9. COMPETENCY AND PERSONAL KNOWLEDGE

A. INTRODUCTION

The term "competency" refers to the minimal qualifications someone must have to be a witness. In order to be a witness, a person other than an expert (experts are a special case discussed later in the course) must meet seven basic requirements.

1) Take some kind of oath to tell the truth.
2) Have a functioning memory and ability to communicate.
3) Not already be involved in the trial as a judge or juror
4) Not be one of the attorneys in the case
5) Not be disqualified by the Dead Man's Rule.
6) Be old enough to be able to testify at least as intelligently as Glen Beck.
7) Have actually witnessed something.

Not all these requirements are of equal importance. The first three never come up. No judge is going to let a witness take the stand without administering the oath. No attorney in his or her right mind is going to intentionally call a witness who has no memory or cannot communicate, and if they do, you're not going to object to it. No attorney is going to call the presiding judge or a juror as a witness

The fourth is a lot of fun at the pretrial stage. Ethical rules prohibit a lawyer from serving simultaneously as a witness and an advocate, so hardball litigators subpoena the other side's lead lawyer to be a witness, and then file a motion to disqualify him or her from representing your opponent because of the witness/advocate rule. Much hilarity results. However, it's not relevant at the trial stage.

That leaves three competency issues:

- The dead man's statutes are state laws so obscure they are a favorite of bar examiners. Basically, a live person cannot claim that a dead person owed them money if there's no written evidence of the debt. Otherwise, an estate would soon be depleted by phony claims. There are dozens of exceptions, qualifications, twists and turns.
- Whether a young child can understand the obligation to tell the truth and can communicate in some sensible way. The usual rule is that a child is competent if the child "is sufficiently intelligent to observe, recollect and narrate the facts and has a moral sense of obligation to tell the truth." This means that when small children are involved, the judge and attorneys will have to question the child about his or her ability to accurately describe what the child has seen, and about whether the child understands the difference between true and false, and will tell the truth.
- And most importantly -- does the witness have personal knowledge of all the facts to which the witness testifies. Along with relevancy, this is one of the two most fundamental rules of evidence. A witness may only testify to matters within their personal knowledge. Rule 602 says "a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the

matter." That means it is the obligation of the person calling a witness to establish by preliminary questions that the witness has personal knowledge of something relevant

B. COMPETENCY

1. General Rule

A person called as a witness must be "competent" to testify. This is a question of law, not of mental competence. Everyone is presumed competent, and even severely mentally ill people may testify. See *Thornton v. State*, 653 N.E.2d 493 (Ind. Ct. App. 1995) (teenager with multiple personality disorder whose memory was scattered among six personalities was competent to testify); *Wallace v. State*, 426 N.E.2d 34 (Ind. 1981) (paranoid-schizophrenic witness confined to state hospital who had delusions about the defendant held to be competent).

Historically, the law disqualified lots of people, including felons, slaves, the accused, the wife of the accused, people with an interest in the outcome, non-Christians, foreigners, habitual drunkards, people who were not property owners, and children. Today, almost everyone is competent to be a witness who has the minimal mental capacity to have perceived the events, can remember them, can communicate in some fashion, and promises to testify truthfully. There are still a few exceptions -- very young children, jurors and judges, and some people claiming a dead person owes them money.

Incompetency is determined before a witness testifies and is unique. Every other objection to testimony must be asserted item-by-item. An objection based on incompetency is made to all testimony the witness would give.

2. Incompetency Distinguished from Privilege

Incompetency is determined before a witness gives any testimony. If found to be incompetent, the witness may not take the stand or give any testimony at all. Privilege is asserted on a question-by-question basis and only prevents a witness from testifying about particular confidential communications.

3. Requirement of an Oath

Before being allowed to testify, each witness must be sworn to tell the truth, the whole truth, and nothing but the truth. No particular form is required; rather, the oath should be calculated to impress upon the conscience of the person being sworn the necessity for truthful testimony. A solemn affirmation may be accepted in lieu of an oath. The Establishment Clause precludes a court from requiring a potential witness to swear to tell the truth "so help me God."

4. Even Inherently Unreliable Witnesses Are Competent

Competency has nothing to do with credibility. Even inherently unreliable witnesses must be allowed to testify if they take an oath. The judge may not usurp the jury's function by excluding a witness whose testimony the judge thinks is false or inherently unreliable. Donald Trump is competent to be a witness.

5. Intoxicated Witnesses

A witness who is so intoxicated at the time he or she is called to testify that the witness will have difficulty giving coherent evidence may be found incompetent by the trial judge. However, intoxication does not per se render a witness incompetent. An impairment of the witness's ability to perceive, recall, narrate, or understand the nature and obligation of the oath must be demonstrated before the witness can be prevented from testifying.

6. Child Witnesses

Rule 601 makes no reference to child witnesses, presuming even those as young as 2 years old competent. The common law used to disqualify children under seven years old, but that absolute rule has been replaced by the common practice of holding a competency hearing to determine if the child has the ability to communicate, can distinguish truth from falsity, and understands the obligation to tell the truth.

7. Witnesses Who Violate Separation Order

The judge has discretion to disqualify witnesses who violate a separation order by discussing testimony with other witnesses or listening to trial proceedings. However, unless the witness's violation of the order was procured by the party calling that witness, the judge is not required to exclude the testimony. In criminal cases, the defendant's constitutional right to compulsory process means a court may not exclude a material defense witness who violates a separation order unless the defendant is at fault.

8. Witnesses Called in Violation of Discovery Rules

If a party calls a surprise witness in its case-in-chief whose name was not on the original witness list required by Fed. R. Civ. P. 26, the court may rule that witness incompetent to testify, although the preferred remedy is a continuance rather than a complete exclusion of the testimony unless the party acted in bad faith. The law prefers cases to be decided on the merits. Counsel often cannot know in advance what rebuttal witnesses will be needed, so belated disclosure is not usually ground for excluding their testimony.

9. Dead Man's Statutes

The one relic of the old days is the so-called "Dead Man's Statute." When an executor or administrator of an estate is one party, an adverse party suing the estate is not competent to testify about a supposed transaction with the deceased which, if true, would result in a judgment or debt against the estate. The decedent cannot refute the testimony, so the probability of fraud is high. The incompetency applies only in circumstances in which the decedent, if still alive, could have refuted the claim, and when the effect of a successful claim would diminish the estate. The rule only applies when a monetary judgment may be made against the estate and not when the action is to contest the validity of a will or trust. The incompetency is removed if the testimony of the deceased has been preserved in a deposition or former trial transcript or the estate itself opens the door.

10. The Judge, Jurors and Attorneys.

Judges and jurors are incompetent as witnesses in the present case and in proceedings concerning prior cases in which they participated. A party's trial counsel is generally not competent to be a witness unless a showing is made that he or she possesses relevant non-privileged information not otherwise available, or their testimony is needed on a technical matter such as whether an exhibit was properly stored.

C. PERSONAL KNOWLEDGE RULE

The most important part of the competency analysis is whether a potential witness perceived relevant events. We require most witnesses to demonstrate that they have "personal knowledge" about the events from their own observations. An objection that no such foundation has been laid is usually made to individual items of evidence like other objections, but can also be made to entire topics, e.g., if a witness testifies he did not see the actual fight, an objection can be made to preclude any testimony about the fight.

1. Rule

Rule 602 states that a witness may testify to a matter only if a foundation is laid that the witness has personal knowledge of it. In general, this means a witness must have been present at and observed all events they testify about. There are three exceptions: experts may testify based on second-hand knowledge; properly conducted public opinion polls are admissible; and a witness may testify to matters of family history, even if some of those matters happened before the witness's birth. Witnesses generally may not speculate about another person's state of mind, thought processes, or attitudes.

2. Personal knowledge rule distinguished from opinion rule

Rule 602 is a minimal and general standard. It asks whether a witness had <u>any</u> knowledge. The opinion rule (701) is more focused and asks whether a witness has <u>enough</u> personal knowledge to make specific conclusions reliable. Thus, a witness who was drunk at a noisy and poorly lit strip club at 2:00 am when a shooting occurred has enough personal knowledge to testify generally about events that occurred there, even if he didn't see or remember much. Limitations on ability to perceive correctly go to the weight of the evidence (impeachment) rather than its admissibility. However, that same witness may not have seen the shooter's face clearly or long enough to make his opinion that the defendant was the shooter reliable enough to be admitted.

3. Foundation

(A) When witnesses testifies about what they themselves did or thought, no foundation is required. Everyone is presumed to know what they did.

(B) Before a witness may testify to what other people did or said, Rule 602 requires that a foundation be laid that is sufficient to support a finding that the witness has personal knowledge

of the matter. The foundation is usually satisfied through the witness's own testimony that he or she was present and saw or heard what happened.

(C) Before a witness may describe a building, landscape or object, a foundation is required that the witness saw that item at the time of the event, not at some other time.

(D) If a witness seeks to testify about what someone else was thinking or feeling, no foundation is possible. By definition, the witness cannot have personal knowledge of what is inside another's head. However, if the witness observed someone closely, they may be able to testify that the person "appeared" to be angry, sad, disoriented, etc.

4. How to Object

Good objections address the lack of foundation rather than asserting that the witness lacks personal knowledge:

- I object to the witness describing the fight because no foundation has been laid that he has personal knowledge of what happened. He did not say he actually saw it.
- I object to the witness speculating about whether the defendant "deliberately" started the fight. No foundation can be laid that he knows what another person was thinking

5. Family and organizational "common" knowledge

I know that my parents were married and that Sarah is my sister, even though I was not present at those events. I know that Prof. Orenstein usually teaches evidence even though I have never actually seen her teach. I know when my wife is really, really mad at me even when she says nothing. This kind of testimony is generally allowed based on "common" knowledge rather than a strict interpretation of personal knowledge. The foundation required is that the witness has been a member of a small group -- usually family or workplace -- long enough to know what's going on. There is a lot of judicial discretion to decide whether the amount of knowledge the witness has justifies the testimony.

6. Memories Recovered After Hypnosis or During Therapy

In most states, a witness may not testify to something recalled under hypnosis because no foundation can be laid that this is a genuine memory. However, a previously hypnotized witness may testify as to anything the witness remembered before being hypnotized. The fact that the witness was hypnotized, and was therefore susceptible to suggestion, is a matter of weight for the jury and not a per se disqualification of the witness. The same holds true foir a witness who claims to have recovered memories (usually of childhood sexual abuse) during counseling or therapy because the counseling climate renders the person especially susceptible to suggestion, so that genuine memory cannot readily be distinguished from implanted memory.

7. Personal Knowledge Not Required of Experts

Expert witnesses are subject to Evidence Rule 703, not 602. Rule 703 permits experts to give opinions based on second-hand information such as a review of medical records in a malpractice case, or an opinion poll in a trademark infringement case.