



JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 24, 2019

Title	Agenda Item Type
Juvenile Law: Competency	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643	January 1, 2020
Recommended by	Date of Report
Collaborative Justice Courts Advisory Committee Hon. Richard A. Vlavianos, Chair	September 3, 2019
Family and Juvenile Law Advisory Committee Hon. Jerilyn L. Borack, Cochair Hon. Mark A. Juhas, Cochair	Contact Kerry Doyle, Attorney 415-865-8791 kerry.doyle@jud.ca.gov Tareq Nazamy, Senior Analyst 415-865-7666 tareq.nazamy@jud.ca.gov

Executive Summary

The Collaborative Justice Courts Advisory Committee and the Family and Juvenile Law Advisory Committee recommend amending and renumbering one rule, and amending one rule, to conform to recent statutory changes regarding a child who is the subject of a petition filed under Welfare and Institutions Code sections 601 or 602, when the court has a doubt as to the child's competency to understand the court proceedings.

Recommendation

The Collaborative Justice Courts Advisory Committee and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective January 1, 2020:

1. Renumber California Rules of Court, rule 5.645(a)–(c) as rule 5.643; and

2. Amend rule 5.645 to address expert qualifications and court proceedings for juvenile competency evaluations.

The text of the amended rule is attached at pages 8–13.

Relevant Previous Council Action

The Judicial Council adopted what is now rule 5.645, effective January 1, 1999, as rule 1498. It was renumbered and amended effective January 1, 2007. It was further amended effective January 1, 2012 to meet the requirement in Welfare and Institutions Code section 709 (added by Assem. Bill 2212; Stats. 2010, ch. 671, § 1) that the Judicial Council develop and adopt rules regarding the qualifications of experts who evaluate children when the court or child’s counsel raises the issue of the child’s competency in any juvenile delinquency proceeding.

Analysis/Rationale

Assembly Bill 1214 (Stone; Stats. 2018, ch. 991) revises Welfare and Institutions Code sections 709 and 712, regarding a child’s competency to understand the court proceedings, to expand the duties of an expert evaluating the child whose competency is in doubt. The bill (see Link A) also requires the Judicial Council to adopt a rule of court relating to the qualifications of those experts, in consultation with specified stakeholders.¹ The bill also mandates the Judicial Council to develop and adopt rules to implement the other requirements in section 709(b), also in consultation with specified stakeholders.

Rule 5.645 would be amended, and five new subdivisions would be added to the rule. Subdivisions (a)–(c), with slight modifications to existing language, would be renumbered as rule 5.643.

Rule 5.643

The committees recommend that the subdivisions of current rule 5.645 that address the procedures for commitment to a county facility—when the court believes a child has a mental disability or may have a mental illness—be renumbered as rule 5.643. References to “mental retardation” would be replaced with “developmental disability.” The remainder of the rule would be unchanged from what is now in subdivisions (a)–(c) of rule 5.645.

Rule 5.645

The committees recommend that the remainder of current rule 5.645 be amended to address expert qualifications and court proceedings for competency evaluations.

The committees recommend that subdivision (a) (currently subdivision (d)) of the rule be amended to remove the reference to Penal Code section 1367, as this section addresses an adult’s

¹ All further statutory references are to the Welfare and Institutions Code and all further rule references are to the California Rules of Court, unless otherwise indicated.

competency to stand trial, and to replace the current definition of competency with a cross-reference to the definition in section 709(a)(2).

Subdivision (b) (currently subdivision (d)(1)(B)–(C)) would be amended to identify the minimum training and experience needed for an expert to be eligible for appointment for forensic evaluations of juveniles.

Subdivision (c) would be added to govern the requirements for the court-appointed expert when the child refuses an interview.

Subdivision (d) would be added to address the mandate in section 709 that the expert must review all the available records, by requiring that each county, in its written protocol regarding competency required under section 709(i), include a description of the process for obtaining and providing the records to the expert to review.

Subdivision (e) would be added to identify the requirements for the expert’s mandated consultation with the child’s counsel.

Subdivision (f) would be added to identify the requirements for the mandate that the expert gather a developmental history of the child.

Subdivision (g) would be added to govern the requirements for the expert’s written report regarding the child’s competency to stand trial.

Additionally, the Advisory Committee comment to the rule would be deleted as it is misleading and does not accurately reflect the procedure for obtaining regional center services.

Policy implications

The committees considered how to best implement AB 1214, which required the development of a rule of court with specified stakeholders.

The proposed rule of court maintains the high level of training and experience requirements that competency evaluators must meet. It also requires a face-to-face interview of the child, a consult with the child’s counsel, and detailed written report requirements including a developmental history of the child and recommendations for appropriate services. This proposal will result in better and more comprehensive evaluator reports which will assist the judicial officer in determining whether the child is competent, and if found incompetent will inform the judicial officer’s decisions about orders for mental health services as well as at the hearings reviewing those services.

Comments

This proposal circulated for comment as part of the spring 2019 invitation-to-comment cycle, from April 12 to June 10, 2019, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks,

attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, probation officers, Court Appointed Special Advocates programs, and other juvenile and family law professionals. Additionally, it was provided to the stakeholders who helped develop the proposed rule with an invitation to distribute it as they wished. Four courts, two organizations, and one individual provided comment: two agreed with the proposal, two agreed with the proposal if modified, no commenters opposed the proposal, and three did not indicate a position. A chart with the full text of the comments received and the committees' responses is attached at pages 14–35.²

As circulated for public comment the term “mentally retarded” was replaced with “intellectually disabled.” One commenter suggested that this phrase be changed to “has a developmental disability” to reflect the preferred usage that the person “has a disability” instead of referring to them as “developmentally disabled,” thus reflecting that the person is more than their disability. The committee also replaced “intellectual disability” with “developmental disability” in response to this comment and to track the statutory language.

As circulated for public comment, the rule allowed for an interview of the child, if an in-person interview was not possible due to distance, to be conducted remotely, using videoconference or another form of remote electronic communication. The hope was that this would decrease custodial time for children who lived in more remote areas. One commenter was opposed to allowing evaluator interviews that are not face-to-face. After much discussion, the committees concluded that children are not comfortable in remote communication systems and this could skew results. There also would be much of the child’s demeanor and behavior that the evaluator would not be able to observe. It is also not possible to control what is going on outside of camera range, such as eavesdropping staff or other environmental issues that may affect testing. The committees concluded that until the medical or psychological profession established guidelines in this area, it was not appropriate to provide for it in the rule.

Assembly Bill 1214 amended section 709 to require the evaluator to consult with the minor’s counsel. As circulated for public comment, the proposed rule required that consultation to include three questions. Two commenters were opposed to requiring specific questions of minor’s counsel. The committees considered removing the questions and discussed the potential for interference with the confidential attorney-client relationship. However, the committees concluded that since the minor’s counsel often has the most information about the minor and that evaluators routinely do not consult with the minor’s counsel, it was important to include these minimal, basic questions all evaluators should be asking. The committees made great efforts in the language of the rule to protect the attorney-client privilege.

² There is also an attachment to the comment chart. One policy organization submitted proposed amendments to the rule text that corresponded with the substantive reasons given for the suggested changes. The substantive reasons for the suggested rule text and the committees’ responses are in the comment chart. The suggested changes to the rule text are contained in Attachment A to the comment chart.

One of the more robust of the committees' discussions was whether the rule should use the term "child" or "minor." The current rules all use "child," but the statutes use "minor." The committees note that throughout the juvenile court rules and forms there is a consistent practice of using "child," and this term is clearly defined in rule 5.502.³ Use of the term "child" is a reminder to all in the system that juvenile offenders are developmentally distinct from adults. "Minor" is not defined in the rules of court. Section 101(b) defines "child or minor" as a person under the jurisdiction of the juvenile court under section 300, 601, or 602, but most children in delinquency court are older and do not like to be called "child." The proposal circulated for public comment using the term "minor" and sought specific comment on which term to use in the rules. After public comment, the committees also considered using the term "youth" in the rules. However, this term also is not defined in the rules of court. Any definition of the term would be an important substantive change to the proposal, and public comment should be sought before the council defines the term. The committees resolved to continue to use the word "child" in the proposed rules.

Alternatives considered

The committees discussed multiple potential rule topics, several of which the committees decided against developing.

Records review process. The committees discussed whether the rule should address the requirement that the expert must review all the records provided and specify the process, such as who provides the records to the expert and how the expert obtains confidential records. The committees concluded it was best to allow each county to determine its own process and decided instead to propose amending rule 5.645 to require that the written protocol mandated under section 709(i) include a description of the process for obtaining and providing the records to the evaluator to review, including who will obtain and provide the records to the evaluator.

Testing. The committees discussed whether the rule should address the requirement that the expert must administer age-appropriate testing unless the facts of the case render testing unnecessary or inappropriate. The committees discussed whether the rule should address the nature and content of evaluation tools and whether the rule should specify when testing is unnecessary or inappropriate. The committees concluded that these areas should be left to the discretion of the expert evaluators and did not include this topic in the proposed rule.

Interpreters. The committees discussed whether the requirements that apply to court interpreters should apply to interpreters used by competency evaluators.⁴ The committees decided against proposing such an amendment, concluding in part that the requirements for a Judicial Council–certified interpreter could be too difficult to meet, particularly in smaller counties and for rarer languages. The committees also noted that the interpreters used for mental health evaluations are more akin to medical interpreters than interpreters for court proceedings.

³ Rule 5.502(5) provides: "'Child' means a person under the age of 18 years."

⁴ Specifically, the committees reviewed Government Code section 68561 et seq. and rule 2.893.

“Additional qualified experts.” The committees discussed the new provision in section 709 that allows the district attorney or minor’s counsel to retain or seek the appointment of additional qualified experts who may testify during the competency hearing. The committees discussed whether the rule should specify the qualifications for these experts, and whether additional experts should be subject to the requirements in the new rule. The committees concluded that the phrase “additional qualified experts” is ambiguous in the statute and that an appellate court should decide what this phrase means, not the Judicial Council through the rule-making process. The committees concluded that the current provision that does not preclude involvement of clinicians with other qualifications as consultants or witnesses should remain in the rule.

School psychologists. The committees discussed whether rule 5.645 should be amended to allow school psychologists to be appointed as experts in competency proceedings. This change would be made by removing the requirement that school psychologists have a doctoral degree and simply using the term “licensed psychologist.” The committees discussed how this could create a larger pool of potential evaluators, but also discussed that not all school psychologists have the depth and breadth of education and training that one needs to obtain a doctoral degree. The committees concluded that school psychologists who do not hold a doctoral degree should not be included among the professionals listed in the rule who can conduct competency evaluations.

Fiscal and Operational Impacts

It is important to note that the new legislative mandates regarding evaluators will likely increase costs to the courts and counties, with no additional funding made available. A benefit, however, is that the reports received will be of much higher quality than under current standards and will be more useful for judicial decisionmaking.

Costs for evaluations may increase due to more comprehensive evaluation and written report requirements. Some counties, particularly smaller counties, will have challenges finding qualified evaluators. For counties that do not have existing protocols, there will also be increased costs for local implementation to develop the statutorily required county protocols, again with no additional funding made available to cover these costs.⁵

There is also the potential for increased litigation costs because, as the reports become more comprehensive, there will be more information on which to cross-examine the expert. Alternatively, more thorough reports could lessen the need for contested hearings because the reports may speak for themselves.

A major operational impact is that longer time frames likely will be needed to complete the reports because of the additional requirements to interview the child’s counsel, attempt to

⁵ Section 709(i) mandates that the “presiding judge of the juvenile court, the probation department, the county mental health department, the public defender and any other entity that provides representation for minors, the district attorney, the regional center, if appropriate, and any other participants that the presiding judge shall designate, shall develop a written protocol describing the competency process and a program to ensure that minors who are found incompetent receive appropriate remediation services.”

interview the child face-to-face, and increased written report requirements. Currently, the process generally takes three to four weeks. This time frame will likely expand, thus increasing the amount of time these children are held in secure custody.

Again, however, a benefit is that the reports received will be of much higher quality than under current standards and will be more useful for judicial decisionmaking. The reports will be better and more comprehensive which will assist the judicial officer in determining whether the child is competent, and if found incompetent will inform the judicial officer's decisions about orders for mental health services as well as at the hearings reviewing those services.

Attachments and Links

1. Cal. Rules of Court, rules 5.643 and 5.645, at pages 8–13
2. Chart of comments, at pages 15–34
3. Attachment A: Attachment to Chart of Comments, at pages 35–45
4. Link A: Assembly Bill 1214,
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1214

Rule 5.645 of the California Rules of Court is amended, and subdivisions (a)–(c) are renumbered as rule 5.643, effective January 1, 2020, to read:

1 **Rule ~~5.645~~ 5.643. Mental health or condition of child; court procedures**

2
3 **(a) Doubt concerning the mental health of a child (§§ 357, 705, 6550, 6551)**

4
5 Whenever the court believes that the child who is the subject of a petition filed
6 under section 300, 601, or 602 is mentally disabled or may be mentally ill, the court
7 may stay the proceedings and order the child taken to a facility designated by the
8 court and approved by the State Department of Mental Health as a facility for 72-
9 hour treatment and evaluation. The professional in charge of the facility must
10 submit a written evaluation of the child to the court.

11
12 **(b) * * ***

13
14 **(c) Findings regarding ~~mental retardation~~ developmental disability (§ 6551)**

15
16 Article 1 of chapter 2 of part 1 of division 5 (commencing with section 5150)
17 applies.

18
19 (1) If the professional finds that the child ~~is mentally retarded~~ has a
20 developmental disability and recommends commitment to a state hospital, the
21 court may direct the filing in the appropriate court of a petition for
22 commitment of a child ~~as a mentally retarded person who has a~~
23 developmental disability to the State Department of Developmental Services
24 for placement in a state hospital.

25
26 (2) If the professional finds that the child ~~is not mentally retarded~~ does not have a
27 developmental disability, the child must be returned to the juvenile court on
28 or before the expiration of the 72-hour period, and the court must proceed
29 with the case under section 300, 601, or 602.

30
31 (3) The jurisdiction of the juvenile court must be suspended while the child is
32 subject to the jurisdiction of the appropriate court under a petition for
33 commitment of a ~~mentally retarded~~ person who has a developmental
34 disability, or under remand for 90 days for intensive treatment or
35 commitment ordered by that court.

36
37 **Rule 5.645. Mental health or condition of child; competency evaluations**

1 ~~(d)(a) Doubt as to capacity to cooperate with counsel~~ child's competency (§§ 601,
2 602, 709; Pen. Code, § 1367)
3

4 (1) If the court finds that there is substantial evidence ~~that regarding~~ a child who
5 is the subject of a petition filed under section 601 or 602 ~~lacks sufficient~~
6 ~~present ability to consult with counsel and assist in preparing his or her~~
7 ~~defense with a reasonable degree of rational understanding, or lacks a rational~~
8 ~~as well as factual understanding of the nature of the charges or proceedings~~
9 ~~against him or her, that raises a doubt as to the child's competency as defined~~
10 ~~in section 709, the court must suspend the proceedings and conduct a hearing~~
11 ~~regarding the child's competence~~ competency. Evidence is substantial if it
12 ~~raises a reasonable doubt about the child's competence to stand trial.~~

13
14 ~~(A)(2)~~ Unless the parties have stipulated to a finding of incompetency, the
15 court must appoint an expert to examine the child to evaluate the child and
16 determine whether the child suffers from a mental illness, mental disorder,
17 developmental disability, developmental immaturity, or other condition
18 affecting competency and, if so, whether the condition or conditions impair
19 the child's competency the child is incompetent as defined in section
20 709(a)(2).
21

22 ~~(3)~~ Following the hearing on competency, the court must proceed as directed in
23 section 709.
24

25 **(b) Expert qualifications**
26

27 ~~(B)(1)~~ To be appointed as an expert, an individual must be a:
28

29 ~~(i)(A)~~ Licensed psychiatrist who has successfully completed four years of
30 medical school and either four years of general psychiatry residency,
31 including one year of internship and two years of child and adolescent
32 fellowship training, or three years of general psychiatry residency,
33 including one year of internship and one year of residency that focus on
34 children and adolescents and one year of child and adolescent
35 fellowship training; or
36

37 ~~(ii)(B)~~ Clinical, counseling, or school psychologist who has received a
38 doctoral degree in psychology from an educational institution
39 accredited by an organization recognized by the Council for Higher
40 Education Accreditation and who is licensed as a psychologist.
41

42 ~~(C)(2)~~ The expert, whether a licensed psychiatrist or psychologist, must:
43

- 1 (i)(A) Possess demonstrable professional experience addressing child and
2 adolescent developmental issues, including the emotional, behavioral,
3 and cognitive impairments of children and adolescents;
4
5 (ii)(B) Have expertise in the cultural and social characteristics of children and
6 adolescents;
7
8 (iii)(C) Possess a curriculum vitae reflecting training and experience in the
9 forensic evaluation of children and adolescents;
10
11 (iv)(D) Be familiar with juvenile competency standards and accepted criteria
12 used in evaluating juvenile competence;
13
14 ~~(v)(E) Possess a comprehensive understanding of~~ Be familiar with effective
15 interventions, as well as treatment, training, and programs for the
16 attainment of competency available to children and adolescents; ~~and~~
17
18 (vi)(F) Be proficient in the language preferred by the child, or if that is not
19 feasible, employ the services of a certified interpreter and use
20 assessment tools that are linguistically and culturally appropriate for the
21 child; and
22
23 (G) Be familiar with juvenile competency remediation services available to
24 the child.
25

26 ~~(2)~~(3) Nothing in this rule precludes involvement of clinicians with other
27 professional qualifications from participation as consultants or witnesses or in
28 other capacities relevant to the case.
29

30 ~~(3) Following the hearing on competence, the court must proceed as directed in~~
31 ~~section 709.~~
32

33 **(c) Interview of child**

34
35 The expert must attempt to interview the child face-to-face. If an in-person
36 interview is not possible because the child refuses an interview, the expert must try
37 to observe and make direct contact with the child to attempt to gain clinical
38 observations that may inform the expert's opinion regarding the child's
39 competency.
40

41 **(d) Review of records**

42
43 (1) The expert must review all the records provided as required by section 709.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

(2) The written protocol required under section 709(i) must include a description of the process for obtaining and providing the records to the expert to review, including who will obtain and provide the records to the expert.

(e) Consult with the child’s counsel

- (1) The expert must consult with the child’s counsel as required by section 709. This consultation must include, but is not limited to, asking the child’s counsel the following:
 - (A) If the child’s counsel raised the question of competency, why the child’s counsel doubts that the child is competent;
 - (B) What has the child’s counsel observed regarding the child’s behavior; and
 - (C) A description of how the child interacts with the child’s counsel.
- (2) No waiver of the attorney-client privilege will be deemed to have occurred from the child’s counsel report of the child’s statements to the expert, and all such statements are subject to the protections in (g)(2) of this rule.

(f) Developmental history

The expert must gather a developmental history of the child as required by section 709. This history must be documented in the report and must include the following:

- (1) Whether there were complications or drug use during pregnancy that could have caused medical issues for the child;
- (2) When the child achieved developmental milestones such as talking, walking, and reading;
- (3) Psychosocial factors such as abuse, neglect, or drug exposure;
- (4) Adverse childhood experiences, including early disruption in the parent-child relationship;
- (5) Mental health services received during childhood and adolescence;
- (6) School performance, including an Individualized Education Plan, testing, achievement scores, and retention;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

(7) Acculturation issues;

(8) Biological and neurological factors such as neurological deficits and head trauma; and

(9) Medical history including significant diagnoses, hospitalizations, or head trauma.

(g) Written report

(1) Any court-appointed expert must examine the child and advise the court on the child’s competency to stand trial. The expert’s report must be submitted to the court, to the counsel for the child, to the probation department, and to the prosecution. The report must include the following:

(A) A statement identifying the court referring the case, the purpose of the evaluation, and the definition of competency in the state of California.

(B) A brief statement of the expert’s training and previous experience as it relates to evaluating the competence of a child to stand trial.

(C) A statement of the procedure used by the expert, including:

(i) A list of all sources of information considered by the expert including those required by section 709(b)(3);

(ii) A list of all sources of information the expert tried or wanted to obtain but, for reasons described in the report, could not be obtained;

(iii) A detailed summary of the attempts made to meet the child face-to-face and a detailed account of any accommodations made to make direct contact with the child; and

(iv) All diagnostic and psychological tests administered, if any.

(D) A summary of the developmental history of the child as required by this rule.

(E) A summary of the evaluation conducted by the expert on the child, including the current diagnosis or diagnoses that meet criteria under the most recent version of the *Diagnostic and Statistical Manual of Mental*

1 Disorders, when applicable, and a summary of the child’s mental or
2 developmental status.

3
4 (F) A detailed analysis of the competence of the child to stand trial under
5 section 709, including the child’s ability or inability to understand the
6 nature of the proceedings or assist counsel in the conduct of a defense
7 in a rational manner as a result of a mental or developmental
8 impairment.

9
10 (G) An analysis of whether and how the child’s mental or developmental
11 status is related to any deficits in abilities related to competency.

12
13 (H) If the child has significant deficits in abilities related to competency, an
14 opinion with explanation as to whether treatment is needed to restore or
15 attain competency, the nature of that treatment, its availability, and
16 whether restoration is likely to be accomplished within the statutory
17 time limit.

18
19 (I) A recommendation, as appropriate, for a placement or type of
20 placement, services, and treatment that would be most appropriate for
21 the child to attain or restore competence. The recommendation must be
22 guided by the principle of section 709 that services must be provided in
23 the least restrictive environment consistent with public safety.

24
25 (J) If the expert is of the opinion that a referral to a psychiatrist is
26 appropriate, the expert must inform the court of this opinion and
27 recommend that a psychiatrist examine the child.

28
29 (2) Statements made to the appointed expert during the child’s competency
30 evaluation and statements made by the child to mental health professionals
31 during the remediation proceedings, and any fruits of these statements, must
32 not be used in any other hearing against the child in either juvenile or adult
33 court.

34
35 **Advisory Committee Comment**

36
37 Welfare and Institutions Code section 709(b) mandates that the Judicial Council develop and
38 adopt rules regarding the qualification of experts to determine competency for purposes of
39 juvenile adjudication. Upon a court finding of incompetency based on a developmental disability,
40 the regional center determines eligibility for services under Division 4.5 of the Lanterman
41 Developmental Disabilities Services (Welf. & Inst. Code, § 4500 et seq.).

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
1.	Commissioner Robert Leventer Superior Court of Los Angeles County	NI	<p>This submission comments on two proposed rules: 1) Rule 5.645(b)(E) regarding the necessary qualifications of appointed competency experts; and 2) Rules 5.645(g)(I) and (J) which delineate what must be contained in an expert’s written evaluation of a minor’s competency. The following discussion analyzes both substantive issues in connection with the posed rules, as well as those relating to the potential economic burden posed by their implementation.</p> <p>Rule 5.645(b)(E). [Expert Qualifications] Possess a comprehensive understanding of effective interventions, as well as treatment, training, and programs for the attainment of competency available to children and adolescents.</p> <p>To the extent this rule requires an expert to have specific training as to evidence-based juvenile remediation this rule sets the bar too high. Restoration of incompetency for juveniles is a relatively new field and is not taught in professional schools. There is only one evidence based juvenile remediation program in California (Santa Clara) and only a few in the country. Information about remediation services is not readily available, in part because so few programs exist. Requiring experts to have</p>	<p>The committees appreciate this comment and have modified this provision to track the statutory requirement that the expert “be familiar with” effective interventions, as well as treatment, training, and programs for the attainment of competency available to children and adolescents.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>comprehensive knowledge of this subject should not be required.</p> <p>Given the education and training available in this area, the current statutory language is sufficient. Section 709(b)(2) provides: “The expert. . . shall be familiar with competency remediation for the condition or conditions affecting competence in the particular case.”</p> <p>However, the committee might want to add that the expert be familiar with their county’s remediation services.</p> <p>Rule 5.645(g)(I) [Written Report] If the minor has significant deficits in abilities related to competency, an opinion with explanation as to whether treatment can reduce the impairments related to the minor’s deficits in competency abilities, the nature of that treatment, its availability, and whether restoration is likely to be accomplished within the statutory time limit.; A competency evaluation is a functional evaluation. It is not a comprehensive diagnostic assessment. A functional competency evaluation will not determine whether a minor needs</p>	<p>See response above.</p> <p>The committees declined to make the suggested change because the committee did not want to limit familiarity with remediation services to those services within the child’s county.</p> <p>The committees view the treatment that could result as the result of a competency evaluation broadly, and not limited to education about the court process. AB 1214 added a requirement that</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>“treatment”. Moreover, a court does not have the authority to order any “treatment”, other than remediation, prior to assuming jurisdiction, i.e., when and if proceedings are reinstated.</p> <p>The court is only authorized to offer remediation services which consist of structured, specialized education about the court process. Again, treatment beyond remediation is not permissible in the context of a competency proceeding. Counsel may explore the need for other forms of treatment, but that should not be in the responsibility of the court appointed competency expert.</p> <p>Rule 5.645(g)(J) [Written Report] If psychotropic medication is considered appropriate and necessary, whether the treatment will likely restore the minor to mental competency, 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 psychotropic medication in the county juvenile hall, and whether the minor has capacity to make decisions regarding psychotropic medication. If the expert is of the opinion that a referral to a psychiatrist is necessary to address these issues, the expert must inform the court of this opinion and</p>	<p>upon a finding of incompetency, the court must refer the minor to services to attain competency. It authorizes courts to refer the minor to treatment services to assist in remediation that may include mental health services, treatment for trauma, medically supervised medication, behavioral counseling, curriculum-based legal education, or training in socialization skills.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>recommend that a psychiatrist examine the minor.</p> <p>A functional competency evaluation should not include an assessment of a minor’s need for psychotropic medication. That goes far beyond a competency evaluation. Counsel and the court may want to explore issues and treatment unrelated to competency that might benefit a minor, but such an analysis falls far outside the purview of a competency evaluation. Also, there is no evidence-based rationale for the use of psychotropic medication to address incompetency remediation in juveniles.</p> <p>Cost: Los Angeles Juvenile Court has a select panel of competency experts who are appointed in rotation. The court orders about 175 competency evaluations per year. The cost of each evaluation is \$850. This amount does not approach fair compensation for the experts. The cost of having a comprehensive assessment included with all competency evaluations, as contemplated by these rules, would at minimum double the cost to the court.</p>	<p>The committees have modified the proposal to delete the provision regarding psychotropic medication. The committees retained the proposed language requiring that if the expert is of the opinion that a referral to a psychiatrist is appropriate, the expert must inform the court of that opinion and recommend that a psychiatrist examine the minor.</p> <p>The committees are aware that the new legislative mandates regarding evaluators will likely increase costs to the courts and counties, with no additional funding made available, and will note this in the report to the Judicial Council.</p>
2.	Orange County Bar Association By: Deirdre Kelly	AM	<i>Does the proposal appropriately address the stated purpose?</i>	

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>In part.</p> <p>The amendments to rule 5.645(e) go beyond the statutory requirements and invite counsel to commit ethical breaches. Welfare and Institutions Code section 709(b)(3), requires evaluators to “consult with minor’s counsel.”</p> <p>The amendments to rule 5.645(e), which implement this requirement, provide evaluators with specific direction, not included in the statutory language. The proposed rule would require experts to ask “if minor’s counsel raised the question of competency, why minor’s counsel doubts that the minor is competent” ... “[w]hat has the minor’s counsel observed regarding the minor’s behavior” ... and “[a] description of how the minor interacts with minor’s counsel.”</p> <p>Issues of attorney-client privilege notwithstanding, Business and Professions Code section 6068, subdivision (e), requires an attorney to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client.” Although the term “secrets” is not defined, the State Bar has authoritatively cited the broad definition contained in ABA Code of Professional Responsibility, which defines a</p>	<p>The committees concluded that since minor’s counsel often has the most information about the minor and that evaluators routinely do not consult with minor’s counsel, it was important to include these minimal, basic questions all evaluators should be asking. The committees made great efforts in the language of the rule to protect the attorney-client privilege.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>secret as “information gained in the professional relationships...the disclosure [of] which [would] be embarrassing and would be likely to be detrimental to the client...” (Cal. Formal Opinion 1986-87, citing the ABA Code of Prof. Responsibility, DR 4-101.) The statute has been construed broadly and includes the entire client file, even that information which has been made public. (<i>In the Matter of Johnson</i> (Review Department 2000) 4 Cal. State Bar Ct. Rptr. 179; see also <i>In re Jordan</i> (1972) 7 Cal.3d 930, 940-94 [“the protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance which are reflected in numerous statutes”].) Similarly, rule 1.6 of the Rules of Professional Conduct demands an attorney “shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client unless the client gives informed consent.” While an attorney may be at liberty to share some of this information with the expert that will often not be the case. And while we realize the rule requires the evaluator to ask—and not the attorney to answer—in many situations attorneys might feel compelled to share this information by virtue of the proposed language</p>	

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>or, worse yet, may not know they are violating their ethical obligations by sharing this information.</p> <p>We feel it is best to use the language of the statute and simply require evaluators to consult with counsel, so that the attorney can determine what information they may ethically share with the evaluator.</p> <p><i>Should rule 5.645(g)(1)(C)(i) be more specific regarding the records reviewed by the evaluator? Should the rule list out the sources listed in section 709(b)(3)?</i></p> <p>Yes. Section 709(b)(3) reads, “the expert shall personally interview the minor and review all of the available records provided, including but not limited to, medical education, special education, probation, child welfare, mental health, regional center, and court records, and any other relevant information that is available.” However, rule 5.645(g)(1)(C), only requires an evaluator to list the sources of information considered. While rule 5.645(f) [requiring documentation of a developmental history] can only be satisfied with a review of these specific records, it would be a helpful reminder that review of these records is required by listing them in the Rule of Court.</p>	<p>The committees prefer to add a cross reference to section 709(b)(3) rather than list out the sources in listed in that section.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p><i>Should rules 5.643 and 5.645 use the term “child” or “minor?”</i></p> <p>We express no opinion on this point.</p>	<p>No response required.</p>
3.	<p>Pacific Juvenile Defender Center By: Sue Burrell San Francisco, CA</p>	NI	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes.</p> <p>Should rule 5.645(g)(1)(C)(i) be more specific regarding the records reviewed by the evaluator? Should the rule list out the sources listed in section 709(b)(3)?</p> <p>No. We are concerned about requiring uniform lists of records. Each case is different, and what is useful in one case might not be useful in another. Our specific suggestions are contained in the comments.</p> <p>Should rules 5.643 and 5.645 use the term “child” or “minor”?</p> <p>We have struggled with this terminology in our own work, and agree with the analysis of the problem. Herein, we suggest two alternatives. First, the term “youth” can be used either by itself or in combination with “child.” It reflects the fact that our young people are not yet adults, but are older than children. Young people perceive the term “youth” as respectful. Also, it</p>	<p>No response required.</p> <p>The committees prefer to add a cross reference to section 709(b)(3) to define the sources the expert must consider.</p> <p>The committees appreciate the input and have modified the proposal to retain the term “child,” instead of the term “minor” as circulated, to be consistent with the other juvenile court rules and forms. The committees considered using the term “youth,” as suggested by the comment. However, the committees declined to make this change, as this term is not defined in the rules of court and</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>is preferable to the term “minor,” which is defined as “lesser in importance, seriousness, or significance” - not at all what we should be conveying about young people. A number of statutes have used the term “youth,” for example, Welfare and Institutions Code sections 224.73, 625.6, 992, 1177, 1788, 1900, 2011, 2023, 13754; some statutes use a combination of “child,” “youth,” and “minor.”</p> <p>Also, the term “person” may be useful in some situations. For example, “minor” is sometimes used to connote that the person is less than the age of majority, but this becomes confusing in situations where the person has reached the age of majority but is still treated as a juvenile under our laws. Person is a good option in those situations. (See, for example, Welf. & Inst. Code, § 208.5.)</p> <p>Comments by Section Please note that, to avoid confusion, we accepted the proposed changes, so the underlined text and strikeout text reflects our suggestions.*</p> <p>Rule 5.643 Comments: We have added “youth” throughout this rule, and “person” or “young person” in places. We kept “child,” as well, because this particular rule includes dependents under Welfare and Institutions Code section 300, who are often very young.</p>	<p>any definition of the term would be an important substantive change to the proposal and public comment should be sought before the council defines the term.</p> <p>Please see Attachment A to this comment chart which contains the commentator’s suggested amendments to the rule text. The substantive reasons for those suggestions are listed in the comment column of this chart and the committees’ responses are listed in this column.</p> <p>The committees appreciate the input and have modified the proposal to retain the term “child,” instead of the term “minor” as circulated, to be consistent with the other juvenile court rules and forms. The committees considered using the term “youth,” as suggested by the comment. However,</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>Also, we suggest rewording the description of disabilities. The preferred usage is to say that the person “has a disability” instead of referring to them as “developmentally disabled,” thus reflecting that the person is more than their disability. (The Centers for Disease Control and disability groups have provided helpful advice on this:</p> <p>https://www.cdc.gov/ncbddd/disabilityandhealth/pdf/disabilityposter_photos.pdf; https://www.reachcils.org/resources/disability/disability-rights/guidelines-writing-and-referring-people-disabilities; and https://adata.org/factsheet/ADANN-writing.) If we can begin to change the outmoded language sprinkled through the rules and the Codes, it would be good.</p> <p>Also, we suggest removing the word “doubt” from rule 5.643. Welfare and Institutions Code section 705 refers to “when the court is in doubt,” but the way the rule is phrased (“Doubt concerning...”), it sounds too much like what happens in competency proceedings, and may cause confusion.</p>	<p>the committees declined to make this change, as this term is not defined in the rules of court and any definition of the term would be an important substantive change to the proposal and public comment should be sought before the council defines the term.</p> <p>The committees agree with this suggestion and have modified the proposal to use the phrase “has a developmental disability” instead of “intellectually disabled.” The committee also replaced “intellectual disability” with “developmental disability” in response to this comment and to track the statutory language.</p> <p>The committees prefer to retain the phrase “Doubt concerning the mental health of a minor” as that is the language in Welfare and Institutions Code sections 357 & 705.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>Rule 5.645 Comments: Since this rule will apply to persons who are at least 12 years of age, we suggest replacing the terms “child” and “minor” with the term “youth.”</p> <p>Proposed subdivision (a)(1) – we agree with enunciating the competency standard and simply referring to section 709.</p> <p>Proposed subdivision (a)(2) – we agree with adding the language “unless the parties have stipulated to a finding of incompetency...”, as that is in the new amendments to section 709. We agree with adding “mental illness” to the specific conditions affecting competence, since that is in the statute, and with rewording the last clause to reference the statutory standard for incompetency.</p> <p>Proposed subdivision (b) - We are agree with the decision not to require “additional qualified experts” to meet the requirements of the rule. Those experts might have helpful testimony as consultants or witnesses even though they do not meet the requirements for the court appointed evaluator. We agree with the decision</p>	<p>The committees appreciate the input and have modified the proposal to retain the term “child,” instead of the term “minor” as circulated, to be consistent with the other juvenile court rules and forms. The committees considered using the term “youth,” as suggested by the comment. However, the committees declined to make this change, as this term is not defined in the rules of court and any definition of the term would be an important substantive change to the proposal and public comment should be sought before the council defines the term.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

Commenter	Position	Comment	Committees Response
		<p>to require psychologists of all kinds, including school psychologists, to be licensed.</p> <p>Proposed subdivision (b)(1)(E) - We suggest including language to call for experts who are knowledgeable about the particular conditions suspected in the case. Not sure if our language is quite right, but if, for example, we think the youth has a developmental disability, we would want to be sure that the expert evaluator knows about that disability.</p> <p>Proposed subdivision (b)(1)(F) – We agree with the Committee’s decision about allowing certified interpreters other than Judicial Council certified, but think the rule should specify by whom they may be certified. As we understand it, California does not offer a medical certification, but people can get national certifications from National Board of Certification for Medical Interpreters, www.certifiedmedicalinterpreters.org and Certification Commission for Healthcare Interpreters, www.healthcareinterpretercertification.org. We do not have the expertise to give failproof advice, but have suggested language that could be vetted with experts in the AOC interpreter certification program.</p> <p>Proposed subdivision (b)(1)(G) – We like the idea of the evaluator providing the court and other parties with information about available remediation services whenever possible. There has been an unfortunate belief in some places that remediation consists solely of curriculum driven workbooks, but the universe of</p>	<p>The committees declined to add a requirement that the expert be knowledgeable about the particular conditions suspected in the case. The rule already sets a high bar for expert qualifications. Further, the parties will likely not know the condition until the evaluation is completed.</p> <p>The committees declined to specify who must certify the interpreters. There are numerous, varied interpreter certification programs and institutions. The committee prefers to not list them all out because it could miss listing several existing programs and would not include any programs that arise in the future. Further, it would limit judicial discretion to determine if an interpreter is adequately certified.</p> <p>No response required.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

Commenter	Position	Comment	Committees Response
		<p>remediation is much broader, and the evaluator may be helpful in providing ideas for the remediation plan.</p> <p>Proposed subdivision (c) – We are opposed to allowing evaluator interviews that are not face-to-face. In our experience, youth are not comfortable in Skype, videoconference or other remote communication systems, and this is sure to skew evaluation results. Doing interviews through remote communication devices interferes with the evaluator’s ability to build trust with the young person, makes it much more difficult to administer testing, and impairs the evaluator in evaluating body language and affect. Also, from our experience in attorney interviews, we know that it is impossible to control for what is going on outside of camera range, such as eavesdropping staff or other environmental issues that may affect testing. These concerns are recognized as potential pitfalls of remote “telepsychology” by the American Psychological Association <i>Guidelines for the Practice of Telepsychology</i>, https://www.apa.org/practice/guidelines/telepsychology. One of the APA training modules specifically states that “[t]elepsychology may not be a good fit for some individuals, some diagnoses or some age groups, such as very young children...” and also points out that the integrity of testing may be at risk because “[m]ost test instruments and assessment approaches were designed for in-person use .” (Rebecca A. Clay, <i>How to make the most of telepsychology and steer clear of pitfalls</i>, 48</p>	<p>The committees agree with this suggestion and have modified the proposed rule to remove the paragraph allowing the interview to be conducted remotely. The committees’ original intent was that this could decrease custodial time for youth who lived in more remote areas. The committees concluded, however, that youth are not comfortable in remote communication systems and this could skew results. There also would be much of the youth’s demeanor and behaviors that the evaluator would not be able to observe. It is also not possible to control what is going on outside of camera range, such as eavesdropping staff or other environmental issues that may affect testing. The committees concluded that until the medical or psychological professions establish guidelines in this area, it was not appropriate to provide for it in the rule.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>Monitor on Psychology 30 (May 2017).) In cases involving issues as serious as competency, we believe the state needs to provide the resources for face-to-face communications with evaluators.</p> <p>Proposed subdivision (d)(1) – In response to the question posed about whether to list out all the types of records set forth in section 709, we think the proposed language is adequate in simply referring to the statute.</p> <p>Proposed subdivision (d)(2) – We do not think the decision of what records should be provided and who should provide them should be left to individual counties. Section 709 already calls for the expert to review records provided by counsel or “other information” regarding lack of competency from any other person. It seems best to leave things as described in the statute. We have heard of some experts giving lawyers checklists of records, but the statute already sets forth the types of records to consider, and we believe it is up to counsel to determine what is relevant and to provide such records to the experts.</p> <p>Proposed subdivision (e)(1) – We do not think the rule should prescribe what the evaluator asks the young person’s counsel. The evaluator should simply consult with counsel as required by the statute. We realize that the attorney has put competency into question, but have concerns that, given that this is the court’s evaluator, the proposed language skirts too closely to interference with the confidential</p>	<p>No response required.</p> <p>The committees prefer to allow each county to determine its own process and retained the proposed provision in rule 5.645 requiring that the written protocol mandated under section 709(i) must include a description of the process for obtaining and providing the records to the evaluator to review, including who will obtain and provide the records to the evaluator. This gives each county discretion to determine the process that will work best.</p> <p>The committees concluded that since minor’s counsel often has the most information about the minor and that evaluators routinely do not consult with minor’s counsel, it was important to include these minimal, basic questions all evaluators should be asking. The committees made great</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

Commenter	Position	Comment	Committees Response
		<p>attorney client relationship. The attorney should be able to determine what to disclose.</p> <p>Proposed subdivision(f) – We have suggested substantial changes and additions to the elements of the developmental history to focus more on the purpose of the developmental history in the context of competency. We used as a guide the writings of Thomas Grisso, a national expert on juvenile competence evaluation. If these are too detailed, they may at least serve as a guide for the categories of information that may be relevant for the developmental history.</p> <p>Proposed subdivision (g)(1)(C)(ii) and (iii) – Because we think what is considered should be determined by defense counsel, and that the evaluator should not be tasked with obtaining the materials, we took this out. Similarly, we took out (g)(1)(C)(iii) to conform with the earlier suggested changes on face-to-face interviews. The suggested text already covers what the evaluator should do if the youth refuses an interview.</p> <p>Proposed subdivision (g)(1)(H) – We object to including a provision on malingering in the rule. It is not mentioned in the statute, and we are concerned that it will create a straw man for a situation that seldom occurs in juvenile cases. Also, in our experience, malingering has occasionally been alleged in cases where the remediation services were utterly inadequate, but the blame was placed on the youth for not becoming competent. Most of the standardized tests used by evaluators have built in safeguards</p>	<p>efforts in the language of the rule to protect the attorney-client privilege.</p> <p>The committee concluded that it would be preferable to keep the proposed provisions regarding developmental history. This proposed amendment to the rule was developed with the assistance of Dr. Grisso, a national expert on juvenile competency evaluations. Further, the suggested language would be important substantive changes to the proposal and would need to circulate for public comment before they are considered for adoption.</p> <p>See responses above.</p> <p>The committees agree with this suggestion and have removed the proposed provision on malingering. The committees concluded that there are enough safeguards built into the standardized tests to capture malingering.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>to capture malingering, and we believe those are sufficient to address the issue.</p> <p>Proposed subdivision (g)(1)(I) and (K) – we suggest using the term “attainment” for juveniles, not “restoration.” That is the preferred term used by experts such as Thomas Grisso, who point out that restoration implies that the person was once competent and now will be again, while many young people have never been competent.</p> <p>Proposed subdivision (g)(1) (J) - We suggest that the rule clarify that medication administered in juvenile hall is voluntary, and that if involuntary medication appears necessary, the youth should be referred for handling under the involuntary commitment statutes.</p> <p>Proposed subdivision (g)(1)(K) – We amended the recommendations language to emphasize that placement is not the primary goal – that services and treatment are also important. And we suggest adding the language from the statute about least restrictive environment.</p>	<p>The committees agree with this suggestion and have added the words “attain” or “attainment” whenever the rule uses “restore” or “restoration”</p> <p>The committees have removed this portion of the rule regarding psychotropic medication.</p> <p>The committees agree with this suggestion and recommend amending the rule to state “The recommendation must be guided by the principle of section 709 that services must be provided in the least restrictive environment consistent with public safety” as recommended by the commenter.</p>
4.	Superior Court of San Diego County By: Mike Roddy Executive Officer	AM	Our Court uses minor, rather than child, in juvenile justice cases	The committees appreciate the input and have modified the proposal to retain the term “child,” instead of the term “minor” as circulated, to be consistent with the other juvenile court rules and forms. The committees considered using the term “youth,” as suggested by the comment. However, the committees declined to make this change, as

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>Our local protocol will have to be revised to include a process for providing reports to the evaluator</p> <p>CRC 5.643(b)(2): delete inaccurate subdivisions from 5250 and 5260</p> <p>CRC 5.645: The Committee did a good job on this rule.</p>	<p>this term is not defined in the rules of court and any definition of the term would be an important substantive change to the proposal and public comment should be sought before the council defines the term.</p> <p>No response required.</p> <p>The committees agree to delete the inaccurate subdivisions.</p> <p>No response required.</p>
5.	Superior Court of Los Angeles County	AM	<p>Does the proposal appropriately address the stated purpose? Yes, the proposal addresses the stated purpose</p> <p>Should rules 5.643 and 5.645 use the term "child" or "minor"? The rules should use the term “minor.”</p>	<p>No response required.</p> <p>The committees appreciate the input and have modified the proposal to retain the term “child,” instead of the term “minor” as circulated, to be consistent with the other juvenile court rules and forms. The committees considered using the term “youth,” as suggested by the comment. However, the committees declined to make this change, as this term is not defined in the rules of court and any definition of the term would be an important substantive change to the proposal and public comment should be sought before the council defines the term.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>Would the proposal provide cost savings? If so, please quantify. No, we do not anticipate cost savings</p> <p>Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes, two months would be sufficient.</p>	<p>The committees are aware that the new legislative mandates regarding evaluators will likely increase costs to the courts and counties, with no additional funding made available, and will note this in the report to the Judicial Council.</p> <p>No response required.</p>
6.	Superior Court of Orange County, Juvenile Court and Family Law Divisions	NI	<p><i>Should rules 5.643 and 5.645 use the term “child” or “minor”?</i> The term “minor” should be used to be consistent with Welfare and Institutions section 709.</p> <p><i>Would the proposal provide a cost savings?</i> No, the proposal would not provide a cost savings.</p> <p><i>What would the implementation requirements be for courts?</i> Judges would need to be notified of the changes. A local 709 Administrative Order/Protocol may also need to be revised.</p>	<p>The committees appreciate the input and have modified the proposal to retain the term “child,” instead of the term “minor” as circulated, to be consistent with the other juvenile court rules and forms. The committees considered using the term “youth,” as suggested by the comment. However, the committees declined to make this change, as this term is not defined in the rules of court and any definition of the term would be an important substantive change to the proposal and public comment should be sought before the council defines the term.</p> <p>The committees are aware that the new legislative mandates regarding evaluators will likely increase costs to the courts and counties, with no additional funding made available, and will note this in the report to the Judicial Council.</p> <p>No response required.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p><i>Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</i> Yes, two months would be sufficient time for implementation.</p> <p>Rule 5.645 Mental health condition of minor; competency evaluations For section (g)(1)(C), it is recommended that the sentence cross-reference Welfare and Institutions Code section 709(b)(3) to define the sources the expert is to consider</p>	<p>No response required.</p> <p>The committees agree to add a cross reference to section 709(b)(3) to define the sources the expert must consider.</p>
7.	Superior Court of Riverside County By: Susan Ryan Chief Deputy – Legal Services	A	<p>Does the proposal appropriately address the stated purpose? Yes, the updates to current Rule 5.645 to include the language “intellectual disability” or “developmental disability” and to replace “child” with the word “minor” will make the rule language more uniform. Breaking out subsections (a)-(c) to be renumbered as Rule 5.643 clarifies the expert qualifications of evaluators and the court proceedings for competency evaluations.</p> <p>Should rule 5.645 (g)(1)(C)(i) be more specific regarding the records reviewed by the evaluator? Should the rule list out the sources listed in section 709(b)(3)? Perhaps. Listing the sources may not be necessary, maybe the rule can just refer back to 709(b)(3). The actual evaluators are more likely to refer to the code sections when they have questions, but also referencing 709(b)(3) in the Rule could also be helpful.</p>	<p>No response required.</p> <p>The committees agree to add a cross reference to section 709(b)(3) to define the sources the expert must consider.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>Should rules 5.643 and 5.645 use the term “child” or “minor”? Either is fine, but to be more consistent with language used throughout juvenile laws, rules and forms the term “minor” may be best.</p> <p>Would the proposal provide cost savings? If so, please quantify. If the actual evaluators writing reports have more direction as to what they should review and what the reports should contain the quality of the reports should be better thus requiring less continuances. These efficiencies could also lead to minors being detained for as short a period as possible. However, it should be noted that many courts continue to struggle to find 709 evaluators that meet the requirements. Some courts may need to increase the evaluator fees paid to attract competent and qualified evaluators.</p> <p>What would the implementation requirements be for courts? Courts may need to update local protocols, inform judicial officers, stakeholders and evaluator panels of the changes. Some minute codes in the case management system and referral orders may need to be modified.</p>	<p>The committees appreciate the input and have modified the proposal to retain the term “child,” instead of the term “minor” as circulated, to be consistent with the other juvenile court rules and forms. The committees considered using the term “youth,” as suggested by the comment. However, the committees declined to make this change, as this term is not defined in the rules of court and any definition of the term would be an important substantive change to the proposal and public comment should be sought before the council defines the term.</p> <p>The committees are aware that the new legislative mandates regarding evaluators will likely increase costs to the courts and counties, with no additional funding made available, and will note this in the report to the Judicial Council.</p> <p>No response required.</p>

SPRING 19-24

Juvenile Law: Competency (Amend Cal. Rules of Court, rule 5.645; renumber rule 5.645(a)–(c) as rule 5.643)

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

	Commenter	Position	Comment	Committees Response
			<p>Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? For our court yes. Our protocol was revised this year after AB1214 when into effect, so in large part our current protocol has already accounted for these issues.</p> <p>How well would this proposal work in courts of different sizes? Notifications, system and order changes would likely need to occur in any size court. The proposals should work well for courts of any size. Some courts will likely continue to have difficulties in attracting qualified evaluators.</p>	<p>No response required.</p> <p>No response required.</p>

Comment Chart Attachment A

Suggested Language:

**Rule 5.643. 5.645. Mental health or condition of child or youth
~~minor~~; court procedures**

**(a) When the court is concerned about ~~Doubt concerning~~ the mental health of a
child or youth ~~minor~~ (§§ 357, 705, 6550, 6551)**

Whenever the court believes that the child or youth ~~minor~~ who is the subject of a petition filed under section 300, 601, or 602 has a mental disability or mental illness is mentally disabled or may be mentally ill, the court may stay the proceedings and order the child or youth ~~minor~~ taken to a facility designated by the court and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation. The professional in charge of the facility must submit a written evaluation of the child or youth ~~minor~~ to the court.

(b) Findings regarding a mental disorder (§ 6551)

Article 1 of chapter 2 of part 1 of division 5 (commencing with section 5150) applies.

(1) If the professional reports that the child or youth ~~minor~~ is not in need of intensive treatment, the child or youth ~~minor~~ must be returned to the juvenile court on or before the expiration of the 72-hour period, and the court must proceed with the case under section 300, 601, or 602.

(2) If the professional in charge of the facility finds that the child or youth ~~minor~~ is in need of intensive treatment for a mental disorder, the child or youth ~~minor~~ may be certified for not more than 14 days of involuntary intensive treatment

according to the conditions of sections 5250(c) and 5260(b). The stay of the juvenile court proceedings must remain in effect during this time.

(A) During or at the end of the 14 days of involuntary intensive treatment, a certification may be sought for additional treatment under sections commencing with 5270.10 or for the initiation of proceedings to have a conservator appointed for the child or youth ~~minor~~ under sections commencing with 5350. The juvenile court may retain jurisdiction over the child or youth ~~minor~~ during proceedings under sections 5270.10 et seq. and 5350 et seq.

(B) For a child or youth ~~minor~~ subject to a petition under section 602, if the child or youth ~~minor~~ is found to be gravely disabled under sections 5300 et seq., a conservator is appointed under those sections, and the professional in charge of the child or youth's ~~minor's~~ treatment or of the treatment facility determines that proceedings under section 602 would be detrimental to the child or youth ~~minor~~, the juvenile court must suspend jurisdiction while the conservatorship remains in effect. The suspension of jurisdiction may end when the conservatorship is terminated, and the original 602 matter may be calendared for further proceedings.

(c) Findings regarding intellectual disability (§ 6551)

Article 1 of chapter 2 of part 1 of division 5 (commencing with section 5150) applies.

(1) If the professional finds that the child or youth ~~minor~~ has an intellectual disability is ~~mentally retarded~~ and recommends commitment to a state hospital, the court may direct the filing in the appropriate court of a petition for commitment of a child or youth ~~minor~~ as a person with a developmental disability ~~mentally retarded~~ to the State Department of Developmental Services for placement in a state hospital.

(2) If the professional finds that the child or youth ~~minor~~ does not have an intellectual disability is ~~not mentally retarded~~, the child or youth ~~minor~~ must be returned to the juvenile court on or before the expiration of the 72-hour period, and the court must proceed with the case under section 300, 601, or 602.

(3) The jurisdiction of the juvenile court must be suspended while the child or youth ~~minor~~ is subject to the jurisdiction of the appropriate court under a petition for commitment of a person with an intellectual disability ~~mentally retarded~~, or

according to the conditions of sections 5250(c) and 5260(b). The stay of the juvenile court proceedings must remain in effect during this time.

**Rule 5.645. Mental health or condition of youth minor; court procedures
competency evaluations**

(a) Doubt as minor's competency (§§ 601, 602, 709)

(1) If the court finds that there is substantial evidence about ~~that regarding [or: about?]~~ a youth minor who is the subject of a petition filed under section 601 or 602 that raises a doubt as to the young person's minor's competency as defined in section 709, the court must suspend the proceedings and conduct a hearing regarding the youth's competency ~~minor's competence~~. Evidence is substantial if it raises a reasonable doubt about the youth's ~~child's~~ competence to stand trial.

(2) Unless the parties have stipulated to a finding of incompetency, the court must appoint an expert ~~to examine the child~~ to evaluate the youth minor and determine whether the youth minor suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competency and, if so, whether the ~~condition or conditions impair the child's competency~~ the youth minor is incompetent as defined in section 709(a)(2).

(3) Following the hearing on competency, the court must proceed as directed in section 709.

(b) Expert qualifications

(1) To be appointed as an expert, an individual must be a:

(A) Licensed psychiatrist who has successfully completed four years of medical school and either four years of general psychiatry residency, including one year of internship and two years of child and adolescent fellowship training, or three years of general psychiatry residency, including one year of internship and one year of residency that focus on children and adolescents and one year of child and adolescent fellowship training; or

(B) Clinical, counseling, or school psychologist who has received a doctoral degree in psychology from an educational institution accredited by an organization recognized by the Council for Higher Education Accreditation and who is licensed as a psychologist.; and

(2) The expert, whether a licensed psychiatrist or psychologist, must:

(A) Possess demonstrable professional experience addressing child and adolescent developmental issues, including the emotional, behavioral, and cognitive impairments of children and adolescents;

(B) Have expertise in the cultural and social characteristics of children and adolescents;

(C) Possess a curriculum vitae reflecting training and experience in the forensic evaluation of children and adolescents;

(D) Be familiar with juvenile competency standards and accepted criteria used in evaluating juvenile competence;

(E) Possess a comprehensive understanding of effective interventions, as well as treatment, training, and programs for the attainment of competency available to children and adolescents, including the particular condition or conditions suspected in the case; and

(F) Be proficient in the language preferred by the youth minor, or if that is not feasible, employ the services of an interpreter certified by the Administrative Office of the Courts, a recognized professional association, or an accredited college or university interpreter program, ~~certified interpreter and~~ use assessment tools that are linguistically and culturally appropriate for the youth minor; and

(G) Be familiar with juvenile competency remediation services available to the youth minor.

(3) Nothing in this rule precludes involvement of clinicians with other professional qualifications from participation as consultants or witnesses or in other capacities relevant to the case.

(c) Interview of minor

The expert must evaluate the youth ~~attempt to interview the minor face-to-face~~.

~~(1) If an in person interview is not possible due to distance, the interview may be conducted remotely, using videoconference or another form of remote~~

~~electronic communication that allows the evaluator and the minor to communicate in real time and see each other during the interview, with no delay in aural or visual transmission or reception.~~

~~(2) If an in-person interview is not possible because the minor refuses an interview, the evaluator must still meet with the minor ~~try to observe~~ and make direct contact with the minor to attempt to gain clinical observations that may inform the evaluator's opinion regarding the minor's competency.~~

(d) Review of records

(1) The evaluator must review all the records provided as required by section 709.

~~(2) The written protocol required under section 1 709(i) must include a description of the process for obtaining and providing the records to the evaluator to review, including who will obtain and provide the records to the evaluator.~~

(e) Consult with minor's counsel (1) The expert must consult with minor's counsel as required by section 709.

~~This consultation must include asking minor's counsel the following: (A) If minor's counsel raised the question of competency, why minor's counsel doubts that the minor is competent;~~

~~(B) What has minor's counsel observed regarding the minor's behavior; and~~

~~(C) A description of how the minor interacts with minor's counsel.~~

(2) No waiver of the attorney-client privilege will be deemed to have occurred from minor's counsel's report of the minor's statements to the evaluator, and all such statements are subject to the protections in (g)(2) of this rule.

(f) Developmental history

The expert must gather and include in the report a developmental history of the minor as required by section 709. This history is to help explain a youth's capacity to understand the adjudication process and participate in it, explaining the clinical and/or developmental reasons for any deficits in those abilities. It must be documented in the report and may ~~must~~ include, but is not limited to the following:

Educational Records: A history of challenges that interfere with academic success and thus, identify possible areas of court-related weaknesses or help to confirm diagnoses. These records may contain descriptions of the youth’s general learning style and/or the typical educational supports used with the youth and the efficacy of those services. Whether or not the youth has been in special education, the records may help the examiner consider the youth’s daily functioning in a setting, like court, with significant verbal demands.

- Progress in school, including grade level, grades and achievement levels, testing of general intelligence, specific cognitive abilities, and/or learning abilities that help clarify the youth’s developmental trajectory; records of educators or service providers indicating the young person functions at a level not commensurate with chronological age; and whether the youth is in a regular or alternative education program;
- Any history of special education, including the basis for eligibility; types of services called for in Individualized Education program (IEP); services actually provided, setting for services; date of last IEP;
- Any school suspensions or expulsions, their basis, and any alternative services provided;
- Any significant disruption in school attendance and the reasons therefore;
- Any visits to or treatment by a school psychologist and the basis;

Health and Mental Health Records: Information about physical and mental disabilities identified by providers in the past, and how they have impacted the youth, and the efficacy of any treatment.

- Medical history, including diagnoses and treatment for potentially relevant conditions;
- Early health records where potentially relevant, including evidence of in utero exposure to drugs/alcohol; history of whether the youth achieved developmental milestones such as walking, talking, and reading;
- Mental health history including diagnoses, medications, treatment by mental health professionals, or hospitalizations;
- History of head injuries or incidents of being rendered unconscious, including any diagnosis of Traumatic Brain Injury;
- Any regional center contact; determinations of eligibility; and services provided;
- History of substance use and any treatment or intervention;

Child Welfare Records/Family History that may identify potentially relevant neglect or trauma, the history and general functioning of the family and/or specific struggles the family has faced.

- History of contacts with the child welfare system; any 300 petitions filed or sustained; placements; history of any services provided to the youth;
- Family history, including current living conditions; history of moving, and other disruptions due to death, incarceration, incapacitation of parent or guardians;
- History of trauma or domestic violence in the home; other trauma history such as exposure to community violence or witnessing violence to loved ones;
- History of migration or immigration from other countries; any relevant cultural or linguistic background of the youth and family.

Legal Records that describe the youth's past record of arrests or contacts with the system that might help explain strengths and weaknesses in the youth's understanding of the legal process.

- History of involvement in juvenile justice system, including sustained petitions, dispositions, interventions and services provided.

~~(1) Whether there were complications or drug use during pregnancy that could have caused medical issues for the minor;~~

~~(2) When the minor achieved developmental milestones such as talking, walking, and reading;~~

~~(3) Psychosocial factors such as abuse, neglect, or drug exposure;~~

~~(4) Adverse childhood experiences, including early disruption in the parent-child relationship;~~

~~(5) Mental health services received during childhood and adolescence;~~

~~(6) School performance, including an Individualized Education Plan, testing, achievement scores, and retention;~~

~~(7) Acculturation issues;~~

~~(8) Biological and neurological factors such as neurological deficits and head~~

trauma; and

~~(9) Medical history including significant diagnoses, hospitalizations, or head trauma.~~

(g) Written report

(1) Any court-appointed evaluator must examine the minor and advise the court on the minor's competency to stand trial. The expert's report must be submitted to the court, to the counsel for the minor, to the probation department, and to the prosecution. The report must include the following:

(A) A statement identifying the court referring the case, the purpose of the evaluation, and the definition of competency in the state of California;

(B) A brief statement of the expert's training and previous experience as it relates to evaluating the competence of a minor to stand trial;

(C) A statement of the procedure used by the expert, including:

(i) A list of all sources of information considered by the expert;

~~(ii) A list of all sources of information the expert tried or wanted to obtain but, for reasons described in the report, could not be obtained;~~

~~(iii) A detailed summary of the attempts made to meet the minor face³⁰ to face and a detailed account of any accommodations made to make direct contact with the minor; and~~

~~(iii^v)~~ All diagnostic and psychological tests administered, if any;

(D) A summary of the developmental history of the child;

(E) A summary of the evaluation conducted by the expert on the minor, including the current diagnosis or diagnoses that meet criteria under the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders*, when applicable, and a summary of the minor's mental or developmental status;

(F) A detailed analysis of the competence of the minor to stand trial under

section 709, including the minor's ability or inability to understand the nature of the proceedings ~~and to~~ assist counsel in the conduct of a defense in a rational manner as a result of a mental or developmental impairment;

(G) An analysis of whether and how the minor's mental or developmental status is related to any deficits in abilities related to competency;

~~(H) A summary of an assessment conducted for malingering or feigning symptoms, if clinically indicated, which may include psychological testing;~~

(I) If the minor has significant deficits in abilities related to competency, an opinion with explanation as to whether treatment can reduce the impairments related to the minor's deficits in competency abilities, the nature of that treatment, its availability, and whether attainment restoration is likely to be accomplished within the statutory time limit;

(J) If psychotropic medication is considered appropriate and necessary, whether the treatment will likely enable the youth to attain ~~restore the minor to~~ mental competency, 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 psychotropic medication in the county juvenile hall, and whether the minor has capacity to make decisions regarding psychotropic medication. Involuntary medication may not be administered pursuant to section 709, and may only be administered in conformity with Welfare and Institutions Code 705 or Penal Code Section 4011.6 (for non-wards), or Welfare and Institutions Code section 6550 if they are wards. If the expert is of the opinion that a referral to a psychiatrist is necessary to address these issues, the expert must inform the court of this opinion and recommend that a psychiatrist examine the minor or that the minor be referred for civil commitment proceedings pursuant to the above referenced sections; and

(K) A recommendation, as appropriate, for the type of placement, services, ~~or or type of placement and~~ treatment that would be most appropriate for restoring the minor to competency. The recommendation shall be guided by the principle of Section 709 that services shall be provided in the least restrictive environment consistent with public safety.

(2) Statements made to the appointed expert during the minor's competency evaluation and statements made by the minor to mental health professionals

during the remediation proceedings, and any fruits of these statements, must not be used in any other hearing against the minor in either juvenile or adult court.

We very much appreciate the opportunity to help with the development of this rule. Please let us know if we can provide further explanations about any of the comments or suggestions in this document.

Sincerely yours,



Sue Burrell, Policy and Training Director
Pacific Juvenile Defender Center
Mill Valley, California 94941
(415) 389-9027 (Home Office)
1sueburrell@gmail.com