21A Fed. Prac. & Proc. Evid. § 5054.1 (2d ed.)

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Rule 104. Preliminary Questions

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§ 5054.1 Preliminary Fact Determinations by Jury—Scope of Rule 104(b)

Primary Authority
Fed. R. Evid. 104

We have seen that "conditional relevance" lacks the sort of determinacy one expects of procedural rules designed to cover repetitive evidentiary problems. [1] We have suggested that in view of the definitional deficiencies of Rule 104(b), courts should determine what preliminary questions of fact fall within the special procedural regime it establishes by consulting the policy of Rule 104, those matters that other Rules designate for 104(b) treatment, and the precedents. [2] This section explores the scope of Rule 104(b) using those techniques. [3]

Personal knowledge

The question of whether a witness has personal knowledge within the meaning of Rule 602 is a 104(b) preliminary question of fact. [4] Since the procedural consequences of that designation have been spelled out in another volume, here we need only explain what light that designation sheds on the meaning of "conditional relevance." [5]

The importance of Rule 602 arises from the fact that personal knowledge provides one of the epistemological anchors for our adversary system of factfinding. [6] Since few judges specialize in Cartesian philosophy, it is fortunate that the requirement of personal knowledge also reflects the common sense belief that in determining the facts, it makes no sense to rely on people who literally "do not know what they are talking about." [7] Since jurors can readily grasp and easily apply the Rule, policy might suggest that personal knowledge could well be left to the jury without the need for any judicial intervention into their finding of this preliminary question. [8]

Since few witnesses would testify that they "channeled" the facts to which they wish to testify, usually witnesses think they know something they did not see either because someone else told them about it or because they have inferred it from things that they did see; in other words, the requirement of personal knowledge backstops the hearsay and opinion rules. [9] Since jurors may be less appreciative of and less willing to enforce the hearsay and opinion rules, policy might also suggest that personal knowledge be treated as a 104(a) fact for the judge under the heading of the "qualifications" of the person to be a witness. [10]

But giving the judge complete control under Rule 104(a) might lead to an excessively stringent enforcement; jurors may be more tolerant than the judge of the foibles of perception and memory that plague all humans. [11] Rigorous enforcement of the personal knowledge requirement clashes with the general policy of the Evidence Rules, exemplified by the abolition of all rules of competence by Rule 601, favoring admission and evaluation over exclusion as method of insuring the reliability of evidence. [12] Finally, giving the judge the power to exclude for lack of personal knowledge allows her to usurp the exclusive role of the jury in determining the credibility of witnesses. [13]

Placing personal knowledge within the 104(b) regime rather than crafting some other procedural compromise between the conflicting values has the advantage of following a single model rather than proliferating procedures and standards. [14] But while personal knowledge resembles other 104(b) preliminary facts in its concern for probative value [15], we should keep in mind that it is a "specialized application." [16] Unlike other 104(b) facts, which must be based on admissible evidence [17], Rule 602 allows the witness to prove her own personal knowledge. [18]

Authentication

Like relevance, authentication of writings and objects is "an inherent logical necessity"; before the factfinder can reliably draw an inference from a physical object, they must know that the object is what the proponent claims it is. [19] Since most writings are genuine, not forged, and since the proponent is unlikely to offer an object without some witness to identify it, the preliminary fact of authenticity might be safely left to the common sense of the jury. [20] On the other hand, jurors are supposed to make the common inferential error summed up in the saying that "one picture is worth a thousand words"; that is, when the witness says "if you don't believe he hit me, look at this picture of my face", the juror can easily overlook the need to consider the implied claim that the injuries depicted in the photo were in fact inflicted by the defendant. [21] Judicial intervention may also be required to prevent manipulation of the doctrine by proponents who understand they can lower the requirement for authentication by making more modest claims about the object [22]; for example, claiming only that "this is the dope that was found on the ground near where the defendant was arrested" rather than "this is the dope the defendant threw on the ground when he saw the officers approaching." [23] Moreover, since most writings also raise hearsay issues whose preliminary facts Rule 104(a) allocates to the judge, the judge will already be deeply involved in questions of preliminary fact when an authentication issue arises. [24] But giving the preliminary facts for authentication solely to the judge would allow her to decide the case under the guise of determining the admissibility of evidence in cases in which the preliminary fact coincides with a consequential fact; for example, is this Grandma's will or is that defendant's dope? [25]

Rule 901 provides for shared responsibility for the determination of the authenticity of evidence. [26] The judge controls the ability of counsel to lower the burden of authentication by determining whether the modest claim of authenticity meets the standard of relevance in Rule 401 or whether its probative worth when authenticated in this fashion is outweighed by the danger that the jury will too readily use it for some other purpose that the evidence should be excluded under Rule 403. [27] If the judge does not exclude the evidence on these grounds, she can only keep it from the jury if no reasonable jury could find the evidence was authentic. [28] While in theory the ultimate determination of authenticity is to be made by the jury [29], as a practical matter lawyers reportedly rarely ask to have the jury instructed about their duty to determine the preliminary question of authenticity before they use the evidence. [30] If the issue is submitted to the jury, it is usually thought that they must find that the preponderance of the evidence supports authenticity. [31]

Courts should use caution in using Rule 901 as more than an analogy in determining how to proceed in the cases of other evidence that may need "connecting up" to make it admissible. [32] Rule 901 is a "specialized application" of Rule 104(b) [33]—with the emphasis on "specialized." [34] To treat it as a "specific application" of Rule 104(b) ignores some ways in which authentication may differ from the procedure prescribed for cases of conditional relevance. [35] For example, Rule 902 takes many of the problematic instances of authentication away from the jury and leaves them to be determined by the judge alone. [36] As a 104(a) question of preliminary fact, the judge can use inadmissible evidence to determine self-authentication—which neither he nor the jury can do under Rule 104(b). [37] Moreover, self-authentication under Rule 902 allows the judge to, in effect, direct a verdict on the question of authentication—a dubious procedure under both Rule 901 and under Rule 104(b) generally. [38]

The Best Evidence Rule

Rule 1008 so differs from the so-called "specialized applications" that the Advisory does not even make that claim for it. [39]

The so-called "best evidence rule" contains a core of common sense entombed in the amber of centuries of technicality. [40] The modern documentary originals rule tries to balance the danger of fraud and simple error in copies of, or testimony about,

important documents against the costs of avoiding these dangers by excluding too much evidence that probably lacks these flaws. [41] Because the jury may fail to appreciate and abide by the technicality, most preliminary questions of fact regarding the admissibility of secondary evidence of the contents are assigned to the judge under Rule 104(a). [42] This allocation also furthers efficiency by allowing the judge to rely on inadmissible evidence to prove preliminary questions of fact unlikely to be seriously contested in most cases except as a strategy to make the opponents task costly; e.g., that the original of the document cannot be found. [43]

However, every case in which the documentary originals rule is invoked will usually raise questions of authenticity as well, questions that the jury has the institutional competence to handle. [44] And, as in the case of stand-alone problems of authenticity, to allow the judge to determine the preliminary questions of fact would tend to undermine the jury's constitutional role as factfinder. [45] From these policy considerations and the language of Rule 901, courts might have been able to figure out for themselves that these embedded issues of authenticity should also go to the jury; but just to make sure, the Advisory Committee added Rule 1008 to spell this out. [46]

Rule 1008 allocates all other preliminary questions of fact regarding the best evidence rule to the judge under Rule 104(a). [47] But the Rule takes three issues of authenticity away from the judge and sends them to the jury to be determined "as in the case of other issues of fact." [48] These issues are whether the claimed original ever existed, whether another writing is in fact the original, and whether other evidence of the contents accurately reflects the contents. [49] As to these issues, the judge must admit the evidence unless no reasonable jury could find authenticity. [50]

While some state drafters thought Rule 1008 was just another "specific application" of Rule 104(b) [51], Judge Miller seems to have better captured Rule 1008 when he describes it as a sort of "mini-version of Rule 104" because it allocates power between judge and jury on a single issue much as Rule 104 tries to do for the entire corpus of evidence law. [52] This makes Rule 1008 a better model than Rule 104(b) [53] in cases where the court wants to impose limits on the power of courts under Rule 104(a) in order to preserve the constitutional role of the jury. [54]

Rule 104's bifurcation boundary eroded

Prior to codification, the common law of many states regarding preliminary questions of fact was a mess; a supposed uniform principle with so many ad hoc exceptions that it was difficult to predict what courts would do with respect to issues never adjudicated. [55] Rule 104 sought to end this chaos by dividing preliminary questions of fact into two groups and subjecting each to a different but uniform standard. [56] While it is too early to predict a return to the common law chaos, courts have already begun to erode the Advisory Committee's neat bifurcation in pursuit of greater fairness, heedless of the effect this may have on the efficiency of the courts. [57]

For example, at common law most courts had required that when evidence of other crimes, acts, or wrongs was admissible for some noncharacter purpose, it had to be proved by some higher standard, normally by "clear and convincing" evidence. [58] When Rule 404(b) went into effect, courts and state drafters generally assumed that because of the importance the Advisory Committee placed on judicial discretion under Rule 403, that the preliminary facts for the admissibility of other crimes evidence belonged to the trial judge under Rule 104(a). [59] But as we have seen, the Supreme Court held that preliminary questions of fact only had to be proved by a preponderance of the evidence. [60] Subsequently, for reasons not entirely clear, the Court held that preliminary facts regarding the admissibility of other crimes evidence were questions for the jury under Rule 104(b). [61]

The Supreme Court's suggestion that any rule that evolved from the common law doctrine of legal relevance fell within Rule 104(b) breached the Advisory Committee's neat bifurcation, opening the dike for further erosions. [62] The natural next step was to shift preliminary facts regarding the admissibility of character evidence under Rule 404(a) to the jury. [63] Then moving from Rule 404 to Rule 608, the admissibility of prior false accusations of rape by a sexual assault victim that turned on a question of fact were turned over to the jury. [64] Also, whether the defendant is the person named in a record of conviction is

a 104(b) preliminary fact. [65] Meanwhile, some states began to erase limits barring criminal defendants from making the so-called "Perry Mason defense" by moving the preliminary facts to Rule 104(b) so as to lower the standard of proof. [66]

Since some state courts had common law rules requiring the admissibility of hearsay to be submitted to the jury, erosion of judicial control over proof of preliminary questions of fact easily emerged in that area. [67] One state holds that the jury must decide the preliminary facts to the admissibility of prior consistent statements. [68] Another takes the same position regarding authorized admissions. [69] Some writers have said that the jury determines the preliminary facts for straight admissions, but it is unclear whether they limit this to cases of written admissions where there is an overlap between hearsay and authentication. [70] So far, however, federal courts seem to be holding fast against the tide. [71]

Distinguish the case of states that still hold to the "second crack doctrine"; e.g., where the jury determines the preliminary fact only after the judge decides in the facts in favor of admission. [72]

One court has suggested that authentication of electronically stored information is a two-step process: first, the court determines they jury could reasonably find the evidence is authentic; second, the jury decides whether the evidence is what its proponent claims. [73]

Footnotes

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1 **Lacks determinacy**
We should find this particularly troubling because Rule 104(b) not only defines those preliminary facts subject to its special procedural regime but because it indirectly controls the scope of Rule 104(a), the default rule for all matters that do not fall within Rule 104(b).

2 **Precedents**
See § 5054, above.

3 **Scope of Rule 104(b)**
Since Rule 104(b) cannot go beyond the scope of Rule 104 itself, readers may find it helpful to consult § 5053.4, which deals with that subject.

4 **A 104(b) fact**
See Advisory Committee's Note, Rule 602.
State v. Bryant, R.I. 2006, 888 A.2d 965, 972 (in applying Rule 602, trial judge can exclude only if she finds that the witness could not have perceived the fact; if a jury could find personal knowledge, the judge should admit the evidence and leave the issue to the jury).

5 **Consequences spelled out**
See vol. 27, § 5027.

6 **Epistemological anchors**
By that we mean that is that the entire logic of our law of evidence rests upon belief that humans can know the external world through their capacity to perceive. See vol. 27, § 6022, p. 192. Judicial notice provides the other epistemological anchor. See § 5102, below.

7 **"Do not know"**
See vol. 27, § 6022, p. 189.

8 **Policy might suggest**
See § 5052, above.

9

Backstops hearsay and opinion
See vol. 27, § 6022, p. 190.

10

"Qualifications"
See § 5053.1, above.

11

Foibles of perception
See vol. 27, § 6022, p. 195.

12

Favoring admission
See vol. 27, § 6022, p. 195.

13

Credibility
See vol. 27, § 6022, p. 195.

14

Following model
1 Robinson, Longhofer & Ankers, Michigan Court Rules Practice: Evidence, 2d ed.2002, p. 67.

15

Probative value
7 Adams & Weeg, Iowa Practice: Evidence, 2002, pp. 70–71.

16

"Specialized application"
1 Giannelli & Snyder, Ohio Practice: Evidence, 1996, p. 84; Larson, South Dakota Evidence, 1996, p. 40.

17

Based on admissible
See § 5055, below.

18

Prove her own
See vol. 27, § 6028.

19

"Logical necessity"
See vol. 31, § 7102, p. 13.

20

Left to jury
See vol. 31, § 7102, p. 13.

But see
7 Adams & Weeg, Iowa Practice: Evidence, 2002, p. 71 (writings and objects always require some witness to "connect them up").

21

Inferential error
See vol. 31, § 7102, p. 13.

22

Making modest claims
Since authentication only requires proof that the writing "is what the proponent claims it is", the proponent would have to prove that Grandma signed the will if the will is offered as "Grandma's will"; but if the proponent only claims that "this is the will that was found in Grandma's safe deposit box after her death", he only has to prove those facts and hope that the jurors will infer Grandma's signing from the signature and the place the will was found. See vol. 31, § 7102, p. 31.

23

"Threw on ground"
Sophisticated jurors may be aware that such "dropsey testimony" is frequently fabricated by police officers to avoid Fourth Amendment problems and use that knowledge to discredit other testimony of the officers. By making the more modest claim, the prosecutor can keep the lying officer away from the jurors by only calling officers who did not arrive on the scene until after the arrest and seizure. But this raises a question of relevance for the judge; can the jury infer possession from mere proximity to contraband?

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Allocates to judge

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