JUDICIAL COUNCIL OF CALIFORNIA

770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

# MEMORANDUM

Date
October 20, 2015

To
Members of the Policy Coordination and Liaison Committee

From
Cory T. Jasperson, Director
Governmental Affairs

Subject
Proposal for Judicial Council: 2016 Legislative Priorities

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Cory T. Jasperson, 916-323-3121
cory.jasperson@jud.ca.gov
Laura Speed, 916-323-3121
laura.speed@jud.ca.gov

## Executive Summary

Each year, the Judicial Council authorizes sponsorship of legislation to further key council objectives and establishes priorities for the upcoming legislative year. For the 2015 legislative year, the council's legislative priorities focused on investment in the judicial branch, securing critically needed judgeships, and expanding access to interpreters in civil cases. Governmental Affairs recommends a similar approach for the 2016 legislative year. Staff recommends that the Policy Coordination and Liaison Committee (PCLC) propose the following as Judicial Council legislative priorities in 2016:

1) Advocate for investment in our justice system to avoid further reductions and to preserve access to justice for all Californians, including a method to provide stable and reliable funding, including growth funding; this includes seeking the extension of sunset dates on increased fees implemented in the fiscal year (FY) 2012–2013 budget:

   - $15 or $20 fee for various services, to be distributed to the Trial Court Trust Fund (Sargent Shriver project), expiring on July 1, 2017 (Gov. Code, § 68085.1)
   - $40 probate fee enacted in 2013, expiring on January 1, 2019 (Gov. Code, § 70662)

2) Work with the Administration and Legislature to address the concerns raised in the Governor's veto message of the judgeship bill (SB 229, Roth), advocate for funding of new judgeships, and ratify the authority of the council to convert vacant subordinate judicial officer positions to judgeships in eligible courts;
3) Advocate for a three-branch solution to ensure fairness and efficiency of California's penalty assessment structure;
4) Continued sponsorship of judicial branch operational efficiencies, cost savings and cost recovery measures.

These legislative priorities support the Chief Justice's Access 3D framework for increased access to the courts. Access 3D seeks to ensure access to the justice system through:

- Improved physical access by keeping courts open and operating during hours that benefit the public.
- Increased remote access by increasing the ability of court users to conduct branch business online.
- Enhanced equal access by serving people of all languages, abilities and needs, reflecting California's diversity.
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Additionally, PCLC is recommending that the council delegate to PCLC the authority to take positions or provide comments on behalf of the Judicial Council on proposed legislation, administrative rules or regulations, after evaluating input from council advisory bodies and council staff, and any other input received from the courts, provided that the input is consistent with the council's established policies and precedents.

## Recommendation

Staff recommends that the Policy Coordination and Liaison Committee propose the following as Judicial Council legislative priorities in 2016:

1. Advocate budget stability for the judicial branch to include: (a) sufficient fund balances to allow courts to manage cash flow challenges; (b) a method for stable and reliable funding for courts to address annual cost increases in baseline operations and plan for the future; and (c) sufficient additional resources to allow courts to improve physical access to the courts by keeping courts open, to expand access by increasing the ability of court users to conduct branch business online, and to restore programs and services that were reduced or eliminated in the past few years. This includes seeking the extension of sunset dates on increased fees implemented in the fiscal year (FY) 2012–2013 budget:

    - $15 or $20 fee for various services, to be distributed to the Trial Court Trust Fund (Sargent Shriver project), expiring on July 1, 2017 (Gov. Code, § 68085.1)
    - $40 probate fee enacted in 2013, expiring on January 1, 2019 (Gov. Code, § 70662)

2. Seek additional judgeships and subordinate judicial officer conversions.

    a. Work with the Administration and Legislature to address the concerns raised in the Governor's veto message of the judgeship bill (SB 229, Roth).

    b. Secure funding for critically needed judgeships. Seek funding for 12 of the remaining 50 unfunded judgeships, assigned to the courts with the greatest need based on the most recently approved Judicial Needs Assessment. (See alternatives in the Comments section, below.)

    c. Secure funding for two additional justices in Division Two of the Fourth Appellate District (Riverside/San Bernardino). Seek funding for one additional justice in FY 2016–2017 and the second additional justice in FY 2017–2018.

    d. Advocate, as is done each year, for legislative ratification of the Judicial Council's authority to convert 16 subordinate judicial officer (SJO) positions in eligible courts to judgeships, and sponsor legislation for legislative ratification of the council's authority to convert up to 10 additional SJO positions to judgeships if the conversion will result in an additional judge sitting in a family or juvenile law assignment that was previously presided over by an SJO.

3. Advocate for a three-branch solution to ensure the fairness and efficiency of California's penalty assessment structure. The issue of state penalty assessments is a complex matter that requires the attention of all three branches of government to implement long-term solutions.

4. Continue to sponsor legislation to improve judicial branch operational efficiencies, including cost savings and cost recovery measures. This includes continuing to seek passage of Judicial Council sponsored proposals approved in 2015 but not yet enacted.

5. Delegate to PCLC the authority to take positions or provide comments on behalf of the Judicial Council on proposed legislation, administrative rules or regulations, after evaluating input from council advisory bodies and council staff, and any other input received from the courts, provided that the input is consistent with the council's established policies and precedents.

## Previous Council Action

The council has taken a variety of actions over the past years related to the above recommendations. Recent key actions in these areas follow:

**Budget**: In 2009 and 2010, the council adopted as a key legislative priority for the following year advocating to secure sufficient funding for the judicial branch to allow the courts to meet

their constitutional and statutory obligations and provide appropriate and necessary services to the public. In December 2011, the council adopted as a key legislative priority for 2012 advocating against further budget reductions and for sufficient resources to allow courts to be in a position to reopen closed courts and restore critical staff, programs, and services that were reduced or eliminated in the past several years. A key legislative priority adopted for 2012 also included advocating for a combination of solutions to provide funding restorations for a portion of the funding eliminated from the branch budget since 2008. The combination of solutions included restoring the general fund, implement cost savings and efficiencies through legislation, identifying new revenues, and using existing revenues to restore services to the public and keep courts open.

In 2013, the council adopted a key legislative priority of advocating to achieve budget stability for the judicial branch, including advocating against further budget reductions and for sufficient resources to allow courts to be in a position to reopen closed courthouses; restore court facility construction and maintenance projects; and restore critical staff, programs, and services that were reduced or eliminated in the past four years. In both 2014 and 2015, the council included similar priorities to advocate budget stability for the judicial branch, including advocating for (1) sufficient fund balances allowing courts to manage cash flow challenges; (2) a method for stable and reliable funding for courts to address annual cost increases in baseline operations; and (3) sufficient additional resources to allow courts to improve physical access to the courts by keeping courts open, to expand access by increasing the ability of court users to conduct branch business online, and to restore programs and services that were reduced or eliminated in the past few years.

**Senate Bill 1021 (Stats. 2012, ch. 41)—Public safety.** In FY 2012–2013 temporary fee increases were approved by the Legislature to help address some of the fiscal issues faced by the courts.

Given that the courts are not fully funded, it is necessary to seek an extension on the temporary fee increases. See table 1 below for actual and projected revenues from the Senate Bill 1021 fees.

**Table 1. Sen. Bill 1021 Fee Increases**

| Description | FY 2012-13 Actual | FY 2013-14 Actual | FY 2014-15 Actual | 2015-2016 (10R for Gov's Jan. Budget) Projected |
|---|---|---|---|---|
| $40 increase to first paper filing fees for unlimited civil cases where the amount in dispute is more than $25K (GC 70602.6) | $12,185,260 | $12,655,226 | $11,890,458 | $11,919,231 |
| $40 increase to various probate and family law fees (GC 70602.6) | $7,629,479 | $7,718,618 | $7,744,597 | $7,722,665 |
| $20 increase to various motion fees (GC 70617, GC 70657, GC 70677) | $7,641,569 | $7,332,651 | $7,192,278 | $6,982,622 |
| $450 increase to the complex case fee (GC 70616) | $ 11,253,455 | $11,830,217 | $9,181,206 | $8,507,693 |
| **Total** | **$ 38,709,763** | **$ 39,536,712** | **$36,008,539** | $35,132,812 |

The above fee increases were extended for an additional three years as part of the 2015-2016 budget. The new sunset date is July 1, 2018. The fees expiring after 2015 (see below) were not included in the 2015–2016 budget.

**Fees that will Sunset on 7/1/17 or 1/1/19**

| Description | FY 2012-13 Actual | FY 2013-14 Actual | FY 2014-15 Actual | 2015-2016 (10R for Gov's Jan. Budget) Projected |
|---|---|---|---|---|
| **July 1, 2017 sunset -- Sargent Shriver Project** | | | | |
| $10 increase to GC 70626(a) - miscellaneous post-judgment fee | $8,655,059 | $8,692,493 | $7,960,241 | $7,443,656 |
| $10 increase to GC 70626(b) - miscellaneous post-judgment fee | $253,422 | $315,743 | $378,008 | $480,073 |
| | | | | |
| **January 1, 2019 sunset** | | | | |
| New $40 probate fee (GC 70662) -- effective 1/1/14 | n/a | $57,740 | $121,442 | $121,442 |
| **Total** | **$ 8,908,480** | **$ 9,065,976** | **$8,456,691** | **$8,045,171** |

**Judgeships and SJO conversions:** In 2005, the Judicial Council sponsored Senate Bill 56 (Dunn; Stats. 2006, ch. 390), which authorized the first 50 of the 150 critically needed judgeships. Full funding was provided in the 2007 Budget Act, and judges were appointed to each of the 50 judgeships created by SB 56.

In 2007, the council secured the second set of 50 new judgeships of the 150 critically needed judgeships. (AB 159 [Jones]; Stats 2007, ch. 722.) Initially, funding for the second set of new judgeships would have allowed appointments to begin in June 2008. However, because of budget constraints, the funding was delayed until July 2009. The delay allowed the state to move the fiscal impact from FY 2007–2008 to FY 2009–2010. The Governor included funding for the second set of judgeships in the proposed 2009 Budget Act, but the funding ultimately was made subject to what has been called the “federal stimulus trigger.” This trigger was “pulled,” and the funding for the new judgeships and the various other items made contingent on the trigger was not provided.

In 2008, the council sponsored Senate Bill 1150 (Corbett) to authorize the third set of new judgeships. With the delay of the funding for the second set of judgeships and the state's worsening fiscal condition, SB 1150 was held in the Senate Appropriations Committee. At its October 25, 2008, meeting, the council approved the 2008 update of the Judicial Needs Assessment. At the same time, the council confirmed the need for the Legislature to create the third set of 50 judgeships, completing the initial request for 150 new judgeships, based on the allocation list approved by the Judicial Council in 2007. The council also sponsored Senate Bill 377 (Corbett) in 2009 to authorize the third set of judgeships to become effective when funding was provided for that purpose. That legislation was also held in the Senate Appropriations Committee.

In both 2011 and 2012, the council sponsored AB 1405 to establish the third set of 50 judgeships. Even though the legislation did not provide funding for those positions, the state's continuing fiscal crisis and the fact that the second set of 50 judgeships had yet to be appointed because of lack of funding resulted in the legislation's not moving forward. The Judicial Council chose not to sponsor similar legislation in 2013 and, instead, chose to focus on other critical budgetary concerns.

In 2014, the council sponsored SB 1190 (Jackson), which sought to secure funding for the second set of 50 new judgeships approved in 2007 but not yet funded and to authorize a third set of 50 new judgeships to be allocated consistent with the council's most recent Judicial Needs Assessment. This bill also would have authorized the two additional justices in Division Two of the Fourth Appellate District. The bill was held in the Senate Appropriations Committee.

In 2015, the Judicial Council sponsored SB 229 (Roth) which would have appropriated $5 million for the funding of 12 of the 50 previously authorized judgeships. Unfortunately, Governor Brown vetoed the bill.

With regard to subordinate judicial officer conversions, existing law allows the Judicial Council to convert a total of 162 subordinate judicial officer positions, upon vacancy, to judgeships. The statute caps the number that may be converted each year at 16 and requires the council to seek legislative ratification to exercise its authority to convert positions in any given year. For the past five years, that legislative ratification took the form of language included in the annual budget act.

The council converted the maximum 16 positions in fiscal years 2007–2008, 2008–2009, 2009–2010, 2010–2011, and 2011–2012; 13 in 2012–13; and 11 in 2013–2014. For FY 2014–2015, 9 SJO positions were converted. As of October 20, 2015 there have been no conversion in FY 2015-2016.

Additionally, legislation enacted in 2010 (AB 2763; Stats. 2010, ch. 690) expedites conversions by authorizing up to 10 additional conversions per year, if the conversion results in a judge's being assigned to a family or juvenile law assignment previously presided over by an SJO. This

legislation requires that the ratification for these additional 10 positions be secured through legislation separate from the budget. Each year since 2011, the Judicial Council has sponsored legislation to secure legislative ratification of these additional SJO conversions: Senate Bill 405 (Stats. 2011, ch. 705), Assembly Bill 1403 (Stats. 2013, ch. 510), Assembly Bill 2745 (Stats. 2014, ch. 311). In 2015, the council sponsored SB 1519, which again provided the ratification for the conversion of an additional 10 SJOs.

In total, 117 SJO positions have been converted, leaving only 45 of the total 162 positions that remain to be converted.

**State Penalty Assessments:** The issue of state penalty assessments is a complex matter that requires the attention of all three branches of government to implement a long-term solution.

In May of this year, Senator Kevin de León, President Pro Tempore of the Senate, sent a letter to Martin Hoshino requesting assistance in addressing this issue. In addition, Senator de León introduced SB 404[1], which states the "intent of the Legislature to enact legislation to provide a durable solution to address the issues of equity and efficacy of penalty assessments associated with criminal and traffic base fines." SB 404 is a two-year bill and can be acted on by the Legislature in January.

In June, the council unanimously adopted a new rule that directs courts to allow people who have traffic tickets to appear for arraignment and trial without deposit of bail, unless certain specified exceptions apply. The rule also states that courts must notify traffic defendants of this option in any instructions or other materials provided by the court to the public.

A traffic amnesty program was also enacted as part of the 2015-2016 Budget[2]. An 18-month traffic and non-traffic infraction violation amnesty program that discounts delinquent court-ordered debt and restores suspended driver's licenses for qualified participants commenced October 1, 2015 and continues through March 31, 2017. The program provides discounts of 50% and 80% to qualifying debtors, as specified. The council and staff also worked diligently with the Legislature and the Counties to adopt the guidelines for the traffic amnesty program.

SB 405 (Hertzberg, Stats. 2015, ch. 385) provides that the ability of a defendant to post bail or to pay a fine or civil assessment is not a prerequisite to filing a request that the court vacate the assessment. Provides that the imposition or collection of bail or a civil assessment does not preclude a defendant from scheduling a court hearing on the underlying charge. SB 405 also made some technical changes to the traffic amnesty program.

**Efficiencies:** In 2012, the council approved sponsorship of 17 proposals for trial court operational efficiencies, cost savings, and new revenue measures. An additional 6 efficiency proposals were approved for sponsorship in the first quarter of 2013.

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[1] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB404
[2] SB 85 (Stats. 2015, ch. 26) http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB85

The recommended legislative priorities include continued sponsorship of the remaining proposals for trial court operational efficiencies, cost savings, and new revenue measures approved for sponsorship in 2012–2015, but not yet enacted into law. A list of efficiencies enacted by the Legislature is included in attachment A.

The remaining efficiency proposals, which are more substantial and, consequently, more controversial, have continuously been rejected by the Legislature. In addition, each year the council has approved sponsorship of various efficiency proposals that are not yet enacted into law. The list below includes all previously approved efficiency proposals and staff recommends continued sponsorship of these proposals.

Other efficiency proposals, which are more substantial and, consequently, more controversial, were rejected by the Legislature in both 2013 and 2014.

**Efficiency and Cost-Recovery Proposals for continued sponsorship in 2016:**

- **Sentencing Report Deadlines (AB 1214 Achadjian):** Amends Penal Code section 1203 to require courts to find good cause before continuing a sentencing hearing for failure by the probation department to provide a sentencing report by the required deadlines. *2-year bill pending in the Assembly Public Safety Committee.*
- **Peremptory challenges (SB 213 Block):** Simplifies and reduces peremptory challenges in criminal misdemeanor cases. Would reduce and standardize the number of challenges at five for all misdemeanors, plus two challenges per side when two or more defendants are jointly tried. *Held in Assembly Public Safety Committee.*
- **Retention of court records: driving offenses (AB 897 Gonzalez):** Would correct drafting errors in the rules governing retention of court files regarding certain misdemeanor traffic offenses. Reduces the requirement for courts to retain files regarding violations of Vehicle Code sections 23109 (speed contests) and 23109.5 (sentencing for speed contests) from ten years to five years while increasing the requirement for courts to retain files regarding violations of Vehicle Code section 23103 (reckless driving) from five years to ten years. Ensures that reckless driving convictions are retained on the same ten-year retention schedule as convictions for driving under the influence of alcohol, and clarifies that convictions for speed contests are retained on the same five-year retention schedule as all other misdemeanor Vehicle Code violations. *Bill was gutted and amended to a different subject area.*
- **Annual Court Facilities Construction Fund Report:** Amend Government Code section 70371.8 to allow the annual report on the Immediate and Critical Needs Account of the State Court Facilities Construction Fund to be submitted to the Legislature by November 1 rather than March 1 each year so that actual revenue/expenditure figures can be included rather than projection estimates.
- **Trial by written declaration**: Eliminates the trial de novo option when the defendant in a Vehicle Code violation has not prevailed on his or her trial by written declaration.
- **Monetary sanctions against jurors**: Amend Code of Civil Procedure section 177.5 to add jurors to the list of persons subject to sanctions.

**Efficiency and Cost-Recovery Proposals Rejected by the Legislature in 2013 and 2014**

- **Administrative assessment for maintaining records of convictions under the Vehicle Code:** Clarifies that courts are required to impose the $10 administrative assessment for each conviction of a violation of the Vehicle Code, not just upon a "subsequent" violation.
- **Audits**: Defers 2011 required audit until trial courts and the Judicial Council receive specified funding to cover the cost of the audits.
- **Bail bond reinstatement**: Authorizes courts to charge a $65 administrative fee to reinstate a bail bond after it has been revoked.
- **Collections**: Allows courts to retain and distribute collections rather than transferring collected funds to county treasuries with distribution instructions.
- **Court costs for deferred entry of judgment**: Clarifies that the court can recoup its costs in processing a request or application for diversion or DEJ.
- **Court reporter requirement in non-mandated case types**: Repeals Government Code sections 70045.1, 70045.2, 70045.4, 70045.6, 70045.75, 70045.77, 70045.8, 70045.10, 70046.4, 70050.6, 70056.7, 70059.8, 70059.9, and 70063 to eliminate the unfunded mandate that the enumerated courts (Trinity, Modoc, Merced, Kern, Nevada, El Dorado, Butte, Tehama, Lake, Tuolumne, Monterey, Solano, San Luis Obispo, and Mendocino) use court reporters in specified non-mandated case types.
- **Destruction of records relating to possession or transportation of marijuana**: Eliminates the requirement that courts destroy infraction records relating to possession or transport of marijuana.
- **File search fee for commercial purposes**: Allows courts to charge a $10 fee to commercial enterprises, except media outlets that use the information for media purposes, for any file, name, or information search request.
- **Marijuana possession infractions**: Amends Penal Code section 1000(a) to exclude marijuana possession, per Health and Safety Code section 11357(b), from eligibility for deferred entry of judgment.
- **Notice of mediation**: Amends Family Code section 3176 to eliminate the requirement for service by certified, return receipt postage prepaid mail for notice of mediation and clarifies that the court is responsible for sending the notice.
- **Notice of subsequent DUI**: Repeals Vehicle Code section 23622(c) to eliminate the court's responsibility to provide notification of a subsequent DUI to courts that previously convicted the defendant of a DUI.
- **Penalty Assessments**: Revises and redirects the $7 penalty assessment from court construction funds to State Court Facilities Trust Fund.
- **Preliminary hearing transcripts**: Clarifies that preliminary hearing transcripts must be produced only when a defendant is held to answer the charge of homicide.

**Delegation of Authority:** California Rule of Court 10.12(a)[3] authorizes PCLC to act for the council by:

(1) Taking a position on behalf of the council on pending legislative bills, after evaluating input from the council advisory bodies and the Administrative Office of the Courts, and any other input received from the courts, provided that the position is consistent with the council's established policies and precedents;

(2) Making recommendations to the council on all proposals for council-sponsored legislation and on an annual legislative agenda after evaluating input from council advisory bodies and the Administrative Office of the Courts, and any other input received from the courts; and

(3) Representing the council's position before the Legislature and other bodies or agencies and acting as liaison with other governmental entities, the bar, the media, the judiciary, and the public regarding council-sponsored legislation, pending legislative bills, and the council's legislative positions and agendas.

## Rationale for Recommendation

The mission of the Judicial Council includes providing leadership for improving the quality and advancing the consistent, independent, impartial, and accessible administration of justice. Among the guiding principles underlying this mission is a commitment to meet the needs of the public, which includes reinvestment in our justice system to avoid further reductions and to preserve access to justice, which Californians expect and deserve.

Further, the Chief Justice has proposed a framework to increase public access to the courts. Her vision, entitled Access 3D, combines strategies from the courts—actions that will ensure greater public access—with a reasonable reliance on reinvested funds to the judicial branch. Access 3D is a multidimensional approach to ensuring that Californians have access to the justice system they demand and deserve. The three dimensions of access are:

- Improved physical access, by keeping courts open and operating during hours that benefit the public.
- Increased remote access, by increasing the ability of court users to conduct branch business online.
- Enhanced equal access, by serving people of all languages, abilities, and needs, reflecting California’s diversity.

The key to the success of Access 3D as well as the Blueprint for a Fully Functioning Judicial Branch outlined by the Chief Justice last year is an investment in the courts. The proposed 2016 legislative priorities continue to support the goals of Access 3D.

[3] http://www.courts.ca.gov/cms/rules/index.cfm?title=ten&linkid=rule10_12

**Budget**

State General Fund support for the judicial branch has been reduced significantly, from a high of 56 percent of the total branch budget in FY 2008–2009, to just 40 percent in the current year (FY 2015-2016). Over this same period, to prevent debilitating impacts on public access to justice, user fees and fines were increased; local court fund balances were swept; and statewide project funds, as well as $1.7 billion in courthouse construction funds, were diverted to court operations or to the General Fund. The council has spent considerable time over the past several years addressing the impacts of budget cuts on the branch, redirecting resources to provide much needed support to trial court operations, advocating for new revenues and other permanent solutions, and looking inward at cost savings and efficiencies that could be implemented to allow the courts to serve the public effectively with fewer resources.

The reinvestment in the branch beginning with FY 2013–14 to current year are important steps that enable the courts to begin to address service impacts resulting from past budget cuts.

**Judgeships and SJO conversions**

The council has consistently sponsored legislation in recent years to secure the 150 most critically needed judgeships. In December 2011, the council authorized continued sponsorship of Assembly Bill 1405 (Committee on Judiciary), to establish the third set of 50 new judgeships. In 2013, however, the council chose not to sponsor legislation seeking the additional judgeships and instead chose to focus on other more urgent budgetary concerns. In 2014, the Judicial Council again sponsored legislation (Sen. Bill 1190 [Jackson]) to secure funding for the second set of 50 new judgeships, which was approved in 2007 (Assem. Bill 159 [Jones]; Stats. 2007, ch. 722) but has yet to be funded, and to authorize a third set of 50 new judgeships to be allocated consistent with the council's most recent Judicial Needs Assessment.

In 2015, the council sponsored Sen. Bill 229 (Roth) which appropriated $5 million for an addition 12 judgeships with a limited staff compliment. The Governor vetoed the bill on October 8, 2015.

The Governor's veto message stated "I am aware that the need for judges in many courts is acute – Riverside and San Bernardino are two clear examples. However, before funding any new positions, I intend to work with the Judicial Council to develop a more systemwide approach to balance the workload and the distribution of judgeships around the state."[4]

The council also has annually directed staff to take action to secure legislative ratification of 16 SJO conversions to judgeships, as authorized by Government Code section 69615. In December 2013, the council additionally directed staff to pursue legislation to secure ratification of the authority to convert 10 additional vacant SJO positions to judgeships. Such legislation, similar to the efforts for the 16 conversions, must be pursued annually.

[4] https://www.gov.ca.gov/docs/SB_229_Veto_Message.pdf

To be most effective it is recommended that the council commit to working with the Administration and Legislature to address the concerns raised in the Governor's veto message of the judgeship bill (Sen. Bill 229, Roth) and to advocate for funding of new judgeships, and ratify the authority of the council to convert vacant subordinate judicial officer positions to judgeships in eligible courts;

**State Penalty Assessments:**
All three branches of government took action to address the issue of state penalty assessments, however, a long-term solution has not been implemented. This issue needs to be addressed to ensure the fairness and efficiency of the penalty assessment structure. Commitment from each branch is necessary to address this complex matter in order to find a workable long-term solution.

**Efficiencies and continued sponsorship:**
To address the budget crisis faced by the branch, in April 2012, the Judicial Council approved for sponsorship 17 legislative proposals for trial court operational efficiencies, cost recovery, and new revenue. An additional 6 efficiency proposals were approved for sponsorship in April 2013. Several noncontroversial and relatively minor measures were successful as the following efficiency measures were enacted into law. In addition, other efficiencies have been approved by the Judicial Council as sponsored legislative proposals each year.

**Delegation of Authority:**
California Rule of Court 10.12(a) authorizes PCLC to act for the council by:

(1). Taking a position on behalf of the council on pending legislative bills, after evaluating input from the council advisory bodies and the Administrative Office of the Courts, and any other input received from the courts, provided that the position is consistent with the council's established policies and precedents;
(2). Making recommendations to the council on all proposals for council-sponsored legislation and on an annual legislative agenda after evaluating input from council advisory bodies and the Administrative Office of the Courts, and any other input received from the courts; and
(3). Representing the council's position before the Legislature and other bodies or agencies and acting as liaison with other governmental entities, the bar, the media, the judiciary, and the public regarding council-sponsored legislation, pending legislative bills, and the council's legislative positions and agendas.

The council has delegated to PCLC the authority to act on already introduced legislation. However, often administrative bodies or commissions ask for comments on legislative proposals not yet in the formal legislative process or on proposed rules and regulations that may affect the branch. PCLC is in the appropriate position to analyze and take positions on these actions. The process for taking a position on pending legislation or a proposed regulation would be the same as for a bill—staff would work with the advisory bodies for feedback on a recommended position and then bring the bill to PCLC for a final determination. Delegating

this authority will allow PCLC to be nimble in responding to these proposals and also ensure that the council position is presented in a timely manner.

## Comments, Alternatives Considered, and Policy Implications

The council has consistently sponsored legislation in recent years to secure the most critically needed judgeships. In December 2011, the council authorized continued sponsorship of AB 1405 (Committee on Judiciary) to establish the third set of 50 new judgeships. In 2012, however, the council chose not to sponsor legislation seeking the additional judgeships and instead chose to focus on other more urgent budgetary concerns for 2013.

For 2016, there are multiple options in pursuing funding for the second set of 50 judgeships:

- Seek funding for 12 of the remaining 50 unfunded judgeships, assigned to the courts with the greatest need based on the most recently approved Judicial Needs Assessment. This mirrors the actions taken by the Legislature during budget negotiations for FY 2015-2016 and what was provided for in Sen. Bill 229 9Roth).

- Consider not pursuing funding for this year. The lack of judicial resources, however, is continuing to significantly impair the ability to deliver justice, and failure to move forward will only further deny Californians' access to justice.

- Continue recent requests and pursue funding for the 50 judgeships already authorized. This is the highest-cost option and has not been successful with the Legislature or the Governor.

- Request funding over multiple years.
  - Request the funding of new judgeships over two years, with 25 judgeships being funded each year.
  - Request the funding over three years, with 10 the first year, 15 the second year, and 25 the third year. This is the recommended option.
  - Request the funding over five years, with 10 judgeships funded each year.

**Table 2. Cost of New Judgeships**

| | Year 1 | Year 2 | Year 3 | Year 4 | Year 5 | Ongoing |
|---|---|---|---|---|---|---|
| | (in thousands) | | | | | |
| 50 Judgeships | $ 65,420 | $ 65,837 | $ 65,837 | $ 65,837 | $ 65,837 | $ 65,837 |
| 12 Judgeships[5] | 7,874 | 7,734 | 7,734 | 7,734 | 7,734 | 7,734 |
| 2-Year Phase-In 25/25 | 32,710 | 65,128 | 65,837 | 65,837 | 65,837 | 65,837 |
| 3-Year Phase-In 10/15/25 | 13,084 | 32,593 | 65,128 | 65,837 | 65,837 | 65,837 |
| 5-Year Phase-In | 13,084 | 26,051 | 39,018 | 51,986 | 64,953 | 65,837 |

Initial costs in year one may vary depending on the amount of time it takes to fill each new judgeship position. Additionally, one-time costs are an estimate and may vary from court to court.

## Implementation Requirements, Costs, and Operational Impacts

The public expects and deserves access to the California courts. Providing timely access to high- quality justice is the cornerstone of Access 3D. The key to the success of Access 3D is a robust reinvestment in the courts. Adoption of the proposed legislative priorities will allow Judicial Council staff to support the goals of Access 3D and the Blueprint for reinvesting in our justice system.

## Relevant Strategic Plan Goals and Operational Plan Objectives

The recommendations support many of the council's strategic plan goals, including Goal I, Access, Fairness, and Diversity, by seeking to secure funding to provide access to the courts for all Californians; Goal II, Independence and Accountability, by seeking to secure sufficient judicial branch resources to ensure accessible, safe, efficient, and effective services to the public; and Goal IV, Quality of Justice and Service to the Public, by seeking funding to continue critical programs to meet the needs of court users

## Attachment

1. Attachment A: Efficiency and Cost-Recovery Approved by the Legislature

[5] The cost of the 12 judgeships includes funding for 3.0 FTE and .42 FTE for interpreters; the funding under the other phase in formulas includes the 8.87 FTE.

Efficiency and Cost-Recovery Approved by the Legislature

**Senate Bill 75 (Stats. 2013, ch. 31).** This Courts Trailer Bill of the Budget Act of 2013 approved the following efficiency proposals:

- Increases the statutory fee from $10 to $15 for a clerk mailing service of a claim and order on a defendant in small claims actions.
- Prohibits the Franchise Tax Board (FTB) and the State Controller from conditioning submission of court-ordered debt to the Tax Intercept Program on the court or county providing the defendant's social security number, while still allowing the social security number to be released if FTB believes it would be necessary to provide accurate information.
- Increases the fee from $20 to $50 for exemplification of a record or other paper on file with the court.
- Modifies the process for evaluating the ability of a parent or guardian to reimburse the court for the cost of court-appointed counsel in dependency matters.

**Assembly Bill 619 (Stats. 2013, ch. 452).** This court facilities bill revises the formula for assessing interest and penalties for delinquent payments to the State Court Facilities Construction Fund to conform to the existing statute governing interest and penalties for late payments to the Trial Court Trust Fund by using the Local Agency Investment Fund rate.

**Assembly Bill 648 (Stats. 2013, ch. 454).** This bill on court reporter fee cleanup clarifies language from the prior year that created a new $30 fee for court reporters in civil proceedings lasting one hour or less.

**Assembly Bill 1004 (Stats. 2013, ch. 460).** This bill on electronic signatures on arrest warrants allows magistrates' signatures on arrest warrants to be in the form of digital signatures.

**Assembly Bill 1293 (Stats. 2013, ch. 382).**This bill establishes a new $40 probate fee for filing a request for special notice in certain proceedings.

**Assembly Bill 1352 (Stats. 2013, ch. 274).** This court records retention bill streamlines court records retention provisions.

**Senate Bill 378 (Stats. 2013, ch. 150).** This bill provides that an electronically digitized copy of an official record of conviction is admissible to prove a prior criminal act.

JUDICIAL COUNCIL OF CALIFORNIA

770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

# MEMORANDUM

Date
October 21, 2015

To
Members of the Policy Coordination and Liaison Committee

From
Cory Jasperson, Director
Governmental Affairs

Subject
Proposal for Judicial Council-Sponsored Legislation: Disposition of the San Pedro Courthouse

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Cory Jasperson, 916-323-3121
cory.jasperson@jud.ca.gov

## Executive Summary

On April 9, 2015, the Policy Coordination and Liaison Committee (PCLC) voted to sponsor legislation to declare the existing San Pedro Courthouse surplus to allow for its disposal, contingent on Judicial Council action to declare the Courthouse as surplus for purposes of Government Code sections 70391(c) and 11011 at its April 17, 2015 meeting. PCLC took this action under its delegated authority to act on behalf of the council when "time is of the essence." This report recommends that PCLC approve an alternative that would allow the Judicial Council to retain the proceeds from the disposition of the San Pedro Courthouse for use on construction projects.

## Recommendation

Approve sponsorship of an alternative proposal to authorize the disposition of the San Pedro Courthouse to allow the judicial branch to retain the proceeds to be deposited in the Immediate

and Critical Needs Account of the State Court Facilities Construction Fund established by Senate Bill 1407 (Perata; Stats. 2008, ch. 311).

## Previous Council Action

On April 9, 2015, PCLC voted to sponsor legislation necessary to declare the existing San Pedro Courthouse surplus to allow for its disposal, under the delegated authority to act on behalf of the council when "time is of the essence." Proceeds of sales of surplus property are required to be deposited into the Deficit Recovery Bond Retirement Sinking Fund and then into the Special Fund for Economic Uncertainties (aka the Rainy Day Fund) as required by under Article III, section 9 of the California Constitution.

On April 17, 2015, the Judicial Council declared the San Pedro Courthouse to be surplus property and directed Judicial Council staff to notify the Legislature that the court facility is surplus and take all actions necessary to obtain the Legislature's authorization to dispose of the surplus facility in accordance with Government Code sections 70391(c) and 11011.

## Rationale for Recommendation

The State of California, acting by and through the Judicial Council, holds title to the San Pedro Courthouse, a building of approximately 30,000 square feet with two interior floors, and front and rear parking lots (the Courthouse). The Courthouse is a shared-use facility, with the Judicial Council holding a 95.15 percent equity interest and the County of Los Angeles (the County) the remaining 4.85 percent. The Superior Court of California, County of Los Angeles (the court) closed the Courthouse on June 30, 2013 and has since advised Judicial Council staff that the court does not have a current or any future need for the Courthouse.

The County of Los Angeles has expressed its desire to purchase the Courthouse at its fair market value as soon as possible, and the court supports its sale to the County as surplus property.

After the Judicial Council declared the San Pedro Courthouse surplus property and PCLC approved proposed legislation to provide the legislative authorization required to dispose of the Courthouse as surplus property, Governmental Affairs staff received comments from the Legislature requesting an alternative proposal that would allow the Judicial Council to retain the proceeds from the sale of the San Pedro Courthouse.

This recommendation responds to that request.

## Comments, Alternatives Considered, and Policy Implications

An alternative would be to leave the sponsorship proposal as is, with the proceeds going to the Deficit Recovery Bond Retirement Sinking Fund rather than being retained by the Judicial Council for future use on construction projects.

## Implementation Requirements, Costs, and Operational Impacts

Judicial Council staff time would be required to complete the sale of the courthouse. The branch will benefit from the revenue if allowed to retain the proceeds from the sale of the San Pedro Courthouse.

## Attachments

1. April 9 PCLC report on San Pedro Courthouse

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770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

# MEMORANDUM

Date
March 30, 2015

To
Members of the Policy Coordination and Liaison Committee

From
Laura Speed, Assistant Director, Governmental Affairs

Subject
Proposal for Judicial Council-Sponsored Legislation: Disposition of the San Pedro Courthouse

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Laura Speed, 916-323-3121
laura.speed@jud.ca.gov
Charles Martel, 415-865-4967
charles.martel@jud.ca.gov

## Executive Summary

Government Code section 70391[1] vests in the Judicial Council the authority to dispose of surplus court facilities acquired through the SB 1732 transfer process in compliance with section 11011.

Section 70391 states, in pertinent part:

> The Judicial Council, as the policymaking body for the judicial branch, shall have the following responsibilities and authorities with regard to court facilities, in addition to any other responsibilities or authorities established by law:

[1] All future code references in this report are to the Government Code, unless otherwise noted.

[¶] . . . [¶]

(c) Dispose of surplus court facilities following the transfer of responsibility under Article 3 (commencing with Section 70321), subject to all of the following:

1. If the property was a court facility previously the responsibility of the county, the Judicial Council shall comply with the requirements of Section 11011 . . . .

Section 11011 provides the general statutory framework and process for disposition of surplus state-owned property by the Department of General Services (DGS). That process requires DGS to report annually to the Legislature the real property it has declared excess and to request legislative authorization to dispose of that excess process by sale or otherwise.[2] Carrying that process over to the judicial branch, the first step in disposing of a surplus court facility is for the Judicial Council[3] to declare that property to be surplus and to request legislative authorization to then dispose of it by sale or otherwise.

The State of California, acting by and through the Judicial Council, holds title to the San Pedro Courthouse, a building of approximately 30,000 square feet with two interior floors, and front and rear parking lots (the Courthouse). The Courthouse is a shared-use facility, with the Judicial Council holding a 95.15% equity interest and the County of Los Angeles (the County) the remaining 4.85%. The Superior Court of California, County of Los Angeles (the court) closed the Courthouse on June 30, 2013 and has since advised Judicial Council staff that the court does not have a current or any future need for the Courthouse.

The County has expressed its desire to purchase the Courthouse at its fair market value as soon as possible, and the court supports its sale to the County as surplus property.

On March 20, 2015, the Facilities Policies Working Group (FPWG) reviewed the status of the Courthouse, the County's stated desire to purchase it, and relevant law. The FPWG voted to move the matter to the Judicial Council with the recommendation that the council (1) declare the Courthouse as surplus, (2) direct Judicial Council staff to notify the Legislature that the court facility is surplus and take all actions necessary to obtain the Legislature's authorization to dispose of the surplus facility in accordance with Government Code sections 70391(c) and 11011, (3) authorize sale of the Courthouse to the County, and (4) delegate to the Administrative Director authority to execute a real property sale agreement with the County for the Courthouse

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[2] Section 11011(c).

[3] See California Rule of Court Rule 10.183(c)(2):

> The Judicial Council must determine the following issues concerning transfer of responsibility of court facilities, except in the case of a need for urgent action between meetings of the council, in which case the Executive and Planning Committee is authorized to act under rule 10.11(d).
> [¶] . . . [¶]
> (2) A decision to dispose of a surplus court facility under Government Code section 70391(c).

that is contingent on receipt of legislative authorization. Those recommendations are set for Judicial Council action at its April 17 meeting.

The proposed legislation, a copy of which is attached hereto as Attachment 1, is the legislative authorization required in order to dispose of the Courthouse as surplus property. Because of the County's desire to complete its purchase of the Courthouse as soon as possible, the proposed legislative language is being brought to the Policy Coordination and Liaison Committee (PCLC) before the April 17 Judicial Council meeting to keep the matter moving in as timely a manner as possible, but with the understanding that no further action will be taken with respect to the proposed legislation until after the Judicial Council acts on April 17.

## Recommendation

Contingent on Judicial Council action to declare the Courthouse as surplus for purposes of sections 70391(c) and 11011 at its April 17, 2015 meeting, the Facilities Policies Working Group recommends the Judicial Council sponsor legislation in the form of the proposed legislation attached as Attachment 1 to authorize the disposition of the San Pedro Courthouse as surplus property.

## Previous Council Action

No previous Judicial Council action, but note earlier action by the FPWG described above and pending Judicial Council action on April 17, 2015.

## Rationale for Recommendation

Under existing law, disposition of a court facility declared surplus by the Judicial Council requires authorizing legislation. PCLC's consideration of the proposed authorization language prior to Judicial Council action is needed to support the County's desire to complete its acquisition of the Courthouse as soon as possible.

## Comments, Alternatives Considered, and Policy Implications

No alternatives were considered given that the authorizing legislation is required by statute.

## Implementation Requirements, Costs, and Operational Impacts

Judicial Council staff time would be required to complete the sale of the Courthouse.

## Attachment

1. Text of proposed legislation

**Proposed Legislation**

(_) The Judicial Council may sell, exchange, sell combined with an exchange, or lease for fair market value, upon those terms and conditions as the Judicial Council determines are in the best interests of the state pursuant to Section 70391(c) of the Government Code that certain parcel of real property consisting of approximately 1.8 acres and improvements, known as the San Pedro Courthouse located at 505 South Centre Street, in San Pedro, Los Angeles County Assessor Parcel Number 7455-013-901.

(_) The Judicial Council parcel has both county and state equity. Proceeds received from the disposition of that parcel shall be subject to the reimbursement of county equity as required under applicable state laws.

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770 L Street, Suite 1240 • Sacramento, California 95814-3368
Telephone 916-323-3121 • Fax 916-323-4347 • TDD 415-865-4272

# MEMORANDUM

Date
October 7, 2015

To
Members of the Policy Coordination and Liaison Committee

From
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

Subject
Proposal for Judicial Council-Sponsored Legislation: Juvenile Competency

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Dr. Amy Bacharach, 415-865-7913
amy.bacharach@jud.ca.gov
Mr. Alan Herzfeld, 916-323-3121
alan.herzfeld@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 Family and Juvenile Law Advisory Committee, the Collaborative Justice Courts Advisory Committee, and the Mental Health Issues Implementation Task Force recommend that the Judicial Council sponsor legislation to amend Welfare and Institutions Code section 709.[1] 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.

## Previous Council Action

There has been no previous council action on this recommendation. However, the council received prior reports addressing the need for legislation related to competency 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. In 2011, the council also amended California Rule of Court 5.645(d) to specify the qualifications of experts evaluating minors' competency to participate in juvenile proceedings as required by changes to Welfare and Institutions Code section 709 enacted in 2010. This rule change was effective January 1, 2012.

## Rationale for Recommendation

Competency is currently defined as lacking sufficient present ability to consult with counsel and assist in preparing a defense with a reasonable degree of rational understanding or lacking a rational as well as factual understanding of the nature of the charges or proceedings. 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

[1] The Family and Juvenile Law Advisory Committee, the Collaborative Justice Courts Advisory Committee, and the Mental Health Issues Implementation Task Force formed a join working group in 2014 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. The working group met ten times to discuss appropriate amendments to Welfare and Institutions Code section 709 before sending a draft to the full committees for further discussion and finalization.

competency determinations[2] 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 add language that mirrors that in Penal Code section 1367, which applies to adults.

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, from July 14, 2015, to August 24, 2015, 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. A chart with all comments received and committee responses is attached.

Commentators made remarks about several general topics, including who can declare doubt about a minor's competency, who should have the burden to prove incompetency, and what qualifications evaluators should have. Members of the joint working group met ten times, including three calls following the comment period, and had an extensive discussion regarding these and other topics, discussed below.

The original proposal broadened the number of people who could raise a doubt about a minor's competency to understand the proceedings and assist with the defense. Several commentators expressed concern about allowing anyone to express a doubt about a minor's competency, and some specifically noted that prosecutors should not be able to express a doubt. The working group decided to maintain the language that only the court and the minor's counsel can express doubt as to the minor's competency, while specifying that the court may receive information from any source regarding a minor's competency. This language is in subsection (a)(2). 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 included. 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)).

This proposal clarifies the procedure for the competency hearing and attributes to the minor the burden of establishing by a preponderance of evidence that he or she is incompetent to stand

[2] *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.

trial. This language is in subsections (c) and (g). In the case of *In re R.V.* (May 18, 2015, S212346), the California Supreme Court held that section 709 contains an implied presumption that a minor is competent. The working group looked to this case, as well as Evidence Code sections 605 and 606,[3] and concluded that the burden to prove incompetency is most appropriately the minor's. Nearly all commentators agreed that the burden of proof should be placed with the minor. 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.

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. Subsection (b) specifies the training requirements for an expert, as well as the expert's responsibilities regarding information gathering and report writing for the court. Commentators were split about whether specific training requirements and information gathering direction should be included in the statute or be put into a rule of court. The working group believed that at least brief qualifications should be in the statute. In addition, subsection (b) (4) ensures that statements made to the expert during the 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. 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. The original proposal included dependency court. However, some commentators were concerned that prohibiting these statements in a dependency proceeding may unduly prevent the protection of the minor when abuse or neglect is discovered. The working group thus removed dependency court proceedings from the language.

Commentators also made remarks about diversion programs, services for incompetent violent youth, and who should be responsible for costs associated with remediation services. After extensive discussion, 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. In addition, the working group realized that incompetent violent 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. Finally, the working group 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 while others do not. The working group decided not to address the specific issue of funding.

All members of the Family and Juvenile Law Advisory Committee, the Collaborative Justice Courts Advisory Committee, and the Mental Health Issues Implementation Task Force also

[3] "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."

reviewed the proposal and, after making minor modifications, voted to approve the amended statute.

## Implementation Requirements, Costs, and Operational Impacts

With no statewide procedure in place currently, courts have different criteria and requirements for determining and dealing with juvenile incompetency. Because of this, some courts may spend more time and money on determining competency, while others may spend less than they do under the current county-by-county regime. The proposal could result in additional hearings and expert appointments. However, by clarifying procedures, allowing minors to be remediated in the least restrictive setting, and enforcing timelines for determinations of competency, a minor's stay in juvenile hall may be shortened.

## Relevant Strategic Plan Goals and Operational Plan Objectives

The proposed legislative amendments support the policies underlying Goal I: Access, Fairness, and Diversity. Specifically, this legislation revision supports Goal I, policy 4, which provides that the Judicial Branch should "work to achieve procedural fairness in all types of cases." The proposed legislative amendment also supports the policies of Goal IV: Quality of Justice and Service to the Public. Specifically, these rules support policies 3 and 4, which provide that the judicial branch should "provide services that meet the needs of all court users and that promote cultural sensitivity and a better understanding of court orders, procedures, and processes" and "promote the use of innovative and effective problem-solving programs and practices that are consistent with and support the mission of the judicial branch."

## Attachments

1. The text of the proposed legislation
2. Chart of comments

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 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 lacks 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 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 rules 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.

(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.

(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.

(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.

(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 been 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 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 6026550 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.

| Topic | Commentator | Position | Comment | Committee Response |
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| **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.<br>*Parent*<br>• Who would advise the parent and provide legal advice? The minor is represented by his attorney, but that attorney cannot advise the parent.<br>• Would every parent be given an attorney? Some parents, guardians, siblings do not act in the minor's best interest.<br>• What if the parent and attorney have a conflict?<br>• Would the attorney advise the parent to request that an attorney be provided to them?<br>*Family Members*.<br>• 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?<br>• 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)?<br>*Substantial Evidence*<br>• 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*<br>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:<br><br><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 competency.</u> <u>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</u>. |
| | Christine | AM | Yes [to adding Participants], they probably know more | The advisory bodies have considered all the |

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| | Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department | | than an attorney can determine and they are generally very involved in the youth's life. | comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is:<br><br><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 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</u>. |
| | Roger A. Luebs, Juvenile Judge Superior Court of California, County of Riverside | | *Participants*<br>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:<br><br><u>During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to</u> |

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| | | | 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.<br><br>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.<br><br>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.<br><br>The advisory bodies agree to rewrite the language in the first sentence of (b) to clarify the intent. The language is:<br>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 |

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| | | | | defined above. |
| | 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:<br><br>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.<br><br>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:<br><br>During the pendency of any juvenile proceedings, the court may receive information from any source regarding the minor's ability to |

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| | | | may vary. The language included in § 709(a)(1) adequately addresses this issue. | 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. |
| | Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court | | *Participants*<br>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.<br>• The decision about whether a minor is competent is a legal decision not just a mental health observation.<br>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).]<br>• 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.<br><br>*Confidentiality*<br>The court should not be obligated to invite, or even encouraged to make an inquiry, about a minors' | *Participants*<br>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:<br><br>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.<br><br>*Confidentiality*<br>The advisory bodies believe the rewrite addresses this issue. |


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| | | | competence or mental health from participants in the courtroom. Such an inquiry is fraught with confidentiality and other legal and strategical implications which are necessarily left with minor's counsel.<br><br>*Substantial Evidence*<br>"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.<br>• [If the court finds ~~substantial~~ sufficient evidence that raises a reasonable doubt as to the minor's competency .... ] | *Substantial Evidence*<br>The advisory bodies believe the rewrite addresses this issue. |
| | Sue Burrell, Staff Attorney on behalf of the Youth Law Center | | *Participant*<br>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.<br>• 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.<br>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. | *Participants*<br>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:<br><br>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 |

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| | | | • We are concerned that allowing prosecutors to raise competence as an issue would introduce that kind of subterfuge into juvenile proceedings. The impact 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.<br>Of all the parties involved in juvenile cases, prosecutors are in the worst position to know whether competence should be raised.<br>• 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)<br>• 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.<br>• Part of the ethical duties of defense counsel include interviewing and communicating with parents or guardians, so parents or guardians have a ready | shall suspend the proceedings. |

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| | | | 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 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.<br>• 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.<br><br>*Substantial Evidence*<br>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.<br><br>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.<br><br>Recommendation: Change "substantial" to "sufficient," | *Substantial Evidence*<br>The advisory bodies believe the rewrite addresses this issue. |

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| | | | but omit the proposed addition of "reasonable." | |
| | Margaret Huscher, Supervising Deputy Public Defender III, Law Office of the Public Defender, Shasta County | | 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.<br>• 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.<br><br>*Family Member*<br>Conversely, I have a grave concern that a family member may not understand the legal process and, albeit with good intentions, create legal chaos.<br>• 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.<br>• 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.<br>• 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.<br><br>*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:<br><br><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 competency.</u> <u>Information received or</u> <u>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</u><br><br>The advisory bodies believe the rewrite addresses this issue. |


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| | | | 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 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.<br>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.<br>• 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?<br><br>*Evidentiary Hearing*<br>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.<br><br>As an experienced defense attorney, there is a temptation to declare a doubt when the client is | The advisory bodies believe the rewrite of subdivision (b) addresses this issue to clarify the intent of the subdivision:<br><br>The advisory bodies agree to rewrite the language in the first sentence of (b) to clarify the intent. The language is:<br>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 |

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| | | | 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 concerned that an unfettered stipulation could be abused by attorneys' agreement to avoid difficult clients/cases. | 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. |
| | 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.<br>• 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.<br>• 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:<br><br>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 | | 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: |

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| | 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 |
| | 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.<br>• 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.<br>• 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:<br><br>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<br><br>The advisory bodies acknowledge that youth who commit violent crimes present additional challenges. This legislation clarifies process and procedure. |
| | Adrienne Shilton, | | Yes, [to adding additional participants] CBHDA | The advisory bodies have considered all the |

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| | Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California | | recommends that this should primarily include adults who have been known by the individual youth for at least one year. | comments regarding parties and participants. The advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is:<br><br>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*<br>We strongly object to allowing other parties express a doubt as to a child's competency to assist his or her attorney.<br>• 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.<br>• The child's defender, and the delinquency judge are the two individuals who are in the best position to express a doubt.<br>• 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 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:<br><br>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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| | | | the competency process, and California has no state hospitals with programs for children and adolescents, youth remain in custody without appropriate services for months, with concomitant deterioration in their mental well-being.<br>• 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.<br>• 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).<br><br>*Reasonable Evidence (Substantial/Sufficient)*<br>The proposed changes introduces an unsupported concept of "reasonable" evidence, which we oppose.<br>• 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 | | No, [to adding additional participant] We are strongly opposed to broadening the number of persons who can | The advisory bodies have considered all the comments regarding parties and participants. The |

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| | Director on behalf of the East Bay Children's Law Offices | | raise a doubt beyond the court or minor's counsel.<br>• Other parties or participants in the case will not know the legal issues and factual investigation 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.<br>• 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.<br>• 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."<br><br>Recommendation: Retain the current language of Section 709(a), providing that the minor's counsel or the court may express a doubt. | advisory bodies decided to rewrite subdivision (a)(1) to address all these issues. The new language is:<br><br><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 competency.</u> <u>Information received or</u> <u>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</u> |
| | 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.<br><br>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, | Information only. No comment needed. |

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| | | | 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, the Advisory Committees are taking significant steps to ensure that a more comprehensive evaluation of justice involved juveniles.<br><br>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.<br><br>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.<br>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).<br><br>These amendments are an encouraging step towards ensuring that youth receive adequate services and are not simply ushered through the juvenile justice system | |

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| | | | as a matter of course.<br><br>Studies have shown that that approximately 65%-70% of youth in juvenile detention have a diagnosable mental health disorder. (Skowyra, Kathleen, and Joseph 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?<br>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:<br><br>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:<br><br>During the pendency of any juvenile |

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| | | | | 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 |
| | 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:<br><br>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.<br><br>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. |


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| | | | | The attorney for the minor still has a duty to zealously advocate for his or her client. |
| | Ashleigh E. Aitken, President On behalf of Orange County Bar Association | | Yes, the burden to prove incompetency is best placed upon the minor. | The advisory bodies agree. |
| | 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.<br>• 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 | |

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| | | | 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 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.<br><br>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.<br><br>• 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 | |

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| | | | incompetent and/or whose competency has not been remediated. To establish parallelism in the provisions, subdivision (l) could provide:<br><br>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.*<br><br>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:<br>• 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.) | 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:<br><br>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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| | | | 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 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 | | 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 | 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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| | Member on behalf of the Pacific Juvenile Defender Center | | counsel would then be put in the position of being responsible for proving incompetency, when she did not raise the issue.<br>• The current provisions of Section 709 that permit either defense counsel or the court to raise the issue of 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 | 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<br><br>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.<br><br>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.<br><br>In addition, the threshold requirement of "sufficient evidence, that raises a reasonable doubt" to suspend the | 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:<br><br>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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| | | | 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.<br><br>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." | The advisory bodies believe that the rewrite addresses the issues raised by the commentator. |
| | 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.<br>• Hence, is there a double bind here?<br>• Should incompetence of a minor be the presumptive stance?<br>• 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 | | Responsibility to Prove Incompetency<br>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, | The advisory bodies believe that minor bears the burden of proving incompetency. |

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| | Officers of California | | 2015, S212346). | |
| **Evaluators** | Roger A. Luebs, Juvenile Judge Superior Court of California, County of Riverside | | 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 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 | The advisory bodies believe that evaluator should consult the minor's attorney as the minor's attorney may have additional information about the minor regarding his or her ability to understand the legal process.<br><br>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. 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. 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: 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. |
| | Margaret Huscher, Supervising | | I am very pleased with the idea that the evaluator makes an opinion regarding the type of treatment and whether | The advisory bodies agree with this concept. The advisory bodies rewrote the section to state: |


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| | Deputy Public Defender III, Law Office of the Public Defender, Shasta County | | the minor can attain competency within a reasonable time.<br>• It would be helpful to have the evaluator's opinion regarding "the least restrictive environment" possible is in order to receive remediation services.<br>o 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. | Services shall be provided in the least restrictive environment consistent with public safety. |
| | 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.<br>• 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."<br>• 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 | The advisory bodies agree.<br><br>Information only. No comment needed<br><br>Information only; no comment needed. |

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| | | | 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 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.<br><br>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 | 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 |

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| | | | 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?<br><br>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".]<br>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"?<br><br>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?<br><br>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.<br><br>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? | 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 competency evaluation in a latter juvenile or adult adjudication.<br><br>The advisory bodies added the following language:<br><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><br><br>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. |

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| | | | | The advisory bodies agree. This was a drafting error. The reference should be to subdivision (j), not (d) |
| | Ashleigh E. Aitken, President On behalf of Orange County Bar Association | | 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. |
| | 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.<br>• Likewise, the directions for the process the experts shall follow in conducting the competency evaluation should be statute.<br>• We recommend that this process include conferring with family members and caregivers when possible.<br>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.<br><br>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 | Mention of remediation instructions has been removed. The advisory bodies added the following language:<br><br><u>Service providers and evaluators shall adhere to the standards set forth in this statute and the California Rules of Court.</u> |

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| | | | because our panel of experts is trusted by both sides.<br><br>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 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".<br>• A thorough competency evaluation is costly and time-consuming. We have been advised that repeated competency testing is unreliable and contraindicated.<br>• 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).<br>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. | Information only; no comment needed. |
| | 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 | | The Youth Law Center agrees with the proposed language and with putting it [Evaluator information] into statute. Although we understand the desire not to | The advisory bodies agree. |

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| | Youth Law Center | | 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.<br><br>**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.<br><br>**Recommendation:** We suggest removing the language that could provide excuses for not disclosing expert reports and expected testimony, as follows:<br><br>(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:<br>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, | | Our court likes most of the changes to subdivision (b), | The advisory bodies believe that at least brief |

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| | Executive Officer, Superior Court of California, County of San Diego | | 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.<br><br>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.<br><br>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.<br><br>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. | qualifications should be in the statute.<br><br>No comment needed.<br><br>No comment needed. |
| | Janice Thomas, Ph.D. Alameda County Behavioral Health Care Services | | *Directing experts*<br>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.<br><br>• The requirements therefore benefit the Court, without interfering with the judgment of a trained, | The advisory bodies agree.<br><br>Information only, no comment needed. |

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| | | | 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.<br><br>• 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).<br><br>*Qualifications of experts*<br>Whether expert qualifications and training currently found in rule 5.645 be explicitly put into the statute or left to a rule of court.<br>• 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.<br>• Most importantly, it would seem that these | 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.<br><br>The advisory bodies agree. |


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| | | | 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.<br><br>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).<br>• Juvenile competency evaluations are highly complex and involve considerations beyond those present in adult evaluations.<br>• 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.)<br>• A comprehensive expert assessment based on multiple sources and spanning a longer period of time is necessary to accurately measure a youth's | Information only, no comment needed. |

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| | | | capabilities. (*Ibid*.)<br>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.<br><br>*Forensic Evaluation*<br>• 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.<br><br>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.*<br><br>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 | Information needed. No comment needed<br><br>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. |

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| | | | <u>children, CASA workers, and the minor's delinquency attorney and social worker. A basis of a juvenile competency determination is the capacity to learn.</u> (Grisso, Evaluating Juveniles' Adjudicative Capacities, supra, at pp. 21-22.)<br>• This factor cannot be assessed without retesting for retention at a later date because all that is being 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.<br><br>*Permitting prosecution experts to evaluate the minor*<br>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.<br>• 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<br><br>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. |

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| | Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California | | • CBHDA recommends that it should be in the rule of court; not in the statute.<br><br>• 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. |
| | 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.<br>• 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.<br><br>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 | The advisory bodies agree and have rewritten the statement:<br><br><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><br><br>The advisory bodies do not believe that section |

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| | | | times, the minor should be held in the least restrictive environment. | (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.<br><br>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.<br><br>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.<br>• 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? | The advisory bodies agree. |

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| | | | • 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?<br>• 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.<br><br>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.<br>• 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.<br>• What is the remediation time frame?<br>• 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.<br><br>The advisory bodies did not address a remediation time frame as each minor should be evaluated on a case-by-case basis. The |


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| | | | | 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:<br>• Who is responsible for the cost of remediation, especially where developmentally delayed is concerned.<br>• 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. |
| | Christine Villanis, Deputy Chief Juvenile Services, San Mateo County Probation Department | AM | It does not address who is responsible for providing remediation services<br>• 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 | The advisory bodies rewrote subsection h:<br><br><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</u> |

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| | | | served by the programs and treatment they receive. | a written protocol describing the competency process and a program to ensure that minors who are found incompetent receive appropriate remediation services. |
| | Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of California, Los Angeles County, Juvenile Court | | 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 remediation services through Regional Center as specified in their Individualized Program Plan.]<br>• 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.<br>• 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 | Information only. No comment needed. |

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| | | | 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.<br>• Developmental immaturity is not a recognized mental illness or disorder, and if that is the 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.<br>• 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. | 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.<br><br>Information only. No comment needed |
| | 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.<br>• 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.<br>• Specifically, the Remediation Program is charged with giving an opinion as to the likelihood of the | 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 |

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| | | | 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.<br>• As laid out here, the Remediation Program might have a remediation counselor render an opinion, which is a practice I have seen in at least one other jurisdiction.<br><br>*Definition of Remediation Counselor*<br>• Furthermore, the proposal uses the phrase "remediation counselor" but does not define remediation counselor.<br>• The remediation phase involves not only legal instruction, but also involves case management and treatment.<br>• 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.<br>• 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 | issue and dealt with it by allowing counsel for the minor or people request another evaluation.<br><br>The advisory bodies chose not to define remediation counselor as each program would define the roles and responsibilities of the remediation counselors.<br><br>Information only. No comment needed. |

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| | | | 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.<br>o 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 not have experience in evaluating competency.<br>• A rehabilitation counselor might be defined as someone who instructs the youth in the legal proceedings.<br>o 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.<br>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. | Information only. No comment needed.<br><br>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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| | | | • 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<br>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 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.)<br><br>• 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.)<br>• There is nothing wrong with children who are not competent to stand trial. They are often simply immature. Using the term attainment will avoid | 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, |

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| | | | 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.<br><br>If the term remediation is retained, perhaps it is more accurate and less damaging to state that competency has 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 ... "].)<br><br>• 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.)<br>• 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).<br><br>There are also concerns with the standards at the remediation/attainment hearing. | *Juvenile and Family Court Journal* 23–38. |

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| | 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 ineffective, the minor should be released from custody and placed in the least restrictive environment. | The advisory bodies disagree and feel that a 14-day rule would be burdensome to all parties.<br><br>The advisory bodies agree that minors should be placed in the least restrictive environment and have rewritten:<br><br>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<br>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 | 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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| | | | 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 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. | |


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LEG15-04

**Juvenile Competency** (amend Welfare and Institutions Code section 709)

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

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| **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. |
| | 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". | |



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| | 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.<br>• 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 of the Youth Law Center | | 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 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.<br><br>Recommendation: Add the following sentence to the end of Section 709, subdivision (c): Nothing in this | The advisory bodies agree and has rewritten the section:<br><br>(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. |


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| | | | section shall prohibit the use of such statements at the request of the minor. | |
| | Sue Burrell, Staff Attorney on behalf of the Youth Law Center | | *Remediation and Timelines*<br><br>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.<br><br>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.<br><br><u>Recommendation: Revise the proposed language as follows:</u><br><br>(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 | 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:<br><br><u>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 every 30 calendar days for minors in custody and every 45 calendar days for minors out of custody.</u> |


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| | | | 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. | |
| | 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.<br>• 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.<br>• 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.<br>• 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, § | Information purposes only. No comment needed. |

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| | | | 125812.)<br>• 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).)<br>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).)<br>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. |
| | 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 | The advisory bodies believe that the language as written is permissive. This language appears at the hearing to dismiss the petition. The language is, "<u>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.</u>" The court must make a determination of appropriateness prior to making |

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| | | | when the minor could be cared for adequately without that.<br><br>Recommendation: Change "shall" refer to "may" refer. | 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.<br>• 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.<br>• 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.<br>• 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. | 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 issue of the minor's dangerousness is beyond the scope of the proposal. |
| | Rosemary Lamb | | Dismissal of Petition due to Inability to Remediate | The advisory bodies agree that probation should |

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| | McCool, Deputy Director, Chief Probation Officers of California | | 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. | 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.<br>• 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.<br>• 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 these protocols are developed or what power the juvenile judge has to require agencies to provide the needed services.<br>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 | The advisory bodies agree that the reference to subdivision (m) is an error and should be a reference to subdivision (j).<br><br>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.<br><br>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 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. |


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| | | | 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. | |
| | 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.<br><br>• 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.<br><br>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.<br><br>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.<br><br>Recommendation: Revise the proposed language as follows:<br>(j) The presiding judge of the juvenile court, the County | The advisory bodies agree. |

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| | | | 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 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.<br><br>We have learned that the collaborative process in developing San Francisco's competence protocol included the active participation of the juvenile court, | Information only. No comment needed. |

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| | | | 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 Children's Law Offices | | The proposed language in proposed Section 709(l)(3) appears appropriate. However, this provision would be strengthened by specifying a maximum timeline after which the petition shall be dismissed (perhaps distinguishing felonies from misdemeanors).<br><br>• 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.<br>• The 15 day timeline is consistent with Welf. & Inst. | 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 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 |


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| | | | Code § 737, requiring court review pending execution of a disposition order.<br>Likewise for minors in-custody, the court should review the effect of detention upon the minor in addition to the remediation services.<br><br>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.<br><br>The proposed legislation should re-emphasize this principle and avoid unintentionally promoting in-custody remediation options. | to determine whether the youth has attained competency.<br><br>Information only, no comment needed.<br><br>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, 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 | Information only. No comment needed. |


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| | | | 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?<br><br>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.<br>• If taking it to court upon failure of diversion is not an option, what is the consequence of not being compliant with diversion?<br>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 On behalf of Orange County Bar Association | | 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. |
| | Hon. Michael I. Levanas, Presiding Judge, and Commissioner Robert Leventer, Superior Court of | | 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. | 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 |

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| | California, Los Angeles County, Juvenile Court | | • *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 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.<br><br>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 | 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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| | | | 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.<br>• 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.<br>• 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 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 | |

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| | | | 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.<br>• 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.<br><br>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 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. | |

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| | | | Recommending to add 709 (a)(2) providing for dismissal without formal proceedings**.**<br>*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.*<br><br>*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 Affairs, County Behavioral Health Directors Association of California | | 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 choice, for example. It would appear that treatment programs would also be included in local protocols, if only for intervention purposes. | The advisory bodies agree. |
| | Lexi Howard, | | Yes, a diversion program in the local protocols fulfills | The advisory bodies agree. |


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| | Legislative Director on behalf of the Juvenile Court Judges of California | | the need of the court. | |
| | Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California | | CBHDA's chief concern regarding these recommendations has to do primarily with:<br>• 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.<br>• The programs to restore competency or remediation services will vary wildly from inpatient to an array of outpatient services.<br>o Youth who are violent will more likely require an inpatient service.<br>o These services should be evidence-based and provided in the least restrictive setting.<br>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.<br>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. |
| | Corene Kendrick, PJDC Board Member & Amicus Committee Member on behalf | | The proposed statutory language does not include a mechanism for early dismissal or diversion, which must be included.<br>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 | 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. |

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| | of the Pacific Juvenile Defender Center | | to have different standards.<br>• 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.<br>• We also believe that if remediation services are not being provided, or are ineffective, the child should be released from detention.<br>• 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.<br>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. | |
| | Roger Chan, Executive Director on behalf of the East Bay Children's Law Offices709 | | 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 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 | Mention of a diversion program was eliminated. |

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| | | | 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.<br>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.<br>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 Department of Mental Health | | Does the option of a diversion program in the local protocols fulfill the need of the court<br>• 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 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. | Information only. No comment needed. |
| **Should the** | Christine Villanis, | AM | In some counties, I would think that they would | Information only. No comment needed. |


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| **statute include specific information regarding payment for initial court ordered competency evaluations or continue following current local county based practices?** | Deputy Chief Juvenile Services, San Mateo County Probation Department | | 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. | |
| | 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<br>a) Competency evaluators<br>[*LA uses county funds. Other counties include these funds in the budget of the Public Defender's office, others use DMH funding.]*<br>*b)* Added staff from Probation.<br>*In Los Angeles Probation has assigned special staff to monitor and service competency cases. Of course, these employees require training and supervision.*<br>c) Remediation Instructors.<br>*Probation officers and DMH staff serve as 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.* | Information only. No comment needed. |

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| | | | 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.<br>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.<br>• 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.<br>• Likewise, I cannot imagine our mental health department willingly providing remediation services, especially if they cannot bill Medi-cal or private insurance for the treatment. | Information only. No comment needed. |
| | Lexi Howard, Legislative | | Continue to follow county based practices | The advisory bodies agree. |

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| | Director on behalf of the Juvenile Court Judges of California | | | |
| | 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.<br>• 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. |
| | Angela Igrisan, Mental Health Administrator, on behalf of the | | Should the statute include specific information regarding payment for initial court ordered competency evaluations or continue following current local county based practices? | The advisory bodies decided to not include language on funding and payment. This could be included in a future protocol. |

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

| Topic | Commentator | Position | Comment | Committee Response |
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| | Riverside County Department of Mental Health | | • Yes, this would be much appreciated. None of the county agencies are clear on whose mandate necessitates competency activities. | |
| **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?<br>• What happens if a county is not in compliance with this statute?<br>• 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.<br><br>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. |
| | Hon. John Ellis, Presiding Juvenile Judge on Behalf of Solano | 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 | 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 |

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| | County Superior Court | | 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. | 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.<br>• 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, County of San Diego | | Subdivision (i): The cross-reference to subdivision (d) is a mistake. We believe it would now be (g).<br><br>I agree with subdivision (j)<br><br>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 | The advisory bodies agree. |

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| | | | 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.<br><br>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).<br><br>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:<br>(a) <u>Whenever the court believes that a minor who is subject to any juvenile proceedings is mentally</u> | The advisory bodies agree with the re-write proposed. |

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| | | | 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.<br><br>**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 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, | 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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| | | | and we should be assuring that happens except in the most extreme cases.<br><br>**Recommendation:** Insert the following sentence:<br><br>(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.<br>• 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.<br><br>*Competence v. Competency*<br>We would prefer the use of the term "competence" over "competency" in the statute because that is the term used in the criminal statutes. | Information only. No comment needed |


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| | | | *Restoration v. Remediation*<br>We prefer the term "restoration" over "remediation" because it is a more understandable term by the general populous. | 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. |
| | | | *Case Management Responsibility*<br>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)<br><br>*Funding*<br>Who is responsible for funding these items, which is an important piece that is lacking in the current WIC 709, | 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 |


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| | | | • It is hoped that these areas can be addressed in future legislation after this proposal becomes law. | 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. |
| | | | Our court recommends the language be changed to state:<br><br>"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 results in an inability to assist counsel or understand the nature of the proceedings, including but not limited to</u> | The advisory bodies changed the language in subdivision (a) and believe this rewrite addresses the concern of the commentator. |

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| | | | 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.<br>• Unknown but likely not.<br>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.<br>• A couple of hours training. Beyond that, unknown.<br>How well would this proposal work in courts of different sizes?<br>• Unknown.Local practice, particularly with respect to diversion, may have a greater impact than county size.<br>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 difficult to accurately predict and assess costs and training. | 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.<br><br>The advisory bodies agree.<br><br>The advisory bodies agree.<br><br>Information only. No comment needed. |
| | Amanda K. Roze, | | An overall concern is that the proposal appears to blur | The advisory bodies changed the language in |

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| | Attorney at Law, Sebastopol, CA | | 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.<br><br>• 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. | subdivision (a) and believe this rewrite addresses the concern of the commentator |
| | Adrienne Shilton, Director, Intergovernmental Affairs, County Behavioral Health Directors Association of California | | Does the proposal appropriately address the stated purpose?<br>• CBHDA believes that the proposal does address the stated purpose. | The advisory bodies agree. |

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| | 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.<br><br>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.")<br><br>We therefore propose that the section should read as follows (deletions in red, additions in bold underline, including minor grammatical changes):<br>(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 and appreciate 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 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:<br>(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* | The advisory bodies changed the language in subdivision (a) and believe this rewrite addresses the concern of the commentator |

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| | | | *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. | |
| | 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.<br><br>• 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.<br><br>The advisory bodies discussed, at length, the purpose of the proposal. The advisory bodies wanted to a proposal that was politically viable. |

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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<br>or without addressing the all-important question about how to fund what these youth need and deserve. | The intent of the proposal was never to solve all the issues with incompetent youth, but to provide some directions to the courts and juvenile stakeholders. |

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

# MEMORANDUM

Date
September 4, 2015

To
Members of the Policy Coordination and Liaison Committee

From
Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Subject
Proposal for Judicial Council-Sponsored Legislation (Criminal Justice Realignment): Court Jurisdiction Over and Calculation of Time During Supervision Revocation

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Eve Hershcopf, 415-865-7961
eve.hershcopf@jud.ca.gov
Sharon Reilly, 916-323-3121
sharon.reilly@jud.ca.gov

## Executive Summary

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to amend Penal Code sections 1203.2(a), 1170(h)(5)(B), and 3456(b) to clarify that when supervision has been revoked, summarily or otherwise, the time that elapses during revocation shall not be credited toward any period of supervision. The proposal was developed at the request of criminal law judges to enhance judicial discretion by preserving court jurisdiction to adjudicate revocations of probation, mandatory supervision, and postrelease community supervision.

## Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council sponsor legislation to amend Penal Code sections 1203.2(a), 1170(h)(5)(B), and 3456(b), as follows:

1. Probation: Replace the current tolling provision in Penal Code section 1203.2(a), "The revocation, summary or otherwise, shall serve to toll the running of the period of supervision," with the provision, "Time during revocation, summary or otherwise, shall not be credited toward any period of supervision."

2. Mandatory Supervision: Replace the current tolling provision in Penal Code section 1170(h)(5)(B), "Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision," with the provision, "Time during revocation, summary or otherwise, shall not be credited toward any period of supervision; provided, however, that the defendant shall not remain in custody for a period longer than the term of supervision imposed under this section."

3. Postrelease Community Supervision: Replace the current tolling provision in Penal Code section 3456(b), "Time during which a person on postrelease supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision," with the provision, "Time during revocation, summary or otherwise, shall not be credited toward any period of supervision; provided, however, that the person subject to postrelease supervision shall not remain in custody for a period longer than the term of supervision authorized under this section."

The text of the proposed amendments to Penal Code sections 1203.2(a), 1170(h)(5)(B) and 3456(b) is attached.

## Previous Council Action

Since the enactment of criminal justice realignment in 2011, the Judicial Council has sponsored and supported legislation seeking much needed clarification to that landmark legislation. Most recently, for example, in 2015 the Judicial Council sponsored SB 517 (Monning; Stats. 2015, ch. 61), which provides courts with discretion to order the release of supervised persons from custody, unless otherwise serving a period of flash incarceration, regardless of whether a petition has been filed or a parole hold has been issued. Although courts are generally authorized to determine the custody status of supervised persons during court revocation proceedings, without that legislation courts had no express statutory authority to order the release of persons supervised on post-release community supervision or parole if detained by the supervising agency, particularly if detained on a parole hold. (Penal Code sections 1203.2, 3000.08, 3056, 3455).

Also, in 2015 the Judicial Council supported AB 1156 (Brown, Stats. 2015, ch. 378), which makes numerous clarifying changes to statutes governing criminal justice realignment, including, among others: (1) that in any case where the preimprisonment credit of a person sentenced to the county jail under the 2011 Realignment Act exceeds any sentence imposed, the entire sentence shall be deemed to have been served, except for the remaining portion of mandatory supervision, and the defendant shall not be delivered to the custody of the county correctional administrator; (2) that when a defendant is sentenced to the county jail under the

2011 Realignment Act, the court may, within 120 days of the date of commitment on its own motion, or upon the recommendation of the county correctional administrator, recall the sentence previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the original sentence; (3) that the Judicial Council adopt rules providing criteria regarding a court's decision related to the imposition of the lower, middle, or upper term; and (4) that a person is not subject to prosecution for a nonfelony offense arising out of a violation in the California Vehicle Code, with the exception of Driving under the Influence (DUI) that is pending against him or her at the time of his or her commitment to a county jail under the 2011 Realignment Act. (Penal Code sections 1170, 1170.3, 4852.01, 4852.03, 4852.04 4852.06, 4852.1, 4852.21; Vehicle Code section 41500). While the council did not sponsor AB 1156, the council approved a proposal that also would have addressed the ambiguity in the law relating to recalling felony jail sentences.

## Rationale for Recommendation

Under criminal justice realignment, courts are required to conduct revocation proceedings for four distinct categories of supervision—probation, mandatory supervision, postrelease community supervision, and parole.[1] Revocation proceedings for all categories are governed by the longstanding procedures in Penal Code section 1203.2. The tolling provision in Penal Code section 1203.2(a) currently states: "The revocation, summary or otherwise, shall serve to toll the running of the period of supervision."

In *People v. Leiva* (2013) 56 Cal 4th 498, the California Supreme Court held when probation has been summarily revoked the tolling provision in Penal Code section 1203.2(a) preserves the court's jurisdiction to adjudicate only those violations that occurred within the original term of probation. (*Id.* at pp. 515–516.)[2] As a result, if no violation is later found to have occurred during the original probation period, supervision will be deemed to have terminated *even if* the defendant never complied with the terms of supervision or violated the terms while supervision was revoked but after the original probation period had expired. (*Id.*) The tolling provision in Penal Code section 1203.2(a) limits judicial discretion and, once physical custody over the probationer has been regained, restricts courts in determining the consequences that should flow from conduct the supervised person has committed after expiration of the original probation term. (*Id.* at p. 519.)

[1] Penal Code section 3000.08, the provision governing parole revocation, does not include a tolling provision.
[2] In *Leiva*, the defendant was deported immediately upon his release from custody; when he failed to report to the probation department his probation was summarily revoked and a warrant issued. Seven years later the court regained physical custody when the defendant was arrested on the warrant. The trial court determined due to the defendant's deportation there was no willful violation of the original term of probation but, based on subsequent violations, revoked probation and committed the defendant to state prison. On review, the Supreme Court concluded summary revocation of probation under Penal Code section 1203.2(a) preserves the trial court's authority solely to adjudicate a claim that the defendant violated a condition of probation during the probationary period.

Similar concerns regarding court jurisdiction and the effect of tolling provisions arise in two other statutes that address the calculation of time during a period of supervision revocation: Penal Code section 1170(h)(5)(B) (mandatory supervision) and Penal Code section 3456(b) (postrelease community supervision). The tolling provisions in both statutes[3] lack clarity and suspend the running of the period of supervision only in cases where the supervised person has absconded; they are inapplicable to other types of cases, such as *Leiva*, where the defendant was deported.

The recommended amendments for all three supervision provisions would clarify that elapsed time during revocation shall not be credited toward any period of supervision; that is, if a court summarily revokes supervision, the proposed revisions would preserve court authority to determine the consequences of all alleged supervision violations, both those that occurred during the original supervision term and those that occurred after expiration of the original term. This reformulation of the tolling provisions would enable the court, after regaining physical custody of the supervised person, to ensure compliance with court-imposed terms and conditions of supervised release.

The minor differences in the proposed language for the three provisions reflect the statutory distinctions between probation, mandatory supervision, and postrelease community supervision. The proposed revisions for mandatory supervision and postrelease community supervision are consistent with the structure of the controlling statutes,[4] which prohibit holding the supervised person in custody for a period longer than the supervision term originally imposed by the sentencing court (for mandatory supervision), or authorized by statute (for postrelease community supervision).

## Comments, Alternatives Considered, and Policy Implications

The proposal was circulated for comment from April 17 to June 17, 2015. A total of seven comments was received; of those, three agreed with the proposed changes, two agreed if modified, and two opposed the proposed revisions. In addition, the Trial Court Presiding Judges Advisory Committee Joint Legislation Subcommittee took a support position after reviewing the legislative proposal.

A chart with all comments received and committee responses is attached.

### Notable comments and alternatives considered

As originally circulated, the proposed revisions for all three forms of supervision were identical; in place of the current tolling provisions, the proposal substituted, “Time during revocation,

[3] For mandatory supervision, Penal Code section 1170(h)(5)(B):“Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.” For postrelease community supervision, Penal Code section 3456(b): “Time during which a person on postrelease supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision.”
[4] Penal Code section 1170(h)(5)(A)-(B) (mandatory supervision); Penal Code section 3451(a) (postrelease community supervision.

summary or otherwise, shall not be credited toward any period of supervision." Two commentators noted that, unlike probation, the statutes that govern mandatory supervision and postrelease community supervision include limits on the term that the supervised person can serve. For postrelease community supervision, the maximum term authorized by statute is three years following release from custody;[5] for mandatory supervision, the term imposed for the offense by the sentencing court is the maximum the supervised person can be required to serve.[6] Following summary revocation and a finding that the defendant violated supervision, the court cannot extend supervision beyond these maximum authorized terms.

To address the issues raised by these commentators and account for the statutory differences between the various forms of supervision, the committee added a clarifying proviso to the proposed tolling provision for mandatory supervision, to read: "Time during revocation, summary or otherwise, shall not be credited toward any period of supervision*; provided, however, that the defendant shall not remain in custody for a period longer than the term of supervision imposed under this section."* The committee added a similar clarifying proviso to the proposed tolling provision for postrelease community supervision, to read: "Time during revocation, summary or otherwise, shall not be credited toward any period of supervision*; provided, however, that the person subject to postrelease supervision shall not remain in custody for a period longer than the term of supervision authorized under this section."*

## Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts are expected.

## Attachments

1. Proposed amendments to Penal Code sections 1203.2(a),1170(h)(5)(B), and 34565(b)
2. Comments chart

[5] Penal Code section 3451(a).
[6] Penal Code section 1170(a)(3);(h)(5)(A)-(B)

Penal Code sections 1203.2(a),1170(h)(5)(B), and 34565(b) would be amended, effective January 1, 2017, to read:

**§ 1203.2(a)**

(a) At any time during the period of supervision of a person (1) released on probation under the care of a probation officer pursuant to this chapter, (2) released on conditional sentence or summary probation not under the care of a probation officer, (3) placed on mandatory supervision pursuant to subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, (4) subject to revocation of postrelease community supervision pursuant to Section 3455, or (5) subject to revocation of parole supervision pursuant to Section 3000.08, if any probation officer, parole officer, or peace officer has probable cause to believe that the supervised person is violating any term or condition of his or her supervision, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the supervised person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. However, the court shall not terminate parole pursuant to this section. Supervision shall not be revoked for failure of a person to make restitution imposed as a condition of supervision unless the court determines that the defendant has willfully failed to pay and has the ability to pay. Restitution shall be consistent with a person's ability to pay. ~~The revocation, summary or otherwise, shall serve to toll the running of the period of supervision.~~ Time during revocation, summary or otherwise, shall not be credited toward any period of supervision.

**§ 1170(h)**

(5) (A) Unless the court finds, in the interest of justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion. (B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. ~~Any time period which is suspended because a person has absconded shall not be credited toward the period of supervision.~~ Time during revocation, summary or otherwise, shall not be credited

toward any period of supervision; provided, however, that the defendant shall not remain in custody for a period longer than the term of supervision imposed under this section.

**§ 3456**

(a) The county agency responsible for postrelease supervision, as established by the county board of supervisors pursuant to subdivision (a) of Section 3451, shall maintain postrelease supervision over a person under postrelease supervision pursuant to this title until one of the following events occurs:

(1) The person has been subject to postrelease supervision pursuant to this title for three years at which time the offender shall be immediately discharged from postrelease supervision.

(2) Any person on postrelease supervision for six consecutive months with no violations of his or her conditions of postrelease supervision that result in a custodial sanction may be considered for immediate discharge by the supervising county.

(3) The person who has been on postrelease supervision continuously for one year with no violations of his or her conditions of postrelease supervision that result in a custodial sanction shall be discharged from supervision within 30 days.

(4) Jurisdiction over the person has been terminated by operation of law.

(5) Jurisdiction is transferred to another supervising county agency.

(6) Jurisdiction is terminated by the revocation hearing officer upon a petition to revoke and terminate supervision by the supervising county agency.

(b) ~~Time during which a person on postrelease supervision is suspended because the person has absconded shall not be credited toward any period of postrelease supervision.~~ Time during revocation, summary or otherwise, shall not be credited toward any period of supervision; provided, however, that the person subject to postrelease supervision shall not remain in custody for a period longer than the term of supervision authorized under this section.

## LEG15-01
## Criminal Justice Realignment: Court Jurisdiction Over and Calculation of Time During Supervision Revocation
(Amend Penal Code sections 1203.2(a), 1170(h)(5)(B), 3456(b))
All comments are verbatim unless indicated by an asterisk (*).

| | Commentator | Position | Comment | Advisory Committee Response |
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| 1. | Azar Elihu<br>Criminal Defense Attorney | AM | Court should retain jurisdiction during supervision; and supervision should not be extended when it's revoked and reinstated, as revoked probations are often reinstated with the same terms and conditions without extension. | Although courts have authority to reinstate probation with the same terms and conditions, if the probationer is not in custody during a period when supervision has been revoked, the probationer should not receive credit on the probation term for the time that the probationer is on revoked status. |
| 2. | Orange County Bar Association<br>Ashleigh Aitken, President | A | (no comments were provided) | No response required. |
| 3. | Orange County Public Defender<br>Mark S. Brown, Assistant Public Defender | N | The Orange County Public Defender disagrees with the committee's proposed amendments to sections 1203.2, 1170(h) and 3456 of the Penal Code. The stated goal of "harmonizing the statutory provisions to promote uniformity" is not appropriate because probationary supervision, mandatory supervision, and postrelease community supervision are not intended to be uniform – they are fundamentally different. In addition, the proposed amendments directly contravene the holdings in *People v. Leiva* (2013) 56 Cal.4th 498, are contrary to existing statutes, and raise serious constitutional concerns.<br><br><u>*Persons on Probation Supervision*</u><br>It is unclear from the "Invitation to Comment" whether the committee intended to overrule the holdings in *Leiva*. However, the proposed amendments to section 1203.2 will directly overrule the holdings in *Leiva*.<br><br>First, the *Leiva* court held the current tolling | • It is desirable to have the tolling provisions of Penal Code sections 1203.2, 1170(h) and 3456 consistent to the extent possible, while recognizing the differences between probation supervision, mandatory supervision, and postrelease community supervision. The committee has revised the proposed tolling provisions for mandatory supervision and postrelease community supervision to account for the statutory differences between these types of supervision.<br><br>• In *People v. Leiva* (2013) 56 Cal 4th 498, the California Supreme Court held that, when probation has been summarily revoked, the tolling provision in Penal Code section 1203.2(a) preserves the court's jurisdiction to adjudicate only those violations that occurred within the original term of probation. (*Id.* at pp. 515–516.) As a result, if no violation is |

| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | provision in section 1203.2 is intended "to preserve the trial court's jurisdiction to determine whether a defendant violated probation during the court-imposed period of probation." (*Leiva* at page 518.) In reaching this holding, the *Leiva* court noted: "[I]t is reasonable to conclude that the Legislature intended to reemphasize the following objectives by enacting the tolling provision. First, the provision would ensure that, once probation was summarily revoked, the prosecution would have a fair opportunity to prove that a defendant violated probation during the probationary period even when a formal probation violation hearing could not be held before probation expired. Second, the provision would ensure a defendant's due process right to a formal hearing in which to litigate the validity of an allegation that he violated the conditions of probation during the probationary period whenever such a formal hearing could be held." (*Leiva* at page 515.)<br><br>The *Leiva* court further held the current tolling provision in section 1203.2 was not intended to "[extend] indefinitely the terms and conditions of probation until a formal probation violation hearing could be held." (*Leiva* at page 514.) Yet, the committee's proposed amendment to section 1203.2 does just that.<br><br>The example given on pages 516-517 by the | found to have occurred during the original probation period, supervision will terminate even if the defendant never complied with the terms of supervision or violated those terms while supervision was revoked but after the original probation period had expired. (*Id.*) The tolling provision in Penal Code section 1203.2(a) limits the court's jurisdiction and, once physical custody over the probationer has been regained, restricts courts in determining the consequences that should flow from conduct the supervised person has committed in the interim, following expiration of the original probation term. (*Id.* at p. 519.) The proposed revision to Penal Code section 1203.2 is designed to provide courts with jurisdiction and discretion to determine those consequences. |

| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | *Leiva* court is illustrative of the unreasonable consequences that will flow as a result of the committee's proposed amendment to section 1203.2: "Consider a defendant who is placed on three years' probation, which is summarily revoked during this time period for an alleged but mistaken claim of violation. Twenty years later, the defendant is stopped for a traffic violation, and a warrant check reveals the bench warrant from the summary revocation. The basis of the summary revocation is not sound." But if the proposed amendment to section 1203.2 is adopted, the defendant's probationary period will never end until a formal revocation hearing takes place. Such a consequence "raises serious due process concerns because… a defendant's probationary term [will be extended] indefinitely without notice or a hearing as to the propriety of such an increase." (*Leiva* at page 509.) Furthermore, such a consequence "is contrary to our statutes that authorize the courts to grant probation for a period not to exceed a specified time (§§ 1203a, 1203.1) and contrary to language in section 1203.2 that gives the court authority, when an order setting aside the judgment or the revocation of probation, or both, is made after the expiration of the probationary period, to again place the person on probation for the same period of time 'as it could have done immediately following conviction.' (§ 1203.2, subd. (e).)" (*Leiva* at page 517.) | |

## LEG15-01

## Criminal Justice Realignment: Court Jurisdiction Over and Calculation of Time During Supervision Revocation

(Amend Penal Code sections 1203.2(a), 1170(h)(5)(B), 3456(b))

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

| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | *Persons on Mandatory Supervision*<br>Unlike a person on probation, a person on mandatory supervision had a sentence imposed. A portion of the sentence is served in county jail and the remaining portion is served on mandatory supervision. If the mandatory supervision is revoked, the person will serve the balance of his sentence whether or not his mandatory supervision has been revoked, summarily or otherwise. Therefore, the proposed amendments to sections 1203.2 and 1170(h) are unnecessary. In addition, the amendments raise serious constitutional concerns because a supervisee's sentence will be extended.<br><br>To illustrate that the committee's proposed amendments to sections 1203.2 and 1170(h) are unnecessary, consider the following example: A defendant is sentenced to 2 years, one year in county jail and one year on mandatory supervision. Five days before the end of his mandatory supervision term, the defendant is arrested and his mandatory supervision is summarily revoked for a violation. Five days later[1] he is released because he has served his full 2 year sentence, including his full mandatory supervision term. As the example demonstrates, the proposed amendments to sections 1203.2 and 1170(h) are unnecessary because the defendant served | • A person serving the mandatory supervision portion of a Penal Code section 1170(h) sentence cannot be held in custody for a period longer than the term of supervision imposed by the sentencing court under Penal Code section 1170(h). To address this restriction, the committee has added a clarifying provision, to read:<br>"Time during revocation, summary or otherwise, shall not be credited toward any period of supervision*; provided, however, that the defendant shall not remain in custody for a period longer than the term of supervision imposed under this section.*" |

| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | his full sentence.<br><br>To illustrate the unreasonable consequences that will flow as a result of the committee's proposed amendments to sections 1203.2 and 1170(h), consider the following example: A defendant is sentenced to 2 years, one year in county jail and one year on mandatory supervision. Five days before the end of his mandatory supervision term, the defendant is arrested and his mandatory supervision revoked for an alleged but mistaken claim of violation. Instead of being released 5 days after his arrest, the defendant will not be released until after his formal revocation hearing, which takes place on day 45. Thus, the defendant's sentence was unlawfully increased by 40 days.[2] Such a consequence "raises serious due process concerns." (See, for example, *Leiva* at page 509.)<br><br><u>*Persons on Postrelease Community Supervision*</u><br>Unlike a person on probation or mandatory supervision, a person on postrelease community supervision (PCS) had a sentence imposed, served his full sentence in prison, and was released on PCS. If the PCS is revoked, the person will serve his full PCS sentence whether or not his PCS has been revoked, summarily or otherwise. Therefore, the proposed amendments to sections 1203.2 and 3456 are unnecessary. In addition, the | • A person serving a period of postrelease community supervision cannot be held in custody for a period longer than the mandated term of supervision as set forth in Penal Code section 3456. To address this restriction, the committee has added a clarifying provision, to read:<br><u>"Time during revocation, summary or otherwise, shall not be credited toward any period of supervision*; provided, however, that the person subject to postrelease supervision shall not remain in custody for a period*</u> |

| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | proposed amendments are contrary to existing statutes and raise serious constitutional concerns.<br><br>To illustrate that the committee's proposed amendments to sections 1203.2 and 3456 are unnecessary, consider the following example: A defendant is released from prison and placed on PCS for 3 years. Five days before the end of his PCS term, the defendant is arrested and his PCS revoked for a violation. Five days later he is released because he has served his full PCS term of 3 years. As the example demonstrates, the proposed amendments to sections 1203.2 and 3456 are unnecessary because the defendant served his full PCS term of 3 years.<br><br>To illustrate the unreasonable consequences that will flow as a result of the committee's proposed amendments to sections 1203.2 and 3456, consider the following example: A defendant is released from prison and placed on PCS for 3 years. Five days before the end of his PCS term, the defendant is arrested and his PCS revoked for an alleged but mistaken claim of violation. Instead of being released 5 days after his arrest, the defendant will not be released until after his formal revocation hearing, which takes place on day 45. Thus, the defendant's PCS term was unlawfully extended by 40 days.[3] Such a consequence "raises serious due | *longer than the term of supervision authorized under this section."* |

| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | process concerns." (See, for example, *Leiva* at page 509.) Furthermore, such a consequence is contrary to section 3456, subsection (a)(1), which mandates that PCS immediately end after the defendant has been on PCS for three years.<br><br>_____<br>[1] The defendant may actually be released after 4 days if he is awarded conduct credits pursuant to section 4019.<br><br>[2] Of course the defendant can mitigate the due process violation by waiving his right to a revocation hearing and admitting a violation he did not commit. This resolution of course raises different serious due process concerns. (See, for example, *Leiva* at page 509.)<br><br>[3] Of course the defendant can mitigate the due process violation by waiving his right to a revocation hearing and admitting a violation he did not commit. This resolution of course raises different serious due process concerns. (See, for example, *Leiva* at page 509.) | |
| 4. | Santa Barbara County Probation Department<br>Kimberly Shean, Manager | AM | As the Post Release Community Supervision population offers jurisdictional issues for the court when compared to standard probation, the term 'Revocation' requires further definition. One option would be to define as the date on which the Court authorizes a warrant or finds probable cause pursuant to 3455 (b)(1) PC. | • Postrelease community supervision involves greater complexity than probation because of the ability of the supervising agency to impose "flash incarceration" as an intermediate sanction. Nevertheless, only a court can revoke supervision. When the court summarily revokes postrelease community |

## LEG15-01
## Criminal Justice Realignment: Court Jurisdiction Over and Calculation of Time During Supervision Revocation
(Amend Penal Code sections 1203.2(a), 1170(h)(5)(B), 3456(b))
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| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | 'Reinstatement' also requires distinction and definition for the following two events-<br><br>• In the event a warrant has been issued "reinstatement' is defined as the date the offender is arrested on the warrant if the matter is handled pursuant to 3454(c) PC (flash) or when the Court reinstates supervision under 3455(a)(1) PC (revo).<br><br>• 'Reinstatement' in the event a revocation has been filed is defined as the date the Court reinstates supervision under 3455(a)(1) PC or the date the offender waives his/her right to a hearing and agrees to the recommended disposition. | supervision in response to the filing of a petition for revocation, the person under supervision may or may not be in custody; if in custody, the court can award custody credits when making a final determination whether to revoke supervision. If the supervised person has absconded or is otherwise not in custody, the time between the summary revocation by the court and the court's final determination on the revocation petition should not count toward the person's period of supervision, whether or not the court ultimately "reinstates" the person on supervision.<br>• Also see related response to commentator #3, above. |
| 5. | Superior Court of Los Angeles County | A | (no comments were provided) | No response required. |
| 6. | Superior Court of San Diego County<br>by Mike Roddy<br>Court Executive Officer | A | (no comments were provided) | No response required. |
| 7. | Paul Wellencamp<br>Attorney | N | In Alameda County, it's the Court's uniform policy to grant probation for the maximum term possible and to maintain a defendant on probation as long as possible. This enables law enforcement and the courts to search, incarcerate, and try defendants, and to manage a crowded court calendar, without the inefficiencies posed by certain constitutional rights. As a consequence, prior to the Supreme Court's decision, defendants often remained on | See related response to commentator #3, above. |

| | Commentator | Position | Comment | Advisory Committee Response |
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| | | | probation for very long terms. This was compounded by the tendency of some judges to leave probation in revoked status for extended periods of time -- even though the revocation had been resolved, the defendant released from custody and progress reports ongoing.<br><br>Because probation revocations, especially in misdemeanors, are frequent, it was very difficult to determine when probation expired. Doing so required careful examination of the court file. Frequently inaccurate clerks minutes and data entry made determining whether a defendant was on probation even more complicated. Consequently, many defendants were brought to court and held in custody in cases where probation had, in fact, expired.<br><br>Here in Alameda County, where probation is used to eliminate constitutional protections for as long a term as possible, the Court's decision introduced much-needed certainty and fairness into being on probation -- and still authorized probation terms of many years. This proposal permits our Court to return to the abuses of the past. It should not be adopted. | |

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

# MEMORANDUM

Date
September 18, 2015

To
Members of the Policy Coordination and Liaison Committee

From
Court Interpreters Advisory Panel
Hon. Steven K. Austin, Chair

Subject
Proposal for Judicial Council-Sponsored Legislation: Provisional Qualification of American Sign Language Interpreters

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Anne Marx, 415-865-7690
anne.marx@jud.ca.gov
Alan Herzfeld, 916-323-3121
alan.herzfeld@jud.ca.gov

## Executive Summary

The Court Interpreters Advisory Panel (CIAP) recommends that the Judicial Council sponsor legislation to amend Evidence Code section 754 to incorporate language allowing for provisional qualification of American Sign Language (ASL) interpreters. This proposal was developed at the request of courts to create flexibility for the courts in securing services of ASL interpreters. Its enactment will result in revisions to Judicial Council forms dealing with the use of interpreters, which will provide guidance to court staff when court certified ASL interpreters are not available.

## Recommendation

CIAP recommends that the Judicial Council sponsor legislation to amend Evidence Code section 754 as follows:



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

1. Update and clarify unnecessary, inaccurate, or obsolete language, including replacing all references to the term “hearing impaired” with “deaf or hard of hearing”
2. Simplify language regarding the process for selecting the ASL testing entity, and tie the process to the requirements of the California Rules of Court.
3. Add language requiring ASL court interpreters to enroll with the Judicial Council, in order to become California court certified, and not just to hold the requisite certification, while eliminating the need for local courts to maintain their own rosters.
4. Add language expressly allowing courts to use provisionally qualified ASL interpreters when a California court certified interpreter is not available. Courts will be able to provisionally qualify ASL interpreters according to the same rules and guidelines which govern use of provisionally qualified spoken language interpreters.

The text of the proposed amendment to Evidence Code section 754 is attached.

## Previous Council Action

In April 2013, PCLC first approved that proposed changes to Evidence Code section 754 go out for public comment. The council has taken no previous action related to this proposal.

## Rationale for Recommendation

Court certified and registered spoken language interpreters are governed by a body of state laws which are different from those which govern American Sign Language (ASL) court certified interpreters. ASL interpreters are regulated by California Evidence Code section 754. One of the differences between ASL interpreters and spoken language interpreters is that there is an established process in place for courts to provisionally qualify spoken language interpreters when no certified or registered interpreter is available. There is currently no method to do this for American Sign Language interpreters. As a result of shortages in court certified ASL interpreters, courts are regularly forced to use interpreters who are not court certified.

Without a procedure by which to provisionally qualify ASL interpreters, courts are left to determine how to fill a need in the second most used language in the state. The proposed changes will update Evidence Code section 754 and will provide a process allowing for provisional qualification of ASL interpreters. This will standardize the process statewide, and assure courts appropriately consider an interpreter’s qualifications when determining whether to appoint a non-court certified interpreter when no certified interpreter is available. The proposal brings the process for provisionally qualifying ASL interpreters in line with the process for spoken language interpreters.

Beginning in 2011, as a result of shortages of ASL court certified interpreters in California, the Court Interpreters Advisory Panel’s American Sign Language Subcommittee began reviewing possible changes to section 754, including adding language to allow for provisional qualification. In June 2013, the proposed changes went out for public comment. After receiving these comments, staff and CIAP representatives have engaged in direct outreach and education at the

local and national level to review the proposed changes, including explaining that upon the adoption of any statutory changes, rules of court and forms would be changed to effectuate the statutory change.

CIAP continues to support the need to amend section 754 to provide a clear, uniform process to provisionally qualify non-court certified ASL interpreters when court certified ASL interpreters are not available.

## Comments, Alternatives Considered, and Policy Implications

### Comments and Policy Implications

Comments were received from 27 commentators, including two court representatives, eight community organizations or businesses, two members of the deaf or hard of hearing communities, nine interpreters and six other members of the public. The comments can be categorized into the following five themes:

1) There are sufficient numbers of court certified ASL interpreters to interpret whenever needed by the courts and so only court certified interpreters should be used.
2) The proposal lowers the standards for ASL interpreters from what currently exists in California courts. Courts should not be able to provisionally qualify non-court certified interpreters and do not have the skill set to do so.
3) Only Specialist Certificate Legal (SC:L) interpreters, as certified by the Registry of Interpreters for the Deaf (RID), are currently working in the courts and only court certified interpreters should be allowed to work in court.
4) California should support the training required to become court certified in order to increase the pool of court certified interpreters.
5) Courts need flexibility when they are not able to find a court certified ASL interpreter and the current law does not provide them with any flexibility.

CIAP reviewed all the concerns raised by commentators, and provides the following responses to the generalized issues raised:

**1) There is a shortage of court certified ASL interpreters in the California Courts so courts should not be restricted to only using court certified ASL interpreters**

ASL is currently the second most used language in the courts and there are approximately 35 court certified interpreters who are active in the courts.[1] ASL court users require approximately 7500 service days a year of interpreter time. There are not sufficient numbers of court certified ASL interpreters to meet the need.

[1] While there are 55 ASL certified court interpreters on the Master List, some of them maintain the certification but do not regularly work in the courts.

If courts only hired court certified interpreters there would be very long delays for deaf court users, which is unacceptable for the courts and would be unfair to deaf court users. Courts have been placed in the position of using non-court certified interpreters to address the need, but do not have clear statutory authority nor direction to do so. The proposed changes to section 754 will raise standards by providing courts with clear, uniform direction about how to handle a situation when one of the 35 active court certified interpreters is not available. This will ensure that courts appropriately consider whether a non-court certified interpreter is qualified to provide the interpretation in each case, and create accountability for a process which out of necessity has, until now, been unregulated.

2) **The proposed changes raise standards by formalizing the process and creating accountability when courts cannot secure a California Court Certified ASL Interpreter for a court event.**

Currently non-court certified ASL interpreters work in California courts when court certified interpreters are not available. It became clear to CIAP that many stakeholders who commented, but may not be regulars to the court community, were not aware that many courts are currently forced to use non-court certified interpreters due to the shortage of ASL interpreters.

Advocates, interpreters, judges, and court staff are using court certified interpreters in the most complex and high-stakes cases and saving non-court certified interpreters for more routine events, such as continuances. The courts have been important partners in bringing in court certified interpreters when the defendant or court user simply cannot do without. When no court certified interpreter is available, however, the more than 100 coordinators working in the courts have no formal direction about who they should hire instead. It is difficult to determine which of the more than one dozen RID certifications should be sought, or if other certifications would be acceptable. Coordinators do not have the specialized background to know what kinds of training or mentoring they should look for in order to understand who may be most qualified to interpret in these instances.

CIAP believes that the proposed changes to Evidence Code section 754 will support courts in selecting the best available interpreter, while formally instituting the minimum qualifications that ASL interpreters must meet. If the statute is amended, the form INT 110 will be modified to include a selection of generalist certifications which must be part of any provisional qualification. CIAP will also be suggesting a number of changes to the INT forms for interpreters of all languages, including the kinds and amounts of training and mentoring the local courts should look for when considering an interpreter for provisional

qualification. This will significantly increase the standards currently observed in some courts.

CIAP also believes that requiring courts to comply with California Rule of Court 2.893 in relation to ASL and complete provisional qualification documentation, including affirming on the record of the court that the appropriate process was followed, will create accountability for the process.[2] Rule 2.893 also contains safeguards related to the length of time an interpreter can be provisionally qualified.

Finally, CIAP believes these changes will enforce the requirement that courts must first use court certified interpreters from the Master List, just as they are required to for spoken language interpreters. It is only when a court certified ASL interpreter is not available that courts would then follow the provisional qualification process. Once all of the changes are in place, courts will be required to use provisionally qualified interpreters who hold a specified RID generalist certification.

3) **Court Certified ASL interpreters are not the only interpreters currently working in courts and it is not reasonable, or even possible, to expect they would be.**

Contrary to the perceptions of many commentators, including the Registry of Interpreters for the Deaf (RID), California courts are currently using non-court certified ASL interpreters in some instances. CIAP worked with RID over the past two years to try and find common ground on how to address this issue of minimum requirements for provisionally qualified ASL interpreters when a court certified interpreter is not available.

This proposal recognizes that fact and imposes obligations on courts when they need to provisionally qualify an ASL interpreter. While RID prefers that the SC:L be incorporated into statute, CIAP believes this is not the best approach. California statutes are designed to allow more than one certification program to be considered as a certifying body and allow any given certification program to recommend one or more certificates. Both the certifying body, and the required certificate itself, could change over time.

Highlighting the importance of creating and maintaining flexibility, in August 2015, RID announced a moratorium on performance exams for all certifications,

[2] On January 1, 2015, new layers of accountability to the provisional qualification process for spoken language interpreters were instituted. This was not originally contemplated when the changes to Evidence Code section 754 were originally proposed in 2013. If § 754 is changed as proposed, the provisional qualification of ASL interpreters would be treated the same as for spoken language interpreters.

including the Specialist Certificate Legal, effective January 1, 2016, but with enrollment deadlines in the September/October 2015 timeframe.

For an undefined period of time, effective immediately, no one will know what to prepare for, or be able to take the legal certification test in California or in the rest of the country. This underscores the fact that it is not reasonable to continue with a system which does not have provisional qualification when over the next few years it will be impossible for new interpreters to become certified.

4) **The Judicial Council has continually supported the training of prospective ASL court interpreters over the past 7 years.**

CIAP agrees that helping to promote trainings for a career in court interpreting, and not just for passing any specific exam, is critical for prospective court interpreters. Over the past seven years the Judicial Council has either co-sponsored, expanded, or created legal training opportunities within California, RID's western Region V, and nationally.

This year, the Judicial Council co-sponsored a significant train-the-trainer event for ASL legal interpreter trainers. Through this partnership, California assured that four legally certified interpreters (one deaf and three hearing) participated in the multi-day workshop and they were required to use this training to offer legal trainings in California. To date, four such training workshops have occurred, and this is the beginning of a series of opportunities for introductory and advanced level interpreters to learn about court work, familiarize themselves with the responsibilities and skills and prepare for a career in court interpreting.

5) **CIAP believes that California courts need flexibility in assuring language and disability access for Deaf and Hard of Hearing court users**

As outlined above, there are not enough court certified interpreters working in the courts, and yet current law requires the courts to only use court certified interpreters in ASL, and treats ASL differently from spoken languages in this regard. While other states have a range of policies regarding certification, from a preference for the highest levels of certification down to not requiring any certification at all, California is unique in not having a backup system in place for when there are no court certified ASL interpreters available.

Courts cannot continue to be bound by requirements that are not and cannot be met. Modifying Evidence Code section 754 as proposed, to allow for the provisional qualification of ASL interpreters, subject to existing rules, codes, forms and formalities, will give the courts the flexibility they need, while

simultaneously raising standards and creating the accountability that deaf court users and community members deserve.

### Alternatives considered

- No change, no allowance for provisional qualification with ASL interpreters.
  The current situation forces courts, on a regular basis, to use interpreters who are not court certified, without any basis in current California statutes. While some commentators proposed not making any changes, this appeared to be based on a mistaken assumption that courts currently use only court certified interpreters. Continuing without any change, particularly in light of the testing moratorium announced by the only national ASL interpreter testing organization in the country, is untenable for the California courts.
- Provisional Qualification that is more prescriptive than currently required in spoken languages.
  California could go forward with provisional qualification requirements for ASL which are different, and more restrictive, then those for spoken language however this would not be good for the courts, or for the public. While suggestions were made by RID to establish very specific requirements if a court certified interpreter is not available, it is not practical for more than 100 court interpreter coordinators around the state to stay up to speed on a changing list of generalist certifications or for them to check highly detailed proofs of educational courses taken or hours of mentored time completed. Instead, CIAP will be proposing changes to INT forms that will provide guidelines of what court staff may look for, along the lines of suggestions made by RID. In light of the upcoming moratorium, with an undefined effective period, CIAP does not suggest making changes to the Evidence Code more specific than the attached proposal.

## Implementation Requirements, Costs, and Operational Impacts

No significant implementation requirements, costs, or operational impacts are likely. Limited training to inform court staff and judicial officers that ASL interpreters should now be treated like spoken language interpreters, as related to provisional qualification, will be required, most likely through written memoranda or regularly scheduled Center for Judicial Education and Research educational events.

## Attachments

1. Proposed amendment to Evidence Code section 754
2. Comments chart

Evidence code section 754 would be amended, effective January 1, 2017, to read:

Evidence Code section 754. Deaf or hearing impaired persons; interpreters; qualifications; guidelines; compensation; questioning; use of statements

(a) As used in this section, "individual who is deaf or ~~hearing impaired~~ hard of hearing" means an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include an individual who is ~~hearing impaired~~ hard of hearing provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment provided pursuant to Section 54.8 of the Civil Code.

(b) In any civil or criminal action, including, but not limited to, any action involving a traffic or other infraction, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court-ordered or court-provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness or juror is an individual who is deaf or ~~hearing impaired~~ hard of hearing and the individual who is deaf or ~~hearing impaired~~ hard of hearing is present and participating, the proceedings shall be interpreted in a language that the individual who is deaf or ~~hearing impaired~~ hard of hearing understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon.

(c) For purposes of this section, "appointing authority" means a court, department, board, commission, agency, licensing or legislative body, or other body for proceedings requiring a qualified interpreter.

(d) For the purposes of this section, "interpreter" includes, but is not limited to, an oral interpreter, a sign language interpreter, or a deaf-blind interpreter, depending upon the needs of the individual who is deaf or ~~hearing impaired~~ hard of hearing.

(e) For purposes of this section, "intermediary interpreter" means an individual who is deaf or ~~hearing impaired~~ hard of hearing, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the individual who is deaf or ~~hearing impaired~~ hard of hearing and the qualified interpreter.

(f) For purposes of this section, "qualified interpreter" means an interpreter who has been certified as competent to interpret court proceedings by an organization approved pursuant to the California Rules of Court ~~by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired~~ and who is listed on the Judicial Council's list of recommended interpreters.

(g) In the event that the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or ~~hearing impaired~~ hard of hearing or his or her particular variant of sign language, the court or other appointing authority shall, in consultation with the individual who is deaf or ~~hearing impaired~~ hard of hearing or his or her representative, appoint an intermediary interpreter.

(h) ~~Prior to July 1, 1992, the Judicial Council shall conduct a study to establish the guidelines pursuant to which it shall determine which testing organizations, agencies, or educational institutions will be approved to administer tests for certification of court interpreters for individuals who are deaf or hearing impaired. It is the intent of the Legislature that the study obtain the widest possible input from the public, including, but not limited to, educational institutions, the judiciary, linguists, members of the State Bar, court interpreters, members of professional interpreting organizations, and members of the deaf and hearing-impaired communities. After obtaining public comment and completing its study, the Judicial Council shall publish these guidelines. By January 1, 1997, the Judicial Council shall approve one or more entities to administer testing for court interpreters for individuals who are deaf or hearing impaired. Testing entities may include educational institutions, testing organizations, joint powers agencies, or public agencies.~~

~~Commencing July 1, 1997, court interpreters for individuals who are deaf or hearing impaired shall meet the qualifications specified in subdivision (f).~~

A court may for good cause appoint an interpreter who is not qualified pursuant to subdivision (f). The court shall follow the good cause and qualification procedures and guidelines for noncertified or nonregistered spoken language interpreters set forth in Government Code section 68561 and those adopted by the Judicial Council.

(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person's regular duties as an employee of the state, county, or other political subdivision of the state. Except as provided in subdivision (j), payment of the interpreter's fee shall be a charge against the court. Payment of the interpreter's fee in administrative proceedings shall be a charge against the appointing board or authority.

(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or non-court proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of ~~an~~ a qualified interpreter shall be made~~,~~ without any unnecessary delay, unless either the individual who is deaf or ~~hearing impaired~~ hard of hearing affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder.

Payment of the interpreter's fee shall be a charge against the ~~county, or other political subdivision of the state, in which the action is pending~~ employer of the investigating peace officer or other person as identified above in this subdivision.

(k) No statement, written or oral, made by an individual who the court finds is deaf or ~~hearing impaired~~ hard of hearing in reply to a question of a peace officer, or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding, may be used against that individual who is deaf or ~~hearing impaired~~ hard of hearing unless the question was accurately interpreted and the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court ~~makes special findings~~ finds that either the individual could not have used an interpreter, or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder and that the statement was made knowingly, voluntarily, and intelligently.

(l) In obtaining services of an interpreter for purposes of subdivision (j) or (k), priority shall be given to first obtaining a qualified interpreter.

(m) Nothing in subdivision (j) or (k) shall be deemed to supersede the requirement of subdivision (b) for use of a qualified interpreter for individuals who are deaf or ~~hearing impaired~~ hard of hearing participating as parties or witnesses in a trial or hearing.

(n) In any action or proceeding in which an individual who is deaf or ~~hearing impaired~~ hard of hearing is a participant, the appointing authority shall not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure proper communication with the participating individual who is deaf or ~~hearing impaired~~ hard of hearing.

~~(o) Each superior court shall maintain a current roster of qualified interpreters certified pursuant to subdivision (f).~~

(o) No statement attributed to a person who is deaf or hard of hearing shall be considered by the court unless (1) the statement was accurately interpreted, or (2) either the individual could not have used an interpreter, or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder. A statement interpreted by a qualified interpreter or an interpreter appointed as provided in subdivision (h) is presumed to be accurately interpreted.

## LEG13-07

**Provisional Qualification of American Sign Language Interpreters** (Amend Evidence Code section 754)

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

| | Commentator | Position | Comment | Committee Response |
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| 1. | Mike Roddy<br>Court Executive Officer<br>Superior Court of San Diego County | A | This proposal will assist the court in locating ASL interpreters consistent with other language interpreters hired for court hearings, when certified ASL interpreters are unavailable. Revising the INT 100, INT 110, and INT 120 consistent with the updated language is appropriate. | CIAP agrees. |
| 2. | Kathleen Gibbins<br>Ms. Gibbins indicated comments presented on behalf of an organization, but no organization name given | N | *Using a non certified ASL interpreter can result slow responses or even misunderstanding. This may even cause a mistrial due to lack of information that was missed during the interpreter and so who will judge who is qualified to interpret if they need one. My daughter was given a mom who had a deaf child and that lady could not read my daughters sign language. My daughter gave a wrong answer and she told her it was right answer. It really is not going to help the court or the session go any faster if the interpreter is uncertified. Please do not pass this one it will cause a lot of problems. (Rancho Cucamonga, CA) | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |
| 3. | Terri Manning<br>ASL Interpreter<br>Northern CA Registry of Interpreters for the Deaf | N | Thank you for taking my comment. I am a RID certified Sign Language Interpreter and vice president of my local affiliate chapter of the RID, NorCRID. I am extremely concerned that giving provisional legal credentials to a generalist interpreter sets the interpreting standards at a lower bar for cases before the courts. I do not want any the People of the state of California to pay for mistrial cases corrupted by an underqualified interpreter. While I am a 27-year, highly qualified generalist interpreter, I am not qualified to serve in the courts because I | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance. Upon successful enactment of |

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| | | | am not trained as a legal interpreter. I question, as this Proposal is written, how the courts would screen for qualified vs. unqualified. This Proposal sets no standards for what makes a generalist qualify for provisional court interpreting. Such a screening needs to be sensitively, statistically reliable and validly in place to verify whether one, like me, is indeed qualified for provisional standing. Such a screening needs to involve experts in the ASL interpreting field and Deaf Community, and not be approved by non-experts: the plaintiff, defendant or judge. I fear that the veteran "bad apples" in the field would flock to the courts for such work if no high standards, proctored by the appropriate experts, are in place.<br>(Oakland, CA) | the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used. |

## LEG13-07

**Provisional Qualification of American Sign Language Interpreters** (Amend Evidence Code section 754)

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

| | Commentator | Position | Comment | Committee Response |
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| 4. | Robin Mills<br>Interpreter | N | This is a step backwards for the field of ASL interpreting. The registry of Interpreters for the Deaf (RID) states who is qualified to work in court - those that have the SC:L. 754 (f) of the Evidence Code states those qualified to work in court have the RID SC:L certification. Interpreters receiving their SC:L have demonstrated a high level of proficiency in interpreting between ASL and English in a court of law. They have studied and trained extensively. They have been evaluated and have passed a rigorous test that has been shown to by psychometrically sound. Allowing a coordinator to "qualify" an interpreter based on anything less than that would be a disservice to Deaf people in the court system. An interpreter's qualifications can not be ascertained by what is stated on paper or prior experience.<br>(Oakland, CA) | CIAP disagrees. There is not a sufficient number of court certified interpreters to provide services in all needed assignments around the state. The goal is to always have a court certified ASL interpreter, but we know they are not always available for court assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |
| 5. | Jennifer Jacobs, CSC | N | I am writing to express my outrage over the suggestion that requirements for ASL interpreters be lowered. It is vital to continue to require interpreters to have specialized training and certification to enable them to work in the courts. This is the only way to ensure equal access to people whose primary means of communication is a form of signed language.<br><br>I do not have that specialized training. I am well aware of the scarcity of such interpreters, and have been called upon to work with interpreters in the courts, but only with the understanding that I am working with someone who does have | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP agrees that training potential court interpreters is essential to creating a sufficient and qualified pool of ASL court interpreters. The California Judicial Council has continually |

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| | | | such training, to ensure that communication is accurately conveyed. There is no way for the court to determine on their own whether or not an ASL interpreter is provisionally qualified to work in that setting. To provide an unqualified interpreter is worse than having no interpreter at all, because if someone is there signing, the assumption is the deaf person is getting full access to the information, while in reality this could very well NOT be true.<br><br>If the court is that concerned about having access to interpreters with the proper skills set, perhaps a better solution is to sponsor advanced training for interpreters willing to invest their time and energy in becoming qualified to work in the courts.<br><br>Thank you for the opportunity to share my concerns. | supported the training of prospective ASL court interpreters over the past 7 years. |
| 6. | Jeanine Strobel | N | In the interest of justice, I strongly believe that only legally certified interpreters should be used in any legal proceeding.<br>(Fairfax, CA) | CIAP disagrees. There is not a sufficient number of court certified interpreters to provide services in all needed assignments around the state. The goal is to always have a court certified ASL interpreter, but we know they are not always available for court assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |

## LEG13-07

**Provisional Qualification of American Sign Language Interpreters** (Amend Evidence Code section 754)

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

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| 7. | Barbara Bell | N/I or N | This is in response to the changes that someone is trying to make to use other ASL interpreters when qualified, certified court interpreters are not available.<br><br>My biggest concern with this is:<br>What if the court system in a small rural town doesn't have the experience or the exposure of ASL interpreting or the Deaf culture to make good judgment of an ASL interpreter hired to do the job?<br><br>A good analogy would be this….Suppose someone hires a Cantonese interpreter to interpret a client who speaks Cantonese…how would I know that the interpreter is qualified? How would I know if he is able to understand the client or is interpreting correctly about the court system to the client? How would I know if the interpreter is knowledgeable about the court system or their culture? I need something to prove to me without any qualms that this person is qualified. This person's life is at stake…and cannot defend himself because of a big language barrier. To depend on good faith is not enough in this case.<br><br>Another analogy: This happened in a General Hospital. Someone pulled a staff member from another part of the hospital who claimed that he knew and used ASL interpreting to help a patient. He went ahead and interpreted for a mentally ill client who was in the psychiatric ward. Fortunately, another therapist who uses | CIAP disagrees. There is not a sufficient number of court certified interpreters to provide services in all needed assignments around the state. The goal is to always have a court certified ASL interpreter, but we know they are not always available for court assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance. Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used. |

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| | | | ASL was there and saw this person. And stated that the interpreter only knew the basic signs of abc but not the fluent ASL language! And this interpreter was doing the communicating between the psychiatrist and the patient! That is extremely dangerous and harmful for the client especially if the client may be psychotic, suicidal….or is from another country such as Mexico. This happens all the time… And the psychiatrist makes the wrong diagnosis or wrong medication….They are doing more harm than good to the deaf patient.<br><br>We have too many wannabes ASL interpreters who are incompetent…Try using one who is not certified or doesn't know sex education to teach or provide sex education to a deaf asl student….it is a laugh and very embarrassing….<br><br>Please don't embarrass yourselves, California and the court system by getting just temporary ASL interpreters …..Please do not give up, just find and use those who are qualified…..<br><br>Thank you for reading this email. | |
| 8. | Holly Newstead | AM | I would like to comment on Proposal: LEG13-07.<br>I whole heartedly agree with the proposed changes to obsolete language and juror requirements. I would like to commend the Court Interpreters Advisory Panel's hard work. My comments are related to the proposed revision of section 754. I have not seen in other fields where a deficit in qualified individuals | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |

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| | | | leads to the lowering of standards. If there aren't enough qualified, say, Firefighters, society does not say "well, then, we will lower the certification requirements and accept those without the training required to enter the field". No, more training facilities are set up and offered in a variety of places. You NEVER lower the standards because there are not enough qualified people, you INCREASE the number of qualified people.<br>California has shown serious intention about increasing this pool by offering several trainings, the last one being in 2010. The current RID SC:L test has a very high fail rate, which means generalist interpreters are not being provided with enough training to become proficient to work in the courts. I have been approached by many generalist interpreters stating that they wonder why I work in court; that they are too scared of the legal realm to ever work there. These are highly skilled generalist interpreters who have the skill to contribute to the legal field. I believe that if there were training programs available for them, they could become confident in the legal field and contribute enormously. So, if there few current legal specific training programs offered, and few highly skilled generalist interpreters being trained, then who are these provisionally qualify American Sign Language (ASL) interpreters going to be? My concern is that they will be interpreters without the skill and ethical knowledge necessary to work in a court. This does not mean that I do not understand the | CIAP disagrees that the proposal will not provide sufficient guidance. Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used.<br><br>The statewide Language Access Plan's Implementation Task Force is charged with implementing complaint processes to address complaints about the lack of language access, or an interpreter's skills. As these processes are implemented, they will be positioned to address abuses in the over use, or improper use of the provisional qualification process for any language, including ASL.<br><br>CIAP agrees that training potential court interpreters is essential to creating a sufficient and qualified pool of ASL court interpreters. The California Judicial Council has continually supported the training of prospective ASL court interpreters over the past 7 years. |

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| | | | problem of scarcity of court-certified ASL interpreters and the difficult circumstances of having no alternative to a certified interpreter. I know from personal experience that this is the case. I do not believe that all of the California Courts, however, do due diligence in trying to locate and appropriately pay current certified SC:L Interpreters working in the State. I am often available and willing to travel to Courts; however, they won't pay me – the Judicial Council daily payment rate, mileage and travel. I believe there is a scarcity of ASL court interpreters; however, I also believe the ones that are currently working are not being utilized to their fullest. My main concern is that courts will state they have attempted to locate an SC:L, but that one could not be found, and use generalist certified interpreters instead; without putting any effort into actually locating an SC:L. I don't see any provision for the monitoring of the home Courts and the interpreter coordinators.<br>I think that a time limit should be built into the system whereby a generalist interpreter has a certain amount of time to sit for and pass the RID SC:L exam after which their ability to work in the courts will be withdrawn. There must be incentive for generalist interpreters to improve their skills and become court certified.<br>I would also like to emphasize that the record must clearly reflect the qualifications of the interpreter working. If the interpreter is not an SC:L, the attorneys/clients should be absolutely clear that they are using a generalist certified | |

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| | | | interpreter.<br>Thank you for taking the time to read my comments. This topic is very important to me.<br><br>(Navarro, CA) | |
| 9. | Cris Eggers, MA, CI & CT,<br>President<br>Communique Interpreting | N/I | I am highly concerned about the proposed revisions to Evidence Code Section 754 regarding the discarding of requirements for sign language interpreter qualifications. With the current standards, requiring the Registry of Interpreters for the Deaf (RID) certification SC:L, the vetting of the interpreters is done by RID, an entity that specializes in ascertaining interpreter qualifications. RID tests interpreters not only for knowledge of the legal system but tests interpreters to ensure their competency in interpretation of sign language and English in the legal setting.<br><br>With the proposed revisions, court personnel become the supposed experts who determine interpreters' capabilities. Let us imagine for a moment that court personnel can actually ascertain an interpreter's knowledge of the legal system by that interpreter's exposure to legal settings. This is a bit dubious as a qualifier, but let us accept it as a valid way to measure competence.<br><br>Even supposing that exposure to legal concepts qualifies an interpreter knowledge-wise, how will those court personnel test and validate the interpreters' language competence? Do court personnel speak English and sign language? | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance. Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used.<br><br>The statewide Language Access Plan's Implementation Task Force is charged with implementing complaint processes to address complaints about the lack of language access, or an interpreter's skills. As these processes are implemented, they will be positioned to address abuses in the over use, or improper use of the |

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| | | | Have court personnel been trained to assess interpreters?<br><br>I understand the shortage of interpreters with the SC:L qualifications. Living in a semi-rural area, I understand the time and the cost involved to get an SC:L interpreter to a remote court. The court currently must pay higher costs for the SC:L qualification as well as travel costs. Should the proposed revisions be approved, what is to prevent courts from stating they tried to locate but could not find an SC:L? What is an acceptable level of effort on locating an SC:L before they are allowed to hire a generalist to do a specialist job?<br><br>I have been RID certified since 1996, as a generalist. I took introduction the American legal system, introduction to legal interpreting (two times), observed in the courts, and took a full semester of legal interpreting at the graduate level. On paper I appear qualified and I am certain any court would approve me provisionally to interpret in court. Yet, if RID were to test me, I would fail epically on the test because I do not possess the necessary legal language in English or sign language to interpret accurately. Also, my knowledge is derived from books, not from actual experience. Even with my many years of experience as a generalist and my apparent paper qualifications I could not provide deaf participants in a court proceeding access linguistically to the proceedings. | provisional qualification process for any language, including ASL.<br><br>CIAP agrees that training potential court interpreters is essential to creating a sufficient and qualified pool of ASL court interpreters. The California Judicial Council has continually supported the training of prospective ASL court interpreters over the past 7 years. |

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| | | | Fortunately I am self-aware and honest about my own competence and would not offer my services to the courts. Should the revisions to 754 interpreting requirements be approved, what is most likely to occur is that courts after doing some undetermined amount of searching could claim that an SC:L is not available. Then they will find a generalist willing to work outside of his or her area of expertise. So the courts will hire interpreters who do not have the self-awareness or sense of accountability to ensure due process for deaf individuals.<br><br>Rather than eschewing requirements, I suggest the State invest in training generalists to take and pass the SC:L test. A community college course would be a good venue for this. I know the courts have made an effort to implement VRI. Could this technology be employed even further? At a minimum, it should be an SC:L interpreter, not court personnel who determine an interpreter generalist's ability to function in a legal setting.<br><br>Thank you for taking time to read my comments and concerns. | |
| 10. | Sarah E. Prudhom, CI<br>Agency Owner/interpreter<br>Hired Hands LLC<br>(indicated NOT on behalf of organization) | N | A court certified interpreter cannot, and should never be substituted with an interpreter holding only a generalists certification, or no certification at all. It is abominable that the CA court system should even propose this. The rights of everyone in that courtroom would be at | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process |

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| | | | risk. It would be the equivalent of having a law school student representing a plaintiff or defendant.<br>There is no judge qualified to assess an interpreters' skill level and competency. As much as we have our Code of Conduct under RID, there are still rogue interpreters who would like to think their skills and ethics equivalent to that of a court-certified interpreter and would accept the role of court interpreter a: for the money; and b: because of an over-inflated view of their own skills and experience. You must stop this legislation.<br>(Fremont, CA) | and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance. Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used. |
| 11. | Brenda Roberts | N | I have been working for L.A. County for almost 15 years and I have yet to meet a judge who is qualified to qualify an interpreter. Yes there are few of us who hold the SC:L,however there are many who are certified and have extensive training in the legal field and are available to provide services. This proposal is a major disservice to the deaf and hard of hearing community and to us professionals who take our training and legal certification seriously.<br>(Ontario, CA) | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |
| 12. | Arlene Cervantes<br>Interpreter & Jury Manager – Countywide<br>Superior Court, County of Riverside | A | Does the proposal reasonably achieve the stated purpose?<br><br>Yes<br><br>Would this proposal have an impact on public's access to the courts? If a positive impact, please | CIAP agrees that the proposed language would allow courts to hire provisionally qualified interpreters when court certified interpreters are not available.<br><br>CIAP does not believe that this proposal would necessarily result in the fiscal savings indicated by |

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| | | | describe. If a negative impact, what changes might lessen the impact?<br><br>Yes. This would allow the court to hire provisionally qualified interpreters (PQI) when certified interpreters are unavailable.<br><br>POSITIVE IMPACT: This would eliminate continuances and delays; and provide increased access to the public by creating a PQI list of interpreters to hire from. There are many times when unscheduled customers are needing an ASL interpreter, and are asked to return on a different date due to unavailability.<br><br>NEGATIVE IMPACT: This is a new process that will affect all areas of litigation (mandated and non-mandated). It will require training, revisions to procedures, and creating codes for the case management systems. Having adequate time for implementation would alleviate this problem.<br><br>Would the proposal provide costs savings? If so, please quantify. If not, what changes might be made that would provide savings, or greater savings?<br><br>The only savings to the court would come by our ability to enforce the non-certified, non-registered state rate ($175.00 Full Day / $92.00 Half-Day) on the provisionally qualified ASL interpreters. | the commentator.<br><br>Commentator's proposed changes regarding the length of time for which an interpreter may be provisionally qualified are beyond the scope of CIAP's original proposal to modify Evidence Code 754. The commentator's proposed changes would need to be incorporated into changes to Rule 2.893. A review of Rule 2.893 is underway by CIAP during the 2015-2017 timeframe and these comments will be considered as part of that process. |

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| | | | Also, if we have a large list of PQ's, then more likely this will cause the interpreters to compete for the assignments and we will be able to negotiate for the non –certified, non-registered state rate. If the list is small, then those interpreters who have been provisionally qualified will know that they can ask for a higher rate because the Court will have a need, and the alternative would be to continue the matter.<br><br>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.<br><br>We would need time to implement the provisionally qualifying process, update our action and minute codes; train our judges, managers and staff. We already have some codes created, and some of our judges, clerks and coordinators are already familiar with the INT process for spoken language interpreters. For those with this existing knowledge the training time will be less.<br><br>Would twelve (12) months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? | |

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| | | | Yes<br><br>If this proposal would be cumbersome or difficult to implement in a court of your size, what changes would allow the proposal to be implemented more easily or simply in a court of your size?<br><br>No, but it will take some time to formalize the process and train Judicial Officers and staff. The most difficult challenge will be when ASL PQI's have exceeded the time in which they can be provisionally qualified (four 6 month periods), this is a total of 2 years. Currently the court must make "specific findings on the record in each case in which the interpreter is sworn that good cause exists to appoint the interpreter notwithstanding, that he or she has failed to achieve Judicial Council certification".<br><br>RECOMMENDED CHANGES: It is recommended that the PQ time periods be modified to extended from four 6 month periods to four 12 month periods. This will allow us to keep our more experienced ASL interpreters for a longer period without having the court make good cause findings on the record, due to the ASL interpreter's failure to become certified. The interpreter will still only be allowed to renew 4 times, but will extend the time to 4 years, rather than 2 years. | |
| 13. | Alice Russell | N/I | As a person who is hard of hearing, I write regarding the Judicial Council of California changing Evidence Code Section 754 and the | CIAP disagrees. There is not a sufficient number of court certified interpreters to provide services in all needed assignments around the state. The |

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| | | | arrangement for ASL interpreters when court certified interpreters are not available. I am concerned that the quality of communication might not be high enough to serve the people being represented, resulting in justice not being served.<br>As with any language, there are nuances and interpretations that only someone experienced would be able to distinguish. People well versed in ASL are the only ones that could determine the suitability of an interpreter for a task as important as court interpreting.<br>I would ask that you work with the Deaf Community and take their recommendations under consideration regarding interpreter shortages.<br><br>(Santa Cruz, CA) | goal is to always have a court certified ASL interpreter, but we know they are not always available for court assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |
| 14. | Carrie Levin | N | The Courts should NOT have the authority to temporarily qualify ASL interpreters as it wrongly accuses innocent deaf people, fails to meet the ADA requirements, and a very bad strategy . Here's why:<br>1- Diminishing deaf community rights' to have access to excellent and quality communication that can have serious consequences of unfair trial & wrongfully accusing innocent deaf people. The chance of using incompetent ASL interpreters in court proceedings increases and legal misinterpretations are likely to happen as a result.<br>2- The Courts have no understanding of ASL language, court interpreting professions or | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |

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| | | | the Deaf community. None. ASL language is considered a foreign language by many colleges and universities. Add to that the years of training required for ASL court interpreters need to become certified. The Deaf community has its own culture, complete with rules, etiquette, expectations, etc. The Courts have no background in the study or understanding of a culture foreign to them. Using uncertified interpreters is a violation of the ADA as it fails to address competent interpreters and clear communication access.<br>3- Using a temporary ASL interpreter and then certifying them is a poor solution to the backlog and delays because there's a shortage of qualified court ASL interpreters. In emergency situations, it even jeopardizes the legal rights deaf people to fair trial due to the likelihood of communication breakdown of incompetent ASL interpreters not familiar with courts.<br><br>I demand fair justice, fair representation and a fair trial for all Deaf Californians. I strongly urge that the courts not be given the power to certify temporary ASL interpreters in legal court proceedings.<br><br>(Sunnyvale, CA) | |
| 15. | Colin Piotrowski | N | It is not the deaf community's fault that the court are unable to locate certified ASL interpreters. it just mean the court has poor time management or does not pay ASL interpeters well enough for them to stay on the court's list. Any compromise to this will risk Deaf | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process |

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| | | | defendant to jail time if we put them together with non certified interpreter and they often do make a lot of misunderstanding statements. It is the court's responsibility to see that deaf people are due to fair process, not shoddy and cheaper process. I promise you there will be so many problems if you went ahead with the proposed changes. I am a teacher and hold two master's degrees and I've had my share of experience with certified and non certified in court setting and my lawsuits. Listen to the experts please.<br><br>(Pleasanton, CA) | and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |
| 16. | Linda Drattell<br>Community Relations Director<br>Deaf Counseling, Advocacy and Referral Agency (DCARA)<br>(indicated NOT on behalf of organization) | N | I am concerned with the Judicial Council of California's decision to Revise Evidence Code Section 754 to provide "Provisional Qualification for American Sign Language Court interpreters." Here are my reasons:<br>1. The ADA requires that interpreters be competent.<br>2. ASL is a language unto itself, and has a different syntax, grammar and diction rules than English. In addition, there are local and regional differences in ASL. A sentence in English translated word for word into sign language, might be unintelligible by an ASL speaker. Similarly, an unqualified interpreter may incorrectly interpret what an ASL signer is saying. Here is an example of how a sentence translated from ASL into English would look like:<br>"DADDY MANY MANY HIT<br>BLOOD ME SAW ME RAN<br>TELL FRIEND ME AFRAID | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance . Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used. |

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| | | | CALL POLICE MAYBE JAIL"<br>The meaning would be lost on the court. The meaning of the sentence in English is "<br>DADDY HIT HER SO MANY TIMES UNTIL I SAW THE BLOOD. I WAS SO SCARED AND RAN AND TOLD A FRIEND ABOUT IT. MY FRIEND CALLED THE POLICE AND MAYBE DADDY WILL GO TO JAIL. "<br>3. An uncertified interpreter doesn't meet the ADA requirements because of the years of training and practice that have to be met to be certified. Just as with any language, special training is required to become a court interpreter, according to the Superior Court of California (http://www.occourts.org/directory/cris/interpreter-information.html. California has a Court Interpreter Program, which requires complete fluency in both English and the foreign language, requiring a level of expertise that is far greater than everyday bilingual conversation. The interpreter must have full command of of specialized legal and technical terminology to street slang.<br>ADA requires that interpreters be competent. 28 CFR Part 35, Section section 35.160 requires that. a public entity must ensure that its communications with individuals with disabilities are as effective as communications with others. Allowing uncertified interpreters would undermine the requirement in this Section. Allowing uncertified sign language interpreters to be considered provisionally | |

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| | | | qualified for court representations does not allow for equally effective communication for the deaf individual who must rely on the interpreter both to understand the court proceedings and to convey his or her testimony. It would be quite easy for an interpreter not acquainted with the nuances of legal terms or street slang to miscommunicate the meaning of what a deaf defendant or witness is saying, or to miscommunicate to the deaf defendant or witness the question being asked – resulting in inaccurate testimony.<br>ASL is a language unto itself.<br>The regulations define the qualifications of a "qualified interpreter": "Qualified interpreter means an interpreter who…is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters…." 28 CFR section 35.104. The interpreter has to be able to "interpret effectively" and "accurately". ASL is a language, and not merely deaf English. It has its own vocabulary, syntax and grammar rules. A comparison can be made when translating for someone who speaks Spanish. If you translated English word for word into Spanish, and ignored vocabulary, syntax, dialect, and so forth, the translation would be poor at best, and unintelligible at worst. As the regulations state, a qualified interpreter must provide communication between a deaf and hearing person that is effective, accurate, and impartial, | |

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| | | | using any necessary specialized vocabulary. Certified court interpreters, are both impartial and possessing the necessary vocabulary, and are able to interpret both receptively and expressively, as outlined in the ADA,section Title II: Signing and interpreting are not the same thing. Being able to sign does not mean that a person can process spoken communication into the proper signs, nor does it mean that he or she possesses the proper skills to observe someone signing and change their signed or finger-spelled communication into spoken words. The interpreter must be able to interpret both receptively and expressively.<br>An uncertified interpreter doesn't meet the ADA requirements because of the years of training and practice that have to be met to be certified.<br>The mere fact that a person who happens to sign would be given “temporary” designation as a qualified interpreter leads one to believe that this same person would not normally qualify to interpret in a court setting under normal circumstances if other certified interpreters knowledgeable in interpreting court proceedings were present. The deaf defendant, or a defendant affected by a deaf witness, would be ill-served by an unqualified interpreter – no matter the temporary designation – due to the lack of functional equivalence in communications that goes directly against the intention of ADA Title II-7.0000.<br><br>Reccommendations | |

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| | | | One recommendation is to work with Deaf interpreters in Court (http://www.interpretereducation.org/wp-content/uploads/2011/06/Deaf-Interpreter-in-Court_NCIEC2009.pdf). As this paper presents, Deaf litigants present regional and dialectical variations in American Sign Language. Such a Deaf-hearing interpreting team accommodation is reasonable to avoid misclassifying Deaf litigants as incompetent, and it assists and improves the quality of interpretation, especially since non-Deaf interpreters may not be fluent in ASL.<br>I would also recommend that no decision be made without working together with leaders of the Deaf Community and the Registry of Interpreters for the Deaf.<br><br>(Pleasanton, CA) | |
| 17. | Margaret Ransom Cobb, SC:L | AM or NI | I tried repeatedly today to submit my comments via the Judicial Council website but was unable to find the invitation for this particular proposal. I am emailing my comments to this address instead.<br><br>I am a CA Court Certified (RID SC:L) interpreter and have been since 2000. I have worked in Los Angeles, Santa Barbara, Alameda, and San Francisco counties as an independent contractor from 1989 to the present, and have held the position of Staff Sr. ASL Interpreter for the Superior Court, Ventura County from September of 2006 to the present. | Technical correction adopted with a direct reference to the California Rules of Court. |

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| | | | I will be brief. I am in favor of all of the proposed changes but I do want to highlight one concern that I have with sub-section f) (copied here from the proposal):<br><br>f) For purposes of this section, "qualified interpreter" means an American Sign Language interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired and who has enrolled with, and is listed on, the state roster maintained by the Judicial Council.<br><br>My concern with this proposed change is that removing this language without providing a specific reference to the information contained in the proposed strike-through portion of sub-section f) leaves it reading much as it did before the current language was added to EC 754.<br><br>To anyone who is unfamiliar with the legislative and administrative history of the development and implementation of these guidelines, it may appear that the Judicial Council is taking a step backward in the definition of "qualified interpreter". I would strongly urge the inclusion of a reference to Rule 2.892 immediately after the text that has the strike-through that I have referenced above.<br><br>As an interpreter, and CA citizen, I was very involved with the efforts that led to the | |

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| | | | establishment of the language of EC 754 and also served on the Judicial Council's first advisory committee to begin the process of implementing the requirement for guidelines. I am aware that many years have passed and many people have come and gone in the Judicial Council as well as in the CA Deaf and interpreting communities since that time. I would like to be sure that anyone who might be considering further revisions or changes to EC 754 would be well aware of the location of the guidelines that define "qualified interpreter". I understand the need for brevity in the text of the code. I think that providing the immediate reference to Rule 2.892 in the text of f) will provide the most expedient and direct access to the document, entitled, "Guidelines for Approval of Certification Programs for Interpreters for Deaf and Hard- of-Hearing Persons".<br><br>My final comment is related to the preceding one. With regard to the following proposed language of sub-section j) (copied here from the proposal):<br><br>j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an a qualified interpreter shall be | |

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| | | | made, without any unnecessary delay, unless either the individual who is deaf or hearing impaired hard of hearing affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder. Payment of the interpreter's fee shall be a charge against the county, or other political subdivision of the state, in which the action is pending employer of the investigating peace officer or other person as identified above in this subdivision.<br><br>I am focusing only on the addition of the term "a qualified interpreter". I applaud the insertion of the word "qualified". However, this increases my concern that the definition of "qualified interpreter" in sub-section f) is missing in the proposed changes to that language. Without a clear reference to Rule 2.892 in sub-section f) it is unclear how these definitions are being used in sub-section f) and sub-section j). I am assuming that the definition in sub-section j) is that used in the Americans with Disabilities Act, which is vastly different form the definition used by the Judicial Council for court ASL interpreters.<br><br>Thank you for taking the time to read and consider these comments.<br><br>(Newbury Park, CA) | |

## LEG13-07

**Provisional Qualification of American Sign Language Interpreters** (Amend Evidence Code section 754)

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

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| 18. | Jim Brune<br>Executive Director<br>Deaf Counseling Advocacy and Referral Agency (DCARA) | N | Deaf Counseling Advocacy and Referral Agency (DCARA) respectfully files the following comments in response to the Invitation to Comment released by the Judicial Council of California seeking feedback on the proposed changes to Evidence Code Section 754.<br><br>Established in 1962, DCARA is a community-based non-profit organization that serves the needs of Deaf, Hard of Hearing, Late-Deafened, and Deaf-Blind people in 14 counties in the greater San Francisco Bay Area and North Coast. We provide a wide range of services including information and referral, independent living skills training, advocacy, peer counseling, employment preparation/placement/retention, and community education services to deaf, deafened, hard of hearing, and deaf-blind individuals and their families.<br><br>DCARA applauds the Court Interpreter Advisory Panel's efforts to update the language in Section 754 and provide clear guidelines for the judiciary to follow in the event that an interpreter holding the SC:L certificate is not available. There are some issues that DCARA would like to address in response to the Invitation to Comment:<br><br>Lowering of standards for certified interpreters: While DCARA appreciates the fact that the scarcity of interpreters holding the SC:L certificate is a very real challenge facing | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>The proposal was not intended to modify, nor does it modify, the requirements or process for a Deaf Interpreter to work in the courts, when needed to establish access for a deaf or hard of hearing court user. Such a change is beyond the scope of the committee's original charge.<br><br>The statewide Language Access Plan's Implementation Task Force is charged with implementing complaint processes to address complaints about the lack of language access, or an interpreter's skills. As these processes are implemented, they will be positioned to to address abuses in the over use, or improper use of the provisional qualification process for any language, including ASL. |

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| | | | California courts, DCARA strongly feels that a generalist interpreter certificate, even one by NAD-RID (NIC), is not at all adequate to prepare an interpreter for the complexity of communications and dialogues that occur in the court room. DCARA proposes that language be added to clarify that in the event that a SC:L interpreter is not available, the courts shall provisionally qualify interpreters who possess professional experience in legal settings in addition to possessing a generalist interpreter certificate. For example, this provisional qualification can be granted to an interpreter who provides documentation of formal legal interpreter training and interpreting or mentoring experience. The impact on Deaf and hard of hearing people's lives as a result of communication that is relayed in a courtroom proceeding is far too great to lower this standard.<br><br>Deaf Intermediary Interpreters: DCARA believes that the Judicial Council of California should offer certification to Deaf intermediary interpreters who possesss the Conditional Legal Interpreting Permit – Relay (CLIP:R). The CLIP:R is the highest standard currently available to evaluate a deaf interpreter's legal acumen and should be the only means used by the court to certify Deaf Intermediary Interpreters.<br><br>Empowerment of the Deaf or hard of hearing client during a court proceeding: DCARA feels | |

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| | | | it is of utmost importance that the court engage in interactive dialogue with the Deaf or hard of hearing client to determine whether effective communication is happening during the court proceeding. The court should check in with the Deaf or hard of hearing client at several occasions during the proceeding. The court should also cease the proceeding if it is determined that effective communication is not happening. Part of this dialogue should include the court informing the Deaf or hard of hearing client of their right to effective communication at every court proceeding.<br><br>DCARA sees this Invitation to Comment as a starting point for further dialogue on developing stronger and more clear language within Evidence Code Section 754 to ensure provision of optimal American Sign Language (ASL) interpreting services within the courts of California. DCARA urges the Judicial Council of California to seek input from professionals who are affiliated with the Registry of Interpreters for the Deaf (RID), the Northern California chapter of the Registry of Interpreters for the Deaf (NorCRID), DCARA, as well as the organizations that comprise the California Coalition of Agencies Serving Deaf and Hard of Hearing Persons (CCASDHH), of which DCARA is part.<br><br>Please do not hesitate to contact me if you have any questions regarding DCARA's response to this Invitation to Comment on proposed | |

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| | | | regulation changes to Evidence Code Section 754. I can best be reached at 510.343.6672 or Jim.Brune@dcara.org.<br><br>(San Leandro, CA) | |
| 19. | Marilyn Finn<br>HLAA member | N/I | I feel that this piece of legislation has not realized the difference in the communication needs of people who are deaf and those of us who are hard of hearing.<br><br>Ninety nine percent of hard of hearing people do not use sign language, will need a captioner, not an interpreter. Some will be able to use FM or infrared systems, those with a more profound hearing loss, like me, must have captioning to understand.<br><br>This legislative proposal just came to my attention a few moments ago. I hope that I am mistaken in thinking that you propose to provide hard of hearing people with ASL interpreters, which would be the same as giving them someone speaking Swahili.<br><br>As a former member of the staff of the Hearing Loss Association of America (HLAA) and a former president of the HLAA California State Association, I am most concerned that the captioning issue was not being spelled out. I sincerely hope that the writers of this proposal know of our separate communication needs and will be specific in addressing the importance of captioning. | A person who is hard of hearing, such as described by the commentator, is excluded from Evidence Code 754. (see section (a).) |

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| | | | Thank you for being present for our population. | |
| 20. | Robin Mills<br>(2nd submission) | AM | My concern is, an interpreter can be qualified on paper (having received an RID certification-not SC:L- and taken legal trainings) yet not possess the skills necessary to interpret in a court of law. An interpreter may have previously interpreted in legal settings, when he/she should not have. A coordinator who is not fluent in ASL or a certified ASL interpreter would not be able to make the determination that the interpreter had skills to work in a legal setting. If the final decision was in the hands of an interpreter holding an SC:L in conjunction with the court coordinator, i believe interpreters not possessing the skills would be weeded out.<br><br>(Oakland, CA) | CIAP disagrees that the proposal will not require sufficient standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |
| 21. | Ken Arcia<br>HH/LD Support Specialist<br>DCARA<br>(Did not indicate on behalf of organization) | N/I or N | I am late-deafened, meaning I grew up with regular hearing and became deaf after learning to speak (at age 21). I feel it is VITAL that a certified interpreter be used for all court related functions! I would not trust the future of my situation in a court of law to someone who was not certified. Many deaf do not even know that they can ask for their proceedings to be postponed until a certified interpreter is found! Thank you. Ken Arcia<br>(Castro Valley, CA) | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance . Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the |

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| | | | | interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used. |
| 22. | Howard A. Rosenblum,<br>Chief Executive Officer<br>National Association of the Deaf | AM or NI | The National Association of the Deaf (NAD) submits this Comment with respect to LEG 13-07 which focuses on the "Provisional Qualification for American Sign Language Court interpreters and other updates to Evidence Code Section 754."<br>The proposed updating of Evidence Code Section 754 consists of nine specific changes outlined on pages 2-3 of the Invitation to Comment publicized by your office. The NAD supports many of these changes as appropriate in terms of terminology and comporting with the requirements of the Americans with Disabilities Act (ADA). However, the NAD objects to two particular proposed changes, specifically those proposed in paragraphs numbered 4 (affecting subdivision (h)) and 9 (affecting subdivision (o)). The NAD responds to your "Request for Specific Comments," specifically whether "the proposal reasonably achieves the stated purpose" and whether "this proposal [would] have an impact on public's access to the courts[, and if the impact is negative,] what changes might lessen the impact. These two proposed changes (paragraphs 4 and 9) would not achieve the stated purpose, and urge in this letter changes | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance . Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used. |

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| | | | that would lessen the impact.<br>The new language proposed for subdivision (h) would allow a non-certified interpreter to be appointed by a court for good cause. There appears to be no guidance on what constitutes "good cause" or on what the minimum level would be required for any individual to be appointed as an interpreter for purpose of a court proceeding. While the NAD is sensitive to the need for locating and appointing an interpreter to facilitate effective communications in a California state court where an interpreter that is certified and listed on the state's court roster is not available, the fact remains that court proceedings often greatly impact the rights of deaf and hard of hearing individuals – including whether they live or die, whether they are put in prison, and whether they are stripped of funds, property or rights. As a result, it is imperative that the interpreter who handles such court proceedings be qualified specifically for such court matters. The interpreter must, at a minimum, be qualified pursuant to the definition of a "qualified interpreter" pursuant to the regulations under Title II of the ADA, found at 28 C.F.R. section 35.104, as follows:<br>Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language | |

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| | | | interpreters, oral transliterators, and cued-language transliterators.<br><br>The new language in subdivision (o) reinforces the point that a non-certified interpreter appointed by a court for "good cause" is by indicating that "A statement interpreted by a qualified interpreter or an interpreter appointed as provided in subdivision (h) is presumed to be accurately interpreted."<br>This language fails to protect deaf and hard of hearing individuals from misinterpretations by unqualified interpreters that have been appointed by any court, because their misinterpreted statement will be presumed to be accurately interpreted.<br>The NAD proposes changes to these updates to better protect the rights of deaf and hard of hearing individuals who require interpreter services in California state courts.<br>The new subdivision (h) should be modified to read as follows:<br>"Should an interpreter on the roster pursuant to subdivision (f) not be available for a court proceeding including with any reasonable delay and advance scheduling, a court may for good cause appoint an interpreter who is not certified at the level required by subdivision (f).<br>However, the good cause and qualification procedures and guidelines adopted by the Judicial Council shall include requirements that the court only appoint an interpreter who is certified at the next highest level by the testing | |

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| | | | organization recognized by the Judicial Council and has substantive interpreting experience in court. Such appointed interpreters shall only be allowed to work within the courts for a period of six months. A court may not appoint an interpreter for good cause pursuant to this subdivision beyond January 1, 2020, as the Judicial Council will take steps to ensure that a sufficient number of interpreters certified pursuant to subdivision (f) are placed on the Judicial Council's state roster to meet the needs of the entire state as well as take other measures to meet the communication needs of deaf and hard of hearing individuals."<br>The new subdivision (o) should be modified to retain only the first sentence. The second sentence should be eliminated in its entirety to protect the right of deaf and hard of hearing individuals to not have their statement misinterpreted.<br>Should the Judicial Council have questions regarding this Comment proposed by the NAD, please do not hesitate to contact me at howard.rosenblum@nad.org.<br>(Silver Spring, MD) | |
| 23. | Linda Twilling, Ph.D.<br>Psychologist, Kaiser Permanente, Fremont, CA<br>Psychologist, Cochlear Implant Team, Children's Hospital Oakland. | N or NI | Hello,<br>The Registry of Interpreters for the Deaf carefully evaluates ASL interpreters to insure that they are able to interpret for Deaf people in the courtroom. It would be inappropriate for a judge--or any lay person-- to evaluate the sign language skills of an interpreter and determine that he or she is qualified at that level. Deaf people vary considerably in their sign skills- | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |

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| | | | fluent ASL to limited sign skills and everything in between. Further, many Deaf people have additional disabilities such as learning disabilities, CP, vision issues, etc., that can impair their ability to understand or express language. Deaf people need to have a highly qualified interpreter, especially in a situation as important and serious as a court room. I high recommend that you leave the current rules in place and do not interfere with the ability of a Deaf person to participate in a fair trial. (Oakland, CA) | CIAP disagrees that the proposal will not provide sufficient guidance . Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used. |
| 24. | Saul Bercovitch<br>Legislative Counsel<br>State Bar's Committee on Administration of Justice (CAJ) | AM | The State Bar of California's Committee on Administration of Justice (CAJ) has reviewed and analyzed the Judicial Council's Invitations to Comment, and appreciates the opportunity to submit these comments… (unrelated comments deleted)<br>5. Provisional Qualification for American Sign Language Court Interpreters and Other Updates to Evidence Code Section 754 - LEG13-07<br><br>CAJ supports this proposal subject to the comments below.<br><br>First, unlike American Sign Language (ASL) interpreters, the spoken language interpreters have an employment system with the California courts. Under this system, courts are required to give priority to certified/registered employees and contractors. This system has led to reductions in the use of non-certified/non- | CIAP determined the technical correction suggested regarding interpreters in civil is not necessary because a certified interpreter must already be prioritized under existing procedures and guidelines for spoken language.<br><br>CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters. |

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| | | | registered spoken language interpreters in California courts. (Trial Court Interpreters Program Expenditure Reports, 2004-2008 and 2011-2012). Without a similar employment system for ASL interpreters, the good cause exception may be applied with much more frequency in ASL interpretations than with spoken language. In the end, frequent use of the good cause exception may result in a less reliable supply of qualified ASL interpreters, as there would be less incentive for ASL interpreters to seek certification. To protect against this possibility, and maximize the use of certified ASL interpreters, CAJ believes the rules should provide that priority be given to the engagement of certified ASL interpreters.<br><br>Second, the proposed language would provide that "the courts shall follow the good cause and qualifications procedures and guidelines for spoken language adopted by the Judicial Council." There do not appear to be specific "good cause" guidelines for spoken language for civil cases, although there are procedures and guidelines for the appointment of non-certified interpreters in criminal and juvenile delinquency proceedings. (See Government Code Section 68561, California Rule of Court 2.893 and Procedures and Guidelines to Appoint a Noncertified Interpreter in Criminal and Juvenile Delinquency Proceedings (Form IN-110)). To avoid potential confusion, the proposed language should be modified so it applies specifically to both civil and cases. | |

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| | | | To address these issues CAJ recommends that proposed subdivision (h) be modified to read as follows:<br><br>"Priority shall be given to an interpreter who is certified pursuant to subdivision (f) but ~~A~~ a court may for good cause appoint an interpreter who is not certified pursuant to that subdivision ~~(f)~~. In civil and criminal cases ~~The~~ the court shall follow the good cause and qualification procedures and guidelines for spoken language interpreters adopted by the Judicial Council."<br><br>Disclaimer<br><br>This position is only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.<br><br>(San Francisco, CA) | |
| 25. | Trilingual Interpreting Services by Carol Sue Richardson<br>MA, CSC, SC: L, CCI | AM | The CIAP-proposed changes throughout the document which substitute "hard-of-hearing" for "hearing-impaired" indeed bring the language up-to-date.<br><br>In order to avoid confusion and to reflect that | CIAP adopted a technical correction to include a direct reference to the California Rules of Court in lieu of the commentator's suggested language.<br><br>CIAP disagrees with the proposed change to subsection (h) which would require the SC:L as |

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| | | | the Registry of Interpreters for the Deaf is now the sole body which certifies American Sign Language Interpreters to interpret court proceedings, Subdivision (f) should read:<br><br>For the purposes of this section, "qualified interpreter" means an American Sign Language Interpreter who has been certified by the Registry of Interpreters for the Deaf as competent to interpret court proceedings and who has enrolled with, and is listed on, the state roster maintained by the Judicial Council.<br><br>While the text of Subdivision (h) is obsolete at this time, instead of the wording proposed by the CIAP, the new language should instead read as follows:<br><br>A court may for good cause appoint an interpreter who is not on the state roster of court-certified interpreters but who would otherwise qualify to join said roster, cheifly that she or he hold a Specialist Certificate: Legal from the Registry of Interpreters for the Deaf.<br><br>(Oakland, CA) | the only alternative to an interpreter qualified under subdivision (f). There is not a sufficient number of court certified interpreters to provide services in all needed assignments around the state. |
| 26. | Law Office of Susan Gonzalez by Susan Gonzalez, Deaf Attorney | N | Granted there is a scarcity of qualified and appropriately certified ASL interpreters for any legal proceedings. The proposal fails to address the incompetency of the local "coordinators" for accommodations and their refusal to follow recommendations. Further the proposal outlines no consequences should the court continue to fail to provide SC:L or qualified ASL | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same |

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| | | | interpreters. Lacking any enforcement and consequential action results in a recommendation that is brushed aside at the whim of each coordinator. Case in point is a coordinator at the Santa Clara County Superior Court who is buddy-buddy with two uncertified and unqualified interpreters. I have had cases continued because those two "interpreters" were not available. My clients suffered harm as result of continued delays. The coordinators are able to choose whomever they wish without penalty. The judge and opposing counsel had no clue as to the resulting damage.<br><br>The proposal fails to outline precisely who will be responsible for determining if an interpreter may be provisionally qualified. Judges, clerks, coordinators, attorneys or AOC etc. do not have the requisite staff to make qualified, informed and appropriate determinations. To require the Deaf/DeafBlind/Hard of Hearing/Late-Deafened individual to place such blind trust in those entities is tantamount to trying to put out a building fire with a single glass of water. It simply does not work. To determine qualifications requires the person making said determination to have a basic grasp of what makes the individual qualified to do the job. To allow courts et al. to provisionally qualified ASL interpreters to appease themselves momentarily most definitely will result in long-term harm, especially when the ASL interpreter should never have been provisionally qualified. | process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance . Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified interpreter is used.<br><br>The statewide Language Access Plan's Implementation Task Force is charged with implementing complaint processes to address complaints about the lack of language access, or an interpreter's skills. As these processes are implemented, they will be positioned to to address abuses in the over use, or improper use of the provisional qualification process for any language, including ASL. |

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| | | | At the bare minimum, should this language persist into the final form, require that all parties, especially the Deaf/DeafBlind/Hard of Hearing/Late-Deafened individual/s, expressly, knowingly and voluntarily consent on record to the use of said ASL interpreter who only possess XYZ certificate for the particular proceeding only. Transcripts of said proceeding shall be made available to all parties for verification of interpreting. All orders should be pending rather than final until transcripts verify the accuracy of interpreting. For verification purposes, only an interpreter possessing SC:L or NCI: Master may be used in conjunction with representing attorneys and the Deaf/DeafBlind/Hard of Hearing/Late-Deafened party/ies.<br><br>The proposal makes no reference to the SC:L however comments from Tracy Clark states AOC will continue to require said certificate. If that is indeed the case, the proposal should outline in preferential order what certificate/s shall be required when coordinators (ick) are to determine qualifications of an interpreter. Leaving the language as vague as it currently is leaves the door open for varied interpretations depending on the individual and their perception and/or understanding of ASL interpreters. Such has been the case with terms contained within ADA; for example "reasonable accommodations" have been interpreted differently and rarely is there an agreement between the individual making the request for | |

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| | | | accommodations and the individual/entity providing accommodations.<br><br>It also would be wise and courteous to include DeafBlind and Late-Deafened as adjectives. These individuals have just as much right to be recognized and their unique needs acknowledged.<br><br>Thank you for this opportunity to comment.<br><br>Respectfully submitted June 19, 2013 at 8:55PM.<br>(San Francisco, CA) | |
| 27. | Shane Feldman<br>Executive Director<br>Registry of Interpreters for the Deaf, Inc. | AM<br>(or N) | Jointly Filed Comments of the Registry of Interpreters for the Deaf, Inc., Northern California Registry of Interpreters for the Deaf, Sacramento Valley Registry of Interpreters for the Deaf, and San Diego County Registry of Interpreters for the Deaf<br>The Registry of Interpreters for the Deaf, Inc. (RID), Northern California Registry of Interpreters for the Deaf (NorCRID), Sacramento Valley Registry of Interpreters for the Deaf (SaVRID), and San Diego County Registry of Interpreters for the Deaf (SDCRID) respectfully file the following comments in response to the Invitation to Comment (LEG 13-07) released by the Judicial Council of California seeking feedback on the proposed changes to Evidence Code Section 754.<br>Established in 1964 and incorporated in 1972 as a 501 (c)(3) non-profit membership | CIAP disagrees that the proposal lowers standards. The goal is to always have a court certified ASL interpreter, but we know they are not available for all of the needed assignments and noncertified interpreters are used. The proposed changes raise standards by formalizing the process and creating accountability when a court certified ASL interpreter is not available. This is the same process used for spoken language interpreters.<br><br>CIAP disagrees that the proposal will not provide sufficient guidance . Upon successful enactment of the legislation, Judicial Council will revise the INT forms to collect information about the interpreter's required generalist certification, as well as their legal training and experience. These forms must be signed by the interpreter. A judicial officer must also affirm on the record that all processes for provisional qualification are followed every time a provisionally qualified |

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| | | | organization, the Registry of Interpreters for the Deaf, Inc promotes the welfare and growth of individual interpreters as well as the profession of interpretation of American Sign Language (ASL) and English. NorCRID, SaVRID, and SDCRID are California-based affiliate chapters of RID working to support ASL interpreters within the state.<br>While the "Invitation to Comment" categorizes the proposed changes as an update, we believe introducing the provisional qualification of ASL interpreters is a substantive change and warrants careful consideration. We believe that the proposal will have a negative impact on public's access to the courts, specifically by impeding the Deaf community's ability to have fair and equal access through effective communication to California's judicial system. Furthermore, we want to impress upon the court that additional staff time and resources will be necessary to appropriately evaluate an ASL interpreter's qualifications in the absence of a bright line rule. We believe that the administrative impact of these changes goes beyond informing the jurisdictions when they are able to provisionally qualify interpreters. The court interpreter coordinators will need to be trained on the | interpreter is used.<br><br>Further, RID has issued a moratorium on SC:L performance exams beginning January 1, 2016 and there is no indication of how long it will take until interpreters can again become court certified. This will exacerbate the current situation, and a backup plan for what to do when a court certified ASL interpreter is not available is now more urgent than ever.<br><br>The proposal was not intended to modify, nor does it modify, the requirements or process for a Deaf Interpreter to work in the courts, when needed to establish access for a deaf or hard of hearing court user. Such a change is beyond the scope of the committee's original charge.<br><br>CIAP encourages the interpreting community, and the Deaf community to provide input to CIAP's ASL advisory member if there are additional future suggestions related to changes for the Rules or INT forms. |

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| | | | changes to Rule 2.893 and Forms INT 100, INT 110, and INT 120 and additional time and resources will need<br>to be available to properly engage in the qualification process.<br>Standards<br>The California Department of Social Services website explains, “Section 504 of the Rehabilitation Act of 1973<br>and Title II and Title III of the Americans with Disabilities Act (ADA), as well as other state and federal laws<br>require the provision of auxiliary aids and services (i.e., interpreting services) necessary to ensure effective<br>communication with deaf, hard of hearing or deaf-blind individuals. An interpreter should be certified by either the Registry of the Interpreters for the Deaf (RID), the National Association of the Deaf (NAD) or<br>the American Consortium of Certified Interpreters (ACCI).”1 (Emphasis added) We could not agree more.<br>We believe that current California law employs best practices by recognizing the Specialist Certificate: Legal<br>(SC:L) as the only means to become a certified court interpreter. RID, NorCRID, SaVRID, and SDCRID<br>emphasize that this is the best available standard to certify court interpreters who are hearing. We also believe<br>that the Judicial Council of California should offer certification to deaf intermediary | |

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| | | | interpreters who possess<br>the Conditional Legal Interpreting Permit-Relay (CLIP:R). The SC:L and the CLIP-R are the highest credentials<br>currently available to evaluate an interpreter's legal acumen and thus should be the only means used by the court<br>to certify American Sign Language interpreters, including Deaf intermediary interpreters.<br>Of the SC:L, the National Consortium of Interpreter Education Centers (NCIEC) observes, “Certification of<br>interpreters in this area of specialization is administered by the Registry of Interpreters for the Deaf, and<br>requires that one possess generalist certification, and completion of a set number of hours of training and<br>supervised work experience prior to application. The certification process involves a stringent written and<br>performance exam.”2 In a 2003 Wisconsin Law Review Article, Michelle Lavigne and McCay Vernon<br>observed, “Just as a law license ensures that a lawyer has at least a minimal level of competence, as attested by<br>her law school and the bar examiners, so too does the certification of an interpreter.”3 RID, NorCRID, SaVRID,<br>and SDCRID believe that becoming a highly qualified interpreter begins with attaining appropriate credentials.<br>Fortunately, the field of American Sign | |

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| | | | Language interpreting, unlike many other languages, has a robust certification system whereby interpreters may obtain a generalist certificate in interpreting and then become specialists in the field of legal interpreting. Best Practice: Using an SC:L in Legal Situations In order to provide deaf or hard of hearing people access the judicial system in a free and unimpaired manner, Lavigne and Vernon suggest that there be a "rebuttable presumption that if an interpreter is not certified, the interpretation was not adequate. This rebuttable presumption may seem harsh, but the potential for miscommunication and harm is so great that, on balance, it is worth whatever inconvenience or discomfort it may cause."4 RID, NorCRID, SaVRID, and SDCRID agree with their observation that "requiring the appointment of a certified interpreter will bring a measure of rationality and dependability to the process."5 Notably, Lavigne and Vernon emphasize, "In complex proceedings, the appointment of an interpreter who has an additional certification in Legal Interpreting (SC:L) is strongly encouraged. In an ideal world, the best practice would be the use of a legally certified interpreter only."6 (Emphasis added.) A | |

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| | | | generalist interpreter<br>certificate, even an NAD-RID generalist certificate, is not adequate to prepare an interpreter for the complex<br>nature of communications in the courtroom, police stations, and prisons. NCIEC explains, "Nationally certified Interpreters who hold this credential have demonstrated specialized knowledge of legal interpreting, and greater familiarity with procedure and protocol followed within the court and legal system. These interpreters have also<br>demonstrated the necessary skills in being able to interpret complex legal discourse."7<br>Intermediary Deaf Interpreters in Legal Settings<br>RID, NorCRID, SaVRID, and SDCRID encourage the Judicial Council of California to adopt rules that allow<br>intermediary Deaf interpreters who hold a Conditional Legal Interpreting Permit-Relay (CLIP:R) to be certified<br>to interpret in the court system. Through the RID certification system, a person may become a Certified Deaf<br>Interpreter (CDI) if that person demonstrates knowledge and understanding of deafness, the Deaf community,<br>and Deaf culture. The CDI also possesses native or near-native fluency in American Sign Language and has<br>demonstrated specialized training and/or experience in the use of gesture, mime, props, drawings and other tools<br>to enhance communication. Holders of CLIP:R | |

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| | | | have completed an RID-recognized training program designed for interpreters and transliterators who work in legal settings and who are deaf or hard of hearing. A generalist certification for interpreters/transliterators who are deaf or hard of hearing (RSC or CDI) is required prior to enrollment in the training program. We urge the Judicial Council of California adopt the CLIP-R as the means by which CDIs are able to become certified court interpreters.<br>Provisional Qualification of Interpreters<br>RID, NorCRID, SaVRID, and SDCRID believe that this proposal will have a negative impact on public's access to the courts, specifically by impeding the Deaf community's ability to have fair and equal access through effective communication to California's judicial system. We believe that using interpreters who possess an SC:L or CLIP:R employs best practices in the provision of communication access and should be the standard employed by the California court system. However, we recognize that in rare and limited situations, the courts may need to resort to the provisional qualification of interpreters. Should this proposal pass, we believe that strong guidelines must be in place to ensure that those who are provisionally qualified by the | |

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| | | | court possess the knowledge, skills, and abilities to facilitate effective communication. Without clear, concise guidelines, the courts may inadvertently provisionally qualify an interpreter without appropriate credentials or training. To this end, we offer the following recommendations:<br>1. The proposal states that "If legislation is adopted the Court Interpreters Advisory Panel will consider conforming changes to Rule 2.893 and Forms INT 100, INT 110, and INT 120." We believe that the equitable administration of justice hinges on the content of these updates and changes must be made to ensure effective evaluation of the qualifications of ASL interpreters.<br>2. In revising forms INT 100, INT 110, and INT 120, deaf and hearing interpreters, as well as the Deaf community, should be consulted and involved in this process. RID and its affiliate chapters stand ready to serve as resources as these important changes are considered. We also encourage the Council to reach out to advocacy organizations such as California Association of the Deaf and the California Coalition of Agencies Serving the Deaf and Hard of Hearing, Inc. for input from the Deaf community. | |

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| | | | 3. The Judicial Council of California should adopt rules that allow intermediary Deaf interpreters who hold a Conditional Legal Interpreting Permit-Relay (CLIP:R) to be certified to interpret in the court system.<br>In addition to making conforming changes to the INT 100, INT 110, and INT 120 forms, guidelines about hiring ASL interpreters should be established for court systems unfamiliar with the knowledge, skills, and abilities necessary to interpret in the courtroom. RID, NorCRID, SaVRID, and SDCRID, as well as documents published by the NCIEC, can facilitate this process.<br>5. There should be mandatory criteria for the provisional qualification of interpreters, including:<br>a. To be provisionally qualified by the court, an ASL interpreter must possess a generalist certification. The Judicial Council should establish a system through which a novice in the evaluation of ASL interpreters can easily ascertain what generalist certifications are available and applicable to legal interpreting.<br>b. In addition to possessing a generalist certification, an ASL interpreter must provide documentation of formal legal interpreter training and interpreting or mentoring experience.<br>6. There should be a strict time limit on | |

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| | | | provisionally qualifying American Sign Language interpreters and this time limit should be made clear in any updates of the INT 100, INT 110, and INT 120 forms.<br>7. The court, in consultation with a hearing interpreter, Deaf intermediary interpreter, and the client, should engage in an interactive process to determine whether effective communication is happening in the absence of a certified court interpreter. This should happen several times in the proceeding. If effective communication is not happening, the proceeding should halt and the court should seek out the services of a certified interpreter.<br>8. Every person that receives interpreting services should to be informed, in their native language, that they have a right to effective communication and they have the right to complain or inform the court when and if they feel the interpreter is not effective. This should be read by every judge or shown to every person who is using an interpreter before the start of any judicial proceeding.<br>Conclusion<br>RID, NorCRID, SaVRID, and SDCRID view this Invitation to Comment as a beginning and not an end. We ask that the Judicial Council of California engage | |

## LEG13-07

**Provisional Qualification of American Sign Language Interpreters** (Amend Evidence Code section 754)

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

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| | | | RID, its affiliate chapters, and the Deaf community when implementing these changes through the revision of Rule 2.893 and Forms INT 100, INT 110, and INT 120. We stand ready to serve as a resource by providing our knowledge and expertise on legal interpreting. Access to the courts in a free and unimpaired manner is a cornerstone of our justice system. We must work together to ensure that interpreters are well qualified to provide effective communication to deaf and hard of hearing people who access the legal system through the use of ASL interpreters.<br>Alexandria, VA) | |

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

# MEMORANDUM

Date
August 27, 2015

To
Members of the Policy Coordination and Liaison Committee

From
Civil and Small Claims Advisory Committee
Hon. Patricia M. Lucas, Chair

Subject
Proposal for Judicial Council-Sponsored Legislation: Timing of Electronic Service

Action Requested
Recommend for Judicial Council Sponsorship

Deadline
N/A

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov
Daniel Pone, 916-323-3121
daniel.pone@jud.ca.gov

## Executive Summary

The Civil and Small Claims Advisory Committee recommends the Judicial Council sponsor legislation to amend Code of Civil Procedure section 1005 to (1) clarify that service of motion papers may be made electronically, and (2) provide that the notice period before a hearing for motion papers served electronically is extended by two court days. Code of Civil Procedure section 1005 addresses the time of service of supporting and opposing papers for specified motions. It provides that the notice period before a hearing is extended a certain number of days—which vary depending on whether the motion is served by mail, facsimile transmission, express mail, or another method of overnight delivery—and it excludes certain papers from the extension. Section 1010.6 of the Code of Civil Procedure and rule 2.251 of the California Rules of Court both provide for electronic service of documents and a two-day extension of time, if a document is served electronically, to the notice period before a hearing and any right or duty to act or respond within a specified period or on a date certain after service of the document. Section 1005, by contrast, does not list electronic service among the methods of service in that statute.


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

## Recommendation

The Civil and Small Claims Advisory Committee recommends the Judicial Council sponsor legislation to amend Code of Civil Procedure section 1005 to (1) clarify that service of motion papers may be made electronically, and (2) provide that the notice period before a hearing for motion papers served electronically is extended by two court days.

## Previous Council Action

The Judicial Council renumbered and amended rule 2.251 effective January 1, 2011. That rule addresses electronic service and the amendments, among other changes, replaced the word "notice" with "document" in subdivision (a)(1), which provides that electronic service is permitted when authorized by the rules. The amendments also added a subdivision on reliability and integrity of documents served by electronic notification. Effective July 1, 2013, in response to legislation that required the council to adopt uniform rules to permit mandatory electronic filing and service of documents in specified civil actions, the council amended several rules, including rule 2.251.

## Rationale for Recommendation

Amending section 1005 to include electronic service among the different methods of delivery for which a specified number of days are added to the notice period would provide, in a single statute, the notice periods for various methods of service.[1] Because section 1005 does not currently address electronic service, there may be uncertainty about extension of the notice period when service is made electronically. The proposed amendment will correct this omission and provide clarity. In drafting the specific language, the committee decided not to refer to electronic notice "pursuant to section 1010.6" because the proposed amendment is intended to apply to any legally authorized electronic service—including service that could be established in the future—and not be limited to section 1010.6.

Both section 1010.6 and rule 2.251 provide that if a document is served electronically, any period of notice, or any right or duty to act or respond within a specified period or on a date certain after service of the document, is extended by two court days. Section 1010.6 provides in the first sentence that "[a] document may be served electronically in accordance with rules adopted pursuant to subdivision (e)." That subdivision provides that the Judicial Council shall adopt uniform rules for the electronic filing and service of documents in the trial courts, which it has done. Rule 2.251 is among the rules adopted, and it provides an extended notice period of two court days "unless otherwise provided by a statute or a rule." Because neither section 1005 nor any other statute provides a different extended notice period, rule 2.251 is effective in establishing the extended notice period of two court days for electronic service. The same extended notice period is provided in section 1010.6.

[1] Section 1005(b) currently provides for a two-calendar-day extension for the following methods of service: "facsimile transmission, express mail, or another method of delivery providing for overnight delivery." Under § 1010.6 and rule 2.251, the time extension for electronic service is two *court* days.

Thus the extended notice period when a document is served electronically is addressed by existing law and is two court days. But because section 1005 addresses notice periods for many types of service of motions and does not include electronic service, it leaves a gap. The proposal would fill the gap by amending the statute to include electronic service.

## Comments, Alternatives Considered, and Policy Implications

The proposal circulated for public comment from April 17 to June 17, 2015. Comments were received from 12 commentators; four agreed with the proposal without modifications, seven agreed but suggested modifications, and one did not agree.[2] Commentators included the California Judges Association (CJA), three superior courts, a superior court operations analyst, a legal author and publisher, two committees of the State Bar of California, and two attorneys. The most significant comments are discussed below.

The Superior Courts of Los Angeles, Riverside, and San Diego Counties agreed with the proposal and did not suggest any modifications or provide specific comments. CJA suggested that section 1005 be amended to include the time of service by electronic means. The committee notes that under current law, electronic service is complete at the time of transmission or when notification of service is sent and declines to impose a requirement on the serving party to state the time that electronic service was effectuated. CJA also suggested that there be consistency in the amount of time that notice is extended when a document is served by facsimile, express mail, and electronic service by amending section 1010.6 and rule 2.251 to change the extension of time for electronic service from court days to calendar days.

Although the invitation to comment for this proposal asked for comments on whether the extended notice period for electronic service should be two calendar days to make it the same as the other types of service, amending section 1010.6 and rule 2.251 is beyond the scope of the proposal. The question was intended to seek commentator's views on the various notice periods, which the committee will consider at a future meeting. This proposal is intended to fill a gap in section 1005 and make it consistent with other laws on the extension of time for electronic service. Though an extension of two calendar days (often a shorter period than two court days) may make sense for electronic service, which is usually received immediately, this proposal is not intended to change the existing extended times for electronic service. The committee recognizes that the extension period will remain different for electronic service than for facsimile and overnight service.

Six other commentators suggested that the extended time periods for service be uniform for facsimile, overnight, and electronic service, with some suggesting that all of those methods of service extend the time two calendar days and some suggesting that service be extended two court days. The commentator who did not agree, the court operations analyst, also based her objection on the inconsistency in the time for service of notice of a motion by facsimile and overnight delivery on the one hand, and service of notice electronically on the other. Under current law the former methods of service are given an extended notice period of two calendar

[2] The text of all comments received and committee responses are included in a comment chart attached. One additional commentator is listed on the comment chart but the comment she submitted is unrelated to the proposal.

days and electronic service has an extended notice period of two court days.[3] The committee recognizes this lack of uniformity and notes that commentators who believe that the extended periods should be uniform do not agree on whether the time should be counted in court or calendar days. The invitation to comment for this proposal specifically sought comments on whether section 1005 should be amended to provide an extension of time of two court days, rather than calendar days, for alternative methods of delivery (facsimile and overnight). There was no consensus among the comments and the committee declines to recommend changing the notice period for alternative methods of delivery.

## Implementation Requirements, Costs, and Operational Impacts

The proposal should not result in any implementation requirements or costs because it does not change the law on timing of electronic service.

## Attachments

1. The text of the proposed legislation
2. Chart of comments

[3] Section 1005 provides for an extension of two calendar days for notice served by facsimile transmission, express mail, or another method of overnight delivery; section 1010.6 and rule 2.251 provide for an extension of two court days when a document is served electronically.

Code of Civil Procedure section 1005 would be amended, effective January 1, 2017, to read:

**§ 1005. Requirement of written notice for certain motions; Time for serving and filing; Method of serving**

**(a)** Written notice shall be given, as prescribed in subdivisions (b) and (c), for the following motions:

**(1)** Notice of Application and Hearing for Writ of Attachment under Section 484.040.

**(2)** Notice of Application and Hearing for Claim and Delivery under Section 512.030.

**(3)** Notice of Hearing for Claim of Exemption under Section 706.105.

**(4)** Motion to Quash Summons pursuant to subdivision (b) of Section 418.10.

**(5)** Motion for Determination of Good Faith Settlement pursuant to Section 877.6.

**(6)** Hearing for Discovery of Peace Officer Personnel Records pursuant to *Section 1043 of the Evidence Code*.

**(7)** Notice of Hearing of Third-Party Claim pursuant to Section 720.320.

**(8)** Motion for an Order to Attend Deposition more than 150 miles from deponent's residence pursuant to Section 2025.260.

**(9)** Notice of Hearing of Application for Relief pursuant to *Section 946.6 of the Government Code*.

**(10)** Motion to Set Aside Default or Default Judgment and for Leave to Defend Actions pursuant to Section 473.5.

**(11)** Motion to Expunge Notice of Pendency of Action pursuant to Section 405.30.

**(12)** Motion to Set Aside Default and for Leave to Amend pursuant to Section 585.5.

**(13)** Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.

**(b)** Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 16 court days before the hearing. The moving and supporting papers served shall be a copy of the papers filed or to be filed with the court. However, if the notice is served by mail, the required 16-day period of notice before the hearing shall be increased by five calendar days if the place of mailing and the place of address are within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States~~, and~~. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by two calendar days and if the notice is served by electronic service, the required 16-day period of notice before the hearing shall be increased by two court days. Pursuant to Section 1010.6(a)(4), the extension does not apply to extend the time for filing a notice of intention to move for new

trial, a notice of intention to vacate judgment under section 663a, or a notice of appeal. Section 1013, which extends the time within which a right may be exercised, or an act may be done, does not apply to a notice of motion, papers opposing a motion, or reply papers governed by this section. All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days, and all reply papers at least five court days before the hearing.

The court, or a judge thereof, may prescribe a shorter time.

**(c)** Notwithstanding any other provision of this section, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, electronic service, or other means consistent with Sections 1010, 1010.6, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This subdivision applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in subdivision (a).

The court, or a judge thereof, may prescribe a shorter time.

Code of Civil Procedure section 1005 would be amended, effective January 1, 2017, to read:

| | Commentator | Position | Comment | Committee Response |
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| 1 | P.J. Basso | AM | This proposed amendment (LEG15-03) should be amended, in my opinion, to require that both parties to an action agree on electronic notification prior to this method of notice being used. | Initially it should be noted that electronic service is defined under rule 2.250as both electronic transmission and electronic notification (with a hyperlink). Current law—Code of Civil Procedure section 1010.6 and rule 2.251—addresses a party's agreement to accept electronic service. Electronic service is authorized when a party has agreed to accept electronic service through express consent or—except for self-represented parties—the act of electronically filing any document with the court. This proposal is intended to be consistent with that law, rather than to change it. The committee therefore declines to make this change. |
| 2. | California Judges Association<br>by Joan P. Weber, President | AM | The Civil Committee recommends that CCP §1005 be amended to include the time of service by electronic means. To ensure consistency for service by facsimile, express mail and electronic service, the committee also recommends that CCP §1010.6 and CRC 2.251, which currently provide 2 court days for electronic service, be amended to provide 2 calendar days for electronic service. | The committee interprets this as suggesting an additional provision that would require the serving party to include the time of service. The committee declines to make this change. This proposal is intended to fill a gap in section 1005 and make it consistent with other laws on the timing of service. Those laws provide that electronic service is complete at the time of transmission or when notification of service is sent. They also add two *court* days to the period of notice or duty to act when a document is served electronically. |
| 3. | Deborah Coel<br>Operations Analyst at<br>Superior Court of Orange County | N | 1. Position on Proposal:<br>The Court believes that the rules regarding timing of service should be uniform.<br><br>2. Request for Specific Comments<br><br>a. Does this legislative proposal appropriately address the stated purpose? | |

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

| | Commentator | Position | Comment | Committee Response |
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| | | | The purpose of this proposal is to amend the Code of Civil Procedure section 1005 to clarify that service of motion papers may be made electronically, and to provide that if a document is served electronically, the notice period before a hearing will be extended by two court days. Amending section 1005 to include electronic service addresses the issue that all methods for delivery are in one place. However, the Court believes that leaving the time frame for electronic service as it stands today is not in the best interest of the court and the public.<br><br>b. Should section 1005 be amended to change the extended notice period for service by facsimile transmission, express mail, and other methods of delivery providing for overnight delivery from two calendar days to two court days?<br><br>The Court believes that for ease of use, the time frame rules for electronic service, facsimile, express mail, and overnight delivery should be uniform. The Court acknowledges that some attorneys may know the specific rules as they are written currently and would have to relearn the rules if the delivery time frames were changed to make them uniform. However, the Court recommends having all of the time frame rules be consistent regardless of the method of delivery. This change would reduce confusion and increase efficiencies for Court staff as well as for the public. | The committee recognizes the benefit of consistency in extended time frames, but this proposal is intended to add the existing time extension for electronic service to section 1005. At a future meeting the committee will consider whether to propose amendments to bring consistency. |

## LEG15-03

**Timing of Electronic Service** (amend Code Civ. Proc., § 1005)

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

| | Commentator | Position | Comment | Committee Response |
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| | | | The Court is comfortable with the change being electronic service conforming to two calendar days or the other methods changing to two court days. The goal is to have one uniform rule with respect to the timing of service. | |
| 4. | Azar Elihu, Attorney<br>Los Angeles | A | | |
| 5. | Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee | | | |
| 6. | Julie Goren, Author/Publisher<br>Litigation by the Numbers<br>Sherman Oaks | AM | I wasn't aware of any confusion as regards whether eService is allowed under CCP 1005(b), but it makes sense to add eService to the list.<br><br>As regards the length of the extension for eService under CCP 1005(b), eService should remain at two court days, and fax and overnight should be changed to two court days. This would go a long way towards simplifying calendaring motions, but, perhaps more important, would simplify calendaring generally.<br><br>First, as regards CCP 1005 notice itself, adding a calendar day extension to the 16 court day statutory period creates problems. Inconsistent results may occur when counting forward or backward. Although CCP 12c was enacted to fix the problem, it did not solve everything. One still must count forward to identify the earliest | The committee agrees that having the same type of days (court or calendar) when calculating extended times of service would be simpler. This proposal, however, is not intended to change the current law, but rather to fill in a gap where section 1005 is silent. At a future meeting, the committee will consider whether to propose amendments to bring consistency.<br><br>This comment doesn't appear to be directed to the proposal but addresses more generally the issue of calculating time for service under various statutes. The proposal does not add a calendar day extension. |

| | Commentator | Position | Comment | Committee Response |
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| | | | possible hearing date, yet timeliness of notice is determined by counting backwards from the hearing date. The beauty of the two court day eService extension is that the problem goes away (18 court days forward or backward has consistent results). Other than hand delivering notice of motion, eService is currently the easiest method to calendar. Changing fax and overnight to two court days would provide more simplicity; changing eService to calendar days would be a detriment. | |
| | | | Second, eService is the only method other than mail (more below) which currently has a single extension throughout the code. This is another huge benefit of eService. Providing that eService adds two calendar days under CCP 1005(b) and two court days everywhere else (per CRC 2.251) would be a step in the wrong direction. | The committee agrees and does not propose this change. |
| | | | Third, changing fax and overnight service in CCP 1005(b) to court days would greatly simplify calendaring generally. Currently, CCP 1013 and CCP 437c add two court days for fax and overnight mail, while CCP 1005(b) adds two calendar days for the very same service methods. Changing fax and overnight to two court days under CCP 1005(b) would provide much needed consistency throughout the CCP. | The committee recognizes the benefit of consistency in extended time frames. This proposal, however, is not intended to change the current law, but rather to fill in a gap where section 1005 is silent. At a future meeting, the committee will consider whether to propose amendments to bring consistency among various types of service. |
| | | | Alternatively, if the committee determines that two court days is too long in CCP 1005(b), then for consistency sake, 16 court days needs to be | This proposal is intended to state the extension of time when motion papers are electronically served |

| | Commentator | Position | Comment | Committee Response |
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| | | | changed to a period based on calendar days (it used to be 21), and eService should be changed to calendar days in CCP 1005(b) and CRC 2.251. This, too, would simplify calendaring under CCP 1005(b) by requiring counting of calendar days plus calendar days under every method of service; provide uniformity throughout the code so that fax and overnight would always be two calendar days no matter what was being served or responded to; and would have an added bonus: where an MSJ is being eServed, one would be counting calendar days plus calendar days.<br><br>Comment on proposed wording: This language: "Pursuant to paragraph (4) of subdivision (a) of Section 1010.6, the extension does not apply to extend the time for filing a notice of intention to move for new trial, a notice of intention to vacate judgment under section 663a, or a notice of appeal." does not belong in CCP 1005(b) for the same reason that the identical language in CCP 1013 does not belong here.<br><br>Suggested revisions to CCP 1005(b): (1) the statute currently refers to "16 court days" in one place and “16-day period” in two other places, with a third now being proposed. For consistency, change “16-day period” to “16 court day period.”<br><br>Suggested revision to CCP 1005(c): Rather than listing every possible manner of service, and not saying they must be authorized methods | and to be consistent with time the extensions for electronic service of a document in section 1010.6 and rule 2.251.<br><br>The language is consistent with statutory drafting.<br><br>“The required 16-day period” refers back to “16 court days.” The committee does not think it necessary to include “court-day” before period.<br><br>The proposal did not add that language; it is currently in the statute. The proposal simply |

| | Commentator | Position | Comment | Committee Response |
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| | | | (as would be the case of eService and fax), perhaps say: "serve by any means authorized by law and reasonably calculated to ensure delivery to the other party or parties no later than the close of the next business day" which is the language currently being used in CRC 3.1312. | added "electronic service" and "1010.6" to the other means of service and listed code sections. The committee declines to make this change. |
| 7. | Roger Haag, Attorney at Law<br>Long Beach | AM | Solos and small practitioners may have email addresses but may not use them regularly or as a regular part of their business practice. Electronic service should only be permitted if all parties first agree to accept electronic service. | Current law—Code of Civil Procedure section 1010.6 and rule 2.251—addresses a party's agreement to accept electronic service and this proposal is intended to be consistent with that law, rather than to change it. |
| 8. | Orange County Bar Association<br>by Ashleigh Aitken, President | AM | The goal of the proposed legislation is a laudable one. A preferred approach would be to amend section 1005 to provide that, if notice is served electronically, the period for service is extended by two calendar days (i.e., change the period for electronic service by conforming it to the type of extension period used in section 1005 for other kinds of service). This amendment will cause less confusion and result in fewer difficulties for practitioners and the Courts. | The proposal is intended to fill a gap in section 1005 and state the extension of time for electronic service that is included in existing law. |
| 9. | State Bar of California<br>Committee On Admin. of Justice | AM | The State Bar of California's Committee on Administration of Justice (CAJ) has reviewed and analyzed the Judicial Council's Invitations to Comment, and appreciates the opportunity to submit these comments.<br><br>CAJ generally supports an amendment to Code | |

| | Commentator | Position | Comment | Committee Response |
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| | | | of Civil Procedure section 1005 that adds electronic service to the means of expedited service identified in that statute. As currently proposed, the amendment adds the option of electronic service to section 1005, subdivision (b) and provides in part: "[A]nd if the notice is served by electronic service, the required 16-day period of notice before the hearing shall be increased by two court days." The proposal also amends subdivision (c) of section 1005 to add "electronic service, or other means consistent with Sections 1010, 1010.6" to the methods reasonably calculated to ensure delivery of opposing or reply papers the day after filing. The proposed amendments are consistent with section 1010.6, subdivision (a)(1)(C)(4), which has provided since its enactment in 1999 that "any period of notice, or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic means by two court days." The statute exempts certain types of motions also exempted from the requirements of section 1005. Correspondingly, rule 2.251 of the California Rules of Court, adopted as part of the uniform rules for electronic service and filing, similarly provides for an extended notice period of two court days. (Cal. Rules of Court, rule 2.251(h)(2).)<br><br>CAJ has some concern that the notice period for | The committee notes that this proposal does not set the extended time period for electronic service |

| | Commentator | Position | Comment | Committee Response |
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| | | | electronic service is effectively extended for a greater time period than that for service by facsimile transmission, express mail or other overnight delivery method—each of which extend the notice period by two <u>calendar</u> days. (§ 1005, subd. (b).) In its discussions, CAJ initially rejected extending the notice period to two <u>court</u> days for each type of expedited service because attorneys are familiar with the existing timeframes, but ultimately concluded that the goal of consistency among all types of expedited service overrides that concern.<br><br>Accordingly, CAJ proposes that legislation adding electronic service to and modifying the other expedited service provisions of section 1005, subdivision (b) states:<br><br>"If the notice is served by facsimile transmission, express mail, ~~or~~ another method of delivery providing for overnight delivery, <u>or electronic service</u> the required 16-day period of notice before the hearing shall be increased by two ~~calendar~~ <u>court</u> days. <u>Pursuant to paragraph (4) of subdivision (a) of Section 1010.6, the extension does not apply to extend the time for filing a notice of intention to move for a new trial, a notice of intention to vacate judgment</u> | at 2 days; it merely states that period of time, which is provided in section 1010.6 and rule 2.251.<br><br>The committee recognizes the benefit of consistency in extended time frames. This proposal, however, is not intended to change the current law, but rather to fill in a gap where section 1005 is silent. At a future meeting, the committee will consider whether to propose amendments to bring consistency among various types of service. |

| | Commentator | Position | Comment | Committee Response |
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| | | | under section 663a, or a notice of appeal."<br><br>Please note, however, that a minority of CAJ believes consistency should be achieved by conforming electronic service to the existing two calendar day extension in section 1005.<br><br>CAJ supports the amendments to section 1005, subdivision (c) as proposed. | |
| 10. | State Bar of California<br>Litigation Section<br>Rules and Legislation Committee<br>By Reuben A. Ginsburg, Chair | AM | The Committee agrees that the notice period extensions for service of a notice of hearing by various methods, including electronic service, should be provided all in one statute, Code of Civil Procedure section 1005.[23] We also believe that greater consistency between the notice period extensions in sections 1013 and 1005 would simplify matters and may help to eliminate some confusion.<br><br>Section 1013 extends "any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document" by 5 calendar days for service by mail within California (subd. (a)), 2 court days for overnight delivery (subd. (c)), and 2 court days for fax service (subd. (e)). Section 1005, subdivision (b) states that section 1013 is inapplicable to a notice of hearing, opposition, and reply papers on a | |

[23] All statutory references are to the Code of Civil Procedure unless stated otherwise.

| | Commentator | Position | Comment | Committee Response |
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| | | | motion, which are governed instead by section 1005. But we believe that the notice period extensions for service of a notice of hearing by various methods under section 1005, subdivision (b) should match the notice period extensions for service of other documents by the same methods under section 1013, subdivisions (a), (c), and (e). The reason for the different extensions under the two statutes is not apparent, and it appears that the benefits of consistency would outweigh any reasons for the difference. We also believe that specific notice period extensions in other statutes and court rules should conform with section 1013 unless there is a compelling reason for a different extension.<br><br>We suggest changing the notice of hearing extensions in section 1005, subdivision (b) for service by overnight delivery and fax from 2 calendar days to 2 court days to conform with the extensions in section 1013, subdivisions (c) and (e) for the same service methods. The use of court days rather than calendar days would also be more consistent with the use of court days for electronic service in section 1010.6, subdivision (a)(4) and the use of court days in the final sentence in section 1005, subdivision (b), stating the time to file opposition and reply papers on a motion (9 and 5 court days, respectively).<br><br>Rule 2.306(d) states that "any prescribed period of notice" is extended by 2 court days for | This proposal is not intended to change the extension of time for any method of service. It simply recommends adding "electronic" to section 1005 to fill a gap. |

| | Commentator | Position | Comment | Committee Response |
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| | | | service by fax. This is consistent with section 1013, subdivision (e) (2 court days for fax service) but inconsistent with section 1005, subdivision (b) (2 calendar days for fax service of a notice of hearing). Section 1005, subdivision (b) states that section 1013 is inapplicable to a notice of hearing, opposition, and reply papers on a motion, but does not state that rule 2.306(d) is inapplicable to a notice of hearing. Changing the extension period for fax service under section 1005, subdivision (b) from 2 calendars to 2 court days would resolve this discrepancy.<br><br>We also suggest that the Judicial Council consider revisiting the issue of whether there should be any extension for electronic service.<br><br>Finally, we would delete the following language from the proposal: "Pursuant to paragraph (4) of subdivision (a) of Section 1010.6, the extension does not apply to extend the time for filing a notice of intention to move for a new trial, a notice of intention to vacate judgment under section 663a, or a notice of appeal." We believe that this language is unnecessary because section 1005, subdivision (b) only extends "the required 16-day period of notice before the hearing" on a motion. Unlike sections 1013 and 1010.6, subdivision (a)(4), section 1005, subdivision (b) does not apply more broadly to "any right or duty to do any act or make any response within any period or on a | <br><br>This is beyond the scope of the proposal and the committee will consider whether to revisit the issue at an upcoming meeting.<br><br>The proposal did not add that language; it is currently in the statute. The proposal simply added "electronic service" and "1010.6" to the other means of service and listed code sections. The committee declines to make this change. |

| | Commentator | Position | Comment | Committee Response |
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| | | | date certain after service of the document." The limiting language is appropriate in sections 1013 and 1010.6, subdivision (a)(4) because those statutes would otherwise apply to the three stated notices. But we believe that the limiting language does not belong in section 1005, subdivision (b) and therefore would delete this language from the proposal. | |
| 11. | Superior Court of Los Angeles County (no name indicated) | A | No specific comment. | No response necessary. |
| 12. | Superior Court of Riverside County by Marita Ford, Sr. Management Analyst | A | No specific comment. | No response necessary. |
| 13. | Superior Court of San Diego County by Mike Roddy, Executive Officer | A | No additional comments. | No response necessary. |
| 14. | Martha Welch San Diego | A | *The comment submitted is unrelated to the proposal. | No response necessary. |