

May 15, 2012

BOARD OF FIRE COMMISSIONERS
FILE NO. BFC 12-074

Date: May 4, 2012
To: Honorable Board of Fire Commissioners
From: Stephen Miller, Independent SM Assessor
Subject: **AUDIT AND ASSESSMENT OF FIRE DEPARTMENT LITIGATION**

FINAL ACTION: Approved Approved w/Corrections Withdrawn
 Denied Received & Filed Other

Recommendation:

That the Board of Fire Commissioners approves the following recommendations:

1. Receive the *Audit and Assessment of Fire Department Litigation*.
2. Direct the Fire Department to provide the Board of Fire Commissioners with a written plan of action in 30 days describing how the Department intends to implement the recommendations.

Summary:

This *Audit and Assessment of Fire Department Litigation (Audit)* is the second of two reports relating to a review of litigation involving the Fire Department. The first was the *Review of the Miller & Rueda Lawsuit* dated September 15, 2011.

A draft of the *Audit* was provided to the Fire Department, City Attorney's Office and a private attorney, who represented the City in one of the cases reviewed, on March 29, 2012, and each was asked to provide comments and corrections by April 12, 2012. The Department responded by indicating the draft was reviewed, no factual errors were found and work had begun on a draft plan of action.

Comments from the private attorney were evaluated and considered prior to finalizing the report. The City Attorney's Office and the private attorney were provided an

additional week within which to provide comments and corrections. The City Attorney's Office did not respond in any way to two written requests for comments and corrections before this *Audit* was sent to the printer four weeks after the first request was sent.

The voters were told local juries had imposed several multi-million-dollar verdicts in lawsuits challenging conduct in our fire stations when asked to approve the creation of an Independent Assessor position. This *Audit* reveals that over the last 10 years, the taxpayers have paid more than \$18 million in labor relations cases and more than \$14 million in litigation where it was alleged the Department failed to properly pay overtime as required by federal law.

Some of the other key findings include:

1. The Department generally does a good job providing litigation liaison services to defense counsel and there are examples where such services have contributed to a good trial result.
2. Depending on the case, poor litigation results are related to misconduct by Department members, poor supervision/management and poor legal services.
3. Too often, the Fire Commission and other parts of the Department are not provided sufficient timely information about litigation, particularly as it relates to corrective actions and the prevention of lawsuits.
4. The Department lacks the resources, programs and staff with the experience and expertise necessary to implement an effective litigation risk management program.
5. There are proposals to hold the Fire Department directly responsible for the cost of litigation, which makes significant improvements in litigation risk management and prevention all the more necessary and prudent.

Given the cost of litigation, this *Audit* sets forth numerous recommendations that are important for this Board and the Department to consider. There is one area of particular concern that has not been corrected since Fire Commissioners first began asking about it more than five years ago.

As the *Audit* points out, the Department tests for alcohol when it is believed an employee is under the influence while on duty. Under such circumstances, the Department may have the employee provide a urine sample that is then tested by an outside facility. While the City was successful in one lawsuit involving this issue, it continues to be exposed to similar litigation because the Department has not changed how it tests for on-duty alcohol abuse.

It is strongly recommended that the Board of Fire Commissioners provide clear direction to the Department to immediately cease the manner in which it conducts tests for

alcohol abuse of those members suspected of being impaired while on duty, and direct the Department to begin utilizing the City Personnel Department's process to determine both blood alcohol concentration levels and controlled substance abuse. This recommendation should not apply to those who have entered into a contract with the Department requiring alcohol or controlled substance abuse testing as a condition of continued employment.

Other key recommendations include:

1. In addition to hiring a professionally trained and experienced risk manager, the Department should seek the authority to hire a litigation specialist with the necessary education, training, expertise and experience to effectively monitor and oversee pretrial, trial and post-trial proceedings, as well as manage general litigation risk management issues, on behalf of the Fire Department.
2. The Department should design, implement and consistently use a comprehensive electronic tracking system to track and manage litigation.
3. The Department should develop and implement a comprehensive, consistent and integrated plan to ensure human relations, work environment and leadership training needs are effectively met at every level of the Department.
4. The Department should require more information and advice from its defense attorneys to ensure that litigation risk management opportunities are maximized.
5. The Department should significantly improve the quality and timeliness of communications with the Board of Fire Commissioners and other parts of the Department about litigation issues.

Fiscal Impact:

None.

Attachment

LOS ANGELES BOARD OF FIRE COMMISSIONERS



AUDIT AND ASSESSMENT OF FIRE DEPARTMENT LITIGATION



OFFICE OF THE INDEPENDENT ASSESSOR

STEPHEN MILLER
Independent Assessor

April 26, 2012

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April 26, 2012

Honorable Board of Fire Commissioners
City Hall East, Room 1840
200 North Main Street
Los Angeles, CA 90012

Dear Madam President and Honorable Members of the Board of Fire Commissioners:

An Audit and Assessment of Fire Department Litigation is submitted to you. This follows the *Review of the Miller & Rueda Lawsuit* that was provided to you in September 2011.

These reports find that the Department does a good job providing support to defense attorneys once litigation has been filed. However, the Department does not do enough to prevent or reduce the risk of litigation, or to monitor and oversee litigation once it is filed. Much of this is due to a lack of training, education, experience, staff and other resources needed to implement an effective litigation risk management program.

The financial cost of litigation is very high. Over the past ten years the taxpayers have paid more than \$38 million on litigation involving the Fire Department. Of this amount, almost \$32 million has been paid in cases involving labor relations issues and in cases where it is alleged the Department failed to properly pay overtime as required by federal law. Any additional costs related to pending case are not included in these figures.

It is never a good time to spend taxpayer dollars on litigation. This is especially true when the risk of litigation can be reduced or eliminated. The need for the Fire Department to improve litigation risk management becomes all the more important given the current state of the City's budget and proposals to hold the Department responsible for litigation costs in the future.

In addition to making certain findings, these reports provide recommendations that may assist the Department in improving its litigation risk management practices. This includes ensuring that the Department places a much greater emphasis on reducing the risk of litigation and monitoring active lawsuits to prevent similar litigation. Of critical importance is the need for the Department to improve its communication with the Fire Commission on issues related to litigation.

A draft of this report was provided to the Fire Department and the City Attorney's Office on March 29, 2012. Both were asked to conduct a fact-checking review and provide comments and corrections in two weeks. The Department replied by indicating their review found no factual errors and that work had begun on addressing the issues and recommendations.

Honorable Board of Fire Commissioners

April 26, 2012

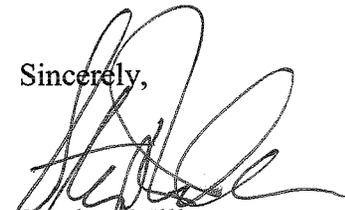
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When the City Attorney's Office did not reply to the request for comments and corrections, another week to provide comments and corrections was provided. This office waited four weeks after March 29, 2012, before going to print with this report. During that time the City Attorney's Office did not ask for more time to review the draft report or provide comments or corrections.

The level of cooperation provided by the Fire Department and its Risk Management Section during this audit and assessment has been excellent. The Department appears to be committed to improving litigation risk management. It is critical that the Department receive strong support in that endeavor not only from this Commission, but from the City Attorney's Office, the City Council and the Mayor.

Finally, I must acknowledge and thank Special Investigator Alexa Daniels-Shpall for her invaluable assistance in preparing this report. It could not have been done without her dedication and hard work.

Sincerely,



Stephen Miller
Independent Assessor

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EXECUTIVE SUMMARY

From July 2002 to July 2011, the City of Los Angeles paid \$38 million on Fire Department related lawsuits. Labor relations cases accounted for only 5.7% of all claims against the Department, but 47.2% of all money paid in Department litigation, or almost \$18 million. In Fair Labor Standards Act cases, where sworn members of the Department alleged they were not paid overtime as required under federal law, the City paid almost \$14 million, which amounts to less than 1% of all claims against the Department but 36% of all money paid in Department litigation.

In 2010 alone, the City paid \$10.8 million to settle or satisfy judgments in six cases involving labor relations issues previously filed against the Department. This \$10.8 million is equivalent to the annual personnel cost of staffing 15 paramedic rescue ambulances. The current deployment plan calls for the Department to staff 89 paramedic rescue ambulances throughout the City on a daily basis, which many claim is insufficient.

The reasons for these costs are many. In some cases, members of the Department were found to have engaged in misconduct. In others, poor supervision and management contributed to litigation and a bad result. Additionally, bad outcomes in some cases were the result of the Department being provided poor legal services.

While the Department does a good job of providing a liaison to assist attorneys in the defense of lawsuits once litigation is filed, the Department does not do what needs to be done to reduce the risk of litigation or to monitor active litigation. Executive Directive No. 9, issued on January 10, 2007, requires that the Department engage in certain litigation risk management strategies. Many of these requirements are not currently met because the Fire Department does not have the programs, systems, staffing, expertise, education and training required to implement a more broadly based and effective litigation risk management program.

The City achieved a positive trial court result in some of the cases reviewed for this audit. However, one of these cases was reversed on appeal because of legal work related to serving a timely notice of entry of judgment and a failure to rebut evidence of prejudicial juror misconduct. Despite excellent legal and liaison work resulting in a defense verdict in a second case, the Department has failed to correct an alcohol testing practice, the deficiency of which contributed to the filing of the lawsuit in the first place. The City continues to be exposed to the risk of future legal actions because this practice has inexplicably not been changed.

The City suffered a negative trial court result in other cases reviewed for this audit. The Court of Appeal decision in a high-profile case highlighted problems with how the case was tried and handled on appeal. These problems went unrecognized by the Department and others. In another case, the City Attorney's Office refused to discuss how the first phase of the trial resulted in an almost \$1 million verdict against the Department. While the City may or may not prevail in a second phase of this case, the City Attorney's Office has refused to discuss or provide any advice concerning what the Fire Department should do to avoid similar lawsuits in the future, although the issues involved directly impact how the Department handles complaints of misconduct on a daily basis.

Communication is critical to litigation risk management. Too often information about what is occurring in litigation is not communicated to those who need the information in a timely manner, if at all. One case reviewed for this audit involves allegations that procedural protections were violated. Those responsible for ensuring that such procedural protections are afforded to those under investigation were not kept informed concerning the testimony and contentions made during the litigation. In another case, the Fire Commission was not provided timely information concerning what Department actions and/or policies led to an almost \$500,000 settlement in a case filed with the Equal Employment Opportunity Commission, or what actions have been or must be taken to eliminate or reduce the Department's exposure to future complaints of a similar nature.

On January 7, 2008, the City Controller observed that one of the worst ways to spend taxpayer dollars is to waste them on lawsuits, settlements and court judgments. While the number of lawsuits involving the Fire Department, particularly those related to labor relations, seems to be trending down, more needs to be done to prevent and manage the risk of litigation. To do so requires an allocation of resources that have not been consistently dedicated to the task.

REVIEW OF REPORT

On March 29, 2012, a draft of this report was provided to the Fire Department, the City Attorney's Office and the private attorney retained to represent the City in one of the cases reviewed. Each was asked to conduct a "fact-checking review" and provide comments and corrections. This office also offered to discuss any issues and answer any questions concerning the draft.

Comments from the private attorney, received on April 12, 2012, were evaluated and considered prior to finalizing the report. On April 16, 2012, the Department indicated that it had no corrections to make to the draft report, and that work had begun to address the issues and recommendations set forth in the draft report. The City Attorney's Office did not respond to requests for comments and corrections, and did not request more time to conduct a "fact-checking review" of the report. This report did not go to print until four weeks after the March 29, 2012 request for comments and corrections was made.

OFFICE OF THE INDEPENDENT ASSESSOR

On January 26, 2006, the Los Angeles City Controller published its *Review of the Los Angeles Fire Department Management Practices*. On January 31, 2006, the City of Los Angeles Personnel Department released its *Audit of Fire Department Selection and Employment Practices*. Both audits cited longstanding problems with leadership and communications, the complaint and disciplinary process, human relations issues and the drill tower recruit training academy. Both audits made many recommendations for improvement in these four areas.

It was later proposed an Independent Assessor position be established to assist the Board of Fire Commissioners in providing strong civilian oversight over the Fire Department. In March 2009, the voters of Los Angeles approved Charter Amendment A, which created the position of Independent Assessor. Section 523 was added to the City Charter and said, among other things, the Independent Assessor shall have the same access to Fire Department information as the Board of Fire Commissioners, and shall have the power and duty to: a) audit, assess and review the Fire Department's handling of complaints of misconduct committed by employees; b) conduct any audit or assessment requested by majority vote of the Board of Fire Commissioners; and c) initiate any assessment or audit of the Fire Department or any portion of the Fire Department.

The first Independent Assessor was appointed and began work on October 5, 2009. The Board of Fire Commissioners approved the *Policies and Authority of the Independent Assessor* on December 15, 2009. More information concerning the Office of the Independent Assessor and its reports may be found at www.oialafd.lacity.org.

AUTHORITY OF THE INDEPENDENT ASSESSOR TO MONITOR & REPORT ON FIRE DEPARTMENT LITIGATION

Evidence of the Independent Assessor's authority to monitor and report to the Fire Commission on litigation involving Fire Department employees, polices and practices can be found in Los Angeles City Charter section 523, the ballot materials accompanying Measure A from the March 3, 2009 election and the class specification for the position approved by the Civil Service Commission on March 12, 2009.

Charter section 523:

The Independent Assessor position was created with the approval of Charter Amendment A by 53 percent of the voters on March 3, 2009. This amendment became effective on April 1, 2009. The powers and duties of the Independent Assessor described in Charter section 523 include: 1) under rules established by the Board of Fire Commissioners, audit, assess and review the Fire Departments' handling of complaints of misconduct committed by employees, sworn or civilian, of the Fire Department;¹ and 2) initiate any assessment or audit of the Fire Department or any portion of the Fire Department with prior notice to the Board of Fire Commissioners. This audit and assessment of litigation involving the Fire Department was properly noticed and commenced pursuant to Charter section 523(c).²

Ballot materials:

The analysis and arguments provided when voters were asked to approve the Charter amendment provide further insight into the intent of the voters when approving this provision. This excerpt from the Chief Legislative Analyst's "Impartial Summary" demonstrates what the voters were told they would be adopting by voting in favor of the amendment:

This Charter amendment would provide the Fire Commission with the authority to hire an Independent Assessor who will report directly to the Fire Commission and be responsible for auditing and reviewing the Department's activities, including the handling of allegations of misconduct and other operational issues.³

According to the City Attorney's Office, ballot materials are entitled to the greatest weight, the court's primary goal is to give effect to the intent of the voters, courts may assume ballot materials reflect the voters' intent in passing a charter amendment and voter intent is decisive.⁴ The ballot argument filed in support of the Charter amendment noted "local juries have imposed several multi-million-dollar verdicts in lawsuits challenging conduct in our fire stations ...

¹ The rules are contained in the *Policies and Authority of the Independent Assessor*, as attached to BFC 09-117 R1, approved by the Fire Commission on December 15, 2009.

² *Initiation of an Audit and Assessment of Fire Department Litigation and Risk Management Section*, BFC 11-037, March 15, 2011.

³ Ballot Pamp., Primary Nominating & Consolidated Elec. (March 3, 2009), analysis of Charter Amendment A by the Chief Legislative Analyst, p. 18.

⁴ Complaint for Declaratory and Injunctive Relief Regarding Interpretation of the Los Angeles City Charter filed in *The City of Los Angeles v. Los Angeles City Controller, Laura N. Chick*, Los Angeles County Superior Court, Case No. BC402345, pp. 3, 19 (citing *Howard Jarvis Taxpayers Ass'n v. County of Orange* (2003) 110 Cal.App.4th 1375, 1381 and *Trader Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 49).

Prevent taxpayer dollars from going to pay costly courtroom verdicts. Support Measure A.”⁵ A later ballot argument said independence would boost citizen confidence, which in turn would reduce the City’s exposure to legal challenges and litigation costs.⁶

These materials are entitled to great weight in ascertaining the voters’ intent behind approving Charter section 523. The multiple references to reducing the costs associated with litigation as well as the emphasis on independent oversight, establish that monitoring Fire Department litigation was one of the primary roles envisioned by the voters for the Independent Assessor.

Class specification:

The voters’ intent that the Independent Assessor would provide independent oversight over Fire Department litigation was carried over into the class specification for the position. Prior to being approved, this class specification was reviewed by the City Attorney’s Office on December 15, 2008.

The “Summary of Duties” section includes the following description: “The Independent Assessor, Fire Commission plans, assigns, organizes and directs the work and resources of professional and clerical personnel engaged in the oversight of the Los Angeles Fire Department’s internal disciplinary process for sworn and civilian employees, civil **litigation**, and directs annual audits ...” (Emphasis added). Furthermore, under the “Minimum Requirements” section, it says a “law degree is highly desired but not required.”

Even more concrete examples of how the Independent Assessor is supposed to monitor Fire Department litigation can be found in the “Examples of Duties” section of the class specification:

- **Maintains a working relationship** with the City Attorney to determine the presence of misconduct or mistreatment of individual(s) by either civilian or sworn employees, and to identify whether a nexus exists between the Los Angeles Fire Department’s policies and procedures and the **litigation**.
- **Establishes and maintains communication** with the Litigation Section of the Professional Standards Division and the City Attorney on matters of mutual concern such as **litigation**, or misconduct to determine whether revisions in policies or procedures might mitigate legal actions against the City.
- **May coordinate requests** from the Board of Fire Commissioners for City Attorney opinions and briefings in executive sessions on matters related to **litigation**.

⁵ Ballot Pamp., *supra*, argument in favor of Charter Amendment A, at p. 19.

⁶ Ballot Pamp., *supra*, rebuttal to the argument against Charter Amendment A, at p. 23.

OVERVIEW OF THE FIRE DEPARTMENT'S RISK MANAGEMENT SECTION & LITIGATION MANAGEMENT

The Risk Management Section (RMS) has responsibility for issues related to Fire Department risk management, safety, threat assessments and workers' compensation in addition to civil litigation. The City Attorney's Office usually initiates contact with the Fire Department's RMS when a lawsuit involving the Fire Department's personnel or operations is received.⁷ The RMS then acts as a liaison, subject matter expert and Department representative throughout the litigation. These responsibilities usually fall on the shoulders of one or two sworn members of the RMS.

Risk Management Section staffing:

The RMS is staffed by one battalion chief and four captains. A single clerical support person was recently added. Litigation became an RMS responsibility in 2008 when it was determined a conflict would prevent the Professional Standards Division (PSD) from serving as the primary monitor of Department litigation. The RMS received no additional staffing when the responsibility for litigation was undertaken in addition to its other duties.

Litigation Tracking System:

The Litigation Tracking System (LTS) is a data collection system used by the RMS. It captures basic information such as case name, type of litigation, status, case number, file date, trial date and contact information for the attorneys involved. Progress notes summarizing significant events can be entered. This audit reviewed all entries for all cases in the LTS. The information for selected cases was then compared to information from other sources, such as the City Attorney's Office and the Superior Court. The RMS also has paper files for some of the litigation cases.

Litigation liaison activities:

One major RMS responsibility involves having a sworn member act as a liaison to defense counsel during litigation. This involves researching and collecting large amounts of information, including records and files located throughout the Department and assisting with preparing responses to pretrial discovery requests. The RMS is responsible for arranging for Department employees to attend litigation related interviews, meetings, depositions and trials.

Subject matter expert:

A second major RMS responsibility involves a sworn member providing subject matter expertise to defense counsel as litigation is taking place. This includes providing information concerning

⁷ City Charter section 271 says the City Attorney shall have the power and duty to represent the City in all legal proceedings. City Charter section 272 says the City Attorney shall defend the City in litigation and shall manage all litigation of the City, subject to client direction by the City Council involving matters over which the Charter gives the Council responsibility, and subject to client direction by the Mayor involving matters over which the Charter gives the Mayor responsibility. Private counsel is retained in some cases when a conflict prevents the City Attorney from representing the City or where specialized knowledge and experience is required.

Department policies and procedures as well as firefighting and/or emergency medical or rescue services.

Department representative:

A third major RMS responsibility is attending various litigation-related hearings and meetings. These include meetings with witnesses, depositions, settlement conferences, mediations, court hearings and trial, as well as meetings of the Board of Fire Commissioners, City Claims Board,⁸ Budget and Finance Committee and City Council. Regular litigation meetings are also held with the Fire Chief.

⁸ The Claims Board is comprised of the Mayor as chair, the President of the Council and the City Attorney, or their designees, pursuant to City Charter section 273, subdivision (b)(2).

EXECUTIVE DIRECTIVE NO. 9

On January 10, 2007, the Mayor issued Executive Directive No. 9 requiring all City departments, including the Fire Department, to establish a litigation risk management system.⁹ According to the Directive, “[e]very Department Head has a responsibility to provide leadership in litigation risk management to continue to reduce City payouts and to reduce the number of claims filed ... this Executive Directive implements steps to ensure high-level involvement of all City departments in the practices necessary to minimize costs expended on litigation now and in the future.”¹⁰

The Directive explains that a successful risk management system includes mechanisms to ensure completion of the following five key practices:

1. Early review of filed claims and litigation to determine suitability for settlement;
2. Ongoing thorough review of the facts underlying filed claims and litigation to determine if systemic change in policy or practice is warranted to prevent similar future claims;
3. Planning and implementation of identified changes in policy and/or practice;
4. Thorough and timely review of facts discovered in litigation to determine and implement any appropriate discipline and/or retraining for specific employees; and
5. Careful and informed consideration of all decisions to appeal or not appeal adverse court determinations, with consideration of future City activity and the possibility of binding legal precedent.

To accomplish these five objectives, and to ensure high-level involvement in minimizing litigation costs, Executive Directive No. 9 requires the Fire Department to take four general actions. The Fire Department is required to: 1) designate a Litigation Risk Manager; 2) develop a litigation protocol with the City Attorney’s Office; 3) develop internal protocols; and 4) provide quarterly litigation reports. While the Fire Department has taken some of the actions required by the Mayor’s Directive, its provisions have not been fully implemented in the more than four years since it was issued. The Fire Department’s RMS was not aware of Executive Directive No. 9 and its requirements when this audit began.

Designate Senior-Level Litigation Risk Manager:

Under Executive Directive No. 9, each Department Head is required to designate a senior-level staff member as Litigation Risk Manager. The name and contact information of the designated individual was to be submitted in writing to the Office of Counsel to the Mayor, with copies to the City Attorney and CAO, by January 31, 2007.

⁹ On January 7, 2008, the City Controller released a report titled *Evaluation of Citywide Risk Management Functions*. Besides reviewing the decentralized nature of risk management in the City and recommending an improved system of risk management, it also noted millions of dollars had been paid out in multiple firefighter cases that could have been avoided.

¹⁰ Appendix 1 is a copy of Executive Directive No. 9.

The Fire Chief designated a deputy chief as the Department's Litigation Risk Manager on January 24, 2007. This audit was unable to determine if the Fire Commission, which is ultimately held responsible for litigation risk management as head of the Fire Department, was consulted or advised of the appointment.¹¹ The formal designation letter explained the Litigation Risk Manager would be responsible for implementing the requirements of Executive Directive No. 9 until the PSD was developed, where it was planned a Litigation and Risk Management Section would be housed.

As the PSD was developed, it was correctly recognized that a conflict would arise where litigation was handled and supervised by the same division that was assigned the responsibility for investigating and prosecuting misconduct. In fact, a "firewall" has been established to prevent confidential information obtained during attorney-client communications from being shared with the PSD.

Shortly after the January 2007 designation, the deputy chief was reassigned and no longer had any responsibility for risk management functions. As far as this office could determine, there was not another official designation of a Fire Department Litigation Risk Manager until August 11, 2011, when the Fire Chief designated the current battalion chief in charge of the RMS as the Department's Litigation Risk Manager. Department representatives reported that the chief deputy who supervised the RMS served as the defacto Litigation Risk Manager from April 2007 to the summer of 2011.

Duties of the Department's Litigation Risk Manager:

The Directive describes the duties of the Litigation Risk Manager, which include:

1. Tracking all claims and litigation related to department employees and/or programs, including regularly seeking and receiving updates from counsel and reviewing critical discovery, such as depositions of department employees;
2. Serving as liaison to defense counsel (whether city attorney or outside counsel), the Mayor's Office and the City Administrative Officer (CAO);
3. Representing the Department before the Claims Board;
4. Ensuring the availability and attendance of appropriate Department personnel at court hearings, mediations, depositions and other legal proceedings (when requested by the City Attorney or Mayor's Office);
5. Ensuring that litigation-related reviews of policies, practices and/or employee conduct are conducted and of the quality necessary to yield appropriate action;
6. Timely reporting under the Directive; and

¹¹ The Fire Commission is the head of the Fire Department with the power to supervise, control, regulate and manage the Department. Los Angeles City Charter, sections 500 and 506.

7. Developing and implementing other Department-specific loss control and risk management practices (in consultation with the Mayor's Office, CAO and City Personnel Department).

Generally, the Department does a good job of serving as liaison to defense counsel (providing subject matter expertise and assisting in obtaining required documents and information); representing the Department at various meetings, mediations, depositions and court hearings; and arranging for and ensuring the attendance of appropriate Department personnel at meetings, depositions and court hearings. To be sure, this work is very time consuming and critical to litigation.

The tracking of claims is inconsistent. Some cases are formally tracked and others are not. Little information could be found confirming that pretrial discovery materials, such as deposition testimony, were used to change or improve operations. While a great deal of emphasis is placed on winning the lawsuit, or achieving the best litigation result possible, less emphasis is placed on developing a robust litigation risk management program. To a great extent this is due to a lack of resources and expertise.

Develop Protocol for Timely Notice and Ongoing Evaluation of Litigation and Claims:

Under Executive Directive No. 9, each department is required to develop a protocol with the City Attorney's Office for timely notice and ongoing evaluation of all claims or litigation served on the City that relate to Department employees and/or programs. The Directive states that the protocol shall include mechanisms to ensure the Department:

1. Receives timely notice and a copy of any claim or litigation-commencing complaint or petition (generally within 10 days of the City's receipt or acceptance of service);
2. Cooperates with the assigned defense counsel in conducting an early review of the allegation in the claim/litigation and investigating the facts underlying the allegations;
3. Discusses and determines with assigned defense counsel whether early mediation or other settlement discussions would be appropriate (generally within 90 days of the City's receipt or acceptance of service of a pleading commencing litigation);
4. Discusses and determines with assigned defense counsel whether a statutory offer of settlement should be recommended to the Charter-designated decision-making body (at least six months before any scheduled trial date);
5. Engages in ongoing discussions with assigned defense counsel about the advisability of mediation or other settlement negotiations;
6. Has an opportunity to review all deposition transcripts of Department employees (current or former), and all significant opposition-produced discovery documents, to determine if any follow-up action is warranted;

7. Discusses with assigned defense counsel whether an appeal should be filed (within two weeks of an adverse decision/judgment and at least two weeks before any deadline to file or notice an appeal); and
8. Presents and discusses with assigned defense counsel any proposed change in policy or practice and any proposed employee discipline or retraining related to the facts underlying the claims in litigation before implementation to ensure no adverse effect on defense of the litigation.

This written protocol required by the Directive was to be submitted to the Office of Counsel to the Mayor, with copies to the City Attorney and CAO, by June 15, 2007. When this audit was initiated, the written protocol with the City Attorney's Office had not been created. After the audit began, the RMS submitted a written protocol to the Mayor's Office on August 11, 2011. To a great extent, the protocol reflects current practice. The protocol does not fully address all the requirements of the Directive.

Some of the Directive's requirements are met only in some of the cases. Overall, it is unclear how consistently cases are evaluated to determine whether a change in policy or practice, or employee discipline or retraining is warranted. It appears that some suggestions for reform come from the City Attorney's Office and are communicated to Department management by the RMS staff.

Develop Internal Protocol:

Executive Directive No. 9 requires each department to develop an internal protocol for the ongoing assessment of claims and litigation, and for implementation of appropriate follow-up. The protocol is required to include timelines and mechanisms to ensure the Department:

1. Completes an early and thorough investigation of the facts underlying any claim or litigation, in cooperation with assigned defense counsel, within 90 days of the Department's notice of the claim or litigation;
2. Evaluates carefully and thoroughly whether the allegations in the claim or litigation and the facts revealed through investigation suggest the advisability of a change in policy or practice, or the need for new or renewed training, and that such evaluation occurs following the early investigation (within 105 days of the Department's notice of the claim or litigation), periodically as appropriate throughout the litigation as additional facts are discovered and within 30 days following the conclusion of the litigation through settlement or judgment;
3. Timely develops, plans and implements any warranted changes in policy, practice and/or training after evaluation and due consideration of litigation defense and budgetary impacts;
4. Evaluates carefully and thoroughly whether the allegations in the claim or litigation and the facts revealed through investigation suggest the advisability of discipline, reassignment or retraining of individual employees whose actions contributed to potential

liability, and that such evaluation occurs following the early investigation (within 105 days of the Department's notice of claim or litigation), periodically as appropriate throughout the litigation as additional facts are discovered and within 30 days following conclusion of the litigation through settlement or judgment;

5. Timely pursues any warranted discipline, reassignment or retraining of individual employees whose actions contributed to potential liability after due consideration of litigation considerations and applicable Civil Service and Personnel rules; and
6. Evaluates carefully and thoroughly whether the allegations in the claim or litigation and the facts revealed through investigation suggest the advisability of the City seeking a change in federal, state or municipal law or regulation, and that such evaluation occurs following the early investigation (within 105 days of the Department's notice of the claim or litigation), periodically as appropriate throughout the litigation as additional facts are discovered and within 30 days following the conclusion of the litigation through settlement or judgment.

The Directive required that the Fire Department submit its internal written protocol to the Office of the Counsel to the Mayor, with copies to the City Attorney and CAO, by June 15, 2007. As stated previously, the RMS was unaware of the Directive or its requirements prior to the initiation of this audit. The RMS did submit an internal protocol for litigation risk management to the Mayor's Office on April 11, 2011. Like with the City Attorney protocol, this is also incomplete; only some requirements are met in some cases.

Without formally complying with the requirements of the Directive, the Department provided a few examples of having initiated reviews of policy changes in an attempt to reduce the risk of future litigation. However, these reviews were not consistently conducted and many more should have occurred.

Report Quarterly on Litigation Risk Management:

Under Executive Directive No. 9, each department is required to submit confidential quarterly written reports to the Mayor's Office indicating each filed claim or litigation that relates to Department employees and/or programs. The information to be included in these reports includes:

1. The date the claim or litigation was filed, the date it was served, the date the Department was notified of the claim or litigation and any scheduled trial date;
2. The specific allegations in the claim or litigation;
3. Whether the early investigation and consideration of early settlement process was completed (including whether such settlement was pursued);
4. Whether evaluations of the claim or litigation for warranted changes in policy, practice or training, or individual employee discipline or training were completed (including when completed), and whether any such steps were pursued and the status of those steps;

5. Whether evaluations of the claim or litigation for the advisability of seeking a change in federal, state or municipal law or regulation were completed, and any recommendation from those evaluations;
6. Whether the Department evaluated deposition transcripts or significant opposition-produced discovery;
7. Whether evaluations of possible statutory offers of settlement occurred, when they occurred and whether an offer was made; and
8. Any judgment or decision adversely affecting the City's position, and what recommendation was reached after evaluating a possible appeal.

This audit determined that the Department has not provided the quarterly reports since the Directive was issued in January 2007. Much of the required information was provided in the City Attorney's Semi-Annual Reports on Liability Claims. However, these reports were no longer provided after June 2009. Much of the information that is supposed to be included in these quarterly reports can be collected by the LTS. Complete quarterly reports would assist both the Mayor's Office and the Department in making informed decisions in litigation matters.

Audit criteria:

This audit selected seven lawsuits for a detailed review and assessment. Nineteen requirements set forth in the Directive were used as audit criteria when conducting the detailed assessments. While some of the cases were filed before the Directive was issued by the Mayor in January 2007, the Directive sets forth some rather basic litigation risk management elements. Some of what is called for by the Directive was being performed by the Department before the Directive was issued and before the RMS became responsible for litigation.

TRACKING SYSTEMS

The Fire Department's Risk Management Section (RMS) utilizes two systems to track the progress of lawsuits. The first is the Litigation Tracking System (LTS), which is an Access database containing records for approximately 68 cases (as of April 12, 2011). The second is a series of paper case files.

Litigation Tracking System:

This audit reviewed all entries for all cases in the LTS. The records in the LTS contain information on both open and closed cases involving the Fire Department. There are fields in each record for the following information:

- Settlement Date
- Settlement Type
- Settlement Amount
- Case Name
- Case Type
- Case Stage
- Case Number
- File Date
- Trial Date
- City Attorney, Address, Phone
- Opposing Counsel, Address, Phone
- Progress Note
- Case Summary

The amount and accuracy of the information contained in these records varies considerably. In most cases, the case name, type, stage, number and file date are all complete. In some cases, the file dates did not match court records and a few of the case numbers listed in the tracking system were incorrect.

The records consistently have information related to which city attorney or outside counsel was assigned to the case as well as the opposing counsel. A number of records contain case summaries and varying numbers of entries relating to the chronological progress of the case. Most of these entries describe the scheduling of depositions, what transpired at other meetings and some communications from the attorney handling the case.

The vast majority of these records do not provide information concerning the opinions or advice from legal counsel regarding liability and damages, the nature and status of corrective actions or other information that would be directly responsive to what is called for by Executive Directive No. 9. Very little information is recorded concerning what has been communicated to the Fire Chief, the Fire Commission and others about litigation, and the decisions or direction given in response. The recording of such information is important and basic to a strong litigation risk management system.

The LTS currently in use is quite basic and limiting. It is not comparable to the robust Complaint Tracking System used by the PSD. The LTS is not conducive to tracking relevant information and providing management reports concerning litigation, including quarterly reports to the Mayor's Office as called for under Executive Directive No. 9. The current LTS is also not designed to capture information that would assist in conducting a workload evaluation.

Case Files:

The RMS also maintains paper case files for some Fire Department-related cases. Between the LTS and the case files maintained by the RMS, there are a total of 109 case records.¹² Approximately 62% of these 109 cases (68 total) have records in the LTS, and approximately 60% have paper files (65 total). Only approximately 32% of the 109 cases (35 total) have both a record in the LTS and a corresponding paper file.

Comparison of the Risk Management Section’s Litigation Tracking System and the City Attorney’s Semi-Annual Reports on Liability Claims:

The tracking systems utilized by the Fire Department’s RMS and the City Attorney’s Office are independent of one another and contain different types of information. Looking at what is contained in the system maintained by the City Attorney’s Office is useful in assessing the quality of the system used by the RMS.

Risk Management Section – Litigation Tracking System

According to the LTS, 60 cases involving the Fire Department were filed from 2006 through 2010. Most of the cases filed by those outside the Department for these five years were claims involving paramedic services, wrongful deaths and traffic accidents. The cases filed by Department members involved the work environment, including claims of discrimination and harassment based on race, gender and disability; retaliation; the Fair Labor Standards Act (FLSA); and wrongful termination. Table 1 below lists the total number of cases filed from 2006 to 2010 by year and type.

Table 1: LTS Cases Filed 2006-2010 by Year and Type

Allegation Type ¹³	Year Filed					Total
	2006	2007	2008	2009	2010	
Labor	11	9	6	4	5	35
Paramedic	1	2	3	3	0	9
Traffic Accident	4	4	3	1	0	12
Other	0	2	2	0	0	4
TOTAL	16	17	14	8	5	60

Source: Risk Management Section, Litigation Tracking System (as of April 12, 2011).

City Attorney’s Office – Semi-Annual Reports on Liability Claims

Until October 2009, the City Attorney’s Office provided the Fire Department with a Semi-Annual Report on Liability Claims every six months. These reports contained information relating to: 1) all the new claims filed during the reporting period, 2) a list of all claim payments made during the reporting period, and 3) a listing of all the current cases.

New claims in the City Attorney’s report were broken down into three categories: Auto Liability, General Liability and Labor Relations. Different information is provided depending on the claim

¹² As of April 12, 2011.

¹³ The LTS utilizes 48 different allegation categories. They have been broken down into these general categories (Labor, Paramedic, Traffic Accident and Other) for convenience.

category. The portions of the reports dedicated to claim payments provided a general category summary as well as information about the amount paid and the date of payment. Finally, the City Attorney's reports contained an alphabetical list of current cases, as well as a summary by case category. Many of the case descriptions set forth in the City Attorney's report were duplicated in the Fire Department's LTS.

Comparison of the LTS and City Attorney Reports:

There appear to be some discrepancies between the LTS records and the information compiled by the City Attorney's Office. For the purposes of this report, this office examined the records of cases that were filed between 2006 and 2010. This office was able to obtain complete City Attorney reports for 2006, 2007 and 2008, but only the report for the first half of 2009 (January to June). No reports were generated after October 2009. Accordingly, this audit includes full annual data for only three of the five years, 2006-2008.

The categories utilized by the LTS do not match up with those used by the City Attorney's Office, which makes a comparison even more challenging. Of the 48 different case types used in the LTS, 35 are related to labor relations claims. Having 35 different categories used by the Department for labor relations cases makes it difficult to analyze exactly what types of cases are being filed and whether any individual type is either increasing or decreasing. These 35 case types could easily be simplified, and it may be advisable to simply employ the same categories utilized by the City Attorney's Office.¹⁴ The City Attorney's Office uses three broad categories for claims: Auto Liability, General Liability and Labor Relations. Within labor relations there are 18 case types with additional subcategories.

What can be observed is that the LTS does not contain records for most of the traffic accident claims involving the Fire Department. The LTS contained a total of 12 records over the 4-year period while the City Attorney's reports revealed a total of 95 in 2006, 87 in 2007 and 89 in 2008. In just the first half of 2009, the City Attorney's report contained 53 traffic accident claims.

The two tracking systems appear to have similar information regarding the total number of labor relations cases filed from 2006 to 2008. In the Labor Relations category, the City Attorney's records show a total of 10 cases filed in 2006, 7 cases in 2007 and 8 cases in 2008. Combining the LTS categories of FLSA, Hostile Work Environment, Discrimination, Harassment, Retaliation, Wrongful Termination and Labor Relations, produces the following totals: 10 cases filed in 2006, 10 cases filed in 2007, and 7 cases filed in 2008.

Biweekly Litigation Meetings with the Fire Chief:

The RMS staff meets with the Fire Chief to provide information related to litigation on a biweekly basis. Information concerning cases is provided, including any new developments in ongoing cases. Generally, most of the information provided concerns procedural milestones. Much of the information called for by, or in compliance with the requirements of, Executive Directive No. 9 is generally not provided or discussed.

¹⁴ Department representatives have indicated that this is now the current practice.

Although actions to reduce the risk of future litigation are not routinely discussed, this biweekly meeting did provide the forum for the Fire Chief to direct a review of the Department for current and/or potential violations of the FLSA. The Department has been successfully sued a number of times for violating the FLSA by failing to pay overtime as required by law.

Specific Recommendations:

1. The Department should design, implement and consistently use an electronic tracking system to track litigation and enhance risk management. This should also include tracking litigation costs and the amount of time spent by RMS personnel on each case.
2. To the extent that the Department's electronic tracking system for litigation is not able to adequately track or preserve information related to litigation, the Department should develop and regularly use a paper-based case file system.
3. The manner in which the Department tracks information related to litigation should include all of the information called for by Executive Directive No. 9. It is recommended that the Department also track additional information. One suggested outline is included in Appendix 2.
4. The manner in which the Department categorizes litigation case information should be consistent with the way in which the City Attorney's Office categorizes such information.
5. Biweekly litigation meetings conducted by the Fire Chief should place a greater emphasis on making sure the information called for by Directive No. 9 is being obtained consistently and used to reduce the exposure to litigation. One suggested roadmap is included as Appendix 3.

LITIGATION COSTS

The costs associated with Fire Department-related claims and litigation can include settlements, jury verdicts, plaintiffs’ attorney’s fees, costs, interest on judgments and sometimes fees for hiring outside counsel. These litigation costs are typically paid from accounts controlled by the City Attorney’s Office. Back pay associated with Fair Labor Standards Act (FLSA) litigation is typically paid from accounts controlled by the Fire Department. In the future, the Fire Department may be responsible for more of the costs associated with litigation (either some or even all the costs). To be sure, and regardless of the account from which the cost is deducted, it is the taxpayers who actually pay the full cost of litigation.

The City Attorney’s Office uses a few broad categories to track Fire Department lawsuits. Table 2 below sets forth the payments made on Fire Department claims and lawsuits by these general categories from Fiscal Year 2002 to mid-2011.¹⁵

Table 2: All Fire Department Claims/Lawsuits & Payments

Claim/Lawsuit Type	Total Claims/Lawsuits	Total Amount Paid by City	% of Total Claims	% of Total Payments
Dangerous Condition	7	\$56,711	1.2%	0.1%
Fire ¹⁶	60	\$105,224	10.3%	0.3%
FLSA ¹⁷	3	\$13,684,245	0.5%	36.0%
Labor Relations	33	\$17,947,851	5.7%	47.2%
Land Use	1	\$4,885	0.2%	0.0%
Miscellaneous ¹⁸	18	\$567,648	3.1%	1.5%
Paramedic	23	\$800,778	3.9%	2.1%
Traffic Accidents	439	\$4,874,272	75.2%	12.8%
TOTAL	584	\$38,041,614	100.0%	100.0%

Sources: City Attorney’s Office, 10-year historical data of all LAFD payouts since FY 2002; Fire Department accounting records.

As can be seen from this table, approximately 75.2% of Fire Department-related litigation and claims are attributed to traffic accidents and this category represents approximately 12.8% of all the payments. Claims related to labor relations, which include discrimination and retaliation claims, account for only 5.7% of all the claims but 47.2% of all the payments made in Fire Department-related claims and litigation during this period. Additionally, there were only three

¹⁵ 2011 is only a partial figure. At the time this information was provided in July 2011, the City Attorney’s accounting records had not been updated through June 30, 2011.

¹⁶ Cases involving Fire personnel other than paramedic staff.

¹⁷ The Total Amount Paid by the City includes both back pay paid by the Fire Department and all the liquidated damages, interest, costs and attorney’s fees paid from accounts controlled by the City Attorney’s Office.

¹⁸ This category includes claims related to personal injuries, civil rights violations, recovery of workers’ compensation benefits, wrongful death actions, etc.

claims under the FLSA (0.5% of all claims) during this period but they accounted for 36% of the payments made. (The FLSA claims allege a failure to pay overtime as required by law.)

It is important to recognize that payments to satisfy judgments or settle cases are made in the years following the initial filing of a claim or lawsuit. Table 3a and Chart 1 below show the annual breakdown of how much was paid in Fire Department labor relations claims and how many claims or lawsuits were paid. These do not provide information related to FLSA cases. Table 3a below also lists the years in which the paid claims or lawsuits were filed.

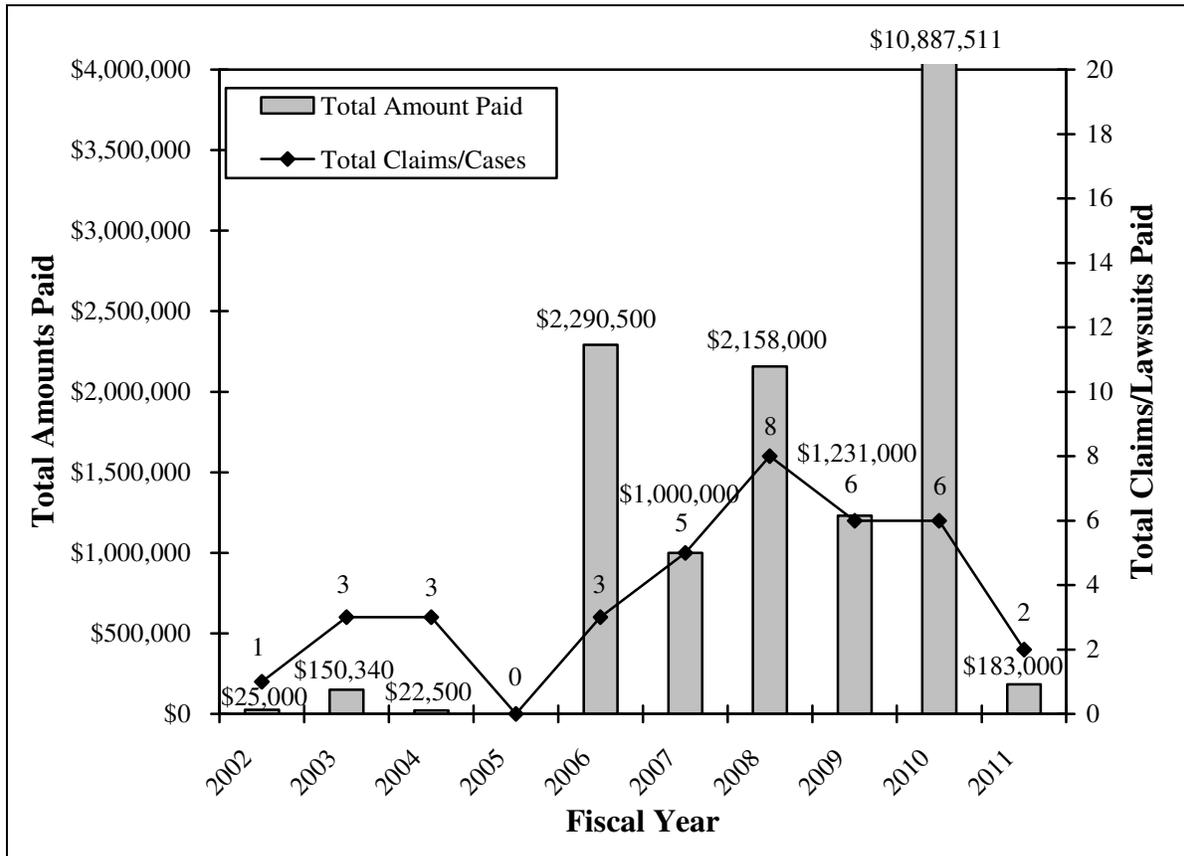
Table 3a: Fire Department Labor Relations Claims/Lawsuits, Payments and Filed Years

Fiscal Year	Total Amount Paid	Total Claims/Lawsuits Paid¹⁹	Lawsuit Filed Years
2002	\$25,000	1	n/a
2003	\$150,340	3	1997, 2001, 2002
2004	\$22,500	1	2001
2005	\$0	0	
2006	\$2,290,500	3	2003, 2004, 2005
2007	\$1,000,000	5	2005, 2006
2008	\$2,158,000	8	2005, 2006, 2007
2009	\$1,231,000	6	2004, 2006, 2007, 2008
2010	\$10,887,511	6	2005, 2006, 2008
2011	\$183,000	2	2008, 2009, 2010
TOTAL	\$17,947,851		

Source: City Attorney's Office, 10-year historical data of all LAFD payouts since FY 2002.

¹⁹ Two of the lawsuits had multiple payments made in different years so they are counted twice in the Total Claims/Lawsuits Paid portion of this table and corresponding charts below.

Chart 1: Fire Department Labor Relations Claims/Lawsuits, Total Amount and Claims/Cases Paid by Year



Source: City Attorney’s Office, 10-year historical data of all LAFD payouts since FY 2002.

The above table and chart do not include payments made in FLSA lawsuits during this time period. The following payments for damages, attorney’s fees, interest and costs in FLSA lawsuits were made from accounts controlled by the City Attorney’s Office: \$3,028,488 paid in 2006, \$3,875,000 paid in 2009 and \$220,000 paid in 2010. The total paid from accounts controlled by the City Attorney’s Office in these three years was \$7,123,488. This did not include back pay for overtime owed to the plaintiffs. These additional payments, made from Fire Department accounts, were as follows: \$2,565,757 paid in 2006, \$3,875,000 paid in 2009 and \$120,000 paid in 2011; for a total of \$6,560,757. The total paid from all accounts is \$13,684,245. Additional information about costs and expenses related to FLSA litigation appear in Table 8 on page 90 of this report.

Table 3b below further illustrates the lag time in between when a claim or lawsuit is filed and when it is actually paid. For example, although there were payments made in eight lawsuits in 2008, none of them were filed in that year. In fact, only four lawsuits were filed that year, and even fewer new lawsuits have been filed in recent years. Similarly, only one lawsuit was filed in 2010 while the payments in six others totaled over \$10 million.

Table 3b: Fire Department Labor Relations Claims/Lawsuits, Payments and New Filings

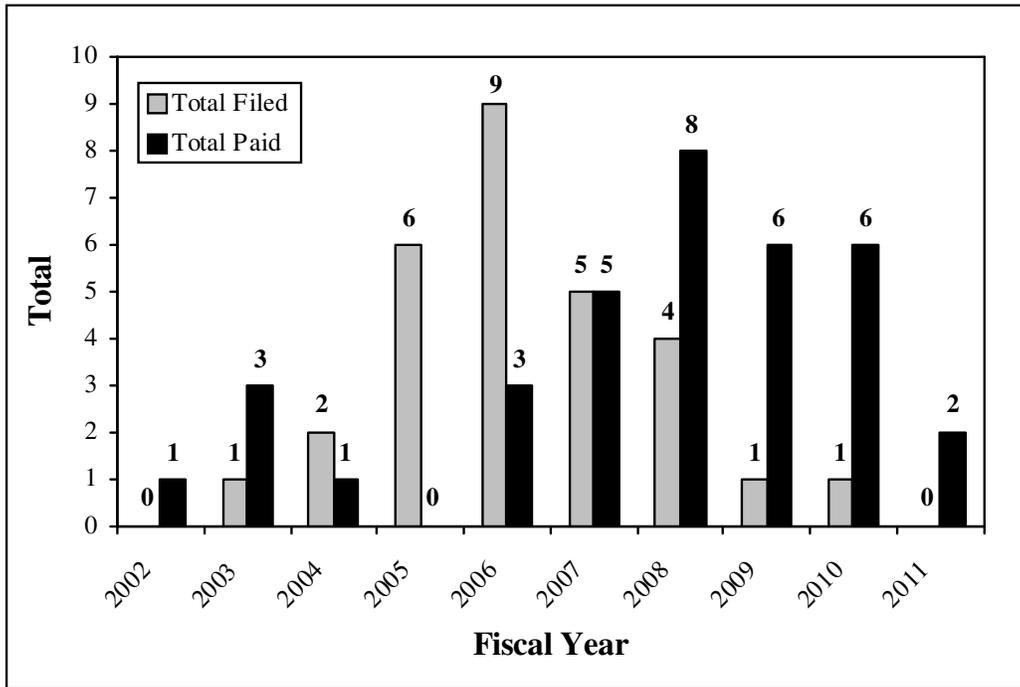
Fiscal Year	Total Amount Paid	Total Claims/Lawsuits Paid	Total New Lawsuits Filed²⁰
2002	\$25,000	1	0
2003	\$150,340	3	1
2004	\$22,500	1	2
2005	\$0	0	6
2006	\$2,290,500	3	9
2007	\$1,000,000	5	5
2008	\$2,158,000	8	4
2009	\$1,231,000	6	1
2010	\$10,887,511	6	1
2011	\$183,000	2	0
TOTAL	\$17,947,851		

Sources: City Attorney's Office, 10-year historical data of all LAFD payouts since FY 2002; Los Angeles County Superior Court website, Civil Case Summary.

Chart 2 below illustrates this same information: the total number of lawsuits filed and the total number of lawsuits for which payments were made in each year from 2002 to 2011.

²⁰ The filing date for three lawsuits is unknown, and three of the claims paid during this period were filed before 2002.

Chart 2: Total Claims/Lawsuits Filed vs. Total Claims/Lawsuits Paid

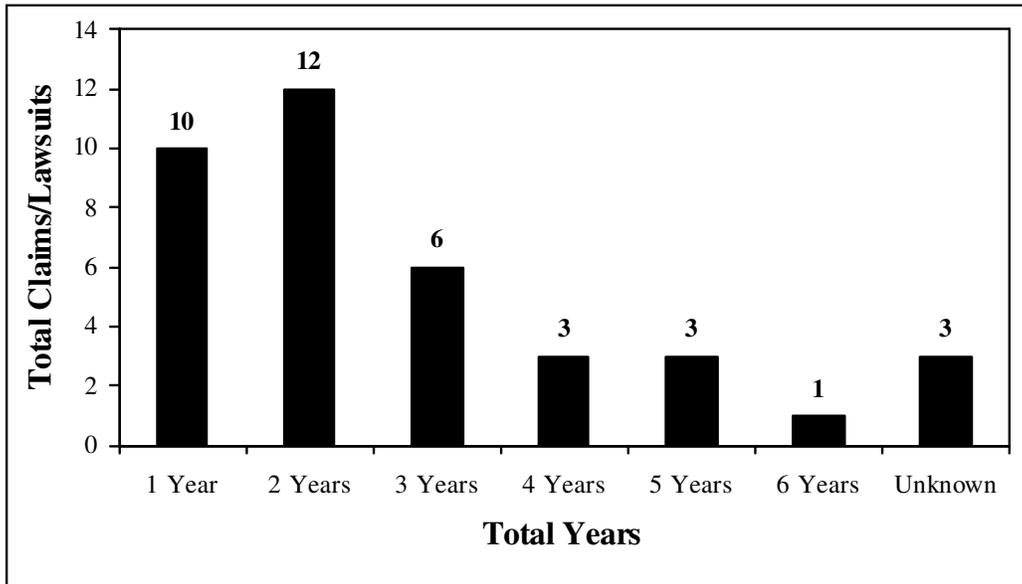


Sources: City Attorney's Office, 10-year historical data of all LAFD payouts since FY 2002; Los Angeles County Superior Court website, Civil Case Summary.

This chart illustrates how the rise in lawsuits filed in 2005 and 2006 likely caused the increase in payments in the years that followed.

Chart 3 below shows the distribution of these labor relations lawsuits based on how many years lapsed between when the lawsuit was filed and when a payment was made.

Chart 3: Years Between Filing and Payment (for payments made 2002-2011)



Sources: City Attorney’s Office, 10-year historical data of all LAFD payouts since FY 2002; Los Angeles County Superior Court website, Civil Case Summary.

As is clear from this chart, payments in the majority of lawsuits are made approximately 1-2 years after they are filed.

Outside Counsel:

The City hires outside counsel to represent the City in litigation involving the Fire Department when the City Attorney’s Office has a conflict of interest or where the lawsuit itself may require special legal expertise. City Attorney Policy Directive #20, adopted in November 2005, outlines the policies and procedures for hiring outside counsel. Additionally, the City Attorney’s Office provides periodic reports to the City Council regarding these expenditures. Table 4 below illustrates the amounts spent by the City for outside counsel for Fire Department labor relations and FLSA lawsuits.

Table 4: Outside Counsel Expenditures for Fire Department Labor Relations and FLSA Litigation

Fiscal Year	Labor Relations	FLSA	Total Expenditures²¹
2005-06	\$329,965	\$136,215	\$466,180
2006-07	\$469,593	\$150,850	\$620,443
2007-08	\$1,578,575	\$103,765	\$1,682,340
2008-09	\$634,860	\$490,639	\$1,125,499
2009-10	\$74,186	\$149,524	\$223,710
2010-11	\$77,965	\$529,093	\$607,058
TOTAL²²	\$3,165,144	\$1,560,086	\$4,725,230

Source: City Attorney's Office, Outside Counsel Expenditure Reports FY 2005-06 to 2010-11.

Many of the lawsuits continue from fiscal year to fiscal year such that there may be payments to outside counsel for work on the same lawsuit performed in multiple fiscal years. The payments in the above table do not take into account any payments made prior to Fiscal Year 2005-2006.

Cost of the City Attorney's Office:

Most litigation involving the Fire Department is handled by the City Attorney's Office. This audit makes no attempt to audit, assess, estimate or report on this expense. This expense would include such things as the salary and benefits costs for attorneys and litigation support staff, court reporters for pretrial depositions, litigation expert witnesses and consultants and other expenses. However, it is critical to note that the full cost of these legal services, which are quite substantial, must be paid with taxpayer dollars as well.

²¹ In Fiscal Year 2005-06, the "Paying Departments" listed for the outside counsel expenditures related to Fire Department litigation were the City Administrative Officer and City Attorney's Office. In Fiscal Year 2006-07, Fire Department litigation was listed in two different categories, one titled "Other (including Police & Fire)" and the other "Conflict Panels" under the City Administrative Officer. The Fire Department did not have its own category in these City Attorney reports until Fiscal Year 2007-08. It is for this reason that the outside counsel expenditures for Fire Department-related litigation for Fiscal Years 2005-06 and 2006-07 are best estimates.

²² Council File No. 02-2223 indicates that a total of \$380,000 was paid for outside counsel in one FLSA case while the City Attorney's records only show \$260,432 being spent. Table 4 uses only the figures from the City Attorney's records so the FLSA Lawsuits and Total Expenditures totals may be higher if the figure in the Council file is more accurate.

SELECTED CASE REVIEWS WITH POSITIVE TRIAL COURT RESULTS

Four lawsuits where a positive trial court result was achieved were selected for a detailed assessment. The four cases were filed against the City by six current or former Fire Department employees. Each of the four cases was litigated by the City Attorney's Office. Two of the cases are still being litigated, although one was filed in 2003 and the other was filed in 2009 and involves an incident that occurred in 1998.

Nineteen requirements set forth in Executive Directive No. 9 were used as audit criteria by this office when conducting the detailed assessments. While some of the cases were filed before the Directive was issued by the Mayor in January 2007, the Directive sets forth basic litigation risk management elements. Some of what is called for by the Directive was being performed by the Department before the Directive was issued and before the Risk Management Section (RMS) became responsible for litigation. Additional criteria were also used as appropriate or relevant.

Specific findings and/or recommendations are set forth for some of the cases, in addition to the more general findings and recommendations at the conclusion of this report.

JABARI JUMAANE LAWSUIT

CASE BACKGROUND:

Allegations:

On April 18, 2003, Firefighter Jabari Jumaane filed a lawsuit against the Fire Department alleging he had been harassed, discriminated and retaliated against because of his race and medical condition (including taking sick and disability leave as well as filing a workers' compensation claim).²³

Jumaane alleged that in September 1998, after less than a month of being under a new supervisor, he received a negative yearly performance evaluation when all his previous evaluations had been excellent.²⁴ From October to May of 1998, Jumaane received six written reprimands for tardiness and failure to provide requested information about his work activities.²⁵

In June 1999, Jumaane was suspended for 10 days for a variety of performance issues, including insubordination, poor work performance, failure to maintain inspection records and failure to provide documentation for his inspection activities and whereabouts.²⁶ He believed this suspension was in retaliation for his speaking out against racism and harassment in the Department.²⁷

²³ Complaint filed on April 18, 2003, Los Angeles County Superior Court, Case No. BC294248.

²⁴ Plaintiff's Short Statement of Case filed on September 29, 2005, Los Angeles County Superior Court, Case No. BC294248.

²⁵ Defendant City of Los Angeles' Trial Brief filed on September 30, 2005, Los Angeles County Superior Court, Case No. BC 294248.

²⁶ Defendant City of Los Angeles' Trial Brief filed on September 30, 2005, Los Angeles County Superior Court, Case No. BC 294248.

²⁷ Plaintiff's Short Statement of Case filed on September 29, 2005, Los Angeles County Superior Court, Case No. BC294248.

In the summer of 2000, Jumaane went on leave for a work-related injury, and from August to October of that year he alleged he was subjected to an investigation into his disability, including being videotaped. He believed this investigation was motivated by his prior speaking out and filing of a workers' compensation claim.²⁸ Finally, in April 2001, Jumaane was suspended for 15 days for not following the home-garaging policy for Department vehicles.²⁹ Jumaane alleged he was wrongfully suspended because the Department had not complied with the procedures that would have allowed him to do what he had done.³⁰

Trial:

The jury trial lasted a little more than three weeks, and the jury returned a verdict in favor of the City on June 19, 2007. Judgment on the jury verdict in favor of the City was entered on August 14, 2007.³¹ Jumaane filed motions for new trial and judgment notwithstanding the verdict (JNOV) on October 3, 2007. One of the claims raised by Jumaane to justify his new trial motion was jury misconduct, and his motion was accompanied by a declaration from a juror who claimed to have witnessed racially-motivated misconduct by fellow jurors.³² Jumaane's new trial motion was granted on December 3, 2007, and the City appealed.

Appeal:

On August 5, 2010, the Court of Appeal issued its written decision affirming the grant of a new trial.³³ The Court of Appeal decision points out numerous problems with the City's appeal:

1. When arguing that the plaintiff's new trial motion was not timely, the City offered a proof of service for the notice of entry of judgment that was dated "seven weeks *before* judgment was entered;"
2. The City could not produce a valid proof of service for a September 18, 2007 mailing of the notice of entry of judgment; and
3. The City did not offer any declarations in opposition to the new trial motion in an attempt to rebut evidence of prejudicial juror misconduct.³⁴

Future activity:

Given the Court of Appeal decision, it appears this case is destined for another lengthy and expensive trial unless a settlement is reached. The mandatory settlement conference that was to take place on October 7, 2011 did not go forward. As of March 27, 2012, there were no future hearings listed on the Superior Court website.

²⁸ Plaintiff's Short Statement of Case filed on September 29, 2005, Los Angeles County Superior Court, Case No. BC294248.

²⁹ Defendant City of Los Angeles' Trial Brief filed on September 30, 2005, Los Angeles County Superior Court, Case No. BC 294248.

³⁰ Plaintiff's Short Statement of Case filed on September 29, 2005, Los Angeles County Superior Court, Case No. BC294248.

³¹ Los Angeles County Superior Court, Case No. BC294248.

³² *Jumaane v. City of Los Angeles*, 2010 Cal.App.Unpub. LEXIS 6262.

³³ *Jumaane, supra*, 2010 Cal.App.Unpub. LEXIS 6262.

³⁴ *Jumaane, supra*, 2010 Cal.App.Unpub. LEXIS 6262.

RISK MANAGEMENT SECTION RECORD KEEPING:

The RMS was unable to produce any file material for review during the course of this audit. There are no case materials in the RMS file cabinets nor is there a record for the case in the LTS. While this litigation may have been initiated before the LTS was activated, the litigation is continuing. A Department representative indicated that there was a case file at one time but that it may have been sent to the City's archives.

Requests for case materials sent to the City Attorney's Office went unanswered. Thus the information used as the basis for this audit came from the Court of Appeal's unpublished decision, trial court records and interviews with Department members involved in the litigation.

EXECUTIVE DIRECTIVE NO. 9 CRITERIA:

Claim and case tracking:

The City Personnel Department was notified by the Department of Fair Employment and Housing (DFEH) on April 22, 2002, that Jumaane's claim had been closed. The Personnel Department notified the Fire Department of the case closure on April 26, 2002.

This office was unable to find any evidence of the RMS tracking either the claim or litigation in this case. This office was able to obtain Jumaane's DFEH claim from the City Personnel Department, and reviewed the court file for information from the complaint and special verdict.

Liaison and support activities:

The RMS became involved in this case after discovery was completed. A Department representative reported that others in the Department collected and provided documents during the pretrial discovery phase of the case. Additionally, a Department representative served as a subject matter expert on the inner workings of the Department (he had been an inspector just like Jumaane), and helped collect information, including Department and City policies, that related to the allegations in the complaint. A Department representative also reported assisting in evaluating the credibility of witnesses.

For the new trial, a Department representative has contacted witnesses that may be needed at trial and collected miscellaneous documents in response to requests from the City Attorney's Office.

Investigation of case facts and review of discovery materials:

A Department representative reported conducting preliminary interviews with witnesses and individuals involved in the case (verifying statements they made in Department reports) prior to the city attorney interviewing them. This office was unable to find any evidence that the Department had the opportunity or did review deposition transcripts of Department employees or opposition-produced discovery documents in this case.

The extent to which a Department representative personally attended pretrial depositions and trial is not documented. Such attendance can often provide litigation risk management opportunities.

Mediation and settlement discussions:

A Department representative reported attending a mediation and on September 28, 2005, the City filed a statutory offer of settlement³⁵ offering Jumaane \$3,000 to settle his case.³⁶ A Department representative reported having discussions with counsel regarding the weaknesses or deficiencies in the Department's case. What occurred at the mediation and what was discussed about the strengths and weaknesses of the case are not documented.

Reviews of and actions to correct Department policies, practices and/or employee conduct:

A Department representative reported making recommendations regarding corrective action up his chain of command but did not know what happened as a result. The recommendations are not documented. One issue he highlighted was the fact that Jumaane was able to attack the Department because of the lengthy amount of time that passed between the incidents that served as the basis of his discipline and the discipline itself. He also raised the issue of a lack of oversight for inspections. How these issues were addressed is not documented and this office was unable to determine if these issues were ever addressed.

REPORTING TO THE FIRE CHIEF AND BOARD OF FIRE COMMISSIONERS:

Reports to the Board of Fire Commissioners:

The Jumaane case was listed on a few Board of Fire Commissioners meeting agendas from 2005 to 2007. It was not listed on any of the agendas for a closed session discussion since the August 5, 2010 Court of Appeal decision was issued. The case was never discussed in public session with the Board of Fire Commissioners.

Reports to the Fire Chief:

A Department representative reported that the city attorney had meetings with the Fire Chief during the first trial, but the discussion was more general in nature and did not get into the specifics or nuances of the case.

The Fire Chief at the time of the appeal reported having conversations about the case with RMS staff and a city attorney, but that that individual was not the city attorney assigned to the case. He reported receiving updates on the status of the case but nothing on the likelihood of success or any recommendations for corrective action in response to the case.

³⁵ Where a plaintiff does not accept a defendant's pretrial settlement offer and then fails to obtain a more favorable judgment or award, the plaintiff cannot recover any post-offer costs and is responsible for paying the defendant's post-offer costs (these costs are deducted from any damages awarded to the plaintiff). Cal. Code of Civ. Proc., § 998. The advantage of making a pretrial settlement offer under section 998 is that the City may be able to recover its trial costs even if the plaintiff obtains a favorable judgment and even if the award is less than the City's trial costs.

³⁶ Defendant City of Los Angeles' Offer to Compromise filed on September 28, 2005, Los Angeles County Superior Court, Case No. BC294248.

MISCELLANEOUS CRITERIA:

Timely claim filing:

While the City raised the issue of untimely filing of the DFEH claim, the Court of Appeal found that it was in fact timely.³⁷ The City argued that the last possible day Jumaane could have suffered any adverse employment action was either April 2, 2001, when he rescinded his request for a Board of Rights hearing, or April 12, 2001, when he wrote to the Department asking to revert from Inspector to Firefighter to avoid further alleged discrimination.³⁸ The court found that it was the City's burden to prove April 30, 2001, the last day of Jumaane's suspension, was not the last date that Jumaane suffered an adverse employment action.³⁹ The court held that the City failed to do so.⁴⁰ Accordingly, Jumaane had one year from that date to file his DFEH claim, which he did by filing it on April 16, 2002.⁴¹

Jumaane's DFEH claim stated that the incidents of harassment, discrimination and retaliation occurred on June 7, 1999, April 16, 2001, and April 9, 2002. He filed his DFEH claim on April 16, 2002. Accordingly, his DFEH claim was determined to be timely for at least some of his allegations of wrongdoing.

Timely complaint containing all allegations:

Jumaane filed his DFEH claim on April 16, 2002, and his right-to-sue letter was dated April 19, 2002. He filed his lawsuit on April 18, 2003, and it was thus timely because it was filed within one year (by one day).⁴²

In his DFEH claim, Jumaane claimed he was suspended for insubordination and improper home garaging of his vehicle, but that these actions were actually harassment, discrimination and retaliation for exercising his right to fight racism and discrimination in the Fire Department. His complaint stated that the adverse actions taken against him were the result of harassment, discrimination and retaliation based on his race and medical condition.

While the allegations of racial harassment, discrimination and retaliation appeared in both the DFEH claim and complaint, Jumaane's allegations related to his medical condition were not included in the DFEH claim. Accordingly, an argument could be made that these allegations should have been excluded from the case.

SPECIFIC FINDINGS:

Findings:

1. While the City received an excellent trial result, the trial was lengthy and expensive. Additionally, the appellate decision raises serious questions about the quality of legal

³⁷ *Jumaane, supra*, 2010 Cal.App.Unpub. LEXIS 6262.

³⁸ *Jumaane, supra*, 2010 Cal.App.Unpub. LEXIS 6262.

³⁹ *Jumaane, supra*, 2010 Cal.App.Unpub. LEXIS 6262.

⁴⁰ *Jumaane, supra*, 2010 Cal.App.Unpub. LEXIS 6262.

⁴¹ *Jumaane, supra*, 2010 Cal.App.Unpub. LEXIS 6262.

⁴² Los Angeles County Superior Court, Case No. B294248.

service provided in connection with the post-trial proceedings related to serving the notice of entry of judgment and refuting allegations of juror misconduct.

2. Liaison activities contributed to the excellent trial result.
3. There is no case information in the RMS' files. The new litigation liaison has no history or background on the case that may help in the new trial.
4. The nature and extent of corrective action recommended and implemented in response to the lawsuit is not documented.
5. While an excellent trial result was obtained, there is nothing documented confirming that those responsible for discipline or inspections were advised about the plaintiff's allegations in an attempt to reduce the risk of future similar claims.

BRETT MATTSON, PHILLIP SARVER & BRIAN STIEN LAWSUIT

CASE BACKGROUND:

Allegations:

On October 19, 2005, Brett Mattson, Phillip Sarver and Brian Stien filed a lawsuit against the City of Los Angeles and four Fire Department chief officers alleging violations of constitutional rights, discrimination, harassment, defamation and infliction of emotional distress.⁴³ The three had been firefighter recruits who attended a graduation party on the evening of October 21, 2004. They, along with others, were late reporting for graduation-related duties the following morning.

A supervisor documented the three as having an odor of alcohol and being absent without leave (AWOL). They were ordered to provide a urine sample. None of the three was permitted to graduate. Shortly before the graduation ceremony, one chief officer was heard saying, "They should be fired on the spot." A laboratory report later confirmed positive alcohol levels for each of the three.

Each of the three was charged with: 1) failing to report for duty as specified by his commanding officer; 2) reporting for duty unfit and under the influence of alcohol; and 3) bringing discredit to the Fire Department by reporting for duty while under the influence of alcohol. A high ranking chief officer imitated an intoxicated individual and asked a union official, "Would you want someone like this performing surgery?"

Each recruit chose to resign rather than be terminated. They later claimed they were not permitted adequate time to consult with a union official or attorney, or provided a name-clearing liberty interest hearing before resigning. Although other recruits were disciplined for also being tardy that day, the plaintiffs (who are all Caucasian) claimed an African-American was not disciplined for being late. The then Fire Chief said he would consider rehiring the three if they re-established themselves on the hiring list. None of the three were rehired by the City of Los Angeles, although they were all employed by other fire agencies at the time of trial in 2010.

The recruits' causes of action for intentional infliction of emotional distress, discrimination and certain constitutional claims were dismissed on a motion for summary judgment before trial. The only surviving causes of action after the court's summary judgment ruling were: 1) a Fourteenth Amendment procedural due process claim related to the failure to hold a name-clearing liberty interest hearing; 2) defamation; and 3) harassment under the Fair Employment and Housing Act (FEHA).

Trial:

Testimony was taken and evidence was submitted during a three-day trial held in federal court beginning on September 28, 2010.⁴⁴

The chief officer in charge of overseeing the disciplinary process in 2004 was the first witness to testify on the morning of September 29, 2010. He testified that the applicable Fire Department

⁴³ Complaint filed on October 19, 2005, Los Angeles County Superior Court, Case No. BC341677.

⁴⁴ The lawsuit was removed to federal court on December 21, 2005, in case No. CV 05-8861-DOC (RZx).

policy prohibited members from reporting for duty while under the influence of alcohol. He said that would mean a member would be subject to discipline with a blood alcohol concentration (BAC) greater than .01 percent.

The Department policy in effect at the time of the incident was enacted in 1989. It said, “Department members will be considered impaired and unable to perform their duties in a safe manner if an alcohol level is at a level as low as .01%.”⁴⁵ The 1989 written policy does not make reference to whether this .01% is a blood or urine alcohol concentration level. During the trial, the parties did stipulate:

“The Los Angeles Fire Department’s policy regarding alcohol consumption is that the department’s employees will be considered impaired and unable to perform their duties in a safe manner if the alcohol level exceeds .01 percent blood alcohol content.”

Each of the three recruits was ordered to provide urine samples, which were tested by Quest Diagnostics. The chief officer in charge of discipline at the time believed the laboratory reports provided the BAC, based on a calculation performed by Quest Diagnostics after submission of the urine samples for testing.⁴⁶

An expert for the plaintiffs testified the Quest Diagnostics reports provided information concerning the urine alcohol concentration level without conversion to a blood alcohol concentration level, and that the Fire Department erroneously interpreted the urine alcohol concentration in the lab reports as blood alcohol concentration. This expert testified the numbers set forth in the Quest Diagnostics reports were further unreliable because there could be a substantial urine alcohol concentration with no alcohol in the blood. To obtain a more reliable BAC from a urine sample would require applying a urine-to-blood conversion factor of 1.3 on a second void urine sample obtained 20 minutes **after** the first void.⁴⁷

The defense expert in human factors and behavioral toxicology testified there was no simple formula to convert urine alcohol concentration to blood alcohol concentration, that doing so depended on several conditions and is a tedious, iterative process that takes a lot of time. After assuming the plaintiffs were in the “elimination” phase of the blood alcohol concentration curve, that they voided urine at 7:30 am, estimating their metabolism rate and assuming they were moderate drinkers, the expert estimated the BAC for each of the plaintiffs for when they should have reported for duty and for when they actually arrived for work. The expert testified that in both cases, their blood alcohol concentrations likely exceeded the .01 BAC threshold in the Department’s policy using a 1.3 conversion factor.

Some of the other contentions or issues raised during trial included:

- A former chief officer testifying for the plaintiffs claimed there were insufficient signs to support reasonable suspicion that the three recruits were under the influence of alcohol,

⁴⁵ Los Angeles Fire Department, April 4, 1989 memorandum re: Substance Abuse, p. 2.

⁴⁶ During his deposition, this chief officer testified he believed he had someone research and verify that the result in the laboratory report was a blood alcohol concentration level.

⁴⁷ Meaning emptying the bladder or urinating for the first time.

and pointed out inconsistencies in the documentation related to establishing reasonable suspicion. A witness who prepared the initial and individualized reasonable suspicion documentation said it was incomplete and inconsistent with other documentation.

- The chief officer who ordered the urine sample testing testified that he smelled alcohol on a group of seven recruits standing about six to eight feet away, made no attempt to evaluate them individually and could not differentiate which or how many smelled of alcohol.⁴⁸
- There was inconsistent testimony about whether a “drug recognition expert” was required or had been relied on in the past to assist in determining the existence of reasonable suspicion.
- A former chief officer testifying for the plaintiffs claimed the Fire Department was predisposed to firing the recruits given the inappropriate comments made by two chief officers before the investigation had been completed.
- Two chief officers involved in the 2004 disciplinary process provided inconsistent testimony about whether the recruits were entitled to and were provided a name-clearing liberty interest hearing. A former chief officer testified the Fire Department routinely provided name-clearing liberty interest hearings for recruits and probationary firefighters in the past, while a current chief officer testified that the requirement did not apply to this situation.
- An expert for the plaintiffs testified that the recruits were entitled to be represented by the union during certain proceedings. Two chief officers involved in the disciplinary action provided inconsistent testimony about whether recruits were entitled to union representation.
- Witnesses provided inconsistent testimony about when a member of the Department is considered AWOL.
- A former chief officer said celebratory parties at the conclusion of training are suggested by staff, paid for by recruits and that staff is invited to attend. A former training instructor and current member of the Fire Department testified it would be “disrespectful” to make training staff pay for drinks at traditional graduation parties. A drillmaster said he was not aware of a rule that prohibited staff from fraternizing with recruits during

⁴⁸ If this chief officer testified in a pretrial deposition, it was not included in the RMS file materials. A December 23, 2008 court order found the plaintiffs failed to provide specific, affirmative evidence that defendants did not individually evaluate each plaintiff and, in contrast, defendants submitted evidence of an individualized evaluation. Therefore, the court dismissed the plaintiffs’ claim that their Fourth Amendment rights were violated by an illegal search. Page two of the Department’s 1989 substance abuse policy, in effect when this chief officer said he made no attempt to individually evaluate the recruits, clearly stated the evaluation “must be individualized.”

training.⁴⁹ Two members of the Department said that it was not uncommon for recruits to show up late and “hung over” on the day of graduation without being disciplined.

- There was a contention the recruits had insufficient time to consider whether they should resign with disciplinary charges pending in lieu of being terminated.

On October 1, 2010, the jury returned a unanimous verdict stating the **plaintiffs did not prove by a preponderance of evidence** that:

1. The Fire Chief and/or City of Los Angeles violated their constitutional rights by depriving them of a name-clearing liberty interest hearing;
2. The defendants harassed the plaintiffs on the basis of their race; and
3. Two chief officers made defamatory statements about the plaintiffs.

The trial was complicated and involved many difficult issues. The City and the individual defendants were well represented during trial by the City Attorney’s Office. The City’s trial attorneys did a good job in obtaining a defense verdict in a case that could have easily been lost.

Although quite rare and extraordinary, the court permitted the jury to address the parties in open court after the verdict was read. The record reveals the jury expressed disappointment in the choices made by the recruits “to drink” and “maybe, even to go to the party.” The jury suggested that sometimes attempting “to be part of the group” or engaging in “right[s] of passage” are “better off skipped.” In response to a question from the judge, the jury was unanimous in stating they would like to see the recruits rehired.

The jury expressed an equal amount, if not a greater degree, of disappointment with the Fire Department and its “mentoring” of the recruit class. In final comments, one juror was recorded as saying:

“I feel with a heavy heart - - and I’m saddened because everybody raised their hand and says, *I’ll tell the truth.*”

“Yet, we witnessed lies over and over and deception. And if this is the way the court system is supposed be [*sic*], it saddens me, because we’re not all telling the truth. And it just breaks my heart.

“I feel for you guys. I feel for your families. And I’m very disappointed as well, but - - I mean, like he said, it was a lose/lose situation.”

⁴⁹ At least six members of the Fire Department’s training staff were investigated for attending the graduation party in question, in violation of the rule prohibiting fraternization between staff and recruits, and one captain received discipline for doing so. At least one internal memorandum recognized that while it “appeared to be an ongoing practice for Academy staff to attend graduation parties,” the practice needed to end and the Department needed to strictly enforce the standard prohibiting such conduct in the future.

Appeal:

The plaintiffs did not file an appeal in the case. The City Attorney's Office obtained an agreement whereby the City would waive its costs of trial in exchange for the plaintiffs' waiver of an appeal.

RISK MANAGEMENT SECTION RECORD KEEPING:

The RMS file contained a substantial amount of material including, but not limited to, copies of some pleadings, depositions and written discovery materials.⁵⁰ It is difficult to tell if all discovery materials were included. Copies of the right-to-sue letters from the DFEH were not included, but the letters rejecting the government claims were. A copy of the City's answer that assists in determining what denials and affirmative defenses were raised in response to the plaintiffs' allegations was not included.

The LTS record made brief references to the progress of the case. However, the notes were incomplete in at least three important areas, as follows:

- The most recent progress note says the “[F]oreman of the jury had major concerns about testimony from some of our witnesses.” The LTS record makes no reference to what these concerns were and what, if anything, was done in response.
- The LTS record notes that at one point questions were asked by the Claims Board about the remedial measures the Department had undertaken to prevent “this” from happening in the future. There is no information indicating what the Department's response was to these questions or the Department's progress in implementing such remedial measures.
- The LTS record does not make reference to whether attending depositions, reviewing discovery or attending trial resulted in a review of policies, practices, training or conduct, or whether any corrective actions were considered as a result of these litigation-related activities.

This litigation arises from how the Fire Department handles certain critical issues directly related to the disciplinary process. These issues include when and how employees are tested when they are suspected of appearing for duty while under the influence of alcohol and rights to union representation, as well as when and under what circumstances employees are entitled to a name-clearing liberty interest hearing. Many issues related to the Department's program of initial firefighter training were also raised. The RMS file materials and record keeping provide no evidence these issues were fully vetted either during or after the trial in an attempt to prevent, or at least reduce, the risk of similar allegations and lawsuits in the future.

The issues continue to be relevant. About one year after the verdict was returned in this lawsuit the Fire Department was again confronted with an employee who was suspected of appearing for

⁵⁰ A substantial amount of additional file material, which had not been provided when this office first requested the case materials, was provided for review after a first draft of this section of the report was completed, suggesting a need for an improved record keeping system. The additional material was fully considered in preparing this final version.

duty while under the influence of alcohol. A urine sample was obtained and tested in the same manner as that used for these plaintiffs. It is possible that many of the issues related to alcohol testing raised in this earlier lawsuit may now be raised again by this employee if disciplinary charges are brought. During the course of this audit and assessment, personnel currently assigned to the PSD said they have received no information from the RMS about the alcohol testing procedure or other issues raised in this lawsuit since it was concluded.⁵¹

EXECUTIVE DIRECTIVE NO. 9 CRITERIA:

Claim and case tracking:

This audit was able to verify that the plaintiffs presented their government claims on their defamation and intentional infliction of emotional distress causes of action in a timely manner.⁵² The plaintiffs also timely sought right-to-sue letters from the DFEH on their discrimination claims. The file material contained a copy of the March 7, 2005 letters from the City Attorney's Office rejecting each of the government claims.

Liaison and support activities:

There is substantial evidence that a member of the RMS provided support and liaison services throughout the litigation. The first litigation liaison assigned to the case obtained documents for the defense attorney. The second litigation liaison assigned to the case assisted in responding to voluminous written discovery requests, and attended depositions, a Claims Board meeting, a settlement conference and trial.

Investigation of case facts and review of discovery materials:

This office could not determine from the material reviewed whether the RMS was involved in an investigation of the claims before the lawsuit was filed. It does not appear as though the litigation liaisons conducted any early investigations of the facts after the lawsuit was filed, although at least one of them did attend interviews conducted by the defense attorney. While a litigation liaison did attend pretrial depositions, it does not appear that the litigation liaison reviewed plaintiff-produced discovery.

Mediation and settlement discussions:

It is clear that a member of the RMS did attend a Claims Board meeting where obtaining settlement authority was discussed. Although it is noted that the Department was asked questions about the case, there is no indication what those questions and answers were.

Two of the plaintiffs initially agreed to accept \$190,000 to settle their lawsuit. The City also authorized a settlement in this amount. However, the settlement was never concluded. The three

⁵¹ The PSD was aware of the issues before trial. A chief officer in the PSD responded to questions about alcohol testing in a letter dated April 8, 2008, which stated that a first void of urine was used for testing and that the Department "cites BAC results when the test results come in." PSD chief officers were present for a June 13, 2008 Fire Commission Personnel Committee meeting where these issues were discussed. The City Attorney's Office was also present at that meeting.

⁵² State claims presentation requirements did not apply to the plaintiffs' other causes of action because these requirements do not apply to federal civil rights actions. *Felder v. Casey*, 487 U.S. 131 (1988). An action for relief under the Fair Employment and Housing Act is not subject to the claims procedures. *Murray v. Oceanside Unified School District* (2000) 79 Cal.App.4th 1338, 1358.

plaintiffs requested more than \$1 million at the conclusion of trial. The jury, instead, returned a verdict in favor of the defendants. The RMS files do not indicate if a settlement offer had been made pursuant to Rule 68 of the Federal Rules of Civil Procedure.

Reviews of and actions to correct Department policies, practices and/or employee conduct:

One of the litigation liaisons assigned to this case reported that the City Attorney's Office "looked at" the name-clearing liberty interest issue at some point during the litigation; that the litigation liaison reviewed the need to change the substance abuse policy and met with a subject matter expert from health services. After also consulting with the city attorney, recommendations were then provided to a Department supervisor. The RMS file material contained a copy of a good outline from the City Attorney's Office with helpful information on how to handle a name-clearing liberty interest hearing involving someone in a "recruit status."⁵³

The RMS files and LTS record do not indicate what actions were taken in response to a review of the name-clearing liberty interest and substance abuse policy issues after recommendations were passed on to a Department supervisor. A revised substance abuse policy was drafted in May 2005 but was never brought before the Board of Fire Commissioners or adopted. The 1989 substance abuse policy that was in effect at the time of the events at issue in this case remains the current policy.

REPORTING TO THE FIRE CHIEF AND BOARD OF FIRE COMMISSIONERS:

The RMS file materials and the LTS record do not reference what, if any, information was provided to the Fire Commission and/or the Fire Chief concerning this lawsuit. The lawsuit appeared on the Fire Commission agendas for 11 closed session meetings from March 2010 to May 2011.

The incident giving rise to this lawsuit did result in policy discussions related to the collection of urine samples and alcohol testing with at least the Fire Commission's Personnel Committee (Personnel Committee). At the December 8, 2006 meeting, Commissioner Casimiro Tolentino directed the Fire Department to review the substance abuse policy in light of concerns raised by the mother of one of the recruits.⁵⁴ A chief officer informed the Personnel Committee that all aspects of the policy would be reviewed. The City Attorney's Office told the Personnel Committee that the policy would be reviewed and compared with that of the Police Department.⁵⁵

On April 20, 2007, the chief officer charged with reviewing the Fire Department's substance abuse policy informed the Personnel Committee that the policy had not been changed since 1989 and that Dr. Jothan Staley from the City Personnel Department was recommending that the Fire Department revise the chemical testing portion of the Department's "reasonable suspicion" testing policy.⁵⁶ The chief officer went on to inform the Personnel Committee that the policy

⁵³ The outline appears to be current as of March 30, 1994.

⁵⁴ Audio recording of the December 8, 2006 Personnel Committee meeting.

⁵⁵ No evidence could be found in the Fire Commission's files that a review and comparison was provided by the City Attorney's Office.

⁵⁶ Audio recording of the April 20, 2007 Personnel Committee meeting.

“will be revised, or was going to be recommended to be revised,” to “expand testing from the simple urine test to include the breathalyzer because, according to Dr. Staley, that’s the industry standard.”⁵⁷

On June 13, 2008, the Fire Department’s substance abuse policy was again discussed when the PSD presented information to the Personnel Committee concerning members arrested for the crime of driving while under the influence.⁵⁸ Toward the end of the discussion, Commissioner Tolentino asked if the Department was using a breathalyzer when a member was suspected of being under the influence of alcohol while on duty. The Department responded by saying “no.” When there was a delay after Commissioner Tolentino asked “Why not?” he asked if there was a particular reason why this should not be discussed since it was a policy matter. At that point, Commissioner Genethia Hudley-Hayes requested information about breathalyzers, a first void of urine and blood alcohol testing. The Personnel Committee also requested copies of the substance abuse policies for both the City of Los Angeles and for the Fire Department.

Although the Personnel Committee has held subsequent meetings, the information requested on June 13, 2008, has not been provided. No evidence could be found that would indicate the Department addressed the substance abuse policy issues with the full Commission since June 13, 2008.

MISCELLANEOUS CRITERIA:

Timely complaint containing all allegations:

The complaint initiating the lawsuit was filed in state court on October 19, 2005, which is more than six months after the government claims were rejected. There is nothing in the RMS file or the LTS record indicating an attempt was made to dismiss the claims of defamation and intentional infliction of emotional distress before the trial based on the fact the complaint was filed more than six months after the government claims were rejected.⁵⁹ Both the initial complaint and first amended complaint also failed to allege compliance with the government claims presentation requirements on these issues.⁶⁰

The complaint initiating the lawsuit does allege compliance with the DFEH requirement to obtain a right-to-sue letter. The actual letters were not included in the materials reviewed for this

⁵⁷ Audio recording of the April 20, 2007 Personnel Committee meeting. Jothan Staley was employed as a medical doctor and assigned to the Medical Services Division of the City Personnel Department at the time.

⁵⁸ Audio recording of the June 13, 2008 Personnel Committee meeting.

⁵⁹ The claimant must ordinarily file suit within six months after a written notice of claim rejection is personally delivered or deposited in the mail. California Government Code, section 945.6, subd. (a)(1); *County of Los Angeles v. Superior Court (N.L.)* (2005) 127 Cal.App.4th 1263; and *City of Los Angeles v. Superior Court (Katz)* (1993) 14 Cal.App.4th 621, 629. The court dismissed the emotional distress claim on a motion for summary judgment but not the defamation cause of action. The complaint set forth a prayer for punitive damages against the two chief officers. The City and chief officers accused of making defamatory statements had a strong interest in having the defamation cause of action dismissed at the earliest opportunity before trial. Fortunately, the jury returned a defense verdict on this cause of action.

⁶⁰ Presentation of a claim, when required by law, is a mandatory prerequisite to maintaining a cause of action against a public entity, and a failure to allege facts demonstrating or excusing compliance with the claims presentation requirement subjects a complaint against a public entity to a demurrer for failure to state a cause of action. *State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1239.

audit. The City Attorney's Office attempted to have the plaintiffs' harassment cause of action eliminated based on an argument that a right-to-sue letter had not been obtained for the harassment claim. The court found that the plaintiffs' DFEH claim was sufficient.

Defense's use of experts to refute testimony given by Plaintiffs' expert witnesses:

The record clearly demonstrates that the City called expert witnesses to counter the testimony of the plaintiffs' experts on both discipline and alcohol related issues at the time of trial. The record also indicates that expert testimony came at a significant price to the City. The alcohol expert said he expected to bill a total ranging from \$14,000 to \$18,000. The expert on disciplinary matters said he expected to bill approximately \$10,000 for his services. Such costs provide a substantial incentive to adopt policies and practices that seek to eliminate, or at least substantially reduce, their necessity.

Review of personnel files:

The plaintiffs said they were told they were eligible to be rehired by the Department. One of the plaintiffs said he reapplied within days of resigning in lieu of dismissal and once again later, but was rejected during the background phase after passing the written test each time. His testimony suggested the then Fire Chief was insincere about rehiring the recruits. The Fire Chief at the time acknowledged saying the plaintiffs would be eligible for rehire, but that an application within a week after resigning in lieu of discharge was not realistic. This office agrees.

The personnel files for the three plaintiffs were reviewed in an attempt to determine what the files said about "rehire rights." Each file currently contains a notation: "Resignation in lieu of discharge – No rehire" at the top of a form in the section titled "Action." However, in a specifically designated area of the form titled "Eligible For Rehire" each form says "Yes." This office was told that the comment is the only one permitted by the computer and that the Personnel Services Section would rely on the comment in the "Eligible For Rehire" area of the form. Therefore, and according to the Personnel Services Section, each plaintiff would be eligible for rehire.

REVIEW OF ALCOHOL TESTING:

This office conducted a review of alcohol testing for the purposes of this report given: 1) the concerns about alcohol testing that have been raised by the mother of one of the recruits since at least 2006; 2) there have been no changes in how the Fire Department tests for alcohol since the Department's April 2007 statement to commissioners that the policy would be revised to include the use of breathalyzers; 3) a Fire Commissioner's request for information about breathalyzers, first voids of urine and blood alcohol testing has gone unanswered since June 13, 2008; and 4) the evidence presented during the trial.

The need to ensure the Fire Department relies only on valid alcohol test results in disciplinary investigations should be obvious. While there may be differing burdens of proof, and as the testimony of the alcohol experts in the **civil litigation** brought by Mattson, Sarver and Stien clearly demonstrates, the need for reliable and valid scientific evidence is not limited to **criminal prosecutions**. The fact the jury decided these plaintiffs did not prove their case by a

preponderance of the evidence does not validate the Department's method of testing for alcohol nor does it prevent future legal challenges.

The Fire Department's current written policy says a member will be considered impaired and unable to perform his or her duties in a safe manner if the alcohol level is as low as .01%. In administering this policy, the Department will discipline employees if they have a blood alcohol concentration (BAC) of .01% or more. To determine the BAC, the Department obtains a urine sample for testing. Therefore, the extent to which a urine sample may be relied on to provide an accurate BAC level is critical.

Review of Mattson test result:

The scientific testing of urine samples obtained from Fire Department employees to determine the presence of alcohol is exemplified by the urine sample obtained from Recruit Brett Mattson on October 22, 2004. It was submitted to Quest Diagnostics to determine if alcohol was present. The resulting laboratory report provided to the Fire Department said the quantity of alcohol in the sample tested was .03 g/dL. This is a report of the urine alcohol concentration (UAC), not the BAC.⁶¹ However, the Department thereafter erroneously referred to the number set forth in the laboratory report as a BAC.

According to the alcohol experts who testified during trial, the conversion factor that should be applied to the test result obtained from Quest Diagnostics (a UAC) in order to determine the BAC is 1.3. According to a physician from Quest Diagnostics, in order to establish the BAC for the urine sample submitted, the .03 UAC would have to be divided by a conversion factor ranging from 1.5 to 1.8.⁶² The fact a physician at Quest Diagnostics would use a different conversion factor, and a range of 1.5 to 1.8 at that, only adds to the potential confusion when attempting to convert a UAC to a BAC.

Review of scientific literature:

A substantial amount of scientific literature discusses the problems associated with relying on a urine sample to obtain a valid BAC.

- According to the American Medical Association, “[i]f a person starts drinking with the bladder full of urine, or has not voided for some hours, while the blood level of alcohol is decreasing, the level in the bladder may change more slowly than that of the blood as the latter rises or falls. This discrepancy can be overcome by having the subject empty his bladder and by taking the sample of urine after 20 minutes.”⁶³
- In concluding that “urine alcohol estimation is unreliable,” British scientists from the Royal Air Force Hospital's Department of Pathology commented that “it is disturbing ... to find that in this study the 1.33 conversion factor applies to only 2 of 59 cases.”⁶⁴

⁶¹ Confirmed by Dr. Rodica Predescu, Director of Laboratory Operations for Quest Diagnostics/Employer Solutions on December 22, 2011.

⁶² December 22, 2011 conversation with Dr. Predescu.

⁶³ *Alcohol and the Impaired Driver: A Manual on the Aspects of Chemical Tests for Medicolegal Intoxication*, p. 19 (1968): American Medical Association.

⁶⁴ *Further Observations on the Validity of Urine Alcohol Levels in Road Traffic Offenses*, 17(4) *Medical Science and the Law* 269 (1977).

- Researchers at Duquesne University concluded, “the unreliability of using a urine ethanol concentration to predict a blood ethanol concentration cannot be questioned.” They also said, “[f]or the 714 cases where the BAC was greater than 0.10%, the mean urine to blood ratio was 1.18 with a range of 0.07-3.40. The wide range ... indicates the high probability of a large error being introduced into the calculations of a blood ethanol value from a urine ethanol concentration when using an average value from the ratio of urine to blood ethanol concentration.”⁶⁵
- Two criminalists from the California Department of Justice, Bureau of Forensic Services wrote: “To validate further the accuracy of a BAC determined from the urine sample taken after first voiding the bladder, and to determine if the BAC has increased or decreased during the time between voiding and the second urine ‘sample,’ at least 30 ml portion of the ‘void’ urine sample should be collected, analyzed, and reported together with the second urine ‘sample’ results.” They also concluded that “it should be conceded that a reasonable potential variation up to 1.5:1 could apply in some cases.”⁶⁶
- Another researcher recommended against translating a UAC to a BAC using the 1.33:1 ratio because of “large inter-subject and intra-subject variations.” The conversion cannot accurately be made when, among other things, “the previous drinking pattern, the frequency of urination, and the functioning of the kidneys and bladder are unknown.” In the study actual UAC/BAC ratios observed were higher than ratios commonly set by statute, with the result that BACs based on urinalysis will be erroneously high.⁶⁷

Statutes, Regulations, Policies and Bulletins:

The scientific literature appears to provide the basis for various statutes, regulations, policies, practices and bulletins that address testing for alcohol:

- Those arrested for an alleged violation of the drunken driving laws have the choice of a urine test only where blood and breath testing are “unavailable.”⁶⁸
- The only approved urine sample shall be a sample collected no sooner than 20 minutes after first voiding the bladder.⁶⁹
- In urine alcohol cases a precaution is necessary that is not an element in blood sample cases. The subject must first empty his or her bladder (“void”). After waiting at least 20 minutes, the analysis “sample” is collected. It is important to accurately note the time of the “void” and “sample” (if applicable) on the sample label and sample envelope.⁷⁰

⁶⁵ Winek, Murphy and Winek, *The Unreliability of Using a Urine Ethanol Concentration to Predict a Blood Ethanol Concentration*, 25 Forensic Science International 277, 280 (1984).

⁶⁶ Biasotti and Valentine, *Blood-alcohol Concentration Determined from Urine Samples as a Practical Equivalent or Alternative to Blood and Breath Alcohol Tests*, 30 Journal of Forensic Sciences 194 (1984), p. 206.

⁶⁷ Jones, *Ethanol Distribution Ratios Between Urine and Capillary Blood in Controlled Experiments and in Apprehended Drinking Drivers*, 37(1) Journal of Forensic Science 21 (1992).

⁶⁸ California Vehicle Code, section 23612.

⁶⁹ 17 California Code of Regulations section 1219.2, subd. (a).

⁷⁰ California Department of Justice, Bureau of Forensic Sciences, *Physical Evidence Bulletin* (Rev. 12/11).

- The City alcohol testing policy used for all employees other than sworn personnel in the Fire and Police Departments, relies on a breathalyzer for testing in cases where there is a reasonable suspicion an employee is under the influence of alcohol.⁷¹
- On April 20, 2007, the Fire Department told the Fire Commission's Personnel Committee that the policy "will be revised, or was going to be recommended to be revised," to "expand testing from the simple urine test to include the breathalyzer because, according to Dr. Staley, that's the industry standard."

SPECIFIC FINDINGS & RECOMMENDATIONS:

Findings:

6. The City Attorney's Office obtained an excellent trial result, and the city attorney made efforts to reduce the issues to be tried by a jury by pursuing a pretrial motion for summary judgment.
7. The Department's litigation liaison activities contributed to the excellent trial result.
8. An out-of-date policy governing how the Fire Department tests for alcohol impairment contributed significantly to the City being exposed to a lawsuit that was expensive to defend.
9. The Fire Department incorrectly assumed the lab result was a blood alcohol concentration when in reality it was a urine alcohol concentration.
10. The manner in which the Fire Department currently tests for alcohol impairment places the Department at an unnecessary risk of having alcohol test results challenged in disciplinary proceedings, and places the City at an unnecessary risk of expensive litigation. These risks have not been sufficiently mitigated in the year and a half since this litigation concluded.
11. The Fire Department has unreasonably delayed revising how it tests for alcohol impairment since the Fire Commission's Personnel Committee was told on April 20, 2007, that the Department would revise how it tests for alcohol impairment.⁷²
12. While the Department's current practice is to discipline members for having a blood alcohol concentration of .01 percent or above, the Department's written procedures only permit obtaining of a urine sample. The written procedures actually prohibit obtaining a

⁷¹ Report to the Board of Civil Service Commissioners, Follow-Up Information – Response to Request for Information Regarding Alcohol Testing (July 18, 2008). This report also says the Police Department uses urine, blood or a breathalyzer.

⁷² Executive Directive No. 9 requires the Department to consider corrective action after the early investigation, periodically as appropriate throughout the litigation and within 30 days after judgment.

blood sample in lieu of urine to determine a blood alcohol concentration unless the member is unable to provide urine due to unconsciousness.⁷³

13. Chief officers needlessly exposed the City and themselves to an expensive lawsuit by making inappropriate comments and failing to comply with the Department's substance abuse policy, which requires an individualized reasonable suspicion determination.⁷⁴
14. There was much inconsistent testimony concerning when and under what circumstances a name-clearing liberty interest hearing is required, whether recruits are entitled to union representation during disciplinary proceedings, how "absent without leave" is interpreted and whether the recruits had sufficient time to decide whether they should resign in lieu of discharge.
15. The Department appropriately determined a need to end the practice of training staff attending graduation parties, and attempted to discipline one captain for doing so. Some current members of the Department saw nothing wrong and even suggested it would be disrespectful to make training staff pay for drinks at a graduation party. One member of the training staff said he did not know there was a rule prohibiting fraternization with recruits.

Recommendations:

6. The Fire Chief and the Fire Department should be instructed to provide a revised written substance abuse policy to the Fire Commission for consideration and approval. This policy should clearly state Department members will be considered impaired and unable to perform their duties in a safe manner if their blood alcohol concentration is .01 percent or more. The revised written policy should be provided to the Fire Commission in no more than 30 days.
7. The Fire Chief and the Fire Department should be instructed to stop the manner in which blood alcohol concentration levels are currently tested. The Fire Chief and the Fire Department should be instructed to begin utilizing the City Personnel Department's process to determine both blood alcohol concentration levels and substance abuse.⁷⁵
8. The Fire Chief and the Fire Department should be instructed to revise the Department's written substance abuse practices and procedures in order to:

⁷³ Los Angeles Fire Department, April 4, 1989 memorandum re: Substance Abuse, p. 2.

⁷⁴ While the City prevailed on these issues, employees should not engage in obviously inappropriate conduct that exposes them and the City to litigation, as this can result in completely unnecessary expense to the taxpayers.

⁷⁵ After establishing reasonable suspicion by completing a Reasonable Suspicion Observation Form, the employee is transported to the Medical Services Division (MSD), or a contract testing facility, to be tested. The Reasonable Suspicion Observation Form is turned over to MSD staff, the employee is examined by a doctor who determines whether the employee should be tested for alcohol/drugs. Typically the employee will be tested for both alcohol and drugs, using a breath test for alcohol and a urine test for drugs. The alcohol test results are available immediately and the drug test results are provided in 3-10 working days.

- a. Ensure reasonable suspicion determinations are made only by appropriately trained personnel who are able to demonstrate proficiency in making such determinations; and
 - b. Effectively and efficiently facilitate the City Personnel Department's testing of both blood alcohol concentration levels and substance abuse.
9. In complying with these recommendations, the Fire Department should immediately obtain the advice of the City Attorney's Office to determine the extent to which the Department is required to "meet and confer" about these recommended changes in the Department's policies, practices and procedures related to alcohol and substance abuse testing.⁷⁶
10. The Department should adopt written procedures that clearly define when a name-clearing liberty interest hearing is required, who is entitled to such a hearing and what the requirements are for such a hearing.

⁷⁶ These recommendations are simply intended to ensure that scientifically reliable and valid test results are obtained, employees' rights are protected and exposure to expensive litigation is reduced. This audit did reveal the existence of a Letter of Intent between the City and the Chief Officers Association stating that the parties agree to begin negotiations for a substance testing program by no later than June 2007, and such a program will include urine and/or hair testing. These negotiations have not been initiated as of the date of this report.

SUSAN SPENCER LAWSUIT

CASE BACKGROUND:

Allegations:

On June 11, 2007, Firefighter/Paramedic Susan Spencer filed a lawsuit against the Fire Department alleging discrimination on the bases of gender and physical disability, and retaliation.⁷⁷ Spencer claimed she was subjected to a continuous pattern of harassment and discrimination because of her gender, including: being drilled excessively in ladder, hose, pickaxe and sledgehammer drills while in the drill tower, which resulted in a shoulder injury; being unnecessarily retested on ladder drills after returning to duty, which resulted in a knee injury; having the shield for her helmet withheld by the captains because they wanted her to complete a 10-month physical agility evaluation that was typically waived in situations like hers; having her equipment hidden from her or tampered with; rumors and derogatory comments made about her while trying to transfer to the Operations Control Division (OCD); and being accused of benefit abuse.⁷⁸

Trial:

The jury trial lasted approximately three weeks. On August 13, 2009, the jury returned a special verdict finding in favor of the City, and judgment was entered on September 10, 2009.⁷⁹ Specifically, the jury found that Spencer was an employee of the Fire Department and that she had complained of gender discrimination but that the City had not taken any adverse employment actions against her.⁸⁰

RMS RECORD KEEPING:

While the RMS maintained some records for the Spencer case, they were not complete. The LTS record contained the following: a short summary of the case; dates for the case management conference, plaintiff's deposition, mediation, continuances, trial and final status conference; and a short description of a meeting with the city attorney on the case. The case file from the RMS' files contained the following: a copy of the plaintiff's DFEH complaint and right-to-sue letter; the deposition of a deputy chief; two emails from the city attorney on the case; and detail letters for Department members who might be needed at trial. Additionally, the RMS provided electronic copies of personal appearance subpoenas for Department members. The case file did not contain a copy of the complaint, any motions filed by the City (there were six motions in limine at trial) or the special verdict.

EXECUTIVE DIRECTIVE NO. 9 CRITERIA:

Claim and case tracking:

From the materials provided by the RMS, it appears that Spencer's claim and case were sufficiently tracked by the Department. The City Personnel Department received a copy of

⁷⁷ Complaint filed on June 11, 2007, Los Angeles County Superior Court, Case No. BC372501.

⁷⁸ Complaint filed on June 11, 2007, Los Angeles County Superior Court, Case No. BC372501.

⁷⁹ Los Angeles County Superior Court, Case No. BC372501.

⁸⁰ Special Verdict filed on August 13, 2009, Los Angeles County Superior Court, Case No. BC372501.

Spencer's DFEH complaint and right-to-sue letter on October 27, 2006. This was then forwarded to the Fire Chief's office and received three weeks later on November 17, 2006. (The Personnel Department forwarded a copy to the City Attorney's Office at the same time.) The complaint was filed on June 11, 2007, and the RMS received the case approximately three weeks after that on July 3, 2007.

What is not clear is whether there was any further legal activity in the case after the trial result. It is common for an appeal or new trial motion to be filed. Whether there was some agreement not to pursue these remedies in exchange for a waiver of costs is not explained in the LTS record or case file materials made available for review.

Liaison and support activities:

The RMS case file contained evidence that the RMS served as litigation liaison for the city attorney assigned to this case. The case file contains copies of emails between the city attorney and RMS staff regarding collecting information and coordinating witnesses for trial, as well as copies of all the detail letters notifying Department members that they would be on-call during the trial. There was also evidence that the Department assisted in preparing the witness list and made notifications to witnesses.

Investigation of case facts and review of discovery materials:

There was no evidence that the Department conducted an early review of the allegations in this case or the underlying facts. This case was transferred between litigation liaisons after discovery had been completed. The LTS record includes many of the significant dates in the case, including the dates for the case management conference, plaintiff's deposition, mediation, trial and final status conference.

The case file contains a copy of a deputy chief's deposition and there is evidence he was asked to review it in preparation for trial. However, there is nothing to suggest that deposition, or any other pretrial discovery was reviewed by the RMS or Department in an attempt to evaluate what, if any, corrective actions should be taken. There was no opposition-produced discovery documents in the case file.

Mediation and settlement discussions:

This office found no evidence related to mediation or settlement discussions involving the Department in this case. Whether a settlement offer was made at some point during the litigation was not recorded in the materials provided for review.

Reviews of and actions to correct Department policies, practices and/or employee conduct:

Spencer claimed she was required to perform a 35-foot extension ladder drill using two rather than three members for either a discriminatory or punitive purpose. It is less clear when this alleged abuse involving a 35-foot ladder drill was to have occurred. The Department indicated that the same issues had been raised in other cases and that the City Attorney's Office provided advice regarding corrective action in response to those other cases.

This practice was indeed at issue in other cases not set forth in this report. A change in how the Department trains with a 35-foot extension ladder was memorialized in Department Bulletin No.

05-09, dated June 15, 2005. This was approximately one month after an earlier lawsuit involving the issue had been filed.

Since this bulletin outlining the limited circumstances under which two members could drill with a 35-foot ladder was issued before Spencer filed her lawsuit, no further review of the policies, practices or employee conduct related to the two-member drill was conducted in response to the Spencer case.

A chief officer did direct that Spencer should receive her helmet shield when he observed she did not have one. The same chief officer later indicated to subordinates that Spencer was to complete a 10-month physical agility evaluation when they asked. The extent to which further counseling, retraining or other corrective action steps were considered or taken in response to Spencer's allegations, in an attempt to reduce the exposure to similar claims in the future, was not mentioned in the materials provided for review.

REPORTING TO THE FIRE CHIEF AND BOARD OF FIRE COMMISSIONERS:

It does not appear the Spencer case was ever discussed with the Fire Commission because it was never listed on any of the meeting agendas. This office was unable to determine the extent to which the Spencer case was discussed with the Fire Chief.

MISCELLANEOUS CRITERIA:

Timely claim filing:

Spencer claimed that the discriminatory actions taken against her began before and occurred as recently as November 2005. She filed her DFEH complaint on August 29, 2006. Accordingly, her DFEH complaint was filed less than one year from the date of the most recent alleged wrongdoing, and thus was timely.

Timely complaint containing all allegations:

Spencer's right-to-sue letter from the DFEH was dated September 20, 2006, and she filed her complaint on June 11, 2007. Accordingly, her complaint was filed within one year of the closure of her claim and was thus timely.

In her DFEH complaint, Spencer claimed that she had been harassed on the bases of her gender and on-duty physical injury, denied accommodation, subjected to retaliation, and that the Fire Department failed to remedy these actions. Her complaint stated substantially the same things, including being subjected to a hostile work environment, targeted for excessive drilling because of her gender and other instances of discrimination and harassment. Accordingly, Spencer's allegations in her complaint matched those listed on the DFEH claim.

STEVEN ROBINSON LAWSUIT

CASE BACKGROUND:

Allegations:

On December 2, 2009, Firefighter Steven Robinson filed a lawsuit against the Fire Department alleging discrimination on the basis of disability and failure to accommodate a disability.⁸¹ A Second Amended Complaint added a charge of failure to engage in the interactive process.⁸² The pleadings alleged that in 1998, while working as a helicopter pilot for the Fire Department, Robinson was seriously injured when his helicopter crashed due to a serious technical defect. After receiving care, he returned to full, unrestricted duty, but in 2001 he began suffering from seizures related to a head injury caused by the crash. As a result, Robinson became disabled.

The lawsuit alleged that in 1999, the City Council and Mayor approved a civil service position for Fire Helicopter Pilots. Robinson alleged this position was created to accommodate pilots who suffered serious injury in the line of duty and were no longer able to fly so they would not suffer a decrease in pay and benefits; rather they would become captains.⁸³ This position did not become available until late 2008.

After requesting a light-duty position be created for him with the same pay and benefits as his former position, Robinson alleged he was given numerous promises that he would continue to receive pay at the level of a pilot.⁸⁴ In April 2007, Robinson alleged he was told that a former fire chief's promise that he could remain in the Air Operations Section (AOS) and retain his pilot salary and benefits would not be honored, and that he must begin the interactive process to find a suitable position. Robinson claimed that other similarly situated individuals were reasonably accommodated while he was not, and thus the Fire Department was discriminating against him on the basis of his disability.

In late 2007, he claimed being told he would be included on the list of pilots to be transferred to the civil service Fire Helicopter Pilot position. However, in early 2008, Robinson was trained as a dispatcher and reassigned from his position in the AOS to the OCD.⁸⁵ When other qualified individuals were transferred into the Fire Helicopter Pilot position in late 2008, Robinson was not similarly transitioned. Robinson remained assigned as a dispatcher, at a 25% pay reduction.

Court proceedings:

Robinson filed his lawsuit on December 2, 2009.⁸⁶ That was followed by a First Amended Complaint on March 2, 2010, and a Second Amended Complaint on June 28, 2010. The City filed its motion for summary judgment (motion) on August 10, 2010, in an attempt to have the court dismiss the lawsuit. The City's motion was well researched, reasoned and presented. The

⁸¹ Complaint filed on December 2, 2009, Los Angeles County Superior Court, Case No. BC427150.

⁸² Second Amended Complaint filed on June 28, 2010, in Los Angeles County Superior Court, Case No. BC427150.

⁸³ Complaint filed on December 2, 2009, Los Angeles County Superior Court, Case No. BC427150.

⁸⁴ Complaint filed on December 2, 2009, Los Angeles County Superior Court, Case No. BC427150.

⁸⁵ Complaint filed on December 2, 2009, Los Angeles County Superior Court, Case No. BC427150.

⁸⁶ Los Angeles County Superior Court, Case No. BC427150.

court granted the motion on November 8, 2010. Judgment in favor of the City was entered on November 29, 2010, and Robinson filed his notice of appeal in January 2011.⁸⁷

The evidence submitted in support of and in opposition to the motion established that Robinson was seriously injured as a result of a helicopter crash through no fault of his own.⁸⁸ He was receiving helicopter pilot bonus pay in addition to his firefighter salary at the time of the crash.⁸⁹ He was prohibited from flying aircraft when his FAA Medical Certificate was revoked as a result of an accident-related seizure in September 2001.

The Fire Department permitted Robinson to continue working in an unfunded, light-duty position at the Fire Department's AOS where he continued to receive his helicopter pilot bonus pay despite not having a valid pilot's license for almost eight years.^{90, 91}

In January 2003, the Fire Commission adopted an Americans with Disabilities Act Policy and Accommodations Request Procedure. In April 2007, the Department initiated the Reasonable Accommodation Process in an attempt to place Robinson in a funded position for which he was qualified, but would not permit him to continue receiving his helicopter pilot bonus pay. Robinson rejected these positions, contending the pay reduction was unreasonable and that he had been promised that he would retain his bonus pay and light-duty position for the balance of his career.⁹²

A new fire chief had decided Robinson could no longer remain in the unfunded position, as creating a position for a specific person set a poor precedent.⁹³ As a result, Robinson was transferred to the OCD to become a dispatcher. At the conclusion of his OCD training in June 2009 he lost his helicopter pilot bonus pay.⁹⁴

Robinson's opposition to the motion argued that he should have been reclassified to a newly created civil service Fire Helicopter Pilot position, that he was not reasonably accommodated, that he was discriminated against on the basis of his disability and that the Department had

⁸⁷ Los Angeles County Superior Court, Case No. BC427150; California Court of Appeal, 2nd District, Case No. B230078.

⁸⁸ The crash was a terrible tragedy. It resulted in the death of three members of the Fire Department and an 11 year-old child who was being flown to a hospital following an auto accident. Another member of the Fire Department was seriously injured in addition to Robinson.

⁸⁹ The biweekly bonus pay was \$1,140 at the time Robinson was assigned as a dispatcher. The helicopter pilot bonus pay at the time of the crash was at a lower amount.

⁹⁰ Robinson received approximately \$208,196 in helicopter pilot bonus pay from October 6, 2001, to June 20, 2009.

⁹¹ It was uncontested that he developed and implemented an award-winning fire prediction mapping system that was of great value in fighting wildland fires while assigned to the AOS. Some of this work involved flying in (as opposed to piloting) a helicopter. Robinson also assumed other responsibilities such as helitac training, which did not require a license to fly a helicopter.

⁹² Robinson remains a current Fire Department employee.

⁹³ The City Administrative Officer had previously advised against the Fire Department employing persons in unfunded positions. Robinson was one of 20-30 persons in such positions. It appears that all unfunded positions were eliminated at the same time as Robinson's.

⁹⁴ On July 22, 2008, the City's Executive Employee Relations Committee directed that Robinson be reassigned to duties compatible with his restrictions and paid at a level commensurate with his assigned duties.

effectively created a position at the AOS where he could have been accommodated.⁹⁵ The City's motion papers effectively and persuasively presented law and evidence showing that Robinson was not entitled to the various positions he sought, and was not discriminated against because he was not qualified and/or no longer held the licenses required for the positions.

Appeal/Future activity:

Robinson filed an appeal after the trial court granted the City's motion for summary judgment, and both sides have filed their appellate briefs.

Robinson's contention on appeal is that: 1) the new Fire Helicopter Pilot position was created so that when a pilot is disabled or restricted from flying he or she can be reassigned to the rank of Captain rather than to the rank of Firefighter, and he should have been included in the new classification so he could become a captain instead of a firefighter in the OCD; 2) the unbudgeted mapping tasks to which he was assigned at the AOS developed into a "created position" because it was valued by the department; and 3) the City did not meet its obligation to engage in the interactive process.

The City's appellate brief, like its motion for summary judgment, was well researched and written. The City argues, among other things: 1) the Fire Helicopter Pilot position was not created to accommodate disabled pilots; 2) since Robinson was not qualified to pilot helicopters, he could not be reasonably accommodated in the new classification; 3) he was reasonably accommodated as a dispatcher because it was within his Firefighter classification; and 4) his temporary light-duty assignment did not become funded because it was "important" or valued by the Department.

Oral argument in the Court of Appeal has been set for May 16, 2012. A decision is expected shortly thereafter.

RISK MANAGEMENT SECTION RECORD KEEPING:

While there was no Robinson file in the RMS case records cabinet, the materials provided upon request from this office were more complete than those in some of the other cases reviewed during the course of this audit.

The materials provided by the RMS include the following: the original and second amended complaints; a memorandum from the city attorney regarding the civil service Fire Helicopter Pilot position; the minute order granting the City's motion for summary judgment; an investigative report following Robinson's stress claim; a copy of the City's motion for summary judgment and the attached materials; multiple emails to and from the city attorney and Department representatives assigned to the case; copies of discovery demands and responses; notices for depositions and court appearances; and other background and informational documents. These materials did not include any of the six motions in limine filed by the City.

⁹⁵ Plaintiff' Opposition to Motion for Summary Judgment filed on October 12, 2010, Los Angeles Superior Court, Case No. BC427150.

The LTS record contained the following: a short summary of the case; when the case was handed off to another city attorney and meetings with the new attorney; communications from the attorney regarding mediation and status conferences; dates of interviews with Department members and the plaintiff's deposition; and a summary of what transpired at the mediation.

The RMS and City Attorney's Office also provided some of the appellate briefs.

EXECUTIVE DIRECTIVE NO. 9 CRITERIA:

Claim and case tracking:

From the materials obtained by this office, it appears the RMS received notice of Robinson's first DFEH claim in May 2009, but did not begin tracking the case until a month after the lawsuit was filed on December 2, 2009. Robinson filed his claims with the DFEH for disability discrimination and failure to accommodate on March 9, 2009, and November 3, 2009, respectively. In his claims Robinson alleged that he was forced to transfer because of his physical and mental disability, and that such discrimination and refusal to accommodate began in February 2009 and continued to the time he filed the claims. Right-to-sue letters were issued on March 26, 2009, and November 16, 2009. Both the claims and right-to-sue letters were attached to the lawsuit, a copy of which was provided by the RMS. A former fire chief reported that RMS tracked this case from start to finish.

The first note in the LTS record is dated January 12, 2010⁹⁶, and says, "Met with City Attorney ... discussing facts in case." The other seven notations in the LTS record are each dated and briefly describe the main developments in the case. These include meetings with defense counsel, mediation, post-mediation status conference, interviews with Department members, answering discovery requests from the plaintiff, deposing the plaintiff and the judgment. These entries indicate that Department representatives were kept reasonably informed by defense counsel of developments in the case.

Liaison and support activities:

There is substantial evidence that Department representatives acted as active and effective liaisons for defense counsel in this case. The relationship between the Fire Department and defense counsel appears to have been very good and productive. One Department representative reported communicating with the city attorney assigned to the case on a daily basis, and meeting in person at least once a week.⁹⁷ He also reported providing support by getting the attorney up to speed on the organization of the Department and the meanings of some of the terminology.

Department representatives assisted in finding subject matter experts, setting up interviews with Department members and retrieving documents requested by the city attorney, as well as providing additional ones that they thought would be useful. Department representatives also attended interviews with members and non-members, pre-deposition preparation with members and attendance at all depositions, mediations and meetings with the Fire Chief. One

⁹⁶ The LTS incorrectly indicates the discussion took place on January 12, 2009.

⁹⁷ The city attorney involved was exceptionally cooperative with this office during the course of performing this audit and assessment.

representative described his role in attending these meetings as assisting with clarifications and answering questions, as well as reporting back to the Department about what occurred.

These activities were corroborated by the emails between Department members and the city attorney provided by the RMS. Furthermore, the LTS record contained entries related to Department representatives attending city attorney interviews of Department members, mediations and the plaintiff's deposition.

Investigation of case facts and review of discovery materials:

It appears that Department representatives were involved in the preliminary investigation into the facts in this case conducted by the assigned city attorney. Department representatives reported attending interviews with members and non-members, as well as researching and providing significant amounts of background information to the city attorney, including how transfers operate, how job classes are created and, more specifically, how the Fire Helicopter Pilot position was created and why. These actions are further corroborated by email correspondence between the Department and city attorney.

Furthermore, the materials provided by the RMS indicate that significant research was conducted concerning the underlying facts of the case. These materials included a memorandum from the City Attorney's Office in February 2009 regarding the Fire Helicopter Pilot position, Charter Section 1014 and reasonable accommodation issues; an investigation conducted by the City Personnel Department in May 2009; a timeline of Robinson's career and case; a listing of members with pending reasonable accommodation interactive procedures (including Robinson); a copy of a request that Robinson be placed in a light-duty position in the AOS until he could return to full duty; a report to the Board of Fire Commissioners on the Air Operations Workgroup; and materials related to the Department's Reasonable Accommodation Interactive Process.

One Department representative reported attending depositions and drafting responses to the plaintiff's discovery requests. He could not recall whether he reviewed the discovery requests sent by the City or the responses received from the plaintiff. The materials provided for this audit by the RMS included the City's responses to interrogatories propounded by the plaintiff, a production demand from the plaintiff, Robinson's declaration and deposition notices for Department members.

Mediation and settlement discussions:

From the RMS materials it appears that a mediation took place on June 8, 2010, and that Department representatives met with the city attorney assigned to the case ahead of time to discuss their strategy. The LTS record contained a good summary of what transpired at the mediation, including what Robinson wanted and what the Department was willing to offer him. A Department representative stated that there were no settlement discussions after the mediation.

Reviews of and actions to correct Department policies, practices and/or employee conduct:

One Department representative reported that after the case there was a meeting with the Fire Chief to discuss how he would be accommodating injured pilots in the future and to review other

pilots who were in the same or a similar situation as Robinson. He was not aware of any written policy that resulted from this discussion.

A former fire chief recalled having discussions about modifying the current reasonable accommodation policy and was told that the City had a tremendous amount of exposure. He described the problem as the Department doing a lot to accommodate injured members previously but that it was not done as much any more. He believed that an inconsistent application of policies created potential liability in this case.

REPORTING TO THE FIRE CHIEF AND BOARD OF FIRE COMMISSIONERS:

This case was listed on the agendas for Board of Fire Commissioners meetings 10 times from March 16, 2010, to May 3, 2011. One Department representative stated that the Board of Fire Commissioners had been provided updates in this case. These updates were primarily related to the status of the case and nothing more elaborate because it was not an “impactful” case. The Department representative also reported that at certain times it was unclear who was supposed to speak in a closed session meeting (Department representatives or only the city attorney).

Department representatives reported providing case status reports to the Fire Chief on a regular basis. There was also a more extensive meeting with the Fire Chief after the City’s motion for summary judgment was granted. The focus of the meeting was how to accommodate other injured pilots in the future, and they reviewed other individuals in a similar situation as Robinson.

MISCELLANEOUS CRITERIA:

Timely claim filing:

Robinson alleged that the discriminatory actions taken against him began in February 2009 and continued until he filed his second DFEH claim in November 2009. Accordingly, the DFEH claims were filed within one year from the ending date of the discriminatory actions, and thus were timely.

Timely complaint containing all allegations:

Robinson received his right-to-sue letters on March 26, 2009, and November 16, 2009. He then filed his complaint on December 2, 2009. Accordingly, his complaint was timely because it was filed within one year of receiving his right-to-sue letters.

Robinson’s first DFEH claim contained the allegation of discrimination on the basis of disability, and his second alleged the Fire Department’s failure to accommodate him. Both of these allegations were contained in his original lawsuit filed on December 2, 2009. In his second amended complaint, filed on June 28, 2010, he alleged that the Fire Department also failed to engage in the interactive process. No DFEH claim related to this allegation could be located in the materials provided for our review. Furthermore, his Second Amended Complaint alleged that after failing to participate in an interactive process, despite his requests in 2006 or 2007, he was placed in an inferior position on June 21, 2009. This date was after his first DFEH claim but prior to both his second DFEH claim and the filing of the original complaint.

SPECIFIC FINDINGS & RECOMMENDATIONS:

Findings:

16. The Department did not initiate the Reasonable Accommodation Process with Robinson until April 2007, which was more than four years after the Fire Commission adopted the Americans with Disabilities Act Policy and Accommodations Request Procedures in January 2003.
17. A former fire chief placed Robinson in an unfunded position that resulted in his continuing to receive helicopter pilot bonus pay for which he was not qualified for eight years because he did not possess the required medical certificate.⁹⁸
18. While a former fire chief made the decision to place Robinson in an unfunded position that resulted in his continuing to receive helicopter pilot bonus pay he did not qualify for, that decision was based on requests, recommendations and support from subordinate chief officers starting at the rank of Battalion Chief.⁹⁹
19. Failing to follow the policies adopted by the Fire Commission resulted in an expensive lawsuit, and placed the Department and City at risk of an adverse result with far reaching implications.¹⁰⁰
20. The inability to continue Robinson in an unfunded position after eight years resulted in a lawsuit containing allegations that Department personnel made false promises and misrepresentations to Robinson.
21. The City and the Fire Department were very well represented by the City Attorney's Office in this lawsuit; especially because the case was dismissed on a motion for summary judgment so there was no costly trial.
22. The Department's litigation liaison activities contributed significantly to the excellent trial court result.
23. The city attorney assigned to conduct the trial court proceedings and the RMS have a particularly good working relationship, which has benefitted both the Department and the City.

⁹⁸ The Office of the Independent Assessor is currently conducting an audit and assessment of Fire Department bonuses and promotional applications, which will address this specific finding.

⁹⁹ No information could be located in the Department's files indicating whether the Department consulted with its legal counsel about the advisability of proceeding in such a manner, or that legal counsel was aware of and/or volunteered advice on this topic.

¹⁰⁰ Additionally, the City should not have to rely on the CAO or other officials outside the Department to compel appropriate decision making by Fire Department managers as it pertains to eliminating unfunded positions.

24. The policy related to accommodating injured Department members appeared to change depending on who the fire chief was at the time; this resulted in inconsistent treatment of members.

Recommendations:

11. The Fire Department should be required to fully explain and justify all unfunded positions, or certify that no unfunded positions exist, to the Fire Commission in writing every six months.
12. The Department should ensure compliance with Fire Commission-approved policies regarding disability accommodation so that all members are treated the same.

SELECTED CASE REVIEWS WITH NEGATIVE TRIAL COURT RESULTS

Three lawsuits where the City suffered a negative trial result were selected for a detailed assessment. The three cases were filed against the City by seven current or former Fire Department employees. The three cases were either litigated by the City Attorney's Office or by outside counsel. One of the cases was the subject of a prior report by this office so only a brief report concerning the current status of that matter is provided here.

The same 19 requirements from Executive Directive No. 9 were used as audit criteria when conducting the detailed assessments in these cases. While some of the cases were filed before the Directive was issued by the Mayor in January 2007, the Directive sets forth some basic litigation risk management elements. Some of what is called for by the Directive was being performed by the Department before the Directive was issued and before the Risk Management Section (RMS) became responsible for litigation. Additional criteria were also used as appropriate or relevant.

Case-specific findings and/or recommendations are set forth for some of the cases, in addition to the more general findings and recommendations at the conclusion of this report.

CHRIS BURTON & JOHN TOHILL LAWSUIT

BACKGROUND:

Allegations:

On October 6, 2006, Captains Chris Burton and John Tohill filed a lawsuit against the City alleging the Fire Department unfairly disciplined them on the basis of their race.¹⁰¹ The two Caucasian captains were on duty and supervisors at the fire station when Tennie Pierce, an African-American firefighter, was served dinner with dog food in it. The plaintiffs claimed they had no knowledge that dog food had been placed in the dinner by a Hispanic firefighter.¹⁰²

The lawsuit alleged political pressure resulted in Burton receiving a 30-day suspension without pay and a punitive transfer, Tohill receiving a 24-day suspension without pay and a punitive transfer, while the Hispanic firefighter responsible for the prank only received a suspension of six days without pay. The claim was made that the discipline was imposed without a full investigation, although one had been requested.

Trial:

During the trial that began on February 11, 2008, it was revealed that Tohill had purchased the can of dog food with the intention of giving it to Pierce with a spoon as a joke. The firefighter who mixed the dog food in the pasta and meat sauce said he did it on the spur of the moment and no one else knew he was going to do so. Burton decided to not report the incident because: 1)

¹⁰¹ Complaint filed on October 6, 2006, Los Angeles County Superior Court, Case No. BC359875.

¹⁰² Pierce sued the City claiming a hostile work environment based on racial harassment in 2005. The City paid almost \$1.5 million to settle the case (not including \$1.3 million in defense fees). The incident was also widely reported in the media.

initially Pierce did not allege any race discrimination or that he was being subjected to a hostile work environment, which would need to have been reported; 2) initially Pierce did not want the incident reported or disciplinary action to be taken; and 3) captains had been asked by their supervisors to handle more personnel issues at the station level.

Once the incident was reported to a higher-level supervisor by Pierce, all the participants except Pierce were ordered to complete written reports. A battalion chief submitted a report recommending an Advocate investigation be completed.¹⁰³ He later assisted Pierce in preparing his written report concerning the incident. An assistant chief reviewed the written reports and also recommended an Advocate investigation be conducted. Although Pierce, Burton, the battalion chief and assistant chief requested an Advocate investigation, none was performed.

A deputy chief gave the materials to the executive officer in charge of discipline, who then provided a disciplinary recommendation to the Fire Chief. The executive officer did not perceive the incident to be racially motivated, but believed it was a prank in violation of Department policy. Discipline was imposed as alleged in the complaint.

A former chief officer testifying as the plaintiffs' expert said, among other things, that the Fire Department violated an unwritten policy that investigations are conducted when there are disputed factual issues, when the prestige of the City or the Department is at risk or when the discipline exceeds a 15-day suspension.

The City's defense attorney attempted to get the case dismissed when the plaintiffs concluded their presentation of evidence at trial. The court denied the motion by saying there was some circumstantial evidence the jury could consider in deciding whether the plaintiffs were discriminated against on the basis of their race because the incident was not sent for an investigation, no one owned up to making the disciplinary recommendation and Pierce was assisted in the preparation of his report.

After presentation of the City's defense, the jury determined race was a motivating factor for taking disciplinary action against the plaintiffs. A total verdict of \$1,644,046 was returned in their favor. On June 9, 2008, the trial court also ordered that the plaintiffs' attorneys be awarded \$400,000 in attorney's fees.

Appeal:

The City filed an appeal on June 5, 2008.¹⁰⁴ Although with different law firms, the same private attorney represented the City throughout the litigation,¹⁰⁵ including all trial and appellate proceedings.¹⁰⁶ The Court of Appeal issued its unpublished decision on February 18, 2010,

¹⁰³ An Advocate investigation is a formal investigation conducted by sworn members of the Fire Department who are called Advocates.

¹⁰⁴ California Court of Appeal, 2nd District, Case No. B208451; 2010 Cal.App.Unpub.LEXIS 1125.

¹⁰⁵ Private counsel was retained to represent the City in the lawsuit brought by Captains Burton and Tohill. The City Attorney's Office was already representing both the City and Captains Burton and Tohill as defendants in the litigation brought by Firefighter Pierce, so it could not represent the City in the lawsuit brought by Burton and Tohill in their capacity as plaintiffs.

¹⁰⁶ It appears that the attorney handling the appeal had legal malpractice coverage of \$1 million yet the trial court judgment was more than \$1.6 million (without considering the attorney's fees).

affirming the judgment in all respects.¹⁰⁷ The Court of Appeal decision raises significant issues concerning how the litigation was handled.

Sufficiency of the evidence - Although the City was told “the plaintiffs put forth absolutely no evidence that their suspensions were racially motivated” and that the appellate briefs would argue the evidence was not sufficient to support the jury’s verdict, this argument was never raised in the City’s appellate briefs.¹⁰⁸ Nothing in the files reviewed for this audit suggested the City ever authorized waiver of the “sufficiency of the evidence” argument on appeal. Whether the Department discriminated against the plaintiffs on the basis of their race was the entirety of the case.

In its February 18, 2010 decision, the Court of Appeal noted that it could not review whether substantial evidence supported the jury’s findings because the attorneys representing the City failed to raise the issue on appeal. A recording of the appellate oral arguments reveals the Court of Appeal initiated questions concerning why the “substantial evidence” issue was not raised on appeal.¹⁰⁹

Future lost earnings - The City’s appellate brief argued that Tohill should not have received almost half a million dollars for future lost earnings and the trial court should have limited his recovery to past economic damages based on the representations made during trial that these were the only damages sought. The Court of Appeal said the City’s attorneys waived the issue by failing to object to the award in the trial court and stipulating to the special verdict form that permitted an award of future lost earnings.¹¹⁰ Therefore, trial counsel did not preserve the issue for appeal.

Although not mentioned by the Court of Appeal, it is worth noting that the City’s counsel did not object and even stipulated to the jury instructions permitting an award of future lost wages to Tohill.¹¹¹

¹⁰⁷ On April 1, 2010, the City filed a Petition for Review in the California Supreme Court, which was denied without comment on May 12, 2010.

¹⁰⁸ Overturning a judgment on the basis that the evidence was not sufficient to support the jury’s verdict is rare and very difficult because the burden on appellate review is high. However, other issues with similarly high burdens were raised on appeal. For example, the appeal properly argued the total damages awarded to the plaintiffs were excessive.

¹⁰⁹ The attorney representing the City in this matter informed this office the jury inferred bias given the severity of the plaintiffs’ discipline when compared to the discipline received by the firefighter who took responsibility for the incident. The attorney did not believe this evidence was sufficient to support the verdict and said he thought “sufficiency of the evidence” was raised on appeal.

¹¹⁰ While the decision to cross-examine Tohill about the financial implications of entering the deferred retirement option program may have been a *strategy* to show Tohill would receive a substantial amount of money in addition to his regular retirement (Reporter’s Transcript on Appeal, pp. 1634-36), it opened the door for Tohill’s attorney to elicit evidence to make the claim he should receive an award of future lost earnings (Transcript on Appeal, pp. 1643-45). As the trial court’s May 7, 2008 ruling said: “Specifically, as to Tohill’s future economic losses, this issue was raised after the defendant cross-examined Tohill concerning the amounts of money Tohill received through the DROP program.”

¹¹¹ Reporter’s Transcript on Appeal, pp. 2038-39, 2047.

Evidence of pranks - The City's appellate brief argued the trial court should not have admitted testimony about other pranks. The Court of Appeal noted the City failed to identify any particular trial testimony about which it complained, failed to properly cite to the record, failed to elaborate on errors in any meaningful way and, as a result, the claims were without foundation and waived.

Special jury instructions - The City's appellate brief claimed the trial court erred by refusing to give special jury instructions proposed by the City. The Court of Appeal said the City withdrew the instructions, the City failed to provide an adequate record on appeal, and the record was insufficient to show the trial court refused the requested instructions.

The actual words used by the Court of Appeal in describing and responding to each of the City's seven appellate arguments are set forth in Appendix 4.¹¹²

Costs:

On June 16, 2010, the City Council approved a settlement of the Burton & Tohill lawsuit in the amount of \$2,523,334.49.¹¹³ The settlement was approved by the Mayor on June 21, 2010.¹¹⁴ On June 24, 2010, the City paid the plaintiffs and their attorneys \$2,530,000 to conclude the litigation.¹¹⁵ A full satisfaction and judgment was filed on July 22, 2010.¹¹⁶

Although the jury's verdict was \$1,644,046, the plaintiffs and their attorneys were paid \$2,530,000, and the total cost to the City was **\$3,282,035**. Table 5 below sets forth a more complete breakdown of the litigation costs, including the judgment, costs, attorney's fees for the plaintiffs, attorney's fees for the City's defense¹¹⁷ and interest on the trial court judgment.

¹¹² The issues raised by the Court of Appeal decision were brought to the attention of both the Mayor's Office and the City Attorney's Office by this office in 2010.

¹¹³ Los Angeles City Council File No. 08-0529-S2.

¹¹⁴ Los Angeles City Council File No. 08-0529-S2. The City Council and Mayor were obligated to settle the case at that time given the adverse trial result and unsuccessful appeal.

¹¹⁵ City of Los Angeles, check number 0300105036.

¹¹⁶ Los Angeles County Superior Court, Case No. BC359875.

¹¹⁷ The same attorney represented the City throughout the litigation. At the beginning of the case he was employed by Jackson Lewis, and during the lawsuit he left to open his own firm.

Table 5: Costs in the Burton & Tohill Lawsuit

<i>Burton</i>					
Past Economic Loss	\$11,808				
Past Non-Economic Loss	\$507,500				
Future Non-Economic Loss	\$72,500				
<i>Subtotal</i>	\$591,808	\$591,808	\$591,808	\$591,808	
<i>Tohill</i>					
Past Economic Loss	\$7,488				
Future Economic Loss	\$467,250				
Past Non-Economic Loss	\$367,500				
Future Non-Economic Loss	\$210,000				
<i>Subtotal</i>	\$1,052,238	\$1,052,238	\$1,052,238	\$1,052,238	
Judgment	\$1,644,046	\$1,644,046	\$1,644,046	\$1,644,046	
Plaintiffs' attorney's fees¹¹⁸		\$550,000	\$550,000	\$550,000	
Costs			\$34,791	\$34,791	
Interest				\$326,935	
<i>Subtotal</i>					\$2,530,000
Defense Fees					\$752,035
TOTAL	\$1,644,046	\$2,194,046	\$2,228,837	\$2,555,772¹¹⁹	\$3,282,035
	Jury Verdict	with Attorney's Fees	with Costs	with Interest	with Defense Fees

Sources: Los Angeles City Council File Nos. 08-0925, 08-0529-S2; CAO File 0130-01756-1517; Controller remittance records; Special Verdict and Final Judgment in Los Angeles County Superior Court, Case No. BC359875; City Attorney's Office, Outside Counsel Expenditure reports from FY 2005-06 to FY 2010-11.

RISK MANAGEMENT SECTION RECORD KEEPING:

The RMS file contained a substantial amount of material including, but not limited to, copies of some pleadings, written discovery materials, correspondence from the private attorneys representing the City, legal briefs, the City's motion for summary judgment and the plaintiffs' personnel records. There were no deposition transcripts included in the materials received for this audit.

The correspondence from the City's defense counsel provided regular progress reports concerning the case and some of the legal issues. However, this office is concerned about the

¹¹⁸ The total amount for the plaintiffs' attorney's fees included \$400,000 for the trial and \$150,000 for the appeal.

¹¹⁹ This was later rounded to \$2,530,000.

extent to which Department personnel assigned to the RMS would be able to evaluate the accuracy and quality of the information provided. For example, the Department was told the trial court's denial of the City's motion for summary judgment before trial was grounds for appeal.¹²⁰ While that may sound good to a lay person, the Court of Appeal specifically noted that even assuming the trial court erred by denying the City's motion for summary judgment, there was no miscarriage of justice because the discrimination issue was fully litigated at a trial on the merits, and after a trial, the issue of whether plaintiffs established a prima facie case is irrelevant.

The LTS record for this case provided more information than most of the others reviewed for this audit. While the LTS provided a good procedural history of the case, it did not document whether the plaintiffs' allegations, discovery or evidence at trial prompted a review of how the Department administers its disciplinary system.

EXECUTIVE DIRECTIVE NO. 9 CRITERIA:

Claim and case tracking:

The Fire Department's Personnel Services Section received a notice from the City Personnel Department on April 25, 2006, that Tohills' DFEH claim was filed April 5, 2006, and closed that same month. The lawsuit was then filed with the court on October 6, 2006. The first entry in the LTS record is dated January 21 (presumably 2007).

Liaison and support activities:

The RMS began their monitoring and liaison activities promptly. Four different Department members served the role of litigation liaison given the long life of this case. The evidence suggests they kept quite busy gathering information for discovery responses, attending depositions, interviews, trial and other proceedings. Litigation liaisons also provided information about Department operations and policies. The fact the case was handled by multiple liaisons over a period of many years underscores the need to maintain complete documentation of all activities as required by Executive Directive No. 9 to ensure continuity in how the RMS handles cases.

The Office of the City Administrative Officer (CAO) had a substantial amount of file material that was reviewed by this office. There were direct communications between that office and the City's defense attorney. The primary focus of the CAO's office was related to the payment of attorney billings and other financial affairs.

Investigation of case facts and review of discovery materials:

There is little to indicate the RMS personnel assigned to this matter engaged in the investigation of case facts. The City Personnel Department did conduct an investigation. That investigation concluded there was no evidence either captain had knowledge about someone feeding dog food to Pierce, the firefighter who did so was not adequately disciplined, the discipline for Burton and

¹²⁰ In *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 836 the court noted no case has "considered the merits of the order denying summary judgment as a basis to reverse a judgment entered after the trial on the merits." (See also *Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1268.)

Tohill was too severe and that one of the chief officers involved in the disciplinary process relied on the “captain of the ship doctrine” in recommending discipline to the Fire Chief.¹²¹

Although a litigation liaison was heavily involved in assisting in the preparation of written discovery responses, there is nothing to suggest the RMS conducted reviews of discovery, such as depositions, for the purpose of complying with the Mayor’s litigation risk management Directive.

Mediation and settlement discussions:

The LTS record has a brief note indicating the plaintiffs’ settlement demand was \$1 million. There is no information indicating whether the City sought settlement authority or made a settlement offer before trial. The records provided to this office do not document an opinion from the defense attorney concerning the potential jury verdict and settlement value. The attorney did provide an opinion on the likelihood of a motion for summary judgment being granted.

Appeal discussions:

From the materials provided for this audit, it appeared that the appeal would allege the evidence was not sufficient to support the jury’s verdict. However, “sufficiency of the evidence” was not raised on appeal. There is nothing indicating the defense attorney was questioned about why “sufficiency of the evidence” was not included in the City’s appellate brief. As was indicated by the Court of Appeal, the failure to raise the issue constituted a complete waiver of the issue.

The RMS case file and LTS record both documented discussions concerning whether an appeal should be pursued. This includes summarizing the grounds for taking an appeal and the progress of the appeal. After the Court of Appeal affirmed the trial result, there was further discussion about filing a petition for review with the California Supreme Court, which was also documented. Again, the concern of this office is whether the Fire Department currently has the personnel with the training, education and experience to properly discuss, evaluate or question the advice provided.

Reviews of and actions to correct Department policies, practices and/or employee conduct:

The materials provided for review set forth an inadequate record to determine whether internal reviews and corrective actions were undertaken in response to the litigation. However, this office does note that Executive Directive No. 8 prohibiting hazing, the required reporting of hazing and the Professional Standards Division’s CTS were all implemented after the dog food incident occurred. The City’s defense attorney was not sure what the Department could have done differently “because they were obligated to do something.”¹²²

REPORTING TO THE FIRE CHIEF AND BOARD OF FIRE COMMISSIONERS:

The records reviewed by this office did not indicate much about what was discussed with the Fire Chief concerning the Burton & Tohill lawsuit. There is a memo in the RMS case file

¹²¹ The file material did not indicate if the defense attorney provided or was asked to provide a liability opinion in light of the Personnel Department’s investigative findings.

¹²² Interview with Mr. Edward Zappia, June 21, 2011.

summarizing the jury's verdict. Commission records indicate the case was scheduled for closed session meetings with the Fire Commission on five occasions from January 2, 2007, to September 21, 2010. However, the case was not discussed on at least two of those occasions.

No information regarding corrective actions or policy issues discussed with the Fire Commission could be located. When an attempt was made to discuss the appellate decision with the Fire Commission in closed session, the Commission was told by its General Counsel it had no jurisdiction to discuss the case. The defense attorney did not remember ever providing case updates to the Commission. The former Fire Chief did not remember receiving any corrective action recommendations.

MISCELLANEOUS CRITERIA:

Timely claim filing:

The plaintiffs' allegations required they file a claim with the DFEH. The complaint alleged the Department imposed the suspensions in May 2005. The plaintiffs' personnel files show that Burton received notice on April 21, 2005, that his suspension was to be served from April 30, 2005, to May 30, 2005. Tohill received notice on May 3, 2005, that his suspension was to be served from May 14, 2005, to June 7, 2005. A review of the personnel files and payroll records confirm they served their suspensions.

The materials received by this office included the initial DFEH claim for Tohill filed on April 5, 2006, but not the DFEH claim for Burton. The DFEH right-to-sue letters for both plaintiffs were attached to the complaint initiating the lawsuit. Right-to-sue letters were issued to Burton on April 24, 2006, and May 15, 2006, and to Tohill on April 24, 2006, and April 28, 2006. Accordingly, the claims were timely because they were filed less than one year after the discipline was imposed.

Timely complaint containing all allegations:

Each of the right-to-sue letters provided DFEH closure dates suggesting the claims were filed in a timely manner. The lawsuit was filed in October 2006, less than one year after the right-to-sue letters were issued, and thus was timely.

This office was unable to obtain copies of all the plaintiffs' DFEH claims and thus a comparison between the allegations made in the claims versus the allegations made in the complaint could not be completed.

Defense's use of experts to refute testimony given by Plaintiffs' expert witnesses:

The plaintiffs' attorney called an expert to testify about the Fire Department's disciplinary process. A defense expert was retained but was not called to testify. One of the Department members assigned to act as a liaison in this litigation said the defense expert was in the hallway of the courthouse ready to testify but the City's defense attorney decided not to call him. The defense attorney said he thought he had effectively cross-examined the plaintiffs' expert so there was no need to call the defense expert to testify. A carefully selected and properly prepared defense expert may have been helpful in attempting to refute the testimony of the plaintiffs' expert in at least three areas.

The plaintiffs' expert testified the Department was supposed to follow the Civil Service Disciplinary Guidelines in setting discipline, police and fire personnel are held to the same standards as civilian personnel and the disciplinary guidelines are not to be exceeded just because the plaintiffs were uniformed personnel.¹²³ A defense expert may have been able to testify that the Civil Service Guidelines clearly stated that employees in supervisory positions and those performing safety functions are held to a higher standard, such that those employees may be subject to more severe levels of discipline.¹²⁴ The plaintiffs' expert was not cross-examined on this issue. There was information in the materials reviewed by this office indicating the plaintiffs were disciplined on the basis of the "captain of the ship doctrine."

Second, the plaintiffs' expert testified he could not recall any incident where a captain was disciplined for failing to report or prevent a prank.¹²⁵ A litigation liaison says he provided the defense attorney with specific information about a captain who received a 30-day suspension many years earlier as a result of a female paramedic being victimized by a prank when the captain was not only off duty but out of the state.¹²⁶ A well prepared expert may have been able to use this information effectively, or at the very least it may have served as a basis for cross-examining the plaintiffs' expert.

Finally, the plaintiffs' expert testified the Department failed to comply with the "Board of Review" process when administering discipline in this case.¹²⁷ A defense expert could have testified the "Board of Review" process does not apply to the disciplinary process, that the applicable hearing process is the "Board of Rights" process as set forth in the Department's *Board of Rights Manual*, and that the plaintiffs did not appeal their discipline by requesting a "Board of Rights" hearing, although they had a right to do so. One of the litigation liaisons informed us he had explained the difference between the "Board of Review" and the "Board of Rights" process to the defense attorney. The difference between a "Board of Rights" and a "Board of Review" was not the subject of cross-examination of the plaintiffs' expert.

In addition to responding to the plaintiffs' expert, a defense expert may have been able to discuss the issue of potential supervisory failures, particularly in light of the evidence that pranks were condoned at the fire station where the incident occurred. Pierce actually participated in some of this prior pranking, as evidenced by now-public photographs. At least the defense attorney correctly believed this history of pranking was relevant to the case.

Sufficient evidence to support the verdict:

The jury concluded that race was a motivating and improper factor in the Department's decision to discipline the plaintiffs. In an interview with this office, the defense attorney indicated that in

¹²³ Reporter's Transcript on Appeal, p. 1914. The Fire Department was using the Civil Service Disciplinary Guidelines at the time the discipline was imposed and only later adopted its own set of guidelines for sworn members.

¹²⁴ One of the chief officers involved in the disciplinary process said one of the reasons the plaintiffs were disciplined was because they permitted an environment where pranks were openly accepted.

¹²⁵ Reporter's Transcript on Appeal, p. 1915.

¹²⁶ One of the chief officers interviewed in the course of this audit confirmed a captain had been disciplined in such a manner.

¹²⁷ Reporter's Transcript on Appeal, pp. 1918-24.

his estimation the evidence of racial bias was weak and circumstantial. This office agrees. Initially, the defense attorney said he raised insufficiency of the evidence as one of the grounds for appeal. Whether the evidence was sufficient to support the verdict is certainly a central issue in the litigation. However, and as noted in the Court of Appeal decision, this was not raised on appeal. Therefore, the Court of Appeal never determined if the evidence was sufficient to support the verdict.

Attorney litigation experience:

The Court of Appeal decision, trial transcript, the City’s records and files and comments from the Department’s litigation liaisons raise questions about the actual jury trial experience possessed by the City’s defense counsel. This case highlights how the selection and monitoring of defense counsel is critical to an effective litigation risk management program.

SPECIFIC FINDINGS & RECOMMENDATIONS:

Findings:

25. The Court of Appeal decision suggests the City was not well represented in trial or during the appellate proceedings.¹²⁸
26. The attorney who handled the appeal in this matter had legal malpractice insurance limits of only \$1 million dollars when the judgment he was charged with appealing was \$1,644,046 plus attorney’s fees of another \$400,000.
27. The \$3,282,035 ultimately paid by the City to resolve this litigation was twice the jury’s verdict of \$1,644,046.
28. The need to review the manner in which the City was represented by outside counsel was not recognized within a reasonable time after the Court of Appeal decision was issued.

Recommendations:

13. The Fire Department should require that attorneys who represent the interests of the Department in trial have substantial and verifiable jury trial experience in the issues being litigated.¹²⁹

¹²⁸ This finding is not based on the City losing at trial or being unsuccessful on appeal. This finding is based on an appeal which alleged the trial court erred by failing to grant a pretrial motion for summary judgment when no California case has reversed a final judgment following a full trial on such grounds; the failure to appeal on the grounds of insufficient evidence when the City was told “plaintiffs put forth absolutely no evidence that their suspensions were racially motivated;” opening the door to an award of future lost earnings; the repeated failure to properly preserve and present an adequate record on appeal; and the failure to cross-examine the plaintiffs’ expert or present a defense expert on certain issues.

¹²⁹ Too often attorneys without substantial jury trial experience as lead counsel claim they are experienced litigators. Arbitrations, administrative hearings, quasi-judicial tribunals and even court trials are no substitute for jury trial experience involving similar cases. The City may want to consider requiring trial attorneys be members of the American Board of Trial Advocates.

14. The City should review how it selects outside counsel in litigation matters, including its requirement that outside counsel have sufficient legal malpractice coverage for the case being handled by the attorney. In selecting counsel to handle appellate issues, the City should consider selecting counsel who did not litigate the case being appealed.
15. In addition to hiring a professional general risk manager to lead and manage the RMS and the Department's risk management program, the Department requires a professional specialist with substantial training, education and experience to specifically manage and oversee Fire Department civil litigation matters on a daily basis.¹³⁰

¹³⁰ The City Controller previously made a similar recommendation. *Review of the Los Angeles Fire Department Dispatch Staffing and Special Duty Assignments*, April 24, 2006, p. 23. The professional risk manager and specialist in litigation matters should be in addition to the personnel required to handle other risk management activities such as safety and workers' compensation.

LEWIS BRESSLER, BRENDA LEE & GARY MELLINGER LAWSUIT

CASE BACKGROUND:

Allegations:

On July 19, 2005, Captain Lewis Bressler, Captain Gary Mellinger and Firefighter Brenda Lee filed a lawsuit against the Fire Department alleging discrimination, harassment and retaliation.¹³¹ The incidents giving rise to the lawsuit were alleged to have occurred in 2003 and 2004.

Mellinger claimed he was discriminated against because of his age and association with other members of a protected class, including his co-plaintiffs Bressler and Lee. He alleged that evidence of this discrimination included false and derogatory statements, excessive drilling, unjustified criticism of his job performance, distribution of complaints made by him and other actions. At one point he submitted a memorandum complaining about what he perceived as inappropriate behavior and language by two others. He later claimed he was shunned and harassed as a result of his memorandum.

Bressler claimed he was discriminated against on the bases of age and religion, and evidence of such discrimination included derogatory remarks, unjustified scrutiny of his work performance, being subjected to unwarranted discipline and other actions.

Lee claimed she was discriminated against on the bases of gender, race/color, sexual orientation and association with other members of a protected class. Lee claimed that evidence of this discrimination included derogatory remarks, excessive drilling, exclusion from certain positions, unwarranted disciplinary action, being deemed unfit for duty and other actions.

All three plaintiffs alleged that individual Department members caused them harm and should be held personally liable. They alleged that one employee in particular had used racial and anti-gay slurs in addition to making religiously insensitive comments and using inappropriate racial language.

Mellinger trial:

The court handled each plaintiff's case separately. The first trial began on September 12, 2006, and lasted approximately one week with the jury reaching a verdict on Mellinger's claims on September 20, 2006.¹³² This verdict included an award of \$277,001, and concluded that one of the individually named defendants acted with malice, oppression or fraud, potentially subjecting him to punitive damages.¹³³ It was reported that the court dismissed the causes of action alleging age discrimination and harassment, leaving only the retaliation and failure to prevent discrimination causes of action. Mellinger thereafter settled with the City for \$350,000 (which

¹³¹ Complaint filed on July 19, 2005, Los Angeles County Superior Court, Case No. BC336783.

¹³² Los Angeles County Superior Court, Case No. BC336783. A trial transcript was not available for review.

¹³³ Los Angeles County Superior Court, Case No. BC336783; Risk Management Section, Litigation Tracking System record; report to Claims Board in Mellinger case file. Government Code section 825(a) says nothing authorizes a public entity to pay punitive damages; however, subdivision (b) of that same section permits a public entity to pay punitive damages under certain conditions.

included any claim for punitive damages, attorney's fees and costs),¹³⁴ and thereafter his case was dismissed on January 4, 2007.¹³⁵

Bressler trial:

Bressler's jury trial began on March 28, 2007.¹³⁶ The trial lasted a little over two weeks, during which three of the individually named defendants were dismissed.¹³⁷ The jury reached a verdict on April 13, 2007.¹³⁸ While the jury did not find that the City had discriminated against Bressler on the basis of age, they did find: 1) he was subject to adverse employment actions in retaliation for his reporting discrimination, harassment or retaliation against himself or others, including Lee or Mellinger; and 2) the City failed to take all reasonable steps necessary to prevent the discrimination, harassment or retaliation against him.¹³⁹ As a result, the jury awarded Bressler a total of \$1,730,848 in damages.¹⁴⁰ The judgment was also entered on April 13, 2007.¹⁴¹

Bressler appeal:

The City filed its notice of appeal in Bressler on May 22, 2007. Oral argument in the Bressler appeal was held on January 22, 2009, and the appellate court issued its opinion affirming the trial court verdict on January 29, 2009.

According to the appellate court, Bressler presented evidence indicating another supervisor retaliated against him, and recruited others to retaliate against him, after Bressler engaged in protected activity by reporting: 1) the other supervisor made a sexually inappropriate comment about a firefighter's wife;¹⁴² and 2) racial, sexual and sexual orientation discrimination and harassment claimed by Lee. After receipt of Bressler's report about Lee's claims, a chief officer recommended an inquiry to ensure Bressler was "not trying to divert attention away from his own questionable performance." At trial, this chief officer indicated the captains carrying out this inquiry would include the same captains Bressler and Lee had complained about.

The investigation consisted of, in part, chief officers directing firefighters to answer certain questions in writing. When some firefighters expressed reluctance, one of the supervisors, who was the subject of complaints by Bressler and Lee, informed the firefighters he would "make a format" that the firefighters could just sign. The Court of Appeal reported the trial evidence showed remarkably similar firefighter responses, and two were identical. One of the firefighters testified at trial that he "lied through my teeth" during the investigation because he was afraid of retaliation.

The Court of Appeal found Bressler had claimed a chief officer: 1) threatened to send a supervisor to his station to prove he was not satisfactory if he did not sign and concur with his

¹³⁴ Los Angeles City Council File No. 06-2640.

¹³⁵ Los Angeles County Superior Court, Case No. BC336783.

¹³⁶ *Bressler v. City of Los Angeles*, 2009 Cal.App.Unpub. LEXIS 788.

¹³⁷ Los Angeles County Superior Court, Case No. BC336783.

¹³⁸ Los Angeles County Superior Court, Case No. BC336783.

¹³⁹ Special Verdict filed on April 13, 2007, Los Angeles County Superior Court, Case No. BC336783.

¹⁴⁰ *Bressler v. City of Los Angeles*, 2009 Cal.App.Unpub. LEXIS 788.

¹⁴¹ *Bressler v. City of Los Angeles*, 2009 Cal.App.Unpub. LEXIS 788.

¹⁴² The Court of Appeal noted the other supervisor received a suspension and temporary transfer to another fire station as a result of making the sexually inappropriate statement.

performance evaluation; and 2) told Bressler he would have a year of misery if Bressler reported anything about racism or a hostile work environment.

The appellate decision concluded that Bressler proved adverse employment actions were taken against him by showing: 1) he received unjustifiably low marks on a performance evaluation; 2) two notices to improve and a reprimand were issued; 3) he received a development prescription; 4) his time off was restricted; 5) it was requested that he be transferred on allegations of mental illness; and 6) an unsatisfactory performance evaluation was issued. The Court of Appeal also found a causal link between the adverse employment action and the protected activity with evidence that the supervisor who was disciplined for making a sexually inappropriate comment about a firefighter's wife: 1) spoke frequently to others about Bressler reporting the misconduct over the following years; 2) influenced those in positions of authority to take adverse employment actions against Bressler; and 3) caused Bressler to receive a memorandum about his use of a siren.

The Court of Appeal rejected the City's argument that it should prevail because it had proffered a legitimate, nonretaliatory reason for the employment actions taken against Bressler. The court found that Bressler had provided sufficient evidence to satisfy his burden to show the City's reasons were a mere pretext for its true retaliatory motivation.¹⁴³

Lee trial:

Lee's jury trial began on June 18, 2007, and after two weeks the jury returned a special verdict in her favor on July 3, 2007.¹⁴⁴ The jury found: 1) the City had taken an adverse employment action against Lee based on her gender, race or sexual orientation; 2) she had been subject to harassment and a hostile work environment because of these characteristics; 3) an individually named captain had participated in these actions and caused her harm; 4) the City retaliated against her for reporting discrimination and harassment; 5) the City failed to prevent discrimination and harassment of Lee; and 6) there was clear and convincing evidence that the captain acted with malice, oppression or fraud in harassing Lee.¹⁴⁵ Lee was awarded a total of \$6,214,927 in damages, and an additional \$2,500 in punitive damages against one of the individually named defendants.¹⁴⁶ Judgment in the case was entered on July 12, 2007.¹⁴⁷

Lee appeal:

The City's notice of appeal in Lee was filed on October 9, 2007.¹⁴⁸ Oral argument in the Lee case was held on December 18, 2009, and the court issued its opinion, which reversed the trial court verdict and remanded the case, on February 18, 2010.

On appeal in the Lee case, the City argued that the judgment must be reversed because: 1) Lee failed to exhaust her administrative remedies for one of her claims (that she was not permitted to return to work); 2) substantial evidence did not support the finding that her termination was

¹⁴³ The City also argued on appeal that Bressler had failed to provide sufficient evidence on his underlying retaliation claim. The Court of Appeal rejected that argument as well.

¹⁴⁴ Los Angeles County Superior Court, Case No. BC336783.

¹⁴⁵ Special Verdict filed on July 3, 2007, Los Angeles County Superior Court, Case No. BC336783.

¹⁴⁶ *Lee v. City of Los Angeles*, 2010 Cal.App.Unpub. LEXIS 1151.

¹⁴⁷ Los Angeles County Superior Court, Case No. BC336783.

¹⁴⁸ California Court of Appeal, 2nd District, Case No. B202865.

discriminatory; and 3) the trial court's rulings excluding certain evidence were erroneous and prejudicial to the City.

The court found that Lee's DFEH claim, filed on June 16, 2004, stated that the discrimination she suffered took place from "8/03 to present." Lee's right-to-sue letter was issued on July 20, 2004, and she filed her lawsuit on July 19, 2005. Lee's lawsuit included a discrimination allegation that the City had refused to allow her to return to work under the pretext that she was psychologically unfit to be a firefighter; an action which occurred in May 2005 after she received her right-to-sue letter from the DFEH. The trial court overruled the City's attempt to bar evidence of discrimination not included in a timely DFEH claim. The trial court also denied the City's motions for a directed verdict, judgment notwithstanding the verdict and new trial.

The appellate court found that Lee's allegation related to her termination was not sufficiently similar or related to those allegations raised in the DFEH claim such that the DFEH was provided an opportunity to investigate it; particularly because "many of the acts alleged in her complaint took place during a later time period than that specified in her charge, were carried out by different perpetrators, and occurred at different employment locations."¹⁴⁹

The appellate court held that the trial court had no jurisdiction to hear allegations concerning acts not included within the scope of the DFEH investigation of Lee's June 16, 2004 charge, and the trial court abused its discretion in denying the City's motions to exclude evidence of those acts. The judgment was reversed and the case was remanded for a new trial, limited to the issues over which the trial court did have jurisdiction.

Lee settlement:

About a week before this report was sent to the printer, this office was informed that a tentative settlement had been reached in the litigation involving Lee.

Costs:

The costs to the City in the Bressler, Lee & Mellinger lawsuit are significant, as they were for some of the other cases selected for this audit. So far the City has paid a total of \$4.4 million in this case. This amount includes the settlement with Mellinger for \$350,000; the damages, attorney's fees and interest paid to Bressler; and the fees paid to outside counsel for defending the City in the Lee case as of June 30, 2011. This total amount does not include the amount of the Lee settlement that has not yet been paid or the amount of additional defense fees incurred in the further defense of the Lee case.

Table 6 below is a breakdown of the damages, attorney's fees and interest on the judgment paid by the City in the Bressler case:

¹⁴⁹ *Lee v. City of Los Angeles*, 2010 Cal.App.Unpub. LEXIS 1151.

Table 6: Bressler Lawsuit Costs

<i>Bressler</i>			
Past Economic	\$244,000		
Future Economic	\$1,081,848		
Past Non-Economic	\$405,000		
Judgment	\$1,730,848	\$1,730,848	\$1,730,848
Attorney's Fees		\$264,055	\$264,055
Interest			\$1,340,834 ¹⁵⁰
TOTAL	\$1,730,848	\$1,994,903	\$3,335,737
	Jury Verdict	with Attorney's fees	with Interest

Sources: Special Verdict in Los Angeles Superior Court, Case No. BC336783; Los Angeles City Council File No. 09-1905; City Attorney accounting records.

Table 7 below is a breakdown of the City's defense costs for outside counsel in the Lee case through June 30, 2011:

Table 7: Outside Counsel Expenditures in Lee Lawsuit

Fiscal Year	Total Expenditures
2006-07	\$70,069
2007-08	\$360,769
2008-09	\$231,389
2009-10	\$43,259
2010-11	\$22,076
TOTAL	\$727,562

Source: Los Angeles City Attorney's Office, Outside Counsel Expenditure Reports from FY 2006-07 to FY 2010-11.

RMS RECORD KEEPING:

While the RMS maintained some records for the Bressler, Lee & Mellinger lawsuit, they were not complete. The LTS record contained entries for many of the major events in the cases, including mediation and trial dates, descriptions of the plaintiffs' claims, dates for key depositions, tentative settlements, jury verdicts, etc.

There was no RMS case file for Bressler; the only Bressler case materials provided by the RMS for this audit were an electronic copy of Bressler's deposition (three volumes in total) and a copy of the Plaintiff's Opposition To Defendants' Motion For Nonsuit. (Copies of Bressler's DFEH claims were attached to a document in the Lee case file.)

The RMS case file for Lee contained letters from the attorneys on both sides of the case to the Court of Appeal regarding the related case (Bressler); a request for judicial notice with an

¹⁵⁰ This amount of interest is a best estimate given the known amounts of the judgment, attorney's fees and total payment.

attached memorandum of points and authorities, a declaration from the City's attorney, exhibits (copies of the plaintiffs' DFEH complaints) and a proposed order; and a copy of the appellate decision.

The RMS case file for Mellinger contained a report from the City Attorney's Office to the Claims Board; an email between city attorneys about the verdict and a settlement offer from Mellinger; a witness list with contact information for Department members; form interrogatories from Mellinger and drafts of the City's responses; and a number of Mellinger's performance evaluations.

None of the case files contained a copy of the complaint, most of the motions filed by the City (including the motions for summary judgment, nonsuit, judgment on the pleadings, judgment notwithstanding the verdict, new trial or any of the 10-plus motions in limine), the special verdict or any of the appellate briefs in Lee or Bressler.

EXECUTIVE DIRECTIVE NO. 9 CRITERIA:

Claim and case tracking:

From the materials this office was able to obtain, it appears that the RMS did not record any notice or keep any copies of the claims from Bressler, Lee and Mellinger. Bressler filed his first DFEH claim on June 16, 2004, and his amended claim on January 21, 2005. Mellinger filed his first DFEH claim on July 10, 2004, and his amended claim on January 21, 2005. Lee filed her one and only DFEH claim on June 16, 2004. The City Personnel Department received notice on July 14, 2004, from the DFEH that Mellinger's July 10, 2004 claim had been closed, and thereafter notified the Fire Department on July 28, 2004. The plaintiffs' complaint was filed on July 19, 2005, but the first entry in the LTS record is dated ten months later on May 8, 2006.

There were a number of entries made in the LTS record after May 2006 tracking the progress of the case, including trial dates, rulings on some motions, dates that documents were filed, whose depositions were taken, verdicts and other items. These entries indicate that Department representatives were kept reasonably informed by defense counsel of procedural developments in the cases.

Liaison and support activities:

There is substantial evidence that multiple Department representatives acted as liaisons for defense counsel in these cases. One Department representative reported assisting in the preparation of the City's witness list, obtaining copies of the plaintiffs' personnel files, responding to interrogatories and requests for admissions, attending attorney interviews of Department members (approximately 10 in total), attending the depositions of the plaintiffs and one Department member and attending the trials. This member reported representing the Department before the Claims Board, but did not recall attending any mediation sessions.

Another Department representative reported working full-time at the outside counsel's office beginning approximately two months before the trial started. His activities included reviewing proposed questions and suggesting others during trial, making copies and performing research, coordinating logistics (like arranging for details and transporting witnesses to trial) and preparing

exhibits for trial. He also reported reviewing depositions for inaccuracies or inconsistencies and sitting in on interviews.

The presence of a witness list, form interrogatories and draft responses, and copies of Mellinger's personnel records in the Mellinger case file from the RMS corroborate accounts that Department representatives provided support to defense counsel before and during trial.

The LTS record indicates that Department representatives made sure Department personnel were available to speak with defense counsel on at least one occasion, and that a Department representative attended a mediation hearing. At least one Department representative also attended a closed session Council meeting to discuss settlement in these cases.

Investigation of case facts and review of discovery materials:

All three plaintiffs alleged they were retaliated against for opposing and reporting unlawful discrimination and harassment against themselves and others, including their co-plaintiffs, and that the City failed to take the necessary remedial action.¹⁵¹

The Department first conducted an informal inquiry and then a formal investigation of Mellinger's claims long before trial. That investigation concluded there was no merit to his claims; that he made false allegations in an attempt to "get even" with other supervisors; and that he surreptitiously tape-recorded conversations with others.¹⁵²

It is unclear the extent to which the Department conducted a preliminary investigation into the facts and allegations in these cases once the lawsuit was filed. One Department representative reported answering the defense attorney's initial questions about the case and also attended attorney interviews with Department members (approximately 10 in total). The only other thing that is known is that the RMS did not begin inputting progress notes into the LTS until May 2006, 10 months after the complaint was filed.

While a Department representative reported reviewing depositions for inaccuracies, there was no information indicating whether a review of discovery resulted in any corrective actions being taken. There were no copies of opposition-produced discovery responses in any of the three RMS case files.

¹⁵¹ Complaint filed on July 19, 2005, Los Angeles County Superior Court, Case No. BC336783.

¹⁵² This audit noted several differences between what the Department's investigation reported a witness said and what later Court of Appeal decisions reported the same witness said. This audit made no attempt to reconcile the differences.

Mediation and settlement discussions:

The only materials obtained by this office regarding settlement discussions were communications between the City's defense attorneys and the City Council and/or Claims Board. These materials included recommendations to either settle or not settle a particular plaintiff's case. There were also entries in the LTS record about: 1) attending a closed session City Council meeting where it was recommended that a specific pretrial settlement demand be rejected; and 2) a tentative settlement falling apart when one of the plaintiffs decided to reject the tentative agreement.

One Department representative said he did not attend any mediation sessions and could not remember attending any settlement discussions. He stated that he did provide his input regarding how witnesses appeared in their depositions, as well as his personal knowledge of the involved individuals, to defense counsel for the purpose of helping counsel evaluate the case for settlement. Another Department member said that he remembered settlement talks breaking down. A deputy chief stated that he recommended settling one of the cases but that his recommendation was rejected.

Appeal discussions:

The only information obtained by this office regarding discussions about whether the City should appeal the adverse verdicts in these cases was found in a confidential Claims Board report from the City Attorney's Office and a few of the LTS record entries. The attorney's report to the Claims Board appears to provide an appropriate recommendation and supporting factual rationale.

The references to appeal proceedings in the LTS record relate to outside counsel providing:

- The City Council with:
 - A procedural history of the case, including evidence the trial counsel sufficiently preserved the record on appeal;
 - The facts of the case;
 - The likely effect of the trial court's erroneous ruling on the jury's verdict;
 - The cost of a new trial motion and appeal; and
 - A settlement recommendation.
- Periodic status reports to the RMS.

While these entries in the LTS record evidence communications between the defense attorney and the City Council regarding the decision to appeal, there is little evidence that such discussions took place between defense counsel and the Department, or that the defense attorney offered opinions or advice about what the Department could do to reduce the risk of similar

lawsuits in the future. One Department representative remembered some discussion about an appeal in the Lee case but he left the case shortly afterwards.

Reviews of and actions to correct Department policies, practices and/or employee conduct:

There was insufficient evidence available to determine what, if any, review of Department policies and practices or employee conduct related to the issues raised in these cases took place either after the complaint was filed in July 2005, or after the decisions in January 2007 (Mellinger verdict), April 2007 (Bressler verdict), July 2007 (Lee verdict), January 2009 (Bressler appellate decision) and February 2010 (Lee appellate decision).

There was one LTS record entry that indicated some sort of review was under way to determine whether any action should be taken in response to the Bressler verdict:

“The Lewis Bressler v. City case was tried in April 2007. It resulted in a verdict against the City in the amount of \$1,730,848. Plaintiff was also later awarded both attorney’s fees and costs. I believe that the Court of Appeal just recently issued a ruling in favor of plaintiff on the City’s appeal. **It is currently under review to determine what if any action to be take** [sic].” (Emphasis added.)

Additionally, one Department representative remembered the Fire Chief issuing departmental bulletins that spoke generally about treating one another professionally, but that none were specific to hostile work environment issues.¹⁵³ He also reported that he had made informal recommendations to the city attorney and chain of command regarding training and discipline improvements; however, he did not believe anything ever happened with those recommendations.

Another Department representative said he had provided his own recommendations and that he thought the Department had “tightened up” Equal Employment Opportunity investigative procedures in response to these cases. He did not recall the defense attorneys making any recommendations regarding corrective action. The former Fire Chief stated that he did not recall having any corrective action discussions related to the outcomes in these cases.

Since these trial results, the PSD was established in 2008. The PSD has an Equal Employment Opportunity (EEO) Unit dedicated to conducting these types of investigations. When established, the PSD also had a Workforce Excellence Unit dedicated to evaluating and helping resolve workplace environment issues. That unit has since been eliminated. On June 6, 2008, the Mayor ordered the adoption of Executive Directive No. 12, *Policy against Discrimination in Employment based on Sexual Orientation, Gender Identity or Gender Expression*.

This audit could find no evidence that any discipline, reassignment or retraining of individuals named in the complaint, or involved in the events giving rise to the litigation or adverse verdicts, took place. An internal investigation of the two captains named in the complaint was conducted before the trials concluded, and resulted in a conclusion that they had not acted improperly.¹⁵⁴

¹⁵³ Departmental Bulletin No. 04-13, issued on June 8, 2004, addressed hostile work environment and discrimination complaints. This bulletin was issued around the time that the plaintiffs filed their first DFEH claims.

¹⁵⁴ Conversely, an internal investigation of Mellinger concluded that he had engaged in misconduct.

The captain who was found by the jury to be personally liable to the plaintiffs was promoted four years after the lawsuit was filed, three years after the Mellinger trial concluded and two years after the Lee trial ended. However, the one-year statute of limitations for taking disciplinary action against the two captains accused of wrongdoing by the plaintiffs had long since expired by the time the trials were concluded.

REPORTING TO THE FIRE CHIEF AND BOARD OF FIRE COMMISSIONERS:

Reports to the Board of Fire Commissioners:

This case was listed on more than 10 agendas for Board of Fire Commissioners meetings from 2005 to 2011. One Department representative stated that he had asked to go before the Board of Fire Commissioners in order to provide an update in these cases but that the Commission's General Counsel had told him he could not.

Reports to the Fire Chief:

Department representatives reported providing case status reports to the Fire Chief.¹⁵⁵ The city attorneys or outside counsel handling the cases were present at some of these meetings as well. However, these updates were limited to only the very basics of what was happening in the case (i.e., who had been interviewed, etc.). There was no discussion of the allegations in the case, assessments of the Department's liability or potential damages or the likely verdicts in the cases. These Department representatives did report having fuller discussions of the case (i.e., what the case entailed, where the case was, maybe a few subjective opinions, etc.) with the heads of the RMS and Operations.

Department representatives also reported briefing the Fire Chief when verdicts were reached in each of the cases. The former Fire Chief recalled that he was told about the basis for the reversal on appeal in Lee and that the RMS had provided some risk exposure information.

MISCELLANEOUS CRITERIA:

Timely claim filing:

Bressler and Mellinger alleged that the discriminatory actions taken against them began in September 2003 and continued until they filed their second DFEH claims in January 2005. Lee alleged that the discriminatory actions taken against her began in August 2003 and continued until she filed her DFEH claim in June 2004. Accordingly, all three plaintiffs' DFEH complaints were filed within one year from the ending date of the discriminatory actions, and thus were timely.

Timely complaint containing all allegations:

Bressler filed his first DFEH claim on June 16, 2004, and his amended claim on January 21, 2005. The Department did not have a copy of Bressler's right-to-sue letters and this office was unable to obtain copies from other sources. Mellinger filed his first DFEH claim on July 10, 2004, and his amended claim on January 21, 2005. The Department did not have a copy of Mellinger's right-to-sue letters and this office was unable to obtain copies from other sources.

¹⁵⁵ The frequency of these meetings seemed to vary. One representative only met with the Fire Chief a handful of times while another provided updates more frequently.

Lee filed her one and only DFEH claim on June 16, 2004, and received her right-to-sue letter on July 20, 2004.¹⁵⁶ Accordingly, this office was unable to determine whether the plaintiffs' complaint, filed on July 19, 2005, was timely as to the Bressler and Mellinger claims. It appears the complaint was timely filed for Lee's claims because it was filed within one year of her receiving her right-to-sue letters.

Bressler and Mellinger both filed amended claims with the DFEH in January 2005. The original discrimination claims alleged harassment and retaliation. The amended claims added an allegation that they had been forced to quit their jobs. Bressler's and Mellinger's portions of the plaintiffs' complaint alleged harassment, discrimination and retaliation, as well as a failure to take remedial actions during the period of September 2003 to January 2005. Accordingly, Bressler's and Mellinger's allegations in the complaint matched those listed on their DFEH claims.

Lee filed her one and only DFEH claim in June 2004, alleging she had been harassed, denied accommodation and denied family or medical leave. Her DFEH claim did not allege that she had been forced to quit her job. Some of the facts listed in the lawsuit occurred after the closure of her DFEH claim in July 2004. Her lawsuit listed incidents occurring between December 2004 and May 2005, which included being subjected to repeated drills, problems with her locker, complaints being filed against her, being placed off work and being told "she could not return to the Fire Department because she was unfit for duty for mental reasons."¹⁵⁷ The fact that these incidents could not be included within the scope of the DFEH investigation of Lee's claim, particularly being placed off work and told she could not return, served as the basis for the Court of Appeal decision reversing the verdict in her case.

SPECIFIC FINDINGS & RECOMMENDATIONS:

Findings:

29. The internal investigations conducted by the Fire Department reached conclusions that were inconsistent with the trial results, and any attempt to reconcile the differences between the internal investigations and the litigation results is not documented.
30. The extent to which the allegations and facts, as revealed during an early investigation, pretrial discovery and trial, revealed the need for corrective or other actions is not well documented or even clear.
31. The internal investigations and trials revealed serious work environment issues.
32. Any disciplinary investigations or actions involving those whose conduct served as a basis for large verdicts returned against the City are barred by the statute of limitations set forth in Charter section 1060, which contains no tolling provisions.

¹⁵⁶ *Lee v. City of Los Angeles*, 2010 Cal.App.Unpub. LEXIS 1151.

¹⁵⁷ Complaint filed on July 19, 2005, Los Angeles County Superior Court, Case No. BC336783.

33. The \$3,335,737 the City ultimately paid at the conclusion of the Bressler litigation was almost twice the \$1,730,848 jury verdict.
34. The City and Fire Department were well represented in the Lee appellate proceedings and trial counsel appropriately preserved the trial record for a successful appeal.

Recommendations:

16. City Charter section 1060 should be amended to include a statute of limitations and tolling provisions as described in both the *Firefighters* and *Public Safety Officers Procedural Bill of Rights Acts*.¹⁵⁸
17. In addition to fully complying with Executive Directive No. 9, the Department should attempt to reconcile inconsistencies between internal investigations and litigation results.
18. Evidence of how the Department conducted its internal investigation, as revealed by the Bressler trial, strongly confirms the need to have internal investigations conducted and overseen by investigative professionals.

¹⁵⁸ Both provide a one-year statute of limitations from the date of discovery and tolling for those named as defendants in civil litigation. The Fire Department employs both firefighters and peace officers.

JOHN MILLER & MICHAEL RUEDA LAWSUIT

This office previously published the *Review of the Miller & Rueda Lawsuit (Review)* on September 15, 2011, and only after the City Attorney's Office was asked to comment on and correct the report. The *Review* was scheduled for discussion by the Fire Commission at its September 20, 2011 meeting, at which time the City Attorney's Office requested that it not be discussed in public. After a closed session meeting with the City Attorney's Office, the *Review* was removed from the Commission's public website. The City Attorney's Office did not request that the report not be published in the three weeks between August 29, 2011, when the draft *Review* was provided to the City Attorney's Office for comment and correction, and the September 20, 2011 Commission meeting.

Review overview:

The *Review* reported that on March 3, 2011, a jury awarded almost \$1 million to Battalion Chief John Miller based on allegations the Fire Department retaliated against him for engaging in protected activity. This office was unable to determine if the almost \$1 million verdict was the result of Fire Department misconduct, how the City Attorney's Office litigated the case, a combination of these factors, or some other reason.

The *Review* noted the court denied the City's motion to reopen discovery after the court determined the City had failed to conduct discovery within the time allowed by law. The *Review* also questioned whether the city attorney properly objected to evidence that may have been barred by failure to comply with the claims presentation requirements of the Government Code.

The *Review* reported that the court was going to proceed with a second phase of the trial, where the judge would determine if money damages should be awarded for alleged violations of the *Public Safety Officers and Firefighters Procedural Bill of Rights Acts*. These statutes govern how complaints and investigations of misconduct brought against arson investigators and firefighters are to be handled by the Fire Department.

The *Review* noted that this office sent written questions about the Miller & Rueda lawsuit to the City Attorney's Office on May 23, 2011, and the City Attorney's Office had replied with a written refusal to answer the questions or discuss the litigation with this office or the Fire Commission. This included a refusal to answer or discuss the following question:

What actions does the Fire Department need to take to correct each of the malicious violations found by the jury to have occurred and to prevent malicious violations of the *Firefighters or Public Safety Officers Procedural Bill of Rights* from occurring in the future?

Review findings & recommendations:

Below are the findings and recommendations set forth in the *Review*.

Findings

35. The jury in the Miller & Rueda case returned a \$993,491 verdict against the City of Los Angeles based on allegations that a member of the Los Angeles Fire Department was retaliated against after engaging in protected activity.
36. The jury in the Miller & Rueda case returned special verdicts finding that the rights and protections afforded to two members of the Fire Department pursuant to the *Public Safety Officers Procedural Bill of Rights Act* and the *Firefighters Procedural Bill of Rights Act* were maliciously violated with the intent to injure them 42 times, and these findings could lead to additional money damages of \$1,050,000, plus attorney's fees.
37. The City Attorney has refused to answer questions concerning the jury's verdicts and has said the verdicts will not be discussed with either the Independent Assessor or the Fire Commission because the Fire Commission is not the City Attorney's client and management of litigation is the sole province of the City Attorney.
38. This review is unable to determine if the jury's verdicts are the result of Fire Department misconduct, the manner in which the case was tried, a combination of both, or other factors entirely.
39. The Fire Department was not in full compliance with the Mayor's Executive Directive No. 9 governing litigation risk management at the time the litigation or this review were initiated.
40. The Fire Department does a good job providing liaison services to the litigation attorneys who defend the City and Fire Department.
41. The Fire Department currently does not have personnel with the education, training, expertise and experience necessary to effectively monitor and oversee Fire Department litigation. This has a direct and negative impact on the Fire Department's ability to take effective litigation risk reduction steps and necessary corrective action in a timely manner.
42. Additional evidence of improper investigative practices was discovered during the course of this review and such improper practices expose the City to an unreasonable risk of liability and money damages. Such improper investigative practices may also present an unreasonable risk that otherwise meritorious criminal prosecutions may be tainted and not filed.

Recommendations

19. Seek authority to hire an employee with the necessary education, training, expertise and experience to effectively monitor and oversee pretrial, trial and post-trial proceedings, as

well as manage general litigation risk management issues, on behalf of the Fire Department.¹⁵⁹

20. Adopt a formal set of protocols to address what the Fire Commission and Fire Department expect its litigation counsel to provide in the way of information, advice and legal services to inform their efforts in further reducing litigation risks.
21. Continue to increase the hiring of qualified civilian employees to manage and supervise the disciplinary process, conduct misconduct investigations and prosecute Boards of Rights hearings.

Current status:

Since the *Review* was published, the court has received evidence on the issue of whether money damages should be awarded for alleged procedural rights violations. The plaintiffs are seeking \$25,000 for each violation and additional money damages. The City has appropriately lodged objections to attempts to obtain a double damages recovery (damages for the same violations under both statutes) and evidence supporting allegations that would be barred by a failure to comply with the claims presentation requirements of the Government Code. Closing arguments in this phase of the trial are scheduled for April 27, 2012.

Continued monitoring of this litigation since publication of the *Review* revealed that the PSD was not timely advised what the plaintiffs were alleging in regard to violations of the *Firefighters and Public Safety Officers Procedural Bill of Rights*. Since no pretrial discovery was conducted on these issues, timely communications are necessary so the PSD can evaluate any potential need to revise policies and change practices. This is particularly true when the plaintiffs contend the PSD did not properly handle complaints of misconduct because the Department receives many hundreds, if not more than a thousand, misconduct complaints every year. While a “firewall” properly prevents confidential information obtained during attorney-client communications from being shared with the PSD, sworn testimony in court can and should be shared.

In May 2011, the City Attorney’s Office provided this office with a copy of the plaintiffs’ deposition testimony. In early October 2011, the City Attorney’s Office also provided copies of trial briefs filed by the plaintiffs in the litigation. However, on October 13, 2011, the City Attorney’s Office refused to provide a copy of the deposition testimony of a chief officer and a motion related to the production of confidential personnel files. The chief officer’s deposition testimony and motion are directly relevant to assessing whether the Fire Department is complying with the Mayor’s Executive Directive No. 9, which requires that the Department review depositions and take appropriate corrective action. Without the deposition testimony and motion, this office is unable to determine the extent to which the Department should have recognized a need to engage in training or other corrective actions, in an attempt to reduce the risk of future litigation, as required by Executive Directive No. 9.

Although the first phase of this case involving allegations of retaliation concluded more than a year ago, no final judgment has been entered because the second phase of the case involving alleged violations of procedural rights has not been completed. Whether this litigation concludes

¹⁵⁹ The Department has included a request for a risk manager in its proposed budget for Fiscal Year 2012-13.

on the basis of the trial court result, with an appeal or by way of a settlement, the concerns of this office remain the same. A litigation result alone often does not adequately address the actions necessary to prevent future similar lawsuits, and the Department should not wait until litigation is over before beginning to assess and take actions to reduce the risk of future, similar lawsuits.

FAIR LABOR STANDARDS ACT LITIGATION

The Fair Labor Standards Act (FLSA) sets standards for basic minimum wage and overtime pay in private and public employment.¹⁶⁰ Unless specifically exempted, an employer must pay overtime pay for hours worked in excess of 40 in a workweek, at a rate of at least 1.5 times the employees' regular rate of pay.¹⁶¹ There is a partial overtime exemption for employees "engaged in fire protection or law enforcement."¹⁶²

"Fire protection personnel," under section 7(k), includes firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel or hazardous materials workers who:

1. Are trained in fire suppression;
2. Have the legal authority and responsibility to engage in fire suppression;
3. Are employed by a fire department of a municipality, county, fire district, or State; and
4. Are engaged in the prevention, control and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.¹⁶³

Section 7(k)¹⁶⁴ allows these employees to be paid on a "work period" basis, which can range from seven to 28 consecutive days, and requires that overtime pay be paid for hours worked in excess of 212 (fire) or 171 (police) hours for a 28-day work period.¹⁶⁵ (The same ratio of 212:28 is used for work periods of any other duration between seven and 28 days.)¹⁶⁶

If an employee succeeds in proving a FLSA violation, the court may award the plaintiffs the amount of their unpaid minimum wages or overtime compensation, and an additional equal amount as liquidated damages.¹⁶⁷ Additionally, a court may allow a reasonable attorney's fee and the costs of the action to be paid by the defendant.¹⁶⁸ The past and current practice in these

¹⁶⁰ U.S. Department of Labor: <http://www.dol.gov/compliance/laws/comp-flsa.htm>.

¹⁶¹ U.S. Department of Labor: <http://www.dol.gov/compliance/laws/comp-flsa.htm>.

¹⁶² U.S. Department of Labor: <http://www.dol.gov/whd/regs/compliance/whdfs8.pdf>.

¹⁶³ U.S. Department of Labor: <http://www.dol.gov/whd/regs/compliance/whdfs8.pdf>.

¹⁶⁴ No public agency shall be deemed to have violated subsection (a) of this section **with respect to the employment of any employee in fire protection activities** or any employee in law enforcement activities (including security personnel in correctional institutions) if - (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed. 29 U.S.C. § 207, subd. (k) (emphasis added).

¹⁶⁵ U.S. Department of Labor: <http://www.dol.gov/whd/regs/compliance/whdfs8.pdf>.

¹⁶⁶ For example, overtime pay must be paid for any hours worked over 106 hours for a 14-day work period for firefighters.

¹⁶⁷ 29 U.S.C. § 216, subd. (b).

¹⁶⁸ 29 U.S.C. § 216, subd. (b).

cases is to have the Department pay the unpaid overtime and have the liquidated damages, attorney's fees and costs paid out of funds controlled by the City Attorney's Office.¹⁶⁹

Past and current FLSA cases:

There have been approximately six lawsuits against the Fire Department and City since the late 1990s involving the FLSA. In each case, a group of Fire Department employees claimed they did not qualify under the section 7(k) partial overtime exemption to the FLSA, and accordingly were seeking to recover payment for unpaid overtime. The RMS had hard copy case files for only three cases: Achan, Haro and Tomassi. There were entries in the LTS for these cases and the latest Ramsey case.

The first case, Acrich v. City of Los Angeles,¹⁷⁰ filed in 1997, was brought by 192 single-function paramedics who claimed that they did not qualify for the section 7(k) overtime exemption because they had no firefighting responsibilities. It is unclear from the materials this office was able to obtain exactly how much was paid out in this case. According to the Council file, the City authorized payment of up to \$1.8 million for back pay in December 1999.¹⁷¹

The second case, Cleveland v. City of Los Angeles,¹⁷² filed in 1999, was brought by 119 dual-function firefighter/paramedics. These plaintiffs claimed they were entitled to overtime payment when assigned to rescue ambulances because that assignment is "not designed to provide fire protection services," and thus did not qualify for the FLSA partial overtime exemption under section 7(k).¹⁷³ The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's finding that section 7(k)'s exemption did not apply.¹⁷⁴ The district court's critical findings included the following:

Plaintiffs did not qualify as "employees in fire protection activities" under *either* definition because: (1) Plaintiffs do not have the "responsibility to engage in fire prevention, control or extinguishment" as set forth in 29 C.F.R. § 553.210(a)(3); (2) Plaintiffs are not regularly dispatched to fire scenes as described by 29 C.F.R. § 553.215(a)(2); (3) Plaintiffs' nonexempt work is not limited to less than twenty percent of their total work hours as described by 29 C.F.R. § 553.212; and (4) Plaintiffs do not have the "responsibility to engage in fire suppression" as set forth in 29 U.S.C. § 203(y).¹⁷⁵

In total, the City paid \$5.8 million to resolve this case.

The next case, Haro v. City of Los Angeles,¹⁷⁶ filed in 2002, also involved dual-function firefighter/paramedics (including air ambulance firefighters). This case was consolidated with an

¹⁶⁹ Both of these funding sources, of course, are comprised of taxpayer dollars from the City's General Fund.

¹⁷⁰ United States District Court, Central District of California, Case No. CV 97-4163.

¹⁷¹ Los Angeles City Council File No. 99-0680. After 1992, the Department stopped hiring single-function paramedics.

¹⁷² United States District Court, Central District of California, Case No. CV 99-9175.

¹⁷³ *Cleveland v. City of Los Angeles*, 420 F.3d 981, 984 (9th Cir. 2005).

¹⁷⁴ *Cleveland, supra*, 420 F.3d at p. 991.

¹⁷⁵ *Cleveland, supra*, 420 F.3d at p. 987.

¹⁷⁶ United States District Court, Central District of California, Case No. CV 02-9587.

additional case, Achan v. City of Los Angeles,¹⁷⁷ filed in 2004, and members assigned to the Operations Control Dispatch (OCD) were first added in 2004 with the majority being added in 2006. Both the dual-function firefighter/paramedics and the dispatcher/call-takers claimed they were not exempt from the general FLSA overtime rules because their assignments did not include firefighting responsibilities. In August 2008, the City paid \$7,750,000 in back pay and liquidated damages to these plaintiffs.¹⁷⁸ However, these payments did not resolve all the issues in the case.

On November 30, 2009, the district court granted the plaintiffs' motion for summary judgment, and awarded them three years of double overtime pay on January 13, 2010. From the materials obtained by this office it appears that the case is ongoing, with appeals filed by the City in both the Haro and Achan cases in January 2012.¹⁷⁹ As of June 30, 2011, the City had paid more than \$1,618,579 in fees for outside defense counsel in these cases.¹⁸⁰

In Tomassi v. City of Los Angeles,¹⁸¹ filed in 2008, a group of probationary firefighters filed a lawsuit alleging that the Department failed to compensate them for "off the clock" hours (the time before and/or after a scheduled shift when probationary firefighters are expected to be present at the station).¹⁸² In October 2010, the City approved a settlement with the five members for \$340,000.¹⁸³ The City also paid \$882,697 in fees for outside counsel.¹⁸⁴

The most recent case is Ramsey v. City of Los Angeles,¹⁸⁵ filed in 2010, which also involves dual-function firefighter/paramedics assigned to rescue ambulances with single-function paramedics. The plaintiffs' theory is that these dual-function firefighter/paramedics have no firefighting responsibilities because they are partnered with single-function paramedics who are not trained in fire suppression. As of February 2012, 35 members had signed up to be part of the class and discovery in the case was well under way with trial set to begin in June.¹⁸⁶ As of June 30, 2011, \$63,935 had been paid to outside counsel for representing the City in the litigation.¹⁸⁷

¹⁷⁷ United States District Court, Central District of California, Case No. CV 04-4334.

¹⁷⁸ Los Angeles City Council File No. 08-1873.

¹⁷⁹ There is evidence in Council File No. 08-1873 that the City Council voted to reject a settlement offer from the plaintiffs on September 22, 2010. Additionally, the court records from December 9, 2011, show the court ordered the City to pay 26 of the plaintiffs a total of \$1,772,523.04 in back wages and the same amount in liquidated damages. This office was unable to determine what occurred related to this order.

¹⁸⁰ City Attorney's Office, Outside Counsel Expenditure reports from FY 2005-06 to FY 2010-11. This is the figure given in the City Attorney records as the cumulative expenditures; however, the sum of the figures given for fiscal year expenditures from 2002-2011 is only \$472,200.

¹⁸¹ United States District Court, Central District of California, Case No. CV 08-1851.

¹⁸² This office was able to locate a Special Notice issued prior to the filing of this lawsuit dated January 5, 2007, titled "Holding Over Directive." This notice stated, in part, "[R]esponsible officers shall not permit the practice of probationary members holding over after being relieved and performing any work-related duties." While a Department representative reported that corrective action was taken in response to this lawsuit, this office was unable to locate any written evidence of such corrective action.

¹⁸³ Los Angeles City Council File No. 10-2464.

¹⁸⁴ City Attorney's Office, Outside Counsel Expenditure reports from FY 2007-08 to FY 2010-11.

¹⁸⁵ United States District Court, Central District of California, Case No. CV 10-5592.

¹⁸⁶ Risk Management Section, Litigation Tracking System record.

¹⁸⁷ City Attorney's Office, Outside Counsel Expenditure report for FY 2010-11.

FLSA Costs:

Table 8 below sets forth all the costs to the City associated with these FLSA cases.

Table 8: FLSA Case Costs (Acrich, Cleveland, Achan/Haro and Tomassi)

	Acrich	Cleveland	Achan/Haro	Tomassi	TOTAL
Back pay	n/a ¹⁸⁸	\$2,565,757	\$3,875,000	\$120,000	\$6,560,757
Damages, fees, costs and interest	n/a	\$3,028,488	\$3,875,000	\$220,000	\$7,123,488
<i>Subtotal</i>	\$1,800,000	\$5,594,245	\$7,750,000	\$340,000	\$15,484,245¹⁸⁹
Defense Fees		\$260,432 ¹⁹⁰	\$1,618,579 ¹⁹¹	\$882,697	\$2,761,708
TOTAL	\$1,800,000	\$5,854,677	\$9,368,579¹⁹²	\$1,222,697	\$18,245,953

Sources: Los Angeles City Council File No. 02-2223; City Attorneys' Office, Outside Counsel Expenditure reports from FY 2005-06 to 2010-11; *Cleveland, supra*, 420 F.3d at 987; Fire Department accounting records.

Department's prior responses to FLSA litigation:

After the City filed its appeal in the Cleveland case in March 2003, the Department made a number of changes to the staffing and dispatching of ambulances. In the summer of 2004, the Department assigned breathing apparatus to all ambulances, fitted and assigned personal protective equipment to all dual-function firefighter/paramedics and changed the dispatch protocol so that paramedic ambulances were automatically dispatched to all structure fires and reported smoke incidents.¹⁹³ Accordingly, incident commanders had the discretion to deploy firefighter/paramedics assigned to paramedic ambulances at emergency incidents in fire suppression and rescue operations. In early 2006, the dispatch protocol was again changed to add an additional rescue ambulance to each structure fire and related incident.¹⁹⁴

After making these changes, Department representatives traveled to Washington, D.C. in November 2005 to meet with the U.S. Department of Labor (DOL). The purpose of this meeting was to obtain an opinion letter regarding whether dual-function firefighter/paramedics employed by the LAFD qualified for the partial overtime exemption under section 7(k). The Department provided a variety of materials to the DOL to illustrate the duties and responsibilities of

¹⁸⁸ The Department was unable to determine how much of this amount was paid from Department-controlled funds for back pay.

¹⁸⁹ This total is greater than the total provided in Table 2 by \$1.8 million because that table only includes payments made since Fiscal Year 2002. The payments made in the Acrich case were made prior to that time.

¹⁹⁰ Council File No. 02-223 shows a total of \$380,000 appropriated for outside counsel but City Attorney records show only \$260,432 in Cumulative Expenditures for this case.

¹⁹¹ The City Attorney's records list this figure as the Cumulative Expenditures in the case but the same records show only \$472,200 being spent as Fiscal Year Expenditures from 2002-2011.

¹⁹² This amount reflects only what has been paid out in the case so far. The case has not been concluded so this total amount will likely increase.

¹⁹³ Los Angeles Fire Department, Departmental Bulletin No. 04-11, issued on June 7, 2004, and effective July 1, 2004.

¹⁹⁴ Los Angeles Fire Department, Departmental Bulletin No. 06-03, issued on January 16, 2006.

firefighter/paramedics.¹⁹⁵ This included evidence showing that rescue ambulances had been equipped with firefighting equipment and dispatch protocols had been changed.

With these changes, the DOL issued an opinion letter stating that dual-function firefighter/paramedics, as their duties were described in the letter request, did qualify for the partial overtime exemption.¹⁹⁶ The DOL applied the six factors articulated by the 9th Circuit in the Cleveland case. The DOL concluded:

“In *Cleveland v. City of Los Angeles*, [citation omitted], the Ninth Circuit stated that in order for dual-function firefighter/paramedics to have sufficient fire suppression responsibility under section 3(y), they must ‘have some real obligation or duty’ to engage in fire suppression. [Citation omitted.] Unlike the dual-function firefighter/paramedics described in your letter, the dual-function firefighter/paramedics at issue in *Cleveland* did not, according to the Court, carry fire suppression breathing equipment in their paramedic ambulances, were not expected to wear fire protection gear at fire scenes, did not assist with any fire suppression, and were dispatched only to perform medical services.”

After applying the six factors used by the 9th Circuit, the DOL concluded that the firefighter/paramedics described by the Department “appear to engage in both fire prevention, control, and suppression and respond to emergencies where life, property, or the environment is at risk,” and accordingly qualified for the partial overtime exemption.

While the Mayor’s Executive Directive No. 9 was issued after the Department’s actions described here, these actions are a good example of one of the items included in a good litigation risk management program: evaluating whether the allegations in a claim or litigation, and the facts revealed through investigation, suggest the advisability that the City seek a change in federal, state, or municipal law or regulation. Here the Department recognized that a change in law, or more accurately a different interpretation of the statute, was needed.

Additionally, the City Council supported the Department in this endeavor by adopting a resolution on November 1, 2005, that stated the City would include in its 2005-06 Federal Legislative Program sponsor and support of “any legislation making clear and explicit that dual-function firefighter/paramedics, when assigned to a paramedic resource, are ‘responsible’ for performing fire suppression functions within the meaning of the FLSA and therefore, eligible for the partial overtime exemption provided to other firefighters.”¹⁹⁷

City Controller’s Review of the Los Angeles Fire Department Dispatch Staffing and Special Duty Assignments:

On April 24, 2006, the City Controller issued the *Review of the Los Angeles Fire Department Dispatch Staffing and Special Duty Assignments*. The Controller concluded that 62 firefighter

¹⁹⁵ These materials included a historical overview of dual-function firefighter/paramedics and single-function paramedics in the Department, photos of firefighter/paramedics engaged in fire suppression and rescue activities, the June 2004 and draft January 2006 Departmental Bulletins, a summary of the activities during a typical shift, After Action Reports that included information about firefighter/paramedics engaging in fire suppression and a variety of incident summaries and dispatch recordings describing the same.

¹⁹⁶ U.S. Department of Labor, FLSA2006-20 (June 1, 2006).

¹⁹⁷ Los Angeles City Council File No. 02-2223-S1.

call-taker positions in the OCD 9-1-1 dispatch unit and 18 special duty positions throughout the Department should be civilianized. Additionally, the 24-hour platoon duty schedule for OCD call-takers could be switched to an 8, 10 or 12-hour shift. These changes, the Controller found, could result in \$2.3 to \$3.8 million in savings for the Department. At the time of the *Review*, the OCD was made up of 88 sworn members (75 firefighters, nine captains, three battalion chiefs and one assistant chief). Currently the OCD has two additional firefighters.

In addition to recommending civilianizing the OCD call-taker positions, the Controller also recommended that the Department:

1. Conduct a time and task study to determine the number of civilian call-takers needed based on hourly historical call data for volume, duration and required service;
2. Determine the preferred shift schedule to meet the demands over a 24-hour period, and establish the number of call-takers needed during each shift to meet peaks and valleys in call volumes;
3. Identify and develop a training program for civilian emergency medical dispatchers with input from industry sources, comparable civilian fire department dispatch centers and the LAPD; and
4. Develop a sworn and civilian command structure, including the roles and responsibilities of civilian call-takers and sworn dispatch resource controllers.

Department's Response and Fire Commission Consideration

At the May 15, 2007 meeting of the Board of Fire Commissioners, the Department presented a report titled "Dispatch Staffing and Special Duty Assignment Analysis."¹⁹⁸ This board report contained the Department's response to the Controller's *Review*, and included a recommendation that the Department maintain sworn members in all OCD and special duty positions. The Commission voted to adopt the Department's recommendation.¹⁹⁹

In its report, the Department maintained (among other non-budgetary reasons for keeping sworn members in the positions) that the savings calculated by the Controller were not accurate. Rather, the Department concluded, the changes recommended by the Controller would actually increase budgetary spending. While the Controller found that civilianization would produce savings of \$2.3 to \$3.8 million per year, the Department concluded that civilianization would cost the Department anywhere between \$682,000 (at a minimum) to \$5 million per year.

The sources of these differing results were the different figures used by the Controller and the Department for: 1) the annual wages and benefits for sworn versus civilian dispatchers, and 2) the total number of civilians needed to replace sworn positions.²⁰⁰ The Department's analysis produced a lower annual wages and benefits figure for sworn dispatchers and a higher figure for civilians than those used by the Controller. Additionally, the Department estimated that the

¹⁹⁸ Board of Fire Commissioners Report No. 07-034 (May 8, 2007).

¹⁹⁹ Board of Fire Commissioners, May 15, 2007 Meeting Minutes.

²⁰⁰ The Department also reached different conclusions regarding attrition rates and personnel training time and costs.

minimum number of sworn positions needed was 76 rather than 62, and the total number of civilians needed to replace those positions would be 176 rather than 84 or 106.²⁰¹ Table 9 below shows a comparison of these various calculations.

Table 9: OCD Civilianization Savings/Cost Comparison

		Annual Wages Including Retirement and Other Benefits	# of Positions	Total Cost
Controller	Sworn	\$151,554	62	\$9,396,348
	Civilian	\$67,156	84	\$5,641,104
	<i>Total Savings</i>			\$3,755,244
Controller	Sworn	\$151,554	62	\$9,396,348
	Civilian	\$67,156	106	\$7,118,536
	<i>Total Savings</i>			\$2,277,812
Department ²⁰²	Sworn	\$146,169	62	\$9,062,478
	Civilian	\$91,931	106	\$9,744,686
	<i>Total Savings</i>			(\$682,208)
Department	Sworn	\$146,169	76	\$11,108,844
	Civilian	\$91,931	176	\$16,179,856
	<i>Total Savings</i>			(\$5,071,012)

Sources: City Controller, *Review of the Los Angeles Fire Department Dispatch Staffing and Special Duty Assignments*; Board of Fire Commissioners, Report No. 07-034 (May 8, 2007).

One potentially significant problem with the Department's calculations in its board report was the failure to anticipate the impact of the FLSA on sworn dispatcher schedules. By the time the 2007 board report was prepared, firefighters had sued the City in four different cases, each time contending they did not qualify for the partial overtime exemption under section 7(k).²⁰³ The City had also paid \$7,394,245 in two of the cases before the 2007 board report concerning dispatch staffing costs was prepared.²⁰⁴ The RMS reported that the first of the OCD dispatchers became plaintiffs in the Achan/Haro case in 2004 and the majority of them were added in 2006.

²⁰¹ The Department's conclusions regarding minimum staffing were based on the differences in the work schedules for sworn versus civilians (56-hour week for sworn and 40-hour week for civilian), and the higher staff relief factor for civilians. A staff relief factor is a formula that determines the number of people needed to staff a fixed position 24 hours per day, seven days per week. This must take into account paid time off for holidays, vacations, sick leave, injuries, etc.

²⁰² This calculation shows the cost of civilianization using the Department's wages and benefits figures but the Controller's minimum staffing figures.

²⁰³ The four cases include Acrich filed in 1997, Cleveland filed in 1999, Haro filed in 2002 and Achan filed in 2004.

²⁰⁴ The City paid \$1.8 million in 1999 to settle the Acrich case. The City paid a total of \$5,594,245 in back pay, damages and attorney's fees in 2006 to settle the Cleveland case.

Maintaining sworn dispatchers working on a platoon duty schedule (three 24-hour shifts per week) would result in overtime pay of 16 hours per week per dispatcher (56 hours per week on platoon duty less 40 hours per week under the FLSA), or 1,216 hours at 1.5 times the regular rate of pay. The lowest current biweekly salary for a Firefighter III is \$2,416, each member receives an EMT bonus of \$195 biweekly, and an OCD dispatcher with less than two years of continuous service receives a biweekly bonus of \$80.²⁰⁵

Assuming the dispatcher is not also a paramedic, bilingual, holds an advanced degree or is entitled to any additional bonuses, the weekly salary would be approximately \$1,345. Accordingly, the cost of 16 hours of overtime pay at a rate of 1.5 would be \$576 per dispatcher, or \$43,824 for all 76 dispatchers per week and \$2,278,892 on an annual basis. (Because the Department's figure for annual wages included retirement and other benefits, this office was unable to compare these figures with those calculated by the Department in response to the Controller's *Review*.)

Department's current strategy regarding FLSA litigation:

In 2011, the Fire Chief initiated a comprehensive review of FLSA exposure across the Department. The goal was to identify positions that do not qualify for the partial overtime exemption and to take corrective actions to reduce or eliminate the financial exposure. To accomplish this task, the Department enlisted the services of Liebert Cassidy Whitmore, a law firm with significant employment law experience.

Additionally, the Department is attempting to negotiate an agreement whereby OCD sworn positions will be converted to a 40-hour work week schedule rather than a 24-hour platoon duty schedule.

The Department is continuing to work with outside counsel to clarify what can and should be changed in order to mitigate current damages and prevent future FLSA liability. At the time this audit was published, the work in this area was continuing. This office is encouraged that the Department is now taking responsible steps in this area.

Missed opportunities, complications and outstanding issues:

While the Department now appears to be on the right track in regards to examining areas of potential FLSA liability, it missed a number of opportunities to do so before now. The Department had an opportunity after the first lawsuit in 1997 (Acrich) to reevaluate the timekeeping and schedules of all sworn members who did not have "firefighting responsibilities." Even if it was not recognized at that time because the plaintiffs had never been trained in fire suppression, it certainly should have become clear after the second lawsuit in 1999 (Cleveland) involving dual-function firefighter/paramedics. After that case it was certainly clear that even those members who have been trained in fire suppression would not qualify for the partial overtime exemption if their assignment did not have firefighting responsibilities attached to it.

²⁰⁵ City Administrative Officer, Memorandum of Understanding # 23 - Firefighters & Fire Captains (July 1, 2009, to June 30, 2010).

Executive Directive No. PE-3 concerning the Fair Labor Standards Act was issued on May 14, 2002. It required that all general managers, department heads and City commissions designate an assistant general manager to coordinate FLSA issues; ensure that all personnel follow applicable directives, bulletins and procedures on the subject of the FLSA; and take all steps necessary to ensure supervisors understand and properly administer the FLSA requirements. Directive No. PE-3 said annual evaluations of chief administrative officers would include a determination of the ability to ensure that FLSA violations do not occur. It is worth noting the Achan, Tomassi and Ramsey cases were all filed after Directive PE-3 was issued in 2002.

The Department did not begin calculating FLSA time for OCD dispatchers on a weekly basis until March 2011. The FLSA lawsuits filed from 1997 to 2004, the Controller's audit of OCD staffing and the addition of OCD dispatchers as plaintiffs to the Achan/Haro lawsuit in 2006, should have put the Department on notice that the current system was not sustainable and corrective action was required.

Finally, the Department could have focused on limiting FLSA liability Department-wide after the Mayor's Office issued Executive Directive No. 9 in January 2007. Executive Directive No. 9 required the Department to engage in an ongoing and thorough review of facts underlying filed claims and litigation to determine if changes in policy or practice were warranted to prevent similar future claims. Such a review and corresponding corrective actions should have prevented additional FLSA violations.

Conflict of interest:

One significant issue that was discovered during the course of this audit was that one of the captains assigned to the RMS is a plaintiff in one of the FLSA cases (the Achan/Haro case). This captain joined the lawsuit first as a dual-function firefighter/paramedic, and received a settlement when that part of the case was concluded. This member of the RMS remains a plaintiff in the second part of the case involving OCD dispatchers.

His involvement in the cases predated his assignment to the RMS (in 2010), however, he has continued to work on other FLSA cases (namely the Ramsey case), and has access to case materials like the LTS records and paper case files. This audit discovered nothing that would suggest that this member of the RMS has acted inappropriately. The information provided suggests this member is a valued member of the RMS. However, this situation places this member and the Department in a difficult position.

This conflict of interest was recognized early on by the Department and after consulting with the outside counsel handling the various FLSA cases, it was determined that this member of the RMS would continue to work on other FLSA cases. With respect to the Achan/Haro case, he would not receive any communications nor participate in any discussions about the case.

It should be noted that in February 2012, the outside counsel retained for the purpose of conducting a comprehensive review of FLSA issues provided a draft opinion letter concerning the Department's potential FLSA exposures. The last page of this privileged document indicates that a copy was provided to this member of the RMS. In moving forward with this review of FLSA issues, the Department should consult with the City Attorney's Office and/or outside

counsel to formally evaluate and determine what is in the best interests of the Department and the City with regards to utilizing this member in FLSA-related issues.

As stated previously, there is no evidence that this potential conflict of interest has negatively impacted the Department's interests in any way. However, FLSA lawsuits have involved many sworn members of the Department such that the potential for any future RMS staff member being involved in one of them creates some concern. This is just one more reason that the litigation specialist position should be filled by an experienced civilian employee rather than a sworn member.

Communications with the Fire Commission:

Perhaps the most important missed opportunity is the Department's continuous failure to bring issues related to FLSA litigation to the attention of the Board of Fire Commissioners. While some of these FLSA cases appeared on numerous meeting agendas, it does not appear that many of them were discussed in any detail at those meetings. The only exception is possibly the Cleveland case. At the June 6, 2006 Fire Commission meeting, the Commission President requested a briefing on pending litigation at the next meeting, and that the Personnel Committee review the particulars of the Cleveland case at the next committee meeting. However, the agenda for the next Personnel Committee meeting on June 23, 2006, made no mention of the Cleveland case.

TRAINING

This audit reviews a number of expensive lawsuits where Fire Department employees were alleged to have engaged in behavior that is not appropriate for the workplace. The response by supervisors and managers was not appropriate in some cases. Some cases suggest broader work environment issues.²⁰⁶

While the disciplinary process can and should address some of these issues, both discipline and litigation only address problems and misconduct after the fact, sometimes long after the fact. Unfortunately, the Department has a spotty history, with only a few isolated examples, of attempts to implement preventative strategies and training programs to address some of these areas more proactively.

Workforce Excellence Unit:

A Workforce Excellence Unit (WEU) was included as a part of the Professional Standards Division in 2008. The purpose of the WEU was to provide tools and training to help resolve workplace environment issues before they become official misconduct complaints requiring disciplinary action or resulting in litigation. WEU was eliminated as a result of budget cuts. When eliminated, the Department lost one of its tools to address work environment issues and conflict in a proactive way.

It is worth mentioning that the Police Department continues to employ a Work Environment Liaison Section (WELS), the purpose of which is to “provide guidance to create collaborative agreements and resolutions to environmental conflicts.” The complaints referred to the WELS are non-misconduct or minor misconduct complaints. WELS officers provide mediation, conciliation, environmental evaluations and informal counseling and advice.²⁰⁷

Human relations training:

The Fire Department reports it currently has no one providing human relations training to the Department’s personnel.²⁰⁸ While some human relations training may be provided during the Department’s academy, the Department has not held an academy in a number of years. Currently, training in human relations, interpersonal skills and other issues identified in past litigation is not taking place at all levels of the Department on a regular and continuing basis.

The Department reports that the In-Service Training Section recently began developing a plan for human relations training. A training video and corresponding lesson plan were created in 2010 but ultimately discarded. A power point presentation was created by one of the members of the WEU and has since been modified and updated, but not yet implemented. This

²⁰⁶ The same or similar issues were mentioned in the City Controller’s January 26, 2006 *Review of the Los Angeles Fire Department Management Practices*, the Personnel Department’s January 30, 2006 *Audit of Fire Department Selection and Employment Practices*, the City Controller’s January 7, 2008 *Evaluation of Citywide Risk Management Functions* and the *Assessment of the Department’s Disciplinary Process and Professional Standards Division* published by this office on March 27, 2010.

²⁰⁷ WELS officers reported spending approximately half of their time on informal counseling and advising employees.

²⁰⁸ See budget request included in the LAFD Proposed Budget for Fiscal Year 2012-13.

presentation on managing the work environment includes a discussion on discrimination, harassment and retaliation laws, hazing and the internal and external complaint processes.

The Department reports that in accordance with state law, all officers and civilian supervisors are currently required to complete two hours of an internet-based e-learning course titled “Sexual Harassment: California Manager’s Edition.”²⁰⁹ In response to changes in the law and the issuance of new City policies related to human relations issues, the Department has disseminated various Department notices and bulletins. These notices include City and Department policies on work environment complaints, sexual harassment and hazing.

The Department reports that it intends to conduct human relations training via the Learning Management System. This is an online training system that can be accessed by each member at each work location. The topics included in this training system will include all City-mandated training (sexual harassment, domestic violence, sexual orientation and human trafficking), as well as EEO-related videos (harassment in the public sector, subtle discrimination and multi-generational work environment). This training program has not yet been implemented.

Supervisory and management training:

Some supervisory and management classes and training in operational areas, such as the Incident Command System, are available to Department members. While this training is very useful for learning how to handle emergency responses and incidents, there is relatively little, if any, training provided for supervisors and managers in the areas of human relations, conflict resolution, interpersonal skills, employee counseling and leadership related to the every day work environment.

The Department offers a Leadership Academy for supervisors who may attend on a voluntary basis (it is not funded). There are plans to provide a voluntary program of training for those firefighters interested in promoting to the rank of Captain. Again, there is currently no funding for this program.

Thus far, what is lacking is a mandatory, funded program for Department supervisors and managers. This kind of program would ensure that all Fire Department supervisors and managers are provided with skills and training in some of the critical areas identified by misconduct complaints and litigation. Such training is a critical step in holding supervisors and managers accountable on a daily basis.

EEOC harassment and retaliation case:

Litigation against the Fire Department is not limited to lawsuits filed in state and federal courts. The City recently settled a complaint involving the Fire Department that was filed with the U.S. Equal Employment Opportunity Commission (EEOC). The settlement agreement in that case includes a training requirement. According to a January 31, 2012 press release from the EEOC announcing the settlement:

“Anthony Almeida, a firefighter/engineer employed since 1986, filed an EEOC discrimination charge initially in 2007, alleging that he was continually harassed by

²⁰⁹ Los Angeles Fire Department, Departmental Bulletin No. 07-08, issued on July 18, 2007.

fellow firefighters at his station who employed deeply offensive comments of a sexual and religious nature. An EEOC investigation uncovered that the harassment, which began in late 2006, appeared linked to a lawsuit filed against the Catholic Church by Almeida regarding sexual abuse he suffered by a priest. One coworker learned that Almeida had filed a lawsuit against the Catholic Church over the abuse, and several coworkers mocked him for that, using explicit and offensive religious and sexual epithets. Although Almeida complained about the harassment to management officials, the EEOC investigation found that the Fire Department failed to adequately halt or address it. Further, the investigation found that Almeida had suffered retaliatory discipline for his participation in another equal employment opportunity investigation.”

The Conciliation Agreement between the EEOC and the City requires monetary relief of \$494,150 to be paid to Almeida and his attorneys, that all sworn members acknowledge receipt of non-discrimination and non-harassment policies annually, and that an external complaint procedure continue to be offered. The agreement also contains a required training component:

1. All chiefs are required to complete a live, two-hour training on the relevant laws and how to recognize and properly respond to possible harassment and discrimination occurring in the workplace.
2. The chiefs are to provide live introduction of video training with their subordinates, after which the chiefs are to conduct live discussions to field questions about the video presentation, make reference to the EEO Policy Manual, and to address questions or concerns.

This EEOC case was first brought to the attention of the Fire Commission when it was discussed in closed session on October 18, 2011.²¹⁰ At its February 13, 2012 meeting, the Commission’s Human Relations Development (HRDC)/Personnel Committee requested that the Department provide the full Commission with a report concerning the matter.²¹¹ It is unfortunate that almost \$500,000 in monetary relief and a conciliation agreement five years after the allegations of discrimination, harassment and retaliation were received is what is necessary to implement a Department-wide training program on harassment, discrimination and retaliation.

Specific recommendations:

22. The Department should develop and implement a comprehensive, consistent and integrated plan to ensure human relations, work environment and leadership training needs are effectively met at every level of the Department.²¹²

²¹⁰ The RMS has no file or LTS record for this case because EEOC cases are not monitored by the RMS.

²¹¹ As with other litigation matters, the Fire Commission needs to know the following about this claim: 1) what is alleged to have occurred; 2) what misconduct occurred; 3) exactly what conduct by the Department caused the City to pay damages; 4) what was done or needs to be done to correct the misconduct; 5) what was done or needs to be done to correct the other problems brought to light by the litigation; and 6) what was done or needs to be done to prevent future claims, complaints and lawsuits of a similar nature.

²¹² The LAFD Proposed Budget for Fiscal Year 2012-13 contains a request to hire a Senior Personnel Analyst II to manage human relations training. The projected cost is \$159,401.

23. The Department should also ensure that those responsible for training receive information from the PSD, RMS and other areas of the Department that receive information related to possible training gaps so that as issues are identified training curricula may be updated to address those issues in a timely manner.

24. The Department should ensure that it complies with Executive Directive No. 9 when complaints are filed against the Department with the Equal Employment Opportunity Commission, Department of Fair Employment and Housing or other similar entities. This is particularly true as it relates to thoroughly reviewing the facts of a complaint to determine if: 1) changes in policy or practices are warranted to prevent similar future complaints; and 2) appropriate discipline and/or training is necessary.

AUDIT IMPEDIMENTS

The Department was fully cooperative with this office once this audit commenced. The Department consistently demonstrated and expressed an eagerness to improve its risk management functions in any way it could.

The City's decentralized system of risk management and inconsistent information, as well as the failure to maintain regular reporting and poor information management systems inside and outside the Fire Department, contributed to the difficulties encountered while conducting this audit.

The level of cooperation provided by the City Attorney's Office ran from excellent to uncooperative and even threatening. The attorney who successfully handled the Robinson case was very cooperative and responsive to our requests for information. City Attorney staff responsible for the accounting records related to lawsuit payments and outside counsel costs were similarly helpful.

When asked for information about the Miller & Rueda lawsuit, a City Attorney supervisor responded by saying his subordinates would not discuss the case with the Fire Commission or the Independent Assessor, and would not provide advice on what the Fire Department could do to avoid similar lawsuits in the future. When the City Attorney's Office was provided a draft of the Miller & Rueda report for prepublication review, a City Attorney executive sent a letter threatening to report the Independent Assessor to the State Bar if he did not cease and desist. Since the Miller & Rueda report was published, the City Attorney's Office has failed to discuss the case or report with this office in private; failed to discuss the related policy issues with the Fire Commission in public (it was on the agenda for the September 20, 2011 Fire Commission meeting); failed to discuss the policy issues with the Department in private; and the report has been removed from the Commission's public website.²¹³

The inability to obtain information about litigation involving the Fire Department from the City Attorney's Office remains a serious impediment to effective litigation risk management. Problems in this regard are described in this office's March 27, 2010 *Assessment of the Department's Disciplinary Process and Professional Standards Division* and September 15, 2011 *Review of the Miller & Rueda Lawsuit*. The City Attorney's Office has not corrected the issues raised in these prior reports.

²¹³ Executive Directive No. 9 clearly calls for continuous evaluation of litigation in an attempt to effectuate timely corrective action. In regards to the City Attorney's Office, the report provided a list of examples where the City missed opportunities before and during trial to limit litigation issues and potential liability, and provided a summary of the first phase of the trial and jury verdicts. In regards to the Fire Department, the report discussed elements of an effective litigation risk management system, including corrective actions to reduce the risk of future liability and other issues. The report concluded with a summary of impediments encountered in conducting a review of the Miller & Rueda lawsuit. The report did not compromise the City's position in the second phase of the trial involving alleged violations of procedural rights. The issues in the second phase of the trial will be decided by a judge, not a jury. The City's trial attorneys asserted certain objections during the second phase of the trial that were not raised in the first phase of the trial but were mentioned in the report.

LOOKING FORWARD

There are a few items on the horizon worth noting. They include personnel requests in the Fire Department's proposed budget, the Department's review of FLSA exposure and proposals to hold City departments, including the Fire Department, responsible for litigation costs in the future.

Personnel requests:

The proposed budget for Fiscal Year 2012-13 includes requests for critical positions directly related to the issues raised by this audit. The first area involves risk management and the second area involves human relations training.

The Department is proposing to add risk management staff, including a civilian risk manager and a management analyst. While this audit fully supports the need for this additional staff, we are concerned that this additional staffing will be insufficient. As this audit points out, the current staffing is not adequate to meet the requirements of Executive Directive No. 9, other than perhaps as it relates to litigation liaison work. A professional risk manager will be able to provide greater expertise in overall risk management. The Department also requires a specialist in litigation risk management. Sworn members of the RMS should continue to assist in litigation liaison duties, as well as with issues related to safety and workers' compensation.

The Department is also proposing to add a Senior Personnel Analyst II position to provide human relations training. Again, while this office certainly supports the addition of such a specialist, this position should be a part of a comprehensive plan to provide complete and continuing training on human relations, leadership and conflict resolution strategies at all levels of the Department.

FLSA audit:

The Department has engaged an outside law firm to conduct an audit of how the Department may mitigate any further exposure to FLSA claims. This office fully supports this endeavor. However, the Ramsey case is still pending and the financial exposure has not yet been determined.

Litigation costs:

Generally, the cost of litigation has been paid from accounts under the control of the City Attorney's Office. There are current proposals to shift litigation costs to individual departments, the theory being that this would provide departments with an added incentive to reduce the risk of lawsuits.²¹⁴ One of these proposals was articulated in a recent report from the City Administrative Officer as follows:

²¹⁴ It is not clear if such proposals would call for the Fire Department to be responsible for both defense and indemnity costs, or only the cost of indemnity. Defense costs typically include things such as attorney's fees to defend the lawsuit, court reporters for depositions, expert witnesses and consultants and other expenses related to preparing a case for trial. Indemnity costs typically include the expense of a settlement or satisfaction of a judgment. Likewise, it is not clear whether the Department would be responsible for expenses such as attorney's fees, when they are available to a prevailing party, and interest on the judgment.

“Enhance risk management accountability across all departments by requiring departments to absorb liabilities resulting from failed management decisions and repeated mistakes.”²¹⁵

While certainly a laudable goal, such proposals raise complicated and serious questions about budget planning, litigation risk management functions, liability prevention programs, the quality of legal services provided to the Fire Department, litigation control and many other issues. It is well worth noting some of the practical problems associated with such a proposal as highlighted by the some of the cases discussed in this audit:

- In the Burton & Tohill lawsuit, where the Fire Department had no control over the selection of defense counsel, had no control over the litigation and had no litigation risk management expertise to properly question, monitor and oversee defense counsel, the Department would have been required to find \$3,283,026 in its 2010 budget to satisfy the judgment, interest and attorney’s fees, despite the Court of Appeal decision suggesting there may have been problems with the quality of the City’s legal representation.
- In the Miller & Rueda lawsuit, the jury returned a verdict of \$993,000 after the court denied a request to re-open pretrial discovery because the city attorney failed to conduct discovery within the time permitted by law. After the verdict, the City Attorney’s Office: 1) incorrectly told the City Council’s Budget and Finance Committee that the City received a favorable verdict; 2) refused to answer questions concerning whether appropriate and timely objections were raised at the time of trial; 3) may not have presented certain defense evidence at trial to explain a permanent transfer of one of the plaintiffs; 4) refused to discuss the policy implications of the trial result with the Fire Commission in public or with the Independent Assessor in private; 5) refused to answer questions concerning what the Fire Department should do to avoid similar claims in the future; and 6) threatened to report the Independent Assessor to the State Bar when he provided a draft of the Miller & Rueda report containing this information to the City Attorney’s Office for review.
- In 2010, the City paid \$10,887,511 to settle or satisfy judgments in six cases involving the Fire Department. By way of comparison, the following is a list of Department resources that could be funded for one year (personnel costs only) using this amount of funding²¹⁶:

4 Light Forces and
2 Paramedic Rescue Ambulances = \$10,894,757

OR

6 Engines and
2 Paramedic Rescue Ambulances = \$10,930,369

²¹⁵ City Administrative Officer, *Four-Year Budget Outlook and Update to the Three-Year Plan to Fiscal Sustainability*, dated April 6, 2012, at p. 38.

²¹⁶ The budget information is attached as Appendix 5.

OR

15 Paramedic Rescue Ambulances = \$10,819,545

OR

2 Light Forces,
2 Engines and
4 Paramedic Rescue Ambulances = \$10,773,875

FINDINGS & RECOMMENDATIONS

Prior sections of this audit set forth specific findings and recommendations, primarily related to the review of lawsuits and training. In addition to these specific findings and recommendations, this audit also produced general findings and recommendations of a more general nature.

Specific Findings:

Jumaane

1. While the City received an excellent trial result, the trial was lengthy and expensive. Additionally, the appellate decision raises serious questions about the quality of legal services provided in connection with the post-trial proceedings related to serving the notice of entry of judgment and refuting allegations of juror misconduct.
2. Liaison activities contributed to the excellent trial result.
3. There is no case information in the RMS' files. The new litigation liaison has no history or background on the case that may help in the new trial.
4. The nature and extent of corrective action recommended and implemented in response to the lawsuit is not documented.
5. While an excellent trial result was obtained, there is nothing documented confirming that those responsible for discipline or inspections were advised about the plaintiff's allegations in an attempt to reduce the risk of future similar claims.

Mattson, Sarver & Stien

6. The City Attorney's Office obtained an excellent trial result, and the city attorney made efforts to reduce the issues to be tried by a jury by pursuing a pretrial motion for summary judgment.
7. The Department's litigation liaison activities contributed to the excellent trial result.
8. An out-of-date policy governing how the Fire Department tests for alcohol impairment contributed significantly to the City being exposed to a lawsuit that was expensive to defend.
9. The Fire Department incorrectly assumed the lab result was a blood alcohol concentration when it was in reality a urine alcohol concentration.
10. The manner in which the Fire Department currently tests for alcohol impairment places the Department at an unnecessary risk of having alcohol test results challenged in disciplinary proceedings, and places the City at an unnecessary risk of expensive

litigation. These risks have not been sufficiently mitigated in the year and a half since this litigation concluded.

11. The Fire Department has unreasonably delayed revising how it tests for alcohol impairment since the Fire Commission's Personnel Committee was told on April 20, 2007, that the Department would revise how it tests for alcohol impairment.
12. While the Department's current practice is to discipline members for having a blood alcohol concentration of .01 percent or above, the Department's written procedures only permit obtaining of a urine sample. The written procedures actually prohibit obtaining a blood sample in lieu of urine to determine a blood alcohol concentration unless the member is unable to provide urine due to unconsciousness.
13. Chief officers needlessly exposed the City and themselves to an expensive lawsuit by making inappropriate comments and failing to comply with the Department's substance abuse policy, which requires an individualized reasonable suspicion determination.
14. There was much inconsistent testimony concerning when and under what circumstances a name-clearing liberty interest hearing is required, whether recruits are entitled to union representation during disciplinary proceedings, how "absent without leave" is interpreted and whether the recruits had sufficient time to decide whether they should resign in lieu of discharge.
15. The Department appropriately determined a need to end the practice of training staff attending graduation parties, and attempted to discipline one captain for doing so. Some current members of the Department saw nothing wrong and even suggested it would be disrespectful to make training staff pay for drinks at a graduation party. One member of the training staff said he did not know there was a rule prohibiting fraternization with recruits.

Robinson

16. The Department did not initiate the Reasonable Accommodation Process with Robinson until April 2007, which is more than four years after the Fire Commission adopted the Americans with Disabilities Act Policy and Accommodations Request Procedures in January 2003.
17. A former fire chief placed Robinson in an unfunded position that resulted in his continuing to receive helicopter pilot bonus pay for which he was not qualified for eight years because he did not possess the required medical certificate.
18. While a former fire chief made the decision to place Robinson in an unfunded position that resulted in his continuing to receive helicopter pilot bonus pay he did not qualify for, that decision was based on requests, recommendations and support from subordinate chief officers starting at the rank of Battalion Chief.

19. Failing to follow the policies adopted by the Fire Commission resulted in an expensive lawsuit, and placed the Department and City at risk of an adverse result with far reaching implications.
20. The inability to continue Robinson in an unfunded position after eight years resulted in a lawsuit containing allegations that Department personnel made false promises and misrepresentations to Robinson.
21. The City and the Fire Department were very well represented by the City Attorney's Office in this lawsuit; especially because the case was dismissed on a motion for summary judgment so there was no costly trial.
22. The Department's litigation liaison activities contributed significantly to the excellent trial court result.
23. The city attorney assigned to conduct the trial court proceedings and the RMS have a particularly good working relationship, which has benefitted both the Department and the City.
24. The policy related to accommodating injured Department members appeared to change depending on who the fire chief was at the time; this resulted in inconsistent treatment of members.

Burton & Tohill

25. The Court of Appeal decision suggests the City was not well represented in trial or during the appellate proceedings.
26. The attorney who handled the appeal in this matter had legal malpractice insurance limits of only \$1 million dollars when the judgment he was charged with appealing was \$1,644,046 plus attorney's fees of another \$400,000.
27. The \$3,282,035 ultimately paid by the City to resolve this litigation was twice the jury's verdict of \$1,644,046.
28. The need to review the manner in which the City was represented by outside counsel was not recognized within a reasonable time after the Court of Appeal decision was issued.

Bressler, Lee & Mellinger

29. The internal investigations conducted by the Fire Department reached conclusions that were inconsistent with the trial results, and any attempt to reconcile the differences between the internal investigations and the litigation results is not documented.

30. The extent to which the allegations and facts, as revealed during an early investigation, pretrial discovery and trial, revealed the need for corrective or other actions is not well documented or even clear.
31. The internal investigations and trials revealed serious environment issues.
32. Any disciplinary investigations or actions involving those whose conduct served as a basis for large verdicts returned against the City are barred by the statute of limitations set forth in Charter section 1060, which provides no tolling provisions.
33. The \$3,335,737 the City ultimately paid at the conclusion of the Bressler litigation was almost twice the \$1,730,848 jury verdict.
34. The City and Fire Department were well represented in the Lee appellate proceedings and trial counsel appropriately preserved the trial record for a successful appeal.

Miller & Rueda

35. The jury in the Miller & Rueda case returned a \$993,491 verdict against the City of Los Angeles based on allegations that a member of the Los Angeles Fire Department was retaliated against after engaging in protected activity.
36. The jury in the Miller & Rueda case returned special verdicts finding that the rights and protections afforded to two members of the Fire Department pursuant to the *Public Safety Officers Procedural Bill of Rights Act* and the *Firefighters Procedural Bill of Rights Act* were maliciously violated with the intent to injure them 42 times, and these findings could lead to additional money damages of \$1,050,000, plus attorney's fees.
37. The City Attorney has refused to answer questions concerning the jury's verdicts and has said the verdicts will not be discussed with either the Independent Assessor or the Fire Commission because the Fire Commission is not the City Attorney's client and management of litigation is the sole province of the City Attorney.
38. This review is unable to determine if the jury's verdicts are the result of Fire Department misconduct, the manner in which the case was tried, a combination of both, or other factors entirely.
39. The Fire Department was not in full compliance with the Mayor's Executive Directive No. 9 governing litigation risk management at the time the litigation or this review were initiated.
40. The Fire Department does a good job providing liaison services to the litigation attorneys who defend the City and Fire Department.
41. The Fire Department currently does not have personnel with the education, training, expertise and experience necessary to effectively monitor and oversee Fire Department

litigation. This has a direct and negative impact on the Fire Department's ability to take effective litigation risk reduction steps and necessary corrective action in a timely manner.

42. Additional evidence of improper investigative practices was discovered during the course of this review and such improper practices expose the City to an unreasonable risk of liability and money damages. Such improper investigative practices may also present an unreasonable risk that otherwise meritorious criminal prosecutions may be tainted and not filed.

Specific Recommendations:

Tracking Systems

1. The Department should design, implement and consistently use an electronic tracking system to track litigation and enhance risk management. This should also include tracking litigation costs and the amount of time spent by RMS personnel on each case.
2. To the extent that the Department's electronic tracking system for litigation is not able to adequately track or preserve information related to litigation, the Department should develop and regularly use a paper-based case file system.
3. The manner in which the Department tracks information related to litigation should include all of the information called for by Executive Directive No. 9. It is recommended that the Department also track additional information. One suggested outline is included in Appendix 2.
4. The manner in which the Department categorizes litigation case information should be consistent with the way in which the City Attorney's Office categorizes such information.
5. Biweekly litigation meetings conducted by the Fire Chief should place a greater emphasis on making sure the information called for by Directive No. 9 is being obtained consistently and used to reduce the exposure to litigation. One suggested roadmap is included as Appendix 3.

Mattson, Sarver & Stien

6. The Fire Chief and the Fire Department should be instructed to provide a revised written substance abuse policy to the Fire Commission for consideration and approval. This policy should clearly state Department members will be considered impaired and unable to perform their duties in a safe manner if their blood alcohol concentration is .01 percent or more. The revised written policy should be provided to the Fire Commission in no more than 30 days.
7. The Fire Chief and the Fire Department should be instructed to stop the manner in which blood alcohol concentration levels are currently tested. The Fire Chief and the Fire

Department should be instructed to begin utilizing the City Personnel Department's process to determine both blood alcohol concentration levels and substance abuse.

8. The Fire Chief and the Fire Department should be instructed to revise the Department's written substance abuse practices and procedures in order to:
 - a. Ensure reasonable suspicion determinations are made only by appropriately trained personnel who are able to demonstrate proficiency in making such determinations; and
 - b. Effectively and efficiently facilitate the City Personnel Department's testing of both blood alcohol concentration levels and substance abuse.
9. In complying with these recommendations, the Fire Department should immediately obtain the advice of the City Attorney's Office to determine the extent to which the Department is required to "meet and confer" about these recommended changes in the Department's policies, practices and procedures related to alcohol and substance abuse testing.
10. The Department should adopt written procedures that clearly define when a name-clearing liberty interest hearing is required, who is entitled to such a hearing and what the requirements are for such a hearing.

Robinson

11. The Fire Department should be required to fully explain and justify all unfunded positions, or certify that no unfunded positions exist, to the Fire Commission in writing every six months.
12. The Department should ensure compliance with Fire Commission-approved policies regarding disability accommodation so that all members are treated the same.

Burton & Tohill

13. The Fire Department should require that attorneys who represent the interests of the Department in trial have substantial and verifiable jury trial experience in the issues being litigated.
14. The City should review how it selects outside counsel in litigation matters, including its requirement that outside counsel have sufficient legal malpractice coverage for the case being handled by the attorney. In selecting counsel to handle appellate issues, the City should consider selecting counsel who did not litigate the case being appealed.
15. In addition to hiring a professional general risk manager to lead and manage the RMS and the Department's risk management program, the Department requires a professional

specialist with substantial training, education and experience to specifically manage and oversee Fire Department civil litigation matters on a daily basis.

Bressler, Lee & Mellinger

16. City Charter section 1060 should be amended to include a statute of limitations and tolling provisions as described in both the *Firefighters* and *Public Safety Officers Procedural Bill of Rights Acts*.
17. In addition to fully complying with Executive Directive No. 9, the Department should attempt to reconcile inconsistencies between internal investigations and litigation results.
18. Evidence of how the Department conducted its internal investigation, as revealed by the Bressler trial, strongly confirms the need to have internal investigations conducted and overseen by investigative professionals.

Miller & Rueda

19. Seek authority to hire an employee with the necessary education, training, expertise and experience to effectively monitor and oversee pretrial, trial and post-trial proceedings, as well as manage general litigation risk management issues, on behalf of the Fire Department.
20. Adopt a formal set of protocols to address what the Fire Commission and Fire Department expect its litigation counsel to provide in the way of information, advice and legal services to inform its efforts in further reducing litigation risks.
21. Continue to increase the hiring of qualified civilian employees to manage and supervise the disciplinary process, conduct misconduct investigations and prosecute Boards of Rights hearings.

Training

22. The Department should develop and implement a comprehensive, consistent and integrated plan to ensure human relations, work environment and leadership training needs are effectively met at every level of the Department.
23. The Department should also ensure that those responsible for training receive information from the PSD, RMS and other areas of the Department that receive information related to possible training gaps so that as issues are identified training curricula may be updated to address those issues in a timely manner.
24. The Department should ensure that it complies with Executive Directive No. 9 when complaints are filed against the Department with the Equal Employment Opportunity Commission, Department of Fair Employment and Housing or other similar entities. This is particularly true as it relates to thoroughly reviewing the facts of a complaint to

determine if: 1) changes in policy or practices are warranted to prevent similar future complaints; and 2) appropriate discipline and/or training is necessary.

General Findings:

1. The Department does a good job providing valuable liaison services during litigation which includes: providing special knowledge about the Fire Department to litigation counsel; representing the Department before the Claims Board and closed sessions of the City Council and Fire Commission; attending depositions, settlement conferences, trial and other proceedings; assisting with the preparation of discovery responses; and ensuring Department personnel are available to attend court hearings, depositions and other legal proceedings.
2. With some notable exceptions, the Department does not consistently engage in the practice of carefully and thoroughly evaluating whether allegations in a claim or litigation, and the facts as revealed through investigation or pretrial discovery, suggest the advisability of a change in policy or practice or the need for new or renewed training shortly after the Department is notified of the claim or litigation, periodically throughout the litigation and within 30 days following the conclusion of the litigation through settlement or judgment.
3. The Department does not consistently engage in the practice of carefully and thoroughly evaluating whether the allegations in claims and litigation, and the facts as revealed through investigation and pretrial discovery, suggest the advisability of discipline, reassignment or retraining of employees whose actions contributed to liability shortly after the Department is notified of the claim or litigation, periodically throughout the litigation and within 30 days following the conclusion of the litigation through settlement or judgment.
4. In some cases the Department improperly assumes the legal result determines whether corrective action is required. The Department also places too much emphasis on achieving the best litigation result, and too little on litigation risk management. Court verdicts, judgments and decisions do not always adequately address or determine whether revisions to policies, practices or procedures might be appropriate and reduce the risk of future litigation against the Department.
5. Too often the Department waits until litigation is finally concluded before deciding to review or implement policy changes or take other corrective or remedial action, and sometimes such reviews or actions never take place.
6. The Department does not have written policies, procedures or guidelines to ensure that the Department consistently obtains appropriate and timely reports from its litigation counsel concerning litigation issues and actions the Department should consider in an attempt to reduce the risk of litigation. Litigation counsel does not provide advice regarding corrective actions as often as they should, and corrective actions recommended by legal counsel are not adequately documented.

7. A “firewall” has been established between the RMS and PSD to prevent information obtained during communications covered by the attorney-client privilege, or other confidential communications, from being provided to the PSD, which is highly appropriate.
8. Too often the “firewall” between the RMS and PSD prevents non-confidential information from being communicated to the PSD so that timely corrective action can be properly formulated and implemented.
9. The Department’s existing record keeping and litigation tracking systems are not adequate to track all claims and litigation appropriately.
10. The Department does not adequately and consistently track all claims and litigation. The amount and quality of the information currently maintained varies greatly.
11. As head of the Fire Department, the Fire Commission does not receive sufficient and timely information needed to determine if the Department is appropriately responding to litigation.
12. The quality of legal services provided to the Fire Department ranges from very good, as demonstrated by the Robinson case, to poor, as demonstrated by the appellate decision in the Burton & Tohill case and the almost \$1 million verdict for retaliation in the Miller & Rueda case.
13. While the Fire Commission does not make “client” decisions concerning how litigation involving the Fire Department is controlled or managed, and with some exceptions, the Fire Commission is not adequately and consistently informed about the allegations set forth in claims, complaints and lawsuits.
14. The Fire Commission does not receive sufficient information about facts revealed during pretrial discovery to ensure that the Department is taking appropriate corrective actions in response to litigation.
15. The Fire Commission does not receive sufficient information at the conclusion of litigation to determine if appropriate corrective actions have been implemented by the Department in an attempt to avoid litigation in the future.
16. Too often the Fire Commission does not receive information, reports and recommendations concerning litigation matters before the information, reports or recommendations are provided to the City’s Claims Board, the City Council’s Budget and Finance Committee or the City Council.
17. With some exceptions, the Fire Chief does not consistently receive sufficient information concerning litigation involving the Department to provide appropriate direction.

18. The Department lacks the staffing, training, education and experience to meet the requirements of an effective litigation risk management program.
19. The Department currently complies with only a few of the requirements under Executive Directive No. 9.
20. There is little documentation of any cost-benefit analysis used in determining whether to pursue appeals in cases that the Department loses at trial. This analysis is critical given the fact that, as demonstrated in a few of the cases reviewed for this report, the ultimate payout after an appeal can be as much as twice the amount of the verdict after the trial because of additional attorney's fees and interest on the judgment.

General Recommendations:

1. The Department should hire a professional risk manager to manage all of the Department's risk management programs. The Department should also hire an employee with the necessary education, training and experience to evaluate, oversee and monitor litigation involving the Fire Department.
2. The Department should develop, implement and consistently use an electronic litigation tracking system fully capable of meeting the requirements of Executive Directive No. 9 and documenting all relevant litigation-related information.
3. The Department should ensure that the allegations set forth in all claims, complaints and lawsuits are carefully and thoroughly evaluated within 105 days of the Department's notice for the purpose of identifying and taking appropriate and timely corrective or remedial actions. Such evaluations and follow-up actions should involve affected persons and parts of the Department, as appropriate.
4. The Department should ensure that the facts, as revealed through investigation and pretrial discovery, are carefully and thoroughly evaluated on a real-time basis in all cases to ensure appropriate and timely corrective or remedial actions. Such evaluations and follow-up actions should involve affected persons and parts of the Department, as appropriate.
5. The Department should ensure that all facts and circumstances are carefully and thoroughly reviewed to determine the advisability of implementing appropriate and timely corrective or remedial actions within 30 days following the conclusion of litigation through settlement, verdict or judgment in all cases.
6. The Department should adopt a process whereby all litigated cases are thoroughly and carefully evaluated for litigation errors within 30 days after trial and appellate proceedings have concluded.
7. The Department should take all necessary steps to ensure that information that is not truly confidential is shared with appropriate parts of the Department, such as the PSD and

Training & Support Bureau, in a timely manner so that early corrective actions can be formulated and effectuated. For example, the PSD should be provided with copies of claims, complaints, lawsuits, discovery responses, deposition testimony and a summary of trial testimony in a timely manner when issues in the case are directly related to PSD policies, procedures and investigations.

8. The Fire Chief should use the biweekly litigation meetings as an opportunity to ensure litigation risk management and prevention opportunities are maximized. In doing so, the Fire Chief should consider requiring that the information called for in the outline set forth in Appendix 3 is provided on a regular basis.
9. When litigation counsel do not provide appropriate litigation status reports on a voluntarily basis, the Department should seek such reports, which should then be documented in the litigation tracking system and shared with other parts of or persons in the Department, as appropriate. Some of the information that the Department should require that defense counsel provide in litigation status reports is set forth in Appendix 2.
10. The Department should ensure that the Fire Commission is kept fully informed about the Department's continuing litigation evaluations, and the advisability of changes in policies, practices, training, discipline and all other necessary corrective actions within 120 days after the Department is first placed on notice of the claim, complaint or lawsuit; periodically as appropriate throughout the litigation; and within 45 days following the conclusion of the litigation by way of settlement, verdict or judgment.
11. In litigation matters, the Department should ensure that it fully complies with the letter and spirit of Rule 15(g) of the Department's Rules and Regulations, which requires that the Fire Commission receive all conclusive recommendations, requests, reports and other communications before they are provided to others in the City.
12. The Department should establish standards for trial experience, legal malpractice coverage, etc., for all trial attorneys representing the Department in litigation.

APPENDIX 1



ANTONIO R. VILLARAIGOSA
MAYOR

EXECUTIVE DIRECTIVE NO. 9

Issue Date: January 10, 2007

Subject: Litigation Risk Management

The City of Los Angeles has shown great progress in recent years both in reducing the number of claims filed against the City and in reducing total payouts of taxpayer funds to compensate claimants. Still, while lawsuits are an inevitable part of running a large City, there is room for further progress in preserving City resources by reducing and preventing claims against City operations and employees.

It is the City Attorney's charter-mandated responsibility to provide legal advice and to represent the City in defending litigation. In addition to a direct role in approving settlements and in making certain other litigation decisions, as Chief Executive Officer of the City, the Mayor has the responsibility to ensure that City personnel cooperate with the City Attorney's office (or conflict counsel in conflict cases) to secure an efficient and effective resolution of all claims filed against the City, and to ensure that active steps are taken based on experience with prior claims and lawsuits to reduce and prevent the filing of future claims. These two critical responsibilities require involvement at the highest levels of City management. Every Department Head has a responsibility to provide leadership in litigation risk management to continue to reduce City payouts and to reduce the number of claims filed. This responsibility includes assigning, training, and supervising high-level managers to engage directly on these tasks. Department Heads will be held accountable for the performance of these tasks and for progress in reducing the City's litigation risk and expense.

A successful litigation risk management system includes mechanisms to ensure regular completion of five key practices: 1) early review of filed claims and litigation to determine suitability for settlement; 2) ongoing, thorough review of the facts underlying filed claims and litigation to determine if systemic change in policy or practice is warranted to prevent similar future claims; 3) planning and implementation of identified changes in policy and/or practice; 4) thorough and timely review of the facts discovered in litigation to determine and implement any appropriate discipline and/or retraining for specific employees; and 5) careful and informed consideration of all decisions to appeal

or not to appeal adverse court determinations, with consideration of future City activity and the possibility of binding legal precedent.

The City of Los Angeles already has in place several mechanisms to accomplish the objectives underlying these practices. Indeed, many of the practices delineated below are already followed in several departments working closely with the City Attorney's Office. This Executive Directive seeks to ensure that the City regularly completes these five key practices, with the input of all appropriate knowledgeable managers. More specifically, this Executive Directive implements steps to ensure high-level involvement of all City departments in the practices necessary to minimize costs expended on litigation now and in the future.

In accordance with these objectives, I direct that each City department undertake the following actions, and ask that each proprietary department adopt similar practices:

Designate Senior Level Litigation Risk Manager

Each Department Head shall designate a senior-level staff member to serve as Litigation Risk Manager, whose duties shall include:

1. Implementing the practices described in this Executive Directive;
2. Tracking all claims and litigation related to department employees and/or programs, including regularly seeking and receiving updates from counsel and reviewing critical discovery, such as depositions of department employees;
3. Serving as liaison to defense counsel, whether City Attorney or conflict counsel, in claims or litigation involving department employees and/or programs;
4. Serving as liaison to the Mayor's Office and the CAO with respect to all matters related to litigation risk management;
5. Representing the department before the Claims Board whenever department-related litigation is before the board;
6. Ensuring that appropriate department personnel are available and attend court hearings, mediations, depositions, and other legal proceedings when requested by the City Attorney's Office or Mayor's Office;
7. Ensuring the conduct and quality of all litigation-related reviews of policies, practices, and /or employee conduct to yield appropriate action, as described in this Executive Directive;

8. Reporting timely on all matters required in this Executive Directive; and
9. Developing and implementing, in consultation with Mayor's Office, CAO, and Personnel, other department-specific loss control and risk management practices.

Each Department Head shall submit the name and contact information of the designated Litigation Risk Manager to the Mayor's Office (Office of Counsel to the Mayor), with a copy to the City Attorney and to the CAO by no later than January 31, 2007. Each Department Head shall designate a new Litigation Risk Manager within 30 days of the current manager leaving the department.

Develop Department Protocols for Review of Litigation and Claims

Each department, through its Litigation Risk Manager, shall develop a protocol with the City Attorney's Office for timely notice and ongoing evaluation of all claims or litigation served on the City that relate to department employees and/or programs. The protocol shall include mechanisms to ensure the following:

1. That the department receives timely notice and a copy of any claim or litigation-commencing complaint or petition, generally within ten days of the City's receipt or acceptance of service;
2. That the department cooperates with assigned defense counsel in the conduct of an early review of the allegations in the claim or litigation and investigation of the facts underlying the allegations;
3. That the department discusses and determines with assigned defense counsel whether early mediation or other settlement discussions would be appropriate in the case following initial review of the allegations and investigation of the facts, generally within 90 days of the City's receipt or acceptance of service of a pleading commencing litigation;
4. That the department discusses and determines with assigned defense counsel whether a statutory offer of settlement should be recommended to the Charter-designated decision-making body, at least six months before any scheduled trial date;
5. That the department engages in ongoing discussions with assigned defense counsel about the advisability of mediation or other settlement negotiations;
6. That the department has an opportunity to review all deposition transcripts of department employees or former employees, and all significant opposition-produced discovery documents, to determine if any follow-up action is warranted;

7. That the department discusses with assigned defense counsel whether an appeal should be filed, within two weeks of an adverse decision or judgment, and at least two weeks before any deadline to file or notice an appeal of any adverse decision or judgment;
8. That the department presents and discusses with assigned defense counsel any proposed change in policy or practice and any proposed employee discipline or retraining related to the facts underlying the claims in litigation before implementation to ensure no adverse effect on defense of the litigation.

This Executive Directive also requests that the City Attorney's Office work with each department to facilitate the development of protocols that meet the above criteria. In addition, each department shall work with the CAO and Mayor's Office (Office of Counsel to the Mayor) to secure compliance with the established protocol by conflict counsel in conflict cases.

Each department shall also develop an internal protocol with respect to claims or litigation served on the City that relate to department employees and/or programs. The protocol shall include timelines and mechanisms to ensure the following:

1. That an early and thorough investigation of the facts underlying any claim or litigation is completed, in cooperation with assigned defense counsel, within 90 days of the department's notice of the claim or litigation;
2. That the department evaluates carefully and thoroughly whether the allegations in the claim or litigation and the facts revealed through investigation suggest the advisability of a change in policy or practice, or the need for new or renewed training, and that such evaluation occurs following the early investigation (within 105 days of the department's notice of the claim or litigation), periodically as appropriate throughout the litigation as additional facts are discovered, and within 30 days following the conclusion of the litigation through settlement or judgment;
3. That the department timely develops and implements any warranted changes in policy, practice, and/or training after due consideration of litigation defense and budgetary impacts;
4. That plans for warranted changes in policy, practice, and/or training are evaluated for budgetary impact and included in the department's budgetary planning;
5. That the department evaluates carefully and thoroughly whether the allegations in the claim or litigation and the facts revealed through investigation suggest the advisability of discipline, reassignment, or retraining

of individual employees whose actions contributed to potential liability, and that such evaluation occurs following the early investigation (within 105 days of the department's notice of the claim or litigation), periodically as appropriate throughout the litigation as additional facts are discovered, and within 30 days following the conclusion of the litigation through settlement or judgment;

6. That the department timely pursues any warranted discipline, reassignment, or retraining of individual employees whose actions contributed to potential liability after due consideration of litigation defense considerations and applicable Civil Service and Personnel rules; and
7. That the department evaluates carefully and thoroughly whether the allegations in the claim or litigation and the facts revealed through investigation suggest the advisability of the City seeking a change in federal, state, or municipal law or regulation, and that such evaluation occurs following the early investigation (within 105 days of the department's notice of the claim or litigation), periodically as appropriate throughout the litigation as additional facts are discovered, and within 30 days following the conclusion of the litigation through settlement or judgment.

Each department shall submit its written protocol with the City Attorney's Office and its written internal protocol to the Mayor's Office (Office of the Counsel to the Mayor), with copies to the City Attorney and CAO by no later than June 15, 2007. Any future modifications to either protocol should be submitted to the same offices.

Report Quarterly on Litigation Risk Management

Each department shall submit a confidential quarterly written report to the Mayor's Office (Office of Counsel to the Mayor), with copies to the City Attorney and CAO, indicating each filed claim or litigation that relates to department employees and/or programs, and including the following:

1. The date the claim or litigation was filed, the date it was served, the date the department was notified of the claim or litigation, and any scheduled trial date;
2. The specific claims alleged in the claim or litigation;
3. Whether the early investigation and consideration of early settlement process was completed, including whether any early settlement process was pursued;
4. Whether evaluations of the claim or litigation for warranted changes in policy, practice or training, or individual employee discipline or training have been completed, including when completed, whether any such steps were pursued and the status of any such steps;

5. Whether evaluations of the claim or litigation for the advisability of seeking a change in federal, state, or municipal law or regulation, including any recommendation from those evaluations;
6. Whether the department has evaluated deposition transcripts or significant opposition-produced discovery;
7. Whether evaluations of possible statutory offer of settlement have occurred, when they occurred and whether an offer was made; and
8. Any judgment or decision adversely affecting the City's position, and what recommendation was reached after evaluating possible appeal.

These quarterly reports should be prepared with due regard to ensuring no harm to the defense position of the City in any open claim or litigation. Each department should expect to meet with its appropriate liaison in the Mayor's Office to discuss each quarterly report.

The first such quarterly report shall be due no later than July 15, 2007. Reports shall be due on July 15, October 15, January 15, and April 15 of 2007-2008 and every succeeding year.

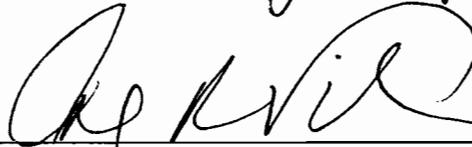
Departments with significant numbers of routine Workers Compensation, traffic-related negligence, or other ministerial types of claims, may request the Mayor's Office to exempt such cases from these protocols and to substitute a less-frequent and less detailed review of trends and patterns in such cases.

Summary of Required Actions

1. Each Department Head shall designate a senior-level staff member as Litigation Risk Manager to perform the duties noted above. Designation is to be made in writing to the Mayor's Office (Office of Counsel to the Mayor), with copies to City Attorney and CAO, by no later than January 31, 2007. A new Litigation Risk Manager is to be designated, with appropriate notices, within 30 days of vacancy.
2. Each department shall develop a protocol with City Attorney's Office for notice and evaluation of litigation and claims, including elements noted above. Written protocol is to be submitted to Mayor's Office (Office of Counsel to the Mayor), with copies to City Attorney and CAO, by no later than June 15, 2007.
3. Each department shall develop an internal protocol for ongoing assessment and implementation of appropriate follow-up to claims and litigation, including elements noted above. Written protocol is to be submitted to Mayor's Office (Office of Counsel to the Mayor), with copies to City Attorney and CAO, by no later than June 15, 2007.

4. Each department shall submit a confidential quarterly report regarding claims / litigation and appropriate follow-up, including information noted above, to the Mayor's Office (Office of Counsel to the Mayor), with copies to City Attorney and CAO. First report is to be submitted by July 15, with subsequent reports due each year on October 15, January 15, April 15, and July 15.

Executed this 10th day of January, 2007



ANTONIO R. VILLARAIGOSA
Mayor

Supercedes Executive Directive 2001-36 (Riordan)

APPENDIX 2

FIRE DEPARTMENT LITIGATION REPORTS

Executive Directive No. 9 holds the Board of Fire Commissioners accountable for litigation risk management in the Fire Department. The Directive sets forth numerous requirements in an attempt to ensure that active litigation risk management is taking place on a continuous basis. In order to ensure that the Fire Department and the Board of Fire Commissioners have sufficient information to ensure that effective litigation risk management is taking place, the Fire Department requires that legal counsel provide regular litigation reports containing to the following information.

INITIAL LITIGATION REPORTS:

Given the requirements of Executive Directive No. 9, it is expected that the Fire Department will receive a copy of all claims, complaints, lawsuits or petitions within 10 days of the City's receipt or acceptance of service. Executive Directive No. 9 requires the Fire Department to carefully and thoroughly evaluate allegations made against the Fire Department as well as the facts revealed through investigation and pretrial discovery, in order to reduce or eliminate the risk of litigation. As such, attorneys representing the interests of the Fire Department shall provide an initial written litigation report to the Risk Management Section within 120 days of the Department's first notice of the claim, complaint or litigation. The information to be provided in the initial litigation report includes the following:

1. Identification and general background information of claimant(s), complainant(s) or plaintiff(s) with any known information concerning litigation history.
2. Identification of plaintiff's attorney and information relating to the attorney's experience.
3. Identification of the attorney assigned to defend the City/Department in the litigation, with a statement summarizing the trial experience and qualifications of the attorney to handle the specific issues involved in the litigation in the same or similar forum.
4. The court and venue in which the litigation has been filed, and the judge to whom the matter has been assigned.
5. Date of alleged loss.
6. Identification of the Fire Department Bureau, Division, Station, work location and all persons involved in the litigation.
7. Location of alleged incident(s).

8. Summary of the allegations with particular emphasis on what the Department and/or its employees are alleged to have done to cause the filing of the claim, complaint or lawsuit.
9. Summary of the incident giving rise to the claim, complaint or litigation.
10. Information describing the nature and extent of any injuries.
11. A summary of and opinions concerning compliance with:
 - a. Claims presentation requirements of the Government Code;
 - b. DFEH and EEOC requirements;
 - c. Satisfying administrative remedies;
 - d. Satisfying judicial remedies; and
 - e. The applicable statute of limitations.
12. A summary of any applicable pleading motions with an opinion concerning the likelihood of success on the motion.
13. A summary of potential defense arguments with an opinion concerning the likelihood of succeeding.
14. Information concerning potential cross-complaints or other indemnity issues.
15. An initial liability evaluation, including an opinion concerning the likelihood of succeeding in the litigation.
16. An initial damages evaluation.
17. Information and opinions concerning the Department's percentage of liability, the plaintiff's liability apportionment and the apportionment of liability that is likely to be attributed to any co-defendants.
18. A description of the Department resources that will be required to assist in the defense of the claim, complaint or lawsuit.
19. An evaluation of how the litigation or case will impact or involve the Department's operations and/or resources during the investigation, pretrial and trial phases of the case.
20. An opinion concerning the impact the litigation will have on the Department's operations should the City lose the litigation.

21. An opinion concerning the realistic settlement value of the claim, complaint or lawsuit, and whether the City should make a statutory settlement offer.
22. A review and evaluation of other legal remedies sought by the litigation.
23. An evaluation concerning whether attorney's fees may be recoverable by the plaintiff, and the amount the City may be required to pay to the plaintiff(s).
24. An evaluation concerning the cost of defending the litigation (with and without an appeal).
25. An evaluation of the likely jury verdict in addition to a statement of the likely range of a jury verdict.
26. A statement describing how the defense should be prepared, including defense investigative needs and how the Department can assist in preparing a defense.
27. A description of how pretrial discovery should be conducted, including a description of discovery methods, timelines and costs.
28. A summary of potential motions or actions, such as motions for summary judgment or adjudication, that will dispose of or limit the scope of the litigation, with opinions concerning the likelihood of success.
29. Information concerning the extent to which expert consultants or witnesses will be required, and the cost of such experts.
30. Recommendations describing how the Fire Department may eliminate or reduce the risk of similar claims, complaints or lawsuits in the future, regardless of the merits of the allegations.
31. Advice and opinions concerning changes in Fire Department policies, practices and/or training that would eliminate or reduce the likelihood of similar claims, complaints or lawsuits in the future, regardless of the merits of the allegations.
32. Advice and opinions on anything that would restrict or limit the ability of the Fire Department to take immediate corrective or remedial action in an attempt to reduce or eliminate future claims, complaints or lawsuits, regardless of the merits of the allegations in the present case.
33. Advice and opinions concerning the extent to which claims, complaints, lawsuits, discovery responses, deposition testimony, exhibits, trial or testimony obtained in open court and other evidence may or may not be shared with involved parts of the Department so that timely and appropriate corrective or remedial actions may be taken.

LITIGATION STATUS REPORTS:

Executive Directive No. 9 requires the Fire Department to carefully and thoroughly evaluate the facts throughout the litigation as additional facts and information are discovered. The purpose of carefully and thoroughly evaluating the facts is to ensure that the Department is taking all reasonable and necessary steps in a timely manner to reduce or eliminate the risk of future litigation. Therefore, all counsel defending litigation involving the Fire Department shall provide written reports to the Risk Management Section within 10 calendar days of significant case events. Significant case events include, but are not limited to, court hearings, court orders or rulings, facts revealed during defense investigations, facts revealed during pretrial discovery and settlement demands. The following information is required;

1. A summary of the case event.
2. A statement describing how the event impacts the Department's operations.
3. Advice, opinions and recommendations on whether the case event suggests the need to seek a change in federal, state or municipal law or regulation.
4. A statement concerning how the case event impacts the litigation including the issues of liability and damages.
5. Advice, opinions and recommendations for future handling of this and other litigation.
6. Advice, opinions and recommendations about how the Fire Department may eliminate or reduce the risk of similar claims, complaints or lawsuits in the future in light of the case event.
7. Advice, opinions and recommendations concerning changes in Fire Department policies, practices and/or training that would eliminate or reduce the likelihood of similar claims, complaints or lawsuits in the future in light of the case event.
8. Advice, opinions and recommendations on how the Department's ability to take immediate corrective or remedial action in an attempt to reduce or eliminate similar claims, complaints or lawsuits in the future may be limited or restricted in light of the case event.
9. Advice, opinions and recommendations concerning the extent to which the case event may or may not be shared with involved parts of the Department so that timely and appropriate corrective or remedial actions may be taken.

LITIGATION REPORT AT CONCLUSION OF DISCOVERY:

Given the requirements of Executive Directive No.9, including the requirement to provide the Mayor's Office with quarterly litigation reports, counsel defending litigation involving the Fire Department are to ensure that the Risk Management Section receive written reports concerning all litigation matters at least six months before any scheduled trial date and, if applicable, no later than 30 days after the conclusion of discovery. Such reports are to ensure that all prior information previously provided is still current, applicable or updated. Such reports shall also include:

1. Advice, opinions and recommendations about whether a statutory offer of settlement should be made.
2. Advice, opinions and recommendations on further legal actions that need to be taken.
3. Advice, opinions and recommendations about the need to present motions in limine on specific legal or factual issues.
4. Advice, opinions and recommendations on corrective or remedial actions that may reduce or eliminate the risk of similar claims, complaints or lawsuits in the future.

TRIAL LITIGATION REPORT:

Within 15 days following the conclusion of litigation through settlement, verdict or judgment, including appellate decisions, litigation counsel are to provide the Risk Management Section with a written report that shall address the following:

1. A summary of settlement conditions or the trial result.
2. A statement describing how the settlement or trial result impacts the Department's operations.
3. Advice, opinions and recommendations on whether the settlement conditions or trial result suggest a need to seek a change in federal, state or municipal law or regulation.
4. Advice, opinions and recommendations concerning whether evidence revealed during trial necessitates corrective or remedial action.
5. Advice, opinions and recommendations about how the Fire Department may eliminate or reduce the risk of similar claims, complaints or lawsuits in the future in light of the settlement or trial result.

6. Advice, opinions and recommendations concerning changes in Fire Department policies, practices and/or training that would eliminate or reduce the likelihood of similar claims, complaints or lawsuits in the future, regardless of the result.
7. Advice, opinions and recommendations on how the Department's ability to take immediate corrective or remedial action in an attempt to reduce or eliminate similar claims, complaints or lawsuits in the future may be limited or reduced.
8. Advice, opinions and recommendations concerning the extent to which the settlement or trial result may or may not be shared with involved parts of the Department so that timely and appropriate corrective or remedial actions may be taken.

APPELLATE LITIGATION REPORT:

Executive Directive No. 9 requires the Fire Department to discuss appeal options when the City suffers an adverse decision or judgment. Therefore, counsel defending litigation involving the Department are to provide appellate litigation reports within 10 days after a verdict, decision or judgment. The information provided shall include:

1. A summary of the factual issues relevant to an appeal.
2. Advice, opinions and recommendations concerning the legal issues relevant to an appeal.
3. Advice, opinions and recommendations concerning the likelihood of prevailing on each appellate issue.
4. An evaluation concerning the ability to settle before taking an appeal and/or the ability to eliminate or reduce the need to pursue an appeal.
5. An evaluation of the costs and expenses of an appeal, including interest on the judgment, costs, expenses and legal fees incurred in preparing and arguing an appeal and the amount of attorney's fees the City may be obligated to pay to the plaintiff, if applicable.

APPENDIX 3

FIRE CHIEF'S LITIGATION MEETINGS

New claims, complaints and lawsuits:

1. Was a careful and thorough evaluation of the allegations and an early investigation conducted within 105 days after the Department was first notified of the claim, complaint or lawsuit?
2. To what extent do other parts of the Department, such as the PSD and Training & Support Bureau, need to be informed of or involved in evaluating the merits of the allegations and the need to take timely corrective action without compromising confidentiality issues?
3. What did the initial evaluation reveal concerning:
 - a. Alleged wrongdoing by the Fire Department or its employees;
 - b. The need for further investigation;
 - c. Suitability for settlement recommendations to the Charter-designated decision-making body;
 - d. The need for changes in policy or practice to prevent future similar claims;
 - e. The need for appropriate discipline, reassignment and/or retraining;
 - f. The need for other actions to be taken in an attempt to avoid similar claims, complaints or lawsuits in the future;
 - g. Any legitimate reason corrective or remedial action cannot be initiated immediately; and
 - h. Other noteworthy issues?
4. What is status of the plaintiff(s) complying with:
 - a. Administrative remedies;
 - b. Government Claims Act requirements;
 - c. Other claims requirements, such as EEOC and DFEH;
 - d. The applicable statute of limitations; and
 - e. Pleading requirements?

5. What legal advice and opinions concerning liability, damages exposure and corrective action has the Department received?
6. What additional legal advice and opinions concerning liability, damages exposure and corrective action does the Department require?
7. To what extent has the Fire Commission been provided information about the evaluation and early investigation of claims, complaints and lawsuits, and the need to adopt or revise Department policies, practices or procedures or take other corrective actions within 120 days after the Department first learned of the claim, complaint or lawsuit?

Continuing litigation matters:

1. What is the status of corrective actions that were deemed necessary as a result of early evaluations and investigations of claims, complaints and lawsuits?
2. What is the status of corrective actions that were deemed necessary as a result of pretrial discovery in continuing litigation matters?
3. To what extent do other parts of the Department, such as the PSD and Training & Support Bureau, need to be informed of or involved in evaluating the results of pretrial investigation and discovery and the need to take timely corrective action without compromising confidentiality issues?
4. What has pretrial discovery revealed in the following areas:
 - a. Alleged wrongdoing by the Fire Department or its employees;
 - b. The need for further investigation or pretrial discovery;
 - c. Suitability for settlement recommendations to the Charter-designated decision-making body;
 - d. The need for changes in policy or practice to prevent future similar claims;
 - e. The need for appropriate discipline, reassignment and/or retraining;
 - f. The need for other actions to be taken in an attempt to avoid similar claims, complaints or lawsuits in the future;
 - g. Any legitimate reason corrective or remedial action cannot be initiated immediately; and
 - h. Other noteworthy issues?

5. To what extent do other parts of the Department, such as the PSD and Training & Support Bureau, need to be informed of or involved in evaluating the results of trial testimony and the need to take timely corrective action without compromising confidentiality issues?
6. What has trial revealed in the following areas:
 - a. Alleged wrongdoing by the Fire Department or its employees;
 - b. Suitability for settlement recommendations to the Charter-designated decision-making body;
 - c. The need for changes in policy or practice to prevent future similar claims;
 - d. The need for appropriate discipline, reassignment and/or retraining;
 - e. The need for other actions to be taken in an attempt to avoid similar claims, complaints or lawsuits in the future;
 - f. Any legitimate reason corrective or remedial action cannot be initiated immediately; and
 - g. Other noteworthy issues?
7. What legal advice and opinions concerning liability, damages exposure and corrective action has the Department received?
8. What additional legal advice and opinions concerning liability, damages exposure and corrective action does the Department require?
9. To what extent has the Fire Commission been provided information about what investigation and pretrial discovery reveals about the need to adopt or revise Department policies, practices or procedures, or take other corrective actions within 30 days after the need to adopt or revise policies, practices or procedures was first identified?

At time of settlement, verdict, judgment or appellate decision:

1. What is the status of corrective actions that were deemed necessary as a result of early evaluations and investigations of claims, complaints and lawsuits?
2. What is the status of corrective actions that were deemed necessary as a result of pretrial investigation or discovery and trial testimony in continuing litigation matters?

3. To what extent do other parts of the Department, such as the PSD and Training & Support Bureau, need to be informed of or involved in evaluating the merits of the allegations and the need to take timely corrective action without compromising confidentiality issues?
4. What has settlement, trial, verdict, judgment or appellate decision revealed in the following areas:
 - a. Alleged wrongdoing by the Fire Department or its employees;
 - b. Suitability for settlement recommendations to the Charter-designated decision-making body;
 - c. The need for changes in policy or practice to prevent future similar claims;
 - d. The need for appropriate discipline, reassignment and/or retraining;
 - e. The need for any other actions to be taken in an attempt to avoid similar claims, complaints or lawsuits in the future;
 - f. Any legitimate reason corrective or remedial action cannot be initiated immediately; and
 - g. Other noteworthy issues?
10. To what extent were internal Department actions or investigations consistent or inconsistent with the conclusion in the legal matter brought against the Department?
11. To what extent did pretrial preparation and discovery properly prepare the case for trial or appeal, narrow the issues and eliminate surprises?
12. To what extent did the legal advice or opinions provided by defense counsel accurately predict or reflect the final litigation result on liability, damages and other legal issues?
13. To what extent has the Fire Commission been provided information about the need to adopt or revise Department policies, practices or procedures, or take other corrective actions within 30 days after the conclusion of the matter by way of settlement, verdict, judgment or appellate decision?

APPENDIX 4

**BURTON & TOHILL LAWSUIT
APPELLATE ARGUMENTS AND RESPONSES**

CITY OF LOS ANGELES ARGUMENTS ON APPEAL	COURT OF APPEAL RESPONSE TO ARGUMENTS
<p>1. “The City contends the trial court should have granted its motion for summary judgment. Specifically, the City argues that plaintiffs could not establish a prima facie case of discrimination, because they could not show they were performing their job duties in a satisfactory manner at the time they were subject to adverse employment actions. In addition, once the City submitted evidence of a legitimate, nondiscriminatory reason for plaintiffs’ discipline, plaintiffs failed to present any evidence that the adverse employment actions taken against them was based on their race.” (Pages 12-13)¹</p>	<p>“Even assuming the trial court erred by denying the City’s motion for summary judgment, there was no miscarriage of justice because the discrimination issue was fully litigated at a trial on the merits, and after a trial, the issue of whether plaintiffs established a prima facie case is irrelevant.” (Page 24)</p> <p>“We note that on appeal, the City has not raised the issue of whether the jury’s findings are supported by substantial evidence. [Citation omitted.] Therefore, we have no cause to review whether substantial evidence supports the jury’s findings that the City’s adverse employment actions were motivated by plaintiffs’ race.” (Page 25)</p>
<p>2. “The City contends the trial court abused its discretion by allowing former LAFD Assistant Chief and Fire Commissioner Thomas Curry to testify as an expert witness as to LAFD’s disciplinary process and the contents of a complaint manual.” (Page 25)</p>	<p>“A witness may render an opinion ‘if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.’” (Pages 25-26)</p> <p>“The evidence established that Curry retired in 1999 after working more than 31 years for LAFD. From late 2001 to late 2002, Curry served as a fire commissioner. The fire commission manages LAFD’s resources, oversees operations, and supervises the fire chief. The incident at issue in this case occurred in 2004. The trial court did not abuse its discretion by concluding that Curry’s service was sufficiently recent. In addition, no</p>

¹ All pages reference the unpublished appellate decision in *Burton v. City of Los Angeles*, 2010 Cal.App.Unpub. LEXIS 1125.

	<p>personal knowledge of the incident was required in order for Curry to testify about the application of the LAFD’s disciplinary process. Curry’s personal bias affects the weight of his testimony, not the admissibility of his testimony or his qualifications as an expert.” (Pages 26-27)</p>
<p>3. “The City contends the trial court erred by admitting testimony about pranks from three witnesses that was irrelevant and highly prejudicial.” (Page 27)</p>	<p>“However, the City fails to identify in its briefs any particular trial testimony about which it complains.” (Page 27)</p> <p>“The City has failed to properly cite to the record or otherwise identify the evidence the court admitted or the alleged erroneous ruling. We also find the City’s briefs fail to elaborate on the perceived errors in any meaningful way. As a result, the claims are without foundation and waived.” (Page 28)</p>
<p>4. “The City contends the trial court erred by refusing special jury instructions proposed by the City.” (Page 28)</p>	<p>“Burton and Tohill state that the City withdrew the instructions and failed to provide an adequate record for review on appeal. We agree with Burton and Tohill.” (Page 28)</p> <p>“At no point has the City provided a citation to the record establishing that the requested instructions were denied. We conclude that the record is insufficient to show the trial court refused the requested instruction. We presume the City withdrew the instruction. Accordingly, the City has not shown any instructional error.” (Page 31)</p>
<p>5. “The City contends the damages awarded are so excessive as to shock the conscience.” (Page 31)</p>	<p>“We disagree.” (Page 31)</p> <p>“The question is not whether this court would have decided the factual issues differently or awarded the same damages as the trier of fact. ... we cannot say as a matter of law that the awards of past and future noneconomic loss are so grossly excessive as to shock our sense of justice and give rise to a presumption the</p>

	<p>jury was influenced by passion or prejudice.” (Pages 39-40)</p>
<p>6. “The City contends the trial court should have limited plaintiffs’ recovery to past economic damages for loss of pay from the suspensions based on a representation by their attorney during trial that these were the only damages being sought.” (Page 40)</p>	<p>“This is not an accurate statement of the record, and furthermore, the issue had been waived by the City’s stipulation to the verdict form.” (Page 40)</p> <p>“During the presentation of Burton and Tohill’s case on February 15, 2009,² their attorney informed the trial court that they would not be calling an economist to testify. [Plaintiffs’ attorney]: I think we’re going to limit our damages to the suspension, loss of pay for the suspension. [P] The Court: And the pain and suffering? [P] [Plaintiffs’ attorney]: And the pain and suffering.” (Pages 40-41)</p> <p>“There is no evidence the City raised this issue in the trial court or objected to the questions about future damages that were presented to the jury before the jury was discharged. The City simply cites a statement by the trial court in a completely unrelated context during the questioning of a witness that plaintiffs’ constantly changing strategy put everyone under pressure. In fact, the City stipulated to the verdict form which included questions concerning Burton’s future noneconomic damages and Tohill’s economic and noneconomic damages. The City waived any objection by agreeing to the special verdict form and failing to object before the jury was discharged.” (Page 41)</p>
<p>7. “The City contends the amount of damages awarded by the jury bears no reasonable relationship to the evidence of Burton’s and Tohill’s economic and psychological injuries, and therefore must have been punitive, in violation of <i>Government Code section 818</i> (providing that a public entity is not liable for</p>	<p>“This is incorrect.” (Page 42)</p> <p>“The jury was instructed: ‘You must not include in your award any damages to punish or make an example of defendant City of Los Angeles. Such damages would be punitive damages, and they cannot be a part of your</p>

² The Court of Appeal decision mistakenly says 2009. Page 693 of the Reporter’s Transcript confirms the date was 2008, not 2009.

<p>punitive damages).” (Pages 41-42)</p>	<p>verdict. You must award only the damages that fairly compensate plaintiffs Burton and/or Tohill for their loss.” (Page 42)</p> <p>“We may presume that the jury understood and followed this instruction.” (Page 42)</p>
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APPENDIX 5

**FY 2011-12
LAFD Resource Costs**

Light Force = 18 (1 Captain II, 1 Engineer, 1 Appartus Operator, 3 Firefighter III x 3 shifts)						
Class Code	No.	Classification	Acct 1012 Total	Acct 1030 Total	Acct 1093 Total	Total Salaries
2141-2	3	Captain II	374,643	2,061	115,577	492,281
2131	3	Engineer	299,736	2,061	92,469	394,266
2121	3	Appartus Operator	299,943	2,061	92,532	394,536
2112	9	Firefighter III	822,141	6,183	253,630	1,081,954
	18		1,796,463	12,366	554,209	2,363,038

Engine = 12 (1 Captain, 1 Engineer, 2 Firefighter III x 3 Shifts)						
Class Code	No.	Classification	Acct 1012 Total	Acct 1030 Total	Acct 1093 Total	Total Salaries
2142-1	3	Captain I	354,348	2,061	109,316	465,725
2131	3	Engineer	299,736	2,061	92,469	394,266
2112	6	Firefighter III	548,094	4,122	169,087	721,303
	12		1,202,178	8,244	370,872	1,581,294

Paramedic Rescue Ambulance = 6 (2 Firefighter/Paramedics x 3 shifts)						
Class Code	No.	Classification	Acct 1012 Total	Acct 1030 Total	Acct 1093 Total	Total Salaries
2112	6	Firefighter III	548,094	4,122	169,087	721,303

4 Light Forces and 2 PM Rescues	6 Engines and 2 PM Rescues	15 PM Rescues	2 Light Forces 2 Engines 4 PM Rescues
# Light Force 4 9,452,151	# Light Force 0 0	# Light Force 0 0	# Light Force 2 4,726,076
# Engine 0 0	# Engine 6 9,487,763	# Engine 0 0	# Engine 2 3,162,588
# PM Rescue 2 1,442,606	# PM Rescue 2 1,442,606	# PM Rescue 15 10,819,545	# PM Rescue 4 2,885,212
10,894,757	10,930,369	10,819,545	10,773,875

\$11,000,000 is equal to the funding for:

**4 Light Forces and
2 Paramedic Rescue Ambulances \$10,894,757**

or

**6 Engines and
2 Paramedic Rescue Ambulances \$10,930,369**

or

15 Parmedic Rescue Ambulances \$10,819,545

or

**2 Light Forces and
2 Engines and
4 Paramedic Ambulances \$10,773,875**