

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.E. 601

The Committee on Rules of Evidence is considering proposing to the Supreme Court of Pennsylvania the amendment of Pennsylvania Rule of Evidence 601 concerning the competency of witnesses for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **September 15, 2023**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Committee on Rules of Evidence,

Sara E. Jacobson, Chair

Rule 601. Competency.

- (a) **General Rule.** Every person is competent to be a witness except as otherwise provided by statute or in these rules.
- (b) **[Disqualification for Specific Defects] Grounds for Incompetency.** A person **[is] may be incompetent, in whole or in part,** to testify if the court finds **[that because of a mental condition or immaturity]** the person:
- (1) is, or was, at any relevant time, incapable of perceiving accurately;
 - (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
 - (3) has an impaired memory; or
 - (4) does not sufficiently understand the duty to tell the truth.

Comment: [Pa.R.E. 601(a) differs from F.R.E. 601(a). It is consistent, instead, with Pennsylvania statutory law. 42 Pa.C.S. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. See, e.g., 42 Pa.C.S. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa.C.S. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa.C.S. §§ 5925, 5926, and 5927); 42 Pa.C.S. §§ 5930—5933 and 20 Pa.C.S. § 2209 (“Dead Man’s statutes”).]

Pa.R.E. 601(a) differs from F.R.E. 601 insofar as a person may also be incompetent as provided by statute. Pennsylvania statutory law deems all persons to be fully competent witnesses, except as otherwise provided by statute. See 42 Pa.C.S. §§ 5911, 5921; see also, e.g., 42 Pa.C.S. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa.C.S. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa.C.S. §§ 5925, 5926, and 5927); 42 Pa.C.S. §§ 5930—5933; and 20 Pa.C.S. § 2209 (“Dead Man’s statutes”). This rule provides grounds for incompetency in addition to those found in statute.

Pa.R.E. 601(b) has no counterpart in the Federal Rules. It is consistent with Pennsylvania law concerning the **[factors for determining competency of a person to testify, including persons with a mental defect and children of tender years. See *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976) (standards for determining competency generally); *Commonwealth v. Goldblum*, 498 Pa. 455, 447**

A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity)] grounds for incompetency. See *Commonwealth v. Goldblum*, 447 A.2d 234, 239 (Pa. 1982).

Pennsylvania case law [recognizes two other grounds for incompetency,] has recognized that a child's "tainted" [testimony, and] recollection or a hypnotically refreshed [testimony] recollection may impair a witness's memory to the point of rendering the witness incompetent. [In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court reiterated concern for the susceptibility of children to suggestion and fantasy and held that a child witness can be rendered incompetent to testify where unduly suggestive or coercive interview techniques corrupt or "taint" the child's memory and ability to testify truthfully about that memory. See also *Commonwealth v. Judd*, 897 A.2d 1224 (Pa. Super. 2006).

In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Supreme Court rejected hypnotically refreshed testimony, where the witness had no prior independent recollection. Applying the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for scientific testimony, the Court was not convinced that the process of hypnosis as a means of restoring forgotten or repressed memory had gained sufficient acceptance in its field. *Commonwealth v. Nazarovitch, supra*; see also *Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989) (when witness has been hypnotized, he or she may testify concerning matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis); *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984) (same). Pa.R.E 601(b) is not intended to change these results.] See *Commonwealth v. Delbridge*, 855 A.2d 27 (Pa. 2003) (child's tainted recollection); *Commonwealth v. Nazarovitch*, 436 A.2d 170 (Pa. 1981) (hypnotically refreshed recollection); *Commonwealth v. Romanelli*, 560 A.2d 1384 (Pa. 1989) (when witness has been hypnotized, he or she may testify concerning matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis). For the constitutional implications when a defendant in a criminal case, whose memory has been hypnotically refreshed, seeks to testify, see *Rock v. Arkansas*, 483 U.S. 44 (1987).

The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the court as a preliminary question under Rule 104. The party challenging competency bears the burden of proving grounds of incompetency by clear and convincing evidence. [*Commonwealth v. Delbridge*, [578 Pa. at 664,] 855 A.2d at 40. The court may observe a witness or conduct a colloquy of the witness to determine whether there is a compelling need to order a competency evaluation. See *Commonwealth v. Thomas*, 215 A.3d 36, 43-45 (Pa. 2019). In *Commonwealth v. Washington*, [554 Pa. 559,] 722 A.2d 643 (Pa. 1998), a case involving child witnesses, the Supreme Court announced a *per se* rule requiring trial courts to conduct competency hearings outside the presence of the jury. See also *Commonwealth v. Hutchinson*, 25

A.3d 277, 295 (Pa. 2011) (finding arguable merit that the trial court's *voir dire* procedure violated the *per se* rule promulgated in *Washington*). Expert testimony has been used when competency under these **[standards has been]** **grounds is** an issue. See e.g., *Commonwealth v. Baker*, [466 Pa. 479,] 353 A.2d 454, **457-458 (Pa. 1976)**; *Commonwealth v. Gaertner*, [335 Pa. Super. 203,] 484 A.2d 92, **98-99 (Pa. Super. 1984)**.

[Official Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2007, effective December 14, 2007; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).]

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

Publication Report

Proposed Amendment of Pa.R.E. 601

The Committee on Rules of Evidence has undertaken a review of Pennsylvania Rule of Evidence 601 concerning the competency of fact witnesses. While Pennsylvania's law of competency is based upon statute and case law, the Committee's review focused on grounds for incompetency established by case law and codified in the rule at subdivision (b). Several amendments to the rule text and commentary are proposed.

Within subdivision (b), the Committee proposes changing the title from "Disqualification for Specific Defect" to "Grounds for Incompetency." No substantive effect is intended; rather, the title will more accurately describe the remainder of the subdivision.

Next, the word "is" would be replaced with "may be" to clarify that the presence of any of the grounds in subdivisions (b)(1)-(b)(4) does not render a witness incompetent. The amendment recognizes that these grounds may also serve as bases for impeachment of a competent witness. See, e.g., *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1082 (Pa. 2001) ("When a witness suffers a condition relevant to his or her ability to accurately observe and report events, the jury must be informed of that witness' disability in order to properly assess the weight and credibility of the testimony."), *abrogated on other grounds*, *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). Competency relates to the "capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true." *Commonwealth v. Delbridge*, 855 A.2d 27, 40 (Pa. 2003).

Additionally, the Committee proposes inserting "in whole or in part" to recognize that a witness may be incompetent to testify on some matters but not all matters. For example, a witness with dementia may have some recollection of distant memories but not of recent memories. Under that circumstance, the witness should be able to testify about the memories the witness can recall. Another example is a child with a tainted recollection – the child may not be competent to testify about the tainted recollection but could be competent to testify about other matters.

Finally, the Committee proposes to remove the phrase, "that because of mental condition or immaturity," from subdivision (b). The phrase was thought to be too limited

and unintentionally omitted a physical condition as a cause for incompetency. This change would eliminate causation as a factor so that the grounds for incompetency are based upon the witness's ability.

The Comment to Pa.R.E. 601 is proposed to be extensively rewritten. The first paragraph is restated to highlight the difference between Pa.R.E. 601(a) and F.R.E. 601 concerning the sources of authority for exceptions to the general rule of witness competency. The revised paragraph also clarifies that Pa.R.E. 601 is an independent source of such authority. The second paragraph is intended to identify the common law underpinning the grounds for incompetency without a string of case citations. Given that the rule itself is a source of authority, its genealogy is less relevant to the application of the rule.

The third paragraph presently states that Pennsylvania case law recognizes two other grounds for incompetency based on tainted testimony and hypnotic recollection. The Committee believes both of those grounds are actually a subset of subdivision (b)(3) (impaired memory). The third paragraph of the Comment has been revised accordingly.

Additionally, rather than attempt to explain the case law cited within the third and fourth paragraphs of the Comment, the Committee proposes to remove those discussions and cite the cases and add parenthetical descriptions of the holdings. This approach allows the opinions to "speak for themselves."

The fifth paragraph is proposed to be amended to recognize the use of judicial observation and witness *voir dire*/colloquy as means of determining whether a competency hearing and expert is necessary. See *Commonwealth v. Thomas*, 215 A.3d 36, 43-45 (Pa. 2019). The Committee also proposes modifying the discussion of competency hearings being conducted outside the presence of the jury.

The discussion of *Commonwealth v. Washington*, 722 A.2d 643 (Pa. 1998), as it relates to proceeding outside the presence of the jury, is also located in Pa.R.E. 104, cmt. at ¶ 6 concerning preliminary questions. In *Commonwealth v. Hutchinson*, 25 A.3d 277 (Pa. 2011), the trial court judge conducted a brief colloquy of a minor to determine whether the minor understood the duty to tell the truth. Thereafter, the prosecutor conducted *voir dire* to establish the minor's competency as a witness. The prosecutor conducted *voir dire* of another minor witness to establish competency. Both the colloquy and *voir dire* were performed in the presence of the jury.

Through a PCRA, the defendant claimed that counsel was ineffective for not objecting to the competency colloquy and *voir dire* being conducted in the presence of the jury. On appeal, the Court concluded that the claim had arguable merit given the requirement of *Washington*. See *id.* at 295. Thus, it appears that a colloquy or *voir dire* for the purpose of determining custody must be conducted outside of the presence of the

jury. However, the Court held that the defendant was not prejudiced because the judge did not make a formal ruling that the minors were competent. *See id.* Further, the jury was instructed that they were solely responsible for determining credibility. *See id.* at 295-296. Finally, the notes of testimony indicated that the minor witnesses were competent. *See id.* at 296 - 299.

All comments, concerns, and suggestions concerning this proposal are welcome.