



Module 2: Legal Issues and Agency Liability: Guidance for the Field

Time: 10:30 a.m. – 11:45 a.m. (1 hour and 15 minutes)

Training Objectives:

1. Identify the steps to take to prevent or mitigate legal liability through the investigative process.
2. Understand the use of, and the difference between, Miranda and Garrity, as required by PREA standard 115.(3)34.
3. Apply an understanding of Miranda and Garrity to conducting successful investigations.

Materials Needed:

1. Easel pad and markers
2. PowerPoint® player/machine (lap top computer and LCD projector)
3. Screen or monitor
4. Handout: Miranda and Garrity Scenario


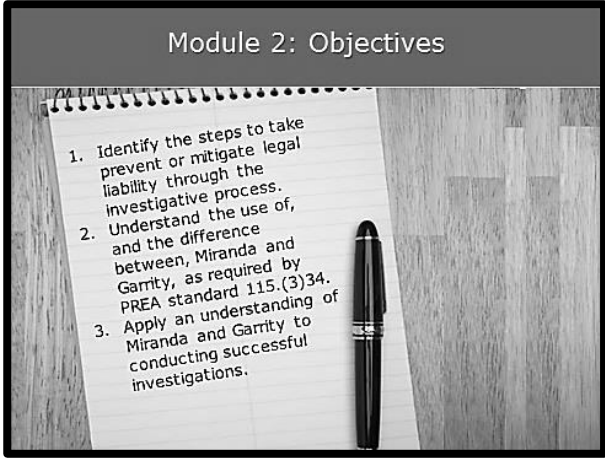


This module has been developed over many years and includes legal research and work provided by American University, Washington College of Law, and Jeff Shorba.





Training Tips:



- Trainers should consider inviting a representative from the agency's Human Resources or Legal Department to co-present or present this module. This may enhance the discussion of the case law.
- Trainers may want to add lawsuits specific to their agency or their state to this module to engage their audience. Additionally, trainers should view the case law provided in this module as suggestion – remove cases that are not appropriate for your agency, such as those specific to juvenile/adult. Include those cases that seem most applicable to the training participants and your agency.
- An investigation mapping scenario specific to issues addressed in this module has been provided and is located at the end of the module. If you remove slides from this training,



consider inserting the Scenario activity twice: once following the Miranda and Garrity section at the beginning of Module 2, and once at the end of Module 2. Have participants conduct the Scenario activity following the Miranda and Garrity section and then report out. At the end of the module, have participants re-form their previous groups and again conduct the Scenario activity, deciding what they would do differently following the second half of the module.

- Be advised that this module may contain material that utilizes concepts and language that may be upsetting or difficult for some participants. This may include statements referring to genitalia, sexual harassment, sexual abuse, trauma and suicide. Videos used may also contain profanity. Please review all materials prior to using to ensure they are appropriate for use in your agency and make substitutions where needed. You should also consider providing a general notice to participants at the beginning of each training session.
- Please note that this module was developed specifically for facilities that use the Adult Prisons and Jail or Juvenile PREA Standards. Facilities using the Community Confinement or Lockup standards should review all standard references to ensure that the content and language is appropriate for their facility type and inmate/resident population and adjust the material as needed to their specific circumstance.




Time	Lecture Notes	Teaching tips
1 min	<p>Module 2 Legal Issues and Agency Liability: What Investigators Should Know</p> <p>In this module we are going to talk about legal liability in investigating allegations of sexual abuse and sexual harassment in custodial settings.</p> <p>You have influence and a responsibility in your role as an investigator to ensure allegations are responded to in an effective and professional manner. This module is designed to increase your awareness of the liability issues that exist around sexual abuse in confinement settings in general, and in investigating sexual abuse incidents in particular.</p> <p>As always, it is important to reach out to your legal department if you have any questions regarding the legality of a situation or a liability you may identify.</p>	 <p>Legal Issues and Agency Liability: What Investigators Should Know</p>
.5 min	<p>Module 2: Objectives</p> 	 <p>Objectives</p> <p>Ask the class if they know what is meant by these terms.</p>
.5 min	<p>Miranda and Garrity</p>	 <p>Miranda and Garrity</p> <p>Experienced investigators may feel that this is basic information.</p>


	 <p>A requirement of PREA standard 115.(3)34 is for investigators be trained on Miranda and Garrity warnings.</p>	<p>However, many facility investigators who have little to no investigations training need this information with a robust classroom discussion. Encourage discussion throughout this module.</p>
<p>1 min</p>	<p>Video</p> 	 <p>It is recommended that trainers consider the inclusion of a video clip here to add humor to the module. One possible video is the Miranda Rights scene from <i>21 Jump Street</i>, which can be found on YouTube at the following link:</p> <p>https://www.youtube.com/watch?v=T45aF1NLMyM</p>
<p>1 min</p>	<p>Miranda v. Arizona (S.Ct. 1966)</p>	 <p>Miranda v. Arizona</p>




	<div data-bbox="446 191 1045 646" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Miranda v. Arizona (S.C.T. 1966)</p> <ul style="list-style-type: none"> • Stems from the Fifth Amendment against self-incrimination: • “The prosecution may not use statements....stemming from an interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self incrimination....” <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>What is Miranda? We’ve all heard of the constitutional right not to incriminate yourself.</p>	
<p>1 min</p>	<div data-bbox="446 835 1045 1291" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Miranda v. Arizona (S.C.T. 1966)</p> <div style="border: 1px solid gray; padding: 5px; margin: 10px auto; width: 80%;"> <p>If a person is in custody & being interrogated: → they must be made aware of the fact that they have the right <u>not</u> to answer questions</p> </div> <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • Miranda is a warning read in the event of a custodial interview. • Since a suspect has a 5th Amendment right not to incriminate him or herself if they are in a situation where they are in custody and being interrogated, they must be made aware of that right. • Note that you only need to read someone their Miranda rights if you are asking them questions. If you are building a rapport, you can wait to read the Miranda rights until immediately before you begin the questioning part of the interview. 	 <p>Miranda v. Arizona</p>
<p>1 min</p>	<p style="text-align: center;">Berghuis v. Thompkins (S. CT. 2010)</p>	

	<div data-bbox="448 191 1045 646" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Berghuis v. Thompkins (S. Ct. 2010)</p> <ul style="list-style-type: none"> • Shooting suspect mostly silent during three hour interrogation • Asked if “he prayed to God to forgive him for the shooting”. Answered yes <ul style="list-style-type: none"> • S. Ct. said statement could be used • Silence during interrogation does not invoke right to remain silent • Interrogation need not end until there is an “unambiguous” statement that you wish to remain silent <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>How does a suspect demonstrate his or her desire to remain silent?</p> <ul style="list-style-type: none"> • They actually need to state their desire to remain silent. Just being silent does not invoke that right. • In this case, the suspect’s answer of “yes” was used to convict him and the guilty finding was upheld. 	<p>Berghuis v. Thompkins</p>
<p>.5 min</p>	<p style="text-align: center;">Miranda v. Arizona (S.CT. 1966)</p> <div data-bbox="451 1136 1052 1591" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Miranda v. Arizona (S.CT. 1966)</p> <p>A suspect must waive his/her rights:</p> <ul style="list-style-type: none"> • Voluntarily • Knowingly • Intelligently • Unambiguously <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>If a suspect wishes to waive his or her rights, give them their rights in writing and have them sign that piece of paper. Best practice is to actually record the warning. This record will help you avoid claims of confusion later on.</p>	<div data-bbox="1198 1003 1302 1075" style="text-align: right;">  </div> <p>Miranda v. Arizona</p>
<p>1 min</p>	<p style="text-align: center;">Miranda</p>	<div data-bbox="1198 1801 1302 1873" style="text-align: right;">  </div>

	<div data-bbox="453 228 1053 680" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center; background-color: #cccccc; margin: -10px -10px 10px -10px;">Miranda</p> <ul style="list-style-type: none"> Are incarcerated offenders ever not in custody? Can they ever choose to leave? Under what conditions would they really have "freedom" to leave? <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> Are prisoners in custody? If someone is in prison, do you need to give them the Miranda warning? Yes. 	<p>Miranda</p>
<p>1 min</p>	<p style="text-align: center;">Howes v. Fields (S. Ct. 2012)</p> <div data-bbox="453 1150 1053 1602" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center; background-color: #cccccc; margin: -10px -10px 10px -10px;">Howes v. Fields (S. Ct. 2012)</p> <ul style="list-style-type: none"> Michigan jail inmate questioned for 5-7 hours by armed deputies using a sharp tone and profanity Told he was free to return to his cell but no Miranda warning Court defined custody as "circumstances that are thought generally to present a serious danger of coercion" People already in prison or jail unlikely to be coerced by a longing for prompt release and questioners lack authority to do so Balance – told free to leave with length, hour and tone of the questioning <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> This is a Supreme Court case in which it was determined that people already in custody are unlikely to be coerced by their longing for release. However, the length of time of the interview, the tone of the questioning, and the timing may impact this. 	<div data-bbox="1198 848 1302 919" style="text-align: center;"> </div> <p>Howes v. Fields</p>

<p>1 min</p>	<p style="text-align: center;">Miranda</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Miranda</p> <ul style="list-style-type: none"> Agency in collaboration with your prosecuting authorities will need to decide how to develop your own process Most conservative approach is to provide Miranda warnings Generally does not discourage inmate from talking and will provide the most protection If not, will need to ensure documentation the inmate was free to leave and other conditions which would distinguish the situation from “custody”. <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div>	 <p>Miranda</p> <p style="color: red;">Insert agency requirements regarding the use of the Miranda warning. Must it always be used? Best practice is to always use Miranda.</p>
<p>1 min</p>	<p style="text-align: center;">Garrity v. New Jersey (S. CT. 1967)</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Garrity V. New Jersey (S. CT. 1967)</p> <ul style="list-style-type: none"> Officers were threatened with termination if they would not testify to the fixing of tickets The court held that this process of requiring officers to testify violated the constitution Coerced testimony could not be used against them in criminal proceeding <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>What is Garrity?</p> <p>If an agency’s policy requires employees to cooperate with investigations and tell the truth under threat of termination, investigators need to warn them of that fact and emphasize that any statements made will not be used against them in a criminal proceeding.</p>	 <p>Garrity V. New Jersey</p>
<p>1 min</p>	<p style="text-align: center;">Garrity</p>	 <p>Garrity</p>

	<div data-bbox="448 191 1045 646" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Garrity</p> <ul style="list-style-type: none"> • The warning will clearly inform the staff that his/her answers to questions will not be used against them in a criminal prosecution • Subject must be informed that refusing to give a statement (or failing to give a true statement) may be grounds for immediate termination of employment <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • The warning must clearly inform the staff member that their statements will not be used in criminal proceedings, and that they may be disciplined or terminated if they choose not to cooperate. • This means that the Garrity warning should never be used if there is any chance that the information established in that interview will be used in a criminal proceeding. 	
<p>1 min</p>	<p style="text-align: center;">Garrity: The Investigative Process</p> <div data-bbox="448 1083 1045 1539" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Garrity: The Investigative Process</p> <ul style="list-style-type: none"> • The burden of proof that the prosecutor did not use statements of the accused under Garrity is on the State. • The two cases must not mingle after interrogation of the suspect staff with Garrity warning <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • If you interview a staff member who is a suspect in a criminal case before the case goes to trial, and you receive information from that staff member regarding their guilt, the burden of proof is on the prosecutor to demonstrate that information was not shared from those interviews with the criminal investigators. • This is a very difficult thing to prove, since it involves proving that no communication took place or that the 	 <p>Garrity: The Investigative Process</p>

	investigators were ignorant of the staff member's guilt.	
1 min	<p style="text-align: center;">Garrity: The Investigative Process</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Garrity: The Investigative Process</p> <p>Solutions</p> <ul style="list-style-type: none"> - Try a non-coerced staff suspect statement first - If the suspect staff refuses to answer questions and your agency wants answers you must provide some type of Garrity warning <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> ● What should you do? If you need to interview the staff member before the criminal case is complete, try a non-coerced interview. ● This means that you would <i>not</i> threaten staff with termination, which would make it a coerced interview. 	 <p>Garrity: The Investigative Process</p>
.5 min	<p style="text-align: center;">Garrity: The Investigative Process</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Garrity: The Investigative Process</p> <p style="text-align: center;">It is important to let the criminal case pass into the charged state before the administrative investigator begins to interview the staff suspect</p> </div> <p>Alternatively, let the criminal case move forward with the awareness that it may last for months or even years.</p>	 <p>Garrity: The Investigative Process</p>
1 min	Court Approach	 <p>Court Approach</p>

Court Approach

- Courts are not prison administrators
- Courts always have the benefit of hindsight
- Litigation changes the landscape for decisions
- Litigation brings other issues
 - press coverage, etc.



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Technically, courts do not run or oversee prisons, but they will sometimes take that role during lawsuits and tell you what you should have done with the benefit of 20-20 hindsight.


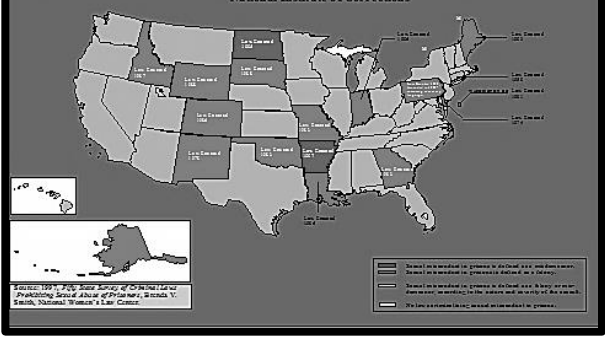


Administrators make decisions with the information they have in front of them at the time. So, the question here is how do you get the best information possible to make the right decisions and either avoid litigation in the first place or make decisions that will be supported by a judge.

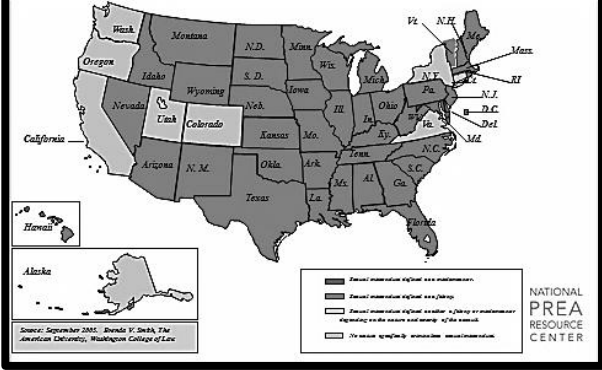



How many of you have been sued or been involved in litigation at some level?

When you have litigation, what comes along with it? Lawyers. And what do lawyers require? Money. Litigation may also involve media coverage and bad publicity. These are all reasons to avoid litigation.





Pause for show of hands. It is usually the majority of people in the room.





<p>1 min</p>	<p style="text-align: center;">What The Court Looks For</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">What The Court Looks For</p> <ul style="list-style-type: none"> • Prior Practice of the Department/Facility <ul style="list-style-type: none"> <input type="checkbox"/> Have there been prior complaints? <input type="checkbox"/> Who has raised them? <input type="checkbox"/> Is there a policy? Consistently applied? <input type="checkbox"/> Is there training? Mandatory? For whom? <input type="checkbox"/> Was there a thorough investigation? <input type="checkbox"/> Were appropriate actions taken? (Discipline, termination, etc.)  </div> <p>The court looks at:</p> <ul style="list-style-type: none"> ● Past behaviors and past complaints ● Investigations to see if allegations were appropriately addressed and if responses were adequate. <p>As an investigator, look for patterns of incidents, high risk situations, or facility weaknesses that exist and ensure administrators are aware of these so that they can be addressed.</p>	 <p>What The Court Looks For</p>
<p>.5 min</p>	<p style="text-align: center;">Staff Sexual Misconduct Criminal Laws</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Staff Sexual Misconduct Criminal Laws</p> <ul style="list-style-type: none"> • The climate has changed significantly in the last two decades • Similar to the current emphasis on PREA – staff sexual misconduct became significant issue in the early 1990’s • Problems arose due to major cases in several states  </div> <ul style="list-style-type: none"> ● Criminal law has changed significantly over time. In the 1990s, several significant lawsuits raised national awareness around the issue of staff sexual misconduct. ● This attention resulted in an increase in state criminal laws addressing staff sexual misconduct and, eventually, 	 <p>Staff Sexual Misconduct Criminal Laws</p>


	the Prison Rape Elimination Act.	
.5 min	<p>Staff Sexual Misconduct Criminal Laws</p> <div style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Staff Sexual Misconduct Criminal Laws</p> <ul style="list-style-type: none"> • All 50 states, the federal government, and D.C. have laws specifically covering the sexual abuse of persons in custody • 32 states cover community corrections agencies • 29 cover juveniles explicitly – 17 implicitly <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>Now, all 50 states and the federal government have laws that specifically cover the issue of sexual abuse of people in custody.</p>	 Staff Sexual Misconduct Criminal Laws
.5 min	<p>1990 State Laws Prohibiting Staff Sexual Abuse</p> <div style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">1990 State Laws Prohibiting Staff Sexual Abuse</p> <p style="text-align: center; font-size: small;">State Criminal Laws Prohibiting Sexual Misconduct with Offenders in 1990 National Institute of Corrections</p>  <p style="font-size: x-small;">Source: 1990, 2010, State Survey of Offender Legal Prohibiting Sexual Abuse of Prisoners, Brenda Y. Smith, National Institute of Corrections</p> </div> <p>In 1990, less than half the states had laws addressing the sexual abuse of people in custody.</p>	 1990 State Laws
.5 min	<p>2010 State Laws Prohibiting Staff Sexual Abuse</p>	 2010 State Laws


	<p style="text-align: center;">2010 State Laws Prohibiting Staff Sexual Misconduct</p>  <p>It wasn't until 2010 that all states had laws addressing the issue, including laws covering community corrections either implicitly or explicitly.</p>	
<p>.5 min</p>	<p style="text-align: center;">States that Cover Community Corrections 2010</p>  <p>These last two maps demonstrate how sexual abuse in correctional settings has become more acknowledged and addressed through legislation.</p> <p>State laws address sexual abuse in community corrections ...</p>	 <p>States that Cover Community Corrections</p>
<p>.5 min</p>	<p style="text-align: center;">States that Cover Juvenile Justice Agencies</p>	 <p>States that Cover Juvenile Justice</p>





	<div data-bbox="446 191 1044 646" data-label="Figure"> </div> <p data-bbox="326 657 724 688">...and juvenile justice agencies.</p>	
<p data-bbox="212 730 289 762">1 min</p>		<div data-bbox="1198 730 1304 800" data-label="Image"> </div> <p data-bbox="1198 804 1414 957">Insert slide with the laws of the state in which your agency/facility is located.</p>
<p data-bbox="212 966 289 997">1 min</p>	<div data-bbox="467 1003 1068 1459" data-label="Complex-Block"> <div data-bbox="475 1010 1068 1087" data-label="Section-Header"> <h3 style="background-color: #8B4513; color: white; padding: 5px; text-align: center;">Other State Criminal Laws</h3> </div> <div data-bbox="508 1108 1036 1367" data-label="List-Group"> <ul style="list-style-type: none"> • Sexual Assault • Statutory Rape • Sodomy • Sex Offender Registration <ul style="list-style-type: none"> • Adult and Juvenile • Vulnerable Adult Statutes • Licensing • Malfeasance in Office/Official Misconduct • Obstruction of Justice • Making False Statements to a Government Official • Mandatory Reporting </div> <div data-bbox="992 1377 1052 1436" data-label="Text"> <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> </div> <p data-bbox="326 1497 1036 1577">Here is a list of some of the laws that investigators and prosecutors may use in a case.</p> <p data-bbox="326 1612 1166 1822">Some staff members who have been involved sexually with an inmate may think that termination is a possible consequence of their actions. They may be surprised to learn that they could also be sentenced to time in prison and/or have to register as a sex offender for the rest of their lives.</p>	<div data-bbox="1198 961 1304 1031" data-label="Image"> </div> <p data-bbox="1198 1035 1349 1094">Other State Criminal Laws</p>


<p>1 min</p>	<p style="text-align: center;">State Tort Law Claims</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">State Tort Law Claims</p> <ul style="list-style-type: none"> • Assault • Battery • Intentional Infliction of Emotional Distress • Negligent Infliction of Emotional Distress • Negligent Hiring, Firing, Supervision  <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>What is tort?</p> <ul style="list-style-type: none"> • Tort is a civil claim for money. It is usually a claim additional to the criminal charge, and an additional liability to the agency and the individual. 	 <p>State Tort Law Claims</p> <p>Ask the class to define tort and wait for an answer before moving on.</p>
<p>1 min</p>	<p style="text-align: center;">Litigation</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Litigation</p> <ul style="list-style-type: none"> • Policy and practice are often developed in crisis • Being proactive now can help avoid crisis later • Taking the right steps in policy, procedure, practices and investigations will make litigation less likely and will make for more effective policies and procedures in the long run  <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>As an investigator, you have access to information about your agency that other people do not. Be aware of how that information can guide the development and revision of policy and practice.</p> <p>Do not be afraid to speak up when you see policies or practices that need to be developed or modified that could help minimize your agency's exposure and liability.</p>	 <p>Litigation</p>



<p>1 min</p>	<p style="text-align: center;">PREA and Legal Issues</p> <div data-bbox="435 235 1057 688" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">PREA and Legal Issues</p> <ul style="list-style-type: none"> PREA does not create a separate cause of action. However, it will be used as justification in other lawsuits. <div style="text-align: center;">  </div> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>Byrd v. Maricopa County (9th Cir - 1/5/11)</p> <ul style="list-style-type: none"> Pretrial detainee in jail subjected to cross gender strip search Ninth Circuit found search violated 4th amendment rights Opinion cited the PREA Commission report and standards </div> <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>Is there such thing as a PREA lawsuit? No. PREA does not create a new cause of action.</p> <p>However, this doesn't mean you cannot file a lawsuit based on another cause of action and allege that the agency/facility is not compliant with PREA. For example, PREA was used as additional support in this case for damages and liability.</p> <p>The most common bases for legal challenges are:</p> <ul style="list-style-type: none"> ● 42 U.S. C. 1983 ● Eighth Amendment ● Fourth Amendment ● Fourteenth Amendment ● State tort claims 	<div style="text-align: center;">  <p>PREA and Legal Issues</p> </div> <p>Ask the class whether there is such a thing as a PREA lawsuit and wait for some answers before moving on.</p>
<p>1 min</p>	<p style="text-align: center;">Legal Framework</p> <div data-bbox="444 1402 1045 1856" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Legal Framework</p> <div style="display: flex; align-items: center;">  <div style="margin-left: 10px;"> <p>42 U.S.C. 1983</p> <p>Creates a federal cause of action for the vindication of rights found elsewhere</p> </div> </div> <ul style="list-style-type: none"> • Key Elements <ul style="list-style-type: none"> – Deprived of a right secured by the constitution or law of U.S. – Deprivation by a person acting under color of state law – Don't forget volunteers and contractors <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div>	<div style="text-align: center;">  <p>Legal Framework</p> </div>



	<p>This means, if an inmate’s rights under the Constitution or federal law are violated, they can use this legal framework to sue. Why would a plaintiff want to take a case to a federal (vs. state) court? Because it removes the “home court” advantage of the agency from their state where they may have relationships.</p>	
<p>1 min</p>	<p style="text-align: center;">Official Liability: 8th Amendment Farmer v. Brennan, 511 U.S. 825 (1994)</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Official Liability: 8th Amendment</p> <p style="text-align: center; margin: 5px 0;">Farmer v. Brennan, 511 U.S. 825 (1994)</p> <ul style="list-style-type: none"> – Transsexual prisoner brought suit for injuries suffered when prison officials placed him in general prison population – Established new legal standard with two part test: <ul style="list-style-type: none"> 1. The injury must be objectively serious 2. The official must have acted with deliberate indifference or reckless disregard for constitutional rights <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>The 8th Amendment prohibits cruel and unusual punishment.</p> <p>Farmer v. Brennan is one of the more famous 8th Amendment lawsuits because it established the legal standard of deliberate indifference.</p> <ul style="list-style-type: none"> ● This case was brought against the Federal Bureau of Prisons by a prisoner who was sexually abused while in custody. ● The plaintiff argued that prison officials should have known that he would be hurt in the general population because he was transsexual, and therefore staff should have protected him. ● He sued on the basis that his 8th Amendment right was violated. ● The deliberate indifference legal standard has a two part test. <ol style="list-style-type: none"> 1. Was the injury objectively serious? <ol style="list-style-type: none"> a. What does “objectively” mean? b. It means that it can be demonstrated through 	<div style="text-align: center;">  <p>Official Liability: 8th Amendment</p> </div> <p>Ask the class the following questions and wait for answers. Encourage discussion.</p> <p>Ask: What does deliberate indifference mean?</p>


	<p>some sort of evidence, e.g., medical records, expert testimony, pictures.</p> <p>c. Can you have an objectively serious mental health injury? Yes.</p> <p>2. Did the official act with deliberate indifference or reckless disregard for the offender’s constitutional rights?</p>	<p>Ask: What does “objective” mean?</p>
<p>1 min</p>	<p>8th Amendment: What the Court Looks For</p> <div data-bbox="446 604 1045 1056" style="border: 2px solid black; padding: 10px; margin: 10px 0;"> <p style="text-align: center;">8th Amendment: What the Court Looks For</p> <ul style="list-style-type: none"> • Deliberate indifference to inmate vulnerability – safety or health • Official knew of and disregarded an excessive risk to inmate safety or health • Official must be aware of facts which would indicate a substantial risk of harm and the official drew that inference • Do not need to know of actual harm just risk </div> <p>Deliberate indifference means that the official wantonly disregarded knowledge that he/she had or that he/she should have known.</p> <ul style="list-style-type: none"> ● The court looks to see whether officials demonstrated a deliberate indifference to some risk factor, either to the inmate’s safety or health. ● This would mean that the official knew of and disregarded an excessive risk to inmate/resident safety or health, or that the official was aware of facts that indicated a substantial risk of harm and that the official drew that inference. ● It’s important to note that the official does not need to know of any actual harm, but just be aware of the risk of harm. 	 <p>8th Amendment: What the Court Looks For</p>



<p>1 min</p>	<p style="text-align: center;">Legal Framework</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Legal Framework</p> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <p>Types of Liability</p> <p>Two types of liability:</p> <ul style="list-style-type: none"> • Official • Individual </div> <div style="width: 50%; text-align: center;">  </div> </div> </div> <p>There are two types of liability.</p> <ul style="list-style-type: none"> • What is official liability? It is agency liability or liability within your official capacity. • Individual liability is personal. If it is found that you are liable, you pay. 	 <p>Legal Framework</p>
<p>1 min</p>	<p style="text-align: center;">Legal Framework</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Legal Framework</p> <p>Official Liability</p> <ul style="list-style-type: none"> • Did it happen on your watch? • Were you responsible for promulgating and/or enforcing policy? • Did you fail to act or ignore information presented to you? • Did it result in harm – proximate cause (as opposed to the direct cause)? <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>The question that is asked here is: What information did you have? Can you be held officially liable if you were not directly involved? Yes – through proximate cause.</p>	 <p>Legal Framework</p>
<p>1 min</p>	<p style="text-align: center;">Legal Framework</p>	 <p>Legal Framework</p>



	<div data-bbox="446 191 1045 646" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Legal Framework</p> <p>Official Liability</p> <p>Can Result From:</p> <ul style="list-style-type: none"> - Failure to train – ensure staff are aware of laws and policies - Negligent supervision – oversight to ensure policies followed and complaints addressed - Negligent employment or retention – take action if needed – failure to fire - Best protection is proactive approach – courts will look to see what steps have been taken <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>This can result from your hiring someone who was not appropriately vetted or keeping someone employed who should have been fired.</p> <ul style="list-style-type: none"> ● Some administrators will avoid firing someone so as to avoid being sued. It is better to be sued for firing someone than to be blamed in the event that you did not fire that individual, and they perpetrated sexual abuse. ● The way to mitigate official liability is to pay attention to patterns or “red flags” and to be proactive rather than reactive. ● The more proactive you are and the more you follow personnel policies and the law, the less official liability there will be. 	
<p>1 min</p>	<div data-bbox="446 1360 1045 1816" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Legal Framework</p> <p style="text-align: center;">Legal Framework</p> <p>Official Liability – <u>Policy is Not Enough</u></p> <p><u>Daskalea v. DC (DC Cir. 2000)</u></p> <p>Court ordered sexual misconduct policy could not insulate agency even though guard’s acts were against policy</p> <ul style="list-style-type: none"> - No training on policy - Never gave policy to staff or inmates - Policy not posted - 15 grievances by inmate resulted in no action - No “supervision” by staff or cameras <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div>	<div data-bbox="1198 1318 1302 1390" style="text-align: center;">  </div> <p style="text-align: center;">Legal Framework</p>



	<p>Policy is not enough. This agency had a great policy but they never trained on it.</p> <ul style="list-style-type: none"> • Having a policy in writing is a good start, but staff, contractors, and volunteers need to be trained on it. Minimally, they need to read it and sign it, showing it has been read and understood. • Policy is not helpful unless something is done with it. 	
<p>1 min</p>	<p style="text-align: center;">Legal Framework</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Legal Framework</p> <p>Individual Liability</p> <ul style="list-style-type: none"> • Plaintiff must provide notice that the suit is against the official in her personal capacity • Direct participation not required <ul style="list-style-type: none"> – Actual or constructive notice of unconstitutional practices – Demonstrated gross negligence or deliberate indifference by failing to act – Assumed knowledge of state law as correctional administrator – Egregious behavior – but it can happen <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • Usually, if you are sued, you are sued in your official capacity. • There is a pretty high standard for a finding of individual liability. 	 <p>Legal Framework</p>
<p>1 min</p>	<p style="text-align: center;">Riley v. Olk-Long, 282 F.3rd 592 (8th Cir. 2002)</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center;">Riley v. Olk-Long, 282 F.3rd 592 (8th Cir. 2002)</p> <ul style="list-style-type: none"> • Inmate brought Eighth Amendment action against Warden (Olk-Long) and Director of Security (Sebek) • Alleged male staff had forced sexual relations with offender • Jury found corrections officials deliberately indifferent • Warden and Security Director found personally liable <ul style="list-style-type: none"> • Warden (\$25,000); • Security Director (\$20,000) <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • This case is out of Iowa and is a lawsuit against a warden and security director at a women’s facility. 	 <p>Riley v. Olk-Long</p>


	<ul style="list-style-type: none"> • They were sued in both their official and individual capacity and were found liable. The decision was upheld on appeal in 2002. 	
<p>1 min</p>	<p style="text-align: center;">Riley v. Olk-Long – What Happened?</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Riley v. Olk-Long – What Happened?</p> <ul style="list-style-type: none"> Officer made inappropriate comments to inmate regarding sex with roommate Officer groped the inmate. She did not report it. Did not think she would be believed and feared discipline Officer later entered inmate’s cell and raped her Another inmate witnessed the incident and reported it Inmate placed in administrative segregation during investigation Officer terminated and convicted under state law <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>What happened?</p> <ul style="list-style-type: none"> • A new inmate came into the facility, and a male officer started harassing her. • He started off with jokes about her having a lesbian relationship with her roommate. When she did not object to the jokes, he groped her and then waited to see what she did. • When she did not report his behavior, he raped her. • She also did not report the rape. However, there are no secrets in prison, and the rape became known and was reported by another inmate. <p>So, why are the security director and the warden being held responsible?</p>	 <p>Riley v. Olk-Long</p>
<p>1 min</p>	<p style="text-align: center;">Riley v. Olk-Long Why Personal Liability?</p>	 <p>Riley v. Olk-Long</p>



	<div data-bbox="448 191 1045 646" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Riley v. Olk-Long Why Personal Liability?</p> <p>Why were Warden and Security Director held personally liable?</p> <ul style="list-style-type: none"> • Prior to this incident other female inmates had complained • Officer had a history of predatory behavior • Four prior investigations closed as inconclusive (sending \$, sexual assaults, bus stop pick up, comment to inmate's mother) • Collective bargaining unit precluded permanent reassignment – put in control center for short time then put back • Opportunity to terminate officer but did not <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> ● There had been previous complaints about the officer's past behavior. ● It is debatable whether there was enough evidence in the past to fire him, but there had been a number of (mostly inconclusive) investigations. ● The problem was that a collective bargaining agreement required the facility to move someone under investigation only for a specific and limited period of time. ● So, despite the fact that the officer was actually under investigation at the time of the sexual abuse, he continued to work in the housing unit. 	
<p>1 min</p>	<div data-bbox="448 1220 1045 1717" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Riley v. Olk-Long – Court Decision</p> <p style="text-align: center;">Riley v. Olk-Long – Court Decision</p> <p>Court Decision</p> <ul style="list-style-type: none"> • Found the Warden and Security Director were deliberately indifferent • Did not take the threat posed by the officer seriously • Collective bargaining agreement is not an excuse • Protecting the inmate is the duty of both correctional officials <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>The court found that:</p> <ul style="list-style-type: none"> ● The officer should have been fired or kept away from the 	 <p>Riley v. Olk-Long</p>

	<p>inmates.</p> <ul style="list-style-type: none"> • A collective bargaining agreement is not an excuse. You cannot bargain away someone’s constitutional rights. • If the officer was constantly under investigation without allegations ever being substantiated, there might be a problem with the investigation process. 	
<p>1 min</p>	<p style="text-align: center;">Ortiz v. Jordan (S.CT. 1/24/11)</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Ortiz v. Jordan (S.Ct. 1/24/11)</p> <ul style="list-style-type: none"> • Female reformatory inmate brought 4th and 8th amendment claims against a case manager and prison investigator • Alleges officer Schultz walked up to her in living quarters and grabbed breast – said he would “see her tomorrow” • Next day she reported it to case manager Jordan • Jordan said Schultz was reassigned to another facility and would be leaving the next day. Just wait it out. <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>The female inmate in this case brought both a 4th Amendment and 8th Amendment claim against the agency. What happened?</p> <ul style="list-style-type: none"> • The inmate was groped and reported the incident. • Instead of reporting it and removing the inmate from contact with the officer, her case manager told her that it was the officer’s last day and that she should wait it out. • The inmate was sexually assaulted later that same day. 	 <p>Ortiz v. Jordan</p>
<p>1 min</p>	<p style="text-align: center;">Ortiz v. Jordan (S.CT. 1/24/11)</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Ortiz v. Jordan (S.Ct. 1/24/11)</p> <ul style="list-style-type: none"> • Jordan wrote an incident report. In it she stated Ortiz would not name her assailant. Jordan did not notify her supervisor (she submitted the report two days later). • Later that day Ortiz was again sexually assaulted by Schultz. She reported it. • Investigator Bright assigned who began investigation two days later. • Bright placed Ortiz in solitary confinement. Ortiz claims this was retaliation for reporting. <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div>	 <p>Ortiz v. Jordan</p>



	<ul style="list-style-type: none"> • After the assault, the case manager waited two days to write an incident report and falsely stated that the inmate would not name the perpetrator. • The investigation was also unnecessarily delayed and did not start until two days after the incident. • Once the investigation began, the inmate was put in solitary confinement, which was seen as retaliatory since she had been in general population for two days after the incident without problems. 	
<p>1 min</p>	<p style="text-align: center;">Ortiz v. Jordan (S.Ct. 1/24/11)</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Ortiz v. Jordan (S.Ct. 1/24/11)</p> <ul style="list-style-type: none"> Legal claims: Jordan did nothing to stop second assault and placement in solitary was retaliation Case proceeded to trial. Jury returned a verdict for plaintiff \$350,000 in compensatory and punitive damages against Jordan \$275,000 against Bright Case appealed on technical grounds - when can qualified immunity defense be raised <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>The verdict returned by the jury held both the case manager and the investigator personally liable.</p>	 <p>Ortiz v. Jordan</p>
<p>1 min</p>	<p style="text-align: center;">Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005)</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005)</p> <ul style="list-style-type: none"> Inmate alleged sexual assaults by jail administrator and officer (son-in-law of Sheriff) Written statements provided by women to Sheriff Sheriff delayed moving women from jail or moving officers Both later convicted of assault <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div>	 <p>Gonzales v. Martinez</p>


	<p>This case addresses what top administrators should know.</p> <ul style="list-style-type: none"> • A sheriff’s son-in-law had a number of allegations made against him. The sheriff did not respond appropriately and was held accountable. 	
<p>1 min</p>	<p style="text-align: center;">Gonzales v. Martinez – Court Findings</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Gonzales v. Martinez – Court Findings</p> <ul style="list-style-type: none"> Sheriff ignored complaints claiming inmates were being troublemakers Rarely went to the jail and admitted administrator did not like investigations Left women in custody of alleged assailants Knowledge of risk does not have to be specific to one individual or one incident <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>Why was he held accountable?</p> <ul style="list-style-type: none"> • It was found that the sheriff should have known what was going on. • Rather than investigating the allegations, he ignored the cases and failed to remove the women from contact with their alleged assailants. • The son-in-law was later convicted on assault. • Although all agencies have complaints by troublemakers, all allegations have to be investigated, or the agencies and the individuals within the agency can be held liable. 	 <p>Gonzales v. Martinez</p>
<p>1 min</p>	<p style="text-align: center;">Beers-Capitol v. Whetzel, 256 F.3d 120 (2001)</p>	 <p>Beers-Capitol v. Whetzel</p>



	<div data-bbox="448 191 1045 646" style="border: 2px solid black; padding: 10px; margin-bottom: 10px;"> <p style="text-align: center;">Beers-Capitol v. Whetzel, 256 F.3d 120 (2001)</p> <ul style="list-style-type: none"> • Residents of juvenile detention facility sexually assaulted brought 8th Amendment claim against supervisors and co-workers • No summary judgment for facility counselor on official or personal liability where: <ul style="list-style-type: none"> - She told one of the plaintiffs she "kind of knew" employee was "messing" with residents - Admitted in deposition she heard rumors employee was having sex with residents - She did not investigate or report, but made file notes of the claims to "cover herself" <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>This was a highly visible case in the media with significant liability.</p> <ul style="list-style-type: none"> ● The juveniles made an 8th Amendment claim of sexual assault and tried to claim summary judgment. ● This would mean that, assuming all of the allegations are true, the plaintiffs would win. ● Here, the counselor made two mistakes. <ol style="list-style-type: none"> 1. She admitted to suspecting something without reporting it. 2. She documented her suspicions. <p>What do we tell our staff about reporting?</p> <ul style="list-style-type: none"> ● It is easy to report when someone approaches you with an allegation. But what about rumors? Suspicion? ● It is best to over-report rather than under-report. Do not put your own career on the line for someone else. 	
1 min	Guidry v. Rapides School Board, 560 So.2d 125 (La. App. 1990)	 Guidry v. Rapides School Board



	<div data-bbox="448 191 1045 646" style="border: 1px solid black; padding: 5px;"> <p style="text-align: center;">Guidry v. Rapides School Board, 560 So.2d 125 (La. App. 1990)</p> <ul style="list-style-type: none"> • Action against residential training school • Co-ed group of mentally handicapped children required constant supervision • Staff took brief smoke break • Girl sexually assaulted by group of boys • Court held: School breached its duty of reasonable care by leaving students alone • Responsible for damage caused by male students <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> ● In this case, a staff member left a group of mentally handicapped children alone during a brief smoke break. ● During this time, a girl was sexually assaulted by a group of boys. ● The court determined that the staff member breached his duty by leaving the youth alone, and was therefore held liable. ● This is a general supervisory lesson: Vulnerable individuals require supervision at all times. 	
<p>1 min</p>	<p style="text-align: center;">R.G. v. Koller (D. Hawaii 2006)</p> <div data-bbox="448 1129 1045 1583" style="border: 1px solid black; padding: 5px;"> <p style="text-align: center;">R.G. v. Koller (D. Hawaii 2006)</p> <p>Lesbian, Gay and Transgender Youth sought preliminary injunction against secure juvenile facility Court granted a preliminary injunction based on evidence of:</p> <ul style="list-style-type: none"> – Campaign of harassment based on sexual orientation including threats of violence, physical and sexual assault, social isolation and constant use of homophobic slurs <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> ● In this case, three juveniles (one male-to-female transgender youth, one lesbian, and one 18-year-old boy perceived to be gay) sued Hawaii Youth Correctional Facility for harassment and extensive use of isolation. 	 <p>R.G. v. Koller (D. Hawaii 2006)</p>
<p>1 min</p>	<p style="text-align: center;">R.G. v. Koller</p>	 <p>R.G. v. Koller</p>


	<div data-bbox="448 191 1045 646" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">R.G. v. Koller</p> <p>Supervisory staff knew of the harassment. Failed to take the following actions:</p> <ul style="list-style-type: none"> - Policies and training to protect LGBT youth; - Adequate staffing and supervision; - Functioning grievance system; and - Classification system to protect vulnerable youth <p>System was also in discussions with DOJ to reach agreement on civil rights violations</p> <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> ● The facility claimed the isolation was reasonable and non-punitive. The court determined that the use of isolation on children was not within the “range of accepted professional practices” and constituted punishment in violation of due process rights.” ● The court maintained the facility was deliberately indifferent based on its lack of: <ol style="list-style-type: none"> 1. Policies and training necessary to protect LGBT youth; 2. Adequate staffing and supervision; 3. A functioning grievance system; and 4. A classification system to protect vulnerable youth. ● The court also criticized the agency for using isolation as their first option and having no alternative housing plan. 	
<p>1 min</p>	<div data-bbox="448 1297 1045 1753" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Kahle v. Leonard (8th Cir. 2007)</p> <p style="text-align: center;">Kahle v. Leonard (8th Cir. 2007)</p> <ul style="list-style-type: none"> • On the job trainee supervised by senior officer in jail • After lockdown trainee entered inmate’s cell three times • Allegations of kissing, oral sex and genital contact – one visit lasting more than 5 minutes • Any entrance into cell was to be logged <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>This is a case about supervisors, new staff, turnover in staff, and technology.</p>	<div data-bbox="1198 1255 1305 1325" style="text-align: center;"> </div> <p style="text-align: center;">Kahle v. Leonard</p>



	<ul style="list-style-type: none"> • Within this facility, policy required logging every entrance to a cell. However, a trainee under supervision by an experienced officer entered an inmate’s cell multiple times within one evening with no justification or logging of the entrance and sexual abused her each time. 	
<p>1 min</p>	<p style="text-align: center;">Kahle v. Leonard (8th Cir. 2007)</p> <div style="border: 1px solid black; padding: 5px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc;">Kahle v. Leonard (8th Cir. 2007)</p> <ul style="list-style-type: none"> • Supervisor could be held liable for trainee behavior • Work station had lights indicating cell door was open • Testimony he could see cell from supervisor station • No logs of any entry into cell • No qualified immunity <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • The experienced officer who was training the new employee was sitting at a workstation. • From that work station, he could clearly see a board on which a light comes on every time someone enters a cell. • Additionally, he could actually see the cell itself from his seat. Therefore, it was determined that the supervisor could be held liable for the trainee’s behavior. 	 <p>Kahle v. Leonard</p>
<p>1 min</p>	<p style="text-align: center;">Legal Framework Qualified Immunity</p> <div style="border: 1px solid black; padding: 5px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc;">Legal Framework</p> <p>Qualified Immunity</p> <ul style="list-style-type: none"> • Was the law governing the conduct clearly established? • Reasonable person test • Sepulveda v. Ramirez (9th Cir. 1992) <ul style="list-style-type: none"> – Male officer observed female in stall during entire urinalysis process – No qualified immunity. Observation was unconstitutional - no reasonable officer could believe it was lawful • Similar result in staff sexual misconduct cases <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div>	 <p>Legal Framework</p>




	<p>Qualified immunity allows government employees to take advantage of a legal framework wherein their responsibilities are not clearly defined. If the law is not clear enough, the individual should not be penalized for a reasonable interpretation of the law. This applies only to government employees, not private employees. In this case,</p> <ul style="list-style-type: none"> ● A male staff member observed a female throughout the entire urinalysis process. ● He attempted to claim qualified immunity. ● Because laws governing cross-gender supervision during a urinalysis are clearly defined, he was not determined to have qualified immunity. <p>Sexual abuse laws are also very clearly defined now, so it is difficult to argue for qualified immunity in these sorts of cases.</p>	
<p>1 min</p>	<p style="text-align: center;">Volunteer and Contractor Liability</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #555; color: white; padding: 5px;">Volunteer and Contractor Liability</p> <ul style="list-style-type: none"> - Smith v. Cochran, 339 F.3d 1205 (2003) <ul style="list-style-type: none"> <input type="checkbox"/> Inmate assigned to work in state driver's license bureau as part of her sentence <input type="checkbox"/> Supervised by non correctional officer <input type="checkbox"/> Provided sex in exchange for favors (seeing brother at the job, gifts, trips to see family, etc.) <input type="checkbox"/> Agency that is delegated the responsibility of the state can be liable under 8th amendment <p style="text-align: right; font-size: small; margin-top: 10px;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>Volunteers and contractors can be helpful in a facility but also can create additional exposure to liability.</p> <p>This is a case where a love affair between a male supervisor (contractor) at a state driver's license bureau and the female inmate working for him ended, and the inmate sued.</p> <p>Who is liable, the Department of Corrections (DOC) or the Drivers License Bureau? The answer here is the DOC, because they gave authority over the inmate to the contractor and did</p>	 <p>Volunteer and Contractor Liability</p>



	not appropriately train him.	
1 min	<p style="text-align: center;">Volunteer and Contractor Liability</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Volunteer and Contractor Liability</p> <ul style="list-style-type: none"> ▢ Holding of the case has implications for anyone with authority over inmates ▢ “Penological responsibilities” delegated (supervisory authority and job training) ▢ Acting as agents of corrections ▢ Have the ability to affect inmate conditions or release via discipline ▢ Ensure mandatory training to avoid civil and criminal penalties <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>What if the contractor had been appropriately trained?</p> <ul style="list-style-type: none"> ● This probably would have protected them against liability. ● There was another case with a privately-contracted drug treatment counselor who sexually abused an inmate. The inmate sued, but the agency could demonstrate that they had policy and training in place and that the contractor had no history of this sort of behavior. ● The DOC could show that they had done their best to prevent the incident and were not liable. 	 <p>Volunteer and Contractor Liability</p>
1 min	<p style="text-align: center;">Investigative Process</p> <div style="border: 1px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Investigative Process</p> <ul style="list-style-type: none"> • False Arrest and Malicious Prosecution • Undercover operations <ul style="list-style-type: none"> – Issues of consent – Need to protect – How is inmate treated following the investigation? – What incentive is provided for participation in the investigation? <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> ● Within the investigative process, an agency can be sued in a number of different ways. An agency and 	 <p>Investigative Process</p>



	<p>investigator can be sued for false arrest or malicious prosecution if a defendant can demonstrate that the investigation was poorly done and did not provide enough evidence to arrest or prosecute.</p> <ul style="list-style-type: none"> • Additionally, there are a number of issues involved with undercover operations. When covertly monitoring staff, investigators need to be sure that staff could not argue there was a reasonable expectation of privacy. • If an inmate participates, retaliation needs to be monitored for and prevented. Additionally, investigators need to make sure the incentives they use to convince an inmate to participate are appropriate. • Finally, if there was enough evidence to move forward with a prosecution but the agency chose not to proceed, this could create liability for both the investigator and the agency. 	
<p>1 min</p>	<p>Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)</p> <div data-bbox="446 1024 1045 1478" style="border: 1px solid black; padding: 10px; margin: 10px auto; width: fit-content;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)</p> <ul style="list-style-type: none"> • Investigator Lunn assigned to review allegations of sexual misconduct • Receives information that Inmate Ross had sex with Officer Corona • Inmate initially denies • Inmate later admits to sex • Inmate has had history of mental illness <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>Here is an example of a case where an investigator was sued for false arrest and malicious prosecution.</p> <ul style="list-style-type: none"> • An allegation was made that an inmate with a history of mental illness was sexually abused by an officer. • When interviewed, the inmate initially denies it, but later stated that sex did occur. 	 <p>Investigative Process</p>
<p>1 min</p>	<p>Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y</p>	


	<p style="text-align: center;">April 11, 2002)</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)</p> <ul style="list-style-type: none"> Investigator takes statement Investigator corroborated details of the encounter with records and review of facility Files a felony complaint against Officer Officer placed on administrative leave without pay Officer charged with sexual assault of inmate Acquitted after jury trial Reinstated with back pay Officer files suit for false arrest and malicious prosecution <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>The investigator corroborated some details provide by the inmate and filed a felony case against the officer. After a jury trial, the officer was acquitted and reinstated with back pay. He then sued for false arrest and malicious prosecution.</p>	<p>Investigative Process</p>
<p>1 min</p>	<p style="text-align: center;">Investigative Process Standards</p> <div style="border: 2px solid black; padding: 10px; margin: 10px auto; width: 80%;"> <p style="text-align: center; background-color: #cccccc; margin: 0;">Investigative Process Standards</p> <ul style="list-style-type: none"> False arrest – no probable cause to make allegations against Officer Malicious Prosecution – commenced or continued a criminal proceeding without probable cause Both probable cause issues. If probable cause is there for initial arrest something else must intervene to invalidate it for prosecution <p style="text-align: right; font-size: small; margin: 0;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>A false arrest requires there to be no probable cause to make allegations against the defendant. Malicious prosecution is the commencement or continuation of criminal proceedings without probably cause.</p> <p>Normally, if there is probable cause for arrest, there is probable cause for prosecution, so a malicious prosecution claim would require some additional evidence to have surfaced if it were to be made in isolation.</p>	<div style="text-align: center;">  <p>Investigative Process Standards</p> </div>


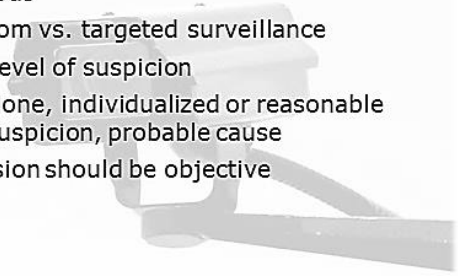


<p>1 min</p>	<p>Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)</p> <div data-bbox="446 283 1045 735" style="border: 1px solid black; padding: 10px; margin: 10px 0;"> <p style="text-align: center;">Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)</p> <ul style="list-style-type: none"> • No false arrest because Lunn had probable cause. <ul style="list-style-type: none"> • Could rely on informant testimony notwithstanding her psychiatric history • Corroborated her testimony through review of facts • Was objectively reasonable to believe that probable cause existed • Reasonable officers could have disagreed over whether probable cause existed • Nothing happened with probable cause to suggest malicious prosecution <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • In this case, it was determined that the investigator had probable cause. An informant’s mental health history does not delegitimize his/her testimony. Additionally, the investigator corroborated the inmate’s testimony in other ways. • This meets the standard: It was objectively reasonable to believe that probable cause existed. This also means that two reasonable investigators could disagree over whether probable cause existed. • The malicious prosecution claim was not upheld because probable cause was found for the initial arrest, and no new evidence had surfaced before the prosecution. 	<div data-bbox="1198 193 1302 262" style="text-align: center;">  </div> <p style="text-align: center;">Investigative Process</p>
<p>1 min</p>	<p>Sting Operations: Sanchez-Luna v. U.S. (Dec. 2004)</p> <div data-bbox="446 1354 1045 1806" style="border: 1px solid black; padding: 10px; margin: 10px 0;"> <p style="text-align: center;">Sting Operations: Sanchez-Luna v. U.S. (Dec. 2004)</p> <ul style="list-style-type: none"> • Suspicion of female offender sexually abused by officer • Investigator sets up sting. Agent in closet with camera • Oral sex occurs with offender while agents record • No effort made to stop the act <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div>	<div data-bbox="1198 1304 1302 1373" style="text-align: center;">  </div> <p style="text-align: center;">Sting Operations</p>




	<p>Sting operations are also areas of potential liability.</p> <ul style="list-style-type: none"> • In this case, they used a female offender to catch an officer in the act of sexual abuse. • The female offender cooperated with the investigation, and the officer incriminated himself. The problem here is that instead of just videotaping the mandatory minimum amount of activity, the camera kept rolling and investigators did not stop the abuse. 	
<p>1 min</p>	<p>Result of Litigation: Sanchez-Luna v. U.S. (Dec. 2004)</p> <div data-bbox="446 646 1045 1100" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Result of Litigation: Sanchez-Luna v. U.S. (Dec. 2004)</p> <ul style="list-style-type: none"> • Officer pleads guilty • Terminated from position • 8th Amendment violation alleged • Settlement of \$165,000 to plaintiff <p>When conducting operations – ensure you are in position to prevent or stop sexual conduct from occurring</p> <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • So, the inmate sues. • The point here is that the minute you start to see the incriminating behavior, you have enough evidence and can stop filming. 	 <p>Result of Litigation</p>
<p>1 min</p>	<p>Elements of Failure to Protect</p> <div data-bbox="446 1381 1045 1835" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Elements of Failure to Protect</p> <ul style="list-style-type: none"> • Prison official knew that the inmate faced a substantial risk of serious harm • Disregarded risk by failing to take reasonable steps to abate the risk  <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div>	 <p>Elements of Failure to Protect</p>


	<p>Failure to protect is an important claim within corrections. It requires that a facility official knows that an inmate faces a substantial risk of serious harm, but fails to take reasonable steps to protect him or her.</p>	
<p>1 min</p>	<p>Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)</p> <div data-bbox="446 489 1045 940" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)</p> <ul style="list-style-type: none"> • Inmate sued unit manager for not changing his cell assignment upon request <ul style="list-style-type: none"> • Told unit manager that cellmate was predatory homosexual rapist • Said he had been warned by other inmates • 3 days later forcibly raped <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p>This is a case in Michigan where an inmate went to his unit manager and said, “Look, I’ve been told that my cellmate is a predatory homosexual rapist.” However, nothing was done to protect the inmate, and he was raped three days later.</p>	 <p>Failure to Protect</p>
<p>1 min</p>	<p>Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)</p> <div data-bbox="446 1272 1045 1724" style="border: 1px solid black; padding: 10px;"> <p style="text-align: center;">Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)</p> <p>Unit Manager’s Defense</p> <ul style="list-style-type: none"> • No record of cellmate as “designated” homosexual predator – past conviction • Asked inmate if he had been solicited or threatened – answer was no • Inmate only referred to rumor • Didn’t specifically ask for protection just cell change • Would have been placed in segregation if he had asked <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <ul style="list-style-type: none"> • The defense for the case was that the cellmate was not designated as a “predator” because he did not have a conviction. 	 <p>Failure to Protect</p>


	<ul style="list-style-type: none"> • The unit manager asked the inmate if he had been threatened, and he said no. The inmate also did not ask for protection, just for a cell change. • Why do you think that was? Because he did not want to go to segregation. 	
<p>1 min</p>	<p align="center">Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)</p> <div data-bbox="446 533 1045 984" style="border: 1px solid black; padding: 10px; margin: 10px auto; width: fit-content;"> <p align="center">Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)</p> <p>Court's Decision</p> <ul style="list-style-type: none"> • Allowed the case to proceed – no summary judgment • Evidence inmate was affiliated with group known for preying on other inmates • Defendant on notice there was a high risk of assault • Reasonable claim of 8th amendment violation <p align="right"><small>NATIONAL PREA RESOURCE CENTER</small></p> </div> <ul style="list-style-type: none"> • The court determined that there would be no summary judgment and allowed the case to proceed. Soon thereafter, more information was revealed. The cellmate was part of a group of inmates known for predatory behavior, and the inmate's case manager was not informed of the inmate's concern. • What sort of information should be shared across the facility? What kinds of screening tools should be used when making housing placements? 	 <p>Failure to Protect</p>
<p>1 min</p>	<p align="center">The 4th Amendment</p>	 <p>The 4th Amendment</p>

	<div data-bbox="446 195 1045 646" data-label="Image"> </div> <p data-bbox="326 684 1138 804">Another right to be aware of when conducting investigations is the right of your staff against unreasonable searches and seizures.</p> <ul data-bbox="375 846 1166 1457" style="list-style-type: none"> ● You need to consider this when deciding whether to search a staff person’s locker or car or to record one of their conversations. ● If there is signage informing the staff that cars in the facility parking lot are subject to search, that lockers within the facility are subject to search, and that phone conversations made from within the facility are subject to recording, then you can make the argument that there was no reasonable expectation of privacy. ● However, if those signs are not in place, and there has been no training on this topic, you’ll have to be careful. Consult with legal. Ensure you get a warrant or other appropriate permission before doing anything that may contaminate evidence or inhibit prosecution. 	
1 min	Privacy	 <p data-bbox="1198 1570 1279 1598">Privacy</p>

	<div data-bbox="446 191 1045 646" style="border: 1px solid black; padding: 10px;"> <h3 style="text-align: center;">Privacy</h3> <ul style="list-style-type: none"> • Right to privacy is contextual • In corrections, what constitutes a “reasonable expectation of privacy” is different than in the community • Secure institutional settings vs. community corrections • Correction officers working in secure areas have low expectations of privacy  </div> <p>Correctional investigators do have an advantage — privacy is different in the institutional context for both inmates and staff. If handled correctly, investigators can have access to these sorts of searches. In addition, “searches” is a broad term that could apply to cameras, cars, purses or cells.</p>	
<p>1 min</p>	<div data-bbox="446 1119 1045 1572" style="border: 1px solid black; padding: 10px;"> <h3 style="text-align: center;">Surveillance</h3> <ul style="list-style-type: none"> • Notice—Is it posted and in policy? • Methods • Random vs. targeted surveillance <ul style="list-style-type: none"> • Level of suspicion • None, individualized or reasonable suspicion, probable cause • Decision should be objective  </div> <p>Similarly, it is important to give notice if surveillance is possible.</p>	 <p>Surveillance</p> <p style="color: red;">Insert agency policy regarding surveillance.</p>
<p>1 min</p>	<h3 style="text-align: center;">Employee Surveillance</h3>	 <p>Employee Surveillance</p>

	<div data-bbox="446 191 1045 646" style="border: 1px solid black; padding: 10px;"> <h3 style="text-align: center;">Employee Surveillance</h3> <p>If you are going to use employee surveillance in investigations, think about:</p> <ul style="list-style-type: none"> • Notice to employees • (e.g., that there are cameras present in the workplace) • Methods used • Random vs. targeted surveillance • Objective cause • Balance between intrusiveness and employer need  </div> <ul style="list-style-type: none"> • Consider whether notice has been given to employees when deciding what methods to use. • Establish how best to balance your employees' rights with your need for information and safety. 	
<p>10 min</p>	<p>Activity: Scenario</p>	 <p>Divide participants into groups of four and have them answer the questions on this scenario. Have one group volunteer to present their answers to the class for discussion. They will have six minutes to work on it and four minutes to report out. See attachment.</p>
<p>1 min</p>	<p style="text-align: center;">Lessons Learned: Liability</p>	 <p>Lessons Learned</p>

	<div data-bbox="448 191 1045 646" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Lessons Learned: Liability</p> <ul style="list-style-type: none"> • Corrections officials can and are held officially and personally liable • Liability stems from failure to: <ul style="list-style-type: none"> <input type="checkbox"/> Train <input type="checkbox"/> Supervise <input type="checkbox"/> Investigate, and <input type="checkbox"/> Discipline • Lawsuits are not just a legal issue but affect the reputation of an agency and the corrections profession <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p style="margin-top: 20px;">As we mentioned earlier, as an investigator, you have access to information about the agency that many others do not. This information can be used to influence the policies, practice, and leadership of the agency.</p>	
1 min	<div data-bbox="448 1245 1045 1696" style="border: 2px solid black; padding: 10px;"> <p style="text-align: center;">Lessons Learned: Liability</p> <p style="text-align: center;">Lessons Learned: Liability</p> <ul style="list-style-type: none"> • Examine patterns in your facility • Same officer accused many times may mean different things • Check many sources of information – medical, grievances, etc. • History of inconclusive investigative findings can be problematic • Lack of leadership – sometimes you have to take a risk <p style="text-align: right; font-size: small;">NATIONAL PREA RESOURCE CENTER</p> </div> <p style="margin-top: 20px;">Examine the patterns that appear throughout your investigations.</p> <ul style="list-style-type: none"> ● What officers are consistently involved in allegations? 	 <p>Lessons Learned</p>

	<ul style="list-style-type: none">• What areas of facilities are hot spots? Keep administrators in the loop.	
1 min	Questions?	

Module 2: Legal Issues and Agency Liability Handout

Inmate/resident Joe McPhearson reported to a nurse yesterday that Officer Maloney called him into his office and asked him to give him a blowjob. McPhearson refused, but is concerned that it may happen again. You interview McPhearson and, during the course of the interview, he reveals that his cellmate has been coercing him into sex. McPhearson's cellmate mentioned this to Officer Maloney, and that is what sparked his proposition.

First you decide to interview McPhearson's cellmate, both to discuss the possible sexual abuse and to establish whether the alleged conversation with Officer Maloney ever occurred. You call him up to your office that afternoon and tell him that you want to ask him some questions but he's free to go at any time. Should you read him his Miranda rights?

Answer: Howes v. Fields determined that a suspect being interrogated within a confinement facility may or may not be considered to be "in custody" depending on the length, hour and tone of the questioning. Best practice is to always read Miranda rights.

McPhearson's cellmate corroborated McPhearson's statements regarding the conversation between the cellmate and Officer Maloney. The investigator assigned to the administrative investigation wants to interview Officer Maloney. Should they?

Answer: A non-coerced interview with Officer Malloney would be safe, but any threat of discipline or termination in the event of non-cooperation during the interview would require a Garrity warning. To avoid negatively influencing a potential prosecution, they should wait to conduct a coerced interview until it is determined if he will be formally charged.

You decide that a sting operation may be appropriate since Officer Maloney had implied that he would be propositioning McPhearson again. McPhearson agrees to cooperate, so you arrange for an agent with a camera to hide at the scene and for McPhearson to approach Officer Maloney again. What should agents be aware of in advance of a sting operation?

Answer: Sanchez-Luna v. U.S. determined that investigators need to ensure that they can prevent or stop any sexual contact from occurring during the sting.

Officer Maloney did not initiate any sexual contact during the sting operation, so you decide to search Officer Maloney's locker and car for evidence and to see what can be discovered through surveillance. What considerations are necessary in advance of these steps?

Answer: Investigators need to discuss searches and surveillance plans with their supervisors to ensure that the decision is approved. Check what is in policy. If the surveillance is going to be targeted to this Officer, have your supervisor determine if there is probable cause. Check whether there is appropriate signage that would allow for locker searches or car searches without a warrant.