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INVITATION TO COMMENT

[ItC prefix as assigned]LEG-__

Title
Judicial Council–Sponsored Legislation: Juvenile Competency

Action Requested
Review and submit comments by August 24, 2015

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

Proposed Effective Date
January 1, 2017

Proposed 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

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Executive Summary and Origin

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

Background

Before 2011, the only guidance for determining the legal competency for juveniles was found in rule 1498 of the California Rules of Court and case law. Rule 1498 (renumbered in 2007 as rule 5.645) was adopted by the Judicial Council effective January 1, 1999. Rule 1498 was specifically drafted to conform to the court ruling in *James H. v. Superior Court* (1978) 77 Cal.App.3d 169,[1] which referred the juvenile court to the definition of incompetency stated in Penal Code section

[1] See *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 858.

1367 or the test stated in *Dusky v. United States* (1960) 362 U.S. 402. Although Penal Code section 1367 referred to "mental disorder or developmental disability," *Dusky* did not. Interpreting rule 1498, the court in *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847 considered the question of whether a mental disorder or developmental disability as required by the Penal Code was an elemental requirement under rule 1498(d).[2] The court held it was not. Therefore, the test of competency is that as stated in *Dusky*.[3] Since 1999, this rule of court (rule 5.645, formally rule 1498) has been amended three times.[4]

Effective January 1, 2011, Welfare and Institutions Code section 709 was enacted by the passage of Assembly Bill 2212 (Fuentes); Stats. 2010, ch. 671). [5] This bill endeavored to clarify the legal standard regarding competency in juvenile delinquency proceedings. The following year, section 709 was amended by AB 104 (Stats. 2011, ch. 37) to include provisions for minors who are developmentally disabled. Since 2011, section 709 has been clarified and interpreted in appellate decisions. In 2013–2014, five published appellate decisions addressed the issue of competency as discussed in section 709. In May 2015, the California Supreme Court issued an opinion that clarified some aspects of section 709 (See: *In re R.V.* (May 18, 2015, S212346)).

Recommendations have also been made to the Judicial Council to address issues and gaps in section 709. In 2008, the *Juvenile Delinquency Court Assessment (JDCA),* the first-ever comprehensive assessment of California's delinquency court system, recommended changes to section 709. [6] These recommendations included a call for legislation addressing competency issues more adequately and effectively.[7] *The Task Force for Criminal Justice Collaboration on Mental Health Issues* in their final report to the Judicial Council in 2011 also recommended changes in juvenile competency procedures. The final report contained two recommendations on juvenile competency issues. One recommendation was that experts in juvenile law should further study the issue of juvenile competency to ensure appropriate services. [8] The report also recommended modifying the law regarding juvenile competency proceedings to refine legal procedures and processes.[9]

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[2] *Timothy J., supra,* at p. 15.

[3] The *Dusky* test is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."

[4] The rule was amended in 2007, 2009, and 2012.

[5] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

[6] Center for Families, Children & Cts., Admin. Off. of Cts., *Juvenile Delinquency Court Assessment* (2008), *http://www.courts.ca.gov/cfcc-delinquency.htm*.

[7] JDCA Recommendation 27.

[8] JDCA Recommendation 95: Experts in juvenile law, psychology, and psychiatry should further study the issue of juvenile competence, including the need for appropriate treatment facilities and services, for the purpose of improving the systemic response to youth found incompetent to stand trial in the delinquency court.

[9] JDCA Recommendation 96: Existing legislation should be modified or new legislation should be created to refine definitions of competency to stand trial for juveniles in delinquency matters and outline legal procedures and processes. Legislation should be separate from the statutes related to competency in adult criminal court and should be based on scientific information about adolescent cognitive and neurological development and should allow for appropriate system responses for children who are found incompetent as well as those remaining under the delinquency court jurisdiction.

Prior Circulation

There has been no prior circulation of this proposal.

The Proposal

The advisory bodies propose amending section 709 to address the issues that arise when a doubt is expressed regarding the minor's competency. The advisory bodies formed a joint working group in 2014 to develop this proposal with input from others in the juvenile justice community.[10] This proposal addresses: who may express doubt regarding competency, who has the burden of establishing incompetence, the role of the expert in assessing and reporting on competency, the process for determining competency, the process for determining whether competency has been remediated, review hearings to ensure the proceedings are not unduly delayed, due process and confidentiality protections for minors during the competency determination and thereafter, and remediation services.

The standard to determine competency in juvenile court is different from that for determining competency for adults, as discussed in *Bryan E. v. Superior Court* (2014) 231 Cal.App.4th 385, 390–391. In *Bryan E.*, the appellate court held that the trial court incorrectly applied the standard of competence 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.[11] Unlike adults, a minor may be determined to be incompetent based upon developmental immaturity alone (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847). However, although the standard for competency is different, the purpose of competency determinations for adults and juveniles is similar; therefore, the proposed language in subdivision (a) adds language that mirrors that in Penal Code 1367, which applies to adults.

The proposal broadens the number of persons who can raise a doubt as to the minor's competency in understanding the proceedings. Currently, doubt can be raised only by the minor's counsel or the court. The change allows counsel for a minor, any party, participant, or the court to raise doubt. The addition of party and participant is inspired in part by *Drope v. Missouri* (1975) 420 U.S. 162. In *Drope*, the wife of the defendant raised the issue of competency during her testimony. The United States Supreme Court found that the defendant was deprived of due process because the trial court failed to order a psychiatric examination with respect to his competency to stand trial after his wife raised the issue of competency. Courts have an independent duty to determine competency issues as a matter of due process. In juvenile delinquency proceedings, the parent or relative caretaker may be the only person who has sufficient information to raise doubt as to the minor's competency. Although parents and

[10] The working group, comprised of members of the Family and Juvenile Law Advisory Committee, the Collaborative Justice Advisory Committee, and the Mental Health Issues Implementation Task Force, included judges from a cross-section of courts, a chief probation officer, deputy district attorney, deputy public defender, and private defense attorney.

[11] *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.

relatives are not parties in delinquency court proceedings, they are allowed to participate in the court hearings. An expression of doubt does not automatically require suspension of the proceedings, it merely triggers the inquiry. The proceedings would be suspended only if the court finds there is substantial evidence that raises a reasonable doubt as to the minor's competence.[12]

Once the court suspends the proceedings, the proposal, in subdivision (b), clarifies the procedure for the competency hearing. First, it adds the ability of the parties to stipulate to the minor's competence or lack thereof. Second, it attributes to the minor the burden of establishing incompetence. The recent California Supreme Court case of *In re R.V.* (May 18, 2015, S212346) discusses this specific issue. The Supreme Court held that section 709 contains an implied presumption that a minor is competent. "Because the presumption of competency applies in a wardship proceeding, the party asserting incompetency bears the burden of proving the minor is incompetent to proceed."[13] Because the existing statute is silent on the burden of proof, the court looked to Evidence Code sections 605 and 606 and held that the party asserting incompetence has the burden of establishing incompetence. [14] By specifically attributing the burden of establishing incompetence to the minor, this proposal alleviates the need to rely on Evidence Code section 606, thus closing a gap in the existing statute.

If the court orders the suspension of proceedings and there is neither a stipulation nor submission as to the minor's competence, the court is required to appoint an expert to evaluate whether the minor is competent. Paragraph (2) of subdivision (b) of the proposal clarifies what is expected of the expert who is appointed to assess the minor's competence. The expert must personally interview the minor, consult with the person who raised a doubt about the minor's competence (unless the court raised the doubt), review all available records, consider the minor's developmental history, administer age-appropriate testing (unless testing is deemed unnecessary or inappropriate), and render an opinion in a written report of the minor's competence. The expert is required to state the basis for his or her conclusions and address the type of treatment that would be effective for the minor to attain competence. The addition of subdivision (c) in the proposal ensures that statements made to the expert during the competency evaluation, any statements made by the court-appointed expert, and any fruits of the minor's competency evaluation shall not be used in any other adjudication against the minor in either juvenile or adult court.[15] The proposal also requires the Judicial Council to develop a rule of court outlining the training and experience needed for an expert to be competent to conduct forensic evaluations of minors.

Nothing in the proposal prevents the prosecutor or the minor from retaining or seeking the appointment of additional qualified experts. The proposal adds subdivision (d) to section 709 to specifically address this issue. If the party anticipates using the expert's report or testimony at the

[12] Current language in section 709(a).
[13] *In re R.V.* (May 2015, S212346, 19).
[14] Evid. Code § 606 reads: "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."
[15] See *People v. Arcega* (1982) 32 Cal.3d 504, 518.

evidentiary hearing, the report and expert's qualifications must be disclosed to the opposing party within a reasonable period of time prior to the hearing, but no later than five court days before the hearing. The opposing party may request a continuance to prepare further for the hearing and must show good cause for the continuance. If the court finds that the minor is competent, the court shall reinstate proceedings.[16] If the court finds the minor incompetent, the minor must be referred to a remediation program. [17]

Recognizing the unique characteristics of each county, rather than establishing a statewide process to encompass all aspects of the issue, the proposal adds a requirement to section 709 under subdivision (j) that the presiding judge of the juvenile court and enumerated stakeholders develop a written protocol and program to ensure that the minors who are found incompetent receive appropriate services. The proposal also adds a requirement that, upon a finding of incompetence, the court must refer the minor to the county remediation program, but allows each county to determine the specific infrastructure for such a program. The proposal allows for counties to add a diversion program to their written protocol. The proposal adds that these remediation services must be held in the least restrictive environment consistent with public safety and requires the court to review the remediation services every 30 calendar days for a minor in custody and every 45 calendar days for minors out of custody.

When there is a recommendation regarding the minor's remediation, the court must hold an evidentiary hearing, unless the parties submit on the recommendation or enter into a stipulation. Again, the proposal places the burden of proof on the minor to prove, by a preponderance of the evidence, that the minor is incompetent. If the recommendation is that the minor is not remediable, the burden is placed on the prosecutor to prove that the minor is remediable. The proposal further defines the options for the court. If the court finds the minor is remediated, the court must reinstate proceedings. If the court finds that the minor is not yet remediable, but is able to be remediated, the court must order the minor back to the program. Finally, if the court finds that the minor will not achieve remediation, the court may set a hearing or hold a meeting to determine if there are any further services that would be available to the minor after the dismissal of the petition. All persons with information about the minor would be invited to the hearing or meeting. The last alternative for the court, if appropriate, is to refer the minor for an evaluation pursuant to section 6550 et seq. or section 5300.

[16] Current language in § 709(d).

[17] 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.

Alternatives Considered

The advisory bodies consider numerous viewpoints when discussing each of the issues set forth above, as well as other potential changes that were not ultimately included in this proposal. The most significant alternatives to the language in this proposal are highlighted below.

There are two issues that are not addressed in this proposal. One issue is cost of remediation services and the burden to pay for such services. There was much discussion concerning the cost of 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 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 second issue is incompetent youth with dangerous or violent behavior. The advisory bodies realize 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.

Raising Doubt of a Minor's Competency

The advisory bodies considered the alternative of maintaining the current language that only the court and the minor's counsel can express doubt as to the minor's competency. However, in considering *Drope v. Missouri* (1975) 420 U.S. 162 and their experience in delinquency proceedings, members concluded there was benefit to provide for nonparties to express a doubt about the minor's competence, particularly because parents and relatives are in a unique position to be aware of factors raising a doubt about competence. The advisory bodies considered explicitly adding "parent" to the list of those who may raise the issue of competence, but determined that this was too limiting, as there may be other people—relatives and nonrelatives—involved in a minor's life who may have information that would raise a doubt regarding a minor's competence. Therefore, the committee agreed that the statute should allow the minor's counsel, any party, participant, or the court to express doubt as to a minor's competence. The advisory bodies discussed the burden this places on the defense attorney. The discussion with the advisory committees focused on the potential conflict the defense attorney may have when the stated interest of the minor is to enter a plea, yet others raise a doubt as to competency. The advisory bodies understand that this may present challenges for the minor's attorney; however, because the court has an independent duty to determine competency in juvenile proceedings, the advisory bodies believe that it is important that other participants in the court process be able to express a doubt as to the minor's competency.

Burden of Proof

The advisory bodies considered the burden of proof discussion found in *In re R.V.* (May 18, 2015, S212346). The burden of proof regarding the minor's competence is found in subdivisions (b) and (l) of the proposal. *In re R.V.* places the burden on the party raising doubt of competency. The advisory bodies considered using this language. However, as stated in the prior section, the advisory bodies concluded the burden 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. Thus, the proposal is mindful of the *In re R.V.* decision. The advisory bodies also discussed the ethical dilemma for the minor's attorney that may result from placing the burden of proof on the minor, such as the minor insisting on his or her competence to enter a plea after a parent expressed a doubt regarding the minor's competence. However, because the proposal specifically provides that an expression of doubt does not automatically lead to a suspension of the proceedings, the minor's attorney may advocate against the need for a competency determination. If a competency evaluation is ordered, the ethical constraints on the minor's attorney would not be compromised by the proposal's placing the burden to prove incompetence on the minor.

Diversion Alternative

Much discussion surrounded the addition of a diversion program added to subdivision (j) of the proposal. Although there is no current statutory authority to allow a diversion program for a minor who may not be competent, the advisory bodies heard from many courts and juvenile justice partners about diversion programs that have been operating successfully. The diversion programs under section 654.2 cannot be used in these proceedings, because those programs presume consent of the minor, which cannot be given if the minor is not competent. In some circumstances, a diversion program can be a useful way to allow minors who may not be competent to benefit from services without a formal competency evaluation or adjudication of wardship. The advisory bodies attempted to incorporate such a diversion program into the proposal. However, after much discussion, it was decided that a formal diversion program in statute was less desirable than the existing practice where local jurisdictions create programs unique to the needs of each jurisdiction.

Competency Evaluations

In subdivision (b), upon the suspension of proceedings, the court shall appoint an expert to evaluate the minor's present capacity to assist counsel or understand the nature of the proceedings. The advisory bodies considered whether to place the responsibility of payment for the first competency evaluation including cost of the examination, report, and testimony on a particular agency. Since the passage of the Lockyer-Isenberg Trial Court Funding Act of 1997 (AB 233 (Escutia and Pringle), Stats. 1997, ch. 850), questions about payment responsibility for such services turn on whether the evaluation is part of probation services, district attorney services, juvenile delinquency defense services, or whether the evaluation serves the needs or use of the court.[18] The advisory bodies discussed county practices and while the court usually pays for the initial paper examination and report, practices vary regarding payment for testimony on the first report, second or third competency opinions requested, and other mental health evaluations.

The advisory bodies considered whether or not to specify in statute the requirements of the expert. Some thought it was too burdensome to list the type of records the expert should review,

[18] See Gov. Code, § 77003(a)(7); Cal. Rules of Court, rule 10.810(b)(3-5) & function 10; see generally 87 Ops.Cal.Atty.Gen. 62 (2004); cf. Evid. Code, § 731(a)

arguing that a competent expert should know what needs to be reviewed for a thorough competency evaluation. Others maintained that the statute needed to specify the type of records and testing that was needed to ensure consistent and well-informed competency evaluations. The advisory bodies ultimately concluded it was useful and necessary to identify the type of records that the expert must review. The advisory bodies also discussed whether to include in the statute the requirements for the expert. Many people were concerned that the experts conducting competency evaluations have varied degrees of understanding regarding juvenile competency, and statewide criteria need to be set. However, because specific requirements for experts and training requirements may be fluid and comprehensive, they would be more appropriately included in a rule of court than in the statute itself. This is also consistent with the previous legislative direction to the Judicial Council to develop and adopt rules for the implementation of the requirements regarding experts.

The advisory bodies added subdivision (c) regarding the use of statements made by the minor during the competency evaluation. Originally, the advisory bodies had made reference to Evidence Code section 1017. After consideration, it was determined that Evidence Code section 1017 does not apply to competency hearings. It applies to the communications made during an evaluation relating to a plea based on insanity or to present a defense based on a mental or emotional condition. There was also discussion that the proposed language is too broad, and alternative language was proposed. However, the advisory bodies decided on the current proposed language citing *People v. Arcega* (1982) 32 Cal.3d 504. 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.

Appointment and Procedure for Evaluations

Alternatives were considered to the language in subdivision (d) of the proposal, which allows the prosecutor or the minor to retain or seek the appointment of an additional qualified expert. One alternative was to eliminate the language, as current law contemplates only one expert. Some did not want to encourage more evaluations, while others cited local protocols that allowed for more than one expert to be appointed by the court. The advisory bodies agreed on the current language, because it addresses both concerns and creates more uniformity. The language allows for more than one evaluation if the party can retain his or her own expert. The court may also consider a request to appoint an additional expert; such request may be granted or denied.

Time Frames

Additional alternatives were considered in subdivision (d) regarding the time frame for disclosure of the expert's report and qualifications prior to the hearing. The time frame proposed was within a reasonable time and not later than five court days prior to the hearing. Many thought the five-day time frame was too short and did not allow enough time for discovery. It was proposed that the time frame should be 30 days, as in the criminal and civil discovery statutes. However, because many courts were already setting the hearing date weeks from the

request for hearing, the advisory bodies were concerned about delaying the court hearing for an additional 30 days. Thus, the advisory bodies decided to keep the language as originally proposed, as it does allow for the court to grant a continuance upon a showing of good cause by the opposing party.

Alternatives for the time frame discussed in subdivision (k) of the proposal were also discussed. Subdivision (k) requires the court to review the progress of remediation services at least every 30 calendar days for minors in custody and every 45 days for minors out of custody. Proposed time frames considered were a minimum of 45 days for all minors and either 60 to 90 day review hearings, depending on the minor's custody status. The advisory bodies wanted the court to review the minor's progress in remediation services on a frequent and ongoing basis. They decided that 45 days and 60 days were too long to wait for a court review for a minor who was in custody while participating in services.

Implementation Requirements, Costs, and Operational Impacts

The sponsoring advisory bodies are proposing this legislation because it has concluded that its adoption would clarify the process and procedure when a doubt has been raised as to a minor's competency to understand court proceedings. 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.[19] By clarifying the procedures, allowing youth to be remediated in both the least restrictive setting and a diversion program, and enforcing timelines for determinations of competency, it is anticipated that a minor's stay in juvenile hall will be shortened.

[19] 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)

Request for Specific Comments

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

- Does the proposal appropriately address the stated purpose?
- Should participants be added to the list of individuals who can raise doubt?
- Should the burden to prove incompetency be placed on the minor?
- Should the statute include specific information regarding payment for initial court ordered competency evaluations or continue following current local county based practices?
- Should the discussion directing experts in subdivision (2) of paragraph (b) be taken out of the statute and placed in a rule of court?
- Similarly, should the expert qualifications and training currently found in rule 5.645 be explicitly put into statute or left to a rule of court?
- Does the option of a diversion program in the local protocols fulfill the need of the court?
- 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?

The advisory committees also seek comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. The text of the proposed Welfare and Institutions section 709 is at pages 11–14
2. http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=709.

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

(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 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.

(1) During the pendency of any juvenile proceedings, the minor's counsel, any party, participant, or the court may express a doubt as to the minor's competency. ~~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 expressed by a party or participant does not automatically require suspension of the proceedings, but is information that must be considered by the court. If the court finds ~~substantial~~ sufficient evidence, that raises a reasonable doubt as to the minor's competency, ~~the proceedings shall be suspended~~ the court shall suspend the proceedings.

(b) Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at an evidentiary hearing, unless a stipulation or submission by the parties is made to the court. At an evidentiary hearing, the minor has the burden of establishing by a preponderance of the evidence that he or she is incompetent to proceed. The court shall appoint an expert to evaluate ~~whether~~ 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 impair the minor's ~~competency~~ present capacity to assist counsel or understand the nature of the proceedings.

(1) The expert shall have expertise in child and adolescent development~~, and training in the~~ and forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence. ~~The Judicial Council shall develop and adopt rules for the implementation of these requirements.~~

(2) 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 a 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. The expert shall consider a developmental history of the minor. When standardized testing is used, 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 the 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 and shall address the type of treatment that would be effective in the minor attaining competency and the likelihood that the minor can attain competency within a reasonable period of time.

(3) The Judicial Council shall develop a rule of court outlining 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 requirements related to this subdivision.

(c) Statements made to the appointed expert during the minor's competency evaluation and any statements made by the minor or the appointed expert on the issue of the minor's competency, and any fruits of the minor's competency evaluation shall not be used in any other delinquency, dependency, or criminal adjudication against the minor in either juvenile or adult court.

(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 the 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. 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.

~~(f)~~ (e) 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.

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

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

(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)).

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

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

~~(c)~~ (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. During this time, the court may make orders that it deems appropriate for services, subject to subdivision ~~(h)~~ (d) ~~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.

(j) The presiding judge of the juvenile court, the County Probation Department, the County Mental Health Department, and any other participants the presiding judge shall designate, shall develop a written protocol and 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.

(k) Upon a finding of incompetency, the court shall refer the minor to the county's remediation program, as described in (m). Remediation counselors and evaluators shall adhere to the standards set forth in this statute and the California Rules of Court. The program shall provide services in the least restrictive environment consistent with public safety. Priority shall be given to minors in custody. 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 30 calendar days for minors in custody and every 45 calendar days for minors out of custody.

(*l*) Upon presentation of the recommendation by the remediation program, the court shall hold an evidentiary hearing on whether the child is remediated or is able to be remediated, unless a stipulation or submission by the parties is made to the court. 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. The provisions of subsection (d) shall apply at this stage of the proceedings.

(1) If the court finds the minor has been remediated, the court shall reinstate the delinquency proceedings.

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

(3) If it appears that the minor will not achieve remediation, the court must dismiss the petition. The court may invite all persons and agencies with information about the minor to the dismissal hearing to discuss any services that may be available to the minor after jurisdiction is dismissed. Such persons and agencies may include, but not be limited to, the minor and his or her attorney; 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 Section 6550 et seq. or Section 5300 et seq.