
CHAPTER 7

Experiencing the 2004 Florida Hurricanes: A Lawyer's perspective

by Alfred O. Bragg, III

Introduction

This chapter shares the experience of providing legal services in the context of an actual disaster, in this case, a series of them. The writer had the privilege of acting as legal counsel to the Florida State Emergency Response Team during the unprecedented series of hurricanes that ravaged the state over the course of almost seven weeks, beginning on August 10, 2004. This is a reflective look at what a lawyer in that situation is likely to be called upon to do, and it is being provided to help other lawyers anticipate some of the problems that may arise. While emergency situations are rare, it may be useful when they do occur to have had the opportunity to understand and anticipate what lawyers may be called upon to provide their governmental clients. This chapter presents a chronicle of some of the problems that government counsel may be called upon to deal with in such emergency situations.

The Legal Context

In the United States, it has never been quite true that the measures needed to meet emergencies are outside the strictures of the law;¹ it is more accurate to say that, in the past, the law and its normal processes have been too slow to keep up with the pace of emergencies. This is probably even more accurate given the potential of new threats of terrorist acts and other situations that have not been encountered previously.

The ability of lawyers to function in such pressure situations is changing with the development of ever-faster microprocessors. This evolution of information and its processing, in less than a generation, has vastly improved the lawyer's ability to function in such situations. While the rise of the Internet and the refinements in the microprocessor have transformed the practice of

law, it is not as well known that these developments have created whole new legal specialties. The role of legal counsel in representing emergency managers while responding to disasters is one of these, and their ability to perform has been improved greatly as a result of these developments.

As an emergency situation unfolds, a lawyer must make many legal decisions in rapid-fire sequence. If properly prepared, and with access to relevant legal materials, it is now possible to render legal advice and guidance to clients in the real-time environment of a cascade of events that arise from a single, albeit many faceted, cumulative disaster. In the past—and even now, unless advance thought is given to the situation confronting the lawyer—it was not possible to give the client for consideration all the applicable legal variables that would allow a better informed set of decisions.

The improvements in information processing, and the speed of access to information, has changed all this. Clients can be given a better grounding in the law that is relevant to the operational decisions that need to be made while options are still open. This differs from decision making during disaster response only a few decades ago, when the only variables considered were operational ones; the actions taken rested solely on operational needs, and only after those needs were met were the legal consequences of the actions considered. Whether actions complied with legal requirements (and therefore triggered liability or other legal exposures) remained largely up to chance.

In performing as legal counsel, a lawyer now has the opportunity to provide timely advice from a position of advantage in several respects. First, the lawyer has the use of up-to-date computer hardware and software unknown to most members of the legal profession even fifteen years ago. Second, in responding to events during the recent spate of Florida hurricanes, the lawyers operating from a workstation in the State Emergency Operations Center had immediate access both to the State Coordinating Officer and to the personnel staffing all of the state's Emergency Support Functions. Third, because these lawyers had been involved beforehand in every exercise the Division of Emergency Management had staged for five years, a close working relationship had evolved that resulted in the lawyers being able to interact successfully with the operational personnel.

This provided an opportunity for the lawyers to play an integral role and to take advantage of the relationships built from the earlier training opportunities on the operational side. Each of these advantages made its own contribution and allowed the lawyers to play a significant role in an evolving process in which the state coordinating officer, in effect, had to rewrite the law of the state to enable it to meet an unprecedented series of disasters.

The Florida Legal Environment

Under the Florida Constitution, as in many states, the power of the state to act in emergencies is vested in the governor as its chief executive authority. The governor is the “commander-in-chief of all military forces of the state not in

active service of the United States . . . [and] the chief administrative officer of the state responsible for the planning and budgeting for the state.”² The state constitution further provides that the governor “shall have power to call out the militia to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion.”³

Much of the Florida governor’s authority to meet emergencies comes from the state’s constitution. Nevertheless, the legislature also has allowed for the exercise of that authority in the Florida Emergency Management Act, which creates the Division of Emergency Management, and spells out specific operational roles for the governor and his or her subordinates in responding to disasters.⁴

Upon being notified of a disaster in the state that is beyond the response capability of the local government, the State Emergency Response Team is likely to advise the governor to declare a state of emergency. The declaration or proclamation of an emergency, usually in an executive order, has a life of only sixty days, unless renewed.⁵ Unless the event is a “minor” disaster within the meaning of the act,⁶ the governor also is likely to request the president of the United States to declare it a major disaster in accordance with the Stafford Act.⁷ This is one purpose of the proclamation or declaration. Another is to designate a “state coordinating officer” for the disaster, not only to delegate the operational powers of the governor to that official,⁸ but also to give the state coordinating officer the power to act for the state as the governor’s “authorized representative” in dealing with the Federal Emergency Management Agency (FEMA).⁹

The declaration or proclamation of a state of emergency opens with a recital of the event or series of events that constitute the disaster and classifies it as a minor, major, or catastrophic disaster.¹⁰ The proclamation declares the existence of a state of emergency and defines its territorial scope,¹¹ which may be statewide. Depending on the complexity of the response demanded by the disaster, the declaration or proclamation may not only designate a State Coordinating Officer and Authorized Representative,¹² but may activate the Florida National Guard.¹³

In recent years, declarations of emergency issued by the governor have delegated the following powers to the state coordinating officer, all of which are vested in the governor in the first instance by the Emergency Management Act: the authority to suspend the effect of any statute, rule, ordinance, or order of any state, regional, or local governmental entity as needed to cope with the disaster;¹⁴ to direct all state, regional, and local governmental agencies, including law enforcement agencies;¹⁵ to confiscate any private property needed to meet the disaster;¹⁶ to order the evacuation of all persons from any part of the state and regulate the movement of persons and traffic within the state;¹⁷ and to redelegate his powers to subordinates by the designation of one or more “deputy state coordinating officers” and “alternate authorized representatives” to act in his absence.¹⁸ As it turned out, this redelegation proved critical in the 2004 hurricanes, because senior officials were scattered in different locations as the disasters passed from one phase to the next; the state was well

into the process of trying to recover from Hurricane Charley while Hurricane Jeanne was on its way to making landfall.

The declaration of a state of emergency has yet other effects that arise by operation of law, regardless of whether the executive order mentions them. Agencies are relieved of budgetary restrictions as needed, and are allowed to exceed these restrictions in meeting the emergency.¹⁹ Under the Florida Mutual Aid Act, the director of the Department of Law Enforcement takes direct command of all the state law enforcement agencies, regardless of whether they are statewide or local.²⁰ One immediate effect of the declaration of emergency is to freeze the prices of essential services and commodities, and any increase in prices following the declaration gives rise to a rebuttable presumption of price gouging that may subject the offender to judicial penalties.²¹ The state of emergency also gives all executive and administrative agencies independent legal authority under the Florida Administrative Procedure Act to promulgate emergency rules and orders to the extent that the latter are needed to meet the emergency.²²

The Florida Operational Environment

The activities that comprise emergency management in its broadest sense have been clustered into four classes of activities: preparedness, response, recovery, and mitigation. The first and last are preventive in character.²³ The response and recovery phases are remedial in the purest sense. Unlike response, the recovery phase may take years depending on the scale of the disaster. The response phase may be the one best known to the general public, because the response activities take place just as the disaster qualifies as “breaking news,” and attention from the press is at its height.

The response to a disaster is different from the other three phases of emergency management in the salient respect that, in the response phase, everything happens much faster. The other three are “planned” processes in the sense that disaster planners have some time to engage in operational planning. The response to a disaster can be planned only insofar as preparedness measures ensure that needed resources are staged and in place, and that vulnerable elements of the population are ordered to evacuate those areas in immediate danger. Beyond that, the only “planning” function is performed by the disaster itself, which dictates the response needs as it moves in and has its way.²⁴ In the end, the disaster determines its own response.

Another fundamental characteristic of the response phase follows from the first: Its unpredictability. While some response needs are foreseeable (generators, water, shelter), not all of them are. Construction cranes may be needed to remove wreckage from highways before anything else can be done. Even the resources known to be needed cannot be delivered to the scene until conditions allow. Without knowing what obstacles lay in their way, responders can only estimate their time of arrival at the scene. Information concerning physical conditions at the scene may be conflicting or nonexistent. In many large disasters, the first mission may be the removal of wreckage from highways, airport runways, or other components of the transportation infrastructure.

Humane assistance from the outside may not be possible until at least some part of that infrastructure is up and running.²⁵

This, then, is the operational environment in which legal counsel must function; to most lawyers it is an alien setting. Lawyers are accustomed to bringing order out of chaotic situations after the fact, not while the chaotic events themselves are occurring.²⁶ With the onset of the disaster, a communications blackout may ensue. During this interlude, no information from the scene is forthcoming at all. This is likely to be followed by a cascade of information, much of it conflicting, and only some of it reliable. Once communications with responders at the scene are established, reports and requests for missions flow in torrents; the operational environment that at first was made chaotic by too little information is now made chaotic by too much.

With the director of the Division of Emergency Management now acting as state coordinating officer, and a state of emergency in place arming him with the authority to rewrite the law as needed to meet the disaster, the question becomes what legal actions are needed. The state coordinating officer and his subordinates take these actions in one of two ways. The first, and far more common, is the assignment of missions that cannot be performed without infringing on some legal requirement, such as the statutory requirement for competitive bidding in the procurement of services and supplies. To the extent that the statutes and rules setting up the procurement procedures may impede the timely performance of the mission, the mission assignment or other order by the state coordinating officer is deemed *pro tanto* to have overridden any competing statutory or regulatory requirement.²⁷

The second is at once more formal and less commonplace. In accordance with his delegation of authority from the governor, the state coordinating officer may issue his own formal written orders to override legal requirements that threaten to delay or otherwise impede the response to a disaster. Through gradual experimentation, lawyers have devised approaches for use of such orders in Florida,²⁸ although this device almost surely exists in other jurisdictions. Drafting such orders to meet a fluid situation is a chronic challenge. During the recent hurricanes, the challenge differed in degree, but not in kind, from those posed by lesser disasters.

Like other disasters, hurricanes generate so many different kinds of crises that it is impossible to foresee even a substantial fraction of the situations calling for legal intervention. Anyone can foresee that evacuations have to be ordered, turnpike tolls lifted, highways reconfigured for one-way traffic, and utility equipment sent in from other jurisdictions to restore electrical power; all these measures require the state coordinating officer to supersede one or more statutes, rules, or other legal requirements.

Less apparent is the need to override other statutes and rules whose requirements may have become impossible to meet due to the disaster, or that have to be modified in order to enable government and regulated businesses to function under disaster conditions. Like the potential universe of smaller emergencies bred by one large disaster, the potential universe of legal issues awaiting emergency management counsel has no boundaries; counsel may expect almost anything.²⁹

The Police Power

It is also vital for emergency management counsel to stake out in advance the known boundaries of the police power as it relates to general emergencies in their jurisdiction, regardless of whether the application of that power has been codified in legislation or exists only in decisional law. Such information is the *sine qua non* of the law governing disaster response; without it emergency managers cannot undertake any response operation with adequate assurance that it passes legal muster.

While to a large extent the Florida Emergency Management Act codifies many of the specific acts that constitute the exercise of the police power as it applies to emergencies, it should be recalled that the police power is an attribute inherent in the powers of the state as sovereign, and that the existence of legislation allowing for its exercise within a specified organizational structure should not be construed as a limitation on the power to take the measures needed in emergencies.³⁰ Even after the legislature has invoked its constitutional powers by the creation of a comprehensive statutory and regulatory scheme through which the governor can meet emergencies, an untapped residue of constitutional authority still may be present. If legal counsel for emergency management are allowed to participate in crafting the proclamation or other document by which the governor declares a state of emergency, they should frame the document so that, in it, the governor invokes this residual authority as well.³¹

Counsel may not always find the boundaries of the police power easy to locate, especially as applied to general emergencies in their jurisdiction. The precedential boundaries established by statutes that were passed to regulate such day-to-day matters as building, zoning, and sanitation do not measure the scope of the police power in emergencies, because in emergencies the stakes are higher. During Hurricane Frances, counsel advised a local government that it had legal authority to bulldoze a system of drainage pipes on private property. The local government had tried to find the owner to procure his consent, but had not been able to. The water in the system was backing up so that some sixty nearby homes were in danger of flooding. Venerable precedent was available to apply the police power to allow the destruction of property in order to protect the community as a whole.³² The essential lesson for legal counsel is to identify such applicable precedents in advance and have them at hand concerning the limitations of the police power, favorable and unfavorable alike, so that emergency managers and responders can be advised at least as to what extent legal grounds support their decisions.

The Balance Between Authority and Power

If every issue posed to emergency management counsel were a "legal" issue in its purest sense, the professional duties of counsel would be much easier to perform than they are in fact. In addition to the likelihood that, during the opening hours of the disaster, counsel may be asked to render legal advice and guidance based on information that is inaccurate or incomplete, ethical issues

also are likely to arise. The pivotal question of how best to meet the state coordinating officer's operational objectives has a surface simplicity that belies some of the complexities of the operational environment. Difficult decisions are made more so when ethical issues are piled onto the legal ones. Such issues may beset lawyers even where their client has sufficient legal authority to act. Indeed, sometimes it is in the very environment where the operational side of disaster response has an abundance of legal authority that ethical questions may loom the largest.

The sweeping delegation of authority from the governor to the state coordinating officer relates to this in several ways. First, the delegation concentrates formidable powers into the hands of the state coordinating officer. Second, these powers are not the exercise of executive powers only. While countenanced by authorizing legislation or based on constitutional powers relating to emergencies, the exercise of such authority may be used to countermand, at least for a time, other laws adopted by the legislature. Exercising that emergency authority intrudes upon the legislative function. This is something more than the exercise of executive power. Third, as a practical matter, the state coordinating officer is often too preoccupied with operational duties to select *ad interim* statewide policies from the wide array of options available, for better or worse. This may include such quasi-legislative determinations as choosing which features of the statute or rule should be suspended, for how many days, and for which cities or counties.

Often, these decisions are left to counsel. Therefore, counsel must take on the added role of policymaker. This should not come as a complete surprise. Beset on all sides by operational and logistical headaches of every description, it is natural for the state coordinating officer to defer to counsel in any legal matter, and in so doing, counsel may even be asked to set the relevant parameters of the policy. In such circumstances, lawyers should understand that they are assuming a multiple role that may compromise their independent professional judgment, or pose yet other ethical issues.³³

Even counsel who are able to function free of ethical distractions may find it a challenge to strike a proper balance in the preparation of emergency orders. On one hand, counsel must frame the orders to ensure that agencies or other parties are relieved of literal compliance with a statute or rule whose requirements can no longer be met, or circumstances arise where adherence to those requirements cannot be justified in the face of an emergency. On the other hand, an important role and obligation of counsel is to limit the scope and duration of the order, so that it is no broader than necessary to achieve the intended purpose. By declaring a state of emergency, the governor has not only called up the formidable powers of that office to countermand what the legislature has done, but has in turn delegated that power to a state coordinating officer, who has not been elected by anyone.³⁴

It therefore falls to counsel to be aware of the need to strike the appropriate balance between what is needed to meet the disaster and the public interest in restoring the law to its *status quo ante* once the need has passed. This is not the only variable in the equation. The interests of various political constituencies do not go into hibernation when disaster strikes. Indeed, some of them see the

disaster as a window of opportunity to achieve ends the law denies them in ordinary times. Counsel may need to anticipate these issues, and be aware of appropriate restrictions on setting limits on actions taken during emergencies.

Lawyers preparing for a role in emergency management must be prepared to assume their roles before an emergency exists, and they need to be familiar with the statutory and regulatory maze applicable to situations where they will be asked to make adjustments to existing policies when the emergency arises. Undertaking this role effectively would not have been possible a generation ago, but the current texts of relevant statutes, rules, and cases are now only keystrokes away. Regardless of the positions urged by other agencies and special pleading by outside constituencies, counsel for the state coordinating officer are answerable for the legal and factual integrity of the emergency order, so they must master the subject matter to which the order will apply, at least to ensure that it strikes a proper balance between the immediate object of getting the job done and the narrowness and specificity needed to prevent abuse, whether intended or unintended.

As can be seen from the discussion above, advance planning for the role of legal counsel in emergency situations is essential. Knowledge of the laws, statutory and regulatory, in which counsel will be asked to function is critical to counseling for clients who are likely to be overwhelmed by operational decisions and will be relying on legal counsel for support on the scope and soundness of governmental actions that will be undertaken. Hopefully, the recitation of only some of the issues encountered in Florida's recent hurricane emergencies may stimulate counsel in other jurisdictions to prepare themselves to take on similar roles.

NOTES

1. *See* *Sterling v. Constantin*, 287 U.S. 378 (1932).
2. FLA. CONST. art. IV, § 1(a) (1968).
3. FLA. CONST. art. IV, § 1(d) (1968). In addition, the constitution provides for the continuity of governmental operations: "Upon vacancy in the office of governor, the lieutenant governor shall become governor. Further succession to the office of governor shall be prescribed by law . . ." FLA. CONST. art. IV, § 3(a) (1968).
4. FLA. STAT. §§ 20.18(2)(a), 252.32(1)(a), 252.36(1)(a) (2004).
5. FLA. STAT. § 252.36(2) (2004). Proclamations and declarations of states of emergency have the force and effect of law. FLA. STAT. § 252.36(1)(b) (2004).
6. FLA. STAT. § 252.34(1)(c) (2004).
7. 42 U.S.C. § 5170 (2000).
8. *See* FLA. STAT. § 252.36(8) (2004).
9. 42 U.S.C. § 5143(c) (2000). During recent years, the division's director has performed the role of state coordinating officer. The designations of "State Coordinating Officer" and "Authorized Representative" have the same meanings assigned to them in the regulations that implement the Stafford Act. *See* 44 C.F.R. §§ 206.2(a)(13), 206.2(a)(23) (2004).
10. FLA. STAT. § 252.36(3)(c) (2004).
11. FLA. STAT. § 252.36(2) (2004).
12. *See*, FLA. STAT. § 252.36(8) (2004).

13. FLA. STAT. § 252.36(4) (2004). Depending on the type of expertise needed in responding to the disaster, the declaration may also designate one or more “incident commanders.” *Id.*

14. FLA. STAT. §§ 252.36(5)(a), 252.46(2) (2004); *see* FLA. EXEC. ORDER NO. 04-192 (Sept. 1, 2004) (Hurricane Frances); FLA. EXEC. ORDER NO. 04-206 (Sept. 10, 2004) (Hurricane Ivan); FLA. EXEC. ORDER NO. 04-217 (Sept. 24, 2004) (Hurricane Jeanne). All the Executive Orders are on file with the author, as well as with the Florida Secretary of State.

15. FLA. STAT. §§ 252.36(5)(b), 252.36(6) (2004).

16. FLA. STAT. §§ 252.36(5)(d), 252.43(1), 252.43(3) (2004).

17. FLA. STAT. §§ 252.36(5)(e), 252.36(5)(f) (2004).

18. FLA. STAT. §§ 252.36(4), 252.36(8) (2004). In addition, the declaration directs the state coordinating officer to activate the Statewide Comprehensive Emergency Management Plan, to invoke the Statewide Mutual Aid Agreement and Emergency Management Assistance Compact, and to distribute all supplies stockpiled for emergencies. *See* FLA. STAT. §§ 252.36(3)(a), 252.36(3)(b) (2004).

19. FLA. STAT. § 252.37(2) (2004). When the governor declares a state of emergency, the act also gives the chief financial officer the authority to take over the operations of any financial institution in the state or to enter any other orders needed to ensure its financial soundness. *See*, FLA. STAT. § 252.62(2)(a) (2004). In disasters other than minor ones, the declaration also constitutes authority for medical practitioners licensed in other jurisdictions to practice in Florida, subject to such conditions as the declaration may prescribe. FLA. STAT. § 252.36(3)(c)(1) (2004).

20. FLA. STAT. § 23.1231(2)(d) (2004).

21. FLA. STAT. §§ 501.160(1)(b), 501.160(2) (2004).

22. FLA. STAT. §§ 120.54(4)(a), 252.46(1) (2004).

23. Mitigation is the coordination of planning, zoning, building and other land use policies to ensure that when a disaster strikes, its impact will be minimal; each state must submit its own state plan to be eligible for federal mitigation assistance. 42 U.S.C. § 5165(a) (2000); *see*, 44 C.F.R. § 201.4(a)(1) (2004). Mitigation strategies may include the placement of infrastructure away from zones prone to flooding, and the dedication of such lands for use as green space. Preparedness is a well-known aspect of emergency management; typical preparedness measures include the simulation of disasters in formal exercises whose “players” include elected officials, emergency managers, and responders at all levels of government.

24. The expression “disaster,” as used here, is intended to cover not only the event itself (such as a fire, hurricane or explosion), but its primary effects (casualties and the destruction of infrastructure), as well as secondary consequences (looting, injuries to responders, congestion on highways resulting from evacuations), and tertiary ones (stalled vehicles on highways, stranded passengers running out of prescription medications, and altercations between drivers). Large disasters tend to breed smaller ones.

25. Response measures in Florida are aggressive rather than passive; resources are pushed to the scene regardless of whether local officials have requested them. The rationale for this is simple: It is better to have too many commodities and supplies on hand than too few, and, in any case, sooner is better than later.

26. Members of the legal profession are trained to intervene in situations that are in disarray and restore them to order. In many such cases, the lawyer at least finds the situation stable in the sense that it cannot get any worse. Emergency management counsel do not even have this meager consolation.

27. FLA. STAT. §§ 252.36(5)(a), 252.46(2) (2004).

28. FLA. STAT. §§ 252.35(2)(s), 252.36(4), 252.36(8) (2004). During the hurricanes, the state coordinating officer issued some sixty-one Supplemental Orders that overrode statu-

tory and regulatory requirements encompassing such varied subjects as property valuations for ad valorem taxes, the cancellation of homeowners' insurance policies, the staffing requirements for home care services, and the reconstruction of facilities for cattle auctions. All the Supplemental Orders are on file with the author and with the Division of Emergency Management.

29. As one instance, Hurricane Frances threatened to close the Gulf of Mexico to shipping at a time when Hurricane Charley had already depleted fuel supplies statewide; the further curtailment of fuel shipments from refineries could have caused a statewide shortage. To prevent such a shortage, the governor issued an Executive Order "to regulate the allocation and distribution of fuel supplies" during the emergency. FLA. EXEC. ORDER NO. 04-196 (Sept. 5, 2004). In order to protect fuel suppliers from potential antitrust liability, the Executive Order was framed to trigger the protection of state-action immunity for the suppliers. *See, Parker v. Brown*, 317 U.S. 341 (1942).

30. The text of the act itself implies that, in it, the legislature did not use all the constitutional power the state has. FLA. STAT. § 252.33(4) (2004). Moreover, the act obligates the state to compensate the owners of real and personal property that it confiscates in responding to a disaster. FLA. STAT. §§ 252.43(1), 252.43(3) (2004). Yet under the traditional use of the police power in responding to an imminent danger, the state would have no obligation to pay. *See, Nordmann v. Dep't of Agric.*, 473 So. 2d 278 (Fla. Dist. Ct. App. 5th 1985).

31. Florida has shown some reluctance to exercise its police power to the fullest. As one application of that power, the state arguably has the authority to vaccinate persons to prevent communicable disease. *See Jacobson v. Mass.*, 197 U.S. 11 (1905). Yet parents in Florida may elect to allow their children to go without vaccinations. FLA. STAT. § 381.003(1)(e)2 (2004).

32. *See Dudley v. Orange County*, 137 So. 2d 859 (Fla. Dist. Ct. App. 2d <YEAR?>), *appeal dismissed*, 146 So. 2d 379 (Fla. 1962), *cert. denied*, 372 U.S. 959 (1963).

33. Such issues may arise when political constituencies or public agencies with ties to them request the State Coordinating Officer to relieve them of statutory or regulatory requirements that not only can be met, but that should be met to prevent future disasters from being even worse. This writer was informed during Hurricane Frances that one such interest was seeking to reconstruct its public facilities without meeting the requirements of the Florida Building Code.

34. For the state coordinating officer to relieve agricultural officials of bidding requirements on cattle auction facilities for a few weeks to enable local cattle breeders to meet a seasonal market scarcely qualifies as a step down the slippery slope to totalitarian government, but like all other powers, it is capable of abuse. As discussed, *supra*, the danger of abuse here is more likely to come from the very interests the statute or rule was intended to regulate.

Author Bio

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