

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Probate and Mental Health Advisory Committee
Hon. Don E. Green, Chair
Douglas C. Miller, Committee Counsel, 415-865-7535,
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DATE: March 8, 2005

SUBJECT: Probate Conservatorships: Securing Preappointment Medical
Testimony Under the Health Insurance Portability and Accountability
Act of 1996 (adopt forms GC-333 and GC-334) (Action Required)

Issue Statement

California law sometimes requires courts to consider expert medical evidence concerning a proposed conservatee's mental capacity or physical condition before the appointment of a conservator, and even before the hearing on the petition for the appointment. The evidence consists of one or both Judicial Council capacity declaration forms.¹ However, regulations issued in 2003 under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)² restrict the authority and willingness of health-care professionals to complete, sign, and deliver these declarations concerning their patients.

Some courts have responded to the challenge presented by the HIPAA regulations by adopting a local form ex parte order that authorizes a medical expert declarant to complete and sign a capacity declaration concerning the declarant's patient at the

¹ See Probate Code sections 1825(b), 1890(c), and 2356.5(f)(3) and Judicial Council forms GC-335, *Capacity Declaration—Conservatorship*; and GC-335A, *Dementia Attachment to Capacity Declaration—Conservatorship*.

² The regulations are found at 45 C.F.R. parts 160 and 164 (2003). HIPAA is Public Law No. 104-191 (August 21, 1996).

beginning of a conservatorship proceeding for the patient. No statewide form order exists for this purpose.³

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective July 1, 2005, adopt as mandatory forms the proposed new *Ex Parte Application for Order Authorizing Completion of Capacity Declaration—HIPAA* (form GC-333) and *Ex Parte Order Re Completion of Capacity Declaration—HIPAA* (form GC-334) so that a medical expert declarant can be authorized by a court to offer testimony on a proposed conservatee’s mental capacity or physical condition before the hearing on a petition for appointment of a conservator, in full compliance with the regulations under HIPAA.

Copies of the proposed new forms are attached at pages 6–8.

Rationale for Recommendation

Both California law and the regulations under HIPAA authorize a health-care provider to disclose a patient’s private medical information in response to a court order.⁴ But if a petition for appointment of a conservator requests that the proposed conservator be granted exclusive authority to make medical decisions for the conservatee or “dementia powers,”⁵ California law requires submission of a capacity declaration signed by a medical expert declarant (a health-care provider under HIPAA) concerning a proposed conservatee’s mental capacity (private medical information under HIPAA) at the earliest stage of the conservatorship proceeding, before a hearing and before a court order would ordinarily be available.

³ See Superior Court of Santa Clara County form PB-4017 and Superior Court of San Diego County form PR-7.

⁴ See Civil Code section 56.10(b), which provides in material part:

“A provider of health care, a health care service plan, or a contractor shall disclose medical information if the disclosure is compelled by any of the following: (1) By a court pursuant to an order of that court.”

45 C.F.R. part 164.512(e)(1) provides in part:

“A covered entity may disclose protected health information in the course of any judicial . . . proceeding: (i) In response to an order of a court . . . , provided that the covered entity discloses only the protected health information expressly authorized by such order”

⁵ See Probate Code sections 1880 and 1890(c) (exclusive authority to make medical decisions for the conservatee), and 2356.5(f)(3) (dementia powers) and form GC-335A, an attachment to the capacity declaration used when dementia powers are requested. Dementia powers are the exclusive authority to consent to psychotropic dementia medications for the conservatee or the power to place the conservatee in a specialized restricted-egress facility for residents with dementia.

The capacity declaration must also be used to provide evidence of the proposed conservatee's physical condition at the same early point in the proceeding, in support of a request that the proposed conservatee be excused for medical reasons from attending the first court hearing in the case.⁶

The new forms are intended to enable petitioners in conservatorship proceedings to immediately request, and courts to promptly issue, orders that will authorize health-care providers to complete and sign capacity declarations in full compliance with the HIPAA regulations in time for the declarations to be used as they were intended, at the very earliest stage of the proceedings.⁷

The proposed *Ex Parte Order Re Completion of Capacity Declaration—HIPAA* (form GC-334) is designed to be attached to copies of the capacity declaration that the declarant named in the order is authorized to complete, sign, and return to the party or attorney named at the top of the form. A clerk's certification is provided on the second page so the order can easily be certified in a visible way if the proposed declarant requests or demands a certified copy of the order. The order advises the named declarant that the attached capacity declaration is to be completed, signed, and returned to the party or attorney within 15 days after the declarant receives it.

Item 2 of the *Ex Parte Application for Order Authorizing Completion of Capacity Declaration—HIPAA* (form GC-333) and item 6 of the order call for statement of the purposes for which the capacity declaration is to be used. The forms follow the local forms on which they are based, in that one of the purposes specified is to support the appointment of a conservator of the estate. The Judicial Council capacity declarations are not required by statute for this purpose. However, their use for this purpose is not

⁶ See Probate Code section 1825(b) and the first page of form GC-335.

⁷ An appointed conservator of the person of a health-care provider's patient would not need a court order to authorize the provider to disclose the patient's private medical information. The conservator would have authority to consent to disclosure of the information under state and federal law. See Civil Code sections 56.10(b)(7) and 56.11(c)(2), Health and Safety Code section 123105(e), and the federal regulations at 45 C.F.R. part 164.502(g)(1) and (2).

The Health and Safety Code provision defines a patient's representative as including his or her conservator of the person. Civil Code section 56.11(c)(2) authorizes an incompetent patient's "legal representative" to sign a written authorization to release the patient's medical information.

The federal regulation requires a "covered entity," a defined term that includes a health care provider, to treat the "personal representative" of a person as the person, for purposes of an authorization to release medical information about the person. A "personal representative" of an adult includes someone who has authority to make medical decisions for that person under applicable law. A conservator of the person has either shared authority with the conservatee or exclusive authority to make medical decisions for the conservatee (Prob. Code, §§ 2354 and 2355). (The HIPAA regulations do not require a patient's "personal representative" to have *exclusive* authority to make the patient's medical decisions in order to be empowered to consent to release of the patient's medical information.)

expressly prohibited by statute and may be impliedly authorized by Probate Code section 1821(a), which requires that supplemental information showing a proposed conservatee’s need for the appointment of a conservator of the estate must be provided to the court separately from the petition for the appointment in one or more declarations signed by persons with knowledge of the facts.⁸

Alternative Actions Considered

The advisory committee considered proposing an authorization order only, without an application, based on the two local forms identified in footnote 3. The advisory committee concluded, however, that an application form separate from the proposed authorization order should be developed if the order is to be provided to all courts.

Some courts now charge filing fees for probate ex parte applications. There is also a proposal now in development for legislation that would adopt uniform filing fees in all civil cases, including probate matters. The current draft of that proposal would charge a filing fee for an ex parte application in such matters. An application for ex parte relief that is or may become subject to a filing fee should be in writing to create a clear record in support of collection of that fee.

Comments From Interested Parties

Attached at pages 9–17 is a chart showing the comments received on these proposed forms and the advisory committee’s responses. Eleven comments were received. All commentators approved of the forms.

Five commentators recommended modifications. The executive director of the County Counsels’ Association of California would change the order to direct the medical expert declarant to complete and sign the capacity declaration rather than just authorize the declarant to do so. The advisory committee disagrees with that recommendation because it does not believe the court would have authority to make such an order to a person who is not before the court and is not a party to the proceeding.

Mr. Dean J. Zipser, representing the Orange County Bar Association, stated that the order goes too far in its advice to the declarant that the completed capacity declaration “must” be completed and returned to the requesting party within 15 days of its receipt by the declarant. The advisory committee disagrees with this comment.

⁸ Supplemental information about a proposed conservatee from laypersons is to be provided in Judicial Council form GC-312, *Confidential Supplemental Information*. (See rule 7.1050 of the California Rules of Court.) But there is no statute or rule that prohibits submission or consideration of a supplemental declaration from a medical expert concerning a conservatee’s mental capacity and the effect of that capacity on the need for the appointment of a conservator of the estate. Some courts authorize or require a capacity declaration when a conservatorship of the estate is sought. See rule 4.120G of the Superior Court of San Diego County Local Rules and rule 11A(5) of the Superior Court of Santa Clara County Local Rules.

This language is mandatory in form to encourage timely completion and delivery of the declaration but is intended merely to advise the declarant of the time deadlines implicit in the process. The order as a whole is an authorization, not a direction. The advisory committee does not believe that a declarant who fails to meet the time deadline could be sanctioned by the court for violating this part of the order any more than he or she could be punished for failing to complete the capacity declaration at all.⁹

Mr. Zipser would also expand the authorization order to cover all possible situations where medical testimony concerning a conservatee's mental capacity might be required in a conservatorship. The advisory committee disagrees with this recommendation because it believes that the authorization order should be limited to situations where the Judicial Council capacity declaration identified in the order is required by statute or permitted under local rules.

Ms. Sandra Riley, the supervising probate attorney of the Superior Court of Los Angeles County, would expand the scope of the authorization order to include situations where the capacity declaration is used after appointment of a conservator.¹⁰ The advisory committee disagrees with this comment. As noted in footnote 7, an authorization order should be unnecessary after a conservator's appointment; the conservator could consent to disclosure of the conservatee's private medical information without an order.

Implementation Requirements and Costs

These forms will incur the normal costs associated with the development and distribution of new Judicial Council forms. That cost, and the cost to parties and courts of presenting and hearing ex parte applications, should be outweighed significantly by the savings to parties and courts in continuance costs because medical declarants will be enabled and more willing to sign capacity declarations without concern about the HIPAA regulations and will do so in a more timely fashion, enabling hearings to proceed with fewer continuances.

⁹ See the advisory committee's response to the comment from the executive director of the County Counsels' Association of California, discussed immediately above and on page 9 of the attached comment chart.

¹⁰ A petition for exclusive authority to make medical decisions for a conservatee or a petition for dementia powers is not always combined with a petition for appointment of a conservator. Either petition may be filed at any time after the conservator's appointment. The capacity declaration, form GC-335, is required whenever a petition for exclusive authority to make medical decisions is filed, and that form plus the dementia attachment, form GC-335A, must be submitted whenever a petition for dementia powers is filed.

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): <hr/> <p style="text-align: center;">TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____</p> <p>E-MAIL ADDRESS (<i>Optional</i>): _____</p> <p>ATTORNEY FOR (<i>Name</i>): _____</p>	FOR COURT USE ONLY Draft 6 03/21/05 Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE OF (<i>Name</i>): _____ <p style="text-align: right;">PROPOSED CONSERVATEE</p>	CASE NUMBER: CONSERVATORSHIP PETITION HEARING DATE:
EX PARTE APPLICATION FOR ORDER AUTHORIZING COMPLETION OF CAPACITY DECLARATION—HIPAA * (Health Insurance Portability and Accountability Act of 1996)	DEPT.: _____ TIME: _____

1. Applicant (*name*):
 has filed a petition for the appointment of a conservator for the above-named proposed conservatee. The petition is set for hearing on (*date*): _____ at (*time*): _____ in Dept.: Rm.:
2. The petition requests (*check all that apply*):
 - a. A finding that the proposed conservatee should be excused from attending the hearing on the petition.
 - b. Exclusive authority to consent to medical treatment for the proposed conservatee.
 - c. Dementia powers.
 - d. Appointment of a conservator of the estate.
 - e. Other (*specify*): _____
3. Applicant has requested (*name each declarant*):

to complete, sign, and deliver to applicant for use to support the petition, a *Capacity Declaration—Conservatorship* (form GC-335) *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A) (the Declaration), concerning the medical condition or mental capacity of (*name of proposed conservatee*):

4. The proposed conservatee has not consented to the disclosure of any private medical information that would be disclosed by the completed Declaration.
5. Applicant requests this court to authorize each declarant named in item 3 to complete, sign, and deliver the Declaration to Applicant within 15 days of the declarant's receipt of the court's order.
6. Applicant requests this court to dispense with notice of hearing on this application.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ _____
 (TYPE OR PRINT APPLICANT'S NAME) (APPLICANT'S SIGNATURE)

* For use with *Ex Parte Order Re Completion of Capacity Declaration—HIPAA* (form GC-334).

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY Draft 7 03/07/05 Not approved by the Judicial Council	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER: CONSERVATORSHIP PETITION HEARING DATE:	
CONSERVATORSHIP OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE OF (<i>Name</i>): _____ PROPOSED CONSERVATEE	DEPT.: _____	TIME: _____
EX PARTE ORDER RE COMPLETION OF CAPACITY DECLARATION—HIPAA (Health Insurance Portability and Accountability Act of 1996)		

- Attached to this order is a *Capacity Declaration—Conservatorship* (form GC-335) and a *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A) (the Declaration).
- (*Name*): _____
has applied for an order authorizing the declarant named in item 5 to complete, sign, and return the Declaration for the purpose specified in item 6 and good cause appearing,

THE COURT FINDS

- Notice of the hearing on the application should be dispensed with and the application should be granted.
- A petition for the appointment of a conservator has been filed in this proceeding by (*name of petitioner*):

This petition is set for hearing on (*date*): _____ at (*time*): _____ in Dept.: Rm.:

- Declarant (*name each*):

_____ has been requested to complete and sign the Declaration for the purpose specified in item 6.

- Petitioner proposes to use the Declaration to provide evidence to support (*check all that apply*):
 - A finding that the proposed conservatee should be excused from attending the hearing on the petition.
 - A request for exclusive authority to consent to medical treatment for the proposed conservatee.
 - A request for dementia powers.
 - The appointment of a conservator of the estate.
 - Other (*specify*): _____

CONSERVATORSHIP OF (Name): _____	CASE NUMBER: _____
PROPOSED CONSERVATEE	

THE COURT ORDERS

- 7. Notice is dispensed with.
- 8. Each declarant named below is authorized to complete, sign, and deliver to the attorney or other person whose address appears at the top of page 1 of this order the original of the Declaration, consisting of:
 - a. *Capacity Declaration—Conservatorship* (form GC-335) (name each authorized declarant):

b. and *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A) (name authorized declarant):

regarding (name of proposed conservatee):

to enable the Court to determine whether the proposed conservatee should be excused from attending the hearing on the appointment of a conservator or the proposed conservator should be granted certain powers over the person or estate of the proposed conservatee.

- 9. Use of the Declaration is governed by the disclosure safeguards contained in the regulations of the federal Department of Health and Human Services (45 C.F.R. parts 160 and 164) under the Health Insurance Portability and Accountability Act of 1996 (Public Law No. 104-191 (August 21, 1996)), and no use other than what is permitted in those regulations is permitted by this order.
- 10. The completed and signed original of the Declaration must be returned to the attorney or other person whose address appears at the top of this order within 15 days after its receipt by the declarant authorized to complete and sign it.
- 11. Other orders (specify):

Date: _____

Judicial Officer

CERTIFICATION

I certify that this document and any attachments is a correct copy of the original on file in my office.

Date: _____

Clerk, by _____, Deputy

(SEAL)

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
1.	Ms. Grace Andres Program Manager Superior Court of Solano County 600 Union Avenue Fairfield, CA 94533	A	N	Agree with proposed changes.	No response necessary
2.	Ms. Jennifer B. Henning Executive Director County Counsels' Association of California 1100 K Street, Suite 101 Sacramento, CA 95814	AM	Y	Agree with proposed changes only if modified. The concern of our organization is that the HIPAA ex parte forms are inadequate. The fact that the court "authorizes" a doctor to make a declaration is not an order requiring such a response. If doctors are not ordered to make such a declaration, they may believe there is no legal obligation to do so, and that they would be in violation of HIPAA for providing only such information.	The advisory committee shares this commentator's concern that doctors may continue to decline to complete capacity declarations because of concern about the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or for other reasons. But the committee disagrees with the recommendation that the form should order the doctor to sign the declaration. The court's authority to order a doctor to sign such a declaration is questionable. The doctor is not before the court and is not a party to the proceeding when he or she is requested by the conservatorship petitioner to evaluate a proposed conservatee and complete the capacity declaration. The court order authorizing the doctor to complete and sign the capacity declaration fully complies with HIPAA and the regulations issued under it, and should remove most doctors'

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
					legitimate concerns about the effect of that law and those regulations as support for their reluctance to complete, sign, and return capacity declarations.
3.	<p>Mr. Brad Lovelace Partner Wingert Grebing Brubaker & Goodwin LLP 600 W. Broadway, Seventh Floor San Diego, CA 92101</p>	A	N	<p>Agree with proposed changes.</p> <p>Since the HIPAA regulations took effect, it has been increasingly difficult to get physicians to complete the capacity declaration. San Diego County has a similar ex parte procedure for getting a HIPAA order, which has been helpful.</p> <p>The proposed form order is good because it instructs the physician to complete and return the capacity declaration within 15 days.</p> <p>The only suggestions I have are that stronger language be used so that it is clear that the physician is under court order to fill out the capacity declaration and not merely authorized to do so. Although paragraph 8 of the order states that the physician must complete the form, it would be nice</p>	<p>Item 10 on page 2 of the order, form GC-334, states that the completed and signed capacity declaration “must” be returned to the attorney or the party identified in the order within 15 days. Item 10 is merely an instruction intended to advise the doctor and the party requesting the order of the time limitations inherent in the process. Item 10 is not an order directing the doctor to return the declaration within that time or at all.</p> <p>See the advisory committee’s response to the comment of the County Counsel’s Association of California, above.</p>

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
				to have more language emphasizing that completion of the declaration is mandatory and not merely authorized.	
4.	Ms. Sharon Ngim Staff Liaison to the Standing Committee on the Delivery of Legal Services The State Bar of California 180 Howard Street San Francisco, CA 94105	A	Y	We support the proposal to adopt forms GC-333 and GC-334.	No response necessary.
5.	Ms. Linda Paquette Law Office of Linda Paquette 847 S. Grand Avenue Pasadena, CA 91105	A	N	Agree with proposed changes.	No response necessary.
6.	Ms. Tina Rasnow Senior Attorney/Coordinator Superior Court of California, County of Ventura 800 S. Victoria Avenue Ventura, CA 93009	A	N	Agree with proposed changes.	No response necessary.
7.	Ms. Sandra Riley Supervising Probate Attorney Superior Court of Los	AM	N	Agree with proposed changes only if modified. The first paragraph of the proposed GC-333, Ex	The advisory committee disagrees with the

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
	Angeles County 111 North Hill Street Los Angeles, CA 90012			Parte Application for Order Authorizing Completion of Capacity Declaration—HIPPA, states that the applicant “has filed a petition for the appointment of a conservator...” Consideration should be given to expanding the form to allow for other circumstances when a Capacity Declaration is required. The necessity for a Capacity Declaration may also arise when, subsequent to the appointment of a conservator, determinations that the conservatee lacks medical capacity (Prob. Code, § 1890) or dementia powers (Prob. Code, § 2356.5) are sought. Proposed GC-333 may be useful when the physician is not cooperating with the conservator.	commentator’s recommendation that the form application be revised to permit an application for an order authorizing a doctor to complete and sign a capacity declaration after appointment of a conservator. Under the HIPAA regulations, an appointed conservator may consent to disclosure of the medical information contained in the capacity declaration. The authorizing order (form GC-334) would add nothing to the conservator’s authority to give this consent. The authorizing order may persuade a reluctant doctor, but is not a mandatory order that could compel him or her to act if not persuaded. A doctor who would not be persuaded by an appointed conservator’s written consent to disclosure of the conservatee’s medical information is likely to remain unpersuaded by an authorizing order.
8.	Mr. Kevin Samsel Senior Probation Officer, Court Investigator	A	N	Agree with proposed changes. Is there any need to consider including a disclaimer	The advisory committee does not believe

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
	Probation Department, County of Humboldt 333 "J" Street Eureka, CA 95501			that the medical information sought in the capacity declaration is intended to be made available by the petitioner to Court Investigators, as the courts rely on the investigation report to evaluate allegations?	there is any need to tell the doctor authorized to complete and sign the capacity declaration of who will see the medical information contained in it, and for what purpose. Moreover, there is no basis in law for advice to the doctor that access to the information would be limited to the court investigator, the court, or the parties to the conservatorship proceeding. The declaration is not a confidential document; it is filed in the regular court file that is available for inspection by the public. The doctor's testimony in open court consistent with the capacity declaration would be similarly available to the public.
9.	Mr. Gregory W. Winters Managing Attorney Legal Services Senior Advocacy Center of Nor. Cal., Inc. 1647 Hartnell Avenue, Ste. 6 Redding, CA 96002-2268	A	N	Agree with proposed changes. Makes general good sense (which may be a liability), given the gross misunderstanding of HIPAA prevalent in the medical community.	No response necessary.
10.	Mr. Dean J. Zipser President Orange County Bar Association	AM	Y	Agree with proposed changes only if modified. The Orange County Bar Association reviewed and supports the following changes to W05-08 as stated:	

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
	P.O. Box 17777 Irvine, CA 92623			<p>1. Proposed W05-08, new forms GC-333 and GC-334 agree with the form with the following suggestions.</p> <p>A. We suggest that box 2d on GC-333 and box 6d on GC-334 read, “The appointment of a conservator of the person or estate, or both.”</p>	<p>1 A. The advisory committee disagrees with this recommendation. The capacity declaration is neither expressly authorized nor required to be filed in support of a petition for the appointment of a conservator of the person that does not also request exclusive authority to make medical decisions for the conservatee or dementia powers under Probate Code sections 1880–1898, and 2356.5 (except for the limited purpose of establishing a proposed conservatee’s inability for medical reasons to attend the hearing on the petition for appointment of a conservator, a purpose that does not require a determination of the proposed conservatee’s mental capacity).</p> <p>On the other hand, some courts’ local rules require or authorize the filing and court consideration of a capacity declaration in support of the appointment of a conservator</p>

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
				<p>B. We suggest that a box 2e on GC-333 and box 6e on GC-334 be added to read, “A determination that the proposed conservatee is of unsound mind or lacks the capacity to make a decision or do certain acts.”</p>	<p>of the estate. The proposed forms include items identifying petitions for the appointment of a conservator of the estate so they could easily be used in these courts.</p> <p>B. The advisory committee disagrees with this recommendation. The proposed form order authorizes a medical declarant to complete and sign the Judicial Council capacity declarations, forms GC-335 and GC-335A. These declarations are expressly required by statute to support the petitions identified in items 2a–c of form GC-333 and items 6a–c of form GC-334, or are permitted by some local rules to be used to support the petition identified in items 2d and 6d. They are neither required nor authorized to be filed or considered by the court for any other purpose.</p> <p>The general statement recommended by the Orange County Bar Association refers to the Due Process in Competency Determinations Act (Prob. Code, § 810–813), which provides that a</p>

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
				<p>C. We suggest that box 2e on GC-333 and box 6e on GC-334 be re-numbered 2f and 6f.</p>	<p>judicial determination that a person is legally incapacitated from performing an act or making a decision must be based on a finding of a deficit in mental functions that is correlated with the act or decision in question. (See Prob. Code, §§ 810(c) and 811(a).) That general statement of law, even if applicable to petitions other than those identified above, would neither require nor authorize the use of the capacity declarations to support those other petitions.</p> <p>Regulations issued under HIPAA authorize an appointed conservator of the person to consent to the release of a conservatee’s private medical information. An appointed conservator could authorize a medical witness to testify about a conservatee’s mental functions or other medical condition in support of any of those other petitions, filed after the conservator’s appointment.</p> <p>C. This change would be unnecessary if the other recommended changes are not made.</p>

Comments for Proposal W05-08

Adopt Forms GC-333 and GC-334, *Ex Parte Application for Order Authorizing Completion of Capacity Declaration and Order, etc.*

	Commentator	Position	Comment on behalf of group?	Comment	Response of Probate and Mental Health Advisory Committee
				We have one additional concern about this proposed form – Item 10 of the order (GC-334) states that the health care provided “must” return the completed Capacity Declaration within 15 days. We question what authority a court has to make such an order.	The advisory committee agrees with the question raised by this comment. The quoted language is intended as an instruction, not an order. See the advisory committee’s responses to the comments of the County Counsel’s Association of California and Mr. Brad Lovelace, above.
11.	Ms. Nance Yomato Attorney 210 N. 4th Street, #101 San Jose, CA 95112	A	N	Agree with proposed changes.	No response necessary.