

Invitation to Comment

Title	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).
Summary	The proposed rule would define ex parte communications in proceedings under the Probate Code and conservatorship proceedings under the Lanterman-Petris-Short Act, and prescribe the courts' authorized responses to such communications in those proceedings.
Source	Probate and Mental Health Advisory Committee Hon. Don Edward Green, Chair
Staff	Douglas C. Miller, Attorney Committee Counsel Office of the General Counsel, Administrative Office of the Courts (415) 865-7535, douglas.miller@jud.ca.gov
Discussion	<p>Proceedings under the Probate Code, particularly decedents' estates, conservatorships, and guardianships; and mental health conservatorships under the Lanterman-Petris-Short Act¹ feature a significant 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.</p> <p>Most persons interested in these proceedings never formally appear in them by filing pleadings or prosecuting or defending litigation. Most are not represented by attorneys in the matters in which they are interested. Nevertheless, their interest is often deep and continues over a long period of time; particularly their interest in the performance of personal representatives of decedents' estates, trustees, conservators, and guardians.</p> <p>Judicial officers and court staff in proceedings under the Probate Code often receive telephonic or written communications from interested persons outside the presence of other persons or parties about matters pending in the court or about an open proceeding when no specific matter concerning it is pending. These communications often concern</p>

¹ Welfare and Institutions Code section 5350, et seq.

the performance of fiduciaries appointed by the court and subject to its supervision. Courts have not had clear guidance on how to deal with these communications under Canon 3B7 of the California Code of Judicial Ethics.

Canon 3B7 provides in material part that:

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.²

The Omnibus Conservatorship and Guardianship Act of 2006 has addressed this situation by adding section 1051 to the Probate Code and section 5372 to the Welfare and Institutions Code.³ Section 1051(b) authorizes the court to refer a communication to the court investigator or take other appropriate action in response to an ex parte communication concerning the performance by a fiduciary of his or her duties or a person subject to a conservatorship or guardianship. Section 1051(c) directs the Judicial Council to adopt a rule of court on or before January 1, 2008 to implement section 1051.

Welfare and Institutions Code section 5372 applies Probate Code section 1051 to Lanterman-Petris-Short Act (LPS) conservatorships, and directs the Judicial Council to adopt a rule to implement section 5372, also on or before January 1, 2008.

The Probate and Mental Health Advisory Committee proposes the adoption of rule 7.10 in response to the statutory directive.

² “Law” for purposes of Canon 3B7 denotes court rules as well as statutes, constitutional provisions, and decisional law. See the term “Law” in the Terminology section of the Code of Judicial Ethics.

³ Stats 2006, chapters 490–493 (respectively, SB 1116, SB 1550, SB 1716, and AB 1363), referred to as the Omnibus Act. 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.

Proposed rule 7.10(a)(4) would define a “party” for purposes of the rule as a fiduciary appointed in a proceeding under the Probate Code or in an LPS conservatorship and any other person who has filed a pleading concerning any matter then pending in the court. Rule 7.10(a)(3) would define a “pleading” by applying the definition of that term in existing rule 7.3.⁴ An “ex parte communication” would be 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 and the court outside the presence of all parties or attorneys, including written communications sent to the court without copies having been provided to other interested persons.

Rule 7.10(b) would provide that parties and attorneys in proceedings under the Probate Code or in LPS conservatorships remain subject to the same restrictions concerning ex parte communications as parties and attorneys in other civil actions or proceedings or in criminal actions.

However, rule 7.10(c) would authorize a judicial officer to receive and consider an ex parte communication from a person (but not a party as defined in the rule) about a matter then pending in the court. The court would be required to fully disclose the communication and any response made by the court to all parties and their attorneys, unless the court finds good cause to dispense with the disclosure if necessary to protect a conservatee or ward from harm. The court could decline to take further action on the communication or could take any appropriate action, including any combination of 6 actions listed in proposed rule 7.10(c).

The latter include reviewing the file and taking any action supported by the record, such as ordering a status report or an accounting shown to be late. Other possible actions include referring the matter to a court investigator and receiving and acting on the investigator’s report about the matter, referring the matter for a criminal investigation, and referring the matter to a licensing agency for disciplinary action on a license (including a fiduciary’s license under the new professional fiduciary licensure provisions of the Omnibus Act that will become

⁴ A contest, answer, petition, application, objection, response, statement of interest, report, or account filed in a proceeding under the Probate Code. This definition also applies to LPS conservatorships (Welf. & Inst. Code, § 5350).

effective on July 1, 2008).⁵

The text of rule 7.10, Probate Code section 1051, and Welfare and Institutions Code section 5372 is attached beginning at page 5.

Attachments

⁵ Omnibus Act, chapter 491, section 3, adding a new Chapter 6 to Division 3 of the Business and Professions Code, commencing with section 6500.

Rule Proposal

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

1
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 and any other person who has filed a
21 pleading in the proceeding concerning a matter then pending in the
22 court.
23
24 (5) A “ward” is a minor subject to a guardianship under Division 4 of the
25 Probate Code and includes a proposed ward concerning whom a
26 petition 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 and the court outside the presence of all parties and
31 attorneys, including written communications sent to the court without
32 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.

1 (8) “LPS Conservatorship” is a conservatorship under Chapter 3 of the
2 LPS Act, commencing with section 5350 of the Welfare and
3 Institutions Code for persons gravely disabled as the result of a mental
4 disorder or impairment by chronic alcoholism.

5
6 (9) A “conservatee” is a person subject to a conservatorship under Division
7 4 of the Probate Code or Chapter 3 of the LPS Act and includes a
8 proposed conservatee concerning whom a petition for appointment of a
9 conservator has been filed.

10
11 (10) A “matter then pending in the court” in proceedings under the Probate
12 Code or in an LPS conservatorship refers to either:

13
14 (A) A request for relief or opposition in pleadings filed in the
15 proceeding that has not yet been resolved by a decision of the
16 court or an agreement of the parties; or

17
18 (B) A guardianship, conservatorship, and decedent’s estate
19 proceeding administered under the Probate Code and an LPS
20 conservatorship at all times between the date the first petition for
21 appointment of a fiduciary is filed in the matter and the date the
22 court determines that the administration is completed (for
23 example, by final discharge of the fiduciary), whether or not there
24 is an unresolved request for relief pending at any particular time
25 between those dates.

26
27 **(b) Ex parte communications prohibited**

28
29 Parties and attorneys in proceedings under the Probate Code or in LPS
30 conservatorships are subject to the same restrictions concerning ex parte
31 communications as parties and attorneys in other civil actions or proceedings
32 or in criminal actions.

33
34 **(c) Ex parte communications received and considered**

35
36 Notwithstanding (b), a judicial officer may receive and consider an ex parte
37 communication from a person as to a matter then pending in the court under
38 the Probate Code or in an LPS conservatorship. The court must fully disclose
39 the communication and any response made by the court to all parties and
40 their attorneys, unless the court finds good cause to dispense with the
41 disclosure, if necessary to protect a conservatee or ward from harm. The
42 court may decline to take further action on the communication, with or
43 without replying to the person or returning any written communication

1 received from the person. The court may also take appropriate action,
2 consistent with due process and California law, which may include any one
3 or combination of the following:
4

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

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

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

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

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

27 (6) Set a hearing as to the communication, compel the fiduciary's
28 attendance, and require a response from the fiduciary as to the issues
29 raised by the communication.

Probate Code section 1051

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

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.

Item SP07-17 Response Form

Title: 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).

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **[respond using the Internet](#)** to:

Address: Ms. Camilla Kieliger,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102

Fax: (415) 865-7664 **Attention:** Camilla Kieliger

Internet: **<http://www.courtinfo.ca.gov/invitationstocomment/commentform.htm>**

DEADLINE FOR COMMENT: 5:00 p.m., Friday, July 13, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee.
All comments will become part of the public record of the council's action.*