

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SPR19-18

Title

Criminal Procedure: Diversion for
Incompetent Defendants and Posttrial
Hearings on Competency

Action Requested

Review and submit comments by June 10,
2019

Proposed Effective Date

January 1, 2020

Proposed Rules, Forms, Standards, or Statutes

Amend Cal. Rules of Court, rule 4.130

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Proposed by

Criminal Law Advisory Committee
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Executive Summary and Origin

The Criminal Law Advisory Committee recommends amending rule 4.130 of the California Rules of Court relating to mental competency proceedings in criminal cases to incorporate changes due to [Assembly Bill 1810](#) (Stats. 2018, ch. 34), a bill that significantly altered the statutory landscape for mental competency proceedings.

Background

Effective June 27, 2018, AB 1810 established mental health diversion (Pen. Code, §§ [1001.35](#), [1001.36](#)) and amended the statutes for mental competency proceedings in both misdemeanor and felony cases (Pen. Code, §§ [1370](#), [1370.01](#)) to allow a judge to grant diversion to a defendant who has been found incompetent to stand trial. AB 1810 also provided a mechanism for a judge to reconsider the competency of a defendant awaiting transfer to the State Hospital when presented with substantial evidence that the defendant has regained competence—essentially providing a procedural “off-ramp” on the road to the State Hospital. (Pen. Code, §§ [1370\(a\)\(1\)\(G\)](#).) This proposal would update California Rules of Court, rule 4.130, which governs mental competency proceedings, to account for these changes in law.

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.

The Proposal

Amending rule 4.130 of the California Rules of Court is urgently needed to respond to a recent change in the law. The proposed amendments add two subdivisions to the existing rule, as well as make changes to existing subdivisions.

Changes to requirements for expert reports in competency proceedings

These amendments:

- Require an expert competency report to contain an opinion as to whether the symptoms motivating the defendant's behavior would respond to treatment; and
- Facilitate consideration of diversion after a finding of incompetency.

Diversion for incompetent defendants

To address the diversion of persons eligible for commitment under Penal Code sections 1370 and 1370.01, the amendments:

- Add a subdivision to the rule to address diversion for incompetent defendants;
- Establish procedures for initiating a hearing to consider diversion after a defendant has been found incompetent, including what information to consider;
- State the maximum period of diversion after a finding that the defendant is incompetent to stand trial;
- Delineate how evidence of the finding of eligibility for diversion and treatment and progress reports relating to diversion can or cannot be used in other proceedings;
- State that a court may not condition a grant of diversion for an incompetent defendant on either:
 - The defendant's consent to diversion, either personally, or through counsel; or
 - A knowing and intelligent waiver of the defendant's statutory right to a speedy trial, either personally, or through counsel;
- Establish procedures for incompetent defendants who are terminated from diversion that:
 - Require the court to appoint a psychiatrist or psychologist to reexamine the defendant's competence to stand trial; and
 - Allow the court to refer the matter to the conservatorship investigator in certain situations.

Posttrial hearings on competency

The proposed amendments:

- Add a subdivision to the rule to address posttrial hearings on competency, both in “off-ramp” cases under Penal Code section 1370(a)(1)(G) and after a defendant has been terminated from diversion;
- Establish procedures for initiating a hearing to reconsider competency after an earlier finding of incompetency, including what evidence can trigger such reconsideration;
- Allow a court to appoint a psychiatrist or a licensed psychologist to examine the defendant and, in a report filed with the court, opine as to whether the defendant has regained competence;
- Establish procedures for a posttrial hearing on competency;
- Dictate that the presumption of competency does not apply to posttrial hearings on competency;
- Allow the court to consider any evidence, presented by any party, which is relevant to the question of the defendant’s current mental competency;
- Establish the standard of proof for posttrial competency hearings as preponderance of the evidence; and
- Require that the court’s findings as to the defendant’s mental competency must be stated on the record and recorded in the minutes.

Alternatives Considered

The proposed rule adds language requiring an expert competency report to contain an opinion as to “whether the symptoms motivating the behavior would respond to treatment,” to facilitate assessment for mental health diversion eligibility for defendants in competency proceedings and promote efficiencies by avoiding the unnecessary delay caused by requiring a report by an expert that assesses competency and a report by another expert that assesses eligibility for diversion. The committee considered keeping the requirements regarding expert reports as they were, but decided that it would be more efficient to include this requirement as it is very close to the current requirement in the rule that the report include “[a] recommendation, if possible, for a placement or type of placement or treatment program that is most appropriate for restoring the defendant to competency.” (Cal. Rules of Court, rule 4.130(d)(2)G.) The committee discussed whether to require the expert to opine on the defendant’s eligibility for mental health diversion but concluded that was both too ambiguous and potentially too burdensome.

The committee considered creating a separate rule for mental health diversion that could be cross-referenced from the rule on competency for defendants who were granted diversion after

being found incompetent. But ultimately—given the paucity of case law on mental health diversion and the statutory language favoring local discretion in implementation—the committee decided to limit itself to the task of updating the existing rule on competency proceedings. (See Pen. Code, § 1001.35(b).)

Fiscal and Operational Impacts

This proposal may require that a court-appointed expert conduct a more extensive evaluation of the defendant and provide greater detail in the expert report. Accordingly, it may result in increased costs to the courts depending on how they compensate court-appointed experts and whether their experts currently provide the information required by the rule amendments in their reports.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Do the proposed procedures for the diversion of defendants who have been found incompetent to stand trial provide adequate guidance to courts and litigants?
- Do the proposed procedures for posttrial hearings on competency provide adequate guidance to courts and litigants?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would the changes for the contents of expert reports in competency proceedings result in a significant cost to courts? If so, please quantify.
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rule 4.130, at pages 6–10
2. Link A: [Assem. Bill 1810](#) (Stat. 2018, ch. 34), at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1810
3. Link B: [Pen. Code, § 1001.36](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1001.36.&lawCode=PEN
4. Link C: [Pen. Code, § 1370](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1370.&lawCode=PEN
5. Link D: [Pen. Code, § 1370.01](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1370.01.&lawCode=PEN

Rule 4.130 of the California Rules of Court would be amended, effective January 1, 2020, to read:

1 **Rule 4.130. Mental competency proceedings**

2
3 (a) ***

4
5 (b) **Initiation of mental competency proceedings**

6
7 (1)–(2) ***

8
9 (3) In a felony case, if the judge initiates mental competency proceedings prior to
10 the preliminary examination, counsel for the defendant or counsel for the
11 People may request a preliminary examination as provided in Penal Code
12 section 1368.1(a) and rule 4.131.

13
14 (c) **Effect of initiating mental competency proceedings**

15
16 (1) If mental competency proceedings are initiated, criminal proceedings are
17 suspended and may not be reinstated until a trial on the competency of the
18 defendant has been concluded and the defendant ~~either~~ is found mentally
19 competent at a trial conducted under Penal Code section 1369, at a hearing
20 conducted under Penal Code section 1370(a)(1)(G), or at a hearing following
21 a certification of restoration under Penal Code section 1372.

22
23 (A) ~~Is found mentally competent; or~~

24
25 (B) ~~Has his or her competency restored under Penal Code section 1372.~~

26
27 (2)–(3) ***

28
29 (d) **Examination of defendant after initiation of mental competency proceedings**

30
31 (1) On initiation of mental competency proceedings, the court must inquire
32 whether the defendant, or defendant’s counsel, seeks a finding of mental
33 incompetence.

34
35 (2) Any court-appointed experts must examine the defendant and advise the
36 court on the defendant’s competency to stand trial. Experts’ reports are to be
37 submitted to the court, counsel for the defendant, and the prosecution. The
38 report must include the following:

39
40 (A) A brief statement of the examiner’s training and previous experience as
41 it relates to examining the competence of a criminal defendant to stand
42 trial and preparing a resulting report;

1
2 (B) A summary of the examination conducted by the examiner on the
3 defendant, including a summary of the defendant's mental status, a
4 ~~current~~ diagnosis under the most recent version of the *Diagnostic and*
5 *Statistical Manual of Mental Disorders*, if possible, of the defendant's
6 current mental disorder or disorders, and a statement as to whether
7 symptoms of the mental disorder or disorders which motivated the
8 defendant's behavior would respond to mental health treatment
9 ~~summary of the defendant's mental status;~~

10
11 (C)–(G) ***

12
13 (3) Statements made by the defendant during the examination to experts
14 appointed under this rule, and products of any such statements, may not be
15 used in a trial on the issue of the defendant's guilt or in a sanity trial should
16 defendant enter a plea of not guilty by reason of insanity.

17
18 (e) ***

19
20 (f) **Posttrial procedure**

- 21
22 (1) If the defendant is found mentally competent, the court must reinstate the
23 criminal proceedings.
24
25 (2) If the defendant is found to be mentally incompetent, the criminal
26 proceedings remain suspended and the court must ~~follow the procedures~~
27 ~~stated in Penal Code section 1370 et seq.~~ either issue an order committing the
28 person for restoration treatment under the provisions of the governing statute,
29 or, in the case of a person eligible for commitment under Penal Code sections
30 1370 or 1370.01, may consider placing the committed person on a program
31 of diversion.

32
33 (g) **Diversion of a person eligible for commitment under section 1370 or 1370.01**

- 34
35 (1) After the court finds that the defendant is mentally incompetent and before
36 the defendant is transported to a facility for restoration under section
37 1370(a)(1)(B)(i), the court may consider whether the defendant may benefit
38 from diversion under Penal Code section 1001.36. The court may set a
39 hearing to determine whether the defendant is an appropriate candidate for
40 diversion. When determining whether to exercise its discretion to grant
41 diversion under this section, the court may consider previous records of
42 participation in diversion under section 1001.36.

- 1 (2) The maximum period of diversion after a finding that the defendant is
2 incompetent to stand trial is the lesser of two years or the maximum time for
3 restoration under Penal Code section 1370(c)(1) (for felony offenses) or
4 1370.01(c)(1) (for misdemeanor offenses).
5
- 6 (3) The court may not condition a grant of diversion for an incompetent
7 defendant on either:
8
- 9 (A) The defendant’s consent to diversion, either personally, or through
10 counsel; or
11
- 12 (B) A knowing and intelligent waiver of the defendant’s statutory right to a
13 speedy trial, either personally, or through counsel.
14
- 15 (4) A finding that the defendant suffers from a mental disorder rendering him or
16 her eligible for diversion, any progress reports concerning the defendant’s
17 treatment in diversion, or any other records related to a mental disorder that
18 were created as a result of participation in, or completion of, diversion or for
19 use at a hearing on the defendant’s eligibility for diversion under this section
20 may not be used in any other proceeding without the defendant’s consent,
21 unless that information is relevant evidence that is admissible under the
22 standards described in article I, section 28(f)(2) of the California
23 Constitution.
24
- 25 (5) If, during the period of diversion, the court determines that criminal
26 proceedings should be reinstated under Penal Code section 1001.36(d), the
27 court must, under Penal Code section 1369, appoint a psychiatrist, licensed
28 psychologist, or any other expert the court may deem appropriate, to examine
29 the defendant and return a report, opining as to the defendant’s competence to
30 stand trial. The expert’s report must be provided to counsel for the People
31 and to the defendant’s counsel.
32
- 33 (A) On receipt of the evaluation report, the court must conduct an inquiry
34 as to the defendant’s current competency, under the procedures set
35 forth in (h)(2) of this rule.
36
- 37 (B) If the court finds by a preponderance of the evidence that the defendant
38 is mentally competent, the court must hold a hearing as set forth in
39 Penal Code section 1001.36(d).
40
- 41 (C) If the court finds by a preponderance of the evidence that the defendant
42 is mentally incompetent, criminal proceedings must remain suspended,
43 and the court must order that the defendant be committed, under Penal

1 Code section 1370 (for felonies) or 1370.01 (for misdemeanors) and
2 placed for restoration treatment.

3
4 (D) If the court concludes, based on substantial evidence, that the defendant
5 is mentally incompetent and is not likely to attain competency within
6 the time remaining before his or her maximum date for returning to
7 court, and has reason to believe the defendant may be gravely disabled,
8 within the meaning of Welfare and Institutions Code section
9 5008(h)(1), the court may, instead of issuing a commitment order under
10 Penal Code sections 1370 or 1370.01, refer the matter to the
11 conservatorship investigator of the county of commitment to initiate
12 conservatorship proceedings for the defendant under Welfare and
13 Institutions Code section 5350 et seq.

14
15 (6) If the defendant performs satisfactorily and completes diversion, the case
16 must be dismissed under the procedures stated in Penal Code section
17 1001.36, and the defendant must no longer be deemed incompetent to stand
18 trial.

19
20 **(h) Posttrial hearings on competence**

21
22 (1) If, at any time after the court has declared a defendant incompetent to stand
23 trial, and counsel for the defendant or a jail medical or mental health staff
24 provider provides the court with substantial evidence that the defendant's
25 psychiatric symptoms have changed to such a degree as to create a doubt in
26 the mind of the judge as to the defendant's current mental incompetence, the
27 court may appoint a psychiatrist or a licensed psychologist to examine the
28 defendant and, in an examination with the court, opine as to whether the
29 defendant has regained competence.

30
31 (2) On receipt of the evaluation report, the court must direct the clerk to serve a
32 copy on counsel for the People and counsel for the defendant. If, in the
33 opinion of the appointed expert, the defendant has regained competence, the
34 court must conduct a hearing, as if a certificate of restoration of competence
35 had been filed under Penal Code section 1372(a)(1), except that a
36 presumption of competency does not apply. At the hearing, the court may
37 consider any evidence, presented by any party, which is relevant to the
38 question of the defendant's current mental competency.

39
40 (A) At the conclusion of the hearing, if the court finds that it has been
41 established by a preponderance of the evidence that the defendant is
42 mentally competent, the court must reinstate criminal proceedings.

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(B) At the conclusion of the hearing, if the court finds that it has not been established by a preponderance of the evidence that the defendant is mentally competent, criminal proceedings must remain suspended.

(C) The court's findings as to the defendant's mental competency must be stated on the record and recorded in the minutes.

Advisory Committee Comment

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