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The Independence of the Law Department

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The Independence of the Law Department

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Anyone who begins reading *Fighting for the City* will quickly come to see that the book is no Law Department vanity project.¹ Professor Nelson has not written the coffee-table book that often is the product of a commissioned corporate history—the usual self-congratulatory onward march of events with lots of pictures. Instead, Professor Nelson has employed his talents as a law professor and historian to research and write a critical account of the Law Department in which he recounts both triumphs and failures of the Department over three centuries. His greatest contribution, in my view, is to present a history of the Law Department in the context of larger trends and developments in New York City history. In doing this, he has produced what former Mayor Edward I. Koch, in his note printed on the book jacket, calls “a major addition to the literature of New York City history.”

An understanding of the role of the Law Department in New York City government requires consideration of who the Law Department’s clients are, the extent of its authority to determine the city’s position in particular matters, and how it handles conflicts which may arise among its clients. To help shed light on these questions, I will discuss the provisions of law that establish the function and authority of the Law Department, judicial determinations that have helped fix its relationship with its clients, and the outcome of particular legal controversies where city agencies have taken conflicting positions.

However, first, a few words in regards to Professor Nelson’s work. I will not quibble here with Professor Nelson’s judgments on the trajectory of the office’s history or on particular episodes he recounts in the book. The only reservation with the work I will express is the tendency to attribute to the Law Department, as an institution, programmatic, or ideological objectives of its own, during certain periods of its history. This is a reservation only, and one based on my own experience at the Law Department, which I concede may be not be representative of the broader history of the Department, and judging from some of the episodes recounted in the book, happily so. To illustrate: Professor Nelson deplors efforts to squelch dissent during the McCarthy years,² and applauds efforts on behalf of the poor during the sixties.³ I do not challenge his judgment in either case. I cannot, however, entirely accept his characterization of what he calls “Corporation Counsel’s anti-Communist effort”⁴ on the one hand or, on the other, his description of Law Department lawyers as “advocates for an ideological agenda.”⁵ Furthermore, I take issue with Professor Nelson’s characterization of the mission of the Law Department, under Allen G. Schwartz and his successors, to operate in the “corporate mode,” representing the city in the manner that lawyers represent business interests.⁶ Appealing as this model may be in that it reflects the professionalization of the Law Department, it does not encompass the totality of the modern Law Department.

1. WILLIAM E. NELSON, *FIGHTING FOR THE CITY: A HISTORY OF THE NEW YORK CITY CORPORATION COUNSEL* (2008).

2. *See id.* at 195–211.

3. *See id.* at 230–40.

4. *Id.* at 209.

5. *Id.* at 239.

6. *See id.* at 261–75.

To assess the role of the Law Department in city government, it is necessary to view the Department as an agency of government and an actor in the process of governmental decision-making, and to look at the role prescribed for it in the City Charter itself.⁷ As is true with regard to the role and effectiveness of other institutions, the people involved—the leadership and staff of the office—play a vital role in determining how the office carries out its responsibilities and how its performance will be judged.

Chapter 17 of the New York City Charter provides for a Law Department, the Corporation Counsel, first assistant, and other assistants as may be appointed.⁸ It lists specific powers, such as opening streets, approving deeds and bonds, and, of course, instituting and defending lawsuits. But it is in section 394 of the Charter that the special role of the office in city government is set forth: “the [C]orporation [C]ounsel shall be attorney and counsel for the city and every agency thereof and shall have charge of all the law business of the city and its agencies and in which the city is interested.”⁹ These are broad powers and responsibilities. The independence of the office is grounded in its direct grant of authority to have charge of “all the law business of the city,” and in its role in applying and defending the provisions of the Charter in its charge to be attorney and counsel “for the city and every agency thereof.”¹⁰

Complementing section 394 is section 395, which allows city agencies to hire counsel to assist in the legal affairs of the agency; but with the narrow exception of cases where there may be a personal judgment or motion to commit for contempt of court, officers or agencies may not employ other counsel to represent them.¹¹ Agencies may also employ their own counsel to represent them in cases where there is a conflict among agencies that requires judicial resolution, and the Corporation Counsel, on behalf of the city, is representing one of those agencies. In 1972 the New York Court of Appeals decided *Cahn v. Town of Huntington*, which held, quite sensibly, that, where different agencies of a municipality sue one another, the municipal attorney cannot represent both sides, and the agency not being represented may employ special counsel.¹²

Thus, in addition to its role as defender of the city when it is sued—as it is thousands of times a year, with 6120 tort actions alone commenced in 2007—the Corporation Counsel advises city agencies and interprets the laws applicable to the conduct of the city’s business. That task includes devising interpretations of the City Charter that, absent judicial intervention, govern the powers of different city officers, agencies, and bodies, and their relationship to one another.

7. NEW YORK, N.Y., CHARTER ch. 17 § 394 (2004).

8. *Id.* §§ 391–92.

9. *Id.* § 394.

10. *Id.*

11. *Id.* § 395.

12. 29 N.Y.2d 451 (1972).

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It is the Law Department that determines the position of the city in litigation. This was enunciated by the First Department in *In re Kay v. Board of Higher Education*,¹³ a decision that Professor Nelson discusses in his book.¹⁴ In that case, the Board of Higher Education, now City University of New York (“CUNY”), hired Bertrand Russell as a professor of philosophy at City College.¹⁵ Russell was at the time seen by many as an apostle of “free love” and other “unacceptable” ideas.¹⁶ When the lower court declared the Board of Higher Education’s resolution hiring Russell null and void, the board sought to appeal. The Corporation Counsel advised that no appeal should be taken, and when the board sought to proceed with outside counsel it engaged, one of whom was the future United States Supreme Court Justice John Harlan, the appellate division dismissed the appeal.¹⁷ After delineating the narrow circumstances where an agency may hire its own counsel to represent it, the court held that “the decision of the corporation counsel with respect to the advisability of appealing from the order . . . is binding.”¹⁸

More recently, applying *In re Kay*, the courts have dismissed lawsuits instituted by borough presidents against the Metropolitan Transit Authority (“MTA”) where the Corporation Counsel declined to represent them. In *In re Abrams v. Ronan*, the Bronx borough president sought to compel Manhattan and Bronx Surface Transit Operating Authority to increase the number of free transfer points available to bus passengers in the Bronx.¹⁹ In *Lamberti v. MTA*, the Staten Island borough president sought to challenge authority of MTA to raise tolls on the Verrazano Narrows Bridge.²⁰

Two cases involving the city’s pension systems are illustrative of both the authority of the Corporation Counsel to interpret the law under which an agency operates and the exclusive representation of agencies by the Corporation Counsel. In *Michael v. Bellamy*, the court upheld the position of a single member of the New York City Employees’ Retirement System against all of the other trustees who took a position contrary to the opinion of the Corporation Counsel.²¹ In *Caruso v. New York City Police Department Pension Funds*, the New York Court of Appeals held that trustees of the Police Department Pension Funds, who successfully challenged the Corporation Counsel’s interpretation of a provision of state law known as the “Heart Bill,” were not entitled to reimbursement by the funds for their legal expenses.²² The court

13. 20 N.Y.S.2d 898 (1st Dep’t 1940).

14. NELSON, *supra* note 1, at 173–75.

15. *In re Kay*, 20 N.Y.S.2d at 899.

16. See NELSON, *supra* note 1, at 172–73.

17. *In re Kay*, 20 N.Y.S.2d at 901.

18. *Id.*

19. 36 N.Y.2d 714 (1975).

20. 565 N.Y.S.2d 111 (1st Dep’t 1991).

21. 437 N.Y.S.2d 977 (1st Dep’t 1981).

22. 72 N.Y.2d 568, 573–74 (1988).

reiterated that under the City Charter the Corporation Counsel has what the court denominated as “exclusive” authority over the law business of the city and stated that city officers and agencies are “unequivocally” prohibited from employing counsel.²³

The Law Department, as counsel to the city and its agencies, is charged with interpreting the Charter and opines on its application, again subject, of course, to the opinion of the courts if the interpretation is challenged. One notable instance of an opinion of the Corporation Counsel having far-reaching impact on the operation of the city is Opinion No. 11 of 1990, signed by Corporation Counsel Victor A. Kovner.²⁴

The newly revised City Charter mandated a number of new provisions—wisely recommended by the 1989 Charter Revision Commission headed by Fritz Schwarz—that would govern the actions of city agencies. The sections of the Charter that were added or amended addressed such issues as conflicts of interest, budgetary procedures, rulemaking, and procurement. The Corporation Counsel was presented with the question of whether these new provisions governed, not only the city itself, but also the various public entities performing city-related functions separately established by or pursuant to state law, to which the Charter language applied on its face. These entities included the Health and Hospitals Corporation, the Off-Track Betting Corporation, the New York City Board of Education, the New York City School Construction Authority, and the Public Development Corporation (predecessor to the New York City Economic Development Corporation).

The opinion, dealt with in some detail by Professor Nelson,²⁵ provides a window into the approach of the Law Department in exercising its responsibility to interpret the Charter. The opinion examined the applicability of each of the new provisions to each of the entities in question, carefully testing each provision against the language and purpose of applicable state law.²⁶ By explaining the assumptions from which it proceeded, and clearly setting forth its analysis, the sixty-nine page opinion buttressed the legitimacy of authority of the Corporation Counsel to provide definitive interpretations of the provisions of the Charter.

While the Law Department is an agency of the city, its staff is selected in a merit-based and non-political manner (ideally so, and this is certainly the case today); the elected officials that are our clients are political actors, each with various policy and political objectives that sometimes clash with each other. In addition, the holders of elected positions, be they mayors, comptrollers, members of the city council, or others, will seek to preserve, and sometimes push the boundaries of, their institutional powers and prerogatives. So, given the statutory authority and charge of the Corporation Counsel to advise and defend the city and its agencies, one of the greatest challenges the men and women of the office face is dealing with situations where different officials or bodies are in disagreement.

23. *Id.* at 575.

24. Op. NYC Corp. Counsel 11–90 (1990).

25. NELSON, *supra* note 1, at 304–05.

26. *See supra* note 24, at 3–7.

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There is, unfortunately, no requirement that client-agencies be consistent in the positions they urge. Sometimes one or another official may be firm or even inflexible in pursuit of a goal; sometimes compromise will be the order of the day. Their views of Charter powers may vary from issue to issue. But the Law Department best serves when it is devoted to a reasoned interpretation of the City Charter and the powers of city officials that serve the long-term institutional interests of the city.

I received my own initiation into these complexities when I assisted and then succeeded Hadley Gold as counsel to the now-defunct Board of Estimate. Peter Zimroth has recounted our vigorous, if doomed, efforts to preserve the board, whose structure the U.S. Supreme Court ultimately found to be unconstitutional.²⁷ But while the board existed, counseling it—eight independently elected officials sitting as one body and passing on the budget, city contracts, and land-use decisions in all five boroughs—often tested one’s skills at persuasion. Sometimes, because issues like the location of jails and homeless shelters elicited passionate disagreement, counseling the board tested the thickness of one’s skin as well. Even rules of procedure, such as whether a majority or a two-thirds vote was required in certain instances, elicited heated argument because substantive issues were at stake. When the question arose as to whether the mayor was authorized to vote on certain budget modifications, I advised the board that he did. I then found myself defending (successfully) the position in the court of appeals when all five borough presidents and the president of the city council united to sue the Mayor over the issue.²⁸

As statutory counsel to the pension systems, it is the duty and objective of the Law Department to provide advice and counsel to each of the city’s pension systems. This is no easy task. Today, my colleagues in our Pensions Division face the challenge of being attorney and counsel to five different pension systems, each one administered by a board of trustees composed of different officials and divided between city and employee representatives. For example, the Board of Trustees of the New York City Employees’ Retirement System (“NYCERS”) consists of a representative of the mayor, the public advocate, the comptroller, each of the borough presidents, and the chief executive officer of three employee organizations designated by the city’s Director of Labor Relations as representing the largest number of employees who belong to NYCERS. In the course of their proceedings, the trustees of the various systems may differ on a number of issues, most frequently on the application and interpretation of provisions of the pension laws to individual applications for disability retirement.

Among the most significant legal controversies to confront the Law Department as attorney for the city’s pension systems was the dispute between city and employee representatives of the Police Pension Fund and the Fire Department Pension Fund over whether, pursuant to the so-called “Heart Bill,” a heart condition incurred by a police officer or firefighter while employed by the city must be presumed to be the

27. Peter L. Zimroth, *Reflections on My Years as Corporation Counsel*, 53 N.Y.L. SCH. L. REV. 409, 416–20 (2009); *see also* Bd. of Estimate of the City of N.Y. v. Morris, 489 U.S. 688, 690 (1989).

28. *Golden v. Koch*, 49 N.Y.2d 690, 692–93 (1980).

result of an accident, as required by applicable provisions of the city's Administrative Code for the payment of disability or death benefits.²⁹ That controversy was resolved by litigation in which the New York Court of Appeals concluded, contrary to the position taken by the Law Department, that such a presumption did apply.³⁰

The process of enacting local legislation is most fruitful when the executive branch and the legislative branch—the mayor and the city council—collaborate. This collaboration, with the usual and expected give-and-take, has resulted in some of the most important local enactments—notably, the regulation of lobbying,³¹ campaign finance reform,³² and more recently, the New York City Smoke Free Air Act,³³ the prohibition of gifts by lobbyists to city officers and employees,³⁴ and the regulation of campaign contributions (“pay-to-play”) by people doing business with the city.³⁵ The Campaign Finance law of 1988 that stands out as one of the most notable examples of cooperation between the city council and the mayor. The enactment of this ground-breaking legislation was possible only because both the council and the Mayor rose above immediate parochial self-interest. The members of the council serving before the enactment of term limits sacrificed the advantage of incumbency by providing public matching funds for insurgent candidates. Mayor Koch, who, as the sitting mayor, surely had a substantial fundraising advantage over any challenger, acted bravely in supporting legislation that both limited the amount of money he could spend and provided additional funds to his opponent in the face of a difficult battle for nomination for a fourth term (which, in fact, he lost).³⁶

The Law Department is intimately involved in the adoption of local laws, advising the agencies and the mayor's office, drafting proposals, and negotiating with the council. When mayoral agencies propose legislation, the office advises on the legality of the proposal and whether it can proceed, and, if the proposal is legally defective, often suggests alternatives that can achieve some or all of the policy objectives in a lawful manner. When adopted local laws are challenged, it is the Law Department that defends them. This has been the case even where a local law is vetoed on policy grounds by the mayor and the council overrides the veto. Recently, the Mayor objected to and vetoed a local law prohibiting the use of metal bats in

29. *Uniformed Firefighters Ass'n v. Beekman*, 52 N.Y.2d 463, 467 (1981).

30. *Id.* at 472–73.

31. NEW YORK, N.Y., LOCAL LAW No. 14 (1986) (codified in N.Y. CITY ADMIN. CODE §§ 3-211–3-223).

32. NEW YORK, N.Y., LOCAL LAW No. 8 (1988) (codified in N.Y. CITY ADMIN. CODE §§ 3-701–3-714).

33. NEW YORK, N.Y., LOCAL LAW No. 47 (2002) (codified in N.Y. CITY ADMIN. CODE §§ 17-502–17-506; 17-508–17-509; 17-513; 27-4273–27-4274; 27-4276).

34. NEW YORK, N.Y., LOCAL LAW No. 16 (2006) (codified in N.Y. CITY ADMIN. CODE §§ 3-224–3-228; NEW YORK, N.Y., CITY CHARTER, ch. 68, § 2607).

35. NEW YORK, N.Y., LOCAL LAW No. 67 (2007) (codified in N.Y. CITY ADMIN. CODE §§ 3-702–3-703).

36. See Maurice Carroll, *Dinkins Wins Dem Race; Ends 12-Year Koch Reign; The Winner Is Gracious in Victory*, NEWSDAY, Sept. 13, 1989, at 3. For background information on the socio-economic context of New York City at the time of this election, see Donald Baier & Scott Minerbrook, *New York's First and Last Hurrabs*, U.S. NEWS & WORLD REPORT, Sept. 25, 1989, at 26.

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school games.³⁷ The council overrode the Mayor's veto, and the Law Department successfully defended the enactment when it was challenged.³⁸ However, what happens when the Law Department advises that a bill is unlawful and it is nonetheless enacted into law over the veto of the Mayor?

The 1989 Charter revisions, which, in the course of abolishing the Board of Estimate, reallocated, sometimes without precision, the powers of the city's elected officials, naturally created new disagreements among elected officials about their powers. Disputes arose concerning the powers of the mayor and the city council, and on a few occasions, the comptroller, that could not be resolved short of litigation. The Corporation Counsel could not represent both parties to the dispute in court, so, consistent with *Cahn v. Town of Huntington*,³⁹ these officials have relied on able in-house counsel, sometimes supplemented by engaging outside counsel, to litigate these cases, while the Corporation Counsel represented the mayor or mayoral agencies.

Issues between the mayor and comptroller have involved the comptroller's role in the issuance of debt, the approval of concessions, and the registration of contracts.⁴⁰ One such case that attracted substantial public attention concerned the comptroller's objections to the city's marketing agreement with Snapple.⁴¹

But it is the relationship between the mayor and the city council that has created the most litigation. Much of this litigation, as noted above, flows from the 1989 Charter Revision, which divided most of the powers of the Board of Estimate between the mayor and council. Disputes have arisen over the interpretation and application of provisions of the Charter,⁴² whether the council has overstepped its role and "curtailed" the authority of the executive,⁴³ and whether a local law is inconsistent with or preempted by state or federal law.⁴⁴

The Law Department is often called on to assist the mayor's office and the council in seeking modifications to make legislative proposals legally acceptable. But where the issues in question cannot be resolved and the legislation is enacted,

37. NEW YORK, N.Y., LOCAL LAW No. 20 (2007).

38. *USA Baseball v. City of New York*, 559 F. Supp. 2d 285, 288 (S.D.N.Y. 2007).

39. 29 N.Y.2d 451 (1972).

40. *See Giuliani v. Hevesi*, 90 N.Y.2d 27 (1997).

41. *See In re Comptroller of N.Y. v. Mayor of N.Y.*, 7 N.Y.3d 256 (2006).

42. *See generally In re N.Y. City Council v. City of New York*, 770 N.Y.S.2d 346 (1st Dep't 2004) (determining that agreements governing abandonment and demolition of elevated railway structures and surrender of easements and segments of elevated railway to city and other property owners do not require land use review under applicable Charter provisions).

43. *See Giuliani v. Council of N.Y.*, 688 N.Y.S.2d 413 (Sup. Ct. N.Y. County 1999) (holding local law requiring council approval of individual licensing determinations of the Taxi and Limousine Commission invalid, in part on grounds that it curtailed the mayor's powers without having been approved in referendum).

44. *See Mayor of N.Y. v. Council of N.Y.*, 780 N.Y.S.2d 266 (Sup. Ct. N.Y. County 2004) (holding local law prohibiting city agencies from doing business with financial institutions that engage in certain lending practices were preempted by federal and New York State law regulating financial institutions).

litigation will ensue, initiated either by the mayor, the council, or a third party. A broad range of issues has been litigated, among them: budgetary procedures,⁴⁵ powers of appointment,⁴⁶ restrictions on city contracting,⁴⁷ education and work activities of public assistance recipients,⁴⁸ and collective bargaining.⁴⁹

The Law Department most often prevails in these contests, but by no means always. For instance, in *Council of the City of New York v. Giuliani*,⁵⁰ the New York Court of Appeals held that a proposal of the Mayor to privatize the services of a hospital under the jurisdiction of the Health and Hospitals Corporation could not go forward without state legislative authorization. More recently, the New York Court of Appeals concluded that a city council enactment designating certain fire department employees as “uniformed employees” for collective bargaining purposes did not unlawfully curtail the mayor’s authority over collective bargaining.⁵¹

The ability of the Law Department both to defend the validity of local laws and at times to challenge them—indeed, maintaining the office’s independence and authority in interpreting the Charter and advising our clients in the making of city policy—requires the office to demonstrate the qualities of competence, integrity, and what I call, “institutional loyalty.” The positions taken by the office are tested and are credible only to the extent that they are backed by rigorous analysis and the best possible legal skills. This requires a firm commitment to continuing the non-political, merit-based system of hiring. This merit-based hiring, exemplified by the Honors Program established in the Lindsay administration, was later expanded and institutionalized under Allen Schwartz and his successors. It also requires that the Law Department be able to compete in the marketplace and attract the very best lawyers to public service.

Advising officials with differing objectives requires our lawyers to demonstrate the integrity and consistency of their positions as well as loyalty to the proper functioning of the city, its agencies, and officials, requiring them to look beyond the immediate issue at hand. This means that we must do our best to ensure that advice on the interpretation of the City Charter and the principles applied in evaluating a proposal are consistent and accurate. To the extent we fail in this, we fall short of fulfilling our mandate.

45. *See, e.g.*, *Council of N.Y. v. Giuliani*, 621 N.Y.S.2d 832 (Sup. Ct. N.Y. County 1994).

46. *See, e.g.*, *Mayor of N.Y. v. Council of N.Y.*, 721 N.Y.S.2d 39 (1st Dep’t 2001); *Mayor of N.Y. v. Council of N.Y.*, 651 N.Y.S.2d 531 (1st Dep’t 1997).

47. *See, e.g.*, *In re Council of N.Y. v. Bloomberg*, 6 N.Y.3d 380 (2006); *Mayor of N.Y. v. Council of N.Y.*, 789 N.Y.S.2d 860 (Sup. Ct. N.Y. County 2004).

48. *See, e.g.*, *Mayor of N.Y. v. Council of N.Y.*, N.Y. L.J., Dec. 1, 2004, at 24 (Sup. Ct. N.Y. County 2004); *Killett-Williams v. Bloomberg*, N.Y. L.J., May 15, 2003, at 21 (Sup. Ct. N.Y. County 2003).

49. *See, e.g.*, *Mayor of N.Y. v. Council of N.Y.*, 9 N.Y.3d 23 (2007); *New York City Health & Hosp. Corp. v. Council of N.Y.*, 752 N.Y.S.2d 665 (1st Dep’t 2003).

50. 93 N.Y.2d 60, 72 (1999).

51. *Mayor of N.Y. v. Council of N.Y.*, 9 N.Y.3d 23, 33 (2007).

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This article has addressed the subject of the Law Department's institutional independence. In closing I would like to say just a few words about another kind of independence: personal independence—the professionalism, judgment, and honor of those who have served as Corporation Counsel and as lawyers at all levels in the Law Department. Turning one final time to Professor Nelson's book, we see examples of the interaction between Corporation Counsels and the mayors who appointed them. Professor Nelson describes the pressure brought on Corporation Counsels by Tammany mayors to fill the office with patronage employees, some of whom actually turned out to be quite able.⁵² He vividly portrays Mayor LaGuardia directing his Corporation Counsels to take actions to support his political ends.⁵³ In stark contrast, Professor Nelson relates an episode where Peter Zimroth and Len Koerner exercised their independent legal judgment and determined to take an appeal in a case even though this clashed with Mayor Koch's political goals. Mr. Zimroth then presented his legal reasoning to Mayor Koch, who replied: "This is your judgment. You do what you think is right here."⁵⁴

The Corporation Counsels, current and former, who participated in the symposium have brought their independence, ability, judgment, and energy to the service of the city and its people, in ways known and unknown, as do the hundreds of women and men who make up the city's Law Department.

52. NELSON, *supra* note 1, at 109–11.

53. *Id.* at 171–75.

54. *Id.* at 277–78.