REPRESENTING DISASTER SURVIVORS: CHALLENGES TO SURVIVORS AND LAWYERS

Presented by the
American Bar Association
Section of Litigation,
Center for Professional Responsibility,
Tort Trial and Insurance Practice Section,
Young Lawyers Division and
Center for Professional Development
Representing Disaster Survivors: Challenges to Survivors AND Lawyers

Wednesday, June 22, 2016 | 1:00 PM Eastern
Sponsored by the Section of Litigation, Center for Professional Responsibility, Tort Trial and Insurance Practice Section, Young Lawyers Division, Standing Committee On Disaster Response and Preparedness, and the ABA Center for Professional Development

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FEMA & Other Disaster Benefits

June 22, 2016
Attorney Ranie T. Thompson
Director, CrescentCare Legal Services
Laws, Regs, Policy Sources

42 U.S.C. § 5174 (The Stafford Act)

44 C.F.R. Part 206 – (Federal Disaster Assistance)

www.fema.gov (agency website)
www.disasterassistance.gov (apply, monitor app., etc.)

Or via FEMA Helpline: 1-800-621-3362

FEMA Assistance

- Presidential declaration of “major disaster”
- Federal assistance supplements resources of state and local governments and voluntary relief organizations.
- To provide financial assistance and direct assistance,
  - to ELIGIBLE individuals and households
  - who as a direct result of a major disaster or emergency,
  - have UNINSURED or UNDERINSURED, necessary expenses and serious needs and
  - have no other means to meet those needs.

www.fema.gov/pdf/about/stafford_act.pdf
Registration Deadline – 206.112

* **60 days** but can be extended
  * by regional director or his designee

* **Late registrations accepted**
  * **60 days** after standard or extended period
  * Good cause shown
  * Suitable documentation and justification for delay in registration

Hierarchy for Relief & Recovery

1. Red Cross
2. Other voluntary relief efforts
3. Insurance proceeds
4. Small Business Administration (SBA) loans for personal and business use
5. FEMA benefits
6. Can also get welfare, unemployment, food stamp, Medicaid, other benefits
FEMA Assistance

Individuals and Households Program (IHP)
44 CFR 206.101-120

- Direct financial assistance.
- Housing assistance. (206.117)
- Other needs assistance (“ONA”). (206.119)

7

- $33,000 Monetary limit through mid-October 2015 – a bit under.
- Changes Total monetary limit per household changes yearly (annual CPI adjustment).
- Unpaid FEMA debts should not be offset against amounts to which an applicant is entitled.
- FEMA considers applicant’s financial situation except with rental assistance requests by homeowners.
Housing Assistance

Basic requirement:

* Renters and homeowners.
* Primary residence.
* destroyed, inaccessible, or uninhabitable.

This means that those homeless at the time of the disaster are ineligible.

Housing Assistance

Assistance may include:

* **Rental Assistance**, renewable for up to 18 months, available for both displaced homeowners and former renters who cannot find affordable rentals; FEMA much stricter on renewal applications of former renters; renewal applicants must have receipts to show use of prior aid.

* **Temporary shelter** in hotels, mobile homes (trailers), boats, or housing on military bases.

* Money to repair damaged homes/hazard mitigation.

* Money toward replacing destroyed housing, but subject to the cap on assistance.
Ineligible persons

- Non–disaster related displacement
- Non-primary residence displacement
- Persons with adequate rent-free housing alternatives
- Persons with secondary or vacation home within reasonable commuting distance to disaster area
- Persons who own rental property that meets their temporary housing needs
- Persons in shared household situation and pre-disaster roommates

Termination of Housing Assistance

- Have received for **18 months** (unless extended by FEMA)
- Maxed out aid cap ($33,000)
- Adequate alternate housing is available
- Got into it through misrepresentation/fraud
- **Fail to comply with lease/rental agreement (applicant breaks lease)**
- **Do not provide evidence that you are working towards a permanent housing plan (if no good cause)**
- Notice and Right to Appeal:
  - 15 day notice to terminate for unit—tenants have appeal rights; consider action in state court to challenge
Other Needs Assistance (ONA)

FEMA may cover disaster-related:
- Personal Property loss: Clothing, furnishings, appliances, tools for jobs, educational materials
- Medical and dental costs
- Replacement or repair of necessary medical items
- Disaster-related funeral and burial costs
- Cleaning and sanitization of property
- Vehicles damaged by the disaster
- Moving and storage costs
Tip for Advocates

- Some amounts may be set by FEMA. Check website for press releases on policy guidance.
- Other amounts are determined based on a pattern you will be able to identify as you work with clients.
- Expect disparities in amounts and types of assistance provided.
- Be willing to advocate based on the regulations.

SBA Loans

SBA Disaster Loans 15 U.S.C. § 636 (b), (c)

Regulations 13 C.F.R. § 123 et seq.

Agency website www.sba.gov
SBA Loans

- Completed SBA loan application may be required by FEMA for ONA
- not for housing programs assistance
- Summary denials (e.g., very low income/resources) may be done by FEMA and SBA
  - You will need to push FEMA and SBA on this
- SBA loan decisions can be appealed

- Personal/Real Property Replacement
  - Homeowners and renters
  - Repair or replace disaster damages to primary residence (up to $200,000) or personal property (up to $40,000)
- Physical Disaster Business Loans
- Economic Injury Disaster Loans

Lessons learned...

* Loans are very attractive (esp. to low-income folks)
  * Low interest rate (0% - 5%)
  * Small payments
  * Short term
* Defaulted borrowers who ignore these face tough collections, including wage garnishments and foreclosure.
* Frequently causes trouble for homeowners seeking loan modifications, DILs, Short Sales on primary loans.
* Dischargeability in bankruptcy?
Other Disaster Assistance

Disaster Unemployment Assistance ("DUA")

ELIGIBILITY:
- Unemployed workers/ self-employed who:
  - Became unemployed as a direct result of the disaster
  - Are not eligible to receive regular unemployment insurance
- Or those who:
  - Become breadwinner after head of HH dies in disaster
  - Become unemployed due to disaster-sustained injury
  - Can't reach their job due to disaster
  - Were scheduled to start a job but can’t due to disaster

- Application Deadlines will be announced by state agency that administers unemployment insurance program. See www.scsei.org.
- App Deadlines may differ by county.
- Denials can be appealed but act quickly; usually there's a short appeal period (check your state law)
- DUA overpayments are not waivable as a matter of federal law; check your state law for collection relief rights on regular UI overpayments.
Disaster Food Stamps ("D-SNAP")

- SNAP (Supplemental Nutrition Assistance Program) = formerly Food Stamps.
- D-SNAP = Cash assistance for new and ongoing FS recipients
- Usual SNAP financial eligibility rules relaxed.
- D-SNAP resources: www.fns.usda.gov/disaster/disaster-assistance
- Check with the agency that administers the food stamp (SNAP) program in your state.
- Many eligible for regular SNAP benefits have never applied; advise of possible dual eligibility.
- Assistance denials can be appealed.

Appeals
42 U.S.C. §5189a (Sec. 423 of the Stafford Act)
44 C.F.R. §206.115 (Appeals)
Can Appeal Any Eligibility-Related Decision

- Eligibility for assistance, including recoupment;
  - *Amount* or type of assistance;
  - *Cancellation* of an application;
  - *Rejection* of a late application;
  - *Denial of continued assistance* under 206.114
  - FEMA’s intent to collect rent on housing provided by FEMA;
  - *Termination of direct housing assistance*;
  - Denial of request to purchase FEMA-provided housing unit;
  - Sales price of such housing unit;
  - “Any other eligibility-related decision.”

44 C.F.R. §206.115 (a)

Appeal Requirements

**REQUIREMENTS**

- In writing - 44 C.F.R. §206.115(b);
- Explain reason(s) for the appeal - 44 C.F.R. §206.115(b);
- Must be **signed by the applicant or authorized representative** (who must also include a form meeting FEMA requirements, signed by applicant) - 44 C.F.R. §206.115(b);
- FEMA form 009-0-3
- Postmark or fax within 60 days of FEMA’s decision - 44 C.F.R. 206.115 (a). FEMA mailing address & fax number on the decision.

**CHALLENGES**

- Paper Only
- Hearsay & other deficient evidence unchallenged.
- FEMA decision maker invisible.
- Inability to challenge ex parte contacts by FEMA.
- Inability to present live testimony.
- Inability to cross-examine adverse witnesses.
Recommended Inclusions

- Any due process or other legal objections.

- All evidence you want considered with the appeal, in whatever form available and relevant to the claim (e.g., affidavits, declarations or other statements, receipts, any type of documentation).

- Don't assume appeal adjudicators will review FEMA file; include copy of full file or selected portions if sufficient; if you seek judicial review have in your appeal everything you want a court to see.

- Any need for accommodation, or argument of illegal discrimination, should be thoroughly documented.

Flood Bar Issue

- Flood zone recipients of FEMA aid are required to purchase and maintain flood insurance “for at least the assistance amount” on the flood-damaged property. 44 C.F.R. §206.110(k)(3).

- Homeowners must maintain flood insurance for as long as the address exists, and the flood insurance requirement “is reassigned to any subsequent owner.” 44 C.F.R. §206.110(k)(3)(i)(A).

- Renters must keep flood insurance “on the contents” for as long as they reside at the flood-damaged unit. 44 C.F.R. §206.110(k)(3)(i)(B).

- Those who do not comply are not eligible for future FEMA assistance on the same flood-damaged property. §206.110(k)(3); §206.113(b)(8).

TIPS

- FEMA may not have the facts right.

- FEMA should prove the prior assistance amount and that the recipient was informed of the future obligation.

- If a prior owner was the recipient, argue that FEMA should prove that your client received notice. But if you can prove the opposite, document this in your appeal.

- FEMA may have sent notice of the obligation to a wrong address.

- Document thoroughly.
FEMA Recoupment

6 CFR Part 11 (Dept. of Homeland Security)
31 CFR Parts 900-904 (Dept. of Treasury)
44 CFR Part 206 (Federal Disaster Assistance)


NOTE: Past uncollected debt should not preclude receipt of new disaster assistance.

FEMA’s Authority To Recover Overpaid Assistance.

44 C.F.R. §206.116 Recovery of Funds

(a) The applicant must agree to repay to FEMA (when funds are provided by FEMA) and/or the State (when funds are provided by the State) from insurance proceeds or recoveries from any other source an amount equivalent to the value of the assistance provided. In no event must the amount repaid to FEMA and/or the State exceed the amount that the applicant recovers from insurance or any other sources.

(b) An applicant must return funds to FEMA and/or the State (when funds are provided by the State) when FEMA and/or the State determines that the assistance was provided erroneously, that the applicant spent the funds inappropriately, or that the applicant obtained the assistance through fraudulent means.
FEMA Recoupment

WHAT
- Expedited Assistance
- Personal Property Assistance
- Transitional Housing Assistance
- Rental Assistance
- Transportation Assistance
- Any other kind of assistance

WHY
- Duplication of benefits - single household
- Duplication of benefits – insurance
- Damaged dwelling not primary residence
- Failure to maintain flood insurance
- Overpayment of assistance (e.g. Personal Property)

Collection Process Step by Step

Step 1: Notice of Debt (Written demand for payment)
6 C.F.R. §11.3; 33 C.F.R. §901.2
- Resolution Options:
  - Pay in full
  - Ask for repayment plan
  - Ask for compromise of debt
  - Appeal
  - Ignore it (not the best idea)
- Timeline:
  - 30 days: pay in full or FEMA starts to charge interest
  - 60 days: deadline to appeal
  - 90 days: deadline to set up repayment plan to avoid financial penalties (6% per year)
  - 120 days: no appeal or appeal denied, FEMA turns case over to Treasury Department for collection
If FEMA Proceeds with Collection

- **Step 2** is a **Letter of Intent** from the FEMA Finance Center letter = “last chance to pay or resolve debt” notice.

- **Step 3** - Debt will be **referred to U.S. Department of the Treasury**, which will send a notice explaining its multiple means of collection including:
  
  A. Offset of other federal payments, such as Social Security benefits or IRS tax refunds.
  B. Referral to private collection agency.
  C. Administrative wage garnishment of federal employees.

Additional fees will be added to the debt once it is final.

Judicial Review

- Available under the federal Administrative Procedure Act for six years after the first FEMA appeal decision on the issue.

- Courts are very limited in what issues can be reviewed.

If FEMA Proceeds with Collection

- Certain amounts are protected from recovery, including:
  - A. Debtor’s first $750 a month in Social Security income is exempt.
  - B. Collection in general is limited to 15% of income.
    31 CFR § 285.4(e)(1).

- In court actions, exemptions are available that would be available in bankruptcy. 28 U.S.C. § 3014.

Final Thoughts and Tips
Resources

- ABA Standing Committee on Disaster Response and Preparedness
- www.disasterlegalaid.org
- FEMA's Help after a Disaster

Andrew VanSingel
Director of the Low Income Tax Clinic
Prairie State Legal Services
Disaster Legal Services Overview

• Disaster Legal Services (DLS) is a Federal disaster assistance program operated by the American Bar Association Young Lawyers Division (ABA YLD) pursuant to a memorandum of agreement with the Federal Emergency Management Agency (FEMA), a division of the Department of Homeland Security.

• Through DLS, persons affected by major disasters may receive free legal assistance.
DLS Mission

To provide free legal assistance to low-income persons affected by presidentially declared major disasters.

POLL

Are you aware of the ABA's Disaster Legal Services Program which is run through the Young Lawyers Division?

- Yes
- No
Eligibility for Assistance through DLS

- DLS is provided to “low-income” disaster survivors.

“Low-income individuals means those disaster victims who have insufficient resources to secure adequate legal services, whether the insufficiency existed prior to or results from the major disaster. In cases where questions arise about the eligibility of an individual for legal services, the Regional Director or his/her representative shall make a determination.” (44 CFR 206.164(a))

Types of Legal Matters Served Under DLS

- Only individuals with legal matters directly arising from the disaster will be served.

- Legal issues covered include: bankruptcy, civil rights, employment law, family law, FEMA benefits claims, insurance law, landlord-tenant law, real estate law, as well as wills, trusts, and probate matters.

- Fee-generating cases are not allowed.
Volunteer Attorney Role

- Same responsibility level as with paying clients:
  - Duty of confidentiality
  - Duty of diligence
  - Competent and professional representation

- Entitled access to Disaster Recovery Centers to provide legal assistance and conduct client intake

Funding Facts of the DLS Program

- Hotline expenses are reimbursed up to $5,000 by FEMA.

- Many bar associations never request reimbursement.

- In large disasters (e.g. Katrina), FEMA may agree to reimburse expenses in excess of $5,000.

- To ensure reimbursement, requests pre-approval from FEMA before funding.
FEMA

Authority, Background, Roles

FEMA’s Mission

“To support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.”
FEMA: Authority to Act

- FEMA has authority to provide free legal services to low-income survivors of major disasters pursuant to 42 U.S.C. Section 582 and 44 CFR 206.164.

- The Robert T. Stafford Disaster Relief and Emergency Assistance Act, P.L. 93-288 Amended
  • Section 415 (42 U.S.C 5182)

- Code of Federal Regulations
  Title 44 / 44 CFR § 206.164

Presidential Directive

“Whenever the President determines that low-income individuals are unable to secure legal services adequate to meet their needs as a consequence of a major disaster, consistent with the goals of the programs authorized by this Act, the President shall assure that such programs are conducted with the advice and assistance of appropriate Federal agencies and State and local bar associations.” (Section 415, Stafford Act, Legal Services)
Disaster Recovery Centers

Individual Assistance
Types of Individual Assistance (IA):

- Mass Care / Emergency Assistance (Voluntary Agency Coordination).
- Individuals and Households Program (IHP)
- Other:
  - Disaster Legal Services (DLS).
  - Disaster Unemployment Assistance (DUA)
  - Crisis Counseling Programs (CCP)

Implementing DLS

FEMA’s Coordination with the YLD
Implementing a DLS Operation

1. The President: Major Disaster Declared – Declaration includes Individual Assistance (IA)

2. FEMA: DLS Needs Assessment & Coordination (DLS is not automatic with every major disaster declaration)

3. FEMA: Intent to Implement Letter- authorizes the setup of the hotline

4. YLD: The Director contacts the ABA YLD District Representative (DR) for the affected area.

5. YLD: The DR implements the DLS hotline, a toll free number connecting disaster survivors with attorneys.

DLS Roles & Responsibilities

Joint Field Office (JFO) Specialist/Region

- Notifies the DLS Director (Andrew VanSingel) of the presidential declaration
- Prepares the letter of intent to implement DLS and forwards letter to DLS
- Provides the hotline information to the National Processing Service Center (NPSC)
- Completes the initial request for allocation of funds (60-1)
- Prepares the initial funding letter and forwards to National Director
- Forwards a copy of the purchase order (40-1) to the YLD/ABA Finance Administrator
- Obligates additional funds to YLD upon request with justification and informs National Director of the supplemental funds
DLS Roles & Responsibilities
FEMA HQ Program Specialist

• Primary role of the FEMA HQ Program Specialist is to support the JFO Specialist with information and resources necessary to implement the DLS Program
• In the event of a catastrophic event (similar to Superstorm Sandy) the HQ Program Specialist will assume responsibility for the implementation of the DLS program until the JFO is established and to expedite services to disaster survivors
• Creates and maintains a file for each disaster that includes the activation of the DLS program

DLS in South Carolina

1. Disaster (flooding in several counties in SC)
2. FEMA Declaration (4241-SC) on October 5 including Individual Assistance (IA)
3. DLS is Activated (October 5)
4. DLS team works with DR (Ashleigh Wilson) to implement plan
5. Hotline is setup (October 6)
6. Press Release is finalized and approved (October 9)
7. Monitoring of DLS / hotline (October 9 – February 10)
8. DLS wrap-up, invoicing, etc. (February)
Recap of calls from SC Flooding DR-4241-SC

<table>
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<tr>
<th>Hotline Established - October 14, 2015</th>
<th>Through 01/15/16</th>
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<tbody>
<tr>
<td># of SC licensed volunteers</td>
<td>90</td>
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<tr>
<td># of Bankruptcy Calls</td>
<td>3</td>
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<tr>
<td># of Civil Rights Calls</td>
<td>1</td>
</tr>
<tr>
<td># of Contract/Contractor Calls</td>
<td>34</td>
</tr>
<tr>
<td># of Criminal Calls</td>
<td>3</td>
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<td># of Employment Calls</td>
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<tr>
<td># of Landlord-Tenant Calls</td>
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<tr>
<td># of Other Calls</td>
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<tr>
<td># of Real Estate/Mortgage Calls</td>
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<tr>
<td># of Succession/Wills/Power of Attorney Calls</td>
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<tr>
<td>Repeat Calls</td>
<td>102</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>580</td>
</tr>
</tbody>
</table>

BY: SC Bar-FEMA Flood Disaster Hotline Coordinator - Leah G. Johnson, Assistant Executive Director, SC Bar

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**Your Role!**

Planning and Coordination of the Legal Community
Your Role: Planning (In Advance!)

- Pursuant to the MOA, the YLD has “the sole and complete authority to coordinate and manage the delivery of legal services to disaster survivors.”

- We have committed to establish a “disaster-specific program which will outline the planned services and methodology for implementation of legal services for the particular disaster.”

What Should Your Program Look Like?

1. Holistic! In the MOA, we commit to use our “best efforts” to collaborate with “law firms, not-for-profit legal services providers, Legal Services Corporation and its recipients, state and local bar associations and pro bono organizations.”
   - We want you to get to know every legal organization in your state, including law schools. This is a GREAT excuse to network.

2. Efficient! In the MOA, we recognize that the best use of resources might mean that we use an established state or local bar telephone number for the hotline.

3. Staffed! You will need committed volunteers to staff the hotline AND to accept cases.

4. In Writing! This year, we are asking our volunteers to put together a draft proposal for their DLS program, BEFORE a disaster hits.
Why Involve Law Schools?

Educating attorneys is important to the revitalization of our profession.

• “The profession of law is fundamental to the flourishing of American democracy. Today, however, critics of the legal profession, both from within and without, have pointed to a great profession suffering from varying degrees of confusion and demoralization. A reawakening of professional élan must include revitalizing legal preparation.” (Carnegie Report, 2007)

• Our “aim . . . should be to elevate the twin concepts of the practice of law as a public service calling and the development of the capacity for reflective moral judgment to the same level as legal knowledge and traditional legal skills. This is indeed an ambitious goal.” (American Bar Association, 1996)

• “Disasters present challenges and opportunities for law schools and other academic institutions with social justice missions because they expose poverty, racism, and inequality. Whether the disaster is a flood, hurricane, fire, tornado, or riot, preexisting social inequality and vulnerability will affect how severe and how lasting the damage will be. Accordingly, the study of disasters can serve as a lens for a broader inquiry into social justice, an inquiry that the legal academy is obliged to make as part of its educational mission.” (Engaging the Legal Academy in Disaster Response, 2011)
Your Role: Implementing, Monitoring & Data Collection

If you have done your homework in advance, at the time a disaster strikes, you will be ready to implement DLS.

- **Pay attention** to disaster-related news in your district.
- **Reach out** to the DLS Director if you are not sure whether DLS has been or will be implemented.
- **Submit** your program plan (as revised for the particular disaster) to the Vice Director supervising your disaster.
- **Implement** your program **within 48 hours** of receiving the LOI from the Director. *Hotline, press release, continuing advertisement of services.*
- **Monitor** your program to make sure the needs of low-income survivors are being met. *Is the program reaching the affected population? Communicate with your FEMA representative!*
- **Collect data** on the numbers of survivors served and the kinds of cases referred.
- **Report weekly** to your assigned Vice Director.

Your Role: Passing the Baton

Your knowledge and planning is not something that should be lost in transition!

- **Capture what you learn** and ensure that the next DR is ready to build on what your program.
- **Communicate** with the DLS Director and any Vice Director assigned to your disaster:
  - What works/doesn’t work/can be improved?
  - How can we assist you with unmet needs in your state?
So, What Do I Do Now?

Network and Submit Your Plan

The Plan

Your plan should include at least the following:
1. An understanding of the types of disasters likely to hit your state.
2. An understanding of existing resources for disaster legal aid.
3. A back up coordinator if you are affected by the disaster.
4. The location where the hotline will be housed and how it will be staffed. A contingency plan if that organization is affected by the disaster.
5. Where cases will be referred: participating organizations, names, contact numbers.
   - Plan in advance for the kinds of cases likely to arise.
   - Which organizations can meet those needs?
   - Which organizations have assisted with disasters in the past?
   - Which organizations affirmatively do not wish to participate in the program?
6. Unmet needs that can be handled pre-disaster.
   - Does your state have a handbook for volunteer attorneys?
   - Does your state have a handbook for disaster survivors?
   - Can you work with law schools or law firms to prepare new or updated materials?
Networking as a Key Part of the Plan

1. Bar Associations
2. Legal Aid
3. Law Firms
4. Law Schools

We are a part “community of practitioners” who have “for centuries [been] deeply immersed in the common law and carrying on traditions of craft, judgment and public responsibility.” (Carnegie Report, 2007)

Issue-Spotting as a Key Part of Planning

Planning in advance is important for many reasons:

• Hotline staffing:
  – Who will answer calls? If a non-attorney, how will calls be referred to attorneys for “limited legal advice”?

• Screening:
  – If a case needs to be referred for continuing legal advice, who will income screen? How will this be accomplished? What are the pro bono requirements in your state? How do law firms and legal aid organizations determine pro bono eligibility?

• Political considerations:
  – Which organizations are most interested in disaster recovery? Who are the political and community stakeholders?

• Resources:
  – Which organizations have existing resources sufficient to handle disaster response? What new resources will be needed if a major disaster strikes?
Our Expectation

• Your plan is due to the DLS Director by October 1.

• If you need an extension to complete your plan, just let us know!

DLS Success

- Since 2005, over 100,000 disaster survivors have been served.

- Since 2007, DLS has been implemented in 40 states and 2 U.S. territories.

- The return on investment continues to be worthwhile. Implementation costs are usually under $500 per hotline. The outreach provides a significant service for those impacted and contributes to the improved public perception of lawyers.
Resources

- ABA DLS website: http://www.americanbar.org/groups/young_lawyers/disaster_legal_services.html
- Disaster Legal Aid website: http://www.disasterlegalaid.org/
- Practising Law Institute Training: Providing Legal Assistance in the Aftermath of Disaster (FREE): http://pli.edu/Content/Seminar/Providing_Legal_Assistance_in_the_aftermath

Post-Disaster
Insurance Claims
Mortgage Issues
Federal “Duplication of Benefits”

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Working with Post-Disaster Clients

- **Give clients information in writing whenever possible—handouts or short written summaries:** they are under stress, trying to absorb a lot of new information, and likely receiving conflicting information.

- Recognize that your clients have to make difficult decisions amid competing priorities, often choosing between a range of bad options.

- Give information and advice, but understand that clients may not be able to follow it.

- Don’t become frustrated with your clients.

Insurance Claims: gathering and preserving evidence

- **Get papers organized early:** insurers and agencies will be asking for the same documents repeatedly.
  - (Consider bringing multi-pocket redwell folders to give to clients to help them organize documents.)

- **Pre- and post-disaster photos are critical evidence:**
  - Take photos of the home interior before removing debris
  - Take detailed photos of all “debris”—furnishings, personal items, particularly costly items like electronics
  - Take photos of all home damage: the insurance adjuster will take photos, but they may miss things.
  - Locate pre-disaster photos:
    - Family photos inside the home
    - Photos from a home appraisal, if home recently purchased or refinanced
      - The mortgage company should have a copy, or may be able to identify the appraisal company used.
      - Appraisals can also be useful evidence of the home’s pre-disaster conditions, if the insurer claims pre-existing damage or bad condition.

- **Take photos of repair work as it progresses:** this is important evidence not only for potential insurance disputes and mortgagee release of insurance proceeds, but also for purposes of “duplication of benefits” in a coming government disaster recovery program.

- **Gather/salvage any pre-disaster receipts** for major home contents purchases (furniture, appliances etc.), home improvements, and home repairs. These documents can help prove the quality and price of things like kitchen countertops, etc.

- **Use licensed contractors for all repairs and get itemized estimates and invoices:** the client will need these to claim additional insurance payment for “replacement cost value”.
Insurance claims: relevant law

• Homeowners insurance is state regulated.
  – Look to state law and state insurance regulatory agency for relevant law and rules.
  – File complaints on insurance company (and mortgage company) misconduct with state regulatory agency! The state regulator needs to be aware of problems, and multiple complaints spur action.

• Most residential flood insurance is a FEMA program, the National Flood Insurance Program (NFIP).
  – Regulations governing the NFIP are at 44 C.F.R. Parts 59, 60, 65, and 70
  – FEMA's website has many informational materials about flood insurance claims and coverage, including a copy of the standard policy: www.fema.gov/national-flood-insurance-program

Making Insurance Claims

• Get a copy of the client’s policy from the client or the carrier, and read it.
• The policy Declarations Page tells you how much coverage the client has and any endorsements (non-standard coverage).
• Flood insurance policies through the National Flood Insurance Program (NFIP) are standard, available online at FEMA website.
• Most homeowners insurance policies are “all perils” policies with exclusions. Flooding is an exclusion.
• Check the policy for endorsements and riders, which can add coverage for perils that are otherwise excluded (e.g. sewer back-up). Endorsements should be noted on the policy Declaration Page.
Making Insurance Claims: When to hire a public adjuster

• A public adjuster may be necessary if the insurer undervalues the claim by omitting some damage or by underpricing:
  – The public adjuster will charge a percentage of any claim payment for which he/she assisted (capped at 12% in New York).
  – If the public adjuster assists only with a supplemental claim—the insured’s claim that additional funds are owed—the public adjuster receives a percentage of only the additional funds recovered, not the whole claim payment.
• Quality of public adjusters varies greatly: check references, better business bureau, regulatory agencies.
• To find an adjuster:
  – American Association of Public Insurance Adjusters
  – Your state’s regulatory agency that licenses public adjusters

Actual Cash Value (ACV) v. Replacement Cost Value (RCV)

• ACV: Depreciated value of what was lost or damaged
• RCV: The cost to replace or repair the damaged item
• Most homeowners insurance policies and NFIP flood insurance policies pay claims initially at ACV.
• The insured then has a short timeline—normally 180 days—to notify the insurer in writing that the insured intends to replace or repair damaged items and claim RCV (recoverable depreciation). Read the policy to know the deadline to give notice.
• Some items are paid only at ACV. Check the policy. The depreciation on these items will be “non-recoverable.”
• NFIP policies pay only ACV if the building was under-insured (less than 80% of the building value, not including the land value) or if it is a multi-family building.
• If the actual cost of repair is higher than the RCV value in the insurer’s adjuster’s report, the insured can seek the actual cost paid. (The client must submit paid invoices for the work to the insurer.)
### Sample from a homeowners insurance adjuster report

<table>
<thead>
<tr>
<th>Description</th>
<th>Qty</th>
<th>Unit Price</th>
<th>Estimate Amount</th>
<th>Additional *</th>
<th>Replacement Cost/Value</th>
<th>Depreciation</th>
<th>Actual Cash Value</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Basement - Living Room</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1a. Remove Paneling</td>
<td>578.67 SF</td>
<td>$0.37</td>
<td>$194.11</td>
<td>$65.62</td>
<td>$259.73</td>
<td>-0.00</td>
<td>$259.73</td>
</tr>
<tr>
<td>1b. Paneling</td>
<td>578.67 SF</td>
<td>$1.86</td>
<td>$1,076.33</td>
<td>$329.90</td>
<td>$1,406.23</td>
<td>-37.50</td>
<td>$1,368.73</td>
</tr>
<tr>
<td>2a. Remove Vinyl tile</td>
<td>286.42 SF</td>
<td>$1.37</td>
<td>$382.40</td>
<td>$120.27</td>
<td>$502.67</td>
<td>-0.00</td>
<td>$502.67</td>
</tr>
<tr>
<td>2b. Vinyl tile</td>
<td>286.42 SF</td>
<td>$2.42</td>
<td>$695.14</td>
<td>$353.58</td>
<td>$1,048.72</td>
<td>-72.45</td>
<td>$976.27</td>
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<tr>
<td><strong>Subtotals - Basement - Living Room</strong></td>
<td></td>
<td></td>
<td>$2,375.98</td>
<td>$869.37</td>
<td>$3,245.35</td>
<td>-109.95</td>
<td>$3,135.40</td>
</tr>
<tr>
<td><strong>Basement - Closet</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3a. Remove Bifold door set - Birch veneer - Double</td>
<td>2.00 EA</td>
<td>$18.00</td>
<td>$36.00</td>
<td>$11.03</td>
<td>$47.03</td>
<td>-0.00</td>
<td>$47.03</td>
</tr>
<tr>
<td>3b. Bifold door set - Birch veneer - Double</td>
<td>2.00 EA</td>
<td>$200.17</td>
<td>$400.34</td>
<td>$122.71</td>
<td>$523.05</td>
<td>-20.92</td>
<td>$502.13</td>
</tr>
<tr>
<td>4a. Remove Vinyl tile</td>
<td>25.75 SF</td>
<td>$1.37</td>
<td>$35.28</td>
<td>$10.81</td>
<td>$46.09</td>
<td>-0.00</td>
<td>$46.09</td>
</tr>
<tr>
<td>4b. Vinyl tile</td>
<td>25.75 SF</td>
<td>$2.42</td>
<td>$62.32</td>
<td>$31.79</td>
<td>$94.11</td>
<td>-8.52</td>
<td>$85.59</td>
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<tr>
<td><strong>Subtotals - Basement - Closet</strong></td>
<td></td>
<td></td>
<td>$533.94</td>
<td>$176.34</td>
<td>$710.28</td>
<td>-27.44</td>
<td>$682.84</td>
</tr>
</tbody>
</table>

**Recoverable Depreciation: recoverable if repairs are made or lost item replaced**

<table>
<thead>
<tr>
<th>Replacement Cost Value</th>
<th>$8,770.62</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less Depreciation</td>
<td>(368.28)</td>
</tr>
<tr>
<td>Actual Cash Value</td>
<td>$8,402.34</td>
</tr>
<tr>
<td>Less Deductible</td>
<td>1,000.00</td>
</tr>
<tr>
<td>Net Claim</td>
<td>$7,402.34</td>
</tr>
<tr>
<td>Total Recoverable Depreciation</td>
<td>368.28</td>
</tr>
<tr>
<td>Net Claim if Depreciation is Recovered</td>
<td>$7,770.62</td>
</tr>
</tbody>
</table>
Mortgagee is co-beneficiary on insurance claim payment

- The mortgagee (mortgage company) is a beneficiary of any insurance policy on a property with a mortgage. (Does not apply to contents coverage or non-real property coverage, like loss of use.)
- The claim payment check will be a two-party check made out to the insured and the mortgage company.
- The insured must endorse the check and give it to the mortgage company for its endorsement.
- Under the terms of most mortgages, the mortgage company may hold the funds and disburse them in installments.
  - Read the mortgage contract to see the specific rights and duties of the mortgagor and the mortgagee regarding insurance claim payments.
  - The mortgage should be publicly recorded and available online.
  - Fannie/Freddie have specific guidelines on insurance loss settlement.
- Under most circumstances, the mortgage contract prohibits the mortgagee from applying the insurance funds to mortgage principal or payment arrears.

Wrong mortgagee on the insurance check?

- Because mortgage servicing rights are frequently bought and sold, the insurance company may make the claim payment check out to the wrong mortgagee.
- The homeowner should return the check to the insurance company and ask that the check be re-issued with the correct payees.
- Include proof of the correct mortgagee:
  - Satisfaction of Mortgage (publically recorded), if the mortgage was paid off;
  - A recent mortgage statement, if the mortgage servicing was transferred.
Force-placed insurance

- Clients may be unaware that they have property hazard insurance.
- Anyone with a mortgage likely has homeowners insurance, since the mortgagee will force-place insurance on the property.
- Anyone with a property in a Special Flood Hazard Area (a FEMA high-risk flood zone) and a mortgage likely has force-placed flood insurance as well.
- Force-placed insurance policies typically do not cover lost personal property, but they do cover damage/losses to real property.
- If your client has a mortgage, especially a mortgage in default (missed payments), contact the mortgage servicer to see whether it has force-placed insurance.
  - Get copies of the insurance policies.
  - The homeowner needs to make the insurance claims. Don’t rely on the mortgagee to do so.
  - Force-placed homeowners and flood insurance are for repair of the property, not to pay off the mortgage.

FEMA Group Flood Insurance Policy (GFIP)

- If your client has received FEMA help following a flood in the last 3 years, he/she may have been enrolled in the FEMA Group Flood Insurance Program (GFIP).
- These policies provide low cost flood insurance for 3 years.
- The coverage is limited, up to the FEMA maximum IHP grant at the time of enrollment. (The maximum grant at the time of Sandy was $31,900.)
- Contact FEMA to see if your client in in a GFIP.
Mortgage default following a disaster

• Inability to make monthly mortgage payments is very common following a disaster.
• Fannie Mae, Freddie Mac and State regulators may order suspension of foreclosures for a period of time following a disaster.
• Fannie Mae, Freddie Mac and most major mortgage servicers offer temporary mortgage payment forbearance options, which suspend mortgage payments for a period of time following a disaster.
  – Fannie Mae and Freddie Mac websites should have information about forbearance availability and terms, for mortgages owned by Fannie and Freddie.
  – For information on disaster relief options for FHA-insured loans, go to:
    • http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/nsc/qah0121
  – Check the mortgage servicer’s website or contact them to learn what options the servicer offers.
  – To find out if a loan is owned by Fannie or Freddie, use these loan look-up sites:
    • https://ww3.freddiemac.com/loanlookup/
    • www.knowyouroptions.com/loanlookup (Fannie Mae)
• Mortgage servicers may convert forbearance requests into loan modification requests. This may or may not be in your client’s best interest. Consult a foreclosure prevention specialist (attorney or qualified housing counselor) for advice.

Beware of mortgage forbearance traps: negative credit consequences

• Forbearance periods typically are 3, 6, or 12 months.
• The homeowner will eventually have to repay the missed mortgage payments.
• Some mortgage servicers report forborn payments as missed payments to credit reporting agencies and charge late payment fees, so the client’s credit rating may suffer as a result of the forbearance.
  – Check with the servicer to see whether it will report forborn payments as missed to credit reporting agencies and whether it will assess late payment fees.
  – If the answer is yes, seek intervention by state regulatory agencies.
  – If it is a Fannie- or Freddie-owned mortgage or an FHA-insured mortgage, check to see whether these agencies have prohibited late fees and negative credit reporting.
Beware of mortgage forbearance traps: balloon payments

- The ideal forbearance plan will move the missed payments to the end of the loan, essentially extending the term of the loan by 3, 6, or 12 months.
- Many mortgage servicers instead demand full payment of all forbored amounts in a single lump sum at the end of the forbearance—a “balloon payment.”
- Find out up front how the servicer intends to handle the forbored payments.
- If the servicer demands a balloon payment of the full forbored amount, the homeowner may be able to pursue a mortgage modification or establish a payment plan.
- If possible, the client should not use insurance funds designated for home repair to pay mortgage arrears or forbearance balloon payments. (See “duplication of benefits” section below.)

CDBG-DR Programs and “Duplication of Benefits”: What you don’t know now can hurt you later

- Congress is likely to appropriate funds under the Stafford Act, 42 U.S.C. 5121 et seq., to help with the recovery following a disaster.
- The funds come through the Community Development Block Grant Disaster Recovery program (CDBG-DR), overseen by the Department of Housing and Urban Development (HUD).
- The Stafford Act prohibits a person, business or other entity from receiving CDBG-DR-funded assistance if that assistance duplicates any other assistance already received, including insurance claim payments. 42 U.S.C. 5155; 44 C.F.R. 206.191.
- The federal requirement that CDBG-DR expenditures be “necessary and reasonable” further informs the prohibition on duplication of benefits.
  - 2 C.F.R. part 225 (State, local, and Indian Tribal governments)
  - 24 C.F.R. 570.489(d) (State grantees)
  - 24 C.F.R. 570.610 (local government grantees)
- In other words, if a client has already received insurance payment (NFIP or private insurance), FEMA payment (IHP), Small Business Administration (SBA) loan, or other funds or in-kind assistance from public, private or non-profit sources for a given purpose or a given recovery need (e.g. home repair), that client cannot receive CDBG-DR-funded assistance for the same purpose or the same recovery need.
- Note: a private loan that is not guaranteed by SBA is not duplicative. 76 F.R. 71063 (Nov. 16, 2011)
- If the funds received did not fully cover the need, the client is still eligible for CDBG-DR-funded assistance for the uncovered portion of the need.
- For a detailed discussion of HUD’s interpretation of the duplication of benefits prohibition, see HUD’s Federal Register clarification: 76 Fed. Reg. 71060 (Nov. 16, 2011).
Assistance is only duplicative if it was for the same purpose or portion of need

- If the CDBG-DR-funded recovery program is for home repair, FEMA Individual and Households Program (IHP) grants received for other purposes (temporary housing, lost medication, etc.) are not duplicative.

- If the client received, e.g., $50,000 in flood and homeowners insurance on their hurricane-damage claim, but the CDBG-DR-funded program assess that the home sustained $100,000 in damage, the client can still receive $50,000 in CDBG-DR-funded home repair assistance.

- If the CDBG-DR-funded assistance is for hazard mitigation, such as elevation of homes in a flood plain, the funds received for home repair should not be duplicative.

“Eligible uses” of funds

- Funds spent on a different, “eligible use” may be deemed non-duplicative.
- What constitutes an “eligible use” will vary, based on the particular program at issue:
- Example:
  Under New York City’s Build It Back program, rent paid by homeowners displaced by Sandy is an “eligible use.” These rent payments are deducted from the benefits received from other sources in determining the duplicative amount.
Forced mortgage payoff and “control” of funds

- Funds received will not be deemed duplicative if the client lacked legal control over the funds (i.e. the funds were not “available” to the client). 42 U.S.C. 5155; 76 Fed. Reg. 71063.

- A mortgagee (lender) might determine that insurance funds received following a disaster are insufficient to restore or repair the home (mortgage security) and unilaterally decide to apply the insurance proceeds to the mortgage principal, pursuant to the following standard mortgage clause (italicized).

  “Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security of this Mortgage is not thereby impaired. If such restoration or repair is not economically feasible or if the security of this Mortgage would be impaired, the insurance proceeds shall be applied to the sums secured by this Mortgage, with the excess, if any, paid to Borrower.”

- It is very rare for a mortgagee to invoke this provision to unilaterally apply insurance proceeds to unpaid mortgage principal (as opposed to trying to get the homeowner to consent to this use, or trying to treat the insurance funds as a payment toward mortgage arrears).

- If the mortgagee unilaterally applies insurance proceeds to pay down the unpaid principal balance, and if the homeowner did not consent to this, then those insurance funds may be excluded from a duplication-of-benefits calculation, based on the homeowner’s lack of legal control over the funds.

- The client will need to prove forced mortgage payoff through a letter from the mortgagee stating that it has unilaterally applied the insurance funds to the principal balance.

How duplication of benefits works in practice

- The determination of benefit duplication is case-by-case: The CDBG-DR-funded program must assess the need, determine all funds received for that need, and then calculate any duplication.

- If the CDBG-DR-funded program gives grants to pay for unmet needs, the duplicative amount will be deducted from the grant awarded to the client.

- If the CDBG-DR-funded program gives in-kind assistance (such as New York City’s Build It Back home repair program), in order to receive assistance the client must pay to the program any duplicative funds not spent on “eligible uses.”
Practical advice for clients to avoid duplication-of-benefits trouble when the CDBG-DR funds come

- **If possible** (and it may not be possible):
  - Don’t use insurance claim payments to pay mortgage arrears or payoff the mortgage principal balance—seek a forbearance instead;
  - Don’t use insurance claim payments made for building damage to replace lost contents;
  - Be sure to know what the FEMA funds you received are for (e.g. temporary housing, home repair, lost furnishings, etc.) and use them for that purpose. If the FEMA award letter does not specify the purpose, contact FEMA to ask specifically what amount was awarded for what purpose;
  - Keep all receipts for all the work done, supplies purchased, etc., so that you can later document how you spent funds received.
  - Use repair contractors that give detailed invoices that itemize the costs of each repair.

*Remember that your client may not be able to follow these recommendations in a post-disaster environment where home repair contractors are in short supply, prices are inflated, scammers of all types are flooding in, and mortgagees are threatening foreclosure.*