

## **Disaster and Succession Planning**

### **Boone County Bar Association**

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## **DISASTERS**

Disasters come in many forms:

- Natural disasters (tornado, flood, earthquake, asteroid strike)
- Local disasters (fire, crime, power outage, cell phone outage, sewer backup, etc.)
- Personal disasters (accident, illness, disability, death)

Two keys to disaster planning:

1. Planning
2. Redundancy

### **Planning for Natural Disaster**

What plans or systems do you have in place?

- Access to data.
- Access to computer programs.
- Ability to communicate.

### **Access to data**

The more your office is paper based, the greater the chance you will permanently lose data. If you store most or all of your data electronically, the issue will be the adequacy of your backup.

Manual backups can be sufficient. Any backup must be completed regularly and a copy must be regularly stored at a separate, secure location. For many attorneys the separate, secure location is their home. The size of the Joplin tornado revealed that this type of approach was not always safe. The separate location must be sufficiently geographically separated that it is unlikely both locations will be destroyed by the same natural disaster. Some attorneys in that area used a secure underground storage facility for their backup. Their back up was safe.

In order to avoid the loss of paper data, documents must be routinely scanned. Even those who did not lose their electronic backup lost some documents, including documents on very active matters that were on the attorney's desks.

**Cloud backups.** Although storing data on a remote server connected by the internet (cloud storage) includes a duty of ethical due diligence, cloud storage is generally ideal for recovery from a disaster. We have a discount through The Missouri Bar with Dobson Technologies (formerly Corevault). Data for the backup is encrypted from your computer to the backup as well as in storage. The link (after the name change) is <http://www.mobar.org/memberservices/dobson-technologies/?terms=corevault>

None of these issues are completely new. Storage of data on a laptop isn't that different from carrying files in a briefcase. Storing files in the "cloud" isn't that different from storing files in a facility owned and operated by a third party. The risks are essentially the same (snooping employees, break-ins, loss of data) but the steps necessary to protect against the risks vary. It may be more necessary to employ or consult with an expert to make sure you have adequately addressed technology risks.

Several states have issued ethics opinions on cloud computing. For example, North Carolina 2011 Formal Ethics Opinion 6 (January 27, 2012) concludes:

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of SaaS that the lawyer is required to apply when representing clients.

The North Carolina opinion can be found at <http://www.ncbar.com/ethics/ethics.asp?page=2&from=1/2012&to=1/2012> . North Carolina had originally posted a very specific opinion for comment. However, after receiving much comment and realizing that it is difficult to be specific with an area that changes so rapidly, they ultimately issued a very general opinion. Missouri has, to date, not issued an opinion on cloud computing for those very reasons.

This is a portion of the original draft North Carolina opinion. The specifics listed there are worth considering. I have bolded some that I consider high priority considerations:

**Inquiry #2:**

Are there any "best practices" that a law firm should follow when contracting with a SaaS vendor to minimize the risk?

**Opinion #2:**

Yes, a lawyer should be able to answer the list of questions below satisfactorily in order to conclude that the risk has been minimized. However, the list is not all-inclusive and consultation with a security professional competent in the area of online computer security is recommended when contracting with a SaaS vendor. Moreover, given the rapidity with which computer technology

changes, what may constitute reasonable care may change over time and a law firm would be wise periodically to consult with such a professional. The lawyer or law firm should be able to answer the following questions sufficiently to conclude that the risk to confidentiality and security of client file information is minimal:

- **What is the history of the SaaS vendor?** Where does it derive funding? How stable is it financially?
- Has the lawyer read the user or license agreement terms, including the security policy, and does he/she understand the meaning of the terms?
- Does the SaaS vendor's Terms of Service or Service Level Agreement address confidentiality? If not, would the vendor be willing to sign a confidentiality agreement in keeping with the lawyer's professional responsibilities? Would the vendor be willing to include a provision in that agreement stating that the employees at the vendor's data center are agents of the law firm and have a fiduciary responsibility to protect client information?
- How does the SaaS vendor, or any third party data hosting company, safeguard the physical and electronic security and confidentiality of stored data? Has there been an evaluation of the vendor's security measures including the following: firewalls, encryption techniques, socket security features, and intrusion-detection systems?
- Has the lawyer requested copies of the SaaS vendor's security audits?
- **Where is data hosted? Is it in a country with less rigorous protections against unlawful search and seizure?**
- **Who has access to the data besides the lawyer?**
- Who owns the data—the lawyer or SaaS vendor?
- **If the lawyer terminates use of the SaaS product, or the service otherwise has a break in continuity, how does the lawyer retrieve the data and what happens to the data hosted by the service provider?**
- If the SaaS vendor goes out of business, will the lawyer have access to the data and the software or source code?
- **Can the lawyer get data "off" the servers for the lawyer's own offline use/backup?** If the lawyer decides to cancel the subscription to SaaS, will the lawyer get the data? Is data supplied in a non-proprietary format that is compatible with other software?
- **How often is the user's data backed up? Does the vendor back up data in multiple data centers in different geographic locations to safeguard against natural disaster?**
- If clients have access to shared documents, are they aware of the confidentiality risks of showing the information to others? *See* 2008 FEO 5.
- Does the law firm have a back-up for shared document software in case something goes wrong, such as an outside server going down?

You are responsible for the risks of storing information securely. This must include protecting the confidentiality and integrity of the information. Some of the important issues to address would be: (1) how (equipment and format) is the data is stored, (2) where is the data stored, (3)

who has access, (4) what security measures are in place, (5) are there any limitations on access by the attorney, (6) are there backups, and what does the actual agreement say – is it adequate?, and (7) is the data protected (encrypted, etc.) as it travels from your computer to the computer where it will be stored?

If you are in a location without internet access or if your internet service is down, you won't be able to access your online backup. As a result, you should also have a local backup.

### **Access to Computer Programs**

The concerns that apply to cloud backups not only to pure storage but also SaaS (Software as a Service). SaaS merely means that you are not downloading the software onto your computer. We have all used SaaS. As soon as we stopped loading software onto our computers to access Westlaw or Lexis, we were using SaaS. If you are using either of those services or FastCase, you are using SaaS. If you use Gmail or Facebook, you are using SaaS. The biggest issue, in addition to confidentiality, that relate to SaaS is access. You have to be able to access the internet to use SaaS.

Software that you access online is more likely to be available to you in the event of a disaster. If your computer is destroyed, you are more likely to be able to get a new computer and access your programs, if the programs themselves reside on the internet.

Another good option is software that you download onto your computer from the software vendor. In other words, when you purchased the software, you did not obtain it on a disk, you downloaded it from the vendor's site. Usually, you have a password that allows you to go back to that site to download the software again (at least for a period of time) if you get a new computer, etc.

If you obtained your software on a disk, it is advisable to store your disks in a secure location separate from your computer.

Of course, the loss of software programs is usually not as serious as the loss of data. Unless it was a unique or custom program, replacing it may be more a matter of expense than anything else. However, purchasing new programs may result in compatibility issues with your data. We all have to deal with those issues from time to time. The most undesirable time to deal with that issue would be when you are already dealing with a disaster.

### **Ability to Communicate**

A natural disaster will most likely severely limit the ability to communicate, both voice and data. You should plan ahead to have the ability to communicate through multiple methods. Your day to day communications with clients in normal circumstances probably involve voice calls and email. After a disaster, voice calls may be difficult. Even if phone lines and circuits remain available, they will probably be overloaded.

Experience has shown that text messages may get through when voice messages can't. You may normally use cellular service but not internet. Having a Voice Over Internet Protocol (VOIP) account, such as Skype already set up may facilitate communication. Even if you don't regularly email clients, you may be able to email, if you have or can find internet service. These options highlight the desirability of obtaining complete contact information from clients.

### **Planning for a Local Disaster**

The good news is that most planning for a natural disaster will also apply to a local disaster. The biggest part of planning for a local disaster is realizing that it can happen, even though you may not want to think about it.

The primary extra step necessary to plan for a local disaster involves the crime possibility. Other than locking your doors, what additional security do you have? How much you need depends on your circumstances.

Are all of your computers, even your desktops, password protected? Do you have an external hard drive? Is it password protected? What about confidential data on thumb drives, DVD's or CD's?

### **Planning for a Personal Disaster**

Any of us can be struck down by a personal disaster, at any time – regardless of age or health. Comment 5 to Rule 4-1.3 states:

[5] To prevent neglect of client matters in the event of a practitioner's death or disability, the duty of diligence may require that each practitioner prepare a plan, in conformity with applicable rules, 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. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer) and Rule 5.26.

A good starting point is The Missouri Bar's publication Planning Ahead – A Guide to Protect Your Client's and Your Survivor's Interests In the Event of Your Disability or Death [This publication is available in PDF and Word at this link.] <http://www.mobar.org/lpmonline/disaster/>

- ◆ Make arrangements with a Successor Lawyer
- ◆ Trust Account Access
- ◆ Office Procedures Manual
- ◆ Easily Accessible, Complete Contact List

- ◆ Easily Accessible, Complete Calendaring System
- ◆ Up to Date Time and Billing Records
- ◆ File Destruction Policy

Rule 4-1.22 (Effective 7/1/13. Currently, Rule 4-1.15(m)).

#### **4-1.22 FILE RETENTION**

A lawyer shall securely store a client's file for 10 years after completion or termination of the representation absent other arrangements between the lawyer and client. If the client does not request the file within 10 years after completion or termination of the representation, the file shall be deemed abandoned by the client and may be destroyed.

A lawyer shall not destroy a file pursuant to this Rule 4-1.22 if the lawyer knows or reasonably should know that:

- (a) a legal malpractice claim is pending related to the representation;
- (b) a criminal or other governmental investigation is pending related to the representation;
- (c) a complaint is pending under Rule 5 related to the representation; or
- (d) other litigation is pending related to the representation.

Items in the file with intrinsic value shall never be destroyed.

A lawyer destroying a file pursuant to this Rule 4-1.22 shall securely store items of intrinsic value or deliver such items to the state unclaimed property agency.

The file shall be destroyed in a manner that preserves client confidentiality.

A lawyer's obligation to maintain trust account records as required by Rules 4-1.145 to 4-1.155 is not affected by this Rule 4-1.22.

#### **5.26 Appointment of Trustee**

(a) **Appointment.** A circuit court, through the presiding judge or a judge of the circuit designated by the presiding judge, may appoint one or more members of the bar to serve as a trustee for a lawyer who maintained an office in the circuit if no trustee has been appointed and a showing is made that:

- (1) The lawyer is unable to properly discharge the lawyer's responsibilities to clients due to disability, disappearance or death, or

(2) The lawyer failed to comply with Rule [5.27](#) after disbarment or suspension.

Notice of the trustee's appointment shall be given by the clerk of the court to the chief disciplinary counsel who shall monitor and assist the work of the trustee as necessary and appropriate.

(b) **Duties of Trustee.** The trustee shall take whatever action seems indicated to protect the interests of the clients and other affected parties, including:

- (1) Inventory active files and make reasonable efforts to distribute them to clients,
- (2) Deliver any undistributed active client files and any inactive client files to the chief disciplinary counsel for action as required by this Rule 5;
- (3) Take possession of and review the lawyer trust and business accounts;
- (4) Make reasonable efforts to distribute identified trust funds to clients or other parties (other than the lawyer);
- (5) After obtaining an order of the court, dispose of any remaining funds and assets as directed by the court; and
- (6) Initiate any legal action necessary to recover or secure any client funds or other property.

The lawyer, to the extent possible, shall cooperate and promptly respond to reasonable requests for information from the trustee.

(c) **Protection of Client Information.** The trustee shall be bound by the Rules of Professional Conduct pertaining to client confidentiality with regard to the records of individual clients.

The trustee shall not disclose any information contained in any file under this Rule 5.26 without the informed, written consent of the client to whom the file relates except as necessary to:

- (1) Carry out the order of appointment, or
- (2) Comply with any request from an appropriate disciplinary authority.

The trustee shall report professional misconduct on the part of the lawyer as required by Rule [4-8.3](#).

(d) **Reports to the Court.** The trustee shall file written reports with the clerk of the appointing court:

- (1) Within 120 days of appointment;
- (2) Prior to being discharged if later than 120 days of appointment; and
- (3) At such other times as directed by the appointing court.

The reports shall describe the nature and scope of the work accomplished and to be accomplished under this Rule 5.26 and the significant activities of the trustee in meeting the obligations under this Rule 5.26.

The final report must include accountings for any trust and business accounts, the disposition of active case files, and any requests for disposition of remaining files and property.

The trustee may apply to the appointing court for instructions whenever necessary to carry out or conclude the duties and obligations imposed by this Rule 5.26.

(e) **Immunity.** All trustees appointed pursuant to this Rule 5.26 shall be immune from liability for conduct in the performance of their official duties in accordance with Rule [5.315](#). This immunity shall not extend to employment under Rule 5.26(f).

(f) **Acceptance of Clients.** With the consent of any client, the trustee may, but need not, accept employment to complete any legal matter.

(g) **Legal Responsibility of Lawyer.** The lawyer for whom a trustee has been appointed or the estate of a deceased lawyer for whom a trustee has been appointed is liable to the trustee for all reasonable fees, costs, and expenses incurred by the trustee as approved by the appointing court. To the extent that the approved trustee's fees, costs, and expenses are paid by the disciplinary authority or other third party, the lawyer or the estate shall be liable to make reimbursement to the disciplinary authority or other third party for such payment.

(h) **Fees, Costs, and Expenses.** Application for allowance of fees, costs, and expenses shall be made by affidavit to the appointing court, which may enter a judgment in favor of the trustee and against the attorney or the estate of a deceased attorney for whom a trustee has been appointed. The application shall be made on notice to the chief disciplinary counsel, the lawyer or, if deceased, to the lawyer's personal representative, or heirs. For good cause shown, an interim application for fees, costs, and expenses may be made.

As approved by the appointing court, the trustee shall be entitled to reimbursement from the lawyer or the deceased lawyer's estate for:

(1) Reasonable expenses incurred by the trustee for costs, including, but not limited to, clerical, paralegal, legal, accounting, telephone, postage, moving, and storage expenses, and

(2) Reasonable attorneys' fees.

In the absence of other funding sources, the chief disciplinary counsel may pay the approved fees, costs, and expenses.

*(Adopted June 20, 1995, eff. Jan 1, 1996. Amended October 25, 2011, effective January 1, 2012.)*

### **5.315. Immunity and Privileges**

(a) Communications submitted to the advisory committee, chief disciplinary counsel, regional disciplinary committees, disciplinary hearing panels, or the staffs of any of these entities relating to lawyer misconduct or disability are absolutely privileged if submitted in good faith. No lawsuit predicated on such communications may be instituted.



(b) All complainants and all witnesses are immune from suit for any testimony given in the course of any proceeding under this Rule 5.

(c) The advisory committee, chief disciplinary counsel, regional disciplinary committees, disciplinary hearing panels, **trustees appointed pursuant to Rule 5.26, their staffs and representatives are immune from suit for any conduct in the course of their official duties.**

*(Adopted June 20, 1995, eff. Jan 1, 1996. Amended October 25, 2011, effective January 1, 2012.)*

(emphasis added).

### Resources

Planning and Recovery for Other Types of Disasters (There are links to many articles on disaster planning below the links to the Planning Ahead guide.)

<http://www.mobar.org/lpmonline/disaster/>

Changing Firms, Merging, Closing a Practice, Retirement  
Articles

<http://www.mobar.org/lpmonline/changing/>

Closing a Solo Practice: An Exit To-Do List

May/June 2011 Law Practice Magazine, Volume 37 Number 3

[http://www.americanbar.org/publications/law\\_practice\\_home/law\\_practice\\_archive/lpm\\_magazine\\_archive\\_v37\\_is3\\_pg48.html](http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_archive_v37_is3_pg48.html)

Pass It On: Secrets to Succession and Transition Planning

[American Bar Association > Publications > GP Solo > 2012 > July/August 2012: Buying, Selling, or Closing a Law Practice](http://www.americanbar.org/publications/gp_solo/2012/july_august/pass_it_on_secrets_succession_transition_planning.html)

[http://www.americanbar.org/publications/gp\\_solo/2012/july\\_august/pass\\_it\\_on\\_secrets\\_succession\\_transition\\_planning.html](http://www.americanbar.org/publications/gp_solo/2012/july_august/pass_it_on_secrets_succession_transition_planning.html)

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Missouri's first Legal Ethics Counsel 2003 - 2012. Deputy Chief Disciplinary Counsel 2000-2003. Staff Counsel for OCDC 1993 - 2000. Unit Chief of the Professional Licensing Unit of the Attorney General's Office 1985-1993. Assistant A.G. 1981 - 1993.

She served as an officer of the National Organization of Bar Counsel from 2008 to 2012. She served as President from 2011 to 2012.

She received her B.S.Ed. in 1978 from Mizzou. In 1981, she received her J.D. from UMKC