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## A Legal Guide to Homeland Security and Emergency Management for State and Local Governments

Shawn M. Herron\*

\*Kentucky Department of Criminal Justice Training, Shawn.Herron@ky.gov

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# A Legal Guide to Homeland Security and Emergency Management for State and Local Governments

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## **Abstract**

*A Legal Guide to Homeland Security and Emergency Management for State and Local Governments* is a compendium of articles by attorneys experienced in what is a rapidly expanding new field of law. These articles range from a personal account of the 2004 Florida hurricane outbreak to mutual aid considerations.

**KEYWORDS:** law, emergency management, homeland security

**A Legal Guide to Homeland Security and Emergency Management for State and Local Governments**

By Ernest B. Abbott and Otto J. Hetzel, Eds.

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*Reviewed by*

Shawn M. Herron, J.D.

Staff Attorney

Kentucky Department of Criminal Justice Training

Richmond, KY 40475

In a crisis, decisions must come fast and they must be accurate. Attorneys, as a rule, are accustomed to having prior notice of a concern and sufficient time and the resources available to do necessary research and make decisions. However, attorneys tasked with emergency management decisions may provide counsel for emergency management or emergency responder disciplines on a daily basis, or they may instead be pressed into service unexpectedly during a crisis situation. In *A Legal Guide to Homeland Security and Emergency Management for State and Local Governments*, the American Bar Association has brought together attorneys working in both the public and private sector to close the knowledge gap that exists even for experienced public sector attorneys and to better prepare attorneys to succeed in an often unfamiliar role. These contributors are well-versed in emergency management law and address a variety of topics. No matter what the day-to-day responsibilities of the reader are, however, they will take away valuable information from this book. The Introduction stresses that “a lawyer’s success in representing a jurisdiction as it responds to and recovers from a terrorist attack or natural catastrophe will largely depend on actions taken in advance of the event,” and that theme is the guiding force for the compendium.

The editors, Ernest B. Abbott of FEMA Law Associates, PLLC and Professor Otto J. Hetzel, Wayne State University (Michigan), have chosen to divide the volume into two sections. The first part, Chapters 1 through 6, includes pre-disaster topics, such as airport security, terrorism, public health, and other planning issues and funding. The second part discusses a variety of issues that might arise during and after a disaster strikes.

Among several chapters of particular interest in the first part is Professor William Nicholson’s discussion on “Preparedness for Public Health Emergencies.” With the increasing concerns about avian influenza and its potential to trigger a pandemic, public health has joined the ranks of emergency response disciplines. And like the attorneys for whom this book is intended,

public health personnel must quickly learn a new way of responding – from the process of slow and measured scientific thinking and discussion before a decision is made to quickly deciding upon and then taking an immediate course of action. Professor Nicholson’s review of the interaction between public health and emergency management law, as well as new issues relating to mutual aid, the Emergency Management Assistance Compact (EMAC), and the National Incident Management System (NIMS) is particularly insightful. Professor Nicholson briefly discusses the need for a nationwide credentialing system for public health and medical providers, as well as the confusion concerning the application of Good Samaritan laws – which many incorrectly believe provide blanket immunity from liability for all actions. (In fact, statutes that fall under that label are considerably different from state to state and may provide a false sense of security to volunteers.) He also addresses the limitations of the federal Volunteer Protection Act of 1997.

In the chapter entitled “Homeland Security Begins at Home,” Rufus Calhoun Young, Jr. and Dwight H. Merriam, attorneys practicing in the field of land use, provide a review of factors that must be considered for “terrorist-sensitive facilities,” as well as those that might not be considered a target for terrorism, but that are certainly at risk for local crime. This chapter is more of a compilation of references, including web sites and checklists, but the material included is no less useful for that reason.

In the second half of the book, Alfred O. Bragg, III, assistant general counsel for the Florida Division of Emergency Management, contributes a detailed personal perspective on hurricanes Charley, Frances, Ivan, and Jeanne that pummeled Florida over a period of less than two months in 2004. Bragg notes that an attorney who is properly prepared (and who has access to the necessary relevant legal reference material) is able to provide legal advice to a client “in the real-time environment of a cascade of events that arise from a single, albeit many faceted, cumulative disaster.” This is something an attorney who has not given advance thought to the issues simply is not able to do, particularly if circumstances prevent access to a library or the Internet. Of particular interest, Bragg mentions that the attorneys who represent emergency management in the state of Florida “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.” Whether this is common remains to be seen, but local and state attorneys certainly should be involved in exercises, as they will most certainly be involved during the actual disaster. Finally, Bragg observes that lawyers working in an emergency environment must seek an “appropriate balance” between the immediate need and the long-term

consequences of each and every action, and that attorneys are often forced into the role of policymaker, not just legal counsel.

David A. Trissell and Diane Donley, both of FEMA's Office of the General Counsel, provide an excellent overview of National Response Plan and its interaction with the overall federal response system. In particular, they clarify how *Posse Comitatus* applies in a disaster and discuss the limitations in using the military and laws authorizing emergency actions by the Department of Defense in various situations. Trissell and Donley also provide a concise description of new entities created by the Department of Homeland Security, including the Homeland Security Operations Center (HSOC) and the Interagency Incident Management Group (IIMG), along with the Homeland Security Information Network (HSIN).

In the chapter entitled "Marshalling Resources," Alan Cohn does a superb job outlining the myriad concerns involved in developing comprehensive and effective mutual aid agreements. Cohn expands upon the topic by including a discussion on decisionmaking, pointing out as an example the contradiction that occurred when the governor of Washington faced litigation. One group actually filed a lawsuit arguing that the zone designated for evacuation in anticipation of the Mount St. Helen's eruption was both too large and too small! Cohn's caution about the assumption that using the Incident Command System is protected by the immunity most states accord to discretionary acts is certainly timely considering that the implementation of the NIMS and ICS is now a requirement for receiving federal preparedness funds. Cohn's practice recommendations include, for example, the need to address the procedures for notification and implementing mutual aid, liability, and immunity issues and the need to include a provision to require arbitration of disputes concerning reimbursement. Cohn also sheds light on the Emergency Management Assistance Compact (EMAC) and some of the matters that might remain in conflict, even though both states have adopted the EMAC. His description of interoperable communications is excellent, and it is sufficiently non-technical for attorneys who lack a background in the subject.

Although the book contains much timely information in and of itself, perhaps its most valuable attribute is the questions each chapter poses that can be answered only on a state-by-state basis. In addition, the Appendix, prepared by members of the American Bar Association's Committee on Homeland Security and Emergency Management, provides a lengthy and practical checklist, with questions that attorneys should take back, discuss and research for their own jurisdiction. Questions range from such simple matters as who in the jurisdiction has the legal authority to declare a disaster to much more complex issues, such as exploring the legal liabilities to which a municipality might be exposed during a disaster. In many cases, the attorney may find that there is essentially no guiding law on the precedent at all and further research may be necessary to. In addition,

as mentioned earlier, many of the chapters have internal, topic-specific checklists or at least raise questions for legal counsel to research and answer, when possible.

The volume does not include an overall bibliography, and its index is not extensive, given the length of the book and the variety of topics covered. This lack of a bibliography is offset, however, since each chapter is liberally footnoted with a vast amount of useful information. The lack of a comprehensive index is troublesome, however, since a single topic might be touched upon in multiple chapters, and the index often did not adequately reflect this. Finally, and surprising for a legal publication, the book does not include a table of the legal cases that are mentioned throughout the volume.

Nevertheless, *A Legal Guide to Homeland Security and Emergency Management for State and Local Governments* is a worthwhile addition to a legal library both for attorneys who are new to emergency management as well as for those who have been serving in that position for some time. In addition, it might serve as an excellent supplemental text for law schools that are interested in introducing students to this new field.

There is an old saying that the time to take action is while you still have time to act. Agencies and their legal counsel must resolve these questions now, because when the disaster is upon us, it will be far too late.