

**NORTHWESTERN UNIVERSITY SCHOOL OF LAW  
JUDICIAL COUNCIL**

Opinion 02-3

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**November 5, 2002**

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J. Polk delivered the opinion of the Judicial Council, in which L. Coimbra, B. Dunn, T. Givens, C. Riekes, and T. Tatum join. S. Lubet and H. Shapo dissent. E. Gamonal did not take part in this opinion.

The question presented in this case is whether there has been a violation of Art. I, § 2(e) of the Honor Code,<sup>1</sup> which states that: “A violation occurs when a student knowingly . . . plagiarizes; which includes, but is not limited to, failing to attribute language or ideas to their original source or failing to indicate by quotation marks a passage from another source of more than (5) consecutive words.”

Upon hearing the evidence presented by the Honor Code Prosecutor (the “Prosecutor”), the Defendant moved for directed verdict. For the reasons stated in this opinion, the Defendant’s motion for directed verdict is GRANTED.

**I. Background**

After a finding of probable cause by the SBA Executive Committee on March 6, 2002, the Defendant was charged with plagiarizing five paragraphs of the brief that the Defendant and a partner<sup>2</sup> submitted for the Spring 2002 Julius Miner Moot Court Competition. On September 6, 2002, the Defendant filed a motion to dismiss the plagiarism charge. On October 24, 2002,

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<sup>1</sup> All references in this opinion are to the 1986 Honor Code of the Students of Northwestern University School of Law.

<sup>2</sup> The partner was never charged with plagiarism as the Prosecutor’s investigation revealed that the partner did not write the portions of the brief allegedly including plagiarism.

that motion to dismiss was unanimously denied by the Judicial Council at the pre-trial hearing.<sup>3</sup>

The case then proceeded to trial, which took place on November 2, 2002.

## **II. Findings of Fact**

The Defendant and a partner (the "Partner") participated in the Spring 2002 Julius Miner Moot Court Competition (the "Competition"). As part of the Defendant's participation in that competition, the Defendant and the Partner submitted a brief. After participating in several rounds of the competition, the Defendant and the Partner were notified by the co-chairpersons of the Competition that the Defendant and the Partner were being disqualified due to potential plagiarism contained in their brief.

The Prosecutor offered three documents into evidence: (1) the brief that the Defendant and the Partner allegedly submitted for the Competition (Exhibit S-1, and hereafter, the "Brief"); (2) the law review article from which the alleged plagiarized portions of the brief were allegedly drawn (Exhibit S-2, and hereafter, the "Article"); and (3) a letter allegedly submitted by the Defendant to the Prosecutor "to self-report a possible honor code violation" (Exhibit S-3, and hereafter, the "Letter"). However, as discussed in Section IV, based upon the testimony of the Partner, the Judicial Council was unable to find beyond a reasonable doubt that any of the three exhibits offered by the Prosecutor were what they were purported to be.

## **III. Movant's Burden on Motion for Directed Verdict**

The Judicial Council, in considering the Defendant's motion for directed verdict, first voted on the proper burden that must be met by the movant to prevail on such a motion. The Judicial Council ruled that, in order to prevail, the Defendant needed to establish that no reasonable finder of fact could determine beyond a reasonable doubt, based upon the

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<sup>3</sup> See *Judicial Council Opinion 02-2*.

Prosecution's evidence, that the Defendant violated the Honor Code.<sup>4</sup> In making its ruling, the Judicial Council followed a previous case in which the Judicial Council granted the defendant's directed verdict because: "The Prosecutor ha[d] the burden of proving the elements of the offense beyond a reasonable doubt, and the Judicial Council d[id] not feel the Prosecutor . . . satisfied that burden." *Judicial Council Opinion 02-1*, 5. Under the Honor Code, "[a]djudications under the Honor Code shall be consistent with previous Judicial Council opinions unless overruled." Honor Code Art. V, § 3(b). Because the Judicial Council found no reason to overrule *Opinion 02-1*, it applied a reasonable doubt standard<sup>5</sup> in its consideration of the Defendant's motion for directed verdict.

#### IV. Analysis

Although the Prosecutor offered the Brief, the Article, and the Letter into evidence, the Judicial Council held that the Prosecutor did not overcome the Defendant's motion for directed verdict because no reasonable finder of fact could determine beyond a reasonable doubt, based upon the Prosecution's evidence, that the Defendant committed a violation of the Honor Code.<sup>6</sup>

Most importantly, the Prosecutor failed to introduce sufficient evidence to allow a reasonable finder of fact to determine beyond a reasonable doubt that the Brief was the brief actually submitted by the Defendant and the Partner for the Competition. The Prosecutor called the Partner to testify regarding the Brief. The Partner testified that: (a) the Partner co-authored a brief with the Defendant in the Competition; (b) one of the social security numbers on the front of the Brief offered into evidence by the Prosecutor was the Partner's; (c) the Partner believed

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<sup>4</sup> The Judicial Council made this decision by a 6-2 vote, with Professors Lubet and Shapo dissenting.

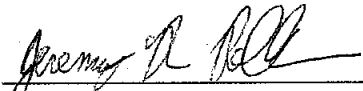
<sup>5</sup> Professors Lubet and Shapo voted to apply a *prima facie* standard to consideration of the motion for directed verdict.

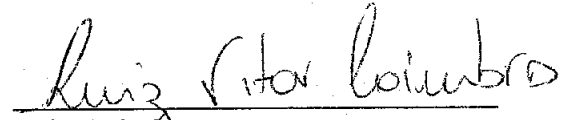
<sup>6</sup> The Judicial Council unanimously granted (8-0) the directed verdict based upon the reasonable doubt standard. Although Professors Lubet and Shapo believed that the reasonable doubt standard was inappropriate for the Defendant's motion for directed verdict, they agreed that, under such a standard, the Defendant's motion for directed verdict must prevail.

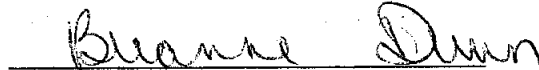
the evidence left too much doubt as to whether the Defendant actually authored the Brief offered into evidence by the Prosecutor.

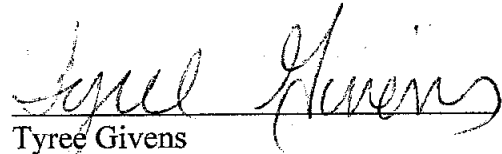
## **V. Conclusion**


To withstand the Defendant's motion for directed verdict, the Prosecutor needed to present sufficient evidence to allow a reasonable finder of fact to determine beyond a reasonable doubt that the Defendant committed a violation of the Honor Code. Because the Prosecutor's sole witness testified that: (1) the Brief was merely "similar" to that the Partner co-authored with the Defendant and submitted for the Competition; (2) the Partner could not determine whether it was the Defendant's social security number that appeared on the Brief's cover page; (3) the Partner never actually read the Defendant's portion of the brief they submitted for the Competition; and (4) the Partner ultimately could not determine whether the Brief was that which the Defendant and the Partner submitted for the Competition, the Prosecutor failed to meet this burden. Therefore, the Defendant's motion for directed verdict is GRANTED, and the complaint in this matter is dismissed.

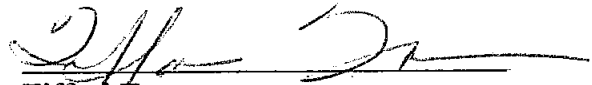
  
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Jeremy Polk, Chairperson

  
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Luiz Coimbra

  
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Breanne Dunn

  
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Carin Riekes

  
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Tiffani Tatum

**NORTHWESTERN UNIVERSITY SCHOOL OF LAW  
JUDICIAL COUNCIL**

Case 02-3

DISSENTING OPINION OF STEVEN LUBET.

I dissent from the majority opinion for the following reasons.

I. STANDARD FOR GRANTING A DIRECTED VERDICT

The majority, following Judicial Council Opinion 02-1, concluded that a directed verdict should be granted if “no reasonable finder of fact could determine beyond a reasonable doubt . . . that the Defendant violated the Honor Code.” I believe that this is an incorrect standard. Rather, a defense motion for a directed verdict should be denied so long as the prosecution has presented a prima facie case.

The Honor Code contains no provision allowing the defendant to move for a directed verdict (or, more properly, a judgment as a matter of law). In the absence of a jury, it is not self-evident that such motions are necessary or appropriate. Following a strict analogy to criminal procedure, it might be argued that a defendant is entitled to present such a motion as a matter of due process, but Honor Code proceedings are not criminal in nature.

While many of the procedural rights of the defendant are borrowed from criminal law, this does not mean that the entire process must follow that template – as it quite obviously does not. The only penalties are civil, though serious. Several provisions of the Honor Code depart dramatically from standard criminal procedure, most noticeably adjudication by the dean in the case of graduating and former law students (Article IV, Section 5), the absence of public proceedings (Article IV, Sections 1(d), 3 and Article VI, Section 6), conviction by two thirds of the Judicial Council (Article V, Section 2(j)), and faculty review (Article VI, Section 5).

As presently constituted, our Honor Code proceedings – like all university disciplinary proceedings – are administrative in nature. Therefore, I would not import rules of criminal procedure unless they are specifically found in the Honor Code itself. Judicial Council Opinion 02-1 includes no analysis of either the availability of directed verdict motions, or of the standard by which they are to be decided. The opinion is consequently unpersuasive; accordingly I would overrule it in that regard.<sup>1</sup>

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<sup>1</sup>I would not reach the question of whether Opinion 02-1 should also be overruled on the merits of the decision, holding that the Honor Code applies to Journal competitions and interpreting Article I, Section 2(e) in that context.

If a directed verdict motion is to be entertained, there is good reason for deciding it on the “prima facie case” standard, since that is most likely to allow the judicial council full access to relevant evidence, as is appropriate in an administrative proceeding. This standard would not infringe upon the defendant’s right to remain silent, as the defendant could nonetheless decline to testify or produce evidence.

Moreover, the structure of the Honor Code process counsels against requiring the prosecution to meet the reasonable doubt standard before the close of all evidence. The prosecutor is a student, without the assistance of investigative staff or comparable resources. There is evidently 100% annual turnover in the student prosecutor’s office. The prosecutor does not have access to compulsory process in the case of students who have graduated. As is manifest in the instant case, there is little that the prosecutor can do when faced with an uncooperative or disingenuous third-party witness. Unlike standard criminal procedure, the prosecutor cannot compel a recalcitrant witness to testify before a grand jury or at a preliminary hearing. Thus, the prosecutor is unable to obtain or perpetuate testimony during the pretrial phase.

Employing the “prima facie case” standard, I would have voted to deny the defense motion for a directed verdict. The brief plainly contains as many as five paragraphs that were lifted from the article without attribution, easily satisfying the honor code’s definition of plagiarism, and there was sufficient evidence that the defendant authored and submitted the brief.

## II. REASONABLE DOUBT

The majority determined to apply the more rigorous “reasonable doubt” standard to the defense motion, finding that the testimony of the sole prosecution witness (“the partner”) was insufficient to satisfy this test.

I disagree with the majority’s characterization of the partner’s testimony, that he was “unable to confirm that the Brief offered into evidence by the Prosecutor was that which the Partner and the Defendant submitted in the Competition.” Rather, I would say that the partner willfully *refused* to confirm the authenticity of the brief. He was not simply “less than credible,” as the majority puts it. Rather, he was openly uncooperative.

Nonetheless, the prosecution produced no other evidence that Exhibit S-1 was, in fact, the brief submitted by the defendant to the Moot Court competition.<sup>2</sup> Rejection of the partner’s purposefully equivocal testimony cannot constitute proof beyond a reasonable doubt.

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<sup>2</sup>I disagree with the majority regarding the other two exhibits, S-2 (the article) and S-3 (the self-report), both of which were sufficiently authenticated to support a finding beyond reasonable doubt.

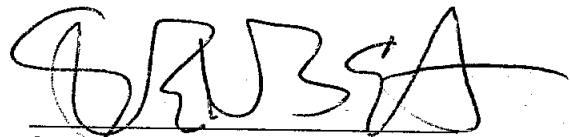
### III. DEFENSE COUNSEL'S ACCUSATIONS OF MISCONDUCT

This proceeding was unfortunately marred by a series of accusations against the integrity of the student prosecutor. While the prosecutor and his predecessor did commit several procedural errors, none of these remotely caused substantial prejudice to the defendant.

More importantly, there is absolutely no reason to believe that the student prosecutor engaged in any form of misconduct whatsoever. The accusations against him served only to prolong the hearings, providing no advantage to the defendant. Defense counsel should recognize that such ad hominem attacks are often counterproductive. In this case they were highly inappropriate.

Finally, I must comment upon defense counsel's claim of judicial bias on the part of the chair of the Judicial Council. This claim was based exclusively on a *sua sponte* ruling in which the chair clarified an earlier order. I believe that the chair's ruling was correct, both procedurally and on the merits, but even if erroneous it surely did not indicate bias. Adverse rulings are part of litigation. They happen to everyone. Even if palpably unsound, such rulings cannot be equated with bias or prejudice. Proof of actual bias generally requires establishment of an "extrajudicial source," not simply mistake or even overreaching. See Shaman, Lubet & Alfini, JUDICIAL CONDUCT AND ETHICS at 115-118 (3d edition, 2000). In this case, there was not even an attempt at such a showing. I do not fault defense counsel for seeking to overturn the chair's ruling. There were respectable arguments in support of the defense position. But the claim of judicial bias was unsupported and unsupportable.

4 November 2002



Steven Lubet  
Professor of Law



Northwestern University School of Law

Judicial Council

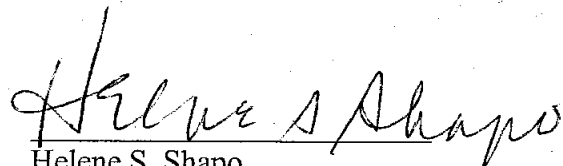
Case 02-3

DISSENTING OPINION OF HELENE S. SHAPO

I dissent from the majority opinion because I believe the council used an inappropriate standard, that is, that “no reasonable finder of fact could determine beyond a reasonable doubt . . . that the Defendant violated the Honor Code,” when it voted to direct a verdict for the student defendant. I believe that the appropriate standard should be one requiring the prosecutor to make a prima facie case. Under that standard, I would have denied the defendant’s motion for a directed verdict.

Agreeing with Professor Lubet on that issue, I join three points in his dissent on the following issues.

1. I would overrule Judicial Council Opinion O2-1 insofar as it required the Prosecutor to prove “the elements of the offense beyond a reasonable doubt” for purposes of a directed verdict.
2. I believe that the Prosecutor’s Exhibits S-2 and S-3 were properly authenticated.
3. I have no reason to believe that the student prosecutor engaged in misconduct in this case or that the Judicial Council chair was biased, and believe that both were wrongly accused by the defense counsel.

  
Helene S. Shapo  
Professor of Law