29.4 Competency of Witnesses

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This section deals with the competency of witnesses to testify at trial. For a discussion of a defendant's capacity, or competency, to proceed to trial, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 2, Capacity to Proceed (2d ed. 2013).

A. General Rule

In order to testify, a witness must be competent. 81 AM. JUR. 2D *Witnesses* § 160 (2004). Before adoption of the N.C. Rules of Evidence, a witness was considered competent if he or she understood the obligations of an oath or affirmation and had sufficient capacity to understand and relate facts that would assist the fact finder. *See State v. Gordon*, 316 N.C. 497, 502 (1986). This standard is comparable to the competency standard under the N.C. Rules of Evidence, which has governed competency determinations since 1984. *Id.* (so noting). The common law imposed a variety of other grounds for disqualifying witnesses from testifying. Most of these disabilities have been removed by the rules of evidence, which allow anyone to be a witness who meets the standard of competency. *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 131, at 506–07 (8th ed. 2018).

N.C. Rule of Evidence 601(a) provides that, unless disqualified by the Rules of Evidence, "[e]very person is competent to be a witness." A person is only disqualified as a witness if the person is incapable of (1) expressing himself or herself so as to be understood (either directly or through an interpreter) or (2) understanding the duty of a witness to tell the truth. N.C. R. EVID. 601(b). This rule "does not ask how bright, how young, or how old a witness is." *State v. Davis*, 106 N.C. App. 596, 605 (1992). The only question is: "does the witness have the capacity to understand the difference between telling the truth and lying?" *Id.*; *see also State v. Hicks*, 319 N.C. 84 (1987) (to be found competent, a witness is not required to understand his or her obligation to tell the truth from a religious point of view; it is sufficient if the witness knows the difference between the truth and a lie, has the capacity to understand and relate facts, recognizes the obligation to tell the truth, and expresses the intention to tell the truth).

The competency standards set out in Rule 601(a) and (b) "are very nearly the lowest requirements that it is logically possible to imagine." WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 601, at 390–91 (2017). The witness need only "have some ability to communicate and some understanding of the duty to tell the truth." *Id.* at 391.

Whether a person is competent to testify is a decision within the discretion of the trial judge, and his or her determination will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Gordon*, 316 N.C. 497 (1986).

B. Procedures for Determining Competency

Generally. The trial judge must determine the competency of a witness when the issue is raised by a party or by the circumstances. *State v. Eason*, 328 N.C. 409 (1991). Competency is a preliminary question; therefore, the Rules of Evidence (other than those governing privileges) do not apply. *See* N.C. R. EVID. 104(a); *State v. Fearing*, 315 N.C. 167 (1985) (recognizing applicability of Rule 104 to competency determination). In determining competency, the judge may consider any relevant and reliable information even if that information would not be technically admissible in evidence at trial. *See, e.g.*, *In re Will of Leonard*, 82 N.C. App. 646 (1986) (proper for trial judge to consider court records of the witness's involuntary commitment proceedings even if they were hearsay and not properly authenticated, identified, or received in evidence at the voir dire hearing).

Burden on party contesting competency. In jurisdictions such as North Carolina where every person is considered competent to testify unless shown otherwise, the party challenging a witness's competence has the burden of establishing incompetence. *See* JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 2.13[B], at 2-58 (6th ed. 2016).

Inquiry should be made before witness testifies. No particular procedure is required for determining competency but, if a party objects to a witness testifying based on competency grounds, a voir dire of the witness is typically conducted before he or she testifies. *See State v. Fearing*, 315 N.C. 167 (1985); *see also State v. Reynolds*, 93 N.C. App. 552, 556–57 (1989) (stating that the better practice is to determine competency before a witness begins to testify in order to avoid having to strike prejudicial testimony or to grant a mistrial). The trial judge must make sufficient inquiry to satisfy himself or herself that the witness "is or is not competent to testify." *In re Will of Leonard*, 82 N.C. App. 646, 649 (1986). "The form and manner of that inquiry rests in the discretion of the trial judge." *Id.* An adequate inquiry generally includes personal observation of the witness. *Fearing*, 315 N.C. 167. The judge also may hear testimony from witnesses who are familiar with the witness, but such testimony is not required. *See State v. Roberts*, 18 N.C. App. 388 (1973). If the competency of a State's witness is at issue, the defendant should have the opportunity to examine the witness, but the denial of that opportunity may not always violate the defendant's confrontation rights. *See State v. Beane*, 146 N.C. App. 220 (2001) (finding in circumstances of case that the trial judge's decision not to allow defense counsel to cross-

examine a child witness at a competency hearing was harmless error and that the defendant's cross-examination of the witness at trial cured any prejudice).

The failure of the trial judge to hold a voir dire hearing or to make findings of fact or conclusions of law in support of his or her decision does not automatically entitle the defendant to a new trial. *See State v. Spaugh*, 321 N.C. 550 (1988); *State v. Huntley*, 104 N.C. App. 732 (1991).

Judge has no authority to order evaluation of witness. There is no statutory authority for a trial judge to order a witness to undergo a psychiatric or psychological evaluation to determine the witness's competency. *See State v. Phillips*, 328 N.C. 1 (1991); *State v. Fletcher*, 322 N.C. 415 (1988).

C. Unavailability Distinguished

The standard of incompetency under N.C. Rule of Evidence 601 is not the same as unavailability under North Carolina's hearsay rules. A person may be found unavailable for the purpose of admitting a hearsay statement by that person if he or she is unable to be present or to testify because of a then existing physical or mental illness or infirmity. *See* N.C. R. EVID. 804(a)(4). An illness or infirmity does not necessarily mean that a person is incompetent to testify. Only if the person's illness or infirmity renders the person incapable of expressing himself or herself or understanding the obligation to tell the truth will the person be found incompetent to testify. *See In re Faircloth*, 137 N.C. App. 311 (2000) (explaining the difference between competency and unavailability and holding that the trial court erred in relying on the unavailability standard in disqualifying children from testifying). On the other hand, if a person is found incompetent to testify under Rule 601, then he or she also is "unavailable" within the meaning Rule 804. *See In re Clapp*, 137 N.C. App. 14, 20 (2000). Further discussion of this issue as it relates to child witnesses can be found immediately below.

D. Child Witnesses

No set age limit. There is no fixed age under which a person is considered too young to testify. *State v. Eason*, 328 N.C. 409 (1991). Children as young as four years old have been permitted to testify in North Carolina. *See, e.g.*, *State v. Kivett*, 321 N.C. 404, 414 (1988) (no abuse of discretion by the trial judge in finding a four-year-old witness to be competent where the voir dire record revealed that the witness testified that "he knew what it meant to tell the truth, that it was good to tell the truth and not good to tell a lie, that he knew that he was there to tell the truth, and that he was going to tell the truth"); *State v. Robinson*, 310 N.C. 530 (1984) (four-year-old found competent to testify as to events that allegedly occurred when she was three years old even though her answers on voir dire examination were sometimes vague and nonsensical); *State v. Ward*, 118 N.C. App. 389 (1995) (four-year-old found competent and allowed to testify as to offenses that allegedly occurred when she was two years old); *see also Wheeler v. United States*, 159 U.S. 523, 524 (1895) (stating that "[w]hile no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency"; competency depends

on the capacity and intelligence of the child, his or her appreciation of the difference between truth and falsehood as well as of his or her duty to tell the truth). That a child may have told a lie in the past and is uncertain as to dates and times does not disqualify him or her from being a competent witness. *See State v. Fletcher*, 322 N.C. 415 (1988).

North Carolina cases finding a child incompetent to testify are: *State v. Wagoner*, 131 N.C. App. 285, 286–87 (1998) (four-year-old child found incompetent to testify to events that allegedly occurred when she was two years old because at trial "she could not then remember the events . . . , could not express herself in court, and did not understand the obligation of the oath or the duty to tell the truth"); *State v. Jones*, 89 N.C. App. 584 (1988) (four-year-old alleged victim found incompetent to testify).

Adequate inquiry required. As with determining the competency of any witness, the judge must make adequate inquiry. This generally includes a personal examination or observation of the child on voir dire. *See State v. Fearing*, 315 N.C. 167, 174 (1985) ("[I]n exercising . . . discretion in ruling on the competency of a child witness to testify, a trial judge must rely on his [or her] personal observation of the child's demeanor and responses to inquiry on . . . examination."). A stipulation by the parties as to the competency of a child witness is not sufficient. *Id.* (finding "no informed exercise of discretion" where trial judge merely adopted the stipulations of counsel that a child was not competent to testify); *State v. Pugh*, 138 N.C. App. 60 (2000) (judge disqualified four-year-old from testifying without making adequate inquiry; judge's brief questions were insufficient to determine competency of the witness).

Instead of personally observing the child on voir dire, the judge may choose to observe the child while he or she testifies. *See State v. Spaugh*, 321 N.C. 550 (1988) (court states that primary concern in *Fearing* was that trial judge exercise independent discretion in deciding competency after observation of child and not particular procedure used by trial judge in conducting the observation; trial judge's observation of witness while she testified was adequate without separate voir dire). However, if the judge waits until the child begins testifying and then finds the child incompetent, the child's preceding testimony may need to be stricken and the jury instructed to disregard it. *See generally State v. Reynolds*, 93 N.C. App. 552 (1989) (stating that better practice is to determine competency before witness begins to testify to avoid prejudice); JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 2.13[C], at 2-61 (6th ed. 2016) (if during a child's testimony the judge determines that the child is incompetent, the judge may order the child's testimony stricken).

Reconsideration of ruling. The party challenging competency may move for reconsideration if the child was found competent before testifying at trial but then it becomes apparent during the child's trial testimony that he or she is not competent. *See, e.g.*, *State in Interest of R.R.*, 398 A.2d 76 (N.J. 1979) (at close of State's case, defense attorney moved that the four-year-old witness be declared incompetent on basis of actual testimony given by the child).

Exclusion of defendant from competency hearing. Cases have upheld the trial judge's decision to exclude a defendant from the voir dire examination of a child to determine competency; however, exclusion may implicate the defendant's right to confront witnesses and right to be present under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and article I, section 23 of the N.C. Constitution.

In *Kentucky v. Stincer*, 482 U.S. 730 (1987), the U.S. Supreme Court held that the defendant's Confrontation Clause rights were not violated by being excluded from a voir dire hearing to determine a child's competency where the questions asked were unrelated to the basic issues at trial, the judge found the children competent, and the defendant thereafter had the opportunity fully to cross-examine the children at trial. In *State v. Jones*, 89 N.C. App. 584 (1988), the court found no Confrontation Clause violation by the defendant's sequestration in the judge's chambers during the child victim's competency hearing. The court ruled that the defendant had the opportunity for effective cross-examination because he watched the hearing on closed circuit television and was able to hear all the testimony, interact freely with his attorney, and confront the victim through his attorney. Both decisions were issued before the U.S. Supreme Court's decisions in *Maryland v. Craig*, 497 U.S. 836 (1990), which set constitutional limits on remote testimony, and *Crawford v. Washington*, 541 U.S. 36 (2004), which drastically modified Confrontation Clause analysis. For a further discussion of the impact of *Crawford*, including a post-*Crawford* decision by the N.C. Court of Appeals upholding the constitutionality of remote testimony by a child at trial, see i*nfra* § 29.8A, Constitutional Implications.

Stincer also found no due process violation in the circumstances of the case. In *Stincer*, the U.S. Supreme Court held that exclusion did not violate the defendant's federal constitutional right to presence at all critical stages of a criminal proceeding, finding first that the competency hearing was limited in scope and did not involve substantive testimony that might bear a substantial relationship to the defendant's opportunity to defend himself at trial. The Court noted, however, that if a competency hearing bears a substantial relationship to the defendant's opportunity to defend, the trial judge must balance the defendant's role in assisting his defense and substantial, identifiable injury to the specific child witness. *Stincer*, 482 U.S. at 746 n.20. The Court found next that the defendant provided no indication that his presence at the competency hearing would have been useful in ensuring a more reliable determination of the witness's competency. *Id.* at 747 (finding that the defendant presented "no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency").

Jones found no violation of the defendant's state constitutional right to be present in light of the remote testimony procedures used in that case. The charges were noncapital so the court did not discuss whether exclusion would violate a capital defendant's unwaivable right to presence under the N.C. Constitution. *See* Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 5 (UNC School of Government, Dec. 2008) ("[E]xcluding a defendant from a

voir dire presents a special problem in a capital case, given the capital defendant's unwaivable right to be present at all stages of a capital trial.").

For a further discussion of testimony by children outside the defendant's presence during trial, see *infra* § 29.8, Remote Testimony. For a further discussion of a defendant's right to presence, see *supra* § 21.1, Right to Be Present.

Incompetent child is "unavailable." As with any other witness, if a child witness is found incompetent, he or she would be considered unavailable to testify for purposes of the hearsay rules. *See In re Clapp*, 137 N.C. App. 14, 20 (2000). Whether the child's out-of-court statements would be admissible would depend on whether their admission would violate the defendant's right to confrontation (*see Crawford v. Washington*, 541 U.S. 36 (2004)), and whether the statements satisfy the requirements for admission of hearsay. *Compare State v. Wagoner*, 131 N.C. App. 285 (1998) (child's incompetence to testify satisfied unavailability requirement but did not render out-of-court statements too untrustworthy to be admitted under residual hearsay exception), *with State v. Stutts*, 105 N.C. App. 557 (1992) (court found child unavailable as witness on ground that child could not tell truth from fantasy and ruled that child's statements were inadmissible under residual hearsay exception); *see also State v. Hoxit*, 238 N.C. App. 364 (2014) (unpublished) (upholding trial judge's determination that out-of-court statements made by a four-year-old were inadmissible because the statements did not possess the required guarantees of trustworthiness under Evidence Rule 804(b)(5); trial judge had conducted a voir dire hearing and found the child incompetent to testify based on his serious doubts about her ability to express herself truthfully). For further discussion of the residual hearsay exception where a child has been found to be incompetent, see Jessica Smith, *Competency and the Residual Hearsay Exception*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 6, 2015).

Appellate review of competency. Appellate decisions have generally upheld a trial judge's finding that a child witness was competent to testify. *See State v. Fearing*, 315 N.C. 167, 172–73 (1985) ("By far, the vast majority of cases in which a child witness's competency has been addressed have resulted in the finding, pursuant to an informal *voir dire* examination of the child before the trial judge, that the child was competent to testify."); *see also State v. Manno*, 243 N.C. App. 828 (2015) (unpublished) (finding that while the child witness's statements "as to the presence of supernatural beings [ghost and vampire] in the courtroom are admittedly troubling, and the better practice would have been for the trial court to require a *voir dire* examination and make appropriate findings of fact and conclusions of law regarding her competency[,]" the trial judge did not commit reversible error in implicitly finding her to the competent as a witness and allowing her to testify).

Additional resources. For a discussion of issues involving children as witnesses, including competency and examination issues, see Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07 (UNC School of Government, Dec. 2008); John Rubin, Chapter 11: Evidence, *in* SARA DEPASQUALE & JAN S. SIMMONS, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA (UNC School of Government, 2017).

E. Common Competency Issues

Elderly witnesses. Witnesses are not automatically disqualified from testifying due to their advanced age. As long as they meet the qualifications of Rule 601, they are competent to testify. *See State v. Forte*, 206 N.C. App. 699, 709 (2010) (no abuse of discretion by trial judge in finding the prosecuting witness who was at least 99 years old at the time of trial to be competent because "at certain points in his testimony" he showed an understanding of the difference between truth and falsehood and the importance of the truth; that some of his answers were vague and ambiguous and that he was unable to answer some questions was not determinative because "it would not be unusual for an elderly individual to have some difficulty in responding coherently to all of the questions asked during *voir dire*"). For further discussion of *Forte* and the apparently "low hurdle" required to show competency under Rule 601, see Jeff Welty, *State v. Forte and the Competency of Elderly Witnesses*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 9, 2010).

Hearing and speech impaired witnesses. People who cannot hear or speak are not incompetent as witnesses merely because of their disability. *State v. Galloway*, 304 N.C. 485 (1981). If the impaired person is capable of expressing himself or herself concerning the matter in a way that can be understood, and is capable of understanding the duty of a witness to tell the truth, the person is competent to testify. *See* N.C. EVID. R. 601(b). Testimony presented through an interpreter utilizing American Sign Language is "proper in every respect" and "[a]ny confusion arising from the use of sign language to communicate with a deaf and [mute] witness goes to the weight, and not the admissibility, of the evidence." *Galloway*, 304 N.C. 485, 494; *cf. State v. Felton*, 330 N.C. 619 (1992) (although defendant's girlfriend had no formal training in sign language, sufficient evidence established her as a competent witness capable of understanding and recounting the deaf mute defendant's communications to her).

Mentally or physically disabled witnesses. A person who is mentally or physically disabled is not disqualified from testifying merely because of the disability. As long as the disability does not cause the witness to be incapable of expressing himself or herself in a way that can be understood, or incapable of understanding the duty of a witness to tell the truth, the person is competent to testify. *See State v. Oliver*, 85 N.C. App. 1 (1987) (no abuse of discretion by trial judge in finding a 16-year-old witness competent even though she was mentally retarded, functioned at an 8-year-old level, and was unable to answer some questions); *see also State v. Hyatt*, 355 N.C. 642 (2002) (no abuse of discretion in finding witness competent even though witness suffered from viral encephalitis, a disease affecting his speech, and he had to repeat himself many times so the court reporter could understand him); *State v. DeLeonardo*, 315 N.C. 762, 767 (1986) (mildly mentally retarded witness was properly not disqualified as a witness even though his I.Q. was between 55 and 64; his answers to voir dire questions demonstrated that he had "a sufficient level of intelligence to express himself concerning the matter involved" and "an understanding of the importance of telling the truth"); *State v. Davis*, 106 N.C. App. 596 (1992) ("intellectually limited" children were competent where they testified that they knew the difference between truth and falsehood and they swore to tell the truth). *But see State v. Washington*, 131 N.C. App. 156 (1998) (where mentally retarded witness with cerebral palsy was incapable of

effectively communicating at trial because of her disabilities and her inability to speak in a manner that was easily understood, trial judge did not abuse his discretion in ruling that she was incompetent to testify).

Mentally ill witnesses. "[U]nsoundness of mind is not *per se* grounds for ruling a witness incompetent under Rule 601." *In re Will of Leonard*, 82 N.C. App. 646, 649–50 (1986); *see also State v. DeLeonardo*, 315 N.C. 762, 766 (1986) (the general rule is that "a lunatic or weak-minded person" may testify if he or she has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters that he or she has seen or heard with respect to the questions at issue) (citing *State v. Benton*, 276 N.C. 641, 650 (1970), decided before enactment of the rules of evidence)).

Unless a person who is suffering from a mental illness meets the standards for disqualification of a witness set out in Rule 601(b), he or she is competent to testify. *See State v. Liles*, 324 N.C. 529 (1989) (trial judge properly found witness with a past history of mental illness to be competent where finding was based on the judge's personal observation and on a report by Dorothea Dix Hospital that the witness had the capacity to proceed as a defendant); *State v. Liner*, 98 N.C. App. 600, 607 (1990) (even though the witness was paranoid schizophrenic and a "walking drug store," trial judge properly found him competent to testify based on the evidence presented during voir dire and on judge's "opportunity to view the witness and listen to his answers to the questions"). *But see Leonard*, 82 N.C. App. 646 (trial judge properly found witness to be incompetent, not based solely on the witness's diagnosis of schizophrenia, but on personal observation and on the witness's answers to voir dire questions in which she denied ever having been involuntarily committed even though court records directly contradicted that testimony).

Use of drugs or alcohol. A witness is not incompetent to testify on the basis of drug or alcohol abuse alone. The use of impairing substances is only relevant insofar as it affects the user's ability to be understood or to respect the importance of veracity. *See State v. Fields*, 315 N.C. 191, 203 (1985) (that witnesses were abusers of alcohol and hallucinogenic and psychotropic drugs and were actually impaired on the night in question did not render them "inherently incredible" so as to be incompetent to testify); *State v. Edwards*, 37 N.C. App. 47 (1978) (no abuse of discretion in ruling that accomplice was competent to testify where there was no evidence that the witness was under the influence of drugs at the time of testifying nor was there any showing that he was unable to see or remember the events to which he testified).

Credibility distinguished. Where mental instability or drug or alcohol use is concerned, the question is more properly one of the witness's credibility, not his or her competence. *See State v. Fields*, 315 N.C. 191 (1985); *State v. Williams*, 330 N.C. 711 (1992). "As such, it is in the jury's province to weigh his [or her] evidence, not in the court's to bar it." *Fields*, 315 N.C. at 204. A witness with a mental impairment or substance abuse problem may be cross-examined about that matter if it affects his or her ability to observe, remember, or narrate. *See State v. Newman*, 308 N.C. 231 (1983). Past mental problems, including chronic substance abuse, likewise may be a proper subject of cross-examination if they bear on the credibility of the witness's testimony about the relevant events in the case. *Williams*, 330

N.C. 711 (evidence of a key witness's past drug use, his suicide attempts, and his psychiatric history was proper and admissible for purposes of impeachment under Rule 611).

If a proper subject of impeachment, extrinsic evidence—that is, testimony of other witnesses as well as supporting documentation—may be used to impeach the witness's credibility. *Id.* at 719 (noting that "while specific instances of drug use or mental instability are not directly probative of truthfulness," if they cast doubt on the capacity of a witness to observe, recollect, and recount, they are properly the subject not only of cross-examination but of extrinsic evidence as well (quoting 3 DAVID LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 305, at 236 (1979)).

Practice note: If a witness has been impeached based on his or her mental illness or substance abuse, you should consider whether a jury instruction regarding the credibility of that witness would be helpful. If you decide that one would be helpful, you should draft one based on the specific impairments of that witness and submit it in writing to the trial judge at or before the charge conference. Since this is a subordinate feature of a case, the trial judge is not required to instruct on it unless a specific request has been made. For a discussion of instructions on subordinate features of the case, see *infra* § 32.3, Explanation of the Law.

Additional resources. For a further discussion of impeachment of witnesses based on mental or physical impairments, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 156 (8th ed. 2018).

F. Preservation of Competency Issues for Appellate Review

Objection required to finding of competency. If the defendant fails to challenge the competency of a witness or object to a judge's implicit or explicit ruling that a witness is competent, he or she waives the right to appellate review of the issue. *See State v. Gordon*, 316 N.C. 497 (1986) (after voir dire hearing on a witness's competency, trial judge's action in allowing witness to testify was an implicit ruling of competency and defendant was required to object in order to preserve the issue for appellate review); *State v. Steen*, 226 N.C. App. 568 (2013) (issue of competency of child witness to testify was not preserved for appeal when defendant failed to challenge the witness's competence at trial).

If the defendant objects to the trial judge's finding of competency, he or she may assert as error on appeal the subsequent admission of evidence from that witness even though the defendant did not object to or move to strike the testimony on the ground of incompetency at the time the testimony was offered at trial. G.S. 15A-1446(d)(9); *see also Gordon*, 316 N.C. 497 (finding defendant was precluded from using G.S. 15A-1446(d)(9) to assign error to the competency issue where he did not object to judge's finding of competency after voir dire hearing held; issue was reviewable under much stricter "plain error" standard of review); *State v. Hodge*, 212 N.C. App. 236 (2011) (unpublished) (competency issue preserved for appellate review where defendant objected to witness's competency prior to trial; pursuant to G.S. 15A-1446(d)(9), it was unnecessary to renew objection when witness testified at trial). If there are other grounds for objection to the testimony (e.g., hearsay),

counsel must make a specific objection on that additional ground when the objectionable question is asked to preserve the issue for appeal.

Practice note: If you believe that the trial judge erroneously found a witness to be competent to testify, always object on the record to the judge's finding, whether the judge explicitly finds the witness competent or implicitly so finds by allowing the witness to testify. *See State v. Gordon*, 316 N.C. 497 (1986).

Offer of proof required if finding of incompetency. If a judge finds that a witness is incompetent to testify, the party seeking to call the witness must make an offer of proof in order to preserve the issue for appellate review. *See, e.g., In re M.G.T.-B.*, 177 N.C. App. 771 (2006) (based on telephone conversation with child's therapist and without observing or examining child, trial judge found child incompetent and quashed subpoena for child; appellate court declined to address propriety of trial judge's determination of incompetency, finding that respondent made no offer of proof and therefore failed to preserve for appellate review the exclusion of the child's testimony).

G. Additional Resources

For additional information on the competency of witnesses, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 131–135 (8th ed. 2018) (also includes discussion of the competency of an accused and of spouses), and WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 601, at 389–402 (2017) (listing additional authorities and collecting cases).