

## **Alabama Rules of Evidence**

### Article VI. Witnesses

#### **Rule 601.**

##### **General rule of competency.**

Every person is competent to be a witness except as otherwise provided in these rules.

#### **Advisory Committee's Notes, as Amended February 3, 1998**

The starting point for applying Rule 601 is that all witnesses are competent except as otherwise provided under other Alabama Rules of Evidence. This rule is identical to Unif.R.Evid. 601 and to the first sentence of the corresponding Federal Rule of Evidence. It acknowledges the prevailing sentiment that very few persons are incapable of giving testimony useful to the trier of fact and that historic grounds of incompetency – mental incapacity, conviction, etc. – should go to the credibility of the witness and the weight the trier of fact gives to the witness's testimony. See H. Weihofen, *Testimonial Competence and Credibility*, 34 Geo.Wash.L.Rev. 53 (1965); E. Cleary, McCormick on Evidence § 71 (3d ed. 1984) (referring to rules of incompetency as "serious obstructions to the ascertainment of truth"); C. Mueller & L. Kirkpatrick, 3 Federal Evidence § 232 (2d ed. 1994); Comment, *The Mentally Deficient Witness: The Death of Incompetency*, 14 Law & Psychol. Rev. 106 (1990).

This move away from grounds of absolute incompetency is consistent with developments in Alabama practice over the past several decades. Spouses, once declared incompetent to be witnesses for or against each other, are now competent to take the witness stand but are not permitted, over objection, to divulge confidential husband-wife communications. See, e.g., *Arnold v. State*, 353 So.2d 527 (Ala.1977); *Trammel v. United States*, 445 U.S. 40 (1980) (holding that one spouse is competent to testify against the other in a criminal case but cannot be compelled to do so); Recent Decision, *Privilege Regarding Non-confidential Marital Testimony Is Vested Only in Witness Spouse*; *Trammel v. United States*, 11 Cumb.L.Rev. 465 (1980); Ala.Code 1975, § 12-21-227 (providing that the husband and wife may testify either for or against the other in criminal cases but shall not be compelled to do so). Those convicted of crimes involving moral turpitude, once rendered absolutely incompetent, are now permitted to take the witness stand, with their convictions going to credibility rather than competency. See Ala.Code 1975, § 12-21-162(b) (providing that one is no longer rendered incompetent by reason of a conviction for a crime involving moral turpitude; however, the conviction may be a ground of impeachment); *Rowe v. State*, 522 So.2d 328 (Ala.Crim.App.1988).

This rule supersedes any inconsistent statutory grounds of incompetency. Chief among these is Alabama's Dead Man's Statute. Ala.Code 1976, § 12-21-163. Superseding the Dead Man's Statute means that survivors will be allowed to testify, if their testimony otherwise complies with the rules of evidence, and that the unavailability of the deceased person will be merely a factor for the jury to consider in determining the weight to give the survivor's testimony. See *Beddingfield v. Central Bank of Alabama, N.A.*, 440 So.2d 1051, 1052

(Ala.1983) (recognizing the significant body of scholarly criticism of the Dead Man's Statute). In superseding the Dead Man's Statute, Alabama follows the lead of such states as Alaska, Arkansas, Delaware, Hawaii, Iowa, Maine, Michigan, Mississippi, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, and Utah. See J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 601[03] (1990). See also 2 J. Wigmore, *Wigmore on Evidence* § 578 (Chadbourn rev. 1979) (recognizing that the Dead Man's Statute is a survival from an earlier and much broader incompetency statute and characterizing its survival as "deplorable"); M. Ladd, *Uniform Rules of Evidence—Witnesses*, 523, 526 (1956) (characterizing the elimination of the Dead Man's Statute as one of the first steps in improving the law of evidence).

No longer, after the adoption of Rule 601, will a witness necessarily be incompetent because the witness is an idiot or a lunatic during lunacy. See Ala.Code 1975, § 12-21-165(a); J. Weinstein & M. Berger, *Weinstein's Evidence* Rule 601 (1990). Compare C. Gamble, *McElroy's Alabama Evidence* § 94.01 (4th ed. 1991).

Rule 601 supersedes the historic statutory rule of incompetency applied to any witness who has been convicted of perjury or subornation of perjury. See Ala.Code 1975, § 12-21-162(a).

While Rule 601 imposes no requirement of testimonial competency, it provides that incompetency may arise "as otherwise provided in these rules." Both academic writings and judicial opinions suggest that this provision vests in the trial court the discretion to preclude a witness from testifying in extraordinary circumstances when the witness possesses some significant testimonial deficiency. That discretion is said to arise when the witness's deficiency renders the testimony inadmissible because of its being irrelevant (Rule 401) or non-prejudicial (Rule 403), or when the witness is without personal knowledge (Rule 602) or is unable to understand the obligation to tell the truth (Rule 603). See, e.g., *United States v. Ramirez*, 871 F.2d 582 (6th Cir.), cert. denied, 493 U.S. 841 (1989); *United States v. Odum*, 736 F.2d 104 (4th Cir.1984); *United States v. Lightly*, 677 F.2d 1027 (4th Cir.1982); *State v. Fulton*, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044 (1988). See also J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 601[04], at 601-27 (1990). It should be noted, however, that the suggestion of these authorities exceeds their reality in terms of witnesses actually excluded by the courts. Indeed, as one author has observed, an analysis of the decided cases reveals that the application of Rule 601 is "closer to an irrebuttable presumption of competency for every witness." Comment, *The Mentally Deficient Witness: The beginning premise remains: all witnesses are competent and any testimonial deficiency goes to weight rather than admissibility*. See F. Weissenberger, *Weissenberger's Federal Evidence* § 252 (1979). Compare *United States v. Van Meerbeke*, 548 F.2d 415 (2d Cir.1976), cert. denied, 430 U.S. 974 (1977). This competency is to be accorded in all cases of child abuse, whether sexual or otherwise.