

ADVISORY OPINION NO. 92-1

On behalf of the State Judiciary, the Administrative Director of the Courts ("Administrative Director") requested an advisory opinion from the State Ethics Commission (the "Commission"). The request for advice concerned the Judiciary's practice of allowing state supervising court reporters to schedule themselves for court reporting assignments. The Administrative Director asked the Commission whether this practice violated the State Ethics Code.

The Commission reviewed the duties of state court reporters and supervising court reporters. The Commission also solicited information and comments regarding this matter from the Administrative Director, and from the Judiciary's supervising court reporters and their respective court administrators.

Section 606-12, Hawaii Revised Statutes ("HRS"), prescribed the duties of state court reporters:

§606-12 Duties of reporters. The duties of each court reporter shall be to attend upon the court and write down all the testimony of witnesses in shorthand, together with the proceedings and objections of counsel, exclusive of argument, the rulings of the court, charge to the jury, and any other matter which the court may require the reporter to report

Each reporter shall file the reporter's shorthand notes in a suitable filing case provided for that purpose, and, when requested by any party to a cause and so directed by the court, or by the court of its own motion, shall, within such reasonable time thereafter as the court may designate, furnish a certified transcript of the reporter's notes, or any portion thereof, taken in the cause, upon the payment of the fee fixed in section 606-13. The reporter may furnish a transcript of any of the reporter's notes, where the same is not intended for the purposes of appeal to the supreme court, upon the request of any party, without the order of the judge therefor first obtained

Pursuant to section 606-12, the duties of a state court reporter included preparing transcripts of court testimony and proceedings. In addition to their state salaries, court reporters earned fees for the preparation of court transcripts. Section 606-13, HRS, authorized the payment of transcript fees to court reporters:

§606-13 Salary and perquisites of reporters. Each reporter shall receive for his services as prescribed in section 606-12 the salary that may be appropriated from time to time as compensation for his services in court. He may also charge for his services a fee not to exceed \$1.50 per twenty-five line page for the original ribbon copy of transcripts of testimony and proceedings and 60 cents per twenty-five line page for each carbon copy thereof made at the same time when such transcripts are prepared in their regular order for the purposes of appeal to the supreme court and a fifty per cent additional fee for expedited service when transcripts are prepared during the course of a trial. The fees for transcripts ordered by a party shall be paid by the party ordering the same and,

except in the case of the attorney general, the public defender, or the county or prosecuting attorneys or corporation counsels, no reporter shall be required to perform any such service until his fees have been paid or the amount of the estimated cost of the fees deposited with the clerk of the court.

Where the court, of its own motion, orders a transcript to be prepared of the whole or any part of the testimony in a civil cause, it may, in its discretion, direct the payment of the charges therefor, and the taxation of the same as costs, in such manner as to it may seem just. Where the attorney general, the public defender, or the county or prosecuting attorney or corporation counsel, desires transcripts for his own official use, either original or carbon copy, the reporter may be paid for same by warrant upon the treasury of the State or county, as the case may be

The Judiciary had three court reporter offices. The largest office was located in the First Circuit. The Second and Third Circuits had smaller court reporter offices. Each office had a supervising court reporter. Supervising court reporters performed court reporting duties in accordance with section 606-12, HRS. Supervising reporters also prepared court transcripts and earned transcript fees in accordance with section 606-13, HRS. In addition, supervising court reporters performed administrative duties for the Judiciary. These administrative duties included scheduling court assignments for the court reporters in each circuit. Each supervising reporter also scheduled court assignments for herself.

The Commission determined that section 84-14(a) of the State Ethics Code, chapter 84, HRS, was applicable to this situation. This section is part of the conflicts-of-interests law. Section 84-14(a), HRS, states in pertinent part:

§84-14 Conflicts of interests. (a) No employee shall take any official action directly affecting:

- (1) A business or other undertaking in which he has a substantial financial interest

Section 84-14(a) prohibits a state employee from taking "official action" directly affecting a business or undertaking in which the employee has a substantial financial interest. Section 84-3, HRS, defines "official action" as a decision, recommendation, approval, disapproval, or other action which involves the use of discretionary authority.

The Commission closely reviewed information about how supervising reporters scheduled court reporting assignments in the First, Second, and Third Circuits. The Commission concluded that when supervising reporters scheduled assignments for other reporters and for themselves, they exercised discretionary authority and therefore took "official action" within the meaning of section 84-14(a), HRS.

In the First Circuit, the supervising court reporter tried to anticipate which court assignments would produce orders for court transcripts. It was generally recognized that trial courts were more likely to generate transcript work for reporters. The supervising reporter also assessed each court reporter's transcript production record and transcript backlog

record. Court reporters with large backlogs were assigned to courts that were not likely to require transcripts. This enabled reporters to concentrate on pending transcript orders, thereby reducing their backlogs. Court reporters with smaller backlogs, and requisite transcribing skills, were assigned to courts that were more likely to require transcript work. It was clear to the Commission that the supervising reporter exercised discretionary authority when making court assignments in this manner.

In the Second and Third Circuits, supervising reporters generally rotated court assignments among court reporters. However, supervising reporters also adjusted assignment schedules to accommodate individual reporters and the needs of the office. For example, if individual reporters developed large transcript backlogs or become unavailable for certain assignments, supervising reporters adjusted assignment schedules accordingly. When making these adjustments, supervising reporters exercised discretionary authority. Therefore, the Commission concluded, they also took "official action" in carrying out their scheduling duties.

The Commission explained that section 84-14(a), HRS, prohibited supervising court reporters from taking official action that directly affected a "business or undertaking" in which they had a substantial financial interest. The Commission held that, for purposes of section 84-14(a), the preparation of court transcripts for private compensation constituted a "business or undertaking" in which court reporters and supervising court reporters had a substantial financial interest. The Commission concluded that supervising reporters who scheduled assignments for themselves took official action that directly affected this "business or undertaking."

Section 84-3, HRS, defines a "business" to include any individual carrying on a business, whether or not operated for profit. The ethics code does not define the term, "undertaking." However, the Commission noted that in previous advisory opinions, it had defined an undertaking to include an activity, concern, pursuit, or other matter.

The Commission recognized that section 606-12, HRS, required court reporters to furnish transcripts of court testimony and proceedings as part of their state duties. However, the Commission observed that this activity also involved elements of a private business or undertaking: Court reporters earned transcript fees in addition to their state salaries; fees were paid to court reporters by parties ordering transcripts, not by the State Judiciary. Reporters had to obtain general excise tax licenses for the transcript fees that they earned. Section 606-13, HRS, also required reporters to provide, at their own expense, all paper used for the preparation of transcripts. In addition, the Administrative Director informed the Commission that transcript fees were not accounted for by the State and appeared to be private business income for court reporters.

These factors indicated to the Commission that while it might be part of a court reporter's state duties to prepare transcripts, this activity also constituted a business or undertaking in which reporters had a substantial financial interest.

Section 84-3, HRS, defines a "financial interest" to include an ownership interest in a business, an employment (which, for purposes of the ethics laws, means any rendering of services for compensation), and an ownership interest in personal property. The Commission

determined that court reporters had a substantial financial interest in the preparation of transcripts because of the fees that they derived from this activity.

The Commission stated that when supervising reporters scheduled court assignments for themselves, they took official action that directly affected their own transcribing activities and the transcript fees that they earned. Supervising reporters were authorized to assign themselves, at their discretion, court reporting work which involved the preparation of transcripts. The Commission pointed out that a supervisor who assigned herself such work affected her own ability to earn additional income in transcript fees. The Commission believed that this was a conflict of interest.

The Commission emphasized that it was *not* implying that supervising reporters had assigned themselves work for the purpose of maximizing their own transcript fees. The Commission was informed that supervising court reporters often gave themselves assignments which other reporters could not undertake. For example, other reporters sometimes developed large backlogs and were unable to accept additional assignments involving transcript work. A supervising reporter might assign such work to herself to ensure its completion. The Commission understood that these assignments may have served the goals of the court reporter's office to produce transcripts in a timely manner. However, the Commission noted that these work assignments *also* affected the transcript fees that supervising reporters earned in addition to their state salaries. The Commission concluded that this created a conflict of interest for supervising reporters.

The Commission was also informed that supervising reporters did not always know when parties to court proceedings would request transcripts. Other factors might affect whether or not parties requested transcripts. The Commission understood that supervising reporters could not predict with complete accuracy which court assignments would result in transcript work for a reporter. However, it appeared that supervising reporters could predict and did predict which court assignments were *more likely* or *less likely* to involve transcript work. In addition, the Commission noted that supervising reporters based their scheduling decisions, at least in part, on these predictions.

The Administrative Director had confirmed that court assignments affected a reporter's ability to earn transcript fees. In a letter to the Commission, the Administrative Director stated:

It is acknowledged that certain court hearings are more likely to generate a considerable amount of transcripts. A court reporter assigned to the arraignment calendar, for example, will not be required to produce transcripts. Court Reporters assigned to a lengthy trial would have the potential for generating a considerable amount of transcripts. Therefore, it is clear that courtroom assignments do affect a court reporter's ability to earn transcript fees.

Based on this information, and on the Commission's own review of this situation, the Commission concluded that section 84-14(a), HRS, prohibited supervising court reporters from scheduling court assignments for themselves.

The Commission explained that its opinion in this case did *not* mean that the ethics code prohibited supervising court reporters from preparing transcripts or earning transcript fees. Nor did the Commission's opinion prohibit supervising court reporters from scheduling court assignments for other court reporters. The Commission's opinion meant only that supervising reporters were prohibited from determining what their *own* court assignments would be.

The Commission emphasized that its opinion in this case did *not* imply a misuse of position or misconduct by any supervising court reporter. The Commission noted that particularly with respect to the Second and Third Circuits, good working relations appeared to exist between court reporters and supervising reporters. The Commission received information from those circuits that court reporters generally believed their court assignments were scheduled fairly.

However, the Commission explained that the issue in this case was *not* whether supervising reporters acted fairly when making court assignments. Section 84-13, HRS, prohibits a state employee from using the employee's official position to obtain any unwarranted advantages. The Commission stated that section 84-13 prohibited a supervising reporter from unfairly scheduling court reporting assignments to obtain an unwarranted advantage for herself. The information reviewed by the Commission in this case did not indicate that any supervising reporter had violated section 84-13 by unfairly scheduling herself for court reporting assignments.

At issue in this case was whether supervising reporters had a *conflict of interest*, as defined by section 84-14(a), HRS, because of their own financial interests in the preparation of court transcripts. The Commission believed that a conflict of interest indeed existed and stated that it saw no way to avoid the application of section 84-14(a) to all supervising court reporters in this situation.

Finally, the Commission stated that it appreciated the cooperation that it had received from the Administrative Director and also from the court reporter offices in the First, Second, and Third Circuits.

Dated: Honolulu, Hawaii, February 19, 1992.

STATE ETHICS COMMISSION
K. Koki Akamine, Chairperson
Barbara J. Tanabe, Vice Chairperson
Cynthia T. Alm, Commissioner
Rev. David K. Kaupu, Commissioner
Laurie A. Loomis, Commissioner