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## OBTAINING COMPETENT LEGAL ADVICE: CHALLENGES FOR EMERGENCY MANAGERS AND ATTORNEYS

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Recent notable publications include: two books, EMERGENCY RESPONSE AND EMERGENCY MANAGEMENT LAW (2003) and HOMELAND SECURITY LAW AND POLICY (2005); Symposium, *Emergency Planning and Potential Liabilities for State and Local Governments*, 39 ST. AND LOC. GOV. REV. 44 (2007); "Emergency Management Legal Issues" invited chapter for revision of the International City Management Association (ICMA) publication EMERGENCY MANAGEMENT: PRINCIPLES AND PRACTICE FOR LOCAL GOVERNMENT, Kathleen Tierney & William Waugh eds. (2007); "Emergency Management and Law" invited chapter in DISCIPLINES, DISASTERS AND EMERGENCY MANAGEMENT: THE CONVERGENCE AND DIVERGENCE OF CONCEPTS, ISSUES AND TRENDS IN THE RESEARCH LITERATURE, David A. McEntire, Ph.D. ed., Charles C. Thomas Publisher, Ltd., Springfield, IL. (2007); invited chapter in MCGRAW-HILL HANDBOOK OF HOMELAND SECURITY entitled "Legal Issues for Businesses in Responding to Terrorist Events," David G. Kamien ed. (2006); *Seeking Consensus on Homeland Security Standards: Adopting the National Response Plan and the National Incident Management System*, 12 WIDENER L. REV. 491 (2006); and *Legal Issues in Emergency Response to Terrorism Incidents Involving Hazardous Materials: The Hazardous Waste Operations and Emergency Response ("HAZWOPER") Standard, Standard Operating Procedures, Mutual Aid and the Incident Command System*, 9 WIDENER L. SYMP. J. 295 (2003). Nicholson earned a B.A. from Reed College in Portland, OR and a Juris Doctor from Washington and Lee University's School of Law in Lexington, VA. He may be reached at: wnicolson@nccu.edu.

## I. INTRODUCTION

Emergency management is a creature of law.<sup>1</sup> On the federal, state, and local levels, legal enactments generate the formal structure, daily responsibilities, and powers of emergency management organizations.<sup>2</sup> The federal authority to regulate all phases of disasters and emergencies is rooted in the Constitution.<sup>3</sup> State enactments concerning this authority resemble one another.<sup>4</sup> They typically grant significant powers to Governors to deal with emergency events,<sup>5</sup> as well as establish and detail responsibilities for state<sup>6</sup> and local<sup>7</sup> emergency management organizations.

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1. "Laws help create the infrastructure through which emergencies are detected, prevented, declared, and addressed." James G. Hodge, Jr. & Evan D. Anderson, *Principles and Practice of Legal Triage During Public Health Emergencies*, 64 N.Y.U. ANN. SURV. AM. L. 249, 250 (2008).

2. Examples of emergency management law on the federal level include the Robert T. Stafford Act, Pub. L. No. 93-288, 88 Stat. 143 (1974), which provides the pattern for federal aid to states and localities and the Homeland Security Act of 2002, Pub. Law No. 107-296, 116 Stat. 2135 (2002), which establishes standards for local emergency responders and emergency management, among other requirements. On the state level, enactments such as IND. CODE 10-14-1 *et seq.* create the structure and delineate the functions of state and local emergency management. On the local level, many cities and counties have enacted laws that explain with more detail the authorities granted to them under state statutes.

3. Lloyd Burton, *The Constitutional Roots of All-Hazards Policy, Management, and Law*, 5 J. OF HOMELAND SEC. AND EMERGENCY MGMT. 4 (2008).

4. KEITH BEA, L. CHERYL RUNYON & KAE M. WARNOCK, CONGR. RES. SERV. GOV. AND FIN. DIVISION, EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES IN THE STATES, DISTRICT OF COLUMBIA, AND INSULAR AREAS: A SUMMARY 4 (2004).

5. *See, e.g.*, IND. CODE § 10-14-3-11 (2009) (Governor -- Direction and Control of Department -- Powers and Duties) ("In the event of disaster or emergency beyond local control, the governor may assume direct operational control over . . . emergency management functions within Indiana . . . . In performing the governor's duties under this chapter, the governor may do the following . . .").

6. *See, e.g.*, IND. CODE § 10-14-2-4 (2009) (Functions of Agency). ("The agency shall do the following: (1) Coordinate the state's emergency plans; (2) Serve as the coordinating agency for all state efforts for preparedness for, response to, mitigation of, and recovery from emergencies and disasters; (3) Administer this article and IC 16-31; (4) Perform duties assigned to the agency by the governor.").

7. *See, e.g.*, IND. CODE § 10-14-3-17 (2009) (Political Subdivisions -- County, Local and Interjurisdictional Organizations -- Organization -- Powers and Duties).

Under state laws, the major responsibility for emergency management rests with the local unit of government.<sup>8</sup> Experience has proven that “[l]awyeering for a [local unit of government] during a crisis is rarely planned or anticipated. Yet, emergency and disaster conditions will require the prudent involvement of the [local government] attorney.”<sup>9</sup> Local government attorneys (LGAs) and local emergency management coordinators (EMCs) are responsible for understanding and applying emergency management laws with the goals of maximizing public safety and procuring the greatest possible amount of financial support from other levels of government. For example, post-disaster debris removal may be eligible for federal reimbursement only if significant legal requirements are followed.<sup>10</sup>

Despite the requirement for understanding and compliance with legal standards, rural and less wealthy emergency management organizations, in particular, face significant challenges in obtaining competent legal advice.<sup>11</sup> As will be seen, however, even their

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8. See IND. CODE sections *supra* notes 5-7; Chris Green, *Part Time Disaster Planners Common - Many Kansas Counties Do Without A Full Time Emergency Manager*, HUTCHNEWS, July 29, 2007, <http://www.hutchnews.com/Todaystop/Emergency>.

9. Howard D. Swanson, *The Delicate Art of Practicing Municipal Law Under Conditions of Hell and High Water*, 76 N.D. L. REV. 487, 500 (2000).

10. See, e.g., GEORGIA EMERGENCY MANAGEMENT AGENCY, DEBRIS MANAGEMENT PLAN: ROLES AND RESPONSIBILITIES 3 (2006).

In the event of a Presidential disaster declaration, local governments may receive reimbursement, subject to cost-share provisions, for the cost they incur for emergency clearance of debris from roadways and other public access facilities, and for the costs of removal and disposal of debris that poses an immediate threat to life, public health and safety. To be eligible for reimbursement under the Public Assistance Program, contracts for debris removal must meet rules for Federal grants, which mean they are subject to the Common Rule specifying uniform administrative requirements for grants to states and local governments. FEMA's common rule provisions can be found in 44 CFR Part 13, and specific subsections, such as 13.36, describe procurement and other requirements. Public Assistance applicants should comply with their own procurement procedures in accordance with applicable State and local laws and regulations, provided that they conform to applicable Federal laws and standards identified in Part 13.

*Id.*

11. See William C. Nicholson, *Seeking Consensus on Homeland Security Standards: Adopting the National Response Plan and the National Incident*

wealthier fellows face similar problems. There are several reasons for this situation. Historical precedent, ingrained attitudes, and funding challenges together decrease the amount of competent legal advice available to local EMCs. This paper examines how well local units of government are fulfilling the mandate to incorporate legal counsel in the emergency management team.

## II. THE REQUIREMENT FOR COMPETENT LEGAL COUNSEL AND CONSIDERATION OF LEGAL ISSUES

Emergency management (EM) is a legal entity, and without law it would not exist in its current form. Yet “[w]hen disasters do strike, it immediately becomes obvious that the legal issues involved in local government disaster planning are some of the most misunderstood and confusing aspects of the entire process of disaster preparation and recovery.”<sup>12</sup> Emergency management has four phases: (1) mitigation, the lessening or avoidance of a hazard; (2) preparedness, including planning, training, and exercising; (3) response, referring to actions taken in the immediate aftermath of an event to deal with its effects; and (4) recovery, bringing circumstances back to at least the status they had prior to the emergency event.<sup>13</sup> During all four phases of EM, laws delineate the proper ways for local government to exercise EM powers.<sup>14</sup> LGAs and EMCs must comprehend and employ these laws if they are to protect public safety and acquire maximum economic assistance from other levels of government. “[A]ttorneys and their clients . . . need to educate and train one another regarding their respective roles. Clients need to learn, in advance of an emergency or other crisis, about the inherent ambiguities of law, and attorneys need to learn from clients what kinds of legal advice can be optimally

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*Management System*, 12 WIDENER L. REV. 491, 491-559, 524-525 (2006).

12. Joseph G. Jarret & Michele L. Lieberman, Symposium, *When the Wind Blows: The Role of the Local Government Attorney Before, During, and in the Aftermath of a Disaster*, 36 STETSON L. REV. 293, 294 (2007).

13. KEITH BEA, CONGR. RES. SERV., FEDERAL STAFFORD ACT DISASTER ASSISTANCE: PRESIDENTIAL DECLARATIONS, ELIGIBLE ACTIVITIES, AND FUNDING (2005).

14. See William C. Nicholson, *Emergency Management Legal Issues*, in EMERGENCY MANAGEMENT: PRINCIPLES AND PRACTICE FOR LOCAL GOVERNMENT 237 (Kathleen Tierney & William Waugh eds., 2d. ed.) (2007).

utilized by the client.”<sup>15</sup>

On April 29, 2004, the American National Standards Institute (ANSI) recommended to the 9/11 Commission that the National Fire Protection Association (NFPA) standard, “NFPA 1600 Recommended Practices for Disaster Management,”<sup>16</sup> be established as the national preparedness standard.<sup>17</sup> On July 22, 2004, the 9/11 Commission formally endorsed NFPA 1600, stating that it was encouraged by Department of Homeland Security (DHS) Secretary Ridge’s praise for it and specifying its preference that its adoption be promoted by DHS.<sup>18</sup> NFPA 1600 sets up a shared set of norms for disaster management, emergency management, and business continuity programs.<sup>19</sup> One vital aspect of NFPA 1600 is its requirement that all EM and business continuity programs comply with all relevant laws, policies and industry practice.<sup>20</sup> The National Emergency Management Association (NEMA) endorsed NFPA 1600 as an appropriate standard for emergency management—as early as 1998 NEMA passed a resolution signaling its support of NFPA 1600.<sup>21</sup> The standard, along with other existing documents like the Capability Assessment for Readiness (CAR),<sup>22</sup> provides the foundation for the

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15. Demetrios L. Kouzoukas, *The National Action Agenda for Public Health Legal Preparedness: Public Health Emergency Legal Preparedness - Legal Practitioner Perspectives*, 36 J.L. MED. & ETHICS 18, 20 (2008).

16. NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 1600 STANDARD ON DISASTER/EMERGENCY MANAGEMENT AND BUSINESS CONTINUITY PROGRAMS (2004 ed.), available at [http://www.preparednessllc.com/resources/nfpa\\_1600.html](http://www.preparednessllc.com/resources/nfpa_1600.html) (follow “NFPA 1600 - 2004 Edition” hyperlink).

17. ANSI, “9-11 Commission Presented with Recommendation on Emergency Preparedness,” [https://www.ansi.org/news\\_publications/news\\_story.aspx?menuid=7&articleid=670](https://www.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=670).

18. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 398 (2004), available at <http://www.gpoaccess.gov/911>.

19. For information on ANSI, see American National Standards Institute Homepage, <http://www.ansi.org> (last visited Mar. 9, 2010).

20. NATIONAL FIRE PROTECTION ASSOCIATION, NFPA 1600 § 5.2 (2007).

21. NATIONAL EMERGENCY MANAGEMENT ASSOCIATION, NFPA 1600 STANDARD RESOLUTION, available at <http://www.nemaweb.org/?335>.

22. The Capability Assessment for Readiness (CAR) is actually the “common root” for NFPA 1600 and EMAP. Paul Rasch, EMAP Standards Subcomm. Chair and EMAP Technical Comm. Member, remarks at The New Emergency

Emergency Management Accreditation Program (EMAP).<sup>23</sup> EMAP is supported by a large number of important players in emergency management,<sup>24</sup> including the Federal Emergency Management Agency (FEMA).<sup>25</sup> Although the program is voluntary, the fact that it is endorsed by such a wide variety of authorities means that EMAP is well on its way to becoming the *de facto* standard for EM in the United States. As more programs become accredited under the standard, it is more likely that a court will hold all EM to the norm.<sup>26</sup> Accepted industry practices frequently move from *de facto* to *de jure* acceptance through common law adoption in the courts.<sup>27</sup> Failure to comply with a commonly accepted industry standard like EMAP will likely be admitted into evidence in a trial alleging negligent failure to

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Management Standards from the Emergency Management Accreditation Program (EMAP), EIIP Virtual Forum Presentation (August 22, 2007) (transcripts available at <http://www.emforum.org/vforum/lc070822.htm>). FEMA created the CAR, which, previous to EMAP, served as its state emergency management assessment tool. *See* Press Release, FEMA, Emergency Management Assessments Completed in Nine States Under Joint FEMA/EMAP Initiative (July 23, 2003), <http://www.fema.gov/news/newsrelease.fema?id=3712>.

23. FEMA Press Release, *supra* note 22.

24. Many organizations collaborated on and supported the development of EMAP, including: The National Emergency Management Association (NEMA), International Association of Emergency Managers (IAEM), U.S. Department of Homeland Security Emergency Preparedness & Response Directorate (EPR/FEMA), U.S. Department of Justice Office of Justice Programs, U.S. Department of Transportation, National Governors Association, National League of Cities, Council of State Governments (CSG), National Conference of State Legislatures, National Association of Counties, individual states, and others.

EMAP, EMAPonline.org, EMAP History (follow “What is EMAP?” hyperlink, then follow “EMAP History” hyperlink).

25. FEMA Press Release, *supra* note 22.

26. “[W]here relevant to the case and upon a proper evidentiary foundation, safety standards promulgated by organizations such as ANSI may be admitted to show an accepted standard of care, the violation of which may be regarded as evidence of negligence.” *Kent Vill. Assocs. Joint Venture v. Smith*, 657 A.2d 330, 337 (Md. Ct. Spec. App. 1995).

27. Indeed, custom and usage within an industry need not be complete or general where improved safety standards, which EMAP provides for emergency management, are involved. *See* *T.J. Hooper v. N. Barge Corp.*, 60 F.2d 737 (2d Cir. 1932), *cert. denied sub nom* *E. Transp. Co. v. N. Barge Corp.*, 287 U.S. 662 (1932).

prepare for or respond to an emergency.<sup>28</sup> Clearly, evidence of not performing to the standards set by EMAP could lead to a finding of liability.<sup>29</sup>

EMAP requires EM organizations to comply and keep up with changes in relevant laws and authorities:

#### 4.2: Laws and Authorities

##### *Overview*

Laws and authorities refer to the legal underpinning for the program. Federal, state, tribal and local statutes and implementing regulations establish legal authority for development and maintenance of the emergency management program and organization and define the emergency powers, authorities, and responsibilities of the chief executive and the program coordinator. These principles serve as the foundation for the program and its activities.

4.2.1 The emergency management program shall comply with applicable legislation, regulations, directives and policies. Legal authorities provide flexibility and responsiveness to execute

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28. "Evidence of compliance or noncompliance with an industry standard of care is almost always admissible evidence on whether the defendant exercised due care . . ." David G. Owen, *Proving Negligence in Modern Products Liability Litigation*, 36 ARIZ. ST. L.J. 1003, 1023 (2004).

29. There are political costs, and, for local officials, potential legal costs that might be exacted if they fail to prepare for and respond adequately to a disaster. A means of addressing the risk of legal liability and mitigating potential political costs is adherence to accepted national standards. In emergency management . . . [a]t the programmatic level, National Fire Protection Association (NFPA) 1600 has been acknowledged by Congress, the 9-11 Commission, and other bodies as the accepted international standards for emergency management programs. The Emergency Management Accreditation Program (EMAP) operationalizes and expands the NFPA standards for state and local emergency management programs. The EMAP standards affirm that emergency management programs include the public agencies, nongovernmental organizations, and businesses that constitute the capabilities of states and communities to deal with disasters. [This] program[] provide[s] [a] benchmark[] for professional emergency managers and emergency management programs to ensure that they have the tools to manage risks and to deal with disasters.

William L. Waugh, Jr., *The Political Costs of Failure in the Katrina and Rita Disasters*, 604 ANNALS OF THE AM. ACAD. OF POLITICAL AND SOC. SCI. 10, 22-23 (2006).



emergency management activities in disaster and non-emergency situation [sic]. The emergency management program and the program's responsibilities are established in state and local law. Legal provisions identify the fundamental authorities for the program, planning, funding mechanisms and continuity of government.

4.2.2 The program has established and maintains a process for identifying and addressing proposed legislative and regulatory changes.<sup>30</sup>

The National Response Framework (NRF) lists a number of requirements for local officials. Among them is “[u]nderstanding and implementing laws and regulations that support emergency management and response.”<sup>31</sup> Regarding plans, the NRF states that they are acceptable only if “consistent with applicable laws.”<sup>32</sup>

The National Incident Management System (NIMS) also recognizes the importance of knowing and complying with applicable laws:

To better serve their constituents, elected and appointed officials should do the following: . . . Understand laws and regulations in their jurisdictions that pertain to emergency management and incident response.<sup>33</sup>

During the response phase of emergency management, NIMS also supports attorney membership in the Incident Management team:

(4) Additional Command Staff

Additional Command Staff positions may also be necessary, depending on the nature and location(s) of the incident or specific requirements established by Incident Command. For example, a legal counsel might be assigned to the Planning Section as a

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30. EMERGENCY MANAGEMENT ACCREDITATION PROGRAM, EMAP STANDARD § 4.2 (2007), available at <http://www.emaponline.org> (follow “What is EMAP” hyperlink; then follow “The EMAP Standard” hyperlink; follow the EMAP Standard image hyperlink).

31. FEMA, NATIONAL RESPONSE FRAMEWORK 16 (2008), available at <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf>.

32. *Id.* at 74.

33. FEMA, NATIONAL INCIDENT MANAGEMENT SYSTEM 14 (2008), available at [http://www.fema.gov/pdf/emergency/nims/NIMS\\_core.pdf](http://www.fema.gov/pdf/emergency/nims/NIMS_core.pdf).

technical specialist or directly to the Command Staff to advise Incident Command on legal matters, such as emergency proclamations, the legality of evacuation orders, isolation and quarantine orders, and legal rights and restrictions pertaining to media access.<sup>34</sup>

Further, “[t]he incident objectives and strategy must conform to the legal obligations and management objectives of all affected agencies, and may need to include specific issues relevant to critical infrastructure.”<sup>35</sup>

The obligations to comply with existing law and monitor new law mean that the local emergency manager must have access to competent legal counsel on a continuing basis. As the foregoing discussion indicates, the legal issues to which LGAs may need to respond include a wide variety of emergency-management-specific matters of which they may be completely without knowledge.<sup>36</sup> As a member of the Command Staff during a response, the attorney must be prepared to answer legal questions in real time.<sup>37</sup> This temporal

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34. *Id.* at 95.

35. *Id.* at 122.

36. [I]t is incumbent upon the attorney to learn, in advance, what will be expected of him or her in a disaster scenario. It is not at all uncommon for attorneys to be thrust into roles or given responsibilities that are not only outside of their job descriptions, but consist of areas of the law that are alien to them.

Joseph G. Jarret & Michele L. Lieberman, *supra* note 12, at 312.

37. The legal environment during emergencies is always in flux, necessitating constant review. This requires regular communications with law and policymakers at all levels of government, along with private-sector actors, to ensure the legality of specific actions. Public health legal practitioners have to gather reliable, accurate information from public health practitioners or others in the field to understand prevalent public health needs of populations affected by an emergency. This information can be used to prioritize legal issues that may facilitate or impede public health efforts in advance or as they arise. Public health practitioners, healthcare workers, and others may face a plethora of legal issues, both actual and perceived. The capacity to classify quickly and respond to these issues in *real time* is at the core of legal triage.

James G. Hodge, Jr. & Evan D. Anderson, *Principles and Practice of Legal Triage During Public Health Emergencies*, 64 N.Y.U. ANN. SURV. AM. L. 249, 273-74 (2008) (emphasis added).

pressure stands in stark contrast to the usual situation, where lawyers contemplate issues with access to extensive legal resources and time to perform research with the goal of reaching the absolute, nuanced, best legal response.<sup>38</sup> Often, power outages make the electronic research tools and other support upon which an attorney might otherwise rely unavailable.<sup>39</sup>

A great deal of money is often at stake when local legal counsel advise regarding federal requirements. Issues like federal payment for debris clearance and reimbursement of disaster-related costs require strong, knowledgeable advocacy. Legal counsel will find that this process can be painful, but it is always professional.<sup>40</sup>

FEMA's Comprehensive Preparedness Guide (CPG) states that "[a]s a public document, an EOP . . . cites its legal basis."<sup>41</sup> The CPG also requires an "Authorities and References" section, which "provides the legal basis for emergency operations and activities."<sup>42</sup> The "Concept of Operations" section must "[d]escribe how legal questions/issues are resolved as a result of preparedness, response, or recovery actions, including what liability protection is available to responders."<sup>43</sup>

FEMA's Guide for All Hazards Emergency Operations Planning (SLG 101) requires that, at the outset, one must "[r]eview local and/or State laws, rules, regulations, executive orders, etc., that may be

38. William C. Nicholson, *An Essential Team: Local Emergency Managers and Legal Counsel*, 37 PUB. MGR. 81, 83 (2008).

39. "[P]ower outages that accompany most disasters deny attorneys the use of electronic research, the ability to confer with colleagues, access to computer databases, and the use of other helpful resources." Joseph G. Jarret & Michele L. Lieberman, *supra* note 12, at 312.

40. "I have no particular recollections of friction between FEMA and state/local attorneys. Robust debate can be anticipated when millions of dollars may be at stake. There is of course, an appeal process when an applicant is dissatisfied with a specific FEMA decision." Telephone Interview with Mary Ellen Martinet, Associate Chief Counsel for Field Counsel, DHS/FEMA, & Michael Hirsch, former Associate Chief Counsel, DHS/FEMA. (Jan. 8, 2010) (Comments of Mary Ellen Martinet).

41. FEMA, DEVELOPING AND MAINTAINING STATE, TERRITORIAL, TRIBAL, AND LOCAL GOVERNMENT EMERGENCY PLANS (CPG 101) 5-1 (2009), *available at* [http://www.fema.gov/pdf/about/divisions/npd/cpg\\_101\\_layout.pdf](http://www.fema.gov/pdf/about/divisions/npd/cpg_101_layout.pdf).

42. *Id.* at 6-5.

43. *Id.* at C-8.

considered enabling legislation,” and “[r]eview Federal regulatory requirements.”<sup>44</sup> Under “Identify Hazards,” SLG 101 requires that the planner “[b]egin with a list of hazards that concern emergency management in your jurisdiction. Laws . . . can help define the universe of hazards which the planning team should address in the all-hazard EOP.”<sup>45</sup> Under “Authorities and References,” SLG 101 requires that “[t]he Basic Plan should indicate the legal basis for emergency operations and activities. Laws, statutes, ordinances, executive orders, regulations, and formal agreements relevant to emergencies should be listed.”<sup>46</sup> A Legal Advisor or equivalent is found under “Resource Management,” which describes the position as follows:

*Legal Advisor*

- When notified of an emergency, reports to the EOC or other location as specified by the Resource Manager.
- Advises Supply Coordinator and Procurement Team on contracts and questions of administrative law.<sup>47</sup>

In terms of actual compliance with legal requirements, the Nationwide Plan Review: Phase 2 Report found the following regarding compliance (Note: S = Sufficient, PS = Partly Sufficient, NS = Not Sufficient):<sup>48</sup>

States			Urban Areas		
S	PS	NS	S	PS	NS
68%	32%	0%	68%	32%	0%

At both the state and large city levels, about one-third of the plans reviewed were only partly satisfactory regarding coverage of enabling legislation. The review did not address rural or less populated areas which, one might reasonably hypothesize, would have fewer resources

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44. FEMA, GUIDE FOR ALL HAZARDS EMERGENCY OPERATIONS PLANNING (SLG 101) 2-3 (1996).

45. *Id.* at 2-6.

46. *Id.* at 4-16.

47. *Id.* at 5-H-14.

48. FEMA, NATIONWIDE PLAN REVIEW: PHASE 2 REPORT 13 (2006).

and, hence, lower compliance. The Nationwide Plan Review: Phase 2 Report flatly states that “[i]f a plan[’s] . . . laws and authorities are inadequate, it cannot be assessed as fully adequate, feasible, or acceptable.”<sup>49</sup> Similarly, the Congressional Research Service found that twenty-two out of fifty-one state-level pandemic influenza plans lacked discussion of isolation and quarantine laws, and, shockingly, only two of fifty-one plans discussed procedures for judicial review of due process protections.<sup>50</sup>

Unfortunately, on the local level, the lack of a comprehensive treatment of legal issues is a common failing of emergency operations plans.<sup>51</sup> For local governments, failure to have competent legal advice regarding EM law may result in significant liability. This is because local government plays the vital first response role with regard to disasters, and its leaders must make decisions that may have major legal consequences.

Irrespective of the significant, and apparently concurrent, role that the State maintains in the local emergency management function, it is the local government that is on the front line of any disaster. Thus, the local government attorney should become intimately familiar with the local comprehensive emergency plan and with the extent and limitations of authority that a local government may exercise during an impending or realized disaster.<sup>52</sup>

One article discussing legal response duties in the wake of Hurricane Katrina makes the point that:

[a] lawyer might attempt to argue that the failure to craft a disaster preparedness plan is not negligent because that type of precaution is not common in the legal profession. However, doing what is customary (i.e., not preparing a disaster plan) does not preclude a

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49. *Id.* at 62.

50. Sarah A. Lister & Holly Stockdale, CONGR. RES. SERV., PANDEMIC INFLUENZA, AN ANALYSIS OF STATE PREPAREDNESS AND RESPONSE PLANS 16 (2007) available at <http://www.fas.org/sgp/crs/homsec/RL34190.pdf>.

51. William C. Nicholson, *Litigation Mitigation: Proactive Risk Management in the Wake of the West Warwick Club Fire*, 1 J. EMERGENCY MGMT. 14, 17-18 (2003).

52. Joseph G. Jarret & Michele L. Lieberman, *supra* note 12, at 299.

finding of liability based on a cost-benefit analysis.<sup>53</sup>

The American Bar Association (ABA) has made efforts to assist practitioners with planning for emergencies and disasters.<sup>54</sup> After the September 11, 2001 attacks, the ABA created a webpage with guidance for local bar associations desiring to improve their resilience to disasters.<sup>55</sup> Still, such endeavors are in their infancy—even emergency planning, a matter that has been the subject of considerable litigation, did not until fairly recently receive significant attention in legal publications.<sup>56</sup>

### III. ANECDOTAL INFORMATION REGARDING LOCAL LEGAL COUNSEL AND LOCAL EMERGENCY MANAGEMENT COORDINATORS

Since being appointed as General Counsel to the Indiana State Emergency Management Agency in 1995, the author has personally observed and worked with many local government attorneys and local emergency managers. He has noted varying levels of understanding and competence regarding knowledge and application of EM law by these two groups.

Informal conversations with these individuals, as well as state and federal training authorities, reveal a number of beliefs regarding their knowledge and understanding of EM law. Anecdotal discussions indicate widespread ignorance of this aspect of the law among both groups. They reportedly have disagreed over application of the law in emergency situations. Interviews with emergency managers in particular reveal that potential liabilities are one of their greatest sources of concern. Rural units of government in particular suffer from disconnects between LGAs and EMCs.

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53. Brenna G. Nava, Comment, *Hurricane Katrina: The Duties and Responsibilities of an Attorney in the Wake of a Natural Disaster*, 37 ST. MARY'S L.J. 1153, 1170-01 (2006).

54. The ABA provides a "Disaster Law Resources" webpage focused on law firm business continuity. ABAnet, <http://www.abanet.org/disaster/council.html> (last visited Mar. 10, 2010).

55. ABAnet, Member Assistance, [https://www.abanet.org/barserv/disaster/member\\_assistance.html](https://www.abanet.org/barserv/disaster/member_assistance.html) (last visited Mar. 14, 2010).

56. See generally Denis Binder., *Emergency Action Plans: A Legal and Practical Blueprint*, 63 U. PITT. L. REV. 791 (2002).

The relationship between LGAs and EMCs is often tenuous at best. On the attorney side, this situation results from a number of factors. Those who are a one-person operation often must handle all legal work for their jurisdiction, including prosecuting felonies, misdemeanors, and traffic court, as well as providing all legal advice on the total universe of legal issues faced by local government. Providing good advice under these circumstances is a “real challenge.”<sup>57</sup>

Many communities do not have full-time law departments, but rather have part-time<sup>58</sup> lawyers doing their legal work.<sup>59</sup> In many states, the majority of local legal counsel are part-time. In Iowa, for example, fifty-seven are full-time, and forty-two are part-time.<sup>60</sup> In Mississippi, fifty-seven are full-time, and forty-two are part-time.<sup>61</sup> North Carolina has seventy-five part-time and twenty-five full-time county attorneys.<sup>62</sup> In Florida, in contrast, forty-three counties have full-time LGAs, and twenty-four of sixty-seven counties use outside counsel.<sup>63</sup>

Part-time local counsel often earn less per hour for legal work done for the government than they do for their private clients.<sup>64</sup> While

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57. Telephone Interview with Corwin R. Ritchie, Executive Director, Iowa County Attorneys Association (Mar. 12, 2010).

58. “Part-time” means that the attorney is paid for fewer than forty hours weekly on government matters. Like many other attorneys, the part-timers are usually paid at an hourly rate. Telephone Conversation with P. C. McLaurin, Jr., Extension Professor and Leader, Center for Governmental Training and Technology, Mississippi State University Extension Service, contact person for the Mississippi Association of County Board Attorneys (Mar. 12, 2010).

59. Telephone Interview with Corwin R. Ritchie, *supra* note 57.

60. *Id.*

61. “The overwhelming majority are part-time. In Mississippi, approximately seventy-five County Board Attorneys are part-time, with six or seven being full-time.” Telephone Conversation with P.C. McLaurin, Jr., *supra* note 58.

62. Telephone Interview with James B. Blackburn, Legislative Counsel, North Carolina Association of County Commissioners (Mar. 12, 2010).

63. Communication with Gail Ricks, Assistant to Virginia Delegal, Esq., General Counsel, Florida Association of Counties (Mar. 22, 2010).

64. “As a general rule, those who are part-time are paid at a lower hourly rate than they receive for their work for private clients.” Telephone Conversation with P.C. McLaurin, Jr., *supra* note 58.

some are elected (as in Iowa for example),<sup>65</sup> others are appointees. These individuals get the job for a variety of reasons,<sup>66</sup> meaning that they may not come into the job with a background in government law.<sup>67</sup> As appointed rather than elected officials, some may not hold their position for a long period of time, and thus not have the opportunity to build competence in this complex area of law. Some LGAs do not believe they receive the respect to which their position and status entitle them.

LGAs' knowledge of EM law varies greatly, with only a handful having a detailed understanding of EM law. Few have had any formal training in EM law, with a major reason being that Continuing Legal Education (CLE) in EM law is rarely available to LGAs.<sup>68</sup> Even if such training was available, their local government employers do not have funds available to pay for training in EM law.<sup>69</sup> Few meet regularly with the local EMC, and some may meet the EMC only in the immediate aftermath of a disaster. They are more likely to be called on during mitigation than response, where they provide input on such issues as revising building and fire codes.

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65. Telephone Interview with Corwin R. Ritchie, *supra* note 57.

66. "The attorney for the County Board of Supervisors is appointed to the position by the Board. They [sic] may be the most qualified or a friend – which includes political supporter – of the County Board of Supervisors members." Telephone Conversation with P.C. McLaurin, Jr., *supra* note 58.

67. *Id.*

68. For specific information on these programs, see *infra* Part V.

69. Local governments are cutting into their core missions due to economic shortfalls. See, e.g., Flager County Government, County Trims Budget, Emergency Services Positions Cut, <http://www.flaglercounty.org/pages.php?PB=2&NS=255> (last visited Mar.12, 2010) ("Adjustments to Flagler County's budget for next year continue. Tuesday County Administrator Craig Coffey announced the impending layoff of Director of Emergency Services Nathan McCollum. Emergency Services encompasses the county's Emergency Management and Fire Rescue departments."); see also Julia Patterson, *King County's Budget Crisis: Where Do We Go From Here?*, KENT REPORTER, Jan 23, 2010, available at [http://www.pnwlocalnews.com/south\\_king/ken/opinion/82404507.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+southkingopinion+\(Opinion+-+South+King+County](http://www.pnwlocalnews.com/south_king/ken/opinion/82404507.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+southkingopinion+(Opinion+-+South+King+County) ("King County is facing a budget crisis of incomparable magnitude, primarily due to the worldwide economic recession. I have the challenging task of balancing a budget that will severely cut critical functions of government, or work with my colleagues to ask voters if they are willing to support a tax increase for criminal justice, health, and human services programs.").



Their offices do not typically have a plan for disaster operations—indeed, they do not anticipate being a member of the resource management team during a disaster or emergency. Many do not make an effort when speaking to non-lawyers to use everyday language to explain legal matters, which complicates matters for the EMC who is trying to understand them. Generally, neither they nor the units of government they serve fully understand the potential liabilities for failure to fully integrate the legal piece into emergency management. LGAs may be unaware of existing resources, such as the ABA’s “Checklist for State and Local Government Attorneys to Help Prepare for Disasters.”<sup>70</sup>

Local emergency management coordinators also face many challenges that exacerbate the difficulty of obtaining competent legal advice and reflect those faced by LGAs.<sup>71</sup> Although emergency management is often referred to as “in the process of professionalization,” its progress is far from universal.<sup>72</sup> The incomplete nature of that professionalization is part of the reason that legal standards are sometimes not understood or observed. “Current concerns about legal liability arising out of failure to prepare for known hazards, however, may force public officials to pay greater attention to risks to public health and safety.”<sup>73</sup>

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70. American Bar Association, ABAnet.org, State and Local Government Law Section, “Checklist for State and Local Government Attorneys to Help Prepare for Possible Disaster,” <http://www.abanet.org/statelocal/checlist406.pdf> (last visited March 10, 2010).

71. “The capabilities of state and local agencies, however, are still very uneven. Some are highly professional and very capable, and others clearly are not. Capabilities are largely determined by the level of experience with hazards and disasters and by funding levels.” WILLIAM L. WAUGH, *LIVING WITH HAZARDS AND DEALING WITH DISASTERS: AN INTRODUCTION TO EMERGENCY MANAGEMENT* 14 (M.E. Sharpe, Inc. 2000).

72. “Yet, even as participants noted some level of professional status or movement forward as a field[,] they commented (often at great length) on ongoing challenges such as fragmentation, a lack of professional identity, a diminished valuation of emergency management, and the field’s cyclical status flux based on other’s decisions outside the emergency management community.” Carol L. Cwiak, *Strategies for Success: The Role of Power and Dependence in the Emergency Management Professionalization Process* 55 (October 29, 2009) (Ph.D. dissertation), available at <http://www.ndsu.edu/emgt/graduate/alumni>.

73. WAUGH, *supra* note 71, at 52.

Fortunately, there is a structure parallel to that of EMAP to foster and certify the professional growth of individual emergency managers. The “gold standards” for emergency managers are the Certified Emergency Manager (CEM) and Associate Emergency Manager (AEM) credentials, which are administered by the International Association of Emergency Managers (IAEM).<sup>74</sup> These are both nationally and internationally recognized and accepted credentials. The CEM requires the applicant to achieve specific standards in the areas described below:

- Emergency management experience. Three years by date of application. Comprehensive experience must include participation in a full-scale exercise or actual disaster. Three professional references. Including current supervisor.
- Education. A four-year baccalaureate degree in any subject area.
- Training. 100 contact hours in emergency management training and 100 hours in general management training. Note: No more than 25% of hours can be in any one topic.
- Contributions to the profession. Six separate contributions in areas such as professional membership, speaking, publishing articles, serving on volunteer boards or committees and other areas beyond the scope of the emergency management job requirements.
- Comprehensive emergency management essay. Real-life scenarios are provided, and response must demonstrate knowledge, skills and abilities as listed in the essay instructions.
- Multiple-choice examination. Candidates sit for the 100-question exam after their initial application and the other requirements are satisfied. The exam is a maximum of two (2) hours. A pamphlet is available further describing format and sources.

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74. See International Association of Emergency Managers, CEM® FAQ, <http://www.iaem.com/certification/generalinfo/cem.htm> (last visited Apr. 10, 2010).

- Three References. Including a reference from the candidate's current supervisor.<sup>75</sup>

EMAP recommends that agencies over a certain size employ personnel who have earned the CEM/AEM.<sup>76</sup>

The current situation, however, is that many EMCs are not full-time employees, and some are volunteers. In Kansas, for example, according to Major General Tod Bunting, Kansas Adjutant General and top emergency management official, in 2007 “just thirty-eight of the state’s 105 counties boast[ed] a full-time emergency manager.”<sup>77</sup> Often, the EMC is “an individual who must often juggle several different roles, ranging in [sic] from law enforcement to county administrative duties.”<sup>78</sup> Sometimes, counties find themselves so economically challenged that they must share an EMC.<sup>79</sup> In Indiana, of ninety-two counties, forty-six to forty-seven have full-time EMCs. About forty-five Indiana EMCs are part-time, and one is still a volunteer.<sup>80</sup>

In North Carolina, there are thirty-two full-time EM coordinators, while sixty-eight counties have coordinators who also spend part of their time on fire, EMS, law enforcement, or related duties. In order to receive Emergency Management Performance Grant funds, they must spend at least 50% of their time on EM duties. Base salary for all North Carolina EM coordinators ranges from \$20,753 to \$115,661. Eleven jurisdictions report having Certified Emergency Manager (CEM) credentialed staff. None reported being EMAP certified currently, although two are in the process of applying for EMAP certification and three are currently in the process of preparing for applications for EMAP certification.<sup>81</sup> The North Carolina

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75. *Id.*

76. *Id.*

77. Green, *supra* note 8.

78. *Id.*

79. *Id.*

80. Telephone Interview with Duane Davis, Emergency Management Director, Jackson County, IN, President Emergency Management Alliance of Ind. (Mar. 15, 2010).

81. Communication with Brenda Jones, Executive Assistant to the Director, Government Liaison, N.C. Emergency Management (March 31, 2010).

Department of Crime Control and Public Safety's Division of Emergency Management gained EMAP certification in October 2008, and is working with local jurisdictions to support their efforts to follow suit.<sup>82</sup>

Most EMCs had a previous career in one of the emergency response agencies: law enforcement, fire service, or emergency medical services. This experience forms their approach to EM duties, which can either help or hinder them. Some are retirees and their overall energy level may be less than it once was. Some do not believe that they receive the respect to which their position and status entitle them. Often, they are poorly paid.<sup>83</sup> Like the LGAs, their knowledge of EM law varies greatly, with few having a detailed understanding of EM law. Similarly, few have had any formal training in EM law. Like many Americans, they may dislike attorneys, regarding them as conceited and arrogant. Overall, many believe that attorneys are a hindrance rather than an asset, and do not regard legal counsel as an important part of the EM team. Despite these beliefs, however, many EMCs are very worried about potential liability risks, as are the jurisdictions that employ them.<sup>84</sup>

The anecdotal evidence suggests that the more rural and economically challenged a jurisdiction is, the more likely it is to have an LGA and an EMC who correspond to the descriptions above. Of course, the plural of anecdote is not data. One major shortcoming of the anecdotal approach is that the consistency needed for scientifically valid evaluation of the information provided is lacking. For example, the definition of "full-time" used by Duane Davis, Emergency Management Director, Jackson County, Indiana and President of the Emergency Management Alliance of Indiana, includes individuals

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82. Interview with Douglas Hoell, Director, Division of Emergency Management, North Carolina Department of Crime Control and Public Safety (Mar. 3, 2009).

83. "According to data compiled by the Kansas Association of Counties in 2006, full-time emergency managers in smaller counties could make as little as \$30,000 to \$40,000 a year while larger counties can pay out \$70,000 to \$90,000 annually. Part-time managers in a couple counties made as little as \$7 or \$8 an hour in 2006." Green, *supra* note 8.

84. "Current concerns about legal liability arising out of failure to prepare for known hazards, however, may force public officials to pay greater attention to risks to public health and safety." WAUGH, *supra* note 71, at 52.

who do not work for forty hours per week as EMCs,<sup>85</sup> while the Executive Assistant to the Director for Government Liaison, North Carolina Emergency Management's definition includes only full-time forty-hours-per-week EMCs.<sup>86</sup> There is a great need for scientifically valid research to fill the gap in basic knowledge regarding how LGAs and EMCs interact, what they know about EM law, where and how they learned it, and their attitudes toward the matter.

#### IV. EXISTING RESEARCH ON THE RELATIONSHIP BETWEEN LGAS AND EMCs

The relationship between LGAs and EMCs has been the subject of very little research. Indeed, the majority of research on LGAs in general<sup>87</sup> consists of anecdotal statements similar to those discussed above.<sup>88</sup>

The only study encountered addressing the interface between LGAs and EMCs is from a chapter in a 1990 book that compared twelve different municipal departments in a survey. It found that the municipal attorney's office was the least likely to participate in emergency planning activities.<sup>89</sup> The anecdotal evidence suggests that the situation has changed very little in the intervening nineteen years.

One surprising common element that LGAs report is the lack of planning for operations during a disaster by local law departments. Several articles criticize this lack of planning prior to the September

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85. "Some Directors who are full-time preside over 9-11 call centers as well. There is a trend to separating these roles due to the increased workload, as emergency management and administering a 9-11 center both require a full-time commitment to do the job right." Davis did not have information available on how many EMCs in Indiana work forty hours per week for emergency management. Telephone Interview with Duane Davis, *supra* note 80.

86. Communication with Brenda Jones, *supra* note 81.

87. Nicholson, *supra* note 38, at 81-83.

88. In contrast, with regard to emergency management, Dr. Carol Cwiak's Ph.D. dissertation masterfully includes many anecdotal statements along with her well-grounded empirical evaluation of the current and future status of professionalization in that discipline. Cwiak, *supra* note 72.

89. See J.D. Kartz & Mark K. Lindell, *Adaptive Planning for Community Disaster Response*, in *CITIES AND DISASTER, NORTH AMERICAN STUDIES IN EMERGENCY MANAGEMENT* 28 (Richard T. Sylves & William L. Waugh, Jr. eds., 1990).

11, 2001 terrorist attacks. Howard D. Swanson wrote a law review article based on his experience as City Attorney for Grand Forks, North Dakota during and after the Red River floods of Spring 1997.<sup>90</sup> He noted that “inconsistent with the growth of EM programs on the various governmental levels has been the apparent lack of involvement by city attorneys.”<sup>91</sup> Similarly, Roger A. Nowadzky found that local legal offices were not proactive in addressing true potential crises.<sup>92</sup> Even large cities have not been immune to the failure to adequately plan for legal issues during emergencies. In 1993, the Law Department for the Port Authority in New York and New Jersey was unprepared for the assault on the World Trade Center complex—it had no specific plan in place to deal with a disaster like a terrorist attack.<sup>93</sup>

Proactive lawyering does take place, but it typically occurs in the context of ensuring that legal organizations like the courts continue to function after a disaster. Some parts of the legal system are better prepared than others to ensure continuity of operations. For example, judges for the United States Court of Appeals for the Fifth Circuit had already planned for a disaster similar to Hurricane Katrina, which led to their ability to continue functioning after that event.<sup>94</sup> Preparation for continuity of operations is a far different matter, however, than putting a structure in place that will allow close cooperation between LGAs and EMCs. The literature suggests that law firms take business continuity precautions, but for the most part, discussion of the attorney’s role concentrates on what is to be done after the disaster rather than on proactive lawyering.<sup>95</sup>

Ernest Abbott, who served as Chief Counsel for FEMA during the Clinton administration, recently observed, “I would guess that Katrina has led to more involvement of legal departments than 9/11. After all,

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90. Swanson, *supra* note 9.

91. *Id.* at 488.

92. Roger A. Nowadzky, *Lawyering Your Municipality Through a Natural Disaster or Emergency*, 27 URB. LAW 9, 9 (1995).

93. Jeffrey S. Green & Ira Tripathi, *Coping with Chaos: The World Trade Center Bombing And Recovery Effort*, 27 URB. LAW. 41, 46 (1995).

94. John Council, *Katrina Kicks the Fifth Circuit out of Marble Courthouse in the Big Easy*, TEX. LAW., Sept. 5, 2005, at 5, available at 9/5/2005 TEXLAW 5 (Westlaw).

95. *See, e.g.,* Nava, *supra* note 53, at 1178.

9/11 only hit three places, whereas Katrina hit almost every state in the nation, whether through actual contact or by evacuation.”<sup>96</sup> Any increase in involvement by LGAs is apparently incremental. One article discussing legal response duties after Katrina makes the point that “a disaster preparedness plan . . . is not common in the legal profession.”<sup>97</sup>

In contrast to local government, FEMA has significant legal resources.<sup>98</sup> The Office of Field Counsel within the DHS/FEMA Office of the Chief Counsel currently has twenty-five field attorneys, who are termed “Disaster Assistance Employees” (DAE). Further, there are twelve attorneys at recovery offices who are dedicated to specific disasters. DAE are on-call intermittent employees, and they are the backbone of providing disaster assistance. They allow FEMA to surge up for all programs. The relationship between FEMA attorneys and the program people who perform emergency management activities has evolved. In the 1970s, if the field staff did not like legal advice, they simply ignored it. “The interface is always an issue, and you need to stay on top of it.”<sup>99</sup>

#### V. TRAINING FOR LGAS AND EMCs ON LEGAL ISSUES IN EMERGENCY MANAGEMENT

Among those who work closely with LGAs and EMCs, there is general agreement that their cooperation and knowledge of EM law needs improvements. Again, the basis for this consensus is the sum of anecdotal information. Some attempts have been made to address the lack of legal knowledge. Past federal government legal education offerings have focused on federal issues, without being of much help to state and local attorneys.<sup>100</sup>

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96. Telephone Interview with Ernest Abbott, Former FEMA General Counsel and Principal in FEMA Law Associates (Feb. 7, 2009).

97. Nava, *supra* note 53, at 1170-71.

98. Telephone Interview with Mary Ellen Martinet & Michael Hirsch, *supra* note 40.

99. *Id.* (comments of Michael Hirsch).

100. FEMA, through the Emergency Management Institute, taught a class to state and FEMA attorneys September 9-10, 1998 entitled “Course E709: Expediting Disaster Response and Recovery Pursuant to the Stafford Act.” The course focused on the federal side of emergency law. Subsequently, FEMA has worked to educate

A workshop on March 5-6, 2009, titled “The Law and Catastrophic Disasters: Legal Issues in the Aftermath,” provided a relatively thorough treatment of legal issues affecting state and local EM following a radiological event.<sup>101</sup> This tabletop exercise was very helpful, but as with much other training, it focused on response and recovery, rather than addressing the role of legal counsel during all phases of emergency management.<sup>102</sup>

There have been few EM law education offerings at the state and local levels. North Carolina is one exception. A CLE program entitled “Disaster Emergency Law and the Role of the Bar” took place on December 4, 2008.<sup>103</sup> Despite the event’s title, however, perusal of the materials provided to participants indicates that EM law was addressed only in passing. The topics included Public Health Preparedness and Legal Authorities, Workplace Disaster Preparedness, and Ethical Considerations and the Role of the Bar in Emergencies.<sup>104</sup> The North Carolina Emergency Management Association (NCEMA), the professional alliance of local EMCs, presents helpful talks on legal developments from time to time during its spring and fall conferences.<sup>105</sup> They are useful to those who attend,

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state-level attorneys through the National Emergency Management Association (NEMA) Legal Attorneys Committee during their twice-yearly meetings. Telephone Interview with Tamara S. Little, Assistant Attorney General, State of Ohio, NEMA Legal Attorneys Committee Chair (Mar. 21, 2002).

101. The event was designed and coordinated by Ernest Abbott, Former FEMA General Counsel and Principal in FEMA Law Associates. *See generally* FEMA Law, E-Newsletter, <http://www.fema-law.com/E-Newsletters/Issue10Feb09.pdf>. This program was presented in Washington, D.C., in conjunction with the NEMA meeting. The association with NEMA, the national organization composed of state EM directors, ensured attendance by state attorneys. The costs of travel, food, lodging, and registration resulted in few local attorneys attending the event.

102. *See* CAILAW, THE LAW AND CATASTROPHIC DISASTERS: LEGAL ISSUES IN THE AFTERMATH, *available at* [http://www.cailaw.org/Brochures\\_2009/DisasterManagement.pdf](http://www.cailaw.org/Brochures_2009/DisasterManagement.pdf).

103. The North Carolina Bar Association presented this event at the N.C. Bar Center in Cary, N.C. on Dec. 4, 2008.

104. NORTH CAROLINA BAR ASSOCIATION FOUNDATION, DISASTER EMERGENCY LAW AND THE ROLE OF THE BAR (2008).

105. *See, e.g.*, on Wednesday, Mar. 17, 2010 from 8:30 – 9:25 a.m., a program entitled “Liability Issues in Emergency Management” was offered at the Spring Conference of the N.C. Emergency Management Association; *see* Conference Schedule, [https://ncema.renci.org/\\_layouts/Renci/NCEMAConference/](https://ncema.renci.org/_layouts/Renci/NCEMAConference/)



but not all EMCs belong to NCEMA. The cost of dues, travel, registration fees, and time away from other employment are all factors that may prevent some, particularly part-time EMCs, from taking advantage of NCEMA's offerings. Some online CLE offerings have been made available that deal specifically with emergency management law, but they may only be accessible for limited periods of time.<sup>106</sup>

The author has taught courses specifically directed to LGAs and local emergency managers in Indiana, Missouri, and New Jersey. In 2000<sup>107</sup> and 2001,<sup>108</sup> he presented two-day courses in Indiana to local emergency managers and legal counsel on "Legal Issues for Emergency Managers." In Missouri, he gave a workshop on the topic in 2007, entitled "Legal Issues in Homeland Security Emergency and Disaster Law: Working Together for Litigation Mitigation,"<sup>109</sup> and presented it again to the Missouri State Emergency Management Agency on March 13, 2009.<sup>110</sup> He offered a workshop on a similar topic in New Jersey in 2003.<sup>111</sup> In these educational presentations and other speeches, he emphasizes the need for LGAs and EMCs to work closely together in all phases of emergency management.<sup>112</sup>

One frustration for the author has been the lack of participation by LGAs. When he asks those LGAs in attendance their thoughts on why more of their compatriots do not join them at the events, they mention

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Schedule.aspx (last viewed Mar. 10, 2010).

106. *See, e.g.*, West Legal Ed Center, Online CLE Course, "Administrative Law and Emergency Management: Katrina and Beyond II," [http://westlegaledcenter.com/program\\_guide/course\\_detail.jsf?courseId=3739400](http://westlegaledcenter.com/program_guide/course_detail.jsf?courseId=3739400).

107. William C. Nicholson, Lecture at the Indiana SEMA Course: Legal Issues for Emergency Managers (August 12-13, 2000).

108. William C. Nicholson, Lecture at the Indiana SEMA Course: Legal Issues for Emergency Managers (June 16-17, 2001).

109. William C. Nicholson, Lecture at the Missouri Emergency Manager's Training: Legal Issues in Homeland Security Emergency and Disaster Law - Working Together for Litigation Mitigation (Mar. 16, 2007).

110. *Id.* (Mar. 13, 2009).

111. William C. Nicholson, Remarks at the Annual Meeting Seminar of the New Jersey Emergency Management Association: Legal Issues for New Jersey Emergency Management Coordinators (November 19, 2003).

112. *See, e.g.*, William C. Nicholson, Plenary Speech, Emergency Management Alliance of Indiana Conference: Emergency Management and Legal Attorneys - Partnering for Safety and Litigation Mitigation (October 18, 2002).

the lack of CLE credits, the lack of funds for training or transportation to training, the general lack of understanding among local leaders of the legal issues' importance to emergency management, and the lack of connectedness between LGAs' offices and emergency management. These opinions are again examples of anecdotal evidence regarding understanding of EM law, challenges facing LGAs, and the relations between LGAs and EMCs. Clearly, more education in legal issues is needed, as is greater support for LGAs and EMCs who need to obtain that knowledge.

## VI. CONCLUSION

State and local governments vary in the quality of legal guidance afforded to their EMCs. Particularly troubling is the Nationwide Plan Review: Phase 2 Report's finding that plans for about one-third of states and large urban areas were only "partly satisfactory" in outlining enabling laws for EM.<sup>113</sup> These are the best-financed units of government in the nation below the federal level. It is disquieting that many do not know their enabling laws. After all, that information may be researched at leisure. The quality of legal advice given in the heat of emergency response must, perforce, be significantly lower for those unfamiliar with the laws regarding which they are advising.

If legal counsel is to partner with local emergency management, leadership is required.

It has to come from the top if attorneys are to be involved. This has to be on a jurisdiction-by-jurisdiction basis. I think that organizations like the National Governors' Association, the National League of Cities, and so on need presentations on the importance of involving attorneys at the state and local levels at all times. They need to be involved in the emergency operations plans and so on.<sup>114</sup>

Over time local officials are growing to understand potential legal liabilities and the possible effects on their political futures of failure to address these risks. It may be that the personal consequences will

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113. FEMA, NATIONWIDE PLAN REVIEW: PHASE 2 REPORT 13 (2006).

114. Telephone Interview with Mary Ellen Martinet & Michael Hirsch, *supra* note 40 (comments of Michael Hirsch).

motivate them to pay greater attention to emergency management legal hazards.<sup>115</sup> The jurisdiction that employs a CEM as its emergency management coordinator and is EMAP certified is far less likely to experience unexpected liability. Despite this trend toward professionalization, many local jurisdictions have neither full-time attorneys nor full-time emergency coordinators.

Rural units of government face the greatest challenges in obtaining competent legal advice on emergency management issues. They lack the funding of larger entities, and may often find themselves with LGAs and EMCs who lack experience in their posts and are short on knowledge of legal issues.

This situation must be addressed in order to maximize protection from potential liability for both local units of government and their emergency management employees. The solution must embrace scientifically based research to support the anecdotal tales of troubles with emergency management legal issues. When such research has been completed, documented results can be presented in proper forums, and widespread backing for additional education will likely arise.

Similarly, to be effective, EM legal education must have support from governmental authorities at all levels. EM education from the federal government through FEMA must incorporate legal issues. At a minimum, FEMA should create a “Legal Issues in Emergency Management” course that addresses actual concerns found at the state and local levels, rather than solely federal issues, which rarely arise for local EMCs. Federal and state bar associations and law schools have an important role to play as approvers, promoters, and providers of continuing legal education.

Only when the full dimensions of the legal challenges for emergency management have been fully explored and addressed by responsive educational offerings will the universal liability risk to local jurisdictions be mitigated. Only when all local jurisdictions have competent legal advice for emergency management on an ongoing basis will this important hazard be properly addressed.

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115. “The legal liability of local officials for failure to prepare reasonably for disaster and the political liability of elected chief executives at all levels when they have not invested appropriately in emergency management offices and programs are encouraging innovation and reform.” WAUGH, *supra* note 71, at 193.