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## Operation Disaster Defender: A Multi-Disciplinary Approach to Preserving Access to Justice and Client Property through Disaster Preparedness

William S. Gribble

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# OPERATION DISASTER DEFENDER: A MULTI-DISCIPLINARY APPROACH TO PRESERVING ACCESS TO JUSTICE AND CLIENT PROPERTY THROUGH DISASTER PREPAREDNESS

*William S. Gribble*<sup>1</sup>

## ABSTRACT

For centuries, the legal profession has prided itself on managing the impacts of crises and disasters for our clients. However, as disasters seem to be more commonplace than before, is the legal profession prepared to manage a crisis of its own? With the livelihood of nearly 79,000<sup>2</sup> possibly at stake in the United States, shouldn't preparing for a disaster be one of our top priorities as a profession? Additionally, the professional responsibility rules and civil liability will likely not be completely suspended during a disaster. This means that individuals could possibly face discipline or civil liability for failing to prepare for a disaster. Though this culture of preparedness is growing; what about our duty as leaders to preparing our communities? Would it be surprising to learn that there has been a gap in collaboration between legal and emergency management profession until it's too late? Though some work has been done to help bridge this gap, more can still be done.

The Emergency Management profession has developed and routinely updates Emergency Management program accreditation

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<sup>1</sup> J.D. Candidate, Texas A&M University School of Law, Spring 2017; Certified Law Enforcement Planner, International Association of Law Enforcement Planners, 2015; Master of Public Administration focused in Disaster Management, American Military University, February 2014; B.S. in Emergency Administration and Planning, University of North Texas, May 2009.

<sup>2</sup> See Jeff Jacoby, *U.S. Legal Bubble Can't Pop Soon Enough*, The Boston Globe, May 9, 2014 at , <https://www.bostonglobe.com/opinion/2014/05/09/the-lawyer-bubble-pops-not-moment-too-soon/qAYzQ823qpf4GQI2OiPZM/story.html> (last visited Mar. 4, 2016) (25% of the 70% of lawyers in solo practice or at small firm is 78,750).

and certification programs for itself that are used in various industries both domestically and internationally. Incorporating these established programs within the legal community will allow the legal profession to have a solid foundation in mitigating professional responsibility and civil liability pitfalls following a disaster. Additionally, the tertiary effects of this program are likely to: (1) provide a ready and capable legal community who can easily understand and assist emergency managers and civic leaders with some of their most misunderstood legal problems before, during, and after a disaster; (2) safeguard access to justice after a disaster strikes; and (3) preserve client and third-party tangible personal property.

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## INTRODUCTION

Since the days of the East India Trading Company, professions and industries have sought to negate the impact of any risk they face. The legal profession is no different. Disasters—or at least the costs of them—are seemingly on the rise.<sup>3</sup> In fact, from 2000 to

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<sup>3</sup> See DAVID A. MCENTIRE, DISASTER RESPONSE AND RECOVERY, 357-59 (2007). See generally, Holli Riebeek, The Rising Cost of Natural Hazards 4 (NASA Earth Observatory 2005) ("Climate change may not be responsible for the recent skyrocketing cost of natural disasters, but it is very likely that it will impact future catastrophes."), [http://earthobservatory.nasa.gov/Features/RisingCost/rising\\_cost5.php](http://earthobservatory.nasa.gov/Features/RisingCost/rising_cost5.php) (last visited Mar. 4, 2016); Jennifer Daniel, *Rising Tide*, 2012 Businessweek, Nov. 1,

2009 there were three times as many natural disasters than between 1980 and 1989.<sup>4</sup> Further, the impact of disasters is likely to only increase with our society becomes increasingly concentrated within areas more vulnerable to disasters.<sup>5</sup> It is becoming ever more apparent that lawyers need to prepare for disasters, which includes taking steps to protect a client's tangible personal property they are entrusted with.<sup>6</sup> The Insurance Institute for Business & Home Safety reports that 25% of small businesses forced to close due to a disaster for more than 24 hours do not re-open.<sup>7</sup> Part of this could likely be due to the fact that more than 60% of small businesses do not have a formal emergency response plan.<sup>8</sup> To put this in perspective, approximately 70% of attorneys

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2012 at (2012) ("The number of natural disasters since 1996 costing \$1 billion or more doubled compared with the previous 15-year period."), <http://www.bloomberg.com/bw/articles/2012-11-01/rising-tide> (last visited Mar. 4, 2016).

<sup>4</sup> Adrien A. Weibgen, *Note: The Right to Be Rescued: Disability Justice in an Age of Disaster*, 124 *Yale L.J.* 2406, 2408 (2015).

<sup>5</sup> *Id.*

<sup>6</sup> See Special Committees and Commissions / Disaster Response and Preparedness: Resources,,

<http://www.americanbar.org/groups/committees/disaster/resources.html> (last visited Nov. 25, 2015) (embedded video at bottom of page). See also, *Brooklyn Ctr. For Indep. of the Disabled v. Bloomberg*, 980 F. Supp. 2d 588 (S.D.N.Y. 2013) (finding the City of New York violated the Americans with Disabilities Act, the Rehabilitation Act and the New York City Human Rights Law by failing to allow individuals with disabilities meaningful access to the city's emergency preparedness program); *Cal. Found. for Indep. Living Ctrs. v. Cty. of Sacramento*, 2015 U.S. LEXIS 150024 (E.D. Cal. Nov 4, 2015) (order granting partial summary judgment in a complaint alleging the county's failure to meaningfully plan for the evacuation of individuals with disabilities during a disaster, violating the Americans with Disabilities Act and Rehabilitation Act). See e.g., Weibgen, 124 *Yale L.J.* at 2408 (May 2015) (local governments are now being required to adequately plan for the evacuation of their disabled population; where as before, it was more aspirational in nature).

<sup>7</sup> See *UBHS Business Continuity Planning Tool Aids Community Resilience*, 2 *Disaster Safety Rev. Building Community Resilience* 10 (2013), <http://disastersafety.org/wp-content/uploads/2013-Disaster-Safety-Review-2.pdf> (last visited Mar. 4, 2016).

<sup>8</sup> Jeff Drew, *Most U.S. Small Businesses Lack Disaster-Recovery Plans*, *J. of Acct.*, Aug. 2, 2012 at, <http://www.journalofaccountancy.com/news/2012/aug/20126135.html> (last visited Mar. 4, 2016).

in private practice work in a law firm with ten or fewer attorneys, with 48% as solo practitioners.<sup>9</sup> A mere 14% of attorneys work in firms with more than 100 lawyers.<sup>10</sup> Putting these statistics together, this places the vast majority of the legal profession at risk of not reopening after a disaster strikes, allowing a potentially devastating blow to strike a community's justice system in addition to the emotional distress<sup>11</sup> and physical consequences of a disaster.

Access to justice is often only available to those of means, leaving many who are without means to secure legal representation without access to justice.<sup>12</sup> Any reduction in the number of lawyers out of work due to malpractice or their inability to reestablish a law practice following a disaster could have lasting impacts across a community, and possibly create discord or discontent for the legal profession. Since sweeping legislation is often passed following a disaster, this discord could possibly spark legislation to drastically reform the legal profession in ways that many lawyers animatedly oppose.<sup>13</sup> In fact, in March 2015 the Executive Director of the American Bar Association (Mr. Jack L. Rives) invited the

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<sup>9</sup> Margaret Grisdel, Overview of the U.S. Legal Market: Information and Strategies to Promote Your Law Firm Online, <http://www.hg.org/marketing-us-market.html> (last visited Mar. 4, 2016).

<sup>10</sup> *Id.*

<sup>11</sup> Though most people show resilience during a disaster, these also result in distress reactions, health risk behaviors, and mental disorders impacting a wide range of individuals, including: direct victims and his or her families, surrounding community members, and first responders. Often, disasters caused by technological hazards produce the most severe psychological symptoms. See Joshua C. Morganstein et al., *Psychosocial Responses to Disaster and Exposures: Distress Reactions, Health Risk Behavior, and Mental Disorders, in Mental Health and Social Issues Following a Nuclear Accident: The Case of Fukushima 99-100* (Jun Shigemura & Retry Kieth Chhem eds., Springer Japan 2016),

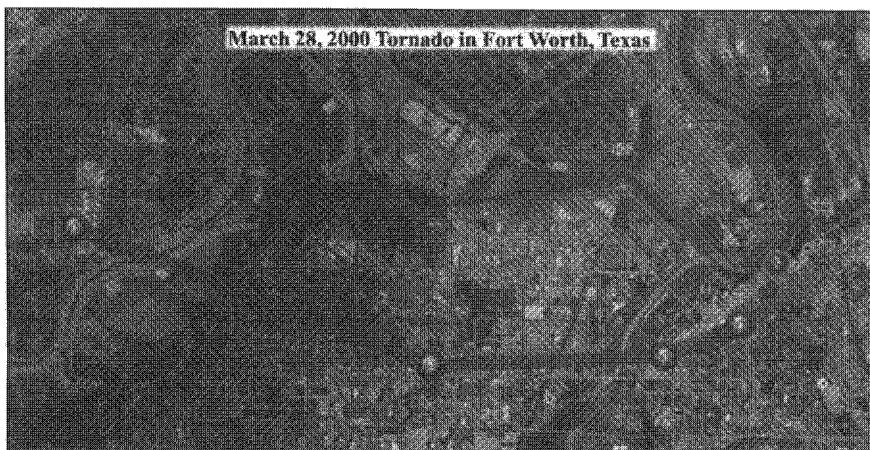
<https://books.google.com/books?hl=en&lr=&id=qOALCwAAQBAJ&oi=fnd&pg=PA98&ots=ZD5vjRFUq8&sig=4un6Du0uQjU1QtdfpxXcM3DMaiM#v=onepage&q&f=true> (last visited Mar. 4, 2016).

<sup>12</sup> Harry Reasoner, *See Finding New Ways to Give Access to Justice to Those Who Cannot Afford Lawyers*, 79 Tex. Bar J. No. 5, 366 (May 2016).

<sup>13</sup> See generally Gillian Hadfield, *Lawyers, Make Room for Nonlawyers*, Cable News Network, (Nov. 25, 2012), <http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession/> (last visited May 17, 2016).

American Bar Association's House of Delegates to consider how low-income victims of disaster gain access to legal help during times of disaster.<sup>14</sup>

For example, in March 2000 a tornado blew through Fort Worth, Texas causing serious damage to some of the skyscrapers.<sup>15</sup> Though not all firms were located in these skyscrapers, the concern of falling glass caused authorities to shut down the downtown area for some time, forcing approximately 325 attorneys and their staff to seek temporary facilities.<sup>16</sup> In-fact, the storm caused documents from some of these firms to fly approximately six miles away in another city.<sup>17</sup> In this case, the Tarrant County Bar Association, District and County Clerks Offices, and other organizations pulled



together to help firms rebuild client files, procure temporary office

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<sup>14</sup> See Memorandum of 2015 Midyear Meeting of the American Bar Association and Meeting of the House of Delegates (Mar. 10, 2015).

<sup>15</sup> See Melissa Sherman, *Pulling Together--Tarrant County's Legal Community Cooperates in Clean-Up*, 20 Tex. Paralegal J. Disaster! (2000), <https://txpd.org/tpj/20/focus1.html> (last visited Mar. 4, 2016). See also Michael E. Young, *Fort Worth Tornado's Devastation 10 Years Ago Changed the Face of Downtown*, The Dall. Morning News, Nov. 26, 2010 at, <http://www.dallasnews.com/news/community-news/tarrant-county/headlines/20100328-Fort-Worth-tornado-s-devastation-10-6620.ece> (last visited Mar. 4, 2016).

<sup>16</sup> Melissa Sherman, *Pulling Together--Tarrant County's Legal Community Cooperates in Clean-Up*, 20 Tex. Paralegal J. Disaster! (2000), <https://txpd.org/tpj/20/focus1.html> (last visited Mar. 4, 2016).

<sup>17</sup> *Id.*

space, hold mail, and help clients find his or her displaced attorneys.<sup>18</sup> However, what if there had been a twin tornado<sup>19</sup> on a path less than 1,000 feet to the North of the actual path striking into the heart of the County Judicial System? If the client's property—be it evidence, property held in trust, or files—were lost at the firm and no way to reproduce it at the courts like what happened in 2000, who would be to blame? Further, would justice cease to exist for an individual with no recourse? We could be simply one crafty legal argument away from seeing a massive malpractice suit following a disaster.

A perusal of available literature reveals an overwhelming amount of different guidebooks<sup>20</sup> and journal articles<sup>21</sup> to disaster/emergency management for lawyers. Some of these resources are peer reviewed programs that accredit an organization's disaster preparedness program. The majority of the others are self-assessed programs generally saying the same thing in difference methods. With the vast array of literature at their

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<sup>18</sup> There are currently no reliable statistics on the recovery or failure of firms after the March 28, 2000 tornado in Fort Worth, Texas. However, considering the statistics provided by the Insurance Institute of Business's statistics of 25% of small businesses without a disaster management plan not reopening, the American Bar Foundation's statistic that 70% of lawyers working in solo or small firms, and the fact that 325 attorneys were displaced after the tornado; overall the disaster would likely have put approximately 57 lawyers out of work.

<sup>19</sup> See e.g., Andrew Freedman, *The Science and Mystery of the Twin Tornadoes that Hit Nebraska*, Mashable, June 17, 2014 at (twin tornadoes that struck Pilger, Nebraska on June 16, 2014 are not an uncommon phenomenon), <http://mashable.com/2014/06/17/the-science-behind-the-twin-tornadoes-in-nebraska/#M3z1zW1g.Oq3> (last visited Mar. 4, 2016).

<sup>20</sup> As of November 23, 2015, there are: (a) twenty-one various titles are available for download from the American Bar Association's Committee on Disaster Response and Preparedness, (b) two published books on either law firm disaster preparedness or risk management, and (c) countless blog or message board postings giving tips or ideas for how to prepare a law firm for a disaster.

<sup>21</sup> See generally Sharon D. Nelson & John W. Simek, 79 *What Will You Do When Your Law Firm Is Breached?: Putting Together an Incident Response Plan* 348 (5th ed. Tex. Bar 2016); James Keim, *Law Office Disaster Preparedness: The Liability and Ethics of Attorneys*, 80 *The Fla. B. J.* 26, <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/9f285aaba6f42c508525715b006abd2f?OpenDocument> (last visited Mar. 4, 2016).



disposal, courts and disciplinary commissioners—at some point—may begin look to some of them for a suggestion on what lawyers should have done prior to a disaster.<sup>22</sup> What should be that standard? An author's opinion or continuously reviewed, revised, and accepted accreditation and certification programs? Further, how does the legal profession go about implementing any certification or accreditation program into an already stressed profession.<sup>23</sup>

The first section of this note briefly introduces the current state of professional responsibility and civil liability impacting lawyers during and after a disaster. The second section will provide a primer for Emergency Management. The third section evaluates current standards applicable to the private sector in both the emergency management and business continuity professions and their ability to be implemented within the legal profession. The fourth section will discuss "Operation Disaster Defender," a plan for progressive implement disaster preparedness accreditation and certification across the legal profession. The final section concludes by summarizing how Operation Disaster Defender will both increase disaster preparedness within the legal profession but provide collaboration points for sustained interaction between the legal and emergency management professions.

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<sup>22</sup> Courts have begun to use the Americans with Disabilities Act and Rehabilitation Act as tools to ensure local governments adequately plan for special populations during a disaster, evaluating their performance based on emergency management testimony. *See e.g. Brooklyn Ctr. For Indep. of the Disabled* 980 F. Supp. 2d 588, 598-99 (E.D. Cal. 2015) (using part of the Office of Emergency Management's Deputy Commissioner for Planning to establish the need to plan for individuals with special needs); *Cal. Found. For Indep. Living Ctrs.*, 2015 LEXIS 150024 at 17 (allowing the expert testimony of June Kailes to opine on what the Airport's evacuation plan should have contained).

<sup>23</sup> *See* Joseph J. Wielebinski, 79 *Culture Shock: A Groundbreaking Empirical Study Confirms that Lawyers Face Unprecedented Substance Abuse and Mental Health Challenges* 226, 228 (3rd ed. Tex. Bar 2016) (study authors suspect that lawyers may have higher rates of substance abuse and mental health issues based on the inherent stress of the job. Among other reasons, "a harshly judgmental and highly competitive environment" was also noted by the study authors as a possible cause for the inherent stress induced upon the legal community.).

## TRENDS IN PROTECTING CLIENT PROPERTY DURING A DISASTER

Currently, lawyers are required by legal ethics and tort law to protect the personal property entrusted to them by a client. These areas focus liability around an agency—or fiduciary—relationship between the lawyer and the client. This section will briefly introduce the current trends in the professional responsibility & civil liability for the safeguard of client property during a disaster. Though ethical issues of client abandonment exist during a disaster, will not be analyzed here. It is also important to note that though this section speaks of client property, a lawyer could be held responsible for the loss of property belonging to a non-client.<sup>24</sup>

### *A. Professional Responsibility*

The American Bar Association’s (“ABA”) Model Rule of Professional Conduct (“Model Rules”) 1.15 requires a lawyer to safeguard client funds and other personal property entrusted to the lawyer during representation of the client. Many states’ ethics rules provide great detail on a lawyer’s duty to safeguard funds; however, they are typically less detailed guidance on safeguarding a client’s tangible personal property. Very few cases and ethics opinions speak directly on safeguarding client property during a disaster.<sup>25</sup> Collectively these sources imply that a lawyer should

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<sup>24</sup> See Orinthea E. Karns, *Case Note: Professional Responsibility --Two's Company, Three's a Crowd? the Implications of Attorney Liability to Non-Client Beneficiaries, Connelly V. McColloch (In re Estate of Drwenski)*, 83 P.3d 457 (Wyo. 2004), 5 Wyo. L. Rev. 525, 532-533 (2005).

<sup>25</sup> See e.g., Florida Bar Opinion 72-37. The Florida Bar. November 27, 1972 (“Although there is no ethical requirement that a lawyer divide trust funds in order to ensure complete FDIC coverage, he is nevertheless expected to act prudently and consider the deposits' size in relation to the size and reputation of the financial institutions concerned”), <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+72-37?opendocument>; Ethics Opinion No. 254 of the Mississippi Bar. The

develop an emergency action plan for handling client's property—including case files—in the event of a disaster.

Comment 1 to Model Rule 1.15 states “a lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances”.<sup>26</sup> Restatement 3d of Law Governing Lawyers §44 similarly describes the lawyer's duty to take “reasonable steps to safeguard the funds or property.”<sup>27</sup> Comment e to §44 offers several factors that should be weighed in evaluating what reasonable steps need to be taken to adequately safeguard the client's property. These factors include:

- (a) the circumstances, such as the property's market value, special value to the client or third-person, or difficulty to replace (if known to the lawyer);
- (b) the property's transferability or convertibility;
- (c) the property's susceptibility to loss or other damage;
- (d) the reasonable customs of lawyers in the community;
- and
- (e) and the availability and cost of alternative methods of safekeeping.<sup>28</sup>

A lawyer may also modify his or her obligation with a client's written informed consent on terms serving “some purpose other than the convenience or profit of the lawyer”.<sup>29</sup> However, the

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Mississippi Bar: 254. December 8, 2005 (How long should Mississippi attorneys retain files before either returning them to the client or destroying the files?), [http://www.msbar.org/media/599901/35a\\_ET\\_OP\\_254.pdf](http://www.msbar.org/media/599901/35a_ET_OP_254.pdf); New York City Formal Eth. Op. 2015-6 (Sept. 2015) (“Ethical Duties When Client Files Are Accidentally Destroyed”), <http://www.nycbar.org/ethics/ethics-opinions-local/2015opinions/2208-formal-opinion-2015-6-duty-to-notify-clients-when-their-files-are-accidentally-destroyed>.

<sup>26</sup> MODEL RULES OF PROF'L CONDUCT r. 1.15 cmt. 1 (AM. BAR ASS'N 1983).

<sup>27</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §44 (AM. LAW INST. 2000).

<sup>28</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §44 cmt. e (AM. LAW INST. 2000).

<sup>29</sup> *Id.*

Restatement goes further to explain that a “lawyer owes a client the fiduciary duties [in] safeguarding the client’s confidences and property...dealing honestly with the client, adequately informing the client....”<sup>30</sup> Not only can a lawyer or firm be found liable for a breach of fiduciary duty for the loss of tangible client property, but since client files are also considered client property, inadvertent disclosure of confidential or privileged information can lead to civil liability.<sup>31</sup>

As states have adopted language synonymous to the Restatement and the Model Rule’s approach to safeguarding client property, they too focused more detail on safeguarding client funds and less on tangible personal property.<sup>32</sup> Some ethics Opinions, provide a little insight in expecting a lawyer to “act prudently” while safeguarding client property or to use “good common sense should provide answers to most questions that arise.”<sup>33</sup> However these opinions do little to fully explain the ethical duties during a disaster. Theoretically, client files are considered the personal tangible property of the client and should be safeguarded.<sup>34</sup> There

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<sup>30</sup> *Id.* at §49.

<sup>31</sup> See RESTATEMENT (SECOND) OF TORTS §874 (AM. LAW INST. 1979).

<sup>32</sup> Compare Tex. Disciplinary Rules Prof’l Conduct R. 1.14, *reprinted in* Tex. Gov’t Code Ann., tit. 2, subtit. G, app. A (West 2015) (Tex. State Bar R. art. X, §9) *with* MODEL RULES OF PROF’L CONDUCT r. 1.15 (AM. BAR ASS’N 1983) *and with* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §44.

<sup>33</sup> Florida Bar Opinion 72-37. The Florida Bar. November 27, 1972 (“Although there is no ethical requirement that a lawyer divide trust funds in order to ensure complete FDIC coverage, he is nevertheless expected to act prudently and consider the deposits’ size in relation to the size and reputation of the financial institutions concerned”).

<http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+72-37?opendocument>; Ethics Opinion No. 254 of the Mississippi Bar. The Mississippi Bar: 254. December 8, 2005 (How long should Mississippi attorneys retain files before either returning them to the client or destroying the files?), [http://www.msbar.org/media/599901/35a\\_ET\\_OP\\_254.pdf](http://www.msbar.org/media/599901/35a_ET_OP_254.pdf).

<sup>34</sup> James Keim, *Law Office Disaster Preparedness: The Liability and Ethics of Attorneys*, 80 The Fla. B. J. 26, <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/9f285aaba6f42c508525715b006abd2f?OpenDocument> (last visited Mar. 4, 2016).

has even been an ethics opinion in New York stating that clients must be notified if his or her files are lost, stolen or destroyed.<sup>35</sup>

Courts and disciplinary boards take the circumstances surrounding a disaster into consideration when determining the appropriateness of disciplinary action.<sup>36</sup> However, since a lawyer is required to hold property with the care of a professional fiduciary, it is reasonable to conclude that a lawyer having notice of impending disaster can only meet his or her ethical obligation by activating an emergency action plan.<sup>37</sup> Failure to create or—more importantly—implement an emergency action plan that leaves client files and property in a “vulnerable, unsecured, law office” can also run a risk of violating Model Rule 1.6 (confidentiality) for example, when papers fly to another city six miles away.<sup>38</sup> Ultimately, a very good method of avoiding malpractice during a disaster is to have a workable emergency action plan and meaningfully activate it during a disaster or emergency.

### *B. Civil Liability*

In addition to ethical obligations to safeguard client property, an attorney or firm could face additional civil liability for the lost, damaged, or destroyed property. A lawyer can be “civilly liable for a client if the lawyer breaches a fiduciary duty to the client...and if

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<sup>35</sup> New York City Formal Eth. Op. 2015-6 (Sept. 2015) (“Ethical Duties When Client Files Are Accidentally Destroyed”), <http://www.nycbar.org/ethics/ethics-opinions-local/2015opinions/2208-formal-opinion-2015-6-duty-to-notify-clients-when-their-files-are-accidentally-destroyed>.

<sup>36</sup> Sandra Varnado & Dane Ciolino, *Reconsidering Lawyers' Ethical Obligations in the Wake of a Disaster*, 19 *The Prof. Lawyer* 8-19 (2009), <http://daneciolino.com/wp-content/uploads/2013/07/2009-12-00-Varnado-and-Ciolino-Reconsidering-Lawyers-Ethical-Obligations-in-the-Wake-of-a-Disaster.pdf> (last visited Mar. 4, 2016).; *see also* Brenna Nava, Comment, *Hurricane Katrina: The Duties and Responsibilities of an Attorney in the Wake of a Natural Disaster*, 37 *St. Mary's L.J.* 1153 (2006).

<sup>37</sup> *Supra* note 37.

<sup>38</sup> Sandra Varnado, “Reconsidering Lawyers' Ethical Obligations in the Wake of a Disaster” at 8-19.

that failure is a legal cause of injury.”<sup>39</sup> Theories assigning civil liability under legal malpractice is similar to both tort or contract, following that there was some breach of a duty (either by reasonable care or by contract) .<sup>40</sup> Though the rules of evidence may help provide some ability for lawyers to recover lost, damaged, or destroyed evidence after a disaster; it may only do so much.

### 1. Legal Malpractice in Texas

In Texas, legal malpractice is based on negligence.<sup>41</sup> The elements of a legal malpractice claim are: (1) a duty, (2) a breach of that duty, (3) that the breach proximately caused the injury, and (4) damages resulted.<sup>42</sup> Lawyers are held to the standard of care exercised by a reasonably prudent lawyer.<sup>43</sup> Though it could be argued that not developing a disaster preparedness plan—or executing it in the event of that disaster—does not surmount to malpractice; however, that argument will likely fail. This is largely due to the cost-benefit analysis established by Judge Learned Hand in 1932.<sup>44</sup> Thus, the fact that lawyers are not currently required to maintain a disaster plan will likely not be a impervious veil of protection from malpractice or disciplinary action. Courts will likely take a case by case approach in determining whether the

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<sup>39</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §49 (AM. LAW INST. 2000).

<sup>40</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §48 cmt. c (AM. LAW INST. 2000).

<sup>41</sup> *Zenith Star Ins. Co. v. Wilkerson*, 150 S.W.3d 525, 530 (Tex. App.—Austin Mar. 25, 2004) (citing *Cosgrove v. Grimes*, 774 S.W.2d 662, 664, 32 Tex. Sup. Ct. J. 501 (Tex. 1989)).

<sup>42</sup> *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. Jun. 28, 1989).

<sup>43</sup> *Hall v. Rutherford*, 911 S.W.2d 422, 424 (Tex. App.—San Antonio Sept. 13, 1995).

<sup>44</sup> *The T.J. Hooper*, 60 F.2d 737,740 (2d Cir. Jul. 21, 1932) (applying a cost-benefit approach in finding barge operators liable for the loss of their loads in a storm because the cost of having a radio receiver—which was not a customary practice at the time—to receive weather reports, was outweighed by the benefit of having up to date weather information).

lawyer was indeed a “reasonably prudent lawyer. However, because disasters can sometimes strike without warning, the question of foreseeability will likely play a key role in determining whether a lawyer is civilly liable for the loss of client—and non-client—property.

## 2. Foreseeability

Whether civil liability will be assigned following the loss or destruction of property entrusted to a lawyer (regardless of it belonging to a client or non-client) during a disaster requires a heavy analysis on the *foreseeability* of the disaster—a sub-element of negligence, under proximate cause.<sup>45</sup>

The 2<sup>nd</sup> Restatement of Torts states that:

“(1) If the actor’s conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent [him or her] from being liable.

(2) The actor’s conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor’s negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.”<sup>46</sup>

Today, we are living in the “Information Age”, which started in the 1990’s with the impressive developments in technology allowing our society to gather and exchange information in ways never before imagined.<sup>47</sup> In the midst of this “information age”, we have discovered was to learn of an impending disaster, develop

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<sup>45</sup> D.E. Buckner, Annotation, *Foreseeability as an Element of Negligence and Proximate Cause*, 100 A.L.R.2d 942100 (2015).

<sup>46</sup> See RESTATEMENT (SECOND) OF TORTS §435(1)-(2) (AM. LAW INST. 1979).

<sup>47</sup> See ushistory.org, *Living in the Information Age*, 2016 U.S. Hist. Online Textbook (2016), <http://www.ushistory.org/us/60d.asp> (last visited Mar. 4, 2016).

ways to alert each other to it<sup>48</sup>, and are getting better at predicting when the next one might occur<sup>49</sup>. With all this information, warning and predicting; the question becomes whether “disasters becoming more foreseeable?” There is currently no apparent case law to give a definitive answer as to whether or not disasters are more foreseeable than they used to be.<sup>50</sup> However, one legal malpractice practitioner has pointed out, that courts will most likely “take the nature of the [disaster] into account in determining whether a lawyer has acted reasonably during and following a disaster.”<sup>51</sup> This determination will likely be along the lines of questioning whether or not the foreseeable disaster could disrupt the lawyer’s representation of the client, obligating him or her to take reasonable steps to manage the risks.<sup>52</sup>

### 3. Using the Best Evidence Rule Post-Disaster

Could using the Best Evidence Rule to replace evidence that was lost during a disaster, actually open an attorney up to legal

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<sup>48</sup> See e.g., Ulrich Meissen, Markus Hardt & Agnès Voisard, *Towards a General System Design for Community-Centered Crisis and Emergency Warning Systems*, in 11th International Conference on Information Systems for Crisis Response and Management 155, 155-159 (Starr Roxanne Hiltz et al. eds., The Pa. State Univ. 2014) [hereinafter *ISCRAM 2014 Conference Proceedings Book of Papers*] (introducing a general foundations and architecture for developing a service on mobile devices that translate incoming emergency alerts to usable information that the recipient can use to take action with), <http://www.iscramlive.org/ISCRAM2014/papers/p69.pdf> (last visited Mar. 4, 2016).

<sup>49</sup> ANNA K. SCHWAB, KATHERINE ESCHELBACH & DAVID J. BROWER, *HAZARD MITIGATION AND PREPAREDNESS*, 333-365 (Laura Town ed., John Wiley & Sons, Inc. 2007).

<sup>50</sup> Mark L. Tuft, *Techno Ethics: Practicing Law in Harm’s Way*, 23 GP Solo Disaster & Recovery (2006), [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/2006\\_dec\\_technoethics.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/2006_dec_technoethics.html) (last visited Mar. 4, 2016). On March 5, 2016 a search across both Lexis Advanced and Westlaw Next produced no cases or situations where lawyers faced disciplinary or civil liability for their lack of preparation for a disaster.

<sup>51</sup> *Id.*

<sup>52</sup> *Supra* note 51.



malpractice? In any legal dispute, courts seek to use the most accurate evidence available to resolve the dispute. Thus, the *Best Evidence Rule*<sup>53</sup> requires parties to use “an original writing, recording, or photograph is required in order to prove its content unless [the rules of evidence] or a [statute provide otherwise]” when addressing a disputed fact or issue to their case.<sup>54</sup> Several states have adopted the *Best Evidence Rule* virtually identical to the Federal Rules of Evidence, while others have either codified it in slightly different language or left it for case law to establish.<sup>55</sup> Several exceptions exist to allow for reproductions or witness testimony as to the content of the original documentary evidence that was lost or destroyed, so long as there is no “bad faith” behind the evidence’s loss.<sup>56</sup> If documentary evidence for a pending case—such as a contract or warranty deed—are lost or destroyed during a disaster or emergency, the issue of *Best Evidence* might arise. Generally, courts have allowed for machine reproductions of documents to be admitted in the place of “original writings” so long as there was no genuine dispute as to the authenticity of the reproduction.<sup>57</sup> However, if the original document is lost at a convenient time or there is some evidence that there was willful neglect in preserving the evidence for trial; this would likely raise

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<sup>53</sup> The common law *Best Evidence rule* is sometimes referred to by courts as the “Original Writing Rule”, which is similar to how it was titled during codification by the Federal Rules of Evidence. See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 576 (D. Md. 2007) (refer to endnote 54).

<sup>54</sup> Fed. R. Evid. 1002 (emphasis added); Anthony J. Albanese, *New York Court of Appeals Holds for the First Time at an X-Ray Is a Writing Subject to the Best Evidence Rule, Eerby Admi Ing Secondary Evidence to Describe the Contents of a Lost X-Ray*, 69 St. John's L. Rev.Surv. of New York Prac. 651 (1995).

<sup>55</sup> Compare Fed. R. Evid. 1002 with Tex. R. Evid. 1002 and Mont. R. Evid. 1002 and Nev. Rev. Stat. §52.235. Compare Fed. R. Evid 1002 with Cal. Evid. Code § 1520 (Deering 2016) and *Schozer v. William Penn Life Ins. Co.*, 84 N.W.2d 639, 644 (N.Y. 1994).

<sup>56</sup> *Schozer v. William Penn Life Ins. Co.*, 84 N.W.2d 639, 644 (N.Y. 1994) (“The court should give careful consideration to the possible motivation for the nonproduction of the original in determining whether the foundational proof of loss was sufficient”).

<sup>57</sup> See *United States v. Morgan*, 555 F.2d 238, 243-44 (9th Cir. 1977).

the suspicion of the court and—if properly objected to during trial—come back to haunt a party or the attorney.<sup>58</sup>

How would this apply after a disaster though? In two ways. First, there may be issues with admitting evidence if a defense counsel can convince the court that opposing counsel willfully or even negligently exposed the original to destruction and exclude any secondary evidence to prove the original's contents. This scenario is very narrow and seems more unlikely than a client using it as a theory during a legal malpractice suit.

The second way the *Best Evidence Rule* might apply after a disaster is if a client seeks damages tied to the billable hours, office charges, and court fees incurred while attempting to submit secondary evidence to prove the contents of the original document that was lost. These charges could be considerable, depending on the complexity of the matter and contents of the document. The theory behind this flows back to the negligence concept and that a lawyer had a duty to develop, implement, and maintain a disaster management plan for their office to, in part at least, minimize damage and loss to client property. Currently, it is unclear. No case law currently suggests that courts have held attorneys civilly liable in a malpractice action for using exceptions to the *Best Evidence Rule* following a disaster where there was not office disaster plan. However, just because it hasn't been done yet, doesn't mean it could never be done.

## A PRIMER ON EMERGENCY MANAGEMENT

Since the beginning of time, humans have sought to control the world around them.<sup>59</sup> Though easily mistaken for each other, Emergency Management, Crisis Management, and Homeland Security are not necessarily the same. Daily, the legal profession

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<sup>58</sup> See *Schozer*, 84 N.W.2d at 644.

<sup>59</sup> See GEORGE D. HADDOW, JANE A. BULLOCK & DAMON P. COPPOLA, INTRODUCTION TO EMERGENCY MANAGEMENT, 1 (4th ed. Butterworth-Heinemann 2011) (early hieroglyphics have been found depicting cave dwellers trying to deal with disasters and even the account of Moses's parting of the Red Sea could be interpreted as a flood control attempt).

engages in crisis management for clients. However, emergency management goes far beyond managing a single crisis or even a small set of events. Emergency management is a method that, when integrated into daily decision making, helps ensure the safety, security, and resiliency of our way of life.<sup>60</sup> Though it is important to keep in mind the divergence of the disciplines, it is also important to note that emergency management, homeland security, and crisis management are still somewhat similar in application, using many of the same skills, resources, and attributes to accomplish similar goals, but they are not the same.

### *A. What is a Disaster?*

Defining the disaster is difficult, because the definition is relative to who is impacted by the situation or circumstance. However, a disaster can be described as an incident or event at the corner of hazards and everyday life that alters the normal routine of a large number of individuals or groups.<sup>61</sup> On the other hand, A crisis is more isolated to a small group or organization and has a somewhat limited impact on society at large.<sup>62</sup>

A perfect example of a crisis is the issues Under Armour faced during the 2014 Winter Olympics during its sponsorship of the United States' speed skating team.<sup>63</sup> A disaster on the other hand

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<sup>60</sup> See GEORGE D. HADDOW, JANE A. BULLOCK & DAMON P. COPPOLA, INTRODUCTION TO EMERGENCY MANAGEMENT, 2 (4th ed. Butterworth-Heinemann 2011).

<sup>61</sup> David Alexander, *An Interpretation of Disaster in Terms of Changes in Culture, Society, and International Relations*, in *What Is a Disaster?: New Answers to Old Questions* 26-28 (Ronald W. Perry & E.L. Quarantelli eds., Int'l Research Comm. on Disasters 2005) [hereinafter *What Is a Disaster?*], <http://www.saarc-sadkn.org/downloads/what%20is%20disaster.pdf> (last visited Mar. 4, 2016)

<sup>62</sup> IAN I. MITROFF & GUS ANAGNOS, MANAGING CRISES BEFORE THEY HAPPEN: WHAT EVERY EXECUTIVE AND MANAGER NEEDS TO KNOW ABOUT CRISIS MANAGEMENT 33-35 (Am. Mgmt. 2001).

<sup>63</sup> During the 2014 Winter Olympics in Sochi, Russia Under Armour outfitted the U.S. Speed Skating team with high-tech suits designed to provide a performance edge to the team. This provided a lot of positive exposure for

can be a combination of multiple crises or some large-scale event that impacts a vast majority of a community, such as Hurricane Katrina in 2005<sup>64</sup>. The key difference in these examples of crises and disasters is the span of the impact. A common trait of disasters is that the affected community's resources to manage the consequences of the incident has been exceeded either immediately or shortly after the event began.<sup>65</sup> Disasters can be classified as either a technological or natural, based on the type of hazard involved. Historically, our nation focuses the majority of their attention to one category of hazards at a time. our nations focus never stays on one type a disaster for too long. Generally, the focus shifts or is reinvigorated by the most recent type of hazard and

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Under Armour, until some thought that the team's 'less than stellar' performance during the early races was caused by the suit. Rather than blaming the athletes for the 'less than stellar times,' Under Armour publicly supported the team's decision to switch to the older suites they had previously worn. Granted, the performance didn't improve; however, Under Armour prevented a public relations nightmare by managing the crisis properly and continues to sponsor the U.S. Speed Skating team. See Dorothy Crenshaw, *Five Cases of Top PR Crisis Management in 2014*, Crenshaw Comm., Dec. 17, 2014, <http://crenshawcomm.com/four-cases-good-crisis-management/> (last visited Mar. 5, 2016); Bloomberg Reports, *Under Armour Extends Contract with U.S. Speedskating Team*, AdvertisingAge, Feb. 21, 2014, <http://adage.com/article/cmo-strategy/armour-extends-contract-u-s-speedskating-team/291805/> (last visited Mar. 5, 2016).

<sup>64</sup> Hurricane Katrina was a Category 3 Hurricane on the Saffir-Simons Scale when it made landfall along the Gulf Coast on August 29, 2005. See History.com, *Hurricane Katrina, 2009* (2009), <http://www.history.com/topics/hurricane-katrina> (last visited Mar. 4, 2016). As a Category 3, Hurricane Katrina brought sustained winds of 100-140 miles per hour and stretched approximately 400 miles—spanning an area approximately the same size as the state of Colorado. See *Id.* Though the storm did a lot of damage, the aftermath of the levee breaches it caused in New Orleans, Louisiana are the subject of continued social study and litigation today. See e.g. *St. Bernard Parish Gov't v. United States*, 2015 Lexis 526 (Fed. Cl. May 1, 2015) (holding the United States liable for at least some flood damage from the levee breaches following Hurricane Katrina). The storm displaced more than a million people from across Gulf Coast region and caused more than \$135 billion in damage. Allison Plyer, *Facts for Features: Katrina Impact*, The Data Center, Aug. 28, 2015 at , <http://www.datacenterresearch.org/data-resources/katrina/facts-for-impact/> (last visited Mar. 5, 2016).

<sup>65</sup> *Supra* note 62 at 25-28.

damage done during that disaster.<sup>66</sup> Though technically incorrect, much of the profession refers to the disasters or events caused by a technological or natural hazard as a “technological disaster” or “natural disaster” respectively.

### 1. Technological Disasters

Technological disasters are man-made events, usually associated with either intentional or negligent conduct of others.<sup>67</sup> Examples of technological disasters include war, civil unrest and rioting, terrorism, major transportation accidents, arson, and structure fires. Typically, the nation’s emergency management focus will shift towards technological disasters after a major event, such as the attacks on the World Trade Center in New York City on September 11, 2001 or the bombing of the Federal Center in Oklahoma City on April 19, 1995<sup>68</sup>.

### 2. Natural Disasters

Natural disasters are extreme meteorological or geological events.<sup>69</sup> Examples of natural disasters include tornados,

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<sup>66</sup> *Supra* note 61 at 12-26.

<sup>67</sup> Fay Pappas, Note, *Gulf Coast Blowout: How the BP Oil Spill Is Corroding Communities and What Attorneys & Policymakers Must Do to Stop It*, 22 U. Fla. J.L. & Pub. Pol’y 229, (2011).

<sup>68</sup> A truck-bomb exploded outside the Federal Building in Oklahoma City, Oklahoma on April 19, 1995, leaving 168 people dead and hundreds more injured. Until the September 11<sup>th</sup>, 2001 terrorist attacks in New York, New York, this had been the worst terrorist attack to take place within the United States. Of the two men responsible for the attack Terry Nichols was sentenced to 161 consecutive life terms in prison and Timothy McVeigh died by lethal injection on June 11, 2001. History.com Staff, *Oklahoma City Bombing Facts & Summary*, 2009 History.com (2009), <http://www.history.com/topics/oklahoma-city-bombing> (last visited Mar. 5, 2016).

<sup>69</sup> Olga Petrucci, *The Impact of Natural Disasters: Simplified Procedures and Open Problems, in Approaches to Managing Disaster - Assessing Hazards, Emergencies and Disaster Impacts* (John Tiefenbacher ed., 2012), Olga Petrucci

hurricanes, earthquakes, landslides, and flooding. Over 370 major federal disaster declarations have been issued by the President of the United States since 2010, usually for natural disasters.<sup>70</sup> Similar to technological disasters, our nation's emergency management focus will shift toward preparing for and mitigating natural disasters after an event, such as Hurricane Katrina<sup>71</sup> in August 2005 and Hurricane Sandy<sup>72</sup> in late October 2012.<sup>73</sup>

### *B. The Profession of Managing Disasters*

Emergency management as a profession centers around "dealing with and avoiding risks, particularly those that have deleterious or catastrophic consequences for communities, regions, or entire countries."<sup>74</sup> Every individual and organization prepare and manage emergencies differently.<sup>75</sup> The methods and strategies employed by individuals or organizations will differ based largely

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(2012). *The Impact of Natural Disasters: Simplified Procedures and Open Problems, Approaches to Managing Disaster - Assessing Hazards, Emergencies and Disaster Impacts*, Prof. John Tiefenbacher (Ed.), ISBN: 978-953-51-0294-6, InTech, DOI: 10.5772/29147. Available from: <http://www.intechopen.com/books/approaches-to-managing-disaster-assessing-hazards-emergencies-and-disaster-impacts/assessment-of-the-impact-caused-by-natural-disasters-simplified-procedures-and-open-problems> (last visited Mar. 4, 2016).

<sup>70</sup> See The Federal Emergency Management Agency, "Disaster Declarations by Year." <https://www.fema.gov/disasters/grid/year> (last visited Nov. 25, 2015).

<sup>71</sup> History.com, *Hurricane Katrina*, 2009 (2009), <http://www.history.com/topics/hurricane-katrina> (last visited Mar. 4, 2016).

<sup>72</sup> Tim Sharp, *Superstorm Sandy: Facts About the Frankenstorm*, LiveScience, Nov. 27, 2012 at, <http://www.livescience.com/24380-hurricane-sandy-status-data.html> (last visited Mar. 4, 2016).

<sup>73</sup> See e.g. GEORGE D. HADDOW, JANE A. BULLOCK & DAMON P. COPPOLA, *INTRODUCTION TO EMERGENCY MANAGEMENT*, 2-5 (4th ed. Butterworth-Heinemann 2011).

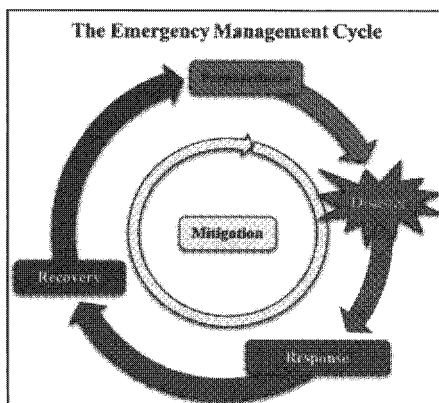
<sup>74</sup> See Public Health Emergencies, *Emergency Management and the Incident Command System*, U.S. Department of Health & Human Services, <http://www.phe.gov/preparedness/planning/mscc/handbook/chapter1/Pages/emergencymanagement.aspx> (last visited Nov. 25, 2015).

<sup>75</sup> See *supra* note 63 at 14-20.

on varying degrees of experience, resources, organizational culture and structure.<sup>76</sup>

## 1. The Emergency Management Cycle

Emergency management activities focus around a four-phase cycle: (1) *mitigation*, (2) *preparedness*, (3) *response*, and (4) *recovery*.<sup>77</sup> The *preparedness*, *response*, and *recovery* phases flow consecutively with each other while *mitigation* can be done during each of the other three phases.<sup>78</sup> Because a disaster is an instantaneous event, it is not found on the emergency management cycle. However, disaster is a transition event, ending the *preparedness* phase and starting the *response* phase.<sup>79</sup>



### (1) The Mitigation Phase

*Mitigation* is the lessening or avoidance of a hazard.<sup>80</sup> Though this phase is easily confused with preparedness, *mitigation* focuses on the hazard itself rather than the capabilities of the individual,

<sup>76</sup> See *supra* note 63 at 45.

<sup>77</sup> See William C. Nicholson, *Article: Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys*, 46 Cal L.Rev. 343, 346 (2010).

<sup>78</sup> *Supra* note 63 at 19-20.

<sup>79</sup> Though there is a debate among scholars as to mitigation occurring between recovery and preparedness phases or concurrently with the other three phases, this illustration adopts the view of concurrent.

<sup>80</sup> See William C. Nicholson, *Article: Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys*, 46 Cal L.Rev. 343, 346 (2010).

organization, or community.<sup>81</sup> Examples of *mitigation* include flood control projects, and installing canopy systems over vehicles in a parking lot. Often, the majority of *mitigation* projects are conducted during the recovery phase to take advantage of disaster recovery funds made available after a disaster declaration<sup>82</sup> has been issued.<sup>83</sup> Often, insurance is considered to be a very effective tool to use for mitigation because it encourages disaster ready building codes and discourages human development in areas that are more prone to disaster.<sup>84</sup>

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<sup>81</sup> *Supra* note 63 at 22-23.

<sup>82</sup> “A disaster declaration is a statement that the community or state cannot respond effectively without outside assistance.” To receive a Presidential Disaster Declaration (sometimes referred to as a “federal disaster declaration”), the following events and actions must occur:

- (1) city and county governments initiate disaster response operations and assess the damage;
- (2) if the municipal and county governments determine that the disaster is beyond their capabilities, then a disaster is declared at the local level;
- (3) if a local disaster is declared, the state sends personnel to assist and evaluate the disaster’s impact;
- (4) if the impact is so severe that more outside help is needed, the governor will declare a disaster and request help from it’s assigned FEMA region (for example, Texas is located in FEMA Region VI, headquartered in Denton, Texas);
- (5) upon receiving a request, a team from FEMA is deployed to conduct a preliminary damage assessment;
- (6) if FEMA personnel assess the damage and determine that a Presidential disaster declaration is warranted, the request is routed to the President through the FEMA Regional Office, to FEMA’s National Headquarters, and the Department of Homeland Security; finally,
- (7) the president declares a federal disaster and resources are allocated to the impacted jurisdictions (Note: the President will never deny a disaster declaration request, all denials are done by FEMA or the Department of Homeland Security to avoid political fallout and blame). *See* David A. McEntire, *Disaster Response and Recovery*, 220-224 (2007).

<sup>83</sup> *See* ANNA K. SCHWAB, KATHERINE ESCHELBACH & DAVID J. BROWER, *HAZARD MITIGATION AND PREPAREDNESS*, 432-34 (Laura Town ed., John Wiley & Sons, Inc. 2007)

<sup>84</sup> *See generally* Howard Kunreuther, *Disaster Insurance: A Tool for Hazard Mitigation*, 41 *J. of Risk and Ins.* 2, 287 (Jun. 1974).



## (2) The Preparedness Phase

Preparedness includes planning, training, and exercising plans for a disaster.<sup>85</sup> The *preparedness phase's* activities differ from *mitigation* in that, preparedness focuses on the capabilities of the individual, organization, or community rather than the hazard itself.<sup>86</sup> Examples of preparedness activities include CPR & First Aid Training, community disaster planning meetings, and running exercises<sup>87</sup> to test emergency response plans in a building (such as a fire drill).

## (3) The Response Phase

Response refers to the actions taken in the immediate aftermath of a disaster to deal with its effects and consequences.<sup>88</sup> The *response phase* is what popular culture pictures when it thinks of a disaster where heroes save the day.<sup>89</sup> It is in this phase that disaster

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<sup>85</sup> See William C. Nicholson, *Article: Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys*, 46 Cal L.Rev. 343, 346 (2010).

<sup>86</sup> *Supra* note 63 at 22-23.

<sup>87</sup> There are two types of exercises discussion-based and operations based. A discussion based exercise aims to familiarize participants with current plans, policies, and procedures, develop new plans, policies, or procedures, or ensure the current plans, policies, and procedures still function like they were intended. Examples of discussion based exercises are: seminars, workshops, tabletop exercises, and games (computer based simulations). An operations based exercise seeks to validate, clarify, or identify issues with current plans, policies, procedures, and agreements. Examples of operations based exercises are: drills, functional exercises, and full scale exercises. Cal. Hosp., *Types of Exercises*, 2011 Emergency Preparedness: Preparing Hospitals for Disasters (2011), <http://www.calhospitalprepare.org/post/types-exercises> (last visited Mar. 5, 2016).

<sup>88</sup> See William C. Nicholson, *Article: Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys*, 46 Cal L.Rev. 343, 346 (2010).

<sup>89</sup> See e.g. *OUTBREAK* (Warner Brothers 1995) (extreme measures are necessary to contain an epidemic of a deadly airborne virus); *VOLCANO* (Twentieth Century Fox Film Corporation 1997) (a volcano erupts in downtown L.A., threatening to destroy the city); *DEEP IMPACT* (Paramount Pictures 1998) (unless

declarations are made at various levels of government. Based on the level of disaster declaration, different resources are available during the *response* and *recovery phases*.<sup>90</sup> Without an official disaster declaration from the community's chief public official, an incident is more akin to a bad day than an actual disaster.<sup>91</sup>

#### (4) The Recovery Phase

The *recovery phase* focuses on bringing the organization or community back—or as close as possible—to pre-disaster conditions.<sup>92</sup> The *recovery* and *response phases* briefly overlap when the immediate life-saving and property preservation activities of the *response phase* are gradually replaced by repair and restoration activities of the *recovery phase*.<sup>93</sup> Though the response phase can last anywhere between a few hours to a few days, recovery can last years—as evidenced by the ongoing recovery efforts for Hurricane Katrina.<sup>94</sup> Examples of *recovery phase* activities during include: repairing or rebuilding damaged homes, replacing personal property lost during the disaster<sup>95</sup>, and reuniting families with each other and their pets or livestock<sup>96</sup>.

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a comet can be destroyed before colliding with Earth, only those allowed into shelters will survive); THE PERFECT STORM (Warner Brothers 2000) (an unusually intense storm pattern catches some commercial fishermen unaware and puts them in mortal danger); WAR OF THE WORLDS (Paramount Pictures 2005) (earth is invaded by alien tripod fighting machines); BATTLE LOS ANGELES (Columbia Pictures 2011) (a squad of U.S. Marines is the last line of defense against an alien invasion).

<sup>90</sup> DAVID A. MCENTIRE, *DISASTER RESPONSE AND RECOVERY* 220-224 (John Wiley & Sons, Inc. 2007).

<sup>91</sup> *Supra* note 91.

<sup>92</sup> See William C. Nicholson, *Article: Obtaining Competent Legal Advice: Challenges for Emergency Managers and Attorneys*, 46 Cal L.Rev. 343, 346 (2010).

<sup>93</sup> *Supra* note 66 at 213-214.

<sup>94</sup> Bruce Alpert, *\$120 Billion in Katrina Federal Relief Wasn't Always Assured*, The Times-Picayune, Aug. 21, 2015 at, [http://www.nola.com/katrina/index.ssf/2015/08/federal\\_governments\\_120\\_billio.html](http://www.nola.com/katrina/index.ssf/2015/08/federal_governments_120_billio.html) (last visited Mar. 4, 2016).

<sup>95</sup> Though popular culture lends to the myth that complete social breakdown occurs leading to looting in every disaster, the opposite is quite the reality. Though there are well documented cases of anti-social behavior (i.e. looting,

## 2. Public Apathy Towards Emergency Preparedness

No matter how integral to the human condition emergency management is, it does not function independent of public support. A systemic problem facing emergency management efforts today is the public's general apathy towards spending the time and resources to prepare, especially given the other priorities in life.<sup>97</sup> Since the early 1900's, the American public has experienced a growing apathy towards preparing for disasters.<sup>98</sup> Today, more than 90% of the public at large choose not to embrace or prepare for disasters or public health threats.<sup>99</sup> This lull in support is often interrupted by disasters in any part of the world. This interruption can lead to an immediate increase of support for responding to specific hazards within a community, leading to a quasi-whiplash of shifting focus in public policy efforts.<sup>100</sup> This whiplash can be a double-edged sword.

Practitioners have found that reviewing and implementing new ideas to fix what did not work—or in some cases, what could have worked better—must happen shortly after the actual event to have any real and lasting impact.<sup>101</sup> However, an over-interested public

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rioting, etc.), more prosocial behaviors are often observed within a community after a disaster. See DAVID A. MCENTIRE, *DISASTER RESPONSE AND RECOVERY*, 66-71 (2007)

<sup>96</sup> Instances have occurred where individuals were either unable to evacuate with their pets or livestock or became separated from them while staying in a public disaster shelter. See <https://training.fema.gov/emiweb/downloads/b-2.pdf>, B-2-3.

<sup>97</sup> See Ana-Marie Jones, *Use of Fear and Threat-Based Messages to Motivate Preparedness: Costs, Consequences, and Other Choices Part One*, *Journal of Business Continuity & Emergency Planning* 180-191 (2012).

<sup>98</sup> See Ana-Marie Jones, *Use of Fear and Threat-Based Messages to Motivate Preparedness: Costs, Consequences, and Other Choices Part One*, *Journal of Business Continuity & Emergency Planning* 180-191 (2012).

<sup>99</sup> *Id.*

<sup>100</sup> Jason A. Rood, *Public Participation in Emergency Management* 43 (Portland State Univ. 2012), [http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1332&context=open\\_access\\_etds](http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1332&context=open_access_etds) (last visited Mar. 4, 2016).

<sup>101</sup> See generally Wayne Heard, *Capturing Good Ideas Before They Vanish*, *Army Magazine*, Association of the United States Army, 46-48 (June 2016); Eric Holdeman, *No-Fault After-Action Reviews: Why does communications*

may come with undesired effects that may actually bog down emergency management activities overall.<sup>102</sup> Thus, emergency managers and emergency management coordinators<sup>103</sup> are required to strike a balance between too much and too little public interest in preparing for disasters.

### *C. Difference Between Emergency Management and Other Disciplines*

Though emergency management and crisis management have many similar objectives, they are not identical disciplines. Similar to Homeland Security, crisis management focuses primarily on technological disasters.<sup>104</sup>

#### 1. Homeland Security Versus Emergency Management

While emergency management and Homeland Security functions tend to get lumped together, they differ in their implementation of an “all-hazards” approach to emergency management.<sup>105</sup> In fact, Homeland Security can be considered a

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*remain the thorny problem that it is?*, Emergency Management Magazine, (Mar. 4, 2016), available at <http://www.emergencymgmt.com/disaster/No-Fault-After-Action-Reviews.html>.

<sup>102</sup>Jason A. Rood, Public Participation in Emergency Management 67-72 (Portland State Univ. 2012), [http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1332&context=open\\_access\\_etds](http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1332&context=open_access_etds) (last visited Mar. 4, 2016).

<sup>103</sup>In Texas, emergency managers are actually the elected officials, such as the Mayor, County Judge, or State Governor. What we think of emergency managers are actually “emergency management coordinators” under state statute.

<sup>104</sup>See *supra* note 60 at 6.

<sup>105</sup>See Paula D. Gordon, *The State of Emergency Management and Homeland Security*, Public Administration times (Aug 2007) <http://users.rcn.com/pgordon/homeland/stateofEM.html> (Emergency management programs are extremely focused towards communities, resources, and partnering. In contrast, Homeland Security programs focus more on

sub-discipline of emergency management that focuses almost exclusively towards technological disasters such as terrorism and law-enforcement.<sup>106</sup> Because of Homeland Security's law enforcement centric techniques implicitly, it is more exclusive of stakeholders from within the community.<sup>107</sup> In comparison, emergency management focuses on both natural and technological disasters and encourages inclusion and collaboration to build more resilient community.<sup>108</sup>

## 2. Crisis Management Versus Emergency Management

A fundamental difference between emergency and crisis management is that technological disasters crisis management seeks to control are often avoidable.<sup>109</sup> This usually results in the organization—or joint venture—responsible for causing the disaster or emergency is likely to be met with an extremely critical public; and likely, endless litigation.<sup>110</sup> Because of this, crisis management primarily centers around preserving the organization during a crisis. This is sometimes referred to as Continuity of

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terrorism and law enforcement; making Homeland Security programs more deliberately guarded and non-collaborative); *see also* Valerie Lucus-McEwen, *Is There Really a Difference Between 'Emergency Management' and 'Homeland Security'?* (Jun. 9, 2010) <http://www.emergencymgmt.com/emergency-blogs/campus/96033289.html> (last visited Nov. 25, 2015).

<sup>106</sup> *Supra* Note 99.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* *See also* ANNA K. SCHWAB, KATHERINE ESCHELBACH & DAVID J. BROWER, HAZARD MITIGATION AND PREPAREDNESS, 17 (Laura Town ed., John Wiley & Sons, Inc. 2007) (“a disaster resilient community is a community or region developed or redeveloped to minimize the human, environmental, and property losses, and the social economic disruption caused by disasters”)

<sup>109</sup> *See supra* note 60 at 6.

<sup>110</sup> *See supra* note 60 at 6. *See also* William Comcowich, *Why PR Crisis Managers Should Learn to Love Lawyers*, Aug. 13, 2015, <http://www.cyberalert.com/blog/index.php/why-pr-crisis-managers-should-learn-to-love-lawyers/> (last visited Nov. 25, 2015).

Operations Management or Continuity of Operations Planning (“COOP”).<sup>111</sup>

During crisis management, an organization’s leadership often looks to a combination of public and private resources to help plan for and manage the impact of a crisis.<sup>112</sup> These measures can take the form of safety training, checklists, and inspection programs to ensure that policies and practices are actually being adhered to. Though crisis brings chaos, chaos itself is not a bad thing for an organization to experience or deal with. In fact, on many occasions, chaos is a good thing that can build, preserve, or further define the character of an organization. Chaos tends to widen the spectrum of options and force the organization to seek new points of view to solve problems.<sup>113</sup> This forcing function can help define an organization’s character based upon how it goes about obtaining these new points of view and the actions taken upon them. For example, in 1982 several packages of Tylenol capsules were laced with cyanide by unknown individuals, which killed six adults and a seven year old girl in Chicago, Illinois.<sup>114</sup> Johnson & Johnson’s response to the incident became the seminal case for how corporations should handle a crisis.<sup>115</sup> This crisis forced pharmaceutical companies to redefine the method in which the pharmaceutical was delivered to the body, from capsule to caplet

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<sup>111</sup> See generally Ana-Marie Jones, *Use of Fear and Threat-Based Messages to Motivate Preparedness: Costs, Consequences, and Other Choices Part One*, *Journal of Business Continuity & Emergency Planning* 180-191 (2012). See also *supra* note 70 at 17-18 (2005).

<sup>112</sup> American Association of Community Colleges, *Crisis Management Planning Resources* (2016),

[http://www.aacc.nche.edu/Resources/Pages/crisis\\_management\\_resources.aspx](http://www.aacc.nche.edu/Resources/Pages/crisis_management_resources.aspx).

<sup>113</sup> See Ikujiro Nonaka, *Creating Organizational Order Out of Chaos: Self-Renewal in Japanese Firms*, *California Management Review* 57-73, 59 (1988) <http://www.ai.wu.ac.at/~kaiser/birgit/Nonaka-Papers/Creating-Organizational-order-out-of-chaos.Self-renewal-2001.pdf> (last visited Nov. 25, 2015).

<sup>114</sup> The Associated Press, *Chicago Tylenol Murders Remain Unsolved After More Than 30 Years*, Fox News, Sept. 28, 2013 at , <http://www.foxnews.com/us/2013/09/28/chicago-tylenol-murders-remain-unsolved-after-more-than-30-years.html> (last visited Mar. 4, 2016).

<sup>115</sup> Reyna Susi, *The Tylenol Crisis, 1982*, 2002 Effective Crisis Mgmt. (2002), <http://iml.jou.ufl.edu/projects/fall02/susi/tylenol.htm> (last visited Mar. 4, 2016). See also *supra* note 70.

so that it could be easier to identify if the medicine had been tampered with.<sup>116</sup>

Similar to emergency management, crisis management differs slightly from organization to organization. This is largely based upon the resources, experience, and planning activities taken prior to the disaster or crisis. The resources, experience, and planning can ultimately determine how the outcome of an emergency, disaster, or crisis.

### **PREPAREDNESS SCHEMES & CURRENT PROGRESS WITHIN THE LEGAL PROFESSION**

One commentator suggests that because disasters and emergencies are becoming more commonplace, that regarding them simply as “acts of God” and disregard preparing for them would be imprudent.<sup>117</sup> It may be safe to assume that the legal profession’s rules of professional conduct will not be totally suspended regardless of the circumstances a disaster may impose upon a community.<sup>118</sup> However, taking the time to develop an emergency action plan may substantially reduce a lawyer’s risk of malpractice and tort liability from the loss of client personal property. Currently, there are a variety of ideas and concepts members of the legal profession are offered when developing his or her own disaster plan. There are two categories of preparedness concepts: self-assessed and accreditation.

#### *A. Disaster Planning in the Legal Profession*

Though no method will guarantee a lawyer’s ability to safeguard client property during a disaster, there are four basic areas that both self-assessed and accredited programs recommend or imply lawyer should consider while developing an emergency

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<sup>116</sup> See *supra* note 60 at 17-18.

<sup>117</sup> See *supra* note 51.

<sup>118</sup> See *id.*

action plan. These areas are: (1) planning, (2) facilities, (3) communication, and (4) insurance.

First, at the outset of representation, a lawyer should consider including a provision in the client engagement letter detailing how the client's property will be handled during a disaster or emergency situation.<sup>119</sup> This can range anywhere from a highly detailed manual or a brief few paragraphs that outline each parties' duties and responsibilities.

Second, he or she should consider storing client property off site with a reputable fiduciary organization that focuses on safeguarding client property either online or in a secure storage facility.<sup>120</sup> Many times these organizations have personnel, systems, and expertise dedicated to ensuring the survival of the property during a disaster.

Third, a lawyer should consider contacting clients to arrange for them to pick up his or her property temporarily during a forecasted disaster, especially if it is not immediately needed for his or her cases.<sup>121</sup> Though, conceptually, this practice might run afoul of the model rule's if the client lacks the ability to store the property during a disaster themselves.

Finally, he or she should review insurance policies and determine whether the right type of insurance policy has been purchased at the right amount for the client's property.<sup>122</sup> This is a good practice not only at work, but at home. Many times, individuals will buy insurance and forget to review it at least annually to ensure adequate coverage.

Ultimately, developing an emergency action plan focuses on reducing the number of questions a lawyer needs to answer when time counts. Answering these questions well in advance of a disaster will also allow the lawyer to find the best solutions to fit his unique situation. However, the issue with self-assessed

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<sup>119</sup> *See id.*

<sup>120</sup> *See supra* note 51. *See also supra* note 50.

<sup>121</sup> *Supra* note 50.

<sup>122</sup> Carol M. Langford, *The Ethical Duties of Disaster Preparation*, The Cal. B. J. (Feb. 2006),

<http://archive.calbar.ca.gov/Archive.aspx?articleId=73830&categoryId=73746&month=2&year=2006> (last visited Mar. 4, 2016).



standards is that there is no confirmation of the actual accomplishment of preparedness objectives before a disaster strikes.

### *B. Available Self-Assessed Standards for the Legal Profession*

Self-assessed standards of disaster preparedness are a convenient and cost-effective way for individuals to get their organizations prepared for a disaster, on a “shoestring”. Many of these standards are a low to no cost, and are generally written by organizations, specializing in the field of emergency management or business continuity. This section will address the various self-assessed standards available to the legal profession and briefly examine its pitfalls.

#### 1. American Bar Association Self Accreditation Standards

In 2010, the American Bar Association (“ABA”) established a committee on Disaster Response and Preparedness with the mission of educating lawyers, bar associations, and the justice system on preparing for and responding to disasters.<sup>123</sup> In August 2011, it published two comprehensive documents<sup>124</sup> to help the legal profession better prepare for disasters.<sup>125</sup> Today, that committee has been elevated to “standing committee” status and is working towards a more resilient and disaster ready profession.<sup>126</sup>

In 2011 the committee presented Resolution 116 to the American Bar Association’s House of Delegates for approval. This

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<sup>123</sup> See *Standing Committee on Disaster Response and Preparedness: About Us*, [http://www.americanbar.org/groups/committees/disaster/about\\_us.html](http://www.americanbar.org/groups/committees/disaster/about_us.html) (last visited Nov. 25, 2015).

<sup>124</sup> The standing committee authored two versions of *Surviving a Disaster*, one geared towards lawyers and the other geared towards bar associations. Both include explanatory material as well as a suggested template for use in creating a disaster plan.

<sup>125</sup> *Supra* note 123.

<sup>126</sup> *Id.*

resolution urged all lawyers to regulatory identify and address risk that arise from any natural or technological disaster that “may compromise their ability to diligently and competently protect their client’s interests and maintain the security of their client’s property.”<sup>127</sup> This resolution was approved without amendment.<sup>128</sup> Some might consider this resolution as an agreement that something must be done, with little actual action.; however, it is actually very significant. When looked at through the lens of disaster preparedness within the legal community, this is the first biggest action in disaster preparedness the ABA House of Delegates has taken since forming the standing committee in 2010. It is a sign that the leaders within the legal profession are awakening to the impacts a disaster has and what practitioners and bar associations can and should do to prepare themselves and their communities.<sup>129</sup>

## 2. Emergency Management Self-Assessed Standards

Before the 1970’s, emergency management as a profession did not exist.<sup>130</sup> Before 1950 the responsibility for disaster management fell largely on state and local authorities, with the federal government stepping in to help in a case-by-case basis.<sup>131</sup> However, the combination of a series of storms, an earthquake, and two legislative acts (the Disaster Relief Act of 1974 and Safford

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<sup>127</sup> Memorandum, 2011 Annual Meeting of the American Bar Association and Meeting of the House of Delegates (Sept. 2, 2011).

<sup>128</sup> *Id.*

<sup>129</sup> See generally David F. Bienvendu and Robert Horowitz, *Adopted Resolution 116*, 2011 A.B.A. Sec. Disaster Response and Preparedness (Aug. 8-9, 2011), [http://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_116.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_116.authcheckdam.pdf).

<sup>130</sup> Brenda D. Phillips, David M. Neal & Gary R. Webb, *Introduction to Emergency Management* (CRC Press 2012), <https://books.google.com/books?id=ByDSBQAAQBAJ&pg=PP1&dq=the%20%22emergency%20management%20cycle%22&lr&pg=PR7#v=onepage&q=the%20%22emergency%20management%20cycle%22&f=false> (last visited Mar. 4, 2016).

<sup>131</sup> *Id.* at 7.

Act of 1988) set in motion the development of the Federal Emergency Management Agency, giving birth to the profession of Emergency Management.<sup>132</sup> Since then, organizations have developed coursework<sup>133</sup> and professional standards to support the development of the profession and the preservation of life and property.

#### a. National Fire Protection Association Standard 1600

The National Fire Protection Association's ("NFPA") Standards Council established the Disaster Management Committee in January 1991 in an effort to develop documents relating to disaster management.<sup>134</sup> This the result of the continued

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<sup>132</sup> *Id.* (Hurricane Camille in 1969, the San Fernando Earthquake in 1971, and Hurricane Agnes in 1972).

<sup>133</sup> There have been few training courses offered for Emergency Mangers to learn about the legal issues associated with emergency management, and those that do exist focusing mainly on federal issues. *See* William C. Nicholson, *Difficulties in Mitigating Legal Exposure: Obtaining Competent Legal Advice; Challenges for Emergency Managers and Attorneys*, in William C. Nicholson, *Emergency Response and Emergency Management Law: Cases and Materials* 237, 244 (2nd ed. Charles C Thomas Publisher, Ltd. 2012). In formal education, a few universities require or offer courses designed for Emergency and disaster management students to learn the legal issues affecting their trade, with those that do require a class on law making it a general overview of public policy, focusing heavily on the administrative procedures act. *See* Univ. of N. Tex., *Program: Emergency Administration and Planning, BS*, 2014 Undergraduate Catalog (2014), [http://catalog.unt.edu/preview\\_program.php?catoid=11&poid=2723&returnto=725](http://catalog.unt.edu/preview_program.php?catoid=11&poid=2723&returnto=725) (last visited Mar. 4, 2016) *accord* Am. Military Univ., *Online Bachelor's Degree in Emergency and Disaster Management*, 2016 Undergraduate Catalog (2016), <http://www.amu.apus.edu/academic/schools/security-and-global-studies/bachelors/emergency-and-disaster-management.html> (last visited Mar. 4, 2016). Though the University of Puerto Rico School of Law has previously been listed by FEMA as offering courses focused on disaster law as part of their JD program, the courses were not listed as current available offerings in their most recent course catalog. Universidad de Puerto Rico Recinto de Río Piedras, *Programa De Clases*, 2016 (2016), <http://derecho.uprrp.edu/estudiantes/programa-de-clases-y-calendario-academico/programa-de-clases/> (last visited Mar. 4, 2016).

<sup>134</sup> National Fire Protection Association Standard 1600 (2016), 1600-1 <http://www.nfpa.org/assets/files/AboutTheCodes/1600/1600-13-PDF.pdf> (last

partnership among the Federal Emergency Management Agency (“FEMA”), National Emergency Management Association (“NEMA”)<sup>135</sup>, and the International Association of Emergency Managers (“IAEM”) was NFPA 1600.<sup>136</sup> This document has been updated seven times since its initial publication in 1995.<sup>137</sup> NFPA 1600’s stated purpose is to provide “fundamental criteria to develop, implement, assess, and maintain the program for prevention, *mitigation*, preparedness, response, continuity, and recovery.”<sup>138</sup> Though some within the emergency management profession see NFPA 1600 as applying exclusively to entities within the private sector, NFPA 1600 is applicable to public, non-profit, nongovernmental organizations, and private entities.<sup>139</sup>

NFPA 1600 walks through the eight major aspects of any disaster preparedness program, and tailors the guidance to allow the standard to be used across different industries with minimal disconformity among different professions. This allows for easier cross-talk and communication before, during, and after a disaster of individuals and organizations from widely varying backgrounds.

Recently, a fundamental change was undertaken in which Business Continuity and Continuity of Operations Programs were emphasized in the updated NFPA 1600.<sup>140</sup> Particularly, the updates focused on adding supply chain risk and information security, that did not exist in the standard prior to 2016. Further, the standard differentiated “continuity” from “recovery.”<sup>141</sup> Despite these changes though, the promotion of disaster preparedness is the threaded throughout the standard.

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visited Nov. 25, 2015).

<sup>135</sup> NEMA is the “National Emergency Management Association” and is the professional association of emergency management directors from all states and territories within the United States. The Nat’l Emergency Mgmt., *What Is NEMA?*, 2016 (2016), <https://www.nemaweb.org/index.php/about/what-is-nema> (last visited Mar. 4, 2016).

<sup>136</sup> *Supra* note 134.

<sup>137</sup> *Id.* at 1600-2 to 1600-3.

<sup>138</sup> *Id.* at 1600-5

<sup>139</sup> *Id.*

<sup>140</sup> *Supra* note 134 at 1600-2.

<sup>141</sup> *Id.* at 1600-2.

## b. ASIS International Standards

ASIS International was established in 1955 and dedicated itself to providing security professionals with programs and materials to address broad security interests from around the world.<sup>142</sup> Today, the organization offers industry standards and guidelines similar to what the National Fire Protection Association.<sup>143</sup> ASIS International published its guidance on Business Continuity in 2009 under the title “Organizational Resilience: Security, Preparedness and Continuity Management System – Requirements with Guidance for Use Standard”.<sup>144</sup> Similar to the NFPA 1600, this program provides generic criteria for establishing and evaluating an emergency management and business continuity program within an organization.<sup>145</sup> Most importantly though, like NFPA 1600, this standard is a self-assessed standard, meaning individuals can claim to meet these standards without a true test or evaluation of their compliance.

### *B. Peer Reviewed Accreditation Programs for Organizations & Individuals*

In addition to self-assessed programs, there are several accreditation and certification programs for individuals concerning

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<sup>142</sup> ASIS Int'l, *About ASIS*, 2016 (2016), <https://www.asisonline.org/About-ASIS/Pages/default.aspx> (last visited Mar. 4, 2016).

<sup>143</sup> Additionally—but not examined in this article—the organization offer the Certified Protection Professional (“CPP”), Professional Certified Investigator (“PCI”), and Physical Security Professional (“PSP”) credentials. *Id.*

<sup>144</sup> ASIS Int'l, *Organizational Resilience: Security, Preparedness and Continuity Management Systems - Requirements with Guidance for Use Standard (Download)*, 2009 ASIS Online (2009), [https://www.asisonline.org/Standards-Guidelines/Standards/published/Pages/Organizational-Resilience-Security-Preparedness-and-Continuity-Management-Systems-\(Download\).aspx?cart=61979d01fa0a4e7eb6a575521ee52b54](https://www.asisonline.org/Standards-Guidelines/Standards/published/Pages/Organizational-Resilience-Security-Preparedness-and-Continuity-Management-Systems-(Download).aspx?cart=61979d01fa0a4e7eb6a575521ee52b54) (last visited Mar. 4, 2016).

<sup>145</sup> *Compare* NFPA 1600 with ASIS “Organizational Resilience: Security, Preparedness and Continuity Management System— Requirements with Guidance for Use Standard”.

disaster preparedness and emergency management. This section will briefly introduce and discuss the only accreditation program for emergency management and the difference between Emergency Management and Business Continuity Certifications for individuals.

### 1. Emergency Management Accreditation Program for Organizations

Founded in 1997, the Emergency Management Accreditation Program (“EMAP”) is an independent non-profit organization that administers the only accreditation program in Emergency Management.<sup>146</sup> EMAP accredits organizations using the “Emergency Management Standard” which was developed based on NFPA and ASIS International guidelines.<sup>147</sup> The voluntary accreditation process seeks to promote a consistent quality in emergency management programs.<sup>148</sup> Today there are 78 accredited entities throughout the United States.<sup>149</sup> Currently the EMAP Private Sector Committee is responsible for initiating contact with potential private sector partners and exploring opportunities to use EMAP standards and assessment process in within the private industry.<sup>150</sup> Though none have achieved official

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<sup>146</sup> See Emergency Management Accreditation Program: Our Mission, <http://www.emaponline.org/index.php/what-is-emap/our-mission> (last visited Nov. 25, 2015).

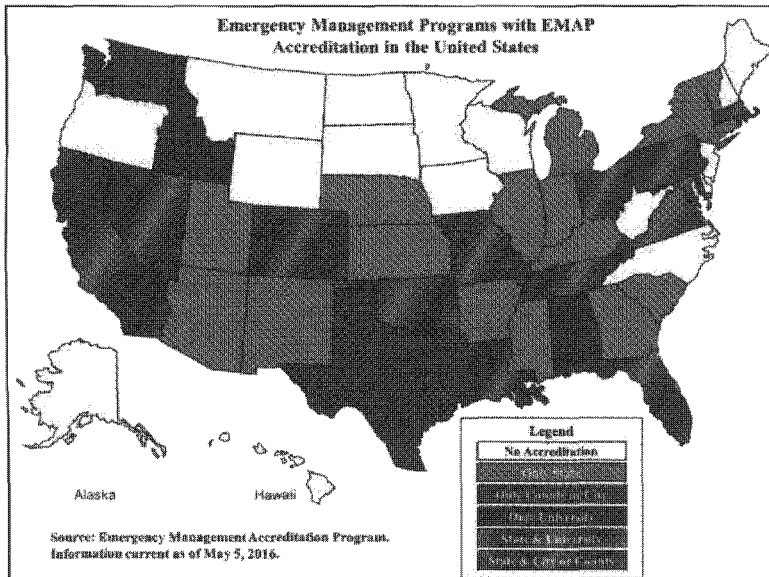
<sup>147</sup> Emergency Management Accreditation Program, *The Emergency Management Standard*, i (2013), <http://www.emaponline.org/index.php/root/for-programs/23-2013-emergency-management-standard> (last visited on Nov. 25, 2015) (click download to view the 2013 edition of the Emergency Management Standard).

<sup>148</sup> Emergency Management Accreditation Program, *The Emergency Management Standard*, i (2013), <http://www.emaponline.org/index.php/root/for-programs/23-2013-emergency-management-standard> (last visited on Nov. 25, 2015) (click download to view the 2013 edition of the Emergency Management Standard).

<sup>149</sup> The Emergency Mgmt. Accreditation Program, *Who Is Accredited?*, 2016 (2016), <https://www.emap.org/index.php/what-is-emap/who-is-accredited> (last visited May 5, 2016).

<sup>150</sup> *Supra* note 146.

accreditation, EMAP has begun work hospital systems seeking accreditation.<sup>151</sup> EMAP is considered the “gold standard” among many professionals in emergency management. In fact, EMAP is the only accreditation program in the United States for the emergency management profession; however, that does not mean that every jurisdiction or organization has achieved accreditation. Achieving accreditation is difficult in that it requires that organizations and jurisdictions open themselves up for sometimes blunt feedback on their preparedness standards.<sup>152</sup> Sometimes larger organizations find that they have a lack of communication within their own structure as they move through the EMAP accreditation process.<sup>153</sup>



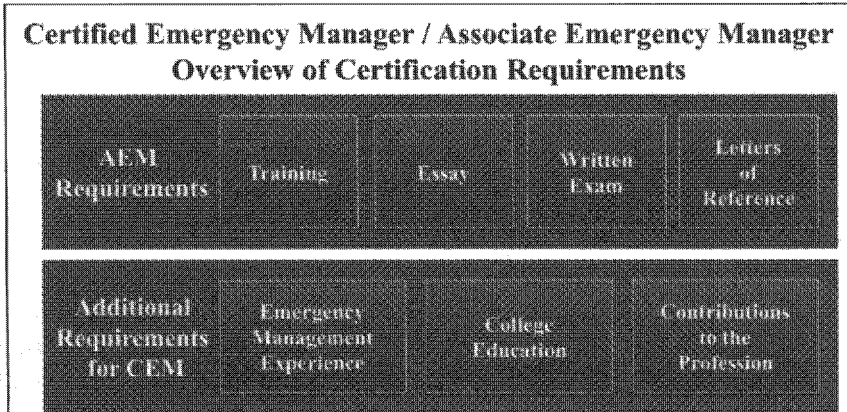
2.

<sup>151</sup> Telephone Interview with Christine Y. Jacobs, Assistant Director, Emergency Management Accreditation Program (Feb. 2, 2016).

<sup>152</sup> *Supra* note 151.

<sup>153</sup> *Id.*

### Professional Emergency Management Certifications for Individuals



Two different certification programs are available for consideration: Emergency Management and Business Continuity. While Emergency Management covers immediate consequence management while Continuity Planning focuses more heavily on long-strategic planning.<sup>154</sup> Two different organizations offer certifications in either Emergency Management or Business Continuity. Emergency Management covers a broader range of topics and capabilities that lawyers are likely to be more familiar with and more likely to utilize during non-emergency situations (regardless of being public or private sector) the Certified Emergency Manager credential will likely prove to be a more effective during implantation within the legal profession.

<sup>154</sup> See Loyola Univ. Chicago: Env'tl. Services, *Emergency Response Vs. Business Continuity Plans*, 2016 (2016).

[http://www.luc.edu/environmentalservices/continuityofoperationsplans/emer\\_res\\_bus\\_con.shtml](http://www.luc.edu/environmentalservices/continuityofoperationsplans/emer_res_bus_con.shtml) (last visited Mar. 4, 2016). See also Valerie Lucas, "EM? COOP? COG? BCM?" 7-9 (2006),

[http://www.calstate.edu/risk\\_management/events/documents/FTPT\\_Presentations/EPBC-1.pdf](http://www.calstate.edu/risk_management/events/documents/FTPT_Presentations/EPBC-1.pdf) (While Continuity of Operations ("COOP") can apply to both public and private sector organizations and entities, Continuity of Government ("COG") is applied solely to government organizations) (last visited Mar. 4, 2016).



## I. The Certified Emergency Manager

Administered by the International Association of Emergency Managers (“IAEM”), the Certified Emergency Manager (“CEM”) and the Associate Emergency Manager (“AEM”)—a sub component to the CEM program—are nationally and internationally recognized credentials and are considered to be the “gold standard” of the Emergency Management profession.<sup>155</sup>

IAEM created the CEM program in 1993 to help raise and maintain professional standards for emergency managers.<sup>156</sup> The Certified Emergency Manager Certification Program includes both the CEM and AEM. Both certifications require a completed application packet<sup>157</sup> along with an application fee<sup>158</sup> at any time during the year, with the certification committee meeting periodically to review applications.<sup>159</sup> Today, there are 1,644 Certified Emergency Managers and 207 Associate Emergency managers around the world.<sup>160</sup> The AEM encompasses part of the

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<sup>155</sup> See William C. Nicholson, *Difficulties in Mitigating Legal Exposure: Obtaining Competent Legal Advice; Challenges for Emergency Managers and Attorneys*, in William C. Nicholson, *Emergency Response and Emergency Management Law: Cases and Materials* 237, 242 (2nd ed. Charles C Thomas Publisher, Ltd. 2012).

<sup>156</sup> International Association of Emergency Managers Global Council, *History of the CEM & AEM*, <http://www.iaem.com/page.cfm?p=certification/history-of-cem> (last visited Nov. 25, 2015).

<sup>157</sup> The AEM and CEM application packets cover four and seven components respectively including: Training, Management Essay, Letters of Reference, Multiple-choice examination, Emergency Management Experience, College Level Education, and contributions to the profession. The Int'l of Emergency Managers, *Certified Emergency Manager/Associate Emergency Manager: The Ultimate Credentials in Emergency Management*, 2015 (2015), <http://www.iaem.com/documents/CEM-Brochure-Mar2015.pdf> (last visited Mar. 4, 2016).

<sup>158</sup> As of February 15, 2016, the certification fee for IAEM members is \$395 while the non-members fee is \$595. The Int'l of Emergency Managers, *Initial Certification*, 2016 CEM Application (2016), <http://www.iaem.com/page.cfm?p=certification/application/initial-certification&lvl=2> (last visited Mar. 4, 2016).

<sup>159</sup> *Supra* note 155.

<sup>160</sup> As of February 2016, there are a total of 1,851 current certifications around the world. The number of certifications fluctuates monthly based on members

overall CEM program and is considered a stepping stone to the CEM. Individuals looking to demonstrate his or her knowledge of Emergency Management but lack the substantial experience necessary to attain a CEM will likely peruse the AEM instead. Additionally, after attaining the credential, AEM and CEM holders are required to maintain his or her certification every 5 years with additional training or contributions to the profession.<sup>161</sup>

### 1. Application Requirements for the Associate Emergency Manager

The AEM application packet has four components: (1) Training, (2) Management Essay, (3) Letters of Reference, and a (4) Multiple-choice Examination.<sup>162</sup> These are the basic components of the higher level CEM application. Applications are submitted through the online system.<sup>163</sup>

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completing the necessary recertification requirements. 92.11% (1,705) of all individuals from around the world with either a CEM or AEM credential reside in the United States. Of the seven IAEM regional councils:

- (i) United States has 1,705 individuals (92.11% of the world) with 192 AEM and 1,513 CEM;
- (ii) Asia has 8 certified individuals (.43% of the world) with 1 AEM and 7 CEM;
- (iii) Canada has 78 certified individuals (4.21% of the world) with 8 AEM and 70 CEM;
- (iv) Europe has 31 individuals (1.67% of the world) all with a CEM;
- (v) Latin America has 3 individuals (.16% of the world) with 1 AEM and 2 CEM;
- (vi) Middle-East/Africa (International) has 9 individuals (.49 % of the world) with 4 AEM and 5 CEM; and
- (vii) Pacific Island (Oceania) has 17 individuals (.92% of the world) with 1 AEM and 16 CEM.

*See* The Int'l of Emergency Managers, *List of Current Holders of CEM or AEM*, Feb. 2016 (Feb. 2016), <http://iaem.com/page.cfm?p=certification/current-cem-aem> (last visited Mar. 4, 2016). 173 CEM applications were reviewed in January 2016, with notifications being made in late February 2016. The Int'l of Emergency Managers, *IAEM - USA Board of Directors Meeting: Tuesday, January 19, 2016*, 5 (2016), <http://www.iaem.com/members/IAEM-USA-Board-Minutes-19Jan2016.pdf> (last visited Mar. 4, 2016).

<sup>161</sup> *Supra* note 155.

<sup>162</sup> *Supra* note 150 at 2.

<sup>163</sup> Currently, applications are the only item submitted online. IAEM staff is

## A. Training

The training component requires that 200 contact hours of training be documented within the last 10 years.<sup>164</sup> This requirement is divided evenly between emergency management training and general management training.<sup>165</sup> While emergency management training must be specifically related to the profession of emergency management (such as incident command training or managing livestock during a disaster) general management can include coursework that can be applied beyond emergency management (such as geology, law, human resources, or sociology).<sup>166</sup> No more than 25% of the hours submitted may be in any single topic area.<sup>167</sup> For example, a 3-credit hour Constitutional Law course would count as approximately 48 contact hours, meaning no more than 25 of those contact hours could be counted as part of the training requirement.<sup>168</sup> Law students are generally required to have completed at least some undergraduate course work before beginning the study of law, it is likely that many of those hours could be counted towards the

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working with the Salvation Army to develop an online CEM/AEM examination system. Additionally, IAEM is working on authoring an online Learning Management System for the CEM/AEM exam preparation course. Beta testing should begin by mid-March 2016. An in-person/instructor led exam preparation course will still be available at conferences and events throughout the year at a fee. The Int'l of Emergency Managers, *IAEM - USA Board of Directors Meeting: Tuesday, January 19, 2016*, 5 (2016), <http://www.iaem.com/members/IAEM-USA-Board-Minutes-19Jan2016.pdf> (last visited Mar. 4, 2016).

<sup>164</sup> The Int'l of Emergency Managers, *CEM/AEM Applications*, 2016 (2016), <http://www.iaem.com/page.cfm?p=certification/application> (last visited Mar. 4, 2016).

<sup>165</sup> The 200 hours is divided evenly between emergency management and general management training—100 contact hours each The Int'l of Emergency Managers, *CEM/AEM Applications*, 2016 (2016), <http://www.iaem.com/page.cfm?p=certification/application> (last visited Mar. 4, 2016).

<sup>166</sup> *Supra* note 157.

<sup>167</sup> *Id.*

<sup>168</sup> Daryl Lee Spiewak, *Selecting or Identifying Training Course Topics*, IAEM Bull. , [http://www.iaem.com/page.cfm?p=certification/CEM\\_Corner/Selecting-or-Identifying-Training-Course-Topics](http://www.iaem.com/page.cfm?p=certification/CEM_Corner/Selecting-or-Identifying-Training-Course-Topics) (last visited Mar. 4, 2016).

general management component also.<sup>169</sup> Based on a usual first year law school curriculum, most first year law students would be able complete the 100 hour general management training requirement almost instantaneously<sup>170</sup>, leaving only the emergency management training to be accomplished through independent study or continuing education course attendance.

### B. Management Essay

The management essay component is a qualitative process—equating to an interview of the candidate—designed to “assess the candidate’s knowledge and abilities of disaster/emergency management and written communications skills.”<sup>171</sup> The candidate is required to individually compose an narrative/essay response to a prompt relating to emergency management.<sup>172</sup> Though there is no time limit for the essay to be completed, the word limit of 1,000 to 1,500 words and fact that the essay is not a research paper guide the content.<sup>173</sup>

### C. Letters of Reference

The references component of the application requires that a candidate submit three signed letters of reference from individuals attesting to the candidate’s character and explaining why they

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<sup>169</sup> NAT’L CONFERENCE ON BAR EXAMINERS & AM. BAR SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2016 at vii, 1-2 (2016). Twenty-six states and territories require law students to have at least completed two years of undergraduate coursework before beginning law school studies. While the ABA’s Recommended Standards for Bar Examiners provides that students should have completed at least three-fourths of the work acceptable for a baccalaureate degree at an accredited law school, California, Michigan, and Guam allow for students to begin legal training after two years of college-level work. *Id.* at 1-2.

<sup>170</sup> A first year law school curriculum consisting of Torts, Constitutional Law, Criminal Law, Contracts, and Real Property Law could satisfy this requirement since each course likely exceeds 25 contact hours at most law schools.

<sup>171</sup> The Int’l of Emergency Managers, *Certified Emergency Manager Associate Emergency Manager Application Booklet*, 2012 46 (2012).

<sup>172</sup> *Id.*

<sup>173</sup> *See generally id.*

deserve CEM or AEM designation.<sup>174</sup> Letters usually outline an individual's accomplishments, work ethic, leadership skills, job responsibilities, experience, and initiatives the candidate has taken in the field of emergency management.<sup>175</sup> Though one of the references must be the candidate's current supervisor, those who do not have a supervisor that can initiate an annual performance rating, may use a current Certified Emergency Manager as a reference in lieu of a supervisor.<sup>176</sup> The other two letters may be: a past supervisor, local, state or federal government official or department head, emergency service organization official, local regional or national disaster/emergency management association official, or others upon approval of the certification commission.<sup>177</sup>

#### D. Emergency Management Written-Exam

The Emergency Management exam component of the application requires a passing score of 75% on a 100 question multiple choice written exam completed in 2-hours or less.<sup>178</sup> The exam questions focus on emergency management principles and practices derived from various sources.<sup>179</sup> Though the exam is conducted at various emergency management conferences, the exam may be administered outside of these large sittings, through a

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<sup>174</sup> See The Int'l of Emergency Managers, *CEM FAQ*, 2016 (2016), <http://www.iaem.com/page.cfm?p=certification/faqs#reference> (last visited Mar. 4, 2016); The Int'l of Emergency Managers, *Certified Emergency Manager/Associate Emergency Manager: The Ultimate Credentials in Emergency Management*, 2015 (2015), <http://www.iaem.com/documents/CEM-Brochure-Mar2015.pdf> (last visited Mar. 4, 2016).

<sup>175</sup> The Int'l of Emergency Managers, *CEM FAQ*, 2016 (2016), <http://www.iaem.com/page.cfm?p=certification/faqs#reference> (last visited Mar. 4, 2016);

<sup>176</sup> *Supra* note 172 at 13.

<sup>177</sup> *Id.* (Subordinates, former students, friends, relatives, and neighbors may not be used as references for the CEM/AEM application).

<sup>178</sup> The Int'l of Emergency Managers, *Answer to Common Asked Questions About the CEM/AEM Examination: A Study Guide*, 4 (2015), <http://www.iaem.com/documents/CEM-Study-Guide-Feb2015.pdf> (last visited Mar. 4, 2016).

<sup>179</sup> *Id.*

controlled proctored exam process.<sup>180</sup> Before sitting for the Emergency Management written-exam, candidates must have paid the certification fee.<sup>181</sup> IAEM allows for high schools, colleges, and universities to administer the exams.<sup>182</sup> Law Schools, because they are part of a universities or college, likely have the capabilities and resources to conduct periodic AEM/CEM exams at nominal costs to members of the legal community.

## 2. Application Requirements for the Certified Emergency Manager

The application requirements for the Certified Emergency Manager include those required under the Associate Emergency Manager Certification (200 contact hours of training, emergency management essay, three letters of reference, and passing score on the emergency management written-examination). However, the CEM application requires additional components, including: Emergency Management experience, college-level education, and six separate contributions to the profession.<sup>183</sup> Similar to the Associate Emergency Manager (“AEM”), the CEM is an online application process designed to recognize the work of practicing emergency management professionals.<sup>184</sup>

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<sup>180</sup> *Supra* note 176. at 4-5.

<sup>181</sup> As of February 15, 2016, the certification fee for IAEM members is \$395 while the non-members fee is \$595. The certification fee allows for candidates to sit for the Emergency Management Written-exam twice—if not passed the first time—and have his or her certification application packet reviewed by the CEM Commission twice—if deemed inadequate the first time. Subsequent sittings or reviews will require payment of an additional certification fee. See The Int'l of Emergency Managers, *Recertification*, 2016 CEM Application (2016).

<http://www.iaem.com/page.cfm?p=certification/application/recertification&lvl=2> (last visited Mar. 4, 2016).

<sup>182</sup> *Supra* note 176 (though exams may be administered by the various entities, the candidate is responsible for all costs associated with proctoring a AEM/CEM exams).

<sup>183</sup> The Int'l of Emergency Managers, *CEM/AEM Applications*, 2016 (2016), <http://www.iaem.com/page.cfm?p=certification/application> (last visited Mar. 4, 2016).

<sup>184</sup> *Supra* note 156.

### A. Emergency Management Experience

To satisfy the Emergency Management Experience component of the CEM application, candidates must show that they have both (1) participated in a full-scale exercise<sup>185</sup> or actual disaster and possess approximately three years of experience that covers all phases of emergency management.<sup>186</sup> Generally, this means most viable CEM applicants will have actively worked within emergency management—or a related field—for at least three years.

### B. College-level Education

To satisfy the education component the candidate must have completed a baccalaureate degree in any subject area from a regionally accredited institution.<sup>187</sup> None of the coursework counted towards the education requirement may be used to “double-dip” and satisfy the 200 hours of training requirement.<sup>188</sup> Thus a Bachelors could be used for the college level education requirement but a graduate level degree could be used for the Emergency Management or General Management training.<sup>189</sup> Additionally, if the bachelors degree—or higher—was in disaster or emergency management, the three years experience requirement is reduced to two years.<sup>190</sup>

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<sup>185</sup> A full scale exercise is a training event that allows public and private entities to practice what they would do during a disaster or emergency situation in real-life scenarios. A Full scale exercise is as close to the real thing you can get, without actually triggering a disaster. These exercises are typically held only periodically, due to the substantial resource requirements they have. *See* Dept of Homeland Sec., *Exercises*, 2016 Ready.gov (2016), <http://www.ready.gov/business/testing/exercises> (last visited Mar. 5, 2016).

<sup>186</sup> *Supra* note 172.

<sup>187</sup> *Supra* note 163 at 14.

<sup>188</sup> *Id.*

<sup>189</sup> *Supra* note 176.

<sup>190</sup> *Supra* note 163 at 10.

### C. Contributions to the Profession

One of the more tedious tasks towards the CEM is documenting six separate contributions to the profession. These contributions must have occurred during the ten years preceding the CEM application and support the field of Disaster/Emergency Management and be outside a candidate's normal job responsibilities.<sup>191</sup> Contributions that may satisfy this requirement include:

- membership in a disaster/emergency management organization;
- professional conference attendance;
- volunteer service work;
- leadership roles;
- special assignments;
- speaking engagements;
- teaching opportunities;
- course development;
- publications;
- audio-visual and interactive products;
- awards or special recognitions;
- state or provincial emergency management certification;
- legislative contact;
- scholarly research; or
- other contributions at the discretion of the CEM Commission.<sup>192</sup>

### II. Business Continuity Professional Certifications

A professional certification in business continuity is another option for the legal profession to alternatively pursue. This section will examine the credential offered by one of the more established organizations in Business Continuity<sup>193</sup>—The Disaster Recovery

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<sup>191</sup> *Supra* note 164 at 29.

<sup>192</sup> *Id.* at 20-30.

<sup>193</sup> The United Kingdom based Business Continuity Institute also offers a “Certificate of the Business Continuity Institute” (“CBCI”). However, it is not



Institute International—and briefly examine why use of Emergency Management Certifications should be explored, rather than Business Continuity.

### 1. Disaster Recovery Institute International

Founded in 1988, the Disaster Recovery Institute (“DRI”) International is a non-profit organization based in New York, New York focuses on providing education and accreditation for organizations and individuals preparing for disasters. A major component for this organization is a battery of different certification programs for individuals in various industries and stages of his or her careers.<sup>194</sup> DRI has six distinct certifications focused on different skill levels and specialization areas.<sup>195</sup> These certification areas include: (1) Continuity, (2) Advanced Continuity, (3) Audit, (4) Public Sector Continuity, (5) Healthcare Continuity, and (6) Risk Management.<sup>196</sup> Some of these certification areas have one or more individual degrees of certification ranging from entry to senior-level experience. The certification most likely to be of immediate off-the-shelf use to the legal profession is the Associate Business Continuity Professional (“ABCP”).

The ABCP is a entry-level certification that allows individuals with some business continuity planning knowledge, but little to no experience, to demonstrate some proficiency in the field.<sup>197</sup> The ABCP requires individuals to pass a qualifying examination and

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examined in this article. The Bus. Continuity Inst., *The CBCI Certification*, 2016 (2016), <http://www.thebci.org/index.php/training-education/the-cbci-credential/about-the-cbci-credential>. (last visited Mar. 4, 2016).

<sup>194</sup> Disaster Recovery Institute International, *About Us*, <https://www.drii.org/aboutus.php> (last visited on Nov. 25, 2015).

<sup>195</sup> Disaster Recovery Institute International, *Certification*, <https://www.drii.org/certification/certification.php> (last visited on Nov. 25, 2015).

<sup>196</sup> Disaster Recovery Institute International, *Certification*, <https://www.drii.org/certification/certification.php> (last visited on Nov. 25, 2015).

<sup>197</sup> Disaster Recovery Inst., *Associated Business Continuity Professional*, 2016 (2016), <https://www.drii.org/certification/abcp.php>. (last visited Mar. 5, 2016).

pay an application fee<sup>198</sup>.<sup>199</sup> The qualifying examination is a multiple-choice formatted test that covers various areas of the “Professional Practices for Business Continuity Practitioners.”<sup>200</sup> Though courses are offered to present the tested material, most exams may be challenged without course attendance.<sup>201</sup> There is no waiting period if a qualifying exam is not passed on the first, or subsequent, attempt.<sup>202</sup>

### III. Using Emergency Management Certifications Over Business Continuity Certifications

Though Business Continuity could be a fit for the legal profession—given the need to ensure the continuity of the justice system during a disaster<sup>203</sup>—the concepts behind Business Continuity could prove more difficult to translate to the legal world. On the other hand, Emergency Management is a creature of law; and without law, emergency management couldn’t exist as it does today.<sup>204</sup> Emergency Management covers a broader range of topics and capabilities that lawyers are likely to be more familiar with and likely to utilize during non-emergency situations (regardless of being public or private sector). Because of the close relationship between law and Emergency Management, the

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<sup>198</sup> As of February 15, 2016, the Application fee is \$200. The annual renewal fee for the Associate Business Continuity Professional (“ABCP”) is \$150 per year. Currently, there is no continuing education requirement to maintain an ABCP certification. See Disaster Recovery Inst., *Associated Business Continuity Professional*, 2016 (2016), <https://www.drii.org/certification/abcp.php>. (last visited Mar. 4, 2016).

<sup>199</sup> *Id.*

<sup>200</sup> Disaster Recovery Inst., *Examination*, 2016 (2016), <https://www.drii.org/coexam/exams.php> (last visited Mar. 4, 2016).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See e.g. Mary L. Boland, Will Your Criminal Justice System Function in the Next Disaster? American Bar Association: Section of Criminal Justice, Spring 2007, Volume 22 No. 1, 28-34 (recommending criminal justice systems adopt some form of continuity of operations plan for local criminal justice systems).

<sup>204</sup> William C. Nicholson, ARTICLE: OBTAINING COMPETENT LEGAL ADVICE: CHALLENGES FOR EMERGENCY MANAGERS AND ATTORNEYS, 46 Cal. W. L. Rev. 343, 344-46 (2010).

common understanding<sup>205</sup> emanated by this relationship will likely allow lawyers to more easily understand and apply Emergency Management concepts over those of Business Continuity.

Moreover, on a macro level it has been noted by both scholars and practitioners that there is a gap in cooperation and understanding between legal and emergency management professions.<sup>206</sup> Having a legal community with the background and understanding of emergency management will help further resolve some of the legal issues which have been noted as the “most misunderstood and confusing aspects of disaster preparation and recovery” and prevent future litigation<sup>207, 208</sup> This common understanding<sup>209</sup> will also help to bridge the gap that seemingly exists between the emergency management and legal professions, possibly doing more to saving lives and preserve property.<sup>210</sup>

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<sup>205</sup> Mija Jaatinen and Rita Lavikka, *Common Understanding as a Basis for Coordination*, Corporate Communications: an International Journal, Vol 13, Issue 2, pp 147-167, 149.

<sup>206</sup> See generally *supra* note 202 at 344-46 (there is a general lack of understanding of emergency management issues and connectedness between local government attorneys, emergency management, and political leadership).

<sup>207</sup> See e.g. *Brooklyn Ctr. For Indep. of the Disabled v. Bloomberg*, 980 F.Supp.2d 588 (S.D.N.Y. 2013) (New York City’s evacuation plans did not meaningfully accommodate the needs of the city’s disabled population during high-rise evacuations and transportation); *Cal. Found. for Indep. Living Ctrs. v. Cnty. Of Sacramento*, 2015 LEXIS 150024 at 52-55 (E.D. Cal. November 3, 2015) (granting partial summary judgment due to County failing to prove the current evacuation plans comply with the Americans with Disabilities Act (42 U.S.C. § 12132) and the Rehabilitation Act of 1973 (29 U.S.C. § 794)).

<sup>208</sup> *Supra* note 202 at 343, 346, (citing, Joseph G. Jarret & Michele L. Lieberman, Symposium, When the Wind Blows: The Role of the Local Government Attorney Before, During, and in the Aftermath of a Disaster, 36 Stetson L. Rev. 293, 294 (2007)).

<sup>209</sup> *Supra* note 198.

<sup>210</sup> *Supra* note 202 at 345-46.

## IMPLEMENTING A DISASTER PREPAREDNESS INCENTIVE PROGRAM

Any theoretical idea must be adequately developed and implemented to achieve the desired outcomes within the legal profession. The issue becomes “how?” Generally, deploying a new standard or program to the field of any profession will take time, training, and resources. Law schools are particularly suited to support the implementation and developing the emergency management capabilities of future legal professionals, while local bar associations are best suited for external development of training and developing current professionals.

### *A. Motivating The Legal Profession & Implementation Potential*

Though an idea is great, the ability to implement the idea is the true crux of any policy matter. This section will discuss some of the issues related to motivating individuals within the legal profession (focused mainly on law schools and students), the potential for the AEM/CEM certification to be offered to the current and future generation of law students, and the potential for EMAP accreditation to be implemented at local bar associations.

#### 1. Motivating the Legal Profession

A major road block in achieving any professional conduct standard is by motivating organizations and groups within the industry towards the ultimate objective or goal. There are two types of motivation *extrinsic* and *intrinsic*. *Extrinsic* motivation refers to the “behavior that is driven by external rewards such as money, fame, grades, and praise” that is usually from an outside individual.<sup>211</sup> However, *intrinsic* motivation is the opposite, and is

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<sup>211</sup> Kendra Cherry, *What is Extrinsic Motivation?*, (May 19, 2015), <http://psychology.about.com/od/eindex/f/extrinsic-motivation.htm> (last visited

an individual rewarding themselves for the desirable behavior.<sup>212</sup> The question then becomes: “should the legal profession use extrinsic motivation to increase disaster preparedness within the legal community?” The answer is not as easy as it may seem.

While relying on an extrinsic motivation scheme may seem to be an adequate solution, some studies have shown that lawyers who focus on extrinsic rewards had a lower well-being than those motivated by *intrinsic* values.<sup>213</sup> An example of *extrinsic* rewards which aided the lowering of the well-being of law students included grades and honor society membership.<sup>214</sup> Though not explicit, inherent reliance on *extrinsic* rewards includes various levels of risk to reward ratios. For example, relying on grades when attending a law school with a curve-based system has a higher amount of risk of disappointment than a graduate school that does not have a curve-based grading system. That being said, any *extrinsic* motivation system used to encourage disaster preparedness within the legal community should ensure there is a low risk chance of failure in preparedness. For example, the standards should be tough, yet attainable with a degree of certainty to reduce any possible anxiety or other negative impact on the well-being of an already inherently stressed profession<sup>215</sup>.

A disaster preparedness credentialing system within the legal community would be considered an extrinsic motivation tool. The question becomes how to actually implement a standard within the legal profession. Currently the legal community lacks a

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on Jan. 7, 2016).

<sup>212</sup> *Id.*

<sup>213</sup> Susan S. Daicoff, *Leadership Roundtable Article: EXPANDING THE LAWYER'S TOOLKIT OF SKILLS AND COMPETENCIES: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 Santa Clara L. Rev. 795, 808 (2012).

<sup>214</sup> *Supra* note 211.

<sup>215</sup> Joseph J. Wielebinski, *Culture Shock: A Groundbreaking Empirical Study Confirms that Lawyers Face Unprecedented Substance Abuse and Mental Health Challenges*, 79 Tex. B. J. Energy. What's on the horizon for Texas? 226, 226-229 (authors of the study suspect lawyers may have higher rates than other professionals or educated populations of alcohol, substance abuse, and mental health issues based on the inherent stress of the job).

comprehensive understanding of emergency management.<sup>216</sup> Having an extrinsic motivation system to provoke interest in disaster preparedness would be a high-reward low risk opportunity that would likely increase the well-being of those within the legal profession. However, attempting to implement an almost entirely new credentialing system—or even less a relatively new concept—would be nearly impossible to do wholesale within the legal profession. Thus, initially a two-pronged approach should be used to increase the disaster preparedness of the legal profession. The main effort should be driven at educating the next generation of lawyers to be disaster ready with the Certified Emergency Manager credential. A supporting effort should be driven at preparing local bar associations using the Emergency Management Accreditation Program (“EMAP”). Upon successful implementation with the majority of law schools and local bar associations, an independent accreditation program should be developed and implemented for law firms and other legal service organizations to strive towards and achieve.

## 2. Potential for Implementation of Certifications at Law Schools

“An informed and educated citizenry is an integral part of managing [disasters] at the local level.”<sup>217</sup> Affording students at law schools the opportunity to attain the AEM or CEM before graduation will give students a unique perspective on the development of public policy and an understanding of how disasters impact every area of legal practice.<sup>218</sup> Students might

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<sup>216</sup> See generally *supra* note 202.

<sup>217</sup> ANNA K. SCHWAB, KATHERINE ESCHIELBACH & DAVID J. BROWER, HAZARD MITIGATION AND PREPAREDNESS, 271 (Laura Town ed., John Wiley & Sons, Inc. 2007).

<sup>218</sup> Certified Emergency Manager is an individual who possesses the knowledge, skills and abilities to effectively manage a comprehensive management program. That program can be in, but not limited to, local government levels, business and industry, military contingency operations, health care related response/planning or educational institutions. Elizabeth B. Armstrong, *Professionalism in Emergency Management: The Road to Recognition as a Certified Emergency*

even be allowed to officially call themselves “specialists” right out of law school.<sup>219</sup> Currently, no law school has openly partnered with IAEM to afford law students the opportunity to attain these credentials. The addition of this professional credential to a law school’s Professionalism Program will likely make law students stand out as unique and further demonstrate practice readiness when compared to students from law schools that do not offer an opportunity to attain a disaster management credential.

Several barriers exist to students attaining the AEM or CEM credentials. Most significant of which is the application fee.<sup>220</sup> Lesser barriers include obtaining training hours preparation of essays, and administration of multiple-choice exam. Solutions may be to either: (1) provide scholarships for individuals seeking to attain an AEM or CEM<sup>221</sup> and (2) provide opportunities for students to complete training requirements and receive assistance in the compilation of their application package at the law school.

Candidates are required to pass the 100-question exam with a 75% in order to be eligible for participation.<sup>222</sup> No financial

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*Manager*, 2016 (2016), [http://www.imscommand.com/CEM\\_Overview.pdf](http://www.imscommand.com/CEM_Overview.pdf) (last visited Mar. 4, 2016).

<sup>219</sup> David L. Hudson, Jr., *Something Special*, *The ABA J.* 23, 23-24 (a federal district court has ruled in *Searcy v. Florida Bar* that the Florida Bar prohibiting individual lawyers and law firms from stating that they are specialists or experts in a practice field without being certified in that field violates the First Amendment of the U.S. Constitution).

<sup>220</sup> (\$395 for IAEM members and \$595 for non-IAEM members. National dues for a student member is \$45 per year, and by joining as a member of IAEM, the application fee for the AEM and CEM is reduced by \$200. *Supra* note 151; International Association of Emergency Managers Global Council, *IAEM Councils*, <http://www.iaem.com/page.cfm?p=join/choose-council> (last visited on Nov. 25, 2015); International Association of Emergency Managers Global Council, *Initial Certification* (Apr. 30, 2014).

<sup>221</sup> If law schools are willing to compensate IAEM membership fees for students to help reduce the cost of the AEM/CEM application fee, it should be done on a reimbursement basis, with students attending a minimum amount of events or meetings to become eligible for reimbursement. This will help prevent students from “freeloading” and not even taking the time to attain what they initially set out for.

<sup>222</sup> International Association of Emergency Managers, *Answers to Commonly Asked Questions About the CEM/AEM Examination: A Study Guide*, 4 (Feb. 2015) <http://www.iaem.com/documents/CEM-Study-Guide-Feb2015.pdf>

requirements are due to IAEM from law schools. IAEM will send the exam directly to the law school (as proctor) with exam administration instructions and a sealed exam packet. The cost of implementation of this practice would be nominal and limited to current on hand staff following existing exam administration protocol at a law school.

While there is no hard data, during initial implantation law schools could reasonably expect to initially fund between 5-10 students per year seeking this certification, with the anticipation that the programs will grow over time. The application fee is substantial when considered in light of a law students' pre-existing financial burdens. If scholarships would be provided to students seeking to attain their AEM/CEM certification, this would make the potential investment by a law school \$2,200 - \$4,400 annually when providing a full scholarship to obtain the credential or between \$1,650 - \$3,300 under a substantial cost sharing model.<sup>223</sup>

### 3. Potential for Implementation of EMAP

In Texas alone, there are fifteen recognized local bar associations.<sup>224</sup> The Emergency Management Accreditation Program ("EMAP") focuses largely on public entities responsible for managing disasters and other emergencies within their jurisdictions.<sup>225</sup> Currently there are three educational institutions accredited by EMAP with several more in the process of

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(last visited on Nov. 25, 2015).

<sup>223</sup> This makes the school's potential investment for students pursuing the CEM or AEM approximately \$440 per student. Proposed is one of two assistance options an outright scholarship (\$440) awarded to individuals who satisfactorily complete all application requirements or a substantial (75-25) cost sharing of the application fee (\$330 paid by the law school and \$110 paid by the student).

<sup>224</sup> American Bar Association, *State & Local Bar Associations*, (Jan. 8, 2016), <http://shop.americanbar.org/ebus/ABAGroups/DivisionforBarServices/BarAssociationDirectories/StateLocalBarAssociations.aspx#> (last visited Jan. 8, 2016).

<sup>225</sup> Emergency Management Accreditation Program, *Our Mission*, (Jan. 8, 2016), <http://emap.org/index.php/what-is-emap/our-mission>, (last visited, Jan. 8, 2016).



accreditation.<sup>226</sup> Additionally, hospital systems have begun to seek EMAP accreditation, though none have yet achieved accreditation.<sup>227</sup> Though their main focus remains on certification of public entities, the program has sought to expand into the private sector.<sup>228</sup>

Because local bar associations tend to function as a quasi-public entity<sup>229</sup>, EMAP accreditation would be most fitting in that it would be a spring board to help firms of all types and sizes within their communities prepare, respond, and recover from disasters.

### *B. The Way-Ahead: "Operation Disaster Defense"*

With the problem defined, challenges identified, and tools available to solve it readily available, what should be done? This section will first, provide a primer on some of the operational planning terms and techniques that will be used to illustrate the proposed solution. Then conceptualize each of the three *lines of effort* that, together in concert, build a more disaster resilient legal profession and justice system.

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<sup>226</sup> *Supra* note 144.

<sup>227</sup> *Supra* note 146.

<sup>228</sup> Emergency Management Accreditation Program, *EMAP Leadership*, (Jan. 8, 2016), <http://emap.org/index.php/what-is-emap/emap-leadership-and-staff>, (last visited, Jan. 8, 2016).

<sup>229</sup> *See e.g.* Quintin Johnstone, Article: Bar Associations: Policies and Performance, 15 *Yale L. & Pol'y Rev.* 193,195-96 (1996) (bar associations helps:

(1) lawyers by: providing opportunities to improve professional skill and knowledge, allowing the development of useful professional contacts, expansion of their client base, and increasing income;

(2) the legal profession generally by: helping to maintain a competent and ethical guild of lawyers and protecting the profession from unqualified legal service providers;

(3) the general public by: protecting and strengthening the administration of justice, enhancing the public's understanding of and respect for the law and legal institutions, and identifying and advocating needed changes in the law while opposing "undesirable" ones).

## 1. A Primer on Operational Planning Doctrine

*Planning* is defined as the “science of understanding a situation, envisioning a desired future, and laying effective ways of bringing that future about.”<sup>230</sup> Planning helps leaders of organizations and professions: understand and develop solutions to problems, anticipate events and adapt to changing circumstances, and organize his or her personnel and resources and prioritize efforts.<sup>231</sup> These solutions are provided through conceptual planning and operational art, which allow leaders to use his or her skills, knowledge, experience, creativity, and judgment to develop strategies and operations achieve goals or objectives.<sup>232</sup>

Two of the terms that will be used to better describe the recommended solution are: (1) lines of effort and (2) end state.<sup>233</sup> A *line of effort* is a “line that links multiple tasks using the logic of purpose rather than geographical reference to focus efforts towards establishing operational and strategic conditions.”<sup>234</sup> These tasks and objectives focus towards establishing the desired outcome or *end state*.<sup>235</sup> An *end state* are conditions that—when achieved—meet the goals of the overall “policy, orders, guidance, and directives”.<sup>236</sup>

The United States Army uses lines of effort as a planning tool during stability operations<sup>237</sup> (such as the current state of affairs in

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<sup>230</sup> The Operations Process, ADRP 5-0, 2-1, (U.S. Army May 2012) [http://armypubs.army.mil/doctrine/DR\\_pubs/dr\\_a/pdf/adrp5\\_0.pdf](http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adrp5_0.pdf).

<sup>231</sup> *Id.* at 2-2.

<sup>232</sup> *See id.* at 2-4.

<sup>233</sup> Other elements of operational art include: “center of gravity”, “decisive points”, “lines of operations”, “operational reach”, “basing”, “tempo”, “phasing and transitions”, “culmination”, and “risk”. However, these terms will not be used to illustrate the policy recommendation of “Operation Disaster Defense”.  
*Id.*

<sup>234</sup> *Supra* note 221 at 2-2.

<sup>235</sup> *Supra* note 221 at 2-2.

<sup>236</sup> *Id.* at 2-8.

<sup>237</sup> Stability operations seek to stabilize the environment in a foreign country, so that they can resolve “the root causes of conflict and state failure” and establish a safe and secure environment to facilitate reconciliation among adversaries. Eventually, stability operations aim to transition responsibility for the

Afghanistan) or Defense Support of Civil Authorities<sup>238</sup> (“DSCA”) (such a disaster and emergency management<sup>239</sup>).<sup>240</sup> Here, because we are dealing with emergency and disaster management, techniques of operational planning are appropriate and best illustrate the recommended policy. In keeping with this doctrinal base, the policy recommendation is named “Operation Disaster Defense”.

## 2. Operation Disaster Defense

Operation Disaster Defense consists of three distinct *lines of effort* each focused on a different group within the legal profession. Each line of effort is discussed in detail through this section. Each

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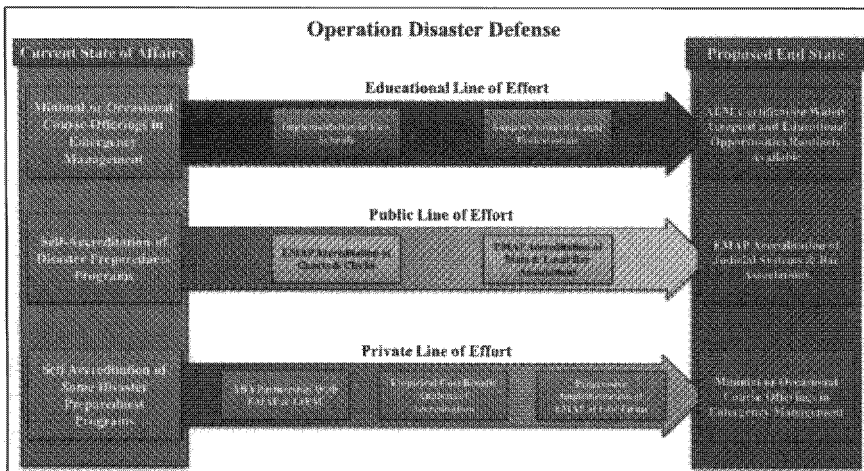
stabilization of the nation to the host-nation governance with a “functioning civil society and viable market economy.” *See* Stability, FM 3-07, 1-1, (U.S. Army Jun. 2, 2015) [http://armypubs.army.mil/doctrine/DR\\_pubs/dr\\_a/pdf/fm3\\_07.pdf](http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_07.pdf) (last visited Mar. 5, 2016).

<sup>238</sup> Defense Support of Civil Authorities (“DSCA”) is the support provided by federal military forces, [Department of Defense (“DOD”)] Civilians, DOD contract personnel, DOD component assets, and [National Guard (“NG”)] forces (when the Secretary of Defense [SecDef], in coordination with the governors of the affected states, elects and requests to use those forces in Title 32, USC, status or when federalized) in response to a request for assistance (“RFA”) from civil authorities for domestic emergencies, law enforcement support, and other domestic activities or from qualifying entities for special events.” Defense Support of Civil Authorities, Joint Publication 3-28, 1-2, (U.S. Department of Defense Jul. 31, 2013) [http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_28.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_28.pdf) (last visited Mar. 5, 2016).

<sup>239</sup> DSCA activities include supporting the preparation for, prevention of, protection from, response to, and recovery from a variety of domestic incidents including: terrorist attacks (such as 9/11/2001), major disasters (such as Hurricanes), both natural and man-made, and planned domestic special events (such as major sporting events). Defense Support of Civil Authorities, Joint Publication 3-28, 1-2, (U.S. Department of Defense Jul. 31, 2013) [http://www.dtic.mil/doctrine/new\\_pubs/jp3\\_28.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_28.pdf) (last visited Mar. 5, 2016). *See also* Michael Garcia, *76th EPLO/CMPO, 9th MSC and USARC Teams Train for DMisaster in Honolulu*, Def. Video & Imagery Distribution Sys., May 28, 2016 at <https://www.dvidshub.net/news/199367/76th-eplo-cmpo-9th-msc-and-usarc-teams-train-disaster-honolulu#.V0yCv8d9fOw> (provides recent example of DSCA activities--a tabletop exercise--in Honolulu, Hawaii.).

<sup>240</sup> *Supra* note 221.

line of effort seeks to take us from our current state of preparedness and separation, to an end state where the legal profession is more disaster ready and has grown closer to the emergency management profession. Though this is a framework for implementation, collaboration and coordination is still required before full implementation of this “operation” can begin.



*i. The Educational Line of Effort*

The Educational *line of effort* seeks to take the legal profession from a minimal or occasional course offering in emergency management and emergency management law to having the Associate Emergency Manager certification widely accepted and emergency management training and educational opportunities routinely available throughout the year. Two major tasks/objectives exist along the Educational *line of effort*: (a) implementing the AEM program in Law Schools and (2) providing conducting education and AEM credentialing support to lawyers at large. Initially this two-pronged approach should have its main effort driven towards educating the next generation of lawyers to be disaster ready with the AEM credential. A collateral objective should be driven at preparing and aiding current attorneys to learn about emergency management and disaster preparedness, and help

individuals complete their packets to earn an AEM or CEM credential.

#### A. Implementation in Law Schools

The main effort of the Educational *line of effort* should be focused towards educating the next generation of lawyers on disaster preparedness and emergency management. Most law students will likely not have the requisite experience or professional contributions to earn the CEM credential and should generally focus their efforts on attaining the AEM credential.

Generally, law students are required to have completed at least some undergraduate course work before beginning the study of law, it is likely that many of those hours could be counted towards the general management component also.<sup>241</sup> Based on a usual first year law school curriculum, most first year law students would be able complete the 100 hour general management training requirement almost instantaneously<sup>242</sup>, leaving only the emergency management training to be accomplished through independent study or continuing education course attendance.

Further, law schools and their local bar associations can help remove barriers for students seeking attaining the AEM or CEM credential by:

- (1) implementation of practical learning courses geared towards emergency management or other public policy related disciplines<sup>243</sup>, professionalism activities that offer support to students to earn an AEM—or for some, the

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<sup>241</sup> *Supra* note 162.

<sup>242</sup> A first year law school curriculum consisting of Torts, Constitutional Law, Criminal Law, Contracts, and Real Property Law could satisfy this requirement since each course likely exceeds 25 contact hours at most law schools.

<sup>243</sup> There is a growing call for law schools to implement more practical learning courses within the required coursework to give students a better edge in the workplace upon graduation. Wendy L. Werner, *Law Schools Get Practical*, 39 L. Prac. Mag. The Fin. Issue (2013), [http://www.americanbar.org/publications/law\\_practice\\_magazine/2013/september-october/career-steps.html](http://www.americanbar.org/publications/law_practice_magazine/2013/september-october/career-steps.html) (last visited Mar. 4, 2016).

- CEM—credential, or through a public policy internship or residency program<sup>244</sup>; and
- (2) providing scholarships to students to help cover the costs of the application and any necessary training.

### B. Support Towards the Legal Professionals

In the legal profession, relatively few attorneys have any formal training in the legal aspects of emergency management.<sup>245</sup> Though various training opportunities have been made available from time to time, most of these trainings only referred to emergency management law in passing or were available for a very short time.<sup>246</sup> At one point, the Puerto Rico School of Law offered courses in emergency management; however, these courses were not listed offerings in their most recent course catalog.<sup>247</sup> Further, CLE in emergency management law is rarely available to local government attorneys.<sup>248</sup> A frustration many these CLE events and workshops face is low attendance by emergency managers and local government attorneys. Often, this is due to the lack of: (a)

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<sup>244</sup> Texas A&M School of Law has a Public Policy extern program allows students to embed in government agencies for a full semester for credit. Additionally, some commentators have recommended that a legal residency be brought back to the profession, similar to what was done as the legal profession initially got its start in the united sates. *See* Tex. A&M School of Law, *Aggie Law Students Selected for Public Policy Externship in Washington, D.C.*, Nov. 17, 2015 at , <https://law.tamu.edu/media/news-media-resources/story/aggie-law-students-selected-for-public-policy-externship-in-washington-d.c> (last visited Mar. 4, 2016); Am. Bar, *Legal Residency: UnitedLex Partners with Law Schools to Give New Grads Work Experience*, A.B.A. J. 35; Quintin Johnstone, Article: Bar Associations: Policies and Performance, 15 Yale L. & Pol’y Rev. 193,195-96 (1996).

<sup>245</sup> *Supra* note 148 at 241.

<sup>246</sup> *Supra* note 148 at 241.

<sup>247</sup> Though the University of Puerto Rico School of Law has previously been listed by FEMA as offering courses focused on disaster law as part of their JD program, the courses were not listed as current available offerings in their most recent course catalog. Universidad de Puerto Rico Recinto de Río Piedras, *Programa De Clases*, 2016 (2016), <http://derecho.uprrp.edu/estudiantes/programa-de-clases-y-calendario-academico/programa-de-clases/> (last visited Mar. 4, 2016).

<sup>248</sup> *Supra* note 148 at 241

funding for travel and (b) understanding of the connection between emergency management and law.<sup>249</sup> Even though a web search can reveal many articles on emergency management law; the demand on lawyers and emergency managers, it is extremely difficult to fully comprehend these concepts via a webpage.

To help remedy this, Law Schools and bar associations should provide regularly annual—or even semi-annual—CLE events aimed at helping current attorneys understand emergency management and the legal aspects of emergency management. These trainings, application workshops and an individual's desire to achieve, can help current attorneys achieve either the AEM or CEM credentials. Though still relatively unlikely, current attorneys are only slightly more probable to have the background and experience necessary to obtain the CEM credential.

*ii. The Public Profession Line of Effort*

The Public Profession Line of Effort focuses on bringing disaster preparedness accreditation programs to the judiciary and local, state, and national bar associations. This line of effort has two distinct objectives that can be accomplished simultaneously in order:

- (a) implementing EMAP accreditation with District and County Clerks, recognizing the work they are already doing in disaster preparedness; and
- (b) implementing EMAP accreditation at local, state, and national bar associations because of the pivotal role they play within their respective communities.

A. Implementation of EMAP Accreditation Programs with the District & County Clerks.

Implementation of EMAP Accreditation along the Public Professional Line of Effort should begin with County and District Clerks. Part of this is because of the critical role that the Clerk's

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<sup>249</sup> *Id.* at 245.

office plays in the judicial system, receiving and maintaining court records for all courts within their jurisdiction.<sup>250</sup> Though data is not publically available, the other part of this reasoning is that because of the Clerk's duty to maintain and protect the records of the courts within their jurisdiction, they are likely to have already implemented many of the requirements for EMAP accreditation.<sup>251</sup> By seeking accreditation, these public entities are officially being recognized for their efforts and acknowledging to their citizenry that they are prepared for a disaster, though they might already be doing so.

### B. Implementation of EMAP at Local & State Bar Associations

Similar to what was seen in the tornado that ripped through Fort Worth, Texas in March 2000, it is likely that local and state bar associations play a critical role in helping firms of all sizes manage a disaster or emergency that has befallen the community. Because of their role in daily life and potential role in emergency

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<sup>250</sup> See Jacqueline J. Byers, *Role of the County Clerk*, Nat'l Ass'n of Counties Res. Brief <http://www.naco.org/sites/default/files/documents/Role%20of%20the%20County%20Clerk.pdf> (last visited Mar. 4, 2016); accord Mason Cnty., *Functions of the County Clerk*, 2016 Mason County Wash. (2016), <https://www.co.mason.wa.us/clerk/function.php> (last visited Mar. 4, 2016); accord Hardee Cnty., *Hardee County Clerk of Courts*, Hardee County, Fla., Aug. 6, 2013 at , <http://www.hardeeclerk.com/?ls=43> (last visited Mar. 4, 2016); accord Harris Cnty., *Role of the Harris County District Clerk*, Harris County District Clerk, Mar. 5, 2016 at , [http://www.hcdistrictclerk.com/Common/about/About\\_us.aspx](http://www.hcdistrictclerk.com/Common/about/About_us.aspx) (last visited Mar. 4, 2016).

<sup>251</sup> See generally Interview with Mary Lou Garcia, Tarrant County Clerk, (Aug. 13, 2015). See also Brenna G. Nava, COMMENT: HURRICANE KATRINA: THE DUTIES AND RESPONSIBILITIES IN THE WAKE OF A NATURAL DISASTER, 37 St. Mary's L. J. 1153, 1162-63 (2006) (noting the U.S. Court of Appeals for the 5<sup>th</sup> Circuit began moving files to the second floor for storage when meteorologists initially warned about Hurricane Katrina a week in advance); Tarrant County Commissioners Court - 9/28/2010, (2010), available at [http://tarrantcounty.granicus.com/MediaPlayer.php?view\\_id=6&clip\\_id=1082&meta\\_id=297744](http://tarrantcounty.granicus.com/MediaPlayer.php?view_id=6&clip_id=1082&meta_id=297744) (discussing the implementation of the Tarrant County Business Continuity Plan to ensure continuity of government operations).



management, local and state bar associations should attain EMAP accreditation as a way of demonstrating the bar's commitment to disaster resiliency, as well as instilling confidence in its members and the community it serves. Because of the quasi-public nature of bar associations<sup>252</sup>, coordinating and implementing EMAP accreditation would likely require minimal—if any—tailoring to meet the needs of the legal profession. Like implementation of EMAP through the Emergency Management Profession, implementation of EMAP within the legal profession should be highly encouraged, yet voluntary, due to the limited resources available to these non-profit organizations.

*iii. The Private Profession Line of Effort*

The Private Profession Line of Effort focuses on bringing disaster preparedness accreditation programs to private firms throughout the United States. This line of effort has three distinct objectives that should be accomplished in sequential order:

- (a) partnership Initiation between the American Bar Association and the Federal Emergency Management Agency (“FEMA”), International Association of Emergency Managers (“IAEM”), and the Emergency Management Accreditation Program (“EMAP”);

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<sup>252</sup> See e.g. Quintin Johnstone, Article: Bar Associations: Policies and Performance, 15 Yale L. & Pol’y Rev. 193,195-96 (1996) (bar associations helps:

- (1) lawyers by: providing opportunities to improve professional skill and knowledge, allowing the development of useful professional contacts, expansion of their client base, and increasing income;
- (2) the legal profession generally by: helping to maintain a competent and ethical guild of lawyers and protecting the profession from unqualified legal service providers;
- (3) the general public by: protecting and strengthening the administration of justice, enhancing the public’s understanding of and respect for the law and legal institutions, and identifying and advocating needed changes in the law while opposing “undesirable” ones).

- (b) an empirical study should be conducted to assess the current climate of disaster preparedness within the legal profession and the expectations of clients; and
- (c) EMAP accreditation at private law firms should be progressively implemented (starting with large law firms) under the supervision of the ABA.

#### A. Partnership Initiation Between ABA and FEMA, EMAP & IAEM

To ease the follow-on efforts of the Education and Private Profession Line of Effort, the American Bar Association should enter into a formal partnership with: FEMA, IAEM, and EMAP.<sup>253</sup> This partnership should allow for routine collaboration in providing regularly scheduled training, program development, and operational collaboration opportunities.

#### B. Empirical Study of Private Sector Emergency Management Accreditation Implantation

Though some attorneys and firms may be inclined to implement emergency management accreditation, many may need

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<sup>253</sup> Currently, the Standing Committee on Disaster Response and Preparedness is not officially partnered with any organization. See Am. Bar, *Committee on Disaster Response and Preparedness*, 2016 (2016), <http://www.americanbar.org/groups/committees/disaster.html> (last visited Mar. 4, 2016). However, the ABA Young Lawyers Division's Disaster Legal Services Program is partnered with the Federal Emergency Management Agency, DisasterAssistance.gov, Disaster Legal Aid Resource Center, American Red Cross, Legal Services Corporation, and National Volunteers Organization Active in Disaster. ABA Young Lawyers Div., *Disaster Legal Service Program*, 2016 (2016), [http://www.americanbar.org/groups/young\\_lawyers/disaster\\_legal\\_services.html](http://www.americanbar.org/groups/young_lawyers/disaster_legal_services.html) (last visited Mar. 4, 2016). Though these Committee on Disaster Response and Preparedness and the Disaster Legal Services Program may share some of the same partners, their focuses are inward and outward facing of the profession respectively. These two groups should not be merged and separate partnership agreements should be drafted between the organizations because of the divergence of the subject matter (disaster preparedness of the legal profession and disaster assistance to individuals and households after a disaster).

some analysis to show the benefit of accreditation. A quantitative research study could best detect a causal relation between accreditation and certification of the private sector legal community, shedding more light upon the benefit of accreditation. It is hypothesized that certification and accreditation will: (1) provide reassurance to clients that the firm (or attorney) have a plan to safeguard his or her tangible property during a disaster and (2) help firms avoid risk exposure during allegations of malpractice or negligence following an emergency or disaster.

Research participants should be asked a series of questions based on the stakeholder group they most align with: (1) client, (2) attorney (personal capacity), (3) attorney (representing a single law firm), and (4) law student. Questions should vary by stakeholder group and be limited to between five and ten questions. To maintain the impartiality of the research, no personally identifiable information should be gathered on the study participants.

Ultimately, this quantitative research study will give a barometer on the current climate of emergency preparedness within the legal profession and client expectations. The results of this study will allow the legal community and American Bar Association to better tailor efforts to implement disaster preparedness accreditation of private law firms.

### C. Progressive Implementation of EMAP Accreditation at Law Firms

Upon completion of an empirical study to gauge the current climate of emergency preparedness within the legal profession, and the expectations of clients during a disaster; EMAP accreditation—or a similar model, narrowly tailored to the legal profession—should be implemented under the supervision of the American Bar Association. Though state bar associations could also supervise the implementation, allowing the ABA's Standing Committee on Disaster Response and Preparedness to do so would allow for more uniform implementation across the United States' legal community. ABA oversight—working in concert with EMAP's Private Sector Committee—would allow for more opportunity to

tailor the EMAP accreditation standards and evaluation of unanticipated nuanced needs of the legal profession.

Due to the time and resources required to achieve EMAP accreditation, implementation of any standard should be done on a volunteer basis. Larger firms—both public and private—are more likely to reap earlier benefits from and able to absorb the costs of EMAP accreditation than smaller firms. Thus, larger firms should be given the first opportunity to work towards EMAP accreditation, progressively working down the proverbial “food chain” over time. Small firms and solo practitioners may not have the resources (human, fiscal, or both) available to achieve EMAP accreditation. Until a cost-effective accreditation program is developed for small firms and solo practitioners, their focus should remain on individual emergency management certifications and self-assessed programs.

## CONCLUSION

As disasters have likely become more foreseeable today, shouldn't the legal profession place preparation of them among their top priorities? Additionally, shouldn't the legal profession—as our nation's premier public policy developers and gatekeepers of justice—guide our community's leaders in addressing some of the most complicated questions facing our communities before disasters strike? Though there has been some work done towards bridging the gap between the legal and emergency management professions, more still needs to be done.

The EMAP and CEM Programs have been in existence within the Emergency Management community for decades. Because the emergency management profession develops, publishes, and reviews standards for emergency management in various industries<sup>254</sup> the legal profession will have a solid foundation to

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<sup>254</sup> Currently, the US Army Corps of Engineers has seven of their forty-three districts (16%) EMAP accredited, the Centers for Disease Control and Prevention is accredited, and Idaho State University, Virginia Tech, and The University of Alabama have EMAP accreditation. *See supra* note 144; U.S.

help mitigate professional responsibility and civil liability pitfalls during a disaster.

Adopting accreditation and certification programs currently used by the Emergency Management profession will allow the legal profession to prepare itself for disasters and emergencies and provide an expanded knowledge base that emergency managers can be drawn upon. Not only will this help save lives and preserve property; but, it will also ensure access to justice after disaster strikes; making governments at every level more resilient in the face of calamity.

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Army Corps of Engineers Headquarters, *Map: Where We Are*, 2016 U.S. Army Corps of Engineers (2016), <http://www.usace.army.mil/Locations.aspx> (last visited Mar. 5, 2016). Additionally, several hospital systems in progress though none have received official accreditation. *Supra* note 151.