

## **Common Legal Issues for the Texas Security Contractor:**

**by Carlos Peniche October 28, 2021, ASSIST Convention (Virtual)**



Introduction – gave legal oriented continuing education at ASSIST conventions about 7 times beginning in 2003 through about 2014 or 2015.

Security is an interesting area of the law.

Dynamics of interaction of law, public perceptions and expectations and human nature.

Hours of boredom interrupted by moments of terror. Military, firefighters, security

The night watchman, grandpa, Mall Cop, Jurassic Park, rent a cop.

### **1. Security Contractor vs Security Consultant**

Effective 9.1.2019 security consultants are no longer regulated in Texas, §1702 Occupations Code (Private Security Act)

Short order cook vs master chef

Negligent Misrepresentation

Deceptive Trade Practices Act (DTPA)

### **2. A Good Contract (Key Elements)**

Who you contract with: “a man’s word is his bond”

Lack of negotiating power with large or sophisticated businesses (they have their own “take it leave it” contracts)

- a. Short & sweet (2-page contract prints on one page front/back), this is more of a marketing issue as opposed to legal
- b. **Effective Date**
- c. **Identify the parties** (get the legal names correctly stated)
  - 1. Principal or Agent for Disclosed Principal (lien)
  - 2. Make sure security contractor's license number is listed
  - 3. Also address, phone and email
- d. **Describe the service provided** (I like to say "will provide security personnel in accordance with client's written requirements)
- e. **Identify the property**
- f. **Client's written requirements** (roving/stationary, how many officers, hours, days, armed/unarmed) (create your own order form)
- g. **Independent contractor**
- h. **Observe & report** (§1702.133 duty to disclose crime)
- i. **Not a guarantor or insurer**
- j. Terms of payment (net 15 days), interest, rates such as armed/unarmed, holidays
- k. **Duration/Termination:** month to month, 6 months, 1 year, notice to terminate
- l. Indemnification: Express negligence rule, conspicuous
- m. Notice: where, how (I like email)
- n. Changes in writing only, signed by the parties
- o. Entireties clause (entire agreement)
- p. Governing Law: Texas
- q. Venue: choose your home court
- r. Jury trial waiver
- s. Severability clause (so one bad term does not sink the entire contract)
- t. Limited liability clause (damage cap) (museum, Picasso painting, don't insure a million-dollar painting at \$20 per hour)
- u. Contractor employee poaching – prohibited with liquid damages clause
- v. Scope of services: extra fee for site survey
- w. Contractual lien for services
- x. Signatures
- y. Personal guarantee

**Not in Contract:** arbitration/mediation (Apple vs. Samsung)

3. Use of force

- a. Have a good written use of force policy (observe & report)
- b. The Frito Lay Case (assaultive conduct)
4. **Insurance: required \$50,000/\$100,000 §1702.124**

Insurance must cover all services provided (f)

§1702.3841 Class A misdemeanor to knowingly fail to have insurance which covers all services provided

§1702.388 felony for second offense

Beware of exclusions to insurance policies:

  - a. Assault & battery
  - b. Bars, saloons, cantinas, nightclubs
  - c. Section 8 and other government subsidized properties
5. The Timberwalk Case: liability for criminal acts of third parties
  - a. Recency – not too old
  - b. Frequency – not too infrequent
  - c. Proximity - not too distant
  - d. Similarity – not too dissimilar (domestic disturbance vs stranger violence)
  - e. Publicity – not unknown (public crime statistics count, deliberate ignorance is not a defense)
6. Litigation

Denial of coverage (insurance carriers know litigation is expensive and risky)
7. Independent contractors
  - a. What are they (lawyer, plumber)
  - b. Contract labor not allowed PSA (must be licensed and under contractor control)
8. Collections