

Confidential -- Judicial Council

## Majority Opinion

D. Ono delivered the opinion of the Judicial Council, in which J. Briscoe, W. Cleghorn, J. Hughes, R. Oberlies, V. Rosenblum, and J. Suarez join. M. Burke and T. Cushenberry 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> of the Northwestern University School of Law 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 Prosecutor, the Defendant moved for Directed Verdict. The Defendant’s Motion for Directed Verdict is GRANTED.

### **I. Background**

The Northwestern University Law Review (the “Law Review”) is one of three student-edited journals at the law school that selects its new members through two separate writing competitions. The majority of the new membership is selected during a competition held in the Spring (the “Spring Competition”); however, several membership positions are filled during a “write-on” competition held in the subsequent Fall (the “Write-on Competition”). Candidates participating in the Write-on Competition are required to perform duties similar to the students granted membership via the Spring Competition. That is, candidates, as well as new members, are required to perform “source and cite” assignments in addition to researching and writing a journal article or case note. Each candidate is assigned to a 3L Associate Editor, who is a third-year law student and current member of the Law Review, to serve as an advisor. The 3L Associate Editor is typically assigned to a group of students comprised of new members, candidates in the Write-on Competition, or both.

The writing of a journal article or case note is a three-draft process, wherein the first draft must be a minimum of 50 pages in length and contain at least 200 footnotes. For the purposes of the Write-on Competition, the Law Review Board evaluates the candidates based on the quality of the “sourcing and citing” as well as on the style and quality of the candidate’s first draft submission.

A charge was brought against the Defendant by a professor in his/her capacity as advisor to the Law Review for violation of Art. I, § 2(e) of the Honor Code based on the Defendant’s submission of his/her first draft.

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<sup>1</sup> Unless otherwise specified, all references are to the 1986 Honor Code.

The Prosecutor subsequently presented the charge to the Executive Committee, which found probable cause of an Honor Code violation, and submitted the issue for trial.

## **II. Jurisdiction**

Prior to trial, the Defendant questioned the Judicial Council's authority to hear this case, arguing that the submission of a first draft in a three-draft process, such as that used by the Law Review, should not be subject to the Honor Code. The Defendant further argued that even if such first drafts were subject to the Honor Code, the Honor Code should not apply if the first draft is withdrawn from consideration prior to notification of a charge of plagiarism. The Judicial Council heard oral arguments by the Prosecutor and the Defense on these issues.

The purpose of the Honor Code is to "recognize an overriding obligation to ethical conduct. . . . throughout *all phases of law school academic life*" (emphasis added). Honor Code, Art. I, § 1. The submission of a first draft during the Write-on Competition is a pre-requisite for membership on Law Review (or a requirement for maintaining membership in the case of new members chosen through the Spring Competition); and the Law Review is a part of law school academic life. Therefore, the Judicial Council holds the submission of a first draft in a three-draft process is subject to the Honor Code.<sup>2</sup>

A violation of the Honor Code occurs when a student knowingly plagiarizes. Honor Code, Art. I, §§ 2(b). Once a student knowingly plagiarizes, a violation has already occurred. The violation does not simply disappear if the student subsequently withdraws the plagiarized work before a formal charge is brought by the Honor Code Prosecutor. Thus, the Judicial Council holds the submission of a first draft in a three-draft process is subject to the Honor Code even if the student withdraws the first draft from consideration prior to notification of an alleged Honor Code violation.<sup>3</sup>

## **III. Findings of Fact**

The Accused, a second-year JD student (hereinafter "Defendant"), sought membership with the Law Review by participating in the Write-on Competition. The deadline to submit the first draft was November 14<sup>th</sup> and the Defendant submitted a first draft of his/her journal article to the Law Review Board on that date. The Law Review Editor-In-Chief (the "Editor") and four other members of the Law Review Board were scheduled to review and evaluate each of the candidate's submissions on November 16<sup>th</sup> in order to make membership decisions.

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<sup>2</sup> The Judicial Council decided this by a 7-0 vote (two members not present).

<sup>3</sup> The Judicial Council decided this by a vote of 6-0-1 (6 for, 1 abstaining, and two members not present).

The Law Review Board had tentatively reserved a number of membership spots to be filled through the Write-on Competition. Based on the candidates' first draft submissions, there were fewer candidates than available membership positions. However, the Editor indicated the Law Review Board was under no obligation to accept all of the candidates. That is, the total membership of the Law Review can vary from year to year and regardless of the number of spots tentatively allocated for the Write-on Competition, the Law Review Board can accept as many or as few candidates from the Write-on Competition as it sees fit.

On November 14<sup>th</sup>, the Editor was in the Law Review office and began reviewing the first-drafts submitted by Write-on Competition candidates (only skimming the drafts of the others). While reviewing the Defendant's journal article, the Editor noticed certain footnotes were more extensive and complex than the Editor had typically seen in the other students' submissions. The Editor conducted a search on Westlaw and compared the Defendant's submission to articles the Editor found on Westlaw. Upon comparison of the Defendant's submission with several articles the Editor retrieved off of Westlaw, and after reviewing the Honor Code several times, the Editor suspected some of the Defendant's article had been taken without proper attribution. Subsequently, the Editor attempted to contact the Defendant by e-mail indicating that she needed to speak with the Defendant as soon as possible because there was a "problem" with the Defendant's submission. The Editor removed the Defendant's submission from the Law Review office in an effort to protect the Defendant's confidentiality as required by the Honor Code.

On November 15<sup>th</sup>, the Editor left a voice message for the Defendant. The Editor then discussed the situation with the professor serving as advisor to the Law Review (the "Professor") and they decided that the Professor would deal with the Defendant. The Professor also left a message for the Defendant to contact him/her. The Defendant was out of town on both the 14<sup>th</sup> and 15<sup>th</sup> and did not retrieve any of the messages until the morning of November 16<sup>th</sup>.

At approximately 1 A.M. CST on Friday, November 16<sup>th</sup>, the Defendant called the Editor from out of town. The Editor told the Defendant there was a problem with the Defendant's journal article. It is disputed whether the possibility of an Honor Code violation was mentioned during the conversation. The Editor told the Defendant that the bigger issue could be dealt with when she got back, but that it would be better for the Defendant to withdraw the journal article prior to the Law Review Board meeting, so that the Editor would not have to explain why the Defendant's submission was withdrawn. The Defendant agreed to voluntarily withdraw his/her submission.

The Defendant flew back the same day (one day earlier than scheduled) and called the Editor, who advised the Defendant to meet with the Professor. The Professor told the Defendant that there was enough evidence of plagiarism to warrant referral to the Honor Code Prosecutor. On Monday, November 21<sup>th</sup>, the Professor brought formal charges against the Defendant.

#### **IV. Analysis**

At trial, the Prosecutor alleged the Defendant plagiarized the work of several articles. The Prosecutor provided: a photocopy of the Defendant's paper; copies of the articles; a document containing excerpts of the allegedly plagiarized text taken from the Defendant's paper along with verbal indication of where the text allegedly occurs within the articles; and a comparison that the Editor compiled in formulating her opinion on the existence of plagiarism.

In examining the evidence, we are not convinced beyond a reasonable doubt that the Defendant was attempting to pass off the ideas or language as his/her own, since all the allegedly plagiarized text appears to have an accompanying citation.<sup>4</sup> Nor does it appear that Defendant was guilty of wholesale copying of another person's work. Rather, the primary citation errors seem to involve inappropriately citing to sources within a source, which could be attributed to the student's ignorance of proper journal citation rules. Furthermore, the evidence does not suggest the Defendant was seeking to hide use of the allegedly plagiarized articles, as each article is cited at least once within the Defendant's submission. Therefore, although it is clear to the Judicial Council that the Defendant failed to attribute properly, we are not convinced the Defendant did so with the requisite knowledge.

The Judicial Council recognizes that plagiarism is a serious offense and the Defendant had something to gain in that there is prestige associated with being a member of the Law Review; however, as with many academic experiences, the Law Review process is also a learning experience. While it is perfectly reasonable for the Law Review Board to use the quality of the first draft for determining whether to extend an offer of membership, it is quite another to hold the quality of a first draft to the same standard as if the student is handing in a final draft for publication, or a final draft of a paper for an academic grade. This learning element associated with participating in the Law Review process helps explain why the creation of a journal submission is a three-draft process.

The Judicial Council is further persuaded that first drafts should be considered learning experiences in some instances. For example, the Professor testified as to how s/he handled another case that s/he referred to the

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<sup>4</sup> In fact, it appears some of the text the Prosecutor points to as evidence of plagiarism is actually properly cited.

Prosecutor prior to the present matter. In that case, a student in one of the Professor's classes had apparently copied text from another source and submitted it as first draft of a two-draft paper. The professor told the student the paper needed to be overhauled; it was only after the student did not make the appropriate changes upon submitting a second draft that the Professor submitted the case to the Prosecutor.<sup>5</sup> While the Judicial Council recognizes that the Professor's prior conduct is not binding precedent, it is illustrative of an alternative way of dealing with first drafts.

The rhetorical question must be asked: if mistakes cannot be made in a first draft, then where can they be made? The Editor admitted the first draft is not expected to be perfect. The Editor also admitted that a candidate can submit a first draft which is full of mistakes and still be selected as a member a Law Review (and ultimately be allowed to complete the three-draft process).

Testimony revealed that at no time did the Law Review Board take the opportunity to assess the candidates' experience and familiarity with proper journal citation practices, which are different from the requirements of first year legal writing papers. There is no Law Review orientation regarding proper journal citation. The 3L Associate Editor assigned to the Defendant never talked to Defendant on how to properly cite. The Editor never spoke to Defendant during the Write-on Competition regarding citation or otherwise. The Professor never spoke with the Defendant during the Write-on Competition and does not know how much the Defendant knew about citing before starting the process. Thus, the Judicial Council finds it reasonable that a student would not know that citing to sources within another source, or the student's other citation errors, could constitute plagiarism; hence the "knowledge" element has not been established beyond a reasonable doubt.

The Prosecutor has the burden of proving the elements of the offense beyond a reasonable doubt, and the Judicial Council does not feel the Prosecutor has satisfied that burden. Therefore, the Judicial Council finds the Defendant not guilty of violating Art. I, § (2)(e) of the Honor Code and Defendant's Motion for Directed Verdict is GRANTED.

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<sup>5</sup> The Professor sought to distinguish that case by arguing that no consequences attached to the first draft submitted by the student; i.e. no grade was attached to the first draft. But this distinction is a non-sequitur since the presence or absence of a benefit is not required for plagiarism.