1.09 Court Determination of Preliminary Questions [1]

(1) The court shall decide any preliminary question as to the admissibility of evidence, including any factual or foundational question necessary for the admissibility of evidence. A court is not bound by the ordinary exclusionary rules of evidence and may consider any reliable evidence, although whether the rules of privilege must be adhered to has not been expressly settled.

(2) In a trial by jury, the court shall not inform the jury of the factual or foundational basis for the court's decision when doing so would potentially usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence.

Note

This rule comes into play when an issue about the admissibility of offered evidence is raised under a rule of evidence. It recognizes that the applicability of the rule will depend upon the determination of whether the requirements of the rule have been satisfied, e.g. the determination of preliminary questions. This rule sets forth the role of the court in making that determination.

Subdivision (1). Subdivision (1) states the traditional and well established rule in New York that the trial court decides all questions regarding the admissibility of evidence. (*See e.g. People v Feldman*, 299 NY 153, 158, 169-170 [1949]; *People v Walker*, 198 NY 329, 334 [1910]; *Russell v Hudson Riv. R.R. Co.,* 17 NY 134, 140 [1858].) To the extent the applicability of a rule of evidence depends upon the existence of a condition(s), the court also determines the existence of the condition(s). (*See e.g. People v Parks*, 41 NY2d 36, 46-47 [1976]; *People v Marks*, 6 NY2d 67, 75 [1959]; *Poppe v Poppe*, 3 NY2d 312, 315 [1957]; *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941].) As necessary, a hearing may be had to resolve a preliminary question as explained by the Court of Appeals in *Marks* (6 NY2d at 75):

> "This New York rule [that a court decides preliminary questions] is not only well grounded in practice but is also sound in principle. The admissibility of evidence may depend upon complicated, collateral fact issues, which would be confusing in jury trials. If, in addition to the questions of fact which are directly involved, any number of collateral issues must be tried in order to determine the admissibility of evidence upon the principal issue, it would obstruct rather than facilitate the administration of justice."

To the extent the determination involves a factual inquiry, the court acts as a trier of fact. (*See Kearney v Mayor of City of N.Y.*, 92 NY 617, 620 [1883].) The court need not accept the uncontradicted testimony of a witness. (*See People v Caprio*, 25 AD2d 145, 151 [2d Dept 1966], *affd* 18 NY2d 617 [1966].)

Additionally, the "determination of . . . preliminary questions of fact is not restricted by the ordinary exclusionary rules of evidence." (*People v Lynes*, 64 AD2d 543, 543 [1st Dept 1978] [citing inter alia Fed Rules Evid rule 104 (a)], *affd* 49 NY2d 286 [1980]; *People v Cotto*, 169 Misc 2d 194, 197-198 [Sup Ct, NY County 1996] [hearsay relied upon in determining whether factual foundation for a hearsay exception has been satisfied], *affd* 240 AD2d 193 [1st Dept 1997], *affd* 92 NY2d 68 [1998].)

Whether the court may compel disclosure of privileged communications in the course of making its determination has not been addressed by the Court of Appeals. Other jurisdictions follow Uniform Rules of Evidence rule 104 (a) which provides that rules on privileged communications remain applicable in the course of determining preliminary questions. (Uniform Rules Evid rule 104 [a] ["In making its determination, the court is not bound by the rules of evidence except the rules with respect to privileges"]; *see also* Fed Rules Evid rule 104 [a] ["In so deciding, the court is not bound by evidence rules, except those on privilege"].)

Subdivision (2). This rule is derived from those cases which hold that a trial judge may not usurp the function of the jury in evaluating witnesses or evidence by, for example, inappropriate questioning of a witness, or commenting on the credibility of a witness or on the proof of an element of the crime. (*See People v Mendes*, 3 NY2d 120, 121 [1957] ["because of the ever present and serious threat that a jury's determination may be influenced by what it interprets to be the court's own opinion, this prerogative (of the trial judge to ask questions) should be exercised with caution"]; *People v Leavitt*, 301 NY 113, 117 [1950] ["the court usurped the function of the jury in commenting on the credibility of a witness for

defendant saying, 'And I will say another thing—that *I wasn't quite satisfied with (the defense witness's) story*' "]; *People v Kohn*, 251 NY 375, 379 [1929] [in a burglary case, the trial judge improperly instructed the jury that " 'the inference is irresistible that the person who was there wanted to steal' "].)

Informing the jury of a trial court's factual or foundational determination in the admission of evidence may equally usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence. Thus, for example, all four Departments of the Appellate Division have held that the court is not required to formally certify a witness as an expert when the court determines the witness is qualified to give expert opinion. (*E.g. People v Gordon*, 202 AD2d 166, 167 [1st Dept 1994]; *People v Wagner*, 27 AD3d 671, 672 [2d Dept 2006]; *People v Grajales*, 294 AD2d 657, 659 [3d Dept 2002]; *People v Eldridge*, 221 AD2d 966, 967 [4th Dept 1995].) As stated by the Appellate Division, Third Department, in *People v Lamont* (21 AD3d 1129, 1132 [3d Dept 2005] [citations omitted]): "The trial court has considerable discretion in determining the admissibility of expert testimony. The court is not required to explicitly declare a witness an expert before permitting such testimony. In fact, there is legitimate criticism of that practice on the basis that making such a declaration in front of a jury improperly bolsters the witness and appears to grant the witness the imprimatur of the court."

Other self-evident examples would include a court not telling a jury that it was admitting a confession because the court found it was voluntarily made; or that it was admitting an identification because it was not premised on a suggestive identification proceeding; or that it was admitting certain statements because it had found a prima facie case of conspiracy.

By contrast, a trial court may need to inform the jury of the law applicable to the consideration of certain types of evidence; e.g. a statement admitted not for its truth; the reason for the introduction of *Molineux* evidence and that it is not admitted to show propensity.

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[1] In May 2023, subdivision (2) was amended to include words that were and are in the Note, namely: "when doing so would potentially usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence."

In December 2023, subdivision (1) was amended to add the second sentence.