United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999). It was error to admit a police officer's opinion about the truthfulness of defendant during an interview.

United States v. Sinclair, 109 F.3d 1527 (10th Cir. 1997). The use of medication or the habitual use of drugs or intoxicants does not establish a witness' incompetency.

Barto v. Armstrong World Industries, Inc., 923 F. Supp. 1442 (D.N.M. 1996). The use of medication or the habitual use of drugs or intoxicants does not establish a witness' incompetency.

McLendon v. Georgia Kaolin Co., Inc., 782 F. Supp. 1548 (M.D. Ga. 1992). No witness can testify to what another knew or thought.

§ 9:80 Attorney Cannot Testify

Objection, Your Honor. The witness is incompetent under the advocate-witness rule.

Comments

The testimony of an attorney for a party is not per se incompetent. However, courts are reluctant to allow attorneys to testify except when necessary, *i.e.*, all other sources of relevant evidence have been exhausted. *United States v. Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976); *United States v. Johnston*, 664 F.2d 152 (7th Cir. 1981); *United States v. Buckhanon*, 505 F.2d 1079 (8th Cir. 1974); *United States v. West*, 680 F.2d 652 (9th Cir. 1982); *see United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998) (discussing advocate-witness rule in case in which during trial prosecutor found evidence in presence of two police officers who then testified about prosecutor's discovery). Courts are reluctant to allow counsel for a party to testify for fear that the attorney will not be objective and that the trier of fact will confuse the roles of advocate and witness and grant improper weight to the argument of counsel. *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998).

If an attorney has withdrawn from participating in the case, the impediment to the attorney testifying, *i.e.*, jury confusion about the roles of advocate and witness, is dispelled. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985); *Bickford v. John E. Mitchell Co.*, 595 F.2d 540 (10th Cir. 1979).

Making the Objection

- Challenge the adequacy of the required demonstration that all other possible sources of the evidence have been exhausted.

Responding to the Objection

- Be prepared to demonstrate all of the following:
  - There is no other source of relevant evidence.
  - Violation of the attorney-advocate rule could not have been anticipated.
  - Another attorney cannot adequately present the case.

Cases

United States v. Armedo-Sarmiento, 545 F.2d 785 (2d Cir. 1976). An attorney for a party is an incompetent witness unless all other sources of relevant evidence have been exhausted.

United States v. Fiorillo, 376 F.2d 180 (2d Cir. 1967). An attorney for a party is an incompetent witness unless all other sources of relevant evidence have been exhausted.

United States v. Ewing, 979 F.2d 1234 (7th Cir. 1992). An attorney for a party is incompetent to testify absent exceptional circumstances.

Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985). If an attorney has withdrawn from the case, the attorney is a competent witness.

United States v. Johnston, 664 F.2d 152 (7th Cir. 1981). An attorney for a party is an incompetent witness unless all other sources of relevant evidence have been exhausted.

United States v. Buckhanon, 505 F.2d 1079 (8th Cir. 1974). An attorney for a party is an incompetent witness unless all other sources of relevant evidence have been exhausted.

United States v. Prantil, 764 F.2d 548 (9th Cir. 1985). Calling the prosecuting attorney as a witness is generally disfavored absent a compelling need for the testimony to be proffered.

United States v. West, 680 F.2d 652 (9th Cir. 1982). An attorney for a party is an incompetent witness unless all other sources of relevant evidence have been exhausted.

Lau Ah Yew v. Dulles, 257 F.2d 744 (9th Cir. 1958). An attorney for a party is an incompetent witness unless all other sources of relevant evidence have been exhausted.

Bickford v. John E. Mitchell Co., 595 F.2d 540 (10th Cir. 1979). If an attorney has

§ 9:90 Child Cannot Testify

Objection, Your Honor. The child is an incompetent witness.

Comments

The competency of children to testify turns on their capacity to understand the required oath and communicate personal knowledge. *See United States v. Thai*, 29 F.3d 785 (2d Cir. 1994) (nothing more required but that court elicit that child witness understood it was "very wrong to tell a lie" and promised to tell the truth; there is no minimum age for a child to give competent testimony); *United States v. Perez*, 526 F.2d 859 (5th Cir. 1976) ("young child" competent); *Pocatello v. United States*, 394 F.2d 115 (9th Cir. 1968) (five-year-old rape victim and seven-year-old sister competent); *United States v. Jones*, 482 F.2d 747 (D.C. Cir. 1973) (12-year-old child competent); *United States v. Hardin*, 443 F.2d 735 (D.C. Cir. 1970) (11-year-old child competent); *Doran v. United States*, 205 F.2d 717 (D.C. Cir. 1953) (minor child); *see also United States v. Spotted War Bonnet*, 882 F.2d 1360, 1362 (8th Cir. 1989) (no error in refusing to appoint psychiatrist to examine child witnesses to determine competency); 18 U.S.C. § 3509 (person under 18 alleged to be victim of crime of physical or sexual abuse or exploitation or witness to crime committed against another person is presumed competent and age alone does not justify competency examination).

Making the Objection

- If there is reasonable doubt about the child witness' understanding of the oath or capacity accurately to communicate what he or she knows, request voir dire and test the child's competency by asking the child to explain the duty imposed by the oath.
- Object to the child's competency as a witness if the child cannot or does not accurately explain the duty to tell the truth.
- Ask the child whether he or she sometimes tells "stories" and whether he or she always pays attention, and object if the child says that he or she does sometimes tell stories and does not always pay attention.

Responding to the Objection

- Be prepared to demonstrate the child's appreciation of the duty to tell the truth and the child's intelligence and capacity to understand, recall and narrate the evidence.

Pocatello v. United States, 394 F.2d 115 (9th Cir. 1968). Children aged five and seven demonstrated an appreciation of the oath and the capacity to observe, recollect and communicate.

United States v. Jones, 482 F.2d 747 (D.C. Cir. 1973). The child demonstrated an adequate appreciation of the difference between truth and falsehood and the duty to tell the truth.

United States v. Hardin, 443 F.2d 735 (D.C. Cir. 1970). An eleven-year-old child understood the oath, and the testimony was logical, responsive and consistent.

Doran v. United States, 205 F.2d 717 (D.C. Cir. 1953). Although a ten-year-old initially testified she did not know what it meant to tell the truth, persistent questioning by the trial judge elicited that she knew she must not tell a "story" and she would be punished if she did not tell the truth.

§ 9:100 Judge Cannot Testify

Objection, Your Honor. The presiding judge is not competent to give evidence in this case.

Comments

The judge presiding at a trial may not testify as a witness; no objection need be made to preserve the error for appeal. Fed. R. Evid. 605; for preservation of error for appeal, *see* Ch. 2. Fed. R. Evid. 605 mirrors the mandatory recusal provision of 28 U.S.C. § 455 [*see* Ch. 17], which requires a judge to disqualify himself or herself if the judge is likely to be a material witness in the case or has personal knowledge of disputed evidentiary facts in the proceeding. The appearance of a judge who has recused himself or herself creates a sensitive problem requiring "delicate treatment." *United States v. Frankenthal*, 582 F.2d 1102 (7th Cir. 1978) (recused judge was only possible source of evidence, his testimony was highly pertinent, was limited to recitation of fact, was brief and was not misused by prosecution).

Violation of the rule may be subject to harmless error analysis. *United States v. Paiva*, 892 F.2d 148 (1st Cir. 1989) (judge overreached power to comment on evidence and added to it but did not appear as a witness).

The prohibition may extend to the judge's law clerk. *Kennedy v. Great Atlantic & Pacific Tea Co., Inc.*, 551 F.2d 593 (5th Cir. 1977) (in action arising out of slip and fall of customer in store on rainy morning, testimony of trial judge's law clerk and his date concerning puddle of water they saw at curiosity-inspired pri-