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August 26, 1997

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

Re: Proposed Rule Changes to Rules 4, 21, 173 and New Rule 177b

Dear Justice Phillips:

The Court Rules Committee has recently approved the following proposed rule changes which I enclose for the court's consideration.

- a. Proposed change to Rule 21 to provide a minimum of five days notice, not including weekends and holidays, for hearings rather than the current three days notice, which does include weekends and holidays.
- b. Proposed change in Rule 4 to delete the three day rule reference in Rule 21 and make it consistent with the proposed Rule 21 change.
- c. Proposed change to Rule 173, which rewrites the Guardian Ad Litem Rule. The purpose of this change is to prevent unnecessary appointments of guardian ad litem and reduce the guardian ad litem fees. Then that affect should reduce litigation costs.
- d. New Rule 177b. This proposed change eliminates the necessity of serving a subpoena on a party for appearance at trial or a hearing and thereby eliminates the costs of issuance of the subpoena and costs of service. The notice to the party or the party's attorney accomplishes the same purpose as a subpoena.

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In connection with Rule 173, I am also enclosing herewith a letter from Judge Mike Wood, who was very helpful and instrumental in suggesting some of the changes to Rule 173.

By copy of this letter to Luke Soules, the Chairman of the Supreme Court Advisory Committee, I am forwarding copies of these proposed rule changes for that committee's consideration.

The Court Rules Committee would appreciate the Supreme Court giving consideration to these proposed rule changes.

Sincerely,

By:


O. C. Hamilton, Jr.

OCH:jf
Enclosures

cc: Mr. Luther H. Soules, III (w/encl.)
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STATE BAR OF TEXAS
COURT RULES COMMITTEE
REQUEST FOR NEW RULES OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording existing Rule:

Rule 173. GUARDIAN AD LITEM

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.

II. Exact wording for proposed Rule:

Rule 173. GUARDIAN AD LITEM (the entire rule is new)

(a) When Appointment Necessary. The court shall appoint a qualified guardian ad litem for an incapacitated person as defined in §3 of the Probate Code, if the incapacitated person is:

- (1) a defendant and has no guardian in this state; or
- (2) a party to the suit and is represented by a next friend or guardian:
 - (i) who appears to have an interest adverse to the incapacitated person;
and
 - (ii) when a settlement of the suit has been reached or is being actively negotiated.

(b) Procedure to Appoint. Appointment may be made pursuant to the motion of a party, on the court's own initiative, or by agreement of the parties. Except by agreement

of the parties the court shall, after notice and hearing, determine the need for a guardian ad litem. If one is needed the court shall:

- (1) appoint a qualified guardian ad litem; and
- (2) if requested by a party, recite the court's findings regarding the necessity for a guardian ad litem and the qualifications of the person appointed.

(c) Duties of Guardian Ad Litem Pursuant to Paragraph (a)(2) of This Rule. The guardian ad litem appointed pursuant to paragraph (a)(2) shall only:

- (i) participate in settlement negotiations if requested by a party and,
- (ii) advise the court on the appropriateness of the apportionment of a proposed settlement.

(d) Conclusion of Guardian ad Litem's Services. Upon conclusion of the guardian ad litem's services, the court shall by written order:

- (1) discharge the guardian ad litem;
- (2) state the amount of fees and expenses awarded to the guardian ad litem for services rendered;
- (3) upon any party's request state the basis for the award of fees; and
- (4) state which party must pay the guardian ad litem fees and expenses in accordance with Rule 141.

(e) Basis for Guardian ad Litem's Fees. A guardian ad litem appointed under this rule is entitled to a reasonable fee for the necessary services provided by the guardian ad litem.

Comment: The purpose of this comment is to emphasize the sole duties of a guardian ad litem appointed pursuant to Paragraph (a)(2) of this rule. Such guardian ad litem should generally be appointed only after a settlement has been reached in a suit, at which time, the guardian ad litem should advise the court on the appropriateness of the apportionment of the settlement proceeds. In some instances, a guardian ad litem may

be asked to participate in settlement negotiations, however, the guardian ad item shall not act as counsel for, or personal representative of the incapacitated person; shall not participate in pretrial discovery; shall not participate in the trial of the case, except for the presentation of the settlement agreement to the court; shall not be responsible for the payment, handling or investment of any settlement proceeds, and is not in a fiduciary relationship with any party.

III. Purpose of proposed rule:

The purpose of the proposed rule changes is to reduce litigations costs by eliminating the appointment of a guardian ad litem when one is not needed and reduce the amount of fees paid to the guardian ad litem. If there is any doubt about the necessity for a guardian ad litem, the court should hold a hearing and make findings regarding the necessity for the appointment. There is also no necessity for the appointment of a guardian ad litem in a Rule 173(a)(2) situation until a settlement has been reached, although the rule does provide that the guardian ad litem may participate in the settlement negotiations, if requested. The guardian ad litem should not, however, participate in any other proceedings, and hence, the guardian ad item fee should be minimal. An additional purpose of the rule is to eliminate confusion as to the duties of the guardian ad litem.



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August 11, 1997

BY TELECOPIER
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Re: Proposed revisions to Rule 173, Texas Rules of Civil Procedure

Dear Carl:

I am writing to make some suggestions concerning the proposed revisions to Rule 173. Please accept my apologies in advance for offering potentially radical changes, very late in the process, and for stepping on the toes of anyone's heartfelt positions and/or language. My only excuse (if it is one) is that I was not invited earlier, and only recently found out. Since I probably will not be able to be present at the committee meeting in Austin on August 22, I am taking the liberty of including some discussion concerning my suggestions.

By way of background, I have served as a guardian ad litem on numerous occasions, in many courts, before I assumed the bench, acting with respect to settlements of cases involving from one to 75 minor plaintiffs, and from one to 10 defendants. I have testified as an expert witness concerning ad litem fees, and have written amicus briefs in the Texas Supreme Court concerning the issues. I have taught at several seminars, which included the proper role of a guardian ad litem, for the Houston and Texas Bar Associations, both before and after I took the bench.

In my experience, there are almost as many ideas concerning the proper duties of a guardian ad litem as there are courts and lawyers. Opinions in the Courts of Appeals and the Supreme Court and actions on writs of error by the Court, have contributed to the confusion because of the wide variety of results reached. As you know, that very confusion has led to enormous differences in the fees awarded for an ad litem's service.

In various Court of Appeals decisions, the roles of guardian ad litem and attorney ad litem have been confused, and the guardian ad litem has been found to actually replace the next friend as

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the representative of the incapacitated person in the suit, to have fiduciary duties to the person with respect to the settlement proceeds, and to have obligations as legal counsel to the incapacitated person. Other opinions have reached the opposite result, and have strictly limited duties and fees awarded to services rendered prior to signing of a judgment. Opinions reaching apparently opposite results have had writs refused or denied.

As we have discussed, in many counties the guardian ad litem is appointed the morning of the settlement hearing, and acts without written order or fee. If it is possible without injury to the other purposes to be served by the revisions, the new rule should not prevent simple minor settlements, as they have been performed without controversy for years.

In my opinion, the revisions of Rule 173 should include some detailed instruction to the trial court concerning the duties and responsibilities of the guardian ad litem, and the limitations thereon. If the duties are properly described and limited, the conduct of the guardian ad litem can more easily be reviewed, and the reasonableness of the fees awarded to the guardian ad litem should be readily ascertainable.

Attached is a suggested draft of Rule 173. The additions and deletions are in comparison to the revised Rule 173 that you sent to me, which appeared to be dated July 22, 1997. The remainder of my letter will concern my reasons for changes I am proposing, and some comments concerning other language included in the draft.

Paragraph (a). All descriptions of physical and mental incapacity, including "minor", "legal disability", "habitual drunkard", "non compos mentis", and others have been removed, to the extent possible, from all Texas statutes and codes in the past three legislative sessions. All have been replaced with "incapacitated person", which is defined in Section 3 of the Probate Code. Use of the same phrase would eliminate the possibility of different standards of incapacity and would also shorten the rule.

Paragraph (a)(2). Some of the greatest fee problems occur when a guardian ad litem has attended and participated fully in all pre-trial discovery and the trial of a case. If the finder of fact assesses damages after a trial, there is no conflict of interest between the personal representative and the incapacitated person. The conflict arises in the cutting up of a limited pie being offered in settlement. If the guardian ad litem only exists because there is a conflict, the guardian ad litem's participation should be limited to the time at which the conflict arose. The proposed rule would also allow participation, on request, during settlement negotiations, because the guardian ad litem can be helpful, almost as a *quasi* mediator.

Paragraph (b)(2). An additional hearing concerning the necessity of an appointment may not achieve at least one desired result, limiting the costs to the parties of settling cases. Most state

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court judges have no staff to prepare an order that accurately sets forth the court's findings. The rule as proposed raises numerous questions to me as a trial judge, because there is no body of law, even with the revised rule, that sets out the standards for either necessity or qualifications. Are conclusory statements sufficient, or will the judge, on the record, be required to give details about the conflict and read an ad litem's resume into the hearing record? If the appointment is on the court's motion, who will take the lead in an evidentiary hearing? What difference would specific findings by the court make in an appeal, since the appellate court decides the propriety of the trial court's conduct based on the evidence admitted or denied, not on the propriety of the trial court's findings. I would propose some more detail be included in this paragraph to guide the trial court's conduct. Another alternative would be to include in Rule 173 the requirement imposed by the Supreme Court's Special Order of March 1994 that the appointment be in writing, and eliminate the need for a hearing.

Paragraph (c)(1)(of the attached revision). The duties of the guardian ad litem should be very strictly defined, and limited. Many argue that the guardian ad litem should assist the plaintiff's counsel, or act as counsel for the incapacitated person, participating fully in discovery and trial. Other than justifying a fee, I don't know why that is necessary.

Certainly apocryphal stories exist in which the guardian ad litem has made a substantial contribution to the preparation or trial of a suit, or "saved" the case, or prevented injustice. What is it about just this situation, a conflict over a limited settlement, that requires an extra court appointed position? Certainly, many cases are settled, in which a disinterested observer would say that a different result would have been reached if there had not been disparate skill between the attorneys for the parties. That has not been urged as a reason to have the court appoint new counsel for the party. We should decide, and then clearly reflect in the rule, whether we are intentionally doing more than have the court review fair apportionment.

Paragraph (c)(2)(of the attached revision). This provision would directly repeal *McGough v. First Court of Appeals*, 842 S.W. 2d 637 (Tex. 1992), *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App.-Dallas 1994, writ dismiss'd by agr.), and their progeny. If the desired result is replacement of the next friend, for some reason, then appointment of a guardian under the Probate Code is appropriate. If the guardian ad litem were to become the personal representative, then is another conflict created? If a guardian ad litem believes the incapacitated person is not properly represented, he or she should immediately bring that matter to the court's attention after notice and hearing. Otherwise, the incapacitated person has a lawyer, and in the case of a guardianship, a lawyer whose representation and fee agreement have been approved by the court. In summary, it makes no sense for a guardian ad litem to become the personal representative or the lawyer.

Paragraphs (c)(3), (4) and (5).(of the attached revision). These paragraphs may be overkill, but each is intended to reverse current case law that appears to expand the role of the guardian ad litem. A competent attorney should be able to evaluate a settlement without anything

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more than a discussion with all counsel. In fact, when no conflict exists but court approval is necessary for some reason, the court usually approves a settlement on less information than that

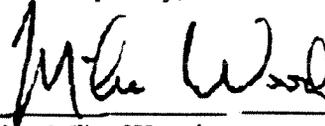
Counsel for the plaintiff commonly receives a contingent fee, and should have the responsibility for receipt and investment of the settlement proceeds. After the settlement apportionment is approved, no conflict exists, and investment of an incapacitated person's funds can be handled by plaintiff's and to a lesser extent, defendants' counsel. It has never been clear to me why the expense of investing the settlement proceeds should be paid by the offering defendant.

Imposition of fiduciary responsibility on the guardian ad litem flies in the face of all attempts to limit guardian ad litem fees. Again, if we need a fiduciary, appoint a guardian, where we have an established body of law describing duties and responsibilities. Don't create duties by common law, opinion by opinion, especially duties that may have an uncertain future quantity and quality, and then expect the guardian ad litem to serve for a reasonable fee based only on pre-judgment time.

Paragraph (d).(of the attached revision) Every time guardian is used, ad litem should be attached, to avoid any possibility of confusion between attorney ad litem and guardian ad litem. The phrase "for services rendered" seems to be superfluous.

This letter has lengthened far beyond my original intent, for which I apologize. I hope it assists the committee in completing its revision. Please do not hesitate to call if I may provide any additional explication of my thoughts.

Yours very truly,



Judge Mike Wood

MW/
enclosures