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NEW JERSEY STATE BAR ASSOCIATION

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Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Assessing the Competency of Child Witnesses
Hughes Justice Complex, P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Assessing the Competency of Child Witnesses

Dear Judge Grant:

The New Jersey State Bar Association (NJSBA) thanks the Judiciary for the opportunity to comment on the proposed procedures for evaluating and assessing the competency of child witnesses contained in a Joint Committee Report from the Supreme Court Criminal Practice, Evidence Rules and Family Practice Committees (Joint Committee Report).

While the NJSBA appreciates the efforts of the Joint Committee and the Judiciary to ensure that court procedures are appropriately balanced to address the unique needs and perspective of children against the importance of ensuring truthful and competent testimony in court proceedings, the NJSBA has grave concerns about the current proposal. The NJSBA is particularly concerned about the reaction of a child to an additional assessment when the child has already been significantly traumatized. An assessment inquiry is likely to invoke a sense of fear and lead to inaccurate responses and ineffective results. For these reasons, the NJSBA believes that no assessment of a child's credibility is necessary. Children should, instead, always be permitted to testify if they are available, with the triers of fact being permitted to weigh the credibility of the testimony as they deem appropriate.

The recommendations of the Joint Committee are based primarily on recommendations submitted to the Committee by Dr. Thomas D. Lyon, Ph.D, who is credentialed in both developmental psychology and the law. Even Dr. Lyon acknowledged concerns about competency assessment of children by the courts when the issue was raised by his peers. He indicated, however, that he was constrained by New Jersey law requiring such assessments. (Joint Committee Report at 8, fn 3, and at 60.) The Joint Committee also noted it was not tasked with recommending changes in the law, but rather was tasked to recommend ways to conduct assessments informed by relevant social science research. (*Id.*) As a result, the notion of eliminating competency assessments for children has not been thoroughly considered or analyzed.

Adoption of a wholesale protocol to administer to every child witness is especially concerning in light of the opinion expressed by Dr. Jodi Quas suggesting that the Committee “think very critically about whether requiring formal competency assessments for children is necessary to achieve the Court’s ultimate goal of pursuing justice. Whether children can or cannot answer competency questions has very little, if any, bearing on their ability to disclose and recount their experiences accurately and completely. It seems to me that the latter is much more important and relevant to a legal case than basic competency capabilities.” (Joint Committee Report at 59-60.) Dr. Gail Goodman also endorsed this opinion (Joint Committee Report at 68-69) and, as noted above, even Dr. Lyon acknowledged being sympathetic to this concern. (Joint Committee Report at 8, fn 3, and at 60.) So, there are real questions about the value of undertaking a competency assessment if the real goal is to elicit truthful testimony that enables the triers of fact to make a just decision.

For these reasons, the NJSBA suggests that the issue be reconsidered with an expanded inquiry to determine if a formal assessment of a child’s competency is a valuable undertaking.

If the Judiciary is inclined to adopt the recommended protocol, despite these concerns, the NJSBA believes some adjustments are necessary. Several of the proposed assessment questions appear biased because the questions favor a specific “correct” answer; and appear designed to lead child witnesses to definitively answer inquiries that, as framed, are wrought with assumptions. In many instances, there will be broader cultural narratives and diverse life experiences that may elicit responses from children that the model will erroneously deem “incorrect.”

In addition, portions of the assessment appear to reflect certain assumptions that may influence a child. For example, the assessment recommends showing pictures of “authority figures” that include a judge, a doctor, or a social worker, but excludes a “parent or guardian.” Notably, many of these “authority” figures are typically called as witnesses in hearings involving children. It would be important to ensure any authority figures presented represent the diverse cultural backgrounds of each child being assessed, and includes parents and guardians, so as not to influence the child’s responses or provide an inaccurate perception of the roles played in the proceeding by those figures not represented.

The protocols should be carefully reviewed to ensure they are flexible enough to account for significantly different responses depending on a child’s culture and lived experience, and to ensure that unintended biases are not introduced through questions, pictures or other media as part of the protocol.

In summary, the NJSBA urges the Judiciary to consider whether it is better to eliminate the competency test rather than to have a test that is likely to result in unjustified confidence in the competence of child witnesses. According to the Joint Report, science supports this inquiry. Eliminating the test also removes the potential for bias to be introduced by the test itself as noted above. The NJSBA urges that the Judiciary instead allow the fact finder to assess the weight of a child’s testimony in total without a bifurcated finding of qualifying and credibility determinations.

Again, the NJSBA appreciates the opportunity to provide these comments to the Judiciary, and stands ready to provide more information or assist in further review if needed. We applaud the efforts of the Joint Committee and the Judiciary to carefully balance all of the interests involved in ensuring truthful testimony is elicited from children in court proceedings, but request that the concerns noted above be taken into consideration as the Judiciary proceeds forward.

Very truly yours.

A handwritten signature in black ink, reading "Kimberly A. Yonta". The signature is written in a cursive style with a large, looping initial "K".

Kimberly A. Yonta, Esq.
President

/sab

cc: Domenick Carmagnola, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director