For 35 years Justice Drowota has made the courts his ministry

CALLED TO SERVE
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PRESIDENT’S PERSPECTIVE

Confidence in jury system declining
What hath ‘Scopes’ wrought?

Eighty years ago this summer, one of the biggest jury trials in American history occurred in Dayton. Not Dayton, Ohio, but rather the county seat of Rhea County, Tenn. The trial, State of Tennessee v. John Scopes, attracted a worldwide audience as it was broadcast over a national radio network. For both good and bad, Scopes placed the American legal system and its lawyers on center stage, and we’ve been there ever since.

It was all a legal charade. John Thomas Scopes was a 24-year-old football coach who agreed to be indicted for violating a Tennessee law that banned the teaching of evolution. Never mind that Coach Scopes, was simply a substitute teacher who couldn’t recall ever teaching evolution. That was beside the point. Like football, it was all just a game to Coach Scopes, who was recruited by the American Civil Liberties Union and several “progressive” town leaders in Dayton to set up a heavyweight legal battle between legendary trial lawyer Clarence Darrow and world-famous orator William Jennings Bryan.

There was no “Court TV” in 1925. No camera in the courtroom. But there was a microphone in the courtroom, and a mighty big one at that. It was set up by WGN Radio out of Chicago to broadcast gavel-to-gavel coverage to millions of Americans.

Nancy Grace wasn’t around in those days to provide commentary. But H. L. Mencken was. He was a cynical newspaper columnist from Baltimore who covered the trial with all the objectivity of Larry Munson broadcasting a Georgia football game. Mencken was clearly rooting for Darrow, and to the chagrin of all the good progressive people of Rhea County, he referred to the citizens of Dayton as “the yokels in Monkey Town.”

The trial began on July 10, 1925, with Judge John Ralston asking a local preacher to open the proceedings with a prayer. Darrow objected. “Overruled,” said Judge Ralston, pointing out to Mr. Darrow that local ministers would be opening the proceedings each day with prayer, but would make no reference to the issues involved in the case. Judge Ralston also denied Darrow’s request that a large banner that read, “Read Your Bible Daily” be removed from the entrance of the courthouse. These two rulings should have been an indication to Darrow that he had an uphill legal battle on his hands. To say the least, it was a road game.

In the second week of trial, Judge Ralston moved the proceedings outdoors. The Rhea County courthouse wasn’t air conditioned, and those funeral home hand fans just weren’t doing the job.

It is an understatement to say that it was an unusual trial. William Jennings

(Continued on page 4)
Bryan not only served as the prosecutor. He also testified as an expert witness on the Bible.

Not to be outdone, Darrow, in his closing argument, asked the jury to find Coach Scopes guilty.

The jury deliberated for nine minutes, which is actually about eight minutes too long considering that the defense counsel had just asked them to find the defendant guilty. The jury then returned and announced it was granting Darrow’s request and finding Coach Scopes guilty. Judge Ralston accepted the verdict and fined Scopes $100. Williams Jennings Bryan promptly agreed to pay it!

Two years later, the Tennessee Supreme Court overturned the Scopes verdict on the technicality that the fine should have been set by the jury rather than by Judge Ralston.

This two-week trial some 80 years ago inspired a Broadway play, a motion picture, the creation of a college (William Jennings Bryan Memorial University in Dayton), and scores of books and documentaries. But its most significant impact was that it heightened public awareness and interest in the American legal system, particularly in jury trials.

Thanks to the radio broadcast of the Scopes trial, millions of Americans became a part of a large national jury. They discussed and debated the case in barbershops and at lunch counters and in bars. Suddenly, American lawyers, judges and juries no longer worked in obscurity. They were high-profile players in a brand new arena.

It is now clear what Scopes has wrought. We lawyers have inherited the wind of a profession and a system that is now scrutinized 24/7, 365 days a year. Over the past 10 years, the American people have spent countless evenings watching extensive TV coverage of high profile cases such as the William Kennedy Smith trial, the first O. J. trial, the second O. J. trial, the sentencing of Martha Stewart, and more recently the Michael Jackson trial. There is now a 24-hour-a-day nationwide cable TV channel that is devoted exclusively to the coverage of trials. In fact, I wouldn’t be at all surprised if this fall, millions of Americans will tune in to ABC’s Monday Night Jury Trial, with Al Michaels doing the play-by-play, Nina Totenberg providing the color commentary, and Hank Williams Jr. crooning, “Are You Ready for Some Lawsuits?”

But all this exposure raises a serious issue. Ironically, as more people watch high-profile cases on TV, the more confidence in the American legal system declines. The problem is that the nationwide jury-watching on TV often disagrees with the real jury that is sitting in the courtroom.

This raises a mighty big responsibility for America’s lawyers. We have to help educate the public that while the

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Marks scored on the test are a mix of known and unknown. Following are selected marks on the 2000 test. The results for the 1999 test were similar: 395 passed, 34 failed, 25 did not sit, and 2 did not take the test. The passing rate was 89%. The average score was 209.

TENNESSEE BAR JOURNAL, AUGUST 2005
All judges not created equal

I applaud the article by Mr. [Charles] Swanson in the June 2005 Tennessee Bar Journal (“Our judicial branch under attack”). I, too, am perturbed by railings against particular judges from persons who do not understand how the system is supposed to work or what rule of law is.

What puzzles me a little is that, though I feel I have a thorough understanding of the role of the judiciary and the rule of law, I find myself undone by what some of the same judges have ruled, even though I would state my consternation in different words and would speak from a different base of knowledge and from long years of experience practicing law in courts all over the country.

There are many fine judges; there are many more above average judges; there are even more adequate judges. But, there are too many unqualified judges who don the robe. Those who are unqualified are unqualified for a variety of reasons ranging from gross incompetence to intellectually capable and industrious judges who make mincemeat out of rule of law, day in and day out, and could not care less.

Part of my point here is that I believe that, when we speak of “judges” generically, we might do a disservice to the judiciary, to the practicing bar and the public in general. In my opinion, it is not fair to the exemplary judges to lump them in with the incompetent or otherwise unqualified judges, as if each should be thought of in the same way. Sometimes, the officeholder is not worthy of the

J E S T I S F O R A L L

“Which came first, the cause of action or the lawyer asserting it?”

WRITE TO THE JOURNAL! Letters to the editor are welcomed and considered for publication on the basis of timeliness, taste, clarity and space. They should be typed and include the author’s name, address and phone number (for verification purposes). Please send your comments to 221 Fourth Ave. N., Suite 400, Nashville, TN 37219-2198; FAX (615) 297-8058; EMAIL: srobertson@tnbar.org.

LETTER

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Concerns about ethical obligations
BPR issues opinion on limited scope legal services

The Board of Professional Responsibility (BPR) adopted Formal Ethics Opinion 2005-F-151 at its meeting in Knoxville on June 17. This opinion formalizes and expands upon an earlier informal opinion provided to the Community Legal Center (CLC) in Memphis addressing lawyers' concerns about their ethical obligations when providing limited scope legal services to otherwise pro se litigants through a pilot program developed by Community Legal Center. The program was made available through a grant from the Administrative Office of the Courts. The BPR sought comments on the opinion. The Tennessee Bar Association (TBA) commented and the final opinion reflects the comments tendered by the TBA. The full text of the opinion is available at: http://www.tba.org/rules/2005-F-151.pdf

TBA section chairs named for 2005-06

If you are not already a member of a section and would like to be, contact Lynn Pointer at the TBA at (800) 899-6993 or in Nashville at 383-7421, lpointer@tnbar.org or go to http://www.tba.org/sections/index.

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Peter Hale Kesser Baker, Donelson Memphis (901) 577-8155

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George Joseph Nassar Jr

TENNESSEE BAR JOURNAL, AUGUST 2005
Art and essay contest winners learn about the American jury system

Winners are in for the 2005 Tennessee Law Day Art and Essay Competitions, which is sponsored by the Tennessee Bar Association Young Lawyers Division.

Each May, the American Bar Association, in conjunction with state and local bar associations, sponsors Law Day programs around the country. The purpose of celebrating Law Day is two-fold: to instill in students an appreciation for the law and foster a greater understanding of the American judicial system, and provide an opportunity for attorneys to serve their local communities.

The theme of this year’s Law Day was: “The American Jury: We the People in Action.” It was chosen to help people understand the jury system and the role they can play in keeping it a vital component of our legal process.

Winning first place for his essay on the theme “The American Jury: We the People in Action,” was Samuel Benjamin Doty of Unicoi County High School in Erwin. In the essay he writes, “... with control that once rested in the hands of kings, the American government has vested power into the command of ordinary citizens that they might express sound judgment for the well being of those on trial.”

Ray Tang of Merrol Hyde Magnet School in Hendersonville won the art competition. You can view the works (in full color) of these and other winners on TBALink at http://www.tba.org/YLD/artessay_2005.html.

First place entry in the Law Day Art Competition, by Ray Tang.

Andrew Sellers is new YLD delegate

Andrew Sellers of Jackson was recently elected Young Lawyer Western Division delegate to the Tennessee Bar Association House of Delegates. He was elected by acclamation to finish the term of his wife, Michelle.

Federal courts in Tennessee now fully connected

Middle District Court online

Last month, lawyers filing in the United States District Court, Middle District of Tennessee, began to do so electronically. All filings (unless there is a showing of cause) now must be made in accordance with the Administrative Practices and Procedures for Electronic Case Filing. Non-lawyers representing themselves may still file with paper.

With this in effect, all federal district and bankruptcy courts in Tennessee now offer electronic capabilities, although some have electronic case management but not electronic court filing.

To see the rules of procedure and information on required training courses, privacy policies and more, go to http://www.tnmd.uscourts.gov.
Reinstated

The following attorneys have been reinstated to the practice of law after complying with Rule 21 as required by the Board of Professional Responsibility: James Gentry Barden, Brentwood; Bruce Henderson Guthrie II, Chattanooga; Sara Katherine Barrett Riley, Lexington, Miss.; Robert M. Simmons, Hilliard, Ohio; and Omari L. Winbush, Nashville.

Suspended

John Louis Dolan Jr., a Memphis attorney, was suspended temporarily from the practice of law by order of the Tennessee Supreme Court on May 26. The court suspended Dolan based on a petition filed by the Board of Professional Responsibility alleging that he failed to respond to a complaint of misconduct.

The suspension was issued pursuant to Section 4.3 of Tennessee Supreme Court Rule 9. Dolan was precluded from accepting any new clients after May 26 and was to stop representing current clients after June 25. At such time he was unable to use the indicia of lawyer, legal assistant or law clerk, or maintain a presence where the practice of law is conducted.

He also was to notify all clients being represented in pending matters, all co-counsel and opposing counsel of the suspension. Finally, he must deliver to all clients any papers or property to which they are entitled. The suspension will remain in effect until it is dissolved or amended by the Supreme Court.

Censured

Nashville lawyer Denvill F. Crowe Jr. was censured by the Board of Professional Responsibility on May 19 for failure to inform his Chapter 13 Bankruptcy clients how to contact him after closing his Nashville office and relocating to Tupelo, Miss. The board found that Crowe violated Rules 1.1, 1.2, 1.3, 1.4, 1.5 and 8.4 of the Tennessee Rules of Professional Conduct. The imposition of this censure declares Crowe's actions to be improper ethical conduct but does not limit his right to practice law.

The Board of Professional Responsibility publicly censured James B. Fisher Jr. of Memphis on May 25. The censure was issued by the board based on Rule 9, Section 8 of the Rules of the Tennessee Supreme Court. Fisher did not request a hearing on the matter.

Pursuant to a complaint alleging ethical misconduct against Fisher, the board conducted an investigation that revealed he consistently had used his IOLTA escrow account for personal transactions unrelated to his law practice from January 1998 through July 2004. The board found no actual misappropriation of funds on Fisher's part, and found somewhat mitigating his acceptance of responsibility and acknowledgment that such commingling was ethically improper.

Fisher's substantial experience in the practice of law since 1978, however, was considered an aggravating circumstance. The imposition of this censure declares his actions to be improper ethical conduct but does not limit his right to practice law.

Contempt of court

On June 17 the Supreme Court of Tennessee found Edward A. Slavin Jr. of St. Augustine, Fla., in willful contempt of the court. He was sentenced to 10 days in jail and fined $50. Slavin's law license was suspended on Aug. 27, 2004, for a period of two years. The suspension order specifically mandated that he comply with the obligations and responsibilities of suspended attorneys. The Board of Professional Responsibility filed a petition for contempt charging that Slavin (1) failed to comply with the order of suspension, (2) had represented clients after having been suspended, and (3) had not complied with Tennessee Supreme Court Rule 9 Section 18 because he failed to notify opposing counsel and clients of his suspension and failed to file an affidavit to that effect.

The court found that Slavin's failure to comply with the order constituted willful contempt of the court beyond a reasonable doubt.
NEWS ABOUT TBA MEMBERS

The Bulletin Board

Tennessee Bar Association members may send information about job changes, awards and work-related news. Send it to The Bulletin Board, c/o The Journal at 221 Fourth Ave. N., Suite 400, Nashville, TN 37219-2198, or email to sballinger@tnbar.org. Submissions are subject to editing. Pictures are used on a space-available basis and cannot be returned. Electronic photos must be saved as a tiff or jpeg (with no compression), minimum resolution 200 dpi, and at least 1” x 1.5” or they will not be used.

Compiled by Stacey Shrader and Sharon Ballinger

New officers of the Tennessee Lawyers’ Association for Women (TLAW) are: Linda Warren Seely, Memphis, president; Jackie Dixon, Nashville, president-elect; Heather Gunn Anderson, Knoxville, recording secretary; Linda Whitlow Knight, Nashville, treasurer; Chantelle Roberson, Chattanooga, corresponding secretary; Jane Powers, Crossville, immediate past president.

Directors are: Patricia Mock, Clarksville, Middle Tennessee director-at-large; Judge Sharon G. Lee, Knoxville, East Tennessee director-at-large; Molly Williams, West Tennessee director-at-large; Heather Gunn Anderson, East Tennessee Lawyers Association for Women (ETLAW) representative; Mary McGinnis, Memphis, AWA representative; Chantelle Roberson, Southeast Tennessee Lawyers Association for Women (SETLAW) representative; Leesa Hinson, Nashville, Lawyers’ Association for Women/Marion Griffin Chapter representative; Angela Hardee Snider, Jackson, Lawyers’ Association for Women/Anne Schneider Chapter representative; and Scotty Perrin, Johnson City, FAME representative.

Circuit Court Judge William B. Acree Jr. of the 27th Judicial District is the new president of the Tennessee Trial Judges Association (TTJA). All 153 circuit, chancery and criminal court judges in Tennessee are members. Acree, of Union City, has served as circuit court judge in Obion and Weakley counties since 1994.

Chancellor Jeffrey F. Stewart of Winchester has been chosen as president-elect of the Tennessee Judicial Conference, which includes all of the state’s 178 trial and appellate court judges. He will become president of the organization in June 2006 for a one-year term. He has been a member of the judiciary since 1989. Stewart, of the 12th Judicial District, will succeed Criminal Court Judge Arthur Bennett of Memphis.

New officers and executive committee members were recently elected of the Tennessee Judicial Conference (TJC). They are Criminal Court Judge Arthur T. Bennett of Memphis, president; Chancellor Jeffrey F. Stewart of Winchester, president-elect; Circuit Court Judge Creed Mc Ginley of Savannah, vice president; Court of Appeals Judge David R. Farmer of Jackson, secretary; Circuit Court Judge Karen R. Williams of Memphis, treasurer. Executive committee members are Circuit Court Judge Royce Taylor of Murfreesboro; Chancellor Thomas R. Frierson II of Morristown; Chancellor J. Steven Stafford of Dyersburg; and Criminal Court Judge Chris Craft, Circuit Court Judge Donna M. Fields and Chancellor Walter L. Evans, all of Memphis.

Leesa Hinson moved up to president of the Marion Griffin Chapter of the Lawyers Association for Women. Sue Van Sant Palmer rose to president-elect. Elected were Joycelyn Stevenson, secretary, and Patricia Moskal, treasurer.

The Tennessee Trial Lawyers Association recently elected new officers. John Pellegrin of Gallatin ascended to the office of president. Stephen T. Greer of Dunlap is the new presi-

(Continued on page 10)

MEGAN RIZZO, who has served as membership coordinator since last year, is now membership director, focusing full time on the TBA’s growing programs.

MONICA MACKIE, who was the TBA’s financial administrator from 1999 to 2004, has returned as director of the TBA Leadership Law program.

MICHELE O’NEILL recently left her post as executive assistant to Allan Ramsaur, which she has held for two years. O’Neill will receive her master’s in public administration from Austin Peay State University this summer.

TERRI GILLEY is the new executive assistant. Most recently she was a loan processor/underwriter for First Tennessee Home Loans in Brentwood and previously has served stints with HCA, Private Business Inc. and AmSouth Bank. She is a native of Brentwood and received her bachelor of science in business administration from the University of Tennessee.
(Continued from page 9)

**NEWS ABOUT TBA MEMBERS**

**student-elect, Wayne Ritchie** of Knoxville, vice president, east; **Dan Clayton** of Nashville, vice president, middle; **Kyle Crowe** of Martin, vice president, west; **Leslie Muse** of Morristown, secretary; and **John Wood** of Brentwood, parliamentarian.

New officers of the Greene County Bar Association are **Michael Brent Hensley**, president; **Kim Miller**, vice president and treasurer; and **Cynthia Pectol** and **Nikki Pierce**, CLE co-chairs.

**Brent Young** will become president of the Kingsport Bar Association in August; **William Wray** is the outgoing president. Other officers are **David Blankenship**, president-elect; **Mike Billingsly**, vice president; **Dawn Mason**, secretary; and **Jim Miller**, treasurer.

Circuit Court Judge **Kay Spalding Robilio** recently received the Jefferson Award for distinguished public service in the area of emotional abuse awareness. The award is given annually by the American Institute for Public Service. For her service, Robilio organized a free seminar on emotional abuse in 2003 and organized a continuing legal education seminar on prosecuting and defending emotional abuse claims. Robilio was the first woman to be elected to the Shelby County Circuit Court and one of the first women to be elected to the downtown Memphis Rotary Club board. She is now in her 22nd year on the bench.

The Knoxville firm of Egerton, McAfee, Armistead & Davis PC has announced the addition of two new attorneys: **P. Newman Bankston** and **Nicholas J. Chase**. Bankston joins the firm’s transactions and corporate law group. A recent graduate of the University of Tennessee College of Law, he served as executive editor of Transactions: The Tennessee Journal of Business Law and earned a concentration in business transactions while in law school. Chase, who is also a University of Tennessee College of Law graduate, joins the firm’s business consultation, transactions and corporate law group. While in law school, he served as student materials editor for the Tennessee Law Review, participated on the National Moot Court Team and served as a student member of Transactions: The Tennessee Journal of Business Law. Prior to entering law school, Chase worked for 10 years with Copper Cellar Corporation as a construction liaison and project manager.

**Luther Wright Jr.**, a member in the Nashville law firm of Boul, Cummings, Connors & Berry PLC, has been named a Rule 31 general civil mediator by the Tennessee Alternative Dispute Resolution Commission. Wright concentrates his practice in employment, general civil and probate mediations. He has extensive experience in the areas of employment law, corporate business litigation, entertainment disputes and probate matters.

Two Tennessee attorneys recently were elected fellows of the American Bar Foundation. They are: **Stephen H. Biller**, a 1965 graduate from Boston University School of Law who now serves with the Bogatin Law Firm in Memphis; and **William C. Carriger**, a 1967 graduate of the University of Tennessee College of Law who now serves with the Chattanooga firm of Chambliss, Bahner & Stophel PC.

Nashville attorney **William H. “Bill” Neely** has joined the law firm of Sherrard & Roe PLC as a member. He previously was a principal with Stokes, Bartholomew, Evans & Petree in Nashville. He will focus primarily on corporate and partnership taxation, business organizations, tax-exempt organizations and employee benefits. Neely received his law degree from the University of Kentucky in 1983 and his masters of law in taxation from the University of Miami in 1984.

**Wynne James** has joined the Nashville office of Waller Lansden Dortch & Davis PLLC as a member. James will focus his practice in the areas of merges and acquisitions and federal tax law. Prior to joining Waller Lansden, James was a member of the law firm Stites & Harbison PLLC. James represents companies across a broad range of industries and his work extends internationally, having represented clients in Argentina, Great Britain, Italy and India. He earned his law degree in 1974 from the University of Tennessee, where he graduated Order of the Coif. In 1975, he received his master of laws in taxation from the University of Florida, while also serving as an instructor at the university’s law center.

**AVON WILLIAMS III** died July 9. He was 45.

He was general counsel for the U.S. Department of the Army, appointed by President Bush in 2001. He earned a law degree from the University of Texas Law School and a master of business administration from Vanderbilt University.

He was the son of the late Avon N. Williams Jr., a civil rights activist and prominent attorney in Nashville. He and his wife Janita had seven children, ranging in age from 2 to 18 years old.
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Teddy Kennedy’s ‘trials’

By Donald F. Paine

Teddy has been mouthing off a lot lately. Let’s see how verbose he was after killing Mary Jo Kopechne on Saturday, June 19, 1969, at Chappaquiddick Island. That incident earned Teddy the sobriquet “Coward of Chappaquiddick.”

His first “trial” was resolved by a guilty plea to leaving the scene of an accident. He uttered one word twice, “Guilty.” Judge Boyle ignored the mandatory incarceration law and suspended sentence.

The second “trial” was an archaic inquest conducted by the same judge at the request of a do-nothing district attorney, Edmund Dinis. Teddy testified about nonexistent facts utterly contrary to his statement to police made nine hours after he left Mary Jo to drown. The perjurious testimony also contradicted his scripted television statement.

Any hope that the inquest would shed light on matters vanished before it began. Unethical Massachusetts State Police Detective Bernie Flynn acted as “mole” and disclosed to Kennedy’s lawyers in advance what proof the prosecutor would present. Compounding the travesty was the unethical conduct of Kennedy counsel in violating the rule of sequestration.

They conveyed to each upcoming witness the testimony of earlier witnesses. The Tennessee version of Evidence Rule 615 contains this salutary provision: “The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness.” Judge Boyle made such a ruling, which was ignored.

There should have been a third and real trial for manslaughter, with resulting conviction and penitentiary time. Judge Boyle found Kennedy guilty at the inquest, and the Registry of Motor Vehicles later made a similar finding. But Doofus D.A. Dinis blocked the grand jury from returning an indictment.

What did Teddy really do that night? My research suggests that he left a party with Mary Jo around midnight after a day and night of drinking hard liquor. Rather than driving toward the ferry landing to return to Edgartown, he turned onto Dike Road. A deputy sheriff, Huck Look, spied him and walked toward his car. Suddenly Kennedy sped off down the road while drunk and encountered Dike Bridge angling to the left. He catapulted the car upside down into Poucha Pond, making his escape and dooming Mary Jo to her fate. He left the scene and failed to report the incident until nine hours later, and then only at insistence of cousin Joe Gargan.

There may be a worse person in public office than killer Kennedy. I’m dubious.

Notes
1. By far the best book on the subject is *Senatorial Privilege: The Chappaquiddick Cover-Up*, by Leo Damore (Regnery 1988), also available in unabridged audio from Blackstone.
2. Kennedy told Gargan earlier that he intended to say Mary Jo was the driver.

Donald F. Paine is a past president of the Tennessee Bar Association and is of counsel to the Knoxville firm of Paine, Tarwater, Bickers, and Tillman LLP. He lectures for the Tennessee Law Institute, BAR/BRI Bar Review, Tennessee Judicial Conference, and University of Tennessee College of Law. He is reporter to the Supreme Court Advisory Commission on Rules of Practice and Procedure.
honor due the office.

We have just completed our annual assessment of judges serving in Shelby County. There are judges I ranked with a perfect 10, and there are judges I ranked with zeros. Not only is it difficult for me to defend the judges I ranked with zeros, I feel obligated to the bench, the bar and, even more, to the general public, in a respectful but effective way, to unseat those judges who have no business on the bench. This creates a dilemma for me.

In the same way that a wholesale assault on the judiciary threatens our system of justice, a wholesale commendation of the judiciary, in my opinion, equally threatens our system.

I have recently written an article for publication, entitled "Who, May I Ask, is Judging the Judge?" For one, I believe that the time for major judicial reform, in Tennessee and beyond, has come. I believe the general public, not just the legal professionals, must play a major role in the process of reform.

I am sometimes asked if I am not afraid that judges will punish me for my convictions about the need for judicial reform. My response is that good judges welcome reform and that most bad judges are good people who I must trust I need not fear would try to punish me for exercising First Amendment rights in the marketplace of ideas.

Any who share my thoughts are invited to join in the debate that is looming as judicial elections approach.

— Larry E. Parrish, Memphis

The American jury system is not perfect, it is the greatest system ever devised for fairly and equitably resolving conflicts. And more important, it is the foundation of our democracy.

We have to stress to our fellow Tennesseans that while they may not agree with a verdict they see on CNN and "Court TV," real jurors are following specific instructions given to them by the court. They base their decisions not on Nancy Grace's commentary, but on the facts as they find them and on the law as given to them by a real judge, not Judge Judy.

Finally, we have to emphasize to our fellow Tennesseans that in the overwhelming majority of cases, juries work conscientiously and reach a well-reasoned decision. You and I may not always agree with the decision. But in a jury trial in an American courtroom, it is we the people who make the decision. And that's what makes America great.

Editor's note: Don't miss the winners of this year's art and essay contest on page 7. The theme of this year’s competition was "The American Jury: We the People in Action."

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For 35 years Justice Drowota has made the courts his ministry

By Barry Kolar

Chief Justice Frank F. Drowota III delivers a speech at a Sept. 11, 2001, first-year anniversary memorial service, which was at the War Memorial Auditorium in Nashville.
To the little old ladies at Nashville’s Woodmont Christian Church, there was never any doubt what young Frankie Drowota would do when he grew up. He would preach, of course. Hadn’t they watched him walk up to the pulpit on youth Sunday year after year, inspiring the congregation with his sermons?

His parents — Dr. Frank Drowota and his wife, Vivian — were the ones who had built that congregation, taking a handful of families meeting in a house on Hillsboro Road in 1943 and turning the parish into a vibrant church of several thousand members. It seemed only natural that Frankie would follow in those footsteps.

Even boyhood friends like Tommy Frist — now Dr. Thomas Frist — thought the ministry might be his calling. “Always, from the very earliest years, he had very high moral and ethical standards,” he says. Natural. Logical. Maybe even predictable. But after graduating from Vanderbilt University in 1960 with a degree in political science, Drowota entered the U.S. Navy and was still searching for a career to pursue in his life. Ministry was a consideration, of course, but the law was another possibility, so he signed up to take the Law School Admissions Test (LSAT) and see how his interest and aptitude rated.

Adding a few more degrees of difficulty to the exam were the unusual circumstances that went with taking it while serving on a 4,500-man aircraft carrier that just happened to be in the middle of the Mediterranean Sea carrying out war games. When the big night rolled around — a seven-hour time zone adjustment put the starting time at night — Drowota hunkered down in the steamy communications officer’s office of the USS Shangri-La and started on the test. Six hours later he’d finished.

“The strange thing about it is, even under those conditions, I did extremely well on the thing,” Drowota says. “Which kind of made me decide to do law school.”

Still, he had to tell his parents that he was choosing law school over the ministry. “My parents would have loved for me to have gone into the ministry,” he says, “but as I told my dad, I said, ‘I really feel like you should have the call, and I have never gotten the call.’ And he said, ‘Son, you are absolutely right. You don’t want to go into something like this unless you feel like you’ve been called to do that.’

“I had never felt that.”

The call of the law

Now more than 40 years after deciding on the law, it’s clear that Frank F. Drowota III had received a calling of a different sort, a call to public service in our justice system. He retires from the Tennessee Supreme Court this month after a 35-year judicial career that includes 25 years on the state’s highest court. He has been described by former Chief Justice William H. D. Fones as one of the greatest chief justices in Tennessee history and is widely recognized for the impact he has had on Tennessee common law. During his more than 30 years as an appellate judge, Drowota has participated in more than 4,500 decisions, authoring at least 1,000 majority opinions and more than 100 dissenting and concurring opinions (see related story, page 17).

As chief justice, it’s clear he’s built a strong sense of collegiality among justices, he’s worked to develop internal rules to ensure opinions are released in a timely manner and he’s been a strong leader.

Justice E. Riley Anderson, who has served on the court with Drowota since 1990, thinks that leadership has been one of his most important contributions.

(Continued on page 16)
“Through his personality and his warmth, he has established improved relations with all of the constituencies of the court — bar associations, the legislature, etc.”

But that’s just a piece of the story. Colleagues and friends speak even more strongly about Drowota’s character and his humanity.

Nashville attorney Ben Cantrell, who first served with Drowota as a chancellor in Davidson County and later on the Tennessee Court of Appeals, says the chief justice’s impact on the judiciary comes “not only from his wisdom and the clarity of the way he writes and his thoughts, but just from being a good person who people look up to and want to emulate.”

Memphis lawyer Buck Lewis puts it more simply: “I just don’t know anyone who doesn’t like Frank Drowota.”

Lewis was the chief justice’s first Supreme Court clerk when he joined the court 25 years ago, and they’ve maintained a close relationship over the years.

“He’s really been a mentor to me,” Lewis says, “both in terms of advising me on things I needed to work on in my practice, and things I needed to work on in public service and bar service. I think he’s been a friend to all 22 of his clerks.”

That was evident in mid-June when 19 of those clerks came back to Nashville for a surprise retirement party, some traveling from as far away as Seattle and Minneapolis. Each toasted his former boss, who responded to each clerk with an anecdote of his own about the time he’d had with each of them.

“He is just such a thoughtful, courteous and welcoming person that you just never felt intimidated,” Lewis says. “He always made you feel a part of the process.”

His friend of more than 50 years, Tommy Frist, agrees. Since they first met in the sixth grade at Woodmont Elementary School, Frist has valued Drowota’s loyalty and sound judgment.

“He’s just a great guy who enjoys life and makes life better for others around him.”

‘I couldn’t be a minister, but I think that lawyers can minister’

Drowota’s parents were a strong force in his character development. Both were caring, kind people who “always went out of their way to help others in need and did so with complete modesty, never seeking recognition,” Drowota says.

The elder Drowota saw a need in Nashville and gave up his pastorship at a thriving church of 1,500 members in Kentucky to take on the task of building a new congregation in what was then a rural part of Davidson County.

At first the family and the church shared one house — with the family living in one side and the chapel and Sunday school rooms in the other. In the ensuing 30 years that the elder Drowota led the church, Woodmont Christian grew to 3,000 members.

Building the church wasn’t cause to ignore family, however.

“They came to all of my sporting events,” Drowota says. “Therefore, I

(Continued on page 21)
Drowota contributed greatly to the state’s substantive law
By Lisa Rippy and Marshall Davidson

During his more than 30 years as an appellate judge, Chief Justice Drowota has participated in more than 4,500 decisions. He has authored at least 1,000 majority opinions, and more than 100 dissenting and concurring opinions. Many thousands of cases seeking Supreme Court review have passed over his desk.

Not surprisingly, Drowota has stamped his impression across the full scope of Tennessee’s common law. Nowhere is this more apparent than in the area of torts, his favorite area of the law. He says his single most significant authored opinion is McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992), in which the court adopted comparative fault, thereby completely reshaping Tennessee tort law. Drowota also authored many of the subsequent opinions that defined the contours of comparative fault and that explained how comparative fault affects other established principles, such as contribution, strict liability, and vicarious liability. Readily acknowledging that formulating workable and meaningful standards to guide courts in apportioning fault is “no simple matter,” Drowota has endeavored along with the court as a whole to provide guidance, “however imprecise and imperfect” that guidance may be.

In addition to writing many of the court’s major comparative fault decisions, Drowota has significantly shaped Tennessee tort law in the areas of punitive damages, invasion of privacy, premises liability, nuisance, negligent, reckless, and intentional infliction of emotional distress, products liability, malicious prosecution, and abuse of process. Moreover, he has authored key decisions concerning governmental immunity, medical and legal malpractice, the family purpose doctrine, and even such unusual topics as loss of chance and wrongful pregnancy.

However, the scope of Drowota’s contribution to civil law is by no means limited to torts. He has authored significant opinions on a wide array of subjects, from workers’ compensation cases to tax cases to regulatory matters. His opinions comprise probate and estate disputes, civil procedure, election law, domestic relations, landlord and tenant law, jurisdiction, employment matters, insurance law, evidence, contract disputes, remedies, securities law, consumer law, civil rights and constitutional law.

Although Drowota began his career as a chancellor, he has authored many important criminal law decisions during his 25 years on the Supreme Court. He has participated in nearly every death penalty appeal since capital punishment was reinstated in 1977. Consequently, he has authored significant capital-case opinions that have addressed such issues as victim impact evidence, comparative proportionality review, pre-execution claims of incompetency, the introduction of mental health evidence at sentencing, prosecutorial discretion in seeking the death penalty, the introduction of mitigation evidence, the constitutionality of aggravating circumstances, and the constitutionality of the death penalty itself.

His influence has been equally as great in non-capital criminal cases. From interpreting the Criminal Sentencing Reform Act of 1989 to abolishing common law doctrines such as the year-and-a-day rule, Drowota’s opinions have modernized Tennessee’s criminal law. Moreover, his opinions have provided guidance on difficult evidentiary questions, such as the admissibility of computer generated animations, of polygraph evidence, and of expert testimony regarding a defendant’s mental state. Not only have Chief Justice Drowota’s opinions provided the authoritative analyses of Tennessee’s insanity and diminished capacity defenses, his opinions also have clarified numerous constitutional criminal procedure issues.

To be sure, Drowota’s opinions, both civil and criminal, have served to update Tennessee law and bring it in line with much of the rest of the country. He has written in a direct and concise style with a common-sense focus on making the law clear to judges, lawyers, and the public. A Drowota opinion, forged from practical realities, tells busy readers what they need to know. Direct and to the point, the opinions speak with strength and clarity. They are promptly issued too, for Drowota is keenly aware that few things cause litigants and their lawyers more frustration, and the judiciary more criticism, than the failure of courts to decide cases on a reasonably prompt basis.

Cases that come before the Supreme Court routinely involve difficult legal issues that are susceptible to more than
Thanks to the contributions of these attorneys and others listed here, the Tennessee Bar Association’s TennBarU was able to provide the Tennessee legal community with high-quality programming during the second quarter of this year. Their contributions help maintain the strength and vitality of the profession.

**CHANGES IN FEDERAL ESTATE TAX AND TENNESSEE INHERITANCE LAWS**

- **Forest Dorkowski**, Apperson, Crump & Maxwell
- **Thomas Randolph Buckner**, Apperson, Crump & Maxwell

**TBA CONVENTION**

- **Paul C. Hayes**, Waller Lansden Dortch & Davis
- **Lucan T. Pera**, Armstrong Allen
- **Dorothy Campbell**, Country Music Television
- **Donald F. Paine**, Paine, Tarwater, Bickers & Tillman
- **Sarah Sheppeard**, Sheppeard, Swanson & Mynatt
- **Van East**, White & Reasor

**GENERAL PRACTICE SEMINAR**

- **William Acree Jr.**, 27th Judicial District
- **Hon. Mike Maloan**, 27th Judicial District
- **Hon. Raymond Morris**, 27th Judicial District
- **Hon. Dwight Stokes**, 4th Judicial District
- **Thomas Moore Jr.**, General Sessions Judge
- **Hon. John Bell**, General Sessions Judge
- **Hon. Hansel McCadams**, General Sessions Judge

**LAW TECH EXPO**

- **Chandra Flint**, Neal & Harwell
- **James Aaron Morris**, Neal & Harwell
- **Keltie L. Hays**, Neal & Harwell
- **Bill Ramsey**, Neal & Harwell

**LITIGATION SECTION REVIEW**

- **Hon. Arnold Goldin**, 30th Judicial District
- **Joseph M. Koury**, Allen Summers Simpson Lillie & Gresham
- **W. Bryan Smith**, The Cochran Firm
- **Dan Coughlin**, Fuller & Vaughan
- **Hon. Dale Workman**, 6th Judicial District

**SOLO/SMALL FIRM FORUM**

- **Beverly Phillips Sharpe**, Board of Professional Responsibility
- **Timothy Takacs**, Attorney at Law
- **Daniel Coughlin**, Fuller & Vaughan
- **Elizabeth Carolyn Driver**, Office of Tennessee Attorney General
- **Stuart Freeman Wilson-Patton**, Office of Tennessee Attorney General
- **Larry Houston Hagar**, Porter, Hildebrand, Nolan, Niewald

**THE 9TH ANNUAL LABOR & EMPLOYMENT LAW FORUM**

- **Connie Lewis Ginsburg**, Attorney at Law
- **Brian Faughnan**, Armstrong Allen
- **Luther Wright Jr.**, Boul, Cummings, Conners & Berry
- **James Gerard Stranch IV**, Branstetter, Kilgore et al.
- **Jane Branstetter Stranch**, Branstetter, Kilgore et al.
- **Jane Hanner Allen**, Counsel On Call
- **Ann Jarvis Pruitt**, Dell Computer Corp.
- **Mary Helen Beard**, FedEx Express Legal
- **Keith Ashley Warren**, Ford & Harrison
- **Kurt Joseph Ponrenke**, King Pharmaceuticals
- **M. Kim Vance**, Tractor Supply Company
- **Sally Ramsey**, U.S. Equal Employment Opportunity Commission USEOC
- **Faye Angela Williams**, USEOC
- **Waverly David Crenshaw Jr.**, Waller Lansden Dortch & Davis
- **Theresa Marie Costonis**, Attorney at Law

**THE ADA ACT: THE FIRST 15 YEARS**

- **Martha Michele Laafferty**, Tennessee Protection & Advocacy TPE
- **Cynthia E. Gardner**, TPE
- **Sally Ramsey**, USEOC
- **Wade Cowan**, Attorney at Law
**What’s new at TennBarU?**

**ACADEMY FEATURES COURT ADMITTANCE**

For a limited number of Tennessee attorneys, this could be the year they experience the honor of being admitted to practice before the U.S. Supreme Court.

The Tennessee Bar Association has arranged a private admission ceremony at the Supreme Court on Wednesday, Nov. 9, as part of the 22nd Annual TBA Academy.

In addition to the admission ceremony, participants will be invited to a Welcome Reception hosted by TBA President Bill Haltom and later a Celebration Dinner at the historic Willard Intercontinental Hotel. Those attending will also earn two hours of CLE credit from programming and receive a tour of the Supreme Court building.

**REGISTER TODAY**

To participate in the admission ceremonies, you must register for the TBA Academy and complete admission filings by Sept. 1 to meet Supreme Court deadlines. Call (615) 383-7421 or go to [https://www.tba.org/onsiteinfo/academy_2005.html](https://www.tba.org/onsiteinfo/academy_2005.html).

**STAY COOL THIS SUMMER, THINK SNOW!**

The Stonebridge Inn and Tamarack Townhouses at Snowmass Village will host the 2006 CLE SKI. Both properties are located in western Colorado and nestled in the heart of the Elk Mountain Range. Ideally located in the core of Snowmass, both properties are a mere 50 to 70 yards from the slopes and two blocks from the Snowmass Village Mall, which offers enjoyable family and fine dining, entertaining nightlife, and a wide selection of shopping. Snowmass is only 20 minutes from the unique amenities and activities of the town of Aspen. Mark your calendar now for February 5-11, 2006. Information and schedules of all CLE programs will be available soon.

**BUSINESS AND TECHNOLOGY LAW TAKE CENTER STAGE**

Learn the latest developments in open source code, mergers and acquisitions in the technology world and more during the seventh annual edition of this seminar. Stops are planned in Memphis (Sept. 9), Nashville (Sept. 23) and Knoxville (Oct. 7).

**DATES SET FOR ETHICS ROADSHOW**

The popular TennBarU Ethics Roadshow returns, featuring Memphis attorney Brian Faughnan. Watch for the program in Chattanooga on Dec. 7, Knoxville on Dec. 8, Nashville on Dec. 14 and Memphis on Dec. 15.

**LEARN THE BASICS OF ELDER LAW**

TennBarU is again teaming up with the TBA Elder Law Section and the National Academy of Elder Law Attorneys to present this program that covers the breadth of elder law. Now a nationally recognized event, this year’s program will be Aug. 19-21 at the Gaylord Opryland Hotel.

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The hot seat
Who knows the chief justice best?
By David L. Johnson

Who knows Chief Justice Drowota better — Claire, his wife of 40 years, or his long-time secretary, Vicki Earls? Only a contest can answer this compelling question. Claire and Vicki were separately interviewed and asked specific questions about the chief. Thereafter, Drowota was asked the same questions and his answers were compared with those of Claire and Vicki. Claire and Vicki’s answers were ranked on a scale of 0-4, with 4 being the highest.

<table>
<thead>
<tr>
<th>Question</th>
<th>C.J. DROWOTA</th>
<th>CLAIRE DROWOTA</th>
<th>VICKI EARLS</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is your favorite restaurant in Tennessee?</td>
<td>Chesapeake</td>
<td>Chesapeakes</td>
<td>Mid-town Café in Nashville</td>
</tr>
<tr>
<td>It used to be Survivor – now its West Wing</td>
<td>West Wing</td>
<td></td>
<td>Survivor</td>
</tr>
<tr>
<td>If you hadn't entered the legal profession, what career path would you like to have chosen?</td>
<td>NFL</td>
<td>Coach</td>
<td>NFL</td>
</tr>
<tr>
<td>Who is your favorite president?</td>
<td>Lincoln</td>
<td>Carter</td>
<td>JFK</td>
</tr>
<tr>
<td>Of what decision you wrote are you the most proud?</td>
<td>McIntyre</td>
<td>McIntyre</td>
<td>McIntyre</td>
</tr>
<tr>
<td>What is your favorite dessert?</td>
<td>Caramel cake</td>
<td>Caramel cake</td>
<td>Caramel cake or ice cream</td>
</tr>
<tr>
<td>If you could excel in one Olympic event, what would it be?</td>
<td>Marathon</td>
<td></td>
<td>Skiing</td>
</tr>
<tr>
<td>If each Tennessee Supreme Court justice were separately stranded in the wilderness, who would first make it back to civilization?</td>
<td>None of us would make it back.</td>
<td>Maybe Janice.</td>
<td>He would.</td>
</tr>
<tr>
<td>With what living person would you most like to have dinner?</td>
<td>Peyton Manning</td>
<td>Steve McNair</td>
<td>Jeff Fisher</td>
</tr>
<tr>
<td>Who's the worst law clerk you ever had?</td>
<td>That's easy. You.</td>
<td>I'm staying away from that one.</td>
<td>David Johnson</td>
</tr>
</tbody>
</table>

The final tally: Claire 22, Vicki 18. Claire has successfully proven that no one knows a person like the person’s spouse.

David L. Johnson is a lawyer with Miller & Martin PLLC in Nashville and was Chief Justice Drowota's (worst) clerk, serving in 1998-99.
Drowota
(Continued from page 16)

went to all my children’s sporting event as they were growing up. Now, I’m enjoying going to my grandchildren’s … and to this day, my family will always still take a spring break or summer vacation together, which makes it fun. I think that’s probably one of my main reasons for retiring, to get to spend more time with my family.”

Of course, that’s not all he plans to do. Drowota’s passion for public service is leading him to take on more work for some of the non-profits that he’s assisted over the years, such as the YMCA, and he intends to remain active in pro bono recruitment.

“I couldn’t be a minister, but I think that lawyers can minister,” Drowota says. “That’s why pro bono has meant so much to me, and why what the Tennessee Bar Association does in its access to justice program means so much to me. I’m 110 percent behind that and want to stay committed to that.” (See related story, “Rule 6 is for all lawyers,” an interview with Justice Drowota, January 2003 Tenn. Bar Journal.)

Building a career on the bench

Time wasn’t always so easy to come by. When Drowota was first appointed to the Chancery Court bench in 1970 — with a 2-year-old daughter and a newborn son — the workload was so heavy that he and fellow Chancellor Cantrell would hear cases five days a week, then write opinions on Saturdays and Sundays.

But instead of seeing it as time away from his wife, Claire, and his children, Drowota made the judiciary a part of his family. During those weekend work hours, children sometimes made the courtroom their playroom. “I saw (Chancellor Cantrell’s daughters) grow through grammar school, high school and college,” Drowota says, “and had the good fortune to perform the wedding ceremony for his oldest daughter.”

His time as a chancellor also gave Drowota exposure to complicated and high-profile cases, including one in which he had to decide who would fill a Supreme Court seat.

“(Gov.) Winfield Dunn had appointed Bob Turley and Bob Turley had a certificate of appointment from the governor for a vacancy on the Supreme Court,” Drowota recounts. “But Bob Taylor did a write-in campaign and he had a certificate of election from the Secretary of State’s office. So here you have two people on Sept. 1, when the court was going to meet, they both came up, one with a certificate of appointment and one with a certificate of election, and a young chancellor has to decide who is going to sit.

“They were both well qualified, but I found, as a ‘learned chancellor,’ that neither one of them were qualified. That the governor had not strictly complied with the certificate of appointment and that Taylor didn’t have a sufficient number of votes to make that a valid election. And so I said neither one.”

His reasoning was sound and on a direct appeal was upheld by the Supreme Court.

From being one of the youngest (Continued on page 25)
Designation as a Certified Legal Assistant (CLA), or Certified Paralegal (CP) is more than the pinnacle of professional achievement for individual paralegals. It is also a sound indication of proficiency to the attorneys, firms, and organizations that hire them.

Since the CLA program was launched by the National Association of Legal Assistants (NALA) in 1976, it has become widely recognized as the definitive credential for paralegals. More than 25,000 individuals have participated in the program, and some 12,500 paralegals are on the certification rolls today.

How certification helps

Voluntary certification programs are an esteemed tradition in most professions, and have been described as the single most important movement in the area of human resources.1 Usually established and administered by a profession's association, certification programs help individuals proceed from education and training into the real-world challenges of paralegal work. Certification programs influence career preparation as continuing career development.

These programs affirm the knowledge, skills, and expertise to perform at a high professional level. Paralegal certification also speaks volumes about individual dedication and commitment to stay abreast of developments in the legal field.

Certification programs are valuable to employers at all levels, whether large or small businesses, corporations or sole proprietorships. Three important ways that certification programs help those who hire paralegals are:

1. Assisting hiring decisions — No interview or single assessment tool can predict performance on the job with complete reliability, but certification is a compelling indication of strong commitment to a chosen career and the ability to meet real-world standards.

2. Verifying educational background and experience — Certification programs provide the professional education and experience documentation that many employers need, but do not have time to check.

3. Helping develop recognition and incentive programs — As models for employee training plans, certification programs build confidence and competence in all employees, and they help employers provide greater service to clients. Certification programs are easily adaptable for employee training and development programs designed by employers.

Differences

Certification programs are unique to the professions they serve, and they are different from other qualification programs. They differ from licensing programs, for example, on several important levels. Licensing is the means by which a government permits a person to do something. The purpose of licensing programs is to protect the public from incompetent practice by requiring a valid license to work. This is unrelated to the purposes of certification programs.

Certification programs recognize high standards of knowledge and skills. There are many certification programs in professions that are not licensed, such as the paralegal profession. Other certification programs in occupations that are licensed serve as a valuable and needed way for licensed professionals to distinguish themselves from others.

Professional certification programs are not the same as “Certificates of Completion,” which are awarded to graduates of paralegal programs. This is often a point of confusion, and it is important for prospective employers, to verify what the “Certified” on a resumé actually means.

Benefits for paralegals and firms

Because of the benefits of certification and the opportunities provided for professional development, creating a paralegal certification program was a top priority of NALA2 when the association was founded in 1975. A program was sought that would help employers identify proficient paralegals, assist paralegal curricula development and provide an ongoing professional development program for paralegals. With the ensuing 30 years of research and development, the CLA/CP program has met and exceeded these goals.

In many markets, CLA/CP certification is crucial to securing a paralegal job and to career advancement. Many law firms require professional staff to have the CLA/CP credential, as do large
corporations such as Wal-Mart.

For employers, certification means that the employee’s educational background has been checked and verified—an increasingly important detail—and that standards developed by those in the profession have been met. Certification gives employers more options in developing opportunities for growth. For private law firms, certification allows higher billing rates.

Initial certification may take many years to achieve, and keeping it requires continuing effort. To maintain CLA/CP certification, paralegals must participate in at least 50 hours of approved continuing legal education every five years.

Throughout its 30-year history, the CLA/CP certification program has garnered respect and recognition as a sound process of professional development. For example, the program is approved by the U.S. Department of Defense as a GI benefit so that veterans, or those still in uniform, may have their CLA/CP examination costs reimbursed by the government.

There also is widespread use of the CLA/CP credential by paralegals in law firms and corporations to make clear the expertise of a professional staff. This is allowed by bar associations throughout the nation, provided that the paralegal’s nonlawyer status is clearly indicated—the CLA/CP initials alone are not sufficient.3

The program
The CLA/CP certification program may be approached by a number of paths. It is available to graduates of paralegal instruction programs that are ABA approved or comply with ABA guidelines, and to college graduates with bachelor’s degrees plus paralegal training.

Working paralegals who have extensive experience may also sit for the examination to become a CLA or CP. The rigorous eight-hour exam, administered over a two-day period, is offered each March, July and December at testing centers located throughout the United States.

The test includes objective questions and two written essays that are part of the Written Communications and Judgment and Legal Analysis sections. The exam covers the following:

- Communications
- Ethics
- Legal research
- Judgment and legal analysis
- Substantive law, consisting of five mini-examinations covering the American legal system and four of the following areas as elected by the government.

Paralegal • Legal Assistant
Just as “attorney” and “lawyer” are synonymous, so are the terms “legal assistant” and “paralegal.” Throughout the United States, state supreme court rules, statutes, ethical opinions, bar association guidelines and similar documents have definitively established the terms as identical. These same documents recognize the paralegal profession as a bona fide legal occupation and encourage the use of legal assistants in delivering legal services.

There is, however, a preference of terms in various circumstances. Some geographic areas, for example, prefer one term to the other. The National Association of Legal Assistants (NALA) has responded by securing the certification mark “CP” from the U.S. Patent and Trademark Office (July 20, 2004), and the venerable CLA Certificate, granted to qualified legal assistants since 1976, has been redesigned to encourage recipients to use either “CLA” or “CP” as their professional credential. Many prefer to use “CLA” because of its long-standing recognition in the legal community, but the term “Certified Paralegal” now may be used as well.

Verifying credentials
It is easy to determine whether the terms “Certified Paralegal” or “Certified Legal Assistant” represent professional certification by NALA, or are used to indicate graduation from an academic paralegal program. The CLA, CP and CLAS credentials are registered certification marks of NALA and should only be used by those authorized by the association.

To confirm whether the CLA, CP or CLAS on a résumé is a correct use of the NALA credential, contact NALA Headquarters at (918) 587-6828 or nalanet@nala.org for an immediate confirmation, or write: NALA Headquarters, 1516 S. Boston Ave., Suite 200, Tulsa, OK 74119.
Paralegal certification

(Continued from page 23)

by examinees:
• Administrative law
• Bankruptcy
• Business organizations/corporations
• Contracts
• Family law
• Criminal law and procedure
• Litigation
• Probate and estate planning
• Real estate

Advanced certification

Paralegals with the CLA/CP credential who wish to demonstrate advanced knowledge in particular practice areas may pursue the CLAS credential. Since the CLAS program was introduced in 1982, more than 1,100 paralegals have achieved this advanced certification by passing a four-hour written examination. Advanced certification is available in the following areas:
• Bankruptcy
• Civil litigation
• Corporate/business law
• Criminal law and procedure
• Intellectual property
• Probate and estates
• Real estate
• California Advanced Specialty (advanced certification on a state-specific law and procedure in the areas of civil litigation, business organizations-business law, real estate, estates and trusts, and family law).

Something new

Work began in 2002 on a restructured advanced certification program slated to begin late in 2005. The new program will be curriculum-based and offered exclusively by way of the Internet. A CLA/CP certified paralegal will be able to participate in a Web-based training program and be awarded advanced certification credentials by demonstrating mastery of the material in a battery of tests.

There are advantages to this model of certification beyond the convenience of a Web-based program. Paralegals will no longer have to wait several months to seek advanced certification, and the clearly defined subject matter in a curriculum-based program makes better sense to employers.

In the former CLAS program, it was difficult to explain what advanced certification in an area as broad as civil litigation actually meant. When certified paralegals complete the advanced program under the new model, their employers will receive a list of specific areas that were mastered, offering a much better understanding of the preparation required and the depth of the material.

This curriculum-based model of advanced certification for paralegals may be new to the legal profession, but it is a well-established approach for certification in many other professions. It lends itself well to the NALA program because those who achieve this certification already have the CLA/CP credential; they have already demonstrated that they have met the standards of general knowledge and skills required of all paralegals. The new advanced curriculum-based certification is a boon to paralegals wanting recognition of their advanced knowledge and experience, and it is advantageous to employers seeking ways to further develop and train employees.

Courses for the advanced curricula are written by experts in training and development programs and in sequential learning. They are guided by an outline developed by a task force of experienced legal assistants, paralegal educators, attorneys, and paralegal managers. The new programs meet the same high standards of certification and educational programs long sponsored by NALA. They may be relied upon by employers and paralegals alike.

Deb Monke is a certified legal assistant specialist and intellectual property administrator for State Farm Insurance Companies in Bloomington, Ill. She has been a member of the National Association of Legal Assistants since 1985 and served in a number of leadership positions before her election as president in July 2004.

Where is certification available?

There may be person in your law firm who is a candidate to become a certified paralegal. If so, it may be easier to accomplish than you think. Many Tennessee schools offer paralegal certification, and a quick Yahoo search will give you a good list. Here are just a few:
• Columbia State Community College offers a live lecture course, beginning Oct. 22, and an online course, beginning Aug. 22.
• Middle Tennessee State University offers the live lecture course this fall. For more information about programs at Columbia State or MTSU, call the Center for Legal Education at (800) 522-7737 or go to http://www.legalstudies.com
• Find out about the University of Tennessee’s paralegal certificate program at http://www.utparalegal.com.
• For more Tennessee schools offering paralegal certification, check out http://www.campusprogram.com/paralegal/Tennessee.html

The number of paralegal positions will increase 62 percent by 2008, according to the U.S. Bureau of Labor Statistics. But you probably already can see that in your own practice. Are you paying the paralegals in your office enough? According to the Center for Legal Studies in Golden, Colo., the national average salary for paralegals is $37,950.
chancellors in the state, Drowota went on to become one of the youngest appellate court judges in the state’s history, when Gov. Dunn appointed him to the Court of Appeals in 1974. He served there until his election to the Supreme Court in 1980 at the age of 42.

Impact on the Supreme Court

Drowota filled the seat that had been held by Joe Henry in what the chief justice calls one of the great courts in the state’s history. Also on that court were William J. Harbison, William H. D. Fones, Ray L. Brock Jr., and Robert E. Cooper.

The ’74 court, as Drowota calls it, had dramatically changed the court’s work. Instead of just issuing opinions, as had previous courts, this group of jurists also saw its role as a rule maker and leader in the administration of the judicial system in Tennessee.

“They used their rulemaking power to create the Board of Professional Responsibility,” Drowota says. “It’s hard to believe you didn’t have that. It’s hard to believe you didn’t have rules of civil procedure and rules of appellate procedure.

“That court changed the tone and set a foundation for the court of the ’90s.”

During his 25 years on the Supreme Court, Drowota has experienced a number of judicial eras. The ’80s court he describes as the hardest working one that he’s ever served on. The court of the ’90s he says was the most accessible and more diverse than any other court. The Court of the 2000’s has been the most collegial, and the most traveled, thus accessible.

It’s no coincidence that the current court — led by Drowota — is such a collegial bunch. It’s a tone he sets by example.

“You know that serving on a court with four other people with all the different points of view is not easy,” Cantrell says, “but he always seems to make it work really well. The direction of the court has always been positive, and I think that’s due in large part to him.”

(Continued on page 27)
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Justice Anderson agrees. “I’ve never known anybody more generous than him,” he says. “And he’ll work day and night not just to accomplish a task on time, but to accomplish it early.”

Deferring to others as usual, Drowota says simply, “It is totally a team effort.”

Barry Kolar is assistant executive director of the Tennessee Bar Association. Lisa Rippy and Marshall Davidson contributed to this story. Photos courtesy Chief Justice Drowota, the Tennessee Supreme Court and George “Buck” Lewis.

Drowota cites one of his main reasons for retiring is to get to spend more time with family. Here, he is surrounded by grandchildren, clockwise from bottom left, Russell Drowota, Casey Close, Rose Drowota, Ryland Close and Clay Close.

State’s substantive law contributions
(Continued from page 17)

one resolution. Respectable arguments often support each opposing party’s position. In fact, the court typically only grants permission to appeal in cases where resolution of the legal issues will advance the law. Moreover, the legal issues almost always implicate a variety of moral, political, economic and social concerns. Keenly mindful of this, Drowota has placed a premium on obtaining the consensus of the Court, believing that issuing a unanimous opinion, which singularly and unambiguously voices the authority of the entire Court as an institution, is particularly important. To achieve this result, he often has stressed areas of agreement and has served as mediator, drawing the justices together with a diplomatic and respectful style. Nevertheless, he has shown respect to dissenting views and himself has taken the initiative to dissent when even his best efforts have not resulted in consensus.

Although Drowota strongly believes the law should be predictable and clear to all, he is bold enough to depart from precedent in forging a new path, whether in a majority or a dissenting opinion, when he is convinced a change is necessary. Time has often vindicated him. For example, he dissented in a case in which the Supreme Court refused to abolish parental immunity as an absolute bar to a child’s recovery for negligence. Nine years later, the Court adopted the rationale of his dissenting opinion, making his view the law. This scenario has occurred on more than one occasion — a credit both to his legal scholarship and to his foresight.

However, Chief Justice Drowota has never been on an ideological mission in performing his work as a judge. He has strived above all else to do right by the parties and to make the law as clear and as sensible as possible.

Lisa Rippy is Tennessee Supreme Court chief of staff and Marshall Davidson is Supreme Court staff attorney. Both are former law clerks of Justice Drowota.

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Imagine the worst the U.S. Treasury could do to us — they’ve done it
Revenge of the IRS: Circular 230 changes law practice

By Dan W. Holbrook

Important Notice: Although this written communication may address certain federal tax issues, it does not meet detailed Treasury Department requirements that would allow you to rely on it to avoid tax-related penalties, and you may not do so. If you desire a formal opinion on a particular tax matter for the purpose of avoiding potential imposition of penalties, we will be happy to discuss with you what the Treasury requires, whether it is possible to meet those requirements under the circumstances, and the anticipated time and additional fees involved. No written statement herein relating to any federal tax transaction or matter may be used by any person, without our prior written consent, to support the promotion or marketing of or to recommend any federal tax transaction or matter addressed herein.

This month’s column is for all practitioners, not just tax attorneys and estate planners. Imagine the worst the U.S. Treasury could do to us. Well, they’ve done it. Effective June 21, 2005, amendments to “Circular 230” allow the IRS to disqualify you from practicing before them (including preparing tax returns), fine you, and make your communications to clients valueless to protect them from penalties for relying on your advice, unless you have met extremely detailed and demanding requirements. In terms of practice management, this is one of the most significant events affecting estate planners in the last two decades.

Not just tax lawyers are affected; all attorneys who even incidentally give written advice on federal taxes (divorce, criminal defense, transactional, and title lawyers, beware!) are subject to these new rules. Details of Circular 230 have been well documented in other articles, so the focus here is pragmatic: how to recognize Circular 230 problems in your normal law practice and how to minimize your risk.

Covered opinions – general rule

Under Circular 230, the general rule is that any written advice will be treated as a “covered opinion” if it concerns any significant Federal tax issues and tax avoidance is at least a significant purpose (true in most estate planning). The IRS will determine whether and to what extent tax avoidance is a significant purpose, without giving us any clear advance guidance. “Written advice” includes emails, faxes, even cell phone text messages. Even this column you’re reading might be considered “written advice” in certain circumstances. Any time you send anything in writing to your client that mentions any tax effect, the IRS may characterize your writing as a covered opinion.

A “covered opinion” must meet a long list of requirements spelled out in the regulations, and preparing one will entail numerous hours of research and drafting. In essence, the IRS is requiring tax professionals to prepare legal briefs on IRS’s behalf as well as the client’s. Few clients will agree to pay for that kind of advice. But a covered opinion that fails to meet all those requirements prevents your client from relying on your advice to avoid penalties and may subject you to the draconian penalties described above. Therefore it is important that you not create any covered opinions unless you intend to do so.

Automatic covered opinions — tax avoidance as principal purpose

Certain types of written advice will be extremely difficult not to be characterized as a “covered opinion.” Most of these, such as advice on “listed
transactions,” marketed opinions, advice subject to conditions of confidentiality, and advice subject to contractual protection, are the province of tax specialists.

Similarly, some written advice is automatically excluded from treatment as a covered opinion, such as SEC filings or advice on a qualified retirement plan, again mostly the province of tax specialists.

In one area, Treasury seems to allow a reasonable exception, then fails to deliver. If tax avoidance is the principal purpose (defined as exceeding any other purpose, whatever that means), as opposed to merely a significant purpose, then the general rule strongly obtains that it will be a covered opinion. In what Treasury no doubt considered a significant concession, it will treat the tax avoidance purpose as only a significant purpose if the arrangement in question “has as its purpose the claiming of tax benefits in a manner consistent with the statute and Congressional purpose.” In other words, if Congress clearly authorizes each and every tax issue in your written advice, then it will not be treated as the principal purpose, even though it clearly results in tax savings.

One would expect this to exempt tax advice on such routine matters as making gifts within the $11,000 annual gift tax exclusion or utilizing all of the federal estate exemption in a “credit shelter trust” at the death of the first spouse. There are two problems. First, how do we know when tax avoidance is or is not the principal purpose? Second, if it is, how do we know whether Treasury will or will not recognize any arrangement as being consistent with Congressional purpose? Most estate planning is about wealth transfer to family, and only secondarily about taxes. But some popular techniques, like GRATs and QPRTs, lend themselves to characterization as having a “principal” purpose of tax reduction, since they would normally have no usage in the absence of the tax benefits. Is it safe to assume that GRATs and QPRTs are consistent with Congressional purposes? Various cases have denied the “routine” annual gift tax exclusion where there were unusual facts. Must you investigate the existence of unusual facts before rendering written advice? Until IRS or the courts provide further guidance on the meaning of “principal purpose” and “significant” if the IRS has some reasonable basis for a successful challenge. It does not require that the IRS be likely to win, only that it has some reasonable basis for its contrary position. This puts a burden on the practitioner to determine objectively whether there is any authority contrary to the written advice, something most practitioners will rarely be compensated by their clients for doing. Accordingly, practitioners should be wary of relying on this exception to avoid treatment as a covered opinion.

(2) Less than “more likely than not.” Written advice will not be a covered opinion if the opinion does not state that the desired tax result is “more likely than not” (MLTN), or words at that confidence level. A MLTN opinion is a “reliance opinion,” which will be a covered opinion. It would seem easy enough to avoid MLTN language. Estate planners rarely if ever use that language, preferring terms like “substantial authority” or “reasonable basis,” if they qualify the tax discussion at all. Clients, however, are likely to read your tax discussions as MLTN unless you clearly specify otherwise, and so may the IRS. In any event, even without your having used specific MLTN language, your client will likely expect not to be liable for penalties on account of reasonable reliance on your advice if the tax results are not achieved. But your client cannot rely on your advice for penalty protection if you did not add all the requirements of a covered opinion.

(3) Add a legend to a reliance opinion. Written advice that reaches a confidence level of MLTN (a “reliance opinion”) will not be a covered opinion if it adds a legend that it cannot be used by the taxpayer to avoid penalties. Despite the potential for poor public relations with clients, this will be the most widely used avenue of avoiding covered opinion status for most written advice by most practitioners. The keys will be educating your clients of the

Exceptions — tax avoidance as only a significant purpose

If tax avoidance is a significant purpose, and not the principal purpose, a number of exceptions are available to avoid creating a covered opinion.

(1) No significant federal tax issue. Written advice will not constitute a covered opinion unless there is a significant federal tax issue. A tax issue is

Yet, of course, we must.”
need for such a disclosure and then plastering the required disclaimer on everything you write, including every letter, email, and fax coming out of your office. Here is a suggested disclosure form, which must be “prominently disclosed” in a separate section (not a footnote) in typeface no smaller than other discussion of the law and facts:

This notice is required by Treasury Circular 230: Unless expressly stated herein, nothing contained in this message is intended or written to be used, can be used, or may be relied upon or used, by any taxpayer for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code of 1986, as amended. No one, without our express prior written permission, may use any part of this email in promoting, marketing, or recommending any arrangement relating to any Federal tax matter to one or more taxpayers. Furthermore, it may not be shared with any other person without our prior written consent other than as required by law or by ethical rules. However, this prohibition on sharing this writing does not preclude sharing with others the nature of this transaction or the fact that it may have been consummated.

(4) Not a marketed opinion. Written advice that the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner in promoting, marketing, or recommending an arrangement to one or more taxpayers (a “marketed opinion”) will not be a covered opinion if it prominently discloses a disclaimer against such use, such as that displayed under the title of this column.

(5) Limited scope opinion. Among the many requirements for a covered opinion is that the advice must consider ALL significant federal tax issues and must reach a conclusion with respect to each (or state that no conclusion is possible). Even seemingly routine planning can implicate multiple tax issues. The sheer number of these in any particular transaction may cause practitioners to overlook or ignore any number of what the IRS may deem to be significant federal tax issues. A practitioner may instead prepare a “limited scope opinion.” It relieves the practitioner from the burden of identifying and addressing all such issues by allowing the areas of discussion to be narrowed to those most relevant to the client. Note, however, that a limited scope opinion is still a covered opinion with respect to the issues discussed and must meet all the requirements for a covered opinion to the extent of the limited scope.

New rules for all other written advice

Even if written advice is not a covered opinion, additional new rules apply, the violation of which can subject a practitioner to the same penalties discussed above. In summary, written advice cannot be based on unreasonable factual or legal assumptions, fail to consider all relevant facts, or take into account the possibilities that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled if raised. Do not discuss audit and settlement possibilities in writing. Period.

Summary

The Treasury has overreacted in its attempt to police tax collections by treating tax professionals as presumptive criminals. Circular 230 will drive a wedge between taxpayer and professional advisor. It will encourage professionals to give only oral advice, unsupported by writing, except perhaps internal memorandum. It will encourage IRS examiners to use intimidation tactics on tax professionals. Worst of all, it will encourage taxpayers to seek tax advice where the cost is lower, such as insurance salesmen and stockbrokers, possibly resulting in more flawed or aggressive tax reporting rather than less. It may even be unconstitutional as a violation of the First Amendment right of free speech. But it is the law — for now. These are interesting times for estate planners.
We're celebrating the Tennessee Bar Journal's first 40 years all year! In each issue we will look back at an area of life in the law to see how the TBJ covered it. This month we consider the people behind the Journal's pages: its editorial board and staff.

Sometimes around 1989 the Tennessee Bar Journal ran an article about taxation, but by the time it was published, the law had changed significantly and the information was no longer correct. Don Paine pointed this out, as well as a few other gaffes, and suggested the Journal needed an editorial board to examine each article.

“The genesis of it was we had egg on our face,” Paine says.

At that time, articles that were submitted for publication were checked for accuracy by various individuals who practiced in whatever area of law the article was about. But that was a cumbersome process, causing then-editor Gary Hunt to have to start from scratch in the review process with each article. The Journal was bi-monthly then so the quantity was not what it is today, but nonetheless it was tedious and time-consuming. Mostly, though, it was a system without continuity and direction.

Often the person with the bright idea has to actually do the work and that's what happened here. Paine was appointed to the first board, along with Mary Martin Schaffner, who served until 1991, and Bill Haltom, who stayed on the board for 15 years. He doesn't hold the record for longevity, though — Paine still serves on the board. It soon grew to five members, which is where it stands today.

No, it's not Moe, Larry and Curly — it's the Journal staff: Landry Butler is publications and advertising coordinator (left); Barry Kolar is officially assistant executive director but also handles many editorial and design responsibilities; and Suzanne Robertson is editor. Other TBA employees who add Journal work to their already-busy jobs are Sharon Ballinger and Stacy Shrader, who compile Bulletin Board and Disciplinary Actions.

(Note continued on page 32)
Current members are Andrée Blumstein, chair, Nathan Rowell, Miles Mason, Jonathan Steen and Paine.

Until everyone had computers and access to the Internet, articles were copied and mailed to each member for review. But in 1999 when the Journal doubled its output to become monthly, things started heating up and a quick response time was more critical. As articles were increasingly being submitted on floppy disks, and then via email, the editorial board began to do its work electronically. Today, an article sent to the Journal frequently is in the hands of the editorial board just minutes after submission. (Note to authors who think it takes too long to hear back from us: there are still the same number of hours in a day and still just one person handling the submission traffic.)

Unlike substantive articles, news items are not subject to board approval and are staff-written.

The same year the Journal went monthly, it began listing links to articles and other related information on the then-new web site, TBAlink (www.tba.org). The magazine also became available online.

Among the many changes the Journal underwent in 1999 was that the editorial board began monthly conference calls. This enabled articles to go through the process quicker and gave members the time to plan future issues and discuss subjects to cover.

“One thing good about our board is that even though it can be contentious and we debate things, we stay friends,” Paine says. “It’s a great relationship.”

It’s true they don’t always agree and no article is accepted until it’s been scrutinized by each member. In 2004, 59 percent of submissions were accepted.

“Sometimes we have a consensus and sometimes we’re wide apart. Just like a court decision, it can be 3-2,” he says, but the entire board stands behind the final decision.

Has the function of the editorial board turned out like Paine envisioned? He says yes.

“Having the editorial board has worked out very well,” he says. “The Journal is light years better than it used to be. Of course I’m prejudiced but the Tennessee Bar Journal is a very, very good publication. We certainly would never have had the quality we have now without the editorial board or staff.”

— Suzanne Craig Robertson
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VINTAGE LAW BOOKS FOR SALE

Paralegal certification
(Continued from page 24)

The benefits of voluntary professional certification programs such as the CLA/CP and CLAS programs extend to the entire legal profession — educators, attorneys, and managers as well as paralegals. These programs encourage paralegals to participate in local study groups, and they promote inclusion of CLA/CP review programs in paralegal school curricula. A number of exam review publications, as well as online seminars and workshops, have been developed by NALA that benefit all paralegals.

Through the certification program, paralegals take charge of their professional and career development, and demonstrate a commitment to professional growth that rivals that of any profession. Firms and organizations which employ paralegals with CLA/CP or CLAS credentials can be confident that their interests are being well served.

ANSWERS TO CROSSWORD ON PAGE 34

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Notes
2. A non-profit professional association with headquarters in Tulsa, Okla. The association, with more than 6,000 members, provides continuing education and professional development programs for paralegals nationwide, and publishes the award-winning quarterly magazine, Facts & Findings.
3. See Mississippi Bar Ethics Committee Opinion 223 (Jan. 19, 1995), and New York State Bar Association Opinion 695 (Aug. 25, 1997). The U.S. Supreme Court has addressed the issue concerning utilization of professional credentials awarded by private organizations in Peel v. Attorney Registration and Disciplinary Committee of Illinois (110 SC 2281 (1990)). The court suggested that a claim of certification is truthful and not misleading if the claim itself is true, the bases on which certification was awarded are factual and verifiable, the certification in question is available to all professionals in the field who meet relevant, objective and consistently applied standards, and the certification claim does not suggest any greater degree of professional qualification than reasonably may be inferred from an evaluation of the certification program’s requirements. The court further advised that there must be a qualified organization to stand behind the certification process.
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