



August 1, 2014

TO: Certified Professional Guardianship Board

FROM: Shirley Bondon, Manager, Office of Guardianship and Elder Services

RE: Conflicts of Interest/Recusal Process

Background

During the June 9, 2014 Board meeting, staff was directed to draft a recusal process for Board review. Before drafting, staff reviewed current Board rules and regulations. Although, conflicts of interest are addressed in General Rule 23 and Disciplinary Regulation 500, provided in pertinent part below. These references do not address the full spectrum of conflicts of interest in relationship to the duties of members of the Board.

General Rule 23¹

“GR 23 (6) Conflict of Interest. A Board member should disqualify himself or herself from making any decisions in a proceeding in which his or her impartiality might reasonably be questioned, including but not limited to, when the Board member has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.”

Disciplinary Regulation 500²

507.1 The Conflicts Review Committee (CRC) shall have three members appointed by the Board Chair, who shall also designate the committee chair. CRC members may not be current members of the Board. CRC members shall be familiar with guardianship practice in the state of Washington.

¹ http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=GR&ruleid=gagr23

² http://www.courts.wa.gov/programs_orgs/Guardian/?fa=guardian.display&fileName=regindex&Reg=500

507.2 The Administrative Office of the Courts (AOC) shall transmit any grievance against a Board member to the CRC. The CRC shall perform the duties that would otherwise be performed by the Standards of Practice Committee (SOPC) under these regulations and AOC shall report to the CRC on any such grievance.

507.3 The CRC may also recommend to the Board Chair that the Board member under investigation be placed on a leave of absence from the Board during its investigation. The CRC will consider the nature of the allegations against the Board member, the available evidence regarding those allegations and the importance of maintaining public trust and confidence in the Board in making its recommendation to the Board Chair. The CRC may make such a recommendation at any time during its investigation and review of the grievance. Except as otherwise set forth in these regulations, the Board Chair shall have the sole discretion to decide whether the Board member should take a leave of absence from the Board and when the Board member may return to the Board.

507.4 If the Board files a complaint against a Board member, the Board member shall take a leave of absence from the Board until the conclusion of the disciplinary proceeding.

507.5 Consistent with the Office of Financial Management rules, CRC members shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties.

509.1.3 A former member of the Board who is also a licensed attorney in Washington shall not represent a professional guardian in proceedings under the Board's regulations until after two (2) years have elapsed following expiration of the Board member's term of office.

512.4.4 Disqualification: The Hearing Officer and all Board members who served on the SOPC are disqualified from participating in the Board's review of the Hearing Officer's decision and from participating in the Board's vote on the matter."

In addition, staff reviewed the Model Code of Ethics for Members of Regulatory Boards for the Licensed Professions³ that the Board discussed during its June 9, 2014 meeting; Advisory Opinion 96-09⁴ prepared by the Washington State Executive Ethics Board, which includes Model Rules for Executive Branch Boards/Commission addressing conflicts of interest and recusal; a memorandum⁵ from the Director of the United States

³ <http://www.fclb.org/Portals/7/CodeOfEthics.pdf>

⁴ <http://www.ethics.wa.gov/ADVISORIES/opinions/2013%20Updated%20Opinions/updated%20Advop%2096-09A.htm>

⁵ <http://www.oge.gov/OGE-Advisories/Legal-Advisories/99x8--Recusal-Obligation-and-Screening-Arrangements/>

Office of Government Ethics regarding Recusal Obligation and Screening Arrangements for executive branch employees; and policies for other governmental bodies. Similar opinions or rules were not located for Judicial Branch boards and commissions.

Recommendation:

Staff submits the following proposed policy for Board review:

Proposed Conflict of Interest Policy

A. Introduction

The Certified Professional Guardianship Board is committed to providing a fair, ethical and accountable environment for the conduct of its internal operations, and the management of its regulatory functions.

Being aware of and managing conflicts of interest are essential for good governance and the integrity of decision-making. It is essential that members understand that their role on the Board and its committees is to represent the interests of the Board and to act in the public interest.

A conflict of interest exists when it is likely that a Board member could be influenced or perceived to be influenced, by a personal interest when carrying out their public duty. Conflicts of interest can be actual, perceived or potential.

A conflict of interest is defined as having any interest, financial or otherwise, direct or indirect, or engaging in any business or transaction or professional activity or incurring any obligation of any nature, which is in substantial conflict with the proper discharge of a Board member's duties to protect the public by ensuring that guardianship services are provided by certified professional guardians in a competent and ethical manner.

An actual conflict of interest involves a direct conflict between a member's Board duties and responsibilities and existing private interests. A perceived or apparent conflict of interest can exist where a reasonable person could perceive that a member's private interest could improperly influence the performance of his or her duties, whether or not this is in fact the case. A potential conflict of interest arises where a member has private interests that could conflict with his or her public duties in the future.

Board members must make public (and recuse themselves from) any actual, perceived and potential conflict of interest to ensure the integrity of the Board and all of its decisions.

Disclosure and recusal are important tools to avoid actual, perceived or potential conflict of interest. Board members must not overuse recusal as an excuse to avoid

conflict in exercising their full responsibilities. The appointment of Board members who will likely need to consistently recuse should be avoided.

B. Types of Conflict of Interest

A private or personal interest may be either pecuniary or non-pecuniary, and includes the personal, professional and business interests of the person and the individuals with whom he or she associates (relative, partner, friend, associate or colleague).

Personal conflicts are those actions that may ultimately have a personal or professional consequence that is a direct or indirect effect of a decision or action. No decisions should be made solely to advance the personal benefit of Board members. Some examples of personal conflict include:

- 1) **Personal gain:** Will this decision affect the Board member's personal life in any direct way?
- 2) **Sexual favors:** Will this behavior affect the Board member's position unfairly?
- 3) **Influence:** Will this behavior affect the Board member's position unfairly? Will it result in unwarranted privileges or exemptions?
- 4) **Effects on personal relationship:** Will there be an effect on the Board member's current, past or future personal and professional relationship(s), including memberships and or status in associations or professional organizations.
- 5) **Benefits to those who have a relationship with the Board member:** No decision should be made solely to effect the personal or financial gain of anyone with whom the Board member has a personal or professional relationship.
- 6) **Gift received:** Acceptance of any gift should be perceived as a bribe to influence present or future considerations.

Financial conflicts are those in which a Board member or those with whom he or she has a personal or professional relationship, may benefit financially, or be perceived as benefitting financially, from decisions by or the influence of the Board member. Money does not have to change hands for an interest to be financial. A financial interest includes, tangible and intangible assets and benefits. Some examples of financial conflicts include:

- 1) **Employment Gain:** These may include opportunities for consulting, speaking teaching, etc. Employment during and subsequent to Board membership should not appear to be relating to any Board matters.

- 2) **Financial Gain: Effects on the Board member's business.** Decisions and actions must not affect the future financial position of the Board member's business. Contractual and creditor relationships also apply here.
- 3) **Outside Activities:** These may include present employment, investment, and/or business opportunities.
- 4) **Recruitment of other professionals or clients into business opportunities:** Extreme care must be exercised to be certain no actual or perceived leverage of authority with the Board position is used in this area.

C. Public Duty

All Board members have a duty to always put the public interest above their own personal or private interests when carrying out official Board duties. Determining public interest in a particular situation can be complex, but on a practical level a Board member's public duty can best be fulfilled by focusing on the Board's duty to protect the public by ensuring that guardianship services are provided by certified professional guardians in a competent and ethical manner; and identifying any form of conflict of interest that arises and ensuring that it is managed effectively.

D. Competing Interests

At times, members may have multiple roles: in addition to their role with the Board, they may have a principal job in which they are employed by a government agency or a private sector organization. They may be self-employed. They may serve in another public sector or community-based role, such as being a member of a committee or statutory body. They may also serve in a professional organization or association.

In their role as Board member they may have access to confidential information that may be useful or of benefit to their work in one or more of their other roles. The risk in this situation is that there may be a temptation to use the information improperly, or to give advantage to the second organization, or create bias or prejudicial treatment of another group or person.

These conflicts are described as **competing interests** or a **conflict of duty**. These situations should be treated in the same way as potential conflicts of interest, that is, to ensure that decisions are made, and are seen to be made, on proper grounds, for the legitimate reason of protecting the public.

E. Participating in Proceedings

There are generally two main categories of proceedings in which Board members commonly face issues of conflict of interest and bias — quasi-judicial proceedings and quasi-legislative proceedings.

Generally, in quasi-judicial proceedings (grievances and complaints) impartiality due to financial conflict of interest or personal interest is impermissible because an unbiased, impartial decision-maker is essential to due process. However, in quasi-legislative proceedings (rulemaking) ethical guidelines for personal or even financial bias may be less strict depending upon the particular facts and circumstances involved.

“Quasi-Judicial Proceedings”

Examples of quasi-judicial proceedings include certification decisions, disciplinary hearings, individual appeals from administrative decisions, and most grant awards. In such cases, no "legal bias" or personal, financial or familial interest is allowed. To avoid these types of conflicts, generally a Board member must refrain from participating in the discussion or voting on the matter.

What constitutes "legal bias" is a matter of law and is more appropriately determined on a fact-specific, case-by-case basis by the Board. According to court decisions, however, legal bias may include preconceptions about facts, policy, law, or a person, group or object.

“Quasi-Legislative Proceedings”

In quasi-legislative matters, (like most rulemaking) Board members should not participate in voting or discussion of matters that involve their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by Board members. Moreover, they should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding. In such circumstances, general personal affiliations with organizations or groups will normally not preclude a Board member from participating in discussion or voting unless the organization itself is petitioning the Board directly regarding the matter. Depending upon the particular facts of (1) the relationship between the organization and the Board member and (2) the role the organization is playing in relation to issues before the Board, ethical requirements may vary greatly — from requiring that the Board member need only disclose his relationship to the full Board, to requiring that the Board remove himself entirely from the proceeding.

F. Managing Conflicts of Interest

What is recusal?

Generally, recusal involves disassociation with the matter at hand. The Board member would not participate in the discussion or the deliberations, make recommendations, give advice, consider findings, or in any other way assume responsibility for or attempt to influence the decision-making process. This is different from abstaining, where one participates fully in the matter, but does not vote.

What should a Board member do to properly recuse?

In order to instill confidence in the process, recusal should occur in public and on the record. In some situations, the Board member may choose to leave the room, but generally recusal followed by appropriate inaction is sufficient.

Rule #1

(1) When a Board member is beneficially interested, directly or indirectly, in a contract or grant that may be made by, through or is under the supervision of the Board, in whole or in part, or when the member accepts, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in such contract or grant, the member shall:

(a) Recuse him or herself from the Board discussion regarding the specific contract or grant;

(b) Recuse him or herself from the Board vote on the specific contract or grant;
and

(c) Refrain from attempting to influence the remaining Board members in their discussion and vote regarding the specific contract or grant.

(2) The prohibition against discussion set forth in sections (a) and (c) shall not prohibit the member of the Board from using his or her general expertise to educate and provide general information on the subject area to the other members.

(3) Under subsection (1), "any other person" has a beneficial interest in a contract or grant when the other person bids or otherwise seeks to be awarded the contract or grant.

EXAMPLE:

The Certified Professional Guardian Board includes representatives from the following areas of expertise: professional guardians; attorneys; advocates for incapacitated persons; court staff including judicial officers; state agencies; and those employed in medical, social, health, financial, or other fields pertinent to guardianships. A Board member is employed by a company that performs surveys. The Board is in the process of selecting a contractor to survey professional guardians. The company that employs a member of the Board is interested in the contract.

The Board member may use his or her general expertise regarding the performance of surveys, but the member is prohibited from participating in the Board's discussion and analysis implementing the criteria for selecting a contractor, and is prohibited from participating in the Board's vote to select a contractor.

EXAMPLE:

The Certified Professional Guardianship Board contracts with King Software to provide computer systems for tracking disciplinary cases. King Software's contract with the Board is almost expired and the Board plans to seek bids from software companies for the next contract period. The Board issues a request for bids to various software companies who offer suitable software, including Medsoft, Inc.

Approximately nine months ago, one Board member worked for Medsoft, Inc. and received compensation from that company. The Board member subsequently left Medsoft, Inc. and went to work for the state. The Board member is not required to recuse herself from selecting a contractor for the Board's disciplinary tracking system because Medsoft did not have a beneficial interest in the Board's contract until it bid on the contract.

Therefore, Medsoft was not a person beneficially interested in the contract when the Board member received the compensation, but the Board members should disclose his or her former relationship with Medsoft. However, if the Board member received delayed compensation from Medsoft after it bid on the contract, that he or she had already earned, this is probably not a conflict of interest, but still should be disclosed. If the Board member continues to work for Medsoft the Board member would be required to disclose the relationship and to recuse himself or herself from the Board's specific discussion and the vote awarding the contract.

Rule #2

(1) When a member of the Board, either owns a beneficial interest in or is an officer, agent, employee or member of an entity or individual which is engaged in a transaction involving the board, the member shall:

- (a) Recuse him or herself from the Board discussion regarding the specific transaction;
- (b) Recuse him or herself from the Board vote on the specific transaction; and
- (c) Refrain from attempting to influence the remaining Board members in their discussion and vote regarding the specific transaction.

(2) The prohibition against discussion and voting set forth in sections (a) and (c) shall not prohibit the member of the Board from using his or her general expertise to educate and provide general information on the subject area to the other members.

(3)(a) "Transaction involving the Board" means a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, grievance or other similar matter that the member in question believes, or has reason to believe:

- (i) Is, or will be, the subject of Board action; or

(ii) Is one to which the Board is or will be a party; or

(iii) Is one in which the Board has a direct and substantial proprietary interest.

(b) "Transaction involving the Board" does not include the following: Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by a member; or a claim, case, lawsuit, or similar matter if the member did not participate in the underlying transaction involving the Board that is the basis for the claim, case, or lawsuit. Rulemaking is not a "transaction involving the Board."

(4) "Board action" means any action on the part of the Board including, but not limited to:

(a) A decision, determination, finding, ruling, or order; and

(b) A certification, grant, payment, award, contract, transaction, sanction, or approval, or the denial thereof, or failure to act with respect to a decision, determination, finding, ruling, or order.

EXAMPLE:

The Certified Professional Guardianship Board disciplines certified professional guardians in Washington State. The Board is conducting an investigation involving the guardianship services provided by a guardianship agency. One of the members of the Board sits on the board of directors for that agency or represents the agency in other matters. The member must recuse him or herself from any Board investigation, discussion, deliberation and vote with respect to disciplinary actions arising from the agency's guardianship services.

The Certified Professional Guardian Board certifies professional guardians in Washington State. The Board is reviewing an application for certification of an individual who is a relative, partner, friend, associate, or colleague of a member of the Board. The member must recuse him or herself from any review, discussion or deliberation regarding the application for certification.

Rule #3

If recusal occurs pursuant to model rule #1 or #2, the member of the Board shall disclose to the public the reasons for his or her recusal from any Board action whenever recusal occurs. The Board staff shall record each recusal and the basis for the recusal.

G. Summary

Considering the guidance provided above, Board members should:

- a. Fully disclose their relationships with any and all individuals and organizations when matters involving those entities come before the board;

- b. Avoid participating in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by other Board members;
- c. Not participate in rulemaking when the organization in which they have a personal interest is the petitioner for the rule in question; and
- d. Not participate in grievances and complaints or other quasi-judicial proceedings involving individuals and organizations with which they are personally interested or where their impartiality might reasonably be questioned as a result of their association with those entities.