

RULE OF LAW IN TIMES OF MAJOR DISASTER

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AMERICAN BAR ASSOCIATION

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The twin blows of the September 11, 2001, terrorist attack and the August 29-30, 2005, devastation caused by Hurricane Katrina, clearly demonstrated that major disasters pose a multitude of challenges to the people and governments of the United States. The challenges not only threaten the lives of Americans but the legal fabric that binds our society together. The Section of Litigation of the American Bar Association convened a Task Force to evaluate whether the legal system operated effectively in these situations and whether changes could be recommended that would more completely insure adherence to the rule of law. Neither the Task Force nor the Section of Litigation considers ourselves to be experts in disaster planning. An array of professionals, with substantial talent and expertise, has contributed valuable insights on how governments, businesses and families should prepare to respond to, and overcome, a major disaster.

On the other hand, the American Bar Association is in a unique position to evaluate the ways in which the legal system can be challenged in times of major disaster, to identify core values of the rule of law which should be respected and promoted, even in stressful times, and to promulgate principles that preserve the rule of law. Key to this process is the notion of advance planning. Much as a municipal government cannot develop an evacuation plan in the midst of a chemical attack, the legal system cannot create a plan to insure the safety of incarcerated arrestees when all the jail personnel have been stricken with avian flu.

The September 11, 2001, terrorist attack and Hurricane Katrina imposed tremendous pressure on the rule of law and, in the case of Hurricane Katrina, the justice system literally collapsed. In the opinion of professionals whose responsibility it is to predict such matters, this country will face other events equally challenging. Some will be man-made; some will be natural. What is believed to be certain is that the consequences will be disastrous if the country has not adequately planned. Planning, preparation and training are key, not just to our survival but to insuring that the values we cherish are maintained, even in trying times. Below are twelve principles. They are the product of a lengthy process spearheaded by the Section of Litigation. Each principle is supplemented in this report with amplifying language, designed to explicate the core value and purpose of the Principle, and to make plain the manner in which the Principle may be implemented so as to reinforce the rule of law.

It is the purpose of these Principles to preserve the rule of law in times of major disaster. The Principles are intended to help insure that justice will continue to be dispensed despite the damage and disruption caused by a major disaster. The Principles are also intended to foster reliance on legal mechanisms when the effort is undertaken to restore a disaster-torn community through programs designed to compensate for loss or render assistance in recovery.

In America the executive and legislative branches of government are vested with the authority and charged with the responsibility to declare that a major disaster has occurred, to design a response to it and to provide the resources necessary to carry out that response. Once these steps have been taken, it is the responsibility of the courts, the organized bar, prosecutors, public defenders, providers of legal services to the poor and individual lawyers to insure that society's response conforms with the dictates of law and fairness. It is only when the rule of law is satisfied that the effectiveness and legitimacy of restoration can be assured.

Each Principle is followed by commentary. The commentary reflects ways in which the Principle can be implemented. Thus, it is the intention of the drafters that the accompanying commentary be used as a guideline to inspire implementation of these Principles.

Principle 1

The rule of law must be preserved when a major disaster occurs.

These Principles are intended to insure that the rule of law is preserved in times of major disaster.

A major disaster is any adverse occurrence, by whatever term described, that is designated as such by national or state authorities pursuant to existing law or is so recognized pursuant to action of Congress or a state legislature.

Principle 2

The preservation of the rule of law requires proactive planning, preparation and training before a major disaster strikes.

It is the duty of all legal organizations – the courts, the organized bar, prosecutors, public defenders, providers of legal services to the poor, individual lawyers, police, and prison and jail officials – to undertake adequate planning and preparation to insure that the legal systems, both civil and criminal, can continue to dispense justice in times of major disaster. To that end all those involved in the dispensing of justice should prepare and adopt appropriate emergency plans. Such plans must be coupled with periodic training exercises to insure effective coordination and cooperation within the legal system in times of major disaster. In effectuating this principle, collaborative efforts are encouraged.

Principle 3

All those involved in the justice system must work collaboratively to assure the ongoing integrity of the system in times of major disaster.

In planning, preparing and training for a major disaster at least eight steps should be undertaken to insure the ongoing integrity of the legal system:

- (i) The courts must plan, prepare and practice the deployment of mechanisms to insure that presiding judges or their designees are ready and empowered to direct the operations of the courts in times of major disaster without significant interruption. Court "holidays" or suspension of operations should be a disfavored response.
- (ii) Those involved in the investigation and prosecution of crime and in the dispensing of justice must plan, prepare and practice appropriate steps to assure the maintenance and integrity of legal records and evidentiary materials. Where such records or materials have been destroyed or damaged due to negligence or reckless disregard, courts should be authorized to impose sanctions if circumstances warrant.
- (iii) The courts must plan, prepare and practice the utilization of alternative physical facilities to conduct judicial business. Most particularly the sharing of facilities by courts with different jurisdictional authority should be authorized and planned for.
- (iv) The courts must plan, prepare and practice for the need to share or lend judicial personnel especially between courts with different jurisdictional authority. Authorization to undertake such action should be the subject of enabling legislation where necessary.
- (v) The courts must plan, prepare and practice for the need to share and lend court protective personnel especially between courts with different jurisdictional authority. Authorization to undertake such action should be the subject of enabling legislation where necessary.
- (vi) Prison and jail officials and the courts must plan, prepare and practice for the need to share incarceration space. Authorization to undertake such action should be the subject of enabling legislation where necessary.
- (vii) Those involved in the dispensing of justice must plan, prepare and practice appropriate steps to insure that an adequate number of public and private attorneys are available to carry out the adjudicatory activities of the justice system. Use of such methods as the admission of attorneys *pro hac vice* should be considered along with responses relying on existing resources within the jurisdiction.
- (viii) Those involved in the dispensing of justice must make information available regarding the status of pending matters as soon and as often as practicable to lawyers, clients, families of clients, the press and the public.

Principle 4

In times of major disaster the requirements of the Constitution must be respected, particularly with respect to criminal prosecutions.

The following points are essential to the operation of the justice system in times of major disaster:

- (i) Major disasters do not abrogate the Constitution. Public authorities are obliged, even in times of major disaster, to provide criminal offenders, accused individuals and others in custody with humane treatment and adjudicative due process.
- (ii) Public authorities charged with the operation of the criminal justice system must plan, prepare and practice for major disasters. Effective law enforcement must continue at all times. Essential to that goal is the establishment of methods to insure sound and continuous leadership of police, prosecutorial, defender and judicial personnel.
- (iii) Mass arrests must be justified and mass prosecutions are never acceptable.
- (iv) In the event of a major disaster, public authorities must continue to process those accused or convicted of misdemeanors in a prompt and orderly manner consistent with the requirements of the Constitution. Where such processing is rendered impracticable commutation should be the preferred response.
- (v) In the event of a major disaster, the criminal courts must continue to operate and must respect the due process rights of criminal offenders and accused individuals. When resources are in critically short supply triage strategies for their use should be implemented with the most serious violent felony charges receiving the highest priority.
- (vi) In the event of a major disaster, criminal custodial and detention institutions must continue to insure the safety of inmates and the security of the public. In such circumstances it is also incumbent upon custodial institutions to facilitate communication between inmates and their immediate families.
- (vii) Deviation from the requirements of the Constitution may only be permitted when martial law has been lawfully invoked. In such circumstances deviation from rights guaranteed by the Constitution should be kept to an absolute minimum and continued only for so long as necessary to insure the restoration of order.

Principle 5

Where the acts or omissions of individuals or organizations result in a major disaster, or exacerbate a natural major disaster, the executive and legislative branches of federal or state government should consider establishing an independent commission of inquiry to examine the reasons for and consequences of such acts or omissions.

The commission should have subpoena power, should hold public hearings and, within one year from the date of the a major disaster, prepare and publish a public report of its findings, including methods of improving legal and other procedures in the event of future major disasters.

Principle 6

To the fullest extent permitted by law the persons affected by a major disaster should be compensated for their losses through insurance coverage and the operation of the judicial system.

Public authorities should, to the extent feasible, promote the availability and effectiveness of private insurance to provide compensation for losses suffered pursuant to a major disaster. Steps that should be considered include: (a) development of the broadest possible set of private insurance programs to address the widest array of potential disastrous events; (b) active encouragement of individuals to participate in such programs; (c) provision of assistance to those who cannot, on their own, afford to participate in such programs; (d) enforcement of measures to secure insurer solvency and effective claims handling practices; (e) development of joint public-private insurance programs where private programs cannot be maintained independently; and (f) reduction in government compensation that is made available to persons affected by a major disaster for those affected persons who decline, without sufficient cause, available insurance coverage or undertake unreasonable risks with respect to exposure to major disasters.

Public authorities should, to the extent feasible, promote the availability and effectiveness of judicial remedies that, pursuant to existing law, hold persons or entities accountable for acts or omissions that cause or exacerbate a major disaster. To improve judicial effectiveness in such cases courts should be granted authority: (a) to concentrate decision-making power in a single or small group of judges consistent with the right to jury trial; (b) to locate the proceedings in a single court or limited number of courts; (c) to designate a single set of legal principles to govern consistent with due process and applicable law; (d) to requisition adequate resources and personnel; (e) to utilize reasonable latitude in fact-finding consistent with the right to jury trial; (f) to take such steps as will streamline and speed the adjudicatory process; and (g) to recognize the propriety of pro rata and other forms of partial awards where necessary. Authorization to undertake such steps should be the subject of enabling legislation.

Principle 7

Government payment of compensation or additional assistance to persons affected by a major disaster should be considered when government is either implicated in the major disaster or public authorities determine that it is in the public interest to do so. Principles of equal treatment, due process and transparency should govern the distribution of compensation and disaster assistance.

In cases where neither insurance coverage nor judicial action is likely to provide reimbursement for losses to persons affected by a major disaster, public authorities should consider providing reasonable compensation or additional disaster assistance to individual persons affected by a major disaster for losses when public authorities determine that it is in the public interest to do so, for example, where public authorities are responsible, through their action or inaction, for the disaster event or where public authorities determine that a remedy traditionally available either through the operation of the judicial system or otherwise should not be made available or should be severely curtailed. In such cases public authorities may provide for alternatives to judicial action to determine eligibility and fix awards. Public authorities should also be free to offer to persons affected by a major disaster, on a voluntary basis, a fair alternative to judicial action for the resolution of claims or the award of assistance.

In cases where public authorities determine to provide compensation to persons affected by a major disaster, priority should be given to providing compensation as follows: first, for physical injury and death; second, for mental suffering or property damage; and third, for economic loss claims. In cases where public authorities determine that public compensation to individual persons affected by a major disaster should be awarded with respect to death claims, it should be presumed that all such persons should be provided equal awards unless they have been deprived of otherwise available judicial remedies, or have had access to such remedies severely curtailed by legislative action, in which case awards should be rendered to account for such deprivation or curtailment.

To the extent feasible, the size and basis for awards should be specified in advance. In cases where public authorities determine that public compensation to individual persons affected by a major disaster should be awarded, claimants seeking such awards should be permitted as expeditious an administrative proceeding as circumstances allow. Hearings should be presided over by a neutral hearing officer. Claimants should be allowed to present relevant documentation and statements. Determinations made should be set forth in written decisions with appropriate explanations. Claimants should be entitled to have a negative determination reviewed, either by a court or meaningful alternative review process. During the course of proceedings, claimants should be treated with dignity and respect.

Principle 8

Government assistance authorized by law should be distributed in an expeditious and efficient manner consistent with principles of equal treatment, due process and transparency.

Public authorities are responsible for insuring that assistance authorized by law both of a regular (e.g. welfare payments) and of an emergency nature (e.g. FEMA assistance, including both mass care--food kitchens, emergency shelters, emergency medical care--and individual and household assistance) is provided to persons affected by a major disaster in the most efficient and expeditious manner. Emergency assistance should be made available to all in need regardless of immigration status.

Principle 9

Charitable assistance to persons affected by a major disaster should be encouraged and benefits to persons affected by a major disaster should be maximized.

Public authorities should take steps, such as negotiation of pre-disaster memoranda of understanding addressing credentialing, licensing, and logistical support and coordination, that allow the effective (but coordinated) operation of charitable organizations in dealing with a major disaster.

Principle 10

Federal, state, territorial, tribal and local governments should work with each other and with the private sector to plan, prepare and train for a major disaster. Such efforts should focus on means to preserve order, protect vulnerable populations, insure adequate communications and assure continuity of operations of business and government.

Distinct from compensation and assistance, there are a range of institutional steps that public authorities should take in response to a major disaster. These include the following:

- (i) Federal response to a major disaster should be treated as a separate and distinct task from protecting the security of the United States.
- (ii) Federal-state-territorial-tribal-local coordination is critical. State, territorial, tribal and local officials are on the scene and have critical local knowledge; the federal government has expertise, resources, and "surge" capacity. In advance of any a major disaster, the federal, state, territorial, tribal and local governments should establish a clear allocation of response obligations in the event of a major disaster.
- (iii) Disaster risk assessment and planning should be integrated into

- government and private infrastructure and land use decisions.
Environmental assessments should include consideration of disaster scenarios and discuss mitigation measures.
- (iv) Standing government procedures should be in place to assess prevention and response to all major disasters, rather than relying on *ad hoc* mechanisms.
 - (v) Disaster plans should be specific and coupled with emergency exercises and training programs.
 - (vi) States should have in place a disaster recovery agency to address housing needs and other post-disaster reconstruction issues without delay.
 - (vii) The maintenance of order is essential. To this end law enforcement should remain first in the hands of state and local police, then the state national guard, then law enforcement and national guard units from other states supplied under mutual aid agreements, and federal law enforcement resources. Consistent with the Posse Comitatus Act, federal military personnel should be used for law enforcement only if these responses are insufficient and only after the President has made the findings required by law.
 - (viii) Special attention should be given to the needs of vulnerable populations in planning disaster responses. Characteristics requiring special consideration include poverty, age (including both the elderly and children) and disability.
 - (ix) Children should be zealously protected. Actions affecting children should conform to the following principles: (a) that maintaining the integrity of the family is in the best interests of children unless clearly demonstrated to be otherwise; (b) that children are presumptively entitled to and eligible for benefits and a major disaster-specific relief; and (c) that the health, education and safety of children in state custody is of paramount concern.
 - (x) Legislation should insure that deadlines, whether found in state or federal rules or statutes or in private contracts such as insurance, can be modified or tolled in the event of a major disaster.
 - (xi) Legislatures, the executive branch and the courts should have standing committees on disaster risk or dedicated staff positions to insure that these risks receive on-going attention.
 - (xii) States should review regulatory statutes to insure that they contain appropriate waiver provisions for conditions resulting from a major disaster.
 - (xiii) Since much infrastructure (including telecommunications, media, and power and transportation systems) is in private hands, private providers should, in case of a major disaster, be given assistance where appropriate to facilitate restoration and maintenance of essential services.
 - (xiv) Maintaining or restoring means of communication in the wake of a major disaster is critical for preservation of the rule of law and must be a top priority in emergency response.
 - (xv) Planning should include a risk assessment of various natural and man-

made threats that could cause a disaster and implementation of a program to minimize such risks, with the goal of assuring continuity of government operations following a disaster. Governments should also educate the private sector on ways businesses can assess their own risk and implement disaster recovery and business continuity programs, and encourage the private sector to implement such programs.

Principle 11

To the extent feasible, attorneys should provide emergency free legal services to those affected by a major disaster to address their unmet basic legal needs and should provide ongoing pro bono services to those who are not able to obtain or pay for services on a fee basis.

To the extent feasible, attorneys representing persons affected by a major disaster who claim compensation or assistance because of losses resulting from the major disaster should provide representation either without fee or on a reduced fee basis. In cases where fees are awarded by courts, the fees should be donated to charitable organizations providing assistance to persons affected by the major disaster.

Principle 12

State, local and territorial Bars should educate their members to plan, prepare and train for a major disaster, including information enabling attorneys to assure the continuity of their operations following a disaster, while maintaining the confidentiality and security of their clients' paper and electronic files and records.

Background on the Principles

These Principles are the product of a collaborative effort, led by the Section of Litigation. In the summer of 2006, Chair of the Section of Litigation, Kim Askew, established the Task Force on the Rule of Law in Time of Calamity. Its assignment was to fashion a set of principles to help insure the preservation of the rule of law when a major disaster strikes – a matter the American Bar Association had not addressed in prior standards or principles.

To that end the Task Force commissioned a series of white papers by leading experts in relevant fields. Those experts included:

- Stephen Sugarman, Roger J. Traynor, Chair at the University of California, Berkeley School of Law (a leading torts scholar)
- Mark Geistfeld, Crystal Eastman, Professor at New York University School of Law (an outstanding insurance law scholar)
- Professor Tom Tyler of the Psychology Department at New York University (the leading academic psychologist in the country regarding the psychological impact of different legal processes)
- Anthony Sebok, Centennial Professor at Brooklyn Law School (the author of a leading torts text)
- Daniel Farber, Sato Sho Professor and Director of the Environmental Law Program at the University of California, Berkeley School of Law (co-author, along with Jim Chen, of *DISASTERS AND THE LAW*, the leading legal text in the field)
- Jim Chen, Dean and Professor of Law at the University of Louisville School of Law (co-author, along with Daniel Farber, of *DISASTERS AND THE LAW*, the leading legal text in the field)
- Professor Tracey Meares of Yale Law School (a leading criminal law and procedure scholar)
- Professor Margo Schlanger of Washington University School of Law (a leading scholar regarding empirical assessment of the legal system)

After the white papers were prepared and circulated, The Section held a symposium in Chicago on December 1-2, 2006. The objective of the symposium was to prepare a preliminary draft set of major disaster principles. To that end, the Task Force's co-chairs, Stephan Landsman, Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University and Professor and Associate Dean JoAnne Epps of

Temple University Beasley School of Law submitted a discussion draft. This was augmented during the symposium by a number of contributions from the white paper drafters. The resulting material was reviewed by the drafting scholars and a distinguished group of advisors to the project. These included Federal District Judge Jack Weinstein (a leading member of both academia and the federal bench with particular expertise in mass litigation), Federal District Judge Alvin Hellerstein (a jurist particularly well versed in matters relating to 9/11), Kenneth Feinberg (Special Master of the 9/11 Compensation Fund), Professor Robert Rabin of Stanford Law School (a leading torts scholar), Professor Francis McGovern of Duke University School of Law (a leading expert on mass litigation), Professor Marc Galanter of the University of Wisconsin Law School (an outstanding scholar with respect to the legal profession) and a number of leaders from the Section of Litigation.

After the December symposium a redrafted set of principles was prepared. These were presented and discussed at the January 18-20, 2007, leadership meeting of the Section of Litigation in Charleston, South Carolina. On January 19, Kenneth Feinberg addressed the leadership, discussing and defending the draft principles. He was joined in these discussions by Professor Stephen Saltzburg of George Washington University Law School as well as Professors Epps and Landsman. Out of these discussions and the contributions of a number of members of the Section of Litigation leadership, including Council Members John Barkett and Irwin Warren, came the redrafted Principles included in the Recommendation. They reflect the best thinking of a distinguished team of scholars, an outstanding group of advisors and the leaders of the Section of Litigation.