2008—2009

MARYLAND STATE BAR ASSOCIATION STATEWIDE HIGH SCHOOL MOCK TRIAL COMPETITION

Managed by
the Citizenship Law Related Education Program
for the Schools of Maryland
www.clrep.org

In cooperation with the
Maryland Judicial Conference Public Awareness Committee,
Executive Committee on Law Related Education,
& Maryland State Department of Education

Important Contacts for the Mock Trial Competition

During LOCAL CIRCUIT COMPETITIONS, your first point of contact is your LOCAL COORDINATOR.

Your second point of contact is the State Mock Trial Director:
Shelley Brown Wojciechowski, 410-706-5362/0
sbw@clrep.org
Citizenship Law Related Education Program
for the Schools of Maryland
Maryland Bar Center
4th floor
Baltimore, Maryland 21201

Circuit	Counties/ City	Local Coordinators
1	Dorchester, Somerset, Wicomico, Worcester	Mr. Chris Palmer, Esq. 410-723-1400 cpalmer@ajgalaw.com
2	Caroline, Cecil, Kent, Queen Anne's, Talbot	See above
3	Baltimore, Harford	Mr. Rex Shepard 410-887-4017 rshepard@bcps.org
4	Allegany, Garrett, Washington	Mr. Jim Zamagias 301-724-5360 x213 jzamagias@bishopwalsh.org
5	Carroll, Howard Anne Arundel	Mrs. Mary Pizzo 410-480-7777 MPizzo@opd.state.md.us Ms. Terry Poisson 410-222-5440 mpoisson@aacps.org
6	Frederick Montgomery	Mr. Michael Bunitsky 301-644-5265 mike.bunitsky@fcps.org Mr. Scott Zanni 301-840-4627 Scott_A_Zanni@mcpsmd.org
7	Calvert, Charles, Prince George's, St. Mary's	Ms. Sue Strickland 301-449-4900 Susan.Strickland3@verizon.net sue.strickland@pgcps.org
8	Baltimore City	Mrs. Stacy McCormack 410-767-2307 SMcCormack@opd.state.md.us

TABLE OF CONTENTS

2008-2009
MSBA HIGH SCHOOL MOCK TRIAL COMPETITION

PART I: ORGANIZATIONAL RULES

1. **Forfeits are prohibited.** As a registered team, you agree to attend all scheduled competitions. If a team does not have an adequate number of students (i.e. due to illness, athletics, or other conflicts), it is still expected to attend and participate in the competition. In these instances, a team will "borrow" students from the opposing team. While this is treated as an automatic win for the opposition, both teams still gain the practice experience. Further, it maintains the integrity of the competition and is respectful of the Court, Presiding Judge, attorneys and the other team that has prepared and traveled to the competition. Coaches should make every effort to notify the local coordinator AND the other coach in advance of the competition. When an opposing team does not have enough students to assist the other team, students may depict two or more of the roles (i.e. they may depict 2 witnesses or play the part of 2 attorneys).

2. Student attorneys are expected to keep their presentations limited to specific time guidelines. It is the presiding judge's sole discretion as to how or if the time guidelines will be implemented during each competition. Teams should NOT object if they perceive a violation of these *guidelines*.
   - Opening statements/closing arguments—5 minutes each;
   - Direct examination—7 minutes per witness;
   - Voir Dire, if necessary— 2 minutes per expert witness (in addition to the time permitted for direct and cross examination)
   - Cross-examination—5 minutes per witness;
   - Re-Direct and Re-Cross Examination—3 minutes and a maximum of 3 questions per witness.

3. Local competitions must consist of at least two rounds with each participating high school presenting both sides of the Mock Trial case.

4. A team must be comprised of no less than eight (8) but a maximum of twelve (12) student members from the same high school, with the exception of high schools with a Maryland State Department of Education inter-scholastic athletics designation of Class 2A or Class 1A, which may combine with any other schools in the LEA in those classifications to field a team. Two "alternate" students are permitted during the local competition only. If a team advances beyond the local competition, an official roster must be submitted not exceeding 12 students.

5. A team may use its members to play different roles in different competitions. (See Part II: Hints on Preparing for the Competition). For any single contest round, all teams are to consist of three (3) attorneys and three (3) witnesses, for a total of six (6) <u>different</u> students. For any single competition, a student may depict one role <u>only</u> of either witness OR attorney.

6. Any high school which fields more than one team (Team A and Team B, for example) may NEVER allow, under any circumstances, students from Team A to compete for Team B or vice-versa. If a high school fields two teams, each team must have a <u>different</u> teacher coach and a <u>different</u> attorney coach than the other team. Additionally, if a high school has two teams, then those teams <u>MUST</u> compete against one another in local (circuit) competition.

7. A. Areas of competition coincide with the eight Judicial Circuits of Maryland. Each circuit must have a minimum of four (4) teams. However, in order to provide the opportunity for as many teams to participate as possible, if a circuit has two (2) or three (3) teams, they may compete in a "Round Robin" to determine who will represent the circuit in the circuit playoff. The runner-up team from another circuit would be selected to compete based upon their winning record and average points scored during local competition rounds. This team would compete with the circuit representative in a playoff prior to the Regional Competition. When a circuit has only one registered team, CLREP may designate another circuit in which this team may compete.

   B. OR, under the discretion of a circuit coordinator and CLREP, if a circuit so chooses, it may combine with the "un-official" circuit to increase the number of opportunities to compete. In this case, a "circuit opening" arises and will be filled by the following method. To create the most equity, a sequential rotation of circuits will occur; this year, it is Circuit Two's turn. If willing, the second place team from this circuit will advance to the regional competitions to fill the opening. If that team is unable to advance, or if Circuit Two is not comprised of at least 4 teams, the opportunity will move to the next <u>circuit</u>, and so on, until the opening is filled. In the event that all

circuits are officially comprised of a minimum of four teams, the designated circuit will remain the next in-line to advance in future years.

2008-2009	**Circuit 5**	2012-2013	Circuit 1
2009-2010	Circuit 6	2013-2014	Circuit 2
2010-2011	Circuit 7	2014-2015	Circuit 3
2011-2012	Circuit 8	2015-2016	Circuit 4

8. Each competing circuit must declare one team as Circuit Champion by holding local competitions based on the official Mock Trial Guide and rules. That representative will compete against another Circuit Champion in a single elimination competition on April 1 or 2, 2009.

9. The dates for the Regionals, the Semi-Finals, and the Finals will be set and notice given to all known participating high schools by Tuesday, November 11, 2008. Changes may occur due to conflicts in judicial schedules.

10. District Court judges, Circuit Court judges, and attorneys may preside and render decisions for all matches. If possible, a judge from the Court of Special Appeals or the Court of Appeals will preside and render a decision in the Finals.

11. Any team that is declared a Regional Representative must agree to participate on the dates set for the remainder of the competition. Failure to do so will result in their elimination from the competition and the first runner-up in that circuit will then be the Regional Representative under the stipulations.

12. Winners in any single round should be prepared to switch sides in the case for the next round. Circuit Coordinators will prepare and inform teams of the circuit schedule.

13. CLREP encourages Teacher Coaches of competing teams to exchange information regarding the names and gender of their witnesses at least 1 day prior to any given round. The teacher coach for the plaintiff/prosecution should assume responsibility for informing the defense teacher coach. A physical identification of all team members must be made in the courtroom immediately preceding the trial.

14. Members of a school team entered in the competition—including Teacher Coaches, back-up witnesses, attorneys, and others directly associated with the team's preparation—are NOT to attend the enactments of ANY possible future opponent in the contest.

15. All teams are to work with their attorney coach in preparing their cases. It is suggested that they meet with their Attorney Advisor at least twice prior to the beginning of the competition. For some suggestions regarding the Attorney Advisor's role in helping a team prepare for the tournament, see PART II: Hints on Preparing for Mock Trial and Appendix A.

16. THERE IS NO APPEAL TO A JUDGE'S DECISION IN A CASE. CLREP retains the right to declare a mistrial when there has been gross transgression of the organizational rules and/or egregious attempt to undermine the intent and integrity of the Mock Trial Competition. **Upon the coaches' review of, and signature on the score sheet, the outcome is final.**

17. There shall be NO coaching of any kind during the enactment of a mock trial: i.e. student attorneys may not coach their witnesses during the other team's cross examination; teacher and attorney coaches may not coach team members during any part of the competition; members of the audience, including members of the team who are not participating that particular day, may not coach team members who are competing. Teacher and Attorney Coaches MAY NOT sit directly behind their team during competition as any movements or conversations may be construed as coaching.

18. It is specifically prohibited before and during trial to notify the judge of students' ages, grades, school name or length of time the team has competed.

19. The student attorney who directly examines a witness is the only attorney who may raise objections when that same witness is being cross-examined. The student attorney who raises objections on direct examination must be the same attorney who then cross-examines that same witness. This same principle applies if a student attorney calls for a bench conference; i.e., it must be the attorney currently addressing the Court. The student attorney who handles the opening statement may not perform the closing argument.

20. Judging and scoring at the Regional's, Semi-Final and Statewide Final Competition are distinct from judging and scoring in some local competitions. As in a real trial, the judge will preside, hear objections and motions, instruct counsel, and determine which team prevailed based on the merits of the law. Two attorneys will independently score team performance at the trial, using the score sheet from the official Mock Trial Guide. At the conclusion of the trial and while in chambers, the judge will award the special point without informing the attorney scorers. The Special Point will only be added to the score sheet in the case of a tie. The attorneys will meet and work out any differences in scoring so that the two attorneys present one score sheet to the judge, and eventually, the two teams. The judge retains the right to overrule any score on the score sheet. Both teams shall receive a copy of this score sheet, signed by the judge. Teams will <u>not</u> have access to the original, independent score sheets of the attorneys.

PART II: <u>HINTS ON PREPARING FOR A MOCK TRIAL COMPETITION</u>
The following tips were developed by long-time Mock Trial Coaches.

1. Every student, teacher and attorney participating in a team's preparation should read the entire set of materials (case and guide) and discuss the information, procedures and rules used in the mock trial competition. Students: you are ultimately responsible for all of this once Court is in session.

2. Examine and discuss the facts of the case, witness testimony and the points for each side. Record key information as discussion proceeds so that it can be referred to in the future.

3. Witness' credibility is very important to a team's presentation of the case. Witnesses: move into your roles and attempt to think as the person you are portraying. Read over your affidavits many times and have other members of your team ask you questions about the facts until you know them.

4. Student attorneys: you should have primary responsibility for deciding what possible questions should be asked of each witness on direct and cross-examination. Questions for each witness should be written down and/or recorded. Write out key points for your opening statements and closing arguments before trial; then, incorporate additional points that arose during the competition for inclusion in your closing argument to highlight the important developments that occurred during the trial. Concise, summary, pertinent statements which reflect the trial that the judge just heard are the most compelling and effective. Be prepared for interruptions by judges who like to question you, especially during closing arguments.

5. The best teams generally have student attorneys prepare their own questions, with the Teacher and Attorney Coaches giving the team continual feedback and assistance. Based on these practice sessions, student attorneys should continue revising questions and witnesses should continue studying their affidavits.

6. As you approach your first round of competition, you should conduct at least one complete trial as a dress rehearsal. All formalities should be followed and notes should be taken by everyone. Evaluate the team's presentation together. Try to schedule this session when your Attorney Coach can attend.

7. **<u>Some of the most important skills for team members to learn are:</u>**

   - Deciding which points will prove your side of the case and developing the strategy for proving those points.

   - Stating clearly what you intend to prove in an opening statement and then arguing effectively in your closing that the facts and evidence presented have proven your case.

   - Following the formality of court; e.g., standing up when the judge enters or whenever you address the Bench, and appropriately addressing the judge as "Your Honor," etcetera.
   - Phrasing direct examination questions that are not leading (carefully review the rules of evidence and watch for this type of questioning in practice sessions).

- Refraining from asking so many questions on cross-examination that well-made points are lost. When a witness has been contradicted or otherwise discredited, learn to limit additional questions, as they often lessen the impact of previously made points.

- Thinking quickly on your feet when a witness gives you an unexpected answer, an attorney asks unexpected questions, or a judge throws questions at you.

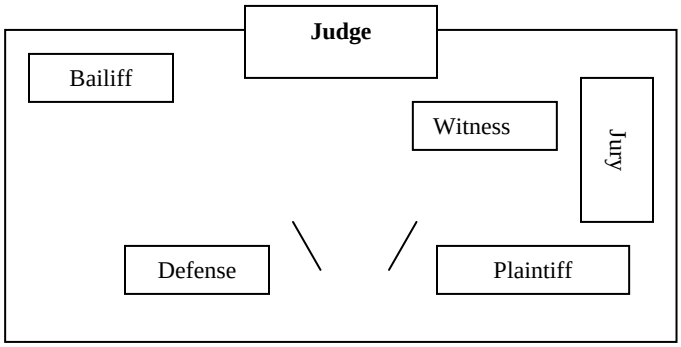
- Recognizing objectionable questions and answers, offering those objections quickly and providing the appropriate basis for the objection.

- Paying attention to all facets of the trial, not just the parts that directly affect your presentation. All information heard is influential! Learn to listen and incorporate information so that your presentation, whether as a witness or an attorney, is the most effective it can be.

- The Mock Trial should be as enjoyable as it is educational. When winning becomes your primary motivation, the entire competition is diminished. **Coaches and students should prepare AT LEAST as much for losing as they do for winning/advancing**. Each member of the team—student or coach— is personally responsible for his/her behavior prior to, during, and at the close of the trial. There are schools and individuals across the state that are no longer welcome to participate based on previous behavior.

PART III: TRIAL PROCEDURES

Before participating in a mock trial, it is important to be familiar with the physical setting of the courtroom, as well as with the events that generally take place during the competition and the order in which they occur. This section outlines the usual steps in a "bench" trial— that is, <u>without</u> a jury.



1. <u>The Opening of the Court</u>
   a. Either the clerk of the Court or the judge will call the Court to order.
   b. When the judge enters, all participants should remain standing until the judge is seated.
   c. The case will be announced; i.e., "The Court will now hear the case of _____v._____."
   d. The judge will then ask the attorneys for each side if they are ready.

2. <u>Opening Statements</u> (5 minutes maximum)
   a. Prosecution (criminal case)/ Plaintiff (civil case)
      After introducing oneself and one's colleagues to the judge, the prosecutor or plaintiff's attorney summarizes the evidence for the Court which will be presented to prove the case.

   b. Defense (criminal or civil case)
      After introducing oneself and one's colleagues to the judge, the defendant's attorney summarizes the evidence for the Court which will be presented to rebut the case which the prosecution or plaintiff has made.

3. <u>Direct Examination by the Prosecutor</u> (7 minutes plus 2 minutes for Voir Dire)

   The prosecutor/ plaintiff's attorney conducts direct examination (questioning) of each of its own witnesses. At this time, testimony and other evidence to prove the prosecution's/plaintiff's case will be presented. The purpose of direct examination is to allow the witness to relate the facts to support the prosecution/plaintiff claim and meet the

required burden. (If an attorney chooses to voir dire a witness, 2 minutes are permitted, in addition to the 7 minutes allowed for direct examination.)

NOTE:
The attorneys for both sides, on both direct and cross-examination, should remember that their only function is to ask questions; attorneys themselves may not testify or give evidence, and they must avoid phrasing questions in a way that might violate this rule.

4. Cross-Examination by the Defendant's Attorneys (5 minutes)
   After the attorney for the prosecution/plaintiff has completed the questioning of a witness, the judge then allows the defense attorney to cross-examine the witness. The cross-examiner seeks to clarify or cast doubt upon the testimony of the opposing witness. Inconsistency in stories, bias, and other damaging facts may be pointed out to the judge through cross-examination. (If an attorney chooses to voir dire a witness, 2 minutes are permitted, in addition to the 5 minutes allowed for cross examination.)

5. Direct Examination by the Defendant's Attorneys (7 minutes plus 2 minutes for Voir Dire)
   Direct examination of each defense witness follows the same pattern as above which describes the process for prosecution's witness.

6. Cross-Examination by the Prosecution/ Plaintiff (5 minutes)
   Cross-examination of each defense witness follows the same pattern as above for cross-examination by the defense.

7. Re-Direct Examination by the Plaintiff/ Prosecution (3 minutes and/or 3 questions)
   The Plaintiff's/Prosecution's attorney may conduct re-direct examination of the witness to clarify any testimony that was cast in doubt or impeached during cross-examination. (Maximum of three minutes or three questions.)

8. Re-Cross Examination by the Defense Attorneys (3 minutes and/or 3 questions)
   The defense attorneys may re-cross examine the opposing witness to impeach previous testimony.
   (Maximum of three minutes or three questions.)

9. Voir Dire Examination by Either the Plaintiff/ Prosecution or the Defense Attorneys (2 minutes)
   Voir Dire is the process of asking questions to determine the competence of an alleged expert witness. Before giving any expert opinion, the witness must be qualified by the court as an expert witness. The court must first determine whether or not the witness is qualified by knowledge, skills, experience, training or education to give the anticipated opinion. After the attorney who called the witness questions him/her about his/her qualifications to give the opinion, and before the court qualifies the witness as an expert witness, the opposing counsel shall (if he/she chooses to do so) have the opportunity to conduct a brief cross-examination (called "voir dire") of the witness' qualifications.

10. Closing Arguments (Attorneys) (5 minutes)
    For the purposes of the Mock Trial Competition, the first closing argument at all trials shall be that of the Defense.
    a. Defense
       A closing argument is a review of the evidence presented. Counsel for the defense reviews the evidence as presented, indicates how the evidence does not substantiate the elements of a charge or claim, stresses the facts and law favorable to the defense, and asks for a finding of not guilty for the defense.
    b. Prosecution/ Plaintiff
       The closing argument for the prosecution/plaintiff reviews the evidence presented. The prosecution's/plaintiff's closing argument should indicate how the evidence has satisfied the elements of a charge, point out the law applicable to the case, and ask for a finding of guilt. Because the burden of proof rests with the prosecution/plaintiff, this side has the final word.

11. The Judge's Role and Decision
    The judge is the person who presides over the trial to ensure that the parties' rights are protected and that the attorneys follow the rules of evidence and trial procedure. In mock trials, the judge also has the function of determining the facts of the case and rendering a judgment, just as in actual bench trials.

PART IV: SIMPLIFIED RULES OF EVIDENCE AND PROCEDURE

In American trials, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the evidence will probably be allowed by the judge. **The burden is on the attorneys to know the rules, to be able to use them to present the best possible case, and to limit the actions of opposing counsel and their witnesses.**

Formal rules of evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of this Mock Trial Competition, the rules of evidence have been modified and simplified. Not all judges will interpret the rules of evidence or procedure the same way, and you must be prepared to point out the specific rule (quoting it, if necessary) and to argue persuasively for the interpretation and application of the rule you think proper. No matter which way the judge rules, attorneys should accept the ruling with grace and courtesy!

1. SCOPE

RULE 101: SCOPE. These rules govern all proceedings in the mock trial competition. The only rules of evidence in the competition are those included in these rules.

RULE 102: OBJECTIONS. An objection which is not contained in these rules shall not be considered by the Court. However, if counsel responding to the objection does not point out to the judge the application of this rule, the Court may exercise its discretion in considering such objections.

2. RELEVANCY

RULE 201: RELEVANCY. Only relevant testimony and evidence may be presented. This means that the only physical evidence and testimony allowed is that which tends to make a fact which is important to the case more or less probable than the fact would be without the evidence. However, if the relevant evidence is unfairly prejudicial, confuses the issues, or is a waste of time, it may be excluded by the Court. This may include testimony, pieces of evidence, and demonstrations that have no direct bearing on the issues of the case and have nothing to do with making the issues clearer.

Example:
Relevant: Dr. Mueller, when you receive a recommendation from a chair of a department, how often do you ordinarily defer to the chairperson's opinion?

Irrelevant: Dr. Mueller, if the students at Parkview Heights would make a posting about you, do you think the post would be a favorable one?

Objections to Irrelevant Questions/Testimony:
"Objection. This testimony is unduly prejudicial."
"I object, Your Honor. This testimony is irrelevant to the facts of the case."

RULE 202: CHARACTER. Evidence about the character of a party or witness (other than his or her character for truthfulness or untruthfulness) may not be introduced unless the person's character is an issue in the case.

Example:

Q. Dr. Mueller, isn't it true that you didn't hire a teacher once because you didn't like the way he looked?

Objection:
"Objection. Evidence of the witness' character is not proper given the facts of the case."

3. WITNESS EXAMINATION

A. DIRECT EXAMINATION (attorney calls and questions witness)

RULE 301: FORM OF QUESTION. Witnesses should be asked direct questions and may not be asked leading questions on direct examination. Direct questions are phrased to evoke a set of facts from the witnesses. A leading question is one that suggests to the witness the answer desired by the examiner -- typically a "yes" or "no" answer.

Example of a Direct Question:
Q: Shea, why did you wait so long to come clean about the conversation you overheard involving Harley Ferguson?

Example of a Leading Question: Shea, isn't it true that you were reluctant to come clean about the conversation you overheard because you feared the wrath of Skyler Mondale?

Narration: While the purpose of direct examination is to get the witness to tell a story, the questions must ask for specific information. The questions must not be so broad that the witness is allowed to wander or narrate an entire story. Narrative questions are objectionable.

Example of Narrative Question:
Q: Skyler Mondale, in your own words, please tell the jury your opinion of Harley Ferguson as a teacher?

Objection:
"Objection. Question seeks a narration."

Narrative Answers:
At times, a direct question may be appropriate, but the witness' answer may go beyond the facts for which the question was asked. Such answers are subject to objection on the grounds of narration.

Objections:
"Objection: Counsel is leading the witness."
"Objection. Witness is being narrative."
"Objection: Question asks for a narration."

RULE 302: SCOPE OF WITNESS EXAMINATION. Direct examination may cover all facts relevant to the case of which the witness has first-hand knowledge. Any factual areas examined on direct examination may be subject to cross-examination.

RULE 303: REFRESHING RECOLLECTION. If a witness is unable to recall a statement made in an affidavit, the attorney on direct may show that portion of the affidavit that will help the witness to remember.

B. CROSS EXAMINATION (questioning the other side's witness)

RULE 304: FORM OF QUESTION. An attorney may ask leading questions when cross-examining the opponent's witnesses. Questions that tend to evoke a narrative answer should be avoided in most instances.

RULE 305: SCOPE OF WITNESS EXAMINATION. Attorneys may only ask questions that relate to matters brought out by the other side on direct examination or to matters relating to the credibility of the witness. This includes facts and statements made by the witness for the opposing party. Note that many judges allow a broad interpretation of this rule.

Example: If, on direct examination, a witness is not questioned about a topic, the opposing attorneys may not ask questions about this topic on cross examination.

Objection:
"Objection. Counsel is asking the witness about matters which did not arise during direct examination."

RULE 306: IMPEACHMENT. On cross-examination, the attorney may impeach a witness (show that a witness should not be believed) by (1) asking questions about prior conduct that makes the witness' credibility (truth-telling ability) doubtful, or (2) asking questions about previous contradictory statements. These kinds of questions can only be asked when the cross-examining attorney has information that indicates that the conduct actually happened.

C. RE-DIRECT EXAMINATION

RULE 307: LIMIT ON QUESTIONS. After cross-examination, up to three (3), but no more than three (3), questions may be asked by the direct examining attorney, and such questions are limited to matters raised by the attorney on cross-examination. (The presiding judge has considerable discretion in deciding how to limit the scope of the re-direct.)

NOTE:
If the credibility or the reputation for truthfulness of the witness has been attacked on cross-examination, the attorney whose witness has been damaged may wish to ask several more questions. These questions should be limited to the damage the attorney thinks has been done and should be phrased so as to try to "save" the witness' truth-telling image in the eyes of the court. Re-direct examination is limited to issues raised by the attorney on cross-examination. Please note that at times it may be more appropriate NOT to engage in re-direct examination.

D. RE-CROSS EXAMINATION

RULE 308: LIMIT ON QUESTIONS. Three (3) additional questions, but no more than three (3), may be asked by the cross-examining attorney, and such questions are limited to matters on re-direct examination and should avoid repetition. (The presiding judge has considerable discretion in deciding how to limit the scope of the re-cross.) Like re-direct examination, at times it may be more appropriate not to engage in re-cross examination.

Objection:
"Objection. Counsel is asking the witness about matters that did not come up on re-direct examination."

4. HEARSAY

A. THE RULE

RULE 401: HEARSAY. Any evidence of a statement made by someone who is not the witness on the stand, which, if offered to prove the truth of the matter asserted in that out-of-court statement, is hearsay, and is not permitted. **For the purposes of the Mock Trial Competition, if a document is stipulated, a hearsay objection may not be raised with regard to it.**

Example: If Harley Ferguson testifies that one of the other tenured teachers said, "If you're not chosen for tenure, Harley, you can bet that Dr. Mueller was pressured into not choosing you from his superiors," and is doing so to prove that he should have received tenure, this is hearsay because the teacher isn't testifying—the witness is repeating something he or she heard.

Objection: "Objection. The statement is hearsay, Your Honor."

Possible Response to the Objection: "Your Honor, the testimony is not offered to prove the truth of the matter asserted, but only to show…."

B. EXCEPTIONS

RULE 402: ADMISSION AGAINST INTEREST. A judge may admit hearsay evidence if it was said by a party in the case and contains evidence which goes against the party's side.

RULE 403: STATE OF MIND. A judge may admit hearsay evidence if a person's state of mind is an important part of the case and the hearsay consists of evidence of what someone said which described that particular person's state of mind.

RULE 404: BUSINESS RECORDS. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method of circumstances of preparation indicate lack of trustworthiness, shall be admissible. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and callings of every kind, whether or not conducted for profit.

RULE 405: EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

5. OPINION AND EXPERT TESTIMONY

RULE 501: OPINION TESTIMONY BY NON-EXPERTS. Witnesses who are not testifying as experts may give opinions which are based on what they saw or heard and are helpful in explaining their story. A witness may NOT testify to any matter of which the witness has no personal knowledge, nor may a witness give an opinion about how the case should be decided.

Example: Harley Ferguson, if it is determined by this court that Skyler Mondale exceeded the scope of her First Amendment right to free speech, what do you think would be an appropriate punishment for her?

Objection:
"Objection. The question asks the witness to give a conclusion that goes to the finding of the Court."

Example: (Lack of Personal Knowledge)
Skyler Mondale, do you believe that Mr. Ferguson may have been "hitting" on the students in his class because he was dissatisfied with his marriage?

Objection:
"Objection. The witness has no personal knowledge that would enable him/her to answer this question/ make this statement."

RULE 502: OPINION TESTIMONY BY EXPERTS. Only persons qualified as experts may give opinions on questions that require special knowledge or qualifications. An expert may be called as a witness to render an opinion based on professional experience. An expert must be qualified by the attorney for the party for whom the expert is testifying. This means that before the expert witness can be asked for expert opinion, the questioning attorney must bring out the expert's qualifications, education and/or experience.

Example: Kendall Mondale, if Skyler is within her Constitutional rights to post questionable allegations against Harley Ferguson on the internet, wouldn't Harley be within his Constitutional rights to picket peacefully outside of your home?

Objection: "Objection. Counsel is asking the witness to give an expert opinion for which the witness has not been qualified. Her purview of knowledge is limited to the Internet."

RULE 503: VOIR DIRE. ("To speak the truth.") After an attorney who has called a witness questions him/her about his/her qualifications, and before the court qualifies the witness as an expert, the opposing counsel shall have the opportunity, if he/she chooses, to conduct voir dire. After the voir dire examination has been conducted, the cross-examining attorney should advise the court as to whether there are any objections to the witness being qualified as an expert witness and/or whether there are any objections to the witness' expertise to give the specific opinion the opposing counsel is trying to elicit from this witness.

Example:
(after questioning by an attorney to create a foundation for his/her witness to be qualified by the Court as an expert witness): "At this time, your Honor, I request that the Court accept and qualify the witness as an expert in the field of child snatching."

Objection:
"Your Honor, we would like permission to voir dire the witness."

6. PHYSICAL EVIDENCE

RULE 601: INTRODUCTION OF PHYSICAL EVIDENCE. Physical evidence may be introduced if it is relevant to the case. Physical evidence will not be admitted into evidence until it has been identified and shown to be authentic or its identification and/or authenticity has been stipulated. That a document is "authentic" means only that it is what it appears to be, not that the statements in the document are necessarily true.

Physical evidence need only be introduced once. The proper procedure to use when introducing a physical object or document for identification and/or use as evidence is (for example):

a. Show the exhibit to opposing counsel.
b. Show the exhibit and have it marked by the clerk/judge. "Your Honor, please have this marked as Plaintiff's Exhibit 1 for identification."
c. Ask the witness to identify the exhibit. "I now hand you what is marked Plaintiff's Exhibit 1. Would you identify it, please?"
d. Ask the witness about the exhibit, establishing its relevancy.
e. Offer the exhibit into evidence. "Your Honor, we offer Plaintiff's Exhibit 1 into evidence at this time."
f. The Judge will ask opposing counsel whether there is any objection, rule on the objection, and admit or not admit the exhibit into evidence.
g. If the exhibit is a document, hand it to the clerk/judge.

NOTE:
After an affidavit has been marked for identification, a witness may be asked questions about it without its introduction into evidence.

7. INVENTION OF FACTS (Special Rules for the Mock Trial Competition)

RULE 701: DIRECT EXAMINATION. On direct examination, the witness is limited to the facts provided in the casebook. If a witness testifies in contradiction of a fact given in the witness' statement, opposing counsel should impeach the witness' testimony during cross-examination. If the witness goes beyond the facts given, such that they directly conflict with the stipulated facts or witness affidavits, a bench conference may be requested by opposing counsel, at which time the counsel may object to invention of facts. (It should be noted that the granting of a bench conference is a discretionary decision of the judge. A request for a bench conference might not be granted.)

Example: During Direct Examination
Q. Skyler Mondale asserts that she saw a concealed flask in Harley Ferguson's desk drawer.

Objection:
"Objection, your honor, the witness is creating facts which are not in the record."

During Cross-Examination
Q: Harley Ferguson claims that he would never encourage children to drink since his prized Mustang was totaled by a teen drunk driver.

Objection: "Objection. The witness is inventing facts that directly contradict case material."

Objection to be made at a bench conference:
"Your Honor, the witness is creating facts which are not in the record."
"Your Honor, the witness is intentionally creating facts which could materially alter the outcome of the case."

RULE 702: CROSS-EXAMINATION. Questions on cross-examination should not seek to elicit information that is not contained in the fact pattern. If on cross-examination a witness is asked a question, the answer to which is not contained in the witness' statements of the direct examination, the witness may respond with any answer which does not materially alter the outcome of the trial. An answer which is contrary to the witness' affidavit may be impeached by the cross-examining attorney. If the witness invents facts material to the case, a bench conference may be called and, if granted, an objection made to the invention of facts.

Objection:
"Objection. The witness' answer is inventing facts which materially alter the case."

8. SPECULATION

RULE 801: Speculation by a witness, upon which the court may not base verdict, is the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge. Speculation as to what possibly could have happened is of little probative value. Some leeway is allowed for the witness to use their own words, and greater freedom is allowed with expert witnesses.

Example: Direct Examination by the Prosecution
Q: Riley, what did Dr. Mueller say to you when you were leaving the office?

A: Dr. Mueller told me to "Google" the stuff about Harley. I'm sure that Dr. Mueller was thinking that I wouldn't make a fuss about not giving Harley tenure once I saw what was posted. (The witness doesn't know what Dr. Mueller's motivation was for requesting that he "Google" the website, so this is speculation.)

Objection:
"Objection. Inadmissible speculation on behalf of the witness. I move that this statement be stricken from the record."

9. PROCEDURE RULES

RULE 901: PROCEDURES FOR OBJECTIONS. An attorney may object anytime the opposing attorney has violated the Rules of Evidence.
NOTE: The attorney who is objecting should stand up and do so at the time of the violation. When an objection is made, the judge will usually ask the reason for it. Then the judge will turn to the attorney who asked the question and that attorney will usually have a chance to explain why the objection should not be accepted ("sustained") by the judge. The judge will then decide whether to discard a question or answer because it has violated a rule of evidence ("objection sustained"), or whether to allow a question or answer to remain on the trial record ("objection overruled").

RULE 902: MOTIONS TO DISMISS. Motions for dismissal at the end of the prosecution's case are NOT permitted.

RULE 903: CLOSING ARGUMENTS. Closing arguments must be based on the evidence and testimony presented during the trial. Offering new information at this point is incorrect.

IN THE CIRCUIT COURT FOR THE STATE OF MARYLAND
IN AND FOR HOWARD COUNTY

Harley Ferguson,	)
Plaintiff,	)
	)
v.	)
	)
Kendall and Skyler Mondale,	)
Defendants	)

All characters, situations, events and names in this case are fictitious.

COMPLAINT
Defamation

Harley Ferguson, Plaintiff, by his attorneys, sues Kendall and Skyler Mondale, Defendant, and states:

1. Plaintiff is a resident of Howard County, Maryland.
2. Defendants Kendall and Skyler Mondale are residents of Howard County, Maryland.
3. Plaintiff Ferguson was an employee of Parkview Heights High School in Howard County, Maryland.
4. Defendant Skyler Mondale is a student, in the twelfth grade, at Parkview Heights High School in Howard County, Maryland.
5. Defendant Kendall Mondale owns the web site hosting business that hosts Tiger Tracks.

STATEMENT OF STIPULATED FACTS

Skyler Mondale was a junior at Parkview Heights High School located in Howard County, Maryland. As the Webmaster, Skyler developed and administered the *Tiger Tracks* website, created for students at Parkview Heights High School to rate their teachers. The site was launched in October of 2007, and was housed on the server owned and operated by Skyler's parent, Kendall Mondale. It was a family business; the website allowed students to log onto the site and anonymously post reviews of their teachers.

From October through December, students from Parkview Heights High School posted their evaluations of teachers. These postings stated that teachers were fair or unfair, hard or easy, gave too much homework, or were fun to have.

Skyler Mondale was enrolled in Harley Ferguson's eleventh grade social studies class and had done well the first quarter, receiving a grade of "B+". However, by January, Skyler's grade had fallen to a "C-". Skyler knew that good grades this year would be crucial to getting into select colleges and that the "C-" would hurt. Skyler knew that Ferguson would never change the grade, as it truly reflected the value of the work. Nevertheless, Skyler vowed revenge against the teacher and discussed with some close friends a plan to "get" Ferguson on *Tiger Tracks*. Shea McCain overheard what was planned and was invited to participate, but declined. In February, Skyler posted comments about Ferguson on the website.

Ferguson overheard several students whispering about posts concerning a particular social studies teacher on *Tiger Tracks*, prompting a visit to the site on March 10, 2008. Ferguson was mortified to read the anonymous posts that claimed s/he was a bad teacher, made fun of students, used sexual innuendos in class, intimidated and bullied students, encouraged students to drink if they were stressed out about grades and life, and even suggested that Ferguson was "hitting" on students, despite being happily married. Ferguson learned that Skyler Mondale was the Webmaster for *Tiger Tracks*, and, on Wednesday, March 12, 2008, confronted the student and requested that the false postings be immediately taken down. On the afternoon of Thursday, March 13, as Ferguson packed up to go home, Skyler Mondale's parent, Kendall Mondale, confronted Ferguson and demanded that Ferguson not bully or intimidate Skyler because s/he was simply exercising a student's First Amendment right to free speech by hosting the *Tiger Tracks* website. Students, Kendall argued, have rights, too. Kendall Mondale left Ferguson's classroom and marched into the office of the principal, Dr. Morgan Mueller, and demanded that Harley Ferguson not intimidate Skyler about the *Tiger Tracks* website.

In early April, Ferguson was dismayed to see that *Tiger Tracks* still posted the false remarks. Ferguson went to Dr. Morgan Mueller and requested that something be done about the postings and blatant insubordination by this student. Dr. Mueller acknowledged awareness of the website and the postings since visiting the website weeks prior, and admitted receiving many telephone calls from concerned parents.

In late April, Riley Smith, the chair of the social studies department, met with Dr. Mueller and recommended that Ferguson receive tenure and contract renewal. Smith stated that Ferguson's numerous classroom observations over the last two years had been excellent and that, unlike most probationary teachers, no improvement was necessary. The other social studies teachers in the department found Ferguson congenial and a rich resource that the school was fortunate to have. Dr. Mueller was noncommittal, but noted that there were negative comments on the *Tiger Tracks* website, some quite serious, and that many parents had been calling about the troubling things they have read on the website. As Smith was leaving the principal's office, Dr. Mueller offhandedly suggested that Smith "Google" *Tiger Tracks*. Dr. Mueller then said, "The last thing I need are angry parents, the board on my case, and bad press. It might be easier all the way around if we just say thanks and good riddance."

In early May, Ferguson had an end of the year meeting with the principal. Ferguson raised concerns about the *Tiger Tracks* website and all of the negative, nasty, and untrue allegations associated with it. Dr. Mueller was evasive about the coming school year and whether or not Ferguson would have a contract. Ferguson asked if the comments on *Tiger Tracks* would impact the chances for tenure, with the understanding that the comments were clearly erroneous and that no one truly believed them. Again failing to answer Ferguson directly, Dr. Mueller abruptly ended the meeting and, as Ferguson left the office, Dr. Mueller suggested to Ferguson that s/he should "draw his own conclusions."

In the beginning of June, Ferguson received a letter from the school district thanking him/her for services rendered and bidding good wishes for future endeavors. The letter, in effect, was the non-renewal of the teaching contract and a denial of tenure. The letter gave no indication of the reasons for non-renewal and the resultant denial of tenure.

Shea McCain ran into Ferguson at the grocery store and mentioned looking forward to the next school year, hoping that Ferguson would be teaching twelfth grade social studies. Ferguson informed Shea that there would be a new social studies teacher next year, as tenure had been denied, most likely due to the lies and horrible things that had been posted on *Tiger Tracks*. Shea felt awfully, but said nothing.

The conversation with Skyler from earlier in the year now weighed heavily on Shea's conscience. Shea decided to call Ferguson and confess what Skyler said and did last February. Shea told Ferguson that Skyler and several friends had been out to get back at Ferguson.

Shea's comments both validated and exacerbated Ferguson's feelings of fury and betrayal. Ferguson immediately contacted an attorney to get advice about the employment rights of untenured teachers and advice about malicious, defamatory statements. Ferguson informed the attorney about the un-renewed contract and the resulting denial of tenure, despite stellar official evaluations and observations. Ferguson also informed the attorney about the false, malicious, and vindictive statements posted on *Tiger Tracks* by a student who received a poor assessment at the end of the first semester. Finally, Ferguson told the attorney about the two separate conversations with Dr. Mueller regarding *Tiger Tracks*, as well as the principal's off-handed comment when Ferguson was leaving the office.

Ferguson brought an action against the school district's failure to renew the contract and subsequent denial of tenure. That action is pending.

Ferguson also brought this action against Skyler and Kendall Mondale for defamation.

All names and references contained within this fact pattern are intended to be fictional.

Additional Stipulations

The parties have stipulated to the authenticity and factual accuracy of the following items. The parties have also agreed that the following items are not in dispute:

1. Tiger Tracks Posting Rules
2. Tiger Tracks Posting: Harley Ferguson Excerpt

3. Article: *Proving Fault*
4. Article: *Publishing Information That Harms Another*

The parties reserve the right to dispute any other legal or factual conclusions based on these items and to make objections to these items based on evidentiary issues.

WITNESSES TO APPEAR BEFORE THE COURT

For the Plaintiff	**For the Defense**
Harley Ferguson, Teacher, Plaintiff	Skyler Mondale, Student/Webmaster, Defendant
Riley Smith, Social Studies Department Chair	Kendall Mondale, Parent/Internet Web Host, Defendant
Shea McCain, Student	Dr. Morgan Mueller, Principal

Witness for the Plaintiff
Harley Ferguson, Teacher

My name is Harley Ferguson. I reside at 23154 Scarlet Rose Way in Columbia, Maryland. I am 32 years old and have been teaching for eight years. Prior to teaching at Parkview Heights, I taught in private school. I was a social studies teacher at Parkview Heights High School in Howard County, Maryland for two years. I thought I was doing a good job, but I was denied tenure and my contract was not renewed.

I got along well with my colleagues in the social studies department, and I believe the students respected me and enjoyed my classes. That is, until the day in March of 2008, when I overheard several students in the hall whispering about *Tiger Tracks* and a post about me. When they saw me, they all quickly turned away and left.

By "Googling" *Tiger Tracks*, I learned that it was a website where students could rate their teachers at Parkview Heights High School. I read some of the anonymous posts about teachers and found them to be essentially what I would expect until I came to mine. That day—March 10, 2008— my life started to fall apart.

I could not believe what I read. The anonymous post indicated that I was a bad teacher, that I ridiculed students, that I used sexual innuendo in class, that I intimidated and bullied students, that I endorsed reckless and illegal behavior to cope with problems faced by teens, and even insinuated that I was "hitting" on students, even though everyone knew I was happily married.

I was shocked and taken aback by these despicable lies about me. I would never, nor have I ever, encouraged a student to drink, or approached a student in any way that could be construed as inappropriate. I have never even considered touching a student of the opposite sex, as I have always erred on the side of caution. These are all devastating lies.

Once I learned that all of the posts were anonymous on the site, I took it upon myself to discover who was responsible for the Website. I learned that Skyler Mondale, a student in my class, was the Webmaster for *Tiger Tracks*.

On Thursday, March 12, 2008, I confronted Skyler and requested, albeit firmly, that the false postings about me be taken down immediately. Skyler nodded and walked away. I thought that the situation was resolved and that the posting about me would be removed.

But on the afternoon of the very next day, as I packed to go home, Skyler Mondale's parent, Kendall Mondale, confronted me and demanded that I not bully or intimidate Skyler. This parent further argued that Skyler was exercising First Amendment rights to free speech and that hosting the *Tiger Tracks* Website was protected by the Bill of Rights, speaking in a manner that discounted my years of education and familiarity with our country's Constitution.

I tried to tell this parent that all speech is not protected, that the First Amendment does not cover lies and untruths; at this point, though, this irate parent was already storming out my classroom. In any event, I thought the matter was over and that the posting about me would come down. How naïve I was to think this.

No one said anything about the postings, and, to my regret, I thought they had been removed from the site; but in early April—I think it was the 7th or 8th—I thought that I had better take a look at the Website to make sure. When I saw the comments still up, I was furious. I could not believe this was happening to me. Even my spouse noticed I was upset, but one of us being upset about this nonsense was enough, so I did not say anything about the situation.

The next day I went to see the principal about the matter and requested that Dr. Mueller do something to get those terrible things written about me off the *Tiger Tracks* website. I also indicated that Skyler Mondale's insubordination and disrespect shown to me, a teacher, was not acceptable and that it had to be addressed.

I was surprised to learn that Dr. Mueller appeared to have been aware of the website and the its content. Dr. Mueller apparently visited the website and received many telephone calls from concerned parents. Once again, I thought the matter would be handled and left Dr. Mueller's office. Once again, I was wrong.

Since I was considered a probationary teacher, I had my end-of-the-year meeting with Dr. Mueller in May. I was aware that all my observations and formal evaluations were all very good and that I had the support of my colleagues, as well as the chair of the social studies department.

After we had discussed my teaching ability, my grasp of the subject matter I was teaching, and how well I worked with my colleagues, I raised the matter of the *Tiger Tracks* Website. I expressed concern about the fabricated allegations about me and said that I hoped the matter had been resolved.

I asked if the comments on *Tiger Tracks* would impact the chances for my tenure, drawing assurance from my belief that any reasonable person would realize the postings were wholly inaccurate. Before I could receive an explicit answer, Dr. Mueller ended the meeting suddenly. When I was leaving, though, I heard Dr. Mueller say in a muffled voice that I should, "draw [my] own conclusions." I felt uneasy about Dr. Mueller's failure to give me a straightforward answer about the coming school year and whether I would have a contract. I would receive my answer in the form of a letter sent to me in June. The letter from the school district thanked me for my services rendered and wished me good luck in my future endeavors. The letter was the school district's way of letting me know that I was not going to receive tenure nor was I going to be teaching there any longer.

It was after the school year ended that I ran into one of my old students, Shea McCain, at the grocery store. Shea mentioned looking forward to the coming school year and hoped I would be teaching twelfth grade social studies. I informed Shea that I would not be back next year because I was not granted tenure, and I also said that it was most likely because of the lies and horrible stuff that had been posted on *Tiger Tracks*. Shea apologized for my situation and then wished me a nice summer.

I am pleased we decided to keep our number published, as the next evening I received a telephone call from Shea. Shea conveyed to me the details of a conversation involving Skyler Mondale earlier in the school year. Shea apologized over and over for not telling me about it sooner, but explained that Skyler was a friend. I told Shea I understood and asked what the conversation entailed. That is when I learned that Skyler had written the post and that it was done deliberately to hurt me because I had given Skyler a low grade.

I was so angry that I contacted an attorney and sought legal advice about my rights as a probationary teacher. I wanted to know what I could do about the malicious, defamatory statements posted on that website about me. I informed my attorney about not having the contract renewed and the resulting denial of tenure, even though my official evaluations and observations were excellent. I also informed my lawyer about the false, malicious, and vindictive statements posted on *Tiger Tracks* by a student who received a poor assessment from me at the end of the first semester.

In addition, I also told my lawyer about the two separate conversations with the principal when the *Tiger Tracks* Website was discussed as well as what the principal had said while leaving.

After thinking long and hard about what was done to me and how it might affect my future efforts to teach, I brought an action against the school district for non-renewal of my contract and denial of tenure. That action is pending.

I have also brought this action against Skyler and Kendall Mondale for defamation.

Harley Ferguson

Harley Ferguson

Witness for the Plaintiff
Shea McCain, Student

My name is Shea McCain. I am seventeen years old, and I am a senior at Parkview Heights High School, which is located in Howard County, Maryland. I was in Harley Ferguson's eleventh grade social studies class.

During February of 2008, I overheard Skyler talking with some friends in the cafeteria about how Skyler had received a lousy grade for the semester in our social studies class and how they were going to "get" Ferguson. Skyler, who is a friend of mine, asked if I wanted to join in the fun, and I told them I was not interested. All they said was that I was going to miss out on "getting even."

I never thought much about it afterward, and Skyler never said anything either. It was not until I ran into Ferguson at the grocery store after school had let out for the summer that it all started to make sense.

I ran into Ferguson at the grocery store and mentioned really looking forward to the next school year and hoped that Ferguson would be teaching twelfth grade social studies. There would be another social studies teacher for twelfth grade, Ferguson said, as tenure had been denied, most likely because of the mean stuff that had been posted on *Tiger Tracks*.

I felt really bad hearing that, and it was at that moment that I remembered the conversation with Skyler earlier in the year about "getting" Ferguson. At that point, I could not bring myself to say anything. Skyler was my friend and it all happened so quickly I could not really think straight. I had never felt so uncomfortable as I did then, so I told Ferguson I was sorry about the whole thing and said simply, "Have a nice summer."

I thought about what had happened to Ferguson that night and the next day and how it was wrong to do that to a person that didn't deserve it. Ferguson was probably one of the best teachers I had ever had, and I knew that many students enjoyed that class and learned a great deal.

I knew I could not just sit on the information I had, so that evening, I called and told Ferguson about the conversation I had with Skyler earlier in the school year. I said that Skyler had deliberately tried to hurt Ferguson because of the low grade Skyler had received.

I did apologize a couple of times for not telling Ferguson about it sooner, but explained that my friendship to Skyler placed me in a precarious position. Ferguson was very understanding about my not saying anything sooner, but I still feel bad about it, because maybe if I had, things might be different now.

I think this whole affair is terrible and I am just sorry I am involved in any way.

Shea McCain
Shea McCain

Witness for the Plaintiff
Riley Smith, Social Studies Department Chair

My name is Riley Smith. I live at 39 Green Pasture Lane in Ellicott City, Maryland. I am the chair of the social studies department at Parkview Heights High School in Howard County, Maryland. I have been a social studies teacher for eighteen years and the department chair for five.

I knew Harley Ferguson for two years, ever since Harley started teaching social studies here at Parkview Heights.

I found Harley to be bright, articulate, and a very good teacher. As Chair, I had to observe Harley's classroom teaching on several occasions during the two-year probationary period. I must say those evaluations were all flawless; I found the teacher-student rapport in Harley's classes better than most.

I do not understand why that website is allowed to post such garbage. I can appreciate that students deserve a voice, but it just seems they should be responsible and respectful as well.

As chair of the Social Studies Department, it was one of my responsibilities to evaluate probationary teachers for tenure and to make my recommendations to the principal. So, in late April— I do not remember the exact date— I met with Dr. Mueller and gave my professional opinion that Harley Ferguson should receive tenure.

I explained that Harley's numerous classroom observations over the last two years had been excellent and that, unlike most probationary teachers, he was just about perfect—I could not put a finger on anything that Harley needed to improve. I also told Dr. Mueller that the other social studies teachers in the department found Ferguson to be very amicable and reasonable, a resource that this school was lucky to have.

Strangely, though, Dr. Mueller did not appear to give any deference to my opinion. At the time, I didn't understand why, as I thought Harley receiving tenure would be a snap. As the meeting was coming to an end and I was getting up to leave, Dr. Mueller said that there were negative comments, some quite serious, on the *Tiger Tracks* Website, and that many parents had called about them.

As I was at the door ready to leave the office, Dr. Mueller offhandedly suggested that I "Google" *Tiger Tracks* and said, "The last thing I need are angry parents, the board on my case, and bad press. It might just be easier all the way around if we just say thanks and good riddance."

I had no intention of going to that website and I also knew that there was nothing I could do for Harley after I heard what Dr. Mueller had said.

Riley Smith

Riley Smith

Witness for the Defendant
Skyler Mondale, Student/Webmaster

My name is Skyler Mondale. My address is 2912 Maple Avenue in Columbia, Maryland. I am a seventeen year-old senior at Parkview Heights High School in Howard County, Maryland. I am also the Webmaster for *Tiger Tracks*, an Internet site that I created and started running in October of 2007 that lets students rate their teachers online so that others can see what they say about a teacher that they have or might have.

There is nothing illegal in rating teachers. I provide a service so that students can have a voice and can be heard and let others know what they think and feel about their teachers. Students have the right to know what others think about the teachers at Parkview. I have taken social studies; I know that students have rights. This is a free speech issue.

I designed the site so that students could post anonymously because I have seen similar sites offering anonymity which proficiently protect their posters from attacks by others. This was my aim, too; I wanted the students to be protected from teachers that might try to retaliate. Ironically, what I wanted to avoid is exactly what is happening to me now for running the site and making my own posting.

After the posting about Ferguson was up on my site about a month, sometime in March, Ferguson confronted me and demanded that I remove the posting. I said it was a matter of the First Amendment and student rights and that I would not take the posting down. I went home and told my parents about being threatened by Ferguson to take down the posting and I think one of them told Ferguson to stop bullying me.

It is true that I did better in the first quarter last year in Ferguson's social studies class and that my grades did drop off at the end of the first semester, but what I said about Ferguson is how I felt and I am entitled to my opinion. I should be able to share how I feel about a teacher with others.

That is all I did when I posted those things on my website about Ferguson. It is how I felt and how I interpreted what was said and done, and from my perspective, what I observed in class. Ferguson is a terrible teacher and should not be teaching in our school. Maybe Ferguson can't prove the postings are false. A lot of opinion is informed, and if you believe it's true, it's true. If they got rid of Ferguson, then it's for the best and I'm not responsible. I'm protected by free speech.

As for talking to my friends about Ferguson before I put up the posting, of course I did. I was concerned about what was going on and was encouraged to post how I felt and what I believed on my own website.

I posted it anonymously, just as all students that use my site are entitled to do. No one ever posted anything on my website using their name; it was always anonymous.

Skyler Mondale

Skyler Mondale

Witness for the Defendant
Kendall Mondale, Parent/Internet Web Host

My name is Kendall Mondale. I reside at 2912 Maple Avenue in Columbia, Maryland. I am Skyler's parent. I also own and operate the server on which *Tiger Tracks* is housed. It is a family business and I am the Web Host.

I provide web hosting –a service that allows individuals and organizations to make their own website accessible to the public through the World Wide Web. I provide space on a server that I own for my clients, as well as providing internet connectivity.

In March of 2008, I learned that one of my child's teachers, Harley Ferguson, confronted Skyler, insisting that posts be removed from *Tiger Tracks*. Skyler told this teacher that the Website was protected by the First Amendment and that the posts would remain on the site.

I went to Parkview Heights High School, found Ferguson, and demanded that all bullying and intimidation of Skyler, for merely exercising First Amendment rights, needed to cease immediately. No one was going to bully any child of mine. I told Skyler that the internet was my profession and that I was very knowledgeable of it. I discussed with Skyler that students have the right, just like everyone else, to voice their opinions.

I found it ironic that I had to tell a social studies teacher about the Bill of Rights and that constitutional rights were not limited to adults. It raises a red flag as to the quality of teachers they have at this school.

I was not happy that this teacher was attacking Skyler, so I left Ferguson's classroom and went to Dr. Morgan Mueller's office and demanded that Harley Ferguson not be allowed to intimidate Skyler about the *Tiger Tracks* Website. I let the principal know that I was not going to stand for this kind of treatment of my child and that, from what I understood, it was a wonder how they could let a teacher like Ferguson in a classroom near students at all.

I reminded Dr. Mueller of my profession, and that I knew a thing or two about the internet, and what could or could not be done on it. I also made sure Dr. Mueller understood that no one was going to intimidate me or my child and that I had friends on the Board of Education who would be hearing about this from me.

I was assured that the matter would be looked into and that it would be resolved.

Kendall Mondale

Kendall Mondale

Witness for the Defendant
Dr. Morgan Mueller, Principal

My name is Dr. Morgan Mueller. I live at 21984 Setting Sun Drive in Columbia, Maryland. I am the principal at Parkview Heights High School, which is located in Howard County, Maryland. I have served in this capacity for five years. Before becoming the principal, I was a vice principal at Thomas Jefferson High School in Anne Arundel County for three years.

I have known about the *Tiger Tracks* website and the rating of teachers since November of 2007. It is my understanding that it went online in October. When I first visited the site, I was not really impressed, nor was I really worried, as the postings were more or less standard. By "standard," I am referring to general comments regarding teachers who were too hard, or gave too many tests, or too much homework. There were a couple of posts that said their teachers were too easy. I was not necessarily happy that the website was created, but there's a limit to what we, as school officials, can do, because it was set up off school grounds. I saw no real harm in it, and I was not overly concerned.

On March 14, 2008, Kendall Mondale literally stormed into my office. Mondale demanded that I stop Ferguson from intimidating Skyler about the *Tiger Tracks* website, claiming that I was violating the First Amendment rights of students. Mondale also threatened to talk to board members about it unless I did something. I assured Mondale that I would look into the matter and take care of it. It bothered me that Mondale had stated that it was a wonder how we could let a teacher like Ferguson in a classroom, let alone near students. I admit that I was taken aback by that, so I was determined to get to the bottom of the matter.

It was in early April that Harley Ferguson came to see me about the matter and was annoyed that Skyler, a student, had shown such disrespect and insubordination to a teacher at Parkview Heights High by posting such horrible and untrue statements. Harley requested that I do something about it. I assured Ferguson that I would indeed do something about the matter. By that point, I was fully aware of the situation from visiting the website myself and from receiving numerous phone calls from concerned and angry parents.

In late April, Riley Smith, the chair of the social studies department, came to see me about Harley Ferguson receiving tenure, as Ferguson's probationary period would end at the end of the school year. Riley mentioned all of the excellent observations and evaluations Ferguson had received over the last two years and even commented that unlike most probationary teachers, Harley was never cited for having an area that needed improvement. Smith also indicated that the other social studies teachers found Harley very easy to work with and a valuable resource whom they were fortunate to have. I was vague, but I did say that there were negative comments on the *Tiger Tracks* Website, some quite serious, and that many parents had been calling me about it. I do remember suggesting that Smith "Google" *Tiger Tracks* and read the comments that were posted. I might have said something to the effect of not being desirous of bad publicity and angry parents harassing me, and that it would be easier to go our separate ways. But really, that was me just spouting off. Everybody spouts off sometime or another.

I met with Ferguson during the last week of May when I meet with every probationary teacher and I raised the issue with the *Tiger Tracks* Website and postings. I was noncommittal about the coming school year and whether or not Ferguson would have a contract. Ferguson asked if the comments on *Tiger Tracks* would impact the chances for tenure, and said that it was obvious that the postings were false. I told Ferguson then that the meeting was over and as Ferguson left the office, I said: "Draw your own conclusions." I'm not sure what else I could have said. I did not recommend tenure and, in the beginning of June, a letter was sent from the school district thanking Ferguson for services rendered and offering good wishes for future endeavors.

Dr. Morgan Mueller
Dr. Morgan Mueller

Tiger Tracks Posting Rules

By using this site you agree to rate and comment ONLY on teachers, administrators (principals, vice principals), counselors or other school professionals who affect a student's education. Do not include secretaries, lunch ladies, janitors or security people. They will not be accepted. You may rate each teacher (or other professional) only once.

Keep your posts appropriate. Do not state something as a fact if it is your opinion. For example, stating "Mrs. Jones doesn't have a college degree" will be deleted. We want your opinion, but please rate your teachers based on your opinion of their TEACHING ability. Please try to provide us with an insight into what is happening in the classroom.

Posts will not be accepted if they:

- contain vulgar or profane words
- are sexual in nature - including “sexy” or “hot” or other perceived sexual language
- have to do with personal appearance (cute, short, fat, bad clothes, etc.)
- have to do with physical disabilities (stutters, limps, wears a hearing aid, etc.)
- are name-calling in nature (jerk, creep, etc.)
- reference alcohol/drug use
- reference problems with the law
- reference race, religion, ethnic background, sexual orientation, age
- include names or initials of other students or the rater or any email addresses
- reference the teacher's personal life including family members (Just got married, Don't like her son, Wife is pretty, How did he afford that car? etc.)
- contain advertising (Buy your yearbooks today! Danny for Class President!)
- are not in English. (Exceptions may be made if the screener is fluent in a specific language and it is the language of the area.)

ALL COMMENTS THAT:

- threaten a teacher, a student, the administrators or the school property
- state the rater intends to harm himself/herself

will be turned over to the proper authorities with the IP address!

Rating Categories for Students

Here are descriptions of Tiger Tracks three ratings categories for students:

Easiness - This is definitely the most controversial of the three rating categories, which is why it is NOT included in the "Overall Quality" rating. Although we do not necessarily condone it, it is certainly true that many students decide what class to take based on the difficulty of the teacher. When rating a teacher's easiness, ask yourself "How easy are the classes that this teacher teaches? Is it possible to get an ‘A’ without too much work?"

Helpfulness - This category rates the teacher's helpfulness and approachability. Are your teachers approachable and nice? Are they rude, arrogant, or just plain mean? Are they willing to help you after class?

Clarity - This is the most important of the three categories, at least to most people. How well do your teachers convey the class topics? Are they clear in their presentation? Are they organized and do they use class time effectively?

Overall Quality - The Overall Quality rating is the average of a teacher's Helpfulness and Clarity ratings, and is what determines the type of "smiley face" that the teacher receives. Due to popular demand, a teacher's Easiness rating is NOT used when computing the Overall Quality rating, since an Easiness of “5” may actually mean the teacher is too easy.

Goals

Our goal is to make this website a valuable resource for both students and parents. Please rate your teachers. We've tried to make this site as easy to use as possible. There's no need to log in and we don't ask your name. All information is held in strict confidence. We encourage all of you to join as a member (FREE) so that you can enjoy the extra benefits of being a member. These benefits include 1) several of you being able to rate the same teacher from the same computer and 2) being able to edit your ratings.

Tiger Tracks Posting Regarding Harley Ferguson

February, 2008

I am in Ferguson's social studies class so I know what I am talking about. No one should have to sit in a class run by such a bad teacher. Ferguson makes fun of us whenever we give wrong answers, calling us dummies or sneering at us with looks of contempt and disdain. If we raise questions or bring up the other side of an argument, we are bullied into agreeing with Ferguson's position or getting more homework or a special research project.

But what is worse is that Ferguson is always making sexual comments or innuendos and touching students of the opposite sex. Ferguson has been known to run a hand over a back or shoulder, and only to the opposite sex; it's a pretty creepy feeling. It pretty bad that Ferguson's hitting on children, and even worse that the adult doing this stuff is supposed to be our teacher, but on top of that, Ferguson is married!

If we are having trouble in school or are stressed out by grades or at home, Ferguson has said we should just go have a "few" and chill out, that we could always find someone to buy it for us if our parents didn't have some at home already. You don't have to be a genius to figure out what I'm talking about either.

What kind of teacher is this? We should not have to be subjected to this kind of a person at Parkview Heights High. Ferguson is not a role-model; Ferguson *needs* a role-model! I would learn more and get more respect if a gerbil taught the class. Ferguson must go! We do not need pervs teaching in our school!

*(***Please reference and/or cite only the language and/or cases contained within this casebook.***)*

Case Law

MARYLAND CASE LAW

1) Under Maryland law, to present a prima facie case of defamation, a plaintiff must establish four elements: (1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm. *Smith v. Danielczyk*, 400 Md. 98, 115, 928 A.2d 795, 805 (2007). A defamatory statement is one "which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person." *Gohari v. Darvish*, 363 Md. 42, 55, 767 A.2d 321, 327 (2001) (quoting *Rosenberg v. Helinski*, 328 Md. 664, 675, 616 A.2d 866, 871 (1992)). *Offen v. Brenner*, 402 Md. 191, 198, 935 A.2d 719, 723 (2007).

2) Under Maryland law, a defamatory statement is one that "tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or from associating or dealing with, that person." *Batson v. Shiflett*, 325 Md. 684, 722-23 (1992). The question often arises whether elected county or municipal legislators can be sued for their statements to the press or other media sources. As with most legal issues, the answer is "it depends." Maryland law has long precluded civil or criminal actions against "a city or town councilman, county commissioner, county councilman, or similar official by whatever name known, for words spoken at a meeting of the council or board of commissioners or at a meeting of a committee or subcommittee thereof."

GLENN REICHARDT, et al. v. CHRISTOPHER A. FLYNN
374 Md. 361 (2000)

Opinion by Eldridge, J.

We granted a petition for a writ of certiorari in this case to determine whether an absolute privilege defense applies to a defamation action involving communications made by students and parents to public school authorities about the perceived misconduct of a public school teacher and coach.

I.

Christopher A. Flynn was employed in the Montgomery County public school system as a teacher since 1989 and as a high school track and cross-country coach from 1990 to 1998. From the 1994 school year, until the time of the petitioners' allegations, Flynn was Walt Whitman High School's only co-educational cross-country track team coach.

Petitioners, Joanna Zuercher and Claire White-Crane, joined the cross-country track team as high school freshmen in 1995. About 2 years later, on January 12, 1998, both students and their parents met with Walt Whitman High School Principal, Dr. Jerome Marco, to express their concerns regarding Flynn's behavior as a coach. According to the girls, their primary concerns related to alleged improper sexual comments made by Flynn and their perception that Flynn was more interested in coaching the male runners than the female runners. The girls alleged that Flynn's conduct appeared contrary to the school system's written policies (titled: "Nondiscrimination;" "Gender Equity;" and "Sexual Harassment") which promised gender equity and an environment free from discrimination and sexual harassment. Joanna and Claire also wrote to other officials of the Montgomery County public school system about Flynn's alleged misconduct. [1]

That same afternoon, Dr. Marco met with Flynn and informed him of the allegations, which Flynn denied. Later that evening, Dr. Marco decided to place Flynn on leave with pay from both his teaching and coaching positions beginning the next day. Two days later, on January 15, 1998, Flynn was formally suspended with pay by the Montgomery County Superintendent of Schools, Paul Vance, while the school system's Department of Personnel Services conducted a confidential investigation. Flynn remained suspended until May 11, 1998, when he was placed in a non-teaching position.

During the investigation, the school system personnel interviewed and received written statements regarding Flynn's conduct from more than 20 students. Flynn was able to obtain these statements from the school system's personnel during its investigation. In addition, Flynn and his counsel were given the opportunity to respond to all statements submitted during the investigation. Neither Flynn nor his counsel chose to do so.

Upon the conclusion of the investigation in July 1998, the School Superintendent issued a written reprimand to Flynn for actions that showed different and unequal treatment of girls on the Walt Whitman High School cross-country track team. The Superintendent also denied Flynn the opportunity to coach any Montgomery County public school athletic teams for one year beginning July 1, 1998, barred Flynn from being a teacher at Walt Whitman High School, and required Flynn to participate in a gender anti-discrimination education course. Walt Whitman High School also replaced Flynn with two cross-country track coaches, one for the boys' team and one for the girls' team.

***

In January 1999, Flynn filed, in the Circuit Court for Montgomery County, this defamation action against the two students, Joanna Zuercher and Claire White-Crane, and their parents, Glenn Reichardt, JoAnn Zuercher, Donald Crane and Diana White-Crane. In his complaint, Flynn alleged that the students and their parents defamed him by fabricating and communicating to Dr. Marco and other public school officials false and malicious allegations of sexual abuse, sexual harassment, and sex discrimination by Flynn against female athletes on the Walt Whitman cross-country track team. Flynn asserted that the girls made these false statements in order to have Flynn removed as their coach and to obtain a separate coach for the female runners on the cross-country team. Flynn alleged that these defamatory statements led to his transfer from Walt Whitman High School and to the loss of his coaching position. In a second count, Flynn alleged tortious interference with the economic relationship between Flynn and the public school system.

In response, the petitioners moved to dismiss the complaint. The Circuit Court for Montgomery County granted the Motion to Dismiss, with prejudice, on the ground that the petitioners' communications with the public school system officials about Flynn's alleged misconduct were protected by an absolute privilege. Flynn took an appeal, challenging only the dismissal of the defamation action. He did not, on appeal, contest the dismissal of the count charging tortious interference with economic relationship.

The Court of Special Appeals reversed, holding that the statements in question were not absolutely privileged. *Flynn v. Reichardt*, 131 Md. App. 386, 749 A.2d 197 (2000). The Court of Special Appeals initially acknowledged that this Court had adopted "the common law rule of absolute privilege in which a person is protected from liability for defamation for testimony given as a witness in a judicial proceeding," and the intermediate appellate court pointed to "Maryland's broad view of the privilege, which includes administrative and other quasi-judicial proceedings." *Flynn v. Reichardt, supra*, 131 Md. App. at 392, 749 A.2d at 201. The Court of Special Appeals stated that, under *Gersh v. Ambrose*, 291 Md. 188, 197, 434 A.2d 547, 552 (1981), the applicability of the absolute privilege in administrative proceedings depended in part upon the "adequacy of procedural safeguards which will minimize the occurrence of defamatory statements." The Court of Special Appeals then held that adequate procedural safeguards were not present in this case because, in the appellate court's view, Flynn was not entitled to a hearing and he was not entitled to any administrative appeal from the Superintendent's adverse actions. *Flynn*, 131 Md. App. at 397-402, 749 A.2d at 203-206. [2]

The students and their parents filed in this Court a petition for a writ of certiorari which we granted, *Reichardt v. Flynn*, 359 Md. 668, 755 A.2d 1139 (2000). Flynn did not file a cross-petition for a writ of certiorari.

The petitioners argue that, under this Court's decisions, the Circuit Court correctly held that absolute privilege barred the action. The petitioners further argue that the Court of Special Appeals erred in holding that Flynn had no right to appeal the Superintendent's actions. Flynn defends the Court of Special Appeals' holding that he had no right to appeal the Superintendent's action. He further argues that petitioners should be entitled only to a qualified privilege. Neither side has raised any state or federal constitutional issues in this case, and neither side has argued that any of this Court's decisions should be overruled.

II.

A.

***

In *Gersh v. Ambrose, supra*, 291 Md. 188, 434 A.2d 547, this Court for the first time addressed the issue of whether the absolute privilege should apply to administrative proceedings. The Court, in an opinion by Judge Cole, again relying upon British authority, held that the privilege should apply to some administrative proceedings. [3] We stated, 291 Md. at 197, 434 A.2d at 551-552, that the application of the absolute privilege in administrative proceedings

"will in large part turn on two factors: (1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements."

We held that the privilege did not apply to the administrative proceeding in the *Gersh* case, as the proceeding was substantially "an ordinary open public meeting." 291 Md. at 196, 434 A.2d at 551. The proceeding did not resemble an adjudicatory administrative proceeding or a contested case administrative proceeding under the Maryland Administrative Procedure Act. *See* Code (1984, 1999 Repl. Vol.), §§ 10-201 through 10-226 of the State Government Article.

***

B.

The Court of Special Appeals in the present case acknowledged that the “prong" of the *Gersh v. Ambrose* "test" was met, saying (*Flynn v. Reichardt, supra*, 131 Md. App. at 394, 749 A.2d at 202):

"In this case, the first prong of the *Gersh* test is clearly met. As the lower court observed, ‘There is really nothing more important to the core of the well-being of our community, our State and our nation than the public school system.' It is unquestionably an issue of strong public interest that students and parents should be protected from suit for reporting a teacher's alleged sexual misconduct."

The Court of Special Appeals also indicated, in one part of its opinion, that if Flynn had been entitled to appeal the Superintendent's action, the "second prong" of *Gersh v. Ambrose* would have been met, as "adequate procedural safeguards are available at the appellate level." *Ibid.* As previously mentioned, however, the intermediate appellate court held "that Flynn did *not* have the opportunity to appeal or request a hearing." 131 Md. App. at 397, 749 A.2d at 203. We disagree.

Section 4-205(c) of the Education Article of the Maryland Code provides as follows:

"(c) *Interpretation of law; controversies and disputes.* -

(1) Subject to the authority of the State Board under § 2-205(e) of this article, each county superintendent shall explain the true intent and meaning of:

(i) The school law; and

(ii) The applicable bylaws of the State Board.

(2) Subject to the provisions of § 6-203 and Subtitle 4 of Title 6 of this article and without charge to the parties concerned, each county superintendent shall decide all controversies and disputes that involve:

(i) The rules and regulations of the county board; and

(ii) The proper administration of the county public school system.

(3) A decision of a county superintendent may be appealed to the county board if taken in writing within 30 days after the decision of the county superintendent. The decision may be further appealed to the State Board if taken in writing within 30 days after the decision of the county board."

In this case, after quoting § 4-205(c), the Court of Special Appeals stated (131 Md. App. at 401, 749 A.2d at 206):

"Contrary to appellees' assertion, § 4-205(c) does not provide a right to appeal *any* decision by a county superintendent, but rather, only those decisions that explain the true intent and meaning of the school law and the applicable bylaws of the State Board, as well as decisions involving the rules and regulations of the county board and the proper administration of the county public school system. A superintendent's decision to suspend a teacher during the

investigation of a complaint and subsequent decision to reprimand is not provided an appeal pursuant to this section of the Maryland Code."
The appellate court did not go on to explain why a superintendent's decision to reprimand a teacher or transfer a teacher to another school because of misconduct is not a decision in a "dispute" involving the "proper administration of the county public school system."

Under the plain language of the statute, as well as this Court's opinions, the dispute in this case did involve the proper administration of the school system. Moreover, in light of the regulations concerning nondiscrimination, gender equity, and sexual harassment, previously referred to in this opinion, *supra* n.1, the dispute also involved the "rules and regulations of the county board." Section 4-205(c) broadly covers county superintendents' decisions on "*all* controversies and disputes" involving rules and regulations of the county school board, the school law and bylaws of the State Board of Education, and the "proper administration of the county public school system" (emphasis added). It is difficult to imagine any disciplinary action against a teacher or coach, taken by a county superintendent, that would fall outside of the broad scope of the statute.

In *Board of Education, Garrett Co. v. Lendo*, 295 Md. 55, 453 A.2d 1185 (1982), a public school teacher who also coached was given an "evaluation" that he "needs improvement" on one item relating to coaching after school hours. The evaluation was made by the teacher's principal and later upheld by the local school superintendent. This Court, in holding that the teacher and coach had a right to appeal under § 4-205(c) and that the State Board of Education was required to entertain the appeal under § 4-205(c), traced the history of the statute since its initial enactment in 1916. In an opinion by Judge Marvin Smith, we rejected the State Board of Education's recent restrictive interpretation that § 4-205(c) required the State Board to hear only those appeals which involved the state "'Education Article or a State Board bylaw,'" 295 Md. at 59, 453 A.2d at 1187. The Court pointed out that the statutory "language is plain and unambiguous, " 295 Md. at 63, 453 A.2d at 1189. We stated that the "argument that this [broad interpretation] will place a tremendous workload on the State Board of Education, that the number of appeals will create fiscal problems, and that the county superintendents collectively make hundreds of decisions each day do not override the plain meaning of the statute which it is our duty to interpret. The workload of the State Board and the fiscal implications are problems for the General Assembly." 295 Md. at 64-65, 453 A.2d at 1190.

***

Under the broad language of § 4-205(c) of the Education Article, and the judicial decisions applying that statute, Flynn was entitled to appeal to the Montgomery County Board of Education and, if there unsuccessful, entitled to appeal to the State Board of Education. The regulations of the Montgomery County public school system grant a right to a hearing with respect to appeals under § 4-205(c) of the Education Article. *See* the Montgomery County Board of Education's Policy BLB, entitled "Rules of Procedure in Appeals and Hearings." Flynn had a right to a second appeal to the State Board of Education, a right to a hearing, and a right to judicial review of the State Board's final administrative decision. The proceedings before the State Board and the judicial review proceedings are governed by the State Administrative Procedure Act, §§ 10-201 through 10-226 of the State Government Article. *See, e.g.*, § 10-203 of the State Government Article delineating the scope of the "Contested Cases" subtitle of the Administrative Procedure Act; *Board of Education of Prince George's County v. Waeldner*, *supra*, 298 Md. at 363, 470 A.2d at 336; *Hunter v. Board of Education, Montgomery County*, 292 Md. 481, 489, 439 A.2d 582, 586 (1982); *Resetar v. State Board of Education*, *supra*, 284 Md. at 553-554, 399 A.2d at 233-234; *Strother v. Howard County Board of Education*, *supra*, 96 Md. App. at 107-110, 623 A.2d at 721-722.

The Court of Special Appeals also indicated that, even if Flynn had been entitled to appeal and obtain hearings before the County Board and the State Board, there would still be inadequate procedural safeguards because the alleged defamation had already occurred in the petitioners' initial complaint. The intermediate appellate court stated (131 Md. App. at 397, 749 A.2d at 203): "Procedural safeguards that are available only on appeal *after* adverse action has already been taken fail to minimize the occurrence of defamatory statements, as required by *Gersh*." This same situation, however, is going to exist in every case in which a complaint is made about government personnel, and the complaint initiates an administrative proceeding. The Court of Special Appeals' criticism would be equally applicable to the facts of *Miner v. Novotny*, *supra*, 304 Md. 164, 498 A.2d 269, or *Imperial v. Drapeau*, *supra*, 351 Md. 38, 716 A.2d 244. In both of those cases, the alleged defamation was contained in the initial complaint against the government employee, and the opportunity for a hearing to rebut the defamation came later. In fact, in probably the majority of cases in which this Court has held that an absolute privilege was applicable, the alleged defamation occurred before a hearing or trial could

take place at which the defamatory statement could be rebutted. In addition to *Miner* and *Imperial*, *see, e.g., Odyniec v. Schneider*, *supra*, 322 Md. 520, 588 A.2d 786 (physician's defamatory statement was made at an examination prior to the health claims arbitration hearing); *Keys v. Chrysler Credit Corp.*, *supra*, 303 Md. 397, 494 A.2d 200 (defamation contained in a writ of garnishment); *Adams v. Peck*, *supra*, 288 Md. 1, 415 A.2d 292 (defamatory statement was made in a pre-trial report to an attorney).

The administrative proceedings and appeals that were available to Flynn were much more extensive than most administrative proceedings in a non-public education matter. He was entitled to hearings, two levels of administrative appeals, and judicial review. [4] In principle, this case is indistinguishable from *Miner v. Novotny*, *supra*, 304 Md. 164, 498 A.2d 269. The Circuit Court correctly held that Flynn's defamation action was barred by absolute privilege.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY. RESPONDENT TO PAY THE COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS.

DISSENT BY: Cathell

Dissenting opinion by Cathell, J.

Cathell, J., dissenting:

I respectfully dissent from the reasoning and the result reached by the majority. The majority has, once again, extended a creature that this Court created, but did not apply, in *Gersh v. Ambrose*, 291 Md. 188, 434 A.2d 547 (1981): administrative proceeding absolute immunity [absolute or qualified privilege]. [1]

***

I have concluded that I was wrong and that this Court lacks the power to modify the common law to create new absolute privileges (absolute immunity) for parties, complainants or witnesses in administrative proceedings. In my view, the exercise of that power violates a unique provision of the Maryland Declaration of Rights (*see infra*) not mentioned in any of the Maryland cases since the 1901 case of *Coffin v. Brown*, 94 Md. 190, 50 A. 567 (1901), a case which we have never overruled. No similar provision is found in the federal constitution. No such constitutional limitations are mentioned in the *Gersh* discussion of the foreign state cases there examined, as being contained in any of the constitutions of those foreign states.

I would also dissent in this specific case, even if the Maryland constitutional provision did not exist. The standards that we discussed in *Gersh*, and later applied (unconstitutionally in my current view) in *Imperial*, in *Odyniec v. Schneider*, 322 Md. 520, 588 A.2d 786 (1991), and in *Miner v. Novotny* 304 Md. 164, 498 A.2d 269 (1985), in respect to administrative proceedings being the functional equivalent of judicial proceedings, simply do not exist in the case at bar. To apply absolute privilege, principles to the case at bar is to open Pandora's Box. [2] If an absolute privilege exists here, it will exist for all administrative proceedings no matter how far from, or attenuated they are from, the type of proceedings contemplated in *Gersh*. [3]

***

We long ago established the basic rule for determining the extent of privilege in a defamation context. Although there have been recent cases, including *Imperial*, *Odyniec*, and *Miner*, in which we have applied a much broader interpretation (though I now doubt the constitutional validity of those cases), we have never overruled the basic holding of *Maurice v. Worden*, 54 Md. 233, 253-55 (1880), where we stated:
"There are two classes of privileged communications which form exceptions to the general law of libel. The one is absolutely privileged and cannot be sued upon, while the other may be the cause of action, and the suit upon it maintained on proof of actual malice [qualified privilege/immunity]. These privileges rest alone on the ground of public policy, and in speaking of them we have no reference to privileges which are secured by constitutional or statutory provisions.

". . . Those enumerated by the author as being absolutely privileged, though false and malicious, and made without reasonable or probable cause, 'are communications made in the course of judicial proceedings, whether civil or criminal, and whether by a suitor, prosecutor, witness, counsel or juror; or by a judge, magistrate, or person presiding in a judicial capacity, of any court or other tribunal, judicial or military, recognized by and constituted according to law; and so also communications made in the course of parliamentary proceedings, whether by a member of either House of Parliament or by petition of individuals who are not members, presented to either house or to a committee thereof.' Beyond this enumeration we are not prepared to go. The doctrine of absolute privilege is so inconsistent with the rule that a remedy should exist for every wrong, that we are not disposed to extend it beyond the strict line established by a concurrence of decisions.

. . .

"We cannot, in view of the authorities or upon principle, hold the communication declared upon to be absolutely privileged. It was made in the line of duty, and this only clothes it with a privilege that is qualified. The occasion operates as a defense, unless express malice be proved.

"'. . . The other class of privileged communications, for which there is no absolute privilege, is very numerous. In order to make the writer or publisher liable, it must appear that he acted maliciously and without probable cause. If there were no probable cause for the communication, the law implies that it was made with malice. If, however, it appear that there was probable cause, the communication is privileged, no matter how much actual malice dictated it.' . . . In *White v. Nicholls*, 44 U.S. 266, 3 How. 266, 11 L. Ed. 591, where the question of privilege was presented, the Supreme Court refused to extend the doctrine of absolute privilege to cases where the author of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral. . . . The court [said] on page 287, 'But the term "exceptions," as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actions or transactions placed above the cognizance of the law, absolved from the commands of justice. It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti*; and still more difficult to imagine how such a privilege could be instituted or tolerated upon the principles of social good. . . .'" [Citations omitted.] [Alterations added.]

***

There are a number of cases where this Court has extended a qualified privilege to certain persons in respect to communications that were potentially defamatory. They include *Orrison v. Vance*, 262 Md. 285, 292, 277 A.2d 573, 576 (1971), where we extended a qualified privilege to a person who had reported a potentially dangerous, and possibly illegal, situation to appropriate authorities. There, we held that "we think the words spoken and written by Vance enjoyed, in these circumstances, a qualified privilege . . . ." *Id*.

I agree that the qualified privilege extended to Vance in *Orrison* was appropriate. More important, it preserved Orrison's right to require that Vance be responsible for his words, and Vance's constitutionally imposed duty to be responsible for abuses, if any, in the exercise of his speech.

In the instant case, my difference with the majority is that it has extended the improper privilege, *i.e.*, an absolute privilege, instead of a qualified privilege. [5] Why, as a matter of policy, should parents and their children be absolutely immune when they are not acting in good faith? [6] Why should parents and their children be permitted to purposefully ruin the lives of others by maliciously communicating defamatory statements? I see no reason, based upon public policy concerns, or on anything else, to extend absolute immunity in such circumstances. The public policy concerns expressed by the majority could, in my view, be fully addressed by the extension of a qualified privilege under the circumstances here present. And, in the process, the constitutional duty imposed upon the exercise of speech in this state could be preserved.

In *Orrison*, the Court, in extending a qualified privilege, noted certain factors very similar to the factors the majority notes in the present case, but the majority in the case at bar goes even further than the Court did in *Orrison*. It extends an absolute privilege.

We noted in *Orrison* that the extension of the qualified privilege in respective cases, depended upon whether the communications were of the type and character, which would allow the claim of privilege to be made. We looked first

at the relationships between Vance and the recipients of his communications, then the legal, moral or social duty impelling Vance to transmit the information, and whether he did so in good faith. In *Orrison*, 262 Md. at 293, 277 A.2d at 577, quoting the *Restatement of Torts* § 598:

"'An occasion is conditionally privileged when the circumstances induce a correct or reasonable belief that

(a) facts exist which affect a sufficiently important public interest, and

(b) the public requires the communication of the defamatory matter to a public officer or private citizen and that such person is authorized or privileged to act if the defamatory matter is true."

We commented then, that:

"The question is not whether Orrison obeyed the law but whether Vance was justified in saying what he did say. . . . He was trying to eliminate what he thought was a very real danger and we are quite unwilling to say that he was not justified in thinking that the danger still existed. Moreover, the State's Attorney, the police, the commissioners and their attorney were certainly reasonable recipients of the communications and the citizens to whom he spoke shared his interest in obviating the danger. We think his efforts in this regard were conditionally privileged."

Orrison, 262 Md. at 293-94, 277 A.2d at 577 (citations omitted) (footnote omitted).

***

As I note, *infra*, the United States Constitution, unlike Maryland's Declaration of Rights, contains no provision in its free speech clause providing that a speaker must remain responsible for abuses in the exercise of speech. I would suggest that in purely state matters, *i.e.*, this, and similar cases, the federal cases extending absolute privileges beyond the traditional common law absolute privileges, are not appropriate authority to extend such privileges where a state constitution requires as a condition of speech, the assumption of responsibility for abuses of that speech.

***

Even without a consideration of Maryland constitutional requirements, I would, again, respectfully suggest, that the safeguards in place in the case at bar as pointed out and relied on by the Court of Special Appeals in its opinion, and in the majority opinion in this case, and in similar cases, are woefully inadequate, even under *Imperial*, *Odyniec* and *Miner* standards, to safeguard the teachers of this State from false, career damaging and career ending, accusations, of the nature extant in this case. What the majority does with its opinion, is to empower disgruntled students, of which one would think there are many, to remove teachers with whom they do not agree, and to do so with absolute immunity from meaningful consequences.

Under the majority's holding, while there are remedies relating to a teacher keeping his job, there are no remedies where the defamed teacher can redeem his or her reputation, nor any significant consequences for a student who fabricates a potentially hurtful claim against a teacher. If a student has a problem with a teacher, all she or he has to do is falsely accuse the teacher of some wrongful act. It ruins the teacher's career. And the student is not accountable to the teacher for his or her deceitful actions. The disturbing examples are seemingly endless.

If a teacher, Ms. Smith, is a tough grader in a required course, all a student needs to do is to falsely claim that she touched him or her in an inappropriate manner, and Ms. Smith will be removed from her teaching position. She will be gone, along with her tough grading reputation. Another teacher, Mr. Jones, sends a student to the principal's office for misbehavior. When the student arrives there he or she tells the principal that Mr. Jones is only trying to punish him or her because he or she has resisted his advances, complained about his sexist remarks, or he or she may accuse him of sexual, gender or racial discrimination. Instead of the student being suspended, Mr. Jones, just like Ms. Smith, will be terminated. These teachers not only lose their jobs, but their careers are destroyed. Even if the student later admits that he or she was lying, Mr. Jones' personnel records will always note that the complaint was made. A later finding of "unsubstantiated" merely means "not proven." Future prospective employers will always evaluate the existence of the charges in comparing Mr. Jones or Ms. Smith, with other applicants for the same positions. In these times of political correctness, the hiring administrators will take the safest course. They will not hire Ms. Smith or Mr. Jones.

Ms. Smith and Mr. Jones are forever tainted, as is Mr. Flynn in the case at bar. Why? In Mr. Flynn's case, merely because several girls wanted a separate cross-country coach. Mr. Flynn will forever be punished for acts he did not commit. He will be forced to pay simply because the appellants in this case failed to raise their children to be truthful,

raised them without a sense of integrity, without sufficient regard for the nature and consequences of their actions. For the failures of these parents, Mr. Flynn pays. With its decision, the majority endorses what the children have done and what their parents have created; it does so in the name of public policy concerns based upon the importance of open avenues of communication for students and their parents. In the process, the majority is sending a message, that it is okay to lie. This is clearly not the type of activity that this Court should encourage and protect by a grant of absolute immunity.

Regardless of which standard is applied, with its decision the majority runs the risk of putting the children in charge of the schools. A logical extension of the holding will put patients in charge of mental health facilities, inmates in charge of correctional institutions, and if its provisions were to be extended to animals, animals in charge of zoos. We should not facilitate such a potential transfer of control.

Moreover, the majority, in my view, does not sufficiently address another issue of policy and public concern -- the impact of its decision, along with the culmative impact of the numerous similar cases based upon false accusations by students, on the teaching profession as a whole.

According to the National Center for Education Statistics, [9] this country will need 2,200,000 new teachers for the public schools in this decade because of teacher attrition and retirement and the anticipated increase in enrollments. It is predicted that half of the teachers who will be in public school classrooms ten years from now have not yet been hired. By 2008, public school enrollments will exceed 54,000,000 students, an increase of 2,000,000 from 1998. Elementary school enrollments are expected to increase by 17% and high school enrollments by 26% over 1998 enrollments. The need for new teachers in high poverty urban and rural districts alone, in the decade will be more than 700,000 teachers.

***

I would respectfully suggest that the establishment of a conditional or qualified privilege standard would better address, what I perceive to be, both areas of public concern. The need for students to communicate with school administrators and the need to ensure that the profession of teaching remain attractive to potential teachers.

Finally, in addition to my belief that the creation of an absolute privilege is not warranted even under the *Gersh*, *Imperial*, *Odyniec* and *Miner* standards, nor that an absolute privilege properly balances the competing public policy concerns, I do not believe that this court can constitutionally fashion new non-traditional, common law absolute privileges in cases involving speech, *i.e.*, defamation. As I perceive the facts of the instant case, and in prior cases as well, by creating the absolute privilege, the Court terminates all remedies for the wrongs committed in a manner that conflicts with the Maryland Declaration of Rights.

ARTICLE [*64] 40 - DECLARATION OF RIGHTS**

Article 40 of the Maryland Declaration of Rights, provides for freedom of press and of speech, but qualifies the right to freedom of speech. It provides in relevant part: "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that privilege*." *Id.* (emphasis added). We have held in a prior defamation case that has never been overruled, that the right to speak is subject to the caveat in Article 40, that the speaker is responsible for abuse of the right.

Twenty-one years after we decided *Maurice*, in *Coffin v. Brown*, 94 Md. 190, 50 A. 567 (1901), we addressed the issue of absolute privilege, at least partially in a constitutional context, incorporating the meaning of Article 40 of the Maryland Declaration of Rights. In *Coffin*, the alleged defamatory communication was addressed to a public officer, the Chairman of the Democratic State Central Committee, and concerned the qualifications of Brown to be a supervisor of elections. The communication contained this language:
"This man Brown was a Justice of the Peace under Democratic rule, and at that time kept a speak-easy, where he sold whiskey, and then as Justice fined the men for disorderly conduct. He helped stuff the ballot-box at the Republican primaries in Vansville District two years ago, and has no moral character whatever. . . . A man that everyone who knows him believes can be induced to perpetrate any crime in politics that will pay him. . . ."
Id. at 192, 50 A. at 567.
In reversing a lower court judgment for the libeler, this Court said:

"If every appointee of a President, Governor, or other officer seeking re-election, is to be liable to be subjected to false charges, imputing crimes or other acts that bring reproach upon him, and he is to be deprived of all redress on the theory that words so uttered or published are privileged, then indeed is his lot an unfortunate one. . . . Our Declaration of Rights declares 'that any citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that privilege.*' It is a gross abuse of that privilege to falsely prefer such charges as are made against the appellee in this letter . . . ."
Id. at 197-98, 50 A. at 569-70 (emphasis in original). This constitutional provision recognizes, indeed, in my view reflects, the State's constitutional interest in affording a greater degree of protection to private persons who are defamed, than that afforded by the majority's decision and affords a greater degree of protection than that provided by the United States Constitution's guarantees of free speech.

The majority's opinion in this case, and perhaps in other recent cases as well, in my view, is in conflict with this Maryland constitutional provision. The majority, at least for the purposes of creating an absolute privilege, acknowledges that the statements of the girls were made with knowledge that they were false, *i.e.*, an abuse, but, flatly states, never-the-less, that the relators, the girls and their parents, are absolutely not responsible for the abuse because of the dictates of public policy concerns. I respectfully suggest that this Court lacks the power to create new common law absolute privileges. To do so in specific new classes of cases, abolishes, or tends to abolish, the Maryland constitutional responsibility requirement by judicial fiat, under the guise of public policy concerns.

It is quite a different situation to create a "qualified privilege" exception. In that circumstance, the injured party retains a remedy, the right and the ability to attempt to prove that the statement at issue was not made in good faith, was not reasonable, and lacked a probable cause basis, in the absence of which, the injured party might recover damages as recourse for the injury suffered. In such a manner, the constitutional obligation that requires a speaker to be responsible for abuses is met. In a case that lacks good faith, reasonableness, and probable cause, the speaker is held responsible for his false and defamatory speech, and the constitution is satisfied. If, however, a plaintiff cannot show a lack of good faith, a lack of reasonableness and/or a lack of probable cause, a speaker's statements may be privileged.

By creating new absolute privileges whenever this Court perceives it to be proper, according to its conception of proper public policy concerns, the Court is, in essence, judicially repealing the constitutional requirement that a speaker be responsible for abusing the privileges of speech. While this Court might have had power normally, in the absence of the exercise of such power by the Legislature, to modify the common law foundation of the law of defamation, it (and the Legislature for that matter), lacks the power to modify the Declaration of Rights of the Constitution of Maryland, which is exactly what occurs when either entity provides that certain speakers are not responsible for abuses in their exercises of speech. With all due respect, it is my belief that in our constitutional form of government, this Court lacks the power to do what it has done in this case, and perhaps, in other recent cases as well (in at least one of which I, admittedly, joined).

The Maryland Constitution contains, as indicated, a provision requiring a speaker to be responsible for abuses of speech. We have recognized that requirement in declining to recognize absolute privileges. *Coffin, supra*.

We did at one time recognize the existence of an absolute privilege arising out of the United States Constitution (although later changing course). We attempted to base an absolute privilege on the federal constitution's petition clause, but our reliance on that provision was later negated. *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), forced us to abandon our reliance on federal case law and the position we had adopted in *Sherrard v. Hull*, 296 Md. 189, 460 A.2d 601 (1983), that a person who was petitioning the government for redress of a grievance had an absolute privilege. As a result, in *Miner*, *supra* and *infra*, we overruled *Sherrard* and *Bass v. Rohr*, 57 Md. App. 609, 471 A.2d 752, *cert. dismissed*, 301 Md. 641, 484 A.2d 275 (1984), as to the existence of an absolute privilege based upon the speaker's right to petition.
"In light of *McDonald*, the *qualified* privilege recognized in *New York Times* and its progeny constitutes the extent of the constitutionally-mandated protection of the First Amendment right to petition the government for redress of grievances. To the extent that they are inconsistent with *McDonald* and this opinion, *Sherrard* and *Bass* are no longer authoritative rulings."
Miner, 304 Md. at 170, 498 A.2d at 272 (emphasis added). Instead, we then based the creation of the absolute privilege we wanted to create in *Miner*, on the administrative proceeding absolute privilege we had formulated under our self-granted power to modify the common law (albeit, unrealized by us, as I perceive it, in an unconstitutional manner), but not applied in *Gersh*.

We adopted the opinion of the Court of Special Appeals in *Sherrard v. Hull*, 296 Md. 189, 460 A.2d 601 (1983). That court, in *Sherrard v. Hull* 53 Md. App. 553, 555, 456 A.2d 59, 61 (1983), had recognized an absolute privilege for persons addressing a legislative body, basing such a privilege on a person's federal constitutional right to petition such bodies to address their grievances and held "that remarks made by an individual in the course of petitioning for a redress of grievances before a legislative body are absolutely privileged under the First Amendment to the United States Constitution." The Court of Special Appeals noted that the First Amendment forbade Congress, and, through the Fourteenth Amendment the states, from passing any law "abridging" the right of the people to petition the government for a redress of grievances.

The Court of Special Appeals in *Sherrard* then discussed the split among the state and federal courts as to whether the "petitioning" privilege should be absolute or qualified. In recognizing that most jurisdictions had recognized only a qualified privilege, the court ascribed to those cases the fact that they involved indirect petitioning (such as in the case at bar).
"Those cases which would hold the privilege to be qualified generally predate *Noerr-Pennington* or are distinguishable in that they do not relate to the direct petitioning of a legislative body. In light of the evolution of the petitioning doctrine, we therefore find them to be unpersuasive. The modern, better reasoned cases hold that *true* petitioning activity should be absolutely privileged.

"There is a common thread which runs through the fabric of absolute defamation immunity as applied in Maryland. The judge and jury in the trial and the senator, delegate and councilperson in the legislative proceeding have a common need to receive as much information as is available in order to render a proper and informed decision."
Id. at 572, 456 A.2d at 69-70 (emphasis added). It is clear that, in any event, the absolute privilege extended to petitioning activities in *Sherrard* by the Court of Special Appeals, and then adopted by this Court, only to be later overruled, only extended to the petitioning of primary legislative entities, and not to other lessor governmental administrative agencies or their proceedings. With our overruling of *Sherrard*, in *Miner*, and in the cases since, including *Imperial*, *Odyniec*, *Miner*, and with the majority's holding in the present case, we appear to have created a bizarre situation in Maryland where one directly petitioning legislative entities has only a qualified privilege, at least so far as the constitutionally guaranteed right to petition is concerned, but when one indirectly petitions a legislative or executive branch by complaining to a subordinate agency of the legislative or executive branches he gets an absolute privilege based upon our common-law creation in *Gersh* of an absolute administrative agency privilege. This is nonsensical.

I would affirm the Court of Special Appeals, but for all of the reasons stated in this dissent, especially on the basis that Article 40 of the Declaration of Rights forbids the judicial creation of new common law absolute immunity from responsibility for abuses of speech, *i.e.*, absolute immunity in defamation cases. I would either overrule the holdings of this Court in *Imperial*, *Odyniec*, and *Miner*, or, hold that they are no longer authoritative rulings, or, in the alternative, I would modify the holdings in those cases so that they would reflect the existence of qualified privilege/immunity rather than absolute privilege/immunity.

To continue on the path this Court has taken in recent years is, in my view, a totally unwarranted extension of the principles of immunity, and, more important, is an affront to the constitutional provision found in Article 40 of the Maryland Declaration of Rights.

United States Constitution: First and Fourteenth Amendments

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Publishing Information that Harms Another's Reputation

When you publish online, whether it's on a blog, in a podcast, in a video you upload to YouTube, or simply in a comment on another's website, you might say or do something that harms the reputation of another person, group, or organization. Fortunately, not everything you publish that harms the reputation of others will open you up to legal liability. For example, you won't generally face legal liability if you simply state your opinion, even if your opinion is harsh, critical, or wildly off-base.

Nevertheless, if you find yourself about to publish something that could harm another's reputation, you should spend some time familiarizing yourself with the various laws that protect reputation. The sections that follow are not intended to make you an expert on libel law, but merely to help you identify potential "red flags" so that when you publish something that might negatively impact the reputation of another person, group, or organization, you will know to be extra careful and will take the necessary steps to minimize your potential legal liability.

First, ask yourself whether what you intend to publish would UPSET YOU if someone else were to publish the information about you. This simple test won't tell you for sure whether you will be liable if the information you publish turns out to be false, but it will get you focused on the statements that should be of greatest concern. Moreover, putting aside the legal implications of what you publish, statements that upset others are more likely to draw their ire and result in a lawsuit, even when they don't actually have a viable legal claim. Depending on what you say and how you say it, you will likely need to be concerned with two different, but related, legal doctrines that aim to protect against reputational harm:

Defamation: Defamation is the general term for a legal claim involving injury to one's reputation caused by **false statements of fact** and includes both libel and slander. The crux of a defamation claim is falsity. Truthful statements that harm another's reputation will not create liability for defamation (although they may open you up to other forms of liability if the information you publish is of a personal or highly private nature).

False Light: False light is similar to defamation. Claims for false light generally involve **untrue implications** rather than directly false statements. For instance, an article about sex offenders illustrated with a photograph you pulled from Flickr of an individual who is not, in fact, a sex offender could give rise to a false light claim, even if the article and photo caption never make the explicit false statement (i.e., identifying the person in the photo as a sex offender) that would support a defamation claim.

Keep in mind that the republication of someone else's words can itself be defamatory. In other words, you won't be immune simply because you are quoting another person making the defamatory statement, even if you properly attribute the statement to it's source. For example, if you quote a witness to a traffic accident who says the driver was drunk when he ran the red light and it turns out the driver wasn't drunk and he had a green light, you can't hide behind the fact that you were merely republishing the witness' statement (which would likely be defamatory).

However, there is an important provision under section 230 of the Communications Decency Act that may protect YOU if a third party – not you or your employee or someone acting under your direction – posts something on your blog or website that is defamatory. We cover this protection in more detail in the section on Publishing the Statements and Content of Others.

So, what should you do if you are facing the prospect of a lawsuit for defamation or false light?

First, familiarize yourself with the section on **Practical Tips for Avoiding Liability Associated with Harms to Reputation**. While you can't always eliminate your legal risks when publishing online, there are a number of ways you can minimize the likelihood of your being on the receiving end of a defamation or false light lawsuit.

Second, if you think you've been improperly sued in retaliation for your speaking out on a public issue or controversy, you may be able to get the case dismissed or file a counter claim under your state's law protecting against **Strategic Lawsuits Against Public Participation** (SLAPP). If you are sued in a state that has an anti-SLAPP law, you may be able to end the lawsuit quickly and recover your costs and attorneys' fees.

Proving Fault: Actual Malice and Negligence

Unlike other countries that hold a publisher liable for every defamatory statement regardless of what steps he or she took prior to publication, under U.S. law a plaintiff must prove that the defendant was at fault when she published the defamatory statement. In other words, the plaintiff must prove that the publisher failed to do something she was required to do. Depending on the circumstances, the plaintiff will either need to prove that the defendant acted negligently, if the plaintiff is a private figure, or with actual malice, if the plaintiff is a public figure or official.

Celebrities, politicians, high-ranking or powerful government officials, and others with power in society are generally considered public figures/officials and are required to prove actual malice. Unlike these well-known and powerful individuals, your shy neighbor is likely to be a private figure who is only required to prove negligence if you publish something defamatory about her. Determining who is a public or private figure is not always easy. In some instances, the categories may overlap. For example, a blogger who is a well-known authority on clinical research involving autism may be considered a public figure for purposes of controversies involving autism, but not for other purposes.

We discuss both of these standards and when they apply in this section.

Actual Malice

In a legal sense, "actual malice" has nothing to do with ill will or disliking someone and wishing him harm. Rather, courts have defined "actual malice" in the defamation context as publishing a statement while either

-knowing that it is false; or

-acting with reckless disregard for the statement's truth or falsity.

It should be noted that the actual malice standard focuses on the defendant's actual state of mind at the time of publication. Unlike the negligence standard discussed later in this section, the actual malice standard is not measured by what a reasonable person would have published or investigated prior to publication. Instead, the plaintiff must produce clear and convincing evidence that the defendant actually knew the information was false or entertained serious doubts as to the truth of his publication. In making this determination, a court will look for evidence of the defendant's state of mind at the time of publication and will likely examine the steps he took in researching, editing, and fact checking his work. It is generally not sufficient, however, for a plaintiff to merely show that the defendant didn't like her, failed to contact her for comment, knew she had denied the information, relied on a single biased source, or failed to correct the statement after publication.

Not surprisingly, this is a very difficult standard for a plaintiff to establish. Indeed, in only a handful of cases over the last decades have plaintiffs been successful in establishing the requisite actual malice to prove defamation.

The actual malice standard applies when a defamatory statement concerns three general categories of individuals: public officials, all-purpose public figures, and limited-purpose public figures. Private figures, which are discussed later in this section, do not need to prove actual malice.

Public Officials

The "public officials" category includes politicians and high-ranking governmental figures, but also extends to government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs. Courts have interpreted these criteria broadly, extending the public figure classification to civil servants far down the government hierarchy. For example, the supervisor of a county recreational ski center was held to be a "public official" for purposes of defamation law. See Rosenblatt v. Baer, 383 U.S. 75 (1966). Some courts have even extended the protection to all individuals engaged in matters of public health, such as hospital staff, given the importance of health issues for the general public. See Hall v. Piedmont Publishing Co., 46 N.C. App. 760, 763 (1980).

In general, if an individual is classified as a public official, defamatory statements relating to any aspects of their lives must meet the actual malice standard of fault for there to be liability. Moreover, even after passage of time or leaving

office, public officials must still meet the actual malice standard because the public has a continued interest in the misdeeds of its leaders.

Public Figures

There are two types of "public figures" recognized under defamation law: "all-purpose" public figures and "limited-purpose" public figures.

All-purpose public figures are private individuals who occupy "positions of such persuasive power and influence that they are deemed public figure for all purposes. . . . They invite attention and comment." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1972). For these individuals, the actual malice standard extends to virtually all aspects of their lives.

This category includes movie stars, elite professional athletes, and the heads of major corporations. Tom Cruise is one; that character actor you recognize instantly but can't quite name is probably not an all-purpose public figure.

As with public officials, the passage of time does not cause this class of individuals to lose their public figure status as long as the original source of their fame is of continued interest to the public.

Limited-Purpose Public Figures

The second category of public figures is called "limited-purpose" public figures. These are individuals who "have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch Inc., 418 U.S. 323 (U.S. 1974). They are the individuals who deliberately shape debate on particular public issues, especially those who use the media to influence that debate.

This category also includes individuals who have distinguished themselves in a particular field, making them "public figures" regarding only those specific activities. These limited-purpose public figures are not the Kobe Bryants, who are regarded as all-purpose public figures, but rather the journeymen basketball players of the league.

For limited-purpose public figures, the actual malice standard extends only as far as defamatory statements involve matters related to the topics about which they are considered public figures. To return to our basketball example, the actual malice standard would extend to statements involving the player's basketball career; however, it would not extend to the details of his marriage.

As regards figures who become prominent through involvement in a current controversy, the law is unfortunately rather murky. In general, emphasis is placed not on whether the controversy is a subject of public interest, but rather:

- The depth of the person's participation in the controversy.
- The amount of freedom he or she has in choosing to engage in the controversy in the first place (e.g., if they were forced into the public light). See Wolston v. Reader's Digest Association, 443 U.S. 157 (1979).
- Whether he has taken advantage of the media to advocate his cause. See Time, Inc. v. Firestone, 424 U.S. 448 (U.S. 1976).

Keeping in mind the difficulty of making the determination of who is a limited-purpose public figure, we've collected the following cases which might be helpful. Courts have found the following individuals to be limited-purpose public figures:

- A retired general who advocated on national security issues. See Secord v. Cockburn, 747 F.Supp. 779 (1990).
- A scientist who was prominent and outspoken in his opposition to nuclear tests. See Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (1966).
- A nationally-known college football coach accused of fixing a football game. See Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
- A professional belly dancer for a matter related to her performance. See James v. Gannet Co., 40 N.Y.2d 415 (1976).
- A Playboy Playmate for purpose of a parody. See Vitale v. National Lampoon, Inc., 449 F. Supp 442 (1978).

Courts have found the following individuals not to be limited-purpose public figures (and therefore private figures):

A well-known lawyer and civic leader engaged in a very public trial involving police brutality. See Gertz v. Robert Welch Inc., 418 U.S. 323 (1972).
A socialite going through a divorce who both collected press clippings on herself and held press conferences regarding the divorce. See Time, Inc. v. Firestone, 424 U.S. 448 (U.S. 1976).
A Penthouse Pet for purposes of parody. See Pring v. Penthouse Int'l Ltd., 695 F.2d 438 (1982).

Individuals who are considered to be limited-purpose public figures remain so as long as the public has an "independent" interest in the underlying controversy. Unlike all-purpose public figures, it is relatively easy for a limited-purpose public figure to lose his status if the controversy in which he is involved has been largely forgotten. But most will still maintain their status. For example, a woman who had publicly dated Elvis Presley over a decade earlier, but who had since married and returned to "private" life, was found to remain a public figure for stories related to her relationship with Presley. See Brewer v. Memphis Publishing Co., 626 F.2d. 1238 (5th Cir. 1980).

Evaluating Public Officials, Public Figures, and Limited-Purpose Public Figures

A public official is a person who holds a position of authority in the government and would be of interest to the public even if the controversy in question had not occurred. The actual malice standard extends to statements touching on virtually any aspect of the public official's life. Even after passage of time or leaving office, public officials must still meet the actual malice standard because the public has a continued interest in the misdeeds of its leaders.

All-purpose public figures are those whose fame reaches widely and pervasively throughout society. The actual malice standard extends to statements involving virtually any aspect of their private lives. Passage of time does not affect their status as public figures as long as the source of their fame is of continued interest to the public.

A limited-purpose public figure is either:
One who voluntarily becomes a key figure in a particular controversy, **or**
One who has gained prominence in a particular, limited field, but whose celebrity has not reached an all-encompassing level.
The actual malice standard applies only to subject matter related to the controversy in question or to the field in which the individual is prominent, not to the person's entire life.

Passage of time does not affect an individual who has achieved fame through participation in a controversy as long as the public maintains an "independent" interest in the underlying controversy.

See this Chart of Public vs Private Individuals for additional examples.

Defining who is a public figure for purposes of First Amendment protections is a question of federal constitutional law, and therefore the federal courts say on the matter is decisive and binding on state courts. Accordingly, state courts *cannot* remove public-figure status from those who have been deemed public figures by the federal courts, but states *can* broaden the scope of the classification. For example, while the Supreme Court has not spoken on the status of educators, most states have recognized teachers as a class of public figures. But some states, for example California, have not done so.

Negligence Standard and Private Figures

Those who are not classified as public figures are considered private figures. To support a claim for defamation, in most states a private figure need only show negligence by the publisher, a much lower standard than "actual malice." Some states, however, impose a higher standard on private figures, especially if the statement concerns a matter of public importance.

A plaintiff can establish negligence on the part of the defendant by showing that the defendant did not act with a

reasonable level of care in publishing the statement at issue. This basically turns on whether the defendant did everything reasonably necessary to determine whether the statement was true, including the steps the defendant took in researching, editing, and fact checking his work. Some factors that the court might consider include:

- the amount of research undertaken prior to publication;
- the trustworthiness of sources;
- attempts to verify questionable statements or solicit opposing views; and
- whether the defendant followed other good journalistic practices.

While you can't reduce your legal risks entirely, if you follow good journalistic practices you will greatly reduce the likelihood that you will be found negligent when publishing a defamatory statement. Review the sections in this guide on Practical Tips for Avoiding Liability Associated with Harms to Reputation and Journalism Skills and Principles for helpful suggestions.

Appendix A: Guidelines for Attorney Coaches

Please also refer to Appendix B: Guidelines for Judges.

I. Approaches to Student Coaching

A. Initial Sessions

The first session with a student team should be devoted to the following tasks:

- Answering questions that students may have concerning general trial practices;
- Discussing court etiquette
- Explaining the reasons for the sequence of events/procedures found in a trial;
- Listening to the students' approach to the assigned case; and
- Discussing general strategies as well as raising key questions regarding the enactment.

B. Subsequent Sessions

Subsequent sessions should center on the development of proper questioning techniques by the student attorneys and sound testimony by the witnesses. Here, an attorney can best serve as a constructive observer and critical teacher—listening, suggesting, and demonstrating techniques to the team.

Students develop a better understanding of the case and learn more from the experience if the attorney coaches **do not** figure out the angles, fill in the gaps, and determine trial strategy for the team. Coaching, guiding, and asking questions of the students is far more beneficial than telling them how to proceed.

If the competition is to realize its full potential, it is crucial that you help discourage a "win-at-all-costs" attitude among your team members. Please coach your team on proper decorum when a case, or decisions throughout the case, are not decided in their favor.

It is extremely important that students are coached on and understand the "human" element of judging and how that fits into the nature of our judicial process. Part of your focus should rest upon the fact that law is not black and white, and that individuals will interpret the law differently. Similarly, <u>as in the real world</u>, court proceedings will vary in relation to the presiding judge; accordingly, scores, interpretations, and outcomes will vary. What is permitted in one courtroom may not be permitted in another; what is successful in one case, may not be successful in another.

After twenty successful years, it has been shown time and time again that the best teams are those that view defeats as opportunities to learn. Debriefing with team members after wins <u>and</u> losses helps everyone to improve their skills and increase their understanding of the law.

II. Time Commitment

There is no pre-determined amount of time that attorney coaches are expected to spend coaching their teams. Some attorneys are available for one to two sessions per month, and others are available on a daily or weekly basis. Attorneys who have caseloads which do not permit them to coach in the afternoons have worked with teams on weekday evenings or weekends.

While most teams work with one attorney coach throughout the competition season, there are a handful of teams which have opted for a "team" of attorney coaches, so that the time commitment of each attorney is decreased.

Appendix B: Guidelines for Competition Judges

I. Procedures for Scoring Competitions

Rankings are determined by both wins and points. Therefore, it is essential that the presiding judge carefully rate each team on all elements listed on the Performance Rating Sheet.

A. Special Point
Always award the Special Point immediately after the close of the trial, and before adding the scores. This point will be used only in the event of a tie.

B. Decorum
Please be sure to score each team's overall performance in decorum in the space provided on the rating sheet.

C. Announcing Your Decision
1. After awarding, tallying and double-checking the rest of the scores, your first announcement to the teams should focus on the general student performance, decorum, and legal understanding that you just witnessed.
2. Your second announcement should be which team prevailed, based on the merits of the case.
3. Your last announcement should declare who prevailed based on student performance (the score sheet).

II. Time Limitations

Students have been asked to limit their presentations to the timeframes listed below. It is particularly helpful for teams to know in advance how you will handle the time guidelines. Some judges prefer to give a warning, for instance, when there is one minute left; others expect students to be mindful of the time on their own. Still others prefer not to watch the time at all, though this has, at times, led to lengthy competitions. Students should not base an objection on the time. This is left to your discretion as the presiding judge. Competitions should last approximately 1 ½ to 2 hours.

Opening/Closing Statements	5 minutes each
Direct Examination	7 minutes/witness
Cross-Examination	5 minutes/witness
Voir Dire, as part of cross-examination	2 minutes per expert witness (in addition to the 5 minutes permitted for the cross-examination)
Re-Direct and Re-Cross Examination	3 minutes or a maximum of 3 questions

III. Mock Trial Simplified Rules of Evidence

The rules of evidence governing trial practice have been modified and simplified for the purposes of mock trial competitions. They are to govern proceedings. Other more complex rules are NOT to be raised during the trial enactment.

Attorneys and witnesses may neither contradict the Statement of Facts or Affidavits, nor introduce any evidence that is not included in this packet of materials**.** As with any perceived violation of a rule of evidence, students should object or request a bench conference.

IV. Trial Procedures

A. Motions to Dismiss
The purpose of the competition is to hear both sides; therefore, motions to dismiss, etcetera, are not allowed. There shall be no sequestration of witnesses at any time during the trial. If such a motion is made, the motion MUST be denied.

B. Opening/ Closing Arguments
Competition procedures permit only one opening statement and one closing argument for each team. In Mock Trial Competition, the Defense Team will always make the first closing argument, followed by the Prosecution/Plaintiff. There is no rebuttal in Mock Trial.

C. Direct and Cross Examinations
Each attorney (three for each side) must engage in the direct examination of one witness and the cross-examination of another.

Mock Trial Performance Score Sheet

Schools:_____vs._____
Plaintiff/Prosecution Defense

1=Fair 2=Satisfactory 3=Good 4=Very Good 5=Excellent

Please note that you are asked to give each attorney a composite score for their overall presentation: direct and re-direct or cross and re-cross. If re-direct or re-cross is NOT used, the attorney should NOT be penalized for not using this technique if there was nothing to be gained by using re-direct or re-cross.

****Please do not use fractions in scoring.****

		Prosecution/ Plaintiff	Defense
Opening Statements			
PLAINTIFF/PROSECUTION First Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
PLAINTIFF/PROSECUTION Second Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
PLAINTIFF/PROSECUTION Third Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
DEFENSE First Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
DEFENSE Second Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
DEFENSE Third Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
Closing Arguments			
Decorum/ Use of Objections: Students were courteous, observed courtroom etiquette, spoke clearly, demonstrated professionalism, and **utilized objections appropriately.**			
TOTAL			
Tie Point (Before totaling score sheet, please award one point to the team you think gave the best overall performance. This point will be used ONLY in a tie.)			
TOTAL WITH TIE POINT(provide this score only in a tie)			

I have checked the scores and tallies, and by my signature, certify they are correct:

Presiding Judge:_____ Date:_____

Teacher Coach, Defense:_____ Teacher Coach, Plaintiff:_____

Maryland State Bar Association
2008-2009
Statewide High School Mock Trial Competition

Registration Deadline……Friday, November 7, 2008
Mock Trial Guides Distributed to teams who have registered and paid by 11/7/08……...Tuesday, November 11, 2008
Circuit Competitions (1st level of competition)……..January 5, 2009-March 26, 2009

Note: All Circuit competitions must be declared to CLREP no later than March 26, 2009.

Regional Competitions (2nd Level of competition)……..Wednesday, April 1, 2009—Thursday, April 2, 2009
(The eight Circuit Champions compete against one another in a single elimination round)

Semi-Final Competitions: Annapolis, MD……....Thursday, April 23, 2009
(The top four teams compete against one another in a single elimination round.)

Statewide Finals: Annapolis, MD…….LIVE WEBCAST……Friday, April 24, 2009

Note: All competition dates are final.
A change by the Chief Judge of the State of Maryland is the only exception.

Organizing Local Competitions

The Citizenship Law-Related Education Program will:

- provide Mock Trial Guides and rules for each State competition;
- disseminate information to each circuit;
- provide technical assistance to Circuit Coordinators;
- provide all registered participants who compete for the season with a certificate of participation;
- assist in recruitment of schools;
- act as a liaison in finding legal professionals to assist teams;
- develop press releases, beginning at the Regional Level of Competition.

The role of the Bar Association is:

- to advocate involvement of local attorneys in preparing teams and hearing trials;
- to provide support to schools;
- to assist the Circuit Coordinator.

The role of the Circuit Coordinator is:

- to make decisions/ mediate at the local level when problems or questions arise;
- to establish the circuit competition calendar;
- to arrange for courtrooms, judges, and attorneys for local competitions;
- to inform and attempt to recruit all schools in the circuit;
- to work with the local Bar Associations to set court dates, recruit attorney advisors, and establish local guidelines;
- to arrange general training sessions if necessary.

The role of the individual school/teacher coach is:

- to DEMONSTRATE that winning is secondary to learning;
- to coach and mentor students about the "real-world" aspect of judging in competitions;
- to teach sportsmanship, team etiquette and courtroom decorum;
- to recruit students for the team;
- to arrange training sessions and scrimmages;
- to arrange transportation to competitions
- to supervise the team during practices and competitions;
- to work with partners to recruit attorney advisors;
- to ensure that the team arrives at all scheduled mock trial competitions.

MOCK TRIAL STATE CHAMPIONS

2007-2008
Severna Park High School
Anne Arundel County

2006-2007
Severn School
Anne Arundel County

2005 – 2006
Severna Park High School
Anne Arundel County

2004-2005
Richard Montgomery High School
Montgomery County

2003-2004
The Park School
Baltimore County

2002-2003
Elizabeth Seton High School
Prince George's County

2001-2002
Towson High School
Baltimore County

2000-2001
DeMatha Catholic High School
Prince George's County

1999-2000
Broadneck High School
Anne Arundel County

1998-1999
Towson High School
Baltimore County

1997-1998
Pikesville High School
Baltimore County

1996-1997
Suitland High School
Prince George's County

1995-1996
Towson High School
Baltimore County

1994-1995
Pikesville High School
Baltimore County

1993-1994
Richard Montgomery High School
Montgomery County

1992-1993
Elizabeth Seton High School
Prince George's County

1991-1992
Oxon Hill High School
Prince George's County

1990-1991
Westmar High School
Allegany County

1989-1990
Bishop Walsh High School
Allegany County

1988-1989
Lake Clifton/Eastern High School
Baltimore City

1987-1988
Pikesville High School
Baltimore County

1986-1987
Thomas S. Wootton High School
Montgomery County

1985-1986
Old Mill High School
Anne Arundel County

1984-1985
High Point High School
Prince George's County

1983-1984
Worcester County Team