PROTECTING THE VOICELESS: PRIMER ON THE ROLE OF THE GUARDIAN AD LITEM IN CIVIL LITIGATION

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CHAPTER 4
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Part I

Primer on Guardian Ad Litems

I. Introduction

Attorneys are routinely appointed to represent disabled, incompetent, absent, or otherwise voiceless persons in civil lawsuits. Depending on the nature of proceeding and the circumstances, the role of a guardian ad litem can differ considerably. This paper will identify the various statutory and procedural rules identifying the role of guardian ad litem, but will focus primarily on the Texas Rule of Civil Procedure 173 “Guardian Ad Litem.” This rule was completely rewritten effective in February 2005 in an attempt to narrow the scope of work a guardian ad litem performs when appointed under the rule.

II. What is a guardian ad litem?

Barron’s Law dictionary provides the following definition of the terms “ad litem,” “guardian ad litem,” and “guardian”:

*Ad litem.* For the suit; for the purpose of the suit; pending the suit.  
*A guardian ad litem* is a guardian appointed to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise.  
*Guardian.* A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. One who legally has the care and management of the person, or the estate, or both, of a child during its minority.

The terms “guardian ad litem” and “attorney ad litem” are often used interchangeably by litigants and courts, but there are important distinctions that should be acknowledged between the two. In particular, the Texas Family Code defines each very differently, and assigns different roles to each. One of the most apparent distinction is that a guardian ad litem need not be an attorney, but only attorneys may serve as an “attorney ad litem.”

An attorney ad litem must advocate in furtherance of the wishes of the ward, rather than what is in the best interests per se. The powers and duties of the attorney ad litem are set out in TEX. FAM. CODE § 107.013 & 107.014. Oftentimes, courts appoint attorneys to serve in a “dual role” as both attorney ad litem and guardian ad litem. TEX. FAM. CODE § 107.001(5)(D). In such cases, the potential for a conflict of interest between the two might develop. See In re Doe 2, 19 S.W.3d 278, 280 n.2 (Tex. 2000) (attorney appointed in dual role in case where minor requested a waiver of parental notification to obtain an abortion). This presentation focuses solely on the role of the guardian ad litem.

The Texas Family Code defines a “guardian ad litem” as follows:

"Guardian ad litem" means a person appointed to represent the best interests of a child. The term includes: 

(A) a volunteer advocate appointed under Subchapter C;
(B) a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests;
(C) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or
(D) an attorney ad litem appointed to serve in the dual role.

TEX. FAM. CODE § 107.001(5).

The Texas Probate provides a similar, though less specific definition. A "Guardian ad litem" is defined as “a person who is appointed by a court to represent the best interests of an incapacitated person in a
guardianship proceeding.” TEX. PROBATE CODE § 601(12).

The Texas Rules of Civil Procedure do not define “guardian ad litem,” but merely describe its role: “A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party,” and when a settlement offer is made, an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest. TEX. R. CIV.P. 173.4(a-c).

III. Under what circumstances is a guardian ad litem appointed?

Guardian ad litems may be appointed pursuant to statute (Family Code, Parental Notification Statute, Probate Code, or Property Code) or by other procedural rules (TEX.R.CIV.P. 173). The purpose and duties of the guardian ad litem differ depending of the various circumstance under which they might be appointed.

Guardian ad litems represent persons who have some condition which renders them incapacitated under Texas law. Typically, the circumstances which render a person legally “incapacitated” relate to their age or heath. Whenever the rights of an incapacitated person are potentially affected by a legal proceeding, guardian ad litems are typically represented to act on behalf of the person. The following categories of persons are considered “incapacitated under the Texas Probate Code:

(A) a minor;
(B) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs; or
(C) a person who must have a guardian appointed to receive funds due the person from any governmental source. TEX. PROBATE CODE § 601(14). Evidence of a physical or mental condition must be based on recurring acts or occurrence with the preceding six (6) month period and not based on a single occasion or occurrence. TEX. PROBATE CODE § 684(c).

The work of guardian ad litems takes often takes on constitutional implications, such as when the state petitions to terminate parental rights. The Texas Constitution provides that “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” TEX. CONST. Art. 1, § 19. When the state seeks to terminate parental rights, or curtain rights to parental support, constitutional rights may be implicated. See Gomez v. Perez, 490 U.S. 535 (1973).

Mandatory Guardian Ad Litems

There are a number of specific circumstances in which the Texas legislature has determined should always require the appointment of a guardian ad litem:

Termination of Parental Rights - Texas law requires a court appointed guardian ad litem for a child immediately after the filing of a petition for termination of parental rights, but before full adversary hearing. TEX. FAM. CODE § 107.011. It also requires the appointment of an attorney ad litem for the child immediately after the filing, but before a full adversary hearing “to ensure adequate representation of the child.” TEX. FAM. CODE § 107.012. However, if the child is the petitioner, and an attorney ad litem has been appointed, or the interest of the child will be represented by a party, it is not necessary to appoint a guardian ad litem.

Parental notification statute - A pregnant minor who wishes to have an abortion without notification to one of her parents may file an application for a court order authorizing the minor to consent to the performance of an abortion without notification to either of her parents or a managing conservator or guardian. TEX.
FAM. CODE § 33.003(a). In such cases, the court must appoint an guardian ad litem for the minor and, if the minor has not retained an attorney, the court shall appoint an attorney to represent the minor. Id. at § 33.033(e). If the guardian ad litem is an attorney admitted to the practice of law in this state, the court may appoint the guardian ad litem to serve as the minor’s attorney.

Discretionary Guardian Ad Litems:

There are also a number of circumstances which have been identified by statutes which vest trial courts with authority to appoint a guardian ad litem, in their discretion. The following are examples:

Pending litigation - For example, a court may, “at any point in a proceeding,” appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or person whose identity or address is unknown, “if the court determines that representation of the interest otherwise would be inadequate.” TEXAS PROP. CODE § 115.014. The Family Code had a similar discretionary provision. See TEX. FAMILY CODE § 107.011(a) (“An associate judge shall recommend the appointment of an attorney ad litem for any party in a case in which the associate judge deems representation necessary to protect the interests of the child who is the subject matter of the suit.”).

Performance contracts for minors - A court may appoint a guardian ad litem for a minor who has entered into an arts and entertainment contract, advertisement contract, or sports contract if the court finds that appointment of the ad litem would be in the best interest of the minor. TEX. PROBATE CODE § 905. An additional basis which a guardian ad litem may be appointed is Texas Rule of Civil Procedure 173, which authorized to the court to act when a potential conflict of interest between a minor and “next friend” arises.

Conflict with “next friend” - A trial court may appoint a guardian ad litem for a party represented by a next friend or guardian only if: (1) the next friend or guardian appears to the court to have an interest adverse to the party, or (2) the parties agree.

The determination of the existence of a conflict requires exercise of judicial discretion. Gibson v. Blanton, 483 S.W.2d 372, 272 (Tex. App.—Houston [1st Dist.] 1972, no writ). The conflict does not have to be actual to justify an ad litem; the potential for a conflict during trial or settlement negotiations is enough to warrant the appointment of a guardian ad litem, because that is where the interests of previously aligned parties are prone to be diverge. McAllen Med. Cntr. v. Rivera, 89 S.W.2d 90, 94 (Tex. App.—Corpus Christi 2002, no pet.).

The guardian ad litem should be involved only so long as the conflict exists. If it ceases to exist, the trial court should remove the ad litem. Brownsville-Valley Reg. Md. Cntr. v. Gamez, 894 S.W.2d 753, 755 (Tex. 1995).

The Thirteenth Court of Appeals recently held in Owens v. Perez ex rel. San Juana Morin, 158 S.W.2d 96, 112 (Tex. App.—Corpus Christi 2005, no pet.), that the appointment of an ad litem pursuant to Rule 173 was an abuse of discretion because it found there to be no conflict of interest to justify the appointment. In that case, Domingo Perez had filed a medical malpractice suit as next friend of Maria Morin, a non compos mentis, but asserted no claim of his own. Prior to trial, Morin and Perez argued that a guardian ad litem appointment was necessary because there was a conflict between them. Id. The trial court appointed an ad litem, denied Owen’s written objections and motion to withdraw the ad litem. Id. at 112. The case was tried and a verdict rendered in plaintiffs’ favor. Owens appealed the order appointing the ad litem and the award of fees. The appellate court agreed with Owens, noting that there was no familial relationship between them (Perez merely referred to Morin as his “aunt” because she had raised him), and Morin did not have a will naming Perez as an heir. Id. Because there was no way
Perez would otherwise be entitled to any of Morin’s recovery, there was no conflict of interest between Morin and her next friend. The appellate court reformed the judgment be delete the award of ad litem fees. *Id.*

IV. What are the guardian ad litem’s duties?

The specific duties of the guardian ad litem depend on the context in which it are appointed. In most cases, they have a dual role. Guardians act as an officers and advisors to the court. *TEX.R.CIV.P. 173; Jocson v. Crabb,* 133 S.W.3d 268, 271 (Tex. 2004). But they are also asked to represent the best interests of the ward or proposed ward for whom they have been appointed to represent. *See* TEX. PROBATE CODE § 601(12).

Deficient work by a guardian ad litem will not necessarily result in the reversal of a judgment based on ineffective assistance of counsel or other grounds. As one court recently explained, “[t]he quality of a guardian ad litem’s investigation and representation at trial has more to do with the reliability and credibility of her recommendation to the trial court than the propriety of the trial court’s judgment.” *Askew v. Askew,* 2005 WL 241539 (Tex. App.—Fort Worth 2005, no pet.) (not published).

A. Texas Family Code

Section 107.002 of the Texas Family Code, “Powers and Duties of Guardian Ad Litem for Child,” provides an outline of the duties of the guardian ad litem.

(a) A guardian ad litem appointed for a child under this chapter is not a party to the suit but may:

1. and review copies of the child's relevant medical, psychological, and conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child; and

2. obtain school records as provided by Section 107.006.

(b) A guardian ad litem appointed for the child under this chapter shall:

1. within a reasonable time after the appointment, interview:

   A. the child in a developmentally appropriate manner, if the child is four years of age or older;
   B. each person who has significant knowledge of the child's history and condition, including any foster parent of the child; and
   C. the parties to the suit;

2. seek to elicit in a developmentally appropriate manner the child's expressed objectives;
3. consider the child's expressed objectives without being bound by those objectives;
4. encourage settlement and the use of alternative forms of dispute resolution; and
5. perform any specific task directed by the court.

B. Texas Rule of Civil Procedure 173

The rule spells out three specific tasks that the guardian ad litem may be expected to perform:

1. Act as an officer of and advisor to the court;
2. Determine and advise the court whether the next friend has an interest adverse to the party; and
3. When settlement is proposed, the guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party’s best interest.

Guardian ad items owe fiduciary duties to the person whom they are appointed to represent. *Byrd v. Woodruff,* 891 S.W.2d 689, 705-06 (Tex. App.-Dallas 1994, writ denied). They clearly have the duty to evaluate a proposed settlement from the minor's (or otherwise incapacitated
person’s) perspective and make a recommendation to the court on the minor's behalf. *Id.* In reviewing a settlement offer, the guardian ad litem's duty includes evaluating the damages suffered by the minor, the adequacy of the settlement, the proposed apportionment and manner of distribution of the settlement proceeds and the amount of attorney's fees charged by the plaintiff's attorney. *Id.* at 707 (guardian ad litem appropriately participated in the settlement conference, reviewed the evidence, examined the legal issues and consulted with the minor and her parents).

V. 
Who may serve as a guardian ad litem?

Qualification – According to the Family code, a person need not be an attorney to be appointed a guardian ad litem. See TEX. FAM. CODE § 107.001(5). Trial courts routinely appoint trained laypersons, such as those associated with Court Appointed Special Advocates, or “CASA”, to act as guardian ad litems in custody and parental termination proceedings. The Texas State Bar is required to provide a course of instruction for attorneys who represent parties in guardianship cases or who serve as court appointed guardians. TEX. GOV’T CODE § 81.114. The courses may include information about duties and responsibilities of guardian ad litems. *Id.* The State Bar holds an annual Guardianship CLE. Some family and probate courts require this instruction before a lawyer may be appointed as either a guardian ad litem or attorney ad litem, and courses are available through local Bar Associations or advocacy organizations such as CASA.

Disqualification - There are a number of reasons why a person might be disqualified from serving as a guardian ad litem, most of which relate to the familial or financial relationship between the proposed guardian and the potential ward and his/her family members.

Under the Texas Probate Code, a person may not be appointed guardian if the person is: (1) a minor; (2) a person whose conduct is notoriously bad; (3) an incapacitated person; (4) a person who is a party or whose parent is a party to a lawsuit concerning or affecting the welfare of the proposed ward, unless the court: (A) determines that the lawsuit claim of the person who has applied to be appointed guardian is not in conflict with the lawsuit claim of the proposed ward; or (B) appoints a guardian ad litem to represent the interests of the proposed ward throughout the litigation of the ward's lawsuit claim; (5) a person indebted to the proposed ward unless the person pays the debt before appointment; (6) a person asserting a claim adverse to the proposed ward or the proposed ward's property, real or personal; (7) a person, because of inexperience, lack of education, or other good reason, is incapable of properly and prudently managing and controlling the ward or the ward's estate; (8) a person, institution, or corporation found unsuitable by the court; (9) a person disqualified in a declaration made under Section 679 of this code; or (10) a nonresident person who has not filed with the court the name of a resident agent to accept service of process in all actions or proceedings relating to the guardianship. TEX. PROBATE CODE § 647.

VI. 
What limitations are there on the work performed by a guardian ad litem?

A guardian ad litem appointed under TEX. FAM. CODE § 107.001, addressing the termination of parental rights, is not required to conduct an investigation to determine the best interests of the child. The guardian ad litem may do so to the extent the guardian considers necessary to determine the best interests of the child. The primary focus of the guardian’s responsibility is the propriety of termination based on the conduct of the parent, not the merits of alternative placement of the child. *In the Interest of D.M.C.*, 168 S.W.3d 319, 321 (Tex. App.—Texarkana 2005, no pet.).
107.002 vests the guardian ad litem with authority to request and obtain a wide array of information, including relevant medical, psychological, and conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interests of the child, school records, and to interview “each person who has significant knowledge of the child's history and condition.”

Texas Rule of Civil Procedure 173 places a number of express restrictions on guardian ad litems. A guardian ad litem: (1) may participate in mediation or a similar proceeding to attempt to reach a settlement; (2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest; (3) must not participate in discovery, trial, or any other part of the litigation unless: (A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and (B) the participation is directed by the court in a written order stating sufficient reasons. Tex.R.Civ.P. 173.4(d). An ad litem is not required, or advised, to attend depositions, go over every document filed in the case, add participate n trial, but the rule advises that they must realize that they do so with the risk of not being compensated. Id. Comment 3.

VII.
What liabilities does the guardian ad litem assume when appointed?

Both the statutes and rules which specially reference ad litems provide for some level of immunity from suit arising from their work as ad litems.

Tex. Family Code - A guardian ad litem appointed under the parental bypass chapter, and acting in the course and scope of the appointment, is not liable for damages arising from an act or omission of the guardian ad litem committed in good faith. Tex. Family Code § 33.006. This immunity does not apply if the conduct of the guardian ad litem is committed in a manner described by Sections 107.003(b)(1)-(4).

Tex. Probate Code - A guardian ad litem appointed under Section 645, 683, or 694A to represent the interests of an incapacitated person in a guardianship proceeding involving the creation, modification, or termination of a guardianship is not liable for civil damages arising from a recommendation made or an opinion given in the capacity of guardian ad litem. Tex. Probate Code § 645A(a). This immunity does not apply, however, to a recommendation or opinion that is: (1) wilfully wrong; (2) given with conscious indifference or reckless disregard to the safety of another; (3) given in bad faith or with malice; or (4) grossly negligent. Tex. Probate Code § 645A(b).

Tex.R.Civ.P. 173 - As an officer and advisor to the court, a guardian ad litem should have qualified judicial immunity. Tex.R.Civ.P. 173, Comment 5. As such, a guardian ad litem’s liability would be governed by the “objective reasonableness” standard first set out in City of Lancaster v. Chambers, 883 S.W.2d 650, 656 (Tex. 1994); see Murillo v. Garza, 881 S.W.2d 199, 202 (Tex. App.--San Antonio 1994, no writ) (holding that this standard applies to all qualified immunity cases). A party suing a guardian ad litem would have to prove that “no reasonable person in [the guardian ad litem’s] position could have thought the facts were such that they justified [the guardian ad litem’s] act.” Id. at 657. The test is one of objective legal reasonableness, without regard to whether the ad litem acted with subjective good faith. Id. at 656.

The comments to the Rule 173 also state, however, that the guardian ad litem’s compliance with the rule may be enforced through “appropriate sanction” should the
rule be violated.

VIII. How are guardian ad litems compensated for their services?

Perhaps no issue has been litigated as much as this issue, particularly in the context of Texas Rule of Civil Procedure 173. In fact, in the comments of the revision, the Court noted that the major changes to the rule were made to limit the involvement of ad litems, which in turn limits their potential compensation.

TEX.R.CIV.P. 173 was revised to expressly limit the potential compensation of guardian ad litems attorneys. They are directed not to participate in discovery. It is noted that “only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role.” Comment 4. Because the role of guardian ad litem is limited in all but extraordinary situations, and any risk that might result from services performed is also limited, compensation, if any is sought, should ordinarily be limited.

Determinations regarding the compensation of ad litems are within the discretion of the trial court. Simon v York Crane & Rigging Co., 739 S.W.2d 793, 794 (Tex. 1987)). Prior to the revision of the rule, a number of substantial ad litem awards were affirmed based on the analysis of lodestar factors under the abuse of discretion standard of review. See Landrover UK v. Hinojosa, 2004 WL 1632657 (Tex. App.—Corpus Christi 2004, pet. filed) (unpublished) (citing Garcia v. Martinez, 988 S.W.2d 219, 222 (Tex. 1999), for setting out these factors) ($100,000 fee); Phillips Petroleum v. Welch, 702 S.W.2d 672, 674 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.) ($666,667 fee).

In Borden v Martinez, 19 S.W.3d 469 (Tex. App.—San Antonio 2000, no pet.), the court reviewed an award attorney’s fees to three guardian ad litems in the amounts of $45,000, $75,000, and $80,000, respectively. Reviewing the award under an abuse of discretion standard, the court noted eight factors pertinent to the fee determination:

- the time and labor required the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- the likelihood that the acceptance of the particular employment would preclude other employment by the lawyer;
- the fee customarily charged in the area for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client of the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id. at 472 (citing Simon v York Crane & Rigging Co., 739 S.W.2d 793, 794 (Tex. 1987)).

While these factors have not been discounted by the new Rule 173, much of the grounds relied upon by guardian ad litems to justify such fees have been stripped. It is no longer feasible for attorneys to explain that they turned away other work, or invested large amounts of time in a case in which they have been appointed under TEX.R.CIV.P. 173, because they are rarely to get involved in a case beyond settlement discussions. Therefore, it appears as thought he era of six figure guardian ad litems are over. Still, the rule does acknowledge that circumstances may arise which justify an expanded role for ad litems. There must be a written order from
the trial court authorizing such an expanded role, however, before time is expended.

PART II

TEXAS RULE OF CIVIL PROCEDURE 173

The procedural rule regarding the appointment of guardian ad litems was “completely revised” in 2004, and the rule went into effect on February 1, 2005. Although there have been less than a handful of decisions interpreting the new rule, the changes it have effectuated warrant close review.

I. The Way It Was

The former Rule 173 (before Feb. 1, 2005) was a single paragraph, and stated:

When a minor, lunatic, idiot or a non-compos mentis may be a defendant to a suit and has no guardian within this State, or where such person is a party to a suit either as plaintiff, defendant or intervenor and is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor, lunatic, idiot or non-compos mentis, the court shall appoint a guardian ad litem for such person and shall allow him a reasonable fee for his services to be taxed as a part of the costs.

Much of the litigation concerning ad litems concerned the scope of representation provided by guardian ad litems, and the extent to which they should be compensated for their services. The uncertainty in the duties of the guardian ad litem is inherent, because an ad litem is typically asked to come into a case near the end, or during the settlement discussions, and give opinions regarding the fairness and wisdom of the proposed settlement. Temporally, the guardian ad litem is appointed after the workup on the case is effectively over, but he or she cannot be expected to provide sound advice on these issues without delving into the facts. The extent to which ad litems may delve, however, has been debated by litigants for years. Last year, the rules were modified to try and end the debate. Guardian ad litems have been advised to delve past settlement discussions at their own risk. TEX.R.CIV.P. 173, comment 3 (“A guardian ad litem may, of course, choose to review the file or attend proceedings when it is unnecessary, but the guardian ad litem may not be compensated for unnecessary expenses or services.”).

Prior to 2004, there were differing views concerning the extent of the work an ad litem undertook when appointed. A guardian ad litem's duty is to act as the personal representative of the minor, rather than as the attorney for the minor, and to participate only to the extent necessary to protect the minor's interests. Jocson, 133 S.W.3d at 271 (citing Am. Gen. Fire & Cas., 907 S.W.2d at 493 n. 2). No statute precisely defines the scope of participation by a guardian ad litem in a personal injury lawsuit. Case law, however, instructs us that although a guardian ad litem is allowed some latitude in determining what activities best serve the minor's interests, he must restrict his actions to those necessary to perform the ad litem's limited role. Phillips, 702 S.W.2d at 674; Byrd, 891 S.W.2d at 705-06. The guardian ad litem's services must not duplicate the work performed by the plaintiff's attorney. Phillips, 702 S.W.2d at 674. A guardian ad litem may only attend depositions, hearings and conferences, participate in strategy sessions with attorneys and engage in other activities when they are necessary to protect the minor's interests. Roark v. Mother Frances Hosp., 862 S.W.2d 643, 647 (Tex. App.-Tyler 1993, writ denied) (guardian ad litem's participation in filing and serving pleadings, strategy sessions with plaintiff's counsel and voir dire and assuming lead in settlement negotiations was beyond scope of his role and time was properly discounted as non-
Goodyear v. Gamez exemplified some of the problem that appellate courts grappled with when considering fees in high dollar litigation. It addressed a situation in which a trial court appointed several attorneys, one for each minor child, whose wrongful death claims were prosecuted by an adult as next friend. The court appointed attorneys spend hundreds of hours reviewing the paperwork that had been generated in the case, before the friendly suit. The trial court awarded ad litem fees in excess of $397,000.

The Gamez court looked critically at the work performed by the attorneys, and concluded that the billing was excessive. It referenced the proposed rule, which stated that ad litem hours were to be limited in most cases. Adding to the court’s criticism was the observation made by a concurring judge that an ad litem had billed for 24 hour periods, which it construed as sanctionable conduct under the disciplinary rules.

The problem stemmed, in part, from inconsistent opinions regarding he role of the ad litem. While some court entrusted ad litem to perform as much work and invitation as they felt necessary, see e.g. Borden, 19 S.W.3d at 475 ($200,000 ad litem fee in case where recovery was $7.5 million was not an abuse of discretion because nature of case required the to use their “hard-earned skills” beyond normal ad litem role), and Landrover, (no abuse of discretion in $100,00 fee paid to attorney with extensive experience and a customary hourly fee of $500), other courts looked more critically on the time expended and the hourly rates charged. See e.g. Holt Texas Ltd., v. Hale, 144 S.W.3d 592, 596 (Tex. App.—San Antonio 2004, no pet)(court held that $50,000 fee for ad litem who documented 90 hours of work was excessive, regardless of the particular skills he possessed); Intern’l Dairy Queen v. Matthews, 126 S.W.3d 629, 633 (Tex. App.—Beaumont 2004, no pet.) (holding that fee award of more than $700 per hour was excessive, particular when attorney failed to segregate work performed vs. defendants who aid the fee form other defendants).

II.

Why It Was Changed
The Texas Supreme court ordered the rule into effect on February 1, 2005, and described the change in its press release as follows:

Revised Texas Rule of Civil Procedure 173 establishes limits on the guardian ad litem’s duties and responsibilities in a case. By limiting the ad litem’s role, the rule consequently seeks to limit the ad litem’s compensation. This rule will take effect February 1.

III. The Way It Is

The new rule seeks to impose clear boundaries on the work of ad litems. While the compensation remains discretionary, and the methodology the same, the scope of the permissible work performed by guardian ad litems has been substantially narrowed.

173.1. Appointment Governed by Statute or Other Rules

This rule does not apply to an appointment of a guardian ad litem governed by statute or other rules.

By including this limitation, the rule expressly recognizes that it applies only to court appointments in the context of pending limitations. If any other provisions of the Family Code, the Probate Code, or some other statute that have required or precipitated the appointment, those statutes define all aspects of the guardian ad litem’s work. It might behoove the appointed guardian ad litem to obtain a written order from the trial court specifying the rule or statute under which the appointment is made, in order to avoid any confusion down the road.

173.2. Appointment of Guardian Ad

Litem

(a) When Appointment Required or Prohibited. The court must appoint a guardian ad litem for a party represented by a next friend or guardian only if: (1) the next friend or guardian appears to the court to have an interest adverse to the party, or (2) the parties agree.

This does not substantially modify the conditions under which a mandatory appointment is made. While it is not required that an actual conflict be demonstrated before an ad litem is appointed, it is typically recognized that settlement offers may precipitate the appointment of an ad litem. However, it should be noted that, in determining whether a guardian ad litem is necessary, “generalized testimony” regarding “the continued presence of ‘money’ in a lawsuit” is not enough to support a finding that a conflict of interest exists. Jocson v. Crabb, -- S.W.3d --, 2005 WL 215137 at 3 (Tex. App.—Houston [1st Dist.] 2005, no pet.). If the appointment is contested, a record should be made regarding the presence of an offer and the proposed division of the monies. Id. Parties must make a showing that the party and the next friend are both going to recover a portion of settlement monies. Id.

Subsection (2) leaves open the possibility that situations may arise where the parties agree that an ad litem should be appointed even when there is no apparent conflict. Because the conflict typically arises once a settlement offer is made, this subsection may contemplate appointments earlier in litigation, before any offer is made. If both sides agree that the appointment of a guardian an ad litem may facilitate settlement even when there is no apparent conflict, they might agree to an appointment under this provision.

(b) Appointment of the Same Person for Different Parties. The court must appoint

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1. The text in each of the numbered paragraphs are those of the committee, and accompany the new rule. My commentary follows each numbered paragraph.
the same guardian ad litem for similarly situated parties unless the court finds that the appointment of different guardians ad litem is necessary.

This is simply a codification of existing cases. The rule expressly disaffirms the appointment of multiple ad litem, as occurred in situations like Goodyear v Gamez, where multiple guardian ad litem were appointed for each minor. If more than one ad litem is to be appointed, a trial court must make findings in the order appointing the attorneys. If any party believes that the interests of each of the children or disabled persons are divergent, such that a single person cannot represent all of their claims, then that a party should brief the issue and make a record of the request. Such divergent interests may exist in wrongful death suit where the paternity of one or more children is in dispute, for example.

173.3. Procedure
(a) Motion Permitted But Not Required. The court may appoint a guardian ad litem on the motion of any party or on its own initiative.
(b) Written Order Required. An appointment must be made by written order.
(c) Objection. Any party may object to the appointment of a guardian ad litem.

This is not a substantial change, but it eliminate some uncertainty regarding the process of an appointment. The rule does not state when an objection to an appointment must be made, but the safe practice would be to object in writing at the earliest point that an ad litem is appointed, and to reiterate same objection at the friendly suit. The failure to lodge a timely objection may be fatal to any challenge on appeal concerning the ad litem. See Landrover U.K., Ltd. V. Hinojosa, 2004 WL 1632657 at *1 (Tex. App.—Corpus Christi 2004, pet. filed)(unpublished memorandum opinion) (appellants lost right to complain about the appointment of an ad litem by failing to make a timely objection at the settlement hearing or in their pleadings).

173.4. Role of Guardian Ad Litem
(a) Court Officer and Advisor. A guardian ad litem acts as an officer and advisor to the court.
(b) Determination of Adverse Interest. A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party.
(c) When Settlement Proposed. When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.
(d) Participation in Litigation Limited. A guardian ad litem: (1) may participate in mediation or a similar proceeding to attempt to reach a settlement; (2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest; (3) must not participate in discovery, trial, or any other part of the litigation unless: (A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and (B) the participation is directed by the court in a written order stating sufficient reasons.

This is the most substantial change in the rule, in that it reflects a clear directive to ad litem to work efficiently and in a focused manner on the limited issues for which they have been appointed. The ad litem is actually proscribed from participating in discovery, trial, or "any
other part of the litigation” besides settlement talks and the conflict determination, unless directed otherwise in writing. This language effectively ties the hands of the guardian ad litem, who cannot undertake activities the ad litem believes are in the ward’s best interest without prior consent. It supercedes those cases which held that guardian had “latitude” to deice what depositions hearing, and other activities were necessary to protect the minor’s interests. See, e.g., *Byrd, 891 S.W.2d at 705-06.*

Compelling arguments still can be made that an attorney cannot make an informed decision about the appropriateness, or fairness of a settlement until he or she is informed in a substantial way about the legal theories and the facts supporting them. The new rule requires the prior authorization be obtained before such activities occur. As a practical matter, the ad litem is obligated to set a hearing each time the ad litem’s participation in developing the case is contemplated.

An attorney appointed as an ad litem should immediately schedule a visit with the incapacitated person and their next friend, and learn as much as possible about the family dynamics as possible. An understanding of family dynamics is critical to have any appreciation for how settlement monies might be utilized. Often the guardian ad litem is the only attorney who will see the living conditions of the parties. A visual inspection of the homestead may raise questions about whether monies should be entrusted to the the next friend for the benefit of the party, or invested in a trust or annuity. Many families have complicated dynamics, and these change as settlements approach. The ad litem must be aware of any substantial family issues that will impact the ward’s future status, particularly if the ward recovery is structured to where monies will not be received until they become adults.

The prudent ad litem should review the pleadings (and select discovery) to ascertain the level of complexity of the case, and the strength or weakness of the law supporting Plaintiffs’ theories to make an initial determination if a settlement offer is reasonable. If the case appears to be complex, or was hotly contested, the ad litem should consider whether additional time is needed to make an informed decision about whether to approve the proposed settlement terms. The ad litem should then prepare a motion to file with the court setting out the grounds upon which he or she believes additional work is required. The trial court must make a writing finding explaining why additional work is required.

### 173.5. Communications Privileged

Communications between the guardian ad litem and the party, the next friend or guardian, or their attorney are privileged as if the guardian ad litem were the attorney for the party.

The ad litem should be cautious about disclosing any communications between the ward ad the ad litem to the next friend until both are independently satisfied that the distribution of settlement proceeds is agreeable. Likewise, when settlement structures are discussed, and the ward is a minor, the ad litem must factor the well-being of the wards for the balance of their minority in determining what a fair apportionment of settlement monies is. In such circumstances, it is often advisable to authorize the payment setting aside of some monies to be spent by the next friend in a way that further the best interests of the ward. If the next friend is the guardian of the minor, the monies will likely be spend on household needs initially anyway, which inure to the benefit of the minors under the next friend’s care.

### 173.6. Compensation

**(a) Amount.** If a guardian ad litem requests compensation, he or she may be reimbursed for reasonable and necessary expenses incurred and may be paid a reasonable hourly fee for necessary services performed.

**(b) Procedure.** At the conclusion of the appointment, a guardian ad litem may file
an application for compensation. The application must be verified and must detail the basis for the compensation requested. Unless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses that are reasonable and necessary. In making this determination, the court must not consider compensation as a percentage of any judgment or settlement.

(c) Taxation as Costs. The court may tax a guardian ad litem's compensation as costs of court.

(d) Other Benefit Prohibited. A guardian ad litem may not receive, directly or indirectly, anything of value in consideration of the appointment other than as provided by this rule.

The process of submitting fees is typically negotiated and agreed upon by the ad litem and the defense counsel. However, there are occasions in which no agreement can be reached, an evidentiary hearing is required. Objections to the fee requested may be lodged for the first time at the hearing. Jocson v. Crabb, 133 S.W. 268, 270 (Tex. 2004) (per curiam).

While Texas Rule of Civil Procedure 131 provides that the successful party shall recover costs from the adversary, with one exception. The court may, “for good cause,” adjudge the costs otherwise as provided by law or these rules. TEX.R.CIV.P. 141. If the court diverges from the general rule, and assesses ad litem fees against a prevailing party, the court must state the explicit reasons for doing so on the record or in its order. Marshall Investigation & Sec. Agency v. Whitaker, 962 S.W.2d 62 (Tex. App.—Houston [1st Dist] 1997, no pet.).

173.7. Review
(a) Right of Appeal. Any party may seek mandamus review of an order appointing a guardian ad litem or directing a guardian ad litem's participation in the

litigation. Any party and a guardian ad litem may appeal an order awarding the guardian ad litem compensation.

(b) Severance. On motion of the guardian ad litem or any party, the court must sever any order awarding a guardian ad litem compensation to create a final, appealable order.

(c) No Effect on Finality of Settlement or Judgment. Appellate proceedings to review an order pertaining to a guardian ad litem do not affect the finality of a settlement or judgment.

Parties should be cognizant of the impact of a petition for writ of mandamus challenging the appointment or enlarging scope of an ad litem’s work in a particular case. The pendency of an original proceeding could unnecessarily prolong settlement of a case if the circumstances do not justify an ad litem’s appointment or increased role. Because multiple ad items for similarly situated parties are now disfavored, and the circumstances justifying the appointment are now narrowly tailored, a trial court order must make the requisite finding, and the record should contain some evidentiary support for those findings in order to pass appellate “abuse of discretion” muster.

It is not necessary to object to an ad litem billing excessively or exceeding to scope of his or her appointment before the hearing set to determine those fees. Jocson v. Crabb, 133 S.W.3d 268, 270 (Tex. 2004) (defendants did not waive their objection to ad litem's attendance at depositions and review of deposition notices and correspondence as beyond scope of ad litem's role by raising first objection at the fee hearing). A party can preserve error by objecting to the appointment at its inception, filing motion to withdraw the appointment, or by lodging specific objections to the evidence offered in support of the fee at the hearing set to determine that issue.
Comments

The comments to the new rule provide additional insight into the extent of the changes, or clarifications, intended by the new rule:

1. The rule is completely revised.

Clearly, the wording of the rule was greatly expanded. Many of the revisions simply grafted into the rule the holdings of courts which had interpreted the prior rule. The intent of the changes are clear: all interpretations of the prior rule which viewed the role of the guardian ad litem expansively are disavowed.

2. This rule does not apply when the procedures and purposes for appointment of guardians ad litem (as well as attorneys ad litem) are prescribed by statutes, such as the Family Code and the Probate Code, or by other rules, such as the Parental Notification Rules.

The other circumstances in which guardian ad lites are appointed are discussed in the preceding pages.

3. The rule contemplates that a guardian ad litem will be appointed when a party's next friend or guardian appears to have an interest adverse to the party because of the division of settlement proceeds. In those situations, the responsibility of the guardian ad litem as prescribed by the rule is very limited, and no reason exists for the guardian ad litem to participate in the conduct of the litigation in any other way or to review the discovery or the litigation file except to the limited extent that it may bear on the division of settlement proceeds. See Jocson v. Crabb, 133 S.W. 268 (Tex. 2004) (per curiam). A guardian ad litem may, of course, choose to review the file or attend proceedings when it is unnecessary, but the guardian ad litem may not be compensated for unnecessary expenses or services.

4. Only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Rule 44. In no event may a guardian ad litem supervise or supplant the next friend or undertake to represent the party while serving as guardian ad litem.

5. As an officer and advisor to the court, a guardian ad litem should have qualified judicial immunity.

This expressly disaffirms the holding of Byrd, 891 S.W.2d at 708, which held that “policy requires that we do no extend the doctrine of derived judicial immunity to a guardian ad litem appointed under Rule 173”).

According to this comment, a guardian ad litem’s liability would be governed by the “objective reasonableness” standard first set out in City of Lancaster v. Chambers, 883 S.W.2d 650, 656 (Tex. 1994); see Murillo v. Garza, 881 S.W.2d 199, 202 (Tex. App.--San Antonio,1994, no writ) (holding that this standard applies to all qualified immunity cases). Under this standard, a party suing a guardian ad litem would have to prove that “no reasonable person in [the guardian ad litem’s] position could have thought the facts were such that they justified [the guardian ad litem’s] act.” Id. at 657. The test is one of objective legal reasonableness, without regard to whether the ad litem acted with subjective good faith. Id. at 656.

6. Though an officer and adviser to the court, a guardian ad litem must not have ex parte communications with the court. See Tex. Code Jud. Conduct, Canon 3.

This comment expressly disavows the
practice of some guardian ad litems who give “status” reports the court that appointed them. Some courts and parties have used ad litems as “messengers,” who keep the court informed on settlement negotiations and the likelihood of a case being resolved before trial, among other things. While the ad litem is an officer of the court, he or she must only discuss the case when all parties are present.

7. Because the role of guardian ad litem is limited in all but extraordinary situations, and any risk that might result from services performed is also limited, compensation, if any is sought, should ordinarily be limited.

This comment could be paraphrased as “the days of the mega guardian ad litem fees are over.” In all candor, the revisions appear in large measure to have been drafted with the intent of eliminating attention-grabbing ad litem fees, and they codify those judicial decisions which construed the role of the guardian ad litem narrowly. The prudent lawyer will document all time expended in furtherance of duties assigned under Rule 173, and will refrain from billing for matters that exceed the scope of the appointment, absent prior court approval pursuant to Tex.R.Civ.P. 173.4(d)(3).

8. A violation of this rule is subject to appropriate sanction.

The comment does not describe the type of sanction contemplated, but most likely it would include disciplinary sanctions against the attorney, rather than any sanctions against the entity the attorney represents. As Justice Duncan wrote in her concurrence in Goodyear v. Gamez, Texas Rule of Disciplinary Conduct 1.04 prevents an attorney from “charg[ing] ... an unconscionable fee.” Gamez, 151 S.W.3d at 593; Tex.Disc.R.Prof’l Conduct 1.04, reprinted in Tex. Gov.Code Ann., tit. 2, subtit. G app. A (Vernon 2005). While the disciplinary rule contemplates fees being charged to an attorney’s own client, and the guardian ad litem’s fees under Tex.R.Civ.P. 173 are paid by an adverse party as a costs of court, the underlying rationale for the rule applies. An ad litem is an officer of the court, and as such, owes a duty of candor to the court, the violation of which may provide different basis for disciplinary sanctions. See Tex.R.Disc.Conduct 1.06; Thompson v. City of Corsicana Housing Authority, 57 S.W.3d 547, 558 (Tex. App.-Waco 2001, no pet).

Conclusion

The role of a guardian ad litem differs substantially, depending upon whether the appointment is based on a statutory provision or procedural rule. While the duties and responsibilities of guardian ad litems under the Family Code, Probate Code and Property Code are more expansive and have been well-defined, the role of an ad litem under the new Texas Rule of Civil Procedure 173 has only recently been expressly limited. Attorneys who are appointed to undertake these duties must be aware of their specific roles to effectively carry out their duties. Hopefully this paper provided some insight into what they might expect once appointed.