NATIONAL PREA RESOURCE CENTER

Specialized Training: Investigating Sexual Abuse in Correctional Settings
Notification of Curriculum Utilization
December 2013

The enclosed *Specialized Training: Investigating Sexual Abuse in Correctional Settings* curriculum was developed by The Moss Group, Inc. (TMG) as part of contract deliverables for the National PREA Resource Center (PRC), a cooperative agreement between the National Council on Crime and Delinquency (NCCD) and the Bureau of Justice Assistance (BJA). The PREA standards served as the basis for the curriculum's content and development with the goal of the *Specialized Training: Investigating Sexual Abuse in Correctional Settings* curriculum to satisfy specific PREA standard requirements.

It is recommended that the *Specialized Training: Investigating Sexual Abuse in Correctional Settings* curriculum be reviewed in its entirety before choosing which modules to use. Any alterations to the original materials must be acknowledged during their presentation or requires removal of the PRC and TMG logos.

BJA is currently undergoing a comprehensive review of the enclosed curriculum for official approval at which point the BJA logo may be added.

Note: Utilization of the enclosed curriculum, either in part or whole, does not guarantee that an auditor will find a facility "meets standard". Rather, an auditor will take into consideration the curriculum used as part of their overall determination of compliance.

NCCD National Council on Crime & Delinquency

THE MOSS GROUP, INC.
Experienced Practitioners Committed to Excellence in Correctional Practice

Notice of Federal Funding and Federal Disclaimer *– This project was supported by Grant No. 2010-RP-BX-K001 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice nor those of the National Council on Crime and Delinquency (NCCD), which administers the National PREA Resource Center through a cooperative agreement with the Bureau of Justice Assistance.*

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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,

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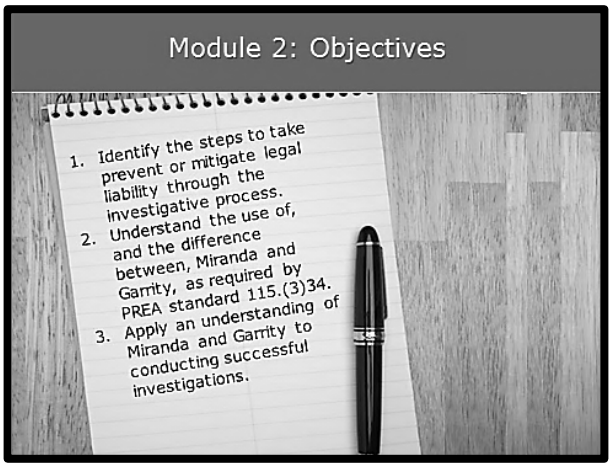
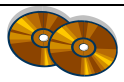
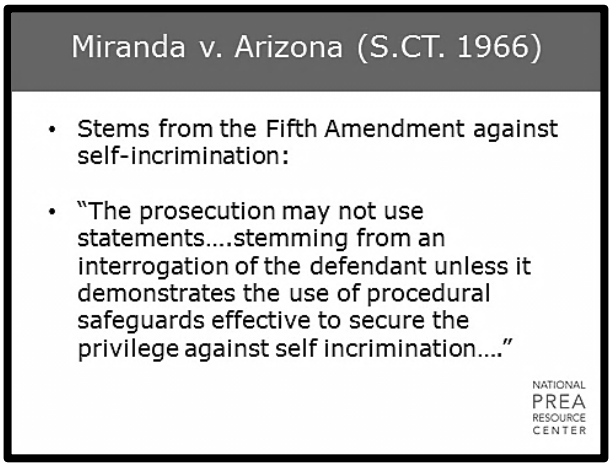
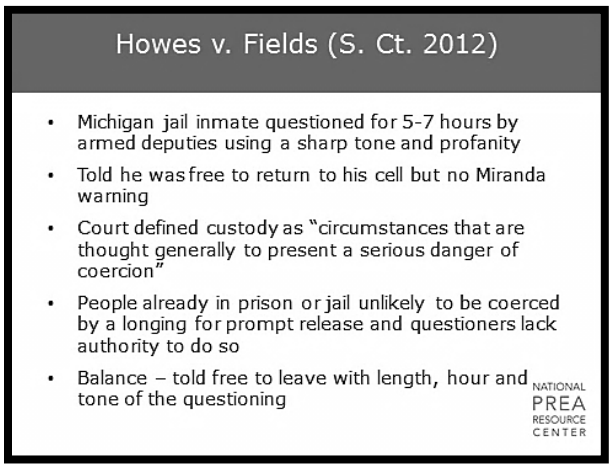
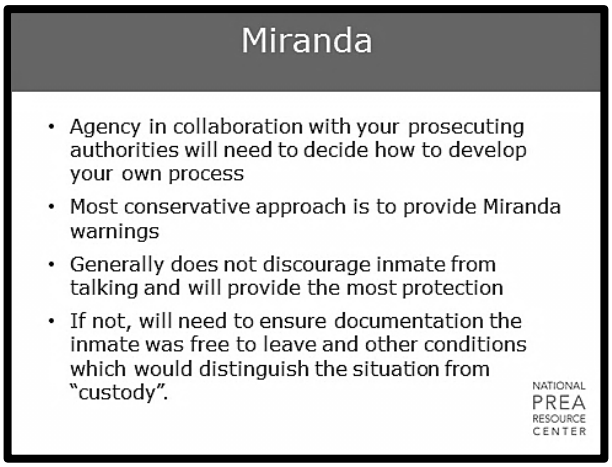
consider inserting the Scenario activity twice: once following the Miranda and Garrity section at the beginning of Module 2, and once at the end of Module 2. Have participants conduct the Scenario activity following the Miranda and Garrity section and then report out. At the end of the module, have participants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

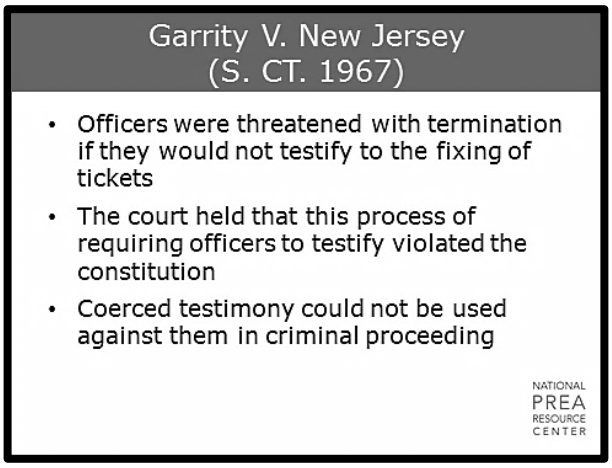
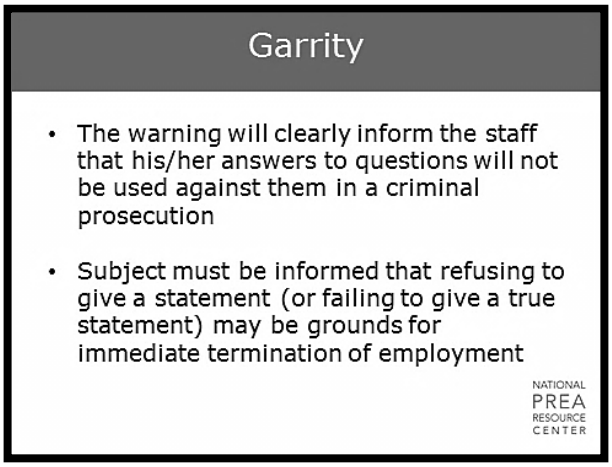
Time	Lecture Notes	Teaching tips
1 min	**Module 2 Legal Issues and Agency Liability:** **What Investigators Should Know** In this module we are going to talk about legal liability in investigating allegations of sexual abuse and sexual harassment in custodial settings. You have influence and a responsibility 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. 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.	**Legal Issues and Agency Liability: What Investigators Should Know**
.5 min	**Module 2: Objectives**  	**Objectives** Ask the class if they know what is meant by these terms.
.5 min	**Miranda and Garrity**	**Miranda and Garrity** Experienced investigators may feel that this is basic

	 A requirement of PREA standard 115.(3)34 is for investigators be trained on Miranda and Garrity warnings.	information. However, many facility investigators who have little to no investigations training need this information with a robust classroom discussion. Encourage discussion throughout this module.
1 min	**Video** 	 This video is meant to be a humorous way to begin the module. The video is embedded in the PowerPoint slide.
1 min	**Miranda v. Arizona (S.CT. 1966)**  What is Miranda? We've all heard of the constitutional right not	 **Miranda v. Arizona**

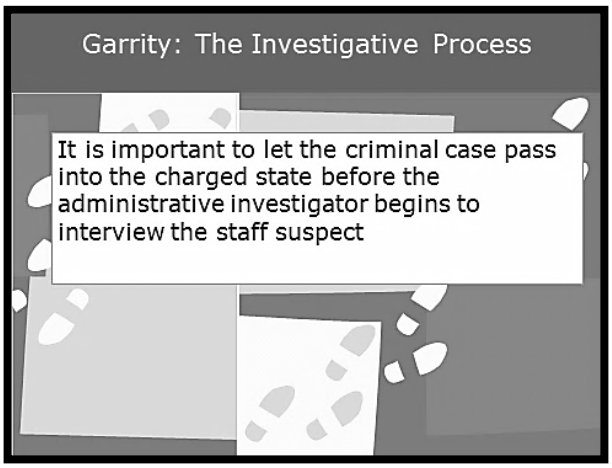
	to incriminate yourself.	
1 min	**Miranda v. Arizona (S.CT. 1966)** Miranda v. Arizona (S.CT. 1966) If a person is in custody & being interrogated: → **they must be made aware of the fact that they have the right <u>not</u> to answer questions** NATIONAL PREA RESOURCE CENTER • Miranda is a warning read 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.	**Miranda v. Arizona**
1 min	**Berghuis v. Thompkins (S. CT. 2010)** Berghuis v. Thompkins (S. Ct. 2010) • Shooting suspect mostly silent during three hour interrogation • Asked if "he prayed to God to forgive him for the shooting". Answered yes • 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 NATIONAL PREA RESOURCE CENTER How does a suspect demonstrate his or her desire to remain	**Berghuis v. Thompkins**

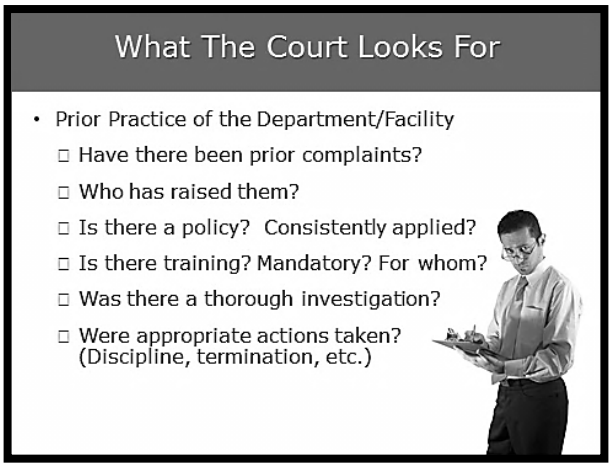
	silent? • They actually need to state their desire to remain silent. Just being silent does not invoke that right. • In this case, the suspect's answer of "yes" was used to convict him and the guilty finding was upheld.	
.5 min	**Miranda v. Arizona (S.CT. 1966)** Miranda v. Arizona (S.CT. 1966) A suspect must waive his/her rights: • Voluntarily • Knowingly • Intelligently • Unambiguously NATIONAL PREA RESOURCE CENTER 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.	**Miranda v. Arizona**
1 min	**Miranda** Miranda • Are incarcerated offenders ever not in custody? • Can they ever choose to leave? • Under what conditions would they really have "freedom" to leave? NATIONAL PREA RESOURCE CENTER • Are prisoners in custody?	**Miranda**

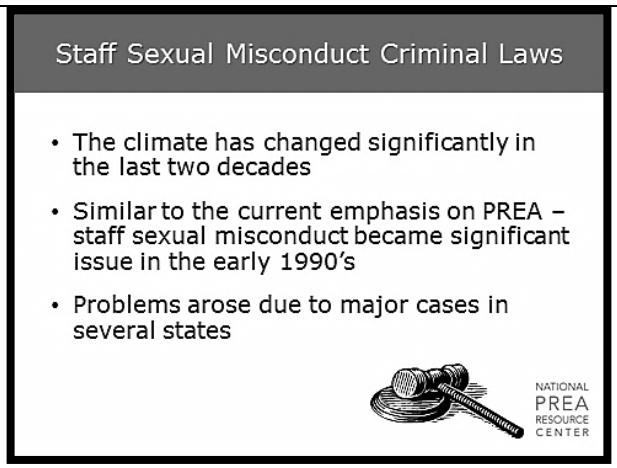
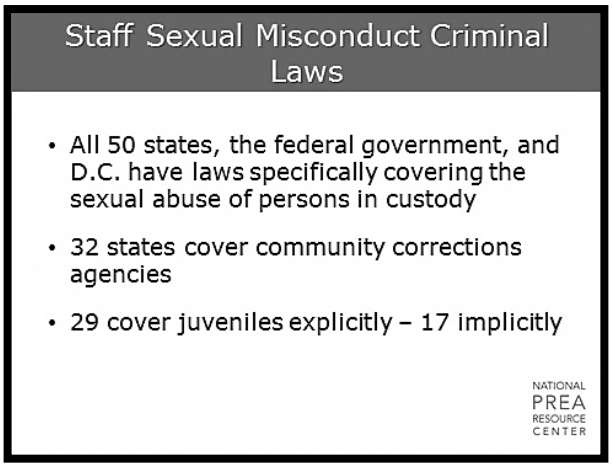
	• If someone is in prison, do you need to give them the Miranda warning? ***Yes.***	
1 min	**Howes v. Fields (S. CT. 2012)**  Howes v. Fields (S. Ct. 2012) • Michigan jail inmate questioned for 5-7 hours by armed deputies using a sharp tone and profanity • Told he was free to return to his cell but no 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 NATIONAL PREA RESOURCE CENTER • 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.	**Howes v. Fields**
1 min	**Miranda**  Miranda • 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". NATIONAL PREA RESOURCE CENTER	**Miranda** Insert agency requirements regarding the use of the Miranda warning. Must it always be used? Best practice is to always use Miranda.

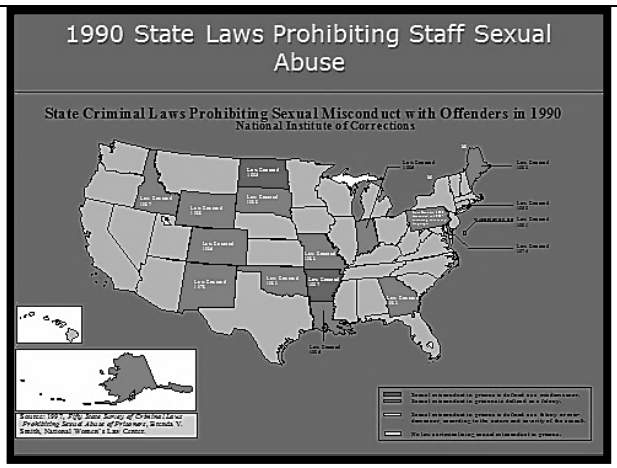
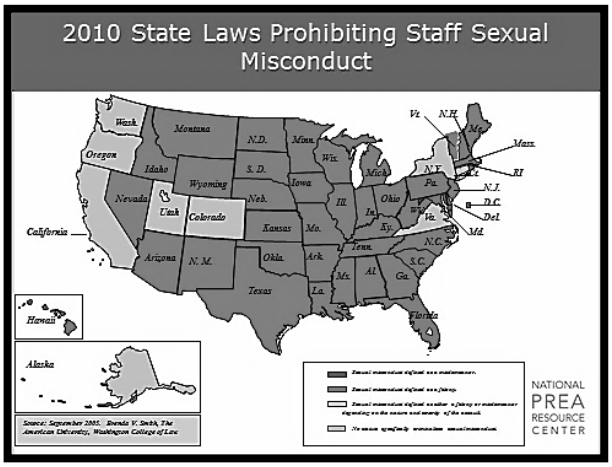
1 min	**Garrity v. New Jersey** **(S. CT. 1967)**  What is Garrity? If an agency's policy requires employees to cooperate with investigations and tell the truth under threat of termination, investigators need to warn them of that fact and emphasize that any statements made will not be used against them in a criminal proceeding.	**Garrity V. New Jersey**
1 min	**Garrity**  • 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	**Garrity**

	established in that interview will be used in a criminal proceeding.	
1 min	**Garrity: The Investigative Process** Garrity: The Investigative Process • 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 NATIONAL PREA RESOURCE CENTER • 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 investigators were ignorant of the staff member's guilt.	**Garrity: The Investigative Process**
1 min	**Garrity: The Investigative Process** Garrity: The Investigative Process Solutions – 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 NATIONAL PREA RESOURCE CENTER • What should you do? If you need to interview the staff member before the criminal case is complete, try a non-coerced interview.	**Garrity: The Investigative Process**

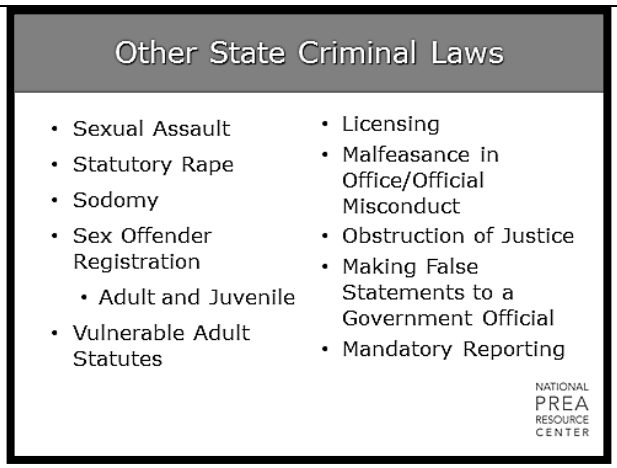
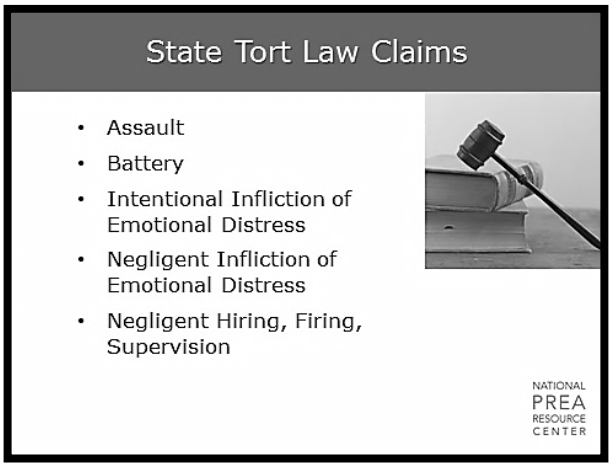
	• This means that you would *not* threaten staff with termination, which would make it a coerced interview.	
.5 min	**Garrity: The Investigative Process**  Alternatively, let the criminal case move forward with the awareness that it may last for months or even years.	**Garrity: The Investigative Process**
1 min	**Court Approach** 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.	**Court Approach**

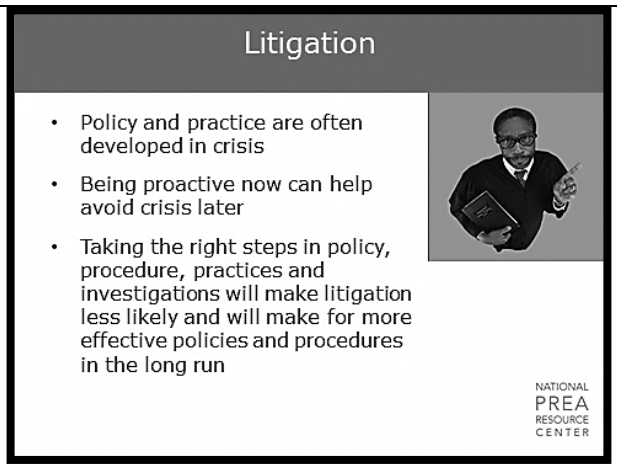
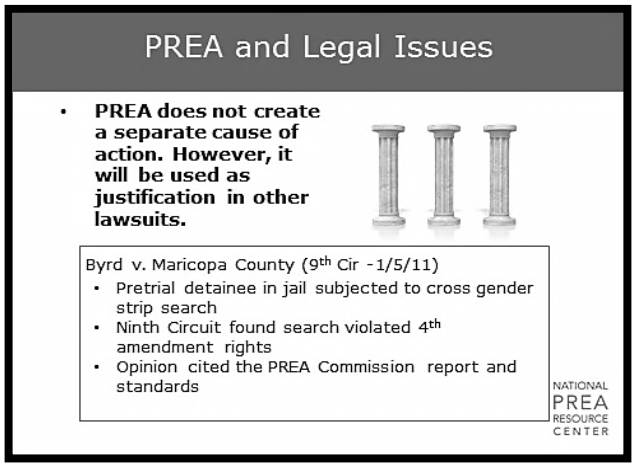
	How many of you have been sued or been involved in litigation at some level? When you have litigation, what comes along with it? Lawyers. And what do lawyers require? Money. Litigation may also involve media coverage and bad publicity. These are all reasons to avoid litigation.	Pause for show of hands. It is usually the majority of people in the room.
1 min	**What The Court Looks For**  The court looks at: • Past behaviors and past complaints • Investigations to see if allegations were appropriately addressed and if responses were adequate. 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.	**What The Court Looks For**
.5 min	**Staff Sexual Misconduct Criminal Laws**	**Staff Sexual Misconduct Criminal Laws**

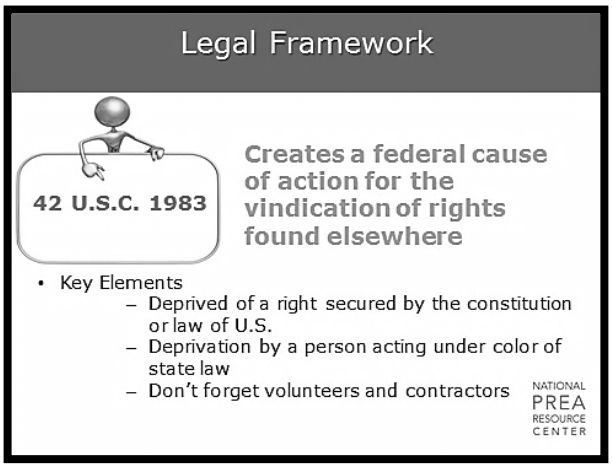
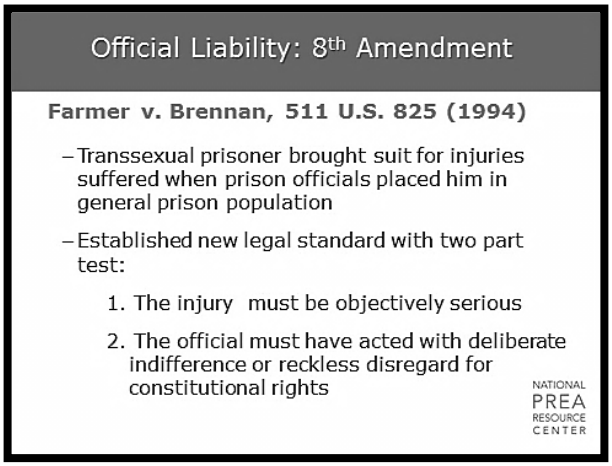
	 • Criminal law has changed significantly over time. In the 1990s, several significant lawsuits raised national awareness around the issue of staff sexual misconduct. • This attention resulted in an increase in state criminal laws addressing staff sexual misconduct and, eventually, the Prison Rape Elimination Act.	
.5 min	**Staff Sexual Misconduct Criminal Laws**  Now, all 50 states and the federal government have laws that specifically cover the issue of sexual abuse of people in custody.	**Staff Sexual Misconduct Criminal Laws**
.5 min	**1990 State Laws Prohibiting Staff Sexual Abuse**	**1990 State Laws**

	 In 1990, less than half the states had laws addressing the sexual abuse of people in custody.	
.5 min	**2010 State Laws Prohibiting Staff Sexual Abuse**  It wasn't until 2010 that all states had laws addressing the issue, including laws covering community corrections either implicitly or explicitly.	 **2010 State Laws**
.5 min	**States that Cover Community Corrections 2010**	 **States that Cover Community Corrections**

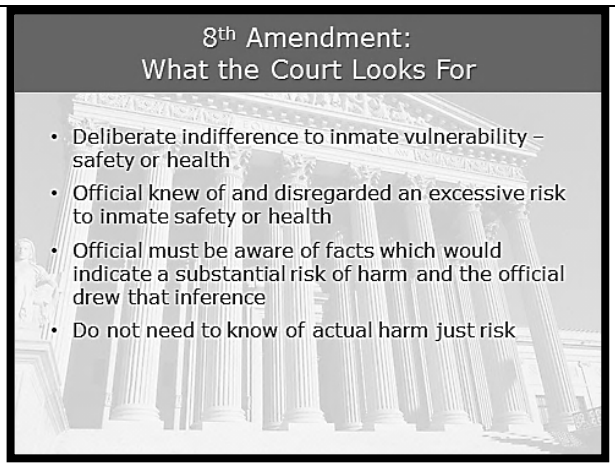
	 These last two maps demonstrate how sexual abuse in correctional settings has become more acknowledged and addressed through legislation. State laws address sexual abuse in community corrections …	
.5 min	**States that Cover Juvenile Justice Agencies** …and juvenile justice agencies.	**States that Cover Juvenile Justice**
1 min		Insert slide with the laws of the state in which your agency/facility is located.
1 min	**Other State Criminal Laws**	**Other State Criminal Laws**

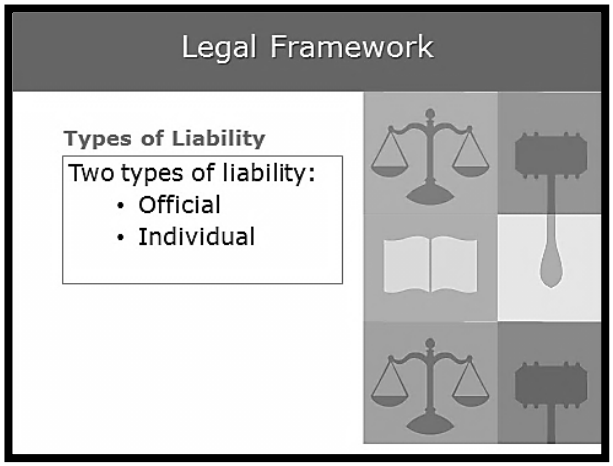
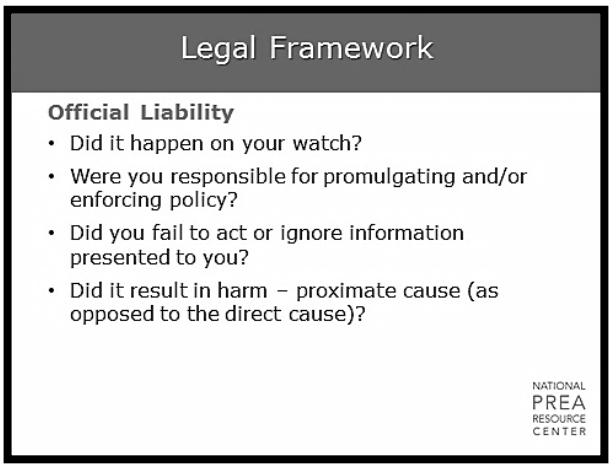
	 Here is a list of some of the laws that investigators and prosecutors may use in a case. Some staff members who have been involved sexually with an inmate may think that termination is a possible consequence of their actions. They may be surprised to learn that they could also be sentenced to time in prison and/or have to register as a sex offender for the rest of their lives.	
1 min	**State Tort Law Claims**  What is tort? • 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.	**State Tort Law Claims** Ask the class to define tort and wait for an answer before moving on.
1 min	**Litigation**	

	 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. 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.	**Litigation**
1 min	**PREA and Legal Issues**  Is there such thing as a PREA lawsuit? No. PREA does not create a new cause of action. 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.	 **PREA and Legal Issues** Ask the class whether there is such a thing as a PREA lawsuit and wait for some answers before moving on.

	The most common bases for legal challenges are: • 42 U.S. C. 1983 • Eighth Amendment • Fourth Amendment • Fourteenth Amendment • State tort claims	
1 min	**Legal Framework**  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.	**Legal Framework**
1 min	**Official Liability: 8th Amendment** **Farmer v. Brennan, 511 U.S. 825 (1994)**  	**Official Liability: 8th Amendment** Ask the class the following questions and wait for answers. Encourage discussion.

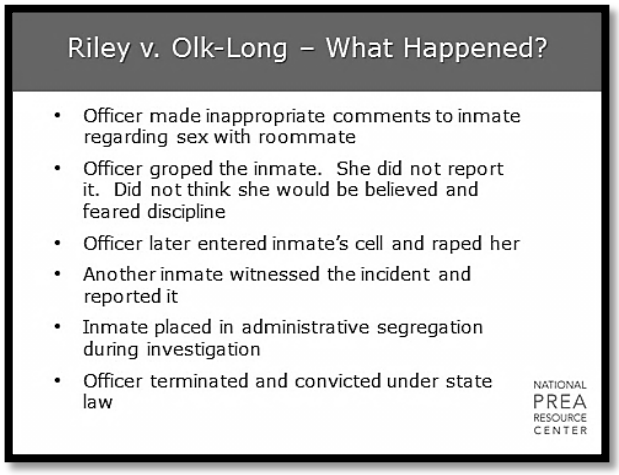
	The 8th Amendment prohibits cruel and unusual punishment. Farmer v. Brennan is one of the more famous 8th Amendment lawsuits because it established the legal standard of deliberate indifference. • This case was brought against the Federal Bureau of Prisons by a prisoner who was sexually abused while 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. 1. Was the injury objectively serious? a. What does "objectively" mean? b. It means that it can be demonstrated through some sort of evidence, e.g., medical records, expert testimony, pictures. c. Can you have an objectively serious mental health injury? Yes. 2. Did the official act with deliberate indifference or reckless disregard for the offender's constitutional rights?	Ask: What does deliberate indifference mean? Ask: What does "objective" mean?
1 min	**8th Amendment: What the Court Looks For**	 **8th Amendment: What the Court Looks For**

	 Deliberate indifference means that the official wantonly disregarded knowledge that he/she had or that he/she should have known. • 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.	
1 min	**Legal Framework**	 **Legal Framework**

	 There are two types of liability. • 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.	
1 min	**Legal Framework**  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.	**Legal Framework**
1 min	**Legal Framework**	**Legal Framework**

	Legal Framework **Official Liability** Can Result From: – 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 NATIONAL PREA RESOURCE CENTER This can result from your hiring someone who was not appropriately vetted or keeping someone employed who should have been fired. • 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.	
1 min	**Legal Framework** **Legal Framework** **Official Liability – Policy is Not Enough** Daskalea v. DC (DC Cir. 2000) Court ordered sexual misconduct policy could not insulate agency even though guard's acts were against policy – 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 NATIONAL PREA RESOURCE CENTER	 **Legal Framework**

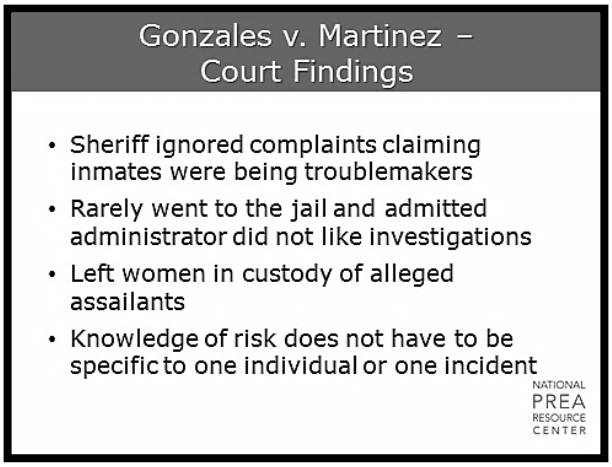
	Policy is not enough. This agency had a great policy but they never trained on it. • Having a policy in writing is a good start, but staff, contractors, and volunteers need to be trained on it. Minimally, they need to read it and sign it, showing it has been read and understood. • Policy is not helpful unless something is done with it.	
1 min	**Legal Framework** Legal Framework **Individual Liability** • Plaintiff must provide notice that the suit is against the official in her personal capacity • Direct participation not required – 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 NATIONAL PREA RESOURCE CENTER • Usually, if you are sued, you are sued in your official capacity. • There is a pretty high standard for a finding of individual liability.	**Legal Framework**
1 min	**Riley v. Olk-Long, 282 F.3rd 592 (8th Cir. 2002)** Riley v. Olk-Long, 282 F.3rd 592 (8th Cir. 2002) • 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 • Warden ($25,000); • Security Director ($20,000) NATIONAL PREA RESOURCE CENTER • This case is out of Iowa and is a lawsuit against a warden and security director at a women's facility.	**Riley v. Olk-Long**

	• They were sued in both their official and individual capacity and were found liable. The decision was upheld on appeal in 2002.	
1 min	**Riley v. Olk-Long – What Happened?**  What happened? • 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. So, why are the security director and the warden being held responsible?	**Riley v. Olk-Long**
1 min	**Riley v. Olk-Long Why Personal Liability?**	**Riley v. Olk-Long**

	Riley v. Olk-Long **Why Personal Liability?** Why were Warden and Security Director held personally liable? • 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 NATIONAL PREA RESOURCE CENTER • 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.	
1 min	**Riley v. Olk-Long – Court Decision** **Riley v. Olk-Long – Court Decision** **Court Decision** • 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 NATIONAL PREA RESOURCE CENTER The court found that: • The officer should have been fired or kept away from the inmates.	 **Riley v. Olk-Long**

	• 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.	
1 min	**Ortiz v. Jordan (S.CT. 1/24/11)** Ortiz v. Jordan (S.Ct. 1/24/11) • 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. NATIONAL PREA RESOURCE CENTER The female inmate in this case brought both a 4th Amendment and 8th Amendment claim against the agency. What happened? • 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.	**Ortiz v. Jordan**
1 min	**Ortiz v. Jordan (S.CT. 1/24/11)** Ortiz v. Jordan (S.Ct. 1/24/11) • 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. NATIONAL PREA RESOURCE CENTER	**Ortiz v. Jordan**

	• 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.	
1 min	**Ortiz v. Jordan (S.CT. 1/24/11)** Ortiz v. Jordan (S.Ct. 1/24/11) • 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 NATIONAL PREA RESOURCE CENTER The verdict returned by the jury held both the case manager and the investigator personally liable.	**Ortiz v. Jordan**
1 min	**Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005)** Gonzales v. Martinez, 403 F.3d 1179 (10th Cir. 2005) • 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 NATIONAL PREA RESOURCE CENTER This case addresses what top administrators should know.	**Gonzales v. Martinez**

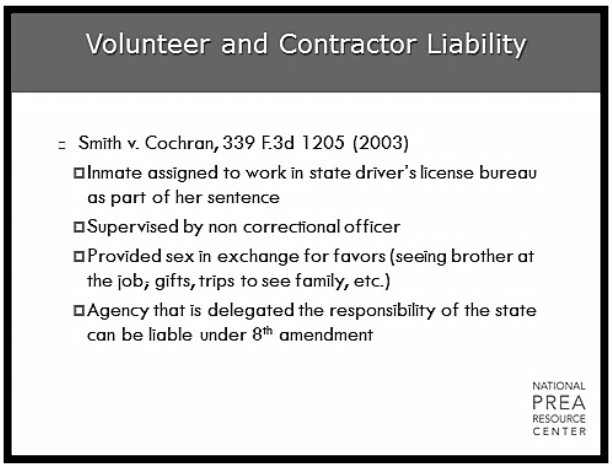
	• A sheriff's son-in-law had a number of allegations made against him. The sheriff did not respond appropriately and was held accountable.	
1 min	**Gonzales v. Martinez –** **Court Findings**  Why was he held accountable? • It was found that the sheriff should have known what was going on. • Rather than 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.	**Gonzales v. Martinez**
1 min	**Beers-Capitol v. Whetzel, 256 F.3d 120 (2001)**	**Beers-Capitol v. Whetzel**

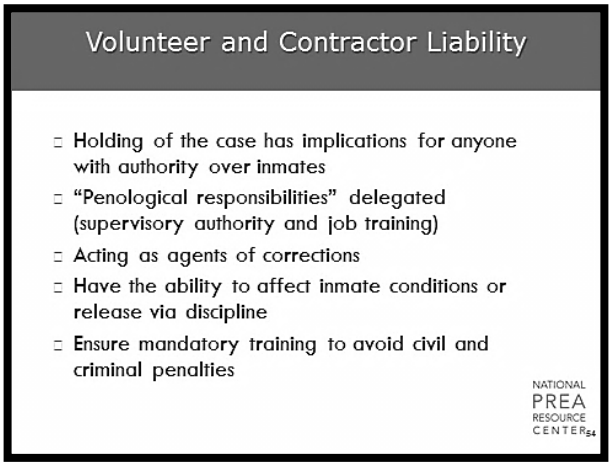
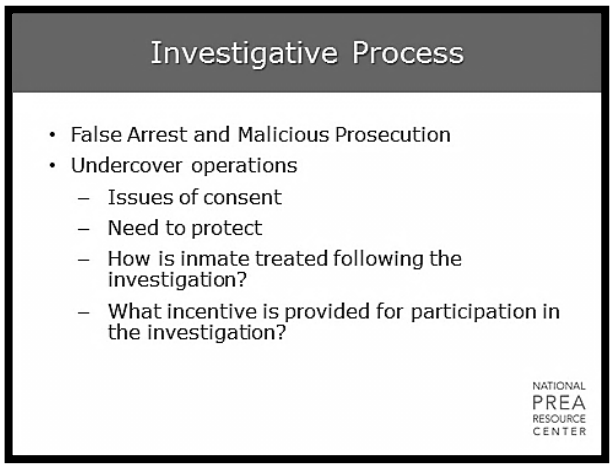
	Beers-Capitol v. Whetzel, 256 F.3d 120 (2001) • Residents of juvenile detention facility sexually assaulted brought 8th Amendment claim against supervisors and co-workers • No summary judgment for facility counselor on official or personal liability where: – She told one of the plaintiffs she "kind of 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" NATIONAL PREA RESOURCE CENTER This was a highly visible case in the media with significant liability. • 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. 1. She admitted to suspecting something without reporting it. 2. She documented her suspicions. What do we tell our staff about reporting? • 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**

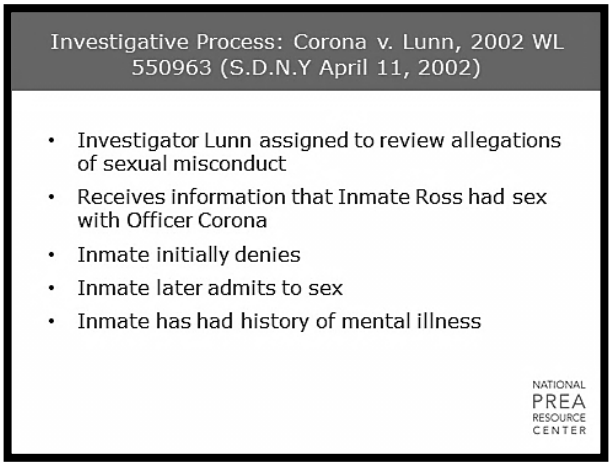
	Guidry v. Rapides School Board, 560 So.2d 125 (La. App. 1990) • Action against residential training school • Co-ed group of mentally handicapped children required constant supervision • Staff took brief smoke break • Girl sexually assaulted by group of boys • Court held: School breached its duty of reasonable care by leaving students alone • Responsible for damage caused by male students NATIONAL PREA RESOURCE CENTER • 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.	
1 min	**R.G. v. Koller (D. Hawaii 2006)** **R.G. v. Koller (D. Hawaii 2006)** Lesbian, Gay and Transgender Youth sought preliminary injunction against secure juvenile facility Court granted a preliminary injunction based on evidence of: – Campaign of harassment based on sexual orientation including threats of violence, physical and sexual assault, social isolation and constant use of homophobic slurs NATIONAL PREA RESOURCE CENTER • 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.	**R.G. v. Koller (D. Hawaii 2006)**
1 min	**R.G. v. Koller**	**R.G. v. Koller**

	R.G. v. Koller Supervisory staff knew of the harassment. Failed to take the following actions: – Policies and training to protect LGBT youth; – Adequate staffing and supervision; – Functioning grievance system; and – Classification system to protect vulnerable youth System was also in discussions with DOJ to reach agreement on civil rights violations NATIONAL PREA RESOURCE CENTER • 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: 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.	
1 min	**Kahle v. Leonard (8th Cir. 2007)** **Kahle v. Leonard (8th Cir. 2007)** • 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 NATIONAL PREA RESOURCE CENTER This is a case about supervisors, new staff, turnover in staff, and technology.	 **Kahle v. Leonard**

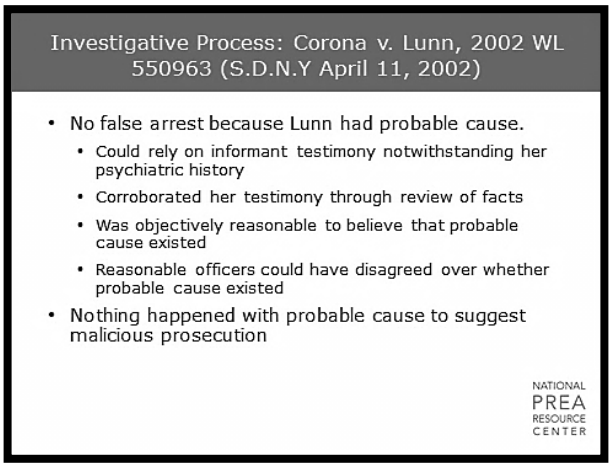
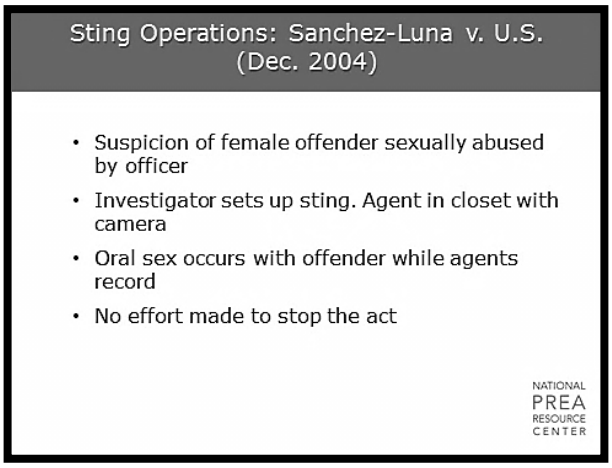
	• Within this facility, policy required logging every entrance to a cell. However, a trainee under supervision by an experienced officer entered an inmate's cell multiple times within one evening with no justification or logging of the entrance and sexual abused her each time.	
1 min	**Kahle v. Leonard (8th Cir. 2007)** Kahle v. Leonard (8th Cir. 2007) • 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 NATIONAL PREA RESOURCE CENTER • 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.	**Kahle v. Leonard**
1 min	**Legal Framework** **Qualified Immunity** Legal Framework **Qualified Immunity** • Was the law governing the conduct clearly established? • Reasonable person test • Sepulveda v. Ramirez (9th Cir. 1992) – 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 NATIONAL PREA RESOURCE CENTER Qualified immunity allows government employees to take	**Legal Framework**

	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, • 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. Sexual abuse laws are also very clearly defined now, so it is difficult to argue for qualified immunity in these sorts of cases.	
1 min	**Volunteer and Contractor Liability**  Volunteers and contractors can be helpful in a facility but also can create additional exposure to liability. 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. 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 not appropriately train him.	 **Volunteer and Contractor Liability**

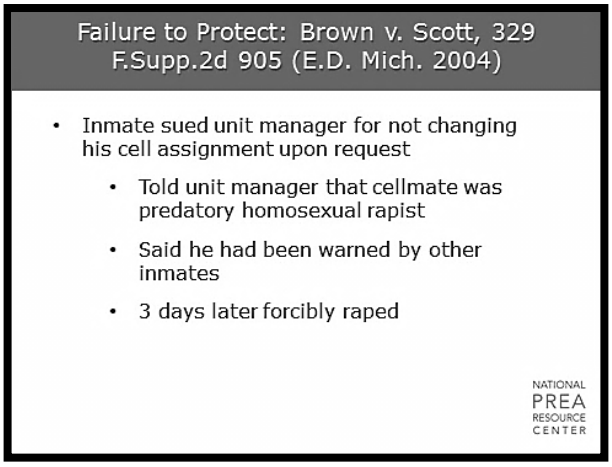
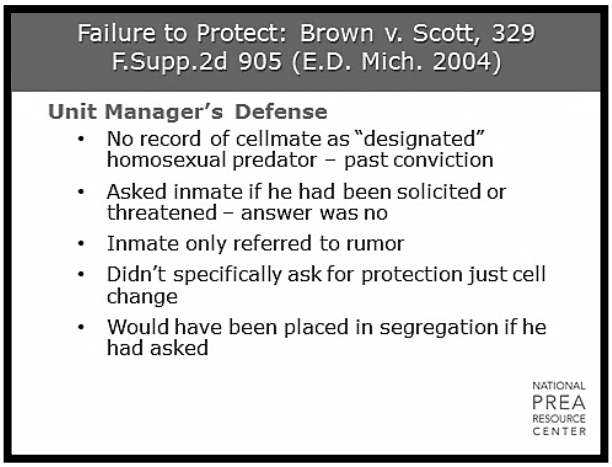
1 min	**Volunteer and Contractor Liability**  What if the contractor had been appropriately trained? • This probably would have protected them against liability. • There was another case with a privately-contracted drug treatment counselor who sexually abused an inmate. The inmate sued, but the agency 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.	**Volunteer and Contractor Liability**
1 min	**Investigative Process**  • Within the investigative process, an agency can be sued in a number of different ways. An agency and investigator can be sued for false arrest or malicious prosecution if a defendant can demonstrate that the	**Investigative Process**

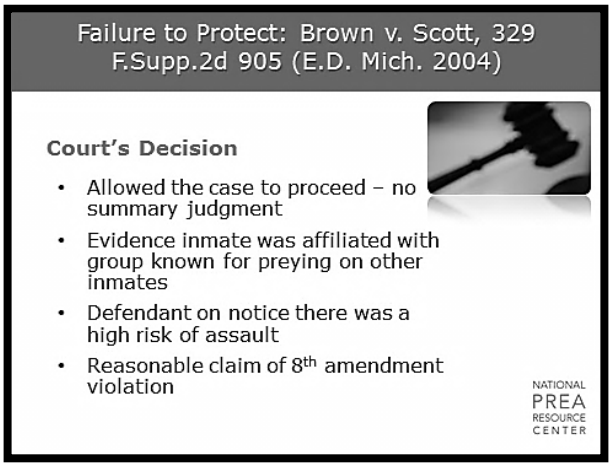
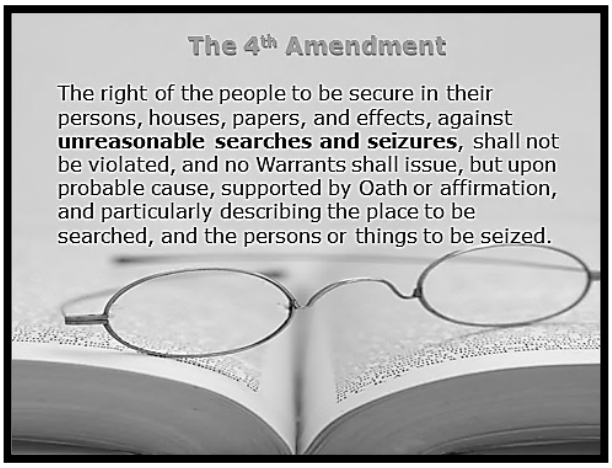
	investigation was poorly done and did not provide enough evidence to arrest or prosecute. • Additionally, there are a number of issues involved with undercover operations. When covertly monitoring staff, investigators need to be sure that staff could not argue there was a reasonable expectation of privacy. • 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.	
1 min	**Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)**  Here is an example of a case where an investigator was sued for false arrest and malicious prosecution. • 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.	**Investigative Process**
1 min	**Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)**	**Investigative**

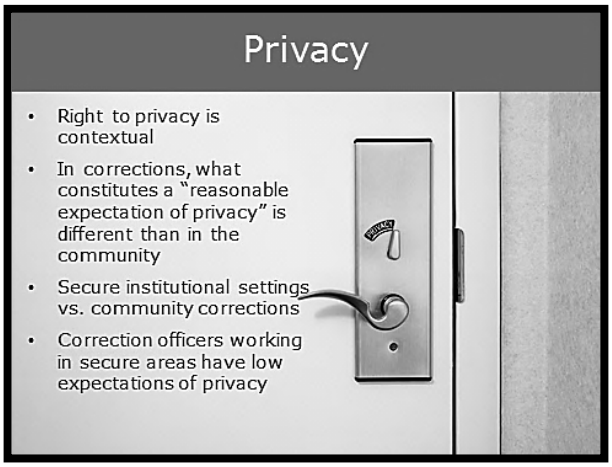
	Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002) • Investigator takes statement • Investigator corroborated details of the encounter with records and review of facility • Files a felony complaint against Officer • Officer placed on administrative leave without pay • Officer charged with sexual assault of inmate • Acquitted after jury trial • Reinstated with back pay • Officer files suit for false arrest and malicious prosecution NATIONAL PREA RESOURCE CENTER 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.	**Process**
1 min	**Investigative Process Standards** **Investigative Process Standards** • 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 NATIONAL PREA RESOURCE CENTER 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. 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.	 **Investigative Process Standards**

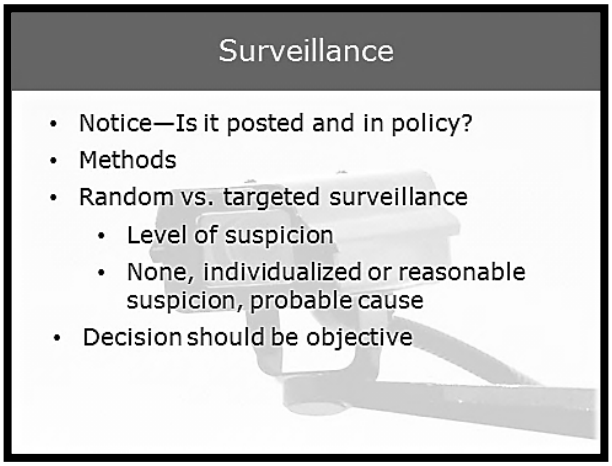
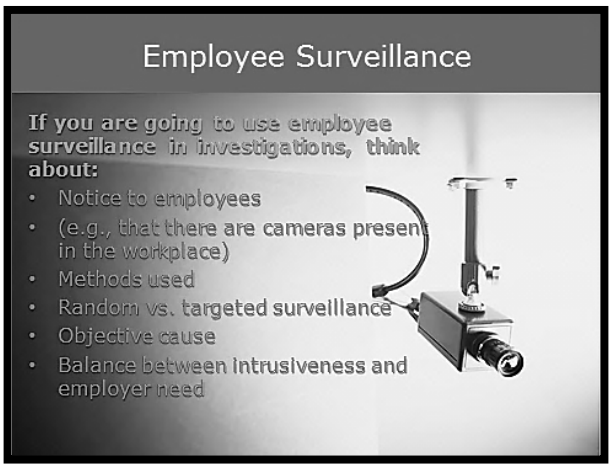
1 min	**Investigative Process: Corona v. Lunn, 2002 WL 550963 (S.D.N.Y April 11, 2002)**  • In this case, it was determined that the investigator had probable cause. An informant's mental health history does not delegitimize his/her testimony. Additionally, the investigator corroborated the inmate's 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.	**Investigative Process**
1 min	**Sting Operations: Sanchez-Luna v. U.S. (Dec. 2004)**  Sting operations are also areas of potential liability.	**Sting Operations**

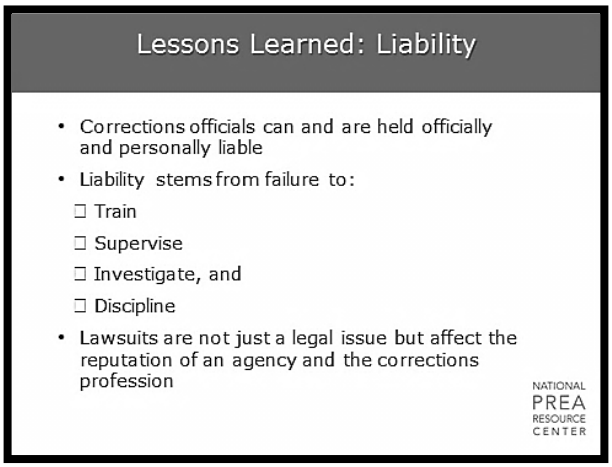
	• In this case, they used a female offender to catch an officer in the act of sexual abuse. • The female offender cooperated with the investigation, and the officer incriminated himself. The problem here is that instead of just videotaping the mandatory minimum amount of activity, the camera kept rolling and investigators did not stop the abuse.	
1 min	**Result of Litigation: Sanchez-Luna v. U.S. (Dec. 2004)** Result of Litigation: Sanchez-Luna v. U.S. (Dec. 2004) • Officer pleads guilty • Terminated from position • 8th Amendment violation alleged • Settlement of $165,000 to plaintiff When conducting operations – ensure you are in position to prevent or stop sexual conduct from occurring NATIONAL PREA RESOURCE CENTER • 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.	**Result of Litigation**
1 min	**Elements of Failure to Protect** Elements of Failure to Protect • 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 NATIONAL PREA RESOURCE CENTER Failure to protect is an important claim within corrections. It requires that a facility official knows that an inmate faces a	**Elements of Failure to Protect**

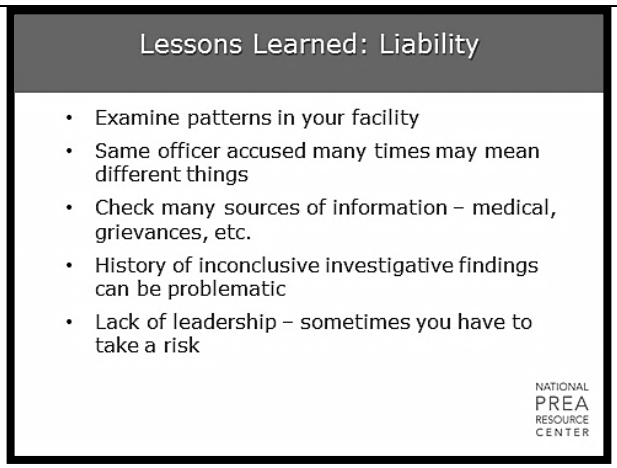
	substantial risk of serious harm, but fails to take reasonable steps to protect him or her.	
1 min	**Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)**  This is a case in Michigan where an inmate went to his unit manager and said, "Look, I've been told that my cellmate is a predatory homosexual rapist." However, nothing was done to protect the inmate, and he was raped three days later.	 **Failure to Protect**
1 min	**Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)**  • The defense for the case was that the cellmate was not designated as a "predator" because he did not have a conviction. • 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.	 **Failure to Protect**

	• Why do you think that was? Because he did not want to go to segregation.	
1 min	**Failure to Protect: Brown v. Scott, 329 F.Supp.2d 905 (E.D. Mich. 2004)**  • 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?	**Failure to Protect**
1 min	**The 4th Amendment**  Another right to be aware of when conducting investigations is the right of your staff against unreasonable searches and	**The 4th Amendment**

	seizures. • 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**  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.	 **Privacy**

1 min	**Surveillance**  Similarly, it is important to give notice if surveillance is possible.	**Surveillance** Insert agency policy regarding surveillance.
1 min	**Employee Surveillance**  • 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.	**Employee Surveillance**
10 min	***Activity: Scenario***	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.
1 min	**Lessons Learned: Liability**  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.	**Lessons Learned**
1 min	**Lessons Learned: Liability**	**Lessons Learned**

	 Examine the patterns that appear throughout your investigations. • What officers are consistently involved in allegations? • 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 McPhearon'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.