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**“DON’T THREATEN TO SUE YOUR JUDGE”:  
AN OVERVIEW OF THE LEGAL OBLIGATIONS OF JUDGES, SCHOOLS & ORGANIZATIONS**

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### I. Introduction

One of my favorite former colleagues (a coach whose emphasis was the speech events) frequently would advise the debaters on what not to do. I recall her advice to one student: “Don’t kick your judge in the face.” After laughing, I thought to myself, “That *is* pretty solid advice.” It would likely constitute the criminal offense of assault and certainly would not help a debater’s chances of winning over the vast majority of judges. Although I do not recall whether she ever advised a student of the following, I am sure she would agree wholeheartedly: “Don’t threaten to sue your judge.” While not many competitors would need my former colleague’s advice about not assaulting your judge, there were some who would have benefited by heeding the latter piece of wisdom.

Likely one of the most massive failures in audience adaptation in the history of competitive interscholastic debate occurred about four years ago at the American Debate Association’s (ADA) Naval Academy Tournament. I—a third year law student at the time—was assigned to judge the first out-round. Also assigned to the panel were two licensed attorneys who generously gave their time back to the debate community instead advancing their legal careers. The strategy of the affirmative team from the University of Louisville was, in part, to rap (probably insufficient alone to win any ballot but unlikely a sufficient reason to lose a ballot) and to refuse to answer the other team’s questions during cross-examination (probably sufficient to upset most reasonable people, but technically not violative of any rule). The strategy of the negative team from Liberty University was, in part, to argue that it was unfair for the other team not to answer questions. The second affirmative speech contained some singing, a vague claim that the debate community was racist, and—to top it all off—a threat to sue the all-lawyer panel and the ADA for breach of contract. Following the last speech was a quick, unanimous decision in favor of the negative team.

Competitive interscholastic debate can lead to many frustrations, hurt feelings, and the development of strong opinions of justice in the activity. Debaters and coaches get mad at opponents, resent certain schools for their tactics, harbor resentment against particular judges, and detest certain debate

organizations for what they encourage or prohibit. Because coaches sometimes hold onto these feelings for years, the ill will can be compounded by their understandable, yet perilous treatment of students' win-loss records as their own. Where emotions run high, and when it seems like no form of communication will convince the audience to change their views, members of debate organizations have sought recourse in the legal system. Following the Louisville–Liberty debate, the coach of Louisville's tirade included threats to sue me and the other judges, as well as the ADA, for not following the rules of the organization, specifically the goal of the organization to provide for educational debate. To my knowledge, no one was sued, thankfully.

Threatening to sue the judge or other members of the activity is generally not a good idea from a Public Relations perspective, and following through with the threat would be a monstrous waste of resources in the vast majority of instances. But that still leaves some instances when a debater, judge, school, or organization might have legal obligations to others in the activity. When legal obligations are not fulfilled, there is frequently a legal remedy available in the courts. What are these legal obligations? What are the ways in which they are breached or not fulfilled? While **THIS ARTICLE IS NOT INTENDED TO PROVIDE LEGAL ADVICE TO ANYONE ANYWHERE FOR ANY REASON** (quadruply emphasized for legal reasons), I am writing it to educate those interested in limiting their liabilities or learning what their legal obligations might be under the laws that might govern them. The following discusses the sources of legal obligations, likely legal obligations for those involved in speech and debate tournaments, common instances of breaches, and remedies available. I conclude with some general recommendations.

## II. Sources of Legal Obligations

Legal obligations, as you might suspect, can be found in the law. Generally speaking, there are five sources of law: constitutions, statutes, rules, agency interpretations, and case law (listed in order of importance, except for case law interpretations of constitutions). Legal constitutions—not to be confused with organizational constitutions—are the fundamental rules of a society, nation, or state. They, as a matter of definition, determine how the government is “constituted,” and this can include the rulemaking institutions and the limits of their power. For example, the U.S. Constitution provides the three branches of government and directs them as to what they may and may not do in terms of governance.<sup>1</sup>

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<sup>1</sup> U.S. CONST. arts. I–III.

Legislative bodies, like Congress or the legislature of one the fifty states, pass statutes. A constitution usually outlines the minimal requirements a legislature must meet in order to have a proposal (usually called a “bill”) to become law, a binding source of legal obligations that can ordinarily be enforced in the courts.<sup>2</sup> During the New Deal, the federal government started testing the limits of the U.S. Constitution by heavily regulating private industries. Because the legislatures did not have the expertise or, in their view, the time to work out the details, they would pass a general mandate and create an administrative agency to enforce the mandate. Congress also granted these agencies “rulemaking authority” to figure out the details of how to enforce the congressional mandate.

Using congressionally conferred rulemaking authority, administrative agencies started making rules to fulfill Congress’s purpose in passing the statute. When those rules are drafted ambiguously, agencies develop informal interpretations rather than making formal changes to the rule. This allows them to act more quickly by acting as a quick internal reference for the agencies’ application of a rule and avoids the requirements of the formal process of notifying the public and having a public comment period that due process often required to change a rule.

Finally, there is case law. This is where the courts come in. The court or judicial system can also be constituted by a constitution. In the U.S., courts have two basic functions: to decide facts and to decide law. “Facts” are usually determined by a jury, whose job is—to keep it simple—determine who is lying and who is telling the truth. When both sides agree to what happened, it is ordinarily the court’s job to decide the case “as a matter of law.” Courts also must decide what the law is. Sometimes this requires interpreting an ambiguous statute (similar to how agency officials will interpret ambiguous agency rules). Other times, courts are called upon to decide whether a law violates the constitution because it either violates an individual’s right, the law was not passed properly, or the law exceeds the scope of the institution that made it.<sup>3</sup>

### III. Analysis of the Sources of Legal Obligations for Speech & Debate

You would be hard-pressed to find a single constitutional provision, statute, agency rule, or agency interpretation that directly regulates competitive interscholastic speech and debate competitions. This means that the sources of legal obligations for competitors, judges, coaches, or organizations at

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<sup>2</sup> See generally “I’m just a bill,” Schoolhouse Rock! (1975), available at <https://www.youtube.com/watch?v=H-eYBZFEzf8>.

<sup>3</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the foundations for judicial review).

competitions must be found in the generally applicable laws. Obviously, criminal laws that prohibit kicking your judge in the face (assault) and other criminal and civil laws still apply. But because the primary purpose of this article is to inform rather than remind, the following will address how general laws might give rise to specific legal obligations in the speech and debate community and how decisions about common practices in the speech and debate “industry” can be informed and improved by reference to the law.

This article analyzes two primary sources of possible legal obligations: the First Amendment and statutes governing the formation and breach of contracts. Because the former is more of an intellectual and academic discussion, it will be shorter. The majority of this section is dedicated to a discussion of possible applications of contract law.

#### A. *The First Amendment*

One constitutional provision that might come to mind as regulating the speech and debate community is the First Amendment’s provision that guarantees the freedom of speech. “Congress shall make no law . . . abridging the freedom of speech.”<sup>4</sup> This provision has been applied to state government and governmental agents, including public schools. This means that private schools and institutions are, in all but very few cases, “off the hook” when it comes to violating the First Amendment. But there are numerous public schools and universities that are subject to the First Amendment.

There are two constitutional principles that likely limit the First Amendment’s application to public schools and universities; as such, there are likely little to no legal obligations of public schools. The first of these principles is that public schools and their employees, charged with educating students, are granted broad latitude in limiting student expression that threatens the ability of educators to educate. There is a lot of case law from the Supreme Court of the United States on this issue. One of the most famous cases, *Tinker v. Des Moines Independent School District* (a case about students wearing black armbands to protest the Vietnam War) establishes that students’ free speech rights are limited by schools’ obligations to educate students.<sup>5</sup>

The second principle is that when considering the scope of one’s free speech rights, courts will analyze the forum in which the speech occurs. Despite the words “no law” in the First Amendment, free speech rights are not absolute. The scope of the right can depend on the forum. For example, we do not have the free speech right to go on a military base and stage an anti-military protest.

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<sup>4</sup> U.S. CONST. amend. I.

<sup>5</sup> 393 U.S. 503 (1969).

Despite a military base being government (i.e. commonly owned) property, the government did not create military bases for free speech activities and military bases were not historically considered a traditional public forum for free speech, as were streets or town squares. Governments frequently create spaces and open government property for specific purposes in a “limited public forum.” As the term suggests, the use of the public forum may be reasonably limited to the specific purpose for which the forum was created.<sup>6</sup>

As a result of these limits on public schools, the primary legal obligations in the debate community likely emanate from a statute. As mentioned before, the obligations will be determined by general statutes rather than statutes that apply specifically to speech and debate competitions (as there are likely none). The next section looks at the one area where legal obligations arise in the speech and debate community the most frequently. Because assault and other crimes are uncommon at speech and debate tournaments, the next section is limited to the most common source of legal obligations in the activity: contract law.

### *B. Possible Applications of Contract Law*

The legal relationships in the speech and debate community are largely contractual. The law ordinarily does not require individuals to contract with each other, as that would just be a round-about way of just creating a legal obligation in a statute. Rather, contracts are based on voluntary relationships. Except for the legal doctrine of duress, the law usually does not recognize the validity of social compulsion arguments like, “Well, we were forced to sign up for the Greenhill Tournament in order to get my debater’s bid to the TOC.” Duress usually requires compulsion by the threat of physical harm and, in some cases, very extreme emotional distress as a basis for avoiding contractual obligations. As a result, the law recognizes that as adults in society, schools and educators can voluntarily determine who to associate with and who not to associate with. Because contractual relationships are voluntary, the law operates under the presumption that parties to an agreement can negotiate and work out the details of their reciprocal obligations.

There are three basic elements of contract formation: an offer, acceptance, and consideration (or an exchange of benefits). An offer usually must clearly communicate what the proposed obligations will be and may limit who can accept the offer and how the offer may be accepted. An acceptance must be made in a reasonable time, and meet the offer’s stipulations about how the offer may be accepted and who may accept it. Finally, consideration—or an exchange in benefits—is simply that each party stands to gain something from the transaction.

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<sup>6</sup> See *Hudgens v. NLRB*, 424 U.S. 507 (1976).

This requirement is based more on the idea that the government wants to discourage *completely* one-sided contractual legal obligations; as this usually indicates that one side did not know what it was doing. As long as there is a reciprocal exchange of benefits, a contract can be formed regardless of whether the benefits one party receives largely outweighs the benefits the other party receives. The law even recognizes that “nominal consideration,” like a \$1 payment, can create incredible legal obligations for the party receiving that \$1. This is due to the legal presumption that because the agreement is entered into voluntarily, the party to receive the lesser benefits could always walk away from the offer.

A contract usually establishes legal obligations only between the parties to the contract. Although the parties cannot create obligations *of* non-parties, the parties to a contract may bind themselves and create a legal obligation *to* a non-party. This third party is sometimes referred to as a beneficiary of the contract, and the legal principle that gives the third party a right to enforce the contract is known as the “third party beneficiary” doctrine. Two parties to a contract may create a legal obligation *to* a third party by (among other thing) clearly intending to provide a benefit to that third party. If the requirements are met, third party beneficiaries might be able to sue for breach of contract even though they are not parties to the contract.

After determining whether a contract has been formed, the next step in ascertaining the legal obligations created by the contract is to examine the terms of the agreement. The terms are ordinarily contained in one document called a “contract.” However, agreements can be formed by a series of documents (such as an email chain or various pages of a website) or even in a series of conversations. The “terms” of a contract include both the legal obligations created by the agreement and the other provisions concerning disputes over how a breach of contract may be resolved. Some examples are provisions that require the parties to go to mediation or arbitration; a provision that decides which state’s laws will apply to the contract (sometimes referred to as “choice of law” clause); a term that chooses where a lawsuit over a breach of obligation must be filed (a “forum selection clause”); and a provision that all of the terms of the agreement are contained the one formal document signed by both parties (usually a formal contract, like a standardized lease agreement).

There are generally two categories of terms. Express terms are written down or actually agreed to orally by the parties. Express terms may be contained, for example, in a formal written contract. Default terms are the terms are not expressly discussed by the parties. Parties frequently will come to an agreement to exchange benefits and fail to discuss all the details. As long as there is some exchange of benefits (i.e. consideration), there is still a contract, but the law will “fill in the gaps” for missing terms. One example in the commercial context is the

absence of a price. In many jurisdictions, a statute will provide that if two commercial parties forget to mention a price, then a reasonable price will be determined in court.<sup>7</sup>

One of the first steps in analyzing the possible contractual relationships common in an industry is to analyze the “players.” When it comes to speech and debate tournaments, the players cannot neatly be divided up into groups and subgroups. Creative solutions sometimes blur the neat lines because the pedagogical interests of schools and educators and the competitive drives of students have led to a shared community goal of getting tournaments running on time and completed. But generally, the players in the speech and debate community include students, coaches, schools, judges, and organizations.

With regard to speech and debate tournaments, the first three categories can be lumped together as a group for most purposes because coaches are usually agents of the schools who contract with a tournament-host school for the benefit of students. A tournament-host school will generally contract only with students who are either homeschooled or at a school that does not have a debate program (or does not have an active debate program). Some judges can be grouped together with schools when the schools hire or bring the judge to fulfill a judging obligation. (And yes, for those wondering right now, a judging obligation is likely a contractual—and thus legal—obligation. Common contractual obligations will be discussed more later.) Tournament-host schools can also hire judges who have not already agreed with a competing school to fulfill that school’s judging obligations. And, speech and debate organizations might have membership agreements for individuals as well as schools.

### *1. Organizational Contracts*

There are many speech and debate organizations, most of which are private. National organizations include the National Speech & Debate Association (formerly known as the National Forensics League), the Cross-Examination Debate Association, the American Debate Association, and the Catholic Forensics League. Many states also have one or more debate organizations. For example, Texas has the University Interscholastic League, a public organization that is part of the University of Texas that offers membership and provides rules for competitions of all sorts, including speech and debate. Texas also has the Texas Forensics Association, which is a private speech and debate organization.

Private organizations are usually organized groups of schools or individuals who voluntarily come together for one or more specific goals. Just like a nation or a state, they constitute themselves with a document frequently

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<sup>7</sup> See, e.g., U.C.C. § 2-305 (2002).

referred to as a “constitution.” And like a national or state constitution, the constitution will outline the purposes of the organization, basic rules, governing bodies, election of members to the governing bodies, procedures for how the governing bodies operate and make internal policies, and how the constitution may be amended. Unlike the U.S. Constitution and the constitutions of many states, speech and debate organizations ordinarily do not include a Bill of Rights or provisions for recognizing rights of individuals who might be affected by the organization’s operations. In other words, speech and debate organizations frequently will not contain a student bill of rights or a judge bill of rights.

Organizations can create contractual (legal) obligations by offering membership options to schools or students that offer benefits to members. Membership offers will likely include a monetary amount a student or school must pay to become a member. The offer might refer prospective members to membership requirements in the organization’s constitution or rules. In order for a contract to be formed, a school or student (depending on the membership options offered by the organization) must accept the offer and follow the offer’s instructions on how to become a member, such as filling out a form and paying membership dues. By following the instructions on how to accept an offer, a student or a school can form a contract with an organization, where the organization receives a benefit (money) and the student or school receives a benefit (membership rights).

Where more variation comes in is in determining all of the places one might find the terms of a contract. Because of the inherent power disparity between an established organized and one person, the organization’s need for consistency, and for efficiency’s sake, it is likely that the organization will create a uniform set of terms in the offer. An organization sometimes refers prospective members to a list of membership benefits and a publically available list of organizational rules or the organization’s constitution. But variations can occur. If a school approached an organization about having the school’s budget issues, and an organization wanted to reduce or waive a fee, the terms could of the agreement could appear both on the organization’s website and an email exchange between the school and the organization. Many organizations do not have formal written contracts, but can still nevertheless exchange benefits (and thus probably create legal obligations) with schools and students.

An entity’s status as a public or private organization or school can affect both contract formation and where the terms of a contractual agreement might be found. With public entities, such as a public high school, public university, or public debate organization, many individuals can be members or agents of the entity, but lack the legal capacity to unilaterally make contracts that—without official approval—determine how to use taxpayer funds. For example, a public high school student probably lacks the legal capacity to form a valid contract on

behalf of the school with an organization. Similarly, a member of a public debate organization (the only one that comes to my mind is Texas's University Interscholastic League (UIL)) might lack the legal capacity and authority to bind the UIL. And if a contract is formed, terms of a public school's or public organization's contractual obligations might be affected by statute or regulations in a way that private entities' are not specifically regulated.

Another way that an organization can create legal obligations is by hosting a tournament. Organizations might host a district, state, or national tournament. Because most organizations do not have their own campuses to host debate tournaments, they must be hosted at a school that is willing and able to host the tournament. When an organization hosts a tournament, its obligations usually mirror the obligations of a school that hosts a tournament. Thus, these obligations will be discussed in the next section on schools.

But before moving on, it is worth noting that unless it is provided by the organization's contract with a member school, organizations likely do not have contractual obligations to those who attend a school-hosted tournament. An exception might lie where there is an independent contract between the competitor and the organization. If a host school violates an organization's rule, this might be sufficient under the organization's contract with a school to render the tournament a nullity with regard to the benefits provided by the organization. In other words, if the school tournament offers competitors the ability to qualify for an organizational competition but does not run the tournament by the organization's rules, the competitors might lose the ability to qualify for the organizational tournament.

## *2. School Contracts*

Schools that have competitive interscholastic speech and debate programs also might have numerous contractual obligations. Schools might contract with an organization for the school's membership benefits. Schools might also contract with organizations for the students' benefits (students who might be considered third party beneficiaries). Another source of a school's legal obligations might be in contracts formed with third parties (such as an assistant coach or a company like The Forensics Files) for help with preparation.

The biggest source of legal obligations for schools is usually debate tournaments. In order to run tournaments, schools frequently contract with numerous third parties. A tournament-host school may contract with other schools or students who will attend the tournament. Obtaining food for hospitality (whether by groceries or catering) and ordering trophies might also be governed by contract law. (In public schools that use public funds for these contracts, the speech or debate coach running the tournament must get formal approval from an

appropriate authority to make these contracts.) Finally, as will be discussed separately in the next section, tournaments frequently contract with independent or “hired” judges.

Tournament-host schools typically contract with other schools and sometimes students to have students compete in various events at a speech and debate tournament. Tournament-host schools will usually extend an offer with a tournament invitation. The tournament invitation will sometimes contain the proposed terms for a contract and generally limit who may enter (i.e. specify who may accept the offer) and how schools and students can sign up (i.e. specify how the offer may be accepted). The consideration, or exchange of benefits, is that students get the opportunity to compete and have fun, and the tournament-host school gets money. Tournament invitations usually enable schools or students to accept the offer simply by signing up for the tournament in a specific way. In high school, statutory and administrative requirements on approval for the cutting of checks to pay entry fees can often take longer than desired, and thus actual payment of entry fees is not always a necessity to the formation of contractual obligations.

A contract term that frequently appears in tournament invitations is the requirement that a school either bring a judge or judges or pay an amount to cover the cost of the tournament-host school to hire independent judges. Because tournament-host schools do not independently contract with the judges a school brings, a tournament-host school has no legal obligations directly to or from the school judge. Although the legal obligations are between the tournament-host school and the attending school, an attending school might breach a contractual obligation if their judge does not show up. A longer discussion of the contractual obligations related to judges is included in the next section.

### ***3. Judges***

Judges are an essential part of competitive interscholastic speech and debate competitions. These individuals are usually assigned by the host school to judge the competitive events at tournaments, and depending on the respective competitive circuit, they range from high school students (usually for novice divisions at high school tournaments) to teachers and professors who have seen speech and debate evolve over decades. The pool of judges (or judging pool) consists of community volunteers, school judges, and hired judges. Because of the voluntary nature of volunteer judges, they have few if any contractual obligations. As I mentioned, school judges usually are “subcontractors” and have contractual obligations with a competing school who has a contract with the tournament-host school. But independent judges (or hired judges) might have contractual

relationships directly with the tournament-host school, assuming with public schools that the offers were extended with proper authority.

Hired judges (individuals who are not under contract with a competing school) are frequently offered the benefit of money in exchange for giving the tournament-host school the benefit of their services of judging. Tournament-host schools usually limit offers to those who would qualify as judges under the rules of the organization or organizations to which the host school is a member. Qualified individuals may accept offers to judge for a price stipulated by the tournament.

The terms of contracts between host schools and judges include a few common obligations. A host school usually accepts the contractual obligation of paying judges if the judges perform services. This usually requires only two things of judges: (1) showing up on time; and (2) timely completing their rounds, which for most hired judges will usually be all rounds. When a judge breaches one of these obligations, or shows up to a tournament without first having appropriately accepted an offer, host schools will frequently account for this by paying the judge on a round-by-round basis with no guarantee of payment if the judge is present and willing to judge but there is not a round for the judge to adjudicate. Then, round-by-round judges usually can accept the host school's offer to receive payment for one round by timely completing the rounds to which they are assigned. Unless the contract between the hired judge and the host school creates legal obligations to third party beneficiaries, such as the students, competing schools or organizations (which they rarely do), a hired judge will lack contractual obligations to competitors. (Thus, a judge likely cannot be sued by a student for violating tournament or organizational rules.)

#### **IV. Breach of Contract & Remedies**

Having outlined the players in the speech and debate "industry" that frequently undertake contractual obligations, and having analyzed the common terms of some of those contracts, this leads us to the next questions: How does a party breach a contract? And what can be done if a party breaches a contract?

The answer to the first question is simple in some regards, yet complex in others. A party to a contract can breach contractual obligations by not fulfilling them. However, not all breaches are "material" (significant) breaches. A material breach is one that would justify letting the non-breaching party out of its contractual obligations. In non-lawyer terms, it is a breach that is important enough that anybody would honestly, and reasonably care about. Assume the following hypothetical facts for example: Host High School contracts with Ms. Judge to be at the Host HS Debate Tournament from 9:00 am to 9:00 pm. Ms.

Judge arrives 9:01 am, and Round 1 does not start until 9:30 am. This is likely not a material breach because there was no real harm done.

When there is a material breach of a contract (perhaps, a judge does not show up or the host school fails to follow the organizational rules and students of a competing school do not get points toward qualification of the organization's state tournament), there are numerous remedies. Because legal obligations are analyzed in this article, they are discussed first. But as a member of the speech and debate community who has represented a client in debate-related litigation in the past, I view considering non-legal remedies as equally if not more important than considering the legal remedies. Let's start with the legal remedies.

A legal remedy is, basically, what you want a court to order a party to do if you win a lawsuit. As the previous sentence implies, obtaining legal remedy requires filing a lawsuit. Courts may generally order a party to pay someone money or to do or not do something. In many cases, a party filing a lawsuit is seeking damages for the amount of money that would adequately compensate them for how the other party's breach damaged them. Another type of remedy is an order that compels a party to do or not do something. These sorts of court orders are referred to as "injunctions." When it comes to a court order to enforce a contractual obligation, the remedy is called "specific performance," which requires a party to perform an obligation specified in the contract.

Another important aspect of contract law is the provision of attorney's fees. As you might have guessed, this can amount to quite a bit. Lawyers can be expensive. Ordinarily, a prevailing party in a lawsuit can only recover money from the other party for damages and costs, but usually cannot recover money to pay their attorneys (the party must "eat" that cost). This is partially to ensure that the suit is significant enough to take it to court. The prevailing party must pay their attorneys from the money they get from a court order. However, when the parties to a contract do not specify in the contract whether the prevailing party can recover attorneys' fees in a contract, some states imply a default term that a party can recover attorney's fees in a lawsuit.<sup>8</sup> This should be a concern for the speech and debate community because contractual agreements are rarely formalized and do not contemplate whether a prevailing party in a breach of contract action could recover attorney's fees. In Texas for example, this would mean that if a host school hired a judge and the judge did not show up, the host school might be able to successfully sue the judge for the damages to the tournament (likely small), but the judge could be on the hook for paying for the school's attorney's fees (which are almost never small).<sup>9</sup>

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<sup>8</sup> *E.g.*, TEX. CIV. PRAC. & REM. CODE § 38.001(8) (2014).

<sup>9</sup> *See id.*

Although the amounts contracted for in the speech and debate community are small, and ordinarily not worth filing a lawsuit over, other issues are more important to some. I recently represented a speech and debate organization in a lawsuit filed by a coach. The coach was seeking an injunction to have the organization's tournament put on hold until the organization and coach could resolve a dispute over whether and how the school's students who qualified for the organizational tournament could compete. This exemplifies not only the type of injunctive relief a party could request from a court but also that the risk of litigation is very real possibility when there are fervent frustrations, hurt feelings, and strong opinions that our shared sense of justice in the activity has been offended.

### **V. Conclusion & Recommendations**

The primary purposes of this article are, one, to encourage the readership to consider how the law affects the speech and debate community and, two, to consider how their oral conversations, email correspondence, and other communications can shape the scope of their contractual obligations.

Another important purpose is to encourage readers to consider how the legal obligations are aimed at furthering conceptions of fairness. Assume the following facts for example: A tournament requires in its invitation that competitors publicly disclose previously run cases and positions, and specifies that violators of the rules will be not be allowed to further compete at the tournament. One competitor discloses her case but her opponent does not disclose his case, despite having previously run it. The girl loses because her opponent has her case "prepped out," and she lacked an equal opportunity to prepare. The girl runs a rule-violation argument in the round, and the opponent admits to the rule violation but argues to the judge that the remedy is, as per the tournament rules, not a loss of the debate but for the tournament director to enforce the rules. All of this is brought to the attention of the tournament director who refuses to enforce the rules. This example shows that the breach of legal obligations voluntarily entered into can offend our sense of justice, and is not socially acceptable.

It is thus my recommendation that, before resorting to the courts (or threatening to do so), competitors and coaches consider whether pursuing a legal remedy is worth the time, mental effort, and energy. In most cases, social remedies should be sufficient. A social remedy is a non-legal remedy that allows us to personally account for the offense of social values (such as our community's sense of fairness). Social remedies can range from the formation of personal opinion about the offender's character. This could include cutting ties and going separate ways from the offender. Or, if cutting ties would be undesirable for other reasons or for students, perhaps social transgressions call for a discussion with the offender, or others in the offender's respective organization or community.

When it comes to organizational memberships, organizations should consider any current obligations that might have been created in the absence of a formal membership agreement. This would include any information on the organization's website or any oral representations made to individuals or coaches prior to signing up for membership. The difficulties associated with determining what contractual obligations were made with what schools could likely be reduced by drafting membership agreements that resemble more of a formal contract. The terms of membership can easily be incorporated into an online form that accepts payment from prospective individual and school members. The agreement could include a standard clause stating that the parties agree that the agreement contains all of the terms of the contract so as to prevent any discrepancy on the organization's website. It can also include terms governing choice of law, forum selection, the availability of attorneys, and other considerations, in the event of litigation.

It might also be prudent for an organizational membership contract to address whether, if the organization hosts a tournament, the organization's enforcement of the tournament's rules are part of the organization's contractual obligations. If the agreement fails to address this, then it is arguable that the failure to enforce an organization's tournament rule might breach contractual obligations to third party beneficiaries (i.e. student competitors). This might expose organizations to additional liability and lawsuits filed by competitors.

When it comes to schools attending and hosting tournaments, there are similar considerations with regard to what promises or guarantees about a tournament that are included in a tournament invitation. One suggestion, similar to organizations creating a standard agreement form, would be to create a set of tournament terms and conditions that could be included in the invitation. Tournament-host schools might want to specify the expectations for a school's judging obligations. And when it comes to hired judges, the tournament school should also consider having a formal contract that clearly spells out what is required of a hired judge and what the school's obligations are to the judge. This is not only desirable from a legal aspect, but also the "business" side of things to ensure that everyone is on the same page about what they are supposed to do.

Realizing that the relationships between the players in the speech and debate community are governed not only by social norms but also the law might shed light on areas where organizations, schools, and judges might be exposing themselves to unnecessary liability and risk of litigation. Although there are not many legal obligations specifically governing the conduct of those in the speech and debate community, the community is not immune from lawsuits for violations of voluntarily entered contractual relationships. An understanding of those relationships should shed light on what "social transgressions" might give rise not only to social remedies but also legal remedies. And, understanding the range of

social and legal remedies is important to furthering cohesion of a community centered on in an inherently competitive activity.

Finally, although there are legal remedies for some breaches of contractual obligations, a legal remedy or a threat of a legal remedy is usually not warranted where a full range of social remedies have not been explored and might be sufficient. And when considering the social remedies, this article will conclude with the recommendation that if one decides that a remedy is appropriate, start with the least drastic one. Don't start with kicking your judge in the face and, please, "Don't threaten to sue your judge."

## SOLVING THE ETHOS PROBLEM

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### I. Introduction

Rhetoric is a subject that has long been the studied by students as they seek to understand how to use language to improve their oral and written communication.<sup>10</sup> Even now, 2,500 years after the Sophists began teaching rhetoric, it is still studied in colleges and universities.<sup>11</sup> Because competitive debate is an educational activity, and communications studies are such an integral part of the American higher educational system, I thought it appropriate to consider how aspects of communications studies interact with interscholastic debate. My main argument is that through its practices, contemporary Policy Debate creates a mini-polity; in doing so it solves some of the problems of *ethos* that plague rhetoricians and communications scholars. *Ethos* was one of the three means of persuasion discussed in Aristotle's Rhetoric, and has become increasingly important for scholars of rhetoric.<sup>12</sup> The argumentative skills used to solve problems that contemporary rhetoric scholars identify can be carried outside of the debate round as students interact as citizens.

It is important to clarify some terms that will be used herein. *Ethos* has to do with one's reputation with the audience and authority.<sup>13</sup> This general *ethos* can be distinguished from prophetic *ethos*. Rhetorician Lynda Walsh provides a clear explanation of prophetic *ethos* when she says, "Prophetic *ethos* is a role that a polity—a group of people who must work together to stay together—authorizes to manufacture certainty for them. Political certainty is an argument that frames a crisis in terms of 'covenant values,' which are what I call the values that a polity

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<sup>10</sup> Gideon O. Burton, *What is Rhetoric*, BRIGHAM YOUNG UNIVERSITY, SILVA RHETORICAE, <http://rhetoric.byu.edu/encompassing%20terms/rhetoric.htm>.

<sup>11</sup> Crystal Sands, *A Very Short Introduction to Rhetoric*, <https://sites.google.com/site/crystalsandsrhetoricsite/a-very-short-introduction-to-rhetoric>.

<sup>12</sup> MICHAEL J. HYDE & CALVIN O. SCHRAG, *THE ETHOS OF RHETORIC* (2004).

<sup>13</sup> Annie Olson, *An Introduction to Rhetoric*, Letourneau University, <http://www.letu.edu/people/annieolson/online/intro.html>.

shares and that distinguish it from its neighboring polities.”<sup>14</sup> These covenant values are not necessarily religious values; they can include ensuring that everyone has adequate food, allowing knowledge to be freely available to all, or requiring that enterprise not be inhibited for example. Walsh is by no means the only rhetorician to describe public perception of an individual in terms of prophetic *ethos*. Professor John Pauley describes Louis Farrakhan as yielding prophetic *ethos*.<sup>15</sup> He writes that Farrakhan displays confidence, calls people back to certain values, and plays a role in solving the political crisis of his time. *Ethos* is an important part of rhetoric studies and prophetic *ethos* is especially worth examining because the prophet is who society turns to in order to solve its crises.

## II. Problems With Ethos

One problem is the relationship between scientific advisors and policy makers. Scientific advisors are chastised by Members of Congress if they explain what “is” instead of what “ought”, or at times if they explain what “ought” instead of what “is”. They are either told that they must only present the facts or criticized for not presenting a solution to the problems they present. Walsh points out, “once we acknowledge this misunderstanding we can explain why the *ethos* of science adviser is so unstable—that is, why it predictably oscillates between worship and witch-hunt”.<sup>16</sup> The general public also can be very critical of scientists they disagree with. When taken in the form of *ad hominem* attacks, such criticism hurts their ability to engage in a substantive discussion of the issues.

Another problem brought up by communications professors is the *doxa* (“assertions about the way things are”) that *ethos* creates. Because *ethos* exists firmly in the social world, it can produce *doxa* that can be hegemonic.<sup>17</sup> The issue of unchallenged assertions of the community that are hegemonic, is that if such assertions include the oppression of a group of people, then such oppression will continue. *Ethos* exists in the social world because a speaker’s credibility is built up through continual interaction with the community.

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<sup>14</sup> Lynda Walsh, *SCIENTISTS AS PROPHETS* (Oxford University Press 2013, ebook).

<sup>15</sup> See generally John L. Pauley, *Reshaping Public Persona and the Prophetic Ethos: Louis Farrakhan at the Million Man March*, 62:4 WESTERN J. OF COMM. 512–36.

<sup>16</sup> See *supra* Walsh n.14.

<sup>17</sup> Judy Holiday, *Intervention: Locating Rhetoric’s Ethos*, 28 RHETORIC REVIEW 4, at 388–405 (Routledge Saylor & Francis Group 2009).

### III. Debate to the Rescue

The way the debate space resolves this first issue is through the process of debating. Walsh points out that it is “When a polity encounters a crisis in which right action cannot be ascertained via traditional democratic debate, it turns to its prophets.”<sup>18</sup> But merely presenting one’s view in front of an opponent does not rescue debate from the shortfalls of the polity. As legendary coach Scott Deatherage said, “Clash is the *raison d’etre* or that which weaves the judge to reach the conclusion when he or she sets side by side two competing alternative visions of the world as they ought to be.”<sup>19</sup> Debate is not about two people talking past each other, but instead about each trying to convince the judge both of what is the current state of affairs and what ought one to do about it. In a congressional debate, the testimony of witnesses is caught in an is/ought dichotomy that becomes a quagmire for everyone involved. In a round, it is acknowledged that both are worthy of debating and the evidence (testimony) is a tool along with one’s ability to weave a story, and frame impacts in order to persuade a judge. Admittedly, debaters must use *logos* (the logic of an argument) to succeed, but it is the practice of clash that leads one to do so and not fall into the trap of the prophetic *ethos*.

Debate helps alleviate the second problem in two ways. The first way is through critical examination.<sup>20</sup> The examination of claims, warrants, clash, and rebuttals all allow the affirmative and negative to rigorously test each other’s truth claims and what could be dominant modes of thought. Think about all the important claims an affirmative makes: inherency, link, internal link, solvency, and a highly important impact. Debate allows one to challenge the validity of each and every one of those claims both from a policy perspective, and a philosophical perspective. Such examination could reveal hegemonic forms of violence. To take another example, imagine if subsidies were so integral to public policy, that it is hardly imaginable that they are not a part of American agricultural policy. If the plan says that the United States Federal Government should remove all cotton subsidies, fiat allows one to debate about an imagined world in which cotton subsidies did not exist. Theoretically, we can use fiat to imagine ending any policy action deemed coercive or destructive that falls within the resolution. Thus, because debate offers the opportunity to test each component of an argument, and

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<sup>18</sup> See *supra* Walsh n.14.

<sup>19</sup> Scott Deatherage, *The Speech*, Cross-X, <http://www.cross-x.com/topic/50532-scott-deatherages-the-speech>.

<sup>20</sup> See *supra* Walsh n.14.

allows participants to envision a world of different government policy, oppressive norms can be challenged.

#### **IV. Conclusion**

As outlined, the debate space is a unique communication space. It includes the use of *ethos* and *logos* like wider communications world; yet it is able to overcome pitfalls to the traditional use of *ethos* through its emphasis on clash, openness to question all aspects of an opponent's claim, and use of fiat. This is not an exhaustive list of issues that rhetoricians try to solve but by starting with *ethos* we can begin to understand how the world of interscholastic debate interacts with wider communications studies.