NEW YORK LAW SCHOOL

NYLS Law Review

Volume 53
Issue 3 *Corporation Counsel: A History of the New York City Law Department*

Article 7

January 2008

The New York City Corporation Counsel: The Best Legal Job in America

Michael A. Cardozo

VOLUME 53 | 2008/09

MICHAEL A. CARDOZO

The New York City Corporation Counsel: The Best Legal Job in America

ABOUT THE AUTHOR: Mr. Cardozo is the Corporation Counsel of the city of New York. The author acknowledges with thanks Senior Counsel Eduardo Crosa's assistance in preparing this article.

I became Corporation Counsel of New York City on January 1, 2002 as smoke from the 9/11 attacks on the World Trade Center was still billowing from Ground Zero. The Law Department was then operating from forty-four different offices around the city as a result of the collapse of the towers, which had been located around the corner from our main office. It was an emotionally-charged moment for my first foray into government service, and a time of enormously uncertain administrative, fiscal, and legal consequences resulting from the attacks. Yet I had no hesitation in accepting an offer to lead the Law Department from Mayor Michael R. Bloomberg, a man whom I had met for the first time only six weeks earlier when he interviewed me for the job. Looking back, after six years in office, I have never regretted that decision and can say without fear of contradiction that serving as Corporation Counsel of the city of New York is arguably the best legal job in the United States. Why?

First, on a personal level, I have had the opportunity to serve the city at a critical time in New York City history: the aftermath of 9/11. Second, heading the second-largest public law office in the nation, and the third-largest law office in New York City, presents significant management challenges, especially in the wake of the World Trade Center attack. And third, the extraordinary number of challenging and cutting-edge legal issues with which the Corporation Counsel's office has dealt during my tenure, and the enormously talented and dedicated lawyers with whom I have been privileged to work in dealing with those challenges, make this an unparalleled job.

Even in times of relative calm, the position of Corporation Counsel presents challenging issues because of the office's position at the intersection of law and politics. For example, as counsel to the city, I am the legal advisor to both the mayor and the city's numerous agencies, including the city council—political entities that sometimes disagree. In such situations, the Corporation Counsel must determine which entity the Law Department can represent. As discussed below, I have faced this sensitive issue several times during my tenure.

The issues that have confronted this office in recent years, like the matters handled by my predecessors and chronicled in Professor Nelson's book *Fighting for the City*, have not only impacted millions of New Yorkers, they have also had important state, national, and international implications. In this article, I will provide an overview of just a few of the legal issues that have faced the office during my tenure.

THE EARLY CASES FORESHADOWED THE FUTURE

Before I took office, I met with each of my eight then-living predecessors and obtained valuable advice as to how to deal with the inevitable challenges I would face. One of those predecessors told me I should look for an early opportunity to demonstrate to both the Mayor and the lawyers at the Law Department that I knew how to litigate. "The earlier you can prove yourself," Fritz Schwarz said, "the more successful you will be both with the lawyers in the Law Department, and with the Mayor." Two cases early in my tenure not only challenged my legal abilities, but were predictive of the extraordinary variety of cases I would handle as Corporation Counsel.

1. Consent Decrees

The first case involved a consent decree—a negotiated agreement between parties that is approved by a court. A court can fashion remedies encompassed by the decree, oversee compliance with the decree, and even modify a consent decree in certain situations. In my first case of this type, a thirty year-old consent decree case initially entitled *Benjamin v. Malcolm*, a federal judge, finding that jail inmates had a constitutional right to have their heads at least six feet apart while sleeping, had ordered the Department of Correction to increase the space between beds from three to six feet at all dormitory facilities at the jails on Rikers Island.[1] To comply with this directive would have required building substantially more jails, at an enormous cost—a cost the city could ill afford, particularly given the economic downturn resulting from 9/11. The Mayor and the correction commissioner were outraged. The city needed to prevent the order from going into effect while the inevitable lengthy appeals process ensued. In the first of what turned out to be a number of court appearances relating to consent decrees, I successfully argued in the Second Circuit for a stay. Following the issuance of the stay, the Second Circuit ultimately agreed with our contention that the district court had erred in imposing the six-foot bed requirement.[2]

Although we succeeded in preventing this unnecessary requirement from going into effect, enabling the city to continue its financial recovery from the effects of 9/11 and allowing the Department of Correction the necessary discretion to oversee its own facilities, the court remained very involved in operating New York City's prisons, as it has for three decades. Five years after the dispute over bed space, I accompanied Judge Harold Baer Jr., his law clerks, and others as he made his annual "inspection" visit at Rikers Island to determine whether the requirements of the consent decree were being met. This continuing court supervision of a mayoral agency is illustrative of the potential never-ending aspects of a consent decree.

Another case that raised concerns similar to those in the consent decree context is *McCain v. Bloomberg*.[3] This case, which was initially filed against the city and state in 1983 and was recently successfully settled, has occupied more of my personal time in the last six years than any other.[4] In *McCain*, homeless families argued there was a constitutional right to shelter and successfully obtained a preliminary injunction. Unlike *Benjamin*, however, the city did not enter into a consent decree, but rather, over the next twenty-five years litigated an unending barrage of motions in which the plaintiffs, relying on that initial preliminary injunction, challenged the city's evolving efforts to address homelessness. The litigation resulted in over fifty court orders touching on and regulating virtually every aspect of the city's shelter program.

---

1. Benjamin v. Fraser, 156 F. Supp. 2d 333, 349 (S.D.N.Y. 2001).

2. Benjamin v. Fraser, 343 F.3d 35, 53 (2d Cir. 2003).

3. No. 41023/83, 2007 N.Y. Misc. LEXIS 8293 (Sup. Ct. N.Y. County Nov. 14, 2007)

4. *See generally* McCain v. Koch, 70 N.Y.2d 109 (1987); *McCain*, 2007 N.Y. Misc. LEXIS 8293.

In 2003, I led the negotiations on behalf of the city as the parties agreed to a historic two-year moratorium on litigation, giving the city the opportunity, without the threat of constant court intervention, to invest substantial resources and develop new approaches to deal with homelessness. Unfortunately, and even though a Special Master Panel found that the city had "earned the opportunity to go forward into a new era" free of court supervision,[5] those efforts did not end the litigation. As a result, in early 2006 the city moved to dismiss the case on the ground that all of plaintiffs' claims had been addressed, and the facts underlying the 1983 injunction bore no resemblance to the shelter system today.[6] Literally two years later, on the very day plaintiffs' responsive papers were due, the parties reached a settlement that brought to an end the twenty-five years of court oversight of the city's family shelter services system.[7] Pursuant to the agreement, the city will regain full control and oversight of its family services system and will no longer be hampered by the need to enforce dozens of highly detailed court orders that required setting aside precious staff time and resources. Freed from these orders, the city can now provide efficient and compassionate homeless services.

These two cases highlight an important and recurring theme of my tenure: What should government lawyers do when a court has found (or soon may find) that a government entity has violated the law and that court has issued (or will issue) orders to prevent the conduct from occurring again? How can a permanent injunction that may hamstring an agency for decades be avoided? A potential solution is to enter into consent decrees, which are intended to enforce statutory or constitutional rights. Although it is vital that all New Yorkers receive the full array of statutory and constitutional rights, these cases raise the issue of which branch of government is best suited to protect these rights.

Consent decrees, unless properly limited, can turn an agency into a ward of the courts, thereby curbing a commissioner's or agency's independence and creativity. They may force, as is certainly true in the two cases just mentioned, agency officials to spend hours in document production and depositions as a court micromanages an area of city administration. For example, the consent decrees in *Benjamin* led to judicial involvement in more than thirty discrete areas of prison administration, from the handling of detainee mail to the attention given to vermin and insect control.[8] The elected mayor and city council, as well as appointed agency commissioners, are supposed to run the government and make difficult policy choices in determining

5. Letter from Family Homelessness Special Master Panel, to Honorable Helen E. Freedman, Supreme Court of the State of N.Y. 3 (Jan. 18, 2005) (on file with the New York Law School Law Review).

6. Municipal Defendants/Respondents' Memorandum of Law in Support of Motion [to Dismiss] at 27–31, *McCain*, 2007 N.Y. Misc. LEXIS 8293.

7. Press Release, Office of the Mayor, Mayor Bloomberg Announces Settlement with the Legal Aid Society Ending 25-Year Litigation and Court Oversight of Homeless Family Services System (Sept. 17, 2008), *available at* http://www.nyc.gov (follow "News and Press Releases" hyperlink; then follow "September 2008" hyperlink).

8. *See Benjamin*, 343 F.3d at 40.

how to utilize scarce public resources to deal with the social problems confronting the city. This is not the role of the courts. Judicial supervision of a government agency or program through a consent decree is bad social policy and should only be used as a last resort—and is something the city strives to avoid.[9]

Because of the enormous potential for unforeseen negative consequences resulting from consent decrees—such as the city being bound by decrees authorized by mayors decades ago[10]—I have insisted that no attorney enter into one on behalf of the city without my personal approval. Where a consent decree is the best option, the experience of the *Benjamin*, *McCain*, and other cases has shown that the city must insist that any decree be drawn as narrowly as possible and include a provision bringing it to an end as soon as practicable.

2. State Constitutional Issues

A few months after I argued the *Benjamin* stay motion, a far more serious case arose threatening the city's fiscal solvency, which I again handled personally. The state legislature had passed a bill that would relieve New York City from $2.5 billion of debt dating back to the city's fiscal crisis of the 1970s by requiring the State Local Government Assistance Corporation to issue bonds, the proceeds of which would allow the city to pay off this old debt. The Governor opposed the legislation, contending primarily that the New York State Constitution prohibited the issuance of bonds of this type without a referendum.[11] I will never forget the Mayor calling me on my cell phone and saying, "Michael, the Governor has somehow obtained an *ex parte* TRO in Albany preventing the city from being relieved of $2.5 billion of debt. Do something."

Of course, I knew nothing about municipal bonds, having been a general litigator for most of my career. The stakes—$2.5 billion for New York City—were enormous. I said to the Mayor, "While I believe I can handle this matter, I will understand if you prefer that we engage outside counsel to handle it." Adopting a stern tone, Mayor Bloomberg responded that he wanted me to handle the case, and said, for the first but certainly not the last time, "Why do you think I appointed you as my Corporation Counsel? If I thought these litigations were going to be easy it wouldn't have mattered who my Corporation Counsel was."

---

9. I touched on this issue in a speech related to the use of alternative dispute resolution to resolve social policy disputes involving local governments. *See* Michael A. Cardozo, *The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel*, 34 Fordham Urb. L.J. 797, 806 (2007). The judge presiding over the *Benjamin* case has publicly disagreed with my views. *See* Harold Baer, Jr. & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin v. Malcolm Consent Decrees*, 52 N.Y.L. Sch. L. Rev. 3 (2007).

10. *See, e.g.*, Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980) (regarding consent decree for prisons); Jose P. v. Ambach, 557 F. Supp. 1230 (E.D.N.Y. 1983) (regarding consent decree for special education).

11. *See* Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp., 764 N.Y.2d 577, 580 (Sup. Ct. Albany County 2003).

The next day, I traveled to Albany to argue the preliminary injunction motion. We ultimately prevailed in the case all the way to the New York Court of Appeals, and I personally argued each step of the way. The case illustrates the importance and wide variety of the matters handled by the Law Department, as well as the fact that many of the issues I handle as Corporation Counsel have little relationship to those I dealt with in my previous professional life. I must admit it was thrilling, yet also somewhat daunting, to have to learn the complex world of municipal bonds quickly and then tell the judges of the court of appeals that what was at stake was nothing less than whether New York City would be relieved of $2.5 billion in debt, or instead be forced to reduce services to city residents and to lay off firefighters, police, and teachers.

It is the immediate aftermath of the preliminary injunction argument, however, that is the most memorable. Four hours after the argument, as we were returning to the city, all the lights went out as the blackout of 2003 hit the Northeast. Stranded in a dark city, and with only three days to file supplemental papers, we did what we had to in order to keep working. One of the attorneys in the case walked with his laptop from Penn Station to his home in Brooklyn; I slept in Westchester that night and literally hitchhiked (the trains were not running) into the city the next day. We managed to work that August weekend on laptops, without air conditioning, to draft supplemental papers and ultimately we succeeded in convincing the court that the legislation was constitutional.

Of the many other state constitutional challenges that have come my way, the emotionally charged issue of same-sex marriage deserves particular mention. In *Hernandez v. Robles*, five same-sex couples challenged the constitutionality of the New York Domestic Relations Law, which limits marriage to the union of a man and a woman.[12] The Law Department, carrying out its responsibility to uphold state law and to defend the city clerk, who is authorized by state law to issue marriage licenses, argued that the Domestic Relations Law was not unconstitutional, and that any change in the law had to be made by the state legislature. This was the same legal reasoning used twenty years earlier when the Corporation Counsel, responding to an inquiry from then City Clerk David Dinkins, advised "that I am of the opinion that the city clerk may not issue a license to marry two persons of the same sex."[13]

The trial court in *Hernandez v. Robles* found the statute unconstitutional;[14] courts in Rockland, Tompkins, and Albany counties had ruled to the contrary.[15] The court issued its opinion early in Mayor Bloomberg's reelection campaign, on the eve of an appearance before a gay and lesbian organization whose political support he was

12. 794 N.Y.S.2d 579, 583–84 (Sup. Ct. N.Y. County 2005).

13. *See* William E. Nelson, Fighting for the City 245 n.49 (2008) (citing Letter from W. Bernard Richland to David Dinkins, Mar. 1, 1976 (on file with the Law Department)).

14. *See Hernandez*, 794 N.Y.S.2d at 610.

15. *See, e.g.*, Kane v. Marsolais, 808 N.Y.S.2d 566, 566–67 (3d Dep't 2006); Samuels v. N.Y. State Dep't of Health, 811 N.Y.S.2d 136, 147 (3d Dep't 2006); Seymour v. Holcomb, 790 N.Y.S.2d 858, 866 (Sup. Ct. Tompkins County 2005); Shields v. Madigan, 783 N.Y.S.2d 270, 277 (Sup. Ct. Rockland County 2004).

seeking. The day after the ruling, the city announced it would appeal, which prevented the decision from going into effect. Ultimately, the New York Court of Appeals ruled 4-3 that the current marriage limitation is constitutional, and if the law is to be changed it must be done by the state legislature.[16]

Hernandez highlighted the role of the Corporation Counsel: to enforce the laws that bind the city. An arguably parallel situation arose in 1886 when, as Professor Nelson recounts in his book, the Corporation Counsel felt himself bound by the laws prohibiting women from registering to vote, regardless of his personal views.[17] Similarly in *Hernandez*, regardless of my personal views, or even those of the Mayor—Mayor Bloomberg made it clear that he personally supported the right of same-sex couples to marry—I felt the office had a responsibility to appeal the *Hernandez* decision so that the highest court of the state could determine the constitutionality of the Domestic Relations Law. I felt this obligation even though in 1997 the New York City Bar Association, of which I was then president, had issued a report with my approval arguing that the Domestic Relations Law, at issue in *Hernandez*, was unconstitutional.[18]

THE CONFLICTS PRESENTED BY THE NEED TO REPRESENT "THE CITY"

As mentioned above, while the City Charter provides that the Corporation Counsel "shall be attorney and counsel for the city,"[19] the city government, with dozens of elected officials, does not always speak with one voice. Occasionally, there are conflicts within city government, and sometimes city objectives conflict with broader state and federal laws. Many of the difficulties associated with such an intra- and inter-governmental conflict came to the fore in a complex dispute between the Mayor and city council over their shared desire to promote fair treatment of domestic partnerships by firms holding city contracts.

In 2004, the council passed, over the Mayor's veto, a local law requiring that virtually all city contracts be awarded only to firms that provide benefits to their employees' domestic partners to the same extent that benefits are given to employees' spouses. While the Mayor has been an outspoken advocate of domestic partner benefits, he concluded, based on the Law Department's advice, that the local law violated state and federal laws, including state laws requiring that municipal contracts be awarded to the lowest responsible bidder and the federal Employee Retirement Income Security Act[20] ("ERISA"), which provides that businesses with employee benefits plans do not have to comply with potentially conflicting requirements

16. *See* Hernandez v. Robles, 7 N.Y.3d 338, 366 (2006).

17. *See* Nelson, *supra* note 13, at 16–17.

18. *See* Committee on Lesbians and Gay Men in the Legal Profession et al., *Same-Sex Marriage in New York*, 52 The Rec. of the Ass'n of the Bar of the City of New York 343, 346 (1997).

19. New York, N.Y., Charter ch. 17, § 394(a) (2004).

20. *See* 29 U.S.C. § 1144 (2006).

imposed by state and local regulations.[21] The Mayor declined to enforce a law he considered to be illegal and, as a result, the council sought a writ of mandamus compelling the Mayor to perform his "ministerial duty" of executing the laws adopted by the city's legislature.

This confrontation raised an important separation of powers question regarding the basic obligations of the three branches of government. The council maintained that since its enactments were presumptively valid, the Mayor was obliged to execute local laws until and unless he obtained a judgment from the judicial branch declaring the law illegal. The Mayor contended that, as chief executive, his duty is to enforce *valid* local laws, and if he considers a local law to be illegal, he may decide not to enforce it and raise the invalidity as a defense in any lawsuit brought to compel him to implement the disputed legislation.

In a 4-3 decision, the New York Court of Appeals agreed with the Mayor, explaining that "[t]he theory the Council advocates would put the courts in the unacceptable position of directing an officer to violate his or her oath of office by enforcing an unconstitutional law."[22] The court explained that the Mayor is obliged to follow federal and state law as well as local laws, and when "a local law seems to the Mayor to conflict with a state or federal one, the Mayor's obligation is to obey the latter."[23] The court also sided with the Mayor on the merits, agreeing that the local law could not be enforced because it unlawfully conflicted with state competitive bidding laws and ERISA.[24]

For the Law Department, this case raised the sometimes difficult issue of which party is the client. Although the Corporation Counsel's clients include the mayor and the agencies of the city, as well as the city council, ultimately it is the "city" as an entity that this office is supposed to represent. In this case, the Law Department represented the Mayor against the city council because we determined that the law was not valid. But that may not always be the case; as counsel to the "corporation," I could find myself in the seemingly difficult position of having to litigate against the very person that appointed me.[25]

---

21. *See* N.Y. Gen. Mun. Law § 103 (McKinney 2008).

22. Council of City of N.Y. v. Bloomberg, 6 N.Y.3d 380, 388 (2006).

23. *Id.* at 389.

24. *Id.* at 393, 395.

25. Professor Nelson's book describes one such litigation from the 1980s, which challenged the constitutionality of the Board of Estimate—a body that was comprised of the mayor, city council president, comptroller, and the five borough presidents. Mayor Koch supported the restructuring of the Board of Estimate. The Corporation Counsel, however, charged with the obligation of defending city laws, argued in favor of the constitutionality of the law and preservation of the Board of Estimate as it existed. The court's decision, ultimately affirmed by the U.S. Supreme Court, held that the board of Estimate was unconstitutional in its then-form because it violated the principle of one person, one vote. The board eventually ceased to exist as a result of the 1989 Charter Revision. *See* Nelson, *supra* note 13, at 295–301.

THE LEGAL CHALLENGES FLOWING FROM 9/11

A great deal of my time has also been occupied by the legal issues generated by 9/11. Two areas deserve particular mention: (1) how to balance civil liberties while protecting society in this age of terrorism; and (2) how to compensate victims of a mass disaster while not bankrupting those who came to their rescue.

1. Civil Liberties in the Age of Terrorism

Two particular litigations highlight the legal tensions this office faces in preserving our civil liberties while at the same time protecting New York City from future terrorist attack.

Following the terrorist bombing of the London subway in July 2005, the city instituted the "Container Inspection Program" to conduct bag searches of randomly selected subway passengers. The New York Civil Liberties Union brought suit on behalf of several individuals, arguing that searching subway riders without individualized suspicion violated the Fourth Amendment of the United States Constitution.[26]

The district court and the Second Circuit upheld the program under the "special needs" exception to the usual Fourth Amendment requirement of reasonable individual suspicion prior to a search.[27] This doctrine provides that a search unsupported by probable cause is not unreasonable if "special needs, beyond the normal need for law enforcement" make the probable cause requirement impracticable.[28] The trial court weighed the intrusion of the program against the public interest the program sought to advance, ultimately finding that the Container Inspection Program was reasonable. The court held that the governmental interest in preventing an attack on the subway was of "the very highest order,"[29] and given that the program combated the real and substantial risk of a terrorist bombing of the city's subway system, it was a reasonably effective measure to reduce that risk and constituted a relatively limited intrusion on subway riders.[30]

Protests of the 2004 Republican National Convention in New York City also gave rise to litigations over the proper balance between civil liberties and protection against terrorists. For example, individuals have filed lawsuits alleging that the police department was motivated by a desire to retaliate against protesters in deciding

---

26. *See* MacWade v. Kelly, No. 05 Civ. 6921 (RMB), 2005 U.S. Dist. LEXIS 39695, at *3 (S.D.N.Y. Dec. 7, 2005).

27. *See* MacWade v. Kelly, 460 F.3d 260, 270–71 (2d Cir. 2006); *MacWade*, 2005 U.S. Dist. LEXIS 39695, at *56–57.

28. *MacWade*, 2005 U.S. Dist. LEXIS 39695, at *54 (referring to Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829 (2002)); *see also MacWade*, 460 F.3d at 268 (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

29. *MacWade*, 2005 U.S. Dist. LEXIS 39695, at *58; *see also MacWade*, 460 F.3d at 267.

30. *See MacWade.* 2005 U.S. Dist. LEXIS 39695, at *56–63; *see also MacWade*, 460 F.3d at 275.

how to process those arrested during the Convention.[31] These cases also seek production of highly confidential intelligence data the police department gathered in preparation for the Convention. The city has litigated these matters vigorously, striving to protect privileged law enforcement information, including the sources and methods used by the police department, which if revealed could compromise future investigations.

2. Compensating Victims of a Mass Disaster

Nearly 2800 people died in the 9/11 attacks on the World Trade Center, including almost 350 firefighters and nearly two dozen police officers. During the subsequent rescue and recovery operation, an estimated 90,000 workers were involved in the work at Ground Zero. Many of these workers subsequently complained that they became sick as a result of their work.

In conjunction with the city's lobbying office in Washington, D.C., we helped to obtain federal legislation that provided no-fault compensation to the victims of the towers' collapse and their families. That fund—the Victim Compensation Fund—ably administered by Special Master Ken Feinberg, paid out about seven billion dollars. While the Fund took care of some of those who suffered respiratory injuries as a result of their work at Ground Zero, strict eligibility requirements and a 2003 application deadline sharply limited those who could receive compensation.

More than 9000 workers who claimed they were hurt as a result of their work in the rescue and recovery effort have filed lawsuits against the city or its contractors after the Victim Compensation Fund closed its doors. The number of plaintiffs continues to grow. To prevail in the litigation, the workers will have to prove both that the city or its contractors are not entitled to statutory and common law immunity for the actions they took in response to the terrorist attack, and that the city and/or its contractors were somehow negligent. While the city believes it and the contractors will prevail, there are admittedly some workers who were injured as a result of their service to the nation and they deserve to be compensated.

Unfortunately, the tort system is ill-suited to resolve such problems. The litigation is a lose-lose proposition for everyone. Should the city and its contractors prevail after a lengthy litigation, workers who were hurt will suffer without receiving any compensation. On the other hand, should the city and its contractors who raced to help in the aftermath of 9/11 be found liable, they face huge financial losses—raising the question of whether any company will come to the aid of another city if there is a similar attack in the future. A new public policy solution must be found. This is why the city is lobbying Congress to re-authorize and re-open the Victim Compensation Fund to provide for federal compensation to those who, without the need to establish fault, can prove their rescue efforts caused them to become sick.

---

31. MacNamara v. New York, No. 04 Civ. 9216 (RJS), 2007 U.S. Dist. LEXIS 79870 (S.D.N.Y. Oct. 30, 2007); *see also* Sabrina Tavernise, *City to Pay $150 per Person in G.O.P. Arrest Settlement*, N.Y. Times, Apr. 16, 2005, at B3.

Such a solution will ensure that those who helped the city in response to the attack will not be punished for having done so.

THE THOUSANDS OF TORT CASES EACH YEAR

Wholly apart from major disasters such as the 9/11 World Trade Center attacks, each year New York City faces potential liability of millions of dollars from tort actions. The Law Department's Tort Division, comprised of 200 lawyers and as many support staff, handles over 6200 new personal injury and property damage suits brought against the city and the Department of Education each year, while simultaneously defending against more than 26,000 pending suits. In the six years I have served as Corporation Counsel, the city has paid more than *three billion dollars* in tort judgments and claims.

This large figure is due in part to New York State's tort laws being among the most pro-plaintiff in the nation. While most of the needed changes in those laws depend on action by the state legislature, the City Council enacted one "tort reform" measure in 2003 that was a victory for both the city and potential plaintiffs. Under previous law, if a plaintiff was injured as a result of a defect on a city sidewalk, and the city had received prior notice of the defect, the city was exposed to potential liability. Since New York City sidewalks, if stretched end to end, would extend halfway around the world, it was impossible for the city to correct every defect of which it received notice. The result was city liability from trip-and-falls on sidewalks totaling more than fifty million dollars annually.

In 2003, the city council, at the Mayor's and my urging, amended the law and placed that liability, with limited exceptions, not on the city but instead on the owners of commercial buildings abutting the sidewalks.[32] Since these owners face potential liability if a pedestrian falls on the sidewalk in front of their building, they are in a far better position than the city to make the needed repairs. The result is not only a projected forty-million dollar savings annually to the city, but safer sidewalks for New Yorkers.

LEGAL MATTERS OF INTERNATIONAL IMPACT

The work of the Corporation Counsel's office also extends to the international realm. As host to the United Nations and related members of the diplomatic and consular community, the city occasionally confronts the unique question of what laws and regulations apply to the many properties owned by foreign countries as well as to the conduct of officials of foreign countries. The issue of unpaid parking tickets on vehicles belonging to diplomats is one example of the unique situations that face the city.

For years, foreign diplomats representing their countries at the United Nations and consular officials, relying on diplomatic and consular immunity, had not only failed to pay their parking tickets, but had ignored New York City parking regulations with impunity. The result had been millions of dollars of unpaid parking fines,

32. New York, N.Y., City Admin Code § 7-210 (1985 & Supp. 2003).

anger at the international community, and a safety hazard because the diplomats' and consular officials' disregard of parking rules clogged the city's streets. Working with Commissioner Marjorie Tiven of the New York City Commission for the United Nations, Consular Corps and Protocol, Commissioner Martha Stark of the New York City Department of Finance, and representatives of the United States Department of State, we created a program to address the problem. This program called for the loss of vehicle registrations and assigned mission and consulate parking spaces if parking tickets were not timely paid, thereby creating the needed incentive for New York City regulations to be followed and the tickets to be paid. For me, the highlight of these difficult negotiations was a phone call I received from Secretary of State Colin Powell while he was in Jerusalem negotiating with the Palestinians and Israelis. During the call, which occurred a few days before the city had threatened to begin the towing of scofflaw consular vehicles if the issue was not resolved, the Secretary asked for a few more weeks to work out the parking ticket dispute.

More challenging was collecting real estate taxes from foreign countries. Under applicable international treaties, the portions of foreign-country-owned properties serving as the diplomatic missions or consulates, as well as the residences of the heads of the missions or consulates, are exempt from property taxes.[33] However, the city contended that the portions of such properties devoted to other purposes, such as housing for staff members, were subject to tax. The United Nations missions of India and Mongolia, which owned valuable properties not far from the United Nations and housed all of their employees in those buildings, disagreed. The city therefore commenced suit against India and Mongolia.[34]

The threshold question facing the city was whether United States courts had jurisdiction to hear the city's claims. The city based its jurisdictional contention on the Foreign Sovereign Immunity Act ("FSIA"), which gives United States courts jurisdiction when a "right in immovable property" is "in issue."[35] The city asserted that the liens that had attached to the properties by virtue of the outstanding taxes equaled such a "right," and the dispute was therefore capable of being adjudicated in U.S. courts, despite the city's conceded inability to foreclose on diplomatic or consular property. In 2007 the case reached the United States Supreme Court, which ruled 7–2 in favor of the city's jurisdiction argument, notwithstanding the opposition of the United States government.[36] The case was remanded for proceedings on the merits and in February 2008 the Southern District granted summary judgment for the city and subsequently ordered the governments of India and Mongolia to pay a

33. *See* City of New York v. Permanent Mission of India to the United Nations, 533 F. Supp. 2d 457, 459 (S.D.N.Y. 2008) (citing the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 and the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227).

34. City of New York v. Permanent Mission of India to the United Nations, No. 03 Civ. 3256 (RCC), No. 03 Civ. 6086 (RCC), 2004 U.S. Dist. LEXIS 23860 (S.D.N.Y. Nov. 23, 2004).

35. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(a)(4) (2006).

36. Permanent Mission of India v. City of New York, 551 U.S. 193 (2007) (Stevens, J. & Breyer, J., dissenting).

combined total of almost forty-seven million dollars in unpaid property taxes and interest.[37]

Not only was this a precedent-setting case that should benefit the city for years to come, but it allowed me, like many of my predecessors, to enjoy the once-in-a-lifetime thrill of arguing before the United States Supreme Court. Incidentally, and further demonstrating the significant legal issues with which the Corporation Counsel's office deals, this was one of three cases involving New York City decided by the Supreme Court in 2007. Those three cases, plus two others in which the city filed important amicus curiae briefs, amounted to almost four percent of all the cases decided by the Court in that year.

ADVANCING THE MAYOR'S AND THE CITY'S INTERESTS

In the affirmative litigation area, the Corporation Counsel has an opportunity to use litigation as a proactive means to advance the interests of the city.[38] For example, the mayor may determine that the federal government has failed to act in the best interest of New Yorkers, either by failing to legislate in a particular area, or by choosing not to enforce duly enacted legislation. Recent efforts, where the office initiated litigation to fill the void left by the federal government, include the protection of New Yorkers from gun violence and from adverse environmental impacts.

1. The Gun Litigations

For years, New Yorkers have been victims of illegal guns. From 1995 to 2004, for example, approximately 5400 New Yorkers were killed by guns, virtually all of which were used by individuals who were legally prohibited from possessing guns.[39] Both Mayor Bloomberg, and Mayor Giuliani before him, had therefore made the reduction of illegal gun traffic into New York a major priority.

In 2000, the city sued gun manufacturers whose sales comprised a significant percentage of the illegally used guns recovered in New York City on the theory that the manufacturers knew or should have known that the negligent or illegal sales practices of certain gun dealers they served disproportionately supplied the criminal market for guns, thereby creating a public nuisance within the city.[40] The amended complaint requested an injunction that would require the manufacturers to monitor their dealers and cease doing business with those who refused to adopt responsible sales practices.

37. *Permanent Mission of India*, 538 F. Supp. 2d at 704.

38. *See* Gail Rubin, *Taking the Offensive: New York City's Affirmative Suits*, 53 N.Y.L. Sch. L. Rev. 491 (2009).

39. *See* City of New York v. Bob Moates Sport Shop, No. 06-CV-6504 (JBW), 2007 U.S. Dist. LEXIS 21085, at *4 (E.D.N.Y. Mar. 22, 2007).

40. *See* City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d. 256, 262 (E.D.N.Y. 2004) (referring to City of New York v. B.L. Jennings, Inc., No. 00 CV 3641 (JBW), 2004 U.S. Dist. LEXIS 3097 (E.D.N.Y. Mar. 2, 2004)).

In November 2005, two weeks before the case was scheduled to go to trial, President Bush signed the Protection of Lawful Commerce in Arms Act ("CAA"), which appeared to give the gun industry sweeping immunity against most tort law suits.[41] When the manufacturer defendants—hours after the bill was signed into law—moved to dismiss the case under the CAA, the city successfully argued that the city's suit fell within one of the statute's exceptions.[42] Unfortunately for New Yorkers, in April 2008, in a case I personally argued, the Second Circuit, in a 2–1 decision, reversed and dismissed the case by narrowly reading the CAA exception at issue.[43]

The Second Circuit's decision luckily has not left the city without recourse against the flow of guns into New York City. Following the initiation of lawsuits against wholesalers, the city pursued a second approach against gun trafficking by expanding its efforts to include retailers. Since the gun manufacturers showed no willingness to police those dealers whose sales practices contributed to the flow of guns into the city, the city decided to take on that task itself.

The city initially identified twenty-seven gun dealers who were significant sources of guns recovered in crimes in the city. One of the principal methods by which guns reach the hands of criminals is through "straw sales," in which a person barred by federal law from purchasing a gun (for example, a convicted felon) uses a stand-in to make the purchase—a sale that often has quite open and obvious signs. Borrowing a tactic employed by civil rights organizations to uncover evidence of racial discrimination, the city sent in pairs of testers to document on concealed video cameras (usually hidden in a New York Yankees baseball cap) whether the dealers selected would sell to a buyer in the simulated straw purchase scenario. Approximately two-thirds of the dealers tested did so—thereby engaging in an illegal sale—while the remainder, recognizing the scenario as an illegal straw purchase, complied with the law and refused the sale.

In two suits commenced in May and December 2006, the city sued each of the dealers who had sold in the simulated straw purchase on public nuisance grounds.[44] The relief sought in the dealer suit was the appointment of a monitor who would supervise the stores to ensure they comply with the law and not engage in illegal sales. Twenty-one of the twenty-seven defendant gun dealers reached settlements with the city in which a court-appointed Special Master will provide training and education, recommend sales practices, and monitor the dealers to ensure compliance

41. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 109 Stat. 2005 (codified as 15 U.S.C. § 7901 (2006)).

42. *See* City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244, 261–64 (E.D.N.Y. 2005).

43. *See* City of New York v. Beretta U.S.A. Corp., No. 05-6942-cv (LEAD), 05-6964-cv (XAP), 06-3692-cv (CON), 06-3695-cv (XAP), 2008 U.S. App. LEXIS 9309 (2d Cir. Apr. 30, 2008).

44. City of New York v. A-1 Jewelry & Pawn, Inc., 247 F.R.D. 296 (E.D.N.Y. 2007); City of New York v. Bob Moates' Sports Shop, Inc., No. 06-CV-6504, 2008 U.S. Dist. LEXIS 11699 (E.D.N.Y. Feb. 15, 2008).

with the law.[45] The six remaining cases were either dismissed or the defendants defaulted.

Three stories stand out in my mind about the gun litigations. First, in both the manufacturer case and the dealer case, two major New York City law firms agreed to work with the Law Department on a *pro bono* basis in prosecuting the cases, an act of public spiritedness that has resulted in millions of dollars of the highest quality legal time being donated to the city. These *pro bono* efforts, which have been duplicated by scores of New York City law firms in city tort litigations and other matters, is testament to the public spirit of the New York bar and its recognition that law firms have an obligation to work for the public good. Second, as a reminder that a Corporation Counsel is in the public eye and can face significant consequences if he acts improperly, one of the gun retailers, claiming it had been defamed by the public comments made about the suit, brought a countersuit in Georgia for defamation against the Mayor, certain other city officials, and me.[46] Third, during the discovery phase of the retailer cases, the Mayor himself was deposed on two occasions, and I personally participated in preparing him for, and defending him at, the depositions.

2. The Environmental Challenges

Environmental concern is another area that the city, and Mayor Bloomberg in particular, has identified as a major priority. As a result, the Law Department has initiated some major litigations against the federal government and actively participated in drafting significant environmental initiatives.

The numerous environmental suits the city has begun over the last six years have challenged several federal agencies to take required steps with regard to greenhouse gas emissions that contribute to global warming, smog that contributes to alarming asthma rates, and inefficient energy uses that contribute to air pollution and jeopardize security by maintaining the nation's dependence on foreign oil.[47] For example, in the most important of the greenhouse gas cases to date, the city was the lead city petitioner in a suit alleging that the Environmental Protection Agency ("EPA"), despite a clear mandate in the Clean Air Act, failed to regulate the emissions of greenhouse gases from motor vehicles.[48] In a landmark decision, the United States Supreme Court ruled for petitioners, holding that greenhouse gases that contribute

45. *See, e.g.*, Press Release, Office of the Mayor, Mayor Bloomberg Announces Settlements with Five Additional Gun Dealers Named in New York City Lawsuits (Apr. 11, 2008), *available at* http://www.nyc.gov/ (follow "News and Press Releases" hyperlink; then follow "April 2008" hyperlink); Press Release, Office of the Mayor, Statement by Mayor Michael R. Bloomberg About Pre-Trial Victory in Case Against Adventure Outdoors Gun Shop (June 2, 2008), *available at* http://www.nyc.gov (follow "News and Press Releases" hyperlink; then follow "June 2008" hyperlink).

46. Adventure Outdoors, Inc. v. Bloomberg, 519 F. Supp. 2d 1258 (N.D. Ga. 2007). As of publication, this case was still pending.

47. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (regarding greenhouse gas emissions); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508 (9th Cir. 2007) (regarding energy efficiency); State of New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006) (regarding clean air).

48. *EPA*, 549 U.S. at 509–13.

to global warming are "air pollutants" under section 202 of the Clean Air Act, that the EPA must promulgate regulations or otherwise provide legitimate reasons not to regulate, and that harms attributable to global warming are sufficient injuries to provide constitutional standing.[49]

The Law Department's environmental initiatives have not been limited to litigation. The Law Department has played a critical role in advising city hall and city agencies on the legal aspects of Mayor Bloomberg's PlaNYC 2030, a local long-term planning and sustainability effort, and in helping draft supportive legislation and regulations. Examples include a congestion pricing plan, greenhouse gas emission reduction targets, plastic bag recycling measures, fuel economy standards for the city's yellow cab fleet, and procurement of ultra-low sulfur diesel fuels for ferries, school buses, and boilers.

NON-LITIGATION MATTERS

One of the lesser-known facts about the Law Department is that it is engaged in far more than just litigation. One of the many reasons why being Corporation Counsel is such a special honor is that it provides the opportunity to pursue the public good through legislative and regulatory change, especially at the state and local levels.

Early in the current administration, the Law Department assisted Mayor Bloomberg in laying the groundwork for pursuing one of his most ambitious promises: improving the public school system. We drafted proposed state legislation that transferred power to appoint the schools chancellor from the Board of Education to the mayor, and empowered the mayor to appoint a majority of the Board, all of whom serve at the mayor's pleasure.[50] Another state law enacted a year later provided for the replacement of community school boards, which had been chosen by public elections with embarrassingly low participation rates, with community education councils consisting only of parents selected by PTA officers and borough presidents (and one non-voting student representative).[51] The Law Department worked closely with the Department of Education and statisticians to craft a regulatory scheme implementing the new council selection process in a manner that would not diminish the influence of minority communities.

A second area where the office's legislative efforts have greatly improved the quality of life for millions of New Yorkers is the smoking ban.[52] The enactment of New York City's Smoke Free Air Act reflects the collaborative efforts of the Mayor's Office, the city council, the Department of Health and Mental Hygiene and the Law Department. It has made most workplaces smoke-free, and eliminated smoking in all indoor areas of restaurants and bars (except for a few tobacco bars that were

49. *Id*. at 527–33.

50. 2002 N.Y. Sess. Laws 2817–33 (McKinney).

51. 2003 N.Y. Sess. Laws 2703–19 (McKinney).

52. *See* New York, N.Y., Local Law 47 (2002) (codified at N.Y.C. Admin. Code §§ 17-502–17-506, 17-508, 17-513, 27-4273, 27-4274, 27-4276 (2007)).

"grandfathered"). This legislation, along with other anti-smoking efforts such as an increase in the cigarette tax, the distribution of nicotine replacement patches, and a vigorous public education campaign, has contributed to a nineteen percent reduction in the city's adult smoking rate, which includes a twenty-three percent reduction in smoking among women and a fifteen percent reduction in smoking among men.[53]

The significance of the smoking legislation cannot be overstated. It has been copied by cities around the world.[54] Moreover, Mayor Bloomberg told those who had participated in this legislative effort that what they had done might be the most important thing they ever did in their professional lives. The legislation is surely a wonderful example of the good one can accomplish as a public servant.

The economic development of the city is another non-litigation area in which the office has played a large role. During my tenure, the Law Department and the Economic Development Corporation successfully concluded many years of difficult negotiations with the Port Authority of New York and New Jersey to amend the city's lease with the Port Authority for the LaGuardia and JFK Airport properties. Through the Law Department's efforts, an amended lease was executed that both recognizes the contemporary realities of airport operations and contributes hundreds of millions of dollars of revenue into the city's coffers that would not have materialized under the old lease.

Of particular satisfaction to me, because of my long relationship with major league sports teams, was the culmination of negotiations for the construction of new stadium facilities for the Yankees and Mets. Staggering hours of transactional lawyering produced deals that required these teams to assume the entire financial burden for the building of these new facilities, with the city and state contributing expanded infrastructure around the new stadium facilities. I am proud that the Law Department's transactional lawyers made such a significant contribution to the city's economic base and infrastructure through these particular deals and the many other transactions in which they represented the city's interests.

Finally, the Law Department recently negotiated the "coordinated street furniture" franchise, which represents one of the largest non-real estate transactions ever entered into by the city. In 2006, after a very lengthy and complicated request for proposal process, the Department of Transportation awarded Cemusa, Inc. the street furniture franchise, which allows Cemusa to install, operate, and maintain 3300 new bus shelters, 330 new newsstands, and up to 20 automatic public toilets, and to sell and place advertising on these structures.

Not only will the city not have to pay to either construct or maintain these structures, but the franchise will provide enormous economic benefits to the city. Over its twenty-year term, Cemusa will pay $999 million in cash to the city, give

53. Centers for Disease Control and Prevention, *Decline in Smoking Prevalence—New York City, 2002–2006*, 56 MORBIDITY AND MORTALITY WKLY. REP. 604 (2007) (citing Thomas R. Frieden et al., *Adult Tobacco Use Levels After Intensive Tobacco Control Measures: New York City, 2002–2003*, 95 AM. J. PUB. HEALTH 1016 (2005)), *available at* http://www.cdc.gov/MMWR/preview/mmwrhtml/mm5624a4.htm.

54. *See* Bryan Virasami, *A Broad Prescription for NYC: City's Health Chief Spearheads Sweeping Plans for NYers, Taking On Everything from Trans Fat to West Nile,* NEWSDAY, Oct. 9, 2006, at A14.

22.5% of the advertising space for city use, including public service messages, and provide over $396 million in free advertising in Cemusa's other markets, which can be used to promote the city.

This transaction was so large and complicated that four attorneys from the Law Department worked nearly full time for almost ten months negotiating the agreement, in conjunction with Department of Transportation attorneys and staff. The Law Department became further involved when two of the losing proposers challenged the award of the franchise to Cemusa. The city's actions were upheld in the New York State Supreme Court, and no appeal was taken.[55]

This street furniture franchise was only one of many business deals negotiated or overseen by the Corporation Counsel's office. The city currently procures over fifteen billion dollars per year of goods, services, and construction. These procurements—which range from major construction projects to office furniture—result in the award of thousands of contracts annually. Attorneys in the Law Department review and approve these contracts, provide both procedural and substantive advice on them to attorneys at other city agencies, and help structure, draft, and negotiate the more complex contracts.

CONCLUSION

The seven years that I have served as Corporation Counsel have given me the opportunity to contribute to the constant and vibrant evolution of New York City—a characteristic of the city that is one of its greatest assets. I have observed the city's dynamic nature not only through the legal issues discussed in this article and the thousands of additional interesting cases that this office handles, but also through my own window. My office, overlooking the World Trade Center site, permits me to observe the steady redevelopment and rebirth of Ground Zero. The work that is occurring at Ground Zero is a testament to the strength of this city and New Yorkers' ability to progress and overcome difficulty. As long as New York City keeps growing, evolving, and constantly redefining itself, as it will no doubt continue to do, the job of Corporation Counsel for the city of New York will remain arguably the best and one of the most rewarding legal jobs in the United States.

55. *See* NBCDecaux, LLC v. N.Y. City Dep't of Transp., Nos. 109233/06, 108831/06 (Sup. Ct. N.Y. County Dec. 19, 2006) (unfiled judgment), *available at* http://iapps.courts.state.ny.us/iscroll/SQLData.jsp?IndexNo=109233-2006.