

State of California  
DEPARTMENT OF STATE HOSPITALS

**INITIAL STATEMENT OF REASONS**

**Proposed Adoption of the Alienist Guideline Regulations**

The Department of State Hospitals proposes to adopt new article 7.5, sections 4750, 4751, and 4752 to title 9, California Code of Regulations as follows.

**THE PROBLEM THAT THE PROPOSAL IS INTENDED TO ADDRESS**

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 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 those guidelines.

Without adequate training, experience, and standards, evaluators may incorrectly determine that an individual is incompetent to stand trial, resulting in that individual being committed to the Department and placed in the state hospital system. The Department estimates that between 20 and 25 percent of defendants the courts refer for competency restoration are competent at the time of admission, delaying the admission of patients who are incompetent and require competency restoration. The admission of competent patients results in considerable Department resources being diverted from the timely admission, treatment, and restoration of patients who are incompetent to stand trial. Department staff need to reassess and diagnose before determining that an individual, previously found to be incompetent by a court-appointed evaluator, does not actually require competency restoration. The ramifications of not having properly trained court-appointed evaluators to make competency diagnoses which are reliable to the court are a significant, unnecessary cost to the State, a disservice to individuals who require restoration, and a major delay to the administration of justice in the courts.

**ANTICIPATED BENEFITS OF PROPOSED REGULATION**

Standardizing the training and experience required of psychiatrists or licensed psychologists who evaluate defendants for mental competency is crucial in ensuring that evaluations are as complete and accurate as possible; that courts can then rely on the evaluations; and that the resulting incompetency commitments to the Department are appropriate. Further, a standard guideline on the training and experience a competency evaluator should have helps ensure that individuals can expect to receive a fair, reliable assessment of their competence to stand trial. Obtaining such a diagnosis would result in

those who are mentally competent to remain in the criminal justice system until timely adjudication of their cases and in those who are incompetent to timely receive appropriate competency restoration. Consequently, Department resources will be spent on those who need competency restoration, and the courts can reduce case delays by avoiding the erroneous commitment of a mentally competent individual.

## **THE SPECIFIC PURPOSE AND RATIONALE FOR DSH'S DETERMINATION THAT EACH ADOPTION, AMENDMENT, OR REPEAL IS REASONABLY NECESSARY**

### **Adopt new sections 4750. Purpose and Scope.**

#### **Adopt new section 4750.**

**Purpose:** To state the purpose and scope of the proposed regulations.

**Necessity:** This proposed regulation is necessary to clarify the objective of the rules and their limits. This clarification is necessary to ensure that the courts, attorneys, and the public accurately understand what these rules cover as they relate to the questionable competency of a defendant.

### **Adopt new sections 4751. Definitions.**

#### **Adopt new section 4751, subsection (a).**

**Purpose:** To provide a standard definition and understanding of "Evaluator."

**Necessity:** This proposed regulation is necessary to provide a common understanding of the term "Evaluator," as used in this proposed section. A standard definition is necessary so that each defendant who may be subject to an assessment by an evaluator receives that assessment by an "Evaluator" with the same or comparable credentials, thus ensuring that all involved parties and the public know what to expect from the defendant's evaluator and that evaluators themselves and potential evaluators know which qualifications are required to be considered an "Evaluator" pursuant to this proposed section.

#### **Adopt new section 4751, subsection (b).**

**Purpose:** To provide a standard definition and understanding of "Forensic Evaluation."

**Necessity:** This proposed regulation is necessary to provide a common understanding of the term "Forensic Evaluation," as used in this proposed section. A standard definition is necessary so that each defendant subject to a court-ordered evaluation receives a "Forensic Evaluation" with the same scope and which answers the same pertinent question, thus ensuring that all involved parties and the public know what to expect in each "Forensic Evaluation" of a defendant; that the evaluators themselves and potential evaluators know what they are expected to assess and include in their forensic reports;

and that the court can expect reliability in the data, methodology, and clinical conclusions of each “Forensic Evaluation” pursuant to this proposed section.

**Adopt new section 4751, subsection (c).**

**Purpose:** To provide a standard definition and understanding of “Incompetent to Stand Trial.”

**Necessity:** This proposed regulation is necessary to provide a common understanding of the term “Incompetent to Stand Trial,” as used in this proposed section. While the definition is a nearly verbatim restatement of the definition of mental incompetence found in Penal Code section 1367, the restatement is necessary to confirm that the use of the term in this proposed section is synonymous with the term used in the Penal Code and not a new definition.

**Adopt new section 4751, subsection (d).**

**Purpose:** To provide a standard definition and understanding of “Licensed Psychologist.”

**Necessity:** This proposed regulation is necessary to provide a common understanding of the term “Licensed Psychologist,” as used in this proposed section. A standard definition is necessary so that each defendant who may be evaluated by a licensed psychologist may be so evaluated by a “Licensed Psychologist” with the same or comparable credentials, thus ensuring that all involved parties and the public know what to expect from the “Licensed Psychologist” evaluator and that the licensed psychologists themselves know which qualifications are required to be considered a “Licensed Psychologist” pursuant to this proposed section.

**Adopt new section 4751, subsection (e).**

**Purpose:** To provide a standard definition and understanding of “Psychiatrist.”

**Necessity:** This proposed regulation is necessary to provide a common understanding of the term “Psychiatrist,” as used in this proposed section. A standard definition is necessary so that each defendant who may be evaluated by a psychiatrist may be so evaluated by a “Psychiatrist” with the same or comparable credentials, thus ensuring that all involved parties and the public know what to expect from the “Psychiatrist” evaluator and that the psychiatrists themselves know which qualifications are required to be considered a “Psychiatrist” pursuant to this proposed section.

**Adopt new section 4751, subsection (f).**

**Purpose:** To provide a standard definition and understanding of “Psycho-legal.”

**Necessity:** This proposed regulation is necessary to provide a common understanding of the term “Psycho-legal,” as used in this proposed section. A standard definition is

necessary so that the evaluation of each defendant's case meets includes an analysis of the intersection between psychiatry or psychology and any applicable legal implication, thus ensuring that the evaluations and conclusions drawn, pursuant to this proposed section, address the same psychiatric or psychological and legal questions and that all involved parties know what to expect from such an inquiry.

## **Adopt new sections 4752. Forensic Evaluator Training Requirements.**

### **Adopt new section 4752, subsection (a).**

**Purpose:** To state the purpose and scope of the evaluation by a psychiatrist or psychologist appointed by the court to conduct such an assessment.

**Necessity:** While the purpose and scope stated are nearly verbatim restatements of the Penal Code section 1369, the restatements are necessary to confirm that the scope and purpose of the forensic evaluation, pursuant to this proposed section, are synonymous with the purpose and scope indicated in the Penal Code and neither expand nor curtail those parameters.

### **Adopt new section 4752, subsection (a)(1).**

**Purpose:** To state the qualifications of a psychiatrist for court consideration to evaluate a defendant for mental competence.

**Necessity:** This proposed regulation is necessary to give the court guidance on what credentials a psychiatrist who is qualified in psycho-legal assessment may have. The requirement to have a State of California license in a renewed and current status is necessary to ensure that the psychiatrist is and will remain in compliance with state licensing requirements, ensuring that his or her practice is legally recognized by the State. Further, any one of the three additional options is sufficient to show that a psychiatrist has adequate qualifications to perform a psycho-legal assessment of a defendant's mental competence.

The first option, the requirement to be Board-certified by the American Board of Psychiatry and Neurology, with added or special qualifications in forensic psychiatry indicates that the psychiatrist has completed stringent requirements by a field-recognized authority and entity, with an understanding of psycho-legal, forensic issues.

The second option, the requirement to be eligible for certification by the American Board of Psychiatry and Neurology, with added or special qualifications in forensic psychiatry indicates that the psychiatrist is actively working toward completing the stringent requirements by a field-recognized authority, with a growing understanding of psycho-legal, forensic issues.

The third option, the requirement to have completed a fellowship in forensic psychiatry indicates that the psychiatrist has a working understanding of psycho-legal, forensic issues.

One of these options is necessary to show that a psychiatrist has gone beyond standard coursework, licensing, and residency to study and be familiar with the specific intersection of psychiatry and legal issues. A psychiatrist who has training and experience in psycho-legal, forensic issues would be in a better position to accurately diagnose an individual's mental competence, resulting in an evaluation the court can rely on and in the appropriate commitment of an incompetent individual.

**Adopt new section 4752, subsection (a)(2).**

**Purpose:** To state the qualifications of a psychologist for court consideration to evaluate a defendant for mental competence.

**Necessity:** This proposed regulation is necessary to give the court guidance on what credentials a psychologist who is qualified in psycho-legal assessment may have. The requirement to have a State of California license in active status is necessary to ensure that the psychologist is and will remain in compliance with state licensing requirements, ensuring that his or her practice is legally recognized by the State. Further, any one of the three additional options is sufficient to show that a psychologist has adequate qualifications to perform a psycho-legal assessment of a defendant's mental competence.

The first option, the requirement to be Board-certified by the American Board of Professional Psychology indicates that the psychologist has completed stringent requirements by a field-recognized authority and entity.

The second option, the requirement to be eligible for certification by the American Board of Professional Psychology indicates that the psychiatrist is actively working toward completing the stringent requirements by a field-recognized authority.

The third option, the requirement to have completed a post-doctoral training in forensic psychology indicates that the psychologist has a working understanding of psycho-legal, forensic issues.

One of these options is necessary to show that a psychologist has gone beyond standard coursework, licensing, and residency to study and be familiar with the specific intersection of psychology and legal issues. A psychologist who has training and experience in psycho-legal, forensic issues would be in a better position to accurately diagnose an individual's mental competence, resulting in an evaluation the court can rely on and in the appropriate commitment of an incompetent individual.

**Adopt new section 4752, subsection (a)(3).**

**Purpose:** To provide a different route for a psychiatrist or psychologist who does not meet the qualifications stated in this proposed section, subsections (a)(1) or (a)(2) for court consideration to evaluate a defendant for mental competence.

**Necessity:** This proposed regulation is necessary to provide an alternate route for a psychiatrist or psychologist to be considered by a court to evaluate a defendant for mental competence. The alternative route is necessary to allow for psychiatrists or psychologists who may have different backgrounds and experience but are otherwise qualified to make a psycho-legal assessment.

The requirement to have a State of California license in a renewed and current status is necessary to ensure that the psychiatrist is and will remain in compliance with state licensing requirements, ensuring that his or her practice is legally recognized by the State.

The requirement to have a State of California license in active status is necessary to ensure that the psychologist is and will remain in compliance with state licensing requirements, ensuring that his or her practice is legally recognized by the State.

The requirement to have at least 24 hours of specialized forensic training relating to incompetency evaluations is necessary to show that the expert has experience evaluating the mental competence of individuals. The proposed subsection requires 24 hours because this number is comparable to other states' requirements, and 24 hours seem to be a reasonable amount of time to learn the basic principles of forensic evaluation.

The requirement to have experience drafting forensic reports which have been submitted to court is necessary to ensure that the expert has familiarity with what psycho-legal questions a court may want answers to. Further, if available, an expert having peer-reviewed forensic reports indicates that the expert's report-writing, methodology, and analysis have been vetted by those with more expertise on psycho-legal issues. Peer-review helps ensure that competency evaluations and reports standards are upheld and maintained.

The requirement, when applicable, to have experience in treating and assessing individuals with developmental disabilities is necessary to ensure that the expert has a fuller context in his or her competency evaluation of a defendant who may have developmental disabilities.

An evaluator who has training and experience in completing psycho-legal, forensic evaluations, especially if peer-reviewed, and in treating developmental disabilities, if relevant, would be in a better position to accurately diagnose an individual's mental competence, resulting in an evaluation the court can rely on and in the appropriate commitment of an incompetent individual.

**Adopt new section 4752, subsection (a)(4).**

**Purpose:** To prescribe a continuing education requirement for psychiatrists or psychologists who are in consideration by a court to evaluate a defendant for mental competence.

**Necessity:** This proposed regulation is necessary to ensure that the psychiatrist or psychologist continues to grow and expand in his or her expertise in forensic evaluation by completing the continuing education courses required by his or her respective licensing board, a field-recognized authority. This requirement to complete continuing education courses ensures that the experts considered by the court to evaluate a defendant's competence are on track with the most updated best practices, data, and science related to psycho-legal, forensic issues. A psychiatrist or psychologist licensed in the State of California already must certify to the respective licensing entity that he or she obtained the required continuing education credits within the 24 months preceding license renewal. This proposed regulation requires that continuing education courses have been completed within the 24 months preceding appointment because the requirement is already consistent and concurrent with the State of California licensing requirements. A psychiatrist or psychologist who is up-to-date on the latest science and other developments in the field would be in a better position to accurately diagnose an individual's mental competence, resulting in an evaluation the court can rely on and in the appropriate commitment of an incompetent individual.

**Adopt new section 4752, subsection (b)(1).**

**Purpose:** To provide an alternative route for the court to consider or appoint an expert who does not meet the guidelines laid out in this proposed section to evaluate a defendant for mental competence.

**Necessity:** This proposed regulation is necessary to ensure that there is no delay in appointing an expert to evaluate a defendant's competence by providing for when a court may have difficulty locating an expert who meets the specific guidelines as set forth in this proposed regulation. While this is a nearly verbatim restatement of Penal Code section 1369, the restatement is necessary to underline that the court remains the ultimate authority in deciding which expert to appoint for the mental competency examination.

**Adopt new section 4752, subsection (b)(2).**

**Purpose:** To provide a route for the court to consider an expert in a specialized field of practice, if a case may benefit from such an expert, to evaluate a defendant for mental competence.

**Necessity:** This proposed regulation is necessary to ensure that any specialized, case-by-case psycho-legal issue may be addressed by an expert who has expertise in answering the specialized psycho-legal issue. This provision is necessary so that a defendant who may have a special case receives a fuller, holistic evaluation which takes into consideration each potentially relevant factor, thus ensuring that each individual is treated fairly and that the evaluation upon which the court will rely provides a fuller picture of the individual, resulting in an appropriate commitment.

## **TECHNICAL, THEORETICAL, OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

1. *Research Data on Competency*, Barbara E. McDermott, PhD Professor, UC Davis Department of Psychiatry, Division of Psychiatry and the Law, Power Point, pp 1-49.
2. The Department also relied upon an article in *Journal of Forensic Psychology Practice*, "States' Standards for Training and Certifying Evaluators of Competency to Stand Trial," published in 2015, vol. 15 issue 4 and can be accessed online at: <http://dx.doi.org/10.1080/15228932.2015.1046798>.

## **ECONOMIC IMPACT ASSESSMENT / ANALYSIS**

DSH does not anticipate any non-discretionary costs or savings imposed on any local agency, as a result of this proposed regulation, during the current fiscal year and the two subsequent fiscal years.

DSH does not anticipate any additional costs to the Department or any other state agency.

### **Creation or elimination of jobs within the State of California**

This proposed regulation is designed to guide the court in its consideration of experts to evaluate a defendant's mental competence. The court already handles this process and does so appoint experts it believes are appropriate. As such, this proposed regulation does not affect Department staff or other State staff, and the Department does not anticipate creating or eliminating any positions or anticipate that the State will create or eliminate any other positions. As a result, the Department does not anticipate that there will be any creation or elimination of jobs within the State of California.

### **Creation of new businesses or the elimination of existing businesses within the State of California**

This proposed regulation is designed to guide the court in its consideration of experts to evaluate a defendant's mental competence. The court already handles this process and does so appoint experts it believes are appropriate. The experts who may be considered and appointed by the court remain the same, and this proposed regulation does not mandate or invite the creation or elimination of the businesses or private practices of these potentially appointed experts. Consequently, the Department does not anticipate that there will be any creation of new businesses or elimination of existing businesses within the State of California.

### **Expansion of businesses currently doing business with the State of California**

This proposed regulation is designed to guide the court in its consideration of experts to evaluate a defendant's mental competence. The court already handles this process and

does so appoint experts it believes are appropriate. The experts who may be considered and appointed by the court remain the same, and this proposed regulation does not mandate or invite the expansion of the businesses or private practices of these potentially appointed experts. As such, the Department does not anticipate that there will be any expansion of businesses currently doing business with the State of California.

Benefits of the regulations to the health and welfare of California residents, worker safety, and the State of California's environment

This proposed regulation may benefit the health and welfare of California residents by ensuring that defendants whose competence is in question are timely evaluated by appropriate and qualified experts who have experience in psycho-legal, forensic issues. A timely, standardized, and appropriate evaluation would result in timely placement and treatment of an incompetent defendant and the timely adjudication of the pending cases of those who are competent and, later, those whose competence has been restored. This uniform process has the following benefits: (1) courts can timely administer justice in cases where the individual is actually competent and order the appropriate commitment of an incompetent individual to the Department; (2) mentally competent individuals do not have to spend time receiving unnecessary competency treatment, freeing up Department resources to admit, treat, and restore mentally incompetent individuals; (3) mentally incompetent individuals receive appropriate treatment and mental competency restoration that they require to move along in the criminal justice system; and (4) the general public and community can rest assured that the criminal justice system, in place in large part to keep them safe, is able to timely administer justice. This proposed regulation may also benefit worker safety by ensuring that the state hospital system treats only appropriate and suitable patients, reducing the risk of erroneously treating patients inappropriate for competency restoration. Lastly, this proposed regulation may benefit the State's environment by streamlining the consideration and appointment process – resulting in properly trained evaluators providing accurate diagnoses upon which the court can rely; appropriate commitment and treatment of mentally incompetent defendants; decrease in the risk of delay in the administration of justice – thus overall reducing carbon footprint, waste, use of resources, and energy costs.

**EVIDENCE SUPPORTING FINDINGS OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

Although this proposed regulation will directly affect businesses or the private practices of experts statewide, the Department concludes that there will be no significant statewide adverse economic impact directly affecting businesses, as a result of this proposed regulation.

Completing continuing education courses, while affecting psychiatrists and licensed psychologists, some of whom are small businesses, is **not** a mandate or an additional requirement. This proposed regulation specifies the guidelines for a court to consider in appointing an expert to evaluate mental competency; this proposal does not mandate that a licensed psychologist or psychiatrist complete any continuing any education credits.

Moreover, state licensing requirements for psychiatrists and psychologists already include a continuing education component, and this proposed regulation provides for nothing beyond what state licensing requirements presently mandate. Therefore, this proposed regulation will not have a significant statewide adverse economic impact directly affecting psychiatrists and licensed psychologists.

**REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES**

The Department believes that there are no reasonable alternatives to the proposed regulations which would be more effective and less burdensome to affected private persons or equally effective in implementing the provision of law.

**DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS OR STATUTES**

The Department expects no duplication or conflict with federal regulations to occur.