

Competency to Be a Witness: A Major Child Forensic Issue

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Competency of a child witness is a changing area of case law and forensic psychiatry practice. This article summarizes the basic legal and clinical aspects of determination of competency of the child witness to testify. Guidelines for such forensic examinations are detailed. Case examples are described that highlight major clinical issues in these examinations.

A child seeing or speaking of an event of forensic importance is not rare. Federal crime statistics estimate that over one quarter of all robberies occur near the home where children are likely to witness the acts. In 1980, 40% of all homicides were the result of domestic violence and 40% of all rapes occurred in the home.¹ Estimates predict that roughly 200,000 new cases of sexual abuse against children may occur each year.² Contested custody cases account for approximately 10% of all custody proceedings.³ Nearly 20 state statutes specifically call for the judicial consideration of the child's wishes in custody matters.⁴ The forensic psychiatrist with child psychiatry expertise is often called to evaluate and form an opinion concerning a child's competency to be a witness. This article examines the legal and psychiatric issues in such examinations, specifically in criminal matters.

Legal Standards

The legal standards for establishing the competency of a child witness vary substantially from jurisdiction to jurisdiction. The majority of states by statute or case law prescribe an age at or above which a child is presumed competent to testify. This age has varied from 14 in common law, 10 currently in approximately half the states, and 12 in other states.⁵ Below the specified age the court must determine on a case by case basis a child's testimonial capacity. Thirteen states, the Federal Rules of Evidence Section 601⁶ and the Military Rules of Evidence Rule 601⁷ have abandoned such age criteria. However, in many states, such as New Hampshire, where there is no specific age that would exclude a child as a witness, a competency challenge can and is routinely raised when a witness is under 10 years of age.⁸

Testimonial capacity is based on four general factors⁹:

1. Present understanding of the difference between truth and falsehood and an understanding of the responsibility to speak the

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- truth; in some states this is phrased as an understanding of the nature and obligation of an oath;
2. Mental capacity at the time of the alleged incident to observe and receive accurate impressions of the occurrence;
 3. Memory sufficient to retain an independent recollection of the event; and
 4. Ability to communicate this memory and the capacity to understand simple questions about the event.

The forensic clinician performing the competency assessment should request a copy of the current rules of evidence or statutes governing competency of witnesses and relevant case law in their jurisdiction because this area of the law is changing rapidly. For example, in Maine a recent case involving the current standards for competency of young children to testify in that state was based on contrasting the Maine Rules of Evidence Rule 601(b), which narrows the legal definition of competency to testify, with earlier case law. In *State v. Samson* (1978)¹⁰ the state of Maine had set out three criteria to use in determining a child's competency: (1) the child's ability to understand and answer questions intelligently, (2) the child's ability to accurately tell a truthful version of his own experience, and (3) the child's ability to understand the difference between right and wrong. In *State v. Pinkham* (1980)¹¹ these criteria were reviewed when a defendant objected to an eight-year-old child testifying, citing that the criteria as articulated in *Samson* were not met. The court rejected the defendant's reliance on *Samson* because that case had taken place before the ratifying of the Maine Rules of Evidence. Rule 601(b) states, "A person is disqualified to be a witness if the court finds that (a) the proposed

witness is incapable of expressing himself concerning the matter so as to be understood by a judge and jury . . . or (b) the proposed witness is incapable of understanding the duty to tell the truth. . . ." The *Pinkham* court found that children need only be able to express themselves so as to be understood by the trier of fact. It also found that the other criteria listed in *Samson* pertained only to the weight and credibility of the testimony and not to competency to be a witness.¹²

The statutory pronouncements establish only very broad guidelines. For example, in Ohio, Rule of Evidence 601(A) states, "Every person is competent to be a witness except those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly. . . ."¹³ Case law must also be examined to gain practical insight into the general legal standards.³ For example, in California, an understanding of the duty to tell the truth requires only that the child witness understand the difference between telling the truth and telling a lie, and that "some earthly evil will befall" if one does not tell the truth. In one California case the court held that the fact that the child knew a spanking follows a lie was sufficient.¹⁴ In Ohio the emphasis in case law has been on the child's appreciation of the duty to tell the truth and ability to communicate. In *Hill v. Skinner* it was stated, "The essential test of competency of an infant witness is his comprehension of the obligation to tell the truth and his intellectual

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capacity of observation, recollections, and communication. 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 a Deity or something held in reverence or regard, and if he has the intellectual capacity to communicate his observations and experiences."¹⁵

Historically, one of the key issues in proving competency has been a determination of the child's understanding of the nature of the oath. In the past a child or an adult who did not have sufficient religious training could not take the oath and would be barred from testifying. Today, however, few states require a formal oath for the child witness.¹⁶ The failure of a child on *voir dire* to understand the technical meaning of an oath will not disqualify him as a witness. Some solutions to this problem have included the following: (1) the judge instructing a child on the meaning and procedure of an oath and then proceeding to have the child formally sworn; (2) other jurisdictions simply allowing the child to take an oath after sufficient questioning of his or her moral understanding; and 3) some states permitting the judge to use any ceremony that is meaningful to the child and that represents to him or her an affirmation of the truth. However, the administration of an oath is a formality only. It is the concept of knowing what it means to tell the truth that is essential.⁴

Courts have traditionally conducted an *in camera* transcribed *voir dire* to establish a child's testimonial capacity. The purpose of the questioning is to

determine whether the child will be allowed to testify at all. The credibility of the testimony is not addressed at the time of the *voir dire*. Judicial inquiry is often directed toward a child's religious and moral beliefs as well as toward the child's ability to differentiate truth from falsehood, the comprehension of the duty to tell the truth, and the understanding of the consequences of not fulfilling that duty.¹⁷

An historical example of *voir dire* is recorded in the widely cited case *Wheeler v. United States* (1895), in which a five-year-old boy testified as a witness to his father's murder. "The boy, in reply to questions put to him on his *voir dire*, said among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to 'tell no lie,' and in response to a question as to what the clerk said to him when he held up his hand, he answered, 'don't you tell no story.'" The child was also asked simple factual questions about his residence, family, and schooling that could be readily confirmed.¹⁸

The appeals court upheld the conviction of the defendant in the *Wheeler* case based upon the finding that the *voir dire* was sufficient for a finding of competency to testify and for the subsequent admission of the child's testimony.

... that the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of

calling as a witness an infant of only two or three years old, there is no precise age which determines the question of competency. This depends on capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous.¹⁸

The judge has sole discretion to make the decision concerning the child's competency. This will be based on the *voir dire*, observation of the child, and, possibly, a psychiatric report. The decision of the trial judge concerning competency of a child is subject to appeal but will not be set aside in the absence of clear abuse of discretion.

The minimal legal standard for competency of a child witness is whether he understands what it means to tell the truth and whether he will adhere to the truth in his testimony.⁴ However, Melton¹⁷ notes that adherence to the truth may not be sufficient to establish competency. "There is also a necessity that the child have cognitive skills adequate to comprehend the event he or she witnessed and to communicate memories of the event in response to questions at trial. If a child's view of the truth bears little resemblance to reality, it will also have little value to the trier of fact. Thus competency to testify implies some measure of competency at the time of the event witnessed as well as at the time of the trial. The child must be able to organize the experience cognitively and

to differentiate it from her own thoughts or fantasies." Psychologically, the child must be able to maintain these skills while under external or internal stress, such as confrontation of the defendant or family and personal pressure to recant. The ability to record and communicate a memory may also require a consistent and intelligible vocabulary of objects and behavior. This may be particularly important in sexual abuse cases. The current legal trend has been toward an unequivocal statement that competency is fixed at the time of testimony, not at the time of the event. Recent rulings have attempted to distinguish the competency determination from issues of intactness of memory, which is increasingly viewed as a credibility issue. However, courts continue to differ on the weight given the capacity of child at the time of the occurrence as it relates to a determination of competency.¹⁹

The complete psychiatric assessment of a child's competency to testify is far more extensive than the minimal legal standard. The difficulty in separating competency and credibility issues or establishing a red line for competence prompted McCormick²⁰ and Wigmore²¹ to recommend that children's testimony be heard by the trier of fact without an initial finding concerning competency. Wigmore recommends:

A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure *a priori* the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility, is futile and unprofitable. . . . Rec-

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ognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let the story come out for what it may be worth.

The Federal Rules of Evidence, Rule 601, adopted such a presumption that all witnesses are competent to testify. Rule 601 provides that "every person is competent to be a witness except as otherwise provided in these rules." The Practice Comment to Rule 601 explains, "The facts that formerly constituted incompetency may be introduced as matters of weight and credibility for the trier of fact." Factors that formerly constituted sufficient grounds for the exclusion of a witness may be grounds for impeachment when all witnesses are presumed competent in a particular jurisdiction.¹⁹ In 1980 the Military Rules of Evidence adopted the same wording as the Federal Rules of Evidence, Rule 601.⁷ A trend is developing in state statutes to abolish the competency requirement for children by adopting Rule 601.⁸

Until Federal Rule 601 is universally adopted, developing case law will continue to attempt to distinguish between competency and credibility issues. These differences were articulated in the *Pinkham* and *Samson* cases in Maine described above and a recent Massachusetts case. In *Commonwealth v. Widrick* (1984)²² a defendant charged with assault, battery, and rape of a seven-year-old child filed a motion requesting that the trial judge order psychiatric examination of the child and a corroborating

witness, the child's six-year-old sister. The motion did not assert that either of them was incompetent because of mental disease or defect, but rather requested that the examinations be available for impeachment purposes at the trial. The appeals court concluded that the trial judge did not have the authority to order a psychiatric examination for the purpose of assessing a witness' credibility as state law allowed for a psychiatric examination only when a witness' competency to testify was at issue. Cross-examinations of the witnesses and the use of expert testimony were held to be adequate methods for assessing the credibility of any witness.

In summary, the legal standards for competency to be a witness vary substantially among jurisdictions and are undergoing rapid reform and refinement in statutes and case law. Forensic psychiatrists doing these examinations are well advised to stay informed of local changes and trends.

The Forensic Examination

Competency is a legal term dealing with a mental capacity or ability to perform an act. Competency is not a unitary concept but instead varies with the specific legal context or issue. There are many areas of competency but the basic questions to be asked in all examinations are the following²³:

1. Is there a mental disease or defect that affects judgment, decision making, or behavior?
2. Does this mental disease or defect directly impair the individual's performance of the specific task?

Smith²³ defines the capacity to be a witness as the ability to understand the

moral obligation to speak the truth and the nature of the questions being asked as well as the ability to form and communicate an intelligent answer. The psychiatric examination for competency to be a witness should organize and analyze the clinical data to answer the two basic questions as they relate to a child being a witness. Table 1 summarizes the elements relevant to the forensic examination for competency to be a witness.

The forensic examination should begin with a review of the current legal standard for competency to be a witness and relevant documents pertaining to the child, such as recent psychological testing if available, school records, police reports of the alleged incident, and psychiatric records. The document review should provide an estimate of intellectual endowment, the documentation of overt psychiatric disorders, and expo-

Table 1
Forensic Examination for Competency to Be a Witness

Legal Standard	Sources of Data	Psychiatric Assessment of Functioning
Is there a mental disease or defect?	Current mental status examination Clinical interview Caretaker's report Review of documents Relevant past history	Level of anxiety and distractibility Presence or absence of unmanageable behavior Presence or absence of significant intellectual deficit Presence or absence of psychosis or other major mental illness Presence or absence of oppositional behavior (refusal to talk) Presence or absence of massive interference by fantasy
Does this mental disease or defect directly impair functions relevant to being a witness?	Same	Basic understanding of court procedure including the role of being a witness Reconstructed mental status examination at time of incident as it relates to memory (both recall and recognition) Intactness of memory of incident Quality of relating to an examiner Capacity to disclose relevant facts Capacity to tolerate cross-examination and confrontation Understanding of difference between truth and falsehood; understanding of responsibility to speak truth Child's willingness to testify

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sure to investigatory materials such as anatomically correct dolls or drawings. A clinical review with a caretaker should provide a review of the child's developmental history and the child's current emotional and intellectual functioning. Each adult and child interviewed should be informed of the purpose of the examination and its lack of confidentiality. Each should be informed that the determination of competency to be a witness rests with the trial judge based on *voir dire* as well as on any psychiatric report. Particular attention should be paid to documenting incapacitating levels of anxiety, disruptive behavior, significant intellectual deficit, or presence of psychosis or other major mental illness currently or at the time of the alleged event. The parent or caretaker may be able to detail the family's vocabulary for body parts or sexual acts if the case involves a sexual abuse allegation. The examiner should also gather data that can corroborate the child's answers to general questions relevant to memory, such as the events on a recent birthday or holiday. The parent or caretaker should be questioned about the child's moral development and any past history of significant lying or antisocial acts. A medical and medication history should be reviewed because lapses of consciousness, delirium, organic amnesia, or medication side effects such as drowsiness may be relevant to competency.

The interview of the child begins with a behavioral observation of the child. Is the child hyperactive, disorganized, or unable to separate from the accompanying caretaker? Is the child informed of or readily able to learn the purpose of

the interview? This will demonstrate the child's ability to orient and participate in a focused, interview-based task such as testifying. Can the child engage in a verbal interview rather than only play? Can the child accurately relate basic data and facts about neutral events? Is the child sufficiently resistant to leading questions on neutral subjects they know well? (In general, children appear to be at much less of a disadvantage in resisting suggestion when they are familiar with the situation.²⁴) Does the child understand the concepts of telling the truth versus telling a lie? Can they identify and give real examples of each? Do they feel an obligation to tell the truth? What do they believe is the consequence of telling a lie? In sexual abuse cases, can they consistently and intelligibly identify body parts when reviewed in a nonleading way? A routine protocol is recommended where the interviewer asks for body part names and functions from head to toe.²⁵ No detailed exploration of the allegation should be made by the examiner during the competency assessment. This is to avoid the issue of interview contamination secondary to the competency assessment being raised; however, the child's reaction to the anatomically correct drawings or dolls and questions concerning body parts may be highly relevant to competency to be a witness. For example, the child who flees the interview room or begins to talk in jibberish when asked to identify body parts is unlikely to be found competent due to his inability to communicate.

Each evaluation should include detailed clinical data to describe the child's current mental status examination. Par-

ticular attention should be paid to behavioral controls and to management of anxiety as well as to coherence and organization of thought because each trait has a major impact on an individual's ability to testify. In a difficult case two to three interviews of increasing length can be held to assess the child's capacity to improve performance when familiar with a setting and an interviewer. Unrealistic or overstimulating modifications of the interview setting, such as offering food or the unstructured use of the anatomically correct dolls or drawings, should be avoided.

An attempt to diagnose a child by the criteria of the Diagnostic and Statistical Manual-III²⁶ should be made. In the majority of traumatized children the diagnosis will be adjustment reaction or posttraumatic stress disorder.²⁷ It will be the concrete behavioral descriptions, however, that will most clearly communicate the impairment in the child's capacity to be a witness. As mental disease and defect are legal terms and have no psychiatric definition, behavioral descriptions will permit the trial judge to determine whether a mental disease or defect exists.

Children should be asked about their willingness to testify to the best of their abilities. Their response and any recommended modification of the legal proceedings that would significantly maximize the children's performance should be noted for the court's consideration. Legally permissible modifications of court proceedings vary among jurisdictions.¹⁹

Table 2 sets forth a format for forensic reports pertaining to a child's compe-

Table 2
Report Format for Competency to Be Witness

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1. Reason for referral
 2. Sources of information noting interview duration, individuals interviewed, professionals consulted by conferences or telephone and documents reviewed
 3. Confidentiality warning
 4. Description of child's current functioning
 5. Relevant past history
 - a. developmental history including language development and vocabulary for body parts
 - b. age and level of functioning at time of alleged event
 - c. medical history
 - d. school history
 - e. psychiatric history
 - f. psychologic testing summaries
 6. Clinical observations, including
 - a. mental status examination
 - b. child's capacity to comprehend simple questions and express self coherently
 - c. demonstration of age appropriate intactness of past memory
 - d. child's knowledge of truth and duty to be truthful
 - e. ability to use skills to testify
 7. Impressions (DSM-III diagnosis)
 8. Opinion
 - a. detail relationship of psychiatric signs and symptoms to functioning relevant to being a witness
 - b. recommend methods to maximize child's performance
 - c. distinguish any credibility issues from competency issues
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tency to be a witness. The opinion should detail the relationship of any current psychiatric signs or symptoms to the role of being a witness. If issues relevant to credibility such as recantation or age-inappropriate language are found on interview these should be noted as distinct from the observations relevant to competency (see Clinical Example 4). Reports should only be sent to the trial judge who ordered the competency assessment. Such reports should be considered a consultation to the judge

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who makes the determination of competency.

Clinical Examples

These clinical examples are summarized to show the range of issues seen during competency to be witness evaluations.

1. Mental Retardation as a Bar to Competency to Be a Witness A child of four with Down's syndrome was allegedly sexually abused by a stepfather. The child's IQ was estimated to be 45 to 50. She had a vocabulary of approximately 75 words and a major speech impediment. During her competency assessment she parroted back the interviewer's questions but gave no consistent, meaningful answers. She was well socialized and in good behavioral control. She eagerly attempted to engage in the interview, leading the examiner to believe that the results represented her best effort. The meaning of her play, enacting penetration of orifices by a throat stick, was confounded by her having had major surgery one month before her assessment to be a witness. No opinion with reasonable medical certainty could be reached concerning the meaning of these nonverbal reenactments.

Moderate retardation as a diagnosis need not be an absolute bar to competency to testify.²⁸ In this case it was the impairment of the child's ability to communicate secondary to the retardation and speech impediment that formed the basis of her being found incompetent to testify. The intervening event of major surgery, which had included extensive instrumentation, prevented any opinion

being reached concerning the meaning of the child's "traumatic play".

2. Disorganizing Anxiety Leading to a Finding of Incompetency to Be a Witness A seven-year-old boy was allegedly physically and sexually abused by a neighbor. This boy had a history since the alleged abuse of tantrums, overactivity, and aggressive behavior to peers. He had no intellectual deficit. On interview he was panicky and unable to separate from his parents. He tolerated only 15 to 30 minutes of interview. He was coherent and understandable on neutral topics. However, he would suddenly interrupt the interview and say, "The bad man will be there [in the courtroom]." He would then look fearful, become disorganized, and barricade himself in the bathroom. He would only reenter the interview room if he could play a board game silently. This observation was repeated over three brief interviews over a two-week period and summarized in the psychiatric report. The judge observed similar behavior at the time of *voir dire* and found him incompetent to be a witness.

This case demonstrates the way in which posttraumatic symptoms can interfere with competency to be a witness. The intrusive thoughts of the anticipated confrontation of the defendant caused this child to behave in a way that grossly disorganized him. His secondary avoidant behavior seriously compromised his competency. Modifications of the legal proceedings such as closed-circuit television would have been unlikely to significantly change the outcome because it was this child's internal distress generating the symptoms.

3. *A Child as a Key Witness in a Murder Trial—a Modern-day Wheeler case* In 1983 a five-year-old girl was the key prosecution witness in a murder trial in which her father was charged with killing his estranged wife, the girl's mother. According to facts presented during the trial the wife went to her husband's office to collect child support payments and "never left the office alive." Katie, aged five, holding a pale green teddy bear, testified that she heard a scream while waiting for her mother outside her father's office. She said she looked into the office window and saw her mother's feet as she lay on the floor. Katie had earlier been easily found competent on *voir dire*. No body was ever found. However, largely based on his daughter's testimony, the defendant was found guilty of manslaughter.

4. *Competency to Be a Witness as a Distinct Issue from Credibility* The seven- and five-year-old stepdaughters of a psychiatric patient alleged that he had sexually abused them after they were noted to have increasingly sexualized behavior. Their mother immediately separated from her husband. Six months later the girls were examined for their competency to be witnesses. Each girl walked in to the interview rooms and essentially stated, "I told a lie before. Daddy didn't do nothing. I was tricked by all those people's questions." Both girls were bright, verbal, articulate, and in good behavioral control and knew the difference between truth and lying in hypothetical situations. Neither had a diagnosable mental disorder or overt symptoms. Discussions with their mother revealed that she now saw her

husband daily, was convinced of his innocence, and permitted the girls to speak with him nightly on the telephone.

The forensic report detailed all of these findings. The examiner gave the opinion that the girls were competent to be witnesses but that the interview material raised major credibility issues to be determined by the trier of fact.

5. *Competency of a Disturbed Adolescent to Be a Witness* Rose was a 14-year-old adolescent in residential treatment who alleged that a staff member had molested her. Rose had a history of conduct disorder and borderline intellectual functioning. She came from a disorganized family where she had witnessed an elder sister being molested by her stepfather. She had no documented history of being sexually abused. She was on no psychotropic medication. During the evaluation for competency to be a witness she was noted to be emotionally immature but organized and relevant in her thinking. She gave a spontaneous, brief, but highly specific account of the allegation. She appreciated her duty to testify truthfully. She tolerated a 90-minute assessment without difficulty. Her account of her past history, including a complicated series of out-of-home placements, was confirmed by a social worker accompanying her to the interview. There were no symptoms of psychosis. The examiner's report stated that there was insufficient clinical evidence to overcome the presumption that this 14-year-old was competent to be a witness. The trial proceeded.

Summary

The competency of child witnesses represents an evolving area of law as well

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as psychiatry. The forensic psychiatrist involved in such examinations needs to be informed of the current legal trends, the limits of the evaluation, the psychologic impact of the child's experience as a witness, and the child's exposure to the criminal justice system and of the impact that these factors have on the child's testimonial capacity. For example, new findings by Pynoos and Eth²⁹ of the psychologic methods that children use to limit traumatic anxiety such as denial-in-fantasy and inhibition of spontaneous thought may seriously compromise testimonial capacity. Forensic psychiatrists with child psychiatry expertise are urged to participate in these evaluations and this area of research.

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