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# Rule 601: General Rule of Competency

# ARTICLE VI. WITNESSES

## RULE 601: GENERAL RULE OF COMPETENCY

Federal Rule of Evidence 601 states:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.[1]

The enactment of Rule 601 abolished the federal common law that a witness should be disqualified based upon general assumptions of incompetence. Prior to the enactment of Rule 601, disabilities such as infancy, religious beliefs, criminal convictions, interest in the litigation, insanity, and adversarial testimony about a decedent may have rendered a witness incompetent to testify.[2] Rule 601 now establishes a presumption of competency of all witnesses,[3] with the exception of the "so-called Dead Man's Acts"[4] which are still recognized in many jurisdictions as exceptions to the general competency rule for all witnesses.[5] As the rule now exists, the trier of fact, after hearing the testimony of all the witnesses, is permitted to decide how much weight should be accorded to the testimony; this is now a question of witness credibility rather than witness competency.[6]

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1. FED. R. EVID. 601.

2. *See* FED. R. EVID. 601 advisory committee's note.

3. *See* United States v. Odom, 736 F.2d 104, 112 (4th Cir. 1984) (stating that "[u]nder . . . [R]ule [601] every witness is presumed to be competent").

4. *See infra* notes 16-26 and accompanying text.

5. FED. R. EVID. 601 advisory committee's note. "The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons." *Id.* Although there is no federal "Dead Man's Act," federal courts sitting in diversity will apply a Dead Man's Statute if one exists under the applicable state law.

6. *See* United States v. Cook, 949 F.2d 289 (10th Cir. 1991). "Rule 601 represents the culmination of the modern trend which has converted questions of competency into questions of credibility while 'steadily moving towards a realization that judicial determination of the question of whether a witness should be heard at all should be abrogated in favor of hearing the testimony for what it is worth.'" *Id.* at 293 (citation omitted).

Even prior to the enactment of the Federal Rules of Evidence, the United States Supreme Court, in *Rosen v. United States*,[7] seemed to be moving away from the stringent common law position, recognizing that "truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding . . . leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting the witnesses as incompetent . . . ."[8] More recently, the Fifth Circuit, in *United States v. Roach*,[9] held that Rule 601 did not require an examination of a witness to determine his or her competency, but rather, the issue is a question of credibility which is to be tested through cross-examination.[10]

In New York, however, the issue of witness competency varies according to the type of proceeding. In criminal proceedings, New York's Criminal Procedure Law provides that any person can be a witness unless the court finds that, due to infancy, mental disease or defect, he or she does not possess the capacity or intelligence required of a competent witness.[11] By contrast, in civil proceedings, a witness is considered to be competent even where he or she has an interest in the event[12] or where he or she has been convicted of a crime.[13]

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7. 245 U.S. 467 (1918) (rejecting the common law rule of witness disqualification based on a prior criminal conviction).

8. *Id.* at 471. *See also* Rock v. Arkansas, 483 U.S. 44, 54 (1987). In *Rock*, the Court applied *Rosen* in holding that a per se rule barring all hypnotically induced testimony in a criminal case is constitutionally impermissible. *Id.* (quoting Rosen v. United States, 245 U.S. 467 (1918)).

9. 590 F.2d 181 (5th Cir. 1979).

10. *Id.* at 186 ("If the court finds the witness otherwise properly qualified, the witness should be allowed to testify and the defendant given ample opportunity to impeach his or her perceptions and recollections.").

11. N.Y. CRIM. PROC. LAW § 60.20(1) (McKinney 1992). Section 60.20(1) states: "Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence." *Id.*

12. N.Y. CIV. PRAC. L. & R. 4512 (McKinney 1992). Section 4512 provides: "Except as otherwise expressly prescribed, a person shall not be

New York however, has a variety of limitations to the general rule of competency. For example, New York Civil Practice Law and Rules [hereinafter C.P.L.R.] section 4502(a)[14] provides a narrow rule of incompetence in matrimonial actions based on adultery.[15]

Similarly, C.P.L.R. section 4519,[16] commonly referred to as the "Dead Man's Statute," provides an additional exception to the witness competency rule.[17] The "Dead Man's Statute" is a codified version of the common law disqualification of adversarial testimony concerning communications with a

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excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party." *Id.*

13. N.Y. CIV. PRAC. L. & R. 4513 (McKinney 1992). Section 4513 provides in pertinent part: "A person who has been convicted of a crime is a competent witness . . . ." *Id.*

14. N.Y. CIV. PRAC. L. & R. 4502(a) (McKinney 1992). Section 4502(a) provides: "A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense." *Id.*

15. N.Y. CIV. PRAC. L. & R. 4502 practice commentaries. Section 4502 provides three exceptions in an action for adultery. Specifically, "[o]ne spouse may testify against the other: 1) to prove the marriage, 2) disprove the adultery, or 3) disprove a defense after evidence in support of the defense has been introduced." *Id. See* Marrow v. Marrow, 124 A.D.2d 1000, 508 N.Y.S.2d 789 (4th Dep't 1986).

16. N.Y. CIV. PRAC. L. & R. 4519 (McKinney 1992). Section 4519 provides in pertinent part:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest . . . by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person . . . .

*Id.*

17. *See* N.Y. CIV. PRAC. L. & R. 4519 practice commentaries. ("CPLR 4519 and its predecessor statutes have preserved the rule of incompetency with respect to the testimony of an interested person concerning a transaction or communication with a decedent or mentally ill person.").

deceased or mentally ill person.[18] The underlying rationale for this exception is the concern that testimony regarding events and actions involving a deceased or mentally incompetent person is not susceptible to verification through cross-examination.[19] Because one of the parties is permanently unable to testify to either contradict or verify the testimony, as a matter of public policy, the New York State Legislature has decided that in order to "achieve adversarial balance in civil trials" by not allowing testimony that cannot be refuted by the other party to the transaction.[20] As such, proof of communications between a deceased person and an interested witness must be proven through documentary evidence.[21]

The "Dead Man's Statute" is frequently invoked in actions to contest a decedent's will. For instance, in *In re Estate of Wood*,[22] the New York Court of Appeals affirmed the applicability of the Dead Man's Statute in New York:[23] "One of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court."[24]

In contrast to New York law, Federal Rule 601 abolished the *federal* common law notion of a Dead Man's Statute.[25] The Dead Man's Statute will be used by a federal court only when state law applies in a diversity action.[26]

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18. *Id.*

19. *Id.* ("Such testimony is considered to be rife with the potential for perjury because it can be given without fear of contradiction by the other party to the transaction.").

20. *Id.*

21. *Id.*

22. 52 N.Y.2d 139, 418 N.E.2d 365, 436 N.Y.S.2d 850 (1981).

23. *Id.* at 143-44, 418 N.E.2d at 366-67, 436 N.Y.S.2d at 851-52 (stating that the Dead Man's statute is embodied in statutory law and modification of it is a matter for the legislature).

24. *Id.* at 144, 418 N.E.2d at 366-67, 436 N.Y.S.2d at 852.

25. *See* FED. R. EVID. 601.

26. *Id. See, e.g.*, Stutzman v. CRST, Inc., 997 F.2d 291 (7th Cir. 1993) (finding that admission of expert testimony is a substantive issue governed by state law); Lovejoy Electronics, Inc. v. O'Berto, 873 F.2d 1001, 1005 (7th Cir. 1989)(holding that "in civil cases 'with respect to an element of a claim or

In conclusion, the Federal Rules of Evidence allow for a much broader interpretation of witness competency, relying upon the finder of fact's ability to weigh testimony in relation to the credibility of the witness. In contrast, while generally allowing all competent witnesses to testify, New York law possesses specific grounds upon which a witness may be disqualified. Finally, in federal cases where diversity jurisdiction exists, state

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defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law'"); Savarese v. Agriss, 883 F.2d 1194 (3d Cir. 1989) (stating that the State's Dead Man's Statute would not apply to a federal claim under 42 U.S.C. § 1983); Finch v. Monumental Life Ins. Co., 820 F.2d 1426 (6th Cir. 1987) (allowing insured's widow to testify regarding statements made by her husband in violation of Tennessee statute because a timely objection was not made); Cipriani v. Sun Life Ins. Co. of America, 757 F.2d 78 (3d Cir. 1985) (holding that in a diversity action, testimony of insured's intent to change beneficiaries on a life insurance policy was admissible under Pennsylvania's Dead Man's Act where alleged beneficiary did not represent any interest of the insured); Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 411 F.2d 88 (3d Cir. 1969) (finding that it was not necessary to decide the competency of a witness under the Dead Man's Act although finding that Pennsylvania state law applied in this diversity action); Spraying Systems Co. v. William G. Smart Co., Inc., 816 F. Supp. 465 (N.D. Ill. 1993) (finding that a manufacturer waived its right to invoke the Illinois Dead Man's Act).

law grounds for disqualification, such as those in New York, may limit the liberal interpretation of the Federal Rules of Evidence.