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Addressing Sexual Misconduct in Community Corrections

Introduction¹

INAPPROPRIATE RELATIONSHIPS BETWEEN OFFENDERS AND EMPLOYEES of community-based corrections organizations have emerged as a serious issue.² Among the most dangerous and destructive of these inappropriate relationships is sexual misconduct. The very nature of community corrections, with semi-autonomous employees, the increasing focus on a rehabilitative rather than the punitive model, the increase of offenders assigned to these programs, and actual allegations of sexual misconduct have raised the awareness of administrators of the need for action.

The bottom line: Sexual misconduct jeopardizes the safety of the public. Employees who compromise their professional ethics and responsibilities by engaging in inappropriate and, in most states, illegal behavior, undermine the criminal justice system, further victimize vulnerable individuals, put the safety of themselves and their peers in jeopardy, and erode public and legislative support for the mission of their agency.³

Community corrections agencies that have yet to experience allegations of sexual misconduct have a range of options available in preventing misconduct that may not exist for agencies where allegations are public, or where litigation has begun. Agency administrators should be, therefore, proactive and aggressive in taking steps to prevent sexual misconduct. Otherwise, they risk the inevitable allegation that forces the agency into a reactive posture.

This article addresses:

- Definitions of staff sexual misconduct with offenders;
- Myths and realities of sexual misconduct in corrections;
- National developments that have affected staff sexual misconduct with offenders;
- State laws prohibiting staff sexual misconduct with offenders;
- Critical issues for community corrections;
- Actions agency administrators can take to address and prevent staff sexual misconduct; and
- Investigations.

Defining Staff Sexual Misconduct with Offenders

Sexual misconduct includes a range of behaviors -- from sexual innuendo, harassment, hostile work environment, to incidents of sexual contact and coerced sex and rape.

For discussion purposes:⁴

Sexual misconduct includes, but is not limited to, acts or attempts to commit acts such as sexual assault, sexual abuse, sexual harassment, sexual contact, obscenity, sexual gratification for any party, unreasonable and unnecessary invasion of privacy, behavior of sexual nature or implication, and conversations or correspondence suggesting a romantic or sexual relationship. Staff sexual misconduct is also behavior such as sexualized name calling between offenders, and between staff and offenders, staff who "observe" offenders of the opposite sex during period of partial or total nudity for periods of time longer than necessary for facility security interests, staff having physical contact with offenders outside the need for searches and related security functions, and staff who make explicit comments about the physical appearance of offenders.

This definition is intended to highlight a range of inappropriate behaviors that are most often identified with sexual misconduct. Administrators should review their state statutes⁵ for additional language and adopt definition(s) that are the most relevant for their operations.

Often the code of conduct for employees and offenders, does not specifically describe behaviors that are acceptable and prohibited. A critical first step in preventing sexual misconduct is defining it. An agency's code of conduct that directs staff to avoid "over-familiarity" or "conduct unbecoming" in working with their clients is insufficient to hold employees and offenders accountable for professional behavior. While one would expect employees to know that sexual relationships with offenders, especially offenders under their supervision is just plain wrong, the absence of agency direction on the matter can provide a convenient scapegoat for ignorance. This ignorance places the agency staff member and the offender at risk.

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Myths and Realities⁶

Many "myths" have emerged about staff sexual misconduct.

Myths

1. Staff know their professional boundaries and have the skills to enforce these boundaries with offenders.

Focus groups of community corrections professionals, at all levels, have revealed that there is a critical gap in staff's ability to establish and maintain professionalism. That gap is that there is not a universally shared and publicly acknowledged and defined standard about sexual misconduct. Should agencies have to specifically tell staff not to become involved in sexual activities with offenders under supervision? Apparently, they do. Community corrections staff report they are unclear about their boundaries, which are further blurred by being responsible for increasing treatment and counseling functions, rather than a strict supervision. As a result of unclear boundaries, and employees' emerging role as helper rather than enforcer, the "slippery slope" of seemingly minor indiscretions and unprofessional behavior can result in sexual misconduct.

Focus group participants also report that training, both pre-service and in-service, for employees in many states is deficient. New employees may be trained in the nuts and bolts of the agency's policies and paperwork requirements, but should also receive information about offenders and interpersonal skills needed to be safe and successful. Too often new employees don't know the significance of the abuse history of their clients and how that history will impact their supervisory relationships. Staff receive information not just about work behaviors to avoid, but what behaviors to embrace in their work. Employees often look to supervisory staff in the organization as their role models and mentors, and if the appropriate behaviors are not there, employees are left to develop their own set of professional boundaries. Supervisors often are unprepared or overloaded to provide appropriate guidance.

The multi-generational workforce does not share the same values or ethics. This is neither good nor bad, just a statement of fact. It is up to the agency to define for all workers acceptable behavior and support that critical directive with training and role modeling.

2. This is a male staff/female offender issue.

Available data from institutional settings indicates that, although the issue of sexual misconduct emerged in women's prisons, the misconduct is occurring on all "four quadrants" – female employees/male offenders, female employees/female offenders, male employees/female offenders and male employees and male offenders.⁷ Therefore an agency's strategic response to addressing and preventing misconduct must include policies that recognize this reality.

In some organizations, cross gender supervision has been blamed for misconduct. While thoughtful deployment of staff, based on fiscal and other management concerns, is a responsibility of agency leadership,

banning cross gender supervision will not halt all staff sexual misconduct. It may, however, decrease offenders' sense of vulnerability and thereby lessen sexual misconduct, but is not the answer.⁸

3. Offenders consent to inappropriate relationships with employees.

Most state statutes, the policies in many agencies, and several court decisions, do not accept or recognize the ability of offenders to consent to illegal or inappropriate behavior with employees. The custodial and supervisory power that community corrections programs and employees have over the offender – most clearly the power to request revocation of an offender's probation or parole – makes the relationship a grossly unequal one. When that level of an imbalance of power exists, there can be no consent.

4. Offenders manipulate inexperienced employees into compromising situations.

In the current work environment, there are many staff that are inexperienced with the offender population they are assigned to supervise. Offenders with long histories of physical and sexual abuse, may view the world quite differently than those who have not experienced these events. These offenders present challenges to the most seasoned corrections professional. Agency leadership has an obligation to prepare and supervise all employees to understand these clients, and give these employees the skills needed to work with them. An excuse for misconduct cannot be that staff are ill-prepared or too inexperienced for their responsibilities.

5. Only new employees get involved with misconduct.

There is no one profile of the staff person who gets involved in sexual misconduct. In some cases they are staff who, for whatever reason, allow their professional boundaries to be crossed, with serious ramifications; in other, rarer instances, they are "predators" watching for vulnerable victims. Employees who get involved are those who are newly hired, and those who have long tenure with an organization. Exemplary employees get involved, as well as problem employees. Supervisors and managers get involved.

At the conclusion of investigations into sexual misconduct allegations, agencies often recognize that there were plenty of early warnings that problems existed, but no one acted on these red flags.⁹ Prevention includes making both staff and supervisors aware of the indicators, as well as the skills and resources to confront the issues.

Realities

The reality of sexual misconduct is that the leadership of the organization sets the tone for the professional conduct of all employees. In the absence of clear policy and procedures, effective training and contract management, misconduct will develop. The leadership of the organization is responsible for assuring that the culture of the organization is healthy,

promotes professionalism, encourages and rewards staff's ability to report misconduct, ensures competent investigations, and prevents the development of a sexualized and hostile work environment. If staff do not believe that the organization has their interests at heart, or if past agency conduct, whether real or perceived, supports these beliefs, a "code of silence" will develop. When established, this code of silence is difficult to address, and it inhibits agency leadership from determining what is really going on in the organization.

The National Scope

Several national and international reports have addressed, explored and investigated the issue of staff sexual misconduct. While none of these reports have specifically addressed community corrections, they are relevant. A summary of these reports is provided so the reader will appreciate the scope of this attention and identify the potential impact on community corrections.¹⁰

- Fifty State Survey of Criminal Laws Prohibiting Sexual Abuse of Prisoners, Brenda V. Smith, National Women's Law Center (1997). This survey provided the first analysis of state statutes' prohibitions of staff sexual misconduct with offenders. This study examines elements of these statutes, including scope, consent, defenses and penalties.
- In December 1996, Human Rights Watch organization published "All Too Familiar: Sexual Abuse of Women in U. S. State Prisons." This report described numerous incidents of sexual harassment, sexual abuse, sexual contact and privacy violations of women in six large correctional facilities, including one combined prison/jail system.¹¹
- In 1997, the United States Department of Justice (DOJ) filed civil rights lawsuits against two states' Departments of Corrections. The results of this litigation were settlement agreements, involving extensive reorganization and revision of policies and procedures. The actions of the U. S. DOJ were based on their findings that the departments failed to sufficiently protect female inmates from sexual misconduct by staff.¹²

- In July 1998, "Nowhere to Hide: Retaliation Against Women in Michigan State Prison" by Human Rights Watch. The report examined numerous allegations of retaliation against the female inmates who had filed suit or complaints against the department for acts of sexual misconduct.¹³
- In 1999, United Nations, "Report of the mission to the United States of America on the issue of the violence against women in state and federal prisons" [pp. 55-63] was issued. The report concluded that sexual misconduct by staff is widespread in U. S. prisons, especially when compared to systems in other industrialized countries. The report offered many recommendations, including the criminalization of sexual misconduct between staff and inmates.¹⁴
- In June 1999, the United States General Accounting Office published "Women in Prison: Sexual Misconduct by Correctional Staff." Four jurisdictions, accounting for more than one-third of the total prison population, were studied. The report found that the following areas were significantly lacking attention: training, reporting methods, procedures for responding to allegations, procedure for preventing

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retaliation against those filing reports, conducting competent investigations, maintaining records of reports and investigations and tracking the progress of investigations.^{15, 16}

- In 2001, Amnesty International published "Abuse of Women in Custody—Sexual Misconduct and Shackling of Pregnant Women: A State-by-State Survey of Policy and Practices in the U. S." This report expanded on AI's 1999 report "Not Part of My Sentence: Violations of Human Rights of Women in Custody" through a national review of policies relating to the treatment of female offenders, with emphasis on the treatment of pregnant offenders.

Clearly, the 1990s created an awareness of the problem of sexual misconduct where an imbalance of power exists—in the military, in religious institutions, in high schools and colleges, and in prison and jail settings. Currently, forty-seven of the states have passed laws criminalizing sexual relationships between staff and inmates (also Puerto Rico, Federal Bureau of Prisons, and the District of Columbia).¹⁷ This number is an increase from 32 states with legislation in 1996. The Association of State Correctional Administrators passed a resolution in 2000 declaring zero tolerance for staff sexual misconduct. The National Sheriffs' Association passed a resolution in June 2002 supporting efforts by sheriffs and jail administrators to aggressively address misconduct.

Litigation regarding allegations of misconduct is increasing. Seldom does a month go by where litigation is not initiated, or a court ruling made.¹⁸ Although the U. S. Supreme Court has not dealt specifically with this issue, many lower federal courts have.

While few managers use only the threat of litigation to promote policy development and training, the interests of plaintiffs' attorneys, the courts, as well as the appalling treatment of offenders in regard to sexual misconduct should provoke agencies to action.

Legislation

Another outcome of the increased attention to staff sexual misconduct with inmates has been the enactment of laws specifically prohibiting sexual contact between correctional staff and inmates.¹⁹ In the early 1990s, few states had laws specifically prohibiting sexual contact between corrections staff and inmates.²⁰ In the absence of such statutes, many incidents of sexual misconduct could not be prosecuted under existing general sexual assault statutes where consent is a defense to the conduct. Often, involved staff claimed that the inmate had either enticed them or had consented to the conduct.²¹ States enacted laws, often in the wake of visible incidents, prohibiting any sexual contact between prisoners and staff.²² These laws differ in their coverage—some applied only to prisons or other detention facilities,²³ while others cover prisons, parole, probation and work release programs.²⁴ Still others covered juvenile facilities.²⁵ Some states took the approach of covering anyone under custody or authority of law.²⁶

A cursory review of these laws makes clear that states either have or are moving to cover the conduct of community corrections employees. Existing

legislative language that refers specifically to community corrections agencies or seeks to cover anyone under custody or authority of law casts a broad net. Currently, with no revisions, community corrections employees could be subject to criminal penalties for sexual abuse of offenders in 27 states.²⁷ However, a number of issues remain that are very specific to the structure of community corrections agencies. First, many of these statutes require that the correctional officer have direct supervisory or disciplinary authority over the offender.²⁸ It leaves open the possibility that relationships between offenders and other community corrections staff who are not directly supervising an inmate could engage in sexual and other intimate relations. While stories abound of correctional staff—both in facilities and in community corrections agencies—who have gone on to have relationships, father or mother children with offenders, and marry, few agencies have developed policies to address these situations.

Then there are other states that have taken the position that relationships between offenders and probation and parole authorities are off limits in their statutes. For example Nevada's law prohibiting staff sexual misconduct with inmates specifically exempts parole and probation from its coverage.²⁹

Third, there is the issue of states like South Carolina that have codified sanctions for false reporting. South Carolina's statute provides that any "person who knowingly or willfully submits inaccurate or untruthful information concerning sexual misconduct" can be imprisoned for up to one year.³⁰ These statutes have a chilling effect on reporting by both staff and inmates.

Finally, the organizational structures that parole and probation agencies find themselves under may determine the application of these laws prohibiting staff sexual misconduct. Many of the statutes only cover the departments of correction.³¹ If community corrections agencies are separate, part of the Department of Public Safety³² or part of the courts, there may be separate sanctions or no sanctions at all. Because some parole and probation officers are licensed social workers there may also be licensing ramifications for sexual misconduct with offenders. This points to the need for a thorough review of your state law, agency policies and licensing regulations.

Community Corrections Environments

The community corrections environment presents a host of challenges to administrators in developing policy and practice to address staff sexual misconduct. There are significant differences between community corrections and traditional institutions in, among other areas:

- organizational structure;
- human resources;
- role autonomy;
- employees' access to confidential information about offenders;
- need for quality supervision of treatment and counseling responsibilities; and
- extremely high caseloads.

Although the vast majority of incarcerated offenders will eventually return to their communities, many under some type of correctional

supervision, the profile of community corrections offender is different from those who are incarcerated. Many community corrections' clients present a lower level of public safety risk and will never see the inside of a correctional institution. Although staff sexual misconduct reaches across all four quadrants the increase of women under community supervision presents additional challenges to staff who are not knowledgeable about the impact of an offender's abuse histories with current behavior, particularly behavior toward authority figures.

As with institutions, it is important to consider the inclusion of volunteers, contractors and third-party providers of services in policy development. With organizations experiencing budget shortfalls and the increased reliance on private providers, the imbalance of power is present with the same potentials for misuse.

In the Community

For purposes of discussion, the following are examples of areas for the attention of administrators. The list is not intended to be exhaustive, but intended rather to generate thinking and discussion regarding the potential for and the impact of staff sexual misconduct within a community corrections environment.

Legislation, Policy and Procedures

Of the 47 states that have criminalized staff sexual misconduct in an institutional setting, 27 states' statutes also extend to community corrections. Administrators must assess whether policies that address staff sexual misconduct are fully relevant to the community corrections environment and enforceable.

Organizational Structure

Uniquely, community corrections organizations fall in a wide variety of organizational structures - including the courts, county government, sheriff's department, state department of correction, state government functions within another agency or some combination thereof. These variations give rise to challenges in defining the acceptable, legal and prohibited staff and offender behaviors; how, to whom and where to report allegations; which entity conducts an investigation; and who administers discipline. In addition to probation and parole functions, there may be variety of other legal statutes or regulations that place offenders in the community, such as furlough or conditional release.

Where does the responsibility lie to develop policy and procedure and effectively address sexual misconduct? Certainly, if an organizational structure presents challenges to administrators, imagine the impact on staff and the offender population in trying to understand the rules, negotiate through the system to report allegations and seek protection against retaliation.

Agency Culture

All correctional organizations have a culture that is unique, regardless of whether they are institutional or community environments. Many elements of culture are positive for the organization, but issues of sexual

harassment, poor staff morale, hostile work environments and sexualized work environments can be equally present in community agencies as in other institutional settings. When an agency administrator takes steps to address staff sexual misconduct, the organization's culture needs to be analyzed and addressed in the strategies. Unaddressed, the potential for sexual, as well as other misconduct, is great. The opportunities for systemic misconduct may be somewhat different than in an institutional setting, but the dynamics of sexual misconduct - abuse of power and breaching professional boundaries - are consistent.

Ethics and Professional Boundaries

Many community corrections staff have enhanced their effectiveness through acquisition of skills often previously provided by trained treatment providers. But too often, treatment services for offenders are viewed within a correctional context rather than a treatment context. Without appropriate supervision, treatment and supervision boundaries may become blurred, placing both offenders and staff in vulnerable positions. Many of the cognitive behavioral strategies - techniques that enhance professionalism of staff and have proven effective with offenders - can create opportunities for misuse of relationships and information. Staff using these tools often do so without appropriate supervision increasing the potential for diminishing professional boundaries.

Power and Autonomy of Community Corrections Staff

Staff performing community supervision functions generally work quite independently, assuming sole responsibility for the caseload, with enormous discretion in responding to offender behaviors. Within the role, much of the work occurs away from supervisors, peers and outside of a traditional office setting. To effectively monitor offender change, staff/offender contact occurs in offender's personal environments, which may often include their residence. Maintaining professional boundaries while still providing effective supervision is a balancing act in community settings.

Prior or Current Personal Contact with Offenders

It is true in many communities that community corrections staff may have had prior relationships with offenders. In less populated communities, staff and offenders may have gone to school or worked together, their children may be involved in the same activities, frequent the same community services and have any number of legitimate prior connections. The fact that many offenders placed on community supervision may be seen by the officer or the neighborhood as more socially acceptable, can have the effect of relaxing professional boundaries. It is even a possibility for supervisors to discover that an offender has offered to perform legitimate services for a staff person (i.e. car repair). Taken as an individual event, such a situation may be a minor concern, or even accepted as part of the daily workings of the organization. In reality, this acts contribute to relaxing professional boundaries and opens the staff up to future favors requested by the offender.

Most community corrections organizations have work rules that discourage or prohibit personal relationships between staff and offenders.

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A Success Story

One organization overcame these obstacles when faced with public allegations of staff sexual misconduct—and the allegations were true. Their first step was to develop the agency's policy regarding zero tolerance and overcome staff resistance. The agency provided very specific training and policies on staff sexual misconduct, and clearly announced their zero tolerance policy. Newly hired staff receive training from experienced staff explaining the damage to the work environment when violations are allowed to continue. Finally, and importantly, the training covers how and why internal affairs investigations are conducted. Many staff are unaware of how many steps in most agency's internal investigations process are actually geared at protecting staff, rather than being "out to get" staff, regardless of their guilt. Inmates were also oriented to the agency's policies and procedures. The sheriff personally meets with all staff in pre-service and in-service training to support this policy.

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However, some community corrections staff have argued that having a personal relationship with an offender that they do not supervise, or having become unknowingly involved with an offender under supervision, should not be characterized as misconduct. Agencies must articulate clearly what activities are prohibited and thoughtfully address areas that can arise—subjects which tend to be ambiguous in a community corrections setting.

Administrative Leadership and Support

The impact of staff sexual misconduct on an organization is devastating. As within institutions, sexual misconduct often starts with small, seemingly harmless actions, which if detected, would diminish the occurrence of incidents. Supervisors need the time, talent and support to effectively manage their subordinate staff. Often part of this equation is missing and well-intended supervisors are clearly "stretched too thin" to provide quality and timely supervision. In addition to sufficient training and support, staff must be encouraged and supported to openly discuss their interpersonal challenges and the potential professional compromises inherent in supervising offenders. While institutions have publicly attempted to meet these challenges, focus group participants gathered for the purpose of discussing this issue in community corrections indicate that it is rare that staff sexual misconduct is discussed within the community corrections arena. Supervisory staff often do not have sufficient information to address this issue. Organizations must develop the resources to train and support supervisors to be both vigilant in addressing staff sexual misconduct and to provide staff with the tools to do their jobs professionally.

Administrative and Political Issues

Staff sexual misconduct issues may be less defined in the community. Existing personnel policies may present challenges to effective reporting, investigating and the ability to adequately protect alleged victims. Hiring standards currently in place may not be sufficient as there may be conflict in policy regarding off-duty behavior, or determining whether a particular staff person is actually appropriate to supervise offenders. There may be resistance by collective bargaining units to criminalize staff sexual misconduct with offenders in the community, especially because of the issue of "freedom of association." Agency administrators may believe it to be less of an issue in the community environment or are unsure how to begin to address the issue. Where power and authority over another exists, so does the potential for staff sexual misconduct.

Investigations and Data Collection

Who is responsible for carrying out investigations of alleged incidents of staff sexual misconduct? Many community corrections organizations have no authority to initiate or investigate allegations, have no investigative protocols and often must assign their own staff, many of who are not trained investigators, and who must add an investigation to their already overburdened work schedule. Some organizations have informal arrangements within their larger organization to conduct investigations. Some agencies may rely on outside law enforcement agencies or create a memorandum of understanding with an entity to perform investigations. Without a credible and consistent investigation process, the quality of investigations is undermined and staff and alleged victims will have little confidence in the process. If staff and offenders do not believe in the investigative process, they will be less likely to report, and a code of silence will flourish.

Collecting and maintaining data on allegations and findings is often missing within community corrections environments. The structure to adequately develop and keep information, which often may not appear to be relevant or even connected, is often non-existent with an inability to assess the extent of presence of the problem.

Administrators in community corrections organizations must begin the process of addressing staff sexual misconduct with offenders. Many lessons and resources can be drawn from the prison

and jail experience. The unique organizational structure of many community organizations will present challenges to effectively addressing misconduct, with union, staff and political barriers to overcome. As noted previously, administrators can be proactive or reactive. The proactive approach lends itself to preservation of the agency's reputation and integrity, assures protection for staff and offenders, and allows leaders to develop their own solutions, rather than having solutions thrust on them. As one sage correctional administrator observed, public allegations about staff sexual misconduct with offenders are not career builders.

Preventing Sexual Misconduct

An agency with the best policies, procedures, training and supervision may well receive allegations of sexual misconduct by staff. That is a fact of life. But the agency that has proactively pursued policy development and training is certainly in a better position to address allegations. So, what are the prevention strategies?

1. Establish a zero tolerance policy.

Written policy is the best offense. This proactive strategy is built with the commitment to a policy of zero tolerance for staff sexual misconduct. This commitment must be clearly role modeled by agency leadership, through public statements and adoption of concise and descriptive policies. Without all three—public statements, policies and setting the example—staff receive mixed messages. Even model behavior is not enough when written policy does not exist.

If personal integrity, public safety and professionalism are not sufficient reasons to adopt zero tolerance for staff sexual misconduct, then vicarious liability should be. Vicarious liability is created when:

Someone else (such as a supervisor) knew or should have known what was occurring or about to occur, but did nothing to correct the situation, and that lack of action was the proximate cause of subsequent harm, injury, or death.

Vicarious liability³³ can result from the failure to train, negligent supervision, or negligent hiring or retention. Under vicarious liability, administrators are responsible for activities within their organizations. Administrators who develop effective policy, who stay abreast of legal issues, who assess their organization's vulnerabilities and address problems as they arise through reprimand, training, investigation and sanctioning, will have a far greater chance of insulating themselves and their agencies from individual staff member's actions.

Gaining staff support of the zero tolerance policy is a challenge for some agency administrators. Getting staff to see what's in it for them is often the first question needing to be overcome. Staff are usually suspicious and untrusting of the internal investigative process, and see few reasons to risk becoming a snitch. The "wall of silence" exists in many organizations, where the agency's informal culture protects staff whose behavior is out of step with agency policy or the law.

2. Define prohibited behaviors.

Specifically defining prohibited behaviors is essential to insuring education of staff and offenders, as well as prompting compliance. Without knowing the specific agency policy on what constitutes misconduct, it is difficult to hold staff and offenders accountable for prohibited actions.

3. Require mandatory reporting by employees.³⁴

Agencies that have been successful in addressing misconduct report that requiring staff to report suspicions of misconduct is an integral part of their prevention strategies. Most agencies require staff to report suspicions of illegal activities, but in the case of staff sexual misconduct, the administrators need to assess whether they believe that they are receiving reports.

4. Review all policies to insure they are consistent with and promote zero tolerance.

Adopting a single policy is a first step. Agency administrators should also examine if their other policies and procedures support zero tolerance in the workplace.³⁵

5. Develop or amend contracts for services that require the contractor to adopt zero tolerance, agency definitions, reporting requirements and protection for the agency's clients of contractors who are accused of misconduct.

With many services in community corrections organizations provided by third party contracts, agency contracts must include requirements for contractor behaviors consistent with the agency's definitions of sexual misconduct, state law, as well as mandatory reporting and cooperation during investigations. Requests for proposal for services should include the agency's zero tolerance policies and definitions and require the incorporation of these policies in the final contract language. It may be possible to amend existing contracts for services to require the contractor to adopt protocols to prevent and address misconduct, and define how the agency's clients will be protected from contractors accused of misconduct during the investigative process. Contracts should include language that places harsh penalties for inappropriate contractor behavior, consistent with the agency's penalties, as well as the means by which the agency can terminate contracts that violate the agency's zero tolerance policies.

6. Train staff not only regarding policies and procedures, but also equip them with the skills and knowledge they need to supervise offenders on their caseload.

Staff frequently learn what not to do in the course of their job responsibilities, but often don't receive formal training on what to do.

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Miranda v. Arizona, 384 U.S. 436 (1966):

If an investigation involves possible criminal allegations, and becomes accusatory, then Miranda rights apply to all parties. Those parties are protected from making self-incriminating statements under coerced conditions, and without proper legal advice and representation.

When the investigation or interrogation reaches the point where the respondent (person under investigation) may be making self-incriminating statements, he/she must be advised of their rights under the Constitution as defined by Miranda. It is highly recommended to include a written form, delineating the Miranda warning, signed by the respondent and witnessed by at least one investigator.

Garrity v. New Jersey, 385 U.S. 493 (1967):

In Garrity, the Supreme Court decided a case where police officers were ordered and compelled by internal investigators, with authority of a N.J. statute, to give a statement about alleged conduct. The officers were told that if they did not make the statement, they would lose their jobs. The officers gave the statements, which were later used to incriminate them in a criminal prosecution. The court found that states have the right to compel such statements as a condition of employment, but such statements cannot be used against officers in criminal prosecutions.

What does this mean for corrections administrators and investigators?

- Statements can only be compelled as a condition of continued employment if there is immunity from using the statements to self-incriminate in criminal court.
- If the respondent staff member is granted immunity, but refuses to answer specific questions as part of an administrative inquiry, directly related to official duties, the respondent may be dismissed or suffer disciplinary consequences for failing to answer.
- If the respondent staff member is granted immunity from criminal prosecution, and the statement given provides probable cause, administrative sanctions are allowed.

It is highly recommended that Garrity warnings be given in writing and signed by the respondent staff member with at least one witness.

Training staff about the agency's zero tolerance policy and reporting procedures is critical. As critical is giving staff the skills they need to effectively supervise their client caseloads. Role modeling and mentors can assist both new and longer-term staff as they face the daily challenges of their workplace. Agencies should also consider orienting staff to the internal investigative process as a means to gain the staff's understanding and, hopefully, confidence in the process. This confidence is critical to reporting suspicions.

7. Orient offenders and their families to the agency's policies, including multiple reporting mechanisms and protections against retaliation.

Offenders and their families need to know the definitions for the acceptable and unacceptable behavior by agency employees during the course of the supervision relationship. Only through targeted education, with multiple reporting points and guarantees against retaliation, can administrators receive credible and full information.

Many agencies and staff fear that an aggressive zero tolerance policy, coupled with offender orientation/training about staff sexual misconduct, will invite and encourage malicious and deliberately false allegations by offenders against staff with whom the offender seeks to "get even." Agencies with aggressive policies report this infrequently occurs. The real danger is to allow this fear to prevent the development and enforcement of a zero tolerance policy, or to resort to a watered-down approach that can leave staff and offenders more confused and with less direction. Agencies must also be clear in distinguishing between malicious allegations and allegations for which no corroborating evidence could be found.

Prevention is a multi-pronged strategy. Critical to this discussion is that agency options diminish when an allegation is made public. Proactive management before an allegation surfaces means administrators can plot a deliberate course of action to achieve prevention through development of policies and procedures, training staff, orienting offenders and defining the investigative process.

Investigations

One of the most critical issues facing community corrections professionals regarding staff sexual misconduct with offenders is the investigative process.

Because there are many different types of organizational structures, it is difficult to present a single investigative model that fits each and every organization. Managers are faced with the task of developing an investigative process specific to their particular agency's organizational structure, state statute, or administrative regulations. Designing protocols and written memoranda of understanding with outside organizations who will investigate allegations (i.e. state police, local police, inspector general, etc.) are also recommended.

There are, however, a few basic principles of investigating allegations of staff sexual misconduct that apply across the spectrum. These elements can be included in memoranda of agreements that agency administrators wish to conclude with investigating agencies, if other than their own. These elements include:

- An investigative process supported by written policies and procedures that require thorough, timely, and fair investigations into allegations of staff sexual misconduct;
- Investigators who are specially trained to handle these sensitive and critical investigations;
- An internal investigative process clearly understood by all staff and offenders to eliminate the air of mystery and fear which often results in the strengthening of the code of silence;
- Specific and clear reporting procedures for staff, offenders and third parties that provide a safe atmosphere for those who report allegations, assure protection from retaliation and provide for appropriate handling of false allegations; and
- Cross training of personnel from other agencies who may be investigating allegations of sexual misconduct.

Each agency should consider establishing investigative protocols *before* allegations arise, whether or not another organization will be the investigating body. At a minimum, these protocols should address:

- How reports are received and processed;
- Preliminary inquiry procedures;
- Identifying, collecting and preserving evidence, including chain of custody;
- Who investigates each type of allegation;
- Procedures for notifying staff and offenders of an investigation, where required by state law, administrative regulations, policy, or collective bargaining agreements;
- Medical and mental health interventions, as needed, for those involved, both staff and offenders, including referral of staff to employee assistance programs/resources;
- Reassignment of staff and offenders, if necessary, during the investigation;

Red Flags

The National Institute of Corrections has conducted training for several years entitled "Staff Sexual Misconduct with Inmates." At the conclusion of that training, participants are asked to list those behaviors that they now see as RED FLAGS — events, actions or activities that should have tipped them off sooner to the possibility of staff sexual misconduct.

Some of these red flags are relevant in the community corrections setting:

- Over-identifying with an offender or their issues (i.e. blind to offender's actions)
- Horse-play, sexual interaction between staff and offender
- Offender knowing personal information about staff
- Staff isolation from other staff
- Staff granting special requests or showing favoritism
- Staff spending an unexplainable amount of time with an offender
- Offender grape-vine, rumors
- Staff overly concerned about an offender
- Drastic behavior change on the part of an offender or staff
- Staff confronting staff over an offender
- Staff/offender improving his/her appearance, dress, make-up, hair
- Staff can't account for time
- Staff's family being involved with offender's family
- Staff in personal crisis (divorce, ill health, bankruptcy, death in family)
- Staff who consistently work more overtime than peers and who volunteers to work overtime
- Staff having excessive knowledge about an offender and his/her family
- Staff intervening, or helping with the offender's personal life, legal affairs
- Overheard conversations between staff and offender which are sexualized in nature, or refer to the physical attributes of staff or offender

COVER STORY

- Format of the report;
- Timelines for completion (generally);
- Point of contact (person) between the investigators and your agency;
- Confidentiality of information;
- Access to agency personnel and offender records;
- Interview protocols for staff, offenders, and third parties, including when mental health practitioners may be helpful to the investigation;
- Use of covert equipment, surveillance, etc.;
- Production of evidence (fiscal, physical (DNA), telephone records);
- Establishing partnerships with the external investigative body and outside agencies, such as prosecutors, state and local law enforcement agencies, hospitals, advocacy groups, etc.

Many of these investigations involve human interactions at their worst, as staff are alleged to have compromised their integrity, and possibly, friends and co-workers. The investigator must have an understanding of these human dynamics and how they affect communication, particularly during initial and follow-up interviews. The investigator must also be able to handle the potential of criminally prosecuting a fellow employee, and even someone of higher rank. The investigator must also understand how the abuse histories of offenders will impact an investigation. Investigators must be skilled at assessing the impact of post-traumatic stress disorder as investigations progress, and understand how and when to involve mental health professionals to protect vulnerable victims and to enhance the investigative outcome.

Community corrections personnel have identified investigations as one of their most trying dilemmas when addressing allegations of misconduct. This is especially true when they don't have the authority, personnel, mandate, or skills to conduct a timely, credible investigation. Those outside agencies who may be required or assigned to investigate allegations are often uninterested in promptly pursuing allegations, or their lack of knowledge about community corrections limits their effectiveness. Meantime, staff and offenders are watching this drama and ascertaining for themselves whether investigation of allegations and addressing misconduct is really a priority for the agency.

Summary and Conclusions

Zero tolerance policy; clear and consistent procedures; a well-designed investigative process or development of investigative protocols; thorough, timely, fair and competent investigations; training for all levels of the issue; offender orientation/training — these elements will support an organization in its efforts to not only prevent staff sexual misconduct with offenders, but also effectively manage allegations to protect the integrity of the organization and its staff.

Resources

The National Institute of Corrections has resources currently available to community corrections administrators. Some of these resources are on NIC's website, www.nicic.org. NIC also has funding available for on-site technical assistance and training. For more information, contact Allen Ault, Ph.D., Chief, Special Projects Division, National Institute of Corrections, ault@bop.gov. Other resources have been noted and footnoted throughout this article.

Endnotes

¹ The source material for this article was gathered by the Center for Innovative Public Policies, Inc., during development of a National Institute of Corrections (NIC) funded project [Cooperative Agreements 01P18GIR4, 01P18GIR4, Supplement # 1, 02P18GIR4, Supplement #2] to produce training curriculum for agency personnel charged with investigating allegations of staff sexual misconduct with inmates, and provide training and technical assistance. The Center for Innovative Public Policies, Inc. would like to acknowledge the work of NIC, its staff and numerous consultants who have provided leadership and support of the field in this important public initiative. For more information about this subject, or to obtain NIC technical assistance and/or training, please see the resources section of this article.

² See *Smith v. Cochran*, 216 F. Supp.2d 1286, *Sepulveda v. Ramirez*, 967 F.2d 1413 (9th Circuit 1992).

³ See Brenda V. Smith, *Fifty State Survey of State Criminal Laws Prohibiting the Sexual Abuse of Prisoners*, 2002. [hereinafter *Fifty State Survey*] See also Training Program, *Investigating Allegations of Staff Sexual Misconduct with Inmates*, July 7 – 12, 2002. www.wcl.american.edu/faculty/smith/02conf.cfm for an electronic version of this document.

⁴ For additional definitions see *Staff Sexual Misconduct with Inmates: A Policy Development Guide for Sheriffs and Jail Administrators*, Susan W. McCampbell and Larry S. Fischer, National Institute of Corrections, August 2002. This document is available at www.cipp.org, and will be available through the NIC Information Center (www.nicic.org).

⁵ Op. Cit. *Fifty State Survey*

⁶ See also, "Investigating Allegations of Staff Sexual Misconduct: Myths and Realities," Susan W. McCampbell and Elizabeth P. Layman, *Sheriffs*, November-December 2002. [www.cipp.org/sexual/article2.pdf]

⁷ A description coined by A. T. Wall, Director, Rhode Island Department of Corrections. See also the National Institute of Corrections video conference, December 12, 2002, www.nicic.org.

⁸ Brenda V. Smith, *Watching You, Watching Me: Judicial Responses to Cross Gender Supervision of Prisoners* (forthcoming 2003) on file with author.

⁹ See page 35 for a list of "red flags" developed in NIC's training work with corrections agencies. Thanks to Jennie Lancaster, North Carolina Department of Corrections, and Terna Farnon, California Department of Corrections (retired) for their work in this area.

¹⁰ See also "Sexual Misconduct in Corrections," by Elizabeth P. Layman, Susan W. McCampbell, Andie Moss, *American Jails*, November/December 2000. [www.cipp.org/sexual/article2.html]

¹¹ Human Rights Watch, *Women's Rights Project: All Too Familiar: Sexual Abuse of Women in U. S. Prisons*, 1996. www.hrw.org.

¹² *U. S. v. State of Michigan*, Civil Action No. 97-CVB-71514-BDT (E.D. Michigan, 1997), *U. S. v. State of Arizona*, No. 97-476-PHX-ROS.

¹³ Human Rights Watch, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons*, 9/98. www.hrw.org/reports/98/women.

¹⁴ United Nations Economic and Social Council, Commission on Human

Rights 55th Session: Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1997/144; Addendum - Report of the mission to the USA on the issue of violence against women in state and federal prisons: E/CN.4/1999/68/Add.2GE.99-10012(E), 4 Jan 99. www.un.org/pubs.

¹⁵ United States General Accounting Office: *Women in Prison: Sexual Misconduct by Correctional Staff*; Report to the Honorable Eleanor Holmes Norton. House of Representatives; GAO-GGD 99-104, June 1999. www.goa.gov.

¹⁶ See also, United States General Accounting Office, *Women in Prison: Issues and Challenges Confronting U. S. Correctional Systems*, Report to the Honorable Eleanor Holmes Norton. House of Representatives; GAO-GGD 00-22, December 1999.

¹⁷ The states currently without specific statutes are Vermont, Alabama and Oregon. Op. Cit., *Fifty State Survey of Criminal Laws Prohibiting Sexual Abuse of Prisoners*.

¹⁸ Kristine Mullendore & Laurie Beever, *Sexually Abused Female Inmates in State and Local Correctional Facilities*, 1 WOMEN, GIRLS & CRIM. JUST. 81-96 (Oct./Nov. 2000) (providing thorough case summaries of recent litigation involving sexual abuse of women prisoners).

¹⁹ See generally Brenda V. Smith, *Fifty State Survey of State Criminal Law Prohibiting the Sexual Abuse of Prisoners* (2002) [hereinafter 50 state survey 2002].

²⁰ At present, only three states - Alabama, Oregon, and Vermont - have not enacted legislation specifically prohibiting sexual contact between staff and inmates. Legislation in Vermont is pending. See 50 STATE SURVEY 2002, *supra* note 1.

²¹ See e.g., *Carrigan v. Davis*, 70 F. Supp.2d 448, 451 (1999) (citing defendant's assertion that his sexual activity with the plaintiff was not only consensual, but that she seduced him); *Long v. McGinnis*, 97 F.3d 1452 (6th Cir. 1999) (alleging plaintiff's consent to sex with male inmate); *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997) (noting that if a state legislature's treatment of the injury is *de minimis* - in that sanctions for crimes are relatively lax - it will result in *de minimis* review at trial when a violation of the law is alleged); *Fisher v. Goord*, 981 E. Supp. 140 (W.D.N.Y. 1997) (ruling that consensual sex engaged in before the enactment of New York's law characterizing such activity as statutory rape was legal, while acknowledging the particular situation in prisons that operates to make "consensual" sex a sham).

²² See Smith, *50 State Survey 2002*, *supra* note, at 3 (noting that COLO. REV. STAT. §18-3-404 (West 2000) provides that any actor subjecting any person in custody to any sexual contact is guilty of unlawful sexual conduct.)

²³ See *id.* at 15, 22, 26, 29 (Idaho, Louisiana, Massachusetts, Mississippi, New York and Pennsylvania are among states who have enacted legislation prohibiting sexual contact with inmates only in prisons or detention settings).

²⁴ See *id.* at 13, 20, 41 (Georgia, Kansas, and North Dakota are among states that have enacted legislation covering prisons, parole, probation, and work release programs).

²⁵ See *id.* at 19-20, 23-25, 31, 37 (Iowa, Kansas, Maine, Maryland, Montana, and New Mexico are among states that have enacted legislation expressly prohibiting sexual contact with inmates in juvenile facilities).

²⁶ See *id.* at 10-12, 19 (The District of Columbia, Florida, and Iowa are among states that have enacted legislation covering anyone in custody or under

authority of law).

²⁷ See *Fifty State Survey*, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, South Carolina, Utah, Virginia, Washington, West Virginia and Wyoming.

²⁸ See, e.g., *Fifty State Survey*, Connecticut, District of Columbia, Georgia, and Illinois.

²⁹ See NEV. REV. STAT. 212.187(1) (1997). The language of the statute specifically provides that "[a] person who voluntarily engages in sexual conduct with a prisoner who is in lawful custody or confinement, other than in the custody of the division of parole and probation and of the department of public safety of residential confinement, is guilty of a category D felony." (emphasis added) *Id.*

³⁰ S.C. Code Ann. §44-23-1150 (D).

³¹ See, e.g., ARIZ. REV. STAT. ANN. §13-1419 (West 1989 and Supp.); DE. CODE ANN. tit. 11, § 1259 (1995 and Supp.) (using the term "detention facility"); IDAHO CODE §18-6110 (Michie 1997 & Supp.); KY. REV. STAT. ANN. § 510.120 (Michie 2000); MO. REV. STAT. § 405 (West 1996 & Supp.); R.I. GEN. LAWS §11-25-24 (1999); S.D. CODIFIED LAWS §24-1-26.1 (Michie 1998 and Supp.); (using the term "detention facility"); VT. STAT. ANN. § 3256 (2000).

³² See Nev. Rev. Stat. 212.187(1) (1997), *supra* at n. 11.

³³ See *Monell v. Departments of Social Services of the City of New York*, 436 U.S. 658 (1978).

³⁴ Two states, Florida and Missouri, include as part of their statute mandatory reporting by staff. Failure to report is a separate criminal offense.

³⁵ Op. cit. McCampbell/Fischer, *Staff Sexual Misconduct with Inmates: A Policy Development Guide for Sheriffs and Jail Administrators*. □

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