JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 14–15, 2017

Title
Criminal Procedure: Court-Appointed Expert's Report in Mental Competency Proceeding

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 4.130

Recommended by
Criminal Law Advisory Committee
Hon. Tricia Ann Bigelow

Agenda Item Type
Action Required

Effective Date
January 1, 2018

Date of Report
July 26, 2017

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Executive Summary

The Criminal Law Advisory Committee recommends amending rule 4.130 of the California Rules of Court relating to mental competency proceedings in criminal cases to implement recommendations from the Judicial Council's mental health task forces. The proposal amends this rule to identify the information that must be included in a court-appointed expert's report on a criminal defendant's competency to stand trial.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2018 amend:

1. Rule 4.130(d)(2) of the California Rules of Court to require that competency evaluations include:

    a. A brief statement of the examiner's relevant training and previous experience;

b. A summary of the examination, including a current diagnosis, if possible, of the defendant's mental disorder and a summary of the defendant's mental status;

c. A detailed analysis of the defendant's competence to stand trial;

d. A summary of an assessment conducted for malingering or feigning symptoms, if clinically indicated;

e. A statement on whether treatment with antipsychotic medication is medically appropriate, or a recommendation that a psychiatrist examine the defendant if the examining psychologist is of the opinion that referral to a psychiatrist is necessary to address medication issues;

f. A list of all sources of information considered by the examiner; and

g. 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

2. Rule 4.130(a) to clarify that the above amendments apply only to formal competency evaluations, not to brief preliminary evaluations, under certain conditions.

The text of the amended rule is attached at pages 12–13.

Previous Council Action

The Task Force for Criminal Justice Collaboration on Mental Health Issues released its final report in April 2011. Among the task force's recommendations was the suggestion that rule 4.130—which addresses mental competency proceedings under Penal Code section 1367 et seq.—be revised. Specifically, the task force recommended revising rule 4.130(d)(2) to identify what information must be included in the court-appointed expert's report.

The Mental Health Issues Implementation Task Force—the task force convened to review the 2011 recommendations and develop a plan for their implementation—issued a final report in December 2015. This final report also included the recommendation to amend rule 4.130(d)(2).

The council has not amended rule 4.130 since its adoption, effective January 1, 2007.

Rationale for Recommendation

The Criminal Law Advisory Committee circulated for public comment the rule amendments recommended by the task forces. This proposal contains changes that the committee made in response to the comments. In doing so, the committee attempted to strike a balance between enhancing the quality and consistency of reports and minimizing the burden on courts and court-appointed experts.

This proposal amends rule 4.130(d)(2) by adding seven new subparagraphs (A) through (G).

Statement of the examiner's training and previous experience

New subparagraph (A) requires that court-appointed expert reports include "[a] brief statement of the examiner's training and previous experience as it relates to examining the competence of a criminal defendant to stand trial and preparing a resulting report."

Summary of examination

New subparagraph (B) requires that court-appointed expert reports include "[a] summary of the examination conducted by the examiner on the defendant, including a current diagnosis under the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders* [DSM], if possible, of the defendant's mental disorder and a summary of the defendant's mental status." The language of new subparagraph (B) varies slightly from the circulated proposal and task force recommendations. The committee made two changes in response to comments.

Current diagnosis. Several commenters expressed concern about the feasibility of providing a diagnosis. One explained how the proposal affects court-appointed experts. Without increasing the reimbursement for reports, experts may reach hasty conclusions based on insufficient information. She explained that experts may have only 15 minutes to interview the defendant and might base the diagnosis solely on the defendant's uncorroborated self-reporting. This diagnosis would then follow the defendant and could have significant consequences.

Another similarly explained that a diagnosis would require lengthier evaluation of the defendant because most are not receiving regular mental health care.

Conversely, other commenters affirmed their support of the requirement that reports include a diagnosis. One commenter expressed concern that the absence of a meaningful diagnosis has resulted the arrival at state hospitals of defendants who do not need competency restoration, thereby delaying the admission of defendants who require intensive treatment. This commenter identified the proposal's requirement of a diagnosis as one of the two "most basic and significant reforms contained in this proposed rule." Two others also stated their support for this requirement.

On balance, the committee decided to retain the proposal's requirement of a diagnosis, but revised the requirement to apply only "if possible." The revised proposal instructs experts to include a diagnosis in the report, but provides a safety valve if a diagnosis is not possible in a particular case.

Diagnosis under the current DSM. Another commenter described seeing, in her review of hundreds of competency evaluations, diagnoses that no longer exist in DSM-5, the current version of the DSM. She explained the importance of an accurate diagnosis in facilitating treatment planning for defendants found incompetent.

The committee agreed and revised the proposal to specify that a diagnosis must be "under the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders*."

Analysis of the defendant's competence to stand trial

New subparagraph (C) requires that court-appointed expert reports include "[a] detailed analysis of the competence of the defendant to stand trial using California's current legal standard, including the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder."

Summary of a malingering assessment

New subparagraph (D) requires that the court-appointed expert reports include "[a] summary of an assessment—conducted for malingering or feigning symptoms, if clinically indicated—which may include, but need not be limited to, psychological testing."

The language of new subparagraph (D) differs from the circulated proposal and the task force recommendations in that it applies only if malingering or feigning symptoms are clinically indicated. The committee made this revision in response to several comments.

One commenter explained that a summary of malingering or feigning might be inappropriate if malingering and feigning were not clinically indicated. Another commenter similarly clarified that it is not necessary to conduct a malingering assessment in every case; the expert would know the signs of possible malingering that warrant further exploration and possible application of a malingering assessment tool. The commenter also expressed concern that a malingering tool might detect exaggeration, resulting in the misidentification of the defendant as malingering and competent.

A third commenter approved of the requirement, stating that the failure to address potential malingering results in sending defendants who do not need competency treatment to state hospitals.

The committee agreed with these comments. Recognizing the importance of addressing malingering, where clinically indicated, the committee has retained this requirement in the proposal.

A fourth commenter recommended revising the proposal to require that malingering determinations address in a detailed statement whether the expert controlled for cultural differences. The committee declined to pursue this recommendation. In evaluating the defendant for malingering, the expert should be aware of how any cultural differences might influence that evaluation. The committee concluded that requiring a detailed statement to this effect would be too onerous.

Treatment with antipsychotic or other medication

New subparagraph (E) requires that the court-appointed expert reports include:

> Under Penal Code section 1369, a statement on whether treatment with antipsychotic or other medication is medically appropriate for the defendant whether the treatment is likely to restore the defendant to mental competence, a list of likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, whether it is medically appropriate to administer antipsychotic or other medication in the county jail, and whether the defendant has capacity to make decisions regarding antipsychotic or other medication. If an examining psychologist is of the opinion that a referral to a psychiatrist is necessary to address these issues, the psychologist must inform the court of this opinion and his or her recommendation that a psychiatrist should examine the defendant.

(Cal. Rules of Court, rule 4.130(d)(2)(E).)

The language of new subparagraph (E) differs in two ways from the circulated proposal and task force recommendations. The committee made both changes, described below, in response to public comments.

Antipsychotic and other medication. One commenter explained that antipsychotic medication is not the only class of psychotropic medication that may restore a defendant to competency. Although Penal Code section 1369(a) mentions only antipsychotic medication, the committee recognized that antipsychotic medications are a subset of psychotropic medication, a broader category of medication that may be helpful in competency restoration. Accordingly, the committee revised the proposal to encompass medication other than antipsychotic medication.

Application to psychologists. Six commenters expressed concern about requiring that psychologists assess whether medication is appropriate for the defendant. Because prescribing medication is outside the scope of their licenses, psychologists would be disqualified as court-appointed experts if this requirement were to apply to them. Recognizing that psychologists cannot legally prescribe medication (Business and Professions Code section 2904), the committee incorporated the language suggested by a commenter that requires examining psychologists to inform the court if referral to a psychiatrist is necessary to address any medication issues.

List of all sources considered

New subparagraph (F) requires that the court-appointed expert reports include:

> A list of all sources of information considered by the examiner, including legal, medical, school, military, regional center, employment, hospital, and psychiatric

> records; the evaluation of other experts; the results of psychological testing; police reports; criminal history; 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.

(Cal. Rules of Ct., rule 4.130(d)(2)(F).)

This language differs from the circulated version and task force recommendations. The committee effectively combined language from three circulated subparagraphs—(G), (H), and (I)—into subparagraph (F). It also included an additional example of a possible source suggested by a commenter.

Separate statement and summary of certain sources. The circulated version and task force recommendations had two additional subparagraphs (G) and (H) requiring the expert to separately state whether he or she had reviewed certain sources—namely, the police reports, criminal history, statement of the defendant, statements of any witness to the alleged crime, booking information, mental health screenings, and mental health records—and to provide a summary of any information from those sources relevant to the expert's opinion of competency.

One commenter questioned why it was necessary to report sources that the expert did not review. The commenter explained that if the report did not list the source, the court should assume that the expert did not review it.

In response to the comment, the committee decided the requirement to list all sources considered was sufficient, allowing the inference that the expert did not consider sources unnamed in the report. The committee also decided against requiring a summary of any information from the sources relevant to the expert's opinion of competency. Explaining what information led to the expert's opinion of competency is implicit in subparagraph (C)'s requirement that the expert provide a detailed analysis of the defendant's competency. The committee expects that experts will summarize relevant information from any source that contributed to the forming of their opinion.

Accordingly, the committee added the sources identified in circulated subparagraphs (G) and (H) to the list of examples in subparagraph (F).

Summary of consultation with prosecutor and defense counsel. The circulated version and task force recommendations would have also required that reports include "[a] summary of the examiner's consultation with the prosecutor and defendant's attorney, and of their impressions of the defendant's competence-related strengths and weaknesses."

Five commenters disagreed with this requirement. One explained that the experts should act independently and render an unbiased opinion without consulting either attorney. This requirement would indicate to experts that they should seek input from counsel. The commenter noted that if an expert were to receive input from counsel, it should be disclosed in the report.

Another stated that counsel's impressions of the defendant's competency would not be useful to include in the report. A third indicated that this summary was not necessarily a bad idea, but questioned why it should be required. The commenter recommended that experts identify who referred the defendant and why, but that their findings should rely on document review, the clinical interview, and testing. A fourth indicated that this requirement might increase the time of the evaluation and the cost to the court.

The fifth asked that the report, at most, contain checkboxes to indicate whether the expert had prepared it in consultation with counsel. It viewed including the impressions and substantive comments of defense counsel as inappropriate and unnecessary. Checkboxes would provide notice to the court if the expert consulted with counsel, but would not risk undermining the integrity of the attorney-client relationship.

The committee agreed with the comments and removed from the proposal the requirement that experts summarize their consultation with counsel. However, the committee revised subparagraph (F) to identify "consultation with the prosecutor and defendant's attorney" among the examples of sources that an examiner must list, if considered, in the report.

Regional centers for the developmentally disabled. One commenter suggested adding "regional centers" to the list of examples of sources that an examiner may consider. The committee agreed and incorporated this recommendation into the proposal.

Placement recommendation

New subparagraph (G) requires that the court-appointed expert reports include "[a] recommendation, if possible, for a placement or type of placement or treatment program that is most appropriate for restoring the defendant to competency."

One commenter expressed concern with overreliance on inpatient and jail-based competency programs. It requested that the proposal require that experts provide a detailed analysis of the appropriate placement for treatment and a summary of the assessment used.

In response to the comment, the committee revised the proposal to require the examiner to make a recommendation, if possible, regarding placement for competency treatment. The court has discretion to determine the placement of defendants found mentally incompetent. (See Pen. Code, §§ 1370(a)(1)(B)(i), 1370.1(a)(1).) To the extent that the expert can make a recommendation in a particular case as to whether the defendant is clinically suitable for inpatient or outpatient treatment, that recommendation may help courts make placement decisions.

Application of rule amendments

The proposal also amends rule 4.130(a) by adding new paragraphs (2) and (3) to clarify the application of the rule amendments in subdivision (d). New paragraph (2) provides that the new requirements for court-appointed expert reports apply only to formal competency evaluations ordered by the court under Penal Code section 1369(a). New paragraph (3) clarifies that they do not apply to brief preliminary evaluations of a defendant's competency subject to two conditions: (1) parties stipulate to a brief evaluation; and (2) the court orders the evaluation in accordance with a local rule of court that specifies the content of the evaluation and the procedure for its preparation and submission to the court.

The committee decided that this clarification was needed based on the comment submitted by the Superior Court of Los Angeles County. The court explained that applying the rule amendments to short reports would have a substantial impact on the court, including significant costs. To address its burgeoning caseload of defendants found incompetent to stand trial, the court uses two evaluation types: a "full report" and a "short report." Often, the latter is sufficient for the parties and the court and avoids the additional expense and delay required to prepare a "full report." Defendants benefit from this system; those who are clearly incompetent will have a shorter wait for competency treatment.

The committee regarded the court's "short reports" as outside the intended application of the rule amendments, which are meant to apply only to full competency evaluations, not brief preliminary reports stipulated to by the parties. Accordingly, it revised the proposal to clarify its intended application to only full competency evaluations.

Comments, Alternatives Considered, and Policy Implications

This proposal circulated for public comment from March 14 until April 28, 2017. Nineteen comments were submitted in response to the invitation to comment; 4 agreed with the proposal, 6 agreed with the proposal if modified, 8 did not indicate their position, and 1 disagreed. The committee revised the rule amendments in response to the comments. This report addresses many of the comments and the committee's responses above in the rationale section of the proposal; it addresses others immediately below and in the section on implementation requirements, costs, and operational impacts. The committee's specific responses to each comment are available in the attached comments chart at pages 14–53.

Statement of the examiner's training and previous experience

Two commenters view as unnecessary the requirement that reports include a statement of the examiner's training and previous experience. One explained that including a statement on experience and training in every report would be redundant for superior courts that draw from the same pool of examiners. It also noted that examiners would need to testify to their training and experience if called into court. The other commenter indicated that this statement is not in accord with other assessments performed by psychiatrists and psychologists and reasoned that admission to the panel is sufficient to indicate the examiner's qualifications.

The committee declined to revise the proposal to omit this requirement. Once prepared, examiners can readily copy and paste this statement into new reports. Including the statement in every report will ensure that it becomes part of the record, regardless of whether the examiner is called to testify.

Effect of bias and the defendant's individual characteristics on the evaluation

One commenter recommended revising the proposal to require a detailed statement explaining how individual characteristics of the defendant may influence the expert's assessment and findings. The commenter identified the following as examples of individual characteristics that may affect an evaluation: (1) distrust of psychologists; (2) auditory, linguistic, or cultural barriers to communication; and (3) educational, socioeconomic, sexual, and racial biases or differences. The commenter cited to studies addressing how bias results in the misinterpretation of behavior and inequity in access to mental health care.

The committee declined to pursue this recommendation. In evaluating the defendant, the expert should be aware of and take into account how any individual characteristics of the defendant might influence that evaluation. The committee concluded that requiring a detailed statement to this effect would be too onerous.

Developmental disabilities

One commenter recommended revising the proposal to require a diagnosis of the defendant's developmental disability. He explained that defendants may be found incompetent not only for a mental disorder, but also for a developmental disability.

The committee declined to pursue this recommendation. Although a defendant may be mentally incompetent "as a result of mental disorder *or* developmental disability," Penal Code section 1369(a) requires only that the expert "evaluate the nature of the defendant's mental disorder," not the developmental disability. (Pen. Code, §§ 1367(a), 1369(a), italics added.) The committee also recognized that a court would appoint a regional center if it suspected a developmental disability and that the regional center would necessarily evaluate the defendant for a developmental disability. (See *id.,* § 1369(a); Welf. & Inst. Code, § 4643; Cal. Code Regs., tit. 17, § 54010; *People v. Leonard* (2007) 40 Cal.4th 1370, 1387–1391.) The committee reasoned that adding this requirement to the rule appears to be unnecessary, may prove confusing where a developmental disability is not indicated, and may be outside the scope of the rules proposal as circulated.

Implementation Requirements, Costs, and Operational Impacts

This proposal may require that a court-appointed expert conduct a more extensive evaluation of the defendant and provide greater detail in the expert report. Accordingly, it may result in increased costs to the courts depending on how they compensate court-appointed experts and whether their experts currently provide the information required by the rule amendments in their reports.

One court explained that the rule amendments would require updating their case management system, revising procedures, and notifying staff, judges, and justice partners of the new requirements.

Other comments—including the comment from the Superior Court of Los Angeles County discussed above—detailed how the proposal would burden the courts. One court explained that its costs would increase if the rule amendments were to require a diagnosis, a summary of mental status, a summary of consultation with counsel, separate statements regarding whether the examiner had consulted certain sources, and summaries of relevant information from those sources. Requiring medication recommendations of all experts would also increase court costs by excluding psychologists from the pool of qualified experts.

The Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee similarly expressed concern for the proposal's fiscal impact on the courts. It recommended that the rule amendments be optional guidelines instead of requirements.

In response to these comments, the committee revised the proposal significantly in an effort to alleviate its burden on the courts. In doing so, it attempted to strike a balance between enhancing the quality and consistency of reports and minimizing the burden on courts and experts.

First, the committee clarified that the intended application of the proposal is only to formal evaluations conducted under Penal Code section 1369(a). The committee does not intend the proposal to apply to brief preliminary evaluations so long as (1) the parties stipulate to a brief evaluation, and (2) the court orders the evaluation under a local rule specifying the content of the evaluation and the procedure for its preparation and submission to the court. As discussed above, the committee expects that this clarification will reduce the proposal's impact on the Superior Court of Los Angeles County.

Second, the committee revised various requirements to lessen their burden on the courts. It revised the proposal to require a diagnosis only "if possible" and a malingering assessment only "if clinically indicated." It clarified that psychologists could continue conducting evaluations by providing that they need not make medication recommendations, but only inform the court if they determine that a psychiatrist should examine the defendant for treatment with medication. Lastly, the committee removed the requirements that experts provide separate statements regarding whether they had reviewed certain sources and summaries of relevant information from those sources.

Attachments and Links

1. Cal. Rules of Court, rule 4.130, at pages 12–13
2. Comments chart, at pages 14–53
3. *Task Force for Criminal Justice Collaboration on Mental Health Issues: Final Report* (April 2011), *http://www.courts.ca.gov/documents/Mental_Health_Task_Force_Report_042011.pdf*

4. *Mental Health Issues Implementation Task Force: Final Report* (December 2015), *http://www.courts.ca.gov/documents/MHIITF-Final-Report.pdf*

Rule 4.130 of the California Rules of Court is amended, effective January 1, 2018, to read:

Rule 4.130. Mental competency proceedings

(a) Application

(1) This rule applies to proceedings in the superior court under Penal Code section 1367 et seq. to determine the mental competency of a criminal defendant.

(2) The requirements of subdivision (d)(2) apply only to a formal competency evaluation ordered by the court under Penal Code section 1369(a).

(3) The requirements of subdivision (d)(2) do not apply to a brief preliminary evaluation of the defendant's competency if:

(A) The parties stipulate to a brief preliminary evaluation; and

(B) The court orders the evaluation in accordance with a local rule of court that specifies the content of the evaluation and the procedure for its preparation and submission to the court.

(b)–(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) A brief statement of the examiner's training and previous experience as it relates to examining the competence of a criminal defendant to stand trial and preparing a resulting report;

(B) A summary of the examination conducted by the examiner on the defendant, including a current diagnosis under the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders*, if possible, of the defendant's mental disorder and a summary of the defendant's mental status;

(C) A detailed analysis of the competence of the defendant to stand trial using California's current legal standard, including the defendant's

ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder;

(D) A summary of an assessment—conducted for malingering or feigning symptoms, if clinically indicated—which may include, but need not be limited to, psychological testing;

(E) Under Penal Code section 1369, a statement on whether treatment with antipsychotic or other medication is medically appropriate for the defendant, whether the treatment is likely to restore the defendant to mental competence, a list of likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, whether it is medically appropriate to administer antipsychotic or other medication in the county jail, and whether the defendant has capacity to make decisions regarding antipsychotic or other medication. If an examining psychologist is of the opinion that a referral to a psychiatrist is necessary to address these issues, the psychologist must inform the court of this opinion and his or her recommendation that a psychiatrist should examine the defendant;

(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; 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) A recommendation, if possible, for a placement or type of placement or treatment program that is most appropriate for restoring the defendant to competency.

(3) * * *

(e)–(f) * * *

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Criminal Procedure Court-Appointed Expert's Report in Mental Competency Proceedings

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

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	**Position**	**Comment**	**Committee Response**
1.	California Board of Psychology By: Antonette Sorrick Executive Officer Dr. Stephen Phillips President	AM	The Board of Psychology ("Board") has received the invitation from Judicial Council of California (Council) to comment on the proposed guidelines for professionals regarding mental competency determinations. The Board is in support of the efforts of the Council to draft the guidelines and approves of the proposed language. See comments on specific provisions below	The committee appreciates the input of the Board of Psychology. See responses to comments below.
2.	California Psychological Association By: Elizabeth Winkelman Director of Professional Affairs	AM	The California Psychological Association wishes to comment on the proposed amendments to the California Rule of Court relating to mental competency proceedings in criminal cases. Our association has almost 4,000 members and represents the interests of approximately 20,000 licensed psychologists in the state, including psychologists who perform competency evaluations in criminal cases. See comments on specific provision below.	The committee appreciates the input of the California Psychological Association. See responses to comments below.
3.	Yok Choi, Psy.D., Ll.B (Hons)	N/I	I am a psychologist working with PC 1370 patients at a forensic facility in California. My job duties currently include writing periodic reports to the court on the status of PC 1370 patients sent to my facility. In the course of my work, I have come across innumerable evaluations done by court-appointed evaluators that have led to the commitment of defendants as incompetent to stand trial. I have read the Proposal of the Task Force for Criminal Justice Collaboration of Mental Health Issues, and specifically, the proposal for	The committee appreciates the input of Dr. Choi.

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

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			amendments to rule 4.130(d)(2) which addresses mental competence proceedings under PC 1367. My interaction with the proposal stems from my involvement as a representative of AFSCME Local 2620 at the Stakeholders Meeting for AB 1962 of 2016. I would like to submit my comments on the said proposal in my personal capacity. The views set out herein are mine, and mine alone, and do not represent the views of any organization of which I may be a part. I applaud the Task Force for its thoughtful work, and specifically on its recommendations for specific information to be included in court-appointed experts' reports. See comments on specific provisions below.	See responses to comments below.
4.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	N/I	Thank you for the opportunity to comment on the Judicial Council of California's proposed amendments to the California Rule of Court relating to mental competency proceedings. The County Behavioral Health Directors Association of California (CBHDA), which represents the public mental health and substance use disorder program authorities in counties throughout California, would like to offer the following comments on the proposed changes to the California Rule of Court. See comments on specific provisions below.	The committee appreciates the input of the County Behavioral Health Directors Association of California. See responses to comments below.

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

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5.	Albert De La Isla Principal Administrative Analyst Orange County Superior Court	N/I	See comments on specific provisions below.	The committee appreciates the input of Mr. De La Isla. See responses to comments below.
6.	Department of State Hospitals By: Pam Ahlin Director	N/I	The Department of State Hospitals (DSH) is a critical stakeholder in the Incompetent to Stand Trial process. DSH provides restoration of competency services for felony defendants who are committed by the courts based on varying degrees of information currently provided in court appointed competency evaluations. DSH fully supports the Judicial Council's proposed amendment to the California Rules of Court rule 4.130, as DSH believes this would be a significant positive change in the Incompetent to Stand Trial process. See comments on specific provisions below.	The committee appreciates the input of the Department of State Hospitals. See responses to comments below.
7.	Disability Rights California, California's Protection & Advocacy System By: Tifanei Ressi-Moyer Legal Fellow Sacramento Regional Office	N/I	Respectfully, DRC submits two recommendations for requirements that may assist the courts in making individual competency determinations. See comments on specific provisions below.	The committee appreciates the input of Disability Rights California. See responses to comments below.
8.	ENRIGHT & OCHELTREE, LLP By: Noelle Bensussen	N/I	This firm represents many Regional Centers and the Association of Regional Center Agencies (ARCA) in various matters. ARCA asked if we would like to comment on the proposed changes to Rule 4.130(d)(2)) suggested by the Criminal Law Advisory Committee. We are not making these comments on behalf of any particular client but as a law firm that has represented various Regional Centers in cases in which a defendant was suspected of having a developmental disability and also	The committee appreciates the input of Enright & Ocheltree, LLP.

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			suspected of being incompetent to stand trial; we have also represented various Regional Centers after the determination has been made that a defendant is incompetent and has a developmental disability and a placement recommendation must be made. (See Penal Code § 1370.1.) See comments on specific provisions below.	See responses to comments below.
9.	Carlos Flores Executive Director San Diego Regional Center	N/I	In general the proposal appropriately addresses the stated purpose for persons with mental illness. See comments on specific provisions below.	The committee appreciates the input of Carlos Flores. See responses to comments below.
10.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	AM	See comments on specific provisions below.	The committee appreciates the Harbor Regional Center's input. See responses to comments below.
11.	Hon. Suzanne N. Kingsbury Presiding Judge El Dorado Superior Court	A	This guidance provided by the proposed rule is necessary to provide courts with the information needed to appropriately handle issues of competency in criminal cases. The rule will also assist new alienists in conducting their evaluations and preparing reports. As a former member of the Mental Health Issues Implementation Task Force, and its predecessor task force, I am delighted to see the Judicial Council take this action. See comments on specific provisions below.	The committee appreciates Judge Kingsbury's input. See responses to comments below.
12.	Barbara McDermott Professor UC Davis, Department of Psychiatry	AM	I have reviewed the proposed changes and agree that the competency evaluations must be improved. See comments on specific provisions below.	The committee appreciates Professor McDermott's input. See responses to comments below.

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13.	Orange County Bar Association By: Michael L. Baroni President	A	See comments on specific provisions below.	The committee appreciates the support of the Orange County Bar Association. See responses to comments below.
14.	State Bar of California's Standing Committee of Legal Services By: Sharon Djemal Chair, Standing Committee on the Delivery of Legal	A	See comments on specific provisions below.	The committee appreciates the support of the State Bar of California's Standing Committee of Legal Services. See responses to comments below.
15.	Superior Court of California, Orange County, Family Law and Juvenile Court By: Cynthia Beltran Administrative Analyst	N/I	See comments on specific provisions below.	The committee appreciates the court's input. See responses to comments below.
16.	Superior Court of California, County of Los Angeles By: Sandra Pigati-Pizano Management Analyst	AM	See comments on specific provisions below.	The committee appreciates the court's input. See responses to comments below.
17.	Superior Court of California, County of San Diego By: Mike Roddy Executive Officer	A		The committee appreciates the court's support.
18.	Superior Court of California, County of Sonoma By: Ken English Sup. Research Attorney	N	Pursuant to the Judicial Council's Invitation to Comment, No. SPR17-10, regarding proposed amendments to Cal. Rules of Court, rule 4.130, Sonoma County Superior Court ("SCSC") respectfully provides the following comments: See comments on specific provisions below.	The committee appreciates the court's input. See responses to comments below.

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List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	**Position**	**Comment**	**Committee Response**
19.	Joint Rules Subcommittee, Trial Court Presiding Judges Advisory Committee (TCPJAC) Court Executives Advisory Committee (CEAC)	AM	See comments on specific provisions below.	The committee appreciates the input of the TCPJAC/CEAC Joint Rules Subcommittee. See responses to comments below.

	Comments Applicable to Multiple Rules		
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20.	Yok Choi, Psy.D., Ll.B (Hons)	The requirement for items 1, 2, 3, 6, 7, and 8 is consistent with good practice for forensic assessments, and should be included in any report to the court. However, given that the fee for writing these reports is a meager $300 to $350 on an average, my concern is that evaluators will be forced to come up with hasty conclusions based on very little, or worse still, no, data. Such quick conclusions would not serve the purposes of justice, and could well backfire.	The committee understands the concerns raised by Dr. Choi and the burden that this proposal would place on the courts and experts. It has revised the proposal to lessen the burden, where appropriate. For example, the proposal now requires a diagnosis only "if possible."
21.	Albert De La Isla Principal Administrative Analyst Orange County Superior Court	No procedure impact, communication should be made to Supervising Judges and stakeholders (doctors on expert panel) This will be an issue for Alternate Defense Services in that we currently have contracts with our experts which outline our current scope of work and qualifications. This would potentially need to be modified to meet these requirements. Contract revisions would take several months. ☐Does the proposal appropriately address the stated purpose? **Response: Yes.** ☐Would the proposal provide cost savings? If so, please quantify.	No response required. The committee recognizes the potential impact on the court. No response required.

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		Response: No cost savings anticipated.	No response required.
		☐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.	
		Response: Minimal, just lays out the standards for reports we are already receiving today.	No response required.
		☐Would three and a half months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?	
		Response: Yes.	No response required.
		☐How well would this proposal work in courts of different sizes?	
		Response: Unknown.	No response required.
22.	Department of State Hospitals By: Pam Ahlin Director	Implementation of the proposed rule would set an appropriate standard for the completeness and rigor of forensic evaluations of defendants that will provide Judges with the information required to make a fully informed decision on the competence of defendants. It would also offer clinicians at State Hospitals or other treatment venues more timely and useful information on the condition of a defendant prior to their admission for treatment to restore their competence.	No response required.
		DSH was an active participant in the Task Force for	No response required.

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		Criminal Justice Collaboration on Mental Health Issues Final Report of April 2011, which developed its Competence to Stand Trial recommendations that have now become this proposed Rule of Court. DSH supported them then and continues to do so today. The lack of a meaningful mental health diagnosis for the potentially incompetent defendant and the failure to address the question of potential malingering by those being assessed for competency present our hospitals with defendants who do not require competency restoration and unnecessarily delay the admission of defendants whose condition requires intensive treatment. In the Department of State Hospitals' opinion these are the two most basic and significant reforms contained in this proposed rule. DSH appreciates the chance to express its support for the Judicial Council's proposed amendment to the California Rules of Court rule 4.130 and appreciates the Judicial Council's active effort to improve the quality and thoroughness of forensic evaluations of defendant competence.	No response required. No response required.
23.	Disability Rights California, California's Protection & Advocacy System By: Tifanei Ressi-Moyer Legal Fellow Sacramento Regional Office	Respectfully, DRC submits two recommendations for requirements that may assist the courts in making individual competency determinations. **<u>Recommendation One</u>: A detailed analysis of what placement for treatment is most appropriate for the defendant to be restored to competency and a summary of the assessment used.** California courts have broad discretion in their ability to	No response required. The committee agrees. To the extent that the expert can recommend the defendant's placement for treatment (e.g., whether the defendant might be suitable for outpatient restoration), that recommendation should be reflected in the report and thereby made available to the court for its consideration in

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		determine the most appropriate placement for restoration of an individual found incompetent to stand trial. This recommended requirement will be a valuable tool to the court when making its decision, and will provide additional insight into balancing the individual mental health needs of the defendant and public safety concerns. *See* Cal. Pen. Code § 1370(a)(1)(B)(i). It will also supplement the Council's recent efforts to increase the number of options available for this population of defendants. Assembly Bill No. 2190, Approved by Governor (September 28, 2014). Court-appointed expert report requirements that focus solely on inpatient and jail-based programs are problematic for individuals determined incompetent to stand trial, and would contravene the Council's own stated objective to prevent prolonged delays and provide timely restoration. *Task Force for Criminal Justice Collaboration on Mental Health Issues: Final Report* 27 (April 2011). According to lawsuits filed against California's Department of State Hospitals, there are currently hundreds of defendants who have been determined incompetent and are languishing in county jails for months without appropriate treatment while waiting for a hospital bed. *See Stiavetti v. Ahlin*, case no. RG15779731 (2015); *People v. Brewer*, *235 Cal.App.4th 122 (2015)*; *In re Loveton*, 244 Cal. App. 4th 1025 (2016). Relying on inpatient hospital care is restrictive and expensive, and "increases hospital census and lengthens delays for restoration services." W. Neil Gowensmith, et al., *Forensic Mental Health Consultant Review Final Report* 25 (2014); NR Johnson, et al., *Outpatient Competence Restoration: A Model and Outcomes* World Journal of Psychiatry (2015). Jail-based restoration programs are also not sufficient to	ordering the defendant's placement. Accordingly, the committee has revised the proposal to require that reports include "[a] recommendation, if possible, for a placement or type of placement or treatment program that is most appropriate for restoring the defendant to competency." See response above. See response above.

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		meet the complicated needs of this population. It is well-documented that conditions within jails exacerbate pre-existing mental health issues rather than provide relief. Jails are not therapeutic environments designed for treatment, and the quality of treatment can vary widely from jail to jail. ACLU & Bazelon, *A Way Forward: Diverting People with Mental Illness from Inhumane and Expensive Jails into Community-Based Treatment that Works* (2014); Treatment Advocacy Center, *A Beds Capacity Model to Reduce Mental Illness Behind Bars* (January 2017). Moreover, in 2014, the Council sponsored successful legislation to "[i]ncrease the number of treatment options available for people who have been found incompetent to stand trial." *Mental Health Issues Implementation Task Force: Final Report* 14 (December 2015). The court sought and procured broader discretion to allow mental health treatment for an individual in their respective communities "rather than in a custodial or in-patient setting" until competency is restored. *Ibid*. This was a formidable initial step in realizing that for many individuals, community-based restoration services are more efficient, cost-conscious and client-centered than facility-based treatment, and should be seriously considered for each individual recommended for restoration before the court. *See* W. Neil Gowensmith, et al., *Looking for Beds in All the Wrong Places: Outpatient Competency Restoration as a Promising Approach to Modern Challenges*, Psychology, Public Policy, and Law 9 (June 6, 2016) (explaining that States save nearly four-hundred dollars per day, per patient, in outpatient programs compared to inpatient treatment, which is in line with the Council's goal to promote cost-savings). A court-appointed expert report must afford the judicial	See response above.

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		branch an opportunity to meet its clear and specifically stated objectives regarding defendants determined incompetent to stand trial. For these reasons, DRC suggests that expert reports be required to include a detailed analysis of the most appropriate treatment setting for the defendant to be restored to competency and a summary of the assessment used in that analysis.	The committee has revised the proposal to require that the expert's report include a placement recommendation, if possible. Satisfying this requirement necessarily entails explaining why the expert selected a particular placement. The committee declines to revise the proposal to require a detailed analysis or that the report include a summary of the assessment used. Instead, the committee prefers to leave this in the discretion of the expert.
		<u>Recommendation Two</u>: A detailed statement explaining how individual characteristics of the defendant may influence the conclusions of their assessment (e.g. the defendant distrusts psychologists); whether auditory, linguistic, or cultural barriers to communication limit the accuracy of the analysis; whether education, socioeconomic, sexual and racial biases or differences have been considered and addressed; and whether the basis for a determination of malingering has been controlled for cultural differences.	The committee declines to pursue this recommendation. In evaluating the defendant, the expert should be aware of and take into account how any individual characteristics of the defendant might influence that evaluation. The committee has concluded that requiring a detailed statement to this effect would be too onerous.
		As identified in the final report of the Council's Task Force for Criminal Justice Collaboration on Mental Health Issues, culturally and linguistically appropriate treatment services and programs are a necessary component of restoration. Final Report 13-14 (2011). Although "not solely within the purview of the judicial branch," addressing the disparities in access to these services and programs is a shared responsibility of the courts. *Mental Health Issues Implementation Task Force: Final Report* 70 (December 2015). When determining	See response above.

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		competency and potential placement, the courts must have confidence that biases held by the expert will not aggravate disparities in access to mental health treatment in California's criminal justice system. Inequity in access to mental healthcare is persistent throughout California, including, and perhaps especially, in the criminal justice system. Latino Mental Health Concilio, et al., *Community-Defined Solutions for Latino Mental Health Care Disparities: California Reducing Disparities (*2012) (hypothesizing that ineffective communication between patient and doctor, biases about distribution and severity of illnesses in people of color, and "poor access and quality of care," are all root causes of these disparities). For example, studies have demonstrated that men of color with mental health illness are less likely than white men to be determined appropriate for alternatives to jail-based treatment. Similarly, Black men's behavior is more likely interpreted as aggressive or dangerous compared to similarly behaved white men, potentially rendering them ineligible for otherwise appropriate outpatient or inpatient treatment for competency restoration. Joshua C. Cochran & Daniel P. Mears, *Race, Ethnic, and Gender Divides in Juvenile Court Sanctioning and Rehabilitative Intervention*, JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY (2014) (reviewing analyses of racial and ethnic disparities in placement options within diversion and probation); Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY JOURNAL OF CRIMINAL LAW, 8-9, 53 (2010); Hubbard, et al., *Competency Restoration: An Examination of the Differences Between Defendants Predicted Restorable and not Restorable to Competency*, 27 LAW HUM BEHAVIOR 127 (2003); Lonnie R. Snowden, *Bias in Mental Health Assessment and Intervention: Theory and Evidence*,	See response above.

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		AMERICAN JOURNAL OF PUBLIC HEALTH (2003). The disparities seen across the spectrum of cultures that make up the State of California should be acknowledged and abated where possible within the judicial branch. Studies have shown that "implicit bias is most likely to have an effect in situations with substantial ambiguity, room for 'judgement calls,' and constraints on time and attention." Irene V. Blair, et al. *Unconscious (Implicit) Bias and Health Disparities: Where Do We Go from Here?*, THE PERMANENTE JOURNAL (2011). Given the nature of expert reports submitted to the court, a requirement to provide a statement explaining any potential cultural barriers to an expert's assessment is both appropriate and encouraged.	See response above.
24.	ENRIGHT & OCHELTREE, LLP By: Noelle Bensussen	We believe that Penal Code sections 1369 and 1370.1 need revisions as well as the Rule of Court, rule 4.130 in order to clarify the appropriate process for determining whether a defendant has a developmental disability and is incompetent to stand trial. We would be happy to propose revisions to the Committee in the future. For your information, Regional Centers are non-profit corporations contracted by the State of California, Department of Developmental Services, to assess individuals to determine whether they have a developmental disability and to coordinate services for individuals with developmental disabilities under the Lanterman Developmental Disabilities Services Act ("the Lanterman Act.") (Welf. & Inst. Code § 4500 et seq., spec. § 4620, 4640, 4512, subd.(a), 4646-4648.) There are 21 Regional Centers in California serving specific geographical areas of the State. In order to be eligible for Regional Center services after	No response required. No response required. No response required.

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		that age of 3 years, an individual must have a developmental disability as that term is fined by law. The Lanterman Act defines the term "developmental disability" to mean "a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature." (Welf. & Inst. Code § 4512, subd. (a); see also Penal Code § 1370.1, subd. (a)(1)(H).) The Lanterman Act defines "substantial disability" to mean "the existence of significant functional limitations in three or more of the following areas of major life activity, ***as determined by a regional center***, and as appropriate to the age of the person: a) Self-care. b) Receptive and expressive language.	No response required.

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		c) Learning. d) Mobility. e) Self-direction. f) Capacity for independent living. g) Economic self-sufficiency." (Welf. & Inst. Code § 4512, subd. (l); emphasis added.) As stated in the Lanterman Act's companion regulations, developmental disabilities do ***not*** include handicapping conditions that are: "(1) ***Solely psychiatric disorders*** where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder." "(2) ***Solely learning disabilities***. A ***learning disability*** is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss." "(3) ***Solely physical in nature***. These conditions include congenital anomalies or conditions acquired through disease, ***accident***, or faulty development which are not associated with a	No response required.

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		neurological impairment that results in a need for treatment similar to that required for mental retardation." (Cal. Code of Regs., tit. 17, § 54000, subd. (c); emphasis added.)	
		Only a Regional Center can determine whether an individual has a developmental disability and, in turn, is eligible for regional center services. (Welf. & Inst. Code §§ 4642-4643, 4512, subd. (a) & (l), *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 488.) A multidisciplinary team at a Regional Center makes the eligibility determination; it is not determined by one individual or based on one report. (Cal. Code of Regs., tit. 17, § 54001, subd. (b).)	No response required.
		For your information, we recently filed a petition for writ of mandate in the Court of Appeal in Riverside on behalf of Inland Regional Center after a Superior Court ordered that Inland Regional Center assess a defendant for competency without giving the Regional Center a chance to determine whether the defendant was eligible for regional center services (i.e. whether he had a developmental disability.) The Regional Center filed the writ after sanctions were issued against Inland Regional Center. The Court of Appeal's Opinion in favor of Inland Regional Center is attached hereto. The Court of Appeal ordered that it be published. The Opinion should be considered when making revisions to the relevant competency statutes.	No response required.
		In sum, Rule of Court 4.130 and competency statutes must address developmental disabilities. If it is suspected that a defendant has a developmental disability, the defendant must be referred to the regional center for assessment and,	To the extent the commenter is recommending that the committee propose revising rule 4.130 more broadly to address developmental disabilities, that recommendation is outside the

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		at least for purposes of determining eligibility for services, the regional center must make determination as to whether the defendant has a developmental disability. Furthermore, if the defendant is developmentally disabled, the competency assessment must be performed by a psychologist with expertise in assessing individuals with developmental disabilities. We are informed that the assessment tool administered to an individual with an intellectual disability (formerly known as "mental retardation") is different than the assessment tool utilized when an individual does not have an intellectual disability. Therefore, the assessor must be given information about the diagnosis of the developmentally disabled defendant so that he/she can determine the appropriate competency assessment tool to use. The attached Opinion [*Inland Counties Regional Center, Inc., v. Superior Court of Riverside County* (2017) 10 Cal.App.5th 820, 216 Cal.Rptr.3d 450, 459] and the *Leonard* case [*People v. Leonard* (2013) 40 Cal.4th 1370] to which it cites, support the conclusion that a Regional Center must assess a developmentally disabled defendant for competency. However, we are informed that some Courts have on their panel of experts individuals with expertise in assessing competency in individuals with developmental disabilities. Other Courts appoint the appropriate Regional Center to make the competency determination. We urge against drafting or modifying any statute to require that a Regional Center perform the competency assessments without considering the negative impact this would have on Regional Centers. Except for the assessment for eligibility and coordination of services, Regional Centers do not generally provide direct services and must utilize outside vendors to perform services, including competency assessments. We would like the opportunity to further discuss statutory language that	scope of the present proposal but may be considered by the committee in the future. Any change to statute is outside the scope of the present proposal.

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		would assure that the defendant's rights are protected but that does not shift assessment obligations to the Regional Centers.	
25.	Carlos Flores Executive Director San Diego Regional Center	In general the proposal appropriately addresses the stated purpose for persons with mental illness. It is less clear if the proposal adequately addresses persons with developmental disabilities [as defined in §4512(a) of the W&I Code]. The proposal is consistent with the penal code (i.e. §1369) and uses the term "mental disorder." This term usually applies to persons with mental illness and not to persons who solely have a developmental disability. For example the term severe mental disorder is defined in the penal code as follows: **2962.** As a condition of parole, a prisoner who meets the following criteria shall be provided necessary treatment by the State Department of State Hospitals as follows: (a) (1) The prisoner has a severe mental disorder that is not in remission or that cannot be kept in remission without treatment. (2) The term "severe mental disorder" means an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or which grossly impairs behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. The term "severe mental disorder," as used in this section, <u>does not include</u> a personality or adjustment	No response required. No response required.

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		disorder, epilepsy, <u>mental retardation or other developmental disabilities</u>, or addiction to or abuse of intoxicating substances. Accordingly, below are suggestions for Rule 4.130 your consideration (additions in red font): (d)(2)(B) ". . . including a current diagnosis, if any, of the defendant's mental disorder <u>or developmental disability</u> and a summary of the defendant's mental status."	The committee declined to pursue this recommendation. Although a defendant may be mentally incompetent "as a result of mental disorder *or* developmental disability," Penal Code section 1369(a) requires only that the examiner "evaluate the nature of the defendant's mental disorder," not the developmental disability. (Pen. Code, §§ 1367(a), 1369(a), italics added.) The committee also recognized that a court would appoint a regional center if it suspected a developmental disability and that the regional center would necessarily evaluate the defendant for a developmental disability. (See *id.*, § 1369(a); Welf. & Inst. Code, § 4643; Cal. Code Regs., tit. 17, § 54010; *People v. Leonard* (2007) 40 Cal.4th 1370, 1387–1391.) Adding this requirement to the rule would appear to be unnecessary, may prove confusing where a developmental disability is not indicated, and may be outside the scope of the rules proposal as circulated. (d)(2)(F) " A list of all sources of information considered by the examiner, including legal, medical, school, <u>regional center</u>, military, . . ."	The committee agreed and incorporated the recommendation into the proposal. If the expert considers information from a regional center, the report should identify that source.

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26.	Orange County Bar Association By: Michael L. Baroni President	When an expert is appointed during competency proceedings, rule 4.130(d)(2) requires the expert to examine the defendant and submit a report on the issue of defendant's competency to the court, counsel of defendant, and counsel for the prosecution. The rule does not otherwise describe what the report should contain. This proposal would amend rule 4.130(d)(2) to require that the report include the following information to assist courts in making competency determinations: 1) A brief statement of the examiner's training and experience; 2) a summary of the examination conducted by the examiner on the defendant, including a current diagnosis of defendant's mental disorder and a summary of the defendant's mental status; 3) a detailed analysis of the competence of the defendant to stand trial using California's current legal standard; 4) a summary of an assessment conducted for malingering, or feigning symptoms; 5) which may include, but need not be limited to, psychological testing; 6) under Penal Code section 1369, a statement on whether treatment with antipsychotic medication is medically appropriate for the defendant, whether the treatment is likely to restore the defendant to mental competence; 6) a list of all sources of information considered by the examiner, including legal, medical, school, military, employment, hospital, and psychiatric records; the evaluations of other experts; the results of psychological testing; and any other collateral sources considered in reaching his or her conclusion; 7) a statement on whether the examiner reviewed the police reports, criminal history, statement of the defendant, and statements of any witnesses to the alleged crime, as well as a summary of any information from those sources relevant to the examiner's opinion of competency; 8) a statement on whether the examiner reviewed the booking information, including the information from any booking,	No response required. No response required.

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		mental health screening, and mental health records following the alleged crime, as well as a summary of any information from those sources relevant to the examiner's opinion of competency; and 9) a summary of the examiner's consultation with the prosecutor and defendant's attorney, and of their impressions of the defendant's competence-related strengths and weaknesses. These amendments, which parallel recommendations made by The Task Force for Criminal Justice Collaboration on Mental Health Issues and The Mental Health Implementations Task Force, would provide more information to the court and attorneys on the strengths of the expert's opinion, provide guidance to the experts on the expected scope of their examination, and promote uniform professional standards among examiners in their reports to the court.	No response required.
27.	State Bar of California's Standing Committee of Legal Services By: Sharon Djemal Chair, Standing Committee on the Delivery of Legal Services	**Specific Comments** • Does the proposal appropriately address the stated purpose? Yes.	No response required.
28.	Superior Court of California, Orange County, Family Law and Juvenile Court By: Cynthia Beltran Administrative Analyst	**Q: What would the implementation requirements be for courts?** Information would be shared with staff, judges and justice partners to notify them of the new requirements. Updates to our case management system and procedure revisions would also be needed. **Q: Would three and a half months from Judicial Council approval of this proposal until its effective date**	No response required.

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		provide sufficient time for implementation? Three and a half months would be sufficient time to implement this requirement for courts. However, the court-appointed experts may need additional time to make the necessary changes on their end.	No response required.
29.	Superior Court of California, County of Los Angeles By: Sandra Pigati-Pizano Management Analyst	The proposed changes to Rule 4.130 of the California Rules of Court will fix a problem experienced in some counties, but will cause even greater problems and will dramatically increase costs in other counties. Accordingly, the changes to Rule 4.130 should allow counties to opt-out by local rule. Changes to Rule 4.130 were originally proposed in the *Task Force for Criminal Justice Collaboration on Mental Health Issues: Final Report* (April 2011). Several counties apparently experienced problems with the completeness of reports submitted by court-appointed experts in proceedings under Penal Code section 1369. The rule change was designed to address this problem. Different counties have different needs: in Los Angeles County, there has never been a problem with completeness of experts' reports, but the proposed rule change would have collateral consequences which would be significantly detrimental. Due to the volume of competency adjudications, Los Angeles staffs its mental health courthouse with on-site psychiatrists every day – two doctors each morning, and two each afternoon – who perform relatively brief competency evaluations in the courthouse lockup. The evaluation is memorialized in a one-page "short" report, which is oftentimes sufficient for the parties, and the court, to reach a determination of competency. The experts who prepare these reports are	The committee recognized the burden that the proposal will place on courts, including the Superior Court of Los Angeles County. In response, the committee clarified the application of this rule. The committee intended for the rule amendments to apply only to full evaluations conducted under Penal Code section 1369. It did not intend for the rule amendments to apply to preliminary evaluations so long as (1) the parties stipulate to the evaluation and (2) the court orders the evaluation under a local rule that that specifies the content of the evaluation and the procedure for its preparation and submission to the court. The committee expected that this clarification would alleviate the burden on the court.

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		extremely experienced, thoroughly vetted, and very well-known to both court and counsel. Any of the lockup experts can complete as many as six short reports in a three-hour shift. In some cases, either because of the seriousness of the charges, or because the defendant's competency is a close call, the matter is referred out to an expert for a more traditional "long" report. The requirements of the proposed rule would make it very difficult to continue to utilize short reports. The proposed rule mandates that competency reports include a discussion of the expert's training and previous experience, a summary of the examination conducted and the defendant's mental status, a detailed analysis of the defendant's competence, a summary of an assessment for malingering, a list of all sources of information considered by the examiner, a statement of whether the expert reviewed booking police reports, criminal history, the defendant's statement, and witness statements, and a summary of information from those sources relevant to the expert's opinion of competency, a statement of whether the expert reviewed booking information, mental health screening, and mental health records, and a summary of information from those sources relevant to the expert's opinion, and a summary of the expert's consultation with the prosecutor and defense attorney, as well as their impressions of the defendant's competence-related strengths and weaknesses. The sheer volume of this information could not possibly be included in a one-page "short" report. While the lockup experts in Los Angeles consider all of this information, requiring the experts to write a narrative of all of this information would make the short report format untenable. Elimination of the short report would have drastic consequences in Los Angeles. First, short reports save	See response above. See response above.

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		money. A lockup psychiatrist is paid $1,000 per three-hour shift, and completes as many as six short reports per shift. Evaluating those same six defendants by way of long reports, which cost $500 each, would triple the cost. Second, short reports save court appearances. When competency can be determined by way of a short report, the entire competency matter can be adjudicated in a single court appearance. If a long report is necessary, at least two and possibly more court dates are required, using additional resources of the court as well as the sheriff's department to transport the defendant to court. Third, short reports can be better for a defendant's mental health. The preparation of a long report typically takes four to six weeks. If the defendant has a serious mental illness and is in custody – which is very often the case – the defendant can deteriorate even further during this time period. The challenges to Los Angeles brought about by the proposed rule changes are exponentially greater because of the skyrocketing caseload for competency cases. The mental health courthouse, which handles approximately 95% of the competency cases in Los Angeles County, received approximately 1,000 competency cases per year between 2006 and 2010, but topped 5,000 competency cases during 2016, a 500% increase. The caseload is expected to be even higher in 2017. The short report process is indispensable in allowing the court to meet this demand. Recognizing that there is a need for this rule in counties other than Los Angeles, the proposed rule should be modified to allow a court to opt out by local rule. Allowing a court to opt out of a provision of the California Rules of Court by local rule is not unprecedented. For example, Rule 3.720 allows a court to opt out of the statewide case management rules. Allowing opt-outs only upon enactment	See response above. See response above.

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	Commentator	**Comment**	**Committee Response**
		of a local rule causes courts to engage in a considered, deliberate action. By adding language in proposed Rule 4.130 such as, "unless a court by local rule specifies otherwise," each court would have the flexibility to apply the proposed rule in the way that makes the most sense for that particular county.	
30.	TCPJAC/CEAC Joint Rules Subcommittee TCPJAC/CEAC	The JRS notes that the proposal will create a significant fiscal impact for the trial courts and result in increases to court staff workload. The proposal seeks to mandate court operations/procedures that, instead, should be permissive/discretionary. The proposed rule should instead be in the form of guidelines or suggested practices. The only stated purpose appears to be to adopt a recommendation in the 2011 report without any other background or stated purpose. That report does not mention why these factors should be mandatory in every competency evaluation. The 2015 Final Report mentioned the issue of "lengthy delays in case processing and competence restoration." Requiring every report to include all of the detail in the proposed rule may result in unnecessary delay. *Suggested Modification:* The JRS strongly recommends that the last sentence in rule 4.130 (d)(2) read as follows instead of as proposed: "The scope of the report shall address all requirements set forth in Penal Code Section 1369, and the court may order that the report include, but not be limited to, any of the following:"	The committee recognized the significant fiscal and operational burden that the proposal may place on courts. In revising the proposal, the committee sought to strike a balance between minimizing the burden on the courts and standardizing evaluations statewide to minimize deficiencies. It is also mindful that Penal Code section 1369 already provides for several of these requirements. The committee has revised specific requirements in an effort to minimize the burden. For example, the revised proposal requires a diagnosis only "if possible" and a malingering assessment only "if clinically indicated." It also requires only a list of the sources reviewed; it no longer requires a summary of each. In addition, the committee sought to clarify that the application of the proposal is limited to full evaluations under Penal Code section 1369. As explained above, it does not extend to brief preliminary evaluations if those evaluations (1) are stipulated to by the parties and (2) ordered by the court under a local rule specifying the content of the evaluation and the procedure for its preparation and submission to the court.

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

	Comments Applicable to Multiple Rules		
	Commentator	**Comment**	**Committee Response**
			For these reasons, the committee declined to pursue the subcommittee's recommendation to make all of the requirements optional.

	Subdivision (d)(2)(A)		
	Commentator	**Comment**	**Committee Response**
31.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 1 [subdivision (d)(2)(A)]: A brief statement of the examiner's training and previous experience as it relates to examining the competence of a criminal defendant to stand trial, and preparing a resulting report. CBHDA Comment: This is something the examiner would need to testify to if called into court. While this item makes sense for new evaluators, for counties using the same evaluators on a regular basis, this item is redundant be required to include in every report.	The committee declined to revise the proposal to omit this requirement. Once prepared, experts can readily copy and paste this statement into new reports. Including the statement in every report will ensure that it becomes part of the record, regardless of whether the expert is called to testify.
32.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	1. This [subdivision (d)(2)(A)] would not be in line with other assessments or evaluation done by psychologists and psychiatrists. Also, getting onto the panel itself indicates that someone is qualified to perform the assessment. As some will have extensive experience, this "brief statement" may not end up being brief and become unwieldy.	See response above.

	Subdivision (d)(2)(B)		
	Commentator	**Comment**	**Committee Response**
33.	Yok Choi, Psy.D., Ll.B (Hons)	[G]iven that the fee for writing these reports is a meager $300 to $350 on an average, my concern is that evaluators will be forced to come up with hasty conclusions based on very little, or worse still, no, data. Such quick conclusions would not serve the purposes of justice, and could well backfire. For instance, the proposed rules [subdivision	The committee recognized that a diagnosis may not be possible depending on the information available to the expert and the length of time the expert has to evaluate the defendant. Accordingly, the committee has revised the proposal to provide that the report must contain a diagnosis "if possible."

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

	Subdivision (d)(2)(B)		
	Commentator	**Comment**	**Committee Response**
		(d)(2)(B)] call for a diagnosis. Any diagnosis, or even a diagnostic impression, based on a 15-minute interview which produces only self-reported uncorroborated information from the defendant, is likely to follow the defendant through the course of his commitment, should he eventually be committed to a state hospital, and may inadvertently provide a basis (where maybe none existed before) for that defendant to pursue a PC 1026 defense later on. I know that the considerations for PC 1026 commitment are very different than for PC 1370. However, one of the things evaluators look for is a history of psychiatric disorder. Hence a diagnosis at the PC 13667 stage may provide such history. Such a diagnosis may, again inadvertently, also provide a basis for a disability claim in the future. Many defendants who enter the state hospital system, go in with no psychiatric history other than while they were incarcerated, when there is clear secondary gain to their establishing a psychiatric history.	
34,	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 2 [subdivision (d)(2)(B)]: A summary of the examination conducted by the examiner on the defendant, including a current diagnosis, if any, of the defendant's mental disorder and a summary of the defendant's mental status. CBHDA Comment: We support the inclusion of this item in the examiner's report.	No response required.
35.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	2. Yes, absolutely. All evaluators should conduct an MSE [mental status evaluation] and provide diagnostic information.	No response required.

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

	Subdivision (d)(2)(B)		
	Commentator	**Comment**	**Committee Response**
36.	Barbara McDermott Professor UC Davis, Department of Psychiatry	Under Rule 4.130 (d) (2) (B) I would suggest that the evaluator be required to use the current version (now 5) of the Diagnostic and Statistical Manual of Mental Disorders (DSM) and provide justification for how they arrived at that diagnosis. I have reviewed hundreds of competency evaluations and have seen examiners assign diagnoses that do not or no longer exist in the current version of the DSM or do not provide rationale for their diagnostic opinion, or both. Providing an accurate diagnosis with justification forces the examiner to be thoughtful in their evaluation. Additionally, accurate diagnoses will facilitate treatment planning if the defendant is found not competent and ordered for restoration.	The committee agreed and incorporated the recommendation to require a diagnosis under DSM-V into the proposal. To avoid having to update the proposal when the DSM is revised, the proposal now requires, if possible, "a current diagnosis under the most recent version of the Diagnostic Statistical Manual of Mental Disorders."
37.	Superior Court of California, County of Sonoma By: Ken English Sup. Research Attorney	4.130(d)(2) (B): "A summary of the examination conducted by the examiner on the defendant, including a current diagnosis, if any, of the defendant's mental disorder and a summary of the defendant's mental status" SCSC comment: This proposed amendment might present issues if it requires the alienist to assess a diagnosis where there is not a history of mental health care. Requiring, or suggesting, that the alienist work up a diagnosis may be unnecessary, and potentially costly to the courts. Penal Code § 1368 et seq. is a procedure to assess competency; not necessarily to provide for a diagnosis. The underlying diagnosis, at this stage, is somewhat irrelevant to the question posed, i.e. is the defendant competent. Further, a majority of the population of defendants that would be assessed under § 1369 are likely not receiving (nor have received in the past) regular mental health care. As a result, an assessment that required a diagnosis would potentially require a much more detailed examination that would be outside of the scope of the statutory scheme. Moreover, requiring a diagnosis might require the input from additional	Penal Code section 1369 requires that the expert evaluate not only the defendant's ability or inability to understand the nature of the criminal proceedings and assist counsel, but also "the nature of the defendant's mental disorder." Evaluating the nature of the defendant's mental disorder is directly relevant to the competency determination. (See Pen. Code, § 1367(a) [recognizing mental incompetence only if it is "as a result of a mental disorder or developmental disability"].) To the extent that a diagnosis is not feasible, the expert should not include one. Accordingly, the committee has revised the proposal to require a diagnosis "if possible." Input from other disciplines would not be necessary because psychiatrists and psychologists are

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	Subdivision (d)(2)(B)		
	Commentator	**Comment**	**Committee Response**
		disciplines, e.g. neuropsychiatrists, further increasing exposure to additional costs by the court. However, if this subsection only requires the alienist to report on past diagnosis(s) from the defendant's past medical records, if available, then the proposed amendment should more clearly state that restriction.	authorized to make diagnoses. (See, e.g., Bus. & Prof. Code, § 2903.)
		The requirement of a "summary of the defendant's mental status" is too open ended. Exactly what is a "summary of the defendant's mental status"? Would this require the alienist to review the defendant's entire medical history and summarize it? Or is this to insure that the alienist provide the court with a short executive summary of their present findings related to this evaluation? This requirement, as currently drafted, is too broad, and might negatively impact costs.	A mental status evaluation involves an assessment of the client's current mental capacity through an evaluation, for example, of general appearance, orientation, speech pattern, affect, mood, impulsivity, potential for harm, judgment, insight, thought processes, reality testing, intellectual functioning, and memory. It is a routine part of any mental health assessment.
		Further, these additional requirements, beyond a competency evaluation, might increase the timing for such evaluations; increasing the time a defendant is within a legal gray area (i.e. before a determination of competency, and before a forced medication evaluation) with respect to forced medications and mental health care while awaiting the results of the evaluation. As drafted this amendment will likely increase both the timing of the evaluation and the costs to the court.	The committee recognized the potential impact on the courts and revised the proposal to require a diagnosis only if possible.

	Subdivision (d)(2)(C)		
	Commentator	**Comment**	**Committee Response**
38.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 3 [subdivision (d)(2)(C)]: A detailed analysis of the competence of the defendant to stand trial using California's current legal standard, including the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental disorder.	No response required.

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

	Subdivision (d)(2)(C)		
	Commentator	**Comment**	**Committee Response**
		CBHDA Comment: We support the inclusion of this item in the examiner's report.	
39.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	3. I would be surprised if there were evaluations that did not include this.	No response required.

	Subdivision (d)(2)(D)		
	Commentator	**Comment**	**Committee Response**
40.	Yok Choi, Psy.D., Ll.B (Hons)	Item 4 [subdivision (d)(2)(D)] may, or may not, be clinically indicated, so a mandatory summary of an assessment for malingering/feigning may be inappropriate. Also, if an opinion as to malingering/feigning is expressed at this stage, subsequent court evaluations (which state psychologists at state hospitals typically author) would also have to address this issue, whether or not it is a salient consideration. If they disagree with the PC 1367 evaluator's view, they would have the additional burden of providing a basis for a contrary opinion.	The committee agreed and revised the proposal to require a summary of an assessment for malingering or feigning symptoms only "if clinically indicated."
41.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 4 [subdivision (d)(2)(D)]: A summary of an assessment conducted for malingering, or feigning symptoms, which may include, but need not be limited to, psychological testing. CBHDA Comment: We support the inclusion of this item in the examiner's report.	No response required.
42.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	4. I do not think it ALWAYS necessary to conduct assessment for malingering. Generally, the symptoms impeding competency are clear and as psychologists/ psychiatrists who work with individuals with mental illness,	See response above.

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

	Subdivision (d)(2)(D)		
	Commentator	**Comment**	**Committee Response**
		we know what signs to look for that would indicate malingering and then therefore warrant further exploration (possibly with a malingering assessment tool). Also, a concern would be exaggeration. This is often harder to detect, but if a malingering tool detected it - the danger would be finding someone competent due to malingering when he/she isn't.	

	Subdivision (d)(2)(E)		
	Commentator	**Comment**	**Committee Response**
43.	California Board of Psychology By: Antonette Sorrick Executive Officer Dr. Stephen Phillips President	[T]he Board would like to express concern regarding guideline #5 [subdivision (d)(2)(E)]. "Under Penal Code section 1369, a statement on whether treatment with antipsychotic medication is medically appropriate for the defendant, whether the treatment is likely to restore the defendant to mental competence, a list of likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, whether it is medically appropriate to administer antipsychotic medication in the county jail, and whether the defendant has the capacity to make decisions regarding antipsychotic medication" The following comments are provided to assist in the clarification and finalization of guideline #5: First, while it may be within the scope of competence and the scope of licensure for psychologists to recommend the evaluation of an individual's medication needs, it may not be within the knowledge, skills, or abilities of a licensed psychologist to make definitive determinations regarding the medical necessity for, and the ultimate impact of, the administration of medication. It is, however, fully within the	No response required. The committee agreed that the proposed rule amendment, as circulated, did not adequately differentiate between psychiatrists and psychologists. The committee revised the proposal, as suggested by the California Psychological Association, to provide: "If an examining psychologist is of the opinion that a referral to a psychiatrist is necessary to address these issues, the psychologist must inform the court of this opinion and his or her recommendation that a psychiatrist

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

	Subdivision (d)(2)(E)		
	Commentator	**Comment**	**Committee Response**
		scope of competency and licensure for a well-trained criminal forensic psychologist to ascertain the competency or capacity of the individual defendant to make decisions regarding antipsychotic or other medication. Second, it should be noted that antipsychotic medication is not the only class of psychotropic drugs, which may restore a defendant to competency depending on the nature of the disorder or condition, which draws a defendant's competency into question. Reference might be better made to psychiatric or psychotropic medication rather than antipsychotic medication. Third, as many criminal forensic evaluations are performed by psychologists as opposed to psychiatrists, it may be important to provide alternative guidelines depending on whether the evaluation is being performed by a psychologist or by a psychiatrist in order to provide appropriate guidance to evaluators and to the Court. The Board respectfully requests the language be amended appropriately to address these concerns.	should examine the defendant."
44.	California Psychological Association By: Elizabeth Winkelman Director of Professional Affairs	Please consider revising the proposal to amend Rule 4.130(d)(2) to clarify that, in some cases, an examining psychologist may recommend a referral to a psychiatrist for further examination, consistent with the flexibility provided by Penal Code section 1369. This could be accomplished by adding the text suggested below in capital letters to section (d)(2)(E): "Under Penal Code section 1369, a statement on whether treatment with antipsychotic medication is medically appropriate for the defendant, whether the treatment is likely to restore the defendant to mental competence, a list of likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, whether it is medically appropriate to administer antipsychotic medication in the county jail, and whether the	See response above.

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

	Subdivision (d)(2)(E)		
	Commentator	**Comment**	**Committee Response**
		defendant has the capacity to make decisions regarding antipsychotic medication. IF AN EXAMINING PSYCHOLOGIST IS OF THE OPINION THAT A REFERRAL TO A PSYCHIATRIST IS NECESSARY TO ADDRESS THESE ISSUES, THE PSYCHOLOGIST SHALL INFORM THE COURT OF THIS OPINION AND HIS OR HER RECOMMENDATION THAT A PSYCHIATRIST SHOULD EXAMINE THE DEFENDANT."	The committee has incorporated this language into the proposal.
45.	Yok Choi, Psy.D., Ll.B (Hons)	Item 5 [subdivision (d)(2)(E)], which talks about an assessment for the involuntary administration of antipsychotic medications, should not be a mandatory item. Competence to make decisions regarding medications involves a question of dangerousness, and not merely one of mental capacity. Mental capacity to make these decisions call for a different inquiry than mental capacity to understand the criminal trial process and to work with an attorney, which is what trial competence is about. By making this item mandatory, psychologists may be ruled out as assessors of competence, because a determination of the necessity for medications and their side effects, etc., is, arguably, not within the scope of practice of psychologists.	Because the proposal requires only that the expert state whether treatment is appropriate, the committee has retained this requirement to facilitate compliance with Penal Code section 1369(a). However, the committee agrees that the proposal should not require psychologists to opine on issues outside the scope of their license. It has revised the proposal to require that psychologists only inform the court if they are of the opinion that a psychiatrist should examine the defendant.
46.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 5 [subdivision (d)(2)(E)]: Under Penal Code section 1369, a statement on whether treatment with antipsychotic medication is medically appropriate for the defendant, whether the treatment is likely to restore the defendant to mental competence, a list of likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, whether it is medically appropriate to administer antipsychotic medication in the county jail, and whether the defendant has the capacity to make decisions regarding antipsychotic medication.	No response required.

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

	Subdivision (d)(2)(E)		
	Commentator	**Comment**	**Committee Response**
		CBHDA Comment: If the court-appointed expert is a mental health professional other than a psychiatrist or prescribing practitioner, this requirement is out of the professional's scope of practice.	See response above.
47.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	5. Although I do think it prudent to indicate whether medication may assist in rendering someone competent, listing the side effects, efficacy, and alternative treatments is unnecessary and may be outside of the scope of psychologists' practice.	See response above.
48.	Superior Court of California, County of Sonoma By: Ken English Sup. Research Attorney	4.130(d)(2) (E): "Under Penal Code section 1369, a statement on whether treatment with antipsychotic medication is medically appropriate for the defendant, whether the treatment is likely to restore the defendant to mental competence, a list of likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, whether it is medically appropriate to administer antipsychotic medication in the county jail, and whether the defendant has the capacity to make decisions regarding antipsychotic medication"	No response required.
		SCSC Comment: This proposed amendment makes a medication evaluation mandatory for all evaluations, which may be contrary to statute. Pursuant to § 1369, such a statement is only statutorily required "if within the scope of [the examiner's] license and appropriate to their opinions." Thus, under the statute, such an evaluation is not mandated in every case – it's only mandated if such an evaluation is within the scope of the examiner's license and appropriate to their opinion. If it's beyond their licensed expertise, or not pertinent to their opinion, the statute doesn't require this evaluation. But the proposed Rule of Court makes it mandatory evaluation. The statute does make it mandatory for any examiner to address issues of capacity to consent to	See response above.

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	Subdivision (d)(2)(E)		
	Commentator	**Comment**	**Committee Response**
		medication and whether the defendant is a danger to self or others (but that's a different analysis than whether treatment with antipsychotic medication is appropriate). Making this evaluation mandatory will necessarily limit the pool of examiners to psychiatrists licensed to make determinations whether antipsychotic medication is appropriate. Limiting the pool of alienists will increase both the timing of the evaluation and the costs to the court.	See response above.

	Subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
49.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 6 [circulated subdivision (d)(2)(F)]: A list of all sources of information considered by the examiner, including legal, medical, school, military, employment, hospital, and psychiatric records; the evaluations of other experts; the results of psychological testing; and any other collateral sources considered in reaching his or her conclusion. CBHDA Comment: We support the inclusion of this item in the examiner's report.	No response required.
50.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	6. Evaluators should be doing this already. It is standard practice to list all information considered in the assessment.	No response required.

	Circulated subdivision (d)(2)(G), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
51.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 7 [circulated subdivision (d)(2)(G)]: A statement on whether the examiner reviewed the police reports, criminal history, statement of the defendant, and statements of any witnesses to the alleged crime, as well as a summary of any	No response required.

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

	Circulated subdivision (d)(2)(G), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
		information from those sources relevant to the examiner's opinion of competency. CBHDA Comment: We support the inclusion of this item in the examiner's report, and recommend that the requirement should focus on the summary of the information obtained and its relevance to the examiner's opinion of competency.	To reduce the burden of implementing this proposal, the committee revised it to require that the expert list only the sources considered. However, the committee understands that an expert would include in the report any information derived from these sources that is relevant to the competency determination.
52.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	7. I would hope this is already being done as well.	No response required.
53.	Superior Court of California, County of Sonoma By: Ken English Sup. Research Attorney	4.130(d)(2)(G): "A statement on whether the examiner reviewed the police reports, criminal history, statement of the defendant, and statements of any witnesses to the alleged crime, as well as a summary of any information from those sources relevant to the examiner's opinion of competency" SCSC Comment: This proposal will add time to the evaluation because it requires the alienist to provide a "summary" of each source that was reviewed that was relevant. As drafted this amendment will likely increase both the timing of the evaluation and the costs to the court.	No response required. The committee agreed that providing for a summary of each source reviewed may be too onerous. Accordingly, the committee revised the proposal to require that the report list only the sources considered. To the extent that the information derived from any of the listed sources informed the expert's competency determination, the examiner should include that analysis in the report.

	Circulated subdivision (d)(2)(H), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
54.	County Behavioral Health Directors	Item 8 [circulated subdivision (d)(2)(H)]: A statement on	No response required.

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

	Circulated subdivision (d)(2)(H), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
	Association of California By: Linnea Koopmans Senior Policy Analyst	whether the examiner reviewed the booking information, including the information from any booking, mental health screening, and mental health records following the alleged crime, as well as a summary of any information from those sources relevant to the examiner's opinion of competency. CBHDA Comment: We support the inclusion of this item in the examiner's report, and recommend that the requirement should focus on the summary of the information obtained and its relevance to the examiner's opinion of competency.	To reduce the burden of implementing this proposal, the committee revised the proposal to require that the expert list only the sources considered. However, the committee understood that an expert would include in the report any information derived from these sources that is relevant to the competency determination.
55.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	8. This would be included with the above two proposals. All information reviewed should be noted in the report. However, I do not think it necessary to report what was not reviewed. If something is not listed, the assumption would be that it was not reviewed.	The committee agreed and revised the proposal to require only that the expert list the sources considered.
56.	Superior Court of California, County of Sonoma By: Ken English Sup. Research Attorney	4.130(d)(2) (H): "A statement on whether the examiner reviewed the booking information, including the information from any booking, mental health screening, and mental health records following the alleged crime, as well as a summary of any information from those sources relevant to the examiner's opinion of competency" As a result of the use of commas in this provision, the scope of the information required by proposed amendment is unclear. Is it only "booking" information, which is then described to "include" certain information that's considered "booking" information; or is talking about "booking" information and other "non-booking" information. The grammar/punctuation of the proposed amendment makes it vague and susceptible to multiple interpretations. In any	No response required. The committee declined to pursue these recommendations because it removed this requirement from the proposal.

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

	Circulated subdivision (d)(2)(H), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
		event, this new requirement will add time to alienist's evaluation by requiring a "summary" of these items. As drafted this amendment will likely increase both the timing of the evaluation and the costs to the court.	

	Circulated Subdivision (d)(2)(I), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
57.	Yok Choi, Psy.D., Ll.B (Hons)	Item 9 [circulated subdivision (d)(2)(I)] may also lead to inadvertent consequences. A court appointed evaluator is by definition, an independent evaluator, who should render an unbiased opinion, with no input from either attorney. The inclusion of this item in the list of required information may suggest to evaluators that they should seek input from counsel, which may not be the intention of the proposal. If on the other hand, input had been obtained, I would agree that such information ought to be disclosed in the court report.	The committee agreed that requiring a summary of the expert's consultation with the prosecutor and defense counsel may be problematic for this reason and for the other reasons expressed in the comments below. However, the committee believed that if the expert consults with the prosecutor and defense counsel, the report's list of sources considered should so note. Accordingly, the committee removed this requirement from the proposal. It also listed "consultation with the prosecutor and defendant's attorney" among the examples of sources that, if considered, the report should identify.
58.	County Behavioral Health Directors Association of California By: Linnea Koopmans Senior Policy Analyst	Item 9 [circulated subdivision (d)(2)(I)]: A summary of the examiner's consultation with the prosecutor and defendant's attorney, and of their impressions of the defendant's competence-related strengths and weaknesses. CBHDA Comment: We do not believe the prosecutor and defense attorney's impressions of the defendant's competency is a useful component to include in the report.	No response required. See response above.
59.	Harbor Regional Center By: Kimberly Robbins Forensic Psychologist	9. Not necessarily a bad idea, but not sure it should be required. The evaluator should note who referred the client and why, but the findings should really rest on document	See response above.

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

	Circulated Subdivision (d)(2)(I), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
		review, clinical interview, and testing.	
60.	State Bar of California's Standing Committee of Legal Services By: Sharon Djemal Chair, Standing Committee on the Delivery of Legal	**Additional Comments** SCDLS supports the positive change in the content of the court-appointed expert's report in mental competency proceedings. SCDLS also suggests that the report not include anything beyond check boxes to indicate that the report has been prepared in consultation with both the prosecutor and defense counsel. We do not think it is necessary or appropriate to disclose the impression or substantive comments of defendant's counsel regarding such matters in the report. The integrity of the attorney client relationship is important and such disclosures might inadvertently undermine it. The mere fact of the expert's consultation with both parties in the context of preparation of the report in mental competency proceedings should be sufficient for the court. The court would thereby be on notice that both parties have had an opportunity to confer with the expert freely about the salient facts, concerns, and potential issues with regard to the defendant's ability to understand the proceedings, communicate with counsel, and to aid in his or her own defense.	See response above.
61.	Superior Court of California, County of Sonoma By: Ken English Sup. Research Attorney	4.130(d)(2)(I): "A summary of the examiner's consultation with the prosecutor and defendant's attorney, and of their impressions of the defendant's competence-related strengths and weaknesses." SCSC Comment: The second clause of the proposed amendment is ambiguous: ",…and of their impressions…". Who is "their"? Does this refer to the alienist or the attorneys with whom the alienist consulted? SCSC proposes the following language: "A summary of the examiner's consultation with the prosecutor and defendant's	No response required. The committee declined to pursue these recommendations because it removed this requirement from the proposal.

	Circulated Subdivision (d)(2)(I), now part of subdivision (d)(2)(F)		
	Commentator	**Comment**	**Committee Response**
		attorney, including the attorney's communications about their impressions of the defendant's competence-related strengths and weaknesses." Finally, what are "competence-related strengths and weaknesses"? The evaluation under § 1369 is binary (to some degree)—the defendant is either competent or not. As a result SCSC, is unclear as to the necessity of this proposed amendment. Further, requiring the alienist to consult with both attorneys may increase both the timing of the evaluation and the costs to the court.	