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JUSTICE, JUSTICE SHALL YE PURSUE

Honorable Jonathan Lippman

SPECIFIC AREAS FOR REFORM

HOUSING

Andrew Scherer
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IMMIGRATION

Claire Thomas & Lenni Benson
Fidèle Menavanza

PRISONERS' RIGHTS

Brett Dignam

TORT LIABILITY

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WOMEN'S RIGHTS

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ALTERNATIVE MODELS

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Joan Vermeulen
Raymond Brescia

THE ROLE OF GOVERNMENT OFFICIALS

Paris Baldacci
Lisa Grumet

IMPACT

**COLLECTED
ESSAYS ON
EXPANDING
ACCESS TO
JUSTICE**



Promoting Justice from the Inside: The Counseling Role of Local Government and School District Attorneys

Lisa F. Grumet¹

Local government attorneys have a critical role to play in promoting justice.² School districts, cities, towns, counties and other local governments are responsible for providing many direct services to community members, including education, public assistance, child welfare, and law enforcement. They are subject to many complex federal, state and local legal requirements for providing these services.

When a local government fails to comply with one or more of these requirements, and thus fails to meet its legal obligations to a member of the public, it can be challenging for the individual to seek justice through the courts. Compounding this problem is that resources to represent individuals in civil litigation are typically limited in cases for which counsel is not legally required.³ Judicial proceedings can be complex and time-consuming.

As public servants, local government attorneys and other local officials should work together to ensure that individuals are treated fairly by local agencies and receive services that they are entitled to under the law. Given the complex legal responsibilities of local governments to members of the public, local officials should seek legal advice early on when developing and implementing new policies. And local government attorneys should be proactive in working with local policymakers to prevent and correct possible violations of the law.

This essay discusses how local government attorneys can work with local policymakers to promote justice, including compliance with the United States Constitution and implementation of lawful policies that support the rights and needs of individuals and families. Local government

¹ New York Law School, Director, Diane Abbey Law Institute for Children and Families; Associate Director, Impact Center for Public Interest Law; Adjunct Professor of Law. Before coming to New York Law School in 2013, the author worked for 16 years with the New York City Law Department, and engaged in policy and counseling work in the General Litigation, Legal Counsel and Family Court Divisions. This essay is dedicated to many former clients and colleagues in New York City government who have worked to promote justice and to make New York City a better place. Thank you to Mark Daly and all of my family and to Deborah Archer, Carol Buckler, Anthony Crowell, Bruce Green, Richard Marsico, Carlin Meyer and Andrew Scherer for their comments, guidance and support.

² “Local government” for the purposes of this essay is defined broadly to include cities, counties, school districts, towns, and other public bodies with governing authority that is limited to one defined geographic region in a state. This essay focuses on the role of local government attorneys, as opposed to state or federal attorneys, for several reasons. One is that local government is the area in which the author has personal experience. But in addition, the role of local government attorneys and their relationships with their clients can be qualitatively different from those of state or federal attorneys in several respects. First, local government attorneys’ offices are near those of their clients, which is not always the case for state or federal attorneys. Second, local governments are more involved in delivering direct services to the public than state governments or the federal government. Attorneys are often involved in counseling local officials on how to implement these services consistent with state and federal law. Third, local government attorneys are appointed or retained by local government officials, which is not always the case for state attorneys (who may work for an independently elected Attorney General). See Frederick A. O. Schwarz, Jr., *Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy*, 53 N.Y.L. SCH. L. REV. 375, 387 (2008/2009) (discussing differences between the New York City Corporation Counsel’s role and responsibilities and those of New York State and federal attorneys).

³ Several essays in this volume of IMPACT discuss the limited availability of free legal assistance for cases in which an individual is not legally entitled to free counsel, as well as initiatives to expand access to legal services. See, e.g., Hon. Jonathan Lippman, *Justice, Justice Shall Ye Pursue*.

attorneys interact with other local officials on a regular basis, and should develop strong working relationships with local policymakers (and vice versa). Their ethical responsibilities give them some professional independence in assessing policy issues through a “legal lens.”⁴ They may have long-term institutional knowledge and extensive access to information, and can conduct a thorough investigation in order to understand and to solve problems. They are able to collaborate with local policymakers in order to develop just policies and, where needed, to bring about change.

This essay is as much descriptive as it is prescriptive – that is, the work of local government attorneys that is described here reflects work that the author engaged in and observed colleagues engage in while working at the New York City Law Department for more than a decade. The author worked with other Law Department attorneys, and attorneys at other New York City agencies and the Mayor’s Office, to counsel local officials in the context of defending or anticipating litigation; negotiating and implementing class action and other settlements; and drafting or revising policies, rules and legislation. Local government attorneys regularly counsel government officials on a wide range of law and policy issues and positively impact the lives of individuals and families.⁵

Even so, in the author’s experience, the role of local government attorneys in counseling local officials is often misunderstood, perhaps because so much of the work is done behind the scenes. When local government attorneys are successful in advising a local official to develop a sound policy or to reject an unjust proposal, the attorney’s work is rarely public. In contrast, local government attorneys have a more visible role in defending litigation – including litigation that might have been avoided or settled if the attorneys’ advice had been followed, and for which the attorneys are actively working with local officials to address the underlying problems.

Furthermore, local government attorneys are not unanimous in how they see their roles – nor are local officials unanimous in how they perceive the role of attorneys. Some attorneys may fear that advising a public official not to pursue an initiative would result in the attorneys losing influence with the official, or even their jobs. Some public officials may be reluctant to heed legal advice if they disagree with it or if they believe that an attorney has overstepped his or her role.

⁴ Schwarz, Jr., *supra* note 2, at 386 (“[T]he legal lens is one of the lenses used in America to examine most public policy questions.”).

⁵ Speaking from his own experience as the former Corporation Counsel of the City of New York, Frederick A. O. Schwarz, Jr. observed:

Every day, city government touches people in the most intimate and immediate ways: their safety, their schooling, their health, their sanitation, their housing, their transportation, their daily jobs. Directly and frequently, the city affects the lives, the aspirations, and the pocketbooks of millions of people and tens of thousands of businesses. And so does the work of the [New York City] Law Department.

Id.

Significant scholarship has been written on whether government attorneys have a “justice-seeking” role, particularly when defending civil litigation.⁶ This essay focuses on the question of *how* local government attorneys promote justice when counseling local government officials, regardless of whether litigation is present.

Local government attorneys can work in conjunction with local policymakers to promote policies that support the legal rights of individuals, and help to diagnose and to correct situations in which government has failed to meet its legal obligations. This counseling work can prevent litigation by ensuring that local policies and procedures are consistent with local agencies’ legal obligations and protect local constituents’ rights. Effective counseling can also occur while litigation is pending, and help to address issues raised by the litigation and contribute to an appropriate resolution of the legal proceeding.

Part I of this essay discusses the ethical rules for advising clients under the Model Rules of Professional Conduct, and how these rules may apply in the local government context. In particular, Part I discusses *In re County of Erie*,⁷ in which the United States Court of Appeals for the Second Circuit endorsed a proactive role for the “complete” government lawyer in advising local government officials. Part II discusses features of the local government lawyer’s role that help to facilitate the attorney’s work in promoting justice. The conclusion briefly reflects on the importance of the role of local government attorneys.

I. Promoting Justice through Counseling Local Officials: Ethical Considerations

The counseling or advisory role of attorneys generally is addressed by Rule 2.1 of the Model Rules of Professional Conduct. This Rule directs that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”⁸ In providing this advice, “a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”⁹ As the commentary to the Rule explains:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely

⁶ Excellent arguments for a “justice-seeking” or “public interest” role for government attorneys appear in Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000), and Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C.L. REV. 789 (2000). For alternative perspectives, see Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government’s Chief Legal Officer*, 22 NO. 3 PROF. LAW. 4, 5 (2014) (arguing that with respect to advocacy, “the relationship between lawyer and government entity is no different than the relationship between attorney and client in private practice”); Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1013-17 (1991) (arguing that the role of government lawyers in litigating cases is similar to that of private attorneys); Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987) (describing the idea that “government attorneys represent some transcendental ‘public interest’” as “incoherent”). For analysis of who should be considered the “client” for a government lawyer, see Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U.L. REV. 1033, 1049-73 (2007). See also Cardozo, 22 NO. 3 PROF. LAW. at 5-6; Green, 9 WIDENER J. PUB. L. at 266-70; Schwarz, Jr., *supra* note 2, at 377-78.

⁷ 473 F.3d 413 (2d Cir. 2007).

⁸ MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N). For insightful discussion of ethical considerations and the counseling role of attorneys generally, see Fred C. Zacharias, *Practice, Theory, and the War on Terror*, 59 EMORY L. J. 333 (2009).

⁹ MODEL RULES OF PROF’L CONDUCT r. 2.1. New York has adopted this Rule verbatim, except that New York includes “psychological” factors in addition to “moral, economic, social and political factors.” N.Y. RULES OF PROF’L CONDUCT r. 2.1.

technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.¹⁰

For attorneys counseling local officials, “moral, economic, social and political factors” are often relevant. As one former Corporation Counsel for the City of New York has described, many local policy matters involve legal issues, and vice versa: “Every policy issue, it seems, had a legal component. Most legal issues had serious policy consequences. The Corporation Counsel’s office operated at the intersection of law and policy.”¹¹ In light of the responsibility of local officials to the public and the intertwined relationship of the law and local policy, considerations of justice, fairness and equity are inherent to a local government attorney’s counseling work.¹²

Furthermore, all attorneys are required to investigate matters for which they undertake representation. The Model Rules of Professional Conduct require that attorneys “provide competent representation to a client,” which includes “thoroughness and preparation reasonably necessary for the representation.”¹³ The commentary to the Rule indicates that “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem.”¹⁴ In the context of litigation, all attorneys are required to conduct appropriate factual investigations, and cannot take positions in court that contradict what they learn from an investigation.¹⁵

Although the behind-the-scenes counseling role of local government attorneys is rarely discussed in judicial decisions, the Second Circuit wrote at length about the importance of this role in *In*

¹⁰ MODEL RULES OF PROF’L CONDUCT r. 2.1 cmt. 2.

¹¹ Peter L. Zimroth, *Reflections on My Years as Corporation Counsel*, 53 N.Y.L. SCH. L. REV. 409, 410 (2008/2009). Mr. Zimroth served as Corporation Counsel under Mayor Edward I. Koch from 1987 to 1989. *Id.* at 409 n.a1. A series of excellent articles on the New York City Law Department appear in this volume of the New York Law School Law Review, which was published after a symposium on the history of the New York City Law Department.

¹² In New York City, individuals who have held the position of Corporation Counsel have publicly discussed the relevance of these considerations to their counseling work. A biographical entry for Corporation Counsel Zachary W. Carter, who began serving in the position under Mayor Bill de Blasio in 2014, describes how he sees his role: “As a key legal advisor to the Mayor and his City agencies, Mr. Carter is primarily focused on advancing the City’s interests, with a commitment to justice and fair outcomes for individuals.” *Biography of the Corporation Counsel*, NEW YORK CITY LAW DEP’T, <http://www.nyc.gov/html/law/html/about/counsel-bio.shtml> (last visited May 16, 2016). Michael A. Cardozo, who served as Corporation Counsel under Mayor Michael R. Bloomberg from 2002 to 2013, has observed that Model Rule 2.1 “has a special resonance in the government lawyer context”: “the government lawyer must not only give legal advice, but must also forcefully express views on the desirability and morality of the particular policy question at issue.” Cardozo, *supra* note 6, at 4 n.a1, 7. Former Corporation Counsel Frederick A.O. Schwarz, Jr., who served under Mayor Koch from 1982 to 1986, has discussed the “heightened responsibility” of government attorneys to “uphold the law,” and sees their role in part “to help assure that both the Constitution and its related values are considered.” Schwarz, Jr., *supra* note 2, at 375 n.a1, 376, 381.

¹³ MODEL RULES OF PROF’L CONDUCT r. 1.1(a).

¹⁴ *Id.* r. 1.1 cmt. 5. For one example of a government attorney discussing factual information that impacted his counseling, see Green, *supra* note 6, at 249 (quoting a former Nevada Deputy Attorney General’s discussion of his determination, in the context of institutional reform litigation, that a state prison “was in violation of state fire codes worse than even the complaint suggested”).

¹⁵ See MODEL RULES OF PROF’L CONDUCT r. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”); *id.* r. 3.1 cmt. 2 (noting that attorneys are required to “inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions”); FED. R. CIV. P. 11(b) (requiring attorneys making written submissions to perform “an inquiry reasonable under the circumstances” and certify that “the factual contentions have evidentiary support” and “the denials of factual contentions are warranted on the evidence” unless otherwise indicated).

re County of Erie.¹⁶ The case involved a class action lawsuit in which the plaintiffs alleged that the county maintained an unconstitutional policy requiring that all detainees coming into county jails undergo a strip search.¹⁷ Before the litigation began,¹⁸ an Assistant County Attorney worked with local officials to change their policy; inspected a correctional facility to monitor compliance; and, following the inspection, argued for county officials “to implement changes as soon as possible.”¹⁹ The plaintiffs sought discovery of emails between the attorney and local officials on these issues.²⁰

The Second Circuit noted that “[i]t is to be hoped that legal considerations will play a role in governmental policymaking.”²¹ The Court found that although the emails between the attorney and local officials on these issues concerned policy matters, they were protected by the attorney-client privilege: “When a lawyer has been asked to assess compliance with a legal obligation, the lawyer’s recommendation of a policy that complies (or better complies) with the legal obligation – or that advocates and promotes compliance, or oversees implementation of compliance measures – is legal advice.”²² The Court emphasized how government lawyers’ counseling work ultimately benefits “the public which is entitled to compliance with the ever growing and increasingly complex body of public law.”²³

The language of the Second Circuit decision suggests that the judges, who took the rare step of granting a mandamus petition to prevent use of the attorney’s emails in the litigation, appreciated the attorney’s work and sought to encourage similar behavior.²⁴ Through her proactive approach to her work and her advice to county officials, the attorney in *County of Erie* had acted in a way that was consistent with what the Second Circuit described as a “complete lawyer”:

The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. . . . The more careful the lawyer, the more likely it is that the legal advice will entail follow-through by facilitation, encouragement and monitoring.²⁵

¹⁶ 473 F.3d 413 (2d Cir. 2007).

¹⁷ *Id.* at 416.

¹⁸ The litigation began in 2004; the documents at issue were a series of emails that were sent in 2002 and 2003. *Id.* at 415, 421-22.

¹⁹ The Magistrate Judge assigned to the case described documents that were the subject of a discovery dispute as including the following: a document from the county attorney to county officials that “propose[d] changes to existing policy to make it constitutional, including drafting of policy regulations”; an email counseling the county sheriff “to not wait for his chiefs to act but to implement changes in the policy as soon as possible;” and emails that postdated adoption of a revised policy, in which the county attorney was “advocating to administrative and executive officials within the Sheriff’s Department to take steps to implement the new policy (such as acquiring equipment, training personnel), inspecting one facility and commenting upon its compliance with the new policy, and urging Sheriff’s Department officials to implement changes as soon as possible.” *Pritchard v. County of Erie*, No. 04CV534C, 2006 WL 3858475, at *1 (W.D.N.Y. Jan. 4, 2006) (citations omitted), *objections overruled*, 2006 WL 3872844 (W.D.N.Y. Apr. 17, 2006), *vacated and remanded sub nom.* In *re County of Erie*, 473 F.3d 413 (2d Cir. 2007).

²⁰ *Id.*

²¹ In *re County of Erie*, 473 F.3d at 422.

²² *Id.*

²³ *Id.* (quoting In *re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984)).

²⁴ A mandamus petition was granted even though the plaintiffs had already received copies of the emails that were at issue, as ordered by the district court. *Id.* at 417.

²⁵ *Id.* at 420-21.

Assessment of legal obligations, thorough factual investigation, consideration of alternative approaches, review of implementation, and follow-up are all important functions for local government attorneys when advising clients on policy matters. As discussed in the next section, local government attorneys have significant resources available to them that can help them to do this work effectively, and to prevent or help to redress wrongs.

II. Promoting Justice in Practice: Resources of the Local Government Attorney

Several aspects of the local government attorney's role are particularly important for effective counseling of local government officials and for promoting justice. First, the relationships local government attorneys may develop through their regular interactions with public officials can enhance their influence. Local government attorneys may be consulted about potential issues before action is taken or as soon as a problem arises, and can help to solve problems by providing sound legal advice. Second, in approaching policy issues through a "legal lens," local government attorneys provide a necessary perspective that can shape policymaking and promote compliance with the law. Third, local government attorneys may have significant access to people, places and information in order to conduct an appropriate investigation. In this way, they can help to address not just written policies and decisions by senior policymakers, but complex problems involving the daily actions of many local government employees.²⁶

A. Relationships with Government Officials

Local government attorneys, through their regular interactions and ongoing professional and interpersonal relationships with government officials, are in a strong position to promote justice.

Generally, local government attorneys become involved in policy matters in several different ways. A policymaker may expressly request legal advice. An attorney may learn about a legal issue indirectly through his or her work with the agency. Someone from outside the local agency may call the attorney about an issue. An issue may receive public attention through the media. A new law or court decision may require changes in local policies or procedures. A lawsuit may be filed alleging that the agency has failed to meet its legal obligations.

Local government officials may – and should – regularly seek the advice of attorneys when developing new policies or implementing new initiatives. They may ask attorneys to draft or review agency policies or proposed legislation or administrative rules. They may seek input on how to structure new initiatives in a way that comports with legal requirements. Local government attorneys may also provide guidance about how to implement new legal requirements that come from new local, state or federal legislation or from a court decision. Through providing appropriate legal advice, local government attorneys can help to ensure that agency policies and procedures comply with the law.

Furthermore, through their day-to-day work and interactions with local officials, local government attorneys may learn about, anticipate and address potential legal issues, and thereby prevent or

²⁶ The discussion in this section concerns the work of attorneys who are employed by local government agencies or school districts. Although privately employed attorneys who are retained by government agencies for limited purposes should have a similar role, in practice there may be differences in their relationships with local officials, the degree of access to local officials and to information, and/or the time and resources available to them for investigation.

help to redress legal violations. Sometimes local government attorneys may learn about potential legal issues without expressly being asked for legal advice. Local government agency leaders may not realize that there are potential legal consequences to implementing a new initiative, especially if they are new to government.²⁷ For example, consider a hypothetical scenario in which a social services official plans to launch a new initiative to help domestic violence victims. The agency does not have enough resources to hire new staff, and the official proposes reassigning employees who help to issue public assistance benefits. A local government attorney may learn about the proposed staff reassignment while attending a meeting, when copied on an email, or through an informal conversation with a colleague. The attorney could speak with the official about planning to ensure that legally mandated services would not be disrupted by the staff reassignment, and/or exploring alternative resources for implementing the new program.

In addition, a local government attorney may learn about an issue from sources outside of the government. For example, an attorney could be contacted by legal advocates who indicate that a local office has improperly denied Medicaid benefits to some individuals or families in violation of agency procedures. The attorney could work with the local office or with senior agency officials to ensure that the benefits are issued and that the office follows the correct procedures in the future.

Concerning litigation: a local government attorney may be assigned to defend a lawsuit that alleges unlawful deficiencies in agency performance or violations of individual rights. Class actions or other lawsuits that expressly challenge local policies and procedures clearly warrant a review to assess the merits of the allegations, and counseling concerning any changes that may need to be made.²⁸ But attorneys defending individual litigation that seeks money damages only (and not injunctive relief) may also learn of issues that impact other people in addition to the plaintiff. For example, consider a case in which a *pro se* plaintiff who was previously committed at a local psychiatric facility alleges that conditions at the facility were constitutionally inadequate. If the attorney's investigation corroborates the plaintiff's allegations, the attorney can bring this information to the attention of local policymakers who would be in a position to address the conditions, and thus protect the rights of others at the facility.

However the local government attorney receives information about possible legal violations, the attorney can – and should – advise government policymakers of potential legal issues, and options for addressing them.²⁹

The conversation may not be easy – and the results are not guaranteed. While some officials may appreciate and immediately respond to the attorney's concerns, others may be in denial about the extent of the problem, or may feel frustrated and defensive. Some officials may be uncertain how to implement competing policy priorities and legal mandates while working under fiscal

²⁷ See Schwarz, Jr., *supra* note 2, at 380-81 (“Governmental decisions affect many interests that may not always be obvious, and affect the rights of many who may lack access to decision-makers. It is often the lawyer’s role to articulate fairly those rights and interests.”).

²⁸ Many cases seeking institutional reform raise serious issues requiring change. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (discussing types of institutional reform litigation and how it can bring about change). For a critical perspective on institutional reform litigation, see ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003).

²⁹ MODEL RULES OF PROF’L CONDUCT r. 2.1 cmt. 5 (“In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client . . . may require that the lawyer offer advice if the client’s course of action is related to the representation.”).

constraints. Some officials may be insensitive to the needs of the individuals who may be adversely affected by a new initiative – or, they may believe that the new initiative would benefit more members of the public even if it results in violating some individuals’ rights. The law is not always clear, and some officials may disagree with the attorney’s analysis or prefer to risk an adverse court ruling. Some officials may not want attorneys involved at all. Understanding the perspectives of local officials can be helpful in approaching the issue. The challenge of counseling clients who may not want to listen can be significant, but should not be a deterrent to providing legal advice.³⁰

Sometimes a policy may be legally vulnerable even though it is intended to protect and promote the interests and rights of local constituents. For example, successful legal challenges have been brought to local policies and initiatives that support school integration,³¹ affirmative action,³² and separation of church and state.³³ Legal challenges have been brought to local anti-smoking, environmental, rent regulation and anti-discrimination laws and policies.³⁴ Local government attorneys can work with local officials to draft local laws or policies that are consistent with existing case law or statutory requirements and are supported by a strong factual record, in order to maximize the likelihood that the policies will be upheld in court.³⁵

Importantly, because of their ongoing relationships with their clients, local government attorneys can be ideally positioned to explain legal problems to government officials and to explore creative solutions. At times, relationships between local government officials and attorneys or other representatives from legal advocacy organizations may be strained. Some local government officials may be more responsive to concerns raised by a local government attorney – and more likely to trust the attorney’s judgment – particularly if the attorney already has a strong working relationship with the official. Also, through their work local government attorneys can develop significant insight into the operations of local agencies as well as the perspectives of agency officials. With this knowledge, in some situations local government attorneys can work to craft solutions that would address the legal issue while also meeting other concerns raised by agency officials.

³⁰ As stated in the commentary to Model Rule 2.1:

Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Id. r. 2.1 cmt. 1.

³¹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

³² See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³³ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). See generally Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law”*, 52 UCLA L. Rev. 1223, 1268 (2005) (discussing litigation to “invalidate affirmative action programs as violations of the Equal Protection Clause, revitalize the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment as restrictions on economic regulation . . . expand the concepts of ‘equal access’ to governmental benefits for religious groups and religious liberty in the private sector, [and] strike down campaign finance laws under the First Amendment,” among other things).

³⁴ See Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1143-45 (2007) (discussing attempts by businesses to use preemption doctrine to challenge local regulations).

³⁵ For example, the author worked closely with New York City Department of Education officials and other Law Department attorneys to defend a multi-year legal challenge to a policy that prohibited the use of public school buildings for “religious worship services” or “as a house of worship.” *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 36 (2d Cir.), *cert. denied*, 132 S. Ct. 816 (2011) & *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1730 (2015). The policy that was upheld had been revised while the litigation was pending. 650 F.3d at 34-35. The Second Circuit had initially affirmed a preliminary injunction in the case, but reversed a permanent injunction after the policy was revised and the factual record was further developed. *Id.* at 34-35, 41-46.

Local government attorneys can be highly influential in helping to prevent or remedy problems, whether through internal agency conversations, by working together with advocates from outside government, or in the context of litigation. By providing sound legal advice to officials whom the attorney works with on a regular basis and working creatively to develop solutions, a local government attorney can help to promote justice.

B. Legal Lens

Many different public officials and constituents may express their views on the merits of a proposed local policy initiative. A local government attorney exercising his or her obligation to advise clients on the legal merits of an issue brings a distinct perspective to internal agency policy discussions – here termed the “legal lens.”³⁶ The attorney, like other officials, may discuss moral, practical and political considerations. However, unlike other officials, the attorney is also ethically required to describe whatever legal requirements may apply, and how a court or a state or federal oversight agency might perceive the policy initiative if it were challenged. The attorney’s ethical obligations provide the attorney with a degree of independence in raising concerns about proposed initiatives that some other local officials may lack.³⁷

A local government attorney’s analysis of possible legal issues can and should influence internal agency discussions about how to design, revise or implement an agency policy initiative. Among other things, the attorney may discuss the presence or likelihood of litigation or an administrative proceeding; any challenges attorneys might face in defending the agency; the risk of an adverse court ruling or determination of a government oversight agency; and the impact that the precedent of an adverse determination may have on future agency initiatives or the agency’s authority. The attorney may discuss any likely remedial action that might be taken by a court or government oversight agency, including injunctive relief, monetary damages, fines, or withholding of government funds.

The local government attorney’s role can be especially important when the people whose rights might be adversely impacted by the action do not have significant political power.³⁸ The threat of an adverse ruling and court intervention in agency operations can prompt agency officials to take actions that they might not otherwise take, in order to protect individual rights. For example, if a new law enforcement initiative raises civil liberties concerns, a local government attorney can analyze relevant constitutional law precedents and discuss the likelihood that it could be enjoined in court. The attorney can also propose revising the initiative based on the legal precedents.

When bringing legal risks to the attention of local government officials, a local government attorney may also discuss possible alternatives. It may be possible for government officials to change a policy or restructure an initiative in a way that would address the officials’ policy goals in a manner that is consistent with the agency’s legal obligations. The attorney’s ability to propose solutions may be enhanced in situations in which the attorney has developed a strong understanding of the factual circumstances as well as the legal issues, and has constructive working relationships with agency officials.

³⁶ See Schwarz, Jr., *supra* note 2, at 386.

³⁷ See Jeffrey D. Friedlander, *The Independence of the Law Department*, 53 N.Y.L. SCH. L. REV. 479 (2008/2009). Mr. Friedlander served as First Assistant Corporation Counsel at the New York City Law Department for about 20 years. See Sam Roberts, *No. 2 Lawyer for New York City, Set to Retire, Looks Back*, N.Y. TIMES, Apr. 16, 2015, <http://www.nytimes.com/2015/04/17/nyregion/city-of-new-yorks-no-2-lawyer-to-retire.html>.

³⁸ Schwarz, Jr., *supra* note 2, at 380-81.

C. Access: People, Places and Information

In situations where there is evidence that a government agency is not meeting its legal obligations, a thorough investigation can help in identifying the causes and possible solutions.³⁹ Local government attorneys can obtain significant access to people, places, documents and data needed to assess an issue. They can review written policies and procedures to determine whether they are facially sufficient. They can interview people working in a range of different positions in the agency (agency leaders and directors of individual programs or offices, and also non-managerial employees who directly serve the public or otherwise work on the challenged issue). They can obtain and review relevant documents and data, regardless of whether litigation is pending and regardless of whether the documents were requested in discovery. They can visit schools, hospitals, jails, public assistance offices, shelters, and other locations where they can interview employees, observe operations and conditions, and learn about and review other relevant documents.

In some cases, the legal issues may have directly resulted from the actions or policies of policymaking officials. In these situations, local government attorneys should counsel the officials to revise the policies or take other actions needed in order to prevent or remedy the problem.

In some circumstances, however, the issues raised may have resulted from a lack of policy clarity or training, insufficient resources, misunderstanding, or insufficient attention to an issue when faced with competing priorities, as opposed to malice or a complete lack of concern. Once the problem is identified, local officials may be interested in taking steps to address it and to make improvements as quickly as possible. A thorough factual investigation by a local government attorney can help the attorney to assess the situation, and to recommend possible solutions in conjunction with local agency officials. The solutions may vary depending on the nature and extent of the problem.

Consider, for example, a situation in which a school district attorney learns that some schools in the district have not been providing mandated educational services for schoolchildren who recently immigrated to the United States and are not fluent in English.⁴⁰ Here are some issues or causes that a school district attorney could explore through a thorough investigation, and some possible responses that school district policymakers might consider:

³⁹ While this section focuses on situations involving violations of the law, a thorough investigation of course can also help to refute a claim that lacks factual merit.

⁴⁰ For a review of federal requirements to provide services for children learning English, see Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Acting Assistant Attorney General for Civil Rights, U.S. Dep't of Justice, Dear Colleague Letter: English Learner Students and Limited English Proficient Parents, at 5 (Jan. 7, 2015) (discussing state and school district obligations under the Equal Educational Opportunities Act, Pub. L. No. 93-380, § 204(f), 88 Stat. 484, 515 (1974) (codified at 20 U.S.C. § 1703(f)), "to take 'appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs'"), available at <https://www.justice.gov/sites/default/files/crt/legacy/2015/01/07/eldcleng.pdf>.

Possible Reasons for School's Failure to Provide Required Services	Possible Responses by School District
A. No school district policy guidance exists on how schools should provide the services.	A. Develop and disseminate policy guidance.
B. A policy exists, but no training was provided and school officials are not familiar with the policy.	B. Provide training.
C. A policy exists and training was provided, but insufficient resources were provided for the school to provide services effectively.	C. Provide appropriate resources.
D. A policy exists and training and resources were provided, but services were not effectively implemented by school officials.	D. Provide enhanced support, supervision and oversight.
E. A policy exists and training and resources were provided, but some school officials have demonstrated hostility toward recent immigrant families and willfully failed to provide required services.	E. Refer the culpable school officials for appropriate disciplinary action.

The chart is provided to help illustrate the importance of determining the reasons that services are not being provided. Sometimes policy clarification and training are sufficient to address a problem, but sometimes they are not. New resources, administrative support and/or monitoring may be needed to ensure compliance. In situations in which local government attorneys discover evidence of wrongdoing by agency employees, generally their first obligation is to the government agency – not to the individual – and a referral for possible disciplinary action may be appropriate.⁴¹

Of course, many problems have more than one cause. Multiple steps may be needed in order to bring about change, and many people at a local agency may need to be involved. In the case of systemic failures to implement legal mandates, substantial resources, time, monitoring, and possibly even structural changes at the agency may be required.

⁴¹ Generally the local government attorney's primary responsibility is to the local agency or entity, and not to individual employees. See MODEL RULES OF PROF'L CONDUCT r. 1.13 (concerning representation of organizational clients) & cmt.9 (concerning rule's applicability in the government context). State or local law may also govern the local government attorney's role with respect to individual employees in the context of litigation. For example, in New York City, the Corporation Counsel's responsibilities to represent individual employees in litigation extend only to claims "arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was *acting within the scope of his public employment* and in the discharge of his duties *and was not in violation of any rule or regulation of his agency* at the time the alleged act or omission occurred." N.Y. GEN. MUN. LAW § 50-k(2) (emphasis added). See, e.g., Banks v. Yokemick, 144 F. Supp. 2d 272, 277-81 (S.D.N.Y. 2001).

Significantly, local government attorneys can take the initiative to investigate these issues quickly outside of the context of litigation discovery, or even when no litigation is pending at all. Through their work, local government attorneys may learn about problems that have not received any public attention. Early intervention can help to prevent long-term, systemic failures that are particularly difficult to solve. By being proactive, local government attorneys can help to address problems more quickly than might otherwise occur through the litigation process. Also, when litigation is pending, taking quick action to address the issues raised by the litigation can help lead to an effective remedy that has the support of local officials as well as plaintiffs and the Court.

III. Conclusion

Through providing effective counsel to local officials, local government attorneys can help to ensure that local policies comply with the law, to anticipate potential legal issues that could result from new initiatives, and to solve legal problems that may come to their attention. They can also help to develop sustainable policies that support the rights and interests of local constituents. In summary, local government attorneys' actions can benefit members of the public whose needs and rights may be impacted by government action or inaction.

That is, local government attorneys can promote justice – from inside government. •