Tom Goldsmith

From: Tom Goldsmith [TTGsmith@TGandA.com]
Sent: Monday, November 28, 2011 12:06 PM
To: 'Camilla.Faulk@courts.wa.gov'
Cc: 'guardian.program@courts.wa.gov'
Subject: Suggested New Rule GR 31A Public Disclosure, administrative Court records -As regards the Certified Public Guardianship Board

Honorable Justice Johnson;

Let me begin by clearly stating that I am a strong supporter of Washington State's Certified Professional Guardianship Board (CPGB). This board is a team of dedicated generalists and specialists who consistently work to improve the complex and difficult circumstances in which many elderly and otherwise incapacitated citizens find themselves.

Yet I believe GR-31A, as proposed, would grant too much latitude, while failing to leave effective checks or balances in place. Therefore I respectfully suggest that paragraph (c)(1)(C)(4) which states,

"*This rule does not apply to the Certified Professional Guardian Board. Public access to the board's records is governed by GR 23.*"

should be removed.

Details of my reasoning follow.

1. Trust in government is essential to the well-being of citizens served, while withholding information generally sows seeds of distrust. Thus in only the most extreme (and clearly documented) of situations, should exemption from scrutiny be granted.
2. The community of those under guardianship is a public especially in need of a sense of trust.
3. It is very difficult for those under guardianship, and their loved ones, to learn about the system which controls and broadly influences their lives. Such difficulties can undermine the foundations of trust.
4. The guardianship community is not in a special situation which would justify exemption from scrutiny.
5. Problems we have seen, not surprising given complexity and a large number of players, indicate that insight resulting from public disclosure would be beneficial, not negative.
6. All parties would benefit from a more open, more transparent guardianship community.

Please find further details supporting these points below. Where I cover many aspects of the professional guardianship system, and personally conclude that in the absence of a **"perfect world"** it is surely a mistake to exclude a broad component of Washington State's social support system (the professional guardianship community) from review.

I believe public concerns, reflected in the press as well as Senate and House bills, confirm my own views. With such concerns currently "in the air" now seems a bad time to lessen the public flow of related information.

Thank you in advance for consideration of my thinking on these issues.

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Further Supporting Details

I believe complexity, together with what I would call a "culture of withholding information" within the professional guardian community, works to the disadvantage of **ALL PARTICIPANTS**. Most importantly the public, presumed beneficiaries of guardianships, is too often denied information, and thus find themselves in situations where they cannot understand, or are unable to learn enough about, what is happening within a guardianship or its law-based context.

This situation would be worsened by the paragraph (c)(1)(C)(4) as proposed in GR 31A. This step would be equivalent to inviting the distinguished CPG Board to operate as a self-regulated entity, and without the support of mandated public disclosure or formal review.

In addition, I believe unconditionally delegating so much responsibility, where a history of non-disclosure has already fostered lack of trust, would compound the current dilemma for two reasons. First, the community of elderly and otherwise incapacitated persons is particularly vulnerable and thus will continue to have expanding needs, while family members and other advocates insist on increasing levels of care. Second, both changing social values and demographics suggest that numbers in this group may grow substantially over coming decades.

Let me repeat and expand on points 1. – 6. above.

1. Trust in government is essential to the well-being of citizens served, while withholding information generally sows seeds of distrust. Thus in only the most extreme (and clearly documented) of situations, should exemption from scrutiny be granted.
    a. The CPG Board is composed of energetic, dedicated, faithful and well meaning members. The stature of the board should be maintained.
    b. Why would administration of the guardianship world not be subject to outside and public review, just as are other functions of government and the Courts.

2. The community of those under guardianship is a public especially in need of a sense of trust.

    a. The professional guardianship world's complexities regarding individual rights, needs for privacy, and need for dignity require especially complex solutions. Resulting solutions must be trusted, while trust is surely only achieved under the illumination of outside insight and balancing controls.

    b. Lack of information, or confidence in effective review, can combine to increase distrust, even to the extent of paranoia. The community of the incapacitated can be especially vulnerable to worries that they may be neglected or exploited. While the elderly, while observing successive loss of capacity and control, is always struggling to differentiate between the real and the unreal.

    c. Lack of transparency can easily be an invitation to abuse. At the same time, both vulnerability and the presence of wealth can significantly increase temptation, or encourage lack of prudence and caution, for some practitioners.

3. It is very difficult for those under guardianship, and their loved ones, to learn about the system which controls and broadly influences their lives. Such difficulties can undermine the foundations of trust.

    a. From the public's point of view, the apparatus, laws, and regulations of guardianships in general, and of the Courts and the CPGB in particular, are complex and surely seem arcane and tortuous. They are undoubtedly difficult for the average layman to understand.

    b. Even the disciplinary decisions shown on the CPGB web site are hardly written for easy comprehension by the average layman. Also summary or over-view information is lacking.

    c. There is no instance I know of, or any way I have seen, for the family of an incapacitated person to evaluate the possible "fit" of a guardian with the ward's anticipated needs. Guardians are often recommended by a Guardian ad Litem, with little chance of the family even having an idea of the professional skills or capabilities they might be getting.

    d. I've been told "Case law" around professional guardianships is scant, making it hard for all concerned to understand the related law and law-based expectations of guardianship.

    e. The effort and cost of obtaining most Court documents or related information is already a substantial obstacle for a family member or other stake-holder to overcome in learning the details of cases.

4. The guardianship community is not in a special situation which would justify exemption from scrutiny.

a. The proposed paragraph (c)(1)(C)(4) reads:

"*This rule does not apply to the Certified Professional Guardian Board. Public access to the board's records is governed by GR 23.*"

But GR 23 simply states only:

"*Disclosure of Records. The Board may adopt regulations pertaining to the disclosure of records in the Board's possession.*"

Yet I am not aware of any general policies or guidelines that have been drafted or adopted by the CPGB to set objectives or assure insight by the public (or even by other agencies) into the goings-on of the board or the guardianship community.

b. This board regulates the activities of an extremely important and sensitive function within our society. Taking away basic freedoms from aging or otherwise incapacitated persons is an enormous step, and one which none of us would like to have happen to ourselves, or to a beloved family member.

In 1978 Elias S. Cohen wrote,

"Recognize guardianship for what it really is: the most intrusive, non-interest serving, impersonal legal device known and available to us and, as such, one which minimizes personal autonomy and respect for the individual, has a high potential for doing harm and raises at best a questionable benefit/ burden ratio. As such, it is a device to be studiously avoided."

While one might simply classify this as an ultra "libertarian" or extremely "conservative" and reactionary point of view, I find it to be right on target.

My family suffered greatly from a guardianship "gone wrong" as my parents approached the ends of their lives. So what I think Cohen means is, "If there must be a guardianship, we must ***be sure it is done well***." I believe the professional guardianship community, as much as any other, needs to be open to scrutiny by the public. Only this can assure the public that the treatments of wards, and their families, is "done well".

c. As I understand it, all Fiduciaries in Washington State are encouraged by law to rely on the actions of prior Fiduciaries who have been involved in the cases they work with. Thus one natural avenue of scrutiny and review (professional peer checking) is already closed, for practical purposes.

d. Some in the "ward" community have a strong feeling that guardians tend to see withholding or cutting off of information as essential to keeping both family members and the ward calm and quiet. I find the fact that this feeling exists disturbing. While I also see it as a particularly persuasive argument against exemption from scrutiny.

e. Filing a grievance with the CPGB during an active guardianship introduces complications one might not anticipate or understand. Due to considerations of jurisdiction, the CPGB defers to the Court, beginning with a (sometimes sealed) letter notifying of the grievance, outlining key issues involved, and attaching the grievance text itself. Then as I understand it, unless the Court chooses not to act, and/or returns the issue to the board's Standards of Practice Committee

(SoPC), the board does not act.

Because the board's Standards of Practice (SoP) are "guidelines" which do not have the status of law, the Courts are often guided by other factors in their decisions. That is, those practice guidelines an outside observer might think would hold sway for all professional guardianships may not be not followed in a large portion of cases. Of course this situation is generally confusing to the layman (and perhaps for attorneys, or even law-makers). Because disclosure is so limited regarding the grievance process, this dilemma is less likely to be worked out. Either in ordinary daily processes and awareness, or by legislative revision.

A thought I've had on this, is to ask why the letter to the Court would be sealed, or why it might remain sealed. And (whether sealed or not) if these **letters to the Court could be released**, say after 90 or 180 days. If each were to become public, they might perhaps clarify a great deal of what is now confusing regarding grievances. Especially if "editorial" comments could somehow be added by someone neutral and respected.

f. Rejected grievances are not, in practice, made available to the public for review (as outlined below) while the individual grievant is only presented with too-brief explanations of the dismissal. This surely leaves a notable "fog" of confusion for much of the public.

g. With little public clarity on grievances, for both professional guardians and the wards and families they serve, the board's Standards of Practice (SoP) are put in jeopardy. That is these rules, intended to define and guide guardian conduct, are solely enforced by a process which is in reality excluded from outside review. This leaves a gap that surely undermines the trust of all potentially-observing parties.

h. Dismissed CPGB grievances are not subject to appeal. This fact compounds the problems of lack of public understanding.

i. Senate Bill 5740, which would have mandated open access to dismissed CPGB grievances, has not been passed as a law.

j. Exclusion of scrutiny should not be allowed without putting alternative pathways for review in place. Yet such checks and balances are lacking.

k. I do not know of any ombudsman, inspector, or agency responsible for oversight or review of the professional guardianship community other than the CPGB.

l. A large piece of each CPGB meeting takes place in "executive session". The public has little idea of what occurs in this part of the board's proceedings. It appears also, that minutes are not taken, and thus self-review is not easily accomplished.

5. Problems we have seen, not surprising given complexity and a large number of players, indicate that insight resulting from public disclosure would be beneficial, not negative.

The Grievance Process:

a. I have understood that the CPGB grievance process is the only formal channel for disciplining a guardian who does not follow the board's Standards of Practice (SoP) guidelines of conduct. (While the Courts may consider non-conformance to SoP, I understand it is unusual for them to do so, because they defer to CPGB autonomy and responsibility.) Since by far the majority of grievances are dismissed (for reasons the public is not privileged to know) it is easy for a citizen to have the impression this channel of review and discipline is rather benign. This view is confirmed if one looks at the preponderance of minor infractions such as late filings or insurance coverage irregularities that the grievance procedure has exposed.

b. Compounding the problem of this appearance of weakness, even though there has been notable public concern about potential professional guardianship abuse, and some commentary in the press, as well as legislative concern, the CPGB voted on June 10th 2010 to continue a policy of restricting access to dismissed complaints. (See further details on this, below.) I have heard a good deal of commentary indicating these policies have undermined public trust.

c. Only grievances leading to disciplinary actions are broadly open to scrutiny, yet members of the public express deep concern that these published grievances do not, in particular, reflect situations in which a ward has been arbitrarily or unnecessarily isolated from family members. I have heard substantial public concern that some professional guardians have too often isolated family from wards expediently, simply to make handling of the case easier. Or worse, to keep a concerned family member in the dark and thus disempowered, and to silence tiresome or inconvenient objections. This view, which I have seen expressed rather vigorously in the press, reflects experience I have had myself, so I see the possibility of a gap in the grievance picture. Thus I, as well as the public, can be left with an unfortunate (and I believe inaccurate) impression that there could possibly be some sort of tacit "white wash" going on within the grievance process. This of course, is an especially difficult situation for a board which includes members of the regulated community, because observers are often concerned about situations which involve "regulation by the regulated".

d. Grievances, by their nature, can be valid complaints which reflect faults in the guardianship process, and as such may contain important information about the functioning of the system itself. Yet without practical access to dismissed grievances, the public is excluded from knowing of possible system improvements that these complaints might indicate are necessary.

e. While there are reasons the reputation of a guardian should be protected, the practice of not disclosing dismissed grievances is not fair to a grievant (whether ward, family member, or other interested person) and thus fosters suspicion. I believe **the public must be trusted** to reach sensible conclusions about the nature of a situation which has led to a grievance.

f. The CPGB June 10th 2010 decision (referenced above) which limits access to dismissed grievances raised disturbing questions for me.

   i. No public comment was sought on the proposed solution, of making heavily redacted information on dismissed grievances available, in no-less-than-one-year bundles.

   ii. The vote was taken, as usual, with no record of either the number of votes for/against. Or who voted each way.

   iii. Minutes for the June 10th meeting state, "*It was noted that the SOPC* [Standards of Practice Committee] *is now creating summaries of dismissed grievances with identifying information removed and that these summaries will be available to the public.*" But such summaries are yet to be found.

   iv. Ironically, a Certified Guardian spoke as a guest speaker at the same board meeting. Two things she said disturbed me.
   - Seemingly, as a cynical joke, she suggested there might be a "fast lane" for grievances against her because there were so many.
   - I was startled at what she expressed as her basic philosophy, that the guardian's job was simply to "identify the good and the bad family members", then remove the bad ones.

Other Problem Areas:

g. What the CPGB has called an "audit" of guardians is a very small step toward insight into Washington State's guardianship community. Pre-announced random tallies and follow-up of guardians' conformance in meeting filing dates and other deadlines has done little to give transparency.

h. I have seen ample evidence that group-bullying of individuals (ganging up) is not unusual within the world over-seen by professional guardians. Also, I believe guardians and fiduciaries can be participants (witting or unwitting) in such abuse. Yet I have not seen or heard concerns about bullying expressed in any CPGB or even court proceedings.

i. Those attorneys who make substantial input into cases and a ward's life have little obligation to advocate for the ward, even though they often serve as advisor and supporter of the guardian. At the same time, there is little formal or informal collaborative outside review monitoring the effectiveness of the guardian's role. Because of limited disclosure of case information, the attorney's

role can go unchecked, except by the guardian alone, leaving an important function within guardianships without review.

j. I have on several occasions concluded (as indicated above) that the guardianship community has a tendency toward, or "a mentality" of, withholding rather than disclosing information. I have also suspected the CPGB shares this weakness.

   i. I have repeatedly observed that members of the professional guardianship community seem not to see negative consequences from withholding information. These persons seem not to connect observations indicating suspicion and distrust on the part of ward or family members with their own lack of communication, transparency and meaningful review.

   ii. As an example, In the case of our family, the guardian repeatedly became anxious that I might respond to my aging mother's concerns and insecurity about her finances, by replying directly to her questions on this subject. Thus he chose to forbid me from entering into such conversations with her. He seemed not to have understood that my mother (a "child of the depression") had always been concerned about these matters, and simple words of assurance, from her trusted and well-informed son, could have been of significant comfort to her.

   iii. I suspect that when the CPGB withholds information from the public, this may have the effect of reinforcing what I see as a similar, ill-advised, and dysfunctional tendency of professional guardians.

6. All parties would benefit from a more open, more transparent guardianship community.

   a. A continuing problem with both the professional guardianship community and the CPGB is that their activities are **chronically under-funded**. (Given the social and the financial costs of damage to the vulnerable populations served, I find this lack of available resources to be tragic.) Yet if sources of increased funding are ever to be found, an energetic information campaign will surely be necessary.

      In this circumstance it seems counter-productive to take any action that would reduce the flow of information. Yet I see the suggested exemption as such an action.

   b. Indeed, a major argument for exempting the CPGB from public disclosure requirements might be that there simply are not funds or resources available to support disclosure. If this is an argument in anyone's mind, it seems remarkable that there appears to be no recognition of or debate on this point.
      I personally suspect any limiting of public information must, in the long run, be costly (in both human and economic terms). Thus I would suggest discussion of this issue would benefit all

concerned. …Especially in these times, when there is so much pressure to seek quick-fix budget savings, and when negative long-term consequences of errors need to be ever-so-clearly identified.

c. Anything which makes it more difficult to get information about activities of the CPGB makes it more difficult for a member of the public to learn and understand. Lack of understanding leads to distrust.

d. My experience, as sketched above throughout this e-mail, has convinced me that at the very least, CPGB activities, especially the grievance process, can be said to show an appearance of lack-of-justice. It can also be easily suspected that individual board members might act to benefit themselves or associates in board proceedings. Whether such suspicions are fair or not can be debated, but it must be said that too little has been done to dispel such a view. For example, I have seen no reporting or documentation of when an individual recuses his or herself, or when there are abstentions on votes.

e. Self-regulation, while sometimes seen as a practical and expedient idea, often leads to suspicion and distrust, and sometimes omissions and deficiencies. To fully exclude the CPGB from public disclosure exposes the guardianship world to these risks.

f. Without disclosure, and free/open access to pertinent facts, full and open discussion is very hard to achieve. Correspondingly, creative discussions, and thus effective solutions are difficult to find.

g. Where system improvement is sought, easy and complete access to overview, as well as detailed-information, is always important. Without information it is difficult (both for outsiders and insiders) to see patterns which should be adjusted to achieve improvement. And surely any public dialogue will be limited and stilted, at best.

h. The CPGB, like many other parts of government, is a regulating body staffed as well as influenced by the community it regulates. As always in such situations, disclosure (both to the public and to other stake holders) and effective review are essential for staying on track and effectively serving the public.

i. The guardianship community, like so many aspects of our modern and increasingly complex society needs to use creative and “interdisciplinary” solutions to better serve its public. Yet if information is withheld (and it is very hard to know what information is important) help is not likely to be forthcoming from other disciplines.

    i. As an example, I’ve observed that the most basic ideas of financial accounting, auditing, and auditability, as known in the small-business world, are mostly unknown and thus little practiced by guardians.

Yet basic principles from this source could do a great deal to clarify important financial issues for both wards and their families.

ii. As another example, mediators and other professionals who work with conflict resolution always, in my experience, go to extreme lengths to keep all parties to a conflict informed on essential details. Yet, even though guardians are often thrust into family-conflict situations, or themselves can become targets of criticism, I have often seen that withholding of information from family members is relied upon, apparently as an expedient means of calming a situation. My feeling is this can often be counter-productive, especially in the long run. Review by outsiders, then associated training, could perhaps be helpful to some guardian practitioners.

j. A perhaps indirect argument for making information on dismissed grievances is that information useful to all concerned might become available. Yet for such information to become useful, it seems likely that individual grievances might have to be supplemented by "editorial comment" provided by one or more highly respected member of the board or the associated community. When I think further about this I see two benefits.

i. Ideas about what "frivolous" complaints really might be could become effectively documented, to the benefit of all.

ii. Useful education material might be produced, in the form of "case examples" where a ward or family member was thought to have been unfairly treated, yet solid thinking and explanations were behind the decisions made or actions taken. Or simply where trainees would be encouraged to think about the issues at hand.

k. I would argue that full exemption from scrutiny or review of any broad or essential component of government or the system of justice is imprudent. But suppose, for argument's sake, one suggested that such exclusion might be feasible or for some reason necessary. What standards, or what safe-guards would a prudent steward then want to have in place? Should full exemption be allowed for "perfect" or "near-perfect" agencies or organizations? Then if exemption were granted to such a pristine, well-funded organization, how would there be assurance that the "perfection" didn't tarnish over time, or even lead players to "scrimp on justice", thus making exemption inappropriate?
…Asking these questions in the context of professional guardianships, and related to the (chronically under-funded) CPGB, leads me to conclude these are not environments or institutions of "perfection". Also that no one appears

to be talking about “controls” to assure that the proposed exemption wouldn’t soon prove to have been a bad idea.

l. As a companion thought to the point above, I’d like to add that my doubts about “perfection” appear to be shared by numerous citizens of Washington State, by the press, by Washington State’s legislature, and the even the GAO (investigating arm of Congress) in Washington DC. Firstly, I’d say such doubts are to be expected for a complex and intricate structure, serving persons of vulnerability and deep social and economic needs. So there should be no surprise. Secondly, I find it imprudent to seriously consider an information-flow exemption when such concerns are afoot.

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As background about myself, I have been studying the CPG Board for over two years. In 2008 my near-centenarian parents, and thus our family, became involved in a guardianship situation. I soon discovered I needed to know more about this powerful, often tortuous and confusing, sometimes arcane area of law, customs, and legal details.

Thus in mid 2009 I began regularly attending CPGB board meetings, reading, and also talking to any and all I could find who had knowledge. I must report that this learning about the guardianship system has not been easy. The multiple state laws, the CPGB Standards of Practice (SoP), the disciplinary “grievance” system, and the large number of persons and functions all combine to make a very complex and sophisticated system indeed. But more importantly, the multiple areas where detailed information is simply not accessible have made my task more difficult.

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