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To: Judicial Branch Certification Commission (“JBCC”)
From: Craig Enoch and the Texas Deposition Reporters Association (TEXDRA)
Re: Comments in Support of Removal of the “One-Third Rule” from the Code of Ethics for Certified Shorthand Reporters and Court Reporting Firms

As the JBCC is aware, I represent TEXDRA, which is an association of Certified Shorthand Reporters and Court Reporting Firms (“CSRs and CRFs”). Currently, the Code of Professional Conduct for CSRs and CRFs provides:

A CSR or CRF shall not charge for a copy at a rate more than one-third the per page cost of the original and first copy.

After holding numerous meetings and hearing written and oral testimony from official reporters, freelance reporters, and attorneys, the Court Reporters Certification Advisory Board has proposed revising the Code (now to be called the Code of Ethics for Certified Shorthand Reporters and Court Reporting Firms) to eliminate the One-Third Rule. I, along with TEXDRA, strongly urge the JBCC to adopt the Advisory Board’s proposed Code.

I. The Code of Ethics should regulate behavior, not prices.

The current One-Third Rule is a price-fixing mechanism that restricts the free market by imposing a numeric cap on the amount CSRs and CRFs can charge for copies of deposition transcripts. Before the JBCC, however, is a Code of Ethics that establishes the *ethical* rules governing the *behavior* of freelance reporting. A fee cap has no place in a Code of Ethics. Instead, and more appropriately, the proposed Code of Ethics includes several rules that ensure CSRs and CRFs are not *unethical or unfair* in their pricing practices, while declining to impose an arbitrary fee cap:

- A CSR and CRF is required to render court reporting services with honesty, integrity, and fair dealing to all parties. Rule 4(a).
- A CSR and CRF must act in a professional manner. Rule 5(b).
- A CSR and CRF must not enter into, or provide services under, a prohibited contract described by Texas Government Code section 154.115. Rule 10(t).

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Section 154.115, in turn, prohibits court reporters from entering into contracts that (1) undermine the impartiality of the court reporter; (2) require the reporter to relinquish control of a transcript before it is certified and delivered to the custodial attorney; (3) require a reporter to provide any service not made available to all parties to an action; or (4) give or appear to give an exclusive advantage to any party. TEX. GOV'T CODE § 154.115(a).

- A CSR and CRF must be fair and impartial toward each participant in a legal proceeding. Rule 11(f).
- A CSR and CRF must (1) not provide services on a contingent fee basis; (2) charge all parties to an action the same price for an original transcript or reporter's record; (3) charge all parties to an action the same price for a copy of a transcript or reporter's record or for like services performed in an action; and (4) disclose in writing to all parties or their attorneys upon request at any time an itemization of all rates and charges. Rule 17.

As a majority of the Advisory Board correctly recognized, a fee cap simply does not belong in the Code of Ethics. Indeed, TEXDRA is not aware of any other profession that is subject to an ethical rule imposing a numeric cap on the amount the professional may charge for his or her services in the free market. There is no reason CSRs and CRFs should be treated differently from any other professional.

Notably, only three other states impose caps on charges for copies: West Virginia, Michigan, and Arizona. And these states' caps are much higher than in Texas and, except for Arizona, are imposed by statute, not rule. *See* W. VA. CODE § 47-27-2(b)(4) (55 percent the price of the original transcript); MICH. COMP. LAWS § 600.1491(2)(b) (two-thirds the price of the original transcript); ARIZ. CODE OF JUDICIAL ADMINISTRATION § 7-206(J)(3)(d) (60 percent the price of the original transcript). In other states, CSRs and CRFs—like other professionals—may charge what the competitive market will bear. The same should be true in Texas.

II. The One-Third Rule is anticompetitive.

The One-Third Rule is also anticompetitive and negatively impacts CSRs and CRFs throughout the competitive marketplace. First, Texas faces a shortage of CSRs and CRFs. *See* 2013-2014 Court Reporting Industry Outlook Report Executive Summary, p. 13, available at http://www.crtakenote.com/about-court-reporting/2013-14_NCRA_%20Industry_Outlook.pdf. Requiring Texas CSRs and CRFs to charge less than what reporters can charge in the rest of the country does nothing to ease this shortage and creates a disincentive for a freelance reporter to work in Texas.

Second, since the One-Third Rule was adopted, the reporting industry, like so many other industries, has undergone rapid and significant changes that make the rule particularly obsolete. CSRs and CRFs have moved from low-tech, manual recordation to high-tech capture of

testimony and exhibits. This technological development has many benefits but comes with additional costs. CSRs and CRFs should have the flexibility to adjust fees for their services to recapture these costs.

Third, the national and international scope of today's major litigation, including arbitration and other types of proceedings, provide opportunities for Texas CSRs and CRFs to network with reporters in other states to meet the needs of Texas-based clients. But Texas CSRs and CRFs find it difficult to take advantage of this opportunity. Out-of-state CSRs and CRFs may provide services for an agreed upon fee, unrestricted by Texas's current One-Third Rule so long as they do not affiliate with a Texas CSR or CRF. And on those occasions when a Texas reporter is offered the opportunity to network with an out-of-state reporter, the Texas reporter often must personally pay to the out-of-state reporter the difference in the cost for copies to the extent the price exceeds that allowed under the One-Third Rule.

Finally, Texas Government Code section 152.102 prohibits the Texas Supreme Court from adopting rules that restrict competitive bidding by CSRs and CRFs, subject to rules relating to ethics. TEX. GOV'T CODE § 152.102(a). Though this statute is subject to ethics rules, it is questionable whether the Legislature intended for an ethics rule to restrict competition by imposing an arbitrary cap on fees. Indeed, imposing an arbitrary cap on what CSRs and CRFs can charge could constitute an anticompetitive and unfair method of competition under the Federal Trade Commission Act. *See* 15 U.S.C. § 45(a) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); *see also generally* *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015).

The One-Third Rule is anticompetitive and has no place in the Code of Ethics.

III. The arguments expressed by the TCRA in support of the One-Third Rule are not legitimate.

Before the Advisory Board, the Texas Court Reporters Association (TCRA) argued in favor of the One-Third Rule. Each of their arguments is unpersuasive.

- TCRA argued that the One-Third Rule is needed to prevent cost-shifting from one party to another in litigation, such as by charging "zero" for the original and imposing the entire cost on the copy. But the proposed Code of Ethics requires CSRs and CRFs to be fair and impartial to parties in litigation. Rule 11(f). Further, the Texas Government Code and proposed Code of Ethics prohibit reporters from entering into contracts that undermine their impartiality or give an exclusive advantage to one party. TEX. GOV'T CODE § 154.115(a); Rule 10(t). Thus, the proposed Ethics Code and Texas law protect against unfair arrangements.

- TCRA contended it is unfair to subject official reporters to a one-third rule while exempting CSRs and CRFs from the same requirement. TCRA refers to Texas Government Code section 52.047(c), which prohibits official reporters from charging for copies more than one-third of the original cost per page. But section 52.047 reflects a legislative decision to impose a one-third rule on official reporters—while the Legislature refused to impose this limitation on CSRs and CRFs. Further, the anticompetitive concerns that animate price fixing in the private, freelance reporting business are not as acute in the government context since the market cannot operate as a control on an official reporter's costs. Unlike in depositions, a party cannot shop around for reporters in the courtroom. Additionally, official reporters receive salaries and benefits while freelance reporters receive their entire compensation from the costs of original transcripts and copies. Thus, the financial realities of official reporters and freelance reporters are simply not the same.
- TCRA argued that elimination of the One-Third Rule will benefit large CRFs to the detriment of individual CSRs and small CRFs. But it defies this State's strong free market principles to engage in price-fixing to assist one group of professionals to the detriment of competitors. In any event, this argument does not reflect reality. If anything, the One-Third Rule arguably advantages large out-of-state firms, which can better absorb the price limit in Texas, to the detriment of any Texas CSR or CRF, which are price-limited by an ethical rule that follows them throughout the country.

In short, the One-Third Rule does not belong in a Code of Ethics, is anticompetitive, and is not reflective of this State's free market principles. The JBCC should adopt the Code of Ethics recommended by the Advisory Board, which eliminates the One-Third Rule. Thank you for your time and consideration.

Respectfully,

/s/ Craig T. Enoch

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