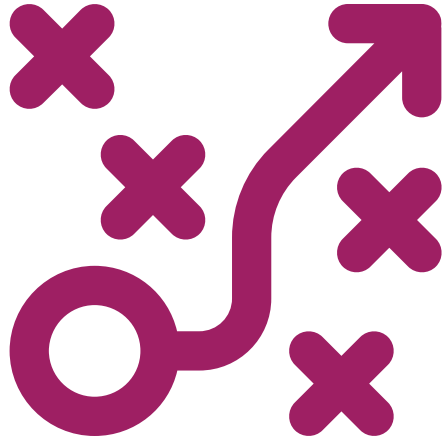


THE LAW FIRM GUIDE TO

Disaster Planning & Recovery

Protecting Your Firm and Your Clients
From the Unexpected



WASHINGTON STATE
BAR ASSOCIATION



The Law Firm Guide to
**DISASTER PLANNING
& RECOVERY**

*Protecting Your Firm
and Your Clients
From the Unexpected*

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The Law Firm Guide to Disaster Planning & Recovery *Protecting Your Firm and Your Clients From the Unexpected*

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Product of the WSBA's Practice Management Assistance Program

www.wsba.org/pma

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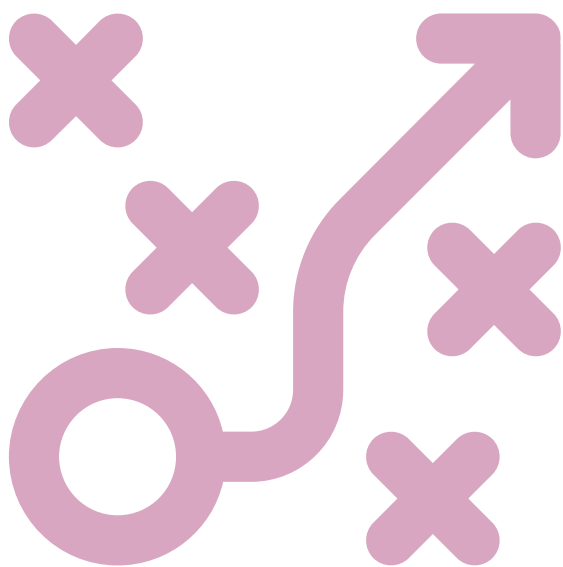
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Introduction

UNEXPECTED EVENTS can severely affect your ability to provide legal services. The risk includes events that affect your health, such as accidents or illness, but it can also include events that affect your working space or the technology you use to handle client information.

These written materials will help you (1) identify the common areas where solo and small firm licensed legal professionals run into trouble; (2) mitigate both the risk and the impact of disasters, by using good prevention techniques; and (3) address disasters when they do occur.

By the end of reviewing this material, you should have enough information to begin changing your law firm management practices so that you are better prepared.

Learning Objectives

This resource will cover the following topics:

- Your professional responsibility for disaster planning.
- Business continuity plans and why you should have one.
- Best practices for mitigating the impact of unexpected events.

Is This Guide for Me?



WHAT IT INVOLVES:

Unexpected disasters can impact your business operations and your ability to deliver legal services. Potential causes include unexpected illness or a health crisis, cyber attacks or data breaches, natural disasters, and other disruptive events that impact your business or the community at large.



WHAT COULD GO WRONG:

Without a strategy or process in place to mitigate the effects of these events, you can lose time, money, and resources trying to recover from an event. You may even become the subject of discipline, or vulnerable to malpractice claims if your failure to prepare causes harm to a client.



YOU'RE VULNERABLE IF:

- You do not have a business continuity plan.
- You do not maintain a viable back-up for data.
- You have not designated someone to take over if you are incapacitated.



WHAT YOU CAN DO:

- Keep backups of case files, key contact information, and deadlines.
- Develop a written protocol for addressing unexpected events. ■

Your Professional Responsibility to Prepare for Disasters

LICENSED LEGAL PROFESSIONALS in Washington State have a duty to competently represent their clients.¹ This duty includes an obligation to make arrangements to safeguard your clients' interests if you are suddenly unable to practice, whether due to events affecting you or your practice.

Acting Diligently and Promptly

Rule 1.3 of the Washington Supreme Court's Rules of Professional Conduct (RPC) requires that licensed legal professionals act with "reasonable diligence and promptness" when representing a client.² Comment 3 acknowledges that "unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." This is true in cases where you or your office is impacted by an unexpected disaster for which you are not prepared. Without an adequate business recovery plan, your clients may experience delays and gaps in communication that impact client satisfaction. Even worse, you may miss important deadlines while you struggle to return to business as usual.

Communication

RPC Rule 1.4 requires that you keep clients promptly and reasonably informed about the status of their matter.³ If you or your office is severely impacted by a disaster you may struggle to keep clients reasonably informed. This issue can be exacerbated if you lose access to important documents or information.

¹ See [RPC Rule 1.1, et seq.](#), or, for Limited Licensed Legal Technicians, [LLLT RPC Rule 1.1, et seq.](#)

² [RPC Rule 1.3](#), or, for Limited Licensed Legal Technicians, [LLLT RPC Rule 1.3](#).

³ [RPC Rule 1.4](#), or, for Limited Licensed Legal Technicians, [LLLT RPC Rule 1.4](#).

Confidentiality

Under RPC Rule 1.6, you cannot reveal information related to a client without their consent.⁴ This means that you need to take reasonable precautions to protect confidential information from inadvertent disclosure. This includes securing your physical location (locking file cabinets, etc.) and securing electronic information.

Document Retention

RPC Rules 1.15A and 1.15B require that you maintain records and documentation related to trust accounts and property for at least seven years.⁵ If an unexpected disaster occurs and you lose those records, you could be the subject of discipline or vulnerable to client malpractice claims. ■

⁴ [RPC Rule 1.6](#), or, for Limited Licensed Legal Technicians, [LLLT RPC Rule 1.6](#).

⁵ [RPC Rule 1.15A](#), or, for Limited Licensed Legal Technicians, [LLLT RPC Rule 1.15A](#); [RPC Rule 1.15B](#), or, for Limited Licensed Legal Technicians, [LLLT RPC Rule 1.15B](#).

General Best Practices for Risk Mitigation

TO PROTECT YOUR CLIENTS' INTERESTS, and to ensure your business can survive an unexpected disaster, you should implement the following best practices.

Record Keeping

To protect information and preserve records, you should:

1. Keep an up-to-date matter list with contact information for clients and opposing counsel. Keep track of any related parties or entities to check for conflicts. This list should be accessible in electronic format.
2. Keep an electronic and physical record of deadlines and court obligations. Establish a protocol for running reports and/or creating a list of those critical events.
3. Back up files and documents regularly. Make sure you are using a method that is different from your everyday filing process (for example, if you primarily keep records in hardcopy form, make sure you are creating electronic backups).

If you utilize practice management software, you likely have the ability to create reports with the matter information that you need. Otherwise, you can create your own. For an example spreadsheet for tracking client matters, visit www.wsba.org/guides. You should be updating this regularly as part of your business operations so that if something unexpected occurs, you have the most up-to-date information available to you.

Similarly, practice management software can be used to record matter deadlines, court obligations, and other significant dates of note. If you do not use software to help you track deadlines, you should implement an electronic calendar system that includes the following:

1. **Statute of Limitations and Reminders:** any matters that are subject to a statute of limitations should include multiple calendar events to note that date, the basis for the calculation, and reminder events well in advance of the deadline.
2. **Case Schedules:** you should record any court-ordered trial schedules, any motion deadlines, any ADR schedules, etc. You should also incorporate any workflows or procedures that you want to include as part of your case management strategy. Breakdown each court deadline with the underlying elements of the project. For example, if you have a trial date of March 30, you may want to build out a timeline for drafting the trial brief and sending the draft to the client.
 - a. When you are calendaring dates that are calculated based on rules, you should note the rule that was used to do the calculation and (if possible) have another person double-check the calculation. You should also note the triggering date (for example, when calendaring a deadline to respond to discovery requests, you should list the court rule as well as the date that the discovery requests were served).
 - b. One way to double check your calculations is to use an online date calculator (such as <https://www.timeanddate.com/date/dateadd.html>) and then count the dates out yourself using a calendar as a reference.
 - c. In addition to your own deadlines or obligations, you should be calendaring the dates you expect others to complete a task, such as responding to discovery or replying to a motion.
3. **Matter Progress:** In addition to deadlines, you should also utilize a project management method to track developments in a client matter so you know at a glance where you are at in the process. In creating this system, you need to balance (1) your desire to work efficiently and minimize administrative distractions; and (2) the risk of relying on memory or previous correspondence to figure out what transpired last.

For a template to help you build project schedules and import them into your Outlook calendar, visit www.wsba.org/guides.

Another document retention step you should take is to back up your files electronically, if you do not already. The following are options for backing up data:

- **Backup for hardcopies:** If you only keep hardcopy files, one initial step is to start implementing a process to scan and store those documents electronically. You may elect to store files on your computer or on a server that you manage. For long-term archiving, you may want to consider saving files in a PDF/A format.⁶
- **Cloud storage:** The next step for backing up documents is to store electronic files in the Cloud. This means that rather than storing those files on your own hard drive, you are uploading them to a company's servers via the Internet. This way, if something happens to your laptop or other device, you can still access your files. Most cloud storage services have their own redundant backup systems that will provide some measure of protection against unexpected issues with their service.⁷
- **Additional backup:** Even if you are using a cloud storage service to store electronic files remotely, you will want to back up files on your desktop and any other files that you do not store in the Cloud. Windows and Apple systems will both let you create backups through your device settings. You can also create a backup to an external hard drive. Finally, some practitioners add a second backup cloud service for added precaution.

For more information about document retention, and cybersecurity considerations for cloud storage, check out the practice management guides at www.wsba.org/guides.

⁶ For more information about PDF/A format, see *PDF/A Frequently Asked Questions*, PDF Association, Inc. (June 20, 2015) (available at <https://www.pdfa.org/pdfa-faq/>).

⁷ For more discussion of the ethical obligations related to online data storage, see WSBA Advisory Opinion 2215 (available at <http://mcle.mywsba.org/IO/print.aspx?ID=1662>).

Business Continuity Plan

A business continuity plan is a written document that lays out a plan for your firm to function and accomplish critical business processes if an unexpected event occurs (such as an earthquake, fire, pandemic, medical emergency, etc.).⁸ Your business continuity plan should specify a process for addressing unexpected events as follows:

- 1. First 12 hours:** Your Business Continuity Plan should include a written process and approach for notifying clients and opposing counsel that you are experiencing an emergency: e.g. (1) set an automatic reply on your email to warn recipients that your response may be delayed; (2) change your voicemail greeting; (3) provide any contact information you can for urgent matters, such as a cell phone number. Send notifications by email or letter as appropriate. If you have staff, you should have an established process for communicating with each other if the office is inaccessible. If there has been a data breach, consider your legal responsibilities under RCW 19.255.010.
- 2. First 24 hours:** You need to identify all existing deadlines and determine immediately (1) which deadlines are occurring within 4 weeks; (2) which of those deadlines require an extension; and (3) the process for obtaining those extensions (for example, can you informally request an extension by email? Do you need to make a motion to the court?). If the incident implicates an insurance claim, begin the claims process and be sure to document any relevant damage.
- 3. First 48 hours:** If the hardware you primarily use to work (e.g. computer, laptop, or tablet) is destroyed, you need to determine what your options are for replacing hardware or utilizing other options, mindful of confidentiality concerns and cybersecurity protection. Be cautious when accessing or transmitting client data with devices that are owned or accessible by third parties. Based on your deadlines coming up, also consider any needs you have for printing, document delivery, document production, service, etc. Identify and notify parties (including the post office) where you can receive any deliveries or service. Always be aware of RPC Rule 1.6 confidentiality protections.⁹ Determine for yourself where your temporary workplace will be, and

⁸ AMERICAN BAR ASSOCIATION, *Surviving a Disaster: A Lawyer's Guide to Disaster Planning 1* (2011).

⁹ **RPC Rule 1.6**, or, for Limited Licensed Legal Technicians, **LLLT RPC Rule 1.6**.

consider any opportunities in your area for temporary office space.¹⁰ Determine what steps need to be taken to ensure payroll is processed on time and any bills or invoices are paid timely.

- 4. First 72 hours:** Unless your initial analysis indicated that you need to do this sooner, start your process for obtaining any extensions you need. Use a spreadsheet or other method to track each deadline and any extensions you receive. In addition to deadlines, you need to identify and address any document loss you suffered, including business records, trust accounting records, and any client files.
- 5. First Week:** By the end of the first week, you should be as close to fully operable as possible. You should be able to timely complete work and respond to inquiries, your bookkeeping should be up to date, and you should have a process in place to address any long-term needs such as permanent office space. With RPC Rule 1.4 in mind,¹¹ notify your clients of material changes in handling their matters due to the unexpected and unforeseen emergency events and required adjustments to your practice.

Your business continuity plan should also keep an up-to-date summary of the following:

- 1. Banking information** such as financial institutions, account numbers. You should also specify the backup location for trust account records, account ledgers, and other important client accounting information. You should establish and identify a source of cash flow for covering operating expenses (such as a line of credit). Finally, you should establish a protocol for meeting your payroll and other accounts payable obligations. Make sure all of this documentation is stored securely.
- 2. Contact information and emergency contacts for yourself and all staff members.** You should specify a timeline and format for sharing updates about office closures, etc. with staff while an incident is ongoing.

¹⁰ You may be able to reserve study rooms at your local library and, depending on where you live, you may have a co-working space nearby where you can rent an office for a day, week, or more. Most co-working spaces provide Wi-Fi and printing amenities. For example, in Spokane you can have access to a desk for a week for \$65 (<https://www.workatfellow.com/plans/>).

¹¹ **RPC Rule 1.4**, or, for Limited Licensed Legal Technicians, **LLLT RPC Rule 1.4**.

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3. **Contact information for vendors** (telephone, internet, utilities, etc.) **and office facilities** (after-hours business access, emergency helpline for the building, etc.). If you experience utility outages, what are your options? How will your business be impacted?
 4. **Location of where to obtain contact information for all clients on current matters** to enable your office to reschedule appointments, if necessary. This information should also be used to connect with clients to apprise them of all current or changed material deadlines and case adjustments as a result of the emergency.
 5. **Insurance information** including a summary of policies, coverage types and amount, and contact information for claims reporting.

You may want to consider keeping a physical copy of your business continuity plan in a secure location such as a safe or bank vault. Whatever storage method you choose, make sure you are updating your plan on at least an annual basis.

Designate a Custodian

If something unexpected happens to you and you are unable to practice, even temporarily, your clients may be harmed if there is no one to step into your shoes. Often this happens when a practitioner passes away suddenly and their family or friends are left to deal with the firm's business operations while also grieving. This is a burden on others that you want to avoid leaving behind.

Instead, you should designate another licensed legal professional¹² (the "Custodian") who can temporarily serve as a custodian for the business, either until you recover (if you will return to work) or until the firm is closed (if you will not return to work).

This relationship should be memorialized in a written agreement between you and the Custodian, and as part of the client engagement process you should obtain client consent for the Custodian to contact them if something goes wrong. You should also provide the client with information on how to reach out to the Custodian if the client needs access to their file but is unable to reach you.

¹² See [RPC Rule 1.15A\(h\)\(9\)](#) ("Only a lawyer admitted to practice law or an LLLT may be an authorized signatory on the account."), or, for Limited License Legal Technicians, [LLLT RPC Rule 1.15A\(h\)\(9\)](#) ("Only an LLLT or a lawyer admitted to practice law may be an authorized signatory on the account.").

The written agreement between you and the Custodian should memorialize:

- The scope of the Custodian's responsibility and specific duties that the Custodian will perform depending on the circumstances of your condition.
- The circumstances that will trigger the Custodian's performance of the agreement, including how your condition will be determined and who will make the determination and notify the Custodian.
- The mechanism(s) for the conclusion of the agreement, depending on the circumstances of your condition, such as (a) a set period after the Custodian begins performance, (b) a deliverable, such as all client matters are closed, or (c) when you can resume work.
- A mechanism for the Custodian to obtain a copy of your business continuity plan and any other logistical information they need.
- Authorization for the Custodian to contact clients, obtain time extensions in client matters, and arrange for the closure of your practice if needed.
- Authorization for the Custodian to disburse payroll; provide clients with an accounting and collect fees; and reconcile trust accounts; and, depending on your condition, authorization for the Custodian to wind down the firm's finances, return client property, and close financial accounts.
- A process to review and address conflicts of interest between your clients and any clients of the Custodian assisting you, before the Custodian is exposed to confidential information.
- A fee arrangement if the Custodian will be compensated for assisting you.

You should also discuss and memorialize the scope of the Custodian's duties to both you and your clients. This agreement should memorialize whether the Custodian is representing your interests as your attorney. Under this arrangement, the Custodian may have fiduciary obligations to you that conflict with the Custodian's ability to represent your clients and/or disclose certain information about your practice.

In addition to a Custodian, if you have a trust account you should also identify another licensed legal professional to be an authorized signer on your trust account if something happens to you. This second licensed

legal professional should be tasked with auditing and approving any deposits or withdrawals to the firm's trust account. Note that if you do not designate this in advance and you become incapacitated, your clients will not be able to obtain their trust account funds until a court orders access. Your clients may need those funds to find another licensed legal professional to take over their case.

When considering the process, consider the following:

- 1.** Who will determine whether you are incapacitated, and how will they know to contact the Custodian who has agreed to help administer your practice? Refer to RPC 1.15A for information about the tasks that only a licensed legal professional can perform.
- 2.** Does your bank require a power of attorney for a non-account holder to access your accounts?

Depending on where you live and the bank you use, some approaches may work better than others. Some banks require only a letter signed by both parties granting authorization to sign on the account. You may want to sign a limited power of attorney. Contact the bank that holds your IOLTA account and ask the institution what information it needs to grant access to another licensed legal professional.

- 3.** How long will the authority be granted to the licensed legal professionals who are assisting you? Who can terminate the agreement if something goes wrong?

In addition, you should ensure that your estate planning documents are updated as needed. You should obtain legal advice to ensure that your estate planning is consistent with the contingency arrangements you make for your business. You should also consider maintaining a life insurance policy that will cover intermediate expenses while your practice is taken care of. ■

TL;DR¹³

A **S A SOLO OR SMALL-FIRM PRACTITIONER**, an unexpected illness or event can debilitate your practice and cause irreparable harm to your clients. To protect your clients' interest, as well as your own, you should create a plan that provides for business operations to continue as usual. You should also document and backup important files and information. Finally, you should make arrangements for the administration of your business financial accounts if you are unavailable. ■

¹³ A shorthand notation summarizing the content of the materials.

Additional Resources

Frequently Asked Questions

- ▶ *If I do not have a designated custodian for my practice, and I pass away, will the WSBA administer the closure of my practice?*

Not necessarily. While the Rules for Enforcement of Lawyer Conduct establish a process for designating a custodian to protect client interests,¹⁴ this is a very limited resource and is not available in all circumstances. You need to be proactive in establishing your own succession planning so that your clients are protected and your loved ones are not burdened with finding a resolution for your business functions.

- ▶ *If I store all of my documents electronically, is that sufficient for backup purposes?*

Not necessarily. You need to make sure you have a document storage system that is sufficiently secure from cyber attacks and data breaches. You also need to make sure that if your existing storage system fails for any reason, you have another way of accessing that data. You may accomplish this by keeping hard copies of important records, or by ensuring that your electronic data is sufficiently backed up.

¹⁴ See [Rules for Enforcement of Lawyer Conduct Rule 7.7](#).

WSBA Member Resources

For more information and assistance from the WSBA on document retention, consider these resources available to WSBA-licensed legal professionals:

- **Free Lending Library:** Borrow from a selection of 400 books. You can register immediately online and start placing holds. Titles will be shipped to you automatically. Visit www.wsba.org/library to get started.
- **Free Consultations:** You can speak with WSBA staff in the Practice Management Assistance Program for personalized advice regarding your law firm business management. Visit www.wsba.org/consult to get started.
- **Free Ethics Help:** You can speak to WSBA staff regarding questions of ethical obligations or your professional responsibility. The phone number is (800) 945-9722.
- **Discounts on Software and Services:** Through the Practice Management Discount Network, WSBA members receive discounts on a menu of software and services to help you improve your practice and client service delivery. Visit www.wsba.org/discounts to learn more.

For other WSBA resources and member benefits, visit www.wsba.org/MemberSupport.

External Resources

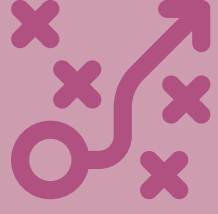
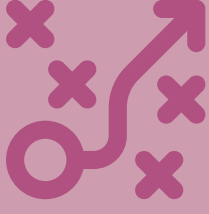
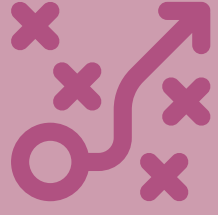
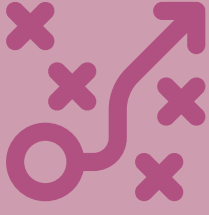
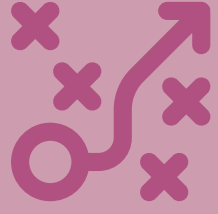
AMERICAN BAR ASSOCIATION, *Committee on Disaster Response and Preparedness* (available at <https://www.americanbar.org/groups/committees/disaster/>).

AMERICAN BAR ASSOCIATION, *After Disaster Strikes: A Checklist* (Nov. 13, 2003) (available at <https://www.americanbar.org/content/dam/aba/images/disaster/checklist.pdf>).

DEPARTMENT OF HOMELAND SECURITY, *Ready campaign* (available at <https://www.ready.gov/business>). For a summary of costs associated with creating a business continuity plan, see https://www.fema.gov/media-library-data/1387572158481-3561e0b74b8da0f6deb4424c9a29bbf6/business_cost.pdf.

U.S. CHAMBER OF COMMERCE, *Quick Guide: Small Business Disaster Preparedness* (available at https://www.uschamberfoundation.org/sites/default/files/media-uploads/USCCF_SBDP_QuickGuide_v2.pdf).

WASHINGTON STATE SMALL BUSINESS DEVELOPMENT CENTER, *Disaster Planning and Recovery* (available at <https://wsbdc.org/services/grow/resources/disaster-planning-and-recovery/>). ■



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