[CAPTION]

MOTION TO DETERMINE COMPETENCY OF WITNESS
(Including Children)

The Defendant, by counsel, respectfully requests this Court to order a psychiatric examination of the witness, [insert name of witness], to determine his/her competency to testify. In support of the Motion, the Defendant would show the following: [include specific grounds that are applicable to your case]

1. The witness does not have the capacity to accurately perceive, record and recollect impressions of fact.

2. The witness does not understand the duty to tell the truth as well as understand the difference between the truth and a lie or fantasy.

3. The witness does not possess the capacity to comprehend questions and express himself/herself understandably, where necessary with aid of an interpreter.

4. The child witness does not:

   a. understand the difference between telling a lie and telling the truth;

   b. know he or she is under compulsion to tell the truth; and

   c. know what a true statement actually is.

   Russell v. State, 540 N.E.2d 1222 (Ind. 1989).

5. It is within the Trial Court's discretion and the Trial Court's duty to grant the hearing upon a timely motion or objection. Mengon v. State, 505 N.E.2d 788 (Ind. 1987); Ware v. State, 376 N.E.2d 1150 (Ind. 1978).

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to order psychiatric examination of the witness, [insert name], to determine his/her competency to testify, and for all other relief just and proper in the premises.

(Signature)

REFERENCES **CASEBANK O.5.a**

Indiana Rule of Evidence 601 ("every person is competent to be witness except as otherwise provided in these rules or by act of the Indiana General Assembly.")

CASE LAW

GENERAL

Hughes v. State, 546 N.E.2d 1203 (Ind. 1989) (if the evidence at the hearing places competency in doubt, the court should order witness to be examined by a psychiatrist, unless the State can show paramount interest in denying the petition).

Mengon v. State, 505 N.E.2d 788 (Ind. 1987) (when the competency of a witness is challenged by a timely objection, it is the duty of the trial court to schedule a hearing as to whether a witness is competent to testify).

Parker v. State, 532 N.E.2d 1172, 1174 (Ind. 1989) (competency of a witness is a matter of law to be decided by trial court).

Napoli v. State, 451 N.E.2d 35, 37 (Ind. 1983) (a witness takes the stand clothed with a presumption of competency, and the burden of establishing the witness's incompetency falls upon the challenging party).

Clark v. State, 447 N.E.2d 1076, 1081 (Ind. 1983) (to extent that Defendant's motion sought to suppress all testimony of accuser because she had been questioned under hypnosis, it was too broad; a *per se* exclusion is not applied to testimony from witness that has undergone hypnosis).

Donald v. State, 930 N.E.2d 76 (Ind.Ct.App. 2010) (under the Due Process Clause, a defendant facing a probation revocation is entitled to a competency evaluation whenever there is reason to believe he is incompetent).

Minnick v. State, 965 N.E.2d 124 (Ind.Ct.App. 2012) (trial court did not abuse its discretion in denying Defendant's request for a new competency evaluation before proceeding with the new sentencing hearing because there was no evidence Defendant was actually incompetent; Defendant's allocution was very clear and concise, he assisted counsel, disclosed pertinent facts, and offered relevant testimony).

CHILDREN

Brewer v. State, 562 N.E.2d 22, 23 (Ind. 1990) (judge has sole discretion to determine child's competency to testify based upon observation of child's demeanor and responses to questions posed to the child by counsel and the court).

Casselman v. State, 582 N.E.2d 432 (Ind.Ct.App. 1991) (whether a witness knows what the truth actually is involves a determination of whether the witness knows the difference between truth, other connotations of truth that may not satisfy this element, and fantasy).

Aldridge v. State, 779 N.E.2d 607 (Ind.Ct.App. 2002) (the Defendant failed to show that children could not distinguish between the truth and a lie or that they did not understand the need to tell the truth at trial, and were therefore incompetent to testify). See also Burrell v. State, 701 N.E.2d 582 (Ind.Ct.App. 1998).

Newsome v. State, 686 N.E.2d 868 (Ind.Ct.App. 1997) (proving that the child knows what a true statement is cannot be satisfied by a flat statement such as: "I know what the truth is;" the State failed to lay the foundation of competency for a seven year-old child's testimony).

Harrington v. State, 755 N.E.2d 1176 (Ind.Ct.App. 2001) (fact that child's testimony at trial could be interpreted as ambiguous goes to child's credibility, not his competency).

Hoover v. State, 589 N.E.2d 243 (Ind. 1992) (a psychiatric examination of the child-witness is within the sound discretion of the trial court).

Page v. State, 274 Ind. 264, 410 N.E.2d 1304 (1980), *on remand*, 424 N.E.2d 1021 (1981), *aff'd*, 442 N.E.2d 977 (1982) (Defendant has no right, in sex offense case, to subject victim to psychiatric examination; when psychiatric examination of victim is ordered, Defendant has no right to have a mental health examination conducted by a psychiatrist as opposed to a psychologist).

NOTES:

1. You must make a timely objection in order to get a hearing on competency. The objection must be before the witness in question testifies. See Little v. State, 413 N.E.2d 639, 645 (Ind.Ct.App. 1980). Witness incompetency to testify cannot be established on cross-examination, but must be resolved prior to witness testifying. Roller v. State, 602 N.E.2d 165 (Ind.Ct.App. 1992).

2. There is a split of authority as to whether Rule 601 requires the proponent to establish competency if competency is challenged or requires the opponent of the witness to establish incompetency. See, e.g., Bellmore v. State, 602 N.E.2d 111, 117, *reh'g den.* (Ind. 1992) (there is a presumption of competency); Ware v. State, 376 N.E.2d 1150, 1151 (Ind. 1978); Aldridge v. State, 779 N.E.2d 607 (Ind.Ct.App. 2002); but see Newsome v. State, 686 N.E.2d 868, 872-73 (Ind.Ct.App. 1997) (holding that Rule 601 "does not create [a] burden-shifting presumption," following Russell v. State, 540 N.E.21d 1222 (Ind. 1989) and noting that Bellmore pre-dates the adoption of the Indiana Rules of Evidence); Buchanan v. State, 742 N.E.2d 1018 (Ind.Ct.App. 2001), *aff'd in relevant part, vacated in part*, 767 N.E.2d 967 (Ind. 2002); Haycraft v. State, 760 N.E.2d 203 (Ind.Ct.App. 2001); Harrington v. State, 755 N.E.2d 1176 (Ind.Ct.App. 2001).