



Dora

Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2009 Sunrise Review: Professional Fiduciaries

November 20, 2009





Dora

Department of Regulatory Agencies

Executive Director's Office

Greg Ferland
Acting Executive Director

Bill Ritter, Jr.
Governor

November 20, 2009

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunrise reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed its evaluation of the sunrise application for regulation of professional fiduciaries and is pleased to submit this written report. The report is submitted pursuant to section 24-34-104.1, Colorado Revised Statutes, which provides that DORA shall conduct an analysis and evaluation of proposed regulation to determine whether the public needs, and would benefit from, the regulation.

The report discusses the question of whether there is a need for regulation in order to protect the public from potential harm, whether regulation would serve to mitigate the potential harm, and whether the public can be adequately protected by other means in a more cost-effective manner.

Sincerely,

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Acting Executive Director

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Background

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunrise Process

Colorado law, section 24-34-104.1, Colorado Revised Statutes (C.R.S.), requires that individuals or groups proposing legislation to regulate any occupation or profession first submit information to the Department of Regulatory Agencies (DORA) for the purposes of a sunrise review. The intent of the law is to impose regulation on occupations and professions only when it is necessary to protect the public health, safety or welfare. DORA must prepare a report evaluating the justification for regulation based upon the criteria contained in the sunrise statute:¹

- (I) Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety, or welfare of the public, and whether the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument;
- (II) Whether the public needs, and can reasonably be expected to benefit from, an assurance of initial and continuing professional or occupational competence; and
- (III) Whether the public can be adequately protected by other means in a more cost-effective manner.

Any professional or occupational group or organization, any individual, or any other interested party may submit an application for the regulation of an unregulated occupation or profession. Applications must be accompanied by supporting signatures and must include a description of the proposed regulation and justification for such regulation.

Methodology

DORA has completed its evaluation of the proposal for regulation of professional fiduciaries. During the sunrise review process, DORA performed a literature search, contacted and interviewed the applicant, interviewed a variety of stakeholders, reviewed licensure laws in other states and conducted interviews of administrators of those programs.

¹ § 24-34-104.1(4)(b), C.R.S.

Profile of the Profession

A fiduciary is a person who assumes responsibility for a position of trust.² There are a variety of types of fiduciaries, including:

- Guardians;
- Conservators;
- Trustees; and
- Personal representatives.

Guardians

A guardian is appointed by a court (District Court, except the City and County of Denver where a Probate Court exists) to ensure that the needs of an incapacitated person (also known as a “ward”) are met. Section 15-14-102, Colorado Revised Statutes (C.R.S.), defines an incapacitated person as,

an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety or self-care, even with appropriate and reasonably available technological assistance.

In general, a guardian is responsible for making decisions regarding the ward’s support, care, education, health and welfare and for attending to the ward’s personal and medical needs.³ However, the guardian is required to encourage the ward to participate in the decisions, act on the ward’s own behalf and develop or regain the capacity to manage the ward’s personal affairs.⁴

Additionally, a guardian must, at all times, act in the ward’s best interest and exercise reasonable care, diligence and prudence.⁵

There are two types of guardianships: limited and unlimited. A limited guardianship establishes limits, or specific duties, that are agreed upon to assist the ward, while other aspects remain the responsibility of the ward.

An unlimited guardianship, meanwhile, enables the guardian to maintain control of the decisions for the well being of the ward. In order for an unlimited guardianship to be granted by the court, the reason(s) detailing why a limited guardianship is not appropriate must be submitted and ultimately approved by the court.

² Professional Fiduciary Association of California. *What is a Fiduciary?* Retrieved October 20, 2009, from http://www.pfac-pro.org/pages/nav_what_is_a_fiduciary.htm

³ § 15-14-314(1), C.R.S.

⁴ § 15-14-314(1), C.R.S.

⁵ § 15-14-314(1), C.R.S.

To obtain guardianship over an incapacitated person, there is a formal process through the court that includes:

- A Petition for Appointment of Guardian;
- A court visitor conducts an investigation to determine whether a person needs a guardian;
- A hearing is scheduled;
 - A notice of hearing is sent to the respondent (ward);
 - A notice of hearing is sent to parties listed on the petition for guardianship;
- An Acceptance of Office Notice; and
- Notice of Appointment.

A Petition for Appointment of Guardian is required for anyone who wishes to obtain guardianship of an incapacitated person. The Petition for Appointment of Guardian requires the following information to be completed, including, but not limited to:

- A statement detailing the reason guardianship is necessary;
- The type of guardianship requested (limited or unlimited);
- An evaluation of the respondent by a physician, psychologist or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment, if requested; and
- The contact information related to parents, children, person responsible for care, legal representative, etc.

Upon receipt of the Petition for Appointment of Guardian, a court visitor, who serves as an investigator for the court, is appointed by the court to interview the respondent, the person seeking appointment of guardianship and other interested parties. The visitor completes a report (with a recommendation for the appointment of guardianship), which includes, but is not limited to the following:

- Whether the respondent is objecting to the nominated guardian;
- Whether further evaluation of the respondent should occur;
- Whether the respondent believes that the court should in fact, appoint the person seeking appointment;
- The reason the petition was originated; and
- Whether interested parties believe that a guardian should be appointed.

After the visitor completes his or her evaluation and submits it to the court, a hearing regarding the matter of guardianship is scheduled with the court. A Notice of Hearing must be delivered to the respondent, and he or she must attend the hearing unless excused by the court. Also, interested parties listed on the Petition of Appointment must be notified of the hearing.

Upon completion of the hearing, the guardian (assuming the court approves the appointment) must complete an Acceptance of Office form, which is the formal acceptance of guardianship.

However, before a court order is issued, a background check and credit check of the guardian is required, unless waived by the court.

Within 30 days of the appointment of the guardian, a copy of the Notice of Appointment of Guardian and Notice of Right to Request Termination or Modification, with a copy of the Order, must be given to the ward and persons listed on the petition.⁶

Within 60 days of the appointment, the guardian must file a report with the court on the condition of the ward, the guardian's personal care plan and account for money and other assets in the guardian's possession or control.⁷ Thereafter, the guardian's report must be filed annually with the court, unless otherwise specified.

There are also several other types of guardians that the court may utilize in an attempt to provide adequate protection to wards, including, but not limited to:

- Guardian *ad litem*;
- Emergency guardian; and
- Temporary substitute guardian.

The court may appoint a guardian *ad litem* at any stage of the proceeding, if the court determines that representation of the ward's interests otherwise would be inadequate.⁸ The court is required to state the duties of the guardian *ad litem* and its reasons for the appointment.⁹

An emergency guardian may be appointed by the court, for no longer than 60 days, if it finds that harm to the ward's health, safety or welfare is likely to occur.¹⁰ If the court appoints an emergency guardian, an attorney who represents the ward is mandatory.¹¹

If the court determines that a guardian is not performing his or her duties, the court is authorized to appoint a temporary guardian for no longer than six months.¹²

⁶ § 15-14-409(3), C.R.S.

⁷ Guardianship Alliance of Colorado. *Education Materials*. Retrieved August 25, 2009, from <http://www.guardianshipallianceofcolorado.org/educational.html>

⁸ § 15-14-115, C.R.S.

⁹ § 15-14-115, C.R.S.

¹⁰ § 15-14-312(1), C.R.S.

¹¹ § 15-14-312(1), C.R.S.

¹² § 15-14-313(1), C.R.S.

Conservators

A conservator is appointed by a court to manage the financial affairs, including both real and personal property, of a minor or protected or incapacitated person.¹³ The court may grant conservatorship if,

by clear and convincing evidence, the individual is unable to manage property and business affairs because the individual is unable to effectively receive or evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance or because the individual is missing, detained or unable to return to the United States.¹⁴

There are also limited and unlimited conservatorships, which have the same connotation as limited and unlimited guardianships. That is, conservatorships can be limited by the court to specific functions, or the court may grant unlimited conservatorship if the petitioner is able to demonstrate the necessity for an unlimited conservatorship.

The formal process via the court for obtaining conservatorship is the same as guardianship. That is, an interested person must file a Petition of Appointment, a court visitor conducts an investigation, a hearing is scheduled, and an Acceptance of Office Notice and a Notice of Appointment are issued.

Upon appointment, a conservator is required to provide an inventory of the estate of the protected person and a financial plan to the court within 90 days. The inventory details all of the assets, while the financial plan highlights a monthly budget, including any income and expenditures. Thereafter, a conservator must submit an annual report to the court detailing the financial administration of the estate.

Trustees

A trustee is a person, bank or trust company appointed by a trust agreement to safeguard, invest and distribute the trust's valuable assets according to the provisions of the trust agreement.¹⁵

Trusts have thousands of uses, ranging from preserving a child's inheritance until he or she is an adult, to managing the financial affairs of an elderly person, to running a large business.¹⁶

¹³ *Oversight of Probate Cases, Colorado Judicial Branch Performance Audit*, Clifton Gunderson LLP (2006), p.9.

¹⁴ § 15-14-401(1)(a)(I), C.R.S.

¹⁵ *Oversight of Probate Cases, Colorado Judicial Branch Performance Audit*, Clifton Gunderson LLP (2006), p.10.

¹⁶ Colorado Bar Association. *So Now You Are a Trustee*. Retrieved August 28, 2009, from <http://www.cobar.org/index.cfm/ID/20298?wwparam=1251481139>

There are two categories of trusts: living (also known as a revocable trust or revocable living trust) and testamentary. Both living and testamentary trusts can be established as irrevocable trusts, which are all generally used for estate tax reduction and investment management, but these trusts cannot be terminated or changed.¹⁷

A living trust is established during the lifetime of the person who creates it, and the trust is revocable, which means that the person who creates it can change the terms of the trust or end the trust entirely.¹⁸

There are also two types of living trusts: funded and unfunded. A funded living trust occurs when the creator of the trust contributes money and property into the trust during his or her lifetime for the benefit of him or herself and possibly other family members.¹⁹

An unfunded living trust typically receives assets through a simple, pour-over will following the death of the creator of the trust.²⁰ A pour-over will “pours” any property the deceased still owned at the time of death into the trust that the person set up during his or her lifetime.²¹

Additionally, a testamentary trust is provided for under a will, and is not created until the person who wrote the will has died.²² Testamentary trusts are used to provide for management of assets for minor children, disabled relatives or any other person that the person writing the will makes provisions for but feels they cannot handle an inheritance properly by themselves.²³

¹⁷ New York Life Trust Company, FSB. *Irrevocable Trusts*. Retrieved October 25, 2009, from http://www.nylim.com/New_York_Life/Content/PASS/Files/Other/20030724120940_774kb_Irrevocable_Trust.pdf

¹⁸ Law Offices of Bette Heller, P.C. *Frequently Asked Questions*. Retrieved September 21, 2009, from http://www.colorado-elder-probate-lawyer.com/probate_faqs.html

¹⁹ United States Air Force Academy. *What is a Living Trust?* Retrieved September 21, 2009, from <http://www.usafa.edu/superintendent/ja/LivingTrust.cfm?catname=JA>

²⁰ United States Air Force Academy. *What is a Living Trust?* Retrieved September 21, 2009, from <http://www.usafa.edu/superintendent/ja/LivingTrust.cfm?catname=JA>

²¹ Free Advice. *Wills*. Retrieved October 25, 2009, from http://law.freeadvice.com/estate_planning/wills/pour_over_will.htm

²² Law Offices of Bette Heller, P.C. *Frequently Asked Questions*. Retrieved September 21, 2009, from http://www.colorado-elder-probate-lawyer.com/probate_faqs.html

²³ Law Offices of Bette Heller, P.C. *Frequently Asked Questions*. Retrieved September 21, 2009, from http://www.colorado-elder-probate-lawyer.com/probate_faqs.html

Personal Representatives

A personal representative is responsible for distributing the assets of the deceased as well as completing the decedent's business, such as paying bills and filing tax returns.²⁴ Specific duties of a personal representative include:²⁵

- Taking an inventory of assets of the estate, and ensuring that the assets are protected while serving as the personal representative;
- Managing the assets until the estate is closed, paying estate bills, taxes, etc; and
- Making distributions to the heirs or to the beneficiaries under a will.

Formal authority to function as a personal representative is granted by the court. The court issues "domiciliary letters" to the personal representative, which highlights the fact that a personal representative has been appointed.²⁶ These "letters" are showed to various third parties, such as banks, insurance companies, etc., when administering the estate.²⁷

There are a variety of types of personal representatives, including, but not limited to:

- Public administrator;
- Special administrator; and
- Successor personal representative.

A public administrator is,

a private individual...appointed by the court...to collect, protect and manage the assets of certain individuals, and to administer the estates of decedents where the decedent left no one who is willing and able to administer the estate.²⁸

A public administrator does not only serve as a personal representative, he or she may also serve as a conservator or trustee. In fact, the public administrator is often appointed to administer assets in situations where the person who owns the assets is unable to effectively manage them and there is no other suitable person available.²⁹

²⁴ Colorado Bar Association. *So Now You Are a Personal Representative*. Retrieved August 28 2009, from <http://www.cobar.org/index.cfm/ID/20882>

²⁵ United States Air Force Academy. *Personal Representative*. Retrieved October 25, 2009, from [http://www.usafa.af.mil/superintendent/ja/Personal Representative.cfm?catname=JA](http://www.usafa.af.mil/superintendent/ja/Personal%20Representative.cfm?catname=JA)

²⁶ Colorado Bar Association. *So Now You Are a Personal Representative*. Retrieved August 28 2009, from <http://www.cobar.org/index.cfm/ID/20882>

²⁷ Colorado Bar Association. *So Now You Are a Personal Representative*. Retrieved August 28 2009, from <http://www.cobar.org/index.cfm/ID/20882>

²⁸ Steenrod, Schwartz & McMinimee, LLP. *About Public Administrators*. Retrieved September 3, 2009, from <http://www.steenrodlaw.com/AboutPA/index.html>

²⁹ Steenrod, Schwartz & McMinimee, LLP. *About Public Administrators*. Retrieved September 3, 2009, from <http://www.steenrodlaw.com/AboutPA/index.html>

A special administrator is appointed by the court to take charge of the assets and/or investigate the status of an estate and report to the court.³⁰

A successor personal representative is a personal representative who is appointed by the court to succeed a previously appointed personal representative.³¹

There are national certifications available to guardians and conservators. Specifically, the Center for Guardianship Certification (CGC) offers certification as well as a master certification with the passage of an examination.

National Guardianship Association Certification

In order to obtain a certification through the CGC, a candidate is required to possess the following minimum qualifications:³²

- Must be 21 years of age;
- Must be a high school graduate or possess the general education development or equivalent;
- Must have one year of relevant work experience related to guardianship or conservatorship or the following educational or training requirements:
 - A degree in a field related to guardianship; or
 - Completion of a course curriculum or training specifically related to guardianship or conservatorship approved by the CGC.
- Must not have been convicted or pled guilty or no contest to a felony.

If a candidate satisfies the aforementioned minimum standards, he or she is eligible to take the CGC certification examination.

In order to take the examination, a candidate must complete an application, which is currently \$50 as well as submit the examination fee, which is \$150. The application must provide a list of past employers (to ensure that the candidate fulfils the work experience requirement); as well as education and information related to criminal history. The application must also be notarized.

³⁰ Legal-Dictionary. *Special Administrator*. Retrieved November 2, 2009, from <http://legal-dictionary.thefreedictionary.com/special+administrator>

³¹ Dorchester County. *Definition of Terms*. Retrieved November 2, 2009, from <http://www.dorchestercounty.net/ProbateDef.htm>

³² Center for Guardianship Certification. *Rules and Regulations Regarding Certification and Re-Certification of National Certified Guardians*. Retrieved October 23, 2009, from <http://www.guardianshipcert.org/files/webfiles/NCG%20Rules%20&%20Regulations.pdf>

Once the CGC renders the application complete, the candidate is eligible to take the examination. The examination is a comprehensive test consisting of multiple-choice questions related to the best practices in guardianship of the person and estate (conservator duties).³³ The examination includes, but is not limited to the following areas:³⁴

- Ethics;
- Duties and responsibilities of guardians; and
- Property management.

To pass the examination, a candidate must receive a score of 75 percent or higher. Once a CGC certification is issued, it is valid for two years.

In order to maintain the CGC certification, a candidate must complete 20 hours of continuing education every two years, complete a re-certification application and submit \$150.³⁵

An unsuccessful candidate may retake the examination for a fee of \$100. Also, the unsuccessful candidate must provide the CGC a notice of intention to retake the examination no later than 30 days prior to the examination date.

The CGC also offers a certification for master guardians. To qualify for the master guardian certification a candidate must possess the following qualifications:³⁶

- National Certified Guardian in good standing at the time of submission of application;
- Graduate degree from an accredited college or university with three years of full-time professional guardianship experience, or a bachelor's degree with five years of full-time professional guardian experience or 12 years of full-time experience in the field of guardianship;
 - Experience is defined to include all of the following:
 - Serving in a position of making decisions while serving as a court-appointed guardian or as agent for the court-appointed guardian providing services directly to or on behalf of two or more unrelated wards;

³³ Center for Guardianship Certification. *The Center for Guardianship Certification Application Process for National Certified Guardian Certification*. Retrieved October 23, 2009, from <http://www.guardianshipcert.org/files/webfiles/NCG%20Application%20Packet.pdf>

³⁴ Center for Guardianship Certification. *The Center for Guardianship Certification Application Process for National Certified Guardian Certification*. Retrieved October 23, 2009, from <http://www.guardianshipcert.org/files/webfiles/NCG%20Application%20Packet.pdf>

³⁵ Center for Guardianship Certification. *The Center for Guardianship Certification Application Process for National Certified Guardian Certification*. Retrieved October 23, 2009, from <http://www.guardianshipcert.org/files/webfiles/NCG%20Application%20Packet.pdf>

³⁶ Center of Guardianship Certification. *Application Packet for Certification as a National Master Guardian*. Retrieved October 25, 2009, from <http://www.guardianshipcert.org/files/webfiles/CGC%20NMG%20Application%20Packet.pdf>

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- Spending an average of at least 16 hours per week as a guardian during at least three of the last five years including the most recent year;
 - Demonstrating experience in at least six of the following, including the first experience requirement:
 - High degree of competence managing complex issues;
 - Manage significant financial estates;
 - Conduct or arrange for comprehensive assessment of a wards' needs;
 - Provide supervision and case oversight to less experienced guardians;
 - Plan, implement, control, direct, fund a professional guardianship program;
 - Have experience with more than one disability group;
 - Provide training and mentoring to less experienced guardians;
 - Provide educational opportunities by presenting topics related to guardianship;
 - Provide consultation regarding medical procedures including use of psychotropic medications and evaluation of behavioral programs;
 - Advance the profession through policy development, legislative action, advocacy or community outreach;
 - Provide consultation or make decisions on end of life issues and other complex or controversial issues; or
 - Actively advocate for limited guardianship, alternatives to guardianship and restoration of wards.

If a candidate meets the qualifications for National Master Guardian Certification, he or she must complete an application and pay the application fee, which is currently \$150. The application must include the following:³⁷

- Four professional letters of recommendation;
- Confidentiality waiver; and
- Proof of employment and education.

Upon completion of the application and paying the examination fee, which is \$325, a candidate may take the examination. The National Master Guardian examination is a two-part test consisting of a multiple choice section and an essay section.

A candidate who does not pass the examination may re-take the examination for \$100.³⁸ Also, notice of intention to re-take the examination must be received not later than 30 days prior to the examination date.³⁹

³⁷ Center of Guardianship Certification. *Application Packet for Certification as a National Master Guardian*. Retrieved October 25, 2009, from <http://www.guardianshipcert.org/files/webfiles/CGC%20NMG%20Application%20Packet.pdf>

The National Master Guardian Certification is valid for three years, and a certified person must become re-certified (\$225) before the end of the three-year period to avoid having to retake the examination.⁴⁰

A certified National Master Guardian must complete 30 hours of continuing education during the three-year period.

³⁸ Center of Guardianship Certification. *Application Packet for Certification as a National Master Guardian*. Retrieved October 25, 2009, from

<http://www.guardianshipcert.org/files/webfiles/CGC%20NMG%20Application%20Packet.pdf>

³⁹ Center of Guardianship Certification. *Application Packet for Certification as a National Master Guardian*. Retrieved October 25, 2009, from

<http://www.guardianshipcert.org/files/webfiles/CGC%20NMG%20Application%20Packet.pdf>

⁴⁰ Center of Guardianship Certification. *Application Packet for Certification as a National Master Guardian*. Retrieved October 25, 2009, from

<http://www.guardianshipcert.org/files/webfiles/CGC%20NMG%20Application%20Packet.pdf>

Proposal for Regulation

Two Coloradans (Applicant) submitted a sunrise application to the Department of Regulatory Agencies (DORA) for review in accordance with the provisions of section 24-34-104.1, Colorado Revised Statutes. The application identifies certification and registration for professional fiduciaries as the appropriate level of regulation to protect the public. Although not delineated in the sunrise application, the Applicant defines professional fiduciary as any entity who accepts a fee for fiduciary services.

The sunrise application also states that certification would set standards for competency and ethical behavior, thus establishing credibility for the professional fiduciary industry. The sunrise application further states that as the baby boomer generation begins to retire, there will be an increase in consumer demand for professional fiduciaries among the elderly population.

The Applicant proposes a requirement that professional fiduciaries register with the state. Doing so would aid in collecting information related to the number of estates managed by professional fiduciaries, thereby giving policy makers a more comprehensive picture of the fiduciary industry.

Finally, the Applicant proposes the establishment of a transparent grievance process for complaints initiated against fiduciaries that occurs outside of a probate court. According to the Applicant, this would eliminate the potential conflict of interest that may exist when a probate judge is asked to review fees and actions of a fiduciary he or she may have appointed would help ensure consumers are protected from financial abuses.

Summary of Current Regulation

The Colorado Regulatory Environment

Currently, there are a variety of laws that offer oversight of fiduciaries in Colorado, including:

- The Colorado Probate Code;
- The Colorado Uniform Veterans' Guardian Act; and
- The Colorado Bank Code.

The Colorado Probate Code, which is located in Title 15, Articles 10 through 17, Colorado Revised Statutes (C.R.S.), provides oversight in probate matters, including:

- Guardians;
- Conservators;
- Trustees; and
- Personal representatives.

Sections 15-14-101 through 15-14-318, C.R.S., detail the general powers and duties provided for through a court-appointed guardianship. The court approves guardianship (District Courts except Denver which has its own dedicated Probate Court), for a person who is deemed incapacitated (also known as a "ward").

Section 15-14-102, C.R.S., defines an incapacitated person as,

an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety or self-care, even with appropriate and reasonably available technological assistance.

Section 15-14-207, C.R.S., highlights the required duties of a court-appointed guardian, which include:⁴¹

- Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities and physical and mental health;
- Take reasonable care of the ward's personal effects and bring a protective proceeding if necessary to protect the property of the ward;
- Expend money of the ward which has been received by the guardian for the ward's current needs for support, care, education, health and welfare;

⁴¹ §§ 15-14-207(2)(a-f), C.R.S.

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- Conserve any excess money of the ward for the ward's future needs, but if a conservator has become appointed for the estate of the ward, the guardian must pay the money at least quarterly to the conservator to be conserved for the ward's future needs;
 - Report the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule; and
 - Inform the court of any change in the ward's custodial dwelling or address.

The general powers of a court-appointed guardian, except as otherwise limited by the court, are as follows:⁴²

- Apply for and receive money for support of the ward otherwise payable to the ward's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship or custodianship;
- If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's custodial dwelling outside the state upon express authorization of the court;
- If a conservator for the estate of a ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay for the benefit of the ward;
- Consent to medical or other care, treatment or service for the ward;
- Consent to the marriage of the ward; and
- If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

Sections 15-14-401 through 15-15-433, C.R.S., highlight the statutory provisions governing court-appointed conservators. A conservator is appointed by a court to manage the financial affairs, including both real and personal property, of a minor or protected or incapacitated person.⁴³ The court may grant conservatorship if,

by clear and convincing evidence, the individual is unable to manage property and business affairs because the individual is unable to effectively receive or evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance or because the individual is missing, detained or unable to return to the United States.⁴⁴

⁴² §§ 15-14-208(2)(a-f), C.R.S.

⁴³ *Oversight of Probate Cases, Colorado Judicial Branch Performance Audit*, Clifton Gunderson LLP (2006), p.9.

⁴⁴ § 15-14-401(1)(a)(I), C.R.S.

Section 15-14-418, C.R.S., details the general duties of conservators related to financial plans, which include, but is not limited to:

- The conservator, while taking into account the limitations of the protected person, encourage the person to participate in the decisions, act on the person's own behalf and develop or regain the ability to manage the person's estate and business affairs;
- The conservator, no later than 90 days after appointment, must file for approval with the appointing court a financial plan for protecting, managing, expending and distributing the income and assets of the protected person's estate; and
- The conservator must file an amended financial plan whenever there is a change in circumstances that requires a substantial deviation from the existing financial plan.

Additionally, court-appointed conservators are required to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship.⁴⁵ The amount of the bond must be,

equal to the amount of the aggregate capital value of the property in the estate in the conservator's control, plus one-year's estimated income and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation, lacks power to sell or convey without court authorization.⁴⁶

The bond is paid from the protected person's estate, unless otherwise directed by the court.⁴⁷ However, the court has the authority to waive the bond requirement.

The court is also authorized to impose restrictions on the conservator's access to, or transfer of, certain assets within the protected person's estate.⁴⁸

Upon the death of a protected person, a conservator cannot make any expenditures of conservatorship funds except with court authorization other than those necessary to preserve the assets of the estate.⁴⁹ However, the conservator is authorized to release funds for funeral, cremation or burial of the deceased protected person.⁵⁰

⁴⁵ § 15-14-415, C.R.S.

⁴⁶ § 15-14-415, C.R.S.

⁴⁷ § 15-14-416(e), C.R.S.

⁴⁸ § 15-14-415, C.R.S.

⁴⁹ § 15-14-428(2), C.R.S.

⁵⁰ § 15-14-428(2), C.R.S.

The Colorado Probate Code prohibits dual roles of guardians and conservators. Section 15-14-310(5)(a), C.R.S., states that unless the court makes specific findings for good cause shown, the same professional may not act as an incapacitated person's or a protected person's:

- Guardian and conservator;
- Guardian and direct service provider; or
- Conservator and direct service provider.

The regulatory oversight of trusts is contained in sections 15-16-101 through 15-16-307, C.R.S. The trustee of a trust is required to register the trust with the court within 30 days of acceptance of the trust.⁵¹ Trusts with a value of less than \$500 are not required to be registered with the court.⁵²

In order to register a trust, a Trust Registration Statement must be filed with the court delineating the name and address of the trustee.⁵³

The statement must identify the trust as follows:⁵⁴

- In the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate;
- In the case of a written *inter vivos* (living) trust, by the name of each settler and the original trustee and the date of the trust instrument; or
- In the case of an oral trust, by information identifying the settler or other source of funds and describing the time and manner of the trust's creation and the terms of the trust including the subject matter, beneficiaries and time of performance.

The court has jurisdiction over a trust when interested parties initiate proceedings concerning the internal affairs of a trust.⁵⁵ Proceedings initiated by interested parties may include the following:⁵⁶

- Appoint or remove a trustee;
- Review trustees' fees and to review and settle interim or final accounts;
- Ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, instruct trustees and determine the existence or nonexistence of any immunity, power, privilege, duty or right; and
- Release registration of a trust.

⁵¹ § 15-16-101(1), C.R.S.

⁵² § 15-16-101(2), C.R.S.

⁵³ § 15-16-102(1), C.R.S.

⁵⁴ §§ 15-16-102(2)(a-c), C.R.S.

⁵⁵ § 15-16-201(1), C.R.S.

⁵⁶ §§ 15-16-201(1)(a-d), C.R.S.

Sections 15-12-601 through 15-12-623, C.R.S., highlight the statutory provisions governing court-appointed personal representatives. In order for the court to appoint a personal representative, the personal representative must file a bond, if required by the court, and a statement of acceptance.⁵⁷ By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person.⁵⁸

A bond is not required for a personal representative appointed in an informal proceeding,⁵⁹ which means that other than filing a statement of acceptance, the court is not involved. However, a bond for a personal representative may be required in the following instances:⁶⁰

- Upon appointment of a special administrator;
- When a personal representative is appointed to administer an estate under a Will containing an express requirement of bond; or
- When an interested person requests, through the court, that the personal representative obtain a bond.

Section 15-10-501, *et seq.*, C.R.S., contains the statutory provisions for fiduciary oversight for which the court has obtained jurisdiction. There are several tools available to the court in order to respond to issues that could compromise the health and safety of a ward or protected person. For example, the court is authorized to take action without the requirement of prior notice or hearing, if it appears to the court that an emergency exists where a ward's or protected person's health, safety or welfare or the financial interests of an estate is at risk of substantial harm, the court has the authority to order immediate restraint, restriction or suspension of the powers of the fiduciary.⁶¹

The court is also authorized to surcharge a fiduciary if it determines, after a hearing, that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper.⁶² The court may surcharge the fiduciary for any damage or loss to the estate, beneficiaries or interested persons.⁶³

If a court determines, after a hearing, that a breach of fiduciary duty has occurred or an exercise of power by a fiduciary has been improper, it may order such sanctions as it deems appropriate.⁶⁴

⁵⁷ § 15-12-601, C.R.S.

⁵⁸ § 15-12-602, C.R.S.

⁵⁹ § 15-12-603(1), C.R.S.

⁶⁰ §§ 15-12-603(1)(a-c), C.R.S.

⁶¹ § 15-10-503(1), C.R.S.

⁶² § 15-10-504(2)(a), C.R.S.

⁶³ § 15-10-504(2)(a), C.R.S.

⁶⁴ § 15-10-504(4), C.R.S.

Additionally, the Uniform Veterans' Guardianship Act (Act), which is located in sections 28-5-201 through 28-5-223, C.R.S., provides the statutory oversight of guardians for veterans. The Act delineates that a guardian controls a veteran's income stream and nothing further. Under the Act, the guardian does not have authority over care or custody of an incapacitated person.

Section 28-5-205, C.R.S., limits the number of veterans who can be in a guardian's care, with the exception of banks and trust companies, to no more than five unless all of the wards are members of one family.

The Act also requires guardians of veterans to execute and file a bond in an amount not less than the estimated value of the personal estate and anticipated income of the ward during the ensuing year.⁶⁵

Section 28-5-213, C.R.S., delineates compensation for guardians of veterans. Specifically, the compensation payable to guardians must be based on services rendered and cannot exceed five percent of the amount of income received during the period covered by the account.

The Colorado Banking Code, specifically, Title 11, Article 109, C.R.S., governs trust companies in Colorado. Trust companies, including banks, offering services as fiduciaries are regulated under the Colorado Banking Code. Among other things, section 11-109-304, C.R.S., directs the Colorado Banking Board to establish minimum capital requirements for trust companies in order to operate in Colorado. In fact, the initial capital requirement for trust companies is \$1 million or a greater amount established by the Colorado Banking Board.⁶⁶

⁶⁵ § 28-5-210(1), C.R.S.

⁶⁶ Colorado Division of Banking. Regulation TC13.5 - Minimum Capital for Non-Depository Trust Companies.

Regulation in Other States

According to the sunrise application, there are seven states that regulate professional fiduciaries: Alaska, Arizona, California, Florida, Nevada, Texas and Washington. However, the Center for Guardianship Certification (CGC) staff stated that Nevada does not regulate professional fiduciaries.

Alaska

The State of Alaska licenses both professional guardians and conservators. Guardians are court-appointed to provide personal services for incapacitated persons, while conservators manage the estate of protected persons. To be defined as a professional guardian or conservator, a person must,

provide services as guardian or conservator to more than one person or two people who are related to each other up to and including the fourth degree of consanguinity, whether of the whole or half blood or by adoption, computed under the rules of civil law.⁶⁷

There are three types of licenses available that relate to guardians: full, partial and temporary. A full guardian may provide either guardianship of conservatorship services, while a partial guardian only provides guardianship services. In order to become licensed as a full or partial guardian, a candidate must meet the following requirements, including, but not limited to:⁶⁸

- Completion of two or more years of professional client casework experience or at least an associate's degree in human services, social work, psychology, sociology, gerontology, special education or a closely related field;
- Certification as a guardian by a nationally recognized organization in the field of guardianships; and
- Completion of a criminal background check, with no convictions, in the past 10 years, of fraud, misrepresentation, material omission, theft, etc.

The requirements for a professional conservator license include, but are not limited to:⁶⁹

- High school diploma or a general education development diploma or its equivalent;
- Six months of employment experience in a position involving financial management or at least an associate's degree in accounting or a closely related field;
- Certification as a guardian by a nationally recognized organization in the field of guardianships; and
- Completion of a criminal background check, with no convictions, in the past 10 years, of fraud, misrepresentation, material omission, theft, etc.

⁶⁷ Alaska Stat. § 08.26.010.

⁶⁸ Alaska Stat. § 08.26.020.

⁶⁹ Alaska Stat. § 08.26.030.

Upon satisfying the initial requirements for a full or partial guardian license or a conservator license, a candidate must complete an application and pay the application fee, which is \$50. The candidate must also pay the \$450 licensing fee as well as the \$54 fingerprint fee. Licenses are valid for two years.

Temporary licenses are issued to persons who,

(are) not currently certified by a nationally recognized organization in the field of guardianships at the time of the application but (are) likely to become certified within one year from the date of the temporary license.⁷⁰

Temporary licenses are valid for one year.

Licensed guardians and conservators are required to submit an annual report to the Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing. Annual reports must include the following:⁷¹

- Evidence of the continuing existence of a bond and professional liability insurance;
- A list, including case numbers, of the wards and protected persons for whom the licensee is acting as a professional guardian or conservator;
- An accurate financial statement of the licensee;
- A letter stating that the licensee has filed all required court reports in the previous calendar year; and
- A copy of all of the licensee's federal tax documents filed with the Internal Revenue Service (IRS) and all of the licensee's correspondence with the IRS.

Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing staff is authorized to take disciplinary action against a licensee for the following, including, but not limited to:⁷²

- Obtaining or attempting to obtain a license through deceit, fraud or intentional misrepresentations;
- Failing to comply with the standards of conduct established by the Department of Commerce, Community and Economic Development; or
- Failing to maintain a bond or other surety as required by a court order.

⁷⁰ Alaska Stat. § 08.26.050.

⁷¹ Alaska Stat. § 08.26.080.

⁷² Alaska Stat. § 08.26.130.

Arizona

The State of Arizona licenses the following fiduciaries:⁷³

- Guardians;
- Conservators;
- Public fiduciaries; and
- Fiduciaries in the Department of Veterans' Services.

Fiduciaries who charge fees for service for one or more persons must obtain a license in order to provide services for remuneration.

In order to qualify for licensure, a candidate must:

- Be at least 21 years of age;
- Be a citizen of the United States;
- Not have been convicted of a felony; and
- Attest that the applicant has not been found civilly liable in an action that involved fraud, misrepresentation, material omission, misappropriation, theft or conversion.

Additionally, a candidate must also possess a minimum level of education and experience to qualify for licensure. The education and experience requirements include, but are not limited to:⁷⁴

- A high school diploma or general education development equivalent diploma and three years of relevant work experience;
- A high school diploma or general education development equivalent diploma and a certificate of completion from a paralegal or legal assistant program; or
- A bachelor of arts or science degree from an accredited college or university and one year of relevant work experience.

To obtain a license, a candidate must also pass an examination. The fee for the examination is \$50.

Licensed fiduciaries are required to submit an annual statement to the court for review.

⁷³ Arizona Supreme Court, Administrative Office of the Courts, Certification and Licensing Division. *Fiduciary Individual Certification Candidate Study Guide*. Retrieved October 30, 2009, from <http://www.supreme.state.az.us/fiduc/pdf/FIDExamStudyGuideJan2007.pdf>

⁷⁴ Arizona Code of Judicial Administration. *Part 7: Administrative Office of the Courts. Chapter 2: Certification and Licensing Programs. Section 7 – 202: Fiduciaries*. Retrieved October 30, 2009, from <http://www.supreme.state.az.us/fiduc/pdf/2009/WebDocs/7202Effct050109.pdf>

California

The State of California licenses guardians and conservators, as well as trustees and agents under a durable power of attorney. In order to be required to obtain a conservator or guardian license, a person must provide services to two or more individuals, who are not related to the conservator or guardian.⁷⁵ Guardians are court-appointed to provide personal services for incapacitated persons, while conservators manage the estates of protected persons.

Meanwhile, trustees and agents under a durable power of attorney must be licensed if they provide services to more than three people or more than three families, or a combination of people and families that totals more than three who are not related.⁷⁶

Trustees are responsible for carrying out the terms of the trust as set forth in a trust document.⁷⁷

An agent under a durable power of attorney acts as an attorney-in-fact to make health-care decisions, including:⁷⁸

- Placement;
- Medical treatment; and
- Final burial arrangements.

To be eligible to become licensed, a candidate must:⁷⁹

- Be 21 years of age; and
- Be a United States citizen or legally admitted to the United States.

Also, a candidate must complete 30 hours of pre-licensing education in approved courses. An approved course must be relevant to fiduciary responsibilities of the person or of estate management for conservators, guardians, trustees or agents under durable power of attorney, or of court system ethics.⁸⁰

⁷⁵ Cal. Bus. & Prof. Code § 6501(f).

⁷⁶ Cal. Bus. & Prof. Code § 6501(f).

⁷⁷ Professional Fiduciary Association of California. *In What Specific Roles do Fiduciaries Serve?* Retrieved October 20, 2009, from http://www.pfac-pro.org/pages/nav_what_is_a_fiduciary.htm

⁷⁸ Professional Fiduciary Association of California. *In What Specific Roles do Fiduciaries Serve?* Retrieved October 20, 2009, from http://www.pfac-pro.org/pages/nav_what_is_a_fiduciary.htm

⁷⁹ California Department of Consumer Affairs Professional Fiduciaries Bureau. *Licensing Application Package Information – California Professional Fiduciary*. Retrieved November 1, 2009, from http://www.fiduciary.ca.gov/licensees/app_gen_info_07.shtml

⁸⁰ California Department of Consumer Affairs Professional Fiduciaries Bureau. *Pre-Licensing Education Information*. Retrieved November 1, 2009, from http://www.fiduciary.ca.gov/forms_pubs/prelicreq.shtml

Prior to licensure, a candidate must meet minimum education and experience requirements, including:⁸¹

- A bachelor of arts or sciences from an accredited college or university;
- An associate of arts or sciences degree from an accredited college or university, and at least three years of relevant work experience; or
- At least five years of relevant work experience.

Prospective candidates must also pass a criminal background check.

A candidate is required to pass a licensing examination provided by the CGC. Upon successful completion of the eligibility, pre-licensing, education/experience and background check requirements, a candidate may submit his or her application and the applicable fee, which is \$400, to the California Department of Consumer Affairs Professional Fiduciaries Bureau.

When licensed, a licensee must complete 15 hours of continuing education annually.

Also, licensees must submit an annual client list to the California Department of Consumer Affairs Professional Fiduciaries Bureau. The list includes:⁸²

- The names of the licensee's current conservatees or wards and the trusts or estates currently administered by the licensee;
- The aggregate dollar value of all assets currently under the licensee's supervision as a professional fiduciary;
- Case names;
- Court locations; and
- Case numbers of all conservatorship, guardianship, trust or other estate administration cases that are closed.

Florida

The State of Florida regulates professional guardians, who are responsible for personal services for incapacitated persons, and professional guardians of the property, who are responsible for managing the estate of the protected person.

Specifically, the State of Florida established a registry for eligible guardians. A professional guardian or professional guardian of the property is any guardian who receives compensation for services rendered to more than three wards.⁸³

⁸¹ Cal. Bus. & Prof. Code §§ 6539 (g)(1-3).

⁸² Cal. Bus. & Prof. Code §§ 6534(1,2,5).

⁸³ Fla. Stat. Ch. 744.102(17).

To provide services as a professional guardian or a professional guardian of the property, a candidate must pass a CGC examination. There are two examinations available including:

- A Florida competency examination, which includes the CGC National Certified Guardian examination, which is \$250; and
- An examination that only includes the Florida competency portion, which is \$140.

Also, for candidates who were unsuccessful in passing either of the examinations mentioned above, a candidate may re-take the examination for \$100.

To be on the registry of professional guardians and professional guardians of the property, a candidate must also fulfill the following requirements:

- Complete 40 hours of training approved by the Statewide Public Guardianship Office;
- Complete 16 hours of continuing education units every two years;
- Maintain a minimum of a \$50,000 bond; and
- Complete background and credit history checks.

A person may not be appointed by the court as a guardian unless the person discloses in the application form the names of all wards for whom the person is currently acting as a guardian.⁸⁴

Texas

The State of Texas requires professional guardians of the person and professional guardians of the estate to be certified in order to provide services to wards or protected persons. The State of Texas also offers a provisional certification.

Section 111.042 of the Texas Government Code delineates that the following individuals must be certified:

- Individuals, other than attorneys or corporate fiduciaries, who are private professional guardians;
- Individuals who provide guardianship services to wards of the Texas Department of Aging and Disability Services; and
- Individuals, other than volunteers, who provide guardianship services to wards of a local, county or regional guardianship program.

In order to qualify for either a guardian of the person or guardian of the estate certification, a candidate must possess a high school diploma and pass a criminal background check.

Upon satisfying the initial requirements for certification, a candidate completes an application and pays the applicable fee, which is \$25. In addition, a candidate must pass a CGC guardianship examination and pay the examination fee, which is \$175.

⁸⁴ Fla. Stat. Ch. 744.3125(2).

Certification is valid for two years, and the cost of re-certification is \$25.

Also, a provisional certification is valid for two years, and in order to provide services under a provisional certification, a person must operate under the supervision of a certified guardian. The aforementioned fees are applicable for the provisional certification.

Once certified, a person is required to complete six hours of continuing education each year.

Certified guardians are required to provide an annual client list to the Board of Guardian Certification highlighting the following:⁸⁵

- The total number of wards;
- The dollar amount of money received for the provision of guardianship services; and
- The total amount of money received from any other public source, including a county or the federal government, for the provision of guardianship services.

The certification system utilized within the State of Texas requires the court to limit compensation for guardians to no more than five percent of the ward's income. However, the court has the authority to amend the five percent limit if it determines that the fee is unreasonably low.⁸⁶

Washington

The State of Washington requires certification of professional guardians, which includes guardians who attend to the personal needs of incapacitated persons, and guardians who handle the financial matters of incapacitated persons.

The requirements for professional guardian certification include, but are not limited to:⁸⁷

- Be at least 18 years of age;
- Possess an associate's degree from an accredited institution and at least two years experience working in a discipline pertinent to the provision of guardianship services or a baccalaureate degree from an accredited institution and at least two full years relevant work experience; and
- Complete a background investigation.

Prior to obtaining certification as a professional guardian in Washington, a candidate must complete initial training, which consists of 100 hours of instruction. The initial training is completed in a six month period and costs approximately \$3,000 to complete.

Certified professional guardians must complete 12 continuing education credits every two years.

⁸⁵ Tex. Gov. Code Ch. 111.044.

⁸⁶ Tex. Gov. Code Ch. 665(c).

⁸⁷ Wash. State Court Rules GR 23.

Analysis and Recommendations

Public Harm

The first sunrise criterion asks:

Whether the unregulated practice of the occupation or profession clearly harms or endangers the health, safety or welfare of the public, and whether the potential for harm is easily recognizable and not remote or dependent on tenuous argument.

Before moving forward in the analysis of the harm concerning professional fiduciaries, it is important to identify what constitutes harm to the public. The improper actions of professional fiduciaries could result in financial and emotional harm to consumers. Financial harm is more clearly identifiable to consumers because assets (money, land, real estate, etc.) are taken from an estate.

By contrast, emotional harm is more difficult to identify and quantify. District Courts (except the City and County of Denver where a Probate Court exists) are where probate matters are adjudicated. The courts are responsible for determining the care of an incapacitated person, which is inherently stressful, particularly when there are instances when a family is feuding over assets of an estate or the care of a loved one. Generally, court proceedings are emotional experiences, which is not exclusive to probate issues. For example, a court proceeding determining child custody is stressful and emotional for the parties involved.

The District Court is responsible for appointing professional fiduciaries, which include the following:

- Guardians;
- Conservators;
- Trustees; and
- Personal representatives.

Although the sunrise application, which was submitted to the Department of Regulatory Agencies (DORA) by two Coloradans (Applicant) requesting regulation of professional fiduciaries, did not provide a definition of a professional fiduciary, interviews with the Applicant indicated that, for purposes of the proposed regulation, a professional fiduciary is anyone who charges a fee for fiduciary services.

In order to determine whether the regulation of professional fiduciaries is necessary, DORA requested that the Applicant provide specific examples of harm to the public related to professional fiduciaries highlighted above.

This sunrise review identified five major subject areas concerning harm as it relates to the proposal to regulate professional fiduciaries. The five subject areas are:

- Popular press articles;
- Disciplinary actions imposed on professional fiduciaries in other states;
- Colorado State Auditor 2006 performance audit on oversight of probate cases;
- “Estate of Denial” website articles; and
- General information.

The Applicant included a number of newspaper articles from the popular press in Colorado and other states, including:

- The Denver Channel on-line publication (Channel 7 News in Denver);
- The Denver Post;
- The Rocky Mountain News;
- The Colorado Spring Gazette;
- The Denver Westword;
- The Los Angeles Times;
- The Houston Chronicle;
- The Pasadena Weekly;
- The St. Petersburg Times; and
- The West Virginia Gazette.

Analysis of Popular Press Articles

The majority of examples provided in the newspaper articles allege harm occurred against protected persons who were under the care of court-appointed guardians or conservators. A table of the articles submitted for this sunrise review is in Appendix A on page 42.

More specifically, the majority of concerns with guardians and conservators were related to excessive fees charged to the wards. For example, a Denver Westword article⁸⁸ maintains that a guardian was remunerated approximately \$23,000 for a few months work. The guardian questioned the veracity of the assertion in the article that \$23,000 in fees were charged for a few months of work.

⁸⁸ Steve Jackson, “Mommy Dearest,” *Westword*, May 22, 1997.

There were also articles submitted that alleged guardians either acted as a guardian and conservator, served as a guardian and in-home health care provider and provided duplicative services to wards. These issues have been addressed in the Colorado Probate Code. Specifically, the Colorado Probate Code, enacted in 2001, prohibits dual roles of guardians and conservators. Section 15-14-310(5)(a), Colorado Revised Statutes (C.R.S.), states that unless the court makes specific findings for good cause shown, the same professional may not act as an incapacitated person's or a protected person's:

- Guardian and conservator;
- Guardian and direct service provider; or
- Conservator and direct service provider.

Additionally, one article⁸⁹ provided by the Applicant addressed actions of a trustee. The article claimed that a trustee committed theft of as much as \$5 million from at least 10 people. The article also stated that the trustee, who was a licensed attorney, ultimately lost his law license, was sentenced to 32 years in prison and paid \$3.35 million in restitution to the victims.

The information in the article, if true, delineates the fact that the current system worked in providing recourse when a trustee commits unethical or illegal acts against the trust and its beneficiaries.

Further, the Colorado newspaper articles provided for this sunrise review did not contain any information related to the performance or actions by personal representatives. Therefore, it is impossible to conduct a review on personal representatives from these sources of information. The absence of harm in any of the articles provided calls into question the need for regulation of personal representatives in Colorado.

It is important to note that DORA contacted some of the providers referenced in the articles of Colorado papers, and they expressed concerns about the veracity of the articles.

The national newspaper articles identified issues associated with court-appointed guardians and conservators. Generally, the issues were related to fees and alleged theft of funds by either guardians or conservators.

Within the national newspaper articles provided for this review, there were examples of harm regarding the actions of trustees. However, it is important to note that all of the examples were related to fee disputes, which are under the purview of the court. That is, fee disputes are reconciled via the court system, not regulatory oversight. In fact, some of the articles provided (from Florida) were more than 16 years old, and changes have been implemented to provide greater protections for beneficiaries, including the requirement that a trustee notifies all beneficiaries.

⁸⁹ Ivan Moreno, "Attorney who stole millions: 'Drowning in a sea of nothingness'," *Rocky Mountain News*, May 11, 2007.

However, some of the national articles addressed issues associated with the performance of personal representatives regarding theft of estate funds. In fact, one of the articles,⁹⁰ states that a personal representative stole \$270,000 from an estate. Upon being convicted of stealing the funds, the personal representative was sentenced to prison.

Additionally, DORA conducted an analysis of disciplinary actions imposed on regulated professional fiduciaries in the following states:

- Alaska;
- Arizona;
- California;
- Florida;
- Texas; and
- Washington.

Importantly, all of the states that regulate professional fiduciaries do not set fees nor does the governing entity regulate fee disputes. Instead, in all of these states, the court approves fees, and if a fee dispute arises, the complaint goes to the court and the court ultimately decides whether fees charged by a professional fiduciary are appropriate.

Disciplinary Actions from Other States

Alaska

There are a total of 13 licensed professional guardians and conservators in Alaska. Staff with the Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional licensing stated that there have been zero disciplinary actions imposed against licensed guardians and conservators in the past year.

Arizona

Arizona Supreme Court staff stated that there are 350 licensed fiduciaries in Arizona. In 2009, there were approximately 15 disciplinary actions initiated against licensed fiduciaries. Staff indicated that the majority (approximately 80- to 85 percent) of complaints are dismissed. Of the 15 in the current year, most have been resolved through a consent agreement.

California

Staff with the Professional Fiduciaries Association of California stated that there are currently 383 licensed professional fiduciaries in California, and there is currently one pending case involving a licensed professional fiduciary.

⁹⁰ Jeffrey Good, "Broken promises," *St. Petersburg Times*, August 28, 1994.

Florida

Staff with the Department of Elderly Affairs, stated that there are 374 registered professional guardians and guardians of the property. In 2009, there was one complaint that was filed against a professional guardian. The complaint involved a professional guardian's bond that had not been renewed. The professional guardian renewed his bond.

Texas

There are 337 certified guardians in Texas. Staff with the Guardian Certification Program stated that during fiscal year 2009 (September 1 through August 30), there were two cases of disciplinary actions initiated against certified guardians. In one case, the certified provisional guardian voluntarily surrendered her certification.

The other case included a provisional guardian whose certification was revoked because she violated established rules. Specifically, the guardian failed to notify staff within the Guardian Certification Program that she changed businesses, which necessitates notification to the Guardian Certification Program of a change of address. The guardian was given the opportunity to notify the Guardian Certification Program of the address change to avoid disciplinary action, but the guardian did not respond. Therefore, her certification was suspended.

Washington

Washington Court staff stated that there are approximately 254 certified guardians. In 2008, there were 25 disciplinary actions initiated against certified professional guardians; the Washington Certified Professional Guardian Board dismissed 21. Four of the cases resulted in settlement agreements. Reasons for the disciplinary action are unclear; as are the settlement agreements contained therein.

Through September 2009, there were nine disciplinary actions initiated against certified professional guardians. Six of the cases were dismissed, and the remaining three are being investigated.

Analysis of Disciplinary Actions from Other States

The data presented above for the six states that regulate professional fiduciaries delineate that there were very few disciplinary actions. There are two possible explanations for the low number of disciplinary actions.

It could be argued that the implementation of a regulatory program enhanced the quality of professional fiduciaries. This is achieved by mandating the passage of an examination, a minimum number of hours of instruction, etc.

Conversely, it could be argued that the regulatory oversight implemented in the aforementioned states does not address the most substantive issue related to professional fiduciaries – fee disputes. As mentioned earlier, states that regulate professional fiduciaries do not have jurisdiction over fees. Rather, the courts that appoint the professional fiduciaries approve fees for service, and hear complaints; when deemed necessary, courts take appropriate action on fee disputes.

Therefore, it is reasonable to conclude that regulatory oversight has not resulted in a decrease in adverse actions by professional fiduciaries; instead, there are few disciplinary actions because the regulatory frameworks in these states do not address the major issue highlighted in several articles - fees. Again, the court is responsible for determining whether fees were reasonable, or not.

Other Information Sources

The Applicant also provided information concerning harm to consumers from the following sources:

- Colorado State Auditor performance audit that was completed in 2006 by Clifton Gunderson, LLP;
- Articles from the “Estate of Denial” website; and
- General information related to guardians, conservators, physicians, etc. of protected persons.

The Colorado State Auditor 2006 performance audit recognized that some courts lack effective systems for monitoring the services provided and fees charged by guardian and conservator appointees, placing some protected persons and their estates at risk.⁹¹

As such, the 2006 audit identified five key issues related to oversight of professional fiduciaries. In particular, the audit focused on issues related to protective proceedings, which are court-appointed guardians and conservators. However, the audit did recommend providing information to interested parties regarding their rights related to oversight of trustees and personal representatives.

⁹¹ *Oversight of Probate Cases, Colorado Judicial Branch Performance Audit*, Clifton Gunderson LLP (2006), p.13.

In response to the recommendation, the Colorado Judicial Branch revised its Trust Registration Statement to include the following:

The court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person. All interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate or trust in the manner provided by the provisions of this code by filing an appropriate pleading with the court by which the estate or trust is being administered and serving it on all interested persons pursuant to section 15-10-401, C.R.S.⁹²

The four remaining recommendations in the 2006 performance audit are as follows:⁹³

1. Improve the consistency and effectiveness of court review of conservator and guardian plans and reports by establishing minimum review procedures; requiring guardians and conservators to maintain detailed information of fees and expenditures; and developing a risk-based model for reviewing higher-risk guardian and conservator cases.
2. Improve procedures for ensuring that professional and non-professional guardians and conservators are qualified to perform their duties toward protected persons.
3. Strengthen controls over the management of probate cases by making improvements to the automated case management system.
4. Consider a range of options for ensuring fees charged by guardians and conservators are reasonable and that policies for determining reasonableness are consistently applied by the courts.

Analysis of the Colorado State Auditor 2006 Performance Audit

The State Court Administrator (Office) is addressing three of the four remaining recommendations identified in the 2006 audit. Specifically, in response to recommendation one highlighted above, the Office recently filled a Probate Coordinator position (and is in the process of hiring two Probate Examiners) to establish procedures for reviewing the annual reports that are required to be submitted to the courts for court-appointed guardians and conservators.

In an attempt to improve monitoring and oversight, guidelines have been created, in the form of a checklist, for court staff.

The Probate Coordinator is also working to create a method for reviewing reports, including the development of a risk-based model that would identify higher risk situations that could necessitate greater scrutiny of reports.

Implementing a risk-based model would assist in identifying issues associated with wards or protected persons who could be vulnerable to abuse.

⁹² Colorado Judicial Branch, *Colorado Trust Registration Statement*.

⁹³ *Oversight of Probate Cases, Colorado Judicial Branch Performance Audit*, Clifton Gunderson LLP (2006), p.5.

In response to the third recommendation in the 2006 audit, the Office created guardianship and conservatorship manuals, which are available on the Colorado Judicial Branch website.

The Office, specifically the Probate Coordinator, is creating a system to identify the number of professional fiduciaries operating in Colorado, as well as how many assets are in their control.

The fourth recommendation encourages a range of options for ensuring that fees charged by guardians and conservators are reasonable and policies for determining fees are consistently applied through the courts.

In response to this recommendation, the Colorado Bar Association has created a Compensation and Cost Recovery statute. The statute, which may be introduced in the 2010 legislative session, includes establishing factors for determining reasonable fees, including, but not limited to:⁹⁴

- The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the service properly;
- The compensation customarily charged in the community for similar services with due consideration and allowance for the complexity or uniqueness of any administrative or litigated issues, the need for an availability locally of specialized knowledge or expertise and the need for and advisability of retaining outside fiduciaries or lawyers to avoid potential conflicts of interest; and
- The nature and size of the estate, the liquidity or illiquidity of the estate, and the results obtained during the administration of the estate.

As referenced above, the issues identified in the 2006 audit are in the process of implementation by both the Office and the Colorado Bar Association. Implementing these measures could serve to enhance consumer protection of protected persons.

Analysis of the State of Denial Website Articles

Most of the articles submitted to DORA from the “Estate of Denial” website did not detail specific instances of harm; instead, these articles highlight various concerns associated with the probate system.

However, one “Estate of Denial” website entry outlined concerns with the probate process. Specifically, the example detailed a family dispute where the mother of an incapacitated person raised concerns with the wife, who was the co-trustee and the guardian. Based on the information provided, the court removed the wife from guardianship and from acting as the co-trustee. According to the article, the mother of the incapacitated person was concerned about the wife’s care of the incapacitated person, including the expenditure of funds.

⁹⁴ Draft legislation §§ 15-1-603(3)(a,c,d), C.R.S.

It is important to note that the court acted within its authority and, according to the article, appointed a new guardian and co-trustee. These actions are within the court's jurisdiction, and it is unclear whether regulation would address this issue.

Analysis of General Information

The general information provided for this sunrise review related to guardians, conservators, physicians, etc. of protected persons and does not provide enough detail to conduct an analysis. Also, it should be noted that the information is dated; that is, the most recent information on the compact disks was from 2001 or earlier.

Summary of Harm

A great deal of information was provided for this sunrise review related to harm to consumers. The majority of issues presented concerned fee disputes and theft of assets within an estate. There are a variety of measures, as highlighted in this section of the sunrise review, currently being implemented in order to enhance consumer protection.

Also, as some of the popular press articles alluded to, the process currently in place via the courts and regarding theft is effective. In fact, some of the articles stated that persons who were convicted of stealing funds received prison sentences.

Need for Regulation

The second sunrise criterion asks:

Whether the public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional or occupational competence.

This criterion addresses the proposition of whether the state should require a certain level of education and/or impose a requirement that professional fiduciaries pass an examination before being certified in Colorado. As outlined earlier in this report, many of the states that regulate professional fiduciaries require the passage of an examination prior to being regulated.

According to the information provided to DORA for this sunrise review, very little evidence has been presented that professional fiduciaries do not possess adequate skills, education or competence to practice safely. This review uncovered limited evidence of harm to the public resulting from lack of education of practitioners.

Instead, the examples of harm submitted for this sunrise review addressed issues related to excessive fees. More specifically, the majority of examples were related to court-appointed guardians and conservators, while issues associated with trustees and personal representatives were limited.

The absence of issues related to competency calls into question the need to require professional fiduciaries to possess a certain level of education and/or pass an examination prior to providing professional fiduciary services.

Alternatives to Regulation

The third sunrise criterion asks:

Whether the public can be adequately protected by other means in a more cost-effective manner.

Public protection for wards and protected persons could potentially be realized in a more cost-effective manner in a variety of ways. First, utilizing the current certification system established by the Center for Guardianship Certification (CGC) could offer public protection. The CGC offers a certification and a master certification. The state could require all professional fiduciaries in Colorado to obtain national certification in order to provide guardian or conservator services for remuneration. The costs to the state would be minimal; however, requiring all professional fiduciaries to obtain certification prior to working in Colorado could limit the number of professional fiduciaries.

However, the certifications offered by the CGC only measure competency for guardians and conservators. Although the examinations cover topics concerning trustees and personal representative duties, the examination does not measure competency of trustees and personal representatives. As such, utilizing the CGC certification would only include guardians and conservators, which does not address the entire proposal for regulation (guardians, conservators, trustees and personal representatives).

An analysis of the examples of harm provided for this sunrise review did not identify issues where professional fiduciaries were incompetent. Consequently, requiring professional fiduciaries to obtain certification from CGC is unwarranted.

Additionally, the court (District Court except Denver where a Probate Court exists) provides oversight of court-appointed guardians and conservators. The court has the authority to appoint, remove, sanction or surcharge a guardian or conservator. The court also has the authority to hear complaints about fees, and ultimately require fees to be returned to the protected person's estate.

Typically, other than registering a trust with the court, trustees are not under the supervision of the court. However, the court may initiate jurisdiction over a trust when a complaint is filed.

Also, personal representatives are court-appointed, but not under the jurisdiction of the court. Personal representatives operate in an “informal” capacity related to court oversight, which essentially means that the court does not intervene unless an interested person files a complaint with the court regarding the actions of a personal representative. Once a complaint is filed, the court may choose to initiate jurisdiction, which could result in “supervised” or “formal” administration.

Clearly, a more cost-effective means to provide oversight of protected persons related to guardians and conservators, and when necessary, trustees and personal representatives already exists via the court system.

Conclusion

The sunrise application submitted to DORA requested certification and registration of professional fiduciaries, as well as establishing a transparent grievance process for complaints against fiduciaries outside of a probate court. For purposes of this sunrise review, professional fiduciaries are persons or entities that accept a fee for service.

Professional fiduciaries include:

- Guardians;
- Conservators;
- Trustees; and
- Personal representatives.

The sunrise application asserts that certification of professional fiduciaries would set standards for competency and ethical behavior, thus establishing credibility for the professional fiduciary industry. This is inconsistent with the first sunrise criterion, which asks whether regulation is necessary to protect the public. Therefore, sunrise reviews, and subsequently recommendations, do not serve to add credibility to professions, instead recommendations create a regulatory framework to provide protection to the public when harm has been identified.

Further, the examples of harm submitted to DORA for this sunrise review and detailing harm to consumers came largely from a number of popular press articles; or from various states, including Texas and Florida, both of which currently regulate professional fiduciaries. Information contained in the articles did not identify issues associated with competency. Absent verifiable documentation illustrating competency issues, creating a regulatory framework that unduly requires professional fiduciaries to become certified is unnecessary.

Instead, the majority of the alleged instances of harm in the articles from Colorado and other states were related to fee disputes and theft of estate assets.

Specifically, the cases highlighted issues with excessive fees charged to wards or protected persons' estates. Some of the articles indicated that there is not adequate oversight of guardians and conservators.

In an attempt to mitigate the issue of excessive fees related to professional guardians and conservators, the Office within the Colorado Judicial Branch has created a Probate Coordinator position, as well as two Probate Examiner positions that are charged with creating a system to effectively monitor the most at-risk protected persons through the implementation of a risk-based oversight model. The greater the risk of the protected person, the more oversight will be allocated to reviewing, among other things, the annual statements that are required to be submitted to the court. The implementation of this system will serve to increase oversight of protected persons and could enhance financial protection.

Also, as some of the popular press articles included in this sunrise review alluded to, the process currently in place via the courts and regarding theft is effective. In fact, some of the articles stated that persons who were convicted of stealing funds received prison sentences.

Additionally, the sunrise application proposes requiring professional fiduciaries to register with the state. Doing so would aid in collecting information related to the number of estates managed by professional fiduciaries, thereby giving policy makers a more comprehensive picture of the fiduciary industry.

The Office, specifically the Probate Coordinator, is charged with creating a database that will accurately track the number of professional fiduciaries as well as the amount of assets in their control. This oversight mechanism was proposed in the sunrise application, and will be implemented by the Office. Providing an accurate account of the number of professional fiduciaries will serve to assist the Office and the court if issues arise with a professional fiduciary.

Establishing an additional registry within DORA could present several problems for the professional fiduciaries, the courts and DORA. Because a registry is already in the process of being created within the Office, an additional registry in DORA, which could provide the same information would be duplicative and an inefficient use of government resources.

Further, the sunrise application requests the establishment of a transparent grievance process for complaints initiated against fiduciaries that occurs outside of a probate court. Eliminating the potential conflict of interest that may exist when a probate judge is asked to review fees and actions of a fiduciary he or she may have appointed will help ensure consumers are protected from financial abuses, according to the Applicant.

Judges, including those in district and probate court, have inherent power to appoint individuals for special purposes to either assist the parties or the court. The following examples provide a few instances where the court may appoint individuals:

- Guardians *ad litem* are appointed by courts to protect wards in legal proceedings; or
- Special masters are appointed by courts for a variety of tasks, including assisting the court and parties with discovery disputes and special legal issues.

Once these individuals are appointed by the court, they are under the jurisdiction of the court for all matters including any actions the appointed individual undertakes, and the court has jurisdiction to determine the appropriate fees charged by the individual it appoints.

It is not a conflict of interest for courts in probate matters to appoint persons as professional fiduciaries. As mentioned above, courts appoint a variety of individuals for various reasons, and they are under the jurisdiction of the court, including fee disputes and actions taken by professional fiduciaries.

Upon appointing a professional fiduciary, the principal role of the court is to review the actions of the appointees, (via required reports or complaints filed with the court) including the reasonableness of fees. The grievance process against a professional fiduciary is undertaken solely by the court, which is consistent with any other court-appointed individual, thus there does not appear to be a need to establish a grievance process outside of the probate court.

If parties are dissatisfied with a court's decision, there are appeal avenues, including the Colorado Court of Appeals and the Colorado Supreme Court. The courts are the final arbitrator for court appointed individuals.

Additionally, a party may file a complaint against a judge with the Judicial Discipline Commission (Commission). The Commission was established to investigate allegations that a judge is not properly performing his or her duties because of willful misconduct, ethical violations or a permanent disabling health condition.⁹⁵ The Commission may take various actions to remedy improper conduct, including, but not limited to:⁹⁶

- Privately or publicly reprimanding the judge; or
- Recommending that the Colorado Supreme Court remove the judge from office.

⁹⁵ Colorado State Judicial Branch. *Judicial Discipline Commission*. Retrieved November 9, 2009, from http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm/Committee_ID/13

⁹⁶ Colorado State Judicial Branch. *Judicial Discipline Commission*. Retrieved November 9, 2009, from http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm/Committee_ID/13

Issues identified during this sunset review were predominantly in the area of court-appointed guardians and conservators. As such, the Office is in the process of creating a database or “registry” to track professional fiduciaries. The Office is also creating a risk-based model, which would identify protected persons who are most at risk of being taken advantage of by professional fiduciaries. This model would enhance protection to the public by increasing monitoring of the most at-risk population in protective proceedings.

Legislation may also be introduced to address fees in the 2010 legislative session, which could provide additional protection to protected persons and their assets. The legislation may, among other things, establish factors for reasonable compensation for fiduciaries. Specifically, section 15-10-603(3)(c), C.R.S., establishes a factor for determining the reasonableness of fees by taking into consideration the compensation customarily charged in the community for similar services.

Finally, a great deal of information was provided for this sunrise review regarding harm, or the potential for harm, to consumers - specifically in the area of court-appointed professional fiduciaries (guardians and conservators). However, the majority of the issues highlighted in the information provided focused on fees. There are two dynamics that are important to providing adequate consumer protection: court oversight and new mechanisms being implemented. Utilizing the court system for oversight is consistent, as highlighted above, with any other court-appointed professional. That is, once appointed by the court, the court has jurisdiction for all matters, including determining the reasonableness of fees.

Further, new mechanisms mentioned above are in the process of being developed, and in order to measure their effectiveness, they should be given the opportunity to be fully implemented and operational. Doing so is consistent with the third sunrise criterion, which asks whether consumer protection could be realized in a more cost effective manner other than the proposed regulation.

The current oversight model, in addition to the new mechanisms that are in the process of being implemented, serve to create an environment of enhanced consumer protection – particularly with court-appointed guardians and conservators.

Recommendation – Impose no additional oversight of professional fiduciaries.

Appendix A – Articles and Investigations

Specific Individuals – Colorado

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
Tom Burke, Laney Valian, and John Ferrugia, "System Could Drain Your Retirement Savings," <i>TheDenverChannel.com</i> , May 9, 2007.	Excessive Fees	X			
Sue Lindsey, "Denver probate lawyer loses license," <i>Rocky Mountain News</i> , February 25, 2008.	Misappropriation - Fraud – \$70,000				
Ivan Moreno, "Attorney who stole millions: 'Drowning in a sea of nothingness'," <i>Rocky Mountain News</i> , May 11, 2007.	Theft – As much as \$5 Million from at least ten people Suspected of Murder to Access Funds			X	
Lou Kilzer and Sue Lindsey, "The probate pit," <i>Rocky Mountain News</i> , April 7, 2001.	Theft - \$317,000	X			
Lou Kilzer and Sue Lindsey, "The probate pit," <i>Rocky Mountain News</i> , April 7, 2001.	Excessive Fees Placed Lien on Sister's House and Charged 8% Interest on Balance Owed	X	X		
Lou Kilzer and Sue Lindsey, "The probate pit," <i>Rocky Mountain News</i> , April 7, 2001.	Hired Her Own Company as Co-Guardian		X		
Lou Kilzer and Sue Lindsey, "Costly litigation," <i>Rocky Mountain News</i> , April 9, 2001.	Conflict From Acting in Dual Role	X	X		
Sue Lindsey, "Presumed innocent," <i>Rocky Mountain News</i> , April 10, 2001.	Claimed Mother was Incompetent (Was Later Determined Competent) Sold Properties Spronz charged between \$50,000 and \$100,000 for her labor as Conservator	X			
Lou Kilzer and Sue Lindsey, "Bankroll about-face," <i>Rocky Mountain News</i> , April 11, 2001.	Wolfe wanted individual (dementia) moved back home at a cost of \$13,051/month against doctor's and caregivers' orders	X			
Lou Kilzer and Sue Lindsey, "Guardian vs. family," <i>Rocky Mountain News</i> , April 12, 2001.	Excessive and Unnecessary Fees Duplication of Services	X	X		
Lou Kilzer and Sue Lindsey, "Guardian vs. family," <i>Rocky Mountain News</i> , April 12, 2001.	Legal Fees	X			

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
Lou Kilzer, "I hope to die soon': Ex-teacher falls into system; death proves only way out," <i>Rocky Mountain News</i> , April 13, 2001.	Son (Spencer) told authorities she had dementia - sold artifacts and heirlooms	X	X		
Steve Jackson, <i>Westword</i> : <ul style="list-style-type: none"> "Mommy Dearest," May 22, 1997. "To Grandmother's House We Go," June 12, 1997. "Here Comes the Judge," June 19, 1997. 	Unreasonable Fees Over Restrictive Care		X		
(Jones)	Appointed guardian after Wolfe – also provides the in-home health care (a potential conflict of interest) Allowed to put a lawyer of her own on ward's tab		X		
(Dice)	Main contribution was obtaining restraining order against ward's son (\$28,386)				
(Paul)	\$50,000 even though Ayers appointment was expected to end his involvement		X		
(Ayers)	\$23,000 for a few months' work		X		

Colorado General Investigations-Findings

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
Alan Prendergast in Colorado Crimes, "Think you've got a right to court records? Think again. . .," <i>Westword.com</i> , October 1, 2009.	Expresses concerns about access to court records				
Tom Burke, Laney Valian, and John Ferrugia, "System Could Drain Your Retirement Savings," <i>TheDenverChannel.com</i> , May 9, 2007.	Excessive Fees	X			
Sue Lindsey, "Protective services blasted," <i>Rocky Mountain News</i> , September 29, 2007.	Excessive Fees Disputes with guardians and conservators drain estates of funds	X	X		
Sue Lindsey, "Audit finds lax monitoring of court-appointed guardians," <i>Rocky Mountain News</i> , September 27, 2006.	Fees Vary and may be Excessive Reports Missing Courts Don't Follow Up on Missing Reports or Problems Practices in Courts that Do Review Reports are Inadequate to Identify Errors or Inappropriate Expenses	X	X		
Lou Kilzer and Sue Lindsey, "History of Denver's probate system," <i>Rocky Mountain News</i> , April 7, 2001.	Bills are not reviewed.	X	X		
Lou Kilzer and Sue Lindsey, "The probate pit," <i>Rocky Mountain News</i> , April 7, 2001.	Insulated Group of Insiders Costs Bear No Relationship to Benefit of the Individual Wards Pay for Services They May Oppose Wards Pay Their Opponents (legal costs) Deprive Elderly of their Life, Liberty and Property, Often Without Due Process Individuals Moved and Locked Up Under False Pretenses to Gain Control	X	X		
Lou Kilzer and Sue Lindsey, "Costly litigation," <i>Rocky Mountain News</i> , April 9, 2001.	Conflicts when Acting in Dual Roles	X	X		
Lou Kilzer and Sue Lindsey, "A matter of convenience," <i>Rocky Mountain News</i> , April 14, 2001.	Court found that individual was competent and that a family member should be granted power of attorney to help with financial affairs.	X	X		

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
<p>Lou Kilzer and Sue Lindsey, "Colorado seeks solutions to probate problems," <i>Rocky Mountain News</i>, April 14, 2001.</p>	<p>Discusses new Colorado law which among other things prohibits a person from serving as a guardian and conservator for the same ward – due to Wolfe and Conrardy.</p> <p>Loopholes in law - a judge can overlook the law If good cause is shown; may make it easier for attorneys to charge fees against estates without showing that the ward benefited; the ward must pay guardian's legal fees if the ward complains about being overcharged.</p>	X	X		
<p>Steve Jackson, "Mommy Dearest," <i>Westword</i>, May 22, 1997.</p>	<p>Judge ignored procedures when considering guardianship. Took testimony of two caregivers who were not qualified to diagnose dementia. No substantial medical evidence as required by Colorado law.</p> <p>Judges are supposed to follow a hierarchical list when choosing a guardian (spouse, adult child, family friend) before appointing a guardian.</p> <p>Judge sided with Wolfe every time</p>				
<p>Steve Jackson, "To Grandmother's House We Go," <i>Westword</i>, June 12, 1997.</p>	<p>Ward's attorneys claim judge Stewart violated Colorado's Probate Code and Code of Judicial Conduct by acting as counsel, expert witness and fact finder in a closed hearing.</p> <p>Judge issued restraining order against son after Wolfe said he was interfering. Stewart ordered that ward's lawyer be dismissed and replaced with a court appointed GAL.</p> <p>Judge refused to step down as lawyers motioned for ex parte communication and not allowing ward to attend own hearing.</p>				
<p>Steve Jackson, "Here Comes the Judge," <i>Westword</i>, June 19, 1997.</p>	<p>Judge had previously represented Wolfe (conflict of interest and she should have recused herself)</p>				

National Articles

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
Lise Olsen, "Houston businessman's fee dispute comes with a cost," <i>Houston Chronicle</i> , June 24, 2007.	Son disputed about everything guardian did. Legal fees cost ward between \$285 K and \$700K.		X		
Lise Olsen, "Family fights probate court over fortune," <i>Houston Chronicle</i> , June 25, 2007.	Excessive Fees - \$1.38 million over 7 years			X	
Lise Olsen, "Probate judges often OK illegal billing," <i>Houston Chronicle</i> , June 25, 2007.	Improper and excessive fees		X		
Lise Olsen, "Perry Whatley battles probate court to the end," <i>Houston Chronicle</i> , June 25, 2007.	Niece and wife battled over guardianship (nearly \$1.5 million in two years on legal bills, court authorized expenses for his probate care and related litigation) Ward filed lawsuit against judge, his appointees and others for fraud, conspiracy and breach of fiduciary duties (\$15 Million in damages). Case didn't settle – ward died.		X		
Lise Olsen, "Questions, allegations surround Texas probate courts," <i>Houston Chronicle</i> , June 25, 2007.	Judges' appointments include: a judge's son, ex-probate judges, ex-court employees, campaign treasurers, judges' close friends, former law firms, former law students and classmates and investment partners. (some of which contribute to judge's re-election campaigns even when they are running unopposed.				
Lise Olsen, "Tips for cutting conflicts and costs in complex cases," <i>Houston Chronicle</i> , June 25, 2007.	More mediation Use professional guardianship companies Better monitoring of billing procedures and hourly lawyer fees Simplify the appeals of bill disputes				
"A Catch-22 if you want lawyer's work reviewed," <i>Houston Chronicle</i> , June 25, 2007.	Latham was convicted of theft and misapplication of fiduciary property – lost law license. Ward's estate was awarded a \$97,000 settlement (ward was dead by this time)		X		
"California moves to end conservator abuses," <i>National Public Radio</i> , September 8, 2006.	Talks about proposed law changes requiring a license and agency with investigatory and disciplinary authority. Legislation would also require increased court supervision – court investigators will visit people under conservatorship to make sure they're fine.	X	X		

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
<p>Robin Fields, Evelyn Larrubia, and Jack Leonard, "When a family matter turns into a business," <i>Los Angeles Times</i>, November 13, 2005.</p>	<p>Findings (reviewed more than 2,400 cases):</p> <ul style="list-style-type: none"> Seniors lose independence with sudden swiftness (more than 500 were entrusted to for-profit conservators without their consent at hearings that lasted minutes – many were not notified of emergency hearings) In 9 of 10 emergency hearings wards were not interviewed by a court investigator before a judge decided they needed a conservator Conservators isolate wards from family and friends One withheld allowance forcing ward to rely on a church for food One ward moved to a care home – refused to tell daughter where she was for a month One conservator paid his taxes thorough ward's estate and invested in a friend's restaurant business One conservator sold ward's house to herself at a discount – conservator's daughter later sold the house for triple the price Excessive fees - \$170 to bring ward \$50 in groceries - \$1,700 for attending ward's burial Ward's paying legal bills of guardians they oppose Oversight is erratic and superficial – judges rarely take action against conservators One conservator went against ward's wishes for her brother's funeral arrangements Once conservators identify a prospect they can go to court and initiate a case without the client's approval Over 50 instances where conservators used their authority over assets to benefit themselves or their friend, relatives or employers One conservator had ward's will changed to name their organization beneficiary without will being reviewed by an independent attorney or a court 	X			

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
<p>Jack Leonard, Robin Fields, and Evelyn Larrubia, "Justice sleeps while seniors suffer," <i>Los Angeles Times</i>, November 14, 2005.</p>	<p>Daum hired son to invest \$3 million of 13 clients in stock market without court approval – lost money but son earned commissions (court staff brought it to judge’s attention but the judge took no action – Three years prior, son was working in a car dealership Daum admitted to making investments without court approval in another case and was stripped of her financial authority over four clients. Was criticized for hiring son whose commissions were more than \$44K in just four of 13 cases. Ordered to pay \$20,500 for the court investigation but not restitution. Swanson took \$156K out of clients account without court approval – Plead no contest to grand theft and tax evasion (55 clients) and was sentenced to five years and \$1.1M in restitution. Swanson stated that if the courts would have investigated, it would have been obvious what he was doing. Walker (a former Green Beret) opened conservatorship business one year after filing for bankruptcy Judge discovered that he had lent client’s money to a business partner – allowed him to continue on 6 cases. He plead guilty to stealing from at least five clients – is serving a 16 year prison term Cambalik – For years, judge ignored complaints of theft of money and jewelry DA investigators discovered hidden investments, stolen jewelry and drained bank accounts – more than \$1 million – pled guilty to embezzlement and perjury – serving 26 year prison term. Judge plead and was found guilty of financial conflicts – he bought a ward’s bungalow and other misconduct – was fined \$27K. McCullough was hired by judge (an old colleague to make a recommendation on who should be a conservator for ward – named someone other than ward’s choice. Ward appealed – judge allowed McCullough to oppose appeal and awarded McCullough \$40,000 in fees. Ward’s choice for conservator was eventually appointed. Attorney’s fees totaled over \$400K. Enright was removed as conservator for financial mismanagement – courts did not notify registry. One and a half years later was appointed to another ward. Sixteen months later was forced to step down. Was fined more than \$18K for neglect. No longer acts as a conservator.</p>	<p>X</p>			

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
<p>Evelyn Larrubia, Jack Leonard, and Robin Fields, "Missing money, unpaid bills, and forgotten clients," <i>Los Angeles Times</i>, November 15, 2005.</p>	<p>Had filed bankruptcy and had nursing license placed on probation for filling in patients' charts with work she had not performed. Failed to pay clients' bills or inform them what she was doing with their money. Purchased one client's home at discount while pretending that someone else was the real purchaser Helped a business partner inherit the estate of another client Allowed her son to live in ward's house and paid utilities from ward's assets. Paid a lawyer from another's account Moved a ward out of his apartment into one of her associate's apartments for three times the cost Investigation found that Chavis failed to account for more than \$1 million. Bonding companies that insured her clients' money only paid a fraction of the missing money Courts ordered her to pay – As of date of article, no restitution had been paid.</p>	<p>X</p>	<p>X</p>		
<p>Robin Fields, Evelyn Larrubia, and Jack Leonard, "For most vulnerable, a promise abandoned" <i>Los Angeles Times</i>, November 16, 2005.</p>	<p>LA's public guardian stripped of funding (only source of help for people with little or no money) Rejects more than 4 out of 5 people in need forcing the demand for for-profit conservators who typically only take wards with sizeable estates Auditor found agency could not perform its basic function – scant resources, lethargic culture and top heavy structure.</p>	<p>X</p>	<p>X</p>		
<p>"California moves to end conservator abuses," <i>National Public Radio</i>, September 8, 2006.</p>	<p>Lawmakers passed a series of bills – regulating guardians, or conservators Investigate complaints and discipline if violations of code of ethics Check up on wards to make sure they are fine. At time of article, governor had not signed.</p>	<p>X</p>			
<p>Kevin Uhrich, "Through a glass, darkly," <i>Pasadena Weekly</i>, September 21, 2006.</p>	<p>Lawmakers passed a series of bills – regulating guardians, or conservators Investigate complaints and discipline if violations of code of ethics Check up on wards to make sure they are fine. Among its provisions, AB 1363 would force the California Judicial Council to develop uniform standards for conservatorship conduct, fees and asset management, and create a committee to review and take action on complaints. At time of article, governor had not signed.</p>	<p>X</p>			

Source	Issue	Conservator	Guardian	Trustee	Personal Representative
"Excessive: Trustee lawyer fees," <i>The Charleston Gazette</i> , September 13, 2009.	Extraordinary and unjustified fees In at least a couple of years, he paid himself more than \$50,000 a year" -- exceeding the amount provided for the son's care -- the lawsuit alleges. In other years, he took \$25,000 to \$30,000. He also paid \$54,000 to the Spilman, Thomas and Battle law firm. The lawsuit demands removal of trustee Guils and repayment of excessive fees. No resolution yet.			X	
Jeffrey Good, "Broken promises," <i>St. Petersburg Times</i> , August 28, 1994.	Sill named executor- was supposed to distribute inheritances within one year. After Five years later a judge asked where the money was – She had stolen \$270,000. Sill was convicted of stealing money from four estates – sentenced to 2 ½ years in prison. Gill sold items to appraisers – allegedly for a 20 th of value. Stevens loaned himself \$16,400 to buy Mercedes. His secretary tipped off the Florida Bar – he repaid money and pleaded guilty to grand theft and related crimes. (Doesn't mention sentence)				X
Jeffrey Good, "Taking action," <i>St. Petersburg Times</i> , September 4, 1994.	Mr. and Mr. Spees sold living trust packages for \$450 to \$2,190 each. Sold using misinformation and unreliable statistics.			X	
<i>St. Petersburg Times</i> , Trust became a slush fund 9/4/94 (Moore and Bowsman)	Moore and Bowsman began plundering estate before his death. They pleaded guilty to grand theft. One was given probation; other was sentenced to 30 months in prison for notary fraud and probation for theft. Ordered to repay over \$82K. As of date of article, no restitution had been paid.			X	
Jeffrey Good, "Taking action," <i>St. Petersburg Times</i> , September 4, 1994.	Lawyers who prey on elderly should be stopped and disbarred if necessary. Bar should tighten screening of lawyer ads. Send knowledgeable investigators to check out public trust seminars. Legislators should increase protections without changing unique character of living trusts – require formal notification to beneficiaries – require trustees to register with the court.			X	
Jeffrey Good, "A license to steal," <i>St. Petersburg Times</i> , August 28, 1994.	New law allows estate professionals to charge more. Law requires heirs to prove fees are unreasonable.				X
Jeffrey Good, "Taking action," <i>St. Petersburg Times</i> , September 11, 1994.	Restitution is a vital component – setting a firm schedule of repayment. Increase each lawyer's contribution to security fund. Require a bond to cover all liquid assets unless beneficiaries waive this protection.				