

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****AUGUST 8-9, 2011****RESOLUTION**

RESOLVED, That the American Bar Association urges all lawyers to regularly assess their practice environment to identify and address risks that arise from any natural or manmade disaster that may compromise their ability to diligently and competently protect their clients' interests, and maintain the security of their clients' property.

FURTHER RESOLVED, That the American Bar Association urges state, territorial, local, tribal, and specialty bar associations to create committees dedicated to emergency management planning and response.

REPORT

I. Introduction

Disasters are a fact of life, whether caused by nature, human error, or malicious actions. It may be a small office fire, a few flooded blocks next to a cresting stream, a city wide blackout, or a region-wide pandemic flu or violent weather event such as the tornados that devastated parts of Alabama and neighboring states in late April. At its worst, a disaster can cripple a country, as just witnessed with the horrific earthquake and tsunami that struck Japan, and the earthquake in Haiti. But regardless of the type, size or cause, most disasters have two common traits: they are random and they cause damage.

While major disasters capture the headlines, what may be characterized as “minor disasters” are an everyday occurrence? According to the Federal Emergency Management Agency, at least one natural disaster occurs every week in the United States.¹ Yet even a minor disaster --a burst pipe in the room with the computer server – can harm a law firm. Thus even if you believe that you live where cataclysmic events don’t occur, all lawyers and law firms are at risk of a disaster affecting their practice. There are no “disaster free” zones.

Fortunately, there is a third trait shared by most disasters. With proper planning, the damages and harms they cause can be mitigated, clients may be served, and law practices may be preserved. This recommendation urges all lawyers to assess, on a regular basis, the environment in which they work to identify those risks and potential disasters and to take steps to address them. It is in each lawyer’s self interest. Failure to do so can be costly. At least one study from the U.S. Department of Labor found that most businesses that experience a major disaster are no longer in business within five years. The same report revealed that the vast majority of businesses do not consciously prepare for disaster and post disaster recovery. Unfortunately, lawyers and firms are no exception to this general rule. An informal survey of 200 New Jersey State Bar Association members found that only 20 percent had or were developing disaster plans.²

Preparing for a disaster is not a one time event. Nor is disaster planning and response best done in isolation. Plans must be regularly updated and tested, and staff must be trained. Today, more than ever, governmental authorities can’t do it alone and the private sector is viewed as an essential collaborator and partner to ensure community resiliency. This recommendation, therefore, calls for bar associations to establish permanent disaster committees that will help educate its members, and to ensure that the bar collaborates with courts, legal service providers, governmental agencies, and others.

II. Lawyers’ Special Obligations

Disaster planning is especially important for lawyers. Not only is it necessary to protect, preserve, and in extreme cases rebuild one’s practice or firm, lawyers also have special

¹ Federal Emergency Management Agency, *Declared Disasters by Year or State*, at http://www.fema.gov/news/disaster_totals_annual.fema.

² Positan, Wayne, New Jersey Lawyer Newspaper, March 19, 2007.

obligations to their clients. Lawyers must represent the client competently and diligently, safeguard client's property, and maintain client confidentiality and communications.³ These obligations are neither excused nor waived following a disaster. While the Model Rules of Professional Conduct do not specifically address this obligation, a small body of post-Katrina literature suggests that failure on the part of a lawyer to prepare for disasters could lead to violations of these rules, or even expose the lawyer to civil liability for failure to protect property and interests.⁴ As noted by two authors writing for an ABA Center for Professional Responsibility publication,

*After Katrina, lawyers nationwide should consider the ethical implications of their approach towards preparing for a potential disaster. While the Model Rules of Professional Conduct do not delineate every scenario that could give rise to an ethical violation, the text of these rules are written in broad, general terms, under which certain actions or inactions of a lawyer in preparing for a disaster could constitute ethical violation in the jurisdictions adopting them.*⁵

An argument in support of an ethical obligation to have a disaster plan can be made by looking at the obligation of a solo practitioner to have a plan to serve clients in the event of his/her demise or disability. This is, in some regards, the ultimate disaster scenario that needs to be planned for under the Model Rules of Professional Conduct.⁶

While disasters may be unpredictable as to time and place, that one may occur is arguably foreseeable. Who would dispute, for example, that hurricanes will strike the Gulf States or that snow storms will cripple the upper Midwest. And if a disaster is considered foreseeable, failure to prepare may even have malpractice implications, as well as increase the possibility of ethical violations. Ironically, a small disaster that only affects the lawyer, and not the community, such as an office fire, may put the lawyer at greater risk of an ethical lapse. Courts are less likely to suspend filing deadlines – as was done by the Louisiana Supreme Court following Hurricane Katrina – or have sympathy for lawyers who did not take steps to protect their client's interests.

³ Many of the potential rule violations go to the heart of the attorney-client relationship. See ABA Model Rules of Professional Conduct, including Model Rule 1.1 (competence), Model Rule 1.3 (diligence), Model Rule 1.4 (communications), Model Rule 1.6 (confidentiality), Model Rule 1.15 (safeguarding property), and Model Rule 1.16 (terminating representation),

⁴ See, e.g., Varnado, Sandra & Dane Ciolino, "Reconsidering Lawyers' Ethical Obligation in the Wake of a Disaster," *Professional Lawyer*, Vol. 9, No. 4 (ABA 2009); Nava, Brenna G., "Hurricane Katrina: The Duties and Responsibilities of an Attorney in the Wake of a Natural Disaster," 37 *St. Mary's L.J.*, 1153 (2006); Keim, James, "Law Office Disaster Preparedness: The Liability and Ethics of Attorneys," *Florida Bar Journal*, Vol. 80, No. 5 (May 2006); Tuft, Mark, "Putting Clients First: Ethical Considerations in Disaster Planning and Recovery," *GPSOLO*, December 2006 (ABA General Practice, Solo & Small Firm Division).

⁵ Varnado, *ibid.*

⁶ See Comment 5 to Model Rule 1.3, "To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan...that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action."

Add to this, the same disaster that struck a lawyer may impact the clients. In these instances lawyers may “have a special obligation to serve these clients in times of crisis in order to restore these businesses to functionality and commerce to the community at large.”⁷

III. Identifying, Assessing and Addressing Risks

Fortunately, disaster planning need not be hard. Many resources are readily available for lawyers, law firms, and businesses to assist in disaster planning and recovery.⁸ Many of these resources have been identified by the ABA Special Committee on Disaster Response and Preparedness and may be found on the Committee’s website at www.americanbar.org/groups/committees/disaster.

Disaster planning can seem beyond the expertise and financial means of the solo and small firm practitioner who can not hire consultants or afford maintaining off site work space. But even simple steps will pay off handsomely should a disaster strike and many of these have been made easier by advances in technology. Any firm, large or small, will be better positioned to survive a disaster if they just protect (back up) and store data offsite, have remote access to business applications (today made easier by the Web), keep offsite an accurate list with comprehensive contact information (phone/cell/alternative phone numbers, home e-mail addresses) for staff, clients, and major vendors, and maintain an up to date inventory of equipment and client property. Simple steps to manage critical dates such as filing deadlines and court appearances can be achieved by sending your calendar to your home email or by keeping it on your Blackberry, smart phone, or other personnel digital assistant (PDA).

It is not a question of *if* a disaster will happen, but rather *when*. The best time to prepare for a disaster is before one actually occurs. There are preparedness strategies that are common to all disasters. The disaster planning process can be typically divided into four phases: preparation, response, resumption of limited activity or relocation, and recovery to pre-disaster levels of operation.

Before creating a disaster plan, it is often best to ask the simple questions: what if you could not enter your office for the next week, two weeks, or a month? What would you do? What follows are some basic principles that will guide a lawyer or law firm in the disaster planning process⁹.

⁷ Munneke, Gary A., “Disaster Planning: What We Have (and Haven’t) Learned.” Pace Law Faculty Publications, Paper 568 (2008). <http://digitalcommons.pace.edu/lawfaculty/568>

⁸ For an overview of emergency planning legislation during the past decade see also article in *The SciTech Lawyer*, Volume 7 Issue 4, Spring 2001, Section of Science & Technology Law, American Bar Association.

⁹ Muneke, Gary A., Anthony Davis, “Disaster Recovery for Law Firms The Essential Formbook: *Comprehensive Management Tools for Lawyers*, Volume IV” (ABA 2004) Munneke, Anthony E. Davis. See also the following websites.
http://www.practicepro.ca/Practice/PDF/Practice_Interruptions_booklet.pdf
<http://www.ready.gov/business/plan/planning.html>
<http://www.fema.gov/pdf/business/guide/bizindst.pdf>

1. Top management must be involved in the development of the disaster recovery plan, and should be responsible for establishing an emergency response person or team. A team should include representatives from each functional area of the organization with assigned responsibilities.
2. Conduct a thorough risk assessment and business impact analysis that includes a wide range of possible disaster scenarios.
3. Identify systems that are critical for the practice to survive, and assign priority to essential functions. Determine the maximum amount of time that the organization can operate without each critical system. Develop back-up procedures of all critical data and vital records.
4. Organize and document a written plan that is short and concise. The plan should be written in a standard format to facilitate the documentation of detailed procedures and allow for ongoing maintenance of the plan. A comprehensive list of critical contacts should be included.
4. Develop testing criteria and procedures and test the plan on a regular basis (at least annually). After testing procedures have been determined, the plan should be tested by conducting either a tabletop exercise or a full scale exercise. The plan should be updated to correct any problems identified during the test.
5. Once the disaster recovery plan has been written and tested, the plan should be approved by top management and all staff should be informed and trained appropriately.

IV. Disaster Planning for State and Local Bars

Recently, the ABA conducted its first ever table top exercise of the ABA's disaster plan. The plan itself was substantially revised and reformatted in 2010 with an eye toward eventual certification, using the private sector standard developed by the British Standards Institution.¹⁰ The ABA intends to eventually seek full certification and to share its experience with state and local bar associations.

As part of the private sector, a bar association should prepare for disasters. Most bar association disaster planning and recovery efforts strive to ensure safety of staff, protect key assets and records, and ensure timely resumption of key business functions. These key functions may vary by association. For example, a unified bar with responsibility for the bar exam and lawyer admissions, mandatory CLE authorization, and professional discipline will place a higher value on restoring these activities than holding an annual meeting, social events, or special projects.

In 2010, the U.S. Department of Homeland Security approved, for the first time, three voluntary preparedness standards for the private sector.¹¹ These standards arose from and were

¹⁰ One of the three private sector standards approved by US Department of Homeland Security.

¹¹ Voluntary Private Sector Accreditation and Certification Preparedness Program, 75 Fed. Reg. 34148-02 (June 16, 2010).

one of the key recommendations of the 9/11 Commission.¹² While the three voluntary private sector standards differ, they share common features. Strong organizational management is needed to demonstrate commitment to the program, and to take an active role in its development and execution. In addition, planning is a continuous process with new “risks and hazards” being identified on an ongoing basis, staff trained, and plans periodically tested. For these and other reasons it is critical that bar associations establish permanent disaster-related committees to ensure ongoing support from association leadership.

VI. Special Role of State and Local Bar Associations

While there are many tasks and duties that could be assigned to a permanent committee, few would be more critical than ensuring that the bar association is an active participant in the larger communities disaster response efforts. Much like lawyer has a special obligation to be able to serve his/her client after a disaster, bar associations likewise have a duty to assist the general public in recovering from a disaster.

Bar associations serve the public by providing legal services to disaster survivors. Following a disaster, disaster survivors, (including a firm’s existing clients) often face legal challenges. Among these are issues of housing, public benefits, insurance, consumer protection, wills and estates, health care and personal bankruptcy. Bar associations must be prepared to help meet the sudden surge in pro bono demand by recruiting lawyers, providing them resources in these legal areas often unfamiliar to them, and linking disaster survivors to attorneys.

In extreme cases, bar associations may need to recruit lawyers to provide pro bono assistance to disaster survivors in other states, or to supervise out of state lawyers providing such assistance to survivors in the association’s home state. In anticipation of this, bar associations should work with the highest court in their state to adopt the Model Rule on the Provision of Legal Services following Determination of Major Disaster.¹³ The model rule, adopted by the ABA House of Delegates in 2007, would allow out-of-state lawyers to provide pro bono legal services in an affected jurisdiction. Lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster would also be allowed to practice law on a temporary basis in an unaffected jurisdiction.

To do this effectively, the bar association must be prepared. And to be effective, this preparation must be done collaboratively with courts, local emergency management agencies, legal services providers, social service agencies, and others in the community. Another collaborator is the ABA, which through its Young Lawyers Division and in partnership with state and local bar associations and legal services providers, has provided toll free, disaster legal services hot lines to disaster survivors following a major disaster. This service, supported by an agreement between the ABA and the Federal Emergency Management Agency, has helped tens of thousands of disaster survivors since the 1970s.

¹² Implementing Recommendations of the 9/11 Commission Act of 2007, Publ. L. No. 110-53 (2007).

¹³ It has currently been adopted in 13 jurisdictions. To see the rule and a chart showing state implementation go to the Special Committee on Disaster Response and Preparedness http://www.americanbar.org/groups/committees/disaster/resources/resources_for_courts.html

Recognizing the need for an established, collaborative response, the Nebraska State Bar created a Joint Coordinating Committee for Disaster Preparation and Recovery, with the purpose of ensuring “Justice System Continuation of Operations, Legal Services to Disaster Victims and Service to Members.” The following is a brief description of the “Nebraska Plan,” as an example to other bar associations.¹⁴

The Nebraska Plan is an effort to bring together a coordinating committee to deal with the continuity of operations of the state’s court systems, the mobilization of legal services to disaster victims and services to members of the bar that would aid and encourage their own disaster response plans for their firms or other legal entities.

The first step was the formation of a Joint Coordinating Committee. The members of the Committee currently include the Nebraska Supreme Court Administrator, the Nebraska Supreme Court IT Director, the Executive Director of the NSBA, the ABA-YLD Liaison for Iowa and Nebraska, and the Chair of the NSBA Young Lawyers Section. Additional ex-officio members include the Nebraska Association of County Officials (Executive Director) – trial court facilities managed by county government; elected Clerks of the District Court (President); elected Clerk Magistrates (President); Nebraska Emergency Management Association (appointed liaison); Attorney General’s Office (appointed liaison); Nebraska State Government (Chief Information Officer; Facilities Management); Law Schools for pro bono assistance and faculty review of state specific materials(Creighton & UNL); Nebraska State Patrol (appointed liaison); and the Red Cross of Nebraska (appointed liaison).

The Coordinating Committee met and provided materials specific to their area. The Nebraska Supreme Court provided its continuation of operations plan (COOP), the ABA-YLD Representative provided a schematic for the establishment and operation of a disaster legal services hotline post incident, and the NSBA YL Section Representative provided the Iowa State Bar Disaster Legal Services Manual. These materials were shared with the members of the coordinating committee.

1. As a result of this meeting, a number of action steps were identified, including:
2. Confirm the appointment relationship for ex-officio members and maintain an up-to-date contact list
3. Develop a statewide Disaster Preparation and Response Plan that would be available through the Joint Coordinating Committee
4. Prepare and Update the Iowa Disaster Legal Services Manual for Use in Nebraska¹⁵
5. Propose the adoption of the Model Rule on the Provision of Disaster Legal Services

¹⁴ Information provided by Jane Schoenike, Executive Director, Nebraska State Bar Association, April 18, 2011.

¹⁵ Many legal issues faced by disaster victims fall in areas of law less familiar to private practitioners. Therefore, a number of states have developed Disaster Legal Services Manuals (often using a common template). Many of these and other resources for lawyers can be found at the ABA Special Committee on Disaster Response and Preparedness and at the National Disaster Legal Aid website, <http://www.disasterlegalaid.org/>. This website is created and maintained by a collaboration of the ABA, NLADA, LSC, and ProBono net.

6. Create a separate page on the NSBA website for Disaster Preparation and Disaster Legal Services
7. Schedule bi-annual meetings of the Joint Coordinating Committee to keep up-to-date with changes in procedures and capabilities
8. Conduct Continuing Legal Education programs for members who elect to participate in a panel for Disaster Victim Legal Services
9. Conduct Continuing Legal Education programs for members and their staff regarding disaster preparation, risk management and ethical issues
10. Develop period materials for inclusion in the NSBA Magazine....*The Nebraska Lawyer*
11. Develop public legal education programs that can be presented by members on disaster preparation issues.

As bar associations develop committees to address disaster planning and response, the ABA Special Committee on Disaster Response and Preparedness will, through its website, report on progress and share best practices that emerge from these committees.

V. Conclusion

The possibility of a disaster affecting a law practice is a fact of life. Disasters do not discriminate by practice setting, substantive area of law, or location. And the potential for damage - and in extreme cases devastation - caused by a disaster is real. Accordingly, the Special Committee on Disaster Response and Preparedness urges adoption of this recommendation calling for lawyers to assess risk and prepare for disasters so that they may safeguard their practice and continue to serve clients in a diligent and competent matter.

Similarly, bar associations have a responsibility to its members and the community to help prepare for and recover from disasters. This is an ongoing responsibility which requires collaborative efforts between the public and private sectors, in keeping with contemporary emergency management practice. To achieve this objective, the Committee urges adoption of this recommendation calling for bar associations to create standing committees charged with educating its members on disaster preparation and response, and to collaborate with legal entities, emergency management agencies, social services providers, and others to enhance community resilience should a disaster strike.

Respectfully submitted,

David F. Bienvenu, Chair
Special Committee on Disaster Response and Preparedness
August 2011

GENERAL INFORMATION FORM

Submitting entity: Special Committee on Disaster Response and Preparedness

Submitted by: David F. Bienvenu, Chair, Special Committee on Disaster Response and Preparedness

1. Summary of Resolution.

This policy urges lawyers to regularly assess their environment to determine risks that may arise from natural or manmade disasters, and to take steps to address or ameliorate them so that they may diligently and competently protect their clients' interests and maintain the security of their clients' property.

The resolution further urges state and local bar associations to create standing or permanent committees to address disaster planning and response and to work collaboratively with federal, state, regional and local legal institutions, social services, and emergency management agencies as part of a community wide effort to prepare for, mitigate, respond to and recover from disasters.

2. Approval by Submitting Entity.

The Special Committee on Disaster Response and Preparedness approved this recommendation at its Business Meeting on November 6, 2010.

3. Has this or a similar resolution been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

In August, 2007, the House of Delegates adopted the Rule of Law in Times of Major Disaster. As part of 12 principles, the policy urged bar associations to educate its members on importance of disaster planning. The proposed recommendation would take the 2007 ABA policy one step further by directly appealing to individual lawyers, as part of their obligation to serve clients.

5. What urgency exists which requires action at this meeting of the House?

While there is no legislative urgency, this resolution is particularly timely. The best time to motivate individuals and businesses to undertake disaster planning is when disasters are "in the news." With the earthquake in Japan, violent tornados in the South, rising waters of the Mississippi, and even fears of a post Osama Bin Laden death terrorist acts now is one of those moments. This also follows on ABA's efforts this past year to revamp its business continuity of operations plan in compliance with federal voluntary

private sector preparedness standards adopted in 2010 by the US Department of Homeland Security.

6. Status of Legislation. (If applicable)

Not applicable.

7. Cost to the Association. (Both direct and indirect costs.)

No ABA funds would be necessary to implement this Recommendation.

8. Disclosure of Interest. (If applicable)

No conflicts of interest have been identified.

9. Referrals.

Given the universal application of this Resolution, it will be shared with all section, divisions, and forums contemporaneously with its filing. The resolution will also be shared with committees and commissions with particular interest or expertise in this area, including Standing Committee on Technology and Information Systems, Standing Committee on Client Protection, Standing Committee on Ethics and Professional Responsibility, Standing Committee on Bar Activities and Services, National Association of Bar Executives, and the National Conference of Bar Presidents.

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EXECUTIVE SUMMARY

1. Summary of the Resolution:

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The resolution further urges state and local bar associations to create standing or permanent committees to address disaster planning and response and to work collaboratively with federal, state, regional and local legal institutions, social services, and emergency management agencies as part of a community wide effort to prepare for, mitigate, respond to and recover from disasters.

2. Summary of the issue which the resolution addresses:

Throughout the country there is a general failure of individuals and business to prepare for disasters, and lawyers and law firms are no exception. Such failures, as a practical matter, may have devastating consequences on a lawyer/firm's survival should a significant disaster strike. But even if the disaster is small and contained, it may adversely affect a lawyer's ability to diligently and competently represent a client and preserve the client's property. Accordingly, this resolution urges lawyers to proactively assess risks that may arise from a disaster and take steps to address.

Increasingly, throughout the emergency management community, there is recognition that disaster planning, response and recovery can not be done by the public sector alone. There is a general calling by the U.S. Department of Homeland Security, and others, for more private sector involvement, and this resolution urges state and local bar associations to be part of a community wide effort to plan for, respond to, and recover from disasters.

3. An explanation of how the proposed policy position will address the issue:

The policy will address this issue by directly appealing to all lawyers to assess and prepare for disasters. Whereas disasters are an ever present fact of life this effort must be done regularly; it is not a one time event. Accordingly, the policy urges the creation of standing or permanent disaster committees by bar associations so that it may share information with its members and participate in community wide planning, response, and recovery efforts.

4. A summary of any minority views or opposition which have been identified:

None have been identified.