Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear it. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves evidence alleged to have been obtained in violation of the defendant's rights;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

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

Comment

Pa.R.E. 104(a) is identical to F.R.E. 104(a).

The second sentence of Pa.R.E. 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 (**Pa.** 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.

Pa.R.E. 104(b) is identical to F.R.E. 104(b).

Pa.R.E. 104(c)(1) differs from F.R.E. 104(c)(1) in that the Federal Rule says "the hearing involves the admissibility of a confession;" Pa.R.E. 104(c)(1) is 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.

Pa.R.E. 104(c)(2) and (3) are identical to F.R.E. 104(c)(2) and (3). Paragraph(c)(3) is consistent with *Commonwealth v. Washington*, **[554 Pa. 559,]** 722 A.2d 643 (**Pa.** 1998), a case involving child witnesses, in which 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 (**Pa.** 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.

Pa.R.E. 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 (**Pa.** 1959). Under Pa.R.E. 104(d), however, when the accused in a criminal case testifies with regard to a preliminary question only, he or she may not be cross-examined as to other matters. This is consistent with Pa.R.E. 104(c)(2) in that it is designed to preserve the defendant's right not to testify in the case in chief.

Pa.R.E. 104(e) differs from F.R.E. 104(e) to clarify the meaning of this paragraph.

[For the following commentary,
textual indicators have been removed to improve readability.]

Assessing Assertion of Right Against Self-Incrimination

The basis for a right against self-incrimination can be found in constitution and statute. *See* U.S. Const. amend. V; Pa. Const. art 1, § 9; 42 Pa.C. § 5941. In terms of evidence, this right has been described as a "privilege." *See, e.g.*, 42 Pa.C.S. § 5947(b)(2) ("privilege against self-incrimination"); *Commonwealth v. Swinehart*, 664

A.2d 957 (Pa. 1995) (same). The assertion of privilege raises a preliminary question under Pa.R.E. 104(a).

A witness may refuse to testify unless it is "*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer *cannot possibly* have such tendency" to incriminate. *Hoffman v. United States,* 341 U.S. 479, 488 (1951) (emphasis in original); *see also Commonwealth v. Allen*, 462 A.2d 624, 627 (Pa. 1983). "The privilege afforded not only extends to answers that would in themselves support a conviction ... but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." *Ullmann v. United States,* 350 U.S. 422, 429 (1956); *see also Commonwealth v. Carrera*, 227 A.2d 627, 629 (Pa. 1967), *superseded by statute on other grounds, Commonwealth v. Swinehart,* 664 A.2d 957 (Pa. 1995). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. U.S.*, 390 U.S. 39, 53 (1968).

By way of example for the benefit of the bench and bar, the following procedural guidance is offered to assess whether there is a risk of self-incrimination. When a question requires a patently incriminating response, a judicial determination may be made without further inquiry. However, when a response may result in an incriminatory "link in the chain of evidence," then the judge may require more information than presently before the court. *See generally* 1 McCormick on Evidence § 132 (7th ed.); 98 C.J.S. Witnesses § 613.

When further judicial inquiry is necessary, the questioning party should provide the judge with the questions to be asked of the witness and the witness should be appointed counsel if not already represented. Next, the trial judge should consider the claim of privilege *in camera* in the presence of the witness and the witness's counsel, and outside the presence of the parties. The scope of judicial inquiry is not focused on the merits of the case; rather, it is focused on the whether the witness's response to the proposed questions is at risk of self-incrimination.

Thereafter, in the presence of the parties and on the record, the witness's counsel should offer a sufficient proffer for the judge to determine the claim. Upon hearing the parties' arguments, if any, the judge should state on the record whether there are any areas of potential testimony for which a claim of privilege had been substantiated and the reasons therefor. *See also Commonwealth v. Kirwan*, 847 A.2d 61, 65 (Pa. Super. 2004) (A witness may ordinarily only assert the privilege to avoid responding to a particular question; a blanket privilege generally is not permitted.).

Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced January 17, 2013, effective March 18, 2013**; Comment revised __ __, 2019, effective __ __, 2019**.

Committee Explanatory Reports:

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001). Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at __ Pa.B. __ (_____ __, 2013). **Final Report explaining the __ __, 2019 revision of the Comment published with the Court's Order at Pa.B. (, 2019).**