

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT SPR18-16

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Title	Action Requested
Criminal Procedure: Confidentiality of Court-Appointed Experts' Reports in Mental Competency Proceedings	Review and submit comments by June 8, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 4.130	January 1, 2019
Proposed by	Contact
Criminal Law Advisory Committee	Eve Hershcopf, 415-865-7961
Hon. Tricia A. Bigelow, Chair	<a href="mailto:Eve.Hershcopf@jud.ca.gov">Eve.Hershcopf@jud.ca.gov</a>

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### Executive Summary and Origin

The Criminal Law Advisory Committee proposes amending the California rule of court relating to mental competency proceedings in criminal cases. This proposal would amend the rule to make court-appointed experts' reports on a criminal defendant's competency to stand trial presumptively confidential, while also including procedures for interested parties to request access to the experts' reports. The proposal was suggested by a judge of the Superior Court of Los Angeles County.

### The Proposal

This proposal would amend rule 4.130 to make court-appointed experts' reports on a criminal defendant's competency to stand trial presumptively confidential, while also including procedures for interested parties to request access to the experts' reports through requests to unseal. Under the legal standard for making forms confidential stated in *In re Marriage of Burkle* (2006) 135 Cal.App.4th 1045, 1048–1053, the committee considered the balance between a defendant's privacy interests and the public's First Amendment right of access to court records in deciding whether to amend the rule. In doing so, the committee agreed that making the experts' reports presumptively confidential would preserve a defendant's privacy interests in protecting highly sensitive medical information and be consistent with the treatment of medical records in other contexts (e.g., Civ. Code, § 56.10). However, since criminal proceedings are public and the First Amendment provides a right of access to court records, the committee proposes that the experts' reports be subject to a motion to unseal as outlined in California Rules of Court, rule 2.551(h). This would preserve an interested party's opportunity to have the court consider

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

whether, in certain instances, the public right of access overrides a defendant's privacy interests in his or her medical information. The committee also proposes incorporating a simplified procedure to apply to specified parties seeking access to the experts' reports.

This proposal would shift what is currently rule 4.130, subdivisions (e) and (f) to subdivisions (f) and (g), and amend subdivision (e) to add the following:

1. Provide that the experts' reports are presumptively confidential, retained in the confidential portion of the court file, and maintained by counsel as confidential;
2. Provide for a court to consider a motion, application, or petition to unseal the experts' reports under rule 2.551(h);
3. Provide for a simplified procedure for specified parties to request access to the experts' reports in cases involving a defendant who was examined for mental competency under Penal Code section 1369 in a criminal case who is charged in a separate criminal case;
4. Provide that the proposed rule does not preclude a party from applying existing law around ex parte discovery motions for access to the experts' reports when the facts supporting a discovery request are privileged, or as otherwise provided by law;
5. Provide that in cases stemming from complaints filed before January 1, 2019 (the proposed effective date of this rule amendment), the prosecuting attorney, defendant, or counsel for the defendant may request the court clerk to file the experts' reports as confidential. This provision is included to allow parties to a criminal proceeding that predates this amendment to benefit from the change in the rule;
6. Eliminate the advisory committee comment that "[t]he expert reports, unless sealed under rule 2.550, are publicly accessible court documents";
7. Add an advisory committee comment that experts' reports filed as confidential before January 1, 2019, may remain in the confidential portion of the case file without further action by the court.

### **Alternatives Considered**

As discussed above, the committee considered the balance between a defendant's privacy interests and the public's First Amendment right of access to court records in deciding whether to amend the rule.

### **Implementation Requirements, Costs, and Operational Impacts**

It is anticipated that the proposal's requirement that the experts' reports be treated as confidential would have a minimal operational impact on the court. There may be some operational impacts caused by the provision for an interested party to file a motion, application, or petition to unseal

the experts' reports, as provided for in proposed subdivision (d)(3)(A) of the rule, and the provision in subdivision (d)(3)(B) allowing specified parties to file a noticed request for the experts' reports.

## **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- 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.
- Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Cal. Rules of Court, rule 4.130, at pages 4–6

Rule 4.130 of the California Rules of Court would be amended, effective January 1, 2019, to read:

1 **Rule 4.130. Mental competency proceedings**

2  
3 (a)–(c) \* \* \*

4  
5 **(d) Examination of defendant after initiation of mental competency proceedings**

6  
7 (1) \* \* \*

8  
9 (2) Any court-appointed experts must examine the defendant and advise the  
10 court on the defendant's competency to stand trial. Experts' reports are to be  
11 submitted to the court, counsel for the defendant, and the prosecution. The  
12 report must include the following:

13  
14 (A)–(G) \* \* \*

15  
16 (3) Statements made by the defendant during the examination to experts  
17 appointed under this rule, and products of any such statements, may not be  
18 used in a trial on the issue of the defendant's guilt or in a sanity trial should  
19 defendant enter a plea of not guilty by reason of insanity.

20  
21 **(e) Access to experts' reports**

22  
23 (1) The experts' reports are presumptively confidential, except as otherwise  
24 provided by law. The experts' reports must be retained in the confidential  
25 portion of the court's file. Counsel must maintain the experts' reports as  
26 confidential.

27  
28 (A) A court may consider a motion, application, or petition to unseal the  
29 experts' reports under rule 2.551(h).

30  
31 (B) If a defendant who was examined for mental competency under Penal  
32 Code section 1369 in a criminal case is charged in a separate criminal  
33 case, the defendant, defendant's counsel in the separate criminal case,  
34 or the prosecutor in the separate criminal case may file a request with  
35 two days' written notice for access to the experts' reports in the  
36 criminal case where the examination for mental competency occurred.

37  
38 (i) If the moving party is the prosecutor, such notice must be given  
39 to counsel for the subject defendant in the criminal case where  
40 the examination for mental competency occurred.

1 (ii) If the moving party is the defendant or counsel for the defendant,  
2 such notice must be given to the prosecutor in the criminal case  
3 where the examination for mental competency occurred.

4  
5 (iii) The noticed request must include a declaration by the defendant,  
6 the defendant’s counsel in the separate criminal case, or the  
7 prosecutor in the separate criminal case, requesting the experts’  
8 reports under subdivision (d)(3)(B).

9  
10 (iv) The request may be granted upon an affirmative showing by the  
11 moving party that he or she is the defendant in both criminal  
12 cases, the defendant’s counsel in the separate criminal case  
13 involving the same defendant, or the prosecutor in the separate  
14 criminal case involving the same defendant.

15  
16 (C) This rule does not preclude the defendant, the defendant’s counsel in a  
17 separate criminal case, or the prosecutor in a separate criminal case  
18 from filing an ex parte discovery motion for access to the experts’  
19 reports when the facts supporting a discovery request are privileged, or  
20 as otherwise provided by law. The reasons for seeking an ex parte  
21 application for release of the experts’ reports must be included in the  
22 motion.

23  
24 (D) In cases stemming from complaints filed before January 1, 2019, the  
25 prosecuting attorney, defendant, or counsel for the defendant may  
26 request the court clerk to file the experts’ reports as confidential.

27  
28  
29 (f)-(g)\*\*\*

30  
31 **Advisory Committee Comment**

32  
33 The case law interpreting Penal Code section 1367 et seq. established a procedure for judges to  
34 follow in cases where there is a concern whether the defendant is legally competent to stand trial,  
35 but the concern does not necessarily rise to the level of a reasonable doubt based on substantial  
36 evidence. Before finding a reasonable doubt as to the defendant’s competency to stand trial and  
37 initiating competency proceedings under Penal Code section 1368 et seq., the court may appoint  
38 an expert to assist the court in determining whether such a reasonable doubt exists. As noted in  
39 *People v. Visciotti* (1992) 2 Cal.4th 1, 34–36, the court may appoint an expert when it is  
40 concerned about the mental competency of the defendant, but the concern does not rise to the  
41 level of a reasonable doubt, based on substantial evidence, required by Penal Code section 1367  
42 et seq. Should the results of this examination present substantial evidence of mental  
43 incompetency, the court must initiate competency proceedings under (b).

1  
2 Once mental competency proceedings under Penal Code section 1367 et seq. have been initiated,  
3 the court is to appoint at least one expert to examine the defendant under (d). Under no  
4 circumstances is the court obligated to appoint more than two experts. (Pen. Code, § 1369(a).)  
5 The costs of the experts appointed under (d) are to be paid for by the court as the expert  
6 examinations and reports are for the benefit or use of the court in determining whether the  
7 defendant is mentally incompetent. (See Cal. Rules of Court, rule 10.810, function 10.)  
8

9 Subdivision (d)(3), which provides that the defendant’s statements made during the examination  
10 cannot be used in a trial on the defendant’s guilt or a sanity trial in a not guilty by reason of sanity  
11 trial, is based on the California Supreme Court holdings in *People v. Arcega* (1982) 32 Cal.3d  
12 504 and *People v. Weaver* (2001) 26 Cal.4th 876.  
13

14 Although the court is not obligated to appoint additional experts, counsel may nonetheless retain  
15 their own experts to testify at a trial on the defendant’s competency. (See *People v. Mayes* (1988)  
16 202 Cal.App.4th 908, 917–918.) These experts are not for the benefit or use of the court, and their  
17 costs are not to be paid by the court. (See Cal. Rules of Court, rule 10.810, function 10.)  
18

19 ~~The expert reports, unless sealed under rule 2.550, are publicly accessible court documents.~~  
20 Experts’ reports filed as confidential before January 1, 2019, may remain in the confidential  
21 portion of the case file without further action by the court.  
22

23 Both the prosecution and the defense have the right to a jury trial. (See *People v. Superior Court*  
24 (*McPeters*) (1995) 169 Cal.App.3d 796.) Defense counsel may waive this right, even over the  
25 objection of the defendant. (*People v. Masterson* (1994) 8 Cal.4th 965, 970.)  
26

27 Either defense counsel or the prosecution (or both) may argue that the defendant is not competent  
28 to stand trial. (*People v. Stanley* (1995) 10 Cal.4th 764, 804 [defense counsel may advocate that  
29 defendant is not competent to stand trial and may present evidence of defendant’s mental  
30 incompetency regardless of defendant’s desire to be found competent].) If the defense declines to  
31 present evidence of the defendant’s mental incompetency, the prosecution may do so. (Pen. Code,  
32 § 1369(b)(2).) If the prosecution elects to present evidence of the defendant’s mental  
33 incompetency, it is the prosecution’s burden to prove the incompetency by a preponderance of the  
34 evidence. (*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1484, fn. 12.)  
35

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