

Jerry Roth, '83, and Nicholas Fram Discuss Investigating Police Bias

AMICUS, GUEST AUTHOR, POLICING AND LAW ENFORCEMENT

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In March 2015, federal prosecutors in the course of a corruption investigation **revealed** a series of shockingly racist and homophobic text messages sent between several San Francisco Police Department (SFPD) officers. In the wake of the scandal, San Francisco District Attorney George Gascón commissioned a **Blue Ribbon Panel** on Transparency, Accountability, and Fairness in Law Enforcement to investigate to what degree bias in the SFPD may be institutionalized. The Panel consisted of three retired judges and enlisted seven of the city's top law firms to conduct a year's long investigation into the SFPD, all working pro bono. In July 2016, the Panel published a nearly 250-page **report** of its findings, including over 80 recommendations for reform. The report found a number of institutional weaknesses in the SFPD that allowed for bias to go unchecked.

Jerome (Jerry) Roth, a partner at Munger, Tolles & Olson, was recruited to serve as General Counsel of the Blue Ribbon Panel. I had the pleasure of working with Mr. Roth and Nicholas Fram, the lead associate at Munger Tolles working on the project, on some of the Panel's investigations. In addition to assisting Mr. Roth with his General Counsel duties, Mr. Fram and several other Munger Tolles attorneys took a lead role in the Panel's investigations of the San Francisco Police Department's structures of external oversight. Mr. Roth and Mr. Fram graciously agreed to share some of their thoughts on their work for the Blue Ribbon Panel—including its findings and its processes—with the Amicus blog. The following interview has been lightly edited.



JERRY ROTH

What specifically was your role as General Counsel?

JR: From the outset there were a number of questions we addressed regarding how the panel should be formed, what its rights and obligations would be, how it fit in the framework of state law, how it should be set up structurally, how its governance should work, and what powers it would have. We advised the executive director as well as the three judges who made up the actual panel on a whole host of issues relating to best practices. I also conducted some of the key interviews, including of the chief of police, Greg Suhr. We advised with respect to issues of privilege, ethics, and conflicts of interest. We played an organizing and oversight role with respect to the other law firms, and basically acted as a true general counsel responding to any legal issues that arose.

In your opinion, what was the most significant finding the Panel made in its investigations? Or perhaps the most surprising?

JR: For me, the most important findings related to the lack of transparency in what is happening within the police department, in part because of the antiquated methods of collecting data (or not collecting data) on very important subjects, as well as the patchwork oversight of the police department. A spotty collection of different organizations with limited powers were intended to oversee important aspects of how the police department operates. Also, learning about how many community groups felt so oppressed and dissociated from the police officers who were working in their own communities was an eye-opening experience, as was hearing from certain minority police officers who felt that the police department was in many ways an “old boys network.” Learning about the very significant role played by the police union in hindering reform was also very interesting and surprising to me. Obviously the union plays an important role in protecting the rights and interests of police officers, but the power and manner in which they had developed seemed in some important instances to be a hindrance to reform. Those for me were the biggest takeaways. At the same time, we were very impressed by some members of the police department who were so dedicated to improving the situation. So to some extent that was a contrast.



NICHOLAS FRAM

NF: The lack of an audit function—either internal or external—made the SFPD a significant outlier among other major police departments. Without robust oversight, we don't know whether the policies at the police department are effective or if officers are complying with them. And we found that two thirds of the policies in place hadn't been updated since the 1990s. So the lack of an audit function was a big impediment to reform, because it kept the police department doing the same things they had been doing forever, without any indication of whether any of it worked.

Would you say then that the Panel's recommendation to have a policy of regular audits and an Office of the Inspector General was the report's most important recommendation, or the one that could have the biggest immediate impact?

JR: I thought it was an important one, though I think it's hard to say *the* most important one. I would say the recommendations made about the maintenance of data, and the way in which officers are recruited and promoted, are equally important. Making sure that statistics on, for example, community complaints and patterns of practice are even compiled, collected, and analyzed. All of the various recommendations around those issues I thought were among the most important recommendations we made. I think we all found that given the issues that were arising, it was critical for the department to collect and analyze information more thoroughly, and to have such information available to the public, so that the public could analyze these issues in a more coherent way than is possible at this point. Because of a lack of data, you're left now with primarily anecdotal evidence. Anecdotal evidence of course is very important, and does point to certain problems, but it can't be used to analyze the extent and scope of a problem. For that you need more consistent, properly collected data on information such as interactions between police officers and members of minority groups, and the experiences of minority officers. To me that was the most important takeaway, but there were a whole number of recommendations that grew out of that general notion.

NF: Also, the Department of Justice put out a **report** in October of last year that didn't disagree with anything we had found and in fact corroborated and built on a lot of the findings that our report spoke to. We think our report paved the way for many of the DOJ's findings, and in fact their report cited ours several times.

How cooperative was the SFPD with the Panel's investigations?

JR: The SFPD provided us with some documents, but we had trouble getting others, which we then had to bring an action to obtain. So we had some limited cooperation, but felt that we could have gotten more. Similarly, with respect to interviews, they made some people available but not others. They made us go through the union in order to speak to officers, which made the process difficult. They claimed that they needed to do that to protect their officers. We disagreed, based on the nature of the investigation and what we were looking at. On the other hand, the chief of police sat down for a lengthy interview with us and answered our questions. A number of others in the police command spoke with us. So we got some cooperation, but it was limited, and we had to push and fight for other kinds of cooperation.

Do you think the city and the police department have taken reform recommendations seriously?

JR: We met with representatives from the mayor and the board of supervisors held a hearing on the report—I think they took it seriously. The department of course got new leadership, and I think the new leadership is taking it seriously, but it remains to be seen how specifically they do so. The fact, as Nick alluded to, that the report paved the way for the subsequent COPS [Community Oriented Policing Services] report by the Justice Department, which reaffirmed many of our findings, and relied on our report in many ways, I think makes it harder for the city and for the police department to ignore the report. Plus, there are a number of ongoing reforms that relate to issues in the report, for example the use of body-worn cameras by police officers, and enhanced data collection. There was also a recent initiative giving additional oversight authority to the OCC [Office of Citizen Complaints].

NF: The citizens passed a recent **ballot initiative** renaming the OCC and giving them some powers to audit the police. We don't think that is a complete solution. It doesn't give the kind of auditing powers that, for example, the LAPD has had for a very long time. It's a step in the right direction, but it's not a complete solution.

The concept of law firms and retired judges working pro bono to assist local governments with police oversight seems pretty unique. Do you believe this model can be replicated successfully in other cities, and on a more regular basis?

JR: I do think it was unique. I'm not aware of other investigations that were set up in quite this way. Using retired judges to bring their experience and judgment to bear on a difficult public issue, supported by the pro bono resources of major firms throughout the city, is rare, and in my view is an extraordinary model, to be applied only to issues that are very significant. It involved a huge amount of work from these retired judges—all done on a pro bono basis—as well as from the law firms that conducted the actual investigation. When an issue is significant enough to a community, and has the backing of at least some stakeholders in the local government, as we did with the District Attorney's Office, I think this is a terrific model for really tackling the problem in a broader way, and bringing to bear resources that otherwise would not be available. But it's too much of an effort and an undertaking to be done lightly, or to be developed unless there is a serious pressing need. I certainly think that need existed here, given the tensions that had arisen after this texting scandal that really threatened to undermine the community's trust in the police department, especially the minority communities who were the subjects of some of these texts. Of course, those were texts by a few officers, not the whole department, but the whole point of the exercise was to see whether there

were institutional problems. That's a very important question, and I think when you have an issue like that, that's so important, then yes this is a terrific model for getting at questions like that.

But it shouldn't replace the more institutional structures of oversight that should exist within the city and the police department, right?

JR: Absolutely. That's why I say it has to be used rarely, and only when there's an issue that for whatever reason cannot be or is not being addressed internally. We were the only investigation conducted on whether or not the text messages reflected a broader institutional issue in the SFPD, until the Justice Department, which came later. There was no internal investigation by the police department that we're aware of, or by the city. This was a very important issue that called for an investigation with the kind of resources that we devoted to it.

NF: When the police department investigates itself, it tends to do it in private. There are very strong laws in California that protect police officer privacy and personnel files. So there wasn't going to be a public report and a public process if the police department was only doing it itself.

Stepping back now and looking at this type of work generally, how would you compare conducting civil rights investigations from within a private law firm, versus at a non-profit or the government?

JR: Well, I think we had extraordinary resources that we could bring to bear, resources that the government sometimes finds difficult to bring to bear, and that non-profits are sometimes unable to bring to bear. I think we brought years of experience conducting investigations in the private context to the public context, and to the context of bias and racial issues. Those are issues we sometimes do investigate in the private context, for example in the employment area. We were also able to harness the enthusiasm and interest of a number of private lawyers who wanted to do something to benefit their community, in addition to their regular private law work. For a person at a civil rights organization, this is going to be their bread and butter, but for someone working at a private law firm, this was special and different. And I think that brings a little bit of a different energy to the project. I also think it's critical in all these contexts that these types of organizations work together. We worked very closely with our executive director [Anand Subramanian], who actually works at such a non-profit organization [[PolicyLink](#)], and we were working under the auspices of the District Attorney, a government organization. So these are not mutually exclusive projects. But it's very important for law students to know that there are opportunities in private practice to do this kind of work in a whole variety of ways, and that should be weighed as part of their decision making. There is no on-off switch in doing this kind of work. And that's true generally at any organization.

NF: I agree, these kinds of investigations are things that Munger Tolles has done before. Also, if you're looking at impact, who knows if the report would have the same impact if it weren't these independent law firms that were authoring it. Non-profit groups have great missions, but the credibility of these independent law firms was really able to move the needle in a special way. And for people considering different career paths, and whether they can have an impact in the broader community, there's nothing about working in a law firm like Munger Tolles that precludes you from having that kind of impact.

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has chaired the ABA Litigation Section's International Litigation Committee and the ABA's San Francisco White Collar Committee. Mr. Roth has a JD from Harvard Law School ('83), a French-language LLM from the University of Paris ('09), and a BA from Harvard College ('79).

Nicholas Fram is a litigator at Munger Tolles in San Francisco, who represents technology and financial services companies. He serves on the executive committee of the litigation section of the Bar Association of San Francisco's Barristers Club. He has also worked for the United Nations International Criminal Tribunal for Rwanda. Mr. Fram has a J.D. from UC Berkeley School of Law, and an M.A. in International Policy and B.A. from Stanford University.