Governments at all levels, federal, state, and local, have a responsibility to reduce the impact of natural and non-natural disasters within their respective jurisdictions. Unfortunately, by many measures the frequency and severity of disaster events has been increasing over the last several decades. At the same time, the legal landscape applicable to disasters and emergencies has become more complex—and the expertise of lawyers is ever more critical to a jurisdiction’s efforts. This legal guide provides practical insight and guidance to help state and local governments and their legal counsel protect lives, property, public safety, and the public welfare in accordance with law and the constitution.

The guide is organized into four parts, reflecting the very different arenas of emergency management. Part I deals with issues of governance in the emergency response environment. A large disaster will draw responders from local, state, federal (including military), private sector, and nonprofit entities as well as individual responders—none of which are fully “in charge” of the other responders—requiring a governing system that supports incident commanders and ensures effective coordination and collaboration. We then explore, in Part II, three topics in promoting community resilience to disaster through hazard mitigation. If we do not build more resilient communities and infrastructure, through building codes and land use planning, the costs of disaster events will continue to rise. Part III addresses three “special topics” that are very much at the forefront of homeland security and emergency management agendas: cybersecurity and protection from computer and Internet-based threats, public health emergency law, and the state and local governments’ role in enforcing federal immigration laws. Finally, Part IV covers in some detail the legal issues that state and local governments face in many of the critical areas of emergency planning, response, and recovery.

This is the third edition of this guide. The first edition was developed in the aftermath of the terrorist attacks of September 2001. These attacks had demonstrated that the United States was not well prepared for potential terrorist catastrophic events, and also revealed the inability of responders from various jurisdictions, and even within different departments of a single jurisdiction, to communicate with each other. Focusing initially on the threat of terrorism, the federal government reacted by creating the
Department of Homeland Security (DHS) and by providing support for state and local preparedness programs. DHS, through the Federal Emergency Management Agency (FEMA), also developed a National Incident Management System (NIMS) and National Response Plan (NRP) as the coordinating structures to be used during response from “all hazards”—both natural and non-natural. Congress also expanded surveillance and border control initiatives, imposed immigration enforcement measures, and dramatically increased funding of terrorism prevention and preparedness programs.

Hurricanes Katrina and Rita in 2005 exposed weaknesses in implementation of the NIMS and the NRP and renewed understanding of the critical significance to the nation and the federal government of effective response to catastrophic natural events. The extraordinary scale of damage from Hurricane Katrina—a full order of magnitude larger than any previously experienced since creation of the modern emergency response system after World War II—would have strained any emergency response system. Yet, despite many heroic efforts, deployment of available response resources was delayed by lack of understanding of the structures of emergency management and poor coordination among and between governmental entities (federal, state, and local), and among and between governmental entities and the private, nonprofit, and volunteer sectors. Hurricane Katrina triggered enactment of the Post-Katrina Emergency Management Reform Act, a reorganization of FEMA within the Department of Homeland Security, and the development of the National Response Framework to replace the National Response Plan and focus even more attention on the non-federal actors in emergency management. These developments were captured in our second edition.

This third edition reflects major developments since 2010—two major amendments to the National Flood Insurance Program, significant revisions to the Stafford Act (authorizing FEMA’s disaster assistance programs) prompted by the Hurricane Sandy Recovery Improvements Act, and much more aggressive efforts to recover funding previously provided where recipients of disaster assistance grants do not strictly comply with all regulatory conditions applicable to federal grants. As we go to press, the nation is in full response mode regarding Hurricanes Harvey (Texas), Irma (Florida and Georgia), and Maria (Puerto Rico and the U.S. Virgin Islands). Further changes in laws, regulations, and policies can be anticipated as part of congressional action funding the massive costs of these catastrophic disasters.

OVERVIEW TO THE THIRD EDITION

Part I: The Legal Structure of Emergency Management
Chapter 1, “Catastrophic Events, the Law, and Federalism”, describes the constitutional and statutory sources of legal authority during emergencies for officials in our federal
system to take action and to spend money doing so. The chapter then stresses that having authority to act is not enough. Effective response depends critically on the plans, training, and exercises as well as financial resources that allow governments to implement their authority effectively. The chapter illustrates these points through reference to well-known response failures during Hurricane Katrina. This chapter has been updated and expanded from the second edition, which had in turn been built upon Professor Sedler’s discussion of “Federalism and the ‘War on Terror’” in our first edition. (Professor Sedler’s important chapter can be accessed at http://ambar.org/HomelandSecurity).

In Chapter 2, “The Role of the Military and National Guard in Disaster Response,” Professor Michael Greenberger and Katarzyna Fertala analyze whether the federal government is restricted by the Posse Comitatus Act from using Title 10 military forces in disaster response. This had been one of the legal issues which delayed the federal government’s initial response to Hurricane Katrina—and has been considered a controversial area in federalism. But the authors demonstrate (1) that the Posse Comitatus Act restricts only the use of the military in law enforcement missions that become necessary in disaster response; (2) that it does not even apply to non-law enforcement missions such as search and rescue, distribution of supplies, and power restoration; and (3) that even for the domestic use of federal troops for traditional law enforcement functions such as riot control, arrest, and interdiction, the Posse Comitatus Act is not so restrictive as to tie Congress’s and the President’s hands when faced with a catastrophe that overwhelms an affected state’s ability to provide essential government functions.

In Chapter 3, “The National Response Framework and NIMS,” Quin Lucie describes the major building blocks in the structure of the nation’s emergency management system: the National Response Framework (NRF) and the National Incident Management System (NIMS). These documents were promulgated by FEMA based on delegated presidential authority and after vetting across the federal government. Now—after a number of years of prodding and federal grant funding—the NRF and NIMS clearly define the structure of emergency management not just for the federal government, but also for states, local governments, and much of the private sector across the nation.

Mutual aid is a cornerstone of the National Incident Management System and of our nation’s emergency response system. Mutual aid arose naturally out of the humanitarian response of communities to help neighboring communities in need—and it has grown significantly in importance with the demonstrated success of both the Emergency Management Assistance Compact (a compact of the various states and territories of the United States that has been approved by Congress) and of a number of other regional, intrastate, and even international agreements. Chapter 4, “Marshaling Resources,” is an update (by Cathie Hutchins, the Assistant Attorney General of the Commonwealth of Virginia with responsibility for emergency management) of Alan Cohn’s seminal work on mutual aid in our first and second editions. The