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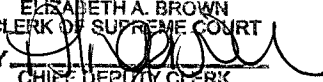
July 23, 2018

FILED

AUG 02 2018

Elizabeth A. Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, Nevada 89701

ADKT 0507

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

Re: Response to public comments submitted by David T. Ochoa [filed 7/5/18, court doc no. 18-25574] regarding proposed Supreme Court Rules on ex parte communications during the administration of guardianships.

Dear Ms. Brown:

The National Center for State Courts' National Probate Court Standards ("NPCS"), in contemplating that courts' effective oversight of guardianships may necessitate review of *ex parte* communication, recommends establishing a protocol to receive and address concerns regarding guardianship cases that is "flexible enough to accommodate emergency or urgent circumstances."¹ Public comment throughout the Commission to Study the Administration of Guardianships time and again identified family members' frustration at the difficulty in bringing their significant concerns to the attention of the court.

The current proposed version of Rule 6 seeks to provide statewide guidelines, which would allow courts the flexibility to receive vital information and take timely corrective action, while affording individuals appropriate notice. Rule 6 was drafted to closely mirror rules in other jurisdictions, namely California and Idaho, which specifically outline a process for receipt of *ex parte* communication in guardianships/conservatorships.²

To ensure Mr. Ochoa's comments are fully understood and considered, please find below the excerpted questions and accompanying responses.

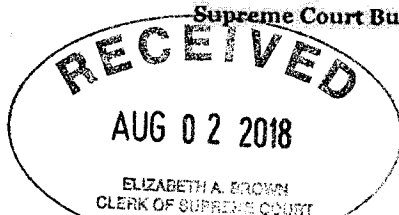
1. *From Attachment B it is not clear if the rule is intended for ex parte communications generally or ex parte communications from the State Compliance Office.*

¹ NPCS Standard 3.3.18: "Probate courts should establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators. The process should outline circumstances under which a court can *receive ex parte communications.*" (Emphasis added).

² See Idaho Court Administrative Rule 54.1, Ex Parte Communication. See also California Rules of Court Rule 7.10(c).

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Rule 6 was originally drafted as contemplating only communications from the Guardianship Compliance Office (“GCO”) to the district court. Throughout discussions on the rules subcommittee, and at the full Commission meeting on April 25, 2018, the Commission voted to approve the current version of Rule 6, which does not limit its applicability to communications between the GCO and district court.

2. *Who determines if the communication raises a significant concern about a guardian’s compliance? If the Judge makes the determination would they not have already violated the rule by receiving and reviewing a communication that did not raise a significant concern?*

In guardianships, as with any other case type, communication is filtered through the court staff to whom such communication was relayed, e.g. the law clerk, judicial assistant, or case compliance specialist. To the extent court staff may seek guidance when considering whether a communication raises a significant concern warranting sharing it with the judge, the Nevada Code of Judicial Conduct (“NCJC”) permits judicial officers to consult with court staff as part of carrying out his or her responsibilities.³ Subsection (b) of Rule 6 specifies the responsive measures to be used when the judicial officer has reviewed the communication and exercised his or her discretion in identifying the appropriate follow up.

3. *Have due process concerns been weighed by the Committee if the Court can take action on the communication and setting a hearing on the communication is optional?*

Rule 6 specifically states that where the court takes action in response to the communication, “[t]he court shall disclose any ex parte communication reviewed under section (b) of this rule, and any action taken by the court, to the guardian, GAL, protected person, the protected person’s attorney, and all parties of record and their attorneys.” (Emphasis added). In disclosing the communication and action, parties may file a responsive pleading and/or request further review.

4. *What are the potential administrative and financial costs to the Court if the Court is mandated to notify “all parties of record” of both permitted and prohibited communications?*

The review of communication and potential filing by court staff may divert staff’s time from other tasks. NRCP 5 requires service of documents upon the parties. In the event the parties are not electronic filers, the mailing of documents involves postage costs.

5. *If the rule applies to any ex parte communication generally and not just ex parte communications from the Compliance Office, how should the Court treat communications that could*

³ NCJC Rule 2.9(A)(3) specifies “[a] judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge’s adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally to decide the matter.”

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both be interpreted as potentially harassing or potentially informative of significant concern[]. . . . [R]eports can come from persons already in conflict with the guardian. . . . How should the court treat [ex parte] information . . . in that situation?"

As stated above, the Court must disclose communication reviewed and any action taken in accordance with NRCPC 5. Rule 6 establishes a policy favoring disclosure and transparency, the process of which may create a record that protects guardians from multiple, frivolous, and harassing complaints from third parties. To that end, NRS 159.0486 provides a mechanism to address this sort of harassment. Because Rule 6 requires courts to notify parties of communications reviewed and prompting action, parties have the opportunity to respond and ensure the information before the court is fully developed, i.e. a complainant's possible conflict of interest with the guardian.

6. *Does having an ex parte communication rule establish a policy toward more disclosures and therefore more protections for those that may be accused of harassing the guardian?*


Potential misuse of Rule 6's process is balanced by requiring disclosure of communications prompting action from the court. Upon disclosure, other parties are able to respond to allegations and/or request further review.


7. *Would it be more beneficial to elaborate on the categories of individuals that could petition the court regarding the need for a guardianship or for the need to review the status of a guardianship?*

The issue of an individual's standing to petition the court for relief is beyond the scope of Rule 6, although the Protected Person's Bill of Rights does not limit the categories of individuals who may express their concerns during a court hearing.

The creation of the GCO and positions of case compliance specialists in certain jurisdictions presents an effective avenue to filter and coordinate the public's questions and concerns regarding the guardianship process. Rule 6 specifies and effectuates such staff's duty to ensure compliance with NRS Chapter 159 obligations, while recognizing an organized, flexible process in which to receive complaints and maintain transparency.

Best Regards,


Kathleen McCloskey
Guardianship Compliance Manager
Supreme Court of Nevada


Mallory Nelson
Case Compliance Specialist
Second Judicial District Court

cc: Justice James Hardesty
Robin Sweet, State Court Administrator
David T. Ochoa, Law Offices of Lipson Neilson