AMERICAN BAR ASSOCIATION

STATE AND LOCAL GOVERNMENT LAW SECTION

CHECKLIST FOR STATE AND LOCAL GOVERNMENT ATTORNEYS TO PREPARE FOR POSSIBLE DISASTERS

Committee
Homeland Security and Emergency Management

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Preface:

The American Bar Association's Section of State and Local Government Law has long recognized that state and local governments respond first to catastrophic events – and must be prepared. In 1995, the Section, working through its Jefferson Fordham Society, sponsored the production of "*ARE YOU PREPARED*" – a continuing legal education video describing the legal challenges that attorneys faced after the first bombing of the World Trade Center and the catastrophic flooding along the Missouri River in 1993. Over the last decade, The Urban Lawyer, a law journal published by the Section, has provided a number of seminal articles dedicated to exploring emergency management law.

In 2002, after the devastation caused by the attacks of September 11, 2001, and following the birth of the Department of Homeland Security, it was clear that the Section could do more, so it created a new Committee on Homeland Security and Emergency Management specifically "*to help state and local government lawyers prepare for and respond to the legal issues their client jurisdictions face from threats due to both natural and non-natural disasters and emergencies.*"

This Checklist – first published in draft in late 2002, has reached a wide audience of state and local government lawyers, as well as federal lawyers who work on intergovernmental issues, practitioners in law firms that service state and local governments and clients that frequently work with those governmental bodies, in addition to academics in such fields as public health, land use, urban development, and emergency management law.

The Checklist incorporates legal issues that will likely emerge from emergency situations regardless of cause. Emergencies – and the legal issues they create for state and local governments – are triggered by all manner of catastrophic events. These catastrophes range from non-natural "Homeland Security" threats involving terrorists and weapons of mass destruction, to industrial or transportation accidents involving hazardous materials, to those resulting from natural hazards of flood, fire, wind, earthquake, and disease. As a practical matter, a municipality's fire and police departments respond to all disasters and operate under legal

authorities relating to emergency situations that are activated regardless of cause.

Terrorist events using weapons of mass destruction raise unique issues (such as mass casualties, federal control over crime scenes, quarantines, decontamination, and coordination of police with military and intelligence officials), but even in terrorist events many of the legal issues generated in disaster preparedness and response are also independent of the cause. The National Response Plan and the National Incident Management System – recently adopted at the direction of President Bush – both recognize that the nation is well served by its 'all-hazards' approach to emergency management. With this approach, the capabilities that are developed in preparing for catastrophic terrorist events will also be available when communities, states, and the Federal government react to (fortunately more common) natural disasters.

Similarly, our nation's preparedness for terrorist incidents is significantly enhanced when the response uses the same management systems and response plans that are regularly 'exercised' in mobilizing for emergencies resulting from natural events. The nation's 'all hazards' approach to emergency management is also important for state and local government attorneys – since as a practical matter they do not have the luxury of specializing in catastrophic events only if they are of natural (or non-natural) origin.

When first publishing this checklist as a draft in 2002, the Committee expressed the long-term hope that it could expand its efforts beyond simply a *checklist* to issues to development and dissemination of resources (key cases, sample contracts, summary analyses, and experts willing to discuss issues) that are available with respect to those issues. We are pleased that several of the efforts of this Committee have reached fruition. The Urban Lawyer has published several new pieces reflecting the Committee's work. The Section and the Jefferson Fordham Society, with the assistance of a generous grant from the Public Entity Risk Institute, have produced a new and updated continuing legal education video: *"ARE YOU READY: What Lawyers Need to Know About Emergency Preparedness and Disaster Recovery."* Finally, the Section will be publishing a book to aid attorneys dealing with these issues later this year.

We very much hope that this Checklist will be of real assistance to state and local government attorneys as they help their clients prepare for, respond to, and recover from catastrophic events. We are continually looking for comments and revisions to provide even more thorough coverage of these issues and help legal counsel become better prepared to handle these critical issues that directly affect our country's health and public safety.

Introduction

Before a disaster strikes, legal counsel should be prepared for the role they may be asked to play. Obvious starting points are anticipating and reviewing likely emergency issues, policies, and legal questions, identifying the various actors with whom counsel may be involved, and knowing how counsel may need to relate to or advise them. The checklist that follows is organized to help counsel work through the issues and identify topics for researching the laws, systems, and policies that may arise in the context of either an unnatural or a natural disaster. [1]

Attorneys should try to determine in advance what roles they may be asked to play by their governmental or other affected clients and what their specific responsibilities will be in those roles. The tasks asked of counsel will to a large extent be dependent upon the emergency impacts experienced by their clients, and partners of their clients, (including government officials, public non-profit or private business officers) – and the emergency actions contemplated and taken.

When a disaster strikes, unless some advance preparation has taken place, counsel may find that a number of the issues they are being asked to consider will not only be new to them, but, if they had been better prepared, many options that might have been available for dealing with emerging issues are no longer available. In addition, attorneys operating in the midst of catastrophes may find their working conditions difficult, to say the least. The disaster may disrupt the infrastructure – such as working computers, telephones, and internet connections – that counsel would normally rely upon to research and generate legal documents to address issues that arise. Given the scope of actions that could arise and the potential impact that terrorist-caused and major natural disasters may entail, preparation is essential. The following represent many, but certainly not all, of the steps that should be taken to prepare for these eventualities that sooner or later most communities are likely to endure.

I. Prepare an Emergency and Disaster Response Handbook and Share It with Your Client

1. ***Research all relevant emergency powers for the jurisdiction.***
   NOTE: Emergency management and homeland security are now exceptionally active areas for legislation, at Federal, state, and even local levels. Research on the scope of emergency powers should be updated several times per year.
   a. Research, using phrases such as "disaster or emergency" and (specific jurisdiction or level of jurisdiction, such as "state, municipal, county, or town)." This should yield the bulk of the various laws (and possible interpretations of them) that deal with what a jurisdiction can do in times of disaster.
   b. Use Legal Indexes of Statutes- using the bound copies of the index to the general laws in your jurisdiction, look up such topics as *disaster, emergencies, war, civil defense* and the like. This search is likely to refer you to applicable laws as well.
   c. Check Special Acts for the Particular Jurisdiction- many states pass special acts dealing

[1] The Committee wishes to acknowledge with appreciation its use with his permission of the very thoughtful paper , "Legal Issues For Municipal Counsel to Consider *Before* Disaster Strikes," of James B. Lampke, Esq., Town Counsel-Town of Hull, Mass, which he presented to the International Municipal Lawyers Association in April 2002,as a starting point in developing this Checklist.

with disaster responses.

d. Check with the State and Local Government Emergency Preparedness Agencies that may have already compiled many of these sources.

e. Check for Local Laws, Ordinances and Regulations on these topics.

2. ***Compile a handbook containing legislative authority and judicial decisions relevant to the variety of issues, policies, and systems that could arise in emergencies and disasters, and keep it current.***

   Keep copies (hard and on disk) on site at the office, but also at another location, offsite.

3. ***Provide client contacts with copies of the materials for reference in advance as part of disaster crisis management.***

4. ***Develop and maintain as part of your Disaster Response Handbook a list of resources where you can obtain legal assistance and information.***

   Keep a master list in your notebook of names, addresses, telephone/fax numbers and email addresses of resources. One resource is the International Municipal Lawyers Association, which has a data bank of forms and materials submitted by members on disaster-related legal issues.

5. ***Set up a portion of your Handbook to cover the various laws and related forms that deal with responding to disasters in your jurisdiction.***

6. ***Have sample forms ready to cover any matters for which specific action cannot be taken beforehand to allow for rapid response to issues that can be anticipated.***

7. ***Develop an appendix of forms and have them also on computer disk and CD so they can be readily adapted to any particular situation.***

   Typical forms may include such matters as declarations of emergency, declaration of curfews, bans on liquor or gun sales, emergency petitions to a court, orders of closure, emergency purchase orders, etc.

8. Identify sources of information, best practices, model acts, and other sources for other assistance with legal issues in your Handbook, regarding planning for and responding to disasters, from such national organizations as: the National Governors Conference, the League of Cities, Conference of Mayors, National Association of Counties, the International Municipal Lawyers Association. The websites of several federal agencies – such as FEMA, DHS, and the Public Health Law Program of the Centers for Disease Control, also provide substantial resources for state and local government attorneys.

II. Authorities Available to Jurisdictions to Protect Public Health and Safety

9. ***Determine if the emergency authority currently provided and the powers that can be exercised under it are sufficient to deal with the potential scope and range of non-natural and natural disasters***.

   Among the issues that must be determined is who has the legal authority to take action, for instance, to tear down dangerous buildings, to exceed appropriations, to purchase supplies, utilize volunteers who will be certifiable if professionals, and can come under sovereign immunity

protections, hire more workers, etc. For example, the following questions need to be answered:

10. ***In times of disaster, who is in charge--is it the elected official or the local governing body or board, or a previously appointed administrative professional?***

    Who has authority: the County Executive, City or Town Mayor or Manager? Designated Emergency Preparedness Director? Police or Fire Chief? Mayor or City or Town Manager but only with approval of Council or Board of Selectmen?

    Under Homeland Security Presidential Directive No. 5, President Bush directed every federal agency, where permitted by law, to withhold any federal preparedness funding to any state or community that had not adopted an incident command system consistent with the National Incident Management System ("NIMS").[2] Counsel should review the community's and state command system to confirm it complies both with applicable law and requirements of NIMS in order to be eligible for potential grants in aid.

11. ***Must there be a declaration of an emergency before the person(s) with authority can act?***

    In many jurisdictions, public health officials have strong powers to protect public health and safety – for example, by detaining persons diagnosed with or exposed to a communicable disease in a quarantine or isolation facility – without a formal declaration of emergency. Issues of forced evacuation may also arise, and both the legal authority and policies that should be utilized in such situations should be known beforehand and relevant instructions should be prepared beforehand.

12. ***When do laws become effective?***

    Are there provisions for emergency laws to become effective sooner than non-emergency laws? What are the steps? Does it make a difference if it is a state or a local law? [There may be special posting requirements for emergency laws.] What procedures apply to renewing such provisions, if that becomes necessary?

13. ***Who has the authority to declare an emergency, and what laws, potential actions, and access to benefits are triggered as a result of who makes the declaration?***

    What powers and authorities of the client jurisdiction are triggered by declarations by various officials -- Mayor; city or town Manager; Council or Board of Selectmen; Police or Fire Officials; State emergency Officials; the Governor? Many jurisdictions have different types of declarations, for which different officials are responsible. For example, a Public Health Officer or Commission may have authority to declare a "public health emergency."

14. ***What differences in declarations of an emergency apply for a local emergency, a state declared emergency, or a federally declared emergency?***

    Different rules generally apply to each type of declaration. For instance, whether it is a local, state, or Federal declared disaster may affect the availability of loans, grants, and reimbursements from state and federal government sources.[3] Depending on the particularities of the jurisdiction's

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[2] Homeland Security Presidential Directive 5, ¶20, issued February 28, 2003, was available as of March 15, 2005, at http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html. As of that date, the full text of NIMS was available at http://www.dhs.gov/interweb/assetlibrary/NIMS-90-web.pdf.

[3] It is critical, regardless of who declares the disaster or if it is declared at all, that such decisions be adequately

laws, the nature of the designation may also affect the scope of authority and actions that can be taken. Knowing the difference in advance will minimize claims after the disaster is over.

15. ***What issues of succession of governmental officials may arise in emergency situations that could have implications for governments taking action, for instance, to declare an emergency?***

    Determine if your state's constitution provide for the continuity of government in times of emergency? Are there succession powers and designations, and who makes those determinations?

16. ***If sufficient powers have not been provided, or are not clear, consider proposing necessary additional relevant authority to cover necessary responsibilities and tasks.***

17. Determine if powers are sufficient for public health and safety purposes in the context of the need for emergency responses.

    For instance, in times of disaster it often becomes necessary to require evacuations, quarantine persons, impose curfews, restrict persons from access to certain areas, including public thoroughfares and buildings. Also, it may seem advisable to impose other controls in such situations, such as banning sales of liquor and guns, and imposing price controls, if authorized.

18. ***Determine who has the authority to make these decisions, what steps must be taken to do so, and what documents are required to record properly the actions taken***.

    As noted above, sample forms that can be readily adapted for these purposes should be prepared well in advance. Be aware of time limits and renewal procedures in drafting such documents.

19. ***Determine if an evacuation plan exists, who determines the circumstances that can require population evacuations in the jurisdiction, and what grounds for evacuation are required and will need to be documented.***

    The authority for most state or local evacuation orders stems from the state's police power; evacuations are generally ordered by police or fire authorities based on a judgment that evacuation is necessary to protect the public health and safety (i.e., evacuation of the community affected by brush fires or leak of a derailed tank car with chlorine gas). Counsel should confirm what procedures and limitations apply to evacuation orders and in doing so should consider the legal and practical challenges of "mandatory" evacuations and any responsibility of the jurisdiction to protect property vacated/abandoned during an evacuation. Can there be forced evacuations and, if so, how are they to be implemented? Is the jurisdiction responsible to effectively evacuate special needs populations? Laws vary widely in terms of whether the government can force people to leave their property. Even if a jurisdiction does not permit forced evacuations, it is a good idea to have ready a notice to give to property owner advising them of the risks involved and the fact that the government may not be in a position to rescue them as events progress. Some jurisdictions provide a pre-printed "waiver" form to provide persons who resist evacuation, as well as collecting information from such persons in order to notify their next

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documented, including the basis for all actions taken, and the need for expenditure of funds for this purpose. After the dust settles and the affected jurisdiction begins to look at loans, grants, and reimbursements, unless careful records are kept all along, the task of documenting actions becomes much more difficult. A process needs to be established in the beginning, even if it as simple as keeping a log of all actions and assigning one or two persons to maintain it.

of kin.

20. ***Determine whether different legal requirements (and authorities of different agencies) will apply when allowing reentry to evacuated areas at the conclusion of the crisis.***

    After evacuation, the evacuating authority must determine when it is safe to allow residents to return to their homes and businesses. Who is responsible for determining when it is "safe?" What kind of public announcement will be made or will decisions be left to police and fire officials in the area? Do other agencies have jurisdiction where trace amounts of chemical, radiological, or biological contamination remain?

21. ***Determine the scope and range of regulatory powers available to control operation of commercial establishments that may be required in emergencies and disasters, including access to and restrictions on use of food service establishments, grocery outlets, etc.***

22. ***Determine the applicability of existing curfew provisions, if they exist, and what grounds or events are required to impose such controls in circumstances of emergencies and disasters and how they are to be documented.***

    For instance, what is the process to declare curfews and how are they to be justified? A review of the available legal decisions relating to curfews in a state is an essential starting point.

23. ***To the extent that law enforcement powers may pertain to your client's, or your own role, determine if a relevant range of potential acts of terrorism are sufficiently covered under applicable criminal laws to enable public safety officials to exercise necessary powers to act.***

24. ***Considering the potential issues that may arise under possible biochemical terrorism scenarios, determine if authority is sufficient to protect residents***

    For instance, can persons within the jurisdiction be required to undergo tests for possible exposure to toxic substances; can treatment to protect them be ordered and then compelled, including, for instance, can decontamination procedures be imposed, can medication with protective agents that may involve injections or ingesting pills that may entail some risk; and can testing (possibly invasive) be ordered. Can use of various protective apparatus, such as biochemical breathing equipment and masks, be mandated?

    Assuming there is legal authority to require decontamination, medical testing, treatment, vaccination, quarantine, and isolation – what legal options are available to address an individual's refusal to consent, for example, to treatment. Can such persons be restricted in the area where they were affected until appropriate procedures to ensure that they safely may enter back into the general society are implemented? If challenges occur, how and when would the individual be provided with whatever hearing might be required by constitutional due process protections?

25. ***Determine if a sufficient range of related public health powers is available to deal with preventive efforts or to control contamination, permit destruction of real and personal property that may constitute a potential hazard, and what obligation of compensation is required of government***.

    What is the process for Boards of Health, governing Officials/Boards, Public Safety Officials, Building Commissioners, Fire Departments and others for making buildings or property safe or demolishing them, and where can such debris be disposed of? [Inevitably, during an emergency situation, there will likely be a need for the government to take action to restrict access to, raze or

board up buildings or clear property due to health and safety reasons. Even in times of emergencies, there are special procedures that must be followed. A failure to follow the rules could lead to claims later on; even if the jurisdiction was justified in wanting to tear down a dangerous structure. A failure to follow the legal requirements in times of an emergency may make the jurisdiction liable for damages. Different rules may apply to different officials who all may be authorized to take such action. Know the differences and the rules.

Note: by statute, federal assistance in removing debris is only available if the state or community arranges for an unconditional authorization to remove the debris, and indemnifies the federal government against any claim arising from removal of debris from private property.[4] It is important to observe appropriate procurement requirements when expecting reimbursement with Federal funds. No more than the minimal essential work necessary to deal with clearing access should be undertaken using emergency procurement procedures. Wider cleanup can be accomplished through appropriate normal procurement processes.

26. Review the jurisdiction's police power authority related to the following matters:

a. ***Restriction and control of access to crime scenes or to areas subjected to biochemical or radioactive incidents, having the potential of residual pollution of the area requiring abatement and cleanup***.

b. Protection and control of access to infrastructure critical to functioning of government and generation and transmission of utilities, such as public buildings; transportation (including bridges, elevated highways, tunnels, and the like); water processing facilities; reservoirs; electrical and gas storage, generation and transmission facilities; communication facilities, or to other areas and systems subject to potential threats of harm.

Determine the level of threshold authority available to protect critical sites of governmental and public utility infrastructure, through such measures as authority to search vehicles, detain persons near critical sites for questioning, and to restrict access to such critical areas, while addressing applicable First Amendment, due process, and privacy rights. For example, who has authority to impose emergency actions relative to water supplies and what actions may be taken. These could range from the need to limit water consumption or divert water from one area to another because of drought conditions or the need to protect water supplies, as well as other utilities, from corruption. Consideration will need to be given to handling situations where the water is not produced by the jurisdiction but, rather, is the property of a private utility.

c. ***Imposition of security measures, such as searches and restrictions on access to public gatherings, including sports and entertainment events, or to certain areas requiring protection.***

What is the process to set up roadblocks and vehicle searches in certain areas? What are the legal issues that may arise from stopping vehicles or people in public areas during an emergency? What are the community's procedures for responding to evidence of unrelated criminal activity (such as stolen property, drugs and drug paraphernalia) discovered during a security search?

27. ***What restrictions are there on emergency action in certain areas, i.e., private roads, wetlands, waterways, private lands, utilities easements, etc.?***

[4] 42 U.S.C. § 5173.

Under the wetlands laws of some states, before emergency work can be done in a protected area, there must be approval of the emergency by the local agency having jurisdiction. Be familiar with the process for emergency work in such areas before you need to utilize it. Under what circumstances and conditions can entry be made on private property? Under what circumstances and conditions can private property-- both real and personal-- be taken or used during an emergency? What, if any, compensation may need to be provided the owner for the loss of use or damage to such property?

III. Surveillance Authority and Protection of Security Information

28. Determine the jurisdiction's authority to conduct surveillance activities and identify potential legal issues that could arise.

Surveillance activities of government already have triggered issues with respect to use of closed-circuit video cameras, photographs, and aerial surveillance, and the extent of authority for government to impose restrictions or sanctions based on such surveillance. Consideration will need to be given to possible damage claims that could be made as a result of governmental actions.

29. ***Determine the jurisdiction's authority to institute record background checks on individuals, use of licensing documentation, and access to public safety information in facilitating responses to potential threats to public safety.***

Justification required for restrictions on an individual's access to facilities and transportation modalities and the basis for the denial has been challenged in a number of decisions that attorneys should have adequate knowledge of in advising their clients. Maintaining the confidentiality of the information source may also be a problem depending upon the source of the records used.

30. ***Determine what forms of communications during the onset of a disaster are available to jurisdictions that may be involved and develop strategies for ensuring coordination of communications in such circumstances.***

Various client communication systems need to be shared by different departments and units of government that must act in a coordinated fashion in disaster situations. These systems should include access to legal counsel to obtain advice on issues that are likely to arise during the course of events where guidance may be requested.

Recent federal preparedness grants, training, and exercises have focused on improving "interoperability of communications." The challenge extends far beyond compatibility of equipment and into compatibility of incident command/management systems of multiple responders. The requirement that all communities be certified as compliant under the National Incident Management System by September 30, 2005, is intended to address interoperability concerns. Counsel may need to become familiar with consequences in event a community fails to comply – or states that it is compliant but then demonstrates in an incident that it had not been.

31. Determine who has authority for your client to access and respond to various types of intelligence information from other levels of government.

Those persons who are authorized to receive and responsible for actions upon receipt of communications from other levels of government regarding intelligence matters and how that

responsibility will be designated officially need to be determined.

32. Who is to have access to intelligence information, and how such information will be safeguarded from those without such authority or the need to know; and how will advance clearance to such communications be determined and documented.

Classified intelligence information cannot be provided to any person who does not possess valid clearance; violation of this statute is a serious criminal offense. Security clearances are granted only by the Federal government. The Department of Homeland Security has ensured that the emergency management function of each state has at least one – and usually more than one – person who has been granted the security clearances necessary to review classified information about potential terrorist threats. Local officials without clearances should be aware of who is the 'cleared' individual that they could contact about suspected events, and whether there is any information (stripped of classified material) that can be provided to assist in response efforts. ***Communication links and command authority need to be established with medical support systems, such as hospitals, doctors, emergency medical services, etc; how such communications will be safeguarded with these medical and health support systems needs to be determined.***

In an era of highly communicable diseases, bioterrorism is a potential basis for attacks on the population that will require careful management and difficult decisions regarding how information on conditions will be communicated.

IV. Intergovernmental Joint Powers Agreements and Actions.

33. Determine the scope of existing joint powers agreements with other governmental bodies and determine if the powers are sufficient to cover issues that may arise in allocation of manpower and resources and to ensure cooperation necessary to respond effectively to various types of disasters.

Be familiar with existing joint powers agreements and mutual aid agreements. For instance, if there are mutual aid agreements, how are they activated?

34. ***Determine what existing policies and procedures have been agreed to by various governmental bodies, for instance, under emergency plans required of jurisdictions in some states, and more generally concerning potential exercise of joint responsibility for dealing with disasters and whether these powers are adequately documented regarding responsibility for responding to particular disasters.***

Review the article on Intergovernmental Agreements in the winter, 2005 issue of the Urban Lawyer. Interstate Mutual Aid is frequently provided under the Emergency Management Assistance Compact, to which 48 states have signed on. A Draft Model Intrastate Mutual Aid Agreement has been developed by the National Emergency Management Association.

35. ***Identify existing coordination requirements as between various levels of government in preparing for and responding to disasters and determine if they are adequate or improvements are required.***

36. ***Review the jurisdiction's emergency plan and command structure for emergency management and the client's role in both in order to prepare to respond to client questions as to legal authority for carrying out various actions for which your client's jurisdiction has responsibility and to ensure effective cooperation between various governmental jurisdictions at all levels of government.***

V. Disseminating Critical Information to the Public

37. Review the available communications systems to be used to convey information between government officials and the public for such matters as disaster alerts and management information, and determine how the authority to exercise such communications systems needs to be authorized and documented.

Determine what procedures and legal approvals should be used in advance and during an emergency regarding who has authority and responsibility for determining when and what will be communicated to adequately alert and inform the public of potential disaster situations and conditions.

38. ***Determine how dissemination of information to the public will be provided using cooperative local media outlets, radio, television, and cable technology for notifications as well as the use of various warning systems and alarms that may be available in a jurisdiction, such as sirens, loud speakers in public and commercial areas, etc.***

The natural instinct of the lawyer may be to restrict communication to the public, due to potential liability from inaccurate information. However, this instinct is simply wrong in emergencies. Information – coordinated among all responders and levels of government to assure consistency – is absolutely critical to a successful emergency response. The public must be advised what the problem is, and how they can best protect themselves, their families, their property, and their livelihoods.

39. ***Anticipate the parameters regarding sharing of intelligence and disaster information with the news media, the extent of access to be provided to the media or to any citizen to make inquiries of government officials or to obtain access to government documents and intelligence information or to sensitive records, including those maintained by medical facilities and health care professionals.***

40. ***Determine how freedom of information and application of open meetings laws will be applied during periods of crisis management and planning and to governmental information sources.***

What are the effects of an emergency declaration or situation on open meeting laws, public records laws, and ethics laws, etc.? For example, what are the requirements to hold an emergency meeting? Are on site inspections considered meetings? [Typical open meeting laws provide exemptions for posting notices of meetings for emergencies. Know in advance what constitutes an emergency under the law and know what special steps must be taken.] Consider procedures needed to provide centralized and consistent treatment of these issues by governmental clients and to provide the media and the public in advance with information about how such matters will be handled.

The balance between policies of openness in government and in restricting access to information that would be useful to those planning a terrorist attack is still being developed. The Department of Homeland Security is promulgating regulations implementing an exception to FOIA contained in the Homeland Security Act of 2002, Public Law 107-296; 116 Stat. 2229; this rule – which would preempt certain state open records laws – may help clarify information issues.

VI. Establish Guidance for Administrators Regarding Administrative Functions during Emergency and Disaster Crises

A. Fiscal and Budgetary Matters

41. ***Determine what existing sources of funding can be used and what procurement requirements are applicable to emergency situations***.

    For instance, who has authority to order emergency actions entailing governmental costs? Who determines the use and allocation of resources/reallocation of appropriated funds? What procedures must be observed and how are they to be documented? What restrictions or limitations apply to such actions? Decide whether existing special emergency authority in this regard is sufficient and propose changes if needed.

42. ***Determine if current emergency procedures are sufficient to authorize funds and obtain access to budgetary resources that may be required, including whether normal limits and restrictions on spending will apply and who can make those decisions***.

    The extent that supplemental approvals will be required should be determined as well.

B. Who Can Exercise Fiscal Authority and How

43. ***Who has the authority to do what in times of disaster?***

44. ***What limits are there on the authority of various boards, city council or executive officials in terms of exercising their typical authority?***

45. ***Who has the authority to waive certain laws?***

    Under disaster laws, some laws can be waived, but only upon prior action by designated officials. Determine if that authority exists in the jurisdiction, who can exercise it, and what must be done. If a declaration or formal order must be issued, have sample forms readily available that can be filled in with the details.

46. ***Is there authority to exceed appropriations and basically disregard set budgets when there is an emergency situation and who has the authority to do what is essentially emergency borrowing?***

    What limits are there on what the money can be spent on? [Dealing with the issue of exceeding budgetary appropriations is often one of the first legal issues to arise.] Some laws require there to be a vote of various governing board officials. Others may require the approval of state officials, the obtaining of which during disasters can be problematic. Some laws may restrict or limit funds exceeding a budget approval and how they can be spent. Knowing these limitations will be essential advice to your client.

47. ***Determine how reimbursement for emergency expenditures for resources can be obtained, what procedures are required to obtain such funding, and from what sources of funds, and what restrictions apply.***

C. Contracting and Procurement Procedures

48. ***Determine what contractual procedures will be applicable during an emergency that could allow for expedited procurement of necessary resources and personnel, including equipment, supplies, materials, food, shelter facilities, etc.***

Identify any special rules in contracting during times of a disaster and how they differ from the typical procurement rules. What triggers special contracting authority, if applicable. Is a declaration of disaster needed, and by whom? A related question is what rules for contracting and procurement are waived when there is an emergency?

What special actions must be taken to utilize the emergency rules i.e., certain types of emergencies, who declares them, special filings of actions taken under emergency laws, limitations on whether the emergency work can only be so far as necessary to temporarily abate the emergency, etc., need to be determined. [Some laws limit the emergency contract work to only the least amount of work needed to abate the emergency. Some laws require approval from state officials before normal contract rules can be waived. There may also be special requirements for filing certifications with the state when there has been a contract entered into without the normal procurement process.]

Such special authority may be needed for:

a. procurement of services, supplies and materials (especially food, shelter, supplies, and medical supplies)
b. public works projects (i.e., bridge repairs, road work, dams, etc.)
c. public building projects (i.e., repairs, reconstruction, temporary structures, etc.)
d. utility contracts (i.e., water, gas, etc.)

D. Handling Personnel Issues in an Emergency Situation

49. ***Determine how personnel can be hired in an emergency, how compensation is determined, and what worker rights will apply where increased governmental staff resources must be provided at times of an emergency.***

50. ***Identify what personnel rules apply in times of disaster, such as hiring procedures, liability for employee actions, actions available under mutual aid agreements, calculation of benefits, wage-hour limits, etc.?***

What special rules apply to personnel matters in times of emergencies? In responding to an emergency, a jurisdiction will almost always need more employees than it typically has. It is critical to know beforehand how to hire people in an emergency, particularly in view of civil service or local personnel code requirements. Other issues that may be affected are whether medical examinations are needed for employees hired in an emergency. Administrators may need to exercise care regarding hiring of persons who would not have been hired under normal times who may gain preferences or access to benefits not normally available to them by suddenly responding to calls for emergency employees.

51. ***Determine under what circumstances emergency appointments can be made, which in effect by-pass normal hiring rules (civil service, collective bargaining, etc.)***

What restrictions are there on emergency employees performing the duties of other employees? [Some laws restrict, for example, police performing the duties of fire fighters. Are there emergency exceptions?] What special rules exist for calling into service employees who have already retired? [Retired employees may be a good source of additional workers when there is a disaster. However, there may be special restrictions on their returning to work, even in times of an emergency.] Other personnel issues can also arise. For instance, can an unpaid volunteer be considered an employee if they serve in an emergency situation? Governmental jurisdictions

even under normal times often survive on volunteers. Their assistance becomes even more important during times of an emergency. However, there are a host of special problems and issues that arise with volunteers – including liability, licensing, credentialing, and management/supervision.

52. ***What special rules are there in terms of the number of hours/days an employee can work and how are those rules applied in times of emergency?***

Often state and federal laws limit the number of consecutive hours or days an employee can work. Special rules may apply in times of emergencies, however. What are the rules of the Fair Labor Standards Act and the Family Medical Leave Act concerning emergency situations? Are there comparable state laws to be considered? [See, for example, 29 CFR 553.25(c), regarding there being an exception to the rules on providing reasonable time off under the FLSA if there is an emergency situation.]
How does the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (38 USC 4301 et seq.) affect employment practices when employees are called up for military duty when National Guard units are activated.?[5] Are there comparable state laws to be considered? [Some key-- and not so key- -employees may be called up for reserve duty during the time the jurisdiction also needs them. There are special rules on how soon they must return to work following release from military service in order to maintain their rights to their positions.]

VII. Liability of Governmental Units in Emergency Situations

53. ***Determine the extent of the municipality's potential for liability for injuries/medical expenses sustained by employees and volunteers or retirement/disability benefits for them in times of emergency.***

While there is usually little dispute that all that can (and some would argue should) be done should be attempted when people need to be saved from injury or death, administrators should at least know what the government's exposure will be if a volunteer is injured, the rescue of a victim fails, or a citizen's property is damaged. Other issues range from what is the jurisdiction's potential liability for benefits to an emergency employee or to a volunteer's family should the employee or volunteer die while serving in the emergency? Similarly, to what extent is the jurisdiction liable for injuries/medical expenses or personal property damages sustained by employees from other jurisdictions or for contributions to their retirement/disability benefits for those employees of other jurisdictions coming to its aid in an emergency? Many of these issues are dealt with in the mutual aid agreements under which assistance is provided by other jurisdictions.

54. ***What are the special rules for dealing with hazardous substances in times of emergency?***

Are there environmental restrictions when taking action to dispose of materials, including debris, snow, water, etc.? Are piles of snow, which may have road salt or other chemicals mixed in, considered hazardous material for which special disposal rules apply? Environmental agencies have been known to cite (and fine) local governments for such acts as dumping snow (which has chemicals in it from the roads) into a body of water. Knowing where such material can be disposed of in advance could save a jurisdiction considerable cost if remediation becomes necessary, let alone embarrassment.

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[5] The US Department of Labor website, www.dol.gov, at the Veteran's Employment and Training Services section, provides a wealth of information on this law, including downloadable/printable text.

55. ***Determine to what extent governmental liability will still apply in emergency and disaster management situations.***

For instance, to what extent is a jurisdiction liable for injuries/medical expenses/property damage *caused by* employees and volunteers in times of emergency? Further, will the employee or volunteer be indemnified for any damage or injury they may cause? What if they are performing a task which normally requires a special license and they do not have it because they are filling in during an emergency? Do these same rules apply and to what extent is a jurisdiction liable for injuries/medical expenses/property damage sustained or caused by employees from other jurisdictions or for contributions to their retirement/disability benefits as a result of those employees coming to the aid of another jurisdiction. [Typically, mutual aid agreements or laws provide that the entity providing the employees remains liable for payment, but the entity receiving the services has to reimburse the entity sending the help.] Different requirements might apply where the employees volunteer on their own time to help out in another jurisdiction.

56. ***What special liability rules apply in emergency circumstances***?

For instance, what are the jurisdiction's special liability rules that might apply to doctors, nurses, and other health care professionals, or a "Good Samaritan" who come forward to help people in times of emergency? [State laws often provide special exemptions to liability by doctors, nurses, people with CPR training, etc. Knowledge of the application of such rules is likely to affect whether a jurisdiction enlists the assistance of such professionals.]

57. ***What are the liabilities a governmental jurisdiction faces when entering on private property or taking or using private property during an emergency?***

What state laws apply to government entering private property in times of an emergency can be critical regarding government liability. Those laws may be different if it is not a state-declared disaster. Photographs or videos taken of the area before or at least while work is being carried out may provide useful evidence to sustain government intervention. State eminent domain laws may also apply to such situations.

58. ***Determine what laws are subject to suspension during times of emergency***.

For instance, how are laws regarding statute of limitations, Sunday or Blue Laws, waiver of minimum number of school days, local tax proceedings, and creditor/debtor laws affected by declarations of emergency? Special rules may even govern the use of vehicles (including all terrain vehicles and snow mobiles) in times of emergency. Often there are special rules for using such vehicles on public streets during an emergency if authorized by the appropriate official. Such vehicles may be the community's only source of transportation in some disasters.

Special laws concerning rebates on taxes paid for property damaged during a disaster may apply during emergencies. [Some states have laws that provide for rebate of taxes when property has been damaged and the taxes were paid on the pre-damaged value of the property.]
Special laws concerning the value of property to be taken under eminent domain where the property was damaged in a disaster may apply. Similarly, access to state funding may apply in times of emergency or to the time for repayment of loans.

Disaster relief organizations may also receive special treatment under state laws.

Contract provisions can also be affected by definitions concerning Acts of God, disaster, emergency, etc. In some states, special laws establish a day or week for particular recognition of workers in disasters. Disasters can also affect issues in the administration of the criminal justice system in times of emergency. Some municipal counsel also handle criminal prosecutions, so counsel need to know the rules regarding the effect of a delay on bringing someone before the court for bail or arraignment in times of an emergency, as well as the other nuances of criminal law in times of an emergency.

Insurance provisions can also be affected by disaster situations. Know before disaster strikes what your insurance policies provide for coverage in times of an emergency. Remember, an emergency declaration may be helpful in getting state or federal aid, but it also may affect the level of insurance coverage that can later be obtained from the carrier. Similarly, "force majeure clauses" in existing contracts may need to be evaluated, hopefully before, but certainly after emergencies occur. [Many construction project contracts may provide for extensions of time and releases from liability if there is an enemy attack, act of God, or other force majeure occurrences. Many times these clauses are left in contracts with little thought to them. Since contractors can often obtain insurance to cover these contingencies, governments may want to consider excluding such clauses.]

Access to governmental benefits may also be subject to disaster relief. [Following 9/11, a number of bar associations and other legal agencies set up programs to help people deal with the paperwork needed for receiving benefits. There was, for example, an expedited process on receiving death certificates. Of course, it is important not to overlook appropriate verification requirements. It has been reported recently that a number of fraudulent cases have arisen involving people wrongly obtaining death benefits following 9/11.]

VIII. Develop a Knowledge of Applicable Federal and State Government Laws, Regulations and Authority in Handling Disasters, Both Non-natural and Natural.

A. Key Federal Laws

59. ***The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, et seq., as amended.***

This act deals with federally declared disasters and emergencies; it is a principal source of federal disaster assistance to state and local governments in times of disaster.

i. Direct Federal Assistance: FEMA coordinates all assistance provided directly by the federal government in response to declared disaster sand emergencies.
ii. Public Assistance Program: provides federal grants of "not less than 75%" of the cost of certain emergency costs and of the "repair, restoration, reconstruction, or replacement" of public facilities and certain non-profit facilities.
iii. Individual and Housing Assistance: provides funding for, and in some cases supplies, temporary housing for displaced households; and for federal funding of "immediate needs" of affected individuals and families.
iv. Post-Disaster Mitigation Programs, particularly the Hazard Mitigation Grant Program
v. Pre-Disaster Mitigation Programs; mitigation planning requirements and

funding for pre-disaster mitigation

vi. Emergency preparedness planning and exercising authorities.

General requirements that affect local government eligibility for funding:

vii. Duplication of benefits

viii. Ineligibility of for-profit businesses and the Legal Responsibility Doctrine

ix. Federal Grant Administrative Requirements

x. Distinction between "costs" that can be eligible and "losses," such as reduced revenues, that are not.

60. ***Small Business Administration***

xi. SBA disaster loans for individuals and small businesses

61. ***Specific Departmental Emergency Programs***

xii. ***Department of Health and Human Services***

xiii. ***Department of Transportation***

xiv. ***Housing and Urban Development***

xv. ***Environmental Protection Agency***

xvi. ***Department of Agriculture***

62. ***National Flood Insurance Program***

xvii. Flood Plain Management

B. State Laws

63. ***For local government attorneys, become familiar with the State laws for dealing with emergencies on a statewide level and for local emergencies***.

For instance, know how the State militia or other such groups can be called in to help? [Usually the law provides that local officials may request the National Guard or militia to come and provide assistance; know if a legislative body must also approve.]