

Item W05-08 Response Form

Title: Ex parte application and order authorizing testimony in conservatorship proceedings by medical professionals subject to patient privacy regulations under the Health Insurance Portability and Accountability Act of 1996 (**adopt forms GC-333 and GC-334**)

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

Comments: _____

Name: _____ Title: _____

Organization: _____

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Romunda Price,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 **Attention:** Romunda Price
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 P.M Friday, February 4, 2005
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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.

<i>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.</i>
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Title	Ex parte application and order authorizing testimony in conservatorship proceedings by medical professionals subject to patient privacy regulations under the Health Insurance Portability and Accountability Act of 1996 (adopt forms GC-333 and GC-334)
Summary	This proposal is for the adoption of a form ex parte application and a form order authorizing a medical expert declarant to complete, sign, and deliver a capacity declaration concerning a proposed conservatee, for use to support certain allegations in a petition filed at the commencement of a conservatorship proceeding.
Source	Probate and Mental Health Advisory Committee Hon. Don E. Green, Chair
Staff	Douglas C. Miller Attorney Office of the General Counsel counsel to the advisory committee (415) 865-7535, (415) 865-7664 (Fax) douglas.miller@jud.ca.gov
Discussion	Regulations issued by the U. S. Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) ¹ affect the use and disclosure of a person’s individual health information. These regulations impact the ability of a medical expert to provide evidence of a (proposed) conservatee-patient’s mental or physical condition for purposes of determining whether a conservator should be granted exclusive authority to consent to medical treatment for the conservatee or extraordinary “dementia powers,” ² or whether the proposed conservatee should be excused from attending the hearing on the petition for appointment of a conservator because of medical inability.

¹ HIPAA is Public Law 104-191 (August 21, 1996). The regulations were adopted in 2000, amended in 2002, and became effective as to most health care providers and health insurance plans on April 14, 2003. (See 65 FR 82802, December 28, 2000; 67 FR 53270, August 14, 2002.) The regulations are reported at 45 CFR parts 160 and 164.

² “Dementia powers” are powers to place a conservatee in a restricted-egress facility suitable for patients suffering from dementia and to consent to the administration of psychotropic medications appropriate for the treatment of such patients. See Probate Code section 2356.5.

The regulations permit a patient or a patient's conservator to authorize disclosure of the patient's protected medical information.³ In many cases, however, a petitioning proposed conservator also requests exclusive authority to consent to the proposed conservatee's medical treatment or dementia powers, or must present medical evidence of the patient's inability to attend the appointment hearing. The patient may be unwilling or unable to consent to disclosure of the medical information necessary to support these requests. In this situation, medical evidence, consisting of Judicial Council form capacity declarations, forms GC-335 and GC-335A, must be completed by medical professionals subject to the regulations and filed with the court before a conservator is appointed.

The regulations permit a health care provider to disclose protected medical information about a patient when a court orders or authorizes the disclosure. The information disclosed is limited to that specifically authorized by the order.⁴

The proposed new form GC-333 is an application for an order, and form GC-334 is an order, intended to satisfy this provision of the regulations. The application would request the court to authorize specified medical expert declarants to complete, sign, and deliver to the applicant within fifteen days, one or both Judicial Council form capacity declarations, form GC-335, *Capacity Declaration—Conservatorship*, and form GC-335A, *Dementia Attachment to Capacity Declaration—Conservatorship*.

Item 2 of the application and item 6 the order would require a statement of the purposes for which the capacity declarations are to be used. The stated purposes include, but are not limited to, the three purposes for which the use of the capacity declarations is now expressly required.⁵

³ See 45 CFR part 164 section 502(g)(1) and (2), and Probate Code sections 2354 and 2355 (authority of an appointed conservator of the person to consent to medical treatment for the conservatee).

⁴ 45 CFR part 164 section 512(e)(1).

⁵ The three purposes are to support (1) a determination that the proposed conservatee is excused from attending the appointment hearing because of a medical disability (form GC-335, Prob. Code, § 1825(b)); (2) a petition for exclusive authority to make medical decisions for a conservatee (form GC-335, Prob. Code, § 1890(c)); and (3) a petition for dementia powers (form GC-335A, Prob. Code, § 2356.5(f)(3)).

The new forms provide the additional purpose of supporting a petition for appointment of a conservator of the estate. The latter use of the capacity declarations is neither required nor prohibited by state law. This use is, however, expressly permitted by some courts' local rules.⁶ An "other" category has also been provided, to cover other possible uses of the capacity declarations that a court may permit.

Attachments

⁶ See Superior Court, Santa Clara County Local Rules, rule 5.11A(5), effective July 1, 2004.

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): <hr/> <p style="text-align: center;">TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____</p> <p>E-MAIL ADDRESS (<i>Optional</i>): _____</p> <p>ATTORNEY FOR (<i>Name</i>): _____</p>	FOR COURT USE ONLY Draft 2a 11/29/04 Not approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE OF (<i>Name</i>): _____ <p style="text-align: right;">PROPOSED CONSERVATEE</p>	CASE NUMBER: CONSERVATORSHIP PETITION HEARING DATE:
EX PARTE APPLICATION FOR ORDER AUTHORIZING COMPLETION OF CAPACITY DECLARATION—HIPAA*	DEPT.: _____ TIME: _____

1. Applicant (*name*):
 has filed a petition for the appointment of a conservator for the above-named proposed conservatee (the Petition). The Petition is set for hearing on (*date*): _____ at (*time*): _____ in Dept.: _____ Room: _____
2. The Petition requests (*check all that apply*):
 - a. A finding that the proposed conservatee should be excused from attending the hearing on the petition.
 - b. Exclusive authority to consent to medical treatment for the proposed conservatee.
 - c. Dementia powers.
 - d. Appointment of a conservator of the estate.
 - e. Other (*specify*): _____
3. Applicant has requested (*name of each proposed declarant*):

 to complete, sign, and deliver to applicant for use to support the Petition, a *Capacity Declaration—Conservatorship*, Judicial Council form GC-335 *Dementia Attachment to Capacity Declaration—Conservatorship*, Judicial Council form GC-335A (the Declaration), concerning the capacity of (*name of proposed conservatee*): _____
4. The proposed conservatee has not consented to the disclosure of any private medical information that would be disclosed by the completed Declaration.
5. Applicant requests this court to authorize each declarant named in item 3 to complete, sign, and deliver the Declaration to Applicant within fifteen days of receipt of the court's order.
6. Applicant requests this court to dispense with notice of hearing on this application.

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 APPLICANT'S NAME)	▶	_____ (APPLICANT'S SIGNATURE)
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* Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (August 21, 1996).
 For use with form GC-334, *Ex Parte Order re Completion of Capacity Declaration—HIPAA*.

ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____	FOR COURT USE ONLY Draft 4a 11/29/04 Not approved by the Judicial Council	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER: CONSERVATORSHIP PETITION HEARING DATE:	
CONSERVATORSHIP OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE OF (<i>Name</i>): _____ PROPOSED CONSERVATEE	DEPT.: _____ TIME: _____	
EX PARTE ORDER RE COMPLETION OF CAPACITY DECLARATION—HIPAA *		

- Attached to this Order is a proposed *Capacity Declaration—Conservatorship*, Judicial Council form GC-335 and a proposed *Dementia Attachment to Capacity Declaration—Conservatorship*, Judicial Council form GC-335A (the "Declaration").
- (*Name*):
has applied for an order authorizing the declarant named in item 5 to complete, sign, and return the Declaration for the purpose specified in item 6 and good cause appearing,

THE COURT FINDS

- Notice of the hearing on the application should be dispensed with and the application should be granted.
- A petition for the appointment of a conservator has been filed in this proceeding by (*name of petitioner*):

This petition is set for hearing on (*date*): _____ at (*time*): _____ in Dept.: Rm.:

- (*Name each declarant*):

has been requested to complete and sign the Declaration for the purpose specified in item 6.

- Petitioner proposes to use the Declaration to provide evidence to support (*check all that apply*):
 - A finding that the proposed conservatee should be excused from attending the hearing on the petition.
 - A request for exclusive authority to consent to medical treatment for the proposed conservatee.
 - A request for dementia powers.
 - The appointment of a conservator of the estate.
 - Other (*specify*): _____

* Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 (August 21, 1996).

(Order and clerk's certification on page 2)

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CONSERVATORSHIP OF (Name): _____	CASE NUMBER:
PROPOSED CONSERVATEE	

THE COURT ORDERS

- 7. Notice is dispensed with.
- 8. Each declarant named below is authorized to complete, sign, and deliver to the attorney or other person whose address appears at the top of page 1 of this Order the original of the Declaration, consisting of:
 - a. *Capacity Declaration—Conservatorship.* (Name each authorized declarant):

b. and *Dementia Attachment to Capacity Declaration—Conservatorship.* (Name authorized declarant):

regarding (name of proposed conservatee):

to enable the Court to determine whether the proposed conservatee should be excused from attending the hearing on the appointment of a conservator or the proposed conservator should be granted certain powers over the person or estate of the proposed conservatee.

- 9. Use of the Declaration is governed by the disclosure safeguards contained in the regulations of the federal Department of Health and Human Services (45 CFR parts 160 and 164) under the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191 (August 21, 1996)), and no use other than what is permitted in those regulations is permitted by this Order.
- 10. The completed and signed original of the Declaration must be returned to the attorney or other person whose address appears at the top of this Order within fifteen days after its receipt by the declarant authorized to complete and sign it.
- 11. Other orders (specify):

Date: _____

Judicial Officer

CERTIFICATION

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

Date: _____

Clerk, by _____, Deputy

(SEAL)