JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
October 1, 2015

To
Collaborative Justice Courts Advisory Committee

From
Joint Juvenile Competency Issues Working Group

Subject
Amendments to Welfare and Institutions Code Section 709: Juvenile Competency

Action Requested
Please review and respond

Deadline
October 7, 2015

Contact
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As you may recall, at the February 2014 meeting, the committee included in its annual agenda developing draft legislation regarding competency and identify members to participate in a joint working group for this purpose. Members were provide an opportunity to volunteer for the working group, which was composed of members of the Family and Juvenile Law Advisory Committee, the Collaborative Justice Advisory Committee, and the Mental Health Issues Implementation Task Force. This group was chaired by Judge Tondreau and included judges from a cross-section of courts, a chief probation officer, deputy district attorney, deputy public defender, and private defense attorney. The working group met ten times since May 2014, including three calls following the Summer 2015 comment period. The working group has reached consensus on the proposed draft and is now bringing the language to the three advisory bodies for consideration. The working group had extensive discussion particularly regarding the following issues:

- Whether small counties were in agreement about subsection (b) (1) regarding evaluators' expertise.

- Who can raise a doubt about a minor's competency: The working group decided to maintain the language that only court and the minor's counsel can express doubt as to the minor's

competency. Some members of the working group felt strongly that the specific exclusion of prosecutors from the list of people who could raise a doubt could violate the current law as stated in *Drope v. Missouri* 420 U.S. 162 (1975). This language is in subsection (a) (2).

- Who has the burden of proof: The working group concluded the burden to prove incompetency is more appropriately the minor's. By specifying this, the proposal addresses the gap in the existing statute and alleviates the need to rely upon the general provisions of Evidence Code section 606. This language is in subsections (c) and (g).

- Whether to specify that self-incriminating statements or fruits of such statements during an evaluation could be used: The working group decided on the current proposed language citing *People v. Arcega* 32 Cal.3d 504 (1982). In *Arcega*, the Supreme Court held that it was an error to admit the psychiatrist's testimony at trial on the issue of guilt, as it violated the rule that neither the statements made to the court-appointed psychiatrist during a competency evaluation nor the fruits of such statements may be used in a trial on the issue of guilt. This language is in subsection (b) (4).

The working group specifically decided not to include the following three issues:

- A diversion alternative: The working group decided that a formal diversion program in the statute was less desirable than the existing practice where local jurisdictions create programs unique to the needs of each jurisdiction.

- Development of services for violent incompetent youth: The working group realized that these minors present additional challenges. However, the proposal discusses only the process and procedures to establish competency, as the issue of the minor's dangerousness is beyond the scope of the proposal.

- Which local entity is responsible for the costs associated with remediation services: During this discussion, it was discovered that not all counties pay for remediation services in the same way. Some counties already have protocols in place that address remediation services and funding; others do not. The working group decided not to address the specific issue of funding.

The Mental Health Issues Implementation Task Force reviewed this proposal at a teleconference meeting held on September 29th and approved the draft as submitted with one minor change to (a) (1) as noted in bold below:

A minor is mentally incompetent for purposes of this section if he or she is unable to understand the nature of the delinquency proceedings, **including his or her role in the proceedings**, or to assist counsel in conducting a defense in a rational manner

Background

Effective January 1, 2012, the council, at the recommendation of the committee, amended rule 5.645(d) of the California Rules of Court to specify the qualifications of experts evaluating minors' competency to participate in juvenile proceedings as required by changes to WIC 709 enacted in 2010. At that time the committee also considered drafting proposed legislation to more comprehensibly address this issue but decided that the complexity of the issues coupled with the need to address core issues during the economic downturn warranted posting discussion.

The Task Force for Criminal Justice Collaboration on Mental Health Issues examined metal health issues in juvenile court and while no recommendations in the April 2011 report specifically dealt with the issue of expert qualifications, the task force noted that procedures to determine competency should be clarified and improved. The Implementation Task force was scheduled to sunset on June 30, 2014. In order to help meet the ongoing and emerging needs of the courts, the Mental Health Issues Implementation Task Force was extended to December 31, 2015. This extension will allow the Implementation Task Force to (1) support the projects that are currently in progress and (2) complete the process of reassigning the work while providing a single body with mental health expertise to guide the transition.

In 2014, the Family and Juvenile Law Advisory Committee decided to continue working with the Collaborative Justice Courts Advisory Committee and Mental Health Issues Implementation Task Force on the drafting of proposed legislation. A Joint Juvenile Competency Issues Working Group was formed with members from all three bodies. The working group sought informal comment from court stakeholders in the juvenile justice community on the draft legislation and has incorporated that input into the current proposed legislation.

The Joint Juvenile Competency Issues Working Group met ten times to discuss potential amendments to WIC 709. The proposal was circulated for public comment during the summer 2015 cycle, yielding a total of 24 comments. The working group reviewed the comments and incorporated them into the draft legislation. After comments from the three advisory bodies are incorporated, this draft legislation will be presented to the Judicial Council Policy Coordination and Liaison Committee in October and, if approved, to the Judicial Council of California for action at their December 11, 2015, meeting.

Attachments

1. DRAFT of WIC 709
2. Draft report to the Judicial Council (following review by the three advisory bodies, this will be enhanced with additional detail and discussion)
3. Comment chart with proposed responses

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

709. (a) Whenever the court has a doubt that a minor who is subject to any juvenile proceedings is mentally competent, the court must suspend all proceedings and proceed pursuant to this section.

(1) A minor is mentally incompetent for purposes of this section if he or she is unable to understand the nature of the delinquency proceedings, including his or her role in the proceedings, or to assist counsel in conducting a defense in a rational manner, including a lack of a rational or factual understanding of the nature of the charges or proceedings. Incompetency may result from the presence of any condition or conditions, including, but not limited to, mental illness, mental disorder, developmental disability, or developmental immaturity. Except as specifically provided otherwise, this section applies to a minor who is alleged to come within the jurisdiction of the court pursuant to Section 601 or Section 602.

(2) ~~(a)~~ During the pendency of any juvenile proceeding, ~~the minor's counsel or~~ the court may receive information from any source regarding the ~~express a doubt as to the~~ minor's ~~competency. A minor is incompetent to proceed if he or she lacks sufficient present~~ ability to understand the proceedings. Minor's ~~consult with~~ counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt ~~and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or~~ does not automatically require suspension of proceedings ~~against him or her~~. If the

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

court has ~~finds substantial evidence raises~~ a doubt as to the minor's competency, the court shall suspend the proceedings ~~shall be suspended~~.

(b) Unless the parties stipulate to a finding that the minor lack competency, or the parties are willing to submit on the issue of the ~~Upon suspension of proceedings, the court shall order~~ that the ~~question of the~~ minor's lack of competency, ~~competence be determined at a hearing. The~~ the ~~court~~ Court shall appoint an expert to evaluate the minor and determine whether the minor suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competency, and~~,~~ if so, whether the minor is competent to stand trial. ~~condition or conditions impair the minor's competency.~~

(1) The expert shall have expertise in child and adolescent development~~,~~ and ~~training in the~~ forensic evaluation of juveniles~~, and shall be familiar with~~ for purposes of adjudicating competency~~,~~ ~~standards~~ and shall be familiar with competency standards and accepted criteria used in evaluating juvenile competency and shall have received training in conducting juvenile competency evaluations ~~competence~~.

(2) The expert shall personally interview the minor and review all the available records provided, including, but not limited to medical, education, special education, probation, child welfare, mental health, regional center, court records, and any other relevant information that is available. The expert shall consult with the minor's attorney and any other person who has provided information to the court regarding the minor's lack of competency. The expert shall gather a developmental history of the minor. If any information is not

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

available to the expert, he or she shall note in the report the efforts to obtain such information. The expert shall administer age-appropriate testing specific to the issue of competency, unless the facts of the particular case render testing unnecessary or inappropriate. In a written report, the expert shall opine whether the minor has the sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding and whether he or she has a rational, as well as factual, understanding of the proceedings against him or her. The expert shall also state the basis for these conclusions. If the expert concludes that the minor lacks competency, the expert shall make recommendations regarding the type of remediation services that would be effective in assisting the minor in attaining competency, and, if possible, the expert shall address the likelihood of the minor attaining competency within a reasonable period of time.

(3) The Judicial Council shall ~~develop and~~ adopt a rule~~s~~ of court identifying the training and experience needed for an expert to be competent in forensic evaluations of juveniles and shall develop and adopt rules for the implementation of other ~~these~~ requirements related to this subdivision.

(4) Statements made to the appointed expert during the minor's competency evaluation, statements made by the minor to mental health professionals during the remediation proceedings, and any fruits of such statements shall not be used in any other delinquency or criminal adjudication against the minor in either juvenile or adult court.

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

(5) The prosecutor or minor may retain or seek the appointment of additional qualified experts, who may testify during the competency hearing. The expert's report and qualifications shall be disclosed to the opposing party within a reasonable time prior to the hearing, and not later than five court days prior to the hearing. If disclosure is not made in accordance with this subparagraph, the expert shall not be allowed to testify, and the expert's report shall not be considered by the Court, unless the Court finds good cause to consider the expert's report and testimony. If, after disclosure of the report, the opposing party requests a continuance in order to prepare further for the hearing and shows good cause for the continuance, the court shall grant a continuance for a reasonable period of time.

(6) ~~(f)~~ If the expert believes the minor is developmentally disabled, the court shall appoint the director of a regional center for developmentally disabled individuals described in Article 1 (commencing with Section 4620) of Chapter 5 of Division 4.5, or his or her designee, to evaluate the minor. The director of the regional center, or his or her designee, shall determine whether the minor is eligible for services under the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500)), and shall provide the court with a written report informing the court of his or her determination. The court's appointment of the director of the regional center for determination of eligibility for services shall not delay the court's proceedings for determination of competency.

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

(7) An expert's opinion that a minor is developmentally disabled does not supersede an independent determination by the regional center ~~whether~~ regarding the ~~minor is eligible~~ minor's eligibility for services under the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500)).

(8) ~~(h)~~ Nothing in this section shall be interpreted to authorize or require the following:

A. ~~(1) The court to place~~ Placement of a minor who is incompetent in a developmental center or community facility operated by the State Department of Developmental Services without a determination by a regional center director, or his or her designee, that the minor has a developmental disability and is eligible for services under the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500)).

B. ~~(2) The director of the regional center, or his or her designee, to make determinations~~ Determinations regarding the competency of a minor by the director of the regional center or his or her designee.

(c) The question of the minor's competency shall be determined at an evidentiary hearing, unless there is a stipulation or submission by the parties on the findings of the expert. The minor has the burden of establishing by a preponderance of the evidence that he or she is incompetent to stand trial.

(d) ~~(c)~~ If the minor is found to be competent, the court shall reinstate proceedings and proceed commensurate with the court's jurisdiction.

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

(e) ~~(part of (c))~~ If the court finds ~~incompetent~~ by a preponderance of evidence that the minor is incompetent, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction. During this time, the court may make orders that it deems appropriate for services~~, subject to subdivision (h), that may assist the minor in attaining competency~~. Further, the court may rule on motions that do not require the participation of the minor in the preparation of the motions. These motions include, but are not limited to, the following:

(1) Motions to dismiss.

(2) Motions ~~by the defense~~ regarding a change in the placement of the minor.

(3) Detention hearings.

(4) Demurrers.

(f) Upon a finding of incompetency, the court shall refer the minor to services designed to help the minor to attain competency. Service providers and evaluators shall adhere to the standards set forth in this statute and the California Rules of Court. Services shall be provided in the least restrictive environment consistent with public safety. Priority shall be given to minors in custody. Service providers shall determine the likelihood of the minor attaining competency within a reasonable period of time, and if the opinion is that the minor will not attain competency within a reasonable period of time, the minor shall be returned to court at the earliest possible date. The court shall review remediation services at least every 30 calendar days for minors in custody and every 45 calendar days for minors out of custody.

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

(g) Upon receipt of the recommendation by the remediation program, the court shall hold an evidentiary hearing on whether the minor is remediated or is able to be remediated, unless the parties stipulate to or submit on the recommendation of the remediation program. If the recommendation is that the minor has attained competency, and if the minor disputes that recommendation, the burden is on the minor to prove by a preponderance of evidence that the minor remains incompetent. If the recommendation is that the minor is not able to be remediated and if the prosecutor disputes that recommendation, the burden is on the prosecutor to prove by a preponderance of evidence that the minor is remediable. If the prosecution contests the evaluation of continued incompetence, the minor shall be presumed incompetent and the prosecution shall have the burden to prove by a preponderance of evidence that the minor is competent. The provisions of subdivision (c) shall apply at this stage of the proceedings.

(1) ~~(d)~~ If the court finds that the minor ~~is found to be competent~~ has been remediated, the court ~~may proceed commensurate with the court's jurisdiction~~ shall reinstate the delinquency proceedings.

(2) If the court finds that the minor is not yet remediated, but is likely to be remediated, the court shall order the minor returned to the remediation program.

(3) ~~(e) This section applies to a~~ If the court finds that the minor will not achieve competency, the court must dismiss the petition. The ~~who is alleged to come within the jurisdiction of the~~ court ~~pursuant to Section~~ may invite all persons and agencies with information about the minor to the dismissal hearing to

Welfare and Institutions Code Section 709 would be amended, effective January 1, 2017, to read:

discuss any services that may be available to the minor after jurisdiction is terminated. Such persons and agencies may include, but not be limited to, the minor and his or her attorney; probation; parents, guardians, or relative caregivers; mental health treatment professionals; public guardian; educational rights holders; education providers; and social service agencies. If appropriate, the court shall refer the minor for evaluation pursuant to Welfare and Institutions Code Sections ~~601 or 602~~6550 et seq. or 5300 et seq.

(h) The presiding judge of the juvenile court; the County Probation Department; the County Mental Health Department; the Public Defender and/or other entity that provides representation for minors; the District Attorney; the regional center, if appropriate; and any other participants 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.

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455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: December 11, 2015

Title
Judicial Council–Sponsored Legislation: Competency under Welfare and Institutions Code Section 709

Rules, Forms, Standards, or Statutes Affected
Amend Welf. & Inst. Code, § 709

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Collaborative Justice Advisory Committee
Hon. Richard Vlavianos, Chair
Hon. Rogelio R. Flores, Vice-chair

Mental Health Issues Implementation Task Force
Hon. Richard J. Loftus, Jr., Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2017

Date of Report
October 1, 2015

Contact
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amy.bacharach@jud.ca.gov

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee, the Collaborative Justice Advisory Committee, and the Mental Health Issues Implementation Task Force (advisory bodies) recommend amending Welfare and Institutions Code section 709 to clarify the legal process and procedures in proceedings that determine the legal competency of juveniles.

Recommendation

The joint working group, formed by the Family and Juvenile Law Advisory Committee, the Collaborative Justice Advisory Committee, and the Mental Health Issues Implementation Task Force and composed of members of each entity, as well as judges from a cross-section of courts, a chief probation officer, a deputy district attorney, a deputy public defender, and a private defense attorney, recommend that the Judicial Council sponsor legislation to amend Welfare and Institutions Code section 709. The amendments will address the issues that arise when a doubt is expressed regarding a minor's competency, including the following:

- Who may express doubt regarding competency in minors;
- Who has the burden of establishing incompetency;
- What is the role of the forensic expert in assessment and reporting on competency in minors;
- What is the process for determining competency in minors;
- What is the process for determining whether competency has been remediated;
- What is the process for ensuring that proceedings are not unduly delayed; and
- What is the process for ensuring due process and confidentiality protections for minors during the proceedings.

The text of the amended statute is attached at pages X–X.

Previous Council Action

There has been no previous Council action of this recommendation. However, the Council received prior reports addressing the need for such a recommendation in the Juvenile Delinquency Court Assessment in 2008 and the Report from the Task Force for Criminal Justice Collaboration on Mental Health Issues in 2011.

Rationale for Recommendation

The standard to determine competency for juveniles is different from that for determining competency for adults, as discussed in *Bryan E. v. Superior Court* 231 Cal.App.4th 385 (2014), 390–391. In *Bryan E.*, the appellate court held that the trial court incorrectly applied the standard of competency for adult proceedings, rather than the standard required in juvenile proceedings. The appellate court cited a litany of cases addressing the difference between adult and juvenile competency determinations.[1] Unlike an adult, a minor may be determined to be incompetent based upon developmental immaturity alone (*Timothy J. v. Superior Court* 150 Cal.App.4th 847 (2007)). Although the standards for competency for adults and juveniles is different, the purpose of competency determinations for adults and juveniles is similar. Therefore, the recommended changes to Welfare and Institutions Code section 709 adds language that mirrors that in Penal Code 1367, which applies to adults.

[1] *In re Christopher F.* (2011) 194 Cal.App.4th 462; *In re Alejandro G.* (2012) 205 Cal.App.4th 472; *In re John Z.* (2014) 223 Cal.App.4th 1046.

The recommended changes benefit minors who may be incompetent by providing them with a clear standard for determination, clarifying the procedure for the competency hearing, attributing to the minor the burden of establishing incompetence, clarifying what is expected from an expert who is appointed to evaluate a minor, requiring minors who are found incompetent to receive appropriate services, and requiring the Judicial Council to develop a rule of court outlining the training and experience needed for juvenile competency evaluators.

Comments, Alternatives Considered, and Policy Implications

The proposal was circulated for comment during the summer 2015 cycle, yielding a total of 24 comments. Of those, one agreed with the proposal, four agreed with the proposal if modified, and nineteen did not indicate a position.

Commentators made remarks regarding who can declare doubt about a minor's competency, who should have the burden to prove incompetency, what information evaluators should obtain, what qualifications evaluators should have, whether and when a petition should be dismissed, , remediation services and diversion programs, and developing protocols. The committee thoroughly discussed the comments and made changes accordingly. A chart with all comments received and committee responses is attached at pages x–x.

Members of the joint working group had an extensive discussion regarding who can provide the court with information about competency concerns and who could express a doubt of a minor's competency. Defense attorneys did not feel that prosecutors should be explicitly stated as participants who may express a doubt of a minor's competency while prosecutors felt that they should be explicitly stated. Defense attorneys were concerned about the potential for prosecutorial overreach while prosecutors were concerned that their exclusion from the list of people who could raise a doubt could violate the current law as stated in *Drope v. Missouri* 420 U.S. 162 (1975). The working group ultimately compromised on language for section (a) (2).

In addition, all members of the Family and Juvenile Law Advisory Committee, the Collaborative Justice Advisory Committee, and the Mental Health Issues Implementation Task Force reviewed the proposal and provided feedback. [Describe feedback.]

Implementation Requirements, Costs, and Operational Impacts

Although this proposal may result in some additional hearings and expert appointments, it is anticipated that the proposed legislation will result in a net cost savings by limiting the amount of time a minor spends in juvenile hall. It is estimated that states spend approximately $150,000 per year for every youth in a juvenile facility.[2] By clarifying the procedures, allowing youth to be remediated in both the least restrictive setting and a diversion program, and enforcing timelines

[2] Juvenile Law Center, *Ten Strategies to Reduce Juvenile Length of Stay* (March 18, 2015), *http://jlc.org/sites/default/files/publication_pdfs/LengthofStayStrategiesFinal.pdf* (as of June 1, 2015)

for determinations of competency, it is anticipated that a minor's stay in juvenile hall will be shortened.

Attachments

1. Welf. & Inst. Code, § 709, amended
2. Chart of comments

LEG15-04
Welfare and Institutions Code Section 709
All comments are verbatim unless indicated by an asterisk (*).

Topic	Commentator	Position	Comment	Committee Response
Declaring Doubt (who can declare doubt)	San Bernardino Public Defender By Richard Sterling, Supervising Deputy Public Defender	AM	Concerned with anyone other than an attorney or judge declaring a doubt. *Parent* • Who would advise the parent and provide legal advice? The minor is represented by his attorney, but that attorney cannot advise the parent. • Would every parent be given an attorney? Some parents, guardians, siblings do not act in the minor's best interest. • What if the parent and attorney have a conflict? • Would the attorney advise the parent to request that an attorney be provided to them? *Family Members*. • What procedure would be in place for the family member to tell the court that the minor has mental issues and may not understand the proceedings? Many judges do not allow them to speak or allow them to ask any questions. Would the judge be required to make some sort of finding in each case that the minor is competent before going forward? • Would the court inquire from each family member whether they believe the minor is competent and why? What about family members that disagree with each other (divorced parents, siblings)? *Substantial Evidence* • Also, on the first court appearance, other than the family member telling the court and/or attorney that the minor has mental issues, what other evidence would amount to substantial evidence to declare a doubt? They may bring documentation, but many do not. In that instance, the attorney based on what he is told should declare the doubt about competency	*Parent and Family Member/ Substantial Evidence* The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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Topic	Commentator	Position	Comment	Committee Response
	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	Yes [to adding Participants], they probably know more than an attorney can determine and they are generally very involved in the youth's life.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings.
	Roger A. Luebs, Juvenile Judge Superior Court of California, County of Riverside		*Participants* Subsection (a)(1) creates confusion by allowing any "participant" in the proceedings to "express a doubt" thereby triggering a duty of inquiry by the court. This is especially true because subdivision (b) indicates that the competence of the minor can be resolved by "stipulation". As drafted, it appears that the prosecutor and the defense counsel can simply agree that the minor is or is not competent. If counsel can resolve the issue by "stipulation", what role do the other participants have in "expressing a doubt"?	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

Topic	Commentator	Position	Comment	Committee Response
			I see no good purpose for conveying legal standing on "participants" to "express a doubt". The judge and minor's attorney should be trusted with the responsibility of "expressing doubt" when all the information available to them, including information offered by other "participants", suggests it is appropriate. Subdivision (b) seems to me to be drafted poorly. Since getting an expert evaluation occurs before conducting an evidentiary hearing, I think sentence three in that subdivision should precede the first two sentences. Also, sentence three indicates that the opinion should address whether the minor has "impair[ed]" capacity, but the issue is not "impairment", it is absence or presence of capacity. Almost every child who appears in juvenile court suffers from some degree of impairment, but that does not render them incompetent. I suggest that the third sentence be changed to read: "Upon suspension of the proceedings, the court shall appoint an expert to evaluate the minor and determine whether the minor suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competence and, if so, whether the condition or conditions render the minor incompetent as defined in subdivision (a)." I also suggest this change in language because I do not think it is a good idea to repeat, in various forms, the definition of "incompetence" throughout the statute.	understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings. That is different from the court suspending proceedings and potentially appointing an evaluator to determine a minor's competency. The stipulation or submission by the parties in subdivision (b) allows the court to appoint an evaluator without having to hear additional evidence about whether the minor may or may not be competent. The advisory bodies agree to rewrite the language in the first sentence of (b) to clarify the intent. The language is: Unless the parties stipulate or are willing to submit on the expression of doubt, the Court shall appoint an expert to evaluate the minor and determine whether the minor suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competence, and if so, whether the minor is incompetent to stand trial as defined above.

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Welfare and Institutions Code Section 709
All comments are verbatim unless indicated by an asterisk (*).

Topic	Commentator	Position	Comment	Committee Response
	Ashleigh E. Aitken, President On behalf of Orange County Bar Association		No [to adding additional participants] No additional individuals should be added to the list of individuals who can raise a doubt.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings.
	Kiran Savage-Sangwan, Director of Legislation and Advocacy on behalf of the National Alliance on Mental Illness (NAMI)	A	Yes [to adding additional participants] Family members or caregivers are often in the best position to provide information and raise doubt as to competency of a child. Family members and caregivers witness the child's behavior on a regular basis, and over time. Teachers and other providers of services such as health care should be able to raise doubt as to competency. Depending on the unique circumstances of each child, the adults best able to provide the information necessary to the proceedings	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's

Topic	Commentator	Position	Comment	Committee Response
			may vary. The language included in § 709(a)(1) adequately addresses this issue.	competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings.
	Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court		*Participants* No [to adding additional participants] Allowing any party or participant to intervene in the court process would be confusing and might cause the court to impermissibly interfere in the attorney-client relationship. • The decision about whether a minor is competent is a legal decision not just a mental health observation. o ["More is required to raise a doubt as to competence than mere bizarre action or bizarre statements. A lack of objectivity and possibly self-destructive emotional approach to self-representation does not equate to substantial evidence of incompetence to stand trial." People v. Halvorsen, 42 Cal. 4th 379, 403 (2007).] • The proposal does not define who is a party or participant, but would invite just about anyone to weigh in on the mental health condition of the minor. Certainly it is the obligation of minors' counsel and the court to consider information that parents, relatives, teachers, therapist, etc., have provided about the mental health of the minor. *Confidentiality* The court should not be obligated to invite, or even encouraged to make an inquiry, about a minors' competence or mental health from participants in the courtroom. Such an inquiry is fraught with confidentiality and other legal and strategical	*Participants* The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings. *Confidentiality* The advisory bodies believe the rewrite addresses this issue.

Topic	Commentator	Position	Comment	Committee Response
			implications which are necessarily left with minor's counsel. *Substantial Evidence* "Substantial evidence" is the long-standing legal standard in adult competency matters and there is ample case law on this standard to give the courts guidance. "Sufficient evidence" is ambiguous and would seem to take away judicial discretion on whether to suspend proceedings and initiate a costly and burdensome process. • [If the court finds ~~substantial~~ sufficient evidence that raises a reasonable doubt as to the minor's competency ....]	*Substantial Evidence* The advisory bodies believe the rewrite addresses this issue.
	Sue Burrell, Staff Attorney on behalf of the Youth Law Center		*Participant* We are opposed to the proposed broadening of individuals who may raise the issue of competence. Specifically, we are opposed to allowing prosecutors raise the issue. Retain the existing language on who may express a doubt as to competency. • Recommending to retain the current language of Section 709, subdivision (a), subsection (1), providing that the minor's counsel or the court may express a doubt. In California, adults found incompetent may be held for up to three years in state hospitals. It is hardly a secret that prosecutors sometimes seek a finding of incompetence as a way to obtain custodial time in cases they might have difficulty proving, either because of the defendant's disabilities or because the evidence is weak. • We are concerned that allowing prosecutors to raise competence as an issue would introduce that kind of subterfuge into juvenile proceedings. The impact	*Participants* The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings.

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			would be even worse for juveniles because, unlike the adult system, we have no state hospitals with adolescent programs. This means that incompetent youth needing a custodial setting would most likely be warehoused in juvenile detention or correctional facilities. Of all the parties involved in juvenile cases, prosecutors are in the worst position to know whether competence should be raised. • The California Supreme Court has expressly discounted the capacity of prosecutors in relation to juvenile competence. In *In re R.V.* (2015) 61 Cal.4th 181, 196, the Attorney General argued that "imposition of the burden of proof on a minor who claims incompetency comports with policy concerns because, like an adult criminal defendant, the minor and minor's counsel have superior access to information relevant to competency." Our Supreme Court agreed, stating that the defendant and defense counsel likely have better access to the relevant information (*Ibid*., citing *People v. Medina* (1990) 51 Cal.3d 870, 885) • The current provisions, allowing either defense counsel or the court to raise the issue are adequate to provide an avenue for parents or other caregivers to bring attention to conditions that could impact competence. • Part of the ethical duties of defense counsel include interviewing and communicating with parents or guardians, so parents or guardians have a ready avenue in which to offer concerns about competence. The court provides an important check and balance on this process. If for example, defense counsel has not raised the issue when it seems	

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			apparent to the court that it should have been raised, the court may raise the issue on its own motion to assure the integrity of the process. • The court can do this without the baggage that would inevitably taint an assertion of incompetence by the prosecutor. Our office has worked on juvenile incompetence issues for nearly a decade now, and we have not heard of a single case or situation in which the current language would have been inadequate to protect the rights of the young person before the court. *Substantial Evidence* Substantial to "sufficient" and adding "reasonable." Our review of the cases suggests that "substantial" and "sufficient" are interchangeable (*see, e.g., People v. Stankewitz* (1982) 32 Cal.3d 80, 92-93, "substantial evidence of incompetence is sufficient to require a full competence hearing even if the evidence is in conflict"), so we have no objection to that change. However, we do object to the addition of the word "reasonable." That appears to be interjecting a standard that is new and unsupported. We are concerned that adding "reasonable" will be viewed as adding some additional burden to what is currently required to justify the declaration of a doubt. Recommendation: Change "substantial" to "sufficient," but omit the proposed addition of "reasonable."	*Substantial Evidence* The advisory bodies believe the rewrite addresses this issue.
	Margaret Huscher, Supervising Deputy Public		I do not share the advisory bodies concern that a parent or caretaker may be the only person with sufficient information to raise a doubt.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision

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	Defender III, Law Office of the Public Defender, Shasta County		• Sometimes, it is immediately obvious that there is an unavoidable incompetency issue and we declare the doubt early in our representation. More frequently, however, , we will meet repeatedly with the minor, talk with family, review school records, consult with hall staff, etc. to explore alternatives to incompetency. *Family Member* Conversely, I have a grave concern that a family member may not understand the legal process and, albeit with good intentions, create legal chaos. • Family members generally do not know the collateral consequences to having an incompetent child or be able to weigh the risk to and benefits of declaring a doubt. • When we represent a child where there is a concern that the child may not be comprehending the proceedings, we have a heightened responsibility to that child: it is a balancing act between the child's express interests and what we think is best for the child. • Adding the uncertainty of the parents' opinion could potentially make the process more emotionally difficult and uncertain for the child, as well as create conflict between the family member and the minor's attorney. *Substantial Evidence* In all the years that I have practiced, I have never had a judge, after a doubt has been declared, hold a hearing on whether there is substantial evidence to suspend proceedings. Judges rely on defense attorneys to identify	(a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings The advisory bodies believe the rewrite addresses this issue.

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			clients who are struggling to participate in the criminal process and to declare a doubt appropriately. However, it is unlikely that judges will have a professional relationship with the family members such that judges can rely upon the family's judgment in order to know whether to suspend proceedings. The proposed amendment requires the judge to make a finding of incompetency based upon sufficient evidence, but fails to provide guidance as to what sufficient evidence might be. • In the scenario where minor's attorney remains quiet and the parent, in an attempt to provide sufficient evidence, spews forth information about the minor, what finding is the judge supposed to make? Assuming the judge relies upon the attorney's judgment in *not* declaring a doubt, on what basis does the court make a finding that insufficient evidence was offered by the parents? *Evidentiary Hearing* Why is this sentence necessary? As defense attorneys, we routinely stipulate to the doctor's reports on the issue of competency rather than presenting live testimony. However, this sentence seems to suggest that the parties could stipulate to incompetency without a doctor's report as a foundation for that stipulation. As an experienced defense attorney, there is a temptation to declare a doubt when the client is argumentative and simply *will not listen to or follow* the attorney's advice. Likewise, there is a temptation to declare a doubt when the strategy is to delay the inevitable. If this language is to be included, I am	The advisory bodies believe the rewrite of subdivision (b) addresses this issue to clarify the intent of the subdivision: The advisory bodies agree to rewrite the language in the first sentence of (b) to clarify the intent. The language is: <u>Unless the parties stipulate or are willing to submit on the expression of doubt, the Court shall appoint an expert to evaluate the minor and determine whether the minor suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competence, and if so,</u>

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			concerned that an unfettered stipulation could be abused by attorneys' agreement to avoid difficult clients/cases.	whether the minor is incompetent to stand trial as defined above.
	Greg Feldman, Deputy Public Defender, on Behalf of San Francisco Office of the Public Defender		We strongly object to allowing other parties express a doubt. • It is the defender and the resources and training that we dedicate to the determination of client competence who is in the best position to express a doubt. We are concerned that allowing other parties to express a doubt invites possible abuse of the competency process by other parties to delay proceedings especially when the majority of our clients are in custody. • Because there are almost no alternative placements for youth in various stages of the competency process, youth remain in custody without appropriate services for months. It is no surprise that they deteriorate with extended exposure to long term detention suffering from anxiety, depression, anger, and even suicidal ideation. The prosecutors are bound by their ethical obligation to not communicate with a child who is represented by counsel. They are in no position to express a doubt on behalf of a youth facing delinquent charges.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings
	Lexi Howard, Legislative Director on behalf of the Juvenile Court Judges of California		Yes, [to adding additional participants] Since the raising of doubt is merely for the court's consideration and does not result in the suspension of proceedings automatically, we agree with adding "participants."	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or

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				the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings
	Michelle Linley, Chief, Juvenile Division, on behalf of the San Diego county District Attorney's Association		No, [to adding additional participants] We would oppose the modification allowing any party or participant to raise the issue of competency. In the comments preceding the proposed legislation it is stated that it is believed that this legislation and the proposed timelines will reduce stays in Juvenile Hall. In practice some of the juveniles that are not competent are also very violent. The focus should be, not only on reducing Juvenile Hall stays, but on public safety. • When any party may raise the issue of competency we have a concern that non-attorneys will not understand the legal requirements for competency which will increase the number of allegations of incompetency. • This could result in unnecessary delays in the case, longer detention in Juvenile hall and misallocation of precious mental health resources. If instead, the concerns were brought to the attention of a Juvenile Justice Partner those allegations would be investigated by those with knowledge of the legal system and presented to the court in the appropriate circumstances.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings The advisory bodies acknowledge that youth who commit violent crimes present additional challenges. This legislation clarifies process and procedure.
	Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral		Yes, [to adding additional participants] CBHDA recommends that this should primarily include adults who have been known by the individual youth for at least one year.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is:

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	Health Directors Association of California			During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings
	Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf of the Pacific Juvenile Defender Center		*Participant* We strongly object to allowing other parties express a doubt as to a child's competency to assist his or her attorney. • We are strongly opposed to any broadening of the individuals who may raise the issue of competence. Currently, the Court or counsel for the child may raise a doubt as to his or her competency. • The child's defender, and the delinquency judge are the two individuals who are in the best position to express a doubt. • The proposed language to add any party opens the door to possible abuse of the competency process by other parties, including for reasons to delay proceedings, especially when the majority of children are in custody. Because there are almost no alternative placements for youth in various stages of the competency process, and California has no state hospitals with programs for children and adolescents, youth remain in custody without	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings

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			appropriate services for months, with concomitant deterioration in their mental well-being. • Prosecutors especially should not be permitted to raise a doubt. They are bound by their ethical obligation to not communicate with a child who is represented by counsel. They cannot speak with the child to get to know the child's capabilities and limitations, and therefore they are the least able to express a doubt on behalf of a youth facing delinquent charges. • The California Supreme Court recently discounted the ability of prosecutors to have complete knowledge in a competency proceeding, as the minor and the minor's counsel have superior access to relevant information. (*In re R.V.* (2015) 16 Cal.4th 181, 196, *citing People v. Medina* (1990) 51 Cal.3d 870, 885). *Reasonable Evidence (Substantial/Sufficient)* The proposed changes introduces an unsupported concept of "reasonable" evidence, which we oppose. • While case law supports the proposition that "substantial" and "sufficient" are interchangeable, the addition of the word "reasonable" in the proposed legislation has no basis in the law and introduces a new standard or additional burden of what evidence is required to raise a doubt. "Reasonable" is not used in Penal Code 1369.	The advisory bodies believe the rewrite of subdivision (a) addresses this issue.
	Roger Chan, Executive Director on behalf of the East		No, [to adding additional participant] We are strongly opposed to broadening the number of persons who can raise a doubt beyond the court or minor's counsel. • Other parties or participants in the case will not know the legal issues and factual investigation	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is:

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	Bay Children's Law Offices		necessary to evaluate a minor's competency. While other participants, such as parents or relatives, may have relevant information regarding the minor's competency, it is the responsibility of the minor's attorney to ascertain that information in the course of her investigation. • Allowing "any party" or "participant" to express a doubt may cause unnecessary court delays to the detriment of the minor's due process rights, potential undermining of the attorney-client relationship, and interference with or violation of confidential case strategy. • In any event, the categories of "any party" or "participant" are too broad. For example, Welf. & Inst. Code § 676 enumerates 28 offenses in which members of the public can be admitted to juvenile proceedings and become "participants." Recommendation: Retain the current language of Section 709(a), providing that the minor's counsel or the court may express a doubt.	During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings
	Endria Richardson, Staff Attorney, Legal Services for Prisoners with Children ("LSPC")		By limiting the parties who may express doubt as to a minor's competency to the minor's counsel or the court, existing law may make it more likely that youth who are not, in fact, fit to stand trial, do not even have their competency considered by the court. By broadening the number of people who are able to raise competency issues—including specialists who may have adequate time to meet with and evaluate the minor, the minor's parents and loved ones who know them best, teachers who have observed the minor in an educational setting—as well as the criteria used to consider whether a minor is not competent to stand trial,	Information only. No comment needed.

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			the Advisory Committees are taking significant steps to ensure that a more comprehensive evaluation of justice involved juveniles. One of the most serious decisions the state makes about a young person is whether to send him or her through the criminal system. It is a decision that deserves a thorough, thoughtful review by an unbiased decision-maker who considers many factors. Developmental and neurological evidence about adolescents and young adults concludes that the process of cognitive brain development continues into early adulthood—for boys and young men especially, this developmental process continues into the mid-20s. The still-developing areas of the brain, particularly those that affect judgement and decision-making, are highly relevant to criminal behavior and culpability. The fact that teens are still developing neurologically and emotionally may mean that a thorough evaluation of their competence must be performed by an expert—one who is not burdened by excessive caseloads (as many public defenders are), and is a competent assessor of the healthy development of youth and adolescent brains (as courts are not). These amendments are an encouraging step towards ensuring that youth receive adequate services and are not simply ushered through the juvenile justice system as a matter of course. Studies have shown that that approximately 65%-70% of youth in juvenile detention have a diagnosable mental health disorder. (Skowyra, Kathleen, and Joseph	

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			Cocozza. "Research in Brief." *Communications* 21.4 (1996): n. pag. *National Center for Mental Health and Juvenile Justive*. June 2006. Web.)	
	Tari Dolstra, Division Director, Juvenile Services Riverside County Probation Department		• Should participants be added to the list of individuals who can raise doubt? If probation departments are included in "….social services agencies...", then there is no need to identify our agency specifically.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings
	Angela Igrisan, Mental Health Administrator, on behalf of the Riverside County Department of Mental Health		The statute says "any party or participant can raise doubt" which is sufficient.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require

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				suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		Expanding who may Raise Doubt of Minor's Competency: We are supportive of the changes to allow additional parties to question the competency of a youth.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings
Burden of Proof	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	Yes [the burden of proof should be placed on the minor], this makes sense in being consistent with the adult court. However, if you are saying they cannot contribute to their own defense, how do they then contribute to defending that they are incompetent to do so?	The advisory bodies agree. The defense attorney has a duty to communicate with their client and take direction from their client. However, the ability for an attorney to perform these tasks may be limited based on a minor's ability to understand the proceedings. The attorney for the minor still has a duty to zealously advocate for his or her client.
	Ashleigh E. Aitken, President		Yes, the burden to prove incompetency is best placed upon the minor.	The advisory bodies agree.

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	On behalf of Orange County Bar Association			
	Sue Burrell, Staff Attorney on behalf of the Youth Law Center	AM	Agrees on using the suggested language if language in (a)(1) remains the same. Do not expand the language to allow additional parties to raise the issues of competence. • The suggested change appears to incorporate the burden of proof recognized in *In re R.V.* (2015) 61 Cal.4th 181, placing the burden on the minor. This provision points out the absurdity of allowing other parties such as the prosecutor to raise the issue of competence. If that were allowed, the minor's counsel would be in the position of being responsible to show incompetence in case in which they did not raise it. If the law is expanded to allow additional parties to raise the issue of competence, we believe the burden should be placed on the person raising the issue.	The advisory bodies agree that the minor has the burden of proof. The advisory bodies believe the rewrite of subdivision (a) addresses the remaining issues.
	Lexi Howard, Legislative Director on behalf of the Juvenile Court Judges of California		Yes, the Burden of proof to prove incompetency should be placed on the minor	The advisory bodies agree.
	Amanda K. Roze, Attorney at Law, Sebastopol, CA		The Invitation and proposed changes appear to contain conflicting information about the implied presumptions at such a hearing. According to information in the Invitation (p. 5), "the proposal places the burden of proof on the minor to prove, by a preponderance of the evidence, that the minor is incompetent." The proposed change themselves, though, seem to make a distinction based on whether the recommendation is that	

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			competency has been remediated. It appears that if the recommendation is that the minor has not attained competency, that the prosecution has the burden to prove that he or she is remediable. The language therefore suggests that the prosecution would have the burden to prove competence, if it sought to make competence itself an issue at that point. Where a minor has been found incompetent, competency services have been provided, and an expert opines that he has attained competency, there is some basis in reason to assign the burden to the minor to establish that he remains incompetent. However, it would defy reason to presume a minor competent at a remediation/attainment of competency hearing where he has previously been found incompetent and the provider of remediation services and/or the appointed expert states that competency has not yet been attained. • It is implicit in section 709 that once a minor is determined to be incompetent, he is presumed to remain incompetent until he is shown to have attained competency. (See § 709, subd. (c).) That is, after all, the purpose of the hearing on attainment of competency. Therefore, proposed subdivision (l) should be amended to clearly provide that the prosecution has the burden to establish competence where the recommendation is that the minor remains incompetent and/or whose competency has not been remediated. To establish parallelism in the provisions, subdivision (l) could provide:	

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			If the recommendation is that the minor's competency has been remediated, and if the minor disputes that recommendation, the burden is on the minor to prove, by a preponderance of evidence, that the minor remains incompetent. If the recommendation is that the minor is not able to be remediated, and if the prosecutor disputes that recommendation, the burden is on the prosecutor to prove by a preponderance of evidence that the minor is remediable. *If the prosecution contests the evaluation of continued incompetence, the minor shall be presumed incompetent, and the prosecution shall have the burden to prove that the minor is competent.* On a related issue, the proposed changes do not address the situation where anew section 602 petition is filed against a minor who has been found incompetent. In Alameda County's competency protocol, for instance, the minor is always presumed competent when new charges are filed. Under a section titled New Offenses, the protocol states: • The minor is presumed competent. ... If the court determines that there is not substantial evidence the minor is incompetent, the new case will not be suspended and the court will proceed with the new underlying juvenile proceedings. The issue of the minor's competence on the previously suspended petition/notice will remain as is, until the court makes a finding regarding competence on the matter. (Alameda County Competency Protocol, p. 20.) Thus, the Protocol posits the logically and legally untenable proposition that a minor can be both incompetent and competent simultaneously, i.e. currently incompetent as to prior suspended petitions but	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: Upon receipt of the recommendation by the remediation program, the court shall hold an evidentiary hearing on whether the minor is remediated or is able to be remediated, unless the parties stipulate to or submit on the recommendation of the remediation program. If the recommendation is that the minor's competency has been remediated, and if the minor disputes that recommendation, the burden is on the minor to prove by a preponderance of evidence that the minor remains incompetent. If the recommendation is that the minor is not able to be remediated and if the prosecutor disputes that recommendation, the burden is on the prosecutor to prove by a preponderance of evidence that the minor is remediable. If the prosecution contests the evaluation of continued incompetence, the minor shall be presumed incompetent and the prosecution shall have the burden to prove by a preponderance of evidence that the minor is competent.

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			competent as to newly-filed petitions. To avoid such a result, it must be accepted that once a minor is found incompetent, he is presumed to remain incompetent until it is proven that he has attained competency, or until the appointed expert or an expert remediation provider opines that his competency has been remediated.	
	Michelle Linley, Chief, Juvenile Division, on behalf of the San Diego county District Attorney's Association		It is unclear what legal authority is the basis for shifting the burden to the Prosecution when there is an allegation that the minor cannot be remediable. We would oppose shifting of the burden in the event the prosecutor disputed the recommendation that the minor is not able to be remediated.	The advisory bodies disagree. In re R.V. clearly addresses that the minor has the burden to prove incompetence and cites Evidence Code 605 and 606 to fill the void. The advisory bodies agree that the minor has the burden of proof to prove incompetency, which logically follows that the prosecution has the burden to prove the opposite.
	Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California		CBHDA recommends that the burden of proof be placed on the State. CBHDA further recommends that the Judicial Council of California convene experts to develop well thought-out set of consequences for children who commit serious crimes but who may not understand the legal system well enough to assist in their own defense.	The advisory bodies disagree. The In re R.V decision clearly states that the burden rests on the minor.
	Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf of the Pacific Juvenile Defender Center		Additionally, the suggested change regarding burden of proof proposed for subdivision (b), which appears to codify the *In re R.V.* decision that held that the burden of proof is on the child, illustrates that is illogical to let the prosecutor raise the issue of competency – minor's counsel would then be put in the position of being responsible for proving incompetency, when she did not raise the issue. • The current provisions of Section 709 that permit either defense counsel or the court to raise the issue of	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: <u>During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's</u>

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			competency are adequate to provide an avenue for parents or other caregivers to bring attention to conditions that could impact competence. Pursuant to their ethical obligations, defense counsel must interview and communicate with a juvenile client's parents or guardians, so they already can avail themselves of the defender	competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings The advisory bodies believe that the rewrite addresses the issues raised by the commentator.
	Roger Chan, Executive Director on behalf of the East Bay Children's Law Offices		As noted in In re R.V. (2015) 61 Cal.4th 181, "It necessarily follows from a presumption of competency that the burden of proving incompetency is borne by the party asserting it." Unless the presumption of competency is changed to a presumption of incompetency (e.g. following a prima facie showing of incompetency) similar to the presumption of incapacity under Penal Code § 26, the burden should not change. However, this underscores the impracticalities of adding participants to the list of individuals who can raise a doubt. The two proposed changes construed together would result in the absurd situation where the minor's counsel would be responsible to prove incompetence in cases where they did not raise it. In addition, the threshold requirement of "sufficient evidence, that raises a reasonable doubt" to suspend the proceedings creates a different standard than that for adults. Penal Code § 1368(a) references when "a doubt arises in the mind of the judge…" To avoid interjecting a new standard for juveniles, the word "reasonable" should be omitted.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to understand the proceedings. Minor's counsel or the court may express a doubt as to the minor's competency. Information received or expression of doubt does not automatically require suspension of the proceedings. If the court has a doubt as to the minor's competence, the court shall suspend the proceedings The advisory bodies believe that the rewrite addresses the issues raised by the commentator.

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			Recommendation: Retain the proposed language in Section 709(a)(1) without adding individuals who may raise a doubt. Omit "reasonable" as modifying the court's "doubt."	
	Tari Dolstra, Division Director, Juvenile Services Riverside County Probation Department		Yes, it is agreed the burden of proof should be placed upon the minor.	The advisory bodies agree.
	Angela Igrisan, Mental Health Administrator, on behalf of the Riverside County Department of Mental Health		This appears to be a question best left for legal counsel to answer who can better define 'burden of proof' and the implications. Our initial thoughts are that it is inappropriate to place this burden on a protected class of people. Timothy J vs. Superior Court (2007) as referenced in the document ruled that a child could be ruled incompetent by developmental immaturity alone. • Hence, is there a double bind here? • Should incompetence of a minor be the presumptive stance? • Otherwise, minors would be granted the full rights and responsibilities of adults?	The advisory bodies read In re R.V. as presuming that the minor is competent. Once someone raises a doubt, the court considers that information when determine whether to suspend proceedings. It is clear that juvenile proceedings are different from adult proceedings, including juvenile competency proceedings.
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		Responsibility to Prove Incompetency We agree that the individual asserting incompetency should bear the responsibility of proving such incompetency as is consistent with In re R.V. (May, 18, 2015, S212346).	The advisory bodies believe that minor bears the burden of proving incompetency.
Evaluators	Roger A. Luebs, Juvenile Judge Superior Court of California,		Regarding subsection (b)(2), requiring the expert to consult with the minor's attorney interjects an unnecessary opportunity for advocacy into what should be an objective scientific process. Should the expert also	The advisory bodies believe that evaluator should consult the minor's attorney as the minor's attorney may have additional

Topic	Commentator	Position	Comment	Committee Response
	County of Riverside		be required to consult with the prosecutor to get the prosecutor's views on the competence of the minor? If the minor's counsel has objective information that would assist the expert in forming an opinion regarding the minor's competence, that information should be required to be furnished in written form which should reduce the risk of advocacy and also make the whole process more transparent	information about the minor regarding his or her ability to understand the legal process. The advisory bodies disagree that the information should be in written form. The attorney may not know what questions until the evaluator asks. The evaluator may not know what questions to ask until the evaluator has reviewed the materials. Requiring the answers in writing also seem burdensome and are not conducive to answering follow –up questions if the evaluator has any,
	Kiran Savage-Sangwan, Director of Legislation and Advocacy on behalf of the National Alliance on Mental Illness (NAMI)		Regarding subsection 709(b)(2) state "The expert shall personally interview the minor and review all the available records provided, including but not limited to medical, education, special education, child welfare, mental health, regional center, and court records. The expert shall consult with the minor's defense attorney and whoever raised doubt of competency, if that person is different from the minor's attorney and if that person is not the judge, to ascertain his or her reasons for doubting competency. <u>The expert shall consult with family members and caregivers to the minor, when possible, to review information regarding the minor's developmental and psychological history</u>. The expert shall consider a developmental history of the minor."	The advisory bodies agree with this concept. The advisory bodies rewrote the section to state: <u>The expert shall personally interview the minor and review all the available records provided, including, but not limited to medical, education, special education, probation, child welfare, mental health, regional center, court records, and any other relevant information that is available.</u>
	Margaret Huscher, Supervising Deputy Public Defender III, Law Office of the Public Defender, Shasta County		I am very pleased with the idea that the evaluator makes an opinion regarding the type of treatment and whether the minor can attain competency within a reasonable time. • It would be helpful to have the evaluator's opinion regarding "the least restrictive environment" possible is in order to receive remediation services.	The advisory bodies agree with this concept. The advisory bodies rewrote the section to state: <u>Services shall be provided in the least restrictive environment consistent with public safety.</u>

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			○ With our regional center clients, we have had extensive arguments regarding whether the client needs to be in a group home and/or at Porterville Developmental Center in order to receive remediation. Indeed, these arguments have been based upon gut instinct and speculation. A psychologist's opinion would be very helpful.	
	Janice Thomas, Ph.D. Alameda County Behavioral Health Care Services		I especially support the language which directs the expert to "consult with the minor's defense attorney and whoever raised a doubt of competency." However, I would note that not all defense attorneys are willing to describe their perceptions of a youth's competency-related deficits and impairments. • Although I have never encountered any difficulty in obtaining supporting records from defense attorneys, I have encountered difficulty when I have asked attorneys to complete the "Attorney CST Questionnaire" described in Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice (Grisso, 2005). One defense attorney explained that he did not want to become a witness to a competency proceeding by stating his observations in an interview or by completing the "Attorney CST Questionnaire." • When defense attorneys do not report to evaluators their perceptions of their clients' deficits, the expert can certainly report in the evaluation that he or she contacted the defense attorney and that the defense attorney did not choose to participate in the consultation. I suppose that would suffice in terms of the expert meeting the requirements of the statute. But still, I wonder if problems are raised when defense attorneys discuss their cases with	The advisory bodies agree. Information only. No comment needed Information only; no comment needed.

Topic	Commentator	Position	Comment	Committee Response
			court-appointed evaluators and whether there is a legitimate issue to be addressed.	
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		Competency Evaluations: We would like the statute to be more explicit as to who is responsible to fund the evaluations and reports. Without such specificity we fear that the county, or probation more definitively, will bear the burden of those costs. The reports, in our view, are meant to aid the court in determining how to proceed with the minor's case and as such we believe the court and/or state should bear the cost of the evaluation and any accompanying reports.	The advisory bodies believe that funding decisions for the evaluation and reports should be at the discretion of the jurisdiction.
Expert Qualifications	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	No [do not take out of statute and put in rule of court]. I think it is helpful to have the information in one place. When statute refers to some other source, it becomes difficult to keep track. It will be much simpler for those who are not attorneys to follow. And since any party can now participate, less complicated may be appreciated. Same as above. [Keep expert qualifications in the rule of court] It is clear cut when we do not have to jump from one source to another to get information that is pertinent.	The advisory bodies agree.
	Roger A. Luebs, Juvenile Judge Superior Court of California, County of Riverside		With regard to subdivision (c), this would essentially put an evidentiary privilege created by judges into statute. Since a rule created by judges can be changed by judges, I do not think it is a good idea to make it less changeable by placing it in statute. It should be noted that the privilege as drafted applies to "[s]tatements made [by anyone] to the appointed expert", not just statements made by the minor to the expert. Is this really the law, or is it an expansion of the existing judge made privilege?	The advisory bodies disagree per People v. Arcega, 32 Cal.3d 504. Originally the advisory bodies made reference to Evidence Code Section 1017. However Evidence Code Section 1017 applies to communications made during the course of an evaluation relating to "a plea based on insanity or to present a defense based on his or her mental or emotional condition." A hearing to determine competence to stand trial is neither of these things. It is not necessary to mention a code section to convey the prohibition of using information gathered by an expert during a

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			In addition, the statute creates not only an evidentiary privilege with respect to the minor's statements to the evaluator, but also precludes the use of "any fruits of the minor's competency evaluation [not fruits of the minor's "statements", but fruits of the "evaluation".] Does this proposed legislation mean the prosecutor in other proceedings against the minor must prove that any evidence offered against the minor is not a "fruit of the minor's competency evaluation"? Finally, assuming the privilege against using the minor's statements in a criminal or delinquency context should be memorialized in statute, what is the basis for applying this judge made rule to dependency proceedings? It seems to me that the issue of the use of the minor's statements should be left to judges to decide in accordance with case law in effect at the time the issue is raised. There is a confusing reference in the second sentence of subdivision (i). What does subdivision (d) have to do with the court making orders for services?	competency evaluation in a latter juvenile or adult adjudication. The advisory bodies added the following language: <u>Statements made to the appointed expert during the minor's competency evaluation, statements made by the minor to mental health professionals during the remediation proceedings, and any fruits of such statements shall not be used in any other delinquency or criminal adjudication against the minor in either juvenile or adult court.</u> Because of the cross-over issues, the advisory bodies believe that these statements should not be used in dependency proceedings. Under Welfare and Institutions code 827, the parties with access to the delinquency files are the same as dependency files. The rules regarding protecting information need to be the same for both files. The advisory bodies agree. This was a drafting error. The reference should be to subdivision (j), not (d)
	Ashleigh E. Aitken, President		Expert qualifications and training are best left contained in a rule of court which can be more easily amended when needed than a statute.	The advisory bodies believe that at least brief qualifications should be in the statute.

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	On behalf of Orange County Bar Association			
	Kiran Savage-Sangwan, Director of Legislation and Advocacy on behalf of the National Alliance on Mental Illness (NAMI)		Due to the specialized nature of these evaluations for juveniles with mental illness, the qualifications and training requirements should be in a statute as currently proposed. • Likewise, the directions for the process the experts shall follow in conducting the competency evaluation should be statute. • We recommend that this process include conferring with family members and caregivers when possible. Family members and caregivers are often in the best position to provider information about the child's behavior and changes over time. It is important that the expert evaluator have this information when providing an opinion to the court	The advisory bodies agree.
	Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court		This amendment *[§709(c) Statements made to the appointed expert ... shall not be used in any other delinquency, dependency, or criminal adjudication against the minor in either juvenile or adult court.]* is excellent and should also be extended to statements made to remediation instructions. The proposed amendment of subsection (d) would seriously undermine the Los Angeles County Protocol and by doing so, impose a significant costs to the county general fund. This procedure has worked successfully because our panel of experts is trusted by both sides. When a request is made for a competency evaluation, a psychologist is selected from a panel of approved experts. A rate of reimbursement is negotiated with this	Mention of remediation instructions has been removed. The advisory bodies added the following language: <u>Service providers and evaluators shall adhere to the standards set forth in this statute and the California Rules of Court.</u> Information only; no comment needed.

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			panel. The minor's counsel maintain the confidentiality of the competency evaluation obtained for investigative purposes by providing that they may choose not to disclose the evaluation until, and unless, a doubt is expressed. The district attorney, or the minor's counsel may request another competency evaluation upon a showing of "good cause". • A thorough competency evaluation is costly and time-consuming. We have been advised that repeated competency testing is unreliable and contraindicated. • Repeated competency testing also imposes a significant burden on the minors (who miss school), parents (who miss work) and the court (which has to schedule additional hearings). If the initial testing was incomplete or new relevant information became available then the court could find good cause to order a second evaluation. This procedure has successfully limited the number of evaluations and curtailed the use of "hired guns" by opposing parties.	
	Mike Roddy, Executive Officer, Superior Court of California, County of San Diego		It is important to include something like this so that the minor can speak freely during the evaluation and not risk self-incrimination, but our court believes the proposed language is too vague and overly broad and could lead to litigation as to its meaning.	The advisory bodies agree.
	Sue Burrell, Staff Attorney on behalf of the Youth Law Center		The Youth Law Center agrees with the proposed language and with putting it [Evaluator information] into statute. Although we understand the desire not to freeze in law requirements that could change, it is difficult to imagine that anything in the proposed language would change over time. There is need for just the sort of guidance this language provides.	The advisory bodies agree.

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			Notice and process when additional experts are to be used. We support adding requirements for handling the process when additional experts will be used. We are worried that limiting the notice requirements to when counsel "anticipates" presenting the expert's testimony may provide too much wiggle room. The better rule would be to simply require 5 days notice before an expert may testify or have his/her report presented. **Recommendation:** We suggest removing the language that could provide excuses for not disclosing expert reports and expected testimony, as follows: (d) The prosecutor or minor may retain or seek the appointment of additional qualified experts, who may testify during the competency hearing. ~~*In the event a party seeking to obtain an additional report anticipates presenting t*~~ *T*he expert's ~~*testimony and/or report, the*~~ report and the expert's qualifications shall be disclosed to the opposing party within a reasonable time prior to the hearing, and not later than five court days prior to the hearing, *or the expert may not testify and the report may not be received in evidence*. If, after disclosure of the report, the opposing party requests a continuance in order to prepare further for the hearing and shows good cause for the continuance, the court shall grant a continuance for a reasonable period of time.	The advisory bodies agree with this concept. The advisory bodies rewrote the section to state: The prosecutor or minor may retain or seek the appointment of additional qualified experts, who may testify during the competency hearing. The expert's report and qualifications shall be disclosed to the opposing party within a reasonable time prior to the hearing, and not later than five court days prior to the hearing. If disclosure is not made in accordance with this subparagraph, the expert shall not be allowed to testify, and the expert's report shall not be considered by the Court, unless the Court finds good cause to consider the expert's report and testimony. If, after disclosure of the report, the opposing party requests a continuance in order to prepare further for the hearing and shows good cause for the continuance, the court shall grant a continuance for a reasonable period of time.
	Mike Roddy, Executive Officer, Superior Court of California, County of San Diego		Our court likes most of the changes to subdivision (b), especially the clarification regarding the burden of proof. That said, the level of detail in (b)(2) is normally reserved for rules of court, and rules of court are much easier to revise as revisions become necessary; therefore, it may be better to shift some of the details to	The advisory bodies believe that at least brief qualifications should be in the statute.

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			the rules of court for ease of amending later should the need arise. Our court likes most of the changes to subdivision (b), especially the clarification regarding the burden of proof. That said, the level of detail in (b)(2) is normally reserved for rules of court, and rules of court are much easier to revise as revisions become necessary; therefore, it may be better to shift some of the details to the rules of court for ease of amending later should the need arise. I agree with subdivision (d) although it is possible that the process will become too drawn out and it may lead to over detention of incompetent youth. I agree with subdivision (e), (f), and (g) but as an alternative, these sections could all be combined into one subdivision with subparts, which may be easier to understand.	No comment needed. No comment needed.
	Janice Thomas, Ph.D. Alameda County Behavioral Health Care Services		*Directing experts* I do not see the harm in the statute containing direction to experts. The proposal lays out general requirements which anyone who is qualified would presumably follow independently of being directed. • The requirements therefore benefit the Court, without interfering with the judgment of a trained, independent expert, by informing the Court as to what should be included. These requirements would hopefully add efficiency to the Court's ability to assess the quality of an evaluation and would improve quality across jurisdictions.	The advisory bodies agree. Information only, no comment needed.

Topic	Commentator	Position	Comment	Committee Response
			• I would prefer, in fact, that a requirement be added. I have seen evaluations in which an opinion of mental retardation or intellectual disability has been offered without the benefit of standardized testing. I would recommend that standardized testing be required to support any opinion regarding intellectual disability or mental retardation. Such a requirement would conform to best practices as laid out in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (American Psychiatric Association, 1994), where the diagnostic criteria of mental retardation require "an IQ of approximately 70 or below on an individually administered IQ test ... " (p. 46). *Qualifications of experts* Whether expert qualifications and training currently found in rule 5.645 be explicitly put into the statute or left to a rule of court. • I would recommend that expert qualifications and training be explicitly included in the statute. For one, non-lawyers would probably find it helpful to have the qualifications spelled out in the statute. It might also be helpful to legal professionals who are considering retaining an expert. • Most importantly, it would seem that these requirements are the bare minimum and that no harm would come from spelling out the minimum credentials. If any local jurisdiction wants additional requirements, then those requirements could be included in a rule of court.	The advisory bodies have discussed whether to add the requirement of standardized testing. However, in reading *In re R.V.*, the expert in that case tried to administer standardized testing, but the youth would not cooperate. Also, the advisory bodies believe the experts have the knowledge regarding whether or not standardized testing is needed. The advisory bodies agree.

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			In closing, overall the revisions reflect a great improvement over the existing statute. My main concerns have to do with the revisions pertaining	Information only. No comment needed.
	Amanda K. Roze, Attorney at Law, Sebastopol, CA		The standards for appointed experts leave too much room for unqualified individuals to conduct evaluations. Proposed section 709, subdivision (b)(1) provides: "The expert shall have expertise in child and adolescent development and forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence." While subdivision (b)(3) provides that the Judicial Council shall develop a rule of court outlining the training and experience needed, that rule would likely be unnecessarily limited due to the language in subdivision (b)(1). • Juvenile competency evaluations are highly complex and involve considerations beyond those present in adult evaluations. • They require special expertise and more extensive review of materials and interviews of witnesses than required for adults. Isolated impressions of a minor are not necessarily reliable indicators of his abilities. (Grisso, Evaluating Juveniles' Adjudicative Capacities, at pp. 21-22.) • A comprehensive expert assessment based on multiple sources and spanning a longer period of time is necessary to accurately measure a youth's capabilities. (*Ibid*.) As proposed, subdivision (b)(1) is insufficient to protect the rights of minors. It calls for an expert to have expertise in forensic evaluation of juveniles and familiarity with competency standards and accepted criteria used in evaluating competency.	Information only, no comment needed.

Topic	Commentator	Position	Comment	Committee Response
			Forensic Evaluation • The term forensic evaluation is not limited to *competency* determinations, and the requirement of familiarity with competency evaluations does not necessarily include *juvenile* competency. As a result, the provision does not exclude a witness who has never conducted a juvenile competency evaluation, and who has done no more than reviewed the JACI (Juvenile Adjudicative Competency Interview) format to conduct a juvenile competency evaluation. Therefore, the provision should be amended to provide: The expert shall have expertise in child and adolescent development and forensic evaluation of juveniles *for the purposes of adjudicative competency*, and shall be familiar with competency standards and accepted criteria used in evaluating *juvenile* competence *and have received training in conducting juvenile competency evaluations*. Additionally, subdivision (b)(2) should be amended to include that experts shall conduct multiple interviews with the minor, and also interview other relevant individuals who have not been listed such as family members and school staff, and in the case of cross-over children, CASA workers, and the minor's delinquency attorney and social worker. A basis of a juvenile competency determination is the capacity to learn. (Grisso, Evaluating Juveniles' Adjudicative Capacities, supra, at pp. 21-22.) • This factor cannot be assessed without retesting for retention at a later date because all that is being	Information needed. No comment needed The advisory bodies believe that by rewriting (b)(2) and adding the language for the evaluator to review all relevant information, this concern is addressed.

Topic	Commentator	Position	Comment	Committee Response
			tested at the first session is the ability to parrot back information. (*Ibid.*) Evidence of learning is meaningless without evidence that the information is retained and can be applied. Additionally, Thomas Grisso, the recognized expert in the field has also opined that multiple sources of information are required. Therefore, more than a single interview with the minor and his or her attorney should be required. *Permitting prosecution experts to evaluate the minor* The provisions should include the ability of the minor's counsel to observe the interview through a two-way mirror, or to have the interview audio recorded. • Where questions are raised about the minor's competency, he or she is not a reliable witness for relaying information to defense counsel about the interview process. Therefore, without an objective means of evaluating the prosecution expert's interview and the minor's responses, defense counsel is placed at a disadvantage. Since it is a violation of due process to force an incompetent person to trial, counsel must be given every reasonable means of evaluating prosecution expert evidence	Information only. No comment needed The advisory bodies believe that each evaluator should determine the best way to evaluate the child and whether it would be helpful to have minor's counsel observe the evaluation.
	Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health		• CBHDA recommends that it should be in the rule of court; not in the statute. • CBHDA recommends that the qualifications should be in a rule of court.	The advisory bodies believe that at least brief qualifications should be in the statute.

LEG15-04
Welfare and Institutions Code Section 709
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Topic	Commentator	Position	Comment	Committee Response
	Directors Association of California			
	Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf of the Pacific Juvenile Defender Center		There may be a reason for the child's statements to the appointed expert to be used in a dependency proceeding involving the child. • The experts appointed by the court may be mandated reporters, and statements made to the expert by the child regarding abuse or neglect she has experienced are the sort of thing they would have to raise with child protective services. The proposed language refers to "dependency… adjudication *against* the minor…" (emphasis added), but dependency cases are not brought *against* a child; they are *for* the child's benefit. We appreciate the recognition that statements should not be used against a child in a criminal prosecution or juvenile adjudication, and think that language should remain, but believe that the reference to dependency court should be deleted. Children should be held in the least restrictive environment if he or she is found incompetent. Section (i) should include language stating that at all times, the minor should be held in the least restrictive environment.	The advisory bodies agree and have rewritten the statement: <u>Statements made to the appointed expert during the minor's competency evaluation, statements made by the minor to mental health professionals during the remediation proceedings, and any fruits of such statements shall not be used in any other delinquency or criminal adjudication against the minor in either juvenile or adult court.</u> The advisory bodies do not believe that section (i) is the appropriate place to add a statement regarding least restrictive placement. Least restrictive placement is in subdivision (k)
	Roger Chan, Executive Director on behalf of the East Bay Children's Law Offices		We agree with the proposed language (*discussion directing experts in Subdivision (2) of paragraph (b) be taken out of the statute and placed in a local rule of court*) and with including the discussion in statute. The proposed language provides needed guidance and uniformity in the evaluation of a minor's competency.	The advisory bodies agree.

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Topic	Commentator	Position	Comment	Committee Response
			However, proposed Section 709(c)'s prohibition on using statements and any other fruits of the competency evaluation in dependency proceedings may unduly prevent the protection of the minor when abuse or neglect is discovered. Often, initiating dependency proceedings is appropriate and necessary for these youth where competence is in question.	The advisory bodies agree.
	Tari Dolstra, Division Director, Juvenile Services Riverside County Probation Department		It is believed both the direction to experts and the qualifications and training required should be comprehensively addressed in either the statute *or* the Rules of Court.	The advisory bodies understand that the commentator would like all information either in the statute or rule of court. The advisory bodies believe that some direction in the statute on expert qualifications is warranted to provide consistency among evaluators statewide.
	Angela Igrisan, Mental Health Administrator, on behalf of the Riverside County Department of Mental Health		We prefer that the qualifications and directing experts be kept in statute. This would move more closer to statewide equity for the children. • For example, if a child on Riverside county probation committed a crime in Sacramento County while in placement, would the argument about both directing experts and the qualifications of the experts result in a delay to court proceedings for the child? • Also, the question of more concern is had the determination of competency raised by an expert with one set of qualms be different than one with another set? • Would there be a difference in justice served? It also provides everyone with a clear and directive base to start the discussion. If left to court discretion, they would potentially be changing each time a new judicial team was appointed.	The advisory bodies agree.

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Topic	Commentator	Position	Comment	Committee Response
			Again, we support keeping the qualifications clear and specific in statute as indicated above.	
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		Expert's Access to Records: In subsection (b)(2) the proposed language outlines all the records that the expert shall be permitted to review and does not reference probation. Was the intent not to include probation or did the joint committees and task force believe that probation falls under the category of court records? If probation's records are not covered under court records, we believe that probation records should be listed in statute.	The advisory bodies agree that probation records should be included. In most counties, the probation department is responsible for providing all the records. However, in those counties where the probation department does not collect the records for the evaluator, probation records should be given.
Remediation Services	San Bernardino Public Defender By Richard Sterling, Supervising Deputy Public Defender	AM	There should be clarification on what a reasonable period of time is for remediation, such as no longer than 6 months for out of custody and a defined shorter period of time for a minor in custody. • At the end of a certain time period, the law should state the minor will not gain competency in the foreseeable future and dismiss the case. • What is the remediation time frame? • How often is the remediation treatment provided? One time per week or more?	The advisory bodies treat each minor on a case-by-case basis. As such, it is difficult to put a time limit on remediation services. "Reasonable period of time" is the current statutory structure as is "foreseeable future." The advisory bodies chose not to define these terms to give the court discretion to treat each minor differently according to the circumstances of their case. The advisory bodies did not address a remediation time frame as each minor should be evaluated on a case-by-case basis. The remediation treatment goes beyond the scope of this proposal. This proposal discusses only the process and procedures to establish competency
	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department		Unfunded statute: • Who is responsible for the cost of remediation, especially where developmentally delayed is concerned. • It is cost prohibitive to create a remediation program for this population when a county may or may not get one or two candidates per year.	The advisory bodies are aware that each county and court addresses funding for remediation services in different ways. The development of the protocol as required by statute should address who is responsible for cost of remediation and address a situation where a county has very few of these cases.

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LEG15-04
Welfare and Institutions Code Section 709
All comments are verbatim unless indicated by an asterisk (*).

Topic	Commentator	Position	Comment	Committee Response
	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	It does not address who is responsible for providing remediation services • Who pays for them? In counties where there are not very many competency cases, it is cost prohibitive to put together a program, especially for developmental immaturity, where there is no specific agency that might be set up to address this (unlike developmentally delayed and mentally ill).	The advisory bodies specifically did not address cost in this proposal as cost is determined differently in each county.
	Ashleigh E. Aitken, President On behalf of Orange County Bar Association		Continuing current local county practice for payment is best. Expert fees can vary greatly across the counties. Specific payment information included in the statute will discourage each county from negotiating the best fees for such services which are available for that locale.	The advisory bodies agree.
	Kiran Savage-Sangwan, Director of Legislation and Advocacy on behalf of the National Alliance on Mental Illness (NAMI)		We support the development of a written protocol and program for remediation services and diversion programs at the county level, as specified in Sec. 709 (j). We recommend that the Judicial Council consider requiring the presiding judge of the juvenile court to also designate family and consumer advocates to participate in the development of the protocols and programs. By adding these perspectives to those of the Court, the County Probation Department and the County Mental Health Department, juveniles may be better served by the programs and treatment they receive.	The advisory bodies rewrote subsection h: <u>The presiding judge of the juvenile court; the County Probation Department; the County Mental Health Department; the Public Defender and/or other entity that provides representation for minors; the District Attorney; the regional center, if appropriate; and any other participants 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.</u>
	Hon. Michael I. Levanas, Presiding Judge, and Commissioner		Los Angeles limits remediation services to minors who are detained, or have an open or sustained 707(b) or Penal Code §290.008(c) petition, or have three or more open or sustained petitions within a three year period. [All Regional Center clients are eligible to receive	Information only. No comment needed.

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Topic	Commentator	Position	Comment	Committee Response
	Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court		remediation services through Regional Center as specified in their Individualized Program Plan.] • We try to divert minors who do not meet these criteria to programs and services, separate from our remediation program, which will address their underlying delinquent behaviors. • This, we believe, is most consistent with the purposes of the juvenile court. It typically takes well over a year from the time a petition is filed and a doubt is expressed through the completion of a remediation program and ultimate disposition of a case. During that time there will have been many court hearings, therapist appointments and weeks or months of remediation training. The cost of the remediation program, as well as the burden on the parents and minor in attending court hearings and appointments, is enormous. There is no reason to think that after this lengthy delay minors charged with misdemeanors or lower level felonies will be "accountable" for their delinquent behavior in any meaningful sense or that public safety will be enhanced by a formal grant of probation. Mandating that all minors participate in a remediation program is harmful and wasteful in many, if not most, cases where a minor is found incompetent.	
	Margaret Huscher, Supervising Deputy Public Defender III, Law Office of the Public Defender, Shasta County		My experience has been, when departmental resources are scarce, there seems to be more focus on inter-departmental fighting than on an individual minor's best interests; therefore, it would be helpful if the statute set forth which department is responsible for providing the county's remediation program. • Developmental immaturity is not a recognized mental illness or disorder, and if that is the	The advisory bodies understand that resources are scare. The local protocol should set forth which department is responsible for providing the county's remediation program. Information only. No comment needed

Topic	Commentator	Position	Comment	Committee Response
			foundation for the incompetency, I can predict our mental health department will not cooperate in providing services. There must be a funding source for a remediation program. • The adoption of standards and rules of court setting forth the contents of a remediation program could clarify probation's role with incompetent minors. Likewise, standards for remediation programs could solve our current difficulty with the regional center treatment provider who is contracted to provide restoration services yet does not have practical experience with the court's processes.	
	Janice Thomas, Ph.D. Alameda County Behavioral Health Care Services		I read the proposed revisions to say that the specifics of the "Remediation Program" will be left to local jurisdictions. • There are many good reasons for this as the empirically-based, peer-reviewed scientific basis of remediation is still in early stages. However, while giving discretion on the one hand, the proposed revisions are prescriptive on the other. • Specifically, the Remediation Program is charged with giving an opinion as to the likelihood of the youth attaining competency. In my opinion, this charge is outside the scope of expertise for such an undefined entity. Given that the nature of the remediation programs would vary by jurisdiction, there is no guarantee that the remediation program would include a qualified expert to render an opinion as to the minor's attainment of competency or the minor's likelihood of attainment of competency. • As laid out here, the Remediation Program might have a remediation counselor render an opinion,	The advisory bodies agree that the remediation program should be left to local jurisdictions. The commentator raises an issue regarding whether the remediation program would have a psychologist or psychiatrist on staff to render an opinion as to whether the youth has attained competency. The advisory bodies discussed this issue and dealt with it by allowing counsel for the minor or people request another evaluation.

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			which is a practice I have seen in at least one other jurisdiction. *Definition of Remediation Counselor* • Furthermore, the proposal uses the phrase "remediation counselor" but does not define remediation counselor. • The remediation phase involves not only legal instruction, but also involves case management and treatment. • It would be useful to clarify the role of the remediation counselor with respect to these entirely different roles of instructor, case manager, and treatment provider. In Alameda County, I have found capable case managers as critical to competency remediation and although essential to any Remediation Program are not trained to render opinions about attainment of competency. • A case manager has expertise in community-based services, knows the qualifications needed for the patient to access those services, can identify funding complexities, e.g., re-applying for Medi-Cal after the minor was an inmate for an extended period of time, and knows which programs require a youth to be a 602 and which do not. ○ A case manager might also assist with obtaining additional services, e.g., legal advocacy in those instances in which a youth needs additional school-based mental health services. In short, a case manager can implement a plan that has been laid out by the evaluator or by a multi-disciplinary team; but they have not been trained and do	The advisory bodies chose not to define remediation counselor as each program would define the roles and responsibilities of the remediation counselors. Information only. No comment needed. Information only. No comment needed.

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			not have experience in evaluating competency. • A rehabilitation counselor might be defined as someone who instructs the youth in the legal proceedings. ○ One jurisdiction has considered utilizing special education teachers as rehabilitation counselors. In fact, the rehabilitation counselor, as defined as the instructor, might have a legitimate opinion about the youth's attainment of factual knowledge, but whether or not the youth has rational understanding and whether the youth can consult with his or her attorney would likely be outside the scope of the rehabilitation counselor. In short, I do not think the proposed revisions should prescribe that the "Remediation Program shall determine the likelihood of the minor attaining competency ..." I think opinions of this nature should be excluded from the Program's charge. • Instead, I believe the Courts are better served by an opinion from a qualified expert who can take into consideration the minor's progress in the Remediation Program and form an opinion based on the progress, or lack thereof, and based on the totality of information The totality of information might include the fact that mental health services have not been adequate and that had services been adequate, the youth might attain competency. Assessment of the relationship	The advisory bodies believe that it is up to the defense or prosecution to ask for further evaluation if they do not believe the opinion from the Remediation program.

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			between disorders, services, and attainment is outside the scope of the rehabilitation counselor's expertise.	
	Amanda K. Roze, Attorney at Law, Sebastopol, CA		There are additional concerns regarding the "remediation" phase. The Invitation (p. 5, fn. 17) posits the choice as being between the terms restoration and remediation. Certainly, between those choices, remediation is preferable. However, an even better, or at least alternate, term would be "attainment" of competency. Since juveniles maybe, and very often will be, deemed incompetent on the basis of developmental immaturity, the question is whether they have attained competency, not whether they have been restored. (Compare § 709, subd. (c) [Whether minor will "attain" competency] with Pen. Code, § 1372 [whether adult has "recovered" competency.) • The term remediation connotes a need to "correct something that is wrong or damaged or to improve a bad situation." (http://dictionary.cambridge.org/us/dictionary/english/remediate.) • There is nothing wrong with children who are not competent to stand trial. They are often simply immature. Using the term attainment will avoid denigrating minors and will be consistent with the use of the term "attain" in subdivision (i) of section 709. It would serve the additional benefit of avoiding confusion between the terms restoration and remediation, and therefore further emphasize the differences between adult and juvenile competency procedures. If the term remediation is retained, perhaps it is more accurate and less damaging to state that competency has	The advisory bodies considered many alternatives to restoration. The advisory bodies selected the term remediation to use throughout the proposal. As noted in the recent article in the *Juvenile and Family Court Journal* (Spring 2014), some scholars prefer the term *remediation* rather than *restoration* when referring to juveniles because, in some states, juveniles may be found to be incompetent due to developmental immaturity as well as because of mental illness and intellectual deficits or developmental disabilities. Remediation involves utilization of developmentally and culturally appropriate interventions along with juvenile/child-specific case management to address barriers to adjudicative competency. See Shelly L. Jackson, PhD, Janet I. Warren, DSW, and Jessica Jones Coburn, "A Community-Based Model for Remediating Juveniles Adjudicated Incompetent to Stand Trial: Feedback from Youth, Attorneys, and Judges" (Spring 2014), Vol. 65, Issue 2, *Juvenile and Family Court Journal* 23–38.

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			been remediated, rather than that the minor him- or herself has been remediated. [See e.g. Invitation, p. 5, "If the court finds the minor is remediated ... "].) • Proposed section 709's use of these constructions is inconsistent. Subdivision (l) refers to whether the "minor's competency has been remediated" but also refers to a recommendation when "the minor is not able to be remediated." (See Proposed changes, p. 5.) • The remediation/attainment phase should also have a time limit for remediation services prior to dismissal, in order to provide for statewide consistency. Currently, some counties such as Los Angeles County appear to have a 120-day limit (*In re Jesus G.*(2013) 218 Cal.App.4th 157, 162), while others like Alameda County appear to have no limit (http://www.acbhcs.org/providers/documentation/SOC/AC_Juvenile_Competency_Protocol.pdf). There are also concerns with the standards at the remediation/attainment hearing.	
	Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf of the Pacific Juvenile Defender Center		The court shall review remediation services**,** the continuing necessity of detention if the minor is detained, and the welfare of the minor at least every ~~30~~ 14 calendar days for minors in custody, and every ~~45~~ 60 calendar days for minors out of custody. If the minor is detained in custody, such a review must consider the effect of the minor's continued detention on his or her physical and emotional well-being, and include an update on the status of the minor's remediation. If remediation services are not being provided, or are	Q to working group: I think the 14 day rule we can say would create too many hearings and be burdensome on all parties. However, what do you think of the additional language about the review must consider? The advisory bodies disagree and feel that a 14-day rule would be burdensome to all parties.

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			ineffective, the minor should be released from custody and placed in the least restrictive environment.	The advisory bodies agree that minors should be placed in the least restrictive environment and have rewritten: Upon a finding of incompetency, the court shall refer the minor to services designed to help the minor to attain competency. Service providers and evaluators shall adhere to the standards set forth in this statute and the California Rules of Court. Services shall be provided in the least restrictive environment consistent with public safety. Priority shall be given to minors in custody. Service providers shall determine the likelihood of the minor attaining competency within a reasonable period of time, and if the opinion is that the minor will not attain competency within a reasonable period of time, the minor shall be returned to court at the earliest possible date. The court shall review remediation services at least every 30 calendar days for minors in custody and every 45 calendar days for minors out of custody.
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		Written Protocols and Remediation Program CPOC agrees that WIC 709 is gravely in need of improvement, but those improvements go beyond clarifying the legal process and procedures as outlined in the proposal. In clarifying legal process and procedures, the joint entities putting forward the proposal are also tasking counties with developing written protocols and a remediation program without clearly defining how such activities are to be funded. We believe that protocols and a remediation program would greatly benefit youth who may be incompetent to	The advisory bodies understand that funding is an issue. However, many counties have already addressed this issue in protocols. Also, the purpose of this proposal is to help clarify the court process and procedures.

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			stand trial; however, by choosing not to address the underlying and all important issue as to how to fund these services, the risk then becomes that disparate programs will be developed due to lack of resources – in the form of capitol and service capacity – at the county level. In your executive summary it is noted on page 5 that subsection (j) is intended to ensure that all youth who are found incompetent receive appropriate services; however, without funding to accompany the changes to WIC 709 it is unfair to assume that all counties will be positioned to establish and operate a remediation program. The proposed statute is silent as to whether the state, courts or counties are to assume this responsibility and how the program is to be funded. We contend that this is a state responsibility. Further, appropriate services are not defined nor is there guidance as to the core elements of a successful remediation program.	
Remediation Timeframe / Foreseeable Future	San Bernardino Public Defender By Richard Sterling, Supervising Deputy Public Defender	AM	The expert appointed should address in their competency evaluation whether the minor will attain competency in the foreseeable future. If that answer is no and remediation will have no impact per the expert as addressed in their report, the case should be dismissed based on lack of jurisdiction as soon as possible. However, the dismissal may not occur, or it may take months of litigation. This issue is the subject of litigation between DA's office and Public Defender, as the DA will not accept the expert's opinion on that issue and courts are reluctant to dismiss cases in general when crimes are committed. Many minors due to developmental disabilities or otherwise are incompetent and will never become competent. Once the expert states that in their report, the case should be dismissed soon thereafter. Unfortunately, they are not.	The current proposal requires the expert to address the likelihood that the minor can attain competency within a reasonable period time rather than "foreseeable future." The advisory bodies understand that there may be some reluctance to terminate cases based on incompetency when there has been a serious crime. Subdivision (d) of the proposal states that the prosecutor or minor may see the appointment of additional qualified experts.

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	Roger A. Luebs, Juvenile Judge Superior Court of California, County of Riverside		The last sentence of subsection (b)(2) contains a misstatement of the law pertaining to time frames. I suggest that it be changed to read: "The expert shall also state the basis for these conclusions, make recommendations regarding the type of remediation services that would be effective in assisting the minor in attaining competency, and, if possible, express an opinion regarding what would be a reasonable time within which to determine the likelihood that the minor might attain competency within the foreseeable future".	
	Phyllis Shibata, Commissioner of the Superior Court of California, County of Los Angeles, Juvenile Court	NI	As a bench officer who has presided over many competency hearings, I would find it helpful if we had a clear definition of the term "foreseeable future" in the context of whether a substantial probability exists that an incompetent minor will attain competency in the foreseeable future. If one of the concerns of the legislation is to limit the amount of time a minor spends in juvenile hall, knowing what the outside time limit is essential.	This proposal eliminates "foreseeable future" in favor of "reasonable period of time" (b)(2).
	Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court		Only trained psychologists or psychiatrists can render an opinion on the likelihood of a minor attaining competency. • Remediation instructors generally do not have these credentials. In Los Angeles the initial competency evaluation includes an assessment of the likelihood of the minor attaining competency. The court will only send those minors likely to attain competency to a remediation program. Spending the time and resources on remediation when attainment is not likely is not necessary.	The advisory bodies agree. The remediation program recommendations in subdivision (*l*) are anticipated to be from a trained psychologist or psychiatrist. If not, then the parties can seek an independent evaluation.
	Sue Burrell, Staff Attorney on behalf		We agree with the rationale for limiting the use of statements made to an expert in evaluating competency. The only limitation we wonder about is the one on not	The advisory bodies agree and has rewritten the section:

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	of the Youth Law Center		using statements in dependency proceedings. For example, couldn't there be times when a young person's statements would be relevant and helpful in establishing the need for dependency jurisdiction or obtaining needed services in a dependency case? Is there a way to allow such use at the request of the minor? One way to handle this would be to add a clarifying sentence. Recommendation: Add the following sentence to the end of Section 709, subdivision (c): Nothing in this section shall prohibit the use of such statements at the request of the minor.	(4) Statements made to the appointed expert during the minor's competency evaluation, statements made by the minor to mental health professionals during the remediation proceedings, and any fruits of such statements shall not be used in any other delinquency or criminal adjudication against the minor in either juvenile or adult court.
	Sue Burrell, Staff Attorney on behalf of the Youth Law Center		*Remediation and Timelines* We have two suggestions for this section. First, the court should review remediation services for detained youth at least every 15 days, just as it does the cases of youth detained pending placement (Welf. & Inst. Code § 737). The proposed 30 days is far too long a period between reviews for youth in custody. Second, the language appears to suggest that there is only one kind of remediation program, when in fact remediation services make take many different forms. Some youth may be appropriately sent to the kind of curriculum-based training in which they learn court concepts. Others may benefit from medication or mental health services. Others may benefit from regional center services. Any of these services could contribute to the attainment of competence. We suggest revising the language slightly to reflect this.	The advisory bodies have considered all the comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is: Upon a finding of incompetency, the court shall refer the minor to services designed to help the minor to attain competency as described in (m). Service providers and evaluators shall adhere to the standards set forth in this statute and the California Rules of Court. Services shall be provided in the least restrictive environment consistent with public safety. Priority shall be given to minors in custody. Service providers shall determine the likelihood of the minor attaining competency within a reasonable amount of time, and if the opinion is that the minor will not attain competency, the minor shall be returned to court at the earliest possible time. The court shall review remediation services at least

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			Recommendation: Revise the proposed language as follows: (k) Upon a finding of incompetency, the court shall refer the minor to *services designed to help the minor to attain competency* ~~*the county's remediation program*~~, as described in (m). *Service providers* ~~*Remediation counselors*~~ and evaluators shall adhere to the standards set forth in this statute and the California Rules of Court. ~~*The program shall provide s*~~ *S*ervices *shall be provided* in the least restrictive environment consistent with public safety. Priority shall be given to minors in custody. *Service providers* ~~*The Remediation Program*~~ shall determine the likelihood of the minor attaining competency within a reasonable amount of time, and if the opinion is that the minor will not, the minor shall be returned to court at the earliest possible time. The court shall review remediation services at least every *15* ~~*30*~~ calendar days for minors in custody and every 45 calendar days for minors out of custody.	every 30 calendar days for minors in custody and every 45 calendar days for minors out of custody.
	Amanda K. Roze, Attorney at Law, Sebastopol, CA		Finally, while *In re R.V.* concluded that a minor is presumed competent, it is important to note that this finding applies only to the initial competency determination. *In re R.V.* did not concern post-incompetency determination or remediation/ attainment proceedings. • A presumption of incompetence must be preserved for this aspect of the proceedings, both as a matter of due process, logic, and public trust in the process. • Once a child has been declared incompetent, he cannot be presumed competent in the absence of the expert's evaluation that he has attained competency through the remediation services.	Information purposes only. No comment needed.

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			• This conclusion is consistent with California's approach toward child competency in other areas. Minors are incompetent to authorize most medical treatment, buy cigarettes or alcohol, vote, marry without written parental consent and a court order, or possess an unrestricted driver's license. (Cal. Const., art. 2, § 2; Bus. &Prof. Code, § 25658; Fam. Code., §§ 302, 6500 et seq., 6900 et seq.; Health & Saf. Code, §119405; Pen. Code, § 308; Veh. Code, § 125812.) • They are permitted to disaffirm contracts and cannot enter an admission in juvenile court without the consent of an attorney. (Fam. Code, § 6710; Welf. & Inst. Code, § 657; Rule 5.778(d).) California law even protects minors from tattoos and body piercings. (Pen. Code, §§ 613, 652, subd.(a).) It stands to reason that a child should be protected from a presumption of competence once he or she has been found to be incompetent. This is especially true for children under the age of 14 who are presumed incapable of committing a crime and are categorically ineligible for prosecution as adults. (Pen. Code, § 26; Welf & Inst. Code, §707, subd. (b).) It would defy reason to suggest that a child who is presumed incapable of committing a crime is nevertheless competent to stand trial.	
Dismissal of Petition	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	Indicating that the court is to invite people to discuss and allows them to make a referral for evaluation implies that they are still involved and still have jurisdiction and some level of control over the matter.	The advisory bodies believe the language is clear that the court must dismiss the petition. The additional language is permissive state that the court may invite persons to a dismissal hearing. If parties object to this invitation, then it will be up to the court to decide whether to proceed.

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	Sue Burrell, Staff Attorney on behalf of the Youth Law Center		The proposed language appears appropriate, except that in subdivision (l) (3), "may" should be substituted for "shall." We believe that there might be occasions when the minor could meet the definition or "gravely disabled" but there are reasons not to refer him or her to the involuntary treatment system under the Lanterman-Petris Short Act (LPS). Changing the word "shall" refer to "may" refer would preserve the intention of the proposal without locking the court into an LPS referral when the minor could be cared for adequately without that. Recommendation: Change "shall" refer to "may" refer.	The advisory bodies believe that the language as written is permissive. This language appears at the hearing to dismiss the petition. The language is, "If appropriate, the court shall refer the minor for evaluation pursuant to Welfare and Institutions Code Section 6550 et seq. or Section 5300 et seq." The court must make a determination of appropriateness prior to making the referral.
	Margaret Huscher, Supervising Deputy Public Defender III, Law Office of the Public Defender, Shasta County		A law without teeth (such as a judge without jurisdiction) is useless. • Judges are routinely concerned about dismissing a minor's petition when the minor is not progressing adequately towards restoration and yet continues to need treatment and supervision. Already, judges have the power to bring stakeholders together to discuss appropriate services for the minor after the court loses jurisdiction. • Why codify a judge's leadership position to cajole and suggest?	The advisory bodies disagree and believe that statutory authority is needed to allow the court to bring people together.
	Michelle Linley, Chief, Juvenile Division, on behalf of the San Diego county District Attorney's Association		In the proposed language of WIC 709 (l)(3), we would oppose the dismissal of the petition prior to referral of the minor for evaluation pursuant to WIC 6550 et seq. or WIC 5300 et seq. The referral, evaluation and determination of eligibility should occur prior to dismissal of the petition. This is especially true in cases where there is a significant danger to the public due to the actions of the minor.	The advisory bodies believe the court has the discretion to make a referral pursuant to section 6550 et seq. or section 5200 et seq. However, the advisory bodies believe the serious and violent offenders is outside the scope of this legislation. The advisory bodies realize that these minors present additional challenges. However, this proposal discusses only the process and procedures to establish competency, as the

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			• The changes to WIC 709 apply to a myriad of charges. Our concern centers around the application to some of our cases where the minor is charged with murder, rape and other serious and violent felony charges. We as a county use the diversion type process on many of our less serious offenses, however, straight dismissal on serious and violent offenses is of grave concern to us in light of the danger to the minor and the public.	issue of the minor's dangerousness is beyond the scope of the proposal.
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		Dismissal of Petition due to Inability to Remediate Subsection (l)(3) outlines what happens if it appears that a youth will not achieve remediation and directs the court to dismiss the petition. The proposed language permits the court to invite all persons and agencies with information about the minor to the dismissal hearing and lists persons and entities that may be included. While the list is not intended to be exhaustive since the word "may" is used, we believe probation should be listed in statute.	The advisory bodies agree that probation should be listed in the statute.
Protocol	Roger A. Luebs, Juvenile Judge Superior Court of California, County of Riverside		My greatest concern is that your proposal does not sly address the need to insure that remediation services are made available to incompetent minors. • Proposed subdivision (k) states that the court "shall" refer the incompetent minor to the "county's Remediation program, as described in (m)". However, there is no subdivision "(m)" in the proposed legislation and, indeed, there is no real description of the required remediation program in the proposed legislation. • Subdivision (J) requires that the court and county agencies create a "protocol" to provide remediation services, but the proposed legislation does not address how remediation services will be provided while	The advisory bodies agree that the reference to subdivision (m) is an error and should be a reference to subdivision (j). The advisory bodies did not describe or give detail regarding remediation services because each individual county may design their remediation programs to suit the local counties needs and resources. The advisory bodies took into consideration input from many local counties regarding their remediation process. Currently, in section 709 (c), the law allows the court to make order that it

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			these protocols are developed or what power the juvenile judge has to require agencies to provide the needed services. o I believe the proposed legislation should include some additional language in subdivision G) reading something like: "In the absence of a protocol, or in the event the court finds the adopted protocol insufficient to address the remediation needs of the minor, the court may order the County Probation Department to provide, directly or through engaging the services of others, such remediation services as the court finds reasonable and appropriate." A comprehensive rewrite of the juvenile competency law must address the "elephant in the room", the provision of remediation services.	seems appropriate for services that may assist the minor in attaining competency. The advisory bodies acknowledge it may take counties some time to develop protocols. However, their current process of helping a minor attain competency should be used until a protocol is established.
	Sue Burrell, Staff Attorney on behalf of the Youth Law Center		• We strongly disagree with making diversion an optional feature in county protocols. Our state is in dire need of a dismissal/diversion option for use in cases involving potentially incompetent youth. • We agree with the requirement of having each county prepare its own protocol, but request that the scope be broadened and that additional parties be added to the list of who should develop it. The proposed language appears to limit the protocol to consideration of remediation services. In our experience, it has been useful in the counties that have protocols, to cover the entire competence process. This has enabled counties to insert specific timelines, to address things like appointment of experts, and to provide other expectations about the local process.	The advisory bodies agree.

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			Also, we believe it is important to include the public defender, the prosecutor, and the regional center in development of the protocol. We took out the optional diversion language, as that has been replaced by a statewide provision in paragraph 5. Recommendation: Revise the proposed language as follows: (j) The presiding judge of the juvenile court, the County Probation Department, the County Mental Health Department, *the public defender or other entity that provides representation for minors, the prosecutor, the regional center,* and any other participants 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 services for the remediation of competency. ~~*The written protocol may include remediation diversion programs.*~~	
	Mike Roddy, Executive Officer, Superior Court of California, County of San Diego		I agree with subdivision (h) if the minor is found to be competent, the court shall reinstate proceedings and proceed commensurate with the court's jurisdiction.	The advisory bodies agree.
	Greg Feldman, Deputy Public Defender, on Behalf of San Francisco Office of the Public Defender		San Francisco competence committee has already established a strong protocol that supports dismissal of charges where there is a substantial likelihood that the minor will not gain competence in the foreseeable future. Without such a requirement of dismissal, youth can face grave consequences due to prolonged detention and the lack of adequate service delivery to meet the individualized needs of the youth. The trial judge is in a unique position to view the behavior and the mental health evidence and records presented and should have	Information only. No comment needed.

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			the authority to dismiss in the interest of justice and the best interests of the minor. We would support a provision in the legislation to mandate dismissal within a reasonable period of time. We have learned that the collaborative process in developing San Francisco's competence protocol included the active participation of the juvenile court, the probation department, mental health department, district attorney, and defense counsel. By having a shared 0nd transparent process, San Francisco was able to develop a protocol that served the integrity of the process while also addressing public safety and the best interests of the minor. We would recommend that the parties listed above be incorporated into the legislation to develop a written protocol.	
	Lexi Howard, Legislative Director on behalf of the Juvenile Court Judges of California		Yes, The language in subdivision (3) of paragraph (i) clearly portrays that a minor may not be kept under the court's jurisdiction once a determinate finding is incompetence has been made.	The advisory bodies agree.
	Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California		CBHDA believes that it is not clear from this language that the minor may not be kept under the court's jurisdiction once a determinate finding of incompetence has been made. CBHDA recommends that the paragraph read: "A minor who is found mentally incompetent and is not a threat to public safety will not be under juvenile court jurisdiction".	The advisory bodies disagree with adding this language. The advisory bodies realize that the youth who dangerous are a special population. However, once a determination is made that competency cannot be attained, the court has no choice but to dismiss proceedings.
	Roger Chan, Executive Director on behalf of the East Bay		The proposed language in proposed Section 709(l)(3) appears appropriate. However, this provision would be strengthened by specifying a maximum timeline after	The advisory bodies discussed the timelines in depth and agreed that 30 calendar days for youth in custody and 45 calendar days for youth out of custody is an appropriate timeframe. The

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	Children's Law Offices		which the petition shall be dismissed (perhaps distinguishing felonies from misdemeanors). • Similarly, the period for review of remediation services in paragraph (k) should be changed to every 15 calendar days for minors in-custody, and every 45 calendar days for minors out-of-custody. • The 15 day timeline is consistent with Welf. & Inst. Code § 737, requiring court review pending execution of a disposition order. Likewise for minors in-custody, the court should review the effect of detention upon the minor in addition to the remediation services. However, detention based on incompetence for the purpose of remediation should be discouraged. One of the earliest opinions on juvenile competence found that, "…a finding of incompetence in a juvenile proceeding should not result in a confinement order or its equivalent." In re Patrick H. (1997) 54 Cal.App.4th 1346, 1359. The proposed legislation should re-emphasize this principle and avoid unintentionally promoting in-custody remediation options.	advisory bodies understand that youth should not be detained longer than necessary and work needs to be done to move these youth to the least restrictive placement. However, the remediation services need time to work for the youth and the advisory bodies believe that 30 days is a minimum length that services should be offered to determine whether the youth has attained competency. Information only, no comment needed. The advisory bodies agree that youth should be in the least restrictive placement possible.
	Tari Dolstra, Division Director, Juvenile Services Riverside County Probation Department		Yes; however, is it intended that the court will order identified persons or agencies to be present at this hearing in order to discuss services following dismissal? In Riverside County, the current protocol outlines a "Juvenile Competency Attainment Team" (JCAT) who develops a remediation plan and reports to the court (via a Probation Memorandum) the progress of the minor throughout the proceedings. Members of this team include: Probation, Department of Mental Health,	Information only. No comment needed.

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			Riverside County Office of Education, Department of Public Social Services, and the Inland Regional Center. Following thorough execution of remediation services, and a final forensic psychological evaluation supporting that the minor has not, and will not reach competency, a plan for continued services is submitted to the court prior to dismissal. While it is supported that information should be gathered from all involved parties (parents, the minor, counsel, etc.) it is believed JCAT (or a similarly organized group) should be the formal organized party to develop a 'post-dismissal' service plan, as they are the parties most appropriately experienced in services available in the community.	
	Angela Igrisan, Mental Health Administrator, on behalf of the Riverside County Department of Mental Health		Does the language in subdivision (3) of paragraph (l) clearly portray that a minor may not be kept under the court's jurisdiction once a determinate finding of incompetence has been made? Yes, the language is completely clear.	The advisory bodies agree.
Diversion Program	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	The court's needs may be served on one level, but one of the tools encouraging completion of diversion is the assurance of not taking it to court. • If taking it to court upon failure of diversion is not an option, what is the consequence of not being compliant with diversion? Also, this likely puts the burden on probation without the support of the court.	The protocol may address a diversion program and any consequences of not completing diversion.
	Ashleigh E. Aitken, President		Yes, the option of diversion program in local protocols can fulfill the need of the court. In many instances, had a minor not been found incompetent, a diversion program would have been already available to the minor.	The advisory bodies agree.

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	On behalf of Orange County Bar Association			
	Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court		The juvenile court needs statutory authority for a diversion program which allows for judges to order services for minors which address the underlying reasons for their delinquent behavior while proceedings are suspended. This authority needs to be expressly stated. • *A minor who is charged with an assault might benefit from anger management counseling. A minor charged with possession of drugs may benefit from drug counseling.* A minor with mental health problems may benefit from therapy. Presently the court does not have the authority, and Probation does not have the mandate, to provide services to minors without juvenile court jurisdiction. If the court had the ability to allow minors to participate in a diversion program which offered these services, *without punishment,* in exchange for a dismissal, we could enhance public safety and assist the minor in becoming crime fee in most competency cases.	The advisory bodies did try to include a diversion program into previous drafts. However, commentators to those drafts were confused by the diversion language and no consensus could be reached regarding the applicability in each local court. The advisory bodies therefore moved the option of a diversion program into the protocol to address the concerns of the larger and smaller courts.
	Sue Burrell, Staff Attorney on behalf of the Youth Law Center		Of all the proposed changes, we were the most troubled by the failure to include a dismissal or diversion mechanism. Relegating it to a permissible option in county level protocols is totally inadequate, given the tremendous need to provide a path out of lengthy competence proceedings in some cases. All of the previous drafts of the proposed changes have included such a provision. We will oppose this measure in the Legislature if it fails to include a statewide mechanism for dismissal.	The advisory bodies did try to include a diversion program into previous drafts. However, commentators to those drafts were confused by the diversion language and no consensus could be reached regarding the applicability in each local court. The advisory bodies therefore moved the option of a diversion program into the protocol to address the concerns of the larger and smaller courts.

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			For more than a decade, our office has heard from probation officers, lawyers, experts and courts that some youth simply do not belong in the juvenile justice system, and/or will be ill-served by being forced to endure lengthy competence proceedings potentially followed by prosecution. We also know that some defenders walk their clients through inauthentic admission, not because they believe their client is competent, but to avoid the negative impact of lengthy proceedings. We also know what happens to youth with cognitive limitations in custody. They are often isolated out of a misguided attempt to protect them, and their mental status almost inevitably deteriorates. Their needs require an inordinate amount of staff time, and few juvenile halls have staff who are adequately trained to work with youth who are very young, have intellectual challenges or suffer from serious mental illness. • The Chief Probation Officers of California commissioned an entire monograph on this issue, *Costs of Incarcerating Youth with Mental Illness: Final Report* (Ed Cohen and Jane Pfeifer, 2008). Congressman Henry Waxman published a paper on *Incarceration of Youth Who Are Waiting for Community Mental Health Services in California* (2005). There is very much a need to assure that young people with intellectual challenges and mental illness are treated in the right system, and having a dismissal mechanism in the competency process may provide an opportunity to redirect some of these youth. • There are also practical considerations for the court and prosecutors. A substantial number of cases involving cognitively impaired youth will result in dismissals months down the road because of Penal	

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			Code 26 issues, or statements found to be involuntary or in violation of *Miranda*. Others will be dismissed because, in the passage of time, witnesses have disappeared or no longer remember what happened. And from the standpoint of the court, forcing all youth to go through formal competence proceedings and "remediation" puts the court in the difficult position of trying cases involving youth who didn't understand what was happening then, and surely do not understand any better months down the road. Many youth who were found incompetent, but are later deemed "remediated," are still barely functioning. As a matter of fundamental fairness, we need to provide an alternative path for handling at least some of these cases. • Finally, everything and more that we would do at the end of formal competence proceedings could be done at the beginning. In fact, the services provided after a finding of incompetence must be limited to services designed to help the minor attain competence, but the services prior to such a finding are not so limited. We recognize that some cases may involve alleged behavior so serious that the proceedings will need to go forward with a formal hearing and remediation, but at least some cases could fairly be disposed of if the court were satisfied that the behavioral issues are being addressed, or in the interest of justice if the minor is unlikely to attain competence in the foreseeable future. Maybe the stumbling point on this has been that what is called for isn't "diversion" in the sense of the person agreeing to do certain things (since some of the youth	

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			may actually be incompetent), but instead is a facilitated dismissal. These comments offer a possible solution. This is an attempt to address previous sticking points such as whether admissions are needed, and also to require a full evaluation to assure that dismissal occurs in cases that truly merit it. Recommending to add 709 (a)(2) providing for dismissal without formal proceedings**.** *When a doubt has been declared and the expert appointed pursuant to subsection (a), the court may, upon motion of the minor or on the court's own motion, set a hearing to consider whether the case may be dismissed without formal competency proceedings. Upon receipt of the expert report, or such additional expert reports and evidence as may be presented, the court may dismiss the case in the interest of justice where there is a substantial likelihood that the minor is incompetent and will not attain competence in the foreseeable future, or where services and supports can be arranged to adequately address the behavior that brought the minor to the attention of the court.* *The court may employ the joinder provisions of Section 727, subdivision (a),subsection (4), to facilitate the involvement of other agencies with legal duties to the minor, and may invite the participation of family members, caregivers, mental health treatment professionals, the public guardian, educational rights holders; education providers, and social service agencies.*	
	Adrienne Shilton, Director, Intergovernmental		CBHDA recommends that a diversion program should be available, especially for minor offenses. There are some that are evidence-based and may be the better	The advisory bodies agree.

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	Affairs, County Behavioral Health Directors Association of California		choice, for example. It would appear that treatment programs would also be included in local protocols, if only for intervention purposes.	
	Lexi Howard, Legislative Director on behalf of the Juvenile Court Judges of California		Yes, a diversion program in the local protocols fulfills the need of the court.	The advisory bodies agree.
	Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California		CBHDA's chief concern regarding these recommendations has to do primarily with: • What happens after the child is determined incompetent. This proposal largely addresses the actual qualification process and not the truly difficult matter of what happens after the decision is made that the child is incompetent to stand trial. • The programs to restore competency or remediation services will vary wildly from inpatient to an array of outpatient services. o Youth who are violent will more likely require an inpatient service. o These services should be evidence-based and provided in the least restrictive setting. o The 30 day review process for those who have a severe mental illness seems arbitrary and not likely to be fruitful; many evidence-based programs are of much longer duration. The issue of how to serve children who are found incompetent is very complex, and far more involved than the qualification process as contained in the Judicial Council's proposal.	The advisory bodies are aware that there are many issues to juvenile competency. This legislation is limited to process and procedure. This legislation is not proposed to solve all the issues that surround our incompetent youth.

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Welfare and Institutions Code Section 709
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	Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf of the Pacific Juvenile Defender Center		The proposed statutory language does not include a mechanism for early dismissal or diversion, which must be included. The proposed language fails to include procedures for early dismissal or diversion, and it should not be left to be discretionary and up to the courts county-by-county to have different standards. • The statutory language should call for the dismissal of charges where there is a substantial likelihood that the minor will not gain competence in the foreseeable future. Without such a requirement of dismissal in the interest of justice, youth can face grave consequences due to prolonged detention. • We also believe that if remediation services are not being provided, or are ineffective, the child should be released from detention. • We propose that the general rule should be that if a minor charged with a misdemeanor has not gained competency within six months, the case should be dismissed; and if a minor charged with a felony has not gained competency with 12 months, that the case be discharged. We understand that some cases may involve charges so serious that the proceedings need to proceed to a hearing and disposition, but in those cases, the Court could use its inherent joinder power under Welfare & Institutions Code section 727(b)(1) to ensure that other agencies and professionals are involved in the treatment of the youth.	The advisory bodies believe that each local court protocol should address timelines for diversion. Adding a specific requirement of when the case should be dismissed would limit judicial discretion. These minors need to be treated on a case-by-case bases.
	Roger Chan, Executive Director on behalf of the East Bay		No, Diversion programs should not be an optional component of county protocols. Nearly every county is struggling with what to do when youth are found to be incompetent and proceedings are suspended. Diversion programs are often a desired outcome as they may	Mention of a diversion program was eliminated.

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	Children's Law Offices709		potentially address a minor's family, social, and educational, supervision or mental/developmental health needs, as well as public safety concerns. While it is appropriate for each county to develop its own protocol, the scope should be broadened beyond remediation services and the statute should specifically identify additional participants in the protocol's development, including the district attorney and public defender.	
	Tari Dolstra, Division Director, Juvenile Services Riverside County Probation Department		Yes, the option of a diversion program in the local protocols fulfill the need of the court. However, it is believed, as indicated, a program of diversion pursuant to 654.2 WIC is not appropriate to be used 'in lieu' of a disposition. Development of a remediation plan and monitoring of this plan and the minor's progress until such time is it determined to effect competency or terminate proceedings/dismissal of the case is best served by the probation department. However, parameters are needed to establish the extent of this supervision, as well as abilities to remove the minor from the community and detain in juvenile hall during the course of remediation, should concern for the safety of the minor or the community become evident. While keeping the 'least restrictive environment' in mind, and the committee's notation that a 'minor's dangerousness is beyond the scope of this proposal' it would be beneficial to outline the parameters for custodial action should it be warranted.	The advisory bodies agree.
	Angela Igrisan, Mental Health Administrator, on behalf of the Riverside County		Does the option of a diversion program in the local protocols fulfill the need of the court • This is a question to the court, not mental health. Our opinion is that it would be helpful to have diversion programs as an option because each child's circumstances are different. The discussion	Information only. No comment needed.

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	Department of Mental Health		centered around the fact that some diversion programs are voluntary. This appears less relevant to me because the court and probation could amend the voluntary aspect of the program.	
Should the statute include specific information regarding payment for initial court ordered competency evaluations or continue following current local county based practices?	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	In some counties, I would think that they would appreciate something to help make this determination. I could see fiscal restraints becoming an issue and the courts using their power to order others to pay.	Information only. No comment needed.
	Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court		Services that need to be funded in a typical competency case. Different counties use different funding mechanisms for various parts of these programs. It would be difficult to quantify, but some of the common costs include a) Competency evaluators [*LA uses county funds. Other counties include these funds in the budget of the Public Defender's office, others use DMH funding.]* *b)* Added staff from Probation. *In Los Angeles Probation has assigned special staff to monitor and service competency cases. Of course, these employees require training and supervision.* c) Remediation Instructors. *Probation officers and DMH staff serve as*	Information only. No comment needed.

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			remediation instructors in Los Angeles. It is too soon to tell how many instructors will be required. These positions are funded from different sources in different counties. Each county will handle competency cases differently according to the number of cases they project, funding sources, the relative cooperation between the players in that court's culture, whether Probations is under the court administration, availability of Proposition 63 funds, the availability of experts, and the type of remediation program they select. It may be too soon to create a statewide law or rules in this area. It would probably be best to revisit this area after counties, and the country, have had a chance to experiment.	Information only. No comment needed.
	Margaret Huscher, Supervising Deputy Public Defender III, Law Office of the Public Defender, Shasta County		• I do not foresee any county department volunteering to fund or administer an expensive and time consuming remediation program, and I predict a judge's committee, as established in (j), would be incapable of agreeing on which department will provide the necessary program. • This skepticism comes as a result of watching our probation department's reluctance to supervise, counsel or provide case management planning for incompetent minors. Their position has been that, until the date the minor is deemed competent, the minor is not on probation. This reluctance to provide for counseling and case management is true even when the minor is held in juvenile hall pending restoration. • Likewise, I cannot imagine our mental health department willingly providing remediation	Information only. No comment needed.

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			services, especially if they cannot bill Medi-cal or private insurance for the treatment.	
	Lexi Howard, Legislative Director on behalf of the Juvenile Court Judges of California		Continue to follow county based practices	The advisory bodies agree.
	Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California		CBHDA recommends that payment should not be discussed in statute.	The advisory bodies agree.
	Roger Chan, Executive Director on behalf of the East Bay Children's Law Offices		Continue following current local county based practices. • Given the wide range of resource and economical considerations between counties and geographic regions, local counties should have discretion to establish payment procedures for court-ordered competency evaluations. For example, in Alameda County, the court has a partnership with the county's Behavioral Health Care Services for evaluations to be performed by county providers.	The advisory bodies agree.
	Tari Dolstra, Division Director, Juvenile Services Riverside County Probation Department		It is believed the agency or entity raising the doubt should be responsible for payment of evaluations. If, following the initial evaluation, any party wishes to seek additional evaluations for the sake of a 'second opinion', that party should be responsible for payment.	The advisory bodies do not take a position on who should pay for the evaluations. The advisory bodies are leaving this up to local county practice.

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	Angela Igrisan, Mental Health Administrator, on behalf of the Riverside County Department of Mental Health		Should the statute include specific information regarding payment for initial court ordered competency evaluations or continue following current local county based practices? • Yes, this would be much appreciated. None of the county agencies are clear on whose mandate necessitates competency activities.	The advisory bodies decided to not include language on funding and payment. This could be included in a future protocol.
Potential ramification/ Unintended consequence	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department		What are the ramifications if the statute isn't addressed? • What happens if a county is not in compliance with this statute? • Are there any ramifications?	The advisory bodies believe that all remedies that are currently available under section 709 will be available under the new section. The advisory bodies also believe that the protocols can discuss ramifications, if warranted. The option of appealing a court order is also still available to the parties.
Dangerousness	Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department	AM	One of the big issues for many jurisdictions is about how to deal with juveniles who are a danger to their communities but are also deemed incompetent, especially in regards to developmental immaturity. If there is no real danger, it is fine to dismiss charges as the risk to the community is minimal. In the adult system, offenders are held until they are competent. It would make more sense to me if, based on the seriousness of the crime, that there was some provision to keep a youth detained in some way until they can be found competent or we can show that they are no longer a danger to their community. We have had a couple of situations where, due to developmental immaturity, charges were dismissed and the youth continued to seriously victimize the community without consequence. As a law enforcement officer and protector of the community, this does not make sense to me.	The advisory bodies have heard that the issue of dangerousness is a concern ad that these minors present additional challenges. However, this proposal discusses only the process and procedures to establish competency, as the issue of the minor's dangerousness is beyond the scope of the proposal.

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	Hon. John Ellis, Presiding Juvenile Judge on Behalf of Solano County Superior Court	AM	Although substantial changes to W&I 709 are desperately needed, I do not think the proposed amendment goes far enough regarding guidelines for competency training. On occasion, minors who are found incompetent are also a public safety risk if they are released from custody. However, probation departments are not equipped to treat these minors. IN PC 1368 incompetent defendants are sent to a state hospital or a regional center for treatment. W&I 709 needs a similar provision.	The advisory bodies believe that subdivision (*l*) (3) allows courts to make a referral to an assessment to determine if the youth is gravely incapacitated. The advisory bodies have heard that the issue of dangerousness is a concern ad that these minors present additional challenges. However, this proposal discusses only the process and procedures to establish competency, as the issue of the minor's dangerousness is beyond the scope of the proposal.
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		Omission of Violent/Dangerous Youth found to be Incompetent: We are disappointed that the joint committee declined to address the issue of incompetent youth with dangerous and violent behavior. What are the court's options when a petition involving a violent and/or dangerous behavior is dismissed due to the court's finding that the youth cannot be remediated?	The advisory bodies understand that the dangerous and violent youth present additional challenges.
Technical Changes	Ashleigh E. Aitken, President On behalf of Orange County Bar Association		Agrees that the proposal addressed the stated purpose. • Subdivision (k), end of first sentence (page5, line 6), "as described in (m)". There appears to be no (m) in the proposed legislation. The phrase should be corrected to read, "as described in (j)."	The advisory bodies agree.
	Mike Roddy, Executive Officer, Superior Court of California, County of San Diego		*There is no subdivision (m). Remediation program should not be capitalized in the subdivision.*	The advisory bodies agree.
	Mike Roddy, Executive Officer, Superior Court of California,		Subdivision (i): The cross-reference to subdivision (d) is a mistake. We believe it would now be (g). I agree with subdivision (j)	The advisory bodies agree.

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	County of San Diego		For consistency purposes, use "subdivision" (not subsection). Our court does not understand how the process laid out in (l)(3) can work. Instead of inviting all those stakeholders to a hearing, it may be better to set up a multidisciplinary team meeting prior to the hearing and allow the team to make appropriate referrals to services. The team could then make recommendations to the court for the final hearing.	
	Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf of the Pacific Juvenile Defender Center		A subdivision has a reference to a subdivision (m), which does not exist.	The advisory bodies agree.
Miscellaneous	Sue Burrell, Staff Attorney on behalf of the Youth Law Center		Subdivision (a), wrongly limits incompetence to 4 causes. In fact, incompetence may stem from any cause resulting in the person's inability to meet both prongs of the Dusky test. A sentence in the same section, a little bit further down states the causation correctly by adding "including but not limited to." This is important because, while most cases probably fit into the big categories of mental illness, mental disorder, developmental disability, or developmental immaturity, there may be cases involving additional causes (for example, linguistic or cultural issues).	The advisory bodies agree with the re-write proposed.

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			Remove the first statement of causation and retain the second, and get rid of the surplus language in the second statement. The section would read as follows: (a) Whenever the court believes that a minor who is subject to any juvenile proceedings is mentally incompetent, the court must suspend all proceedings and proceed pursuant to this section. A minor is mentally incompetent for purposes of this section if, ~~*as a result of mental illness, mental disorder, developmental disability, or developmental immaturity, the minor*~~ *he or she* is unable to understand the nature of the delinquency proceedings or to assist counsel in conducting a defense in a rational manner including a lack of a rational or factual understanding of the nature of the charges or proceedings. Incompetency may result from the presence of any condition or conditions ~~*that result in an inability to assist counsel or understand the nature of the proceedings*~~, including but not limited to mental illness, mental disorder, developmental disability, or developmental immaturity. Except as specifically provided otherwise, this section applies to a minor who is alleged to come within the jurisdiction of the court pursuant to Section 601 or Section 602. **Section 709, subdivision (i). Orders upon finding the minor incompetent.** We agree with the rewording of the standard of proof for incompetence. Our additional request is that this section specifically state the minors must be held in the least restrictive appropriate environment. We have heard anecdotal evidence that children in some counties are being held for months to receive remediation services in juvenile hall for relatively minor offenses. In our view, those counties	The advisory bodies agree that minors should be held in the least restrictive environment. The advisory bodies address this issue in subdivision (k) and do not believe that it needs to be articulated in subdivision (i)

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			are vulnerable to liability for violating the Americans with Disabilities Act and the 14th Amendment. The respected remediation programs provide services primarily in the community or in non-secure settings, and we should be assuring that happens except in the most extreme cases. **Recommendation:** Insert the following sentence: (i) ~~If the minor is found to be incompetent by a preponderance of the evidence~~, If the court finds by a preponderance of evidence that the minor is incompetent, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction. *The minor shall be held in the least restrictive appropriate environment.*	
	Mike Roddy, Executive Officer, Superior Court of California, County of San Diego		We have some youth who have significant mental health issues and/or pose a risk of safety to themselves and others, but no one is legally responsible (other than mom/dad) in overseeing their care. Oftentimes the parents are trying to help the youth but the options are limited. These are the youth with serious charges--murder, rape, sexual assault, assaults where the parents are locking their doors, or can't have them home due to safety concerns. • The youth have high mental health needs, but may not necessarily qualify for regional center services, conservatorship or WIC 300. Based upon these facts, our court welcomes the changes to WIC 709. *Competence v. Competency*	Information only. No comment needed

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			We would prefer the use of the term "competence" over "competency" in the statute because that is the term used in the criminal statutes. *Restoration v. Remediation* We prefer the term "restoration" over "remediation" because it is a more understandable term by the general populous. *Case Management Responsibility* This proposed legislation doesn't identify case management responsibility for youth who are in the competency stage of proceedings (proceedings suspended but youth in need of services)	The advisory bodies disagree. The advisory bodies selected the term remediation to use throughout the proposal. As noted in the recent article in the *Juvenile and Family Court Journal* (Spring 2014), some scholars prefer the term *remediation* rather than *restoration* when referring to juveniles because, in some states, juveniles may be found to be incompetent due to developmental immaturity as well as because of mental illness and intellectual deficits or developmental disabilities. Remediation involves utilization of developmentally and culturally appropriate interventions along with juvenile/child-specific case management to address barriers to adjudicative competency. See Shelly L. Jackson, PhD, Janet I. Warren, DSW, and Jessica Jones Coburn, "A Community-Based Model for Remediating Juveniles Adjudicated Incompetent to Stand Trial: Feedback from Youth, Attorneys, and Judges" (Spring 2014), Vol. 65, Issue 2, *Juvenile and Family Court Journal* 23–38. There was much discussion concerning the cost of remediation services. During this discussion, it was discovered that not all counties pay for

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			Funding Who is responsible for funding these items, which is an important piece that is lacking in the current WIC 709, • It is hoped that these areas can be addressed in future legislation after this proposal becomes law. Our court recommends the language be changed to state: "During the pendency of any juvenile proceeding <u>for a minor who is alleged to come within the jurisdiction of the court pursuant to Section 601 or Section 602</u>, the minor's counsel, any party, participant, or the court may express a doubt as to the minor's ~~competency~~ <u>competence</u>. ~~Doubt expressed by a party or participant does not automatically require suspension of the proceedings, but is information that must be considered by the court.~~ A minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding of the nature of the charges or proceedings against him or her. ~~Doubt express by a party or participant does not automatically require suspension of the proceeding, but is information that must be considered by the court. If the court finds sufficient substantial evidence, that raises a reasonable doubt as to the minor's competency, the court shall suspend the proceedings.~~ <u>Incompetence may be caused by any condition or combination of conditions that</u>	remediation services in the same way. Some counties already have protocols in place that address remediation services and funding; others do not. The advisory bodies decided not to address the specific issue of funding. They thought it was better left to be discussed in the local protocols. The advisory bodies changed the language in subdivision (a) and believe this rewrite addresses the concern of the commentator.

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			results in an inability to assist counsel or understand the nature of the proceedings, including but not limited to mental illness, mental disorder, developmental disability, or developmental immaturity. Expression of a doubt as to the minor's competence does not require automatic suspension of the proceedings but must be considered by the court. If the court finds sufficient evidence that raises a reasonable doubt as to the minor's competence, the court shall suspend the proceedings.	
	Lexi Howard, Legislative Director on behalf of the Juvenile Court Judges of California		Would the proposal provide cost savings? If so please quantify. • Unknown but likely not. 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. • A couple of hours training. Beyond that, unknown. How well would this proposal work in courts of different sizes? • Unknown.Local practice, particularly with respect to diversion, may have a greater impact than county size. The most difficult questions are those immediately above, dealing with costs, implementation and training. There are so many factors including size of the county, what kind of competency development program is involved, whether minors are in juvenile hall during remediation, what the state of knowledge is concerning competency and competency development, etc. that it is	The advisory bodies do not know the specific cost savings, but believe there will be cost savings by moving the children out of the hall and keeping them in the least restrictive placements. The advisory bodies agree. The advisory bodies agree. Information only. No comment needed.

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			difficult to accurately predict and assess costs and training.	
	Amanda K. Roze, Attorney at Law, Sebastopol, CA		An overall concern is that the proposal appears to blur the line between adult and juvenile competency by adding language that mirrors Penal Code section 1367. As the Invitation notes (p. 3), the standards for adult and juvenile competency determinations are different. Juvenile competency issues must be understood in the context of recent scientific advances. Within the last 15 years, developments in psychology and brain science have demonstrated fundamental differences between juvenile and adult brain functioning which require that juveniles be treated differently from adults in numerous aspects of the juvenile justice process. (See, e.g., *J.D.B. v. North Carolina* (2011) 564 U.S. __ [131 S.Ct. 2394, 2403] ["children ... lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them"].) The courts have already reached into the case law surrounding section 1367 in analyzing competency issues for minors. • Mirroring the language from section 1367 in section 709 will only increase this trend and cause stagnation in the law instead of forcing the courts to recognize the differences in adults and children. In order to foster more enlightened approaches for children, section 709 and rule 5.645 should make as much of a break from section 1367 as possible.	The advisory bodies changed the language in subdivision (a) and believe this rewrite addresses the concern of the commentator
	Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors		Does the proposal appropriately address the stated purpose? • CBHDA believes that the proposal does address the stated purpose.	The advisory bodies agree.

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	Association of California			
	Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf of the Pacific Juvenile Defender Center		Competency may stem from any cause resulting in the person's inability to meet both prongs of the *Dusky* standard, and the proposed language limits the Dusky standard. We are concerned that the proposed language has excessive verbiage that is confusing and may inadvertently narrow the *Dusky* standard to limit incompetence to four potential causes (mental illness, mental disorder, developmental disability, or developmental immaturity) when in fact there may be other causes of incompetency under *Dusky*. Furthermore, the *Matthew N.* and *Alejandro G.* decisions by the Court of Appeal included the concept that the individual must not only understand the nature of the proceedings, but appreciate them. (*In re Matthew N.* (2013) 216 Cal.App.4th 1412; *In re Alejandro G.* (2012) 205 Cal.App.4th 47). (The phrase "and appreciate" should also be added in subsection (b), between the words "understand" and "the nature of the proceedings.") We therefore propose that the section should read as follows (deletions in red, additions in bold underline, including minor grammatical changes): (a) Whenever the court believes that a minor who is subject to any juvenile proceedings is mentally incompetent, the court must suspend all proceedings and proceed pursuant to this section. A minor is mentally incompetent for purposes of this section if, ~~*as a result of mental illness, mental disorder, developmental disability, or developmental immaturity, the minor*~~ he or	The advisory bodies changed the language in subdivision (a) and believe this rewrite addresses the concern of the commentator

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			she is unable to understand and appreciate the nature of the delinquency proceedings, or to assist counsel in conducting a defense in a rational manner, including a lack of a rational or factual understanding or appreciation of the nature of the charges or proceedings. Incompetency may result from the presence of any condition or conditions ~~*that result in an inability to assist counsel or understand the nature of the proceedings*~~, including but not limited to mental illness, mental disorder, developmental disability, or developmental immaturity. Except as specifically provided otherwise, this section applies to a minor who is alleged to come within the jurisdiction of the court pursuant to Section 601 or Section 602.	
	Roger Chan, Executive Director on behalf of the East Bay Children's Law Offices		The proposed changes to Section 709(a) erroneously limit incompetence to four causes. In fact, incompetence may stem from *any* one cause resulting in the person's inability to meet both prongs of the *Dusky* test. Recommendation: (a) Whenever the court believes that a minor who is subject to any juvenile proceedings is mentally incompetent, the court must suspend all proceedings and proceed pursuant to this section. A minor is mentally incompetent for purposes of this section if, *as a result of mental illness, mental disorder, developmental disability, or developmental immaturity, the minor he or she* is unable to understand the nature of the delinquency proceedings or to assist counsel in conducting a defense in a rational manner including a lack of a rational or factual understanding of the nature of the charges or proceedings. Incompetency may result from the presence of any condition or conditions *that result in an inability to assist counsel or understand the nature of*	The advisory bodies changed the language in subdivision (a) and believe this rewrite addresses the concern of the commentator

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			the proceedings, including but not limited to mental illness, mental disorder, developmental disability, or developmental immaturity. Except as specifically provided otherwise, this section applies to a minor who is alleged to come within the jurisdiction of the court pursuant to Section 601 or Section 602.	
	Tari Dolstra, Division Director, Juvenile Services Riverside County Probation Department		While the cost of remediation and the burden to pay for such services was not addressed in this proposal, it would be beneficial to designate the appropriate party/agency and the ability to procure funding.	The advisory bodies believe the cost of remediation programs should be left to local county protocols.
	Angela Igrisan, Mental Health Administrator, on behalf of the Riverside County Department of Mental Health		Yes, the proposal appears thorough and appropriate	Information only. No comment needed.
	Rosemary Lamb McCool, Deputy Director, Chief Probation Officers of California		In our view, WIC 709 cannot be examined in isolation. It is undoubtedly interconnected to the larger challenge to meet the needs of youth who come into the delinquency system due to a lack of resources at the community level. The changes to WIC 709 will provide more process direction to judicial officials, but the proposal does not address how to move youth through the system and get them the services they need to either be remediated and adjudicated or, in the cases of those found to be incompetent, long-term treatment services. • Additionally, we recommend the statute be more explicit that youth whose competency is in question are better served in the community rather than in the	Information only. No comment needed. The advisory bodies discussed, at length, the purpose of the proposal. The advisory bodies wanted to a proposal that was politically viable. The intent of the proposal was never to solve all

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All comments are verbatim unless indicated by an asterisk (*).

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			juvenile hall unless they pose a risk to public safety. Understandably, addressing the needs of the youth in need of remediation is a challenge and the joint committees undertaking this process needed to start somewhere. We appreciate the changes to the code sections where additional clarity and direction are provided; however, we believe that more needs to be done to address the very important needs of youth found incompetent to stand trial. This issue needs more conversation and cannot be done in isolation or without addressing the all-important question about how to fund what these youth need and deserve.	the issues with incompetent youth, but to provide some directions to the courts and juvenile stakeholders.

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