

JUDICIAL COUNCIL OPINION

No. 87-1

Hearing Dates:    March 14, 1987  
                     April  2, 1987

Opinion Issued:   April 23, 1987

## I. DECISION

Judicial Council Members Baharoglu, Berman, McFadden, Pence, Prague and Slead delivered the majority decision of the Council. Members Fielkow, Greabe and Lapidus dissented.

### FINDINGS OF FACT

1. The Defendant is in his/her final year of instruction at Northwestern University School of Law and is thereby subject to the provisions of the school's Honor Code.

2. On Friday, December 19, 1986, the Defendant took a make-up final examination in Professor Jon Waltz's Civil Procedure I course in room Williams 107.

3. Professor Waltz's written instructions accompanying the Civil Procedure I examination stated, on page 1 and again on page 2, that "the examination is open book to this extent: Federal Rules of Civil Procedure Pamphlet, Class Notes and student-created outlines (including any annotations in the pamphlet), and xeroxed materials distributed in class. No Hornbooks. No Commercial Outlines."

4. Professor Waltz's oral instructions in class were that the Hornbook was not to be used for the examination.

5. Following the examination, a student in the make-up examination room, Williams 107, reported to the registrar's office that s/he thought s/he had witnessed an Honor Code violation. The reporting student had taken Waltz's Civil Procedure I final examination four days earlier, on December 15, 1986.

6. On February 3, 1987, upon adequate investigation, the Student Bar Association Prosecutor brought evidence of this allegation to the Executive Committee of the Student Bar Association (hereinafter referred to as the SBA). The Prosecutor charged the Defendant with a violation of Article I, Section 2, Subsection (c) of the Northwestern University School of Law Honor Code. (Hereinafter referred to as the Honor Code.) The SBA then informed Professor Waltz of the allegations in the form of a letter. Professor Waltz soon thereafter responded that the charge was not, in his opinion, de minimis, nor should it be dropped. On February 4, 1987, the SBA made a finding of probable cause pursuant to Article IV, Section 3(c) of the Honor Code.

7. On February 10, 1987, the Student Bar Association Prosecutor sent notice of the finding to the Defendant, and advising s/he of his/her rights in Honor Code proceedings.

8. The Chairperson of the Judicial Council contacted both the Prosecutor and the attorney for the Defense to arrange a pre-trial hearing which was held on February 24, 1987.

## INTRODUCTION

At a pre-trial hearing attended by the Judicial Council Chairperson, the Student Bar Association Prosecutor and the attorney for the Defendant on February 24, 1987, the Prosecutor and attorney for the Defendant stipulated that the trial date be set beyond the 21-day period set forth in the Honor Code for a date on or after March 11, 1987 and before March 19, 1987. The stipulation was signed by the Prosecutor and the attorney for the Defendant in the presence of Judicial Council Chairperson.

## DISCUSSION OF DECISION

The Council in this case was presented with a very serious problem: Should a student be allowed to make "use" of a prohibited item during a final examination, in violation of Article I section 2(c) of the Honor Code. Article I Section 2(c) of the Honor Code states: "A violation occurs when a student knowingly . . . uses material not permitted by the professor in an examination or other graded assignment." Critical to the determination of the issue before the Council is the interpretation of this rule, and specifically the word "use". The Council interpreted the word "use", as applied in this section of the Honor Code, to include any opening of the forbidden materials to a printed page during the said examination. The majority of the Council found that this definition falls within the plainly understood meaning of the word "use". The Council was also in agreement that the reasonable student should have known that the word "use" is defined in that manner. Based upon this interpretation, the Council has determined that the Defendant's actions fall within the parameters of the violation charged.

Although the interpretation of the word "use" is essential to the resolution of this case, the full context of the rule must be examined. The rule defers to the professor's determination of what material is prohibited. Professor Waltz's Civil Procedure I examination was open book to a limited extent; that extent being "[students] could bring to the examination the Federal Rules of Civil Procedure Pamphlet, their class notes, any xeroxed materials that [Professor Waltz] had handed out during the course of the semester, and any student-created outlines." No Hornbooks. No Commercial Outlines."(emphasis added) Record at 13. This fact was communicated to the students both orally in class and twice on the examination itself. The Defendant admitted that s/he knew the Horn Book was a prohibited material.

Complicating the instant case is the fact that materials prohibited in one form were permissible in another form. For example, the Horn Book itself was expressly prohibited, whereas its content was permissible if transposed into student-created material. This problem is resolved, however, by reference to the rule. The rule states prohibited material are not to be used "in an examination". The Prosecutor was not required to prove that the material was used "on" an examination, but rather that the material was used "in" the examination room.

The evidence clearly shows that both the Horn Book was prohibited and in the examination room. The question to be determined is whether the Horn Book was impermissibly "used". In this case, the Defendant argued that s/he did not "use" the Horn Book as that word is defined under Article I Section 2(c) of the Honor Code. The Defendant insisted that s/he read only the index

cards which s/he had written and placed on various pages of the Horn Book prior to the examination. The Defendant asserted that at no time did s/he read any words, text, table of contents or indexes in the Horn Book, thus being free from any violation of the Honor Code and the Professor's instructions.

The Defendant testified that s/he has, over the years, suffered from extreme "Test Anxiety". Beginning in his/her first year of law school, s/he sought and received counselling for this problem. A professor that has known the Defendant for a number of years verified the Defendant's testing problem and stated that it was the worst case of test anxiety he had seen in 10 years. Record at 108. As another means of coping with his/her test anxiety, the Defendant has traditionally overprepared. Record at 166. As part of his/her preparations for the Civil Procedure I examination, s/he paperclipped index cards in strategic areas of the Horn Book to improve his/her recollection of the Horn Book's materials while studying for the examination. The index cards consisted of a condensed summary of that page or section of the Horn Book to which the index card was attached. The Defendant continuously stressed, during direct and cross-examination, that before entering the examination room, s/he never intended to use these cards, but that during the test s/he remembered that the answer to at least one of the examination questions was on one of the index cards. It was at that point that s/he opened the Horn Book and searched for the index card. The Defendant also testified that s/he would not, and did not, cheat on an examination. Record at 167-168.

The Council has determined that the Defendant's actions fall within the Council's definition of the word "use" as stated in Article I, Section 2(c) of the Honor Code. The issue is not whether the Defendant intended to cheat, or utilize the material to an unfair advantage; these are separate violations under the Honor Code. The issue here is whether the Defendant knowingly used impermissible material in an examination. The Defendant admitted that s/he knew the Horn Book was not to be referred to in the examination and that in fact s/he did not read the book. The Defendant also testified that s/he opened the book, but only to refer to items printed on the index cards which were not included in his/her outline; thus in his/her mind, s/he did not violate the instructions of the professor nor the Honor Code. The Council disagrees and concludes that opening the prohibited book in the examination constitutes a "use" and is a violation of the Professor's instructions, and thus a violation of the Honor Code. The clear language of the professor's written and oral instructions places a reasonable student on notice that using the prohibited Horn Book in any manner would be a violation of his instructions. To interpret the rule in any other way would be tantamount to writing the rule out of the Honor Code. Allowing forbidden materials to be open and obvious during a final examination is in clear contradiction of any and all instructions. Preventing this behavior serves the interests of an honest academic community. Therefore, the Council finds the Defendant guilty of violating Article I, Section 2(c) of the Honor Code.

## II. PENALTY

Judicial Council Members Baharoglu, Berman, Fielkow, Greabe, McFadden, and Prague delivered the majority decision of the Council. Members Lapidus, Pence and Slead dissented.

### DISCUSSION OF PENALTY

On April 2, 1987, the Judicial Council held a penalty hearing attended by the Prosecutor, Counsel for the Defendant and the nine members of the Council. At this hearing, the Prosecutor recommended a penalty of a grade of "F" on the Defendant's Civil Procedure I examination, a permanent notation of the violation on the Defendant's transcript, and a one semester suspension from Northwestern University School of Law. The Counsel for the Defendant recommended a sentence of "No Penalty". After carefully considering the two counsel's recommendations and suggestions from individual council members, the Council voted (6-3) that a sentence of "No Penalty" was appropriate.

In assessing any penalty, the Council feels that the penalty should accurately reflect the circumstances of the situation. As a result of the testimony offered, the Council has found (5-4), that the Defendant did not receive any benefit from the printed words in the prohibited materials. The Council, therefore, has decided that a penalty of a grade of "F" on the Defendant's Civil Procedure I examination would not be consistent with this determination. Failing a person when he has received no substantive benefit from the material would be illogical.

The Council also has concluded that neither a one semester suspension nor a permanent notation on the Defendant's transcript would be suitable under the circumstances for the following reasons.

Throughout the Council's deliberations, great emphasis was given to the Defendant's integrity and great personal obstacles which s/he has had to overcome to satisfy his/her law school education. The Council was convinced that the Defendant is an honest person who used bad judgment during the examination and has already suffered enough by being brought up on charges and eventually convicted of violating the Honor Code.

A temporary notation of the violation on the Defendant's transcript, to be removed upon the Defendant's acceptance to any State Bar Association was also suggested but it was eventually rejected by the Council for lack of merit and reasoning.

In conclusion, the Council has determined that any penal recommendation, other than one of no penalty, would be too severe under the surrounding facts and therefore was rejected.

Opinion by:

Adam Berman  
Ronald Prague

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The specific personal obstacles, other than the aforementioned "test anxiety", are not mentioned in this opinion to preserve the confidentiality and identity of the student.



Pence, J., with whom Slead, C.J. joins, concurring in part, dissenting in part.

I concur in Part I of the majority opinion, but I respectfully dissent from Part II which addresses the penalty.

I believe the appropriate penalty in this case would be a temporary notation upon the Defendant's transcript to be removed upon the Defendant's acceptance by any state bar association. In recommending a penalty, I do not believe that the Honor Code and the prior penalties are the only "law" that we should consider; I believe that we also are bound by the Model Rules of Professional Conduct. Based upon the evidence of Defendant's inability to adequately cope with pressure situations, I have strong doubts about the Defendant's fitness to practice law.

In order to fulfill our ethical obligation, a temporary notation would serve notice to any state bar committee. The state bar committee then could investigate and make their own determinations about Defendant's fitness to practice. Once the Defendant becomes a member of a state bar, the notation should be removed because it has served its purpose.

LAPIDUS dissenting, with whom Greabe and Fielkow join.

The majority correctly identifies the two questions which are central to the proper determination of this case. The first question involves a legal interpretation of the Honor Code. What acts involving the prohibited Hornbook will be deemed to be impermissible use? (maj. op. pg.4) The second question is one of fact. Did the defendant knowingly undertake activities constituting impermissible use as that term is interpreted? (maj. op. p.6)

We in the minority disagree with the majority's legal interpretation of the Honor Code. To draw the line of impermissible use at "opening the prohibited book in the examination..." (maj. op. pg.6) is overly formalistic, harsh and without justifiable logic.

The Honor Code is appropriately named. Its purpose is to prohibit unethical conduct. (Art. 1 Sec. 1) A finding of guilt in an Honor Code matter is extremely serious. It has the potential to detrimentally affect the entire career of the party found guilty. The requirement in the Code that specific intent be found was an attempt by the drafters, of which I am one, to introduce an element of moral culpability into the determination of guilt. With its decision today the majority writes that all-important requirement out of the Code. The majority instead seems to be using a negligence standard. This is evidenced by the majority's discussion of the penalty, and the imposition of "no penalty".

The majority makes the distinction between using the

Hornbook "on" the examination, and using it "in" the examination.(maj. op. pg.4) There is no doubt that the defendant technically violated the professor's prohibition of the Hornbook by bringing the Hornbook into the test room. The act the defendant was found guilty of, however, was the impermissible use of the Hornbook as a holding device for notecards. If any other book or device had been used for this purpose there would be no case before us. The defendant did not violate the spirit of the professor's prohibition nor that of the Honor Code. During testimony even the professor agreed that using the Hornbook as a holding device for notecards would constitute merely a technical violation. (Record at 33). In the scheme of the Honor Code the majority's finding that opening the Hornbook, without "gain[ing] any benefit from the printed words..." (maj. op. pg.7) makes no more sense than would a finding that sitting on the book to raise the position in one's seat was impermissible use.

The majority is concerned that failure to find the defendant guilty will impair the effectiveness of the rule. (maj. op. pg.6) Our concerns differ. We are concerned that the majority's interpretation will allow and encourage findings of guilt for actions which are merely innocent mistakes. The student administered Honor Code of Northwestern University Law School should never be so harsh and unforgiving.

We disagree in the interpretation of the word use in the Code. Therefore, we are compelled to also disagree as to

whether the defendant acted in violation of the Code. Under an interpretation which would require actual use of the words in the Hornbook rather than its physical being, the defendant would be not guilty.

LAPIDUS

I find myself in an unusual position. Based on the proper interpretation of the Honor Code, I believe the defendant is innocent. However, I also share the opinion expressed by Ms. Pence in her dissent to part II of the majority's opinion. If the majority's interpretation and finding of guilt is upheld I join in the Pence dissent as to the penalty.

Roger W Slead  
Roger Slead, Chairman  
(Concurring in Pt. 1, Dissenting from Pt. 2)

William Lapidus (dissenting)  
Bill Lapidus

Selma Baharoglu  
Selma Baharoglu

Tim McFadden  
Tim McFadden

Adam Berman  
Adam Berman

Brenda Pence  
Brenda Pence, concurring in Pt. 1, dissenting  
from Pt. 2

Brian Fielkow, dissenting  
Brian Fielkow

Ronald Prague  
Ronald Prague

Mary Clare Greabe  
Mary Clare Greabe  
(Dissenting)