State of the Judiciary 1980
Chief Justice Ray L. Brock, Jr., Tennessee Supreme Court
Message to the State Bar meeting
Summer 1980

Mr. President, Distinguished Guests, and My Fellow Lawyers,

This is the first time that I have been invited to address the members of this Association at its annual meeting. I view the occasion as one of high personal privilege.

The State of Tennessee's judiciary is good! Not as good as it would have been if the Court Reorganization Bill had been enacted, but good, anyway!

Let me discuss briefly with you some of the more significant developments of the past year and some of the problems of the future.

F.T.C. INVESTIGATION

I wish to commend Evans Harvill, your president and the members of your Board of Governors for their wise and successful efforts in opposing the attempt of the Federal Trade Commission to investigate and regulate "the learned professions," including the Bar of Tennessee. It was with great relief that we recently learned that the Federal Trade Commission had relented and called off the proposed investigation. Of course, the Bar of this State and your Supreme Court had nothing to hide from such an investigation but all of us, members of the Bar and members of the Court, shared the view that such regulation of the Bar of Tennessee as might be needed was the business of your Supreme Court and the organized Bar and certainly not the business of the Federal Trade Commission in Washington.

PROPOSED NATIONAL COURT OF STATE REVIEW

There is a movement under way to establish a "National Court of State Review" A new Federal Court of nine judges that would review cases from the State Courts. It is proposed that such a Court would "have jurisdiction to review, on a discretionary basis, criminal and quasi-criminal cases from the State Courts which present Federal constitutional issues. This jurisdiction would be "in place of, and not in addition to, the jurisdiction presently exercised by the Federal District Courts and the Circuit Courts of Appeal." It is argued that this Court is needed to "assure consistency in the application of Federal constitutional law to the States and promote prompt and final resolution of these matters." This proposal was defeated last year by the Conference of Chief Justices meeting at Flagstaff, Arizona, and was defeated by an even larger margin when placed again before the conference at the mid-year meeting in Chicago on February 1, 1980.

However, this idea is not dead and is certain to resurface at the next meeting of the Conference of Chief Justices next month. As your Chief Justice, I have opposed this proposal on each of the prior occasions mentioned and will do so again. In my opinion, the proposed Court is both unnecessary and impractical. Let me explain.

According to the latest figures available, there were 7,123 habeas corpus cases attacking State convictions commenced in the United States District Courts during the fiscal year, July 1, 1978, to June 30, 1979. During that same period 11,195 cases were filed by State prisoners under various Civil Rights Statutes and 184 mandamus proceedings were instituted against State prison officials. The handling of such a large volume of cases, even on a certiorari basis, would be more than a single Court of nine judges could handle.

Moreover, with one Court in the entire nation to handle these matters, great expense and inconvenience would be incurred by litigants and their attorneys, most of whom would be required to travel long distances to the Seat of the Court, wherever that might be.

Further, the inevitable effect of having such a Court would be to reduce the Supreme Courts of the fifty States to the status of Intermediate Appellate Courts. The ever shrinking independence of the State Judiciary would be further diminished.

Advertising and Specialization

Whether you and I like it or not, lawyer advertising is going to be with us for a long time to come. It was forced upon us by the decision of the Supreme Court of the United States in Bates v. State Bar of Arizona[1] and it now appears that a plan of specialization may be necessary to prevent false and misleading advertising.

Responding to the Bates decision, your Supreme Court established rules permitting and regulating lawyer advertising on April 10, 1978.[2] The authorization of lawyer advertising came as a shock to the vast majority of the lawyers of this State, as is shown by the fact that, although it has been permissible for more than two years now, probably less than one percent of the lawyers of Tennessee have engaged in any form of advertising allowed in the 1978 opinion. However, as lawyers become more and more accustomed to the use of advertising, it is expected that advertising will be more utilized by the lawyers of Tennessee in the days to come. Our task must be to insure that advertising is dignified and not misleading.

Of course, there really is something to be said for permitting lawyers to advertise. Just how does a layman who needs a lawyer go about finding one-the right one for his problem? The yellow pages of the telephone directory won't help much. Oh, yes, there are names, addresses and telephone numbers, but there is no indication of specialties of practice or expertise, nor any

listing of fees. Dignified door signs, and the yellow pages do not mention fees, experience or specialties. It just may be true that there is a need for informative advertising of lawyers' services-it may be in the public interest. Advertising can be abused; it can also be informative. E.J. Younger, Attorney General of California, put it this way:

"I am as cognizant as anyone of the potential dangers in (lawyer) advertising. It's not in anyone's interest to market legal services like underarm deodorant. But, that's not the issue. The problem is that ordinary people simply don't know how to find a lawyer."

Now, I admit that the ordinary people of East Tennessee do seem to know how to find a lawyer, judging from the volume of litigation in that area, but perhaps in Middle and West Tennessee the problem exists as in California.

Judging from the decisions interpreting Bates, it appears that all truthful advertising may be allowable, unless some plan of specialization is adopted. Indeed, we recently amended the rule governing lawyer advertising by deleting the requirement that a fee schedule accompany a listing of services, provided, that a disclaimer of knowledge or expertise above that of other lawyers in the community be listed.

With these thoughts in mind, your Supreme Court appointed a Commission on Specialization composed of seven outstanding Tennessee lawyers on April 17, 1978, and requested that they study the whole problem of specialization and present the Court with a suggested plan. The Court admonished the Commission that no plan of specialization would be approved unless it met these requirements: (1) Participation in it must be completely voluntary, (2) All costs of administering the program are to be paid by those lawyers participating in it, (3) No lawyer may be denied the right to practice in any field of law because of his failure to be certified in that particular field and (4) The plan must require that specialists to whom clients have been referred shall not take advantage of such referrals to enlarge the scope of their representation of such clients.

The members of the Commission set about diligently to perform their duties and held public hearings in the major cities in all parts of the State. Recently the Commission has filed its report with the Court. The findings of the Commission may be summarized as follows:

1. Most Tennessee lawyers are not adequately informed about specialization or the problems of formulating a sound and workable program, and are not aware of the possible benefits of such a program.

2. Many lawyers in Tennessee do not desire any plan of specialization. It appears that the lawyers in rural areas are especially fearful that they will be adversely affected by any proposal

of specialization. They fear that the urban lawyer through advertising could lure clients to the city that would otherwise remain with the rural lawyers.

3. Most lawyers in Tennessee do realize that de facto specialization already exists, even in rural areas, to a large extent.

4. If a plan is to be adopted, the majority of the lawyers surveyed favor a "certification" plan rather than a "self-designation" plan.

At this point permit me to digress to distinguish between "certification" and self-designation" plans.

A certification plan purports to require a formal evaluation of a lawyer's competence by a Certifying Board, and the Certifying Board assumes some degree of responsibility for assuring that a lawyer, who holds himself out as a specialist, does, in fact, possess more expertise in that field than does a non-specialist.

On the other hand, under a self-designation plan an attorney simply identifies himself as a specialist in a particular field and is permitted to hold himself out as such specialist. No independent evaluation is made of his competence in that field. However, usually a minimum number of years in practice is required and a substantial portion of that practice must have been in the area of the proposed specialty and, also, a minimum number of hours of continuing education spent in the specialty area, both before and after designation, is required. As I said, Tennessee lawyers, thus far, appear to prefer "certification" to "self-designation."

5. The proponents of certification believe that it offers more protection to the public by reducing the likelihood of less competent attorneys being able to qualify as specialists.

6. The experience in other States indicates that lawyers are much more likely to participate in a self-designation plan than in a certification plan.

We do not yet have in final form a recommended plan of specialization.

If and when a program of specialization is adopted, it will have to be staffed and administered by the lawyers of Tennessee. It must be wholly self-supporting. Public funds are not available and there will be no general assessment of members of the Bar to finance the program. If and when a plan is adopted, it will be successful only if it attracts a substantial number of lawyers to participate in its certification program. The plan must require mandatory continuing legal education as a condition for continued certification. Indeed, the objective of all specialization programs is to achieve improvement in lawyer competence.

Before adopting any plan of specialization, your Supreme Court will seek the advice of the Bar with respect to all aspects of such a program. I hope that you will not hesitate to give us the benefit of your thinking in this area. We need it!

At this point I wish to publicly express the gratitude of the Court for the splendid work already performed by the members of the Specialization Commission. They are Mr. James M. Glasgow of Union City, Chairman; Dean John Wade of Nashville, Reporter for. the Commission; Mr. Ervin Bogatin of Memphis; Mr. N. R. Coleman, Jr. of Greeneville; Mr. Robert L. McMurray of Cleveland; Mr. Thomas H. Peebles, III, Nashville; and Mr. Jerry Summers of Chattanooga.

Advisory Ethics Opinions

Another development within the past year has been the establishment of a committee to give advisory ethics opinions. This was done upon the petition of the Tennessee Bar Association requesting that such action be taken. The committee was set up pursuant to an order of your Supreme Court entered last April, amending Rule 42 of the Supreme Court Rules.

Briefly, the system provided is that the Disciplinary Board of the Supreme Court is divided into three geographical ethics committees, each being responsible for issuing ethics opinions during times designated by the Disciplinary Board. It is provided that each Ethics Committee shall issue and publish formal ethics opinions on proper professional conduct upon its own initiative or when requested to do so by a member of the Bar, or an officer or a committee of the State or local Bar Association. There is an exception which is that no opinion may be issued in a matter that is pending before a Court or a pending disciplinary proceeding. Periodically opinions will be published in summary or in complete form. Members serving on an Ethics Committee do not receive any compensation for their services as such but may be reimbursed for travel and other expenses incidental to the performance of their duties. Although some of us have had serious reservations about the need for such an agency, we now have it and we all hope that it will be of substantial service to the Bar.

Legal Research by Computer

You may be interested to know that steps are being taken to explore the need for and the feasibility of making available to the Courts of Tennessee legal research by computer. Judge Clifford Sanders of the Court of Appeals, Eastern Section, heads a committee of the Judicial Conference in checking into this matter. The Lexis System will be demonstrated at the Judicial Conference next Wednesday and Thursday at the Opryland Hotel. I understand that the robot gives the correct answers only if the judge or lawyer asks the right questions.

T.R.A.P.

Last July the Tennessee Rules of Appellate Procedure became effective and from all appearances have been well received. Of course, minor problems have occurred, such as the interpretation of Rule 11. As presently written, the Rule appears to contemplate that the appellant will file his brief only after his application for permission to appeal has been granted, but, upon reflection, it is obvious that the wise thing to do is for the appellant to file his brief along with his application for permission to appeal, because without the benefit of the brief an application for permission to appeal might be denied which would have been granted if the Court had the benefit of the brief.

No doubt other defects will appear. If you discover any, please let us know about it by letter to the Executive Secretary or the Chief Justice.

Court Reporters In Civil Cases

The preparation and filing of transcripts of the proceedings at trial in civil cases, including the evidence considered by the Trial Court, continues to be a problem under the new Rules of Appellate Procedure as they were under the old procedure. It is likely that very little can be done to alleviate the problem until such time as we are able to have official Court Reporters in civil cases in Tennessee. In this connection I wish to report that the Judicial Council at the urging of Mr. Justice Cooper has recently undertaken a study of the feasibility of providing official Court Reporters in all civil cases tried in Courts of Record in this State so that the responsibility for preparing and filing a proper transcript will fall upon an official reporter rather than upon the litigant and his attorney. Let us all hope that the Judicial Council is successful in this regard so that sometime in the near future the practicing lawyer will have no more responsibility to prepare and file a transcript of the trial than he has now for keeping and filing the pleadings in a case.

All Tennessee Judges Should Be Lawyers

I recently read an article in a leading magazine, written by a prominent Law Professor, that was entitled "Too Much Law Too Little Justice." Whether one agrees or disagrees with the thesis thus indicated, it is becoming daily more obvious that the veritable avalanche of new laws and revisions of old laws, both statutes and Court decisions, is just too much for lay judges to assimilate, properly comprehend and correctly apply to a given case in litigation. I respectfully suggest that the hour is late for the General Assembly to solve this problem by enacting legislation requiring all Tennessee judges to be educated as lawyers. It makes no sense for this State to provide counsel trained in the law but a judge who is a layman unlearned in law!

Conclusion

In the decade of the seventies, the Judicial System of Tennessee has undergone a substantial overhaul.

In 1970 a whole new system of practice and procedure in civil cases has been adopted.

New Codes of Conduct for both lawyers and judges were adopted in 1973 and 1975.

A State-wide organized system for handling grievances against attorneys has been put into operation under Rule 42 of the Rules of the Supreme Court in 1976.

A whole new system of practice in criminal cases has been put into effect in 1978.

Completely new Rules of Appellate Procedure have been adopted in 1979. Writ of error, broad appeal and two kinds of certiorari are gone.

The Tennessee Judicial Information System (TJIS), a computer based system for following a case from its filing to its conclusion, has been inaugurated.

We now have lawyer advertising and TV in the Court Room.

Specialization, Court reorganization and other changes lie ahead.

I have enthusiastically supported all of these reforms, and more. But, some of us. are growing weary of reform - We would like to lie down and rest a while. We fear that the ultimate goal-the cause of justice-may be hampered rather than advanced by continuous changes of the rules.

With this thought in mind I wish to close by quoting from the most learned man I know, Dr. David Beebe, the minister of my church, in Chattanooga. Dr. Beebe is both progressive and conservative in his outlook, as exemplified by this quotation from a recent sermon:

"Not all wisdom was invented in our time. And those who throw away the wisdom of the past, because they think it isn't up to date, throw away a great deal that is wise. We do not have to live under the heavy hand of the past. Neither can we cavalierly reject what has been handed down."

Thank you.

1. 433 U.S. 350, 53 L.ED.2d 810, 97 S. Ct. 2691 (1977)
2. In re Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638.