

Invitation to Comment

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| Title | Probate: Standards for Determining Compensation of Conservators and Guardians and Standards of Conduct for Conservators and Guardians of Estates (adopt rules 7.756, 7.1009, and 7.1059 of the California Rules of Court and renumber existing rule 7.756 as rule 7.776). |
| Summary | The proposed rules of court would establish standards for the determination of reasonable compensation to be awarded to conservators and guardians from the estates of their conservatees and wards, and standards for the performance of the duties of conservators and guardians of estates. |
| 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>The Omnibus Conservatorship and Guardianship Reform Act of 2006¹ requires the Judicial Council to adopt a rule of court, effective on or before January 1, 2008, to require uniform standards of conduct for actions that conservators and guardians of estates may take in the management of the estates in their charge. The rule must include, at a minimum, standards for determining compensation for asset management chargeable to conservatees and wards.</p> <p>New Probate Code section 2410 provides as follows:</p> <p style="padding-left: 40px;">“On or before January 1, 2008, the Judicial Council, in consultation with the California Judges Association, the California Association of Superior Court Investigators, the California State Association of Public Administrators, Public Guardians, and Public Conservators, the State Bar of California, the National Guardianship Association, and the Association of Professional Geriatric Care Managers, shall adopt a rule of court that shall require uniform standards of</p> |

¹ Stats 2006, chapters 490–493 (respectively, SB 1116, SB 1550, SB 1716, and AB 1363), referred to as the Omnibus Act. The direction to the Judicial Council is contained in new Probate Code section 2410, added by section 22 of chapter 493 (AB 1363).

conduct for actions that conservators and guardians may take under this chapter on behalf of conservatees and wards to ensure that the estate of conservatees or wards are maintained and conserved as appropriate and to prevent risk of loss or harm to the conservatees or wards. This rule shall include at a minimum standards for determining the fees that may be charged to conservatees or wards and standards for asset management.”

The Probate and Mental Health Advisory Committee is proposing three rules of court in response to the statutory directive. New rule 7.756 would govern compensation of conservators and guardians.² New rules 7.1009 and 7.1059 would establish standards for the performance of the duties of, respectively, guardians and conservators of estates.

These rules were developed from drafts prepared by a working group consisting of members of the advisory committee’s Elder Law and Incapacity Subcommittee and representatives of the organizations mentioned in section 2410.

Rule 7.756

This rule would specify a nonexclusive list of factors courts may consider in determining just and reasonable compensation for conservators or guardians from the estates of their conservatees or wards. (See proposed rule 7.756(a).) The factors listed are modeled after those listed in current rule 7.756 (to be renumbered as rule 7.776 in this proposal) concerning compensation of trustees and, to a lesser extent, rule 4-200(B) of the Rules of Professional Conduct of the State Bar, which lists factors to be considered in determining whether an attorney’s fee is prohibited as unconscionable. Some of the listed factors are unique to conservatorships and guardianships.³

Subdivision (b) of the rule would provide that no single factor listed in the rule is to be exclusively determinative, and subdivision (c) would advise that the rule is not to be construed as authority for a court to set a fixed maximum or minimum compensation or a maximum approved

² Current rule 7.756, concerning compensation of trustees, would be renumbered as rule 7.776.

³ See proposed rule 7.756(a)(1) and (4): “(1) The size and nature of the conservatee’s or ward’s estate; (4) The conservatee’s or ward’s anticipated future needs and income.”

hourly rate for compensation.

Rule 7.1059

This rule would state principles to guide conservators of estates. The rule is divided into two main areas of interest. The first pertains to avoidance of actual and apparent conflicts of interest with the conservatee (rule 7.1059(a)). This portion of the rule lists four areas of concern that touch on the conservator's relationships to providers of services to conservatees in his or her care, including in-home caregivers and providers of institutional residential housing to the impaired elderly.

The second area of interest is specific estate management responsibilities listed in rule 7.1059(b). Among those mentioned is a detailed list of factors to be considered when deciding whether it would be in the conservatee's best interest to dispose of estate property. (See rule 7.1059(b)(18).) One of the factors listed in paragraph 18 is consideration of the previously-expressed and current desires of the conservatee concerning the property. This responsibility is expressly limited by Probate Code section 2113, a new statute added by the Omnibus Act.⁴ Section 2113 requires a conservator to accommodate his or her conservatee's desires, except to the extent that doing so would violate the conservator's fiduciary duties or impose an unreasonable expense on the conservatorship estate.

Paragraph (17) of rule 7.1059(b) would recommend that conservators consider notifying the conservatee's family members in advance of disposition of the conservatee's tangible personal property, to give them an opportunity to acquire such property. Many if not most items of sentimental value to family members above and beyond their monetary worth are in this asset category.

Also required is consideration of the conservatee's ability to manage some of his or her assets, and a recommendation to take appropriate action to enable the conservatee to do so, consistent with that ability.

There are several sources of the standards contained in rule 7.1059. One of the most important is the Standards of Practice for Guardians, which is copyrighted and published by the National Guardianship Association. This organization is one of the organizations consulted

⁴ Stats. 2006, chapter 493, § 13 (AB 1363).

by the advisory committee in the development of this rule, as required by section 2410. The committee proposes to particularly recognize the contribution of the National Guardianship Association and its Standards of Practice in an Advisory Committee Comment following rule 7.1059.

Rule 7.1009

This rule would incorporate the standards of practice in rule 7.1059 and apply them to guardians of estates, except as the context otherwise requires. Two principles of estate management unique to guardianships are expressly stated, however. These are (1) management for the long-term benefit of the ward if he or she has a parent available to provide support; and (2) consideration of a request for court authority to support the ward from the estate if he or she does not have a parent available to provide sufficient support (see rule 7.1009(b) and Prob. Code, § 2422.)

The text of rules 7.756, 7.1009, and 7.1059 is attached beginning at page 5.

Attachment

Rule Proposal

Rule 7.756 of the California Rules of Court would be renumbered, and rules 7.756, 7.1009, and 7.1059 would be adopted, effective January 1, 2008, to read:

Rule 7.756. Compensation of Conservators and Guardians

(a) Standards for determining just and reasonable compensation

The court may consider the following nonexclusive factors, in determining just and reasonable compensation for a conservator from the estate of the conservatee or a guardian from the estate of the ward:

- (1) The size and nature of the conservatee's or ward's estate;
- (2) The benefit to the conservatee or ward, or his or her estate, of the conservator's or guardian's services;
- (3) The necessity for the services performed;
- (4) The conservatee's or ward's anticipated future needs and income;
- (5) The time spent by the conservator or guardian in the performance of services;
- (6) Whether the services performed were routine, or required more than ordinary skill or judgment;
- (7) Any unusual skill, expertise, or experience brought to the performance of services;
- (8) The conservator's or guardian's estimate of the value of the services performed;
- (9) The compensation customarily allowed by the court in the community where the court is located for the management of conservatorships or guardianships of similar size and complexity.

(b) No single factor determinative

No single factor listed above should be the exclusive basis for the court's determination of just and reasonable compensation.

1 **(c) No fixed compensation or maximum hourly rate authorized**

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3 This rule may not be construed as authority for a court to set a fixed
4 maximum or minimum compensation, or a maximum approved hourly rate
5 for compensation.
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7 **Rule 7.756. 7.776. Compensation of Trustees**

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11 **Rule 7.1009. Standards of Conduct for Guardians of the Estate**

12
13 **(a) Standards for conservators apply to guardians**

14
15 Except as the context otherwise requires, the provisions of rule 7.1059 apply
16 to guardians of the estate.
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18 **(b) Guardianship estate management**

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20 In addition to complying with applicable standards of estate management
21 specified in rule 7.1059(b), guardians of the estate must:
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- 23 (1) Manage the estate primarily for the ward's long-term benefit if the
24 ward has a parent available who can provide support;
25
26 (2) If it would be in the best interest of the ward and the estate, consider
27 requesting court authority to support the ward from the estate if the
28 ward does not have a parent available to provide support or sufficient
29 support.
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31 **Rule 7.1059. Standards of Conduct for Conservators of the Estate**

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33 Except as otherwise required by statute, conservators of the estate should be
34 guided by the following principles:
35

36 **(a) Avoidance of actual and apparent conflicts of interest with the**
37 **conservatee**

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39 The conservator must avoid actual conflicts of interest and, consistent with
40 his or her fiduciary duty to the conservatee, the appearance of conflicts of
41 interest. The conservator must avoid any personal, business, or professional
42 interest or relationship that is or reasonably could be perceived as self-
43 serving or adverse to the best interest of the conservatee. In particular:

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- (1) Except as appropriate for non-professional conservators with full disclosure to the court, the conservator should not personally provide housing, medical, or legal services to the conservatee;
- (2) The conservator must be independent from all service providers, except in unique circumstances in which no other conservator or service providers are reasonably available; the exception is in the best interest of the conservatee; the circumstances are fully disclosed to the court; and prior court approval has been obtained;
- (3) The conservator must neither solicit nor accept incentives from service providers; and
- (4) The conservator should not employ his or her family members to provide services to the conservatee for a profit or fee when other alternatives are reasonably available. Where family members do provide such services, their relationship to the conservator must be fully disclosed to the court, the terms of employment must be in the best interest of the conservatee compared to the terms available from independent service providers, the services must be competently performed, and the conservator must be able to exercise appropriate control and supervision.

(b) Conservatorship estate management

The conservator of the estate must:

- (1) Provide competent management of the conservatee’s property, with the care of a prudent person dealing with someone else’s property;
- (2) Refrain from speculative investments;
- (3) Refrain from making loans or gifts of estate property, except as authorized by the court after full disclosure;
- (4) Manage the estate for the benefit of the conservatee;
- (5) Subject to the duty of full disclosure to the court and persons entitled under law to receive it, closely guard against unnecessary or inappropriate disclosure of the conservatee’s financial information;

- 1 (6) Keep the money and property of the estate separate from the
2 conservator's or any other person's money or property, except as may
3 be permitted under statutes authorizing public guardians or public
4 conservators and certain regulated private fiduciaries to maintain
5 common trust funds or similar common investments;
6
7 (7) Hold title reflecting the conservatorship in individual securities, mutual
8 funds, securities broker accounts, and accounts with financial
9 institutions;
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11 (8) Keep accurate records of all transactions. Professional fiduciaries must
12 maintain prudent accounting systems and procedures designed to
13 protect against embezzlement and other cash-asset mismanagement;
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15 (9) Undertake as soon as possible after appointment and qualification to
16 locate and safeguard the conservatee's estate planning documents,
17 including wills, living trusts, powers of attorney for health care and
18 finances, life insurance policies, and pension records;
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20 (10) Undertake as soon as possible after appointment and qualification to
21 secure the real and personal property of the estate, insuring it at
22 appropriate levels, and protecting it against damage, destruction, or
23 loss;
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25 (11) Make reasonable efforts to preserve property identified in the
26 conservatee's estate planning documents;
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28 (12) Communicate as necessary and appropriate with the conservator of the
29 person of the conservatee, if any, and with the trustee of any trust of
30 which the conservatee is a beneficiary;
31
32 (13) Pursue claims against others on behalf of the estate when it would be in
33 the best interest of the conservatee or the estate to do so. Consider
34 requesting prior court authority to pursue or compromise large or
35 complex claims, particularly those that might require litigation and the
36 assistance of counsel, and request such approval before entering into a
37 contingent fee agreement with counsel;
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39 (14) Defend against actions or claims against the estate when it would be in
40 the best interest of the conservatee or the estate to do so. Consider
41 requesting court approval or instructions concerning the defense or
42 compromise of litigation against the estate;
43

- 1 (15) Collect all public and insurance benefits for which the conservatee is
2 eligible;
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- 4 (16) Evaluate the conservatee’s ability to manage cash or other assets and
5 take appropriate action, including obtaining prior court approval when
6 necessary or appropriate, to enable the conservatee to do so to the level
7 of his or her ability;
8
- 9 (17) When disposing of the conservatee’s tangible personal property,
10 consider notifying the conservatee’s family members in advance and
11 giving them an opportunity to acquire the property, with approval or
12 confirmation of the court;
13
- 14 (18) In deciding whether it is in the best interest of the conservatee to
15 dispose of property of the estate, consider the following factors, among
16 others, as appropriate in the circumstances:
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- 18 (A) The likely benefit or improvement of the conservatee’s life that
19 disposing of the property would bring;
20
- 21 (B) The likelihood that the conservatee would need or benefit from
22 the property in the future;
23
- 24 (C) Subject to the factors specified in Probate Code section 2113, the
25 previously-expressed or current desires of the conservatee
26 concerning the property;
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- 28 (D) The provisions of the conservatee’s estate plan concerning the
29 property;
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- 31 (E) The tax consequences of the disposition transaction;
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- 33 (F) The impact of the disposition transaction on the conservatee’s
34 entitlement to public benefits;
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- 36 (G) The condition of the entire estate;
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- 38 (H) Alternatives to disposition of the property;
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- 40 (I) The likelihood that the property will deteriorate or be subject to
41 waste if retained in the estate;
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1 (J) The benefit versus the cost or liability of maintaining the property
2 in the estate.

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4 **Advisory Committee Comment**

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6 The Probate and Mental Health Advisory Committee consulted with several organizations in the
7 development of rules 7.1009 and 7.1059, including the National Guardianship Association, a
8 nationwide voluntary association of professional and family fiduciaries, guardians, and allied
9 professionals. The National Guardianship Association's Standards of Practice were a particularly
10 significant source of inspiration for many of the provisions of these rules. The advisory
11 committee wishes to express its particular appreciation for the assistance of the National
12 Guardianship Association in this project.
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Item SP07-14 Response Form

Title: Probate: Standards for Determining Compensation of Conservators and Guardians and Standards of Conduct for Conservators and Guardians of Estates (adopt rules 7.756, 7.1009, and 7.1059 of the California Rules of Court and renumber existing rule 7.756 as rule 7.776).

- 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>

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

*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.*