It's Time to Get a Little of That Ole' Time Religion

IN THE BEGINNING, at least for many of the older members of the bar, professional liability (legal malpractice) was almost unheard of - our profession seemed almost beyond sin. In those earlier days there were some transgressions, but they were so few and seemed so obvious, it was not difficult for the profession to turn a blind eye. *Van Orman v. Nelson*, 78 N.M. 11, 427 P.2d 896 (1967). But then came *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (1972). Our Supreme Court, possibly for the first time, raised the specter of legal malpractice. But when the court affirmed summary judgment in favor of a brother lawyer at the bar, the case was not the burning bush it probably should have been for us all.

It may have taken seven days to create other things, but it was seven years before our courts addressed legal malpractice again. In 1979 both the Supreme Court in *Jaramillo v. Hood*, 93 N.M. 433, 601 P.2d 66 (1979) and the Court of Appeals in *George v. Caton*, 93 N.M. 370, 600 P.2d 822 (Ct. App. 1979), almost in unison, preached to all of us again that legal malpractice was a viable cause of action in this jurisdiction. As a profession, we should have started to "see the light", but it almost seemed as if the court was preaching-to-the-choir and we weren't listening to the sermon - that lawyers can be held accountable for their transgressions.

The rest is not in the Good Book, but it is in the case books. For those of us who haven't gotten the message, our appellate courts are still preaching and it is worth reading their most recent messages to the flock: *Meiboom v. Carmody*, N.M. Bar Bull. Vol. 43, No. 1 (01/08/04) and *Andrews v. Saylor, et al.*, N.M. Bar Bull. Vol. 42, No. 48 (11/27/03).

For many of us in the bar, the older ones, our introduction to the religion of our profession came through a mandatory ethics class we sat through in our third year of law school. In that two-semester hour class we were introduced to the Canons of Ethics. We came for our

two semester hours, we dutifully memorized the "Thou Shalt Not's", we regurgitated them on a final exam, and graduated to the practice of law where, it seemed, the real rules which governed were "no holds barred" and "rough and tumble." We [seemed] to forget the Canons and our "Thou Shalt Nots."

For the younger members of the bar, the Canons of Ethics were like the Dead Sea Scrolls - legal artifacts. In the 1980's the American Bar Association promulgated its Model Rules of Professional Conduct replacing the Canons. Our Supreme Court, not long thereafter adopted, almost in their entirety, the ABA Model Rules in what we now refer to in New Mexico as our Code of Professional Responsibility.

While it is not suggested that the Code of Professional Responsibility has been ignored by the bar, the Supreme Court in *Garcia v. Rodey*, 106 N.M. 757, 750 P.2d 118 (1988), did make clear that, "the rules [the Code of Professional Responsibility] are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." 106 N.M. at 762.

But our Supreme Court didn't want the members of the flock to get the wrong message from *Garcia v. Rodey* and in an effort to help the bar to be "aspirational", the court in the late 1980's instituted rules requiring minimum continuing legal education - one of hour of which each year was required to be in ethics.

The flock, however, didn't seem to be getting the message and in 1998, the Supreme Court added to the bar's annual continuing legal education, not only the one hour of ethics, but two additional hours on professionalism - a little Golden Rule training for all of us.

The Supreme Court has not been alone in trying to spread the word. Several of the professional liability companies have also weighed in, offering annual risk management seminars

for their insureds, luring them to one-half day seminars with the enticement of discounts on their professional liability insurance premiums. And many of us came, we listened, and we left with our five or so percent discounts on our malpractice premiums.

The foregoing is somewhat irreverent, cynical and overstated. If I have offended, I apologize. That is not my intention nor purpose. It is my hope that there are many in the bar who are believers. For those who have been the object of a legal malpractice claim - that ordeal almost always makes the lawyer a believer in the importance of risk management. For those of us who have represented colleagues in legal malpractice cases, we have witnessed firsthand this conversion - the baptism by trial and the emergence of new believers in the Code of Professional Responsibility. When "professional responsibility" suddenly turns into "professional liability" - when money passes hands from the lawyer or his professional liability insurance company to a former client - when there is suddenly consequences for our not being professionally responsible, then we get religion. Which brings me to the real purpose of my comments.

At the risk of being too cute, let me use a line from Meredith Willson's *Music Man* and suggest to the bar that "There is trouble, right here in River City, and it begins [with U and ends in G]" and I don't know what it rhymes with, but it is "underwriting." In the 1980's the legal profession experienced what has been often referred to as the "hard market." The insurance companies began pulling out of the professional liability market; coverage was extremely difficult to find. There just were very few carriers who were willing to write insurance for lawyers. The bar and the profession responded in many ways. The State of Oregon established its own professional liability company and made professional liability insurance mandatory for all lawyers practicing law in that state. Other bars sponsored insurance companies to provide some source of professional liability coverage for its members. Today there is a group of bar

sponsored companies around the country which are often referred to as the NABRICO companies - National Association of Bar Related Insurance Companies.

Today the situation is different. It is not a "hard market" in the sense it was in the 1980's; there is not a shortage of insurance companies who are willing to write coverage. Currently, there is no less than twelve insurance companies writing professional liability insurance in New Mexico. The problem which now confronts our profession and New Mexico lawyers is that for the first time (and by the "first time" I mean for the last several years) professional liability insurance companies are underwriting. By "underwriting", I mean they are looking very hard at who they will insure. For years, a lawyer's or firm's claim history didn't seem to be that important. This was due to many factors which go beyond the expertise of this writer and this article. Five years ago, a little sin may have gone unnoticed; today we are being held accountable. Professional liability insurance companies are looking long and hard at past claim histories. They are taking very seriously disciplinary complaints. They are refusing to write insurance for law firms who have problem lawyers. And, much to the dismay of this writer, some companies seem to also be penalizing lawyers and firms for complying with their insurance contract obligation of reporting "potential" or "threatened claims." We are seeing lawyers and law firms who cannot get professional liability insurance - not because there aren't more than enough insurance companies writing in this state, but because the companies are not interested in lawyers and law firms who have not demonstrated professional responsibility in their practices.

So what does this all mean? It means that it is time to get that old fashioned religion of professional responsibility. It means that avoiding professional claims is not just a matter of professional responsibility, it is a matter of dollars and cents. Sometimes, the pocket book or the bottom line is what it takes to get religion.

I have kidded above about the ABA's Canon of Ethics being the Dead Sea Scrolls. Well, soon our Code of Professional Responsibility, as we know it, may also be relegated to the annals of legal history and replaced by the new testament, if you will - the product of the ABA's *Ethics 2000* - the ABA's Model Rules of Professional Conduct. Taking a bold step, the ABA's new rules provide in their *Scope* provisions after stating that a "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer.... Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." And this is just one of many changes in the Model Rules.

The practice of law is not getting easier. Our professional obligations and responsibilities are continually being re-defined. Now more than ever, a lawyer must be religious about his/her professional responsibilities. The State Bar has a very active Lawyer Professional Liability Committee. The committee is redoubling its efforts this next year to spread the word. Committee members are available to present risk management CLE's to sections and committees and the committee will, over the next year, provide articles on specialized areas of risk management and professional liability insurance. The State Bar in conjunction with PALMS (Practicing Attorneys Liability Management Society, Inc.) makes available to the members of our bar a risk management/ethics hotline. There is a Lawyer's Assistance Confidential Hotline where anyone (family, colleague, legal assistants, the suffering lawyer him or herself) can get confidential help for the lawyer who is struggling with the disease of alcoholism or addiction.

The resources and help is there. You just have to reach out.