

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 482**

**September 19, 2018**

## **Ethical Obligations Related to Disasters**

*The Rules of Professional Conduct apply to lawyers affected by disasters. Model Rule 1.4 (communication) requires lawyers to take reasonable steps to communicate with clients after a disaster. Model Rule 1.1 (competence) requires lawyers to develop sufficient competence in technology to meet their obligations under the Rules after a disaster. Model Rule 1.15 (safekeeping property) requires lawyers to protect trust accounts, documents and property the lawyer is holding for clients or third parties. Model Rule 5.5 (multijurisdictional practice) limits practice by lawyers displaced by a disaster. Model Rules 7.1 through 7.3 limit lawyers' advertising directed to and solicitation of disaster victims. By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster.*

### **Introduction<sup>1</sup>**

Recent large-scale disasters highlight the need for lawyers to understand their ethical responsibilities when those events occur. Extreme weather events such as hurricanes, floods, tornadoes, and fires have the potential to destroy property or cause the long-term loss of power. Lawyers have an ethical obligation to implement reasonable measures to safeguard property and funds they hold for clients or third parties, prepare for business interruption, and keep clients informed about how to contact the lawyers (or their successor counsel). Lawyers also must follow the advertising rules if soliciting victims affected by a disaster.

Much information is available to lawyers about disaster preparedness. The American Bar Association has a committee devoted solely to the topic and provides helpful resources on its website.<sup>2</sup> These resources include practical advice on (i) obtaining insurance, (ii) types and methods of information retention, and (iii) steps to take immediately after a disaster to assess damage and rebuild. Lawyers should review these and other resources and take reasonable steps

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> ABA COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS, <https://www.americanbar.org/groups/committees/disaster.html> (last visited Sept. 6, 2018). ABA Committee on Disaster Response and Preparedness, *Surviving a Disaster A Lawyer's Guide* (Aug. 2011), [https://www.americanbar.org/content/dam/aba/events/disaster/surviving\\_a\\_disaster\\_a\\_lawyers\\_guide\\_to\\_disaster\\_planning\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning_authcheckdam.pdf).

to prepare for a disaster before one strikes the communities in which they practice. Lawyers should also review their disaster preparedness plans when a disaster threatens. Included within disaster planning, and of particular importance for sole practitioners, is succession planning so that clients and others know where to turn if a lawyer dies, is incapacitated, or is displaced by a disaster.

Despite the wealth of information available on preparing for a disaster and on the practical steps a lawyer should take to preserve the lawyers' and the clients' property and interests after a disaster, there is a dearth of guidance on a lawyer's ethical responsibilities (i) when a disaster threatens, and (ii) after a disaster occurs.<sup>3</sup> This opinion addresses the lawyers' obligations in these circumstances.<sup>4</sup>

### A. Communication

Model Rule 1.4 requires lawyers to communicate with clients.<sup>5</sup> One of the early steps lawyers will have to take after a disaster is determining the available methods to communicate with clients. To be able to reach clients following a disaster, lawyers should maintain, or be able

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<sup>3</sup> There are three ethics opinions from state bars on a lawyer's obligations after a disaster: N.Y. City Bar Ass'n Formal Op. 2015-6 (2015) advises lawyers to notify clients of destruction of client files in a disaster if the destroyed documents have intrinsic value (such as a will) or if the lawyer knows the client may need the documents; La. Advisory Op. 05-RPCC-005 (2005) advises lawyers on providing pro bono assistance through a hotline or both; and State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) advises lawyers not to participate in a mass disaster victims chat room because it is intrusive, but not because it is prohibited as in-person solicitation.

<sup>4</sup> This opinion focuses primarily on the obligations of managers and supervisors within the meaning of Rule 5.1, recognizing that lawyers practice in a variety of contexts, including solo offices, small firms, large firms, government agencies and corporate offices. Subordinate lawyers may rely on the reasonable decisions of managers and supervisors on how to address the ethical obligations this opinion describes. Some of the obligations may be reasonably delegated or assigned to specific lawyers within a firm or organization. Methods of compliance with the obligations may vary depending on the practice context in which they arise. In addition, lawyers employed by governmental or other institutional entities may be subject to requirements imposed by law, or the policies of those entities. Reasonable implementation of the obligations described in this opinion satisfies the Model Rules. Opinion 467 provides examples of how to comply with obligations under several Model Rules in a variety of practice settings. *See* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) provides:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible.<sup>6</sup>

In these early communications clients will need to know, for example, if the lawyer remains available to handle the client's matters, or, alternatively, if the lawyer is unavailable because of the disaster's effects, and may need to withdraw. In a situation in which a disaster is predicted, for example, with a hurricane or other extreme weather event, lawyers should consider providing clients with methods by which the lawyer may be reached in the event that emergency communication is necessary. Information about how to contact the lawyer in the event of an emergency may be provided in a fee agreement or an engagement letter.<sup>7</sup>

In identifying how to communicate with clients under these circumstances, lawyers must be mindful of their obligation under Rule 1.1 to keep abreast of technology relevant to law practice<sup>8</sup> and Rule 1.6(c)'s requirement "to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."<sup>9</sup>

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<sup>6</sup> This opinion addresses a lawyer's ethical responsibilities. Lawyers should take similar steps to maintain communication with their own colleagues and staff. It is also good practice for a lawyer to maintain and update this information on a secure Internet website after the disaster so that colleagues and support staff will have a centralized location to find contact information. For information about the appropriate methods for storing electronic or paper records, lawyers may consult the ABA Committee on Disaster Response and Preparedness website. Also, many state bars and courts provide information on disaster preparedness.

<sup>7</sup> Practical problems a lawyer may wish to consider in advance include whether (i) landline phones will be out of service, (ii) the U.S. Postal Service will be impaired, and (iii) electronic devices will lose battery power.

<sup>8</sup> ABA Model Rule 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] to Rule 1.1 provides: "... [A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."

<sup>9</sup> As this Committee has previously noted, lawyers may transmit confidential information over the Internet if the lawyer has made reasonable efforts to prevent accidental or unauthorized access to the information. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017). *See also* Alaska Bar Ass'n Op. 98-2 (1998); State Bar of Ariz. Formal Op. 97-04 (1997); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010); D.C. Bar Op. 281 (1998); Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 2001-2 (2001); Haw. State Ethics Comm'n Formal Op. 40 (2001); Ill. State Bar Ass'n Advisory Op. 96-10 (1997); Iowa State Bar Ass'n Op. 15-01 (2015); N.C. State Bar Op. RPC 215 (1995); State Bar Ass'n of N.D. Advisory Op. 97-09 (1997); Ohio Bd. of Cmss'rs on Grievances & Discipline Op. 99-2 (1999); S.C. Bar Advisory Op. 97-08 (1997); Prof'l Ethics Comm. State Bar of Tex. Op. 648 (2015); Utah State Bar Advisory Op. 00-01 (2000); Vt. Advisory Op. 97-5 (1997); Wash. State Bar Ass'n Advisory Op. 2175 (2008).

## B. Continued Representation in the Affected Area

Lawyers who continue to provide legal services in the area affected by a disaster have the same ethical obligations to their clients as before the disaster, although they may be able to provide advice outside their normal area of expertise.<sup>10</sup>

Lawyers may not be able to gain access to paper files following a disaster.<sup>11</sup> Consequently, lawyers must evaluate in advance storing files electronically so that they will have access to those files via the Internet if they have access to a working computer or smart device after a disaster. If Internet access to files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.<sup>12</sup>

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<sup>10</sup> Comment [3] to Rule 1.1 allows: "In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. Ill-considered action under emergency conditions can jeopardize the client's interest."

<sup>11</sup> Rule 1.15 requires that lawyers take reasonable steps to preserve trust account records and documents and property of clients and third parties when a lawyer has notice of an impending disaster. *See also* subsection (E), *infra*, for a discussion of a lawyer's obligations when files are lost or destroyed in a disaster.

<sup>12</sup> Lawyers must understand that electronically stored information is subject to cyberattack, know where the information is stored, and adopt reasonable security measures. They must conduct due diligence in selecting an appropriate repository of client information "in the cloud." Among suggested areas of inquiry are determining legal standards for confidentiality and privilege in the jurisdiction where any dispute will arise regarding the cloud computing services. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); Ala. State Bar Op. 2010-02 (2010) (Lawyer may outsource storage of client files through cloud computing if they take reasonable steps to make sure data is protected); State Bar of Ariz. Formal Op. 09-04 (2009) (Lawyer may use online file storage and retrieval system that enables clients to access their files over the Internet, as long as the firm takes reasonable precautions to protect the confidentiality of the information; in this case, proposal would convert files to password-protected pdf documents that are stored on a Secure Socket Layer server (SSL) which encodes the documents); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-184 (2012) (Lawyer may operate virtual law office "in the cloud" as long as the lawyer complies with all ethical duties such as confidentiality, competence, communication, and supervision; lawyer should check vendor credentials, data security, how information is transmitted, whether through other jurisdictions or third-party servers, the ability to supervise the vendor; and the terms of the contract with the vendor); Fla. Bar Op. 12-3 (2013) (Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely); Ill. State Bar Ass'n Op. 16-06 (2016) (Lawyer may use cloud-based service to store client files as long as the lawyer "takes reasonable measures to ensure that the client information remains confidential and is protected from breaches"; lawyer should engage in due diligence in choosing the provider, including reviewing industry norms, determining the provider's security precautions such as firewalls, password protection and encryption, the provider's reputation and history, asking about any prior breaches, requiring that the provider follow confidentiality requirements, requiring that the data is under the lawyer's control, and requiring reasonable access if the contract terminates or the provider goes out of business); Iowa State Bar Ass'n Op. 11-01 (2011) (Due diligence a lawyer

As part of the obligation of competence under Rule 1.1 and diligence under Rule 1.3, lawyers who represent clients in litigation must be aware of court deadlines, and any extensions granted due to the disaster. Courts typically issue orders, usually posted on their websites, addressing extensions.<sup>13</sup> Lawyers should check with the courts and bar associations in their jurisdictions to determine whether deadlines have been extended.

Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.<sup>14</sup> Lawyers with notice of an

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should perform before storing files electronically with a third party using SaaS (cloud computing) includes whether the lawyer will have adequate access to the stored information, whether the lawyer will be able to restrict access of others to the stored information, whether data is encrypted and password protected, and what will happen to the information in the event the lawyer defaults on an agreement with the third party provider or terminates the relationship with the third party provider); State Bar of Nev. Formal Op. 33 (2006) (Lawyer may store client files electronically on a remote server controlled by a third party as long as the firm takes precautions to safeguard confidential information such as obtaining the third party's agreement to maintain confidentiality); New York City Bar Report, *The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations* (Nov. 2013), <https://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf>; N.Y. State Bar Ass'n Op. 842 (2010) (Permissible to use an online computer data storage system to store client files provided the attorney takes reasonable care to maintain confidentiality; lawyer must stay informed of both technological advances that could affect confidentiality and changes in the law that could affect privilege); State Bar Ass'n of N.D. Advisory Op. 99-03 (1999) (Permissible to use electronic online data service to store files as long as the lawyer properly protects confidential client information, perhaps via password protected storage); Pa. Bar Ass'n Op. 2011-200 (2011) ("An attorney may ethically allow client confidential material to be stored in 'the cloud' provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks"); S.C. Bar Advisory Op. 86-23 (1988) (A lawyer can store files in a storage facility operated by a third party if the lawyer ensures that confidentiality is maintained); Tenn. Formal Op. 2015-F-159 (2015) (Lawyer may store information in the cloud if the lawyer takes reasonable measures to protect the information); Vt. Advisory Op. 2010-6 (2010) (Lawyers may use cloud computing if they take reasonable steps to ensure confidentiality of information and that information is accessible).

<sup>13</sup> See, e.g., Sup. Ct. of Fla. Administrative Order No. AOSC17-57 (2017), <http://www.floridasupremecourt.org/clerk/adminorders/2017/AOSC17-57.pdf> (extending time periods in the wake of Hurricane Irma); N.D. Sup. Ct. Administrative Order 20 (2011), <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (staying deadlines due to flooding); N.D. Sup. Ct. Rules Section 6, Emergency Procedural Rule, Administrative Rule, or Administrative Order, available at <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (last visited Sept. 4, 2018); Sup. Ct. of Texas Emergency Order Suspending Criminal Court Proceedings in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438759/179091.pdf>; Supreme Court of Texas Emergency Order on Statutes of Limitations in Civil Cases in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438804/179098.pdf>.

<sup>14</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.3 (2018). Designating a successor and adding trusted signatories are good practices that may already be in place as part of normal succession planning. Some states require designation of a successor counsel or inventory lawyer. See, e.g., Rules Regulating the Fla. Bar R. 1-3.8(e),

impending disaster should take additional steps. For example, a transactional lawyer should review open files to determine if the lawyer should transfer funds to a trust account that will be accessible after the disaster or even attempt to complete imminent transactions prior to the disaster if practicable.

A disaster may affect the financial institution in which funds are held, or the lawyer's ability to communicate with the financial institution. Consequently, lawyers should take appropriate steps in advance to determine how they will obtain access to their accounts after a disaster. Different institutions may have varying abilities to recover from a disaster.<sup>15</sup> After a disaster, a lawyer must notify clients or third persons for whom the lawyer is holding funds when required disbursements are imminent and the lawyer is unable to access the funds, even if the lawyer cannot access the funds because the financial institution itself is inaccessible or access is beyond the lawyer's capability.<sup>16</sup>

### C. Withdrawal from Representation After a Disaster

Lawyers whose circumstances following a disaster render them unable to fulfill their ethical responsibilities to clients may be required to withdraw from those representations. Rule 1.16(a)(1) requires withdrawal if representation will cause the lawyer to violate the rules of professional conduct. Rule 1.16(a)(2) requires withdrawal if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client," for example, if the lawyer suffers severe injury or mental distress due to the disaster. Rule 1.16(b)(7) allows termination of the representation when the lawyer has "other good cause for withdrawal." These conditions may be present following a disaster. In determining whether withdrawal is required, lawyers must assess whether the client needs immediate legal services that the lawyer will be unable to timely

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Iowa Ct. Rule 39.18(1), Me. Bar R. 32(a), and Mo. R. 4-1.3 cmt. [5] & R. 5.26. Some states permit voluntary designation, including California, Delaware, Idaho, South Carolina, and Tennessee. See *Mandatory Successor Rule Chart* (June 2015), ABA, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mandatory\\_successor\\_rule\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mandatory_successor_rule_chart.authcheckdam.pdf). Lawyers should also be aware that, in most jurisdictions, a power of attorney to handle law firm affairs will be insufficient because it expires on the principal's death.

<sup>15</sup> The rules do not require a lawyer to place funds in a large or national financial institution. See MODEL RULES OF PROF'L CONDUCT R. 1.15 (2018). However, a prudent lawyer in a disaster-prone area should inquire about a financial institution's disaster preparedness before placing funds there. The lawyer must comply with IOLTA requirements regardless of which financial institution the lawyer chooses.

<sup>16</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 and 1.15(d) (2018).

provide. Lawyers who are unable to continue client representation in litigation matters must seek the court's permission to withdraw as required by law and court rules.<sup>17</sup>

#### **D. Representation of Clients by Displaced Lawyers in Another Jurisdiction**

Some lawyers may either permanently or temporarily re-locate to another jurisdiction following a disaster. Their clients and other residents of the lawyers' home jurisdiction may relocate to the same jurisdiction, or elsewhere, and still require legal services. Although displaced lawyers may be able to rely on Model Rule 5.5(c) allowing temporary multijurisdictional practice to provide legal services to their clients or displaced residents, they should not assume the Rule will apply in a particular jurisdiction. Comment [14] to Rule 5.5 provides:

... lawyers from the affected jurisdiction [by a major disaster] who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

Displaced lawyers who wish to practice law in another jurisdiction may do so only as authorized by that other jurisdiction. Subdivision (c) of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster provides:

Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis if permitted by order of the highest court of the other jurisdiction. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.<sup>18</sup>

This ABA Model Court Rule further provides that lawyers:

- are required to register with the Supreme Court in the state where they are temporarily allowed to practice;

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<sup>17</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2018).

<sup>18</sup> Full text of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (2007) can be found at:

[https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/model\\_rule\\_disaster\\_katrina.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/model_rule_disaster_katrina.authcheckdam.pdf). The ABA Standing Committee on Client Protection Chart on State Implementation of

the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (Sept. 8, 2017) can be found at:

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/katrina\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf).

- are subject to the disciplinary authority in the jurisdiction of the Supreme Court in the state where they are temporarily allowed to practice; and
- must cease practice within 60 days after the Supreme Court in the state where they are temporarily allowed to practice determines the conditions of the disaster have ended.<sup>19</sup>

### E. Loss of Files and Other Client Property

Some lawyers located in an area affected by a disaster may have their files destroyed. Lawyers who maintain only paper files or maintain electronic files solely on a local computer or local server are at higher risk of losing those records in a disaster. A lawyer's responsibilities regarding these files vary depending on the nature of the stored documents and the status of the affected clients.

Under the lawyer's duty to communicate, a lawyer must notify current clients of the loss of documents with intrinsic value, such as original executed wills and trusts, deeds, and negotiable instruments.<sup>20</sup> Lawyers also must notify former clients of the loss of documents and other client property with intrinsic value. A lawyer's obligation to former clients is based on the lawyer's obligation to safeguard client property under Rule 1.15.<sup>21</sup> Under the same Rule, lawyers must

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<sup>19</sup> See ABA Model Court Rule Provision of Legal Services Following Determination of Major Disaster, *supra* note 17. For an example, see the emergency order entered by the Supreme Court of Texas in 2017, permitting the temporary practice of Texas law by lawyers displaced from their home jurisdictions after Hurricane Harvey. The Court adopted requirements and limitations similar to those in the ABA Model Court Rule. See Court of Texas Amended Emergency Order After Hurricane Harvey Permitting Out-of-State Lawyers to Practice Texas Law Temporarily, Misc. Docket No. 17-9101 (Aug. 30, 2017), available at <http://www.txcourts.gov/media/1438820/179101.pdf>.

<sup>20</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015); See also ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1977) (Lawyer should not dispose of client property without client consent, should not destroy information that would be useful to the client if the statute of limitations has not run, should not destroy information that the client may need and is not otherwise easily accessible by the client, should exercise discretion in determining which information might be particularly sensitive or require longer retention than others, should retain trust account records, should protect confidentiality in the destruction of any files, should review files before destruction to determine if portions should be retained, and should retain an index of destroyed files); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2001-157 (2001) (Regarding destruction of closed files, indicating that property of the client such as original documents (like wills) is subject to bailment law or other statute, lawyers may not destroy other file materials without making reasonable efforts to obtain client consent, lawyers may not destroy items required to be retained by law, lawyers may not destroy items if destruction would prejudice the clients' interests, and criminal case files should not be destroyed while the client is living); State Bar of Mich. Op. R-12 (1991) (Lawyers must give notice to clients regarding file destruction after 1998, files before 1998 may not be destroyed without reasonable efforts to notify the client, and lawyers are not required to notify clients of file destruction if the lawyer maintains a copy of the documents on microfilm (excluding original documents of the client or if destruction of the documents would prejudice the client's interests)). Lawyers should note that in some states, the client may be entitled to all substantive documents in the file at the client's request. See e.g., State Bar of Ariz. Op. 15-02 (2015).

<sup>21</sup> See also N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

make reasonable efforts to reconstruct documents of intrinsic value for both current and former clients, or to obtain copies of the documents that come from an external source.<sup>22</sup>

A lawyer need not notify either current or former clients about lost documents that have no intrinsic value, that serve no useful purpose to the client or former client, or for which there are electronic copies. The lawyer must respond honestly, however, if asked about those documents by either current or former clients.<sup>23</sup>

The largest category of documents will fall in the middle; i.e., they are necessary for current representation or would serve some useful purpose to the client. For current clients, lawyers may first attempt to reconstruct files by obtaining documents from other sources. If the lawyer cannot reconstruct the file, the lawyer must promptly notify current clients of the loss. This obligation stems from the lawyer's obligations to communicate with clients and represent them competently and diligently.<sup>24</sup> A lawyer is not required either to reconstruct the documents or to notify former clients of the loss of documents that have no intrinsic value, unless the lawyer has agreed to do so despite the termination of the lawyer-client relationship.<sup>25</sup>

ABA Model Rule 1.15(a) also requires lawyers to keep complete records accounting for funds and property of clients and third parties held by the lawyer and to preserve those records for five years after the end of representation. A lawyer whose trust account records are lost or destroyed in a disaster must attempt to reconstruct those records from other available sources to fulfill this obligation.

To prevent the loss of files and other important records, including client files and trust account records, lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly.<sup>26</sup> Although not required, lawyers may maintain these files solely as electronic files, except in instances where law, court order, or agreement require maintenance of paper copies, and as long as the files are readily accessible and not subject to inadvertent

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<sup>22</sup> Lawyers should consider returning all original documents and documents with intrinsic value created by the lawyer as a result of the representation to clients at the end of representation to avoid this situation.

<sup>23</sup> See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

<sup>24</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 & 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

<sup>25</sup> Lawyers should consider including in fee agreements or engagement letters the understandings between the lawyer and the client about how the lawyer will handle documents once the representation is ended. In addition, lawyers should consult statutes, common law, and court rules that may also govern the retention of client files.

<sup>26</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2018).

modification or degradation.<sup>27</sup> As discussed above, lawyers may also store files “in the cloud” if ethics obligations regarding confidentiality and control of and access to information are met.

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<sup>27</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1127 (1970) (Lawyers may use company that stores attorney files on computer as long as the company is set up so that the material is available only to the particular attorney to whom the files belong and the employees of the company; lawyers must take care to choose an appropriate company that has procedures to ensure confidentiality and to admonish the company that confidentiality of the files must be preserved); State Bar of Ariz. Op. 07-02 (2007) (Lawyer may not destroy original client documents after converting them to electronic records without client consent, but may destroy paper documents if they are only copies); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct 2001-157 (2001) (Electronic records may be insufficient if originals are not accurately reproduced, and some documents cannot be copied by law); Fla. Bar Op. 06-1 (2006) (Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests; files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction); Me. Bd. of Overseers Op. 185 (2004) (Lawyers may maintain closed files electronically, rather than paper copies, if they are accessible to the client); Me. Bd. of Overseers Op. 183 (2004) (“If an attorney dispenses with the retention of paper files in favor of computerized records, the attorney must be mindful that the obligation to the client may require the attorney to maintain the means to provide copies of those records in a format that will make them accessible to both the attorney and the client in the future. Because the attorney is obligated to ensure that the client is able to make informed decisions regarding the disposition of the file and also must take care in destroying files to be sure that useful information is retained, an attorney will need to consider how new hardware or software will impact future access to old computerized records.”); Mo. Informal Advisory Op. 127 (2009) (Lawyer may keep client's file in exclusively electronic format except documents that are legally significant as originals and intrinsically valuable documents and providing that the appropriate software to access the information is maintained for the time period the file must be retained); State Bar of Mich. Op. R-5 (1989) (File storage via electronic means should be treated carefully to ensure confidentiality by limiting access to law firm personnel); N.J. Advisory Comm. on Prof'l Ethics Decisions Op. 701 (2006) (Documents may be stored electronically if sufficient safeguards to maintain confidentiality of the documents, particularly if they are stored outside the law firm, except for documents that are client property such as original wills, trusts, deeds, executed contracts, corporate bylaws and minutes); N.Y. County Lawyers Ass'n Op. 725 (1998) (General opinion on the ethical obligation to retain closed files, including that it may be proper for a lawyer to retain only electronic copies of a file if “the evidentiary value of such documents will not be unduly impaired by the method of storage”); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 680 (1996) (Although some items in a client's file may be stored electronically, some documents (such as original checkbooks, check stubs, cancelled checks, and bank statements) are required by the rules to be kept in original form; documents stored electronically should be stored in “read-only” form so they cannot be inadvertently destroyed or altered; and records must be readily produced when necessary); N.C. State Bar Op. RPC 234 (1996) (Closed client files may be stored electronically as long as the electronic documents can be converted to paper copies, except for “original documents with legal significance, such as wills, contracts, stock certificates, etc.”); S.C. Bar Advisory Op. 02-14 (2002) (General opinion on disposition of closed files when one member of a two-member firm retires, discussing various situations and notes that files may be placed on computer or other electronic media; Note: In South Carolina, the files are the property of the client); S.C. Bar Advisory Op. 98-33 (1998) (The committee declined to give an opinion on electronic retention of closed files as a legal question, but indicated there was no prohibition against retaining documents in electronic format as long as doing so did not adversely affect the client's interests and as long as the lawyer took reasonable precautions to make sure that third parties with access to the electronic records kept the records confidential); Va. State Bar Op. 1818 (2005) (Lawyer can maintain client files in electronic format with no paper copies as long as the method of record retention does not adversely affect the client's interests); Wash. State Bar Ass'n Op. 2023 (2003) (Lawyer may have firm file retention policy in which original documents are provided to the client and the lawyer keeps only electronic copies of file materials as long as documents “with intrinsic value” or that are the property of the client cannot be destroyed without client permission); State Bar of Wis. Op. E-00-3 (2000) (If lawyer has stored files electronically, lawyer should provide

## F. Solicitation and Advertising

Lawyers may want to offer legal services to persons affected by a disaster. The existence of a disaster, however, does not excuse compliance with lawyer advertising and solicitation rules.<sup>28</sup> Of particular concern is the possibility of improper solicitation in the wake of a disaster. A lawyer may not solicit disaster victims unless the lawyer complies with Model Rules 7.1 through 7.3.<sup>29</sup> “Live person-to-person contact” that is generally prohibited means “in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection,”<sup>30</sup> and a significant motive for the lawyer’s doing so is pecuniary gain.<sup>31</sup> In addition to ethical prohibitions, lawyers should be aware that there may be statutory prohibitions that may apply.<sup>32</sup>

Lawyers may solicit in-person to offer pro bono legal services to disaster victims, because the lawyer’s motive does not involve pecuniary gain.<sup>33</sup> Additionally, lawyers may communicate with disaster victims in “targeted” written or recorded electronic material in compliance with Rules 7.1 through 7.3. Lawyers also should be mindful of any additional requirements for written or recorded electronic solicitations imposed by particular jurisdictions.<sup>34</sup>

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client copies on disk at client's request. However, lawyer can bill client for time/expense if required to obtain information in format client wants. Attorney does not need to provide client with internal memos, personal notes, and the like).

<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 7.1 – 7.5 (all of these Rules were amended in August 2018).

<sup>29</sup> See MODEL RULES OF PROF'L CONDUCT R. 7.3 (2018). See also *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000) (Lawyer suspended for one year for soliciting clients by passing out brochures in affected areas in wake of tornados); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) (Solicitation of prospective clients in mass disaster victim chat room is not considered in person solicitation but nevertheless is prohibited because it is “intrusive”).

<sup>30</sup> MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. [2] (2018). Rule 7.3(b) contains some exceptions, and Rule 7.3(c) contains an additional prohibition. Both should be consulted.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., FLA. STAT. §877.02 (Prohibiting solicitation on behalf of lawyers by hospitals, police, tow truck operators, insurance adjusters); 49 U.S.C. §1136(g)(2) (Prohibiting lawyer solicitation within 45 days of an air transportation accident).

<sup>33</sup> MODEL RULES OF PROF'L CONDUCT R. 7.3(a); La. Bd. of Ethics Op. 05-RPCC-005 (2005) (Lawyer may solicit disaster victims in person to provide pro bono legal services). Providing pro bono legal services is encouraged by, inter alia, Model Rules 6.1 and 6.2.

<sup>34</sup> See, e.g., Rules Regulating the Fla. Bar R. 4-7.18(b)(2) (requiring contrasting “advertisement” mark on envelope and enclosures; statement of qualifications and experience; information on where the lawyer obtained the information prompting the written solicitation; and specified first sentence, among others).

## G. Out-Of-State Lawyers Providing Representation to Disaster Victims

Lawyers practicing in jurisdictions unaffected by the disaster who wish to assist by providing legal services to disaster victims must consider rules regulating temporary multijurisdictional practice.<sup>35</sup> Out-of-state lawyers may provide representation to disaster victims in the affected jurisdiction only when permitted by that jurisdiction's law or rules, or by order of the jurisdiction's highest court.

The ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster<sup>36</sup> provides that the Supreme Court of the affected jurisdiction must declare a major disaster and issue an order that allows lawyers in good standing from another jurisdiction to temporarily provide pro bono legal services in the affected jurisdiction through a non-profit bar association, pro bono program, legal services program, or other organization designated by the courts.<sup>37</sup> The Model Court Rule also requires those lawyers to register with the courts of the affected jurisdiction, and subjects those lawyers to discipline in the affected jurisdiction.<sup>38</sup>

## Conclusion

Lawyers must be prepared to deal with disasters. Foremost among a lawyer's ethical obligations are those to existing clients, particularly in maintaining communication. Lawyers must also protect documents, funds, and other property the lawyer is holding for clients or third parties.

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<sup>35</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 (c), cmt. [14] (2018): "Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster." Most states have adopted some form of ABA Model Rule 5.5 on Multijurisdictional Practice. A chart on state implementation of ABA Multijurisdictional Practice Policies compiled by the ABA may be found at: [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/recommendations.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf).

<sup>36</sup> ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER, available at [https://www.americanbar.org/content/dam/aba/images/disaster/model\\_court\\_rule.pdf](https://www.americanbar.org/content/dam/aba/images/disaster/model_court_rule.pdf) (last visited Sept. 7, 2018). The ABA Chart on State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster can be found at: [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/katrina\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf)

<sup>37</sup> Providing pro bono legal services in this situation would assist the lawyer in meeting the suggested goal of 50 hours per year set forth in Model Rule 6.1(a).

<sup>38</sup> As noted above, the Supreme Court of Texas issued an emergency order in 2017 after Hurricane Harvey following the ABA Model Court Order. *See supra* note 18.

By proper advance preparation and taking advantage of available technology during recovery efforts, lawyers will reduce the risk of violating professional obligations after a disaster.

**Dissent:** Keith R. Fisher dissents.

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PROFESSIONAL RESPONSIBILITY**

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328

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