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HEARING OF THE SUPREME COURT  
ADVISORY COMMITTEE  
(AFTERNOON SESSION)

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**COPY**

Taken before Anna L. Renken, a Certified  
Shorthand Reporter in Travis County for the State of  
Texas, on the 16th day of January, 2004, between the  
hours of 1:45 p.m. and 5:08 o'clock p.m. at the Texas  
Association of Broadcasters, 502 E. 11th Street, Suite  
200, Austin, Texas 78701.

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I N D E X

SECTION 4.12, HOUSE BILL 4 - - - - -	11054
AD LITEM - - - - -	11056
EVIDENCE RULES - - - - -	11153
RULE 202 - - - - -	11169

1 CHAIRMAN BABCOCK: All right, everybody.  
2 Let's go. Everybody ready to go? Justice Hecht has  
3 asked to take an item out of order. I don't know.  
4 What do you think?

01:46 5 (Laughter.)

6 JUSTICE NATHAN HECHT: Section 4.12 of  
7 House Bill 4 says "The Supreme Court shall amend Rule  
8 194.2 Texas Rules of Civil Procedure as soon as  
9 practicable following the effective date of this  
01:46 10 article" -- that's already gone into effect -- "to  
11 include disclosures of the name, address and telephone  
12 number of any person who may be designated as a  
13 responsible third party." So is there any reason why  
14 we shouldn't just issue an order as soon as we can  
01:46 15 making that change, or is there any reason that we  
16 should add something more than just a line that says  
17 exactly what the statute says?

18 PROFESSOR DORSANEO: I think it should  
19 be done; and it could go in (b) which talks about, or  
01:47 20 right after "(b), the name, address and telephone  
21 number of any potential parties" and just kind of add  
22 it.

23 JUSTICE NATHAN HECHT: "Or responsible."  
24 All right.

01:47 25 PROFESSOR DORSANEO: It would be easy

1 enough to do. And I don't know why we would need a  
2 committee to go through all that.

3 CHAIRMAN BABCOCK: Does anybody else  
4 have any comments? Elaine.

01:47 5 PROFESSOR CARLSON: Is there any thought  
6 to providing for express provisions for service?

7 PROFESSOR DORSANEO: For what?

8 PROFESSOR CARLSON: Service on a  
9 responsible third party or putting anything in the  
10 pleadings?

11 PROFESSOR DORSANEO: Don't need to be  
12 served anymore.

13 PROFESSOR CARLSON: I know.

14 JUSTICE NATHAN HECHT: I just haven't  
01:47 15 thought about it. Maybe there should be.

16 CHAIRMAN BABCOCK: Justice Gray.

17 JUSTICE TOM GRAY: And this just  
18 occurred to me off the top of my head, so forgive me  
19 if it sounds crazy. But is there any need to  
01:47 20 expressly provide in there that if the only source of  
21 the information was to attorney-client privilege, that  
22 it is not disclosed. That just kind of concerns me  
23 that the only way that you know of a responsible third  
24 party is through the privilege. Is that an exception  
01:48 25 to the privilege, and should we expressly say that,

1 that notwithstanding that the only way you know about  
2 it is through a privileged communication, that you are  
3 still required to disclose, i.e., a waiver, required  
4 waiver?

01:48 5 PROFESSOR DORSANEO: I don't think the  
6 privilege covers information. I think it covers  
7 communications.

8 CHAIRMAN BABCOCK: Richard.

9 MR. MUNZINGER: I don't think the  
01:48 10 attorney-client privilege is implicated. The rule  
11 imposed an obligation upon a party and not upon  
12 counsel.

13 PROFESSOR DORSANEO: Plus it's not a  
14 communication.

01:48 15 JUSTICE TOM GRAY: Like I said, that  
16 just came off the top of my head. Maybe I should have  
17 left it there.

18 CHAIRMAN BABCOCK: Good. All right.  
19 Back to Justice Bland.

01:49 20 HONORABLE JANE BLAND: All right. I  
21 think where we left it is something like, and I'm sure  
22 this is not perfect, "Unless the parties agree, the  
23 Court must appoint a guardian ad litem only when the  
24 defendant has made an offer to settle the minor's  
01:49 25 claim" --

1 HONORABLE TRACY CHRISTOPHER: "Party's."

2 HONORABLE JANE BLAND: I'm sorry. I'm

3 sorry -- "the party's claims and there is an adverse

4 interest between the next friend for the minor" -- I

01:49 5 mean, I'm sorry -- "between the next friend and the

6 party." And we don't need the second sentence because

7 we've now made the first sentence restricted to only

8 would be my view that the second sentence would be

9 surplusage; but I'm happy to add in a second sentence.

01:50 10 MS. SWEENEY: Can you read it one more

11 time?

12 CHAIRMAN BABCOCK: Okay. Hang on. Carl

13 and then Justice Duncan.

14 MS. SWEENEY: But can we read it again

01:50 15 first just so we can have it in our brains?

16 HONORABLE JANE BLAND: Yes. Yes.

17 "Unless the parties agree, the Court must appoint a

18 guardian ad litem only when the defendant has made an

19 offer to settle the party's claims and there is an

01:50 20 adverse interest between the next friend and the

21 party." I mean I guess it shouldn't be "party."

22 MR. HAMILTON: No. Because the next

23 friend is the party.

24 HONORABLE JANE BLAND: Party, right.

01:51 25 MR. HAMILTON: The next friend and the

1 minor" or "the next friend and the incapacitated  
2 person."

3 HONORABLE JANE BLAND: "Incapacitated  
4 person." Okay. So that should be "incapacitated  
5 person." "Next friend and the" --

6 JUSTICE GRAY: Some reference to the --

7 CHAIRMAN BABCOCK: Hang on. She can't  
8 get this if everybody talks at one time. Justice  
9 Bland.

01:51 10 JUSTICE JANE BLAND: I'm sorry. I do  
11 agree. There is a problem there. So --

12 JUSTICE TOM GRAY: It has to be in  
13 reference to the individual represented by the  
14 incapacitated person.

15 JUSTICE JANE BLAND: Yes, I agree.

16 HONORABLE TRACY CHRISTOPHER: I think we  
17 can cure it by saying "Unless the parties agree, the  
18 Court must appoint a guardian ad litem or a party  
19 represented by a next friend only when the defendant  
01:51 20 has made an offer to settle the party's claim and  
21 there appears to be an adverse interest between the  
22 next friend and the party."

23 HONORABLE JANE BLAND: That's good.

24 CHAIRMAN BABCOCK: Justice Duncan.  
01:51 25 Maybe not.

1 HONORABLE SARAH B. DUNCAN: I think  
2 grammatically you-all are ascribing a great deal of  
3 weight to the word "only" than can be ascribed to it.  
4 What that sentence says grammatically is that you must  
01:52 5 do it in this circumstance and it does not at all  
6 restrain any other circumstances in which it can be  
7 done.

8 HONORABLE JANE BLAND: So you think the  
9 second sentence is not surplusage and we should keep  
01:52 10 that in, "The Court must not appoint an ad litem if no  
11 potential adverse interest exists"? Okay. I think  
12 you're right.

13 CHAIRMAN BABCOCK: Harvey.

14 HONORABLE HARVEY BROWN: Just say the  
01:52 15 words "should not" or "must not" in the first  
16 sentence. That restricts it.

17 HONORABLE JANE BLAND: Except for the  
18 fact that Professor Albright pointed out earlier that  
19 we have to have some enabling language, but not just  
01:52 20 restrictive language. So maybe what we should do is  
21 have the second sentence.

22 MR. YELENOSKY: I don't think you should  
23 try to put the "unless" clause in the same sentence.

24 HONORABLE JANE BLAND: Right. Okay. So  
01:53 25 instead let's try another alternative. Is that all

1 right? So instead it would be "The Court must appoint  
2 a guardian ad litem for a party represented by a next  
3 friend only when the defendant has made an offer to  
4 settle the party's claim and there is an adverse  
01:53 5 interest between the next friend and the party.

6 Unless the party's agree, the Court must not appoint  
7 an ad litem if no adverse interest exists." How does  
8 that sound?

9 CHAIRMAN BABCOCK: Is that okay with  
10 everybody? Jeff.

11 MR. BOYD: I agree with Justice Duncan.  
12 I'm not sure grammatically that that first sentence,  
13 "must appoint only if." And we're -- well, you still  
14 had "only" in there. Right?

01:54 15 HONORABLE JANE BLAND: Right. That  
16 would be the only case where you would have to would  
17 be the point.

18 MR. BOYD: And he may do so in any other  
19 case unless there is not a conflict of interest?

01:54 20 That's --

21 JUSTICE JANE BLAND: You may not unless  
22 the parties agree unless a conflict exists. You must  
23 not. I'm sorry. I did not. "Must not," that would  
24 be the second sentence that would hopefully take out  
25 the --

1 HONORABLE CARLOS LOPEZ: -- the need for  
2 the word "only."

3 MR. BOYD: And so do we end up saying  
4 that --

01:54 5 HONORABLE JANE BLAND: Well, that was a  
6 "must." That was Judge Christopher's let's have  
7 "must" and "only" instead of "may."

8 MR. BOYD: Do we end up in saying that  
9 the Court must, that if there is an offer to settle  
01:54 10 and a conflict, then the Court must do so regardless  
11 of whether the parties want it?

12 HONORABLE CARLOS LOPEZ: That's what the  
13 rule says.

14 CHAIRMAN BABCOCK: Judge, what do you  
01:55 15 want to do?

16 HONORABLE TRACY CHRISTOPHER: Why don't  
17 we work on that some more and come back and move on to  
18 the next more weighty issues.

19 CHAIRMAN BABCOCK: Yes. Drafting by a  
01:55 20 committee of 35 is hard. Is that okay with you?

21 HONORABLE JANE BLAND: Yes.

22 CHAIRMAN BABCOCK: Okay. Let's go on to  
23 the next issue.

24 HONORABLE JANE BLAND: I think paragraph  
01:55 25 (d) is just intended to define attorney ad litem to --

1 so that people would know that attorney ad litem only  
2 refers to attorneys -- well, not to define, but to  
3 articulate when an attorney ad litem should be  
4 appointed. And that would be when a defendant or  
01:55 5 defendants are served by publication and the defendant  
6 has not answered.

7 CHAIRMAN BABCOCK: Carl.

8 MR. HAMILTON: The only question I had  
9 is this implies that that's the only place where you  
01:55 10 would ever have an attorney ad litem. And is that  
11 correct? That's the only place you would ever have an  
12 attorney ad litem?

13 JUSTICE JANE BLAND: There are other  
14 provisions in other Codes for attorney ad litem. I  
01:56 15 know the Family Code, the Probate Code, the Parental  
16 Notification Rules all provide for attorney ad litem  
17 as well as some other specific statutes like, for  
18 example, in the Health & Safety Code if you're  
19 committing somebody for tuberculosis, inpatient  
01:56 20 tuberculosis treatment and things like that. So this  
21 would be the situation that's not covered by specific  
22 statutes.

23 MR. HAMILTON: Another question I have  
24 is what is the difference? The Courts use the term  
01:56 25 interchangeably ad litem, attorney ad litem and

1 guardian ad litem. Is there a difference in the two?

2 HONORABLE JANE BLAND: We try to in the  
3 second page on 173.3 describe the difference between  
4 the two, because I think there was a lot of discussion  
01:57 5 in the last two meetings about the fact that we needed  
6 to distinguish the two and define what their roles  
7 are. So this is our effort to do that.

8 MR. MEADOWS: This rule treats them as  
9 different. And this (d) would be a circumstance where  
01:57 10 the Court must appoint an attorney ad litem; but it's  
11 not the only circumstance where it could happen.

12 CHAIRMAN BABCOCK: Jane, what is the  
13 source of subparagraph (d)? Where is that derived  
14 from?

01:57 15 HONORABLE JANE BLAND: I think Bill  
16 Dorsaneo could probably state the rule.

17 HONORABLE CARLOS LOPEZ: I think it's in  
18 the default judgement rule, isn't it?

19 JUSTICE JANE BLAND: It's under  
01:57 20 certified publication.

21 HONORABLE LEVI BENTON: It's either 107  
22 or 108.

23 CHAIRMAN BABCOCK: 109.

24 JUSTICE NATHAN HECHT: 109.

01:58 25 MR. HAMILTON: It's part of the

1 trespass --

2 PROFESSOR DORSANEO: I'll find it here  
3 in a second. It would be in the Judgement section.

4 MR. BENTON: Under the service section.  
01:58 5 It's in the rules on service.

6 PROFESSOR CARLSON: It's rule 244.

7 PROFESSOR DORSANEO: Yes. I knew there  
8 was a 44 in it. I knew that. I think you're right,  
9 244. Yes, it's 244, Civil Procedure Rule 244.

01:59 10 CHAIRMAN BABCOCK: Just out of  
11 curiosity, is that used very much?

12 JUSTICE JANE BLAND: It's requested  
13 quite a bit.

14 HONORABLE TRACY CHRISTOPHER: We use it  
01:59 15 all the time in tax lawsuits.

16 CHAIRMAN BABCOCK: Okay.

17 HONORABLE HARVEY BROWN: And the civil  
18 lawsuits tell the lawyers you have to appoint somebody  
19 and end up paying for it. It discourages service by  
01:59 20 publication.

21 HONORABLE CARLOS LOPEZ: I was going to  
22 say the same thing. You might just want to clarify  
23 who pays for it.

24 CHAIRMAN BABCOCK: It says it's taxed as  
01:59 25 costs. If the defendant loses, there is nobody there.

1 They didn't answer. There is nobody around.

2 HONORABLE JANE BLAND: Well, it's often  
3 used in in rem proceedings. And so the costs can be  
4 associated with a lien on the property.

02:00 5 CHAIRMAN BABCOCK: Okay. Great.

6 HONORABLE JANE BLAND: That's its common  
7 use.

8 CHAIRMAN BABCOCK: All right. Any other  
9 comments about (d)?

02:00 10 HONORABLE JANE BLAND: Okay. (e) is  
11 some language that we included for discussion  
12 purposes, but we do not recommend. And this was to  
13 take a look at the situation that I think Paula  
14 described at some of our earlier meetings about when  
02:00 15 an ad litem at some point shifts from being an  
16 evaluator of a settlement and its fairness to being a  
17 lawyer for the minor. And so this would be something  
18 that would allow a way for, you know, that to happen  
19 under the rule, and it would be coupled with 173.4(c)  
02:01 20 of Compensation.

21 It was the committee's view, and I think it was  
22 the consensus of the group, that we should narrowly  
23 define the role of the typical ad litem to a review of  
24 the proposed settlement, a determination of whether  
02:01 25 it's in the minor's best interest and then to advise

1 the Court of that evaluation and this and nothing  
2 more. And I think several committee members recited  
3 instances where that limited engagement exploded into  
4 a full fledged representation of the party not only in  
02:01 5 the context of settlement discussions, but also at  
6 trial and depositions, and sometimes it was at the  
7 behest of the judge even that the ad litem is doing  
8 all of this.

9 And so this was something for your review to  
02:02 10 consider; but it was our view that maybe putting  
11 something in a rule might encourage this, and it was  
12 the subcommittee's view that that's really not the  
13 ad litem's role, that the minor or the incapacitated  
14 person has representation by counsel and that it's not  
02:02 15 the ad litem's role to become associated counsel with  
16 counsel that is already representing the incapacitated  
17 person.

18 CHAIRMAN BABCOCK: Harvey and then Ralph  
19 and then Bill.

02:02 20 HONORABLE HARVEY BROWN: I agree with  
21 the subcommittee recommendation not to do this. First  
22 of all, I think it's better handled informally on  
23 those few instances where an attorney is just not  
24 doing the job rather than filing a formal motion  
02:03 25 that's in writing that the person is not doing a good

1 job.

2 But secondly, I do think it expands the duties  
3 of an ad litem who now has any right to second guess  
4 whether the lawyer is, quote, "adequate." "Adequate"  
02:03 5 to me might be very similar to negligent or  
6 malpractice. So now an additional duty for the  
7 ad litem is to carefully watch the plaintiff's lawyer  
8 to see if they may have a cause of action, and from  
9 that they're going to say "I have to be there."

02:03 10 CHAIRMAN BABCOCK: Ralph.

11 MR. DUGGINS: Harvey said what I wanted  
12 to say. Although currently Rule 173 is not limited to  
13 a settlement rule. It still has this "any adverse  
14 interest." So presumably --

02:03 15 HONORABLE JANE BLAND: Yes. And I think  
16 our intent was to limit that. And I think we try to  
17 do that in the next section. So you're right.  
18 Current Rule 173 I think has been defined in various  
19 cases to require various responsibilities of  
02:04 20 ad litem, and there was no consistency either in the  
21 case law or across the state as to what the  
22 responsibilities of an ad litem are under Rule 173.  
23 So this is our attempt to define those  
24 responsibilities.

02:04 25 CHAIRMAN BABCOCK: Okay. Bill then

1 Paula.

2 PROFESSOR DORSANEO: When that problem  
3 does arise what should happen? I guess my question is  
4 a predicate to saying should there been some language  
02:04 5 in there that says "This isn't your responsibility"?  
6 This problem is going to arise, and not talking about  
7 it is not going to make it go away. So what happens?

8 HONORABLE HARVEY BROWN: What I have  
9 seen is a status conference. Someone mentions it  
02:05 10 informally, or the judge sometimes raises the issue.

11 PROFESSOR DORSANEO: So it's kind of an  
12 oral motion in informal form?

13 HARVEY BROWN: Yes.

14 CHAIRMAN BABCOCK: Paula and then Judge  
02:05 15 Benton.

16 MS. SWEENEY: I think by you limiting  
17 the duties the way you do in 173.3 that that  
18 essentially moots (e), and if your duty is only to do  
19 those things, then you don't have a duty to do this.  
02:05 20 And Bill's question of what happens when a plaintiff's  
21 lawyer is inadequate, the answer under this rule is  
22 the ad litem tells the judge settlement is not in the  
23 minor's best interest. And if the judge says "Why  
24 not," then explains because the plaintiff's lawyer is  
02:05 25 doing a lousy job. But it would be within that

1 limited definition of the duties and not in the old  
2 sense of taking over and trying the case. So I don't  
3 think you need (e) because of what you have done with  
4 173.3.

02:06 5 CHAIRMAN BABCOCK: Justice Hecht.

6 JUSTICE NATHAN HECHT: Discussion at an  
7 earlier time was whether the ad litem should advise on  
8 the fairness of the split or on the fairness of the  
9 settlement. If it's the latter, wouldn't the ad litem  
02:06 10 have an obligation to pretty much look at the file,  
11 depositions, trial strategy, the whole thing?

12 CHAIRMAN BABCOCK: Judge Benton.

13 HONORABLE LEVI BENTON: During the break  
14 someone said that there is an opinion out of the  
02:06 15 Dallas Court of Appeals that says the ad litem is a  
16 fiduciary. So, you know, I think we have to come back  
17 to (e) after we make some firm determination of  
18 whether we'll go with 173.3(a) as drafted, because if  
19 we don't adopt or if the Court doesn't adopt this last  
02:07 20 sentence of 173.3(a) that expressly says there is no  
21 fiduciary relationship, then the guardian ad litem  
22 under the Dallas court indeed may have that  
23 obligation.

24 HONORABLE JANE BLAND: That's true.

25 CHAIRMAN BABCOCK: Carlos, did you have

1 something?

2 HONORABLE CARLOS LOPEZ: Well, I guess

3 it goes back to my understanding, and I don't know

4 where I got it, frankly, was always that the ad litem,

02:07 5 the need for the ad litem was the conflict, so they

6 really only needed to be involved to the extent of the

7 conflict. And so the conflict was created by the fact

8 that a pot of money was being split by someone who had

9 an interest in it. So I never understood it to be the

02:07 10 ad litem's role to go back and try to increase the

11 amount of the pie. I mean, I guess you could argue

12 that this is an overarching, quote, unquote,

13 "undefined, amorphous best interest of the child,"

14 well, it's always in the best interest of the child to

02:08 15 get more money, I guess. I mean, but that doesn't

16 mean there is a conflict. Besides how would you

17 impose? Doesn't that next friend have a right to

18 decide who the lawyer is going to be? If the Court

19 finds that the first lawyer was no good, then does the

02:08 20 Court just get to decide who the next lawyer is? I

21 have a real problem with that.

22 CHAIRMAN BABCOCK: Carl and then Paula.

23 MR. HAMILTON: In the Court Rules

24 version we provided that if requested by the parties,

02:08 25 the guardian could participate in the settlement

1 negotiations. Jane's draft provides that the guardian  
2 not participate in any court proceedings -- I guess  
3 that would include settlement negotiations -- unless  
4 ordered by the Court for sufficient reasons. So both  
02:08 5 of us are sort of saying that the guardian may be  
6 involved in the settlement negotiations if asked. So  
7 if that were the case, then I suppose the guardian  
8 would have to look at the whole file. But if he's not  
9 asked and he's only asked to approve the settlement,  
02:09 10 that would seem to imply that it's just the split and  
11 not the amount.

12 CHAIRMAN BABCOCK: Paula, then Buddy,  
13 then Richard.

14 MS. SWEENEY: That's where you run into,  
02:09 15 squarely into the issue. Because how can you advise  
16 on the split without reviewing the file? And I think  
17 you-all tried to do that in terms of "reasonable and  
18 necessary work," I mean, or whatever the language is  
19 that you-all have included. The problem is we need a  
02:09 20 reasonableness standard for what the ad litem needs to  
21 do to advise the Court; but we're being asked to write  
22 a rule because reasonableness apparently is being  
23 abused and so we're trying not to have a  
24 reasonableness standard and to have some kind of  
02:10 25 bright line, and that's where we're running into the

1 problem. Because there are times when it is not in  
2 the minor's best interest for the ad litem to come in  
3 there and try to get the most possible money for the  
4 minor because the minor's parents need the money more  
02:10 5 than the minor does to get the minor to adulthood.  
6 You know, I mean, you have to take the context of the  
7 entire family into consideration.

8 And so to say that it's only to approve the  
9 split period in a vacuum I don't think you can say  
02:10 10 that, because you can't tell the Court yes, the split  
11 is okay without reviewing the entire context of the  
12 case: "Did they get enough money overall; did they do  
13 they work they needed to do; if they had designated  
14 two more experts, could they have gotten another X  
02:10 15 hundred thousand which would then put this much more  
16 money in the minor's pocket? Therefore I'm not  
17 approving the settlement because they haven't done  
18 enough work yet." We've seen that happen before where  
19 settlements have been blown up.

02:10 20 So I think somehow to me there has to be, and  
21 this may be what the Court is trying to get away from,  
22 there has to be some reasonableness discretion for the  
23 ad litem to do what they need to do to advise the  
24 Court yes, this is or is not an appropriate settlement  
02:11 25 for the minor.

1 JUSTICE NATHAN HECHT: Just so  
2 responsibility for that, I think the problem, as we  
3 have talked about from time to time, nobody agrees  
4 what that reasonable standard is.

02:11 5 MS. SWEENEY: That's right.

6 JUSTICE NATHAN HECHT: And the whole  
7 state is divided on it. In one place the guardian  
8 ad litem participates in the whole case just as if he  
9 or she was on the file. Another place all they do is  
02:11 10 approve the split, stands up, looks up and says "It  
11 looks okay to me, judge," and that's the end of it.  
12 And so I think what this exercise has illuminated is  
13 that the practice is not the same and we don't agree  
14 on what the practice should be.

02:12 15 MR. LOW: But if you confine it merely  
16 to the split, there are times you can't do that,  
17 because I filed for approval as a guardian ad litem a  
18 settlement because they went into the court and said  
19 the structure of the settlement was not taxable. Back  
02:12 20 in the old days, which Skip would say I have full  
21 knowledge of, if you knew what the sole total amount  
22 of the settlement was, then it was taxable. And so I  
23 wouldn't approve it. And the judge then appointed an  
24 accountant to advise and it was taxable. So it wasn't  
02:12 25 just a split; but I knew what these people were being

1 told was wrong and I wouldn't approve the settlement.  
2 So there are so many different situations when you get  
3 into this. It's difficult to draw a fast and solid  
4 rule.

02:12 5 CHAIRMAN BABCOCK: Richard, did you have  
6 something?

7 MR. MUNZINGER: I wanted to make sure I  
8 understood the way that we are conceiving the rule  
9 right now and ask a question. The way I understand  
02:13 10 the rule that is being considered and the passing  
11 question, it is that agreement of the parties is  
12 required for appointment of a guardian ad litem.

13 COMMITTEE MEMBERS: No.

14 MR. MUNZINGER: We have 173.2(b),  
02:13 15 "Unless the parties agree, the Court must appoint a  
16 guardian ad litem only when the defendant has made an  
17 offer for settlement." What happens if the parties  
18 don't agree? And why that is pertinent to the present  
19 discussion is because we are talking about a guardian  
02:13 20 ad litem who is going to advise the Court on the split  
21 of the settlement; but we have a rule that talks about  
22 appointment of a guardian ad litem when an offer is  
23 made. Those may not be the same and most are not,  
24 because the first offer to settle is generally  
02:13 25 rejected. And so once again you have this problem of

1 a guardian ad litem who is engaged in discussions now  
2 with a party represented by a next friend. The  
3 guardian ad litem, ultimately he or she is or is not a  
4 fiduciary; but the guardian ad litem obviously has  
02:14 5 some kind of duty to the person lacking capacity,  
6 assuming it's a minor for the moment.

7 I don't know, I don't see how these two are  
8 put together. We have a discussion talking about the  
9 guardian advice as to the split; but he's appointed  
02:14 10 when the offer is made. I think it's a problem. Once  
11 again you've pushed this guardian ad litem out into  
12 the relationship between the plaintiff and the  
13 plaintiff's lawyer and the minor's family; and there  
14 is nothing, there is no settlement to be divided yet,  
02:14 15 because the rule has called for the appointment when  
16 an offer is made, unless I've misconstrued the rule.  
17 And I plead guilty to being stupid; but it just seems  
18 to me that that's what we're doing here. We may be  
19 getting --

02:14 20 CHAIRMAN BABCOCK: We're not going to  
21 accept your plea on that. But Bill.

22 PROFESSOR DORSANEO: I don't know how  
23 you approve the split. I don't know how that makes  
24 any sense at all. If there needs to be a guardian  
02:15 25 because there is an adverse interest, then it would

1 seem to me that the person who is in play is in play  
2 to do whatever the professional job that that person  
3 normally does is with respect to evaluating the  
4 settlement offers. You say "Well, there's not a lot  
02:15 5 of money here. It's only \$1.98; but 80 percent of it  
6 goes to the minor." So that's fine. That doesn't  
7 make any sense. The first thing you have to evaluate  
8 is whether the amount of money bears some reasonable  
9 relationship to the harm. Whatever standard you use  
02:15 10 to evaluate that maybe discount that in some way for  
11 liability purposes. If it is measured up from the  
12 standpoint of the extent of the harm and you were in  
13 the happy position of having excess money, well maybe  
14 that excess money would go to the parents. Maybe that  
02:16 15 would make sense; but I don't see how you do a  
16 professional job by being restricted to taking a look  
17 at one aspect of the problem.

18 CHAIRMAN BABCOCK: Lamont.

19 MR. JEFFERSON: I go back to Carlos'  
02:16 20 point, which is the reason the ad litem is appointed  
21 is because of the conflict. There is no conflict that  
22 everybody wants to get the biggest pot possible for  
23 everyone to settle. The plaintiff wants that. The  
24 ad litem wants that. The minor wants that. That's in  
02:16 25 everybody's best interest; but the ad litem to me it's

1 not normally going to be the case that the ad litem is  
2 going to contest the amount of the global settlement.  
3 What the ad litem is there to make sure of and I think  
4 the way the rule is drafted is that the settlement  
02:16 5 itself is in the minor's best interest; and that  
6 encompasses a lot of different things, including the  
7 split. It's not just the split, but it would  
8 certainly include the split. And the ad litem has the  
9 responsibility to look at as much as the ad litem  
02:17 10 needs to look at to advise the Court whether the  
11 ad litem believes that the settlement itself is in the  
12 minor's interest.

13 CHAIRMAN BABCOCK: Paula.

14 MS. SWEENEY: Well, except though,  
02:17 15 Lamont, under existing, the way it's construed now  
16 there are cases in which the defense has just, and  
17 I've seen this, has just steamrolled some poor schmoe  
18 of a lawyer and the schmoe is wanting to take a small  
19 settlement. And an ad litem gets appointed and comes  
02:17 20 in and says "Huh-uh. I'm going to try it or else  
21 you're going to pay 3X." And they pay 3X and then you  
22 approve it.

23 And now the way it's being written here the  
24 ad litem wouldn't be able to come in and say "No, I'm  
02:17 25 going to try it." But the ad litem could still say

1 "I'm not approving, I'm not recommending the  
2 settlement because the totality is insufficient."

3 MR. JEFFERSON: I think that is  
4 something that the ad litem could consider under the  
5 way the rule is drafted now because in that instance  
6 they are -- ordinarily I said the case is that  
7 everyone is on the same page and they're trying to get  
8 as much money as they can. There is the exceptional  
9 case where a lawyer needs to make a mortgage payment  
02:18 10 or whatever and is willing to settle cheap, and in  
11 that case the ad litem can decline to recommend the  
12 settlement.

13 MS. SWEENEY: Or just not so much needs  
14 the money cheap; but can't get any more because the  
02:18 15 defense is saying "Come and get it."

16 MR. JEFFERSON: Sure. And that could be  
17 another circumstance under this rule and the way it's  
18 drafted is now where the ad litem would say "The  
19 settlement is not in the minor's best interest." But  
02:18 20 it's not a just a split or a not split or just a --

21 MS. SWEENEY: Right.

22 MR. JEFFERSON: -- there is not enough  
23 money or it is enough money. It's, I mean, the bottom  
24 line is whether it's in the minor's best interest.  
02:18 25 And there are a lot of factors that go into that.

1 CHAIRMAN BABCOCK: Carlos.

2 HONORABLE CARLOS LOPEZ: I kind of  
3 wondered where that "best interest" language came  
4 from. It's not in Rule 173. Clearly we treat minors  
02:18 5 different than incapacitated people. Correct?

6 MS. SWEENEY: No.

7 HONORABLE CARLOS LOPEZ: Or not? Just  
8 let me give you an example. In Professor Dorsaneo's  
9 case where the plaintiff's lawyer settled cheap for  
02:19 10 \$1.98, just a regular case where the lawyer, the  
11 plaintiff's lawyer did not do a good job for the  
12 client, are we going to ask the Court to get involved  
13 and say "You can't settle this case for \$1.98. That's  
14 just completely unfair. The case is worth much more  
02:19 15 than that"? We don't do that. The reasons we do it  
16 here is because we want to make sure somebody is not  
17 getting the short end of the stick because of a  
18 conflict of interest. So I'm just saying it's two  
19 philosophies. It's two different understandings of  
02:19 20 why the ad litem is there in the first place. I  
21 always saw them as there to cure the conflict; but  
22 other people took a much broader view which is quote,  
23 unquote, "best interest." I don't quarrel with that.  
24 I'm just saying it's an admittedly much larger  
25 concept.

1 CHAIRMAN BABCOCK: Justice Hecht.

2 JUSTICE NATHAN HECHT: And as I hear,  
3 and I don't know this as a fact, but I play out  
4 Paula's scenario and the ad litem says "I'm not going  
02:19 5 to approve the settlement. It's far too small." So  
6 they go out in the hallway and the defendant says "You  
7 know, you're right. I think you probably are right.  
8 And advice like that has got to be worth six or seven  
9 hundred dollars an hour; and I know you've spent 10  
02:20 10 hours on this or 100 or whatever. So we're going to  
11 increase the settlement 10 percent or 20 percent and  
12 go ahead and pay your fee." And they say a lot of  
13 trading, some of the lawyers tell me there is trading.  
14 And it shouldn't go on, and we can't prosecute crime  
02:20 15 through the Civil Rules; but I guess which is the  
16 greater evil? That somebody is going to get run over  
17 and this is going on, or can we just not, we just  
18 can't do anything about it?

19 MS. SWEENEY: I've never heard of trying  
02:20 20 to buy off the ad litem that way, at least not in  
21 Dallas. But what I do see though is this rule as  
22 written would sharply curtail the ad litem's ability  
23 to have "and/or else" behind "the settlement is  
24 inadequate."

02:21 25 And if you think the case just is being settled

1 on the whole too cheaply and you think because the  
2 plaintiff's lawyer is being steamrolled, currently the  
3 ad litem in a lot of places can just step in and say  
4 "Well, I'm just going to try it" and will get more.  
02:21 5 And that sometimes does the trick and gets the case  
6 resolved, and sometimes we have to try it.

7 We're talking about taking away that power  
8 essentially under this rule, because all you could do  
9 would be to advise. And I'm not sure that's -- I  
02:21 10 mean, if the plaintiff's lawyer is going to get  
11 steamrolled and that's why there is a crummy offer,  
12 they're still going to get steamrolled even if you  
13 don't approve the settlement. So I don't know how. I  
14 don't know the answer to that; but I highlight the  
02:22 15 problem.

16 But I come back to where I have been all along,  
17 which is we're not going to write a perfect rule.  
18 Just like I'm not sure this line that the guardian  
19 ad litem doesn't have a fiduciary relationship, I'm  
02:22 20 not sure that's true. If we're going to say so  
21 understanding that, you know, we're picking a set of  
22 problems, but at least we're picking a direction to go  
23 in, as long as that's the intended decision of the  
24 committee, then that's fine. But I mean I think we  
02:22 25 have to realize we're picking between options here and

1 we're choosing to say if we go with this version,  
2 ad litem have this limited role period and because of  
3 that they are not a fiduciary and because of this this  
4 is all they can do and this is all they can charge and  
02:22 5 this is all they can review. And if we do that, we  
6 solve a lot of these unknown issues and the variances  
7 from county to county. It's still not going to be a  
8 perfect rule.

9 CHAIRMAN BABCOCK: Carlos.

02:23 10 HONORABLE CARLOS LOPEZ: I kind of  
11 agree. I mean, just sort of picking between two  
12 philosophies I don't -- sort of whatever the majority  
13 decides. As a practical matter I think what happens  
14 -- I know what happens all the time in Dallas. I've  
02:23 15 had ad litem at the hearing say "Judge, the  
16 plaintiff's lawyer didn't do a darn bit of work, near  
17 what they should have. I ended up having to do a lot  
18 of the work to get this thing up to speed. Pay me my  
19 normal hourly fee for that; but don't award this  
02:23 20 plaintiff's lawyer more than 20 percent. Don't  
21 approve a 40-percent fee or a 35-percent fee, because  
22 they didn't earn it."

23 And sometimes that was on the record.

24 Sometimes it wasn't, you know. As a practical matter  
02:23 25 though, I mean, the leverage is not necessarily Paula

1 coming in to drive the case. It's the ad litem saying  
2 "I won't recommend. I'll recommend to the judge not  
3 to approve this settlement." And then everybody is  
4 back to square one, and that's some leverage. It's  
02:23 5 not the same leverage as we talked about; but it's  
6 certainly something.

7 CHAIRMAN BABCOCK: Harvey:

8 HONORABLE HARVEY BROWN: I think the  
9 problem is that because of the conflict of interest we  
02:24 10 have one person wearing two hats. You're wearing the  
11 hat of the parents and the child. And the reason we  
12 appoint an ad litem is so that we now have two people  
13 wearing those two hats. And then the question becomes  
14 reasonableness; and as the judge said, no one defines  
02:24 15 "reasonableness," but you have to think about  
16 reasonable what? It's not a reasonable person. It's  
17 not a reasonable lawyer. In effect they're stepping  
18 into the shoes of being the client. They are now in  
19 effect the child, the ad litem.

02:24 20 This is how I've always looked at it. I may  
21 be wrong. They in effect have become the client.  
22 Because they're the client they are to look at the  
23 reasonableness of the settlement in the same way a  
24 client would. That doesn't mean you go to every  
02:24 25 deposition. You look at it with the advise of the

1 lawyers taking enough information you need to make an  
2 intelligible decision as the client. And as the  
3 client in Paula's situation I can't be the lawyer. I  
4 can't start lawyering, because that's not my job; but  
02:25 5 I can say "I won't approve the settlement," or I can  
6 say "Judge, we need a new lawyer. Appoint somebody to  
7 be the lawyer. I'm the client. I want a new lawyer."  
8 And that's the way I think you handle it. It's not  
9 that you become the lawyer. You tell the judge they  
02:25 10 need a new lawyer. "I'm the client, and want to  
11 discharge the first lawyer and get a second lawyer  
12 in."

13 So I think the reasonableness is nebulous.  
14 As lawyers when they think about reasonableness they  
02:25 15 want to act like lawyers; but they're not. They're  
16 really acting as clients.

17 CHAIRMAN BABCOCK: Tracy and then  
18 Richard.

19 HONORABLE TRACY CHRISTOPHER: I was  
02:25 20 going to agree with what Harvey said, which is why we  
21 had the alternative language in there if people  
22 thought it was necessary. And in Paula's instance or  
23 what Carlos was saying, when the guardian ad litem  
24 starts to do legal work it's not really fair that the  
02:25 25 defendant has to pay for that legal work. That's

1 where the problem comes in, which is why the way we  
2 wrote the rule, that if you have an attorney ad litem,  
3 it comes out of the plaintiff's share, because it's  
4 not really for the defendant to be paying for the  
02:26 5 attorney's fees of the plaintiff when the guardian  
6 ad litem becomes an attorney.

7 CHAIRMAN BABCOCK: Richard Munzinger.

8 MR. MUNZINGER: I don't know where the  
9 guardian ad litem would ever find the authority to  
02:26 10 become counsel as to the minor plaintiff. It's a  
11 matter of contract with the next friend who in Rule 44  
12 says has power to pursue the lawsuit and settle it.  
13 What gives the guardian ad litem any authority where?  
14 Would the Court find the authority to say to the  
02:26 15 guardian ad litem "You are now counsel for the minor"?  
16 Where does the judge get that kind of authority? If  
17 the guardian said "I'm going to try the case; I'm  
18 filing for a motion for a Rule 12," you have got to  
19 show that you represent this client. Where in the  
02:26 20 heck does he get the authority to do that?

21 And then you run into the problem she has got  
22 where the defendant is paying for the prosecution of  
23 the case against itself. Once again, I don't -- well,  
24 it is a tough rule.

02:27 25 CHAIRMAN BABCOCK: Carl.

1 MR. HAMILTON: It's sort of like Rule  
2 244 mentioned earlier. And Court Rules is working on  
3 a revision of that. A lot of research was done on it.  
4 And as an example, in Rule 244 where you have a  
02:27 5 defendant served by publication in a trespass to find  
6 title suit and the suit goes to trial, the attorney  
7 ad litem comes in and under current case law takes  
8 over the representation of the defendant served by  
9 publication even through an appeal, if necessary, and  
02:27 10 then his fees come out of the property or the  
11 plaintiff has to pay it. So the poor plaintiff ends  
12 up bringing the suit and winning it; but has to pay  
13 the lawyer's fees on the other side that tried to keep  
14 him from winning it.

02:28 15 Most cases, most Courts don't go that route.  
16 Most Courts limit the duty of the attorney at litem to  
17 a determination of whether or not the defendant could  
18 be found and whether service by publication was proper  
19 and then they allow a normal default judgment to go  
02:28 20 against the defendant as in other cases.

21 PROFESSOR DORSANEO: That's not how that  
22 is supposed to be at all.

23 CHAIRMAN BABCOCK: Buddy.

24 MR. HAMILTON: They're saying the same  
02:28 25 thing here, that we want to limit the duties of the

1 guardian ad litem and not get him involved in the  
2 lawsuit.

3 MR. LOW: But maybe there is a middle  
4 ground, because on one side we are talking about not  
02:28 5 participating in the trial. In other words, don't  
6 take depositions, don't do all that work. But if you  
7 get called at the last minute in a settlement and  
8 there have been a whole bunch of depositions and the  
9 settlement is pretty small but the damages are big,  
02:28 10 the lawyer says "Well, this one did this. This one  
11 did that." Then maybe the guardian ad litem should  
12 review certain things to determine whether the overall  
13 rather than, you know, have him participate in the  
14 depositions. So maybe you could limit it to that.

02:29 15 Or what I did is just got an order from the  
16 Court saying that my only duty is the split and so  
17 forth. So maybe you can, the guardian ad litem,  
18 that's not where the fees come where the people want  
19 the big fees because they took the deposition, they  
02:29 20 pushed the case and everything; but maybe they could  
21 be paid or should be to review certain things just to  
22 see if it's within the realm of fair.

23 CHAIRMAN BABCOCK: Alistair Dawson.

24 MR. DAWSON: It seems to me that if the  
02:29 25 perceived evil or bad thing is running up ad litem

1 fees and there is no real control over them and since  
2 in all likelihood the defendant is going to have to  
3 pay for it and at least on the plaintiff's side  
4 they're not all that worried about it, I guess I have  
02:30 5 two comments about that. One, the defendant is paying  
6 it, which I understand they do in most instances.  
7 That has an impact on settlement. It means less money  
8 in the pot that goes to the plaintiffs. They're  
9 looking at the risk of litigation saying "We're  
02:30 10 willing to pay this much money." But the one that  
11 goes to the ad litem, I think an argument can be made,  
12 that less goes to the plaintiffs.

13 And I wonder if there is not a different way of  
14 coming at this. Rather than trying to limit the  
02:30 15 circumstances that you have an ad litem, why not give  
16 the ad litem more obligations? For example, within so  
17 many days of employment they file some kind of budget,  
18 what they're going to do and the number of hours it's  
19 going to take them to do it; and then either the Court  
02:30 20 or the parties can object to that, say "You don't need  
21 to be doing all these things," have some  
22 determination. And/or at the conclusion of the case  
23 they submit and the Court has to approve it, and the  
24 Court decides where those fees should come from.  
02:31 25 Should they come from the defendants, or should they

1 be split between the defendants and the plaintiffs?  
2 Give more responsibility for the ad litem to sustain  
3 or I guess get their fees, to demonstrate the  
4 necessity of the fees that they're charging throughout  
02:31 5 the process.

6 CHAIRMAN BABCOCK: Okay. Bill, you had  
7 your hand up.

8 PROFESSOR DORSANEO: I'm trying to  
9 figure out who this ad litem is. It seems clear to me  
02:31 10 that there is no attorney-client relationship or other  
11 fiduciary relationship, that the ad litem is an  
12 officer of the Court, an arm of the Court who has  
13 responsibility for policing the problem, whatever the  
14 problem is, and that is the only sensible way to think  
02:32 15 about it, I believe.

16 Now this idea of -- if the problem is  
17 compensation or overcompensation, regardless of  
18 whether the person does or claims to have done a lot  
19 of legal work, then is there some way to address that?  
02:32 20 When I started practice, and I was talking to Mike  
21 about this, the ad litem appointments they either were  
22 not compensated or they were compensated at a very  
23 nominal level. Now whatever has happened to turn this  
24 into some sort of an economic engine needs to be  
02:32 25 corrected; but the solution is not to leave the minor

1 or some defendant who doesn't know that his parental  
2 rights are subject to being terminated when he is  
3 cited by publication to their own devices or to the  
4 tender mercy of people who are out to get them or out  
02:33 5 to hurt them. The solution is to deal with the proper  
6 role and the proper compensation level for this  
7 ad litem. The role again would be to be a  
8 representative of the Court to determine whether in  
9 the context of the minor whether the overall  
02:33 10 settlement was in the minor's best interest; and in  
11 the other context it perhaps could be crafted more  
12 narrowly. Thinking about it in other ways I have  
13 trouble dealing with it.

14 CHAIRMAN BABCOCK: Yes, Paula.

02:33 15 MS. SWEENEY: What has happened is that  
16 the ad litem, at least the way it's construed in  
17 Dallas, has been construed to have a fiduciary  
18 relationship to the incompetent, incapacitated person  
19 and has liability in malpractice up to the amount of  
02:33 20 the settlement. So, you know, if you tell me "Come on  
21 here and tell me whether or not to approve this six or  
22 nine or ten million dollar settlement; here is your  
23 \$250 fee," no. I mean, there is no way I can do the  
24 work necessary. There is no way I can with an  
02:34 25 unlimited exposure and a fiduciary responsibility.

1 That's why the job has mushroomed and grown, because  
2 there is now case law that says you do have that  
3 responsibility; and there's a lot of lawyers who think  
4 you do who argue vociferously and testify as expert  
02:34 5 witnesses to that effect. So that's why we're in this  
6 position of trying to say if on the one hand we're  
7 going to ratchet, you know, delineate fees and duties,  
8 we at the same time also have to delineate the  
9 responsibility. Or we can ride the horse in the other  
02:34 10 direction; but if this is the direction we're going  
11 in, then we have to take that whole scenario into  
12 consideration.

13 CHAIRMAN BABCOCK: Lamont.

14 MR. LAMONT JEFFERSON: It does seem to  
02:34 15 me that the duty of the guardian ad litem it just  
16 makes no sense that their role is to approve the  
17 settle. They are to provide information to the  
18 Court. They are kind of the investigative arm for the  
19 Court, and they ought to be able to do whatever they  
02:35 20 need to do to get there. Does that mean they are the  
21 minor's lawyer, or does that mean that there is a  
22 fiduciary relationship? I have a problem in the rule  
23 if we say in the rule that means that they're not the  
24 lawyer, because and I have served as an ad litem on a  
02:35 25 couple of occasions. I mean, I liked being able to go

1 to the parents and say "My job is to look out for  
2 Johnny here, and I'm going to make my recommendation,  
3 an independent recommendation on that basis."

4 I don't think you ought to be absolutely free  
02:35 5 from liability. You do have a responsibility and you  
6 have a role to act reasonably and you ought to have  
7 some pretty good discretion about how you get to your  
8 final decision and what you -- discretion on what you  
9 need to do to get there. But, you know, you should  
02:35 10 not be totally free of culpability. You should have  
11 some kind of immunity.

12 And so it doesn't offend me that if you do your  
13 job in just a completely horrendous manner, that  
14 you're subject to liability for it. But you have got  
02:36 15 an obligation to do what you need to do to approve a  
16 settlement and come to the conclusion using your  
17 business judgment of the settlement in the minor's  
18 best interest. It's hard to write a rule that says  
19 all the things you can and can't do to get to that  
20 position.

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOW: Actually I've defended two  
23 lawyers that got sued when they were acting as  
24 attorney ad litem; and one of them the issue being  
02:36 25 raised is whether their malpractice covered that. You

1 know, they were serving in another capacity. So we  
2 have to look.

3 There is some exposure. And if we're going to  
4 make it less, we better limit it clearly or give that  
02:36 5 person a right to do what he really needs to do to  
6 protect himself and the minor.

7 MS. SWEENEY: You've got to pick which  
8 direction you're going.

9 CHAIRMAN BABCOCK: Harvey.

02:37 10 HONORABLE HARVEY BROWN: I think that's  
11 absolutely right. Another way of thinking about the  
12 problem is the ad litem does not have to be an  
13 attorney. So to impose duties as if the ad litem is  
14 acting as an attorney is not consistent with that. So  
02:37 15 we have to recognize the "reasonableness" standard  
16 can't be a reasonable lawyer.

17 CHAIRMAN BABCOCK: Bill.

18 PROFESSOR DORSANEO: I haven't thought  
19 about this nearly as much as people who do this all  
02:37 20 the time; but it seems to me that this person as an  
21 arm of the Court ought to have some sort of immunity,  
22 maybe not absolute immunity, but that seems the better  
23 way to go if the problem is that the person is subject  
24 to being evaluated as if he or she was supposed to be  
02:37 25 the primary representative of the person whose

1 interests are involved.

2 CHAIRMAN BABCOCK: Can you create  
3 immunity in a Rule of Procedure?

4 PROFESSOR DORSANEO: I can make someone  
02:38 5 a deputy of the Court and then I think it would  
6 happen.

7 MS. SWEENEY: You're talking about  
8 judicial immunity like the Court appointed experts  
9 have in the psychiatric cases, and that's because  
02:38 10 they're court appointed by rule.

11 CHAIRMAN BABCOCK: Yes.

12 HONORABLE SARAH B. DUNCAN: I think  
13 somebody talked about this earlier; but I'm not sure  
14 we gave it enough consideration: What is it that  
02:38 15 we're appointing a guardian ad litem to be? It's not  
16 to be another professional, another lawyer for the  
17 incapacitated person. It's to be an adult for the  
18 incapacitated person, an adult that does not have an  
19 interest adverse to the incapacitated person which,  
02:39 20 and I say this only somewhat facetiously, maybe the  
21 problem is that we're appointing attorneys. And  
22 attorneys act as attorneys. That's just what we know  
23 how to do. Maybe we should say "You can't appoint an  
24 attorney to be a guardian ad litem."

25 (Laughter.)

1 HONORABLE SARAH B. DUNCAN: And I say  
2 that only somewhat facetiously.

3 JUSTICE NATHAN HECHT: That would solve  
4 the problem.

02:39 5 HONORABLE SARAH B. DUNCAN: That's only  
6 somewhat facetious, because it's because when you take  
7 an attorney "This is my job. This is what I get paid  
8 for." But if you take a nonattorney, they don't look  
9 at it that way. This is not what they get paid for.  
02:39 10 So I realize it sounds radical; but if that's where  
11 the problem developed because we've got attorneys and  
12 attorneys are trying to be attorneys and attorneys  
13 have malpractice exposure, maybe that's where we need  
14 to look at solving the problem.

02:39 15 HONORABLE DAVID PEEPLES: I know some  
16 retired judges who need some work.

17 (Laughter.)

18 CHAIRMAN BABCOCK: Skip.

19 MR. WATSON: Is the duty of the guardian  
02:40 20 ad litem to the person that he or she is appointed to  
21 look after, review the settlement for, however you  
22 want to say it, or is the duty of the guardian  
23 ad litem or could it be cast as a duty to the Court,  
24 that the guardian ad litem exists as an advisory arm  
02:40 25 of the Court, and that the duty flows to give the

1 Court the guardian ad litem's best judgment of the  
2 status of the case and the fairness of the settlement,  
3 vis-a-vis the person that the Court is desiring to  
4 protect? If it's phrased as an arm of the Court, as  
02:40 5 an officer of the Court, if you please, but whose duty  
6 flows to the Court rather than to the incompetent or  
7 to the minor, I think we cut through a lot of the  
8 problems. Now we may create some, but I don't see  
9 them.

02:41 10 MS. SWEENEY: He's right.

11 CHAIRMAN BABCOCK: Bill.

12 PROFESSOR DORSANEO: To me what we're  
13 doing here is normally we have a party who is expected  
14 to look out for the party's own interest. And then in  
02:41 15 some circumstances we let a substitute handle that  
16 problem including a next friend. Now when all of that  
17 doesn't work right and there needs to be an evaluation  
18 of the propriety of what the judge is asked to do,  
19 then it does rest on the judge's shoulders to step in  
02:41 20 and to make certain that things are done properly.

21 Now if we don't want the judge to conduct the  
22 independent investigation -- for a variety of reasons  
23 we obviously don't -- then we are talking about in  
24 effect a Court appointed expert or someone, an advisor  
02:42 25 to perform that function. And that seems to me to be

1 the best model rather than trying to replace lawyers,  
2 replace clients, impose the same kind of disputes that  
3 lawyers have to clients on ad litem with the  
4 potential for using up a lot of the proceeds along the  
02:42 5 way. So I agree with what Skip said, which I think he  
6 was agreeing with what I said.

7 (Laughter.)

8 CHAIRMAN BABCOCK: Justice Hecht.

9 JUSTICE NATHAN HECHT: But I have  
02:42 10 trouble understanding why you would only do that in  
11 cases where there happens to be a conflict between the  
12 next friend and the minor, because if the minor were  
13 going to get all of the money and there was no  
14 conflict, it wouldn't make any difference if the  
02:43 15 plaintiff's lawyer were getting steamrolled or the  
16 defendant is being steamrolled. The judge is not  
17 going to say "I think you're paying too much" or "I  
18 think you're paying too little." It's not the judge's  
19 business to assess that in that case any more than it  
02:43 20 is in any other case. So it's kind of hard to  
21 understand why you would just do it in cases where  
22 there happens to be a conflict between the next friend  
23 and the minor.

24 MS. SWEENEY: That's one of the things  
02:43 25 that we're trying to cure is Courts over appointing,

1 because every time they see a minor that's what  
2 happens.

3 JUSTICE NATHAN HECHT: Right.

4 PROFESSOR DORSANEO: Because that's the  
02:43 5 clear case. And the other cases are --

6 CHAIRMAN BABCOCK: Subtle.

7 PROFESSOR DORSANEO: -- maybe you are in  
8 need of assistance too; but I have a harder time  
9 dealing with it. So I know that that case needs help.  
02:43 10 I'm not sure about the other cases; and there is no --  
11 you have no place to stop whenever there is an  
12 attorney-client relationship.

13 CHAIRMAN BABCOCK: Buddy.

14 MR. LOW: But in any case even though  
02:44 15 it's just a minor and the parents have no claim, isn't  
16 the judge supposed to hear testimony to see that it is  
17 fair and, quote, "to the best interest of the minor"?

18 JUSTICE NATHAN HECHT: Not if there is  
19 not a conflict.

02:44 20 MR. LOW: I'm not talking about a  
21 conflict. I'm talking about just a minor, nobody gets  
22 any money but the minor. And they come in and they  
23 say "Judge, we settled this minor's case for \$200."  
24 He says "What? And he lost an arm?" I mean, doesn't  
02:44 25 the judge have some duty to see? He has to find that

1 it's to the best interest and a fair settlement; and  
2 he has to testify to that, the next friend. Doesn't  
3 the judge have to find that?

4 PROFESSOR DORSANEO: It used to be. It  
02:44 5 used to say that.

6 MR. LOW: Boy, we've gone a long way,  
7 because it used to.

8 CHAIRMAN BABCOCK: Have we talked this  
9 out?

02:44 10 MS. SWEENEY: Well, it's because Rule 44  
11 says the settlement is not binding unless it's  
12 approved by the Court.

13 MR. LOW: Right.

14 MS. SWEENEY: And the custom and  
02:45 15 practice has grown to be the Court will approve it if  
16 it is in the best interest of the minor.

17 MR. LOW: Best interest.

18 MS. SWEENEY: So although I don't know  
19 about what the exact authority, that's certainly the  
02:45 20 usage and the custom and the practice, that before you  
21 can get what the defense wants which is binding and  
22 conclusive upon the party forever you have to have it  
23 approved by Court, and approved by Court is not going  
24 to happen without testimony of fair and reasonable.

25 MR. LOW: As to fairness and so forth, I

1 mean, and the judgement is going to put that. That's  
2 what I always put, "to the best interest of the  
3 minor," and the Court finds that.

4 CHAIRMAN BABCOCK: Bill.

02:45 5 PROFESSOR DORSANEO: I remember what  
6 Buddy remembers. And Article 1994 I think, if married  
7 up to Rule 44, did talk about this. And I don't know  
8 whether -- I think that may need to be studied to see  
9 whether we need to do something about that. I don't  
02:46 10 know whether in the recodification that just  
11 disappeared or somebody took it out. You know, as we  
12 know, in a lot of recodification they just go away.

13 MR. LOW: The *Pluto* case held that under  
14 1994. If that's escaped, we've let something get by.

02:46 15 CHAIRMAN BABCOCK: Bobby.

16 MR. MEADOWS: I don't really have a  
17 question so much as I wonder where we are, because I  
18 agree. It is an evolution. But we talked about a lot  
19 of this last time; and this rule was written to,  
02:46 20 largely what Paula expressed a moment ago, and that is  
21 to pick a direction, which I think it was the sense of  
22 the committee was the last time we discussed it. It  
23 may be we can talk about this and reexamine it. But  
24 is that what we're up to here, or are we trying to  
02:46 25 just reexamine what direction we've picked?

1           This rule is written as best we could do it  
2 to try to address the problem of the over use of  
3 ad litem and the payment of unreasonable fees for  
4 ad litem and to curtail the work to settlement. And  
02:47 5 there is some talk about the language that is  
6 important; but I can't tell whether we're trying to  
7 get away from that or not. And maybe we ought to  
8 know.

9           CHAIRMAN BABCOCK: Well, I think my  
02:47 10 sense is that the Court wants the sense of this  
11 committee, and if you know, failing to achieve  
12 consensus, that it just wants a good discussion, which  
13 we've been having. Judge Sullivan.

14           HONORABLE KENT SULLIVAN: I want to  
02:47 15 raise one very pragmatic point before we go on too  
16 far. This goes back to something Buddy Low said. I  
17 think it was the sense of the committee in terms of  
18 prior discussion of wanting to clarify the  
19 relationship and trying to specify that it's not an  
02:48 20 attorney-client relationship with the minor.

21           CHAIRMAN BABCOCK: Right.

22           MR. KENT SULLIVAN: But I wanted to  
23 defer here to legal malpractice insurance experts. Do  
24 we run some risk if this rule explicitly says this,  
02:48 25 that we have written attorneys who perform that

1 function out of coverage for any alleged legal  
2 malpractice claim? And I say this, because I think  
3 the two ills that we probably started with and are  
4 most concerned about, one was the issue of cronyism,  
02:48 5 which has been discussed in terms of the appointments  
6 of ad litem. The other is the issue of liability.  
7 And if somebody in the room knows if there is a  
8 straightforward answer to that, I think a lot of folks  
9 would be very interested in what we're doing from that  
02:49 10 perspective.

11 CHAIRMAN BABCOCK: So you're saying  
12 173.3(a) where it says that the attorney does not have  
13 an attorney-client relationship with the minor, are  
14 you saying how can it be malpractice if there is no  
02:49 15 attorney-client relationship?

16 MR. MUNZINGER: How can there be  
17 coverage?

18 CHAIRMAN BABCOCK: It would be  
19 malpractice. There just wouldn't be any coverage.

20 MS. SWEENEY: Yes.

21 MR. MUNZINGER: So we've got a guardian  
22 ad litem who has performed a function who is now  
23 exposed to a damage claim by this minor and he has no  
24 insurance coverage because we have written the rule  
02:49 25 saying there is no attorney-client relationship, and

1 the rule hasn't gone forward to make him an officer of  
2 the Court to give judicial immunity even though he's  
3 acting for the Court.

4 MR. SULLIVAN: In other words, I thought  
02:49 5 it was everyone's consensus that it was a good idea to  
6 clarify the relationship. And I think this states  
7 what the consensus was. But Buddy raised a compelling  
8 issue, that we have created a horrendous problem  
9 potentially. I don't know the answer; but I thought  
02:50 10 we ought at least to consider it.

11 CHAIRMAN BABCOCK: Justice Bland.

12 JUSTICE JANE BLAND: Well, could we do  
13 something? And I'm not familiar enough with the case  
14 law in judicial immunity to know if this would help.  
02:50 15 But could we do something like "A guardian ad litem  
16 serves solely as an officer of the Court and does not  
17 have an attorney-client relationship." Or solely --  
18 can we go ahead and confer by rule when you confer the  
19 sort of immunity that court personnel typically have  
02:50 20 with respect to their official functions?

21 CHAIRMAN BABCOCK: Elaine.

22 JUSTICE JANE BLAND: But I know it  
23 doesn't --- you know, I know it doesn't extend to  
24 court reporters and they're not. I know the blanket  
02:50 25 of judicial immunity is not far flung.

1 CHAIRMAN BABCOCK: Elaine.

2 PROFESSOR CARLSON: Rule 171 sort of  
3 sets that up in the Master and Chancellory Rule. My  
4 memory is that masters have immunity through their  
02:51 5 judicial appointment. And it's clear when you read  
6 Rule 171 a master serves as an officer of the Court.  
7 It could be modeled after that; but it still could  
8 leave you, as Judge Sullivan pointed out, without any  
9 coverage to urge that defense.

02:51 10 MS. SWEENEY: It's very troubling to me  
11 to be going that far down the road in a rule. I  
12 realize I've been advocating getting on a horse and  
13 going one direction or another; but we're jumping some  
14 pretty big fences.

02:51 15 PROFESSOR CARLSON: Yes. As Justice  
16 Hecht pointed out, is this really a judicial function,  
17 or is this --

18 MS. SWEENEY: Or was it something that  
19 should be done by a committee in this room, or should  
02:51 20 it be done through the judicial process working its  
21 way up to a fully briefed-out Court opinion?

22 CHAIRMAN BABCOCK: Carlos.

23 HONORABLE CARLOS LOPEZ: That's what I  
24 was going to say. And I also was going to question if  
02:52 25 you're really arguing. It looks like it's gathering

1 steam. As a policy matter I'm not sure why we should  
2 have immunity. I mean, if they bungle it royally and  
3 if you consider all of the hurdles that the  
4 malpractice plaintiff has to theoretically jump to win  
02:52 5 that malpractice case against the ad litem, why should  
6 they have immunity? If the Court is relying on that  
7 opinion in deciding whether to accept the settlement  
8 or not, if the minor is relying on that opinion in  
9 deciding whether to accept the settlement or not.

02:52 10 I mean, I can understand the practical  
11 concerns. And maybe there needs to be a gross  
12 negligence standard if we're talking legislating.  
13 With full immunity you're going to get a bunch of  
14 bozzos who don't know what they're doing. This is  
02:52 15 going to be more of a cottage industry than it already  
16 is.

17 CHAIRMAN BABCOCK: Justice Bland.

18 JUSTICE JANE BLAND: I agree with Paula  
19 that we probably are going off the trail into  
02:53 20 substantive law here; and maybe the best thing to do  
21 would be to -- and we wrote it in because we wanted to  
22 give some protection for the role that they were going  
23 to be in which was not going to be serving as counsel.  
24 But maybe that's clear through other aspects of the  
02:53 25 rule and what we should do is just remove the last two

1 sentences of 173.3(a) and let case law determine  
2 whether or not there is an attorney-client  
3 relationship and whether there is a fiduciary  
4 relationship. Because I agree, this is really getting  
02:53 5 into substantive matters that are not really  
6 rulemaking.

7 CHAIRMAN BABCOCK: Buddy.

8 MR. LOW: One order I got the judge to  
9 outline what my duties are. But is that fair? Am I  
02:53 10 going into court asking him to limit my  
11 responsibilities? Am I looking after the interest of  
12 the minor or myself? And it might have been myself;  
13 but I wouldn't serve unless they did. They could very  
14 well have a claim that I did that not for him, but I  
02:54 15 didn't want to read all the depositions and do it.

16 CHAIRMAN BABCOCK: Right. Carl.

17 MR. HAMILTON: I think the rule needs to  
18 be specific, because this person is a guardian  
19 appointed by the Court. I think that's what guardian  
02:54 20 ad litem means. This person is appointed because the  
21 current guardian or next friend bringing the suit has  
22 a possible adverse interest or conflict. Now we are  
23 going to appoint somebody else to take care of the  
24 minor's interest. It doesn't have to be a lawyer.

02:54 25 Now that person probably has not got the

1 capability, if not a lawyer, to go into the file and  
2 investigate the whole thing and see if they've done  
3 that. If he's going to do that, he's going to have to  
4 hire a lawyer to represent him in the case; and then  
02:55 5 it's that lawyer that may have the amount of practice  
6 and responsibility. But the guardian should not,  
7 because in many cases he won't even be a lawyer. Now  
8 whether or not we still need to give that person some  
9 kind of immunity, why would you give that person any  
02:55 10 more immunity than you'd give the next friend?

11 CHAIRMAN BABCOCK: Richard Munzinger.

12 MR. MUNZINGER: Just a respectful reply  
13 to Judge Lopez, why would you give immunity? I'm a  
14 lawyer. The local judge tells me, "Richard, you act  
02:55 15 as guardian ad litem for minor plaintiff Smith." "No,  
16 judge. I'm not going to do that." "Why?" "Well,  
17 because when the Court wrote this rule it said it's  
18 not an attorney-client relationship and I've got no  
19 malpractice coverage. And gosh, they can get to my  
02:55 20 estate now." I'm not going to tell a local judge  
21 that.

22 HONORABLE CARLOS LOPEZ: I got told all  
23 the time.

24 MR. MUNZINGER: You live in a big city  
02:55 25 and I don't.

1 (Laughter.)

2 MR. MUNZINGER: But the point is the  
3 lawyer who's told by a judge is an officer of the  
4 Court and has some presumptive obligation to act when  
02:56 5 asked. And if he does and he's not insured because  
6 we've written it into the rule, we've created an  
7 unfair burden on that lawyer.

8 We are all told we have pro bono obligations.  
9 Fine. But we don't have to bankrupt ourselves to that  
02:56 10 or expose ourselves to bankruptcy.

11 CHAIRMAN BABCOCK: Justice Hecht.

12 JUSTICE NATHAN HECHT: But I'm just  
13 trying to put it all and see if it fits; and I have  
14 trouble distinguishing that from the federal judge  
02:56 15 ordering you to represent a criminal defendant for \$35  
16 an hour. Surely you're exposed in that situation.

17 MR. MUNZINGER: Yes, sir. But it is  
18 covered.

19 JUSTICE NATHAN HECHT: It is a federal  
02:56 20 judge.

21 CHAIRMAN BABCOCK: Your attorney-client  
22 relationship, see, this rule writes that out. That's  
23 the problem.

24 JUSTICE NATHAN HECHT: But should it be  
02:56 25 written out?

1 CHAIRMAN BABCOCK: That may be the  
2 solution.

3 JUSTICE NATHAN HECHT: I mean, I  
4 understand that the concern is the liability. But it  
02:57 5 looks like you're exposed in other appointment  
6 situations too.

7 MR. MUNZINGER: I have malpractice  
8 coverage in those situations because I am acting as an  
9 attorney; and no insurance carrier that I'm aware of  
02:57 10 would tell me that I didn't have coverage because I  
11 wasn't acting as an attorney, but I've got a rule here  
12 saying I'm not acting as an attorney, and the  
13 insurance companies in my experience are not prompted  
14 to assume coverage they don't have to.

02:57 15 (Laughter.)

16 MR. LOW: Really.

17 MR. WATSON: Justice Hecht, the place  
18 where I saw it and the reason I went back to defining  
19 to whom does the duty flow as solving it was in the  
02:57 20 federal context when I was asked to defend a federal  
21 bankruptcy trustee who had been sued for allegedly  
22 mismanaging the assets of a bankrupt estate was  
23 specifically a lawsuit and how the lawsuit was  
24 handled, et cetera. And that law is very clear that  
02:57 25 when the Court asks somebody to do something like that

1 it's quite different from defending a criminal  
2 indigent defendant. Here it is the same thing to  
3 preserve the assets of the estate. A person is acting  
4 as an arm of the Court in doing that job and the  
02:58 5 damages don't flow to the estate. The problem is that  
6 that person is subject to discipline by the Court that  
7 appointed him. And if he's messed up the duty that he  
8 was appointed by the Court to perform, then he has to  
9 face the Court and he deals with the Court; but it's  
02:58 10 crystal clear that quasi judicial immunity follows him  
11 and the lawsuit is dismissed. It's not a problem.  
12 Well, I guess it could be of malpractice coverage; but  
13 you know, in my instance the cost because it was a  
14 frivolous lawsuit and I was asked to represent the guy  
02:59 15 were taxed against the bankruptcy, because you just  
16 can't sue him period.

17 CHAIRMAN BABCOCK: Judge Sullivan.

18 MR. SULLIVAN: Could the intent and the  
19 policy here be perhaps better expressed in the form of  
02:59 20 some sort of comment? I think one of the difficulties  
21 we have here is trying to be extremely brief and to  
22 the point and use language appropriate for the rule  
23 for something that is more complicated, and we might  
24 be better served with perhaps an entire paragraph  
02:59 25 devoted to it. I think the intent was exactly the

1 consensus of the committee. The language that was  
2 ultimately used was consistent with the intent of the  
3 committee; but I think it's a more complicated  
4 concept, i.e., we are talking about someone who will  
02:59 5 be called upon to use legal skill, analysis,  
6 et cetera, but perhaps we want to make clear that we  
7 don't contemplate that person would actually have an  
8 attorney-client relationship with the minor and three  
9 or four sentences might convey that.

03:00 10 CHAIRMAN BABCOCK: Justice Bland.

11 HONORABLE JANE BLAND: I can't confer  
12 with my two fellow committee members. I personally  
13 would be okay with taking out the last two sentences  
14 and either leaving in the case law or putting it in a  
03:00 15 comment. And I don't know the general view of  
16 comments and whether you-all like them or don't like  
17 them or whether the Court likes them.

18 CHAIRMAN BABCOCK: The Court likes them.

19 JUSTICE NATHAN HECHT: The Court didn't  
03:00 20 used to like them; but we've gotten fonder of more of  
21 them.

22 (Laughter.)

23 HONORABLE JANE BLAND: But, you know, I  
24 agree that we can't really write a rule beyond  
03:01 25 substantive law, and all we can do is define very

1 limited roles. And also, you know, not in this  
2 paragraph, but in the one below it we say, you know,  
3 you can't -- you know, we can basically give you  
4 things to defend yourself with if you do get sued; but  
03:01 5 we can't probably keep you from getting sued.

6 CHAIRMAN BABCOCK: Justice Hecht.

7 JUSTICE NATHAN HECHT: This is kind of  
8 close on whether it's substantive, because the  
9 privilege rules define the --

03:01 10 HONORABLE JANE BLAND: Attorney-client  
11 relationship.

12 JUSTICE NATHAN HECHT: -- attorney-client  
13 relationship for purposes of that rule. So the  
14 Federal Rules Committee thought those kinds of  
03:01 15 provisions were substantive when they were writing the  
16 rules, and the Congress left them out. Most of the  
17 states have not thought that and adopted rules. So  
18 it's not unprecedented to draw those kinds of  
19 definitions.

03:01 20 CHAIRMAN BABCOCK: Judge Christopher.

21 HONORABLE TRACY CHRISTOPHER: Well, my  
22 only concern in leaving it out, which I don't have a  
23 real objection to it, but my concern about leaving it  
24 out is that on the one hand we have hamstrung what the  
03:02 25 ad litem can do in (a) and (b), and on the other hand

1 there is a Dallas court of appeals that says you have  
2 a fiduciary relationship if you're a guardian  
3 ad litem. And there is a Houston court of appeals  
4 that says you do not have an attorney-client  
03:02 5 relationship if you're a guard ad litem.

6 So, you know, I just -- but apparently in other  
7 parts of the state people might not necessarily follow  
8 or believe that that's really what the Supreme Court  
9 has come down with or what the law is on the rules for  
03:02 10 guardian ad litem. And I would hate to put guardian  
11 ad litem into a box without some protection, which is  
12 why, you know, I prefer it specifically stated that he  
13 didn't have the fiduciary relationship.

14 CHAIRMAN BABCOCK: Carlos.

03:02 15 HONORABLE CARLOS LOPEZ: I have come  
16 full circle. Judicial immunity is not forever and  
17 ever and ever. Judges can be sued and successfully if  
18 they've done certain things wrong. And I guess  
19 theoretically the ad litem could too. So I withdraw  
03:03 20 my earlier comments about being against immunity.

21 CHAIRMAN BABCOCK: Elaine.

22 PROFESSOR CARLSON: Judge Christopher,  
23 it's not inconsistent to say there is no  
24 attorney-client relationship, but there is a fiduciary  
03:03 25 duty.

1 HONORABLE TRACY CHRISTOPHER: It is not.  
2 And what I really worry about more is the guardians  
3 who think they have to become an attorney, which  
4 apparently is the case up in Dallas. And if we have  
03:03 5 hamstrung the guardian's role to be very limited, but  
6 they still have a fiduciary duty, how do they fulfill  
7 their fiduciary duty with such a limited ability to  
8 review the case?

9 CHAIRMAN BABCOCK: Buddy.

03:03 10 MR. LOW: The Canons of Ethics create an  
11 attorney-client relationship pretty easily, performing  
12 you know, for a beneficiary for someone; and it would  
13 be difficult to say you're not. You are a lawyer and  
14 you have a law license or you can't do what you're  
03:04 15 doing. It would be unauthorized practice. If you're  
16 a lawyer, I'm afraid the Canons of Ethics create an  
17 attorney-client relationship there, and you're going  
18 to have to amend that too.

19 CHAIRMAN BABCOCK: Lamont.

03:04 20 MR. JEFFERSON: I don't think saying  
21 whether or not the relationship is one of a fiduciary  
22 says very much. The term "fiduciary" is so broad in  
23 the law and has so many different meanings and  
24 relationships that I don't -- to say that they're not  
03:04 25 a fiduciary, doesn't have a fiduciary relationship, I

1 think is too broad here because there are elements of  
2 the relationship that are very similar to fiduciary  
3 relationships. So it bothers me to say that they're  
4 not a fiduciary; but it would also bother me to say  
03:05 5 that they are a fiduciary because to me that doesn't,  
6 it just doesn't say very much. You really have to  
7 look at a fiduciary relationship in the context of the  
8 relationship.

9 CHAIRMAN BABCOCK: Should we try to  
03:05 10 leave this right now and go to the compensation issue?

11 HONORABLE JANE BLAND: Do you want to  
12 take a vote about whether or not to leave in these  
13 last two sentences?

14 CHAIRMAN BABCOCK: The last two  
03:05 15 sentences, that's a good idea. And since you stated  
16 it as a proposition of let's take them out. Right?

17 JUSTICE JANE BLAND: I am neutral.

18 CHAIRMAN BABCOCK: You're neutral.  
19 You're Switzerland on this. Okay.

03:05 20 HONORABLE JANE BLAND: I'm neutral. I'm  
21 Switzerland. I want to do what everybody thinks is  
22 the best.

23 CHAIRMAN BABCOCK: All right. Here is  
24 how we'll phrase the vote: The last two sentences in  
03:05 25 173.3(a), how many people think we should leave them

1 in? Raise your hand. How many people think we should  
2 take them out? Okay. The innies are six. The outies  
3 are 15. So the vote is to take them out.

4 MR. LOW: But, Skip, some people might  
03:06 5 have voted to leave them in with some changes.

6 CHAIRMAN BABCOCK: Chip. Chip, Skip.

7 MR. LOW: I'm not speaking to Skip after  
8 what he said.

9 CHAIRMAN BABCOCK: Yes. I know.

03:06 10 (Laughter.)

11 HONORABLE SARAH B. DUNCAN: Before we  
12 leave those two sentences could we get a vote on the  
13 issue?

14 CHAIRMAN BABCOCK: Okay. How would you  
03:06 15 frame it, Sarah?

16 HONORABLE SARAH B. DUNCAN: However you  
17 would frame it, Chip.

18 CHAIRMAN BABCOCK: Okay. I just wanted  
19 you to bounce it back to me. So the vote would be  
03:07 20 should we have language that would suggest that the  
21 guardian has some form of judicial immunity? Is that  
22 what you're thinking?

23 HONORABLE HARVEY BROWN: Can I amend  
24 that?

03:07 25 CHAIRMAN BABCOCK: Sure.

1 MR. BROWN: And just say I think part of  
2 that rule is the duties to the Court.

3 MS. SWEENEY: Exactly. Right. That's  
4 how --

03:07 5 HONORABLE HARVEY BROWN: The duty is to  
6 the Court and therefore you'd have some type of  
7 immunity. And that might not be judicial. There is  
8 also qualified immunity. There's lots of things that  
9 could be explored at the subcommittee level on that  
10 issue.

11 (Laughter.)

12 CHAIRMAN BABCOCK: How many people are  
13 in favor of having the subcommittee explore the  
14 immunity issue?

03:07 15 MR. MEADOWS: I think I can speak for  
16 the subcommittee.

17 (Laughter.)

18 CHAIRMAN BABCOCK: Yes, Bobby.

19 PROFESSOR CARLSON: Fascinating.

20 CHAIRMAN BABCOCK: Yes, Judge Lawrence.

21 HONORABLE TOM LAWRENCE: It's been years  
22 since I've looked at this judicial immunity. It's not  
23 absolute. There are, as he said, times that judges  
24 can be sued, particularly if they get outside of their  
03:08 25 jurisdiction; but there is also official immunity.

1 And there is also a question if you try to create this  
2 relationship, are you creating liability to the county  
3 or state when you do that? And there are a lot of  
4 cases on this; and I think it would be a good idea for  
03:08 5 the committee to look at this.

6 CHAIRMAN BABCOCK: Bobby, do you want a  
7 last word on this issue?

8 MR. MEADOWS: We take all incoming.

9 CHAIRMAN BABCOCK: Okay. How many  
03:08 10 people think it's worthwhile for the committee to  
11 spend its valuable, the subcommittee to spend its  
12 valuable time looking at the immunity issue? Raise  
13 your hand. How many people think the subcommittee  
14 ought to not waste its valuable time on this issue of  
03:08 15 immunity?

16 MS. SWEENEY: You should recuse  
17 yourself.

18 CHAIRMAN BABCOCK: Note that the chair  
19 of the subcommittee has raised his hand.

03:09 20 MR. MEADOWS: The subcommittee is going  
21 to have a task force.

22 (Laughter.)

23 CHAIRMAN BABCOCK: Okay. Noting that  
24 most of the majority of 16 votes were not on the  
03:09 25 subcommittee, the vote is 16 to 6 for the subcommittee

1 to take this up.

2 HONORABLE CARLOS LOPEZ: Double their  
3 salary.

4 CHAIRMAN BABCOCK: So they'll do that.

03:09 5 HONORABLE JANE BLAND: All right.

6 CHAIRMAN BABCOCK: Compensation, let's  
7 knock out compensation.

8 HONORABLE JANE BLAND: Okay. You don't  
9 want to take about (b) or (c)?

03:09 10 CHAIRMAN BABCOCK: We can talk about (b)  
11 or (c). Justice Gray had something first.

12 JUSTICE GRAY: On 170 I need to back up.  
13 I was thinking about the attorney-client privilege  
14 thing a while ago and missed a comment I wanted to  
03:09 15 make on 173.2(d), the last word, has not, "a defendant  
16 has not answered." That may not be as open as we want  
17 it to be. "Made an appearance" is broader. There are  
18 a lot of things the defendant can do that doesn't  
19 constitute an appearance -- excuse me -- an answer  
03:10 20 included there.

21 JUSTICE JANE BLAND: All right.

22 PROFESSOR CARLSON: Good catch.

23 CHAIRMAN BABCOCK: Jane, do you want to  
24 talk about (b) and (c) 173.3 quickly?

03:10 25 JUSTICE JANE BLAND: Yes. I don't think

1 there is much to discuss. But with (b) we talked  
2 about it last time was the ad litem should not  
3 participate in court proceedings except for mediation.

4 MR. LOW: Wait a minute. Who is going  
03:10 5 to participate in the court proceedings to approve the  
6 settlement, because they're going to testify?

7 HONORABLE JANE BLAND: True.

8 MR. LOW: So you can't exclude them from  
9 that.

03:10 10 HONORABLE JANE BLAND: Right. Other  
11 than the settlement hearing.

12 MR. LOW: Yes. Okay.

13 HONORABLE JANE BLAND: That's good.  
14 Before the settlement hearing.

15 CHAIRMAN BABCOCK: Judge Gray.

16 JUSTICE TOM GRAY: I think you're going  
17 to be open to a lot of discussion about or at least  
18 potentially about what is a court proceeding. Does  
19 that include depositions?

03:11 20 CHAIRMAN BABCOCK: Right.

21 JUSTICE JANE BLAND: Should we say  
22 "depositions and other court proceedings"?

23 JUSTICE GRAY: I actually tried to frame  
24 it when I perceived it as an issue as "not  
03:11 25 participating in the development of the case or not

1 participate in the case except for."

2 MS. SWEENEY: They've got to be able to  
3 confer with plaintiff's counsel and mill around and  
4 talk strategy and that kind of thing. And then you're  
03:11 5 going to get defense lawyers saying "Heck, no. That's  
6 participating in the case. You can't sit around and  
7 talk to the plaintiff's lawyer and find out what  
8 they're thinking and why this is a good settlement."  
9 You can't do your job.

10 HONORABLE TOM GRAY: This could be a  
11 little bit dangerous with the attorney-client  
12 privilege, isn't it, with those kind of communications  
13 going on?

14 MS. SWEENEY: You have to have those. I  
15 think that --

16 JUSTICE GRAY: They are privileged.

17 MS. SWEENEY: I think that if the  
18 co-defense strategy and his motions are privileged, I  
19 can make these privileged.

03:11 20 HONORABLE TOM GRAY: But they don't have  
21 the relationship with the plaintiff or the party.

22 MS. SWEENEY: They've been appointed by  
23 the Court to do these things, they're going to have to  
24 be able to find out the data, and it's not going to be  
03:12 25 a waiver of privilege.

1 CHAIRMAN BABCOCK: Justice Sweeney  
2 speaking. Harvey.

3 HARVEY BROWN: I don't think we can say  
4 they can't participate in all depositions, because  
03:12 5 one, the minor might be deposed. And I think it's not  
6 unusual for the ad litem to attend the minor's  
7 deposition. And secondly, I think if they're trying  
8 to act in this independent capacity, that sometimes a  
9 key deposition can be very important in evaluating the  
03:12 10 case. It's the critical witness, and the way they  
11 appear and the way they respond can be very, very  
12 important in deciding whether to settle a case. And  
13 while I certainly agree they shouldn't go to every  
14 deposition, I think a blanket rule that says none goes  
03:12 15 too far.

16 MR. LOW: Have the Court approve it  
17 before they go.

18 CHAIRMAN BABCOCK: Ralph.

19 HONORABLE HARVEY BROWN: You could.

03:13 20 MR. DUGGINS: I would suggest something  
21 like (b) could be better handled in a comment where  
22 you say "typically you should not do this or not do  
23 that" and say a little more yet not have an absolute  
24 bright line "you cannot or should not."

03:13 25 The other thing I wanted to say is when we're

1 talking about the attorney-client, whether there is an  
2 attorney-client privilege or communication we should  
3 look at 501(a)(1), because it defines the definition  
4 of "client" as I read it would include this very  
03:13 5 situation.

6 JUSTICE NATHAN HECHT: Well, there is a  
7 privilege 503(b)(1)(c): "The client has a privilege  
8 to refuse disclosure of" blah, blah, blah "but if  
9 communication by the client or a representative of the  
03:13 10 client or the client's lawyer or a representative of  
11 the lawyer to a lawyer or a representative of a lawyer  
12 representing another party in a pending action and  
13 concerning the matter of common interest therein."

14 HONORABLE TOM GRAY: But I thought we  
03:14 15 just said over there, and that would be the part we  
16 took out, that they're not representing anybody.

17 HONORABLE HARVEY BROWN: They're not a  
18 lawyer, but just a client.

19 HONORABLE TOM GRAY: That's what we just  
03:14 20 took out.

21 CHAIRMAN BABCOCK: We took that out.  
22 Still they might not be a lawyer. Yes, Carl.

23 MR. HAMILTON: I want to ask Harvey,  
24 under what circumstances would the guardian have  
03:14 25 already been appointed when they're in the process of

1 taking depositions? Normally that doesn't happen  
2 until they reach settlement.

3 MR. DUGGINS: That's not true in  
4 Fort Worth.

03:14 5 HONORABLE HARVEY BROWN: Sometimes  
6 they're appointed very early; but sometimes you get  
7 appointed around the time of mediation and then there  
8 are some depositions after mediation.

9 MR. HAMILTON: They get appointed  
03:14 10 whether or not there is an adverse interest.

11 CHAIRMAN BABCOCK: Justice Duncan.

12 HONORABLE SARAH B. DUNCAN: This all  
13 still goes to me what is this person appointed for?  
14 Are they appointed to be another attorney, in which  
03:14 15 case they can discuss strategy, or are they appointed  
16 to be an adult who doesn't have a conflict? And I  
17 think it's when you muck up the two that you start  
18 getting these problems about fees. I mean,  
19 independence. How can, if this person is supposed to  
03:15 20 be the equivalent of an IME, how can this person go  
21 have a strategy conference with the plaintiff's lawyer  
22 with the defense lawyer not present? I'm not saying  
23 it doesn't happen. But we're by discussing this  
24 immunity thing we are envisioning an independent arm of  
03:15 25 the Court it seems to me.

1 CHAIRMAN BABCOCK: So which do you think  
2 it should be, Sarah?

3 HONORABLE SARAH B. DUNCAN: I think it  
4 ought to be an independent arm of the Court with  
03:15 5 immunity. And I think once you say that, and I think  
6 their relationship is not one of attorney for the  
7 minor or other incapacitated person. It's to be an  
8 adult who is not caught in a conflict.

9 CHAIRMAN BABCOCK: Justice Hecht.

03:16 10 JUSTICE NATHAN HECHT: Okay. And so  
11 then the fee that is paid is not an attorney fee?

12 HONORABLE SARAH B. DUNCAN: Right.

13 JUSTICE NATHAN HECHT: It's some other  
14 kind of fee?

03:16 15 HONORABLE SARAH B. DUNCAN: Right.

16 CHAIRMAN BABCOCK: A consulting fee.  
17 Arm of the Court fee. Ralph.

18 MR. DUGGINS: That may work in theory;  
19 but in practice in Tarrant County the guardian is  
03:16 20 working with the plaintiff's lawyer to help prosecute  
21 the case. And they are in it, Carl, from very early  
22 on and going to hearings. I'm not saying that should  
23 be the practice. I'm just saying that is the  
24 practice, like it or not.

03:16 25 HONORABLE SARAH B. DUNCAN: And all I'm

1 saying is that that is being an attorney. And we need  
2 to take an up or down vote should the guardian  
3 ad litem be an attorney for the minor or other  
4 incapacitated person, or should they be an  
03:16 5 unconflicted adult? What is that person's role?

6 CHAIRMAN BABCOCK: It sounds like you're  
7 moving a vote.

8 HONORABLE SARAH B. DUNCAN: I could be.  
9 I could be.

03:17 10 CHAIRMAN BABCOCK: You're going to be  
11 very coy about it though, aren't you?

12 HONORABLE SARAH B. DUNCAN: Coy, me?  
13 Come on. Coy is not something I get accused of.

14 (Laughter.)

03:17 15 CHAIRMAN BABCOCK: Richard.

16 MR. MUNZINGER: Coming back to Justice  
17 Duncan's comments, if you're going to create somebody  
18 who becomes an officer of the Court who is not a  
19 lawyer and the practice in Tarrant County is to  
03:17 20 appoint them early on in the game, we now have  
21 somebody who is standing between the plaintiff and  
22 plaintiff's lawyer supervising the plaintiff lawyer's  
23 work and interfering with the attorney-client  
24 relationship. We have got a stranger to that  
03:17 25 relationship who is now coming in to tell the judge

1 "Richard Munzinger is not doing a good job for his  
2 client, judge." He's creating all kinds of procedural  
3 problems in that relationship, because we have a rule  
4 that says that you can appoint this person when an  
03:17 5 offer of settlement is made. You've now taken and  
6 made him an officer of the Court to review what? The  
7 conduct of the plaintiff's lawyer in developing the  
8 case? Not a settlement, but the conduct of bringing  
9 the case to a settlement can be done. I think you're  
03:18 10 creating all kinds of problems that are not necessary.

11 MR. DUGGINS: I don't think that that's  
12 -- if that's what I said, that's not what I meant. I  
13 think it's working along the lines of the rule that  
14 Justice Hecht pointed to about a matter of common  
03:18 15 interest. I think the ad litem works with the next  
16 friend's lawyer to help prosecute and consult with him  
17 on the case. I don't see them going opposite  
18 directions.

19 MR. MUNZINGER: But if they become  
03:18 20 officers of the Court, the Court is now already  
21 choosing sides to help the plaintiff get more money  
22 from the defendant?

23 MR. DUGGINS: I'm not proposing that  
24 they be officers of the Court. I'm just saying that  
03:18 25 in practice what Sarah is proposing would change,

1 would flip things on their head in Tarrant County, to  
2 make them neutral. They're not neutral is what I'm  
3 saying right now.

4 MR. MUNZINGER: And my concern is that  
03:18 5 in the rule that has been drafted and discussed we'd  
6 be doing a lot more to the practice of law in the  
7 state than simply clarifying a problem that arose in  
8 South Texas because people were paid too much money in  
9 compromised situations. I think you may be causing a  
03:19 10 whole heck of a lot more problems than you think  
11 you're causing, not least of which is legislating in  
12 the rule under the guise of a procedural rule what the  
13 nature of the relationship is. Whether it's fiduciary  
14 I'm saying is a matter of substantive law, not  
03:19 15 procedural law.

16 CHAIRMAN BABCOCK: Judge Benton.

17 HONORABLE LEVI BENTON: Not to impose  
18 more obligations on the subcommittee. You know, I'm  
19 just, I'm sitting here. And this role that has  
03:19 20 existed in American jurisprudence since Buddy Low's  
21 birth --

22 (Laughter.)

23 CHAIRMAN BABCOCK: Whoa, that's how long  
24 it's been the law?

03:19 25 HONORABLE LEVI BENTON: -- and we've not

1 heard anything from the subcommittee on their survey  
2 of the law of other states.

3 HONORABLE TRACY CHRISTOPHER: We're not  
4 doing that.

5 (Laughter.)

6 CHAIRMAN BABCOCK: Justice Duncan.

7 HONORABLE SARAH B. DUNCAN: I'm not  
8 taking a position one way or the other on whether the  
9 guardian ad litem should or should not be an attorney.  
03:20 10 All I'm trying to point out is that most of our  
11 discussion here arises out of an attorney as the  
12 ad litem; and I think we need to decide what is this  
13 person's role. Is it to be an attorney to help  
14 prosecute the lawsuit as it is in Tarrant County, or  
03:20 15 is it to be another adult that doesn't have an  
16 interest adverse to the minor or incapacitated person?  
17 And I'll be happy not to vote on that issue; but I  
18 think that's the vote we need to have.

19 CHAIRMAN BABCOCK: An unconflicted  
03:20 20 adult. Elaine.

21 PROFESSOR CARLSON: But Sarah, the  
22 ad litem is still an advocate. They're not a neutral.  
23 I disagree that you look at it in terms of acting as  
24 an attorney. They act as an advocate as their parent  
03:21 25 would do.

1 HONORABLE SARAH B. DUNCAN: I'm not  
2 saying they shouldn't be an advocate.

3 PROFESSOR CARLSON: How can you be an  
4 advocate and neutral?

03:21 5 HONORABLE SARAH B. DUNCAN: You can't  
6 necessarily be an advocate and neutral; but you can be  
7 an advocate and not an attorney.

8 PROFESSOR CARLSON: Yes.

9 HONORABLE SARAH B. DUNCAN: And the  
03:21 10 question is do we want this person to fill the role of  
11 attorney, or do we want this person to fill the role  
12 of an unconflicted next friend, a parent without a  
13 conflict? Harvey understands what I'm saying. You  
14 say it. You'll say it better.

15 HONORABLE HARVEY BROWN: I agree. I  
16 think that they are stepping in and taking the role  
17 that mom would normally do or dad would normally do  
18 except for the conflict.

19 PROFESSOR CARLSON: But that's not a  
03:21 20 neutral.

21 HONORABLE HARVEY BROWN: No.

22 HONORABLE SARAH B. DUNCAN: No.

23 HONORABLE HARVEY BROWN: I agree.  
24 They're aligned with the plaintiff and they can  
03:21 25 participate just like in strategy decisions and stuff

1 like that just like a client would, just like mom  
2 would sit down with the lawyer and talk about "Is this  
3 the right expert," or you know, "Tell me, how did the  
4 expert deposition go," or "You say this is the most  
03:22 5 important deposition in the case. Can I go watch  
6 too." Those are things that a parent would normally  
7 do and an ad litem should do.

8 CHAIRMAN BABCOCK: Frank, then Ralph.

9 MR. GILSTRAP: I've really found this  
03:22 10 whole discussion disturbing.

11 CHAIRMAN BABCOCK: Do you want to  
12 amplify on that, Frank?

13 MR. GILSTRAP: I sat back and I've been  
14 listening because I knew two things: One, that I  
03:22 15 didn't really understand what an attorney ad litem or  
16 guardian ad litem was very well; and two, that there  
17 were people who did understand that. I think the  
18 latter is true, but they all don't have the same  
19 understanding.

03:22 20 We have really disparate views of what the  
21 role of an attorney ad litem or a guardian ad litem  
22 is. We have got just differing practices in parts of  
23 the state that vary a lot.

24 And I think Judge Benton's comment might be  
03:22 25 helpful. It might be helpful to go back and maybe

1 look at what the established law in the United States  
2 is on this. Is there some general understanding  
3 throughout the 50 states as to what a guardian  
4 ad litem is, or is everybody as confused as we are?  
03:23 5 Because I don't see how we can go about making these  
6 decisions on specific rule provisions when we don't  
7 have a common understanding. And we don't.

8 CHAIRMAN BABCOCK: Judge Christopher and  
9 Justice Duncan.

03:23 10 HONORABLE TRACY CHRISTOPHER: We have a  
11 lot of Texas law on the role of a guardian ad litem  
12 and what a guardian ad litem is supposed to do; and I  
13 don't really think from a law standpoint we need to  
14 deviate from what the Texas law is. If you look at  
03:23 15 the statutory law that sets up what a guardian  
16 ad litem is in family court, it carefully delineates  
17 between a guardian ad litem and an attorney ad litem.  
18 And they're very different animals.

19 And that is what we are trying to do in this  
03:24 20 rule, to insure that -- apparently in Tarrant County  
21 they don't make that distinction -- to insure that  
22 everybody in the state is making that distinction  
23 between a guardian ad litem and an attorney ad litem,  
24 and to know that in the role of a settlement it's a  
03:24 25 guardian ad litem.

1 CHAIRMAN BABCOCK: Levi.

2 HONORABLE LEVI BENTON: You know, the  
3 problems that have existed in South Texas probably  
4 existed in the Bronx way back when. And I bet there's  
03:24 5 probably an advisory committee to the New York Court  
6 of Appeals that has studied this issue. I mean, I  
7 think -- I said it in jest; but I think there is  
8 really something that might be gained. I know there  
9 is Texas jurisprudence; but the high court hasn't  
03:24 10 really spoken on this in an opinion in some time. And  
11 I think there is some value looking at what has  
12 happened in New York and Los Angeles and other places  
13 that South Texas could have to pattern itself after.

14 CHAIRMAN BABCOCK: Sarah.

03:25 15 HONORABLE SARAH B. DUNCAN: In that  
16 regard, we have got a whole new Family Code provision.  
17 And before we reject the Family Code definitions,  
18 which I'm not sure would be a good thing to do, we at  
19 least need to consider them.

03:25 20 HONORABLE TRACY CHRISTOPHER: I have  
21 them here. I could read it to everybody if you'd  
22 like.

23 HONORABLE SARAH B. DUNCAN: I've read  
24 them.

03:25 25 HONORABLE TRACY CHRISTOPHER: But if the

1 rest of the committee would like me to read them.

2 HONORABLE SARAH B. DUNCAN: But they're  
3 not evident in this rule proposal.

4 HONORABLE TRACY CHRISTOPHER: If we  
03:25 5 enacted this family law guardian ad litem rule and  
6 tailored it for civil cases, the fees would be  
7 astronomical, because when you read this and find out  
8 what they're supposed to do, you would be astonished.  
9 And I'll be glad to read it if anybody wants to hear  
03:25 10 what the guardian ad litem is supposed to do in a  
11 family law case.

12 CHAIRMAN BABCOCK: Buddy wants to hear.

13 MR. LOW: No, no.

14 (Laughter.)

03:26 15 MR. LOW: Frank raised something. The  
16 only thing that is really broke about the rule was too  
17 many times the Court appointed an attorney to serve as  
18 attorney ad litem and they were acting as lawyers and  
19 asking for exorbitant fees. Now if there were other  
03:26 20 things broke about it, I don't know. I mean, maybe we  
21 didn't know what a guardian was; but we were dumb  
22 enough and it didn't matter.

23 (Laughter.)

24 MR. LOW: What I'm saying is that we are  
03:26 25 fixing so many things; but as we fix something we

1 break something else. I'd go back to trying to fix  
2 what was broke to start with.

3 JUSTICE NATHAN HECHT: You can't recover  
4 stupidity once you've been enlightened.

5 (Laughter.)

6 CHAIRMAN BABCOCK: Yes, Harvey Brown.

7 HONORABLE HARVEY BROWN: I think what is  
8 broken is the definition of the role of guardian. I  
9 mean, if you have to go to court and ask the judge for  
03:27 10 direction as to "Should I do this," then that means  
11 the law is not clear; and that is part of the problem  
12 is there's lawyers across the state who think they're  
13 doing the right thing. They're not trying to gouge  
14 the client. They think it's their duty to read every  
03:27 15 pleading in 10 boxes.

16 I just testified in a case where the lawyers  
17 were hired a week before settlement. The ad litem was  
18 appointed a week before settlement. They read every  
19 deposition and boxes of pleadings and they testified  
03:27 20 that that was their duty and they had to do it.

21 MR. LOW: See, that's not what bothers  
22 me. What bothers me is that is they appoint somebody  
23 and he becomes the real lawyer and when it's over they  
24 give me a bill for two million dollars.

03:27 25 MR. MEADOWS: But you would agree

1       though, Buddy, that that is the essential thing this  
2       rewrite is trying to address --

3                       MR. LOW:    Right.

03:28 4                       MR. MEADOWS:  -- is to limit the scope  
5       of the work --

6                       MR. LOW:    Right.

7                       MR. MEADOWS:  -- and therefore the fees,  
8       have it defined, have language put in that tries to  
9       give the ad litem that that is protective of the  
03:28 10       position.  The person is not supposed to be a  
11       fiduciary, not supposed to be an attorney.  We're  
12       talking about things that create, that shed some light  
13       on that; but this whole thing was addressed to fix  
14       that one problem.

03:28 15                      MR. LOW:    Okay.  But certainly a whole  
16       bunch of other problems have arisen while doing this.

17                      MR. MEADOWS:  Well, I think we have gone  
18       much deeper in this discussion than we ever did.  I  
19       mean, we're now talking about what is the essence of  
03:28 20       the guardian ad litem.  And, you know, I kind of agree  
21       that we can't help the fact that this is applied  
22       differently in different counties in the state.

23                      I think it is important to draw the distinction  
24       between the guardian ad litem and the attorney at  
03:28 25       litem.  I think it's important to define what we mean

1 by the scope of the work and what is to be  
2 compensated.

3 CHAIRMAN BABCOCK: Judge Lawrence.

4 HONORABLE TOM LAWRENCE: This concept of  
03:28 5 trying to protect this individual by giving them  
6 judicial immunity, that would mean that they would  
7 have to be a judicial officer, and that would mean  
8 that they would presumably be subject to the Code of  
9 Judicial Conduct. And I don't see how that is going  
03:29 10 to work with them being an advocate who is subject to  
11 the Code of Judicial Conduct.

12 CHAIRMAN BABCOCK: Paula.

13 MS. SWEENEY: I'm not in favor of giving  
14 judicial immunity; but there is quasi judicial  
03:29 15 immunity that applies to Court appointed  
16 psychiatrists, that applies to master -- discovery  
17 masters. I think it's more that type of immunity that  
18 is being discussed; and that doesn't subject you to  
19 the Code of Judicial Conduct, I don't think.

03:29 20 CHAIRMAN BABCOCK: Judge Bland.

21 HONORABLE JANE BLAND: I think that we  
22 have really discussed this rule a lot, and we have  
23 actually even moved through that language; and what we  
24 are on right now is whether or not we could get a  
03:29 25 consensus on participation in court proceedings. And

1 with Buddy's friendly amendment I propose that we vote  
2 on 173.3(b) as it is, you know, and I'll read it with  
3 Buddy's amendment, and then we can go ahead and make  
4 this small decision instead of debating it yet for a  
03:30 5 third meeting the role of the ad litem.

6 I think we have rased a bunch of the issues  
7 and you're sending that to us to look at some more;  
8 but let's try to see if we can get some of these small  
9 parts, agreement on some of the small parts. What do  
03:30 10 you all think? Would that be okay?

11 MR. DUGGINS: If we'd prefer a comment,  
12 how do you want us to vote on this? How do you want  
13 to frame the vote?

14 HONORABLE JANE BLAND: Well, I mean,  
03:30 15 what it is right now is "The guardian ad litem must  
16 not participate in court proceedings before the  
17 settlement hearing except for mediation unless ordered  
18 by the Court for sufficient reasons shown." My  
19 proposal is to leave it that way and let the rule go  
03:31 20 out there for a while and see. You know, if it  
21 not -- if it's too broadly drawn or too narrowly  
22 drawn, we can find that out.

23 CHAIRMAN BABCOCK: So if you are for a  
24 comment, you'd vote against that, I guess. A couple  
03:31 25 more comments. Bill and then Richard.

1 PROFESSOR DORSANEO: Well, addressing  
2 that specific thing and backing up, I don't know  
3 whether this is clear now with what we did to it that  
4 the guardian ad litem is not an attorney. I don't  
03:31 5 know whether that's clear anymore.

6 HONORABLE JANE BLAND: I think you're  
7 right. We should have a sentence that says a guardian  
8 ad litem may be an attorney.

9 PROFESSOR DORSANEO: May be.

03:31 10 JUSTICE JANE BLAND: Or we could say may  
11 or may not be.

12 PROFESSOR DORSANEO: I'm an attorney;  
13 but I'm not acting as an attorney right now in the  
14 sense of representing a client. I mean, that's when  
03:31 15 Sarah was talking about not being an attorney I  
16 assumed that she meant acting as an attorney, not  
17 whether somebody had a law license or not. Because to  
18 say that the guardian ad litem cannot participate in  
19 court proceedings, I'm not sure what that means. But  
03:32 20 I don't suppose you mean that they can't go, right, --

21 JUSTICE JANE BLAND: Yes.

22 PROFESSOR DORSANEO: -- and sit there  
23 and watch?

24 HONORABLE JANE BLAND: Yes.

03:32 25 PROFESSOR DORSANEO: Do you mean that?

1 HONORABLE JANE BLAND: Well, and charge  
2 for it.

3 PROFESSOR DORSANEO: Well, "the charge  
4 for it," --

03:32 5 HONORABLE JANE BLAND: They may go --

6 PROFESSOR DORSANEO: -- that's the next  
7 paragraph.

8 JUSTICE JANE BLAND: -- because the  
9 courtroom is open to the public. But --

03:32 10 PROFESSOR DORSANEO: Yes. The "charge  
11 for it" is the important part. But, you know, I think  
12 the guardian ad litem without judicial authorization  
13 shouldn't appear as counselor in a court proceeding.  
14 I don't want them to be able to say "Now it's okay.  
03:32 15 You two people have spoken. Now it's my turn to act  
16 as counsel for the minor." That's what I think we  
17 don't want, the person acting as a lawyer, appearing  
18 as counsel or appearing as an advocate.

19 HONORABLE JANE BLAND: Participating.

03:33 20 PROFESSOR DORSANEO: Yes, appearing as  
21 an advocate. If they go and just sit there and watch,  
22 so what.

23 CHAIRMAN BABCOCK: Richard.

24 MR. MUNZINGER: I would add "discovery"  
03:33 25 and "trial" if you want to distinguish between court

1 proceedings and a trial. "The guardian ad litem must  
2 not participate in discovery, court proceedings or  
3 trial or court proceedings except for mediation that's  
4 ordered by a Court specifically."

5 CHAIRMAN BABCOCK: You've got to add  
6 that you've got to let them participate in the hearing  
7 where they're going to say that the settlement is  
8 okay.

9 MR. MUNZINGER: "Other than the  
03:33 10 settlement."

11 CHAIRMAN BABCOCK: Okay. What do you  
12 think about that, Jane? Does that work?

13 MR. MEADOWS: What is it again?

14 MR. MUNZINGER: Add "discovery" to the  
03:33 15 prohibition of participation. "A guardian ad litem  
16 must not participate in discovery, court proceedings  
17 or trial except," whatever it says, "except for  
18 mediation unless ordered by the Court for sufficient  
19 reasons shown," and if necessary, you add something  
03:34 20 about the settlement hearing.

21 MR. MEADOWS: That's fine with me.

22 CHAIRMAN BABCOCK: Jane, is that okay  
23 with you?

24 HONORABLE JANE BLAND: Yes.

03:34 25 CHAIRMAN BABCOCK: Do you want to vote

1 on that? Everybody in favor of (b) containing that  
2 language raise your hand.

3 MR. JEFFERSON: We're still voting  
4 against it if we're in favor of a comment?

03:34 5 CHAIRMAN BABCOCK: Correct. Jane, do  
6 you have your hand up?

7 HONORABLE JANE BLAND: I do.

8 CHAIRMAN BABCOCK: All those against it?  
9 It passes by a vote of 18 to 10. Why don't we take  
10 our afternoon break.

11 (Recess 3:34 to 4:04.)

12 CHAIRMAN BABCOCK: All right. Let's get  
13 going. Is everybody ready to go? All right. Judge  
14 Bland, let's try to spend a few minutes on 173.4 and  
04:04 15 then get to Buddy and the evidence rules, because  
16 Buddy says that, unlike this rule, the evidence rules  
17 are going just to fly by.

18 (Laughter.)

19 HONORABLE TOM GRAY: Like they always  
04:04 20 do.

21 MR. LOW: I've got John helping me, so  
22 what more can I ask?

23 HONORABLE JANE BLAND: Well, we pretty  
24 extensively discussed compensation at our last two  
04:04 25 meetings.

1 CHAIRMAN BABCOCK: Yes, we did.

2 (Laughter.)

3 HONORABLE JANE BLAND: And we have done

4 our best to incorporate those discussions. I think

04:04 5 subsection (a) discussed that ad litem may be

6 reimbursed for reasonable and necessary expenses and

7 may be paid a reasonable hourly fee. Subsection (b)

8 requires the Court to conduct a hearing to determine

9 the total amount of fees and expenses that are

04:04 10 reasonable and necessary, and that the Court cannot

11 consider compensation as a percentage of any judgment

12 or settlement. Subsection (c) states that the Court

13 can tax ad litem fees as costs of court and can

14 determine which party is to pay those costs. We have

04:05 15 I think that the bracketed language in (c) is out

16 because I didn't hear anybody in favor of the

17 corresponding section in Rule 173.2, so what will be

18 out. And subsection (d) is a provision that ad litem

19 can't receive anything other than reimbursement and a

04:05 20 reasonable hourly fee. That initially had a laundry

21 list after it of other kinds of reimbursement they

22 could not receive for their services and other kinds

23 of compensation they could not receive for their

24 services, and it was determined at the last meeting

04:06 25 that we didn't want to have a laundry list because it

1 was too likely that people would read that  
2 inclusively. And finally, and this one may need a  
3 little bit of discussion, it's the paragraph that says  
4 that a party can appeal the order awarding an ad litem  
04:06 5 fee and it will not affect the finality of the case.  
6 And that too came, arises out of our earlier  
7 discussions of this provision. There may be some  
8 discussion about the mechanics, the way that that's  
9 done.

04:06 10 MR. YELENOSKY: There's a typo in there.

11 JUSTICE JANE BLAND: Okay.

12 MR. YELENOSKY: It should begin with an  
13 "a."

14 JUSTICE JANE BLAND: Oh, okay. Because  
04:06 15 it was an "a," and then we said it was an "e," so we  
16 probably need to just go check our dictionary to make  
17 sure.

18 PROFESSOR DORSANEO: "a."

19 HONORABLE JANE BLAND: Judge Christopher  
04:07 20 was an "a" and Bobby and I were "e."

21 CHAIRMAN BABCOCK: What word?

22 HONORABLE JANE BLAND: Okay. I'll  
23 double check that. If I think it's "a," we'll change  
24 it to "a."

04:07 25 MR. YELENOSKY: It's a verb.

1 MR. SULLIVAN: Mr. Chairman, I call the  
2 question.

3 (Laughter.)

4 CHAIRMAN BABCOCK: On "a" versus "e"?

04:07 5 JUSTICE JANE BLAND: And hearing no  
6 other comments on compensation.

7 (Laughter.)

8 JUSTICE JANE BLAND: I'm teasing.

9 CHAIRMAN BABCOCK: All right. Yes,  
04:07 10 Judge Gray.

11 HONORABLE TOM GRAY: On, I don't know if  
12 you intend to make a distinction; but in (b) you used  
13 the terms "fees and expenses." You then used "fees"  
14 in (c), and then you refer to them as the "cost" in a  
04:07 15 written order; but you don't include "expenses" as  
16 something that can be included as costs.

17 JUSTICE JANE BLAND: Okay. So we will  
18 include "fees and expenses" in subsection (c).

19 HONORABLE TOM GRAY: Which seems to be  
04:08 20 appropriate. And in (e) it does not appear the  
21 ad litem could appeal the order.

22 HONORABLE JANE BLAND: Okay. Good  
23 point.

24 HONORABLE LEVI BENTON: That's why they  
04:08 25 pay you the big bucks.

1 (Laughter.)

2 CHAIRMAN BABCOCK: Richard Munzinger.

3 MR. MUNZINGER: Just a question: Under  
4 current law can the Court tax costs of Court against  
04:08 5 all parties, or is it limited to taxing the costs  
6 against the prevailing party?

7 HONORABLE CARLOS LOPEZ: "Except for  
8 good cause," Rule 139.

9 MR. MUNZINGER: So it's the prevailing  
04:08 10 party except for good cause. Because Rule 173.4(c)  
11 seems to arguably amend that.

12 CHAIRMAN BABCOCK: If you threw in "for  
13 good cause"?

14 MR. MUNZINGER: I would prefer that the  
04:09 15 Court can tax against whoever it wants to whether it's  
16 the plaintiff or defendant overall; but at the moment  
17 173.4 seems to give the Court the option regardless of  
18 good cause against the party.

19 CHAIRMAN BABCOCK: Is there any reason  
04:09 20 why the Court by rule can't do that?

21 MR. MUNZINGER: No.

22 CHAIRMAN BABCOCK: And you like the way  
23 this is?

24 MR. MUNZINGER: I like it the way it is,  
04:09 25 or I'd like it to be expanded. It seems to me that

1 it's suggesting that either one or the other party  
2 must pay when the Court could say "everybody must  
3 pay." You could say "whether the fees should be taxed  
4 against all or only some of the parties."

5 CHAIRMAN BABCOCK: Okay.

6 MS. SWEENEY: Chip.

7 CHAIRMAN BABCOCK: Yes.

8 MS. SWEENEY: The ad litem inures to the  
9 benefit of the defense and is almost universally  
04:09 10 requested by the defense; and it gives me real heart  
11 burn to tax that against some little kid.

12 MR. MUNZINGER: It gives me real heart  
13 burn that it inures only to the benefit of the  
14 defense. Why can't a child sue his parents for  
04:10 15 stealing from him? It inures to the benefit of all  
16 parties. If you have finality of judgment and  
17 certification of the Court, the judgment is final and  
18 fair.

19 MS. SWEENEY: You lost me on the kids  
04:10 20 suing their parents. But it's the defense than wants  
21 finality, and it's the defense that wants the ad litem  
22 and the defense that requests the ad litem; and to tax  
23 that against the plaintiff is, particularly in a  
24 losing situation, is doubly unfair.

04:10 25 MR. MUNZINGER: I was under the

1 impression the ad litem was not requested by the  
2 defense, but by agreement of the "parties" the way  
3 this rule is drafted.

4 MS. SWEENEY: It is in custom and  
04:10 5 practice the ad litem is requested by the defense so  
6 that the defense can have a final judgment and  
7 security that this child is not going to coming back  
8 when he turns 18.

9 MR. MUNZINGER: And I agree with what  
04:10 10 you just said; but I understand that now we have  
11 something here that's "by agreement of the parties."

12 MR. YELENOSKY: No.

13 MS. SWEENEY: If the parties agree, the  
14 Court can appoint an ad litem earlier than the "must."  
04:11 15 But if the parties don't agree, then the Court can  
16 only do it at the later stage or however we ended up  
17 phrasing that.

18 CHAIRMAN BABCOCK: Skip.

19 MR. WATSON: Just a point that I think  
04:11 20 we can fix in drafting. The sentence of subpart (e)  
21 appears to sound like that the appeal is taken by  
22 filing a motion to sever. I would suggest changing  
23 the last sentence to read "A motion to sever the  
24 ad litem fee order must be granted." And I'd move  
04:11 25 that up to be the second sentence so that the final

1 sentence reads "Such an appeal will not affect the  
2 final appeal of the settlement or judgment."

3 CHAIRMAN BABCOCK: Any problem with  
4 that, Jane?

04:11 5 HONORABLE JANE BLAND: No.

6 CHAIRMAN BABCOCK: Elaine.

7 PROFESSOR CARLSON: We might think about  
8 in that last sentence of (e) tracking 176(a)(8) that  
9 deals with a ceiling. It says "Any order relating  
04:12 10 to," and it would be "ad litem fees," "shall be deemed  
11 to be severed from the case and a final judgment which  
12 may be appealed by any party."

13 HONORABLE JANE BLAND: That's a great  
14 idea.

04:12 15 MR. WATSON: That's fine.

16 CHAIRMAN BABCOCK: Okay. Buddy.

17 MR. LOW: Why didn't you stop and just  
18 say "the Court may tax ad litem fees as cost of Court"  
19 and let, because the Court ruling is governing, you  
20 know.

21 HONORABLE CARLOS LOPEZ: It governs  
22 anyway, doesn't it?.

23 MR. LOW: Yes. I mean, why go farther  
24 than that? Just "taxed as court costs." I mean, I'm  
04:12 25 asking a question. I'm not telling you.

1 MS. SWEENEY: You're right. And let  
2 established law take over.

3 MR. LOW: Yes. I'm not --

4 CHAIRMAN BABCOCK: Bill.

04:12 5 PROFESSOR DORSANEO: It really doesn't  
6 make sense to talk about saying things are taxed as  
7 court costs only -- only takes you to those rules. I  
8 mean, if you want to say the Court may determine which  
9 party is to pay costs in a written order, maybe they  
04:13 10 don't need to be taxed as court costs. Taxing them as  
11 court costs sends you over to those rules about cost  
12 courts.

13 MR. LOW: Well, you go into those rules  
14 anyway, aren't you?

04:13 15 PROFESSOR DORSANEO: Not computed as  
16 court costs.

17 MR. LOW: All the deposition costs and  
18 everything aren't you going to that rule?

19 PROFESSOR DORSANEO: Uh-huh (yes).

04:13 20 MR. LOW: If you're going there anyway,  
21 why not take it all there?

22 CHAIRMAN BABCOCK: Justice Bland.

23 HONORABLE JANE BLAND: I think the  
24 thought was that you have two situations. You have  
04:13 25 one where the fees might be taxed at the end of a

1 trial, which would be the rare circumstance, and you  
2 have the other which is the fees would be assessed as  
3 part of the approval of a settlement by the Court when  
4 the settlement involves a minor. And in that  
04:14 5 situation you're not really taxing them as costs.  
6 They're part of the entire package of the agreed final  
7 judgment that the Court approves. And I guess --

8 PROFESSOR DORSANEO: This is a hybrid.

9 JUSTICE JANE BLAND: Right. I mean, I  
04:14 10 think it's either they might be taxed as costs at the  
11 very end of the case if you sign a final judgment that  
12 is not agreed.

13 MR. LOW: I've just always put them in  
14 as costs.

04:14 15 HONORABLE JANE BLAND: You've put them  
16 in at costs?

17 MR. LOW: That's what I've always done;  
18 but that doesn't mean everybody does.

19 CHAIRMAN BABCOCK: All right. Yes,  
20 Carlos.

21 HONORABLE CARLOS LOPEZ: I agree with  
22 what they just said; but I have a question about how  
23 this works. I've always had a question about once you  
24 start writing this down how do you codify it in terms  
04:14 25 of the situation where the publication where you've

1 got the ad litem involved yet the defendant hasn't  
2 answered, they're not going to answer, probably never  
3 will, probably never even saw it. And yet who pays  
4 for the ad litem? Do you see what I'm saying? The  
04:15 5 prevailing party is the party that got the default  
6 judgment if they got a default judgment. So you tax  
7 the costs against the non-answering defendant that  
8 doesn't have any money. You know, how do you actually  
9 get the ad litem paid?

04:15 10 HONORABLE TRACY CHRISTOPHER: In that  
11 case there is good cause to tax it against the moving  
12 party, because the only way they can get the default  
13 is by having the ad litem. I mean, I usually make the  
14 plaintiff pay.

04:15 15 HONORABLE CARLOS LOPEZ: I do too. And  
16 I've warned them ahead of time, said --

17 HONORABLE TRACY CHRISTOPHER: Right.

18 HONORABLE CARLOS LOPEZ: -- "Do you  
19 really want to be judgment proof or do you really want  
04:15 20 to do this, because you're going to end up paying for  
21 the ad litem," --

22 HONORABLE TRACY CHRISTOPHER: Right.

23 HONORABLE CARLOS LOPEZ: -- because  
24 there is no other way to pay them.

04:15 25 CHAIRMAN BABCOCK: All right. Yes,

1 Carl, last comment.

2 MR. HAMILTON: Or we could say that fees  
3 will be in accordance with the rules, because 131 says  
4 you tax the successful party who recovers costs. And  
04:16 5 then 141 says "The Court may for good cause to be  
6 stated in the record adjudge costs otherwise as  
7 provided by the law or these rules." So you could use  
8 131 or 141 to tax the costs.

9 CHAIRMAN BABCOCK: Okay. Any other  
04:16 10 comments? This subcommittee is going to do a lot of  
11 work between now and March.

12 HONORABLE TRACY CHRISTOPHER: I'm not  
13 researching Bronx law.

14 (Laughter.)

15 CHAIRMAN BABCOCK: Huh?

16 HONORABLE TRACY CHRISTOPHER: I'm not  
17 researching Bronx law.

18 CHAIRMAN BABCOCK: We particularly want  
19 to know how Vermont treats this issue. Okay. Buddy,  
04:16 20 let's go to evidence.

21 MR. LOW: All right. The first point  
22 on --

23 CHAIRMAN BABCOCK: Let's be snappy.

24 MR. LOW: I am. The first point has  
04:17 25 already be decided.

1 (Laughter.)

2 CHAIRMAN BABCOCK: I have no doubt.

3 MR. LOW: The affidavit concerning costs  
4 and services we voted on that last time. You know, we  
04:17 5 had a proposal and we agreed to stop kind of in the  
6 middle and not do what the State Bar had recommended  
7 and say you might file a counter-affidavit. So we  
8 have the comment about repealing 18.001 and that was  
9 voted on. And I sent that to you, Chris already. So  
04:17 10 how snappy is that?

11 MS. SWEENEY: Very snappy.

12 CHAIRMAN BABCOCK: That's pretty snappy.

13 MR. LOW: The next thing is ex parte,  
14 and this should be very simple and very  
04:17 15 uncontroversial.

16 (Laughter.)

17 MR. LOW: The Evidence Committee of the  
18 State Bar presented, they studied this at great length  
19 and decided that because of HIPPA and other  
04:18 20 regulations concerning privacy in medical care that  
21 you should only have ex parte conversations with the  
22 plaintiff's doctor by consent, with consent from the  
23 plaintiff or by Court order. Court order could be  
24 under HIPPA could be a subpoena or what -- it could  
04:18 25 be -- your committee, Harvey and Tommy drew a rule

1 similar to that; but it also has a form that has, you  
2 know, where the consent had to be and it's rather  
3 rather lengthy.

4 The other view, and Judge Brister filed a  
04:18 5 minority report, and that view is that "Just don't do  
6 anything and allow it." The problem is the federal  
7 courts following state law say you can't have  
8 ex parte, that that is not a waiver to allow ex parte  
9 conferences.

04:19 10 The fourth view is, and John pointed something  
11 out to me, there are statutes, federal and state which  
12 encourage peer review. And John was concerned that a  
13 lawsuit may be filed and, you know, if a hospital or a  
14 medical provider might need to interview doctors, and  
04:19 15 it would include this material. And the federal  
16 statute and state statutes favor that.

17 HIPPA is 170 something pages. The summary is  
18 47. And if I told you I really understood HIPPA, I  
19 probably couldn't tell you a more falsehood; but it is  
04:19 20 clear that HIPPA intends to preempt state law or any  
21 other law. I mean, that part I can tell you. And my  
22 reading of HIPPA is that it's intended to protect  
23 one's medical records and that basically you can only  
24 get the information through Court order or subpoena or  
04:20 25 the legal process or by written consent.

1           There's a mental health statute in Texas which  
2 makes it a penalty to do something like that. But so  
3 John had a proposal. Let me see if I can find my  
4 letter here. Here it is, a fourth proposal  
04:20 5 (indicating). And that is the first part of Rule 509,  
6 Exceptions to Civil Procedures, where he would say  
7 "Exceptions to confidentiality and privilege in  
8 administrative proceedings exist and subject to  
9 federal law and the laws of this state relating to  
04:21 10 confidentiality of a person's healthcare information  
11 exceptions to confidentiality exists." In other  
12 words, he would just put, add in there "subject to  
13 federal and state laws that prohibit that."

14           HONORABLE DAVID PEEPLES: Buddy, some of  
04:21 15 us don't know where we're supposed to be looking at.

16           MR. LOW: Well, you don't have it to  
17 look at.

18           HONORABLE DAVID PEEPLES: Okay.

19           (Laughter.)

04:21 20           MR. MEADOWS: There is a way to move  
21 something through.

22           (Laughter.)

23           MR. LOW: Judge, we had, this was  
24 presented back when Judge Brister made his rather  
04:21 25 lengthy speech five or four meetings ago; and now

1 John's proposal is not -- that is something that the  
2 committee has not considered. I sent it to the  
3 Evidence Committee; but it just -- we didn't put it  
4 together until when, John? About a month ago or so?

04:22 5 MR. MARTIN: About.

6 MR. LOW: No. It was more than a month  
7 ago. It was two months ago.

8 MR. MARTIN: In December, I think.

9 MR. LOPEZ: But so I first wanted to  
04:22 10 get, before we go I just wanted to see what direction.  
11 I mean, we have four directions to go; and without  
12 getting into the language there is no need to argue  
13 the language over a direction we don't want to go.

14 So there are really four things we can do.  
04:22 15 There are some people that don't like just a general  
16 exclusion and say you can do it unless you are  
17 prohibited by federal and state law. And there are  
18 some people that want it more clearly. I don't know  
19 how to -- I guess maybe we could put in there "subject  
04:22 20 to requirements of peer review" or something like that  
21 "maybe it shouldn't be done other than in that." What  
22 about that, John? What do think?

23 MR. MARTIN: Well, I made a long speech  
24 about this last time; but in the interest of time I  
04:23 25 will not repeat anything I said. But I raised several

1 other questions in addition to the peer review  
2 question. One is the situation where a patient who is  
3 a plaintiff in a medical malpractice case comes back  
4 to the same healthcare provider. That happens more  
04:23 5 often than you might realize. I represent a hospital  
6 in Dallas that is the only place in town that does  
7 certain procedures. And if a child has to go get a  
8 procedure like that, has to come back to our hospital.  
9 We welcome them; but we've had a number of situations  
04:23 10 where the plaintiff in a lawsuit is actually a patient  
11 in the hospital. If you read that, if you took that  
12 rule of Evidence Committee rule literally, the  
13 hospital administration people couldn't talk to the  
14 doctors taking care of that child while he was there  
04:23 15 because he's a plaintiff in a lawsuit.

16 MR. LOW: Right.

17 MR. MARTIN: And that obviously isn't  
18 anybody's intent. So there is that and the peer  
19 review issue. And also the situation where a hospital  
04:23 20 is accused of being vicariously liable for a resident  
21 physician, a fellow or even an emergency room  
22 physician whether or not he's independent or even an  
23 independent physician, there has to be the ability to  
24 communicate with the alleged agent on the part of the  
04:24 25 attorneys for the hospital. And the rule didn't

1 address that at all either.

2 Finally, the other point I think I made is that  
3 I just don't see how you can summarize this 170 page  
4 regulation in a rule, and that's why I suggested to  
04:24 5 Buddy -- Buddy and I had a telephone call after our  
6 last meeting, and I suggested to Buddy that we just  
7 amend Rule 509 to say "subject to federal and state  
8 privacy laws" so that lawyers are on notice that they  
9 better watch out for whatever HIPPA requires.

04:24 10 And the other point I will make, and then I'll  
11 stop, I notice in this material that you passed out  
12 today from the Rules of Evidence Committee, from the  
13 State Bar Committee, they make the statement that this  
14 committee decided or determined that HIPPA did not  
04:25 15 preempt this area. And that is not correct.

16 MR. LOW: That's not their only false  
17 statement.

18 MR. MARTIN: The committee didn't  
19 determine that. I think what they're referring to is  
04:25 20 I discussed at some length a decision that came out of  
21 a court in New Jersey in some diet drug litigation,  
22 and that judge ruled, and I said at the last meeting  
23 that I wasn't sure I agree with him, that judge ruled  
24 that because HIPPA is silent on this ex parte issue,  
04:25 25 that was not prevented. That is what was said.

1 I think the Rules of Evidence Committee of the  
2 State Bar ought to be made aware of that opinion  
3 because it does discuss a lot of these issues, and in  
4 reading their report they didn't seem to be aware of  
5 it.

6 MR. LOW: Chris passed that out. I  
7 wouldn't have passed that out, because they accused us  
8 of being wrong. But they did get it. They more or  
9 less said we didn't know what HIPPA did. But we do  
04:25 10 know what HIPPA did. We just don't know what to do  
11 with it. So I think -- and I don't think they  
12 intentionally --

13 MR. GRIESEL: I was seeking to expose  
14 the scandals.

04:26 15 (Laughter.)

16 MR. LOW: So that is the proposal that  
17 we more or less not try to say that HIPPA says this,  
18 HIPPA says that, but just point out so people are on  
19 notice. So we have that alternative which wouldn't  
04:26 20 require much amendment.

21 CHAIRMAN BABCOCK: In shorthand what do  
22 you call that alternative?

23 MR. LOW: That alternative is the Martin  
24 alternative.

25 CHAIRMAN BABCOCK: The Martin

1 alternative. Okay.

2 MR. MARTIN: That's the kiss of death.

3 I'm sorry.

4 CHAIRMAN BABCOCK: All right.

04:26 5 MR. LOW: And the Justice Brister  
6 alternative is he was against it, so I don't know how  
7 to -- I guess it was to do nothing. He filed a  
8 minority report; but he didn't want to prevent it.

9 And then the other one is where it's already  
04:26 10 been passed out, the one you and Tommy I believe drew,  
11 and it's fairly lengthy and tries to comply with  
12 notice and what you have to say in the notice.

13 CHAIRMAN BABCOCK: And that's adding the  
14 509(g)?

04:27 15 MR. LOW: Yes.

16 HONORABLE HARVEY: That's my  
17 recollection.

18 MR. LOW: Right.

19 CHAIRMAN BABCOCK: Lengthy.

04:27 20 MR. LOW: And then you have in the first  
21 stuff I passed out the paragraph where the State Bar  
22 Committee says you can only -- it's point blank. You  
23 can only do it by Court order or permission of the  
24 patient.

04:27 25 CHAIRMAN BABCOCK: Okay. So which does

1 the subcommittee recommend?

2 MR. LOW: The subcommittee has not met  
3 on all that. We haven't had -- our subcommittee has  
4 not met since, on this since that last time. And John  
04:27 5 and I just did this the first part of November, I  
6 believe, or something like that and I have not had a  
7 meeting since then. I've sent everything to the  
8 subcommittee. And that's all.

9 CHAIRMAN BABCOCK: Okay. Why don't --  
04:27 10 do you want to have a little discussion about which of  
11 the alternatives, if any, the group wants?

12 MR. LOW: Well, I'd have to get the  
13 group together.

14 CHAIRMAN BABCOCK: No. I mean this  
04:28 15 group.

16 MR. LOW: Oh, this group? First of all,  
17 I tend to favor John's. It's not -- there might be  
18 there are other people that want something more  
19 definite, not just tell the lawyers. But I don't know  
04:28 20 how to do it.

21 CHAIRMAN BABCOCK: Yes.

22 MR. LOW: I mean, we need to make people  
23 aware. And we could even put a footnote in there, if  
24 you wanted to, about the statute that has the peer  
04:28 25 review. And I've got it here, --

1 CHAIRMAN BABCOCK: Uh-huh (yes).

2 MR. LOW: -- the requirements in Texas  
3 and federal and about citing HIPPA and healthcare or  
4 something.

04:28 5 CHAIRMAN BABCOCK: How do you people  
6 feel about the so-called Martin proposal?

7 MS. SWEENEY: Could you reiterate it?

8 MR. LOW: Let me read it. It reads  
9 "Subject to federal laws and the law of this state  
04:29 10 relating to the confidentiality of a person's health  
11 care information, exceptions to confidentiality or  
12 privilege in administrative proceedings and civil  
13 proceedings in court exist," and then everything is  
14 the same. And it doesn't talk about ex parte. It  
04:29 15 talks about, you know, when you file a lawsuit; but it  
16 points out that all of those are subject to the  
17 federal and state law and you better proceed at your  
18 own risk, because there are some statutes that make it  
19 a fine or a penalty. And I don't know. Does HIPPA  
04:29 20 provide a penalty, John?

21 MR. MARTIN: For certain things it does,  
22 yes.

23 MR. LOW: Yes.

24 MR. MARTIN: Again, it doesn't address  
04:29 25 them specifically.

1 MR. LOW: For everything. So I can't,  
2 this committee can't tell everybody exactly HIPPA; but  
3 HIPPA was intended to preempt before a lawyer goes and  
4 talks ex parte, and the doctor better do a little  
04:30 5 reading and some understanding.

6 MS. SWEENEY: I'm sorry. It went too  
7 fast for me. The Martin proposal is you can do  
8 ex parte except if the law prohibits it? What is the  
9 Martin proposal?

04:30 10 MR. LOW: Well, we think that perhaps  
11 that the Martin proposal is you can't do it except in  
12 the situation where you have a peer review or where  
13 necessary for the treatment, like John is talking  
14 about, when somebody comes back. And so that's the  
04:30 15 only two situations I can think of. Isn't it, John?

16 MR. MARTIN: I think I've said this  
17 multiple times in the committee. You may have been  
18 absent the last time. I think it's abundantly clear  
19 under HIPPA that the lawyer can't or a defense lawyer  
04:30 20 can't just go out and talk to the plaintiff's doctor  
21 absent an authorization or absent a Court order; but  
22 these various proposals that have come out of the  
23 Rules of Evidence Committee are just overly broad and  
24 would lead to some of the absurd results that I  
04:31 25 mentioned earlier. And I just think this is the best

1 way to do it. The case I mentioned in New Jersey,  
2 Paula, I'd be happy to send you a copy of it, is a  
3 case where in New Jersey they've always had a  
4 procedure where you can't go talk to the doctor unless  
04:31 5 you have a specific authorization called a Stampler  
6 authorization Court decision to go do it. And there  
7 was a debate and ADLA got involved and PRI got  
8 involved and there were briefs. And the Court in that  
9 case said that you could still do it if you had a  
04:31 10 proper authorization, but this one wasn't a proper  
11 authorization. Therefore you can't do it in this  
12 case.

13 CHAIRMAN BABCOCK: Ralph.

14 MR. DUGGINS: Would your opinion change  
04:31 15 if it were a paid expert that reviewed the treating  
16 physician's records, a testifying expert?

17 MR. MARTIN: That one party could go  
18 talk to the other side?

19 MR. DUGGINS: If the defense -- if the  
04:31 20 plaintiff hired a third -- a second physician who had  
21 testified in part, was going to be a testifying expert  
22 who had reviewed the treating physician's records, in  
23 your view could the defense go ex parte and talk to  
24 that expert?

04:32 25 MR. MARTIN: You can't do that today

1 under some ethical rules.

2 MR. DUGGINS: Yes.

3 MR. MARTIN: You can't talk to the other  
4 side's expert.

04:32 5 MR. DUGGINS: I was just trying to see  
6 whether there is any distinction between the treating  
7 physician and an expert.

8 MR. MARTIN: I don't think an expert  
9 would be covered by HIPPA, for example, because I  
10 believe -- I stand to be corrected on this; but I  
11 think there is an ethical rule that says neither side  
12 can go talk to the other side's expert.

13 CHAIRMAN BABCOCK: That's correct.

14 MS. SWEENEY: That's right.

04:32 15 CHAIRMAN BABCOCK: Judge Gaultney.

16 HONORABLE DAVID GAULTNEY: But I thought  
17 the HIPPA reg has a provision in it that said it was  
18 not intended to interfere with the concept that in  
19 order to bring a lawsuit you waived any privilege to  
04:32 20 the confidentiality of the records, state law  
21 requirement. I thought there was a specific, express  
22 statement in the regulation to that effect.

23 MR. MARTIN: I'm not aware of that.

24 MR. LOW: I've never seen a provision  
04:33 25 that talked about waiver. If it's in there, it

1 escaped me.

2 HONORABLE DAVID GAULTNEY: I'll try to  
3 find it.

4 MR. LOW: Well, find it, because I have  
04:33 5 got the regulations. No. I just brought the summary.  
6 The regulations are too voluminous. But let me point  
7 out just for the record 42 USCAA 11.101 is the  
8 statute, the federal statute that favors peer review  
9 in weeding out doctors, and that is adopted in 160.001  
04:33 10 of the Occupation Code.

11 CHAIRMAN BABCOCK: Any more comments  
12 about the Martin proposal? Buddy, is the plan to get  
13 back with your subcommittee and come up with some  
14 specific language and then come back to us?

04:34 15 MR. LOW: I'd like some direction from  
16 you. I don't want to go down four trails if a lot of  
17 them are --

18 CHAIRMAN BABCOCK: Well, you recommended  
19 a direction. You recommended the Martin alternative.

04:34 20 MR. LOW: I recommended the direction  
21 that John said. I don't know. The other committee  
22 members, I sent them, all of them this. Whether or  
23 not they have had a chance to study it, we have not  
24 met on it.

04:34 25 CHAIRMAN BABCOCK: Well, I don't see --

1 I don't hear a lost criticism of John's proposal.

2 MR. LOW: All right. Then my committee  
3 will get back and we will come up with something and  
4 determine whether we need a footnote or something.

04:34 5 But something along those lines, and we'll do that.

6 CHAIRMAN BABCOCK: Okay. What is your  
7 next evidentiary point?

8 MR. LOW: There are none other. That's  
9 all. The only other thing that the State Bar has not  
04:34 10 even sent to us yet. I sent this what? A few days  
11 ago, Judge?

12 HONORABLE LEVI BENTON: Yes, sir.

13 MR. LOW: They raised a question of when  
14 the Court amended 407(a) the federal court doesn't  
04:35 15 have a 407(b) pertaining to products liability like we  
16 do. And we took that sentence out, you know, that  
17 doesn't apply to products, that it may have a  
18 connotation more than what we want. And they want  
19 recall letters and so forth to the downstream to be  
04:35 20 able to introduce them. But they have not met on  
21 that. Their subcommittee met and sent me their stuff;  
22 and I sent it to my committee. So we will also wait  
23 to hear from them. And we're through.

24 CHAIRMAN BABCOCK: Okay. Cool. Bobby,  
04:35 25 Rule 202.

1 MR. MEADOWS: Okay. This rule has been  
2 on the agenda before. We've never really gotten to it  
3 for much of a discussion.

4 CHAIRMAN BABCOCK: We've got 25 minutes  
04:36 5 to discuss it.

6 MR. MEADOWS: Well, we're going to  
7 hopefully meet that with ease.

8 (Laughter.)

9 MR. MEADOWS: There is no proposal. And  
04:36 10 what we'll look for in this discussion is direction of  
11 whether or not we should produce one. The rule first  
12 came to our attention from the Governor's Office.  
13 Ralph Duggins on this committee has written a letter  
14 to the subcommittee about it as well, and Paula  
04:36 15 generally responded to that letter and had her own  
16 views about any need for change. We've also gotten a  
17 letter from Roger Hughes in The Valley, and Roger  
18 Hughes has also written an article that I think was  
19 made available on our website. I'm not sure if anyone  
04:37 20 has managed to get it. But John brought it to my  
21 attention and I've read it, and it certainly is worth  
22 reading.

23 The question -- before I get to the what we as  
24 a subcommittee found as the more obvious issues, I  
04:37 25 think everyone understands that this is a rule that is

1 the collapse of Rules 737 and Rule 187. And it's  
2 generally used to perpetuate testimony in advance of  
3 an anticipated suit or to investigate a potential  
4 claim. And there are some complaints about it because  
04:37 5 of the way it's used primarily in medical malpractice  
6 cases, and as I mentioned, it seems to be the case in  
7 the most serious complaints. The most anecdotal  
8 information you hear about it comes out of The  
9 Valley. But that's not -- it's not geographically  
04:38 10 limited that way, I should say.

11 We looked at it, talked about it when we met.  
12 And we basically made several observations, that if we  
13 were going to take up the rule and look at ways it  
14 might be changed or I don't want to say "fixed" so  
04:38 15 much, as just addressed, it would be over certain  
16 concerns that have appeared from cases in that in the  
17 first instance has to do with whether or not the order  
18 granting relief under Rule 202 is appealable. There  
19 are venue issues associated with the rule as to where  
04:38 20 discovery can take place. There are questions about  
21 the vagueness of what the rule allows because  
22 basically there are pleading and notice requirements,  
23 that the request or the suit needs to be verified,  
24 identified, those that are most likely to be affected  
04:39 25 by the rule. And but it just simply has to state that

1 the failure to take the deposition would prevent or  
2 delay justice in an anticipated suit or the likely  
3 benefit of allowing the deposition outweighs the  
4 burden or expense of the procedure. And there are  
04:39 5 some who feel that maybe there should be greater  
6 clarity and specificity about the reason that the  
7 relief is requested or the deposition discovery is  
8 needed.

9 For example, in the medical malpractice  
04:39 10 context, we're told that frequently it's a way to  
11 launch discovery, one-sided discovery where you can  
12 examine doctors and others about opinions as opposed  
13 to just factual discovery more in the nature I think  
14 the way most think the rule was intended.

04:39 15 So I think what we wanted to have was just a  
16 general discussion about it. And in fairness, I  
17 wanted to highlight. I don't think I have omitted  
18 anything. Did I, Tracy?

19 HONORABLE TRACY CHRISTOPHER: Well, we  
04:40 20 had time limits, about whether the time limits of the  
21 first deposition would apply in deposing the second  
22 same person in the actual lawsuit.

23 MR. MEADOWS: No. I did not mention  
24 that. In addition to a question about -- and I have  
04:40 25 to say that I added a couple of these just sort of on

1 my own since we met, because there's just looking at  
2 the case law, there is this question about venue.  
3 There is the question we noted in our subcommittee  
4 about the appealability of the order, that is, what is  
04:40 5 the scope of permissible discovery under the rule,  
6 whether it's facts or more open ended type of  
7 discovery. What happens with the time that's taken up  
8 in the discovery if a suit is brought? Do those time  
9 limits count under the rules, limit depositions and  
04:41 10 the time of depositions, or do you start all over? It  
11 apparently goes both ways now. And then there is  
12 the -- there has been -- Ralph addressed this. I  
13 would be happy for him to speak to it. And that is  
14 this whole question about whether or not there should  
04:41 15 be some sanctions imposed if the rule is somehow  
16 seemed to be misused or determined to be misused. We  
17 didn't really have a recommendation on that. We just  
18 sort of identified it as an issue. So I think that  
19 captures it, doesn't it, Jane and Tracy?

04:41 20 HONORABLE JANE BLAND: (Nods  
21 affirmatively.)

22 HONORABLE TRACY CHRISTOPHER: (Nods  
23 affirmatively.)

24 MR. MEADOWS: We talked about this rule  
04:41 25 before when we had a greater attendance when Bill

1 Edwards was present and John was present. I think the  
2 general feeling at that time, which was about a year  
3 ago, was that the rule seemed to work pretty well and  
4 there didn't really seem to be an important need to  
04:42 5 rewrite it.

6 But since then there has been just -- there  
7 has been more bubbling up about it; and I think it's  
8 certainly -- I think we're obligated to discuss it  
9 because of the complaints and concerns that have been  
04:42 10 expressed to the committee. So that's where we are,  
11 Chip.

12 CHAIRMAN BABCOCK: Sure. Paula and then  
13 John.

14 MS. SWEENEY: What concerns as far as by  
04:42 15 who, when, where and in what forum and under what  
16 circumstances?

17 MR. MEADOWS: Well, Roger Hughes in  
18 particular has been very clear about his complaints.  
19 And in addition to the letter he's written, which as I  
04:42 20 say, is available, you may or may not have it, he has  
21 written an article where he elaborates; but basically  
22 it goes to the points that we have, the points that I  
23 identified.

24 MS. SWEENEY: Well, I've tried to  
04:42 25 download and print everything that I could download

1 and print before I drove down here; but I do not have  
2 anything from Roger Hughes. I don't know what his  
3 complaint is. If it's venue, what's the problem that  
4 he's citing? If it's appealability, what does he  
04:43 5 want? Interlocutory appeals? What is the complaint  
6 that this one individual located in The Valley is  
7 raising?

8 MR. MEADOWS: Well, --

9 HONORABLE TRACY CHRISTOPHER: He  
04:43 10 specifically he has an eight-page memorandum, and he  
11 would like a rule that would permit the ruling to be  
12 treated as a final judgment for purposes of appeal.  
13 Currently the standard is uncertain and difficult to  
14 apply as to whether it's a final judgment or whether  
04:43 15 it's not or whether you can only mandamus. So that  
16 was his specific issue.

17 MS. SWEENEY: So that's the gist, the  
18 sum? I mean, that's the heart of the eight pages?

19 HONORABLE TRACY CHRISTOPHER: Yes.

04:43 20 MS. SWEENEY: Okay. So these other? So  
21 that's the appealability issue. These other issues  
22 are raised by whom, where?

23 CHAIRMAN BABCOCK: Well, I think this  
24 started out with the governor.

04:44 25 MR. SWEENEY: The governor just says

1 there are concerns, no substance.

2 CHAIRMAN BABCOCK: The governor asked  
3 the Court to look into it and the Court asked us to  
4 look into it, so that's what we are doing.

04:44 5 MS. SWEENEY: But I'm trying to get some  
6 phrase from a quotable entity, lawyer or litigant  
7 anywhere as to what the alleged problem with 202 is.

8 CHAIRMAN BABCOCK: I can give you one,  
9 Paula. One of the cases in this memo was my case; and  
04:44 10 what the plaintiff's lawyer did was sue a broadcast  
11 center for -- well, they didn't sue them. They asked  
12 for depositions; and there was no -- it was clear that  
13 the plaintiff or the person asking for the depositions  
14 had been the subject of a variety of broadcasts on the  
04:45 15 television station. And it didn't take a genius to  
16 realize that this 202 Examination, these 202  
17 examinations were for the purpose of "investigating"  
18 quote, unquote, some would say "fixing" the testimony  
19 for a later liable case.

04:45 20 Typically in a liable case the defendant has  
21 the right by special exceptions to require the  
22 plaintiff to say what broadcast or publication it is  
23 that is defamatory and what statements in the  
24 broadcast are claimed to be false. That is thought to  
04:45 25 be necessary so that the defendant can then inform

1 himself and prepare himself and go back and think  
2 about what sort of investigation was done with respect  
3 to the various statements.

4 In a Rule 202 Examination the defendant or the  
04:45 5 person being asked for the discovery doesn't have any  
6 of those protections. It's my recollection -- I  
7 didn't really directly handle this case; but I was on  
8 the pleadings -- I think there were like multiple  
9 broadcasts, 15 broadcasts or something about this  
04:46 10 company and many, many statements made by many, many  
11 different reporters all of which the station would be  
12 responsible for.

13 In opposing the Rule 202 Exam we pointed all  
14 this out. We said "Hey, at least make him tell us  
04:46 15 what it is that he's mad about." And the trial judge  
16 declined to do that, and there was a mandamus  
17 proceeding, and the mandamus was denied on the basis  
18 that there is an adequate remedy of law.

19 So the depositions went forward at tremendous  
04:46 20 expense because we couldn't let the reporters go in  
21 there without having prepared them, you know, on all  
22 15 broadcasts, some of which turned out not to be at  
23 issue at all. And surprise, surprise there was a  
24 consequent defamation case that ultimately, you know,  
04:47 25 was litigated and wound up in summary judgment. But

1 it was in my view was certainly a circumvention of  
2 what the existing law was protecting a defendant.

3 And I would guess a doctor in malpractice cases  
4 would have some of the same kind of front end  
04:47 5 protections that occur in defamation cases. So that's  
6 one issue. Whether or not it's a good thing or a bad  
7 thing is open to debate. It probably depends on which  
8 end of the telescope you're looking through; but that  
9 is an issue. That type of issue is what is there.  
10 Carlos.

11 HONORABLE CARLOS LOPEZ: One of the  
12 things I always find a little amorphous in the rule  
13 when I'm trying to figure out whether to grant it or  
14 not was sort of is it being done in anticipation? Is  
04:48 15 it being -- is it really legitimately to try to figure  
16 out whether there is a lawsuit there or not, or is it?  
17 Your intuition can tell you and the facts and  
18 circumstances can tell you.

19 I denied a couple of those on the grounds  
04:48 20 that it was obvious they were going to file a lawsuit.  
21 It was clear, you know, a lawsuit was obviously going  
22 to be filed there. So it wasn't to see if a lawsuit  
23 should be filed or not. It was clearly sort of an end  
24 run, you know, kind of trying to get there first.

04:48 25 So the rule, if applied properly, I think, at

1 least the way it was written back then, they have to  
2 show you that they're really legitimately trying to  
3 figure out whether there ought to be a lawsuit as  
4 opposed to obviously in a case there is going to be a  
5 lawsuit.

6 MS. SWEENEY: The lawyer has to aver  
7 that. I don't remember if it has to be verified or  
8 not; but you have to go represent to the Court that  
9 you're investigating and that -- I mean, you do.

04:48 10 That's the whole basis for getting leave to do a 202  
11 is you have got to go in there and show the Court that  
12 your purpose is to determine whether or not a lawsuit  
13 is feasible or that there, or in the case where you're  
14 doing it in a perpetuation it's something different,  
04:49 15 but in the context we're talking about. So you have  
16 already got the lawyers having to meet that standard  
17 to the Court's satisfaction.

18 HONORABLE CARLOS LOPEZ: I guess I was  
19 just saying if we're going to do -- it might be  
04:49 20 helpful -- I'm just throwing this out -- maybe to put  
21 some kind of flesh on that bones as to what the trial  
22 judge is supposed to be looking for in deciding  
23 whether he agrees with that or not. I mean, it's just  
24 sort of, you know.

04:49 25 CHAIRMAN BABCOCK: It does have to be

1 verified, Paula; but it doesn't take very much to say  
2 under oath that "I want to take this guy's deposition  
3 to investigate whether or not I'm going to file a  
4 lawsuit." I mean, he could easily meet that in my  
04:49 5 case, because he's trying to depose the reporter to  
6 see if he could get the report to admit "Yes. I lied  
7 about this guy and I did it with actual malice and I  
8 was a bad guy." Now you wouldn't expect him to say  
9 that; but he sure in good faith could say "I'm  
04:50 10 investigating a lawsuit." Yes, Ralph.

11 MR. DUGGINS: I think those of you who  
12 are new to the committee may not have seen the  
13 experience I had that is a response to your question.  
14 I know you've seen it. But it was a troubling  
04:50 15 situation to me. It's a similar abuse to the one Chip  
16 just described in that we had a young man at a private  
17 school in Fort Worth who threatened to kill another  
18 student and was kicked out of school. And his parents  
19 enlisted the aid of a local former -- a lawyer who was  
04:50 20 a former trustee and proceeded to come after the  
21 headmaster and the middle school principal and the  
22 teacher and file a 202 Proceeding on the pretense that  
23 they wanted to investigate a breach of contract and an  
24 intentional infliction of emotional distress claim.  
04:51 25 It doesn't take much to say "We think my son was

1 abused when he was interviewed by the school  
2 administration."

3 And we suspected that this was really just a  
4 plan to stir up the board against the headmaster and  
04:51 5 try to convince the board not to renew his contract  
6 which was up for renewal later that year. And the  
7 judge granted the petitioner two hours with the  
8 headmaster, the middle school principal and two of the  
9 teachers who were involved and specified exactly what  
04:51 10 documents were to be produced for the deposition.

11 And this order was entered in June and the  
12 depositions were set for September about a week after  
13 the contract renewal date. And in the meantime the  
14 parents continued to foment controversy over the  
04:52 15 headmaster, and the board eventually decided not to  
16 renew the headmaster's contract.

17 That decision was on a Monday. The  
18 depositions were scheduled two days later. The day  
19 after the contract was not renewed we got a notice  
04:52 20 from the petitioner's lawyer saying he was canceling  
21 the deposition because he had issues over what  
22 documents were to be produced even though the judge  
23 had already specified exactly what was to be produced.  
24 And he said he'd take them up with the Court.

04:52 25 He never did. He never took the depositions

1 and dismissed the matter for want of prosecution a  
2 year later. But it cost the school a substantial  
3 amount of money because it had to hire me to represent  
4 the school and another lawyer in Fort Worth to  
04:52 5 represent the four individuals. It created a great  
6 deal of anguish among these people. I mean, it was  
7 clearly misused for the wrong purpose; and yet we had  
8 no way to recover even the out of pocket costs that  
9 the school incurred there under this rule.

04:53 10 And so my point is if we're going to keep the  
11 rule, and I see good and bad with the rule, is that we  
12 ought to consider adding some provision that allows  
13 the Court to condition the discovery on payment of  
14 fees or costs or that has some ability to sanction a  
04:53 15 petitioner who has abused it or misused it for the  
16 wrong kind of reasons.

17 CHAIRMAN BABCOCK: Paula.

18 MS. SWEENEY: And my comment is the same  
19 as the response that I sent you when you first  
04:53 20 circulated that: The depositions were never even  
21 taken and a suit was not filed. And so there is to me  
22 that's an example of maybe the rule worked. Maybe the  
23 202 deposition that would have been taken, if it had  
24 been taken, would have gone even further towards  
04:54 25 precluding a lawsuit. But these guys are complaining

1 that they didn't get sued.

2 MR. DUGGINS: No.

3 MS. SWEENEY: Well, then we can't win.

4 MR. DUGGINS: No. We're complaining that

04:54 5 we incurred a great deal of expense and had to spend a

6 lot of time on a proceeding that was a bogus

7 proceeding because they never intended to sue. They

8 never intended to take the depositions in my view, or

9 if they did, they were only designed to try to run the

04:54 10 headmaster off. These are totally separate issues.

11 MS. SWEENEY: You don't think regular

12 sanctions rules apply? Because you are saying they

13 filed a frivolous or not in good faith motion.

14 MR. DUGGINS: Have you ever had Rule 13

04:54 15 sanctions levied?

16 MS. SWEENEY: I didn't ask that.

17 MR. DUGGINS: I've never in 26 years

18 seen them levied.

19 CHAIRMAN BABCOCK: Judge Sullivan and

04:54 20 then Carl.

21 MR. SULLIVAN: I think procedurally the

22 relief is already available under probably under 215

23 here, under Rule 13 and in the Civil Practices and

24 Remedies Code based on the way you characterized that

04:55 25 situation. There may be a different issue about the

1 willingness of the judge to actually look into it and  
2 then award sanctions if they found that it was in bad  
3 faith and/or for the purposes of harassment; but I  
4 think there is no new relief necessary in this  
04:55 5 situation.

6 MS. SWEENEY: Did you-all ask for it?  
7 Or Chip, did you-all ask for it? I mean, you-all are  
8 talking about egregious conduct; but I'm not hearing  
9 any motions filed with any trial courts.

04:55 10 CHAIRMAN BABCOCK: Well, Paula, I don't  
11 think I said "egregious conduct." In fact I think  
12 that the way the rule is written the person who was  
13 asking for the depositions was able to meet the  
14 requirements of the rule. The problem is that the  
04:55 15 rule as written allows somebody to circumvent the  
16 protections that a defendant in that circumstance  
17 would normally obtain, and the reason those  
18 protections aren't available is because they haven't  
19 filed suit yet.

04:56 20 I don't -- I'm sure we did not. I know we  
21 didn't file for sanctions; and I don't think sanctions  
22 would have been appropriate if we filed for them  
23 because the proponent here met the requirements of the  
24 rule. I mean, he didn't swear in a phony way or  
04:56 25 anything. It's just that it was very expensive to the

1 responding party to do that, and the cause of the  
2 expense was that they weren't entitled to the  
3 protections that they normally would have gotten by  
4 requiring either by special exception or if the  
04:56 5 pleading stated it, what the defamatory broadcast was  
6 and what in that broadcast the complainant was  
7 claiming was false. Carl.

8 MR. HAMILTON: John, you may remember  
9 this better than I about Roger Hughes' complaint. He  
04:56 10 had some complaint about malpractice claims and the  
11 plaintiffs' lawyers noticing and getting the  
12 deposition of the doctor, defendant doctor sometimes  
13 even without representation on the part of the doctor,  
14 because there had been no lawsuit filed, there was no  
04:57 15 insurance coverage, the doctor didn't want to hire a  
16 lawyer to pay him.

17 MR. MARTIN: Yes. He mentioned that.  
18 And he mentioned the time limits issue, the fact that  
19 the time limits in the rules for deposition after a  
04:57 20 suit is filed arguably don't apply to this kind of  
21 proceeding, so it was used as a way to get more hours  
22 of deposition testimony. And he said they were going  
23 into opinions and all those other things. I don't  
24 remember all the points he made.

04:57 25 CHAIRMAN BABCOCK: Let me ask a question

1 of Justice Hecht. Governor Perry's letter to the  
2 Court has got some gray hair on it. It's been a  
3 while, and we have this one letter and maybe another  
4 and then anecdotal complaints such as the one that  
04:58 5 Ralph and I have indicated. Is it something the Court  
6 still wants us to look at, or is it not a problem in  
7 the jurisprudence of the state?

8 JUSTICE NATHAN HECHT: Well, no. I  
9 mean, the Court still wants to find out what the  
04:58 10 answer is to the questions that have been raised and  
11 see if there will be changes in the rule.

12 CHAIRMAN BABCOCK: Carl.

13 MR. HAMILTON: Can I ask Judge Hecht a  
14 question? I know this came about in the new rule sort  
04:58 15 of thing. I don't remember how this came about. I  
16 know before that we had a rule on perpetuation of  
17 testimony when somebody was about to die or something.  
18 How did we get into this position of this kind of  
19 deposition?

04:58 20 JUSTICE NATHAN HECHT: I blame this on  
21 Dorsaneo.

22 (Laughter.)

23 PROFESSOR DORSANEO: You did that.

24 JUSTICE NATHAN HECHT: I did it. We  
04:58 25 were down to the end of the discovery rules project.

1 The only two discovery rules that we hadn't dealt  
2 with, they were in the old rules were --

3 PROFESSOR DORSANEO: 737.

4 JUSTICE NATHAN HECHT: -- 737.

04:59 5 PROFESSOR DORSANEO: And 187 was the  
6 deposition to perpetuate testimony.

7 JUSTICE NATHAN HECHT: And so we thought  
8 why do we get all this way and not finish out these  
9 last two rules? Which nobody ever used and there was  
04:59 10 never any controversy. They used them in probate  
11 cases.

12 There is a federal analog to these rules.  
13 It's about two sentences long in the federal rules,  
14 and they don't ever use it. In fact they talked about  
04:59 15 it in the federal committee the other day, and none of  
16 the other judges ever even heard of the rule. And so  
17 it had never come up, so we thought this is easy.  
18 We'll combine these two provisions. There don't need  
19 to be two rules. They both cover the same thing.  
04:59 20 We'll take the standards out of the rules and put them  
21 in this rule and we'll be done with it.

22 But I don't think much changed in that  
23 process. At least I was not aware that anything was  
24 being changed when that rule was being written; but it  
05:00 25 did sort of bring it to people's attention in the

1 process of reviewing the proposed changes. It got  
2 minor comments, and there was some question about  
3 whether we should include it at all or not in the last  
4 package before they were adopted. And the Court was  
05:00 5 persuaded by a few lawyers who wrote and said "Every  
6 once in a while, once in a great while we use this  
7 rule to make sure that we're not missing something or  
8 not leaving a claim uninvestigated. It doesn't have  
9 to be used very often, but when it's needed it really  
05:00 10 is useful." And since it had never caused any problem  
11 in the past we included it in the rules.

12 Well, it now is getting fairly widespread use  
13 in a whole lot of contexts that it was never used in  
14 before. And so I don't think that's because the rule  
05:01 15 changed so much as it is in my view as it is because  
16 people just became aware of it during that process and  
17 started using it.

18 CHAIRMAN BABCOCK: Bill.

19 PROFESSOR DORSANEO: The part of it that  
05:01 20 came from 187 did change a little bit, because it  
21 talked about, I believe it talked about an allegation  
22 that you couldn't file the suit, the anticipated suit  
23 for some reason.

24 JUSTICE NATHAN HECHT: Right.

05:01 25 PROFESSOR DORSANEO: Like somebody

1 hadn't died yet in a probate proceeding.

2 JUSTICE NATHAN HECHT: But the other  
3 rule --

4 PROFESSOR DORSANEO: 737 did not.

5 JUSTICE NATHAN HECHT: -- was pretty  
6 broad.

7 MR. PROFESSOR DORSANEO: Was much  
8 broader. So in effect it did recodify and bring  
9 everything into one rule that probably didn't change  
05:01 10 existing law very much.

11 We could go back and look at those requirements  
12 which I also believe were in the federal rule and see  
13 whether maybe that should be reinstated for this rule  
14 and just frankly just forget that we ever had an  
05:02 15 equitable bill of discovery remnant from the days of  
16 yesteryear in the form of Rule 737.

17 MR. LOW: Isn't it true that now  
18 plaintiffs are using this? Used to a defendant  
19 always -- I mean, a plaintiff always did that. Now  
05:02 20 the defendants are doing that, which had never been  
21 done before.

22 But the question I have with the rule is years  
23 back I represented International Harvester. A guy  
24 died in a truck, NorFreight, and so they used this to  
05:02 25 take depositions. We found out they were going to be

1 taking depositions and just attended. And nothing  
2 said I had a right to ask questions or anything,  
3 because I don't represent NorFreight. They're not in  
4 bed with me. But I wanted to be there, because I knew  
05:03 5 we were fixing to be sued.

6 So I just went. I don't know what my authority  
7 was. And I asked questions. And I wasn't bigger than  
8 the other lawyer. I just convinced him I had a right  
9 to do it. But the rule didn't tell me that.

05:03 10 What happens in a situation like that when you  
11 know about it and you know who they are really setting  
12 up? You have no right to ask the question.

13 CHAIRMAN BABCOCK: Bobby.

14 MR. MEADOWS: Well, I was just going to  
05:03 15 join with Buddy on that. That's one of Mr. Hughes'  
16 complaints is that there is no sanction or there is  
17 nothing to do about improper use of the rule and  
18 sometimes it's used in a way excluding parties that  
19 would ordinarily be involved.

05:03 20 I was just going to add another thing while  
21 we're getting this on the record, the nature of the  
22 complaint. In addition to what Carl said, what  
23 Mr. Hughes also points out is that the rule is used to  
24 avoid Article 4509(i) which requires prefiling notice  
05:04 25 of a claim, because he says what happens when you get

1 the 202 Order is that it triggers everything that goes  
2 with the lawsuit. The doctors will notify their  
3 insurance carrier, engage a lawyer. They'll hire  
4 experts to investigate the matter in controversy. So  
05:04 5 you've avoided all of the reasons from 4509(i).

6 I don't practice in this area. I don't know.  
7 Bit that's something that he articulated as a serious  
8 concern is that an order under Rule 202 is avoiding  
9 the purposes of 4509(i).

05:04 10 CHAIRMAN BABCOCK: Okay. Well, Bobby,  
11 why don't you and your subcommittee discuss this  
12 further and then, you know, bring us back a proposal  
13 at the next meeting. The proposal may be to do  
14 nothing.

05:05 15 MR. MEADOWS: Can I just say something  
16 with the idea of seeking direction here?

17 CHAIRMAN BABCOCK: Yes.

18 MR. MEADOWS: We met. I mean, we  
19 weren't in full attendance. And we are going to try  
05:05 20 to do better about making sure everybody is  
21 participating. But we were aware of these issues. We  
22 read the rule and basically just read it with the eye  
23 of under the cases that had been decided that deal  
24 with the rule and questions about appealability and  
05:05 25 scope and discovery and that sort of thing along with

1 these issues that had been raised by complaints are  
2 there ways to make the rule better. But that's just  
3 the way we went about it. I don't know if that's what  
4 you're suggesting or we need to really, you know,  
05:05 5 broaden the scope of inquiry or not.

6 CHAIRMAN BABCOCK: I think that the way  
7 we work in the subcommittee process is the Court sends  
8 us a rule to look at. Then the subcommittee discusses  
9 it and they come to the full committee and say "Hey,  
05:06 10 here are the issues we've identified. We recommend  
11 that there be no change on this and we recommend that  
12 this language change to reflect this" and then we  
13 debate it.

14 MR. MEADOWS: That's fine. We will look  
05:06 15 at it. We will do a little more investigation and  
16 we'll just bring you our best judgment on what the rule  
17 ought to look like.

18 CHAIRMAN BABCOCK: Okay. Great. Yes,  
19 Paula.

05:06 20 MS. SWEENEY: Can I just suggest one  
21 thing to you-all? Because I think part of the issue  
22 is that, as you say and some say, it's easy to swear  
23 you don't intend to file a lawsuit. I don't agree  
24 that that's easy. I think if I say something to a  
05:06 25 Court, especially if I'm attesting to it, that it

1 ought to be true. But maybe that's where the teeth  
2 ought to be in the part one, in the motion process to  
3 the Court that there ought to be some more substantial  
4 statement that "At this time I don't intend to sue  
05:07 5 this person and I need this deposition to learn  
6 facts."

7 And then I think the other area of inquiry  
8 ought to be scope. I mean, I think accumulating hours  
9 is kind of for bean counters who spend a lot of time  
05:07 10 worrying about how many hours they get per deposition.  
11 That doesn't seem that important to me. But the scope  
12 does, because if it really is an investigatory  
13 deposition, even if you're asking a defendant doctor  
14 why did you do what you did, well, that's one thing.  
05:07 15 And yes, that's going to get him to give some opinion,  
16 because you can't talk about medicine without having  
17 some opinion. But that's a whole different thing from  
18 "Tell me the standard of care. And don't you recall  
19 in literature?" And so I think if you-all are trying  
05:07 20 to address those problems, that those two areas would  
21 go quite a long way.

22 CHAIRMAN BABCOCK: Okay. Well, here is  
23 the good news. We're through our docket, and so we  
24 don't have to come back tomorrow. So we can party  
05:08 25 long and hard tonight. We're in recess, thank you,

1       Until March 5th.

2                               (Adjourned 5:08 p.m.)

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CERTIFICATE OF THE HEARING OF  
SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter,  
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