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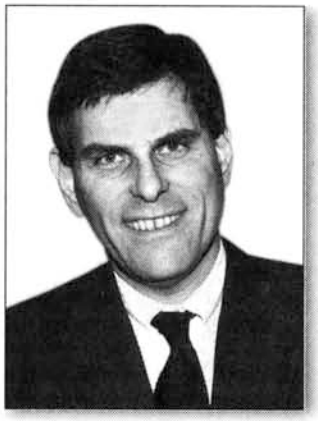
Defending Policy Initiatives



The general litigation division, with about two dozen lawyers,[1] has responsibility for defending cases that often receive intense public and judicial scrutiny, involving as they do the core policy determinations of city agencies.

These cases often raise issues concerning the city's administration of social services programs, foster care, health and mental health care services and education programs, as well as compliance with the Election Law and Freedom of Information Law. The division handles challenges to the city's delivery of social services through the Human Resources Administration that touch on such programs as public assistance, food stamps, Medicaid and workfare. Similarly, lawsuits against the city's Department of Education concern such issues as special education programs, bilingual education and the constitutionality of the use of school facilities by religious groups.

In addition to defending such lawsuits, division attorneys play an indispensable role in advising city officials on how to comply with court mandates or, in appropriate circumstances, how to seek to modify them, as well as to negotiate subsequent remedial orders.

I will describe here some of the most interesting matters handled by the general litigation division.

Homeless Litigation

One of the most persistent and important issues dealt with by the general litigation division is that of homelessness. Since 1979, the city has been a defendant in several major cases in state court concerning shelter and related services to homeless adults (*Callahan v. Carey* and *Eldredge v. Koch*) and to homeless families with children (*McCain v. Bloomberg, Lamboy v. Eggleston* and *Slade v. Bloomberg*).

The *Callahan* litigation, initiated in 1979, asked the court to find a right to shelter for homeless men under the New York State Constitution. That case was settled in 1981 by a consent decree in which the city agreed to provide shelter and board to homeless men. The decree prescribes numerous qualitative and quantitative standards governing shelter conditions. These standards largely mirror regulations subsequently promulgated by the state. The Appellate Division extended the coverage of the decree to homeless women. *Eldredge v. Koch,* 98 AD2d 675 (1st Dept. 1983). At the time the decree was entered, the city housed approximately 1,500 homeless men. The shelter system has since grown to approximately 7,750 single adults. Over the years, and particularly in the 1980s, there was considerable motion practice concerning the adequacy of shelter. More recently, however, *Callahan* has generated relatively little litigation as the city undertook major reforms in the system.

In 1983, the city was sued by homeless families with children in *McCain v. Koch* (now *McCain v. Bloomberg*). Like the *Callahan* plaintiffs, plaintiffs in this case sought, among other relief, a declaration that the New York Constitution and certain statutes provide a right to shelter. In 1986, the First Department granted plaintiffs a preliminary injunction holding that homeless families were entitled to shelter. *McCain v. Koch,* 117 AD2d 198 (1st Dept. 1986).

Unlike *Callahan,* which resulted in a settlement, *McCain* has been heavily litigated. Over the ensuing years, the New York Supreme Court has granted over 50 orders in *McCain* and its two related cases. These orders address a wide range of matters such as the conditions at the Emergency Assistance Unit, promptness of shelter placements, shelter conditions, medical priorities, eligibility procedures and contempt sanctions.

Between 2003 and 2005, the court, with the consent of the parties, appointed a special master panel that oversaw the homeless families litigation and afforded a respite from motion practice. The panel reviewed all aspects of the city's family shelter program and suggested a number of reforms that the city has adopted. At the same time, under Commissioner of Homeless Services Linda Gibbs, the city also introduced many innovations that have dramatically transformed and improved the system. Most recently, the court, at the urging of the city, declared that the city's proposed procedure for reapplicants to the shelter system did not violate previous orders of the court.

Civil Forfeiture, Driving While Intoxicated

One of the city's most scrutinized agencies, the Police Department, often implements innovative policy initiatives designed to protect the public safety. One of the more interesting cases handled by the division involves the Police Department policy, begun in 1999, to initiate civil forfeiture proceedings for motor vehicles whose drivers are arrested for driving while intoxicated. The department acted pursuant to its authority under New York City Administrative Code §14-140, which allows the Police Property Clerk to take custody of property used as an "instrumentality of a crime" and then dispose of it by means of a civil forfeiture proceeding. The purpose of this program was to deter drunken driving and its attendant fatalities and injuries.

Following the commencement of a class action lawsuit and request for preliminary injunctive relief by the Legal Aid Society, the division attorney assigned to the case successfully moved to dismiss the action for failure to state a claim.[2] However, on appeal, the U.S. Court of Appeals for the Second Circuit reversed the order of dismissal, finding the civil forfeiture program to be deficient in not providing prompt, post-deprivation hearings in which motorists could challenge the continued deten-

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tion of their cars pending the civil forfeiture process.[3]

On remand to the trial court, division lawyers, along with their colleagues from our administrative law, legal counsel and appeals divisions, worked closely with the Police Department to determine the most efficacious way of complying with the mandate to provide due process hearings. Ultimately, division lawyers convinced the trial court to enter an order in which these due processing hearings would be conducted under the auspices of the city's adjudicative agency, the Office of Administrative Trials and Hearings (OATH), rather than by judges of the Criminal Court, as urged by the plaintiff class. As a result, hundreds of motorists now seek resolution of their claims for the return of their cars from OATH administrative law judges, who have established procedures for the timely adjudication (or, in many cases, settlement) of these claims. Litigation continues in this case with regard to the constitutional adequacy of the adjudicatory procedures implemented by OATH.

Election Litigation

Another important function of the general litigation division is the defense of determinations made by the New York City Board of Elections. The Board of Elections is responsible for the supervision and conduct of elections and referenda held in New York City, including the receipt and verification of designating petitions for public and party office, the review and determination of objections to such petitions, and the preparation of official primary and general election ballots for use in the city.[4]

In every election cycle, various candidates and their supporters seek to have the board place their names on the ballot or remove an opponent's name for various reasons arguably permitted by the Election Law. After the board makes its determination, dissatisfied candidates and their supporters may challenge it in court. Under Election Law §16-100(1), "[t]he supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally." In light of the summary nature of these proceedings, each county of the Supreme Court designates a special election part, where a single judge will be assigned to hear and decide these challenges. Division lawyers appear to explain and defend the actions of the board, often on less than 24 hours notice. Litigants sometimes attempt to assert a federal constitutional claim in conjunction with the state claim asserting a violation of the Election Law. A federal judge must then determine if a board determination or a provision of the Election Law comports with constitutional standards, while at the same time maintaining deference to the manner in which the state of New York chooses to regulate its elections.

In *Soleil v. State of New York*, 04 Civ. 3247 (DGT), 2005 U.S. Dist. LEXIS 4441, a candidate seeking a state Senate seat challenged the Board of Election's invalidation of his nominating signatures, based on objections filed by two individual citizen objectors. The candidate and a supporting voter alleged that allowing citizen objectors to scrutinize the proffered nominating signatures—as opposed to a competing candidate—violated their civil rights under 42 USC §1983, their First Amendment right to free speech and their Fourteenth Amendment right to due process. They further alleged that this broad grant of standing to noncandidate voters, authorized by Election Law §6-154(2), was unconstitutionally broad and not reasonably suited to meet any compelling or legitimate state interest.[5]

In 'Soleil,' a candidate for the state Senate challenged the election board's invalidation of nominating signatures, based on objections by individual citizens.

The U.S. District Court for the Southern District of New York found that the challenged section was constitutionally sound, noting that a state's power to regulate elections is needed to ensure an orderly operation of the democratic process. The court found the state interest in this case—preventing fraud by ensuring that candidates demonstrate a significant modicum of support—is a compelling one, and it was taken pursuant to a legitimate regulatory interest.[6] Because its restriction on an individual's right of association was reasonable, nondiscriminatory and minimal, the court upheld the validity of the provision and the board's determination.

Consent Decree Litigation

Like other municipalities, over the last 35 years the city of New York has entered into negotiated consent decrees to settle lawsuits. A consent decree has the elements of both a contract and a judicial decree.[7] Such a decree "embodies an agreement of the parties" and is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees."[8] Consent decrees entered into in the 1970s and 1980s often contained very specific and detailed rules subject to judicial enforcement.

In recent years, city officials have become dissatisfied with this means of resolving disputes, since detailed consent decrees limit the discretion of government officials to a degree that often stifles worthwhile initiatives and improvements. As a result, division lawyers have been active in seeking to scale back certain consent decrees in the areas of education, law enforcement and public assistance, and, in those instances where the facts require that the city not oppose entry of a consent decree, negotiating a far more limited set of obligations than has been the norm in the past, thereby allowing the city's elected and appointed officials, rather than judges, monitors and litigants, to develop programs and policies that comport with applicable legal standards.[9]

Presently, division lawyers are grappling with one of the oldest cases and consent decrees in the Southern District of New York, *Benjamin v. Malcolm*,[10] and a series of related cases.[11]

Benjamin was brought on behalf of a class of pretrial detainees who challenged various conditions of confinement on Rikers Island and other city jails. In 1979, the city entered into a 52-page consent decree that covered 30 substantive categories, including such items as the type of jewelry that inmates could wear, the amount of towels and linen they could receive per week, and the same-day provision of newspapers in English and Spanish. In 1995, the city, initially through this office's affirmative litigation division, moved for termination under the Prison Litigation Reform Act of 1995 (PLRA).[12] Section 3626(b)(2) of the PLRA provided that any prospective relief that was ordered before the enactment of the PLRA—such as the *Benjamin* decree—will be immediately terminated if the relief was approved or granted in the absence of a finding by the court that the relief was narrowly drawn, extended no further than necessary to correct the violation of a federal right and was the least-intrusive means necessary to correct the violation of that right.[13]

After a series of fact-finding hearings, the U.S. District Court for the Southern District of New York terminated a majority of the provisions of the original consent decree. The remaining areas—concerning attorney visitation rights, the use of restraints on inmates and certain environmental conditions found to be of constitutional dimension—have been the subject of efforts by general litigation division lawyers, working in conjunction with agency officials and their in-house counsel, as well as a court-appointed monitor, to help the Department of Corrections comply entirely with constitutional standards, thus setting the stage for termination of the remaining provisions.

Conclusion

In today's litigious world, few significant government policy determinations will escape judicial scrutiny. When a lawsuit is commenced, lawyers from the general litigation division will be the city's first line of defense in evaluating the merits of that challenge and also resolving it, whether it be by litigation or negotiation.

1. The division was in the past one of the largest in the law department. However, in recent years, separate divisions handling the defense of §1983 lawsuits and employment and labor litigation have been created out of the general litigation division.
2. *Krimstock v. Safir*, 99 Civ. 12041 (MBM), 2000 U.S. Dist. LEXIS 16444 (SDNY 2000).
3. *Krimstock v. Kelly*, 306 F3d 40 (2d Cir. 2002), cert denied, —US—, 123 SCt 2640 (2003).
4. See N.Y.S. Constitution, Art. 2, §8.
5. *Soleil*, 2005 U.S. Dist. LEXIS 4441 *2.
6. Id. at *16-19.
7. *Firefighters v. Cleveland*, 478 US 501, 519, —SCt— (196).
8. *Rufo v. Inmates of Suffolk County Jail*, 502 US 367, 378, —SCt— (1992).
9. For a full and thoughtful consideration of this topic, see Ross Sandler and David Schoenbrod, "Democracy by Decree," Yale University Press, 2003.
10. *Benjamin v. Malcolm*, 75 Civ. 3703 (HB).
11. The six related cases are: *Forts v. Malcolm*, 426 FSupp 464 (1977), *Ambrose v. Malcolm*, 76 Civ. 190, *Maldonado v. Ciuros*, 76 Civ. 2854, *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, 79 Civ. 4913, *Detainees of the Queens House of Detention for Men v. Malcolm*, 79 Civ. 4914, *Rosenthal v. Malcolm*, 74 Civ. 4854.
12. PubLNo 104-134, 110 StCt 1321, §§801-810 (Apr. 26, 1998).
13. 18 USC §§3626 (b)(2); 3626 (a)(1)(A).

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