



## JUDICIAL COUNCIL OF CALIFORNIA

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# REPORT TO THE JUDICIAL COUNCIL

*Item No.: 22-095*

For Circulating Order CO-22-02 on: May 10, 2022

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**Title**

Criminal Procedure: Mental Competency  
Proceedings

**Agenda Item Type**

Action Required

**Effective Date**

May 10, 2022

**Rules, Forms, Standards, or Statutes Affected**

Amend Cal. Rules of Court, rule 4.130

**Date of Report**

April 18, 2022

**Recommended by**

Criminal Law Advisory Committee  
Hon. Brian. M. Hoffstadt, Chair

**Contact**

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### Executive Summary

The Criminal Law Advisory Committee recommends amendments to California Rules of Court, rule 4.130, to reflect statutory changes to Penal Code section 1370 and new Welfare and Institutions Code section 4335.2 authorizing the Department of State Hospitals to conduct a reevaluation of a defendant found to be incompetent to stand trial in specified circumstances, and statutory changes to Penal Code section 1370.01 regarding defendants found incompetent to stand trial in a misdemeanor criminal proceeding.

### Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council amend rule 4.130 of the California Rules of Court, effective May 10, 2022. The proposal would:

- Clarify that a placement recommendation from the court-appointed expert only applies to felonies;
- Add a subdivision requiring the expert competency report to contain an opinion as to whether a misdemeanor defendant is “gravely disabled”;
- Clarify that restoration only applies to felonies and those found incompetent to stand trial due to developmental disabilities;

- Add a new subdivision to state posttrial options provided in the amended statute when a defendant is found incompetent to stand trial in a misdemeanor criminal proceeding;
- Delete provisions that duplicate statutes on mental health diversion;
- Amend the title to subdivision (h) to clarify that the contents apply to posttrial hearings on competence under Penal Code section 1370; and
- Add references to reevaluations done by Department of State Hospitals.

The proposed amended rule is attached at pages 6–9.

### **Relevant Previous Council Action**

Rule 4.130 was adopted effective January 1, 2007. It was most recently amended, effective September 1, 2020, to reflect legislative changes by deleting an advisory committee comment stating that expert reports are publicly accessible court documents (Senate Bill 55; Stats. 2019, ch. 251), and replacing outdated terminology to describe mental health disorders (Assembly Bill 46; Stats. 2019, ch. 9).

### **Analysis/Rationale**

The recommended amendments to rule 4.130, regarding mental competency proceedings, reflect statutory changes to Penal Code sections 1370 and 1370.01.

Penal Code section 1370, which applies to felony cases in which a defendant is found to be mentally incompetent, was amended, in relevant part, to authorize the Department of State Hospitals to conduct a competency reevaluation of a defendant in county custody if the defendant has been committed to and awaiting admission to the department for 60 days or more (Assembly Bill 133; Stats. 2021, ch. 143). This reevaluation procedure is further detailed in Welfare and Institutions Code section 4335.2. The recommendation includes amending subdivision (h) on posttrial hearings on competence to reference competency reevaluations conducted by the Department State Hospitals as a basis for a posttrial hearing on competence.

Penal Code section 1370.01, which applies to misdemeanor cases in which a defendant is found to be incompetent, was amended, in relevant part, to repeal provisions regarding the restoration of competency for a person charged with a misdemeanor, or a violation of probation for a misdemeanor, and, on finding the defendant incompetent to stand trial, requiring a court to suspend the proceedings and take certain actions, including granting diversion not to exceed one year or dismissing the charges (Senate Bill 317; Stats. 2021, ch. 599).

Based on these statutory changes to section 1370.01, the recommendation adds a new subpart to subdivision (f) to state posttrial options provided in the amended statute when a defendant is found incompetent to stand trial in a misdemeanor criminal proceeding. It also clarifies, in subdivision (f)(2), that restoration to competency only applies to felonies or those found incompetent to stand trial due to developmental disabilities, as misdemeanor defendants found incompetent to stand trial under section 1370.01 are no longer restored to competence. The recommendation also clarifies that a placement recommendation from the court-appointed expert

only applies to felonies, and eliminates portions of subdivision (g) on mental health diversion that are duplicative of statutory language as unnecessary.

The recommendation includes adding new subdivision (d)(2)(h) to require the expert competency report to contain an opinion as to whether a misdemeanor defendant is “gravely disabled,” to incorporate statutory changes allowing a court to refer misdemeanor defendants ineligible for diversion to the county conservatorship investigator for possible conservatorship proceedings. This provision is responsive to the fact that a determination as to grave disability will need to be made within the statutory timeframe if a defendant found incompetent under section 1370.01 is ineligible for diversion or is found unsuitable or terminated from diversion. Requiring the evaluator to assess the defendant for grave disability contemporaneously with the competency evaluation affords the court and responsible county agencies the information needed to change courses swiftly, should diversion be denied.

### **Policy implications**

This proposal has no major policy implications because the recommendation is to implement new legislation. It aligns with the Judicial Council’s policy to keep the California Rules of Court consistent with related statutes.

### **Comments**

This proposal circulated for comment from February 4, 2022, to March 18, 2022. Three comments were received. The Superior Court of Los Angeles County agreed with the proposal, and the Superior Court of Orange County and Orange County Bar Association agreed with the proposal if modified.

### ***Clearer language as to posttrial procedure in subdivision (f)(2)***

The invitation to comment offered an alternative along with the proposed language for subdivision (f)(2) regarding posttrial procedures. This language states posttrial options when a defendant is found incompetent under section 1370 or 1370.1, clarifying that restoration only applies in these contexts. Two commenters recommended the alternative as clearer. The committee agreed and has incorporated the alternative language into the recommended revisions.

### ***Diversion for persons found incompetent to stand trial under Penal Code section 1370.1 (developmental disability)***

Subdivision (f)(2) on posttrial procedures outlines two options for a defendant found incompetent to stand trial: (1) restoration treatment for persons found incompetent to stand trial under Penal Code section 1370 (felonies) or section 1370.1 (developmental disabilities), or (2) mental health diversion for persons found incompetent to stand trial under Penal Code section 1370.

The Orange County Bar Association commented that it was not clear whether a person found incompetent to stand trial due to a developmental disability was ineligible for diversion, and that the reference to Penal Code section 1370.1 should be removed. The committee declined to incorporate the commenter’s suggestion, as Penal Code section 1370.1 does not include a section

on mental health diversion, unlike Penal Code section 1370. The committee also finds the reference to section 1370.1 in subdivision (f)(2) appropriate.

***Add language that finding of grave disability not be a basis to deny diversion***

The committee proposed and circulated a new provision (subdivision (d)(2)(H)) in the evaluator's report section:

[The report must include the following:] [¶] ... [¶] If the defendant is charged only with a misdemeanor offense, an opinion based on present clinical impressions and available historical data as to whether the defendant, regardless of custody status, appears to be gravely disabled, as defined in Welfare and Institutions Code section 5008(h)(1)(A).

The proposed language reflects Penal Code section 1370.01(b)(1)(D), which outlines three options for the court to pursue if a misdemeanor defendant who is incompetent to stand trial is ineligible for mental health diversion. One option is for the court to refer the defendant to the county conservatorship investigator in the county of commitment for possible conservatorship proceedings if, based on the opinion of a qualified mental health expert, the defendant appears to be gravely disabled, as defined in Welfare and Institutions Code section 5008(h)(1)(A).

The Orange County Bar Association submitted a comment to add the following language to proposed subdivision (d)(2)(H): "Any opinion that the defendant appears to be gravely disabled shall not be a basis to deny the defendant diversion pursuant to Penal Code section 1001.36."

The committee declined to add the commenter's suggested language. It is the committee's position that the proposed language in subdivision (d)(2)(H), requiring an evaluator to provide an opinion as to whether a misdemeanor defendant is gravely disabled, does not suggest that the defendant, if gravely disabled, cannot be diverted under section 1001.36. The rule is responsive to the fact that a determination as to grave disability will need to be made within the statutory timeframe if a person found incompetent under section 1370.01 is ineligible for diversion or is found unsuitable or terminated from diversion. Requiring the evaluator to assess the defendant for grave disability contemporaneously with the competency evaluation affords the court and responsible county agencies the information needed to change courses swiftly, should diversion be denied.

***Procedures following reevaluation by Department of State Hospitals***

The Superior Court of Orange County posed questions regarding the procedures following reevaluation by the Department of State Hospitals as contemplated by Assembly Bill 133. The committee notes that the questions address points in the relevant statutes around reevaluation, and are outside the scope of this proposal.

***Alternatives considered***

The committee did not consider the alternative of taking no action, because the rules would be inaccurate if not revised to reflect the recently enacted laws. The committee considered waiting

for the regular Judicial Council cycle, which would have resulted in the amended rule not going into effective until January 1, 2023, but decided the amendments should take effect immediately to ensure that the rules of court are consistent with statute.

The committee considered adding a new subdivision on mental health diversion for a defendant found incompetent to stand trial in a misdemeanor criminal proceeding under Penal Code section 1370.01. However, since the new subdivision in the rule would largely duplicate the statutory requirements already stated in Penal Code section 1370.01, the committee decided not to propose a new subdivision. Instead, the committee added posttrial options for when a defendant is found incompetent to stand trial in a misdemeanor criminal proceeding to the existing subdivision on posttrial procedures.

### **Fiscal and Operational Impacts**

The statutory changes to Penal Code section 1370.01 include an evaluation by a qualified mental health expert on whether specified defendants are gravely disabled as defined by Welfare and Institutions Code section 5008(h)(1)(A). The proposed rule suggests this evaluation be conducted as part of the initial competency examination to increase efficiencies and streamline procedures, when appropriate, by having one court-appointed expert provide all the relevant mental health information regarding the defendant rather than requiring the appointment of a separate expert at a later time.

The Superior Court of Orange County commented that the proposed rule allowed the court to act more swiftly to assist defendants who have a mental illness or are gravely disabled.

### **Attachments and Links**

1. Cal. Rules of Court, rule 4.130, at pages 6–9
2. Chart of comments, at pages 10–13

**Rule 4.130. Mental competency proceedings**

**(a)–(c) \* \* \***

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

**(1) \* \* \***

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

**(A)–(E) \* \* \***

**(F)** A list of all sources of information considered by the examiner, including legal, medical, school, military, regional center, employment, hospital, and psychiatric records; the evaluations of other experts; the results of psychological testing; police reports; criminal history; the statement of the defendant; statements of any witnesses to the alleged crime; booking information, mental health screenings, and mental health records following the alleged crime; consultation with the prosecutor and defendant’s attorney; and any other collateral sources considered in reaching his or her conclusion; ~~and~~

**(G)** If the defendant is charged with a felony offense, a recommendation, if possible, for a placement or type of placement or treatment program that is most appropriate for restoring the defendant to competency; and

**(H)** If the defendant is charged only with a misdemeanor offense, an opinion based on present clinical impressions and available historical data as to whether the defendant, regardless of custody status, appears to be gravely disabled, as defined in Welfare and Institutions Code section 5008(h)(1)(A).

**(3) \* \* \***

**(e) \* \* \***

**(f) Posttrial procedure**

**(1)** If the defendant is found mentally competent, the court must reinstate the criminal proceedings.

- 1
- 2 (2) If the defendant in a felony case is found to be mentally incompetent under
- 3 section 1370 or the defendant in any criminal action is found to be mentally
- 4 incompetent under section 1370.1 due to a developmental disability, the
- 5 criminal proceedings remain suspended and the court ~~must~~ either:
- 6
- 7 (A) Must issue an order committing the person for restoration treatment
- 8 under the provisions of the governing statute; or
- 9
- 10 (B) In the case of a person eligible for commitment under ~~Penal Code~~
- 11 ~~sections 1370 or 1370.01~~, if the person is found incompetent due to a
- 12 mental disorder, may consider placing the ~~committed~~ person on a
- 13 program of diversion under section 1001.36 in lieu of commitment.
- 14
- 15 (3) If the defendant is found to be mentally incompetent in a misdemeanor case
- 16 under section 1370.01, the criminal proceedings remain suspended, and the
- 17 court may dismiss the case under section 1385 or conduct a hearing to
- 18 consider placing the person on a program of diversion under section 1001.36.
- 19

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

21 **Reinstatement of felony proceedings under section 1001.36(d)**

22

- 23 (1) ~~After the court finds that the defendant is mentally incompetent and before~~
- 24 ~~the defendant is transported to a facility for restoration under section~~
- 25 ~~1370(a)(1)(B)(i), the court may consider whether the defendant may benefit~~
- 26 ~~from diversion under Penal Code section 1001.36. The court may set a~~
- 27 ~~hearing to determine whether the defendant is an appropriate candidate for~~
- 28 ~~diversion. When determining whether to exercise its discretion to grant~~
- 29 ~~diversion under this section, the court may consider previous records of~~
- 30 ~~participation in diversion under section 1001.36.~~
- 31
- 32 (2) ~~The maximum period of diversion after a finding that the defendant is~~
- 33 ~~incompetent to stand trial is the lesser of two years or the maximum time for~~
- 34 ~~restoration under Penal Code section 1370(c)(1) (for felony offenses) or~~
- 35 ~~1370.01(c)(1) (for misdemeanor offenses).~~
- 36
- 37 (3) ~~The court may not condition a grant of diversion for defendant found to be~~
- 38 ~~incompetent on either:~~
- 39
- 40 (A) ~~The defendant's consent to diversion, either personally, or through~~
- 41 ~~counsel; or~~
- 42

(B) ~~A knowing and intelligent waiver of the defendant's statutory right to a speedy trial, either personally, or through counsel.~~

(4) ~~A finding that the defendant suffers from a mental health disorder or disorders rendering the defendant eligible for diversion, any progress reports concerning the defendant's treatment in diversion, or any other records related to a mental health disorder or disorders that were created as a result of participation in, or completion of, diversion or for use at a hearing on the defendant's eligibility for diversion under this section, may not be used in any other proceeding without the defendant's consent, unless that information is relevant evidence that is admissible under the standards described in article I, section 28(f)(2) of the California Constitution.~~

(5) If a defendant eligible for commitment under section 1370 is granted diversion under section 1001.36, and during the period of diversion, the court determines that criminal proceedings should be reinstated under Penal Code section 1001.36(d), the court must, under Penal Code section 1369, appoint a psychiatrist, licensed psychologist, or any other expert the court may deem appropriate, to examine the defendant and return a report, opining on the defendant's competence to stand trial. The expert's report must be provided to counsel for the People and to the defendant's counsel.

(A)(1) \* \* \*

(B)(2) \* \* \*

(C)(3) If the court finds by a preponderance of the evidence that the defendant is mentally incompetent, criminal proceedings must remain suspended, and the court must order that the defendant be committed, ~~under Penal Code section 1370 (for felonies) or 1370.01 (for misdemeanors),~~ and placed for restoration treatment.

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



1       (6) ~~If the defendant performs satisfactorily and completes diversion, the case~~  
2       ~~must be dismissed under the procedures stated in Penal Code section~~  
3       ~~1001.36, and the defendant must no longer be deemed incompetent to stand~~  
4       ~~trial.~~

5  
6       **(h) Posttrial hearings on competence under section 1370**

7  
8       (1) \* \* \*

9  
10      (2) On receipt of ~~the~~ an evaluation report under (h)(1) or an evaluation by the  
11      State Department of State Hospitals under Welfare and Institutions Code  
12      section 4335.2, the court must direct the clerk to serve a copy on counsel for  
13      the People and counsel for the defendant. If, in the opinion of the appointed  
14      expert or the department's expert, the defendant has regained competence,  
15      the court must conduct a hearing, as if a certificate of restoration of  
16      competence had been filed under ~~Penal Code~~ section 1372(a)(1), except that  
17      a presumption of competency does not apply. At the hearing, the court may  
18      consider any evidence, presented by any party, ~~which~~ that is relevant to the  
19      question of the defendant's current mental competency.

20  
21      (A)–(C) \* \* \*

**SP22-03****Criminal Procedure: Mental Competency Proceedings** (Amend Cal. Rules of Court, rule 4.130)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Orange County Bar Association by Daniel S. Robinson, President	AM	<ul style="list-style-type: none"> <li>• Re (f)(2): the language in the comment box is more clear than the language in the proposed rule.</li> <li>• Re (f)(2), 1370.1: It is not clear that a person found incompetent pursuant to PC 1370.1 is ineligible for diversion pursuant to PC 1001.36. The reference to 1370.1 in (f)(2) should be removed</li> <li>• Re (d)(2)(H): add the following language: “Any opinion that the defendant appears to be gravely disabled shall not be a basis to deny the defendant diversion pursuant to Penal Code section 1001.36.”</li> </ul>	<p>The committee agrees and has incorporated the alternate language for subdivision (f)(2) in its recommendation to the Council.</p> <p>Penal Code section 1370.1 does not include a section on mental health diversion, unlike Penal Code section 1370. The reference to section 1370.1 in subdivision (f)(2) is appropriate.</p> <p>The proposed language in subdivision (d)(2)(H), requiring an evaluator to provide an opinion as to whether a misdemeanor defendant is gravely disabled does not suggest that the defendant, if gravely disabled, cannot be diverted under section 1001.36. The rule is responsive to the fact that a determination as to grave disability will need to be made within the statutory timeframe if a person found incompetent under section 1370.01 is ineligible for diversion or is found unsuitable or terminated from diversion. Requiring the evaluator to assess the defendant for grave disability contemporaneously with the competency evaluation affords the court and responsible county agencies the information needed to change courses swiftly, should diversion be denied.</p>
2.	Superior Court of Los Angeles County by Bryan Borys	A	No specific comment.	No response required.

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

**SP22-03****Criminal Procedure: Mental Competency Proceedings** (Amend Cal. Rules of Court, rule 4.130)

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

	<b>Commenter</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
3.	Superior Court of Orange County by Elizabeth Flores, Operations Analyst	AM	<p>In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:</p> <ul style="list-style-type: none"> <li>• Does the proposal appropriately address the stated purpose? Response: The proposal does appropriately address the stated purpose.</li> <li>• In subdivision (f)(2), would the following phrasing be clearer and more accurate than the proposed version? Response: Yes, the alternate phrasing is clearer than the proposed phrasing.</li> </ul> <p>The advisory committee also seeks comments from courts on the following cost and implementation matters:</p> <ul style="list-style-type: none"> <li>• Would the proposal provide cost savings? If so, please quantify. Response: Not placing a mentally incompetent defendant with misdemeanor charges in the Department of State Hospitals would be efficient and low cost. The court would not spend additional monies having the Sheriff's Department transporting the defendant to and from the state hospital, housing in the county jail for the interim, or other supplemental reports. The initial competency examination of the defendant requiring competency findings and now placement recommendations eliminates the second part of the process. The defendant will no longer have to be interviewed</li> </ul>	<p>No response required.</p> <p>The committee agrees and has incorporated the alternate language for subdivision (f)(2) in its recommendation to the Council.</p>

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

## SP22-03

### Criminal Procedure: Mental Competency Proceedings (Amend Cal. Rules of Court, rule 4.130)

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

Commenter	Position	Comment	Committee Response
		<p>by the doctors multiple times. The court can now act more swiftly to assist defendants who have a mental illness or are gravely disabled.</p> <p>Defendants with felony charges awaiting admission into a treatment facility under Penal Code Section 1370 and are in custody for 60 days or more is unclear as to their reevaluation. Once the court orders them committed, the facility has 90 days to submit a progress report to the court. Who will the court pay for reevaluations if the defendant has not been transported to a facility? The defendants are to be reevaluated by the doctors upon arrival at the facility. The given background of this proposal states the Department of State Hospital has been authorized to review the defendant before being admitted into the treatment facility. I am unclear as to who and where this is to take place. What will be the required time frame of noticing the facility that the defendant will not be admitted if found competent while currently in custody?</p> <p>The addition of subdivision (d)(2)(H) would assist the court in determining if the defendant should be referred for conservatorship upon making a finding of incompetence. This may reduce the number of subsequent reports and hearings.</p> <ul style="list-style-type: none"><li>• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of</li></ul>	<p>These questions are outside the scope of these rules. The court does not appoint or pay experts for reevaluations conducted by the Department of State Hospitals pending a committed individual's transportation to a treatment facility. Since the Department of State Hospitals conducts the reevaluation and would provide the opinion that the person has regained competence, no notice to a Department of State Hospitals facility would be necessary. (See Welf. and Inst. Code, § 4335.2.)</p>

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

## SP22-03

### Criminal Procedure: Mental Competency Proceedings (Amend Cal. Rules of Court, rule 4.130)

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

	Commenter	Position	Comment	Committee Response
			<p>training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?</p> <p>Response:</p> <ul style="list-style-type: none"><li>-the court notifying the regional center, CONREP, Orange County Health Care Agency, and County Public Guardian; their services may be requested sooner -who is to notify the court the defendant was reevaluated, will not be admitted into a treatment facility or diversion program, and be returned to the court?</li><li>-identifying the person responsible for contacting the treatment facility to advise the defendant will no longer be transported to their facility.</li><li>-revising some of the functions will be necessary to combine because, as of now, some procedures are two steps -no docket codes or modifying our case management system are required</li></ul> <ul style="list-style-type: none"><li>• How well would this proposal work in courts of different sizes</li></ul> <p>Response: This proposal does not depend on how big or small a court is. It assists judicial officers with clarity and directives on handling defendants with mental health issues.</p>	<p>This issued is addressed in statute. The Department of State Hospitals would notify the court if, in the opinion of the department's expert, the defendant has regained competence, and the court would proceed as if a certificate of restoration of competence was returned under Penal Code section 1372(a)(1), except a presumption of competency would not apply and a hearing would be held to determine whether competency has been restored. (Pen. Code, § 1370(a)(1)(H)(ii).)</p>

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