HONOR CODE REVIEW COUNCIL

Case 87-1

PER CURIAM:

The Judicial Council opinion 87-1, dated April 23, 1987, held in a split decision that the accused was guilty of a violation of Article I, section 2(c) of the Honor Code, providing that "A violation occurs when a student knowingly . . . uses material not permitted by the professor in an examination or other graded assignment." The Council determined, however, that under the circumstances a penalty would be inappropriate. The accused has appealed the finding of a violation. A violation, of course, is a very serious matter which can affect a student's entire legal career whether or not a formal penalty is exacted; hence this appeal can in no way be regarded a matter of small import.

The Honor Code Review Council, while ruling in favor of the accused on this appeal, wishes to point out its respect for the conscientiousness and professionalism of all the persons involved in every stage of this proceeding.

First, the complaining witness is to be commended for her attentiveness to the integrity that the Honor Code itself demands, and for her willingness to undertake a difficult duty that is all too easy to shirk. The student Prosecutor and the Judicial Council--both majority and dissenters--showed a diligence, sensitivity, and attention to detail that can only serve as a model for proceedings of this sort.

We think, however, that under the special circumstances of the evidence in this case, the findings of the Council do not support the majority's verdict of an Honor Code violation.

It is undisputed in this case that the accused brought a hornbook with her into the examination and opened it, even though the professor's instructions specified "no hornbooks." The Council majority ruled that the opening of the book to a printed page in itself constituted a "use" of the book, whereas the accused maintained that she had not "used" the contents of the book, but only her own study cards that were clipped to the book's pages, and that were permitted under the examination rules.

There is no question that the act of opening the hornbook presented the very strong appearance of an

infraction. The accused argues that the term "use" is ambiguous and consequently flawed, but we do not think it is necessary to reach that point here. Normally, it is entirely reasonable to suppose that anyone opening a book is attempting to "use" it, in the sense of getting some information from its contents; this is clearly what the complaining witness quite reasonably believed. Acts of this sort would under most circumstances give rise to a permissible inference of a violation from which an adjudicatory body could, without further specific findings, hold that such a violation had occurred.

The accused, however, presented voluminous evidence to rebut that very strong and natural inference; her evidence was to the effect that in her very special case, appearances deceive: that her opening of the book was not to use its contents but to locate and read her own notes, which were, of course, permitted in the exam. She gave extensive testimony on her general experience in taking examinations; her awesomely intensive normal study practices, which included the practice of summarizing materials and clipping notes to book pages; the manner in which she prepared and used her own study materials in the time leading up to the events in question here; the materials that she planned to use in the exam itself--which did not include the notes here

in question until she realized during the exam that those notes contained material not contained in her other note materials; and her inattentiveness to the hornbook prohibition during the exam due to her plan to use only her own notes. She supported her own testimony with documentation of her study materials, as well as with witnesses attesting to her experience, character, and quite extraordinary conscientiousness.

Her testimony and documentary evidence was sufficiently credible to rebut the normal inference that would be made from her acts, and the statements in the majority's opinion, while not perfectly clear on the point, do suggest that they believed her evidence. Under these circumstances, it was incumbent on the Judicial Council majority members to say that they did not believe her evidence--if in fact they did not--in order to find a violation of the Honor Code section in question.

The Judicial Council majority's discussion of the word "use" suggests that they were concerned with preventing not only improprieties, but appearances of impropriety as well. Prohibitions on appearances of impropriety are certainly a part of some ethics codes--as for example in public offices or positions of fiduciary trust--and in such

instances, an insistence on the formal application of rules is entirely appropriate, since what is at stake is the impression made on others, in a large community in which individualized details are likely to be disregarded. But we think that the Honor Code, while recognizing a duty of honesty that students have towards each other, is aimed primarily at actual, intentional and knowing wrongdoing rather than the mere appearance of wrongdoing. Insofar as the Code does aim at appearances, it should permit rebuttal of those appearances within the student community's careful and detailed adjudicatory process. For this reason, we think that "use" in the Code section here at issue should not be taken as absolute, but should be construed to reach what is undoubtedly the object of this rule--the knowing attempt to use the content of prohibited materials.

We are also aware that the Board may have been concerned about questions of proof, and about creating an untenable situation in which a violation hinges entirely upon the confession or denial of the accused. We do not think that problem is presented here. A finding of improper use did not hinge simply on her own statements about her motivations and actions in the exam room, but was supported by her extensive corroborating information about an entire course of conduct while studying for and taking exams, by

the internal consistency of that information with her statements on the incident in question, by introduction into evidence of the materials used, and by the evidence of other persons at every juncture at which they could be expected to know something about her practices and character.

The Council might have thought this evidence not credible, or might have thought it insufficient to rebut the natural inference that one might make from the acts in question here; indeed, we wish to stress that it takes a great deal to overcome that inference. But given the very extensive nature of the accused's rebuttal--that is, to show that she opened to book only to find and use her own permitted materials rather than to look at the content of the prohibited materials--and given the statements in the Council majority's opinion suggesting that the Council members did give credence to her rebuttal, some finding to the contrary was necessary as a precondition to a ruling of an Honor Code violation. Since the Council did not make such a finding, we think that a ruling of a violation is not sufficiently supported.