

Do Hard Times Yield Bad Ethics?

There are few things that liberals and conservatives seem to agree on any more, but one of the few is that the economy has been down for a while now. Why that is so or whether it's someone's fault remain issues about which to disagree, but that times are bad is accepted. What does a poorly performing economy mean for the legal profession, and more particularly for the ethical standards of the profession? Does a bad economy result in a similar downturn in ethical standards; *i.e.*, does a bad economy equal bad ethics?

Layoffs, Going Solo

Several aspects of the legal profession are immediately affected by tough economic times. Firms start cutting salaries and laying off employees, including attorneys. Some of the largest firms in the state have already done so. Where do laid-off lawyers go? And what happens to those who remain behind? Well, perhaps some of the top young talent from big firms will wind up at mid-size to small firms, unless those firms too are laying off or at least not hiring. Those hired may only replace some attorneys at those firms. Some of the laid-off will by necessity become solos, permanently or at least until they find different employment. Likewise, for newly admitted attorneys, the job market is currently pretty grim, since while a few may be hired to replace more experienced attorneys at a lower cost to a firm, it is just as

likely that they too will have to "hang out a shingle," at least temporarily. Those who remain behind likely face stresses of their own due to longer hours and heavier workloads.

Though some marketers can argue that a recession is a "perfect" time to commence a solo practice, I'm not convinced that that's true for the majority of the

people who find themselves opening a new practice, especially if it's not an entrepreneurial choice. Now, an increase in solo practitioners does not necessarily indicate any lowering of the ethical standards, but since many of these new solos are not there totally by choice and many are used to practicing in a firm with solid support staff assistance, the possibility of inadvertent error or even shortcuts does exist. So also attorneys remaining in downsized firms face similar challenges. Many of these lawyers will feel compelled to enter into areas of practice with which they are not familiar, or take on questionable clients or cases simply because an advance fee is available.

Although bills have to be paid, taking a case that you are not competent to handle is not the answer. Nor is rationalizing conflict-of-interest decisions so that you may accept an otherwise prohibited representation. Rather, hard work, effective marketing, networking skills and mutual support are essential in these times to build a practice; also get input on how to manage a law business properly. Put the phone numbers for the Director's Office—to call for an advisory opinion—and for your malpractice carrier—to get timely advice on potential risks—on speed dial!

Bankruptcy

Economic downturns also result in an increase in bankruptcy filings, meaning extra work for one segment of the bar, but also that more lawyers themselves may seek to file bankruptcy. There has long been some confusion about an attorney's ability to file personal bankruptcy under either Chapter 7 or Chapter 13 of the Bankruptcy Code. It is not unethical for an attorney to file bankruptcy; indeed, an attorney has the same right as any person to file bankruptcy. A bankruptcy trustee could not realistically sell a law practice, so a lawyer in bankruptcy may certainly continue to practice, although the physical assets of the lawyer's office may be subject to sale. Ethical issues can arise in bankruptcy, however. For while filing bankruptcy is not an ethical issue *per se*, fraud or dishonesty committed in connection with a bankruptcy petition can be and has been.

"Borrowing"

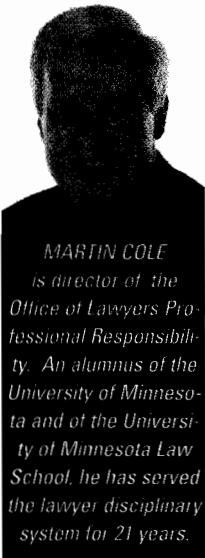
From a lawyer discipline perspective, the fear during a recession is that bad times can bring out the worst in some people. Obviously the most serious concern in economic bad times is that an attorney may turn to clients' funds as a source of "extra income." "Borrowing" client funds, no matter whether the attorney intends to repay the money, is misappropriation that will result in substantial discipline and possibly criminal prosecution. Attorneys working in lawyer discipline have long had an intuitive sense that misappropriation of client funds increases during economic tough times, but this belief is supported principally by anecdotal evidence. In part that is so because the conduct often does not immediately come to light, perhaps not until after the economy begins to recover. Thus, tying the two together is not always clear. Vigilance against the temptation to "borrow" must come from within, especially if there are not trust account safeguards in place in your practice.

Commingling of personal funds in a lawyer's trust account also has the potential to increase in economic bad times. Hiding funds from creditors by placing them in a fiduciary account puts legitimate client funds at risk and also can subject an attorney to substantial discipline.

Depression

Finally, depression is a very real possibility during economic hard times, and not just the deeper-level-of-economic-problems kind of depression. If lawyers, as regularly reported, are indeed up to six times more likely than the general population to suffer from depression even in the best of times, how much more likely to occur are depression or other psychological problems resulting from the stress of layoffs, declining salaries or revenues, or longer hours? Certainly alcohol and drug abuse issues can increase as well. Here, vigilance must be taken not only as to our ethics, but as to the well-being of ourselves and our fellow lawyers as well.

Ultimately, no recession or even a depression will last forever; economic recovery will occur. Losing your ethical compass due to hard times, however, can have an impact that lasts forever. ▲



MARTIN COLE is director of the Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 21 years.