

THE COURTS

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. I]

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 in bold 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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Committee on Rules of Evidence
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no later than July 30, 2010.

By the Committee on Rules of Evidence

PROFESSOR SANDRA D. JORDAN,
Chair

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

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. 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.**] *Preliminary Questions Dependent On Proof of Facts.* 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.

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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).

* * * * *

[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).

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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 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.

[Pa.B. Doc. No. 10-1111. Filed for public inspection June 18, 2010, 9:00 a.m.]

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Amendment of Philadelphia Civil Rules *212.1 and *212.3; General Court Regulation No. 2010-01

Order

And Now, this 2nd day of June, 2010, the Board of Judges of Philadelphia County having voted at the Board of Judges' meeting held on May 20, 2010 to amend Philadelphia Civil Rules *212.1 and *212.3, *It Is Hereby Ordered* that Philadelphia Civil Rules *212.1 and *212.3 are amended as follows.

This General Court Regulation is issued in accordance with Pa.R.C.P. No. 239 and the above-referenced rule changes shall become effective thirty (30) days after publication in the *Pennsylvania Bulletin*. The original General Court Regulation shall be filed with the Prothonotary in a Docket maintained for General Court Regulations issued by the President Judge of the Court of Common Pleas of Philadelphia County, shall be published in the *Pennsylvania Bulletin*, and copies shall be submitted to the Administrative Office of Pennsylvania Courts, and the Civil Procedural Rules Committee. Copies of the General Court Regulation shall also be submitted to American Lawyer Media, *The Legal Intelligencer*, Jenkins Memorial Law Library, and the Law Library for the First Judicial District of Pennsylvania, and shall be posted on the web site of the First Judicial District of Pennsylvania: <http://courts.phila.gov/regs>.

By the Court

HONORABLE PAMELA PRYOR DEMBE,
President Judge
Court of Common Pleas

**AMENDMENTS TO PHILADELPHIA
LOCAL CIVIL RULES**

Philadelphia Civil Rule *212.1. [Pretrial and Settlement Conferences] Filing Pre-Trial Statements.

[(A) The scheduling of settlement and pretrial conferences and the filing of the pretrial memoranda shall be in accord with the applicable Program Case Management Order. The pretrial memorandum shall include that information required by the Pretrial Scheduling Order] (Rescinded).

(B) As authorized by Pa.R.Civ.P. No. 212.1(c), pre-trial statements shall be filed as required in a case's applicable Program Case Management Order.

*Adopted by the Board of Judges of the Court of
Common Pleas on May 20, 2010.*

Philadelphia Civil Rule *212.3. [Settlement Conferences—Non-Jury Cases] Pre-Trial and Settlement Conferences.

(A) The court, in its Program Case Management Orders scheduling pre-trial or settlement conferences pursuant to Pa.R.Civ.P. No. 212.3, may order anyone with a financial interest in the outcome of a case to be personally present at the pre-trial or settlement conference. Failure of anyone with a financial interest in the outcome of a case to appear may result in the imposition of sanctions against such party, or other entity. The court, upon appropriate request of counsel, may for good cause permit a party or representative to appear by telephone rather than in person.

[(A)] (B) In non-jury cases, the Trial Judge shall not enter into settlement negotiations without the consent of the parties and may refuse to enter into settlement negotiations even if the parties consent to such participation. In such a case, if the parties wish to pursue settlement negotiations with a judge, arrangements shall be made to find a judge agreeable to all parties to serve as a settlement conference judge.

[(B) Non-jury cases shall not be assigned for trial to the judge who acted as settlement conference judge unless both the parties and the judge agree to such an assignment.]

*Adopted by the Board of Judges of the Court of
Common Pleas on May 20, 2010.*

[Pa.B. Doc. No. 10-1112. Filed for public inspection June 18, 2010, 9:00 a.m.]

Title 25—LOCAL COURT RULES

CLARION COUNTY

**Administrative Order Establishing a Victim/Witness
Coordinator Fee; No. 691 CD 2010**

Administrative Order

And Now, May 28, 2010 all criminal and juvenile defendants shall be assessed as part of their costs a Seventy-Five dollar (\$75.00) Victim/Witness Coordinator Fee at the time of their sentencing or disposition. These monies shall be deposited into a segregated account by the Clerk of Courts, which account shall be used by the County Commissioners for the exclusive purpose of funding Victim/Witness staff positions to comply with the requirements of the Victim's Bill of Rights.

This order shall become effective thirty (30) days after its publication in the *Pennsylvania Bulletin*.

By the Court

JAMES G. ARNER,
President Judge

[Pa.B. Doc. No. 10-1113. Filed for public inspection June 18, 2010, 9:00 a.m.]
