THE UNIVERSITY OF TENNESSEE KNOXVILLE

Tennessee Journal of Law and Policy

Volume 7
Issue 2 *Summer 2011*

Article 4

November 2011

Panel Discussion 1: Tennessee Supreme Court Rule 40A

Elizabeth Sykes

Lucie Brackin

Jennifer Evans Williams

the legal field, nonprofits, academia, and social services all supporting our efforts to put together a day where advocates could really discuss what has already been done, what worked and what didn't, and what should be done in the future. Today, we have some outstanding speakers for you. I'm so excited. I think it's going to be a great day. At the end of each session we're going to have a question and answer period, and I would encourage each of you to ask questions and to share your thoughts with the panelists, because the more we learn, the more places we can go. Thank you so much for being here.

Let's move on to panel one. We have a great line-up today. We have Ms. Jennifer Evans Williams, who joins us from Springfield, Tennessee, and she is a certified child law specialist. We have Ms. Elizabeth Sykes from the Administrative Office of the Courts in Nashville, Tennessee. And all the way from Memphis, we have Ms. Lucie Brackin of the Landers Firm. She is on the Rule 40A[1] work group for the Tennessee Supreme Court. So thank you all so much for being here and I'll turn it over to you.

PANEL DISCUSSION 1: TENNESSEE SUPREME COURT RULE 40A

Elizabeth Sykes
Lucie Brackin
Jennifer Evans Williams

ELIZABETH (LIBBY) SYKES: Thank you very much. My name is Libby Sykes. I'm the director of the Administrative Office of the Courts in Nashville, and it is my pleasure to be here today. We're going to talk a little bit about Rule 40A, which governs the appointment of guardians ad litem in parenting cases. When we were

[1]TENN. SUP. CT. R. 40A.

talking about the program and how we wanted to present it today, it was decided that I was not as much the expert on the day-to-day application of the rule as Jennifer and Lucie are, so I will start with a little bit about the evolution of this rule and how it got started.

On August 27, 2007, almost four years ago now, I was in my office. I had several staff members who were attending a hearing before the General Assembly's House Children and Family Affairs Committee, and I remember when the phrase "impeaching a judge" came up, I thought, "Well, I guess I'd better go across the street and see what all is going on." I knew that we were having a hearing on the use of guardians ad litem. There were probably four women testifying from Shelby County, and all of them were going through very high-conflict divorces. All of them had had guardians ad litem, or in some instances attorneys ad litem, appointed in their cases. They all had some common complaints about the role of a guardian ad litem, the duration of appointment, and the cost. All of them had guardian ad litem fees in excess of $30,000, and one was far in excess of $100,000. They all complained of instances where they were assessing the guardian ad litem fees as child support. They also talked about the use of the guardian ad litem reports. In one instance, there was actually an attorney at litem appointed to represent the guardian ad litem.

One of the parties was a woman by the name of Mrs. Susie Andrews, who was going through a divorce in Shelby County. At that time her divorce had not been tried. Several months after this hearing, the case was tried by Senior Judge Kurtz from Davidson County, who was brought in to hear the case. Dr. Andrews was a physician, and he and Mrs. Andrews had been married about eleven years and had one child. They decided they were going to get a divorce, and I don't know what all that transpired before that, but during this case Dr. Andrews asked that a guardian ad litem be appointed.

Before I start reading from some of the orders that Judge Kurtz entered relating to this, I wanted to say, first of all, that Judge Kurtz said in this order there was no criticism of the efforts of the guardian ad litem or the attorney ad litem, and that they both conducted themselves in a highly professional manner and performed the role they assumed. The issue was not whether their intentions were good but, rather, did they exceed the boundaries drawn by the law for their respective roles? Now I'm going to go back and look at this opinion,[2] because it talks about the role of the guardian ad litem and how the role of the guardian ad litem was viewed in the culture of Shelby County. It said that on December 17, 2008, the guardian ad litem and attorney ad litem filed a motion to set and assess fees. As near as the Court can compute, the guardian ad litem had already been paid fees in around $71,000 and contends she is owed another $99,400, for a total of $170,000. The attorney ad litem has already been paid around $30,000 and seeks an additional $69,800, for a total of about $100,000.[3] He also writes earlier in this opinion that the attorney fees, the guardian ad litem fees, and the attorney ad litem fees all were in excess of a million dollars in this divorce of an eleven-year marriage involving one child.[4]

I would also like to mention that in this divorce, both the parties agreed to the appointment of both the attorney ad litem and the guardian ad litem. So it's not the initial appointment order at issue, but rather while the case was pending, what the role of the guardian ad litem was. Judge Kurtz said in his order that while the case was pending, the guardian ad litem served as mediator, arbitrator, and decision-maker and attempted to dissolve

---

[2]Andrews v. Andrews, _ S.W.3d _, 2010 WL 3398826 Aug. 31, 2010, *appeal denied* Tenn. Ct. App. Mar. 9, 2011.
[3]*Id.* at *15.
[4]*Id.* at *11.

disputes between the parties. It describes how the guardian ad litem interviewed twenty people and ultimately submitted a report that with the exhibits and other things that were attached was almost 300 pages long.[5] In his order, Judge Kurtz cites to a previous opinion, *Toms,*[6] that talks about what the proper role of a guardian ad litem is, and he concludes that some of the cases in Shelby County had far exceeded what a guardian ad litem's proper role is. Judge Kurtz wrote that during the hearing on what fees should be awarded to the guardian ad litem, there was an affidavit from an attorney in Shelby County who was often appointed as a guardian ad litem who said the role that the guardians had actually assumed speaks to an expectation which does not appear in any court order and expresses a role beyond what is authorized by legal authorities referenced.[7] He also writes that it also appears a legal culture had developed in the 30th Judicial District,[8] in which the guardians ad litem assumed authority beyond the parameters set forth in case law.

However, he says, when push comes to shove, law must trump culture. He talks about the guardian ad litem in the case, and says that she became an active participant in the poisonous dynamic between the parties, that she became a mini judge, and that her relationship with Mr. Andrews was so estranged that she had to procure her own attorney because she, for all practical purposes, became a third party to what was a two-party divorce.[9] He ultimately reduced her fee and awarded her an additional $7,500, and I think gave the attorney ad litem $5,000.[10]

These were some of the things that the parties were speaking of during that hearing on August 27, 2007. As I

---

[5]*Id.* at *7.
[6]*Toms v. Toms,* 209 S.W.3d 76 (Tenn. Ct. App. 2005).
[7]*Andrews*, 2010 WL 3398826 at *12.
[8]The 30th Judicial District of Tennessee encompasses Shelby County.
[9]*Andrews*, 2010 WL 3398826 at *5, *14.
[10]*Id.* at *14.

said, this divorce had not been tried at that time; this order had not been entered. After that hearing, during the 2008 legislative session several bills were introduced basically to prohibit the appointment of guardians ad litem in these types of cases. There was considerable discussion about impeaching judges. We knew that wasn't going anywhere, and that it was just a lot of discussion, but members of the Supreme Court, I remember particularly then Chief Justice William Barker, met with the chairman of the House Children and Family Affairs Committee, Mr. John Berry from Memphis, and asked Representative Berry if he would allow the Supreme Court to implement a rule rather than the General Assembly just passing a law that basically did away with the court's discretion to appoint a guardian ad litem.

After that session, they allowed the Court that time. After numerous meetings with judges and other parties, the first Rule 40A was filed on April 1, 2008, for public comment. That public comment period ended on June 30, 2008. On May 1, 2009, almost a year later, the first rule went into effect.[11] That rule was a provisional rule, meaning it had a one-year application. On April 30, 2010, the Supreme Court entered an order extending the effective date of that rule until December 31, 2010.[12] Also, on August 2, 2010, the Supreme Court entered an order appointing the Rule 40A work group that Ms. Brackin was

[11] *See* In Re: Order Establishing Tenn. Sup. Ct. R. 40A, Appointment of Guardians Ad Litem in Custody Proceedings, M2009-01926-SC-RL2-RL (filed Feb. 17, 2009), *available at* http://www.tncourts.gov/sites/default/files/rule_40a_order_2-17-09.pdf (hereinafter "Order Establishing").

[12] In Re: Tenn. Sup. Ct. R. 40A, Extension of Effective Date, M2009-01926-SC-RL2-RL (filed Apr. 30, 2010), *available at* http://www.tncourts.gov/sites/default/files/order_extending_comment_period_and_exp_date_of_rule40a.pdf.

on.[13] The court set another comment deadline of November 30th, 2010. On December 15th, 2010, the work group submitted its report.[14] On January 21st, 2011, the Supreme Court published the work group's report for public comment and also extended the effective date of the provisional rule which was filed on May 1st, 2009, until further orders of the court.[15] They also put in another public comment period on the work group's report, which ended on March 14th, 2011.[16] We would anticipate in the next few months that the Supreme Court will act on the work group's report.

So that is the evolution of this provisional rule. I'd like to turn it over to Lucie Brackin. Lucie was a member of the Rule 40A work group, which was chaired by Professor Janet Richards from the University of Memphis School of Law, and I think that Lucie is going to go through the rule and some of the changes the work group has suggested and some of the concerns that they had with the original rule that was filed.

LUCIE BRACKIN: Thank you, Libby. It was such an honor to be asked to participate in the work group. I've been in private practice in Memphis since 2002, and I have served as a guardian ad litem and as an attorney who was appointed a guardian ad litem, so I was quite honored to be asked to serve along with two other private practice attorneys and several judges and magistrates from across Tennessee. I think the point in the makeup of the group was to get representatives from all across the state. I know that all of the ladies that testified at the August 27, 2007 hearing

---

[13]*See* In Re: Tenn. Sup. Ct. Rule 40A, M2009-01926-SC-RL2-RL (filed Jan. 21, 2011), *available at* http://www.tncourts.gov/sites/default/files/rule_40a._final_comment_and_extension_order.1.21.11.pdf [hereinafter 40A Work Group].
[14]*Id.*
[15]*Id.*
[16]*Id.*

were related to Shelby County or our area, and so I know it was important for the committee to have representatives from Shelby County. I was on there, along with Chancellor Arnold Goldin, from our county.

First, I want to talk about the process we used to formulate our proposed rule. Before I did this, I had no idea what went into something like this. One of our first meetings was in August, and we decided that we would set up regular conference calls monthly so that we could make sure and stay on track to get everything done by December. But, you know lawyers: you set your pretend deadline and then you have your real deadline. With each conference call, we would all put in our suggestions. We decided that we would go through the provisional rule section by section, make our modifications to it, and then submit that as a proposal to the Supreme Court. There was a wonderful lady at the courts, Mary Rose, who did a lot of the typing up of our meetings and doing the different drafts and circulating them around, and everyone would review them before we had our next call. The result was the order that we proposed to the court.

We tried to go back to our respective bars and get feedback from our members. Particularly I had some friends that worked within a work group within the TBA,[17] and they did an excellent job with their suggestions. I was sort of a liaison to let the committee know what they thought should be changed. I also had individual one-on-one discussions with the members of the bar about the real problems. The majority of the feedback was that we should have guardians ad litem limited to licensed attorneys. We wanted all the ethical obligations that went along with being an attorney to apply to those serving as guardians ad litem. The other big problem was in Section 9,[18] which was the "Participation in Proceeding" section that detailed what

[17]Tennessee Bar Association.
[18]TENN. SUP. CT. R. 40A, §9.

the guardian ad litem was supposed to do. There was a discrepancy between what Section 9 used to say and what other sections of the provisional rule seemed to say. I thought I might go through the rule and explain where we got the changes that we wanted to make. In Section 1,[19] our big change was to limit the definition of a guardian ad litem to a licensed attorney instead of a CASA[20] volunteer or another professional who the court could appoint, because that was a big change that the provisional rule made. We also put a commentary in there that the same attorney who was a Rule 40[21] guardian ad litem could also be a 40A guardian ad litem.

One thing that we felt in Section 2[22] was extremely important was what was going to happen to ongoing cases. At the time that the new rule would go into effect, we wanted the court to be able to reappoint a guardian to serve under the new rule rather than the old rule. I know that from my bar, people are waiting to see what happens before they appoint or seek to appoint a guardian ad litem. I have a case right now that I have put on hold, and I'm not going to seek a guardian ad litem appointment until the new rule goes into effect, because I feel right now a guardian is powerless and can't even get any information to the court unless one of the parties calls them as a witness. One of my good friends in Memphis right now is a guardian ad litem. She has done an investigation and has made internal recommendations to the attorneys. Well, neither side likes the recommendations, so that guardian is not going to be called. She has done this work, put in all this effort, and can't even get her information to the judge. I think that's a real problem.

---

[19]TENN. SUP. CT. R. 40A, §1.
[20]Court-Appointed Special Advocate.
[21]TENN. SUP. CT. R. 40.
[22]TENN. SUP. CT. R. 40A, §2.

We also wanted to change the language in Section 3 under the appointment section, in paragraph (c), to "the court *should* consider" and not "*shall* consider."[23] Not all of these factors are applicable to each situation, and we wanted the court to have the discretion to consider what the court wanted. Also, in several of the comments, we needed that catch-all paragraph at the end: "any other factors necessary to address the best interest of the child." You just can't plan for everything, and we wanted to have that as a way for the judge to consider something that you couldn't have foreseen.

We took out paragraph (d) of Section 4,[24] because if the guardian is going to be an attorney, there are ethical rules that have to be followed regarding any sort of conflict of interest, and it was no longer necessary. We took that section out, and we made (e) the new (d).[25] What we really worried about, particularly from Shelby County, is a situation where a guardian is agreed to by both the parties and the guardian does an investigation, puts all this work in, interviews witnesses, and then at the end a party says there was a conflict or comes up with all these complaints about the guardian because they don't like the final result. That's why we put "raised without delay" and "should be addressed,"[26] because we've had situations where at the end of the case, a new attorney becomes involved, and they say there was an issue with the guardian. Well, if they didn't raise it in the beginning, then they shouldn't be allowed to raise it in the end—unless, of course, there is a conflict between the new attorney and the GAL; however, this should have been raised before or when new counsel substituted in. So that's why we wanted that to be in there.

---

[23]TENN. SUP. CT. R. 40A, §3(c); *see also* 40A Work Group, *supra* note 13, App. at 2.
[24]TENN. SUP. CT. R. 40A, §4(d); *see also* 40A Work Group, *supra* note 13, App. at 4.
[25]*See* 40A Work Group, *supra* note 13, App. at 4.
[26]*Id.*

Next under Section 6, "Role of Guardian Ad Litem,"[27] one of the main complaints out of Shelby County was that the guardians were assuming judicial roles in the parties' situations and were arbitrating. We know now that there cannot be any arbitration of parenting issues because of *Tuetken*,[28] which I believe cert has been filed to the United States Supreme Court on that case. Under this proposed Rule 40A, we put under (b) that "the guardian ad litem shall not function as a special master for the court or perform any judicial or quasi-judicial responsibilities,"[29] because there were a lot of complaints that the guardians had too much power. Under Section 7,[30] regarding access to the child, you might have thought that it was a no-brainer that the guardian would be able to talk to a child without a parent being present. Well, there were parents who were insisting on being present. We put in here under subparagraph one that the guardian should have access to the child "without the presence of any other person unless otherwise ordered by the court,"[31] so that the court can be involved if that was an issue.

Under Section 8[32] we wanted to include the duties and responsibilities from Rule 40. Also, we thought the way that Section 8 was set up was confusing and paragraph (c) was unnecessary, so we redid the way that was organized. Also, under new subparagraph (c) of that section, we wanted to make it clear that there was no authority for an appointment of an attorney ad litem.[33] Before the *Andrews* case[34] came down from Judge Kurtz, it

---

[27]TENN. SUP. CT. R. 40A, §6.
[28]Tuetken v. Tuetken, 320 S.W.3d 262 (Tenn. 2010), *cert. denied*, 2011 U.S. LEXIS 3645 (U.S. May 16, 2011).
[29]*See* 40A Work Group, *supra* note 13, App. at 4.
[30]TENN. SUP. CT. R. 40A, § 7.
[31]40A Work Group, *supra* note 13, App. at 5.
[32]TENN. SUP. CT. R. 40A, §8.
[33]*See* Rule 40A Work Group, *supra* note 13, App. at 5-7.
[34] *Andrews*, 2010 WL 3398826.

was the accepted practice in Shelby County that if a guardian ad litem was being attacked by one of the attorneys, the guardian ad litem could have the protection of an attorney ad litem to defend and represent them. There was a situation where a guardian was deposed, and it was ugly. That really is more of a civility problem than a problem within the rule, but in response we wanted to make it clear that there would be no authority for the appointment of an attorney ad litem. For situations where the child's preference was in contrast to what really was best for the child, there had been an argument to allow in section (c) the appointment of an attorney ad litem to represent the preference of the child and then a guardian ad litem to represent the best interest of the child. We felt that just wasn't necessary, and that the guardian could outline for the court what the preference of the child was as well as well as advocate for the best interest of the child.

Section 9[35] was the other biggie. Once we decided that we wanted to limit who could be a guardian ad litem to an attorney and said that the guardian ad litem could take all actions that an attorney could, we eliminated most of the language in Section 9 and just said "all rights and privileges accorded to an attorney."[36] But one thing that we definitely wanted in there was for the guardian ad litem to be able to participate in every hearing and in alternative dispute resolution proceedings. I have found that a guardian ad litem can be instrumental in formulating a settlement, and nine times out of ten it is in the best interest of the children for a settlement to be reached. That's an important part of what a guardian ad litem should do: if a settlement could be facilitated and that guardian is in a position to help, then they need to and should do that. Under the commentary, we specifically wanted to state that the guardian ad litem may not be a witness or testify unless there are extraordinary

[35]TENN. SUP. CT. R. 40A, §9.

[36]*See* Rule 40A Work Group, *supra* note 13, App. at 7.

circumstances, and that there wouldn't be a report and recommendation to the court. In lieu of that, the guardian may file a pretrial brief or memorandum. There has to be a way to get the information to the court, and so we wanted to do that through a pretrial brief or memorandum. We didn't want there to be any ambiguity, so we just stated definitively in subparagraph (3)[37] that the guardian would present the results in the same manner as a lawyer presents a case—by calling witnesses, submitting evidence, and making arguments. That was a big change that we made from the provisional rule.

Of course, the fees and expenses section also had to be addressed.[38] I would invite you to read those opinions that ultimately came out in the cases of the ladies who testified, and you will see there were a lot of problems. Those cases were extremely unusual and extremely acrimonious. If you look at the *Andrews* case,[39] you can see the fees that the guardian and the attorney ad litem had are only a drop in the bucket compared to the fees that were spent on the attorneys in that case. We wanted to give the court a way to monitor fees, and we had a lot of discussion on that issue. There was a suggestion that the guardian should have to submit a fee request each month to the court to get paid. I felt like that would add even more time, because the guardian ad litem would have to file a motion or present it, give notice, go to court and argue it every single month, and that would just escalate fees unnecessarily. What we decided to do was to have an initial retainer paid. We had discussion about whether the retainer should be paid to the court. Well, if it's paid into the court, you've got to go to the court to get paid. So if the parties agreed to put that in the guardian ad litem's escrow account, after the retainer was depleted, the guardian would have to

[37] *See* Rule 40A Work Group, *supra* note 13, App. at 9.
[38] TENN. SUP. CT. R. 40A, §11.
[39] *Andrews*, 2010 WL 3398826.

go back to the court to address getting an additional retainer at that point. Of course, the order has to lay out the manner of payment, the hourly rate, the dates of deposit, and also whether periodic payments would be drawn from that account, and the guardian has to give notice to the parties of every withdrawal.

I was shocked to even imagine that a guardian wouldn't submit a monthly bill. I would think that would have been a completely regular occurrence, but surprisingly not. In the order we've included that the guardian has to give notice to the parties of a withdrawal, a statement of services supported by an affidavit, and also give the parties time to object before a withdrawal would be made. We also wanted to make sure in paragraph (f)[40] that we added that even if an objection is not made, at each monthly or periodic payment withdrawal, a party could still address the reasonableness of the guardian ad litem's fees at the end of a case. It may be that a party doesn't realize until the end that a guardian is doing way too much work or overbilling, and we wanted to put in here that there could be an objection made at the end of the case.

We had a lot of discussion about Section 12,[41] about appeals by a guardian ad litem. We talked about whether a guardian ad litem could initiate an appeal. If a parent is not initiating an appeal, then we didn't feel a guardian should initiate an appeal of a court decision. We did want the guardian to have the ability to appeal if there was a ruling on fees or the reasonableness of fees, and we referred back to Section 4(d) and Section 11(h).[42]

After we submitted our rule, the court made relatively minor suggestions, and one of them was to leave the effective date blank for the court to fill in. That's what went into the committee's suggestions to improve 40A.

---

[40]*See* 40A Work Group, *supra* note 13, App. at 11.
[41]TENN. SUP. CT. R. 40A, §12.
[42]*See* 40A Work Group, *supra* note 13, App. at 12.

Now, Jennifer, if you would like to talk about some of the problems that you had operating under this rule, I think that might be a little more interesting.

JENNIFER EVANS WILLIAMS: Thank you all for being here. My name is Jennifer Evans Williams. I'm a certified child welfare law specialist here in Tennessee. I practice mainly in the upper middle counties of Tennessee: Davidson, Cheatham, Montgomery, and Robertson. I started as a DCS[43] attorney under Ms. Mary Walker, who is one of our panelists later, and in the last eight years I've been in private practice primarily doing guardian ad litem work. One of the first things they asked me in law school was, "What do you want to do?" and I wanted to protect abused and neglected children. That's what I've done with my career, and that's what I intend to continue to do: represent children. I do adoptions, I do some post-divorce custody work and child support, but mainly I do guardian ad litem work. So when the provisional rule first came out, I got a little hot under the collar about the changes that were drastically different in the practice as a guardian ad litem versus Rule 40A.

What I see in listening to the presentation here about Rule 40A's history and how we got here is that the mistakes of a few have almost ruined the work of many. That was my opinion when I first got 40A. I was very upset. I was so upset that I made two comments. The first one was, "Please don't do this. Guardians ad litem who practice in juvenile court need the same standards that we have when we're going to practice in divorce court, so please don't do this." I wrote a brief, one page letter. Then, when I got the provisional rule with all the changes, I wrote a long letter that was very passionate and professional about how I felt that I could not protect children under Rule 40A, and that it would keep me from doing my job. In fact,

[43]Tennessee Department of Children's Services.

I met with my judges and said, "Don't give me any more of these cases, because I can't protect children if you're going to tie my hands as a lawyer and make me just an advocate and not a lawyer."

That didn't work. They kept giving me cases, because there were children that were in need of guardians ad litem with experience, who know this kind of law, and know what they're doing. If you're working as a guardian ad litem, it's because you care about children. You don't do this work to make a lot of money. You use other cases to supplement your income, and you do this work because you love children. Should you be compensated? Yes, you should. But making sure that the child's interests are taken care of is the reason why you're here.

I'm going to go through both my concerns with the current provisional rule and some of the things I actually like about it, as well as what I think about the working group's provision, which is not yet law. The provisional rule is still in effect until the Supreme Court considers adopting the working rule, which is a really great idea and is really going to fix a lot of the issues. When I'm done here, we'd like an open discussion from you all.

I'll start with a positive note about the current provisional rule's Section 3, where it indicates that the judges shall appoint guardians ad litem "sparingly."[44] That sounds a little odd, but the reason why I think that's appropriate is there aren't enough of us who do this work. If every single divorce required a guardian ad litem, there is no way that we could get the work done. Those of us that do this know that it's great work, but not every lawyer acts as a guardian ad litem. So limiting the scope of which cases would take guardians ad litem relieved me, because I'm one of the few guardians in my counties and I can't do them all, and "sparingly" limits it to the cases that are more severe. The judges in my region often say, "Children can survive

[44]TENN. SUP. CT. R. 40A, §3(b).

divorce, but they cannot survive the conflicts of divorce." I think that's one of the biggest reasons why judges appoint guardians ad litem in these cases: when there's extreme conflict, extreme violence, drugs: what they call the really hot button issues. One of the judges tells me that I'm his guardian ad litem in a lot of his cases because I "speak the language." I used to be a DCS attorney, and I know what risk of harm is and what threats to children are. Judges like people that have had those kinds of experiences and are willing to use that experience to protect children. So that limitation was one of the things I liked about the rule.

One of the other things I liked was in both Sections 4[45] and 8[46] where the rule specified the tasks of a guardian ad litem and the expectations of the court and the litigants for the guardian ad litem. When I'm appointed on a case, a parent will meet with me in my office, and I'll ask, "Do you know why you're here, and do you know why I am appointed on your case?" They say, "No. Why do I have to pay money to the court for you when I've got a lawyer?" I explain to them that I'm not their lawyer, I'm not the other side's lawyer, but that I'm there for their child, and it is my job to make sure that their child is protected. Sections 4 and 8 of the order are really clear in explaining our role to the lawyers and the court, so they know that we can't do everything and what our tasks and our rules are. I like that section.

Section 5 talks about the duration of our appointment, which is fine because it tells us that when the case is over, our role is over.[47] Here is a practical tip from me: I want an order of withdrawal. We all should know that when the litigation is over, we're done. But the parents may not know that, and the children may not understand that. When I'm relieved, that doesn't mean I'm going to stop

[45]TENN. SUP. CT. R. 40A, §4.
[46]TENN. SUP. CT. R. 40A, §8.
[47]TENN. SUP. CT. R. 40A, §5.

talking to that child. I tell all the children who I represent that in the event there are questions or problems a year or so down the road and they need to call me, they can call me. I tell them I'm not their lawyer in court and I may not file the actions that need to be filed for them, but I'm here if they have questions or concerns. But I want an order saying that I don't have a legal and ethical responsibility to continue to visit that child and check on that child.

I think Section 11[48] addressing our fees is reasonable. The reason I think it's reasonable is because it's in line with the regulations for what those of us who take guardian ad litem appointments in juvenile court are paid. Is it enough? No, it's not. Are there limits, and are we going to go over our caps? Yes, we are. But the reason why you do this work is because you love children, not for the money. It should be the same in Rule 40A: there need to be limits and set parameters so that cases like those in Shelby County don't mess this up for the rest of us.

The things that I like about Rule 40A are brief, because I have more concerns with the provisional rule. One of the problems that I had with the provisional rule is Section 1, which Lucie has addressed, and how it originally applied to non-lawyers.[49] This provisional rule applied to you CASA advocates too, and you're not lawyers. You've had a lot of experience and probably know the things a lawyer is supposed to do, but this rule applied to you too. This rule made a big open door for just about anybody that the court or lawyers felt would be appropriate to be appointed as a child advocate, and I was concerned that it applied to more than just lawyers.

Under Section 8, the provisional rules originally said a guardian ad litem is not a party to the suit.[50] How are we not a party to the suit if we are the advocate for the

[48]TENN. SUP. CT. R. 40A, §11.
[49]TENN. SUP. CT. R. 40A, §1.
[50]TENN. SUP. CT. R. 40A, §8(b).

child? It makes no sense to me. Everyone knows that when there's the sequestration of witnesses, if you're not a party, you're out in the hallway. So you, the guardian, are going to sit there all day while witnesses are being called to testify about what's going on in the child's life that you are there to protect, and you can't hear what's going on. Could you have interviewed that person? Yes, and you should have, if you knew about that person. But how many of us know when you interview a person, what they tell you then is the exact same thing they're going to say when they get to court under oath? I think a lot of us know that that doesn't happen. So that concerned me, even though it hasn't happened to me yet, honestly. I've been called as a witness under this provisional rule, and I have not been sequestered by the rules. My judges have determined I wasn't going to be under the rule of sequestration. Even though I may not be considered a party under the provisional rule, they wanted me in the courtroom and wanted me hearing what's going on with my child. Thankfully, the judges allowed me stay in, because it's been eye opening to see some of the witnesses in court.

I think the biggest problem under the provisional rule is Section 9,[51] and the working rule really resolved my concerns.[52] I don't see how as a guardian ad litem you can be an advocate for your child if you are not allowed to act as a lawyer. We all went to law school, or are going to law school, for our law degrees, and we should be allowed to use them. Why are we going to be appointed for children if we're not going to be able to use that law license to protect them? If you are not allowed to act as a lawyer, you're not allowed to file motions, you're not allowed to file pleadings, you're not allowed to call witnesses, and you're not allowed to introduce exhibits. There is no way that you can protect the child that you're appointed to represent if

[51] TENN. SUP. CT. R. 40A, §9.

[52] *See* 40A Work Group, *supra* note 13, App. at 7-9.

you're not able to act as a lawyer as your law license allows you.

I have several children that I represent. When I first got the cases, I sent a letter of appointment to the lawyers explaining my role, asking for permission to meet with their client, and requesting information about what's going on in the case. I included a restraining order that says "we are restrained and enjoined from speaking to the child about the litigation, about custody, about visitation, and about the guardian ad litem's role." Let's keep the child out of the middle of this, because as I stated earlier, the adjustment of divorce is hard on children, but it's the conflict that's the main issue. So I wanted a restraining order that said everyone was going to use common sense and keep the child out of the middle of this high conflict situation. Nine times out of ten, they would all sign it. If Mom is going to sign it, Dad's going to sign it, or if Dad's going to sign it, Mom's going to sign it, because they both want to look good to the judge and this guardian ad litem by saying they're putting their child's interest first. There are quite a few cases I had that the parents actually wanted that, but sometimes you have these cases where they just want to get the leg up on each other. So I would have those restraining orders signed. Then if I ever went to visit the child and the child told me about how badly Mom is bashing Daddy, or Dad is bashing Mom, or Stepmom is saying this, I would do a motion for contempt or a show cause order to say, "Judge, they're putting this child in the middle, and preventing this is exactly the reason why you appointed me."

Well, under the provisional rule, I can't do that. I can't file pleadings. I can't file motions. I can't do show cause orders. I can't protect my client from the actions of these parents. It reduces me to sending a strongly-worded letter to their lawyers asking them to please make them stop. But for parties that are already acting unreasonably, what good is a letter going to do? When parties are not

listening already and are already not doing what they're supposed to, my letters are going to be in vain. Is it going to document that I'm doing my job? Sure. But is that protecting my child? No. All that will happen is the parent will get that letter from their lawyer and then go to the child and say, "Why are you telling this guardian ad litem what I said? You need to keep your mouth shut." That's going to make it harder on that child. That part of the provisional rule prevented me from protecting children, so that was one of my main issues.

Another issue that affects practitioners who represent litigants as well is 9(c) of the old rule.[53] It said a guardian ad litem may communicate with a party who is represented by an attorney unless the party's attorney has notified the guardian ad litem in writing that such communication should not occur outside the attorney's presence. What have we learned in law school 101? If a party is represented, you don't speak to them without the permission of their lawyer. To me, it is a direct violation of ethical considerations to go talk to that mom and that dad without telling the lawyer who represents them. As a litigant's attorney, that's very concerning. If I was representing someone, I wouldn't want a guardian ad litem talking to my client. A lot of us know that clients sometimes are their own worst witnesses, and they need to be protected from themselves from saying things that are not appropriate. They may have the best of intentions, but it comes out wrong and hurts their case. That was a big concern for litigants. As a practical matter, I still get permission from the litigant's attorney to go speak with the client or offer to have them present while I speak with and interview the client. To me, that's just what is ethical: you don't talk to another person's client without permission.

[53]TENN. SUP. CT. R. 40A, §9(c).

The biggest problem with the provisional rule is the (f) subsection about calling us as a witness.[54] Major problem. How can we protect our children if we are the witness and not the lawyer? In fact, it hurts really the litigants, because I've been called already four times over the last year as a witness in cases that I represent, and what the judges are saying is: "You enter at your own risk, because I'm going to let her say whatever she wants to when she gets on this stand." So I get to talk like an expert: get in hearsay, give my opinion, and say whatever I want to say, and then I'm cross-examined. It's been a bit odd. For those of you who have not been called as a witness, it's a lot more fun to be at the podium than it is to be in the witness seat.

LUCIE BRACKIN: I agree.

JENNIFER EVANS WILLIAMS: I don't really care for the witness seat, but at the same time, I do what I need to do to take care of the children. It's worked out just fine, but I'm just not able to call the witnesses that I need to call, because I'm just saying what someone else has told me. When I first met with the judge to tell him I didn't want to take these cases under the provisional rule, I asked him, "How is it going to work if I'm a witness? I don't have any firsthand knowledge. I'm not living in these people's home. I'm interviewing kids, interviewing witnesses, and talking to school professionals." He said, "I'm going to treat you like an expert, and let you testify about anything that you relied upon to make your opinion." I don't know how many litigants' attorneys are going to like that continuing, because it really hurts their cases as much as it hurts ours.

Those were my main concerns with regards to the provisional rule. One of the things that I think is good in the working group's provision is that it is lawyers only

[54]TENN. SUP. CT. R. 40A, §9(f).

under Section 1.[55] If you're a guardian ad litem in a dependency and neglect case in juvenile court, and there's some kind of action that goes to circuit court, juvenile court by authority transfers that under 37-1-103,[56] and you can be the guardian ad litem in whatever new action is going on. That consistency is important for a child, because the child doesn't understand who guardians ad litem are and why you're here now but not here later.

Lucie went over access to children under Section 7[57] well, but I just wanted to briefly mention that it's very important. You would be surprised if you haven't done this work how difficult it is to get access to the child that you represent, and I've had to put in orders to see the child. The schools are protective, as they should be, but when I get there they say they'll have to call the parent and get permission. That really defeats the purpose of me coming to the school to talk to the child alone, because I want to make sure the parent is not telling the child what to say to me. So the addition by the work group of "without the presence of any other person"[58] is extremely important. Now, if it is passed where we are lawyers and are not called as witnesses, I like to get a social worker or guidance counselor in there with me, so that they can be my witness. Then, I call them to the stand and ask what the child said when we met, instead of me having to give that information. It's very important to have the second part of the provisional rule there that talks about our discovery. It's hard sometimes for schools to release records without permission from the parents, and I'm glad they're overprotective, but a lot of times if they've not worked with guardians ad litem before, schools don't realize what your authority is and what your role is.

---

[55]*See* 40A Work Group, *supra* note 13, App. at 1.
[56]TENN. CODE ANN. §37-1-103 (2011).
[57]TENN. SUP. CT. R. 40A, §7.
[58]40A Work Group, *supra* note 13, App. at 5.

LUCIE BRACKIN: One thing that we did as part of the committee was put together a Rule 40A discovery order that I think would help in addressing that as well, Jennifer. It's very short: fabulously, a bunch of lawyers and judges were able to put together an order that's a paragraph long. It just says, "For the purpose of preparing for the adjudication and disposition of matters pending before the court, the children's guardian ad litem, _____, shall have access to all documents and records pertaining to the children, including but not limited to all records of the Department of Children's Services and any other medical, educational and/or psychological records. The guardian ad litem is further authorized to interview any individuals having contact with or providing services to the child, work products of the Office of the District Attorney and counsel for the Tennessee Department of Children's Services, the open criminal investigative files of the police department, and the identity of persons making reports/complaints to the Tennessee Department of Children's Services are excluded from this order for discovery." Then we have a way to modify it and tailor it to your situation. That order was something that we were going to suggest for people to use to have that access to the information that needs to be in an order.

JENNIFER EVANS WILLIAMS: I think it's essential. In juvenile court, we've got rules to give us discovery, and we're allowed to get the records. We should have the same liberties and abilities in chancery and circuit courts when we're doing this litigation, because we've got to have access to these records to be able to fully advocate for the children. My strongest reason for praying and praying that the Supreme Court will adopt the working group's rule is that it makes us lawyers again. I think Rule 40A's first provisional rule took that away from us. And how it is that we can protect children if we're not lawyers, I have no idea.

That's what we need to do if we're going to represent children. CASA is an awesome organization. I've been on the board of directors and I'm the current trainer in Robertson County, and they do a great job as non-lawyers.

That's one thing I commented: if you're going to keep this rule as is, then apply it to them. Take the funding that you're going to pay guardians ad litem and put it in their not-for-profit organization so they can recruit more volunteers to be advocates and witnesses for children. But if you're going to regulate guardians ad litem in post-divorce litigation, let us do our jobs and let us be lawyers.

So that's what my practical experience has been on the front line, working under the provisional rule in cases where that's made it difficult or impossible for me to protect children. Now we'll just open this up to questions.

ROBERT ROGERS: My name is Robert Rogers. I practice here in Knoxville. I mostly practice in juvenile court here in Knox County. It appears there's been a lot of labor and effort put in to crafting Rule 40A and working on these provisions, but all the while there was Rule 40 that appears to work very well every day in juvenile courts across Tennessee, and it does a very good job of outlining the duties and responsibilities of GALs. I'm wondering, why all this effort to create this hybrid of a social worker and an attorney in Rule 40A, and why didn't they just expand the scope of Rule 40 to include these cases?

JENNIFER EVANS WILLIAMS: I've had the same thoughts, so I'll have to let one of you ladies see if you can help with that.

ELIZABETH (LIBBY) SYKES: My memory is a lot of the discussion centered on the difference of the child in the Rule 40A. In Rule 40, you have an allegation of dependency and neglect, and in a lot of those instances you do have a guardian appointed for that child. The difference

between that and the divorce case is that you just don't have that allegation of abuse and neglect in a divorce case.

LUCIE BRACKIN: Also, I'll give the non-politically-correct answer: the legislature was about to do something and the court did not want the legislature coming up with their own rule, because Lord knows what ruckus would have resulted from that. Basically, it's because the court wanted to preempt the legislature in doing anything.

ELIZABETH (LIBBY) SYKES: That's true. I think that what the General Assembly was going to do might be a couple lines prohibiting the appointment of the guardians in cases where there are not the allegations of abuse and neglect. The court wanted to be the one to go through that rule-making process, because once you put something in statute, you can only change it once a year. A Supreme Court rule can be changed more often.

DANIELLE GREER: Hi. My name is Danielle Greer, and I'm a 3L here at the University of Tennessee and a member of the *Journal*. I'd like to know how deposing a GAL would work, and in what situations that would occur? I would think that would be very problematic.

JENNIFER EVANS WILLIAMS: I believe it would too, but the current provisional rule allows for that. If you're going to be called as a witness, you're going to be almost treated like an expert by some judges, and they're going to depose you like they're going to depose everyone else for discovery. In some cases I've had some colleagues who have been served interrogatories to answer. To protect the confidentiality of my client but still comply with rules of discovery and the court order creates a lot more problems. I think the current provisional rule opens you up to discovery requests such as that, and I think that's going to make it more time-consuming and run up fees even more. Now, if

the working group rule is passed, I don't think that it would allow that. I think it will treat us much more like guardians ad litem in juvenile cases, as we should be.

LUCIE BRACKIN: Have you been deposed, Jennifer?

JENNIFER EVANS WILLIAMS: No, not yet.

LUCIE BRACKIN: I haven't either.

JENNIFER EVANS WILLIAMS: I've been called as a witness and I've had a colleague get served interrogatories, but I haven't been deposed. They usually will call me and depose me over the phone but not a formal deposition.

COLLEEN STEELE: Hello. Colleen Steele of the Knoxville Bar and also a GAL, and I am in adversarial post divorce, so I'm in both sets of courts. Has there been any anecdotal evidence of how each individual court system is responding to the provisional Rule 40A? I've not found any consistency even from one judge to another. So invoking the rule at this point is kind of like saying, "Well, hello, come down my little rabbit hole," because they don't believe in it.

JENNIFER EVANS WILLIAMS: Right. I've had some judges tell me "I'm going to run the courtroom the way I feel that it needs to be run, and I'm going to do what I feel like I need to do until an appeals court tells me that I can't do things this way." I think we know a lot of judges that have handled it that way. The judges that I've practiced in front of have tried to stick by the provisional rule in saying that the parties can call me as a witness, but they've also said they can leave me in the courtroom to act as a lawyer for the client, leaving it to the litigants to agree as to what the role of guardian ad litem is in some of those cases I've done. Obviously, you should be following the provisional

rule, because that's what the rule is, but until someone appeals it, that decision is going to be final. But I've not seen consistency. I don't know if you have, Lucie, as far as how judges handle them.

LUCIE BRACKIN: I can think of only one case in Shelby County where a guardian has been appointed since this provisional rule went into effect, but I'm sure there are more out there. I am the chair of the family law section, and I like to know what's going on in the courtroom. Judge Robert Childers, one of our circuit court judges, commented that if the Supreme Court's intent in adopting Rule 40A was to keep judges from appointing guardians ad litem to assist courts in making the difficult decisions involving the best interest of minor children, then the court has succeeded. He's written a more detailed letter to the chair of our committee and said that he stopped appointing guardians ad litem. So in Shelby County, we're just not appointing guardians ad litem.

ELIZABETH (LIBBY) SYKES: I'd like to add though that after this hearing we did a search across the state, and what we noticed is that you had pockets where guardians were appointed regularly in divorce or post-divorce situations, and then you had cases like Davidson County, where they never appointed a guardian ad litem. So, even in Shelby County where that it was a little bit more common, it was really on a small percentage of the more high-conflict cases. The practices across the state were very different. So, Lucie, you say that guardians ad litem haven't been appointed in Shelby County since then. What has been the impact on the children?

LUCIE BRACKIN: From what I've seen, I think it's leading to longer, more protracted trials. The guardians ad litem in my experience were extremely helpful in letting attorneys know the problems in the case on each side, and

saying, "You guys need to knock heads together and make these people settle this case, because this is going to come out about your client and this is going to come out about your client." So it was also an extremely effective settlement tool. Guardians ad litem are being appointed in Shelby County, but I just don't know of people that have been used, other than my friend who is not going to be called because neither side wants to call the guardian ad litem. That's the only story really that I've heard in the last year about that.

JENNIFER EVANS WILLIAMS: I have the same thing in Montgomery County and in Robertson County, the district that I'm mainly appointed in as a guardian ad litem. They're continuing to appoint me even though I (inaudible) after Rule 40,[59] they're continuing to do that, because it is a very effective settlement tool. They tell the litigants when they appoint me as guardian ad litem, "You better listen to what this guardian ad litem has to say because I know you got one side but I know she's got the child's side and I'm going to listen really strongly to what she has to say." Now, 50 percent of the time judges do what I recommend, and 50 percent of the time they don't, because sometimes I'm an overprotective mother bear to the kids that I represent and the judges want to be a little bit fairer to the parties. But the parties take what guardians ad litem say seriously at the appointment. So when I get through doing my investigation, I usually do a letter and/or a phone call to the lawyers and say, "This is what I think you need to do, this is what I think is best for the children," and they usually convince their clients to do that in a lot of cases and settle. And that is the reason why the chancery and circuit court judges there continue to appoint me, because it takes a lot of trial time off their docket and reduces litigation because I'm going to be influential to the judge at the time he makes

[59] TENN. SUP. CT. R. 40.

a decision. Though, like I said, some of the time he does what I ask, and some of the time he doesn't, depending on what's needed to be done.

Another issue that I would file when I was appointed guardian ad litem was a motion for random drug screens. There are a lot of cases you get those allegations. How are they going to get done? You file a motion. Well, a provisional rule doesn't let me file motions. So I write a letter saying, "Please do drug screens." How effective is that? Well, someone is not going to say, "Oh, sure, I'll do one. I smoked pot last week, but sure, guardian ad litem, because you asked me to." So I can't file those kinds of things under the provisional rule. Under the working group rule, I'll be able to do that to protect children when I feel like it's necessary.

AMY WILLIAMS: My name is Amy Williams. I'm a 1L here, but I worked with the CASA program for several years before I came to law school. And I was just wondering, with the guardians at litem, GALs, in juvenile court there's a fund for that and the families aren't paying for it. Have you encountered cases where there are parties who are going through a divorce where there needs to be a GAL appointed to that child but the parties can't afford to pay for it? Is there any kind of provision for that in the works?

JENNIFER EVANS WILLIAMS: No. What the judges say is, "If you can afford to hire a lawyer to fight this divorce, you can afford to pay for the child's lawyer, and you're going to do it," and that's what they do. And typically my judges will make each party put $750 down, which is a $1,500 retainer, and they ask when I get close to running out of that if I would notify the court for additional funds. But if you manage the case right and do what you're supposed to do in a relatively quick time frame, you can usually get it done close to that or slightly more. It depends

on how litigious the parties are going to be and the extent of the litigation, if it's going to continue to escalate some of those fees. Sometimes I've had cases where there's a pro se litigant and you've got one person that's filed for divorce and the other side can't. The judge can make that pro se litigant pay the entire guardian ad litem fee up front, and at the end of trial the judge can possibly give a judgment against the other pro se litigant for reimbursement, kind of like a marital debt asset or something of that nature, and they'll allocate that. Sometimes at the end of the divorce a judge will split 50/50 on the GAL fee, sometimes a judge will say 100 percent on one side, 75/25; whatever the judge feels is appropriate.

One of the things I like that my judges are doing in my county is giving a joint and several liability judgment against both parties, so, that way, if I've got one party who's got money and the other one does not, at least I can hopefully get paid most, or a portion of, the fee that I've expended and let them go after the other party later. Often I incur more debt than I do collection on those fees, but like I said at the beginning, it's not the money that you do this work for; it just has to help supplement your income.

JACKIE KITTRELL: My name is Jackie Kittrell and I'm wondering about the statement of the guardian ad litem as a settlement tool. How do the guardians in 40A[60] cases work in mediation? Do they attend mediation? Is mediation even in play at that time?

JENNIFER EVANS WILLIAMS: Mediation is required before there can be a contested litigation. And I attend mediation if the lawyers attend mediation. I take that rule. Because everybody knows when lawyers are at mediation, it kind of hypes everybody up and they're all bullied up, and if we're not bullied up, then parties might be more open

[60] TENN. SUP. CT. R. 40A.

to resolve disputes. So I attend it if the lawyers attend it. If the lawyers don't attend it, I don't. I demand that the lawyers consult with my schedule so that I can be there if they're going to be there, because often I'm going room to room helping the mediator settle the case, and I've settled some cases that way. Have either of you had experience with that?

LUCIE BRACKIN: I've not actually attended a mediation. I make sure to do a report before mediation so that the lawyers can have it at mediation, and that's a very effective way to do it. But in mediations, you're sitting there all day, maybe a half a day, and there's a lot of down time. So, to me, it doesn't make a lot of sense to be there at the mediation. I've been on call when I've known that a case was mediating, and I will inform the lawyers to call my cell phone, and that I'll interrupt whatever I'm doing. I'll talk, or I'll come down there if they want me to. But, I think just sitting there with them is maybe not the best use of time. But I do know GALs who have sat there through a mediation, like in an extremely contested case where their presence would be helpful. So it just depends.

JENNIFER EVANS WILLIAMS: I've done both. Sometimes I've gone; sometimes I haven't, because I've been on call. Sometimes I've sent a letter ahead of time saying, "This is what I think is going on in this case." Like Lucie said, it depends on the kind of case.

LINDA SHOWN: I'm Linda Shown. I practice in Blount County in juvenile, chancery, and circuit court. I believe that we really are on the right track here by revising this rule because the other rule just gutted the effective representation for the child. But I think we should also consider a name change because we're really not guardians ad litem, we're more to the effect of attorneys ad litem, and I think that that would make it clearer and reduce the

confusion of what our role is. How can it be possibly be that we would be sent out into the other room or the witness room when we're supposed to be there acting as an attorney? So it seems to me that we should rename ourselves.

JENNIFER EVANS WILLIAMS: I agree to a point. What I have found goes to the part where the working group actually has addressed what you've just said, where they pretty much bifurcated the role of the guardian ad litem. It's under Section 8(c).[61] Because the way I take those terms, and this may be old school from what I learned, an attorney ad litem can be appointed in juvenile court as well as in a dependency and neglect proceeding strictly for the preference of the child. It doesn't matter what you want, it's strictly what the child wants that you've got to push for, whereas a guardian ad litem in juvenile court uses best interest strictly. And often as guardian ad litem you can do both, unless it becomes so divergent that you can't do both and you have to ask for an attorney ad litem under Rule 40[62] to be appointed for that child in juvenile court. So the only thing that concerns me about the term is that's what we're doing, because we are attorneys for the children, but we're called the guardian ad litem, although we should be doing both. Under the provisional rule as under this working group rule, we're going to be the guardian ad litem and the attorney ad litem because we've got to put on two hats.[63] We've got to make sure that the best interest of the child is fully advocated for, but at the same time we've got to make sure that that child's preferences are expressly given to the court. I feel most of the time I can do that by making sure the right witnesses are called and making sure the court knows the child's preference when it's an age

[61] TENN. SUP. CT. R. 40A, §8(c).
[62] TENN. SUP. CT. R. 40.
[63] TENN. SUP. CT. R. 40A, §9, cmt. (2).

appropriate circumstance. I also advocate for best interest as well. This doesn't contemplate getting an attorney ad litem to come in only for a child's preference, and I don't know if other extreme situations will allow that or not. But I can see your point.

DANIELLE GREER: As you can see, I'm very interested in this topic. It's Danielle Greer once again. And I know one of the main criticisms of the prior rule and using it in divorce cases was that the GAL was a lot of times acting as the judge and judges saw that as a problem. I don't necessarily agree. I see the argument. I could make the argument if I was on that side of the opinion. How do you think the changes that your group has proposed alleviate that concern? I'll ask the rest of you whether you think that that is a real concern or not. Because my opinion is that it's truth-seeking, and that may be the common thread, but it's something that we need in these cases. It's the only reason why GALs are necessary in these types of cases anyway, and to eradicate that thread of it would be to render you pointless.

LUCIE BRACKIN: Well, in the proposed rule we say specifically that the guardian ad litem cannot have a judicial or quasi-judicial role and cannot be a special master,[64] so that specifies that a guardian cannot make decisions over the situation at hand. But, you know you are being a truth seeker, because oftentimes you have a guardian appointed because one party's saying this and another party's saying that and the attorneys are saying, "We don't know who's telling the truth so let's get a guardian to investigate and tell us what is the truth here." The next step is that if you have a truth-seeker, there's got to be a fact-finder. So the guardian is sort of a fact-finder, which is the judicial role, and that's a difficult problem to

[64] TENN. SUP. CT. R. 40A, §6(b).

have. But you've got to have someone impartial to step in and say, "I've talked to this neighbor, I've talked to this teacher, I've talked to this doctor, and this is really what's going on here." And usually it's sort of a blend of what both parents are saying that I've seen and that I've found. So, I hope that helps.

JENNIFER EVANS WILLIAMS: Did the original case[65] deal with the judge just rubber stamping some of the guardian ad litem's recommendations?

LUCIE BRACKIN: That was a big complaint. The issue was that the judge would say, "Oh, we have a guardian ad litem report," and the parties perceived that they were just rubber stamping it and saying, "We're going to go with this."

ELIZABETH (LIBBY) SYKES: That was the perception.

JENNIFER EVANS WILLIAMS: Okay.

ELIZABETH (LIBBY) SYKES: I don't know that that was reality.

LUCIE BRACKIN: It was the perception.

ELIZABETH (LIBBY) SYKES: But that was the perception.

LUCIE BRACKIN: The attorney still had the opportunity to put on their case. They could still call their witnesses, but we do have some judges in Shelby County who won't let you put on your case, so there was a complaint made for a reason.

---

[65] *Andrews*, 2010 WL 3398826.

JENNIFER EVANS WILLIAMS: In my jurisdictions I've heard that that's the perception, but actually, with my judges, like I said earlier, fifty percent of the time they do what I recommend, or a quasi-part of what I recommend, and fifty percent of the time they don't, which really shows the impartiality of the guardian ad litem. I'm not the magistrate; I'm not the one making the decision. I'm just there as an advocate for the child and my opinion of what's best and the judge's opinion sometimes coincide and sometimes they do not. I listen to the judges and think, "Wow! That makes sense. Why didn't I think of that before I told you what I was going to say?"

RENEE DELAPP: Thanks. My name is Renee DeLapp and I work as a therapist here in town and I also have a law degree, so I come at it from a couple of directions. And I just want to comment that one of the things that I've really appreciated about the guardians ad litem that have been involved with children I've been involved with – I used to work as a school-based therapist – has been the problem-solving that's possible before all the damage is done, because these cases can go on for years, as we all know. And what I've really noticed too is as we defund DCS and some of the other social agencies that could have had a role, the gap is getting huge. So the presence of somebody who actually is the child's advocate, who can fill in for a therapist like me, where my ability and my professional role, my ethics, have to stop, there needs to be that next step that can happen. So I really appreciate what you do.

ELIZABETH (LIBBY) SYKES: Our office administers the indigent defense fund and the guardian ad litem fund. So if you have attorneys here in the office who haven't been paid, it's probably my fault.

JENNIFER EVANS WILLIAMS: You better exit fast right now.

ELIZABETH (LIBBY) SYKES: But, anyway, I would encourage you by saying that in the next couple of months we're introducing a system we're calling ICE, it's Indigent Claims Entry, it's an electronic interface for the submission of these claims. And so this is my plug for that. Guardians ad litem are being paid within three to four days as opposed to twelve weeks.

LUCIE BRACKIN: Yeah.

ELIZABETH (LIBBY) SYKES: So anybody who is still continuing to send in paper, I've really decided they must not want to be paid at this point.

JENNIFER EVANS WILLIAMS: We have the ICE system in Robertson and Davidson counties now and it's wonderful.

ELIZABETH (LIBBY) SYKES: It's wonderful.

JENNIFER EVANS WILLIAMS: It's computerized. You've got to put it all in the system, but that payment comes by automatic draft. It's working really well.

ELIZABETH (LIBBY) SYKES: It may be the greatest thing we've ever done.

JENNIFER EVANS WILLIAMS: Really.

ELIZABETH (LIBBY) SYKES: But I would like to add that when our office took over the guardian ad litem fund for dependency and neglect, and we took it from the Department of Children's Services in mid-2000 or so, we were given $800,000. This year, we'll spend six million dollars from that fund. Last year we spent a total of thirty-six million dollars statewide for our guardian ad litem and

indigent defense funds. And almost ten million dollars of that money is used for what I now call child welfare cases as opposed to the attorney that is representing a person in a criminal case. I think a lot of those things are more of a social work-type role than the role of an attorney, but what I'm often told is that because of the cuts in the staff at Department of Children's Services, there's not people actually there to do it, so that guardian ad litem in those dependency and neglect cases actually does have to take on that role that you would otherwise think the Department of Children's Services would do. But that's not a criticism with the Department, we've taken our own cuts, but it's a reality that it's moved our fund from $800,000 to $6,000,000.

JACKIE KITTRELL: I had one more question for Lucie Brackin that participated in the work group.

LUCIE BRACKIN: Yes.

JACKIE KITTRELL: Could you talk more about the reasoning behind Section 12 that prohibits GALs from initiating appeals?[66]

LUCIE BRACKIN: Yes.

JACKIE KITTRELL: I have a problem with that because I figure if I'm going to be the child's attorney that means I need to be able to access every legal avenue that's available to me, and that might be filing an appeal if necessary. It seems like that would unnecessarily handicap the child's attorney, the GAL. I don't know if there's been a rash of GAL-initiated appeals in the state.

LUCIE BRACKIN: Well, the reality of it is that of course there's not, because who's going to pay for that? The

[66] TENN. SUP. CT. R. 40A, §12.

rationale for that is that if either parent does not make the choice to appeal the decision, then the working group didn't want to give the authority to the guardian ad litem, because the parents' rights are paramount in their divorce. We just didn't want to give the guardian that power.

JACKIE KITTRELL: Isn't that a bit difficult to square with advocating for the best interest of the child? I mean, you can have cases where the parents are possibly colluding one or more issues and the trial court goes along with it. I mean, does it -

LUCIE BRACKIN: Well, in such a hotly-contested divorce situation or post-decree modification, those parents really aren't colluding about much of anything because they can't say that the sun sets or the sun rises.

JACKIE KITTRELL: Right.

LUCIE BRACKIN: And so that's not a real possibility. And we did have a lot of discussion at the end of our committee meetings about this and just decided that if we included the authority of a GAL to appeal we would obligate the parents to pay for the guardian to appeal the decision and we just couldn't put that burden on them.

ELIZABETH MCDONALD: Could I follow up on that?

LUCIE BRACKIN: Sure.

ELIZABETH MCDONALD: I don't know that I need that but you know, if you're the guardian ad litem and you would be interested in appealing, a lot of times that's because the parent who may not have much money is the one appealing, and the one who had the money and the hotshot lawyer won – and from a guardian ad litem's perspective that was not the right decision. The wealthier

party was able to put more of their case on because they had more money for the experts and the discovery and the private investigators, but little mom or dad who didn't have that much money was the best place for the child, although they didn't have the money to really litigate with as much intensity as the other side. I mean, that's been my experience. The one with the money is the one who's going to win, unless the other one is just so grossly off the chart. So it sort of seems to me that – I agree with what you're saying – you give the guardian ad litem for the party with less resources just enough to make a little sting but not enough to do enough to help the child.

LUCIE BRACKIN: I think you have definitely hit on a concern in this proposed rule.

JENNIFER EVANS WILLIAMS: I've run into that as guardian ad litem on occasion. And to file an appeal is not that expensive with a cost bond. Even the parent that doesn't have that much, all they've got to do is file the appeal and you, as guardian ad litem, are still appointed, and so you then go in and advocate on that appeal for what position you're going to advocate. Whether or not you're going to get paid is a different matter, but you're obviously going to do what you need to do for the child in doing that. I've also had people say they wanted to call me when I wasn't even on the case to be a guardian ad litem for a child. Well, you can't hire a guardian ad litem, that's court-appointed. Now, you can go hire an attorney ad litem for that child's preference if there are some issues that are going on where that could be done.

ELIZABETH MCDONALD: In a divorce proceeding?

JENNIFER EVANS WILLIAMS: You can try to hire an attorney for the child. Whether or not you're going to have standing or not, I don't know.

ELIZABETH MCDONALD: In a parentage action I was involved in the other side didn't like my position as the guardian ad litem, so they wanted to demand an attorney ad litem. The judge said there was no provision for that.

JENNIFER EVANS WILLIAMS: There's not. All I know is it would be a case of first impression, if someone were to file it.

JAMES CARNEY: I'm James Carney. I'm a family mediator. I'd like to follow up on the discussion around Judy Kittrell's question. I do a lot of cases that involve high conflict and about one-third of those have guardians appointed, and I find often that the guardian serves a very valid role in the mediation because they can offer resources or help resolve some of the allegations that often fly about, about a parent being terrible, and they can help work through solutions to improve the trust, and resolve those questions and get down to the needs of the child, and that often is what is the key to getting the resolution.

JENNIFER EVANS WILLIAMS: Thank you. That helps. And I think for everybody that does guardian ad litem work, it helps to know from a mediator's standpoint that we're not stepping on your toes. Because I'm a talker, as you can tell, and sometimes when I go to mediation I really get to talking and I'm thinking, "Well, maybe I'm stepping on the mediator's toes," and I pull them aside and say, "Do you need me to shut up?," and they say, "No, you're giving me the information, it's being helpful."

ALAN BALLEW: I'm Alan Ballew. I've been a guardian ad litem in the juvenile court here in Knoxville since 2000. That's all I do. I believe that there is a fundamental right that's being ignored. Someone just a minute ago said that the parental rights are superior, or fundamental, or more

important, as an underlying right in a case. When you have parents that are fighting in litigation, one cannot assume that the children involved are not being abused or neglected. Anytime the parents are fighting like that, the children know that they are in the middle. There is no constitutional right for children. Everybody pays lip service to protecting children, but they have no constitutional rights, it's always parental rights. And until we address that, we'll be doing this sort of thing forever.

JENNIFER EVANS WILLIAMS: Well spoken. I agree.

RACHEL KIRBY: I think it was Section 7, access to the child and information relating to the child,[67] and this may already be decided, but if there is a tape at the CAC[68] of an interview, does that fall under that and give me access to that tape?

JENNIFER EVANS WILLIAMS: It should. And one of you might want to answer this more than me. My experience is what I usually do with DCS. A lot of times DCS is involved in these cases, that's the reason there may not be an action pending but there's been allegations and DCS is investigating and that's the reason why I'm appointed by the court, and I will do an agreed protective order with DCS to get access to their records, which includes the CAC records. Now, under the provisional rule, I can't file pleadings, but under the working group rule I can,[69] and that will give me access to that. But recently there's – and I haven't had a chance to read all the way through it on my e-mail – an Attorney General's opinion[70]

---

[67] TENN. SUP. CT. R. 40A, §7.
[68] Child Abuse Center.
[69] TENN. SUP. CT. R. 40A, §9.
[70] Confidentiality of Records and Testimony Regarding Child Sexual Abuse Investigations, Tenn. Att'y Gen. Op. No. 11-21 (March 11,

about access to CAC records that actually just came out in the last month and I had that sent to my e-mail. So if you'll see me after, I'll get you that. But do you all have any comments about that? It seems like this should be allowed. This should help you get that.

LUCIE BRACKIN: I think it would help you get that. You know, the order that we put forth said that work product would not be discoverable,[71] but an interview with the child I don't think could ever be classified as work product. I think you should be entitled to obtain that. You may have to go to your judge if you have a problem getting it.

JOHN GROGAN: John Grogan, Washington County DCS. If you're appointed GAL, there's a statutory provision that allows you access to those records.[72]

JENNIFER EVANS WILLIAMS: Right. And that's what I usually use. My local DCS attorneys prefer a protective order in the file one that I'm going to use and keep for myself for the purposes of litigation, so that it's not disseminated, because they deal with all kinds of lawyers and they want to make sure that some GAL is not just going to get it and start streaming it to the parents and relatives and all this kind of thing. So, to protect the child, they ask me for a protective order, which I don't have a problem doing because I'd rather be more protective than not. But I agree with you, there's a statutory provision, but not everybody recognizes that as they should.

JOHN GROGAN: Okay. The way I usually do that is with that or a HIPAA[73] protective order perhaps.

2011) , *available at* http://www.tn.gov/attorneygeneral/op/2011/op11-21.pdf

[71] 40A Work Group, *supra* note 13, App. at 5.

[72] TENN. CODE ANN. §34-1-107 (2011).

JENNIFER EVANS WILLIAMS: Yeah. It kind of protects everything. I think it's good practice.

COLLEEN STEELE: In my experience, I've had a lot of GALs that were very helpful in getting medical records, especially for the child or for the opposing party in an adversarial role where I represent one or the other parent. The GAL has been the one who has been able to get the information and most of them have been very cooperative in providing it because this is information that adversarial counsel need to know.

JENNIFER EVANS WILLIAMS: That's the reason why when I get my protective orders, most often what I'll do is include that information in my protective orders, if it's appropriate, and it's going to be for me and the opposing counsel, because I don't want to be in violation of the order and distribute it to opposing counsel if the person who provided it to me expected it would only go to me. But a lot of times I've been using that too.

JOHN EVANS: We've got about five more minutes, so a couple more questions.

LORI SAYLOR: My name is Lori Saylor. I practice in Cumberland County. I was just wondering if there was going to be a discussion of guardian ad litem appointments in child support cases where the district attorney said under *Witt v. Witt*[74] that in a paternity issue you have to have a guardian ad litem, but there's absolutely nobody that wants to pay for you to go to court or do any work whatsoever on that case.

---

[73] Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 *et seq.* (1996).
[74] Witt v. Witt, 929 S.W.2d 360 (Tenn. Ct. App. 1996).

LUCIE BRACKIN: I don't know of any discussion on that issue that I've ever heard.

JENNIFER EVANS WILLIAMS: I don't either, except that under Section 1[75] it talks about post-divorce and paternity actions. I'm wondering if this Rule 40A is going to apply to paternity actions as well: if it's going to require the litigants to be responsible for those fees, and if they can't pay those fees, if it's going to be up to the judge to determine how they're going to be appointed. In Davidson County, they've appointed me under a 40A appointment in some paternity actions in the child support court because it was a paternity suit about the original parenting plan involving allegations back and forth about what's best for that child, but the judge has to assess the parties with that. Now, they assess it, the parties never put down the original payment, I finish the case and I'm still not paid, and I've got a debt out there to collect. But when you're appointed by the judge, you're going to do the job you're supposed to do. But I haven't been appointed in some of those under this rule.

LUCIE BRACKIN: I don't think this proposed rule, specifically the title "Appointment of Guardians ad Litem in Custody Proceedings,[76] would apply to a child support matter.

JENNIFER EVANS WILLIAMS: I don't think it applies to child support only, but when it defines custody proceedings, it says paternity,[77] and I kind of think it may apply.

---

[75] TENN. SUP. CT. R. 40A, at §1.
[76] *See generally* TENN. SUP. CT. R. 40A.
[77] TENN. SUP. CT. R. 40A, §1(a).

LUCIE BRACKIN: Well, this custody can be an issue in a paternity case.

JENNIFER EVANS WILLIAMS: Right.

ELIZABETH MCDONALD: I'd like to follow up with that. I'm Elizabeth McDonald from White County. And when you get in these cases where the real issue is DNA, there's really nothing for an attorney – a guardian ad litem – to do. You talk to this person, they're decent, you talk to that person – what is it for us to do in those cases? Yet, when you go and you look at what we're supposed to do, the things that I do really are not going to impact the situation. Both of them have got an attorney, both of them have a child. I don't understand what we're supposed to be doing in those cases.

JENNIFER EVANS WILLIAMS: Those that I've been appointed to use the initial comparative fitness test.[78] When paternity has been established and there's allegations back and forth about how each parent is not fit, and there's allegations similar to a DCS or a post-divorce type of action –

ELIZABETH MCDONALD: But under the statute[79] you have to appoint one and it's just DNA out there, that's all. I don't see the point.

LUCIE BRACKIN: I don't see the point.

JENNIFER BJOUNSTAD: I was on a case like that with *Witt*[80] and it says there ought to be a guardian ad litem and

---

[78] *See* Parker v. Parker, 986 S.W.2d 557 (Tenn. 1999); Nelson v. Nelson, 66 S.W.3d 896 (Tenn. Ct. App. 2001); Gaskill v. Gaskill, 936 S.W.2d 626 (Tenn. Ct. App. 1996).
[79] TENN. CODE ANN. §37-1-149 (2011).

that was before DNA was as strong a proof as it is now, but it said you had to have a guardian ad litem if there's ever an issue, and so what you do is look at the DNA test and you say, "Yeah, he's the dad."

LUCIE BRACKIN: That's it.

JENNIFER BJOUNSTAD: In that case I tell the attorneys I'm going to meet the child, there's really not a lot for me to do, if there's stuff you want me to do I'm not doing, I'll be happy to do it, but this is what the case law says, this is what the paternity test says.

ELIZABETH MCDONALD: I know.

JENNIFER BJOUNSTAD: But the case law requires that there's a guardian ad litem.

ELIZABETH MCDONALD: Yeah.

LUCIE BRACKIN: Can I just say one last thing before we close? The work group is very optimistic that the Tennessee Supreme Court is going to adopt our rule. We hope very much that the court will. We've actually drafted a suggested order on how to appoint guardians ad litem that I believe will be disseminated. One thing that we wanted to say specifically in the order was to reference Rule 40A and put the website address where anyone can go and find the rule,[81] so that the parties can go and find it and read it. That was one thing that we thought would be important for the litigants to be able to see the rule and read the rule that governs guardians ad litem.

---

[80] *Witt*, 929 S.W.2d at 360.

[81] *See generally*, 40A Work Group, *supra* note 13.

JESSICA VAN DYKE: Thank you so much to this panel. They were all excellent. I think they gave us a lot of great information that we can all use in the future. We have a small token of our appreciation for each of you that Danielle has. At this point, we're going to take a quick break.

DANIELLE GREER: Let's give the panelists a hand before we go.

(A break was taken)

JOHN EVANS: Panel number two will discuss litigation for change. The panelists will each discuss how various jurisdictions have raised awareness about the shortcomings in the child welfare system. We have several scholars that are going to be speaking on this topic this morning. We have Jacqueline Dixon, who is a local counsel, and she served on *Brian A. v. Bredesen*,[82] and she's from Nashville. We have Professor Dean Rivkin, he's a professor of law here that works with the Education Law Practicum. And we have Robert Schwartz, who is the executive director of the Juvenile Law Center in Philadelphia, Pennsylvania. And also Professor Rivkin has several students who will be speaking on this panel as well. I just want to remind the panelists that I know that we've divided up the time so we can hear from you equally and we'll have cards up there demonstrating that. And we certainly look forward to your remarks.

[82] Brian A. v. Bredesen, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).