

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Criminal Law Advisory Committee
Hon. Steven Z. Perren, Chair
Joshua Weinstein, Committee Counsel, 415-865-7688,
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DATE: August 31, 2006

SUBJECT: Criminal Cases: Rules Governing Mental Competency Proceedings in
Superior Court (adopt Cal. Rules of Court, rule 4.130) (Action Required)

Issue Statement

Mental competency proceedings in criminal cases are governed by statute and case law. Reconciling the statutes and court decisions can be difficult, and the actual practice in courts varies widely, not always conforming to required procedure.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2007, adopt rule 4.130 of the California Rules of Court to clarify the mental competency proceedings in criminal cases.

The text of the proposed rule is attached at pages 4–8.

Rationale for Recommendation

The proposed rule would provide for uniformity and fidelity to the legal requirements by clarifying the appropriate and necessary procedures and bringing together the statutory and case law authorities in a logical and sequential manner. The proposed rule would:

- Clarify when the court must order mental competency proceedings. Subdivision (b) provides an overview for initiating mental competency proceedings. It provides that the court must initiate proceedings if the court has substantial evidence of the defendant's mental incompetency. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1020.) This subdivision also clarifies that competency proceedings are initiated only if the court has the requisite doubt. A literal reading of Penal Code section 1368 would lead one to believe that competency proceedings must be initiated if defense

counsel informs the court that he or she “believes the defendant is or may be mentally incompetent.” (See Pen. Code, § 1368(a) and (b).) Case law does not support that reading, however. According to the appellate courts in those cases, the trial court is not required to initiate mental competency proceedings if defense counsel’s statements do not provide substantial evidence of the defendant’s mental incompetency. Reviewing courts have stated that “a defendant is not entitled to a trial on the issue of his mental competency merely upon the statement of defense counsel, but that there must be objective substantial evidence of a doubt as to the defendant’s mental competency before he is entitled to a full hearing pursuant to section 1368.” (*People v. Stewart* (1979) 89 Cal.App.3d 992, 996; see also *People v. Hayes* (1999) 21 Cal.4th 1211, 1280–1282; *People v. Welch* (1999) 20 Cal.4th 702, 737–738; and *People v. Hays* (1976) 54 Cal.App.3d 755, 760.)

- Clarify that criminal proceedings are suspended if the court orders mental competency proceedings. Subdivision (c)(1) states that criminal proceedings are suspended on the initiation of mental competency proceedings and may not be reinstated until the trial on competency has been completed and either the defendant is found competent or competency is restored, under Penal Code section 1372.
- Explain speedy trial calculations. Subdivisions (c)(2) and (c)(3) explain the effect of mental competency proceedings on speedy trial calculations in both felony and misdemeanor cases.
- State procedures for selection of the court-appointed experts to examine the defendant. Subdivision (d) provides that the court must appoint at least one expert to examine the defendant or two if the defense informs the court that the defendant is not seeking a finding of mental incompetency. (Pen. Code, § 1369.) The advisory committee comment on this rule clarifies that (1) the experts’ reports under this rule are publicly accessible documents unless sealed under rule 2.550, and (2) the costs for experts appointed under this rule are borne by the court, but the court is not to pay for experts retained by the parties.
- State the procedure for the trial on mental competency. Trial procedures, including the presumption of competency, the burden of proof, and the closing argument are addressed in (e).

Alternative Actions Considered

The committee considered whether to propose statutory amendments to make the mental competency reports confidential court records. The committee declined to do so because whether the records should be confidential appears to be a substantive policy decision not one of court administration.

Comments From Interested Parties

The rule was circulated for 10 weeks in the spring 2006 circulation cycle. Twelve comments were received. Of those, seven agree with the proposal, four agreed if modifications are made, and two do not agree. The committee incorporated most of the suggested changes into the recommended rule.

Two comments resulted in noteworthy changes. First, the committee has added subdivision (b)(3) to conform with Penal Code section 1368.1(a), which provides that, if mental competency proceedings are initiated prior to the preliminary hearing in a felony case, defense counsel may request that the preliminary hearing be conducted nonetheless. The committee declined to incorporate a substantive comment that was connected to this issue: that the proposed rule provide that the preliminary hearing and mental competency trial cannot be heard simultaneously. As Penal Code section 1368.1(a) does not address this one way or another, the committee declined to suggest that this comment be adopted. (See comments by Janice Fukai and Michael Judge.)

The second noteworthy change related to subdivision (b)(2). It was suggested, and the committee agreed, that the rule allow defense counsel to request that he or she be allowed to present his or her opinion regarding the defendant's mental competency in camera, if appropriate.

A chart summarizing the comments is attached at pages 9–14.

Implementation Requirements and Costs

Implementation would not impose costs.

Attachments

Rule 4.130 of the California Rules of Court would be adopted, effective January 1, 2007, to read:

1 **Rule 4.130. Mental competency proceedings**

2
3 **(a) Application**

4
5 This rule applies to proceedings in the superior court under Penal Code
6 section 1367 et seq. to determine the mental competency of a criminal
7 defendant.

8
9 **(b) Initiation of mental competency proceedings**

10
11 (1) The court must initiate mental competency proceedings if the judge has
12 a reasonable doubt, based on substantial evidence, about the defendant's
13 competence to stand trial.

14
15 (2) The opinion of counsel, without a statement of specific reasons
16 supporting that opinion, does not constitute substantial evidence. The
17 court may allow defense counsel to present his or her opinion regarding
18 the defendant's mental competency in camera if the court finds there is
19 reason to believe that attorney-client privileged information will be
20 inappropriately revealed if the hearing is conducted in open court.

21
22 (3) In a felony case, if the judge initiates mental competency proceedings
23 prior to the preliminary examination, counsel for the defendant may
24 request a preliminary examination as provided in Penal Code section
25 1368.1(a).

26
27 **(c) Effect of initiating mental competency proceedings**

28
29 (1) If mental competency proceedings are initiated, criminal proceedings
30 are suspended and may not be reinstated until a trial on the competency
31 of the defendant has been concluded and the defendant either:

32
33 (A) Is found mentally competent; or

34
35 (B) Has his or her competency restored under Penal Code section
36 1372.

37
38 (2) In misdemeanor cases, speedy trial requirements are tolled during the
39 suspension of criminal proceedings for mental competency evaluation

1 and trial. If criminal proceedings are later reinstated and time is not
2 waived, the trial must be commenced within 30 days after the
3 reinstatement of the criminal proceedings, as provided by Penal Code
4 section 1382(a)(3).

5
6 (3) In felony cases, speedy trial requirements are tolled during the
7 suspension of criminal proceedings for mental competency evaluation
8 and trial. If criminal proceedings are reinstated, unless time is waived,
9 time periods to commence the preliminary examination or trial are as
10 follows:

11
12 (A) If criminal proceedings were suspended before the preliminary
13 hearing had been conducted, the preliminary hearing must be
14 commenced within 10 days of the reinstatement of the criminal
15 proceedings, as provided in Penal Code section 859b.

16
17 (B) If criminal proceedings were suspended after the preliminary
18 hearing had been conducted, the trial must be commenced within
19 60 days of the reinstatement of the criminal proceedings, as
20 provided in Penal Code section 1382(a)(2).

21
22 **(d) Examination of defendant after initiation of mental competency**
23 **proceedings**

24
25 (1) On initiation of mental competency proceedings, the court must inquire
26 whether the defendant, or defendant's counsel, seeks a finding of mental
27 incompetence.

28
29 (A) If the defense informs the court that the defendant is seeking a
30 finding of mental incompetence, the court must appoint at least
31 one expert to examine the defendant.

32
33 (B) If the defense informs the court that the defendant is not seeking
34 a finding of mental incompetence, the court must appoint two
35 experts to examine the defendant. The defense and the
36 prosecution may each name one expert from the court's list of
37 approved experts.

38
39 (2) Any court-appointed experts must examine the defendant and advise the
40 court on the defendant's competency to stand trial. Experts' reports are
41 to be submitted to the court, counsel for the defendant, and the
42 prosecution.

1
2 (3) Statements made by the defendant during the examination to experts
3 appointed under this rule, and products of any such statements, may not
4 be used in a trial on the issue of the defendant's guilt or in a sanity trial
5 should defendant enter a plea of not guilty by reason of insanity.
6

7 **(e) Trial on mental competency**
8

9 (1) Regardless of the conclusions or findings of the court-appointed expert,
10 the court must conduct a trial on the mental competency of the
11 defendant if the court has initiated mental competency proceedings
12 under (b).
13

14 (2) At the trial, the defendant is presumed to be mentally competent, and it
15 is the burden of the party contending that the defendant is not mentally
16 competent to prove the defendant's mental incompetence by a
17 preponderance of the evidence.
18

19 (3) In addition to the testimony of the experts appointed by the court under
20 (d), either party may call additional experts or other relevant witnesses.
21

22 (4) After the presentation of the evidence and closing argument, the trier of
23 fact is to determine whether the defendant is mentally competent or
24 mentally incompetent.
25

26 (A) If the matter is tried by a jury, the verdict must be unanimous.
27

28 (B) If the parties have waived the right to a jury trial, the court's
29 findings must be made in writing or placed orally in the record.
30

31 **(f) Posttrial procedure**
32

33 (1) If the defendant is found mentally competent, the court must reinstate
34 the criminal proceedings.
35

36 (2) If the defendant is found to be mentally incompetent, the criminal
37 proceedings remain suspended and the court must follow the procedures
38 stated in Penal Code section 1370 et seq.

1 **Advisory Committee Comment**

2
3 The case law interpreting Penal Code section 1367 et seq. established a procedure for
4 judges to follow in cases where there is a concern whether the defendant is legally
5 competent to stand trial, but the concern does not necessarily rise to the level of a
6 reasonable doubt based on substantial evidence. Before finding a reasonable doubt as to
7 the defendant’s competency to stand trial and initiating competency proceedings under
8 Penal Code section 1368 et seq., the court may appoint an expert to assist the court in
9 determining whether such a reasonable doubt exists. As noted in *People v. Visciotti*
10 (1992) 2 Cal.4th 1, 34–36, the court may appoint an expert when it is concerned about
11 the mental competency of the defendant, but the concern does not rise to the level of a
12 reasonable doubt, based on substantial evidence, required by Penal Code section 1367 et
13 seq. Should the results of this examination present substantial evidence of mental
14 incompetency, the court must initiate competency proceedings under (b).

15
16 Once mental competency proceedings under Penal Code section 1367 et seq. have been
17 initiated, the court is to appoint at least one expert to examine the defendant under (d).
18 Under no circumstances is the court obligated to appoint more than two experts. (Pen.
19 Code, § 1369(a).) The costs of the experts appointed under (d) are to be paid for by the
20 court as the expert examinations and reports are for the benefit or use of the court in
21 determining whether the defendant is mentally incompetent. (See Cal. Rules of Court,
22 rule 10.810, function 10.)

23
24 Subdivision (d)(3), which provides that the defendant’s statements made during the
25 examination cannot be used in a trial on the defendant’s guilt or a sanity trial in a not
26 guilty by reason of sanity trial, is based on the California Supreme Court holdings in
27 *People v. Arcega* (1982) 32 Cal.3d 504 and *People v. Weaver* (2001) 26 Cal.4th 876.
28

29 Although the court is not obligated to appoint additional experts, counsel may
30 nonetheless retain their own experts to testify at a trial on the defendant’s competency.
31 (See *People v. Mayes* (1988) 202 Cal.App.4th 908, 917–918.) These experts are not for
32 the benefit or use of the court, and their costs are not to be paid by the court. (See Cal.
33 Rules of Court, rule 10.810, function 10.)

34
35 The expert reports, unless sealed under rule 2.550, are publicly accessible court
36 documents.

37
38 Both the prosecution and the defense have the right to a jury trial. (See *People v.*
39 *Superior Court (McPeters)* (1995) 169 Cal.App.3d 796.) Defense counsel may waive
40 this right, even over the objection of the defendant. (*People v. Masterson* (1994) 8
41 Cal.4th 965, 970.)

42
43 Either defense counsel or the prosecution (or both) may argue that the defendant is not
44 competent to stand trial. (*People v. Stanley* (1995) 10 Cal.4th 764, 804 [defense counsel
45 may advocate that defendant is not competent to stand trial and may present evidence of
46 defendant’s mental incompetency regardless of defendant’s desire to be found

1 competent].) If the defense declines to present evidence of the defendant’s mental
2 incompetency, the prosecution may do so. (Pen. Code, § 1369(b)(2).) If the prosecution
3 elects to present evidence of the defendant’s mental incompetency, it is the prosecution’s
4 burden to prove the incompetency by a preponderance of the evidence. (People v. Mixon
5 (1990) 225 Cal.App.3d 1471, 1484, fn. 12.)

6
7 Should both parties decline to present evidence of defendant’s mental incompetency, the
8 court may do so. In those cases, the court is not to instruct the jury that a party has the
9 burden of proof. “Rather, the proper approach would be to instruct the jury on the legal
10 standard they are to apply to the evidence before them without allocating the burden of
11 proof to one party or the other.” (People v. Sherik (1991) 229 Cal.App.3d 444, 459–460.)

SPR06-23
Mental Competency Proceedings in the Superior Court
(adopt Cal. Rules of Court, rule 4.130)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Hon. Jeff Almquist Santa Cruz Superior Court 701 Ocean Street, Room 110 Santa Cruz, CA 95060	A	Y		
2.	Justice Roger W. Boren Administrative Presiding Justice Court of Appeal, Second Appellate District 300 South Spring Street Los Angeles, CA 90013	AM	N	<p>Rule 4.130(c)(2) <u>(2) In misdemeanor cases, speedy trial requirements are tolled during the suspension of criminal proceedings for mental competency evaluation and hearing trial. If criminal proceedings are later reinstated and time is not waived, the trial must be commenced within 30 days after the reinstatement of the criminal proceedings, as provided by Penal Code section 1382(a)(3).</u></p> <p>Reason: Rule 4.130(c)(3), governing felony cases, refers to “trial,” as does rule 4.130(c)(1), while rule 4.130(c)(2), governing misdemeanors, refers to “hearing.” Penal Code section 1369 refers to “<i>trial</i> by court of jury of the question of mental competence” and does not distinguish between felony and misdemeanor cases. Rule 4.130(c)(2) therefore should also refer to “trial.”</p>	Agree.
3.	Ms. Mary Carnahan Criminal Division Program Manager Solano Superior Court 530 Union Ave., Ste. 200 Fairfield, CA 94533	A	N	As it relates to operations only.	

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4.	Ms. Janice Y. Fukai Alternate Public Defender Los Angeles County Law Offices 35 Hall of Records 320 W. Temple St. Los Angeles, CA 90012	AM	N	<p>Proposed rule 4.130 would be acceptable if it were modified as discussed below. Proposed rule 4.130 fails to address one situation which arises with some regularity. Penal Code §1368.1(a), provides that “If the action is on a complaint charging a felony, proceedings to determine mental competence shall be held prior to the filing of an information <u>unless</u> the counsel for the defendant requests a preliminary examination under the provisions of Section 859b.” (Emphasis added.) The proposed rule fails to provide for this eventuality.</p> <p>In Los Angeles County, many magistrates have failed to understand this provision, and have suspended criminal proceedings despite counsel’s request for a preliminary hearing. The result has been delays which violate the time limits of Penal Code §859b and dismissal of the felony complaint. It is suggested that the rule make it clear that when counsel requests a preliminary hearing, that hearing must be timely conducted.</p> <p>Another issue which has arisen in Los Angeles county is that at least one judge sitting in the Mental Health Department has concluded that the provision does not otherwise change the proceedings applicable to mental competency proceedings. Thus, although a preliminary hearing will be conducted, the court can</p>	<p>Agree. Subdivision (b)(3) added to rule to reflect Penal Code section 1368.1(a)</p> <p>Disagree. Penal Code section 1368.1(a) provides for a mental competency trial before the preliminary examination unless defense counsel requests a preliminary examination. That section does not prohibit the</p>

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				<p><u>simultaneously</u> conduct the preliminary hearing <u>and</u> competency proceedings, which the court referred to as “dual tracking.”</p> <p>I do not believe that this is a correct construction of the law, and that if counsel requests a preliminary hearing, then competency proceedings must not be conducted unless and until the defendant has been held to answer and a felony charge has been filed. However, whichever result is believed to be correct, this rule should plainly set out what procedures should be followed when counsel requests a preliminary hearing pursuant to §1368.1(a).</p>	preliminary examination and mental competency trial from being conducted simultaneously. Such changes must be addressed through legislation or case law.
5.	Mr. Robert Hirth Chief Defense Attorney Madera Alternate Defense Madera	N	N	No one has the same insight into the mental processes of the defendant like the defense attorney. Further, communication between defendant and attorney is privileged, so anything beyond his observations would be privileged. How does the proposed rule deal with this conundrum?	Disagree. Proposed rule does not change existing law in this regard. Such changes must be addressed through legislation or case law. However, subdivision added to allow counsel to request to present reasons for his or her opinion in camera if appropriate.
6.	Mr. Michael P. Judge Public Defender Los Angeles County Public Defender’s Office 210 W. Temple St., 19th Floor Los Angeles, CA 90012	AM	Y	My office would agree with proposed rule 4.130 if it was modified as discussed below. Proposed rule 4.130 fails to address one situation which arises with some regularity. Penal Code section 1368.1, subdivision (a), provides that “If the action is on a complaint charging a felony,	Agree. Subdivision (b)(3) added to rule to reflect Penal Code section 1368.1(a).

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				<p>proceedings to determine mental competence shall be held prior to the filing of an information <u>unless</u> the counsel for the defendant requests a preliminary examination under the provisions of section 859b.”</p> <p>In Los Angeles County, many magistrates have failed to understand this provision, and have suspended criminal proceedings despite counsel’s request for a preliminary hearing. The result has been delays which violate the time limits of Penal Code section 859b and dismissal of the felony complaint. It is suggested that the rule make it clear that when counsel requests a preliminary hearing, that hearing must be timely conducted.</p> <p>Another issue which has arisen in Los Angeles County is that at least one judge sitting in the Mental Health Department has concluded that the effect of section 1368.1(a) is merely to allow a preliminary hearing to be conducted, but that the provision does not otherwise change the proceedings applicable to mental competency proceedings. This, although a preliminary hearing will be conducted, the court can <u>simultaneously</u> conduct the preliminary hearing <u>and</u> competency proceeding, which the court referred to as “dual tracking.”</p> <p>I do not believe that this is a correct</p>	<p>Disagree. Penal Code section 1368.1(a) provides for a mental competency trial before the preliminary examination unless defense counsel requests a preliminary examination. That section does not prohibit the preliminary examination and mental competency trial from being conducted simultaneously. Such changes must be addressed through legislation or case law.</p>

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				construction of the laws, and that if counsel requests a preliminary hearing, then competency proceedings must not be conducted unless and until the defendant has been held to answer and a felony charge has been filed. However, whichever result is believed to be correct, this ruled should plainly set out what procedures should be followed when counsel requests a preliminary hearing pursuant to section 1368.1(a).	
7.	Ms. Tressa Kentner and Debra Meyers Court Executive Officer and Chief of Staff Counsel Services 172 W. 3rd, 2nd Fl San Bernardino, CA 92415	A	N		
8.	Ms. Irene Lopez Certified Program Manager Ventura Superior Court 800 s. Victoria Ave. Ventura, CA 93009	A	Y		
9.	Los Angeles Superior Court 111 N. Hill Street Los Angeles, CA 90012	A	Y	Case law appears to support these rule changes, which would increase defense counsel's burden in having proceedings suspended per section 1368.	
10.	Mr. Nelson Lu Deputy Public Defender San Joaquin Public Defender's Office Stockton	AM	N	The rule generally codifies current law, but there is something that I think the rule should make clear: that defense counsel should be allowed to make the declaration to show substantial evidence with regard to the doubt over the defendant's incompetency in camera,	Agree. Subdivision (b)(2) now provides that court may allow counsel to present reasons for his or her opinion in camera if appropriate.

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				so that the prosecution is not unduly informed of those facts in violation of attorney-client privilege.	
11.	Mr. Mike Roddy, Executive Officer Superior court of San Diego County 220 West Broadway San Diego, CA 92101	A	Y		
12.	Ms. Laura Rusk Supervising Court Clerk Kern County Superior Court 1415 Truxtun Ave. Bakersfield, CA 93301	A	N	A little concerned about the reports being publicly accessible.	Agree, but there is no provision in law making reports confidential. Thus, the only ones that are not publicly accessible are those sealed under rule 243.1.