

Module Four Investigations

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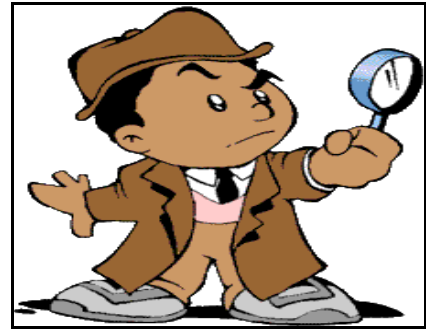
Learning Objectives:



- Clarify the agency's investigative process;
- Identify effective investigative protocols;
- Review personnel issues associated with investigations;
- Understand the post-investigation/allegation impact agency operations and morale;
- Understand the importance of demystifying the investigative process for employees; and
- Learn why investigations fail.

You Are the Investigator

As you think of your organization's investigative process, answer the following:



1. The total number of investigations into allegations of staff sexual misconduct in the last three years are _____.

What were the outcomes of these investigations? Sustained? Unfounded? What percentage of investigations were closed as "inconclusive?"

2. The statutory authority for your agency to conduct investigations is _____?
3. The specific training provided to those assigned to investigate allegations of sexual misconduct is:

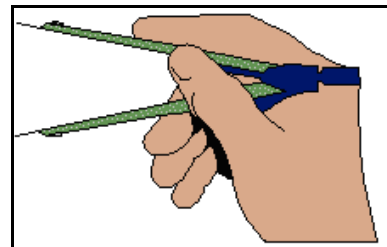
Have all investigators been trained? When and where?
4. What are the time requirements to complete an investigation?
5. How are offenders informed about filing a complaint regarding allegations of sexual misconduct? How are offenders' families informed?
6. How do supervisors know what to do if they suspect sexual misconduct?

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7. Are investigations completed when the subject employee resigns during the investigation?
8. What percentage of the line staff would agree that the investigative process is fair and impartial?
9. Can anyone who is conducting an investigation impose “Garrity warnings” and compel an employee to answer questions?
10. How and when are employees informed of their workplace privacy rights?
11. If covert surveillance is needed as part of an investigation, how is that initiated? Who has to approve?
12. What percentage of employees could accurately describe the internal investigative process?

Alternative Exercise: Mapping the Investigative Process

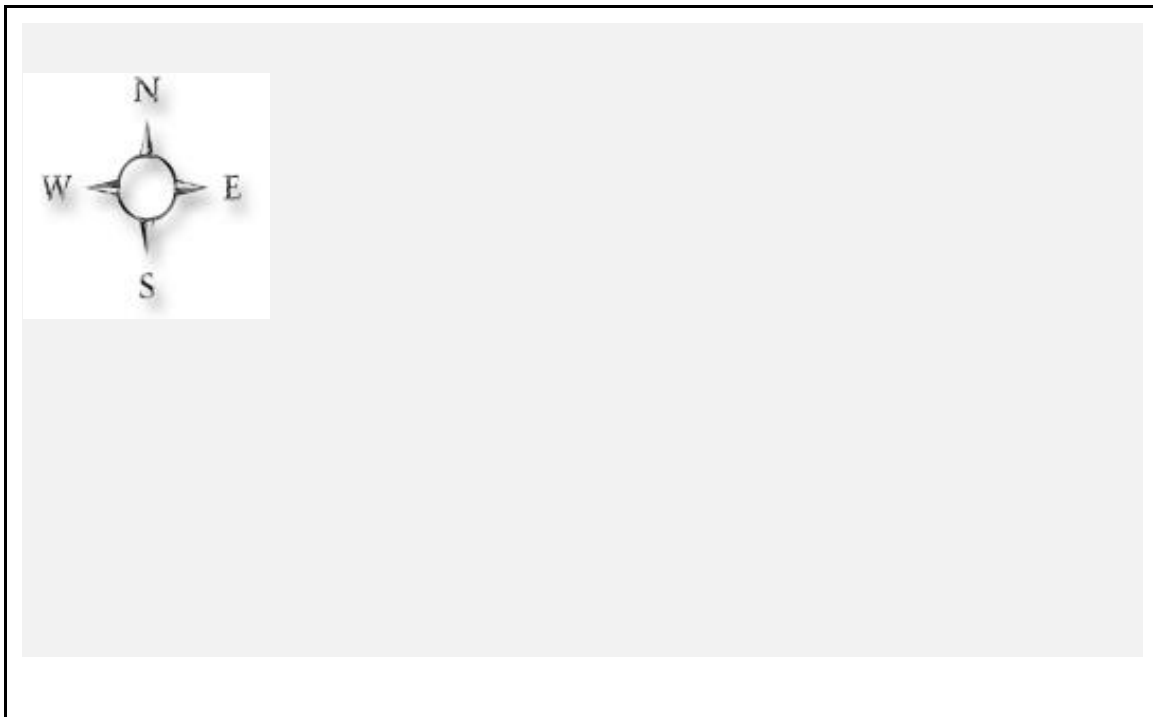
Mapping is a strategy for identifying needed changes in your agency’s investigative process. Even if another organization is responsible for investigations that arise from allegations in your agency, what you and your employees do before the investigators arrive is important to the ultimate outcome. Take time to lay out the following:



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- How are allegations received from employees, from offenders, from the public?
- Who receives and logs the allegation?
- What happens to allegations after they are made?
- Who decides if allegations have merit?
- What are the time lines for completing investigations (formal and informal)?
- Where investigative information is maintained and who has access to it?
- Notification processes if another entity conducts the investigation?
- How is evidence identified, secured, and chain-of-custody maintained?
- What happens to an employee who is the subject of the investigation?
- What happens to the offender who is the alleged victim?
- What happens to the other offenders who are on the employee's caseload while the investigation is proceeding?
- What are procedures for answering questions from the media?

Consider these issues as you map the process from beginning to end.



Responsibilities of Agency Leadership in Investigations

What are your responsibilities regarding investigations? Even if your organization doesn't have the authority or responsibility to investigate allegations, your actions and those of your employees still have an impact on investigative outcomes.



Community corrections organizations have a responsibility to:

- Establish an environment where allegations are reported;
- Insure that allegations are investigated;
- Develop clear and consistent policies, procedures and protocols for conducting investigations or assisting others to conduct them;
- Protect the victim from further harm;
- Preserve the rights of employees;
- Train those charged with investigative responsibilities;
- Assure that investigations are fair and credible;
- Impose fair and consistent disciplinary action;
- Use the information gained in the investigation to improve the agency's operations; and
- Establish memorandums of understanding (MOU's) with the agencies or entities who will be involved in the investigative process.

Investigative Issues for Community Corrections

Organizational Structure - There are many different organizational structures in community corrections. Because of this, there is no single strategy for handling allegations and complaints that will apply in every organizational structure. There are certain principles and policies for conducting investigations that are universal, however, and these will be discussed throughout this **Module**.

Who investigates - Investigations may be conducted by the agency itself or an outside entity. For this reason,

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it is very useful that the agency establishes a relationship with the investigating entity BEFORE allegations arise. The agency should provide the investigators with training about agency operations, policies, and procedures. Protocols should be established clearly delineating the responsibilities of each party. An agency may designate a liaison to work with the investigator.

Availability of witnesses and complainants - In many cases, investigators may have to locate witnesses or complainants who may no longer have any contact with the criminal justice system. It is important that contacts are made as soon as possible, to limit the amount of time when persons can move or leave the area.

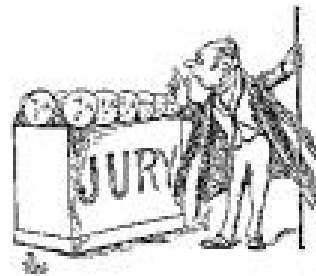
Cooperation of witnesses and complainants - As the majority of community corrections offenders are not incarcerated, investigators may find that gaining their cooperation is difficult. Witnesses may not want to cooperate if there is no gain for them personally, particularly if they will be in the public eye as a result of their statements or eventual testimony.

The skill, experience, empathy, sensitivity, communication style, and attitude of the investigator will have significant impact on gaining cooperation. For this reason, it is critical that those assigned to conduct these investigations have the training, experience, and knowledge necessary to elicit appropriate responses from witnesses and complainants.

Investigators also need to be aware that many victims will have a history of sexual abuse. The importance of skill and sensitivity to interviewing these victims as well as interpreting their responses is critical to these investigations.

Administrative and Criminal Investigations

One of the critical issues facing administrators when allegations surface is the decision as to whether to pursue an administrative and/or criminal investigation. Decisions made very early in the process, when, perhaps, a small amount of information is known, significantly impacts investigative outcomes. One important consideration is whether to proceed with an administrative investigation using Garrity warnings, or whether to proceed with a criminal investigation employing Miranda warnings.



Criminal Investigations

Miranda¹ provides a constitutional protection for the accused that guarantees their right to counsel and their right to not make self-incriminating statements without proper legal advice. Miranda applies when an investigation involves allegations that could lead to criminal prosecution. In any state where staff sexual misconduct is defined by criminal statutes, Miranda will apply.

An investigator and/or agency representative conducting an investigation that reaches the point where the employee under investigation may be making self-incriminating statements, or the elements of a crime are present, must advise the respondent of their rights under the Constitution as determined by Miranda, or stop the interview. Otherwise the information gained from this point forward can be used in administrative investigations, but have little or no use as part of a criminal case.

Administrative Investigations

Garrity² established that an employee cannot be compelled to make an incriminating statement or action that will be subsequently used in a criminal proceeding, if that statement was compelled as a condition of


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employment. What does this mean for investigations in a community corrections setting?

- If an employee under investigation is not granted immunity from criminal prosecution, any statement given under the threat of losing employment or adverse personnel action may be considered unconstitutionally coerced and not used in criminal prosecution.
- If an employee under investigation is granted immunity from criminal prosecution but refuses to answer specific questions as part of an administrative inquiry directly related to official duties, the employee may be dismissed from employment or suffer other disciplinary consequences, as set by agency policy and procedure.
- If an employee who is under investigation is granted immunity from criminal prosecution and makes an incriminating statement, the employee may be dismissed or disciplined according to agency policy and procedures for such violation(s) of agency procedures based on their statement and/or supporting evidence.

It is important to consider the consequences of making a decision early on in an investigation about whether to pursue a criminal or administrative investigation. The agency should have clear protocols on how investigations go forward with specific detail about administrative and criminal investigations. The following Checklist is designed to review protocols that impact investigations into allegations of staff sexual misconduct.

The Checklist - Here's a checklist of issues to consider when working to improve your agency's investigative process. Make notes about what you need to review for your organization, as well as any new ideas that might help you with investigations.

	<p>State Law</p> <ul style="list-style-type: none">• Statutes or administrative regulations are generally the sources of authority to conduct investigations. Each agency should identify the relevant parts of a statute or administrative regulation that grants that authority to them.
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Investigative Policies, Procedures and Protocols

At a minimum, investigative policies should include:

- Partnerships with the investigative body;
- Training for those performing investigations;
- Mandatory reporting of allegations from employees, vendors, contractors and volunteers;
- Protocols for supervising the clients/offenders on the caseload of the employee or contractor during the course of the investigation;
- Procedures for preliminary inquiries;
- Establish how, when and under what circumstances employees and/or offenders are notified of the investigation;
- Provide medical and mental health interventions, as needed for the victim, accused and witnesses;
- Specify how evidence is identified, collected, preserved, organized and stored;
- Address personnel issues, such as reassignment of employees during investigation;
- Job qualifications for investigators;
- Assignment of investigators;
- Supervisory monitoring of investigations;
- Potential investigative outcomes;
- Tracking investigations; and
- Use investigative findings to improve operations.



Preserving Investigative Integrity

Basic steps which help preserve the integrity of the investigation include:

- Decisions regarding pursuing administrative or criminal investigation. While it is possible to pursue administrative violations after beginning an investigation according to criminal procedures, it is unlikely that it will be possible to do the opposite.
- Conduct an initial review of information BEFORE taking any other action. Determine the need for immediate action based on potential risk, danger, injuries, or the loss of critical physical evidence.
- Conduct a preliminary inquiry BEFORE interviewing the subject(s) of the complaint and other witnesses. Interviews will become contaminated without sufficient preparation, information, and/or with multiple interviews.
- Complete preliminary inquiry as quickly as possible. The timing of this part of the process will depend upon the nature of the allegation(s). Do not spend an excess amount of time in this part of the process, as information may lose its freshness or validity with too much delay. Also, it is critical to begin collecting evidence immediately to protect its integrity. Evidence can become contaminated and/or diminished with the passage of time.
- Assume that the allegation is has validity. Trained investigators begin with this premise, seek evidence, gathering facts to objectively and thoroughly prove or disprove the allegations.
- Gather and then objectively and thoroughly review information from documentary sources, such as logbooks, files, computer entries, etc., as much as possible, before interviewing witnesses.



Covert Surveillance

Protocols should consider if and how covert surveillance will be used. The objectives of cover surveillance are to:

- Quickly assess the validity of all or part of the allegations;
- Alert as few non-investigative persons as possible;
- Obtain evidence of the suspected allegation in a controlled situation; and
- Reach an objective outcome more quickly and with stronger evidence.
- Assure that no harm comes to an offender who may be involved as a subject of the surveillance.






Human Resource Management

Administrative protocols should address:

- Protection of employee rights and prevention of any potential future harm to offenders/victims.
- State laws which establish specific employee protections, establish internal investigative procedures, and guide the agency's operations during investigations into allegations of any employee misconduct.
- Agency administrative procedures addressing the work status of an employee who is the subject or a witness in the investigation. The procedures should address when an employee is reassigned, when the employees should or can be placed on leave with or without pay, and how employees who are witnesses are protected from retaliation. Procedures also should address the status of the other offenders/clients on the caseload of the employees during the course of the investigation.
- Collective bargaining agreements which delineate many issues including assignment of employees, removal from duty, pay status, and notifications to subject employees at the initiation of an investigation.
- Use of the polygraph in states where polygraphs are permitted for investigative purposes. Notification may be required to inform employees of their obligations, the time, date, and place of the examination, and whether legal representatives can be present. It is important that if polygraph examinations are permitted by an agency, the employee is notified of this at the time of employment.
- Production of physical evidence in states permitting production of physical evidence such as DNA, blood for drug or alcohol screening, handwriting for analysis, personal telephone records, personal financial records, or other evidence allegedly held by the suspect-employee. Indicate how such evidence will be acquired, time lines, and related procedures. Procedures for collection of DNA, blood and urine follow those adopted by OSHA and the FBI.

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	<p>Completion of Investigations</p> <ul style="list-style-type: none">• If an employee resigns in the midst of an investigation, protocols should dictate whether the investigation is concluded. Issues for consideration in developing the protocols should include:<ul style="list-style-type: none">▶ Consideration of agency liability if the subject employee works for another employer in the future and repeats the violating behavior.▶ Information developed to prevent further misconduct.▶ Support of the agency’s zero tolerance policy.▶ Referral to the prosecutor for possible criminal violations.• Investigative findings are consistent with protocols and facilitate data collection and analysis.• Information gained from investigations is used to review and improve agency operations.
	<p>Investigative Partnerships</p> <p>Consider partnerships and/or Memorandum of Understandings (MOUs) with stakeholders:</p> <ul style="list-style-type: none">• The prosecutor;• Hospitals, mental health providers and sexual assault treatment centers where medical/physical evidence of sexual assault will be collected and for medical care of the victim. A local mental health center may also be an excellent source of crisis intervention.• Advocacy Groups - Many jurisdictions have been successful in establishing partnerships with advocacy groups such as Human Rights Watch, Amnesty International, battered women’s programs, rape crisis organizations, or victim or offender rights groups. While involving advocacy groups may appear counterproductive, there are many benefits to developing this relationship.
	<p>Intelligence</p> <ul style="list-style-type: none">• The agency has a policy regarding the collection of intelligence and use of informants. The policy addresses reliability and identification of informants along with procedures for documentation.

Exercise: Investigative Scenarios

If you ever wanted to be an investigator, now is your chance. Review the case scenarios and describe how you would initiate the investigation. Are there any special considerations because of the nature of sexual misconduct investigations? Are you being too cautious in your approach or not cautious enough?

Aftermath Management

The Rumor Mill - Keeping Employees Informed

When an investigation is underway, the surest way for administrators to promote gossip and rumors is to remain silent. Written communications may not be the best way to share information until investigations are complete and any disciplinary or criminal actions have concluded. However, within the parameters of confidentiality requirements, information should officially be shared with employees. In many cases, acknowledgment from agency leadership that an investigation is underway may help defuse the situation. Check with the agency's legal advisor to develop a format that is within the law, administrative regulation or collective bargaining agreements. For example, a supervisor may say:



“There is an investigation into allegations regarding an employee, and I know that everyone will understand that details cannot be discussed until the investigation is completed. It is a very difficult time for everyone involved, and your cooperation is requested and appreciated. Please do not repeat rumors as doing so may adversely affect the employee involved. As soon as possible, you will be informed of the outcome of the investigation. If you were the subject of an investigation, I know that you would not want others making assumptions or discussing the situation without knowing the facts. We ask you

*to protect the privacy of the employee involved,
as well as the integrity of the investigation.”*

Employees are understandably concerned and uneasy when one of their peers is under investigation. Sexual misconduct increases this uneasiness, due to the delicate nature of the behavior. The agency leadership should:

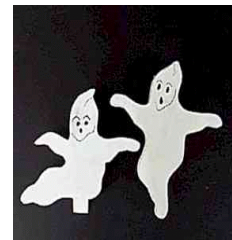
- Be available to listen to employees' concerns;
- Demonstrate concern for employees and their questions;
- Provide support through employee assistance programs or peer debriefing;
- Debrief employees as soon as possible, within the parameters of confidentiality and protecting the integrity of the investigation;
- Be consistent and fair; and
- Ensure protection against retaliation.

Employees need to talk about the experience when one their colleagues is accused or found guilty of such a serious breach of professional ethics. It is up to the leadership within the agency to allow them to do this in a constructive and positive manner, rather than through gossip and rumor.

At the conclusion of the investigation, the agency's leadership should share what they can with the employees and offenders, using this opportunity to reiterate the agency's zero tolerance policy.

Demystify the Investigation Process

Secrecy or Privacy? Historically, internal affairs investigative units, or even individuals who perform investigations, have been perceived by employees as a “top secret” group, due to the sensitive nature of the investigations. While information must be maintained in confidence, employees should be aware of the investigative process. If employees do not understand



the steps of this process, they will distrust the process and may be unwilling to cooperative.

The following methods can help achieve this goal.

Educate Employees - Educating employees about the internal investigations process will 'demystify' it and will produce several significant benefits:

- Allows employees to appreciate that investigations into allegations protect them.
- Begins to change employee attitudes that the investigations are arbitrary, unfair, biased and heavy-handed.
- Clarifies what to expect if an employee becomes the subject or a witness in an investigation.
- Confirms employees' rights and obligations during an investigation.
- Informs employees about the potential value to the agency of applying what is learned during the investigation
- Advises employees of the penalties for those employees [or offenders] who make deliberately false allegations.
- Reinforces the agency's policy of zero tolerance and mandatory reporting requirements.

Encourage Investigators to be Visible When Not Investigating - Many investigators have experienced this: *"As soon as I drove into the parking lot, my presence is known within two seconds."* The appearance of an internal affairs investigator is disruptive. Suddenly no one is talking about anything except the investigator and why they were there. Rumors fly, people speculate, phone calls are made, and everyone is on guard.

There are a number of ways to help alleviate this reaction:

- Assure that investigators are visible when NOT conducting an investigation;
- Demystify the investigative process so employees understand what is happening;
- Protect the confidentiality of the investigation - assure that employees know that you will NOT discuss details of investigations with others; and
- Be a model of integrity and trust.

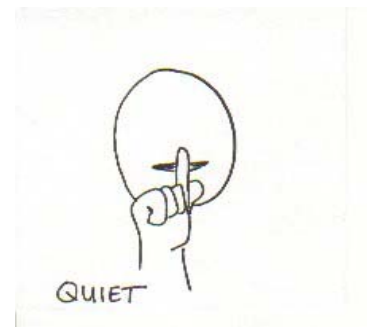
Investigators who are from outside the agency may not be able to follow the advice of being visible, as they will, by the nature of their relationship with the agency, only appear when investigations have started. This is a challenge for the agency leadership to overcome as well as for the employees who feel that they are under added scrutiny.

Addressing the Code of Silence

Addressing an organization's code of silence is a parallel exercise to improving the culture. The code of silence has evolved over, perhaps, many years, and flourishes in organizations where the communication and trust between the leadership and line staff is deficient. Working to improve employees' trust of the organization, particularly in the investigative and discipline processes is a long-term undertaking.

What are the steps that successful agency leaders find have worked?

- Clearly establish the mission of the organization and assure it is known and understood by all employees.
- Demonstrate an on-going commitment to improve communications, both formal and informal in the daily work life of employees through management by walking



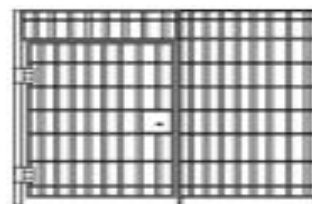
around, involvement of line employees in policy and procedure development, and showing the ideas of staff are valued.

- Improve training as a commitment to improving professionalism.
- Listen to employees. Address concerns; dispel rumors.
- Train management staff and supervisors to assure they have the skills and knowledge to perpetuate a healthy organization.
- De-mystify the investigative process through the creation of written policies and procedures and training.
- Assure that practice follows policies and procedures.
- Insure that those who report allegations of misconduct are protected against retaliation by their peers and are acknowledged as “heros.”

Not addressing the code of silence and failing to protect those who report can cost organizations. In a recent case litigated in a New England state, an organization was held liable for failing to protect an employee who reported misconduct. The employee claimed he was subjected to a hostile work environment. He reported to management that his supervisor was playing cards with jail inmates. He was immediately ostracized by his fellow offices who refused to stand beside him at roll call. They called him a rat and dropped cheese beside his chair at lunch. Threatening posters also went up around the jail and his wife, who is confined to a wheelchair with multiple sclerosis, received a menacing phone call. The employee in this case won a judgement of \$500,000 against the department for failing to protect him and address the code of silence.³

Why Investigations Fail⁴

Understanding why investigations fail provides a framework for agencies to improve and enhance their investigative process. Investigations fail for many reasons, which may include:



- Weak agency policy;
- Lack of support from the top;
- Poor teamwork;
- Poor record keeping;
- Leaks during the investigation;
- Uncooperative complainants;
- Uncooperative employees - code of silence;
- Poorly trained & inexperienced investigators;
- Limited evidence;
- Lack of commitment to the task; and
- Poor communication and weak links with investigative partners.

Effective policies and procedures, even for agencies who don't have investigative authority, can help overcome many of these obstacles, and dramatically improve investigations.

Conclusion: Module Four

This Module has been designed to help administrators think about their critical role in the investigation of a staff sexual misconduct, regardless of whether they are mandated or authorized to conduct these investigations.

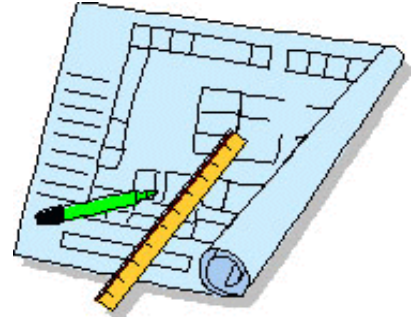
This Module provided a checklist for administrators to use to develop or refine existing procedures and protocols, as well as ideas about developing memoranda of agreements with critical partners and stakeholders.

Aftermath management has been highlighted as critical to help organizations and employees address the impact of allegations and investigations. Understanding why investigations fail provides additional insight into how to improve an agency's approach to investigations.

Exercise: Blueprint - Module Four

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

- Make notes about what issues are of concern to you.
- What is working well in your organization?
- 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.

Attachment C - Garrity and Miranda

	<i>Criminal (Miranda)</i>	<i>Administrative (Garrity)</i>
<i>Basis of violation</i>	Law, criminal statute	Policy & Procedure
<i>Standards</i>	Elements of crime	Elements of violation
<i>Testimony</i>	Hearsay inadmissible	Hearsay admissible if supported
<i>Evidence</i>	Polygraph inadmissible	Polygraph results can be used as investigative tool to support other evidence & information
<i>Procedural</i>	Need prosecutor support	Can still proceed if prosecution denied
<i>Procedural</i>	Rules of discovery apply - reports and evidence will be used at trial	Consider how reports will be used internally
<i>Due Process</i>	Miranda protections	Garrity protections
<i>Burden of Proof</i>	Beyond reasonable doubt	Preponderance of evidence

Endnotes:

1. *Miranda v. Arizona*, 384 U.S. 436 (1966) *Garrity v. New Jersey*, 385 U.S. 493 (1967)
2. *Garrity v. New Jersey*, 385 U.S. 493 (1967)
3. *Bruce Baron v. Suffolk County Sheriff's Department and Daniel Hickey*, May 16, 2003, 01-CV-10143, United States District Court for the District of Massachusetts.
4. Thanks are extended to A.T. Wall, Director, Rhode Island Department of Corrections, for his work on "Why Investigations Fail" and "Aftermath Management".