

**State of California
DEPARTMENT OF STATE HOSPITALS**

UPDATED INFORMATIVE DIGEST

**GUIDELINES ON COURT APPOINTMENT OF
FORENSIC EVALUATORS REGULATION**

Sections Affected:

Proposed adoption of new article 7.5 and sections 4750 and 4751, title 9, California Code of Regulations.

Background and the Effect of the Rulemaking:

Assembly Bill (AB) 1962 (2016) added a provision to Penal Code section 1369 mandating that the Department of State Hospitals (DSH or the Department) adopt guidelines for the education and training standards for a psychiatrist or licensed psychologist to be considered for appointment by the court to evaluate a defendant whose mental competence is in question. AB 1962 also provided for when there is no reasonably available expert who meets the Department's guidelines; in that case, the court has discretion to appoint an expert who does not meet the guidelines.

This proposed rulemaking adopts the Guidelines on Court Appointment of Forensic Evaluators Regulation (Guidelines) to provide guidance to the court in its consideration of experts to evaluate individuals whose mental competency is at issue. This proposed rulemaking specifies the education and training that the Department believes reflect best practices for an expert to evaluate a defendant and reliably advise the court on the issue of mental competency to stand trial. Further, DSH anticipates that the best practices reflected in this proposed rulemaking will result in more reliable competency evaluations, increasing the likelihood that the court will commit to the Department only the individuals who are incompetent to stand trial.

Description of Regulatory Action:

On January 18, 2019, the Notice of Proposed Regulatory Action for the proposed regulation was posted, marking the beginning of a 45-day comment period. The 45-day comment period closed on March 4, 2019. DSH has considered all timely and relevant comments received during that period and responded to them in the Final Statement of Reasons.

DSH did not receive a request for a public hearing as outlined in the Notice of Proposed Action.

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(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 supplemental 15-day comment period through a “Notice of Public Availability of Modified Text.” The Notice of Public Availability of Modified Text.” comment period was from September 12, 2019 through September 27, 2019.

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. Guidelines on Court Appointment of Forensic Evaluators

Text: [Title was changed from “Alienist Guidelines” to “Guidelines on Court Appointment of Forensic Evaluators.”]

Rationale: 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 the 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-Substantive Modifications to the Regulation Text:

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

In original section 4751, subdivision (e).

Text: “Psychiatrist” means an allopathic physician licensed by the Medical Board of California who has completed a Board-approved residency-training program in psychiatry or an osteopathic physician licensed by the Osteopathic Medical Board of California ~~and~~ who has completed a Board-approved residency-training program in psychiatry.

Rationale: This non-substantive change is necessary to clarify that the completion of a Board-approved residency-training program in psychiatry applies to the allopathic physician or the osteopathic physician.

In original 4752, subdivision (a) to:

Text: The court shall appoint a psychiatrist or licensed psychologist to evaluate whether a criminal defendant is incompetent to stand trial. This evaluation shall include: the nature of a defendant’s mental disorder; a defendant’s ability or inability to understand the nature of the criminal proceedings or -to assist counsel in a rational manner in the conduct of a defense;.....

Rationale: This non-substantive change of removing a space before the word “to” is necessary for clarity and correct grammar.

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

Text: If a psychiatrist or licensed psychologist who does not meet ~~the provision in~~ either subsection (1) or (2) above, the expert shall have training or experience consisting of:

Rationale: This non-substantive change of removing “the provision in” is necessary for clarity and brevity.

Changes to Underlying Laws or Effect of the Regulation:

There have been no other changes in applicable laws or to the effect of the proposed regulation from the laws and effects described in the Notice of Proposed Action.

Comparable Federal Regulations:

There are no federal regulations comparable to the Guidelines regulation.