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7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
8 MARCH 5, 2004
9 (AFTERNOON SESSION)
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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in Travis County for the State of Texas,
21 reported by machine shorthand method, on the 5th day of March,
22 2004, between the hours of 1:56 p.m. and 5:34 p.m., at the
23 Texas Association of Broadcasters, 502 East 11th Street, Suite
24 200, Austin, Texas 78701.
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1 **INDEX OF VOTES**

2

Votes taken by the Supreme Court Advisory Committee during this
3 session are reflected on the following pages:

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2 CHAIRMAN BABCOCK: Okay. We had a 13 to 9 vote,

3 although maybe some stragglers wanted to change to --

4 MR. DUGGINS: Nine side.

5 CHAIRMAN BABCOCK: -- a "yes," but I think that

6 the -- about the scope of the second sentence in 202.5, but I

7 think that the consensus was that we ought to go ahead and have

8 the subcommittee look at that and propose some language.

9 So moving right along, the next issue is to

10 remove the word "adverse" from section 202.3(a) and 202.1(f);

11 and this is Mr. Munzinger's idea, that anybody who has got an

12 interest in the lawsuit, whether they are adverse or not, ought

13 to have notice from the petitioner. So the issue is whether or

14 not we're going to have the subcommittee consider that and then

15 report back to us for a more full discussion. Does that work

16 or not?

17 MR. MEADOWS: Shall we have some brief

18 discussion about it? Is everybody -- is there any downside to

19 it? I mean, it's just broadening the net, as I understand it.

20 CHAIRMAN BABCOCK: Paula.

21 MS. SWEENEY: Yeah, it is a problem. It's

22 already hard to identify everybody who might become a party,

23 and you run into the risk if you guess wrong then you make the

24 deposition unusable later, so, I mean, it already says "All

25 persons the petitioner expects to have an interest adverse."

1 If you make it any broader than that you really....
2 MR. MUNZINGER: Chip?
3 CHAIRMAN BABCOCK: Yeah, Richard.
4 MR. MUNZINGER: With all due respect, I
5 disagree. The rule presently says that the trial court
6 currently has the jurisdiction, or the discretion rather, not
7 to allow a deposition to be used if a person was not given
8 notice. By removing a limitation on those who must be given
9 notice you actually increase the probability that the
10 deposition can be used.
11 CHAIRMAN BABCOCK: Okay. Any other comments
12 about this? This is so limited that it's not a matter that the
13 subcommittee particularly has to draft anything. Either we're
14 going to take the word "adverse" out or we're not, right?
15 MS. SWEENEY: What does that mean? Do you want
16 to call on me?
17 CHAIRMAN BABCOCK: Oh, I don't know. Let me
18 think about that.
19 HONORABLE TOM GRAY: Can we take a vote on that?
20 CHAIRMAN BABCOCK: Let's take a vote on whether
21 I call on Paula. Yeah, Paula.
22 MS. SWEENEY: Thank you. What does that mean,
23 "persons who have an interest"? Insurance companies? Well,
24 what is that legal term, "person interested"? Spouses of
25 people you might sue have an interest. I mean, "have an

1 adverse interest," I know what that means legally, but
2 "interested"? The partners of somebody you might later sue?
3 MR. MUNZINGER: Chip?
4 CHAIRMAN BABCOCK: Yeah, Richard.
5 MR. MUNZINGER: In response, if the partners of
6 somebody you later sue may have to pay the judgment, why
7 wouldn't they have an interest? Is the object here to find
8 evidence that might be used in justice or is the object here to
9 secure an advantage? If it's to secure justice, the greater
10 notice that you give, the greater likelihood you have that
11 those who have a real interest in the case may intervene,
12 thereby making it a more fair procedure for everybody,
13 lessening the problems on the trial court in exercising its
14 discretion as to whether to keep the evidence out.
15 MS. SWEENEY: But they're not going to be part
16 of the lawsuit. They're just interested. They're going to get
17 to come to this deposition or this hearing, but they're not
18 going to be part of the later lawsuit, but they're interested,
19 so I have to let them know? What does that mean?
20 MR. MUNZINGER: The classic definition of the
21 word "interest" I think would be that which the courts apply,
22 but if you want to specify it in the rule we can specify in the
23 rule. All I'm saying is that if you say "adverse interest" you
24 may or may not increase the category of those who may
25 participate whose rights might be affected. If I have an

1 interest and my right might be affected, why shouldn't I have
2 an opportunity to participate in a deposition in which my right
3 might be affected --
4 MS. SWEENEY: Happens all the time.
5 MR. MUNZINGER: -- as an American citizen.
6 MS. SWEENEY: Happens all the time.
7 MR. MUNZINGER: Well, it shouldn't.
8 MS. SWEENEY: Well, of course, it should. We're
9 going to have to sue everybody who might potentially be
10 interested in what happens in the lawsuit? That is not the
11 law. It's not even good public policy.
12 MR. MUNZINGER: Why write a rule that allows it
13 to persist?
14 CHAIRMAN BABCOCK: Can you think of some
15 instances where it could happen? For example, if there was an
16 accident and you thought that the cause of the accident was at
17 the hands of an individual or a company and they were adverse
18 because that's what you believed when you filed your petition,
19 but there may be some other companies out there who might be
20 implicated, but they are -- at this point you can't say they're
21 adverse, they're just another party. Would that be an instance
22 where you would not have to give them notice now, but would if
23 this amendment -- I'm just asking. I don't know. Richard.
24 MR. ORSINGER: If I understand the proposed
25 change, you could use the deposition against people with

1 notice, but not against people with no notice. Is that the
2 idea?
3 MR. MUNZINGER: Well, the rule at the moment
4 leaves it to the discretion of the trial court. A person
5 without notice may still be adversely affected by use of the
6 deposition.
7 MR. ORSINGER: After the proposed change you
8 cannot use it against someone that had no notice.
9 MR. MUNZINGER: No. That's not the change
10 that's proposed.
11 MR. ORSINGER: What's the proposed change?
12 MR. MUNZINGER: To leave it to the discretion of
13 the trial court as it is, but to expand the sentence that makes
14 it clear to the trial court that it would have the discretion
15 to not only bar the evidence but to prohibit use of the
16 testimony by way of impeachment.
17 MR. ORSINGER: And that's the trial judge, not
18 the judge who's granting the 202 motion, right?
19 MR. MUNZINGER: That's correct
20 MR. ORSINGER: And so if the trial judge says,
21 "I'm not going to allow you to use the deposition against
22 anyone who wasn't there and permitted to make objections or ask
23 cross-questions," then we're going to have a trial in which the
24 deposition is admissible against X number of named defendants
25 and inadmissible against X number of other named defendants,

1 and we instruct the jury to disregard the deposition as against
2 to the latter category?
3 MR. MUNZINGER: I don't know how else it would
4 work
5 CHAIRMAN BABCOCK: Hang on for a second. I
6 thought that we were talking about taking the word "adverse"
7 out of 202.3(a), right?
8 MR. MUNZINGER: That's what I thought we were
9 talking about.
10 CHAIRMAN BABCOCK: All right. And that is only
11 about what the petitioner has to give notice to, and right now
12 it says, "All persons petitioner expects to have interest
13 adverse to petitioners in the anticipated suit." That's who
14 you have to give notice to, and that language is repeated up in
15 202.1(f) where it says that the petition has to state the names
16 of the persons petitioner expects to have interest adverse to
17 the petitioners in the anticipated suit, and Richard's proposal
18 is to take the word "adverse" out.
19 MR. ORSINGER: Then otherwise it's the same?
20 CHAIRMAN BABCOCK: Yeah. Otherwise it's the
21 same. To expand the number of people, so it would read "State
22 the name of the persons petitioner expects to have interest in
23 the anticipated suit."
24 MR. ORSINGER: Now, if I'm going to sue a
25 manufacturer I don't have to list every possible plaintiff, do

1 I? I mean, I'm not obliged to do that, am I?
2 CHAIRMAN BABCOCK: Well, good question. Carl.
3 MR. HAMILTON: Well, that was going to be my
4 suggestion, that when you talk about adverse interest or just
5 interest, I agree with Paula. That's pretty vague as to what
6 you mean, and why do we not say "anticipated parties to the
7 suit"? You have to give notice to anticipated parties?
8 HONORABLE TOM GRAY: Because then you could have
9 a -- one of those third person culpable individuals that you
10 don't anticipate suing for some reason that you know is going
11 to have an adverse interest, but yet you don't anticipate
12 making them a party, and you're going to be able to take the
13 deposition without giving them notice, and they're not even --
14 they're not going to be a party to the suit, but yet you're
15 still going to determine their liability in this suit.
16 MR. ORSINGER: Well, if they're just a
17 responsible third party you can't determine their liability.
18 You can only take liability away from the named defendants.
19 HONORABLE TOM GRAY: You may be trying to
20 actually limit during the course of that deposition how much
21 gets allocated to that responsible third party.
22 HONORABLE TRACY CHRISTOPHER: They don't care.
23 HONORABLE TOM GRAY: They might.
24 MR. HAMILTON: Yeah, but they don't care.
25 That's right.

1 MR. ORSINGER: So you may have the defendant
2 giving notice of the deposition instead of the plaintiffs to
3 all these other potential defendants?
4 MR. HAMILTON: Anybody that might be a party
5 ought to be given notice, I think.
6 CHAIRMAN BABCOCK: Okay. Anymore comments about
7 this? Well, I think -- yes, Justice Gaultney.
8 HONORABLE DAVID B. GAULTNEY: I was just
9 thinking, "interest adverse to petitioners in the anticipated
10 suit" seems to be broader; and maybe I'm wrong, but at least in
11 terms of determining who is going to be a party to a lawsuit,
12 it might be a narrower decision than deciding who might
13 potentially have adverse interest. So I'm not sure changing it
14 to party, "potential parties to a lawsuit" accomplishes
15 anything. I don't think you want to notice all the potential
16 plaintiffs if they are on the same side of the lawsuit with
17 you. I'm not sure that would necessarily be advancing much.
18 HONORABLE TERRY JENNINGS: If it's to perpetuate
19 testimony and they wanted to develop --
20 HONORABLE DAVID B. GAULTNEY: I guess I'm still
21 thinking about this as an investigation of a claim.
22 CHAIRMAN BABCOCK: Investigative. Richard.
23 MR. MUNZINGER: We use the word "potential
24 parties" in the disclosure rule now. Any party who receives a
25 request for the disclosure is required now to identify

1 potential parties; and the way I've always interpreted that,
2 that requires me to identify those persons who I believe may
3 become a party whether I want them to be a party or not,
4 whether I believe there is or isn't substantive evidence or
5 reason to join them. If they are a potential party, I must
6 identify them if I've honored the rule.
7 HONORABLE DAVID B. GAULTNEY: So you think
8 that's broader than the language as currently written?
9 MR. MUNZINGER: Well, the only reason that I
10 wanted to drop the word "adverse" was to maximize the number of
11 persons who might have an interest in the lawsuit whose
12 interests could be affected by it to participate so that due
13 process as to those persons is honored. If you say "potential
14 party" that may do it. I'm not married to my suggestion. My
15 hope was that you -- as I said, I mean, I've used this rule to
16 my own personal advantage. We all do it for clients, and
17 people whose interests may be adversely affected by a judgment
18 or subsequent litigation ought to have a shot at
19 cross-examining witnesses and participating in proceedings that
20 are going to affect their economic interests, or their
21 interests, whether it's economic or otherwise.
22 CHAIRMAN BABCOCK: Nina, then Paula
23 MS. CORTELL: I really think that Richard's last
24 comment -- I guess unintentional, but it seems to support the
25 current language because it's all persons adversely affected,

1 and that's what that term would encompass. I'm very concerned
2 that the term "interested in" is just way too broad. "Parties
3 to," I think probably allows more gamesmanship in the process,
4 so I would stick with the current language.
5 CHAIRMAN BABCOCK: Paula.
6 MS. SWEENEY: Yeah. The example to the
7 discovery disclosure rule, the difference there is those could
8 be supplemented as more information is gathered. This would
9 fix a "gotcha" in time if you didn't guess right at the time
10 you sent out this notice and later discovered parties who might
11 or might not be able to continue to use the deposition, whereas
12 under the disclosure rules there is no "gotcha." If you find
13 somebody new, you supplement your disclosure. So I don't think
14 that's an apples and apples analogy.
15 CHAIRMAN BABCOCK: Okay. I think we've talked
16 about this pretty much. Let's have a vote on whether we should
17 delete the word "adverse," and I find it in three places.
18 202.3(a) and 202.1(f)(1) and (2). So everybody in favor of
19 removing "adverse" from the rule in those three spots raise
20 your hand.
21 HONORABLE TERRY JENNINGS: I just had a question
22 CHAIRMAN BABCOCK: Yeah, Judge.
23 HONORABLE TERRY JENNINGS: So we are no longer
24 voting on whether or not the subcommittee should --
25 CHAIRMAN BABCOCK: Right. Yeah. This one is

1 just kind of an up or down.
2 HONORABLE TERRY JENNINGS: Flat-out vote.
3 CHAIRMAN BABCOCK: Yeah. So this is an up or
4 down.
5 HONORABLE TRACY CHRISTOPHER: There is "adverse
6 party" in another spot, 202.3(b).
7 MR. GILSTRAP: 202(b)(1). It's in there.
8 CHAIRMAN BABCOCK: 202 point -- which rule,
9 Richard?
10 MR. GILSTRAP: 202.3(b)(1). I'm sorry.
11 CHAIRMAN BABCOCK: Okay. Everybody in favor of
12 removing the word "adverse" raise your hand. Everybody
13 opposed?
14 So by a vote of 19 to 2 --
15 MR. MUNZINGER: Close vote.
16 HONORABLE TOM GRAY: Now, how many weren't
17 voting, now, if we get to add those to our side?
18 CHAIRMAN BABCOCK: 19 to 2 to keep the word
19 "adverse" in there.
20 All right. There was a proposal to add to Rule
21 202.1(g) language as requiring the petitioner to say why the
22 suit can't be filed.
23 MR. MEADOWS: Or perhaps shouldn't be filed. I
24 mean, just some explanation as to why this proceeding needs to
25 be pursued in favor of a lawsuit.

1 CHAIRMAN BABCOCK: Okay. Something, but that
2 concept.
3 MR. MEADOWS: Brings that forward as a matter
4 that needs to be verified and understood and considered by the
5 court.
6 CHAIRMAN BABCOCK: Right. So there would be
7 some statement about, "Hey, the reason I haven't filed a
8 lawsuit is" and there would be a reason.
9 MR. MEADOWS: "Maybe I won't have to" or
10 whatever.
11 CHAIRMAN BABCOCK: Yeah.
12 MR. GILSTRAP: How do you advance the ball with
13 that? What does that help? I mean, there is all sorts of
14 reasons for not filing a lawsuit, and what reasons -- what
15 reasons -- what good does it do to have people say why they are
16 not filing a suit at this time?
17 CHAIRMAN BABCOCK: It seems to me that you're
18 just going to have a bunch of language like "I can't file it at
19 this time because I haven't investigated enough, but this is
20 going to help me investigate."
21 MR. GILSTRAP: Or you may not want to be that
22 specific. You might just say, "It's not in my client's
23 interest to file it at this moment" or something like that, so
24 how do you really help?
25 CHAIRMAN BABCOCK: Yeah, Carl.

1 MR. HAMILTON: I think really a more pointed
2 question is why -- there must be a showing as to why you cannot
3 wait to take the deposition until the lawsuit has been filed,
4 not just why you haven't filed it, but why can't you wait until
5 the lawsuit is filed before you take this deposition?
6 MR. MEADOWS: That gets to the point I think.
7 MS. SWEENEY: Carl's right.
8 MR. GILSTRAP: Okay. What kind of answers would
9 go into that blank?
10 MR. HAMILTON: "I don't know who the parties
11 are."
12 MR. GILSTRAP: Would I have -- "It's not in my
13 best client's best interest to file it at this time," would
14 that be enough?
15 MR. HAMILTON: That's kind of not very much of a
16 reason.
17 MR. GILSTRAP: What's that?
18 MR. HAMILTON: Why isn't it in his best
19 interest?
20 MR. GILSTRAP: Well, it may be it's protected by
21 attorney-client privilege.
22 MR. ORSINGER: Well, then there's also the
23 possibility that the lawyer who if he names a party as it's
24 presented he's making a representation under Rule 13 in Chapter
25 10 that he's made an adequate investigation, but the

1 information is all controlled by the potential defendants, so
2 do I just file against everybody that might be liable and drop
3 them and then get a Rule 13 sanction or what?
4 CHAIRMAN BABCOCK: Yeah, Richard.
5 MR. MUNZINGER: As I read that section of the
6 rule, it isn't a condition of granting the petition. It's
7 merely addressing the contents of the petition. The portion of
8 the rule that addresses the conditions for granting an order
9 allowing the deposition is found in 202.4. This is information
10 that would be given to the trial court and would be required to
11 be pled, but is not necessarily a condition of the granting of
12 the order, as I read the rule. And I don't say that in support
13 of the language. I say it to clarify.
14 CHAIRMAN BABCOCK: Okay. Yeah, Stephen.
15 MR. YELENOSKY: Well, isn't there an underlying
16 policy question here, because we were hearing that some suits
17 weren't filed and there was the supposition that some weren't
18 filed because they didn't pan out; and if part of the reason
19 for this rule is to prevent suits from being filed then one
20 would have to conclude that it would be perfectly appropriate
21 to say, "I want to do a deposition because I don't know enough
22 yet as to whether I want to file a suit"; and so if that's
23 true, it seems to answer the specific question here. If that's
24 not true then why does the rule say it could be for purposes of
25 investigation?

1 CHAIRMAN BABCOCK: Okay. Let's have a showing
2 of hands. Everybody who is in favor of adding some language to
3 202.1(g) indicating why the suit can't be filed, or put a
4 different way, why depositions can't wait, some language
5 inviting that concept. Everybody in favor of that raise your
6 hand.
7 All opposed? 12 to 5 opposed, so I think we can
8 drop that one out of the mix, Bobby.
9 All right. This is Justice Peeples', Judge
10 Peeples' issue under 202.4. The "must" versus "may" issue,
11 Justice Peeples having the argument made to him that this is
12 really mandatory. It tilts in favor of doing it as opposed to
13 not doing it, and this language needs some tweaking in order to
14 get to the proper place.
15 HONORABLE DAVID PEEPLES: And in addition, and
16 possibly more important, sub (1) talks about "the requested
17 deposition may prevent a failure or delay of justice." I think
18 that ought to be something like "it shows a reasonable
19 likelihood" or "is reasonably likely to prevent a failure,"
20 rather than just "may." I just want the committee to look at
21 it.
22 CHAIRMAN BABCOCK: Okay. Frank.
23 MR. GILSTRAP: Well, we've got to note carefully
24 that this not only has a "must" requirement, but it also sets a
25 minimum. It says "if and only if." So you can't do it unless

1 you meet both these criteria.
2 CHAIRMAN BABCOCK: Right.
3 MR. GILSTRAP: And insofar as Judge Peeples'
4 comments on (1), isn't (1) about the deposition perpetuating
5 testimony? Isn't that what 202.4(a)(1) is about? And do we
6 really need to tinker with that?
7 MR. MEADOWS: You don't need to meet both
8 elements.
9 MR. YELENOSKY: No, the "may" and "must."
10 MR. MEADOWS: Oh, we mean the "may" and "must"
11 CHAIRMAN BABCOCK: Yeah. It starts out by
12 saying "the court must."
13 MR. MUNZINGER: But it's either (1) or (2).
14 MR. MEADOWS: Yeah. It's either (a) or (b).
15 CHAIRMAN BABCOCK: Right. That's right. Either
16 (1) or (2).
17 HONORABLE TERRY JENNINGS: But if the concern is
18 some kind of abuse of the system, if we tinker with the scope
19 isn't that going to address the concern of abuse?
20 CHAIRMAN BABCOCK: Possibly.
21 HONORABLE TERRY JENNINGS: You know, if we lay
22 out what the trial court's discretion is as far as setting the
23 scope of it
24 CHAIRMAN BABCOCK: It could, depending on how we
25 tinker with that language; but, of course, on the paragraph

1 that deals with the order, I think Justice Peeples' point was
2 that that's where the judge is going to look to to see what
3 discretion he has or doesn't have, and some people make the
4 argument to him that he doesn't have much discretion here.
5 Any other comments on this? Yeah, Nina.
6 MS. CORTELL: I agree with Judge Peeples that
7 the "may" is a very low threshold and that it probably would
8 benefit from a slightly elevated standard with using the
9 suggested language of "reasonable likelihood," that "there's a
10 reasonable likelihood that," something like that.
11 CHAIRMAN BABCOCK: Okay.
12 MS. CORTELL: I think that's a good suggestion.
13 MR. YELENOSKY: I agree with that.
14 MS. SWEENEY: So it would say "allowing the
15 petitioner to take the requested depo if there's a reasonable
16 likelihood of preventing a failure or delay of justice" or
17 something?
18 MS. CORTELL: Right.
19 MR. YELENOSKY: So otherwise it -- in every case
20 it may do it and then you're in the "must" situation.
21 CHAIRMAN BABCOCK: Right.
22 MS. CORTELL: Right.
23 HONORABLE TOM GRAY: But you're going to leave
24 "must" in place?
25 CHAIRMAN BABCOCK: Well, we can try to do the

1 rule on the fly here or we can send it to subcommittee. I
2 don't mind doing it on the fly. What do you want to do, Judge
3 Peeples?
4 HONORABLE DAVID PEEPLES: I just want the
5 committee to look at it
6 CHAIRMAN BABCOCK: Okay. He wants the
7 subcommittee to look at it, and it was his issue, so let's see
8 if we can vote on that. Everybody that thinks the subcommittee
9 should look at 202.4(a) and especially the interplay between
10 the word "must" in the first sentence and the word "may" in
11 subsection 202.4(a)(1) raise your hand.
12 All opposed? By a vote of 15 to 4 the
13 subcommittee is to look at this, at this one. All right.
14 HONORABLE TRACY CHRISTOPHER: Can I ask a
15 question?
16 CHAIRMAN BABCOCK: Yeah.
17 HONORABLE TRACY CHRISTOPHER: Is the question
18 only with subpoint (1), which I agree with Frank really deals
19 with perpetuating testimony. No. (a)(2) is what is always
20 quoted in connection with the presuit, you know, investigative
21 deposition; and what I -- you know, the burden or expense of a
22 procedure is generally pretty minimal. I mean, if all we're
23 talking about is, you know, somebody has to give up four hours
24 of their time and we're going to reimburse them at $250 an hour
25 or something like that and the plaintiff offers to reimburse

1 them for their time, that's met just like that. I mean, if you
2 want to tighten this rule, that's the language you've got to
3 tighten up.
4 HONORABLE TOM GRAY: The word "likely" in part
5 (2)?
6 HONORABLE TRACY CHRISTOPHER: Yeah, the burden
7 or expense of the procedure. I mean, unless we're talking
8 about some sort of unfairness, the burden is an unfairness in
9 letting them take the deposition first. Normally I read that
10 as just, you know, "Gosh, you know, I don't want to give up
11 four hours of my time or six hours of my time." That's the
12 burden of a deposition.
13 CHAIRMAN BABCOCK: I think that's a fair point,
14 so I think the subcommittee ought to look at 202.4(a) in its
15 entirety, not just subparagraph (1).
16 HONORABLE TRACY CHRISTOPHER: Well, but I'd like
17 some guideline on whether people want to tighten up that, the
18 second aspect, the burden or expense of the procedure, because
19 I think that's a pretty low threshold
20 CHAIRMAN BABCOCK: Okay. Carl.
21 MR. HAMILTON: Well, if you're right that (1)
22 deals with perpetuation of testimony, I think it needs to say
23 that.
24 CHAIRMAN BABCOCK: Yeah. On its face it
25 doesn't.

1 MR. HAMILTON: Huh?
2 CHAIRMAN BABCOCK: On its face it doesn't.
3 MR. HAMILTON: It doesn't. No, I know. It's
4 got this nebulous language in there, and if that's what we're
5 intending then I think that needs to be rewritten. But I agree
6 with Judge Christopher that (2) is always going to be a given.
7 The judge is always going to find (2), so that doesn't really
8 have much teeth in it
9 CHAIRMAN BABCOCK: Richard.
10 MR. ORSINGER: I think that there was a
11 consensus earlier that we're going to break the two rules
12 apart. I don't know that we took a vote on that, but I think
13 everybody kind of agreed to that and that if we do do that then
14 Carl's concern about the ambiguity will be resolved by breaking
15 it in a separate rule. I don't know if we need to vote on that
16 or whether everybody agrees that we are going to do that
17 CHAIRMAN BABCOCK: I don't think we voted, but I
18 did think there was consensus that there wasn't any issue with
19 the perpetuating testimony.
20 MR. ORSINGER: Okay.
21 MR. MEADOWS: Well, what I understood was that
22 we were interested in limiting the scope of the deposition in a
23 matter involving investigation of an anticipated suit but not
24 perpetuating testimony, and that was the only place that there
25 was a difference. I didn't know that we were -- the idea was

1 to have two separate rules.

2 CHAIRMAN BABCOCK: Judge Gray.

3 HONORABLE TOM GRAY: I thought we were going to
4 have two separate rules or I would have raised the issue under
5 -- like 202.2(d) forecloses the possibility, as I read it, that
6 you can file a petition that meets these requirements for the
7 purpose of perpetuating testimony, because if the petition must
8 state the contents of (d) and the purpose of the petition is to
9 perpetuate testimony, you can't meet that section. And so I
10 thought -- I thought we were splitting the rules out into two
11 rules. I thought we would break them back apart, one to
12 investigate and one to -- or I would have been saying some
13 other comments along the way.

14 MR. ORSINGER: And that was the premise of all
15 these votes. If we were going to impose a lot of these
16 restrictions on the perpetuation deposition then I'm not sure
17 the vote would have been the same count.

18 HONORABLE DAVID PEEPLES: I thought someone said
19 that all of our votes would have zero impact on the
20 perpetuation.

21 MR. GILSTRAP: That's correct. Although, if you
22 change 202.4(a)(1), you are affecting the perpetuation,
23 deposition perpetuating testimony.

24 MR. YELENOSKY: But we wanted to, because "may"
25 is too low a threshold even for that.

1 MR. ORSINGER: Wait a minute. We didn't -- the
2 premise of all our discussions has been that we weren't
3 altering the perpetuation deposition. If all of the sudden
4 we're now saying that some of these votes do apply, I think we
5 haven't made a proper record and haven't had an accurate vote
6 on this. We started this whole series by saying we were only
7 affecting what --
8 CHAIRMAN BABCOCK: Judge Christopher.
9 HONORABLE TRACY CHRISTOPHER: Well, I agree that
10 they should be split out. I know that's more work for us, but
11 I think they should because I don't think you ought to -- if a
12 person is dying, and you attach an affidavit that says he's
13 dying, I don't think you have to show reasonable likelihood
14 that he's going to die before you can take the deposition. You
15 know, I think you ought to be able to attach something from the
16 doctor that says he's got terminal cancer and we're not sure
17 how long he's going to have to live and that that should be
18 enough.
19 CHAIRMAN BABCOCK: Yeah.
20 MR. YELENOSKY: But "may" is lower than that.
21 "May" to me is "Well, he might die."
22 HONORABLE TRACY CHRISTOPHER: Reasonable
23 likelihood that he's going to die?
24 MR. YELENOSKY: No, it's not a reasonable
25 likelihood that he's going to die. It's reasonable likelihood

1 that you're going to prevent a failure or delay of justice.
2 And I don't -- I mean, I don't know that it matters much if
3 it's just limited to perpetuation of testimony, but it seems to
4 me you can always argue that every testimony has to be
5 preserved because it might otherwise be lost.
6 HONORABLE DAVID B. GAULTNEY: And why we have
7 been referencing that is the reason. I mean, if you read the
8 "or"'s, it's to obtain the testimony of any person for use in
9 an anticipated suit. So, I mean, (a) is pretty broad, although
10 I thought of it in terms of taking a dying deposition.
11 CHAIRMAN BABCOCK: Okay. Anything else on that?
12 Okay. Judge -- Richard Orsinger, I think you suggested adding
13 a phrase to 202.5 that said, quote, "for any purpose"? My
14 notes may be wrong about this
15 MR. ORSINGER: No, I did not make that.
16 MR. MUNZINGER: That was me
17 CHAIRMAN BABCOCK: Richard Munzinger. Sorry.
18 Wrong Richard.
19 MR. MUNZINGER: You want me to explain why?
20 CHAIRMAN BABCOCK: Yeah, will you? Yeah.
21 MR. MUNZINGER: The discussion at the time was,
22 or at least I thought it was, that a deposition may not be
23 proffered as affirmative evidence, but a statement contained in
24 it could be used to impeach a witness as a prior inconsistent
25 statement; and the rule as presently written may or may not

1 tell trial courts that they would have the authority and
2 exercise their discretion not to allow the deposition testimony
3 to be used to impeach, and so this would at least be a way of
4 saying to trial courts, "You have the authority to prevent the
5 use of the deposition to impeach a witness," only under the
6 circumstance, of course, where that party had not been given
7 notice of the original deposition.
8 CHAIRMAN BABCOCK: Where would you insert the
9 word?
10 MR. MUNZINGER: After the word "use." "A court
11 may restrict or prohibit the use for any purpose of the
12 deposition taken."
13 CHAIRMAN BABCOCK: Okay. Any discussion on
14 that? Paula.
15 MS. SWEENEY: We're back to where we were
16 before. I mean, if you're prohibiting the use of the
17 deposition for any purpose, including impeachment, what do you
18 do in the circumstance where you have somebody who said, you
19 know, "The light was red, I swear" and then they show up at
20 trial, "The light was green, I swear." They've lied. They're
21 lying somewhere, and, what, you can't show that to the judge?
22 As officers of the court we're going to ignore that and we're
23 going to pretend the perjury didn't happen? It is an
24 unworkable situation to ignore statements under oath, for
25 impeachment purposes at least

1 CHAIRMAN BABCOCK: Richard, then Ralph.
2 MR. MUNZINGER: Well, first off, the person may
3 or may not be lying. Secondly, it would seem to me if I were a
4 judge I would look at this rule. I probably could interpret
5 the rule today as saying that I have that authority. I may
6 prohibit the use. There seems to be no limitation of it; and
7 finally, many people who are deposed or who testify in cases,
8 if they are not acquainted with the importance of words, use
9 words as they do in ordinary conversation. They are not
10 sufficiently aware that words have very important meanings.
11 Not all cases are as simple as the red light/green light, and
12 many people when they understand what they're doing under oath
13 tell the truth. They're not quite so flip and glib with words,
14 so I think it's -- you know, I think it just tells the trial
15 courts you've got that authority.
16 CHAIRMAN BABCOCK: Ralph.
17 MR. DUGGINS: I think irrespective of which way
18 you go everyone should consider comment 2 because it says, "A
19 deposition taken under this rule may be used in a subsequent
20 suit as permitted by the Rules of Evidence, except that a court
21 may restrict or prohibit its use to prohibit taking unfair
22 advantage of a witness."
23 CHAIRMAN BABCOCK: What were you reading from,
24 Ralph?
25 MR. DUGGINS: Comment 2. Am I reading the wrong

1 comment?

2 HONORABLE DAVID PEEPLES: At the beginning of

3 the rule.

4 MR. DUGGINS: So it is the right comment. Yeah

5 CHAIRMAN BABCOCK: Yeah. Okay. Stephen.

6 MR. YELENOSKY: Well, Richard, isn't it true,

7 though, that what you said is how you explain after an

8 attempted impeachment and the same thing you would do if you

9 had a prior inconsistent statement in admissions that wasn't

10 even under oath? You could explain it away, but to say you

11 can't present that it happened to me is a problem.

12 MR. MUNZINGER: The only concern I have, again,

13 is the absent party who was not a participant. The only time

14 this sentence comes into play is a situation where the person

15 against whom the evidence is offered and the impeachment was

16 offered was not a participant in the original deposition that

17 was taken before the litigation was filed because that person

18 didn't have notice, and I'm not sure that my language changes

19 what the rule says. It may not change what the rule says. I

20 thought it was making it clearer, but I know if I were a trial

21 court and I were confronted with a situation where I thought

22 somebody was being taken advantage of, I sure as heck would not

23 want to feel that I had to admit evidence against someone who

24 didn't participate in an official court proceeding.

25 It's not an investigator's affidavit. It's

1 not -- this is now the State of Texas has condoned a procedure
2 and has said you can use this evidence against someone who
3 wasn't there to participate. I think it's a distinct
4 situation. It's a different situation, but it may not change
5 the substance of the rule. I don't know.
6 CHAIRMAN BABCOCK: Okay. Everybody in favor of
7 adding the phrase "for any purpose" in 202.5 after the word
8 "use," raise your hand.
9 MR. MUNZINGER: 24 to 1.
10 CHAIRMAN BABCOCK: You and Gray. Everybody
11 against? By a vote of 18 to 2 that one doesn't pass.
12 One more, Judge Sullivan says that discovery
13 limits on witness depositions, time limits, etc., should be
14 imported into this rule and count in any subsequent proceeding.
15 Have I said that close enough?
16 HONORABLE KENT SULLIVAN: My proposal was that
17 it be the default rule and that someone who wanted more time
18 with the witness would have to make a showing.
19 CHAIRMAN BABCOCK: Okay. Everybody hear that?
20 MS. SWEENEY: Say it again. I'm sorry.
21 CHAIRMAN BABCOCK: Can you say it again, Judge?
22 HONORABLE KENT SULLIVAN: I'm trying to repeat
23 what I said before. I thought the six-hour rule that is
24 incorporated into the rule for the taking of oral depositions
25 was appropriately referenced in this rule, that being that a

1 Rule 202 deposition taken of a witness would, in fact, count at
2 that time and the 202 deposition would count towards the
3 six-hour total if a deposition is taken subsequently after suit
4 is filed because it gives the proper incentives.
5 It then suggests that if a lawyer were to get to
6 the point, to keep the 202 deposition to the purposes for which
7 it was intended and that you don't have any suggestion or any
8 incentive for someone to try and game the system and make a
9 play for what would otherwise be an unnecessary 12-hour
10 deposition of a witness, with the flexibility, of course, that
11 if the circumstances so warranted and you had to have more time
12 and you could make that showing then the court would simply
13 grant leave to extend the deposition.
14 CHAIRMAN BABCOCK: So you think the possibility
15 now is that the 202 deposition could be six hours. The lawsuit
16 is subsequently filed. The same witness is deposed for another
17 six hours, so in effect there's been a 12-hour deposition of
18 that witness, right?
19 HONORABLE KENT SULLIVAN: I certainly think
20 that's possible. Absolutely.
21 CHAIRMAN BABCOCK: Okay. And what you're
22 proposing is that whatever time is taken in the 202 deposition
23 be subtracted from the six hours that would be available in the
24 subsequent lawsuit.
25 HONORABLE KENT SULLIVAN: Yes.

1 CHAIRMAN BABCOCK: Okay. Richard.
2 MR. ORSINGER: Is the six-hour limitation per
3 party or per side?
4 HONORABLE KENT SULLIVAN: Side.
5 MR. ORSINGER: Okay. The problem I have with
6 Judge Sullivan's proposal is that you're taking away the
7 deposition time of someone who may have an allied interest but
8 isn't advised about it and joins the lawsuit as a party and
9 they find out they can't even take the deposition.
10 HONORABLE KENT SULLIVAN: Then you seek leave.
11 MR. ORSINGER: I don't agree that they should
12 take leave. I don't think it's any fairer to tell a plaintiff,
13 "You can't take the defendant's deposition because some other
14 plaintiff already took it."
15 HONORABLE KENT SULLIVAN: You've already got the
16 problem, though.
17 MS. SWEENEY: Yeah.
18 HONORABLE KENT SULLIVAN: Because you've already
19 got an allocation problem with aligned parties that's inherent
20 in the rule on oral depositions.
21 MR. ORSINGER: But at least if I --
22 HONORABLE KENT SULLIVAN: So your proposal is to
23 go back and amend the rule on oral depositions.
24 MR. ORSINGER: No, what I'm saying is that if
25 you have multiple plaintiffs that have individual interests,

1 they all have a lawyer in the courtroom and they can fight over
2 how they allocate their questioning. In this instance one
3 plaintiff's lawyer has used up all of the time questioning that
4 witness and none of the other plaintiff's lawyers have an
5 opportunity to ask any questions at all unless they can go into
6 court during the lawsuit and get an exception made for them.
7 Where is the due process to those plaintiffs?
8 CHAIRMAN BABCOCK: Judge Gray.
9 HONORABLE TOM GRAY: I would point out to
10 Richard that if Richard had voted with Richard Munzinger and I
11 on the first vote we lost so badly, that wouldn't be a problem.
12 CHAIRMAN BABCOCK: So there, Richard.
13 MR. ORSINGER: I'm against all of these changes.
14 CHAIRMAN BABCOCK: Paula.
15 MS. SWEENEY: I sympathize with what you're
16 saying, but that's going to be the unusual circumstance of
17 later-added plaintiffs because much more often it's later-added
18 defendants, and they wouldn't be prejudiced in this
19 hypothetical because normally the defendant isn't going to ask
20 himself questions in a 202 deposition anyway.
21 MR. ORSINGER: Why don't we just apply it to
22 later-added defendants and not later-added plaintiffs?
23 MS. SWEENEY: Obviously I would be fine with
24 that, but some of this rule that's going to pass here, I think
25 as long as the court has discretion when faced with manifest

1 injustice or good cause or what have you to allow the extra
2 time if circumstances led to that, I think the proposal makes
3 sense because I don't think it was included to double the depo
4 time that a party would have.
5 CHAIRMAN BABCOCK: Yeah, Frank.
6 MR. GILSTRAP: Is this an unsettled point at
7 this time? Is there law on this?
8 CHAIRMAN BABCOCK: I don't know.
9 MS. SWEENEY: There's discussion about it out
10 there as to whether you get two six-hour shots at somebody.
11 CHAIRMAN BABCOCK: Okay. Everybody in favor of
12 Judge Sullivan's suggestion that we have language that will
13 restrict the automatic ability to get two six-hour depositions,
14 a 202 deposition and then a subsequent six-hour deposition in
15 the lawsuit, raise your hand.
16 All those opposed? By a vote of 18 to 3 that
17 one passes. Carl had two other issues, but I think they've
18 been subsumed by our discussion on 202.4. They were that there
19 should be a more -- we should have more specific language about
20 what the court must find to grant, but that's subsumed within
21 202.4 or not, Judge Christopher?
22 HONORABLE TRACY CHRISTOPHER: Well, actually,
23 since I know Bobby is going to delegate this to me, I would
24 like more specifics in 202.4 in terms of required finding. I
25 would like to have more of a sense of the committee if we're

1 going to make it stronger, how are we going to make it
2 stronger.
3 CHAIRMAN BABCOCK: And we can talk about that,
4 Judge. The second thing that Carl raised, a subset of the same
5 issue, is that he thought that the phrase "to prevent a failure
6 or delay of justice" was a phrase that was too vague and needed
7 something more than that. So Judge Christopher has called for
8 discussion. So, Carl, since this is your idea, why don't you
9 make it less vague?
10 MR. HAMILTON: Well, I think that as it was
11 pointed out earlier, this business of you have to say why you
12 can't wait to take the deposition when the suit is filed, if
13 that's going to be a requirement it ought to be in 202.4 rather
14 than just what you have to say in your petition. There ought
15 to be some showing as to the urgency of taking it now, not
16 waiting until the suit is filed. That's one thing the court
17 ought to have to find. That's the basic guts of the whole
18 thing, is why can't you wait? Why do you have to do it now?
19 There ought to be good cause for that.
20 HONORABLE TRACY CHRISTOPHER: But I have that we
21 voted against that 12 to 5.
22 CHAIRMAN BABCOCK: That's true. 12 to 5 was the
23 vote. Okay. What other comments? Paula? Because you always
24 have a comment.
25 HONORABLE JAN PATTERSON: We've been a little

1 distracted over here.
2 CHAIRMAN BABCOCK: Stephen.
3 MR. YELENOSKY: Well, could it -- maybe that
4 first one doesn't need to apply at all to the investigatory
5 depositions; and if so, would it help if we instead of talking
6 about preventing a failure or delay of justice we talked about
7 preventing the loss of testimony or something? Does that help
8 at all?
9 HONORABLE TRACY CHRISTOPHER: In connection with
10 a perpetuation deposition?
11 MR. YELENOSKY: Yeah. And only with the
12 perpetuation. Because I don't know -- yeah, I don't see its
13 relevance in the investigatory depositions.
14 HONORABLE TRACY CHRISTOPHER: I don't either.
15 MR. YELENOSKY: So if it's only applying to
16 perpetuation, would it help to make the language clearly apply
17 to perpetuation?
18 HONORABLE TRACY CHRISTOPHER: Yes.
19 CHAIRMAN BABCOCK: Okay. Any other comments?
20 Yeah. Judge Gaultney.
21 HONORABLE DAVID B. GAULTNEY: I'm trying to
22 think of some way to have the trial court address an issue like
23 the defamation case or an arbitration case, and I was wondering
24 if in the findings perhaps there should be something like it's
25 not -- "would not cause an injustice" or "would not be

1 inconsistent with other law" or something to that effect. I
2 don't know. I'm trying to figure out some way to focus the
3 trial court's consideration on those factors.
4 CHAIRMAN BABCOCK: Could you inject an ability
5 of the court to in effect require a more definite statement of
6 the reasons why -- of the matters that they're going to inquire
7 into? I suspect the judge probably has that discretion anyway,
8 but you could -- I mean, if you're just talking about ideas,
9 you could throw that in there.
10 Yeah, Carl.
11 MR. HAMILTON: I have a question. If my
12 suggestion was voted down and nobody else can come up with a
13 reason why we should allow this investigative deposition then
14 why are we doing it?
15 CHAIRMAN BABCOCK: Rhetorical question or do you
16 want somebody to answer it?
17 MR. HAMILTON: Rhetorical question, why are we
18 doing it?
19 CHAIRMAN BABCOCK: Richard.
20 MR. ORSINGER: I was disturbed by the proposal
21 that this Rule 202, if I interpreted that comment right, might
22 apply in a case where there's an arbitration agreement. I
23 don't know if anyone thinks that it might, but I don't see how
24 it would. And I don't know that that's what you meant; but if
25 you've agreed to arbitrate, I think you've agreed not to take

1 depositions either during the lawsuit or before the lawsuit.
2 HONORABLE DAVID B. GAULTNEY: Right. Which is
3 my point. Earlier Judge Sullivan, Kent, said that he was
4 familiar with some case where -- did I get it right -- there
5 was an effort to do a 202 deposition despite the fact that
6 there was an arbitration agreement, so that would be a case
7 where I guess you would agree that it would be improper.
8 MR. ORSINGER: I have a major problem with that.
9 MR. YELENOSKY: Wouldn't you take it to the
10 arbitration judge?
11 MR. ORSINGER: There is no arbitration judge.
12 There's a panel of arbitrators.
13 MR. YELENOSKY: Well, the panel or whatever.
14 MR. ORSINGER: But they haven't been appointed
15 yet because there's no lawsuit filed.
16 HONORABLE DAVID B. GAULTNEY: I guess I
17 shouldn't have used that as a premise. What I'm trying to
18 focus on is where -- another example I tried to use was the
19 case where there was a defamation case or the defamation claim
20 that Chip had described that he was involved in. The focus is,
21 is there an arbitration clause or is there a provision of law
22 or is there something which would preclude discovery, yet 202
23 doesn't appear to bar the deposition? It appears to permit it,
24 nevertheless.
25 Arbitration clause may be the clearest example

1 that you've got where it would clearly be inappropriate; and if
2 that were brought to the judge's attention, he could say, "No,
3 I find that you don't have discovery here." That's what I was
4 using the arbitration example for, not that it would be proper
5 to use 202 in that context but that it would be improper.
6 MR. ORSINGER: Well, if it's to perpetuate
7 someone who might die before the arbitration proceeding then I
8 think there's an argument here, although I can see that the
9 arbitration clause might be more spirited of it; but if
10 somebody is going to die before you can have arbitration, the
11 only way to preserve their testimony is by taking a deposition.
12 But if it's investigatory, I can't imagine that anyone -- I
13 mean, if anyone -- I hope that everyone agrees with me. If we
14 don't, we probably ought to write it, that if you've agreed to
15 arbitrate then this block -- that applies to a 202 deposition
16 just as much as it does to a deposition during a lawsuit
17 CHAIRMAN BABCOCK: But the theory behind the
18 proponent of the deposition would be "But I've agreed to
19 arbitrate certain issues, but this witness is outside of those
20 issues, related to my relationship with the adverse party, but
21 outside what I've agreed to arbitrate, so I'm taking the
22 deposition on nonarbitration issues and, oh, there's obviously
23 some overlap and we may have to ask a few questions that get
24 into arbitration." That would be the proponent's argument, I
25 would think.

1 HONORABLE TOM GRAY: "I want to find the issue
2 that's outside the arbitration agreement in this presuit
3 deposition."
4 CHAIRMAN BABCOCK: And there was some fraud.
5 There may have been some fraud involved and that would get us
6 outside of arbitration possibly, so...
7 MR. SUSMAN: I could give you a pretty good
8 argument why you should be able to take a deposition. In the
9 first place, to file an arbitration involving a lot of money
10 costs a lot of money. You're not just talking about a filing
11 fee. You're talking about a big slug of money paid to the AAA.
12 A lot of times discovery is totally permitted in arbitrations.
13 We take depositions in arbitrations all the time. Routinely
14 almost. So, you know, who's to say you can't?
15 MR. ORSINGER: The arbitrators say that.
16 MR. SUSMAN: Yeah, but we don't have
17 arbitrators, and I don't want to go spend the 20,000-dollar
18 filing fee unless I know I have a good lawsuit. I just want to
19 take one deposition
20 MR. ORSINGER: How do you stop people from
21 abusing the rule?
22 MR. SUSMAN: Huh?
23 MR. ORSINGER: I mean, of all the potential
24 abuses that everyone has dreamed up today, that is clearly the
25 most likely one

1 MR. SUSMAN: I have been sitting here all day
2 figuring a way I could use this. It's finally occurred to me.
3 It made my whole trip here worthwhile.
4 MR. ORSINGER: I agree. That's an abuse.
5 MR. SUSMAN: You better write something.
6 MR. MUNZINGER: I don't know that a deposition
7 under this Rule 202 is precluded by an arbitration agreement at
8 all. Arbitration agreements are not self-effectuating. They
9 are waived all the time, and parties can agree all the time,
10 and I'm not sure. This rule doesn't mention arbitration. It
11 says "litigation." If I'm a party to an arbitration agreement,
12 "Judge, I intend to file it because" --
13 MR. SUSMAN: I think we ought to take this off
14 the table. It's not really important. No one is talking about
15 doing it, right? I mean, let's just table it.
16 MR. ORSINGER: Well, now that somebody has
17 mentioned it everybody is going to start doing it.
18 CHAIRMAN BABCOCK: Yeah. Susman's got his 202
19 petition drafted, brought his computer with him.
20 Judge Gaultney.
21 HONORABLE DAVID B. GAULTNEY: Well, I didn't
22 mean to get us off on that route, but I think that while the
23 focus on required findings is what I'm focusing on, whether the
24 trial judge should be thinking about it, and one focus might be
25 whether this is an abuse of the 202, and I don't know how

1 you -- does that fit in under burden, or does that just mean
2 it's inappropriate?
3 CHAIRMAN BABCOCK: Judge Peeples.
4 HONORABLE DAVID PEEPLES: Back to the point
5 Tracy was asking guidance on, I think I'd like to see in sub
6 (a) -- Tracy, I mean, right now it just says "balance the
7 likely benefit against the burden and expense." I'd like to
8 tell the judge, "You need to decide what level of need there is
9 for this before suit" and then balance after you've decided
10 there's enough need. I don't know if you want to say
11 "substantial need" or "adequate need" or something like that,
12 but the concept of the need to do this is something I think the
13 judges ought to focus on and have to find before they do it.
14 CHAIRMAN BABCOCK: Stephen.
15 MR. YELENOSKY: Well, I've got to say it again
16 because Carl brought it up again. What's the policy reason
17 behind the investigatory deposition? It sounds like people --
18 at least Carl doesn't think there's a good one. What's been
19 put out there is that it may avoid some lawsuits. Now, I don't
20 know -- we don't believe that the empirical evidence we have
21 can lead necessarily to that conclusion, but if we don't then
22 maybe we need to find out because it sounds to me like a lot of
23 people aren't buying that, because if that's true, in every
24 instance the party may not have a need for it, but the system
25 has a need.

1 So I don't understand how we would expect the
2 party to present anything other than simply that this may avoid
3 a lawsuit. So I go back again to what's the policy reason
4 behind it; and if we need more empirical evidence, let's stop
5 and get it.
6 CHAIRMAN BABCOCK: Any other comments? Okay.
7 Let's move on to what we've all been waiting for
8 HONORABLE TRACY CHRISTOPHER: Paula likes my ad
9 litem draft. I showed it to her.
10 CHAIRMAN BABCOCK: Yeah.
11 HONORABLE TRACY CHRISTOPHER: We could have gone
12 on without her
13 CHAIRMAN BABCOCK: Well, there will be no
14 controversy, right, Paula?
15 MR. MEADOWS: Was the decision -- I understand
16 the question is pressing. Maybe I just -- are there to be two
17 rules or one rule? Because we're only changing, you know,
18 small things about this fairly lengthy rule and --
19 CHAIRMAN BABCOCK: I think there are strongly
20 held views on the committee -- they may or may not be minority
21 views -- that we should not tamper with the perpetuating
22 testimony.
23 MR. MEADOWS: I agree. But that doesn't mean
24 there should be a separate rule.
25 MR. GILSTRAP: If you don't think the change is

1 going to tamper with the perpetuation deposition then it's
2 okay, but if you think that it's going to tamper with the
3 perpetuation deposition then you're not supposed to do that.
4 CHAIRMAN BABCOCK: Right. Fair enough.
5 MR. MEADOWS: So much help.
6 CHAIRMAN BABCOCK: Okay. Let's move onto ad
7 litem, and Tracy has got a new draft that Paula endorses, and
8 so I'm sure that we will be out of here in 15 minutes.
9 HONORABLE TRACY CHRISTOPHER: Okay. I don't
10 know how to do redlining, so I'm afraid my new draft is not
11 redlined. So you'll just have to trust me when I tell you I
12 made the changes that you requested from the last one. Most of
13 those were ministerial. The first substantive paragraph that
14 people had comments about is 173.2(b).
15 MR. ORSINGER: Oh, I've got comments on
16 paragraph (1). So are we going to need to come back on it or
17 do we need to stop on (1)?
18 HONORABLE TRACY CHRISTOPHER: Well, you didn't
19 make comments last time.
20 MR. ORSINGER: I wasn't here last time, but that
21 doesn't keep me from talking this time
22 CHAIRMAN BABCOCK: Hang on. Tracy gets to lead
23 us where she wants to lead us.
24 MR. ORSINGER: Just as long as we come back, I
25 don't care where we go

1 CHAIRMAN BABCOCK: We keep coming back, Richard.
2 We keep coming back until the cows come home, Richard.
3 HONORABLE TRACY CHRISTOPHER: Okay. So I
4 reworked the wording of 173.2(b) to state when the court must
5 appoint a guardian ad litem, and it was only when the defendant
6 had made the offer to settle the party's claims, unless the
7 parties agreed to an earlier appointment. That was something
8 that was discussed, so I put that in there. I brought back in
9 the "adverse interest" language instead of the "conflict of
10 interest" because everyone wanted "adverse interest" and then
11 made it clear that the court must not appoint an ad litem if no
12 adverse interest exists. So those were the changes to (b).
13 MR. YELENOSKY: Chip?
14 CHAIRMAN BABCOCK: Steve
15 MR. YELENOSKY: Can we talk about that section?
16 CHAIRMAN BABCOCK: Well, it depends on how Judge
17 Christopher wants to proceeds.
18 HONORABLE TRACY CHRISTOPHER: No, that's --
19 those are changes, and if you're happy with them, I'm happy;
20 but if you're not, we'll work on it.
21 MR. YELENOSKY: I agree with the intent, but
22 when I read the language I think unless you break that into
23 three sentences the first sentence is ambiguous, because when
24 you have a "must, only if" then that lends itself to an
25 interpretation that there may be a "may." I would try to

1 redraft where you change it, take out the "unless" clause in
2 the first sentence and just create a second sentence that says
3 "unless the parties agree to an earlier appointment the court
4 must not make the appointment until the offer to settle has
5 been made." Otherwise, that first sentence is ambiguous
6 because you're trying to both say it must happen, but only if.
7 Does that mean that the judge still may? I mean, I don't think
8 it's clear.
9 CHAIRMAN BABCOCK: Do other people have that
10 problem? Judge Christopher, was the concept that the parties
11 could agree to an appointment earlier in time?
12 HONORABLE TRACY CHRISTOPHER: Right.
13 CHAIRMAN BABCOCK: But if the defendant had made
14 an offer to settle and there appeared to be an adverse interest
15 between the next friend for the party and the party then the
16 court had to -- must appoint.
17 HONORABLE TRACY CHRISTOPHER: Right.
18 MR. YELENOSKY: But it's also trying to specify
19 the point at which you can appoint, and trying to do that all
20 in the same sentence to me leads to some ambiguity.
21 MR. DAWSON: The problem I have with what you
22 propose is it doesn't tell you when the court is required. It
23 says they can't do it any earlier than that, but it doesn't
24 tell you when they're required to do it. The way he's proposed
25 it is "The court must not appoint a guardian until the

1 settlement offer is made." Okay. Well, that tells the earlier
2 date, but it doesn't tell me that the court is required to
3 appoint a guardian.
4 MR. YELENOSKY: Well, the first sentence says
5 the circumstances under which you must appoint, and that's when
6 the party -- when a party is represented by a next friend and
7 there appears to be an adverse interest.
8 Second sentence said that -- tells you the time
9 at which you must do it, which is by default when the offer of
10 settlement has been made unless there is prior agreement. The
11 third sentence says if the conditions in the first sentence
12 don't exist, you must not, so it makes three different points
13 in three different sentences. But I don't know. It's hard
14 to --
15 CHAIRMAN BABCOCK: Carl.
16 MR. HAMILTON: I'm confused about this. Unless
17 the parties agree to an earlier appointment. Suppose they
18 agree to an earlier appointment. Then in 173.3 it says the
19 duty is limited to reviewing the proposed settlement, and it
20 goes on to say that the guardian must not -- "must not
21 participate in discovery, court proceedings or trial, except
22 mediation." Now, does that mean unless ordered by the court?
23 I guess that -- I guess that means that the
24 reason the parties would agree to an earlier appointment would
25 only be for mediation, because they can't do anything else; and

1 if there wouldn't be a reason for an earlier appointment, the
2 only appointment would be at the time of settlement; and then
3 the only duty would be to review the settlement agreement. So
4 if that's what we're trying to say we ought to say it a little
5 clearer.
6 CHAIRMAN BABCOCK: Richard.
7 HONORABLE TRACY CHRISTOPHER: Well --
8 CHAIRMAN BABCOCK: Judge Christopher. Sorry.
9 HONORABLE TRACY CHRISTOPHER: I'm sorry.
10 "Unless the parties agree to an earlier appointment" was added
11 at the last meeting, and I'm perfectly happy deleting that from
12 the rule if that's what's causing the problems, but there was
13 some belief that we ought to have flexibility to ask for an
14 earlier appointment, but I'm happy not to.
15 MR. HAMILTON: But if we do, what can they do in
16 the earlier appointment? That's my question.
17 HONORABLE TRACY CHRISTOPHER: I kind of agree
18 with you.
19 CHAIRMAN BABCOCK: Paula.
20 MS. SWEENEY: You're right, Carl, that mediation
21 would trigger the need for an ad litem whether it's agreed or
22 not; but the way that you-all have written this, if there's no
23 offer before mediation, the judge can't appoint an ad litem.
24 You go to the mediation, and then you don't have the ad litem
25 for the mediation, which I think we decided we did want. So

1 you may want to address that so that it's clear that the ad
2 litem can be appointed before the mediation even if there's no
3 offer on the table before mediation, because right now the
4 court would not be able to do so.
5 But I agree with you, Carl. The way the rule is
6 written mediation and approving -- or not approving, reviewing
7 the settlement agreement and making a recommendation are the
8 only two things the ad litem can do, which is fine if that's
9 the policy that the Court wants to set
10 CHAIRMAN BABCOCK: Richard.
11 MS. SWEENEY: You see what I'm saying, Judge?
12 HONORABLE TRACY CHRISTOPHER: Yes.
13 MR. ORSINGER: This may have been resolved last
14 time. I'm sorry if it was, but the way I read this, even if
15 the trial court prior to settlement as a result of pretrial
16 hearings believes that there is an inherent conflict between
17 the next friend and the child, the court cannot appoint a
18 guardian ad litem because "the court must appoint a guardian ad
19 litem only when" to me suggests that you cannot appoint when
20 not. I don't know if I'm reading this wrong or whether that
21 was intended.
22 If it was intended, it would be my position that
23 the trial judge should always be able to appoint a guardian ad
24 litem if the trial judge becomes aware of a conflict between
25 the next friend and the child or the next friend and the

1 elderly person.

2 JUSTICE HECHT: What would that conflict be?

3 MR. ORSINGER: Well, I mean, I could see it

4 might come up in a nonsuit, for example.

5 JUSTICE HECHT: In a what?

6 MR. ORSINGER: In a nonsuit that's not a

7 settlement. Let's say -- I mean, you can concoct your own, but

8 let's say that you have family law litigation and that somebody

9 initiates a lawsuit because the child was a victim of certain

10 behavior, but because of the unrelated lawsuit, not a tort

11 case, but the family law case is resolved and it's agreed that

12 all the tort proceedings, including the one on behalf of the

13 child, are dismissed.

14 Now, if the trial judge is aware that there was

15 an allegation that there was, say, molestation or abuse and the

16 next friend wants to come in and nonsuit the case and it's not

17 incident to a settlement because nobody has paid anybody

18 anything in the tort case, at that point the trial judge ought

19 to have the power.

20 But let's say that there is vicious litigation

21 going on, and it doesn't look like there's any settlement in

22 the near future, but important things are being done, like six

23 hours of depositions are being used up by the next friend who

24 is also a litigant. Shouldn't the trial judge be able to say,

25 "I think the next friend is emphasizing their own interests at

1 the expense of the child's interest, and I think there ought to
2 be a guardian ad litem who should have the ability to hire a
3 lawyer to come in here and advocate the child's views
4 independently"?
5 All I'm arguing is that trial judges should have
6 the power to appoint an ad litem when they think there is a
7 conflict of interest between the next friend and the child,
8 even if it occurs outside the context of the settlement. Now,
9 I don't know if that was voted down or not, but anyway.
10 CHAIRMAN BABCOCK: Judge Christopher, what do
11 you think about what Carl and Richard have just said?
12 HONORABLE TRACY CHRISTOPHER: Well, with respect
13 to what Richard said, we have exempted out family matters from
14 this rule, and then so the rules governing appointment of ad
15 litems in family situations are still in place in cases of
16 potential abuse.
17 MR. ORSINGER: But the tort is not under the
18 Family Code. The tort is under -- is in the civil court.
19 HONORABLE TRACY CHRISTOPHER: And I think we had
20 a pretty long discussion last time as to what the rule
21 concerning ad litem was going to be, was the guardian ad litem
22 going to be like an attorney. We decided, no, we were not
23 going to have the guardian ad litem be like an attorney.
24 CHAIRMAN BABCOCK: Right.
25 HONORABLE TRACY CHRISTOPHER: So we're not

1 appointing a guardian ad litem to double-check that the
2 plaintiff's lawyer is doing a good job on behalf of the minor.
3 I mean, I did not think that that's what we wanted our guardian
4 ad litems to be, and I thought we wanted to limit the rule to
5 guardian ad litem.
6 MR. ORSINGER: Let me make it past just
7 potential. Let's assume that it's not just a possibility that
8 the next friend is not acting in the child's best interest.
9 Let's say as a result of pretrial proceedings the trial judge
10 is convinced that the --
11 HONORABLE TRACY CHRISTOPHER: Well, what is the
12 next friend doing?
13 MR. ORSINGER: The next friend has hired the
14 lawyer that's representing the child.
15 HONORABLE TRACY CHRISTOPHER: And the lawyer is
16 doing a bad job.
17 MR. ORSINGER: I'm not saying bad. I'm not
18 talking about a conflict of interest here. I'm not talking
19 about negligence. I'm saying that if the trial judge becomes
20 convinced that the next friend who sometimes also has a
21 financial stake in the lawsuit independent from the child's is
22 favoring their own outcome at the expense of the child's
23 outcome, and let's not say that it's just hypothetic. Let's
24 say the trial judge is now convinced of it. Our rule prohibits
25 the trial judge from appointing a guardian ad litem.

1 HONORABLE TRACY CHRISTOPHER: Well, I think we
2 did discuss that possibility, and I thought that we had
3 concluded that ultimately the minor has the right to sue the
4 next friend and the minor has the right to sue their lawyer for
5 bad conduct in connection with handling the case and that we
6 were not hiring a guardian ad litem to step in there and try to
7 stop malpractice by the plaintiff's lawyer. I mean, that was
8 my understanding.
9 CHAIRMAN BABCOCK: Stephen.
10 MR. YELENOSKY: I agree with you, but I do think
11 he's pointing out something slightly different, and your first
12 comment may respond to it in saying you can sue the guardian ad
13 litem later, but our discussion about the guardian ad litem is
14 not to check for malpractice by the attorney led us to make
15 clear that the guardian ad litem was not functioning as an
16 attorney. But that isn't really responsive to his situation
17 where the person telling the lawyer what the objective is, the
18 person who's deciding the thing that a client gets to decide,
19 not the lawyer work, but the client work, has a conflict with
20 the ultimate client, the child.
21 HONORABLE TRACY CHRISTOPHER: But ultimately
22 that's malpractice if the lawyer is not doing a good job for
23 the child.
24 MR. YELENOSKY: No, but if he's following -- if
25 the lawyer is following the guidance of the next friend, whom

1 the court recognizes as the spokesperson for the child, does
2 that become malpractice because --
3 HONORABLE TRACY CHRISTOPHER: If the lawyer is
4 representing the mother and the child, and the mother is
5 somehow directing the litigation to the disadvantage of the
6 child, yes, I think the lawyer for the mother and the child has
7 a duty to say, "This is wrong. I'm not going to follow the
8 advice of the mother"; and if he does follow the advice of the
9 mother, he opens himself up to malpractice.
10 MR. YELENOSKY: But it's not necessarily
11 obvious. There could be a difference between mother and child
12 about issues -- issues of placement, for instance.
13 HONORABLE TRACY CHRISTOPHER: If it's obvious to
14 the trial judge, it ought to be obvious to the plaintiff's
15 lawyer.
16 MR. YELENOSKY: Well, it may be obvious in a
17 monetary situation. I'm not sure it's obvious in another
18 situation where a child or a guardian for a child might choose
19 a particular placement for a child, yet a conflicted next
20 friend might choose a different one.
21 HONORABLE TRACY CHRISTOPHER: Right. Which is
22 why we've totally exempted out the Family Code. In the Family
23 Code you-all have guardian ad litems, you have attorney ad
24 litems, you've got --
25 MR. YELENOSKY: Well, that's a good response.

1 HONORABLE TRACY CHRISTOPHER: You've got
2 guardians for the attorneys and attorneys for the guardians. I
3 mean, there are plenty of ad litems in the Family Code.
4 MR. YELENOSKY: You're right. You're right
5 about that.
6 CHAIRMAN BABCOCK: Richard Munzinger.
7 MR. MUNZINGER: She's addressed the problem.
8 It's a major expansion of existing law, but I don't have
9 anything to add to what Judge Christopher said.
10 CHAIRMAN BABCOCK: Okay. So it seems to me
11 we're back to this timing issue. Is everybody happy with the
12 "unless the parties agree to an earlier appointment" language
13 or do we want to take that out?
14 MS. SWEENEY: Well, it leaves the possibility
15 that there's something we haven't thought of and allows the
16 parties to conduct their own litigation. I mean, Carl, if for
17 some reason you and I are in a lawsuit and we agree we do need
18 an ad litem, even though it doesn't fit these hoops we ought to
19 be able to ask the court to appoint one; and if we don't agree,
20 it's not going to happen because if only you think we need an
21 ad litem, the court doesn't have authority unless there's a
22 settlement offer on the table or we're going to mediation,
23 assuming we're going to make sure that the language so
24 specifies.
25 So, you know, I mean, the policy we're

1 recommending to the Court is that we clarify the role of ad
2 litems by this rule and that it be a narrow rule, a narrow
3 role, a circumscribed role, and I think the way it's written
4 does that.
5 I still would like to have a change in the
6 "appears to be an adverse interest," to "appears to be a
7 potential adverse interest" so that there is not a finding that
8 the court thinks the plaintiff's lawyer appears to have an
9 adverse interest, because it's the appearance. It's not -- the
10 court is not saying, "I think you do" or even "it looks like
11 you do." The court is only saying there might be, and those of
12 us who take this seriously take this seriously.
13 CHAIRMAN BABCOCK: Carl.
14 MR. HAMILTON: Are you reading the rule to mean
15 that if you and I agree on the appointment of an ad litem that
16 the ad litem can come in and do anything, participate in
17 depositions or whatever?
18 MS. SWEENEY: Well, that's a good point. I
19 think the way the rule is written, no. Do we want the
20 agreement to permit the ad litem to do more if we should agree
21 to that?
22 MR. HAMILTON: The other point that I had in
23 Richard's example of the conflict, I don't think the next
24 friend would be suing on behalf of the minor himself for abuse,
25 so I don't think that works, but I do think that the nonsuit is

1 an area that we might want to think about including in this in
2 addition to the settlement because if the next friend for some
3 reason -- let's say the defendant offers the next friend a
4 settlement under the table to dismiss the lawsuit.
5 That becomes a conflict of interest there, which
6 is kind of akin to the settlement, but it's a nonsuit, so maybe
7 the court ought to in the instance that the next friend elects
8 to nonsuit ought to inquire at that point, and if there seems
9 to be a conflict -- or maybe just not even inquire, but just
10 appoint a guardian ad litem in the event of a nonsuit to see if
11 there is a conflict that has developed.
12 CHAIRMAN BABCOCK: Yeah, Paula.
13 MS. SWEENEY: This would be the place where we
14 stop agreeing, Carl.
15 CHAIRMAN BABCOCK: I knew it was too good to
16 last.
17 MS. SWEENEY: One of the few safety valves in
18 the system right now is nonsuit up until you're down at the
19 courthouse in the middle of a trial. If it's a minor case, the
20 nonsuit is not prejudicing the minor. The minor can refile,
21 and it's letting the nose of the camel under the tent to
22 eradicate the right to nonsuit, which is already something the
23 laws are eradicating. It's a political issue. It hasn't been
24 brought before this committee, and I object strenuously to
25 adding it to the rule, because all we're doing is starting to

1 chip away at something that right now ain't broke. It does
2 work. It allows people to get away from the courthouse
3 unscathed in some instances, and to put in anything that
4 advocates what is currently an absolute right when if we are
5 talking about minors a nonsuit would be without prejudice is
6 stepping down a slippery slope completely inadvertently, and I
7 don't think we should slide it into this rule without a lot of
8 discussion, which I'm prepared to engage in.
9 MR. HAMILTON: The statute wouldn't run against
10 a minor, but wouldn't it run against another person such as
11 incompetents?
12 MS. SWEENEY: Not if you're incompetent.
13 MR. YELENOSKY: Malpractice.
14 MS. SWEENEY: Except in a malpractice case where
15 even -- but those are going away anyway.
16 CHAIRMAN BABCOCK: Richard.
17 MR. ORSINGER: I think we -- when we amended the
18 class action rules we were concerned about certain kinds of
19 settlement that were not -- they would result in dismissals or
20 nonsuits as opposed to a bona fide settlement and people might
21 try to evade our effort to shine sunlight on the process and be
22 sure that there were no illicit or indirect benefits being
23 received. In that situation I recall we included nonsuits in
24 the area of what you could not do without the permission of the
25 court. I can dig the exact language out.

1 But I'm not sure what slippery slope Paula is
2 talking about because I don't really get involved in this kind
3 of litigation, but it seems to me that if you're going -- if
4 you have what appears to be a legitimate case for a child and
5 you've decided to nonsuit it, that it's not that big of a
6 burden to come into the court and show it, and maybe rather
7 than forcing the appointment of a guardian maybe we should just
8 say maybe you have to make a showing to the judge before the
9 judge accepts the nonsuit or something, but I don't like the
10 idea that someone could have a lawsuit, a different lawsuit,
11 not this lawsuit, that they gain a benefit in. This lawsuit
12 gets dismissed, and nobody is checking.
13 CHAIRMAN BABCOCK: Paula.
14 MS. SWEENEY: And that's, as you say, because
15 you don't do this work and --
16 CHAIRMAN BABCOCK: You ignorant slut.
17 MS. SWEENEY: I want the record to show I said
18 that in a really nice way and I think Richard's a really smart
19 lawyer. There are a lot of times when it is important for the
20 plaintiff to be able to abandon a lawsuit, and there are states
21 that don't allow you to abandon a lawsuit without a motion and
22 permission.
23 Now, we're already in a situation where there's
24 all kinds of teeth in lawsuits now and people -- and if you can
25 be forced to stay in one or to justify why you want to stop, in

1 a highly politically charged environment where decisions are
2 made based on political considerations you're taking away a
3 valuable safety valve that allows the plaintiff out. You're
4 allowing -- if you have to have permission to quit, you may not
5 get it. That's the whole point. Otherwise, if it was
6 automatic, we wouldn't be asking for permission, but what
7 you're talking about is sending a message to the judge because
8 they know you can't quit. You have to keep litigating. And in
9 the situation that we're litigating in today that is, I think,
10 very, very inappropriate to do, to say, "No, you have to keep
11 on. You've got to keep suing."
12 CHAIRMAN BABCOCK: Yeah, Justice Hecht.
13 JUSTICE HECHT: But if the only concern were
14 that the adult was getting something in exchange for the
15 nonsuit so that you could still have an absolute right to
16 nonsuit, you just had to give up whatever you were getting
17 under the table or whatever, does that raise the same problems?
18 I'm just trying to understand.
19 MS. SWEENEY: A little, Judge, because if you're
20 nonsuiting a minor you're nonsuiting without prejudice under
21 our existing system, so the minor could come back. So the
22 minor is not being prejudiced in that regard, regardless of
23 whether the adult is taking something under the table. So
24 you're not hurting the minor by allowing the nonsuit, but
25 potentially you are causing an impact to everybody else and to

1 the system by requiring that the lawsuit continue or that the
2 parties have permission for the nonsuit because even if the
3 defendant -- you know, back to Carl again, Carl says, "Well,
4 I'm going to pay your mama under the table. I want -- the
5 court doesn't approve that settlement, won't know about it, but
6 I want you to nonsuit the kid." It's without prejudice to the
7 child.
8 Now, if on the other hand, he wants a settlement
9 agreement releasing the child, which would prejudice the child,
10 then we're back to the ad litem, who would presumely come in
11 and say, "Heck, no, you can't do that. I'm not going to
12 recommend it." So all you would be doing by the proposal to
13 require permission for the nonsuit is prohibiting voluntary
14 nonsuits that people have a right to take that at this time
15 aren't causing any harm to minors because they can come back
16 later.
17 MR. ORSINGER: Assuming the defendant is still
18 there and assuming the insurance company is in place when they
19 come back, etc., etc.
20 MS. SWEENEY: Those assumptions are always made
21 when we say minors have until they're 20.
22 CHAIRMAN BABCOCK: Justice Hecht.
23 JUSTICE HECHT: And then on another -- I'm just
24 trying to understand this because I think the Court is going to
25 take a pretty intense interest in this, but our idea is that, I

1 guess, under the Family Code, Richard, the parent has the right
2 to call the litigation shots for the child, period.
3 MR. ORSINGER: The interests -- assuming that
4 there is a marriage then that right is shared by the two
5 parents without an allocation of authority. If the child is
6 born out of wedlock, probably the mother calls that shot until
7 there's a court order; and if it's after there's a court order
8 then usually that right is allocated, but sometimes it's
9 shared.
10 JUSTICE HECHT: So the theory here is that when
11 there's litigation and the child is represented by a parent who
12 has the authority to make those kind of decisions, the ad litem
13 is not going to get into any of those calls. If the child is
14 represented by a next friend who is not a parent or doesn't
15 have the right to make those decisions, then I guess the trial
16 judge could suggest or insist that a guardian or that a formal
17 guardian be appointed before continuing on. At least you could
18 raise -- surely you could raise the issue.
19 MR. ORSINGER: Not under this rule, because you
20 can only appoint a guardian for a settlement.
21 JUSTICE HECHT: I mean a probate court guardian.
22 MR. ORSINGER: Oh, excuse me. What do you do
23 if you're --
24 JUSTICE HECHT: So the only thing this is -- the
25 only thing this rule is focusing on is the split of the

1 settlement basically

2 MR. ORSINGER: But it also prohibits the court

3 from looking at anything else. So let's say that there is a

4 vicious divorce going on and the mother has filed a lawsuit on

5 behalf of the daughter against the father for sexual abuse.

6 Okay. And because of pretrial hearings or whatever, the

7 district judge is satisfied that she's acted out of animosity

8 and attempting to gain the benefit of property division in the

9 divorce, and the child is now an official plaintiff against her

10 own father.

11 Okay. Now, I think a district judge in the tort

12 case, which is not under the Family Code and is not in the

13 family court, should be able to say, "This situation is too

14 volatile, and I don't think that the mother should be calling

15 the litigation shots for the child. I want to appoint an

16 independent guardian, let them make their own independent

17 assessment about whether the claim is valid or not; and if they

18 want to nonsuit it, come up here and show me that nothing

19 happened; or if you want to proceed, fine. At least I know

20 you're making a decision that's not biased by feelings,

21 animosity, or financial reward."

22 And I'm not satisfied by Judge Christopher's

23 assurance that the Family Code will help in that situation

24 because I think that the tort case will not be part of the suit

25 affecting the parent-child relationship and probably not even

1 in the same court that's hearing the family law matter, and I
2 understand that we don't want guardian ad litem getting in too
3 early where they just run up a fee and don't add any value, but
4 it defies my understanding of the role of district judge to say
5 if a district judge is convinced that the person who is running
6 the child's lawsuit is not running it for the interest of the
7 child, they can't replace that representative with someone who
8 is neutral. And we're prohibiting that in this rule, and I
9 know you-all voted to do that last time. I'm sorry I wasn't
10 here to argue against it, but it's just disturbing to me that
11 trial judges won't have that power.
12 JUSTICE HECHT: Just to put a finer point on it,
13 I think what the committee was saying is you can still do it.
14 You've just got to go to probate court to get it done. You
15 just can't do it on motion.
16 MR. ORSINGER: Who goes to probate court?
17 JUSTICE HECHT: Whoever wants the guardian
18 appointed. Well, I guess that's a problem, too, because you
19 wouldn't be a movant.
20 HONORABLE TRACY CHRISTOPHER: Can I ask you a
21 question? In Houston any tort case involving the families
22 stays in family court. Is that not the practice throughout the
23 rest of the state?
24 MR. ORSINGER: In San Antonio we don't have
25 family courts, but if you file the lawsuit separately they

1 track along independently unless someone joins them together.
2 HONORABLE TRACY CHRISTOPHER: So they would have
3 two different judges?
4 MR. ORSINGER: They would have two different
5 court proceedings, and you have a different judge every day you
6 go to court. Not the same judge -- I mean, it could be the
7 same judge, but it's likely it's just whoever is available when
8 that case comes up for hearing. Now, if they're both set for
9 hearing -- if both cases are set for hearing at the same time,
10 they will both be assigned out to the same judge.
11 HONORABLE TRACY CHRISTOPHER: Okay. And if
12 there's a divorce pending the child would get a guardian ad
13 litem --
14 MR. ORSINGER: No.
15 HONORABLE TRACY CHRISTOPHER: -- under the
16 Family Code or no?
17 MR. ORSINGER: Well, in Houston they always do,
18 but in San Antonio they almost never do unless you can show an
19 extraordinary reason, and I'm not sure how it works in the
20 dockets that have dedicated family law judges, which they do in
21 Dallas, Houston, Fort Worth, even Midland, places like that,
22 they pretty much do not -- the family law judges do not want
23 damage cases in their court. So if some plaintiff files a case
24 for a child in the civil side and has a family law proceeding
25 on the family law side, it's up to the civil judge whether to

1 send that case to the family law judge, in my experience.
2 HONORABLE TRACY CHRISTOPHER: Well, I know in
3 Houston we send them over to the family.
4 MR. ORSINGER: Okay. Well, that's probably a
5 local practice, and I wouldn't really presume to speak about
6 the practice around the state.
7 CHAIRMAN BABCOCK: Paula, then Ralph.
8 MS. SWEENEY: Isn't what you're suggesting,
9 Richard, the judge has decided this is to the detriment of the
10 child and to appoint somebody else to oversee the suit, aren't
11 you talking about an attorney ad litem and not a guardian?
12 MR. ORSINGER: No, I'm not. And I am
13 specifically staying away from the attorney ad litem. The
14 guardian ad litem is to step into the role of the next friend,
15 who is not a lawyer. The next friend is someone who is close
16 to the child and is aware that the child has an injury and
17 should be -- have their rights vindicated in the litigation
18 system. So all I want to do is replace the next friend with
19 someone who doesn't have a conflict, and they may hire the same
20 lawyer or they may hire a different lawyer or they may tell the
21 same lawyer to nonsuit the case because based on their own
22 personal assessment it's not a legitimate case.
23 I'm not suggesting -- in my view an attorney ad
24 litem is required to do what the child wants if the child is at
25 least four years old. That's an overstatement or an

1 oversimplification, but if you read our Family Code, that's the
2 rule. If you're an attorney ad litem, you do what the kid
3 wants even if you don't agree with it, as long as the child is
4 mature enough to understand what the attorney is saying.
5 Definitely don't want an attorney ad litem in that decision.
6 We want someone who's stepping in for the next friend but who
7 doesn't have a potential conflict of interest. That's what I'm
8 trying to say here.
9 CHAIRMAN BABCOCK: Ralph.
10 MR. DUGGINS: Why wouldn't that go to the
11 probate court?
12 MR. HAMILTON: Who's going to take it?
13 MR. DUGGINS: Can't the father petition for the
14 guardian of the estate?
15 MR. ORSINGER: Yeah, I mean, the defendant in
16 the case could open up a guardianship proceeding and then, tell
17 me now, if we've got a family law matter going on over here
18 even with temporary custody maybe, we've got a personal injury
19 case going on over here with the next friend and now we have a
20 probate court opened up to establish a guardian of the person,
21 who has jurisdiction over what?
22 MR. DUGGINS: Well, all I was trying to do was
23 follow up on Justice Hecht's question about the availability of
24 a remedy in a situation where you didn't appear to think there
25 was one. I'm not saying it's not complicated or --

1 MR. ORSINGER: Would the probate judge be the
2 one to be the umpire in that situation? I'm not convinced that
3 that's the case. When you have a kid in custody -- the Probate
4 Code was written in the Thirties before we even had a Family
5 Code; and many things that are now done under the Family Code,
6 used to be you had to do them under the Probate Code with the
7 appointment of a guardian of a person.
8 When the Family Code, Title 2, relating to
9 parent-child was adopted and became effective in 1974 it gutted
10 most of the probate practice relating to children. Not all of
11 it, but most of it. And for awhile there were parallel
12 competitions between somebody going into a district court where
13 there was a divorce and custody case and getting an appointment
14 there and somebody else going to the probate court and being
15 appointed as a guardian of the person, but over time the Family
16 Code has won out insofar as management of the affairs of the
17 child is concerned in most of the instances that I'm familiar
18 with.
19 So I'm not sure how practical it is that a
20 guardianship of the person is what we want to do as an
21 alternative to just replacing the next friend in the tort case,
22 because now you've got three judges, three lawsuits, three
23 separate court systems; and we don't have a clear line of
24 demarcation in them.
25 CHAIRMAN BABCOCK: Judge Gray and --

1 HONORABLE TOM GRAY: I'm trying to figure out a
2 fact pattern that would be different that this may trigger a
3 problem in, and I was thinking more of the one present sibling,
4 absent sibling, parent in a nursing home, some type of injury,
5 parent goes into incompetency; and you've got this situation
6 where the local sibling is going to take care of the suit as a
7 next friend and then they're offered money to settle; and a
8 different fact pattern, but same problem.
9 And the problem I keep coming back to in my mind
10 as that problem develops is how is the trial judge, that trial
11 judge when the nonsuit is made, ever going to become aware of
12 the fact pattern. But is that another fact pattern that this
13 problem might arise in under your scenario? I mean, is that
14 the same type problem that you're looking at for the need for
15 the trial court flexibility to appoint another guardian ad
16 litem or a guardian --
17 MR. ORSINGER: To replace the next friend with a
18 guardian?
19 HONORABLE TOM GRAY: Right.
20 MR. ORSINGER: I could see, for example, that
21 one person might want the nursing home to just provide lifetime
22 care at no additional cost while another child might want to
23 recover money damages instead.
24 HONORABLE TOM GRAY: Because there may be a very
25 real difference if the parent that is in the nursing home

1 recovers a monetary settlement of who is going to get that when
2 that person dies versus who is going to get money now while the
3 parent is alive. It just seemed like a different fact pattern
4 that maybe -- or at least it was helping me get my mind around
5 it, and I was trying to think if it really applied or not to
6 the situation that you-all were concerned about, and it seems
7 like it does.
8 CHAIRMAN BABCOCK: Judge Christopher and then
9 Steve and then Paula.
10 HONORABLE TRACY CHRISTOPHER: Oh, I didn't have
11 my hand up
12 CHAIRMAN BABCOCK: Oh, I'm sorry. Stephen.
13 MR. YELENOSKY: I was just going to ask Richard
14 if much of the problem or all of the problem is limited to the
15 situation where there is a pending family law case, because you
16 posit the example if you've got a divorce going on and then you
17 have a court claim in civil court; and with respect to other
18 types of claims, Paula laid out how she thinks, anyway, that
19 would be taken care of. If it's just while there is a pending
20 family law case, do we need to have some exception that says
21 that the guardian ad litem rules in the Family Code apply when
22 there's a pending family law case?
23 MR. ORSINGER: That's just the example that I'm
24 probably more familiar with, but I would doubt that no one
25 would take advantage of a minor except when there's a divorce

1 pending. I mean, it seems to me like the problem would be
2 broader. Maybe it doesn't come up as often, in which event we
3 wouldn't want to tailor the rule for it.
4 MR. YELENOSKY: The other kind of advantage that
5 they might be taken of, as Paula pointed out, you wouldn't be
6 able to get a release without getting a settlement or order of
7 the court.
8 MR. ORSINGER: I think that's -- you know,
9 that's an alternative. I mean, would you rather have a very
10 good lawsuit and the verdict now and the settlement now or
11 would you rather have a bad lawsuit or a bad settlement --
12 pardon me, a dismissal with the right to come in after 10 or 15
13 years and try to sue the defendant. I mean, it's not an equal
14 choice, depending on how old the child is. If the child is 11
15 and it's going to be another seven or eight years before they
16 have the right to sue, how likely is it they are ever going to
17 even know about the right to sue? How likely is it the
18 defendant will still be in practice? How likely is it the
19 defendant will still have the insurance? I mean, those to me
20 are questions that are not just to be disregarded lightly.
21 CHAIRMAN BABCOCK: Paula.
22 MS. SWEENEY: They're not. I think what
23 happened that you didn't hear is -- and I think the sense of
24 the committee was that we were trying to formulate a
25 recommendation to the Court about the scope of ad litemhood in

1 Texas; and is it going to be broad or is it going to be narrow;
2 and we went with narrow, with very specific delineations of
3 responsibilities; and the answer to your question, this last
4 question, was that the child's lawsuit might not be as good in
5 six years or eight years, but they had other remedies,
6 including a malpractice suit against the lawyer that prejudiced
7 their interest and that there were protections in the system
8 for the child or incompetent who is thus prejudiced by some
9 action taken during the incompetence, but that in terms of a
10 policy recommendation to the Court it was going to be for a
11 narrow ad litem role.
12 The thing that you raise that does trouble me,
13 though, and, Judge, I don't know if -- I don't remember talking
14 about this, is the earlier question where you stated let's
15 assume the judge knows there is a conflict and knows the kid is
16 getting -- or the incompetent is somehow being abused, and yet
17 under this rule the court could do nothing, and I don't know
18 if -- you know, on the one hand I want paragraph (b) to talk
19 about that "it appears there is a potential conflict," but
20 maybe we need a paragraph (e) in cases where there is a finding
21 of conflict the court may appoint or may appoint at any time or
22 something like that if the court so finds. But I think that's
23 where we ran into Carl's problem. They are just going to find
24 a conflict in every case and appoint, but that would solve your
25 problem.

1 MR. ORSINGER: Well, maybe there's -- and maybe
2 what's happening here is because we're afraid that a paragraph
3 (e) would be abused by some judges to appoint too frequently.
4 MS. SWEENEY: Right.
5 MR. ORSINGER: What's happening is that we're
6 taking away the right of the honest judge in an appropriate
7 situation to appoint --
8 MS. SWEENEY: That's right.
9 MR. ORSINGER: -- so that a judge who's not
10 maybe up to the standards we would want can't abuse it.
11 MS. SWEENEY: Right.
12 MR. ORSINGER: Okay. If that's what -- I was
13 trying to read all the signals you were saying in all of your
14 comments about politics and everything. I agree that abuses
15 exist, but I think a better way to curtail the abuses is to
16 curtail the award of attorney's fees and make them appealable
17 and maybe even have some kind of elevated standard of appellate
18 review, because we all know where these decisions are coming
19 from.
20 We all know where these 500,000-dollar awards
21 for, you know, 15 minutes of work are coming from; and later on
22 we've separated that out as a severable, appealable issue. We
23 are mandating that it has to be based on necessary time spent
24 and reasonable rate. Maybe we even ought to say "reasonable
25 hourly rate" or something. Maybe we could curtail the abuses

1 by limiting the amount of money that can be abused but still
2 give the good district judges the power to protect these
3 innocent victims.
4 CHAIRMAN BABCOCK: Paula, would the problem
5 you've just identified be cured if you took the word "only" out
6 of 173.2(b)?
7 MS. SWEENEY: Could you narrow down where that
8 "only" is?
9 CHAIRMAN BABCOCK: Yeah. It's in the second
10 line, about six or seven words in right after "next friend."
11 MS. SWEENEY: It won't bother me, but it will
12 bother Carl because it opens the door to appointment.
13 MR. HAMILTON: That doesn't bother me, but I
14 don't think that fixes the problem.
15 MS. SWEENEY: Yeah.
16 MR. HAMILTON: If you took "only" out it still
17 says the "adverse interest, or "offer of settlement and there
18 is an adverse interest."
19 CHAIRMAN BABCOCK: Well, it would suggest to me
20 that there are three levels then, that the judge must do it
21 under this circumstance, the judge must not do it under this
22 circumstance, and that leaves a middle ground when the judge
23 would have some discretion. If you took the word "only" out.
24 MR. DUGGINS: Richard, does that solve your
25 problem?

1 MR. ORSINGER: I think it solves my problem, but
2 I think that we have to be careful that we don't have judges
3 appointing people to sit in on depositions they don't need to
4 be sitting in on
5 CHAIRMAN BABCOCK: We're not there yet. We're
6 going to get there, but we're not there yet. What about this?
7 HONORABLE TRACY CHRISTOPHER: I'd like to accept
8 that, but I don't think it's really curing the problem.
9 CHAIRMAN BABCOCK: It may not. I just --
10 HONORABLE TRACY CHRISTOPHER: Especially if I
11 reword it as suggested. The first sentence would read "The
12 court must appoint a guardian ad litem for a party represented
13 by a next friend when the defendant has made an offer to
14 settle" -- no, excuse me.
15 "The court must appoint a guardian ad litem for
16 a party represented by a next friend when there appears to be
17 an adverse interest between the next friend and the party."
18 Sentence two: "The court must not appoint an ad litem if no
19 adverse interest exists." Sentence three: "Unless the parties
20 agree to an earlier appointment, the court must not appoint
21 until the defendant has made an offer to settle that party's
22 claim." And I'm not really sure that cures the problem.
23 CHAIRMAN BABCOCK: Justice Hecht.
24 JUSTICE HECHT: And is there an adverse interest
25 other than how the money is going to be split?

1 MR. ORSINGER: Well, yes, I can tell you this.
2 In family law matters there is, there can be whether the suit
3 should even be pursued.
4 JUSTICE HECHT: Yeah, but those go to the family
5 MR. ORSINGER: I'm not talking about a divorce
6 case or a custody case. I'm talking about a tort case where
7 the parent has brought a lawsuit on behalf of the child against
8 the other parent, against the stepfather or whatever. I mean,
9 when you're dealing with matters that are emotional like that,
10 sometimes they are not driven entirely by monetary reward; and
11 if you feel that what's happening here was that the child is
12 being thrust into an adverse position against their own parent,
13 even against the child's will or even -- and based on the
14 child's statement to the court that they weren't the victim of
15 any kind of inappropriate behavior, surely the district judge
16 should have the power to take the decision-making authority
17 away from the one who's doing that, even though it's not
18 directly -- money is not on the table yet.
19 MR. DUGGINS: Does Chip's amendment solve that?
20 MR. ORSINGER: I think it does solve it. I
21 guess I'd like to read it, make sure that Judge Christopher
22 feels like it solves -- she said she didn't think it solved it
23 CHAIRMAN BABCOCK: Well, that's because she
24 reworded a lot of things. If you take the language -- and I'm
25 not sure it solves it either. In fact, I think it kind of

1 leaves something to the imagination, but if you have it as
2 written here and only strike the word "only," it would then
3 read, "Unless the parties agree to an earlier appointment,"
4 because Paula says it's important to keep that clause in there
5 to give the lawyers in the case flexibility.
6 MR. ORSINGER: Right.
7 CHAIRMAN BABCOCK: So I'm all right with that.
8 "The court must appoint a guardian ad litem for a party
9 represented by a next friend when the defendant has made an
10 offer to settle that party's claims and there appears to be an
11 adverse interest between the next friend and the party. The
12 court must not appoint an ad litem if no adverse interest
13 exists." Now, that leaves another word in there between "must"
14 and "must not" --
15 MR. ORSINGER: Right
16 CHAIRMAN BABCOCK: -- which is unexpressed in
17 the rule, but would give the trial judge some discretion in the
18 circumstance, maybe in the circumstance you're talking about or
19 maybe in some other circumstances. The reason why you might be
20 sly and vague about this is so as to not encourage the
21 appointment, the rote appointment of ad litems, which is one of
22 the evils we're trying to cure here, but it is -- it leaves
23 something to the imagination, and in rule-making that's
24 typically not a good idea
25 MR. ORSINGER: And an argument will be made

1 because you haven't been given the authority, you therefore
2 don't have the power.
3 CHAIRMAN BABCOCK: An argument might make that,
4 although the rule would not say that.
5 MR. ORSINGER: The rule doesn't say you can and
6 the rule doesn't say you can't, and so are judges permitted to
7 do things that the rules don't say they can do?
8 CHAIRMAN BABCOCK: Well, they have inherent
9 authority, which they always exercise.
10 MR. SUSMAN: Wait a minute.
11 CHAIRMAN BABCOCK: Yeah, Stephen.
12 MR. SUSMAN: I mean, you know, I understand what
13 you're saying and I think I agree with you, but we could
14 certainly write the rule to make more sense. You're saying if
15 there's an adverse interest the court must appoint a guardian
16 at the time of settlement
17 CHAIRMAN BABCOCK: Right.
18 MR. SUSMAN: And may otherwise.
19 CHAIRMAN BABCOCK: Right.
20 MR. SUSMAN: May earlier. If there's no adverse
21 interest, under no circumstance can you appoint a guardian,
22 period.
23 CHAIRMAN BABCOCK: Right.
24 MR. SUSMAN: I mean, rather than the way it's
25 worded, it just needs to be reworded to accomplish that.

1 MR. MUNZINGER: My memory of the past discussion
2 was that we put this sentence in there because the principal
3 problem with amendments to the rules which this rule was
4 addressing was the problem of the rogue judge who was
5 appointing his buddies and taking all of the money off of the
6 defendant's insurance companies and what have you. If you
7 remove that restriction, you haven't cured the problem that
8 brought this rule to the attention of the committee in the
9 first place.
10 The exception that Richard is thinking about is
11 swallowing up the purpose of the rule, and it may or may not be
12 a problem. I'm not satisfied completely that a district judge
13 wouldn't have the authority to investigate circumstances
14 regarding members of the Bar before his or her court if it was
15 egregious, as you suggest, Richard. But the problem I have
16 with just knocking the word "only" is we debated this the last
17 time. The whole purpose of these amendments to this rule was
18 to take control of the rogue judges who were ignoring their
19 legal obligations not to milk insurance companies, big
20 defendants, and what have you elsewhere in the state; and
21 you're going back -- what you've done is put all that
22 discretion back in the very people you don't want to have the
23 discretion
24 CHAIRMAN BABCOCK: Richard Orsinger, not
25 Munzinger.

1 MR. ORSINGER: Could we save your motive by
2 tightening up and making the decision of whether a conflict
3 exists reviewable and then the fee awarded reviewable by a
4 higher court, or is that not enough protection? What if we
5 make it clear that the trial judge's finding that there is a
6 conflict has to be based on specific evidence and they have to
7 articulate the findings and it's subject to review by the court
8 of appeals and the Supreme Court and they are limited to a
9 reasonable hourly rate for work necessarily done? Can we
10 protect you that way, or do you have to take all the discretion
11 away from the trial judge to have protection?
12 MR. MUNZINGER: I think last time we discussed
13 this part of the concern was that the insurance company or the
14 defendant, whoever it might be, is looking at attorney's fees
15 on appeal and expenses on appeal that reduce the economic
16 incentive to consider the appeal. I don't know how efficacious
17 an appeal is for that problem.
18 My personal belief is, Richard, that the
19 instances that you are concerned about are so few and far
20 between that I'm wondering if we're not throwing the baby out
21 with the bathwater when we begin tinkering with this rule.
22 It's much like the deal on Rule 202. We have got 200 cases
23 filed in 22 months in Houston and we are all concerned about
24 not screwing up Rule 202 because it happens so infrequently.
25 Admittedly the concerns that you express are important because

1 they involve children and families who are being abused.
2 Whether or not it's sufficiently frequent to warrant changing
3 this rule when we know we have abuses in certain parts of the
4 states and we know we have people who are are milking other
5 people to help their friends, and that's what this rule was
6 designed to prevent, and I question the need for it.
7 CHAIRMAN BABCOCK: But before we throw that baby
8 out we're going to have to get her an ad litem.
9 Steve.
10 MR. SUSMAN: Isn't there a way -- you know, I
11 agree with Richard. Isn't there a way to deal with bad judges
12 that doesn't hurt innocent people? I mean, he's posited a
13 pretty sympathetic case; and, you know, maybe there are only
14 five of them, but can't we deal with the bad judges in some way
15 directly?
16 HONORABLE TRACY CHRISTOPHER: If we are talking
17 about tort cases between spouses, don't you think I can go to
18 the Family Code and look at their guardian ad litem rules if I
19 needed to do a guardian ad litem rule? I mean, isn't that
20 where you see the most potential for abuse, is when it's
21 between the spouses?
22 MR. ORSINGER: You can't look to the Family Code
23 under this version of the rule because it has to be in a suit
24 affecting the parent-child relationship, and I will discuss
25 that one when he allows me to go back to part (1), but you will

1 not have a suit affecting in your court. You will have a tort
2 in your court, and the Family Code provisions apply only as to
3 children when they're in the suit affecting it.
4 MR. YELENOSKY: But we could write this
5 rule --
6 MR. ORSINGER: So your authority is going to
7 have to be under the rules or it's going to have to be inherent
8 from your jurisdictional statute or from the Constitution.
9 MR. MUNZINGER: May I ask Richard a question?
10 CHAIRMAN BABCOCK: Sure.
11 MR. MUNZINGER: A suit by a child against its
12 parent with a pending divorce case in another court is not a
13 suit affecting the parent-child relationship?
14 MR. ORSINGER: No. A suit affecting the
15 parent-child relationship has to do with allocating the rights
16 or responsibilities of parents or people in parent-like
17 positions relative to the child. So it would not include money
18 damage claims or, in my view, although there is a little bit of
19 dispute, even the management of property.
20 MR. YELENOSKY: But, again, Richard, if that's
21 the only problem, all we have to do is slip into this rule that
22 in those instances where there is a pending family law case you
23 can use the Family Law Code.
24 MR. ORSINGER: I would feel a lot better if that
25 were --

1 MR. SUSMAN: That was my exact question. Can
2 you think of an abuse outside the example you gave? I mean,
3 can we solve your problem, which really seems horrible, by
4 simply saying the judge does have discretion to appoint a
5 guardian where there is an adverse interest -- you know, where
6 there is a dispute between parents or there's a suit by a child
7 against a parent or something like that.
8 MR. YELENOSKY: Richard said earlier he couldn't
9 imagine that there wouldn't be, but we keep getting back around
10 to that, and that seems to cover every example we've got
11 CHAIRMAN BABCOCK: Skip Watson.
12 MR. WATSON: I either need to get a recess so
13 that I can go sell my Martha Stewart stock --
14 MR. ORSINGER: Did she get convicted?
15 JUSTICE HECHT: Too late.
16 MR. WATSON: Yeah.
17 MR. HAMILTON: She did?
18 MR. WATSON: Yeah. Or could we get a vote on
19 whether -- or the consensus of whether or not we think this
20 unique but clearly relevant family law problem needs to be
21 addressed in this rule? I think some of us think we understand
22 the problem, but this isn't the place to fix it.
23 CHAIRMAN BABCOCK: So you think we're hung up on
24 Richard?
25 MR. WATSON: Yep.

1 MR. ORSINGER: I'm happy to take a vote, if
2 nobody wants to talk about it, and let's quit talking about it.
3 But this is not the place to fix it. This is the place that
4 causes the problem. The language that you guys are adopting is
5 the language that strips from the district courts the power to
6 protect children in situations like that, and the Family Code
7 doesn't give it to you because they don't do damage cases.
8 MR. SUSMAN: Bravo to Richard.
9 CHAIRMAN BABCOCK: Judge Gaultney.
10 HONORABLE DAVID B. GAULTNEY: Why can't we go
11 back to the application exception in number (1)(a) and deal
12 with Steve's suggestion that we can except that type of
13 situation from the application of this rule. You know, if he
14 has an exception so it wouldn't be limited solely to -- the
15 exception wouldn't be limited solely to suits involving the
16 parent-child relationship, but it would also pick up pending
17 family matters or something like that.
18 MR. YELENOSKY: But rather than -- if you except
19 it, though, there's nowhere to go as opposed to inserting the
20 Family Code, because if you except family law, they have their
21 provisions that apply; but if you except these tort cases
22 without saying that the Family Code applies, you don't have
23 anything that specifies what an ad litem is, so that's why I
24 suggested inserting.
25 CHAIRMAN BABCOCK: Alistair.

1 MR. DAWSON: We may be saying the same thing. I
2 would propose that we vote on whether to add a provision that
3 would give the trial court the discretion to appoint an ad
4 litem if such appointment of a guardian would be authorized
5 under the Family Code.
6 CHAIRMAN BABCOCK: That's an idea.
7 HONORABLE TERRY JENNINGS: Well, would it --
8 CHAIRMAN BABCOCK: Go ahead.
9 HONORABLE TERRY JENNINGS: Would it solve
10 Richard's problem if you just added what he's talking about in
11 here after "only," "only when, one, there is an actual conflict
12 or an actual adverse interest between the next friend and the
13 party or between the lawyer and the party" and -- or excuse me,
14 "or, two, when the defendant has made an offer to settle a
15 party's claims."
16 CHAIRMAN BABCOCK: Okay.
17 MR. YELENOSKY: Can I just point out that it
18 would apply when it applies in Family Code puts you back in the
19 same situation because Richard says it wouldn't apply. The
20 Family Code by definition would not apply to that tort claim
21 unless you say it does in this rule.
22 MR. ORSINGER: Let me warn everybody, you don't
23 want to incorporate the family law standards because they're as
24 broad as the horizon, because in family law we want the trial
25 judge to put somebody in the courtroom that doesn't have a

1 conflict.

2 MR. SUSMAN: Richard, it's not going to be a
3 problem because we're only talking about a handful of cases in
4 that situation. I mean, what we're trying -- the evil we are
5 trying to deal with is judges who wholesale give these guardian
6 appointments in every tort case.

7 MR. ORSINGER: Right. Right.

8 MR. SUSMAN: Now, we deal with that evil because
9 we're taking -- they can only do it in a case where a guardian
10 will be appointed in a dispute between the child and parent.

11 MR. ORSINGER: Okay. Okay. That would catch
12 most of my problem and wouldn't broaden it too much

13 CHAIRMAN BABCOCK: So you'd amend 173.1(a) to
14 say something like "The Family Code governs the appointments of
15 ad litems in suits involving the parent-child relationship and
16 disputes between parents and children."

17 MR. ORSINGER: No. I think that's too broad
18 because a clever district judge is going to say, well, I think
19 that there is a dispute between the child and the parent as to
20 whether the parent was contributorily negligent, so I'm going
21 to appoint my campaign manager and give him $500,000.

22 I think what we need to do is say something like
23 that we're going to give them the conflict basis for
24 appointment where the suit involves claims between family
25 members or where a child is suing a parent or a parent is suing

1 a child. That's going to catch most of the stuff that I care
2 about, and it isn't going to -- we don't want to pick up the
3 situation where the dad is driving the car and the kid is in
4 the backseat and the judge says, "A-ha, there's a conflict,
5 contributory negligence," you know, appointment
6 CHAIRMAN BABCOCK: Okay. But is 173.1(a) the
7 place to fix it?
8 MR. ORSINGER: No, I don't think so. My
9 suggestion would be to fix it -- to say that the trial court
10 has the discretion
11 CHAIRMAN BABCOCK: Now where are you?
12 MR. ORSINGER: I'm under 173.2, and maybe under
13 a paragraph (e) like Steve was suggesting or that where the
14 lawsuit is -- where family members are suing each other then
15 the court has the authority to appoint a guardian ad litem if
16 the court finds that the next friend has a conflict with the
17 child. And so we're not changing the scope of where the rule
18 applies, and the only opening we're giving the judge based on
19 conflict is where the family members are suing each other.
20 CHAIRMAN BABCOCK: What do you think about that,
21 Judge Christopher?
22 HONORABLE TRACY CHRISTOPHER: I'm not terribly
23 opposed to it. I just don't know if I see the necessity of it.
24 CHAIRMAN BABCOCK: Yeah, Frank.
25 MR. GILSTRAP: Richard, you're posing the

1 situation where basically you have say a man and woman are
2 getting a divorce and the mother says that her husband has been
3 abusing the stepdaughter and files a next friend suit on behalf
4 of the stepdaughter against the father?
5 MR. ORSINGER: But there are varying situations.
6 Could be the ex -- the father is suing the stepfather on behalf
7 of the child.
8 MR. GILSTRAP: And then the judge says, "Well,
9 I've heard this young woman's testimony. I think it's
10 frivolous. I'm going to appoint a guardian ad litem," and the
11 guardian ad litem is going to say, "I'm going to nonsuit this
12 lawsuit."
13 MR. ORSINGER: That's possible, or maybe it's
14 being nonsuited and the judge thinks the divorce is being
15 settled on condition that the tort case is dismissed, and he
16 doesn't like that or she doesn't like that.
17 MR. GILSTRAP: I'm not sure. How different is
18 that than, say, a situation where the mother has got the
19 daughter to file a frivolous sexual abuse case against a third
20 party, Michael Jackson or something like that?
21 MR. DAWSON: Frivolous?
22 MS. SWEENEY: That's close enough.
23 MR. GILSTRAP: That's been floated through the
24 media.
25 MR. SUSMAN: That's more obvious than in his

1 example. In his example it's clear that the mother has a beet
2 to pick with the father. Not clear in your example that the
3 mother has a beet to pick with Michael Jackson.
4 MR. GILSTRAP: Sure. She wants money.
5 MR. SUSMAN: Well, so. I mean, their interests
6 are aligned in some way.
7 MR. ORSINGER: I'm not opposed to your rule
8 because I frankly think the district judge ought to have
9 discretion any time they believe there is a conflict. The
10 policy decision has been made that because of the abuse of that
11 discretionary authority we're going to take it away from the
12 judges, and I guess what I'm saying is if you take all
13 discretion away from the judges I can tell you about some
14 situations where bad things are going to happen to kids.
15 Maybe if we can figure out some way to protect
16 against bad things that happen to kids then go ahead and take
17 all the discretion away and I really won't care. I'm sorry we
18 have to do that, but if we do do that, at least we protect
19 these interfamily litigation because interfamily litigation may
20 not cross your desk very much, but I do see it
21 CHAIRMAN BABCOCK: Okay. You propose a
22 subparagraph (e) that says, "The court may appoint an ad litem
23 where family members are suing each other."
24 MR. ORSINGER: And the court finds that there
25 was a conflict between the next friend and the interest of the

1 child, conflict between the interests or whatever your standard
2 of conflict is.
3 MR. MUNZINGER: Chip?
4 CHAIRMAN BABCOCK: Yes.
5 MR. MUNZINGER: You envision that the conflict
6 arises in circumstances other than when the case is going to be
7 dismissed; is that correct?
8 MR. ORSINGER: Sometimes just the fact that the
9 case is being pursued.
10 MR. MUNZINGER: And what authority would the
11 guardian ad litem have and what benefit would the guardian ad
12 litem provide to the court if the guardian ad litem is
13 representing the child? Is he going to say the mother is a
14 liar?
15 MR. ORSINGER: The guardian ad litem is going to
16 independently assess what's the validity of the claim and has
17 the complete authority to tell the lawyer for the child to
18 nonsuit it.
19 MR. MUNZINGER: Yeah, but then the guardian ad
20 litem is making a judgment and a judicial decision as to who is
21 telling the truth.
22 MR. ORSINGER: Well, the next friend has the
23 right to nonsuit, too. I mean, all I'm doing is saying the
24 person who is making the decision is someone who is independent
25 who doesn't have a stake in the outcome. That's all I'm

1 saying.
2 MR. MUNZINGER: But again, you're allowing the
3 guardian ad litem to be appointed at any stage of the
4 proceedings and not just when the case against the daddy or
5 mommy is going to be dismissed
6 MR. ORSINGER: I'm suggesting that it only be
7 when the trial judge becomes convinced that there is a
8 conflict. I don't care when that occurs. I just don't agree
9 that it's only going to occur when you're settling the case.
10 MR. MUNZINGER: Yeah, but, see, part of the
11 problem that we had in our discussion last time was, is that
12 you don't want guardian ad litems to be some kind of
13 super-angel who goes around and judges the abilities of the
14 trial lawyers who are pursuing these cases on behalf of their
15 clients, and it seems to me you may be creating a situation now
16 where that happens.
17 You've appointed me guardian ad litem to
18 double-check on the bona fides and the validity of a claim that
19 somebody's stepfather or father has been sexually abusing a
20 small child, and your main -- a judge is now telling me, "You
21 go out there, Munzinger, and you find out whether or not this
22 is a good claim." And I come back and say, "Judge, that woman
23 is a liar." Well, that's what juries are for, and that's what
24 fact-finders are for in lawsuits. That's not what guardian ad
25 litems are for. Let me finish.

1 The only concern I have is I agree with you that
2 the problem may exist when the case is being dismissed, but I'm
3 not so sure you want to create a situation where you've got a
4 stranger coming in now who's a guardian ad litem in this tort
5 litigation, which is most probably not covered by insurance
6 because it's an intentional form of sexual assault. I'm not
7 sure that's a good thing, and I'd sure like to think about it
8 before I vote for it.
9 MR. ORSINGER: Would you agree that the next
10 friend has the power to nonsuit that?
11 MR. MUNZINGER: Yes.
12 MR. ORSINGER: Okay. Now, why is it any scarier
13 that a self-appointed next friend has the power to nonsuit a
14 lawsuit than someone that has the trust of the court and
15 doesn't have an apparent conflict with the child can exercise
16 that power instead of someone the court distrusts?
17 MR. MUNZINGER: Well, because the guardian ad
18 litem is necessarily making a decision as to whether mom is
19 telling the truth or not, in the hypothetical that I have
20 envisioned. The guardian ad litem is saying the woman is a
21 liar; and she's saying, "I'm not either. I've got in the
22 petition here I saw him doing it and she told me that. Now
23 she's frightened of him." Who resolves this dispute? The
24 woman is testifying under oath, "I saw him do it to her," and I
25 say, "No, no, Judge. She's crazier than a june bug."

1 No. That's not going to work. I don't have
2 a -- I don't have that much of a problem with, in the situation
3 where the case is going to be nonsuited, the court can appoint
4 a guardian ad litem to advise it whether the nonsuit is, in
5 fact, meritorious or doing something else. I'm not so sure, by
6 the way, that it isn't already picked up in this rule, because
7 if I say to you, "I'll settle case A with you if you'll dismiss
8 case B, that's a settlement of both cases"; and arguably a
9 guardian ad litem, if the minor is involved, would be triggered
10 in both cases. But I respect your concern for the child, I
11 just don't want to be having some super-lawyer come in and tell
12 the judge, "Throw that case out, Judge. The woman's a liar."
13 MR. ORSINGER: It's probably not going to -- I
14 wouldn't envision it being a lawyer. Under these definitions
15 arguably it's not a lawyer
16 CHAIRMAN BABCOCK: Judge Gray has had his --
17 MR. MUNZINGER: Even so, even so, the person is
18 making a fact decision as to who's telling the truth and is
19 judging the merits of the lawsuit instead of letting the
20 fact-finder of that lawsuit judge the merits of the lawsuit.
21 You've deprived me of a jury trial.
22 CHAIRMAN BABCOCK: Judge Gray.
23 HONORABLE TOM GRAY: I've sat here and pondered
24 the language that might work and changed it a couple of times,
25 but I would propose that based upon the exchange that something

1 like this could work: "The court must appoint a guardian ad
2 litem for a party represented by a next friend only when, one,
3 the parties agree; two, the defendant has made an offer to
4 settle the party's claims and there appears to be an adverse
5 interest between the next friend and the party, and the --
6 between the next friend and the party; three, the trial court
7 has determined that an adverse interest actually exists between
8 the next friend and the party in a suit involving family
9 members." And so it specifically excepts out the problem that
10 Richard Munzinger has.
11 I initially had it limited to "and when the
12 trial court is presented with a nonsuit," but I understand
13 there may be an earlier time at which the problem is presented,
14 so if we just except out in all suits involving the family
15 members, that does -- I don't think it's the situation where
16 the abuse of the use of guardian ad litems has been prevalent;
17 and, therefore, the problem is still fixed essentially by the
18 exact language that is in the subcommittee's proposed rule.
19 I've just reformulated it as a tabular type listing of when a
20 guardian ad litem must be appointed.
21 CHAIRMAN BABCOCK: Read it one more time, Judge.
22 HONORABLE TOM GRAY: "The court must appoint a
23 guardian ad litem for a party represented by a next friend only
24 when, one, the parties agree; two, the defendant has made an
25 offer to settle the party's claim and there appears to be an

1 adverse interest between the next friend and the party; three,
2 the trial court has determined that an adverse interest
3 actually exists between the next friend and the party in a suit
4 involving family members."
5 MR. GILSTRAP: It should be "between family
6 members" and it should have an "or" between two and three.
7 CHAIRMAN BABCOCK: Yeah. "Or" between one, two,
8 and three.
9 MR. GILSTRAP: One and two, and two and three
10 CHAIRMAN BABCOCK: And are you going to have a
11 sentence, "The court must not appoint an ad litem if no adverse
12 interest exists"?
13 HONORABLE TOM GRAY: I think it's redundant of
14 the one, two, three; but it strengthens what we're trying to
15 do, and there's no reason not to include it
16 CHAIRMAN BABCOCK: Judge Christopher, what do
17 you think about that language?
18 HONORABLE TRACY CHRISTOPHER: Again, I'm --
19 CHAIRMAN BABCOCK: You don't think it's
20 necessary, but --
21 HONORABLE TRACY CHRISTOPHER: I agree with
22 Richard about, you know, giving an out in a suit between family
23 members, but....
24 CHAIRMAN BABCOCK: Who else? Skip.
25 MR. WATSON: We may have covered this, but --

1 CHAIRMAN BABCOCK: I'm sure we have.
2 MR. WATSON: I don't see the way we drafted the
3 duties of the ad litem to review a settlement, determine
4 whether a settlement is in the best interest, and recommend a
5 settlement, I still don't see how we've solved anything about
6 nonsuits. You know, I mean, I'm just missing -- the premise of
7 Richard's argument doesn't seem to be fitting the rule; and I'm
8 not necessarily opposed to changing it, but I don't see what
9 the language proposed is going to accomplish as long as
10 173.3(a) is in there. This was not designed to address
11 nonsuits, period, paragraph.
12 MR. SUSMAN: I think that comment is worthwhile.
13 We're going to have to fix up that next paragraph, 173.3,
14 Richard, if you're going to accomplish -- you want that
15 guardian ad litem in those circumstances to do more than just
16 approve a settlement.
17 MR. ORSINGER: Well, we can just write a
18 separate paragraph for that
19 MR. SUSMAN: You have to add some powers there.
20 Could we vote on the concept of whether we want to do something
21 to accommodate his concern?
22 CHAIRMAN BABCOCK: Yeah. I was just getting
23 ready to go there. If we can get Judge Gaultney's comment and
24 then we will try to raise that issue.
25 HONORABLE DAVID B. GAULTNEY: I just had a

1 question. Is this going to be triggered only when there's an
2 offer to settle a minor's claim or if there's an offer to
3 settle the next friend's claim also? Could it read, "If
4 there's an offer to settle the next friend's claim or the
5 minor's claim"? Because you've got an offer to settle the next
6 friend's claim and nonsuit the minor's claim
7 CHAIRMAN BABCOCK: You're talking about Judge
8 Gray's language?
9 HONORABLE DAVID B. GAULTNEY: I think both of
10 them had that language.
11 HONORABLE TOM GRAY: Both of them, yeah.
12 CHAIRMAN BABCOCK: Okay. I think that it would
13 be healthy at this late date to maybe decide whether or not we
14 want to fix the issue that Richard has brought to the floor,
15 which is going to, it seems to me, necessarily change 173.3 as
16 well, or whether we're going to stick with the language in
17 173.2(b) as drafted, subject to maybe some minor tweaking, but
18 to leave it this way. Does that strike anybody as moving --
19 advancing the ball if we do that?
20 MR. ORSINGER: Sure.
21 MR. GILSTRAP: Say that again, please. I'm
22 sorry.
23 CHAIRMAN BABCOCK: Frank, I was saying I think
24 we have fully discussed this issue and should we have a vote on
25 whether or not we should try to incorporate into the rule,

1 which is going to implicate more than 173.2(b), because it's
2 also going to implicate 173.3(b), the concern that Richard
3 raises; or are we going to stick with the language that Judge
4 Christopher has proposed, 173.2(b) with some minor tweaking to
5 the extent we need to.
6 MR. GILSTRAP: Do we adopt Richard's idea or not
7 and then we figure out how to do it.
8 MR. ORSINGER: If there's enough support for it.
9 MR. GILSTRAP: Sure. Sure.
10 CHAIRMAN BABCOCK: Judge Christopher, does that
11 seem like an appropriate way to proceed?
12 HONORABLE TRACY CHRISTOPHER: Sure.
13 CHAIRMAN BABCOCK: Why don't we just put
14 Richard's problem -- not his personal problems, but the problem
15 he has raised on the table. So everybody that thinks we should
16 try to deal or address the problem that Richard has articulated
17 for us in this rule raise your hand.
18 Everybody opposed raise your hand. So by a vote
19 of 14 to 3 it is to address that issue. I don't know how the
20 court reporter feels, but I bet she wants about a
21 five-or-so-minute break, and even if she doesn't, I do
22 (Recess from 4:02 p.m. to 4:13 p.m.)
23 CHAIRMAN BABCOCK: Here's the deal about
24 tomorrow, if you're interested. Justice Hecht and I have
25 conferred, and we're thinking that with the fact that we've had

1 a lot of people who have had to leave today and may not be able
2 to be here tomorrow that we ought to go through this rule and
3 get everybody's views on the different things that Judge
4 Christopher has redrafted. We've got a strong expression about
5 what Orsinger has said about 173.2, and we'll work on that, and
6 we probably -- we probably should have gotten to this earlier
7 in the day, but that's my fault. This is the rule that the
8 Court is most interested in hearing our views on because
9 they're going to work on it in short order, so we'll go for the
10 next, you know, hour or so and try to get as much on the record
11 as we can; and, Justice Hecht, do you want the subcommittee or
12 Judge Christopher to try to redraft based on our comments or --
13 JUSTICE HECHT: Yeah. I think so, and then
14 we'll take the comments and redraft and begin working on it.
15 CHAIRMAN BABCOCK: Okay. But this rule is going
16 to be out of our clutches after today, so anybody that's got
17 any big comments about it -- easy now, easy. Okay. Paula had
18 her hand up first.
19 MS. SWEENEY: I'd like to move that 173.2(b),
20 however it's currently constituted, I don't know where this
21 sentence went, but the sentence that says that the party's --
22 "The defendant has made an offer to settle the party's claim
23 and there appears to be an adverse interest" be modified to say
24 "and there is a potential adverse interest" for the reasons
25 previously stated, unless you-all would like to hear me state

1 them again

2 CHAIRMAN BABCOCK: No. I think we know your

3 position, and it is that you don't want to be stigmatized by

4 the judge having granted something pursuant to this language,

5 which makes it sound like there is an adverse interest.

6 MS. SWEENEY: Exactly, when all we're talking

7 about is the potential may exist.

8 CHAIRMAN BABCOCK: Right. Judge Christopher,

9 what do you think about that?

10 HONORABLE TRACY CHRISTOPHER: So you want it to

11 be "there appears to be a potential adverse interest"?

12 MS. SWEENEY: No. "And there is a potential

13 adverse interest"

14 MR. HAMILTON: Take out "appears"?

15 MS. SWEENEY: Take out "appears to be an adverse

16 interest," which implies that the judge thinks so, and puts in

17 that "there is a potential adverse interest." So it would

18 read, "Defendant has made an offer to settle that party's

19 claims and there is a potential adverse interest between the

20 next friend for the party and the party."

21 HONORABLE TRACY CHRISTOPHER: That sounds

22 stronger to me than appearing to be one, but if you want it, I

23 don't really feel strongly about it.

24 MR. MUNZINGER: I note only that it's a change

25 in the language from existing Rule 173, and I suspect the Bar

1 would conclude that that is a substantive change. If that's
2 the intent of the committee or the Court, so be it, but the
3 present rule I think talks about the appearance of an interest.
4 When you go around changing that language it tells everybody
5 that you meant something different than what the prior case law
6 in terms of Rule 173 is.
7 MS. SWEENEY: It also talks about idiots and
8 lunatics. I mean, I think as long as we're updating we ought
9 to do it thoroughly.
10 CHAIRMAN BABCOCK: Well, I mean, Paula's got a
11 proposal on the table, and what does everybody think about
12 that? Richard, you think that it's a change that is
13 unnecessary from prior language and that it might confuse the
14 Bench and the Bar because --
15 MR. MUNZINGER: I don't know that I think it's
16 unnecessary, Chip. I haven't studied the case law, nor the
17 rule, but I just point out if you change the language of a rule
18 you're telling everybody -- you're at least suggesting to
19 people there is a different standard. If the prior case law
20 interpreted the rule to say "potential" it may be unnecessary.
21 I don't feel strongly about it one way or the other.
22 CHAIRMAN BABCOCK: Paula, do you feel
23 stigmatized under the old language?
24 MS. SWEENEY: I don't like it.
25 CHAIRMAN BABCOCK: So the answer is "yes"?

1 MS. SWEENEY: Well, I don't agree that I feel
2 stigmatized, but I don't like the implication of the judge
3 finding in every case where I represent a minor that there is a
4 conflict, and I think that's not the reality. The reality is
5 that it means "Hold on, let's double-check this."
6 CHAIRMAN BABCOCK: You intend a change
7 basically?
8 MS. SWEENEY: Yeah. I want this to be clear
9 that this isn't a finding of a conflict, and I think that's the
10 reality of the practice.
11 CHAIRMAN BABCOCK: Judge Sullivan.
12 HONORABLE KENT SULLIVAN: This is a change, and
13 I think it's an improvement
14 CHAIRMAN BABCOCK: It's a change, and it's
15 a --
16 HONORABLE KENT SULLIVAN: An improvement.
17 CHAIRMAN BABCOCK: An improvement. Okay. What
18 else? Alex.
19 PROFESSOR ALBRIGHT: If we're going to change
20 that, we also need to change the -- in any event we have to
21 change the last sentence because that indicates that there has
22 to be a finding of an adverse interest if the judge appoints an
23 ad litem where we've said that the judge can appoint one if
24 it's potential or appears to be.
25 CHAIRMAN BABCOCK: Okay. Judge Gray.

1 HONORABLE TOM GRAY: Well, if I understood the
2 change, it's going to broaden or it would broaden the
3 circumstances in which the trial court could make the
4 appointment, and I thought the whole purpose of what we were
5 doing was to tighten the circumstances under which the
6 appointments were being made
7 CHAIRMAN BABCOCK: Right. That was Richard
8 Munzinger's thought, that that -- no, no. I guess it was Judge
9 Christopher's thought that that was broader language as well.
10 Richard Orsinger.
11 MR. ORSINGER: I agree with Judge Gray's comment
12 that that is going to be an invitation for judges to intervene
13 even though there is no demonstrable adverse interest, and I'm
14 going to propose later on that we make it clear that the
15 court's finding on adverse interest is subject to appellate
16 review, because if all we do is decide whether the fee is
17 reasonable or not, we're never deciding whether there should
18 have been an ad litem in the first place. And so I would
19 prefer to say that you can't have an ad litem if there's no
20 adverse interest, and then I would prefer to have the appellate
21 system saying "Because there was no adverse interest, this
22 guardian gets nothing" rather than just that this guardian gets
23 his hourly rate times the number of hours spent in a case they
24 never should have been appointed in in the first place.
25 HONORABLE TRACY CHRISTOPHER: Why should the

1 guardian be punished for the judge's bad decision? That's
2 harsh.
3 MR. ORSINGER: Okay. I mean, remembering what
4 we're measuring against. We're measuring against the judges
5 who are looking for a way to appoint their campaign managers.
6 CHAIRMAN BABCOCK: Carl.
7 MR. HAMILTON: I was just going to say, how does
8 this get on appeal if it's a settlement?
9 MR. ORSINGER: Anybody can appeal the attorney's
10 fees award even if there is a settlement. Can't they?
11 HONORABLE TRACY CHRISTOPHER: Yes.
12 MR. ORSINGER: Did I misunderstand that?
13 HONORABLE TRACY CHRISTOPHER: No, it's in there.
14 It's in 173.4(e).
15 MR. ORSINGER: In other words, an insurance
16 company could say, "Okay, I'm going to pay X in damages. You
17 prove up your fees, and then I reserve the right to appeal it."
18 CHAIRMAN BABCOCK: Okay. Judge Sullivan.
19 HONORABLE KENT SULLIVAN: And the point I think
20 was made before, but perhaps the word "potential" belongs in
21 the last line as well, "if no potential adverse interest
22 exists."
23 CHAIRMAN BABCOCK: Yeah. Okay. Is everybody --
24 let me put it a different way. Is anybody opposed to changing
25 this language and adding the "potential" language?

1 MR. ORSINGER: Yes. I'm opposed to it.
2 Definitely.
3 CHAIRMAN BABCOCK: Anybody else? Is everybody
4 else in favor? Everybody in favor of it, raise your hand.
5 10 to 3 in favor. Okay. What else -- who else
6 has comments about things? Richard.
7 MR. ORSINGER: I have a general comment and then
8 a comment about subdivision (1). Can I make them both?
9 CHAIRMAN BABCOCK: Sure.
10 MR. ORSINGER: Okay. My general comment is that
11 under the old rule we made it clear that the ad litem was
12 appropriate when we had a minor, a lunatic, an idiot or a
13 non-compos mentis, but the current rule I don't think says in
14 modern terms that a guardian is appropriate when we either have
15 a minor or someone who is incompetent, whatever proper way we
16 can say that. In other words, we just -- we've kind of
17 forgotten to say when we would do this. We are just talking
18 about how you would do it and what powers they have, but where
19 is there a sentence that says this power is exercisable when
20 you have a minor or someone who doesn't have legal capacity to
21 make their own decisions?
22 MS. SWEENEY: Already represented by a next
23 friend.
24 MR. ORSINGER: That does it for you?
25 HONORABLE TRACY CHRISTOPHER: We had a long

1 discussion about that last time.

2 MR. ORSINGER: And that's good enough to

3 supplant that? Okay.

4 Then my second point is on 173.1. I would like

5 to suggest a change in the way this is worded because, for

6 example, in the Family Code you have ad litems in husband and

7 wife litigation under Title 1 as well as parent-child

8 relationships in Title 2, and I think the court has the power

9 to appoint an ad litem when a minor is trying to have their

10 disabilities removed, which I don't believe is a parent-child

11 relationship suit.

12 So I'm going to propose that we just say, "This

13 rule applies to civil lawsuits for damages, equitable or

14 declaratory relief, but not when" -- scratch "except," because

15 these others are not exceptions to damage, equitable or

16 declaratory. "But not when, No. 1, the Family Code governs the

17 appointment of ad litems, the Probate Code governs the

18 appointment of ad litems, or the Texas parental notification

19 rules govern the appointment of ad litems."

20 The Probate Code change is necessary in my

21 opinion because sometimes Family Code provisions get sucked

22 into probate court because someone comes under the jurisdiction

23 of the probate judge, and the Supreme Court I think has said

24 even probate courts can grant divorces, and you have a --

25 JUSTICE HECHT: Yeah. I mean, they can --

1 probate judges can do anything.
2 MR. ORSINGER: Yeah, I know. So you may have --
3 I mean, as odd as this may seem, you may have a probate judge
4 conducting a proceeding under the Family Code, in which event
5 the Family Code standards apply to some things and the Probate
6 Code standards apply to other things. So rather than get all
7 tangled up in that, can we not just say that this rule applies
8 except where the Family Code applies or the Probate Code
9 applies or the parental notification rules apply?
10 CHAIRMAN BABCOCK: Judge Christopher.
11 HONORABLE TRACY CHRISTOPHER: I'm happy with
12 that.
13 CHAIRMAN BABCOCK: Happy with that. Anybody
14 unhappy with that? Paula, are you unhappy with that?
15 MS. SWEENEY: Happy, happy, happy.
16 CHAIRMAN BABCOCK: Paula has become very happy
17 down there. Carl.
18 MR. HAMILTON: I want to suggest that we
19 separate out the attorney ad litems from this rule. The Court
20 Rules Committee is working on Rule 244 now, which is attorney
21 ad litems; and because of the fact that in situations where you
22 have publication notice an attorney ad litem has to be
23 appointed under the current case law, that attorney has to
24 actually go in and defend the publication defendants; and he
25 runs up a big attorney's fee, which the poor plaintiff has to

1 pay for. Even if he wins the lawsuit he has to pay the other
2 side's attorney's fees, so we're working on some rules to
3 eliminate that problem.
4 We're in the minority of the states on that.
5 The rest of the states only require the attorney ad litem to
6 see if due process was had in connection with the attempt to
7 locate the defendant and if the publication was appropriate,
8 but not to go ahead and defend the defendant. This rule
9 requires that the attorney ad litem act as the lawyer for the
10 party, which I think implicit in that is the whole ball of wax.
11 CHAIRMAN BABCOCK: So we're in 173.3(c) now?
12 MR. HAMILTON: (c) and -- well, 173.2(c) and
13 173.3(c), right.
14 CHAIRMAN BABCOCK: Okay. Judge Christopher?
15 HONORABLE TRACY CHRISTOPHER: The old rule
16 covered both, and that's why we've covered them both in this
17 rule. I don't feel strongly about it. If it's going to be
18 covered in another rule, we can take out attorney ad litems
19 from this rule
20 CHAIRMAN BABCOCK: Richard.
21 MR. ORSINGER: I would like to see the
22 safeguards of compensation control apply to attorney ad litems
23 as well as guardian ad litems.
24 MR. HAMILTON: Oh, yeah. Yes.
25 MR. ORSINGER: You know, I don't see a

1 compelling reason to move them out of here, but if we were to,
2 I would think that the same requirements for reasonable fees
3 and such should apply to them as well
4 CHAIRMAN BABCOCK: And the argument for moving
5 them out of here would be what again?
6 MR. HAMILTON: Well, I don't think 173 applies
7 to attorney ad litems.
8 MR. ORSINGER: Well, it would if we adopt it.
9 MR. HAMILTON: The current rule is just guardian
10 ad litems, and attorney ad litems are in a separate rule.
11 HONORABLE TRACY CHRISTOPHER: Yeah, but it also
12 talks about -- well, this is where we got into all the case law
13 where they confuse guardian ad litem and attorney ad litem
14 MR. HAMILTON: And I think we ought to try to
15 unconfuse it by showing that they are really two different
16 cats.
17 HONORABLE TRACY CHRISTOPHER: I'm happy to take
18 them out.
19 CHAIRMAN BABCOCK: How does everybody else feel
20 about taking them out? Paula.
21 MS. SWEENEY: Wouldn't bother me.
22 CHAIRMAN BABCOCK: Gone. Judge Gray.
23 HONORABLE TOM GRAY: (Motioning.)
24 CHAIRMAN BABCOCK: Let the record reflect that
25 Judge Gray has been making a out-of-here motion.

1 MR. ORSINGER: When we take them out of this
2 rule are we forsaking the 173.4 provisions on compensation, or
3 do we agree they should follow them wherever they end up?
4 HONORABLE TRACY CHRISTOPHER: They are going to
5 follow them --
6 MR. ORSINGER: Okay.
7 HONORABLE TRACY CHRISTOPHER: -- to the new
8 rule.
9 MR. ORSINGER: Okay.
10 CHAIRMAN BABCOCK: Okay. So it's the sense of
11 the committee that we should take 173.2(c) and 173.3(c) out of
12 this rule and put it in a separate rule. Is that the sense of
13 the committee? Yes? Anybody disagree with that? Okay.
14 HONORABLE TOM GRAY: Should we insert the word
15 "guardian" in front of every use of the term "ad litem"?
16 MR. ORSINGER: It would sure help.
17 HONORABLE TRACY CHRISTOPHER: Yes. I mean, if
18 we're going to take them out, we should say "guardian"
19 throughout the whole thing.
20 CHAIRMAN BABCOCK: All right. What's next?
21 HONORABLE TRACY CHRISTOPHER: Okay. The next
22 important issue that we talked about the last time is the
23 duties, which is 173.3(a), and we were asked to look at the
24 possibility -- the possibility of giving ad litems immunity,
25 and Bobby Meadows' associate, Christie Cardon, did a really

1 good memo on immunity, which was sent around to you yesterday.
2 Sorry for the late notice, but it's there for you to read. And
3 it went through the history, and I hadn't realized this, but in
4 the Byrd case that held that a guardian ad litem has a
5 fiduciary duty, the court looked at whether or not the ad litem
6 should have judicial immunity and concluded that the ad litem
7 should not have judicial immunity; and she did a good job going
8 through the reasoning of the Byrd case, going through a Supreme
9 Court case that dealt with whether or not a court reporter
10 should have a judicial immunity, and also another court of
11 appeals case
12 MR. MEADOWS: Delcourt.
13 HONORABLE TRACY CHRISTOPHER: Delcourt, where in
14 the Family Code -- in the family situation the court did grant
15 initial immunity to a guardian ad litem involved in a custody
16 proceeding; and they looked at the function there; and the
17 Delcourt court concluded that the guardian ad litem did have
18 judicial immunity, even though the Byrd court in a normal civil
19 lawsuit concluded that they shouldn't because one was
20 recommending custody arrangements, which was ultimately up to
21 the judge to decide, and the other was essentially deciding
22 whether or not to accept a settlement and whether a settlement
23 was fair.
24 Now, within the subcommittee we thought that
25 perhaps the two cases could not be distinguished but also

1 concluded that we could not confer immunity through our rule;
2 but we felt that that had to be something conferred by the
3 Court or the Legislature, because ultimately after the Delcourt
4 case the Family Code was amended to specifically give judicial
5 immunity to guardian ad litems in certain circumstances. So
6 what we decided to do in this language is to make it clear that
7 the guardian ad litem was not being a lawyer and incorporate
8 the language that the guardian ad litem acts as a personal, not
9 a legal representative, for the party, which is language out of
10 the Byrd case.
11 And we talked in the group that even if the
12 guardian ad litem was going to be held to a fiduciary standard,
13 it would not be a lawyer fiduciary standard. It would be as a
14 personal representative since we have so many lawyers that get
15 appointed as guardian ad litems. And there was concern that a
16 fiduciary relationship in a lawyer-client situation was
17 different than a fiduciary relationship in, say, a parent-child
18 situation or a next friend situation.
19 So this was sort of our compromise that we
20 reached. Previously, the last time around, this group had
21 rejected a statement in there that there was no fiduciary duty
22 and asked us to look at the immunity, so this is what we've
23 come up with as a compromise to clearly delineate that the
24 guardian ad litem should not be held to attorney-client
25 standards or to be -- is not a legal representative by using

1 the language from the Byrd case that the ad litem is a personal
2 representative. So that's the history of that first sentence
3 there in connection, so I don't know whether we want to discuss
4 just that first sentence or go on with the rest of it or if
5 people are happy with our compromise.
6 CHAIRMAN BABCOCK: Well, let's talk about the
7 first sentence. Anybody -- Richard.
8 MR. ORSINGER: Well, I think it is a compromise,
9 and let me just -- I think that was an excellent memo, by the
10 way, that Christie Cardon wrote, but after those cases were
11 decided and in the most recent legislative session, at least in
12 the family law arena, the Legislature has qualified the
13 immunity for a guardian ad litem, attorney ad litem, or what we
14 call an amicus attorney, which is really supposed to answer to
15 the court rather than to the child; but the immunity does not
16 apply for an opinion or recommendation that's given with
17 conscious indifference or reckless disregard to the safety of
18 another or in bad faith or malice or that is grossly negligent
19 or willfully wrongful.
20 So it's not a complete immunity. It's immunity
21 where there's recklessness or intent or bad faith or gross
22 negligence, there is no immunity. It doesn't really say what
23 the duties are, but I just wanted to make that clear. Number
24 one.
25 No. 2, the problem I have with this whole

1 immunity question is, is that this person is more than anyone a
2 fiduciary. More than a lawyer who is representing an adult,
3 because this is someone who is incapable of making decisions
4 for their own interests. To me it's probably the most extreme
5 example of a fiduciary obligation that can exist; and I know
6 that we need for people to step into these roles and make these
7 decisions; and I'm troubled with the fiduciary standards
8 because, you know, No. 1, any profit that the fiduciary makes
9 is presumptively unfair and there are a lot of things about
10 fiduciary litigation that are very scary.
11 But on the other hand, I can't imagine a
12 situation where anyone is more dependent on a fiduciary
13 obligation, so I think basically the first sentence in (a)
14 really doesn't tell us what the standard of care is, really
15 doesn't tell us what exemption from liability you have; but I'd
16 certainly agree that their role is not as a lawyer and they
17 shouldn't be held to legal malpractice standards.
18 CHAIRMAN BABCOCK: Ralph.
19 MR. DUGGINS: I similarly would delete the first
20 sentence and leave it up to the Legislature to change any
21 existing law on what duties, if any, fiduciary or otherwise
22 there are. I tend to agree with you that it is, it seems to
23 me, a fiduciary relationship; but I just don't think it ought
24 to be -- we ought to try to articulate it or to deal with it in
25 the rule.

1 CHAIRMAN BABCOCK: Well, there was a big push
2 last meeting to do exactly that.
3 MR. HAMILTON: Yeah.
4 CHAIRMAN BABCOCK: To define it and grant
5 immunity and do all these other things.
6 MR. DUGGINS: I think it was to define the
7 duties, not to try to say whether or not there was a fiduciary
8 duty or whether they were acting as a legal representative. I
9 think what's contained in the second sentence of (a) hits the
10 nail right on the head, and that specifies what the duty is.
11 Now, whether there are legal causes of action for breach of
12 fiduciary duty or what that standard is, I'm just saying I
13 don't think we ought to try to weigh in on that in a rule.
14 MR. MEADOWS: Well, let me at least give some
15 indication of what it is that I was thinking when we were doing
16 this; and that is that we have purposefully limited what an ad
17 litem can do and what we want an ad litem to do; and given the
18 fact that under the Byrd decision at least the ad litem has a
19 fiduciary duty, we wanted to write the rule in a way that while
20 we could not confer immunity we wanted the rule and the
21 responsibilities associated with an ad litem to work to be
22 understood that within a functional definition that the courts
23 have adopted on analyzing whether or not there is immunity.
24 We couldn't say there is immunity or not, but
25 the Byrd case does, as does the Delcourt case; and when you

1 read those two cases together, Tracy is right, in our judgment
2 there really is no distinction; and so the question is, is the
3 risk of being an ad litem under this rule doing the business of
4 a court, in which case there would be a type of immunity,
5 judicial immunity; and that's why this is written the way it
6 is.
7 It's written to state that there is limited
8 obligation or limited rights for the ad litem. The ad litem is
9 not to be viewed as a lawyer or a legal representative, but as
10 a personal representative under Rule 173. The Byrd case says
11 that, and so if we're going to limit the ways an ad litem can
12 act then I think we need to do it as much as we can to limit
13 the exposure.
14 CHAIRMAN BABCOCK: Carl.
15 MR. HAMILTON: I think the first sentence is
16 important to point out that they're not an attorney ad litem,
17 and they're not to act as an attorney, and otherwise, you sort
18 of perpetuate the confusion that still exists.
19 CHAIRMAN BABCOCK: Yeah. Justice Hecht.
20 JUSTICE HECHT: The Probate Code says a guardian
21 ad litem is an officer of the court. I know we talked about
22 that some last time. But was there discussion about whether it
23 should be that or personal representatives?
24 HONORABLE TRACY CHRISTOPHER: Well, we felt that
25 we couldn't make them an officer of the court absent statutory

1 authority, and we didn't really think that through this
2 procedural rule that we could give them that, and so we kind of
3 stopped trying to do it.
4 MR. MEADOWS: That would fix the problem under
5 these cases.
6 JUSTICE HECHT: I mean, if you could -- the
7 Probate Code then goes on and talks about immunity, but if the
8 person were an officer of the court or whatever it took to get
9 qualified for judicial immunity then that would be whatever it
10 was, but it would be something.
11 CHAIRMAN BABCOCK: Lawyers are officers of the
12 court, aren't they?
13 JUSTICE HECHT: Yeah. I mean, that phrase is
14 not clear to me. Just that's what it says. But if they were
15 -- qualified judicial immunity is probably something like not
16 willful, not reckless.
17 CHAIRMAN BABCOCK: Right.
18 JUSTICE HECHT: It probably has some caveats in
19 it like that. So, but the idea with personal was to try to
20 accomplish that another way.
21 HONORABLE TRACY CHRISTOPHER: That was the --
22 that was the first sentence that we tried to put that idea in.
23 And then the --
24 MR. MEADOWS: Tracy, can I just say, the reason
25 that we thought that the Byrd case should have been decided the

1 other way is because -- and this language was put in this
2 paragraph (a) about it's -- the work is to advise the court is
3 tied to Rule 44, which deals with the court's approval of a
4 settlement involving a minor. That is the only way it's going
5 to be binding, is under Rule 44, and this is -- if you read
6 this Rule 173 the way we've written it, it is intended to
7 assist the court with that function; and, therefore, it would
8 be -- you know, the function analysis would lead to immunity,
9 at least in my judgment.
10 HONORABLE TRACY CHRISTOPHER: Yeah. I think we
11 tried to write it so that they would be -- perhaps in future
12 case law they would go more towards the Delcourt judicial
13 immunity, maybe qualified judicial immunity so there wouldn't
14 be any gross negligence standard, but we didn't think as a rule
15 of procedure we could do that. So that's why we put in the
16 personal representative, and that's why we specifically limited
17 the duties to advising the court, so that they would be in a
18 role of being like an arm of the court.
19 CHAIRMAN BABCOCK: Do we have to add a duty to
20 solve the -- what I'll call the Orsinger problem?
21 HONORABLE TRACY CHRISTOPHER: Well, we will. I
22 mean, if we're putting in that situation and we're allowing for
23 earlier appointments or something other than settlement, we're
24 going to have to change it in some way.
25 CHAIRMAN BABCOCK: Yeah. Okay. Yeah. Justice

1 Gaultney.
2 HONORABLE DAVID B. GAULTNEY: Rule 44, is the
3 way this is currently set up the guardian ad litem is going to
4 in the event of a conflict on a settlement approve the
5 settlement?
6 HONORABLE TRACY CHRISTOPHER: Uh-huh.
7 MR. MEADOWS: Tell the court what he thinks of
8 the settlement.
9 HONORABLE DAVID B. GAULTNEY: Right. And if it
10 is approved, the language of Rule 44 are binding?
11 MR. MEADOWS: Right.
12 HONORABLE DAVID B. GAULTNEY: Should we have --
13 because it stops. The way it stops it doesn't really say it's
14 stepping in instead of the next friend. It just says you
15 appoint a guardian ad litem, and I'm wondering if there needs
16 to be some language here that says -- that makes it clear that
17 it's essentially a decision as though he were next friend or
18 she was next friend.
19 HONORABLE TRACY CHRISTOPHER: Well, I think that
20 if we do that then we're taking them away from immunity,
21 because the more powers we give the ad litem, the less -- you
22 know, under this functional test the less likely a court would
23 be to consider that they have immunity. I mean, for example, a
24 decision to dismiss the lawsuit on behalf of the minor. You
25 know, I think that would be just your plain old next friend

1 fiduciary duty, if we're giving the guardian ad litem those
2 powers, versus just advising the court on a settlement.
3 HONORABLE DAVID B. GAULTNEY: Here's the
4 practical question. You've got a release. Who signs it on
5 behalf of the minor?
6 HONORABLE TRACY CHRISTOPHER: Next friend does.
7 HONORABLE DAVID B. GAULTNEY: Next friend.
8 HONORABLE TRACY CHRISTOPHER: And the guardian
9 ad litem approves it.
10 CHAIRMAN BABCOCK: Alex.
11 PROFESSOR ALBRIGHT: Well, the way this is
12 written, it really sounds to me like the guardian ad litem is
13 the court's --
14 HONORABLE TRACY CHRISTOPHER: Arm.
15 PROFESSOR ALBRIGHT: -- arm because the court's
16 saying, "I can't evaluate this. I need somebody else to."
17 HONORABLE TRACY CHRISTOPHER: Right.
18 PROFESSOR ALBRIGHT: So the guardian ad litem
19 gives a report to the judge, and the judge can either accept it
20 or reject it.
21 HONORABLE TRACY CHRISTOPHER: Right.
22 PROFESSOR ALBRIGHT: The guardian ad litem says,
23 "I think this is an awful settlement." Judge says, "I don't
24 agree with you."
25 HONORABLE TRACY CHRISTOPHER: This is a change.

1 I also sent around Mark Davidson's paper that has a whole long
2 list of all the cases and what they've found that the role of a
3 guardian ad litem is and, you know, take whatever steps are
4 necessary -- under some of the old case law, take whatever
5 steps are necessary to protect the best interest of the minor,
6 participate in the case necessary, authority to nonsuit or
7 settle the claim of a child in civil litigation.
8 So, I mean, we are trying -- we have made an
9 effort to limit here and to change all that old case law to put
10 the ad litem more in a position of qualified judicial immunity.
11 That's what we're aiming for, and if people don't want that
12 then we need to rewrite the rule. But that's what we were
13 aiming for.
14 CHAIRMAN BABCOCK: Skip Watson.
15 MR. WATSON: Just to follow up on that, my
16 memory of the discussion last time was that we went through for
17 a long period of time debating the pros and cons of immunity
18 versus -- and getting people to serve versus the need for
19 someone to be obligated to the minor; and I think it was
20 brought down to the question posed to whom should the duty be
21 owed and what is that duty; and the consensus was I think
22 pretty strong that what we wanted was to create a new animal
23 here in which the duty was owed to the court and the duty was
24 simply to be as an arm of the court to advise the court in
25 almost an amicus type way of "This appears to me to be fair for

1 this incompetent or vulnerable party."
2 And in that consequence it appears that we
3 have -- you know, that the child's lawyer, the next friend, and
4 ultimately the court also looking out for the child's best
5 interest. I'm not at all diminishing that if this is to be a
6 fiduciary relationship that it needs to be a fiduciary
7 relationship, but I'm just simply saying that I think we
8 decided it was not going to be in any shape, form of a
9 fiduciary relationship, that the duty was owed to the court
10 and, therefore, there was going to be some type of qualified
11 immunity along the lines that Justice Hecht was talking about
12 of either self-dealing or some type of extreme or gross
13 negligence.
14 CHAIRMAN BABCOCK: Elaine.
15 PROFESSOR CARLSON: Tracy, if the guardian ad
16 litem is an attorney and they are acting as a personal and not
17 a legal representative and they are not immune, is that -- is
18 there coverage for that under malpractice policies, or is that
19 outside of the coverage?
20 HONORABLE TRACY CHRISTOPHER: I have heard that
21 there may not be and that lawyers who do ad litem work need to
22 make sure that they have specific coverage for it as a
23 fiduciary.
24 PROFESSOR CARLSON: Thank you.
25 CHAIRMAN BABCOCK: Richard.

1 MR. ORSINGER: A couple of comments, is that I
2 agree that this creates a hybrid person whose duty is to inform
3 the court, doesn't replace the next friend; and the next friend
4 may be in favor of the settlement and the guardian may be
5 against it and the trial judge can either accept it or reject
6 it; but I see it more as a fact-finding, more like an
7 investigator, than I do as really a representative,
8 quote-unquote. I envision this language to leave the next
9 friend in place. The next friend does not leave the lawsuit
10 because the guardian has been appointed.
11 HONORABLE TRACY CHRISTOPHER: Right.
12 MR. ORSINGER: Secondly, that first sentence
13 about will act as a personal but not legal representative, if
14 their liability is measured by a negligence standard it's going
15 to be the value -- did they settle the claim for too little,
16 which is something you can only do by assessing the likelihood
17 of certain outcomes in the litigation process; and if you're a
18 lawyer then you will make your own judgment based on your own
19 experience about how good the damages are, how solvent the
20 defendant is, how big is the contributory negligence claim.
21 If you're not a lawyer, you're going to have to
22 rely on a lawyer to tell you, because how would a nonlawyer
23 know whether a settlement in a malpractice case or an
24 automobile accident lawsuit is good or bad unless some lawyer
25 told them how likely they are and what kind of verdict they're

1 going to get, stuff like that. So I'm not sure that the first
2 sentence really changes the standard by which the guardian's
3 liability is measured if it's a negligence standard. And I'm
4 not sure that it is.
5 CHAIRMAN BABCOCK: Judge Gray.
6 HONORABLE TOM GRAY: I think you could push the
7 objective of making it clear that they are acting on behalf of
8 the court by making two changes, one to the first sentence.
9 Drop the words "acts as a personal" and insert the word "is" so
10 that the sentence would read "A guardian ad litem is not a
11 legal representative for the party." Because when I see the
12 "acts as a personal representative for the party" I'm thinking
13 they're acting on behalf of the party. In other words, it's
14 pushing them towards the party and away from the court.
15 Whereas if you just say, okay, they're not a legal
16 representative for the party, that's pushing them -- at least
17 limiting their role there.
18 Then to the second sentence, at the end where it
19 says "advise the court as to the fairness of the settlement for
20 the party," I would change that to say "and advise the court as
21 to the fairness to the party of the settlement," so that you
22 are advising the court as to the fairness to the party of the
23 settlement rather than advising the court as to the fairness of
24 the settlement for the party. "For the party," again, makes it
25 look like you're doing something on behalf of the party rather

1 than on behalf of the court. Do you understand my distinction,
2 where I'm going with it, Tracy?
3 HONORABLE TRACY CHRISTOPHER: Yes.
4 HONORABLE TOM GRAY: And all I'm trying to do is
5 push the language further towards acting on behalf of the court
6 rather than leaving anything there as acting as the -- for the
7 party.
8 CHAIRMAN BABCOCK: What do you think about that,
9 Judge Christopher?
10 HONORABLE TRACY CHRISTOPHER: I'm happy with
11 both those changes.
12 CHAIRMAN BABCOCK: Anybody opposed to that?
13 MR. ORSINGER: Can I suggest an even more
14 radical change, that instead of the first sentence we just say,
15 "A guardian ad litem acts as an advisor to the court"?
16 CHAIRMAN BABCOCK: What do you think about that,
17 Judge?
18 HONORABLE TRACY CHRISTOPHER: That's fine. I
19 just -- I wanted to make sure that he wasn't or she wasn't a
20 legal advisor to the court
21 CHAIRMAN BABCOCK: Uh-huh.
22 HONORABLE TRACY CHRISTOPHER: So --
23 MR. ORSINGER: My proposal is saying that
24 they're not really -- they don't really have a duty owed
25 directly to the child, that the next friend does and the lawyer

1 does, but the guardian, really you're appointing him as an arm
2 of the court to verify that this is really a good settlement
3 CHAIRMAN BABCOCK: "The guardian ad litem acts
4 for the court and is not a legal representative for the party."
5 MR. ORSINGER: That's a more radical statement
6 here; but if that's the way we're directed right now, this is a
7 little schizophrenic because --
8 HONORABLE TRACY CHRISTOPHER: Right.
9 MR. ORSINGER: -- they're a personal
10 representative and they're not a legal representative, but they
11 have this limited duty, but they don't have the ability to make
12 any decisions. They only have the ability to make
13 recommendations.
14 CHAIRMAN BABCOCK: Richard Munzinger.
15 MR. MUNZINGER: I just want to mention again
16 that this -- the first language Richard gave is more protective
17 of a lawyer successfully claiming the coverage of his
18 malpractice policy for some lawsuit that's involving him as a
19 guardian ad litem. The language saying you're a personal
20 representative and not a legal representative is probably going
21 to give your insurance company a perfect reason to refuse
22 coverage in the event you're sued. We mentioned this last time
23 and went beyond it.
24 Moreover, obviously, and I think everybody is
25 aware of it, the language in this rule is certainly contrary to

1 the case law that had gone prior; and we all understand that.
2 But if you say he's an advisor to the court and don't say he's
3 not a legal representative of the party, what have you, you've
4 at least given the lawyer a chance to make some coverage claims
5 credibly to his insurance carrier.
6 CHAIRMAN BABCOCK: Ralph.
7 MR. DUGGINS: If we use the language that says
8 that the guardian is only an advisor to the court, does that
9 allow a party to question the guardian about anything he or she
10 learns in the course of the investigation? I mean, I don't do
11 this, but doesn't a guardian typically get inside the next
12 friend or plaintiff's files and talk? I mean, does that create
13 a problem or not if you say it's -- I mean, if we're
14 highlighting and saying we're changing the rule to make it a
15 personal advisor to the court, it would seem to me that any
16 party would have the right to question the basis for the
17 opinion.
18 HONORABLE TRACY CHRISTOPHER: Yeah, I think that
19 could be a problem
20 CHAIRMAN BABCOCK: Because Paula says, "Hey, the
21 reason we're settling this is because -- you know, nobody knows
22 this, but my client has got this horrible thing to the
23 litigation" and tells that to the advisor of the court, who is
24 not under the cloak of privilege.
25 MR. MUNZINGER: Who may have an obligation to

1 the court to inform the court of it

2 CHAIRMAN BABCOCK: Yeah. Carl.

3 MR. HAMILTON: Normally the way this works is

4 there's been a settlement reached

5 CHAIRMAN BABCOCK: Right.

6 MR. HAMILTON: Been a settlement reached and

7 then the guardian ad litem merely decides whether or not the

8 minor is getting enough out of the settlement

9 CHAIRMAN BABCOCK: Right.

10 MR. HAMILTON: This language almost seems to put

11 some duty on the part of the guardian ad litem to approve

12 settlement, and I'm not sure we want to do that.

13 HONORABLE TRACY CHRISTOPHER: So you only want

14 the ad litem to approve the split of the money, not have any

15 say in whether the total pot was a fair shake?

16 MR. HAMILTON: I think that's right.

17 MS. SWEENEY: The only time that that shifts is

18 if you've got pro se litigants who have been taken advantage of

19 by the carrier, and that's when you see the ad litem come in

20 and say, "Your Honor, this is B.S. and I can't approve this,"

21 and then the settlement goes up and then the ad litem approves

22 it. Usually if they are represented by counsel all you're

23 doing is approving the split.

24 HONORABLE TOM GRAY: Can you do this? Is the

25 language that's there or is Carl's proposal to make it more

1 clear?

2 MS. SWEENEY: If I was appointed an ad litem and

3 I had this rule in front of me and it was a pro se case, I

4 would try to blow the settlement and I would say it's my

5 responsibility because I can't approve the settlement

6 HONORABLE TOM GRAY: You think you're covered by

7 what's here to do that?

8 MS. SWEENEY: Yes.

9 HONORABLE TRACY CHRISTOPHER: The way it's

10 written, as-is?

11 MS. SWEENEY: Well, although it says all I can

12 do is advise the court as to the fairness, but that would at

13 least blow that and say we try the case under this, but I could

14 at least say "I'm not going to approve it."

15 HONORABLE TOM GRAY: You could say it's not

16 fair.

17 MS. SWEENEY: Yeah.

18 CHAIRMAN BABCOCK: Richard.

19 MR. MUNZINGER: The first sentence in 173.3(a),

20 I've forgotten why we wanted to have that sentence in there.

21 Was it to limit the scope of the fiduciary duty of the guardian

22 --

23 HONORABLE TRACY CHRISTOPHER: Yes.

24 MR. MUNZINGER: -- ad litem?

25 HONORABLE TRACY CHRISTOPHER: Yes.

1 MR. MUNZINGER: What if you delete that sentence
2 entirely because, first off, that creates the problems for the
3 lawyers and their insurance coverage, for one reason, just
4 throw it out for the moment; and you read this rule now, it
5 says the guardian ad litem has the limited duty to review a
6 proposed settlement, determine whether it's in the best
7 interest, and advise the court as to the fairness of the
8 settlement.
9 Next paragraph, you can't take part in
10 discovery, you don't go to proceedings and trial except for
11 mediation, etc., etc. Have we not cured the problem that the
12 rule was designed to cure, which was the judge appointing his
13 crony who gets a lot of money and screws up the lawsuit?
14 HONORABLE TRACY CHRISTOPHER: We have, but it
15 seems to me if we don't address in some manner the fact that
16 the guardian ad litem is not supposed to be a lawyer for the
17 party then we leave the guardian ad litem with a very limited
18 ability to do anything and a lot of potential liability.
19 MR. MUNZINGER: Yes, but if we were now -- if I
20 were being sued, if I may continue to discuss it with you and
21 you're a judge, "Judge, how can you say I'm a lawyer? No. 1,
22 my duty is to review the proposed settlement, determine its
23 fairness, and tell the judge. I'm not a lawyer. I can't take
24 a deposition specifically. I can't go to court, don't have the
25 right to address the court. The only thing I can do is go to

1 mediation, unless the judge orders otherwise. I've got limited
2 duties. How can I conceivably be a lawyer, and, therefore, how
3 could I conceivably be held to a fiduciary duty?"
4 HONORABLE TRACY CHRISTOPHER: You charged a
5 lawyer's fee when you came in front of me.
6 MR. MUNZINGER: I beg your pardon?
7 HONORABLE TOM GRAY: And you've made a claim on
8 your attorney malpractice policy, or you reported it to your
9 carrier.
10 MR. MUNZINGER: Making the claim on the
11 malpractice policy, yeah.
12 MR. ORSINGER: Well, we don't want to put
13 lawyers in a situation where they're not insured, even though
14 we know they're exercising legal judgment. As a practical
15 matter this is either going to be a plaintiff's lawyer or a
16 defense lawyer or if it's a nonlawyer they are going to be
17 relying on a lawyer, and so we don't want the lawyers to be
18 exercising legal judgment, but the insurance companies get a
19 pass on it because they're not. That would be the worst of all
20 rules I think.
21 HONORABLE TRACY CHRISTOPHER: That's true.
22 MR. ORSINGER: We've got to either get them
23 immunity or we've got to let them be insured. We can't take
24 away their immunity and take away their insurance, too.
25 CHAIRMAN BABCOCK: Justice Hecht.

1 JUSTICE HECHT: Since they are almost always
2 lawyers, is there a good reason for them not to be lawyers,
3 apart from what they're doing and the legal representation and
4 the liability duty issue that we've been talking about? I
5 mean, as a practical matter is a trial court ever going to
6 appoint someone who's not a lawyer to do this?
7 MR. DUGGINS: Shouldn't
8 CHAIRMAN BABCOCK: Probably not. Is there an
9 attorney-client relationship with the party? Not under this
10 rule
11 MR. ORSINGER: But, see, the problem I have with
12 it is they're probably still held to a legal negligence
13 standard unless we give them immunity, because what they did is
14 they settled too cheap; and that's a legal analysis. A doctor
15 can't tell you whether it was too cheap. An accountant can't
16 tell you whether it's cheap. Only a lawyer can tell you
17 whether it's too cheap; and so you're exercising legal
18 judgment; but you've got no legal insurance and you've got no
19 immunity, so it's basically a legal malpractice case against a
20 lawyer who couldn't exercise any lawyerly skills and is not
21 insured.
22 CHAIRMAN BABCOCK: Is the conversations between
23 the ad litem and plaintiff's counsel privileged now?
24 MR. ORSINGER: In my view, under the guardian ad
25 litem now, they step in as the legal representative of the ward

1 or minor, so clearly the attorney-client relationship under the
2 current configuration would. Now, if we continue the legal
3 representative, who is the next friend, we bring in a new
4 person called the guardian, and the guardian's role is just an
5 evaluative role, then are they a representative of the client?
6 We've said they're not
7 CHAIRMAN BABCOCK: That's my point. What's the
8 current law?
9 MS. SWEENEY: They are not privileged under
10 current law, but because of the almost always identity of
11 interest, I mean, if I tell my ad litem something, you know,
12 "I'm settling this case with my ex, but we can't come to the
13 courthouse, but they don't know that. We got a jump on it" and
14 the ad litem allows it, the ad litem has violated their
15 fiduciary duty to the child. So there's not a formal
16 privilege, but you would violate -- you would divulge --
17 CHAIRMAN BABCOCK: He's not going to blab it,
18 but he gets there in front of the judge; and the judge says,
19 "This looks way low."
20 MS. SWEENEY: "I'll tell you in chambers,
21 Judge."
22 CHAIRMAN BABCOCK: In chambers by yourself or
23 with the other side?
24 MS. SWEENEY: "In chambers. I'm not going to
25 reveal the kind of strategy that I know about in front of the

1 other side, but I'll be happy to reveal it in camera."

2 CHAIRMAN BABCOCK: And the judge says, "No, no,

3 no."

4 MS. SWEENEY: "Then I can't tell you, Judge."

5 CHAIRMAN BABCOCK: "Well, you don't understand

6 who owns the jail and who doesn't."

7 MS. SWEENEY: "Throw me in there"

8 MR. ORSINGER: "Don't expect me here again in

9 this role."

10 MS. SWEENEY: Yeah. "And next time you ask me

11 if I want to be an ad litem for you, Judge, the answer will be

12 different."

13 CHAIRMAN BABCOCK: Richard.

14 MR. MUNZINGER: Has the privilege been waived?

15 A stranger to the privilege has now reviewed attorney-client

16 confidences, whether he's a lawyer -- he's not a --

17 particularly if he's a lawyer and he's not the lawyer for the

18 client, you now have a disclosure of privileged information.

19 The lawsuit falls apart, and the really aggressive defense

20 lawyer is saying, "A-ha, you waived your attorney-client

21 privilege under existing case law. Tell me what you learned."

22 "Their expert is a liar." You've got a problem.

23 MS. SWEENEY: No, under existing case law the ad

24 litem would have a fiduciary duty to the incompetent not to

25 reveal what he had learned.

1 MR. MUNZINGER: I understand, but the change
2 that we're proposing by the discussion is going to erase that
3 prior law by making them nonfiduciary. I'm raising the
4 question what happens to the privilege when strangers have been
5 involved in the communication now? It's a real problem.
6 CHAIRMAN BABCOCK: Carl.
7 MR. HAMILTON: I still think we're going too far
8 with the ad litem. The mother brings a lawsuit for the child
9 and they go hire a lawyer. Now, the lawyer represents the
10 mother who represents the child. Maybe they both have a claim,
11 mother and child; and so that lawyer works on the case and he
12 makes a settlement and now the judge says, "Well, there may be
13 a conflict here, because how are we going to split this up?"
14 So a guardian ad litem gets appointed and the guardian ad litem
15 in a sense steps into the shoes of the mother to represent the
16 interests of the minor. The mother still represents her own
17 interests. So that guardian ad litem now is the client for
18 that attorney who handled the case, who made the settlement.
19 Now, I guess if that guardian ad litem at that
20 point thought the settlement was no good he could tell the
21 lawyer that. I don't know what the lawyer would do about that,
22 but ordinarily the guardian ad litem doesn't tell his own
23 lawyer, "Well, I don't think this settlement is enough." He
24 just says, "Here's how much I want for the the minor out of the
25 pot."

1 CHAIRMAN BABCOCK: Yeah.
2 MR. HAMILTON: So I guess my question is, are we
3 going to give the guardian ad litems the right to monkey with
4 the settlement that's already been made by the party's lawyers
5 and affect that, or are we just going to let them decide on the
6 split?
7 CHAIRMAN BABCOCK: Skip, then Judge Gaultney.
8 MR. WATSON: Just a question, is it possible --
9 the privilege thing really gets my attention. Is it possible
10 to solve that in a Rule of Civil Procedure simply by saying
11 this is a new breed of cat here and the matters communicated or
12 learned by the ad litem in the performances of his duty remain
13 privileged and shall not be communicated to anyone other than
14 the court?
15 CHAIRMAN BABCOCK: We do it in Rules of
16 Evidence.
17 MR. WATSON: I'm making the distinction.
18 CHAIRMAN BABCOCK: Yeah. Judge Gaultney.
19 HONORABLE DAVID B. GAULTNEY: I'm wondering if
20 we can reclaim the privilege by backing a little bit towards
21 the next friend status. In other words, not create the total
22 separated status we've got currently and say something to the
23 effect of for the limited purpose of reviewing the proposed
24 settlement and determining whether the settlement is in the
25 best interest and advising the court, for that limited function

1 he's also instead of the next friend -- I'm trying to figure
2 out a way that we can -- I am real concerned with the concept
3 with the way we've got it currently structured. If he goes to
4 mediation or just consults with the plaintiff's attorney, I'm
5 not sure that's privileged
6 CHAIRMAN BABCOCK: Okay. Judge Sullivan.
7 HONORABLE KENT SULLIVAN: I would have thought
8 there to be no question about the privilege, quite frankly. To
9 the extent that the ad litem is functioning as a lawyer then
10 the joint privilege, I would think, would apply; that is, if
11 you analytically view this as if he is a lawyer representing
12 the ad litem then I think your position would be what has often
13 been referred to as a joint defense privilege, which I think
14 applies to both sides of the case, I think would apply there.
15 To the extent that you analytically view the ad
16 litem as effectively standing in the shoes of the minor then it
17 would be like a direct attorney-client relationship; i.e., he
18 is a representative of a party who is represented by the
19 plaintiff's attorney. So either way, in my view, the privilege
20 applies. It would be certainly an anomaly to say that the
21 plaintiff's lawyer couldn't talk to the guardian ad litem
22 without blowing the privilege.
23 MS. SWEENEY: Or showing the file, if he can't
24 review the file
25 CHAIRMAN BABCOCK: Richard Munzinger.

1 MR. MUNZINGER: I only point out that the rule
2 at the moment says he's not a lawyer, and the logic of your
3 analysis is based upon the fact that the person is a lawyer, it
4 seems to me.
5 CHAIRMAN BABCOCK: No, he said if you step in
6 the shoes of the client.
7 HONORABLE KENT SULLIVAN: If he's not a lawyer
8 he's then a representative of a party speaking with that
9 party's lawyer, and there is a privilege. That's under 503(b)
10 of the Rules of Evidence. That's -- I believe to be clear as a
11 bell.
12 HONORABLE TRACY CHRISTOPHER: That's why we need
13 to keep them in as a representative.
14 MR. ORSINGER: I think that the easier fix to
15 this whole thing is to remember that the Supreme Court can
16 change the Rules of Evidence just like they can change the
17 Rules of Procedure, and why don't we just patch around this
18 problem by making it clear they are not a legal representative
19 but still imposing a privilege which we arbitrarily impose on
20 this particular relationship and then we don't have to worry
21 about all the other case law?
22 We just say when the lawyer is acting -- or when
23 the guardian is acting as an advisor to the court all
24 communications they have with the ward, or whatever you call
25 this person, and their legal representatives are confidential

1 and not subject to disclosure? We can put it in a Rule of
2 Procedure or we can put it over in the Rule of Evidence, and we
3 can quit debating it and go ahead and make them a
4 representative of the court
5 HONORABLE TOM GRAY: Can't you just put it as a
6 new sentence in this rule, right after the other two, whatever
7 they turn out to be? "Communications with the guardian ad
8 litem for purposes of performing the guardian ad litem's duties
9 are privileged for all purposes." I mean, they can make --
10 they have the authority to make privileges, and there a
11 privilege is created. That way it's all communications made to
12 them for purposes of performing their duties, it doesn't matter
13 who it's from or to, whether it's an expert witness that they
14 need to talk to
15 MR. ORSINGER: I think we ought to say "all
16 otherwise confidential communications" because the guardian may
17 want to defend their opinion based on something that was said
18 that's not confidential. I mean, should we make all
19 communications with this person confidential or just
20 confidential communications?
21 HONORABLE TOM GRAY: But the guardian ad litem
22 will be in the position to choose those privileges it chooses
23 to waive or confidential communication it chooses to no longer
24 retain as confidential.
25 MR. ORSINGER: Well, then as the plaintiff's

1 lawyer I don't trust the guardian. There's some things I can't
2 tell him because he might waive them
3 CHAIRMAN BABCOCK: Okay. Let's move on to 173.4
4 and talk about what people have spotted on the compensation
5 rules, (a) through (e). Anybody -- I guess, Judge Christopher,
6 why don't you start?
7 HONORABLE TRACY CHRISTOPHER: Okay. Well, the
8 last time around no one had any complaints about (a) and (b).
9 We added expenses to (c), and people asked me to look at Rule
10 131 and Rule 141 about shifting costs. The subcommittee
11 doesn't recommend it because we think you can go look at 131
12 and 141 and shift costs pursuant to those rules; but I've added
13 some language if you wanted to incorporate it into the rule,
14 and that's the language. It's kind of old-fashioned language
15 because that's what the language is from Rule 131 and Rule 141,
16 so that's the change in (c).
17 And then we didn't have any changes in (d), and
18 then on (e) I just -- there wasn't anything substantive. It
19 was just a couple of stylistic changes to make sure that it was
20 a final appealable order.
21 CHAIRMAN BABCOCK: Justice Hecht.
22 JUSTICE HECHT: Just to understand how things
23 have shifted, if now the guardian ad litem has limited duties
24 and limited responsibility and liability, is there any reason
25 for them to be paid very much, ever?

1 HONORABLE TRACY CHRISTOPHER: Not really.
2 CHAIRMAN BABCOCK: Hang on. I've never been one
3 of these and don't propose to be, but in 173.3, it says they
4 have a duty to review the proposed settlement and then the
5 phrase is "determine whether the settlement is in the party's
6 best interest." That could involve reading many depositions
7 MR. WATSON: How big is the file?
8 CHAIRMAN BABCOCK: Looking at all the pleadings,
9 reading the motion for summary judgment and the response
10 thereto in the record; and you could rack up, if you were
11 really being diligent and it was a complicated case, I mean,
12 you could spend three or four or five days on that under this
13 rule, I think.
14 MS. SWEENEY: In the scheme of what we're
15 talking about, you're not going to get paid very much under
16 what Justice Hecht is talking about, but very much is a half a
17 million dollars. It's getting essentially a contingent fee
18 based on the size of the recovery. Here we're talking about an
19 hourly fee based on reasonable amount of hours for the work
20 done. Even if you have to spend five days reading the file,
21 and you might, it's still not going to be very much in --
22 CHAIRMAN BABCOCK: In the grand scheme of
23 things.
24 MS. SWEENEY: -- the scheme of the abuses that
25 we're talking about. It would still be appropriate.

1 CHAIRMAN BABCOCK: Okay. Carl, then Judge Gray,
2 then Richard.
3 MR. HAMILTON: It says "reasonably hourly fee
4 customary in the community." Now, I doubt that there is any
5 customary fee in the community for guardians. Now, there may
6 be for lawyers, and is that what they're going to base the fee
7 on, is the lawyer's rate, or should it be something else if
8 they're not functioning in the capacity of a lawyer?
9 CHAIRMAN BABCOCK: Paula.
10 MS. SWEENEY: It's got to be a lawyer's rate,
11 because you're taking time away from your law practice. This
12 is a service to the court that we want lawyers to agree to do;
13 and if you, you know, tell me, you know, "Your basic hourly
14 rate is X, but I'm ordering you to do this and I'm only going
15 to pay you one-third X and it's going to take a week," you're
16 going to drive your supply away. "Gosh, Judge, I've got a big
17 conflict with that one. I just remembered a vacation."
18 HONORABLE TOM GRAY: I actually had a comment
19 about the same thing. I just didn't think we needed the
20 reference to "customary in the community in which the case
21 pending." I don't think it impactts what Paula was just
22 talking about. That's sort of antiquated language, and I think
23 it's dropped out of most of the other places. You know, it
24 used to be that medical had the same terminology in it for
25 fees, and you're -- you know, you're going to get into fights

1 that I'm going to have to review on appeal of what is the
2 relevant community. You know, I just would rather not see that
3 language in there in section (b)
4 HONORABLE TRACY CHRISTOPHER: Can I just say
5 that --
6 HONORABLE TOM GRAY: I was probably the one that
7 said it before?
8 HONORABLE TRACY CHRISTOPHER: No, no, no.
9 Harvey Brown was telling me that he was involved in something
10 in the Valley where the ad litem testified that the customary
11 guardian ad litem fee in the community was, you know, $4,000 an
12 hour.
13 JUSTICE HECHT: That's the truth.
14 MR. ORSINGER: Which was true.
15 HONORABLE TRACY CHRISTOPHER: So perhaps you
16 might want to broaden the community.
17 HONORABLE TOM GRAY: Which is exactly why you
18 don't want that language in there, because the only testimony
19 you may have is that the reasonable rate in that community is
20 $4,000 an hour
21 CHAIRMAN BABCOCK: Well, I can see it the other
22 direction, too, because there are rate differences, dramatic
23 rate differences in our state, between Houston and Dallas to
24 take the top end; and, you know, out in West Texas in, you
25 know, San Angelo or Amarillo or Lubbock, the rates are really

1 different.

2 MS. SWEENEY: Let's just write in "the customary

3 fee for Lubbock."

4 MR. WATSON: Did you have to tell Judge Robinson

5 your rate?

6 CHAIRMAN BABCOCK: No. There is no claim for

7 attorney's fees in that case, but the point is if you get an ad

8 litem, and this would probably be rare, but ad litem from

9 Dallas appointed in a case in San Angelo, probably never

10 happen, but I suppose that the Dallas lawyer would only --

11 would be held to the San Angelo rate structure.

12 MR. WATSON: Under that language, yeah.

13 MR. MEADOWS: You're not suggesting that we

14 shouldn't talk about things that could never happen, are you?

15 CHAIRMAN BABCOCK: Sorry. It's late in the day.

16 I got enthusiastic.

17 HONORABLE TOM GRAY: The other comment I had was

18 on subsection (b) there is the terminology used, "appointed

19 representation." I think that probably was a throwback to the

20 attorney ad litem, and just in the context of what we're doing

21 with 173.3(a) there's not -- probably not an appointed

22 representation any longer. It's going to be some other type of

23 service.

24 MR. ORSINGER: What if you call it "the

25 conclusion of the appointment"?

1 HONORABLE TRACY CHRISTOPHER: Right.
2 HONORABLE TOM GRAY: Yes.
3 HONORABLE TRACY CHRISTOPHER: I know we want to
4 leave and be done, but we still have a conflict between the
5 added language that we put in for Richard and where the ad
6 litem was supposed to come in and help out in really bad
7 situations and what we've limited their roles to.
8 MR. ORSINGER: I think we ought to just have a
9 (d) in here for a special description of the responsibilities
10 of someone in that capacity.
11 CHAIRMAN BABCOCK: Richard, I think --
12 MR. ORSINGER: (a), (b), and (c) work just fine
13 in this --
14 MR. MEADOWS: Could the subcommittee appoint a
15 task force?
16 CHAIRMAN BABCOCK: You're way -- not very far
17 ahead of me, actually.
18 Richard, since this is the problem that you
19 yourself have created out of whole cloth, I think that the
20 subpart (e) that you talked about and this new subpart (d)
21 probably ought to be something you should suggest language to
22 that
23 MR. ORSINGER: Okay. If you promise that you
24 will take class actions and 76a off of the agenda, I will do
25 this

1 CHAIRMAN BABCOCK: I'll make that deal, unless
2 Judge Christopher has got a problem with it.
3 HONORABLE TRACY CHRISTOPHER: No. That's fine,
4 but if this is our last meeting and I'm supposed to give
5 Justice Hecht a draft, did we vote for or against changing that
6 first sentence? Did we vote to change it to "a guardian ad
7 litem is an advisor to the court," period, or are we going to
8 keep it the same way, or a guardian ad litem is not a legal
9 representative, or a guardian ad litem acts for the court and
10 is not a legal representative?
11 CHAIRMAN BABCOCK: My sense was that we were not
12 supportive of having the language that said they are not a
13 legal representative. That's my sense of the committee.
14 PROFESSOR ALBRIGHT: I thought the sense was
15 really we needed to keep that it is a personal representative
16 because then they are a representative of the party for
17 attorney-client privilege.
18 MR. ORSINGER: Yeah, but the problem -- we can
19 fix the privilege problem with the sentence. We can't fix the
20 insurance coverage problem with the sentence. I think that if
21 you say they are a representative but not a legal
22 representative then you've got all kinds of liability and no
23 ability to insure it.
24 My proposal is the most radical of all, which is
25 let's not make them either a personal or a legal representative

1 of the party. Let's make them a functionary of the court or
2 an advisor to the court.
3 PROFESSOR ALBRIGHT: But then you have the
4 privilege issues.
5 MR. ORSINGER: You eliminate the privilege
6 problem with the sentence, which I could write in two seconds.
7 PROFESSOR ALBRIGHT: Create a guardian ad litem
8 privilege?
9 MR. ORSINGER: Yeah. Right here in this rule.
10 MR. MUNZINGER: You don't even have to do that
11 if Judge Sullivan's idea is written into the rule that as a
12 representative of the party they are covered by rule whatever
13 it was. 503 so-and-so
14 CHAIRMAN BABCOCK: Ralph.
15 MR. DUGGINS: I think that if you read
16 503(a)(2), which is the rule I think Judge Sullivan was
17 referring to, it's not broad enough to cover it; but I think
18 your suggestion of changing that rule makes for an easy fix.
19 You just add a new subdivision (c) and just say "guardian ad
20 litem pursuant to Rule 173"
21 MR. ORSINGER: But you don't want it under the
22 lawyer-client rule or it's going to be evidence that they have
23 a legal relationship. Why don't we put it in this rule for
24 this limited purpose?
25 HONORABLE TRACY CHRISTOPHER: So the vote is a

1 guardian ad litem is an advisor to the court?
2 CHAIRMAN BABCOCK: All right. Hang on. The
3 Orsinger proposal is that the first sentence says "A guardian
4 ad litem acts as an advisor for the court," period.
5 MR. ORSINGER: Right.
6 CHAIRMAN BABCOCK: How many people in favor of
7 that?
8 HONORABLE DAVID B. GAULTNEY: Can we add his
9 privilege?
10 CHAIRMAN BABCOCK: Yeah, with the privilege
11 language later. How many people in favor of that?
12 How many people are against? So it's unanimous.
13 All eight people who raised their hands --
14 MR. ORSINGER: The Chair not voting.
15 CHAIRMAN BABCOCK: The Chair not voting.
16 MS. CORTELL: Are we comfortable on the
17 insurance issue?
18 CHAIRMAN BABCOCK: Yeah, Frank.
19 HONORABLE TOM GRAY: No.
20 MR. GILSTRAP: Richard, when you redraft (e) are
21 you going to include a provision to allow for appeal of the
22 order appointing the ad litem?
23 MR. ORSINGER: When we get there I think that it
24 ought to say "may appeal the order appointing the guardian ad
25 litem and awarding ad litem fees and expenses" because the

1 biggest abuse is going to be appointing them where they're not
2 necessary under subdivision (e), although it won't happen very
3 much.
4 CHAIRMAN BABCOCK: Nina.
5 MS. CORTELL: I guess my main concern is the
6 legal insurance coverage issue. I mean, you're solving the
7 privilege problem with the added language, but I'm not sure if
8 you solved the other problem. It's like we're almost creating
9 another category of master to the court. I'm a little worried
10 of the unintended consequences.
11 MR. ORSINGER: What we're trying to do is we're
12 trying to get immunity --
13 MS. CORTELL: I know. I know. We're trying to
14 do a lot of stuff, and I'm worried we're creating a whole new
15 ad litem legal unit or something, you know. It's the thought
16 that's been in my brain.
17 CHAIRMAN BABCOCK: If you could draw that for
18 us, we'll insert that into the record at a later time. I think
19 that my sense is that on 173.4(c) there is no enthusiasm for
20 the not recommended language. In other words, what Tracy put
21 in --
22 HONORABLE TRACY CHRISTOPHER: Right
23 CHAIRMAN BABCOCK: -- in the interest of
24 completeness, nobody is enthused about. Am I right about that?
25 MR. DUGGINS: Right

1 CHAIRMAN BABCOCK: Okay. So everybody agrees on
2 that. Any other --
3 HONORABLE TOM GRAY: Well, is there any question
4 that they can do that, if it's not in there?
5 CHAIRMAN BABCOCK: If 131 and 141 apply, then of
6 course they can.
7 HONORABLE TOM GRAY: Yeah. Okay.
8 CHAIRMAN BABCOCK: Richard.
9 MR. ORSINGER: On subdivision (b) I would
10 earnestly propose that we require evidence to do this because
11 there is case law out there that the courts can make
12 assessments and sometimes you can take judicial notice and
13 sometimes -- there's even one case where a court appointed a,
14 quote, referee, and there was no testimony at all. They the
15 court said could call on its knowledge to determine a
16 reasonable fee. I think we ought to require evidence on the
17 record so that it becomes reviewable on appeal. So I think (b)
18 somewhere ought to say not just in the -- "the court must
19 conduct a hearing" --
20 HONORABLE TERRY JENNINGS: Evidentiary hearing
21 MR. ORSINGER: -- "and receive evidence from
22 which the total amount of fees and expenses..." You see what
23 I'm saying?
24 HONORABLE TERRY JENNINGS: "Conduct an
25 evidentiary hearing."

1 MR. ORSINGER: There you go. "Conduct an
2 evidentiary hearing." That was a term industry in case you
3 guys didn't find a fee and we're just going to leave it at the
4 Supreme Court level, so I know it's possible, but we've just
5 got to give them evidence and we have got to give them the
6 power of appellate review
7 CHAIRMAN BABCOCK: How does everybody feel about
8 that?
9 HONORABLE TOM GRAY: Opposed to requiring a
10 hearing when they may agree to do it on submitted evidence. I
11 mean, isn't there some way of getting Orsinger's concept of
12 evidence introduced? I mean besides a hearing.
13 MS. SWEENEY: If you have an agreement, which is
14 what you're postulating -- because we were talking about this
15 at the break. If you have an agreement, if Carl and I agree
16 it's going to be a 19,000-dollar ad litem fee and we go to the
17 court and say at the prove-up hearing, which is where this
18 would take place, "We've agreed," then the court signs the
19 order. No one's going to appeal it, so it doesn't matter if
20 there's evidence or not evidence
21 CHAIRMAN BABCOCK: You can stipulate evidence as
22 well.
23 MS. SWEENEY: Yeah. "Here's my bill. We
24 stipulate it's reasonable"
25 CHAIRMAN BABCOCK: Yeah. Okay.

1 MR. ORSINGER: Okay. In (e) --
2 CHAIRMAN BABCOCK: You are the Energizer Bunny.
3 MR. ORSINGER: This is an important change.
4 MR. MEADOWS: Is this one earnest or not?
5 MR. ORSINGER: This is not as earnest, but I
6 still think it's important. "Any party or ad litem may appeal
7 the order" and then add "appointing the ad litem and awarding
8 ad litem fees." We must be able to review the decision to
9 bring the ad litem in, too, as well as the amount of the fee or
10 award.
11 HONORABLE TOM GRAY: I second his motion for
12 that amendment
13 CHAIRMAN BABCOCK: Anybody disagree with that,
14 even though it wasn't in earnest?
15 HONORABLE TRACY CHRISTOPHER: You know, I think
16 it would be unfair to punish an ad litem for a bad decision of
17 the judge.
18 PROFESSOR ALBRIGHT: I agree. She put in three
19 weeks' work.
20 HONORABLE TRACY CHRISTOPHER: It's not up to the
21 ad litem to come in and say, "Judge, you made a mistake
22 appointing me. There's no adverse interest here." And if the
23 ad litem comes in, does his job, you know, puts in his time and
24 has a reasonable fee, I don't think he shouldn't get paid
25 because the judge made a mistake

1 CHAIRMAN BABCOCK: Well, it will probably be
2 affirmed under those circumstances, but I think what Richard is
3 worried about is where there is evidence in the record that the
4 judge has appointed his crony, his campaign manager, again and
5 again and again; and there's been an objection from the
6 defendant to the appointment of this fellow and they've
7 submitted the proof that is going to result in the reversal on
8 appeal; and under those circumstances maybe it's not as unfair
9 as you could -- as you could postulate otherwise. Paula.
10 MS. SWEENEY: You know, I thought we were okay
11 until Richard said what he said. I mean, if you appoint a
12 noncrony, you appoint just a regular lawyer from the community
13 who comes in and does a bunch of work and the defense doesn't
14 object until the work has all been done, or even if they do
15 object. Let's say the defense is objecting vigorously, but the
16 judge says, "No, I've appointed you, and I want you to do the
17 work," what's the ad litem supposed to do? Do the work when
18 the judge says "Do the work." So now you've now spent a week
19 to do the work because the judge told you to do it, and you
20 might or might not ever get paid for it, and then you're going
21 to have to litigate the appeal if you want to get paid
22 MR. ORSINGER: This isn't going to happen
23 outside of 12 counties, right, because they're not going to
24 appoint lawyers that don't deserve to be appointed outside of
25 those 12 counties

1 MS. SWEENEY: We're not talking about the
2 undeserving crony. We're talking about the generic deserving
3 lawyer who has been nabbed by the court to be an ad litem, but
4 the other side doesn't think there ought to be; and there's
5 going to be a fight; and the ad litem is stuck betweeen the
6 court saying, "Do the work" and some party saying "I object."
7 The ad litem has to do the work and then suddenly you've got
8 somebody pulled away from their practice for a week who might
9 or might not ever get paid. That's not appropriate
10 CHAIRMAN BABCOCK: Justice Hecht.
11 JUSTICE HECHT: The most recent reported abuse
12 was out of Harris County.
13 HONORABLE TRACY CHRISTOPHER: Yes, I know.
14 We've been trying to hide over here.
15 HONORABLE TOM GRAY: What did you-all do?
16 HONORABLE TRACY CHRISTOPHER: Nothing. Nothing.
17 I'll tell you later.
18 MR. ORSINGER: So basically if you don't write
19 that in there then I think we're basically saying that the
20 decision to appoint an ad litem is --
21 CHAIRMAN BABCOCK: The issue is framed. We're
22 just going to vote on it, and those who are in favor of making
23 appealable the decision to appoint the ad litem raise your
24 hand.
25 Those opposed? 7 to 7

1 MR. ORSINGER: Is that the Chair voting or not
2 voting?
3 CHAIRMAN BABCOCK: Huh?
4 MR. ORSINGER: Is that the Chair voting?
5 CHAIRMAN BABCOCK: No. That was without the
6 Chair voting.
7 HONORABLE TOM GRAY: Chip, I apologize. I
8 actually had Terry engaged in conversation. We may both vote
9 for it or we may split on it. What was the motion? I
10 apologize
11 CHAIRMAN BABCOCK: That's okay. That will take
12 the Chair off the hook possibly. The motion was to approve a
13 provision making it appealable, the issue of the appointment of
14 the ad litem.
15 HONORABLE TERRY JENNINGS: You vote first. I'm
16 with Judge Christopher on this one.
17 CHAIRMAN BABCOCK: Which is?
18 HONORABLE TRACY CHRISTOPHER: No.
19 CHAIRMAN BABCOCK: Judge Gray?
20 HONORABLE TOM GRAY: She swayed me as well. The
21 ad litem shouldn't be left hanging out
22 CHAIRMAN BABCOCK: So by a vote of 9 to 7 that
23 fails, and I think we're pretty much done unless Carl --
24 MR. HAMILTON: I've just got one more. Is the
25 consensus that we want the ad litem to review the entire

1 settlement and not just the split? That is what we're saying
2 here? I mean, that's what this reads, and I don't know if
3 that's what we intend or not, for the ad litem to go back and
4 review whether the entire settlement is proper
5 CHAIRMAN BABCOCK: The way this reads, my
6 reading of this is that there are two issues for the ad litem
7 to review: one, whether the split is okay, and, two, whether
8 based on that split the settlement is in the party's best
9 interest.
10 MR. HAMILTON: I think it's more than that. I
11 think it's to review the amount, the total amount
12 CHAIRMAN BABCOCK: Well, you would necessarily
13 review the total amount when you apply the split because you've
14 got to apply it against something.
15 MR. HAMILTON: Well, but you already have the
16 settlement. There's a settlement here for $500,000. Now, the
17 ad litem comes in, and he can either just approve the split
18 that has been recommended or not approve it, or he can go back
19 through the whole case and the settlement discussions and the
20 liability and decide whether he thinks $500,000 is enough.
21 That's where the big fees come in.
22 If he says, "I had to go do all this, read all
23 the depositions, and decide whether or not this $500,000 was
24 enough," and I thought that what we were trying to focus on was
25 to not have the guardian ad litem do all of that, but only to

1 approve the split

2 CHAIRMAN BABCOCK: Judge Christopher, what's

3 your view on it, or do you have a view?

4 HONORABLE TRACY CHRISTOPHER: If their job is to

5 determine whether the amount of the settlement is fair then

6 they have to do more work.

7 MR. HAMILTON: Right.

8 HONORABLE TRACY CHRISTOPHER: I would still like

9 them to give me an opinion on the amount of the settlement, but

10 it would require more work.

11 CHAIRMAN BABCOCK: Well, it seems to me that you

12 necessarily implicate the amount of the settlement because you

13 say in this rule "determine whether the settlement is in the

14 party's best interest."

15 HONORABLE TRACY CHRISTOPHER: Right. Right.

16 The way it's written I think it covers the amount. I think

17 Carl didn't want it to cover that.

18 CHAIRMAN BABCOCK: Okay. All right. Paula.

19 MS. SWEENEY: It needs to be, in my judgment,

20 left open to where the ad litem can do either one. I have

21 participated in settlements where the ad litem literally only

22 looked at how much the incompetent got, completely without

23 regard to what anybody else got, and determined "This is a

24 great settlement. This takes care of this person forever and

25 there's no reason to look at anything else, including even the

1 attorney's fees, because this guy got -- you know, is perfectly
2 well-taken care of. This is definitely in his best interest."
3 Now, that's one end of the spectrum, versus at
4 the other end of the spectrum where you have to look and "Why
5 on earth are you settling this whole case for $250,000? Before
6 I can even decide if, you know, $30,000 is fair to the
7 incompetent, why are you settling it so low?" You've got to
8 look at the whole picture, so there needs to be room there for
9 the ad litem to do whatever is -- I think, is needed at either
10 end of the spectrum.
11 CHAIRMAN BABCOCK: Okay. Ralph.
12 MR. DUGGINS: It can only be limited to the
13 review of the ward's settlement because the other party is
14 presumed to have the capability to judge it, and they've
15 already got counsel to advise them on it. I think you're
16 duplicating an effort and creating a scenario for abuse.
17 CHAIRMAN BABCOCK: Well, maybe I misunderstood
18 what Judge Christopher said, but I think that it is limited to
19 the ward's settlement, but that necessarily implicates what the
20 total number is.
21 HONORABLE TRACY CHRISTOPHER: I mean, it
22 generally does. If it's a wrongful death and the children are
23 -- you know, the mother is getting a certain amount and the
24 children are getting a certain amount, you look at what the
25 children are getting versus what the mother is getting in the

1 whole number. I mean, you don't just look and say, you know,
2 is $50,000 enough for the child for the death of his dad. You
3 have to look at the whole picture, see what the split is, see
4 what the liability was, to determine, yeah, you know, that's
5 obviously not enough for the death of the dad, but given the
6 liability in this case that's a right amount.
7 CHAIRMAN BABCOCK: Paula.
8 MS. SWEENEY: Or see what the coverage is.
9 There's only $200,000 in coverage here. Yeah, we know that
10 this child is brain damaged and is only going to get $125,000
11 for the rest of his life. That sounds appalling to me and how
12 can you do it? Well, because that's all the money and there's
13 no assets, yada-yada, so they have to be able to look at both
14 ends of the spectrum
15 CHAIRMAN BABCOCK: Let's see if the Christopher
16 magic is still working. How many people are in favor of the
17 language as written?
18 MR. ORSINGER: This is a vote between the legal
19 unit and the blind legal unit.
20 CHAIRMAN BABCOCK: How many are opposed?
21 So by a vote of 12 to 2 the Christopher magic is
22 still working, even this late in the day.
23 We got anything else? Okay. For those of you
24 who are helping us pants Chris Griesel at 8:00 o'clock tonight,
25 Sullivan's is at 300 Colorado Street. For those of you who are

1 not going to see us until the next meeting, it is May 14th and
2 15th, and we'll try to give you a heads-up on whether Saturday
3 is going to be necessary before like 3:00 in the afternoon on
4 Friday
5 PROFESSOR CARLSON: Chip?
6 CHAIRMAN BABCOCK: Elaine.
7 PROFESSOR CARLSON: I was just going to suggest
8 it might be a good idea for the subcommittee to go back and
9 review Justice Hecht's letter of last June because there are
10 still some rules that need to be addressed under House Bill 4
11 CHAIRMAN BABCOCK: Yeah. I meant to say that,
12 and since so many people are not here then let's get an e-mail
13 out to the subcommittee chairs and vice-chairs and maybe send
14 that, so they will have his letter again, but that would
15 accomplish that.
16 MR. HAMILTON: What's the name of this place?
17 CHAIRMAN BABCOCK: Sullivan's.
18 MS. SWEENEY: I didn't hear what you said.
19 PROFESSOR CARLSON: Our subcommittees need to
20 look at Justice Hecht's June 16th letter of last year and see
21 if there are other matters in the rules that need to be
22 addressed.
23 MR. ORSINGER: Debra will send that around
24 again, right?
25 CHAIRMAN BABCOCK: Deb will send it around

1 again. Yeah. Okay. We're off the record. Thanks, everybody.
2 (Adjourned at 5:34 p.m.)
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2 CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

3

4 *

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7 I, D'LOIS L. JONES, Certified Shorthand

8 Reporter, State of Texas, hereby certify that I reported the

9 above meeting of the Supreme Court Advisory Committee on the

10 5th day of March, 2004, Afternoon Session, and the same was

11 thereafter reduced to computer transcription by me.

12 I further certify that the costs for my services

13 in the matter are $1,306.50.

14 Charged to: Jackson Walker, L.L.P.

15 Given under my hand and seal of office on this

16 the 18th day of March, 2004.

17

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