SUPREME COURT REVIEW

What the U.S. Supreme Court’s 2004–2005 decisions mean to Tennessee lawyers
**PREMIUM ESTIMATE REQUEST FORM**

**RETURN COMPLETED FORM FOR PREMIUM INDICATIONS**

*Questions? Please call Debbie Matthews, Director, at 615.658.0084*

<table>
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<tr>
<th>PLEASE RETURN TO</th>
<th>Debbie Matthews</th>
<th>FAX No.:</th>
<th>615.658.0044</th>
<th>E-MAIL</th>
<th><a href="mailto:debbie_matthews@ajg.com">debbie_matthews@ajg.com</a></th>
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1. CURRENT COVERAGE

   A. Number of years of continuous coverage:
   B. Current Professional Liability Center Program:
   C. Current Limits:
   D. Effective Date:

   **CURRENT POLICY EXPIRATION DATE:**

   E. Animal premium:
   F. Deductible:
   G. Per Claim or Annual Aggregate:
   H. Does your current policy modify or exclude coverage?

2. ATTORNEYS

   Please provide information about each attorney in your firm. If you do not wish to provide this information, provide number of hours worked on behalf of the firm. (Attach additional sheet if necessary)

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<tr>
<th>Full Name</th>
<th>Date Admitted to Bar</th>
<th>State</th>
<th>Date Began Private Practice</th>
<th>Date Admitted</th>
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<th>Individual E&amp;O Policy Amount</th>
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3. AREA OF PRACTICE

   Please furnish the % of billable hours, not income, you spend in:

   - **Adviory/Advice**: Defense
   - **Litigation**: Insurance Defense
   - **Litigation**: Choate Action/Alternative: Defense
   - **Litigation**: Personal Injury/Property Damage: Defense
   - **Litigation**: Professional Liability
   - **Litigation**: Mediation
   - **Litigation**: Workers Compensation: Defense
   - **Litigation**: Workers Compensation: Plaintiff
   - **Litigation**: Licensing
   - **Litigation**: Local Government/Population (not related)
   - **Litigation**: Natural Resources/Other
   - **Litigation**: Patent
   - **Litigation**: Real Estate: Leased/Tenant
   - **Litigation**: Assigning: Title: Commercial
   - **Litigation**: Assigning: Title: Residential
   - **Litigation**: Insurance
   - **Litigation**: Residential
   - **Litigation**: Foreclosures & Loan Workouts
   - **Litigation**: Syndication/Related Partnerships
   - **Litigation**: Zoning & Planning
   - **Litigation**: Securities (SEC, Stock, Bonds)
   - **Litigation**: Bankruptcy: Business
   - **Litigation**: Tax
   - **Litigation**: Immigration
   - **Litigation**: Intellectual Property
   - **Litigation**: Labor/Employment: Management
   - **Litigation**: Employee
   - **Litigation**: Union

4. CLAIM INFORMATION

   A. Are you aware of any claims involving disciplinary matters,
   B. Are you aware of any claims involving disciplinary matters, insurance or coverage?
   C. Are you aware of any claims involving disciplinary matters, insurance or coverage?
   D. Are you aware of any claims involving disciplinary matters, insurance or coverage?
   E. Are you aware of any claims involving disciplinary matters, insurance or coverage?

5. PLEASE COMPLETE UNDERWRITING INFORMATION

   **YES:**
   - Does any attorney in your firm serve as a director, officer, or employee, or have any family interest, in any other law firm? (If yes, please provide details on another sheet)
   - Does the firm have a claim which involves a legal interest in any other law firm?
   - Does the firm have a claim which involves a legal interest in any other law firm?
   - Does the firm have a claim which involves a legal interest in any other law firm?
   - Does the firm have a claim which involves a legal interest in any other law firm?

6. TOTAL

<table>
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<th>TOTAL (less equal 100%)</th>
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On the Cover
The west facade of the U.S. Supreme Court Building features “Contemplation of Justice” by sculptor James Earle Fraser. Read last term’s significant decisions of the court and how they might apply to your practice here, beginning on page 16.
Since 1956, Tennessee attorneys have looked to IPSCO for their professional and personal insurance needs. We represent some of the finest carriers available with a wide range of insurance markets to choose from. Just complete the fax back reply form below. Our agents will work hard to find the right coverage for you. When it comes to experience and customer service...

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- Business Overhead Expense
- Financial Review Service
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- Long Term Care
- Health
- Life

COVERAGE FOR MY LAW FIRM
- Office Contents/Building Package
- Workers’ Compensation
- Professional Liability
- Life and AD&D
- Disability
- Health
- Dental

Name ____________________________

Firm Name ____________________________

Address ____________________________

City/St/Zip ____________________________

Phone (____) __________________ Fax (____) __________________

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Fax to: 423.629.1109
P R E S I D E N T ’ S P E R S P E C T I V E

Not what they expected
Accepting the call to the legal ministry

I’m a P.K. (preacher’s kid). My father was a Southern Baptist minister. My great grandfather was a circuit riding Methodist preacher. I have three uncles who are preachers, and two cousins who are missionaries.

My late momma wanted to be a preacher, too. But we were Southern Baptists, and as you probably know, in the Southern Baptist church, God is not an equal opportunity employer. Momma settled for being a preacher’s wife and a Sunday school teacher. That’s too bad, because my momma would have been a mighty powerful preacher.

When I was a little boy, everyone in our family expected me to grow up to be a minister because that’s what the men in my family did.

But I had a terrible secret. I didn’t feel “the call” to be a preacher. I wanted to be a lawyer. I didn’t want to be Billy Graham. I wanted to be Perry Mason.

“I didn’t feel ‘the call’ to be a preacher. I wanted to be a lawyer. I didn’t want to be Billy Graham. I wanted to be Perry Mason.”

I didn’t tell a soul that I wanted to be a lawyer. I didn’t want to disappoint my mom and dad who I knew were counting on me to someday stand behind the pulpit and preach the gospel.

But the course of my life changed on June 10, 1964, my 12th birthday. Momma fixed me a birthday dinner featuring all my favorite foods — fried chicken, fried corn, fried green tomatoes, and for dessert, fried peach pie. What can I say? We were Southern Fried Baptists.

After dessert, Momma and Dad gave me my present. I ripped off the wrapping paper in reckless anticipation and found my gift. It was a Bible. Not just any Bible, mind you. It was a Scofield Reference Bible, just like the one Dad preached from every Sunday morning.

And then Momma said, “I know you are going to use this Bible for the rest of your life, because I know God is calling you to be a minister.”

Well, my heart sank. I felt so guilty. I just couldn’t tell Momma I wanted to be a lawyer.

Later that night, I confided in my dad. I told him my secret that I wanted to someday go to law school, not seminary. Dad listened quietly, and after I finished my confession he said, “I think your mother is right. God is calling you to the ministry.”

For the second time on my birthday, my heart sank. I was not only disappointing my momma, I was going to disappoint Dad as well. But then Dad added, “I believe God is calling you to the ministry because he calls all of us to lives of ministry. Some folks are called to be ordained ministers. Others are...”

(Continued on page 4)
called to lives of ministry as teachers, doctors, architects, engineers or mechanics. God may be calling you to a life of ministry in the law.”

And then Dad had a suggestion.

“Take your new Bible and read Micah, Chapter 6.”

And so I did. And this is what it said in verse 8: “What doth the Lord require of thee but to do justice, to love mercy, and to walk humbly with thy God?”

I share this story with you not because I claim some unique calling from above. To the contrary, I agree with my father that all of us who are blessed to be lawyers are called to lives of ministry. Every day we have the chance to minister to people whose lives are in conflict. Every day we have the chance to be advocates for people in need. Every day we have a chance to do justice.

Momma did not live to see me become a lawyer. She passed away a year after she gave me my Bible. I now keep it in my law office.

A few months ago after the conclusion of a jury trial in which I had served as defense counsel, the judge released the jury and then gave counsel permission to talk with them. In the hallway outside the courtroom, I approached the jury foreperson, shook his hand, and thanked him for his service. He smiled and said, “Mr. Haltom, during your closing, you sounded just like a preacher.”

I paused for a moment and then said, “I sure wish my momma could hear you say that. That would have made her proud.”

“All of us who are blessed to be lawyers are called to lives of ministry. Every day we have the chance to minister to people whose lives are in conflict. Every day we have the chance to be advocates for people in need. Every day we have a chance to do justice.”
LETTERS

Kennedy column draws readers’ ire

I am no fan of “Teddy” Kennedy. But, honestly, what was the purpose of this tirade (“Teddy Kennedy’s Trials,” by Donald F. Paine, August 2005 TBJ)? Despite a reference to Tennessee Rule of Evidence 615 this article was not worthy of “Paine on Procedure.”

... 

— Alice Wyatt, Nashville

I have never held the senior senator from Massuchusetts in particularly high regard, and I have held Don Paine — or at least his columns on procedure — in high regard. However, I found Paine’s diatribe in the August issue of the Journal — masquerading as his monthly Paine on Procedure column — to be more befitting a lunatic fringe blog site than an official publication of our State Bar.

What motivated Paine to dredge up — so to speak — the Chappaquiddick story which was in all the headlines for weeks over 35 years ago? And why highlight in a sidebar an alleged quote by a “state police detective,” which doesn’t even appear in the article? Is the statement supposed to be admissible evidence supporting the article’s assertion that a manslaughter trial would necessarily have resulted in a “conviction and penitentiary time?” Or is that conclusion supposed to be based on the “Notes” at the end of the article?

Perhaps the more relevant question is: Was it “Moe, Larry or Curly” featured in your subsequent article (“Who decides what goes in the Journal?”) who decided that Paine’s regurgitation of an old story, complete with character assassinations of the senator, his lawyers, and the prosecutor, was worthy of printing in what I thought

(Continued on page 12)
New ABA survey details pro bono activity
Do you do at least 39 hours of pro bono a year?

According to a new survey, 66 percent of lawyers gave free legal assistance to people of limited means and organizations serving the poor, volunteering an average of 39 hours of such work during a year. The American Bar Association Standing Committee on Pro Bono and Public Service recently released “Supporting Justice,” its report on the first national survey of lawyers’ pro bono activity.

The survey quantifies lawyers’ pro bono work and their attitudes about it. The committee will use this data to track pro bono activity and inform strategies for increasing pro bono work in the future.

“This is the first survey ever to poll lawyers from every state, in every practice area, and of every age and experience level about their pro bono activity,” said Debbie Segal, chair of the committee. “It will be a powerful tool in devising new approaches to encourage pro bono work and reduce inequalities in access to justice.”

Rule 6.1 of the ABA’s Model Rules of Professional Conduct defines pro bono as free legal service to the poor and organizations serving the poor and substantially reduced-fee work for such groups, as well as civil rights, civil liberties, public rights, charitable, religious, civic, community, governmental and educational organizations.

The survey also found that in addition to the 66 percent doing 39 hours, another 18 percent did pro bono work meeting other aspects of the ABA’s definition. Fourteen percent said they had not performed any type of pro bono activity.

Almost half, 46 percent, of lawyers polled met the ABA’s aspirational goal of providing at least 50 hours of free legal services in a year. The survey also provided insight into factors affecting lawyers’ decisions to engage in pro bono activities. When asked for the top two factors encouraging pro bono work, 70 percent of lawyers reported a sense of professional responsibility and personal satisfaction, while 34 percent cited recognition of the needs of the poor. In contrast, when asked about the top two factors discouraging pro bono work, 69 percent of lawyers reported a perceived lack of time, while 15 percent named pressure to work a minimum number of billable hours and 12 percent cited cost concerns.

The full report is available at www.abaprobono.org/report.pdf.

Call for Access to Justice Award nominations

The 2005 Tennessee Bar Association Access to Justice Awards committee is now taking nominations. The deadline is Sept. 20.

There are three categories: one for public service lawyers, one for law students and one for attorneys in private practice doing pro bono work.


A legal beagle?

Oakley is not a beagle, but she is being trained in a law firm. When she completes her education, she will be a working guide dog. Here, she sits at the feet of Stuart Campbell, a lawyer with Stites & Harbison’s downtown Nashville office. Campbell is one of many of the firm’s attorneys and staff members who assist with Oakley’s training by including her in meetings and inviting her into their offices on a daily basis. Oakley, who will be one year old in October, still has about another year before she graduates, when she will be ready to be matched with an owner.
Don’t miss these chances to make your opinions count

TBA motion granted to set comment period for CLE petition

Oct. 6 is the deadline set by the Tennessee Supreme Court for comment on a recent petition by the Tennessee Commission on Continuing Legal Education and Specialization that would amend Rule 21 of the Rules of the Supreme Court. The commission’s petition asks the court to divide the current commission into two entities — the Commission on Continuing Legal Education and the Tennessee Board of Legal Specialization. Doing so would permit a lawyer to advertise that the lawyer is “board certified as a _____ specialist by the Tennessee Board of Legal Specialization.” The change also would amend the requirement that attorneys sign and return an annual report statement.

The Tennessee Bar Association filed a motion July 1 requesting the court to publish the proposed amendments for comment and the motion was granted by the court on July 8.

Deadline for specialization comment period Sept 19

If you have an opinion on the Tennessee Commission on Continuing Legal Education and Specialization’s newly proposed certification programs, you have until Sept. 19 to tell the court what it is. The commission petitioned the Supreme Court this summer to add three specializations: Social Security Disability Law, Juvenile Law (Child Welfare) and DUI Defense.

To read the proposals, go to http://www.tba.org/rules/cle_2005/

To comment on either petition, write to Clerk Michael W. Catalano, Re: Rule 21 Certification Program Comments, 100 Supreme Court Building, 401 Seventh Ave. North, Nashville, TN 37219-1407.

Judicial conduct code under revision

Sept. 15 is the deadline for comment on the preliminary draft of revisions to the American Bar Association Model Code of Judicial Conduct. The preliminary draft and a cover report are posted at www.abanet.org/judicialethics/preliminaryreport.html.

Best program of the year! Child support CLE garners statewide award

The Tennessee Society of Association Executives recognized the TBA with an award for best program of the year in the category of Coordinated Series of Educational Sessions. TennBarU’s Child Support Guidelines series, which reached more than 800 lawyers in six cities, was cited as the best program of the year.

Congratulations to former Family Law Section chair and program producer Stuart Wilson-Patton; TBA CLE department members Roger Spivey, Kathleen Cailouette, Sarah Hendrickson and Vivian Bowles; and the TBA Young Lawyers Division, which also provided significant assistance in the planning and implementation of the program.

New member benefit: TBAJobLink launched

What began as a project of the Young Lawyers Division (YLD) Law School Outreach Committee in 2002 has been expanded to a TBA-wide service, which is to debut in early September. TBAJobLink will allow members to post resumes and search job openings at firms across the state. As a member service, the site will be free to both job seekers and employers.

For those seeking employment, the site will provide a unique outlet that targets the state’s legal community. After completing a quick registration process and selecting a password of their choice, job seekers will be able to post multiple versions of their résumé, highlighting different skills for different types of employers. Users also will be able to search job openings that have been posted.

For those who have positions to fill, the site will offer a no-cost venue to advertise an opening. Any legal employer in the state will be able to list jobs after completing a short registration process. Those employers currently running job classifieds in the Tennessee Bar Journal also will be able to post their openings on the Web site.

TBAJobLink has been designed and developed by TBA staff in conjunction with the YLD Law School Outreach Committee and its chair Laura Steel of Kingsport. Whether you are looking for a clerkship, your first job or career advancement, check out this new member benefit at www.tba.org/joblink.
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 jpg (with no compression), minimum resolution 200 dpi, and at least 1”x1.5” or they will not be used.

Compiled by Stacey Shrader and Sharon Ballinger

L eitner, Williams, Dooley & Napolitan PLLC welcomed two new attorneys to the firm’s Nashville office. Anthony M. Noel joins the firm as of counsel. He received a bachelor of arts degree with a double major in criminology and law studies, and sociology from Marquette University in 1993. He received his law degree from the New England School of Law in 1997.

Kenneth D. Veit joins the firm as an associate. He earned a bachelor’s in sociology with an emphasis in criminal justice from the University of Tennessee in 1997 and received his law degree from the University of Memphis in 2003.

Davidson County General Sessions Court Judge William E. (Bill) Higgins recently attended a national seminar on judicial reasoning after being awarded a scholarship from the State Justice Institute. Higgins is a 25-year veteran of the Nashville courts. He earned his law degree from the Nashville School of Law.

Michael H. Spencer has been named an associate with the Nashville office of Constangy, Brooks & Smith LLC. Spencer specializes in labor and employment law on behalf of employers, defending corporations in matters involving Title VII, the Americans with Disabilities Act and the Fair Labor Standards Act. He formerly served as assistant U.S. attorney for the Southern District of West Virginia. He earned his law degree from Washington and Lee University School of Law in 1996.

Neal & Harwell recently announced the addition of Lisa B. Taplinger as of counsel to the firm. As shareholder of the Young Williams firm in Jackson, Miss., Taplinger’s litigation practice consisted of corporate, employment, personal injury, medical malpractice, domestic and white collar crime. She was an appointee to the State Advisory Committee of the U.S. Civil Rights Commission and State Flag Advisory Commission. She received her degree from University of Mississippi Law School in 1980. She is admitted to practice law in Tennessee and Mississippi.

Sam F. Fowler Jr. has joined the Knoxville office of Holbrook & Peterson PLLC as of counsel to the firm. Fowler has practiced law for more than 50 years and is one of the local pioneers in alternative dispute resolution. He will serve primarily as a mediator in probate court and as an attorney for estates in probate administration.

The Nashville office of Boult, Cummings, Conners & Berry PLC announced that Kim McMillan has re-joined the firm as of counsel in the litigation practice area. McMillan previously served as an associate in Boult Cummings’ litigation group from 1987 to 1992, and most recently practiced law in the firm’s Clarksville office. McMillan also has been a member of Tennessee’s House of Representatives since 1994, serving the 67th House District in Montgomery County. She currently is the

Long-time Memphis lawyer Elmore Holmes III died July 25 at the age of 75. Holmes graduated first in his class from the Vanderbilt School of Law in 1958, and joined the firm now known as Armstrong Allen PLLC. In 1968, he became a partner in the firm. Holmes was a founder of the Community Legal Center and received the Tennessee Bar Association’s Pro Bono Award honoring that work in 1997. He is survived by his wife, daughter, son, sister and four grandchildren, all of Memphis.
majority leader for the House of Representatives. McMillan received her law degree from the University of Tennessee College of Law in 1987.

The Shelby County Commission recently appointed Memphis attorney **Scott Peatross** to be public administrator for the Shelby County probate courts, a four-year office created by state statute. In this capacity, Peatross will serve as fiduciary in estates, conservatorships and guardianships in cases where no family member is able or appropriate to serve. Peatross remains a partner at the Memphis firm of Bateman Gibson LLC, where he practices probate, maritime, railroad and insurance law. He graduated from Rhodes College and Tulane Law School.

The National Arbitration Forum has named Nashville attorney **I.C. (Jack) Waddey Jr.** to its national panel of independent arbitrators and mediators. Waddey, a principal in the Nashville firm of Waddey & Patterson PC, has more than 25 years of legal experience, primarily focused on intellectual property law and more than ten years of experience serving as a certified mediator.

Baptist Memorial Health Care of Memphis recently welcomed **Vicky Powell** to its corporate legal services department as a staff attorney. Powell will be responsible for handling physician contracting, including services and recruiting agreements. Prior to joining Baptist, Powell served as senior counsel in the Office of Inspector General at the U.S. Department of Health and Human Services. She received her law degree from Georgetown University Law Center.

In Knoxville, the firm has added two labor and employment law attorneys. **Joseph Doherty**, who joins the firm as an of counsel member, will focus on workers’ compensation defense, unemployment compensation, retaliatory discharge, employee leave and discrimination claims. A graduate of the Nashville School of Law, he previously served with the law firm of Wimberly Lawson Scale Wright & Daves in Morristown and as law clerk to the Tennessee Supreme Court. **Fletcher Hudson** also joins the firm as an of counsel member and will practice in Knoxville and Memphis. His experience includes union organizational campaigns, National Labor Relations Board matters and union negotiation and arbitration issues. He graduated from the University of Tennessee College of Law and served as partner in the firm of Ford & Harrison and senior partner with McKnight, Hudson, Lewis & Henderson in Memphis. Before entering private practice, he was a trial attorney with the National Labor Relations Board.

The Memphis office welcomes **Betty Campbell**, an associate, who will focus on commercial litigation. She received her law degree from the University of Memphis, where she served on the law review. **Charles D. Hamlett** also joins the firm as an associate. He will focus on commercial transactions, particularly mergers, acquisitions and securities. Hamlett is a graduate of the University of Memphis where he received both a law degree and a master of business administration. **Mark D. Griffin** has joined the firm as a shareholder. He will concentrate his practice in the areas of securities and tort litigation, broker-dealer and investment adviser law and regulation, and general corporate law. He is a graduate of the University of Mississippi School of Law, and is licensed to practice in Mississippi and Tennessee.

**James H. Levine** has been elected a shareholder in the Chattanooga office. Levine concentrates his practice in the areas of mergers and acquisitions, commercial lending, business organizations and commercial contracts. He specializes in owner agreements, equity transfers, HUD-insured financing and IT procurement and outsourcing. He is a 1997 graduate of Tulane University Law School, where he served as managing editor of the *Tulane Environmental Law Journal*. Prior to joining the firm, Levine served as a judicial extern for Federal Magistrate Judge Joseph C. Wilkinson Jr. of the Eastern District of Louisiana.

The Nashville office of Waller Lansden Dortch & Davis PLLC has named **Michelle Bellamy Marsh** a member of the firm. Marsh practices in the area of health care law and regulatory issues. She formerly served as corporate counsel for Community Health Systems in Brentwood. She earned her law degree from the College of William and Mary in 1996.

**Yvette Sebelist** has opened a Nashville office for Siskind Susser PC, a Memphis-based immigration law firm. Sebelist practices exclusively in the area of immigration law, with an emphasis on employment-related issues.
Reinstated

Robert E. Tribble Jr. has been reinstated to the practice of law after complying with Rule 21 as required by the Board of Professional Responsibility.

The Tennessee Supreme Court reinstated Knoxville attorney John Earl Rainwater to the practice of law on July 20. The court had temporarily suspended Rainwater for failing to respond to a complaint of misconduct. On May 23, Rainwater filed a response to the complaint and a hearing was conducted on June 17. The Supreme Court accepted the hearing panel's recommendation to lift the suspension but directed Rainwater to reimburse the Board of Professional Responsibility and the appellate court clerk for the costs and expenses of the proceedings.

Suspended

On June 27, the Supreme Court of Tennessee suspended the law license of Nashville attorney Leroy Cain Jr. for a period of nine months from July 7 until April 7, 2006. The court also ordered Cain to make restitution of $150 to one client and restitution of $415 to a second client within 30 days. The court first suspended Cain on Dec. 17, 2002, for non-compliance with continuing legal education requirements. Cain, however, continued practicing law and made misrepresentations to and failed to adequately communicate with clients, courts, opposing counsel and the Board of Professional Responsibility during this time. The court found that he also accepted fees while suspended, disclosed client confidences and neglected client matters.

On June 28, Knoxville attorney James L. Milligan Jr. was suspended from the practice of law for two years by the state supreme court. The Board of Professional Responsibility had recommended disbarment, but Milligan appealed that decision to the Knoxville Chancery Court, which ruled that he should receive a public censure. The board appealed that ruling to the Supreme Court. The high court found that Milligan misappropriated trust funds by overdrawing his trust account 24 times in one year and incurring overdraft charges of $766. The court also found that Milligan used a client's funds for personal use, forged a client's signature and falsely notarized documents. Milligan admitted depositing client funds in non-trust accounts and using client funds before settlement funds were deposited. The court identified a prior public censure, two admonitions and Milligan's failure to comply with the recommendations of a Tennessee bar law practice management consultant as aggravating factors in the case. The fact that he ultimately made good on the returned checks and that no one lost money were found to be mitigating factors.

Crawford was immediately suspended from the practice of law pending further order from the court. Crawford's suspension resulted from his guilty plea in the U.S. District Court for the Western District of Tennessee at Memphis on March 13. Crawford pleaded guilty to several charges of serious crimes, including seven counts of money laundering, bribery, possession of an illegal handgun and obstruction of justice. The court further ordered that a formal disciplinary proceeding be instituted to determine the extent of final discipline.

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The Tennessee Supreme Court suspended David D. James Jr., formerly of Memphis and currently residing in Olive Branch, Miss., for one year effective July 10. The board had temporarily suspended James on June 16, 2004, for failure to respond to a complaint of misconduct. The board filed a petition for discipline five months later alleging that James received $250 from a client to handle a bankruptcy filing, but kept the money and did not file the requested
motion. James did not respond to the petition for discipline and a motion for default judgment was granted. The board found that James failed to perform for and communicate with his client, neglected this matter and misappropriated his client’s fees. The board also found that the evasion of properly addressed certified mail; failure to cooperate, answer or defend actions; indifference in making restitution to the client; and substantial experience in the practice of law were aggravating circumstances in this case. A hearing panel convened to determine sanctions recommended that James be suspended for one year and that the court should condition reinstatement of his law license on dissolution of the June 2004 temporary suspension. The court adopted the hearing panel’s recommendations and further conditioned reinstatement on reimbursement of the disciplinary proceeding costs.

On July 11, the Tennessee Supreme Court suspended the law license of Memphis attorney Warner Hodges III for a period of one year retroactive to Oct. 1, 2004 – the first date he had been suspended. The court also ordered that Hodges continue his monitoring agreement with the Tennessee Lawyers Assistance Program (TLAP) for a period of five years, with noncompliance constituting immediate grounds for summary suspension. In response to a petition for discipline, Hodges submitted a conditional guilty plea admitting that he had been out of compliance with his TLAP contract and that he had practiced law while suspended.

Knoxville attorney James L. Kennedy was suspended from the practice of law in Tennessee for 90 days by order of the state Supreme Court on July 12. The Board of Professional Responsibility had filed a petition for discipline against Kennedy on April 29, 2004. On June 20, he entered a conditional guilty plea with the board in exchange for the suspension. Kennedy admitted that he failed to act with reasonable diligence and promptness in representing a client with regard to an estate and failed to keep the client reasonably informed regarding the matter. He also admitted that he had continued to practice law while on administrative suspension for non-compliance with continuing legal education requirements. In addition to imposing the temporary suspension, the court ordered Kennedy to pay his Board of Professional Responsibility fees for the years 2000-2004, as well as the costs of the disciplinary proceedings.

On July 12, the Tennessee Supreme Court suspended the law license of Knoxville attorney Stanley R. Barnett for a period of three years retroactive to April 1, 2002. The Board of Professional Responsibility filed a petition for discipline against Barnett in May 2003. In June of this year, Barnett submitted a conditional guilty plea acknowledging that he had failed to comply with court-ordered conditions on his earlier reinstatement, failed to refund client fees after being terminated, failed to appear at scheduled court dates, neglected cases, failed to communicate with clients, failed to return a client’s file upon request after being terminated, failed to respond to requests for information from the board, and failed to notify clients of his suspension. In addition to imposing the three-year suspension, the court ordered that Barnett pay restitution to clients for any unearned portion of fees he had been paid, and pay the costs of the disciplinary proceedings.

Compiled by Stacey Shrader from information obtained from the Board of Professional Responsibility of the Tennessee Supreme Court.

What does a suspension mean?

The Journal will explain different types of disciplinary actions in upcoming issues. This month we look at suspensions.

Orders imposing suspension are effective 10 days after issuance, except where the court finds that immediate suspension is necessary to protect the public. On the effective date of the suspension order, if not immediately, a lawyer may not undertake new legal matters and must cease representing current clients. A lawyer given temporary suspension, however, may continue representing current clients for 30 days. On the effective date of the order, the lawyer must cease using any indicia of lawyer, legal assistant or law clerk and may not maintain a presence where the practice of law is conducted.

The lawyer must notify all clients, co-counsel and opposing counsel of the suspension order, maintain records of the notification and make such records available to disciplinary counsel on request. The lawyer also must return to clients any papers or property to which they are entitled. Within 10 days of the order’s effective date, the lawyer must show compliance with the order and Supreme Court rules.

An attorney suspended for one year or more may not resume practice until reinstated by the Supreme Court. At the conclusion of the suspension period, such attorney must show by clear and convincing evidence that he has the moral qualifications, competency and learning required to practice law, and that resumption of his practice would not be detrimental to the integrity and standing of the bar or the administration of justice or be subversive to the public interest. An attorney suspended for less than one year may resume practice after the suspension period by showing compliance with the conditions of the suspension. An attorney suspended for less than one year with no conditions may resume practice without reinstatement. A lawyer given a temporary suspension may petition the court for modification or dissolution of the order for good cause.
was supposed to be a more or less scholarly publication of the Tennessee Bar.
— Allen T. Malone, Memphis

I was truly, deeply saddened to be confronted by Don Paine's article entitled, "Teddy Kennedy's trials," in the otherwise truly marvelous August 2005 edition of the Tennessee Bar Journal. I do my best every day to avoid voluntarily exposing myself to the kind of intensely uncivil, scream-ridden, anti-dialogue that now sells so many ads on several cable "news" channels, and I never thought that it would be forced upon me in the pages of my Journal.

I would quickly note that I am proud to call Don Paine a dear friend and colleague — we even served together on the Journal editorial board for 13 years. I have always thought that his procedure columns comprise one of the most important and deservedly well-read parts of the Journal. But this month, things abruptly changed.

In a sense, I don't really care whether the facts Professor Paine asserts are true (I hope they are, because, despite the senator's public-figure status, a reasonable reader has to suspect that the writer possessed the ordinary sort of "malice" toward his subject). There are two points: relevance and civility.

Assuming that the professor is correct in claiming that Massachusetts Senator Edward Kennedy is a perjurer, a killer, and should be in the penitentiary for the killing, how exactly is this subject in any way relevant to the practice of law in Tennessee? The professor's columns have always been doted on by readers because of their deep and abiding relevance to what we do every day. Even his historical excursions are almost always intended to teach us a lesson for today's practice. But what practical lesson were we to learn from this screed about the favorite whipping-boy of the hard political and religious right? I have read the article and I have no idea.

For a human being as civil as Professor Paine to pen so uncivil an article is astonishing; for an editorial board as watchful as the Journal's to approve its publication is disturbing and simply wrong. I urge the other members of the editorial board, and especially the TBA Board of Governors, to seriously consider the consequences of publishing so uncivil an article.

A little further down the road this little piece descends is a publication that is the antithesis of the marvelously civil, wonderfully useful Tennessee Bar Journal that Don Paine has done more than any other individual to foster for years, both as an editorial board member and as the author of a lovely, well-written, practical series of articles.

As a reader and editorial board member of the Journal for years, I have thought that the Journal had as its loftiest goal, as its guiding star, the type of scholarly, yet practical articles honored every year by the Joe W. Henry Award. Don Paine has twice justly won that award for earlier articles published in the same space. But can anyone seriously imagine that Don Paine's Teddy Kennedy attack piece could ever qualify for the Joe Henry Award? Indeed, would its tone have done anything other than seriously upset the gifted jurist for whom the award is named?

Were I still on the editorial board, I would vote for more Joe Henry, and less cable-channel venom.
— Lucian Pera, Memphis

I was surprised and disappointed by Don Paine's August column. A politically motivated ad hominem attack has no place in the Journal. Such columns invite responsive and equally divisive attacks. The TBA and its publication best serve the members by rising above the political fray to deal with matters of general concern to lawyers. We also should remember that there are judges among the members, who would be well advised to quit any such organization that engages in partisan advocacy. I would hope that in the future the Journal would follow its own editorial policy to assure that what it prints better serves the bar.
— Matt Sweeney, Nashville

I almost want to apologize in advance for this email, but I have to ask what in the world was the point of Paine on Procedure's "Teddy Kennedy's trials" in the current issue? Evidence Rule 615 was mentioned, but was tangential to the story — which called Ted Kennedy a killer and a coward, referred to a district attorney as "do-nothing" and "Doofus" (even capitalized), and called one Mass. State Police Detective "unethical" as well as decrying Kennedy's lawyers as unethical. It did, however, do a call out from another (presumably not unethical Mass. State Police Detective) again calling Kennedy a killer — that's three times in one very short article. And the call out didn't even appear in the story.

Back to the apology, I halfway feel like my complaint here is as irrelevant as the story itself. A short article written to call Ted Kennedy a killer and that has nothing, and I mean nothing, new to say about this 30+ year old injustice. I don't get it.
— William A. Gillon, Germantown

Based upon the article, "Who decides what goes into the Journal?" I must conclude that Don Paine is speaking for the Tennessee Bar Association in his column "Paine on Procedure." If that is the case, I will be tendering my resignation from this organization. I do not belong to any group that purports to offer commentary on the law and substitutes partisan political diatribes instead. Notwithstanding all of Paine's accomplishments, he should not be allowed to put forward his political philosophy under the guise of promoting a better understanding of the law. If he must editorialize, let him do so with a disclaimer that separates his partisan, rightwing harangues from that of the official organ of the TBA. If it is the belief of the governing body of the TBA that nothing is wrong with promoting a rightwing agenda in the TBA Journal then please accept my resignation as I do.
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The Construction Law Section is chaired by Todd Panther, Tune, Entrekin & White PC, Nashville, (615) 244-2770


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TENNESSEE BAR JOURNAL, SEPTEMBER 2005 13
Does a defense lawyer have a right to have an ex parte discussion with a plaintiff’s treating physician? Does a plaintiff waive her right of patient-physician confidentiality by filing a lawsuit? Can the court compel a plaintiff to execute a medical authorization allowing defense counsel to engage in such conversations?

These issues moved from the back to the front burner with the decision of the Tennessee Supreme Court in Givens v. Mullikin. Like most good appellate opinions, Givens answered some questions and left open others not directly at issue under the facts of the case. Givens told us, definitively, that a “doctor warrants that any confidential information gained through the relationship [with the patient] will not be released without the patient’s permission.”

Givens also made it clear that the implied covenant of confidentiality was trumped by a subpoena to examine records or give testimony. What Givens did not answer was whether a court could issue an order authorizing defense attorneys to talk privately with a plaintiff’s treating physician. Predictably, lawyers for plaintiffs and defendants each found comfort in the language of Givens on this subject, but in reality that “comfort” never resulted in either side being absolutely sure how a judge would rule on the issue. So, over the next two years, the battle waged back and forth. Some trial judges permitted ex parte communications. Others did not. Alsip v. Johnson City Medical Center was the first case to make it to the Court of Appeals on the issue.

The trial judge ordered that defense counsel in the medical negligence case could have ex parte conversations with non-defendant prior or subsequent treating physicians so long as the information sought related to the condition on which the plaintiff originally sought treatment or the post-injury treatment. Also, the trial judge ruled that the defendant could not be present.

The Court of Appeals, in a unanimous opinion authored by Judge Charles Susano, vacated the order, saying that “[n]owhere in Givens does the Court suggest, intimate, or even remotely mention an order of the type before us in this case.” Susano wrote that no decision of the Tennessee Supreme Court held that the filing of a lawsuit waived that covenant of confidentiality but, in any event, that any such rule would be preempted by HIPAA and the rules promulgated there under. Federal law does not permit, in the opinion of the court of Appeals, a state to provide less stringent protections than that provided by federal law. Since nothing in the federal law provides that the filing of a lawsuit waives the right of the patient (indeed, such a proposal was deleted from the final rule), the court held that the mere filing of a lawsuit did not constitute a waiver.

This case is almost certainly going to go to the Tennessee Supreme Court, and I predict that the result will be affirmed. If the mere filing of a lawsuit opens the door to ex parte communications with the plaintiff’s physicians, the shield of confidentiality becomes wafer-thin.

That being said, there is a potential for unfairness to defendants in this result that can be cured by a rule change. In my opinion, a defendant in a medical negligence case should be permitted to take, at their expense, a discovery-only deposition just as if the treating physician deponent were an expert under Rule 32.01(3) of the Tennessee Rules of Civil Procedure. That deposition would give the defen-

John A. Day is a trial lawyer from Brentwood who dreams about torts. He just started a blog about Tennessee tort law; read it at www.dayontorts.com.
not wish to be part of any organization that furthers the interests of the Republican National Committee. I will await your response.

— Charles Ray, Nashville

Paine responds

I apologize for upsetting these good lawyers. Having placed myself in the time out corner, I shall strive to be good. Maybe the column in this issue will better suit.

As Peter Huber wrote in Galileo’s Revenge: "Publish and be damned." I did, and I am.

Respectfully,

— Donald F. Paine, Knoxville

Editor’s note: The Journal endeavors never to offend readers. The column in question represents the opinion of its author, not the Journal or the Tennessee Bar Association. The Journal takes seriously the responsibility to use its resources wisely, including the publication of opposing viewpoints. These letters include every letter received by press time that was intended by its author for publication.

We acknowledge that writers’ opinions are going to be contrary to readers’ views some of the time. As it says in every issue of the Journal on page 3, “Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Tennessee Bar Association, its officers, board or staff.”

A fond farewell from the chief

What a wonderful surprise to receive the August 2005 Tennessee Bar Journal! I want to thank you, the Tennessee Bar Journal staff and your editorial board. Although I knew you were preparing a story on my retirement, I had no idea that Barry’s article would be so lengthy, comprehensive and flattering (“Called to serve,” by Barry Kolar, August 2005 TBJ). He is so creative. His ability to sit down with someone, ask a few questions, and come up with the theme “called to serve” is truly amazing. He has a wonderful writing style. I only wish I could write so well. [Photographer] Dana Thomas was masterful in getting me to feel relaxed and enjoy the shoot. Please convey to him how much I appreciate his wonderful ability to make his subjects look better than they really do.

The quotes from Ben Cantrell, Tommy Frist, Buck Lewis and Riley Anderson are very special to me. The layout with pictures from the past and present is extremely meaningful to me and to my family. To see my parents, who lived to be 94 and 100, with my children, ages 5 and 3, at my 1974 swearing-in and then to see the recent picture of my five grandchildren, ages 12 through 8 months, makes me realize what a wonderful and fulfilling life I have had with a caring and loving family.

Thank you for making the time leading up to my retirement days I will always cherish and remember. I look forward to working with the TBA in any way that I can be of service.

Yours very truly,

— Frank F. Drowota III

CLA designation different from certificate

Your publication of my article on the importance of professional certification for paralegals (“Why Paralegal Certification Counts,” August 2005) was the high point in my day as I leafed through the August issue. I was startled, however, to see your placement of a sidebar in which it was said that becoming a certified paralegal “may be easier to accomplish than you think.” The sidebar listed a number of Tennessee schools offering “paralegal certificates.”

This list of academic programs is probably useful information, but your placement of it on the same page with my article is bound to cause confusion. The sidebar appears to equate professional certification with a certificate of completion from an educational institution — exactly contrary to the article and to the definition of professional certification. Perhaps a quote from Leveraging with Legal Assistants (ABA Section of Law Practice Management, 1993) addresses the issue best in the context of finding and hiring qualified legal assistants:

It would be safe to assume that a CLA can immediately bring experience and capability to the practice.

(Continued on page 36)

Please note these corrections from the August issue

As part of Dan Holbrook’s column in the August Tennessee Bar Journal, “Revenge of the IRS: Circular 230 changes law practice,” there is a suggested disclosure form, printed on page 30, that should be used on “every letter, email and fax coming out of your office.” This is to comply with the IRS’s new rule, which Holbrook writes is “one of the most significant events affecting estate planners in the last two decades.”

However, the sample disclaimer, although not incorrect, is not the one the author intended to accompany the story, and there were four footnotes missing. The author’s intended sample disclaimer is the language found at the very beginning of the article, starting with the words “Important Notice.”

The Journal regrets the error and invites you to access the complete, corrected version of the article at http://www.tba.org/Journal_Current/tbj-2005_08.html.

In the article, “Who decides what goes in the Journal?” (August 2005), the dates of service for editorial board chair Andrée Blumstein were incorrect. She began on the board in 1994, not 1998. Mary Martin Schaffner was mentioned in the body of the story but was omitted from the box. The Journal, once again, regrets the errors.
SUPREME COURT REVIEW

What the U.S. Supreme Court’s 2004-2005 decisions mean to Tennessee lawyers

By Perry A. Craft and Michael G. Sheppard
The first Monday in October marks the beginning of a new Supreme Court term. By the end of the next June, the court will have issued 80 opinions before recessing for the summer.

This article reports the holdings from recent opinions that are of interest to practicing Tennessee lawyers. Last term, the court struck the federal sentencing guidelines, cut back on preempting state tort law, limited contribution under environmental law, held that a client must include the contingency fee suit paid to his lawyer in discrimination suits as gross income, found debtors’ IRAs exempt from the bankruptcy estate, restricted private federal securities suits against publicly held firms, construed the fair use defense to trademark infringement, expanded liability for copyright infringement, extended maritime commerce’s reach, broadened Title IX’s sexual discrimination implied cause of action, allowed one Ten Commandments’ display and struck another, struggled with takings clause issues, upheld drug sniffing dogs at traffic stops, ruled states may not execute minors under 18, reversed a conviction against Arthur Andersen, reinvigorated the Commerce Clause and struck a state law allowing marijuana use for medical reasons, and literally read the criminal wire fraud statute — broadly. After the court issued the term’s last formal opinion in June, Justice Sandra Day O’Connor announced her retirement, and this article briefly reports the implications.

In *Comm. Internal Rev. v. Banks*, the Court ruled that recipients of settlements based on discrimination claims must include attorney’s fees as gross income. When a litigant’s recovery constitutes income, that income includes the part of the recovery paid to his attorney as a contingent fee. The litigants entered contingent-fee agreements with lawyers to contest employment terminations. After settlements were reached, they paid their lawyers contingency fees. Though the fees qualified as miscellaneous itemized deductions, the Alternative Minimum Tax defeated them. The IRC defines “gross income” as “all income from whatever source derived,” §61(a). The anticipatory assignment of income doctrine prevents a taxpayer from excluding economic gains from gross income by assigning them in advance to another. Gains are taxed to those who earn them. Thus, taxpayers cannot avoid taxes by devising plans to keep income when paid from vesting in the person earning it. A contingent-fee agreement was an anticipatory assignment to the attorney of part of the income from a recovery, and the client must include it as gross income. The 2004 American Jobs Creation Act allows taxpayers in computing gross income to deduct “attorney fees” from an unlawful discrimination suit based on civil rights laws, the employment relationship, or retaliation for asserting legal rights. Here, the parties settled before the Act’s passage. The reason the court granted certiorari here is not clear. The court did not foreclose other theories that taxpayers may argue and construed a now repealed, narrow tax code section.

The court resolved a key contribution issue under federal environmental law. In *Cooper Industries Inc. v. Aviall Services Inc.*, though (Continued on page 18)
U.S. Supreme Court decisions

(Continued from page 17)

no suit was filed, a state directed a private firm to clean up a contaminated site under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The firm voluntarily complied. Section 113(f)(1) [42 U.S.C. §9613(f)(1)] specifies that a party may obtain contribution “during or following any civil action,” §106, §107(a). CERCLA allows the government to clean up contaminated areas and then recover costs or force potentially responsible parties (PRPs) to do so. After CERCLA’s passage, courts allowed a private party who voluntarily incurred response costs, not itself subject to suit, to sue for recovery against other PRPs. In 1986, Congress passed §113(f)(1): suit for contribution from PRPs may follow “during or following any civil action.” Section 107, which also allowed for contribution, is similar to §113(f)(1): both allow private parties to recoup costs from other PRPs. Here, Cooper sold sites to Aviall. Both firms had contaminated the sites. An agency instructed Aviall to clean them up, but did not file an administrative or judicial action. After cleaning up the sites, Aviall sued Cooper to recover cleanup costs. Since no action was filed, §113(f)(1) did not allow contribution: it only may be sought “during or following a civil action.

The holding discourages settlements without litigation. Counsel for PRPs may insist upon litigation to preserve their rights to contribution.

■ In Rousy v. Jacoway,5 the court held that a Chapter 7 debtor may exempt his Individual Retirement Accounts (IRAs) from the bankruptcy estate, a result suggested by Patterson v. Shumate, 504 U.S. 753 (1992). Upon filing a petition, all interests of the debtor in property become property of the estate, §541(a)(1). The Bankruptcy Code allows a debtor to withdraw certain property from the estate. Tax law favorably treats IRAs. Debtors may not withdraw funds without penalty until they are 59. Under §522(d)(10)(E), a debtor’s right to receive payment must be from a “stock bonus, pension, profit-sharing, annuity, or similar plan” on “account of illness, disability, death, age” are exempted only “to the extent ... reasonably necessary to support” the account-holder. The IRAs fit those requirements and were exempt.

■ In Norfolk So. Ry. Co. v. Kirby,6 the court expanded maritime commerce’s reach, and applied federal maritime law, not state law, to an inland derailment. To arrange delivery of goods purchased abroad, a seller hired a freight forwarding company (FFC). The FFC prepared a through bill of lading, containing (i) a $500 per package limitation of liability [LOL] clause (unless the bill states another value, 46 U.S.C §1304, Carriage of Goods at Sea Act, sets a $500 per package limit) and (ii) a Himalaya clause, extending limitations clauses to downstream carriers. The FFC hired a German shipper and prepared a second bill with a LOL clause with slightly different terms. Containers were sent by sea to Georgia; the shipper arranged rail transit from port to Alabama. Far from port, the train derailed. Defining maritime commerce conceptually, not spatially or limited to the “tackles,” port-to-port, the court held that transit by rail over land was part of maritime commerce. Broadening maritime commerce meant federal maritime law, not state law, governed the contractual allocation of loss issues stemming from the less-than-clear LOL clauses, an outcome protecting shippers. Under agency law downstream carriers, e.g., the railroad, were not the owner’s agents, but they were agents for one purpose — the limitation, and were also third party beneficiaries. The first bill’s $500 per package LOL controlled. The goods’ owner, not the carrier, bore the $1.5 million loss. Federal maritime law may apply to inland incidents. When goods are shipped in now broadened maritime commerce, limitations of liability clauses should be reviewed and negotiated and clients should secure adequate insurance.

■ In Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992), the court found that the term “requirement or prohibition” in a federal act regulating cigarette labeling and requiring specific warnings embraced common-law duties and preempted state tort law. Afterwards, courts were more likely to preempt state tort law. In Bates v. Dow Agrosciences LLC, the court narrowed Cipollone. A pesticide, Stron-garm, damaged farmers’ peanut crops. They filed state law tort, contract, and deceptive trade practices claims. The court ruled that FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act), 7 U.S.C. §136v(b), did not preempt state law damages suits. The pesticide’s label

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Craft and Michael G. Sheppard are partners in the law firm, Craft, Sheppard & Sitton. Craft, a 1978 University of Tennessee College of Law graduate, formerly served as deputy state attorney general. He devotes most of his practice to class actions, complex litigation, constitutional, antitrust, and ERISA.

For years, he has authored an annual review of the Supreme Court. He welcomes questions, suggestions, and criticisms. His e-mail address is craft@cssjuris.com.
recommended its use wherever peanuts were grown. Under FIFRA, EPA conditionally registers but does not approve pesticides or their use. FIFRA forbids a manufacturer from misbranding or omitting warnings from a label and bars states from imposing “requirements for labeling or packaging in addition to or different from those required” by the act, but states may regulate in-state sales or uses of registered pesticides if the regulation does not authorize a sale or use that FIFRA prohibits, §136v(b). Before FIFRA, pesticide makers routinely faced tort suits. Here, FIFRA allowed states to supplement federal efforts without express authorization. States may review labels to ensure compliance with federal laws or make violating them a state offense. State sanctions for violating state rules duplicating federal requirements are consistent with §136v(b); its prohibitions only apply to “requirements.” An occurrence, e.g., a jury verdict motivating an optional decision is not a “requirement.” FIFRA preempted a state rule only if the rule was a requirement “for labeling or packaging” and it imposed a labeling requirement in addition to or different from those FIFRA required. State tort law was outside that scope. Federal law did not preclude states from “imposing different or additional remedies, only different, additional requirements.” Declaring that preemption is disfavored, suit could proceed: state tort law may aid in enforcing federal law.

■ Title II of the 1934 Communications Act, 47 U.S.C. §151, subjects “telecommunications service” providers to mandatory common-carrier regulation and its requirements, §153(44). In Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services,8 the FCC concluded that cable companies selling broadband Internet service did not provide “telecommunications service” as defined by the act and were exempt from Title II’s common-carrier regulation. The court ruled that the FCC’s interpretation of the act was reasonable and entitled to deference under Chevron U.S.A. Inc. v. Nat’l Res. Def. Council Inc., 467 U.S. 837 (1984). The rub was that the FCC had changed its earlier position, but the court believed the FCC modified its position in response to fresh thinking. By extending Chevron deference to an agency when it changes positions, the dissenters feared that an agency could overrule courts and thwart or limit judicial review.

The 1996 Telecommunications Act prohibits cities from using their zoning laws to impede placement of wireless facilities such as antenna towers based on environmental effects of radio frequency emissions. The 1996 act amended the 1934 Communications Act, 47 U.S.C. §332(c)(7), and gave a private action to a person “adversely affected” by a “local government” action inconsistent with its provisions. After a city used its zoning laws to deny a private property owner a permit to build an antenna, he sued under the 1996 act and the federal civil rights law, 42 U.S.C. §1983. Section 1983 protects “rights,” not “benefits or interests.” A §1983 suit requires a plaintiff to show that a law created an individually enforceable right for a class of beneficiaries to which he belongs. Unlike §1983, §332(c) has a shorter limitations period, only 30 days, requires expedited hearings, and does not allow for damages and attorneys fees. Though sympathetic to the owner’s claims of city interference, in City of Rancho Palos Verdes v. Abrams,9 the court limited §1983’s broad text, which gives a cause of action to a person suffering a deprivation under color of law. A §1983 suit was incompatible with §332(c)’s comprehensive scheme. Thus, the owner could not file a §1983 suit to enforce rights created under the 1996 act. Otherwise, §1983 would become a catch-all for all suits against cities and supplant a host of existing statutory schemes and defined remedies.

■ In Castle Rock v. Gonzales,10 Wife repeatedly asked the police to enforce a domestic restraining order and arrest her estranged Husband for violating it. The police declined, and husband murdered the parties’ three children. The restraining order’s language — authorized by state law — was mandatory, requiring police to arrest the husband for a violation. Though the language was mandatory, the court held the police had discretion not to arrest. The Wife’s interest in securing the arrest did not create a property interest for purposes of due process, and she could not pursue a §1983 claim.

■ Compared to the boys’ team, a public school girl’s basketball team received unequal funding and access to facilities. The girl’s coach, a male, complained, was removed, and sued for retaliation. In Jackson v. Birmingham Bd. of Educ.,11 the court held that the 1972 Title IX of the Education Amendments, 20 U.S.C. §1681, gave Jackson an implied private right of action for retaliation because he complained about sex discrimination. Section 1681 included retaliation when a “funding recipient” retaliated against a person because he complained about sex discrimination. Title IX broadly prohibits sex discrimination by recipients of federal education funding:

No person … shall, on the basis of sex, be … subjected to discrimination under any education … activity receiving federal financial assistance.

Earlier, the court found that Title IX conferred a private right of action for damages. Retaliation because a person complained of sex discrimination is “intentional sex discrimination” or a “differential treatment” is discrimination “on the basis of sex.” Though often un receptive to finding implied causes of actions, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001) (Title VI), the court found that Jackson, a male, was a victim of discriminatory retaliation. Though not the subject of the original complaint, he may sue. This 5-4 decision will affect school boards and programs receiving federal funds. If they fail to act upon sex discrimination complaints, they face potential liability.

■ In Smith v. City of Jackson,12 the court ruled that “disparate impact” claims were cognizable under the ADEA (1967 Age Discrimination in Employment Act), 29 U.S.C. §623(a); however, the court affirmed the dismissal of police officers’ complaint alleging that a city’s pay raise formula discriminated against older workers. Since the city established that

(Continued on page 20)
the pay raise formula was based on a “reasonable factor other than age” (RFOA), the older workers only showed that the practice caused a statistical imbalance and failed to state a claim. When implementing a facially neutral policy that falls more heavily on workers over 40 than on younger workers, counsel may analyze the effects on older employees who, if aggrieved, may file a disparate impact claim.

■ In *Spector v. Norwegian Cruise Line Ltd.*,13 disabled passengers sued a cruise line under Title III of the Americans with Disabilities Act, (ADA), 42 U.S.C. §12181. The ADA bars discrimination based on disability in places of “public accommodation” and “specified public transportation services.” The ADA requires covered entities to make “reasonable modifications in policies, practices, or procedures” to accommodate disabled persons and remove architectural and communication barriers that are *structural* in nature where removal is *readily achievable.* The cruise line operated foreign-flag ships regularly docking at U.S. ports and required disabled passengers to pay higher fares and unlike other passengers, to waive medical liability and travel with companions, while reserving the right to remove them if they endangered other passengers. Plaintiffs claimed that the cruise line failed to make reasonable modifications necessary to ensure their full enjoyment of the ship and that its physical barriers denied them access to the best cabins. Finding that cruise ships fit within Title III’s “public accommodation” and “specified public transportation” definitions, a plurality held that Title III applied, but that cruise ships were not required to remove architectural barriers. Under the ADA, a “readily achievable” barrier removal must be “easily accomplishable,” not cause much difficulty or expense, and consider the impact upon a facility’s operation. A Title III barrier-removal requirement that would make a ship noncompliant with the International Convention for the Safety of Life at Sea would substantially impact its operations and is not “readily achievable.” Whether a barrier modification is “readily achievable” must also account for its effects on shipboard safety. Title III’s nondiscrimination and accommodation requirements do not apply when disabled persons pose significant risks to others’ health or safety, which cannot be eliminated by modifying policies, practices, or procedures. Lower courts have struggled with determining when the ADA requires a covered entity to remove architectural barriers, but the plurality offered little guidance. The justices disagreed as to U.S. law’s extraterritorial application to foreign-flag ships.

■ A prima facie case of trademark infringement requires a plaintiff to prove that the infringer’s practice likely will confuse consumers about goods or services’ origin. In *KP Permanent Make-Up Inc. v. Lasting Impression I Inc.*,14 both KP and Lasting Impression used the term “micro color” to sell permanent makeup. Lasting Impression registered the trademark for “Micro Colors,” but conceded that KP used “Micro Colors” to describe its goods, not as a trademark, a fact that proved fatal. The court shaped the affirmative defense, “fair use,” 15 U.S.C. §1115(b)(4), to trademark infringement. A party raising fair use need not negate any likelihood of consumer confusion about goods or services’ origin. A registered mark’s holder may sue others for using an imitation of the mark in commerce when that “use is likely to cause confusion” or “deceive,” §1114(1). Fair use constitutes a defense to a charge of infringement when “use of the [infringed] name” is a use other “than as a mark ... descriptive of and used fairly and in good faith only to describe the goods … or their geographic origin,” §1115. Fair use may cause some consumer confusion, but a registrant cannot monopolize language or a descriptive term’s use by registering it as a mark. Confusion came from Lasting Impression’s identifying its product with a mark using a known descriptive phrase.

■ Grokster and Streamcast distributed free software to users allowing them to share electronic files by peer-to-peer networks. The users’ computers communicate directly with each other, not through central servers. Copies of a file, e.g., a song, are available on many users’ computers, and requests, retrievals, and downloading are easy and fast. Studios and other copyright holders sued for copyright infringement. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*,15 the court ruled that when a product (here, software) is capable of lawful and unlawful uses, a distributor is liable for acts of copyright infringement (Continued on page 30)
What’s new at TennBarU?

CHILD SUPPORT: WHAT’S THE NEXT STEP?

We have lived with the new Child Support Guidelines for almost a year. Now the “moratorium” on modifications is about to expire and several questions are upon us.

• Are there difficulties or areas of confusion?
• How do we as attorneys and mediators best serve our clients in the coming year?
• How does mediation work in the negotiation of child support issues?
• What ethics issues may be involved?

Answering these and other questions will be the focus of the ADR/Family Law Mock Mediation — Child Support Guidelines seminar, which is coming soon to your area. In addition to a speaker from Department of Human Services — who will provide the latest child support information — a panel of local representatives of the bench, bar and mediation community will address your questions and concerns.

This four-hour course will be offered Sept. 23 in Memphis, Sept. 30 in Knoxville, Oct. 14 in Chattanooga, and Oct. 27 in Nashville. Learn more or register online at https://www.tba.org/onsiteinfo/adr_2005.html

STAY COOL, 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. 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.

LEARN THE LATEST IN TECHNOLOGY LAW

Learn the latest developments in open source code, mergers and acquisitions in the technology world and more during the 7th annual edition of the Business and Technology Law Seminar. In addition, watch for the popular “Top 10 or So Hot Topics and Developments in Technology” session. Presented by Jason Epstein and Bruce Doeg from Baker Donelson Bearman, Caldwell & Berkowitz in Nashville, the program will make stops in Memphis on Sept. 9, Nashville on Sept. 23 and Knoxville on Oct. 7.

SERIES GUIDES YOU THROUGH NEW BANKRUPTCY LAW

Learn what you need to know about the new U.S. bankruptcy law through this popular TennBarU TeleSeminar series. Presented in convenient 1.25-hour segments over three months, this series lets you pick the topics you need to know about, without committing to a lengthy program. Find out more or register at https://www.tba.org/onsiteinfo/ethics2005.html

WHEN ETHICS RULES COLLIDE WITH FIRST AMENDMENT

Ethics expert Brian Faughnan will be back for the 2005 edition of the TennBarU Ethics Roadshow, taking on the topic “Where the First Amendment and Ethics Rules Collide: Attorney Advertising, Public Statements by Attorneys and Judges, and the Upcoming Judicial Elections.” Don’t miss it when it comes to your city. Here’s the schedule: Chattanooga on Dec. 7, Knoxville on Dec. 8, Nashville on Dec. 14 and Memphis on Dec. 15.

TennBarU TeleSeminars offers leading national experts discussing timely topics. Listen in where it’s convenient for you.

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TENNBARU: CLE FOR TENNESSEE
The political leadership in Tennessee — as well as lawyers generally — the media, and hence the public, has ignored the recent report by the Tennessee Bar Association’s Committee on Effective Assistance of Counsel in Capital Cases. Instead of ignoring the report and its recommendations, the legislature, the governor, the attorney general and the legal profession should study it closely and implement its recommendations.

Recent death penalty cases from Tennessee before the Sixth Circuit continue to undermine confidence in the accuracy and fairness of the state’s capital punishment system. The administration of the death penalty nationwide remains broken and arbitrary, and that seems particularly true in Tennessee, as the report makes clear. We still see a consistent pattern of ineffective assistance of counsel, prosecutorial misconduct, and other constitutional errors. A Tennessee rape murder case from the Sixth Circuit is now pending in the U.S. Supreme Court in which DNA evidence disproves the rape; and new evidence shows, according to leading, objective forensic experts, that crucial scientific evidence was fabricated at trial. There is even significant evidence that the murder was committed by a person other than the defendant who has now been on death row for 20 years. A full investigation at the time of trial would probably have revealed much of this evidence.

With the advance of civil society in America, the death penalty as an institution has changed drastically. Prisoners were publicly burned at the stake in the 17th century for witchcraft, blasphemy and other now nonexistent crimes. They were hung publicly in the 18th and 19th centuries for many crimes — horse stealing, sodomy, rape, larceny, as well as murder. In the 20th century, change was even more rapid. Abandoning public deterrence and seeking a less painful death, electrocutions and lethal injection brought state-sanctioned killing inside, concealed from public view. States began to debate and sometimes abolish the capital sanction altogether. Civil society has become ambivalent about its efficacy. Interpreting the Eighth Amendment’s “cruel” punishment clause, the federal courts have limited it to aggravated murder and surrounded the capital trial with a complex maze of rules and standards that are often difficult to understand and are applied inconsistently. The application of death penalty law is now so complicated and requires so many skills that it is more difficult to practice than tax law. It also pays the defense lawyer at rates equivalent to those for a good plumber. For prosecutors, defense lawyers, judges and families connected to the crime, it revs up the emotions like nothing else in the law.

For these reasons, in September 2002 I spoke to the Tennessee Bar Association’s Federal/State Judicial Conference in Nashville about some of the cases and the current condition of the death penalty system in Tennessee. I said that state and federal judges agree that the judicial administration of the death penalty is by far the most difficult, time-consuming, frustrating, and critical joint problem that the Tennessee state and federal judiciary have to grapple with on a daily basis. Our current system consumes enormous public resources, involving many years of sustained work by state prosecutors, state defenders, state judges, federal defenders, and federal judges. Despite the low rates of compensation, what we spend in the death penalty department would buy lots of health care for the indigent and lots more science education.

Despite the fact that death sentences are supposed to be less arbitrary and inconsistent after the Supreme Court’s 1972 invalidation of state death penalty statutes, the system remains just as broken today. The same defendant who receives a sentence of death in Shelby County would
probably not even be subject to a capital trial in Davidson County and most counties in East Tennessee. Prosecution policies are radically different from county-to-county and case-to-case, and so is the quality of defense counsel and their performance. There is no uniformity in the administration of the system in Tennessee, and the same arbitrariness and lack of uniform application exists nationwide. Twelve states, like all 25 of the nations of the European Union, have abolished the death penalty entirely. We have a similar nonuniform, arbitrary system, looking at it county-by-county, in our state.

In my talk, I suggested that the Tennessee Bar Association undertake a study of how the state can set up a system of effective representation and administration in death penalty cases. Having high hopes for the passage of the Innocence Protection Act by Congress, which authorizes grants to states to train, oversee, and improve the quality of death penalty trials, I suggested that a partial solution would be the creation of a state capital trial agency. The next day, then-TBA President Albert Harvey let me know that he intended to ask the Tennessee Bar Association Criminal Justice Section and the House of Delegates “to examine and assure that the bar is doing all it can to provide the most effective representation possible.” By October of 2003, the Board of Governors had charged a distinguished committee consisting of public defenders, private criminal defense lawyers, prosecutors, and civil practitioners to examine the issues surrounding the effective assistance of counsel in Tennessee capital cases.

After approximately 18 months of study, the committee issued its final report on Dec. 31, 2004. The Committee concluded that “Tennessee is woefully out of step with the national [American Bar Association] standards” in death cases.

Effective assistance of counsel is neither uniformly nor consistently provided to individuals facing the death penalty in this state. Concerns over budget have often trumped the need for competent, well-compensated and adequately prepared counsel. There must be uniform standards for appointing counsel to assure that counsel in capital cases are well-versed in law and procedure. And, counsel must be given the resources to assure that they are able to provide competent representation.

According to the committee, Tennessee “has resolved in favor of the state purse conflicts between the state treasury and the fundamental constitutional rights of the accused facing a death penalty.” The result is a system that “perpetuates providing defense services that satisfy only the lowest common denominator in the quality of representation.” The result leads to the conviction of the innocent and imposition of the death penalty after trials with serious constitutional errors.

In the report, the committee noted previous efforts for the enactment of rules that would increase the resources available to appointed counsel and create an independent jurisdiction-wide appointing authority. Currently, attorneys representing indigent capital defendants are appointed by locally elected judges and are not subject to any special review, oversight or training. The Tennessee Supreme Court has recognized the problem but suggested that it is “best addressed through the legislative process,” and not through judicial oversight. There appears to be no legislative oversight yet.

In keeping with those previous efforts, the committee has also recommended that the state create an independent agency that will oversee death penalty administration to ensure the highest quality representation. As noted in the report, such an independent appointing and oversight agency would comply with the American Bar Associa-

(Continued on page 26)
The Tennessee Bar Association recognizes these leading firms for their overwhelming support and membership. Thank you and we look forward to improving the legal profession and administration of justice in the coming year!

To learn how your firm can be listed in future editions, contact Megan Rizzo, Membership Director, at 615.383.7421 or mrizzo@tnbar.org.

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<td>Yost &amp; Robertson PLC</td>
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### West Tennessee

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Reforming a broken system

(Continued from page 23)

tion Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. As both the U.S. Supreme Court and the Court of Appeals for the Sixth Circuit in several cases have held, the standards set forth in the ABA Guidelines provide the guiding rules to be used in cases when defining the prevailing professional norms in ineffective assistance cases. Finally, the committee recommends “that there be ongoing evaluation of the death penalty in Tennessee which includes accurate and consistent monitoring of death penalty cases.”

The TBA committee’s recommendations echo emerging policies announced by Congress. After years of delay, Congress has just recently begun to address problems with the death penalty system nationwide. Last fall, Congress passed with overwhelming bipartisan support the Justice For All Act, which includes the Innocence Protection Act of 2004. In addition to authorizing $25 million over five years to help states pay the costs of post-conviction DNA testing, the Innocence Protection Act authorizes a grant program, to be administered by the attorney general, to improve the quality of legal representation provided to indigent defendants in state capital cases. Grant funds are to be used to “establish, implement, or improve an effective system for providing competent legal representation” to defendants in capital cases.1

According to the Innocence Protection Act, an “effective system” for providing competent legal representation is one that places the responsibility of appointing attorneys to represent indigent defendants on a public defender program or on an entity established by statute or the highest state court and composed of individuals with demonstrated expertise in capital cases. These two standards are consistent with the ABA Guidelines, which state that counsel should be appointed only by a “Responsible Agency” independent of the judiciary and other elected officials.2

An “effective system” further requires the appointing entity to establish qualifications for attorneys appointed in capital cases, to establish and maintain a roster of qualified attorneys, to conduct specialized training programs for capital defense attorneys, and to monitor the performance of appointed attorneys.3 In addition, the system must ensure funding for the cost of competent legal representation. For appointed attorneys, this means compensation for actual time and services at the local market rate for cases of the complexity and responsibility found in a capital case. In addition, compensation for investigators, mitigation specialists and experts must be at a rate "which reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases."4 These standards for an “effective system” set forth by Congress mirror the standards set forth in the ABA Guidelines. Congress also apparently recognizes that many of the problems associated with capital trials are due to prosecution errors, and so it has authorized grants to states to improve the representation of the state in capital trials.5

On paper, the Innocence Protection Act sounds like it could help improve our broken system. Congress authorized the appropriation of $375 million over five years in grants to states that adopt and implement these minimum standards for the appointment of defense counsel in capital cases. Yet, more than six months after the passage of the Act of 2004, it

Report issued from the TBA’s Study Committee on Effective Assistance of Counsel in Capital Cases

On Sept. 26, 2002, Judge Gilbert Merritt of the United States Court of Appeals for the Sixth Circuit presented a speech at the TBA Federal-State Judicial Conference on what Judge Merritt referred to as “one major problem for all of us, the administration of our system of capital punishment.” In his presentation, Judge Merritt noted that almost one-half of the 156 death sentences imposed in Tennessee over the last 25 years have been reversed on appeal and proposed that the Tennessee Bar Association look at the problem of ineffective assistance of counsel – which was cited as the number one reason for reversal of death cases. In response TBA President Al Harvey, subsequently wrote a letter of thanks to Judge Merritt stating that he would ask the Tennessee Bar Association’s Criminal Justice Section and House of Delegates “to examine and assure that the Bar is doing all it can to provide the most effective representation available.”

The TBA Criminal Justice Section, headed by Jim Ramsey, assembled a study committee chaired by former TBA president Katie Edge. The Study Committee on Effective Assistance of Counsel in Capital Cases, began meeting in October 2003 and subsequently presented their Dec. 31, 2004, report to the TBA Board of Governors. This report and supporting data can be found at http://www.tba.org/sections/TB_Crime/capitalcases_study.html

Members of the committee

- Katie Edge, committee chair, Miller & Martin PLLC, Nashville
- Sue Kay, Vanderbilt University Legal Clinic, Nashville
- Jim Ramsey, District Attorney General, Clinton
- Don Dawson, Post Conviction Defender's Office, Nashville
- Bill Ramsey, Neal & Harwell PLC, Nashville
- Sue Palmer, Stites & Harbison PLLC, Nashville
- Dianne Thackery, 30th Judicial District Public Defender's Office, Memphis
- Don Hall, Vanderbilt Law School, Nashville
- Claudia Jack, 22nd Judicial District Public Defenders Office, Columbia
- Mike Passino, Law Office of Micheal J. Passino, Nashville
- Teresa Jones, City of Memphis Law Division Chief City Prosecutor, Memphis
- Gary Gerbitz, Miller & Martin PLLC, Chattanooga
- Jeff Henry, Tennessee District Public Defenders Conference, Nashville
remains unfunded. Without adequate funding and administrative enforcement, the act itself is a dead letter. But this does not mean that the State should not follow the sound policies outlined by the committee, which are consonant with the ABA guidelines and the provisions of the Innocence Protection Act.

The effective-assistance-of-counsel problem must be viewed against the backdrop of a civil society already restive and uncertain about the death penalty. Religious leaders of all stripes — liberal and conservative, Protestant, Catholic and Jewish — have found reasons to advocate either a general repeal of the death penalty or at least for its application to be much more limited and careful. For example, the Catholic Church recently revoked its earlier position on the death penalty. In the Church’s new Catechism and in Pope John Paul II’s encyclical Evangelium Vitae, the Pope stated that the death penalty cannot be squared with the teachings of Christ. One among the several reasons given for this change is that state killings based on vengeance and retribution are wrong. Vengeance is a relative emotion that varies widely and cannot be translated into fair rules applied uniformly. That is also the essential problem the committee points to as the reason why the state should at least adopt the ABA Guidelines in death cases and implement the policies of the Innocence Protection Act. The committee believes that we must stop the randomized selection of defendants by the state for execution. I wish the committee’s recommendations had the authority of the Pope; but even though they cannot claim any biblical jurisdiction, the committee has certainly found themselves in good company. Tennesseans should read the report and take it seriously.

Notes
2. Id. sec. 421(e)(1).
3. Id. sec. 421(e)(2).
4. Id.
5. Id. sec. 422(a).

The Honorable Gilbert S. Merritt is senior circuit judge for the United States Court of Appeals for the Sixth Circuit. Before being appointed to the bench by President Carter in 1977, Merritt was in private practice in Nashville and served as United States attorney for the Middle District from 1966 to 1969.
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 beginnings of mandatory continuing legal education.

Coverage of continuing legal education in the Tennessee Bar Journal dates back to its first issue. But it wasn’t until 1987, when the Tennessee Supreme Court made CLE mandatory with its Rule 21, that reporting extended much beyond photos of lawyers attending classes.

From that point — when the Commission on Continuing Legal Education set up shop in a couple of spare rooms in the old Tennessee Bar Association office on West End Avenue — the magazine has featured articles about new ethics programming, increases in requirements, the advent of distance learning through online classes and more.

In his report on the status of CLE in the May/June 1988 Journal, newly appointed commission executive director David N. Shearon helped clear up questions about the program. In the first year of mandatory continuing legal education (MCLE), he reported that there were more courses being offered and they were of better quality than before.

Now 18 years later, Shearon, who still heads up the commission, believes that has continued.

“MCLE has improved the quality and quantity and increased participation,” he says today. “As participants in a justice system that society has created, it’s our obligation to try to improve the system and our performance.”

Of the 9,703 lawyers required to comply in that first year, about 11 percent were sent orders that gave them 90 days to get their CLE or face suspension. On the more positive side, “more than 8,000 had obtained the necessary hours by April 15,” Shearon wrote back then, “7,000 of those having taken more than the required 12 hours.”

That was a trend that would continue. In fact, in the May/June 1989 Journal, charts and graphs (using new in-house computer graphics technology) showed that eight out of 10 attorneys exceeded the minimum requirement with an average of 23.2 hours; 125 attorneys clocked in with 60 hours or more and eight overachievers took more than 100 hours. The most popular subjects in those first two years of MCLE were general review, litigation and commercial law.

In 1992, the requirement had changed so that three of the hours needed to be designated as “ethics and professionalism” (E&P) credits and the next year the total went to 15 hours.

Claudia Swafford Haltom laid out the details of the upcoming increase to 15 hours in the November/December 1992 Journal article, “The New Ethics Rule: Q & A.” The extra hours were added, Shearon said in the article, because most other states had 12 or more and “when the ethics requirement was added, the commission did not want to decrease the hours for substantive training.”

In 1997, technology embraced the CLE process with the advent of the TBA’s TennBar University, an online CLE source.

“The most significant change,” Shearon says, “is the same as it’s been for adult education in general: the development of distance learning technologies. That’s been huge.”

“Distance learning” hours were approved by the court, but with a restriction on how many would count toward the requirement. Today, six of the required 15 hours may be obtained electronically.

In 2002, the Journal began carrying the insert that you still find in the center of the magazine, as well as up-to-date information at http://www.tba.org/clefront.html.

— Suzanne Craig Robertson
Discover These Great TBA Benefits
For You and Your Firm

As a member of the Tennessee Bar Association, you have access to a wealth of member benefits, ranging from great rates on insurance to discounts on legal research and overnight package delivery. Here's a sample of what you can expect with your membership.

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The TBA sponsors a select number of insurance programs for you and your firm's financial security. Auto insurance from GEICO is also available.

LEGAL RESEARCH FROM LEXISNEXIS™
Flexible research and savings on services for lawyers from LexisNexis™.

DISCOUNTS AT OFFICE DEPOT
When TBA members sign up for this program, they will receive pricing as if they were a large volume purchaser. In addition, Office Depot is offering ordering by fax, phone, the internet or in person at an Office Depot location and free next-day delivery. Find out more at http://www.tba.org/tbinfo/main.html

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by third parties' using the product when he distributes the device with the purpose of promoting its use to infringe copyright. Liability hinges upon the distributor's clear expression or other affirmative steps taken to foster infringement.

In its first “fraud on the market” private securities ruling after the 1995 Private Securities Reform Act’s passage and recent high profile corporate scandals, the court made it more difficult for investors to prevail. In private securities fraud suits against publicly held firms, investors must connect a firm’s misrepresentation to the loss and establish proximate cause and damages. In *Dura Pharmaceuticals Inc. v. Broudo*, investors bought stock at inflated prices because of a firm’s misrepresentations. Previously, the court found an implied private action for 1934 Securities Exchange Act, 15 U.S.C. §78j(b), and Rule 10b-5 violations. The law forbids the “use or employment” of any “deceptive device” (or misleading statement) “in connection with the purchase or sale of any security” contravening SEC rules. An implied private action resembles common-law fraud and deceit actions. In private actions involving publicly traded securities’ purchases or sales after the 1995 law’s passage, plaintiffs must show a material omission or misrepresentation, scienter, connection with the purchase or sale of a security, reliance, and in cases involving public securities markets (fraud-on-the-market) economic loss and “loss causation” or a causal connection between the misrepresentation and the loss, 15 U.S.C. § 78u-4(b)(1)-(4). Even in fraud-on-the-market cases, an inflated purchase price based on a misrepresentation does not necessarily proximately cause a loss. A loss may stem from market factors or industry conditions. If an investor resells stock before the truth leaks out, the misrepresentation does not cause a loss.

Last term, the court construed widely used federal criminal statutes affecting individuals and firms. After press accounts of *Enron’s* financial dealings broke, responsible partners for its CPA firm, Arthur Andersen, realized that a government investigation would follow. Relying on its document retention policy — even after learning about an SEC informal investigation, they directed staff to destroy documents, only stopping after a formal investigation was announced. Andersen was indicted under the former federal obstruction of justice statute relating to witness tampering, 18 U.S.C. § 1512(b)(2) [it is a crime to “knowingly use intimidation … or corruptly persuade” another person with intent to cause that person to alter documents for use in an “official proceeding”]. In *Arthur Andersen LLP v. U.S.* the court reversed a guilty verdict. The trial court watered down pattern jury instructions: the jury could convict without finding the requisite consciousness of wrongdoing or tying the document destruction to an official proceeding. Under §1512, “knowingly” modified “corruptly persuade.” Since document retention policies are common, persuasion alone is innocent, and persuading a person with intent to cause another to “withhold” or alter documents is not inherently wrong, the court found that §1512 required a person to understand that his conduct was wrong or immoral, a construction limiting criminal culpability to persuaders conscious of their wrongdoing. The erroneous instructions permitted the word “corruptly” to cover innocent conduct, let the jury believe that it did not have to find any nexus between persuasion to destroy documents and any particular proceeding, and allowed the jury to return a guilty verdict even if the accused honestly believed the conduct was lawful.

The wire fraud statute, 18 U.S.C. §1343, prohibits using interstate wires to further “any scheme” to defraud, or “for obtaining money” by “false representations.” In *Pasquantino v. U.S.*, the court literally read §1343’s broad language and upheld defendants’ convictions. By telephone, defendants ordered liquor from a U.S. retailer in order to smuggle it into Canada and avoid paying Canadian taxes. Canada has its own criminal tax laws, and
by treaty, Canada may extradite U.S. citizens to stand trial. No U.S. citizen was
deported. In effect, a U.S. prosecution
enforced Canada’s criminal tax laws. The
implications are serious: The U.S. may use
federal law to prosecute U.S. citizens for
acts done inside the U.S. that violate
another nation’s economic laws.

Charged with criminal conspiracy to
launder money, 18 U.S.C. §1956(h), the
trial court denied a defense request for a
jury instruction: at least one co-conspirator
committed an overt act in furtherance of
the conspiracy. In Whitfield v. U.S., the
court affirmed the conviction and held
that a conspiracy to commit money laun-
dering does not require proof of an overt
act. A conviction subjects a person who
“conspires” to commit money laundering
to the same penalty as money laundering
to the conspiracy’s object). In U.S. v.
Shabani, 513 U.S. 10 (1994), the court con-
strued the nearly identical statutory
language for a drug conspiracy and ruled
that no overt act was required, distin-
guishing it from the general conspiracy
statute, 18 U.S.C. §371 (modifying
common law rule by including an overt-
act requirement). In drafting conspiracy
laws, Congress may adopt a model based
either on §371 (overt act required) or the
Sherman Act, 15 U.S.C. §1 (no overt act
needed). Section 1956(h) does not require
proof of an “overt act” to convict.

Constitutional opinions

Congress must act under a specific
constitutional power to enact a law. For
years, the court had ruled that the
Commerce Clause gave Congress expan-
sive authority to regulate and pass a wide
range of federal laws. In U.S. v. Lopez, 514
U.S. 549 (1995), the court limited the
Commerce Clause’s reach, impliedly
raising questions about many federal
statutes’ validity. California’s 1996
Compassionate Use Act allowed sick
patients to use marijuana for medical
reasons. In Gonzales v. Raich, patients
sued to enjoin the federal Controlled
Substances Act’s (CSA) ban of marijuana
as applied to the intrastate possession
of marijuana for medical purposes under state
law. Limiting Lopez, the court ruled against
them. The 1970 CSA marked a compre-
prehensive regime to combat drug trafficking
and control traffic in controlled
substances. The CSA made distributing
marijuana a federal crime. The Commerce
Clause, Art. I, § 8, cl. 3, allows Congress to
regulate the channels, instrumentalities,
or persons in interstate commerce, or local
activities substantially affecting it, which
was the focus here; and the Necessary and
Proper Clause, Art. I, § 8, cl. 18, allows
Congress to make laws necessary and
proper for executing them. The court held
that Congress had the authority to ban
local use of marijuana that State law
permitted. Citing Wickard v. Filburn, 317
U.S. 111 (1942), which stretched the
Commerce Clause to its outermost reach,
the court held that Congress may regulate
a local activity, whatever its nature, if it
exerts a substantial economic effect on
interstate commerce. If the “total inci-
dence” of a practice threatens a national
market, Congress may regulate the entire
class — including a purely intrastate non-
commercial act, however trivial. Here,
Congress acted within its authority: failure
to regulate intrastate marijuana possession
would leave a gaping hole in the CSA.

The Michigan Motor Carriers Act
imposed a $100 flat fee for each truck that
engaged in intrastate commercial opera-
ions — trucks hauling point-to-point
between in-state cities. In Amer.
Trucking Ass’n Inc. v. Mich. Public
Service Comm., truckers claimed that
the flat fee discriminated against interstate
carriers and burdened interstate trade. The
Commerce Clause allows Congress to
“regulate Commerce ... among the several
states” and carries a negative command
preventing States from enacting laws that
discriminate against persons or firms in
interstate commerce. Under the dormant
Commerce Clause, the court has struck
state laws that unjustifiably discriminate
facially against out-of-state firms, impose
burdens on interstate trade that are exces-
sive in relation to local benefits, impose
taxes facially discriminating against inter-
state business and advantaging local enter-
prises, or improperly apportion state
assessments on transactions with out-of-
state components. Michigan’s flat $100 fee
applied to intrastate transactions occur-
ing within the state’s borders and applied
evenhandedly to all truckers. Since
neutral, local fee does not violate the
Commerce Clause, the high court upheld
it. Separately, the court did not preempt
another Michigan law imposing a $100 fee
on trucks bearing Michigan license plates
traveling solely in interstate commerce.

The 21st Amendment repealed the
18th (prohibition) and authorized states
to control the importation and sale of
alcohol within their borders. In Granholm v. Heald, the court struck
state laws that allowed in-state wineries
to sell wine to in-state residents, but
prevented or made it economically
impractical for out-of-state wineries to do so. The court ruled that the state laws
enacted under the 21st Amendment
discriminated against interstate
commerce and violated the dormant
Commerce Clause. The court left in
place the states’ three-tiered distribution
system of alcohol (producer, wholesaler,
retailers). If state law allows in-state
wineries to sell their wines directly to
consumers, state law cannot discriminate
against out-of-state wineries.

By 10 separate, written opinions —
plurality, concurrences or dissents — the
court issued two rulings about public
displays of the Ten Commandments. In
Van Orden v. Perry, the plurality found
that the First Amendment’s Establishment
Clause allowed a privately funded Ten
Commandments monument located on
several acres of public grounds around the
state capitol to remain. Erected decades
ago, the monument was one of several,
diverse monuments and markers focusing
on Texas, its history, and its identity.
Justice Breyer cast the deciding vote and
thought the case “borderline.” In
McCready Co., Ky. v. American Civil
Liberties Union of Ky., the posting of
the Commandments in a courthouse
violated the Establishment Clause: the
government officials’ primary purpose was
to advance religion. The court acknow-
ledged that its Establishment Clause prece-
dents were confusing and difficult to apply.

In U.S. v. United Foods Inc., 533 U.S.

(Continued on page 32)
405 (2001), on First Amendment grounds, the court found unconstitutional a mushroom check-off program that compelled mushroom growers to subsidize generic mushroom advertising with which they disagreed. In

**Johanns v. Livestock Marketing Ass’n**, finding that the producers funded “government speech” (not private speech), the court upheld a near identical law for a beef program. In

**United Foods, the “government speech” argument was not raised, and the court assumed that by the check-off, mushroom growers were funding advertising that was private speech, not government speech. The 1985 Beef Promotion and Research Act created a federal policy to market beef, 7 U.S.C. §2901(b). The secretary of agriculture issued a Beef Promotion and Research Order and appointed a Beef Board, which convened an Operating Committee. A $1-per-head check-off was activated “wig-wag” headlights and changed a flat. An officer spotted them and stopped. Alford hurriedly left. Fearing that Alford was a cop impersonator, police pulled him over and saw a police radio, handcuffs and a scanner. He gave evasive answers to their questions and without their knowledge taped the conversations, which unbeknownst to the police, state law allowed. The officers booked him for violating a privacy law and a traffic offense. A DA told them probable cause existed for other offenses, but the police chose not to stack charges, which later were dropped. Alford then filed a civil detention.**

The initial seizure for speeding was based on probable cause. Police action that does not “compromise any legitimate interest in privacy” is not a Fourth Amendment “search.” No one has a legitimate interest in possessing illegal drugs or contraband. In

**Devenpeck v. Alford**, Alford stopped his car behind a disabled car, activated “wig-wag” headlights and changed a flat. An officer spotted them and stopped. Alford hurriedly left. Fearing that Alford was a cop impersonator, police pulled him over and saw a police radio, handcuffs and a scanner. He gave evasive answers to their questions and without their knowledge taped the conversations, which unbeknownst to the police, state law allowed. The officers booked him for violating a privacy law and a traffic offense. A DA told them probable cause existed for other offenses, but the police chose not to stack charges, which later were dropped. Alford then filed a civil rights suit. At common law, a warrantless arrest by an officer is reasonable when there is probable cause to believe that a crime has been committed. In

**Whren v. U.S.**, 517 U.S. 806 (1976), probable cause depended upon the facts known to the arresting officer at the time of arrest: his subjective intent was irrelevant. Here, police did not violate the Fourth Amendment when the crime for which there was probable cause to arrest was not the crime declared by the officer at the time of arrest or even one closely related to it.

In

**Muehler v. Mena**, the court permitted the handcuffing and detention of a house’s occupants while police executed a search with a warrant. During the search, detention minimized the risk of flight and harm to officers and facilitated an orderly search. Since gang members were mostly illegal aliens, police had invited an INS agent to join them. The Constitution does not prevent officers from asking questions, and the INS agent’s questioning the detainees about their immigration status was not unlawful.

II. The Fifth Amendment’s takings clause provides that private property shall not “be taken for public use, without just compensation.” When a state directly appropriates private property or practically ousts an owner from it, or when governmental interference with private property equates to a taking, the state must compensate him. When an onerous regulation is tantamount to an appropriation or ouster, it is a “regulatory taking.” Two rules are settled: If a regulation either requires even a minor physical invasion of property or completely deprives an owner of all beneficial uses of his property, compensation is required. In

**Lingle v. Chevron U.S.A. Inc.**, by statute, Hawaii limited the rents that Chevron, the market leader, could charge gasoline dealers. Though Chevron would reap overall increased rents, it claimed the law was a regulatory taking. Lower courts applied a test set forth in

**Agins v. City of Tiburon**, 447 U.S. 255 (1980): does the law “substantially advance legitimate state interests?” Repudiating the Agins test to analyze when government action is a “regulatory taking,” the court turned to

**Penn Central Transp. Co. v. N.Y. City**, 438 U.S. 104 (1978). Penn Central considered several factors: the magnitude of the regulation’s economic impact on the owner; the degree it interfered with distinct investment backed expectations and legitimate property interests; the severity of the burden that regulation imposed on the owners’ rights; and examined if the governmental action’s character amounted to a physical invasion or affected property interests by a “public program adjusting the benefits and burdens of economic life to promote the common good.” This means-end “substantially advance legitimate state interests” inquiry was suitable for substantive due process analysis and asked: does regulation of property effectively achieve a legitimate public purpose? On the other hand,
A distressed city with a declining population and high unemployment rate proposed a development plan to revitalize its downtown and waterfront. A large firm would relocate and create jobs, but the plan contemplated taking private homes. The private property owners objected and claimed the plan was not a “public use” under the takings clause. A sovereign may not take one owner’s property for the sole purpose of transferring it to a second private party even if just compensation is paid, but may transfer property from one private party to another if future “use by the public” is its purpose, e.g., a railroad with common-carrier duties. In Kelo v. City of New London, Conn., the court ruled the development plan served a “public purpose,” a broad concept. Society’s needs are varied and have evolved. The court refused to adopt a new bright-line rule that economic development did not qualify as a public use and could not formulate a test to distinguish economic development from other legitimate transfers, e.g., mining. Using eminent domain for economic development did not blur the boundary between public and private takings. Though a “public purpose” may benefit individuals, the court deferred to public officials’ judgments and upheld the plan.

Under the federal Sentencing Guidelines (SG), after a jury returns a guilty verdict, a trial judge alone determines other facts and applies statutory enhancements that increase a sentence’s severity or length above the statutory maximum. In Mistretta v. U.S., 488 U.S. 361 (1989), the court upheld the SG on different grounds. In Apprendi v. N.J., 530 U.S. 466 (2000), the court held that except for a prior conviction, the Sixth Amendment requires a jury to determine any fact that increases a sentence beyond the statutory maximum. In Blakely v. Wash., 124 S.Ct. 2531 (2004), a state criminal statute similar to the SG was struck, and the court signaled that the SG may be unconstitutional. In U.S. v. Booker, the court found that Apprendi/Blakely applied to the SG and struck two parts of the 1984 Sentencing Reform Act that made the SG mandatory.

The Eighth Amendment bars inflicting “cruel and unusual punishments” or imposing excessive fines or sanctions: punishments must fit and be proportionate to the crime. In Roper v. Simmons, the court held that the Eighth and 14th amendments barred states from executing a minor under 18. Reversing Stanford v. Ky., 492 U.S. 361 (1989), the court found that a national consensus against executing juveniles now existed and that society’s “evolving standards of

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TENNESSEE BAR JOURNAL, SEPTEMBER 2005 33
decency” made imposing the death penalties on them “cruel and unusual.” Since juveniles lack maturity and control, have an underdeveloped sense of responsibility, are susceptible to negative influences and peer pressure, and lack adults’ character development, the death penalty’s traditional rationales, deterrence and retribution, did not apply with as much force as with adults. The dissenters mocked the majority for inventing a non-existent “national consensus,” overriding state legislative judgments, and reversing its own 1989 decision.

In two decisions, the court put teeth in Batson v. Ky., 476 U.S. 79 (1986): race-based preemptory challenges to jurors constitute unlawful racial discrimination and violate the 14th Amendment. In Miller-El v. Dretke, the court refused to defer to a prosecutor’s post hoc justifications for striking Blacks from juries and detailed subtle methods used to avoid Batson’s holding and keep Blacks from serving as jurors. In Johnson v. Cal., the court made it easier to mount a Batson challenge. When a defendant questions a prosecutor’s preemptory challenges based on a prospective juror’s race, once the totality of facts gives rise to an inference of purposeful racial discrimination, the prosecutor must explain the basis for the challenge. The trial judge then must decide whether racial discrimination tainted jury selection. Initially, a defendant does not have to prove that a strike “more likely than not” was improper. The prosecutor’s conduct and the facts gave rise to the inference. Pat answers to questions about reasons for striking Black jurors will no longer serve to avoid a Batson inquiry.

Other opinions are briefly noted. In Grable & Sons Metal Products Inc. v. Darue Engineering & Mfg., the court construed 28 U.S.C. §1331 (federal question jurisdiction) and allowed removal of a state law cause of action in light of a substantial, disputed federal statute’s interpretation. Although state law and procedure provided for a quiet title action, the dispositive question regarded “notice” under federal tax law. This federal law question was sufficient to invoke federal question jurisdiction. In Exxon Mobil Corp. v. Allapattah Services Inc., the court held that when at least one named plaintiff satisfies the amount-in-controversy requirement in a diversity action, a federal court action may exercise supplemental jurisdiction under 28 U.S.C. § 1367 over other additional plaintiffs whose claims do not satisfy the minimum amount-in-controversy requirement, provided the claims are part of the same case or controversy as the claims of plaintiffs who do allege a sufficient amount in controversy. In Koons Buick Pontiac GMC Inc. v. Nigh, the court construed damage provisions of the Truth in Lending Act (TILA), 15 U.S.C. §1601. TILA requires creditors to make mandatory disclosures for consumer loans. As first enacted, it set statutory damages for violations: $100/minimum, $1,000/maximum. TILA
was amended recovery for closed-end loans “secured by real property,” §1640(a) (2)(A) (iii), was set at $200/$2,000, floor and ceiling. While ambiguous, the amendment left unaltered the $100/$1,000 limits set for TILA violations of personal property loans, only raising the minimum/maximum recoveries for closed-end loans secured by real property.

In *Graham Co. Soil & Water Cons. Dist. v. U.S. ex rel. Wilson,* the court ruled that a claim for retaliation against an employer who aids the U.S. in uncovering or furthering a False Claims Act (FCA) investigation or suit is governed not by the six-year statute of limitations provision in the FCA, 31 U.S.C. §3731(b)(1), but instead is governed by the most closely analogous state statute of limitations.

**The court in transition**

Finally, Sandra Day O’Connor, the court’s first female Justice, announced her retirement. For the first time since 1994, a new justice will be appointed. Although seven of the nine justices are Republicans, many cases are decided by a 5-4 vote. Justice O’Connor often served as the pivotal fifth vote. Generally considered a pragmatic centrist on the conservative Rehnquist court, her judicial philosophy usually resulted in her voting to support business interests, private property, contract rights, states, public officials, and government agencies. She opposed posting the Ten Commandments in public forums, favored overturning a Texas law criminalizing consensual homosexual conduct, and declined to disturb Roe v. Wade, 410 U.S. 113 (1973). She is thoughtful, brilliant, and gracious, a rare combination of traits for a justice in any era.

As of this writing, no successor has been named, but change is coming to the court. The justices are aging, and some face health issues. President Bush may well have the opportunity to appoint other justices. If so, he will leave his mark on the court for a generation. The stakes are high. A one-vote switch may reverse significant decisions. Diverse, varied interest groups realize Justice O’Connor’s impact on case outcomes. The nominee therefore will likely endure a bruising, bitter confirmation battle. Millions will be raised and spent to support or fight the prospective nominee.

**Notes**

1. The court’s opinions may be downloaded from the court’s web site, www.supremecourtus.gov.

2. Not all decisions from the last Term are discussed. For instance, though the court decided several federal habeas corpus issues, those issues are seldom faced by most lawyers practicing in this state. A U.-Alaska boundary dispute is interesting, but likely is not a subject Tennessee lawyers will confront.


Caveat: The hiring lawyer must be careful to distinguish between a legal assistant with a CLA designation and with a certificate from an educational institution. The latter certificate only implies that the legal assistant will perform well on the job because he or she has successfully completed the legal assistant course given at that institution... The difference is that the CLA has proven experience and proven capabilities within the profession.

Certification is a mainstay in most professions and careers, universally used by employers and those striving to advance in their careers. The misuse of the term “certified” in this field is perplexing — I wonder if CPA’s have the same misunderstandings among those in the accounting field.

Since my article was intended to clarify CLA/CP certification for paralegals and its value and relevance to employers, I want readers to know that the misleading sidebar was not part of my original manuscript. I would caution readers to rely on the information in the article itself. There is only one CLA/CP professional certification program, and it is offered only by NALA, not by any school.

Thanks, again, for publishing the article — it was still a high point of my day.

— Debra J. Monke, president, The National Association of Legal Assistants

Editor’s note: The information in the sidebar was provided by an unrelated source and not by the author. Although programs listed in it do offer other types of education, they do not provide the specific program the article detailed, which is only available through the National Association of Legal Assistants (NALA). This has caused confusion, which the Journal regrets.

For information on NALA’s programs, go to http://www.nala.org.

Judgments: costs, interest and attorney fees

By Donald F. Paine

Your legal skills resulted in a judgment for your plaintiff client. Congratulations. What amounts can you add to the underlying award?

Routine court costs are codified at Tenn. Code Ann. §§8-21-401 et seq. These will be extensively altered Jan. 1, 2006, in all counties except Knox. Litigation taxes are codified at Tenn. Code Ann. §§67-4-601 et seq. These also change the first of next year. Discretionary costs under Civil Rule 54.04 include court reporter fees, expert witness fees, interpreter fees, and guardian ad litem fees. Obviously these costs must be paid by the defendant you defeated.

Prejudgment interest may be available. Liquidated accounts bear interest from due date at the “formula rate” of 4 points above the average prime loan rate. Tenn. Code Ann. §§47-14-109(b) & 102(b). The same interest rate applies to life, disability, and fire insurance policies. See Coiner, Tennessee Law of Damages §3-6 (1988). Eminent domain judgments carry interest from date of taking at 2 points above prime as to any excess value awarded over the amount deposited with the court clerk. Tenn. Code Ann. §29-17-813(a).

In certain lawsuits the judge has discretion to award prejudgment interest up to 10 percent, running from a date selected by the judge.

Tenn. Code Ann. §47-14-123. Such discretion can be exercised “in accordance with the principles of equity” in actions for unliquidated contract breach, property damage, or wrongful death. Prejudgment interest is not allowed in personal injury suits. Louisville & Nashville Railroad Company v. Wallace, 91 Tenn. 35, 17 S.W. 882 (1891).

Post-judgment interest runs at 10 percent. Interest is computed from the date of verdict in jury trials and from “the equivalent determined by the court” in nonjury trials. Tenn. R. App. P. 41 and Tenn. Code Ann. §§47-14-121 & 122. By the way, if your judgment was entered in a federal district court, call the clerk’s office to discover the fluctuating post-judgment interest rate. As I write this, my local clerk says the rate hovers between 3 percent and 4 percent.

Can you recover your attorney fees from the loser? Rarely. If the contract involved in the lawsuit provides for attorney fees to the winner, yes. And a statute may contain that remedy. The best example is the Consumer Protection Act, Tenn. Code Ann. §§47-18-109(e)(1). Fees are often awarded under the rubric “alimony” in divorce cases. Otherwise Tennessee follows the American Rule that each party pays the advocate of choice.

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.
2005-2006 Tennessee Bar Association
Access to Justice Awards

The Tennessee Bar Association is pleased to announce that it is now accepting nominations for the 2005-2006 Access to Justice Awards. The winners will be the nominees who best meet the criteria established below by the TBA Access to Justice Committee. The awards are presented in three categories honoring public service attorneys, members of the private bar and law school students who provide outstanding representation to the state’s poor. The winners will be featured in the January 2006 edition of the Tennessee Bar Journal.

Please submit your nomination on the form that is provided on the following page or online at http://www.tba.org/news/atjawards2005.html. You may also submit additional information, letters, newspaper articles or anything else that will give us a full picture of your nominee’s involvement with public service. Nominations must be submitted on or before September 20, 2005 to:

Access to Justice Committee
Tennessee Bar Center, Suite 400
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(615) 297-8058 (fax)

PUBLIC SERVICE AWARD
The nominee must be:
- an attorney for an indigent client in either civil or criminal defense
- who provided dedicated and outstanding services during the past year
- while employed by an organization that is primarily engaged in providing legal representation to the poor
- and who is either still employed by the civil or defense organization or has ceased work for the organization in the past two years.

HARRIS GILBERT PRO BONO AWARD
The criteria for this award are:
- the nominee should have contributed a significant amount of pro bono work, either in terms of number of cases handled or significance of the work. The casework for which the nomination shall be considered should have occurred within the last three years
- the nominee should not be an employee of an organization whose primary purpose is to provide free legal assistance to the indigent
- the nominee should have demonstrated dedication to the development and delivery of legal services to the poor.

LAW STUDENT VOLUNTEER AWARD
The nominee must be:
- a student enrolled at a Tennessee law school during the 2005-2006 school year
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2005-2006 Award Nomination

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☐ Tell us what makes this individual’s commitment to public service outstanding:
Feel free to use additional sheets to write your nomination, but additional pages are not necessary.

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☐ Name, address and phone number of person making this nomination:

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U.S. Supreme Court decisions
(Continued from page 35)

Notes
1. 75 S.W.3d 383 (Tenn. 2002).
3. 75 S.W.2d at 408-09.
5. Id. at * 2-3.
6. Id. at * 7.
7. “HIPAA” is the Health Insurance Portability and Accountability Act of 1996.
9. By “expense” the author means that a defendant who wants to take the doctor's deposition must pay the doctor's fee and pay for the original of the deposition. Of course, the deposition would be a pure “discovery” deposition of a fact witness and would have to be taken before any deadline established by the court for depositions of fact witnesses.
10. Ordinarily, any deposition can be used at trial under the conditions specified in Rule 32(2) and (3) of the Tennessee Rules of Civil Procedure. Absent agreement of the parties or the deposition of an expert under Rule 32.01(3) there is no such thing as a “discovery” deposition under Tennessee law.

D A Y O N T O R T S
(Continued from page 14)

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