Disciplinary Regulation 500

Public Comments

Tom O'Brien

This is to urge the Board to withdraw the proposed rewrite of the professional guardian disciplinary rules.

There has been no indication to date of any particular problem with the structure of the disciplinary regulations. There is nothing in the minutes of the Board meetings to suggest that any discussion occurred leading up to this rewrite. There has been no significant event that I or anyone I have asked knows of leading up to this proposal.

Similarly, it does not appear that any board member had a hand or was consulted in the drafting of this proposal. This is contrary to the spirit of GR 23, contrary to past practices of the Certification Board, and contrary to good practice.

The proposal is radical, in the dictionary sense of being an extreme change in existing practices. Making an extreme change of this sort is not just likely to result in undesired consequences, it is guaranteed to do so.

The changes are highly controversial. This sort of policy making requires considerably more respect for the opinions of others than the sledgehammer approach that has been taken here.

The existing discipline rule is the result of very painstaking work by a board composed of people who had a high level of practical experience in guardianship, as well as a deep understanding of legal and disciplinary matters. Since its original enactment, the rule has been amended and improved a number of times. Discarding this work out of hand is thoughtless, to say the least, and is unwise.

I respectfully suggest that the Board start over, beginning with discussing whether or not there is a problem.

Deborah Jameson

The new disciplinary regulations appear to be a major change from the old regulations. There is nothing in the meeting minutes that I could find explaining why the change was needed and what problems were to be addressed. It seems to be a radical overhaul with no explanation of the need for such changes.

It is nearly impossible to make useful comments on regulations when presented in parts. The definitions only come to have meaning when the process is fully described.

It seems that the Board's best course of action would be to reserve final approval until the entire disciplinary regulations have beenpublished and commented upon.

One specific comment: Proposed Reg 501.4 sets out definitions. Many of these definitions already exist in Reg 002. Some of the words defined in Reg 002 are defined differently or more expansively in proposed Reg 501.4. It is unclear whether the Board intended to change Reg 002 or eliminate the definitions from Reg 002 at some future date. To the extent the Board is proposing these changes that will affect Reg 002, the Board is not following the procedures outlined in Reg 602 of giving notice of changes to Reg 002. The Board has failed to give notice of the changes and allowed time for public comment.

It is unfortunate to have a discussion and vote on such a major change to the regulations in a phone conference meeting where participation by the public is almost impossible. It seems contrary to Reg 601, "The intent of the…Board is to give notice and <u>the opportunity for public comment</u> whenever the Board intends to adopt, amend, or repeal its regulations…." The Board values transparency and openness, but the process used to create these new regulations and to adopt them has been neither open nor transparent.

From: Tom Goldsmith
To: Bzotte, Kimberly
Cc: Bondon, Shirley
Subject: Public Comment: Proposed CPGB Regulation 500, Discipline Part 1
Date: Tuesday, July 30, 2013 7:26:04 AM

Please consider the following comments to proposed Regulation 500, part 1.

Let me note that I see this regulation revision as surely representing a yeoman's work, much needed to clarify many issues within CPGB responsibility and community.

In **Section 501.4** the following terms should be defined:

- Un-founded
- Un-substantiated
  Both, regarding grievances, as discussed at a recent in-person CPGB meeting, and seemingly useful for understanding findings.

- Investigation should also be defined (in addition to 501.4(p) investigative records). Where several modifying words also need definition:
  - Initial investigation
  - Necessary investigation(s)
  - Active investigation
  - Main, primary, or formal investigation
  - Supplementary or additional investigations
    (Which might be required at a later time, after a main investigation is completed)
    Also:
  - Initial assessment
    (As in RCW 18.130.095, prior to deciding to investigate or dismiss.)
  - Discovery

The Health Department's UDA work surely addresses this area, and might be a useful source of experience and guidance.

Section 502.5 (c) which places an explicit restriction against charging a fee for responding to a grievance seems important

to me. Yet I have two concerns.

- While this is an important policy, it needs further detail to be effective. Because a complaint is likely to be made at a time when a guardian is active with a number of case issues, protections are needed to hinder "burying" charges for responding to a grievance within billings for other activities. Two possible solutions might be to:
    - Require an explicit, written statement by the guardian, together with any billing or Court accounting, that no charges for responding to a (specified) grievance are included.
    - Require a guardian to present his or her time and costs for responding to a grievance, at the time of any billing or Court accounting. Thus making it clear both that defending against a grievance can be costly. Also that those costs are not charged elsewhere.

- Another problem can emerge when a family member or friend is involved with a guardianship case and files a grievance. The guardian may feel offended, and even be tempted to retaliate. In such situations, the guardian may unfairly target the complainant, either while responding to the grievance, or in Court proceedings regarding an incapacitated person's case where the complainant is involved. Again, two possible solutions might be to:
    - Explicitly identify this risk in the regulation, as related to grievances, and proscribe it.
    - Specifically require, in situations where a grievance has been filed, that choosing "professional" terms be preferred. e.g., that terms such as "troublemaker" be deemed too general and not useful. Or that claiming a family member or friend has been the cause of undue expense shall not be heeded unless the magnitude, frequency, and context of outlays is documented.

  My view is that family members, friends of the

incapacitated person, and professionals or others providing support can be resources of great value. Thus any failure to preserve the positive participation of these persons can be destructive and wasteful. Lack of restrictions against poorly founded criticisms of those intending to help, that is absent or low standards of evidence, can be harmful to all.

Thank you for consideration of these comments to the proposed changes of regulation 500.

Tom Goldsmith

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July 23, 2013

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RE: Proposed Revisions to Regulation 500, the disciplinary regulations for Certified Professional Guardians.

General Statement: WAPG objects to the Board's process for presenting and considering the changes to Disciplinary Regulation 500 for the following reasons:

1. The current presentation appears to have exorcised entire sections of the previous Regulation without drawing to the attention of the reader the portions that have been eliminated or how those eliminated sections have been accommodated in the revised Regulation. The effectiveness of public comments is consequently limited and the intentions of the Board in re-writing this Rule hidden from public view.
2. The Board has divided the changes into two sections, the second section having not been published for public comment. WAPG believes that a reading of the whole is necessary for the public to understand the full content of the proposed changes.
3. The Board has proposed the discussion and voting on these changes in a telephone conference, thereby further limiting public participation and discussion.
4. The Board has misrepresented its intentions in revising this Regulation. In its publication note the Board stipulates that the intent of the process is the "..review, revision and reorganization should result in a clearer, more comprehensive regulation." However, a reading of the revisions reflects a significant and major assumption of power and authority by the Board rather than the mere housekeeping the public notice suggests.
5. The Board has provided an inadequate time period for public comment given the extensive nature of the proposed Rule revision.

Current section 501 WAPG objects to the elimination of this section in that the section affirms the commitment of the Board to enforce the Regulation in an unbiased, fair and equitable manner.

New section 501.1 (a) no comment – this language exists in the current regulation

New section 501.1(b) no comment – this language exists in the current regulation

New section 501.1(c) no comment – this language exists in the current regulation

New section 501.1 (d) While the goal of ensuring meaningful access to justice services and the promotion of public trust is laudable in many settings, the Board's adaption of this language suggests that it views its role as an advocate for those filing grievances. While providing a forum for the registration of grievances has a number of positives for guardians and their clients, other entities exist as advocacy agencies. The Board cannot assume the role of advocate and be a neutral arbiter of grievances.

New section 501.2 Jurisdiction: no comment

New section 501.3 Grounds for Disciplinary Action: This new section extends the authority of the Board from enforcing the Standards of Practice to "other regulations" adopted by the Board – what those "other regulations" may be are unnecessarily vague. The Board has already determined that failure to pay dues, or failure to complete continuing education requirements are included elsewhere in its Regulations. If the Board intends to devise new regulations to be subject to this Disciplinary procedure those Regulations should be specifically identified.

New section 501.3 (a – m) no comment – this language exists in the current regulation

New section 501.3 (n) This addition envisions Board discipline when a guardian is deemed to be incompetent however no determination is made as to how incompetence is determined or how incompetence is assessed - the concept of incompetence appears to be a new term within the context of guardianship services. This section should be stricken.

New section 501.3(o) As a matter of practice guardians often do not attend Court Hearings when their appearance is not likely to add value and/or when their appearance has the only effect of incurring unnecessary fees. Other circumstances are also likely to exist which do not warrant a guardian's attendance at a Hearing. Without a definition for "good cause" this section should be stricken.

New Section 501.3 (p) no comment

New Section 501.4 Definitions: WAPG appreciates the addition of a definition section, particularly when new and novel legal terms are being created by Regulation. However, adequate comment on the definitions section is not possible until the Board publishes the entire Rule – at present only the "first half" or so of the proposed Rule has been published. WAPG requests that if the Board elects to vote upon and consider this Regulation in pieces, that this section not be discussed and voted upon until the entire proposed Regulation has been published.

New section 501.4 (o) the definition of incompetence is inadequate and vague; and, any attempt to label a guardian as "incompetent" potentially libelous. Unless the Board can identify an adequate definition in case law or statute this section should be eliminated.

New section 501.4 (r) Party is defined as a CPG and the AOC however WAPG believes, more appropriately, the "Party" should be defined as the CPG and the Board.

New section 501.4 (t) this section stipulates that revocation occurs when a professional guardian's certification is cancelled – the section purports that certification can be cancelled by the Board or the Supreme Court. However, the Board has authority pursuant to GR23 only to recommend revocation – only the Supreme Court has the authority to do so. This section should be rewritten accordingly.

New section 501.4(u) this section stipulates that "suspension" occurs when a professional guardian's certification is suspended – the section purports that suspension can be cancelled by the Board or the Supreme Court. However, the Board has authority pursuant to GR23 only to recommend suspension – only the Supreme Court has the authority to do so. This section should be rewritten accordingly.

New section 501.4 (w) this section appears to use definitions for the use of the words "may, must, shall and should" which are used elsewhere in the Board's rules. WAPG supports the inclusion in this proposed Regulation as assisting in the internal consistency of the Board's Rules

New section 501.4 (x) no comment

New section 501.4 This section appears to have been incorrectly numbered – it should presumably read 501.5

Members of WAPG are not attorneys and we cannot speak with a knowledge based upon an understanding of the law. However, we believe that the adoption of a Board Rule which extends a time limitation for eternity, which extends jurisdiction beyond the grave of a deceased guardian, patently trounces upon any semblance of due process. Statutes of limitation are inherent in all aspects of law and commerce, whether those limitations involve appeal rights in a court of law or limitations on the IRS for pursuing tax claims. For the Board to assume an aggressive position that no limitations should exist is difficult to comprehend.

As noted earlier, elsewhere in these proposed Rules the Board appears to visualize its role as an advocate for undefined parties, and has elected to remove language from Regulation 500 which affirms a role to exercise its authority in a fair, unbiased, equitable, and neutral manner. Recognizing that WAPG sponsored and championed the initial legislation which established this Board and that WAPG members exercised a key role in laying the groundwork for the successful operation of the Board, the inclusion of the "no statute of limitation" provision reflects a sad commentary to what was once considered to be a fair, neutral, and unbiased exercise of protection for incapacitated persons while respecting the practical and legal elements inherent in the practice of guardianship.

WAPG recognizes that the language within this proposed Regulation suggests that the Board may not always exercise its authority ruthlessly. However, the language is vague and undefined – whether the exercise will be limited after three months or twenty years is not stipulated, and whether a guardian will be prosecuted for the filing of a late report or an allegation of theft five years after the closure of a guardianship is not made clear – presumably the Board intends to exercise its discretion in depending upon the political orientation of the Board during any given time period i.e., without the benefit of Rules or other guidance.

WAPG requests that the provision be removed in its entirety and that any new proposals in regards to time limitations be made in a manner more consistent with appeal rights inherent in the legal environment in which guardianships are managed.

New Section 502 WAPG supports the re-titling of this committee from the Standards of Practice committee to the Disciplinary Committee as being a more appropriate reflection of the functions of the committee

New section 502.1 In this section the Board purports to have "inherent power" however nowhere in GR23 is there a delegation of "inherent power" to "maintain appropriate standards of practice" and to "conduct and dispose of individual cases of CPG discipline." A reading of GR 23 fails to reveal any such delegation to the Board by the Supreme Court. Section 2(ii) of GR 23 addressed the Board's authority in relation to Standards of Practice and Section 2(viii) address the Board's authority in regards to discipline – in reading these two sections no "inherent power" is stipulated nor can such "inherent power" be inferred. In fact, if "inherent power" exists, it exists with the Supreme Court with the Certification Board as a mere agent (arguably in the same manner that local Courts are the supra guardians in guardianship cases and the guardian a mere agent of the local Court).

The meaning of the sentence which complete this section – "Persons carrying out the functions set forth in these rules act under the CPG Board's authority" is not clear. Is the Board referring to Hearing Officers? Attorneys who represent the Board? AOC staff? WAPG recommends that unless there is some obvious need for this sentence that it be removed.

New section 502.1 (a)(2) This section specifies that the Board "makes appointments, removes those appointed and fills vacancies....." It isn't clear from a reading of this Rule to what the Board is referring since the Board generally makes recommendations which are then approved by the Supreme Court. WAPG requests that this Rule be clarified. And, clarification should include whether this section belongs in the Rule on discipline.

New section 502.1 (a)(3) This section provides authority to the Board as authorized by GR 23 or "as necessary and proper to carry out its duties." It appears that the Board believes it can arbitrarily generate authority on its own motion beyond that provided to it by the Supreme Court in GR 23. WAPG believes that this position is incorrect, and that this section should not be adopted. In addition, it is not apparent that this section belongs in the Rule on discipline.

New section 502.1(a)(4) no comment

New section 502.1(b) WAPG objects in principal to any restriction on the ability of a guardian to access representation.

New section 502.2 (a)(b) These two sections appear to re-write much of the current section numbered 505 Standards of Practice Committee (SOPC). While 505.1 and 505.2 provide for a balance of disciplines on the committee (an attorney/judicial officer and at least one member a guardian) the proposed revisions ignore such balance. WAPG objects to the abandonment of the principal of balance.

New section 502.2 (c)(d)(e) no comment

New section 502.2(f) WAPG applauds the inclusion of elements which reasonably preclude the participation of Disciplinary Committee members. However, the language of the proposed Regulation does not require that a member disqualify themselves from participation nor does it provide a mechanism for the CPG to challenge the inclusion on the Disciplinary Committee of a member with a conflict. The Rule should be re-written to include such provisions.

In addition, 502.2 (f)(3) and 502.2(f)(4) should be amended to include the inclusion of a judicial officer as a potential party with a conflict.

New section 502.3 Conflicts Review Committee (CRC) It appears from a reading of this proposed revision that the language mirrors the previous Rule contained in Regulation 507 with three notable additions – one addressing confidentiality issues, another addressing issues of independence, and a third allowing CRC members access to files.

WAPG recommends however, that the composition of the CRC be modified to require the inclusion of a practicing guardian, and an attorney or judicial officer. In addition, WAPG recommends that the CRC be provided authority to appoint a chair.

New section 502.2 Disciplinary Counsel This section is confusing in that it identifies disciplinary counsel for the Board or AOC as the Attorney General's Office and in the next sentence stipulates that AOC staff may service as disciplinary counsel. The fourth sentence stipulates that "special" disciplinary counsel may also be appointed. If WAPG understands the intent of this section correctly it would be that the Attorney General <u>or</u> AOC staff may service as disciplinary counsel and that the Board reserves the option of appointing special counsel. WAPG believes that this section should be clarified as to the Board's intent.

While sentence one, two and four stipulate the representative authority of disciplinary counsel the third sentence contains an undefined authorization for disciplinary counsel to "perform other duties". Why this sentence is hidden in this paragraph is not clear and why "other duties" are not defined is equally not clear. WAPG believes that if this sentence is needed it should be placed in a separate section and the "other duties" defined in a manner that allows guardians and their counsels an understanding of the role of the disciplinary counsel.

New section 502.5 (a)(b) WAPG objects to any effort by the Board to limit the ability of a guardian to defend themselves in the complaint process

New section 502.5 (c) It is common in the practice of law for prevailing parties to recover their costs of defense should they prevail in a proceeding - this section seeks to prevent a guardian from recovering those from a grievant even in the event that the guardian prevails in the complaint process. Since WAPG agrees that the incapacitated person should not be penalized for the conduct of their friends/family. WAPG believes that recovery from the grievant or the Board should be allowed.

New section 502.5(d) This section requires that the guardian must furnish written medical and psychological releases or authorizations to the Board for an incapacitated person even if medical/psychological issues are not germane to the complaint. This sentence should be removed as access to necessary records should be provided by the usual discovery and subpoena process.

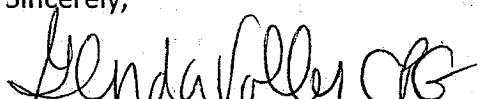
In addition, the same sentence requires that a guardian release their own medical and psychological records to the Board. This requirement should also be removed as being unrelated to the nature of any complaint that the Board may be prosecuting.

New section 503.1 Procedural Rules

Since the Board has not chosen to publish the entire proposed revisions to Regulation 500 it isn't possible for WAPG to fairly provide input into this section. However, in reviewing the current proposed revisions it appears that the Board has reduced several pages of procedural rules and protection to roughly two pages. WAPG requests that, at a minimum, consideration of section 503 be reserved pending the publication of the second half of the revisions to Regulation 500.

General Summary: In nearly every section the proposed Regulation(s) is confusing and opaque. WAPG recommends that the Board not adopt this Regulation at its August meeting, that the Regulation(s) presented for public comment be rewritten, and not again submitted for public comment until the public has the opportunity to review the proposed revisions in their entirety.

Sincerely,



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