

State of California
DEPARTMENT OF STATE HOSPITALS

Addendum to the Final Statement of Reasons for Rulemaking

**THE PROPOSED ADOPTION TO THE GUIDELINES ON COURT
APPOINTMENT OF FORENSIC EVALUATORS REGULATION**

I. GENERAL

A. ACTION TAKEN DURING THIS RULEMAKING

On August 6, 2019 Department of State Hospitals (DSH) withdrew the proposed action regarding the Guidelines on Court Appointment of Forensic Evaluators Regulation from OAL review pursuant to Government Code section 11349.3, subdivision (a).

After withdrawal of the proposed regulatory action, DSH proposed modifications to the originally proposed regulation to sections 4750, 4751, and 4752, title 9, California Code of Regulations. The Department made modifications (with the changes clearly indicated) which are sufficiently related to the originally proposed text and made them available for a 15-day comment period through a "Notice of Public Availability of Modified Text."

The notice and modified text were mailed on September 12, 2019 to all interested parties. The 15-day notice listed the DSH Internet Web site where interested parties could obtain the complete modified regulation text, with the modifications clearly indicated. These documents were also published on the DSH Internet Web site. The 15-day notice and modified regulatory text are incorporated by reference herein. No comments were received during the 15-day public comment period.

DSH received one late written comment after the close of the 15-day comment period in response to the Notice published on September 12, 2019.

II. 15-DAY MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

Modifications made to the originally proposed text are indicated as follows: The added text is in underline and deleted text is in ~~strikeout~~.

Article 7.5, Title was changed from "Alienist Guidelines" to "Guidelines on Court Appointment of Forensic Evaluators." Because the term "Alienist" appears only once in this proposed regulation, in the title, this term was removed and changed to "Forensic Evaluators," which is more consistent with the rest of the text.

In original section 4750.

Text: *[Original section 4750 was removed from the text.]*

Rationale: This section is not regulatory (no mandates) and is just a restatement of the statute; it is not necessary.

In original section 4751, subdivision (b).

Text: “Forensic Evaluation” means the assessment of a defendant, ordered by a court, in which the Evaluator opines on a defendant’s competency to stand trial pursuant to specific psycho-legal referral question related to Penal Code sections 1369 et seq., and competency to stand trial.

Rationale: This subdivision was modified to ensure that it is clear that the question to be answered by an expert appointed by the court pursuant to Penal Code section 1369 is a defendant’s competency to stand trial.

In original section 4751, subdivision (c).

Text: “Incompetent to stand trial” means that as a result of mental disorder or a developmental disability the defendant ~~does not have the ability~~ is unable to understand the nature of the criminal proceedings against him or her or to assist counsel in the conduct of a defense in a rational manner.

Rationale: This subdivision was modified to restate the statute verbatim, for clarity.

In original section 4751, subdivision (f).

Text: “Psycho-legal” means specific applications of psychiatry or psychology to the applicable legal requirements.

Rationale: This subdivision was removed because “psycho-legal” appears only here and in the original section 4751, subdivision (b), from which the term was removed for clarity.

In original section 4752, subdivision (a).

Text: . . . In considering an appointment, the court shall appoint an expert who meets the provisions in subsection (1), (2), **or** (3) of this section **and** who meets the provision in subsections (4), if applicable, and (5) of this section, or an expert with equivalent experience and skills.

Rationale: This subdivision was modified to account for the modification to the original section 4752, subdivision (3)(C), now section 4752, subdivision (4).

In original section 4752, subdivision (a)(1).

Text: If a psychiatrist, the psychiatrist shall have a State of California medical license in ~~a renewed and~~ current status, without any restrictions prohibiting practice, **and** one of the following

Rationale: This subdivision was modified to clarify that a psychiatrist's State of California license referenced is a State of California medical license. Further, "renewed" was removed from the license status requirement to be broader and to also include newly licensed psychiatrists in the expert pool.

In original section 4752, subdivision (a)(2).

Text: If a psychologist, the psychologist shall have a State of California psychology license in ~~renewed and~~ current status and one of the following

Rationale: "Renewed" was removed from the license status requirement to be broader and to also include newly licensed psychologists in the expert pool.

In original section 4752, subdivision (a)(3).

Text: If a psychiatrist or licensed psychologist who does not meet either subsection (1) or (2) above

Rationale: This subdivision was modified to clarify that a license is still required if a court is to appoint a psychologist, even one who does meet the other requirements on board certification or eligibility or post-doctoral training.

In original section 4752, subdivision (a)(3)(B).

Text: Experience in drafting at least six forensic reports submitted to a court or, if fewer than six, proof provided to the court, prior to appointment, that at least three forensic reports submitted to a court were reviewed by. ~~If a peer review panel composed of members who are experienced in the criminal justice system and familiar with the issues of competency and criminal responsibility is available, the court may require a psychiatrist or licensed psychologist to provide proof, prior to appointment, that three of a psychiatrist or licensed psychologist's redacted reports have been reviewed by such a panel.~~

Rationale: This subdivision was modified to provide clarity on how much experience is required in drafting reports. Six was chosen because it is a reasonable number, low enough not to be burdensome, and high enough to ensure that an expert has had sufficient time working on preparing reports for court. The requirement of at least three peer-reviewed reports, if an expert has not yet completed six, was chosen also because it is a reasonable number, low enough not to be burdensome, and high enough to ensure that if a peer review

panel is available in a county, it is able to review enough of an expert's work for quality control.

In original section 4752, subdivision (a)(3)(C).

Text: If evaluating for developmental disabilities, experience in the treatment and assessment of individuals with developmental disabilities.

Rationale: This subdivision was modified, for clarity, by removing it from the requirements under licensed psychologists only and expanding it to be a requirement for either a psychiatrist or licensed psychologists. With this modification, either a psychiatrist or licensed psychologist would need experience in developmental disability if they are evaluation for such a disability.

In original section 4752, subdivision (a)(4).

Text: The expert shall have completed, within the 24 months preceding the appointment, eight hours of the total continuing education courses, ~~as~~ required by their respective licensing board, in forensic evaluation.

Rationale: This subdivision was modified to clarify that the eight hours of continuing education courses required are eight out of the total required by the licensing board.

In original section 4752, subdivision (b).

Text: [*Original section 4752, subdivision (b) in its entirety was removed from the text.*]

Rationale: Original section 4752, subdivision (1) was removed from the text because it is a restatement of the statute, does not provide any extra clarity, and is unnecessary. Original section 4752, subdivision (2) was removed from the text since it is outside the scope of DSH's regulatory authority to allow (" . . . the court may appoint a specialized expert") a court to make such an appointment; courts already have the discretion to do so.

NON-SUBSTANTIAL MODIFICATIONS

Any modification correcting grammar and changes in numbering and formatting was made to improve clarity. These modifications are non-substantive changes made to the regulatory text for clarity and to more accurately reflect the numbering of sections, correct spelling, and correct grammar, but they do not materially alter the requirements, conditions, rights, or responsibilities in the originally proposed text.

III. SUMMARY OF COMMENTS AND AGENCY RESPONSE

DSH received one late written comment after the close of the 15-day comment period in response to the Notice published on September 12, 2019.

Listed below is the organization and individual that provided the comment.

No.	Commenter	Affiliation	Date received
1	Cory T. Jasperson	Judicial Council of California Governmental Affairs	9/30/2019

Commenter #1

Comments: Recommends removal of the peer review provision in modified proposed section 4751, subdivision (a)(3)(B).

Comment 1: *“[I]ssues presented to a forensic examiner demand experience in the presentations unique to a forensic setting, which is experience that may not be encountered by those who work in a treatment setting or who serve in administrative roles but are far removed from forensic practice.”*

Response: DSH has considered this comment and acknowledges that peer review panel members *may* not have the same forensic, clinical experience as that of an expert potentially to be appointed by the court.

Comment 2: *“Peer reviewers who do not share experiences similar to those experienced by the evaluator are less qualified than the forensic examiners they are charged to oversee.”*

Response: DSH has considered this comment and acknowledges that peer review panel members *may* have less experience than an expert potentially to be appointed by the court.

Comment 3: *“[T]he type of forensic peer-review contemplated by the regulation is retrospective, necessarily dependent upon selective reporting by the practitioner of samples of his or her work. Accordingly, samples may not be demonstrative of the expert's work, more generally. It is also extremely limited, as peer reviewers do not view the entire file, rendering them unable to evaluate the substantive conclusions reached in the report.”*

Response: DSH has considered this comment and acknowledges that a peer review panel reviews a limited selection of the work of an expert potentially to be appointed by the court.

Comment 4: *“California's superior courts are not equipped with panels of qualified forensic specialists available to review selected samples by countless practitioners seeking appointment.”*

Response: DSH has considered this comment and acknowledges that a peer review panel *may* not always be available or accessible to each California county superior court.

Comment 5: *“[N]o mechanisms exist for rejected applicants to disagree with or appeal from the reviewers' conclusions and the ensuing decision to exclude them from the court's panel.”*

Response: DSH has considered this comment and disagrees. There is such a mechanism for a court to appoint an expert whose work has not been peer-reviewed or who disagree with a peer review panel's conclusion. Penal Code section 1369, subdivision (h) underlines the court's discretion to appoint an expert who does not meet the guidelines set by the proposed regulation.

Comment 6: *“[T]he council does not believe this criterion can be practically applied and urges that it be deleted.”*

Response: DSH has considered this comment and disagrees. Penal Code section 1369, subdivision (g) charges DSH with creating guidelines to assist courts in appointing qualified experts to evaluate defendants' mental competency. DSH has attempted to set best practices to so assist the court, and a peer review panel is a best practice in that it requires an extra layer of review of a potential expert's work. In cases where peer review is impracticable as the Judicial Council believes it may be the case at times, Penal Code section 1369, subdivision (h) underlines the court's discretion to appoint an expert who does not meet the guidelines set by the proposed regulation.