

**Rule 104. Preliminary Questions**

**(a) Questions of admissibility generally.** Preliminary questions concerning 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 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 in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

**(c) Hearing of jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing 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.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

(Amended effective January 1, 1990.)

***Committee Comment - 1977******Rule 104(a)***

*Rule 104 sets out the relative function of the judge and jury in the trial process. It is clear that the application of the exclusionary rules of evidence rests in the hands of the court. To the extent that admissibility of evidence is conditioned on the resolution of a second question (unavailability of a witness, Rule 804; qualification of expert witness, Rule 702; existence of privilege, etc.) it is the function of the court to determine whether or not the condition has been fulfilled. Often the resolution of the second question will involve a factual determination, and to that extent the court acts as a trier of fact. In this capacity, the court is not bound by the exclusionary rules of evidence other than the rules dealing with privilege. The exclusionary rules of evidence reflect a concern over the capabilities of a lay jury to make technical legal and factual distinctions. The same considerations are not present when the decision as to such a preliminary question is to be made by the court. Furthermore, in the interest of judicial time and expense practicality dictates that the court be permitted to consider reliable hearsay, affidavit, or offers of proof on the preliminary questions as to the competence of an offer of evidence. See C. McCormick, Evidence section 53 (2d ed. 1972). Many existing rules of procedure permit the court to make important decisions based on affidavit. Minn. R. Civ. P. 43.05, 4.06, 56, 65.01, 65.02 and Minn. R. Crim. P. 28.05 subd 5(2), 32. The policy behind preserving the confidentiality of certain communications would be destroyed by permitting the court to inquire into privilege.*

***Rule 104(b)***

*The rule should continue existing practice in Minnesota. See State v. Martin, 293 Minn. 116, 125, 197 N.W.2d 219, 225 (1972) where the court discusses this rule with apparent approval.*

*Rule 104(a) must be read consistently with 104(b) and (c). Pursuant to rules 401-403 the court must make a determination as to the relevance and admissibility of an offer of evidence. If the relevance of the offer is dependent on the existence of a second fact the court's function is to determine whether there is sufficient evidence admitted for a jury decision as to the existence of the second fact. It is for the jury to determine whether or not the second fact is established and the*

*weight to be given the original offer. Questions of fact are deemed to be appropriate for jury determination. To permit the court to determine preliminary questions of this nature would be to severely limit the fact finding function of the jury.*

*For specific application of this provision see rules 901 and 1008. The Committee recommends the rule as provided in the Uniform Rules of Evidence since it clearly preserves the court's control over the order of proof.*

**Rule 104(c)**

*Preliminary hearings on the admissibility of confessions must be heard outside of the presence of the jury. Jackson v. Denno, 378 U.S. 368, 394, 84 S. Ct. 1774, 1790, 12 L.Ed.2d 908, 925, 926, 1 A.L.R.3d 1205 (1964); State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 554, 141 N.W.2d 3, 13 (1965), and Minn. R. Crim. P. 7.01, 8.03 and 11.02. The second sentence of the rule is applicable to both civil and criminal proceedings.*

*Hearings on preliminary questions should be heard outside of the presence of the jury when requested by the accused or where the interests of justice so require. This is consistent with Rule 103(c). See Minn. R. Crim. P. 7.01, 8.03 and 11.02 for specific types of preliminary questions that are resolved at the omnibus hearing in a criminal case.*

**Rule 104(d)**

*This rule limits the court's discretion as to the scope of cross-examination pursuant to Rule 611(b). The rule does not speak to the issue of the subsequent use of testimony on preliminary matters.*