



Disaster Resiliency: How Tax Attorneys Can Assist When a Disaster Strikes

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The Challenge of Making Disaster Survivors Aware of Tax Issues

- To get access to those affected by natural disasters, move quickly once the disaster occurs.
- Realize that disaster survivors will not be thinking about tax issues in the immediate aftermath.
 - Tax issues will become more important during the filing season and in future years.
- In the early stages of a natural disaster, the main feasible objective is to heighten awareness of tax issues and available resources.

Common Disaster-Related Tax Issues

1. Receipt of disaster-related payments, aid, or loans.
2. Receipt of insurance proceeds.
3. Deductions for damage to homes, household contents, and vehicles.
4. Filing and payment deadlines.
5. Targeted disaster-related legislation.

Receipt of Disaster-Related Payments, Aid, or Loans

- The following common types of relief to assist with disaster-related costs are not taxable:
 1. Cash gifts or grants
 2. Household and cleaning supplies
 3. Clothing
 4. Emergency Food Stamps
 5. Temporary Living Assistance
 6. Labor Assistance
 7. Loans
- Amounts (other than loans) received from an employer are taxable *unless* the requirements of Code § 139 are met.

Receipt of Disaster-Related Payments, Aid, or Loans

- Employer-provided relief assistance:
 - Is taxable unless Code § 139 applies
 - Under § 139, a “qualified disaster relief payment” is not taxable.
 - A QDRP includes a payment for reasonable and necessary expenses attributable to a qualified disaster for:
 - Personal, family, living, or funeral expenses; or
 - Expenses incurred for the repair, replacement, rehabilitation of a personal residence
 - A qualified disaster includes a federally declared disaster.
 - No double benefit: the exclusion of § 139 is available to the extent the expense is not otherwise compensated by insurance.
 - Code § 139 can apply to payments from employer to employee. See Rev. Rul. 2003-12.

Receipt of Disaster-Related Payments, Aid, or Loans

- Disaster Unemployment Assistance from FEMA
 - Is taxable
 - Rationale: these amounts compensate for lost wages or income, which would have been taxable had they been earned.

Receipt of Insurance Proceeds

- Insurance proceeds that meet both of the following requirements are not taxable:
 1. Payments are for *residential living expenses* that are attributable to the loss of use or occupancy of property that is the disaster survivor's principal residence, such as:
 - Hotel expenses,
 - Rental expenses for suitable temporary housing,
 - Cost of meals that would ordinarily be cooked at home,
 - Extraordinary transportation costs,
 - Repair, replacement, and rehabilitation expenses for the principal residence, and
 2. Payments are *received during the period of loss of use or occupancy*, which usually is the period of repair or replacement of the damaged principal residence

Receipt of Insurance Proceeds

- Insurance proceeds are taxable for an individual or business if they are for:
 - Mortgage Payments
 - Lost wages/income
 - Lost rental income
 - Lost business profits

Receipt of Insurance Proceeds

- Personal casualty gains can be taxable
- Casualty gains result when insurance proceeds or other reimbursements exceed the adjusted basis of the property
- Example:
 - Insurance payout of \$ 30,000
 - AB of vehicle is (\$20,000)
 - Casualty gain of \$ 10,000

Receipt of Insurance Proceeds

- Avoiding taxation of personal casualty gains:
 - If the taxpayer's principal residence is destroyed, the taxpayer may elect to exclude some or all of the gain realized.
 - See Code § 121.
 - Single taxpayer can exclude up to \$250,000 of gain
 - Married couples filing jointly can exclude up to \$500,000 of gain

Receipt of Insurance Proceeds

- If a personal casualty gain is taxable, a taxpayer may be able to exclude the gain by treating it as an involuntary conversion.
- Under Code § 1033, a taxpayer can elect not to recognize gains from involuntary conversions in current year but must purchase qualified replacement property within a specific time period (generally 2 years).
- To make the election:
 1. Replacement property must be similar or related in service/use to the converted property, and
 - “Similar” depends on use of the property: business? personal?
 2. Replacement property must be purchased within the applicable time period.

Deductions for Damage to Homes, Contents, and Vehicles

- For 2018 through 2025, Code § 165(h)(5) eliminates the deduction for personal casualty losses.
 - Despite the general disallowance, taxpayers can offset the amount of any personal casualty gains by the amount of otherwise-disallowed personal casualty losses.
- But § 165(h)(5) does *not* apply to personal casualty losses arising in federally declared disaster areas.
 - Losses in federally declared disaster areas are deductible.
 - A “federally declared disaster” is one determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

Deductions for Damage to Homes, Contents, and Vehicles

- In 2017 and prior years, taxpayers can take an itemized deduction for the aggregate amount of their personal casualty losses (to the extent they exceed personal casualty gains). § 165(h).
- The taxpayer must show:
 1. Type of casualty and date of occurrence,
 2. The loss was a direct result of the casualty,
 3. He/she was the owner of the property (or a lessee contractually liable for the damage), and
 4. The amount of the loss
- Must report loss on Form 4684 and Schedule A of Form 1040

Deductions for Damage to Homes, Contents, and Vehicles

- Prior-Year Election for Casualty Losses:
 - Taxpayers generally report casualty losses in the year the loss occurred.
 - However, Code § 165(i) permits a taxpayer to elect to treat a loss in a federally declared disaster area as occurring in the prior year.
 - Example: a loss incurred in Year 2 can be reported in Year 1.
 - Could generate an immediate refund.
 - Prior-year election is made by filing an original or amended return for the prior year.
 - Individuals generally have until October 15 of Year 3 to claim a Year 2 loss on a Year 1 return.

Deductions for Damage to Homes, Contents, and Vehicles

- Calculating the Amount of a Casualty Loss:
 - The amount of the loss is the smaller of taxpayer's:
 - adjusted basis (AB) in the property, or
 - the decrease in the fair market value (FMV) of the property as a result of the casualty,
 - Loss is reduced by any insurance or other reimbursement received or reasonably expected to be received
- Example: taxpayer paid \$20,000 for a personal-use truck two years ago and it was worth \$15,000 immediately before a wildfire. If the truck is totally destroyed by the fire, the amount of the loss is \$15,000. If taxpayer receives insurance proceeds of \$10,000 for the truck, the loss is only \$5,000.

Deductions for Damage to Homes, Contents, and Vehicles

- Determining the decrease in property's FMV:
 - The cost of repairing damaged property can be used as a measure of the decrease in FMV if certain requirements are met.
 - Rev. Proc. 2018-8, 2018-2 I.R.B. 286: provides safe harbors for determining the decrease in FMV of personal-use residential real property and personal belongings.
 - The IRS sometimes issues additional safe harbors that can be used in areas affected by specific natural disasters. *See, e.g.*, Rev. Proc. 2018-9, 2018-2 I.R.B. 290.

Deductions for Damage to Homes, Contents, and Vehicles

- Casualty loss deductions are limited
- A personal casualty loss is deductible only to the extent it exceeds:
 - \$100, and
 - 10% of the taxpayer's AGI
- A personal casualty loss is an itemized deduction.
 - Reporting a casualty loss will benefit a taxpayer only if aggregate itemized deductions exceed the standard deduction.
 - If itemized deductions do not exceed the standard deduction, the taxpayer will not benefit from reporting casualty losses and will take the standard deduction (unless Congress creates an exception through legislation).

Filing and Payment Deadlines

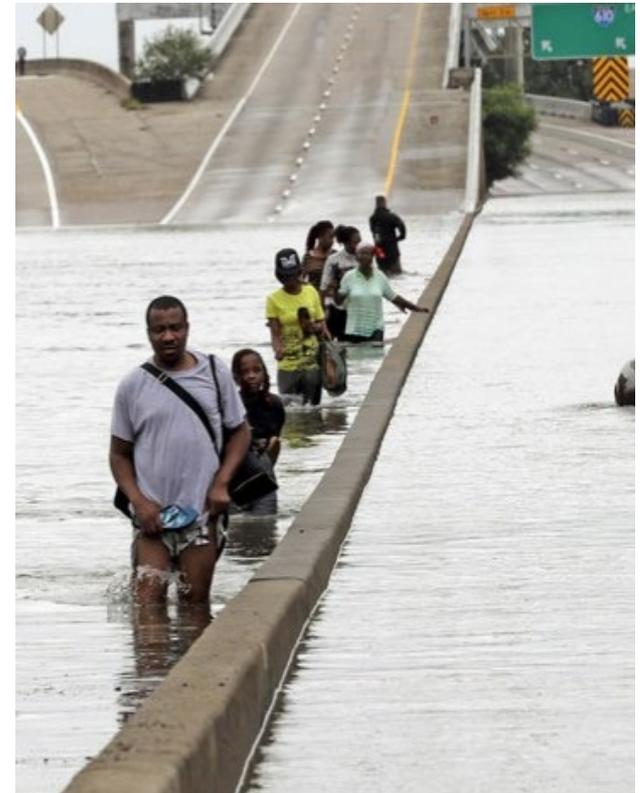
- In response to natural disasters, the IRS commonly grants relief from filing and payment deadlines for those in affected areas.
- The IRS typically extends deadlines in this manner by issuing news releases, available on the IRS website.
- Typical deadlines extended include:
 - Original or extended due date for individual and business returns.
 - Due dates for quarterly payroll and excise tax returns.
 - Due dates for quarterly estimated tax payments.
- Relief is normally provided automatically.
 - If the IRS asserts penalties against a taxpayer eligible for such an extended deadline, the taxpayer should request abatement of the penalties.

Targeted Disaster-Related Legislation

- Congress often enacts legislation in response to specific natural disasters that provides various forms of tax relief for those in affected areas.
- Common legislative responses:
 1. Employee retention credit
 2. Penalty-free access to retirement funds
 3. Special casualty loss rules (e.g., suspending 10% floor)
 4. Use of prior-year earned income for EITC and CTC
 5. Increased charitable contribution limits

Disaster Legal Services

- The ABA’s touchstone public service program
- Operates through an MOA with FEMA and ABA YLD
- YLD serves as exclusive coordinator of legal services for disaster survivors
- Coordination between numerous legal and non-legal agencies



Disaster Legal Services

- Provides FREE legal assistance “low-income” persons affected by a presidentially declared major disaster
- Volunteers assist with a wide range of legal issues
- Needs are both immediate and long-term



Why Do Survivors Need an Attorney?

- Disaster survivors need food, water, shelter—and an attorney
- Many legal issues arise, or are worsened by disasters, such as landlord tenant, consumer fraud, insurance, public benefits, estates and property, and tax issues
- Marginalized communities are especially vulnerable after a disaster

When do Survivors Need an Attorneys?

Immediate (0-30 days) “Shelter”

- Provide information
- Assist with FEMA applications

Short term (1-6 months) “DRC”

- Most legal claims

Long term (+6 months) “Clinical”

- FEMA Appeals
- Title clearing
- Other complex legal claims

DLS Hotline & Tables at Disaster Recovery Centers

- ABA/local bar disaster hotline or disaster hotline at LSC organization
- Calls are addressed by representatives from the LSC-funded organizations
- DLS tables at DRCs are generally staffed by the LSC-funded organizations and any available volunteers

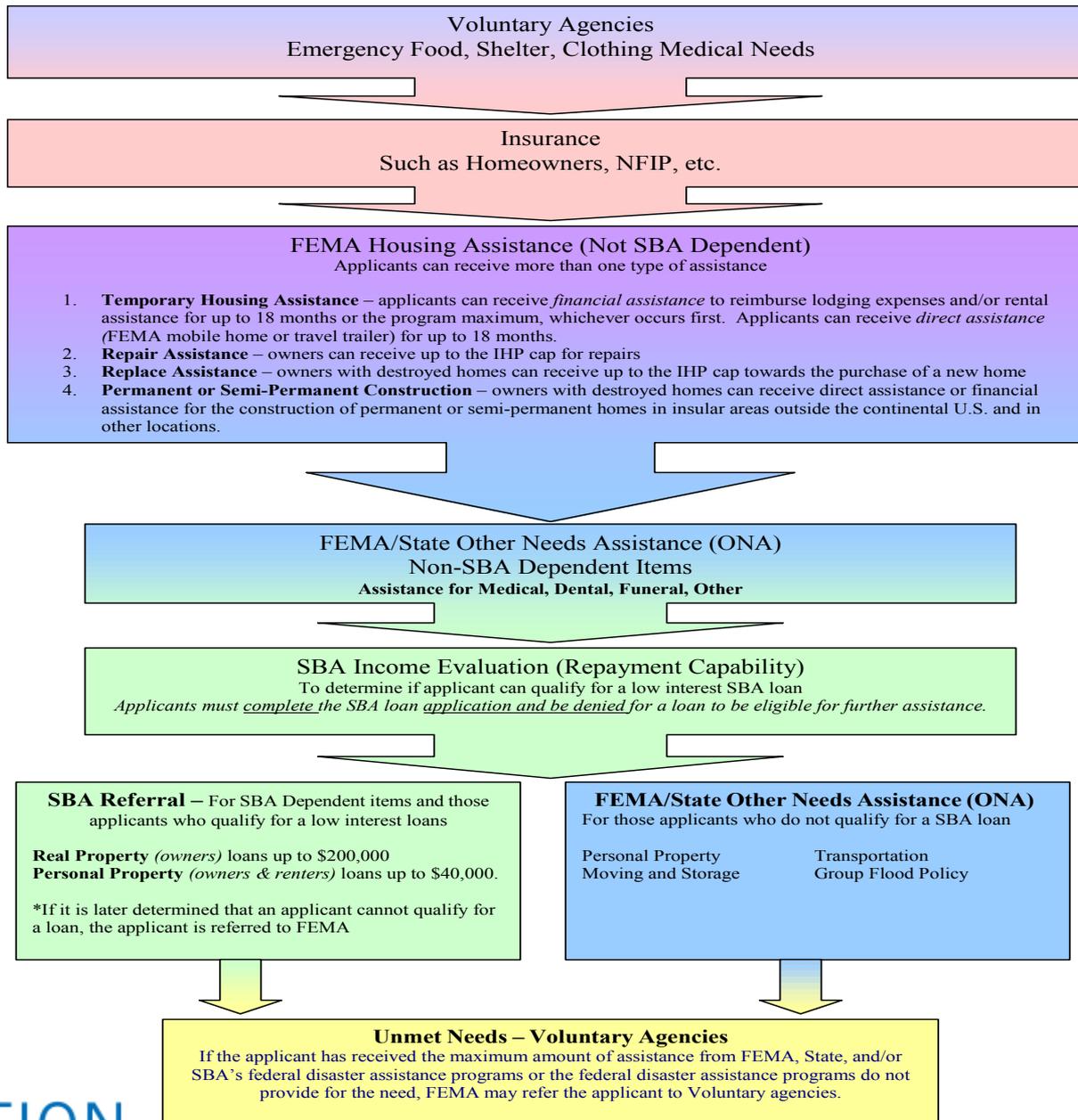
Who is Eligible for DLS

- Provided to those who have “**insufficient resources** to secure adequate legal services”
- Err on the side of inclusion and not exclusion
- Very relaxed compared to LSC / legal aid eligibility
- *See* 44 CFR 206.164(a)
- Fee generating cases prohibited

Hierarchy for Relief & Recovery

1. Red Cross (shelters, other housing for 1-3 months, food, transportation, financial aid)
2. Other voluntary relief efforts
3. Insurance Proceeds
4. SBA Loans for personal and business use
(Required to apply before FEMA will further consider eligibility for certain types of FEMA assistance)
5. **FEMA benefits**
6. Welfare benefits (unemployment, food stamps, TANF, Medicaid, SSI)

Individual Assistance Sequence of Delivery



#1 Disaster-Related Legal Need for Low-Income Clients

In our experience, it has been:

FEMA Appeals

Appeals begin as soon as FEMA inspectors are on the ground and peaks about 60 days after the first deadlines run.

FEMA financial assistance is not always available

Must be a:

- Major Disaster Declaration
Widespread, costly, uninsured damage
- Providing for Individual Assistance (IA)
Not Public Assistance – that's for government and entities
- Covering your county

FEMA Assistance Available

Major Disaster Declaration



Public Assistance Individual Assistance Hazard
Mitigation



Transitional Sheltering Assistance Program (TSA)

Disaster Legal Services (DLS)

Individuals & Households Program (IHP)

Other Needs Assistance (ONA)

Housing Assistance (HA)

SBA Loan Program

Who is Eligible for FEMA Benefits

- At least **one member of the household** is a US citizen, a non-citizen national, or a qualified alien,
- The primary place of residence is **located within the defined disaster** zone and was affected by the disaster,
- The individual must prove that they have suffered a loss that was directly **caused by the disaster**,
- The individual must prove that the loss cannot be rectified by other means, and it is a loss that FEMA can rectify.

Individual Assistance Programs

- Mass Care & Emergency Assistance

Sheltering, feeding, emergency supplies, family reunification, immediate health services

- Crisis Counseling & Training

Individual & group counseling, community networking & support, assessment & referrals, training & educational materials, and PSAs

Individual & Household Program (IHP)

- Housing Assistance (HA)
 - Rental assistance
 - Transitional Sheltering Assistance (TSA)
 - Home repair/replacement
 - Permanent housing construction
- Other Needs Assistance (ONA)
 - Personal Property, Moving, Transportation (Vehicle)
 - Critical Needs Assistance (CNA)*
 - Funeral assistance
 - Medical, Dental, and Child Care
- Capped at \$34,900 (FY18 amount, inflation adjusted)

States vary on ONA bifurcation

- FEMA allows states to choose the level of involvement with ONA
- Most states: single process, FEMA administers all IHP
- Bifurcated process example: Texas
 - 1 FEMA IHP application number, but
 - 2 sets of decision makers
 - » FEMA decides housing issues- written
 - » State (THHSC) decides non-housing issues (ONA)- written then fair hearing

Authority: Federal

- Stafford Act: 42 U.S.C. § **5174**
- Regulations at 44 C.F.R. §§ 206.110 – 206.120
- FEMA’s IHPUG: <https://www.fema.gov/ihp-unified-guidance> (superseded by draft IAPPG <https://www.fema.gov/media-library/assets/documents/163348>)
- www.fema.gov - general information, press releases, publications

Authority: State

– If bifurcated process look to:

State Regulations

State ONA handbooks

Agency websites

Hearing process

Applying for Assistance

- Register within 60 days from the declaration (absent extensions)
 - **In Person** = at the Disaster Recovery Center
 - **Online** = www.disasterassistance.gov
 - **Phone** = 1-800-621-FEMA (3362)
- Important to file on time, but late applications may be accepted on case-by-case basis up to 60 days after declaration

Applying for Assistance (cont.)

- Documentation needed
 - Social Security Number
 - Description of disaster-caused losses
 - Insurance information
 - Location of property
 - Telephone contact number
- Once registered, applicant will receive a FEMA Application Number

Inspections

- FEMA will usually promptly inspect the property
 - To establish that home is uninhabitable (for rental assistance or units), needs repairs/replacing, other property damage occurred, verify ownership and occupancy
 - Must also show proof of identity, occupancy at time of disaster, proof of ownership or rental

Importance of Inspections

- Inspectors don't decide eligibility, but they are FEMA's fact finders
 - Most initial decisions are automated. Computer formulas utilize the information from inspectors to decide eligibility
- Applicant should try to be present
 - If can't be there, designate someone in writing with FEMA prior to inspection
 - check with FEMA for form

More about Inspectors

- Most are not FEMA employees.
- FEMA contracts with two companies to provide inspectors as independent contractors.
 - Only requirement is criminal background check
 - Minimal training – 8 hours on FEMA standards?
 - No background in housing/construction required
 - Limited education requirements

More about FEMA inspectors

- Can't use ladder to view roof
- Don't get underneath a house
- In past – bonuses if hit quotas
- Language barriers

Post Inspection

- Within 10 days of inspection, should get letter with determination
 - Will be followed by check/direct deposit if approved
 - May include SBA loan application
 - Can appeal if denied, or if award isn't large enough
- Person may need to amend their application for help based on changed circumstances—should write FEMA to do that

Common Problems

Navigating Bureaucracy

- FEMA may be just one bureaucracy they are dealing with post-disaster
- The process wears people down, when they've already been knocked down by disaster
 - Jargon and acronyms
 - Cryptic letters with codes
 - FEMA/State relationship not communicated well to applicants
 - Doublespeak (and sometimes misinformation)
 - Bounced around system

No News (It Isn't Good News)

- Maybe – waiting on inspection
- But maybe:
 - Electronic notices they can't access
 - Error in mailing address
 - Other application information to be corrected (best to do in writing)
 - If no word on PPA or TA - was SBA loan app done?

Pictures from a disaster damaged home

Hallway



Living Room



Home damaged by a storm



- Elderly client and his wife - only income is disability benefits.
- No insurance
- Home damaged by torrential rain and tornado-like winds
- Shingles blew off of roof
- Water leaked inside through roof and around windows
- Damaged ceilings, walls, cabinets, flooring
- Mold and mildew
- Estimated repair costs exceed \$10,000

FEMA awarded them . . .

ZERO

Citing “Insufficient Damage”

2018 update: “Home is Safe to Occupy”

2018 clients are told

“Ineligible – Home is Safe to Occupy (IID-HA)

FEMA has determined you are not eligible for Housing Assistance because the damaged caused by the disaster has not made your home unsafe to occupy.

If you decide to appeal this decision, please provide a written explanation and a copy of documents indicating the damage to your home was caused by the disaster and has made your home unsafe to occupy. Acceptable documents may include a written statement from a local building official or contractor estimates.”

Request New Inspection

- Housing Assistance - Insufficient Damage
 - Home is safe to occupy
 - Still “habitable” – “safe” “sanitary” “functional”
- FEMA considers cost of repairs minimal
 - \$50 Rule
- Not “disaster-related” (“caused by” disaster)
 - Deferred maintenance/pre-existing condition
- Home Repair - Award amount too low
 - May result from operation of the same FEMA standards that produce an insufficient damage denial

Lack of cooperation?

- Any form of assistance you applied for – your application is “voluntarily withdrawn”
 - Problem meeting with inspector?
 - Three text “rule”?
- Rental Assistance – not willing to relocate
 - Did applicant understand that relocation is to be temporary while repairs completed?

Failure to Verify Ownership

(Home Repair Issue only)

- Owner-occupant standard includes:
 - Legal owner;
 - Life Tenant; or
 - Person who lives in residence rent-free, responsible for property taxes or (major) maintenance
- Standard must be met at time of disaster
 - While clearing title afterward might help, that alone usually won't resolve it

Shared Household Rule

- Generally, FEMA pays assistance to only one “head of household” from the pre-disaster residence
- FEMA can make exceptions for a particular disaster, i.e., household members separated due to disaster-related reason - but even those exceptions only helped for rental assistance

Insurance

- Denied because have insurance
 - Does applicant actually have any?
 - If yes = Show FEMA what it covers and what it doesn't.
 - If no = Correct FEMA's determination
- Noncompliant with Flood Insurance
 - If required to maintain flood insurance after FEMA assisted in past, but did not, limits FEMA assistance for future disasters for flood related damage only
 - Only applies to those who reside in special flood hazard area
 - Previous owner must communicate flood ins. requirement to new owner

Personal Property Denials

- Personal Property – denied because of minimal needs or amount awarded too low
 - Applicant must prepare list of what essential items were damaged or lost- an appeal exhibit
 - Revisit list with applicant to prepare narrative. What was lost or damaged due to disaster, how, and how to prove
 - Was, and is, property available for inspector to verify losses
 - Essential appliances? Get estimates

Transportation Assistance Denials

- Not essential vehicle(s)
- Not legal to drive on date of disaster (liability ins., registered)
- Repairs needed are cosmetic rather than safety hazard or necessary to make car functional
- If car totaled because of disaster – can receive award over \$7K to replace

Once Approved for Benefits

- Money may ONLY be used for intended purpose
 - Keep receipts and bills to document use for 3 years*
 - Longer is better!
 - FEMA can audit, seek to recoup if it is misused.
- Tax free, exempt from garnishment, etc.
- Benefits do not count against other types of federally-funded (means-tested) aid

Appeals of Housing Assistance

- Written appeal must be postmarked within 60 days of decision letter
 - Declaration under penalty of perjury or notarized
 - Include the person's FEMA registration number and disaster number (listed on the denial letter)
 - Fax to (800) 827-8112, Attention: FEMA – Individuals and Households Program
 - FEMA uses codes in denial letters.
 - FEMA should respond in writing within 90 days
- FEMA Decision is Final (but we have had luck with subsequent appeals if new evidence)

SAMPLE HA APPEAL: Insufficient Damage

- Cover letter with FEMA and personal information, argument, and exhibits reference
- Signed FEMA consent and picture I.D.
- Sworn declaration -client or household member-explain incident, damage, unsafe, storm caused
- Contractor estimate/s-detailed, itemized, somewhat formal, contact info., unsafe, storm damage
- Photos of the damage, photos from before
- Receipts for any repairs already completed

Appeals of ONA- Other Needs Assistance

- 60 day deadline (or show good cause if late)
- If your state is not bifurcated:
 - Submit written appeal to FEMA, same process as Housing Assistance
- If your state is bifurcated:
 - Review state regulations, handbooks, hearing process
 - Ex. In Texas first appeal in writing to FEMA, second appeal is a request for fair hearing with TXDHHS but still submitted to FEMA

Sample ONA Appeal: Transportation (Vehicle)

- Cover letter with FEMA and personal information, argument, and exhibits reference
- Signed FEMA consent and picture I.D.
- Sworn declaration -client or household member-explain damage and incident and why not safe, include why more than one car if needed
- Proof legally registered/titled
- Proof of insurance required by state, if any (liability)
- Mechanic estimate-detailed, somewhat formal, contact info., unsafe, storm damage
- Photos of the damage
- Receipts for any repairs already completed

Regarding Deadlines

- File something timely, and request time to supplement if you need it
 - No guarantee – but honored in past disasters
- Shorter deadlines if FEMA requests that client supplement
- If already late – good cause? (medical, travel, displacement, literacy level, disability, language)

Advocate's Direct Contact with FEMA

- FEMA Authorization form required
 - Fax or mail FEMA the client's completed form authorizing FEMA to talk to you, along with copy of client's driver's license or picture ID
 - Request a copy of the entire FEMA file
- Until that is uploaded, FEMA will only discuss client's application with you if:
 - You, client and FEMA are on phone at same time; or
 - Client is with you in person when you approach FEMA representative at a Disaster Recovery Center

When you call FEMA

- **FEMA Helpline, 1-800-621-3362**
- Some automated information available
- Verification - have authorization form and last 4 of SSN handy
- You do not speak to client's decision maker. You speak to whatever employee fields the call
- The helpline staff review notes from file in order to address your questions
- Tier 1 vs. Tier 2 workers

Contact with FEMA at DRC

- Again – employee reviews notes in the file.
 - Variety of levels of workers but often easier to get information then helpline
- Keep in mind the federal/state administration issues
 - FEMA staff at DRC = Housing Assistance program
 - If state administers ONA may have staff/table for that program in the DRC

When will FEMA send me the file?

- Fastest we've seen in past?
 - One week after the request

- After Harvey?
 - Many months
 - Hope for the best, but don't count on them in order to submit a timely appeal

Who does FEMA correspond with?

- FEMA will generally send file to the advocate if properly requested
- FEMA will NOT send decision letters or other correspondence to advocates – even with authorization on file
 - Advise clients to promptly relay any FEMA communication to you, whether verbal or written

Helpful websites

- For volunteers: bit.ly/FEMAappeals
 - More detailed webinars regarding handling FEMA appeal cases, other types of FEMA cases, sample documents and appeals on variety of topics!
- www.trla.org/disasters
 - Disaster-related legal information, one page handouts variety of disaster related legal issues in English/Spanish
- www.disasterlegalaid.org
 - Fill-in-blank templates for FEMA appeals
 - Variety of training materials, helpful tips

Thank you!

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