

**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. Marjorie Laird Carter, Chair
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DATE: November 4, 2008

SUBJECT: Probate Conservatorships: Authorization to Disclose a Conservatee's
or Proposed Conservatee's Protected Health Information to Court
Investigators (adopt form GC-336) (Action required)

Issue Statement

Recent legislation requires the Judicial Council to adopt, effective January 1, 2009, rules of court and Judicial Council forms necessary to implement a procedure to authorize, by court order, a proposed conservatee's health-care provider to disclose confidential medical information about the proposed conservatee to a court investigator.¹

Recommendation

In response to the legislative mandate, the Probate and Mental Health Advisory Committee recommends that the Judicial Council adopt, effective January 1, 2009, a new mandatory form, *Ex Parte Order Authorizing Disclosure of (Proposed) Conservatee's Health Information to Court Investigator—HIPAA* (form GC-336). To enable the council to meet the statutory deadline, the advisory committee recommends that the council adopt the form immediately without prior circulation for public comment and that the proposal be circulated for public comment after the effective date of its adoption.

A copy of the proposed form is attached.

¹ Stats. 2007, ch. 553 (Assem. Bill 1727), § 7, amending Probate Code section 1826 by adding a new subdivision (r).

Rationale for Recommendation

Probate Code section 1826(r),² a direct legislative response to a recommendation of the Judicial Council's Probate Conservatorship Task Force,³ provides as follows:

The Judicial Council shall, on or before January 1, 2009, adopt rules of court and Judicial Council forms as necessary to implement an expedited procedure to authorize, by court order, a proposed conservatee's health care provider to disclose confidential medical information about the proposed conservatee to a court investigator pursuant to federal medical information privacy regulations promulgated under the Health Insurance Portability and Accountability Act of 1996.⁴

Section 1826(r) refers to Judicial Council forms and rules of court "as necessary to implement an expedited procedure." The advisory committee presents a form order only. The committee does not believe a rule of court is necessary to authorize a court to make this order. Many courts currently issue blanket orders authorizing health-care providers to disclose to the courts' investigators health information protected under the HIPAA regulations. Investigators have advised that the medical community increasingly accepts and complies with these orders. However, the advisory committee believes that the proposed order would gain greater acceptance from medical service providers and record keepers than a blanket order issued in the style of a minute order.

The court would issue the proposed order in each conservatorship case. The proposed order would apply to all conservatorship investigations, including temporary conservatorship investigations under sections 2250.6 and 2253; initial investigations in general conservatorships under section 1826; review investigations under section 1850, including dementia-power review investigations under section 2356.5; and medical consent capacity

² All further references to statutes are to the Probate Code unless otherwise indicated.

³ Judicial Council of Cal., Probate Conservatorship Task Force, *Recommended Practices for Improving the Administration of Justice in Probate Conservatorship Cases* (2007), recommendation no. 4, p. 8, which reads in material part as follows:

The Judicial Council should adopt rules of court or forms as necessary to implement an expedited procedure authorizing the trial court to order the health-care provider to disclose such information to a court investigator under federal medical privacy regulations such as HIPAA.

⁴ The Health Insurance Portability and Accountability Act of 1996, referred to in this report as HIPAA, is Public Law 104-191. It is codified in volumes 18, 29, and 42 of the United States Code. Section 264 of the act, which authorizes the regulations concerning privacy of health information, is codified as a note to 42 U.S.C. § 1302d-2. The privacy regulations were published in final form on August 14, 2002 (67 Fed.Reg. 53182). They are found at 45 C.F.R. §§ 160 and 164.

investigations under section 1894. Although section 1826 concerns initial investigations, subdivision (r) is not expressly so limited.

As proposed, the order identifies by name each investigator authorized to access medical information. The proposed order also provides for certification and would be similar in appearance to the *Ex Parte Order re Completion of Capacity Declaration—HIPAA* (form GC-334), with which health-care professionals are already familiar. These features should reassure those responsible for preserving the confidentiality of medical information about conservatees and proposed conservatees that their patients' privacy rights under HIPAA are waived under proper authority and that they may safely disclose medical information to the investigator.

The proposed order, like section 1826(r) and the Probate Conservatorship Task Force recommendation on which the code provision is based, is limited in its application to medical information disclosure issues raised by the federal regulations issued under HIPAA. Those regulations expressly authorize "covered entities"—"health care providers," "health care plans," and "health care clearinghouses"—to disclose protected health-care information about a person in the course of a judicial proceeding in response to a court order.⁵

The proposed order does not address California medical confidentiality law. California law now clearly permits disclosure of medical information to a court investigator in a conservatorship proceeding. Civil Code section 56.10(c)(12), as amended by section 1.9 of Assembly Bill 1727, permits providers of health care and health care service plans, defined terms under section 56.05 that are analogous to health care providers and health care plans under HIPAA, to disclose to a probate court investigator in the course of any investigation required or authorized in a conservatorship proceeding, medical information relevant to a patient's condition and care and treatment provided. Disclosure under section 56.10(c)(12) does not require a court order.

The amendment of Civil Code section 56.10(c)(12) was an additional legislative response to the recommendation of the Probate Conservatorship Task Force noted above.⁶ The advisory committee believes that this clarification is sufficient to ensure investigators' access to conservatees' medical information under state law.

⁵ 45 C.F.R. § 164.512(e)(1)(i). See also, 45 C.F.R. § 160.103, for definitions of "covered entity," "health care," "health plan," "health care clearinghouse," and 45 C.F.R. § 164.501, definition of "protected health information."

⁶ See footnote 3. The first sentence of the task force's recommendation no. 4 reads as follows:

The Legislature should clarify state law concerning the authority of a health-care provider to disclose confidential medical information regarding a conservatee or proposed conservatee to a

Alternative Actions Considered

In response to a request from one of a number of court investigators to whom an earlier draft of the proposed order was sent with a request for recommendations, the advisory committee considered revising the draft to require a source of medical information about a proposed conservatee to disclose it to a court investigator under state law, Civil Code section 56.10(b)(1).⁷

The committee decided not to expand the order to refer to or apply Civil Code section 56.10(b)(1) at this time for three reasons. First, as noted above, the committee believes that section 56.10(c)(12), as amended by AB 1727, is sufficient to enable court investigators in the ordinary case to gain access under state law to confidential medical information about conservatees or proposed conservatees without a court order. Second, Civil Code section 56.10(b)(1) refers to an order that compels rather than merely authorizes disclosure of confidential medical information and is not limited to disclosures to court investigators in a conservatorship. An order under Civil Code section 56.10(b)(1) may in many cases require notice and a hearing, not the expedited procedure mentioned in the Probate Conservatorship Task Force recommendation and required by Probate Code section 1826(r). Third, section 1826(r) refers only to the federal regulations under HIPAA.

The advisory committee will invite postadoption comments on expansion of the proposed order to address Civil Code section 56.10(b)(1), comments that could result in a possible later effort to revise the order with sufficient time to consider the action and a full opportunity for all interested persons and organizations to comment.

Comments From Interested Parties

This proposal has not been circulated for public comment. The advisory committee did circulate earlier drafts of the form to investigators from a number of courts for their recommendations. Several suggestions were made by these commentators, leading to a number of improvements in the form.

court investigator in the course of the investigator's temporary conservatorship investigation or general conservatorship initial or review investigation.

⁷ Civil Code section 56.10(b)(1) requires health-care providers and health-care service plans to disclose medical information that is compelled by a court order. This provision was not added or changed by AB 1727.

The advisory committee believes that this proposal is not controversial. It recommends that the council adopt the proposed form in time to meet the statutory deadline, before circulation for public comment. The committee proposes to invite comment on the proposal in 2009, to ensure that all points of views are ultimately considered.

Implementation Requirements and Costs

The proposal would incur the costs associated with the development, adoption, and distribution of any Judicial Council form. Courts that currently use blanket disclosure orders would incur additional costs to prepare and issue these orders in individual cases, and possibly to certify copies of them, but greater acceptance of these orders by medical service providers and record keepers over time should offset these modest additional processing costs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	<i>FOR COURT USE ONLY</i> Draft 10 11/14/08 Not approved by the Judicial Council
CONSERVATORSHIP OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE OF (Name): (PROPOSED) CONSERVATEE	CASE NUMBER:
EX PARTE ORDER AUTHORIZING DISCLOSURE OF (PROPOSED) CONSERVATEE'S HEALTH INFORMATION TO COURT INVESTIGATOR—HIPAA (Health Insurance Portability and Accountability Act of 1996)	

THE COURT FINDS

1. A conservatorship proceeding under the Guardianship—Conservatorship Law (Parts 1–4 of Division 4 of the Probate Code, section 1400 et seq.) is pending in this court for the person named in the caption above as the (proposed) conservatee.
2. To perform the investigations required by law, the court investigator or investigators named in item 3 must have access to protected health information about the (proposed) conservatee named in the caption above.
3. The court investigators authorized to access the (proposed) conservatee's protected health information are *(name each authorized court investigator)*:

THE COURT ORDERS

4. Notice is dispensed with.
5. Each health-care provider, health plan, and health-care clearinghouse that has protected health-care information about the (proposed) conservatee named above is authorized to disclose the information to any court investigator named in item 3.
6. The protected health information must be used by the court investigator solely to discharge the investigator's responsibilities in this proceeding and is governed by the disclosure safeguards contained in the regulations of the federal Department of Health and Human Services (45 C.F.R. §§ 160 and 164) under the Health Insurance Portability and Accountability Act of 1996 (Pub.L. No. 104-191 (August 21, 1996)). No use of the protected health information other than that which is permitted in those regulations is permitted by this order.
7. Additional orders, the judicial officer's signature, and the date of this order are on the next page.

Date:

 Judicial Officer
(Clerk's certification is on the next page.)

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CONSERVATORSHIP OF <i>(Name)</i> : <hr/> (PROPOSED) CONSERVATEE	CASE NUMBER:
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8. Additional orders *(specify)*:

Date: _____

Judicial Officer

CERTIFICATION

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

Date: _____

Clerk, by _____, Deputy

