

*Report to City of Chicago  
Concerning Review of the  
Department of Law's Federal Civil Rights Litigation Division*

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## I. SCOPE OF REVIEW/REPORT AND SUMMARY OF FINDINGS

On January 10, 2016, the City of Chicago's Department of Law ("DOL"), through its Corporation Counsel, Stephen R. Patton, retained Winston & Strawn LLP to conduct an independent, third-party review of the DOL'S Federal Civil Rights Litigation ("FCRL") Division. The FCRL Division is the group within DOL that defends the City of Chicago ("the City") and Chicago Police Department ("CPD") officers in civil suits brought under 42 U.S.C. § 1983 (or pursuant to related common law tort theories), based on allegations of CPD misconduct and/or federal civil rights violations.<sup>1</sup>

The City asked that we perform a comprehensive, independent review of the FCRL Division and recommend any changes necessary to conform the FCRL Division's policies, procedures, and practices to the highest professional and ethical standards and litigation best practices. We were directed to include a particular focus on the FCRL Division's discovery practices and procedures, as well as FCRL Division attorney training and supervision. We were asked to prepare a written report summarizing our recommendations, as well as the current status of the FCRL Division's implementation of those recommendations. This report addresses those matters.

In addition, although the main focus of our work was not to review every past case handled by the FCRL Division or to investigate all potential misconduct – but instead was to identify potential areas of improvement for the FCRL Division's policies, procedures, and practices – we agreed that, to the extent during the course of our review we discovered any evidence of past or present misconduct, we would report any such misconduct to the City's Inspector General. This report addresses that issue as well.

In conducting our review, we gathered information from a variety of sources. These sources include:

- **DOL/FCRL Division Documents.** We obtained and reviewed documents relating to the FCRL Division's policies, procedures, practices, and training. Some of these documents existed at the time our review started, while others were created by DOL during and in conjunction with our review.
- **FCRL Division Counsel.** We interviewed each of the approximately 40 attorneys who were employed in the FCRL Division during the period of our review, except for a few attorneys who were hired into the Division after our review started. We spoke with certain FCRL Division attorneys on multiple

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<sup>1</sup> Section 1983 provides a cause of action for individuals injured through a violation of a right protected by the U.S. Constitution or a federal statute, where such violation was committed by a person acting under color of state law. Cases handled by the FCRL Division include those brought under Section 1983 in which a plaintiff claims to have suffered injury caused by CPD officers allegedly using excessive force, conducting an unreasonable search and seizure, making an unlawful arrest, or engaging in other conduct that violated the plaintiff's constitutional or statutory rights.

occasions, including regarding specific policies, procedures, and practices, as well as specific cases. We also interviewed and gathered information from several former FCRL Division attorneys. In addition, we interviewed some outside counsel retained through the DOL/FCRL Division to represent the City or CPD officers in cases that otherwise would be handled by the FCRL Division (hereinafter, "Outside Counsel").

- **Plaintiffs' Counsel.** We obtained information from over 50 attorneys who regularly represent plaintiffs in cases against the City or CPD officers that are handled by the FCRL Division. Following the City's public announcement that we had been retained to conduct a review of the FCRL Division, the fact of our review was well-publicized and well known in the civil rights plaintiffs' bar. Many of these attorneys contacted us to provide information concerning specific cases they handled against the FCRL Division, their experiences with and impressions of the Division, their views on how the Division's policies or practices were lacking or could be improved, and related matters. We had an "open door" policy with respect to input from the plaintiffs' bar and spoke with every attorney who contacted us and expressed an interest in meeting with us. Other plaintiffs' counsel with whom we spoke did not reach out to us; rather, we affirmatively identified and contacted those attorneys due to their involvement in specific cases or issues that were brought to our attention, or by virtue of their frequent interaction with the FCRL Division. While it was not feasible or necessary to interview all plaintiffs' counsel who had cases against the FCRL Division in recent years, we interviewed a broad cross-section of such counsel, including many of the counsel who it appears, based on information provided to us, litigate against the FCRL Division most frequently and in some of the most high-profile or high-exposure cases. Our interviews with plaintiffs' counsel gave us a strong sense of the perspective of attorneys who frequently litigate against the FCRL Division.
- **FCRL Division Staff.** We interviewed nine FCRL Division paralegals, as well as one of the FCRL Division investigators, all of whom assist FCRL Division counsel in their work on cases handled by the Division.
- **Other DOL Attorneys.** We gathered information from and interviewed several DOL attorneys outside of the FCRL Division who work or interact with the FCRL Division on various matters, including matters relating to policies and practices, supervision, training, or hiring. This included Mr. Patton and others in senior positions in the DOL and in the DOL's Torts Division and Legal Information, Investigation and Prosecutions ("LIIP") Division.

- **Consultants Hired By DOL.** We conferred with and obtained information from several consultants hired by DOL who either in the past, or concurrently with our review, provided analysis, advice, or counsel to DOL about the workings of the FCRL Division with respect to policies, office operations and structure, training, and other matters.
- **CPD and Office of Emergency Management & Communications (“OEMC”).** We interviewed and obtained information from individuals at OEMC and CPD, including CPD’s Office of Legal Affairs (“OLA”), who regularly interact with FCRL Division attorneys in providing documents and information relevant to cases handled by the FCRL Division.
- **Pleadings and Other Materials/Files in Cases Handled By the FCRL Division.** Although the purpose of our review was not to investigate each of the approximately 1,800 cases handled by the FCRL Division in the past five years, or to identify each and every instance where an issue arose or a problem may have occurred, we conducted reviews of specific cases handled by the FCRL Division (or Outside Counsel) so as to facilitate our identification of potential areas of improvement for the FCRL Division and aid us in forming our recommendations. With that goal in mind, the cases handled by the FCRL Division (or Outside Counsel) that we sought to review, and did review, were those most likely to reveal problematic issues. Specifically, the cases we reviewed were cases as to which either: (1) the court ordered sanctions against the City, the CPD officers, or their counsel (which we identified based on independent research as well as information from the FCRL Division); or (2) plaintiffs’ counsel who we interviewed expressed concerns about the case, and suggested that we examine the case. We identified 75 such cases, which we then reviewed. We reviewed pleadings and other materials relating to those cases, and as necessary obtained information about those cases from the counsel involved in handling them.

Our review focused on FCRL Division policies, procedures, and practices during the last five years, from May 2011 to present. However, we also reviewed information from prior to that time period. Many of the attorneys and staff at the FCRL Division from whom we gathered information have been working in the Division for many years and were able to provide a broad historical perspective on the office, dating well before 2011. Likewise, many of the plaintiffs’ counsel from whom we obtained information have been litigating cases against the FCRL Division for many years and were able to provide the viewpoint and experience of the plaintiffs’ bar in dealing with the FCRL Division over a substantial period.

In summary, the conclusions from our review are as follows:

In carrying out our primary mandate, we identified a number of areas in which the FCRL Division’s policies, procedures, and practices could be improved. The main areas for such improvements relate primarily to document discovery. We identified a number of areas for

improvement in the FCRL Division's discovery-related policies, procedures, and practices. This report outlines those areas and our recommendations for improvements in those areas. *See infra*, Section III.A.1.

We also identified various other areas for potential improvement in the FCRL Division's policies, procedures, and practices. Those areas are: pre-litigation document preservation (*see* Section III.A.2); training and supervision of FCRL Division personnel, primarily as to discovery-related matters (*see* Section III.B); management of Outside Counsel (*see* Section III.C); and conflicts of interest (*see* Section III.D).

The City/DOL expressed a desire for us to take the time needed to complete a thorough review and analysis of the FCRL Division and to formulate our final recommendations, and allowed us the time to do so. But the City/DOL also expressed an interest in promptly identifying and implementing changes that might improve the functioning of the Division, even before our review was complete. Thus, during the course of our review, the DOL and FCRL Division leadership continued to internally review and evaluate the Division's policies, procedures, and practices and discussed potential improvements to those policies, procedures, and practices with DOL consultants and our team. Based on that work, DOL and FCRL Division leadership have already adopted and are implementing a number of new policies, procedures, and practices, and are continuing to work on other policies, procedures, and practices that address the recommendations outlined in this report. Accordingly, as agreed at the outset of our engagement, this report not only outlines our recommendations, but also notes the status of the FCRL Division's efforts in addressing the areas covered by those recommendations.

During our review, we did not find evidence establishing a culture, practice, or approach in the Division of intentionally concealing evidence or engaging in intentional misconduct relating to discovery practices or other obligations. Our review was prompted in part by the January 4, 2016 opinion of U.S. District Court Judge Edmond Chang in *Colyer v. Chicago, et al.*, Case No. 12 C 4855 (N.D. Ill.), in which the court found, among other things, that a former FCRL Division attorney handling that case had intentionally concealed from the court and plaintiffs' counsel the existence of certain relevant evidence. As discussed in Section IV, *infra*, during our review, we learned of an additional instance of intentional misconduct by an FCRL Division attorney in connection with a case filed in 2005 and settled in 2010. The attorney in that matter self-reported the incident to FCRL Division supervisors and the Illinois Attorney Registration and Disciplinary Commission, both of which then addressed the matter. Our review did not uncover any other evidence establishing any instances of intentional misconduct, or any culture of the Division that would have fostered these instances, which appear to be isolated.

From our specific case reviews (which, again, concerned 75 of the potentially more problematic cases the Division has handled, not all of the approximately 1,800 cases the Division has handled in the past five years), we identified a number of instances in which discovery errors were made or certain aspects of discovery could have been handled with greater diligence. Discovery errors or oversights are certainly not unique to the City or the FCRL Division. Courts are no stranger to motions to compel in many contexts, and many other litigants are at times



involved in discovery disputes involving an alleged failure of diligence by a party in discovery. Such issues are not uncommon particularly in complex cases with a wide range of potentially relevant records, and especially in recent years with the proliferation of electronically-stored information, which is not only becoming increasingly common but also constantly developing and changing. Errors with respect to discovery obligations may result from a number of factors, such as a failure of counsel handling the matter to be sufficiently trained in and knowledgeable about the client's documents, miscommunications between the client and the attorney handling the matter, the attorney's failure to ask the right questions or appropriately follow up internally or with the client, or any number of other factors. For a large and extremely busy office like the FCRL Division, which has around 40 attorneys at any given time, handles hundreds of cases per year, and takes many cases to trial, it may be impossible to eliminate all discovery-related errors or oversights. However, various policies and procedures can be put in place to help minimize the opportunities for such discovery errors to occur. The recommendations set out in this report include recommendations concerning such policies and procedures.

## **II. FCRL DIVISION – BACKGROUND**

The FCRL Division is one of fifteen divisions comprising the DOL.<sup>2</sup> The FCRL Division in its current form was created in 2008. Prior to the creation of the FCRL Division, most cases involving allegations of police misconduct were handled by two DOL divisions that essentially were predecessors to the FCRL Division: the Policy Section of the Commercial and Policy Division ("Policy Section") (which represented the City in such cases) and the Individual Defense Litigation Division ("IDL Division") (which represented the individual CPD officers in such cases). Also, from 2007 to 2011, certain cases alleging police misconduct that were deemed to be complex or to involve high stakes were handled by the DOL Special Litigation Unit ("SLU"). The IDL Division, the Policy Section, and the SLU were all disbanded, and attorneys from those groups formed the new FCRL Division.<sup>3</sup> Since its formation, the FCRL Division has represented both the City and Chicago police officers in cases involving alleged CPD misconduct.

### **A. Nature of the Litigation Handled by the FCRL Division**

The cases handled by the FCRL Division include cases in which plaintiffs allege misconduct by CPD officers, including alleged instances where officers arrested or detained an individual without probable cause, used excessive force, injured a person in police custody, or engaged in other wrongful conduct that allegedly violated the plaintiff's rights. The plaintiffs

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<sup>2</sup> Currently, the other DOL divisions are: the Building & License Enforcement Division, the Legal Information, Investigations & Prosecutions Division, the Appeals Division, the Aviation, Environmental, Regulator & Contracts Division, the Collections, Ownership & Administrative Litigation Division, the Constitutional & Commercial Division, the Employment Division, the Labor Division, the Revenue Litigation Division, the Torts Division, the Finance Division, the Legal Counsel Division, the Real Estate Division, and the Administrative Services Division.

<sup>3</sup> In addition to handling complex litigation involving allegations of police misconduct, SLU also handled complex tort cases. When SLU disbanded, attorneys in SLU who handled those complex tort cases joined the Torts Division.

typically name as defendants in such cases both the City and the CPD officers who plaintiffs claim were involved in the alleged wrongful conduct.

The litigation can include both federal and state law claims. Federal claims are typically asserted under 42 U.S.C. § 1983, which authorizes a plaintiff to bring a claim for relief against a person who, acting under color of state law, violates the plaintiff's federally protected rights. State law claims typically take the form of common law tort claims, such as assault, battery, false arrest, false imprisonment, intentional infliction of emotional distress, or malicious prosecution.

The City can be held liable in cases handled by the FCRL Division under various theories, depending on the circumstances and nature of the claim asserted, including *respondeat superior*, indemnification, and pursuant to the United States Supreme Court's holding in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) ("*Monell*"). Under a *respondeat superior* theory, the City can be held liable for the conduct of a police officer that was performed within the scope of the officer's employment. Similarly, under an indemnification theory, pursuant to state law and the City's collective bargaining agreement with CPD, the City is obligated to pay judgments for compensatory damages awarded against police officers when the officer acted within the scope of his or her employment, provided certain additional conditions are met. Under *Monell*, a municipality can be sued directly under § 1983 and held liable if the plaintiff demonstrates that his or her federal rights were violated as a result of "a policy statement, ordinance, regulation or decision officially adopted or promulgated" by the City, or pursuant to a City "custom."

The damages that can be awarded in cases handled by FCRL Division include compensatory damages against the City or the CPD officer defendant(s). CPD officers against whom compensatory damages are awarded are typically indemnified by the City pursuant to the City's collective bargaining agreement with CPD and state law. Punitive damages also can be awarded against a CPD officer defendant. CPD officers are not indemnified by the City for any punitive damages awarded against them. Also, if a plaintiff prevails on a § 1983 claim, attorney's fees can be awarded pursuant to 42 U.S.C. § 1988(b), which provides that courts, in their discretion, may award reasonable attorneys' fees to the prevailing party in a § 1983 claim.

The majority of the cases handled by the FCRL Division are filed in federal court – specifically, the United States District Court for the Northern District of Illinois. Some cases handled by the FCRL Division (or Outside Counsel) are filed in state court – specifically, the Circuit Court of Cook County, Law Division. However, many cases filed initially in state court are removed to federal court. Thus, the vast majority of cases handled by the FCRL Division (or Outside Counsel) are litigated in federal court in the Northern District of Illinois.<sup>4</sup>

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<sup>4</sup> Prior to approximately mid-2011, the Torts Division handled cases alleging police misconduct filed in the Law Division of the Circuit Court of Cook County. However, beginning in approximately mid-2011, the FCRL Division (or Outside Counsel) has been assigned new such cases filed in the Law Division, and also beginning around that time, FCRL Division counsel were assigned to partner with Torts Division counsel in handling any such existing cases. Both historically and continuing today, the Torts Division also has handled cases alleging police misconduct filed in the Municipal Division of the Circuit Court of Cook County (which seek no more than \$30,000 in damages).

## **B. Organization of the FCRL Division**

Since approximately mid-2011, the FCRL Division has employed a staff of approximately 35-40 attorneys, 9-11 paralegals, three investigators, two secretaries, and one administrative assistant.

### **1. FCRL Division Attorneys**

#### **a. Attorney Titles and Responsibilities**

FCRL Division attorneys are categorized according to four levels of seniority. In order of decreasing seniority, these are: Deputy, Chief, Senior Counsel, and Assistant Corporation Counsel ("ACC"). The FCRL Division is managed and led by two Deputies. The Deputies are responsible for general management and administration of the office including, among other things, establishing and enforcing Division policies; providing supervision and guidance to attorneys in a variety of areas including case analysis, pretrial and trial work, and settlements; overseeing the training of Division personnel; managing attorney and paralegal staffing; and managing Outside Counsel. The Deputies, in collaboration with the City's Corporation Counsel, are also responsible for making decisions concerning the hiring and promotion of FCRL Division personnel. In addition to their administrative and managerial duties, from time to time, the Deputies also have direct involvement in handling and trying some of the FCRL Division's most significant cases. The current FCRL Division Deputies are Liza Franklin and Thomas Platt.<sup>5</sup>

Other supervisory attorneys in the office are Chiefs and Senior Counsel. The FCRL Division is budgeted to employ three Chiefs and eleven Senior Counsel. The Chiefs and Senior Counsel maintain their own caseloads – cases on which they are designated either lead counsel or supervisory counsel – and try some of the Division's most significant cases, including police shooting cases and cases alleging serious injuries. In addition, the Chiefs and Senior Counsel have general supervisory responsibilities, which include providing guidance to ACCs on discovery, motion practice, case analysis, trial preparation, and other matters. Also, from time to time, the Chiefs and Senior Counsel assist the Deputies in various administrative duties, including with respect to training and interviewing candidates for FCRL Division positions.

The ACCs are the most junior attorneys in the FCRL Division. The FCRL Division is currently budgeted to employ 28 ACCs. As discussed below, during the past five years, most ACCs have maintained an active caseload of approximately 25-30 cases at any given time. ACCs work under the direction of a supervising attorney to, among other things, gather relevant factual information, perform factual and legal analysis, draft pleadings, issue and respond to discovery requests, take and defend depositions, and work up cases through trial or settlement.

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<sup>5</sup> Matthew Hurd is also at the Deputy level, but he maintains a full caseload, including trying some of the cases with the highest potential damages exposure, and is thus substantially less involved in general office administrative and managerial duties.

**b. Attorney Case Staffing**

The FCRL Division's Deputies are in charge of attorney staffing. When a case is handled by FCRL Division counsel, the Deputies staff the case according to a number of factors, including attorney availability, the nature of the case, the complexity of the issues, and the potential exposure.

Cases with the highest level of complexity/exposure (such as cases involving police shootings) are assigned to at least two ACCs and a supervisor (typically a Chief or a Senior Counsel). The supervising attorney is the lead counsel for the case and has the authority to divide the work and determine the strategy for the case in cooperation and consultation with the ACCs.

Cases with mid-level exposure (such as many cases involving allegations of excessive force) are also assigned to two ACCs and a supervisor. In mid-level cases, one of the ACCs – often the ACC with the most seniority – is assigned as the lead counsel on the case. The lead ACC, in consultation with the supervising attorney and the second ACC, is responsible for directing the work-up of the case through trial or other disposition by motion or settlement.

Cases with lower level exposure (which often are *pro se* cases or cases alleging minor injuries) are assigned to one ACC and one supervising attorney. The ACC is responsible for keeping and maintaining the case file and for working up the case through trial or other disposition in consultation with the supervising attorney. If the case goes to trial, the supervising attorney will act as the lead trial counsel and will try the case with the assistance of the ACC.

**c. Allocation of Attorney Responsibility for Defending the City and CPD Officers**

As an initial step in any FCRL Division case, a determination must be made whether there are any conflicts between the City and the individual CPD officers involved in the matter. *See infra* Section III.D, regarding conflicts. Where no conflicts are identified between the City and the individual officers involved, the same FCRL Division attorneys (or Outside Counsel) generally represent both the City and the officers.

For cases in which a *Monell* claim is asserted against the City, the FCRL Division attorneys who represent the City on the *Monell* claim usually are separate from the FCRL Division attorneys (or Outside Counsel) who represent the defendant officers. The attorneys who typically represent the City on *Monell* claims are in a sub-group within the Division, the *Monell* group. The *Monell* group is led by Senior Counsel Jonathan Green. Attorneys who are part of the *Monell* group are not limited to representing the City on *Monell* claims, but also have other responsibilities, including representing individual officer defendants and the City in other cases that do not involve *Monell* claims. The *Monell* attorneys and the attorneys representing the individual officers are expected to communicate and coordinate with each other from the onset of a case in reasonable detail and with reasonable frequency about discovery matters, the course of litigation, co-defense preparation of City witnesses, and case resolution efforts.

## **2. FCRL Division Paralegals and Support Staff**

### **a. FCRL Division Paralegals**

The FCRL Division is budgeted to employ 13 paralegals. Two of the FCRL Division's paralegals are Senior Paralegals. The Senior Paralegals are responsible for, among other things, opening new case files, assigning FCRL Division paralegals to new cases, supervising paralegals, and periodically conducting trainings for paralegals and newer FCRL Division attorneys on various issues, such as the identity and nature of CPD records and accessing CPD and OEMC records. In addition to their administrative duties, the Senior Paralegals also are assigned to handle individual cases – typically the Division's more significant cases.

Paralegal duties include engaging in efforts, at the direction of FCRL Division counsel, to preserve documents and materials related to certain incidents that have been identified as potential subjects of future litigation. *See infra* Section III.A.2, discussing the FCRL Division's pre-litigation preservation efforts. Paralegals also have responsibilities on pending cases. One paralegal is assigned to each case handled by the FCRL Division. The responsibilities of a paralegal assigned to a case include undertaking some initial document collection efforts at the outset of the case and further document collection efforts throughout the case, as directed by the attorneys handling the case. As part of such document collection efforts, paralegals typically interact with the various agencies from which the documents are requested, such as CPD's OLA, OEMC, and the Independent Police Review Authority ("IPRA"). Paralegals also help the attorneys maintain hard copy and electronic files of case materials.

### **b. Other FCRL Division Support Staff**

The FCRL Division employs three CPD officers who work as investigators for the Division. One investigator is a CPD Sergeant, and the other two are CPD Detectives. The investigators are paid by the CPD but detailed to the FCRL Division. The investigators assist FCRL Division attorneys in a variety of tasks involving fact investigation, such as assisting in viewing evidence inventoried at the Evidence and Recovered Property Section ("ERPS"), conducting site visits to locations relevant to the litigation, taking witness statements, and photographing evidence and locations that are relevant to particular cases. The investigators also serve subpoenas.

The FCRL Division also employs two secretaries and one administrative assistant who assist the Division in performing certain clerical functions. This work is typically related to office administration and the Division as a whole, rather than any specific case. As a general matter, the office does not have the resources to provide secretarial or administrative assistant support for case-specific work.

## **C. Use of Outside Counsel by the FCRL Division**

Certain FCRL Division cases are handled by Outside Counsel. Over the past five years, the FCRL Division has referred approximately 40 cases per year to Outside Counsel. This

number is down from the 205 cases that were sent to Outside Counsel in 2010 alone. Currently, there are approximately 80-85 pending FCRL Division cases assigned to Outside Counsel. Outside Counsel are currently compensated on an hourly basis at negotiated rates.

Cases may be referred to Outside Counsel, rather than handled by the FCRL Division, for a number of reasons. Cases may be sent to Outside Counsel because there is a conflict between the City and an individual officer or officers, or between officers. Other cases are sent to Outside Counsel due to resource limitations, for example, if the case is complex and requires significant attention, and other senior counsel within the FCRL Division who might handle the matter have limited availability due to existing responsibilities.

Outside Counsel are provided with a set of guidelines for handling FCRL Division cases. In addition, the Deputies generally monitor and oversee the work performed by Outside Counsel. Depending on various factors, an FCRL Division Deputy might, for example, review significant pleadings or discuss key litigation events and strategy with Outside Counsel on particular cases.

#### **D. Challenges Faced by the FCRL Division Relating to Workload, Resources, and Staffing**

FCRL Division attorneys face a number of challenges associated with their work. Their workload is substantial. Over the past five years, there have been approximately 260-280 new FCRL Division cases filed each year. During that period, the Division has had approximately 400 pending cases in the office at any given time (as well as roughly 80-150 at Outside Counsel). Most ACCs carry a caseload of roughly 25-30 cases.

The cases handled by the FCRL Division vary in complexity, and the amount of time an attorney spends on each case varies. But generally speaking, while individual cases require varying amounts of attorney work, and some cases may go through periods of relative inactivity, it is not uncommon for a case handled by the FCRL Division to require numerous witness interviews, many depositions, and the production of many types of records. As set forth more fully below, in the past, FCRL Division attorneys have been required to work with OLA to obtain CPD records, which has proven to be a slow, cumbersome, and difficult process, fraught with potential for miscommunication and delay. This has contributed in part to FCRL Division attorneys having to spend an inordinate amount of time attempting to identify, obtain, and produce relevant documents.

Also contributing to their workload, FCRL Division attorneys frequently try cases. During the past five years, the FCRL Division has tried approximately 25 to 30 cases each year. In fact, we understand that the FCRL Division has tried more civil cases in the Northern District of Illinois in that period than any other law office. The Division also prepares for trial in various other cases that settle before trial. Because preparing for and conducting a trial renders an attorney largely unavailable to tend to matters on other cases, the Division's large number of trials has resulted in attorneys being unavailable from time to time on cases to which they are assigned, requiring multiple attorneys to be assigned to cases and attorneys to cover cases for each other.

In handling their workload, FCRL Division attorneys have somewhat limited resources, due to budget issues. For example, the Division has not had a document management system that would allow attorneys to more easily track, maintain, and analyze the often voluminous documents that are part of each case. Nor has the Division had secretarial staff to assist with time-consuming, case-specific tasks such as scheduling witness interviews, maintaining files, drafting/editing letters, pleadings, or other documents, or engaging in other case management tasks. Because there are only two secretaries and one administrative assistant in the Division, this staff generally engages in work relating to office administration generally, not work for individual attorneys on individual cases. Case-specific work is left for each attorney to perform. In cases with multiple defendants, numerous depositions to schedule, and/or substantial motion practice, this can be a significant burden on FCRL Division attorneys who could otherwise focus their limited time and resources on more substantive tasks, such as factual and legal analysis, following up on discovery, motion practice, and trial preparation.

Compounding the heavy workload carried by FCRL Division attorneys and the limited office resources, the FCRL Division often has operated at below full staffing capacity, largely due to delays in the hiring process and other factors. Over the past several years, while the FCRL Division has been budgeted to hire approximately 45 attorneys, it has often employed only approximately 37 to 40 attorneys at any given time. The reasons for the vacancies in the FCRL Division vary, but it is worth noting that it is not uncommon for mid-level attorneys to leave the Division, after they have obtained trial experience, often for higher-paying jobs in the private sector. At least 15 FCRL Division attorneys have left the Division in the last five years. This turnover has the potential to create managerial challenges, including the need for clearly defined office policies, training, and supervision, so as to assure continuity and consistency.

Moreover, when vacancies do occur, it is often difficult to hire new replacements in a timely manner. Because the FCRL Division, like other City departments, must comply with the City's hiring plan and other obligations originating from the *Shakman* decrees, hiring new attorneys for vacant FCRL Division positions involves cumbersome and time-consuming requirements. This results in a hiring process that typically ranges from three to ten months for each individual applicant. For example, in one representative case, an ACC applied for an entry-level ACC posting in April and was not hired until the following February. The turnover in the office and the delays in filling openings caused by the *Shakman*-driven hiring process have caused the office to routinely be staffed at less than its full allotted capacity.<sup>6</sup>

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<sup>6</sup> The *Shakman* decrees are a series of consent decrees arising out of a 1969 federal civil lawsuit, *Michael L. Shakman, et al. v. Democratic Organization of Cook County, et al.*, Case No. 69 C 214 (N.D. Ill.), which prohibit the City from, among other things, "conditioning, basing or knowingly prejudicing or affecting any term or aspect of governmental employment with respect to one who is at the time already a governmental employee, upon or because of any political reason or factor." In 2014, a federal judge found the City of Chicago to be in "substantial compliance" with the *Shakman* decrees and ended federal monitoring of the City's hiring practices.

### III. RECOMMENDATIONS

The purpose of our review was to identify any changes necessary to conform the FCRL Division's policies, procedures, and practices to the highest professional and ethical standards and litigation best practices. Pursuant to the terms of our engagement, two particular areas of focus of our review in this regard were: (A) discovery-related matters; and (B) attorney training and supervision. Our recommendations in those areas are set forth in Sections A and B below.

During the course of our review, we conducted a broad factual inquiry regarding the FCRL Division. In doing so, we considered whether, in order to ensure compliance with ethical standards and best practices, the Division should make changes in areas beyond discovery, attorney training, and supervision. We sought input on that question from FCRL Division counsel, plaintiffs' counsel, and others, and also took into account all other information we gathered about the Division. Through this process, the only other areas we identified as warranting specific recommendations are management of Outside Counsel and conflicts of interest. Our recommendations in those areas are set forth in Sections C and D below.

#### A. Recommendations Concerning Discovery-Related Matters

Our recommendations concerning discovery-related matters are in two broad areas, each of which is discussed in separate sections immediately below: (1) document production; (2) pre-litigation document preservation.<sup>7</sup>

##### 1. Recommendations Relating to Document Production

One of the primary areas of focus of our review was the FCRL Division's policies and practices with respect to the production of relevant documents in discovery. This issue was a paramount focus for several reasons.

First, in two recent opinions in cases handled by the FCRL Division, *Colyer v. Chicago, et al.*, Case No. 12 C 4855 (N.D. Ill. Jan. 4, 2016) and *Hadnott v. Chicago, et al.*, Case No. 07 C 6754 (N.D. Ill. May 22, 2015), the court sanctioned the City after finding that FCRL Division counsel failed to meet their discovery responsibilities with respect to document production. In both cases, the court found that FCRL Division counsel handling the case had not conducted a reasonable inquiry into the existence of relevant evidence. In the opinion in *Colyer*, which was released about a week before the City retained us to conduct this review and formed part of the impetus for the review, the court also found that one of the Division's senior lawyers, Jordan Marsh, who has since resigned from the Division, acted in bad faith by intentionally concealing relevant evidence from the plaintiffs and the court and making misleading statements to the court concerning what he knew about the existence of that evidence.

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<sup>7</sup> This section uses the term "document" to include electronic records and information, including audio and video recordings, GPS data, and other similar materials, which are often relevant in cases handled by the FCRL Division.



Second, through our review of other specific cases handled by the FCRL Division (discussed further in Section IV, *infra*), we identified a number of other cases in which, for a variety of reasons, discovery failures occurred on the part of the City/FCRL Division, such as where the City/FCRL Division did not timely produce relevant discovery materials. With the exception of one 2005 case discussed in Section IV, *infra*, we did not find evidence in any of these matters establishing that materials were withheld intentionally. Rather, the information we gathered suggests that the discovery failures were unintentional – i.e., the result of, for example, failure of CPD or OEMC to properly identify documents for FCRL Division counsel, despite counsel having requested them; miscommunication between CPD and FCRL Division counsel; or an oversight, lack of sufficient diligence, or inadvertent error made by FCRL Division counsel. We examined these cases in part to understand the root causes of some of these discovery failures and determine if improvements in the FCRL Division's policies and procedures might correct some of the problems that caused these failures, and thereby reduce the risk that such failures will occur in the future.

Third, many of the plaintiffs' counsel from whom we received information and who regularly represent clients in cases against the FCRL Division expressed concerns about the discovery practices of the FCRL Division. While it is not uncommon for attorneys to complain about their adversaries' conduct, particularly with respect to discovery issues, these complaints provided additional reason for us to focus on discovery-related matters. We sought any information plaintiffs' counsel could provide about the types of problems they believe they have experienced in dealing with the FCRL Division (or Outside Counsel) on document discovery issues and other matters. We also sought input from plaintiffs' counsel concerning their views on the causes of any such problems and how they might be corrected. Many plaintiffs' counsel provided their views on those matters, which we have taken into account in formulating our recommendations.

Finally, attorneys within the FCRL Division also gave us reason to focus on document discovery issues. Most FCRL Division attorneys we interviewed readily acknowledged that they have experienced challenges and difficulties in connection with identifying, obtaining, or producing relevant records, particularly from CPD and, at times, from OEMC. Virtually all FCRL Division counsel also acknowledged that various improvements could be made in the process of identifying, collecting, and producing documents. In fact, many expressed to us that they welcomed a fresh look at the office's policies and procedures in the hopes that it might lead to changes that would make the Division's processes for identifying, collecting, and producing relevant documents (particularly from CPD and OEMC) more efficient and more reliable. They each stated that it is both the culture of the office and their personal approach to act in good faith to meet discovery obligations, including with respect to document production, and expressed a desire to have policies and practices in place that furthered those efforts. Many provided or commented on specific ideas that might improve the processes. We have taken those comments into account in forming our recommendations as well.

In summary, our recommendations in the area of document discovery are as follows:

- (1) The FCRL Division should emphasize to FCRL Division attorneys (and Outside Counsel), through policies, training, supervision, and management, the importance of engaging in diligent efforts to pursue relevant discovery materials.
- (2) The FCRL Division should provide FCRL Division counsel (and Outside Counsel) comprehensive and up-to-date knowledge regarding relevant CPD and other City department documents and document systems, including through developing resource materials and training, particularly as to audio/video evidence and other electronic information.
- (3) The FCRL Division should implement enhanced focus, including through training and increased supervision, on document production analysis, i.e., attorney analysis of the facts in each case and types of records that may exist in, and are relevant to, each case, for purposes of determining what to produce.
- (4) The FCRL Division should improve the communication and information flow with CPD and OEMC concerning those departments' records, and/or obtain direct access to such records.
- (5) The FCRL Division should adopt enhanced policies and procedures with respect to document request processing, tracking, and follow-up.
- (6) The FCRL Division should adopt policies and procedures concerning production of: (1) City/CPD e-mails and other electronic communications; and (2) e-communications and other materials in the personal possession of defendant CPD officers.

Each of these recommendations is discussed separately fully below.

**a. Recommendation 1: The FCRL Division should emphasize to FCRL Division attorneys (and Outside Counsel), through policies, training, supervision, and management, the importance of engaging in diligent efforts to pursue relevant discovery materials.**

Various procedural and ethical rules governing the document production process impose on FCRL Division attorneys duties to conduct document discovery diligently and in good faith.<sup>8</sup>

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<sup>8</sup> See, e.g., Fed. R. Civ. P. 26(g)(1)(A) (requiring discovery responses to include attorney signature certifying that "to the best of the person's knowledge, information, and belief formed after reasonable inquiry," the disclosure is "complete and correct as of the time it is made"); Ill. R. Prof. Cond. 3.4 (requiring attorney to make reasonably diligent effort to comply with a legally proper discovery request); Fed. R. Civ. P. 37(c) (providing sanctions may be imposed for failure to satisfy obligations with respect to document production); Ill. S. Ct. Rule 219 (same); Ill. S. Ct. Rule 770 (providing penalties may be imposed for violations of ethical rules); see also *New Medium Techs. v. Barco N.V.*, 242 F.R.D. 460, 464 (N.D. Ill. 2007) ("[L]awyers have a duty to act in good faith in complying with their discovery obligations and to cooperate with and facilitate forthright discovery"); *Kleen Prods. v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at \*1 (N.D. Ill. Sept. 28, 2012) (lawyers "bear a professional obligation to conduct discovery in a diligent and candid manner").

The FCRL Division should make clear – through policies, training, supervision, and management – that a fundamental priority for FCRL Division attorneys is taking the time needed, and making the efforts required, to pursue their discovery obligations in good faith and with diligence.

The Illinois Rules of Professional Conduct impose on the senior attorneys managing a law office a duty to ensure that the office “has in effect measures giving reasonable assurance that all lawyers in the [in the office] conform to the Rules of Professional Conduct.” Ill. R. Prof. Cond. 5.1(a). This duty “requires lawyers with managerial authority . . . to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers . . . will conform to the Rules of Professional Conduct,” including “policies and procedures [] designed to . . . ensure that inexperienced lawyers are properly supervised.” Ill. R. Prof. Cond. 5.1(a), Comment 2.

During our review, we found nothing to suggest that DOL or the FCRL Division has failed to emphasize the importance of acting in good faith in discovery. In fact, all of the attorneys we interviewed expressed that the office fosters a culture of honesty and good faith in discovery matters. The FCRL Division should ensure that all office policies, procedures, communications, and actions continue to cultivate such a culture. Specifically, we recommend that the FCRL Division attempt to continue to manifest a culture of discovery compliance and conscientious document production through various actions, such as the following:

- reiterating, in office meetings, office messaging, and other means, the FCRL Division’s clear and strict policy that good faith and diligent discovery efforts must be made in all cases, so as to reinforce a culture that embodies the policies;
- reinforcing the policy through the manner in which supervisors guide, mentor, and work with less senior attorneys on discovery matters, encouraging them to take sufficient time and pay sufficient attention to detail so as to be able to conduct discovery diligently;
- enforcing the policy with appropriate disciplinary policies and actions as necessary; and
- providing attorneys with sufficient training and resources to be able to conduct diligent discovery.

During the course of our review, the FCRL Division took substantial additional steps to reinforce a culture of good faith and diligent compliance with discovery obligations. For example, the Division adopted various written policies and conducted training making clear that the Division requires diligence and strict adherence to all discovery rules and will not tolerate any intentional or knowing non-disclosure, misleading disclosures, or withholding of discoverable information.

Recent training for FCRL Division personnel included general ethics training given to all DOL personnel by attorney Mary Robinson of the Robinson Law Group, a legal ethics expert and former head of the Illinois Attorney Registration and Disciplinary Commission. The training covered, among other things, various key ethical rules and the importance of ethics compliance. In addition, Ms. Robinson and Michael Flaherty of Flaherty and Youngerman, an attorney whose practice includes a concentration in legal malpractice and who teaches a clinical ethics course at Northwestern Law School, provided FCRL Division personnel with other ethics training specifically related to the types of issues presented in cases handled by the FCRL Division. The training included a focus on discovery and trial preparation.

FCRL Division personnel also recently received training on discovery from FCRL Division Deputy Thomas Platt. The training focused on knowledge of and strict compliance with discovery rules and ethical obligations, reiterating the Division's policy of acting in good faith and diligence in discovery. The training addressed various aspects of proper discovery practices for FCRL Division personnel.

In addition, as set forth more fully in the sections immediately below, during our review the Division also has adopted an array of new policies and procedures that, going forward, should enhance the Division's discovery practices and facilitate attorney diligence in discovery. The adoption and implementation of these policies and procedures, if strictly adhered to, should help reinforce a culture that requires diligent and conscientious efforts in meeting discovery obligations.

**b. Recommendation 2: The FCRL Division should provide FCRL Division counsel (and Outside Counsel) with comprehensive and up-to-date knowledge regarding relevant CPD and other City department documents and systems, including by developing resource materials and training.**

Understanding a client's documents is crucial to an attorney's ability to conduct proper document discovery. The Federal and Illinois State procedural rules impose on attorneys a duty of knowledge concerning the client's documents as an express part of the procedural requirements relating to document production, charging attorneys with understanding their client's records and certifying that document productions are complete, based on a reasonable inquiry.<sup>9</sup>

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<sup>9</sup> Various Federal Rules of Civil Procedure reflect this duty. For example, Rule 26(a)(1) requires a party to produce, as part of its initial disclosures, "a copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii). Rule 34 further permits a party to request the production of documents and electronically stored information in the responding party's "possession, custody or control." Fed. R. Civ. P. 34(a)(1). Rule 26(g)(1)(A) requires that an attorney making initial disclosures or a production response to sign the disclosure/response as a certification that "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry," the production is "complete and correct as of the time it is made." Fed. R. Civ. P. 26 (g)(1)(A); *cf.* Ill. S. Ct. Rule 137 (requiring that every document of a party represented by an attorney is signed by the attorney as certification that "to the best of his knowledge, information, and belief

The Illinois Rules of Professional Conduct likewise impose basic requirements concerning an attorney's knowledge of his or her client.<sup>10</sup> An attorney's lack of knowledge concerning the client's documents can expose the attorney and the client to serious risk of making an incomplete production. Further, failure to understand a client's documents and the types of information that might be recorded with regard to a particular incident creates risk the attorney and client will overlook a record that could have been useful to defending the case. Thus, it is essential that each FCRL Division attorney possess a comprehensive understanding of the information generated by CPD and the other City entities that may be relevant to FCRL Division litigation.

It was evident from our review that it is not an easy or straightforward task for FCRL Division counsel to obtain and maintain a comprehensive understanding of all of relevant City documents, including what types of such records exist, when and how they are typically created, how and where they are stored, and how they may be collected. CPD and OEMC maintain voluminous records of various types. Often, CPD and OEMC create new types of documents and/or introduce new methods for how to maintain those documents. In recent years, the development and prevalence of many new types of information maintained by CPD or the City, such as vehicle dash board cameras, CPD officer body cameras, GPS data, and many other forms of electronic information, has provided key evidence in cases alleging police misconduct, and at the same time has made discovery a more time-consuming and difficult process for FCRL Division attorneys. Getting up to speed and keeping up to speed on all of the different types of electronic and other records, which is essential to perform discovery obligations diligently, requires adequate training and resources (e.g., manuals, guides, or other information).

It is particularly important for FCRL Division counsel (and Outside Counsel) to have a mastery of the relevant types of records possessed by CPD and other City agencies because of the manner in which plaintiffs frequently request such documents and the manner in which the FCRL Division has interacted with CPD to follow up on those requests. While some plaintiffs issue document requests that identify and request specific types of records, it is also not uncommon for plaintiffs to make broad requests, such as requests seeking all documents relating to an arrest, a stop, or other interaction between the plaintiff and CPD officers. Absent clarification, modification, or objection, such requests make it incumbent on the FCRL Division counsel to determine what types of relevant records may have been created, and understand how to obtain them.

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formed after reasonable inquiry it is well grounded in fact . . ."). As litigation progresses, Rule 26(e) further imposes a continuing duty to supplement "in a timely matter" any initial disclosure or document production that is or has become "incomplete or incorrect." Fed. R. Civ. P. 26(e); *cf.* Ill. S. Ct. Rule 214 (imposing "duty to seasonably supplement any prior response [to a document request] to the extent of documents, objects or tangible things which subsequently come into that party's possession or control or become known to that party").

<sup>10</sup> For example, Rule 1.1 requires the attorney to provide "competent representation," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Ill. R. Prof. Cond. 1.1.

While CPD officers involved in the case often can assist the FCRL Division counsel in identifying relevant records that were created in relation to the underlying incident, they might not have complete information on all potentially relevant records, such as records with which they had no involvement in creating. Generally, aside from the officers involved in the case, the FCRL Division attorneys' source of information for identifying and locating CPD documents relevant to any particular matter has been OLA, through which, per past CPD policy, FCRL Division counsel was required to obtain CPD records. Information we gathered during the review suggests that working through OLA often has proven to be extremely difficult and cumbersome for FCRL Division attorneys. OLA frequently has been backlogged with many requests, causing delays. Also, OLA often has functioned more like a document pulling service than a true discovery partner, requiring FCRL Division counsel to identify and specifically request particular documents to be gathered for production, rather than working together with FCRL Division counsel to help identify and obtain any relevant or responsive documents. Although in simpler cases the types of documents involved may be relatively standard and easier to identify, in more complex cases, the amount and types of documents that may be relevant may be much broader, and thus more difficult for FCRL Division counsel to identify and locate without significant assistance from CPD.

As set forth below, to make it easier for FCRL Division attorneys to obtain CPD documents, the FCRL Division and CPD recently instituted a procedure pursuant to which the FCRL Division will access certain CPD systems and locations where CPD stores certain records, and work with CPD custodians directly to obtain certain types of records. This should greatly improve the process of FCRL Division counsel obtaining records from CPD, and avoid some of the issues with OLA that often have made obtaining documents from CPD difficult for FCRL Division attorneys. FCRL Division attorneys will still need, however, a strong base of knowledge of CPD and OEMC records in order to identify and obtain all relevant records.

At various times over the years, the FCRL Division has made efforts to develop certain training materials and resource materials to assist FCRL Division counsel in learning of and keeping up-to-date on the various types of CPD and other City records that exist. For example, years ago, summary manuals were put together by the Division to identify, describe, and give examples of various types of CPD records. One of the Division's head paralegals also has from time to time gathered information on various common types of CPD documents and provided training on those documents to certain new FCRL Division counsel. However, the manuals and training on CPD documents have not been comprehensive, have not been regularly updated and are now outdated, and have not systematically been provided to all Division counsel. In fact, in recent years, prior to the onset of our review, due to workloads and other priorities, the Division had not focused a great deal on formal training for new and lesser experienced FCRL Division attorneys on CPD documents and other relevant records. Thus, many FCRL Division counsel have learned about the various types of CPD documents through individual discussions with supervisors and other counsel and experience in handling cases. While on-the-job training can be a helpful supplement to more general training, a case-by-case knowledge base tends to create knowledge gaps in certain attorneys that may hinder the attorneys' ability to identify and provide timely discovery in all cases.

Almost uniformly, FCRL Division attorneys acknowledged during interviews that they could benefit from a more comprehensive knowledge of the universe of CPD or other City documents that exist, and that at times they have experienced challenges during discovery as a consequence of not possessing a complete knowledge of all CPD and other City entity information generation and record-keeping. For example, Division attorneys described recent occasions in which the FCRL Division learned that it had not timely been told by CPD that CPD was maintaining certain sets of records, such as GPS data (which the FCRL Division previously had understood was retained only at OEMC), and search warrant-related documents being stored at CPD's Homan Square location. Division attorneys also described individual experiences they had in which they did not have knowledge of a particular type of document until that type of document became relevant in a case they were handling. While such knowledge gaps are to some extent natural and understandable, and likely cannot be entirely eliminated through even vigorous training, FCRL Division counsel generally agreed that robust training relating to CPD records would assist them in their discovery efforts and reduce the instances where such knowledge gaps occur.

Many plaintiffs' counsel expressed frustration at what they perceived to be the lack of sufficient knowledge on the part of certain FCRL Division counsel (or Outside Counsel) concerning certain types of CPD documents relevant in cases they have handled. Some experienced plaintiffs' counsel indicated that at times they seemingly know more about CPD documents than the FCRL Division counsel handling the case, and have had to identify specific documents to FCRL Division counsel to locate and produce. While some plaintiffs' counsel went so far as to suggest that it appears at times that some FCRL Division counsel or Outside Counsel have intentionally chosen to remain ignorant of certain relevant records or information, we found no evidence of that in our review.

In our view, however, it remains imperative that the FCRL Division continue to focus on providing its attorneys (and Outside Counsel) with comprehensive and up-to-date knowledge of the types of City records that exist, and other details about them (such as how and when they are created, where they are located, and how they can be identified and recovered), so as to allow the attorneys to marshal that knowledge in handling document requests and interfacing with CPD, OEMC, and other City entities during the document collection process. We thus recommend the following:

- We recommend that the FCRL Division work closely with CPD – as well as OEMC and other City departments that have documents and systems containing information relevant to cases handled by CPD (“the other Departments”) – to prepare comprehensive, detailed resource materials memorializing all of the various types of CPD and other Departments’ documents and systems that may be relevant in litigation handled by the FCRL Division, including providing examples of such documents and descriptions/detailed information about such systems (e.g., GPS data, dash camera systems, and other systems used to create and store electronic records) (“Resource Materials”).

- We recommend that the FCRL Division work closely with CPD and the other Departments to ensure that regular updates are made to the above-described Resource Materials, including by engaging in regular communications with CPD and the other Departments through which the FCRL Division is notified of any new documents, new systems, and new methods or locations for keeping and storing relevant information, and provided with sufficient information about those documents, systems, methods, and locations.
- We recommend that the FCRL Division take steps to ensure that both current and future FCRL Division personnel and Outside Counsel are provided the Resource Materials and adequately trained on the relevant documents and systems and information described in the Resource Materials. In our view, adequate training would include providing information sufficient for FCRL Division personnel to not only be aware of the existence of the documents, systems, and information, but also understand, for example:
  - for documents:
    - how, when, and by whom documents are created;
    - what information the documents reflect and what that information means;
    - where they are stored and for how long;
    - who the custodian is; and
    - how to obtain the documents; and
  - for systems (e.g., the CLEAR system, dash cameras, GPS data):
    - how they work;
    - what information they store, how they store it, and for how long;
    - how the systems can be searched and the types of reports or information that can be generated; and
    - who the custodian is and how to obtain information from the systems.
- We recommend that the training of FCRL Division attorneys and Outside Counsel in these areas be periodic and ongoing, perhaps with different segments of focus over time, and that such training be made available to and required of all new FCRL Division counsel and Outside Counsel.



During the course of our review, the FCRL Division made various efforts to improve its attorneys' knowledge of CPD and other Department documents. For example, the Division has worked on updating certain materials that describe the documents and information created and/or maintained by CPD and OEMC. Specifically, the DOL retained outside consultants to assist in identifying all electronic data applications/sources used by the City's public safety departments, including CPD and OEMC. The work includes identifying and mapping out the information available in those applications and systems, and the retention period for the information. With the assistance of consultants, and working with CPD personnel, DOL has also engaged in a project aimed at ensuring that all types of CPD records have been identified, including the locations and custodians of such records. The information gathered from these projects will be used to help ensure that FCRL Division personnel are aware of all types of CPD records and key information about them, such as where they are stored and how they can be accessed. This information will be used to update internal FCRL Division attorney resource materials that will provide guidance to FCRL Division attorneys concerning CPD and OEMC documents.

Further, the FCRL Division has recently enhanced its training materials for FCRL Division personnel concerning CPD and OEMC records, and conducted training sessions on such records and related discovery matters. We recommend that DOL and the FCRL Division continue to build upon, coordinate, and institutionalize these various measures to develop a robust, unified program that provides all FCRL Division attorneys (as well as Outside Counsel) with comprehensive information about the documents, audio, video, data, metadata, and other information generated by CPD and other Departments, including the process by which that information is created and maintained, how it is used, and how it can be accessed.

**c. Recommendation 3: The FCRL Division should implement enhanced focus, including through training and increased supervision, on document production analysis.**

Knowledge of CPD and other City department records is a necessary, but not sufficient, condition for consistently making timely and complete document production. The various procedural and ethical rules applicable to document discovery impose an obligation on attorneys not only to have adequate knowledge of their clients' documents, but also to proceed diligently and through reasonable investigation to inform themselves of the relevant facts necessary to provide relevant discovery. In short, compliance with the applicable rules requires an attorney's active engagement and pursuit of responsive information.<sup>11</sup>

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<sup>11</sup> In particular, Federal Rule of Civil Procedure 26(a)(1) instructs that "[a] party is not excused from making its disclosures because it has not fully investigated the case." Fed. R. Civ. P. 26(a)(1)(E). Under Rule 26(g)(1), the certification required for initial disclosures and production responses provides that the responses are based on the attorney's "knowledge, information, and belief *formed after reasonable inquiry . . .*" Fed. R. Civ. P. 26 (g)(1)(A) (emphasis added). Thus, early on in litigation, even "[b]efore making its disclosures, a party has the obligation under subdivision (g)(1) to make a reasonable inquiry into the facts of the case." See Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules – 1993 Amendment. Similarly, with regard to the "competence" required to satisfy Illinois Rule of Professional Conduct 1.1, the rule provides that competent representation entails, specifically, "inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures

FCRL Division attorneys and Outside Counsel are often confronted with broad document requests and complicated fact patterns that do not always lend themselves to a straightforward document collection process. Properly assessing what documents are relevant to a particular incident involving alleged police misconduct and requesting those documents is not simply a matter of checking boxes on a request form for certain types of reports or materials. Rather, it often requires intensive fact analysis, which may include a variety of tasks such as interviewing CPD officers and other witnesses, reviewing and cross referencing relevant CPD reports, and obtaining and analyzing electronic information. Further, identifying relevant documents is often an iterative process. As initial materials are received, reviewed, and cross-referenced, and as additional information is gathered from witnesses and other sources, new facts may come to light, leading to a determination that other, previously-uncollected documents and information may be relevant.

For example, in complicated cases – such as police chases of suspects covering a wide area, shootings, large public disturbances, or other incidents that involve many responding officers and witnesses – all of the relevant facts (such as the relevant locations, or the identity of the officers and police cars who were involved), and thus all of the relevant documents and other evidence, might not be immediately apparent from the initial reports an FCRL Division attorney may receive, or the initial investigation that is conducted. Further fact investigation and analysis may be required, such as obtaining additional reports and electronic information, cross-referencing various reports and electronic information that might lead to other relevant facts, and re-interviewing witnesses.

Obtaining relevant discovery materials often requires not only conducting intense factual analysis that may be iterative in nature, but also understanding how to properly request the relevant information from City Departments, especially relating to electronic discovery, such as video and audio evidence and GPS data. For example, in cases involving potential video evidence, a request from FCRL Division attorney or Outside Counsel to CPD or OEMC requesting simply all video relevant to a shooting incident might not be sufficient for CPD and OEMC to identify and collect all potentially relevant video evidence, as CPD and OEMC personnel cannot be delegated the responsibility to determine precisely what is “relevant” to the case – e.g., for what dates and times, and from what cameras. Rather, the attorney may need to analyze the facts of the case, consider the location(s) and time frame of the alleged incident(s), develop reasoned judgments about what cameras may have captured relevant video (e.g., what vehicles were on the scene that may have dash cameras that recorded relevant video, and what other City cameras at what other locations might have relevant video), and then request video

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meeting the standards of competent practitioners.” Ill. R. Prof. Cond. 1.1, Comment 5. Rule of Professional Conduct 1.3 further imposes a duty of “diligence,” Ill. R. Prof. Cond. 1.3, meaning the lawyer “should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer.” Ill. R. Prof. Cond. 1.3, Comment 1. Finally, Rule 3.4 states that “[a] lawyer shall not: in pretrial procedure, . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” Ill. R. Prof. Cond. 3.4(d).

relating to specific dates and times, from cameras in specific cars or at specific locations. Only then can the attorney be assured the relevant video has been obtained and produced.

In speaking with FCRL Division attorneys, we found that, as a general matter, they appreciate the analytic component to document collection and production, understanding that it involves conducting fact analysis and determining from those facts and other knowledge what documents might be relevant and available. They further described how they typically conduct such analysis not only at the outset of the case, but also again at other points in time in the case as they obtain new reports, evidence, or information. They indicated that such analysis might be performed and re-performed, for example, when preparing to meet with CPD officer defendants or other witnesses, when making Rule 26(a) disclosures, when responding to discovery, when preparing for depositions, or when preparing for trial.

However, information we learned suggests that at least with some FCRL Division counsel, particularly less senior ACCs, various factors have at times contributed to make it difficult in some instances for them to spend the time on, and perform at a high level on, the analytical work that forms the basis for identifying and obtaining relevant documents. Some of those factors include high caseloads, time constraints, obligations on other cases, an imperfect understanding of all CPD's documents and systems, difficulties in dealing with OLA, lack of supervision, and a lack of specific training on the analytical aspect of discovery.

While less senior ACCs are ordinarily not assigned as the lead attorney for major or complex cases, and typically are not expected to take the lead on document discovery analysis in complex cases, even in less complex cases involving medium or lower exposure, in which the less senior ACCs would often take the lead in discovery, a fair amount of analytical work must be done to properly identify and obtain relevant documents. Further, in more complex cases, in which more senior ACCs or supervisors would typically take the lead on document discovery, some of the same types of difficulties still sometimes come into play and hinder or delay the performance of robust factual analysis, or render that analysis imperfect or incomplete. Thus, on some occasions, not until counsel has been preparing for depositions or trial has it become apparent that additional relevant documents exist and need to be produced.

We recommend that the FCRL Division place an enhanced focus on the analytical aspect of discovery, in several ways:

- We recommend that the Division adopt policies and procedures that make it clear that diligent and conscientious analytical work – as to obtaining relevant facts and identifying and obtaining all potentially relevant documents – is expected of all attorneys in fulfilling their document discovery responsibilities on every case.
- We recommend that the Division consider specific training sessions on the analytical aspect of document discovery. This training could be performed, for example, by engaging in walk-throughs on examples of the kinds of work that needs to be performed in complex cases to ensure that all relevant documents are identified, having attorneys perform mock discovery exercises on which they are

guided (much like deposition or trial training), or through other training means that demonstrate and emphasize the type of analytical work required to conduct proper discovery.

- We recommend that supervisors be more directly involved in, and be responsible for, the analytical aspects of document discovery, including through meetings with the assigned ACC(s) early on in the case and in follow-up sessions, and provide specific guidance on factual analysis and identifying relevant documents that should be requested and obtained.

During the course of our review, in conjunction with discussions among DOL and FCRL Division leadership, as well as our team, the FCRL Division began implementing certain initiatives designed to address these types of issues and improve the analytical process relating to discovery. New FCRL Division policies and training emphasize the importance of timely and complete document production, including conducting document production analysis. The new policies and training also make clear that Division attorneys, rather than paralegals, are responsible for discovery in all cases and that such responsibilities cannot simply be delegated to paralegals. The new policies also provide that, periodically during the pendency of the case, attorneys are required to analyze and determine whether there is a need to supplement previous discovery responses. Further, the revised policies and training provide that, throughout the case, supervisors have a responsibility, including through reviewing the case file and meeting with the attorneys on the case, to ensure that discovery is complete, accurate, and timely.

In addition, to assist attorneys in their analytical approach to discovery and identification of potentially relevant documents, the Division has developed a number of lists of commonly generated documents for specific types of cases, including, in particular, death in custody (non-suicide); death in custody (non-suicide in lockup); excessive force (no weapon with hospitalization); excessive force (weapon with hospitalization); excessive force (weapon without hospitalization); false arrest (car-related); false arrest (drug-related); false arrest (not car- or drug-related); investigatory stop; malicious prosecution; reversed conviction; search warrant; wrongful death (force used, non-shooting); and wrongful death (shooting). The Division has also begun instituting new training sessions geared toward improving the knowledge of FCRL Division attorneys and paralegals in understanding and identifying relevant documents and how to obtain them. We recommend that the Division continue with these and other efforts to enhance focus on document production analysis.

**d. Recommendation 4: The FCRL Division should improve the communication and information flow with CPD and OEMC concerning those departments' records, and/or obtain direct access to such records.**

Proper document production on behalf of a client requires sufficient communication between the attorney and the client. The attorney needs to ask the right questions of the client to determine what potential documents are created, who created them, how long they are kept, where they are stored, who the custodian is, and other relevant information. The client, in turn,

needs to provide timely and accurate information to the attorney, and generally assist the attorney in identifying the relevant records.

As noted above, historically, to obtain documents from CPD, FCRL Division attorneys have been required to go through OLA. OLA has limited staff and responds to requests from not only the FCRL Division, but also the Torts Division. Frequently, OLA has been backlogged with many requests, causing delays in FCRL Division attorneys obtaining relevant documents. Also, FCRL Division attorneys and OLA staff often have not communicated effectively; many FCRL Division attorneys and paralegals expressed the view that, although certain OLA staff were helpful and responsive, others were difficult to work with, causing difficulties in identifying and obtaining relevant documents in a timely manner. For example, OLA would at times not honor requests for all records related to a particular incident or RD number, but rather would insist that FCRL Division personnel specify each desired record. As another example, OLA would at times reject document request forms as being improperly completed based on trivial reasons, and rather than allow the FCRL Division attorney or paralegal to simply transmit the correct information over the phone, OLA would insist on the submission of an entirely new form.

Likewise, at times certain FCRL Division attorneys have communicated with OLA and OEMC in a fashion that has not promoted the efficient identification and collection of relevant documents. For example, at times certain ACCs have simply forwarded to OLA or OEMC verbatim a broad request received from plaintiffs' counsel, such as a request for all "relevant" records in certain categories, (e.g., audio or video evidence), without providing OLA more details of what specifically is requested (e.g., relevant dates, times, police cars, or locations), apparently expecting OLA or OEMC to figure out which particular documents within the category requested are "relevant." While the ACCs who have simply passed along these types of plaintiffs' requests to CPD and OEMC have done so in order to make sure that the precise requests made by plaintiffs are made known, doing so with those types of requests actually does not facilitate identifying the relevant records, since it is the attorney's job to determine, for example, what the relevant dates and times are for the audio and video evidence that may be available.

Other miscommunications between the FCRL Division and OLA or OEMC have involved, for example, whether OLA and OEMC have retained documents with shorter retention periods. As set more fully below in Section III.A.2, *infra*, some audio, video, and other evidence is maintained by CPD and OLA for only certain periods, such as 30 days, and then gets destroyed. If a record has a 30-day retention period, and after that 30-day period has expired the record is requested for the FCRL Division case, the record may no longer be available. However, if, prior to the record being requested for the FCRL Division case, a *prior* request for the record was made within the 30-day retention period (such as for a criminal case involving the same arrest that is subject to the FCRL Division case), then the record may have already been preserved by OLA or OEMC pursuant to that prior request, and the record may exist and be available for production in the FCRL Division case, even though the request for the record in the FCRL Division case fell outside the 30-day retention period.

In the past, in some FCRL Division cases in which records with a short-term retention period were requested after the retention period for the records had expired, miscommunication occurred between the FCRL Division and CPD/OEMC about whether CPD/OEMC should search for, or has searched for, the records. Specifically, at times in these circumstances, the communication was not clear between the FCRL Division and OEMC/CPD as to whether the FCRL Division was asking or had asked OEMC/CPD to search for the relevant records, whether OEMC/CPD had conducted such a search, and/or whether the records were locatable in the OEMC/CPD databases. This at times led to the relevant records not being identified as having been preserved and available for production, and not being timely produced.

As these examples demonstrate, proper communication between the FCRL Division and OEMC/CPD is crucial to obtaining and producing relevant records. To that end, we recommend that the FCRL Division take steps to improve communication and information flow with CPD and OEMC concerning those departments' records, and/or obtain direct access to such records. Specifically:

- We recommend that, to the extent practicable, the FCRL Division obtain more direct access to certain CPD and OEMC records, such as by accessing CPD and OEMC systems that contain relevant information, or working directly with CPD custodians rather than OLA, so as to avoid having to go through OLA and OEMC personnel for at least some of the records maintained by CPD and OEMC.
- We recommend that the FCRL Division maintain records memorializing the documents the FCRL Division requests from CPD and OEMC, and CPD's and OEMC's responses to those requests. In addition, we recommend that the FCRL Division institute a procedure by which CPD and OEMC certify their completion of responses to requests received from the FCRL Division.
- We recommend that the FCRL Division adopt policies and practices pursuant to which FCRL Division attorneys request, and OEMC/CPD personnel should search for, relevant audio, video, and other records, including in any active databases and any archived or saved databases, regardless of whether the request for the records in the FCRL Division case is made after the retention period for the record expired.
- We recommend that the FCRL Division: (1) adequately train FCRL Division personnel to understand CPD and OEMC databases and electronic records, including the types of searches that can be conducted on those databases and the information required to conduct a specific search (e.g., whether the databases can and must be searched by only certain terms/fields, such as by date, location, time, or other methods); and (2) adopt policies and implement practices ensuring that requests for information from such databases contain sufficient detail, and are in sufficient form, to direct OEMC and CPD to produce the specific records sought.

- We recommend that, on an ongoing basis as needed, DOL and FCRL Division leadership engage in discussions with CPD and OEMC leadership to develop any additional policies and practices required to facilitate and allow for efficiency and clarity in ongoing interactions between the FCRL Division and CPD/OEMC.

During the course of our review, the DOL has taken substantial steps designed to address these issues and improve the FCRL Division's access to information housed at CPD and OEMC, and improve its communications with CPD and OEMC. For example:

- DOL, the FCRL Division, and CPD have implemented a new program for document collection pursuant to which FCRL Division personnel directly access certain CPD electronic document storage systems – specifically, the CPD Criminal History Records Information System (“CHRIS”) and Citizens and Law Enforcement Analysis Reporting (“CLEAR”) System, which contain various CPD reports and information relevant in cases handled by the FCRL Division.
- Also under the new program, FCRL Division personnel have access to CPD locations at which other reports and information are retained, so as to work directly with CPD custodians to identify, locate, and obtain discovery materials. Whereas previously FCRL Division personnel were required to submit virtually all requests for document requests to OLA, under this new program, the FCRL Division obtain documents directly from specific CPD record storage locations, such as Homan Square, Central Headquarters, and the various police districts/areas, working with CPD custodians at those locations. FCRL Division attorneys and personnel make weekly, on-site visits to those locations to collect the requested information.
- Also under the new program, designated CPD personnel located at the premises are required to execute a certification confirming to the FCRL Division personnel that they searched for the requested information and, to the extent it exists, provide the information to the FCRL Division.<sup>12</sup>
- The Law Department likewise has arranged to obtain direct access to records at OEMC. Specifically, the Law Department has embedded within OEMC two FCRL Division paralegals who will handle FCRL Division requests for audio and video files located at OEMC. The paralegals are in the process of training on OEMC systems and, upon obtaining sufficient training and experience, these

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<sup>12</sup> We understand that these new document retrieval procedures will largely eliminate the need for the FCRL Division to go through OLA for the vast majority of CPD records it needs. OLA personnel may still be involved in assisting the FCRL Division in obtaining documents from certain custodians, such as, for example, when such requests are unique or require additional resources, and it is determined that OLA may be of some assistance. But rather than functioning as a bottleneck or pass-through for all of FCRL Division requests, OLA will serve simply as an added resource to help satisfy such requests, as needed.

paralegals should be able to obtain OEMC records in response to FCRL Requests, eliminating the need for FCRL Division to work through OEMC personnel (except, perhaps, in cases where OEMC assistance is needed due to high volume of requests or special requests or circumstances).

- In addition, the FCRL Division has adopted policies and instituted training specifying that, with respect to any potentially relevant audio, video and other records in the possession of CPD or OEMC, FCRL Division attorneys and paralegals should request all such records regardless of whether the request for the records would be made after the retention period for the record expired. The FCRL Division also has made clear to those conducting the searches for such records that searches should be performed for such materials by accessing information in any databases, logs, or other records that might contain information on the records, including active databases or logs of saved or archived records.

We recommend that the FCRL Division continue with these efforts and continue to examine whether additional opportunities exist to improve communication and information flow with CPD and OEMC concerning those departments' records, consistent with our above-stated recommendations.

- e. **Recommendation 5: The FCRL Division should adopt enhanced policies and practices with respect to memorializing, tracking, and following up on requests for relevant information from City departments, and documenting/producing information received in response to such requests.**

Proper memorialization and follow-up on document production work is imperative. Attorneys should memorialize the work they perform in document discovery, so as to create a record of the efforts made and the information requested and received. This includes keeping track of the requests made to the client for documents, following up on those requests, and ensuring that information received is properly documented and maintained.

Maintaining a record of work performed in discovery, including requests made and information received, is particularly important for the FCRL Division. Doing so helps keep track of what has already been done and what additional work needs to be done to complete discovery. Also, at least two attorneys and a paralegal are assigned to each FCRL Division case. For efficient and effective work in discovery, each member of the team should understand, and be able to access materials relating to, the discovery efforts that were made and any information/evidence received. This includes any new attorneys who join a case, such as when team members leave the office and a case is handed over to new attorneys in the office or outside counsel. Finally, if discovery follow-up is needed or questions or disputes arise, the Division may need to be able to understand and explain what prior efforts were made to complete discovery.



Equally as important as memorializing discovery efforts is following up on them. Attorneys need to make sure that, when they make requests for documents or other information to a client, they make efforts to follow up on and close out those requests. This should include indicating in records maintained in the case file whether a response was received to the request and what the response was, and making sure that materials received are logged, retained, shared with other attorneys on the team, and produced, as appropriate.

During our review, we learned that the FCRL Division has not employed a uniform approach to maintaining a record of work performed in discovery. Rather, the procedures followed largely varied from attorney to attorney and paralegal to paralegal. For example, through office procedures, paralegals have been assigned the task on every case of making, at the outset of the case, certain initial standard requests to CPD and OEMC for basic reports and other information, but the paralegals' execution of that task, and their memorialization of precisely how the task was completed, have not always been consistent.

Similarly, the practices on each case, and among various attorneys and paralegals, have not been consistent with respect to documenting and following up on the various requests for records made on the case. Generally, the FCRL Division's office procedures have required maintaining in the hard copy case file and the electronic file for each case the various requests for records made on the case, the responses to those requests, and any materials received in response to those requests, and notifying all team members when such requests are sent or responses or responsive materials are received. But again, these procedures have not always been followed (or have been followed to differing degrees) from one case to the next. Inconsistencies also have occurred in the manner in which attorneys and paralegals have tracked whether, in response to a request, a response or responsive materials have been received, and followed up on outstanding requests. Different attorneys have employed different approaches to such tracking and follow up, and such approaches have at times been inconsistent or incomplete.

Accordingly, we recommend that the FCRL Division adopt enhanced policies and practices with respect to memorializing, tracking, and following up on requests for relevant information from City departments, and documenting information received in response to such requests. We recommend that these policies and practices specifically provide the following:

- Except for initial requests for basic case records, which are completed by the paralegals per Division policy as a matter of course, when an FCRL Division attorney directs a paralegal to make a request for documents to CPD, OEMC, or other City departments, the direction to the paralegal should be made in writing (such as by e-mail) and provide the specifics for the request to be made.
- When the FCRL Division makes a request for documents to CPD, OEMC, or another City Department: (1) the request should be reduced to writing; (2) the attorney or paralegal sending the request should notify other members of the case team that the request has been made and send them a copy; and (3) the request should be maintained in the hard copy file and the electronic file for the case.

- All pending requests to CPD, OEMC, and other City Departments should be tracked and monitored, and as requests remain outstanding, follow up should be performed on the requests as necessary, so as to ensure that the information requested is received timely. This should involve some type of tickler or reminder system for periodically following up on requests in a timely manner, and documenting the follow up in the file.
- The FCRL Division should implement a document management system.
- When CPD, OEMC, or another City Department provides the FCRL Division a written response, certification, documents, or other materials in response to a request made by the FCRL Division: (1) all team members should be notified of the response, certification, documents, or other materials; (2) the response, certification, documents, or other materials should be maintained in the hard copy file and the electronic file for the case; and (3) any materials required to be produced should be timely produced.
- To reduce the risk of confusion or miscommunication with regard to the above-referenced tasks, there should be a clear delineation of responsibility for completing those tasks – e.g., whether lead counsel or the paralegal will perform the task; however, responsibility should ultimately remain with counsel to ensure that all such tasks are performed.

We recognize that, in the past, many FCRL Division counsel and paralegals were already following some or all of the foregoing procedures on specific cases. Further, under the new document retrieval policies and procedures outlined above, which provide the FCRL Division with direct access to CPD and OEMC records, some of the above procedures may be mooted, at least with respect to obtaining certain types of documents from CPD and OEMC. For example, in light of the Division's direct access to CPD and OEMC records, "follow up" on requests for certain CPD and OEMC records will not be needed, since the materials will be promptly received when sought, or handled by FCRL Division personnel. However, we understand that some requests to CPD and OEMC may still take time to complete, and may remain outstanding for certain periods of time, possibly requiring follow up. And in any event, the other procedures regarding memorializing discovery efforts and maintaining the files properly still would apply.

During the course of our review, in addition to implementing the above-referenced policies and procedures regarding direct access to CPD and OEMC records, the FCRL Division has addressed the recommendations set out above in other respects, as well. For example, the FCRL Division has adopted new procedures by which requests made and responses/documents received will be systematically memorialized, and outstanding requests will be tracked for follow-up. Under the new policies, attorneys are required to supplement previous discovery responses as needed by "checking back" with the client entities, including, specifically, checking back with client entities to reexamine the state of discovery well in advance of the close of discovery.

As noted above, the FCRL Division also has implemented policies concerning obtaining certifications that documents and materials have been produced in accordance with discovery requests. The FCRL Division's policies also require ensuring that all discovery materials received are scanned into the electronic case file on the office share drive, documenting all production through production letters, and maintaining production logs reflecting materials produced.

Finally, the FCRL Division is in the process of implementing a new electronic discovery document management system, which we understand will complement and/or replace the current system of keeping documents in hard copy and saving electronic copies to a shared drive. This will further enhance the FCRL Division's ability to more efficiently and accurately manage document collection and production.

Thus, the FCRL Division recently has expended considerable efforts and resources to ensure that the Division adequately memorializes, tracks, and follows up on requests for relevant information from City departments, and documents and timely produces any responsive information collected in response to such requests. We recommend that the FCRL Division continue with these efforts.

**f. Recommendation 6: The FCRL Division should adopt policies and procedures concerning production of: (1) City/CPD e-mails and other electronic communications; and (2) e-communications and other materials in the personal possession of defendant CPD officers.**

Our final set of recommendations in the area of document discovery relates to discovery concerning: (1) relevant City/CPD electronic communications, including City/CPD e-mails and messages conveyed through Portable Data Terminals ("PDTs"); and (2) relevant materials in the personal possession of defendant officers, including texts, e-mails (from personal e-mail accounts), and social media (collectively, "e-communications"), as well as any video, audio, photos, or other documents or materials. We recommend that the FCRL Division adopt policies and procedures for the collection, review, and production of such materials.

With respect to City/CPD e-mails and other electronic communications, as well as e-communications in the possession of the defendant officers, it may be that, given the nature of the litigation handled by the FCRL Division and other factors, in many such cases, no such materials exist that are relevant or necessary to produce. However, in some cases, such materials may exist that are relevant and required to be produced. This could be the case, for example, if: (1) the plaintiff's document requests encompass e-communications, such as by expressly requesting certain forms of e-communications relating to the incident or allegations on which the claims in the complaint are based, or by more broadly requesting "communications" relevant to the incident or allegations; and (2) the City or CPD officers possess e-communications relating to the subject matter of the incidents or allegations. Thus, if the plaintiff's document requests to the City and the defendant officers encompass e-communications relating to a certain subject matter, the FCRL Division (and Outside Counsel), in representing the City and the CPD officers, would have an obligation to conduct a reasonable search for and produce any such responsive materials

in the possession of the City and officers, (subject, of course, to any proper objections, agreements, or court orders that may affect the obligation to comply with the request).<sup>13</sup>

Similarly, other materials in the possession of the defendant officers relevant to the plaintiff's allegations, such as any video, audio, photos, or other documents or materials relating to the alleged incident on which the plaintiff's claims are based, may need to be produced.

We recommend that the FCRL Division adopt specific policies and procedures concerning discovery of these materials, and that the policies and procedures include the following:

- In a timely manner, as part of the initial document collection and discovery work on the case, the attorneys handling the case should determine if any relevant City/CPD e-mails or other electronic communications exist and obtain them, such as through appropriate searches of CPD/City e-mails and PDT terminals relating to the officers involved in the case.
- In a timely manner, shortly after receiving the case, the attorneys handling the case on the part of any defendant officers should determine, as part of the initial document gathering and client interviews, whether the defendant officers have in their personal possession any videos, audios, photos, e-communications, or other materials relevant to the litigation, and ensure that any such materials are promptly preserved and obtained.
- The FCRL Division should produce any relevant (1) City/CPD e-mails or other electronic communications; and (2) e-communications and other electronic or other materials in the personal possession of the defendant CPD officers (subject to and consistent with applicable discovery rules and the discovery process, including any objections, agreements among counsel, and court orders).
- The FCRL Division should ensure that appropriate technical and other resources and procedures are put in place for the timely and accurate collection of any relevant City/CPD e-mails and any other electronic communications in the possession of the City or the defendant officers.

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<sup>13</sup> In December 2006, Federal Rule of Civil Procedure 34 (concerning the production of documents) was amended to “confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.” Fed. R. Civ. P. 34, Committee Notes on Rules—2006 Amendment. Rule 26(a) was similarly amended to require a party to disclose electronically stored information as part of initial disclosures. Fed. R. Civ. P. 26, Committee Notes on Rules—2006 Amendment. Thus, electronic communications, including email and text messages, are subject to production the same as any other responsive information, subject to appropriate objections, including the limitation provided by Rule 26(b)(2)(B) that “[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost,” absent a showing of good cause by the opposition. Fed. R. Civ. P. 26(b)(2)(B).

We understand that the City is currently in the process of preparing formal procedures and protocols, and accompanying training, with respect to discovery of electronically stored information. In addition, during the course of our review, the FCRL Division adopted a procedure pursuant to which the FCRL Division attorneys handling each case will cause a search of each defendant officers' CPD email to be conducted, applying relevant search terms to identify any relevant e-mails. In addition, FCRL Division attorneys have been directed to ensure that, early on in the case, including through the initial client interview of individual defendant officers, they determine whether the defendant officers are personally in possession of any relevant electronic or other evidence. If so, the FCRL Division attorneys are to obtain any such evidence. These procedures have been emphasized in recent FCRL Division training sessions. We recommend that the FCRL Division complete and implement its procedures and protocols with respect to electronic discovery, consistent with our above-listed recommendations, and continue to provide adequate training on such procedures and protocols.<sup>14</sup>

## **2. Recommendations Regarding Pre-litigation Document Preservation**

We make two recommendations concerning the FCRL Division's pre-litigation document preservation efforts: (1) the DOL and/or FCRL Division should consult with the City to assess whether the City should adopt longer preservation periods for certain records; and (2) the FCRL Division should enhance its policies, processes, and controls regarding its pre-litigation preservation efforts. Set forth immediately below is background information relating to the FCRL Division's document preservation efforts, followed by separate sections setting forth our recommendations.

### **a. Background Concerning the FCRL Division's Pre-litigation Preservation Efforts**

When the FCRL Division receives notice of certain incidents involving CPD officers (for example, a police shooting of a suspect), Division personnel make efforts to preserve documents relating to those incidents so that, if the incidents become subject to litigation (which the FCRL Division or Outside Counsel would handle), those documents are available as potential evidence

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<sup>14</sup> During the course of our review, some plaintiffs' counsel raised an issue concerning the FCRL Division's production of metadata, which reflects information about an electronic document such as the document's creation date, modification dates, and author. While in many cases handled by the FCRL Division, metadata may not be available, requested, or relevant, in other cases, metadata may be available and requested and, depending on the issues in the case and other factors, may be relevant. Should metadata be requested, the FCRL Division should treat such requests, at least procedurally, the same as any other discovery requests. For example, the parties can discuss the scope of the request (e.g., which particular metadata is requested, and why) and whether and to what extent the requested metadata is available and relevant. The parties also can try to reach agreement on the production of the data, or if no agreement is reached, they can continue to assert their respective positions – e.g., object to or insist on its production – and litigate the issue, allowing the court to decide the propriety of and scope of any production of metadata, based on the application of the discovery rules to the particular issues, facts, and circumstances of each case. The new FCRL Division policy is consistent with this approach in that it provides that if metadata is sought in a case, FCRL Division attorneys will seek to discuss with plaintiffs' counsel the nature and scope of the request and ensure that any request for metadata is appropriately tailored to the needs of the case.

in the litigation. The FCRL Division engages in these efforts in light of a number of circumstances.

First, the City does not permanently retain all potential evidence of incidents involving CPD officers. Specifically, certain electronic materials that may record activity of CPD officers and/or the public, and thus may be relevant evidence in cases handled by the FCRL Division, are preserved for only certain periods of time. This includes, for example: videos recordings from City of Chicago Police Observation Devices (known as “POD cams” or “blue-light cams”) located in various locations around the City, often at street intersections; video recordings from cameras on the dashboards of certain police vehicles (“dash cams”); audio recordings of citizen calls to 911 (“911 audio”); audio recordings involving communications between and among CPD police dispatchers and CPD officers in the field (“CPD radio calls”); records of messages from PDTs, devices located in certain CPD vehicles through which CPD officers can communicate and obtain information; electronic data concerning the Global Positioning Systems that track movements of police vehicles (“GPS data”); and numerous other types of electronic materials. Certain non-electronic materials also have defined retention periods.

The retention periods for these various materials range from a few days to years. For example: POD cam video is retained between three days and 30 days, depending on the age of the particular POD cam and the technology it uses for the recording; dash cam video is retained for 90 days;<sup>15</sup> CPD radio calls and 911 calls are retained for 30 days; PDT messages are retained for seven days; and GPS data is retained for 30 days.<sup>16</sup>

Second, unless efforts are made to save these materials during their respective retention periods, the materials typically are destroyed or recycled at the end of those periods, and any evidence they contain that may have been relevant to a case handled by the FCRL Division could be lost before the case is filed.

Third, many of the cases handled by the FCRL Division are filed months or years after the date of the alleged incident on which the plaintiff’s claims in the case are based. In fact, many claims brought in such litigation have a one-year or two-year statute of limitations period, and at times claims are not brought until shortly before the statute of limitations is about to expire. Thus, absent some effort to preserve the records with defined retention periods, any relevant evidence they may contain about a particular alleged incident that is the subject of the plaintiff’s claims may no longer exist by the time the case is filed.

Given these factors, the FCRL Division takes efforts to preserve records relating to certain incidents involving CPD officers, preserving such records shortly after the incident

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<sup>15</sup> Not all video recorded by the dash cam is saved; rather, certain triggering events cause excerpts of the dash cam video to be marked for saving, and then saved. The marked/saved excerpts are then retained for 90 days.

<sup>16</sup> A CPD retention schedule dated January 7, 2016, and detailing the retention periods for various CPD documents as of that date, can be found at [http://directives.chicagopolice.org/forms/CPD\\_11.717.pdf](http://directives.chicagopolice.org/forms/CPD_11.717.pdf) (hereinafter, “Forms Retention Schedule CPD-11.717”).

occurs, even though at the time the records are preserved, it is not certain that any litigation will ever result from the incident. Likewise, on occasion, an individual involved in an interaction with CPD will, shortly after the interaction occurs, seek to preserve certain materials relating to the interaction. Typically, the individual will do this through counsel in one of two ways: (1) invoking a court procedure pursuant to which, prior to filing a complaint, the individual can obtain an order directing the City to preserve the materials; or (2) sending a letter to the City or DOL requesting the City preserve the materials. In either case, if the matter involves a potential claim of police misconduct, then whether a court order is obtained directing the preservation or the City/DOL receives a letter requesting the preservation, the FCRL Division engages in the directed/requested preservation efforts.<sup>17</sup>

**b. Recommendation 1: The FCRL Division/DOL should consult with the City to assess whether the City should adopt longer preservation periods for certain records.**

We recommend that the FCRL Division/DOL consider whether the City should adopt longer preservation periods for certain records, so as to improve the ability to preserve additional potential evidence for future litigation.<sup>18</sup>

We recognize that the FCRL Division is responsible for defending the City and CPD officers in cases alleging police misconduct and does not have any specific responsibility for ensuring that document retention periods for various City records are compliant with document retention laws, or otherwise determining what those periods should be. Further, we have not been engaged to assess these issues and have not done so.

For several reasons, however, we recommend the FCRL Division and DOL consult the City and its other departments concerning their document retention policies and encourage them to re-examine those policies. Those reasons include the following:

- The City's current document retention policies affect the body of evidence potentially available in cases handled by the FCRL Division.
- The current document retention policies impact the workload of the FCRL Division because, due to the retention limits and the FCRL Division's desire to preserve potentially relevant evidence where possible, the FCRL Division must

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<sup>17</sup> Other DOL divisions take responsibility for preserving potential evidence relating to incidents involving other types of potential litigation against the City. For example, the Torts Division is responsible for pre-litigation preservation efforts relating to incidents that may lead to tort claims against the City.

<sup>18</sup> We have not examined, and make no findings or comments on, whether the City's retention periods for all City records are consistent with all applicable document retention laws, which is beyond the scope of this report. Various statutes may be relevant to retention periods, including the Illinois Local Records Act, 50 ILCS 205, *et seq.*, which generally requires public records to be preserved indefinitely, subject to certain exceptions and approvals granted by the Local Records Commission.

expend substantial resources identifying incidents to preserve and making preservation efforts (and the Torts Division must do the same for potential torts-related cases against the City).

- As set forth below, the FCRL Division's work in identifying and preserving records in advance of litigation is difficult or carries risks; the preservation work takes significant time and effort and, particularly because identifying and preserving the right records does not involve simply "checking a box," it is subject to, among other things, human error. Thus, even exercising good faith and diligent preservation efforts, it is possible that in some instances the relevant records still may not be preserved, potentially exposing FCRL Division personnel and their clients (the City and/or CPD officers) to accusations of evidence spoliation or violations of procedural or ethical rules.

In considering the issue of retention periods for electronic records that might contain evidence relevant to criminal and civil cases involving police activity, a number of government entities, law enforcement-related groups and others have suggested that when a city, municipality, or agency determines the length of retention periods, it should consider what period would facilitate access by future litigants. For example, the International Association of Chiefs of Police recommends that "[r]etention schedules for recordings should take into consideration the possibility of a civilian complaint against an officer sometime after the encounter."<sup>19</sup> Similarly, The Police Executive Research Forum Report included a recommendation that "When setting retention times, agencies should consider . . . the amount of time the public needs to file complaint."<sup>20</sup> The Maryland Governor's Office of Crime Control & Prevention *Workgroup on the Implementation and Use of Body Worn Cameras by Law Enforcement* has also outlined the following factors to be considered when determining the retention period for video: the length of time allotted for a citizen to file a complaint against an officer; the time it typically takes to resolve complaints and complete investigations; the statute of limitations in criminal cases; and the period of time permitted for the filing of civil litigation.<sup>21</sup> Also, police "departments in Rialto, Fort Collins, Albuquerque, Daytona Beach, and Toronto base retention times [for body camera video] in part on how long it generally takes for complaints to be filed."<sup>22</sup>

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<sup>19</sup> See IACP National Law Enforcement Policy Center, *Body-Worn Cameras*, <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/BodyWornCamerasPaper.pdf> at 5.

<sup>20</sup> Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> at 19 (hereinafter, "PERF, *Implementing a Body-Worn Camera Program*").

<sup>21</sup> Maryland Governor's Office of Crime Control & Prevention, *Workgroup on the Implementation and Use of Body Worn Cameras by Law Enforcement: Final Report* (Dec. 2014), <http://www.goccp.maryland.gov/documents/body-worn-cameras-20141215.pdf> at 15.

<sup>22</sup> PERF, *Implementing a Body-Worn Camera Program* at 17.



Possibly due to the considerations noted above, some cities have determined to retain certain video for up to a year or more. For example, New York City's police department must retain body camera recordings "for a minimum of one year unless archived indefinitely pursuant to an arrest, civil claim, citizen complaint, internal investigation, or as requested by the officer who recorded the video," and the Office of Inspector General for the New York Police Department has recommended that the retention period be extended to 18 months.<sup>23</sup> The Phoenix, Denver, and Albuquerque police departments retain body camera video for at least one year,<sup>24</sup> and the New Orleans police department has a two-year minimum for such video.<sup>25</sup> Nonetheless, the Police Executive Research Forum recently found that the most common retention time for "non-evidentiary" body camera video was between 60 to 90 days, which is consistent with CPD's 90-day retention for body camera and dash camera video.<sup>26</sup>

We have not investigated or analyzed the cost or feasibility of extending the retention periods for particular records, and we recognize that different cities and police departments face different circumstances, concerns, and cost constraints when evaluating how long to retain records. Further, we recognize that the City and its agencies are already substantially burdened with managing the immense (and growing) volume of data and documents generated by proliferating sources of electronic information, including various types of video, audio, and other data. We further acknowledge that there are potential limitations and concerns that must be weighed when determining the advisability of extending retention periods for particular records. Those considerations include, for example:

- whether the City has the technological capacity to substantially extend the retention period for different types of records;
- the cost to the City/taxpayers acquiring the resources/capabilities to store additional video, audio, GPS, and other data;<sup>27</sup> and

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<sup>23</sup> The Office of the Inspector General for the NYPD, *Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability*, <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf> at vi, 36 (hereinafter, "OIG-NYPD, *Body-Worn Cameras in NYC*").

<sup>24</sup> *Id.* at 37; PERF, *Implementing a Body-Worn Camera Program* at 17.

<sup>25</sup> OIG-NYPD, *Body-Worn Cameras in NYC* at 37.

<sup>26</sup> PERF, *Implementing a Body-Worn Camera Program* at 17 ("Non-evidentiary video involves footage that does not necessarily have value to aid in an investigation or prosecution, such as footage of an incident or encounter that does not lead to an arrest or citation or of general activities that an officer might perform while on duty (e.g., assisting a motorist or clearing a roadway).").

<sup>27</sup> According to the Police Executive Research Forum, "The cost of data storage will depend on how many videos are produced, how long videos are kept, and where the videos are stored. If the videos are stored on an online cloud database, the costs typically go toward paying a third-party vendor to manage data and provide other services, such as technical assistance and forensic auditing. If videos are stored on an in-house server, agencies must often purchase additional computer equipment and spend money on technical staff and systems to ensure the data is

- the cost to the City/taxpayers for employee manpower that would be required to respond to requests for substantial additional volumes of such records made in criminal and civil cases or through FOIA requests, including costs to redact, blur, or otherwise prepare video, audio, and other materials for proper production.<sup>28</sup>

Indeed, given the City's financial constraints and technology limitations, it may not be practical to extend any of the retention periods. We do not suggest there is an easy answer in balancing these factors, only that the FCRL Division and DOL engage with the City to evaluate and balance the various considerations and make a reasoned determination of its policy going forward on the appropriate retention periods for these materials. We also recommend that the FCRL and DOL revisit this issue periodically in the future, as technology changes and the feasibility of longer retention may correspondingly change.

**c. Recommendation 2: The FCRL Division should enhance its policies, processes, and controls regarding the pre-litigation preservation efforts.**

Since approximately May 2011, the FCRL Division and other divisions of the DOL have handled pre-litigation document preservation primarily through an electronic database system (the "Preservation Database System").<sup>29</sup> In fact, DOL and FCRL Division personnel have invested significant time and resources to both develop the Preservation Database and utilize it on a regular basis to preserve materials. We understand that, as a result of these time-consuming

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secure." PERF, *Implementing a Body-Worn Camera Program* at 32. "Baltimore city officials estimated [body camera] video storage costs at as much as \$2.6 million annually." Tod Newcombe, *Body Worn Camera Data Storage: The Gorilla in the Room* (Sept. 9, 2015), <http://www.govtech.com/dc/articles/Body-Worn-Camera-Data-Storage-The-Gorilla-in-the-Room.html> (hereinafter, "Newcombe, *Body Worn Camera Data Storage*"); PERF, *Implementing a Body-Worn Camera Program* at 11 (discussing that the need to balance privacy considerations "means making careful decisions about when officers will be required to activate cameras, how long recorded data should be retained, who has access to the footage, who owns the recorded data, and how to handle internal and external requests for disclosure").

<sup>28</sup> "[A]gencies must devote funding and staffing resources toward storing recorded data, managing videos, disclosing copies of videos to the public, providing training to officers, and administering the program." PERF, *Implementing a Body-Worn Camera Program* at 31. For example, the Captain of the Houston Police Department has stated, "The cost of responding to open records requests played a role when we were deciding how long to keep the [body camera] video . . . It takes a lot of time, and personnel, to review and redact every tape." *Id.* at 33-34. Similarly, the President of the District Attorneys Association of the State of New York expressed the following concern with video from body cameras, "The reality is, absent significant state funding, once police begin routinely wearing recording devices District Attorneys will be unable to comply with the voluminous Constitutional and statutory obligations that will be associated with these recordings – namely, reviewing, redacting, transcribing, translating and disclosing thousands of hours of recordings.... The largest cost of all will be personnel. Reviewing recordings is extremely time consuming." District Attorneys Association of the State of New York, *Body Worn Camera Press Release and Testimony* (Dec. 18, 2015), <http://www.daasny.com/wp-content/uploads/2015/12/DAASNY-Body-Worn-Camera-Press-Release-and-Testimony-12.8.2015.pdf>.

<sup>29</sup> Even before the development and implementation of the Preservation Database System, the FCRL Division and its predecessor divisions engaged in pre-litigation document preservation efforts.

efforts, when certain CPD incidents occurred during that period (such as, for example, police shootings or deaths of individuals occurring while in police custody), relevant video and audio records with relatively short-term retention periods were typically preserved, even though often lawsuits relating to those incidents often were not filed (if at all) until well after the retention periods for those materials had expired.

While the FCRL Division's policies and practices, including its use of the Preservation Database System, have resulted in the preservation of many records for litigation that would have otherwise been lost, we identified several potential areas for improvement in connection with the FCRL Division's preservation efforts, both in terms of how the FCRL Division identifies incidents for which preservation efforts should be initiated and how preservation is accomplished. Through the assistance of outside consultants and in conjunction with discussions with our team, the FCRL Division has now addressed those issues through a new pre-litigation document preservation protocol. The specific areas of improvement that we identified, and the FCRL Division's new policies and procedures addressing those issues, are set forth below.

**(i) The FCRL Division should evaluate and identify the types of incidents and circumstances warranting pre-litigation preservation and institute a policy requiring preservation for such incidents and in such circumstances.**

The FCRL Division's efforts to preserve records relevant to certain CPD incidents, even before any litigation has been filed relating to such incidents, provide at least two potential benefits: (1) such efforts may satisfy any legal obligation the City has to preserve records relating to such incidents; and (2) even in the absence of any such obligation, the efforts result in preserving potentially relevant evidence relating to such incidents, which may be useful to the FCRL Division and its clients in defending litigation, if any, that arises out of such incidents. Such benefits are provided, obviously, only with respect to the particular incidents as to which the FCRL Division engages in preservation efforts. Thus, a primary consideration for the FCRL Division with respect to its preservation efforts concerns identifying the particular types of incidents as to which, or circumstances in which, it will engage in such efforts.

In the past, the FCRL Division has engaged in preservation efforts when the City has received a court order requiring preservation of records relating to an incident which may result in litigation handled by the Division. Likewise, the FCRL Division has engaged in preservation efforts upon receiving a preservation request from an individual indicating that the individual intends to sue the City and/or CPD officers in relation to a particular incident. The FCRL Division also has engaged in preservation efforts after learning of certain types of incidents, such as police shootings, deaths of individuals in police custody, or other incidents that may result in litigation handled by the FCRL Division, and that may have high damages claims. However, the FCRL Division has not had in place a precise policy clearly setting forth the incidents for which, or circumstances in which, it will engage in preservation efforts.

We recommend that, in addition to preserving records in circumstances where the FCRL Division receives court orders or requests from potential plaintiffs, the FCRL Division conduct analysis regarding, and adopt a policy that specifies, any other circumstances in which, or

particular incidents for which, it will engage in pre-litigation preservation efforts. We also recommend that, in making that determination, the FCRL Division analyze and make a determination regarding the circumstances in which it may have a legal obligation to engage in pre-litigation preservation, including whether it has any such obligation where particular factual circumstances arise or certain incidents occur.

We further recommend that the FCRL Division ensure that its preservation policy provide that it will make efforts to preserve records in any circumstances in which, and for any particular incidents as to which, it has a legal obligation to preserve. Of course, the policy may provide that preservation efforts will be made even in the absence of any legal obligation to preserve, but should at least encompass efforts to preserve in circumstances that the FCRL Division determines would trigger a legal obligation to preserve.<sup>30</sup>

As noted above, during the course of our review, with the assistance of an outside consultant and in consultation with our team, the FCRL Division adopted a new pre-litigation document preservation protocol. The new protocol contains provisions describing, among other things, the specific circumstances in which, and incidents as to which, the FCRL Division will engage in preservation efforts. The policy provides that preservation efforts will be made when a court issues an order requiring preservation, and when the City/DOL receives a preservation request from an individual or the individual's counsel. In addition, the policy provides that, at a minimum, the incidents that will trigger preservation efforts by the FCRL Division ("Preservation Incidents") will include: a CPD officer discharges a firearm and hits a person or animal; a CPD officer discharges a taser or stun gun, striking an individual and causing the individual to die or incur serious bodily harm; a person in CPD custody or lockup dies or suffers serious bodily injury; and a CPD officer is involved in the destruction of an animal. Thus, the FCRL Division has now clearly set out a policy addressing the circumstances in which, and incidents for which, it will engage in preservation efforts.

**(ii) The FCRL Division should ensure it receives regular and reliable notice of all Preservation Incidents.**

To be able to preserve materials in all Preservation Incidents, the FCRL Division must put mechanisms in place to ensure it receives notice of all such incidents.

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<sup>30</sup> We leave it to the FCRL Division to conduct the legal analysis regarding, and make the specific determination of, the circumstances under which it is required to preserve, which are beyond the scope of this report. We note that, generally, in federal court, the determination of whether a party has a pre-litigation duty to preserve documents involves an analysis of, among other things, whether litigation is reasonably foreseeable. *See Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) ("The duty to preserve evidence begins when litigation is 'pending or reasonably foreseeable.'") (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). The Seventh Circuit has also referred to the duty being triggered when an entity "knew, or should have known, that litigation was imminent." *See Norman-Nunnery v. Madison Area Technical College*, 625 F.3d 422, 428 (7th Cir. 2010); *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008). Similarly, the Illinois Supreme Court has articulated a preservation standard based on when "a reasonable person should have foreseen that the evidence was material to a potential civil action." *Dardeen v. Kuehling*, 821 N.Ed.2d 227, 231 (Ill. 2004).

In the past, the FCRL Division employed various mechanisms to obtain notice of the types of incidents it had identified, including daily monitoring CPD Major Incident Reports and public reports of such incidents, and requesting that CPD notify the Division of such incidents. However, CPD's notifications to the FCRL Division of the identified incidents were not consistent and often were not complete.

We recommend that the FCRL Division ensure that it receives consistent and complete notice from CPD and/or other sources of the incidents for which it has determined it will make preservation efforts.

As part of the implementation of its new preservation protocol, the FCRL Division, through DOL and FCRL Division leadership, has reached an agreement and understanding with CPD pursuant to which CPD will now provide the Division, on a daily basis, with consistent, complete notification of the Preservation Incidents identified in the protocol. In addition, under the new protocol, the Division will continue to utilize the same other methods previously used to receive notice about or become aware of Preservation Incidents, namely, daily monitoring CPD Major Incident Reports and public reports.<sup>31</sup> We recommend that the Division continue to monitor and assess the effectiveness of these methods so as to ensure that it is receiving notice of, and identifying the Preservation Incidents, and determine whether any additional mechanisms need to be utilized.

**(iii) The FCRL Division should require FCRL Division attorneys to supervise, and ultimately be responsible for, preservation efforts.**

In Section III.A, *supra*, we outlined the importance of having attorneys supervise the work of paralegals on discovery efforts and assuming overall responsibility for those efforts, including because of the analytical work required. Doing so ensures that the discovery work is completed thoroughly and accurately. Because conducting thorough and complete pre-litigation document preservation requires the same type of analytical work involved in conducting proper document discovery after a case has been filed, it is likewise important for attorneys to oversee and take responsibility for pre-litigation document preservation efforts.

In the past, the FCRL Division largely entrusted document preservation efforts to paralegals, who would use the Preservation Database System to effectuate the preservation. We recommend that attorneys be involved in and ultimately responsible for pre-litigation preservation efforts, including through conducting the proper factual analysis required to identify the records to preserve, identifying the records to preserve, and directing the activities of the paralegal in assisting with the preservation efforts for such records.

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<sup>31</sup> The Division also will continue to preserve, as it has in the past, upon receiving notice of court orders requiring preservation and letters from individuals making preservation requests, where such orders and letters relate to incidents that may lead to litigation handled by the FCRL Division.

The FCRL Division's new pre-litigation document preservation protocol implements this recommendation, providing that an attorney will be involved in the details of, and have ultimate responsibility for, the preservation efforts, including overseeing any paralegal activities that assist in preservation efforts.

**(iv) The FCRL Division should have standard, detailed protocols to ensure complete and consistent preservation in all cases.**

To ensure preservation is complete and consistent for all Preservation Incidents, it is important that standard procedures be followed for how preservation is to be completed, and that FCRL personnel are trained in, and follow, such procedures.

As noted, since approximately May 2011, the FCRL Division has used the Preservation Database System as the means by which it performs pre-litigation preservation of documents. The Preservation Database System is an electronic system that was developed by DOL with assistance from outside consultants. It allows users to send preservation requests electronically to document custodians at different City agencies, including CPD and OEMC, and allows the requestor to review responses from those agencies.

In short, the Preservation Database System has worked as follows. After gathering preliminary information about a Preservation Incident, the paralegal handling the preservation would log into the Preservation Database System and create a Preservation Request. As part of the Preservation Request, the paralegal would select documents for preservation from lists of documents on the system, which set out the various types of records at CPD, OEMC, and certain other City departments that could be preserved through the system. The paralegal also typically would upload, and attach to the Preservation Request, any relevant documents about the incident that already had been gathered (e.g., police reports, news articles, etc.). Once the Preservation Request was completed, the system would then cause notices to be sent to the various designated custodians of the requested records at each City department (known on the system as subject matter experts or "SMEs"), alerting the SMEs of the requests. Once the SMEs receive electronic notice of these requests, they are supposed to first acknowledge receipt of the request (by causing an electronic message to be sent indicating the custodian's receipt of the request), and then substantively address the request, by responding in one of three ways: (1) the department does not have the requested document or data; (2) the department has the document or data and has preserved it; or (3) the department has the document or data and has sent a copy to the requestor.

As noted above, through the use of this system, over the last five years, many records have been preserved for many incidents. However, our review determined that the deployment of the system has not been entirely consistent, including with respect to the nature, scope, and completeness of the requests through the system for the preservation of documents, the SMEs responses to those requests, and the follow up on those requests.

We recommend that the FCRL Division implement a preservation policy with detailed protocols with respect to use of the Preservation Database System and preservation efforts generally. The policy and protocols should include the following:

- The policy should identify the list of the types and categories of documents that must be requested to be preserved for each Preservation Incident, and the Preservation Database System should provide a mechanism to request the preservation of, and preserve, such items.
- The list of items to be preserved should include all documents that might be relevant in FCRL Division cases that, pursuant to retention policies, are kept for two years or less, absent a request to preserve or other special circumstance.
- The policy should provide that preservation requests should be based on the information reasonably available at the time to the attorneys and paralegals involved in making the request, and that the attorneys should engage in sufficient factual and document analysis in connection with making the request.
- The policy should provide that the personnel handling preservation have a responsibility to understand that a proper preservation effort may be an iterative process, requiring supplemental requests after responses to initial requests are received, and thus they may be required to supplement initial preservation requests as needed.
- The policy should provide that, after preservation requests are made (whether initial or supplemental), the personnel involved in the preservation effort must track whether preservation is completed, and follow up on any outstanding requests until each has been closed out.

The FCRL Division's new pre-litigation document preservation protocol is consistent with the above recommendations.

**(v) The FCRL Division should ensure that FCRL Division attorneys and paralegals receive adequate training in the Division's preservation policy and the Preservation Database System.**

Because various FCRL Division attorneys and paralegals will be involved in pre-litigation preservation efforts, and because knowledge of such efforts is important to understanding what documents may or may not be available in any case involving an incident for which preservation efforts are made, all FCRL Division attorneys and paralegals should receive adequate training on the Division's document preservation policy and the Preservation Database System.

Previously, many attorneys in the Division were unfamiliar with the details of the Division's policy and procedures concerning preservation efforts. Attorneys also did not receive detailed training in the Preservation Database System and most were generally unfamiliar with how it works.

We recommend that all FCRL Division attorneys and paralegals receive adequate training as to the Division's preservation policy and protocols and the Preservation Database System. The FCRL Division has developed and is in the process of providing such training.

## **B. Recommendations Related to Training and Supervision**

In addition to discovery issues, the City asked that we also make a primary focus of our review FCRL Division training and supervision. To some extent, our review of those two areas (discovery issues and training/supervision) overlapped, because our evaluation of attorney training and supervision included consideration of training and supervision as to discovery matters, which we addressed in Section III.A, *supra*. However, we also reviewed the FCRL Division's training and supervision more generally. Our recommendations with respect to training and supervision are set out in separate sections below.

### **1. Recommendations Related to Training of FCRL Division Attorneys and Paralegals**

FCRL Division counsel are entrusted with the significant responsibility of representing the City and individual CPD officers in complex civil rights cases, and they routinely encounter unique and challenging litigation issues, including with respect to discovery. Regular and robust training is essential for FCRL Division personnel to meet those challenges and ensure they are adequately prepared to handle their cases skillfully, in the best interests of their clients, and consistent with all professional and ethical obligations.<sup>32</sup>

Over the years, the FCRL Division and its predecessor entities have provided various training for Division personnel. That training has included, for example, supplying written materials and conducting live training sessions on generally applicable litigation topics, such as early case assessment, legal writing, motion practice, expert witnesses, jury selection, and trial advocacy. The Division provided that type of general litigation training typically either in-house or through partnerships with outside law firms that invited FCRL Division attorneys to attend their continuing legal education ("CLE") programs. In-house trainings generally have consisted of seminars, brown bag lunch sessions, or other presentations put on by FCRL Division attorneys and staff. FCRL Division attorneys also have been given opportunities to participate in formal trial training and deposition training programs, participate in and observe trial preparation exercises, and observe actual trials, so that they can develop and improve their trial advocacy skills.

In addition to generally applicable litigation skills training, FCRL Division attorneys have received written materials and training sessions tailored specifically to their practice,

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<sup>32</sup> Rule 1.1 of the Illinois Rules of Professional Conduct provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The comments to this Rule further explain, "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice...engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."



including with respect to the substantive law relevant to the cases they handle (e.g., § 1983 case law), CPD and other Department documents, and Division-specific discovery matters. Division-specific materials and training sessions have included, for example:

- training manuals drafted by FCRL Division leadership setting forth a guide for providing legal counsel and representation in police misconduct cases;
- presentations and materials describing different categories of documents created and/or maintained by CPD, and the other Departments;
- presentations and materials on Section 1983 law;
- packets containing seminal case law relevant to FCRL Division cases;
- a punitive damages seminar and related materials; and
- handouts describing FCRL Division policies and procedures.

In recent years, in part because of the significant workload carried by FCRL Division attorneys and other factors, the formal training sessions for FCRL Division personnel have not been as frequent. In addition, the manual previously put together by FCRL Division leadership for a guide to ACCs has not been updated for several years, and the manual and other training and policy materials have been provided to new ACCs on an inconsistent basis and are not comprehensive.

We recommend that the FCRL Division enhance its training in several respects, as follows.

- a. **Recommendation 1: The FCRL Division should conduct robust training on a variety of topics, including discovery, ethics, substantive law, and general litigation matters.**

We recommend that the FCRL Division continue to enhance and bolster its training efforts on the following topics:<sup>33</sup>

- **Document Discovery.** As outlined extensively above in Section III.A, we recommend that, with respect to discovery, the FCRL Division should provide and enhance training in these areas:

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<sup>33</sup> This section of the report does not intend to provide a comprehensive list of all relevant topics for which the FCRL Division should provide training. Rather, it identifies some key areas that deserve particular emphasis in future training sessions and materials.

- (1) ethics and discovery obligations, focused in part on reinforcing a culture of compliance in discovery;
  - (2) documents and systems of CPD and other City departments relevant to litigation handled by the FCRL Division, including through creating comprehensive resource materials setting forth key and detailed information concerning such documents and systems and working closely with CPD and the other departments to ensure that regular updates are made to such materials;
  - (3) document production analysis, focused on the type of analytical work needed to properly determine the existing and relevant records for each case;
  - (4) interacting with CPD, OEMC, and other City departments concerning obtaining documents and information timely and accurately, including through the FCRL Division's new direct access document retrieval program concerning CPD and OEMC;
  - (5) memorializing, tracking, and following up on discovery efforts; and
  - (6) discovery relating to City/CPD e-mails and electronic communications, and materials in the personal possession of individual defendant officers.
- **Written Discovery Responses.** We recommend that the FCRL Division provide training specifically geared toward written discovery responses, with exercises and examples demonstrating proper responses and contrasting those with improper or potentially problematic responses. Among other things, such training should:
    - emphasize that lawyers should not make wholesale, boilerplate objections to discovery requests;
    - emphasize that, where an objection to a document request is asserted, the "objection must state whether any responsive materials are being withheld on the basis of that objection" (*see* Fed. R. Civ. P. 34(b)(2)(C)) and, thus, a request may be problematic if it simultaneously objects to a request and produces materials in response to the request, subject to the objection, without specifying whether and to what extent any responsive materials were withheld pursuant to the objection, or without clarifying whether or to what extent the search for responsive materials would be narrowed or limited; and

- emphasize the need for CPD officers to carefully review and ensure the accuracy of their responses to interrogatories and requests for admissions before signing and submitting them.
- **Ethics.** We recommend that the FCRL Division continue to provide and enhance training concerning an attorney's legal and ethical obligations with respect to not only discovery, but also other matters, such as proper advocacy at trials and depositions, and conflicts of interest.
- **Relevant substantive law.** We recommend that the FCRL Division continue to provide training on the substantive legal issues that regularly arise in cases handled by the FCRL Division. Such trainings should include an emphasis on § 1983 law, *Monell*, and other topical legal issues that arise in FCRL Division cases.
- **General litigation matters.** We recommend that the FCRL Division continue to provide training on general litigation skills and topics, such as: early case assessment; conducting client/witness interviews; answering a complaint; drafting and responding to written discovery requests; motion practice (including motions to dismiss, motions for summary judgment, and other dispositive motions); taking and defending depositions; witness preparation; expert witness matters, including expert reports; jury selection (including *Batson* issues); trial advocacy (including opening statements, direct examination, cross examination, and closing arguments); the Federal Rules of Civil Procedure; the Federal Rules of Evidence; and legal writing.

During the pendency of our review, the FCRL Division has taken substantial steps consistent with our recommendations to enhance training. For example, as noted above in Section III.A, through Ms. Robinson and Mr. Flaherty, who have substantial expertise in professional responsibility and ethical rules, the FCRL Division recently has received updated training on ethics. FCRL Division leadership also has recently provided FCRL Division personnel with enhanced training on the discovery rules and various other discovery topics and procedures, including with respect to identifying and understanding the documents and information maintained by CPD and the other Departments, and the new process by which FCRL Division personnel will directly access certain CPD and OEMC records. The Division is in the process of preparing to supplement its discovery training, including with respect to electronic discovery and other, related matters. Training also is being planned in the area of document preservation, and the Division is in the process of updating its training manual and other training materials on discovery matters. We recommend that the FCRL Division continue in these efforts at enhanced training and focus, in particular, on the areas outlined in our recommendations above.

**b. Recommendation 2: The FCRL Division should continue with periodic training efforts, including by updating training materials and conducting periodic training sessions, and should make the training materials available to all FCRL Division personnel in an easily accessed central repository.**

FCRL Division training efforts should continue to develop over time, on a periodic basis, so that training materials are updated and do not become obsolete, and so that the subject matters of the training are periodically emphasized to FCRL Division personnel. In addition, the training materials should be kept in a central repository easily accessible to all FCRL Division personnel – and not just current personnel, but also any future personnel who join the Division after training sessions were completed.

As noted above, over the years, due to the significant workload of FCRL Division attorneys and other factors, certain FCRL Division training materials were not regularly updated. Also, training materials were not always consistently provided to all FCRL Division attorneys, and live training sessions have generally not been recorded or otherwise memorialized for later viewings by new Division personnel who join after the training session was held. These factors have contributed to gaps in FCRL Division training.

We recommend that:

- The FCRL Division should update its training materials periodically, especially in key discovery areas, such as training personnel on the nature of CPD and OEMC documents and systems. Routinely updating training materials with respect to CPD and other City department documents and systems is particularly important because the universe of those documents and systems, as well as various aspects about them such as how the documents are created, stored, and accessed, is rapidly evolving and changing. Regular updates will help ensure that the information presented in those materials is up-to-date and reflects recent developments.
- All FCRL Division training materials should be stored in an easily accessible central repository, the existence and location of which is clearly communicated to all FCRL Division personnel. This includes live, in-person training sessions, which we recommend be recorded. Having all training materials available in a central repository on an ongoing basis will assure that attorneys who are unable to attend certain live training sessions (because, for example, they are on trial or otherwise unavailable) can still receive and benefit from the training. It also will provide new attorneys who join the Division an efficient means of getting up to speed on training the Division previously provided. Further, it will allow FCRL Division attorneys with questions about a particular topic or issue to easily access relevant training materials on that topic or issue on an ongoing basis, as necessary.

During the course of our review, the FCRL Division has taken substantial steps to address these training recommendations. For example, as noted above, the Division has recently updated various training materials. It also has adopted procedures by which all training materials, including videotapes of training sessions, will be stored in a central repository that is easily accessible to FCRL Division personnel. We recommend that those efforts continue.

## **2. Recommendations Related to Supervision of FCRL Division Personnel**

Our recommendations with respect to supervision of FCRL Division personnel concern three areas, each of which is addressed separately below: (1) supervision of ACCs; (2) supervision of paralegals; and (3) making sure that FCRL Division attorneys are taking consistent positions on substantive legal issues across all cases.

### **a. Recommendation 1: The FCRL Division should enhance supervision of ACCs, particularly on discovery matters.**

Adequate supervision of attorneys in the FCRL Division is important for a number of reasons, including to foster consistency, accuracy, and completeness on discovery matters, as well as consistency in how the Division handles other issues that commonly arise in its cases.

As described above in Section II, the FCRL Division provides supervisory oversight on cases by assigning a supervising attorney (typically a Chief or a Senior Counsel) on each case. Generally speaking, it is the supervising attorney's responsibility to, among other things, determine overall case strategy, periodically meet with the case team to provide advice and guidance, review and provide oversight on pleadings and motions, and oversee trial preparation and trial. Because supervisors are assigned on a case-by-case basis, an ACC may have many different supervisors across many different cases to which he or she is assigned. Moreover, while supervisors are assigned to specific cases, they also at times advise ACCs on other cases to which they are not assigned if, for example, the assigned supervisor is unavailable by virtue of being on trial.

As might be expected, especially given the wide range of experience and differing backgrounds of ACCs and their varying strengths and abilities, as well as the different styles of supervision employed by different supervisors, the level of supervision provided on any particular FCRL Division case has varied depending on a number of factors, including, for example, the particular supervisor, the particular ACC, and the complexity of the case. In some cases, supervising attorneys have taken a relatively active, hands-on approach to supervision, at least in some areas, while in other cases, the supervising attorney has been less hands-on and may have interacted less frequently with ACCs on the case.

Generally speaking, applying varying levels of supervision on a case-by-case basis may be appropriate and efficient, helping to focus supervisory resources where needed as opposed to blindly allocating such resources evenly, across all cases. At the same time, we believe that the responsibilities of supervisors should be more clearly defined and standardized to some extent, so that the expectations of supervisors and ACCs with respect to supervision are clear, and the

level of supervisory involvement is more consistent in certain key areas, including with respect to discovery. Accordingly, we recommend the following with respect to attorney supervision:

- The FCRL Division should adopt a policy clearly setting forth certain basic supervisory requirements for supervisors on every case.
- The supervisory requirements should include that:
  - early on, and periodically during the pendency of the case, the assigned supervising attorney conduct case review meetings with the case team to discuss various aspects of the case; and
  - towards the outset of the case, and periodically throughout the discovery process, as needed, the supervisor should meet with the ACC(s) to provide guidance and approval on discovery matters, including to ensure that proper document discovery analysis is conducted (e.g., what documents to seek, and with what parameters), and that document production is completed accurately and timely.
- The FCRL Division should consider whether it would be helpful to assign back-up supervisors for each case so that, if the assigned supervisor is unavailable due to being on trial or for other reasons, the ACCs assigned to the case will have a designated supervisor to contact.
- All existing and operable FCRL Division policies should be assembled and made available to FCRL Division personnel in a readily available central repository for FCRL Division personnel to access, in order that the policies may be consulted by FCRL Division attorneys as needed.
- Senior FCRL Division leadership, working in conjunction with Division supervisors, should provide guidance sufficient to ensure that (1) FCRL Division attorneys are taking consistent positions with respect to substantive legal issues and other matters that commonly arise in litigation (such as the application of the attorney/client privilege or other privileges in various factual contexts, the office approach to protective orders, the discovery of certain types of records, such as officer complaint record (CR) files, and other commonly litigated issues), and (2) FCRL Division personnel adhere to office procedures and preferred approaches with respect to trial preparation, experts, trial advocacy, and other general litigation matters. Rather than simply communicating direction orally within the context of office-wide meetings or other settings, or through other communications, this guidance should be memorialized by updating existing Division policies or procedures, or creating new policies or procedures as necessary, which are then made available to all ACCs.

During the course of our review, the FCRL Division has taken various actions that address the type of supervisory issues outlined in these recommendations. For example, the Division has issued several new policies that specify the requirements and expectations of supervisors. These policies provide, among other things, that supervisors are responsible for overall case strategy and file management and for making sure that discovery is properly conducted, including by reviewing the case file periodically and meeting with the team to ensure that discovery is complete, accurate, and timely in all respects. The policies also specifically provide that supervisors must periodically meet with the case team and make sure that deadlines are being met. The FCRL Division has also conducted supervisor training, during which supervisors were trained on the expectations of them in these and other areas.

Further, also during the course of our review, FCRL Division has issued numerous new policies, protocols, and procedures to provide office-wide guidance to all FCRL Division personnel on various aspects of FCRL Division operations and related matters. These policies have clarified and memorialized the office approach on various topics such as substantive legal issues, discovery processes, case management and other matters. We encourage the FCRL Division to continue its efforts on these issues, consistent with our above recommendations.

**b. Recommendation 2: The FCRL Division should enhance supervision of paralegals.**

In addition to enhanced supervision and guidance for FCRL Division attorneys, it is also essential that FCRL Division paralegals receive adequate supervision. Supervision of paralegals is particularly critical within the context of the issues that are the focus of our review, because FCRL Division paralegals play a significant role in assisting attorneys in discovery-related matters.

FCRL Division paralegals have generally been responsible for engaging in efforts to preserve documents and materials related to certain incidents that have been identified as potentially the subject of future litigation, and helping attorneys in the discovery process. For example, at the direction of counsel, paralegals may send document requests to CPD and other City departments, follow up on such requests, track responses and materials as they are received in response to the requests, ready information for production to opposing counsel, and help maintain the electronic and hard copy case file materials.

As with the level of supervision that supervisors have afforded ACCs, the level of supervision that attorneys have afforded paralegals on any particular case has typically varied depending on a number of factors, including, for example, the particular paralegal, the particular attorney, the complexity of the case, and the complexity of the task on which the paralegal is working. In some cases, attorneys have provided strict supervision over certain paralegal activities, while in other cases, the attorney has afforded more latitude and independence to the paralegal to complete particular tasks. While applying varying levels of supervision may be appropriate and efficient within the context of specific cases, helping to focus attorney resources where needed, we believe that the responsibilities of attorneys and paralegals should be defined

in certain respects, in a manner generally applicable to all cases. Accordingly, we recommend the following with respect to paralegal supervision:

- Paralegals should be involved in executing or implementing attorney direction on document collection efforts.
- FCRL Division counsel should have ultimate responsibility for and conduct the analysis and decision-making concerning pre-litigation preservation and document collection efforts, with the assistance of the paralegal. This should include overseeing and directing the actions of paralegals concerning what requests are made, and how they are made, for records from CPD, OEMC, and other Departments.
- Paralegals should assist FCRL Division counsel with respect to discovery matters, such as memorializing all document collection efforts, following up on outstanding discovery requests, and ensuring that discovery materials received are properly maintained in the case files, though the attorney should retain responsibility for overseeing and directing such efforts, ensuring that such efforts are performed in a complete and accurate manner, and ensuring that all documents that should be produced are produced.

During the course of our review, the FCRL Division clarified existing policies and practices in regard to the matters addressed in the above recommendations. For example, new FCRL Division policies make clear that attorneys, not paralegals, are ultimately responsible for discovery, and that while paralegals may handle requests to CPD or other Departments relating to collecting responsive information in discovery, the responsibility for the completeness and accuracy of the requests to CPD or other Departments and responses to opposing party discovery requests, and for what items should be and are produced, lies ultimately with the attorneys. The new FCRL Division policies also make clear that attorneys are also responsible for pre-litigation preservation efforts, including the decision as to what items should be preserved. We recommend that, going forward, the FCRL Division continue to emphasize, through policies, procedures, and practices, the attorneys' duty to supervise, direct, and take responsibility for paralegal activities.

### **C. Recommendations Related to Training and Supervision of Outside Counsel**

As noted above, a significant number of FCRL Division cases (approximately 40 per year in recent years) are assigned to Outside Counsel. We have two recommendations with respect to cases handled by Outside Counsel. First, we recommend that Outside Counsel receive training from the FCRL Division on matters specifically relating to litigating on behalf of the City and CPD officers in cases alleging police misconduct, such as identifying and obtaining relevant CPD and OEMC documents, and any FCRL Division policies, procedures, and practices concerning discovery and other issues Outside Counsel may face. Second, we recommend that



FCRL Division senior leadership or supervisors provide regular oversight, monitoring of, and guidance to Outside Counsel throughout the pendency of the case.

**1. Recommendation 1: The FCRL Division should provide training to Outside Counsel on matters unique to the type of cases handled by the FCRL Division.**

Training Outside Counsel on matters specifically relating to representing the City and CPD officers in cases alleging police misconduct will help put Outside Counsel in the best position to handle all aspects of their cases properly, more efficiently, and more effectively. Providing such training also will facilitate the cases being handled in accordance with the standards, policies, and expectations of the FCRL Division.

At a minimum, Outside Counsel training should include providing Outside Counsel with the discovery-related training and resource materials that are provided to FCRL Division counsel as outlined above in Sections III.A.1 and III.B.1.a. Specifically, this includes training in these areas:

- (1) ethics and discovery obligations, focused in part on reinforcing a culture of compliance in discovery;
- (2) documents and systems of CPD and other City departments relevant to litigation handled by the FCRL Division, including through creating comprehensive resource materials setting forth key and detailed information concerning such documents and systems, and working closely with CPD and the other departments to ensure that regular updates are made to such materials;
- (3) document production analysis, focused on the type of analytical work needed to properly determine the existing and relevant records for each case;
- (4) interacting with CPD, OEMC, and other Departments concerning obtaining documents and information timely and accurately, including through the FCRL Division's new direct access document retrieval program concerning CPD and OEMC;
- (5) memorializing, tracking, and following up on discovery efforts; and
- (6) discovery relating to City/CPD e-mails and electronic communications, and materials in the personal possession of individual defendant officers.

As with training FCRL Division counsel in these areas, the training of Outside Counsel in these areas should be periodic in nature and include whatever updates are provided to FCRL Division attorneys. Also, other areas of training that would be beneficial to offer to Outside Counsel would include any training provided to FCRL Division attorneys on the substantive law at issue in cases alleging police misconduct, such as training on Section 1983 issues.

During the course of our review, the FCRL Division began to take steps to address Outside Counsel training, per this recommendation. Specifically, the Division recently invited various Outside Counsel to participate in FCRL Division training sessions regarding a variety of topics, including the identification and location of CPD and other Department documents, procedures for direct retrieval and certification of receipt of CPD and other Department documents, pre-litigation preservation policies and procedures, policies concerning discovery, and protective orders. We recommend that the FCRL Division continue with these efforts in the future.

**2. Recommendation 2: The FCRL Division should enhance oversight of Outside Counsel.**

It is important that the FCRL Division supervise, oversee, and provide guidance on the work conducted by Outside Counsel. Such oversight is important because, like Outside Counsel training, it helps make sure that cases are handled by Outside Counsel in a manner consistent with the policies, practices, and expectations of the FCRL Division. Indeed, without adequate supervision and coordination, inconsistencies may arise in how Outside Counsel and FCRL Division attorneys handle similar issues in similar cases, which may run contrary to FCRL Division policies, weaken these positions from a litigation standpoint, and erode the confidence that the public and the courts have in FCRL Division counsel and its litigation approach.

In the past, FCRL Division Deputies have provided some oversight of Outside Counsel. For example, Deputies generally have monitored the status of the cases and provided Outside Counsel with a set of guidelines to which they were expected to adhere. In addition, in certain cases handled by Outside Counsel – particularly those with more complex issues and/or higher litigation exposure – FCRL Division Deputies from time to time have reviewed pleadings and conferred with Outside Counsel on various matters, such as case analysis, motion practice, litigation strategy and approach, settlement offers, and related matters. And if an Outside Counsel case has gone to trial, the Deputies have typically closely followed the trial. But the guidelines provided to Outside Counsel have not been overly detailed, and in many cases, the oversight of and interaction with Outside Counsel has been somewhat limited.

We recommend that the FCRL Division enhance its oversight of Outside Counsel. Specifically, we recommend that the oversight of outside Counsel include the following:

- Provide Outside Counsel with information on FCRL Division policies and procedures relating to matters that impact how Outside Counsel should handle the case, including policies and procedures relating to discovery, substantive legal positions, and other matters.
- Institute an Outside Counsel policy pursuant to which an FCRL Division Deputy or supervising attorney is assigned to monitor and supervise Outside Counsel on each case assigned to Outside Counsel.

- Provide that, under the Outside Counsel monitoring policy, the oversight of Outside Counsel provided by the FCRL Division Deputy or supervising attorney include involvement in significant aspects of the case, such as by:
  - discussing case assessment with Outside Counsel and reaching agreement with Outside Counsel on overall case analysis, strategy, and approach;
  - conducting periodic meetings/calls with Outside Counsel and/or receiving periodic updates from Outside Counsel on matters such as case status, key developments, and important upcoming events;
  - reviewing and approving significant pleadings prior to filing, such as motions to dismiss, motions for summary judgment, significant discovery motions, motions *in limine*, *Daubert* motions, pretrial orders, and jury instructions;
  - approving experts; and
  - discussing and approving trial strategy.

During the course of our view, the FCRL Division adopted a new protocol for supervising cases assigned to Outside Counsel which addresses the foregoing recommendations. This new protocol dictates, among other things, that a Deputy, Chief, or Senior Counsel will supervise each case assigned to Outside Counsel. The protocol further provides that the supervisor is responsible for overseeing key aspects of the case, such as making sure that Outside Counsel has a sound theory of the case, reviewing and approving all substantive motions and filings, approving expert witnesses, approving sanctions motions, reviewing and analyzing damages theories, and a number of other matters. The protocol also directs Outside Counsel to provide periodic case updates to the case supervisor at regular intervals and provides that Outside Counsel must receive approval from the FCRL Division before settling or trying the case. In addition, the protocol contains various other provisions concerning oversight and management of Outside Counsel. This new protocol is consistent with our recommendations that the FCRL Division provide enhanced supervision and oversight of Outside Counsel.

#### **D. Recommendations Related to Conflicts of Interest**

One issue we focused on in our review concerns how the FCRL Division handles simultaneous representation of the City and CPD officers in light of actual or potential conflicts of interest that may exist or develop between a CPD officer and the City, or between multiple CPD officers.

The Illinois Rules of Professional Conduct provide certain limitations on joint representations of clients who have conflicted or adverse interests. In particular, Rule 1.7 provides that, unless certain circumstances are present, a lawyer shall not represent a client

where the representation involves a concurrent conflict of interest. Under the rule, a concurrent conflict of interest exists if: “(1) the representation of one client will be directly adverse to another; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by personal interest of the lawyer.”

The Rule provides that where a concurrent conflict exists, the lawyer may represent the client if: “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent.” Thus, concurrent conflicts do not prevent joint representation in all instances.

The conflict of interest issues addressed in Rule 1.7 may be implicated when the FCRL Division represents both the City and one or more individual CPD officers in the same proceeding. The interests of the City and an individual officer defendant could be in conflict when, for example, the officer and the City are opposing parties in a related matter, such as when the officer has been indicted or convicted of misconduct, the City has initiated disciplinary proceedings against the officer, or the officer has filed a labor grievance against the City. In addition, in cases with multiple officer defendants, conflicts of interest between the officers could arise where, for example, one officer implicates another officer in alleged misconduct, or the testimony of one officer conflicts with the testimony of another officer concerning material facts relating to the incident that is the subject of the case.

In the past, the FCRL Division has addressed potential conflicts as they have arisen on a case-by-case basis. In cases where the Division has determined that a conflict existed between City and the individual officer defendant(s), the Division has generally provided separate Outside Counsel to represent the officer(s), so as to avoid the conflict of interest yet maintain the City’s contractual and statutory obligation to defend the officer.<sup>34</sup> The FCRL Division also has generally provided Outside Counsel for individual officer defendants when the Division has identified conflicts between the officers.

As set forth below, we recommend that, in consultation with professional responsibility experts, the FCRL Division adopt a formal policy on conflicts of interest, and that the policy the Division’s approach to conflicts address certain specific issues.

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<sup>34</sup> Pursuant to the collective bargaining agreement between the City and the Fraternal Order of Police, as well as Illinois Tort Immunity Act, the City is obligated to represent police officers in civil litigation alleging misconduct where the officers were acting within the scope of their employment.

**1. Recommendation 1: The FCRL Division should develop a written conflict of interest policy and train FCRL Division personnel on the policy.**

We recommend that the City adopt a written conflict of interest policy. A written conflict of interest policy will serve to memorialize and clarify for FCRL Division personnel the Division's expectations relating to identifying and addressing conflicts of interest.

We recommend that such policy be informed and approved based on legal advice from Ms. Robinson, who has substantial experience in legal ethics as the former head of the Illinois Attorney Registration and Disciplinary Commission, and whose practice concentrates in the area of professional responsibility. Obtaining advice from Ms. Robinson with respect to the policy will provide the FCRL Division with confidence that its conflict of interest approach is consistent with ethical standards and otherwise appropriate.

We further recommend that the FCRL Division provide training for its attorneys on its conflict of interest policy. Such training will, among other things, serve to enhance the Division attorneys' understanding and ability to apply the policy.

During the course of our review, we advised the FCRL Division of these recommendations, and the FCRL Division took steps to follow them. Specifically, in part based on guidance and advice of Ms. Robinson, the FCRL Division recently finalized a written conflicts of interest policy, and has now trained FCRL Division personnel on the policy. The policy provides a comprehensive approach to conflicts of interest issues.

**2. Recommendation 2: The FCRL Division should conduct individualized conflict of interest assessments for each FCRL Division case, taking into account the particular facts and circumstances of each case.**

Courts have recognized that there is no *per se* conflict between the City and CPD officers in cases in which they are named as co-defendants.<sup>35</sup> Indeed, in many cases, the interests of the City and the individual officer defendant(s) are aligned. For example, where the evidence contradicts the plaintiff's allegations that an officer committed misconduct, and the City is potentially liable for the officer's conduct under an indemnification or *respondeat superior* theory, both the City and the officer clearly have a common interest in defending the claim to avoid unwarranted liability. Providing separate representation for the City and the officer in that

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<sup>35</sup> See, e.g., *Coleman v. Smith*, 814 F.2d 1142, 1147-48 (7th Cir. 1987) (declining to adopt a broad holding that "an automatic conflict results when a governmental entity and one of its employees are sued jointly under section 1983" and finding that conflicts must be analyzed by looking at the facts of each case); *Clay v. Doherty*, 608 F. Supp. 295, 304-05 (N.D. Ill. 1985) (calling for sensitivity to an actual conflict instead of a *per se* conflict rule); *Sherrod v. Berry*, 589 F. Supp. 433, 437 (N.D. Ill. 1984) ("[T]he fact that [the same] lawyers are representing all the defendants does not make their joint representation improper where there is no showing of actual conflicts of interest."); *Guillen v. Chicago, et al.*, 956 F. Supp. 1416, 1425 (N.D. Ill. 1997) (declining to disqualify attorney serving as counsel for City of Chicago and City paramedics on the basis of a "merely hypothetical" conflict).

context would unnecessarily require the City, and by extension the City's taxpayers, to incur unnecessary legal fees for separate lawyers for each defendant.

Nevertheless, we recommend that the FCRL Division carefully analyze the facts of each case to determine if a conflict exists between co-defendants. This case-by-case approach to analyzing conflicts will allow the FCRL Division to address conflict issues in consideration of the specific facts and circumstances of each case and take appropriate steps, as necessary, to appropriately handle any actual conflicts, without being beholden to a blanket requirement to retain separate counsel for separate defendants. This approach also avoids unnecessary costs and legal fees that would necessarily result from automatically assigning separate lawyers to each co-defendant in every FCRL Division case.

The written conflict of interest policy that the FCRL Division developed during the course of our review adopts this approach of making individualized conflicts assessments in each FCRL Division case. We recommend that the FCRL Division adhere to the policy and continue with this approach in the future.

**3. Recommendation 3: The FCRL Division should have an experienced FCRL Division attorney conduct a preliminary conflicts analysis for each case soon after the case is assigned to the FCRL Division.**

We recommended that, at the outset of the case, and before assigning the case to specific FCRL Division attorneys or Outside Counsel, a Deputy in the FCRL Division make an initial determination, based on the information that is reasonably available at the time, of whether there is a conflict of interest between the City and the CPD officer defendants, or between CPD officer defendants.

We further recommend that, where the Deputy determines there is a conflict, separate counsel be retained so that defendants with conflicting interests are separately represented. Adopting this approach will help ensure that FCRL Division lawyers do not begin representing CPD officers until a preliminary determination is made, based on the information readily available at the time, that there is no apparent conflict in doing so.

The newly written FCRL Division conflict of interest policy adopts this approach.

**4. Recommendation 4: FCRL Division attorneys should conduct initial interviews of defendant CPD officers separately.**

One issue we considered during our review is whether, in cases involving multiple CPD officers as defendants or witnesses, the FCRL Division attorneys should interview the officers separately or together (at the same time).

Our review determined that, in the past, the practice of FCRL Division attorneys with respect to conducting joint interviews of CPD officers – whether defendants or simply witnesses – has varied from attorney to attorney, and at times from case to case, depending on the facts and

circumstances. Generally, FCRL Division counsel advised that interviews of defendant officers have been conducted separately from interviews of non-defendant officers who are witnesses. However, some FCRL Division attorneys have conducted group interviews of multiple defendant officers, or group interviews of multiple non-defendant (witness) officers.

Some plaintiffs' counsel have expressed concerns that group interviews of officers could cause officers to be less than candid, and to coordinate their testimony to avoid implicating each other in misconduct. FCRL Division attorneys, however, stated that conducting group interviews is entirely proper, furthering both truth-finding and efficient handling of litigation. With respect to fostering efficiency in handling the case, FCRL Division counsel noted that, in many cases, there are multiple defendant officers and multiple non-defendant officers who are witnesses. In fact, in some cases, there are a dozen or more officers who are named as defendants, such as cases in which the plaintiff's claim concerns an arrest, a chase of a suspect, or an execution of a search warrant involving multiple officers. Separately interviewing each of the often multiple defendant officers, and each of the often numerous non-defendant officers, obviously would be substantially more time-consuming and burdensome than conducting joint interviews of defendant officers and joint interviews of non-defendant officers. FCRL Division attorneys also related that group interviews can be an efficient way to determine the truth of what happened, because such group interviews at times jog the memories of witnesses concerning events that may have occurred several years ago.

In our view, particularly where there is a potential for a conflict of interest, the best practice generally would be to conduct separate interviews of the defendants, at least initially. Doing so allows focus on each individual witness's personal recollection and knowledge and allows the witness to speak freely and uninterrupted by other witnesses.

At the same time, there is no ethical or other legal requirement to separately interview witnesses and defendants in all cases, and the circumstances may sometimes warrant joint interviews. This may be the case for example, where multiple witnesses are testifying about topics that are not disputed (e.g., records custodians) or when conducting follow-up interviews, after a lawyer has already completed separate and detailed interviews of the witnesses and is simply following up on certain uncontroverted points. Many reasons may at times justify joint interviews, depending on the facts and circumstances. Ultimately, whether to conduct joint interviews of witnesses and defendants is a choice for each lawyer in each case, and with each witness, considering all of the facts and circumstances.

Particularly in light of potential conflict of interest issues present for the FCRL Division, however, we recommend that the FCRL Division conduct the initial interviews of defendant CPD officers separately. Although separate interviews of co-defendants or witnesses may not be required, conducting the initial interviews of the defendant officers separately will allow the FCRL Division to obtain independent information from each officer that can facilitate the determination of whether there is an adversity of interests among the parties that the FCRL Division may be representing.

Consistent with our recommendation, the FCRL Division has instituted a policy pursuant to which initial interviews of defendant witnesses will be conducted separately. The FCRL Division has also conducted training on this new policy. We recommend that the FCRL Division maintain this policy and continue to train its personnel in this area.

**5. Recommendation 5: FCRL Division attorneys assigned to a particular case should continue to monitor and assess conflicts of interest issues throughout the pendency of the case.**

We recommend that the FCRL Division conflict of interest policy provide that, during the initial client interviews and throughout the course of a case, each FCRL Division attorney assigned to the case should continue to assess the available information so as to identify any potential conflict of interests that may exist.

We also recommend that the conflict of interest policy provide that, during the initial client interviews, FCRL Division attorneys explain to the individual officer defendants that the officer may receive new, separate counsel, if a conflict is determined to exist, or later develops, between the officer and other officers, or between the officer and the City. Officers will thus be informed that their right to counsel is not dependent on agreeing with other officers' testimony, and that they do not have to be represented by the same counsel, or take the same positions, as other officers.

Finally, we recommend that the FCRL Division policy provide that, if an FCRL Division attorney assigned to a particular case comes to believe that a conflict exists, or simply has questions about whether a conflict might exist, the attorney should consult with the supervising attorney assigned to the case, and bring any such issues to the attention of their supervisors and the Division Deputies for resolution.

The new FCRL Division written conflict of interest policy contains provisions consistent with these recommendations.

#### **IV. SPECIFIC CASE REVIEWS**

As part of our review, we conducted an in-depth review of 75 cases handled by the FCRL Division. Our review of these specific cases supplemented, and provided additional details and perspective on, our work in other areas, including our interviews of plaintiffs' counsel, interviews of FCRL Division attorneys, and our review of documents and other information about the FCRL Division's policies and practices. These case reviews thus helped inform our analysis and recommendations.

In light of the overall purpose of our review – to identify any areas of potential improvement in the Division's policies and practices, particularly in the areas of discovery, training, and supervision – the cases we selected to review were those that would be most likely to involve any problematic issues, such as intentional misconduct or issues that perhaps were caused by a deficiency in the FCRL Division's policies or practices. Specifically, we conducted



a detailed examination of *Colyer* and *Hadnott*, including the full record of evidence relating to the discovery violations the court found that led to sanctions in those cases, both of which involved the failure to produce documents in discovery. We also reviewed all other cases we located in which the court ordered sanctions against the City, the CPD officers, or their counsel in the case. We identified these cases through independent research, including a review of court records, as well as information the FCRL Division and plaintiffs' counsel provided us. We also reviewed all cases as to which any of the more than 50 plaintiffs' counsel who either spoke with us or provided us written information expressed concerns about the case and/or suggested that we examine the case.<sup>36</sup> A list of the cases we reviewed is attached as Appendix A.

About half of the cases we reviewed were filed prior to 2011, the rest in the last five years. Also, roughly half of the cases involved Outside Counsel representing at least some of the defendants. The other cases were handled by FCRL Division attorneys, except that a few of the cases brought to our attention by plaintiffs' counsel were handled by the Torts Division. We reviewed those as well, in part because the Torts Division often faces the same type of discovery issues faced by the FCRL Division, including in dealing with OLA and OEMC to obtain records for discovery. As part of our case reviews, we examined pleadings, spoke with counsel, and reviewed other file materials as necessary, with a particular focus on any issues raised by plaintiffs' counsel or addressed by the court in motions for sanctions.

Other than *Colyer*, in which the court found that former FCRL Division attorney Jordan Marsh had intentionally concealed from the court and plaintiffs' counsel the existence of certain relevant evidence, we did not find evidence of intentional misconduct on the part of any FCRL Division counsel or Outside Counsel in any other case in last five years.

During the course of our review, an issue of potential intentional misconduct was raised concerning *Edwards v. Chicago, et al.*, Case No. 12 C 5576 (N.D. Ill.), which was filed in 2012 and tried in May 2015. Specifically, after our review was announced (and about nine months after the *Edwards* trial concluded), plaintiff's counsel in *Edwards* stated that he suspected that the lead attorney for City on the case, Jordan Marsh, may have improperly withheld from production a CTA bus video that plaintiff claimed was relevant to the police shooting at issue in the case. During the course of our review, we confirmed the existence of a CTA video relating to the incident, and plaintiff's counsel recently announced that he independently obtained the video directly from the CTA, through a FOIA request issued to the CTA. However, our review does not substantiate that the City – including IPRA or the FCRL Division attorneys handling the matter – had any CTA video in its files at the time of the case, or acted improperly with respect to any such video. In March 2014, the City produced to the plaintiff an IPRA file which contained, among other things, notes and e-mails showing that the IPRA investigator sought to obtain a potentially relevant bus video from the CTA. This made plaintiff's counsel aware that a CTA bus video may exist and may be potentially relevant. During the pendency of the case, plaintiff's counsel apparently did not seek to obtain any video directly from the CTA, which is a

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<sup>36</sup> Some plaintiffs' counsel indicated that the cases they identified for us to review involve the type of issues or problems that they had experienced in other cases, as well.

separate entity from the City, either by subpoena or FOIA request. In addition, plaintiff's counsel did not ask the IPRA investigator about his request for CTA video when the investigator was deposed by plaintiff's counsel in May 2014. However, plaintiff's counsel did ask Marsh about the CTA bus video during the middle of trial. Specifically, on Saturday, May 16, 2015 – after the trial had been ongoing for a week – plaintiff's counsel, while preparing for the IPRA investigator's upcoming trial testimony (which was set for Monday, May 18, 2015), sent Marsh an e-mail asking about the CTA bus video referenced in the IPRA file. Later that day, Marsh replied to plaintiff's counsel that he would have someone check on it, and then asked the paralegal on the case to confirm whether IPRA or the FCRL Division had ever received any CTA video. The paralegal then confirmed for Marsh that neither IPRA nor the FCRL Division had ever received any CTA video. Our review does not show any evidence to the contrary. Thus, the record we reviewed does not substantiate any suggestion that the City obtained and withheld any relevant CTA video. In addition, the e-mail exchange between plaintiff's counsel and Marsh in the middle of trial on Saturday, May 16, 2015, was ambiguous concerning whether plaintiff's counsel was asking, and whether Marsh was saying he would check on, either: (a) whether the City/IPRA had obtained a CTA bus video; or (b) whether such a video existed. Further, plaintiff's counsel advised us that he does not recall whether Marsh reported back to him on Monday, May 18, that the City did not have or could not find any CTA bus video, or that no such video exists. Thus, the record we reviewed does not substantiate that Marsh misled plaintiff's counsel about the existence of such a video, as opposed to simply reporting that the City/IPRA had not obtained any such video. As a result, we did not substantiate any claim of intentional wrongdoing (or any discovery violation) in this case.

Aside from *Colyer*, the only other instance of intentional misconduct that we found relates to a case filed in 2005, and involves discovery conduct in 2009-10. In that case, *Johnson v. Chicago, et al.*, Case No. 05 C 6545 (N.D. Ill.), the evidence we obtained shows that a former FCRL Division attorney engaged in discovery misconduct by producing two OEMC documents well after they should have been produced and, prior to producing the documents, redacting information showing the date OEMC generated the documents, thereby concealing important information relating to when the documents were generated by OEMC and received by the FCRL Division. The facts we obtained suggest that these OEMC documents were produced late due to oversight, but that the redaction of those documents to conceal when they had been generated and received by the FCRL Division was improper. The attorney in that matter, who we interviewed and has acknowledged making the improper redactions, self-reported the incident in 2010 to FCRL Division supervisors, who disciplined the attorney, and to the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), which we understand conducted an inquiry and addressed the matter.<sup>37</sup> We found no other instances of intentional misconduct relating to discovery practices or other obligations.

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<sup>37</sup> Under ARDC procedures, the ARDC has various options when a disciplinary issue is brought to the Commission's attention, including taking public disciplinary action; taking private disciplinary action (such as a private reprimand); or taking no action. We found no public disciplinary action relating to issue brought to the ARDC's attention relating to the *Johnson* case. Because we do not have access to the ARDC's confidential processes, we were unable to determine the non-public manner in which the ARDC resolved the matter.

Of the cases we reviewed in which sanctions were imposed, six involved conduct that occurred in the period from 2012-present; the rest involved conduct that occurred before 2012, with some dating back to the late 1990s and early 2000s. Of the six cases involving post-2011 sanctions-related conduct, two of them were *Colyer* and *Hadnott*, and two others concerned an alleged failure to produce documents timely.

In one of those cases, *Volland v. Chicago, et al.*, Case No. 13 C 1447 (N.D. Ill.), the court issued a sanction of \$5,175 due to the delayed production of two complaint record (CR) histories of certain CPD officers. The issue did not involve a failure of FCRL Division counsel to diligently locate the documents or to disclose the existence of the documents to the plaintiff; rather, the FCRL Division counsel in the case disclosed the existence of 23 CR files to plaintiff's counsel and produced 21 of them, but argued to the court that the other two files should not be produced because they were pending files subject to ongoing investigation by IPRA, and thus were subject to the law enforcement investigatory privilege. The court rejected that argument, ordered the files produced, and sanctioned the City for the late production of the files. However, plaintiff's counsel stated on the record that plaintiff's request for sanctions was not directed at counsel for the City, but instead at the City's actions for failing to produce the documents in a timely manner. Likewise, the court did not find that FCRL Division counsel's conduct was worthy of sanctions, only that the City should be sanctioned for the late production.

In the other case, *Klingler v. Chicago, et al.*, Case No. 15 C 1609 (N.D. Ill.), the court issued sanctions for the late production of an IPRA file. The plaintiff's complaint alleges that she was assaulted by one of the defendants, who is an off-duty officer of the Will County Sheriff's Department, and that the two CPD officer defendants took reports from her regarding the assault but did not take sufficient action on her reports. After the plaintiff asked the City to produce any IPRA file relating to the alleged assault, the Outside Counsel representing the City requested OLA to conduct a timely search for IPRA files relating to the CPD officers who are defendants in the matter, but that search initially did not locate the relevant IPRA file, because the IPRA file had not been logged under the officers' names (since they were not involved in the alleged assault), so the file was not produced. Only later – when OLA conducted a second search for any relevant IPRA files, and specifically checked for any IPRA files relating to the plaintiff and the date/location of the incident – was the relevant IPRA file located by OLA and produced. The court granted the plaintiff's motion for sanctions relating to the late production of the file, and ordered the City to pay \$1,800 in plaintiff's attorney's fees relating to the motion. The Court did not find any evidence of intentional withholding of the file, nor did we on our review. Rather, the failure to timely produce the file appears to have been due to a lack of thoroughness in connection with the initial search for the file.

In the other two cases in which sanctions were imposed for conduct occurring after 2011, sanctions were issued for reasons not relating to a delay in production of documents. In one case, the court issued sanctions based on findings that the City's Outside Counsel failed to timely provide chain-of-custody information about certain files during discovery, and then violated a motion *in limine* at trial. *Fields v. Chicago, et al.*, Case No. 10 C 1168 (N.D. Ill.). In the other case, the sanction did not involve FCRL Division counsel's conduct; it involved the failure of a

non-defendant CPD officer, who worked in the CPD lock-up, to appear for his scheduled deposition. *Collins v. Chicago, et al.*, Case No. 11 C 2947 (N.D. Ill.).<sup>38</sup>

We are also aware of a recent motion for sanctions against the City that remains pending at the time of our report. Specifically, in *Turner v. Chicago, et al.*, Case No. 15 C 6741 (N.D. Ill.), the plaintiffs moved for sanctions on June 29, 2016, based on allegations that the City (and one of the defendant officers) had failed to timely disclose the existence of, and produce, an IPRA file and psychiatric evaluations relating to one of the defendant officers. The court has not yet resolved the motion for sanctions, which appears to involve a dispute concerning the proper interpretation of, and response to, the plaintiffs' discovery requests.<sup>39</sup>

Many of the 75 cases we reviewed – indeed, nearly all of the cases brought to our attention by plaintiffs' counsel – involved discovery issues. However, in some of these cases, FCRL Division counsel or Outside Counsel on the matter were not even alleged to have been involved in any problematic conduct. As one example, in one case, sanctions were awarded after an officer showed up for his deposition, but then while waiting for another deposition to end so his deposition could start, left to answer an emergency call, without conferring with his counsel.

Likewise, some of the cases brought to our attention did not involve allegations of undisclosed documents, documents being concealed from the plaintiffs, or similar issues, but instead simply involved disputes between plaintiffs' counsel and defense counsel about the proper scope of discovery or other issues that were fully litigated before the judge handling the case, with both sides presenting their arguments and the court ruling one way or the other, sometimes in defendants' favor and sometimes in plaintiffs' favor. These types of open disputes litigated before the court, which did not result in any sanctions, are common in litigation and do not reflect any problematic conduct by counsel.

In many other cases, although plaintiffs' counsel had a viable claim about a deficiency in discovery, such as late production of documents, we did not find sufficient evidence to conclude that the FCRL Division counsel or Outside Counsel handling the matter had engaged in any lack

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<sup>38</sup> In one other case, *King v. Chicago, et al.*, Case No. 13 C 1937 (N.D. Ill.), the court initially issued sanctions after a CPD officer broadly invoked the Fifth Amendment privilege against self-incrimination and refused to answer deposition questions. The court subsequently granted in part a motion to reconsider the sanctions order, in light of the fact that the officer had refused to answer questions upon the advice of his criminal attorney, and not at the direction of the FCRL Division attorney.

<sup>39</sup> With respect to the IPRA file, the plaintiffs argue that the file was requested in discovery, but the City and the defendant officer have argued in response that the IPRA file is not responsive to the plaintiffs' discovery requests. The City and the defendant officer point out in their briefs that the plaintiffs' discovery requests sought only those IPRA files involving complaints filed against or disciplinary action taken against the defendant officers, which the file at issue does not involve, as the file pertains to a standard investigation (of a police shooting) and did not involve any complaint filed against or disciplinary action taken against the officer. With respect to the psychiatric evaluations, the plaintiffs argue that these documents were requested and not produced timely, but the defense argues that the evaluations were initially withheld from production based on proper discovery objections, which the City later decided to withdraw.

of due diligence or other problematic conduct with respect to discovery or other matters. In fact, in many of these cases involving untimely production of documents, it appears from the records and other information we reviewed that FCRL Division counsel had made a specific request to OEMC or CPD (through OLA) that called for production of a document or documents, but OEMC and/or CPD did not timely produce the document to counsel, for a number of reasons.

However, in a number of cases, discovery errors or oversights occurred due to issues such as FCRL Division counsel or Outside Counsel: miscommunicating with CPD/OEMC; not having full knowledge of or training in certain CPD systems or documents at issue in the case; apparently not performing sufficiently diligent analysis regarding document production, such as by cross-referencing certain materials; or not following up on outstanding discovery requests completely or timely. Thus, the discovery issues collectively addressed in these cases appear to reflect that there is room for improvement in certain areas in the policies, procedures, and practices we outlined above in our recommendations.

As noted above, discovery errors and oversights are not uncommon in discovery in virtually all types of litigation, and even when exercising the utmost good faith and diligence, errors may still occur from time to time. However, counsel should always work conscientiously and diligently to avoid any such errors, striving to employ the best policies, procedures and practices that eliminate such errors to the extent reasonably possible. The recommendations outlined in this report, if implemented assiduously, should serve to minimize the opportunity for similar such errors to occur in the future.

In sum, our case reviews, along with the other work in our review, did not find evidence establishing a culture, practice or approach in the Division of intentionally hiding evidence or engaging in intentional misconduct. While our review did identify areas of improvement for the FCRL Division in certain respects, implementing the recommendations outlined above should enhance the Division's policies and practices in those areas and facilitate the operation of the FCRL Division in accord with best practices and ethical standards.

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**Appendix A – List of Cases Reviewed**

<b>Aguilar v. Chicago, et al., Case No. 14 C 6807 (N.D. Ill.)</b>
<b>Alexander v. Chicago, et al., Case No. 08 C 6688 (N.D. Ill.)</b>
<b>Alvarez v. Chicago, et al., Case No. 11 C 610 (N.D. Ill.)</b>
<b>Barber v. Chicago, et al., Case No. 08 C 6363 (N.D. Ill.)</b>
<b>Bass v. Chicago, et al., Case No. 09 C 1087 (N.D. Ill.)</b>
<b>Beal v. Chicago, et al., Case No. 04 C 2039 (N.D. Ill.)</b>
<b>Blameuser v. Chicago, et al., Case No. 06 C 1987 (N.D. Ill.)</b>
<b>Cage v. Chicago, et al., Case No. 09 C 3078 (N.D. Ill.)</b>
<b>Carradine v. Cortes, et al., Case No. 08 C 6507 (N.D. Ill.)</b>
<b>Chatman v. Chicago, et al., Case No. 14 C 2945 (N.D. Ill.)</b>
<b>Clark v. Chicago, et al., Case No. 07 C 1616 (N.D. Ill.)</b>
<b>Claxton v. Chicago, et al., Case No. 14 C 10076 (N.D. Ill.)</b>
<b>Coleman v. Chicago, et al., Case No. 12 C 10061 (N.D. Ill.)</b>
<b>Collins v. Chicago, et al., Case No. 11 C 2947 (N.D. Ill.)</b>
<b>Colyer v. Chicago, et al., Case No. 12 C 4855 (N.D. Ill.)</b>
<b>Craft v. Chicago, et al., Case No. 06 C 1451 (N.D. Ill.)</b>
<b>Doornbos v. Chicago, et al., Case No. 13 C 6021 (N.D. Ill.)</b>
<b>Edwards v. Chicago, et al., Case No. 12 C 5576 (N.D. Ill.)</b>
<b>Edwards v. Chicago, et al., Case No. 13 C 4558 (N.D. Ill.)</b>
<b>Edwards v. Chicago, et al., Case No. 12 L 13429 (Cir. Ct. Cook Co.)</b>

<b>Fields v. Chicago, et al., Case No. 10 C 1168 (N.D. Ill.)</b>
<b>Foltin v. Chicago, et al., Case No. 09 C 5237 (N.D. Ill.)</b>
<b>Garcia v. Chicago, et al., Case No. 09 C 5598 (N.D. Ill.)</b>
<b>Gaytan v. Kapus, Case No. 96 C 393 (N.D. Ill.)</b>
<b>Gibson v. Chicago, et al., Case No. 10 C 5310 (N.D. Ill.)</b>
<b>Gonzalez v. Chicago, et al., Case No. 15 C 5028 (N.D. Ill.)</b>
<b>Grayer v. Chicago, et al., Case No. 06 C 1997 (N.D. Ill.)</b>
<b>Hadnott v. Chicago, et al., Case No. 07 C 6754 (N.D. Ill.)</b>
<b>Harrington v. Chicago, et al., Case No. 13 C 8277 (N.D. Ill.)</b>
<b>Henderson v. Chicago, et al., Case No. 14 C 9905 (N.D. Ill.)</b>
<b>Hondras v. McGhee, Case No. 13 C 1846 (N.D. Ill.)</b>
<b>Horton v. Chicago, et al., Case No. 13 C 6865 (N.D. Ill.)</b>
<b>Hull v. Chicago, et al., Case No. 13 C 1563 (N.D. Ill.)</b>
<b>Johnson v. Chicago, et al., Case No. 05 C 6545 (N.D. Ill.)</b>
<b>Johnson v. Chicago, et al., Case No. 14 C 9330 (N.D. Ill.)</b>
<b>King v. Chicago, et al., Case No. 13 C 1937 (N.D. Ill.)</b>
<b>Klingler v. Chicago, et al., Case No. 15 C 1609 (N.D. Ill.)</b>
<b>Kluppelberg v. Chicago, et al., Case No. 13 C 3963 (N.D. Ill.)</b>
<b>Lambert v. Chicago, et al., Case No. 13 C 6030 (N.D. Ill.)</b>
<b>LaPorta v. Chicago, et al., Case No. 10 L 11901 (Cir. Ct. Cook Co.); Case No. 14 C 9665 (N.D. Ill.)</b>
<b>Lewis v. Chicago, et al., Case No. 99 L 6348 (Cir. Ct. Cook Co.)</b>



<b>MacNeice v. Chicago, et al., Case No. 09 L 2962 (Cir. Ct. Cook Co.)</b>
<b>Martinez v. Chicago, et al., Case No. 09 C 5938 (N.D. Ill.)</b>
<b>Martinez v. Chicago, et al., Case No. 14 C 369 (N.D. Ill.)</b>
<b>Moore v. Chicago, et al., Case No. 07 C 5908 (N.D. Ill.)</b>
<b>Morado v. Chicago, et al., Case No. 12 C 752 (N.D. Ill.)</b>
<b>Morgan v. Chicago, et al., Case No. 11 C 9271 (N.D. Ill.)</b>
<b>Nelson v. Chicago, et al., Case No. 09 C 883 (N.D. Ill.)</b>
<b>Newsome v. James, Case No. 96 C 7680 (N.D. Ill.)</b>
<b>Obrycka v. Chicago, et al., Case No. 07 C 2372 (N.D. Ill.)</b>
<b>Orejel v. Chicago, et al., Case No. 08 C 364 (N.D. Ill.)</b>
<b>Ortiz v. Chicago, et al., Case No. 04 C 7423 (N.D. Ill.)</b>
<b>Paine v. Chicago, et al., Case No. 06 C 3173 (N.D. Ill.)</b>
<b>Perez v. Chicago, et al., Case No. 13 C 4531 (N.D. Ill.)</b>
<b>Price v. Chicago, et al., Case No. 13 C 1785 (N.D. Ill.)</b>
<b>Private Bank &amp; Trust Company v. Chicago, et al., Case No. 08 L 12698 (Cir. Ct. Cook Co.); Case No. 09 C 7526 (N.D. Ill.)</b>
<b>Richardson v. Chicago, et al., Case No. 12 C 9184 (N.D. Ill.)</b>
<b>Rivera v. Chicago, et al., Case No. 12 C 4428 (N.D. Ill.)</b>
<b>Rodriguez v. Chicago, et al., Case No. 06 C 2151 (N.D. Ill.)</b>
<b>Sabanovic v. Chicago, Case No. 11 L 5458 (Cir. Ct. Cook Co.)</b>
<b>Smith v. Hunt, Case No. 08 C 6982 (N.D. Ill.)</b>
<b>Smith v. Chicago, et al., Case No. 09 C 373 (N.D. Ill.)</b>

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<b>Stepney v. Chicago, et al., Case No. 07 C 5842 (N.D. Ill.)</b>
<b>Taylor v. Chicago, et al., Case No. 14 C 737 (N.D. Ill.)</b>
<b>Teague v. Chicago, et al., Case No. 14 C 6950 (N.D. Ill.)</b>
<b>Thomas v. Chicago, et al., Case No. 06 C 757 (N.D. Ill.)</b>
<b>Vasquez v. Chicago, et al., Case No. 13 C 8095 (N.D. Ill.)</b>
<b>Viramontes v. Chicago, et al., Case No. 13 C 6251 (N.D. Ill.)</b>
<b>Volland v. Chicago, et al., Case No. 13 C 1477 (N.D. Ill.)</b>
<b>Walden v. Chicago, et al., Case No. 04 C 47 (N.D. Ill.)</b>
<b>White v. Chicago, et al., Case No. 12 C 7853 (N.D. Ill.)</b>
<b>Williams v. Chicago, et al., Case No. 14 C 6959 (N.D. Ill.)</b>
<b>Williams v. Chicago, et al., Case No. 14 C 7031 (N.D. Ill.)</b>
<b>Young v. Chicago, et al., Case No. 13 C 5651 (N.D. Ill.)</b>
<b>Young v. Chicago, et al., Case No. 15 C 5636 (N.D. Ill.)</b>

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