

**Committee on Disciplinary Rules and Referenda  
Proposed Rule Changes**

**Texas Rules of Disciplinary Procedure  
Rule 13.05. Voluntary Appointment of Custodian  
Attorney to Act During Disability**

**Public Comments Received  
Through July 7, 2020**

**From:** [Lewis Ward](#)  
**To:** [cdrr](#)  
**Subject:** RE: Comments on Proposed Changes to Rule 13.05  
**Date:** Thursday, June 11, 2020 1:15:45 PM

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**\* State Bar of Texas External Message \* - Use Caution Before Responding or Opening Links/Attachments**

RE: Comments on Proposed Changes to Rule 13.05

To Whom It May Concern:

I reviewed the proposed additional Rule 13.05 and am in favor of it as written.

Thank you!

A. Lewis Ward

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**From:** [Gregory W. Sampson](#)  
**To:** [Claude Ducloux](#); [Brad Johnson](#)  
**Cc:** [Gibson, Laura](#); [Dean Schaffer](#); [Seana Willing](#)  
**Subject:** Revised Proposed Rule 13.05 for CDRR Meeting 6/18/20  
**Date:** Sunday, June 14, 2020 6:49:10 PM  
**Attachments:** [Redraft of Proposed Rule 13.05 6.12.20 GWS.docx](#)

**\* State Bar of Texas External Message \* - Use Caution Before Responding or Opening Links/Attachments**

Claude, thank you for your work in the CDRR subcommittee on this important topic of practice cessation. Laura Gibson, Dean Schaffer and I have been considering the concerns about managing a practice in the temporary cessation context and implications of Part XII in the current draft, which we subsequently discussed with Seana Willing. We believe we may have an approach to proposed Rule 13.05 that addresses both concerns.

We attach for your and the CDRR group's review and consideration, a revision to 13.05 clarifying how a non-judicial custodianship under Rule 13.04 may be terminated. It keeps the approach of 13.04 that cessation activities of a custodian are toward closing the practice and transferring all active files to successor attorneys but recognizes that there may be circumstances in which an appointing attorney may return to practice competent and ready to continue his or her work on active files that have not yet been transferred out to other lawyers. That is but one method by which the custodianship could at that time be concluded. We also address the circumstance that the custodian and returning attorney may not agree on competence in some cases and could then engage a court to make that determination, after which the custodianship would then continue with court supervision if the court determines the custodianship should continue.

We welcome any comments or questions you, the subcommittee or CDRR group may have about this approach in advance of the hearing on Thursday, but Laura, Dean and I will also be participants in the hearing if you would like to discuss it at that time. I also send a copy to Seana for her to consider and for any comments she may have. Thank you for your consideration.

Best Regards, Greg.

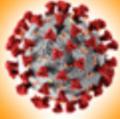
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### **13.05. Termination of Custodianship:**

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

1. The transfer of all active client files to attorneys who take responsibility for the representation or upon distribution of such files and any client property to the client in accordance with the custodian agreement and in compliance with applicable Disciplinary Rules of Professional Conduct;
2. Entry of an order terminating the custodianship from a court with jurisdiction over the practice under Rules 13.02 and 13.03.
3. 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 disbursement of any client property, including client funds held in an IOLTA account.

**Committee on Disciplinary Rules and Referenda**

**Transcript of Public Hearing on Proposed Rule 13.05, Texas Rules of Disciplinary Procedure  
(Relating to the Voluntary Appointment of a Custodian Attorney to Act During Disability)  
June 18, 2020 – By Zoom Teleconference**

*Video of the full Committee meeting, including the public hearings, is available at [texasbar.com/CDRR](http://texasbar.com/CDRR).*

Lewis Kinard:

Go ahead and call the roll, Cory, and make sure we have a quorum.

Cory Squires:

Sir. Mr. Belton. He is on. Mrs. Bresnen.

Amy Bresnen:

Here.

Cory Squires:

Mr. Ducloux.

Claude Ducloux:

Here.

Cory Squires:

Judge Garcia.

Dennise Garcia:

Here.

Cory Squires:

Mr. Hagan.

Rick Hagen:

Here.

Cory Squires:

Dean Johnson.

Claude Ducloux:

He's here. He's (laughs) muted, but he's...

Vincent Johnson:

Present.

Cory Squires:  
Mr. Jordan. Mr. Kinard.

Lewis Kinard:  
Here.

Cory Squires:  
Mrs. Nicholson.

Karen Nicholson:  
Here.

Cory Squires:  
We have a quorum.

Lewis Kinard:  
All right, good. Thanks, Cory. Welcome everybody. This is our quarterly, uh, well, it's our, uh, public hearing and meeting of the Texas, uh, Committee on Disciplinary Rules and Referenda. Uh, this is our second public hearing by Zoom, uh, online only, which we're kind of having fun with still.

Karen Nicholson:  
(laughs).

Lewis Kinard:  
I'm glad that you could join us. Just a few reminders before we begin, uh, everybody's put on mute to start with, uh, participants other than members and certain staff members should only unmute when it's their turn to speak. We'll recognize and call on people, uh, in the order of which they registered to speak. And then if first, there's anyone else left to speak on the public hearing topics, we will, uh, call on you then. We have several who've registered. Uh, if we have, um, we've typically given everybody three minutes and then ask questions if we need to, which may extend that time. Um, and then we move on with our, uh, Committee business after the public hearing. So we have three public hearings today. We're going to call the first one, uh, to order, which is a public hearing and discussion on proposed Rule 13.05 of the Texas Rules of Disciplinary Procedure. And it relates to the voluntary appointment of a custodian attorney to act during the disability of another attorney. Uh, it's on page three of the packet, and we're going to, um, call on the first person who has registered there, uh, Brad or Cory.

Brad Johnson:  
It's really up to- Laura Gibson, Greg Sampson, and Dean Shaffer have all signed up for this topic.

Lewis Kinard:  
Okay.

Brad Johnson:

So whichever, whoever would like to go first, you're welcome to, to go ahead and, and address the Committee. I think, Greg, do you wanna- to maybe go first? I will, uh, let me unmute you.

Claude Ducloux:

Good.

Greg Sampson:

Now I'm unmuted, excuse me.

Lewis Kinard:

There you go.

Greg Sampson:

I had pulled up the document and I kinda [inaudible] and I couldn't unmute. Uh, I apologize for that. Um, yeah, I'm happy to go first. So, um, w-, we sent this out to you, I guess it was probably, uh, Monday hoping that you might have a chance to look at it. I'm happy to kind of just overview, uh, what we've said. It is a [inaudible] different approach to the issue that, that we addressed, but we heard, uh, the comments in the last meeting, um, and wanted to try to find something that would solve all of the issues that y'all had raised, which were good ones. Um, and in fact, what we did was we determined that perhaps the smartest way to approach this, rather than having a parallel course to 13.04, which y'all have already approved, um, which, uh provides, uh, you know, for a custodian to operate without court supervision, uh, to close a practice.

Greg Sampson:

And then we were looking for situations, looking at situations where lawyers, um, were, uh, perhaps able to return to the practice. And we were trying to make a parallel track with, uh, with a temporary cessation rule. But it did run into [inaudible] roadblocks of the, the latest one was the idea that if we have a disabled attorney, um, and, and they're trying to come back, does that then trigger, uh, Part 12, which, uh, under the rules of procedure would require a determination that they would, uh, either have had capacity or didn't have complexity. And then they would, uh, have their license suspended until they could, uh, come back and in very difficult process, I'm understanding, uh, [inaudible] they're no longer disabled.

Greg Sampson:

Uh, so instead we decided maybe this, the better solution is to keep 13.04 the way it is. To operate, uh, when a lawyer, uh, ceases practice for the myriad of reasons that are all provided under the rules. Um, and if in that process, while the custodian is, uh, you know, dealing with notifying clients, the court, et cetera, uh, with the mind toward winding up or, or closing the practice, if that lawyer, the appointing lawyer then comes back, um, perhaps then you could cease the cessation of the practice or, or would be considered perhaps at that point completed because the lawyer now able to, uh, take over his practice again, his or her practice, um, it, w-, that would be one of the, one of the ways that you could terminate. And so we thought perhaps best to just have 13.05 become a termination of the cessation process, or I think, or in terms, uh, I think Dean prefers to say the custodianship process. Um, because as a custodian

is working through the process he is certainly, uh, you know, trying to get all the active files to distribute it to new lawyers or to the clients.

Greg Sampson:

Um, but if that process can be stopped because the lawyer comes back, that would be one of the ways to stop the, uh, the custodianship and then the others, the others are listed there as well. You can certainly get a court order, which I think many lawyers will probably want to do if they're custodians and they're dealing with an IOLTA account. Um, and of course if you complete it all together, all the files have been distributed in accordance with the professional rules of responsibility, uh, that would also be the other way to complete it, which is really something we all understood that, that, that perhaps the best to put it in writing. So that's the, that's the approach. And we're, uh, interested to have y'all's thoughts on that, um, as to whether or not it does solve the, the concerns that were raised before.

Lewis Kinard:

Alright, good. Any members of the Committee have questions for Greg Sampson.

Claude Ducloux:

I may, but I, I want to hear whatever Dean, [inaudible] make sure, because Dean or somebody else might answer a question I have, and I don't want to waste our time if they're going to answer it.

Lewis Kinard:

Mrs. Gibson, Mr. Shaffer, would you like to, uh, comment now?

Laura Gibson:

Um. Yes. This is Laura Gibson. Um, as Greg stated, we, we heard the concerns raised by the Committee at the last meeting and we wanted to address them. And this was, this was a hard nut to crack. Um, we got lots of, um, thinking and analysis by a lot of people. We got Seana Willing involved and obviously Dean Shaffer has been supporting us. Um, and we feel like this rule, um, addresses the Committee's concerns and drives the flexibility needed because we don't know what events are going to happen in the future. And, and we want, um, you know, we want to keep the interests of the lawyers, uh, at, in the forefront, as well as their clients and we want to address the concerns that you don't want somebody, um, practicing law who, you know, is not supposed to be practicing law. So this rule as we've drafted it tries to envision all the circumstances that might arise to give, um, the court and the parties the ability to make the appropriate decisions, uh, depending upon the circumstances.

Lewis Kinard:

Thank you. And so just clarifying the, what we're talking about is a substitute, uh, 13.05 that replaces what we had published, uh, for comment, correct?

Laura Gibson:

Correct.

Lewis Kinard:

And, Brad, was this substitute version already posted on the CDRR website?

Brad Johnson:

It, Lewis, it is, uh, it's included with the meeting materials that have been posted-

Lewis Kinard:

Okay.

Brad Johnson:

... for about the last week. Um, so that, that's, [inaudible] it hasn't been docketed as a request or, you know, published or anything.

Lewis Kinard:

No, no. I just want to make sure if anyone listening or watching that, that they know where to find what we're talking about as opposed to looking at their Bar Journal. So it's [texasbar.com/cdrr](http://texasbar.com/cdrr), you can find the materials there, um, shameless plug for our website, but still...

Claude Ducloux:

(laughs).

Lewis Kinard:

Uh, uh, Dean Shaffer did you have something you'd like to add?

Dean Shaffer:

Uh, mainly by way of background. Just, um, and I think my role here today is mostly to answer questions, but just to give a, a feel for the, what staff sees in these situations. We knew 2017, there had been an uptick in situations where CDC was asked to address, um, scenarios in which lawyers were deceased or otherwise absent, and with that uptick in activity and seeing it's happening across the country, um, Linda Acevedo, our chief at the time, decided that we would centralize all calls with one lawyer. And so that came to the special projects where I work, and pretty early in the project, uh, we saw there are a lot of calls coming in and some of the most difficult ones are the, uh, attorney suicides, any kind of sudden cessation. Um, ideally everybody be doing, uh, succession planning. Um, but what we see are the situations where there hasn't been succession planning and there's some unexpected event. Um, so we early on decided that this would be handled as a pilot program, give us some flexibility in how we're gonna respond to these situations.

Dean Shaffer:

And fairly soon into it, I got to meet Greg and got to see his presentation, he's sort of the heir apparent to Jimmy Brill on these issues (laughs). It was very helpful to have that, that friend and brother working on this. Um, and then as steps moved on and it was clear that we needed more eyes on this. That's when I talked with Laura and that's when things really started happening to, to get the succession planning work-group together, um, to get these, uh, proposed rules underway. And so I want to thank Laura and Greg for their leadership on this. So, um, just in a nutshell, uh, the assignment to me was try and staff these situations, but also keep a record. And where we're at right now [inaudible] yesterday we're, we're up over 550 law practices that I've gotten calls on. There are a variety of patterns that come up. But [inaudible] the sudden cessations and prospective cessation are the most difficult

scenarios. [Inaudible] that deals with, uh, the storage units, uh, or landlords and the lawyer for whatever reason the bill is not brought up to date and we get a call that there are client files.

Dean Shaffer:

And then we've got another large group of not as difficult situations, people who are looking for estate planning, documents, they, they're looking for a single client file, um, or they may have a question about a dormant proceeding that's come up. So those are scenarios, most of the calls involved deceased lawyers. So, um, from my view, it's best to address this, uh, as law practice issues. It's not like ordinary discipline. In most of the cases, there is no law license to be regulated. The lawyer's already deceased and so looking at Part 13, our existing rule for cessations, it's, it's clear that it's dealing with the law practice, not so much the lawyer. And so, in the, uh, in the proposed rules coming about, that's one thing I've, I've kind of pressed for is that we keep that distinction between the lawyer and the law practice. So with that background, any questions, I'll give it a try.

Claude Ducloux:

I, I...

Lewis Kinard:

All right. Claude has a question, I know.

Claude Ducloux:

Thank you, you guys. First of all, I, I do want to say this is a really, a laudable goal, and I, I really see that you've taken this different approach. And of course, what I see, say is just my own opinions. Um, and it's, it's a very, uh, it was, it's a very innovative way, uh, to, to approach this issue. Uh, you've taken into account, I think that the, the clients are foremost. Um, here, here are my, here's my, my thought process in, in going through this, again, to give people who might be listening a little background. The 13.02 and 13.03, were the courtroom way where you see a lawyer needs help in, in shutting down. And I'm just going to use the, the masculine, uh, pronoun "him" to include all lawyers, him. I don't want to say him or her, him or her, or I can use her, but I'll just use one pronoun, uh, to say that when he needs to help closing down the practice. And that allowed the lawyer to sort of have the comfort, the custodian lawyer, that a judge had appointed him or her to do that.

Claude Ducloux:

And there are certain rules to be followed and he can go to the court for guidance when something came up. So we said that'd be great if we had another rule that you didn't have to go to court, but you got the same protections where you're not going to be sued unless you're grossly negligent in the handling of the closing down, that was the purpose of 13.04. And then quite correctly as part of your job, Dean's going to, well, wait a minute, what about if a lawyer is just disabled and we don't know if he or she is going to be coming back, could there be a rule that we could craft or that. Um, my, uh, opinion about that earlier was, well, wait a minute, that's really not closing down, that's the practice of law. And that there's a whole set of what we call disciplinary rules for that. Well, so you've crafted this niche in, into that with this, uh, new rule, 13.05. But still my concern honestly, is that that does involve the practice of law it, within the rule itself. It says, well, you can contact the client and you have to take such action, you can file pleadings, et cetera, to, to protect the client.

Claude Ducloux:

So that, that, uh, constructs the ongoing practice of law. Now, one of the, one of the, I guess, the benefits, one of the few benefits (laughs) of being old like me is if you've, you've seen thousands of situations where things have gone wrong. I, I know personally that, um, if I didn't know if a lawyer was going to be coming back, I'd probably want the protection of a court to tell me. Because, uh, even when I dealt with, uh, I'll make it personal, my mother and her, um, you know, declining mental ability. She, there was many times she said, no, no, I'm, I'm leaving the hospital. I'm fine now. Well, if you're the custodian attorney and the attorney says, I, I'm fine now. I'm completely, uh, recompensated, I'm, I'm sober. I'm- leave. I'm going to take over my practice. But as the custodian attorney, you have to go, uh, Bob, you're really not, you know, you're, you're not well that yet, you're, you're on that up and down.

Claude Ducloux:

I would be scared to rely on this rule when then that lawyer then sues me saying you gave away my, my client files and things like that. These are just, uh, you know, I'm trying to think of scenarios where I would prefer s-, from the get go, to have something, um, that a court has appointed me. And then when you want me not to be appointed, if you think you're ready to resume your practice and we have a dispute about that, you can go to the court and say, judge, I'm ready to take over my own practice again, rather than just tell me that you're ready and kick me out of your office. And then somebody sues me. He says, well, you assumed the, the role of as guardian or, excuse me, custodian, and now you've allowed this person back in, in the public. Again, I think this is a very innovative approach. I want to think some more about it. I'm just trying to think of those situations, because it does involve the practice of law.

Claude Ducloux:

One of the comments that you all said, which was a really good comment and made me, uh, think about it was, well, you know, in the practice of dentistry, they have a rule that, uh, a dentist can come back within a year if he's been disabled due to a heart attack or something like that. Um, but it's a lot easier in that profession, other than orthodontics where you have a long time where you're doing something. Dentist is piece work. I mean, I can get another dentist to do a filling for my, for my client and things like that. And I could understand that might work. But I know for a l-, from talking to lawyers who have to slow down their practices, that you can't practice law part time. You, you're just, if you're a lawyer, you're a lawyer and you've got to be there. I mean, I've handled 10 phone calls this morning that I never expected when I woke up this morning I'd be handling because that's what happens in the practice of law.

Claude Ducloux:

So this does cognize, you know, that you will be practicing law as a custodian in some form or fashion while you await whether or not the, uh, attorney will be able to come back from whatever disability he or she is suffering. And that causes me concern where I would say, well, if it were me personally, I'd just go to the court, it's, it's worth the two or three hours of my time to go get a hearing and get, just go get appointment. And now I know what I'm qua, qualified to do. Again, I'm not saying no, this shouldn't, shouldn't go to the public to consider. I'm just saying, those are my concerns, that it still involves the practice of law.

Lewis Kinard:

Well, thank you. Very good. Anyone else in the Committee have questions or comments for our presenters?

Greg Sampson:

Lewis, if I could respond briefly, I don't want to-

Lewis Kinard:

Yeah.

Greg Sampson:

... I don't want to cut off any questions. But, um, of course, Claude, uh, well taken comments. And that was one other the targets of this new approach, um, was to minimize the management of a practice. Um, and when we did specifically include, I'm sure you saw, uh, the, the item that says that if there's a dispute about whether a lawyer is capable of taking over his files again, in which case you might be able to, uh, complete the cessation or the custodianship. Uh, it specifically says that either of those parties can go to court to get that determination. So-

Claude Ducloux:

Right.

Greg Sampson:

... it's encouraging people to do that, uh, because we do understand that that's a difficult position for a lawyer to be in. Um, probably only if it's in a really, really clean situation, excuse me, um, you know, would a lawyer probably not want to get that in. So we're just reminding lawyers that they certainly have that avenue, um, and I think that's, that's a very good point. But we are really trying to avoid the management of a practice here. We're, you know, we're, there's the list of the power in 13.04. We didn't change those. Um, and it's really limited to what's necessary to allow the client to take the file to another lawyer. Um, and if a client needs to take the file to another lawyer immediately, then those are the first ones. And then those that maybe have more time, they'll get them over time to the lawyer. But I don't know that the process is really any different than court supervised. It's just that, you have the opportunity because you're already in the jurisdiction of the court to more quickly get advice. So-

Claude Ducloux:

Yeah.

Greg Sampson:

... I don't see it as really managing the practice any more than 13.02 or 13.03. It should be managing it without supervision, kind of more like a, perhaps an independent administration, as opposed to a dependent administration, or maybe-

Claude Ducloux:

Well...

Greg Sampson:

... akin to a power of attorney.

Claude Ducloux:

And what you say is absolutely right. I'm not arguing anything with what, y-, your work product or, or anything. Let, let, let me give you an example. Let's say the person who's gone into, um, had a stroke, uh, she's a high dollar personal injury attorney. She's had a stroke. The doctor says it's very unlikely she's ever going to get back. So you start, as the custodian under this rule, start giving away her files. She makes this recovery and she says, "I'm suing you. You cost me a million dollars by, by..." But I, but I was acting under in good faith under 13.05. That's, that, that would worry me. Would, wouldn't it worry you if, uh, in good faith, he says, "No, these, these files are, are time sensitive. We have to get experts appointed. We have to do this. I'm, I'm gonna, uh, give them to another attorney." Um, that, that would worry me. I would want court supervision to say, I'd want to make a motion saying I need to get these files out and have the judge bless it, uh, rather than making that decision myself. But again, this, I think a rule like this definitely has its place. So...

Dean Shaffer:

Just, uh, a point about the mechanics of Part 13 as it currently exists, most cessations, uh, complete under the first rule, 13.01.

Claude Ducloux:

Yeah.

Dean Shaffer:

It's just a matter of getting notice to clients, return the client file. It's in the situations where there are active matters pending and no lawyer is handling them with client consent. That's when the needle starts to point to an application for a court to assume jurisdiction over the law practice.

Claude Ducloux:

Agreed.

Dean Shaffer:

If the court [inaudible] that, um, it'll look at a verified petition under 13.02. Uh, if the court assumes jurisdiction, it will then appoint one or more custodian attorneys. And that role of custodian is unique. I think of these as extraordinary, um, remedies. Uh, there's nothing like custodianship anywhere else.

Claude Ducloux:

Yeah.

Dean Shaffer:

But it's important to keep that distinction that a custodian attorney is not a successor attorney. And the custodian, it's not so much that the lawyer is handing off cases to other lawyers, actually want to avoid that. Um, one, one way to think of it is with detailed succession planning, you would have a successor attorney.

Claude Ducloux:

Yeah.

Dean Shaffer:

One who becomes, uh, the new lawyer or the, even the substitute lawyer, but custodianship is different. It's, the objective there is to bring that law practice to rest. You know, active matters pending, no client or no lawyer handling them with client consent. And so with the appointment of the custodian, we've got four basic objectives, to get notice, or to get access to client files, notice to clients, client direction on where the client wants the file to go, and then those return of property issues. And in some of these situations, uh, there's question about under funded IOLTAs, um, that's very helpful to have a court involved, in- in that situation ... but, with the mechanics of it, I- I agree with Claude, it- the custodianship, it's a court-oriented proceeding, and what we've- we try to do with these new proposed rules is to make it easier to get a custodianship going without ... uh- a complicated court proceeding.

Dean Shaffer:

Um, but- an- and that's- so that's 13.04, and with 13.05, some of the scenarios that come up ... I got a call yesterday, uh, an attorney that- um, who is pregnant, and she's gonna have to leave practice for a while. Um, we've had ... uh, let's see, slip and falls, car accidents, um ... we just ... you name it, we've had lawyers who've had to go into rehab, and so ...

Dean Shaffer:

It- it again comes back to that question, "Are there active matters pending-"

Claude Ducloux:

Yeah.

Dean Shaffer:

[crosstalk] ... [inaudible] lawyer handling with client consent? Um ... if we've got an agreement between lawyers, um, then it's simple under 13.04. N- no court proceeding necessary, but it's always available if needed.

Claude Ducloux:

Right. That's the backup plan. I mean, I guess maybe this is just g- a conservatorship light, when you think, "Look, this person doesn't have much practice, I could probably do this, I don't think I need court intervention. If I do, I always have that, I can always go to court and do a formal 13.02 ... uh, 13.03 petition.

Claude Ducloux:

So, I mean ... maybe that's where it sort of, sort of fits in there. Um, the- the rea- by the way folks, the reason I'm wearing this headphone is because I think I was ... I was being told that my little microphone was going in and out and, Dean, yours was going in and out on us too (laughs), that's-

Dean Shaffer:

Oh no, sorry about that.

Claude Ducloux:

... so- i- if- if- is- that's why I'm wearing this silly thing and I feel like I'm calling a baseball game. "And he's on the third base!" Anyway, so ...

Lewis Kinard:

It makes you look important there, Claude.

Claude Ducloux:

I am, I'm very important.

Lewis Kinard:

Yep. All right, anyone else uh, have questions, uh, or comments on, I would say either version, uh, the one that was recently published and this one, which is up, uh, for, uh submission now? And do we have anybody, uh, I guess- um, Brad or Cory, anybody else look like they're indicating that they wanna talk?

Brad Johnson:

Not currently, if you are- if you've joined the meeting and you're an attendee and you do want to [crosstalk] can either rise your hand using the zoom function if you're on your computer. If you're on telephone only, you can press star nine at this time, and that'll raise your hand. Um, so if- if anyone does wanna speak, please go ahead and let us know now, and we'll be sure to call on you.

Lewis Kinard:

And this is 13.05. We'll- we'll get to the others in a minute.

Claude Ducloux:

Okay.

Brad Johnson:

Correct. And I- Lewis, I don't see anyone right now.

Lewis Kinard:

All right, Greg, ye- yes sir.

Greg Sampson:

I'm sorry, a minute, the- if I could uh, let me just-

Brad Johnson:

Oh.

Greg Sampson:

... give you a little bit more context here, as I understand you're gonna be looking at this rule some more. Um, so the first phase we have completed was getting online designation form going, uh, and that is for the primary purpose-

Claude Ducloux:

That's good.

Greg Sampson:

... now to uh, to allow people to be selected, and then go through 13.02 and 13.03. Um, and so, so that's where we are now. This is, next phase, is trying to allow for something in a simple situation, as Claude pointed out, where perhaps court supervision isn't needed, so this would be very helpful there.

Greg Sampson:

But I wanted you to under- to- to know, as- as I hope you do, that the next phase is obviously gonna be, uh, educating all these people that may be custodians about how to be a good custodian, all the procedures that would need to be followed and why it's good to go to court if you can, and all of those things. But then where also is a part of that process, promulgating standardized forms, um, probably one of the most important of which is gonna be the f- the- the language to put in an engagement letter or a notice to clients that you're, you're appointing a custodian and getting their consent for that, and then of course there's the custodian agreement, which will certainly co- cover things like, if you come back to the practice, you know, this is how we're going to deal with that.

Greg Sampson:

So there is gonna be some follow up documentation, it won't only be the rule that these custodians will have to follow. Uh, we're- we're anticipating that they're- they're gonna need a lot of guidance and we're gonna put- put forth a lot of CLE uh, to train people to do this. So I want you to understand that.

Greg Sampson:

But I do have one uh, quick, uh, proced- I hope it's quick, procedural question and that is, uh, I'm understanding that you can approach this change in the rule that we're proposing now a couple of different ways, and I guess I'm wondering, are- do you all have a sense of whether or not you need to re- um, uh, put this up for re- for, uh, comment again, or if this could be considered a revision that doesn't require that? I'm just wonder ... wondering, procedurally, where- where [inaudible] rule is now and if, if y- if we decide to go this new route.

Lewis Kinard:

No, it's a good question an- and something we will definitely need to talk about because uh, it's a novel question, one we haven't uh, handled before and that's okay, you get to be first on this one, giving us a complete substitution of a rule that's already in process, uh, for- for consideration, so ... While we have a lot of flexibility on making changes, this is a little more than just a new sentence or word or phrase, so I think ... we're probably back to a publication and opportunity to comment, since, just got it and, and uh- but that's something we hadn't decided as a committee yet.

Lewis Kinard:

Uh, it's actually later on our agenda to sit down and, and really hash those things out, and talk about the intent of the statute and, uh, rules and that type of thing.

Claude Ducloux:

Yeah.

Lewis Kinard:

Uh, not that we're discouraging you from- from doing this, because I- I think that there's a lot here, and a lot of good reason for what you've done, but right now we just wanna take comments from- and questions from the public on either version, and hear that, and that way we then can take that into our deliberations as we move into the next agenda items.

Claude Ducloux:

A- and one more comment Greg and Laura, and let me just say, I'm so glad you did that online; I think I was one of the first ones that went online, designated a custodian attorney, and I'm happy to say, that he accepted (laughs), to be it just in case, and it's very easy. Anybody listening out there, if you haven't designated a custodian attorney, in case, uh, the buses come back into operation and run you over, you need to do that.

Lewis Kinard:

Very good. All right, if there's no one else to speak on 13.05, we'll close that public hearing and move to the next.

# Committee on Disciplinary Rules and Referenda Proposed Rule Changes

## Texas Rules of Disciplinary Procedure

### Rule 13.05. Voluntary Appointment of Custodian Attorney to Act During ~~Disability~~Disabling Circumstance

#### Proposed Rule (Clean Version)

**13.05. Voluntary Appointment of Custodian Attorney to Act During ~~Disability~~“Disabling Circumstance”**: In lieu of the procedures set forth in Rules 13.02 and 13.03, and in addition to the appointment of a custodian attorney to assist with the closure of an attorney's practice as provided in Rule 13.04, an appointing attorney planning for a possible temporary cessation of practice may voluntarily designate a Texas attorney licensed and in good standing to act as custodian attorney to assist in the disposition of active client matters for a period of time not to exceed 120 days without closing the appointing attorney's practice, but only: (1) when the appointing attorney experiences a ~~Disability~~Disabling Circumstance, as defined in Rule 1.06; and (2) if the custodian attorney has a reasonable expectation the appointing attorney will resume the practice of law when the ~~Disability~~Disabling Circumstance ceases. A “Disabling Circumstance” for purposes of this Rule occurs when an appointing attorney has disappeared, become inactive, been suspended or becomes physically, mentally or emotionally disabled and cannot provide legal services necessary to protect the interests of the appointing attorney's clients. The terms of the appointing documents, which shall be signed and acknowledged by the appointing attorney and custodian attorney, may include any of the following duties assumed by the custodian attorney during the period of the ~~Disability~~Disabling Circumstance:

- A. Examine the client matters, including files and records of the appointing attorney's practice, and obtain information about any matters that may require attention.
- B. Notify persons and entities that appear to be clients of the appointing attorney of the cessation of the law practice, and suggest that they obtain other legal counsel.
- C. Apply for extension of time before any court or any administrative body pending the client's employment of other legal counsel.
- D. With the prior consent of the client, file such motions and pleadings on behalf of the client as are required to prevent prejudice to the client's rights.
- E. Give appropriate notice to persons or entities that may be affected other than the client.

- F. Arrange for surrender or delivery to the client of the client's papers, files, or other property.

If the appointing attorney's ~~Disability~~ **Disabling Circumstance** does not cease before the end of the 120-day period, or if the appointing attorney otherwise does not return to the practice fully competent to provide the legal services necessary to protect the interests of the appointing attorney's clients before the end of the 120-day period, then the custodian attorney shall proceed to assist thereafter only in the final resolution and closure of the appointing attorney's practice in accordance with Rule 13.04, unless the custodian attorney seeks and obtains a court order extending the period under which the custodian attorney can continue to act as custodian for a specified duration under this Rule.

However, ~~if in the event the appointing attorney attempts to return to the practice before the custodianship is completed or terminated and there is disagreement about whether the Disabling Circumstance ceases to exist or 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~~ which has jurisdiction 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 non-responsive or cannot be located and for proper disbursement of any client property, including client funds held in an IOLTA account.

~~If the appointing attorney's Disability does not cease before the end of the 120-day period, or if the appointing attorney otherwise does not return to the practice fully competent to provide the legal services necessary to protect the interests of the appointing attorney's clients before the end of the 120-day period, then the custodian attorney shall proceed to assist thereafter only in the final resolution and closure of the appointing attorney's practice in accordance with Rule 13.04, unless the custodian attorney seeks and obtains a court order extending the period under which the custodian attorney can continue to act as custodian for a specified duration under this Rule.~~

The custodian attorney shall observe the attorney-client relationship and privilege as if the custodian were the attorney of the client and may make only such disclosures as are necessary to carry out the purposes of this Rule. Except for intentional misconduct or gross negligence, no person acting as custodian attorney under this Rule shall incur any liability by reason of the actions taken pursuant to this Rule.

The privileges and limitations of liability contained herein shall not apply to any legal representation taken over by the custodian attorney.