

# **CERTIFIED PROFESSIONAL GUARDIAN BOARD**

## **REPORT TO THE SUPREME COURT**

**2003**

## ***EXECUTIVE SUMMARY***

In 1997, Washington State took a leadership position nationwide when the Supreme Court signed Order 25700-B 345 and established provisional certification requirements for professional guardians. Today, the Certified Professional Guardian Board (Board) regulates the practice of Certified Professional Guardians (CPGs) (both individuals and agencies) without interfering with the traditional role of the court in overseeing individual guardianship proceedings and legal guardians appointed under Titles 11.88 and 11.92 *et seq.* of the Revised Code of Washington.

This is the fourth report to the Supreme Court concerning the certification and regulation of professional guardians. The first report, published in December 1997, was the Final Report of the Guardian Certification Study Committee. The second report, dated April 21, 1999, was an interim report of the Guardian Oversight Board to the Supreme Court. The third report, dated 2001, was the final report of the Oversight Board, and included a recommendation for the creation of a permanent Certified Professional Guardian Board, and proposed regulations for the admission, training, continuing education, and discipline of professional guardians in this state. This 2003 annual report of the Board to the Supreme Court details the work to date and progress of the Board, and concludes with its statement of direction and recommendations for the future. The report will be made available on the AOC website.

Since its creation in 2001, the Board's work has continued to be demanding and exacting. Membership has increased to 15 members from various related professions, who serve together and on eight committees of the Board. In accordance with General Rule 23 (GR 23), the Board has adopted Application Regulations, Continuing Education Regulations, Disciplinary Regulations, Ethics Advisory Regulations and Standards of Practice.

In order to continue to achieve the greatest protection for the estates and affairs of incapacitated persons in our state, the Board is now focusing on two main areas: the ethical issues CPGs may encounter (both under Standards of Practice and GR 23), and establishing and maintaining a high level of education for the CPG. The Board members spend a considerable amount of time overseeing the mandatory, semi-yearly initial training, the continuing education requirement, and in the review and processing of grievances.

The regulation of CPGs will continue to develop, requiring future changes to GR 23 and its regulations. Unexpected new issues and unresolved old issues will continue to be addressed by the Board. Examples of these include the inclusion of stand-by guardians within the regulation of the Board; clarifying and improving the requirements and practices related to stand-by guardians; increasing the education and quality of experience of CPGs; and determining the extent to which the activities of court-appointed trustees are within the scope and Standards of Practice required of CPGs.

We look forward to a future of providing continuing assistance to the Supreme Court in providing leadership and oversight in this important area.

Vicki L. Hogan, Judge

Chair, Certified Professional Guardian Board

# **CERTIFIED PROFESSIONAL GUARDIAN BOARD**

## **I. HISTORY OF THE BOARD—PROFESSIONAL GUARDIANS IN WASHINGTON**

### **Before General Rule 23 Was Written and Adopted**

Prior to General Rule 23 (GR 23), guardians appointed by the court derived their authority to act from Chapter 11.88 RCW. There was no regulatory system in place other than statutory compliance over those individuals who were appointed to serve as guardians for incapacitated persons (I.P.s) in Washington. During the 1997 legislative session, the Legislature addressed issues relating to the certification of guardians under Title 11 of the Revised Code of Washington (RCW) and made progressive and broad sweeping changes.

As defined by the Legislature in 1997, a "professional guardian" is one who acts as a guardian under Chapter 11.88 RCW for a fee for three or more non-family members. Therefore, guardians who do not collect fees, who only act on behalf of their family members, or who have fewer than three cases would not need certification. A judge wishing to appoint a professional guardian may appoint only those professional guardians who have met the certification guidelines developed by the Administrative Office of the Courts (AOC).

### **The Original Study Group**

The 1997 Legislature directed the AOC to convene a study group to assist the AOC in making recommendations for implementing a program on certifying professional guardians. Thurston County Superior Court Judge Paula Casey chaired the study group. Based upon the study group report, AOC made recommendations to the Supreme Court in December 1997.

### **The Rule Drafters: The Professional Guardian Certification Oversight Board**

In response to the December 1997 report, by court order the Supreme Court established the Professional Guardian Certification Oversight Board (PGCO Board) in July 1998. The order gave the PGCO Board and the AOC responsibility for overseeing the implementation of the certification program and developing final recommendations on specific policies and procedures for a full certification program.

### **Adoption of the Rule**

On October 19, 1999, the PGCO Board submitted its Final Report to the Supreme Court. On January 6, 2000, the Supreme Court adopted the Final Report as submitted and enacted Supreme Court General Rule GR 23. With the enactment of GR 23, the PGCO Board was dissolved and all members of the PGCO Board were appointed to the Certified Professional Guardian Board (Board) chaired by Pierce County Superior Court Judge Marywave VanDeren.

## **The Regulations**

The Board and the AOC have worked together to develop application procedures and regulations, and to establish certification guidelines, guardian training, standards of practice, education regulations, ethics advisory opinion regulations and discipline regulations. The development of these rules and regulations was a comprehensive and in depth process.

## **Education and Testing**

The original Supreme Court Order required the Board to "develop recommended policies and procedures for full certification, including preparation of a qualifying examination." The Board consulted with the state of Arizona regarding its private fiduciary certification program. The Board also consulted with the University of Washington regarding the time and expense of developing, administering and updating a proper, validated test. Based on the information gathered from Arizona, the University of Washington, and the Board's concerns, the Board recommended to the Supreme Court that regulations implementing this section be reserved. There was concern the cost of developing and implementing a test might be prohibitive and there are higher priority demands for resources. The Board was advised that development and maintenance of a valid test and testing protocol, one that would be educationally valid and legally viable, was a significant undertaking. The Board concluded that emphasis on initial and continuing training was the preferred method. This education-based approach was adopted by the Court and remains in place today.

If the Supreme Court later concludes testing is necessary, then there must be an appropriate budget allocation sufficient to develop a testing program. The proposed examination should be linked to the training and designed to expand the learning experience based on the best model of adult learning.

## **The Provisional Period**

### **Certification of the Existing Professional Guardians**

It was decided to have provisional certification during the period the administrative rules were being written. The industry at that time had individuals needing to receive training, have backgrounds checked, and education/experience evaluated.

The Board spent many hours developing training. Mark Sideman, Education Director of the King County Bar Association and an adult educator, was given a contract to develop training and materials. James Degel, an attorney, guardian and PGCO Board member was the editor for the materials. The materials developed became the Washington State Training Manual. The first training was subsidized in part by the DSHS Aging and Disability Services Administration using money from the Older American's Act, Title VII. The \$10,000 from DSHS was crucial to ensure the effort was financially possible.

The applications committee worked with the AOC to develop an application process that included fingerprint cards, criminal history checks, professional licensing checks, and a uniform application review.

The provisional certification and development of the application regulations presented numerous challenges including: the logistics of obtaining fingerprint and background checks; working with previously unregulated guardians who now needed to comply with detailed application requirements and forms; developing the training materials and forms; and orienting the AOC staff to the stringent demands of monitoring certification of this new profession.

## **II. PRESENT STRUCTURE AND ACTIVITIES**

Presently the Board is comprised of CPGs, attorneys, judicial officers, a professor of nursing, a representative of the nursing home industry, a university professor of health policy and administration specializing in guardianships, a representative of DSHS, and consumers.

The Board meets every other month at the Two Union Square AOC office in Seattle and by conference call on alternating months. All Board meetings are open to the public. Although the Board has met in other locations, it is more cost effective to meet in Seattle due to the transportation costs. Board members participate in the semi-annual initial training for new guardians and continuing education for certified guardians. By holding the initial mandatory training and continuing guardian education opportunities in various places around the state, the lines of communication between the Board and local guardians are enhanced.

### **Committees**

The Board operates using a committee system.

### **Use of Technology**

The AOC's web site includes a section devoted to Professional Guardian certification, located at [http://www.courts.wa.gov/programs\\_orgs/pos\\_guardian/](http://www.courts.wa.gov/programs_orgs/pos_guardian/). After initial set up difficulties, the site is running smoothly. GR 23, certification rules and regulations, meeting notices and minutes, approved training opportunities, Board membership list, a searchable list of CPGs and CPG Agencies (CPGAs), and other documents are available on the web site.

The Board primarily uses email as a way to exchange information, viewpoints, and suggestions. Most of the scheduling and transmission of minutes and drafts occur over email. This has resulted in cost and labor savings.

The Board also communicates via the use of a listserv. This ensures current Board members receive all global messages. A listserv that includes all online CPGs has been created. It is in its infancy. Once fully operational, it will be economical, and, more importantly, it will provide faster communication between CPGs and the Board.

### **III. EDUCATION**

Individuals interested in becoming certified as a certified professional guardian must take a two-day “Mandatory Initial Guardian Training” which is offered twice a year. The year after certification, all professional guardians must annually participate in mandatory “Continuing Guardian Education”.

Participants of the Mandatory Initial Guardian Training are given the Washington State Guardian Manual. All CPGs are required to maintain an updated copy of the Manual. The Manual is widely used as a reference tool by CPGs. It includes all rules, regulations, guardianship statutes, and information useful in understanding and administering the varied work and duties of the CPG.

#### **Mandatory Initial Guardian Training**

Beginning in 2000 and each year thereafter, the Mandatory Initial Guardian Training has been offered twice per year. In 2002, a Request for Proposal (RFP) was developed to find an organization to conduct the semi-annual Mandatory Initial Guardian Training. The King County Bar Association was selected for the year 2003. For the year 2004, another RFP was developed and the King County Bar Association was selected, providing continuity to this core Board function. The Board closely monitors the development and presentation of these mandatory certification trainings, and Board members regularly participate as faculty members.

#### **Continuing Guardian Education**

As of 2003, each CPG is charged with obtaining 12 hours per year (2 ethics, 2 general, 4 estate, and 4 person) of continuing guardian education. Continuing guardian education is provided by private vendors who must submit their application for approval to the Education Committee. Board regulations set out the requirements for content, materials, record keeping, and awards of credit hours.

Not all seminar applications for continuing education are approved. In 2003, the education committee approved 24 seminars. Vendors include bar associations, the Washington Association of Professional Guardians, professional guardians, professional guardian agencies, private individuals, and professionals or organizations in related fields.

### **IV. MISCELLANEOUS**

The first Mandatory Initial Guardian Training resulted in the certification of approximately 200 individuals and 40 agencies. Since 2000, there has been a constant flow of persons aspiring to become CPGs. Not all attendees apply to become CPGs and not all applications result in certification.

Since the initial certification, the education and experience requirements have been continuously reviewed and clarified. GR 23 necessitates applicants to possess a specific combination of education and work experience. The determination of what work and life experience qualifies has been an on-going discussion and one the Board believes should continue to evolve. GR 23 describes qualifying experience as “a discipline pertinent to the provision of guardianship services, such as legal, financial, social service, or health care...” In practice, applicants have sought to qualify almost any business or management experience as qualifying and have sought to characterize appointments as guardian for a relative as qualifying. The treatment of such applications is likely to evolve.

GR 23 creates requirements setting out in very general terms that an applicant must possess a combination of education and work experience totaling five years, with a minimum of one year of work experience. There is no qualification as to the content of an applicant’s education background, simply the possession of any degree is sufficient. The Board will continue to review this requirement and may recommend refinement of the rule.

### **De-certification**

Guardians can be decertified for several reasons. There have been a number of persons who did not pay their annual fees or renew their certification if on inactive status. There are some who did not satisfy their mandatory continuing guardian education requirement. There have been a few agencies that have not been able to maintain the required two CPGs at the agency.

### **Renewal**

The annual fees are paid on an annual basis. The dues have not changed since the inception of the program.

### **Cost**

The direct cost of training and materials have been managed by charges to the CPGs.

## **V. DISCIPLINARY PROCEDURES FOR CERTIFIED PROFESSIONAL GUARDIANS**

### ***General Rule (GR) 23***

General Rule 23 authorizes the Board to adopt and implement procedures to review any allegation that a CPG has violated an applicable statute, fiduciary duty, standard of practice, rule, or regulation. The Board is authorized to impose sanctions and remedies designed to protect the public and ensure guardians meet their professional responsibilities.

## **Standards of Practice**

The Board adopted Standards of Practice (SOPs) for CPGs. The SOPs are mandatory to the extent the superior court has granted the guardian the authority described in a given standard. The SOPs concern ethics, residential decisions, medical decisions, financial management, changes in circumstances, complying with statutory requirements, and general decision-making standards for guardians.

## **Disciplinary Regulations**

The Board adopted Disciplinary Regulations to establish a process for the Board to review grievances of alleged violations of rules, regulations, or SOPs.

## **Grievances**

Grievances must be filed in writing with the AOC. Grievants are encouraged to use the grievance form on the Board's web site, to ensure the necessary factual information is provided to allow review of the grievance. The AOC does an initial screening of grievances for two reasons:

- To ensure grievances contain sufficient information for review by the Board and,
- To ensure the grievances allege grounds for disciplinary action over which the Board has jurisdiction. The AOC will return grievances not meeting this criteria to the grievants with an explanation. For example, grievances against attorneys involved in guardianship proceedings will be returned to the grievant with information about how to contact the Washington State Bar Association.

Judicial officers, I.P.s, family members, public agencies, care-giving agencies, financial institutions, healthcare workers, and other persons who have contact with guardians and their clients have made grievances about guardians.

A significant distinction in professional guardian discipline is the requirement of GR 23 that the Board should not become an avenue for people dissatisfied with a court's decision in a specific matter, i.e. "another bite at the apple." The Board does not routinely consider matters that have been resolved by a court with current jurisdiction unless there are findings or an order entered suggesting that a guardian has failed in the guardian's duties. The Board does not consider grievances about the behavior of guardians when they can be resolved by the court with current jurisdiction.

## **Grounds for Disciplinary Action**

The Disciplinary Regulations set forth these grounds for disciplinary action:

- Criminal activity.
- Violation of oath, duties, or SOPs.
- Permitting a guardian's name to be used by an uncertified person or agency.



- False statements on an application for certification.
- Discipline of a guardian by another competent authority in connection with a guardianship or interaction with an incapacitated or vulnerable person.
- Allowing a person whom has been decertified or suspended to practice with a certified guardian.
- Disregard of legal process or order of the Board.
- Making a false statement under oath.
- Conduct demonstrating unfitness to work as a guardian.
- Working as a guardian while on inactive status.
- Failure to cooperate with a disciplinary investigation.

### **Sanctions and Remedies**

Sanctions imposed under the disciplinary process may include decertification, suspension, a prohibition against taking new cases, a letter of reprimand, or a letter of admonishment. Additional remedies may include changes in methods of practice, probation, restitution, additional training for the guardian or staff, requirement that the guardian obtain expert consultation, mentoring, or an audit. The guardian may be ordered to pay the costs of the disciplinary process, including attorney fees.

### **Standards of Practice Committee**

The AOC forwards the screened grievances to the Board's Standards of Practice Committee (SOPC). The Disciplinary Regulations provide the SOPC shall review the grievance within 45 days from the date the grievance was filed with the AOC. The SOPC determines whether there are grounds to proceed with an investigation of the guardian's conduct, based on the information contained in and submitted with the grievance.

### **Active Guardianship Cases**

Many grievances concern guardianship cases that are still active and open. In these cases, the guardian is under the supervision of the superior court that appointed the guardian. GR 23(a) is not meant to duplicate the statutory process by which the courts supervise guardians. The Board also may not wish to infringe upon the authority of the court with regard to guardianships except in certain cases.

The Disciplinary Regulations direct the SOPC to send grievances on active cases to the appropriate superior court with a request the court review the grievance, take any action the court deems necessary, and then report to the SOPC what action, if any, was taken by the court. The SOPC has found the superior courts are willing to review these cases and take action, if necessary, to correct the guardian's practices.

The local superior court's action may or may not resolve the disciplinary matter. If the court did not find a problem with the guardian's conduct, or found that the problem was minor and was corrected by the court, the SOPC may not see the need to impose disciplinary sanctions on the guardian. On the other hand, if the court's report indicates a more serious problem with the guardian's conduct, the SOPC may recommend the disciplinary process continue.

One exception to this general rule is when the judicial officer in the superior court with jurisdiction over a guardianship has made a grievance to the Board. Obviously, in those cases, the court has already reviewed the guardian's conduct and found a problem that it deems necessary to bring to the attention of the Board.

### **Minor Violations**

If the SOPC determines the guardianship practice complained of appears to be a potential violation of the SOPs, but of minor significance and of a nature not potentially harmful to anyone for whom the guardian serves as guardian, the SOPC may request the Board's permission to contact the guardian directly and attempt to resolve the problem by recommending to the guardian how to change the practice. If the SOPC is able to resolve the grievance in this manner, the grievance is closed. If the guardian is not amenable to correcting the problem, then the SOPC refers the grievance to a Review Panel (RP).

### **Grievance Alleging Grounds for Discipline**

If the SOPC finds the grievance alleges facts which, if true, would be grounds for discipline, and if the grievance is not a minor violation resolved by either the SOPC or the court with supervision over the guardianship, then the SOPC will recommend that a RP be appointed to investigate the grievance.

### **Review Panel**

A RP is the next stage in the disciplinary process. Each RP is composed of three members, at least one whom must be a CPG. RP members are appointed by the Chair of the Board. They may be, but are not required to be, Board members. The duty of the RP is to investigate the grievance. The RP reviews relevant documents and pleadings, gathers information from the guardian and other witnesses, and may meet with the guardian.

Upon completion of its investigation, the RP makes a recommendation to the Board regarding the grievance. The recommendation will consist of one of the following courses of action:

- That the grievance proceed to a formal hearing; or
- That the grievance be settled upon terms and conditions proposed by the RP; or
- That the grievance be dismissed as being unfounded.

## **Disciplinary Agreement**

The RP does not have the authority to settle a grievance. The RP may negotiate a tentative disposition with the guardian and then recommend that disposition to the Board. The agreement is not final unless approved by the Board.

## **Formal Hearing**

If the RP finds grounds exist for disciplinary action, and the matter is not resolved by way of a disciplinary agreement, then the RP will recommend the Board file a formal grievance against the guardian and proceed to an administrative hearing. The hearing is held before a hearing officer appointed by the Chair of the Board. Any Board member or other person may be appointed as a hearing officer.

The parties have a right to discovery prior to the hearing. The superior court rules of evidence apply to the proceedings. The rules of procedure are similar, but not identical, to the rules under which executive branch state agencies conduct adjudicative hearings under the Administrative Procedures Act, RCW Chapter 34.05.

After the hearing, the hearing officer has 20 days to file findings of fact, conclusions of law and a recommendation to the Board regarding the final order in the matter.

## **Decision by the Board and the Supreme Court**

The Board may adopt, modify, or reverse the findings, conclusions, and recommended decision of the hearing officer. If the Board's decision is to suspend or decertify the guardian, the Board must file its decision with the Supreme Court for final approval. The Supreme Court, upon review of the record from the hearing and the recommendation from the Board, may adopt, modify or reverse the recommendation of the Board by written order.

If the Board's decision is for a sanction or remedy other than a suspension or decertification of the guardian, or for dismissal of the charges, then the Board's decision is final.

## **Right to an Attorney**

The guardian has the right to an attorney, at his or her own expense, at any stage of a disciplinary proceeding.

## **Confidentiality of Disciplinary Process**

GR 23 and the disciplinary regulations require the Board's disciplinary records and all meetings related to disciplinary proceedings against individual guardians or agencies remain confidential unless the Board files a formal grievance. After the filing of a formal grievance, all records in the disciplinary file and all proceedings related to the grievance are open to public access, except for certain personal information such as home address, financial information and medical information. Action taken by the Board regarding a disciplinary agreement is also taken at a public meeting.

## Areas of Concern

One disciplinary issue the Board has devoted time to discussing is the extent to which it should investigate a grievance against a guardian when a similar grievance has already been made by the same grievant to the superior court with jurisdiction over the guardianship and the superior court has not found fault with the guardian's conduct. GR 23(a) states:

“This rule does not duplicate the statutory process by which the courts supervise guardians nor is it a mechanism to appeal a court decision regarding the appointment or conduct of a guardian.”

Many grievances made to the Board about a guardian's conduct are also made to the superior court supervising the guardianship. Grievances about a guardian's fee, the care being provided by a guardian, and other issues related to a specific guardianship case can and should be addressed by the superior court in an open guardianship case, since the court appointed the guardian and is in the best position to address the issue of the guardian's conduct.

Sometimes the grievant comes to the Board because of unhappiness with the decision made by the superior court when the grievant raised the issue to the court. The court may have disagreed with the grievant that the guardian was acting inappropriately, or the court may have approved fees that the grievant feels are excessive. If the issue was considered by the superior court with authority over the guardianship, and that court found nothing wrong with the guardian's conduct or fees, the Board has been reluctant to allow the grievant to re-litigate the issue in the forum of the Board. GR 23 states the Board's procedures are not meant to duplicate the statutory process by which the courts supervise guardianships, found in RCW Chapters 11.88 and 11.92, and the Board is not to provide a mechanism for appeal of a court decision regarding the conduct of a guardian.

Another difficult area for the Board concerns potential misconduct by a guardian when the guardian is acting in a capacity other than as a guardian, but performing duties similar to that of a guardian. For example, many guardians perform asset management services for trust beneficiaries. Should the Board investigate allegations of misconduct against guardians working in a capacity other than as a guardian, but performing job duties similar to that of a guardian? One of the grounds for disciplinary action against a guardian is “conduct demonstrating unfitness to work as a Guardian.” *Disciplinary Regulation* 502.9. If a guardian commits acts of financial mismanagement while working as a trustee, it would raise concerns that the guardian might commit the same misconduct while managing a guardianship estate on behalf of an I.P. To date, the Board has taken a liberal view that all activities of a CPG may be reviewed.

Another area of continuing discussion by the Board relates to the possible misconduct by a CPG that occurred prior to the adoption of the SOPs, the disciplinary regulations, or even the creation of GR 23. The AOC staff attorney to the Board advised the Board its authority in this regard is limited.

## **Assistant Attorney General Support**

To date there has been very little use of assistant Attorney General time. This has been largely due to the use of the time of the AOC staff attorney. There may be occasions in the future, if there is a need to file a formal grievance against a CPG, or a highly contested discipline process or case, that assistant Attorney General time will be required.

## **Hearing Officers**

To date, there has not been a need for hearing officers other than Board members. If the number of grievances continues to increase and hearings are needed, this may change and could result in a cost for the time of the hearing officers.

## **VI. MISCELLANEOUS**

Other committees carry on the work of the Board, such as the Public Information Committee and the Budget Committee. The Ad Hoc Sub-Committee on Standby Guardians was created to address an increasingly new issue. This sub-committee has met, and determined generally that an agency provides a natural standby. However, individual professional guardians need to have other professionals or family members as standbys. These unresolved issues surrounding the standby guardian will continue to be addressed by the Board.

The Insurance Committee and the Board have, considered whether there should be a requirement for errors and omissions coverage. At the current time, the costs of such coverage remain too high for such a requirement to be practical since the events of September 11, 2001 resulted in many carriers pulling back and prices going up. The Insurance Committee is coordinating with the National Association of Guardians in watching the market and reporting regularly. There has been little movement in the insurance industry towards making policies available.

## **VII. ETHICS ADVISORY OPINIONS**

In November 2001, Ethics Advisory Opinion Regulations were adopted by the Board after the Supreme Court amended GR 23 to allow the Board to issue ethics advisory opinions. The Ethics Advisory Opinion Committee is producing opinions as matters referred to the Board. To date, one Ethics Advisory Opinion has been approved by the Board.

## **VIII. CHANGES NEEDED BY THE SYSTEM**

Continuing minor changes in the rule and various regulations allow the Board to address matters that were not expected. These will continue to require the Board's attention. Other unresolved issues and developing issues have also been highlighted.

It is expected that over a longer period, the education and experience levels required for becoming a CPG will need to rise. Without an increase in education and quality of experience, the program will not be able to achieve the protection of the I.P.s that is desired.

Another area that will need to be addressed by changes in statute is the holdings of trustees who are involved in personal injury and special needs trusts to the standards of CPGs. Guardians employed by banks and trust companies will need to be certified.

From time to time, the Board becomes aware of and discusses matters that involve the legislative process. Improving practices related to stand-by guardians could involve revision of the current statutory provisions. Currently, there are proposals for changes in the Vulnerable Adult Statute, the Wrongful Death Act, and the fee provisions regarding "Medicaid Guardianships" in the Guardianship Statute. The Board has chosen not to approve or advocate for any particular legislative proposal although the Board has made general statements in relation to problems in the administration of guardianships or the protection of I.P.s.