

Confidential -- Judicial Council

**Northwestern University School of Law
Judicial Council**

Case 2001-006

December 11, 2001

Majority Opinion

M. Burke delivered the opinion of the Judicial Council, in which J. Briscoe, W. Cleghorn, R. Oberlies, and J. Suarez join.

The question presented in this case is whether the Accused has violated Art. I, § 2(e) of the 1986 Honor Code of the Northwestern University School of Law. If so, the Judicial Council must further recommend an appropriate penalty.

I. Background

The defendant/student enrolled in a course that required the completion of a research paper as a substantial portion of the final grade. As part of the research for this paper, the professor teaching the course recommended that students meet with him/her to discuss possible paper topics. Taking this advice, the student met with the professor to discuss the student's ideas. After the student indicated an area of general interest, the professor alluded to a recent article that dealt specifically with that area. It is not clear whether the professor specified the recent article by name, but at the very least the professor did mention that he/she knew of an article on the subject. Furthermore, the professor gave the student a CD-ROM that contained a number of articles, indicating that the CD-ROM contained the article of interest. The evidence presented at trial does not indicate how many articles were included in the CD-ROM in total.

The student submitted his/her paper on the date specified by the professor. Upon reading the paper, the professor immediately noticed something familiar about the language and citation style of the student's paper. The professor's suspicions being raised, he/she compared the student's paper to the article that the professor had alluded to. Upon comparison, the professor felt that he/she had reason to believe that the student had plagiarized the article. In accordance with Art. IV, § (1)(c)(ii) of the Honor Code¹, the professor reported the alleged violation to the Honor Code Prosecutor. The Prosecutor subsequently presented the charge to the Executive Committee, which found probable cause that the Accused violated Art. I, § 2(e) of the Honor Code. The case proceeded to trial.

¹ Unless otherwise specified, all references are to the 1986 Honor Code.

Article I, § 2(e) of the Honor Code 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.”

At trial, the Defense presented two main arguments. First, counsel for the Defense forcefully argued that the concept of plagiarism itself required that the accused intend to deceive his/her professor, notwithstanding the language of the 1986 Honor Code. Second, the Defense argued that any similarity between the student’s paper and the allegedly plagiarized article was merely the result of recklessness on the part of the defendant. We will deal with these arguments in turn.

II. Conclusions of Law: Mens Rea Required for a Violation of Art. I, § 2(e)

To establish whether the accused has violated Art. I, § (2)(e), the Council addressed the defendant’s argument about the Mens Rea requirement of that section. However, to determine the appropriate legal construction of that section, the Council first determined the vote required to make conclusions of law.

A. Voting Rules in Determining Conclusions of Law

Although neither party raised the issue, the Council initially addressed whether interpretations of the Honor Code required a majority, or, in the alternative, a two-thirds vote. Article V, § 3(a) grants the Council the authority to interpret the Code, but does not specify voting rules for establishing conclusions of law. By contrast, the Code requires that “two-thirds of the members present find the Accused guilty beyond a reasonable doubt.” Art. V, § (2)(j). However, several other provisions of the Code direct the Council to make determinations by a majority vote. In the case of appeals from determinations by the Council’s Chairperson on issues relating to the postponement of trials, the Council as a whole makes determinations by a majority vote, excluding the Chairperson except in the case of a tie. Art. 5, § (1)(b). The Council decides motions for dismissal or reversal of a guilty verdict by a majority vote. Art. 5, § (2)(f). Similarly, the Council makes recommendations for penalties by a majority vote. Art. VI, § (1)(a). Furthermore, the supermajority required for the determination of guilt is the only provision relating to final decisions of the Council that requires more than a majority vote. In light of these provisions, we hold that the Judicial Council shall interpret the Honor Code by a majority vote.

B. Mens Rea

At trial, the Defense argued that to prove a violation of Article I, § (2)(e), the Prosecution needed to show that the accused intended to deceive his/her professor. In support of this argument, Defense counsel pointed to an

opinion of the Judicial Council decided in 1983. In the 1983 case, the Judicial Council addressed the issue of whether the Prosecutor's complaint "was fatally defective because it failed to allege that the plagiarism charged was intentional." Opinion 83-1, at 1. At the time of that case, the Judicial Council was interpreting the Honor Code as amended in 1979. The analogous provision of the Honor Code, as then enacted, stated that "[a] violation occurs when any student shall intentionally . . . plagiarize." Art. I, § (2)(5) (repealed 1986). The Judicial Council concluded

that plagiarism by its very definition encompass[e]d only intentional attempts to pass off someone'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.

Opinion 83-1, at 2. Relying on the 1983 opinion, the defendant in this case argued that the Honor Code's subsequent amendments did not remove the requirement that the Prosecution prove that the accused intended to deceive his/her professor. As additional support for this argument, the Defense cited Black's Law Dictionary's definition of plagiarism. "It may be perfectly clear what constitutes plagiarism ('using the work of another with an intent to deceive')." Black's Law Dictionary 1170 (Brian Garner, ed., deluxe 7th ed., 1999) (quoting Christopher Ricks, "Plagiarism," 97 Proc. of the Brit. Acad. 149, 151 (1988)). Again citing Black's, the Defense points out that plagiarism is an academic and ethical offense, rather than a legal offense. Id. (quoting Paul Goldstein, Copyright's Highway 12 (1994)). The Defense argued that the subsequent change in the text of the Honor Code did not affect the definition of plagiarism itself, and therefore the Prosecution needed to prove that the defendant intended to deceive his/her professor.

We find this argument interesting as far as it goes, but conclude that it does not go far enough. The amendments to the Honor Code subsequent to this decision made two significant changes. First, the 1986 Honor Code required that the student knowingly (as opposed to intentionally) plagiarize. Art. I, § 2(e). Second, the 1986 Honor Code further defined the concept of plagiarism, stating that it included, but was 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." Id.

Assuming *arguendo* that the concept of plagiarism incorporates an intent to deceive, this does not answer the question. Defendant's proffered definition does not specify whether this requires general or specific intent. Furthermore, even general and specific intent tend to have only a vague significance. The explanatory notes to the Model Penal Code provide interesting insight in this regard. For example, the Model Penal Code's explanatory note

states that there is a “rough correspondence between” the requirement of recklessness, knowledge, or purpose “and the common law requirement of ‘general intent.’” Model Penal Code and Commentaries 228 (1985). Furthermore, “[t]o call murder a ‘specific intent’ crime or to say that it requires an ‘intent to kill’ does not speak with clarity to the issue of what the defendant must have believed, and how carefully he must have formed his belief, in order to successfully claim self-defense.” *Id.* at 232. Because of this ambiguity, the Model Penal Code adopted four categories of culpability, in an effort to dispel the confusion over the ambiguous term “intent.”

The legislative history of the 1986 Honor Code demonstrates a similar concern. “The words ‘knowingly’ and ‘purpose’ were substituted for ‘intentionally’ and ‘intent’ at various points in the violations section to make clear that the Honor Code requires specific rather than general intent before an Act is deemed to be a violation.” Official Comment to the 1986 Honor Code Amendments. Furthermore, the framers of that revision considered, but did not apply, a requirement that plagiarism be done purposefully. *See, e.g.*, Art. I, § 2(a). Additionally, “[t]he definition of plagiarism . . . though not all inclusive, was inserted to provide students with an easily accessible and accepted definition.”

We feel that these changes in the Honor Code clarified not only the circumstances of each offense, but also the result elements. In other words, the Honor Code requires that the accused knowingly fail to attribute (the circumstance element), and that he/she knowingly represent the work as their own (the result element). Therefore, we hold that to establish a violation of Art. I, § (2)(e), the Prosecution must prove that the accused knowingly failed to attribute relevant language, and that he/she knowingly represented that work as their own.² However, we reject the suggestion that the Prosecution needs to prove that the Accused intended to deceive, in the sense that he/she purposefully deceived his/her professor. The 1986 amendments applied the purpose standard to other provisions of the code, but chose not to use this standard in the context of plagiarism.

III. Findings of Fact: Determination of Guilt or Innocence

At trial, the Prosecution put forth evidence that the accused plagiarized the work of the article originally alluded to by the professor teaching the course. The Prosecution displayed a photocopy of the Accused’s paper positioned alongside of the allegedly plagiarized text from the original. The Prosecution additionally highlighted portions of the text that were either verbatim or substantially similar to the original article. The verbatim quotes alone comprised 8-14% of the total text submitted by the student. Furthermore, by the Prosecution’s estimate, an

² The Judicial Council decided this by a vote of 5 for, 3 against, and 1 not voting.

additional 21% of the material submitted by the student was substantially similar to the original article. Although the Defense controverts the Prosecution's method of calculation, we do not base our holding on the exact percentages as calculated by either party.

The Defense did not claim that this similarity resulted by mere coincidence. Rather, the Defense argued that the student included the verbatim quotes and substantially similar text without proper citation as the result of recklessness on his/her part. The Defense additionally presented exhibits comprising printouts of the student's electronic note files. As the Accused prepared his/her paper, he/she took notes on useful articles and case law to support his/her thesis. These notes included quotations from the allegedly plagiarized article, specifying them as "Good Quotes," but did not include citations to any article in particular. The defendant claims that in the rush to get the paper done, he/she lost track of which text was a quotation from another article, and which was his/her original writing. Furthermore, the Defense points out that the student cited the allegedly plagiarized article seven times, and again reminds the Council that the allegedly plagiarized article was pointed out to him/her by his/her professor.

Ultimately, we do not find the defendant's explanations plausible. The Prosecution has the burden of proving the elements of the offense beyond a reasonable doubt, and we feel that he has done so. First, the defendant's paper includes a suspiciously high amount of verbatim text. The paper includes verbatim text strings from the original article in at least thirty different places within his/her article. None of these passages are surrounded by quotation marks, nor does the paper cite to the original article in any of these instances. In many cases, these verbatim portions stretch for more than thirty words, in one case including an exact duplication of seventy-eight words. Given both the frequent presence of these quotes and their length, it is difficult to find that they were included merely recklessly.

Second, the amount and pattern of paraphrasing the original article casts serious doubt on the defendant's explanation. The Defense argues that determining whether something is a paraphrase is highly subjective. While this may be true, we find that many of the allegedly paraphrased portions are so similar to the prior article that their resemblance could not happen by mere coincidence. Not only do these paraphrased portions present the same ideas as the original article, they use substantially similar word choice, punctuation, and sentence structure. In many places, these paraphrased portions appear intermixed with sections of verbatim text in exactly the same order as the original article. In one place in particular, the defendant's paper mimics the prior article word-for-word, including a footnote in the same place as the original article, paraphrasing the text of that footnote in the student's footnote. The

paraphrased portions constitute an even larger amount of the student's paper than the verbatim quotes. While the Defense attempted to argue that these should not have been considered, we feel that these sections, in many ways, are even more damning than the verbatim quotes. While it might be plausible that in the crunch of a deadline, one could recklessly cut and paste verbatim quotes into his/her paper, it truly stretches the imagination to believe that an individual could both recklessly incorporate someone else's text and take the time to rewrite the exact wording of the original article. Furthermore, in many places, the defendant made nuanced alterations from the original. These minor changes include changing one or two words, slightly altering the punctuation, transposing two words, removing quotation marks where the original had been quoting another source, citing to a different reporter in case citations, or altering a case name from a short to a full cite. One is left to wonder why someone would make such changes if in fact the student forgot that these were not his/her own. Finally, the student's paper parallels the article in its structure, using similar overall organization and section headings. While none of these considerations standing alone would necessarily convince us that the defendant acted knowingly, we feel that in combination they lead to only one conclusion. Therefore, we find the defendant guilty of violating Art. I, § (2)(e) of the Honor Code.³

IV. Recommended Punishment

The Judicial Council suggests that the professor give the defendant an opportunity to rewrite the paper. However, the faculty member bringing the charge shall make the ultimate determination of whether to allow the student to rewrite the paper. Furthermore, we make no recommendation as to the final grade in the course. The members of the Council, including students and faculty, acknowledge that the grade to be given a particular student in a course resides solely within the determination of the professor. Furthermore, we decline to recommend punishment in addition to the professor's ultimate determination on the issue of the plagiarized paper. Article VI, § (1)(a) allows that the Council recommend no penalty. Our determination of guilt alone triggers far-reaching and severe collateral consequences. Moreover, the Prosecutor stated that this case involved the lowest proportion of plagiarized material of any case on record at this Law School. A substantial majority of the defendant's work was original or properly attributed. The Defense also demonstrated that the Accused had no experience writing research papers, and therefore only vague familiarity with the requirements of citation and attribution. In light of these mitigating factors, and the realization that the Accused will have to answer for his/her conviction in any application to any State bar, we feel that further punishment would be inappropriate.

³ On the basis of the mens rea standard established by the majority, Burke, Briscoe, Cleghorn, Hughes, Oberlies, Ono, and Suarez found the Accused guilty, while Cushenberry and Rosenblum found the Accused not guilty.

Prof. Joyce A. Hughes, Concurrence and Dissent, in which D. Ono joins.

Because of the Judicial Council ruling on the legal standard, I concur in finding that plagiarism has been proven. For the reasons stated herein, I concur in the decision to impose no penalty from the Judicial Council. However, I dissent from the decision that an “intent to deceive” is not required to prove plagiarism. Moreover, my interpretation of “knowingly” differs from the majority opinion.

At the outset of the hearing in this case and in response to arguments of Accused's counsel, the chairperson of the Honor Code Judicial Council ruled there was no necessity to show that the defendant acted with an “intent to deceive” in order to establish plagiarism. Following the hearing, with one member absent, the council voted 5 - 3 to accept that ruling - i.e, that plagiarism under the Honor Code does not require an intent to deceive. At the time, I understood I was bound by that decision. Thus I concurred in the guilty determination. Nonetheless, I do not accept the view that no intent to deceive is required and the implicit overruling of prior Judicial Council precedent.

The majority opinion herein notes the 83-1 Judicial Council opinion which the Accused’s counsel cited. It is dismissed as having been rendered prior to the 1986 Honor Code revisions. But there is also a 1997 opinion - subsequent to the 1986 Amendment - which concludes that the accused’s actions “could not have realistically been done with the intent to deceive the professor into thinking that the work was the original product of the Accused.” Article IV, Section 3(b) of the Honor Code provides that “Adjudications . . . shall be consistent with previous Judicial Council opinions unless overruled.” The action taken here is at variance with the 1997 decision. Not only do I believe “intent to deceive” is required as the 1997 opinion intimates, the evidence in this case did not demonstrate an intent to deceive. It is my view that when a professor gives a student material, the student usually believes (often mistakenly) that the professor is intimately familiar with the material. Thus, when the student relies upon the same material in his/her paper, it is not done with any intent to deceive the professor that it is the student’s original work.

I understood the ruling of the majority of the Council interpreting the Honor Code that “intent to deceive” is not required to be a binding decision. Because of that, I concur in the conclusion that the Accused is guilty based upon the standard in the Honor Code that plagiarism includes “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 five (5) consecutive words.” ART. I, Sec. 2(e).

The Honor Code requires that an offense be committed "knowingly." In my view, a "knowing" violation in this case means the plagiarism specified in the Honor Code was not accidental. An example of accidental plagiarism is where a paper is transferred from one computer processing program to another, resulting in elimination of all quotation marks. That would not be a knowing violation since it was not a product of conscious action. In this case, the failure to attribute and the failure to indicate quotations marks where required, were done by a conscious act of the Accused - which means knowingly. Thus, given the decision that an intent to deceive is not required and that knowing action was taken, I concur with the finding of guilty.

Similarly, I concur that the Judicial Council should impose no penalty as there may be "far-reaching and severe collateral consequences" to the finding of guilt. Article VI, Section 1(a) of the Honor Code specifically provides the Judicial Council may recommend no penalty. In addition, the prosecutor noted that the case involved the lowest percentage of material that had been plagiarized at the law school. In this instance the Accused actually cited the plagiarized article several times and the article relied upon was given to him/her by the professor involved. Moreover, the 1997 case involving plagiarism recommended that the accused re-write the paper and "if the professor determines the Accused cannot adequately complete the course by re-writing the paper, then in the alternative," the accused had to take another course where a paper was required.

I disagree with prior action which apparently treats plagiarism Honor Code violations more leniently when committed by foreign students than American students. Because of language differences, foreign students should have the right to additional time in writing exams in English. That is a proper accommodation. But I question the justification for treating American students more harshly under the Honor Code than foreign students. In the 1997 case it was suggested that the accused - a foreign student - receive instruction and guidance. That also should be provided American students. This case involved the first law school paper written by the Accused. That fact also supports the decision of no judicial council penalty.

Based upon the foregoing, I concur in the guilty finding but dissent from the decision that an offense of plagiarism can be proven without showing an "intent to deceive". Moreover, I do not subscribe to all the comments about "knowingly" in the majority opinion.

T. Cushenberry and V. Rosenblum would find the Accused not guilty under the knowing standard. V. Rosenblum stated, "In my view, the record did not establish beyond a reasonable doubt that the defendant "knowingly" violated

the Honor Code's requirements. His inclusion of five footnotes citing the article in question did not remedy his muddled judgment but did call into question whether he was conscious of the need for more extensive footnoting and knowingly chose not to footnote."