

# Certified Professional Guardian Board

## Meeting Minutes

January 11, 2010

SeaTac Office Center, 18000 International Blvd., SeaTac, WA

### CHAIR

Judge Kimberley Prochnau

### MEMBERS PRESENT

Robin Balsam  
Gary Beagle  
Ree Ah Bloedow  
Dr. Ruth Craven  
Nancy Dapper  
John Jardine  
Judge James Lawler  
Chris Neil  
Prof. Winsor Schmidt  
Judge Robert Swisher  
Comm. Joseph Valente  
Judge Chris Wickham  
Sharon York

### MEMBERS ABSENT

None

### VISITORS

Shirley Bondon	Pat Joubert	Ken Curry
Diane Pearson	Tom Goldsmith	Jeff Buchan
Summer Gallagher	Sylvia Curry	Amy Miller
Jude Siefker	Cynthia Hanning	Scott Wyatt
Mitchell C. Hunter	Glenda Voller	Leesa Camerota
Stacy Phillips	Jamie Shirley	Sharon Denney
Giselle Loveland	Maureen McCaslin	Claudia Donnelly
Alice Hardman	JR Hardman	Michael Johnson
Ken Fernandes	Linda Custer	Steven Posalski
Amy Stelljes	Scott Malavotte	Doc Williams

### STAFF

Deborah Jameson

### CALL TO ORDER

Judge Prochnau called the meeting to order and asked the Board members and AOC staff to introduce themselves.

## **BOARD BUSINESS**

### **a. Approval of Minutes**

A motion was made and seconded to approve the November 9, 2009 Board Meeting Minutes as presented. The motion passed.<sup>1</sup>

### **b. Chair Report**

Judge Prochnau said that she did not have a chair report given the full agenda.

### **c. Progress Towards 2010 Goals**

Judge Prochnau said that the Board created the 2010 goals at its last long term planning meeting and reviews them at each meeting.

The first goal is to improve and refine the UW Guardianship Certificate Program. Chris Neil and Sharon York plan to attend that last in-person class at the end of February. Gary Beagle reported that he attended a recent in-person class and was impressed by the program and the continued improvements. Board members can access UW course materials and review lessons and student assignments.

The next goal is to review the results of the DR 520 Audit. Judge Prochnau deferred a discussion of that goal to Comm. Valente's presentation later on the Agenda.

Another goal is to develop the core competencies of a successful guardian and consider testing. Judge Prochnau noted that the issue will be discussed at the next long term planning meeting in April.

## **COMMITTEE REPORTS**

**a. Regulations Committee.** Chris Neil reported on the WAPG training that he attended on November 10, 2009. One section of the training was on emergency preparedness. Mr. Neil said that the instructor made a very interesting presentation that specifically addressed concerns of guardians during emergencies.

Mr. Neil then reported that the Regulations Committee has met twice and has been focused on the Standards of Practice. The Committee has made some slight draft modifications and created a Table of Contents for ease of use. Each Committee member has been assigned a section to analyze and determine if any changes are needed. The next meeting will be in early February and the Committee plans to have a proposal to share at the March Board meeting.

The Committee is also going to look at the issue of standby guardians and the proposals of Sharon Denney.

### **b. Standards of Practice Committee**

**i. DR 520 Audit Update.** Commissioner Valente reported that the audit process is still on schedule, but will not finish early as was reported at the last Board meeting. Normally 20 guardian's names are selected each month—17 from Western Washington and 3 from Eastern Washington. When the Board first started the audit, those 20 guardians were usually

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<sup>1</sup> Except in the event of a tie vote, the Chair does not vote on any motions before the Board.

affiliated with an agency and the Board would end up auditing almost 40 guardians each month. Now, there are only 3 small agencies left, so the selection of 20 guardians may result in the audit of 22 guardians.

It is expected that the selection of guardians will be completed with the March 2010 audit. It will take 2-3 months after the selection to complete the audit process. The audit process started in July 2009 and it should be completed by July 2010 at the latest.

Of the open audits, there are two new inquiries and two ongoing inquiries since the last update. An inquiry is opened when a guardian is currently not in compliance with reporting requirements.

Comm. Valente noted that the current audit has been of the timeliness of filing of certain reports—annual reports, personal care plans, inventories, etc. If the Board decides to audit guardians for timeliness at some future date, Comm. Valente thought that auditing 100% of the guardian's cases was a realistic goal.

**ii. DR 510 Technical Change.** Judge Prochnau informed the Board of the request that the Board approve a technical change to Disciplinary Regulation 510 to change language saying that “the AOC Liaison to the Board shall sign a complaint” to “the AOC shall sign a complaint” because the position title, AOC Liaison, no longer exists.

A motion was made and seconded to approve the technical change. The motion passed. The change is effective immediately.

**iii. Confidentiality of Dismissed Grievances.** Judge Prochnau reviewed the SOPC's recommendation that the Board consider amending its regulations regarding investigative records and confidentiality of dismissed grievances. GR 23 now defers all decisions regarding the confidentiality of records to the Board regulations. The current administrative regulation allows a person to request a specific record of a dismissed grievance and it will be provided with the guardian and grievant's identifying information will be redacted.

The Board reviewed how other regulatory agencies handle dismissed grievance records and how the Public Records Act treats such records. The Washington State Bar and Commission on Judicial Conduct do not disclose records of dismissed grievances. Dismissed grievance records involving health care professionals are subject to public disclosure. Under the Public Records Act, the records would be disclosed except in some limited circumstances.

The majority of the SOPC recommended allowing disclosure of disciplinary records of dismissed grievances without redaction of the guardian or grievant's identifying information. Comm. Valente discussed the balance between professional guardian's desire to have no record of meritless grievances and the public's interest in transparency. He noted that if records of dismissed grievances were available, the Board would need to have findings about why the grievance was dismissed.

The Board also considered a change to the definition of investigative records. A motion was made and seconded to approve a change to Administrative Regulation 002.14 as follows:

“Investigative records” are records obtained by the Board during an investigation related to an investigation pursuant to GR 23 and the disciplinary regulations of the Board into the conduct of a professional guardian prior to the filing of a complaint by the Board imposition of any disciplinary sanction or dismissal.<sup>2</sup>

The motion passed. The regulation will be posted for comment and the Board will vote to adopt the regulation at its March 8, 2010 Board meeting.

A motion was made and seconded to approve a change to Administrative Regulation 003.3.1 as follows:

003.3.1 ~~Grievances~~ Disciplinary records of grievances that are dismissed shall be disclosed upon request using established procedures for inspection, copying, and disclosure. ~~with identifying information about the grievant and professional guardian redacted.~~

The Board discussed the amendment.

- There would be a different standard for guardians than for attorneys and judicial officers.
- Complaints are a regular occurrence and guardians should not bear the burden of responding to meritless complaints
- Malpractice insurance for guardians could increase
- The decisions made by guardians are made with the facts known at the time and grievances are judged with 20/20 hindsight
- Guardianship is not an exact science with bright line rules
- There is no utility in disclosing dismissed grievances
- The policy should be to err on the side of openness unless there is a compelling public argument not to do so
- Disclosure would demonstrate that the Board takes complaints seriously
- Vulnerable adults are not able to advocate for themselves the way the clients of attorneys can
- Transparency would lessen perception that Board does not act independently

The Board voted on the motion to approve amending Administrative Regulation 003.3.1 to allow disclosure of dismissed grievance records without redacting identifying guardian and grievant information. The motion did not pass. Judge Prochnau directed the SOPC to draft a recommendation that would allow disclosure of dismissed grievances when part of a general public record request (not for a specific case or guardian) and that would have identifying information redacted.

## **DENNEY PRESENTATION**

Judge Prochnau informed the Board that Sharon Denney had submitted proposed rule and regulation changes to the Supreme Court and that the Board had been asked to review those proposals and comment to the Court. Ms. Denney was invited to speak to provide the Board with more information about her proposals.

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<sup>2</sup> Within all proposed regulation amendments, additions are indicated by underlining and deletions indicated by strikethroughs.

Ms. Denney explained her background and how she came to be interested in proposing changes to guardianship rules and regulations based on the experience of her mother having a guardian. Ms. Denney said that she had three basic recommendations:

- (1) Change the composition of the CPGB because having attorneys, judicial officers and guardians on the Board created a conflict of interest. In their place, Ms. Denney recommended having experts in the social, health, and financial arenas.
- (2) Require that the Board apply the Standards of Practice to the conduct of guardians and not refer grievances involving active cases to the superior court. As part of this recommendation, the Board should form committees and develop plans for regular and random audits.
- (3) Develop Standards of Practice regarding accountability and verification of charges, including attorney fees and guardian fees.

Judge Prochnau solicited comments from the Board. One person noted that Ms. Denney's proposals pointed out some of the flaws in the current monitoring system, though implementing more monitoring would require additional resources. Another member wondered if the monitoring would apply to both professional and non-professional guardians. Judge Prochnau suggested that the Board should invite someone from the Department of Financial Institutions to speak to the Board and provide any suggestions for monitoring and overseeing financial accountings.

## **COMMITTEE REPORTS CONT'D**

### **c. Education Committee.**

i. CPG Manual Update. Gary Beagle reported that after discussion and review by contract officers for both AOC and the UWEO, a decision was made that the UWEO had fulfilled its requirements under the current contract to provide updated materials to the CPG Manual. The UWEO may propose further updates to the CPG Manual at a future date. The UWEO has a license to use the CPG Manual and create a textbook/expanded syllabus.

ii. CE Regulation 205.1: A motion was made and seconded to approve CE Regulation 205.1 as follows:

An active Guardian or sponsoring agency desiring approval of a continuing education activity shall submit to the Committee all information called for by Form 1 at least 30 days prior to the date scheduled for the class, along with an application fee of \$25.00 for each occurrence. If filed less than 30 days before the activity, the application fee is \$50 for each occurrence. Applications for retroactive approval will be considered if submitted with all the information required by Form 1 within 30 days of the continuing education activity.

Discussion: The Regulation was posted for comments for 30 days and the comment period expired December 12, 2009. The Board reviewed comments and the makers of the motion and second agreed to add clarifying language to the amendment to ensure that it is clear that the \$50.00 fee will apply to applications for retroactive approval.

The Board voted to adopt CE Regulation 205.1 as follows:

An active Guardian or sponsoring agency desiring approval of a continuing education activity shall submit to the Committee all information called for by Form 1 at least 30 days prior to the date scheduled for the class, along with an application fee of \$25.00 for each occurrence. If filed less than 30 days before the activity, the application fee is \$50 for each occurrence. Applications for retroactive approval will be considered if submitted with all the information required by Form 1 within 30 days of the continuing education activity and with the \$50 fee.

The motion passed and the regulation is effective immediately.

iii. Gary Beagle reported to the Board that the Education Committee was recommending several changes to Continuing Education Regulations. The reporting cycle would change from one year to two years effective January 1, 2011. Definitions for "person credit", "estate credit", and "general credit" would be added. The number of credits required in person and estate would be reduced and the number of general credits increased. Continuing education credits would carryover in the category in which they are earned. Credit for teaching or participating in an approved continuing education activity would be in the same category as the nature of the activity. Materials from continuing education activities would no longer be sent to AOC after the activity.

A motion was made and seconded to approve changes to the Continuing Education Regulations as follows:

**201 Regulation Definitions.**

As used in these regulations, the following definitions shall apply:

201.9 ~~"Calendar year" shall mean January 1 to December 31.~~ "Reporting period" shall mean a two-year period from January 1 to December 31 the following year.

201.11 To qualify for "person credit", a course or subject must encompass training and information pertaining to personal care, physical care, residential placement, care management, medical, psychological, social, and family matters and other issues with which a Guardian of the Person should be familiar.

201.12 To qualify for "estate credit", a course or subject must encompass training and information about the marshalling, management and sale of assets; responsibility for maintenance and protection of assets; entitlement to federal, state, and other financial benefits; estate planning, including gifting and transfers of assets; and other financial activities with which a Guardian of the Estate should be familiar.

201.13 To qualify for "general credit", a course or subject must encompass training and information pertaining to the business side of a Guardian's practice, including the use of forms to assist in the practice, tax and civil liability, insurance and bond issues, relationship with counsel and other professionals, fee issues and billing practices, and business development. It also includes matters that apply generally to guardianship of person and estate such as the roles of guardians ad litem, petitions for direction, general civil procedure or the role of the court.

## 202 Continuing Education Requirement

- 202.2 ~~Each Guardian shall complete a minimum of 12 credit hours of approved education during each calendar year, except as exempted by Regulation 213. Credit hours accrue for classes approved by the Education Committee and shall annually total no fewer than 12 credit hours that must include the following: Ethics, two hours; estate management, four hours; personal care issues, four hours; and general issues, two hours. (Amended May 14, 2007) Each Guardian shall complete a minimum of 24 credit hours of approved education during each reporting period, except as exempted by Regulation 213. Credit hours accrue for classes approved by the Education Committee and shall biennially total no fewer than 24 credit hours that must include the following: Ethics—4 hours; Person—6 hours; Estate—6 hours; and General—8 hours.~~
- 202.3 ~~If an active Guardian completes more than 12 such credit hours in a given calendar year, the excess credit, up to 12 credits, may be carried forward and applied to such Guardian's education requirement for the next calendar year. Only ethics credits may satisfy the annual requirement for two ethics credit hours. Credits may be carried forward in their original category or as general credits. General credits may be carried forward as general credits in their entirety, up to four hours or two hours each (a total of four) may be applied to estate management or personal care issue credits (Amended December 11, 2005; Amended May 14, 2007). If an active Guardian completes more than 24 credit hours in a given reporting period, the excess credit, up to 12 credits, may be carried forward and applied to such Guardian's education requirement for the next reporting period. Credits may be carried forward only in their original category.~~
- 202.4 Failure to comply with the provisions of this regulation within each ~~calendar year reporting period~~ shall subject the Guardian to disciplinary action, including decertification for failure to comply.

## 203 Credits/Computation

- 203.4 Excess or "carry-over" credits may be applied to the succeeding ~~calendar year's reporting period's~~ credit hour requirement. Such credits shall be reported to the Committee on or before January 31 as is required by Regulation 208.1.
- 203.5 Credit toward the continuing education requirements set forth in these regulations may be earned through teaching or participating in an approved continuing education activity on the following basis:
- 203.5.1 An active Guardian teaching in an approved education activity shall receive credit on the basis of one credit for each hour actually spent by such Guardian in attendance at and teaching in a presentation of such activity. Additionally, an active Guardian teaching in such an activity shall also be awarded further credit on the basis of one credit as defined in Section 201.3 for each hour actually spent in preparation time, provided that in no event shall more than 10 hours of credit be awarded for the preparation of one hour or less of actual presentation. The nature of the activity, person, estate, ethics, or general, will determine the type

of credit hours awarded. Credit hours will be awarded in the same category as the activity.

203.5.2 An active Guardian participating in an approved educational activity shall receive credit on the basis of one credit for each hour actually spent by such Guardian in attendance at a presentation of such activity. Additionally, an active Guardian participating in such an activity shall also be awarded further credit on the basis of one credit for each hour actually spent in preparation time as defined in Section 201.8, provided that in no event shall more than five hours of credit be awarded for such preparation time in any one such continuing education activity. (Corrected 4-8-02) The nature of the activity, person, estate, ethics, or general, will determine the type of credit hours awarded. Credit hours will be awarded in the same category as the activity.

#### **204 Standards for Approval**

The following standards shall be met by any course or activity for which approval is sought:

204.4 Thorough, high quality, readable, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. It is recognized that written materials are not suitable or readily available for some types of subjects; the absence of written materials for distribution should, however, be the exception and not the rule. Providing students the materials on a computer disk or flash drive is encouraged.

#### **205 Procedure for Approval of Continuing Education Activities**

205.5 No later than 30 days following the activity, the sponsoring agency must send the attendance list to the AOC, along with a copy of the completed evaluation ~~and copies of any m~~ Materials distributed at the activity shall be available to the AOC upon request. ~~Electronic copies are preferred.~~ (Amended October 11, 2004) (Amended December 17, 2005) (Amended March 13, 2006)

#### **208 Submission of Information--Reporting of Attendance**

208.1 Compliance Report. ~~Each active Guardian shall, on or before January 31 of each year, commencing January 31, 2003, submit an affidavit to the Committee, at the AOC, setting forth all information required by Form No. 2, concerning such active Guardian's completion of approved continuing education during the preceding calendar year. Such affidavit shall also contain a report of "carryover" credits, if any, as delineated in Regulation 202. Within 30 days from the end of the preceding reporting period, each Guardian shall submit an affidavit to the Committee, at the AOC, setting forth all information required by Form No. 2 concerning such active Guardian's completion of approved continuing education during the preceding reporting period. Such affidavit shall also contain a report of "carryover" credits, if any, as delineated in Regulation 202.~~

208.2 Supplemental Report. If an active Guardian has not completed the minimum education requirement for the preceding ~~calendar year reporting period~~, or complied with Regulation 208.1, compliance may still be accomplished by:

### **209 Submission of Information--Credit for Teaching or Participating**

~~An active Guardian who seeks credit for teaching or participating in an approved continuing education activity pursuant to Regulation 203.5 shall, on or before January 31 of the year following the calendar year in which such teaching or participating was accomplished, submit an affidavit to the Committee, at the AOC, setting forth all information required by the appropriate portions of Form 3, concerning such teaching and/or participating in approved education courses or activities during the preceding calendar year.~~ An active Guardian who seeks credit for teaching or participating in an approved continuing education activity pursuant to Regulation 203.5, shall submit an affidavit to the Committee, at the AOC, setting forth all information required by the appropriate portions of Form 3, concerning such teaching and/or participating in approved education courses or activities during the preceding reporting period. The affidavit shall be submitted within 30 days of the end of the preceding reporting period.

### **213 Exemptions**

~~An active Guardian shall not be required to comply with the minimum continuing education requirements of GR 23, as implemented by these regulations, during the calendar year in which the Guardian is admitted to practice. (change in regulation number 11-08-04)~~ If a Guardian is admitted during the first year of the reporting period, the Guardian needs only to complete 12 credits as described in Regulation 202.3 by the end of the reporting period. If a Guardian is admitted to practice in the second year of the reporting period, the Guardian is not required to comply with the minimum continuing education credits for that reporting period.

Discussion: Board members generally thought that the changes were good ones. There were concerns that allowing guardians to earn teaching credit only in the category taught would result in guardians earning credits that they could not use and might discourage guardians from teaching. Some members noted that Ethics classes usually involved ethical issues in the area of person or estate or general and that teaching credit should be given for ethics and the other area covered. One suggestion was applying some kind of multiplier—for every hour of time teaching, a certain number of hours of preparation time could be earned.

The Board voted on the motion and the motion passed. The amended regulations will be posted for comment and the Board will vote to adopt at its March 8, 2010 Board meeting.

**d. Applications Committee.** Robin Balsam reported that the Application Committee was recommending changes to regulations to allow not only corporations to be certified professional guardian agencies, but also any other legal entity. Ms. Balsam said that the Committee considered limiting agency certification to corporations or limited liability companies, but decided that a broader definition would be appropriate. Ms. Balsam noted that the Board was not creating any additional liability protection for fiduciaries by allowing all legal entities to apply for agency status.

The Committee also proposed a change to require individual certified professional guardians to conduct employee background checks in the same manner as agencies currently are required to do.

A motion was made and seconded to approve changes to the Application Regulations as follows:

## 102 Definitions

102.2 "Agency" means any legal entity in the State of Washington ~~whose articles of incorporation or bylaws authorize the agency~~ authorized by its formation documents to act as a fiduciary, guardian, or limited guardian.

## 103 Qualifications

103.2.6 Submit declaration under penalty of perjury, that the guardian will take steps to ensure his or her employees, agents, or anyone formally associated with the guardian who may come into contact with the person or estate of an incapacitated person has passed a criminal history check prior to having contact with the incapacitated person or their estate, and that all officers and directors of any business entity owned by the guardian meet the qualifications of Chapter 11.88 RCW for guardians.

103.3 An agency applicant must also:

103.3.1 Submit a copy of the formation documents of the legal entity. ~~Articles of Incorporation and Bylaws.~~

~~103.3.2 Submit a "Declaration of Agency Applicant."~~

103.3.4 Submit the names of the agency's board of directors, members, managers, owners, and/or its officers.

103.3.5 Identify all CPGs at the agency (a minimum of two are required), and submit a copy of either meeting ~~board~~ minutes or a board resolution designating the CPGs employed by the agency as the persons with final decision-making authority for incapacitated persons or their estate on behalf of the agency.

Discussion: The Board members had no comments regarding allowing legal entities other than corporations to become certified professional guardian agencies. The discussion focused on App Reg 103.2.6. There was a concern about family members who provide care giving services, but might not be able to pass a background check. There was a concern that the guardian business structure might not involve officers or directors.

A motion was made and seconded to table a vote on the changes to the Application Regulations pending further consideration of the background check provision for both individuals and agencies. The motion did not pass.

A friendly amendment was made and seconded to approve all of the amendments to the Application Regulations except to 103.2.6. The motion passed. The amended regulations will be posted for comment and the Board will vote to adopt at its March 8, 2010 Board meeting.

## OFFICE OF PUBLIC GUARDIANSHIP

Shirley Bondon, Manager of the Office of Public Guardianship (OPG), reported that her office was required to submit a report to the Legislature on Alternatives to Guardianship. The report is complete and has been reviewed by the Supreme Court, the Board for Judicial Administration, and SCJA Guardianship and Probate Committee.

The Advisory Committee made six recommendations:

1. Expansion of State Aging and Disability Resource Centers. The Aging and Disability Services Administration has received a grant of \$200,000 and Ms. Bondon will be participating on an advisory committee developing a plan to expand aging and disability resource centers..
2. Provide protective payee or money management systems. Ms. Bondon reported that the OPG will receive requests for guardianship in cases in which the person only needs help managing funds. AARP has a program for protective payees and Ms. Bondon will work to bring that program to Washington.
3. Endorse adoption of the Uniform Power of Attorney Act. The WSBA Probate and Trust Committee is evaluating the Act and will likely seek adoption on 2011.
4. Provide power of attorney services to individuals who lack the ability to manage their finances. Currently public guardians cannot serve under powers of attorney and legislation will be proposed to allow public guardians to serve and be reimbursed for their service.
5. Create statutory surrogate decision-making committees. In New York, surrogate decision-making committees have been in place for 10 years and make non-emergency medical decisions for those who lack the ability to provide informed consent and have no other persons able to provide consent for them. The Advisory Committee recommends creating similar committees in Washington.
6. Develop a state-wide monitoring program that includes visits, field investigations, financial audits, etc. Ms. Bondon noted that virtually every group that works with guardianships has encouraged the development of monitoring programs and that the issue is finding the financial resources to develop the programs.

Ms. Bondon reported that OPG will be requesting an additional \$275,000 per year from the legislature for fiscal year 2010 to expand the current OPG caseload of 50 clients to a total of 100 clients.

### **CPG PRACTICE EXPERIENCE**

Leesa Camerota talked about a case involving an incapacitated person who had a small Special Needs Trust (SNT). He lived in his car and also had an apartment. He did not choose to live in his apartment and had devised a way to heat his car using power cords from his apartment. The guardian worked with the man about where he could live. The guardian and man decided that an RV would be a good solution and the RV was bought with money from his SNT. The guardian found a place to park the RV. The man moved in and kept his car parked in front of the RV. The guardian petitioned the court to modify the guardianship and it is now limited to the guardian having a duty to respond only when contacted by the man.

### **COMMITTEE REPORTS CONT'D**

e. **Ethics Committee.** Judge Wickham reported that Ethics Advisory Opinion (EAO) 2005-001 was adopted several years ago and is quite detailed and well-thought out. The Board determined to review the opinion for two reasons:

- (1) DSHS was paying only \$700.00 in administrative costs for the establishment of a guardianship; and
- (2) The Board wanted clarity about administering discipline when guardians inappropriately self-petition.

The Ethics Advisory Committee considered these issues and determined that payment by DSHS is not a Board issue and that the opinion does not create a bright line rule that could be translated into a regulation.

Judge Wickham reported that the committee revised the opinion. The comments at the end of the opinion were moved to the beginning of the opinion because the language was important and part of the rationale for the recommended steps. Language regarding obtaining releases from the alleged incapacitated person was removed because the person might not have capacity to meaningfully consent. Language that had the petitioning guardian duplicate the role of the GAL was removed. Language that required a guardian to assess the availability of less restrictive alternatives was removed because it duplicated the role of the GAL and a guardian who fails to consider alternatives and who files a petition that is not in good faith, could be sanctioned by the court.

One board member noted that the revised opinion would make it easier for guardians to comply with the regulations about conflict of interest. The opinion provides a “safe harbor”—if the guardian follows the recommendations outlined in the opinion, the guardian will have addressed the issues around conflict of interest. If a guardian fails to follow the opinion’s recommendations, the Board would have to determine if the guardian violated the standard of practice on a case by case basis.

Another Board member noted that the requirement of a separate declaration or affidavit would highlight for judicial officers the steps taken by the guardian in a way that incorporating the information into a petition would not.

A motion was made and seconded and passed to approve the revisions to EAO 2005-001 as follows:

**OPINION #: 2005-001**

**Analysis-Comments:**

The Certification Board recognizes that there are two public policy objectives underlying this opinion. The first is the public policy need to assure that individuals in need of a guardian have access to that service. The second public policy objective is to assure that the practice of the profession by certified professional guardians results in conduct which is not self-dealing and does not involve the actual or appearance of a conflict of interest. This ethical opinion is intended to recognize the inherent tension between these two public policy objectives and to reconcile those tensions in a manner that provides for the highest ethical practices while making available guardian services to those who need them.

The intent of this opinion is not to discourage the filing of the petitions in good faith. It is the intent of this opinion however, to assure the transparency of the proceedings to the extent that any conflicts or appearances of conflict which a certified professional guardian may have are disclosed and that steps are taken to negate both the real and appearance of self-serving.

Professional guardians have a clear and immediate conflict of interest in nominating themselves to be appointed guardian and to be paid from the estate of the Incapacitated Person. A certified professional guardian should avoid whenever possible initiating a petition for appointment of oneself as guardian.

Ordinarily the facts necessary to complete a petition for guardianship are not available at first hand to a certified professional guardian but are provided by professionals interested in having a guardian appointed. ~~The securing of a release of information from the alleged incapacitated person allowing the certified professional guardian access to those facts should be documented and provided to the certified professional guardian before the certified professional guardian gains access to those facts. When the certified professional guardian meets with the alleged incapacitated person, great care must be taken to avoid minimizing the seriousness of guardianship proceedings or unduly influencing the impaired person to accept appointment of a guardian~~ In many situations, and in particular in the case of alleged incapacitated persons who have limited or no estate, there is no other person with sufficient expertise and interest in the alleged incapacitated person to file a petition for guardianship. Referral sources such as facility staff or government employees who are able to identify the need for guardianship may have institutional limitations on their ability to become formally involved as a petitioner for the guardianship.

There are circumstances in which a care provider or other entity with whom the certified professional guardian has a close personal or professional relationship files a petition for guardianship using an attorney provided by the certified professional guardian, or files a petition for guardianship with the active assistance of the certified professional guardian, with the intention that the certified professional guardian will become guardian at the conclusion of the proceeding. In such circumstances, the certified professional guardian has an obligation to disclose to the Court by Affidavit or Declaration the nature of that relationship.

This opinion acknowledges that the Court with local jurisdiction is the final arbiter as to the need for a guardianship and the appointment of the guardian. The petitioning certified professional guardian should be aware of the Court's ability to require the petitioner to pay any or all fees and costs of proceedings at the Court's discretion, including the fees of the guardian ad litem.

**Opinion: The following are considered to be best practices for Certified Professional Guardians:**

The certified professional guardian should inform referral sources as to how guardianships are processed and should offer to refer interested parties to counsel if necessary. However, petitioners for individuals with no close family or friends, limited assets, living in long term care environments, and/or with complicated care needs are often not available. As a result, the practical reality of the care environment is such that the availability of petitioners for those in need of a guardian is limited or non-

existent. Therefore, the limited and qualified initiation of a guardianship petition by a certified professional guardian is acceptable under certain circumstances. Specifically, if the certified professional guardian determines that a guardianship is in the interests of the Alleged Incapacitated Person, that there are no less restrictive alternatives, and no other person willing to act as petitioner, the certified professional guardian may act as petitioner in a guardianship. However, in initiating such petition the certified professional guardian should:

~~a. when reviewing information or records of an alleged incapacitated person a certified professional guardian should verify that a proper release of information has been provided by the alleged incapacitated person.~~

~~b. in most cases in which the certified professional guardian acts as petitioner the certified professional guardian should refrain from nominating oneself as guardian but should ask the court to direct the guardian ad litem to recommend an appropriate guardian. In the case of a certified professional guardian with an active prior relationship with the alleged incapacitated person, such as acting as trustee or Attorney in Fact, nominating oneself may be acceptable.~~

c. Any time that a certified professional guardian initiates a guardianship petition the certified professional guardian shall, consistent with state statute, engage in an investigation and document that investigation in an Affidavit or Declaration to the Court the following pre-filing efforts:

1. identifying any alternative nominees and provide information as to why alternate nominees who are available are not suitable or able to serve;

2. providing a written request from the party requesting the guardianship which identifies the basis for the request and, the basis for the decision by that party not to petition;

3. providing documentation from third parties of the facts set out in the petition. Such documentation can include statements from care providers, family members, friends, or others with knowledge of the circumstances of the incapacitated person.

4. providing documentation that the certified professional guardian has met with the alleged incapacitated person, the results of that meeting, and an opinion by the certified professional guardian of the capacity issues faced by the alleged incapacitated person.

~~5. providing an assessment by the certified professional guardian as to the availability of less restrictive alternatives, such as the establishment of a trust or power of attorney, and why those less restrictive alternatives do not adequately provide for the needs of the alleged incapacitated person.~~

~~d. An in-person meeting between a certified professional guardian and an alleged incapacitated person is appropriate when the certified professional guardian is gathering information. However, when the certified professional guardian meets with the alleged incapacitated person and imparts information~~

~~about guardianship or the benefits of guardianship the certified professional guardian should:~~

~~—1. inform the alleged incapacitated person that guardianship is a serious legal matter and, should recommend consultation with an attorney;~~

~~—2. avoid making a recommendation or giving advice;~~

~~—3. not solicit the alleged incapacitated person's consent to proceed with a guardianship;~~

e. If a care facility and a certified professional guardian have a relationship or a practice of the facility referring residents to the certified professional guardian, this relationship shall be disclosed and described in detail in the Petition.

## **7. EXECUTIVE SESSION**

The Board adjourned to executive session to consider applications.

### **OPEN SESSION**

The Board reconvened in open session and took the following action:

#### **Action on Applications:**

(1) Motion for conditional approval\* of each of the following applications for certification passed:

- |    |                    |           |
|----|--------------------|-----------|
| a. | Karla Edwards      | CPG 11124 |
| b. | Harry Atlas        | CPG 11127 |
| c. | Michael Gross      | CPG 11138 |
| d. | Barbara Sturdevant | CPG 11137 |

\* Conditional approval is granted pending successful completion of the mandatory training and absent any intervening disqualifying events.

(2) Motion for revocation of conditional and denial of the application of Debbie McCabe-McRae, CPG 11104.

### **Adjourn**

Judge Prochnau adjourned the meeting at approximately 1:00 pm.

Respectfully submitted,

Judge Prochnau  
Deborah Jameson

Board Approved: February 8, 2010