



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Speeches

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**CORPORATION COUNSEL MICHAEL A. CARDOZO'S REMARKS
AT THE BLOOMBERG ADMINISTRATION'S
LEGAL LEGACY SYMPOSIUM**

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Introduction

Before I begin, I want to thank the City Bar Association and Fordham Law School for sponsoring this most interesting and important program. By sponsoring this two-evening discussion, with the debates and inevitable disagreements that it will generate, these two great legal institutions, each of which have supported me in many different ways throughout my career, have provided a forum from which we can all better understand how to deal with the complex legal issues facing New York City.

What is the Bloomberg Administration's Legal Legacy? When my good friend and former colleague, Abbe Gluck, asked me to speak about this issue I was confident that, assuming a legacy can be defined a year before an administration has ended, I would certainly know the answer to that question. After all, during the entire Bloomberg administration I have served as the City's chief legal officer. But on reflection I realized the answer was not so readily apparent. The question has forced me to focus on what exactly our approach to legal issues has been and why we took many of the actions we did. The best way to answer the question, I decided, is to first identify the fundamental principles that have governed our approach, and to then discuss some of the results we have achieved.

Three overarching principles have guided our conduct:

First, we have sought to use the law to effect constructive change, while at the same time tried to ensure that the City complies with the law.

Second, we have defined the Law Department's client as the legal entity known as the City of New York and its constituent agencies. While that may sound self-evident, it means that it is the job of Assistant Corporation Counsels to defend the City within the bounds of the law, and do their best to advance the interests of the legal entity New York City, *even* if that means taking positions adverse to some or indeed many members of that legal entity. It is not the role of Law Department litigators to take on the

amorphous task of “doing justice,” as some commentators have suggested. At the same time, however, we can never lose sight that as government lawyers and public servants we should also seek to promote appropriate policies that are in the best interests of the public.

Third, consultation – with our clients, with our adversaries, and with the courts – is an absolute prerequisite to successfully carrying out our role.

To put this in context I will focus on two major areas of the Law Department’s responsibilities: helping to advance the Mayor’s priorities, and defending the City in both public policy and damage suits. I will end with a brief discussion of some of the ethical principles that have guided our conduct.

Use of the Law to Affirmatively Advance the Mayor’s Priorities

I think most would agree that among Mayor Bloomberg’s highest priorities have been education reform, improving the health and safety of City residents, and spurring economic development, the major areas the panels will be discussing tonight and at next week’s program.

Perhaps the most interesting and innovative part of the Law Department’s role in advancing the Mayor’s priorities has been the affirmative litigations we have brought.

To help implement the Mayor’s efforts to curb illegal guns, we filed suit in the Eastern District against 27 out-of-state gun dealers whose sales practices, our undercover videotapes demonstrated, violated federal law. Most of those cases were settled by the defendants agreeing to the appointment of a federal monitor to oversee their sales practices for at least three years. The result of those suits? The illegal trafficking of guns from the geographic regions where those dealers were located dropped substantially, and the number of guns traced into the City from the monitored dealers decreased by 85 percent.

Among the litigations we initiated to support the Mayor’s efforts to curb smoking, we successfully sued retailers on a Long Island Indian reservation and their wholesale suppliers whose sales of untaxed cigarettes, which were illegal under state law, created a pipeline of bootlegged cigarettes into the City.

We have also used litigation to promote the Mayor’s goals of reducing greenhouse gas emissions and achieving the cleanest air quality of any large U.S. city. To cite but one of many examples, New York City, in a case decided by the United States Supreme Court, joined several states and advocacy organizations in successfully challenging EPA’s determination that it did not have the authority to regulate greenhouse gases.

Much of the work in promoting the Mayor’s initiatives lies in working closely with City agencies to draft statutes, regulations, and contracts that will both implement their goals and withstand the inevitable litigation challenges to them. In the education area, for example, we drafted and obtained preclearance from the Justice Department for landmark legislation establishing “mayoral control” over the public schools. Now that the Department of Education is primarily accountable to the Mayor, rather than a body with six different appointing authorities as before, there is a stronger relationship between our legal offices and we work closely together to promote the Mayor’s agenda of education reform.

Similarly, in the health area, knowing we faced almost certain litigation, we carefully drafted laws and regulations that one, prohibited smoking in restaurants, parks and beaches, two, required the posting of calorie information in certain food establishments, and three banned the sale of large sugary drinks in food service establishments. Thus far, at least, as a result of our close working relationship with our client agencies, we have prevailed in the various legal challenges to these health initiatives.

In economic development, we have worked with various City agencies to develop multi-pronged legal approaches to advance the Mayor’s agenda. For example, in spurring development of the Hudson Yards area of Manhattan we combined up zoning and the traditional use of eminent domain for parks and transit uses, with a creative financing plan using a single purpose borrowing vehicle to finance the extension of

the No. 7 train. This public investment will spur the transformation of a 45-square block area of underdeveloped midtown Manhattan into what will become a major business and residential district..

Defending the City

I want to turn now to the role we play in defending the City in both damage actions and in litigations that claim that by following, or failing to follow, a particular policy the City is violating the Constitution or existing law.

Public Policy Cases

The public policy cases generally involve the impact of City policies, frequently in the social welfare area, on the rights of the poor, the homeless, prisoners, and children. We approach these cases with the view that while of course the government must comply with the law and provide the necessary social safety net to the most vulnerable of our society, it is agency commissioners, not judges, who should set the needed policies and run City agencies.

How has this worked in practice?

First, consistent with our policy of consultation, I have urged advocate groups to communicate with me before, not after, public policy litigation is begun so we can explore with the client whether there are alternatives to the complained-of policy that can meet the client objectives and avoid the inevitable uncertainty and contentiousness that comes with litigation. While I obviously cannot divulge the numerous conversations I have had with my clients that resulted in litigation avoidance, I am pleased to tell you there were many, to the benefit of all.

This does not mean that simply because the advocates say something is illegal, we always agree with them and abandon the proposed policy. And it also does not mean that we have not had litigations involving public policy issues.

Second, when litigation over a particular policy has been brought, and it becomes clear that the City may lose and a potentially sweeping injunction might be entered, the settlement of the case by a consent decree is obviously the better course. But such decrees, we insist, must be narrowly tailored. We have learned by experience that broad consent decrees that go on forever are bad public policy.

Consistent with this overall approach, we have brought to an end – by negotiation and litigation -- consent decrees that have far outlived their usefulness, as well as terminating long running injunctions such as the decree in the *McCain* litigation that saw the New York Supreme Court control virtually every aspect of City homeless policy for more than 30 years. And in the few instances we have entered into consent decrees, they have been limited in time and scope.

The PD Constitutional Issues

Falling between these policy cases and typical damage suits are the lawsuits that involve the difficult balance between the constitutional rights of individuals on the one hand, and public safety, particularly in the aftermath of 9/11, on the other. In the Mayor's continued efforts to make this a safer City, while at the same time recognizing the constitutional rights of individuals, it has been our job to advise the Police Department on the requirements of the law, and to then defend it in the litigations that have been brought challenging the Department policies, such as police surveillance of political groups, bag searches of individuals entering the subways, and the rights of protestors at both the Republican National Convention and the Occupy Wall Street demonstrations.

For example, the random search of bags on the subways was sustained by the Second Circuit, and the Police Department's determination to adopt a "no summons" policy during the Republican Convention was recently upheld by the federal court. These issues, together with the "stop, question and frisk" and

other police polices that are now under attack, are not easy questions.

Torts and 1983 Damage Claims

The final category of cases we defend are damage suits.

Ten years ago, City payouts in settlements and judgments of tort, civil rights, and other damage cases totaled almost \$600 million. By contrast, in the fiscal year that just ended, that payout had declined 15 percent to slightly more than \$500 million. At the same time, the number of pending tort suits against the City has plummeted 60 percent, from over 43,000 cases in 2003 to just over 17,000 at the end of the last fiscal year.

We have achieved these results by approaching damage litigations against the City like a private litigant would. We make a concentrated effort to settle as many meritorious cases as we can at the earliest possible stage; studies show that early settlements of seemingly valid claims cost the defendant less in both payments and transactional costs and, contrary to some pundits, do not result in a spike of new filings. This approach has not only resulted in far earlier payments to those who in fact deserve compensation, but it has also allowed us both to devote our limited resources to making many more dispositive motions, the majority of which have been granted, and to spend our valuable person power in comprehensively trying those cases where we believe we should prevail or the plaintiff's settlement demands are unrealistic. In that connection we have increased substantially the number of federal civil rights cases we take to trial, with astonishing results – of the 43 federal cases tried to verdict in the last 18 months the City has prevailed in all but 8.

And speaking of resources, we increased our available lawyers' time in these damage litigations by forging partnerships with the private bar and law schools, who have supplied to us, on a pro bono basis, lawyers and law students. The resulting public/private partnership is consistent with the Mayor's priorities of forging such partnerships and also gives the participating law students and lawyers valuable hands-on experience.

Another way to reduce the damages the City pays out in tort cases is to reform New York's plaintiff-friendly tort laws. While, with one significant exception, the Mayor and I have been unsuccessful in persuading the State Legislature to make changes in those laws, we were able to persuade the City Council to enact a reform in the sidewalk law making the owners of most buildings, rather than the City, liable if someone is injured as a result of a defect in the sidewalk. The change has not only made the sidewalks safer -- landlords finally have an economic incentive to keep the sidewalks hazard free -- but the statutory revision has already saved the City about \$110 million and continues to save the City approximately \$35 million per year.

WTC Cases

No discussion of tort cases handled by the Bloomberg Administration would be complete without referencing the City's defense of the more than 10,000 individual cases brought against the City and its contractors by persons who participated in the clean up of Ground Zero following the events of 9/11. Although Congress had appropriated \$1 billion to create a Captive Insurance Company to protect the City and the contractors against such litigation, that insurance was far less than the multi-billion dollars of post 9/11 claims the City and its contractors faced. While many of the plaintiffs could be viewed as heroes – after all they alleged they had become ill because of World Trade Center dust while they were unselfishly working to clean up the area around Ground Zero – the City, believing that it was Osama Bin Laden, not New York City, that was responsible for plaintiffs' injuries, took an aggressive litigation approach, denying wrongful conduct and also arguing that it was immune from liability under applicable federal and state civil defense statutes.

At the same time, and recognizing that a government lawyer's obligations include trying to correct wrongs even if the government is not responsible for them, we lobbied the federal government to enact a new Victims Compensation Fund that would provide fair compensation to those who had become ill at Ground

Zero. After 10 years of extensive federal court litigation, we were able to reach a complex settlement with virtually all of the 10,000 plaintiffs and at the same time helped persuade Congress to create a second Victims Compensation Fund from which others who claimed injury could be compensated.

The Rule of Law

Before I conclude, let me offer a few comments about the ethical context in which the Law Department operates.

It is of course easy to say that as lawyers we must always act ethically and adhere to the Rules of Professional Conduct, even if client pressures may make that difficult. But it is not easy to tell any client, and certainly not the Mayor of the City of New York, that a particular proposed action is not only subject to legal attack, but is clearly illegal. However, the giving of such advice is an essential role of any legal advisor.

A vivid example of the conflict between a lawyer's ethical obligations and a client's wishes can be found in the dilemma we faced in 2005 when a State Supreme Court justice declared the New York Domestic Relations Law's then-ban on gay marriage unconstitutional, in a case where the Corporation Counsel's Office was defending the City Clerk's refusal to issue a marriage license to a gay couple. The Mayor, as I am sure you know, strongly favored the elimination of the gay marriage prohibition. So did I. But as the lawyer for the legal entity New York City, I had been sworn to uphold the laws of both the City and the State, and three other judges had upheld the gay marriage ban. I therefore believed it was my professional obligation to appeal the lower court's ruling of unconstitutionality and not to try, in my role of defending the City Clerk, to change the law. So we appealed, prevailing in the New York Court of Appeals by a 4-3 vote, notwithstanding the desires of the Mayor and arguably the citizens of New York City that the gay marriage ban be removed.

Conclusion

Serving as Corporation Counsel of this great City is both an honor and the greatest legal job imaginable. During the Bloomberg Administration we have tried to institute innovative affirmative litigations to effect change, lobby to change the tort laws and other unfunded state mandates, efficiently handle and aggressively defend damage suits, and to do our best not to allow the courts to control city policies and agencies. At the same time we have advised our clients – the City of New York, its agencies, and the Mayor -- of the requirements of the law, and defended them aggressively within the ethical limits of our profession.

I have no doubt that this two-day program looking at the legal approaches of the Bloomberg Administration will result in provocative discussion and constructive suggestions. I hope what I have said tonight offers a useful start to this debate.