

1 **OVERTURE 18** from The Ohio Presbytery (to CCB, OC)
2 “Amend *BCO* 35-1 and 35-8 Regarding Witness Eligibility”
3

4 [Editorial Note: This overture is similar issue to Overture 1 but proposes an alternative
5 amendment.]
6

7 **Be it resolved** that *BCO* 35-1 and 35-8 be amended as follows (underlines for additions,
8 strikethroughs for deletions):
9

10 **35-1.** All persons of ~~proper age and intelligence~~ are competent witnesses, ~~except such~~
11 ~~as do not believe in the existence of God, or a future state of rewards and punishments~~
12 and a witness may testify only after making an oath or giving affirmation to testify
13 truthfully (*BCO* 35-8). ~~Either party has the right to challenge a witness whom he~~
14 ~~believes to be incompetent, and the court shall examine and decide upon his~~
15 ~~competency.~~
16

17 **35-8.** ~~The~~ A witness’s oath or affirmation ~~to a witness~~ shall be administered by the
18 Moderator after warning the witness of the obligation to testify truthfully in the
19 following or like terms. ~~The Moderator shall inform the witness that regardless of~~
20 ~~whether he believes in God or in a future state of rewards and punishments, his oath~~
21 ~~or affirmation is made in the presence of God, and God will judge him on the~~
22 truthfulness of his answers. The Moderator shall then ask the witness the following:
23

24 **Do you solemnly promise, in the presence of God, that you will declare the**
25 **truth, the whole truth, and nothing but the truth, according to the best of**
26 **your knowledge in the matter in which you are called to witness, as you**
27 **shall answer it to the great Judge of the living and the dead?**
28

29 If, however, ~~at any time a witness should present himself before a court, who for~~
30 ~~conscientious reasons prefers to swear or affirm in any other manner, he should be~~
31 ~~allowed to do so.~~ a witness cannot take an oath either because he does not have
32 Christian faith necessary to invoke the name of God rightly or because he
33 conscientiously objects to swearing an oath, the Moderator shall then ask the witness
34 to affirm the following:
35

36 **Do you solemnly promise that you will declare the truth, the whole truth,**
37 **and nothing but the truth, according to the best of your knowledge in the**
38 **matter in which you are called to witness?**
39

40 The amended sections will then read as follows:
41

42 **35-1.** All persons are competent witnesses, and a witness may testify only after
43 making an oath or giving affirmation to testify truthfully (*BCO* 35-8).
44

1 **35-8.** A witness’s oath or affirmation shall be administered by the Moderator after
2 warning the witness of the obligation to testify truthfully. The Moderator shall inform
3 the witness that regardless of whether he believes in God or in a future state of rewards
4 and punishments, his oath or affirmation is made in the presence of God, and God will
5 judge him on the truthfulness of his answers. The Moderator shall then ask the witness
6 the following:

7
8 **Do you solemnly promise, in the presence of God, that you will declare the**
9 **truth, the whole truth, and nothing but the truth, according to the best of**
10 **your knowledge in the matter in which you are called to witness, as you**
11 **shall answer it to the great Judge of the living and the dead?**

12
13 If, however, a witness cannot take an oath either because he does not have Christian
14 faith necessary to invoke the name of God rightly or because he conscientiously
15 objects to swearing an oath, the Moderator shall then ask the witness to affirm the
16 following:

17
18 **Do you solemnly promise that you will declare the truth, the whole truth,**
19 **and nothing but the truth, according to the best of your knowledge in the**
20 **matter in which you are called to witness?**

21
22 **Rationale:**

23
24 This overture is an attempt to improve upon the work of the Piedmont Triad Presbytery in
25 Overture 1. By making this Overture, The Ohio Presbytery does not comment on the
26 substance of Overture 1 in expanding witness eligibility.

27
28 In short, while Overture 1 intends to expand witness eligibility, it actually opens the door to
29 narrow eligibility. While removing the category of witness “competency” and expanding a
30 court’s ability to prohibit any witness from testifying, nothing in the amended *BCO* 35
31 prohibits a court from barring atheists—and many other kinds of people—from testifying.
32 Indeed, the potential abuse of the amended *BCO* 35 is significant: nothing in the text prohibits
33 a court from barring anyone from testifying for any reason.

34
35 Our current *BCO* maintains the important distinction between a witness’s *competency* and a
36 witness’s *credibility*. *Competency* is a determination of a witness’s fitness to testify at all. It
37 is a binary determination by the court: a witness is either qualified (competent) or not
38 qualified (incompetent) to take the stand and give testimony. Consistent with our historic
39 practice,¹ a court should only be able to disqualify a witness from testifying for expressly

¹ Not only is this an American Presbyterian practice traceable in our heritage to at least 1879 (*The Book of Church Order of the Presbyterian Church in the United States* [Richmond, VA: Presbytery Committee of Publishing, 1879]), it is the long-standing common law practice as well, going back before the 18th century (William Blackstone, *Commentaries on the Law of England*, Book 3 [Oxford: Clarendon, 1767], 370). However, the movement in American legal systems has been toward removing all barriers to competency,

1 delineated reasons. Our current *BCO* provides three reasons: improper age, improper
 2 intelligence, and “not believ[ing] in the existence of God, or a future state of rewards and
 3 punishments” (35-1). The *BCO* is clear that a challenge to a witness taking the stand is
 4 permitted only on these grounds.

5
 6 Witness *credibility*, on the other hand, is a separate concept. Credibility is the determination
 7 of whether one’s testimony is truthful or not, a determination that is made by the court trying
 8 a case (*BCO* 35-5). If two witnesses’ stories differ, which one will the court believe? The
 9 one that is more credible. This determination is not made by an official motion, but it is
 10 implicitly decided during deliberations when a court comes to a judgment at the end of a trial.

11
 12 A related concept is an objection not to a witness taking the stand, but an objection to *specific*
 13 *testimony* of a witness. Objecting to particular questions asked to a witness or to particular
 14 statements by a witness is always permitted, and that does not require the language found in
 15 *BCO* 35-1 or Overture 1. Objections may be raised to frivolous or irrelevant questions or
 16 testimony (*BCO* 35-7). Also, the court has the right to use its discretion as to which questions
 17 are appropriate to ask (e.g., whether leading questions are appropriate or eliciting hearsay is
 18 permissible) (*BCO* 35-7). None of these are challenges to competency.

19
 20 The challenges raised to a witness under *BCO* 35-1 are only challenges to that witness’s
 21 competency, not challenges to his credibility (which is offered through other testimony) or
 22 challenges to particular testimony (which any party may raise). The *BCO* 35-1 competency
 23 challenges can only be made regarding that person’s age, intelligence, or belief in God.

24
 25 Maintaining narrow grounds of incompetency is intentional and best suits the interests of
 26 justice. Historically, the PCA has permitted only these very narrow categories to proscribe
 27 how the prosecutor and the accused can conduct his case. He has the right to call his own
 28 witnesses that can best make his argument to the court. Therefore, the rules limiting who can
 29 take the witness stand are very narrow, allowing parties the maximum freedom in developing
 30 their case. This freedom in advocacy is essential in ensuring justice for both victims and
 31 accused individuals in our church courts.

32
 33 Overture 1, however, still permits objections to a witness taking the stand, but it does not
 34 tether those objections to the concept of competency any longer. Instead, Overture 1 does not
 35 describe the situations when a witness may be rightly barred from testifying, so a court is left
 36 to its own discretion in making that determination. All limitations, except for the court’s will,
 37 are removed.

thereby making more people eligible to serve as witnesses. (See, e.g., Note on Fed. Rules Evid. 601; Christopher B. Mueller and Laird C. Kirkpatrick, *Evidence*, 5th ed. [New York: Wolters Kluwer, 2012], 437–438.) This overture follows Overture 1 and the general American trend, but it would be easy to retain the categories of incompetency for improper age and intelligence:

35-1. All persons of proper age and intelligence are competent witnesses, ~~except such as do not believe in the existence of God, or a future state of rewards and punishments~~ and a witness may testify only after making an oath or giving affirmation to testify truthfully (*BCO* 35-8). Either party has the right to challenge a witness whom he believes to be incompetent, and the court shall examine and decide upon his competency.

1 Granting this level of new discretion to courts creates an unjust system. It is not difficult to
2 imagine scenarios where a court would bar witnesses just because they are considered uncouth
3 in the eyes of the court, even though those individuals have important information to assist
4 the court in its pursuit of the truth.

5
6 Consider the hypothetical case of an abusive pastor. Individuals who he has abused have left
7 the PCA church, and some have left the faith altogether. At his trial, the pastor objects to all
8 of these former members testifying because they are “disgruntled” and left the church angrily
9 and without seeking reconciliation and restoration. Thus, he argues to the court, they are not
10 fit to testify. Under the current *BCO*, those who left the faith likely will not be permitted to
11 testify, but the others will. While the intent of Overture 1 is to permit all of these former
12 members to testify, regardless of belief in God, Overture 1 actually sets up the possibility of
13 a court to bar all of these former “disgruntled” members from testifying. A Presbytery could
14 agree with the accused and bar all of them from testifying. Without their critical testimony,
15 there is no case against the pastor, and he is acquitted of all charges. Truth is not found out,
16 a man is not called to account for his sin, and victims continue to suffer.

17
18 Overture 1 leaves a massive loophole that can easily be used (even unintentionally) to
19 drastically narrow who can testify in church courts. To reach Overture 1’s intended result—
20 to expand who can testify in church courts—the mechanism of objecting untethered from
21 competency must be removed.²

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23 *Adopted by The Ohio Presbytery at its stated meeting, February 3, 2024.*
24 *Attested by /s/ TE Jason Piland, Stated Clerk*

² Overture 1 also changes the categories of “oath” and “affirmation” to “oath” and “promise.” This is an unnecessary change that weakens the import and gravity of the affirmation. An “affirmation” is a legal category that has the same legal effect as an oath (see, e.g., Fed. Rules Evid. 603). It triggers rights and obligations in the exact same way that oaths do. There is no reason to use the word “promise” in the place of “affirmation.”