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Revised Texas Rule of Civil Procedure 173: The True Scope of a Guardian Ad Litem's Representation.

Allison P. Mingle

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**REVISED TEXAS RULE OF CIVIL PROCEDURE 173: THE
TRUE SCOPE OF A GUARDIAN AD
LITEM'S REPRESENTATION**

ALLISON P. MINGLE

I. Introduction.....	697
II. Pre-2005 Rule 173.....	700
III. The Chief Complaints Surrounding the Pre-2005 Rule 173	705
A. Unnecessary and Unreasonable Acts Performed.....	705
B. Failure to Properly Appoint a Guardian Ad Litem	707
IV. Amended Rule 173	709
A. Appointment Governed by Statute or Other Rules....	709
B. Appointment of Guardian Ad Litem and Procedure ..	710
C. Communications Privileged.....	710
D. Role of Guardian Ad Litem.....	710
E. Compensation.....	712
F. Review.....	713
V. Amended Rule 173's Effect on Guardians Ad Litem	713
VI. Conclusion	715

I. INTRODUCTION

On October 25, 2002, a Texas trial court approved a settlement between Goodyear Dunlop Tires North America, Ltd., Gamez, and twenty-one other plaintiffs in a product's liability action, many of them minors.¹ In addition, the trial court awarded aggregate ad litem fees of \$397,741.12, to be taxed against Goodyear as court costs.² Later, on February 21, 2003, the trial court entered an additional order granting an aggregate award of \$30,000 for appellate costs (or \$5,000 per ad litem).³ The trial court concluded that the compensation awarded each guardian ad litem was "reasonable and necessary" due to, among other things, the

1. *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, No. 04-02-00932-CV, 2004 WL 1881746, at *1 (Tex. App.—San Antonio Aug. 25, 2004, no pet.).

2. *Id.* Initially, the guardians ad litem requested fees aggregating \$600,000 but the trial judge reduced the ad litem's hourly charge thereby reducing the awarded amount to \$400,000. *Id.* at *3.

3. *Id.* at *1.

ad litem's work performed throughout the case.⁴ Furthermore, the trial court concluded that it was "reasonable and necessary" for the guardians ad litem to participate in hearings and depositions.⁵

Goodyear appealed claiming that the aggregate ad litem fees of nearly \$400,000 were clearly excessive and that the guardians ad litem are not entitled to appellate fees.⁶ The thrust of their argument was that the guardians ad litem participated in activities beyond the scope of their appointment.⁷ After reviewing the evidence, the appellate court concluded that there was factually insufficient evidence to support the award of \$397,741.12 aggregate ad litem fees and remanded the case to the trial court for a re-calculation of ad litem fees.⁸ Among other things, the appellate court found that the guardians ad litem were duplicating work performed by the plaintiffs' attorneys, and, therefore, should not be compensated for such work.⁹ The court also found that the guardians ad litem billed for activities outside the scope of legal work, not just their guardian ad litem responsibilities.¹⁰ For example, it found that several guardians ad litem were "billing time for sleeping; billing time because the ad litem did not get to put his children to bed; and billing for more than 24 hours in any one day." These fees were deemed unreasonable as

4. *See id.* at *3 (noting the trial court's opinion that the guardians ad litem were instrumental in reaching a settlement and were prohibited from accepting other work for the duration of the appointment).

5. *Id.* The trial court also noted that the defendant never objected to the attendance of the guardians ad litem at various hearings and depositions or their involvement in the litigation until after a settlement was reached. *Id.*

6. *Goodyear Dunlop Tires N. Am., Ltd.*, 2004 WL 1881746, at *1. The thrust of Goodyear's argument is that the guardians ad litem participated in activities beyond the scope of their responsibilities. *Id.* at *4.

7. *Id.*

8. *Id.* at *11-12. The appellate court emphasized that five of the six guardians ad litem were appointed only two weeks before the settlement was dictated and only served six weeks total before the settlement was finally approved, yet they were awarded fees based on 160 to 222 hours of service. *Id.* at *11. In accruing these hours of work, the guardians ad litem "engaged in activities outside the scope of their appointment, billed for other attorneys not approved by the trial court, billed for multiple attorneys to attend hearings . . . billed between 0.10 and 4.00 hours to review *each* deposition notice, and even billed time for sleeping." *Id.* In whole, the appellate court was unable to reconcile the guardians ad litem's billing statement with the fee awarded. *Id.* at *12.

9. *See id.* at *5-6 (finding that some of the guardians ad litem charged for time spent reviewing "every piece of paper that crossed their desk," all deposition notices, and attendance at depositions and hearings regardless of whether the particular event related to their respective minor).

10. *Id.* at *10.

a matter of law and an improper performance of a guardian ad litem's legal duty.¹¹

Results such as those in *Goodyear Dunlop Tires North America, Ltd., v. Gamez*¹² can hardly be blamed on the trial court alone. The former statute governing the appointment of a guardian ad litem was, at best, ineffective, and did not serve as adequate guidance for trial courts or appointees. It failed to outline the specific role a guardian ad litem was to play during a suit and was also unsuccessful at outlining what aspects of litigation a guardian ad litem could and could not participate in during the course of the trial and or settlement.¹³ The former version of the rule also allowed for a reasonable fee to compensate the guardian ad litem for his services but failed to state specific parameters for the judge to follow when determining what a "reasonable" fee is for compensation.¹⁴ As a result, in 2001, the Texas Supreme Court appointed a task force to review different guardian ad litem issues and give their recommendations to the Texas Supreme Court's advisory committee, who then drafted an amendment to Texas Rule of Civil Procedure 173.¹⁵

11. *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, No. 04-02-00932-CV, 2004 WL 1881746, at *10 (Tex. App.—San Antonio Aug. 25, 2004, no pet.). Justice Duncan wrote a scathing concurring opinion in which she expressed her "shock and outrage at the billing practices exhibited in this case by these ad litem." *Id.* at *13 (Duncan, J., concurring opinion). She states further that "[b]illing practices such as these not only demonstrate why the legal profession in general—and ad litem in particular—are under siege but also . . . forcefully support [her] request to the full court to report these attorneys to the grievance committee." *Id.* Texas Disciplinary Rule of Professional Conduct 1.04(a) specifically prohibits a lawyer from charging or collecting "an unconscionable fee." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

12. No. 04-02-00932-CV, 2004 WL 1881746, at *10 (Tex. App.—San Antonio Aug. 25, 2004, no pet.).

13. See Mary Alice Robbins, *Fix-It Committee to Look at How Guardian Ad Litem Fees Calculated*, TEX. LAW., Nov. 26, 2001, at 7 (providing that "there are no criteria for judges to follow in making [guardian ad litem] appointments"). One member of the task force appointed in 2001 admits that a guardian ad litem is generally appointed when there is a conflict between a minor and his parents during a settlement agreement but further adds that "the rule isn't as clear as it could be about when an ad litem should be appointed." *Id.*

14. See TEX. R. CIV. P. 173 (Vernon 2004, amended 2005) (stating that guardians ad litem are entitled to a "reasonable fee"); Mary Alice Robbins, *Fix-It Committee to Look at How Guardian Ad Litem Fees Calculated*, TEX. LAW., Nov. 26, 2001, at 7 (noting that there are no decisive factors for judges to follow when calculating guardian ad litem fee awards).

15. Mary Alice Robbins, *Fix-It Committee to Look at How Guardian Ad Litem Fees Calculated*, TEX. LAW., Nov. 26, 2001, at 7; see also Mary Alice Robbins, *Committee Proposal Clarifies Roles for Guardians Ad Litem*, TEX. LAW., Mar. 22, 2004 (repeating Justice Hecht's statement that "the court has been concerned about the large fees – some in the six figures – paid to ad litem in some cases"). The appellate court in *Goodyear Dunlop Tires North America, Ltd.* indicated "these . . . billings demonstrate how the system can be

The amendment was adopted¹⁶ and the revised rule became effective February 1, 2005 and, according to Texas Supreme Court Justice Nathan Hecht, revised Rule 173 “severely limits the roles and compensation for ad litem in civil nonfamily, nonprobate cases.”¹⁷ The revision essentially replaces one rule with seven subsections, each detailing a different aspect of appointing a guardian ad litem and possible compensation for services rendered.¹⁸ Revised Rule 173 makes it clear to guardians ad litem that they are appointed to represent the minor or incapacitated adult and not appointed as their attorney.¹⁹

The purpose of this Recent Development is to discuss: (1) general information and the former Rule 173; (2) the chief complaints surrounding former Rule 173; (3) the amended Rule 173 which became effective February 1, 2005; and (4) how the enactment of amended Rule 173 will affect guardians ad litem.

II. PRE-2005 RULE 173

The former version of Rule 173 provides for the following:

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 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.²⁰

abused by ad litem and must not be condoned or compensated.” *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, No. 04-02-00932-CV, 2004 WL 1881746, at *11-12 (Tex. App.—San Antonio Aug. 25, 2004, no pet.). Further, Justice Duncan specifically noted that the then proposed amendments to Rule 173 will better define the role of the guardian ad litem. *Id.* at 13 (Duncan, J., concurring).

16. See Order, Texas Supreme Court, Amendments to the Texas Rules of Civil Procedure, No. 04-9224, at 1 (Oct. 7, 2004) (ordering the adoption of revised Rule 173).

17. Mary Alice Robbins, *Guardian Ad Litem, Jury Instruction Rules Changed*, TEX. LAW., Oct. 18, 2004. Justice Hecht further explained that the rule revision is “intended to stop trial courts’ practice of paying ‘hundreds and hundreds of thousands of dollars’ to ad litem.” *Id.* Hecht suggests that guardian ad litem fees should be more like \$50 or \$500. *Id.*

18. See Order, Texas Supreme Court, Amendments to the Texas Rules of Civil Procedure, No. 04-9224, at 1 (Oct. 7, 2004) (providing the revised Rule 173 in its complete form).

19. Mary Alice Robbins, *Committee Proposal Clarifies Roles for Guardians Ad Litem*, TEX. LAW., Mar. 22, 2004, at 4.

20. TEX. R. CIV. P. 173 (Vernon 2004, amended 2005). The use of the word “shall” in the rule is mandatory. *Enloe v. Barfield*, 415 S.W.2d 721, 722 (Tex. Civ. App.—Beaumont 1967), *rev’d on other grounds*, 422 S.W.2d 905 (Tex. 1968); *Jaynes v. Lee*, 306 S.W.2d 182,

The trial court has the discretion to appoint a guardian ad litem.²¹ However, if the trial court abuses its discretion by refusing to appoint a guardian ad litem, despite the known presence of a conflict, the trial court's judgment is voidable and susceptible to direct attack.²² The trial court is limited in its ability to appoint a guardian ad litem to instances where there is a conflict of interest between the incapacitated person and another party to the suit.²³ Once the conflict ceases to exist, the trial court should remove the guardian ad litem.²⁴

The powers of the guardian ad litem under the former Rule 173 were, to some extent, limited but not clearly defined. The guardian ad litem's role was limited to protecting the minor or incapacitated person's interests and was not appointed as an attorney for such person.²⁵ The guard-

185 (Tex. Civ. App.—Texarkana 1957, no writ); *see also* Byrd v. Woodruff, 891 S.W.2d 689, 705 (Tex. App.—Dallas 1994, writ dismissed by agreement) (finding that if the trial court determines that a conflict exists, it must appoint a guardian ad litem).

21. *In re* Fort Worth Children's Hosp., 100 S.W.3d 582, 590 (Tex. App.—Fort Worth 2003, no petition); *Estate of Catlin v. Gen. Motors Corp.*, 936 S.W.2d 447, 452 (Tex. App.—Houston [14th Dist.] 1996, no writ) (citing *Simon v. York Crane and Rigging Co.*, 739 S.W.2d 793, 794 (Tex. 1987)). An appellate court must determine "whether the [trial] court acted without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). It is an abuse of discretion if the trial court "appoints a guardian ad litem . . . in the absence of a conflict or if the trial court does not discharge the guardian ad litem when the conflict has ended." *In re* Fort Worth Children's Hosp., 100 S.W.3d at 591.

22. *Hungate v. Hungate*, 531 S.W.2d 650, 653 (Tex. Civ. App.—El Paso 1975, no writ); Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 166 (1997); *see also* *Cook v. Winters*, 645 F. Supp. 158, 160 (S.D. Tex. 1986) (holding that "the improper failure to appoint a guardian ad litem" renders the judgment voidable and subject to direct attack, not collateral attack, in either federal or state courts).

23. *Estate of Catlin v. Gen. Motors Corp.*, 936 S.W.2d 447, 452 (Tex. App.—Houston [14th Dist.] 1996, no writ). Some suggest that as long as there is the possibility of a conflict in the future, the trial judge must appoint a guardian ad litem to protect the party's interest. *See* Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 166 (1997) (stating that if there is a likelihood that adverse interests might develop, the trial court must appoint a guardian ad litem).

24. *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 755 (Tex. 1995); *Estate of Catlin v. Gen. Motors Corp.*, 936 S.W.2d 447, 452 (Tex. App.—Houston [14th Dist.] 1996, no writ).

25. *See* *Estate of Catlin v. Gen. Motors Corp.*, 936 S.W.2d 447, 452 (Tex. App.—Houston [14th Dist.] 1996, no writ) (indicating that an ad litem is merely an officer appointed by the court to protect a child's interest and not an attorney for the child); *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ dismissed by agreement) (noting that the guardian ad litem participates in court proceedings as the minor's personal representative and not as the minor's attorney); *see also* *Durham v. Barrow*, 600 S.W.2d 756, 761 (Tex. 1980) (stating that an ad litem's role is limited to issues in "the suit for which he was appointed").

ian ad litem's participation in the suit was "limited to matters related to the suit for which he or she is appointed."²⁶ The guardian ad litem "should participate in the case to the extent necessary to adequately protect the [incapacitated person's] interest and has considerable latitude in determining what activities are necessary to that effort."²⁷

The guardian ad litem was allowed reasonable compensation only for his representation of the incapacitated person.²⁸ The compensation was paid to the guardian ad litem as part of the costs of litigation taxed to the losing party.²⁹ The guardian ad litem was not entitled to receive compensation for the time spent disputing his fees.³⁰ Likewise, the guardian ad litem was not entitled to compensation for post-lawsuit services.³¹ The reasonableness of fees is normally determined by the trial court using the

26. *Grunewald v. Technibilt Corp.*, 931 S.W.2d 593, 595 (Tex. App.—Dallas 1996, writ denied); *see also* *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995) (limiting the scope of the ad litem's representation to only matters regarding the suit for which the guardian is appointed).

27. *Grant ex rel. Sosa v. Koshy*, 961 S.W.2d 420, 424 (Tex. App.—Houston [1st Dist.] 1997, pet. denied); *see also* *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ dismissed by agr.) (giving the guardian ad litem significant freedom in determining what "depositions, hearings, conferences, or other activities are necessary to such effort").

28. *See* TEX. R. CIV. P. 173 (Vernon 2004, amended 2005) (directing courts to allow a guardian ad litem reasonable fees); *see also* *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995) (citing TEXAS RULE OF CIVIL PROCEDURE 173); *Holt Tex., Ltd. v. Hale*, 144 S.W.3d 592, 594 (Tex. App.—San Antonio 2004, no pet.) (citing Texas Rule of Civil Procedure 173).

29. *See* TEX. R. CIV. P. 173 (Vernon 2004, amended 2005) (allowing the guardian ad litem "a reasonable fee for his services to be taxed as a part of the costs"); *see also* TEX. R. CIV. P. 131 (Vernon 2004) (providing that "[t]he successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided"); TEX. R. CIV. P. 141 (Vernon 2004) (allowing the court, for good cause, to adjudge the costs otherwise than the rules state).

30. *See* *Holt Tex., Ltd. v. Hale*, 144 S.W.3d 592, 598 (Tex. App.—San Antonio 2004, no pet.) (concluding that Rule 173 does not authorize compensation for the representation of the guardian ad litem's own interest). The appellate court found that the trial court abused its discretion in awarding the guardian ad litem compensation for the hours spent arguing over his fees. *Id.*

31. *See* *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 757 (Tex. 1995) (holding that an ad litem is not entitled to fees for services provided after the trial). In *Brownsville-Valley Reg'l Med. Ctr.*, the trial court awarded the guardian ad litem \$40,000 for work performed on the settlement and also work to be performed over the next twenty-two years in advising the minor's parents and overseeing the activities of the newly established trust. *Id.* at 754. The guardian ad litem contended that his services were necessary even after a settlement was reached because the trustee would not adequately monitor the minor's health care and personal needs. *Id.* at 756. The Texas Supreme Court disagreed with this assessment and found that the guardian ad litem's services were not authorized by Rule 173 or reasonable and necessary to care for the minor child's interests. *Id.*

same standards as set out for all attorneys' fees in the Texas Disciplinary Rules of Professional Conduct.³² Those factors include, but are not limited to, the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.³³

The trial court has the discretion to determine the guardian ad litem's reasonable fee, and that determination will not be overturned unless there is a clear abuse of discretion.³⁴ Similar to the abuse of discretion standard used in the appointment of a guardian ad litem, a trial court abuses its discretion if it acts "without reference to any guiding rules or principles" or acts in an arbitrary and capricious manner.³⁵ In other words, a trial court abuses its discretion if it awards guardian ad litem fees

32. *Holt Tex., Ltd. v. Hale*, 144 S.W.3d 592, 594 (Tex. App.—San Antonio 2004, no pet.); *see also Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999) (per curiam) (using the Texas Disciplinary Rules of Professional Conduct factors to determine the reasonableness of guardian ad litem fees); *see also Roark v. Mother Frances Hosp.*, 862 S.W.2d 643, 646 (Tex. App.—Tyler 1993, writ denied) (stating that the trial court generally considers factors that apply in other contexts). The *Garcia* court cautions that although the same factors are used to determine the reasonableness of guardian ad litem fees and attorney's fees, their roles in a suit are significantly different. *Garcia*, 988 S.W.2d at 222 n.2.

33. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

34. *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995); *Valley Coca-Cola Bottling Co. v. Molina*, 818 S.W.2d 146, 148 (Tex. App.—Corpus Christi 1991, writ denied); *Poston v. Poston*, 572 S.W.2d 800, 802 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ).

35. *Valley Coca-Cola Bottling Co. v. Molina*, 818 S.W.2d 146, 148 (Tex. App.—Corpus Christi 1991, writ denied).

when there is insufficient or no evidence to support awarding of such fees.³⁶

In the context of a friendly suit,³⁷ the guardian ad litem owes the incapacitated person a fiduciary duty.³⁸ Because the settlement agreement reached by the parties in a friendly suit is forever binding on the parties, the guardian ad litem's role is even more crucial than in other circumstances because the ad litem's appointment may have serious repercussions for the party.³⁹ In the exercise of this fiduciary duty, "the guardian ad litem shall: (i) use the skill and prudence that an ordinary, capable, and careful person would use in the conduct of his own affairs, (ii) use diligence and discretion in representing the minor's interests, and (iii) be loyal to his fiduciary."⁴⁰

When evaluating the adequacy of a settlement offer, the guardian ad litem must make a recommendation to the trial court after a thorough evaluation of "(i) the damages suffered by the minor, (ii) the adequacy of the settlement, (iii) the proposed apportionment of settlement proceeds among the interested parties, (iv) the proposed manner of disbursement

36. *Holt Tex., Ltd. v. Hale*, 144 S.W.3d 592, 595 (Tex. App.—San Antonio 2004, no pet.). In *Holt*, the appellate court found that the trial court abused its discretion in awarding a guardian ad litem fee totaling \$50,000.00. *Id.* at 597. In its opinion, the court considered the hours spent on the appointment, the type of case involved and the complexity of the guardian ad litem issues, the customary guardian ad litem rate in the community, and the benefit bestowed on the minors and concluded that an hourly rate of \$555 was unreasonable. *Id.* The appellate court suggested that the guardian ad litem remit his compensation by \$27,500 based on an hourly rate of \$300. *Id.* at 598; *see also* *Borden, Inc. v. Martinez*, 19 S.W.3d 469, 471 (Tex. App.—San Antonio 2000, no pet.) (indicating that a trial court abuses its discretion when there is an absence of or insufficient evidence to support the award to the attorney); *Dalworth Trucking Co., v. Bulen*, 924 S.W.2d 728, 738 (Tex. App.—Texarkana 1996, no writ) (requiring that in order for the trial court to clearly abuse its discretion it must have awarded the attorney his fees when there was either insufficient or no evidence to support such an award).

37. A "friendly suit" is defined as "[a] lawsuit in which all the parties have agreed beforehand to allow a court to resolve the issues." BLACK'S LAW DICTIONARY 692 (8th ed. 2004).

38. *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App.—Dallas 1994, writ dismissed by agr.). The issue of the liability of a guardian ad litem appointed under Rule 173 was one of first impression for Texas courts. *Id.* at 704. The Dallas court examined the nature of the relationship between the guardian ad litem, the disabled person, and the court in arriving at its decision. *Id.* The court realizes and notes that Texas law does not explicitly state that a fiduciary relationship exists, but nevertheless, the Dallas court analogizes the ad litem and the incapacitated person's relationship to one between the guardian of an estate or guardian of a ward of the state and his client. *Id.* at 706.

39. *See id.* (maintaining that the court's final judgment is a final determination of the party's interests as represented by the guardian ad litem).

40. *Id.* at 706-07. The guardian ad litem must place the disabled person's interest above all others, including his own. *Id.* at 707.

of the settlement proceeds, and (v) the amount of attorneys' fees charged by the minor's attorney."⁴¹ A reasonable and fair settlement amount is not necessarily the greatest amount a jury would award but rather the probable outcome that would occur if a trial were conducted.⁴²

If a party has an objection to the guardian ad litem's activities or to the amount of the ad litem's compensation, it is imperative that he properly object to preserve error for appeal. The burden is on the guardian ad litem to ensure that he does not exceed the parameters of his role;⁴³ therefore, an objection is properly preserved as long as the objection itself is raised at or before the fee hearing.⁴⁴

III. THE CHIEF COMPLAINTS SURROUNDING THE PRE-2005 RULE 173

A. *Unnecessary and Unreasonable Acts Performed*

The foremost complaint with the former Rule 173 is that it fails to give guidance to trial courts and guardians ad litem as to the ad litem's specific role in the trial or settlement.⁴⁵ Specifically, there is confusion between the different roles of the guardian ad litem and the attorney for the minor or incapacitated adult.⁴⁶ The most common issue brought before appel-

41. *Id.*

42. Jennifer L. Anton, Comment, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 174 (1997).

43. See *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, No. 04-02-00932-CV, 2004 WL 1881746, at *4 (Tex. App.—San Antonio Aug. 25, 2004, no pet.) (placing the burden on the ad litem not to exceed the scope of their appointment).

44. See *id.* at *4 (recognizing that error was properly preserved by raising objection at a fee hearing); see also *Jocson v. Crabb*, 133 S.W.3d 268, 270 (Tex. 2004) (per curiam) (*Jocson II*) (asserting that the post-judgment fee hearing is the "appropriate forum to assert any objections to the fee request and obtain a ruling"). In *Jocson I*, the court of appeals found the defendants' complaints concerning ad litem fees "unpersuasive" because they failed to obtain a ruling on their objection to the ad litem's attendance at various hearings and depositions. *Jocson v. Crabb*, 98 S.W.2d 273, 279 (Tex. App.—Houston [1st Dist.] 2004) (*Jocson I*), *rev'd*, 133 S.W.3d 268 (Tex. 2004). The Texas Supreme Court clearly disagreed with that ruling and found that the defendants properly preserved their error. *Jocson II*, 133 S.W.3d at 270. Consequently, the Texas Supreme Court reversed the appellate court's decision and remanded the case for a determination of the defendants' properly preserved objections. *Id.* at 271.

45. See Mary Alice Robbins, *Committee Proposal Clarifies Roles for Guardians Ad Litem*, TEX. LAW., Mar. 22, 2004, at 4 (paraphrasing a committee member's comment that the lack of clarity in the former Rule 173 causes confusion about what role the guardian ad litem is to play in a suit or settlement).

46. Compare TEX. FAM. CODE ANN. § 107.001 (Vernon Supp. 2004) (clearly defining different terms found in this chapter of the Texas Family Code) with TEX. R. CIV. P. 173 (Vernon 2004, amended 2005) (failing to make a clear distinction between amicus attorneys, attorneys ad litem, and guardians ad litem). The Texas Family Code makes a distinction between amicus attorneys, attorneys ad litem, and guardians ad litem in suits affecting

late courts is that the guardian ad litem's compensation is excessive.⁴⁷ Incorporated in that chief complaint is that the guardian ad litem did not perform acts within the scope of his representation of the minor or incapacitated adult.⁴⁸ In other words, the guardian ad litem performed acts that were not reasonable and necessary to protect the interests of the minor or incapacitated adult and also received compensation for such work.

Many trial courts allow guardians ad litem to take a more active role in the litigation of a suit, a role that is clearly intended for the minor or incapacitated adult's attorney and not the guardian ad litem.⁴⁹ Worse yet, the trial courts often allow the guardian ad litem to receive compensation for such involvement.⁵⁰ For example, in *Goodyear Dunlop Tires North*

the parent-child relationship. TEX. FAM. CODE ANN. § 107.001 (Vernon Supp. 2004). An amicus attorney is "an attorney appointed by the court in a suit . . . whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." *Id.* An attorney ad litem is "an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation." *Id.* A guardian ad litem is "a person appointed to represent the best interests of a child," not necessarily an attorney. *Id.*

47. See *Jocson I*, 98 S.W.3d at 277-78 (addressing the complaints on appeal that the trial court abused its discretion in awarding guardian ad litem fees totaling \$120,077.75); see also *Garcia v. Martinez*, 988 S.W.2d 219, 221 (Tex. 1999) (per curiam) (appealing the appellate court's affirmance of the trial court's award of \$15,000 guardian ad litem compensation to be paid by one defendant). In *Garcia*, Dr. Garcia appealed the trial court's award of guardian ad litem fees because the final judgment provided that he was only responsible for 1/12 of the court costs. *Id.* Therefore, Dr. Garcia complained that he should only have to pay 1/12 of the guardian ad litem fees. *Id.* The Texas Supreme Court reversed the judgment of the court of appeals and remanded the case to the trial court to determine the appropriate guardian ad litem compensation to be taxed against Dr. Garcia. *Id.* at 223; see also *Goodyear Dunlop Tires N. Am., Ltd.*, 2004 WL 1881746, at *1 (appealing the trial courts award of nearly \$400,000 guardian ad litem fees as clearly excessive).

48. See *Jocson I*, 98 S.W.3d at 277 (arguing, among other things, that the fee awarded was supported by insufficient evidence or no evidence because the guardian ad litem charged for work that should have been performed by the minor's attorney); *Goodyear Dunlop Tires N. Am., Ltd.*, 2004 WL 1881746, at *3 (arguing, among other things, that the guardians ad litem were compensated for work performed outside the scope of their duty as an ad litem).

49. See *Jocson I*, 98 S.W.3d at 277-78 (recounting that the trial court approved the guardian ad litem fees despite the duplicitous nature of the work performed). The defendants in *Jocson* argued that the guardian ad litem "reviewed every piece of paper, and attended over 50 depositions, knowing that neither the documents nor the testimony of the witnesses was relevant to any conflict between the child and her parents." *Id.*; see also *Goodyear Dunlop Tires N. Am., Ltd.*, 2004 WL 1881746, at *5 (finding that the guardians ad litem duplicated work competently performed by the minors' attorneys).

50. See *Jocson v. Crabb*, 133 S.W.3d 268, 270 (Tex. 2004) (per curiam) (*Jocson II*) (recounting that the trial court approved the guardian ad litem fees totaling \$117,150 over the objections of the defendants that the fees were excessive); *Goodyear Dunlop Tires N.*

America, Ltd., the appellate court found that the guardians ad litem billed extensive amounts of time to duplicate work that the minors' attorneys were already competently performing.⁵¹ Despite the duplicitous nature of the work, the trial court granted the guardians' requests for compensation.⁵² On appellate review, the court remanded the case to the trial court to make specific findings as to the reasonableness of the work performed and if such work was "necessary to protect the interests of the various minors."⁵³

B. *Failure to Properly Appoint a Guardian Ad Litem*

As previously noted, the role of a guardian ad litem is separate and distinct from the role of an attorney ad litem.⁵⁴ The Texas Family Code specifically delineates between the two. An attorney ad litem is the minor or incapacitated adult's attorney, meaning he is to "participate in the conduct of the litigation to the same extent as an attorney for a party."⁵⁵ In contrast, a guardian ad litem is allowed to attend all legal proceedings "but may not call or question a witness or otherwise provide legal services unless the guardian ad litem is a licensed attorney who has been appointed" as both attorney ad litem and guardian ad litem.⁵⁶

As several appellate courts recognize, a guardian ad litem is appointed to represent the interests of the minor child or incapacitated adult and is not appointed as the attorney for such party.⁵⁷ Unfortunately, several trial courts failed to properly appoint a guardian ad litem under Rule

Am, Ltd., 2004 WL 1881746, at *7 (remanding the case to the trial court to determine whether specific activities performed by the guardians ad litem were reasonable and necessary to award compensation).

51. *Goodyear Dunlop Tires N. Am., Ltd.*, 2004 WL 1881746, at *5. For example, the guardians ad litem attended depositions unrelated to their respective minor and reviewed every pleading filed in the case regardless of its relevance to their respective minor. *Id.* The appellate court held that it is "not reasonable or necessary for a guardian ad litem to attend or review every deposition, or to review and bill time for every motion and pleading filed in a case, without regard to its relevance to the ad litem's minor." *Id.*

52. *See id.* (recounting that the trial court awarded the guardians ad litem aggregate compensation totaling \$397,741.12).

53. *Id.* at *7.

54. *Int'l Dairy Queen, Inc. v. Matthews*, 126 S.W.3d 629, 630 (Tex. App.—Beaumont 2004, no pet.). In this case, the parties to the suit used the terms interchangeably despite the lack of a written order appointing a guardian ad litem. *Id.*

55. TEX. FAM. CODE ANN. § 107.003(1)(D) (Vernon Supp. 2004).

56. TEX. FAM. CODE ANN. § 107.002(c)(4) (Vernon Supp. 2004); *see also* TEX. FAM. CODE ANN. § 107.001(5)(d) (defining guardian ad litem to include "an attorney ad litem appointed to serve in the dual role").

57. *Garcia v. Martinez*, 988 S.W.2d 219, 222 n.2 (Tex. 1999); *Am. Gen. Fire & Cas. Co. v. Vandewater*, 907 S.W.2d 491, 493 n.2 (Tex. 1995).

173.⁵⁸ In *Holt*, the trial court's order appointed Hale as an attorney ad litem and not as a guardian ad litem.⁵⁹ Despite this error, the parties to the suit properly acknowledged that Hale's presence in the suit was limited to the role of a guardian ad litem instead of an attorney ad litem, as ordered.⁶⁰ In *International Dairy Queen Inc.*, the parties used the terms guardian ad litem and attorney ad litem interchangeably despite the order granting an attorney ad litem only.⁶¹ That appellate court noted that although the trial court probably intended to appoint a guardian ad litem pursuant to Rule 173, the signed order prevailed and failed to properly appoint a guardian ad litem.⁶²

In response to clearly excessive guardian ad litem fees and other problems, the Texas Supreme Court, in 2001, appointed a special task force to research the various issues associated with the appointment of a guardian ad litem.⁶³ The special task force specifically identified five problematic areas:

First, the appointee and judiciary often lack the information and training necessary to enable the appointment process to operate efficiently. Second, trial courts sometimes make appointments unnecessarily. Third, some appointments "involve impropriety or the appearance of impropriety." Fourth, the compensation system for some types of appointees is subject to abuse. Finally, the current law regarding the scope of an appointee's duties does not always provide sufficient guidance for the appointees and the courts.⁶⁴

Based on the task force's findings, the Texas Supreme Court Advisory Committee recommended a new rule expounding a guardian ad litem's

58. See *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 (Tex. 1995) (recognizing that both the trial court and the appellate court used the terms "guardian ad litem" and "attorney ad litem" interchangeably); see also *Matthews*, 126 S.W.3d at 630 (noting that the trial court used the terms "guardian ad litem" and "attorney ad litem" interchangeably although the court order did not appoint a guardian ad litem); *Holt Tex., Ltd. v. Hale*, 144 S.W.3d 592, 594 n.1 (Tex. App.—San Antonio 2004, no pet.) (noting that the trial court's order fails to properly appoint the guardian ad litem).

59. *Hale*, 144 S.W.3d at 594.

60. *Id.*

61. *Int'l Dairy Queen, Inc. v. Matthews*, 126 S.W.3d 629, 630 (Tex. App.—Beaumont 2004, no pet.).

62. *Id.*

63. Mary Alice Robbins, *Committee Proposal Clarifies Roles for Guardians Ad Litem*, TEX. LAW., Mar. 22, 2004 at 1; Mary Alice Robbins, *Fix-it Committee to Look at How Guardian Ad Litem Fees Calculated*, TEX. LAW., Nov. 26, 2001, at 7.

64. *Brownsville-Valley Reg'l Med. Ctr., Inc. v. Gamez*, 894 S.W.2d 753, 756 n.5 (Tex. 1995) (citing *Report of the Supreme Court Task Force to Examine Appointment By the Judiciary 5-6* (Mar. 1, 1993)); see also REPORT OF THE SUPREME COURT TASK FORCE TO EXAMINE APPOINTMENTS BY THE JUDICIARY 5-6 (Mar. 1, 1993).

role in civil suits in Texas.⁶⁵ The amended rule specifically states what functions a guardian ad litem can and cannot perform during the duration of his appointment and also establishes parameters for calculating a reasonable fee for services rendered.⁶⁶

IV. AMENDED RULE 173

On October 7, 2004, the Texas Supreme Court ordered an amendment to the Texas Rule of Civil Procedure 173.⁶⁷ The amendment essentially withdraws all of the current language and replaces it with seven individual sections.⁶⁸ The amended rule addresses a different and unique aspect of a guardian ad litem's appointment, function during the suit, communications between the guardian ad litem and his or her client, compensation, and review.⁶⁹ The amendment provides a specific framework for guardians ad litem and trial courts to follow because it substantially limits the ad litem's participation in litigation and provides guidelines for awarding the ad litem compensation.

A. Appointment Governed by Statute or Other Rules

Amended Rule 173.1 "does not apply to an appointment of a guardian ad litem governed by statute or other rules."⁷⁰ In other words, this revised rule does not apply when there are other applicable rules in the Family Code, Probate Code, or other rules, such as the Parental Notification Rules.⁷¹ Specific examples of exclusions from the rule include the "appointment of a guardian ad litem in a suit involving the parent-child relationship, a probate proceeding or application for a judicial bypass of parental notification when an underage girl seeks an abortion."⁷²

65. Mary Alice Robbins, *Committee Proposal Clarifies Roles for Guardians Ad Litem*, TEX. LAW., Mar. 22, 2004, at 1. The task force's recommendations were the starting point of the examination of the issue for the Texas Supreme Court Advisory Committee. *Id.*

66. TEX. R. CIV. P. 173 (Vernon 2004, amended 2005).

67. Order, Texas Supreme Court, Amendments to the Texas Rules of Civil Procedure, No. 04-9224, at 1, 3 (Oct. 7, 2004). A copy of this order is reprinted in 67 TEX. B.J. 894 (2004).

68. See TEX. R. CIV. P. 173 cmt. 1 (stating that "the rule is completely revised"). Any party or guardian violating this rule is "subject to appropriate sanction." *Id.* cmt. 8.

69. *Id.*

70. *Id.* cmt. 1.

71. *Id.* cmt. 2.

72. Mary Alice Robbins, *Committee Proposal Clarifies Role for Guardian Ad Litem*, TEX. LAW., Mar. 22, 2004, at 1.

B. *Appointment of Guardian Ad Litem and Procedure*

The appointment of a guardian ad litem may be made on the trial judge's initiative or upon the request of any party to the suit, but the order itself must be made in writing.⁷³ The trial court is required to appoint a guardian ad litem for a party represented by a next friend or guardian when "(1) the next friend or guardian appears to the court to have an interest adverse to the party; or (2) the parties agree."⁷⁴ Under that same rule, the trial "court must appoint the same guardian ad litem for" parties with similar interests unless the trial court determines that separate guardians ad litem are necessary.⁷⁵

C. *Communications Privileged*

Similar to an attorney-client privilege, "[c]ommunications 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."⁷⁶ Specifically, a lawyer cannot knowingly "[r]eveal confidential information of a client or a former client."⁷⁷ A lawyer is entitled to reveal confidential information, among other times, "[w]hen the lawyer has been expressly authorized to do so in order to carry out the representation"⁷⁸ Under the Texas Rules of Evidence, "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."⁷⁹

D. *Role of Guardian Ad Litem*

Under amended Rule 173.4, the role of the guardian ad litem is specifically delineated. The guardian ad litem is to act as both an officer and an advisor to the court.⁸⁰ The guardian ad litem's role as an advisor and officer of the court is still limited by the Texas Code of Judicial Conduct,

73. TEX. R. CIV. P. 173.3 (Vernon 2004, amended 2005). The rule also allows any party to object to the appointment of a guardian ad litem. *Id.*

74. *Id.* 173.2.

75. *Id.*

76. *Id.* 173.5; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (codifying the confidentiality rules between a lawyer and his or her client).

77. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 (b)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005). "'Confidential information' includes both 'privileged information' and 'unprivileged information'" given to an attorney from his client relating to his representation. *Id.*

78. *Id.*

79. TEX. R. EVID. 503(b)(1).

80. TEX. R. CIV. P. 173.4 (Vernon 2004, amended 2005).

Canon 3, which specifically states that a judge may not have ex parte communications with a guardian ad litem.⁸¹ In his role as an officer and advisor to the court, the guardian ad litem has qualified judicial immunity.⁸² In this context, a guardian ad litem will be protected from liability for damages as long as the ad litem is performing a discretionary function and “does not violate clearly established constitutional or statutory rights of which a reasonable person would have been aware.”⁸³ Texas defines a discretionary function as “a function that requires personal deliberation, decision, and judgment on the part of an official.”⁸⁴

After appointment, the guardian ad litem is required to determine if the party’s next friend or guardian has an interest that is adverse to the party, and to advise the court of such.⁸⁵ Even if there is an extreme circumstance which requires the guardian ad litem to take a broader role in a case, the ad litem is still limited to the role of determining if a party has an interest that is adverse to the ad litem’s party.⁸⁶

The guardian ad litem’s participation in litigation is directly limited to three specific circumstances. Thus, 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;

81. TEX. CODE JUD. CONDUCT, Canon 3(b)(8), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. B (Vernon 2005); *see also* TEX. R. CIV. P. 173.4 cmt. 6 (Vernon 2004, amended 2005) (commenting on the continued application of Canon 3 of the Texas Code of Judicial Conduct).

82. TEX. R. CIV. P. 173.4 cmt. 5 (Vernon 2004, amended 2005). *But see* Byrd v. Woodruff, 891 S.W.2d 689, 707 (Tex. App.—Dallas 1994, writ *dism’d* by *agr.*) (refusing to extend the doctrine of judicial immunity to a guardian ad litem in a friendly suit). The court realized that its decision may discourage potential guardians ad litem from participating in the program, but, nevertheless, the court felt that the minor’s right to sue for inadequate representation by his guardian ad litem outweighs that particular concern. *Id.*

83. Bartlett v. Cinemark USA, Inc., 908 S.W.2d 229, 237 (Tex. App.—Dallas 1995, no writ).

84. *Id.* at 238.

85. TEX. R. CIV. P. 173.4(b) (Vernon 2004, amended 2005). Under Texas Rule of Civil Procedure 44, a next friend may be appointed to represent a minor, lunatic, idiot, or person non compos mentis when he has no guardian. TEX. R. CIV. P. 44 (Vernon 2004, amended 2005). The appointing court must remove the next friend if it is discovered that the next friend has an interest in direct conflict with the disabled party. *Tex. Indem. Ins. Co. v. Hubbard*, 138 S.W.2d 626, 632 (Tex. Civ. App.—Waco 1940, writ dismissed).

86. TEX. R. CIV. P. 173.4(b) cmt. 4 (Vernon 2004, amended 2005).

- (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.⁸⁷

Included in the role as a guardian ad litem, if a settlement offer has been presented, the limited function of determining if the settlement proposed is in the party's best interest and advising the court of their decision.⁸⁸

This rule specifically contemplates the appointment of a guardian ad litem in the case of settlement division proceedings where the "party's next friend or guardian appears to have an interest adverse to the party['s]" best interests.⁸⁹ In that instance, the guardian ad litem in the case should not be involved in the litigation except to the extent such review or involvement is related to the division of settlement proceeds.⁹⁰ If the guardian ad litem chooses to be present at unnecessary events and hearings, he may not be compensated for such attendance or time spent while there.⁹¹

E. Compensation

Once the relationship between the guardian ad litem and incapacitated person ceases, if the guardian would like compensation, he or she must file an application for compensation detailing the basis for the requested compensation.⁹² Only 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."⁹³ After the application for compensation has been verified, "[u]nless all parties agree to the application, the court must conduct an evidentiary hearing to determine the total amount of fees and expenses

87. TEX. R. CIV. P. 173.4 (Vernon 2004, amended 2005). This amendment significantly limits the guardian ad litem's participation in litigation. Under the revised rule, the ad litem must have a sufficient reason in order to get the trial court's permission to take a more active role in litigation. *Id.*

88. *Id.* 173.4(c).

89. *Id.* 173.4(c) cmt. 3.

90. *Id.*

91. *Id.*

92. TEX. R. CIV. P. 173.6(b).

93. *Id.* The guardian ad litem's compensation may be taxed as costs of court. *Id.* The guardian ad litem "may not receive, directly or indirectly, anything of value in consideration of the appointment other than as provided by this rule." *Id.*

that are reasonable and necessary.”⁹⁴ The guardian ad litem’s compensation may be taxed as costs of court.⁹⁵ Further, the guardian ad litem must be paid with currency and “may not receive, directly or indirectly, anything of value in consideration of the appointment other than as provided by this rule.”⁹⁶

F. Review

The appointment of a guardian ad litem and his or her awarded compensation is not absolute, but is subject to review. Any party to the suit “may seek mandamus review of an order appointing the 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.”⁹⁷ Additionally, any party, including the guardian ad litem, may move to sever the order awarding compensation and the court must grant the order thereby creating a final, appealable order.⁹⁸ The finality of a settlement or judgment is not affected by the review of an order regarding a guardian ad litem.⁹⁹

V. AMENDED RULE 173’S EFFECT ON GUARDIANS AD LITEM

Amended Rule 173 will be a tremendous asset to the practice of guardians ad litem. Unlike its predecessor, it specifically states in what functions and capacity a guardian ad litem can and cannot participate. According to the advisory committee’s chairman, Charles “Chip” Babcock, “[t]his rule is not going to hurt guardians ad litem who are performing their duties in the way most of them have. It will, hopefully curb some of the abuses reportedly seen.”¹⁰⁰ A member of the 2001 task force feels that “if the plaintiff has a competent lawyer and the defendant has a competent lawyer, [there is no need] for the ad litem to take an

94. *Id.* The court must not consider the guardian ad litem’s compensation as any percentage of judgment or settlement. *Id.* Given that the guardian ad litem’s role and services performed is limited, his or her compensation should likewise be limited. *Id.* cmt. 7.

95. *Id.* 173.6(c).

96. *Id.* 173.6(a) (effective Feb. 1, 2005).

97. TEX. R. CIV. P. 173.6(a) (Vernon 2004, amended 2005).

98. *Id.* 173.7(b).

99. *Id.* 173.7(c).

100. Mary Alice Robbins, *Guardian Ad Litem, Jury Instruction Rules Changed*, TEX. LAW., Oct. 18, 2004, at 7. Charles L. Babcock is a partner in Jackson Walker, L.L.P. in Houston, Texas. Website of Jackson Walker, L.L.P., at <http://www.jw.com/site/jsp/atty-info.jsp?id=8> (emphasis omitted) (copy on file with the *St. Mary’s Law Journal*). He was first appointed Chairman of the Texas Supreme Court Advisory Committee in 1999 and was reappointed in 2002 to serve in that position until 2006. *Id.*

active role.”¹⁰¹ Specifically, in *Jocson v. Crabb*,¹⁰² a trial court awarded guardian ad litem fees in excess of \$100,000 even though the ad litem himself found no conflict between the minor and his parents and the ad litem was duplicating work performed by the plaintiff's attorney.¹⁰³

Another San Antonio attorney feels that “[f]or 80 percent of the cases that go through, the proposed rule makes sense.”¹⁰⁴ Another committee member feels that the revised rule will make the guardian ad litem more an extension of the court.¹⁰⁵ As the revised rule notes, the guardian ad litem is an “officer and advisor to the court.”¹⁰⁶ As such, the guardian ad litem is granted qualified judicial immunity thereby indicating the drafters' intention to make the ad litem more an extension of the court instead of a participant in court.¹⁰⁷

At least one attorney feels that the amendments are long overdue but that the role of a guardian ad litem should not be so limited.¹⁰⁸ If a guardian ad litem is so severely limited in his representative roles, he may

101. Mary Alice Robbins, *Committee Proposal Clarifies Roles for Guardians Ad Litem*, TEX. LAW., Mar. 22, 2004 at 1.

102. 98 S.W.3d 273 (Tex. App.—Houston [1st Dist.] 2004), *rev'd*, 133 S.W.3d 268 (Tex. 2004) (*Jocson I*).

103. *Jocson v. Crabb*, 98 S.W.3d 273, 277-98 (Tex. App.—Houston [1st Dist.] 2004), *rev'd*, 133 S.W.3d 268 (Tex. 2004) (*Jocson I*). In *Jocson I*, a guardian ad litem was appointed to represent the interests of a minor child during a suit brought by the minor child's parents for medical malpractice. *Id.* at 275. After a confidential settlement was reached, the guardian ad litem requested and the trial court awarded compensation totaling \$117,150 for 585 hours of work. *Id.* In 2004, the appellate court affirmed the award of the fees claiming that the trial court did not abuse its discretion in awarding such. *Id.* at 279. However, in the opinion of the First District Court of Appeals, Justice Price noted that the guardian ad litem never mentioned or knew of a specific conflict between the parents and their child. *Id.* at 277. Despite the lack of conflict, the guardian ad litem attended more than fifty depositions, read several more, and attended at least ten hearings, although he was unable to determine from his records the specific events or depositions. *Id.* More importantly, Price stated, “We find it surprising that it appears from the invoices that [the guardian ad litem] spent hundreds of hours attending hearings and depositions, but spent relatively little time on the responsibilities of a guardian.” *Id.* In an opinion dated February 13, 2004, the Texas Supreme Court remanded the case to the appellate court to address the objections raised by the defendants regarding the excessiveness of the guardian ad litem fees. *Jocson v. Crabb*, 133 S.W.3d 268, 271 (Tex. 2004) (*per curiam*) (*Jocson II*).

104. Mary Alice Robbins, *Committee Proposal Clarifies Roles for Guardians Ad Litem*, TEX. LAW., Mar. 22, 2004, at 1.

105. *Id.*

106. TEX. R. CIV. P. 173.4(a) (Vernon 2004, amended 2005). Again, this language advises the guardian ad litem that their role is as an advisor to the court of the minor or incapacitated adult's best interests and not as the attorney for such party. *Id.*

107. *Id.* cmt. 5.

108. Mary Alice Robbins, *Guardian Ad Litem, Jury Instruction Rules Changed*, TEX. LAW., Oct. 18, 2004, at 7.

be exposing himself to liability in the future.¹⁰⁹ For instance, before the amendment, once a minor reached majority age, if he feels that his guardian ad litem did not represent his best interest, he may sue his appointed guardian ad litem.¹¹⁰ However, the amended rule attempts to address this concern by granting a guardian ad litem qualified judicial immunity when acting in his discretionary function.¹¹¹

VI. CONCLUSION

While the legal community does not yet know of the precise impact of revised Rule 173, it is certainly an improvement over former Rule 173. Where the former Rule 173 was vague and lacked the necessary specific guidelines to adequately direct appointed guardians ad litem and the trial courts, the revised rule makes it clear that the role of the guardian ad litem is to act as an advisor to the court of the minor or incapacitated adult's best interests.¹¹² The revised rule will, hopefully, go a long way to curb some of the abuses seen by the trial courts which have in the past appointed guardians ad litem, who were awarded fees in excess of \$10,000, \$100,00, and even \$400,000. Trial courts and appointees now have a rule to reference during the duration of a guardian ad litem appointment that contains specific and effective guidelines so that there may be fewer abuses of the system.

109. See Mary Alice Robbins, *Guardian Ad Litem, Jury Instruction Rules Changed*, TEX. LAW., Oct. 18, 2004, at 7 (expressing a belief that a guardian ad litem so limited in his or her role is exposing himself or herself to risk in the future). L.E. Lopez, Jr. feels that there are many issues that arise in a lawsuit that the guardian ad litem should examine, and if their roles are severely limited, the guardian ad litem could be exposed to great risk. *Id.*

110. See TEX. CIV. PRAC. & REM. CODE ANN. § 16.001(b) (Vernon 2002) (tolling the statute of limitations for minors until they reach majority age); see also *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App.—Dallas 1994, writ dismissed by agreement) (refusing to grant judicial immunity to guardians ad litem because it will leave no recourse to the minor for inadequate representation by the ad litem).

111. TEX. R. CIV. P. 173.4(a) cmt. 5 (Vernon 2004, amended 2005). Within qualified judicial immunity, a guardian ad litem will only be protected from liability for damages if the ad litem is performing a discretionary function and “does not violate clearly established constitutional or statutory rights of which a reasonable person would have been aware.” *Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229, 237 (Tex. App.—Dallas 1995, no writ).

112. See generally TEX. R. CIV. P. 173 (Vernon 2004, amended 2005) (completely revising current Rule 173 and replacing it with seven subsections specifically detailing the role of the guardian ad litem and what compensation award is allowed).