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§400 Competence of Witness

Under the Federal Rules of Evidence, all people are competent to be witnesses except judges, jurors, and non-experts who lack first-hand knowledge of the matters about which they are going to testify. Generally, the competence of a witness depends upon the capacity of that witness to observe, to remember, to communicate, and to understand the nature of the oath and the duty it imposes to tell the truth. State rules vary, and many disqualify some witnesses who would be competent under the Federal Rules. Many state jurisdictions still disqualify witnesses who fail to meet common law competency requirements. These are discussed in the following sections (§§401-406), and include prior conviction, infancy, religious beliefs, and marital relationship to a party.

③ Practice Tip: If competency comes into question, a good general practice is to ask the judge to make specific determinations that the witness (1) can be understood by the jury, (2) understands his duty to tell the truth, and (3) has personal knowledge of the matter about which he intends to testify.

Cases

Federal Cases

Government of Virgin Islands v. Leonard A., 922 F.2d 1141 (3d Cir. 1991). Rule 601 **presumes competency** to testify. The party requesting that the witness be tested regarding competence must present evidence reasonably indicating something peculiar, unique or abnormal about the witness which would influence the witness' competence, while affecting the court's ability to assess that competence or raise unusual difficulties assessing the witness' credibility.

United States v. Blankenship, 923 F.2d 1110 (5th Cir. 1991), *cert. denied*, 500 U.S. 954 (1991). The presumption is that **every person is competent** to be a witness if that person has personal knowledge of a matter and states that he or she will speak truthfully.

United States v. Moore, 25 F.3d 563 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 341 (1994). In a prosecution for using or carrying firearms during a crime of violence, the witnesses had **proper foundation** to testify because (1) they saw the defendants with handguns; (2) the guns were pointed at the witness; (3) there were other witnesses who saw defendants cleaning guns and removing bullets; and (4) both witnesses had seen and fired a handgun before.

Visser v. Packer Engineering Associates, Inc., 924 F.2d 655 (7th Cir. 1991). A witness' **personal knowledge includes inferences and opinions grounded in the observation** of other first-hand personal experiences.

Autotrol Corp. v. Continental Water Systems Corp., 918 F.2d 689 (7th Cir. 1990). A manufacturer's **in-house counsel** was competent to testify to **fees** incurred by outside counsel where the in-house counsel had to approve the outside counsel's fees.

Kern v. Levolor Lorentzen, Inc., 899 F.2d 772 (9th Cir. 1990). In a **wrongful termination action**, the former employer's personnel manager was not competent to testify about a letter that was written to the former employee before the manager worked for the company.

Gardner v. Chrysler Corp., 89 F.3d 729 (10th Cir. 1996). Trial court properly excluded as **incompetent** a witness proffered to counter manufacturer's assertion that minivan seat was designed to yield in a controlled manner. Although witness was named head of minivan safety leadership team four years after accident, he had **no personal knowledge** of seat back design or performance, had not reviewed any seat assembly information for three years prior to accident, and testified at deposition that "controlled collapse" issue should be referred to engineers because his safety team was more concerned with marketing.

United States v. Bloome, 773 F. Supp. 545 (E.D.N.Y. 1991). The competency of a witness depends upon the **capacity to observe, to remember, to communicate, and to understand** the nature of the oath and the duty it imposes to tell the truth.

Government of Virgin Islands v. Riley, 750 F. Supp. 727 (D.V.I. 1990), on reconsideration in part, 754 F. Supp. 61 (D.V.I. 1991). The **four-year-old son** of a murder victim was found **incompetent** to testify, because the court was uncertain whether the child would be able to communicate to the jury at trial.

State Cases

ILLINOIS

People v. Makiel, 263 Ill. App. 3d 54, 635 N.E.2d 941 (Ill. App. Ct.), *appeal denied*, 642 N.E.2d 1294 (Ill. 1994). While competence is an issue for the trial court to determine, "determinations of the credibility and weight given to the testimony of witnesses are exclusively within the province of the trier of fact." The fact that a witness spent time in a **mental institution** is insufficient to justify the exclusion of his testimony for incompetence.

People v. Williams, 147 Ill.2d 173, 588 N.E.2d 983 (Ill. 1991), *cert. denied*, 506 U.S. 876 (1992). "The determination of whether a witness is competent to testify is within the sound **discretion of the trial court** and may be arrived at either through preliminary inquiry or by observing the witness' **demeanor and ability** to testify during trial."

People v. Williams, 147 Ill. 2d 173, 588 N.E.2d 983 (Ill. 1991), *cert. denied*, 113 S. Ct. 218 (1992). "The determination of whether a witness is competent to testify is within the sound **discretion of the trial court** and may be arrived at either through preliminary inquiry or by observing the witness' **demeanor and ability** to testify during trial."

NEW YORK

In the Matter of Luz P., 189 A.D. 274, 595 N.Y.S.2d 541 (N.Y. App. 1993). “The capacity of a witness to **observe, remember, and communicate** goes to the question of the competency of that witness. All questions of competence are to be decided preliminarily by the court alone. At common law, a nonverbal or **mute witness** such as Luz would have been disqualified from testifying; however, that is no longer the rule and a **deaf mute**, similar to a witness unable to speak English, may testify through a person who can understand and communicate with the witness.”

§401 Conviction

Objection, Your Honor. The witness is incompetent to testify due to a prior felony conviction.**Comments**

The common law barred convicts from testifying, reasoning that a person who disregarded society’s mores once is likely to do so again. This reasoning fails to consider that the jury is capable of judging the credibility of witnesses.

The U.S. Supreme Court repudiated the common law rule prohibiting a convicted felon from testifying, and the Federal Rules of Evidence follow that decision. Many states disqualify those who have been convicted of a crime within their own borders, but do not disqualify witnesses who have been convicted in another state, unless the conviction is for perjury. Generally, however, a recent felony conviction can usually be introduced for impeachment purposes.

Where prior convictions do not disqualify witnesses, they are often used for impeachment. If you intend to impeach a witness by prior conviction, be prepared to confront the witness in the event that the witness denies ever having been convicted. During the pretrial stages, especially in criminal cases, judges will invariably ask counsel whether the government intends to use any prior convictions to impeach the defendant. At that time, reveal the number of and nature of the convictions that you intend to use for impeachment. Advise the defendant’s attorney that you are aware of the convictions and intend to use them; otherwise, it may be a reversible error to surprise a defendant with his or her prior convictions in a criminal case after defendant has taken the stand.

It is not necessary to advise your adversary, in advance, of the convictions that you intend to use against the other witnesses for the defendant in a criminal case.