

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

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Report

TO: Members of the Judicial Council

FROM: Probate and Mental Health Advisory Committee
Hon. Don Edward Green, Chair
Douglas C. Miller, Committee Counsel,
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DATE: October 1, 2007

SUBJECT: Probate and Mental Health: Ex Parte Communications
in Proceedings Under the Probate Code and
Lanterman-Petris-Short Act Conservatorship Proceedings
(adopt rule 7.10 of the California Rules of Court) (Action Required)

Issue Statement

Proceedings under the Probate Code, particularly decedents' estates, conservatorships, and guardianships; and mental health conservatorships under the Lanterman-Petris-Short Act¹ often involve a number of persons interested in the proceedings and entitled to notice of events taking place in them. These persons include heirs and beneficiaries in decedents' estates or trust proceedings and close relatives of conservatees and wards in conservatorships and guardianships.

Most of these interested persons never formally appear in the proceedings by filing pleadings or prosecuting or defending litigation. Most are not represented by counsel. Nevertheless, their interest in the matter is often deep and continues over a long period of time, particularly their interest in the performance of court-supervised fiduciaries—personal representatives of decedents' estates, trustees, conservators, and guardians.

¹ Welfare and Institutions Code section 5000, et seq. The conservatorship provisions are found at section 5350, et seq. The Lanterman-Petris-Short Act is referred to in this report and in proposed rule 7.10 as the LPS Act; mental health conservatorships are referred to as LPS conservatorships.

Judicial officers and court staff responsible for court proceedings under the Probate Code often receive telephonic or written communications from persons interested in these proceedings outside the presence of other persons or parties. These communications often concern the performance of the fiduciaries appointed by the court and subject to its supervision. Courts have not had clear guidance on how to deal with these communications.

The Omnibus Conservatorship and Guardianship Reform Act of 2006² (Omnibus Act) has addressed this situation by adding section 1051 to the Probate Code and section 5372 to the Welfare and Institutions Code. These new provisions authorize the court to refer the communication to a court investigator or take other appropriate action in response to an ex parte communication received about a fiduciary's performance or about a person subject to a conservatorship or a guardianship. The new provisions task the Judicial Council with development of a rule of court by January 1, 2008 to implement the new statutory provisions.

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective January 1, 2008, adopt rule 7.10 of the California Rules of Court to provide guidance to the courts concerning ex parte communications they receive that are described in new sections 1051 and 5372.

The text of proposed rule 7.10 is attached at pages 6–9.

Rationale for Recommendation

Canon 3B7 of the California Code of Judicial Ethics provides in material part:

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

...

- (e) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so.

Section 1051(a) restates the canon's prohibition against ex parte communications between the court and a party or an attorney for a party. Subdivision (b) of the section, however, authorizes the court to refer ex parte communications

² Stats. 2006, ch. 490–493 (respectively, Senate Bill 1116, Senate Bill 1550, Senate Bill 1716, and Assembly Bill 1363). Probate Code section 1051 and Welfare and Institutions Code 5372 were added by section 2 and 5 of chapter 492 (SB 1716). Copies of sections 1051 and 5372 are attached to this report at page 9, following the text of proposed rule 7.10.

concerning a fiduciary, as defined in the Probate Code,³ or concerning persons subject to conservatorships or guardianships, to the court investigator, or take other appropriate action. The court must disclose the communication received to all parties and their attorneys, unless for good cause it determines that nondisclosure would protect a conservatee or ward. Welfare and Institutions Code section 5372 refers to section 1051 and applies it to LPS conservatorships.

Proposed rule 7.10(b)(1) would restate the prohibition against ex parte communications between parties or attorneys and the court expressed in section 1051(a).⁴ Rule 7.10(b)(2) would require judicial officers to treat ex parte communications described in rule 7.10(b)(1) in the same way as such communications received in other civil actions or in criminal matters, except as provided in paragraph (c)(1) of the rule, discussed below.

For purposes of the rule, a party is defined in rule 7.10(a)(4) as a fiduciary appointed in a proceeding under the Probate Code or an LPS conservatorship proceeding, or any other person who has filed a pleading concerning a “matter then pending in the court.” The latter phrase is in turn defined in rule 7.10(a)(10) to mean a request for relief or opposition in pleadings filed in the proceeding that has not yet been resolved by a decision of the court or an agreement of the parties.

A person under the rule may be anyone interested in the proceeding. He or she may be entitled to notice of events occurring in the case even though he or she does not formally appear in the case. A person becomes a party subject to the ban on ex parte communications under rule 7.10(b)(1) and section 1051(a) only when he or she does make an appearance in the case by filing a pleading seeking or opposing specific relief. The person remains a party under the rule only so long as the matter addressed by his or her pleading is still awaiting resolution.⁵

These provisions reflect a unique aspect of LPS conservatorships and three of the most common proceedings under the Probate Code that would be subject to the rule. Decedents’ estates, probate and LPS conservatorships, and guardianships

³ Section 39 of the Probate Code defines “fiduciary “ to mean personal representative of a decedent’s estate, trustee, conservator, guardian, attorney-in-fact under a power of attorney, custodian under the California Uniform Transfer to Minor’s Act, or any other legal representative subject to the Probate Code.

⁴ An ex parte communication is defined in rule 7.10(a)(6) as a communication between any party, attorney, or person in a proceeding under the Probate Code or an LPS conservatorship proceeding and the court outside the presence of all parties and attorneys, including written communications sent to the court without copies having been provided to other interested persons.

⁵ The fiduciary remains a party under the rule throughout his or her tenure in that capacity.

may be pending, in the sense that they are open, for years. However, there may be periods of time while they are open when no specific matters are pending for the court's decision. Moreover, even when specific matters are pending, not every person interested in the case as a whole is a party to those matters. One of these persons may make an ex parte communication to the court about a fiduciary or about a conservatee or ward that discloses important information about the fiduciary's administration or the condition of the conservatee or ward that requires or supports court action, but that would not come to the court's attention in any other way. Rule 7.10(c)(2) would expressly authorize courts to take action in response to this type of ex parte communication, including one or any combination of the actions listed in that paragraph.

The court's authorized actions concerning these ex parte communications would be subject to the limitations in rule 7.10(c)(3). That paragraph would require courts to disclose ex parte communications received and responses made by the court to the fiduciary and all other parties involved in any matters then pending in the proceeding unless the court finds good cause to dispense with disclosure to prevent harm to a conservatee or ward. This requirement and the good cause exception are expressly provided in section 1051. The rule would also require the court to make written findings supporting good cause for nondisclosure, and to preserve any communications received and responses made.

Paragraph (c)(1) of the rule would permit a judicial officer or court staff to receive an ex parte communication in an open proceeding under the Probate Code or in an open LPS conservatorship proceeding for the limited purpose of ascertaining whether it is a communication barred under rule 7.10(b)(1) or a communication concerning which court action is authorized under rule 7.10(c)(2).

Alternative Actions Considered

No alternatives to the rule mandated by Probate Code section 1051 were considered.

Comments From Interested Persons

This proposal was circulated for comment in a special cycle to a list of judicial officers and other court staff interested in probate matters and probate-interest sections of the State Bar and local bar associations, in addition to court executives, presiding judges, individuals, and organizations with a more generalized interest in the trial courts.

Eleven comments were received on this proposal. A chart containing the comments and the advisory committee's responses is attached beginning at page 10, following the text of rule 7.10, Probate Code section 1051, and Welfare and Institutions Code section 5372.

All comments received were favorable, or favorable if suggested modifications are made, except one, the comment from Mr. Joseph Chairez, President of the Orange County Bar Association. Mr. Chairez expresses disapproval of the proposal but gives neither reasons for his view nor recommendations for improving the proposal.

Judge F. Clark Sueyres, Jr., a member of this advisory committee, is concerned about the definition of a “party” under section 7.10(a)(4) of the rule, taken together with subdivision (b) of the rule, which applies the general rule against ex parte communications to attorneys and parties. The definition results in a situation in which the court cannot react to an ex parte communication from a person who at one time filed a pleading in an ongoing guardianship or conservatorship, even though the specific matter addressed by his or her pleading is long since resolved.

The committee agrees with this comment and notes that the ambiguity stems from the fact that the phrase “matter then pending in the court” was defined in two ways under the draft of rule 7.10(a)(10) that was circulated for comment. The first meaning referred to an unresolved request for relief in pleadings filed in the case. The second meaning referred to the entire estate, guardianship, or conservatorship proceeding pending in the court. The committee has modified the rule to refer to the second meaning as an “open proceeding” in revised rule 7.10(a)(11) and to use that term throughout the rule where that meaning is intended.

Implementation Requirements and Costs

Adoption of the proposed rule will result in the usual costs associated with the adoption of any new California Rule of Court. The committee anticipates more court proceedings, including an increased number of investigations and reports by court investigators, arising from the courts’ responses to ex parte communications from persons interested in probate proceedings, but the cost of the additional proceedings should not be significant.

To the extent that the new rule will enable courts to react to and take prompt action in response to ex parte communications that reveal problems in the proceedings subject to the rule, monetary loss and other kinds of harm to persons under the court’s protection should be reduced.

Rule 7.10 of the California Rules of Court is adopted, effective January 1, 2008, to read:

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2 **Rule 7.10. Ex parte communications in proceedings under the probate code**
3 **and certain other proceedings**

4
5 **(a) Definitions**

6
7 As used in this rule, the following terms have the meanings stated below:

- 8
9 (1) “Fiduciary” has the meaning specified in Probate Code section 39, and
10 includes LPS conservators.
11
12 (2) “Person” has the meaning specified in Probate Code section 56.
13
14 (3) “Pleading” has the meaning specified in rule 7.3, but also includes
15 petitions and objections or other opposition filed in LPS
16 conservatorships. The term does not include creditors’ claims and
17 requests for special notice.
18
19 (4) A “party” is a fiduciary appointed in a proceeding under the Probate
20 Code or an LPS conservatorship proceeding, and any other person who
21 has filed a pleading in the proceeding concerning a matter then pending
22 in the court.
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24 (5) A “ward” is a minor subject to a guardianship under Division 4 of the
25 Probate Code, including a proposed ward concerning whom a petition
26 for appointment of a guardian has been filed.
27
28 (6) “Ex parte communication” is a communication between any party,
29 attorney, or person in a proceeding under the Probate Code or an LPS
30 conservatorship proceeding and the court outside the presence of all
31 parties and attorneys, including written communications sent to the
32 court without copies having been provided to other interested persons.
33
34 (7) “LPS Act” is the Lanterman-Petris-Short Act, Part 1 of Division 5 of
35 the Welfare and Institutions Code, commencing with section 5000.
36
37 (8) “LPS Conservatorship” is a conservatorship proceeding under chapter 3
38 of the LPS Act, commencing with section 5350 of the Welfare and
39 Institutions Code, for persons gravely disabled as the result of a mental
40 disorder or impairment by chronic alcoholism.

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(9) A “conservatee” is a person subject to a conservatorship under division 4 of the Probate Code or chapter 3 of the LPS Act, including a proposed conservatee concerning whom a petition for appointment of a conservator has been filed.

(10) A “matter then pending in the court” in proceedings under the Probate Code or in an LPS conservatorship proceeding refers to a request for relief or opposition in pleadings filed in the proceeding that has not yet been resolved by a decision of the court or an agreement of the parties.

(11) Concerning a proceeding under the Probate Code or an LPS conservatorship proceeding, the term “open proceeding” refers to a proceeding that has been commenced and has not been concluded by the final discharge of all fiduciaries or otherwise terminated as provided by law, whether or not there is a matter then pending in the court in the proceeding at any point in time.

(b) Ex parte communications by parties and attorneys prohibited

(1) Except under a stipulation of all parties to the contrary, no ex parte communications may be made by a party or an attorney for a party and the court concerning a matter then pending in the court in proceedings under the Probate Code or in an LPS conservatorship proceeding.

(2) Except as provided in (c)(1), the court must treat an ex parte communication to the court described in (1) in the same way that an ex parte communication from a party or attorney for a party must be treated in other civil actions or proceedings or in criminal actions.

(c) Ex parte communications received and considered

(1) Notwithstanding (b)(2), a judicial officer or court staff may receive an ex parte communication concerning an open proceeding under the Probate Code or an open LPS conservatorship proceeding for the limited purpose of ascertaining whether it is a communication described in (b) or a communication described in (c)(2).

(2) Subject to the requirements of (c)(3), a judicial officer may consider an ex parte communication from a person about a fiduciary’s performance of his or her duties and responsibilities or regarding a conservatee or ward in an open proceeding under the Probate Code or an open LPS conservatorship proceeding. The court may decline to take further

1 action on the communication, with or without replying to the person or
2 returning any written communication received from the person. The
3 court may also take appropriate action, consistent with due process and
4 California law, including one or any combination of the following:

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6 (A) Review the court file and take any action that is supported by the
7 record, including ordering a status report or accounting if it
8 appears that a status report or accounting should have been filed
9 by a fiduciary but is delinquent.

10
11 (B) Refer the communication to a court investigator for further action,
12 and receive, consider, and respond to any report from the
13 investigator concerning it;

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15 (C) If the communication discloses possible criminal activity, refer
16 the matter to the appropriate law enforcement agency or
17 prosecutor's office;

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19 (D) If the communication discloses conduct that might subject a
20 person or organization to disciplinary action on a license, refer the
21 matter to the appropriate licensing agency;

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23 (E) If the communication discloses possible elder or dependent adult
24 abuse, or child abuse, refer the matter to appropriate state or local
25 governmental agencies, including adult protective or child
26 protective service departments; and

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28 (F) Set a hearing regarding the communication, compel the
29 fiduciary's attendance, and require a response from the fiduciary
30 concerning the issues raised by the communication.

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32 (3) The court must fully disclose communications described in (c)(2) and
33 any response made by the court to the fiduciary and all other parties to
34 any matter then pending in the court, and their attorneys, unless the
35 court finds good cause to dispense with the disclosure if necessary to
36 protect a conservatee or ward from harm. If the court dispenses with
37 disclosure to any party or attorney, it must make written findings in
38 support of its determination of good cause, and preserve the
39 communication received and any response made by the court. The court
40 may place its findings and the preserved communication under seal or
41 otherwise secure their confidentiality.

Probate Code section 1051 and Welfare and Institutions Code section 5372

Probate Code section 1051

- (a) In the absence of a stipulation to the contrary between parties who have filed pleadings in a proceeding under this code, there shall be no ex parte communications between any party, or attorney for the party, and the court concerning a subject raised in those pleadings, except as permitted or required by law.
- (b) Notwithstanding subdivision (a), in any case upon which the court has exercised its jurisdiction, the court may refer to the court investigator or take other appropriate action in response to an ex parte communication regarding either or both of the following: (1) a fiduciary, as defined in Section 39, about the fiduciary's performance of his or her duties and responsibilities, and (2) a person who is the subject of a conservatorship or guardianship proceeding under Division 4 (commencing with Section 1400). Any action by the court pursuant to this subdivision shall be consistent with due process and the requirements of this code. The court shall disclose the ex parte communication to all parties and counsel. The court may, for good cause, dispense with the disclosure if necessary to protect the ward or conservatee from harm.
- (c) The Judicial Council shall, on or before January 1, 2008, adopt a rule of court to implement this section.
- (d) Subdivisions (a) and (b) of this section shall become operative on January 1, 2008.

Welfare and Institutions Code section 5372

- (a) The provisions of Section 1051 of the Probate Code shall apply to conservatorships established pursuant to this chapter.
- (b) The Judicial Council shall, on or before January 1, 2008, adopt a rule of court to implement this section.
- (c) Subdivision (a) of this section shall become operative on January 1, 2008.

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**Probate and Mental Health: Ex Parte Communications in Proceedings Under the Probate Code and the Lanterman-Petris-Short Act
(adopt rule 7.10 of the California Rules of Court)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Mr. Joseph L. Chairez President Orange County Bar Association Irvine, California	N	Y	Do not agree with proposed changes.	No response is possible because no specific objections to the proposal were provided.
2.	Hon. Teresa Estrada-Mullaney Judge of the Superior Court of San Luis Obispo County San Luis Obispo, California [Member of the Supreme Court’s Advisory Committee on Judicial Ethics]	A	N	Agree with proposed rule. In my current civil assignment I have a probate calendar. I think proposed rule 7.10 is necessary to allow judges to follow the mandates of the new legislation which demands closer scrutiny by us in conservatorships. We need to have the freedom (for example) to request an investigation if an interested person sends us a letter expressing concerns on a case.	No response necessary.
3.	Ms. Alisa Knight, Court Attorney Superior Court of Kern County Bakersfield, California	AM	N	I am concerned that the proposed language will cause some uncertainty in application in that the two definitions ("party" and "person") are not apparently exclusive of one another. Your analysis indicates that a party's ex parte communications should be treated traditionally, while a non-party person's ex parte communications can be handled in one of the specific enumerated ways or disregarded. I would prefer that the proffered language reflect what is stated in your analysis (i.e., that the distinction between party and person be expressly stated).	The advisory committee believes the distinction between “parties” and “persons” in the proposed rule is reasonably clear. All parties are persons within the meaning of the latter term stated in Probate Code section 56, cited in the proposed rule. However, only those persons who are appointed fiduciaries or who have filed pleadings in a proceeding that have not yet been resolved are parties in that proceeding.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
4.	Ms. Jamie Lamborn Retired Sacramento, California	AM	N	Agree with proposed changes if modified. I suggest rotating the probate investigators to eliminate close relationships between investigators and the probate attorneys that seem to be in court on a daily basis. The ex parte is an easy way to take control of a person's assets and bank accounts. The judge has no way to verify the honesty of the attorney in front of him/her that has filed the request. Rotating the investigators might stop forced conservatorships by ex parte hearings.	The recommendation to rotate investigators is beyond the scope of this proposal.
5.	Ms. Keeley C. Luhnow Associate Attorney Albence & Associates La Jolla, California	AM	N	Agree with proposed changes if modified. I agree with this rule based on past experience, but I think 7.10(c) needs to be tightened up to make sure the Court shares the ex parte communication with all parties. I know it says "must" but with the overburdened infrastructure, I have concerns about that. Perhaps add a time requirement, so that it does not take so long for the communication to be shared that there is not time for it to be acted on by any other party.	The proposed rule's requirement that ex parte communications and any response by the court must be disclosed to the parties is mandatory. The committee believes the rule as drafted is sufficient on this point.
6.	Ms. Jackie A. Miller Executive Director Professional Fiduciary Association of California (PFAC) Sacramento, California	A	Y	Agree with proposed changes. PFAC supports the proposed rule. This may be a person's only access to the court and would help ensure that all interested parties have the opportunity to be heard.	No response necessary.
7.	Mr. Daniel M. Sibears	A	Y	Agree with proposed changes.	No response necessary.

**Probate and Mental Health: Ex Parte Communications in Proceedings Under the Probate Code and the Lanterman-Petris-Short Act
(adopt rule 7.10 of the California Rules of Court)**

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
	Senior Vice President and Deputy for Member Regulation, National Association of Securities Dealers, Washington, D.C.			<p>I am writing in reference to proposed rule 7.10, which the Judicial Council of California has proposed pursuant to the California Omnibus Conservatorship and Guardianship Reform Act of 2006.</p> <p>Specifically, as part of an effort to protect vulnerable persons from abuse by enhancing the courts' oversight of conservators and guardians, the proposed rule would allow courts to refer the matter to a licensing agency for disciplinary action on a license.</p> <p>One of NASD's primary concerns is the protection of investors, particularly senior investors, from securities fraud and other forms of financial abuse. NASD is a non-profit national securities association registered with the Securities and Exchange Commission (SEC). As the primary private-sector regulator of America's securities industry, we oversee the activities of nearly 5,100 brokerage firms, 173,000 branch offices and more than 665,000 registered securities representatives nationwide. Approximately 256,436 of the individual representatives subject to NASD oversight reside or are registered to do business in California. As part of that oversight, NASD licenses individuals and admits firms to the industry, writes rules to govern their behavior, examines them for regulatory compliance with those rules as well as the federal securities laws,</p>	

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>and disciplines those who fail to comply. When NASD receives information regarding alleged misconduct by a registered representative, we conduct an inquiry that will lead to an appropriate disposition that could include a disciplinary action and result in a fine, restitution, suspension, and permanent bar from the securities industry, or other sanction.</p> <p>NASD maintains two offices in California; one in San Francisco and the other in Los Angeles. In addition to performing examinations of NASD firms located in California, both offices investigate complaints about the California-based entities and individuals we regulate, which we receive from a variety of sources. I have included the contact information for the District Director of each office below, in the event that we can serve as a resource for the courts as they move forward in the implementation of proposed Rule 7.10.</p> <p>District 1—San Francisco Christian A. Zrull, Director One Montgomery Street, Suite 2100 San Francisco, CA 94104 415 217-1100</p> <p>District 2—Los Angeles David A. Greene, Director 300 South Grand Avenue, Suite 1600</p>	

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				Los Angeles, CA 90071-3126 213 229-2300	
8.	Mr. Peter S. Stern Vice-Chair State Bar Trusts and Estates Section Executive Committee Palo Alto, California	A	Y	Agree with proposed changes. The Executive Committee agrees with the proposed rule.	No response necessary.
9.	Hon. F. Clark Sueyres, Jr., Judge of the Superior Court of San Joaquin County Stockton, California	AM	N	Agree with proposed changes if modified. Rule 7.10(a)(4) includes in the definition of party anyone who has filed a petition. Subdivision (b) excludes parties from this new exception to the no ex parte communication rule. As proposed, this rule prevents a person who once filed a pro se petition from ever communicating directly with the court. Pro pers are precisely the class for whom this rule was designed and should not be excluded from this new exception.	The definition of a “party” in rule 7.10(a)(4) as a person who has filed a pleading concludes with the phrase “concerning a matter then pending in the court.” The purpose of this definition is to restore a former party’s status as a person under the rule once the matter concerning which his or her pleading was filed has been resolved. The definition of the term “matter then pending in the court” in subparagraph 7.10(a)(10)(B) of the rule as circulated for comment also included the entire probate or LPS proceeding. The committee has modified the rule to apply that definition to the term “open proceeding” in revised rule 7.10(a)(11) and to use the latter term when a reference to the entire

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					proceeding is intended rather than a specific portion of it.
10.	Superior Court of California County of Los Angeles Los Angeles, California	A	Y	Agree with proposed changes.	No response necessary.
11.	Mr. Stuart D. Zimring Attorney at Law North Hollywood, California	A	N	Agree with proposed changes.	No response necessary.