

Advisory Opinion
January 28, 2008

Jacqueline A. Golon, Chief Justice

The Honor Court hereby issues this advisory opinion concerning the request that the Court define the terms “intentional,” “knowing,” “reckless,” and “best efforts.” The Honor Code currently does not contain definitions for these terms. While we understand that the Code’s lack of a formal definition for some or all of these terms has been a subject of concern for several students, it is our opinion that the Court lacks authority to set rigid definitions of these terms through an advisory opinion.

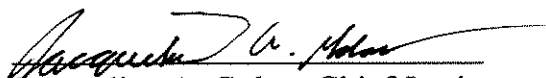
Advisory opinions are meant to interpret the Code. We feel that defining these terms would effectively constitute an amendment to the Code. The Court does not have the ability to effectuate an amendment to the Code through an advisory opinion. Section 11.01 of the Honor Code allows for the proposal of any and all amendments “by petition of any ten (10) students, by the Board of Governors of the Student Bar Association on its own motion, or by petition of a majority of the Honor Court.” Section 11.02 mandates that a proposed amendment be approved in an adoption election by “at least two-thirds (2/3) of the students voting.” It is our opinion that an amendment, approved by two-thirds of voting students, is required to set definitions for any or all of these terms.

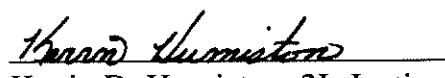
Our decision not to issue definitions for any of these terms through the use of an advisory opinion stems in part from the language found in section 10.06 of the Honor Code: “Conduct consistent with an advisory opinion shall be presumed not to be in violation of the Code.” Advisory opinions typically result from a request detailing a factual situation and regarding whether certain conduct is compliant with or in violation of the Code. The Court then applies the Code to the fact-based situation and determines whether the Court believes that the conduct in question would violate the Code. Advisory opinions are more suitable as a response to fact-based inquiries that require an interpretation of the Code. If a student were to request an advisory opinion regarding whether certain conduct was performed knowingly, recklessly, or intentionally, the Court would submit an opinion. Similarly, if a student requested an advisory opinion regarding whether certain conduct would be deemed to qualify as a use of best efforts, the Court would submit an opinion. The Court has issued such advisory opinions in the past and may issue such advisory opinions when requested to do so. However, the penning of definitions for terms contained in the Code would be more properly achieved through the use of an amendment, rather than through an advisory opinion.


The Court also has significant reservations regarding the request to define the phrase “best efforts.” We feel that the determination of whether a student used his or her “best efforts” in performing his or her duty under the Code must be made on a case by case basis. The Court is uncomfortable in issuing a definition for the phrase “best efforts” as we feel that a definition may be detrimental to the Court’s ability to make a proper determination in each case that may come before the Court. This opinion does not suggest that the phrase “best efforts” can not be defined. The Court merely points out that a determination of whether a student used his or her “best efforts” is a matter for the trier of fact. An advisory opinion would be appropriate in response to a request regarding whether a student used his or her “best efforts” in a hypothetical, fact-based situation. An amendment would be appropriate for setting a definition for the phrase “best efforts.”

While the Court declines to issue a definition of these terms, we feel that the student body governed by the Honor Code should have an understanding of how these terms might typically be applied in a case that would come before the Court. When certain terms are undefined, a Court will generally look to other existing law to find definitions that are suitable. It will often fall upon legal counsel to advocate for the definitions that they believe should be applied. Typically, words are assumed to carry the meaning that they bear in ordinary usage. Courts will also look to secondary sources when interpreting the definition of a disputed term. Some examples of sources the Court might use to determine the meaning of undefined terms such as these include, but are not limited to, the University of Missouri Collected Rules and Regulations, existing case law, sources brought forth by the prosecutor, the accused, or the parties representing the accused, and any secondary sources such as dictionaries.

The Honor Court understands the concern involved with this request. This opinion is not meant to hold that the requested terms should not be defined in the code. An amendment, pursuant to section 11 of the Honor Code, is the proper forum to define terms contained in the Honor Code. It is our opinion that an advisory opinion is not the proper forum to establish definitions for terms contained in the Honor Code.


Jacqueline A. Golon, Chief Justice


Kevin D. Humiston, 2L Justice


Lara K. Pabst, 2L Justice


Anne K. Morrison, 1L Alt. Justice

Justice Christopher D. Aulepp, concurring and dissenting:

FACTS

The UMKC School of Law Honor Code ("Honor Code" or "Code") can be accessed on the Internet at <http://www1.law.umkc.edu/academic/honor.htm>. The Honor Court ("Court") anonymously received the following request for an advisory opinion: "The following terms have no definition given in the UMKC Honor Code:

"Intentional"
"Knowing"
"Reckless"
"Best Efforts"

I request the Honor Court to issue an advisory opinion defining the above terms."

DISCUSSION

This is not simply a case about definitions; rather, this is a case about the scope of authority of the Honor Court in its role of issuing advisory opinions pursuant to section 10 of the Honor Code. Whether the Honor Court has authority to clarify terms *already contained* in the Honor Code has never come before this Court. I concur in part and respectfully dissent in part with the majority's line of reasoning.

The Honor Code starts with a statement of intention: "[w]herefore we pledge ourselves, each and all, to . . . the enforcement of the *standards herein defined*." UMKC School of Law Honor Code § 1 (emphasis added). The next two sections of the Honor Code consist of definitions and a list of "specific" violations of the Honor Code. *See id.* §§ 2-3. The Honor Code contains a lengthy definition of plagiarism. *See id.* § 3.02(h) (expressly adopting the faculty approved definition of plagiarism found at: <http://www1.law.umkc.edu/academic/plagiarism.htm>). The Honor Code provides a process by which amendments may be added. *See id.* § 11. The Honor Code grants authority to the Honor Court to issue advisory opinions. *See id.* § 10. "Conduct consistent with an advisory opinion shall be *presumed* not to be in violation of the Code." *Id.* § 10.06 (emphasis added).

The majority blurs the distinction between advisory opinions and amendments by suggesting that advisory opinions can in effect "amend" the Honor Code. However, an advisory opinion is *not* the same as an amendment, nor does an advisory opinion have the same effect as an amendment. Advisory opinions are temporary, whereas amendments are permanent. Advisory opinions are superseded by amendments. Similarly, advisory opinions can be overruled by subsequent advisory opinions or by an actual case heard by the Honor Court. Next, advisory opinions are not a blank check to students. Conduct taken in reliance on advisory opinions grants only a mere presumption of innocence, not immunity from prosecution. On the other hand, conduct consistent with the Honor Code entitles a student to a not guilty verdict. Because advisory opinions and amendments differ so greatly, an advisory opinion is not the same as amending the Honor Code and the majority blurs the distinction between the two. If this Court were to clarify the requested terms we would not be amending the Honor Code. Because we would not be amending the Code, this Court has authority to clarify the terms.

Not only does this Court have authority to act, but this Court also has a duty to clarify the requested terms. The Honor Code is meant to be as clear and concise as possible. The *organization* of the Honor Code demonstrates the framers' desire for clarity. The framers chose to start the Honor Code by pledging themselves to a set of standards "herein defined" and then immediately followed their pledge with sections of definitions and specific violations. One explanation for this organizational choice is that clarity was very important to the framers. The lengthy definition of plagiarism, coupled with the examples given therein, leads to the conclusion that the framers desired a Code that would be clear. Just as the framers begin the Honor Code by pledging themselves to a list of specifically defined rules, definitions, and prohibitions, they similarly end the Honor Code by returning to the theme of clarity. The framers remind us of the ability to amend the Honor Code or to seek clarification by means of an advisory opinion. Having included a section on amendments, the framers took one extra step and included a section on advisory opinions. Advisory opinions are the avenue by which students can seek clarification to the Honor Code without having to go through the amendment process. This necessarily charges the Honor Court with a duty to clarify the Honor Code when a request for an advisory opinion comes before this Court. Therefore, it is reasonable to say that this Court should clarify the requested terms.

The Honor Court is now faced with an opportunity to fulfill its duty. The majority circumvents its duty to clarify the Honor Code by suggesting nothing concrete. Instead, the majority points to a process that it might or might not take in the future. By purposefully referencing so many sources to which this Court might look in the future, "not limited" to just the sources named, the majority does not clarify the meanings of the terms as requested.

The majority expresses unnecessary fear of clarifying the Honor Code because, for example, they do not want to limit this Court in the future. The majority does not want to issue an advisory opinion unless it is based on a fact based scenario. But, all advisory opinions limit this Court, especially opinions based on fact based scenarios. Advisory opinions based on a fact scenario have a higher likelihood of limiting this Court in the future than do advisory opinions clarifying words already in the Code. Reliance on a fact based advisory opinion makes it harder for the prosecution to prove guilt because the defendant is granted a presumption of innocence. Whereas clarifying the definitions of words does not sanction or prohibit any specific behavior, leaving this Court as much latitude as it had before. Definitions simply clarify what is already in the Code.

I concur with the majority's opinion that the appropriate way to *amend* the Honor Code is through the amendment process, but I strongly, and respectfully, disagree that advisory opinions in effect "amend" the Honor Code. Finally, the majority states significant reservations about the term "best efforts". The student has requested a definition of "best efforts", not a factual determination of whether someone acted *with* best efforts. I agree with the majority that whether someone acted with best efforts should be left to the trier of fact. However, defining "best efforts", which seems to be what the requestor has asked, is subtly different than a factual determination of if someone acted with best efforts.

I am cognizant of the fact that many students will read this opinion. Because students have asked about the terms "intentional", "knowing", "reckless", and "best efforts" in the past there is concern about what the words mean. Because the Honor Code

requires "best efforts" on a student's part, we deserve to have any ambiguous terms defined. Next, because a large part of what law students do is write, and because the requested definitions make up key elements of our plagiarism policy, I see a special need to have the terms "intentional", "knowing", and "reckless" defined. For the above reasons, and after careful deliberation, I have chosen to list below what definitions I would have argued for had I been in the majority. After consulting Black's Law Dictionary, Webster's Dictionary, and various secondary and online sources, I would issue the following definitions for the terms requested:

Intentional - Done with the conscious aim to bring about a result. A person acts intentionally if it is his conscious desire to cause the particular result in question.

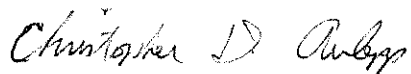
Knowing - Conscious awareness that a result is practically certain to occur. A person acts knowingly when he is aware that a result is almost certain to follow, although he may not desire the result.

Reckless - Creation of a substantial and unjustifiable risk of harm to others, coupled with a conscious and unjustifiable disregard of that risk. A person acts recklessly when he consciously behaves in a way that represents a gross deviation from the way an objectively reasonable person would act were he in the same circumstances as the actor. Recklessness is much more than negligence.

Best Efforts - Diligent attempts to complete a duty or obligation. Best efforts is more than reasonable efforts or good faith efforts.

SUMMARY

The Honor Court had the authority and duty to clarify the requested terms by issuing an advisory opinion. The Court instead chose to declare it lacks authority and described a process it might or might not take to set definitions in the future. The majority did not fulfill its duty to clarify. Issuing an advisory opinion is not the same as an amendment. Amendments and advisory opinions differ significantly. Fact based advisory opinions limit this Court more than clarifying ambiguous terms will limit the Court. Clarifying terms does not sanction or prohibit any behavior whereas advisory opinions based off of fact based scenarios make it harder to prosecute the individual. A definition of "best efforts" is not the same as a factual determination of whether someone acted *with* best efforts.



Justice Christopher D. Aulepp

For a number of reasons, some of which I will discuss *infra*, I find the idea of “advisory” opinions to be discordant with the purpose and function of the Honor Code, and must therefore respectfully dissent. I have chosen to dissent, rather than concur in the majority opinion that an advisory opinion is inappropriate in this particular circumstance in order to make the point that I do not believe advisory opinions are appropriate in any circumstance.

1. Cases or Controversies

We are law students, and we devote ourselves to the study, practice, and sometimes the manufacture of law. For the most part, the intentional creation of law in the United States is performed by legislative bodies. Only when legislatively created law is ambiguous are judges called upon to make new law through interpretation.

Our courts, however, do not independently identify issues to address. Rather, aggrieved parties bring issues before the courts and the courts resolve them. United States Supreme Court Chief Justices as early as John Marshall refused executive requests for advisory opinions because of a lack of a case or a controversy. He was right to do so, as were his successors, and this Court should follow his lead.

To the extent that this opinion conflicts with Article 10 of the Honor Code, I would hold that article to be a nullity.

2. The Code is Contradictory

Article 10 § 6 of the code creates a presumption of innocence for anyone acting in reliance upon an advisory opinion issued by this Court. However, Article 7 § 7 of the code creates the exact same presumption by requiring the Honor Court Prosecutor to convince 75% of the sitting justices by clear and convincing evidence that a violation has occurred, thus rendering Article 10 § 6 surplusage.

3. Advisory Opinions Appeal to the Lowest Common Denominator

I find it difficult to believe that an individual would request an advisory opinion to set a higher standard for himself. I find it much easier to believe such an individual is seeking the floor of the law. What is the most an individual can get away with before being found in violation of the code? That is a question this Court should not answer.

We should seek to establish for ourselves, for our alumni, and for future classes, the highest possible standard of integrity and personal/professional responsibility. Advisory opinions, by their nature, defeat that aspiration.

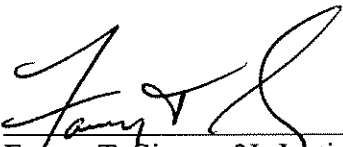
4. Reliance

We learn in practically the first law school first lesson of *stare decisis*; decisions must be respected. Why must they? Because once those decisions go to press, individuals to whom they will be applied must be able to rely on them in order to establish a pattern of conduct that lies within the law. Justice Aulepp correctly points out in his dissent that future Honor Courts will not be bound by our advisory opinions. Candidly, not only should this Court not be issuing get-out-of-jail-free cards, it certainly should not be issuing get-out-of-jail-free cards that may not be effective.

Summary

The issuance of advisory opinions by this Court is contradictory to the universal principals of law that should have, but perhaps did not, guide the creation of the Honor Code. They appeal to the lowest common denominator, they serve an unnecessary purpose, and they do so ineffectively. For that reason, I would hold that the entirety of Article 10 is surplusage and null, and decline to join in an advisory opinion issued by this Court.

To the extent that the position I have taken contradicts the position I took when I signed the Advisory Opinion dated October 10, 2007, I can say only that although I do not withdraw my signature from that opinion, I would not join in such an opinion were it to be considered in the future.



Fawzy T. Simon, 3L Justice