

**IN THE AFTERMATH: RESPONSIBILITY AND PROFESSIONALISM IN THE WAKE  
OF DISASTER**

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I. INTRODUCTION

In the flooding that resulted from Hurricane Katrina, over 50% of Louisiana’s practicing attorneys lost their offices, their homes, or both.<sup>1</sup> In Mississippi, the offices of nearly 900 attorneys along the Gulf Coast were severely damaged or destroyed by Katrina.<sup>2</sup> Over 1,400 attorneys in the World Trade Center buildings lost their offices and records as a result of the September

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1. Michael J. Vitt, *After the Storm: Gulf Coast Lawyers Rebuild*, BENCH & B. MINN., Mar. 2006, at 22, 23.

2. Keith B. Norman, *Hurricane Katrina and the Practice of Law*, 66 ALA. L. 416, 416 (2005).

11 attacks.<sup>3</sup> An EF-5 tornado hit the town of Joplin, Missouri, on May 22, 2011,<sup>4</sup> substantially damaging or destroying the offices of several local attorneys.<sup>5</sup> A downtown office building in Madison, Wisconsin caught fire on April 24, 2012, causing an estimated \$2 million in damages and destroying multiple law offices.<sup>6</sup> A solo practitioner was diagnosed with cancer, and after realizing that it would result in her death, turned her practice and cases over to a colleague, including numerous bankruptcy cases in various stages of emergency.<sup>7</sup> Backup billing records for a law office were destroyed by a computer virus.<sup>8</sup> Disasters are not limited by geography, history, and action—or lack thereof.<sup>9</sup> Any disaster, no matter if it is a hurricane or a tornado affecting thousands, a fire destroying a solo practitioner's office, or even the sudden death or disability of an attorney, has the potential to wreak havoc on attorneys and law firms, their practices, and their clients.<sup>10</sup> More so, disasters cause turmoil and uncertainty in the operation and application of the rule of law.<sup>11</sup>

While the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) set forth the regulations under which attorneys practice,<sup>12</sup> these rules do not excuse a failure to comply based on the occurrence of a disaster.<sup>13</sup> With knowledge that a disaster could occur, attorneys are potentially subject to ethical violations and legal malpractice claims if they fail to plan for such an event.<sup>14</sup> The case law on this topic ranges from courts

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3. Judge Judith S. Kaye, Chief Judge of the State of N.Y. & Chief Judge of the N.Y. Court of Appeals, *Enduring Values and Changing Times*, Orison S. Marden Memorial Lecture Before the Association of the Bar of the City of New York (March 5, 2002), in 57 THE RECORD, WINTER/SPRING 2002, at 20, 22, available at <http://www2.nycbar.org/Publications/record/17.%20Vol.%2057,%20Nos.%201-2,%20Winter-Spring%202002.pdf>.

4. Bill Davis, *Joplin Tornado Survey*, NAT'L WEATHER SERV. WEATHER FORECAST OFF. (May 22, 2011), [http://www.crh.noaa.gov/sgf/?n=event\\_2011may22\\_survey](http://www.crh.noaa.gov/sgf/?n=event_2011may22_survey).

5. See Cynthia K. Heerboth, *Disaster Recovery: Is Your Firm Prepared?*, PRECEDENT, Summer 2011, at 6, 7.

6. Thomas J. Watson, *Up in Smoke: Prepare a Disaster-Recovery Plan Before Disaster Strikes*, WIS. L., July 2012, at 34, 34.

7. Susan A. Berson, *Death of a Practice: As a Lawyer Nears the End, Her Friend Faces the Dilemma of Closing Down a Firm*, A.B.A. J., Jan. 2013, at 42, 43.

8. *In re Ward*, 701 N.W.2d 873, 877 (N.D. 2005).

9. See Jean Barr, *Putting Together a Disaster Recovery Plan*, LEGAL MGMT., Jan./Feb. 1993, at 30, 31.

10. See Heerboth *supra* note 5, at 7.

11. See generally Ronald A. Cass, *The Rule of Law in Time of Crisis*, 51 HOW. L.J. 653, 672–76 (2008) (discussing the implications of the rule of law during disasters).

12. See Robert W. Meserve, *Chair's Introduction to MODEL RULES OF PROF'L CONDUCT*, at xv, xvii (2013).

13. Stephen N. Zack, *Foreword to AM.BAR.ASS'N. SPECIAL COMM. ON DISASTER RESPONSE & PREPAREDNESS, SURVIVING A DISASTER: A LAWYER'S GUIDE TO DISASTER PLANNING* (Aug. 2011), available at [http://www.americanbar.org/content/dam/aba/events/disaster/surviving\\_a\\_disaster\\_a\\_lawyers\\_guide\\_to\\_disaster\\_planning.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning.authcheckdam.pdf).

14. *Id.*

recognizing that certain things are out of an attorney's hands<sup>15</sup> to courts noting that a disaster is no excuse for failure to comply with orders or rules.<sup>16</sup> This Essay recommends that attorneys and firms should assess risks attendant to disasters and properly plan for them.

Beyond mitigating these ethical risks, attorneys must be willing to take on some of the greater challenges that arise from disasters.<sup>17</sup> The legal profession is progressing in its response to disasters, as well as their related effects, beginning with the recognition that "[t]he legal system plays a central role in disaster prevention, response, and management."<sup>18</sup> Yet in many situations, the legal profession has failed to protect the rights of groups and individuals or failed to offer pro bono legal services in truly meaningful ways to those affected by disaster.<sup>19</sup> This Essay recommends that an aware and proactive legal profession be required in both pre-disaster planning and post-disaster settings to ensure that the principles of professionalism and justice are upheld.

Part II of this Essay briefly discusses the definition and scope of the term *disaster*, with an emphasis on how it is applicable to the legal profession. Part III examines the ethical rules for attorneys relating to disaster, including the requirements under the Model Rules and the potential liability of an attorney through a professional negligence-based analysis. Part IV provides an overview of strategies that attorneys and firms should implement—specifically, the need for emergency action plans. Part V discusses pro bono work following disaster and changes in the Model Rules to aid this, including consideration of and counterpoints to rationales often used in limiting pro bono service. Part VI considers the role of professionalism and social justice applicable to actions taken by attorneys in the wake of disaster. This Part includes a brief discussion of a principle of international law that becomes relevant following a disaster, as well as the broader obligations that may be applicable to the legal profession. In Part VI, this Essay posits that these obligations require a stronger response from the legal profession, and that it is incumbent upon the members of this profession to remember that a response—good or bad—affects the broader populace in ways many attorneys may not have considered.

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15. See, e.g., *Coleman v. Guy F. Atkinson Co.*, NV, 887 F. Supp. 49, 53 (D.R.I. 1995) (holding that a trial court properly tolled the statute of limitations where counsel's files were destroyed in a fire); *3M Co. v. Glass*, 917 So. 2d 90, 94 (Miss. 2005) (noting that Hurricane Katrina was a sufficient reason to extend the time for counsel to provide required information).

16. See, e.g., *Matajek v. Skowronska*, 893 So. 2d 700, 701 (Fla. Dist. Ct. App. 2005) (finding that it was not excusable for counsel to file a meditation questionnaire two months late due to hurricanes).

17. See generally Laurie A. Morin, *A Tale of Two Cities: Lessons Learned from New Orleans to the District of Columbia for the Protection of Vulnerable Populations from the Consequences of Disaster*, 12 UDC/DCSL L. REV. 45 (2009) (assembling a catalog of lessons learned from Hurricane Katrina regarding challenges the legal profession faces when a disaster strikes).

18. Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 BYU L. REV. 1783, 1787 (2011).

19. See Deborah Rhode, *Pro Bono in Times of Crisis; Looking Forward by Looking Back*, 31 FORDHAM URB. L.J. 1011, 1011–18 (2004).

## II. DEFINING DISASTER

The first step in disaster planning, of course, involves predicting the type of disaster an attorney or firm may face.<sup>20</sup> Obviously, planning for the possibility of a large natural disaster—such as a hurricane, tornado, or flooding—is required.<sup>21</sup> But many events that are not disasters to the community at large can be a disaster for an attorney,<sup>22</sup> such as the sudden death or disability of a key individual to a firm,<sup>23</sup> disbarment or suspension,<sup>24</sup> an office fire,<sup>25</sup> workplace violence,<sup>26</sup> acts of terrorism,<sup>27</sup> an accidental deletion of computer files,<sup>28</sup> or even simply spilling coffee on an office computer.<sup>29</sup>

This step should be followed by an analysis of vulnerability—what resources does the attorney or firm have in place should a disaster strike—recognizing that lack of resources results in increased vulnerability to clients, as well as the firm or attorney.<sup>30</sup> Attorneys and firms must then periodically evaluate and update emergency plans and required resources in accordance with lessons learned from others and, perhaps, even their own experiences with disaster.<sup>31</sup>

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20. Laura DiBiase, *When Disaster Strikes—Strike Back!*, AM. BANKR. INST. J., Feb. 2003, at 14, 14.

21. *See id.*

22. One practical definition applicable to the legal profession is “[a] true disaster is an event or circumstance that can drive the firm [or an attorney] out of business.” Edward Poll, *Not if, but When: Prepare a Disaster Recovery Plan Today*, CANADIAN B. ASS’N, <http://www.cba.org/cba/practicelink/mf/disaster.aspx> (last visited Oct. 23, 2013). According to Professor Glesner, “sound law practice management will anticipate even earthquakes, floods and the death of attorneys.” Barbara A. Glesner, *The Ethics of Emergency Lawyering*, 5 GEO. J. LEGAL ETHICS 317, 322 (1991).

23. Laura A. Calloway, *Preparing for the Unexpected: Anticipate and Plan for Law Office Disasters*, 67 ALA. LAW., July 2006, at 254, 254; Ellen Freedman, *Preparing for and Recovering from . . . Disaster*, PA. LAW., Jan./Feb. 2006, at 44, 45; Heerboth, *supra* note 5, at 7; *see also* Denis Binder, *Emergency Action Plans: A Legal and Practical Blueprint “Failing to Plan is Planning to Fail,”* 63 U. PITT. L. REV. 791, 792 (2002) (providing a list of types of disasters and accidents).

24. Calloway, *supra* note 23, at 254.

25. Watson, *supra* note 6, at 34.

26. Freedman, *supra* note 23, at 45.

27. *Id.*

28. *Id.*

29. Heerboth, *supra* note 5, at 7.

30. Vulnerability is aptly defined as “the diminished capacity of an individual or group to anticipate, cope with, resist and recover from the impact of a natural or man-made hazard,” and this concept is relative, dynamic, and varies in its forms. *What is Vulnerability?*, INT’L FED’N OF RED CROSS & RED CRESCENT SOC’YS, <http://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/what-is-a-disaster/what-is-vulnerability/> (last visited Oct. 23, 2013).

31. Binder, *supra* note 23, at 804.

### III. PROFESSIONAL RESPONSIBILITY, THE MODEL RULES, AND NEGLIGENCE

Attorneys must be aware of the risks posed by disasters. Yet many attorneys and firms fail to take basic steps to build the *capacity*<sup>32</sup> necessary to ensure that ethical and business risks, such as loss of client property or accidental exposure of client information, can be mitigated when a disaster occurs.<sup>33</sup> Some of the excuses used to avoid undertaking emergency planning include claims that it is painful, time consuming, distracting, and results in lost profit and decreased productivity.<sup>34</sup> Professor Munneke aptly describes some of the reasoning used to excuse failing to plan for disaster:

Despite the fact that disasters do happen, most of us live our daily lives as if they will not happen to us. We do not plan for disaster, especially when harm is less than certain. It is easier to rationalize that we will “cross that bridge when we get to it” than to prepare for a risk that may never come to pass. For many of us, the burden of taking precautions is greater than the uncertain potential loss associated with a disaster. As lawyers, we owe ourselves and our clients a responsibility to be ready for the worst-case scenario.<sup>35</sup>

The ABA recognized that the general failure to prepare for disasters “may have devastating consequences on a lawyer/firm’s survival . . . 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.”<sup>36</sup> In response to this concern, the ABA House of Delegates issued Resolution 116, which states: “[This Policy] 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.”<sup>37</sup>

In explaining its reasoning for adopting this resolution, the ABA noted that while the Model Rules are “neither excused nor waived following a disaster,”

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32. *Capacity* refers to preparedness, including predicting and mitigating the effect of disasters through continuing processes of risk reduction. See *Preparing for Disasters*, INT’L FED’N OF RED CROSS & RED CRESCENT SOC’YS, <http://www.ifrc.org/en/what-we-do/disaster-management/preparing-for-disaster/> (last visited Oct. 23, 2013).

33. See Wayne J. Positan, *The Day After Will be too Late*, N.J. L., Feb. 2007, at 2,2.

34. James Keim, *Law Office Disaster Preparedness: The Liability and Ethics of Attorneys*, FLA. B. J., May 2006, at 26, 26.

35. Gary A. Munneke, *Disaster Planning: What We Have (and Haven’t) Learned*, BUS. L. TODAY, Jan./Feb. 2008, at 23, 23.

36. Am. Bar Ass’n, Res.116 Adopted by the H.D., at 10 (Aug. 8–9, 2011), available at [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_116.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_116.authcheckdam.pdf).

37. *Id.*

they do not specifically address ethical obligations in such situations.<sup>38</sup> Some commentators suggest that, given the breadth and generality of the Rules, there are times when an attorney's failure to prepare for a disaster could constitute an ethical violation.<sup>39</sup>

This Part examines a number of Model Rules and their state counterparts that are, and have been, implicated by disaster. The terms *legal ethics*, *ethics*, and *professional responsibility* are used interchangeably to describe the requirements imposed on attorneys by disciplinary codes and rules.

#### A. *Duties to Clients*

The preamble to the Model Rules provides that an attorney should be "competent, prompt and diligent" in all professional functions.<sup>40</sup> Yet apart from its mention of the provision of legal services following a major disaster in Rule 5.5,<sup>41</sup> the Model Rules do not specifically use the term *disaster* in their application. Still, a number of the Model Rules are potentially implicated when a disaster occurs.

For example, Rule 1.4 provides that attorneys must keep their clients "reasonably informed,"<sup>42</sup> and the comments to the Model Rule note that reasonable communication is necessary for the client to effectively assist in the representation.<sup>43</sup> However, communication systems are often lost or disrupted in the wake of a disaster.<sup>44</sup> Following the tornado in Joplin, two cell phone towers collapsed onto an apartment building.<sup>45</sup> Phone lines went down, cell phone calls failed, and Internet access was disrupted.<sup>46</sup> In Katrina's aftermath, damage to land telephone lines was so extensive that cell phone communication became quickly overwhelmed and text messaging failed.<sup>47</sup> According to one attorney, evacuees from the New Orleans area bought new cell phones with area codes for Baton Rouge, Lafayette, and Shreveport—jamming cell phone lines in those localities as well.<sup>48</sup>

An attorney seeking to comply with Model Rule 1.4 should maintain some form of alternate communication or method of contacting their clients in the

38. *Id.* at 2.

39. Sandra S. Varnado & Dane S. Ciolino, *Reconsidering Lawyers' Ethical Obligations in the Wake of a Disaster*, 19 PROF. L., no. 4, 2009 at 8, 13.

40. MODEL RULES OF PROF'L CONDUCT pmbl. para. 4 (2013).

41. *Id.* R. 5.5 cmt. 14.

42. *Id.* R. 1.4(a)(3).

43. *Id.* R. 1.4 cmt. 1.

44. Press Release, Fed. Comm'n Comm'n & Fed. Emergency Mgmt. Agency, FEMA & FCC Unveil New Tip Sheet for Consumers on How to Communicate During Disasters (Sept. 21, 2001), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-309728A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-309728A1.pdf).

45. See Davis, *supra* note, 4.

46. See Heerboth, *supra* note 5, at 11.

47. Glenn C. McGovern, *Surviving Total Destruction of Your Law Office and Client Base After a Catastrophic Disaster*, 41 TORT TRIAL & INS. PRAC. L.J. 799, 802–03 (2006).

48. *Id.* at 803.

event that the attorney or the client is affected by a communication loss post-disaster. The national law firm of Adams and Reese had backup communication technology, which greatly benefitted the firm in the period following Katrina.<sup>49</sup> For example, intrafirm emails continued after the storm through an email system via a third-party vendor, while members of the firm's management team utilized toll-free numbers to make daily reports at designated times.<sup>50</sup> An example of failure to comply with this rule may be seen in *In re Dicks-Woolridge*.<sup>51</sup> In that case, an attorney suffered from an office fire that destroyed her computers and caused loss or damage to a number of client files.<sup>52</sup> The attorney took no steps to reconstruct trust account records and failed to create a new file for maintenance and management of a separate client's case and documents.<sup>53</sup> The South Carolina Supreme Court affirmed a disciplinary panel's findings that, *inter alia*, the failure to communicate with the client violated South Carolina Rule 1.4.<sup>54</sup>

While the respondent attorney in *Dicks-Woolridge* did not indicate why she made no attempt to contact her client,<sup>55</sup> she may have found the client's response pleasantly surprising had she done so. In one case, in which a fire damaged a building in downtown Madison, Wisconsin, affecting a number of attorneys who had offices there, attorneys who made contacting clients a priority following the fire were surprised by their clients' understanding.<sup>56</sup> Those attorneys lost no clients.<sup>57</sup>

Another area potentially impacted by a disaster that is subject to provisions of the Model Rules concerns the safekeeping of a client's property. Model Rule 1.15(a) requires an attorney to hold a client's property separate from the attorney's property and to appropriately safeguard property other than funds.<sup>58</sup> An attorney must promptly deliver to the client funds or other property the client is entitled to receive, absent an agreement or law to the contrary.<sup>59</sup> Attorneys also must provide a full accounting regarding such property if requested by the client.<sup>60</sup> The comments to Model Rule 1.15 establish the level of care an attorney should use in safekeeping client property, stating that property held by

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49. Terry Carter, *Riding out the Storm: Even the Best Disaster Plans Can't Help New Orleans Lawyers Account for Lost Clients, Disruption and Uncertainty*, A.B.A. J., Feb. 2006, at 32, 36.

50. *Id.*

51. *In re Dicks-Woolridge*, 371 S.C. 42, 48, 637 S.E.2d 565, 568 (2006).

52. *Id.* at 46, 637 S.E.2d at 567.

53. *Id.* at 46–47, 49, 637 S.E.2d at 567, 569. The court noted that from the date of the office fire, the respondent attorney failed to maintain client ledgers or an accounting journal and made no attempt to reconstruct her financial records. *Id.* at 49–50, 637 S.E.2d at 568–69.

54. *Id.* at 51–52, 637 S.E.2d at 569–70.

55. *See id.* at 46–48, 637 S.E.2d at 567–68.

56. Watson, *supra* note 6, at 35–36.

57. *Id.* at 36.

58. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2013).

59. *Id.* R. 1.15(d).

60. *Id.*

an attorney should be kept “with the care required of a professional fiduciary.”<sup>61</sup> Some commentators suggest that this means an attorney must make greater efforts to protect that property than the attorney’s own property.<sup>62</sup> Some states require similar levels of care for attorneys in their management of trust accounts in some states.<sup>63</sup> Model Rule 1.16(d) provides that a client is entitled to have property and papers returned to them when representation ceases.<sup>64</sup> Neither Model Rule 1.15 nor 1.16 provide an exception for disasters.

Returning to the *Dicks-Woolridge* case, the disciplinary panel found that the failure to reconstruct even minimal documentation to determine the ownership of trust account funds after the fire was a violation of South Carolina Rule 1.15, though the panel considered the fire as a mitigating circumstance in its analysis.<sup>65</sup> A similar example may be found in a case from North Dakota in which a computer virus destroyed an attorney’s billing records.<sup>66</sup> The North Dakota Supreme Court held that the virus did not excuse the attorney’s failure to maintain duplicate billing records or account for fees advanced, which violated North Dakota’s Rule 1.15(f) mandating that attorneys keep sufficient records to demonstrate compliance with the rule.<sup>67</sup> The North Dakota Supreme Court’s stance on the duty was clear: “Although it is unfortunate that a computer virus destroyed [the attorney’s] backup billing record files, it [did] not relieve him of his duty to maintain records.”<sup>68</sup>

Model Rule 1.6 requires an attorney to safeguard a client’s confidential information.<sup>69</sup> The importance of client files and information was succinctly stated by one of the attorneys affected by the fire in Madison, Wisconsin, who said “[w]hat I really cared about was getting my client files back . . . at least with our client files back, I could pretty much resume sleeping at night.”<sup>70</sup>

The experiences from the Joplin tornado are instructive to the interpretation of Model Rule 1.6 following a disaster. Missouri’s Rules of Professional

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61. *Id.* R. 1.15 cmt. 1. This is further supported by the fact that there is case law holding the same. *See, e.g., Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002)) (noting that a fiduciary duty arises as a matter of law in attorney–client relationships).

62. *See Varnado & Ciolino, supra* note 39, at 15.

63. *See, e.g., R. REGULATING FLA. BAR 5-1.1(a) cmt.* (2006).

64. MODEL RULES OF PROF’L CONDUCT R. 1.16(d) (2013).

65. *In re Dicks-Woolridge*, 371 S.C. 42, 51, 637 S.E.2d 565, 569 (2006).

66. *In re Ward*, 701 N.W.2d 873, 877 (N.D. 2005).

67. *Id.* at 877–78 (citing N.D.R. PROF. CONDUCT 1.15(f) (2012)).

68. *Id.* at 877. A slightly similar situation was present in *In re Acker*, in which the South Carolina Supreme Court held that an attorney’s failure to turn over documents requested by the Board of Grievances and the documents’ eventual destruction in a hurricane constituted noncompliance with the Board. *In re Acker*, 308 S.C. 338, 340–41, 417 S.E.2d 862, 864 (1992).

69. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013). The Model Rules do not define information or confidential information. *See id.* R. 1.0, 1.6.

70. *Watson, supra* note 6, at 35.



Conduct contain restrictions common to most iterations of Rule 1.6.<sup>71</sup> Following the tornado, the president of the Jasper County Bar Association commented on the wreckage of law offices and the exposure of client information, saying “[i]f there are files exposed and start blowing around, you’ve got confidential information where it shouldn’t be.”<sup>72</sup> One Joplin attorney said that he managed to recover his computer’s hard drive and about 70% of his active cases, but that “one-of-a-kind documents” and his closed files were lost.<sup>73</sup>

The State Bar of Michigan’s Standing Commission on Professional and Judicial Ethics issued an advisory ethics opinion discussing the duties of an attorney when client files in that attorney’s custody—subject to a retention plan or retention period—are damaged by “fire, flood, or other circumstance beyond the control of the lawyer.”<sup>74</sup> The ethics opinion noted that the law firm discussed in the opinion suffered serious water damage to client files after a fire in the firm’s building rendered files that had been closed for periods of six months to twenty years illegible, absent an expensive restoration process.<sup>75</sup> The state bar noted that Michigan Rules of Professional Conduct 1.6 (protection of the confidentiality of client information), 1.15 (safekeeping client property), and Ethics Opinion R-5 (mandating that attorneys have a duty to have a plan or procedure in place governing safekeeping and disposition of client property) were all implicated in such a circumstance,<sup>76</sup> determining that “the ethical principles must be interpreted pragmatically.”<sup>77</sup> The state bar also concluded that, absent a client’s instructions to the contrary, if a client’s rights under a record retention policy had not expired, then the law firm had a duty to make reasonable efforts to notify the affected clients of the damage and whether the firm proposed destruction of the files.<sup>78</sup> In the event that the client failed to respond or could not be located, the file may be destroyed but only in a manner that ensured the safety of the client confidences.<sup>79</sup> If an attorney is aware of a specific circumstance that would require retention of a specific file, that file must be preserved and restored at the attorney’s expense, if necessary.<sup>80</sup>

The ABA’s Ethics 20/20 Commission proposed amending Model Rule 1.6 by adding a new paragraph, which provides that “[a] lawyer shall make

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71. See MO. R. PROF’L CONDUCT R. 4-1.6(a) (2007) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).”).

72. Christine Simmons, ‘One Day at a Time’ in Joplin’s Legal Community, MO. LAWS. WKLY., May 30, 2011, at 12.

73. *Id.*

74. State Bar Mich. Standing Comm. on Prof’l & Judicial Ethics, Op. RI-109, at 1 (1991), available at 1991 WL 519883.

75. *Id.*

76. *Id.*

77. *Id.* at 2.

78. *Id.* at 3.

79. *Id.*

80. *Id.*

reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”<sup>81</sup> While the Ethics 20/20 Commission’s report on this proposed addition focuses on technology and associated risks,<sup>82</sup> it is not unreasonable to think that this requirement, if adopted, would be applicable to all forms of client information, particularly in light of some of the examples discussed below.<sup>83</sup>

Continuing advances in online data backup technology, such as cloud technology, make both initial storage and backup of client data more accessible in multiple circumstances. Certainly, cloud technologies have advantages, such as portability and minimized vulnerability to disaster, which other systems—such as backing up hard drives and physically taking them home nightly, using magnetic tape, or using CD backups—no longer have. However, cloud computing presents its own risks that must be accounted for in determining whether this is a viable solution for law practices.<sup>84</sup> A proposed advisory opinion from the Florida Bar Association noted that cloud computing “raises ethics concerns of confidentiality, competence, and proper supervision of nonlawyers.”<sup>85</sup> To address these concerns, law practices would need to perform

81. Am. Bar Ass’n Comm’n on Ethics 20/20, Res. 105A, at 4 (Aug. 2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105a\\_filed\\_may\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf).

82. Am. Bar Ass’n Comm’n on Ethics 20/20, Rep. to H.D. 105A, at 10 (Aug. 2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/2012\\_hod\\_annual\\_meeting\\_105a\\_filed\\_may\\_2012.authcheckdam.pdf.v](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.v).

83. An attorney’s obligations are also subject to substantive and procedural laws, some of which impose additional obligations on an attorney’s duties to maintain confidentiality. *See, e.g.,* MODEL RULES OF PROF’L CONDUCT pmbl. para. 7 (2013). One example in which state regulations require greater restrictions in protecting confidences than state ethical rules mandate may be seen in the Massachusetts laws regarding data protection. *See* 201 MASS. CODE REGS. §§ 17.01 to .05 (2009). The regulations require every person who “owns or licenses personal information” about a Massachusetts resident to develop and implement a “comprehensive information security program” to incorporate technological and physical safeguards, including encryption on laptops and other portable devices. *Id.* §§ 17.03(1), 17.04(5). The phrase “owns or licenses” includes receiving, storing, maintaining, or having access to “personal information,” which consists of a resident’s first name or initial and last name, combined with one or more of the resident’s: “(a) Social Security number; (b) driver’s license or state-issued identification card number; or (c) financial account number, or credit or debit card number . . .” *Id.* § 17.02. In comparison, the Massachusetts Rules of Professional Conduct are far less restrictive in the scope of the client information and property subject to protection. *See* MASS. RULES OF PROF. CONDUCT R. 1.6, 1.15 (2013). Massachusetts Rule 1.6 refers only to “confidential information,” while Rule 1.15 governs trust accounts and “trust property”—including property held in a fiduciary capacity—mandating “appropriate safeguards,” but does not include property or documents received as investigatory materials or as evidence. *See id.* R. 1.6(C); *id.* R. 1.15(a)(1), (b)(3). Certainly, Massachusetts attorneys who collect credit card information when opening a client file could easily fall within the scope of the more stringent state data protection laws and regulations.

84. These risks are numerous and could easily be the subject of a separate article.

85. Fla. Bar Prof’l Ethics Comm., Op. 12-3 (2013), *available at* [https://www.floridabar.org/\\_85256AA9005B9F25.nsf/0/9DA5423ABE78318685257B0100535ADD?OpenDocument](https://www.floridabar.org/_85256AA9005B9F25.nsf/0/9DA5423ABE78318685257B0100535ADD?OpenDocument).

their due diligence on cloud computing providers and review their confidentiality policies regarding disclosure of information stored in the cloud.<sup>86</sup>

*B. Death or Disability of the Attorney*

The “ultimate disaster scenario” that requires pre-planning to ensure compliance with the Model Rules is the death or disability of a solo practitioner.<sup>87</sup> The comments to Model Rule 1.3 addressing diligence clearly propose that creation of such a plan indicates compliance with the rule.<sup>88</sup> For example, a solo family law practitioner who dies suddenly can leave behind several hundred open case files—many with looming deadlines—a lease for a small office, and contracts with an online legal research and e-filing provider personally guaranteed by the practitioner. A solo practitioner who complied with Model Rule 1.3 might want another attorney—most likely someone other than the executor handling the individual’s estate and probate—to serve as a legal executor or designated successor.<sup>89</sup> A legal executor might agree to take over management of cases upon the attorney’s death or disability, and could be responsible for closing down the practice in the event of the attorney’s death.

Planning for these circumstances is just as relevant at small to mid-size firms, particularly where senior partners—who possibly helped found the firms themselves—are the substantial source of a firm’s revenue.<sup>90</sup> Large law firms have an advantage over smaller firms in this regard, as large firms tend to be more institutionalized regarding succession and replacement of partners and, given their size, can more readily substitute new counsel in the event an attorney dies or becomes disabled.<sup>91</sup>

Certainly, client consent to such an arrangement is one of the many details that would need to be accounted for in such preparations.<sup>92</sup> The ethical

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86. *Id.*

87. Am. Bar Ass’n, Res. 116 Adopted by the H.D., at 10 (Aug. 8–9, 2011), *available at* [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_116.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_116.authcheckdam.pdf).

88. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 5 (2013) (“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.”). Many bar associations offer resources to encourage sole practitioners to begin establishing such plans. *See, e.g.*, MO. BAR, PLANNING AHEAD: A GUIDE TO PROTECT YOUR CLIENT’S AND YOUR SURVIVOR’S INTERESTS IN THE EVENT OF YOUR DISABILITY OR DEATH 1 (2005), *available at* <http://www.mobar.org/lpmonline/disaster/>.

89. Utilizing a cross-agreement under which each agrees to serve in this capacity for the other may effectuate this result.

90. *See, e.g.*, Christine Simmons, *Some Small, Mid-Sized Firms Begin Planning for Succession*, N.Y. L.J., Apr. 22, 2013, at 1, *available at* [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202596807524&Some\\_Small\\_MidSized\\_Firms\\_Begin\\_Planning\\_for\\_Succe ssion&slreturn=20130613174404#](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202596807524&Some_Small_MidSized_Firms_Begin_Planning_for_Succe ssion&slreturn=20130613174404#).

91. *Id.*; *see also* Traci M. Smith, *Death of a Practice: Estate Planning With the Professional Will*, ARIZ. ATT’Y, June 2007, at 36, 37–38.

92. *See* MO. BAR, *supra* note 88, at 3.

obligations to plan for the death of an attorney are truly geared toward protecting the needs of the client should such an event occur.<sup>93</sup> Moreover, the financial aspects of the arrangement affecting a practice would be accounted for as well.<sup>94</sup> An agreement with a legal executor might include provisions for paying earned legal fees to the estate of the deceased attorney, offering some additional coverage of the estate costs, and potentially minimizing financial loss to the heirs and family of the deceased attorney.<sup>95</sup>

### C. *Negligence Analysis and Emergency Plans*

Merely complying with ethical rules is not the only standard that requires an attorney to plan for a disaster.<sup>96</sup> The reasonably foreseeable nature of disasters, whether large or small, also relates to potential liability under a professional negligence analysis.<sup>97</sup> Courts commonly use a negligence analysis when considering cases of alleged legal malpractice.<sup>98</sup> In Texas, for example, an attorney “is held to the standard of care which would be exercised by a reasonably prudent attorney,”<sup>99</sup> and that “standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith.”<sup>100</sup> In the ABA’s Standards for Imposing Lawyer Sanctions, negligence means that an attorney “fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.”<sup>101</sup>

As Professor Binder indicates in his discussion of emergency actions plans, “[t]he essence of negligence is the failure to exercise reasonable care under the circumstances,” which is “based upon the reasonable foreseeability of the risk.”<sup>102</sup> In discussing foreseeability, Binder notes that other professionals such

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93. See Smith, *supra* note 91, at 37.

94. See *id.*

95. See *id.* at 40.

96. See Keim, *supra* note 34, at 28–29.

97. Binder, *supra* note 23, at 795.

98. See, e.g., *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989) (citing *Fireman’s Fund Am. Ins. Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67, 69 (Tex. Civ. App. 1975); *Patterson & Wallace v. Frazer*, 79 S.W. 1077, 1079 (Tex. Civ. App. 1904)) (stating that in Texas, legal malpractice is based on negligence); see also *Whalen v. Randle*, 37 Fed. App’x 113, 120 (6th Cir. 2002) (citing *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999)) (noting that the remedy for negligence by a party’s attorney is a legal malpractice suit); *Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994) (citing *Deppe v. Tripp*, 863 F.2d 1356, 1360 (7th Cir. 1988); *Inryco, Inc. v. Metro. Eng’g Co.*, 708 F.2d 1225, 1235 (7th Cir. 1983)) (stating that a legal malpractice suit is a general remedy for negligence by a party’s attorney); *Hodge v. Cichon*, 78 So. 3d 719, 722 (Fla. Dist. Ct. App. 2012) (citing *Angel, Cohen & Rogovin v. Oberon Inv., N.V.*, 512 So. 2d 192, 194 (Fla. 1987)) (discussing negligence claim based on legal malpractice).

99. See *Cosgrove*, 774 S.W.2d at 664.

100. *Id.* at 665.

101. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS theoretical framework, para. 7 (1991).

102. Binder, *supra* note 23, at 793.

as architects and engineers who build large structures in California, account for natural phenomena that may impact those areas.<sup>103</sup> Furthermore, he noted that “[t]he foreseeability of these events creates a duty, based upon the reasonable foreseeable risk, to employ reasonable care to reduce the risks of a disaster.”<sup>104</sup> In *United States v. Carroll Towing Co.*,<sup>105</sup> Learned Hand set forth an algebraic regarding negligence: “if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P,”—whether *B* is less than *PxL*.<sup>106</sup> Binder adopted Judge Hand’s equation to analyze the duty to prepare an emergency plan under a negligence standard: “1. How likely is an emergency to occur? 2. What are the potential consequences should it occur? 3. What safety precautions are available?”<sup>107</sup>

Binder frames this negligence analysis as “the ease of preparing and periodically updating an emergency action plan will often outweigh the risk of not doing so.”<sup>108</sup> He notes that the duty of reasonable care does not guarantee that an emergency plan would apply perfectly to any one disaster scenario because all contingencies cannot be accounted for.<sup>109</sup> However, failing to follow the plan is “less defensible,” even though some reasonable deviation may be justifiable depending on the circumstances.<sup>110</sup>

In *Coates v. United States*,<sup>111</sup> the government was found negligent when a dam located on National Park Service property failed, and the Park Service failed causing the death of a camper, to warn all the campers who were in danger from the flood—in part due to the government’s failure to implement an emergency plan.<sup>112</sup> Of the four grounds on which the United States was found negligent, the fourth was for failing “to maintain or implement a plan for dealing with emergencies, such as the one involved here.”<sup>113</sup> The court held that, through the government’s role of presentation of national parks, the government created a specific legal relationship between itself and the people who visited national parks by inviting the populace to enjoy these parks in exchange for a monetary fee.<sup>114</sup> By creating this relationship, the government also created a duty to

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103. *Id.* at 796.

104. *Id.*

105. 159 F.2d 169 (2d Cir. 1947).

106. *Id.* at 173.

107. Binder, *supra* note 23, at 798 (emphasis added). Another proposed interpretation of Judge Hand’s analysis is that “because the probability of a loss in the event of a natural disaster is great, a lawyer that fails to create a simple disaster plan should be found liable.” Brenna G. Nava, Comment, *Hurricane Katrina: The Duties and Responsibilities of an Attorney in the Wake of a Natural Disaster*, 37 ST. MARY’S L.J. 1153, 1170 (2006).

108. Binder, *supra* note 23, at 798.

109. *Id.* at 806–07.

110. *Id.* at 808.

111. 612 F. Supp. 592 (C.D. Ill. 1985).

112. *Id.* at 594–95.

113. *Id.* at 595.

114. *Id.* at 595–96.

develop plans and procedures in case of an emergency.<sup>115</sup> The court noted that it was imperative to create such a plan because there “is little time for reflection” during an emergency, and “[e]lementary lapses, obvious with the clarity of hindsight, could [be] avoided” by creating such a plan.<sup>116</sup> The court found that there was a duty to plan, the government failed to plan, and that the failure to plan was a proximate cause of the death of the camper.<sup>117</sup>

Legal ethics counsel for the Supreme Court of Missouri issued a surprisingly generous interpretation following the Joplin tornado, stating that to fulfill the responsibility of maintaining client confidentiality of all information under Missouri’s Rule 4-1.6, “an attorney must take reasonable steps to keep the information physically secure and to secure and backup electronic information.”<sup>118</sup> In the face of reasonably foreseeable risks, failure to take reasonable steps violates the provisions of the rule.<sup>119</sup> According to the ethics counsel, despite the potential exposure of confidential client information, the Joplin tornado “was not a reasonably foreseeable risk.”<sup>120</sup> This statement is questionable, however, given that there have been three tornados in Joplin since 1971.<sup>121</sup> Perhaps more relevant, an EF-5 tornado struck the town of Moore, Oklahoma—located approximately 224 miles southeast of Joplin—on May 20, 2013.<sup>122</sup> Holding that a tornado in that region is not reasonably foreseeable seems untenable. Yet considering whether such occurrences are reasonably foreseeable allows ethics or disciplinary counsel to account for the sudden and emergency nature of disasters, as demonstrated in the *Dicks-Woolridge* case.<sup>123</sup> Ultimately though, the reasonable conclusion stemming from this argument is that an attorney cannot count on it to absolve the failure to plan for disasters.

#### IV. EMERGENCY PLANS AND THEIR USE BY THE LEGAL PROFESSION

As for my professional future, there was nothing I could do at that point to change or augment the preparations I had already made. Whatever decisions I had made in the past on flood insurance, the backing up of files, storage of paper files, business interruption insurance, and

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115. *Id.* at 596.

116. *Id.*

117. *Id.*

118. Heerboth, *supra* note 5, at 11.

119. *Id.*

120. *Id.*

121. Brad Belk, *May Tornadoes Struck Joplin Twice in 1970s*, JOPLIN GLOBE, May 8, 2010, available at <http://www.joplinglobe.com/local/x1008080420/Brad-Belk-May-tornadoes-struck-Joplin-twice-in-1970s>; Bill Davis, *Joplin Tornado Survey*, NAT’L WEATHER SERV. WEATHER FORECAST OFF. (May 22, 2011), [http://www.crh.noaa.gov/sgf/?n=event\\_2011may22\\_survey](http://www.crh.noaa.gov/sgf/?n=event_2011may22_survey).

122. *The Tornado Outbreak of May 20, 2013*, NAT’L WEATHER SERV. WEATHER FORECAST OFF., <http://www.srh.oaa.gov/oun/?n=events-20130520> (last modified July 17, 2013).

123. *In re Dicks-Woolridge*, 371 S.C. 42, 50, 637 S.E.2d 565, 569 (2006).

safeguarding of exhibits and valuables were irrevocable now. I soon learned that I had done some things right but other things wrong.<sup>124</sup>

Professor Binder referenced the old saying “failing to plan is planning to fail” in the title of his article on emergency plans.<sup>125</sup> Making time to create and implement emergency plans has real-world benefits to attorneys and law firms.<sup>126</sup> While forward-thinking attorneys and law firms have much to gain from taking the time to establish emergency plans, who are those less prepared stand to be placed in more danger, whether ethically or to the business itself.<sup>127</sup> Glesner warns that when a poorly organized or overburdened law office meets with a client emergency, a synergistic effect occurs, spawning additional crises and diverting already ill-used resources from other matters.<sup>128</sup>

Attorneys and firms seeking to establish a continuity of operations plan (COOP), an emergency plan, or a business continuity plan certainly do not face a dearth of resources. The ABA’s Committee on Disaster Response and Preparedness created a guide for attorneys, illustrating how to create and implement business continuity plans, and also provided a sample template for such a plan.<sup>129</sup> The Nonprofit Coordinating Committee of New York has prepared documents for legal services organizations and nonprofits to craft and create emergency plans for those and similar organizations.<sup>130</sup>

Certain baseline matters must be addressed in an emergency plan created by an attorney or a firm. Gary A. Munneke proposes that a firm’s basic protections include: (1) a “contact tree” (not necessarily only a “phone” tree, given how service can be affected); (2) basic first-aid equipment and supplies at the office in a place known to everyone; (3) an “escape plan” from the building; (4) an “assembly point” outside the building; (5) identification of a crisis leader; and (6) maintaining cash in the event that banks or ATMs are unavailable.<sup>131</sup> An emergency plan must be adaptive to change as risks change. Thus, “[t]he specific type of event is less important for planning purposes than the possibility

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124. McGovern, *supra* note 47, at 802.

125. Binder, *supra* note 23.

126. *See* Heerboth, *supra* note 5, at 7.

127. *See id.* at 8.

128. Glesner, *supra* note 22, at 323.

129. AM. BAR ASS’N. SPECIAL COMM. ON DISASTER RESPONSE & PREPAREDNESS, SURVIVING A DISASTER: A LAWYER’S GUIDE TO DISASTER PLANNING (Aug. 2011), available at [http://www.americanbar.org/content/dam/aba/events/disaster/surviving\\_a\\_disaster\\_a\\_lawyers\\_guide\\_to\\_disaster\\_planning.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning.authcheckdam.pdf). The ABA has continued to develop additional templates and COOP plans. *See generally* ABA Comm. on Disaster Response & Preparedness, *Resources*, A.B.A., <http://www.americanbar.org/groups/committees/disaster/resources.html> (last visited Oct. 28, 2013) (providing disaster preparation resources for attorneys, law firms, bar associations, and courts).

130. NONPROFIT COORDINATING COMM. OF N.Y., DISASTER PLANNING, EMERGENCY PREPAREDNESS & BUSINESS CONTINUITY (Jan. 2013), [www.npcny.org/info/Disaster\\_Planning.doc](http://www.npcny.org/info/Disaster_Planning.doc).

131. Munneke, *supra* note 35, at 25.

that *some* sort of damaging event might happen.”<sup>132</sup> Attorneys and firms should review emergency plans and make changes following disasters in other locations, drawing upon the experiences of attorneys who underwent disasters.<sup>133</sup>

An example of some hard lessons learned following disaster comes from the national law firm of McGlinchey Stafford, which had an emergency plan that was overcome by Katrina’s severity.<sup>134</sup> The managing partner stated that “[t]hey had a plan for two or three days . . . nobody ever considered this kind of evacuation and recovery.”<sup>135</sup> The firm had to relocate over 140 of its New Orleans-based attorneys and staff to its Baton Rouge office following the storm.<sup>136</sup> Since that time, the firm determined that it would likely maintain excess capacity in each of its offices and develop a plan designating to which office location attorneys should head when evacuating.<sup>137</sup> Similarly, another New Orleans firm had a great plan that included a backup computer system located in a climate-controlled room on the third floor of a building a few miles away from the firm’s offices—a building that had four feet of water blocking its entrance for weeks after Katrina.<sup>138</sup>

The experiences mentioned above, along with lessons learned by New Orleans-based attorney Glenn McGovern, certainly show how some plans can be easily overcome, and why reassessing and amending plans after a disaster is an integral part of emergency planning. McGovern’s law office suffered tremendous damage, not only from having nearly four feet of contaminated salt water in the office, but also from rain that had overloaded the roof as well.<sup>139</sup> The safe that contained his insurance paperwork, backup CDs, and exhibits had corroded and could not be opened, while paper files stored over the four foot level were generally undamaged—although some had begun to smell.<sup>140</sup> While McGovern had a backup computer server on site at his office located seven feet from the floor, it was destroyed when the roof failed.<sup>141</sup>

McGovern credits the survival of his practice, in part, to his decision not to have all of his practice or clients in one location.<sup>142</sup> By accepting cases away

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132. Thomas A. Birkland & Carrie A. Schneider, *Emergency Management in the Courts: Trends After September 11 and Hurricane Katrina*, 28 JUST. SYS. J. 20, 23 (2007). Birkland and Schneider describe these hazards as “*low-probability, high-consequence events*” whose effects are so severe that, despite the unlikelihood of occurrence, they must be planned for in advance. *Id.*

133. *See* Binder, *supra* note 23, at 804 (“Emergency action plans are not static. They must be reviewed periodically and revised in light of changing risks, lessons learned from other disasters, and technological advances.”).

134. *See* Carter, *supra* note 49, at 34.

135. *Id.* at 35.

136. *Id.*

137. *Id.*

138. *Id.* at 36.

139. McGovern, *supra* note 47, at 806.

140. *Id.* at 807.

141. *Id.* at 812.

142. *Id.* at 810.



from his home location, he gave his practice a life preserver.<sup>143</sup> After Katrina, McGovern opened a satellite office ninety miles away from his main office containing basic office essentials.<sup>144</sup> He has an updated website—noting that the Internet was the one thing not damaged by Katrina—and advises listing cell phone numbers on both the website and firm letterhead.<sup>145</sup> McGovern now keeps all his insurance paperwork in a separate location and encourages attorneys to review policies for potential gaps in business interruption coverage.<sup>146</sup> McGovern changed his office equipment to portable laptops for ease of evacuation, with files containing copies of insurance policies, an office inventory, and a checklist of client information with upcoming statutes of limitations and legal deadlines.<sup>147</sup> He also recommends obtaining backups in offsite servers in secured facilities, setting aside a financial reserve to maintain business operations while insurance matters are handled, and drafting a communicated staff retention policy.<sup>148</sup>

#### V. PRO BONO IN TIMES OF DISASTER

The problems that arise in relation to disasters are multifaceted. When disasters strike, many attorneys cannot, or will not, help those who might be in the greatest need.<sup>149</sup> Many times, attorneys who are perfectly capable of performing pro bono work for those affected by a disaster decide not to because they feel that their area of practice does not lend itself to aiding in those cases.<sup>150</sup> Another consideration is that representing victims of disaster, often involving one-shot clients or clients of limited means, discourages firms from undertaking emergency representation as this takes time away from more lucrative or existing clients.<sup>151</sup>

While evidence shows that, in recent years, larger firms have shouldered more pro bono obligations,<sup>152</sup> one interpretation of these statistics suggests otherwise.<sup>153</sup> Assuming that attorneys at these firms bill 2,000 hours annually, they generally contribute approximately only 1% of their collective time to *pro*

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143. *Id.*

144. *Id.*

145. *Id.* at 810–11.

146. *Id.* at 811, 812–13.

147. *Id.* at 812, 813, 816.

148. *Id.* at 812, 815.

149. *See* Glesner, *supra* note 22, at 335–36.

150. *See id.*

151. *Id.* at 334.

152. *See* Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 28 *FORDHAM L. REV.* 2357, 2376 (2010) (citing Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw200*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION* 145 & fig.7.2 (Robert Granfield & Lynn Mather eds., 2009)).

153. *See* Richard Abel, *The Paradoxes of Pro Bono*, 78 *FORDHAM L. REV.* 2443, 2444 (2010) (citing Cummings & Rhode, *supra* note 152, at 2376).

*bono* service.<sup>154</sup> After reviewing the volunteer efforts from attorneys following the September 11 attacks, Professor Rhode noted the “gap between our ideals and institutions.”<sup>155</sup> According to Rhode “[t]housands of New York lawyers gave generously at a time of crisis. Thousands more did not. Of those who did volunteer, the average time commitment was less than fifty hours—under an hour a week for the year.”<sup>156</sup> In her analysis of an informal survey taken after the September 11 attacks, Rhode listed a number of factors attorneys cited in deciding not to make future contributions of time.<sup>157</sup> For 66% of firm attorneys and 44% of solo practitioners as well as a notable 17% of both firm and solo practitioners, the primary reason was “too busy,” with a notable supporting reason of “practice doesn’t lend itself to pro bono work.”<sup>158</sup>

While firms often encourage membership on boards of charitable or cultural organizations—designed to attract clientele under the guise of encouraging pro bono work—this effectively limits the scope of services available to those who have the most need for representation.<sup>159</sup> Rhode also found that attitudes regarding what qualified as pro bono work were not far from the same loose definition of pro bono Glesner found: “favors for clients, friends, or partners, the ‘pet causes’ of certain powerful practitioners, or projects designed primarily to enhance the organization’s image.”<sup>160</sup> When such reasoning and behavioral norms are encouraged—or at least tolerated—in the profession, it exacerbates the negative synergistic effect Glesner discusses, placing more work on overburdened organizations, especially following a disaster.<sup>161</sup>

The notion of a generalist attorney has given way to specialized professional roles, which has led to a disincentive to provide emergency representation unless such representation is either related to an attorney’s specialty or the matter is relatively simple.<sup>162</sup> Attorneys thinking that their particular expertise is not suited for legal services in post-disaster situations creates one of the major

154. *See id.*

155. Rhode, *supra* note 19, at 1011.

156. *Id.* A special report was prepared detailing the legal community’s response to 9/11, including lessons learned about the practical aspects of responding to a disaster, one of which includes the following conclusion: “Lawyers who believe they cannot find volunteer opportunities because of their practice specialty should reconsider their views in light of 9/11.” ASS’N OF THE BAR OF THE CITY OF N.Y. FUND, INC. ET AL., PUBLIC SERVICE IN A TIME OF CRISIS: A REPORT AND RETROSPECTIVE ON THE LEGAL COMMUNITY’S RESPONSE TO THE EVENTS OF SEPTEMBER 11, 2001, reprinted in 31 FORDHAM URB. L.J. 831, 931 (2004) [hereinafter ABCNY FUND ET AL.].

157. Rhode, *supra* note 19, at 1017 (citing ABCNY FUND ET AL., *supra* note 156, at 924).

158. *Id.* (citing ABCNY FUND ET AL., *supra* note 156, at 924).

159. *See* Glesner, *supra* note 22, at 383–84 (citing Cameron Barr, *Doers and Talkers*, AM. L., July–Aug. 1990, at 58).

160. Rhode, *supra* note 19, at 1018.

161. *See* Glesner, *supra* note 22, at 383 (“To the extent that the entire profession does not take seriously its responsibility to provide *pro bono* service to the poor, the caseload pressures on legal services organizations only increase.”).

162. *Id.* at 335–36.

hurdles to providing pro bono services.<sup>163</sup> In most cases, however, these concerns are specious.<sup>164</sup> According to Susan Marmaduke, “Lawyers are trained to listen, to assimilate information quickly, and to communicate clearly. We are accustomed to solving problems under time pressure, in rapidly changing circumstances, and amidst high emotions. All of those skills are necessary to respond effectively to a disaster.”<sup>165</sup>

An excellent example comes from the dire need for representation of defendants that arose in post-Katrina Louisiana. While the cause of that need is discussed in more depth below, the problem existed pre-Katrina, as “a well-known and common divide existed between the overwhelming majority of civil attorneys and the relatively small criminal defense bar.”<sup>166</sup> The Louisiana State Bar Association sought help from its membership after Katrina to provide urgent pro bono assistance for criminal matters.<sup>167</sup> While 600 to 800 attorneys responded, they only offered civil law assistance.<sup>168</sup> Eight months after Katrina, some 150 to 200 civil practitioners volunteered to help the public defenders, and these attorneys were given training in criminal defense matters and accepted several hundred cases involving minor charges.<sup>169</sup> Questioning civil attorneys’ view that they could not contribute to indigent defense in crisis situations, Professor Colbert stated that “[c]riminal law practice is not rocket science; most civil attorneys are smart and fully capable of applying their experienced practice skills to interview people and obtain basic factual information to show that the person had served the imposed sentence and was now being held illegally.”<sup>170</sup> Colbert suggests that “more advanced lawyering skills, such as counseling, negotiation, and trial preparation” would have been useful in presenting a defense for those incarcerated.<sup>171</sup>

The opportunity to assist in post-disaster times through pro bono service is not limited to criminal defense. A huge proportion of the legal services needed in those times involves helping individuals deal with civil matters, including property damage, and aiding businesses with almost every aspect of their operations. Additionally, child custody and support matters quickly arose after Katrina, with one attorney describing these as practical issues, such as a child visiting a parent who evacuated and the custodial parent having no idea where the child or the other parent were.<sup>172</sup> Landlord-tenant matters were also

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163. *See id.*

164. *See id.* (noting that attorneys in these situations should associate with specialists within their own firm).

165. Susan Marmaduke, *Parting Thoughts: The Role of Lawyers in Times of Crisis*, OR. ST. B. BULL., Dec. 2005, at 62.

166. Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 HOW. L.J. 677, 728 (2008).

167. *Id.* at 727.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 728.

172. G.M. Filisko, *What Did Katrina Teach Us?*, A.B.A. J., July 2011, at 33, 36.

common, with examples from New Orleans ranging from landlords ignoring tenant rights to some tenants never paying rent again.<sup>173</sup> Insurance and construction claims are also common after disasters, as are probate matters involving guardianships or probating estates and wills.<sup>174</sup> Common to any aspect of civil law, replacing and drafting new legal documents may be required following a disaster.<sup>175</sup>

In her analysis of the ethics of emergency lawyering, Glesner suggests that “competence,” as utilized in Model Rule 1.1, supports a conclusion that, even if an attorney errs in a matter involving emergency representation, it is likely that there might not be a disciplinary consequence, unless the attorney’s error was indicative of overall incompetence or the error was linked with neglect or an affirmative wrong.<sup>176</sup> Glesner proposes standards for emergency representation of clients,<sup>177</sup> which have viable utility in establishing a baseline standard of quality for such representation and incorporate the admonitions of the Model Rules, the requirements of Rule 11, and malpractice concerns.<sup>178</sup>

#### A. *Changes to Pro Bono Model Rules Post-Katrina*

Following Katrina, an exchange of attorneys took place: large groups of attorneys were displaced, while many attorneys wanted to come to the areas affected to provide assistance, including pro bono work.<sup>179</sup> Thousands of attorneys in Louisiana and Mississippi lost their homes, their law practices, or both.<sup>180</sup> The ABA reported that over 1,750 volunteers, comprised of attorneys licensed in almost every state, including Puerto Rico and the United States Virgin Islands, indicated their willingness to offer pro bono assistance through a web site established by the ABA.<sup>181</sup> Both of these situations directly implicated

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173. *Id.* at 36.

174. *Id.* at 37.

175. *Id.*

176. *See* Glesner, *supra* note 22, at 342–43.

177. *Id.* at 369.

178. *See generally id.* at 339–69 (discussing how the Model Rules, Rule 11, and malpractice cases are helpful in determining standards for emergency representation).

179. *See* Filisko, *supra* note 172, at 36–37.

180. *See supra* notes 1–2 and accompanying text; *see also* AM. BAR ASS’N, IN THE WAKE OF THE STORM: THE ABA RESPONDS TO HURRICANE KATRINA 10 (2006), available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/executivedirector/reports/aba\\_katrinareport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/executivedirector/reports/aba_katrinareport.authcheckdam.pdf).

181. *See* AM. BAR ASS’N, *supra* note 180, at 12. Sadly, a survey indicated that local legal service providers and pro bono coordinators in the affected areas contacted only 12% of the volunteer attorneys. *Id.* at 13. The American Bar Association stated this was largely due to problems with infrastructure and logistics in coordinating and deploying volunteers. *Id.*

provisions of the Model Rules and precipitated changes in the Model Rules in anticipation of future disasters.<sup>182</sup>

Model Rule 5.5, relating to the unauthorized practice of law (UPL) and multi-jurisdictional practice of law (MJP), provides that attorneys shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.<sup>183</sup> This restriction includes prohibitions against establishing an office or systematic presence in the jurisdiction, except as otherwise authorized.<sup>184</sup> The comments recognize that there are occasions an attorney already admitted in a state—and not suspended or disbarred—may provide legal services “on a temporary basis,” namely those set out in Model Rule 5.5(c), which is not an exclusive list.<sup>185</sup> The comments also note that “no single test” is used to determine the “temporary basis” of the circumstances of Model Rule 5.5(c).<sup>186</sup> Neither Model Rule 5.5 nor its comments address situations related to disasters.

Following Hurricanes Katrina and Rita, nineteen states either altered or amended their UPL and MJP rules to accommodate displaced attorneys from affected states by granting these attorneys temporary reciprocity while they were relocated outside of their home jurisdictions.<sup>187</sup> However, there was no uniformity to these rules.<sup>188</sup> Different states placed varying durations on the reciprocity time allowed: some states limited areas of practice or limited displaced attorneys to only assisting existing clients from the attorney’s original state; some states required the attorneys to practice in association with local attorneys; some required displaced attorneys to advise clients that they were not licensed in that state; some states only allowed attorneys from states specifically affected (for example, Alabama’s rule only permitted Mississippi or Louisiana attorneys); and some states reduced or waived fees for displaced attorneys who sought admission to the state bar.<sup>189</sup>

As commentators have suggested, the provisions of Model Rule 5.5(c) allowing licensed attorneys to provide temporary legal services in a state in which they are not admitted to practice, provided that such work is done “in association with a lawyer” in that jurisdiction, were inadequate in light of the tremendous need for pro bono services that existed following an emergency such

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182. See Filisko, *supra* note 172, at 37; Michael H. Rubin & Beth E. Abramson, *Lessons Learned (the Hard Way) by Lawyers During Hurricanes Katrina and Rita*, PROB. & PROP., Sept./Oct. 2006, at 25, 25.

183. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2013).

184. *Id.* R. 5.5(b).

185. *Id.* R. 5.5 cmt. 5. Model Rule 5.5(d) provides exceptions for in-house government and corporate attorneys and attorneys in federal practice. *Id.* R. 5.5(d) cmt. 16.

186. *Id.* R. 5.5 cmt. 6.

187. Rubin & Abramson, *supra* note 182, at 25.

188. *Id.*

189. See *id.* at 28–32 (providing a table noting the status of the practice of law in different states for displaced attorneys after Hurricanes Katrina and Rita).

as Katrina.<sup>190</sup> None of the exceptions in Model Rule 5.5 covered out-of-state attorneys who provide pro bono assistance in areas that suffered a disaster.<sup>191</sup> Following Katrina and Rita, individual states created special rules to allow for such assistance.<sup>192</sup>

On October 10, 2005, the Louisiana Supreme Court issued an “Emergency Pro Bono Civil Legal Assistance Rule” (Emergency Rule) that was effective until February 28, 2006.<sup>193</sup> The Emergency Rule allowed attorneys who were not licensed in Louisiana to provide legal services in prescribed situations, specifically in civil matters with issues regarding “rights, remedies, claims, defenses, injury, or damages resulting from Hurricanes Katrina and Rita and their aftermath.”<sup>194</sup> Such limited representation did not extend to representation in Louisiana courts or administrative proceedings, and the services could only be rendered through the Louisiana State Bar Association or the ABA Young Lawyers Division Legal Assistance Program.<sup>195</sup> Mississippi and Texas also issued emergency pro bono orders and included provisions requiring attorneys to provide assistance through the organizations specifically listed in the orders.<sup>196</sup>

The ABA adopted the “Model Court Rule on Provision of Legal Services Following Determination of Major Disaster” (Model Court Rule), sometimes referred to as the “Katrina Rule,” in 2007.<sup>197</sup> Comment 14 of Model Rule 5.5 was also amended as part of adopting the Model Court Rule.<sup>198</sup> The ABA began developing the Model Court Rule in February 2006, in an effort to create a uniform method to handle displaced attorneys and to better enable attorneys to help provide pro bono services in areas affected by disaster.<sup>199</sup>

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190. *Id.* at 26.

191. *Id.*

192. *Id.*

193. *See, e.g.*, Supreme Court of Louisiana Order, Emergency Pro Bono Civil Legal Assistance Rule (Oct. 10, 2005), available at <http://www.ladb.org/forms/emergency%20pro%20bono%20civil%20legal%20assistance%20rule.pdf> (“A lawyer not admitted to practice law in Louisiana but who is admitted in another United States jurisdiction . . . may provide temporary emergency *pro bono* legal assistance . . .”).

194. *Id.*

195. *Id.*

196. *See In re* Rules of Professional Conduct, No. 89-R-99018-SCT (Miss. Oct. 13, 2005), available at <http://courts.ms.gov/news/2005/sn127311.pdf>; Amended Emergency Order Permitting Lawyers Displaced by Hurricane Katrina or Hurricane Rita to Continue Representing Clients from Temporary Offices in Texas, Misc. Docket No. 05-9171 (Tex. Oct. 11, 2005), available at <http://www.supreme.courts.state.tx.us/miscdocket/05/05917100.pdf>.

197. Am. Bar Ass’n, Recommendation 104 Adopted by the H.D., at 1 (Feb. 12, 2007) [hereinafter Model Rule on Legal Services], available at [http://www.americanbar.org/content/dam/aba/migrated/disaster/docs/model\\_court\\_rule.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/disaster/docs/model_court_rule.authcheckdam.pdf); *see also* Filisko, *supra* note 172, at 34 (noting that this rule is referred to as the “Katrina Rule”).

198. Model Rule on Legal Services, *supra* note 197, at 1.

199. Am. Bar Ass’n Comm. on Client Prot., Revised Rep. to H.D. 104, at 9 (Jan. 29, 2007) [hereinafter Delegate Report], available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/Katrina.authcheckdam.pdf>. The ABA determined that a Model Court Rule was more appropriate than a Model Rule because “the creation of a mechanism for making legal services

The Model Court Rule goes becomes effective when the highest court of a state determines that an emergency affecting the justice system, caused by a natural or other major disaster, has occurred in that state.<sup>200</sup> Until the court makes this determination, the highest courts of other states may not authorize the provisions of the Model Court Rule in their state.<sup>201</sup> Under the Model Court Rule, licensed attorneys in good standing from any jurisdiction are authorized to enter the affected jurisdiction and provide temporary pro bono services, provided that the services are “supervised through an established not-for-profit bar association, pro bono program or legal services program,” designated by that jurisdiction’s highest court.<sup>202</sup> While displaced attorneys are authorized to practice law in unaffected jurisdictions under the Model Court Rule, the legal services offered by displaced attorneys “must arise out of and be reasonably related to that lawyer’s practice of law in the jurisdiction . . . where the major disaster occurred.”<sup>203</sup> These temporary rules apply until the state’s highest court determines that “the conditions caused by the major disaster . . . have ended.”<sup>204</sup>

The most recent information from the ABA indicates that, as of November 8, 2012, sixteen states adopted the Model Court Rule, fifteen states were considering adoption, and eight states declined to adopt the Model Court Rule.<sup>205</sup>

#### VI. PROFESSIONALISM, THE RULE OF LAW, HUMAN RIGHTS, AND SOCIAL JUSTICE AFTER DISASTERS

I may have lost everything physical in my law office, but my life as an attorney still has purpose. I am here to serve clients in Louisiana in their time of need. I have chosen to stay and fight. They respect me more than ever for that. My purpose in being an attorney still exists and has never been more important to me at any other point in my career. Even Hurricane Katrina did not destroy that.<sup>206</sup>

Glenn McGovern’s words drive directly to the purpose of the Model Rules and the ideals of professionalism. The first sentence of the preamble to the Model Rules is instructive: “A lawyer, as a member of the legal profession, is a

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available is not an ethical, but essentially an administrative and operational concern of each state’s highest court.” *Id.* at 10.

200. *Id.* at 11.

201. Model Rule on Legal Services, *supra* note 197, at 1.

202. *Id.*

203. *Id.* at 2. Displaced attorneys so authorized under this section must not be disbarred or suspended. *Id.*

204. *Id.*

205. AM. BAR ASS’N, COMM. ON CLIENT PROT., STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER 1 (2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/katrina\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf).

206. McGovern, *supra* note 47, at 816.

representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice.”<sup>207</sup> As one commentator noted, the presumptive duty to a client is not absolute because as members of a public profession, attorneys have to account for the consequences of their actions to others and to society as a whole.<sup>208</sup> It is these non-client responsibilities have the most bearing on the usage of the term professionalism.<sup>209</sup>

Professor Campbell’s definition of professionalism remains appropriate.<sup>210</sup> That is, professionalism is the “affirmative obligations of the lawyer to the broader society” and is different from ethics or morality because professionalism recognizes the attorney’s obligation to the fundamental tenets of a democratic society.<sup>211</sup> Additionally, “Professionalism is the courage to care about and act for the benefit of our clients, our peers, our careers, and the public good.”<sup>212</sup>

Another term—while decidedly applicable to the roles the justice system and the legal profession play following disasters—is the subject of much discussion particularly given its commonplace usage under a variety of conditions: the Rule of Law.<sup>213</sup> Agreeing on a single definition of the rule of law seems near impossible given the multitudinous constructs in which this term is used.<sup>214</sup> Appropriate to the considerations here, Professor Waldron described the rule of law as “a fragile but crucial ideal . . . appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in their countries’ laws or constitution.”<sup>215</sup> Waldron further noted that “the Rule of Law is violated when the norms that are applied by officials do not correspond to the norms that have been made public to the citizens, or when officials act on the basis of their own discretion rather than norms laid down in advance.”<sup>216</sup>

Perhaps a negative definition of *justice* best frames the usage of the terms and issues discussed in this Part—a recognition of injustice and, therefrom,

207. MODEL RULES OF PROF’L CONDUCT pmb1. para. 1 (2013).

208. Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 138 (1995).

209. See, e.g., Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 137–41 (2011) (citations omitted) (“The *professional* obligation of lawyers are those responsibilities assumed, not on behalf of the client or even the court, but rather on behalf of society as a whole.”).

210. See *id.* at 139–41.

211. *Id.* at 139.

212. OR. STATE BAR, STATEMENT OF PROFESSIONALISM (Dec. 12, 2011), available at [http://www.osbar.org/\\_docs/forms/Prof-ord.pdf](http://www.osbar.org/_docs/forms/Prof-ord.pdf).

213. See Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MIL. L. REV. 92, 93 (2006).

214. See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997); Stigall, *supra* note 213, at 93.

215. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5 (2008).

216. *Id.* at 6.



justice.<sup>217</sup> As one scholar proposes, “[I]n fact, it is precisely the experience of injustice—of the wrongs suffered; of the losses incurred; of the suffering endured—that may allow us to frame, in a sort of *a contrario* construction, an idea of ‘justice’ that is *anchored to reality*.”<sup>218</sup> In building a framework of various experiences following disaster, it becomes apparent that even though the legal profession strives for the special quality of justice, attorneys still have some distance to go.

A. *Statutes of Limitations, Civility, and Equity from Courts and Opposing Counsel*

Obligations relating to legal deadlines are of great importance to attorneys, yet, in the destruction accompanying Katrina, numerous attorneys were left without homes or offices, which made compliance with statutory, regulatory, and court deadlines almost impossible.<sup>219</sup> Looming over this is the proposition that “[n]either hurricanes nor other natural disasters delay or toll the statute of limitations.”<sup>220</sup>

Opposing counsel and the courts themselves are often a primary source of equity and civility when disaster strikes.<sup>221</sup> While the Model Rules do not mandate that an attorney or tribunal account for a disaster that befalls opposing counsel, such considerations were easily given in numerous instances, such as when opposing counsel moved for continuances in cases in which Joplin attorneys were involved without requiring them to file the motions themselves.<sup>222</sup> One attorney who evacuated from New Orleans to Arkansas randomly found out about a hearing in a case he was defending, but had not received notice.<sup>223</sup> The attorney’s opposing counsel not only called him to inform him of the hearing, but also drafted and filed his motion to continue the hearing for him.<sup>224</sup>

Courts have also equitably tolled statutes of limitations following disaster.<sup>225</sup> In one instance, a law firm filed for relief from the statutes of limitations and filing deadlines in all of the firm’s cases due to a fire in the firm’s office that

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217. See Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 283 (2013).

218. *Id.*

219. See Varnado & Ciolino, *supra* note 39, at 8.

220. Keim, *supra* note 34, at 30.

221. See, e.g., *In re Propulsid*, No. MDL 1355, 2005 WL 2787634, at \*1 (E.D. La. Oct. 18, 2005) (stating that opposing counsel agreed to extend deadlines for claims submissions due to issues affecting plaintiff’s counsel post-Katrina); Heerboth, *supra* note 5, at 10 (discussing how Joplin attorneys and courts moved deadlines on cases without attorneys filing for continuances).

222. See Heerboth, *supra* note 5, at 10.

223. See Nahum D. Loventhal, *Help in Continuing a Hearing*, 53 LA. B.J. 293, 293 (Dec./Jan. 2006).

224. *Id.*

225. See e.g., *Coleman v. Guy F. Atkinson Co.*, NV, 887 F. Supp. 49, 53 (D.R.I. 1995); (equitably tolling the statute of limitations when there was a fire in counsel’s office).

occurred the previous week.<sup>226</sup> The Rhode Island Supreme Court granted the relief requested, but limited it to cases in which client files were damaged or destroyed in the fire.<sup>227</sup> Using its discretion and finding that the state supreme court properly tolled the statutes of limitations, the federal district court equitably tolled the maritime statute of limitations in the action pending before it.<sup>228</sup> In doing so, the federal district court noted that “a fire is an extenuating circumstance, that, in the interest of justice, should not be allowed to deprive plaintiffs of their right to seek compensation . . . where the plaintiffs’ attorneys acted responsibly in preserving the rights of his clients.”<sup>229</sup> In a footnote, the court stated that “it is irrelevant . . . whether the file was actually destroyed. The amount of disruption caused by a fire in a legal office is sufficient to warrant a brief toll of limitations statutes.”<sup>230</sup>

Additionally, in an opinion concerning mass tort claims, the Mississippi Supreme Court acknowledged the difficulties affecting the region post-Katrina concluded that it was “appropriate under the circumstances for the trial court to determine the period of time for . . . counsel to provide the information as ordered.”<sup>231</sup> In doing so, the court noted that “[t]he immense devastation visited upon the Gulf Coast by Hurricane Katrina requires that this Court be sensitive to the possibility of extreme hardship in cases including lawyers and parties from the affected area.”<sup>232</sup>

Some courts have been clear in holding that equity and excuse following disasters have some limits.<sup>233</sup> For example, one Florida court found that a law office closure was good cause for delay in filling out a mediation questionnaire when the attorney’s office was in the direct path of three different hurricanes, but the excusable delay only included the ten working days the office was actually closed and did not justify filing the questionnaire over two months late.<sup>234</sup> Decisions from other courts seem to indicate that merely referencing a disaster is not sufficient cause for a court to exercise equitable powers.<sup>235</sup> For example, a

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226. *Id.* at 50.

227. *Id.*

228. *Id.* at 52.

229. *Id.* at 53.

230. *Id.* at 53 n.2.

231. *3M Co. v. Glass*, 917 So. 2d 90, 94 (Miss. 2005); *see also* *United States v. Shugart*, No. CRIM. 505CR6DCBJCS, 2005 WL 3263367, at \*1 (S.D. Miss. Nov. 22, 2005) (discussing the need for alternative venues based on unavailability of two courthouses due to Katrina).

232. *3M Co.*, 917 So. 2d at 94 n.12.

233. *See, e.g., Matajek v. Skowronska*, 893 So. 2d. 700, 701 (Fla. Dist. Ct. App. 2005) (stating that it was not excusable for counsel to file a mediation questionnaire two months late when the counsel’s law offices were closed for only ten days due to hurricanes); *Rudder v. Wash. Mut. Bank*, No. 2-04-360-CV, 2005 WL 3008424, at \*1 (Tex. App. Nov. 10, 2005) (per curiam) (dismissing an appeal when counsel failed to file a brief that was more than six months overdue and counsel stated the reason was because of hurricanes).

234. *Matajek*, 893 So. 2d. at 701.

235. *See, e.g., Ramirez v. McCravy*, 4 So. 3d 692, 693–694 (Fla. Dist. Ct. App. 2009) (holding that the plaintiff failed to demonstrate how six different weather emergencies and the related

fourth request for an extension to file a brief by a pro se appellant was refused in a case in which the appellant claimed that “[b]ecause of unexpected emergencies and interruptions (including the uncertainties which existed for everyone during the recent hurricanes), it is mandatory for the Appellant to seek another extension.”<sup>236</sup>

In two cases from October 2005, motions to transfer venue from the Galveston Division of the Southern District of Texas to the Eastern and Western Districts of Louisiana were denied, with both orders noting that, while not fitting neatly into one of the established factors for considerations of transfer motions, the devastation caused by Hurricanes Katrina and Rita “cannot be ignored.”<sup>237</sup> Judge Samuel B. Kent, no stranger to hyperbole,<sup>238</sup> held that transferring a case to the Eastern District of Louisiana “would be to utterly disregard the most catastrophic natural disaster this nation has seen in the past century.”<sup>239</sup> He also held that while, under normal circumstances, the other case would have been transferred to the Western District of Louisiana, in light of the disasters, there could possibly cause significant delay and undue burden to that court, and would also disregard “the impact of recent catastrophic events on the great State of Louisiana.”<sup>240</sup> Just over a month after issuing these orders, Judge Kent granted a motion to transfer venue to the Western District of Louisiana, where the plaintiff had argued that the havoc created by the hurricanes caused a substantial backlog of cases.<sup>241</sup> According to that order, the court contradicted the deputy clerk in charge of the Western District of Louisiana who advised the court that they were reporting no backlogs and the division “running at its normal pace and schedule,” which indicated no grounds to support the argument that delay or prejudice would result from the transfer.<sup>242</sup>

The post-Katrina actions taken by the judicial, legislative, and executive branches in Louisiana recognized and addressed many of the concerns regarding

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administrative orders tolling the statute of limitations due to court closures were relevant to his late filing of an accident claim four years after the accident occurred); *Rudder*, 2005 WL 3008424, at \*1 (denying counsel’s fourth motion to extend time to file the appellant’s brief when counsel stated that the extension was necessary due to recent hurricanes in the area).

236. *Rudder*, 2005 WL 3008424, at \*1.

237. *Valdez v. Int’l Boat Rentals, Inc.*, No. G-05-238, 2005 WL 2488432, at \*2 (S.D. Tex. Oct. 6, 2005); *Campbell v. Dynamic Cranes, LLC*, No. Civ.A. G-05-241, 2005 WL 2562091, at \*3 (S.D. Tex. Oct. 6, 2005).

238. *See, e.g.*, *Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 785 (S.D. Tex. 1996) (“Alas, this Court’s kingdom for a commercial airport!”). *See generally* Douglas R. Richmond, *Bullies on the Bench*, 72 LA. L. REV. 325, 325–26 (2012) (citing *Kent Sentenced to Almost Three Years in Prison*, GALVESTON COUNTY DAILY NEWS, May 12, 2009) (mentioning how Kent’s career “flamed out” following accusations of sexual assault and pleading guilty to obstruction of justice).

239. *Valdez*, 2005 WL 2488432, at \*2.

240. *Campbell*, 2005 WL 2562091, at \*3.

241. *See Davidson v. Moncla Marine Operations, LLC*, No. Civ. A. G-05-379, 2005 WL 3058170, at \*4 (S.D. Tex. Nov. 10, 2005).

242. *See id.*

legal deadlines, yet afterwards, questions were raised about whether such actions were truly just or patently unwarranted and illegal. On September 1, 2005, the Louisiana Supreme Court issued an order freezing deadlines and court proceedings through September 30, 2005.<sup>243</sup> Five days after this order was entered, Governor Kathleen Blanco issued Executive Order No. KBB 2005-32, providing that all deadlines in legal proceedings, “including liberative prescriptive and preemptive periods in all courts, administrative agencies, and boards,” were suspended until at least September 25, 2005, including those retroactive to August 29, 2005.<sup>244</sup> Governor Blanco extended the suspension for an additional thirty days on September 23, 2005, as Hurricane Rita was approaching.<sup>245</sup> This second order specifically included “non-constitutionally mandated deadlines in criminal proceedings” in the suspension—language which was not present in the first order.<sup>246</sup> On October 19, 2005, Governor Blanco issued another executive order, suspending liberative, prescriptive, and preemptive periods statewide until at least November 25, 2005.<sup>247</sup>

During a special session, the Louisiana legislature ratified the Governor’s suspension orders and extended certain legal deadlines until January 3, 2006, providing a possible extension for the parishes that had been hit the hardest.<sup>248</sup> The legislature also enacted the Criminal Justice Emergency and Disaster Act<sup>249</sup> during this special session, vesting the Louisiana Supreme Court with the power to order emergency court sessions in alternative locations outside of the jurisdiction in which an inmate was subject to criminal prosecution for courts affected by a disaster.<sup>250</sup> According to one justice of the Louisiana Supreme

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243. See Press Release, La. Supreme Court, Louisiana Supreme Court Update from Chief Justice Pascal F. Calogero, Jr. (Sept. 29, 2005), available at [http://www.lasc.org/press\\_room/press\\_releases/2005/2005-12.asp](http://www.lasc.org/press_room/press_releases/2005/2005-12.asp). The Louisiana Supreme Court later extended its closure to October 25, 2005. *Id.*

244. See Exec. Order No. KBB 05-32, La. Reg. 2169 (Sept. 6, 2005), available at <http://doa.louisiana.gov/osr/other/kbb05-32.htm>. “Peremption” under Louisiana law is essentially the same as a statute of repose in common-law states. Varnado & Ciolino, *supra* note 39, at 17 n.10. See generally Majorie Nieset Neufeld, Prescription and Peremption—the 1982 Revision of the Louisiana Civil Code, 58 TUL. L. REV. 593, 60106 (1983) (citations omitted) (explaining peremption in Louisiana).

245. See Exec. Order KBB 05-48, La. Reg. 2352 (Sept. 23, 2005), available at <http://doa.louisiana.gov/osr/other/kbb05-48.htm>.

246. Compare *id.* (suspending all legal deadlines in all legal proceedings), with Exec. Order KBB 05-32, available at <http://l1doa.louisiana.gov/osr/other/kbb05-32.htm> (suspending all legal deadlines except those in criminal proceedings).

247. See Exec. Order KBB 05-67, La. Reg. 2675 (Oct. 19, 2005), available at <http://doa.louisiana.gov/osr/other/kbb05-67.htm>.

248. See LA. REV. STAT. ANN. §§ 9:5821–24 (2007).

249. See LA. CODE CRIM. PROC. ANN. arts. 941–44 (2008).

250. See LA. CODE CRIM. PROC. ANN. art. 944 (2008); see also Greg G. Guidry, *The Louisiana Judiciary: In the Wake of Destruction*, 70 LA. L. REV. 1145, 1163 (2010) (citing LA. CODE CRIM. PROC. ANN. arts. 941–944 (2008)).

Court, this act allowed the court to suspend habeas corpus in the event that the Governor declared a state of emergency.<sup>251</sup>

Some suggest that these quick reactions aided attorneys and protected clients from the consequences of missing deadlines.<sup>252</sup> However, this positive opinion is not universally held.<sup>253</sup> As Judge Sarah Vance described it, with Katrina “came an almost complete breakdown of the justice system in New Orleans.”<sup>254</sup> The orders and acts noted above may have contributed to one of the greater injustices that arose out of Katrina, which this Part now addresses.

### B. *The Rule of Law Meets “Katrina Time”*

Among the examples of abuses of the rule of law included in Professor Waldron’s article was “detaining people without any safeguards of due process.”<sup>255</sup> In the wake of Katrina, this example proved to be all too real.

Persons arrested in New Orleans before Katrina served two kinds of time in jail:<sup>256</sup> (1) police-sentencing time, which involved being jailed for forty-five days or sixty days between an arrest and an eventual decision not to prosecute, depending on the charge, followed by (2) DA time, which involved remaining jailed due to inability to make bail or bond.<sup>257</sup> On an average day, almost 6,500 individuals were housed in the Orleans Parish Prison (OPP), making it one of the largest local jails in the United States—despite New Orleans being only the thirty-fifth most populous city.<sup>258</sup> Over half of OPP’s population consisted of

251. Guidry, *supra* note 250, at 1163 (citing LA. CODE CRIM. PROC. ANN. art. 944(a) (2008)). Compare U.S. CONST. art. 1, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”), and LA. CONST. art. 1, § 21 (“The writ of habeas corpus shall not be suspended.”), with LA. CODE CRIM. PROC. ANN. art. 945(B) (2012) (“Venue for a writ of habeas corpus for an individual whose physical custody has been transferred as a result of the circumstances which are the basis for the emergency session shall be in the parish of East Baton Rouge.”).

252. See Varnado & Ciolino, *supra* note 39, at 8.

253. See generally Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127 (2006) (criticizing actions of the Louisiana judicial, executive, and legislative branches for systematic failures following Katrina). *But cf.*, Guidry, *supra* note 250, at 1155–67 (asserting that the Louisiana Supreme Court met daily and took on new duties in an effort to protect the constitutional rights of criminal defendants in the immediate aftermath of Katrina).

254. Hon. Sarah S. Vance, *Justice After Disaster – What Hurricane Katrina Did to the Justice System in New Orleans*, 51 HOW. L.J. 621, 622 (2008).

255. Waldron, *supra* note 215, at 5.

256. Phyllis E. Mann, *Hurricanes Katrina and Rita – A Year Later In Louisiana*, CHAMPION, Dec. 2006, at 6, 8.

257. *Id.*

258. NAT’L PRISON PROJECT, AM. CIVIL LIBERTIES UNION, ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 13 (2006) [hereinafter NPP REPORT] (citing PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 2088081, PRISON AND JAIL INMATES AT MIDYEAR 2004, at 10 (2005), available at <http://www.opj.usdoj.bjs/pub/pdf/pjim04.pdf>), available at <http://www.aclu.org/files/pdfs/prison/oppreport20060809.pdf> (noting that OPP is the ninth largest local jail in the United

people arrested for traffic violations, municipal violations, minor offenses such as public intoxication, failure to pay a fine, or attachments, with most of the prisoners being pre-trial detainees who had not been convicted of any crimes.<sup>259</sup>

In the devastation and confusion caused by Katrina, thousands of OPP prisoners were scattered in jails and prisons across Louisiana, where allegations of mistreatment and disregard of the prisoner's rights were widely reported.<sup>260</sup> Many of the OPP prisoners began doing what became known as "Katrina time"—remaining in jail or prison, in many cases without being charged or arraigned, for period of time far exceeding the maximum sentence they would have received if they had been found guilty.<sup>261</sup>

Garrett and Tetlow contend that even if habeas corpus was not explicitly suspended in Louisiana, it was all but extinguished for these prisoners:

After Katrina, thousands languished in state prisons for months, awaiting a chance to meet with an attorney and a decision of whether the prosecutor would proceed (required under state law within sixty days). Without any legislative suspension of habeas corpus, the state court system suspended its rules and failed to hold any hearings regarding the prisoners. Only a few state courts haltingly granted habeas petitions and ordered release of prisoners. And again, most prisoners had no access to counsel and only a few were represented by counsel to file habeas petitions. Worse, when a few trial judges did approve the grant of habeas corpus petitions, the Louisiana Supreme Court reversed and delayed the releases, citing its suspension of court deadlines. Federal courts granted relief to only a few prisoners.<sup>262</sup>

No criminal trials were held in New Orleans between September 2005 and June 2006.<sup>263</sup> In the years since Katrina, some courts found that the delays in arraignments and other criminal processes caused by Katrina were justifiable. For example, in *State v. Watson*,<sup>264</sup> the defendant argued that his rights were prejudiced when he was incarcerated for ten months without arraignment or

States); *but see* Garrett & Tetlow, *supra* note 253, at 135 (noting that OPP is the seventh largest jail in the country). The actual numbers of prisoners at OPP when Katrina struck are unclear, ranging from 6,021 to almost 8,000. NPP REPORT, *supra*, at 29 (citing JEFFREY A. SCHWARTZ & DAVID WEBB, TA NO. 06P1035, HURRICANES KATRINA AND RITA AND THE LOUISIANA DEPT. OF PUBLIC SAFETY AND CORRECTIONS: A CHRONICLE AND CRITICAL INCIDENT REVIEW 19 (May 10, 2006), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_katrinanicreport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_katrinanicreport.authcheckdam.pdf)).

259. NPP REPORT, *supra* note 258, at 13.

260. *Id.* at 73–87 (citations omitted).

261. Garrett & Tetlow, *supra* note 253, at 128, 139, 148 (citation omitted); *see also* Mann, *supra* note 256, at 8.

262. *Id.* at 157–58.

263. NPP REPORT, *supra* note 258, at 88 (citing DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 1 (2006)).

264. *State v. Watson*, 993 So. 2d 779 (La. Ct. App. 2008).

advice of counsel.<sup>265</sup> Following Katrina, Watson was moved to a number of different prisons, and while some were able to conduct video arraignments, the state did not believe the facility in which Watson held access to such facilities, which the State argued constituted just cause for delay.<sup>266</sup> The state contended that Watson’s constitutional right to a speedy trial was not violated because the delay was not presumptively prejudicial—Watson was unable to show any particular prejudice from the delay, and the delay was beyond the control the state.<sup>267</sup> The trial court, taking judicial notice of the hurricane and of the difficulties regarding transporting inmates, found that there was justifiable reason for the delay in the arraignment and the court of appeals affirmed its judgment.<sup>268</sup>

The ABA issued “The Rule of Law in Times of Major Disaster,” consisting of twelve principles (ROL Principles), in 2007.<sup>269</sup> The purpose of the ROL Principles is to ensure that the rule of law is preserved following a disaster.<sup>270</sup> The ROL Principles note that, while the executive and legislative branches declare and respond to a disaster, “it is the responsibility of the organized courts, bar, prosecutors, public defenders, providers of legal services to the poor, and individual lawyers to insure that society’s response conforms with the dictates of law and fairness.”<sup>271</sup> The first ROL Principle is that “[t]he rule of law must be preserved when a major disaster occurs.”<sup>272</sup> Other ROL Principles note that planning and preparation is required to preserve the rule of law,<sup>273</sup> and that the requirements of the Constitution must be respected in times of major disaster—with special attention to criminal prosecution.<sup>274</sup> Some of the ROL Principles are blunt: “Major disasters do not abrogate the Constitution.”<sup>275</sup> The notes discussing the ROL Principles acknowledge the failures of the justice system post-Katrina, noting that “[i]n the event of a major disaster, public authorities must continue to process those accused or convicted of misdemeanors in a prompt and orderly manner consistent with the requirements of the Constitution. Where such processing is rendered impracticable commutation should be the preferred response.”<sup>276</sup>

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265. *Id.* at 785.

266. *Id.* at 786.

267. *Id.* at 785–86.

268. *Id.* at 786 (citing LA. CODE CRIM. PROC. ANN. art. 701(E) (2007); *Kimbrough v. Cooper*, 915 So. 2d 344 (La. 2007) (per curiam)).

269. AM. BAR ASS’N, RULE OF LAW IN TIMES OF MAJOR DISASTER 1 (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/disaster/docs/rol\\_in\\_times\\_of\\_disasters.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/disaster/docs/rol_in_times_of_disasters.auth_checkdam.pdf).

270. *Id.* at 2. The ABA specifically referenced the literal collapse of the justice system following Katrina as one of the reasons the ROL Principles were created. *Id.*

271. *Id.* at 3.

272. *Id.*

273. *Id.*

274. *Id.* at 5.

275. *Id.*

276. *Id.*

C. *International Law and the Right to Return*

In the years after Katrina, the displacement of people from New Orleans has resulted in what many called the Katrina diaspora.<sup>277</sup> The true numbers of people displaced from the Gulf Coast is unknown.<sup>278</sup> Yet as Professor Waysdorf noted, despite the hundreds of thousands evacuated by numerous agencies, no agency has tracked the subsequent relocation, placement, or welfare of the former residents.<sup>279</sup>

An intriguing point of international law has bearing on the status and protections afforded to those displaced by disaster. Often times, people such as those who fled the Gulf Coast due to Katrina and Rita are termed refugees, yet many object to that label for good reason: under international law, people displaced by natural and other disasters are properly considered internally displaced persons (IDPs).<sup>280</sup> According to Frederick Kirgis:

No specific international convention (treaty) protects the rights of persons displaced within their own national borders by natural disasters or other causes. Nevertheless, as individuals who have not left their own country, they remain entitled to the full range of human rights that are applicable to the citizens of that country.<sup>281</sup>

The Guiding Principles of Internally Displaced Persons<sup>282</sup> (Guiding Principles) were submitted to the United Nations Commission on Human Rights in 1998, and while they are not established by treaty, the United Nations General Assembly has stated that the Guiding Principles are an important framework for the protection of IDPs.<sup>283</sup> As Professor Kirgis describes them, “[t]he Guiding Principles cover all three phases of displacement, namely protection against

277. See Susan L. Waysdorf, *Returning to New Orleans: Reflections on the Post-Katrina Recovery, Disaster Relief, and the Struggle for Social Justice*, 12 UDC/DCSL L. REV. 3, 12 (2009) (citing Rick Jervis & Brad Heath, *FEMA Spends Nearly \$3B to House Hurricane Victims*, USA TODAY, Aug. 26, 2008, at 1A).

278. The 2008 population of New Orleans was at 72% of its pre-Katrina populace of 450,000. See Rick Jervis, *New Orleans' Population May Have Hit Plateau*, USA TODAY, Aug. 4, 2008, [http://usatoday30.usatoday.com/news/nation/2008-08-04-neworleans\\_N.htm](http://usatoday30.usatoday.com/news/nation/2008-08-04-neworleans_N.htm). Two years later, the population was still 29% less than it was before Katrina. See ALLISON PLYER & ELAINE ORTIZ, GREATER NEW ORLEANS CMTY. DATA CTR., *THE NEW ORLEANS INDEX AT SIX: MEASURING GREATER NEW ORLEANS' PROGRESS TOWARD PROSPERITY* 6 (Aug. 2011).

279. Waysdorf, *supra* note 277, at 35.

280. See Frederic L. Kirgis, *Hurricane Katrina and Internally Displaced Persons*, ASIL INSIGHTS, Sept. 21, 2005, at para. 1, available at <http://www.asil.org/insights050921.cfm>.

281. *Id.* at para. 4.

282. Representative of the U.N. Secretary-General, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement>.

283. Kirgis, *supra* note 280, at para. 8.



displacement, protection during displacement, and the post-displacement phase.”<sup>284</sup> Kirgis also explains that, during these phases, the main duty to ensure the protection of IDPs falls on national authorities, not international authorities.<sup>285</sup>

The Guiding Principles define IDPs as persons who were forced to flee their homes or dwellings to avoid armed conflict, natural disasters or man-made disasters, and who have not crossed an international boundary.<sup>286</sup> Under the Guiding Principles, IDPs have a right to return: the relevant authorities have the duty and responsibility to establish conditions and means to allow IDPs to “return voluntarily, in safety and with dignity” to their homes or to allow them to resettle in another part of the country.<sup>287</sup> IDPs are also entitled to housing, education, and medical services, including mental health and social services.<sup>288</sup>

The Guiding Principles’ recognition of an IDP’s “right to liberty of movement and freedom to choose his or her residence,” and “[t]he right to seek safety in another part of the country,”<sup>289</sup> parallels the right to freedom of travel<sup>290</sup>—a due process guarantee of the Fifth and Fourteenth Amendments recognized by the Supreme Court.<sup>291</sup> The proposition that “the right to flee from a hazardous disaster area is not just implicit in the concept of ordered liberty, it is essential to human dignity,”<sup>292</sup> was clearly evidenced after Katrina.<sup>293</sup> When people attempted to cross the Crescent City Connection Bridge—connecting New Orleans to the neighboring Gretna—they were met with barricades and armed law enforcement officers who demanded that they return to New Orleans.<sup>294</sup> The right to flee argument has not fared well in the courts, however, as several lawsuits filed relating to the blockage of the bridge were dismissed for various reasons, including: (1) finding that the constitution does not guarantee a right to *intrastate* travel;<sup>295</sup> (2) finding that the City of Gretna—the nearest city

284. *Id.* at para 11.

285. *Id.* In comparison to IDPs, someone classified as a refugee (a person who fled across a border because of persecution) can draw upon an established international system of protection and aid. See Roberta Cohen, *Time for the United States to Honor International Standards in Emergencies*, BROOKINGS (Sept. 9, 2005), <http://www.brookings.edu/research/opinions/2005/09/09hurricanekatrina-cohen>.

286. *Guiding Principles*, *supra* note 282, at 5.

287. *Id.* at 14.

288. *Id.* at 11, 12.

289. *Id.* at 9–10.

290. See Rebecca Eaton, Comment, *Escape Denied: The Gretna Bridge and the Government’s Armed Blockade in the Wake of Katrina*, 13 TEX. WESLEYAN L. REV. 127, 163 (2006).

291. See *Jones v. Helms*, 452 U.S. 412, 418–19 (1981) (citing *Williams v. Fears*, 179 U.S. 270, 272 (1900)).

292. Eaton, *supra* note 290, at 173.

293. See *id.*

294. Carol Kopp, *The Bridge to Gretna*, 60 MINUTES (Feb. 11, 2009, 6:55 PM), <http://www.cbsnews.com/stories/2005/12/15/60minutes/main1129440.shtml>.

295. See *Dickerson v. City of Gretna*, No. 05-6667, 2007 WL 1098787, at \*1, \*3 (E.D. La. Mar. 30, 2007) (citing *Wright v. City of Jackson*, 506 F.2d 900, 901–02 (5th Cir. 1975)) (declining to find a constitutional right of intrastate travel); see also *Cantwell v. City of Gretna*, No. 06-9243,

adjacent to New Orleans in Jefferson Parish—had no food, water, or supplies to provide to people who came to Gretna;<sup>296</sup> and (3) finding that there was a plausible policy reason to not allow pedestrian traffic on a vehicles-only bridge, while allowing vehicular traffic to pass without issue.<sup>297</sup>

While the Guiding Principles have not been officially adopted by the United States Congress,<sup>298</sup> doing so would provide additional protections respecting and protecting the dignity of those displaced by disaster.<sup>299</sup> Professor Waysdorf proposes the same, suggesting that updating national legislation and disaster law to include the Guiding Principles would reduce the impact, suffering, and trauma of those affected by disaster.<sup>300</sup> Adopting the Guiding Principles—or similar guidelines, including human rights—in the United States, or even similar laws in individual states, would serve to decrease vulnerability by increasing the ability of a population to recover from disaster.

#### *D. Post-Disaster Social Justice*

In times following disasters, separate from the ideals of professionalism and the requirements of the ethical rules, attorneys are well placed to ensure that social justice is carried out to protect society as a whole.<sup>301</sup> The right to practice law gives attorneys the ability to aid people in true need and those affected by disaster, particularly communities and groups that were already vulnerable before a disaster occurred.

In his list of ten lessons from disasters, Professor Munneke included “share in community healing,” noting that attorneys often take major leadership roles in helping communities recover.<sup>302</sup> According to Munneke, “Transactional business lawyers, whose clients are frequently the victims of the same forces that harm lawyers, have a special obligation to serve these clients in times of crisis in

2007 WL 4256983, at \*3 (E.D. La. Nov. 30 2007) (dismissing the cause of action regarding *intrastate* travel, but denying the 12(b)(6) motion to dismiss claims relating to *interstate* travel).

296. *Alexander v. City of Gretna*, No. 06-5405, 2008 WL 5111152, at \*6 (E.D. La. Dec. 3, 2008) (granting summary judgment and denying plaintiffs’ right to travel claims).

297. *Id.*

298. See Kirgis, *supra* note 280, at para. 8.

299. Waysdorf, *supra* note 277, at 37.

300. *Id.*

301. Professor Rodes defined social justice as:

[T]hat branch of the virtue of justice that moves us to use our best efforts to bring about a more just ordering of society—one in which people’s needs are more fully met. It solves the problem of assignability because it is something due from everyone whose efforts can make a difference to everyone whose needs are not met as things stand. I do not owe the man on the grate a place to live, but I do owe him whatever I can do to provide a social order in which housing is available to him. I do not owe any poor person a share of my wealth, but I owe every poor person my best effort to reform the social institutions by which I am enriched and he or she is impoverished.

Robert E. Rodes, Jr., *Social Justice and Liberation*, 71 NOTRE DAME L. REV. 619, 620–21 (1996).

302. Munneke, *supra* note 35, at 26 (stating that “lawyers play a major role in helping to heal the community at large”).

order to restore these businesses to functionality and commerce to the community at large.<sup>303</sup> As Professor Verchik describes, a free society is obligated to reduce risk to communities and relieve social vulnerability, and the failure to provide such relief constitutes an injustice.<sup>304</sup> Social justice is also a major concern underlying Professor Waysdorf's assertion that "we cannot allow our inner cities to become such highly concentrated poverty areas, segregated by race, and then be surprised when they are so vulnerable to disasters both natural and man-made."<sup>305</sup>

According to the ABA's Center on Children and the Law, 4,940 children—some of whom were in foster care—were initially reported as missing or displaced.<sup>306</sup> Of that group, 4,455 children were located.<sup>307</sup> According to Siobhan Morrissey, "When children are missing from foster care—kids who have been abused, neglected or abandoned—they are the most vulnerable."<sup>308</sup> Working with the National Center for State Courts and the National Council of Juvenile and Family Court Judges, the center developed a project that sought to "locate any children who were separated from their foster families during the turmoil after Katrina, identify lawyers with expertise in child welfare who will be available to volunteer their services following disasters, and assess the legal issues that arise in the wake of widespread disasters."<sup>309</sup>

Other vulnerabilities were revealed when President George W. Bush suspended the provisions of the Davis Bacon Act<sup>310</sup>—which governs pay for workers on federal contracts, in areas affected by Hurricane Katrina and Rita—claiming that it was done to hasten cleanup and reconstruction.<sup>311</sup> This decision led to exploitation and lack of legal protections for illegal migrant workers who came to the Gulf Coast for work in rebuilding.<sup>312</sup> Ultimately, civil rights organizations, such as the Southern Poverty Law Center, filed suit on behalf of

303. *Id.* at 23. Munneke suggests that business law firms and attorneys are in a better position to help their clients overcome consequences of a disaster because, by virtue of providing legal services instead of goods, the firms are more flexible and portable. *Id.* at 23–24.

304. See Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENVTL. L. & POL'Y F. 23, 52 (2012).

305. Waysdorf, *supra* note 277, at 23.

306. Siobhan Morrissey, *ABA Answers the Call: YLD and Other Association Entities Address Legal Needs of Katrina Victims*, A.B.A. J., Feb. 2006, at 66, 66–67.

307. *Id.* at 67.

308. *Id.*

309. *Id.* at 66–67.

310. 40 U.S.C. §§ 3141–3148 (2006) (original version at ch. 411, 46 Stat. 1494 (1931)).

311. See Thomas B. Edsall, *Bush Suspends Pay Act In Areas Hit by Storm*, WASH. POST, Sept. 9, 2005, at D03, available at 2005 WLNR 27761609.

312. See generally Haley E. Olam & Erin S. Stamper, Note, *The Suspension of the Davis Bacon Act and the Exploitation of Migrant Workers in the Wake of Hurricane Katrina*, 24 HOFSTRA LAB. & EMP. L.J. 145 (2006) (explaining the effects of the Davis Bacon Act's suspension on local and migrant workers).

large groups of migrant workers, seeking payment for wages that were not paid in accordance with state and federal laws.<sup>313</sup>

Some of the finest examples of professionalism and ensuring justice following Katrina and Rita came from law students, who created and operated the Student Hurricane Network (SHN).<sup>314</sup> From December 2005 to early 2009, over 5,500 law students traveled to the Gulf Coast, performing work that included gutting homes and clearing rubble, interviewing incarcerated defendants “who had slipped through the cracks and had been left in wait for months to speak to a lawyer,” and talking with FEMA trailer park residents and inquiring as to what they needed most for aid.<sup>315</sup> Professor Colbert heartily praised the work of law students and the SHN post-Katrina, saying that they “performed admirably and in the highest tradition of the legal profession,” and while they “knew little of a profession’s ethical code or aspirational goals [t]hey acted from a sense of what was right and morally necessary from members of a ‘noble’ profession.”<sup>316</sup>

But many times in the aftermath of a disaster, decisions about justice and the question of what role an attorney plays become deeply personal. Returning to Glenn McGovern’s post-Katrina experiences, McGovern found himself faced with the critical decision many attorneys and firms must make following a disaster: whether to stay and rebuild or leave.<sup>317</sup> As he describes it:

Any lingering doubts about my decision to stay and rebuild were removed when I received a phone call from a client who started crying when she heard my voice. “I thought you were dead when I couldn’t reach you,” she cried. “I am in Atlanta. I lost everything. My mom lost her house. Can you still help us?” I choked up. “Sure,” I said. “I’m not leaving. Maybe later I will relocate but I will help you now. That’s what I’m here for.” I had not fully realized others’ need for me until that moment.<sup>318</sup>

McGovern also received calls from his condominium association informing him that twenty-five of their businesses had been lost in the hurricane, the

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313. See *Case Docket: Rodrigues et al. v. Belfor USA Group Inc.*, S. POVERTY L. CENTER, [http://www.splcenter.org/get-informed/case-docket/rodrigues-et-al-v-belfor-usa-group-inc#.UdCxI\\_nVCpc](http://www.splcenter.org/get-informed/case-docket/rodrigues-et-al-v-belfor-usa-group-inc#.UdCxI_nVCpc) (last visited Nov. 3, 2013).

314. The SHN was “a national network of law students dedicated to advancing the cause of social justice in communities affected by Hurricanes Katrina and Rita by coordinating volunteer efforts, aiding public interest organizations, and educating members of the legal community about legal crises in the region.” See *About the Student Hurricane Network*, STUDENT HURRICANE NETWORK, <http://www.studentjustice.org/about/> (last visited Nov. 3, 2013).

315. *SHN Dissolution Announcement*, STUDENT HURRICANE NETWORK, <http://www.studentjustice.org/> (last visited Nov. 3, 2013).

316. Colbert, *supra* note 166, at 740.

317. McGovern, *supra* note 47, at 808.

318. *Id.*

manager had resigned, the other owners had scattered, and nobody knew where to start.<sup>319</sup> McGovern had experience as a building contractor before going to law school and felt that he could help.<sup>320</sup> He recovered the flood proceeds for the condo association; called a meeting to vote to rebuild (with 80% of the owners voting “yes”); negotiated a partial settlement on wind and roof damage claims; obtained building costs and estimates; found a bonded contractor; and, obtained a building permit for the property.<sup>321</sup>

Clearly, the legal profession often times has equal successes and failures when called on to aid those in need following disasters. To tilt this scale towards more successes in the event of future disasters, the profession must first recognize that it serves as a front line of defense in preventing injustice. Awareness of the risks to the rule of law and the system of justice following large-scale disasters is certainly part of this. However, a greater emphasis on social justice and ensuring that those displaced by disaster are guaranteed basic human rights is also necessary. Attorneys who might not normally think their skills are useful following a disaster should be encouraged to reassess their positions. Recognizing that any attorney may be capable of providing legal services in an emergency—not just when asked, but when a great need merits assistance without prompting—aids not just those in need. Providing assistance upholds the principles of civility and professionalism that guide the legal profession.

## VII. CONCLUSION

Americans are no longer just post-Katrina, Rita, and September 11. The United States post-Hurricanes Ike, Gustav, and Sandy, post-Moore and Joplin tornados, post-Boston Marathon bombing, post-Quebec oil train derailment and explosion, and post-Yarnell Hill and the loss of nineteen wilderness firefighters there. In each instance, a disaster occurs, painful reminders are brought to the forefront. Every time, questions arise regarding whether preparation was sufficient, whether the capacity existed to prevent or minimize damage, as well as what could have been done, or what can be done in anticipation of future disasters.

The kind of disaster an attorney may face potentially has no limits, whether natural, technological, or other. But the effects that a disaster can have on a law practice can be contained, thus resulting in compliance with the Model Rules and a corresponding reduction in possible malpractice suits based on negligence. Moreover such preparation minimizes the effects of a disaster on clients.

Yet the broader question remains: what can attorneys do before or after a disaster to ensure that the rule of law and the concept of justice are present and

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319. *Id.*

320. *Id.*

321. *Id.*

protected? Are failures of the justice system—such as regrettably introducing Katrina time into the legal lexicon—offset by the remarkable efforts of the law students of the Student Hurricane Network? Are attorneys capable of reaching past their own specialties to ensure access to justice for those most affected by disaster? These questions may require a deeper individual analysis and an application of one's own morals and values, coupled with the high principles that so many in the legal profession aspire and reach towards. Hopefully, after finding an answer members of the legal profession can take steps towards a stronger sense of justice, so that in the aftermath of a disaster, the harsh results are minimized while the rule of law prevails.