Alabama Rules of Evidence

Article I. General Provisions

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 section (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 the introduction of evidence sufficient to support a finding of the fulfillment of the condition or may admit that evidence subject to the introduction of evidence sufficient to support such a finding.

(c) *Hearing or presence of jury.* In criminal cases, hearings on the admissibility of confessions or evidence alleged to have been obtained unlawfully shall be conducted out of the hearing and presence of the jury. Hearings on other preliminary matters shall be conducted out of the hearing and presence of the jury when the interests of justice require.

(d) *Testimony by accused.* The accused does not, by testifying at a preliminary hearing on the admissibility of a confession, 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.

Advisory Committee's Notes

Section (a). Questions of admissibility generally. Like preexisting Alabama law, and like the corresponding federal rule, this section recognizes that preliminary questions intended to establish conditions precedent to admissibility are for the court rather than the jury. C. Gamble, McElroy's Alabama Evidence § 464.01 (4th ed. 1991); Fed.R.Evid. 104. This principle applies when the judge is called upon to decide whether a statement was sufficiently contrary to a declarant's interest to qualify for admission under the "declaration against interest" exception to the hearsay exclusion. See Ala.R.Evid. 804(b)(3). A similar application arises when the judge decides whether a witness is "unavailable," so that the witness's statement can come within those hearsay exceptions carrying the threshold requirement of unavailability. See Ala.R.Evid. 804(a); *Lundy v. State*, 539 So.2d 324 (Ala.Crim.App.1988). This principle is also

applied when a trial court determines whether a witness's qualifications authorize the witness to testify as an expert. See Ala.R.Evid. 702.

When the preliminary question is of a factual nature, the judge "will of necessity receive evidence pro and con on the issue." Fed.R.Evid. 104 advisory committee's note. In such instances, this section (a) provides that evidence rules generally do not govern the process whereby the judge determines whether the facts governing the preliminary questions exist. Stated differently, the judge, while determining the preliminary question, may hear evidence that itself may not be admissible. A rule making the exclusionary evidence rule inapplicable to the evidence governing preliminary questions has been advocated by imminent authority. E. Cleary, McCormick on Evidence § 53 (3d ed. 1984). A judge, for example, may have to hear what a witness claims to have seen before making the preliminary determination of whether the witness does indeed possess firsthand knowledge sufficient to allow the witness to testify in the case. See Ala.R.Evid. 602.

This rule results in the judge's being made privy to facts that themselves may be inadmissible under the exclusionary rules of evidence. While the judge, in determining preliminary questions, is generally not bound by the exclusionary rules of evidence, there is one important exception – the rules of privilege. The judge may hear facts, in determining whether the party asserting a privilege intended confidentiality, without those facts necessarily being admissible under the rules of evidence. However, the judge customarily should not ask for facts, in making that preliminary determination, that themselves fall within the protection of the asserted privilege. There are occasions, on the other hand, when the trial judge cannot adequately decide whether an asserted privilege applies without hearing, in camera, the matter alleged to be privileged. Nothing in section (a) is intended to preclude the judge from hearing that matter in appropriate circumstances. See *United States v. Zolin*, 491 U.S. 554 (1989).

Section (b). Relevancy conditioned on fact. The admissibility of evidence often turns upon a party's proof of a fact upon which relevancy is conditioned. Such a fact may rightly be termed a "conditional fact." See *Eggleston v. Wilson*, 208 Ala. 167, 94 So. 108 (1922). Thus, for evidence of prior accidents on a civil defendant's premises to be admissible as evidence that the defendant had notice of a defective condition, it first must be shown that the defendant had notice of them. When sufficient evidence is introduced to prove the conditional fact, the judge is to admit the evidence. One exception arises when, as a discretionary matter, the judge admits the evidence upon the condition that the offering party later presents proof of the conditional fact. See *Hooper v. State*, 585 So.2d 142 (Ala.Crim.App.1991), on remand from 585 So.2d 137 (Ala.1990), rev'g 585 So.2d 133 (Ala.Crim.App.), cert. denied, 503 U.S. 920 (1992). See also C. Gamble, McElroy's Alabama Evidence § 13.01 (4th ed. 1991); W. Schroeder, J. Hoffman, & R. Thigpen, Alabama Evidence § 1-4(B) (1987).

Section (c). Hearing or presence of jury. The trial judge is not generally required to conduct hearings on preliminary questions in civil cases out of the hearing and presence of the jury; the trial court must do so only when the court determines that the interests of justice require it to do so. The same rule applies in criminal cases except with regard to the admissibility of confessions and evidence alleged to have been obtained illegally. See *Garsed v. State*, 50 Ala.App. 312, 278 So.2d 761 (1973). See also C. Gamble, McElroy's Alabama Evidence § 10.01 (4th ed. 1991).

Section (d). Testimony by accused. Section (d) constitutes a rejection of the

corresponding federal rule, which recognizes the right of the accused to take the stand at trial and give testimony on any preliminary matter without waiving the right not to be cross-examined as to other issues. See Fed.R.Evid. 104(d). Prior Alabama law, which allows wide-open cross-examination of the accused concerning preliminary matters testified to by the accused at trial, continues.

As under historic Alabama law, section (d) recognizes the accused's right to testify at a hearing on the admissibility of a confession, held outside the hearing of the jury, without being subjected to cross-examination concerning matters related to guilt other than as those matters may be relevant to the question of the confession's admissibility. *Boulden v. State*, 278 Ala. 437, 179 So.2d 20 (1965) (voluntariness); C. Gamble, McElroy's Alabama Evidence § 200.02(7) (4th ed. 1991). However, if the accused takes the stand at trial to testify as to facts going to the weight that the trier of fact should give a confession, the door remains open under preexisting Alabama law to cross-examination as to any matter relevant to guilt. *Duncan v. State*, 278 Ala. 145, 176 So.2d 840 (1965); *Fikes v. State*, 263 Ala. 89, 81 So.2d 303 (1955), rev'd on other grounds, 352 U.S. 191 (1957). See C. Gamble, McElroy's Alabama Evidence § 378.02 (4th ed. 1991).

Section (d) does not address the issue of whether, or to what extent, the accused's prior testimony on a preliminary matter may be used against the accused subsequently. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971); *Simmons v. United States*, 390 U.S. 377, 392 (1968). See also *Walder v. United States*, 347 U.S. 62 (1954) (drawing a distinction between the prosecution's affirmative use of inadmissible evidence and its use of such evidence to contradict the accused when the accused gives what the prosecution believes is perjured testimony).

Section (e). Weight and credibility. Rule 104, in generally assigning to the judge the preliminary questions (see sections (a) and (b)), does not take away from the ultimate fact-finding role of the jury. A positive determination that preliminary facts are sufficient to guarantee threshold relevancy, or the inapplicability of some rule of evidentiary exclusion, does not answer the question of ultimate probative value. Even if the judge concludes that a party has offered sufficient evidence of authenticating facts to admit a handwritten letter, for example, the ultimate issue of authenticity is for the jury. It is the jurors who decide what weight should be given to the authenticating testimony or, indeed, whether the authenticating testimony should be believed at all. Evidence of facts sufficient to qualify a witness as an expert in no way precludes the jury from deciding what weight, if any, to give that witness's testimony. On these ultimate questions of weight and credibility, either party has the right to offer relevant evidence before the jury. *Burton v. State*, 107 Ala. 108, 18 So. 284 (1895), overruled by *Martin v. Martin*, 123 Ala.191, 26 So. 525 (1899).