



E47 The Role of Scientific Evidence Regarding a Child's Competency to Testify: Evidence Required to Overcome a Child's Presumptive Competency

*Stephanie Domitrovich, JD, PhD**, Sixth Judicial District of PA, Erie County Court House, 140 W 6th Street, Rm 223, Erie, PA 16501; *William Bernet, MD**, 1562 Timber Ridge Drive, Brentwood, TN 37027; and *Theodore E. Yeshion, PhD**, ClueFinders, Inc, PO Box 8915, Erie, PA 16505-0915

After attending this presentation, attendees will gain a better understanding of how trial courts view a child's competency and how the litigant carries the burden of proof to overcome the child's presumptive competency.

This presentation will impact the forensic science community by providing lawyers, scientists, and judges with insight into the significant role that reliable and relevant scientific evidence has in assessing the competency of a child witness to testify in a court proceeding whether the child is a victim or a witness.

States such as Pennsylvania have statutes governing the competency of a person to testify. For instance, according to Pennsylvania Consolidated Statutes, Rule 601, the general rule is that every person is competent to be a witness except as otherwise provided by statute or rule. Rule 601 enumerates specifically that a person is incompetent to testify if: (1) at any relevant time the person is or was incapable of perceiving his surroundings; (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. As further enumerated in section (b) of this Pennsylvania statute, the application of this rule is a factual question to be resolved by the court. The party challenging the competency of the testifying party bears the burden of proving grounds of incompetency by clear and convincing evidence or proving that the testimony is tainted.

In most states, there is no fixed age an individual must attain in order to be competent to testify. Age, standing alone, is not a sufficient basis to conclude the child is not competent to testify. Trial courts could and have found two-year-olds and three-year-olds competent to testify. A child is competent to testify if that child possesses the capacity to observe the events, recollect and communicate them, and has the ability to understand questions and to make intelligent answers with an understanding of the child's duty to speak the truth. The decision of competency, once raised, rests primarily with the trial judge who observes the proposed witness, notices his or her manner and apparent possession or lack of intelligence. The trial court has the discretion to ask questions of said witness to disclose the child's capacity and intelligence, as well as the child's understanding of the obligations of the oath. Trial court judges differ as to their approach in examining child witnesses. Some trial judges take the lead and ask the preliminary and foundational questions necessary for competency. The attorneys in this approach would be permitted to ask questions after the trial judge completes his or her *voir dire* of the child. Other judges prefer permitting the attorneys to ask the preliminary and foundational questions on competency with the trial judge asking any follow-up questions. Experts suggest that regardless of who asks the questions, the type of specific questions is crucial to determining the competency of the child. Such questions should be non-leading or open-ended prompts that do not suggest the answer to the child. Examples of best practices in this area regarding questions will be provided to the attendees.

Moreover, a trial judge will consider whether the expert's interviewing techniques have tainted, led, or further influenced the responses of the child. Taint occurs when the memory of the child is considered to have been manipulated so that what the child remembers and what the child has been coaxed into thinking as a memory have been influenced by another.

To assist the trial judge, lawyers should provide testimony and reports from experts such as psychiatrists or psychologists who can testify regarding the child's ability to meet the competency requirements. The attendees in this presentation will learn the importance of hiring experts who can provide evidence based on reliable scientific methodology to assist the knowledge and understanding of the trial judge. The expert is expected to review the prior interviews and depositions of the child, examine the type of questions asked of the child, administer psychological testing such as the NEPSY-II, and review medical records and reports from other experts in the case as well as reports from agencies which serve the best interests of the child. The expert would discuss the issues of memory, suggestibility, and cognitive development and the relevance of these issues to evaluating the testimony of the child witness. The expert provides insight as to how a child's memory is created and how a child's memory can be altered. The attendees will learn about the great difficulty young children have in discriminating between related episodes in memory and how they are especially prone to confusing related pieces of information in memory. Forensic experts provide the written reports with their methodology and opinions analyzing and applying the



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factors which can likely influence the child's ability to provide an accurate, independent recollection of the events the child allegedly experienced.

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