

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 04-9224

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE AND THE TEXAS RULES OF JUDICIAL ADMINISTRATION

ORDERED that:

1. Rules 103, 173, 226a, 292, and 536(a) of the Texas Rules of Civil Procedure are amended as follows.
2. Rule 13.9 of the Texas Rules of Judicial Administration is amended as follows.
3. These amendments, with any changes made after public comments are received, take effect as follows:
 - a. for Rules 103, 173, 226a, and 536, on February 1, 2005, in all pending cases;
 - b. for Rule 292, on February 1, 2005, in all cases filed on or after September 1, 2004;
 - c. for Rule 13.9, on March 1, 2005, in all pending cases.
4. Comments appended to these rules are intended to inform their construction and application.
5. The Clerk is directed to:
 - a. file a copy of this Order with the Secretary of State;

b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

c. send a copy of this Order to each member of the Legislature; and

d. submit a copy of the Order for publication in the *Texas Register*.

6. These amendments may be changed in response to comments received before January 15, 2005. Any interested party may submit comments in writing as follows:

by mail to: Ms. Lisa Hobbs, Rules Attorney
The Supreme Court of Texas
P.O. Box 12248
Austin TX 78711

by fax to: 512-463-1365
Attn: Ms. Lisa Hobbs, Rules Attorney

by email to: Lisa.Hobbs@courts.state.tx.us

SIGNED AND ENTERED this 7th day of October, 2004.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Priscilla R. Owen, Justice

Harriet O'Neill, Justice*

Steven Wayne Smith, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

* Not participating in the adoption of amendments to Rules 103 and 536(a), Texas Rules of Civil Procedure.

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE

Rule 103. Who May Serve

Process — including citation and other notices, writs, orders, and other papers issued by the court — may be served anywhere by (1) any sheriff or constable or other person authorized by law ~~or~~, (2) ~~by any person authorized by law or by written order of the court who is not less than eighteen years of age, or~~ (3) any person certified under order of the Supreme Court. ~~No person who is a party to or interested in the outcome of a suit shall serve any process.~~ Service by registered or certified mail and citation by publication ~~shall~~ must, if requested, be made by the clerk of the court in which the case is pending. But no person who is a party to or interested in the outcome of a suit may serve any process. The order authorizing a person to serve process may be made without written motion and no fee ~~shall~~ may be imposed for issuance of such order.

Comment – 2005

The rule is amended to clarify that it applies to service of all process and to include among the persons authorized to effect service those who meet certification requirements promulgated by the Supreme Court.

Rule 173. Guardian Ad Litem

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

173.1 Appointment Governed by Statute or Other Rules

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

173.2 Appointment of Guardian ad Litem

(a) *When Appointment Required or Prohibited.* The court must appoint a guardian ad litem for a party represented by a next friend or guardian only if:

(1) the next friend or guardian appears to the court to have an interest adverse to the party, or

(2) the parties agree.

(b) *Appointment of the Same Person for Different Parties.* The court must appoint the same guardian ad litem for similarly situated parties unless the court finds that the appointment of different guardians ad litem is necessary.

173.3 Procedure

(a) *Motion Permitted But Not Required.* The court may appoint a guardian ad litem on the motion of any party or on its own initiative.

(b) *Written Order Required.* An appointment must be made by written order.

(c) *Objection.* Any party may object to the appointment of a guardian ad litem.

173.4 Role of Guardian ad Litem

(a) *Court Officer and Advisor.* A guardian ad litem acts as an officer and advisor to the court.

(b) *Determination of Adverse Interest.* A guardian ad litem must determine and advise the court whether a party's next friend or guardian has an interest adverse to the party.

(c) *When Settlement Proposed.* When an offer has been made to settle the claim of a party represented by a next friend or guardian, a guardian ad litem has the limited duty to determine and advise the court whether the settlement is in the party's best interest.

(d) *Participation in Litigation Limited.* A guardian ad litem:

(1) may participate in mediation or a similar proceeding to attempt to reach a settlement;

(2) must participate in any proceeding before the court whose purpose is to determine whether a party's next friend or guardian has an interest adverse to the party, or whether a settlement of the party's claim is in the party's best interest;

(3) must not participate in discovery, trial, or any other part of the litigation unless:

(A) further participation is necessary to protect the party's interest that is adverse to the next friend's or guardian's, and

(B) the participation is directed by the court in a written order stating sufficient reasons.

173.5 Communications Privileged

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

173.6 Compensation

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

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

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

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

Rule 173.7 Review

- (a) *Right of Appeal.* Any party may seek mandamus review of an order appointing a guardian ad litem or directing a guardian ad litem's participation in the litigation. Any party and a guardian ad litem may appeal an order awarding the guardian ad litem compensation.
- (b) *Severance.* On motion of the guardian ad litem or any party, the court must sever any order awarding a guardian ad litem compensation to create a final, appealable order.
- (c) *No Affect on Finality of Settlement or Judgment.* Appellate proceedings to review an order pertaining to a guardian ad litem do not affect the finality of a settlement or judgment.

Comment — 2004

- 1. The rule is completely revised.
- 2. This rule does not apply when the procedures and purposes for appointment of guardians ad litem (as well as attorneys ad litem) are prescribed by statutes, such as the Family Code and the Probate Code, or by other rules, such as the Parental Notification Rules.
- 3. The rule contemplates that a guardian ad litem will be appointed when a party's next friend or guardian appears to have an interest adverse to the party because of the division of settlement proceeds. In those situations, the responsibility of the guardian ad litem as prescribed by the rule is very limited, and no reason exists for the guardian ad litem to participate in the conduct of the litigation in any other way or to review the discovery or the litigation file except to the limited extent that it may bear on the division of settlement proceeds. See *Jocson v. Crabb*, 133 S.W.3d 268 (Tex. 2004) (per curiam). A guardian ad litem may, of course, choose to review the file or attend proceedings when it is unnecessary, but the guardian ad litem may not be compensated for unnecessary expenses or services.
- 4. Only in extraordinary circumstances does the rule contemplate that a guardian ad litem will have a broader role. Even then, the role is limited to determining whether a party's next friend or guardian has an interest adverse to the party that should be considered by the court under Rule 44. In no event may a guardian ad litem supervise or supplant the next friend or undertake to represent the party while serving as guardian ad litem.

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

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

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

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

Rule 226a. ~~Admonitory~~ Instructions to Jury Panel and Jury.

The court ~~shall~~ must give such ~~admonitory~~ instructions to the jury panel and to the jury as may be prescribed by order of the Supreme Court in an order or orders entered for that purpose under this rule.

Comment – 2005

The rule is clarified. With these amendments, the Supreme Court has ordered changes in the prescribed jury instructions consistent with Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.04, 2003 Tex. Gen. Laws 847, 888, codified as Tex. Civ. Prac. & Rem. Code § 41.003.

Rule 292. Verdict by Portion of Original Jury

(a) Except as provided in subsection (b), a~~A~~ verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten or more members of an original jury of twelve or of the same five or more members of an original jury of six. However, where as many as three jurors die or be disabled from sitting and there are only nine of the jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.

(b) A verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages.

Comment – 2005

The rule is divided into two subsections. Subsection (a) is clarified. Subsection (b) is added to make the rule consistent with Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.04, 2003 Tex. Gen. Laws 847, 888, codified as Tex. Civ. Prac. & Rem. Code § 41.003.

Rule 536. Who May Serve and Method of Service

(a) Process — including citation and other notices, writs, orders, and other papers issued by the court — may be served anywhere by (1) any sheriff or constable or other person authorized by law ~~or~~, (2) ~~by~~ any person authorized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court. ~~No person who is a party to or interested in the outcome of a suit shall serve any process.~~ Service by registered or certified mail and citation by publication ~~shall~~ must, if requested, be made by the clerk of the court in which the case is pending. But no person who is a party to or interested in the outcome of a suit may serve any process. The order authorizing a person to serve process may be made without written motion and no fee ~~shall~~ may be imposed for issuance of such order.

(b) [No change.]

(c) [No Change.]

Comment – 2005

Subsection (a) is amended to clarify that it applies to service of all process and to include among the persons authorized to effect service those who meet certification requirements promulgated by the Supreme Court.

**AMENDMENTS TO THE
TEXAS RULES OF JUDICIAL ADMINISTRATION**

13.9 Review.

(a) *MDL Panel Decision.* ~~An o~~Orders of the MDL Panel, including ~~those one~~ granting or denying a motions for transfer, may be reviewed only by the Supreme Court in an original proceedings.

(b) *Orders by the Trial Court and Pretrial Court.* ~~An o~~Orders and or judgments of the trial court ~~and or~~ pretrial court may be reviewed by the appellate court that regularly reviews orders of the court in which the case is pending at the time review is sought, irrespective of whether that court issued the order or judgment to be reviewed. A case involving such review may not be transferred for purposes of docket equalization among appellate courts.

(c) *Review Expedited.* An appellate court must expedite review of an order or judgment in a case pending in a pretrial court.

Comment – 2005

Subsection (b) is amended and subsection (c) is added to clarify the handling of appeals by appellate courts. Subsection (b) forbids transfer for docket equalization but not for other purposes that might arise. Subsection (c) does not require that an appeal from an order or judgment of a case pending in a pretrial court be treated as an accelerated appeal under the Texas Rules of Appellate Procedure if it would otherwise not be accelerated. Rather, subsection (c) requires expedited consideration by the appellate court regardless of whether review is sought by an appeal that is or is not accelerated, or by mandamus.