

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR19-24

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Title	Action Requested
Juvenile Law: Competency	Review and submit comments by June 10, 2019
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643	January 1, 2020
Proposed by	Contact
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Family and Juvenile Law Advisory Committee	
Hon. Jerilyn L. Borack, Cochair	
Hon. Mark A. Juhas, Cochair	

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### Executive Summary and Origin

The Collaborative Justice Courts Advisory Committee and the Family and Juvenile Law Advisory Committee recommend amending and renumbering one rule, and amending one rule, to conform to recent statutory changes regarding a minor who is the subject of a petition filed under Welfare and Institutions Code sections 601 or 602, when the court has a doubt as to the minor’s competency to understand the court proceedings.

### Background

Assembly Bill 1214 (Stone; Stats. 2018, ch. 991) revises Welfare and Institutions Code sections 709 and 712, regarding a minor’s competency to understand the court proceedings, to expand the duties of an expert evaluating the minor whose competency is in doubt. The bill also requires the Judicial Council to adopt a rule of court relating to the qualifications of those experts, in consultation with specified stakeholders.<sup>1</sup> The bill also mandates the Judicial Council to develop

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code and all further rule references are to the California Rules of Court, unless otherwise indicated.

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

and adopt rules to implement the other requirements in section 709(b), also in consultation with specified stakeholders.

## **The Proposal**

Rule 5.645 would be amended, and five new subdivisions would be added to the rule. Subdivisions (a)–(c), with slight modifications to existing language, would be renumbered as rule 5.643.

### **Rule 5.643**

The subdivisions of current rule 5.645 that address the procedures for commitment to a county facility when the court believes a child is mentally disabled or may be mentally ill would be renumbered as rule 5.643. References to “mental retardation” would be replaced with “intellectual disability” or “developmental disability.” References to “child” would be replaced with “minor.” The remainder of the rule would be unchanged from what is now in subdivisions (a)-(c) of rule 5.645.

### **Rule 5.645**

The remainder of current rule 5.645 would be revised to address expert qualifications and court proceedings for competency evaluations.

Subdivision (a) (currently, subdivision (d)) of the rule would be amended to remove the reference to Penal Code section 1367, as this section addresses an adult’s competency to stand trial, and to replace the current definition of competency with a cross-reference to the definition in section 709(a)(2).

Subdivision (b) (currently, subdivision (d)(1)(B)–(C)) would be amended to identify the minimum training and experience needed for an expert to be eligible for appointment for forensic evaluations of juveniles.

Subdivision (c) would be added to identify the requirements of the court-appointed expert’s interview of the minor.

Subdivision (d) would be added to address the mandate in section 709 that the expert must review all the available records, by requiring that each county, in its written protocol regarding competency required under section 709(i), include a description of the process for obtaining and providing the records to the expert to review.

Subdivision (e) would be added to identify the requirements for the expert’s mandated consultation with the minor’s counsel.

Subdivision (f) would be added to identify the requirements for the mandate that the expert gather a developmental history of the minor.

Subdivision (g) would be added to address the expert’s written report requirements regarding whether the minor has the sufficient present ability to consult with counsel and whether the minor has a rational understanding of the proceedings.

Additionally, the Advisory Committee Comment at the end of the rule would be deleted as it is misleading and does not accurately reflect the procedure for obtaining regional center services.

### **Alternatives Considered**

The committees discussed multiple potential rule topics, several of which were deferred.

***Records review process.*** The committees discussed whether the rule should address the requirement that the expert must review all the records provided and specify the process, such as who provides the records to the expert and how the expert obtains confidential records. The committees concluded it was best to allow each county to determine its own process and decided to propose amending rule 5.645 to require that the written protocol mandated under section 709(i) include a description of the process for obtaining and providing the records to the evaluator to review, including who will obtain and provide the records to the evaluator.

***Testing.*** The committees discussed whether the rule should address the requirement that the expert must administer age-appropriate testing unless the facts of the case render testing unnecessary or inappropriate. The committees discussed whether the rule should address the nature and content of evaluation tools and whether the rule should specify when testing is unnecessary or inappropriate. The committees concluded that these areas should be deferred to the expert evaluators and did not include this topic in the proposed rule.

***Interpreters.*** The committees discussed whether the requirements that apply to court interpreters should apply to interpreters used by competency evaluators.<sup>2</sup> The committees decided that the requirements for a Judicial Council–certified interpreter would be too difficult to meet, particularly in smaller counties and for more rare languages. The committees also noted that the interpreters used for mental health evaluations are more akin to medical interpreters than interpreters for court proceedings.

***“Additional qualified experts.”*** The committees discussed the new provision in section 709 that allows the district attorney or minor’s counsel to retain or seek the appointment of additional qualified experts who may testify during the competency hearing. The committees discussed whether the rule should specify the qualifications for these experts and whether additional experts should be subject to the requirements in the new rule. The committees concluded that the phrase “additional qualified experts” is ambiguous in the statute and that an appellate court should decide what this phrase means, not the Judicial Council through the rule-making process. The committees concluded that the current provision that does not preclude involvement of clinicians with other qualifications as consultants or witnesses should remain in the rule.

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<sup>2</sup> Specifically, the committees reviewed Government Code section 68561 et seq. and rule 2.893.

**School psychologists.** The committees discussed whether rule 5.645 should be clarified to allow school psychologists to be appointed as experts in competency proceedings. This clarification would be made by removing the requirement that school psychologists have a doctoral degree and simply using the term “licensed psychologist.” The committees discussed how this could create a larger pool of potential evaluators, but also discussed that school psychologists do not have the depth and breadth of education and training that one needs to obtain a doctoral degree. The committees concluded that school psychologists who do not hold a doctoral degree should not be included among the professionals listed in the rule who can conduct competency evaluations.

**“Child” or “minor.”** One of the more robust discussions was whether the rule should use the term “child” or “minor.” The current rules all use “child,” but the statutes use “minor.” The committees note that throughout the juvenile court rules and forms there is a consistent practice of using “child,” and this term is clearly defined in rule 5.502.<sup>3</sup> Use of the term “child” is a reminder to all in the system that juvenile offenders are developmentally distinct from adults. “Minor” is not defined in rule 5.502. Since section 101(b) defines “child or minor” as a person under the jurisdiction of the juvenile court under section 300, 601, or 602, and because most children in delinquency court do not like to be called “child,” the committees resolved to use the word “minor” in the proposed rules. The committee is aware that this makes the proposed competency rules inconsistent with the other rules of court that use the term “child,” but concluded that tracking the statutory language and recognizing that delinquency proceedings involve older children outweigh considerations of consistency with other rules of court and Judicial Council forms.

### **Fiscal and Operational Impacts**

It is important to note that the new legislative mandates regarding evaluators will likely increase costs to the courts, with no additional funding made available.

Costs for evaluations may increase due to more comprehensive evaluation and written report requirements. Some counties, particularly smaller counties, will have challenges finding qualified evaluators.

For counties that do not have existing protocols, there will also be increased costs for local implementation to develop the statutorily required county protocols, again with no additional funding made available to cover these costs.<sup>4</sup>

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<sup>3</sup> Rule 5.502(5) provides: “‘Child’ means a person under the age of 18 years.”

<sup>4</sup> Section 709(i) mandates that the “presiding judge of the juvenile court, the probation department, the county mental health department, the public defender and any other entity that provides representation for minors, the district attorney, the regional center, if appropriate, and any other participants that the presiding judge shall designate, shall develop a written protocol describing the competency process and a program to ensure that minors who are found incompetent receive appropriate remediation services.”

There are also potential cost increases due to possible growth in litigation because, as the reports become more comprehensive, there will be more information on which to cross-examine the expert. Alternatively, more thorough reports could lessen the need for contested hearings because the reports may speak for themselves.

A major operational impact is that there likely will be longer time frames to complete the reports because of additional requirements to interview minor's counsel and attempt to interview the minor face-to-face, and increased written report requirements. Currently, the process generally takes three to four weeks. This time frame will likely expand, thus increasing the amount of time these children are held in secure custody.

A benefit, however, is that the reports received will be of much higher quality than under current standards and will be more useful for judicial decision-making.

### **Request for Specific Comments**

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

- Does the proposal appropriately address the stated purpose?
- Should rule 5.645(g)(1)(C)(i) be more specific regarding the records reviewed by the evaluator? Should the rule list out the sources listed in section 709(b)(3)?
- Should rules 5.643 and 5.645 use the term "child" or "minor"?

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 two 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, rules 5.643 and 5.645, at pages 6–13
2. Assembly Bill 1214,  
[https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB1214](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1214)

Rule 5.645 of the California Rules of Court would be amended, and subdivisions (a)–(c) would be renumbered as rule 5.643, effective January 1, 2020, to read:

1 **Rule 5.643. 5.645. Mental health or condition of ~~child~~ minor; court procedures**<sup>1</sup>  
2

3 **(a) Doubt concerning the mental health of a ~~child~~ minor (§§ 357, 705, 6550, 6551)**  
4

5 Whenever the court believes that the ~~child~~ minor who is the subject of a petition  
6 filed under section 300, 601, or 602 is mentally disabled or may be mentally ill, the  
7 court may stay the proceedings and order the ~~child~~ minor taken to a facility  
8 designated by the court and approved by the State Department of Mental Health as  
9 a facility for 72-hour treatment and evaluation. The professional in charge of the  
10 facility must submit a written evaluation of the ~~child~~ minor to the court.  
11

12 **(b) Findings regarding a mental disorder (§ 6551)**  
13

14 Article 1 of chapter 2 of part 1 of division 5 (commencing with section 5150)  
15 applies.  
16

17 (1) If the professional reports that the ~~child~~ minor is not in need of intensive  
18 treatment, the ~~child~~ minor must be returned to the juvenile court on or before  
19 the expiration of the 72-hour period, and the court must proceed with the case  
20 under section 300, 601, or 602.  
21

22 (2) If the professional in charge of the facility finds that the ~~child~~ minor is in  
23 need of intensive treatment for a mental disorder, the ~~child~~ minor may be  
24 certified for not more than 14 days of involuntary intensive treatment  
25 according to the conditions of sections 5250(c) and 5260(b). The stay of the  
26 juvenile court proceedings must remain in effect during this time.  
27

28 (A) During or at the end of the 14 days of involuntary intensive treatment, a  
29 certification may be sought for additional treatment under sections  
30 commencing with 5270.10 or for the initiation of proceedings to have a  
31 conservator appointed for the ~~child~~ minor under sections commencing  
32 with 5350. The juvenile court may retain jurisdiction over the ~~child~~  
33 minor during proceedings under sections 5270.10 et seq. and 5350 et  
34 seq.  
35

36 (B) For a ~~child~~ minor subject to a petition under section 602, if the ~~child~~  
37 minor is found to be gravely disabled under sections 5300 et seq., a  
38 conservator is appointed under those sections, and the professional in

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<sup>1</sup> The text of current rule 5.645(a)–(c) would be amended, moved, and renumbered as rule 5.643. It is not underlined as new text because the language is currently contained in the California Rules of Court and to highlight the proposed amendments to the current rule.

1 charge of the ~~child's~~ minor's treatment or of the treatment facility  
2 determines that proceedings under section 602 would be detrimental to  
3 the ~~child~~ minor, the juvenile court must suspend jurisdiction while the  
4 conservatorship remains in effect. The suspension of jurisdiction may  
5 end when the conservatorship is terminated, and the original 602 matter  
6 may be calendared for further proceedings.

7  
8 **(c) Findings regarding ~~mental retardation~~ intellectual disability (§ 6551)**

9  
10 Article 1 of chapter 2 of part 1 of division 5 (commencing with section 5150)  
11 applies.

- 12  
13 (1) If the professional finds that the ~~child~~ minor is ~~mentally retarded~~  
14 intellectually disabled and recommends commitment to a state hospital, the  
15 court may direct the filing in the appropriate court of a petition for  
16 commitment of a ~~child~~ minor as a ~~mentally retarded~~ developmentally  
17 disabled person to the State Department of Developmental Services for  
18 placement in a state hospital.  
19  
20 (2) If the professional finds that the ~~child~~ minor is not ~~mentally retarded~~  
21 intellectually disabled, the ~~child~~ minor must be returned to the juvenile court  
22 on or before the expiration of the 72-hour period, and the court must proceed  
23 with the case under section 300, 601, or 602.  
24  
25 (3) The jurisdiction of the juvenile court must be suspended while the ~~child~~  
26 minor is subject to the jurisdiction of the appropriate court under a petition  
27 for commitment of a ~~mentally retarded~~ an intellectually disabled person, or  
28 under remand for 90 days for intensive treatment or commitment ordered by  
29 that court.  
30

31 **Rule 5.645. Mental health or condition of ~~child~~ minor; ~~court procedures~~**  
32 **competency evaluations**

33  
34 **~~(d)~~(a) Doubt as to capacity to cooperate with counsel minor's competency (§§ 601,**  
35 **602, 709; Pen. Code, § 1367)**

- 36  
37 (1) If the court finds that there is substantial evidence ~~that~~ regarding [or: about?]  
38 a ~~child~~ minor who is the subject of a petition filed under section 601 or 602  
39 ~~lacks sufficient present ability to consult with counsel and assist in preparing~~  
40 ~~his or her defense with a reasonable degree of rational understanding, or lacks~~  
41 ~~a rational as well as factual understanding of the nature of the charges or~~  
42 ~~proceedings against him or her, that raises a doubt as to the minor's~~  
43 competency as defined in section 709, the court must suspend the

1 proceedings and conduct a hearing regarding the child's minor's competence  
2 competency. ~~Evidence is substantial if it raises a reasonable doubt about the~~  
3 ~~child's competence to stand trial.~~

4  
5 ~~(A)(2)~~ Unless the parties have stipulated to a finding of incompetency, the  
6 court must appoint an expert to examine the child to evaluate the minor and  
7 determine whether the child minor suffers from a mental illness, mental  
8 disorder, developmental disability, developmental immaturity, or other  
9 condition affecting competency and, if so, whether the condition or  
10 conditions impair the child's competency the minor is incompetent as defined  
11 in section 709(a)(2).

12  
13 ~~(3)~~ Following the hearing on competency, the court must proceed as directed in  
14 section 709.

15  
16 **(b) Expert qualifications**

17  
18 ~~(B)(1)~~ To be appointed as an expert, an individual must be a:

19  
20 ~~(i)(A)~~ Licensed psychiatrist who has successfully completed four years of  
21 medical school and either four years of general psychiatry residency,  
22 including one year of internship and two years of child and adolescent  
23 fellowship training, or three years of general psychiatry residency,  
24 including one year of internship and one year of residency that focus on  
25 children and adolescents and one year of child and adolescent  
26 fellowship training; or

27  
28 ~~(ii)(B)~~ Clinical, counseling, or school psychologist who has received a  
29 doctoral degree in psychology from an educational institution  
30 accredited by an organization recognized by the Council for Higher  
31 Education Accreditation and who is licensed as a psychologist; and

32  
33 ~~(C)(2)~~ The expert, whether a licensed psychiatrist or psychologist, must:

34  
35 ~~(i)(A)~~ Possess demonstrable professional experience addressing child and  
36 adolescent developmental issues, including the emotional, behavioral,  
37 and cognitive impairments of children and adolescents;

38  
39 ~~(ii)(B)~~ Have expertise in the cultural and social characteristics of children and  
40 adolescents;

41  
42 ~~(iii)(C)~~ Possess a curriculum vitae reflecting training and experience in the  
43 forensic evaluation of children and adolescents;

1  
2           ~~(iv)~~(D) Be familiar with juvenile competency standards and accepted criteria  
3                                   used in evaluating juvenile competence;

4  
5           ~~(v)~~(E) Possess a comprehensive understanding of effective interventions, as  
6                                   well as treatment, training, and programs for the attainment of  
7                                   competency available to children and adolescents; ~~and~~

8  
9           ~~(vi)~~(F) Be proficient in the language preferred by the ~~child~~ minor, or if that is  
10                                  not feasible, employ the services of a certified interpreter and use  
11                                  assessment tools that are linguistically and culturally appropriate for the  
12                                  ~~child~~ minor; ~~and~~

13  
14           (G) Be familiar with juvenile competency remediation services available to  
15                                  the minor.

16  
17           ~~(2)~~(3) Nothing in this rule precludes involvement of clinicians with other  
18                                  professional qualifications from participation as consultants or witnesses or in  
19                                  other capacities relevant to the case.

20  
21           ~~(3) Following the hearing on competence, the court must proceed as directed in~~  
22                                  ~~section 709.~~

23  
24           **(c) Interview of minor**

25  
26           The expert must attempt to interview the minor face-to-face.

27  
28           (1) If an in-person interview is not possible due to distance, the interview may be  
29                                  conducted remotely, using videoconference or another form of remote  
30                                  electronic communication that allows the evaluator and the minor to  
31                                  communicate in real time and see each other during the interview, with no  
32                                  delay in aural or visual transmission or reception.

33  
34           (2) If an in-person interview is not possible because the minor refuses an  
35                                  interview, the evaluator must try to observe and make direct contact with the  
36                                  minor to attempt to gain clinical observations that may inform the evaluator's  
37                                  opinion regarding the minor's competency.

38  
39           **(d) Review of records**

40  
41           (1) The evaluator must review all the records provided as required by section  
42                                  709.

1           (2) The written protocol required under section 709(i) must include a description  
2 of the process for obtaining and providing the records to the evaluator to  
3 review, including who will obtain and provide the records to the evaluator.  
4

5 **(e) Consult with minor’s counsel**

6  
7           (1) The expert must consult with minor’s counsel as required by section 709.  
8 This consultation must include asking minor’s counsel the following:  
9

10           (A) If minor’s counsel raised the question of competency, why minor’s  
11 counsel doubts that the minor is competent;

12  
13           (B) What has minor’s counsel observed regarding the minor’s behavior;  
14 and

15  
16           (C) A description of how the minor interacts with minor’s counsel.  
17

18           (2) No waiver of the attorney-client privilege will be deemed to have occurred  
19 from minor’s counsel’s report of the minor’s statements to the evaluator, and  
20 all such statements are subject to the protections in (g)(2) of this rule.  
21

22 **(f) Developmental history**

23  
24 The expert must gather a developmental history of the minor as required by section  
25 709. This history must be documented in the report and must include the following:  
26

27           (1) Whether there were complications or drug use during pregnancy that could  
28 have caused medical issues for the minor;

29  
30           (2) When the minor achieved developmental milestones such as talking, walking,  
31 and reading;

32  
33           (3) Psychosocial factors such as abuse, neglect, or drug exposure;

34  
35           (4) Adverse childhood experiences, including early disruption in the parent-child  
36 relationship;

37  
38           (5) Mental health services received during childhood and adolescence;

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40           (6) School performance, including an Individualized Education Plan, testing,  
41 achievement scores, and retention;

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43           (7) Acculturation issues;

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- (8) Biological and neurological factors such as neurological deficits and head trauma; and
- (9) Medical history including significant diagnoses, hospitalizations, or head trauma.

**(g) Written report**

- (1) Any court-appointed evaluator must examine the minor and advise the court on the minor’s competency to stand trial. The expert’s report must be submitted to the court, to the counsel for the minor, to the probation department, and to the prosecution. The report must include the following:
  - (A) A statement identifying the court referring the case, the purpose of the evaluation, and the definition of competency in the state of California;
  - (B) A brief statement of the expert’s training and previous experience as it relates to evaluating the competence of a minor to stand trial;
  - (C) A statement of the procedure used by the expert, including:
    - (i) A list of all sources of information considered by the expert;
    - (ii) A list of all sources of information the expert tried or wanted to obtain but, for reasons described in the report, could not be obtained;
    - (iii) A detailed summary of the attempts made to meet the minor face-to-face and a detailed account of any accommodations made to make direct contact with the minor; and
    - (iv) All diagnostic and psychological tests administered, if any;
  - (D) A summary of the developmental history of the child;
  - (E) A summary of the evaluation conducted by the expert on the minor, including the current diagnosis or diagnoses that meet criteria under the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders*, when applicable, and a summary of the minor’s mental or developmental status;

- 1 (F) A detailed analysis of the competence of the minor to stand trial under  
2 section 709, including the minor's ability or inability to understand the  
3 nature of the proceedings or assist counsel in the conduct of a defense  
4 in a rational manner as a result of a mental or developmental  
5 impairment;  
6
- 7 (G) An analysis of whether and how the minor's mental or developmental  
8 status is related to any deficits in abilities related to competency;  
9
- 10 (H) A summary of an assessment conducted for malingering or feigning  
11 symptoms, if clinically indicated, which may include psychological  
12 testing;  
13
- 14 (I) If the minor has significant deficits in abilities related to competency,  
15 an opinion with explanation as to whether treatment can reduce the  
16 impairments related to the minor's deficits in competency abilities, the  
17 nature of that treatment, its availability, and whether restoration is  
18 likely to be accomplished within the statutory time limit;  
19
- 20 (J) If psychotropic medication is considered appropriate and necessary,  
21 whether the treatment will likely restore the minor to mental  
22 competency, a list of likely or potential side effects of the medication,  
23 the expected efficacy of the medication, possible alternative treatments,  
24 whether it is medically appropriate to administer psychotropic  
25 medication in the county juvenile hall, and whether the minor has  
26 capacity to make decisions regarding psychotropic medication. If the  
27 expert is of the opinion that a referral to a psychiatrist is necessary to  
28 address these issues, the expert must inform the court of this opinion  
29 and recommend that a psychiatrist examine the minor; and  
30
- 31 (K) A recommendation, as appropriate, for a placement or type of  
32 placement and treatment that would be most appropriate for restoring  
33 the minor to competency.  
34
- 35 (2) Statements made to the appointed expert during the minor's competency  
36 evaluation and statements made by the minor to mental health professionals  
37 during the remediation proceedings, and any fruits of these statements, must  
38 not be used in any other hearing against the minor in either juvenile or adult  
39 court.  
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**Advisory Committee Comment**

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~~Welfare and Institutions Code section 709(b) mandates that the Judicial Council develop and adopt rules regarding the qualification of experts to determine competency for purposes of juvenile adjudication. Upon a court finding of incompetency based on a developmental disability, the regional center determines eligibility for services under Division 4.5 of the Lanterman Developmental Disabilities Services (Welf. & Inst. Code, § 4500 et seq.).~~