



much like the recent NYPD's candid, self-critical examination of how its officers came to break into Alberta Spruill's apartment in Harlem by mistake, leading to a fatal heart attack. If the incident is particularly controversial, there may even be a blue ribbon, independent investigation of it, such as occurred regarding the LAPD after the Rodney King incident with the Christopher Commission report or after the Rampart scandal with the independent commission report.

This strategy creates lots of paper and, if done right, a heap of candid, critical, no-holds-barred analysis of failings, things that could be done better, lessons learned, and implications for the future—just the sort of thing that causes the city attorney or contract defense counsel to pull their hair out. What if, they worry, all this paper gets discovered by the plaintiff in litigation over the incident? Won't the case therefore be harder, if not impossible, to defend? Doesn't all this analysis add several 00s to any possible settlement? Left to their own devices, therefore, it is depressingly common to see the attorneys advising the police department to act like an ostrich and bury its head in the sand. If the department doesn't know it, the reasoning goes, then the plaintiff can't find out. The whole game becomes one of suppressing development of factual information and critical analysis in order to thwart plaintiff's counsel. Avoid "risk management" is, in essence, what the lawyers are saying – there'll be time enough to learn lessons from the incident *after* the statute has run or *after* the case has been tried or settled. In the interim, advises the lawyer, just say you did nothing wrong and don't generate anything that disputes it. But since the lawyers do need to know the facts and have some analysis in order to judge whether a case is defensible, strategies are devised to keep the department's senior managers like ostriches while at the same time generating the necessary information for the lawyers – as long as the information developed stays firmly under the lawyer's thumb.

It is thus not uncommon to find that personnel within the police department become the paralegals, investigators, and general handmaidens for defense counsel. In order to keep what they might learn under wraps, a couple of key legal stratagems are employed. First, everything developed by the department's own investigation becomes either privileged or attorney work product and thereby either absolutely or conditionally exempt from discovery. It is similarly carefully shielded from police top management, except, perhaps, by way of a shorthand conclusion the lawyer whispers to the police chief along the lines of: "This case is a real dog. We'd better settle it quickly." Second, the city's lawyers represent all or most of the potential defendants or material witnesses within the police department who might have anything to say. Even if separate counsel is arranged, again most often at the city's expense, joint defense agreements and a lawyer's duty of loyalty to the client become obstacles to departmental examination of inappropriate behavior. Not only are the individual officer defendant's statements

legally shielded from discovery by the plaintiff, but they also often wind up being shielded from the police department itself on the theory that it would be disloyal to one client – the individual officer defendant – to pass along adverse information to the lawyer’s other client, the police department or municipality. Some lawyers have gone so far as to claim that they cannot even provide the police department with deposition transcripts or pleadings in the litigation on a similar rationale.

What nerve, one might say; just what you’d expect from a bunch of crafty lawyers. But keep in mind that from the lawyer’s perspective, this all makes sense. For a given lawyer defending the city in a particular lawsuit, it *is* prejudicial to the case, and perhaps ultimately to the lawyer’s future business, if the employee whose conduct is at issue becomes the subject of a thorough internal police investigation and is found guilty of violating policy or other administrative misconduct. The evidence developed thereby, as noted earlier, may become available to the plaintiff in the subsequent lawsuit, thereby increasing the city’s exposure in the particular case and making settlement of it more costly. City attorneys are often judged by their mayors and city councils for their ability to keep settlements and judgments down *in the short run*. For lawyers thus concerned with their individual or office’s track records in litigation and their perceived effectiveness at minimizing judgments and settlements, there is an understandable tendency in these circumstances to want to keep a full and thorough internal police department investigations at bay or on ice so that negative evidence is not developed. If each lawyer defending the city follows essentially the same strategy – and I suggest that is exactly what is happening in city after city across the country – then short-term litigation tactics invariably wind up trumping a long-term risk management strategy.

I submit, however, that what might make sense to a given lawyer defending a specific case does not make sense for the city as a whole in the longer term. In order to limit exposure in the long term, there needs to be *immediate* feedback on critical events. If an internal investigation is put on ice until the litigation is over, the officer in question may either have gotten into more trouble in the interim or the event may have receded so far into the past that a critical examination of it, or discipline for it, may not longer be feasible or meaningful.

To follow a better conceived risk management strategy, however, requires decision makers, including politicians like the mayor and city council, to focus on management of risk in the long run and perhaps in the interim incur some losses. This, in turn, is a difficult pill either for the politicians, the police department, or the city’s lawyers to swallow. It is particularly so since any substantial settlement or judgment seems inevitably to lead to a frenzy of finger pointing. The lawyers blame the police department, saying that but for their own prodigious legal talents

dealing with the poor hand the police department dealt them, the city would have suffered an even larger settlement, or an even more huge adverse verdict. The police department blames the lawyers, saying that they are gutless weasels who'll never take a meritorious case to trial but prefer to cut their risks and attendant prejudice to their future business by settling them out. The politicians take it out on the lawyer – “why didn't you warn us this was going to be such a costly case?” – and on the police department – “what do you mean we've just authorized a million dollar payout and you're telling me the officer in this case was never investigated, much less disciplined? When are you guys going to learn?”

Our answer, as noted in the first paragraph, is that our own experience tells us that when risk is managed responsibly, the amount and cost of litigation drops. Yes, it takes guts all around and an effort of will by the lawyers, the police department, and the politicians to accept possible short term losses for long term gains. In Los Angeles County, those short term greater losses never materialized, and judgments and settlements dropped. But it is still a hard risk to take in a political and societal culture where everything is of the moment; where tomorrow's problem will be someone else's, so why take the heat today? But if done, it will pay off, and in more ways than just dollars.

If self-critical analysis and discipline or revision of policy or retraining after a critical incident is accomplished out in the open with speed, fairness, and integrity, the public perception that the police cannot police themselves will begin to fade. If, on the other hand, a department suppresses bad facts about its officers – either on the department's own initiative or at the instance of its lawyers – fails to investigate, and declines to impose discipline out of fear of giving ammunition to plaintiffs, the reluctance of the police to police themselves only creates stronger incentives to take investigatory and disciplinary power away from the police and repose it in a civilian review board or other outside oversight mechanism. The ability of the police to police themselves, in my view, is a privilege; not a right. Hence, it is better practice, when done carefully and coolly, to buck the lawyer's advice to play ostrich and take care of business when it can be done most effectively.