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IN THIS ISSUE

The Medical Malpractice "Crisis": Myth and Reality

By Burton Craige

The insurance industry tells us that we are in the midst of a grave "medical malpractice crisis." Every day, we hear claims in the media that doctors are "abandoning their profession" because of "skyrocketing insurance premiums," and that "runaway juries" are routinely subjecting innocent doctors and hospitals to "outrageous verdicts." The villain in these stories is invariably the avaricious lawyer who makes his living filing "frivolous lawsuits."

Dave Cutler/SIS

What makes these stories so remarkable is that they are utterly contrary to the facts in North Carolina. The campaign for "malpractice reform" is fueled by four myths, none of which have any basis in reality.

Myth No. 1: "An explosion of frivolous lawsuits."

Four years ago, the National Academy of Sciences' Institute of Medicine concluded that between 44,000 and 98,000 Americans die every year in hospitals because of preventable medical errors.[1] Based on those statistics, 1,200 to 2,800 North Carolinians die in hospitals each year as a result of medical mistakes—an average of three to eight deaths per day.[2] The number of non-fatal injuries caused by medical errors far exceeds the number of deaths. A recent study by the Commonwealth Fund showed that injuries caused by preventable errors occur in about two percent of hospitalizations.[3] At that rate, approximately 18,000 North Carolinians are injured by medical mistakes in hospitals each year.[4] That figure understates the human toll of malpractice, because it does not include those who are injured by medical negligence outside hospitals.[5]

In view of this epidemic of injuries caused by medical negligence, the number of malpractice lawsuits filed in North Carolina is remarkably small. Injured patients filed an average of 617 medical malpractice suits per year from 1998 through 2003—only a fraction of the thousands injured or killed by malpractice. The number of malpractice filings has been stable, rising only 1.0% per year from 2000 to 2003[6]—less than the rate of population growth in North Carolina,[7] and far less than the rate of growth of the state's physician population.[8]

Formidable legal and economic barriers

combine to discourage patients from filing malpractice claims. Rule 9(j) of the North Carolina Rules of Civil Procedure—a procedural hurdle that applies only to malpractice cases—provides that an injured patient cannot file a malpractice lawsuit unless a qualified doctor has determined that the claim has merit and is willing to testify. Patients face the daunting task of finding medical experts who will break the "code of silence" and testify against a colleague. Malpractice cases are notoriously expensive and difficult to win. The routine malpractice case requires the patient and her lawyer to incur upwards of $50,000 in litigation expenses. The complex case requires an investment of more than $100,000 in expenses, and many hundreds of hours of attorney time. If the patient loses, neither the patient nor the lawyer is paid anything. Recognizing these obstacles, attorneys know they risk financial ruin unless they file well-founded malpractice claims.

Myth No. 2: "Outrageous jury verdicts."

North Carolina juries are conservative in medical malpractice cases, consistently favoring the health care provider over the patient. Studies have repeatedly confirmed what lawyers know from experience: malpractice plaintiffs in North Carolina win at trial about 20% of the time.[9] In the rare case that a plaintiff obtains a favorable verdict, the amount of the award reflects the severity of the injuries and the cost of treatment. If the jury's award is excessive and unsupported by the evidence, the trial judge will throw out the verdict and order a new trial.

In 1998 the North Carolina Administrative Office of the Courts (AOC) began to compile data on medical malpractice lawsuits. The AOC data demolish the contention that malpractice defendants need legislative protection from North Carolina juries. Patients and their families filed 3,700 medical malpractice lawsuits between 1998 and 2003.[10] Of those cases, 2,772 had been resolved as of the beginning of 2004.[11] Among the resolved medical malpractice lawsuits, 99 (4%) went to trial.[12] Of the 99 tried cases, only 21 (21.2%) were decided in favor of the plaintiff.[13] The median jury award was $300,000, with only three verdicts of more than $1 million.[14]

Myth No. 3: "Malpractice insurance premiums are skyrocketing."

From 1989 through 2002, Medical Mutual of North Carolina—the largest writer of malpractice insurance in North Carolina—increased its base premium rate 3.8% per year.[15] During the same period, the cost of medical services, including physicians' services, increased at an average annual rate of 5.3%.[16] Thus, victims of malpractice faced sharper increases in medical costs for treating their injuries than doctors faced in their liability premiums.

In 2001 and 2002, when the stock and bond markets dropped sharply, insurers raised premiums to compensate for a lower return on their investments.[17] In 2002, Medical Mutual increased its premiums by 12%.[18] That increase was modest in comparison with premium hikes consumers faced for property, casualty, and health insurance.[19]

Even with recent increases, most North Carolina physicians pay moderate malpractice premiums. In its 2003 rate filing to the North Carolina Department of Insurance, Medical Mutual disclosed that the average collected rate per insured in 2002 was $9,192.[20] Those rates are comparable to premiums charged by other companies. The North Carolina Department of Insurance recently released comprehensive data demonstrating that the average earned premium per physician in 2002 was less than $9,000.[21]

Myth No. 4: "Doctors are leaving North Carolina because of malpractice lawsuits and high insurance premiums."

The number of physicians per person in North Carolina has risen steadily, from 12 doctors per 10,000 population in 1979 to 16 per 10,000 in 1990 to 20 per 10,000 in 2001.[22]

We hear claims that obstetricians are leaving North Carolina in droves because of malpractice lawsuits. Let's look at the facts. From 1995 to 2000, the population of North Carolina increased from 7.2 million to 8.2 million—an increase of 2.3% per year.[23] During the same period, the number of obstetricians practicing in North Carolina increased from 747 to 937—an annual rate of increase of 4.2%.[24] In other words, the number of obstetricians in North Carolina has grown almost twice as fast as the state's population.

Recent studies by the General Accounting Office refute the notion that malpractice lawsuits are causing a crisis in access to healthcare. The GAO carefully reviewed reports by provider groups in five states claiming that malpractice pressures had caused physicians to close their practices or reduce services. The GAO found that problems were "limited to scattered, often rural, locations and in most cases providers identified long-standing factors in addition to malpractice pressures that affected the availability of services."[25] Those "long-standing factors," familiar to most health care providers in rural North Carolina, include professional isolation and distance from major medical centers.

Although the traditional gap in access between rural and urban areas persists, striking new evidence shows that North Carolina is narrowing the gap. A GAO report released in October 2003 confirms rapid physician growth in metropolitan North Carolina, with the number of physicians per 100,000 population increasing from 221 in 1991 to 257 in 2001, an increase of 16.3%.[26] At the same time, the number of physicians per 100,000 population in nonmetropolitan North Carolina grew almost twice as fast, from 96 to 125, a 30.2% increase.[27] Thus the facts belie the claim that the General Assembly needs to enact radical malpractice "reform" to stem an exodus of doctors from rural North Carolina.

The lobbyists for the insurance industry say that North Carolina will attract more doctors if we copy the malpractice "reforms" that California enacted in 1975.[28] But while North Carolina's doctor population was rapidly growing in the 1990's, the number of doctors per capita in California was stagnant. In nonmetropolitan areas from 1991 to 2001, the number of physicians per capita grew twice as fast in North Carolina as in California (30.2% v. 15.2%).[29] From 1991 to 2001, while the number of physicians per capita in metropolitan areas increased 16.3% in North Carolina, the rate of growth in California was only 1.8%.[30] Doctors are flocking to North Carolina and abandoning California. Why should we follow California's example?

"Defensive Medicine"

Advocates for malpractice "reform" claim that the tort system increases medical costs by encouraging doctors to practice "defensive medicine" to avoid lawsuits. The argument fails to withstand scrutiny. A recent GAO report identifies numerous flaws in surveys purporting to demonstrate the prevalence and costs of "defensive medicine."[31] As the GAO notes, when health care providers have "revenue-enhancing motives" to order tests or

procedures, we should "interpret with caution" claims that those practices were induced by "defensive medicine."[32] Moreover, managed care has significantly mitigated the effect of defensive practices: in today's environment, insurance companies will only pay for procedures of proven efficacy.[33]

If a procedure is demonstrably effective and increases patient safety, a conscientious physician should offer that option to her patient, just as she would to a member of her own family. That is simply good medical care, not "defensive medicine."

What Can Be Done?

Four constructive measures will protect patient safety and reduce premiums paid by health care providers:

1. *Reduce malpractice by reforming and strengthening the Medical Board.* The North Carolina Medical Board has been passive and ineffective in identifying and sanctioning incompetent physicians. When bad doctors are not disciplined, good doctors pay for their mistakes through higher premiums. The board should be reconstituted so that it is independent of the Medical Society, the doctors' trade association. The new board should be adequately funded and staffed. When three or more malpractice payments have been made on behalf of a particular doctor, the board should be required to conduct an investigation of the physician and publicize its findings.

2. *Implement effective insurance regulation.* The commissioner of insurance should be given more power to regulate malpractice rates. Public hearings should be mandatory when a proposed rate hike exceeds 10%.

3. *Reduce litigation costs.* A significant factor driving premium increases is the rapid escalation in litigation expenses. Plaintiffs and defendants should be limited to two experts per side in a particular specialty. Expensive expert depositions should be replaced by written expert reports.

4. *Give targeted tax credits to physicians in underserved areas.* Doctors in critical specialties practicing in poor, underserved communities should receive tax credits for their premium payments.

Conclusion

For more than 200 years jurors in North Carolina have responsibly exercised their duty to determine fair compensation for people injured by negligence. We trust juries to decide damages when someone is injured or killed in an automobile accident. We trust juries to make life or death decisions in death penalty cases. But now we are being told that juries and judges cannot be trusted to decide damages in medical malpractice cases, and that health care providers—unlike everyone else—should not be held fully accountable for the consequences of their negligence.

The legal system promotes patient safety by holding doctors, hospitals, and nursing homes accountable for their mistakes. Dismantling the mechanism that protects patient safety will only increase the risk of injury by medical errors. Consumer groups and health care providers should work together to prevent malpractice and implement effective insurance reform. Members of the legal profession should support measures to reduce litigation costs, while vigorously opposing attacks on the jury system. ■

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Endnotes

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10. North Carolina Administrative Office of the Courts, data on medical malpractice filings, 1998-2003 (January 2004).
11. *Id.*
12. *Id.*
13. For every case that went to trial, the North Carolina Academy of Trial Lawyers (NCATL), with the assistance of the staff of county clerk of court offices, determined the disposition of the case and the amount of the verdict, if any. NCATL, Medical Malpractice Lawsuits in North Carolina, 1998-2003 (April 14, 2004).
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20. Tillinghast-Towers Perrin actuarial memorandum included as exhibit in Medical Mutual Insurance Company of North Carolina rate filing with the NC Department of Insurance dated August 30, 2002, No.-R-030001.
21. N.C. Department of Insurance, presentation by Daschiel Propes to House Blue Ribbon Task Force on Medical Malpractice (December 3, 2003).
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23. US Census Bureau, State Population Estimates.
24. NC Health Professional Data System, Cecil G. Sheps Center for Health Services Research, University of North Carolina at Chapel Hill.
25. General Accounting Office, Medical Malpractice: Implications of Rising Premiums on Access to Health Care at 13 (August 2003).
26. General Accounting Office, Physician Workforce, Appendix III (October 2003).
27. *Id.*
28. The California "reforms" included a $250,000 cap on noneconomic damages, caps on fees for plaintiff attorneys, abolition of the collateral source rule, and periodic payments of future medical expenses.
29. General Accounting Office, Physician Workforce, Appendix III (October 2003).
30. Id.
31. General Accounting Office, Medical Malpractice: Implications of Rising Premiums on Access to Health Care at 26-30 (August 2003).
32. *Id.* at 26, 27.
33. *Id.* at 27.

NC Medical Malpractice Insurance Data v. Plaintiffs' Attorneys: Can Fact Prevail Over Fiction?

By David P. Sousa

The 2003 debate over tort reform in the NC Legislature has pitted the plaintiffs' attorneys primarily against the medical malpractice insurers, not the physicians—a strategic ploy by attorneys who make their living suing physicians. The strategy is quite simple: to convince the legislators who vote for reform that the prevailing tort problems are not caused by the state's physicians but, rather, by the companies that insure the physicians. Thus a legislator's "no" vote on reform measures would offend only the insurance companies, which do not vote, not the physicians, who do—a less problematic result for elected officials. Call it the "dehumanization" of the tort reform debate. Effective? You bet. The litigation status quo is thereby maintained, and the plaintiffs' attorneys leave Raleigh having preserved their very lucrative income streams: no caps on damages, no caps on attorney fees, no change to the collateral source rule. Life is good—for the attorneys, but not for the physicians and their patients.

Make no mistake, suing physicians has become big business for many North Carolina attorneys. These attorneys, however, have a real dilemma. On the one hand, they argue against any limitations on awards for medical malpractice because to do so will reduce or eliminate the "litigation deterrent" to the bad medicine that they allege is rampant in the state. On the other hand, they offer no solutions for improving the alleged "dismal care," because to do so would eliminate the basis upon which they sue.

Cynical? Perhaps, but at the heart of the debate are very credible data from the insurers of physicians, showing that reform is needed. Without reform, North Carolina will lose excellent physicians and its citizens will find it increasingly difficult to get access to certain specialists. Physicians will stop seeing those patients (or reduce the number of patients they will see) who either are uninsured or are insured through the lowest reimbursement programs. The quality of healthcare will diminish. It has happened and is happening throughout the country; now it has begun to happen in North Carolina. There is no reason to believe that North Carolina is unique in its ability to ward off these natural outcomes from escalating medical malpractice exposure. Physicians are facing unaffordable insurance premiums and, in the near future, some specialties will be unable to find insurance at any price. Plaintiffs' attorneys counter by blaming the insurers. They have a very vested interest in

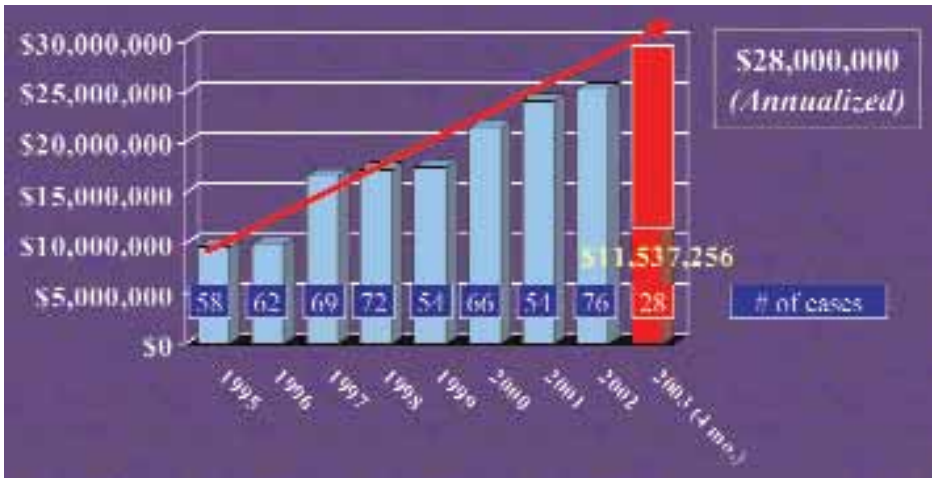

Figure 1. MMIC NC Data—Total Indemnity Paid

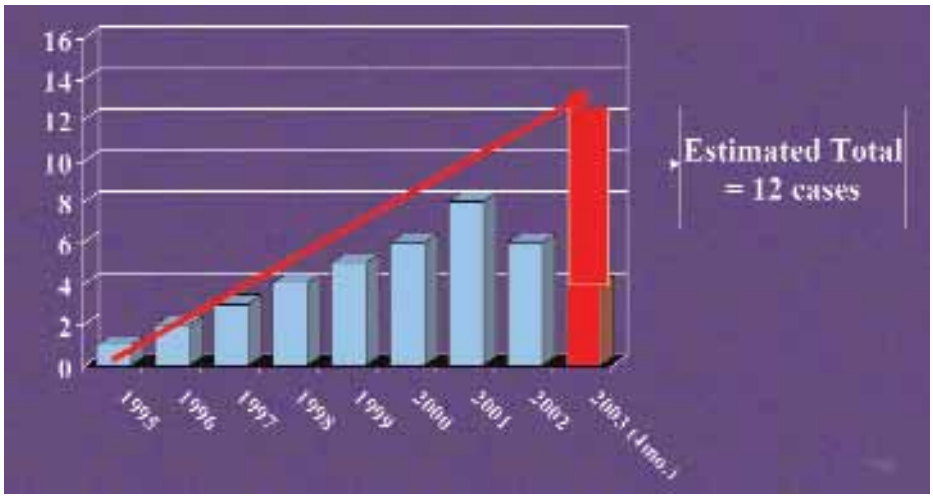

Figure 2. MMIC NC Data—Number of Indemnity Payments $1 Million and >

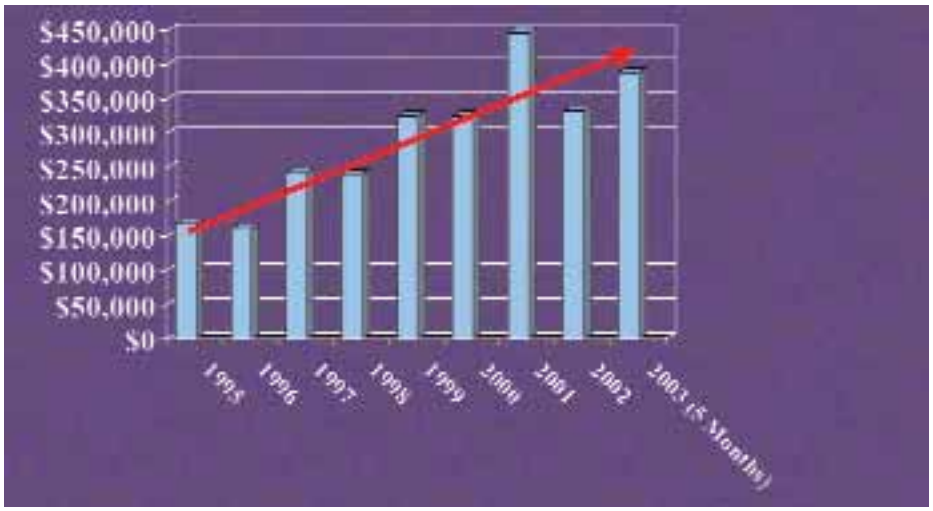

Figure 3. MMIC NC Data—Average Indemnity $ Paid

doing so, because this shifts the debate to exactly where they want it.

The following discussion and presentation of data shows the reality of the malpractice problems facing North Carolina's physicians. (All data come from MMIC's own database of policy-holder information, which is used to generate both the audited financial statements of Medical Mutual Insurance Company of North Carolina and the Annual Statements of Medical Mutual Insurance Company of North Carolina—the "Yellow Book"—filed with the North Carolina Department of Insurance. All statements are independently audited by Ernst & Young.)

Unless addressed through reform, these problems will become real for patients, too. The blame placed on malpractice insurers for these problems by plaintiffs' attorneys is factually baseless. Their advocacy has deteriorated and has become more fiction than fact. The "fictions" discussed (and rebutted) below have become the mantra of the plaintiffs' attorneys in opposing tort reform in Raleigh and in Washington. The time has come to focus the debate where it should be: on physicians and their patients.

Fiction #1: "Big insurance companies" milk their physician insureds for excessive premiums to generate excessive profits.

In 1976, when the commercial, professional liability insurance market effectively left the state, NC physicians started Medical Mutual Insurance Company of North Carolina (MMIC) with their own money. They founded the company with the goal of charging only enough in premiums to sustain a continuing, financially viable insurance market for North Carolina physicians. As its name indicates, it is a mutual company, meaning that it is owned by its physician policyholders. All but one of its board members are physicians. There are no stock dividends paid to the physician-owners, because there are no excessive profits to fund them. There are no pressures from Wall Street to give shareholders some minimum return on equity. There is no stock price to be manipulated by premium pricing. The company serves its goal best by running its operations as efficiently as possible and by charging its owners the lowest premiums possible.

Today, Medical Mutual is the largest insurer of physicians in the state, insuring almost 6,000 physicians, their staffs, and their prac-

tices. Among its peer group of 30 physician-owned insurance companies around the country, its underwriting expense ratio is the lowest in the industry, using only 12.1 cents of every premium dollar collected to cover direct operational expenses (12.1%). The simple average of the underwriting expense ratios for the peer group is 20.7%, and the simple mean is 18.3%.

It is estimated that 80% of all practicing North Carolina physicians are either insured by a mutual insurance company (like MMIC), or employed by an institution that is substantially self-insured. Either to overcharge premiums or to allow inefficient operations of such insurance programs would be inconsistent with the reasons for which these programs exist. They do neither.

Fact: Most NC physicians are not insured by "profit-hungry" corporations.

Fiction #2: Insurers have mismanaged their assets, and that is why they must charge higher premiums.

Insurance companies hire professional, nationally recognized money advisors to manage the investments of all dollars collected from premiums until they must be paid out in claims. The North Carolina Department of Insurance strictly regulates both the type and the allocation of these investments. In 2002, the overall investment return for MMIC's total securities portfolio was almost 7%, with more than 90% of its investments being in fixed income securities. The company's percentage of investments in equities has decreased from a high of 15.25% in 2000 to 7.98% in 2002. Total investment returns for the same three-year period have averaged almost 6%. Because almost all of its investments are—and must be—in high-grade government and corporate bonds, financial market fluctuations have negligible impact on premium pricing. Everyone should have been so fortunate as to have earned 7% on their investments in 2002.

Fact: Malpractice premiums are not soaring because of the vagrancies of Wall Street.

Fiction #3: A significant increase in the number of claims (suggesting more medical errors) is driving the escalation in premiums.

"Frequency" is an insurance term meaning the number of claims reported in a given policy year or calendar year. "Severity" is a term used to describe the dollars paid to the patients and their attorneys. Severity, and not frequency, has driven premium costs up over the past five years. Since the number of insureds may vary on a year-to-year basis, claims reported per 100 doctors is a standard method of annually assessing frequency. From 1998-2002, frequency per 100 doctors has remained at around 11 claims per 100 physicians.

Figure 1 shows the total "indemnity' (dollars paid to patients and their attorneys) from 1995 through May 31, 2003. Note the upward trend line and the aggregate dollars rising from under $10 million in 1995 to $25 million in 2002. Figures 2 and 3 show the rising number of payments in excess of a million dollars and the average indemnity payments for the same time period—again, the trend lines are up, indicating escalating severity.

Fact: Despite claims per 100 physicians remaining steady, the payments to patients and their attorneys are escalating and causing higher premiums.

Fiction #4: Insurers have grossly under reserved their future losses to make up for past financial performance and are playing catch-up with excessive premiums.

Reserves are the dollars that insurance companies are required by law to set aside to assure their financial ability to pay future claims. Each year, an independent actuary certifies the adequacy of MMIC's reserve amounts. In addition, they are annually evaluated by an independent auditor, Ernst & Young. Over the past five years, MMIC has consistently reserved at or above the amounts certified by the independent actuary. Reserves as of December 31, 1998, of $64.9 million grew to $97.75 million at the end of 2002. This five-year reserve growth history serves as a good predictor of the escalating dollars needed to resolve future claims, and the increases in the severity of those claims reserved over that period.

Fact: MMIC's reserves are required and set at levels needed to protect its insureds from future losses.

Fiction #5: "It's just a few bad doctors causing all of the claims problems."

A physician's claims history does not yield mature, statistically meaningful data until after that physician has been our insured for a number of years. Claims are reported over time and, once reported, can take several years to reach resolution. Of those physicians who have been insured by us for ten or more years, 45% have been sued for malpractice. In some specialties, that percentage increases; for example, 55% for emergency medicine, 62% for obstetricians, and 70% for general surgeons. Those percentages do not reflect "just a few doctors."

Almost 1,000 MMIC-insured physicians in North Carolina have been sued one time, and payments to resolve claims against them

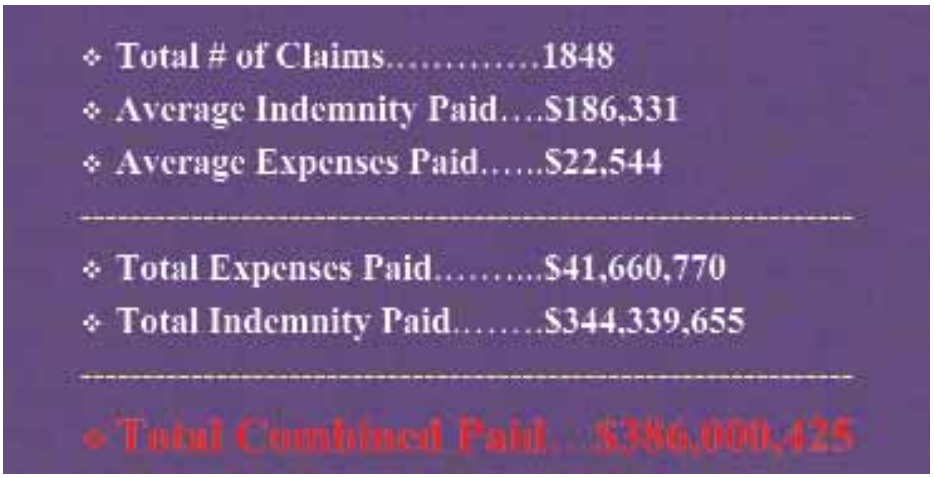

Figure 4. MMIC Inception-to-5/31/03—NC Payment Summary

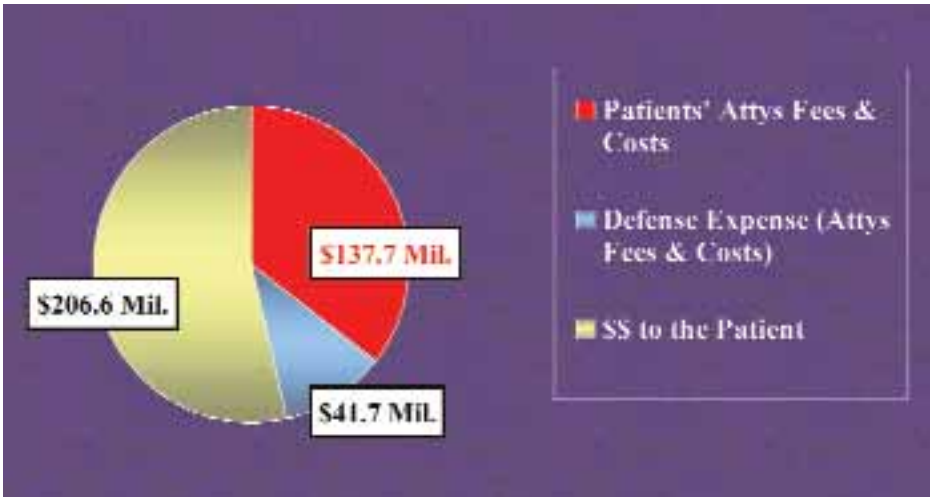

Figure 5. MMIC Inception-to-5/31/03—NC Payment Summary (where all Total Combined Paid dollars went)

are in excess of $183 million. Three hundred twenty-five physicians have been sued more than one time, and payments to resolve claims against them are in excess of $161 million. Based on the average number of physicians insured each year since the inception of the company, almost one-third of that total have been sued at least one time. It is evident that many physicians have been the target of many suits.

Fact: The malpractice crisis is widespread and not the result of a few "bad apples."

Fiction #6: Over time, payments to patients and their attorneys pale in comparison to what the "big insurance companies" spend to fight all of their cases.

Suing physicians has become a "money machine" in North Carolina. The patients—and their attorneys—have done well. Figure 4 summarizes the 26-year claim payment history of MMIC: $386 million has passed from the physician-owned company to the litigation system. Figure 5 shows the distribution of those dollars among patients, their attorneys, and defense costs. The lion's share of the payment pie—over $344 million—goes to the patients and their attorneys.

Fact: The cost to defend MMIC's physicians pales in comparison to plaintiffs' attorney fees and costs.

Fiction #7: Over time, the total increases in physician malpractice premiums have not been that great.

Since 1995, the base premium rate that a general surgeon pays for medical professional liability insurance ($1 million per claim/$1 million aggregate) has increased by 127%, from about $17,000 per year to almost $40,000 per year. Physicians in obstetrics and gynecology have seen a 137% increase ($40,000-$100,000); family practice physicians, 115% ($4,000-$9,000); and emergency medicine physicians, 153% ($9,000-$24,000). The projected premium dollar increases continue their staggering upward trend over the next five years for these same representative specialties and the same coverage limits. By 2008, it is estimated that general surgeons will be paying $86,000 per year, ob/gyns $149,000, family physicians $18,000, and emergency medicine physicians $57,000.

These premium increases cannot, in most instances, be passed on to or recouped from patients. Without taking significant cuts in their revenue, physicians can only absorb so much in rising premiums before they must make difficult decisions regarding the scope, breadth, and location of their practices. These decisions have resulted in significant access to care issues for patients in those states hardest hit by rising liability exposures.

Fact: The malpractice crisis is causing dramatic increases in premiums, which will continue in the absence of tort reform.

Fiction #8: Tort reform proposals calling for caps on noneconomic damages unfairly harm women, children, and the elderly.

In this state and throughout the nation, the specialty most in jeopardy from a malpractice perspective is obstetrics, which has been ravaged by the greedy tort system. If suing physicians has indeed become a money machine, suing obstetricians is the foundation upon which that machine has been built. Twenty-four percent of the total indemnity payments of MMIC over time ($82,375,014 out of $334,339,655) have been paid on behalf of obstetricians. Payments greater than $1 million per case have been made 29 times, with aggregate payments in those cases of almost $40 million. If we include the expenses MMIC has incurred in defending all obstetrics cases ($7.6 million), just over $90 million dollars has been spent on that single specialty since the inception of the company.

Ob/gyn care touches almost every woman and child in the state. Healthcare for many

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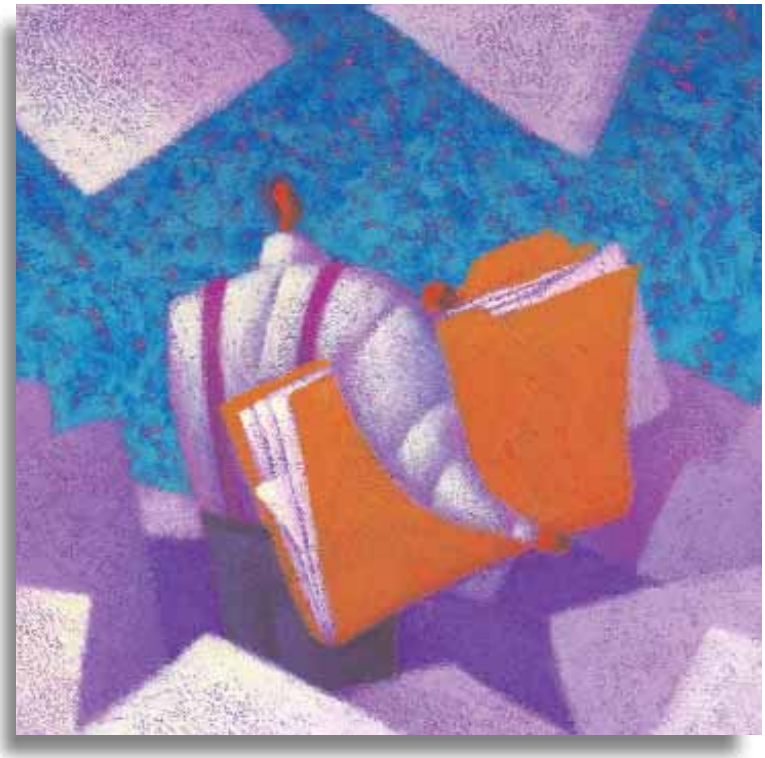
The Problem with Brady: Expectations of Support from the Bar

By Marshall Dayan



In a thoughtful and well-written article in the Winter 2003 issue of this publication, S. Mark Rabil called for open file discovery in capital cases in North Carolina, noting that several North Carolina death penalty convictions were overturned in post-conviction proceedings because prosecutors failed to disclose to the defense exculpatory evidence, in violation of *Brady v. Maryland*.[1] While the specifics of these individual cases are deeply troubling, what is even more troubling is that they are just the tip of the iceberg of a multitude of cases in which prosecutors have failed to fulfill their ethical obligations of the North Carolina Revised Rules of Professional Conduct, Rule 3.8(d). We know that these cases are just the tip of the iceberg of ethical violations because the constitutional standard established in *Brady v. Maryland* incorporates a materiality standard, while Rule 3.8(d) plainly requires prosecutors to disclose evidence favorable to the defense without reference to materiality. *Brady*'s materiality standard allows prosecutors to weigh, before a duty to disclose arises, whether there is a reasonable probability that evidence favorable to the defense will affect the outcome of the case. Rule 3.8(d)'s duty to disclose does not allow a prosecutor to engage in this calculus.

The cases to which Mr. Rabil referred are merely representative of many, many more such cases where discovery violations have not been identified. They have not been identified for several reasons. First, in non-capital cases, there is no constitutional right to counsel in post-conviction proceedings, and in all of the aforementioned cases, the discovery violations were not identified until post-conviction proceedings were commenced. The aforementioned cases were capital cases, so lawyers were appointed. Second, even in capital cases, *Brady*

violations were not routinely discovered in post-conviction until the General Assembly amended the state post-conviction statute to allow capital defendants complete access to prosecutors' trial files in post-conviction discovery. *See* N.C. Gen. Stat. §15A-1415(f) (1996). In other, non-capital cases, *e.g.*, Terence Garner and Lesley Jean, the defendants were simply lucky enough to have lawyers that were willing to represent them in post-conviction proceedings, whether they were appointed or not. Finally, they have not been identified because the *Brady* standard, in contrast to the State Bar's ethical rules, allows prosecutors to make subjective determinations not to disclose evidence favorable to the defense.

Even these few cases that represent the tip of the iceberg have created a serious public relations problem for the criminal justice system—people are beginning to lack confidence in the system to catch and convict the right people. This is problematic not only because the wrong people are being convicted but also because the actual criminals are not, and are therefore still at large, able to commit more crimes. Hence, we must begin to evaluate how to solve this problem.

I. Solving the Problem of Failures to Disclose

After Alan Gell was acquitted at a retrial, North Carolina's Attorney General, Roy Cooper, called the initial conduct of prosecutors "a travesty," and recommended open file discovery in all capital trials in North Carolina, as recommended by Mr. Rabil. Governor Easley has likewise publicly supported open file discovery in capital cases.

However, open file discovery will not alone solve this problem. On February 24, 2004, the Supreme Court decided another capital murder case in which the prosecutors failed to disclose evidence favorable to the accused, *despite the prosecutors announcing at trial that they had provided open file discovery to the defense*. In *Banks v. Dretke*,[2] the Court overturned a conviction and death sentence because the Texas prosecutors had failed to disclose that one of its witnesses was intensively coached by the State prior to his testimony and that he had received a plea bargain in exchange for his testimony, and that another witness had been paid for his testimony, and that he, too, received a favorable plea bargain in exchange for his testimony. In *Banks*, the Supreme Court noted that it had "several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.' (citations omitted) Courts, litigants, and juries properly anticipate that 'obligations to refrain from improper methods to secure a conviction plainly resting upon the prosecuting attorney will be observed.'" *Banks*, citing *Berger v. United States*, 295 U.S. at 88.

A. The Constitutional Standard

The constitutional obligation of prosecutors to disclose evidence favorable to the defense was announced by the United States Supreme Court more than 40 years ago in *Brady v. Maryland*.[3] In that case, John Brady was convicted of a first-degree murder and sentenced to death. He admitted his involvement in the crime, but asserted that his co-defendant, who was tried separately, was the actual killer. Defense counsel sought from the State prior to trial the co-defendant's statements made to investigators, and the State disclosed some of them. It failed to disclose, however, that statement in which the co-defendant admitted culpability for the actual killing. The defense did not learn of this statement until after the conviction and sentence of death were affirmed on appeal. The defense sought post-conviction remedies. The United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[4]

In a more recent application of this rule, the United States Supreme Court also held that "the State's obligation to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government, regardless of any failure by the police to bring favorable evidence to the prosecution's attention."[5] In *Kyles*, the defendant was charged with the robbery and murder of a woman outside of a grocery store in New Orleans. At an initial trial, the jury deadlocked. The State again prosecuted Curtis Kyles for the murder. He was convicted and sentenced to death, and after his conviction and sentence were affirmed on appeal, he discovered that the State failed to disclose to the defense that several eyewitnesses at the scene gave conflicting descriptions of the assailant who shot the victim in the parking lot of the supermarket. The police thought the killer had driven his own car to the parking lot and left it there, driving away in the victim's car, so the police listed the license plate numbers of all the cars in the parking lot. They did not, however, disclose to the defense that the defendant's car was not among those found in the parking lot of the supermarket. The investigation focused on Curtis Kyles only after the police received a telephone call from an informant whose story changed at an interview subsequent to his anonymous telephone call to the police. The informant repeatedly expressed his concern that he might be a suspect for the murder, and ultimately made a third statement that included many discrepancies from his second statement. None of this was disclosed to the defense. Moreover, the State failed to disclose to the defense that the informant had committed prior crimes at the same supermarket location. By contrast, Kyles had a consistent alibi. The Supreme Court concluded that all of this evidence, considered cumulatively, raised a reasonable probability that the outcome of the trial would have been different had the defense been informed of all of this favorable evidence.

The constitutional rule set forth in *Brady* requires the State to disclose material evidence favorable to the accused on the issues of guilt and punishment, including evidence to impeach State's witnesses. Evidence favorable to the defense is material when it creates a reasonable probability, defined by the Court as a less than preponderance standard,[6] that had the disclosure(s) been made, the result of the trial would have been different. In other words, considering the evidence favorable to the defense cumulatively, if there is a reasonable chance that the disclosure could affect the trial, all favorable evidence must be disclosed. It is the materiality standard of the constitutional rule that leads to the continuing problems seen in North Carolina and across the country. Professor Dan Givelber provides insight into why this materiality standard causes so much of the problem in the present constitutional standard.

> A rational prosecutor can view this rule as justifying the withholding of exculpatory matter in virtually any case in which she has made a good faith decision to proceed. By definition, the prosecutor has considered and rejected the possibilities that the defendant is innocent or that there is insufficient evidence to establish that the defendant is guilty.

Dan Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 Rutgers L. Rev. 1317, 1389 (1997).

B. The Ethical Standard

The constitutional standard, without help, will not curb the problem of discovery violations by the prosecution in criminal cases. In *Kyles*, the Supreme Court noted that the American Bar Association standards of conduct are less forgiving than its constitutional rule established in *Brady*.[7] If we are to begin to solve this problem in North Carolina, we must look to the State Bar's Revised Rules of Professional Conduct. Rule 3.8(d) of the Revised Rules, Special Responsibilities of a Prosecutor, require a prosecutor in a criminal case to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." The comments that follow this Revised Rule note that the prosecutor's duty is to seek justice, not merely to convict. This makes the prosecutor's role different from that of a defense attorney; the roles are not, and should not be, considered in rough equivalence. The defense lawyer's obligation is to zealously represent his client within the bounds of the law; the prosecutor's special responsibility is to do justice. For the prosecutor, "winning" is defined as doing justice, not just obtaining convictions. Justice is not done when innocent people are convicted because the prosecution failed to disclose evidence in its possession favorable to the defense.

A fortiori, the aforementioned constitutional decisions all involve cases in which the Supreme Court redressed the grievances of the defendant. By focusing on these cases, it is easy to forget that cases where the defendant's grievances are redressed are the exception rather than the rule. In most cases, reviewing courts find that prosecutors' failures to disclose evidence favorable to the defense are not material, and that, therefore, there is no constitutional violation. For example, in the case of *State v. Jamie Cheek*, from Wilmington, North Carolina, the evidence established that the defendant and an acquaintance, Tom Nelson, took a taxicab from Jacksonville, North Carolina, to Wilmington. Nelson put the driver of the taxicab into the trunk and said he was going to dispose of the taxicab, so the defendant begged Nelson to let him out of the car, choosing to have a beer rather than to be involved in a homicide. Nelson was killed in a shootout with police following the murder, so the State prosecuted Cheek for the homicide. The State vehemently rejected the defendant's contention that he had gotten out of the car prior to the homicide, arguing that the passenger side front door was open, not closed, when the car was found. The inference to be drawn from this was that two people got out of the car at the time it was abandoned, one person from the driver's side and one person from the passenger's side. In state post-conviction proceedings, Cheek's counsel discovered a note in the files, in the prosecutor's handwriting, indicating that the passenger side door of the car was closed when the car was found. At a post-conviction evidentiary hearing, the prosecutor admitted that he had not disclosed to the defense the information that the passenger-side front car door was closed when the car was found. Even though the State proffered no other evidence linking the defendant to the scene, the Superior Court of New Hanover County concluded that the failure to disclose was not material, and that, therefore, there was no *Brady* violation.

The apparent ethical violation in the *Cheek* case is no less serious than the apparent ethical violations in the *Gell* case.[8] Because of the Superior Court's application of the materiality prong of the *Brady* doctrine, however, Cheek was denied any relief from the prosecutorial misconduct in his murder trial. Hence, it is clear that the ethical standard, rather than the *Brady* standard with its materiality prong, has the possibility of affecting change in the criminal justice system and restoring public confidence in that system.

II. Conclusion

Cognizance and application of this Revised Rule returns us to the constitutional rule of *Brady* and its progeny. The constitutional rule requires disclosure of material evidence favorable to the accused. In many cases, defendants establish prosecutors' failure to disclose evidence favorable to the defense, but reviewing courts conclude that there is no constitutional error because the evidence is not material. Such holdings by reviewing courts, usually in post-conviction proceedings, do nothing to restore public confidence in the criminal justice system. Moreover, these holdings by reviewing courts do not exonerate these prosecutors regarding ethical violations, since the Revised Rules require disclosure of evidence favorable to the defense without reference to materiality. Our state appellate courts can begin to hold prosecutors to this standard as a matter of state law, and confidence in the system can begin to be restored. The likelihood, however, is that they will not. Therefore, the State Bar must take the lead. But there is a decided lack of enforcement of Revised Rule 3.8 by the State Bar.[9] In none of the cases mentioned above has the State Bar noted a violation of Rule 3.8 and imposed a sanction, no matter how minimal. Indeed, the State Bar has quite infrequently done so. This may be because of reluctance on the part of members of the Bar to bring complaints, or perhaps because there is a perception that the judicial review process is adequate. It now seems clear that the judicial review process is not adequate, nor should it be made to carry the State Bar's burden of enforcement of the Revised Rules. Rather, Revised Rule 3.8 should be read as complementary to, and a support of, the constitutional rule of *Brady*. The system can be fixed only when both rules are working effectively together. ■

Mr. Dayan is an assistant professor of law at North Carolina Central University School of Law. *He wishes to thank Paul Green of Durham for his generous assistance to both the vision and content of this article.*

Endnotes

1. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
2. ___ U.S. ___, 2004 WL 33040 (Feb. 24, 2004).
3. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
4. 373 U.S. at 87.
5. *Kyles v. Whitley*, 514 U.S. 419, 421, 115 S.Ct. 1555, 1560, 131 L.Ed.2d 490 (1995).
6. *Strickland v. Washington*, 466 U.S. 668, ___ (1984).
7. ABA Standards for Criminal Justice, The Prosecution Function and the Defense Function, 3-3.11(a)(3rd Ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged, or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d)(1984) ("The prosecutor in a criminal case shall . . . make a timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.")
8. The NC State Bar has begun an inquiry into the conduct of David Hoke and Deborah Graves in the initial prosecution of Alan Gell.
9. Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for *Brady* Violations: A Paper Tiger, 65 N.C. L. Rev. 693 (1987).

An Interview with Margaret Maron, Author

By Thomas L. Fowler

Margaret Maron is a writer of mysteries. One of the heroines of Maron's books is a thirty-something North Carolina native named Deborah Knott who grew up in a fictional county just to the southeast of Raleigh. Deborah's father was a locally famous bootlegger and she has 11 older brothers. In nine books (known as the "Deborah Knott Series"), Deborah keeps stumbling onto scenes of murder where she often knows the various suspects and then helps to solve the crime. But Deborah Knott is no police detective, crime scene investigator, or pathologist. She's a judge—a district court judge. In between solving murder mysteries, Judge Knott ("lest ye be judged," as the author points out in one of the books) is hearing custody, equitable distribution, and involuntary commitment cases. And worrying about getting re-elected. In the early spring of 2004, Margaret Maron and I talked about Judge Knott.

Fowler: I thought writers were supposed to write about what they know—but you aren't a lawyer and you are not a district court judge.

Maron: True, but that's the fun of writing fiction: you get to be anything you want to be.

Fowler: Why did you decide for Deborah Knott to be a judge—and why a district court judge rather than a superior court judge?

Maron: Before I created Deborah Knott, I wrote mainly about a New York City homicide detective. When I decided to set a series in North Carolina, I didn't want another police department professional, yet I needed someone connected to the law so as to have legitimate reasons to ask questions and have a chance of getting a straight answer. Reporters and attorneys are commonly used, but no one at that time had written about a female judge. If I'd made her a superior court judge, then she'd be ethically bound not to meddle in an investigation. As a district court judge, though, she could poke her nose in because she was never going to hear a felony homicide.

Fowler: Have you run into difficulties with the limitations on how Deborah can go about solving a murder mystery while remaining an ethical judge?

Maron: Oh, yes indeed! In one book, I had it emerge that someone had been involved in moving a body 20 years earlier, a felony in North Carolina. The moving of the body was important to the plot, that it was a felony wasn't. And besides, in my ignorance, I assumed the statute of limitations would have run on it. After the book was finished, I learned that North Carolina doesn't have a statute of limitations on felonies. It would have weakened the book to have him brought up on that old charge, yet I couldn't let Deborah wink at the law. It was a real impasse until some of my judge friends suggested a point of law that would resolve both Deborah's dilemma and mine.

Fowler: Your novels are full of accurate details of growing up and living in North Carolina—you must be a North Carolina native.

Maron: Born and bred in this briar patch!

Fowler: Your Deborah Knott novels also contain realistic and accurate details on the life of a district court judge. What sort of research do you do in preparing to write about the experiences of a district court judge?

Maron: First, I assume that a woman is a woman is a woman and therefore created and defined by things other than her work. After that, I go to the fount and talk to judges.

Fowler: In the forwards to some of your novels you have thanked various district court judges, *e.g.*, Edwin Preston, John Smith, Shelly Holt, Rebecca Blackmore, Lillian Jordon, and Bill Neely. How did you get to know these judges?

Maron: I knew Judge Preston's wife and when I first began thinking about a judge protagonist, he agreed to have lunch with me where he talked about how much he had enjoyed being a judge. Then Judge Blackmore came to one of my readings down in Wilmington, introduced herself, and invited me to visit her courtroom. That's when I met Judge Smith and Judge Holt, also of the 5th Judicial District. Later, I met the others through them.

Fowler: How helpful have they been to your Deborah Knott novels?

Maron: Absolutely invaluable. I had taken a few paralegal and criminal justice courses at the local community colleges, but trying to get everything I need from a book is almost impossible. The judges keep it real.

Fowler: Do the judges have more stories and anecdotes than you have novels to write in which you can include them?

Maron: I keep a notepad in hand and my ears wide open whenever I'm around judges and attorneys. Most of them have a mordant sense of humor. They're witty, funny, articulate, and the best of them have retained their humanity. I'm very proud that one judge has framed a passage from one of my books and that he keeps it on his office wall.

A little background. Deborah Knott has two conflicting internal voices which I've labeled Pragmatist and Preacher. The Preacher is moralistic and tries to make her do right. The Pragmatist is for doing right, too, but he keeps an eye on whether doing right will also advance her career and he's much more cynical. In *Southern Discomfort*, Deborah Knott's very first case involves a migrant who'd been charged with driving without a license. She's feeling earnest and ceremonial as she tries to focus on the wary man in front of her: "I wanted to reach out and pat his wiry brown arm and assure him that he had not fallen into the hands of an unjust system. . . For some reason it felt crucial to me that I not let this moment and this man pass out of my memory." She tells him she'll suspend judgment if he can bring her a valid driver's license by the end of the week. By week's end, she's a seasoned pro, having now passed judgment on hundreds of DWI's, misdemeanor possession, assaults, B&E's, check kitings, first appearances, etc., etc.

> We briskly disposed of the rest of the calendar before lunch and I was about to adjourn for the day when a Mexican hurried up to the DA from the back of the room, waving a shiny plastic card. His English was so poor that Doug couldn't understand what he was saying, nor why he kept waving the card toward me.
>
> It was the bailiff who finally recognized him. "Tuesday," he reminded me. "Driving without a valid license. You gave him till today to bring you a North Carolina license."
>
> *"Jaime Ramiro Chavez," said the preacher. "The man you were never going to forget." "Welcome to the bench, Judge Knott," said the pragmatist.*

Fowler: In some of the later novels you

have Judge Knott using her laptop computer but I've read very little about Judge Knott using her computer to do electronic legal research or compiling jury instructions on her computer. Is Judge Knott technophobic? Would she attend a training session on using her laptop if it was offered at the next judges' conference?

Maron: She's not technophobic at all, but let's face it: how many times do you need to look up case law on things that district court adjudicates?

Fowler: A point well taken. A superior court judge once told me that he didn't do any legal research himself because the attorneys in the case gave him all the research he needed. Judge Knott went to law school in Chapel Hill, was an assistant district attorney for a couple of years, and has been a district court judge for over ten years—is she planning on running for the superior court bench? Shouldn't she be?

Maron: Yes, she went to law school and yes, she was in private practice for a couple of years, but she was never an ADA.

Fowler: Well, counselor, in the early pages of *Bootlegger's Daughter*, Deborah Knott says: "Some judges enjoy bossing brand-new ADAs and it's not always a male/female thing, although the two years I'd worked in the DA's office, there'd been this one white-haired little bastard who rode me like a dog fly, never lighting, always just out of swatting distance." Sounds like she was an ADA to me.

Maron: Oh, my goodness! How embarrassing that you should know my books better than I do. But you're absolutely right. I'd completely forgotten that. On the other hand, I do know that she hasn't been a district court judge for over ten years.

Fowler: Are you sure? Because based on other details in that first book, it looks like Deborah was in law school at Carolina at the same time I was—maybe a year behind me. In fact, I think I remember seeing her with her study group in the law school lounge—but I didn't really know her then.

Maron: If she'd been there then, I'm sure she would have noticed you, too! Unfortunately for that meeting, book years aren't like real time. Even though she became a judge in a book published ten years ago, I figure she's only been on the bench about three or four years. As for running for the superior court? I don't think so. It would be hard to let her get involved in a murder investigation and then have to recuse herself.

Fowler: So how does Judge Knott feel about the new ethical rules for judges that allow judges to take public stands on legal issues and to directly solicit campaign funds from local attorneys?

Maron: She is really, really opposed to that. Judges should bend over backwards not to take political stands on issues, but to judge impartially, objectively, and as fairly as the law allows, according to the law itself. Soliciting campaign funds from local attorneys is such a bad idea on so many levels that I do not understand why it was even considered, much less allowed.

Fowler: Judge Knott doesn't ever seem to get real philosophical about our legal system but in one book she mentions a comment by Judge Learned Hand that "administering justice is like shoveling smoke," and in another book she observes: "I'm a district court judge. I know the value of hypocrisy." Will Judge Knott muse more about justice in future books? What is her feeling about how well our courts work?

Maron: I already get flak that my books are too political. I've discussed why I think structured sentencing is flawed, why marijuana should be legalized, and how justice for one class isn't the same as justice for another. I am very concerned that the last bastion of objective liberty is being assaulted on a very basic level, so yes, I expect to write about how our courts are influenced and undermined by directives from the top.

Fowler: Your Deborah Knott series has been very popular and successful. Will there be a tenth Deborah Knott book coming out this summer set in the North Carolina mountains?

Maron: *High Country Fall* will be out in August and is set in a fictional town that's an amalgam of resort towns from Blowing Rock to Highlands.

Fowler: I suspect that there are some North Carolina attorneys out there who have a half-finished manuscript in a drawer somewhere or an idea for a murder mystery that they intend to get on paper one of these days. Does the world already have enough legal thrillers to read? What advice would you offer to these John Grisham wannabes?

Maron: The law is so fascinating and so multifaceted that there will probably always be a market for a fresh take on it. Advice? The most basic is FINISH THE BOOK! Everything else can be taken care of in the rewrite.

Fowler: I read another interview with you in which you stated that poetry was your first love—but you have found your success with the novel. Very few people read modern poetry these days. What is it about modern poetry that fails to connect with readers—no rhyming or rhythm, a focus on description and mood rather than any clear message? What do you think?

Maron: I'm afraid I'd have to disagree with that assessment. The audience for good poetry has never been huge. True, there are some poets who write from such personal, arcane viewpoints that you'd almost have to be their best friend to know what they're referring to, but poets like Billy Campbell, Kay Ryan, Robert Pinsky? They're very accessible and they're making clear artistic statements.

Fowler: Thanks very much for talking with me today—and thanks, of course, to her fictional honor, Judge Deborah. Tell her to stop by the AOC the next time she is in Raleigh.

Maron: Thank you. I'll pass it on!

Tom Fowler is an associate counsel with the Administrative Office of the Courts, Raleigh, North Carolina. He earned his BA and JD at the University of North Carolina at Chapel Hill. He encourages judges, even district court judges, to use their laptops for electronic legal research. His e-mail address is: tom.fowler@nccourts.org

Lapsus Linguae[1]

By Judge Marty McGee

Legal proceedings are not *usually* laughing matters. But sometimes, people say things in court that are irresistibly funny. I am including in this column some of those stories from my home county of Cabarrus.

A defendant with another commitment.

From Judge Marty McGee, Concord, NC. I remember the following interaction at calender call seven or eight years ago in the Cabarrus County Courthouse with the late Judge Adam C. Grant presiding. I later read a similar story involving another judge in another place. Perhaps I am confusing what I think I heard in court with what I read, but this certainly sounds like something Judge Grant would have said.

Defendant: Your Honor, I need to have my case continued because my wife is conceiving a baby this morning.

Judge: I am not sure whether your wife is *conceiving* a baby, or delivering one, but in either event, you ought to be there. Your continuance is granted.

Court is closed.

From Judge W. Erwin Spainhour, Concord, NC. Following a hearing one Friday afternoon, Judge Spainhour asked a new bailiff to announce that "Court is closed *sine die*." The puzzled bailiff responded:

Bailiff: Oyez, Oyez, Oyez. This Honorable Court is now closed *la-tee-da*.

The precise age of the minor child.

From Randell Hastings, Concord, NC. In a contested custody action, opposing counsel asked Mr. Hastings's client the following question regarding the minor child:

Counsel: How old was the child when he was born?

Randell, however, admits to asking in another proceeding: "How fast was your car going when it stopped?"

The inappropriate movement of the vehicle.

From Judge William G. Hamby Jr., Kannapolis, NC. A law enforcement officer explained that he stopped a vehicle for the following reason:

Officer: The vehicle was traveling *erotically* all over the road.

The bright smell of alcohol.

From Judge William G. Hamby Jr., Kannapolis, NC. The Court was taking evidence in a DWI case when the officer responded to a question regarding whether he encountered an odor of an alcoholic beverage when he approached the vehicle. The officer responded as follows:

Officer: An odor of alcohol was *illuminating* the vehicle—even when the windows were rolled up.

The responsibilities of a prospective juror.

From Karen Harris, Judicial Assistant, Judicial District 19A, Concord, NC. Ms. Harris assists Judge Hamby in reviewing requests by potential jurors to be excused. She received the following creative letter from a prospective juror:

July 10, 2003

I would like to be excused from jury duty for the following reason -

We do not have central AC in our home, only a large window unit. We have lived here for 27 years and have never left the AC unit on while we are gone because of the chance of fire. We limit our trips to groc. store, etc. to no more than 2 hours— in summers.

We have indoor pets that could not stay without AC 8 hrs a day for 5 days.

We do not have children or any other relatives that could help us with this problem.

Thanks!

A Pro Se divorce.

From Judge Marty McGee, Concord, NC. A *pro se* Plaintiff seeking a divorce testified, among other things, that she and her husband had lived continuously separate and apart for one year prior to her filing the divorce complaint. While I was completing the divorce judgment, the following exchange took place:

Plaintiff: May I tell you one more thing?

Judge: Yes, ma'am.

Plaintiff: I just wanted you to know that our marriage was not *constipated*.

Location, location, location.

From Judge Michael G. Knox, Concord, NC. A defendant, seeking court appointed counsel for a DWI charge, was having an unusually difficult time completing the necessary affidavit. Judge Knox, in an attempt to ascertain the lucidity of the defendant, engaged in the following exchange:

Judge: Sir, do you know where you are?

Defendant: Between a rock and a hard place.

No Judge in their right mind would do that.

From Judge Marty McGee, Concord, NC. Following a temporary child custody hearing in which the defendant did not appear, I granted temporary custody to the Plaintiff and granted the Defendant visitation every

other weekend for the time periods that the Plaintiff suggested. At the next hearing several months later, the defendant again failed to appear and the Plaintiff, who was represented by Scott Robertson, requested that I enter a permanent custody order granting her custody. The following exchange took place while the Plaintiff was testifying:

Judge: Has he [the Defendant] been exercising visitation?

Plaintiff: Yes, Sir.

Judge: He has. So, you are just asking that the conditions remain the same?

Plaintiff: Yes, Sir. But he's dropping them off early saying that it [the order] is not accurate—that no Judge in their right mind would order something like that.

Judge: [Laughter] Well . . . ok.

Plaintiff's Counsel: Judge we realize these are the hours that we outlined and that it is not whether or not you are in your right mind—Your Honor. We are not contesting that issue today.

Judge: [Laughter] Thank you. ■

I would like to compile future columns with amusing anecdotes from legal proceedings from around the state. If you have such a story from a court appearance or deposition, please submit your contributions to me by mail or e-mail. Mail to: Judge Marty McGee, PO Box 70, Concord, NC, 28026. My e-mail address is Martin.B.McGee@ nccourts.org

Endnote

1. This is the Latin term for a misstatement or a slip of the tongue. See the following cases: *State v. Terrell*, COA03-89, 586 S.E.2d 806 (10-21-2003): "It is the general rule that a misstatement by the court, termed lapsus linguae, 'will not be held prejudicial if not called to the attention of the court and if it does not appear that the jury could have been mislead by the statement.'"; State v. Mason, COA02-1115, 583 S.E.2d 410 (8-5-2003): "during oral argument, his attorney committed a lapsus linguae—a slip of the tongue—by asking the jury to find him guilty."

Sousa article (cont.)

women and children, and for most of the elderly, is delivered through the Medicare/Medicaid system. Medicare/Medicaid reimbursement levels are set by the government each year. On March 24, 2003, the Centers for Medicare and Medicaid Services announced that Medicare physician payments would likely be cut by 4.2% in January 2004. This would follow a 5.4% physician pay cut in 2002. In response, the AMA's Yank D. Coble, MD, stated that "[u]nder these conditions, the only way physicians can avoid payment cuts is by limiting care to our nation's elderly and disabled."

In a March report presented to the US Congress, the Medicare Payment Advisory Commission (MedPAC), expressed their concern that doctors may opt out of the program in large numbers once the 2003 cut takes effect. A survey last year by Project Hope, on behalf of MedPAC, found the number of doctors nationwide accepting all new Medicare patients dropped from 76% in 1999 to 69% in 2002. Preliminary results from an AMA study in December 2002 showed, according to *AMNews* (February 3, 2003), that "20% of physicians limited the number of Medicare patients they saw in 2002 after a 5.4% cut in payments. Some 60% reported increased difficulty in making suitable referrals for Medicare patients. Nearly half of the physicians surveyed—including 61% of primary care physicians—said they would *reduce* the number of Medicare patients in their practices if payments are cut again in 2003."

On March 27, 2003, *Modern Healthcare* reported that physicians' average net income *fell* 5% in real dollars between 1995 and 1999, while at the same time average salaries for other skilled professionals *increased* about 3.5% (citing a study of about 12,000 physicians by the Center for Studying Health System Change in Washington). With decreasing physician reimbursements and decreasing physician income, it is only a matter of time before escalating malpractice premiums will seriously erode access to care for children, women, and the elderly. Malpractice insurance is a significant cost to every physician. Tort reform is needed to curb the cost escalation.

Fact: *Without* significant tort reform women, children, and the elderly *will* be harmed.

Conclusion

A report released by a Joint Economic Committee in Washington on May 6, 2003, entitled *Liability for Medical Malpractice: Issues and Evidence*, concluded that a $250,000 cap on noneconomic damages awarded in medical malpractice lawsuits, combined with other reforms, would (1) save Medicare and Medicaid nearly $15 billion over ten years; (2) bring in nearly $3 billion in taxes because employees would have less money coming out of their paychecks pretax to pay for health insurance; (3) reduce defensive medicine by physicians because they will not be worried about lawsuits, thus saving the government an additional $9.3 billion to $16.7 billion by 2012; (4) encourage quality improvement efforts to identify and reduce medical errors; (5) stop physicians from leaving certain states because liability insurance is unaffordable or unavailable; (6) improve the nation's access to healthcare, especially for women, low-income citizens, and rural residents—women have been especially affected because obstetricians have been the first to give up practice in certain states (see discussion under Fiction #7, above); and (7) increase the number of Americans with health insurance by 3.9 million by lowering the cost of coverage. The plaintiffs' attorneys responded to this thoughtful and compelling study by responding that it was "fiction," according to Carlton Carl, spokesman for the Association of Trial Lawyers of America. Yet no facts were cited by the attorneys to discredit the study's findings. The facts in evidence of North Carolina's medical malpractice claims environment are compelling. Our physicians need the help of our legislature to use these facts as the basis for building the type of reform needed to assure the stability of our state's healthcare delivery system. As the above federal study shows, the expected benefits are huge. Isn't it about time that facts prevail over fiction? ■

Mr. Sousa has been the senior vice president and general counsel for Medical Mutual Insurance Company in Raleigh since January 1996. For 15 years prior to that, he was a practicing attorney who defended physicians in medical malpractice cases throughout NC. He may be reached at MMIC, 700 Spring Forest Road, Raleigh, NC 27609. Telephone: 919.878.7609. E-mail: david.sousa@mmicnc.com.

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The State of the Legal Profession in North Carolina

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There is good news about the state of the legal profession in North Carolina. Even the bad news is not as bad as it was a decade ago. The comparative impact of our most recent recession is indicative of a decade of gradual, positive change. During the recession of the early 1990's many lawyers did not have enough work to keep them fully engaged in law practice. Their lives were stressful and they suffered financially. Law firms that had been growing rapidly stopped growing, often downsized, and in some instances disappeared. In contrast, during and following our recent recession almost all lawyers have had plenty of work to do, and firms have continued to grow, as has income from law practice.

The 2002-03 State of the Profession Survey, sponsored by the North Carolina Chief Justice's Commission on Professionalism, provides objective evidence of change for the better. It also documents the persistence of pressures that can make the practice of law, and life itself, difficult. The purpose of this article is to examine important results from that survey, interesting comparisons with results of the North Carolina Bar Association-sponsored 1990-91 Quality of Life Survey, and possible futures for individual lawyers and the legal profession.

Positive Trends

Job satisfaction. A key concern following the 1990-91 Survey was that 18% of North Carolina lawyers were dissatisfied or very dissatisfied with their jobs. Other national surveys had shown a decrease in job satisfaction during the 1980's. This trend has been reversed in North Carolina, where the latest survey showed only 13% dissatisfied or very dissatisfied. Recent ABA and American Bar Foundation studies show the same reversal of job dissatisfaction trends nationally.

Billable Hours and Income. One of the reasons fewer lawyers are dissatisfied with their jobs might be that they are making more money while working fewer billable hours than a decade ago. In 1990 both average and median compensation for lawyers, adjusted for inflation, were between $72,533 and $87,040 ($50,000-$59,999 in 1990 dollars). By 2002 they had risen to a median of $92,000 and an average of $119,000. During the same time period, average billable hours had fallen from 1,654 to 1,555. However, by 2002 lawyers had begun devoting more time to management, client development, and other nonbillable activities. While working fewer billable hours, they reported working more total hours than a decade earlier. While their timekeeping had probably become more sophisticated and disciplined during this time, leading them to become more aware of and account better for their nonbillable activities, the time allocation trend reported is typical in maturing industries such as the legal profession.

Quality of Life and Attitudes Toward Firms and Practice. As one would suspect from the foregoing data, overall indicators of quality of life became more positive over the past decade. Lawyers became more satisfied with their firms, with more of them wanting to stay in the practice of law and with the same firms for the rest of their careers and fewer contemplating a change of jobs within the next two years. Their chief satisfactions with work remained the same: intellectual challenge, autonomy, status, co-workers, the quality of their work, and their relationships with clients.

Discrimination and Harassment. The 1990-91 survey raised concerns about gender discrimination and sexual harassment. The new survey shows positive trends, but much room for improvement in addressing these issues. The percentage of female lawyers reporting personal experience of sexual discrimination in the profession decreased from 70% to 34%, while the percentage who reported having personally experienced sexual harassment in the last few years decreased from 42% to 24%.

Suicidal Ideation. In the 1991 survey one of nine lawyers reported that they had thought of taking their own lives at least once a month during the past year, a fact that caused great concern and was widely publicized. For the 2002-03 survey the wording for that item was changed to allow a broader range of responses. In the new survey only 4.6% reported having thoughts of taking their own lives at least once a month, but an additional 15.6% reported having such thoughts less often than once a

month. These data indicate that while infrequent suicidal ideation is more widespread than we thought, acute problems are less common.

General Health Practices. Ninety-two percent of lawyers are now non-smokers, compared with 88% in 1991, and 20% are non-drinkers, compared with 14% in 1991. Lawyers are taking better care of themselves generally, with the typical lawyer now taking two weeks of non-working vacation a year instead of one week.

New and Continuing Concerns

Professionalism. In the latest survey lawyers were asked to estimate the percentage of opposing lawyers who engaged in various behaviors generally considered to be unprofessional. The two most frequent behaviors were taking on more work than they could handle (36%) and not doing what they said they would do (26%). The least frequent were insulting opposing counsel (14%) and making statements known to be false (15%). The percentage of judges perceived to have behaved unprofessionally toward counsel, clients, witnesses, and court personnel was 15%.

It should be encouraging that the two most common unprofessional behaviors are the two that relate least to character. They are also inextricably intertwined. One who takes on more work than one can handle cannot possibly do what one says one will do for all of one's clients. Modifying one's behavior should correct the other.

General Health Issues. The survey helps us understand that we are largely responsible for our own health. Lawyers who exercise at least once a week possess greater physical and mental health, experience greater life and organizational satisfaction, and earn more than those who exercise rarely or never. However, the percentage of lawyers exercising *more* than once a week has decreased from 48% to 40%. At the same time, the percentage of lawyers reporting diagnoses of stress-related diseases, including coronary artery disease, hypertension, and ulcers, has increased (26.2% vs. 22%).

Alcohol and Drugs. Though fewer lawyers overall drink alcoholic beverages today, over 16% of North Carolina lawyers continue to report drinking three or more alcoholic beverages a day (a majority of these report having three drinks). In addition, the percentage of lawyers who use prescription drugs to relieve anxiety has risen from 3% to 16.8%. From one perspective this increase may be healthy. Prescriptions of a new generation of non-addictive drugs can help lawyers function on the job while grappling with root causes of depression. But there is a danger that lawyers and their caregivers might not appropriately address causes of some depressions if these new drugs are being prescribed merely to mask symptoms.

Gender Differences. In most respects, male and female lawyers responded similarly to the survey. However, there were some significant differences. Overall, female lawyers make less money and are less likely to be married than their male counterparts. If they have children living at home with them, they are 12 times more likely to be the primary caregiver than similarly situated male lawyers. As a group, women lawyers appear slightly less satisfied than men with both practice and life as a whole. Not unexpectedly, the perceptions of male and female lawyers concerning diversity issues are markedly different. A majority of female lawyers agree that racist and sexist attitudes prevent minority and women lawyers from achieving leadership positions in medium and large firms, while only 22% and 17% of male lawyers agree with those respective propositions.

Why the Changes?

Bar Initiatives. Individual lawyers, law firms, bar associations, law schools, and the judiciary responded positively to the 1991 survey results. They initiated task forces devoted to the quality and value of legal services, alternatives to the billable hour, women in the profession, court reform, and public service; court-protected vacation time for litigators; risk management programs; wise law firm training and management programs and policies; an expanded State Bar PALS program and new lawyer assistance programs such as FRIENDS and BarCARES; a host of CLE programs addressing quality of life and lawyer effectiveness; and the Chief Justice's Commission on Professionalism and law school professionalism programs. All of these actions have helped enhance the well-being of lawyers and the profession.

Demographic and Economic Change. Changes in the composition of the bar in the context of the national economy also help explain contrasts in survey results over the past decade. For instance, the average age of respondents to the latest survey was 46 years, an increase of at least six years over 1991. All other factors being equal, older, more experienced lawyers will make more money than younger lawyers; they will also have had more opportunity to experience serious illness and to have it diagnosed.

State and national data indicate that the profession is becoming more urbanized, that a growing percentage of lawyer time is devoted to representation of businesses rather than individuals, and that the rate of annual growth of the bar no longer exceeds the rate of growth of the economy. These factors help explain why lawyers are more fully engaged, and able to make more money, than they were a decade ago.

The most profound demographic changes in the profession bring to it the strengths of diversity. The percentage of African-American lawyers responding to the surveys increased from 2% to 8%, and the percentage of women from 23.7% to 28%. The table below demonstrates that this trend will accelerate during the next decade, when an almost all-male cohort retiring from the profession will be replaced by a group of lawyers almost equally divided between men and women.

Distribution of Male and Female Lawyers in Random Sample by Age

	Female	Male
30 and younger	48%	52%
31-40	40%	60%
41-50	24%	76%
51-60	21%	79%
61 and above	3%	97%

For the next decade or so almost all lawyers aging out of the profession will be white men. The profession's "pipeline trends" project annual increases in the number of lawyers nationally, but unless law schools substantially increase enrollments the net increase of lawyers will decline each year because of the growing number of retirees. The profession will continue to grow more diverse in terms of race and gender. With the economy growing at a greater rate than the profession, lawyers will have to become more efficient to meet adequately the legal needs of the nation. This pressure could make practice more stressful, and it will constrain opportunities for civic leadership and other interests.

Tradeoffs in Professional Life

One of the most interesting findings of the 1991 survey was that once lawyers achieved incomes that met their fundamental needs, their overall sense of well-being declined slightly the more money they made.

The reason was that in order to make more money in a billable hour culture, lawyers had to take time and attention away from more fulfilling relationships and endeavors.

Most career choices reflect inherent tradeoffs that are revealed by the survey data. For instance, family lawyers make less money and confront more contentious work settings than the overall random sample, but nevertheless are more satisfied than the random sample with their practices, which they find consistent with their needs, values, attitudes, and interests. Government lawyers, on the other hand, are less satisfied with their jobs, but more satisfied with their lives as a whole than the overall random sample.

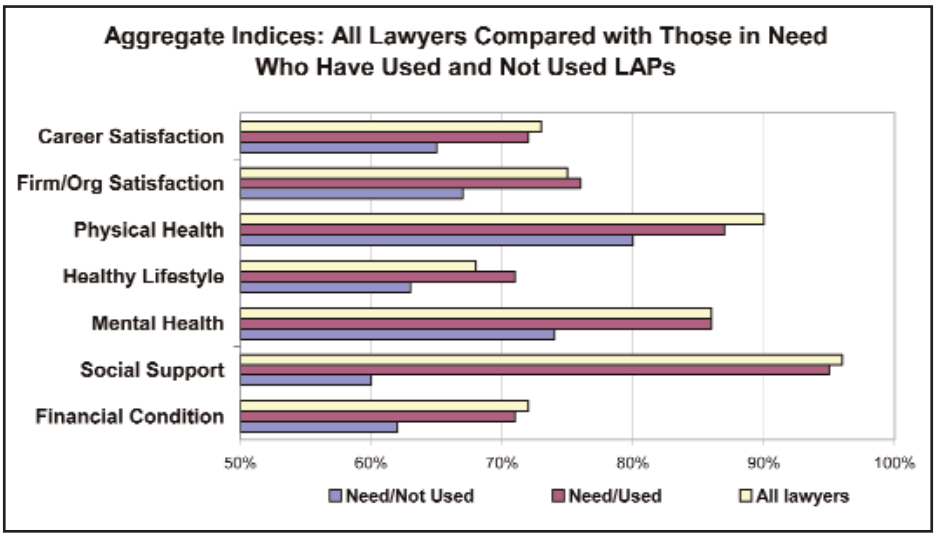
The Impact of Lawyer Assistance Programs (LAPs)

A significant group of lawyers accurately identified their need for counseling in the latest survey. Those who expressed a high or moderate need for counseling to help deal with problems such as stress or addiction scored significantly lower on all seven of the survey's aggregate indices of well-being (career satisfaction, firm satisfaction, physical health, healthy lifestyle, mental health, social support, and financial condition) than lawyers who expressed only some or no need.

As previously discussed, since 1991 the profession has strengthened its existing lawyer assistance programs and created new ones, including FRIENDS and BarCARES. Less than half of the lawyers who need these services use them. According to the survey, only 4% of North Carolina lawyers had utilized those programs by 2003. Another 5% felt they could use assistance from LAPs but had not used them. When asked why they would not use LAPs, 19% of lawyers expressed concerns about confidentially, and another 19% concerns about embarrassment, shame, or stigma.

The survey results should encourage lawyers who think they would benefit from counseling to seek it. Those who said they had considered utilizing LAP services or that they needed but had not considered utilizing them scored much lower than the random sample on all of the survey's aggregate indices. The survey results of lawyers who had used LAP services looked almost identical to those of the random sample as a whole. Their index scores for mental health and firm satisfaction actually exceeded those of the random sample (see chart below).

It is likely that those who expressed need for but have not utilized LAPs are those most in need of assistance from the programs. In addition to concerns about embarrassment or confidentiality, those most in need might not be able to summon the physical and psychological energy to seek help. Chapel Hill lawyer and risk management expert Jay Reeves, who concentrates his practice on disciplinary matters, was asked to what extent lack of office management and self-management skills lead to disciplinary actions. He responded that by the time many lawyers are subject to discipline it is difficult to tell. When he first sees them they are often in a state of deep depression, a near paralysis that makes it difficult for them even to respond to inquiries from the bar. Whether depression causes or is caused by mismanagement, or alcohol or substance abuse, the three are often interrelated. Early decisions to seek help by the lawyer, or the lawyer's friends, are crucial in minimizing harm to the lawyer, clients, firm, and family.



Conclusion

The state of the profession in North Carolina is improving. If there has been an oversupply of lawyers, state and national economic and lawyer population trends indicate that it is lessening, and could even become a shortage at some point in the future. The last time the profession had an opportunity like this was 30 to 40 years ago. Under pressure to meet the great demand for legal services, we used that opportunity to popularize the billable hour and build an oppressive lawyering culture around it.

We know better now, as we have demonstrated by our constructive responses to the 1990-91 Quality of Life Survey over the last dozen years. Synthesizing that experience with the more current and expanded information of the 2002-03 State of the Profession Survey and applying that product is a task for individual lawyers, who bear primary responsibility for their own development and effectiveness.

But it is also a task for their firms, law schools, the courts, and the organized bar. We increasingly see the profession as a network within which we compete fiercely on behalf of our clients while cooperating intensely with each other to maintain a just legal system and to protect and strengthen our network. In fact, the percentage of North Carolina lawyers who believe that it is a primary responsibility of bar-related organizations to sponsor programs that assist lawyers with balancing their personal and professional lives has risen from 54% to 64% since 1991.

We can maximize our effectiveness with a two-pronged approach: education and prevention for the majority of lawyers who are experiencing great job and career satisfaction, but who will experience hardship and need to be aware of and prepared for it when it comes, combined with a supportive network for lawyers in or approaching crisis. ■

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