Challenging Witness Competency

Michael M. Martin
Fordham University School of Law, dean_michael_m_martin@law.fordham.edu

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship

Part of the Evidence Commons

Recommended Citation
Michael M. Martin, Challenging Witness Competency, 1 Pract. Litig. 35 (1990)
Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/72

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
Challenging Witness Competency

Michael M. Martin

Despite the modern trend to hear all the evidence, a surprising number of witnesses can still be challenged on competency grounds.

THE FEDERAL RULES OF EVIDENCE abolish all rules of incompetency except those concerning judges or jurors. When state law supplies the rule of decision, however, state laws of incompetency apply. This fact is signi-

EDITOR'S NOTE: This article is adapted from a chapter in the author's book, BASIC PROBLEMS OF EVIDENCE (ALI-ABA, Philadelphia, 6th ed. 1988).
significant principally in connection with cases to which the Dead Man's Statute of a state applies. See Fed. R. Evid. 601.

**General Rule of Competency**

- As minimum requirements of competency, the judge must find:
  - That the proposed witness is capable of expressing himself concerning the matter so as to be understood by the judge and jury, either directly or through interpretation by one who can understand him;
  - That the proposed witness is capable of understanding the duty of a witness to tell the truth; and
  - That there is evidence that the witness has personal knowledge of the subject matter of his testimony, or experience, training, or education, if that is required. This evidence may be by the testimony of the witness himself.

**Personal Knowledge**

The personal knowledge requirement is codified in provisions such as Fed. R. Evid. 602.

Under Fed. R. Evid. 602 the judge may reject the testimony of a witness that he perceived a matter if the judge finds that no trier of fact could reasonably believe that the witness did perceive the matter. This power to reject testimony expresses a proposition of judicial notice. If no trier of fact could reasonably believe the assertion, the court judicially knows that it is untrue. Its untruth will be a matter of common knowledge.

**Oath or Affirmation**

As a means of impressing on the witness his obligation to tell what he believes to be truth, Fed. R. Evid. 603 is typical in requiring an oath or affirmation. Likewise, an interpreter will be required to acknowledge his obligation to translate properly. See Fed. R. Evid. 604.

A person having all the usual qualifications of pertinent knowledge and ability to communicate may still not be competent to testify. He may be disqualified by:

- Connection with the tribunal;
- Mental derangement;
- Lack of oath capacity;
- Immaturity;
- Infamy;
- Interest; or
- Marital relationship to a party.

**Judge** It is entirely clear that a judge who is not sitting in the particular case is not incompetent to testify merely because he holds a judicial office. He may have an excuse for refusing or failing to obey a subpoena ad testificandum at a specified time and place because obedience would interfere with his judicial duties, but otherwise he is generally competent and compelled. See United States v. Frankenthal, 582 F.2d 1102, 1107-08
(7th Cir. 1978). There is some question as to whether he may refuse to testify to matters that came to his knowledge in an earlier trial or proceeding over which he presided.

Traditionally, there was general agreement that a judge may not testify to a material matter about which there is a bona fide dispute in a trial over which he is presiding and continues to preside as judge; but it was not reversible error, if indeed it is technical error at all, for him to testify to a formal matter that may be essential but, when shown, cannot be disputed. The modern trend is to make the presiding judge incompetent to testify even to formal matters, however. See Fed. R. Evid. 605. In this connection it must be remembered that if a trial judge has knowledge of relevant facts falling outside the area of judicial notice, he cannot properly use it or make it known to the trier except as a witness or by consent of the parties.

JUROR • At common law a juror was competent to testify as a witness at the trial and continue as a juror. If his testimony was material upon a disputed matter, he could hardly be called an unprejudiced trier of the fact in dispute, but it was said that his disqualification to sit as a juror should have been discovered before he was sworn. Fed. R. Evid. 602. Fed. R. Evid. 606(a) and the modern view are squarely opposed: jurors may not testify.

Impeachment of Verdict

The foregoing problem must be sharply distinguished from that of the competency of a juror to testify in impeachment of a verdict of the jury of which he was a member. The cases concerned with juror testimony to impeach a verdict fall into three classes:

- Testimony concerning the juror's mental operations, including the mental and emotional effects that specified events or conditions had upon his decision to join in the verdict;
- Testimony concerning objective events or conditions in the jury room during the jury's deliberations; and
- Testimony concerning objective conduct of a juror outside the jury room.

Testimony of the first class is almost universally rejected when offered to impeach the verdict, but is received in a number of jurisdictions to support the verdict as against evidence admissible and admitted to impeach it. Modern codifications, including Fed. R. Evid. 606(b), reject it in all cases.

The majority of courts still exclude testimony of the second class. There is a minority but growing contrary opinion, often aided by statute, however.

As to testimony of the third class, there is a sharp conflict of authority. When testimony of a competent witness attacking a verdict for misconduct of the jury is admitted, the testi-
mony of jurors that the misconduct did not occur is admissible. See Fed. R. Evid. 606.

ATTORNEY • An attorney is competent to testify for or against her client. If she is not the trial attorney or a member of the same firm as the trial attorney, there is no dissent from this proposition. In a very few jurisdictions she is said to be incompetent as a witness for her client if she is the trial attorney or actively assisting at the trial, except when she could not have foreseen that her testimony would be needed. The overwhelming weight of authority is to the contrary. Although the attorney may be a competent witness, in some circumstances it is a violation of the profession's ethical standards for the attorney to testify. See Model Rules of Professional Conduct Rule 3.

MENTAL DERANGEMENT • All the early precedents to the contrary notwithstanding, no modern court holds that insanity totally disqualifies a witness. If a person of unsound mind has sufficient mental capacity to remember and communicate what he has perceived and to understand the obligation to tell the truth under the sanction that the local practice imposes, he is competent to testify. If his mental derangement does not affect the subject of his testimony, it does not disqualify him, even though it may seriously affect his credibility.

Many state statutes that declare persons of unsound mind incompetent as witnesses are interpreted so as to harmonize with the foregoing statements. If a person has been adjudicated insane or is confined in a mental institution, the party presenting him as a witness usually has the burden of proving him to be competent. Otherwise, the party objecting to a witness on the ground of mental derangement has the burden of proving the witness incompetent. Thus, the inmate of an asylum may testify to what he observed concerning an encounter between a guard and another inmate, and a defendant's conviction of having sexually assaulted an insane woman may be largely based upon the testimony of the woman. State v. Herring, 268 Mo. 514, 535, 188 S.W. 169, 174 (1916); see United States v. Peyro, 786 F.2d 826, 830-31 (8th Cir. 1986); State v. Wildman, 145 Ohio St. 379, 386-88, 61 N.E.2d 790, 794 (1945).

At times the physical condition of a person may be such as to make him mentally incapable of understanding any but very simple questions and thus unable to undergo the cross-examination to which the opposing party is normally entitled to subject him. If he is able to communicate pertinent matter to the jury and to endure what the judge believes to be an adequate cross-examination concerning what he has communicated, he should be held competent, and the weight to be given to his testimony should be for the trier of fact to determine.
OATH CAPACITY • At common law, no one was competent to testify unless he believed that divine punishment would follow false swearing; some of the earlier cases required belief that the punishment would be inflicted after death, and no witness would be heard until after he had sworn that he would tell the truth. The content of the oath was that which conformed to the religion of the witness. See the famous case Omi-chund v. Barker, 26 Eng. Rep. 15 (Ch. 1744). Today in many states statutes forbid or a constitutional provision is construed as prohibiting the requirement of religious belief as a qualification of a witness.

There are many modern cases in which the competency of a child appears to be made to depend upon the child's understanding of the meaning of an oath and this, in turn, depends upon the child's religious belief. The recorded questions put to the child, the answers before and after receiving instruction, and the assumption that the child has an appreciation of the relation between his conduct and the mandates of divinity, on their face, approach the ridiculous. As a practical matter, however, such a proceeding may serve to impress upon a child the duty and importance of telling the truth. The current attitude of the courts is shown in the opinion in Hill v. Skinner, holding admissible the testimony of a child of four years. "The nature of his conception of the obligation to tell the truth is of little importance if he shows that he will fulfill the obligation to speak truthfully as a duty which he owes to a deity or something held in reverence or regard, and if he has the intellectual capacity to communicate his observations and experiences." 81 Ohio App. 375, 377, 79 N.E.2d 787, 789 (1947). Occasionally, statutes provide for unsworn testimony by child witnesses and others too mentally immature to show they understand the obligation to tell the truth. E.g., N.Y. Crim. Proc. Law §60.20 (McKinney 1981). Such statutes may be a practical necessity in prosecuting crimes such as child abuse.

MENTAL IMMATUREY • As was indicated above, the questions of oath capacity of children and of mental immaturity are usually intermingled. The capacity of a child to understand the obligation to tell the truth may or may not be coexistent with the capacity to remember and narrate what he has experienced. This dilemma is neatly illustrated in a California case in which a trial judge was reversed for permitting a child of four years to testify when the judge had not made or permitted an examination tending to show the child's capacity to remember accurately. Prior contradictory statements concerning the crucial facts made by the child to the committing magistrate at the preliminary hearing of defendant were also in evidence. People v. Dela-

The proponent may have the burden of proving the competency of a child under a given age; but the now generally accepted view is as stated by the Kentucky Court of Appeals: "There is no unalterable rule measuring the competency of a witness because of his age, and the court should make inquiry into the child's qualifications and determine whether he is sufficiently intelligent to observe, recollect and narrate the facts, and has a sense of obligation to speak the truth. If so, then the child should be allowed to testify, and it is for the jury to determine what weight to give his testimony, once the court rules he is a competent witness." *Jackson v. Commonwealth*, 301 Ky. 562, 565, 192 S.W.2d 480, 481-82 (1946).

In the seventeenth century it became settled that conviction of treason, felony, or crimen falsi rendered the convict incompetent as a witness. It seems clear that crimen falsi included offenses that involved fraud or deceit or that injuriously affected the administration of justice. Whatever may have been the reason for creating the incompetency, it was later sought to be justified on the theory that the criminal conduct indicated such moral depravity as to make the convict utterly unworthy of belief and that the judgment of conviction was conclusive evidence of guilt, rather than that the incompetency was imposed as a part of the punishment. This theory, however, obviously cannot explain the traditionally accepted rules:

- That a judgment of conviction by a court of another jurisdiction does not disqualify;
- That serving the imposed sentence restores competency;
- That a pardon, though not granted because of the supposed innocence of the convict, does likewise; and
- That a verdict of guilty or even a plea of guilty unless and until followed by a judgment of conviction does not create incompetency.

These rules seem to point to the punitive theory, but it is difficult to see why a litigant who needs a convict's testimony should suffer for the convict's offenses. The irrationality of the common law doctrine has led to its abolition by statute in most states.

As a matter of federal constitutional law, a defendant in a criminal case could not be disqualified from testifying in his own behalf—or of having a witness testify for him—without violating his right of due process. *Washington v. Texas*, 388 U.S. 14, 22 (1967). Similarly, it can be argued that a party to a civil case may be denied critical evidence in his behalf as a result of a state rule of incompetency based upon a conviction.
INTEREST • At common law, a party to an action was incompetent to testify in his own favor and had a privilege not to testify against himself. In equity, the sworn answer of the defendant was treated as evidence insofar as it was strictly responsive to the bill and could not be overcome by the testimony of a single witness. The plaintiff had called for the answer under oath and could not object to its use. A party in equity, by use of a bill of discovery, could also get information on facts essential to his own case that were within the knowledge of his opponent, but could not secure disclosure of the opponent’s case.

In criminal cases, defendants were incompetent as witnesses both in England and in this country. It was not until 1898 that defendants became competent in England, and they were incompetent in a few states until recently. In all states, defendants are now competent to testify, but are not compellable.

A co-indictee would under common law normally be a party and, as such, incompetent to testify on behalf of either the prosecution or the defense. If he ceased to be a party by termination of the prosecution as against him, however, he became competent, at least for the prosecution. If a co-indictee were to be tried separately, he was by the English cases held competent to testify for the prosecution or the defense; but in the United States the greater number of courts held him incompetent to testify for the defense. At present, as a result of statutes or case law, a co-indictee is everywhere deemed competent to testify either for or against his fellow co-indictee, and it is immaterial whether they are tried together or separately.

A person other than a party was disqualified as a witness if he had such an immediate legal interest in the action or suit that he would gain or lose by the direct legal effect of the judgment or decree or if it could be used as evidence against him. The extent of the interest was immaterial. If he would be liable for costs in the event of an adverse decision, he would be incompetent. On the other hand, he was perfectly competent though he mistakenly believed that he had a direct legal interest or considered himself morally bound to pay any adverse judgment or was vitally interested in having the issue determined in a specified way because such a decision would be highly beneficial to him in pending and future business ventures.

Legislation

The slow process by which the common law evolved by judicial decision could not adapt the rules of evidence associated with that law to conditions in modern society with its mass of litigation growing out of commerce. Legislation was imperative. Consequently, disqualification of a witness, whether or not a party, because of interest has been almost entirely abolished both in England and in this country. See Fed. R. Evid. 601.
So-called Dead Man's Statutes

In a significant number of states, statutes exist that disqualify either the opposing party or the opposing party and any other interested person as a witness in any action against the estate of a deceased person or against a representative of an incompetent person. The terms of the statutes vary so widely that is is impossible to make any valid generalization concerning the scope of their operation. The judicial decisions interpreting these statutes also reveal that policy perspectives and attitudes toward these statutes vary widely from state to state. See, e.g., Wolff v. First Nat'l Bank, 47 Ariz. 97, 106-07, 53 P.2d 1077, 1081 (1936); Cocker v. Cocker, 215 Minn. 565, 570, 10 N.W.2d 734, 737 (1934). The cases are in conflict as to whether the marital relation in itself makes the spouse of the interested party incompetent. See Annot., 27 A.L.R.2d 538 (1953). The Illinois Supreme Court has taken what is probably the most extreme position in support of this principle, holding the divorced wife of an interested survivor incompetent to testify concerning any transaction between the decedent and the survivor that occurred while the marriage existed. Heineman v. Hermann, 385 Ill. 191, 52 N.E.2d 263 (1944); Hann v. Brooks, 331 Ill. App. 535, 73 N.E.2d 624 (1947).

In contrast, Wigmore and most other commentators have condemned such statutes. The Commonwealth Fund Committee, The American Law Institute, the American Bar Association, the Commissioners on Uniform State Laws, and the Advisory Committee on the Federal Rules of Evidence also have recommended their abolition, but legislatures and lawyers have until very recently paid little heed. Consequently, the practitioner must consult the local statute and the numerous decisions interpreting its terms. Particular attention must be paid to the provisions concerning:

- The persons disqualified;
- The subject matter to which the disqualification applies; and
- The conditions upon the happening of which the disqualification may be or become inapplicable or be waived.

Some statutes, like that of New York, are fertile breeders of litigation, and most of them, while preventing the enforcement of many honest claims, are ineffective to prevent perjury by witnesses whose interest does not fall within the statutory ban.

Marital Relationship • At common law, neither spouse was competent to testify for the other. This rule was applied in criminal cases in the federal courts until 1933. Then the United States Supreme Court declared it so completely out of harmony with contemporary judicial and legislative thought that it must be abandoned, even though Congress had not seen fit to change it. Funk v. United States, 290 U.S. 371, 380-82
(1933). Today one spouse is competent as a witness on behalf of the other in both civil and criminal cases. The pertinent statutes vary in details.

**Common Law Exceptions**

The common law made some exceptions to the disqualification when its application would create intolerable injustice and the desired marital harmony had already been badly damaged, if not totally destroyed. When the action involved intended injury to the person of one spouse by the act of the other, the injured spouse was deemed competent. (In all the early cases the injured wife was the witness.) How much further the common law extended the exception is not at all clear, but modern statutes have made it applicable to crimes against the person or property of the witness-spouse, including assault, bigamy, adultery, and desertion. Furthermore, in many states husband and wife are by statute made competent witnesses either for or against each other; in others, the common law disqualification has been transformed into a privilege of the witness. Except in prosecutions for crimes against the person or property of the spouse, however, one spouse is still generally incompetent to testify against the other in a criminal case. See generally *Trammel v. United States*, 445 U.S. 40, 48-50 & n.9 (1980); 2 Wigmore §488; 8 id. §2245.

In the federal courts, if state law provides the rule of decision, a spouse-witness' incompetency (or, put in

| In a sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears. |

Wigmore's terms, a privilege that a spouse-witness not testify) is governed by that state's law. When federal law provides the rule of decision, spousal incompetency is treated as a privilege under Rule 501 to be governed, in the absence of a governing statute or constitutional rule, "by the principles of the common law as they may be interpreted... in the light or reason and experience." The Supreme Court's tendency has been to interpret the spousal incompetency-privilege narrowly. In *Wyatt v. United States*, 362 U.S. 525 (1960), the Court extended the common law exception, covering situations in which injury to the person of the wife was the offense charged, to a prosecution under the Mann Act. The wife was the "victim," but not necessarily an unwilling victim.

**Spurious Marriages**

In *Lutwak v. United States*, 344 U.S. 604, 615 (1953), the Court had to deal with the competency of "so-called wives" of "spurious marriages" to testify against and incriminate their purported husbands in the criminal
The disqualification or privilege is usually limited to actions in which the spouse is a party.

prosecution. The marriage ceremonies in *Lutwak* had been performed solely to enable one of the spouses in each instance to qualify for entrance into the United States under the War Brides Act, with the understanding that the marriage would not be consummated by cohabitation and would be followed by divorce. The majority of the Court said: "In a sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule."

Privilege of Spouse-Witness

More recently, the Court decided in *Trammel v. United States*, 445 U.S. 40 (1980), that the incompetency is a privilege to be claimed by only the spouse-witness, not by either spouse, as had apparently been the federal law previously. *Wyatt v. United States*, 362 U.S. 525, at 528-29 (1960). Because the prosecutor has substantial power to induce a spouse-witness to testify, *Trammel* makes it more likely that the government will get the benefits of spousal testimony. *See generally* Lempert, *A Right to Every Woman's Evidence*, 66 Iowa L. Rev. 725 (1981). It should be noted, however, that the Court in *Trammel* reaffirmed the common law privilege for spousal confidential communications.

Whether the exclusion of the spouse is because of incompetency or privilege, it is important to bear in mind the following propositions:

- The relation must be that of legal wedlock. The rule has no application to participants in a bigamous or otherwise void marriage or illicit cohabitation.

- The disqualification or privilege is usually limited to actions in which the spouse is a party. When two or more persons are charged with the same crime and are tried together, the spouse of one defendant may not testify against another defendant, but the same spouse may testify if the other defendant is separately tried. There are a number of decisions, however, which hold one spouse incompetent to testify in any action to matters that will incriminate the other spouse; some go as far as to disqualify the witness-spouse if the testimony will merely disgrace the other spouse. *See, e.g.*, *Grand Jury Subpoena of Ford v. United States*, 756 F.2d 249 (2d Cir. 1985); *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.), *cert. denied*, 459 U.S. 1015 (1982).

- The disqualification or privilege exists from the inception to the termina-
tion of the marriage and should terminate with death or divorce.

- It is immaterial that the marriage was effected for the purpose of making the spouse unable to testify over objection.

- Wigmore seemed to be of the opinion that the exclusion covers extrajudicial assertions by the spouse, but in practically all the reported cases the excluded evidence clearly was inadmissible hearsay. Only in cases involving bills of discovery was the disqualification or privilege of any importance. Most courts hold that the disqualification or privilege does not operate to exclude the evidence when the declarant spouse's statement is found to have been adopted by the party-spouse by his silence or acquiescence or when it is a vicarious admission through an agent or a predecessor in interest.

- The majority of the decisions seem to hold that an inference can be drawn against a party for failure to call his spouse as a witness. The better view, however, seems to be that of Rule 512 of the 1974 Uniform Rules of Evidence, which bars comment on or inference from an exercise of the privilege and indicates that proceedings should be conducted so as to facilitate the making of privilege claims without the jury's knowledge.

The rules of privilege variously permit a person to refuse to be a witness, disclose a communication or matter, or produce an object or writing, or to prevent another from doing so. They are unlike most of the other rules excluding evidence, which reflect considerations intrinsic to the judicial process, such as probative value, reliability, prejudicial effect, and possible confusion of the trier. The privileges which are addressed by these rules are largely concerned with social policies extrinsic to the accurate and efficient resolution of controversies.

The dominant concept by which privileges have been analyzed through most of this century has been Wigmore's. Often described as an "instrumental" or "utilitarian" approach, it calls for weighing the benefits of preventing disclosure against the value to accurate adjudication of having all relevant information before the trier.

ALI-ABA'S MULTIMEDIA LIBRARY
FOR FURTHER STUDY

Courses

Employee Benefits Litigation (Washington, D.C.; Jan. 11-13)

Books

Basic Problems of Evidence, by Michael M. Martin (1988)
The Practical Lawyer's Manual on Trial and Appellate Practice No. 3 (1986)

CLE TV

Using Expert Witnesses in Medical Malpractice Cases (61 mins. with printed study materials; rel. 7/89)

Audio Magazines


For more information, call 1-800-CLE-NEWS (in Pa., 215-243-1651).