

Tom Goldsmith

From: Tom Goldsmith <TTGsmith@TGandA.com>
Sent: Tuesday, November 27, 2012 5:58 PM
To: 'Denise.Foster@courts.wa.gov'
Subject: Proposed GR 31.1 and Professional Guardianships; Transparency or status quo

Honorable Chief Justice Madsen;

I fear the proposed GR 31.1 section (L)(12), as drafted, will not be helpful in achieving the transparency and mutual trust needed for guardians and their wards. My reasons and alternative suggestions are offered in this comment.

Many believe good policy requires that all parties bring the best and most complete information available to bear before decisions are made. It appears the Supreme Court is not being accorded that opportunity with regard to this proposed rule.

I suggest that complaints against guardians should not be handled differently from those for most other public-service professionals in Washington State. Yet the proposed GR31.1 creates a *sui generis* set of disciplinary rules for which no justification is offered as to why they require this unique treatment.

Washington's **Uniform Disciplinary Act**, RCW 18.130 (**UDA**) has been in place for over two decades. This time-tested law appears to be entirely appropriate as a model for handling public disclosure of complaints against guardians as well as for 80-some health care professionals, including dentists, medical doctors, nurses, pharmacists, psychologists, social workers and other highly respected professionals in sensitive positions.

The UDA (as defined in RCW 18.130.095) requires with respect to public disclosure and transparency:

- a. Existence of all complaints be discoverable immediately upon submission.
- b. The cited professional is invited to submit a written statement.
- c. Complaint details are exempt from public disclosure until the complaint is initially assessed.
- d. Complaints determined not to warrant investigation must:
 - i. Remain in the records tracking system.
 - ii. "Including" existence of the complaint.
 - iii. Are subject to public disclosure.
- e. Complaints determined to warrant no cause of action must:
 - i. Include an explanation of the determination to close.
 - ii. Remain in the records and tracking system.

- f. Complaints resulting in discipline are posted and subject to public search, by the professional's name and license identification.

After more than two decades of history, the UDA system seems to be working well with respected professionals broadly exposed to public complaints. The proposed GR 31.1 is almost the polar opposite of the approach taken in the UDA. Yet I have not heard serious discussion by the Certified Professional Guardian Board (CPGB) that compares or evaluates their current "Administrative Regulation 003" rules or outcomes with RCW 18.130 —and I have attended or monitored telephonically all of its public meetings this year and last. Instead, it is proposed that guardians are to be treated like highly-visible and closely-observed judges and members of the Bar. For the latter, there is in place an extensive disciplinary structure and staff supported by a significant amount of financial resources. In contrast, professional guardians are overseen by a part-time, volunteer board whose budget always is limited and whose support comes from a small (albeit serious, energetic, and personally dedicated) AOC staff.

That is, I believe the UDA could be a fruitful source of practical experience, possibly a model of a new code, and surely a meaningful stimulant for discussion. Thus I suggest it behooves the Court to explore this option, perhaps even authorize a **Center for Court Research** study, before acting on the proposed new rule.

Allow me to step back for a moment to what has brought us to this point. I invite the Court's attention to my comments dated November 28, 2011 and February 2, 2012 as background for what follows. The concerns addressed in those comments have been addressed only to the extent that the new proposed GR 31.1 does not exempt the CPGB. While awkwardly, from my point of view, the small, core piece of current CPGB regulations incorporated in GR 31.1 as (L)(12) i, ii, and iii would continue the lack-of-transparency problems we see with professional guardians today.

Since writing you in February, I have learned three things.

1. The existence and apparent success of the UDA.
2. The great difficulty any member of the public has obtaining relevant disciplinary information about filed grievances against individual guardians through a public records request, compounded by the difficulty one has gleaning objective and relevant data from the few documents a request of my own has provided.
3. The CPGB has no plan or objective to undertake an overall analysis of the total body of complaints it receives. (The Board's budget and mandate are limited, and pursuit of serious complaints more than consumes resources at hand.) This means that overall trend or "barometer" policy information that might be mined from CPGB complaints data are unlikely to be provided to the Board to guide its decision-making.

The absence of data and its analysis are unfortunate, especially given the persistent flow of "bad actor" reports, in this state as well as nationally, and a general public concern about potential for "guardian abuse" which many find disturbing. Thus I continue to see professional guardianship as an area where transparency, and public trust can usefully be improved.

In the attached document, please find a list of observations and questions which have emerged as I have worked with the information provided as a result of my own public records request. It is my respectful hope that these thoughts will provide a seed from which to grow fruitful discussion and further analysis of the needs in this important area.



Above all, I believe it would be best if professional guardians were able to be seen through lenses similar to those of other respected and valued serving professionals. And if they are to be handled in ways **exceptionally different**, that justifications, understandable and acceptable to the public, will be forthcoming.

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Professional Guardian Complaint Handling

Can Washington State's Uniform Disciplinary Act (RCW 18-130) be a guide?

Following are observations and questions that have emerged while analyzing complaints (also known as "grievances") filed with the CPGB during calendar years 2010 and 2011.

Observations:

1. Historically, around 30% of complaints filed against guardians, and 9% of those against agencies, have resulted in disciplinary action.

Complaints Filed

2007	27
2008	25
2009	19
2010	33
2011	49

More than 70% escape public scrutiny.

2. Complaints often take over a year, possibly as long as two years or more, before a final decision is reached. Each complaint resulting in disciplinary action is posted as a summary line on an AOC web page, with a link to detailed text. Four web pages list more recent and archived information for individual guardians and for agencies. While a guardian or agency may appeal a CPGB finding (often time-consuming) the person filing a complaint may not.
3. Approximately 70% of cases are dismissed without action, with a notice letter mailed to the individual who filed the complaint. A listing of dismissed complaints has been included in the CPGB's Annual Reports through 2010.

These annual reports have listed an identifying number, county (but never the name of the guardian) nature of allegation, and disposition. In recent years, descriptions have been brief, with seldom more than a dozen words to describe allegations, and only a few words explain complaint disposition. While in years past, members of each complaint's review panel were listed, and the nature of allegations and/or disposition descriptions were more complete.

4. Complaints not yet posted are theoretically available via public records request, but all information which might possibly identify the incapacitated person or the guardian is redacted, making each filing difficult to identify and understand.
5. I can find no "interpretive" information, or introduction to what the complaint-list web pages might tell a reader.
6. In the case of my public records request, it surprised me that I did not find any grievance filing numbers or other identifying notation on any of the submittal documents I received. This raises the question of how staff assures the integrity of files kept for each complaint. From a requestor's point of view, it is difficult to uniquely identify complaints or confidently relate them to outcomes.

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7. Many observers see the making of other people's personal-life and financial decisions by outsiders / *strangers* as difficult and risk-filled undertakings. Accordingly many see Court supervision as surely justified. It is not, however, equally clear to me that guardian tasks can be adequately executed without the public scrutiny other serving professions receive, which undoubtedly supplements any best-efforts the Courts themselves can provide.
8. The most vulnerable of our citizens are those subject to guardianships, but family, friends, and established network of support can be impacted almost as deeply. At the same time, it is virtually impossible for anyone impacted by a guardianship to "walk away" from a Court appointed guardian or attorney. At best, removal of a guardian will require a year-or-two-long, dollar-costly process, initiated and paid for by the incapacitated person, family, or friend(s), followed by limited prospects and little guidance in finding a more suitable individual.
9. As with any "service" the quality delivered is likely to be improved where "consumers" are enlightened, and have realistic expectations. Yet anything short of good transparency is unlikely to foster useful "customer" awareness. Family, friends, and other supporting persons need to be aware of the limits or pitfalls guardianships will, even in the best of circumstances, always face.
10. Needed guardianship reforms seem unlikely to occur in the darkness caused by blocked public disclosure. Further, increased funding to support guardian oversight is unlikely to materialize without public awareness and mined data in the hands of analysts and advocates.

Questions:

Based on the above, I offer the following questions that I respectfully suggest the Court should explore before determining that GR 31.1 should be approved, either as submitted or in a new form.

11. Does the **UDA** work as well as appears? My personal investigation suggests it might, but it would be important to determine if there are any unintended consequences. Has a pragmatic evaluation study of the UDA been undertaken, in an attempt to determine the success of this legislation and the resulting system?
12. What, if anything distinguishes guardians, from medical doctors, nurses, psychologists and numerous other professionals covered by the UDA that would justify a unique complaint process and disclosure rules for them?
13. Could the staff and systems now processing UDA complaints and materials also handle professional guardianship complaints? Alternatively, could details of current UDA processing inform as to how to better manage a comparable system for guardians, should one continue to be maintained at the AOC.

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14. If clerical processing were placed elsewhere, could AOC staff continue to be the "knowledgeable" organ of investigation, guided by CPGB specialists? As I understand it, this process is used by the Medical Quality Assurance Commission, which learned how important staff experience was in working with its constituency of professionals.
15. Are complaints under UDA subject to appeal by complainant if rejected by investigators?
16. If there are cases of successful complainant appeals, are such decisions useful as a way to achieve "case law" like evolutions of applicable rules and regulations? If so, could there be an expectation of similar experience-based evolution of the CPGB's Standards of Practice?
17. What impact do frivolous or "retributive" complaints have on professionals subject to the UDA. How do or could professional groups, or these systems, accommodate /orcorrect for these problems.
18. How are UDA investigations and processing funded?
19. Why has the number of filed complaints reported by the CPGB doubled over the past five years? Is there any reason to believe that the current limited transparency has contributed to this increase?
20. How are complaints distributed among guardians? For example, do 20% of the guardians account for, say 80-90% of complaints or of the serious complaints? If so, what would this tell us about the value of increasing transparency and impact, if any, of adopting a UDA approach? Is there a geographic distribution of complaints that might be significant?
21. How would disclosure of professional guardianship complaints best be handed so they are least likely to lead to unexpected consequences for this important function, especially keeping in mind those many professional guardians who function well and appropriately and therefore are unnoticed and, normally unsung. Does the UDA effectively insulate and protect those who do not go outside the bounds of professional conduct?

Tom Goldsmith is a private person, who has been following Washington State's Certified Professional Guardianship Board since 2009, when his family became involved in a professional guardianship.