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From: Nicol Hebert, Deputy Director
Louisiana Department of Justice
Occupational Licensing Review Program

Date: June 13, 2024

Subject: OLRP File No. 24-02-OR-0023

- Clarify Safe Harbor Affidavit re: “Party Litigant” (LSA-R.S. 37:2556(D))
- Remove Financial Requirements from Safe Harbor Affidavit (LAC 46:XXI.1303(E))
- Adopt Board Code of Ethics (LAC 46:XXI.1305)

I. Summary

The Louisiana Board of Certified Shorthand Reporters (the “*Board*”) has proposed to (i) clarify the Board’s understanding and application of the term “*party litigant*” (for purposes of LSA-R.S. 37:2556(D)) in the form of an answer to “*Frequently Asked Questions*” to be posted on its website (the “*Party Litigant Rule*”); (ii) remove financial disclosure requirements from the affidavit contained in LAC 46:XXI.1303(E) (the “*Safe Harbor Affidavit Rule*”); and (iii) adopt LAC 46:XXI.1305 to establish a code of ethics applicable to Board members, committee members, employees and contractors, and a related violation reporting process (the “*Code of Ethics Rule*”) (collectively the “*Proposed Rules*”). The Board published a Notice of Intent to promulgate the Proposed Rules in the Louisiana Register on January 20, 2024.¹ The notice invited written public comments and requests for oral presentation, argument, or a public hearing through February 12, 2024.² No comments or requests were received during the public comment period.

The Board submitted the Proposed Rules to the Louisiana Department of Justice’s Occupational Licensing Review Program (the “*OLRP*”) on February 26, 2024. The OLRP initiated review on February 29, 2024. The OLRP invited public comments on the Proposed Rules through March 15, 2024 and received no comments. On March 25, 2024, the OLRP requested additional information from the Board. The Board partially fulfilled this request on March 27, 2024 and completed its response on June 3, 2024.

Upon review and for the reasons set forth herein, the Louisiana Department of Justice has determined:

1. The Party Litigant Rule and the Safe Harbor Affidavit Rule are each (i) an occupational regulation with a reasonably foreseeable impact on competition under the purview of the OLRP; and (ii) in keeping with clearly articulated state policy, and thus approved as submitted; and

¹ Louisiana Register, Vol. 50, No. 1 at pp. 45-48 and 149

² Id.

2. The Code of Ethics Rule does not meet the definition of an “*occupational regulation*” subject to OLRP approval because it (i) applies to Board members (and those it hires to assist in Board functions) and does not purport to regulate the shorthand reporting profession; and (ii) is an internal rule that does not have reasonably foreseeable anti-competitive effects on the regulated profession. Accordingly, the Board may proceed with promulgation of this rule in accordance with the Louisiana Administrative Procedure Act³ (the “*Louisiana APA*”) without further input from the OLRP.

II. Analysis

A. Background

In 2016, two national court reporting firms sued Board members challenging the constitutionality of Louisiana Code of Civil Procedure Article 1434 (“*CCP Article 1434*”) and alleging the Board’s interpretation and application of the term “*party litigant*” for purposes of the certification required by LSA-R.S. 37:2556(D) violated federal antitrust laws (the “*Litigation*”).⁴ The constitutionality claims were dismissed with prejudice and the parties settled the antitrust claims. The Board was briefed in executive session regarding the terms of the settlement agreement which required Board members involved in the Litigation to propose that the Board consider taking the following actions:

1. Clarify that “*party litigant*” means a named party to the litigation for purposes of the certification required by LSA-R.S. 37:2556(D);
2. Remove financial disclosure requirements from the “Safe Harbor Affidavit” in LAC 46:XXI.1303 (“*Rule 1303*”); and
3. Establish a Code of Ethics applicable to the Board and related persons, and a means to report violations.

The Board adopted the Proposed Rules and submitted them for promulgation with the intention of avoiding similar antitrust claims in the future.

B. The Board’s Statutory Authority

The Board is a state regulatory body created “*for the purpose of encouraging proficiency in the practice of shorthand reporting as a profession, promoting efficiency in court and general reporting, and . . . establishing a standard of competency for those persons engaged in it.*”⁵ The statutes creating the Board contemplate that it will generally aid in all matters pertaining to court reporting in Louisiana.⁶ Additionally, the Board has statutory authority to (i) enforce matters concerning court reporters’ relations with the public;⁷ (ii) revoke or suspend licenses for a court reporter’s violation of professional duties and state law;⁸ and (iii)

³ LSA-R.S. 49:950 et seq.

⁴ *Veritext Corp. v. Bonin, et al.*, Civil Action No. 16-13903, in the United States District Court for the Eastern District of Louisiana, consolidated with *Esquire Deposition Solutions v. Bonin, et al.*, Civil Action No. 17-9877, in the United States District Court for the Eastern District of Louisiana.

⁵ LSA-R.S. 37:2551(A)

⁶ LSA-R.S. 37:2553(A) and 37:2555(G)

⁷ LSA-R.S. 37:2553(A)

⁸ LSA-R.S. 37:2557(A)

determine the representations to be made in the safe harbor certification contemplated by CCP Article 1434 and LSA-R.S. 37:2556(D)⁹ (collectively, the “*Board’s Statutory Authority*”).

C. The Party Litigant Rule

CCP Article 1434 prohibits a court reporter who is employed by a court reporting firm that “*has a contractual relationship with a party litigant*” from providing court reporting services in the litigation.¹⁰ LSA-R.S. 37:2556(D) provides a process for court reporters to follow as to compliance with CCP Article 1434. Specifically, that an individual reporter should seek “*certification*” from a “*court reporting firm*”, that confirms said firm “*has no prohibited contractual or employment relationship with a party litigant*”.¹¹ LSA-R.S. 37:2556(D) directs the Board to establish rules on the “*procedure and representations by which a court reporting firm shall provide the certification to court reporters*”. In response to this legislative directive, the Board created a certification affidavit which uses the term “*party litigant*” (the “*Safe Harbor Affidavit*”).¹² The term “*party litigant*” is not defined in CCP Article 1434, yet the Board is directed by LSA-R.S. 37:2556(D) to obtain representations regarding such term. The Board clarifies in the Party Litigant Rule that its understanding and application of the term “*party litigant*” means a named party to the litigation for purposes of the Safe Harbor Affidavit.¹³

The Board has the power and authority expressly granted by law, as well as such power and authority that can be implied as necessary or appropriate to execute the express powers granted.¹⁴ The Board’s understanding and application of the term “*party litigant*” for purposes of the certification it was directed to implement and make rules regarding, is necessary and appropriate for it to fulfill the directive contained in LSA-R.S. 37:2556(D). As such, the OLRP finds the Board’s clarification of how it applies the term “*party litigant*” for the purposes of the Safe Harbor Affidavit is in conformity with the clearly articulated state policy of LSA-R.S.37:2556(D) and the grants of regulatory authority under the Board’s creation statute.¹⁵ Further, the Board’s application of the term “*party litigant*” is in line with the clearly articulated state policy of the OLRP’s creation statute,¹⁶ in that the definition appears to be the least restrictive means required to protect the public from CCP Article 1434 concerns. Based on the foregoing, the OLRP has determined the Party Litigant Rule adheres to clearly articulated state policy and approves the rule as submitted.

D. The Safe Harbor Affidavit Rule

The Safe Harbor Affidavit Rule removes the financial disclosure requirements from the Safe Harbor Affidavit (i) because the Board views this requirement as unnecessary, and (ii) to avoid antitrust claims similar to those raised in the Litigation.¹⁷ Louisiana law directs the Board to “*establish by rule the procedures and representations by which a court reporting firm shall provide the necessary certification to court reporters*” in connection with its safe harbor provisions.¹⁸ Pursuant to this directive, the Board promulgated Rule 1303 to create and implement the Safe Harbor Affidavit. The Board’s ability to amend this affidavit to remove the financial disclosure requirements is within the scope of the Board’s Statutory

⁹ LSA-R.S. 37:2556(D)

¹⁰ LSA-C.C.P. Art. 1434(A)(2)

¹¹ LSA-R.S. 37:2556(D)

¹² LAC 46:XXI.1303(E)

¹³ Louisiana Register, Vol. 50, No. 1 at p. 149

¹⁴ *Realty Mart, Inc. v. Louisiana Bd. of Tax Appeals*, 336 So. 2d 52, 54 (La. Ct. App. 1976), citing *Kramer v. State Bd. of Veterinary Med. Examiners*, 55 So. 2d 93 (La. Ct. App. 1951)

¹⁵ LSA-R.S. 37:2551 et seq.

¹⁶ LSA-R.S. 49:260

¹⁷ Louisiana Register, Vol. 50, No. 1 at pp. 45-46

¹⁸ LSA-R.S. 37:2556(D)

Authority. The Board has express authority to promulgate the Safe Harbor Affidavit Rule and LSA-R.S. 37:2556(D) provides the clearly articulated state policy in support of this amendment. Based on the foregoing, the OLRP has determined the Safe Harbor Affidavit Rule adheres to clearly articulated state policy and approves the amendment for adoption as submitted.

E. The Code of Ethics Rule


The Code of Ethics Rule states as its premise that the Board “requires that board members, committee members, employees, and contractors observe high ethical standards in the conduct of their duties and responsibilities and that they comply with all applicable laws and regulatory requirements...”¹⁹ The proposed rule goes on to provide for (i) a reporting process, (ii) retaliation protection, (iii) confidentiality, and (iv) the general handling of reported violations.²⁰ The subject of these complaints and investigations would be Board members, committee members, employees, and contractors.

The OLRP has authority under statute to review “occupational regulations” for compliance with clearly articulated state policy.²¹ An “occupational regulation” is defined in the OLRP statute as: (i) a rule as defined in the Louisiana APA that (ii) has reasonably foreseeable anti-competitive effects.²² The Code of Ethics Rule does not meet the Louisiana APA’s definition of “rule” because such definition specifically excludes “requirement(s) for conduct...regulating only the internal management of the agency”.²³ Because the Code of Ethics Rule is an internal rule that does not purport to regulate the shorthand reporting profession, it also does not have “reasonably foreseeable anti-competitive effects”. Accordingly, the Code of Ethics Rule does not meet the definition of an “occupational regulation” subject to OLRP approval. The OLRP does, however, encourage the Board to review Louisiana Attorney General Opinion 23-0019 for guidance on an occupational licensing board’s authority to investigate board members who are not participants in the regulated profession. The Board may proceed with promulgation of this rule in accordance with the Louisiana APA without further input from the OLRP.

III. Determination

The Louisiana Department of Justice commends the Board’s efforts to promote efficiency, competition and transparency in the shorthand reporting profession. The Party Litigant Rule and the Safe Harbor Affidavit Rule are each in keeping with clearly articulated state policy and approved as submitted. The Code of Ethics Rule does not meet the definition of an “occupational regulation” subject to OLRP approval, and the Board may proceed with promulgation of this rule in accordance with the Louisiana APA without further input from the OLRP.

LOUISIANA DEPARTMENT OF JUSTICE
OCCUPATIONAL LICENSING REVIEW PROGRAM

BY: 

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¹⁹ Louisiana Register, Vol. 50, No. 1 at pp. 47-48

²⁰ Id.

²¹ LSA-R.S. 49:260

²² LSA-R.S. 49:260(G)(4)

²³ LSA-R.S. 49:951(8)