Case 83 - 1

Opinion of the Judicial Council

On October 13, 1983 the Student Bar Association found probable cause to believe that the defendant, who must remain unnamed, had included plagiarized material in the casenote which s/he submitted for consideration to the 1983 Joint Writing Competition. After a full trial on November 6,1983, before eight members of the Judicial Council, the Council returned a unanimous verdict of not guilty. This opinion is issued in accordance with the recommendation of the Honor Code that the Judicial Council set out the reasons for its various findings of law and fact.

I. Pretrial Motions

At the pretrial hearing, the defendant presented two motions for dismissal. The first of these motions, which demanded dismissal of the complaint for failure to commence trial within four weeks of the date of the charge to the Student Prosecutor, in violation of Art.III, Sect. 1 of the Honor Code, is not discussed in this opinion. The Council's ruling against that motion was based upon an inquiry into the facts surrounding an alleged oral waiver of the speedy trial provision, given by the defendant to the Temporary Chair of the Judicial Council. On his own motion, the chair recused himself from the determination of that motion because his participation in certain conversations relevant to the alleged waiver made it impossible for him to give the appearance of complete impartiality.

The second motion to dismiss asserted that the complaint was fatally defective because it failed to allege that the plagiarism charged was intentional. The Honor Code. Art.I, Sect. 2, states that "a violation occurs when any student shall intentionally..." commit any one of a number of listed acts. Subsection 5 delineates plagiarism as one of those prohibited acts. Thus, the prohibited act is intentional plagiarism,

and the question before this council is whether the charge brought by the student prosecutor was fatally defective because it failed to allege expressly that the defendant acted intentionally when s/he allegedly included plagiarized material in his/her casenote.

It is the unanimous decision of this council that the complaint,as drafted and presented by the student prosecutor, sufficiently apprised the defendant of the charges against him/her. It is the council's conclusion that plagiarism by its very definition encompasses only intentional attempts to pass off someone else's work as one's own. Therefore, the failure of the complaint to allege intent specifically is irrelevant because the element of intent is implied in the charge of plagiarism. The requirement in the Honor Code that plagiarism be intentional is redundant. The specification by Art. I. Sect. 2 of the Honor Code that only intentional acts are punishable is designed to clarify the Code's proscriptions with regard to other prohibited acts — acts which unlike plagiarism might be done unintentionally.

It is noted that the definition of plagiarism adopted here, which includes only intentional acts of appropriation, is not necessarily consistent with judicial definitions of that term. Where a complaining party can establish that the alleged plagiarist had access to the work of the one claiming plagiarism, no direct evidence of the defendant's state of mind need be shown to establish that the alleged plagiarist appropriated the controversial material with the intent to deceive the reader. Tamas v. 20th Century Fox, 25 N.Y.S. 2nd 899. But when analyzed more closely, Tamas stands for the proposition that circumstantial evidence of intent (access to original coupled with the appearance of language substantially similar to language in the original) will suffice to prove intent circumstantially. Direct evidence of an actor's state of mind is often difficult to adduce.

Black's Law Dictionary defines plagiarism as "the act of appropriating the literary composition of another...or parts or passages of his writing...and passing them off as the product of one's own mind." To "pass something off" is an active verb phrase implying directed, purposeful action. This indicates that plagiarism may only be done intentionally.

Finally, while the council is aware of the quasi-criminal nature of proceedings before it and the attendant need to insure rigorously that the defendant is given adequate notice of the charges against him/her, the defendant in this case may not be heard to argue that fairness requires

a stricter analysis of the sufficiency of the complaint. Defendant was aware well before trial that the violation charged was intentional plagiarism. This may be inferred from the fact that the council asked counsel to submit proposed definitions of "intent" and "plagiarism" that the council might review when formulating its own definitions. The standard of intent was discussed at the pretrial hearing. Moreover, the defendant advocated that plagiarism be defined as follows:

> the deliberate use of another person's thoughts without attributing the thought to the proper source; with the intent to deceive the reader into believing that the actor's thought is original. (Emphasis supplied.)

We rule that the complaint apprised the defendant sufficiently of the charges against him/her.

II. The Decision on the Facts

At trial it was shown that the defendant submitted a casenote to the Joint Writing Competition that contained a substantial number of phrases that were taken verbatim from at least four law review articles. Those controversial phrases will not be reproduced here because to do so might make it easy to identify the defendant. The frequency and the length of the substantially verbatim phrases (two of the phrases are nearly 20 words long with only one or two words changed) indicate clearly that the challenged phrases had their source in the law review articles. It would defy credibility to assert that the defendant might have constructed the same phrases independantly and coincidentally.

The judicial council votes unanimously to acquit the defendant of the charge of intentional plagiarism. It is the council's decision that it has not been shown beyond a reasonable doubt, Art.IV, Sect.4(5), that the defendant intended to pass off the work of others as his own original work. Evidence presented at trial indicates that the defendant may have copied the challenged phrases onto notecards with inadequate citation and then, several days later, copied the phrases into the text of his draft without realizing that he was not the originator of the phrases.

The weighing of the evidence by each individual council member inherently involves a very subjective evaluative process. The relative weight given to particular pieces of evidence and bits of testimony by the individual council members therefore varies. The following is a list of facts that tend to support the defendant's explanation. Each of these facts may have been given very little or very great consideration by a particular council member:

1. The challenged material appeared only in the "background" portion of the defendant's casenote. This section of the note recounted the history of the law in the area about which the note was concerned. The defendant stated that s/he rushed through his/her research on this section because s/he was more concerned about presenting a convincing argument in the "analysis" section of the note. It is conceivable that the defendant hurriedly copied onto notecards phrasesregarding the background of the law, and because these phrases were merely stale recitation of the law rather than sparkling analysis, s/he might have failed to recognize that the language was not his/her own when s/he copied the language from the notecards into his/her draft. The challenged phrases contain no particularly original word usage that would have immediately alerted the defendant to the fact that the words were not his/her own. The phrases are simple statements encapsulating the holding of particular cases.

2. The defendant explained in some detail his/her research methods, which were grossly deficient in crossreferencing procedures and other measures that would ensure that the defendant would be able to recognize at a later date the source of a particular phrase or statement. S/He often took notes without citing any source, reckoning that s/he would be able to figure out the source later if necessary. The defendant explained that the "background" portion of the paper was written in less than one day, on the last day of the competition. This section of the paper was copied directly from notecards in a quick "cut and paste" effort.

3. The defendant admitted that s/he knew that phrases of such similarity and length should be put in quotations, and s/he stated that whenever s/he thought that the material being copied from notecard to draft had been written by another author, s/he determined the source and cited it properly. The credibility of the defendant was enhanced by his/her steadfast refusal to plead ignorance of the rules of citation.

In contrast to the testimony supporting the defendant's explanation, there is other evidence which indicates circumstantially that the defendant acted intentionally. The defendant certainly acted with reckless disregard as to the probability that the phrases copied from his/her notecards were the property of another writer. But the sheer magnitude of his/her carelessness does not amount to irrebuttable proof of intent. It is highly unusual that any student

with acedemic credentials sufficient to gain him/her admission to a good law school would be so ignorant of the need for scrupulous citation at all levels of resaearch that the student would make errors such as those the defendant claims s/he made. Moreover, were the verbatim phrases contained in the casenote of any greater length, were they more frequent, or were they to contain language of any greater originality that would have alerted the defendant to the fact that the language was not his/her own, it would be difficult for the defendant to overcome the circumstantial inference that s/he must have known as s/he copied the phrases into his/her casesnote that they were written by another author.

The defendant could not produce his/her notecards. No formal inference may be drawn from this failure, the burden being on the prosecution to prove its case. But practically speaking, the circumstantial evidence of intent (the length and frequency of verbatim phraseology) makes it incumbent upon the defendant to establish a plausible theory explaining how the challenged material might have been included unknowingly in the casenote. The absence of the notecards may have cut against the defendant.

Thus, the council is presented with strong circumstantial evidence of intent countered by the defendant's plausible explanation. The unanimous verdict of not guilty does not indicate that the council is persuaded completely by the defendant's explanation. It simply indicates that each council member has weighed the evidence, and each member is left with very real doubt as to whether the defendant knew at the time s/he was drafting his/her casenote that the challenged passages were not the product of his/her own pen. The unanimity of the decision speaks for its rectitude.