Module Five
Legal Issues for Community Corrections

What's in this Module:

- State Statutes
  - Elements of a Good Law

✎Exercise: Triage Your State Law

- The Impact of Legislation
- The Legal Landscape
  - Policies, Procedures and Training
  - Human Resources
  - Vicarious Liability
  - Qualified Immunity
  - Offender Protection/Constitutional Issues
- Lessons Learned: Implications for Community Corrections

✎Exercise: Blueprint - Module Five

- Attachment D - Summary of Cases

Learning Objectives

- Identify elements of a "good" state law;
- Triage and critique your state's law;
- Understand cases relating to employees and offenders;
- Understand legal implications for administrators, managers and supervisors; and
- Review lessons for community corrections.

Review of Legal Issues

This review of legal issues is not designed to make you an expert in the field, but rather to acquaint you with relevant information to help you make informed decisions. You should consult with your agency's counsel to receive more specific information affecting your agency's operations.

State Statutes

Elements of a Good Law[1] - What's in your state's laws regarding staff sexual misconduct with offenders in a community corrections setting? What makes a law "good," or effective? Consider the following:

- Know your state's statutes. What is included, or not included that relates directly to misconduct? If your state's statutes do not specifically address community corrections, you may be in a position to provide important and valuable input as such laws are crafted, revised and enacted.

- The law should cover all settings, including pre-trial services, treatment centers, halfway houses, and restitution centers. Statutes should address private facilities, and those offenders who may be supervised out-of-state by another jurisdiction, public or private.

- The law should clearly define who is covered by the law. Some laws contain the wording "under the care or supervision of the department of corrections."

- The law should cover contractors and vendors who provide services to the agencies, and/or who supervise or provide services to offenders.

- Volunteers and interns should be covered.

- The law should delineate penalties, perhaps a range of penalties, for each type or classification of certain acts (misdemeanor, felony).

- Statutes should specify whether those convicted of sexual misconduct are covered by the state's sex offender registry.

- The statute should address whether offender consent or marriage is a defense.

- The statue should address whether failure to report suspicions or allegations is a separate offense.

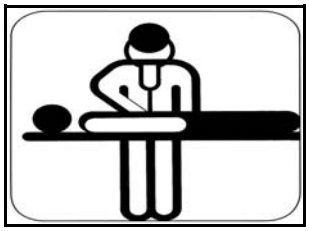
Based on information available to date, these states have specific statues relating to sexual misconduct in community corrections:

State Statutes with Some Coverage (25)		State Statutes Without Coverage (26)	
Alaska	Nevada	Alabama	Missouri
Arkansas	New Hampshire	Arizona	Montana
California	New Jersey	Connecticut	New Mexico
Colorado	New York	Delaware	North Carolina
Florida	Oklahoma	D. C.	North Dakota
Georgia	Pennsylvania	Hawaii	Ohio
Illinois	South Carolina	Idaho	Oregon
Iowa	Utah	Indiana	Rhode Island
Kansas	Virginia	Kentucky	South Dakota
Maine	Washington	Louisiana	Tennessee
Michigan	West Virginia	Maryland	Texas
Minnesota	Wisconsin	Massachusetts	Vermont
Nebraska		Mississippi	Wyoming

Criminal prosecutions for sexual misconduct in states that don't have specific statutes can be gained through laws governing sexual assault and/or statutes covering violations such as "misuse of official position", or "official misconduct."

Exercise: Triage Your State Law

Review your state's statute and make notes by responding to the following questions. Be prepared to share your thoughts.



Triage Your State's Statute

- Think about recent allegations in your agency. Did your state's statutes address this misconduct?
- Who is covered in your state's statutes? Who is not covered?
- What are the penalties? Felony, misdemeanor, both?
- What behaviors are addressed?
- What other statutes may be relevant? Sexual assault, official misconduct? Sex offender registry?
- If you have a law, what would you change or enhance?
- What other statutes or administrative regulations help or hinder investigations?

The Impact of Litigation

Although there has been limited litigation in the community corrections setting regarding sexual misconduct, the absence of system-wide litigation provides the **excellent** opportunity for community corrections to take a ***pro-active*** approach. Working to ***prevent*** the litigation experienced on the institutional side of corrections is an opportunity not often afforded to an organization's leadership.

Litigation, in addition to the obvious toll it takes in terms of employee morale and expense of defending the action has other down sides.

- Policy making by the judicial branch - Seldom do judges want to run corrections organizations, but through judicial intervention or consent decrees, this intervention can and does occur.

- Detrimental public attention - Agencies struggle with their image in the community. Allegations of misconduct do not enhance the reputation of the agency, or the morale of employees.

- Diminished legislative and public support - Allegations of misconduct decrease the public's willingness to support the organization, and the profession. When an agency is facing misconduct allegations, it is more difficult to get pay raises and increased funding. Allegations of misconduct also affect the public's willingness to support the agency.

- Negative impact on recruitment of employees - Attracting and retaining qualified employees is always a challenge. A negative image in the community reflecting upon the workplace does not enhance recruitment and retention.

- Financial damages, both personal and professional - Liability for misconduct and/or the improper investigation of allegations (or worse, ignoring allegations) has resulted

in employees being held personally liable with financial damages assessed, as well as fines and criminal convictions. Agencies have also been required to pay money damages. Allegations of sexual misconduct are rarely career-enhancing for agency leadership.

- Diversion of focus from operational needs - If managers are consistently diverted from their work to concentrate on pending or actual litigation, scarce resources are further diluted.

The Legal Landscape

The legal implications of failing to address and investigate allegations of sexual misconduct may be raised in several perspectives:

- Policies, Procedures and Training
- Human Resources
- Offender Protection/Constitutional Issues
- State tort laws

Policies, Procedures and Training

As noted in **Modules 3 and 4**, potential liability may be created when an organization fails to develop effective policies and procedures to guide employees and prevent harm to offenders. The importance of training is also emphasized.

How a Challenge Could Arise:

Vicarious Liability - Vicarious liability is created when:

- Someone else (such as the employee's supervisor) *knew or should have known* what was occurring or about to occur, but
- *Did nothing* to correction the situation, and
- That lack of action was the *proximate cause* (as opposed to the direct cause) of subsequent harm,

injury or death.

Vicarious liability can result from such circumstances as:

- Negligent hiring
- Failure to properly training
- Negligent supervision
- Negligent retention of the employee

Under the doctrine of vicarious liability, agency administrators are responsible for actions of their employees, vendors, and/or contractors.

Qualified Immunity - Qualified immunity is a special privilege/defense against civil liability, protecting government officials from civil damages under certain circumstances. Qualified immunity does not protect from *criminal prosecution* when there is a violation of law, but is only a defense against *civil liability*.

Qualified immunity generally requires a two-part test or analysis:

- Was the law, statute or case law governing the conduct of the government official clearly established?
- Could a reasonable person have believed that his/her conduct was unlawful?

If the answer is "yes" to both questions, then the immunity may not exist.

Sepulveda v. Ramirez[2] illustrates how an agency can lose it's qualified immunity. In this case, a male officer observed a female offender in a bathroom stall provide a urine sample. The court found that no reasonable person could have believed that such behavior was lawful.

Recent case law has established that qualified immunity does not extend to private contractors who provide

services with corrections agencies and facilities. [3]

Personal Liability - If the actions, or non-actions of corrections administrators result in harm, or continued harm to an offender, personal liability can result. In a recent case, Riley v. Olk-Long, 282 F.3d 592 (8th Cir.2002) personal liability resulted for both the warden and director of security.

Significant issues in this case were:

- The court found that the warden and security director were deliberately indifferent to the safety of the offender, as they had been previously notified of an officer's potential risk of harm to offenders. Both the warden and the security director were found personally liable in the amount of $20,000 and $25,000 respectively.
- Prior to this incident, other offenders had filed complaints of related problems.
- The officer had a history of predatory behavior.
- Four prior investigations were closed as inconclusive.
- Collective bargaining agreement precluded the reassignment officer.
- Director of Security suspected that the officer was guilty, but failed to take leadership in the situation.
- Officer could have been terminated earlier for certain acts, but the agency chose not to do so.

Human Resources

Often issues emerge when managing the human resources aspects of allegations of staff sexual misconduct, for example:

- What should the agency know about a prospective employee's background?
- How is information from background investigations from other agencies assessed?

- What information does your agency release to other agencies about an employee's, or past employee's, job performance and reasons for termination or resignation?
- What are an employee's expectations of privacy in the workplace?
- What are the due process rights of employees under investigation?
- Can I question employees who are the subject of an investigation?
- Do employees have a right to associate with off-duty whom they choose?
- Should an employee named in an allegation be reassigned?
- Are gender-specific assignments permissible?

Prospective Employees' Background

As noted above in the discussion of vicarious liability, the agency should conduct a thorough investigation of candidates for employment to avoid a charge of negligent hiring. This investigation should assure to the best of the agency's ability that, among other qualifications, the candidate does not have a record of domestic violence, sex crimes, or a history of alcohol or drug abuse.

Employee Privacy in the Workplace

An employee has few privacy expectations in a corrections workplace, although most organizations don't do a very good job of informing employees. Employees need to know, and be reminded periodically, that their telephone conversations, computer, Internet transactions, desk, and their car in the employer's parking lot, are all subject to searches. This information is important to a prevention plan, but also important to convey in writing to employees so they know the limits of their privacy in the workplace.

Rights of Employees Under Investigation

The rights of employees under investigation are most often guided by state law or administrative regulations, case law, agency policy and collective bargaining agreements. Generally speaking, public employees in regular or non-probationary status have a property interest in employment, and are entitled to certain due process protections. Public employees in probationary status generally have no right to a hearing prior to dismissal unless they can claim that their individual rights are violated. In most cases, a probationary employee does not have a property interest or "right" to maintain their employment.

What this means is that non-probationary employees have a right to have notice of the charges against them, and how the investigation will proceed. Employees should be instructed not to discuss the allegations with anyone, or contact the complainant or witnesses. Employees should also be notified in writing of the outcome of the investigation.

Whether an agency suspends an employee with or without pay, or reassigns them during an investigation are matters which should be in policy. These decisions, as noted above, should be made within the context of state law, agency policy and collective bargaining agreements. As with any other employee actions, consistency of actions is essential.

Questioning Employees Under Investigation

As noted in **Module Four, Investigations**, the agency needs a plan about how to address allegations. Often, the initial complaint may not even include sexual misconduct, and only after further investigation does the scope of the allegations emerge. How and when to question employees who are witnesses or the subject of the investigation should be a deliberate matter planned by those who are overseeing the investigation. This prevents potential contamination of the investigation as well as

protects the rights of the employees.

Freedom of Association

Some employees believe that they have a First Amendment right to associate, off-duty, with whomever they wish, and their employer can't deny them this right. This issue is made more complex when an officer becomes involved with an individual they only later discover is under the supervision of a criminal justice agency, or who was recently discharged from supervision. Officers have family and friends who may be under supervision. How then does the agency address these issues?

Agency guidelines regarding with whom employees can associate are generally intended to insure the integrity of the agency and the individual employee, and to avoid any conflict of interest or impropriety, or appearance of such. Agency rules should be clear in linking prohibited associations with the mission of the organization and duties of employees. Policies and procedures should spell out what associations are prohibited, what relationships must be reported, in what time frame and to whom. Additionally, the agency policy must match practice - in other words, the agency must follow its own policies and procedures.

Employees have litigated agency policies restricting what they considered to be their freedom of association. These policies have included: anti-fraternization policies which restricted employees from fraternizing or associating with offenders or convicted felons; policies against marriage to known offenders; and questions on job applications or during the screening process concerning associations with offenders, or the criminal histories of family members.

Several cases illustrate the issues.

In Via v. Taylor[4] a corrections corporal was dismissed

because of an off-duty relationship with a paroled inmate. This behavior was prohibited by the department's code of conduct. The court was unsympathetic to the claim that the rule was intended to preserve the orderly functioning of prisons, and found that there were alternative means allowed in other circumstances to avoid any appearance of conflict. For example, in other cases, officers were allowed to transfer. In this case, the department's rules were not upheld.

In Reuter v. Skipper[5]a female corrections officer was dismissed from a sheriff's office because of her relationship with an ex-felon. The court was concerned that no rational connection existed between the rule and the department's objectives in having the rule. In this case the court found that work rules must be tailored in a reasonable way to serve the interests of the state. Speculating that a problem might exist was not enough if there was no impact on job performance.

In Ross v. Georgia[6] a corrections officer's brother, who was on probation, shared an apartment with him. The officer was demoted for "conduct unbecoming." In this case, the court found the department's rule reasonable because personal associations could undermine law enforcement objectives. In this case, the department's rules allowed the employee to seek prior approval, which the officer did not do.

In Wolford v. Angelone[7] a state corrections officer married a convicted felon who was the father of her child. The department's anti-fraternization policy prohibited such actions. The court noted that marriage to an inmate may compromise security and found the regulation justified.

Generally, the courts support corrections and law enforcement agencies' policies and practices designed to "prevent corruption[8]," and the "need to hire employees who act with good judgement and avoid potential conflicts of interest[9]." Overly broad rules and regulations not tied to

the agency's mission or job duties of employees may be too ambiguous to be helpful to the employee or the agency.

Reassigning Employees During Investigations

Agency leaders have an obligation to insure that employees who are alleged to be involved in conduct which violates agency policy and/or state law, do not further harm the offender, or try to intimidate victims or witnesses. Often collective bargaining agreements address employee assignments, but as noted in the Riley case, described earlier, this does not provide an excuse for agency administrators to not move employees who are subjects of investigations in which continuing harm could come to an offender.

The best approach is to have policy in place before an allegation arises which is aimed at safeguarding both employees and offenders during an investigation. The policy can address if the employee is suspended with or without pay, or assigned to a function that safeguards both the employee and the alleged victim. When an employee is reassigned because of an allegation, it is an extremely difficult time for that person, their family and friends, and for others in the organization. For those reasons, having appropriate procedures in place before an incident, as well as reaching agreements with unions about how allegations will be handled, is optimal.

Gender-Specific Assignments

Establishment of gender-specific assignments is an area where there has not been much litigation in community corrections, but some practical considerations seem applicable. Blanket rules establishing that only female employees work with female offenders, and male employees work only with male offenders might trigger a claim of discrimination from both genders. The best approach is for the agency to carefully consider what job

functions require same-sex supervision.

The Sepulveda case, noted earlier, provides a rationale for gender specific assignments for the purpose of viewing the provision of urine samples.[10] Another consideration is the needs of offenders. In several prison-related cases, courts recognized that the past victimization and mental health needs of female offenders were compelling reasons for the assignment of female employees.[11]
The most thoughtful approach is for an agency to clearly articulate the reasonable interests of community corrections in establishing a need for gender-specific posts.

Offender Considerations

A basic function of all corrections organizations is to assure that harm doesn't come to those persons under their care, custody and control. There are many potential protections for offenders. Here is a brief review:

1st Amendment - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

How could a claim arise in community corrections? As noted above, 1st amendment issues arise when employees claim that they have a right to associate with persons of their choice and that the agency can't restrict that right.

4th *Amendment* - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

How could a claim arise in community corrections? Often offenders are required to agree to specific types of searches as a condition of supervision, including drug tests. Agency policy should delineate the specific protocol of such requirements by defining the circumstances under which employees may search, take urine samples, as well as identify the areas in an offender's home, car, and/or office that can be searched.

5th *Amendment* - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

How could a claim arise in community corrections? Potential violations of the 5th amendment may be a concern if an agency's investigation of an offender, or an offender's collateral contacts, uncover evidence of possible criminal violations, even if the investigation is administrative or consistent with the conditions of supervision. Agency policy should include direction to employees about when Miranda warnings are issued to clients, and how allegations of criminal violations are managed or referred.

6th *Amendment* - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

assistance of counsel for his defense.

How could a claim arise in community corrections? As many actions by an agency can result in a client being violated and returned to incarceration, written policy should define if and when a client is afforded right to counsel. The agency's procedures should also define in their contracts with offenders the scope of their right to counsel, if at all, as part of the revocation process.

8th *Amendment* - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

How could a claim arise in community corrections? Most 8th amendment cases are related to incarcerated offenders. However, as there are court decisions finding that sex in prison or jail between employees and inmates is a violation of the 8th amendment, the applicability extends to community corrections. Where there is an imbalance of power -- as in the employee/offender relationship, the agency should insure that inappropriate relations don't develop. Deliberate indifference to the constitutional rights of offenders by an agency, its employees and representatives, may result in a finding of liability.[12]

14th Amendment - No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

How could a claim arise in community corrections? Agencies need to review policies and procedures to insure that no rights of offenders are violated without appropriate hearings, notice, etc. As the "power" of community corrections employees is great in terms of removing offenders from their homes and community - back to

prison or jail, insuring due process rights is critical. While offenders may have a lesser level of due process rights than citizens in the community, agencies need to assure that their procedures are not arbitrary nor applied differently based on the employee or the offender.

United States Code, Title 42, Chapter 21, Subchapter 1, Sec. 1983. - Civil action for deprivation of rights - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

How could a claim arise in community corrections? Many claims filed against corrections agencies are “1983" suits - alleging that public officials used their position to deprive a person of their rights under the constitution. This further underscores the need for definitive policies and procedures, as well as training employees. In a community corrections setting, employees who violate agency procedures to the detriment of the offender’s freedom could result in 1983 actions.

Smith v. Cochran[13] found that acting under color of law extends to state employees who do not, necessarily, work for the community corrections agency. In this case, an inmate on work release at a driver’s license bureau had sex with an employee of that office in return for preferential treatment. The court found that the examiner acted under color of law while supervising the inmate, and further was

not entitled to qualified immunity.

State Tort Laws

Litigation involving state tort laws may also be an avenue for offenders who believe that their rights were violated. In these cases the court may decide if there was intentional infliction of emotional distress based on the violation of state law regarding sexual misconduct.

Lessons Learned: Implications for Community Corrections

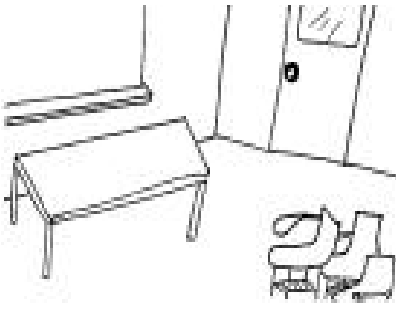
General Lessons - Here, by way of summary, are the lessons for community corrections administrators that have emerged in the wider corrections arena. **Attachment D** provides a summary of court cases considered instructive.

- Some courts have found that sexual intercourse between employees and inmates is an 8th amendment violation.[14]

- Courts have held that consent is not a defense. Because of the power and authority of corrections officials, an imbalance of power is present which demands that the official be held to a higher standard.[15]

- An agency's history of previously unresolved problems places the agency under scrutiny including:

    - Poor management practices;
    - Policy did not match practice;
    - Employees not properly trained; employees and offenders were not informed of procedures and policies;
    - The existence of a sexualized work environment, which led to inappropriate behavior and lack of enforcement of policy and procedure; [16]
    - Failing to act appropriately and competently on information received; and
    - Poor supervision within the agency.[17]



- Patterns of allegations must be examined or given proper attention:
  - The same officer accused many times - where there's smoke there's fire;
  - The inmate grievance procedures were compromised due to improper response to union agreement (courts found that a collective bargaining agreement does not create a defense against failing to protect offender);
  - There was general fear of warden ("Don't bring me bad news"); and there was a history of inconclusive findings in investigations.[18]

- Complaint must get to the agency leadership for an appropriate administrative response:
  - Leadership failed to investigate complaint properly;
  - Warden failed to properly train or monitor the lieutenant assigned to investigate;
  - Officials knew that offender faced a substantial risk due to her classification;
  - Officials failed to take steps to abate the risk; there was a "sham" investigation; and
  - Discipline was not imposed when it was indicated.[19]

- Court required the agency to be more proactive in management, including:
  - Require mandatory employee reporting of alleged or actual instances of sexual misconduct, sexual contact, sexual harassment and sexual abuse and/or improve the procedure to report allegations of employee sexual misconduct;
  - Assure adequate, specially trained, and experienced investigators;
  - Publish, implement and consistently enforce investigative policies;
  - Train all employees, offenders, contractors, vendors and volunteers on the sexual misconduct policies and procedures.[20]
  - Strengthen pre-employment screening of

employees to identify instances of violence or abuse;
- Revise pre-employment screening for non-correctional employees to include the same rigorous screening as for correctional employees;
- Complete background checks on all employees every five years;
- Educate and train employees on mandatory reporting procedures;
- Strengthen investigative procedures;
- Provide psychological and medical services to offenders involved in sexual misconduct;
- Discipline employees who are guilty of sexual misconduct;
- Institute a policy on the handling of false allegations; and
- Screen offenders for a history of past abuse.[21]

Action Steps

What, specifically, can community corrections learn from the litigation involving institutional corrections? What can be learned from the cases that have arisen from community corrections?

Zero Tolerance

- Agencies should establish a zero tolerance policy for sexual misconduct, and should have clear and specific policies and procedures regarding staff sexual misconduct.
- Agency practice must follow policies and procedures.
- The agency should require that employees report allegations of sexual misconduct.
- Procedures for reporting allegations must be clear, known, and available to all without the fear of retaliation for reporting.
- Contractors and vendors should be required to adopt zero tolerance and mandatory reporting.

- An agency must conduct thorough and proper screening of applicants, including employees, interns, volunteers, contractors and vendors.

Training

- It is imperative to provide training for employees, investigators, vendors, contractors, volunteers and offenders.

Response to Complaints

- An agency must respond to all complaints.
- Investigations should be completed by experienced, competent and objective persons.
- Results of investigations must be appropriate, timely, consistent and fair.
- Sanctions must be consistent, fair, and stringent.

Administrative and Supervisory

- Administrators and supervisors are responsible for the actions of subordinates, and must respond to information received.
- Contractors can be held liable for inappropriate actions of offenders under their supervision.
- Consent is not a defense.

Conclusion - Module Five

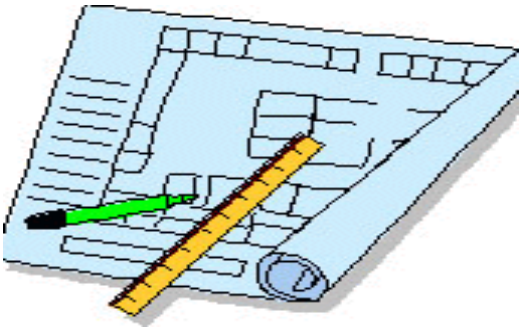
Community corrections leaders have an opportunity to learn from their colleagues in institutional corrections. This leaning has been expensive for your peers - both in terms of financial damages, but as importantly, loss of public support, employee morale and judicial intervention into the daily operation of their agency.

Learning from these circumstances allows community corrections leaders to be proactive in working to prevent and address misconduct.

Exercise: Blueprint - Module Five

Please refer to your personal blueprint. As **Module Five** is completed

- Make notes about what issues are of concern to you.
- What is working well in your agency?
- What is on your "to do" list based on what you have heard?



Use the front page of your blueprint to keep a list of what you believe are important issues to you and your organization.

Endnotes:

1. The work of Professors Brenda V. Smith, Associate Professor, and Susan Carle, Washington College of Law, American University, Washington, D.C. and Jeff Shorba are acknowledged for this Module.

2. Sepulveda v. Ramirez, 967 F 2nd 1413 (9th Circuit) 1992. See also attachment D to Module Fire.

3.See *Richardson v. McKnight, U.S. Supp. No. 95-318. 1996).* In Richardson, the Court found that there was neither common law nor public policy to support qualified immunity for non-governmental employees of for-profit corporations (i.e., contractors for services).

4. Via v. Taylor 224 F. Supp. 2d. 753. See Attachment D to Module Five.

5. Reuter v. Skipper 832 F. Supp. 1420. See Attachment D to Module Five.

6.Ross v. Clayton County, Georgia 173 F. 3rd 1305. See Attachment D to Module Five.

7.Wolford V. Angelone 38 F. Supp. 2n 452. See Attachment D to Module Five.

8. See *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia* 859 F.2d 276 (3rd Cir.1988)

9. See *Ross v. Clayton County, GA*, 173 F.3d 1305 (11th Cir. 1999).

10. Sepulveda v. Ramirez 967 F.2nd 1413

11. Colman v. Vasquez, 142 F.Supp.2d 226, (2d.Cir. 2001), Jordan v. Gardner; 986 F.2d 1521 (9th Cir.1993)

12. For example, in Women Prisoners of the District of Columbia Department of Corrections, et. al., vs. District of Columbia No.95-7041 (relevant to the 8th amendment), the courts found that even though the District of Columbia had policies and procedures to address staff sexual misconduct, these policies were of little value since the Department failed to address the problem appropriately. The court cited "the inadequacy of the Defendant's response to these attacks", and the fact that the Department had "no specific staff training, inconsistent reporting practices, [and] cursory investigations and timid sanctions." This is a very clear message for any agency that has the responsibility to supervise offenders, whether in a field setting or facility.

13. Smith v. Cochran 216 F.Supp 2d 1286, See Attachment D to Module Five.

14. Carrigan v. Delaware, 957 F. Supp. 1376 (D.Del. 1999)

15. Carrigan v. Delaware, 957 F. Supp. 1376 (D.Del. 1999)

16. Daskalea v. DC, 227 F.3d 433 (D.C. Cir. 2000)

17. Morris v. Eversley, 205 F.Supp, 2d 234 (S.D. N.Y. 2002)

18. Riley v. Olk-Long, 282 F.3d 592 (8th Cir.2002)

19. Colman v. Vasquez, 142 F.Supp.2d 226, (2d.Cir. 2001)

20. Cason v. Seckinger, U.S. Middle District Court for the Middle District of Georgia, Macon Division: Civil Action 84-313-1-MAC(CWH)

21. United States v. State of Michigan; Michigan Dept. of Corrections, et.al, U.S. District Court for the Eastern District of Michigan, filed by the Attorney General of the U.S. pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA) of 1980; Civil Action No. 97-CVB-71514-BDT.

Attachment D - Summary of Cases

Jordan v. Gardner; 986 F.2d 1521 (9th Cir.1993)

The findings in the *Jordan* case acknowledge that the past history of sexual and physical abuse of female inmates, which is significantly higher than with male inmates, may justify different treatment. The courts found, that a policy in Washington State allowing male staff to conduct pat searches of female inmates violated their 8th Amendment rights against cruel and unusual punishment based on the offenders' past histories of abuse. Since the Department knew about the history of past abuse, it was liable for failing to heed the increased risk of these females.

While this case is not directly related to community corrections, it does indicate that the courts may consider the special needs of female offenders based on their past history of physical and sexual abuse. Community corrections agencies would be wise to prevent any potential liability around this issue by considering this in practice. Such practices, such as taking urine samples and conducting body searches, should be carefully considered in light of the effect this may have on certain offenders.

Daskalea v. DC, 227 F.3d 433 (D.C. Cir. 2000)

This case involved incidents that occurred in the District of Columbia jails. Female offenders were coerced into performing striptease for staff on numerous occasions, and the general treatment of offenders was demeaning and of a sexual nature.

Significant issues:

- Plaintiff was awarded $5.3 million in damages.
- Language toward offenders was demeaning and inappropriate from initial incarceration.
- Not the first litigation.
- Agency policy existed, but was not posted, not included in staff training, not provided to inmates.

Morris v. Eversley, 205 F.Supp, 2d 234 (S.D. N.Y. 2002)

Significant issues:

- Agency official participated directly in the alleged constitutional violation;
- Agency failed to remedy the problem after being informed;
- Agency supported a practice or custom under which constitutional violations were allowed to continue;
- Agency was grossly negligent in supervising staff; and
- Agency exhibited deliberate indifference to the rights of offenders by failing to act on information that violations were occurring

Riley v. Olk-Long, 282 F.3d 592 (8th Cir.2002)

An officer made inappropriate comments to an offender about her having sex with her roommate. The officer came into the room after lock-down and attempted to fondle the offender. The offender failed to report this incident because she doubted that she would be taken seriously and feared retaliation. Subsequently, an officer raped the offender, and this was witnessed by another offender who reported it. The officer was found guilty, terminated, and convicted under state law.

Significant issues:

- Warden and security director were deliberately indifferent to the safety of the offender, as they had been previously notified of this officer's potential risk of harm to offenders. Both the warden and the security director were found personally liable in the amount of $20,000 and $25,000 respectively.

- Prior to this incident, other offenders had filed complaints of related problems.
- The officer had a history of predatory behavior.
- Four prior investigations were closed as inconclusive.
- Collective bargaining agreement precluded the reassignment officer.
- Director of security suspected that the officer was guilty, but failed to take leadership in the situation.
- Officer could have been terminated earlier for certain acts, but agency chose not to do so.

Colman v. Vasquez, 142 F.Supp.2d 226, (2d.Cir. 2001)

Significant issues:

- Female offender was housed in a special unit for victims of sexual abuse.
- Male staff were allowed to make random pat searches.
- Staff made sexual advances toward offender.
- The facility psychiatrist reported this to an agency Lieutenant.
- There was no response to this complaint by the administration.
- An eventual investigation was done, but by a "phony" internal affairs investigator who had no experience.

Cason v. Seckinger, U.S. Middle District Court for the Middle District of Georgia, Macon Division: Civil Action 84-313-1-MAC(CWH)

This case, originally filed in 1984, involved women in the State Department of Corrections facilities who alleged that certain treatment and conditions violated their civil rights. The allegations included inadequate physical structures, overcrowding, inadequate health care (including mental health), inadequate grievance procedures etc. In 1992, the suit was amended to include allegations of sexual misconduct and sexual abuse. As a result, Georgia entered into an agreement that required certain actions. Georgia's response has been comprehensive and thorough.

Keeney v. Heath - 57 F.3rd 579

Guard at Indiana county jail brought 1983 action alleging that county jail regulation forbidding employees to become socially involved with inmates in or out of jail violated her 14th Amendment due process right to marry.

Captain at the jail became suspicious of a relationship between officer Summers and inmate Keeney, and had Keeney transferred to state prison. Summers visited Keeney in prison and told the Captain that they planned to marry. Summers was told to end relationship or lose her job for violating rule that employees cannot become involved socially with inmates in or out of the jail. Summers resigned and married Keeney. Summers sued saying that the rule forcing her to choose between her job and marriage infringed her constitutional right to marry. Held: rules saying a jail "guard" can't date an inmate who is in or out of jail doesn't violate 14th amendment. Affirmed on appeal.

Ross v. Clayton Co., Ga. 173 F.3rd 1305

County correctional officer brought 1983 action saying his demotion was because he was living with his probationer-brother - and the demotion violated his 1st and 14th amendment rights - judge said that officer had no property interest in his sergeant position and that the demotion did not violate officer's free association rights. Court allowed the exception because there was a departmental regulation. Affirmed on appeal. Allows for an exception if you have a departmental regulation.

> "We find Clayton County's interests in enforcing the Georgia Department of Corrections rule to be well-founded. In the context of law enforcement, there is a special need to employ persons who act with good judgment and avoid potential conflicts of interest. Personal associations with felons

or action probationers could undermine appropriate objectives of a law enforcement agency." Court of Appeals.

Wolford v. Angelone 38 F.Supp. 2d 452

State prison "guard" brought a 1983 action alleging that the Virginia DOC's anti-fraternization policy violated her fundamental 1st Amendment right to marry her ex-convict husband. "DOC's anti-fraternization policy did not sufficiently impact prison guard's fundamental right to marry so as to trigger strict scrutiny analysis." DOC's anti-fraternization policy did not violate either 14th or 1st.

"Upon review, I find that the policy of discharging a state prison employee for her intimate association with an inmate is rationally related to the legitimate goal of maintaining prison security." Court of Appeals.

Weiland v. City of Arnold 100 F.Supp. 2d 984.

Police officer who had been ordered by chief to immediately terminate his personal relationships with a felony probationer because it was unbecoming conduct sued alleging the order violated his right of free intimate association and right to privacy, or, regulation was overly broad and vague. Decision - city had interest in order and efficiency and that outweighed the officer's associational and/or privacy interest in continuing his dating relationship with the felony probationer; and the rule was not void due to vagueness and was not overly broad. Affirmed on appeal. Court deferred to the department's interest in regulating the behavior of its police officers.

Moreland v. Miami-Dade County 2002 WL 31941065 (S.D.Fla.)

African American female correctional officer (non-sworn) began dating a former inmate (Strickland), who was on parole for numerous felonies. After living with him for four months, Moreland discovered that Strickland was engaged in criminal activity. She promptly reported this to Strickland's probation officer, who put her in contact with a detective. Moreland went undercover and, as a result of her efforts, Strickland was sentenced to another twenty-two years. Thereafter, the agency promoted Moreland in 1993 to Corporal (from non-sworn to sworn status).

The Department initiated an investigation into whether Moreland had violated agency rules by becoming romantically involved with Strickland. The investigation was concluded (in 1996), and found that Moreland violated agency rules, even though rule violations were before Moreland was sworn in as a correctional officer, and even as she had maintained a spotless record from 1993 – 1996. One year later Moreland was fired because of the findings of the internal investigation, arguing that she had made inconsistent statements or gave perjured testimony during the proceeding against Strickland. An arbitrator found the firing inappropriate, and recommended disciplinary action tantamount to "time served" (5/3/97 to 8/10/99) with Moreland re-instated. The County did not concur, and offered Moreland a non-sworn position. Moreland filed an EEOC complaint in July 2000 alleging discrimination/disparate treatment. The County kept her on paid suspension as they said no job existed to allow her return. EEOC found reasonable cause to believe that a violation of Title VII had occurred and issued a right to sue letter. The County, in the meantime, offered to hire Moreland as non-sworn officer as they claimed she would be unable to meet the background qualifications for a sworn position. Moreland unable to sustain a claim. Judgment for the County.

Via v. Taylor

Former correctional officer brought action against Delaware DOC alleging wrongful termination resulting from off-duty relationship with paroled former inmate and asserting freedom of association and privacy claims. After trial - judge held that DOC's conduct code prohibiting off-duty personal contact with offenders was not substantially related to state's interests in orderly functioning of prisons and preventing

Dept. from being discredited in public's eye; no evidence showed that officer's relationship with former inmate had any impact on staff or inmates; factors weighted against finding that conduct code was reasonably related to legitimate penological interests; conduct code was void for vagueness and overboard; and defendants were protected by qualified immunity. On appeal, court noted that the Department had a practice of transferring correctional officers to avoid conflicts but this was not an option offered here. Affirmed on appeal [224 F.Supp2d. 753].

Reuter v. Skipper

Female corrections officer brought 1983 action seeking declarations that her association with ex-felon was protected by 1st amendment and that county sheriff's work rules were constitutionally overboard. District Court Held: correction officer's relationship with her domestic partner qualified as family and therefore was entitled to intermediate standard of review; county sheriff's work rule prohibiting employees from associating with ex-felons was not reasonably tailored to serve state interest in maintaining security of sheriff's office; and even if work rule was examined under rational relation standard of review, no rational connection existed between rule and promotion of safety of person and property. Work rules governing such relationships were not in force when her relationship began, and she reported it to the Sheriff. Affirmed on appeal. [832 F.Supp. 1420] "Work rules must be tailored in a reasonable manner to serve the state interest." Court of Appeals.

Pickering v. Board of Education 88 S.Ct. 1731

Court held that a public employee's free speech claims should be evaluated by balancing the right of the worker to express his or her views against the right of the employer to maintain workplace efficiency as a justification for retaliatory conduct.

Vieira v. Presley 988 F.2nd 850

Above average employee of Missouri DOC was interviewed by law enforcement regarding their investigation of activities of his friends and acquaintances. He denied knowing or participating in alleged illegal activities. Vieira resigned because of the threat of being prosecuted for alleged illegal activities and the threat of being fired on the basis of his association with individuals in his hometown. Held for DOC - allegations did not state a violation of a clearly established right of freedom of association.

Fugate v. Phoenix Civil Service Board 791 F.2d 736

City police officers filed action alleging that their constitutional rights had been violated when they were suspended from police force for having sex with women other than their wives while on-duty. Court of Appeals Held: officers did not have constitutionally protected right of privacy to engage in sexual relations with prostitutes while on duty; and police departmental order, prohibiting "conduct unbecoming an officer and contrary to the general orders of the police department" while admittedly vague was valid.

Smith v. Cochran 216 F.Supp2d 1286 (Oklahoma)

Former inmate filed 1983 suit alleging that state drivers' license examiner forced her to have sex with him while she was on work release as a janitor at drivers license examination center. On examiner's motion for summary judgment the District Court held that: examiner acted under color of law while supervising work release inmate; examiner was not entitled to qualified immunity; and examiner's alleged actions were sufficiently outrageous to support inmate's claim for international infliction of emotional distress.

> "Non-consensual sex between prisoner and government employees with authority over prisoner violated clearly established federal law, and thus state drivers license examiner was not entitled to qualified immunity in prisoner's 1983 suit alleging that he forced her to have sex with him in

exchange for increased privileges while prisoner was on work release at drivers license examination." This outcome was affirmed by the 10th Circuit of Appeals on August 12, 2003. (2003 WL 21916505)

Sepulveda v. Ramirez, 967 F.2nd 1413 (9th Cir. 1992)

Male parole officer observing female parolee urinate for urinanalysis violates parolee's fourth amendment rights.

Warns v. Vermazen, Case No. C01-2943 SI (pr), USDC for No. District of California - 2003 WL 23025441.

A drug/alcohol treatment counselor (Vermazen), under contract to the Marin County Probation Department, worked with offenders in a local jail. She was terminated for a "coerced sexual misconduct, including sexual harassment" with inmate Warns. Inmate Warns (pro se) claimed that Vermazen's employer failed to train her, resulting in the inappropriate contact with him. A series of circumstances resulted in only Vermazen's employer, Bay Area Community Resources (BACR) as the defendant. The only question the Appeals Court considered was whether BACR should be held liable for failure to adequately train Vermazen.

The Court reviewed whether the "injury would have been avoided "had the employee been trained under a program that was not deficient"". BACR has a written policy, and demonstrated that Vermazen received that policy, and that employees received informal supervision regarding professional relationships with clients. Although Vermazen told Warns that she had not been trained, the Court found she did receive a copy of the policy manual, and that the manual set behavior and performance standards. The Court also took note that BACR had provided services in the jail for many years and had no previous claims of sexual harassment. While the court found the claim raised by the inmate could have merit, the inmate failed to raise a fact issue as to the adequacy of training provided to counselors, and failed to show what training would have prevented the sexual harassment. Court granted summary judgment for BACR. 2003 US Dist. Lexis 23107

Belvin v. The State of Georgia, 470 S.E.2d 497; 221 Ga.App. 114, No. A96A0519 Court of Appeals of Georgia. April 4, 1996. Certiorari Denied June 24, 1996.

Belvin, a "Surveillance Officer" for the Clayton County Probation Office engaged in sexual contact with a probationer. In his appeal of conviction, Belvin contended that a "Surveillance Officer" is not within the class of persons named in Georgia state law that prohibits "sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer." The court held that the term "probation officer" would include a "surveillance officer", and the judgment of conviction was affirmed.

David T. Britton v. Mary KOEP, individually and as Crow Wing County Commissioner. 470 N.W.2d 518, 19 Media L. Rep. 1208; No. C8-90-1169, Supreme Court of Minnesota. May 24, 1991

Case was an action for defamation against Mary Koep, a county commissioner, who recommended at a public commission meeting that the county probation department hire a female probation officer because "an informant told her that a male county probation officer had coerced female probationers for sexual favors." There had been some corroborating information from other informants concerning Britton's inappropriate dealings with female probationers, in addition to the statements made by an informant to Commissioner Koep. Although further investigation produced no physical or significant evidence, the informants were considered to be truthful. Britton resigned his position in March 1986. The court granted summary judgment for the defendants (Koep and Commission).