



Litigating Competence To Stand Trial In Juvenile Court

AUGUST 11, 2022

MAUREEN PACHECO

LOS ANGELES COUNTY

ALTERNATE PUBLIC DEFENDER'S OFFICE

Overview

- I. What is Competence to stand Trial?
- II. Litigating competency under WIC 709 and Cal. Rules Of Court R. 5.645
 - A. Investigation
 - B. Experts: Qualifications, Required Tasks
 - C. Assessments; JACI
 - D. Challenging Prosecution Experts

Litigating appointment, preparing for cross,
confronting diagnoses of "Malingering"
 - E. The Hearing
- III. IST Finding: Remediation/Restoration



I. Legal Standard: WIC 709; Rule 5.645

- ▶ Due process right to be “present” and to assist in defense

To be competent, client must have both:

(1) sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, AND

(2) a rational as well as factual understanding of the nature of the charges or proceedings against him or her. (**Dusky v. U.S. (1960) 362 U.S. 402**)

- ▶ may result from the presence of any condition(s) including, but not limited to, mental illness, mental disorder, developmental disability, or developmental immaturity.
- ▶ Issue is present time competency (*In re Ricky S.* (2008) 166 Cal.App. 4th 232)

Why is Competency Litigation so Important in Juvenile?

- ▶ Adolescent Brain Development
- ▶ Mental illness: 50-75%
- ▶ ADHD: 7-10% of TOTAL adolescent population; at least 30% in detention
- ▶ Qualifying Special Education Disability: 28-43 %
- ▶ Developmental Issues: about 1 in 6 children had an intellectual disability, ranging from mild to serious, such as intellectual disabilities, cerebral palsy, and autism.
 - ▶ Language Impairment: (Lavigne study, 2011) 25% of kids tested in MJTC: spoken language competency consistently fell in bottom 1 percent
 - ▶ AND individuals with ASD will have up to 7x more contact with law enforcement over their lifetime than their peers.

BIG PICTURE

Issue of competence is identified.

You express a doubt (and court agrees) or Court declares a doubt. Proceedings are suspended. Issue must be resolved.

Parties may stipulate client is incompetent, or court appoints an expert.

You and/or Prosecutor may request court to appoint an additional expert. *

Client is assessed, expert reviews additional documents/speaks with witnesses, and writes a report for court and counsel.

Parties may stipulate client is incompetent, or competency trial is held.

If Court finds client competent—case resumes but issues raised become important in defense and disposition.

If Court finds incompetent—case may be dismissed, or client receives remediation/restoration for specified time line, until restoration, or dismissal/alternative.

II. LITIGATING COMPETENCY

A. Investigation: Before expressing a doubt

B. Experts: pre and post declaration of doubt

- ▶ Expert Qualifications
- ▶ Expert's Tasks
- ▶ Testing/Assessments
- ▶ Prosecution Experts (Court Appointed)

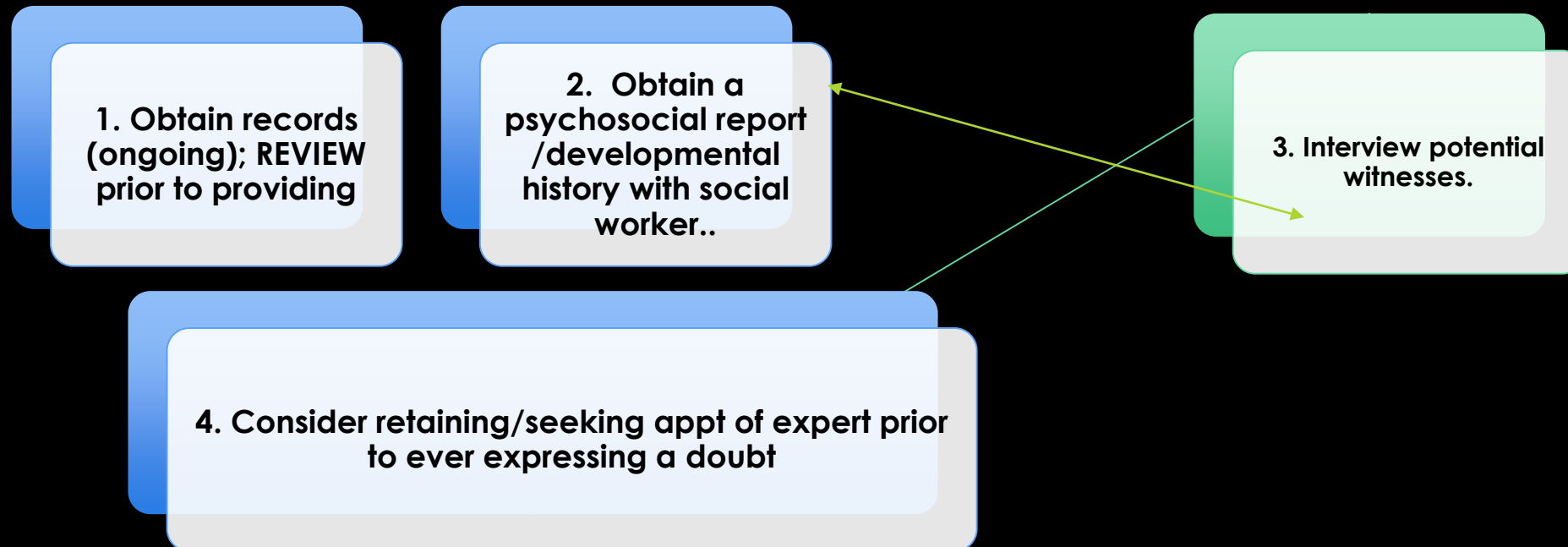
C. Assessments: JACI and other testing

A. Investigation: Identifying Potentially IST Youth

- Age; Speech and Language; Orientation; Mood and Affect; Memory Impairment; Thought Process, Content and Perception

- Collateral Interviews: Parents, Teachers, Social Workers, DSO

Investigation: gathering information



B. EXPERTS: Confidential Expert Pursuant to 730 and 952

► Elijah W. v. Superior Court

- If you have appointed a confidential defense expert prior to an expression and declaration of a doubt, the attorney-client privilege trumps the expert's reporting duties

Check protocols: you have a right to investigate competency, and to have the assistance of a confidential expert to assist you so that you may provide substantial evidence and present your case for incompetency.

When you are ready to “express” a doubt

1. Must present “substantial evidence” for the court to declare a doubt reasonable, credible and of solid value.” (Bryan E. v. Superior Court (2014) 231 Cal.App.4th 385

A yellow rectangular box containing the first step of the process. A light yellow arrow points downwards from the bottom center of the box to the top of the second box.

2. Consider ex parte recitation of basis?

An orange rectangular box containing the second step of the process. A light orange arrow points downwards from the bottom center of the box to the top of the third box.

3. Can reach a stipulation or submission on the reports/evidence you have IF court will be making a finding of incompetency.

After declaration of a doubt by the court

If no stipulation as to incompetency is reached, the court will appoint an expert (following your local protocol), and suspend proceedings.

WIC 709 allows you to file and litigate motions that do not require the participation of the minor, including but not limited to:

- Motions to dismiss
- Motions regarding a change in the placement of the minor
- Detention hearings
- Demurrers

- ▶ The court may, at any time after a petition has been filed, following notice and a hearing, join in the proceedings any agency (as defined in section 362) that the court determines has failed to meet a legal obligation to provide services to a child or a nonminor or nonminor dependent youth for whom a petition has been filed under section 300, 601, or 602.

JOINDER:
WIC 727; Rule
5.575

WIC 709/R. 5.645(b) :EXPERT QUALIFICATIONS

expertise in child and adolescent development and forensic evaluation of juveniles for purposes of adjudicating competency,

familiar with competency standards and accepted criteria used in evaluating juvenile competency,

received training in conducting juvenile competency evaluations, and

** familiar with effective interventions competency remediation for the condition or conditions affecting competence in the particular case.*

Appointment of RC Director for Intellectually disabled youth

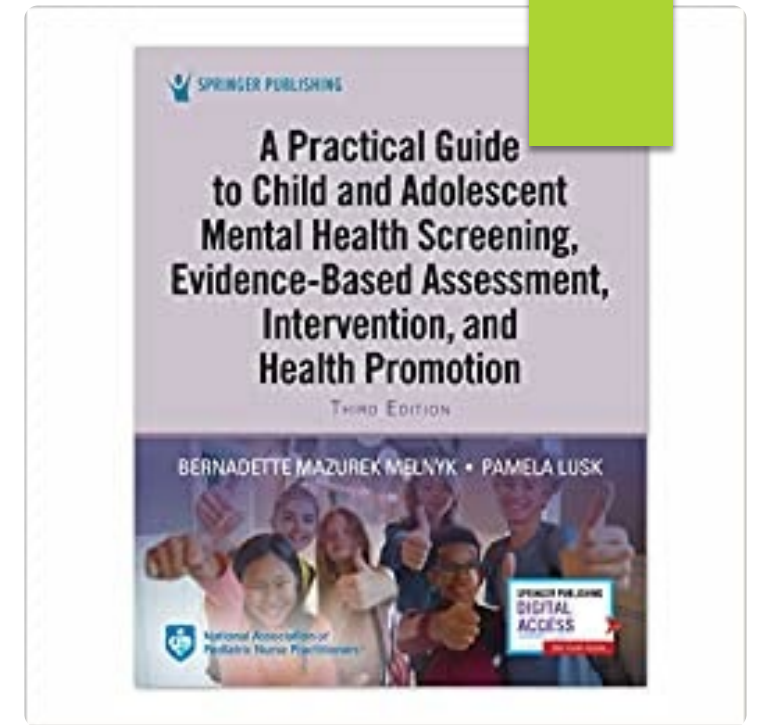
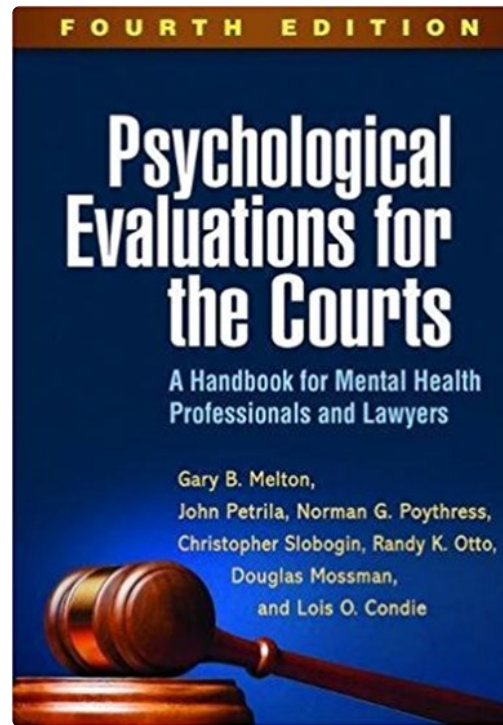
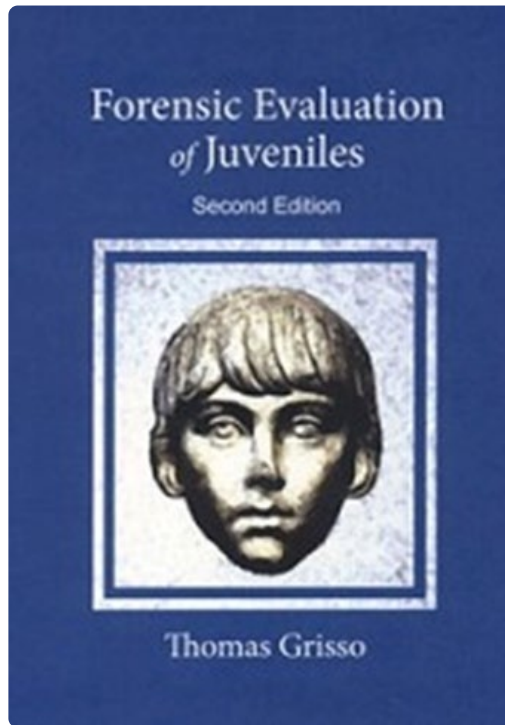
Court is required to appoint Regional Center director or his designee to evaluate the youth.

The director of the regional center, or his or her designee, must report to the court his or her determination of eligibility and shall provide the court with a written report.

The court's appointment of the RC director for determination of eligibility for services shall not delay the competency determination proceedings.

What Experts are Required to Do under WIC 709

Interview	Personally interview the youth (R. 5.645 (c) requires attempt to interview face to face ; if child refuses, must try to observe and make direct contact)
Review	review all of the available records provided , including, but not limited to, medical, education, special education, probation, child welfare, mental health, regional center, and court records, and any other relevant information that is available.
Consult	consult with the youth's counsel* and *any other person who has provided information to the court regarding the youth's lack of competency. R. 5.645 clarifies no waiver of A/C privilege; other privileges still attach
Gather	gather a developmental history* of the youth. If any information is unavailable to the expert, he or she shall note in the report the efforts to obtain that information.
Administer	administer age-appropriate testing specific to the issue of competency unless the facts of the particular case render testing unnecessary or inappropriate.
Be	*be proficient in the language preferred by the youth, or, if that is not feasible, employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the youth.



C. ASSESSMENTS

TESTING for Competency

- ▶ WIC 709: Expert is required to give Juvenile Adjudicative Competency Instrument (JACI)(with specified exceptions)...
- ▶ JACI: 3 types of questions: understanding, appreciation, reasoning.



This Photo by Unknown Author is licensed under [CC BY-SA](#)

Other common testing

- ▶ Intelligence testing: WAIS-IV (16 +) or WISC-V (6-16)
 - ▶ Subparts
- ▶ D-KEFS (Delis-Kaplan Executive Function System)
- ▶ Validity Tests:
 - ▶ 1. Symptom validity tests assess fabrication or over-reporting of symptoms
 - ▶ 2. Performance Validity Tests detect underperformance on neuropsychological tests.
 - ▶ Common instruments: Youth: Tests of Memory malingering (TOMM), validated for 16/17 year old, may be extended to younger ages, MVP Memory Validity Profile (MVP) Word Memory Test, Reliable Digit Span (embedded in the WISC).

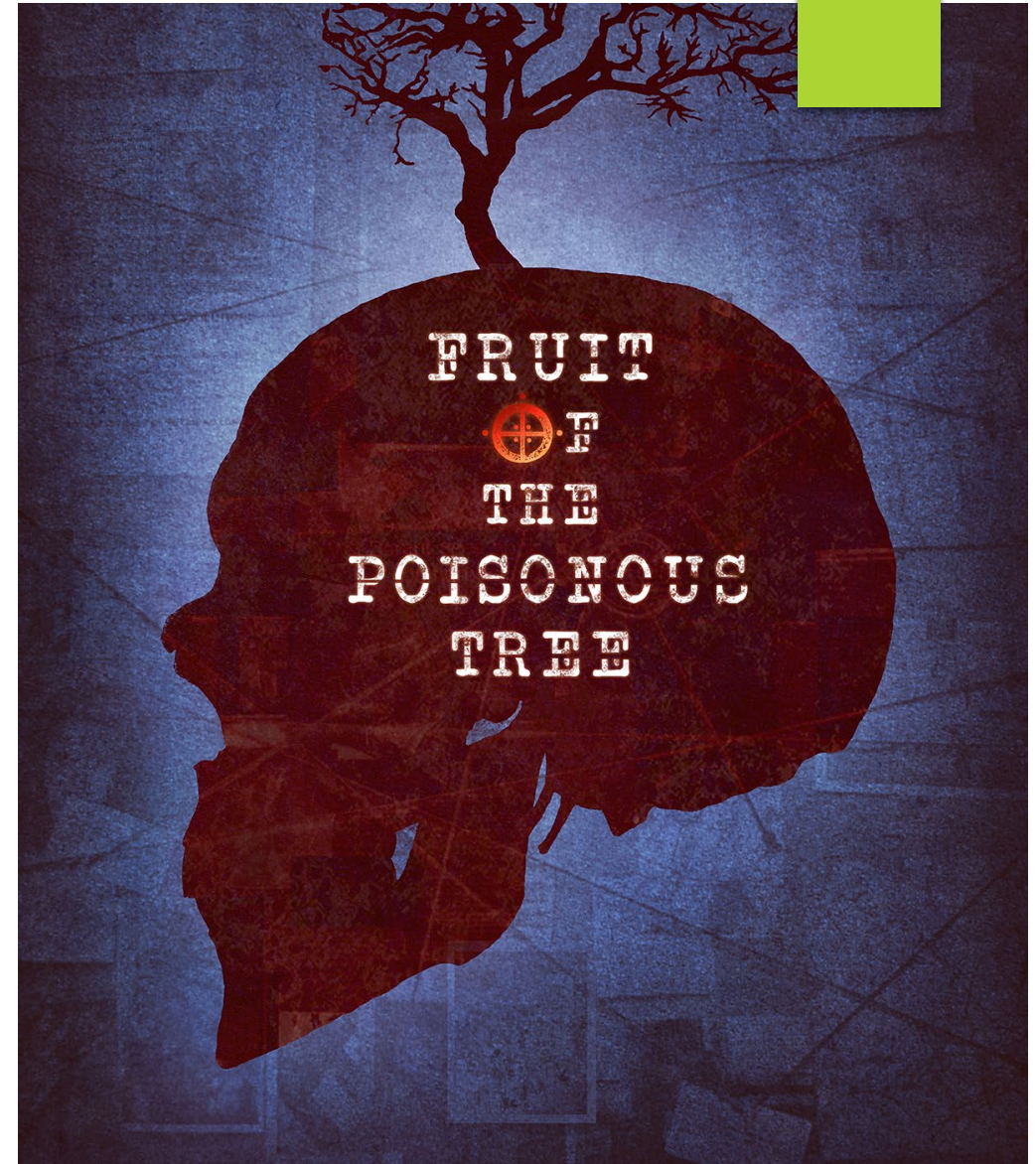
Expert's Report

- ▶ Expert shall opine on the following:
 - ▶ Does the youth have a mental disorder or developmental disability?
 - ▶ Does the youth lack, due to a mental disorder, developmental disability, immaturity or other condition, sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rat'l understanding?
 - ▶ Does the youth lack, due to a md, dd, immaturity or other condition, a rational as well as factual understanding of the nature of the charges and proceeding against him?
 - ▶ Is there a substantial probability that the youth will attain competency in the foreseeable future with appropriate mental health and educational services?
- ▶ **Note: Add'l content requirements are detailed in Rule 5.645 (g)**



Prohibition on use of any statements made by the youth (WIC 709(b))

- Statements made to the appointed expert during the minor's competency evaluation and statements made by the minor to mental health professionals during the remediation proceedings, and any fruits of these statements, shall not be used in any other hearing against the minor in either juvenile or adult court.



D. Challenging prosecution experts

- ▶ DA's expert not allowed to conduct competency evaluation without an order from the juvenile court pursuant to the Civil Discovery (CCP Sections 2016.010 et seq.)



Motion per CCP 2032.310; Court's order

2032.320: The court shall grant a motion for a physical or mental examination under Section 2032.310 only for good cause shown.

(d) An order granting a physical or mental examination shall specify the person or persons who may perform the examination, as well as the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination

Preparation for cross of prosecution expert



Review report carefully



Review CV and investigate



Discuss expert and report with your expert



Be prepared to cross on:

Ethical Guidelines
Methodology: what relied on, issues with testing,
Errors, conclusions
Attack malingering

Malingering

- ▶ Resources: Caroline Carr, *The Assessment of Malingering Within Forensic Populations*, (2015),
<http://scholarsrepository.llu.edu/etd/227>
(adults only)
- ▶ Caution with
 - ▶ Persons with intellectual disabilities; yea-saying
 - ▶ Complex trauma histories
 - ▶ Populations: non-English speakers, forensic setting
- ▶ Inability to determine malingering—false positives- Leads to varying “optimal cut off” scores.

E. The hearing itself: Disclosure of Reports

The expert's report and qualifications shall be disclosed to the opposing party within a reasonable time before, **but no later than five court days before, the hearing.**



Can get good cause reasonable continuance after disclosure to prepare

Court MUST make a determination of Gladys R. prior to the competency finding (clear and convincing evidence)

- ▶ Proponent of incompetency has burden of proof by preponderance
- ▶ May present evidence re likelihood of regaining or attaining competence, or bifurcate . . .
- ▶ *In re R.V.*(2015) 61 Cal. 4th 181: . . .although an expert's opinion is not determinative of the question of competency, such an opinion holds special significance in the juvenile competency setting, as contemplated by the Legislature; court may appoint a second expert where it finds flaws in the expert's methodology and reasoning."

Hearing itself:
avoid R.V.
situation

III. After hearing: finding of incompetency



Remediation Services

Court shall order attainment services unless court finds competency cannot be achieved within the foreseeable future.

The court shall review remediation services *at least*

- every 30 calendar days for youths in custody
- and every 45 calendar days for youths out of custody.

Additional services

- ▶ The court may also refer the minor to treatment services to assist in remediation that may include, but are not limited to,
 - ▶ mental health services,
 - ▶ treatment for trauma,
 - ▶ medically supervised medication,
 - ▶ behavioral counseling,
 - ▶ curriculum-based legal education,
 - ▶ or training in socialization skills,
- consistent with any laws requiring consent

If client is detained

Max is 6 months (unless 707(b)) and shall be in LRE; a finding of incompetency alone shall not be the basis for secure confinement

Court shall consider appropriate alternatives to juvenile hall confinement, including, but not limited to, **(A)** Placement through regional centers **(B)** Short-term residential therapeutic programs **(C)** Crisis residential programs **(D)** Civil commitment **(E)** Foster care, relative placement, or other nonsecure placement **(F)** Other residential treatment programs.

Limits on
secure
confinement:
6 months
unless 707(b)
and findings
made, then
max 18
months

707(b) offense: court may consider whether it is necessary and in the best interests of the youth and the public's safety to order secure confinement for up to an additional year, not to exceed 18 months from the finding of incompetence. Factors to consider:

(i) Where the youth will have the best chance of obtaining competence.

(ii) Whether the placement is the least restrictive setting appropriate for the youth.

(iii) Whether alternatives to secure confinement have been identified and pursued and why alternatives are not available or appropriate.

(iv) Whether the placement is necessary for the safety of the youth or others.

707(b) offenses: conditions for additional 6 months

- J.J. v. Superior Court (2021) 65 Cal. App. 5th 222

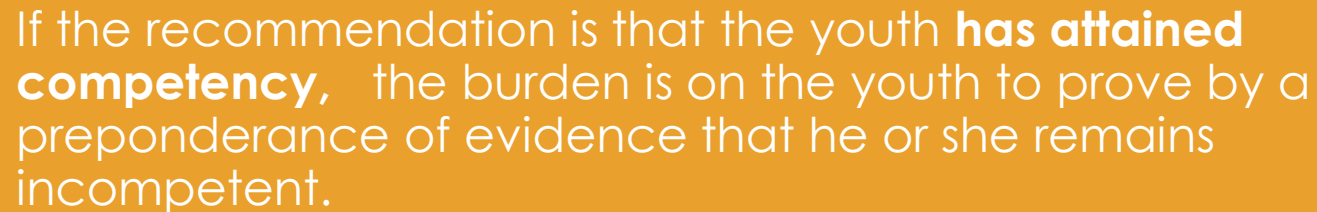
WIC 709(h)(5) does not permit the involuntary confinement of a minor beyond the statutory remediation period for the purpose of arranging post-release services that are not designed to restore competency. Even when a minor is charged with a 707(b) offense the court must dismiss the petition if the minor has not attained competence by the end of the 12-month period unless it makes a finding that there is a substantial likelihood that the minor will attain competence with further remediation services within the next 6 months.

Remediation Hearing within six months

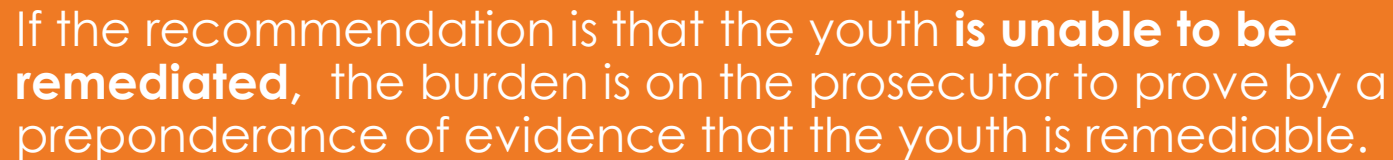
Within six months of the initial receipt of a recommendation by the designated person or entity, the court shall hold an evidentiary hearing on whether the youth is remediated or is able to be remediated.



If the recommendation is that the youth **has attained competency**, the burden is on the youth to prove by a preponderance of evidence that he or she remains incompetent.



If the recommendation is that the youth **is unable to be remediated**, the burden is on the prosecutor to prove by a preponderance of evidence that the youth is remediable.



Litigating restoration

- ▶ Do not accept conclusions re restoration—I
- ▶ “Overall, our findings are concerning because, despite 40 years of research . . . we continue to have no collective empirical understanding of the utility of competency or traditional assessment instruments in the restoration context.” Zapf and Pirelli, *An Attempted Meta-Analysis of the Competency Restoration Research: Important Findings for Future Directions* (January 2020)

I'LL
SEE
YOU IN
COURT



Final Thoughts

Can Competency be re-litigated?

People v. Jones (1991) 53 Cal.3d 1115

Competency is a fluid issue. A previous finding that your client is competent does not bar you from re-litigating the issue later in the case.

Am I entitled to a competency hearing where a transfer motion has been filed?

Tyrone B. v. Superior Court (2008) 164 Cal.App.4th 227: Minors are entitled to competency determinations prior to a transfer hearing

Can a prior admission be withdrawn?

- In re Matthew N. (2013) 216 Cal. App.4th 1412
- Matthew entered a plea in one county and the case was transferred to another county for disposition. His new counsel expressed a doubt as to his competence. After a hearing, the court found he was incompetent developmental immaturity. Based on this, his new counsel moved to withdraw his plea based on the face that developmental issues are linear in nature: if he was incompetent at the time of disposition, he must have been incompetent at the time the plea was entered. Court denied the motion, but Court of Appeal agreed and reversed