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Guardian *focus*

A quarterly newsletter of the Washington State Certified Professional
Guardian Board

NOT JUST ANOTHER NEWSLETTER

Welcome to *Guardian Focus*, a new quarterly newsletter from the Certified Professional Guardian Board (CPGB). This newsletter is designed to update judicial officers and certified professional guardians (CPG) and agencies on actions taken by the Board and other items of interest affecting professional guardianship practice.

Examples will include relevant statutory (RCW) changes or new statutes, state court rules (CR) and general rules (GR) including GR 23 and its implementing regulations regarding CPGs, as well as proposed changes to rules and regulations.

The newsletter will also include relevant reported case law from the Washington Supreme Court or Court of Appeals and activities of the CPGB, to include a summary of any disciplinary actions taken by the Board, scheduled CPGB sanctioned continuing education training opportunities and the dates for upcoming CPG certification training.

Another important feature included in this first issue is ethics opinions issued by the CPGB. These ethics opinions are intended to provide CPGs with the best practices in a variety of circumstances faced in their practice. While these ethics

opinions are not binding upon CPGs in the manner of the Standards of Practice, they do set forth decision-making guidelines for CPGs which the courts and/or the Board will likely review in any grievance proceedings.

The CPGB invites all comments and suggestions from our readers for improving this newsletter. All comments and suggestions can be sent to the Administrative Office of the Courts, Attention CPGB, P.O. Box 41170, Olympia, WA 98504 or e-mail guardian.program@courts.wa.gov.

ETHICS ADVISORY OPINIONS

Ethics opinions are issued in response to requests from practicing guardians and members of the Guardian Board. The opinions serve as a method of addressing issues of general significance that are not specifically addressed by GR 23 or guardian regulations. All approved ethics opinions are available at:

http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=127

▶ May a Certified Professional Guardian or Agency (Guardian) be appointed to provide concurrent, dual or joint representation on behalf of spouses, domestic partners, or persons living in a meretricious relationship?

[Simultaneous Appointment as Guardian for Both Spouses or Domestic Partners](#) (see Opinion 2002-0003, page 2)

▶ When may a Certified Professional Guardian petition for appointment of oneself as guardian? [Professional Guardian Petitioning for Appointment](#)
▶ (see Opinion 2005-001, page 3)

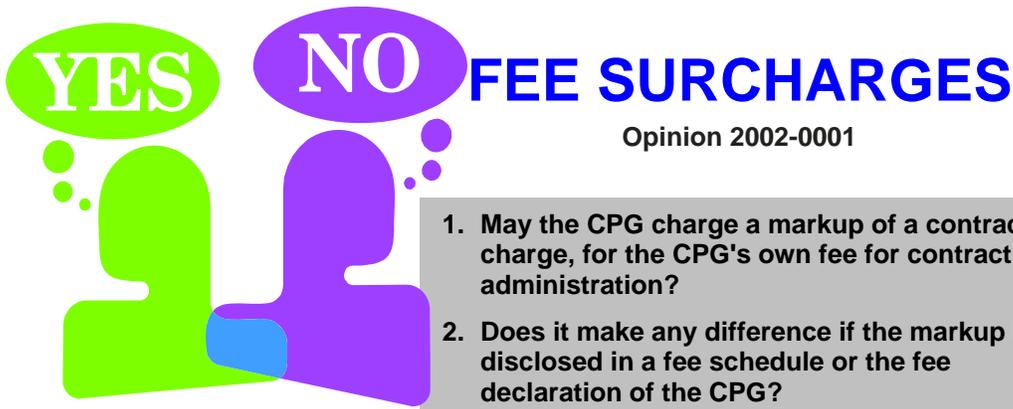
▶ May a CPG charge a markup of a contractor's charge, for the CPGs own fee for contract administration? [Fee Surcharges](#) (see Opinion 2002-0001, page 2)

Any guardian, agency, or Board member may request an ethics advisory opinion. Submit written requests to
Certified Professional Guardian Board, P.O. Box 41170, Olympia, WA 98504
or e-mail guardian.program@courts.wa.gov



FUTURE TRENDS

According to the U.S. Census Bureau, the number of people older than 65 will more than double between 2000 and 2050, and the population over age 85 will quadruple.



1. May the CPG charge a markup of a contractor's charge, for the CPG's own fee for contract administration?
2. Does it make any difference if the markup is disclosed in a fee schedule or the fee declaration of the CPG?

Opinion 2002-0001

In general, the practice as described fails in many ways to meet the Board's standards of practice. Primarily, the standards relating to evasion of disclosure requirements, court supervision of activities and court approval of fees, and the maintenance of a close correlation between services provided, costs of those services, and benefit to the estate.

It may be argued that these problems can be cured by disclosing all markups of contractor fees and seeking approval from the court. This argument fails as described below.

Once the practice of marking up bills for contracted services is established, it is likely to lead to abuse. Guardians commonly hire professionals for all manner of services from pharmacy deliveries to care provision, to home re-modeling. The practice of adding a surcharge to all such bills would result in undue amounts of compensation to the GPG.

CPG's charge fees based on billable hours, flat asset management fees, or transactional fees. Combining this practice with a surcharge arrangement creates a high likelihood of double billing and imposes an unnecessary burden on the court in sorting out the billing methods in evaluating the reasonableness of fees.

A CPG who receives a markup has a conflict of interest that would be virtually impossible to cure. That is, the GPG has a financial incentive to choose more expensive contractors, and to order more work. Additionally, the CPG would be limited to contractors willing to participate in the arrangement. Again, the court would not be able to fully evaluate whether or not this was occurring without imposing additional expense on the estate, as by appointing a guardian ad litem (GAL).

Summary of Opinion:

The practice of "marking up" contracted services to recover expenses of administration is not permissible. Professional Guardian's can recover fees for such services as effectively, more transparently, and without conflicts of interest, by posting the time involved and billing hourly.

To read the analysis go to:

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=640&committee_id=127

SIMULTANEOUS APPOINTMENT AS GUARDIAN FOR BOTH SPOUSES OR DOMESTIC PARTNERS

Opinion 2002-0003

1. May a Certified Professional Guardian or Agency (Guardian) be appointed to provide concurrent, dual or joint representation on behalf of spouses, domestic partners, or persons living in a meretricious relationship? If so, under what circumstances is this appropriate?
2. What criteria should a Guardian apply in determining whether the Guardian should accept a dual appointment; or if already appointed, should the Guardian continue to act on behalf of both persons in a relationship as described above?
3. What procedural steps ought to be followed if the Guardian believes that dual representation is appropriate under the facts of the case, or in order to continue serving when in such a relationship and an actual, apparent, or potential conflict of interest arises?
(Please see answer on the next page)

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Summary of Opinion:

The appointment of the same Guardian to act simultaneously in the best interests of both spouses in a marital relationship, domestic partners, or persons in a meretricious relationship presents, at a minimum, the appearance of a potential conflict of interest, and *should only be done with great caution by a Guardian*. Even if the parties are not married, appellate case decisions have implied and applied certain community property principles to such relationships and legal presumptions may apply. The issues are complex and the circumstances dynamic. Often, actual conflicts may not become apparent until it is too late to seek instruction from the court or for the Guardian to take remedial action. The advice of counsel should be sought prior to accepting such an appointment.

While a court may consider a well-supported petition for a dual Guardianship endorsed by the Guardian ad Litem for one or each of the alleged incapacitated persons, the circumstances upon which the decision was based could change quickly or unknowingly and present a conflict of interest necessitating the removal of the dual guardianship from both cases and two new independent Guardians being appointed. The latter action would foreseeably result in significant additional costs to the estate of the incapacitated person and potentially to the retiring Guardian as well. Only in well-justified cases and after a hearing supported by recommendations of the Guardians ad Litem for each of the alleged incapacitated persons, and assurance that there would be only *de minimus* conflicts, should a Guardian accept such an appointment.

To read the analysis go to:

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=641&committee_id=127

PROFESSIONAL GUARDIAN PETITIONING FOR APPOINTMENT

Opinion 2005-001

When may a Certified Professional Guardian petition for appointment of oneself as guardian?

Opinion 2005-001

A certified professional guardian should avoid, whenever possible, the initiation of a petition for appointment of oneself as guardian.

The certified professional guardian should inform referral sources as to how guardianships are processed and should offer to refer interested parties to counsel if necessary. However, petitioners for individuals with no close family or friends, limited assets, living in long-term care environments, and/or with complicated care needs, are often not available. As a result, the practical reality of the care environment is such that the availability of petitioners for those in need of a guardian is limited or non-existent. Therefore, the limited and qualified initiation of a guardianship petition by a certified professional guardian is acceptable under certain circumstances. Specifically, if the certified professional guardian determines that a guardianship is in the interest of the alleged incapacitated person, that there are no less restrictive alternatives and no other person willing to act as petitioner, the certified professional guardian may act as petitioner in a guardianship. However, in initiating such petition the certified professional guardian should:

- a. When reviewing information or records of an alleged incapacitated person a certified professional guardian should verify that a proper release of information has been provided by the alleged incapacitated person.
- b. In most cases in which the certified professional guardian acts as petitioner, the certified professional guardian should refrain from nominating oneself as guardian but should ask the court to direct the guardian ad litem to recommend an appropriate guardian. In the case of a certified professional guardian with an active prior relationship with the alleged incapacitated person, such as acting as trustee or Attorney-in-Fact, nominating oneself may be acceptable.
- c. Any time that a certified professional guardian initiates a guardianship petition, the certified professional guardian shall, consistent with state statute, engage in an investigation and document that investigation in an Affidavit or Declaration to the court the following pre-filing efforts:

1. Identifying any alternative nominees and provide information as to why alternate

(Continued on page 4)

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nominees who are available are not suitable or able to serve;

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

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

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

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

d. An in-person meeting between a certified professional guardian and an alleged incapacitated person is appropriate when the certified professional guardian is gathering information. However, when the certified professional guardian meets with the alleged incapacitated person and imparts information about guardianship or the benefits of guardianship, the certified professional guardian should:

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

2. Avoid making a recommendation or giving advice;

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

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

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

This opinion acknowledges that the court with local jurisdiction is the final arbiter as to the need for a guardianship and the appointment of the guardian. The intent of this opinion is not to discourage the filing of the petitions in good faith. It is the intent of this opinion however, to assure the transparency of the proceedings to the extent that any conflicts or appearances of conflict which a certified professional guardian may have are disclosed and that steps are taken to negate both the real and appearance of self-serving. The petitioning certified professional guardian should be aware of the court's ability to require the petitioner to pay any or all fees and costs of proceedings at the court's discretion, including the fees of the guardian ad litem.

To read the analysis go to:

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=644&committee_id=127

Mandatory Initial Certified Professional Guardian Training

March 29 & 30, 2007

Contact the
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for more information

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