



SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

JUVENILE COURT

Juvenile Competency Protocol

A Manual for Alameda County

An Interdepartmental Collaboration of

Alameda County

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This Protocol is a collaborative effort between the following Alameda County Departments: Juvenile Court, Probation, Public Defender's Office, District Attorney's Office, Social Services, and Behavioral Health Care Services.

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SECTION ONE

INTRODUCTION AND SCOPE

Summary

When a juvenile delinquency judge believes a minor may be incompetent to enter a plea/stipulation and withstand trial or be adjudicated (because the minor does not understand the court process or cannot effectively communicate with his/her attorney), the court must suspend the proceedings. The proceedings are suspended because it is unjust to subject a person to a court process the person is not competent to understand.

The steps in most competency cases: first, a doubt is raised. Next, the court conducts an initial inquiry process. If the court finds there is “substantial evidence” of doubt regarding the minor being competent, the proceeding is suspended. The court orders the minor’s competency evaluated by a Competency Evaluator. Following the court-ordered competency evaluation, the court will seek a stipulation from the parties that the minor is either competent or incompetent. If there is no stipulation, there will be a trial to determine if the minor is competent. Following the potential stipulation or trial, the judge makes a finding regarding the minor’s competence or incompetence. If the minor is deemed competent, the underlying juvenile case is no longer suspended and may proceed. If the judge finds the minor incompetent, regular juvenile proceedings remain suspended. There will be periodic reviews to see if the minor has attained competency. If the minor attains competency, the underlying proceeding is no longer suspended and the case begins again, where it left off. If the minor does not attain competency, the underlying proceeding remains suspended for a period of time that is no longer than reasonably necessary to determine where there is a substantial probability that the minor will attain competency in the foreseeable future or the court no longer retains jurisdiction. W&I §709(c)

Scope

This Protocol of the Juvenile Court of Alameda County, provides an overview of procedures for determining a minor’s mental ability to participate in juvenile proceedings, the evaluation of a minor, the competency hearing process, the attempt to obtain/restore competency, judicial review, and the steps to take when the minor is either found to be competent or not competent. This Protocol shall not be used to determine a minor’s mental state at the time of the alleged offense(s) for which the minor is accused.

Legal Overview

In all cases, if the court, or minor’s attorney has a reason to doubt whether the minor is competent to enter a plea/stipulation or withstand trial, the issue should be raised at the earliest possible point in the regular juvenile proceeding. Once raised, the judge has an obligation to determine if the minor is possibly incompetent.

Judge must exercise proper discretion and must make the initial decision whether to proceed toward a competency hearing or not, and, if there is a competency hearing,

whether the minor is competent or not. Oftentimes, the judge has within the courtroom many resources (the lawyers, probation officers, minor, minor's family members) upon which the court may make an initial decision to temporarily suspend proceedings.

If the judge declares a doubt regarding the minor's competency, proceedings must be temporarily suspended, an expert must be appointed to evaluate the minor's competency, and the matter must proceed toward a competency trial. If the judge finds the minor competent following the trial, the underlying juvenile proceedings are resumed and the minor enters a plea/stipulation or is tried on the petition. A minor who is found to be incompetent following a competency hearing will continue to have his/her matter suspended while the court orders a competency Restoration Plan. If the minor's competence is restored, the underlying juvenile proceedings resume. If the minor's competence is not restored, the matter is either continued until such time as competency can be restored/obtained, or the petition should be dismissed.

Competency Process Overview

- I. A doubt is raised: Determine if substantial evidence of doubt regarding potential incompetency exists. (At a minimum ask minor's attorney about competency; review any prior psychological reports; talk to parents and probation officers.)
 1. If substantial evidence of doubt does not exist, continue with underlying juvenile proceedings.
 2. If substantial evidence of doubt does exist:
 - a. State doubt on the record.
 - b. Suspend juvenile proceedings.
 - c. Appoint a Pre-Trial Competency Evaluator through Alameda County Behavioral Health Care Services (BHCS) from the BHCS Guidance Clinic or BHCS Psychologists panel.
 - d. Consider custody status of minor (determine whether or not there is information that would change current status). Use least restrictive setting consistent with detention risk factors re: safety of minor and community.
 - e. Set two future court dates:
 - Fifteen (15) business days for receipt of evaluator's report in court;
 - Twenty (20) business days for Competency Review
 - f. At the Competency Review Hearing, the parties can stipulate, submit, or set for a contested trial. If contested trial, set within fifteen (15) business days.
- II. Upon receipt of Competency Evaluator's opinion, if parties stipulate or submit and/or Court finds minor is competent short of a trial, the court will:
 1. Reinstate juvenile proceedings
 2. Remind probation that the court intends to grant credits toward maximum time of confinement, if any, at time of Disposition. Since accrual of confinement time credits tolls while proceedings are suspended.
 3. Consider need for possible psychological evaluation to determine what mental health services the minor may need even though the minor is competent.
 4. Set date of jurisdictional hearing.

- III. If there is a Competency Trial, it proceeds as follows:
1. Minor is presumed competent. Burden of proof lies with minor.
 2. Standard: preponderance of evidence
 3. Any judge can hear the trial; does not need to be the judge who declared doubt.
 4. Minor has no independent right to testify; defense counsel can choose not to call the minor as a witness even if the minor wants to testify.
- IV. Following Competency Trial, if the court finds minor is competent: *refer to II (1) above.*
- V. Following competency trial, if the court finds minor is incompetent:
1. Within 7-10 business days, set a date for receipt of preliminary competency Restoration Plan. (The restoration plan recommended by the evaluator in the current evaluation may be used, provided the parties agree.)
 2. Within thirty (30) business days, the court will conduct/hear a progress report regarding implementation of the competency restoration plan.
 - a. If appropriate, court will order a Multidisciplinary Team (MDT) for determination of necessary Ancillary Services. Set subsequent (if necessary) ninety (90) day review hearings will to determine if minor has been restored to competency.
 - b. Judicial standard of review: In every case, if a minor is found incompetent by a preponderance of the evidence, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction. (W&I §709(c))
 3. If there is a Contested Restoration to Competency Trial
 - a. Minor is presumed competent. Burden of proof lies with minor.
 - b. Standard: preponderance of evidence
 - c. Following Restoration trial, if the Court finds minor is competent, *refer to II, (1) above*
 - d. If the Court finds minor has not obtained competency, determine if attainment is likely to be achieved in the foreseeable future. If yes, return to restoration plan and *refer to V, (1) above*. If not, see next Section Seven.
 4. If at any point the court does not find a *substantial probability* the minor is likely to attain competency in the foreseeable future, the court should dismiss the case.
 - e. Before the case is dismissed, the D.A. has the right to 10 calendar days notice and a trial to prove there is not

- substantial probability* the minor is unlikely to attain competency in the foreseeable future.
- f. If the case is dismissed, court jurisdiction ends.
 - g. The court may consider a referral to Probate Court.

During all competency proceedings, minors have the right to an attorney. Because the policy of the Juvenile Court in Alameda County is that each minor is afforded a public attorney at arraignment, all minors have legal representation throughout their entire case, including any possible competency proceedings.

Although informal solutions should be sought and promoted, there shall be no ex parte communications in any competency matter unless there is a stipulation to proceed with limited ex parte communications. Such stipulations will have to be agreed upon on a case by case basis and placed on the record.

A minor who wants to attend court hearings may come to court hearings.

The minor should be evaluated and receive services in the least restrictive setting that is practical.

The Juvenile Court maintains jurisdiction of the minor during all competency proceedings.

SECTION TWO

INITIATION OF A COMPETENCY PROCEEDING

Welfare & Institute Code §709(a) states: “During the pendency of any juvenile proceeding, the minor’s counsel or the court may express a doubt as to the minor’s competency.”

The juvenile court has an obligation to determine if a minor is competent to enter a plea/stipulation or withstand trial. A person cannot be tried or sentenced while mentally incompetent. Penal Code §1367(a); *Godinez v Moran* (1993) 509 US 389, 396; *Pate v Robinson* (1966) 383 US 375, 378; *People v Hayes* (1992) 21 C4th 1211, 1281. [Adult statute and cases.]

The Court does not automatically begin competency proceedings just because someone asks for such proceedings. Before competency proceedings begin in juvenile court, a judge must have an objective doubt that minor may be incompetent. If the judge has such a doubt, competency proceedings are initiated. If the judge does not have such a doubt, competency proceedings are not initiated. This section explains how a judge conducts the initial inquiry to determine if there is a substantial evidence to suspend the underlying juvenile proceedings and commence competency proceedings.

Competency Defined

The standards for determining whether a person is presently competent to enter a plea, stand trial, or be sentenced, are as follows:

W&I Code §709(a) states:

“A minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her.”

If the court finds substantial evidence raises a doubt as to the minor’s competency, the proceedings shall be suspended.

- The person must be presently capable of understanding the nature and purpose of the proceedings;
- The person must presently comprehend his or her own status and condition in reference to the proceedings; and
- The person must be presently able to assist his or her attorney in conducting a defense. Penal Code §1367(a); *People v Conrad* (1982) 132 CA3d 361, 369. [Adult case]

The “test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v United States* (1960) 362 US 402 [Adult case]

The case of *Timothy J.* added a new component to competency in juvenile cases: developmental immaturity. “A minor is mentally incompetent if, as a result of mental disorder, developmental disability, or developmental immaturity, the minor is unable to understand the nature of the present juvenile court proceeding, or to assist counsel in the conduct of a defense in a rational manner.” Penal Code §1361(a); *Timothy J. v Superior Court* (2007) 150 Cal.App4th 847.

All inquiry by the court shall be on the record.

The Actual Initial Process

Judge's Inquiry

If the judge is the first to doubt whether the minor is competent to enter a plea/stipulation or be tried, the judge must raise the issue of competence. The trial judge, on his or her own motion, may inquire into the minor's mental capacity to stand trial whenever evidence presented prior to disposition raises a *bona fide* doubt. The doubt that triggers the trial judge's obligation to order a hearing is not subjective, but rather determined objectively from the record. *People v. Stiltner* (1982) 132CA3d. 216,222.

Defense Counsel's Doubt

Defense counsel may raise a doubt as to the minor's competency. Court must assess whether counsel is merely commenting of the minor's mental state or requesting a competency hearing under §709. If counsel is requesting a competency hearing pursuant to §709, this triggers the judge's duty to conduct an initial inquiry whether there is good cause to commence competency proceedings. The competency proceedings are not commenced simply because there is a request.

Regardless of who raises the issue of competency, the judge must make the initial inquiry if there is reason to believe competency may be at issue. The court should err on the side of conducting an initial inquiry.

Inclusion of Defense Counsel

If any person (such as a deputy district attorney, probation officer, family member, or probation court officer) believes the minor may be incompetent, that person should relay the belief to the defense counsel. If the issue is raised to the court, the judge should relay the information to defense counsel. Defense counsel can then apply the legal standards to the situation and make a determination whether to advise the court of potential incompetency

Defense counsel is better able to collect information directly from his/her client, and observe the minor in an informal setting, such as an interview room. Defense counsel also needs to make strategic decisions regarding whether they should ask for a continuance, check on the minor's medications or determine if the minor is in a temporary crisis.

Judge Required to Exercise Discretion

W&I Code §709(a) makes it clear that the *judge* must first find "substantial evidence" that "raises a doubt as the minor's competency" before suspending proceedings. Proceedings are not suspended solely on an attorney's request or upon an attorney stating the minor is incompetent.

Talk to the Defense Attorney

Defense counsel's expression of an opinion of minor's mental competence under does not violate the attorney-client privilege (Evid Code §954). Although the attorney's opinion of competence may be principally drawn from confidential communications with

the client, merely giving the opinion does not reveal any protected information. *People v Bolden* (1979) 99CA3d 375, 378. The court should avoid breaching any specific attorney-client privilege, but general questions about counsel's observations and conversations with the minor are recommended.

The court may, but is not required to, allow defense counsel to present his or her opinion regarding minor's competency *in camera* if the court finds that there is a reason to believe that attorney-client privileged information will be inappropriately revealed if the hearing is conducted in open court. Cal Rules of Ct, Rule 4.130(b)(2). [Adult rule]

Regional Center Assessment

The court can consider whether there has previously been an assessment of competency and/or restoration of competency through the State Regional Center for persons who are developmentally disabled. Collecting past information from the Regional Center may help determine if the minor may be currently incompetent to withstand trial. W&I §709 (e) – (h)

Retroactive Determination Not Required

The court must only determine a minor's *current* competency. Penal Code §709(a) conforms to all previous statutes and case law on this issue. It states "A minor is incompetent to proceed if he or she lacks sufficient *present* ability..."

What Constitutes Substantial Evidence

The question of what constitutes substantial evidence of a minor's incompetence cannot be answered by a simple formula applicable to all situations. *People v Laudermilk* (1967) 67 C2d 272, 283. Evidence is substantial if it raises a reasonable or bona fide doubt concerning the minor's ability to understand the nature of the juvenile proceedings against him or her, or assist in his or her defense. *People v Rogers* (2006) 39 C4th 826, 847; *People v Hayes* (1999) 21 C4th 1211, 1282 (judge properly denied defendant's motion for competency hearing). Substantial evidence is not just any evidence that supports the possible fact. Substantial evidence requires evidence that is "reasonable in nature, credible and of solid value." *Bowers v Bernards* (1984) 150 Cal.App.3D 870, 873. [All cases in this section are adult cases]

Even if the court finds the minor to be competent, if the court suspects the minor may have a developmental disability, the court may refer the minor to the Regional Center, if deemed appropriate. (W&I §709 (e) – (h))

Advise the Minor of His or Her Rights

The minor needs to be advised of his/her rights concerning competency proceedings. Although in some case a minor may not have the capacity to understand his/her rights, an attempt should be made to advise each minor. If the minor does not have the capacity to understand his/her rights, the court shall nonetheless continue with the competency proceedings.

Suspend Proceedings

Once the court orders a competency hearing, the juvenile proceedings must be suspended until a trial on the minor's competency has been concluded and the minor either is found mentally competent or has his or her competency restored. Welfare & Institutions Code §§ 709 and 6551 [Juvenile statutes]

SECTION THREE

JUVENILE COMPETENCY FORENSIC EVALUATION

If the court finds that "substantial evidence raises a doubt as to a minor's competency, the underlying delinquency case is suspended, and the matter is heading toward a competency trial, the court must order that a competency evaluation be performed prior to the trial.

W&I Code §709(b) states

"The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency."

Calendaring Future Court Hearings

On the day the court orders a Pre-Trial Competency Evaluation, the clerk of the court will contact the Chief of the Guidance Clinic who will assign a Competency evaluator to the case from the list of approved evaluators. The Chief of the Guidance Clinic, within 48 hours will assign the case to an evaluator who is available and able to provide a timely report within time requirements and constraints of the particular case.

Two days prior to the date the report shall be received in court, the Pre-Trial Competency Evaluator will deliver the completed report to the court clerk's office for distribution to the appropriate trial court.

Pre-Trial Competency Evaluator Qualifications

W&I Code §709(b) states:

"The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence.

Court Instructions to Pre-Trial Competency Evaluator

Upon each appointment of a Pre-Trial Competency Evaluator, the Juvenile Court's Clerk shall issue appropriate instructions by way of a cover letter to the Pre-Trial Competency Evaluator. (Even if the evaluator has done numerous competency evaluations for the court in the past.)

Referral to Pre-Trial Competency Evaluator

When a Pre-Trial Competency Evaluation is ordered by the court, the Juvenile Court Clerk will prepare a packet containing orders and cover letter instructions for the Court-Appointed Competency Evaluator. The Probation Court Officer will provide the relevant documents to the Guidance Clinic within 48 hours.

This packet will include the following:

1. Court instructions for the Pre-Trial Competency Evaluator (cover Letter);
2. Court order indicating all documents from Probation, the court, police departments, and previous evaluators are confidential; that they cannot be shared with third parties without court order;
3. Court order for the Pre-Trial Competency Evaluation;
4. Name of judge and department to which the evaluator will be reporting;
5. Date for Receipt of the court ordered evaluation.

Separately Retained Experts

Defense counsel or the District Attorney may retain their own expert(s). Any assessment reports obtained by the defense attorney shall be confidential unless the expert may testify during the competency hearing or the report is otherwise discoverable. If the attorneys will possibly use an expert in trial, counsel must provide copies of the expert's report and resume to opposing counsel well before trial. If the District Attorney has any possible *Brady* material, the deputy district attorney must provide copies to the defense well before trial. All efforts shall be made by the attorneys to avoid delay in the competency proceedings.

If the minor desires to present testimony of a psychiatrist or psychologist of his or her own choosing, the court may not place conditions on the admission of the testimony, such as the minor's cooperation with the Pre-Trial Competency Evaluator. *People v Mayes* (1988) 202 Cal App. 3rd 908

The court does not pay for the defense or prosecutions experts.

SECTION FOUR

RETURN OF PRE-TRIAL COMPETENCY EVALUATOR REPORT

Two days before the date scheduled for Receipt of the Competency report, the competency evaluation will be delivered to the Court Clerk's Office for distribution to the appropriate trial court. The court clerk in the trial department will distribute copies of the confidential report to: the judge, probation court officer, defense counsel and the deputy district attorney. Cal Rules of Ct, Rule 4.130(d)(2).

The report is circulated to the parties at the hearing for Receipt of the Competency evaluation. At this hearing, three things can happen: the parties can stipulate to the opinion of the Pre-Trial Competency Evaluator, the parties can submit on the opinion, or the parties can contest the opinion, and set the matter for a contested competency hearing.

1. The parties can stipulate to the findings of the Pre-Trial Competency Evaluator. The court need not accept the stipulation. Absent a stipulation, canceling the competency trial, based upon the minor being competent should be done with caution. There must be a solid foundation to support that the "substantial evidence" that warranted the need for a competency hearing no longer exist. An erroneous denial of competency compels reversal of the judgment, because the trial court has no power to proceed with an underlying trial once a doubt arises about a person's competence. *People v Pennington* (1967) 66 C2d 508, 521. The error is *per se* prejudicial and may not be cured by a retrospective determination of the person's mental competence during the regular trial. *People v Stankewitz* (1982) 32 Cal.3d 80. [Adult cases.]

If the court does not accept the stipulation of the parties, the court should set a Competency Trial. At the trial, the parties could still stipulate to the Pre-Trial Competency Evaluator's report, and the court would make whatever findings the court deems appropriate at the hearing. The Competency Trial could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The court presumably could hear the Competency Trial that day.

2. The parties can submit the matter to the court for a court determination based on the Pre-Trial Competency Evaluator's report(s). Basically, the parties would not be taking position and leaving it up to the court to decide. The court would need to set a formal Competency Trial, or obtain a stipulation from the parties that the court can issue written findings and orders without the need for a formal Competency Trial. In this case, the judge would take matter under submission. The judge can issue an oral decision on the record that day, or submit a written decision shortly thereafter.

If either party wants a trial, or the judge wants a trial, and there are only submissions to the Pre-Trial Competency Evaluator's report, the Competency Trial could be set in a relatively brief time because there would be no evidence or argument for the attorneys to prepare. The court could hear the Competency Trial that day.

3. The parties can disagree about the Pre-Trial Competency Evaluator's opinion. The court would set a contested Competency Trial. The trial could proceed by submission on some matters, stipulation on some matters, live testimony, and/or legal argument. The contested trial would be set within fifteen (15) calendar days, subject to an extension for good cause.

When the Court Finds the Minor Competent After Receipt of the Pre-Trial Competency Evaluator Competency Report

If the minor is competent and in-custody, the minor will continue to receive the level of care determined appropriate by the court. If the minor is not in-custody, the Probation Department will recommend and the court may order appropriate referrals for mental health treatment, if indicated.

The court or attorneys may also consider a referral to the Alameda County Collaborative Court which focuses on maintaining the minor at home and treating mental conditions or disorders. If the court suspects the minor may have a developmental disability, or the Pre-Trial Competency Evaluator opines the minor may have a developmental disability, the court may refer the minor to the Regional Center for an evaluation.

SECTION FIVE

COMPETENCY TRIAL

W&I Code §709(b) states "Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing."

Regardless of the conclusions or opinions of the court-appointed Pre-Trial Competency Evaluator, the court that has initiated mental competency proceedings based upon "substantial evidence of doubt" must conduct a trial on the minor's competency, unless there is a stipulation to not have such a hearing, and the judge adopts the stipulation. Rules of Court, Rule 4.130(e)(1).

Timing of Trial

For a contested Competency Trial, the court must set the trial within fifteen (15) business days from the Receipt of Competency Review, unless there is good cause to extend the time for a short period to accommodate the availability of the expert witness(es) or to allow for completion of the new evaluations. If the expert(s) needs to be available for trial, scheduling would have to be coordinated.

De facto good cause would exist for a reasonable continuance if an attorney needs time to secure his/her own expert to render a second opinion. The court must limit the amount of time for the continuance to avoid delay. If the attorney securing the second opinion does not work with haste, the court may proceed to trial without counsel's expert(s). Also, the court should be prudent in continuing trial dates any longer than absolutely necessary when the minor is in custody.

Trial Judge

There is no requirement that the competency hearing be held before the same judge who declared a doubt about the minor's competence to stand trial. *People v Hill* (1967) 67 C2d 105, 113; *People v Lawley* (2002) 27 24th 102, 133-134. [Adult cases.]

Presumption of Competence; Burden of Proof

The minor is presumed competent at the start of the competency hearing. The burden is on the minor to prove his or her incompetence to stand trial by a preponderance of the evidence. W&I Code 709; Penal Code §1369(f); Cal Rules of Ct 4.130(e)(2); *Medina v California* (1992) 505 US 437; *People v Medina* (1990) 51 C3d 870, 885 (presumption and burden of proof under Penal Code §1369(f) do not violate due process); *People v Samuel* (1981) 27 C3d 489, 505, CALCRIM 3451. A preponderance of evidence is "that which preponderates," or is more likely than not, or is more than 50 percent true.

However, if the defense puts on no evidence of the minor's incompetence and the prosecution chooses to put on such evidence, the burden of proof falls on the prosecution. Penal Code §1369(b)(2); Cal Rules of Ct 4.130(e)(2); *People v Mixon* (1990) 225 CA3d 1471, 1484 n12 (burden of proof falls on party who challenges presumption. [Juvenile and adult statutes, cases, and Rule of Court.]

When neither the prosecution nor the minor seeks a finding of incompetence, the trial court may take the initiative and assume the burden of producing evidence of incompetence. *People v Skeirik* (1991) 229 CA3d 444, 459. [Adult cases.]

Presentation of Evidence

Typical order of presentation:

1. Defense counsel goes first because they carry the burden of proof. The minor's attorney offers evidence of the minor's mental incompetence, if the attorney has such evidence, and chooses to do so. Penal Code 1369(b)(1).
2. If defense counsel does not offer evidence of incompetence, the prosecutor may do so. Penal Code 1369(b)(2).
3. If defense counsel put on evidence of incompetence, the prosecutor next offers evidence of minor's present mental competence. Penal Code 1369(c).
4. Each party may offer rebuttal testimony, unless the court, for good reason and in the furtherance of justice, also permits other evidence in support of the original contention. Penal Code 1369(d).

5. The prosecution makes its final argument, if any followed by the defense counsel's final argument, if any. The parties may submit the case without final argument. Penal Code 1339(e). [Adult statutes.]

Minor Has No Right to Testify

If the subject of a competency trial wants to testify, but his/her attorney does not want the person to testify, the subject of the trial has no right to testify. Sometimes defense counsel leaves it up to the minor to decide whether to testify or not, and defense counsel merely puts his/her statement on the record that "it is against advise of counsel for my client to testify, but I leave it up to my client; I am not objecting to his testimony." However, if defense counsel objects to the minor testifying, and asks the court to not allow minor to testify, the court should not allow the minor to testify. *People v Johnny Lee Bell* (2010) 184 Cal.App.4th 1071 [error for court to allow Mr. Bell to testify over defense counsel's objection, but it was harmless error.][Adult case.]

Defense Counsel Can Disagree with Minor

Defense Counsel may present evidence of the minor's incompetence even when the minor desires to be found competent. *People v Stanley* (1995) 10 C4th 764, 804; *People v Bolden* (1979) 99 CA3d 378, 379 (defense counsel must advocate the position that he or she perceives to be in the minor's best interests even when that interest conflicts with the minor's stated position). In that event, (subject to *People v Johnny Lee Bell*, above) the court may consider allowing the minor to testify as to his or her own present competence with the permission of defense counsel, unless the court separately determines that the minor is incompetent to give testimony. *People v Harris* (1993) 14 CA4th 984, 993 [Adult cases.]

Such conflict does not establish sufficient grounds to warrant substitution of counsel (*Shephard v Superior Court* (1986) 180 CA3d 23, 33) or the appointment of second counsel to oppose commitment (*People v Hernigan* (2002) 110 CA4th 131, 135-137). [Adult cases.]

Minor's Statements in Subsequent Proceedings

Neither statements made by a minor to any evaluator, nor any evidence derived from these statements may be used by the prosecution to prove its case-in-chief as to either the minor's guilt. Cal Rules of Ct 4.103(d)(3); *People v Jablonski* (2006) 27 C4th 774, 802-804; *People v Arcega* (1982) 32 C3d 504, 520. Statements made during competency examinations may not be used to impeach the minor if he or she testifies at a regular trial. *People v Pokovich* (2006) 37 C4th 1240, 1246-1253.

This rule of immunity in competency proceedings extends to statements to employees of health facilities charged with restoring the minor's competency under Penal Code §1370. *In re Hernandez* (2006) 143 C4th 459, 475-476 (defense counsel committed prejudicial error at sanity phase of trial by failing to object to testimony of prosecution's expert witness whose opinion of minor's mental state was based on minor's statements to that expert during interviews and testing conducted while minor was confined to a state hospital under Penal Code §1370(a)(1)(B)(i). [Adult statute and case.]

Court Must Consider Expert Opinion

The Court must consider the opinion(s) of the trial experts, but the court does not have to agree with the opinion(s). On the other hand, the court cannot reject opinions without reason. The standard is whether the minor “is incompetent by a preponderance of the evidence.” W&I Code §709(c). [Juvenile statute.]

Express Finding After the Trial

The court must expressly state on the record, either orally or in writing, its determination whether the minor is mentally competent to stand trial, as well as the evidence considered and the reasoning in support of its finding. Cal Rules of Ct 4.130(e)(4)(B); *People v Marks* (1988) 45 C3d 1334, 1343. [Adult cases and Rules of Court.] The court should do the same if the court finds the minor incompetent.

Situations Requiring Second Hearing

When a competency hearing has already been held and the minor has been found competent to stand trial, the court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the competency finding. *People v Lawley* (2002) 27 C4th 102, 136; *People v Kaplan* (2007) 149 CA4th 372, 383-387 (court erred in not ordering second competency hearing when minor’s mental condition has deteriorated since the first hearing as a result of a significant change in minor’s psychotropic medications). The court may take its personal observations of the minor into account in the determining whether there has been significant change in the minor’s mental state. *People v Jones* (1991) 53 C3d 1115, 1153.

SECTION SIX

STEPS FOLLOWING POST-TRIAL FINDING

If the Minor is Competent

Following a competency trial, when a judge finds a minor to be competent, the court should place its findings on the record and proceed with the regular juvenile proceedings. W&I Code §709(d) states: “If the minor is found to be competent, the court may proceed [with the underlying juvenile case] commensurate with the court’s jurisdiction.”

If the Minor is Incompetent

If the court finds the minor incompetent, the court should place its finding on the record and regular juvenile proceedings will remain suspended. Although proceedings will remain suspended, the attorneys, judge, and regular juvenile probation officer will continue with the case and proceed with the Plan to determine whether the minor can be restored to competency.

Competency Restoration Plan

Set date for Receipt of Restoration of Competency Plan within 7-10 calendar days of the court's finding of incompetency. However, if a Restoration Plan is recommended in current evaluation and the parties agree, the court may adopt the recommended plan for Restoration. See Section One, V above.

Placement of Minor

If a program of competency restoration is ordered, the Court must order the minor placed in the least restrictive environment, taking into consideration these factors:

1. Where will the minor have the best chance of obtaining competence?
2. What are the needs of the minor?
3. How serious is the underlying offense(s)
4. Is there a need to protect the community?

Restoration of Competency is the Main Goal

Standard probation and mental health services shall not interfere with the primary short term goal of attempting to obtain/restore a minor's competence. For instance, although an Individualized Education Plan is important in normal situations, it is not the paramount goal during the period that Probation and Mental Health is attempting to assist the minor to obtain/restore competence. Standard services which are not essential to the minor's competence shall be postponed until after the competency process has been completed. If however, some services will help the minor obtain/restore competency (including educational services), those services will be provided.

Of course, the Juvenile Court has an obligation to ensure that minors in the court's care do not deteriorate mentally, physically or emotionally. Toward that end, services that maintain the minor's health must be provided.

State Examination of Developmentally Disabled Minors

If the court suspects the minor is developmentally disabled, there is statutory process that leads to a State mental and physical examination of the minor and ensures the minor receives proper services.

"Developmental disability" is defined in W&I Code §415(a). There are two tests: The first test is that the person must have one of the following: (1) Mentally retardation, which under DSM IV criteria means an IQ of approximately 70 or below on an individually administered IQ test and concurrent deficits or impairments in present adaptive functioning in at least two areas, (2) autism, (3) a seizure disorder, (4) cerebral palsy, or (5)...[the person functions similar to, or needs that same treatment as, a mentally retarded person]. The second test is the person must have 3 of 7 impaired functions: (1) learning, (2) communication, (3) independent living, (4) self care, (5) mobility, (6) economic self sufficiency, and/or (7) memory.

In order for a person to qualify for these services, the State Regional Center within the geographic location of the court must examine and accept the client. Because

regular proceedings have been suspended, there is a question whether the court can order a Regional Center examination. Typically, there will be no objection from the attorneys because such an examination can only help the minor – if the minor qualifies for Regional Center services, the services are provided throughout the lifetime of the client. If there will be a Regional Center examination, there is a benefit to the court ordering the examination early because if the court waits to the end of the court’s competency process and the case is dismissed, the court will lack jurisdiction to order a Regional Center evaluation. A Regional Center examination and possible Regional Center commitment could run parallel to the court’s competency process, but should not interfere with the court’s competency process (which is the primary goal).

SECTION SEVEN

PROGRAM FOR RESTORATION OF COMPETENCY

If a minor is found to be incompetent by stipulation of the attorneys and adoption of the stipulation by the judge, or by court finding the minor incompetent following a Competency Trial, the court must make orders, it deems appropriate to assist the minor attaining or being restored to competency (discussed above). Persons have the right to adequate treatment in order to regain competency.

SECTION EIGHT

PERIODIC COMPETENCY RESTORATION REVIEWS

As soon as the minor is engaged in the Competency Restoration Plan, the must proceed expeditiously with the Competency Restoration Plan.

If the minor has not been restored to competency at the court’s first scheduled 90-day Competency Restoration Review hearing date, subsequent Competency Restoration Reviews should be set every 3 months. A report from the competency evaluator informing whether the minor has been restored/obtained competency will be provided at each Restoration Review hearing and provided to all parties in the same manner as stated for distribution of the Pre trial Competency Evaluation. The Competency Restoration Evaluator shall examine the minor’s current level competence in the report submitted to the court. When appropriate, the Evaluator shall arrange for testing of the minor’s intellectual capacities, or for other pertinent psychological or neurological testing.

Opinion of Expert Regarding the Ability of Minor to Obtain Competency

At each Competency Restoration Review, the Competency Restoration Evaluator must render an opinion regarding whether the minor is competent or likely to obtain competence in a foreseeable future.

Determination of Continued Competency Restoration Services

At each Competency Restoration Review, the judge will have to decide if a further attempt at competency restoration is warranted. In order for the minor to be removed from Competency Restoration Plan, the judge must specifically find it is *unlikely* the minor will regain competence in the foreseeable future. W&I §709.

New Offenses

When the minor is alleged to have committed a new offense or violation of probation, the probation officer should not avoid filing a new notice or petition merely because there is a pending competency process. Probation should proceed as if there were no competency process underway. Probation should not wait until the next scheduled court hearing. Probation can immediately bring the minor into custody which would trigger a detention hearing the next day. Probation can also choose to leave the minor out-of-custody and set an immediate hearing. The handling of new alleged offenses is within the discretion of the Department of Probation.

The probation officer should discuss the new allegation(s) with the minor to determine if the minor understands the nature of the charge(s), whether the minor understands the court process, and whether the minor can communicate effectively regarding the alleged incident. The probation officer's opinion regarding the minor's current competence should be included in any new notice or petition.

The minor is presumed competent. The minor's attorney would have to petition the court for a review of the minor's current competency. Starting anew by applying this Protocol to the new petition/notice, the court must make findings. If there is substantial evidence the minor may be incompetent, the new case will be suspended and the court will order the new petition suspended and the minor's treatment for the new alleged offense to be added to the pending attempt to restore competency.

If the court determines there is not substantial evidence the minor is incompetent, the new case will not be suspended and the court will proceed with the new underlying juvenile proceedings. The issue of the minor's competence on the previously suspended petition/notice will remain as is, until the court makes a finding regarding competence on that matter.

Of course, a determination by the court on the new case can significantly affect the competency issue on the formerly suspended case because the standard for competency is "current" status of the minor. If the minor is competent on the new case, it is a factor to be considered on the pending competency issue.

SECTION NINE

OUTCOME OF RESTORATION PLAN

Return to Regular Juvenile Proceeding

If the court finds that the minor has regained mental competence, the juvenile proceedings must be promptly resumed at the stage at which they were suspended. [Adult provisions at Penal Code §1370(a)(1)(A), 1370.01(a)(1); *People v Simpson* (1973) 30 CA3d 177, 106 CR 254 (unnecessary delay in resumption of proceedings may abridge speedy trial right).]

Statutory Time Limitations Begin Again

When a minor regains competence and the juvenile proceedings are reinstated, the time limits for a speedy trial and/or speedy disposition begin afresh, beginning on the day the regular juvenile proceedings are reinstated. Do not subtract the days that were pending before the minor's regular juvenile proceedings were suspended. Penal Code §1382(a)(2) and (3); Cal Rule of Ct 4.130(c)(2) and (c)(3)(B). [Adult provisions.]

Credit for Pre-commitment Confinement

When the minor gets to the Disposition Hearing in the underlying delinquency case, the minor will be afforded pre-commitment credits toward any maximum time for confinement. Credits should be granted only for days the minor spent in Juvenile hall, a locked Ranch, a locked medical or mental facility (i.e. locked wards at Herrick Hospital, Fremont Hospital, or Willowrock) or the California Division of Corrections and Rehabilitation Juvenile Justice Center. Days the minor spent in any other alternative placement(s) for Competency Restoration Services do not count toward credits.

However, even if the court gives credits to the minor, and the minor has served a period of confinement equal to the maximum time of commitment, the minor may be subject to extended civil commitment proceedings under the LPS Act if he or she is considered dangerous to self or others, or for other reasons. *In re Banks* (1979) 77CA3d 864, 871. [Adult case.]

A minor cannot earn Penal Code §4019 ("good time") conduct and participation credits against the current or subsequent term.

Contested Restoration Hearing

After an evaluation recommending that Restoration to competency has been achieved, minor or the district attorney may request a contested Restoration hearing.

If it is Unlikely the Minor Will Achieve Competency in the Foreseeable Future

If there is substantial probability that the minor will not attain competency in the foreseeable future, the Competency Restoration Plan should end; the underlying delinquency charge(s), should be dismissed; the court should terminate jurisdiction of the minor's case.

Process for Dismissal

If any party moves to dismiss the underlying delinquency case, or if the judge independently is considering dismissal, the District Attorney must give 10 calendar days notice so that the District Attorney may consider requesting a hearing on the matter of dismissal and file an appropriate request for a hearing. The District Attorney will be afforded 10 days to make a decision, and can ask for a setting on the tenth day. The hearing, if requested, must be held within a reasonable time. The court should take into consideration possible expert witness availability, etc. The court cannot dismiss the case until after the hearing, should the District Attorney request one. At any time during the 10 day notice period, the District Attorney can waive the 10 day notice rule and stipulate to, or submit on, dismissal.

If the case is dismissed and there is no reason to have the minor civilly committed, the minor must be released from custody, if the minor is in-custody. Jurisdiction over the minor ends, unless there are other juvenile matters before the court.

This concludes the Juvenile Competency Protocol Manual for Alameda County. This Protocol is subject to edits and revisions periodically as needed.