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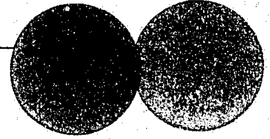
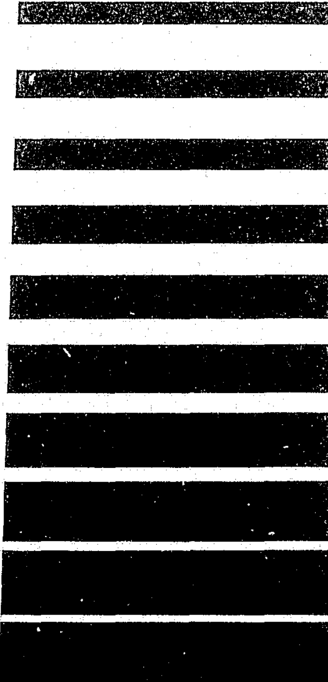


Liability Issues in Community Service Sanctions



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LIABILITY ISSUES IN COMMUNITY SERVICE SANCTIONS

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The term "probation/parole officer" is often used in this monograph when referring to public officers involved in community corrections. That term is used for two reasons: convenience and the fact that many, if not most, community service programs come under probation/parole departments. The legal principles discussed in this monograph, however, apply to all types of community service--including those not supervised administratively by probation/parole agencies.

FOREWORD

In 1982, the National Institute of Corrections published the first comprehensive overview of potential liabilities confronting probation and parole officers as a result of their work with offenders. Due to the great interest generated by this report, the Institute contracted in 1985 with the original author to revise and update **Potential Legal Liabilities of Probation and Parole Officers.**

These publications have spawned an interest in information regarding potential legal liabilities in specific community corrections program areas. Liability questions are frequently askedin the area of community service sanctions. Whether it be a form of pre-trial diversion or post-adjudication sanctioning, or both, we believe that community service is a valuable sanction in corrections. The focus of this monograph is not a concern that liabilities exist that should preclude community service programs, but rather the monograph attempts to identify potential areas of legal concern in this area of community corrections. Our hope is that this information will be helpful in the development and management of effective community service programs.

We emphasize that this monograph was prepared for a national audience and that the reader must obtain specific guidance from his/her state or local jurisdiction.

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May 1986

INTRODUCTION

Community service is a form of offender sanction that is gaining more widespread approval from prosecutors, judges, jail officials, parole boards, and other criminal justice personnel. News items similar to the following have become more common in the last few years.

OFFENDER SENTENCED TO 275 HOURS OF COMMUNITY SERVICE IN COUNTY HOSPITAL
WEEKEND COMMUNITY SERVICE REQUIRED OF PAROLEES
COUNTY EXPANDS USE OF PRETRIAL COMMUNITY PROGRAMS
OFFENDER TO SERVE IN WORK-RELEASE PROGRAM
PROBATIONER SENTENCED TO 3000 HOURS COMMUNITY SERVICE HELPING RESTORE HISTORIC LANDMARK

For purposes of this monograph, a community service program is defined as a program that "places convicted offenders in unpaid positions with nonprofit or tax-supported agencies to perform a specified number of hours of work or service within a given time limit as a sentencing option or condition."[1] Community service programs operate under a variety of titles, including pretrial diversion, court referral, volunteer work, service restitution, or symbolic restitution programs. They are different from restitution in that restitution usually involves money payments to actual victims, whereas community service generally involves performing services of value to the community.[2]

The increasing popularity of community service work stems partly from its restitutive nature and a developing policy against institutionalizing nonserious criminals. It is also a cost-effective move at a time of diminishing resources for corrections programs. As a result of increased use, careful attention has recently been given to community service programs and their ramifications. Among the topics that require attention are possible legal liability issues. This monograph addresses those issues in the hope that liability pitfalls for the community service

officers can be avoided or minimized. At the outset, however, the following considerations must be emphasized.

1. Legal liabilities in community service work is a new field of law; hence guidance sources are meager. There are hardly any statutes, case law, or published articles on the legal aspects of community service in corrections. Therefore, most of the discussion here is derived from related areas of law where similar principles would most likely apply if identical issues are raised.

2. Liability issues, particularly those based on state tort law, vary extensively from state to state. The discussion here is necessarily generic and not meant to provide legal advice on specific problems. Officers are strongly urged to seek prompt advice and counsel from local legal advisors if faced with specific legal problems.

OVERVIEW OF LIABILITIES

The legal liabilities to which community service officers may be exposed in connection with their work are many and varied. They range from federal to state and from civil to criminal liabilities. All these are in addition to probable administrative sanctions from the agency. For purposes of community service, only the more widely used civil liability sources are discussed here, first on the federal and then on the state level.

Liability under Federal Law

In the federal forum, plaintiffs most often invoke Title 42, United States Code, Section 1983, as their main form of legal redress. This lawsuit, popularly known as a Civil Rights action, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

There are two basic elements of a Section 1983 (Civil Rights) lawsuit. These are:

1. The defendant must be acting under "color of law." This means the misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. As a general rule, anything a public officer does in the performance of regular duties and during the usual office hours is considered having been undertaken under color of state law. Conversely, what he/she does as a private citizen during his/her off-hours falls outside the color of state law.

2. There must be a violation of a constitutional or of a federally protected right. Under this requisite, the right violated must be one that is guaranteed by the United States Constitution or given the plaintiff by federal law. Rights given only by state law are not protected under Section 1983. In the context of community service, the important questions are: What rights do offenders have, and how may those rights be violated by public officers? Officers and those working with them need to know the rights of offenders and the type of behavior expected of government officials. These questions are difficult to answer because there are very few cases that specifically tell what those rights might be.

Section 1983 cases are highly preferred by plaintiffs because they are filed in federal courts

and plaintiffs recover attorney's fees if at least one of the allegations prevails. Damages awarded may be nominal, actual, or punitive.

Liability under State Law

Plaintiffs often file a civil action alleging a state tort law violation against public officers when they cannot bring a federal case under Section 1983 because not all elements of a Section 1983 suit are present. There is so much variation in state tort law from one state to another that this brief discussion is restricted to general principles.

A tort is defined as a wrong (independent of contract) in which the action of one person causes injury to the person or property of another in violation of a duty imposed by law. Tort law reaches wrongful acts that result in physical or non-physical injuries. The violation of a right is considered an injury even if it is of a non-physical nature.

The same act may be a crime against the state and a tort against an individual. Thus, a criminal prosecution and a civil tort action may arise from the same act. For example, a person who drives while intoxicated and causes an accident resulting in injury to another driver and damage to his/her car may be guilty of the criminal offense of driving while intoxicated, and civilly liable for the injury inflicted on the other person and the damage to his/her car. Tortious acts may also be the basis for suits charging violation of civil rights under Section 1983. In fact, Section 1983 suits sometimes are called federal tort suits.

Under state law, a defendant may be liable in general if the following tort elements are present:

1. A legal duty owed to the plaintiff;

2. A breach of that duty by omission or commission;

3. The plaintiff must have suffered an injury as a result of that breach; and

4. The defendant's act must have been the proximate cause of the injury.

Negligence is a tort that should be of concern to all public officers in community service situations. Although most decided cases in the negligence area involve prison officials or police personnel, the principles in these cases almost certainly apply to probation/parole officers in similar circumstances. One court offers this widely accepted definition of negligence.[3]

> Negligence, in the absence of statute, is defined as the doing of that thing which a reasonably prudent person would not have done, or the failure to do that thing which a reasonably prudent person would have done in like or similar circumstances; it is the failure to exercise that degree of care and prudence that reasonably prudent persons would have exercised . . . in like or similar circumstances.

WHO MAY BE LIABLE

Plaintiffs generally use the "shotgun" approach in liability cases, meaning that they generally name as defendants everyone who might possibly be connected with the case. This includes the community service officer involved, his/her immediate supervisor, the agency head, and the agency itself.

Field Officers

Field officers are sued for what they do or fail to do as public officials. If liability arises at all and the fault lies with the officer, then monetary responsibility attaches. Other than a successful denial that the act complained of took place, the best

defense in these cases is "good faith." Good faith means "acting with honest intentions, under the law, and in the absence of fraud, deceit, collusion, or gross negligence."

The other often-used defense is official immunity, which is closely related to the "good faith" concept. Immunity consists of three types: absolute, quasi-judicial, and qualified. Absolute immunity does not apply to probation/parole officers, but probation officers may enjoy quasi-judicial immunity, meaning they have the same immunity as the judge in the preparation of a pre-sentence investigation report. Qualified immunity, which applies to all community service officers, means that officers are immune if they acted in good faith, but not if bad faith is involved. It also means that officers are immune in the performance of a discretionary act, but not if the act is ministerial. The line between discretionary (optional) and ministerial (mandatory) is sometimes difficult to draw.

If the officers act in accordance with agency policy or upon orders of their superiors, chances are that the officers act in good faith and are therefore exempt from liability. If the agency policy or order of the superiors turns out to be illegal or unconstitutional, then the agency or superiors may be liable, but not the officers. The exception is if the policy or order is grossly or blatantly illegal or unconstitutional and the officers knew or should have known about it. On the other hand, if the officers act outside the scope of their duties, possibilities are that the act was in bad faith and they become personally liable.

Supervisors

In simplest terms, a supervisor is one who has another employee working for or with him/her in a subordinate capacity. For purposes of this monograph, an officer who supervises an offender or volunteer in community service may be considered a supervisor.

Lawsuits may be filed against the supervisors as private individuals or in their capacity as public officers. Liability as private individuals arises when the supervisors act on their own and outside the scope of duty. In these cases, the agency will probably not undertake their defense or pay for damages if held liable. Most lawsuits, however, are brought against supervisors in their official capacity, regardless of the nature of the act. Plaintiffs prefer to include the supervisor in the lawsuit in order to broaden the financial base for recovery.

Supervisory lawsuits can lead to a possible conflict of interest in a number of ways. If the supervisors are sued in both an official and individual capacity, the agency might assert that the supervisors acted outside their scope of duty and hence should be personally liable. In the absence of mandated representation, the supervisors will most likely have to provide their own defense. This creates a financial burden and places the supervisors at a disadvantage because of the inevitable inference that in the judgment of the agency the act was unauthorized.

A second source of conflict of interest comes from the supervisors' relationship with their subordinates. Supervisors, when sued for what their subordinates have done, may want to dissociate themselves from the act, claiming either that the subordinates acted on their own or in defiance of agency policy, particularly when the violation is gross or blatant. In these instances, the supervisors' defense will be inconsistent with that of the subordinates. The agency will have to determine which party it will defend and whom to indemnify if held liable. Chances are that the agency will decide for the supervisor, but that is a decision to be made by policy makers on a case-by-case basis.

Agencies

Although lawsuits against community service officers are directed mainly at field personnel,

plaintiffs have become more inclined to include supervisory officials and the agency as parties-defendant. This move is based on the theory that the officers act for the agency and therefore what they do is reflective of agency policy and practice. As a matter of legal strategy, it benefits plaintiffs to include supervisors and agencies in a liability lawsuit. Lower level officers may not have the financial resources to satisfy a judgment, nor are they in a position to prevent similar future violations by other officers or the agency. Moreover, chances of financial recovery are enhanced if supervisory personnel or the agency are included in the lawsuit. The higher the position of the employee, the closer the plaintiff gets to the "deep pocket" of the county or state agency. Inclusion of the supervisor and agency may also create dissonance in the legal strategy for the defense, based on a conflict of interest, hence strengthening the plaintiff's claim against one or some of the defendants.

In Brandon v. Holt[4], a 1985 decision, the United States Supreme Court ruled that a money judgment against a public officer "in his official capacity" imposes liability upon the public entity that employs him, regardless of whether or not the agency was named as a defendant in the suit. In this case, the plaintiff alleged that although the director of the police department had no actual notice of the police officer's violent behavior, because of administrative policies he should have known. The Court said that although the director could be shielded with qualified immunity, the city could be held liable.

In general, states enjoy sovereign immunity and therefore cannot be sued, unless the immunity is waived by law or judicial decision. State agencies enjoy this immunity, but state officials may be sued. Until 1978, local agencies were also clothed with governmental immunity. In 1978, local agencies were stripped of that immunity and may now be sued in federal or state court.

SEVEN AREAS OF OFFICER, SUPERVISOR, AND AGENCY LIABILITY

In the context of community service, there are seven specific acts or non-acts for which an officer, supervisor, or agency may be held liable in court. Note that in these types of liability, a community service officer (such as a pretrial, a probation or a parole officer) will most possibly come under the term "supervisor" because of supervisory authority over the offender or volunteer. Ordinarily, only agency chiefs and the agency itself would be liable in these instances; however, community services programs place a field officer under this category because he/she exercises authority over the volunteer or offender, hence his/her inclusion in a possible lawsuit. These seven areas of liability follow.[5]

Negligent Failure to Train

The usual allegation in these cases is that the employee (referring to the offender or volunteer) has not been instructed or trained by the supervisor or agency to a point where he/she possesses sufficient skills, knowledge, or activities required of him/her in the job. The rule is that administrative agencies and supervisors have a duty to train volunteers or offenders and that failure to discharge this obligation subjects the supervisor and agency to liability if it can be proved that violation of rights was the result of failure to train or improper training.

Negligent Hiring

Negligent hiring stresses the importance of proper background investigation before employing or using anyone to perform a job. Liability ensues when an employee is unfit for appointment, when this unfitness was known to the employer, or when the employer should have known about it through background investigation, and when the act was foreseeable.

Negligent Assignment

This means assigning an employee to do a job without ascertaining whether or not he/she is adequately prepared for it, or keeping an employee on the job after he/she is known to be unfit. Examples would be assigning a reckless driver to drive a government motor vehicle or assigning a volunteer or offender who has a history of child molestation to work in a child care center. The rule is that a supervisor has an affirmative duty not to assign or leave a subordinate in a position for which he/she is unfit.

Negligent Failure to Supervise

This means the negligent abdication of the responsibility to oversee volunteers' or offenders' activity properly. Examples are tolerating a pattern of physical abuse of clients, racial discrimination, and pervasive deprivation of rights of third persons. The usual test is: Does the supervisor know of a pattern of behavior but he/she has failed to act on it? A corollary question is: What constitutes knowledge of a pattern of behavior? Some courts hold that actual knowledge is required, while others have ruled that knowledge can be inferred if a history of violation is established and the official had direct and close supervisory control over the subordinates who committed the violations.

Negligent Failure to Direct

Failure to direct means not sufficiently telling the employee of the specific requirements and proper limits of the job to be performed. Examples would be assigning a volunteer to a mail room of a half-way house and failing to inform that volunteer of the proper limits of mail censorship. The best defense against negligent failure to direct is a written manual of policies and procedures for departmental operations. The manual must be legally accurate and updated, and it must form the basis for agency operations in theory and practice. It must cover all the

necessary and important aspects of the job an employee is to undertake. Employees must be required to read and be familiar with the manual as part of their orientation to the agency.

Negligent Entrustment

This refers to the failure of a supervisor to supervise or control properly an employee's custody, use, or supervision of equipment or facilities entrusted to him/her on the job. Examples are improper use of vehicles or firearms that results in death or serious injury. Negligent entrustment differs from negligent assignment in that negligent entrustment involves the giving of tools or equipment instead of assigning a volunteer or offender a task to perform.

Negligent Retention

This means the failure to take action against an employee in the form of suspension, transfer, or termination when the employee has demonstrated unsuitability for the job to a dangerous degree. The test is: Was the employee unfit to be retained and did the supervisor know or should the supervisor have known of the unfitness? The rule is that a supervisor has an affirmative duty to take all the necessary and proper steps to discipline and/or terminate a subordinate who is obviously unfit for service. Unfitness may be determined from prior acts of misconduct indicating a pattern of unfitness. Such knowledge by the supervisor may be actual or presumed. The defense against negligent retention is for the supervisor to prove that proper action was taken against the employee and that the supervisor did all he/she could do to prevent the damage or injury. This suggests that a supervisor must know what is going on in his/her department and must be careful to investigate and document those investigations.

These seven areas of possible liability for what an officer, supervisor, or agency does or fails to do are not exclusive; they tend to overlap, and

plaintiffs usually include more than one allegation in the same complaint. Also, liability does not ensue automatically. Most courts impose liability only if the plaintiff can establish that the injury was the result of failure to perform any of the seven responsibilities. Moreover, courts usually require proof of gross negligence or deliberate indifference (instead of mere negligence) for liability to attach. As of now not many supervisory liability cases have been filed in the area of community service programs; most of the cases have been in police work. The same liability principles apply, however, in police or community service work.

LIABILITY TO THIRD PARTIES

For Injuries Caused by Offenders

Suppose the probationer volunteering or assigned to work in a community center causes illness through negligent food preparation or breaks an expensive piece of woodworking equipment in the craft room? What if the probationer inflicts physical injury to a resident of a nursing home or to a co-employee in a workplace? Aside from the offender's potential personal liability, could the officer or agency supervising the offender suffer liability?

No case law exists on this specific issue. Officer and agency statutory authority, administrative policies, and procedural manuals would be central to determination of liability. In general, courts imply that liability arises only if two elements are present: reasonably foreseeable risk and reliance.

In the context of community service work, the officer must be careful not to place the offender in a type of work that is related to his/her previous offense; otherwise, foreseeability may be established. Obvious examples would be requiring a person placed on probation for drug use to work as a helper in a hospital pharmacy, or requiring a parolee who was

convicted of child abuse to work as a helper in a community nursery. One writer puts it this way:[6]

> The duty to warn arises when, based on the probationer's criminal background and past conduct, the officer can "reasonably foresee" a prospect of harm to a specific third party. "Reasonably foresee" means that the circumstances of the relationship between the probationer and the third party (i.e., the community service employee and possible victim) suggest that the probationer may engage in a criminal or anti-social manner similar, or related to, his/her past conduct.

Aside from foreseeability, the courts also look for the presence of reliance. Essentially, this means that the injured party relies upon representations made by the officer implying that the person who is to do the work is sufficiently competent and reliable to be able to do the job safely. Reliance is easily met in community corrections programs if the volunteer work is done with the knowledge or upon the recommendation of the officer or judge or when the client is assigned to a particular community service program. Therefore, if the work the offender is to perform is related to his/her previous offense, it is best that the officer disclose the background of the client so that the employer or person with whom the client is working is properly warned. The recommendation by the officer or judge denotes reliance.

If the offender obtains the volunteer work on his/her own, there is no reliance. Nonetheless, liability might still ensue if agency policy requires the officer to disclose the client's record (particularly where there is foreseeability that a similar offense might be committed), and the officer fails to do so. In these cases, the better policy for the agency to adopt is one that gives the officer the option to disclose or not to disclose the client's record, even if there is foreseeability, for clients who obtain the

work on their own. An agency policy requiring the officer to disclose carries the seeds of a possible lawsuit emanating from the injured third party or the probationer/parolee, in case he/she does not get the job because of the disclosure. Optional disclosure is, in effect, the policy for federal probation officers. Portions of the Probation Manual of the Federal Government provide as follows:

> Determination of Risk. The determination of whether a "reasonably foreseeable" risk exists depends upon a selective, case-by-case evaluation. The evaluation should be based upon, among other factors, (1) the probationer's job; (2) his or her prior criminal background and conduct; and (3) the type of crime for which he or she was convicted. Special attention should be paid to employment or other circumstances which present the probationer with an opportunity or temptation to engage in criminal or antisocial behavior related to his or her criminal background.
>
> Reasonably Foreseeable Risk. "Reasonably foreseeable" means that the circumstances of the relationship between the probationer and the third party, *e.g.*, employer and employee, suggest that the probationer may engage in a criminal or antisocial manner *similar* or *related* to his or her past conduct.
>
> Decision Regarding Disclosure
>
> (1) If the probation officer determines that *no* reasonably foreseeable risk exists, then *no* warning should be given.
>
> (2) If the probation officer determines that a reasonably foreseeable risk exists, he or she shall decide, based upon the seriousness of the risk created and the possible jeopardy to the probationer's employment or other aspects of his rehabilitation, whether to: (a) give no warning, but increase the probationer's supervision

sufficiently to minimize the risk; (b) give no warning, but preclude the probationer from the employment; or (c) give a confidential warning to the specific third party sufficient to put the party on notice of the risk posed. When appropriate, the probationer may be permitted to make the disclosure with the understanding that the probation officer will verify the disclosure.[7]

Community service may be the consequence of presentence investigation recommendations prepared by probation/parole officers. Reliance, therefore, might easily be established if the recommendation for community work is specific as to place and employer. In these cases, the employer or people at work will most likely know the background of the offender. In some cases, however, judges, on their own, will order community service to a favorite charity or project. Possible liability to the agency or officer here should be minimal, as long as the assignment is not clearly hazardous to third parties, because the agency or officer can claim good faith by virtue of the judicial order. The judge enjoys absolute immunity; hence, he/she has no liability. The case may be different, though, if the condition carries inherent hazard to a third party or the community, or is obviously unconstitutional. An extreme example might be if a child molester is ordered to do volunteer work in a child care center. In such a case, good faith may not suffice to protect the officer from liability. A passive acceptance of the condition by the officer, knowing its inherent dangers, may not excuse him/her from liability. In these cases, it is best to talk with the judge about possible liability consequences.

For Injuries Caused by Volunteers

What if a Rotary Club volunteer, while performing a community service such as helping an offender, injures another person? Obviously, private individuals would be liable personally for their acts, but would the supervising officer or agency incur liability?

No case law exists on these issues, but general legal principles offer guidelines. The general rule is that agencies, officers, or supervisors cannot escape liability for what volunteers do because their involvement is such that what volunteers do can be categorized as state action. The seven areas of liability, discussed earlier, should apply here because volunteers may be considered subordinates of the agency, particularly if the agency exercises supervisory duties or authority over the volunteer.

The nature of the liability would most likely vary according to what the agency did or failed to do. If no training was given to the volunteer and such failure to train amounts to gross negligence, then liability might ensue. If the volunteer's act was in violation of in-service training required of all volunteers, the supervising officer would have a lesser likelihood of liability than if he/she neglected to train the volunteer according to or acquaint the volunteer with agency policies. Once again, written procedural and policy manuals and proper training and explanation of policy would help mitigate supervisory or agency liability. Unless there is fault with the agency, the liability would likely be personal with the volunteer.

If volunteers act outside the scope of their duties, as defined in agency policy or manual, officers and agencies might not be liable. However, if acting outside the scope of duties as defined by agency policy is common and a supervisor superficially or rarely corrects the practice, then that supervisor may have effectively changed the custom or policy. In such a case, the supervisor's chances of being held liable for the volunteer's act would be increased based on negligent supervision or failure to supervise.

LIABILITY TO VOLUNTEERS

For Injuries Caused by Offenders

Agency liability to volunteers is similar to liability to third parties in general. The agency will most probably not be liable except if the agency is guilty of gross negligence or if liability is specifically provided for by state law or agency policy.

An agency has the opportunity to warn and train volunteers of special risks involved in their work with offenders. An example would be warning a volunteer of the violent and assaultive tendencies of the offender with whom the volunteer is working. Agencies should screen offenders for a record of hostility toward superiors. Training for volunteers designed to ease the supervisory relationship and training for offenders enabling them to accept direction would be ways to decrease agency risk of liability.

Another way to decrease risk is for the agency to accept only community service offenders whose diagnostic profile closely fits the agency's program strengths. An agency program that has trained its volunteer staff in non-directive negotiation supervisory techniques, for example, should not accept community service offenders whose presentence investigation profile shows a strong need for directive supervision. Similarly, an agency with a program oriented to a specific ethnic community, i.e., Anglo-American or Mexican-American or Chicano, might decrease tensions that could lead to injury by accepting only community service offenders with a strong profile of tolerance for cultural differences.

Having taken appropriate preventive measures via screening of both volunteers and offenders in community service programs, agencies must continue in-service training of volunteers and offenders to decrease liability risks. If they follow these guidelines, agencies are not responsible for criminal acts by offenders that cause injury to volunteers. Only

foreseeable criminal acts can create agency liability. If the agency takes steps to prevent any foreseeable injury from criminal acts, liability remains with the offender.

Tort liability for injury of the volunteer by the offender follows the same logic. Where the agency can foresee the possibility of risk to a volunteer, liability may be found. Again, the best preventive measure is a careful evaluation of each offender. Pre-sentence investigation reports should be used to establish a profile of each community service offender. Additional agency testing, dependent upon the nature of the community service supervised by the agency, should be used to detail further the offender profile. With this information, the agency may avoid situations leading to liability and teach volunteers the skills needed to avert injury where avoiding all risks would compromise the agency program.

For Other Injuries

Liability to volunteers for other injuries refers to injuries that are not caused by offenders, but by third persons or by the work environment. In general, state tort law would probably govern--meaning that the agency is liable only if what the agency did or did not do amounts to culpable negligence. This degree of negligence varies from one state to another, but usually refers to gross negligence, if there is any liability at all. Some jurisdictions follow a "strict liability" tort rule; they consider types of work so inherently dangerous that liability ensues if injury occurs, regardless of agency fault. Examples would be states where injury to fire fighters means automatic liability regardless of agency fault, because of the nature of the job. These cases, however, are rare and are provided for by state law. Moreover, it is not often that judges or officers would assign clients to these types of jobs.

If volunteers are injured while engaged in community service, it is possible for the agency to be

sued under employment laws. The most probable lawsuit would argue that the volunteers, since they are giving a work benefit to the agency, being supervised for the agency, and, in some cases, receiving 'perks' as an incidental recompense for their volunteer labor, are, for all practical purposes, employees. Unless specific state legislation exempts the agency or volunteers, there is a high probability of liability to the agency as an employer.

In a jurisdiction where agencies can be held liable as employers for volunteer injuries, the agency should obtain coverage under the state Workers' Compensation statute. Such a statute limits liability to a set fee schedule paid by an insurance carrier operating under rules set up by the state statute. This insurance protects agencies against enormous tort damage claims. Further, Workers' Compensation statutes may penalize employers who do not carry the insurance by prohibiting these employers from using contributory negligence or similar defenses against employee suits. Agencies should meet with local counsel to determine state laws relative to their liability for volunteers as employees.

In jurisdictions where volunteers are not covered by Workers' Compensation laws, local counsel should also be consulted for recommendations on general tort liability. In the past, non-profit organizations were exempt from some liability risks. This is no longer true. Therefore, agencies should regularly update insurance coverage in accord with current law.

LIABILITY TO OFFENDERS

For Disclosure of Record

A potential source of liability is disclosure of a client's background to a prospective employer, resulting in the client's not getting the placement or job. The client might sue, claiming malice or violation of confidentiality. This liability is minimal in

court-ordered community service programs because usually the agency has predetermined the program prescribed for the offender through actual placement or recommendation, or the agency runs the program itself. Even in instances, however, where offenders obtain community service placement on their own (as when they are ordered to perform community service with any charitable organization), liability for failure to obtain the placement or job because of disclosure is remote. As one writer puts it:[8]

> It is doubtful that such acts as the disclosure of information to employers proscribing certain employment would be deemed tortious. Federal officers can reveal items of information from public records, such as records of prior arrests or convictions, free of liability from the tort of defamation. Regardless of the source of the information, if it is accurate, no liability could arise for defamation, since truth is a complete defense. As to the tort of invasion of privacy, disclosure of items of public record creates no liability. Also, release of information to a large number of persons is an essential element of the tort of invasion of privacy; that element would be lacking in the release of information to an individual employer. Finally, the tort of interference with a contract or a prospective contract can be justified if the ultimate purpose of the disclosure outweighs the harm to the plaintiff. The impersonal disclosure of information to an employer to protect the public or a third party would appear to be within that rule of justification.

In addition to information gleaned from public records and correctional files about the offender, community service officers frequently receive information directly from the client and the officer's associates. If clients have a right to prevent the

dissemination of information from such sources, might they be able to recover damages from the officer in a proper suit in the event of disclosure? As a matter of general law, the answer is no. Again, case law support for this conclusion is thin. The question hinges on the nature of the behavior expected of the officer based on provisions of state law or agency rules.

Chances of liability to the client in disclosure cases are slim, not only because these records may be of public nature, but also because the disclosure may be justified as protective of society. An exception, which can lead to liability, is if disclosure is prohibited by law or agency policy.

Some departments require disclosure by the officer to the employer of the employee's record even if the employee obtained employment or community service work on his/her own. This policy carries added risks for the officer because failure to disclose might then amount to negligence of duty or violation of policy. A better policy makes disclosure or non-disclosure optional in those cases where the offender obtains the job or community service on his/her own and without the help of the department. This protects the officer either way: if the officer discloses the record, the policy protects him/her; conversely, if the officer does not disclose, there is no liability because such disclosure is optional. Such policy was more extensively discussed earlier in this monograph.

For Injuries in the Performance of Responsibilities

Here again there is not much case law or statutory authority for proper guidance. In general, there should be no liability on the part of the officer or agency, except perhaps in the following situations: (1) if the agency is guilty of gross negligence, (2) if the agency requires the offender to perform a type of community service that is illegal or unconstitutional, (3) if the offender is assigned to perform a

community service that is inherently risky and dangerous, (4) if the offender has a pre-existing health problem that should have been known to the agency, or (5) if state law or agency policy specifically provides for liability.

These probable liability instances are difficult to illustrate in the absence of actual cases--of which there appears to be none. In general, gross negligence is a situation where the community service assignment is such that the officer or agency should have known that danger inheres in the assignment. Asking the offender to perform a community service that is illegal or unconstitutional might expose the agency to liability. An example might be requiring the offender (because of his/her familiarity with the persons or premises) to participate in an illegal police raid, in the course of which the offender is injured. Also, certain community service efforts are inherently risky or dangerous. If an officer, for example, required a parolee to become a police informant and in the course of informing the parolee was injured, liability might be imposed. The fact that the parolee agrees to the assignment does not exculpate the officer from liability because the court might consider parolee approval to have been obtained involuntarily (knowing that the alternative to refusal might be revocation of parole). Another example might be if an officer required a probationer to help patrol a dangerous neighborhood and the probationer was injured in the process.

It is also best for the agency or responsible officials to determine beforehand if there are risks peculiar to a client before assigning him/her to perform community service. For example, offenders may come to their assigned work with pre-existing infirmities that predispose them to accidental injury. An instance would be an offender with a history of serious back problems being assigned to community service work that involves heavy lifting. Additionally, community service sometimes requires offenders to pursue employment tasks with which they have no prior

experience. Liability may arise in these cases under negligence, depending upon how negligence is defined for liability purposes under state tort law.

If liability at all occurs, the agency should first look at the provisions of the Workers' Compensation Act to see if clients' injuries are covered by the provisions thereof. The Worker's Compensation Act is discussed more extensively under "PROTECTIONS AGAINST LIABILITY."

For Injuries Caused by Volunteers

Volunteers working as part of a community service program are agents of the program. Unless specifically exempted by state statute, an agency would be as liable for its volunteer agents' acts that injure offenders as it would be for injuries to any third parties. The question is whether the injury occurred during the scope of employment envisioned by the community service program. If a volunteer deprives an offender of civil rights, an investigation should be made immediately as to whether the deprivation occurred as a part of the community service program or as an independent act of the volunteer that is unrelated to the agency program.

An obvious agency preventive policy is to provide detailed job descriptions as well as training in offenders' civil rights. Then, if a volunteer acts against program policy, it would be difficult to hold the agency liable. The civil rights deprivation becomes the sole responsibility of the volunteer.

There is a particular danger to agencies that fail to train or supervise volunteers. If a volunteer follows custom or informal policy and injury results for the offender, the agency may be found to have approved the injurious practice by not stopping it. Again, written procedural and policy manuals and ongoing in-service training are essential parts of any community service program that seeks to minimize liability risks.

The officer or agency must be careful in the selection of volunteers to avoid gross negligence in that choice. For example, if a juvenile is assigned to perform some kind of community service under the supervision of a volunteer who, unbeknownst to the officer, has had a history of sexual violence or abuse, and such abuse in fact takes place, liability might arise. Courts usually require gross negligence to be established before liability ensues. Liability is enhanced if the officer "knew or should have known" of the volunteer's background establishing foreseeability that the injury would take place. In general, the discussion under "SEVEN AREAS OF OFFICER, SUPERVISOR, AND AGENCY LIABILITY" applies here. This means that there may be liability if (1) there is negligent failure to train, hire, assign, supervise, direct, entrust, or negligent retention, and (2) it can be established that the injury was the result of failure to perform any of the above responsibilities.

Liability of Government for Acts of Private Agencies or Persons

An important issue is the liability of a government agency for the action of a private person or agency with whom it has a contractual relationship. For example, will a probation/parole agency be liable if the proprietor or personnel of a private community service program grossly violates the rights of a volunteer or offender? The issue arises because one of the essential elements of a civil rights case is that the person or agency sued must be "acting under color of law." Public officials are presumably "acting under color of law," but private individuals do not ordinarily fall into this category.

There are no clear laws or court decisions in community service programs addressing the above issues. However, the same issues are raised in the current move towards prison or jail privatization. The literature on these issues is just now starting to develop. The consensus is that the government cannot escape liability for what private parties or agencies

do, whether the services are provided in the form of remunerative contract or not, as long as the government has some degree of involvement in what is done.

Government liability and responsibility arise under several tests. The first, the public function test, holds that if private entities or persons are engaged in the exercise of what are traditionally government functions, their activities are subject to constitutional limitation. The state cannot be rid of constitutional restraints in the operation of its traditional functions by contracting or delegating responsibility to a private party. Conversely, the private party, in assuming the role of the state by performing the public function, is subject to the same limitation as the state itself.

Under the second test for state action, the nexus test, the court looks for a close nexus or link between the actions of public officials and private individuals or agencies. For example, in one case the court found that a private secondary school for delinquent and emotionally disturbed boys was acting under color of state law because there was a sufficiently close nexus between the action of the state in sending the boys to that school and the conduct of school authorities.

A third test for state action is the state compulsion test. Where a state is compelled by statute or duty to provide a service and contracts for that service, state liability cannot be avoided. Therefore, a community agency chartered and provided community service workers by the state will probably be viewed by the courts as carrying out duties of the state and, as such, will be subject to constitutional prohibitions against depriving offenders or volunteers of their civil rights.

A fourth test to determine governmental liability for private acts is the joint action test. In some cases, courts have held private defendants liable as

state actors because they were joint participants with state officials.

These four tests strongly indicate that government officials and agencies may be held liable for what private agencies do in corrections. Although the public function test has been used by most courts, the tests are not mutually exclusive, and any court can use any test to bring private agencies under the umbrella of state action. This has the two-fold consequence of holding public agencies possibly liable for what private agencies do and also imposing constitutional limitations on the actions of private individuals or agencies.

In most cases, private agencies provide services to the government agency by a contract that specifies the forms of service given in return for money paid. Can the agency escape liability by specifying in the contract that the private party agrees to shoulder absolute liability in cases brought by community service offenders and volunteers? Such provision may be included in the contract, but chances are that it will not exculpate the public agency from liability because state action can still easily be established under the four tests. The contractual provision does not bind a third person (the injured offender or volunteer who brings the case) because he/she was not a party to the contract. Regardless of provisions in the contract, the injured party will most likely include the government as a defendant in the lawsuit because the chances of recovery against a public agency (which can always tax the public, hence the "deep pocket" theory) are higher than against private agencies with limited resources.

A related issue is whether or not a private agency can compel a community service worker or volunteer to do what government officials otherwise cannot compel him/her to do because of limitations in the Bill of Rights. An example is a community service project, owned and managed by a private agency, requiring all its residents to attend religious

instruction and services as part of its rehabilitative program. The Constitution prohibits required religious instruction if imposed by government officials, but private individuals do not normally come under the constraints of the Bill of Rights. Similar issues would arise if private agencies restrict community service programs on the basis of race, color, gender, or national origin. Chances are that the courts would require private individuals or agencies working with the government to respect constitutional rights because what they do is considered to be state action.

PROTECTIONS AGAINST LIABILITY

Workers' Compensation Laws

Before the advent of Workers' Compensation insurance, employees whose injuries were caused by employer negligence sued their employers for damages based on negligence under tort law. Awards were often so high that they endangered the continued existence of the employer's enterprise. To curb the risk of increasingly high damage claims, employers endorsed the concept of an insurance plan that, by law, guarantees payment of minimal damage awards to employees. Workers' Compensation statutes provide for a set schedule of benefits which workers recover from the insurance plan for work-related injuries. Contributory negligence and assumption of risk by employees are not available defenses for the employer under the statutes. Generally, in fact, fault or negligence is irrelevant to the claim. The issues center on whether the injury was work-related and whether the injured person is covered by the insurance.

Workers' Compensation laws are usually interpreted liberally; therefore, lawyers are inclined to file a lawsuit under the laws whenever an injury occurs in connection with employment. However, since each jurisdiction enacting a Workers' Compensation plan has a different set of exceptions regarding coverage, jurisdictions must consult local legal counsel

for a more accurate assessment of risks and liabilities.

In some jurisdictions, Workers' Compensation insurance would include community service workers, but other statutes require a separate policy for offenders performing community services. Because Workers' Compensation statutes typically provide that they are the exclusive remedy for employee injuries caused by employer negligence, agencies would generally minimize their risk of loss by obtaining coverage under such a statute. Typical statutes do not allow a worker to sue the employer under tort law, thereby averting the risk of enormous damage claims.

In jurisdictions where Workers' Compensation is available but an agency has not obtained protection under it for its workers, the employer, if sued by an employee for a work-related injury, is not allowed to use the defenses available in negligence actions. These are such defenses as: contributory negligence by the employee, assumption of risk, or contributory negligence of a co-employee. The mere presence of a Workers' Compensation option, therefore, may increase the risk to an agency for damage claims. An agency must look into this possibility in determining whether to subscribe to coverage.

Whether a worker is covered by Workers' Compensation depends on the statute for the jurisdiction. Typically, if a worker is an agent, servant, or employee of an employer, that worker is qualified to recover under the statute. Volunteers and criminal justice clients, however, may pose problems. In one case, Scroggins v. Twin City Fire Insurance Company,[9] a jail inmate was told by the sheriff to accompany him and a deputy to a house in order to remove furniture, in accordance with a court order. In the process of loading a heavy freezer on a truck, the inmate suffered injury to his back for which he later had surgery. There was no provision for inmates in the county jail to be covered by Workers' Compensation;

neither was there a law against it. The issue, therefore, was whether the inmate in the county jail was considered an employee of the state at the time of his injury. The appellate court said that this issue has to be resolved by the trial court; hence it reversed the summary dismissal of the case and remanded it for the trial court to resolve. This case is illustrative of the issue that arises in many states concerning injury claims filed by clients of criminal justice. In the absence of a specific provision for inclusion or exclusion, the issue of coverage of clients or volunteers must be decided by the courts.

If a worker is an independent contractor, performing work according to his/her own methods without being subject to control of the employer except as to the result of the work, that worker is not covered by statute. Since community service programs are usually designed and supervised according to agency policy, it is doubtful that offenders or volunteers could ever be characterized as independent contractors.

Several issues arise in determining who is an employee for purposes of Workers' Compensation. Because they may be resolved differently in various jurisdictions, agencies contemplating community service programs should consult local legal counsel. Some guiding principles, however, follow.

1. Offenders performing community service are usually unpaid. In these cases, whether a worker is an employee is generally decided by a determination as to whether the employer has a right of control or exercises control over the worker. In cases of volunteers, where the volunteer receives services or benefits (such as a tax break) from such work, the argument for employee status is strengthened.

2. Offenders or volunteers may assault and injure one another while performing community service. Only where the injury is sustained in the course of employment is there employer liability. However, if a community service program is designed to

teach employee cooperation skills, the employer might still be found liable. On such facts, it would be difficult to predict whether Workers' Compensation would be awarded or whether the skill development staff could be assigned liability.

3. Community service offenders and volunteers may be transported to their workplace by an employer. The general case law is divided as to whether any injuries incurred during transport would be covered by Workers' Compensation. However, when an agency or non-profit organization will realize benefits from the community service workers so transported, there is a high probability of coverage under Workers' Compensation.

4. Offenders may be aliens who have lived within the United States for many years, have U.S. citizen families, and are fluent in English. These offenders, who may have entered the country legally, risk losing their legal status due to their criminal convictions. An alien, legal or not, is probably eligible for Workers' Compensation. However, due to political pressures for international worker visas, immigration reform legislation may soon impose sanctions on employers of "illegal," or undocumented, aliens. In that event, an insurance carrier may invalidate Workers' Compensation policies for "illegal" workers. Legal counsel should be consulted for immigration law updates. An alien employee whose Workers' Compensation policy is invalidated may still be able to bring a tort claim against a negligent employer.

Even where an employer has Workers' Compensation insurance coverage, additional employer liability may be found in cases of gross negligence. In such cases, punitive or exemplary damages may be assessed against the employer in a state tort or civil rights case. Gross negligence may be defined as "heedless and reckless disregard" of another person's rights.

Legal Representation and Indemnification

Legal representation should rank as a major concern of community service personnel. In some states, an informal and unwritten understanding exists that allows the state attorney general to undertake the defense of a public officer if, in the attorney general's judgment, the case is meritorious. This practice creates uncertainty and allows denial of representation based on extraneous considerations. States use various guidelines in deciding the kinds of acts they will defend. While all of the states provide legal representation at least some of the time, a substantial number will not defend in all civil suits. Enactment of a state statute making such defense by the state obligatory should be explored, if no such statute exists. Legal representation may be undertaken by the office of the attorney general, the city or county legal officers, or through a system similar to medical insurance where an employee has the option to choose his/her own lawyer.

Legal representation on the local government level is much less reassuring than representation for state officers. This is significant because while parole agencies in a great majority of states are administered and funded by the states, probation offices are predominantly controlled on the local level, either by local judicial districts, judges, or political agencies. Each agency determines the type of legal representation it gives to local public officers. Arrangements vary from allowing local officials to get their own lawyer at the county's expense, to having the county or district attorney represent the officer. Whatever the arrangement, it is important that the policy on representation and indemnification be clarified and formalized. An unarticulated and informal policy ("Don't worry, we will take care of you if a lawsuit is filed") should be avoided because it can be implemented selectively and therefore is not much of a guarantee. A formal policy should be established.

Closely related to representation is the issue of indemnification or payment if and when the officer is adjudged liable. A majority of the states provide indemnification for the civil liabilities of their public employees, albeit in varying amounts. The conditions under which the state will pay also vary and are sometimes unclear. Moreover, although most states provide for some form of indemnification, states often do not automatically indemnify. In a majority of states and local agencies, employees can expect the state to help pay the judgment only if the act on which the finding of liability is based was within the scope of employment and done in good faith. The definitions of the terms "within the scope of employment" and "good faith" vary from state to state.

Community service officers are advised to look into their state statutes covering legal representation and indemnification. If no such statute exists, they ought to explore the possibility of introducing one to ensure maximum protection for the officers. Part of the lack of protection comes from a definitional problem. While it is difficult, if not impossible, to spell out very specific guidelines that further refine the phrases "acting within the scope of duty" and "good faith," working definitions of these terms go a long way toward alleviating anxiety and minimizing arbitrariness. Such definitions are not found in a number of current statutes.

Additionally, for maximum protection, it is important that a trial court's finding that the officer acted outside his/her scope of duty and in the absence of good faith not be made binding on the state or local agency, particularly for purposes of indemnification. An independent determination must be allowed the representing or indemnifying state authority (usually the attorney general's office for state officers and the district attorney or county attorney for local officers), based on circumstances as perceived by that agency. Only cases that are grossly and obviously outside the scope of employment and

clearly done in bad faith should be denied legal representation and indemnification.

Liability Insurance

Professional insurance should be given serious study along with the issues of legal representation and indemnification. Only a minority of states have insurance protection for their officers. Insurance is particularly desirable in agencies where legal representation or indemnification is either absent or uncertain because insurance companies usually provide both legal counsel and damage compensation. States where insurance is not provided should explore and, wherever feasible, recommend the enactment of a law or the issuance of an administrative policy providing such insurance.

Professional liability insurance is desirable, but problems may arise concerning premium payments, particularly when those payments are high, as they tend to be. Some agencies pay for the premiums; others do not. This is a matter of negotiation between the employee and the agency. Although agencies argue that liability insurance encourages lawsuits, there is no data to prove this. Besides, having no insurance at all is a luxury that, given current trends, criminal justice personnel can ill-afford.

High insurance premiums and the unavailability of a liability-insurance carrier have forced many government agencies into a system of self-insurance. This means that the agency does not have any insurance at all, but will probably pool resources with other government bodies (as with a group of cities or counties) in case liability arises. There are risks involved in self-insurance, but they are the worry of the government, not of the officer or agency.

Under an insurance carrier or under self-insurance, the status of volunteers is often ambiguous. It is essential to determine this status either

in the insurance or agency policy. Any policy may include community service workers if the insurance parties agree to their inclusion.

ADVICE AND CONCLUSION

Complete avoidance of litigation is impossible in a country where access to court by everybody is a basic constitutional right. You can, however, lessen the chances of being held liable by observing certain rules and practices. In cases of community service, the following rules should help in reducing liability risks.

1. Have a clear and comprehensive departmental policy concerning participation in community programs. To assure that these policies are legal and constitutional, have your legal counsel review them.

2. For liability protection, it is best if the use of community service programs is authorized by law rather than by agency rule or practice. The authorization may simply be for the use of community service programs in general. In the absence of specifics (which is perhaps desirable to give agencies' programs flexibility), the law should state that the specific programs prescribed are left to the judgment and discretion of the various criminal justice agencies involved. In probation/parole cases, authorization may be specific concerning the inclusion of community service as one of the conditions that may be imposed.

3. Participation in community programs by the offender must be imposed as a condition by the prosecutor, judge, parole board, or agency and not by the officer. If the judge or parole board insists on delegating the imposition of specific community service conditions to the probation or parole officer, have the probationer/parolee sign the condition imposed and furnish the judge or board a copy. This rule also holds true for programs not administered by probation/parole departments.

4. If an offender is assigned by the court, board, or officer to perform a specific community service where, given his/her background, the commission of a similar offense is foreseeable, it is best to disclose the offender's background and the reason for his/her being there to the employer (in an employment situation) or to the people with whom he/she is working (in a non-employment situation) to forewarn them of possible risks.

5. If possible, refrain from assigning an offender to risky community service jobs. If such assignment is necessary, make sure that the offender is properly trained and well-acquainted with the possible dangers.

6. In cases where the client obtains community service work on his/her own, have an agency policy which makes disclosure by the officer of the client's background discretionary. This protects the officer from possible liability from an injured client or third party.

7. In case of doubt in probation cases, get an order from the judge for disclosure of information or assignment to a specific community service program. Remember: the judge enjoys absolute immunity, the officer does not.

8. Recommend, through the state professional association, legislation that exempts public officers from liabilities for community service programs. Such legislation is constitutional when used to defeat claims under state tort law.

9. Require all agencies participating in community service to train volunteers as a prerequisite to working with offenders, or at least to acquaint volunteers with what they can and cannot do. A written policy defining these is good protection against liability as long as the policy is valid and constitutional. Train your own officers as well.

10. Meet with legal counsel to determine coverage of Workers' Compensation, particularly whether it includes offenders and volunteers. If excluded, seek coverage.

11. Determine, with legal counsel, the available general insurance supplement for risks not covered by Workers' Compensation.

12. Review current employee training manuals for compliance with federal and state law, revising as necessary to include all work positions for regular employees as well as volunteers and offenders in the community service program.

13. If the officers and agency are covered by state or professional liability insurance, inquire if volunteers are included. If not, you may want to protect volunteers by including them.

These bits of advice are by no means exclusive. Moreover, they may not be applicable to all jurisdictions nation-wide because of statutory, judicial, and administrative variations. Officers, administrators, and agencies must seek the advice of local or state legal counsel for a more effective legal strategy and information.

Although not heavily litigated as of now, liability arising from community service programs will most probably command greater attention in the immediate future. Liability litigations are rising as more states use community service as an alternative to institutionalization or the traditional probation/parole conditions. Other than a successful denial, the best defense in a liability lawsuit is that the officer acted in "good faith," meaning that the officer performed his/her task with all good intentions, lawfully, and in the absence of malice, collusion, ill-will, or gross negligence. Decisions are not always right and injuries may be unavoidable. The officer, however, must always strive to act in good faith if liability risks in job performance are to be minimized.

NOTES

1. M. Kay Harris, et al., Community Service by Offenders, National Council on Crime and Delinquency, January 1979, at 5.

2. Id.

3. Biddle v. Mazzocco, 248 P.2d 364, at 368 (1955).

4. Brandon v. Holt, 105 S.Ct. 873 (1985).

5. These seven areas of liability are discussed more extensively in R. V. del Carmen, Potential Liabilities of Probation and Parole Officers, National Institute of Corrections, Revised Edition, August 1985, at 161-169.

6. Unpublished remarks of Judd D. Kutcher to the American Probation and Parole Association (October 29, 1980).

7. Guide to Judiciary Policies and Procedures: Probation Manual, Chapter 4, 1983.

8. J. Kutcher, "The Legal Responsibility of Probation Officers in Supervision," 41 Fed. Prob. 35, 37-38 (1977).

9. Scroggins v. Twin City Fire Insurance Company, 656 S.W. 2d 2131, Texas App. 8 Dist. (1983).

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