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June 3, 2021

Mr. John Charles “Charlie” Ginn, Chair
State Bar of Texas Board of Directors
McCraw Law Group
[REDACTED]

RE: Submission of Proposed Rule Recommendation – Rule 13.05, Texas Rules of Disciplinary Procedure

Dear Mr. Ginn:

Pursuant to section 81.0875 of the Texas Government Code, the Committee on Disciplinary Rules and Referenda initiated the rule proposal process for proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure, relating to the termination of a custodianship for the cessation of practice. The Committee published the proposed rule in the *Texas Bar Journal* and the *Texas Register*. The Committee solicited public comments and held a public hearing on the proposed rule. At its October 2020 meeting, the Committee voted to recommend the proposed rule to the Board of Directors.

Included in this submission packet, you will find the proposed rule recommended by the Committee, as well as other supporting materials. Section 81.0877 of the Government Code provides that the Board is to vote on each proposed disciplinary rule recommended by the Committee not later than the 120th day after the date the rule is received from the Committee. The Board can vote for or against a proposed rule or return a proposed rule to the Committee for additional consideration.

As a reminder, if a majority of the Board approves a proposed rule, the Board shall petition the Supreme Court of Texas to order a referendum on the proposed rule as provided by section 81.0878 of the Government Code.

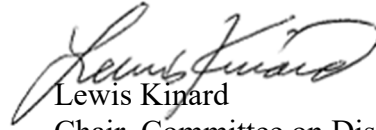
As always, thank you for your attention to this matter and for your service to the State Bar. Should the Board require any other information, please do not hesitate to contact me.

Committee on Disciplinary Rules and Referenda
P.O. Box 12487, Austin, TX 78711

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Sincerely,

A handwritten signature in black ink, appearing to read "Lewis Kinard". The signature is fluid and cursive, with a large initial "L" and "K".

Lewis Kinard
Chair, Committee on Disciplinary Rules and
Referenda

cc: Larry P. McDougal Sr.
Sylvia Borunda Firth
Randall O. Sorrels
Santos Vargas
Trey Apffel
John Sirman
Ray Cantu
KaLyn Laney
Seana Willing
Ross Fischer

Committee on Disciplinary Rules and Referenda

Overview of Proposed Rule

Texas Rules of Disciplinary Procedure

Rule 13.05. Termination of Custodianship

Provided here is a summary of the actions and rationale of the Committee on Disciplinary Rules and Referenda (Committee) related to proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure (TRDP), pertaining to the termination of a custodianship for the cessation of practice.

Actions by the Committee

- **Initiation** – The Committee voted to initiate the rule proposal process at its July 8, 2020, meeting.
- **Publication** – The proposed rule was published in the September 2020 issue of the *Texas Bar Journal* and the August 21, 2020, issue of the *Texas Register*. The proposed rule was concurrently posted on the Committee’s website. Information about the public hearing and the submission of public comments was included in the publications and on the Committee’s website.
- **Additional Outreach** – Email notifications regarding the proposed rule were sent to all Texas lawyers (other than those who have voluntarily opted out of receiving email notices), Committee email subscribers, and other potentially interested parties on September 1 and September 10, 2020. An additional email notification was sent to Committee email subscribers on September 14, 2020.
- **Public Comments** – The Committee published that it would accept public comments through October 6, 2020. The Committee did not receive any written public comments on the proposed rule.
- **Public Hearing** – On September 17, 2020, the Committee held a public hearing by Zoom teleconference. One individual addressed the Committee at the public hearing in support of the proposed rule.
- **Recommendation** – The Committee voted at its October 7, 2020, meeting to recommend the proposed rule to the Board of Directors (Board).

Overview

The Committee previously recommended proposed Rule 13.04, TRDP, which authorizes a lawyer to voluntarily designate a custodian attorney to assist with the designating attorney’s cessation of practice and provides a limitation of liability for the custodian attorney. The Board approved proposed Rule 13.04 at its June 24, 2020, meeting, and it was approved by State Bar members in the 2021 rules vote. On May 25, 2021, the Supreme Court of Texas issued an order approving and adopting proposed Rule 13.04, effective July 1, 2021.

Proposed Rule 13.05 is designed to operate in conjunction with proposed Rule 13.04. Proposed Rule 13.05 specifically sets out three ways in which a custodianship conducted under proposed Rule 13.04 shall terminate: (1) by proper transfer of all active client files and other client property in possession of the custodian; (2) by court order; or (3) by the “return of the appointing attorney to his or her practice prior to completion of the custodianship and resumption of representation of active client matters with the competence to conduct such a representation.”

Proposed Rule 13.05 goes on to clarify that, in the event of a disagreement between the appointing attorney and the appointed custodian regarding the appointing attorney’s competence to resume representation, either party may petition a court for a determination regarding the appointing attorney’s resumption of the practice and the termination of the custodianship. The proposal also authorizes an appointed custodian to seek a court order concerning the proper distribution of certain client files and property, including funds held in an IOLTA account.

The Committee did not receive any written public comments on the proposal. At the Committee’s September 17, 2020, public hearing, Laura Gibson spoke in favor of the proposal. Ms. Gibson and Greg Sampson served as co-chairs of a succession planning taskforce created by State Bar Immediate Past President Randy Sorrels. Both Ms. Gibson and Mr. Sampson provided valuable feedback during the rule proposal process.¹

At its October 7, 2020, meeting, the Committee voted to recommend proposed Rule 13.05 to the Board (as published in the September 2020 issue of the *Texas Bar Journal* and the August 21, 2020, issue of the *Texas Register*).

Additional Documents

Both Proposed Rule 13.05 and a copy of the September 17 public hearing transcript are included on the pages that follow.

¹ On April 17, 2020, the Board approved a resolution requesting that the Committee initiate the rule proposal process related to the voluntary appointment of a custodian attorney to act during a disabling circumstance. In response, the Committee initiated the rule proposal process and published a proposal for public comment in the June 2020 issue of the *Texas Bar Journal* and the May 22, 2020, issue of the *Texas Register*. However, after significant consideration of the subject, including feedback from members of the succession planning taskforce, the Committee determined that the proposal contained herein better addresses possible temporary cessations of practice.

Committee on Disciplinary Rules and Referenda Proposed Rule Changes

Texas Rules of Disciplinary Procedure Rule 13.05. Termination of Custodianship

The Committee on Disciplinary Rules and Referenda, or CDRR, was created by Government Code section 81.0872 and is responsible for overseeing the initial process for proposing a disciplinary rule. Pursuant to Government Code section 81.0876, the Committee publishes the following proposed rule. The Committee will accept comments concerning the proposed rule through October 6, 2020. Comments can be submitted at texasbar.com/cdr or by email to cdrr@texasbar.com. The Committee will hold a public hearing on the proposed rule by teleconference at 10:30 a.m. CDT on September 17, 2020. For teleconference participation information, please go to texasbar.com/cdr/participate.

Proposed Rule (Redline Version)

13.05. Termination of Custodianship: A custodianship conducted by an appointed custodian under Rule 13.04 shall terminate upon one or more of the following events:

- A. The transfer of all active files and other client property in the possession of the custodian in accordance with the Texas Disciplinary Rules of Professional Conduct, in one or more of the following means:
 - 1. To attorneys assuming the responsibility for ongoing matters;
or
 - 2. To the client or client's authorized representative, to the extent that the client is lawfully entitled to such materials.
- B. Entry of an order terminating the custodianship from a court with jurisdiction over the practice under Rules 13.02 and 13.03.
- C. The return of the appointing attorney to his or her practice prior to completion of the custodianship and resumption of representation of active client matters with the competence to conduct such representation.

In the event there is disagreement about whether the appointing attorney is competent to resume representation of a client matter upon return to the practice, either the appointed custodian or the appointing attorney may petition for a determination and order of a court under Rules 13.02 and 13.03 concerning the resumption of the practice by the appointing attorney and termination of the custodianship. An appointed custodian may also petition the court for an order concerning the proper disposition of dormant or closed client files, distribution of active files for which a client is nonresponsive or cannot be located, and for proper distribution of any client property or other property being held pursuant to a representation by the appointing attorney, including client funds held in an IOLTA account.

Proposed Rule (Clean Version)

13.05. Termination of Custodianship: A custodianship conducted by an appointed custodian under Rule 13.04 shall terminate upon one or more of the following events:

- A. The transfer of all active files and other client property in the possession of the custodian in accordance with the Texas Disciplinary Rules of Professional Conduct, in one or more of the following means:
 - 1. To attorneys assuming the responsibility for ongoing matters;
or
 - 2. To the client or client's authorized representative, to the extent that the client is lawfully entitled to such materials.
- B. Entry of an order terminating the custodianship from a court with jurisdiction over the practice under Rules 13.02 and 13.03.
- C. The return of the appointing attorney to his or her practice prior to completion of the custodianship and resumption of representation of active client matters with the competence to conduct such representation.

In the event there is disagreement about whether the appointing attorney is competent to resume representation of a client matter upon return to the practice, either the appointed custodian or the appointing attorney may petition for a determination and order of a court under Rules 13.02 and 13.03 concerning the resumption of the practice by the appointing attorney and termination of the custodianship. An appointed custodian may also petition the court for an order concerning the proper disposition of dormant or closed client files, distribution of active files for which a client is nonresponsive or cannot be located, and for proper distribution of any client property or other property being held pursuant to a representation by the appointing attorney, including client funds held in an IOLTA account. **TBJ**

Committee on Disciplinary Rules and Referenda
Transcript of Public Hearing on
Proposed Rule 13.05 (Termination of Custodianship), Texas Rules of Disciplinary Procedure
September 17, 2020 – By Zoom Teleconference

Video of the full Committee meeting, including the public hearings, is available at texasbar.com/CDRR.

Lewis Kinard:

All right, this will conclude our public hearing on 1.18 and we'll now move on to, uh, the public hearing on proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure. I'll call this public hearing to order. Uh, that proposed rule change addresses the termination of voluntary custodianship conducted under proposed Rule 13.04, also to the Texas Rules of Disciplinary Procedure. Now this version of proposed 13.05 was recently published in the Texas Bar Journal and Texas Register. And like the others, uh, we have... we will accept public comments throughout October 6th, uh, we have this, um, through on the October 7th agenda to take final action if we want to at that point, we have until December 5th to do so.

Lewis Kinard:

Is there anyone signed up to speak on this one, Brad?

Brad Johnson:

Yes, Chair, we have, um, Laura Gibson who signed up and I believe she is on, and then, um, tentatively Greg Sampson was also signed up. So if you'd like I can-

Lewis Kinard:

Okay.

Brad Johnson:

... go ahead and, um, [crosstalk].

Lewis Kinard:

All right, let's invite Ms. Gibson.

Brad Johnson:

Okay. Ms. Gibson, give me one second and then you will show up as a panelist here.

Lewis Kinard:

And while they're doing that, anyone else that wants to speak on this item please, uh, raise your hand in Zoom or do star 9 in the telephone conference system and that will, uh, flag you also as wanting to speak.

Claude Ducloux:

Hi, Laura!

Laura Gibson:

Good morning! Y'all s-, y'all are seeing my loteria, uh, decorations from the Texas Access for Justice, uh, event last night that I haven't taken down yet.

Lewis Kinard:

That's okay. Continue celebrating.

Laura Gibson:

Yes (laughs). Uh, uh-

Lewis Kinard:

All right, thank you for coming today and, and we welcome your comments here.

Laura Gibson:

Thank you. I'm sorry I missed your August 5th meeting where y'all voted to publish the new, um, Rule 13.05. I know Greg Sampson, the co-chair of the succession planning committee with me, was able to attend and I'm delighted that y'all voted to publish them. I don't really have anything to add, um, I know that we struggled with the concepts in this termination of custodianship concept and, uh, went back to the drawing board on this rule with the, the old 13.05 that the Committee had issues with. And came up with what I think is a much better rule, I think it's a lot simpler and clearer and easier to follow. So I'm delighted that, um, great minds, took a lot of energy and time, but we ultimately came up with a resolution that I think is a very good one.

Laura Gibson:

Uh, so I don't have anything to add but I have, um, am here to answer any questions that you have or anything you need from me.

Lewis Kinard:

All right, thank you. Anyone on the committee have questions for Ms. Gibson?

Claude Ducloux:

Yes.

Lewis Kinard:

Claude.

Claude Ducloux:

Let me just say since, thank you Laura very much, since, w-, I participated in this, for those of you in the public who are listening to this, um, this started out... Forgive me but give me 30 seconds of background. We already had in the Rules of Disciplinary Procedure, uh, Procedure when a lawyer was lost or, you know, became disabled where you could go to the court basically and establish what would be equivalent or conco- comparable to a receivership, where somebody, one or more attorneys were appointed to take over his or her practice and, and, um, you know, get rid of those files and pass them on to other attorneys, etc.

Claude Ducloux:

And, uh, so the first change in that was well, if you have to do that with a court why can't you do it voluntarily, um, and so we came up with a rule for that, and then they were thinking but what about if you're not really... 'Cause the rule that we came up with was just really to, to end the practice, but what if, uh, a attorney was just disabled or had a stroke or something like that and there was a possibility that he or she would come back, and that was the genesis of this rule.

Claude Ducloux:

And this is, as Laura said, for probably a fourth generation of this rule that, the iss- issue that we had with the earlier generations of this rule was that if there is no distinct plan to terminate the practice then it's the practice of law and it's, we didn't think it really belonged here. But what we've done with this in, in remodeling this, is that is directing the party, if there is any dispute, just to basically go back to 13.02 and ask the court, "What should I do?" Uh.

[Break in Recording]

Lewis Kinard:

... not on this one.

Tim Belton:

No, I would just, I would just add that the process worked, it was a sausage grinder but I think we have, uh, a good solution and appreciate Laura and Greg investing their time to make sure that, uh, we have the opportunity to address the concerns.

Lewis Kinard:

Okay, anyone else on the Committee? All right, we will conclude the public hearing on proposed Rule 13.05. And again, thanks everyone for listening, for sending in comments, uh, for joining, those who- who did, uh, speak today.