



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 24, 2019

Title

Criminal Procedure: Diversion for
Incompetent Defendants and Posttrial
Hearings on Competency

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 4.130

Recommended by

Criminal Law Advisory Committee

Agenda Item Type

Action Required

Effective Date

January 1, 2020

Date of Report

September 24, 2019

Contact

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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 incorporate changes due to Assembly Bill 1810 (Stats. 2018, ch. 34), a bill that significantly altered the statutory landscape for mental competency proceedings.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council amend rule 4.130 of the California Rules of Court, effective January 1, 2020, to:

1. Require an expert competency report to contain an opinion as to whether the symptoms motivating the defendant's behavior would respond to mental health treatment;
2. Address diversion for defendants found to be incompetent; and
3. Address posttrial hearings on competency, both in "off-ramp" cases under Penal Code section 1370(a)(1)(G) and after a defendant has been terminated from diversion.

The text of the amended rule is attached at pages 6–10.

Relevant Previous Council Action

Rule 4.130 was adopted effective January 1, 2007. It was subsequently amended, effective January 1, 2018, to implement recommendations from the Judicial Council’s Mental Health Issues Implementation Task Force to identify the information that must be included in a court-appointed expert’s report on a criminal defendant’s competency to stand trial.

Analysis/Rationale

Effective June 27, 2018, AB 1810 (see Link A) established mental health diversion (Pen. Code, §§ 1001.35, 1001.36; see Links B and C). It also amended the statutes for mental competency proceedings in both misdemeanor and felony cases to allow a judge to grant diversion to a defendant who has been found incompetent to stand trial. (Pen. Code, §§ 1370, 1370.01; see Links D and E.) Assembly Bill 1810 also provided a mechanism for a judge to reconsider the competency of a defendant awaiting transfer to a state hospital when presented with substantial evidence that the defendant has regained competence—essentially providing a procedural “off-ramp” on the road to the State Hospital. (Pen. Code, §§ 1370(a)(1)(G).) This proposal updates California Rules of Court,¹ rule 4.130, which governs mental competency proceedings, to account for these significant changes in law.

Policy implications

This proposal may require that a court-appointed expert conduct an evaluation of the defendant that is more extensive than what is required by the current rule and provide greater detail in the expert report. Accordingly, implementation 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. However, the proposal also promotes efficiencies avoiding the unnecessary delay and costs caused by requiring a report by an expert that assesses competency and a separate report by another expert that assesses eligibility for diversion.

Comments

This proposal circulated for comment from April 11, 2019, to June 10, 2019. Eight comments were received. Four commenters agreed with the proposal, three commenters agreed with the proposal if modified, and one commenter disagreed with the proposed changes. The committee revised the standard in response to the comments. The comments raised four main issues, discussed below.

The People’s right to request a determination of probable cause under Penal Code section 1368.1(a)

Three commenters expressed concern that the circulated language, which referred to the People’s right to request a preliminary examination under Penal Code section 1368.1(a) (see Link F), was imprecise or overbroad. The committee agreed and modified the proposed amendment to rule 4.130(b)(3) to more specifically refer to the defendant’s right to request a

¹ All further references to “rule” or “rules” are to the California Rules of Court.

preliminary examination under Penal Code section 1368.1(a)(1), and the People’s right to request a determination of probable cause as provided in Penal Code section 1368.1(a)(2) and rule 4.131 (see Link G).

Waiver of competency trial

The proposed amendment to rule 4.130(c), as circulated, stated that if mental competency proceedings are initiated, criminal proceedings are suspended and may not be reinstated until a trial on the competency of the defendant has been concluded and the defendant is found mentally competent at a trial conducted under Penal Code section 1369 (see Link H), at a hearing conducted under Penal Code section 1370(a)(1)(G), or at a hearing following a certification of restoration under Penal Code section 1372 (see Link I). One commenter stated that the circulated language did not take into account that a criminal proceeding may be reinstated when a defendant stipulates or waives the right to a competency trial. The committee discussed whether the circulated language was sufficient to cover the situation raised by the commenter, as well as other related situations, and decided not to incorporate any changes without seeking further public comment.

Proposed added requirements to court procedures

One commenter stated that the proposal would mandate court procedures that should be permissive or discretionary. The proposal includes two new requirements. (All other recommended components would be optional.) First, the proposed rule would require an expert competency report to contain an opinion as to “whether the symptoms motivating the behavior would respond to treatment.” This language, proposed to be added to rule 4.130(d)(1)(B), is intended to facilitate assessment for mental health diversion eligibility for defendants in competency proceedings. The committee believes this ultimately would promote efficiencies by avoiding the unnecessary delay caused by requiring a report by an expert that assesses competency and a separate report by another expert that assesses eligibility for diversion.

The committee also notes that the rule currently in effect requires that the report 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.” (Rule 4.130(d)(2)G.) The committee concluded that the likely benefit of the proposed requirement outweighed any potential burden, because it is sufficiently similar to what is already required.

Second, the proposed rule adds language in subparagraph (h)(2)(C) regarding posttrial hearings on competence, requiring the court’s posttrial findings as to the defendant’s mental competency to be stated on the record and recorded in the minutes. The committee recognized that, out of concerns for the defendant’s privacy, the practice of many courts is to limit public access to competency reports and evaluations, which serve as the primary basis for a court’s findings on mental competence. In requiring the court’s findings to be on the record and recorded in the minutes, the committee sought to balance the public’s First Amendment right of access to court records with a defendant’s privacy interests in their personal medical information. Based on these considerations, the committee retained the requirements as proposed in the rule amendments.

Request for more guidance on proposed procedures and eligibility requirements

One commenter stated that the proposal—whether addressing procedures for mental incompetency diversion or for posttrial hearings on competency—does not provide adequate guidance to the courts. Specifically, the commenter sought additional guidance on the eligibility criteria for mental incompetency diversion. After discussion, the committee declined to revise the guidance on the proposed procedures and eligibility requirements. The committee notes that the eligibility criteria for mental health diversion is set forth in Penal Code section 1001.36(b)(1) and (2), and apply equally when a court is considering mental incompetency diversion pursuant to Penal Code section 1370(a)(1)(B)(iv). Additionally, at the outset, in developing this proposal, the committee intentionally chose to limit its scope, given the statutory language in Penal Code section 1001.35(b) favoring local discretion in development and implementation of diversion options and the lack of case law in this area.

Alternatives considered

In addition to the alternatives considered in response to the public comments, the committee considered creating a separate rule for mental health diversion that could be cross-referenced with the rule on competency for defendants who were granted diversion after being found incompetent. But ultimately—given the paucity of case law on mental health diversion and the statutory language favoring local discretion in implementation—the committee decided to solely update the existing rule on competency proceedings at this time. (See Pen. Code, § 1001.35(b).)

In developing the proposal, the committee discussed whether to require a court-appointed expert to opine on the defendant’s eligibility for mental health diversion, but concluded that was too ambiguous and potentially also too burdensome.

Fiscal and Operational Impacts

The fiscal and operational impacts of this proposal reflect the significant changes to mental competency proceedings set forth by AB 1810. As noted, this proposal may require that a court-appointed expert conduct a more extensive evaluation of the defendant than required by the current rule 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.

Some commenters noted that court-ordered and monitored diversion could increase court costs. The committee notes that this increase is associated with the legislative changes made by AB 1810, not as a result of this proposal.

Attachments and Links

1. Cal. Rules of Court, rule 4.130, at pages 6–10
2. Chart of comments, at pages 11–24
3. Link A: [Assem. Bill 1810](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1810) (Stats. 2018, ch. 34), at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1810

4. Link B: [Pen. Code, § 1001.35](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1001.35.&lawCode=PEN
5. Link C: [Pen. Code, § 1001.36](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1001.36.&lawCode=PEN
6. Link D: [Pen. Code, § 1370](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1370.&lawCode=PEN
7. Link E: [Pen. Code, § 1370.01](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1370.01.&lawCode=PEN
8. Link F: [Pen. Code, § 1368.1](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1368.1.&lawCode=PEN
9. Link G: Cal. Rules of Court, [rule 4.131](#), at https://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_131
10. Link H: [Pen. Code, § 1369](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1369.&lawCode=PEN
11. Link I: [Pen. Code, § 1372](#), at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1372.&lawCode=PEN

Rule 4.130 of the California Rules of Court is amended, effective January 1, 2020, to read:

Rule 4.130. Mental competency proceedings

(a) * * *

(b) Initiation of mental competency proceedings

(1)–(2) * * *

(3) In a felony case, if the judge initiates mental competency proceedings prior to the preliminary examination, counsel for the defendant may request a preliminary examination as provided in Penal Code section 1368.1(a)(1), or counsel for the People may request a determination of probable cause as provided in Penal Code section 1368.1(a)(2) and rule 4.131.

(c) Effect of initiating mental competency proceedings

(1) If mental competency proceedings are initiated, criminal proceedings are suspended and may not be reinstated until a trial on the competency of the defendant has been concluded and the defendant ~~either:~~ is found mentally competent at a trial conducted under Penal Code section 1369, at a hearing conducted under Penal Code section 1370(a)(1)(G), or at a hearing following a certification of restoration under Penal Code section 1372.

~~(A)—Is found mentally competent; or~~

~~(B)—Has his or her competency restored under Penal Code section 1372.~~

(2)–(3) * * *

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

(1) On initiation of mental competency proceedings, the court must inquire whether the defendant, or defendant’s counsel, seeks a finding of mental incompetence.

(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 summary of the defendant's mental status, a ~~current~~ diagnosis under the most recent version of the *Diagnostic and Statistical Manual of Mental Disorders*, if possible, of the defendant's current mental disorder or disorders, and a statement as to whether symptoms of the mental disorder or disorders which motivated the defendant's behavior would respond to mental health treatment ~~summary of the defendant's mental status;~~

(C)–(G) * * *

(3) Statements made by the defendant during the examination to experts appointed under this rule, and products of any such statements, may not be used in a trial on the issue of the defendant's guilt or in a sanity trial should defendant enter a plea of not guilty by reason of insanity.

(e) * * *

(f) Posttrial procedure

- (1) If the defendant is found mentally competent, the court must reinstate the criminal proceedings.
- (2) If the defendant is found to be mentally incompetent, the criminal proceedings remain suspended and the court must ~~follow the procedures stated in Penal Code section 1370 et seq.~~ either issue an order committing the person for restoration treatment under the provisions of the governing statute, or, in the case of a person eligible for commitment under Penal Code sections 1370 or 1370.01, may consider placing the committed person on a program of diversion.

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

- (1) After the court finds that the defendant is mentally incompetent and before the defendant is transported to a facility for restoration under section 1370(a)(1)(B)(i), the court may consider whether the defendant may benefit from diversion under Penal Code section 1001.36. The court may set a hearing to determine whether the defendant is an appropriate candidate for diversion. When determining whether to exercise its discretion to grant

1 diversion under this section, the court may consider previous records of
2 participation in diversion under section 1001.36.

3
4 (2) The maximum period of diversion after a finding that the defendant is
5 incompetent to stand trial is the lesser of two years or the maximum time for
6 restoration under Penal Code section 1370(c)(1) (for felony offenses) or
7 1370.01(c)(1) (for misdemeanor offenses).

8
9 (3) The court may not condition a grant of diversion for defendant found to be
10 incompetent on either:

11
12 (A) The defendant's consent to diversion, either personally, or through
13 counsel; or

14
15 (B) A knowing and intelligent waiver of the defendant's statutory right to a
16 speedy trial, either personally, or through counsel.

17
18 (4) A finding that the defendant suffers from a mental disorder or disorders
19 rendering the defendant eligible for diversion, any progress reports
20 concerning the defendant's treatment in diversion, or any other records
21 related to a mental disorder or disorders that were created as a result of
22 participation in, or completion of, diversion or for use at a hearing on the
23 defendant's eligibility for diversion under this section, may not be used in
24 any other proceeding without the defendant's consent, unless that information
25 is relevant evidence that is admissible under the standards described in article
26 I, section 28(f)(2) of the California Constitution.

27
28 (5) If, during the period of diversion, the court determines that criminal
29 proceedings should be reinstated under Penal Code section 1001.36(d), the
30 court must, under Penal Code section 1369, appoint a psychiatrist, licensed
31 psychologist, or any other expert the court may deem appropriate, to examine
32 the defendant and return a report, opining on the defendant's competence to
33 stand trial. The expert's report must be provided to counsel for the People
34 and to the defendant's counsel.

35
36 (A) On receipt of the evaluation report, the court must conduct an inquiry
37 into the defendant's current competency, under the procedures set forth
38 in (h)(2) of this rule.

39
40 (B) If the court finds by a preponderance of the evidence that the defendant
41 is mentally competent, the court must hold a hearing as set forth in
42 Penal Code section 1001.36(d).

1 (C) If the court finds by a preponderance of the evidence that the defendant
2 is mentally incompetent, criminal proceedings must remain suspended,
3 and the court must order that the defendant be committed, under Penal
4 Code section 1370 (for felonies) or 1370.01 (for misdemeanors), and
5 placed for restoration treatment.
6

7 (D) If the court concludes, based on substantial evidence, that the defendant
8 is mentally incompetent and is not likely to attain competency within
9 the time remaining before the defendant's maximum date for returning
10 to court, and has reason to believe the defendant may be gravely
11 disabled, within the meaning of Welfare and Institutions Code section
12 5008(h)(1), the court may, instead of issuing a commitment order under
13 Penal Code sections 1370 or 1370.01, refer the matter to the
14 conservatorship investigator of the county of commitment to initiate
15 conservatorship proceedings for the defendant under Welfare and
16 Institutions Code section 5350 et seq.
17

18 (6) If the defendant performs satisfactorily and completes diversion, the case
19 must be dismissed under the procedures stated in Penal Code section
20 1001.36, and the defendant must no longer be deemed incompetent to stand
21 trial.
22

23 **(h) Posttrial hearings on competence**
24

25 (1) If, at any time after the court has declared a defendant incompetent to stand
26 trial, and counsel for the defendant, or a jail medical or mental health staff
27 provider, provides the court with substantial evidence that the defendant's
28 psychiatric symptoms have changed to such a degree as to create a doubt in
29 the mind of the judge as to the defendant's current mental incompetence, the
30 court may appoint a psychiatrist or a licensed psychologist to examine the
31 defendant and, in an examination with the court, opine as to whether the
32 defendant has regained competence.
33

34 (2) On receipt of the evaluation report, the court must direct the clerk to serve a
35 copy on counsel for the People and counsel for the defendant. If, in the
36 opinion of the appointed expert, the defendant has regained competence, the
37 court must conduct a hearing, as if a certificate of restoration of competence
38 had been filed under Penal Code section 1372(a)(1), except that a
39 presumption of competency does not apply. At the hearing, the court may
40 consider any evidence, presented by any party, which is relevant to the
41 question of the defendant's current mental competency.
42

1 (A) At the conclusion of the hearing, if the court finds that it has been
2 established by a preponderance of the evidence that the defendant is
3 mentally competent, the court must reinstate criminal proceedings.
4

5 (B) At the conclusion of the hearing, if the court finds that it has not been
6 established by a preponderance of the evidence that the defendant is
7 mentally competent, criminal proceedings must remain suspended.
8

9 (C) The court's findings on the defendant's mental competency must be
10 stated on the record and recorded in the minutes.
11

12 **Advisory Committee Comment**

13 * * *
14

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Diversion for Incompetent Defendants and Posttrial Hearings on Competency (California Rules of Court, Rule 4.130)

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

	Commenter	Position	Comment	Committee Response
1.	Los Angeles County Public Defender by Ricardo D. Garcia, Public Defender Los Angeles County Alternate Public Defender by Erika Anzoategui, Acting Alternate Public Defender	NI	<p>This proposed rule change is overbroad in stating a judge's obligation to permit a district attorney's right to demand a preliminary hearing pursuant to Penal Code section 1368.1, subdivision (a). The proposed language states:</p> <p>(3) In a felony case, if the judge initiates mental competency proceedings prior to the preliminary examination, counsel for the defendant or counsel for the People may request a preliminary examination as provided in Penal Code section 1368.1(a) and rule 4.131.</p> <p>Penal Code section 1368.1, subdivision (a)(1), authorizes a defendant, but not a prosecutor to request a preliminary hearing. By contrast, Penal Code section 1368.1, subdivision (a)(2), authorizes the defendant and the prosecutor to request a preliminary hearing. As such, this proposed new rule should be modified to reflect the plain meaning of Penal Code section 1368.1, subdivision (a), in its entirety as suggested below:</p> <p>(3) (a) In a felony case, if the judge initiates mental competency proceedings prior to the preliminary examination, counsel for the defendant may request a preliminary examination as provided in Penal Code section 1368.1(a)(1) and rule 4.131.</p> <p>(b) In a felony case involving death, great bodily harm, or a serious threat to</p>	<p>The committee agrees, in part, with the comment, and has modified the proposal to more clearly distinguish between a preliminary hearing requested by the defendant under section 1368.1(a)(1) and a determination of probable cause requested by the People under Penal Code section 1368.1(a)(2) and rule 4.131.</p>

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			the physical well-being of another person, if the judge initiates mental competency proceedings prior to the preliminary examination, counsel for the defendant or counsel for the People may request a preliminary examination as provided in Penal Code section 1368.1(a)(2) and rule 4.131.	
2.	Orange County Bar Association by Deirdre Kelly, President	A	<p><i>Does the proposal appropriately address the stated purpose?</i> Yes.</p> <p><i>Do the proposed procedures for the diversion of defendants who have been found incompetent to stand trial provide adequate guidance to the courts and litigants?</i> Yes. Since diversion is discretionary, the proposed amendments to rule 4.130(d)(2)(B), requiring an evaluator to offer an opinion on “whether symptoms of the mental disorder or disorders which motivated the defendant’s behavior would respond to mental health treatment” are especially helpful in signaling to the court that defendant may benefit from diversion under Penal Code section 1001.36 in light of the procedures found in proposed rule 4.130(g)(1).</p> <p><i>Do the proposed procedures for posttrial hearings on competency provide adequate guidance to the courts and litigants?</i> Yes, the rules mirror the language of the statute, Penal Code 1370(a)(1)(G).</p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>
3.	Superior Court of Los Angeles County	A	<i>Does the proposal appropriately address the stated purpose?</i>	

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		<p>Yes, the proposal addresses the stated purpose.</p> <p><i>Do the proposed procedures for the diversion of defendants who have been found incompetent to stand trial provide adequate guidance to courts and litigants?</i></p> <p>Yes, the proposed procedures provide adequate guidance.</p> <p><i>Do the proposed procedures for posttrial hearings on competency provide adequate guidance to courts and litigants?</i></p> <p>Yes, the proposed procedures provide adequate guidance.</p> <p><i>Would the proposal provide cost savings? If so, please quantify.</i></p> <p>This proposal may increase costs to the court as defendants would be on diversion to the court (monitored by the court) and the court would require more extensive expert competency reports.</p> <p><i>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?</i></p> <p>The implementation requirements would include revisions to the current procedure and reference guide, including possible new Court Orders & Findings (COF) codes in the case management system, training for staff and</p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p>
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Diversion for Incompetent Defendants and Posttrial Hearings on Competency (California Rules of Court, Rule 4.130)

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			<p>judicial officers, and negotiating a standard fee for the more extensive (expanded) expert competency reports.</p> <p><i>Would the changes for the contents of expert reports in competency proceedings result in a significant cost to courts? If so, please quantify.</i> Yes, each report would probably require a higher fee for the opinion and more extensive evaluation.</p> <p><i>Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</i> Six months would be preferred to provide sufficient preparation time for implementation.</p> <p><i>How well would this proposal work in courts of different sizes?</i> The proposal seeks to amend the California Rules of Court to correspond to a recent change in law. However, the potential shift of costs and increased costs may have a larger negative impact on smaller/less-populated counties (fewer courtrooms/doctors/programs).</p>	<p>The committee notes that the proposed change in the contents of the experts' reports is sufficiently similar to what is already required.</p> <p>The committee appreciates the response. Based on comments from other courts, the committee recommends three months from approval to implementation.</p> <p>No response required.</p>
4.	Superior Court of Orange County	NI	<p><i>Does the proposal appropriately address the stated purpose?</i> Yes.</p> <p><i>Do the proposed procedures for the diversion of defendants who have been found incompetent to stand trial provide adequate guidance to courts and litigants?</i> Yes.</p>	<p>No response required.</p> <p>No response required.</p>

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		<p><i>Do the proposed procedures for post-trial hearings on competency provide adequate guidance to courts and litigants? Yes.</i></p> <p><i>Would the proposal provide cost savings? If so, please quantify.</i> Possibly. Going through the diversion process may reduce the amount of hearings and reports required to re-evaluate if a defendant is still considered mentally incompetent. Without knowing the volume of cases that this would apply to, I cannot quantify the savings.</p> <p><i>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? There will be changes to our Mental Health procedures so that they cross-reference against our Mental Health Diversion procedures.</i></p> <p><i>Would the changes for the contents of expert reports in competency proceedings result in a significant cost to courts? If so, please quantify.</i> Unknown at this time.</p> <p><i>Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.</i></p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p> <p>No response required.</p>
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			<i>How well would this proposal work in courts of different sizes? It seems as [if] it would work well.</i>	No response required.
5.	Superior Court of Riverside County by Susan Ryan, Chief Deputy – Legal Services	N	<p>The added language to rule 4.130(b)(3) is at best imprecise, and at worst contrary to statute. Penal Code § 1368.1(a)(1) gives the defendant, and only the defendant, the right to request a preliminary hearing while criminal hearings are suspended (see Penal Code § 1368(c)), which makes sense because the purpose is to ensure that a defendant is not committed for competency treatment in the absence of probable cause to bring him to trial, and a preliminary hearing held while a defendant is incompetent cannot be used as the basis for an information anyway (see generally <i>People v. Duncan</i> (2000) 78 Cal.App.4th 765, 769-72). In other words, Penal Code § 1368.1 lets a defendant request a preliminary hearing to test whether the charges are baseless and a competency commitment is unnecessary; there is no similarly compelling reason why the prosecution would need to request a potentially useless preliminary hearing while criminal proceedings are suspended.</p> <p>But instead of saying that, the proposed amendment to rule 4.130(b)(3) is flatly contrary to statute because it permits the District Attorney to request a preliminary hearing while criminal proceedings are suspended, perhaps they were going for a reference to Penal Code § 1368.1(a)(2). This provision does not give the District Attorney the right to request a preliminary hearing to support the filing of an</p>	The committee agrees, in part, with the comment, and has modified the proposal to more clearly distinguish between a preliminary hearing requested by the defendant under section 1368.1(a)(1) and a determination of probable cause requested by the People under Penal Code section 1368.1(a)(2) and rule 4.131.

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		<p>information, but instead the right to request a probable cause determination for the specific and limited purpose of establishing a necessary prerequisite to a conservatorship as set forth in Welfare & Institutions Code § 5008(h)(1)(B)(ii). The background here is that such a conservatorship used to require a pending indictment or information, which posed a problem when the competency proceedings in the criminal case took place prior to that point; but the statutes were amended by Stats. 2017, ch. 246 to fix this and provide the probable cause hearing located in Penal Code § 1368.1(a)(2).</p> <p>One suggestion would be to change the language of proposed rule 4.130(b)(3) so as to differentiate between the defendant's request of a prelim under Penal Code § 1368.1(a)(1), and the People's request for a probable cause determination under Penal Code § 1368.1(a)(2) and rule 4.131.</p> <p>In addition, this proposal may require our case management vendor to modify our case management system to develop codes that will allow us to report these cases properly. We may need new JBSIS codes as well. Unfortunately, we will not know what system modifications are required until we can consult with the vendor.</p> <p>A factor to consider in light of the fact that we are in the midst of transitioning to a new case management system, is whether asking the vendor to modify the current system is practical</p>	<p>The committee agrees with these suggestions and has incorporated them into the amendments that it is recommending for adoption.</p> <p>No response required.</p> <p>No response required.</p>
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Diversion for Incompetent Defendants and Posttrial Hearings on Competency (California Rules of Court, Rule 4.130)

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			at this time. If the vendor is able to modify the system, it may take up to six months or more to develop the modification and turn it over to the court for testing prior to implementation. We may not meet the 2020 proposed implementation date.	
6.	Superior Court of San Bernardino County	A	<p><i>Would the proposal provide cost savings? If so, please quantify.</i> No.</p> <p><i>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?</i></p> <p>The implementation requirements to the court would be to train clerk's office staff, judicial officers, and judicial assistants; modify existing procedures which includes forms for use; possibly creating new codes in the case management system.</p> <p><i>Would the changes for the contents of expert reports in competency proceedings result in a significant cost to courts?</i></p> <p>Need clarification on whether the court appointed expert is the same court appointed psychiatrist that makes the determination that the defendant is incompetent or is this an additional expert? If it is an additional expert: Yes, this change would result in additional costs for expert reports. In addition, the time involved to secure an expert as well as the added cost to</p>	<p>No response required.</p> <p>No response required.</p> <p>The committee intends for the same expert, when possible, to examine a defendant's competency to stand trial and eligibility for diversion under Penal Code sections 1370(a)(1)(B)(v) or 1370.01(a)(2).</p>

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			<p>the court for the expert to complete the competency report.</p> <p><i>Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.</i></p> <p><i>How well would this proposal work in courts of different sizes?</i></p> <p>Minor changes may need to be made to current procedures based on judicial orders</p>	<p>No response required.</p> <p>No response required.</p>
7.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	<p>Rule 4.130, subdivision (c) does not take into account situations where a defendant stipulates/waives his right to trial. It is recommended that portion of the rule be amended as follows:</p> <p>“If mental competency proceedings are initiated, criminal proceedings are suspended and may not be reinstated until a trial on the competency of the defendant has been concluded or the defendant has waived his or her right to a trial and the defendant either: is found mentally competent at a trial conducted under Penal Code section 1369, at a hearing conducted under Penal Code section 1370(a)(1)(G), or at a hearing following a certification of restoration under Penal Code section 1372.”</p>	<p>Because this would be a substantive change to the proposal, the committee believes public comment should be sought before it is considered for adoption. The committee will consider these suggestions during a future rules cycle.</p>
8.	Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Subcommittee	N	<p>The JRS notes that new processes and procedures must be put into place to handle unfiled EPOs as though they were filed documents.</p>	<p>No response required.</p>

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		<p>The JRS notes the following impact to court operations:</p> <ul style="list-style-type: none">• Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.)• Results in additional training, which requires the commitment of staff time and court resources.• Increases staff workload• Impact on local or statewide justice partners <p>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.</p>	<p>No response required.</p> <p>The committee appreciates this input but determined that retaining the two requirements in the proposed rule (the other components of the proposal are discretionary) would be beneficial. First, the proposed rule adds language in subparagraph (d)(1)(B) requiring an expert report to contain an opinion as to “whether the symptoms motivating the behavior would respond to treatment,” to facilitate assessment for mental health diversion eligibility. The committee believes this ultimately promotes efficiencies by avoiding the unnecessary delay caused by requiring a report by an expert that assesses competency and a separate report by another expert that assesses eligibility for diversion. The committee also notes that the rule currently in effect requires that the report 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.” (Rule 4.130(d)(2)G.) The committee concluded that the likely benefit of the</p>
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			<p>proposed requirement outweighed any potential burden, because it is sufficiently similar to what is already required.</p> <p>Second, the proposed rule adds language in subparagraph (h)(2)(C) requiring the court's posttrial findings as to the defendant's mental competency to be stated on the record and recorded in the minutes. The committee recognized that out of concerns for the defendant's privacy, the practice of many courts is to limit public access to competency reports and evaluations, which serve as the primary basis for a court's findings on mental competence. In requiring the court's findings to be on the record and recorded in the minutes, the committee sought to balance the public's First Amendment right of access to court records with a defendant's privacy interests in their personal medical information.</p> <p>No response required.</p> <p>No response required.</p>
		<p>This proposal may require case management vendors to modify case management systems to develop codes that will allow us to report these cases properly. We may need new JBSIS codes as well. Unfortunately, we will not know what system modifications are required until we can consult with the vendor.</p> <p>A factor to consider in light of the fact that we are in the midst of transitioning to a new case management system, is whether asking the vendor to modify the current system is practical at this time. If the vendor is able to modify the system, it may take up to six months or more to develop the modification and turn it over to the</p>	

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		<p>court for testing prior to implementation. We may not meet the 2020 proposed implementation date.</p> <p>Unfortunately, neither the proposed procedures for mental incompetency diversion nor the proposed procedures for posttrial hearings on competency provide adequate guidance to the courts, specifically the eligibility criteria for mental incompetency diversion.</p> <p>This proposal will add additional hearings to incompetent to stand trial proceedings in that it will allow the district attorney to request a preliminary examination after the court has suspended criminal proceedings. Currently, the statute only allows defense counsel to request a preliminary hearing after a finding of incompetence.</p> <p>The court would also be required to set a hearing to consider diversion after the court found a defendant incompetent. New minute codes are required to record any findings of eligibility for diversion. Currently, the Riverside University Health System – Behavioral Health Department is responsible for providing treatment plans and progress reports for defendants who are placed on mental health</p>	<p>The committee notes that the eligibility criteria for mental health diversion is set forth in Penal Code section 1001.36(b)(1) and (2), and apply equally when a court is considering mental incompetency diversion pursuant to Penal Code section 1370(a)(1)(B)(iv). Additionally, at the outset, in developing this proposal, the committee intentionally chose to limit its scope, given the statutory language in Penal Code section 1001.35(b) favoring local discretion in development and implementation of diversion options and the lack of case law in this area.</p> <p>The committee agrees, in part, with the comment, and has modified the proposal to more clearly distinguish between a preliminary hearing requested by the defendant under section 1368.1(a)(1) and a determination of probable cause requested by the People under Penal Code section 1368.1(a)(2) and rule 4.131.</p> <p>No response required.</p>
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		<p>diversion. Should we utilize the same resources to monitor defendants while they are on mental incompetency diversion, we may overburden them in terms of being able to meet the demands of the court in addition to the cost of staffing and other resources.</p> <p>Additionally, if the court places a defendant on mentally incompetent diversion, the court must set a hearing when a defendant is terminated from diversion, which results in an additional hearing. The court is also required to appoint a medical examiner to reexamine the defendant's competence. Thus, the county would incur additional costs for the medical evaluation.</p> <p>The proposal also requires the court reconsider findings of incompetency on defendant who the court previously found incompetent and are currently awaiting placement, which will result in more hearings added to the court's calendar.</p> <p>Currently, during 1372 Certification of Mental Competency Hearings, the court is not required to state any findings on the record. However, under this proposal, the court must state its findings as to the defendant's mental competency on the record and the courtroom assistants must record the findings in the minutes. This will result in the need to create more minute codes to record accurately the court's findings. Additionally, this proposal allows the court to consider any evidence, presented by any party, which is relevant to the defendant's current mental competency. The</p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>
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