

# Reconsidering Lawyers' Ethical Obligations in the Wake of a Disaster

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As Hurricane Katrina barreled towards the Gulf Coast in the last days of August 2005, few were truly prepared for the destruction to property and lives that would be left in its wake. In the storm's aftermath, entire communities of citizens faced rebuilding their homes and their lives as they had known them. Like the communities at large, many members of the Gulf Coast's legal profession had not prepared their offices or their practices for such a catastrophic event as Hurricane Katrina. As a result, in addition to the challenge of rebuilding their personal lives, these professionals faced the additional challenge of attempting to rebuild their professional lives.

Almost four years have passed since Hurricane Katrina forever changed the lives of those in the legal communities of the Gulf Coast. Gulf Coast lawyers learned many lessons from that particular disaster. But, what, if anything, did law firms and individual lawyers do to ensure that the next disaster would not paralyze their professional lives? Did they implement disaster plans? Did they learn from history so as to avoid repeating it?

These questions remain critically important for lawyers in the Gulf Coast region, where storms threaten every hurricane season. They should, however, be important to lawyers nationwide. The entire country witnessed Hurricane Katrina's impact and lawyers anywhere could, one day, face their own disaster. Given the lessons learned from Hurricane Katrina, are a lawyer's professional obligations heightened? After enduring (at worst) or witnessing (at best) a natural disaster's impact on legal communities, are lawyers nationwide on notice of the potential problems accompanying any disaster? If so, what obligations do they have to take action to protect their clients from such problems? Has a lawyer, who is on notice but who takes no action, violated his ethical obligations?<sup>1</sup>

Using the lessons learned from Hurricane Katrina, this article considers these questions with a look back to the legal ethics issues that arose in the storm's aftermath, and to the subsequent responses by governments and professional organizations. In particular, Part I addresses the post-disaster issues associated with: (1) the legal deadlines threatened and/or missed because of Hurricane Katrina; (2) the unauthorized practice of law by displaced Gulf Coast lawyers and those from elsewhere who visited the Gulf Coast region to offer pro bono legal advice or assistance to disaster victims; and (3) the ethical obligations of volunteer lawyers offering pro bono legal advice and assistance to disaster victims via hotlines.

Part II looks forward to the post-Katrina world to consider

some of the ethical obligations imposed upon lawyers nationwide in light of the lessons learned from that particular natural disaster. Part II focuses on a lawyer's ethical duties to prepare for disaster and how a failure to do so may, in some circumstances, violate some jurisdictions' rules of professional conduct. Additionally, it addresses the ethical—and perhaps moral—obligation of lawyers to offer pro bono advice and/or assistance in the wake of a disaster.<sup>2</sup>

## Part I: Looking Back: Ethical Issues Highlighted by Hurricane Katrina and the Reactions Thereto

"The hurricanes of 2005 were 'an implosion of the legal network not seen since disasters like the Chicago Fire of 1871 or the San Francisco Earthquake of 1906, events in times so much simpler as to be useless in making much sense of this one.'<sup>3</sup> Hurricane Katrina, in particular, ravaged the legal system by leaving Gulf Coast courtrooms and law firms inundated with water.<sup>4</sup> Because the legal community was truly unprepared for the destruction that Hurricane Katrina left in its wake, it faced many unforeseen problems and issues, including: (1) legal deadlines threatened or missed by the storm; (2) unauthorized practice of law issues concerning both displaced Gulf Coast lawyers and outside lawyers seeking to offer pro bono advice and assistance to the disaster victims; and (3) ethical issues affecting volunteer lawyers offering legal advice and assistance via hotlines. Luckily for lawyers, state bodies and professional organizations did the one thing they could to help these lawyers and protect the interest of their clients: react.

### *Legal Deadlines*

As every person trained in the practice of law is well aware, "[a] lawyer has many important obligations, including those which relate to . . . responding to deadlines."<sup>5</sup> Yet in the aftermath of Hurricane Katrina, many Louisiana lawyers were left homeless and officeless. Under such circumstances, fulfilling the obligation to timely meet legal and court-imposed deadlines was virtually impossible, yet as a general proposition "neither hurricanes nor other natural disasters delay or toll the statute of limitations."<sup>6</sup> Luckily for the Louisiana lawyers concerned about threatened or missed legal deadlines (as they may affect their clients or the lawyers themselves), the Louisiana Supreme Court and Governor Kathleen Babineaux Blanco, at the request of various professional organizations, quickly responded by suspending legal deadlines. This quick reaction by Louisiana leaders protected the shell-shocked lawyers and ultimately, their clients, from the consequences of any missed deadlines.

One day after Hurricane Katrina made landfall, the Louisiana Supreme Court issued an emergency order

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freezing deadlines and court proceedings through at least September 9, 2005.<sup>7</sup> Immediately, professional organizations in Louisiana, including the Louisiana State Bar Association, the Louisiana Trial Lawyers Association, and the Louisiana Association of Defense Counsel, requested that Governor Blanco offer further relief from the deadlines imposed by the law.<sup>8</sup> In response, on September 6, 2005, eight days after Hurricane Katrina struck, Governor Blanco issued Executive Order No. KBB 2005-32, suspending all deadlines, including but not limited to liberative prescription<sup>9</sup> and peremption,<sup>10</sup> in legal proceedings until at least September 25, 2005.<sup>11</sup> Importantly, this executive order mandated that the suspension have retroactive effect back to the date of the storm, August 29, 2005.<sup>12</sup>

On September 23, 2005, Governor Blanco offered further relief by virtue of Executive Order No. KBB 2005-48. This executive order amended Executive Order No. KBB 2005-32 to extend the existing suspension of legal deadlines for an additional thirty days.<sup>13</sup> During these thirty days, Governor Blanco realized that the Louisiana legislature would have no opportunity to offer relief from legal deadlines until its special session scheduled for November 6, 2005 through November 18, 2005; as a result, she issued Executive Order No. KBB 2005-67 on October 19, 2005.<sup>14</sup> This executive order suspended “liberative prescriptive and preemptive periods” statewide until at least Friday, November 25, 2005.<sup>15</sup>

These quick reactions of the Louisiana Supreme Court, professional organizations, and Governor Blanco assisted Louisiana lawyers and ultimately protected their clients from the disastrous implications of missing a prescriptive or preemptive deadline.

### *Unauthorized Practice of Law Issues*

Hurricane Katrina brought another issue to the forefront: multijurisdictional practice. Every lawyer is aware that each state has its own statutes, ethics rules, and disciplinary rules that regulate bar admission and the lawyers authorized to practice law within state boundaries.<sup>16</sup> Furthermore, each state has its own ethics rule(s) and/or statute(s) defining the allowable parameters of the practice of law by lawyers not licensed to practice in that state.<sup>17</sup> However, the Gulf Coast region saw a mass exodus of lawyers fleeing Hurricane Katrina, and shortly thereafter, the region desperately needed volunteer lawyers to help disaster victims begin rebuilding their lives. The multijurisdictional rules, as they existed in most states at that time, did not address either of the above situations and left both sets of lawyers—the displaced lawyers needing to continue their practice of law outside of their state of licensure and the volunteer pro bono lawyers seeking to enter the Gulf Coast—concerned about the ethical implications of their future plans.

#### **1. The State of the Model Rules as of August 29, 2005**

Prior to 2002, unauthorized practice rules were left solely to the laws of individual states.<sup>18</sup> However, in 2000, in light of the realities of modern communication, travel technology,

and the needs of lawyers and clients, the ABA Commission on Multijurisdictional Practice (“Commission”) began studying various multijurisdictional practice issues.<sup>19</sup> In 2002, the Commission presented to the ABA House of Delegates an amended version of Model Rule of Professional Conduct (“Model Rule”) 5.5, and the ABA House of Delegates approved it.<sup>20</sup> Like its predecessor, the 2002 version of Model Rule 5.5 acknowledges each state’s authority to regulate the practice of law within its borders.<sup>21</sup> Additionally, this version of Model Rule 5.5 goes further than its predecessor rule by providing that a lawyer not admitted to practice in a state shall not “establish an office or other systemic and continuous presence” in that state for the practice of law.<sup>22</sup> However, by adding the modifier “except as authorized by these Rules or other law,” the 2002 version of Model Rule 5.5 allows for exceptions to the absolute prohibition on offices and/or other systemic and continuous presences outside of a lawyer’s home state.<sup>23</sup> Several of these exceptions are found within the text of Model Rule 5.5 itself, which allows a lawyer who is admitted to practice in one state and not disbarred or suspended from practice in any other state to temporar-

**The new provisions did not contemplate the problems that would arise in the wake of any major disaster.**

ily provide legal services in a jurisdiction where he is not licensed where his services: (1) are undertaken in association with a lawyer admitted to practice in the jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in the jurisdiction or another jurisdiction, if the lawyer is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in the jurisdiction or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction which the lawyer is admitted to practice and are not services for which the jurisdiction requires *pro hac vice* admission; or (4) arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.<sup>24</sup> Also, the 2002 version of Model Rule 5.5 allows in-house corporate and government lawyers providing services to their employers and lawyers in federal practice to practice in jurisdictions where they are not licensed.<sup>25</sup> Despite expanding a lawyer’s rights to temporarily practice in a jurisdiction in which he holds no license, the new provisions of the 2002 version of Model Rule 5.5 did not contemplate—and as such, did not address—the problems that would arise in the wake of Hurricane Katrina or any other major disaster.<sup>26</sup>

## 2. The Ethical Problems for Displaced Lawyers

Hurricane Katrina forced many Louisiana lawyers to flee their home state, leaving behind their homes and offices. An estimated fifty percent of Louisiana's practicing lawyers lost homes, offices, or both as a result of the storm.<sup>27</sup> Many relocated to states where they were not licensed to practice law, and lawyers in those states graciously stepped forward to offer these displaced lawyers free workspace<sup>28</sup> and other assistance. Yet in the face of their colleagues' generous offers, displaced Louisiana lawyers were burdened with concern over the ethical implications of accepting the generosity of their out-of-state colleagues. Guidance offered by the comments to the 2002 version of Model Rule 5.5 did little to assuage their fears, as one comment specifically directed that even a lawyer satisfying the safe harbors discussed above would not be allowed to set up an office in a host state.<sup>29</sup> Thus, even under the 2002 version of Model Rule 5.5, a lawyer forced to flee his home state and temporarily set up an office in a state where the lawyer was not licensed to practice law—like many of the displaced Gulf Coast lawyers—would, in most cases, stand in violation of his ethical obligations by doing so.

Compounding the problem was the fact that approximately half of the states had not yet amended their ethics rules to reflect the 2002 amendments to Model Rule 5.5.<sup>30</sup> As such, in those states, the predecessor of the 2002 version of Model Rule 5.5 was in place, and any lawyer unlicensed in those states would be unauthorized to practice law under the Model Rules. Moreover, of the states that had acted upon the 2002 amendments to Model Rule 5.5, some had chosen to impose additional requirements that an out-of-state lawyer would

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have to satisfy before availing himself of Model Rule 5.5's safe harbors.<sup>31</sup> For example, California's version of Model Rule 5.5 required that a lawyer be licensed in a state other than California and also maintain an office in that state; New Jersey required that out-of-state lawyers maintain a bona fide office in a jurisdiction in the United States.<sup>32</sup>

Reaction to the problem was swift. Within five days of Hurricane Katrina's landfall, on September 2, 2005, the Supreme Court of Texas ordered that "an attorney holding a valid law license issued by Louisiana, Mississippi, or Alabama, who is in good standing with the lawyer's respective state bar, and who is displaced from the lawyer's home jurisdiction due to Hurricane Katrina, is permitted to practice law for 30 days from the date of this order from a location in Texas as if the lawyer were located in the state in which

the lawyer is licensed."<sup>33</sup> A week later, on September 9, 2005, the President of the ABA, Michael S. Greco wrote to the President of the Conference of Chief Justices, urging the states' high courts to authorize displaced lawyers to establish temporary offices for the practice of law in other states.<sup>34</sup> Specifically, Mr. Greco asked the high court of each state to consider a rule that would allow displaced lawyers to practice outside of their home state for an extended period of time<sup>35</sup> and suggested that a six-month period of time would be reasonable.<sup>36</sup>

The high courts of almost half of the states, as well as the District of Columbia, responded by issuing nonuniform<sup>37</sup> emergency orders temporarily waiving the restrictions on unauthorized practice and granting to displaced lawyers the temporary authority to practice law in host states.<sup>38</sup> Other states responded by accelerating the effective date of their new ethics rules on multijurisdictional practice.<sup>39</sup> One state responded by lifting its requirement for applications *pro hac vice* and waiving the fee required for admission *pro hac vice*.<sup>40</sup>

Thus, additional professional disaster was averted for the displaced lawyers who now, under certain circumstances and in certain states, could at least attempt to begin to piece together their damaged law practices. At a minimum, under most circumstances, most of the displaced lawyers at least had authority from their host state to practice law in a limited fashion.

## 3. The Ethical Problems for Lawyers Offering Pro Bono Assistance

On the flip side of the multijurisdictional practice coin were the lawyers from elsewhere who wished to provide pro bono advice and assistance to the displaced and damaged residents of the Gulf Coast region in the wake of Hurricane Katrina but who lacked a license to practice law in the affected states. Realizing the enormity of the task of rebuilding, nearly 900 lawyers nationwide volunteered to help hurricane victims within two weeks of Hurricane Katrina and, within six months, almost 2000 lawyers had volunteered.<sup>41</sup>

Initially, these lawyers shared with their displaced Gulf Coast colleagues concerns regarding the unauthorized practice of law. Particularly, they feared that practicing law in a hurricane-ravaged state from which they held no license to do so could violate the ethics rules and unauthorized practice statutes of those affected states. After all, under the pre-2002 version of Model Rule 5.5, they were prohibited, unless allowed by the affected state, from practicing law there. And the 2002 version did little to help, as the safe harbors within it did not apply to—and hence did not protect—the generous pro bono out-of-state lawyers trying to assist in the recovery efforts of the Gulf Coast.<sup>42</sup>

However, by October 2005, courts in Louisiana,<sup>43</sup> Mississippi,<sup>44</sup> and Texas<sup>45</sup> had issued emergency orders permitting the altruistic out-of-state lawyers to enter these states and to temporarily provide pro bono legal assistance to hurricane victims.<sup>46</sup> Under these orders, out-of-state lawyers

were limited to providing temporary legal services related to the hurricanes, and these services could only be provided through specific state-based service providers and lawyer-supervised pro bono agencies.<sup>47</sup> Thus, these orders allowed the volunteer efforts of non-Gulf Coast lawyers to be realized and appreciated.

#### 4. *The ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*

Due to the ethical and statutory problems that Hurricane Katrina imposed upon displaced lawyers and out-of-state pro bono lawyers, on February 12, 2007, the ABA House of Delegates reacted by adopting the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (“Model Court Rule on Disasters”).<sup>48</sup> The Model Court Rule on Disasters addresses both of the multijurisdictional situations presented by Hurricane Katrina: (1) displaced lawyers temporarily seeking to practice in a host state; and (2) out-of-state lawyers offering pro bono assistance to the residents of affected states.<sup>49</sup> Ultimately, a lawyer who provides legal services pursuant to the Model Court Rule on Disasters, “shall not be considered to be engaged in the unlawful practice of law”<sup>50</sup> in a jurisdiction adopting that rule.

As to displaced lawyers seeking to practice in host states, the Model Court Rule on Disasters provides in pertinent part:<sup>51</sup>

Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer’s practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.<sup>52</sup>

The authority to practice law under this provision ends when the highest court of that jurisdiction “determines that the conditions caused by the major disaster in this jurisdiction have ended.”<sup>53</sup> However, a lawyer then representing clients in that jurisdiction pursuant to the above-referenced provision “is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients.”<sup>54</sup>

As to out-of-state lawyers offering pro bono assistance to disaster-affected states, the Model Court Rule on Disasters, provides:

Following the determination of an emergency affecting the justice system,<sup>55</sup> or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside

of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically designated by this Court.<sup>56</sup>

Like the right to temporarily practice law given to displaced lawyers, the right of out-of-state pro bono lawyers to temporarily practice law is limited temporarily by paragraph (d) of the rule, which provides that “the authority to practice law in a jurisdiction granted by paragraph (c) shall end [60] days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.”<sup>57</sup>

Lawyers providing legal services under either of the above paragraphs are subject to the disciplinary authority of the highest court of that jurisdiction in which they are temporarily practicing, as well as to that jurisdiction’s rules of professional conduct as provided in Rule 8.5 of the Model Rules of Professional Conduct.<sup>58</sup> Additionally, such lawyers are required, within 30 days from the commencement of the provision of legal services, to file a registration statement with the Clerk of the highest court of the jurisdiction in the form prescribed by that court.<sup>59</sup> Furthermore,

“[l]awyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.”<sup>60</sup>

To date, seven states<sup>61</sup> have adopted the Model Court Rule on Disasters, one has decided not to adopt it,<sup>62</sup> and nineteen states are in the process of considering it.<sup>63</sup>

#### *Hotlines: Public Opinion 05-RPCC-005<sup>64</sup>*

Another ethical issue brought to light by Hurricane Katrina was the problem of a lawyer volunteering advice and assistance via hotlines or advice booths sponsored by nonprofit organizations or courts. The Louisiana State Bar Association Ethics Advisory Service Committee (“Committee”) issued Public Opinion 05-RPCC-005 (“Opinion”) to address this very issue. By its own terms, the Opinion is limited in applicability to Louisiana-licensed lawyers who would provide such advice to Louisiana-based disaster victims with

respect to matters of Louisiana law.<sup>65</sup> Thus, its ultimate decision<sup>66</sup> is essentially unimportant to non-Louisiana lawyers. Nevertheless, it offers an insightful analysis of four ethical situations triggered by volunteer lawyers offering advice and assistance by hotlines: (1) competence (Louisiana Rule of Professional Conduct 1.1); (2) conflicts in short-term limited legal services situations (Louisiana Rule of Professional Conduct 6.5); (3) legal advice to callers already represented by counsel (Louisiana Rule of Professional Conduct 4.2); and (4) profit-motivated solicitation of victims (Louisiana Rules of Professional Conduct 7.1 and 7.3).<sup>67</sup>

The Committee's opening analysis addressed Louisiana Rule of Professional Conduct 1.1, which provides that a lawyer shall provide competent representation to his clients. The Committee noted that competent representation requires that a lawyer possess the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation.<sup>68</sup> The Committee warned that hotline callers are desperate for help and likely more vulnerable than average clients; thus the Committee discouraged lawyers who lacked the competence in the specific, relevant area of law from volunteering, as doing so could cause more harm than good.<sup>69</sup> Additionally, the Committee noted that those lawyers possessing some degree of competence should carefully limit the scope of their representation by advising the caller of the lawyer's limitations in the area of competency.<sup>70</sup> While recognizing a hotline lawyer's tendency to want to help, it warned such lawyers to be "extremely cautious" of offering advice on matters or

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areas of law with which they lack familiarity<sup>71</sup> and suggested that a hotline lawyer asked to provide advice in such a situation should instead refer the caller to a more competent lawyer or simply decline to offer advice on subjects outside the scope of the lawyer's competence.<sup>72</sup> Comment 3 to the ABA Model Rule of Professional Conduct 1.1 supports the Committee's advice by stating: "In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest."<sup>73</sup>

The Committee's analysis continued by addressing the applicability of Louisiana Rule of Professional Conduct 6.5's to legal advice offered over hotlines. This rule provides:

A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter . . . is only subject to Rules 1.7 and 1.9(a) [rules addressing conflicts of interest for current and former clients] if the lawyer knows that the representation of the client involves a conflict of interest; and . . . is subject to Rule 1.10 [imputation of conflicts] only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter. . . (b) Except as provided in paragraph (a)(2) Rule 1.10 is inapplicable to a representation governed by this Rule. . . .<sup>74</sup>

According to the Opinion, providing legal advice over a hotline or at a booth sponsored by a nonprofit organization—such as a state or local bar association or a court—would trigger Louisiana Rule of Professional Conduct 6.5.<sup>75</sup> The Committee's resolution is in line with Comment 1 to Model Rule 6.5, which explains that:

legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as *legal-advice hotlines*, . . . , a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation.<sup>76</sup>

However, the Committee warned lawyers to remain vigilant regarding conflicts and if a lawyer recognizes such a conflict, he should refrain from further consultation with the client with respect to the matter and refer the client to another lawyer.<sup>77</sup>

The Committee further addressed the issue of hotline lawyers communicating with persons already represented by counsel, specifically the implications of Louisiana Rule of Professional Conduct 4.2.<sup>78</sup> This rule prohibits a lawyer, in representing a client, from communicating about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the lawyer or the authority of the law or a court order.<sup>79</sup> The Opinion provided that if the client represented by another lawyer on one matter consults the hotline lawyer about a new matter, usually one involving a post-disaster issue, Rule 4.2 is not triggered at all, thus allowing the hotline lawyer to communicate with the client.<sup>80</sup> The Committee explained that in such a situation, the client is not, at the time the hotline call is made, yet represented by any lawyer with respect to the new matter.<sup>81</sup> Likewise, a hotline lawyer who encounters a client who is already represented by

a lawyer on a matter can communicate with that client about that same matter, as long as the hotline lawyer has no known or prior or reasonably anticipated client connection with the same matter or one substantially related to it—in which case Rule 1.7 or 1.9 would prevent the hotline lawyer from advising/assisting.<sup>82</sup> The Opinion justified its advice by noting that, even in times of no disaster, clients are fully allowed to seek second—and subsequent—legal opinions, and further that clients “should not be shunned by lawyers (whether manning “hotlines,” booths, or consulted in a normal practice setting) merely because the clients might already be represented by another lawyer in the matter but with whom they cannot currently communicate or locate.”<sup>83</sup> However, the Committee counseled the hotline lawyer to try, if possible, to help the client locate and communicate with the client’s original lawyer.<sup>84</sup>

Finally, the Committee admonished lawyers that “[p]rofit motivated solicitation by volunteer lawyers will not be tolerated, either directly or for the benefit of others through systemic referrals.”<sup>85</sup> In doing so, it referred to Louisiana Rule of Professional Conduct 7.1,<sup>86</sup> which prohibits lawyers from making or permitting to be made a false, misleading, or deceptive communication about the lawyer, the lawyer’s services or the services of the lawyer’s firm, and Louisiana Rule of Professional Conduct 7.3,<sup>87</sup> which prohibits lawyers from “soliciting professional employment in person, by person to person verbal telephone contact or through others acting at his request or on his behalf from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”<sup>88</sup> The Committee also reminded lawyers of Rule 7.3(b)(iii)(C),<sup>89</sup> which prohibits otherwise acceptable forms of “targeted solicitation” for personal injury or wrongful death claims for the thirty days following an accident or disaster involving the person to whom the communication would be sent or a relative of that person.<sup>90</sup> It concluded with the admonition that “lawyers genuinely wishing to do *pro bono* work under the circumstances in question should be clearly focused on helping others in that manner rather than prospecting for their own personal gain and profit” and reminds lawyers that “[t]here is little doubt that the Supreme Court of Louisiana takes a very stern, harsh view of lawyers who would seek simply to take advantage of the misery and misfortune of others by preying upon disaster victims at their lowest and most vulnerable times.”<sup>91</sup>

## Part II: Looking Forward: Ethical Obligations in the Wake of a Natural Disaster in a Post-Katrina World

Some of the legal ethics problems exposed by Hurricane Katrina have since been resolved. Others linger. “A natural disaster presents lawyers with an opportunity to . . . generate new ideas in the event that a disaster strikes again.”<sup>92</sup> Though the unresolved ethical issues remaining some four plus years after Hurricane Katrina are vast in number, two

are most obvious and warrant special attention: (1) a lawyer’s duty to prepare for disaster; and (2) a lawyer’s duty to provide *pro bono* services in the wake of a disaster.

After Katrina, lawyers nationwide should consider the ethical implications of their approach towards preparing for a potential disaster. While the Model Rules of Professional Conduct do not delineate every scenario that could give rise to an ethical violation, the text of these rules are written in broad, general terms, under which certain actions or inactions of a lawyer in preparing for a disaster could constitute ethical violations in the jurisdictions adopting them. This is especially true four years post-Katrina, when many lessons have been learned by those who endured the storm and have been disseminated widely to those who did not. Arguably, Hurricane Katrina put every lawyer nationwide on notice of the potential problems that await his practice in the event of a disaster, which may, in turn, heighten a lawyer’s ethical duty to prepare for disasters.

And in the aftermath of a disaster, lawyers may also have a heightened duty to offer *pro bono* assistance to disaster victims. Although the rules of professional conduct do not mandate a lawyer’s *pro bono* efforts, they certainly encourage lawyers—even in “normal times”—to offer this service to those in need of legal services but unable to pay for them. Thus, it stands to reason that if a lawyer is strongly encouraged to offer *pro bono* assistance during times of no disaster, then his efforts should increase in times of crisis.

### *Non-Exclusivity of the Rules of Professional Conduct*

Every lawyer must comply with the Rules of Professional Conduct adopted in his state of licensure.<sup>93</sup> Although the current rules of most jurisdictions do not specifically address disaster situations, lawyers must remain mindful that the rules of professional conduct are not all-inclusive, and more telling, they offer no exceptions for lawyers faced with natural disasters or any other specific type of harm.<sup>94</sup> As explained in the Preamble to the Model Rules of Professional Conduct:

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by **personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.**<sup>95</sup>

The Preamble further explicates that “[t]he Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.”<sup>96</sup> Lawyers have “a duty to act reasonably even in an emergency,” and “no rules exonerate lawyers because a disaster occurs.”<sup>97</sup> Thus there is “no reason why the rules normally applicable to an attorney’s conduct should not apply because disaster strikes.”<sup>98</sup>

## *Disaster Preparation*

“Catastrophes, such as Hurricane Katrina . . . , have occurred on American soil before, and they will occur again. Newspapers and television broadcasters bombard us daily with reports about disasters, both man-made and naturally occurring.”<sup>99</sup> Many disasters occur when least expected and bring new problems to individuals, courts, and lawyers.<sup>100</sup> Hurricane Katrina stands as an example of the “major weaknesses in America’s disaster preparedness and recovery plans.”<sup>101</sup>

Most lawyers have always been aware that having a contingency plan in place prior to a disaster can help save their practice.<sup>102</sup> After Hurricane Katrina, however, there can be no doubt that “[p]reparation is essential given the scope of the legal issues that arise and the potential impact natural disasters and terrorist attacks can have on the legal system”<sup>103</sup> and that “[w]hen it comes to disaster, reaction after the fact is never an adequate substitute for planning beforehand.”<sup>104</sup> Realizing this, more lawyers have focused on what they need to protect.<sup>105</sup> Sadly, some have not. This is a huge risk, as lawyers unprepared for disasters expose themselves to potential malpractice suits and ethical violations. In fact, some legal organizations “feel that ‘lack of time is no excuse.’”<sup>106</sup>

### **1. The Need to Prepare**

Like any other business, law firms need to confront and prepare for impending disasters, specifically by developing and committing to the implementation of a comprehensive disaster plan.<sup>107</sup> Admittedly, preparing for a disaster is painful and time consuming, resulting in distractions, lost revenue, and decreased productivity.<sup>108</sup> However, a law firm’s preparation for a disaster is critical for several reasons.

First and foremost, the individual lawyers comprising a law firm owe greater obligations to their clientele than do most businesses.<sup>109</sup> As one author aptly notes: “[W]hile it is appropriate to keep in mind that the lawyer’s business and family life [may be] disrupted by the disaster, the client’s needs and interests do not subside or disappear.”<sup>110</sup> Considering that a lawyer is obligated to put his clients first, his failure to prepare for a disaster could constitute a violation of his ethical obligations.

Additionally, a law firm should prepare for purely economic reasons. After all, “[t]he difference between the law firm that survives a . . . disaster and the firm that folds depends on whether the lawyers had the foresight to create and implement a disaster plan.”<sup>111</sup> Studies show companies that experience a complete computer outage for more than ten days are unlikely to fully recover financially<sup>112</sup> and that fifty percent of businesses will shut down within five years of a major disaster.<sup>113</sup> Even more disturbing than this statistic is the fact that “only one-quarter of businesses in the United States have established a disaster recovery plan.”<sup>114</sup> Some attribute this lack of preparation to the natural “sense of optimism” shared by most human beings combined with their preference “to live in the comfortable present, rather than considering the possibility of future devastation.”<sup>115</sup>

Yet, it is painfully obvious to Hurricane Katrina observers (and victims) that “those who create a disaster plan are better equipped to handle and recover from each new series of setbacks.”<sup>116</sup> After all, those better prepared firms are more apt to respond to a disaster, which in turn expedites the process of getting the firm back up and running, minimizing financial loss or service interruption.

### **2. Suggestions for Preparation and the Ethical Rules Potentially Violated by Failure to Prepare**

Suggestions for disaster preparation are extensive and vary widely with the size of the law office/firm in question. However, at minimum, every group of practicing lawyers, regardless of their number, should do certain things to prepare in order to properly protect its clients’ interests and to satisfy the ethical obligations of its lawyers.

#### **Check Legal Deadlines in Advance of a Disaster**

As discussed above, many lawyers were unprepared for the length and severity of practice disruption that Hurricane Katrina would ultimately cause. As a result, state governments had to take extraordinary steps to protect these lawyers’ clients from then-unanticipated harms. Four years after the fact, lawyers should be on notice of this potential effect of a disaster and adequately prepare for it by staying abreast of the legal deadlines existing in all of their cases. After all, “[l]osing track of important dates and deadlines following the forced closure of a law office could spell disaster for the lawyer and firm.”<sup>117</sup> Though this “disaster” could take many different forms, a lawyer who misses a legal deadline certainly violates ABA Model Rule of Professional Conduct 1.3, which requires that a lawyer “act with reasonable diligence and promptness in representing a client.”<sup>118</sup> Comment 3 to this rule further explicates:

Perhaps no professional shortcoming is more widely resented than procrastination. . . [I]n extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.<sup>119</sup>

#### **Store Documents Electronically or Off-Site and Implement a Backup Plan**

In addition to staying on top of legal deadlines, lawyers should also store all pertinent documents electronically or off-site. Included in this “pertinent documents” category are those necessary for a basic law practice to operate: the firm’s calendar and master docket, contact information of clients, pleadings/court orders in all active cases, and important correspondence with clients, opposing counsel, and the court. Likewise, although not absolutely necessary to operate a very basic form of practice, a firm that desires an organized and efficient recovery period should also store electronically or

off-site the contact information of all employees, vendors, and outside technology experts, as well as its billing/time entries.

Lawyers should also have in place a data backup system. After all, electronically stored information is completely useless if the lawyers who need it are unable to access it, as are hard copy documents left behind by human employees fleeing a disaster. As one author noted: "The lesson lawyers should take from Katrina is that discovery recovery and computer backup shouldn't be left to chance."<sup>120</sup> Because many of the documents discussed above are absolutely necessary to operate a law practice, a firm should ensure that it has in place a data backup plan to restore information promptly.<sup>121</sup> Such a data backup plan requires that the firm, in advance of the disaster: (1) acquire an off-site storage location; (2) identify sources of rental computer equipment for temporary use; (3) investigate and discover employees' home computer resources; and (4) store hard copies of all documentation offsite.<sup>122</sup> While it is true that available technology allows the retrieval of some electronic information that has not been backed up, the process of doing so is very costly and may be more than some firms can afford.<sup>123</sup> The key to effective document retrieval is backing up the information periodically, preferably daily, and then maintaining the storage media in an off-site location.<sup>124</sup>

To better prepare for disasters, lawyers should also take advantage of available technology, by acquiring laptops and using on-line data back-up and storage services. Such devices and services make practicing remotely easier. After all, "[i]f there is access to the Internet, a law office can be located anywhere in the world. The Internet allows any member of the firm through virtual private networking to have access to all of the firm's files."<sup>125</sup> Lawyers who fail to utilize alternative storage mechanisms, such as electronic or off-site storage, run the risk that their inaction could violate their ethical obligations. For example, a lawyer is ethically obligated to "act with reasonable diligence and promptness in representing a client."<sup>126</sup> Yet fulfilling this duty is virtually impossible for a lawyer who lacks access to documents, correspondence, and calendar entries for his case. Similarly, a lawyer who has no client contact information<sup>127</sup> may be hard pressed to fulfill his duties under ABA Model Rule of Professional Conduct 1.4 to "consult with the client about the means by which the client's objectives are to be accomplished," to "keep the client reasonably informed about the status of the matter," and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>128</sup> After Hurricane Katrina, "locating clients proved to be one of the largest obstacles faced by lawyers striving to maintain communication with their clients."<sup>129</sup>

### **Store Clients' Property at a Safe Off-Site Location**

Client property located in law office buildings when Hurricane Katrina made landfall were subjected to the winds and water of the storm, and thereafter to the possibility of perusal and theft by persons choosing to enter lawyers' unsecured

offices. Having witnessed such risky behavior, lawyers in known flood areas and vulnerable structures should assure that their clients' files are protected from harm well in advance. Among other options, such lawyers should consider moving any client property, including the client's file,<sup>130</sup> to a safe off-site location, particularly one that will not suffer the same fate as the office location should a disaster strike the region. Failure to do so could constitute a violation of ABA Model Rules of Professional Conduct 1.1 (competence), Rule 1.15 (safekeeping client property), and Rule 1.6 (preserving confidentiality).

"A lawyer has many important obligations, including those which relate to . . . safeguarding the client's property."<sup>131</sup> The duty is based upon Rule 1.15, which provides that a lawyer must identify client property (except for client funds)<sup>132</sup> as such and "appropriately safeguard[]" it.<sup>133</sup> Furthermore, the lawyer is required to keep "complete records of such . . . property" and "preserve[] [that property] for a period of (five years) after termination of the representa-

**A lawyer should also include a provision permitting paperless, electronic storage of all client file materials.**

tion."<sup>134</sup> The comments to Rule 1.15 dictate the standard of care borne by a lawyer safeguarding his client's property: "A lawyer should hold property of others with the care required of a professional fiduciary."<sup>135</sup> What this means, simply speaking, is that a lawyer must offer greater efforts to protect his client's property than he would his own. A lawyer on notice of the threats of a disaster may satisfy this ethical requirement only through preparation and implementation of a disaster plan.<sup>136</sup> As a practical matter, a lawyer should include a provision in his initial contract of representation with the client to specify the manner in which client property will be handled in the event of an approaching, foreseeable disaster.<sup>137</sup> Moreover, a lawyer should also include a provision permitting paperless, electronic storage of all client file materials.

Safeguarding a client's property may not be as strenuous as it seems. As to a client's data, one commentator has noted: "[T]echnology has made it easier than ever to safeguard client files and work product. Data that once occupied shelf after shelf of office space may now be saved, copied, and transported on a single compact disc, DVD, or portable hard drive. No heavy lifting is required."<sup>138</sup> As to non-data client property, a lawyer could satisfy his Rule 1.15 obligation by "renting several large safety deposit boxes at a reputable, well-constructed bank far enough away from sources of

flooding to safely store original documents and evidence that would be difficult or impossible to replace” and should also “consider purchasing fire- and water-proof file cabinets and safes to maintain sensitive documents and property onsite.”<sup>139</sup> An even safer option is for the firm to “contact the client to arrange for the pickup of temporary storage of those materials” and “[h]ave the client sign a receipt or acknowledgment.”<sup>140</sup> Safest of all is for the firm to use on-line, remote data storage.

In addition to a lawyer’s duty to safeguard client property under Rule 1.15, a lawyer is also ethically obligated to preserve the confidences of his clients. Rule 1.6 provides that absent certain circumstances, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . . .” Further, Comment

The Preamble “speaks to lawyers’ ethical societal values and commitment to equal justice.”

16 to Rule 1.6 provides that this duty extends to inadvertent disclosure.<sup>141</sup> A lawyer who unreasonably leaves behind sensitive client files in a vulnerable, unsecured law office risks running afoul of Rule 1.6.

#### *Pro Bono Obligations Following a Disaster*

A lawyer looking into the future should also consider his ethical duties to offer pro bono assistance in the wake of a disaster. As one commentator has noted: “Katrina reveals the ambiguity of the Model Rules’ ethical code [regarding this issue].”<sup>142</sup> The Model Rules of Professional Conduct expressly declare that every lawyer should provide pro bono service, but they admittedly do not provide any enforcement mechanism. Nor do they dictate a minimum number of pro bono hours that a lawyer must dedicate. Yet the express declaration of the Model Rules, along with the strong admonitions of the Preamble adopted by 41 states,<sup>143</sup> indicates that a lawyer’s pro bono efforts should be strong during times of no crisis. Thus, arguably, these efforts should be heightened during times of crisis.

Model Rule of Professional Conduct 6.1 recognizes that “every lawyer has a professional responsibility to provide legal services to those unable to pay.”<sup>144</sup> Although the strict text of that rule does not mandate a specific number of pro bono hours for lawyers (but instead challenges lawyers to attain an aspirational goal of 50 pro bono hours per year),<sup>145</sup> the Preamble to those same rules provides stronger fodder for the idea that a lawyer is obligated by his ethical duty to offer pro bono advice and assistance at all times. The Preamble states that every lawyer is “a public citizen having special responsibility for the quality of justice.”<sup>146</sup> Furthermore,

the Preamble urges lawyers to “ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel” and admonishes lawyers to be “mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.”<sup>147</sup> Thus, the Preamble clarifies that a lawyer is expected to “devote professional time, resources and use civic influence to ensure equal access to our system for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”<sup>148</sup> In essence, the Preamble “speaks to lawyers’ ethical societal values and commitment to equal justice.”<sup>149</sup>

At no other time are so many people so vulnerable and in need of legal advice than in the wake of a disaster. It stands to reason then, that under such circumstances, the explicit mandate of Model Rule 6.1, in combination with the Preamble, serves to push lawyers during times of disaster to go above and beyond what they would consider sufficient pro bono efforts during “normal times.”

#### **Conclusion**

The combination of Hurricane Katrina’s physical destruction and the lack of preparation by the Gulf Coast legal community generated a slew of ethical issues previously not contemplated by the national legal community. Many, like the legal deadlines and unauthorized practice issues, were addressed and resolved in the storm’s immediate aftermath. Others, like legal hotlines, saw clear resolution somewhat later. Still others, like the scope of disaster preparation required of lawyers and the extent of lawyers’ pro bono efforts after a disaster, linger and generate rousing debate between those lawyers who insist that their ethical obligations remain the same at all times and those who instead argue that ethical obligations are heightened during times of disaster. Though the Model Rules do not explicitly address and resolve these issues, lawyers who seek to comply not only with the exact letter of the rules but also with their spirit are well-advised to prepare in earnest for potential disasters and to offer pro bono assistance in the wake thereof. ■

#### **Endnotes**

1. Of course, lawyers must additionally consider the potential malpractice implications of their actions and inactions prior to and in the wake of a disaster, but analysis of that issue is beyond the scope of this article.

2. Many more ethics rules are potentially implicated by a disaster, but the scope of this article is limited to a lawyer’s ethical duties to prepare for disaster and to offer pro bono advice and assistance in the aftermath of a disaster.

3. Brenna G. Nava, *Hurricane Katrina: The Duties and Responsibilities of an Attorney in the Wake of a Natural Disaster*, 37 ST. MARY’S L.J. 1153, 1157 (2006).

4. *Id.* at 1156-57.

5. *Id.* at 1168.

6. James Keim, *Law Office Disaster Preparedness: The Liability*

and Ethics of Lawyers, 80 FLA. BAR J. 26, 30 (2006).

7. Sheryl B. Shapiro, *Current Development, 2006-2007: American Bar Association's Response to Unauthorized Practice Problems Following Hurricane Katrina: Optimal or Merely Adequate?*, 20 GEO. J. LEGAL ETHICS, 905, 905 (2007).

8. See Executive Order KBB 2005-32, Executive Order KBB 2005-48, and Executive Order KBB 2005-67.

9. "Liberative prescription," under Louisiana law, "is a mode of barring of actions as a result of inaction for a period of time." LA. CIV. CODE art. 3447. Liberative prescription equates, in most respects, to the synonymous term "statute of limitations" in the 49 common law states.

10. "Peremption," under Louisiana law, is "a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period." LA. CIV. CODE art. 3458. Peremption equates, in most respects, to the synonymous term "statute of repose" in the 49 common law states.

Peremption differs from liberative prescription in that it may not be renounced, interrupted, or suspended. LA. CIV. CODE art. 3461.

11. Executive Order KBB 2005-32.

12. *Id.*

13. Executive Order KBB 2005-48.

14. Executive Order KBB 2005-67.

15. *Id.*

16. Shapiro, *supra* note 7 at 908.

17. *Id.* at 909.

18. At this time, MODEL RULES OF PROF'L CONDUCT (hereinafter MODEL RULES) R. 5.5 provided that "[a] lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

19. Shapiro, *supra* note 7 at 909.

20. *Id.* at 910.

21. MODEL RULES R. 5.5.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Shapiro, *supra* note 7 at 911.

27. *Id.* at 905-06.

28. *Id.* at 906 ("Just days after the hurricane, neighboring states' bar associations as well as law firms and solo practitioners from 'Vermont to Washington state' had offered free office space to displaced lawyers. . .").

29. *Id.* at 911 (citing Model Rule 5.5, cmt. 5).

30. *Id.* at 912. The MODEL RULES have no force of law in an individual state unless and until that state chooses to adopt them.

31. *Id.*

32. *Id.* at 912-13 (citing CAL. RULES OF COURT R. 9.47(b)(1) and 9.48(b)(1) (2007); N.J. RULES OF PROF'L CONDUCT, 5(c)(5) (2004) and N.J. RULES OF COURT R. 1:21-1(a) (2004)).

33. Emergency Order Permitting Lawyers Displaced by Hurricane Katrina to Continue Representing Clients from Temporary Offices in Texas, Misc. Docket No. 05-9153 (Tex. Sept. 2, 2005), available at <http://www.supreme.courts.state.tx.us/MiscDocket/2005.asp> (last visited August 24, 2009).

In October 2005, the Texas Supreme Court extended the order, permitting lawyers displaced by Katrina and Rita who were licensed in another state to practice from a Texas location until May 31, 2006. 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/advisories/pdf/hurricaneorderamended.pdf> (last visited August 24, 2009).

34. [http://www.abanet.org/cpr/Chief\\_Justice\\_Letter.pdf](http://www.abanet.org/cpr/Chief_Justice_Letter.pdf) (last visited August 24, 2009).

35. *Id.*

36. *Id.*

37. Shapiro, *supra* note 7 at 915-17. Below is a list of some of the ways in which the various orders differed:

(1) The length of time for which displaced lawyers would be allowed to practice in a host state varied from 30 days to September 1, 2006 (over a year after Hurricane Katrina).

(2) Many of the orders included additional requirements that the displaced lawyers were forced to satisfy before and during their practice of law in the host state, including:

(a) Subjecting the displaced lawyers to ethical rules of the host state.

(b) Requiring that the displaced lawyer provide their name, local address/contact information, and license number to the host state bar before beginning practice.

(c) Forbidding displaced lawyers from seeking new business from residents of the host states.

(d) Specifying that the displaced lawyers were limited to legal services involving actions or matters arising out of the lawyer's home state.

(e) Mandating that displaced lawyers inform clients that the lawyer is not admitted to practice in the host state.

(f) Requiring the displaced lawyers practice in association with or under the supervision of a local lawyer in good standing.

(g) Mandating that displaced lawyers apply for a temporary waiver of provisions relating to admission.

38. *Id.* at 914-17.

39. *Id.* at 916.

40. *Id.*

41. *Id.* at 917.

42. *Id.* at 917-18.

43. The full text of the Louisiana order can be found at [www.lasc.org/katrina\\_orders/Order-ProBono.pdf](http://www.lasc.org/katrina_orders/Order-ProBono.pdf). (last visited August 24, 2009).

44. *In Re* Rules of Professional Conduct, 89-R-99018-SCT (en banc), which can be found at <http://www.ajs.org/prose/South%20Central%20Notebook%20Contents/Tab%203/Mississippi%20Rule%206.1.pdf> (last visited August 24, 2009).

45. The full text of the Texas order can be found at <http://www.texasbar.com/Template.cfm?Section=Home&CONTENTID=13207&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited August 24, 2009).

46. Shapiro, *supra* note 7 at 918-19.

47. *Id.* at 919.

48. *Id.* at 919-20.

49. See MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER (f) at <http://www.abanet.org/cpr/clientpro/home.html> (hereinafter MODEL COURT RULE ON DISASTER) (last visited August 24, 2009).

50. *Id.*

51. For all provisions of the MODEL COURT RULE ON DISASTER, the entire text can be found at <http://www.abanet.org/cpr/clientpro/home.html> (last visited August 24, 2009).

52. MODEL COURT RULE ON DISASTER (b).

53. MODEL COURT RULE ON DISASTER (d).

54. *Id.*

55. Solely for purposes of the Model Court Rule on Disasters, the highest court in the jurisdiction shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

(1) this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or

(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction.

MODEL COURT RULE ON DISASTER (c).

56. MODEL COURT RULE ON DISASTER (a).

57. MODEL COURT RULE ON DISASTER (d).

58. MODEL COURT RULE ON DISASTER (f).

59. *Id.*

60. MODEL COURT RULE ON DISASTER (g).

61. See [http://www.abanet.org/cpr/clientpro/katrina\\_chart.pdf](http://www.abanet.org/cpr/clientpro/katrina_chart.pdf) (last visited August 24, 2009). These states include Arizona, Delaware, Iowa, Missouri, New Jersey, Oregon, and Washington.

62. See *id.* North Carolina has declined to adopt the MODEL COURT RULE ON DISASTER.

63. See *id.* These states include Alabama, California, District of Columbia, Florida, Georgia, Hawaii, Illinois, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, North Dakota, New York, Tennessee, Texas, and Virginia.

64. The full text of this public opinion can be found at [www.lsba.org/DocumentIndex/EthicOpinions/05-005RPCC.pdf](http://www.lsba.org/DocumentIndex/EthicOpinions/05-005RPCC.pdf) (last visited August 24, 2009).

65. Additionally, the Opinion explicitly references the LOUISIANA RULES OF PROF'L CONDUCT. However, the specific Louisiana rules upon which the Opinion's analysis are identical to their MODEL RULES counterparts.

66. In sum, the opinion provides that a lawyer who is competent to provide the necessary services may, under the auspices of a nonprofit organization or court: (1) provide short-term limited legal services to clients, such as over a "hotline" or at a booth established to help victims of a natural disaster; and/or (2) properly provide a "second opinion" to persons who may already be represented by counsel but who, for instance, are unable to locate or communicate with their original lawyer. However, profit-based solicitation of disaster victims, especially under the deceptive guise of providing help and/or free disaster assistance, is strictly prohibited.

67. Public Opinion 05-RPCC-005.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. MODEL RULES R. 1.1, Comment 3.

74. LOUISIANA RULES OF PROF'L CONDUCT (hereinafter LOUISIANA RULES) R. 6.5.

75. Public Opinion 05-RPCC-005.

76. MODEL RULES R. 6.5, Note 1 (emphasis added).

77. Public Opinion 05-RPCC-005.

78. LOUISIANA RULES R. 4.2.

79. Public Opinion 05-RPCC-005.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. See former LOUISIANA RULES R. 7.1, now R. 7.2(c).

87. See former LOUISIANA RULES R. 7.3, now R. 7.4(a).

88. Public Opinion 05-RPCC-005.

89. Former LOUISIANA RULES R. 7.3(b)(iii)(C), now R. 7.4(b)(1) (A).

90. Public Opinion 05-RPCC-005.

91. *Id.*

92. Nava, *supra* note 3 at 1188.

93. See, e.g., Model Rules Preamble, paragraph [12].

94. Keim, *supra* note 6 at 27. Though Keim's discussion is limited to the FLORIDA RULES OF PROF'L CONDUCT, it presumably applies with equal force to the MODEL RULES and those in place in most states in the United States.

95. MODEL RULES PREAMBLE at [4] (emphasis added).

96. *Id.* at [16].

97. Nava, *supra* note 3 at 1167-68.

98. *Id.* at 1168.

99. *Id.* at 1154-55.

100. *Id.* at 1166.

101. *Id.* at 1153-54.

102. *Id.* at 1167.

103. *Id.* at 1166.

104. *Id.* at 1191.

105. *Id.* at 1166.

106. *Id.*

107. Keim, *supra* note 6 at 26.

108. *Id.*

109. Nava, *supra* note 3 at 1166.

110. *Id.* at 1167.

111. *Id.* at 1192.

112. *Id.* at 1178-79.

113. *Id.* at 1156.

114. *Id.*

115. *Id.*

116. *Id.* at 1157.

117. Keim, *supra* note 6 at 30.

118. MODEL RULES R. 1.3.

119. MODEL RULE R. 1.3, cmt. 3.

120. Nava, *supra* note 3 at 1169.

121. *Id.* at 1181.
122. *Id.*
123. *Id.*
124. Firms should choose their off-site location very carefully. By way of example, one New Orleans firm had in place a backup computer system located in a climate-controlled room on the third story of a building a few miles away from the office location, but this building had four feet of water blocking its entrance. Learning from stories such as this, many New Orleans firms now keep their backup information in locations outside the city using “mirrored servers.” Nava, *supra* note 3 at 1180.
125. *Id.* at 1190.
126. MODEL RULES R. 1.3.
127. Of course, access to client contact information does a lawyer no good if he has not prepared on his end by ensuring his own ability to initiate and receive communications. For example, every lawyer, in advance of a disaster should purchase a cellular and/or satellite phone to ensure his ability to reach persons verbally. Similarly, he should also, in advance of a disaster, set up an alternate email address with a nationwide provider (like Yahoo, Gmail, Hotmail, etc...), so that he may communicate in writing with others. Furthermore, prior to the disaster, the lawyer should forward his cellular and/or satellite telephone number and alternate email address to all clients so as to remain as accessible as possible.
128. MODEL RULES R. 1.4.
129. Nava, *supra* note 3 at 1168.
130. “The ethical duty to safeguard extends not only to the protection of client funds and personal property possessing intrinsic value, but also to papers contained within a client’s file and the file itself.” Keim, *supra* note 6 at 78.
131. Nava, *supra* note 3 at 1168.
132. As to client funds, Rule 1.15 provides that “[a] lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with the representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person.” MODEL RULES R. 1.15(a).
133. *Id.*
134. *Id.*
135. MODEL RULES R. 1.15, cmt. [1].
136. Keim, *supra* note 6 at 27-28.
137. *Id.* at 30.
138. *Id.*
139. *Id.*
140. *Id.*
141. MODEL RULES R. 1.6, cmt. [16].
142. Wiley A. Branton, *Howard Law Journal Symposium: Katrina and the Rule of Law in the Time of Crisis: Natural Disasters and the Rule of Law in the Time of Crisis*, 51 *How. L.J.* 677, 685 (2008).
143. *Id.* at 684.
144. *Id.*
145. *Id.*
146. MODEL RULES PREAMBLE [1] & [12].
147. *Id.* at [6]
148. *Id.*
149. Branton, *supra* note 142 at 685.

## Law Firm Online Activity Policy

(Continued from page 7)

or other improper online behavior. This section is designed to be very broad and inclusive. A firm may prefer to narrow this provision, but should recognize that doing so may prevent it from having express authority to take action when someone engages in legal but ill-advised behavior.

### Prohibited Sites.

*Because of issues with security policies or similar concerns, Firm prohibits the use of the following social network sites for Firm-related activities without authorization from Firm IT: [identify sites].*

This provision allows for a firm to prohibit lawyers and staff from engaging in firm-related activities on particular sites that the firm deems as posing too great a risk to the firm or its clients. Often these sites can be selected by the firm’s information technology group, and may include sites that lack adequate privacy and other safeguards or serve as frequent sources for those seeking to distribute viruses or other harmful computer information (including malware).

Alternatively, a firm could choose to designate the social networking or other sites where it will allow its lawyers and staff to create profiles that refer to or link back to the firm’s online presence. As previously noted, these policies may be difficult to enforce, but may allow enough freedom to obtain compliance from all but the most determined rule-breakers.

### Conclusion

As noted at the outset, law firm lawyers and staff are using online posts and in particular social networks to promote their services, network, and share their lives, activities, and friendships with others. Law firms can and should take steps to mitigate their risks from such online activity. This article and its sample policy provide a starting point that, with education and reinforcement, should help a firm design and implement its own online activity or social networking policy.

Of course, an online activity policy and related education will not address all issues raised in the opening paragraphs of this article. A firm that wants to further protect itself online may, for example, want to couple an online activity policy and related education with other protections. These protections may include restrictions in employment agreements that limit distribution of client and firm information and post-employment use of the law firm’s name. The protections may also include a proactive, designed approach to social networks, such as encouraging present firm lawyers to populate and use social network sites, so that they become the first-listed profiles of a firm, instead of having disgruntled former lawyers or employees’ profiles appear.

Of course, the lawyers who populate and use the social network may need guidance regarding how they should participate, a function that the proposed policy is designed to facilitate. ■