

INVITATION TO COMMENT

Title	Probate Conservatorships: Authorization to Disclose a Conservatee’s or Proposed Conservatee’s Protected Health Information to Court Investigators (adopt form GC-336).
Summary	The new form is a court order that authorizes medical service providers and record keepers subject to federal medical information privacy law and regulations to provide confidential medical information about conservatees or proposed conservatees to court investigators in conservatorship proceedings.
Source	Probate and Mental Health Advisory Committee Hon. Marjorie Laird Carter, Chair
Staff	Douglas C. Miller 415-865-7535 douglas.miller@jud.ca.gov
Discussion	<p>Recent legislation requires the Judicial Council, effective January 1, 2009, 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</p> <p>In response to the statutory directive, the Probate and Mental Health Advisory Committee proposed and the Judicial Council adopted a new mandatory form, <i>Ex Parte Order Authorizing Disclosure of (Proposed) Conservatee’s Health Information to Court Investigator—HIPAA</i> (form GC-336), effective January 1, 2009. In order to meet the statutory deadline, the form was adopted by the Judicial Council on December 9, 2008, without prior circulation for public comment.</p> <p>The advisory committee invites post-adoption public comment at this time. Comments that recommend changes in the form will be considered by the advisory committee as recommendations for its future revision.</p>

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

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

The advisory committee proposed and the council adopted 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 have issued 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 form order will 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 order in each conservatorship case. The order would apply to all conservatorship investigations. Although section 1826 concerns initial investigations, subdivision (r) is not expressly so limited.

² All further references to codes 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 invitation to comment 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.

The form requires each investigator authorized by the order to access medical information to be identified by name. It 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 an investigator identified in the order.

The 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. It 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.⁵ The advisory committee believes that this clarification is sufficient to ensure investigators' access to conservatees' medical information under state law.

Also relevant is Civil Code section 56.10(b)(1), which requires health-

⁵ 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 court investigator in the course of the investigator's temporary conservatorship investigation or general conservatorship initial or review investigation.

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 does not propose expanding the form 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, 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 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 desires comments on whether the order should be revised to provide for required disclosures of medical information to court investigators under Civil Code section 56.10(b)(1), and if so, what effect this change would or should have on the expedited ex parte procedure for issuance of the order contemplated by this form.

A copy of form GC-336, adopted effective January 1, 2009, is attached to this Invitation to Comment on pages 5–6.

Attachment

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): <div style="text-align: right;">(PROPOSED) CONSERVATEE</div>	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: _____

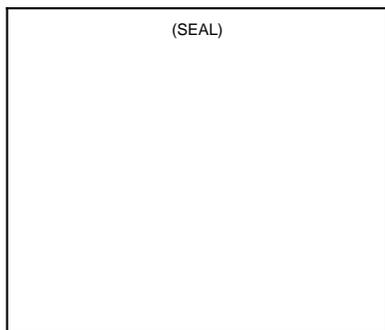
Judicial Officer

CERTIFICATION

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

Date: _____

Clerk, by _____, Deputy



Item W09-03 Response Form

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

- 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 written on this form, prepared in a letter format, or submitted online. 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.

Internet: 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., Wednesday, January 21, 2009

*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.*