codified as Rule 803(25)(E), effective October 1, 1998. The burden of proof and measure of persuasion concerning the preliminary question of a whether a conspiracy existed were not included in the Rule.

Some Rules, such as Rule 602 and Rule 901, have allocated the burden of proof and measure of persuasion pertaining to preliminary questions while many others have not. Accordingly, for the benefit of the bench and bar, the Committee on the Rules of Evidence proposes amendment of Rule 104 and revision of the Comment thereto, which will codify and clarify the case law regarding the burden of proof and measure of persuasion for preliminary questions.

By the Committee on the
Rules of Evidence,

Sandra D. Jordan, Chair

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the admissibility or exclusion of evidence or the qualification of a person to be a witness, [the existence of a privilege, or the admissibility of evidence] shall be determined by the court, subject to the provisions of subdivision (b). In making its determination [it] the court is not bound by the rules of evidence except those with respect to privileges.

(b) [Relevancy conditioned on fact.] Preliminary Questions Dependent On Proof of Facts. [When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.] When the admissibility or exclusion of evidence or the qualification of a person to be a witness under the rules listed below is dependent on the proof of a fact or facts the allocation of the burden of proof and the measure of persuasion shall be as provided in this rule.

Article IV

Rule 404(b) – A party offering evidence of other crimes, wrongs, or acts must offer sufficient proof to support a finding of the crimes, wrongs or acts.

Rule 406 – A party offering evidence of habit or routine practice must offer sufficient proof to support a finding of the habit or routine practice.

Rules 408 to 410 – A party seeking to exclude evidence under Rules 408 to 410 must offer sufficient proof to prove by a preponderance of the evidence the facts required for exclusion.

Article V

A person seeking to exclude evidence as privileged must offer sufficient proof to prove by a preponderance of the evidence the required facts. A party offering evidence under an exception or waiver of the privilege must offer sufficient proof to prove by a preponderance of the evidence the required facts.

Article VI

Rule 601 – A party seeking to disqualify a witness under Rule 601 must offer sufficient proof to prove by clear and convincing evidence the required facts.

Rules 607 to 609 – A party seeking to impeach a witness under Rules 607 to 609 must offer sufficient proof to support a finding of the impeaching facts.

Article VII

Rule 701 – A party offering a lay witness' testimony in the form of an opinion or inference must offer sufficient proof to support a finding of the required facts.

Article VIII

Rules 803, 803.1, 804 and 805 – A party offering evidence under Rules 803, 803.1, 804 or 805 as an exception to Rule 802 must offer sufficient proof to prove by a preponderance of the evidence the required facts.

Article X

A party offering evidence under this Article must offer sufficient proof to support a finding of the required facts.

(c) Hearing of jury. Hearings on the admissibility of evidence alleged to have been obtained in violation of the defendant's rights shall in all cases be conducted outside the presence of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. Even though the court has decided that evidence is admissible, this does not preclude a party from offering evidence relevant to the weight or credibility of that evidence.

Comment

Paragraph 104(a) is [identical] similar to F.R.E. 104(a). The differences are designed to accommodate the changes to paragraph (b). The first sentence is consistent with prior Pennsylvania case law. See *Commonwealth v. Chester*, 526 Pa. 578, 587 A.2d 1367 (1991).

The second sentence of paragraph 104(a) is based on the premise that, by and large, the law of evidence is a "child of the jury system" and that the rules of evidence

need not be applied when the judge is the fact finder. The theory is that the judge should be empowered to hear any relevant evidence to resolve questions of admissibility. This approach is consistent with Pennsylvania law. See *Commonwealth v. Raab*, 594 Pa. 18, 934 A.2d 695 (2007).

Pa.R.E. 104(a) does not resolve whether the allegedly inadmissible evidence alone is sufficient to establish its own admissibility. Some other rules specifically address this issue. For example, Pa.R.E. 902 provides that some evidence is self-authenticating. But under Pa.R.E. 803(25), the allegedly inadmissible evidence alone is not sufficient to establish some of the preliminary facts necessary for admissibility. In other cases the question must be resolved by the trial court on a case-by-case basis.

[Paragraph 104(b) is identical to F.R.E. 104(b) and appears to be consistent with prior Pennsylvania case law. See *Commonwealth v. Carpenter*, 472 Pa. 510, 372 A.2d 806 (1977).]

In many situations under the rules of evidence the preliminary question of admissibility, exclusion, or qualification of a witness depends on proof of a fact or facts. In making its finding, the court will need to determine which party has the burden of proof and the appropriate measure of persuasion. Pa.R.E. 104(b) differs considerably from F.R.E. 104(b), in that the federal rule deals with the burden of proof only when relevancy depends on proof of facts. Pa.R.E. 104(b) allocates the burden of proof and the measure of persuasion for most of rules requiring fact finding by the court. In some situations another rule may allocate the burden of proof and the measure of persuasion. See, e.g., Pa.R.E. 602 and 901.

There are three measures of proof set out in Pa.R.E. 104(b). The least demanding measure is “sufficient proof to support a finding”. This measure might also be expressed as “sufficient proof to justify a reasonable inference” of the required facts, see *Commonwealth v. Hudson*, 489 Pa. 620, 632, 414 A.2d 1381, 1387 (1980), or a “prima facie case” of the required facts, see *Commonwealth v. Brooks*, 352 Pa. Super. 394, 401, 508 A.2d 316, 320 (1986). The preponderance measure requires a more demanding level of proof. See, e.g. *Ferri v. Ferri*, 854 A.2d 600, 603 (Pa. Super. 2004)(defining preponderance of evidence). The clear and convincing measure is the most demanding. See, e.g., *Matter of Sylvester*, 521 Pa. 300, 304, 555 A.2d 1202, 1203-04 (1989) (defining clear and convincing evidence).

Pa.R.E. 104(b) is not intended to change the law, but to codify and clarify prior Pennsylvania law and practice. See, e.g., *Commonwealth v. Petrillo*, 338 Pa. 65, 12 A.2d 317 (1940) (Rule 404(b)); *Nationwide Mutual Ins. Co. v. Fleming*, 924 A.2d 1259 (Pa. Super. 2007) (Article V); *Commonwealth v. Delbridge*, 578 Pa. 641,

855 A.2d 27 (2003) (Rule 601); Commonwealth v. Lam, 453 Pa. Super. 497, 684 A.2d 153 (1996), appeal denied, 548 Pa. 645, 695 A.2d 784 (1997) (Rule 803(25)).

Pa.R.E. 104(b) is not intended to extend the scope of the Rules of Evidence. Thus, this rule does not apply where case law has established the rule of evidence and the burden of proof. See, e.g., Highmont Music Corp. v. J.M. Hoffmann Co., 397 Pa. 345, 155 A.2d 363 (1959) (fraud exception to the parol evidence rule must be proven by clear, precise, and indisputable evidence). This rule does not apply to burdens of proof established by the Pennsylvania or United States Constitution, or by statute.

Usually, the evidence offered to establish the admissibility or exclusion of evidence or the qualification of a witness is offered prior to offering the dependent evidence or the testimony of the witness, but it is within the discretion of the trial court to permit variance from the usual order. See Pa.R.E. 611(a).

The first sentence of paragraph 104(c) differs from the first sentence of F.R.E. 104(c) in that the Federal Rule says "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury." The first sentence of Pa.R.E. 104(c) has been changed to be consistent with Pa.R.Crim.P. 581(F), which requires hearings outside the presence of the jury in all cases in which it is alleged that the evidence was obtained in violation of the defendant's rights.

The second sentence of paragraph 104(c) is identical to the second sentence of F.R.E. 104(c). Paragraph 104(c) says that hearings on other preliminary matters, both criminal and civil, shall be conducted outside the jury's presence when required by the interests of justice. Certainly, the court should conduct a hearing outside the presence of the jury when the court believes that it is necessary to prevent the jury from hearing prejudicial information.

In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, the Supreme Court created a per se rule requiring competency hearings to be conducted outside the presence of the jury. In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court held that a competency hearing is the appropriate way to explore an allegation that the memory of a child has been so corrupted or "tainted" by unduly suggestive or coercive interview techniques as to render the child incompetent to testify.

The right of an accused to have his or her testimony on a preliminary matter taken outside the presence of the jury, a right that the rule expressly recognizes, does not appear to have been discussed in prior Pennsylvania case law.

Paragraph 104(d) is identical to F.R.E. 104(d). In general, when a party offers

himself or herself as a witness, the party may be questioned on all relevant matters in the case. See *Agate v. Dunleavy*, 398 Pa. 26, 156 A.2d 530 (1959). Under Pa.R.E. 104(d), however, when the accused in a criminal case testifies only with regard to a preliminary matter, he or she may not be cross-examined as to other matters. Although there is no Pennsylvania authority on this point, it appears that this rule is consistent with Pennsylvania practice. This approach is consistent with paragraph 104(c) in that it is designed to preserve the defendant's right not to testify generally in the case.

Paragraph 104(e) differs from F.R.E. 104(e) to clarify the meaning of this paragraph. See 21 Wright and Graham, Federal Practice and Procedure § 5058 (1977). This paragraph is consistent with prior Pennsylvania case law.