

## TRE 601(a)(1) & (2): Identify and Challenge Witness Competency<sup>1</sup>

While Texas evidence professors and Texas Board of Law Examiners might conjure up scenarios pertaining to the ‘Dead Man’s Rule’,<sup>2</sup> the grittier realm of legal practice and, particularly, criminal practice is more likely to encounter a witness with difficulties involving memory, perception, communication and insufficient development to undertake the witness oath.

All witnesses are presumed competent.<sup>3</sup> Child witnesses are subject to the same standards, with regard to competency, as all other witnesses.<sup>4</sup>

To be a competent witness, one must possess:<sup>5</sup>

1. Faculties to intelligently observe at the event being related;
2. Faculties to recollect the event being related;
3. a. Faculty to communicate at trial<sup>6</sup>; and  
b. Moral faculty to tell the truth.<sup>7</sup>

The time to challenge the witness’ competency is when the grounds become apparent.<sup>8</sup> The method of challenge can be by objection or motion. Failure to challenge the witness’ competence in a timely manner will constitute waiver.<sup>9</sup> Failure to request the competency examination occur outside the presence of the jury is waiver.<sup>10</sup>

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<sup>2</sup> Texas Rules of Evidence 601 (b)

<sup>3</sup> TRE 601 (a), *Baldit v. Texas*, 522 S.W.3d 753, 761 (Tex. App.—Houston (1st Dist.) 2017)

<sup>4</sup> TRE 601 (a) (2)

<sup>5</sup> *Hogan v. Texas*, 440 S.W.3d 211, 213-4 (Tex. App.—Houston (14th Dist.) 2013), *Reyna v. Texas*, 797 S.W.2d 189, 191-2 (Tex. App.—Edinburg 1990), *Escamilla v. Texas*, 334 S.W.3d 263, 266 (Tex. App.—San Antonio 2010), *Rodriguez v. Texas*, 772 S.W.2d 167, 170 (Tex. App.—Houston (14th Dist.) 1989)

<sup>6</sup> *Watson v. Texas*, 596 S.W.2d 867, 871 (Tex. Crim. App, 1980)

<sup>7</sup> *Watson v. Texas*, 596 S.W.2d 867, 871 (Tex. Crim. App, 1980)

<sup>8</sup> *Robinson v. Texas*, 368 S.W. 3d 588, 603 (Tex App.—Austin 2012)

<sup>9</sup> *Reyna v. Texas*, 797 S.W.2d 189, 192 (Tex. App.—Edinburg 1990)

<sup>10</sup> *Reyna v. Texas*, 797 S.W.2d 189, 192 (Tex. App.—Edinburg 1990)

Courts have no sua sponte duty to examine a witness for competency.<sup>11</sup> The appellate standard of review is abuse of discretion.<sup>12</sup> For the purposes of a witness competency examination, trial courts are not bound by the rule of evidence.<sup>13</sup> Trial courts have conducted acceptable witness competency examinations without a jury, in camera without the parties,<sup>14</sup> and in front of a jury.<sup>15</sup> There is no trial court requirement<sup>16</sup> nor authority to compel a witness to undergo psychiatric/psychological examination for the purpose of making a witness competency decision.<sup>17</sup>

Rulings from other courts do not determine witness competency for providing testimony,<sup>18</sup> but they may create a rebuttable presumption of incapacity.<sup>19</sup>

On appeal, review is not limited to the witness competency examination; review can include all testimony from the witnesses.<sup>20</sup>

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<sup>11</sup> *Baldit v. Texas*, 522 S.W.3d 753, 761-2 (Tex. App.—Houston (1st Dist.) 2017), *Davis v. Texas*, 268 S.W.3d 683, 699 (Tex. App.—Ft. Worth 2008)

<sup>12</sup> *Hogan v. Texas*, 440 S.W.3d 211, 213 (Tex. App.—Houston (14th Dist.) 2013), *Reyna v. Texas*, 797 S.W.2d 189, 191 (Tex. App.—Edinburg 1990), *In Re Commitment of Edwards*, 443 S.W.3d 520 (Tex. App.—Beaumont 2014), *Escamilla v. Texas*, 334 S.W.3d 263, 265 (Tex. App.—San Antonio 2010), *Davis v. Texas*, 268 S.W.3d 683, 694 (Tex. App.—Ft. Worth 2008), *Robinson v. Texas*, 368 S.W. 3d 588, 604 (Tex. App.—Austin 2012), *Villarreal v. Texas*, 576 S.W.2d 51, 57 (Tex. Crim. App. 1978), *Clark v. Texas*, 558 S.W.2d 887, 890 (Tex. Crim. App. 1977), *Fields v. Texas*, 500 S.W.2d 500, 503 (Tex. Crim. App. 1973), *Rodriguez v. Texas*, 772 S.W.2d 167, 170 (Tex. App.—Houston (14th Dist.) 1989)

<sup>13</sup> TRE 104 (a), *Baldit v. Texas*, 522 S.W.3d 753, 761 (Tex. App.—Houston (1st Dist.) 2017)

<sup>14</sup> *Gilley v. Texas*, 418 S.W.3d 114 (Tex. Crim. App. 2014)

<sup>15</sup> *Reyna v. Texas*, 797 S.W.2d 189, 192 (Tex. App.—Edinburg 1990)

<sup>16</sup> *Broussard v. Texas*, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995)

<sup>17</sup> *Texas ex rel. Holmes v. Lanford*, 764 S.W.2d 593, 594 (Tex. App.—Houston (14th Dist.) 1989)

<sup>18</sup> *Kokes v. Angelina College*, 148 S.W.3d 384, 389 (Tex. App.—Beaumont 2004), *In re R.M.T.*, 352 S.W.3d 12, 25 (Tex. App.—Texarkana 2011)

<sup>19</sup> *In re R.M.T.*, 352 S.W.3d 12, 25 (Tex. App.—Texarkana 2011)

<sup>20</sup> *Baldit v. Texas*, 522 S.W.3d 753, 761 (Tex. App.—Houston (1st Dist.) 2017), *Reyna v. Texas*, 797 S.W.2d 189, 191 (Tex. App.—Edinburg 1990), *Davis v. Texas*, 268 S.W.3d 683, 699 (Tex. App.—Ft. Worth 2008), *Clark v. Texas*, 558 S.W.2d 887, 890 (Tex. Crim. App. 1977), *Fields v. Texas*, 500 S.W.2d 500, 503 (Tex. Crim. App. 1973), *Rodriguez v. Texas*, 772 S.W.2d 167, 170 (Tex. App.—Houston (14th Dist.) 1989)