

Invitation to Comment

Title	Fiduciaries as Parties in Civil Cases (adopt rule 7.15 of the California Rules of Court; revise Judicial Council forms MC-050, MC-051, and MC-053).
Summary	New rule 7.15 would clarify and amplify current decisional law on appearances by non-lawyer fiduciaries as parties in civil cases without attorneys, including proceedings under the Probate Code. The proposed revision of three forms used to substitute attorneys in civil cases would provide advice to fiduciaries as parties in these cases about legal representation consistent with current law and the proposed new rule of court.
Source	Probate and Mental Health Advisory Committee Hon. Marjorie Laird Carter, Chair
Staff	Douglas C. Miller, Senior Attorney 415.865.7535, douglas.miller@jud.ca.gov

Discussion The Probate and Mental Health Advisory Committee proposes the adoption of a new rule of court, rule 7.15, to clarify existing law concerning non-lawyer fiduciaries as parties in civil cases, including proceedings under the Probate Code. The proposal would also make changes in the advice given fiduciaries as parties in current Judicial Council forms used for substituting attorneys in these cases, by consent or by order of court on motion of the attorney.

Current law

California appellate decisions in recent years have concluded that non-lawyer fiduciaries may not appear without counsel on behalf of their trusts, decedents' estates, conservatorship or guardianship estates, or principals, in court proceedings the fiduciaries bring or defend against third persons, but may appear without counsel in certain proceedings under the Probate Code that are part of their fiduciary responsibilities. The following decisions are illustrative:

1. *City of Downey v. Willie Johnson* (1968) 263 Cal.App.2d 775 (non-lawyer conservator and executor could not represent either estate in the defense of a condemnation action that "is not an integral part of the proceedings within the jurisdiction of the probate court . . .").

2. *Drake v. Superior Court* (1994) 21 Cal.App.4th 1826 (non-lawyer attorney-in-fact cannot represent principals in family law protective proceeding and dissolution action);
3. *Ziegler v. Nickel* (1998) 64 Cal.App.545 (non-lawyer trustee cannot represent trust or its beneficiaries in lawsuit against seller of allegedly defective product);
4. *Hansen v. Hansen* (2003) 114 Cal.App.2nd 618 (“[A] conservator, executor, or personal representative of a decedent’s estate who is unlicensed to practice law cannot appear in propria persona on behalf of the estate in matters outside the probate proceedings . . .” (civil action for breach of contract, fraud, etc.); and
5. *Finkbeiner v. Gavid* (2006) 136 Cal.App.4th 1417 (non-lawyer successor trustee appointed by the court may petition that court for authority to modify and terminate the trust because the trustee is simply fulfilling his duties to the appointing court by filing the petition).

Although non-lawyer fiduciaries may not represent an estate or trust or its intended beneficiaries, a conservatee or ward, or any other persons with whom they have a fiduciary relationship in court actions prosecuted or defended against third persons, these fiduciaries may file petitions or opposition in many matters under the Probate Code in which they represent only themselves or discharge their duty to report to the court concerning their administration. Examples of the latter include petitions for appointment as fiduciaries, opposition to petitions for their removal or surcharge, petitions for orders authorizing or approving their actions, reports to the court concerning their performance of fiduciary duties, accountings, and petitions for orders authorizing their compensation.

The consequences to the fiduciary, the person or persons the fiduciary represents, the fiduciary’s litigation opponents, and to the courts, caused by a non-lawyer fiduciary’s election to participate in litigation without counsel can be severe. Three of the cases cited above are illustrative.

In *City of Downey v. Willie Johnson*, the non-lawyer fiduciary, first the conservator and later the executor of one of the owners of a parcel of the condemned property, participated without counsel in pretrial matters and a valuation jury trial on behalf of the conservatee/decedent. He then filed a Notice of Appeal and attempted to prosecute an appeal from the condemnation judgment. The Court of Appeal allowed the Notice of Appeal to stand, but struck all other papers filed by the fiduciary and determined the condemnation judgment to be a nullity, “despite the

attendant loss of the efforts and time of the trial courts and their attaches . . .” (See 263 Cal.App.2d at 782–783).

In *Ziegler v. Nickel*, the self-represented trustee’s action on behalf of the trust against the sellers of a mobilehome was dismissed after a demurrer was sustained with leave to amend and no amendment was made within the time allowed. This disposition was not related to the legal issue discussed on the appeal—the trial court’s contemporaneous order requiring the trustee to withdraw as attorney for the trust—but the trustee’s preoccupation with his appeal of that order and lack of legal training concerning the demurrer and its aftermath effectively doomed the trust’s claim against the sellers. Resolution of the matter, including the appeal, took more than two years. (See 64 Cal.App. 4th at 547, 549.)

Hansen v. Hansen was an action by an unrepresented personal representative of a decedent’s estate for breach of contract, fraud, and breach of fiduciary duty allegedly committed against the decedent. After several earlier demurrers, the trial court finally sustained a demurrer to the personal representative’s second amended complaint without leave to amend for failure to state a claim and because the causes of action were time-barred. The personal representative appealed from the order of dismissal.

The Court of Appeal reversed the judgment of dismissal as invalid because of the personal representative’s appearance in the case without counsel. The court concluded that the trial court should have stricken the self-represented fiduciary’s complaint, and directed that it be stricken without prejudice on remand despite the fact that the defendant had never objected, in the trial court or on appeal, to the personal representative’s appearance in the case without counsel. The litigation took more than two years to complete, without final resolution. (See 114 Cal.App.4th at 620, 622–623.)

Rule 7.15

The proposed rule would first address court proceedings in which a non-corporate¹ fiduciary who is not an attorney may represent himself or herself. Subdivision (b) of the rule would permit the fiduciary to appear

¹ A corporation, including a corporate fiduciary, must be represented in a court proceeding by a natural person. Except in the small claims court, that person must be an attorney. (*Merco Construction Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 730, 733; see Code Civ. Proc., §§ 116.530, 116.540(b).) The proposed rule is not intended to change the law concerning appearances in court proceedings by corporations.

as a party without an attorney in any proceeding under the Probate Code in which the fiduciary seeks only to fulfill a fiduciary duty and not to seek relief from, or defend against a claim by, a third party, on behalf of the estate, trust, or person for which or for whom the fiduciary acts.

Subdivision (c) would require a fiduciary to be represented by an attorney in any other civil case,² including proceedings under section 850 of the Probate Code.³

Rule 7.15(a)(2) applies the Probate Code definition of a fiduciary. Section 39 of that code defines the term to mean a:

[P]ersonal representative [of a decedent’s estate],⁴ trustee, guardian, conservator, attorney in fact under a power of attorney, custodian under the California Uniform Transfer to Minors Act . . . or other legal representative subject to [the Probate Code] . . .”

The rule would modify the statutory definition by limiting it to persons who are parties in civil cases in their fiduciary capacities, to ensure that the rule does not apply to fiduciaries who are also parties in civil cases as individuals, unrelated to their fiduciary responsibilities.

The advisory committee submitted a draft of this proposed rule to representatives of the California State Bar. The State Bar’s Professional Competence unit responded, in the form of a memorandum from its director to the State Bar’s Legislative Counsel, forwarded to the committee. The director’s memorandum expressed concern that the proposed rule addresses the unauthorized practice of law by fiduciaries

² The term “civil case” as used in the rule is defined in rule 1.6 of the California Rules of Court. (See rule 7.15(a)(1).) A case is an action or proceeding; a civil case includes all cases except criminal matters and petitions for habeas corpus, and means an action or proceeding prosecuted by one party against another for the declaration, enforcement, or protection of a right or the redress of a wrong, including probate, guardianship, and conservatorship proceedings. (See rule 1.6(2)–(4); see also, Code Civil Proc., §§ 22, 23.)

³ See Probate Code sections 850–859. Section 850 proceedings are proceedings under the Probate Code and are filed and determined in the probate department of the court, but they determine entitlement to property between certain fiduciaries (personal representatives, guardians, conservators, and trustees) and claimants against the estate or trust or those claiming through it. They are, in essence, civil actions by or against fiduciaries against or by persons outside of the fiduciary relationship to determine rights in real or personal property.

⁴ See Probate Code section 58.

only in court proceedings but does not contain a provision indicating that non-attorney fiduciaries remain subject to all other prohibitions of the unauthorized practice of law. The director stated that this omission could be interpreted by some as an indication that there are no such prohibitions.

The advisory committee believes that a rule of court appropriately addresses court administrative practice and procedure, including the governance of court proceedings. The rule's failure to address conduct outside of those proceedings is not intended to suggest that such conduct could not also be the unauthorized practice of law. However, the committee desires comment on whether an advisory committee comment to this effect should be added to the rule to clarify the committee's intention.

Substitutions of attorney

Forms used to substitute attorneys in civil matters, by consent (*Substitution of Attorney Without Court Order—Civil* (form MC-050)) or on motion of the attorney under rule 3.1362 and Code of Civil Procedure section 284(2) (*Notice of Motion and Motion to be Relieved as Counsel—Civil* (form MC-051), and *Order Granting Attorney's Motion to be Relieved as Counsel—Civil* (form MC-053)), contain advice to parties who may become self-represented if the substitution is signed and filed or if the motion is granted. The parties to whom advice is given include guardians, conservators, trustees, personal representatives, and "probate fiduciaries." The advice given to these parties is that in most cases they may not act as their own attorney, and that they should seek legal advice.

The advisory committee proposes the following changes to these forms:

1. The term "probate fiduciary" would be deleted as redundant and replaced by "attorney-in-fact."

An attorney-in-fact is a fiduciary under section 39 of the Probate Code. See also, section 4600 et seq. of that code. He or she is subject to the same restrictions on appearances in civil cases without counsel as other fiduciaries.⁵ A "probate fiduciary" is not defined in these forms. It is unclear who is referred to by this term, as the most significant fiduciaries under the Probate Code, personal representatives, trustees, guardians, and conservators, are separately mentioned.

⁵ See *Drake v. Superior Court* (1994) 21 Cal.App.4th 1826, noted above at page 1.

2. The advice given to fiduciaries would be separated from that given to guardians ad litem, corporations, and unincorporated associations, and modified to conform to the provisions of the proposed new rule of court.

The advice to fiduciaries would read:

“[Y]ou may act as your own attorney in most matters governed by the Probate Code, but you may NOT proceed without an attorney in most other court matters, including some matters governed by that code. See rule 7.15 of the California Rules of Court.”

3. The headings in the text boxes containing advice to parties whose right to represent themselves is limited would be changed.

The heading of the text box on page 1 of form MC-050 would be changed from “NOTICE TO PARTIES APPLYING TO REPRESENT THEMSELVES” to “NOTICE TO CERTAIN PARTIES INTENDING TO REPRESENT THEMSELVES.”

A Substitution of Attorney is not an application by a party for leave to represent himself or herself.

The headings of the text boxes on page 2 of forms MC-051 and MC-053 would be changed from “NOTICE TO CLIENT” to “NOTICE TO CERTAIN CLIENTS CONCERNING LEGAL REPRESENTATION.”

This change should highlight the special advice given to clients or former clients whose right to represent themselves is limited. Other text boxes contain general advice concerning self-representation to clients or former clients whose right to represent themselves is not so limited.

The text of rule 7.15 and copies of revised forms MC-050, MC-051, and MC-053 follow this Invitation to Comment.

Rule Proposal

Rules 7.15, in title 7 of the California Rules of Court, would be adopted, effective January 1, 2010, to read:

Chapter 1 General Provisions

Rule 7.15. Appearances by fiduciaries in civil cases

(a) Definitions

As used in this rule:

- (1) “Civil case” has the meaning provided in rule 1.6(3) of these rules.
- (2) “Fiduciary” means a person defined in Probate Code section 39 who is a party in a civil case in his or her fiduciary capacity.

(b) Appearances without legal representation

A fiduciary, other than a corporate fiduciary, may appear as a party without an attorney in any proceeding under the Probate Code in which the fiduciary seeks to fulfill a fiduciary duty and neither seeks relief from nor defends against a claim by a third party, on behalf of an estate, trust, conservatee, ward, principal, minor, or any other person of whom the fiduciary is a legal representative.

(c) Appearances with legal representation

Except as provided in (b), a fiduciary who is not an attorney must be represented by an attorney in any civil case, including a proceeding under section 850 of the Probate Code.

CASE NAME: _____	CASE NUMBER:
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**PROOF OF SERVICE BY MAIL
Substitution of Attorney—Civil**

Instructions: After having all parties served by mail with the Substitution of Attorney—Civil, have the person who mailed the document complete this Proof of Service by Mail. An **unsigned** copy of the Proof of Service by Mail should be completed and served with the document. Give the Substitution of Attorney—Civil and the completed Proof of Service by Mail to the clerk for filing. If you are representing yourself, someone else must mail these papers and sign the Proof of Service by Mail.

1. I am over the age of 18 and **not a party to this cause**. I am a resident of or employed in the county where the mailing occurred. My residence or business address is (*specify*):

2. I served the Substitution of Attorney—Civil by enclosing a true copy in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid.

(1) Date of mailing: _____ (2) Place of mailing (*city and state*): _____

3. 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 NAME) (SIGNATURE)

NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED

4. a. Name of person served:
b. Address (*number, street, city, state, and ZIP*):

c. Name of person served:
d. Address (*number, street, city, state, and ZIP*):

e. Name of person served:
f. Address (*number, street, city, state, and ZIP*):

g. Name of person served:
h. Address (*number, street, city, state, and ZIP*):

i. Name of person served:
j. Address (*number, street, city, state, and ZIP*):

k. Name of person served:
l. Address (*number, street, city, state, and ZIP*):

List of names and addresses continued in attachment.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____	FOR COURT USE ONLY <p style="text-align: center;">Draft 3 April 17, 2009</p> <p style="text-align: center;">Not Approved by the Judicial Council</p>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
NOTICE OF MOTION AND MOTION TO BE RELIEVED AS COUNSEL—CIVIL	HEARING DATE: DEPT.: _____ TIME: _____ BEFORE HON.: _____ DATE ACTION FILED: TRIAL DATE:

TO (name and address of client):

- PLEASE TAKE NOTICE that (name of withdrawing attorney) moves under California Code of Civil Procedure section 284(2) and California Rules of Court, rule 3.1362, for an order permitting the attorney to be relieved as attorney of record in this action or proceeding.
- A hearing on this motion to be relieved as counsel will be held as follows:

a.	Date:	Time:	Dept.:	Room:
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b. The address of the court: same as noted above other (specify):

- This motion is supported by the accompanying declaration, the papers and records filed in this action or proceeding, and the following additional documents or evidence (specify):

(A memorandum of points and authorities is not required. Cal. Rules of Court, rule 3.1362.)

- The client presently represented by the attorney is

a. <input type="checkbox"/> an individual.	g. <input type="checkbox"/> a trustee.
b. <input type="checkbox"/> a corporation.	h. <input type="checkbox"/> a personal representative of a decedent's estate.
c. <input type="checkbox"/> a partnership.	i. <input type="checkbox"/> an attorney in fact acting for a principal.
d. <input type="checkbox"/> an unincorporated association.	j. <input type="checkbox"/> a guardian ad litem.
e. <input type="checkbox"/> a guardian of a minor.	k. <input type="checkbox"/> other (specify):
f. <input type="checkbox"/> a conservator.	

(Continued on reverse)

CASE NAME: _____	CASE NUMBER: _____
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NOTICE TO CERTAIN CLIENTS CONCERNING LEGAL REPRESENTATION

If this motion to be relieved as counsel is granted, your present attorney will no longer be representing you. If you are one of the parties listed below, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking your pleadings or to the entry of a default judgment against you.

- If you are a **guardian ad litem**, a **corporation**, or an **unincorporated association**, you may NOT act as your own attorney in most cases.
- If you are an **attorney-in-fact**, a **guardian** of a minor, a **conservator**, a **personal representative** of a decedent's estate (**executor** or **administrator**), or a **trustee**, you may act as your own attorney in most matters governed by the Probate Code, but you may NOT proceed without an attorney in most other court matters, including some matters governed by that code. See rule 7.15 of the California Rules of Court.

5. If this motion is granted and a client is representing himself or herself, the client will be solely responsible for the case.

NOTICE TO CLIENTS WHO WILL BE UNREPRESENTED BY AN ATTORNEY

If this motion to be relieved as counsel is granted, you will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

6. If this motion is granted, the client must keep the court informed of the client's current address.

NOTICE TO CLIENTS WHO WILL BE UNREPRESENTED BY AN ATTORNEY

If this motion to be relieved as counsel is granted, the court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in the loss of your case.

Date:

(TYPE OR PRINT NAME OF ATTORNEY)



(SIGNATURE OF ATTORNEY)

Attorney for (name):

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): <hr/> TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY Draft 3 April 17, 2009 Not Approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL—CIVIL	HEARING DATE: DEPT.: _____ TIME: _____ BEFORE HON.: _____ DATE ACTION FILED: TRIAL DATE: _____

1. The motion of (*name of attorney*):
to be relieved as counsel of record for (*name of client*):
a party to this action or proceeding, came on regularly for hearing at the date, time, and place indicated above.
2. The following persons were present at the hearing:

FINDINGS

3. Attorney has
 - a. personally served the client with papers in support of this motion.
 - b. served client by mail and submitted a declaration establishing that the service requirements of California Rules of Court, rule 3.1362, have been satisfied.
4. Attorney has shown sufficient reasons why the motion to be relieved as counsel should be granted and why the attorney has brought a motion under Code of Civil Procedure section 284(2) instead of filing a consent under section 284(1).

ORDER

5. Attorney is relieved as counsel of record for client
 - a. effective upon the filing of the proof of service of this signed order upon the client.
 - b. effective on (*specify date*):
6. The client's current last known address and telephone number:

If the client's current address is known, service on the client must hereafter be made at that address unless otherwise ordered in item 13. If the current address is not known, service must be made according to Code of Civil Procedure section 1011 (b) and rule 3.252 of the California Rules of Court.

7. a. The next scheduled hearing in this action or proceeding is set for (*date, time, and place*):

- b. The hearing will concern (*subject matter*):

NOTICE TO CLIENT
You or your new attorney, if any, must prepare for and attend this hearing.

CASE NAME: 	CASE NUMBER:
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8. The following additional hearings and other proceedings (including discovery matters) are set in this action (*describe the date, time, place, and subject matter of each*):
9. The trial in this action or proceeding:
- a. is not yet set.
- b. is set for (*specify date, time, and place*):
10. Client is hereby notified of the following effects this order may have upon certain parties.

NOTICE TO CERTAIN CLIENTS CONCERNING LEGAL REPRESENTATION

This motion to be relieved as counsel has been granted. Your attorney no longer represents you. If you are one of the parties listed below, YOU SHOULD IMMEDIATELY SEEK LEGAL ADVICE REGARDING LEGAL REPRESENTATION. Failure to retain an attorney may lead to an order striking your pleadings or to the entry of a default judgment against you.

- If you are a **guardian ad litem**, a **corporation**, or an **unincorporated association**, you may NOT act as your own attorney in most cases.
- If you are an **attorney-in-fact**, a **guardian** of a minor, a **conservator**, a **personal representative** of a decedent's estate (**executor** or **administrator**), or a **trustee**, you may act as your own attorney in most matters governed by the Probate Code, but you may NOT proceed without an attorney in most other court matters, including some matters governed by that code. See rule 7.15 of the California Rules of Court.

11. Client is notified that, if the client will be representing himself or herself, the client shall be solely responsible for the case.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED BY AN ATTORNEY

You will not have an attorney representing you. You may wish to seek legal assistance. If you do not have a new attorney to represent you in this action or proceeding, and you are legally permitted to do so, you will be representing yourself. It will be your responsibility to comply with all court rules and applicable laws. If you fail to do so, or fail to appear at hearings, action may be taken against you. You may lose your case.

12. Client is notified that it is the client's duty to keep the court informed at all times of the client's current address.

NOTICE TO CLIENT WHO WILL BE UNREPRESENTED BY AN ATTORNEY

The court needs to know how to contact you. If you do not keep the court and other parties informed of your current address and telephone number, they will not be able to send you notices of actions that may affect you, including actions that may adversely affect your interests or result in your losing the case.

13. The court makes the following additional orders (*specify*):

Date:

JUDICIAL OFFICER

Item SP09-03 Response Form

Title: Fiduciaries as Parties in Civil Cases (adopt rule 7.15 of the California Rules of Court; revise Judicial Council forms MC-050, MC-051, and MC-053).

- 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: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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

Email: invitations@jud.ca.gov

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

Fax: (415) 865-7664, Attn: Camilla Kieliger

DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 26, 2009

***Circulation for comment does not imply endorsement by the Judicial Council.
All comments will become part of the public record of the proposal.***