

CREDIBILITY OF WITNESSES:**Children and Individuals with
Cognitive and/or Intellectual Differences**

An instruction regarding the credibility of a child witness is not required but is permissible in the judge's discretion. *Commonwealth v. Perkins*, 39 Mass. App. Ct. 577, 580 (1995), citing *Commonwealth v. Avery*, 14 Mass. App. Ct. 137, 140-145 (1982).

You have heard the testimony of (a child) (children) (person with cognitive and / or intellectual differences). As in the case of all other witnesses, you are the sole judges of their credibility.

In other words, you must determine, as with any witness, whether the (child's) (person's) testimony is believable and how much weight to give their testimony. In assessing the credibility of a (child witness) (person with cognitive and / or intellectual differences), you may consider the witness's demeanor while testifying, their capacity to make observations and to recollect them, their ability to understand the questions asked, and their ability to answer the questions in a manner that is appropriate in light of the witness's *[list all that apply]* (age) (intelligence) (ability to communicate). You may consider any other facts and circumstances that you consider significant in determining the witness's credibility. In the final

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analysis, you must determine, as with any other witness, whether to believe any or all of the testimony.

NOTES:

1. **Discretionary instruction: child witness.** “[A] trial judge retains discretion to determine whether the jury should receive a special instruction with respect to the credibility of a young witness, and, if so, the nature of that instruction.” *Commonwealth v. Avery*, 14 Mass. App. Ct. 137, 141 (1982). See also *Commonwealth v. Figueroa*, 413 Mass. 193, 196-98 (1992); *Commonwealth v. Krepon*, 32 Mass. App. Ct. 945, 947-48 (1992); *Commonwealth v. A Juvenile*, 21 Mass. App. Ct. 121, 126 (1985). Particularly where the witness’s age has been fully explored and argued to the jury, the judge may decide not to go beyond the general instructions on witness credibility, as contained in Instruction 2.260. See *Commonwealth v. Figueroa*, 413 Mass. 193, 198 (1992) (judge “properly exercised his discretion” in declining to give specialized instruction “and thereby avoiding the risk of intrusion on the jury’s role . . . by singling out a particular witness’s testimony for special scrutiny”). The trial judge may decide simply to add “age” to the list of relevant factors in those general instructions. *Commonwealth v. A Juvenile*, 21 Mass. App. Ct. 121, 122-126 (1985).

2. **Discretionary instruction: witness with cognitive or intellectual differences.** The trial judge may, but is not required, to give an instruction regarding the credibility of an adult witness with cognitive or intellectual delays or differences. See *Commonwealth v. Figueroa*, 413 Mass. 193, 197 (1992) (trial judge not required to give instruction requested by defendant focused on credibility of mentally challenged adult witness in light of general charge on credibility and vigorous exploration of the matter during the trial). In *Figueroa*, the trial judge instructed the jury that they could take into account the demeanor of the witness, the witness’s candor, the accuracy of the witness’s recollection, the witness’s motive for testifying, the probability and reasonableness of the witness’s testimony, and the “intelligence of the particular witnesses who have testified and their ability or capacity to relate to you the matters to which they testify in court.” *Id.* By instructing the jury in this manner, the judge “avoid[ed] the risk of intrusion on the jury’s role as arbiter of the facts by singling out a particular witness’s testimony for special scrutiny.” *Id.* at 198, citing *Avery*, 14 Mass. App. Ct. at 142.

3. **Competence to testify.** General Laws Chapter 233, § 20 states, “Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal,” Courts apply “a two-prong test : (1) whether the witness has the general ability or capacity to perceive, remember, and give expression to that which [he or] she ha[s] seen, heard, or experienced”; and (2) whether [he or] she has an understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment.” *Commonwealth v. Monzon*, 51 Mass. App. Ct. 245, 248 (2001), quoting *Commonwealth v. Brusgulis*, 398 Mass. 325, 329 (1986). The same test applies to adults, children, and individuals subject to a disability. See *Commonwealth v. Thibault*, 77 Mass. App. Ct. 419, 424 (2010); *Commonwealth v. Whitehead*, 379 Mass. 640, 656 (1980).

There is no bright line rule as to what age a child is incompetent to testify. See *Commonwealth v. Calderon*, 65 Mass. App. Ct. 590, 594-95 (2006) (judge not required to hold competency hearing for eleven-year-old solely on age). “The modern trend is ‘in favor of enabling young children to testify, subject to impeachment of their credibility,’” provided that the witness meets both prongs of the competency analysis. See *Commonwealth v. Monzon*, 51 Mass. App. Ct. at 253, quoting *Commonwealth v. Corbett*, 26 Mass. App. Ct. 773, 776 & n.3 (1989).

“The determination of competency is peculiarly within the province of the judge.” *Commonwealth*

v. Widrick, 392 Mass. 884, 888 (1984). “The judge is afforded wide discretion - indeed, is obligated - to tailor the competency inquiry to the particular circumstances and intellect of the witness.” *Commonwealth v. Brusgulis*, 398 Mass. at 329-30. In reviewing a trial judge's ruling on the competency of a witness, an appellate court will examine both the preliminary hearing and the witness's trial testimony. See *Commonwealth v. Monzon*, 51 Mass. App. Ct. at 249.

Neither the inability of a witness to remember specific details of events nor inconsistencies in the testimony render the witness incompetent to testify so long as the witness demonstrates “the general ability to observe, remember and recount.” *Commonwealth v. Trowbridge*, 419 Mass. 750, 755 (1995) (child competent to testify where she gave accurate answers to questions about her religion, her grade in school, and the subjects she studied); *Thibeault*, 77 Mass. App. Ct. at 424-428 (six-year-old child competent where, although child did not know word “promise”, child knew she was expected to tell truth and if she did not, people would “be disappointed in her” and “go away from her”); *Commonwealth v. Gamache*, 35 Mass. App. Ct. 805, 806-809 (1994) (five-year-old permitted to testify about incidents that allegedly took place when the child was twenty-one and thirty-three months old despite inconsistencies and her inability to recall every detail in her testimony).

4. **Challenging competency.** Challenges to the competency of witnesses should be made before the witness testifies. *Commonwealth v. Patton*, 458 Mass. 119, 135-136 (2010). A defendant may move for a *voir dire* of the child witness for competency. See *Commonwealth v. Brusgulis*, 398 Mass. 325, 329-330 (1986). The proponent of the witness may conduct the *voir dire* and the trial judge may further examine the witness, but the fact that the *voir dire* is conducted by the proponent does not necessarily give rise to a right to cross-examination. See *Commonwealth v. Massey*, 402 Mass. 453, 455 (1988) (fact that prosecutor conducted *voir dire* did not require cross-examination by defense counsel, particularly where prosecutor's questions were routine and substantially similar to questions that would have been asked had the hearing been conducted by the judge).

5. **Child hearsay statute, G.L. c. 233, § 81.** Section 81 provides for admission in a criminal case of an out-of-court statement made by a child under age 10 describing an act of sexual contact in criminal cases upon finding that the reliability of the statement outweighs the defendant's confrontation rights. See *Commonwealth v. Colin C.*, 419 Mass. 54, 63-66 (1994). There has been no case challenging the application of § 81 after *Crawford v. Washington*, 541 U.S. 36 (2004).

6. **Child-parent privilege.** A minor child shall not testify against the child's parent and a parent shall not testify against the parent's minor child in a criminal proceeding unless the victim of the proceeding is a family member who resides in the household. G.L. c. 233, § 20. “Parent” is defined to also include a biological or adoptive parent, stepparent, legal guardian, or other person who has the right to act *in loco parentis* for the child, and no longer is required to live with the child for the disqualification to apply. G.L. c. 233, § 20, as amended by the Criminal Justice Reform Bill (St. 2018, c. 29, § 111), applicable to offenses committed after Apr. 13, 2018.

The disqualification, however, is only a partial disqualification as it does not apply where the defendant seeks to offer the testimony. *Commonwealth v. Vigianni*, 488 Mass. 34, 40 (2021) (the statute is most reasonably interpreted to prohibit the Commonwealth from calling the parent to testify against the child; the child may call the parent to testify in support of the child's defense).