IN RE A LAW STUDENT 94-01

HONOR CODE REVIEW COUNCIL OPINION

Hearing Date: May 1, 1995
Opinion Issued: May 8, 1995

Honor Code Review Council Members*
Professor Robert Burns, Chairperson
Professor Jane Larson
Professor Martin Redish
Professor Victor Rosenblum
Professor Leonard Rubinowitz

* Professor Steven Calabresi was not present at the hearing and did not participate in these proceedings.
I. Introduction

This matter came before the Honor Code Review Council as an appeal from a finding by the Judicial Council of a violation of Article I, Section 2(c) of the Honor Code of the Students of Northwestern University School of Law. That section provides that a violation "occurs when the student knowingly uses materials not permitted by the professor in an examination or other graded assignment." Honor Code, Article I, Section 2(c).

The defendant conceded that she/he did use an outline during the Torts examination on December 10, 1993, a closed book exam. The Judicial Council found that the defendant knew that the Torts exam was closed book, and therefore knew that the use of an outline was prohibited. The Judicial Council found the defendant guilty of violating Article I, Section 2(c) of the Honor Code by a vote of 6-2. The Council recommended a penalty of: 1) a suspension of one year (two consecutive semesters) and 2) a notation to be placed on the defendant's transcript for a minimum of ten years (details of the recommended penalty provided below).

Under ARTICLE VIII BASIC PROCEDURES FOR REVIEW OF HONOR CODE, Section 8.04 (Powers of Council Respecting Findings of Guilty) provides that the "Council shall have final authority to affirm or reverse any finding of an Honor Code violation....Findings made by the Board of Governors shall be reversed by the Council only when they are against the manifest weight of the evidence or contrary to the provisions of the Honor Code."

With respect to penalties, Section 8.06 (Powers of Council Respecting Penalties) provides that "[e]xcept as otherwise provided in these rules, the Council shall have final authority to approve, reduce, increase or otherwise modify any penalty recommended by the Board of Governors."

The Honor Code Review Council unanimously affirms the Judicial Council's finding that the defendant was guilty as not being "against the manifest weight of the evidence." With respect to penalty, the Honor Code Review Council modifies the recommendation of the Board of Governors. The Review Council unanimously imposes a penalty of a permanent notation on the defendant's transcript and a grade of F in the Torts course, without any suspension.

II. Procedural History

This matter came before the Judicial Council initially in January, 1994. After a trial, the Judicial Council found the defendant guilty of "knowingly" using "materials not permitted by the professor in an examination or other graded
assignment", in violation of Article I, Section 2(c) of the Honor Code. The Judicial Council recommended that the penalty consist of a permanent notation on the defendant's transcript and a grade of F in the Torts course. The Judicial Council did not recommend any suspension.

On appeal to the Honor Code Review Council, the Review Council found procedural irregularities in the Judicial Council's proceedings. Based on those procedural irregularities, the Review Council remanded the matter to the Judicial Council.

In January, 1995, the differently constituted 1994-95 Judicial Council held a second trial of the defendant. In an opinion issued February 28, 1995, the Judicial Council found that the prosecution had met its burden of proving guilt "beyond a reasonable doubt" and found the defendant guilty of violating Article I, Section 2(c) of the Honor Code. The vote was 6-2 in favor of a guilty finding, which met the Honor Code's requirement of a two-thirds majority necessary for a finding of guilt.

The Judicial Council's specific penalty recommendation was as follows:

"1. A suspension of one year (footnote omitted) (two consecutive semesters) beginning in the fall of 1995. The defendant's readmission is to be achieved only through the regular readmission processes of the school. A memorandum noting this offense and penalty shall be sent to the Associate Dean in charge of Admissions.

2. A temporary notation, to be placed on the defendant's transcript immediately, consisting of a brief but specific description of the penalized conduct. This notation shall only be removed upon petition to the Dean of the Law School. Such a petition shall not be considered until ten years after the defendant's graduation from law school, or, if the defendant chooses not to return to school, until eleven years from the end of the suspension (fall 2007). The petition shall consist of three letters of recommendation from non-family members, attesting to his/her character and giving justification for removal of the notation from defendant's transcript." (p. 10)

On May 1, 1995, the Honor Code Review Council held a hearing at which the defendant was represented by counsel. Prosecutors and defense counsel each had the opportunity to make arguments with respect to both the Judicial Council's finding of guilt and its recommended penalty. The Review Council then deliberated with respect to both of these matters. The Review Council's findings are discussed in the following two sections of this opinion.

III. The Finding of Guilt
Section 8.04 provides that "[f]indings made by the Board of Governors shall be reversed by the Council only when they are against the manifest weight of the evidence..." The Honor Code Review Council finds that the Judicial Council's findings are not "against the manifest weight of the evidence" and therefore affirms the finding of guilt.

There was no direct evidence of the defendant's state of mind. In this case, such evidence could only have come from the defendant's acknowledgement that she/he knew that the exam was closed book either before or during the exam. The defendant has consistently denied any such knowledge.

Consequently, the Judicial Council relied on the cumulative weight of circumstantial evidence to find that the defendant knew that the exam was closed book either before or during the exam, even if she/he was not aware of that fact before she/he entered the examination room. Defense counsel rightly acknowledges that circumstantial evidence can be sufficient to satisfy the prosecution's burden of demonstrating guilt beyond a reasonable doubt, the standard in the Honor Code.

The Judicial Council relied on evidence and testimony presented by the prosecution's witnesses to find that the defendant knew before or during the exam that it was closed book. One student witness testified that she/he told the defendant before the exam began that it was closed book and that she/he should put her/his outline away. That witness also testified that in response, the defendant took her/his outline off the desktop and put it under the desk. The defendant denied that such a conversation took place, or that she/he ever took her/his outline off of the desktop.

That same witness testified that approximately fifteen minutes after the exam began, she/he observed the defendant using the outline that the defendant had put under the desk previously. The witness testified that she/he tapped the defendant on the arm, and whispered to the defendant that she/he would "report" her/him.

Another student witness testified that the defendant asked her/him before the exam what materials could be used on the exam. She/he testified that she/he told the defendant that "you can have things out now but you know you have to put them away later." The defendant testified that she/he understood that student's response to her/his question to confirm the defendant's pre-existing belief that this was an open-book exam.

With respect to both of these student witnesses, the Judicial Council found them to be more credible than the defendant. The Judicial Council found their testimony to be consistent, and that they had no reason to be biased. In contrast, the Council did not find the defendant's testimony on these matters credible, because of what it perceived to be inconsistencies in the defendant's power of recall.
Moreover, the Judicial Council relied on other circumstantial evidence for its finding that the defendant knew that the exam was closed book. The closed book instruction was printed in large letters on the blackboard, and the defendant was sitting in the front row of the classroom. Chris Jones, the law school's registrar, testified that she announced to the class before the exam began that the exam was closed book. Finally, the cover page of the exam itself had the closed book instruction prominently displayed.

The defendant denied any knowledge that the exam was closed book until being informed of the prosecution against her/him for an Honor Code violation in January, 1994. In addition, three student witnesses testified about a conversation they had with the defendant several days after the exam, in which the defendant insisted that the exam was open book and stated that she/he had used her/his outline during the exam. Those student witnesses also testified more generally to the unusual general behavior of the defendant, who was sometimes in her/his own world and not aware of what was going on around him.

The Judicial Council found that the student witnesses who testified to having informed the defendant of the closed book nature of the exam were credible, and the defendant was not. The Council's opinion characterized the defendant's testimony as "a patchwork of partial answers and all-too-convenient memory loss." (p. 8) Based largely on its findings about credibility, the Judicial Council found that the defendant possessed guilty knowledge beyond a reasonable doubt.

The Honor Code Review Council cannot find that the Judicial Council's finding was "against the manifest weight of the evidence", the standard of review in this case. The Review Council emphasizes the limited nature of this review. Whatever individual Review Council members might have found in a de novo proceeding, the standard that the Review Council must apply here provides very little discretion.

It is not "against the manifest weight of the evidence" for the Judicial Council to find that student witnesses who reported informing the defendant about the closed book nature of the exam were credible and that the defendant was not. Nor is it "against the manifest weight of the evidence" for the Judicial Council to reject as undermining a finding of guilt beyond a reasonable doubt that the defendant's general disengagement could have explained a lack of knowledge that the exam was closed book.

In light of the limited nature of the review mandated by the Honor Code, the Honor Code Review Council affirms the Judicial Council's finding of an Honor Code violation.

IV. Penalty
The Honor Code Review Council has final authority to determine penalty. In exercising its discretion "to approve, reduce, increase or otherwise modify any penalty recommended" by the Judicial Council, the Review Council modifies the recommendation in three respects. It makes the transcript notation permanent, it determines that the defendant shall receive a grade of F in the Torts course, and it decides not to suspend the defendant.

The Review Council concludes that the appropriate penalty in this case is a permanent notation of the Honor Code violation on the defendant's law school transcript. Although transcripts are primarily designed to record students' grades, the Law School has a custom and tradition of including other information on the transcript as well. The registrar's office routinely notes on students' transcripts things such as honors, journal participation, Moot Court awards, and titles of senior research projects. Honor code violations have been noted on transcripts very rarely, but that seems to be because very few serious violations have been found by the Judicial Council and affirmed by the Review Council.

The Review Council finds that a permanent notation on the defendant's transcript serves at least two purposes. First, it is an appropriate penalty for such a serious violation. Moreover, it will provide an effective method of providing notice about this violation to others who would have good reason to want to know about it.

The Review Council concludes that the defendant's actions constituted a very serious breach of the norms of the law school community, as reflected in the Honor Code. Placing a notation about this violation on the defendant's transcript is a way of indicating the seriousness of this breach, because the transcript memorializes major events in students' law school careers. This is a statement to the defendant her/himself that the law school condemns this behavior in no uncertain terms.

The notation on the transcript also provides a vehicle for communicating this transgression to the profession at large. First, many legal employers routinely request copies of official transcripts of law students and lawyers they are considering for employment. This is especially the case with law students and lawyers who are in early stages of their careers. The Review Council believes that the school should make known to prospective employers information about such a serious Honor Code violation by one of our students, and that employers have good reason to want to know about this incident in considering the defendant as a candidate for employment.

Moreover, the law school has an obligation to report matters reflecting on our students' "character and fitness"
to bar admissions bodies. A notation on the transcript provides a vehicle for enabling the dean of the school to have ready access to such information in the future when she/he may be called upon by such a body to provide information about the defendant.

Keeping the notation on the defendant's transcript permanently serves all of the above purposes, as well. The notation is a lifetime reminder to the student of the seriousness of her/his actions. It also ensures that the law school's transcript will always convey this information to the profession.

The Review Council hopes that the defendant will rehabilitate her/himself and will be able to present increasing evidence over time of her/his trustworthiness and ability to act in accordance with her/his ethical duties. In that event, the notation on the transcript will have less practical significance; but it will remain as an accurate statement of the need for such evidence of rehabilitation.

With respect to the Judicial Council's recommendation of a one-year suspension, the Review Council determines that a suspension is not warranted for several reasons. First, the Council finds that institutional concerns weigh against a suspension. After the first finding of guilt in 1994, the Judicial Council did not recommend suspension as a penalty. The Honor Code review Council remanded on procedural grounds after that finding. Imposing a suspension after the second trial could have a chilling effect on future defendants aggressively pursuing their rights of appeal, since they would run the risk that a successful appeal could lead to a retrial, a second finding of guilt, and a more severe penalty than the one imposed after the first trial.

In addition, the Review Council believes that a suspension at this point would not have significant additional effects in terms of punishment, deterrence, or rehabilitation. This prosecution began more than 15 months ago, and has been through two findings of guilt and two appeals. The defendant has already paid a substantial price in emotional and financial terms for her/his transgression, and will continue to do so into the foreseeable future as a result of the Review Council affirming the finding of guilt, changing her/his grade in the Torts course to an F, and placing a notation on her/his transcript.

Moreover, a suspension would prolong the defendant's law school career, with the cloud that hangs over it. Permitting her/him to continue her/his legal education uninterrupted will enable her/him to get a fresh start sooner, with the opportunity to conduct her/himself consistently with the ethical obligations of the profession.

Finally, the very few honor code violations that have resulted in suspensions in the last decade or so have involved plagiarism -- premeditated acts that involved taking
credit for someone else's work. Even though one of those incidents involved extra-curricular activity rather than coursework, the Review Council views as mitigating factors here the fact that there was no finding of either premeditation or an effort to take credit for someone else's work.

The Review Council also determines that the defendant shall receive a grade of F in the Torts course, in light of the unfair advantage she/he had from the use of an outline. This grade change also adds to the continuing severe effects that flow from the finding of guilt, thus mitigating further the need for a suspension.

V. Conclusion

For the foregoing reasons, the Honor Code Review Council:

1. Affirms the Judicial Council's finding that the defendant violated Article I, Section 2(c) of the Honor Code.

2. Determines that a permanent notation shall be placed on the defendant's law school transcript immediately, stating that the defendant has been found guilty of a violation of the Honor Code of the Students of Northwestern University School of Law, in that she/he knowingly used materials not permitted by the professor in an examination or other graded assignment.

3. Determines that the defendant shall receive a grade of F in the Torts course.