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Ethical obligations to clients in the wake of a disaster

7-8 minutes

Hurricanes Harvey and Irma, bringing nearly 5-feet of rain to the Houston area and category 4 winds, rain and storm surges in Florida, have taken a devastating toll on the homes and businesses that lay in their paths.

Lawyers and law firms are not immune to the forces of nature, and depending on the types of resources available to them to back up client files and other critical documents and records, some may have weathered these storms better than others.

For those lawyers who saw their offices destroyed and who may have irretrievably lost client files and other critical documents, what are their ethical obligations to their clients?

Most of the available literature on the effects of disasters on lawyers, their law offices and client files address either preventative measures lawyers should take to mitigate the effects of a future disaster or with the steps lawyers should take to physically restore client files and re-establish their law offices after the disaster occurs. See, for example the Florida Bar Resource Institute's [After Disaster Strikes: A Checklist](#) (October 2016); Sandra S. Varnado, Dane S. Ciolino, *Reconsidering Lawyers' Ethical Obligations In The Wake Of A Disaster* 19 No. 4 Prof. Law. 8 (2009);

Brenna G. Nava, *Hurricane Katrina: The Duties And Responsibilities Of An Attorney In The Wake Of A Natural Disaster* 37 St. Mary's L.J. 1153 (2006); and James Keim, *Law Office Disaster Preparedness: The Liability and Ethics of Attorneys* 80-MAY Fla. B.J. 26 (2006).

Disaster Advice from an Insurer

Shortly before midnight on September 13, 2000, attorney Larry Lucht received a call that left him numb. It was a police officer from the city of Worthington, Minn., informing him that the building that housed his law firm was on fire and he should come downtown to take a look.

Worthington, a farming town of just under 10,000 inhabitants located in the far southwest corner of Minnesota, had been home to the law firm where Lucht and his partners, Joel Wiltrout and Todd Ahlquist, had been in general law practice for 13 years.

Read more of this vivid account by Todd Scott, which appeared in the December 2006 issue of the ABA GP Solo Magazine >>

New York City Bar Opinion 2015-6

In [New York City Bar Opinion 2015-6](#) *Ethical Duties When Client Files Are Accidentally Destroyed*, the New York City Bar Ethics Committee considered a lawyer's ethical obligations to clients in the aftermath of a disaster.

This opinion was issued after a 2015 fire in Brooklyn destroyed a warehouse that had contained stored law firm client files, Hurricane Sandy in 2013 that flooded parts of New York City and the September 11, 2001, attacks on the World Trade Center that resulted in the destruction of several law firms' offices and client documents.

Communication

The Opinion stated that in the event that client files are destroyed in a disaster, lawyers may have an obligation under Rule 1.4 *Communication* (Note: the New York Rules of Professional Conduct are available [here](#)) to notify their clients:

... Given that lawyers have a duty to preserve client files (at least for some period of time), it follows that an attorney may have a duty to notify the client or former client when such files have been inadvertently destroyed. This inference is supported by Rule 1.4, which requires an attorney to “promptly inform the client of material developments in the matter,” keep clients “reasonably informed about the status of a matter,” and “promptly comply with a client’s reasonable requests for information”

The Committee’s analysis of the lawyer’s obligation to notify their clients derived in part from its earlier opinions on lawyers’ obligations to preserve client files.

In [Opinion 2010-1](#) *Use of Client Engagement Letters To Authorize the Return or Destruction of Client Files at the Conclusion of a Matter*, the committee addressed a lawyer’s obligations to preserve client files and to help the analysis, divided the contents of a typical client file into three categories.

The first included items that have “intrinsic value or those that affect property rights” such as wills, deeds or negotiable instruments. The second included documents that might be useful in the defense of a matter for which the applicable statute of limitations had not yet expired, and the third included documents of little or no significance that would serve “no useful purpose in serving the client’s present need for advice.”

Applying these three categories to client files destroyed in a disaster, the committee concluded that under Rule 1.4 *Communication* the lawyer would have an obligation to notify clients of any items destroyed that were

in category 1. Regarding active client matters, they would also most likely have an obligation to notify the clients of any items from category 2.

Regarding matters that had been closed, the lawyer would have to decide whether the “client foreseeably may need” any of the category 2 documents that had been destroyed. Other factors to consider include:

- The amount of time that has passed since the matter was closed;
- Whether the firm previously gave the client reasonable notice that the files were available to be collected or delivered and whether the client responded to such notice;
- Whether the firm delivered copies of the files to the client at the conclusion of the matter or the client received copies of the files while the matter was ongoing;
- Whether the firm has previously made unsuccessful attempts to contact the client;
- Whether the contents of the file can be reconstructed from other sources.

Regarding items in category 3, a lawyer would not normally have an obligation to notify the client unless the client specifically requested them.

Competence, diligence

A lawyer’s obligations to provide competent (Rule 1.1 *Competence*) and diligent representation (Rule 1.3 *Diligence*) requires that once the lawyer realizes that the files have been destroyed, he must make every effort to reconstruct the file from any available source including the court, opposing counsel or even the client himself. In the event that the lawyer is unable to reconstruct the file, he must notify the client.

Confidentiality breaches

In the aftermath of a disaster, the opinion also noted that to the extent that confidential client information is exposed, lawyers may also have an obligation to notify their clients of security breaches. After the Brooklyn fire, client papers were scattered around the site. To the extent that this resulted in a potential breach of confidentiality, the lawyer would have an obligation to notify clients.

Disasters come with little or no warning. When they do, consult with your state or local bar association. They may have resources or suggestions to help with the reconstruction of client files, the re-establishment of your law office and ethical obligations to your clients.