

Rule 104. Preliminary Questions.

Comment

Paragraph 104(a) is identical to F.R.E. 104(a). 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 should 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. Under the Federal Rule, the court may consider even the allegedly inadmissible evidence in deciding whether to admit the evidence. See *Bourjaily v. United States*, 483 U.S. 171 (1987). There is no express authority in Pennsylvania on whether the court is bound by the rules of evidence in making its determinations on preliminary questions. In view of this, the approach of the Federal Rule has been adopted.

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).

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 ([Pa.]1998), a case involving child witnesses, the Supreme Court created a per se [error] rule requiring competency hearings to be conducted outside the presence of the jury. In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 ([Pa.]2003), the Supreme Court held that a competency hearing is the appropriate way to explore an allegation that the [testimony] memory of a child has been [“impaired”] so corrupted or “tainted” by unduly suggestive or coercive interview techniques[, and that the burden is on a party alleging testimonial incompetency by reason of taint to prove it by clear and convincing evidence.] 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.