

State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Courtesy Chapter

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*This book is dedicated to Attorneys General
and the men and women who work for them in the
56 jurisdictions. They continue to make an important
contribution to state government and the American legal
system. Without them, there would be no book to write.*

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This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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CHAPTER 24

Disaster Preparedness and Response

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The role of state attorney general offices in disaster planning, recovery and response varies widely from state to state. The attorney general's powers and duties are delineated by the structure of the state government, state emergency planning and decision-making by the governor. The attorney general's role as the state's lawyer and, in many cases, counsel to state agencies, means that the involvement of the attorney general in disaster planning and response is essential.

GENERAL POWERS AND DUTIES IN DISASTER PREPAREDNESS AND RESPONSE

Attorney general offices generally serve as a support agency in times of disaster or emergency. This role can be a function of evolved practice or custom or be explicit within formal state emergency planning. For example, compare Massachusetts, where emergency response by the attorney general's office is conducted according to informal arrangements and understanding among agencies rather than by statute or other sources of authority, to Alabama, where legislation specifies that the Alabama office of attorney general plays a legal advisory and support role for all primary responders.¹

Most attorneys general represent primary response agencies, such as the Department of Emergency Management or Department of Public Safety, in administrative and judicial actions. Therefore, attorneys general must take

1 ALA. CODE § 36-15-1.

an active role in drafting legal documents, advising emergency responders, and reviewing state actions, all with an eye towards both proper and effective enforcement of the law and minimizing litigation in the aftermath of a disaster. Additionally, attorneys general are often uniquely equipped to publish opinions that provide legal guidance to the state in future emergencies. For example, in terrorist situations, civil liberties issues arise that involve complicated constitutional questions that are best dealt with by Attorney General offices prior to an event, so there is no uncertainty for state actors should such an attack occur.

In exercising their general duties as the states' lawyers, attorneys general have an active partnership with governors' offices. In some states, this relationship can be complicated because the governor's office may have its own counsel. However, it is often part of the attorney general's responsibility to carve out a place in the drafting and reviewing of emergency declarations or proclamations emerging from the governor's office despite the existence of staff counsel. For example, in New Hampshire, the governor has historically had staff legal counsel, but the level of involvement of that counsel has varied among administrations. Accordingly, the New Hampshire attorney general's office works around such changes and maintains constant participation with the governor in disaster planning, response and recovery activities.

ENFORCEMENT ACTIVITIES: PROTECTING CONSUMERS WHEN DISASTER STRIKES

As a disaster scenario transitions from immediate response to recovery, attorneys general are involved in different ways. It is in the aftermath of disasters that consumer fraud issues arise, a major issue for attorneys general. Attorneys general have always been on the forefront of protecting the general public against consumer fraud and other violations of consumer protection laws. They have broad legal, investigative and remedial authority in the realm of consumer protection and use enforcement of state statutes as well as consumer education to further protection of consumers.

Preparing for Disaster-Related Scams and Consumer Education Efforts

Consumer education and early and vigilant enforcement of consumer protection laws have been the best methods for reducing the incidence of disaster-related fraud and the magnitude of its impact. Attorneys general have honed

the use of their websites to provide citizens with information to help them avoid becoming victims of consumer fraud and to aid in making wise purchasing and contracting decisions. Information posted may include fact sheets, publications or booklets, press releases on recent consumer protection developments, cases or other pertinent information, and links to other consumer related sites. These are all resources that can advise potential victims in advance about best practices, their state's consumer protection laws and their rights under those laws. Consumer complaint forms and consumer fraud hotline numbers are also available on the websites.

In addition to promoting awareness among potential victims through consumer education, attorneys general have taken more proactive steps to combat consumer fraud. Recognizing that deterrence is one of the most effective ways to combat consumer fraud, many offices have made a practice of publicizing early enforcement efforts. For example, in 2006, in the aftermath of Hurricane Katrina, the Connecticut attorney general settled with several gasoline companies for amounts between \$1500 and \$5000 for price gouging violations.² The Connecticut attorney general noted that “more than money, what matters is the loud alarm to the industry,” recognizing the importance of the deterrent effect on the sellers.³

Many attorneys general have taken proactive approaches in their efforts to forestall potential abuse of consumers. For example, in Louisiana, attorney general office staff traveled to towns predicted to be impacted by potential hurricanes. Employees passed out literature on price gouging and other scams, distributed consumer protection hotline numbers, asked local business to post informational flyers and took pictures of price signs at local gas stations in order to monitor potential price gouging. The impact of this was to educate consumers as well as put potential scammers on alert that they would be actively monitored.

In order for attorneys general to carry out their consumer protection duties, consumer complaints must be received and processed. Establishing a consumer complaint hotline is one way to handle complaints. Another way is through consumer complaint forms, which can be made available from the attorney general's office, or on the office's website. In times of disaster, these processes are expanded and adapted in order to ensure that consumers in the state are always able to report abuses and fraud to the attorney general.

When a crisis hits, the volume of calls received can increase dramatically, and one hotline alone is often insufficient. Calls can stream in at more than one

2 See Emily Bae, *Are Anti Price Gouging Legislations Effective against Sellers During Disasters?*

4 ENTREPREN. BUS. L. J. 83, 95 (2009).

3 *Id.*

thousand per month. Within two days of California's 1994 Northridge earthquake, the Los Angeles Consumer Affairs Department set up a fraud hotline and received 150 complaints in its first day.⁴ During the following month, it received more than 1400 complaints.⁵ To prepare for this possibility, offices have come up with ways to rapidly expand their capacity to receive telephone complaints. For example, in case of disaster, the Florida attorney general's office sets up call centers and pre-assigns employees to handle the additional calls that cannot be processed through their single hotline.

In times of disaster, when phone lines may be unavailable or unreliable and travel to attorney general offices becomes impossible, the attorney general handles complaints most efficiently by establishing a presence in the disaster area. This can be done by sending representatives to a state-established Emergency Operation Center. The California and Florida attorneys general both integrate their staff into local assistance centers in order to effectively receive consumer complaints. Another option is to set up satellite offices near affected areas. After a tornado devastated Joplin, Missouri, in 2011, the attorney general opened a mobile office in Joplin and had assistant attorneys general and investigators on site to receive and respond to consumer complaints.⁶ Staff from the attorney general's office were in Joplin for weeks at a time to ensure that those in affected areas would be able to report any fraud or consumer abuse. They received nearly 300 consumer complaints from Joplin storm survivors during the first two months after the tornado.⁷

Price Gouging

As described in Chapter 13, a majority of the states have price-gouging statutes that forbid charging consumers excessive, exorbitant or unconscionable prices for various goods or services during declared states of emergency, times of disaster or market disruptions.⁸ In the wake of the attacks of September 11, 2001 and following Hurricanes Katrina and Rita in 2005, attorneys general took action against gasoline retailers and oil companies for alleged price gouging, as well as

⁴ *Id.* at 88.

⁵ *Id.*

⁶ See Press Release, Office of the Attorney General of Missouri, "Attorney General Koster to Open Joplin "Mobile Office" Monday" (June 1, 2011).

⁷ See Press Release, Office of the Attorney General of Missouri, "Attorney General's Office on Site to Help Joplin Tornado Victims—Koster Outlines Top Five Consumer Complaints Thus Far" (July 13, 2011).

⁸ See, e.g., FLA. STAT. ch.501.160; N.Y. GEN. BUS. L. § 396-r; TEX. BUS. & COMM. CODE § 17.46(b)(27).

actions against generator sellers and hotel, motel and campground owners for charging consumers excessive or exorbitant amounts.⁹

Home Repair and Improvement Fraud

Home repair and home improvement scams are unfortunately common after a disaster. Faced with the massive task of recovering and rebuilding, disaster survivors are a very vulnerable population. Many people want to begin rebuilding immediately, and most do not yet have the funds to do so. Scammers take advantage of the situation by offering loans or a credit card requiring an up-front fee, but the consumer receives nothing in exchange. Fraudulent safety inspections or water testing scams prey on fears people have about the safety of their electric heaters or their drinking water in the immediate aftermath of a disaster. Additionally, fraudulent firms may try to sell overpriced or useless water treatment devices by offering to test water for free. Some states, like Ohio, have enacted “cooling off” periods for door-to-door sales to protect consumers from high pressure direct sales of these and other goods.¹⁰ These laws provide the purchaser with a three-day period during which a contract made under those circumstances can be canceled.

“Fly-by-night” or transient contractors and merchants also pose a threat to a recovering disaster area. These contractors typically do not hold a valid business license and insist upon a substantial cash deposit up front. In many cases, they do not return to complete the work or, if they do return, they perform the work in a substandard manner. Some attorney general offices have found criminal sanctions effective against habitual home improvement con artists.¹¹ Other states assess civil penalties to provide restitution to their citizens.

In 2013, the Missouri attorney general sued a claims adjuster and insurance company who accepted insurance proceeds and checks from three homeowners who were tornado victims and never provided any home repairs. The adjuster was found guilty of two counts of stealing, and three counts of unlawful merchandising practices.¹²

In addition to vigorously enforcing consumer protection laws by bringing legal action, some offices have found an even more effective form of protection is through prevention. For example, the Consumer Protection Division of the

9 For a more detailed discussion, see Chapter 13.

10 See OHIO REV. CODE ANN. § 1345.21 *et seq.*

11 See 815 ILL. COMP. STAT. § 515/1 *et seq.*

12 See Press Release, Office of the Attorney General of Missouri, “Attorney General Koster Obtains Prison Sentence for Contractor Who Scammed Joplin Tornado Victims,” (Nov. 17, 2014).

Mississippi attorney general offers a model contract for consumers to use to avoid being scammed by a dishonest contractor.¹³ The model contract requires basic contact information, description of the job to be done and goods required and estimated costs for material and labor.¹⁴ It also specifies that the down payment due immediately must not exceed 25% of the total contract price.¹⁵ This creates a paper record that the attorney general office can use to help locate con artists, a major enforcement obstacle in these types of cases. Use of the model contract by citizens also serves as a deterrent to disreputable contractors. Other attorney general offices, such as Louisiana, have also adopted similar model contracts for their citizens' use.

North Dakota's response to the threats posed by transient contractors was to create an expedited registration process for contracting businesses and individuals.¹⁶ The North Dakota attorney general's office requires that applicants submit personal information, including contact information, personal descriptions, license numbers and insurance or bonding information.¹⁷ Applicants are also required to submit a criminal history background investigation and authorize disclosure of discovered information.¹⁸ This information is then made available to consumers so they can ensure they are contracting with reputable businesses or individuals who have been vetted by the state.

Charities Fraud

Many attorney general offices have enforcement and supervisory powers over charitable trusts and solicitations and may bring legal action as is appropriate to protect the public interest.¹⁹ Attorney general offices have the responsibility and authority to protect the public and donors from deceptive and fraudulent solicitations practices and diversion or waste of donated funds and ensure proper use of contributed funds for the beneficiaries benefit.²⁰

13 Office of the Attorney General of Mississippi, A CONSUMER GUIDE: TIPS FOR STORM VICTIMS.

14 *Id.*

15 *Id.*

16 Transient Merchants License Application, Form SFN 52899 (Oct. 2017).

17 *Id.*

18 *Id.*

19 The powers and duties of attorneys general with respect to charities is discussed in greater detail in Chapter 12.

20 James J. Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218, 259-65 (2003) (tracing the past and present role of the Attorney General offices in holding charities accountable).

Bogus charities crop up almost immediately after disasters. Attorney general office investigations and enforcement efforts are a key to combating such bogus charities. It is important to note that charitable scams in the aftermath of a disaster often have a scope that far exceeds the actual areas damaged. After Hurricane Katrina, the FBI reported that it had identified over four thousand fake charity websites that received donations from all over the world.²¹ A large part of the effort to combat bogus charities, like other types of consumer fraud, is education, such as circulating tips and donation best practices. Maintaining a charities registry is often the first tool offered by attorneys general to guard against donations to fraudulent charities.

In most states, charities are required to register with the attorney general. Registration and financial reporting requirements under state laws, however, are not universal or consistent. They vary in their definitions of charitable organizations, procedural requirements and the financial and other information required. For example, in California, all charitable corporations incorporated in or doing business in that state are required to register with the attorney general's Registry of Charitable Trusts.²² While California defines charities expansively, in Texas, only those charities "which solicit for law enforcement, public safety or veterans causes" are required to register with the Texas attorney general.²³

Detailed information about each charity can also help attorney general offices expedite relief to victims of a disaster. The New York attorney general's Charities Bureau sent a questionnaire to each charity claiming involvement in Hurricane Sandy relief work. The surveys showed that a percentage of the funds they collected remained unspent because of the charity's lack of capacity to manage the donations, the time a charity was taking to ensure the funds were spent where needed, or the allocation of funds to a charity's administration. In many cases, the Bureau was able to intervene to remedy the situation and hasten the distribution of goods and services to those in need.

In addition to registration requirements, attorney general offices can use their knowledge of and special relationship with charities to encourage them to coordinate their operations and set up an information sharing system among charities that can be helpful to the public. After the attacks of September 11, 2001, New York's attorney general took a proactive approach towards maximizing efficiency and effectiveness of charitable organizations. Within fifteen days of the attacks, \$500 million had been donated to assist victims and their families. The

21 Charity Navigator, *Protecting Yourself from Online Scams*, at <http://www.charitynavigator.org>.

22 See CAL. GOV. CODE §§ 12580–12599.7.

23 TEX. OCC. CODE §§ 303.001, 1803.001, 1804.001.

attorney general began publicizing the need to coordinate charitable efforts.²⁴ He pushed charities to work together and provide basic information on the funds they were receiving and how they were distributing that money. His goal was to “help avoid duplication and overlapping disbursement of funds.”²⁵ The attorney general used the influence of his office and the relationship he had with charities in New York to motivate nearly 200 charities to list themselves on a database created through his office in October 2001 to provide relief information to the donating public as well as victims seeking assistance.²⁶ Within one year, charities had received over \$2.2 billion dollars, 90% of which was tracked in a publicly available database.²⁷

The victims of some disasters may require a very broad range of services. In the aftermath of the Boston Marathon bombing, the Massachusetts attorney general’s office worked with other state agencies, the FBI victim services division and the Red Cross to establish a family assistance center. By gathering all of these agencies into a central location, they enabled victims and their family members to receive assistance in one place outside of the presence of media.

ADDITIONAL ATTORNEY GENERAL RESPONSIBILITIES DURING DISASTER RESPONSE AND RECOVERY

Federal Reimbursement and Recordkeeping

In the course of responding to a disaster and dealing with its aftermath, attorney general offices may incur expenses that can be reimbursed by the state or federal government. Attorney general offices are responsible for keeping close track of hours worked by state employees and resources expended by state agencies in order to minimize litigation after the fact and maximize federal reimbursement for the state. This can be an incredibly complicated task, especially considering how fast paced and hectic disaster response and recovery can be. In order to expeditiously obtain reimbursements, offices often come up with some

24 See Press Release, New York State Office of the Attorney General, “Statement by Attorney General Eliot Spitzer Regarding the Need to coordinate Charitable Efforts” (Sept. 26, 2001).

25 *Id.*

26 See Press Release, New York State Office of the Attorney General, “AG’s Office Overview of 9-11 Giving” (Sept. 5, 2002).

27 *Id.*

kind of system that enables them to identify and track those expenses that can be recovered.

The Mississippi attorney general successfully tracked expenses associated with the state response to Hurricane Katrina by using a coding system. The attorney general's accounting department added a separate organizing code for Hurricane Katrina to their usual accounting system. This accounting system already required employees to bill time or invoices to different state agencies using an assigned code, and by adding this additional new code, expenses attributed to disaster response and recovery were made easily identifiable after the fact. Attorneys, investigators and other employees tagged their activities, overtime hours, purchases made and any other funds expended towards recovery after Hurricane Katrina, and the office was able to recover almost all of its reimbursable expenses. Another strategy, used by the Florida attorney general, is a system under which all employees are given an itemized Federal Emergency Management Agency (FEMA) form as they are assigned to disaster related activities. This form lists all recoverable expenses, so employees know what actions to tag as they operate on the job. Failure to carefully track these numbers and appropriately label them can cause the loss of millions in state funds.

A major challenge to getting full federal reimbursements includes changes to FEMA forms, standards and requirements. Some offices, such as Louisiana and Florida, have adapted to the constantly evolving landscape of federal reimbursement by developing a relationship with a point person in FEMA and maintaining that relationship so they will be apprised of changes as they occur, rather than attempting to address them in the midst of a disaster. Florida has made its FEMA point person a part of the emergency management committee.

The unique organizational structure of federal disaster response teams can pose other obstacles. FEMA contracts with 28 search and rescue task forces in 19 states to provide local rescue efforts. However, when a disaster occurs in one of those 19 states, FEMA policy considers the team to be a state asset and the task force will not be federally deployed for any in-state event. When the Washington attorney general office needed to provide relief to victims of the Oso mudslide in 2014, it had to act quickly to deploy the Washington task force under state authority before FEMA would divert additional teams to provide assistance.

Another hurdle to reimbursement is maintaining all records from the disaster in case of a FEMA audit, which may occur two to three years after the disaster takes place. In order to fulfill this potential requirement, detailed records should be kept from the outset and carefully stored.

Emergency Management Assistance Compact and Other Interstate Aid Agreements

The Emergency Management Assistance Compact (EMAC), which has been ratified by Congress and is law in all fifty states and the District of Columbia, was created to offer fast and flexible assistance during governor-declared states of emergency. Through EMAC, states can send personnel, equipment and commodities to help disaster relief in other states. EMAC further encourages states' cooperation in response and recovery by providing such legal protections as tort liability protection, workers compensation and reimbursement.

In addition to EMAC, states also often have mutual aid agreements with other states in their region. Attorney general offices must be aware of what duties and responsibilities these agreements and EMAC trigger, such as whether those duties and responsibilities are mandatory or voluntary, and any legal requirements or issues that can arise in fulfilling them. For example, as discussed above, EMAC allows other states to send employees to an impacted state with the understanding that issues of liability, reimbursement, licensure, workers compensation and others have already been addressed. However, in order for all of those protections and benefits to be activated, employees must be deployed according to the EMAC procedure, which requires, among other things, that the receiver state experiencing the disaster follow the necessary process in requesting the help of the responder state. The attorney general, as the legal officer of the state, must ensure that proper steps are followed to prevent future litigation and ensure proper reimbursements.

GOING FORWARD IN DISASTER PREPARATION AND PLANNING

Enabling and incentivizing the private sector to participate in disaster response will be an issue for the attorneys general in the coming years. The private sector is often able to respond to citizens' needs more effectively and efficiently, so some state governments have found that partnering with the private sector and encouraging it to take a larger role in disaster recovery is a very effective strategy for moving forward.

However, liability and privacy issues, among others, can create unanticipated barriers towards private sector participation. One way these obstacles can be overcome is through legislation, which is the route chosen by California. California developed a Liability Registry to enable the state to provide limited protection from liability for private businesses and non-profit organizations

that are interested in donating services, goods, labor, equipment resources, dispensaries or other facilities during emergencies and disasters in California.²⁸ A company is not required to donate if it participated in the Liability Registry, but registering provides private companies legal protection if they decide to do so.²⁹

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28 CAL. GOV. CODE §§ 8588.2, 8657.5.

29 *Id.*