

Disaster Waiting to Happen

You Don't Need to Have a Hurricane to Have a Disaster

I remember discussing Hurricane Katrina with local colleagues, who breathed a collective sigh of relief because, “A disaster like that couldn’t happen in Philadelphia.” They also pooh-pooed the idea that a disaster like Katrina would strike here.

What they ignored, however, is the fact that you don’t have to have a Katrina to have a disaster strike your office. Then I mentioned the Feb. 23, 1991 fire at One Meridian, the high-rise office building that used to be across from City Hall, and they looked at me. Some nodded knowingly, younger lawyers had quizzical looks on their faces. And one attorney, who has at times authored this column, mentioned that if his office had been in that building, he would have simply turned in his law license and found a new career.

While hurricanes, historical levels of flooding, and other natural disasters do not happen around here very often, other disasters can, like the Meridian fire. The Federal Emergency Management Agency even issued a report about the fire¹, which explained that “The fire claimed the lives of three Philadelphia firefighters and gutted eight floors of a 38-story fire-resistive building causing an estimated \$100 million in direct property loss and an equal or greater loss through business interruption. Litigation resulting from the fire amounts to an estimated \$4 billion in civil damage claims. Twenty months after the fire this building, one of Philadelphia’s tallest, situated on Penn Square directly across from City Hall, still stood unoccupied and fire-scarred, its structural integrity in question.”

The building eventually was demolished in 1999, but for eight years it remained a charred grim reminder that disasters can happen anywhere. It is also important to remember that the



One Meridian fire occurred in the days when the cloud didn’t exist, and most law firms were either not computerized or had primitive systems that made it almost impossible to recreate their files. Many law firms had offices at One Meridian, and many lost everything because of the fire. Others slowly recreated their files by working with the courts and counsel in their cases. But it took time, and resurrection of files was a continuous reminder of the need for disaster preparedness.

Fast forward a couple of decades and there are still law firms that have no backup systems and remain primarily paper-based. They are a disaster waiting to happen.

To provide guidance to lawyers about the need to prepare for whatever type of disaster may occur, the American Bar Association Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 482, “Ethical Obligations Related to Disasters,” which concluded that lawyers have an ethical obligation to implement reasonable

measures to safeguard client property and to prepare for business interruptions. In addition, the Opinion concludes that:

- Model Rule of Professional Conduct 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.

Pennsylvania's Rules of Professional Conduct mirror each of these Model Rules closely.

In short, firms must prepare for foreseeable disasters.

While designed to outline the ethical obligations relating to disaster preparation, the ABA opinion is a helpful guide for every attorney. Lawyers in areas such as Philadelphia should review the opinion with special attention to Section E ("Loss of Files and Other Client Property"), which explains obligations relating to files. In particular, the opinion notes that "[l]awyers 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." In general, however, recent ethics opinions suggest that firms should, at a minimum, backup files both locally and in the cloud, thus eliminating the possibility that files are irrevocably lost.

But a firm's obligations go beyond this and impact their relationship with clients.

According to the Opinion, lawyers must also notify current and former clients of the loss of documents with intrinsic value, such as original executed wills and trusts, deeds, and negotiable instruments, and must also "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."

Consider the enormity of this obligation just as it applies to firms that store original wills. Does the firm have to notify every client and advise them to resign every will? Almost certainly yes. And then there is the corollary issue, does the firm also have an obligation to review those documents to confirm that they are up-to-date? Such a requirement is far more difficult for documents such as wills.

Another issue discussed in the ABA opinion is the obligation 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. The opinion notes that "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."

For Pennsylvania lawyers, this obligation already exists under Rule of Professional Conduct 1.15(c), which requires lawyers to maintain their IOLTA accounts in a manner consistent with best practices. Under the rule, a Pennsylvania attorney must maintain IOLTA account records in hard copy or by electronic, photographic or other media "provided that the records otherwise comply with this rule and that printed copies can be produced." In addition, attorneys must "have a backup so that the records are secure and always available" and if records are kept only in electronic form, they must be backed up on "a separate electronic storage device at least at the end of any day on which entries have been entered into the records."

But in the end, every attorney must prepare differently for disasters. If, for example, your office is in a location that floods, then you must consider that possibility when determining where to store your servers and other equipment. Or, if your firm has multiple locations, you must consider what issues could arise in each location and prepare for them.

As the ABA concluded, "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. 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." ■

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¹ U.S. Fire Administration/Technical Report Series, "Highrise Office Building Fire One Meridian Plaza," Philadelphia, Pennsylvania, USFA-TR-049/February 1991

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