

## **Proposed Regulation 413**

### **Public Comments:**

*Tom O'Brien*

#### **413.1 Responsibilities of Owners, Managers, and Supervisory Professional Guardians**

I respectfully suggest that this section be discarded.

Regarding the issue of responsibility for guardianship agency behavior, the question posed is, "Who is responsible for the professional work of a certified professional guardian agency?"

This question is more than adequately answered in existing rules, and the answer is: the Designated Certified Professional Guardians for the agency.

It is just that simple, and should remain that simple. There is no need for extensive verbiage describing the responsibility of the Designated CPGs, and such verbiage only serves to make something simple into something complicated, adding nothing to the bottom line of who is responsible. If a Designated CPG fails in some way to create clear lines of authority within the agency, this does not mitigate the CPGs responsibility.

The existing rules, which applicants for agency status must acknowledge in writing, are :

102.4 "Designated CPG" means the certified professional guardians working for an agency who have the final decision-making authority for incapacitated persons or their estate on behalf of the agency. The designated CPG is responsible for the actions of the agency(ies) for which they serve as designated CPG (Adopted 1-9-12

409.11 The responsibility to protect and preserve the guardianship estate rests with the guardian appointed by the court. When the guardian is an agency, this responsibility is that of the agency and the guardians identified with the Certified Professional Guardian Board as the responsible guardians for the agency. While it may be appropriate and necessary to retain and reasonably rely upon the services of knowledgeable individuals or entities to assist in the performance of duties, it is the responsibility of the guardian to provide appropriate oversight and review, in order to preserve the guardianship estate.

#### **413.2 Responsibilities of a Subordinate Professional Guardian**

This is a valuable addition to the rules, and will assist CPGs working for others to know their obligations. The use of the word "reasonable" is always problematic, but I have no alternative to offer.

In combination with the existing rules applied to Designated CPGs the rules present an elegant, clear and unambiguous understanding of the respective responsibilities: the Designated CPG is responsible for what employees do, and other CPG's do not have "I was only following orders" as a defense.

### **Proposed Regulation 413.4.1**

The section refers to the sharing of fees and most likely makes good sense. However, the concept of a guardian sharing fees is not well established in the industry, and needs better definition. I am aware that this is a well understood term among attorneys, but candidly, I am not certain what it means, especially as applied to CPGs.

### **Proposed regulation 413.4.3**

This rule bans guardianship agencies that are corporations may from having a non-CPG as "a director or officers" Many corporations, in particular not for profit corporations, have boards of directors that include experts in allied fields, for the same general reasons that the Certified Professional Guardian Board includes non-guardians. This practice should not be discontinued. The bottom line responsibilities of Designated CPGs is an effective guard against over-active boards.

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### ***Deborah Jameson***

This regulation appears to have been drafted without an understanding of the way in which many certified professional guardianship agencies ("CPGA") are organized. Many CPGA are non-profit corporations and do not have an "owner". Others have Boards of Directors who may or may not be guardians. Instead, the Board of Directors may function much like the Multi-Disciplinary Advisory Panel that Office of Public Guardians are required to set up—a group of professionals who provide a problem-solving forum.

I am also concerned about regulations that require guardians to "ensure" certain types of behavior or regulations that use the word "reasonable." For example, 413.1.1 states, "An owner...shall make reasonable efforts to ensure that the agency has in effect measures giving reasonable assurance...." A CPGA who wished to avoid liability can no longer simply provide good training and mentoring to staff, but must now create policy and procedure manuals. This has a cost.

The Board can create regulations that have significant financial impacts on guardians without any consideration of the cost. The Washington State Legislature has a process for legislation that has a cost to the State. A fiscal note is created to assess the cost to the State of implementation of a new law. The State recognizes that there must be a balance between the protection needed and keeping the State's accounts balanced. The CPG Board does not seem to recognize that guardians are running small businesses and many of the Board's regulations impose a cost. This is such a regulation.

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### **Tom Goldsmith**

Please consider the following comments to the proposed standard of Practice (SOP) 413.

Obviously this is a much-needed definition and clarification of guardianship agency ownership, responsibility, and every guardian's accountability for incapacitated persons.

I have one specific text suggestion, a text question, and two concerns.

#### **Text Suggestion:**

In Standard 413.1.3.1 I would add to the words "***or should have known***" following, "... *the professional guardian ... knows*" in the third line, as printed.

Without this change to "*knows or should have known*" the often heard 'I didn't know.' answer may make this SoP difficult to enforce.

#### **Text Question:**

In Standard 413.4.3.1 is the term "*majority interest*" sufficient to achieve the CPGB's intentions, or should the words "***substantial interest***" be used? My recollection of the in-person Board meeting where this topic was discussed, is that intentions expressed by the meeting were on the stronger side, leaning away from non-CPG ownership.

#### **First Concern:**

There are at least four general ways this Standard of Practice might be viewed:

1. As a clarification of current policy, more carefully assigning responsibility, accountability, and even legal liability within organizations practicing in a complex and sensitive area. Where practice involves some of the most vulnerable members of society.
2. As a needed regulation of possibly over-zealous or self-aggrandizing "entrepreneurs" or "capitalists" whose contributions are not needed in Washington State.
3. As a "restriction of entry" into a field providing services to incapacitated persons.
4. As an un-necessary limiting of capital and other resources for an under-funded industry in dire need.

I see all four of the above views as having some validity, while each might be thoughtfully defended by supporters and critics alike. So I think it is important that the Board be prepared to hear from each perspective, and have its position and all replies well thought out. While the number of agencies operating in Washington State, and a paucity of checks and balances, make clarification of this “413” essential.

My own opinion is that the conservative path restricting ownership of professional guardianship firms to certified guardians is sensible for the time being. I believe running any business involves attention to the profit motive, and sometimes pressure simply to “keep the doors open” and thus associated risks. So until Washington State has much better monitoring in place, together with coaching, review, and supervision systems, these risks should not be taken. Also, any theoretical possibility of gains from capital investments or other resources for the guardianship community should be offset with a realization that excess capacity can create problems just as can under capacity.

**Second Concern:**

The number of times the word “**reasonable**” is used in the “413” text suggests to me this standard has not been easy to write, and may take considerable time before becoming accepted practice. Thus I hope the Board is prepared to discuss all details thoroughly, and “get it right” in terms of consensus and support.

Such discussion should ask why the word “**responsible**” is used in this regulation, while the word “**accountable**” is not. When I Google >> accountability vs responsibility << I find a general view that these words are NOT synonyms, and their differentiated meanings are thoughtfully discussed. I also see that while “accountability” implies liability and culpability, some find that “responsibility” does not. So I suggest that all interested parties should be asking how “accountability” (which is most clear for solo practitioner guardians) can become a more useful concept within guardianship agencies.

My own personal measure comes from asking who it is (if anyone) that awakens at night, or pauses during a shower, to worry about whether a valid and proper decision is being made. So I believe accountability is acutely important in the guardianship world, where so many decisions are about vulnerable persons whose most serious personal interests are at stake.

Additionally, I would say that if the Board is trying to regulate guardianship owners, it may ultimately be necessary to be much more assertive and direct, rather than simply trying to regulate an owner’s employees.

Thank you for your considering my suggestion, question, and concerns.

July 23, 2013

Certified Professional Guardianship Board  
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PO Box 41170  
Olympia WA 98504-1170

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RE: Proposed Standards of Practice 413: Responsibilities of Certified Professional Guardian Agencies.

**Proposed Regulation 413.1.1** addresses the extent in which an owner of a professional guardian agency assures that the Standards of Practice are being followed.

**Response:** This Regulation appears to be contained within proposed Regulation 413.1.2

**Proposed rule 413.1.2** requires that professional guardians who supervise other professional guardians make reasonable efforts to ensure that other professional guardians adhere to the Standards of Practice.

**Response:** This rule appears duplicative to 413.1.1 above. Perhaps a cleaner and more understandable approach would be to combine the two proposed Rules into a single regulation - "An owner of a professional guardian agency and any professional guardian employed by an agency and having direct supervisor authority....."

In addition, the title of new Section 413 addresses only *guardian agencies*. Since this Regulation is included in proposed Regulation 413 which addresses duties of guardians only within an agency, WAPG recommends that this proposed Regulation be modified such that the duties of individual guardians are segregated and moved to a separate Regulation where the duties of individual guardians are identified.

**Proposed rule 413.1.3 (1)(2)(3)** addresses the circumstances in which a professional guardian is responsible for another guardian's violation of the Standards of Practice.

**Response:** In general, these three sections address how professional guardians in agencies are to supervise other guardians. Since this Regulation is included in proposed Regulation 413 which addresses duties of guardians only within an agency, WAPG recommends that this proposed regulation be modified such that the duties of individual guardians are segregated and moved to a separate Regulation where the duties of individual guardians are identified.

**Proposed Regulation 413.2** addresses the obligations of a guardian to be bound by the Standards of Practice.

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**Response:** Again, this Regulation is included in Proposed Regulation 413 which addresses duties of guardians within an agency. WAPG recommends that this proposed Regulation be modified such that the duties of individual guardians are segregated and moved to a separate Regulation where the duties of individual guardians are identified.

**Proposed Regulation 413.3** addresses the supervision of non-guardian employees

**Response:** Again, this Regulation is included in Proposed Regulation 413 which addresses duties of guardians within an agency. WAPG recommends that this proposed Regulation be modified such that the duties of individual guardians are segregated and moved to a separate Regulation where the duties of individual guardians are identified.

WAPG notes that the Board has departed from the generally accepted universal obligation of guardians to be responsible for the activities and decisions made in their agencies. The decision by the Board to limit the potential liability of guardians is applauded at least within the context of the Board's Regulations is applauded. While what the Board means by "reasonable efforts", "reasonable assurance" and "reasonable efforts" is not defined or particularly clear and is potentially unenforceable, "reasonableness" appears to reflect a broad standard which limits the here-to-fore unlimited liability exposure of a guardian.

**Proposed rule 413.4** addresses the professional independence of a professional guardian

**Response:** This rule is confusing and the intent not clear.

**Proposed Regulation 413.4.1** appears to preclude owners of guardian agencies who are not guardians from being compensated for the work which they perform, a circumstance which would be illogical within considerations of normal marketplace economics.

**Proposed Regulation 413.4.2** appears to preclude the formation of *partnerships* with those who are not guardians (without addressing other business structures besides those of partnerships), and

**Proposed Regulation 413.4.3** appears to prevent associations that provide services *for profit* (a circumstance which arguably excludes any corporation, partnership, or LLC which forms for purposes other than profit).

WAPG proposes that the Board rewrite the sections of proposed Regulation 413.4 so that the intention is clear. Does the Board intend to ban the ownership interest of any guardian entity by those who are not guardians? Does the Board intend to allow such ownership under certain circumstances? What does the Board mean by *profit*. What forms of organization are intended to be included in the Regulation?

**Summary:** The meaning and intent of this proposed Regulation is so opaque that it's intent is not clear - guardians (and Hearing Officers, Disciplinary Committee members, and grievants) should not have to discern with a crystal ball the meaning of the Board's Regulations. The meaning and intent of the Regulations should be clear in the wording.

In addition, while the proposed Regulation applies only to guardian agencies the proposal is replete with references which suggest that the Regulation also applies to individual

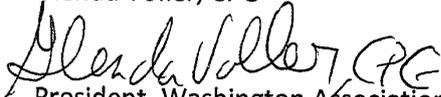
guardians. WAPG recommends that this confusion should be clarified, perhaps by including two sections – one for individual guardians and one for agencies.

WAPG recommends that this Proposed Rule be revised and republished for public comment in a more understandable format and with intentions and definitions made clear in the language.

**Added Note:** WAPG notes earlier drafts of Proposed Rule 413 which included the Board's extension of authority to cover the management of Trusts and powers-of-attorney. Such authority is not contained in RCW 11.88, 11.92, or in GR23. And, the management of Trusts and powers-of-attorney engage statutes which are completely separate from one another, RCW 11.88, and RCW 11.92. and which involve legal documents (Trusts and the related amendments, Court Orders, and powers-of-attorney which are written for specific purposes and with specific limitations). WAPG opposes any effort for the Board to expand its jurisdiction beyond that of guardianships.

Sincerely,

Glenda Voller, CPG



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August 2, 2013

Certified Professional Guardian Board  
c/o Kimberly Bzotte  
Guardian Program  
Administrative Office of the Courts  
P.O. Box 41170  
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Re: Proposed Standard of Practice 413 CPGA Responsibilities

Dear Certified Professional Guardian Board (CPGB):

Thank for posting and providing the opportunity for public comment on Proposed Standard of Practice 413 CPGA Responsibilities.<sup>1</sup>

100% ownership by CPGs not explicitly required by Proposed SOP 413

The Meeting Minutes for April 8, 2013 (page 3) state “A motion was made and passed that guardianship agencies are required to be owned 100 percent by Certified Professional Guardians.” However, Proposed SOP 413 does not appear to explicitly require 100% ownership by CPGs:

[http://www.courts.wa.gov/committee/?fa=committee.display&item\\_id=1544&committee\\_id=133](http://www.courts.wa.gov/committee/?fa=committee.display&item_id=1544&committee_id=133)

Suggestion to add 100% COPG ownership requirement

Proposed SOP 413.4.3.1-3 prohibits CPG practice “for a profit” if a non-guardian owns a majority interest, is a director or officer, or has a right to direct or control. I suggest including an explicit provision in SOP 413 to require 100% ownership of a Certified Professional Guardian Agency (CPGA) by a CPG or CPGs only.

Suggestion to delete “for a profit” from Proposed SOP 413.4.3.1-3

I suggest deleting the “for a profit” language in Proposed SOP 413.4.3.1. A non-CPG governing board or manager of a non-profit CPGA can inappropriately direct, control, or influence the independent professional judgment of a CPG just as a for-profit owner, board, or manager can. The non-CPG governing board or manager of a non-profit CPGA could, for example, threaten to terminate the employment of a CPG, or reduce compensation, if the CPG did not exercise judgment in compliance with the board or manager’s judgment. CPGs, who are fiduciaries to their incapacitated persons, must be able to exercise independent professional judgment in such potentially controversial matters as end-of-life medical care and decision-making, contraception, and the like. I also suggest adding language that all CPGs of a CPGA have the fiduciary responsibility to act primarily for the benefit of the incapacitated persons and to avoid even the appearance of self-interest or conflict of interest.

Suggestion to change provisions for an owner “and” a professional guardian in Proposed SOP 413.1.1 and 413.3.1

Proposed SOP 413.1.1 and 413.3.1 seem to conjunctively provide for and allow “an owner . . . and a professional guardian” as two separate entities. I suggest changing to language that talks about an owner ‘who is a professional guardian.’

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<sup>1</sup> Disclosures: I was a member of the Certified Professional Guardian Board for three terms from 2003-2012. Member, District of Columbia Bar.

Suggestion to change "majority interest" to "any interest" in Proposed SOP 413.4.3.1

In Proposed SOP 413.4.3.1, I suggest changing "majority interest" to "any interest."

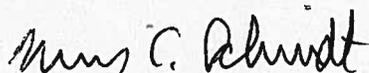
Suggestion to add prohibition of direction of a CPG by a non-guardian

I suggest adding a provision like the following:

A professional guardian or professional guardian agency shall not permit a person who recommends, employs, or pays the professional guardian or professional guardian agency to render guardian services for another to direct the professional guardian or professional guardian agency rendering such guardian services.

I hope this is helpful. Thank you for your consideration of this comment and for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Winsor C. Schmidt". The signature is written in a cursive style with a large initial "W".

Winsor C. Schmidt, J.D., LL.M.  
Professor