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Legal Liability Issues

CHAPTER OUTLINE

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CHAPTER HIGHLIGHTS

- to develop a working knowledge of the basic legal issues affecting security professionals
- to understand the role of civil liability in a security management plan
- to be familiar with court cases that have impacted the security enterprise
- to be better prepared to identify liability issues relevant to a target environment
- to be better prepared to introduce the concept of liability protection into the overall security management strategy

KEY WORDS

Administrative law
Americans with Disabilities Act
Case law
Civil law
Civil Rights Act
Color of law
Common law (mala en se/mala prohibita)
Criminal law
Exclusionary rule
Felony
Foreseeability
Inevitable discovery
Intentional torts
Merchant’s privilege statute
Misdemeanor
Negligence
Nondelegable duty
People developing a security management plan should understand basic civil and criminal liability issues. Litigation can prove financially disastrous for any business. It often falls to the security professional, working with management, to ensure that the agency or business is protected, as much as is reasonably possible, against any circumstance that might result in legal trouble. The chapter highlights some foundations of law, then reviews tort law (negligence issues), and then examines common legal entanglements that security professionals face. Laws related to security vary from state to state. All security professionals should make themselves intimately familiar with legal resources available to them through security resources. For example, in Minnesota, various security professionals with an understanding of law are affiliated with the state chapter of the American Society for Industrial Security.

This chapter is focused on providing a basic understanding of the law as it relates to the security profession. Because laws change, sometimes rapidly and significantly, security professionals and the businesses or organizations they work for must have access to legal counsel. It is essential that security professionals remain up to date on security-related legislation and alter company policies and procedures when necessary.

FOUNDATIONS OF LAW

Society is regulated by policies and laws implemented by legislative bodies and interpreted by the courts. Simply stated, there are three sources of laws: (1) common law, (2) case law, and (3) statutory law. Common law is based in judicial decisions and laws that originated in England. Today, some of these laws have lost their significance. In some states, a couple not legally married but cohabitating as man and wife may meet the designation for “common law marriage.” Not all states acknowledge the concept, however, and the length of cohabitation required to meet the standard may vary. Case law is based on the idea that a court should stand by decisions that have been previously handed down; these previous decisions are known as precedent. The applicability of another case can be determined by whether the facts and applicable law in the case are similar, whether the level of the court is higher or lower, and whether the court has the same legal jurisdiction. Statutory law is codified law. These laws are drafted and approved by a governing body and often change, by amendment, repeal, or revision.
Basic Organization of Law: Criminal, Civil, and Administrative Functions

This chapter is not intended to act as a legal document or provide the kind of legal direction one would require of a lawyer. The objective is simply to review some of the essentials for security professionals. It is important that security professionals understand that law is organized into three basic parts: (1) criminal law, (2) civil law, and (3) administrative law. Criminal law protects order in the state. Criminal law has less to do with the protection of individual rights, because its primary role is ensuring the preservation of the state. Civil law protects private rights, whether those be an individual's rights or the rights of a corporation. Administrative law includes rules, regulations, orders, and decisions created by administrative agencies.

Administrative law can be important to security professionals. Decisions of administrative agencies such as the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC), for instance, affect how security professionals do their jobs. In short, administrative agencies make certain that federal and state requirements are being followed.

Civil litigation is an increasingly significant concern for security professionals because the amount of damages in court actions in security-related incidents has exploded. Civil law is divided into a variety of different areas. These include (but are not limited to) contract law, warrants, agency, and torts. It is true that a particular incident can be handled both as a criminal offense and as a civil offense. Interestingly enough, it is often the decision of the security professional, working with directions from management, as to whether police will be involved in an incident. In other words, specific practices must be outlined for the security professional who is likely to confront a situation where he or she is faced with a decision about whether to pursue criminal charges.

Such decisions come up regularly in retail settings. Consider the example of retail outlets that post “All shoplifters will be prosecuted” signs. While shoplifting is a problem, employee theft often results in more dollars being lost. So while security professionals have a critical role to play in protecting the company and its employees from various threats (including shoplifters), security professionals are also confronted with the reality that transgressions they investigate may involve employees of the company. Security professionals must be prepared for this possibility.

Because proceeding with criminal prosecution is often a less-than-perfect option, companies that discover people inside the company stealing from the company often simply seek remuneration and dismiss the people. Whether the actions taken by security professionals are directed toward customers or employees, the activities involve the potential for criminal or civil confrontations. This means that all the information that could be used at trial must be thorough, accurate, and well preserved. The involvement of police is typically re-
required in criminal complaints, so the emphasis for security personnel is typically noncriminal legal actions between two parties, where one party has claimed a loss or grievance and seeks a private remedy. In short, perhaps the most significant legal challenge to security firms and security personnel involves the corporate need to be protected against liability in the form of tort law, or civil litigation.

Federal, State, and Local Regulation of the Security Industry

For security professionals, it is critical to make distinctions between levels of governance and determine how federal law, state law, and local community ordinances impact the delivery of security services in an area. This cannot be stressed enough. Authority to take action comes from very specific legal precedents; for security professionals employed to provide certain services to an organization or agency, this authority usually comes from administrative law or corporate policies and procedures. Such policies and procedures dictate how the organization expects a security professional to act under various circumstances. Laws governing state operations must comply with legal precedence should a controversial matter go to court. Laws based in statutes are binding, whereas legal precedence can only be associated with case law. Article VI of the U.S. Constitution defines the **Supremacy Clause**, which outlines the main foundation of the federal government’s power over the states (technically, *Marbury v. Madison* implemented the Supremacy Clause). All legal requirements governing the security industry that were legislated by Congress must be followed as interpreted by the appropriate administrative agencies. The federal standard is established as a minimum standard. States or other lesser bodies of governance can only make the standard more stringent, not less so.

Even novice security professionals must be able to determine how laws govern any security-related activity. Furthermore, department or company policy should provide guidelines for security professionals. While these policies must be in compliance with federal, state, and local laws, different corporations and organizations are likely to interpret laws to suit their own needs. One company may be extremely concerned about employee drug use and therefore establish “no tolerance” policies. Other companies may establish policies focused on meeting drug-using employees’ needs, perhaps by requiring counseling. Security professionals can refer to other companies’ policies but must always tailor policies to their own environment, taking into account the enterprise to be secured, its geographic location, its size, its corporate mandates, and so forth.

Administrative agencies of the federal government that contract for private security services include

- the Federal Aviation Administration
- the Interstate Commerce Commission
The Wretched Face of Hate

Despite decades of struggles for civil rights, sad stories of hatred, discrimination, and oppression are still being told. Many individuals have to walk the streets of cities, the halls of schools and offices, and even the rooms of their own houses in fear. All over the nation people are still being attacked because of their race, their sex, or their religion. In this new millennium, is it going to be possible to create a safer environment for all people? Can the United States become the “Land of the Free,” as the founders intended over 200 years ago? Sadly, individuals and groups that espouse hate are still active in the country.

The Aryan Nations is one of the most significant forces in the nation’s white supremacist movement. Operating out of a compound at northern Idaho’s Hayden Lake, the camp is known for its “whites only” sign, its barbed-wire fortifications, and its occasional cross burnings. The founder and leader, Richard Butler, began the operation as the Church of Jesus Christ–Christian/Aryan Nations. This “church” believes that whites are the true children of God, that Jews are Satan’s offspring, and that minorities are inferior.1

On July 1, 1998, Victoria and Jason Keenan, a mother and son, were driving along a public road near the Aryan Nations complex. Jason accidentally dropped his wallet out of the window, and when they turned the car around to get the wallet, the car backfired. The security guards at the complex believed this to be a gunshot and decided to pursue the Keenans’ vehicle. Chasing the car for two miles, the guards shot at the family with assault rifles, forced them into a ditch, and violently attacked them with the butt of a gun. The Aryan Nations claims that the guards violated the organization’s rules by leaving the compound to chase the Keenans. It also claims that the guards were intoxicated and could not coherently react to the situation. In fact, many of the security guards working for Aryan Nations were known to be ex-convicts, some of whom had drug problems and often acted impulsively. Former Aryan Nations security chief Michael Teague said of the many members’ prison records, “We are in the business of forgiving people. We try to help reform them.”2

Yet mainstream America is unlikely to support these actions as “reform.” Members of the community surrounding the Aryan Nations complex argue they are scared. How should Americans provide security for people who are threatened by hate groups? With chapters of various groups spread all over the nation and more than 450 hate Web sites on the Internet today, the job seems difficult and endless. But the Southern Poverty Law Center, which represented the Keenans, believes that bankrupting the groups will stifle the message a great deal, even though it may not eliminate them completely. The Aryan Nations was forced to pay a total award of $6.3 million dollars in compensatory and punitive damages to the Keenans.

The Aryan Nations’ security system failed. The guards acted irrationally and harmed two innocent individuals. The legal consequences are steep. Aryan Nations most likely will lose its compound to pay for the damage award. Butler is not worried, however. “We have planted seeds,” he proclaimed, using language from the Bible. The seeds of hate, it seems, are sprouting.

References

• the Nuclear Regulatory Commission
• the Securities and Exchange Commission
• the Food and Drug Administration
• the General Accounting Office

Furthermore, these agencies have established standards (on age, experience, education, and character) for the security professionals they elect to employ.

The federal government has also dictated standards for how polygraphs can be used. The Polygraph Protection Act of 1980 placed extensive restrictions on the role of polygraphs in preemployment screening, so it is important to look to state statutes to determine how this federal legislation has been applied. In Minnesota, for example, state law prohibits the use of polygraphs in the hiring process. Another example where state laws differ dramatically is in how much information on past employment can be requested.

While the federal role in the security industry remains primarily isolated to government contracts with private industry, more than 45 states have also passed legislation governing the security industry. Several of the qualification requirements outlined by states cover education and training, age, experience, licenses, and personal character. This emphasizes how important it is for security professionals to be familiar with security-related legislation in the area where they work.

Finally, any local ordinances or company policies that relate to the role of the security professional in that community or within that company must be identified and introduced into the security operations. Actions taken by local law enforcement, for example, and how they are expected to work with the security professionals in private industry will be dictated in large part by city and county ordinances, police department policies and procedures, and corporate policies and procedures. Well-trained security professionals will be aware of how these laws, policies, and procedures are likely to impact their work responsibilities.

**Employee Rights Granted through Legal Protections**

Actions at the federal level do impact the job security professionals perform. Figure 11–1 highlights several pieces of legislation and the impact of that legislation on protected classes of citizens. Two other important pieces of federal legislation that impact the security professional are the Civil Rights Act of 1964 and the Americans with Disabilities Act.

**Civil Rights Act of 1964**

The Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin. Title VII of the Civil Rights Act prohibits discrimination with regard to any employment condition, including recruiting, screening, hiring, training, compensating, evaluating, promoting, discr-
### Federal Level Employee Protections

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<td>All federal contractors and subcontractors</td>
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*A Applies to federal agencies, contractors, or assisted programs only.

†Mandatory retirement eliminated except in special circumstances.

EE = Employee; ER = Employer; EEOC = Equal Employment Opportunity Commission
OFCCP = Office Federal Contract Compliance Programs; NLRB = National Labor Relations Board.

**FIGURE 11–1** Federal Level Employee Protections
plaining, and firing. The Equal Employment Opportunity Committee (EEOC) was established by Congress to implement Title VII. The legislation was updated in 1991 to permit women, persons with disabilities, and persons who are members of religious minorities to have a jury trial and sue if they can prove intentional hiring and workplace discrimination.11

Americans with Disability Act

The Americans with Disability Act (ADA) requires employers to provide persons with disabilities equal opportunity with regard to jobs and to make reasonable accommodations for disabled employees. Reasonable accommodations, according to the ADA, may include making existing facilities readily accessible to and usable by employees with disabilities, restructuring jobs, or modifying work schedules.12 The legislation states that businesses are not expected to implement accommodations that impose an “undue hardship” on the businesses. The definition of “undue hardship,” however, is unclear and therefore often a matter of litigation. Typically, undue hardships involve accommodations that are simply too costly for the company. Various accommodations may be implemented by the employer with little cost. The Job Accommodation Network (JAN) was established by the President’s Commission on Employment of People with Disabilities in 1984. JAN provides information and consulting services for anyone who has questions about resources available to meet the needs of a disabled employee. JAN is located in Morgantown, West Virginia, and can be contacted at 1-800-ADA-WORK.

Primer in Basic Crime Classifications

To understand the criminal justice system, security professionals need to be familiar with several important concepts and legal principles. A felony is a serious crime—such as murder, rape, or burglary—that is punishable in most states by death or by incarceration for a period of longer than one year. A misdemeanor is a less serious crime; misdemeanors include petty offenses such as shoplifting, disturbing the peace, and violations of local ordinances and are usually punishable by fines or short jail terms.

Crimes are typically separated into two types: mala en se and mala prohibita. Mala en se crimes are acts that are considered by society to be inherently wrong. This includes crimes that are considered wrong even if there is no law prohibiting the activity. Mala prohibita crimes are acts that are made illegal by criminal statute but are not necessarily defined by society as inherently wrong. Clearly, these distinctions are problematic, as society’s perspective changes. In a sense, all “legally defined or common law” offenses could be more accurately determined to be culturally specific. Many conditions must be met.
before someone who commits a violation of law will be tried in a court of law. Remember, though, a victim of a crime seeks redress in a civil proceeding. Criminal proceedings are brought by the state, which in fact makes the state the injured party.

LEGAL AUTHORITY OF THE SECURITY PROFESSIONAL

In most states, the security professional has no more legal rights than a private citizen. Common law provides authority to the private citizen for making an arrest in order to protect the safety of the public.13 The private citizen is said to have a heavier burden than public officials of demonstrating actual knowledge, events, or other firsthand experience of the crime that led to the arrest.14 Specific requirements regarding citizen’s arrests may be dictated by state law. Furthermore, laws include restrictions on a citizen’s right to arrest, which include (1) the time of the arrest, and (2) the arresting person’s presence during commission of the crime.15

If security professionals are also accredited law enforcement officers or if security professionals work in states where they are required to be commissioned as peace officers, the rules will be different. In short, given the need for attention to state-specific protocol in the event of citizen’s arrests, the actions of the security professional who is performing duties associated with his or her job will be established by the employer or client. It is crucial for the benefit of the contracting agency and the security professional that the exact parameters of responsibility be documented in a policy and procedure manual so that the security professionals clearly understand the process they are to follow. Should any concerns arise, the professionals can reference the policy and procedure manual to ensure company policy is being followed, or they can contact legal counsel. Following this basic rule may assist the company and the security professional in the event there are legal liability questions later.

BASIC CONCEPTS OF CRIMINAL PROCEDURE
AND THEIR APPLICATION TO PRIVATE SECURITY

Various aspects of the law enforcement profession have been incorrectly associated with the security profession. A law enforcement officer has been granted specific authority by the state that a security professional simply does not have. Security professionals and commissioned law enforcement officers are not required to implement the same standards for various procedures. The most confusion exists around the following topic areas: (1) stop and frisk; (2) arrest, detention, and false imprisonment; (3) search and seizure/probable cause; (4) reasonable expectation of privacy; and (5) use of force. Consideration is given to each topic.
Stop and Frisk

_Terry v. Ohio_ permits a police officer who believes criminal activity may be happening to conduct a pat down of a suspect. The objective is to allow the officer to find weapons, thus ensuring the safety of the officer and people nearby. Under certain circumstances, courts have upheld the right of security professionals to conduct a _Terry_ stop and frisk, particularly when the search is conducted to protect persons and property. The courts have upheld that security guards, like any other citizens, are allowed to protect themselves and property, using a reasonable amount of force to do so. “Reasonable suspicion,” not “probable cause,” was said to be the relevant standard.

Arrest, Detention, and False Imprisonment

Security professionals do not often simply do a stop and frisk. But if a person is being detained, the concept of stop and frisk may be applicable. Most statutes agree that the merchant, employee, agent, private police, and peace officer are authorized to detain a suspect, but statutes typically do not mention that other citizens at large have such authority. In some states, the _merchant’s privilege statute_ gives immunity, absent serious error or intentional tortious conduct, to merchants who detain a person suspected of shoplifting. Consequently, security professionals are typically authorized to detain individuals to determine whether theft has occurred, but this authorization is predicated on the security professionals’ intention to involve the police within a reasonable time after the detainment.

In what has been described as an unusual decision, the California Supreme Court ruled (in _People v. Zelinski_, 594 p.2d 1000 [1979]) that the constitutional prohibition against unreasonable search and seizure applied to private security personnel. Critics argue that the application of the law enforcement standard to security professionals is inevitable as the scope of security increases. Such decisions suggest that while precautions can be taken, ultimately controversial questions will result in legal involvement. An example of this is when a company makes decisions about the conditions for a search to protect proprietary information, for example, but does not have a response for the possibility that they might find other kinds of items (such as drugs). Particularly in the absence of a stated policy on drugs, if the outcome of the search (finding drugs) extends beyond the justification for the search (the need to protect company information), the rights of the employee and the responsibilities of the company can easily become entangled in ways that require legal resolution.

Law enforcement officers have the authority to arrest. Security personnel, depending on their function, may have the authority to detain. A person who is legally detained may be interrogated, depending on the circumstances.
is, of course, the purpose of detaining someone, and the courts have supported this idea. The acceptability of the interrogation is based on the legality of the detention and the manner in which the interrogation is conducted.21

**Search and Seizure/Probable Cause**

With reasonable cause, law enforcement officers may stop individuals and require them to show identification and even search them without a search warrant. Without a search warrant, law enforcement officers may decide to make a reasonable search of a person, a vehicle, or some property, or all three, as a process leading up to arrest. If law enforcement officers have a search warrant, they may make a more detailed search of vehicles or property, as indicated in the warrant. **Probable cause** is the required legal standard that suggests that before an arrest, search, or seizure, a person must know of facts and circumstances that would cause a reasonable person to believe a crime had been committed.

A law enforcement officer making a lawful arrest has the authority to search the area within the immediate control of the suspect or to seize anything in plain view. As noted earlier, the stop and frisk guideline allows a law enforcement officer to pat down a person for weapons if the officer reasonably suspects that there has been criminal activity—for the officer's protection and for the protection of others in the area.22 Furthermore, if something is taken from the person when the officer does not have a warrant, the evidence collected may be excluded from future court proceedings, as dictated by the **exclusionary rule** as a violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution.23 An exception to this might be in cases of **inevitable discovery**, which suggest that the information or evidence would inevitably have been discovered from lawful investigatory activities without regard to the violation.*

In most cases, security professionals do not possess legal authority to perform search and seizure. Security professionals should have consent of the individual involved before they are allowed to search the person or his or her property. But there are several methods that give security professionals the consent necessary to conduct searches; for example, at the time of hire, the conditions for a search are outlined or there are signs posted suggesting that packages, containers, and other similar objects may be searched upon entering or leaving the premises, or both. If there are employees who are also sworn officers or who are deputized or licensed, the Fourth Amendment standards for probable cause are likely to apply to them as well. Again, it is essential that security professionals develop a thorough knowledge of the state and local laws

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dictating appropriate security responses. The laws will vary depending on industry, industry standards, and federal and state regulations. Specifically, if a security professional is also a licensed peace officer or police officer, the legal standards governing behavior while working in a particular setting need to be made clear.

**Reasonable Expectation of Privacy**

With the emergence of electronic activities, such as sending e-mail, offices are forced to reexamine employee privacy issues. Furthermore, because some aspects of the security profession can be covert by nature, such as an internal investigation to identify employee theft, there may be claims of violation of privacy. The issue of privacy also pertains to the hiring process. During the hiring process, certain information relating to the applicant may be protected. Personnel screening, background investigations, and other means by which agencies acquire personal information about current or future employees all relate to privacy. At the current time, it is not unusual for companies to require drug screening of all prospective employees. Drug screening, drug testing, and related monitoring programs have been challenged on privacy grounds, and at the present time the ability to use such tests has been upheld.

**Use of Force**

*Use of force* refers to the actions private individuals must take to protect their person or their property. For security professionals, the use of force and the degree of force used must be justified in each particular instance. The multiple levels of force are outlined in Figure 11–2. For security practitioners, the use of force must be “reasonable.” Consideration may be given to the severity of the situation, the danger present, and the kind and degree of threatened misconduct. Is the threat real, pressing, and imminent, and is it accompanied by the ability to carry it out?

In short, the use of force and the amount of force used must be justified in relation to the person or property being protected. Note, finally, that various state statutes determine what are appropriate levels of force in different situations.

**TORT LAW**

Tort law deals with “private or civil wrongs (therefore a.k.a. civil law), other than contracts, and affects or controls relationships between people in any given situation.” Negligence and intentional torts are two areas of tort law that are of great concern to the private security professional. Security officers have certain “duties” identified by law. A breach of these duties, either negli-
Negligence is the failure to exercise a reasonable or ordinary amount of care in a situation that causes harm to someone or something. To prove a case of negligence, the claimant must demonstrate the following: (1) a duty, (2) a breach of duty, and (3) proximate causation.\textsuperscript{28} Foreseeability, the ability to see or know of potential problems in advance, is a related concept. The concept of negligence could easily apply to liability of companies that do not adequately investigate, train, and oversee their security personnel.\textsuperscript{29}

Intentional torts are acts committed by a person who made a decision to act. Intentional torts include (1) assault, (2) battery, (3) false arrest, (4) false imprisonment, (5) defamation of character, (6) malicious prosecution, (7) invasion of privacy, and (8) outrageous conduct.\textsuperscript{30} Even though a tort is a civil wrong, a wrong between two private parties, it may also be a crime. One can be sued civilly for assault, for example, and also be prosecuted criminally for the same thing. Punishment for criminal prosecutions include fines, imprisonment, or death.

Defendants in cases of \textbf{strict liability} are held accountable regardless of their intentions. Elements of a strict liability case include the following: (1) There is a seller of a product or service, (2) the product is unreasonably dangerous to persons or property, (3) a user or a consumer suffers physical harm, and (4) there is causation.\textsuperscript{31} For the security industry, this means (at a minimum) that a security company may be held liable for actions of employees if the acts were committed while the employees were on the job.
LEGAL LIABILITY ISSUES

MISCELLANEOUS LEGAL ISSUES

Legal experts who have a clear understanding of the law as it applies to security professionals are an exceptionally important resource for anyone in the security industry. The expanding role of security professionals and the potential exposures security companies have when dealing with hazardous conditions or dangerous people combine to put security personnel in situations where the legal waters have been untested. Two such situations are nondelegable duty and color of law.

Nondelegable Duty

Security professionals are responsible for reducing or eliminating the risk of certain threats in specific target environments. Security professionals find themselves on the front line when it comes to the possibility of litigation. The courts have repeatedly ruled that companies cannot reduce the amount of liability they incur by contracting with a private security agency. This principle is called nondelegable duty. Therefore, if security professionals are provided by a contractor, the company hiring the contractor, not the contractor, may still be liable for any harm a person receives while on the premises.

Of great concern to the security manager is the notion that the private company may have vicarious liability for the acts of its employees. Vicarious liability, present under the theory of respondent superior, is the indirect legal responsibility a supervisor has for the employees under his or her direction.32

Color of Law

Because of the interactive role of state or governmental agents and security professionals, combined with the possibility for assuming liability, “security managers should be knowledgeable about whether their employees are acting under the color of law by ordinance or statute, through joint action or significant involvement with governmental agents, as a public function, or because a nexus exists between the state and the challenged activity.”33 Color of law refers to the semblance, without substance, of a legal right: “Proof or demonstration that state action caused a personal loss, affront, or indignity under the auspices or color of state law.”34

In other words, the circumstances are such that one might easily misinterpret the authority or power of the actor as being an agent of the state. A classic example might be the following: A county board decided to reject a licensing application from an African American man not on legal grounds but because of the applicant’s race. The people on this board, employed by the state, were acting on behalf of the county and did not comply with the law. As
a result of their action someone was harmed: Someone did not get a license for a business because of race, and the board provided some indefensible excuse. In this example, the county board acted under the color of law. This kind of case involves a related incident for security professionals when a state agency contracts for security professionals or when a private agency has chosen to employ an off-duty police officer. “For private security professionals, the ‘color of state law’ issues are applicable when a direct relationship between a public official and a private security agent has been established. The evidence must demonstrate the security professional is representing him or herself as a public professional, and as a result, directly cause injury.”35

CONCLUSION

The importance of security professionals educating themselves about the legal liability issues likely to impact their operation cannot be stressed enough. Universities offer semester-long courses on criminal law and criminal procedure. The information presented here is intended only to highlight several areas of the law that affect security professionals. Poor training or negligent hiring can result in a lawsuit that can be financially devastating to a company. An everyday encounter with a customer or employee may lead to actions that are contested in a court of law. Is the company protected? Are the company’s policies about conducting surveillance on a suspected shoplifter clear? What are the steps to follow if an employee is suspected of stealing? Should the approach to firing an employee change if the person is a member of a protected class? These and other important matters affect security plans, so security professionals will want to consult legal counsel and refer to some of the books in the references list.

REVIEW QUESTIONS

1. Which aspect of the law (criminal or civil) has the most direct connection with the security profession? Why? Be prepared to justify your response.
2. Outline two primary areas of federal law that dictate protocol for hiring practices in your workplace.
3. Outline the arrest powers of a security professional.
4. Discuss nondelegable duty. What duties can management delegate and what duties cannot be delegated?
5. Outline the issues involved in assessing the color of law. How does this most directly impact a security professional?
DISCUSSION QUESTIONS

1. Discuss the role of liability in preparation of security responses in a given environment.
2. Discuss the important distinctions between arrest and detention of a customer suspected of shoplifting.
3. Discussions about the use of force also involve discussions of defense tactics. Discuss the most appropriate level of force for security professionals within a target environment. Be prepared to justify your response.
4. Based on information presented in the chapter, what does a security professional need to be concerned about when maintaining a reasonable expectation of privacy? How does this standard differ depending on the target environment?

REFERENCES

2. Barron’s Legal Dictionary.
5. Ibid.
7. Ibid.
9. Recent article reviewed for Journal of Security Administration.
14. Ibid.
15. Ibid.
17. Nemeth.
18. Ibid.
22. Nemeth.
23. Ibid.
24. Ibid.
25. Maxwell, 347.
26. Ibid., xxii.
27. Ibid.
29. For more information about the CPP program and materials, go online at http://www.asisonline.org/cpp.html.
30. Maxwell, xxiii.
31. Nemeth.
32. Maxwell.
33. Maxwell, 377.
34. Nemeth.
35. Ibid.