**International Municipal Lawyers Association**
**2014 Annual Conference**
**Baltimore, Maryland**

# Litigating for the City

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*I am indebted for the substantial contributions made to this essay by my extraordinary senior counsel, Ariel Levinson-Waldman, and a staff attorney in our Office of the Solicitor General, Rebecca Kohn.

My four years as Attorney General for the District of Columbia (a position that for over a century was called the Corporation Counsel), as well as my interactions during that time with corporation counsel for other cities, have given me some perspective on the partially overlapping, partially unique, and always interesting challenges of representing the city that is the nation's capital.

Attorneys litigating on behalf of any city in this country are typically responsible for a broad range of litigation. Like most cities' public law offices, we in the District of Columbia handle defensive litigation brought by private parties such as tort, contract and constitutional suits, and employment lawsuits; affirmative litigation to recoup monies owed to the city, to prevent consumer fraud and to protect against mismanagement or worse in the operation of non-profits established in our city; and occasional litigation, both defensive and offensive, against the federal government.

In the District, we also face some unique challenges, owing both to the city's constitutional status as a creature of Congress and to the fact that we are in the city that is the seat of the national government. In this short essay, I will discuss some key issues that all municipal corporation counsel must face, and how those have played out in the District: defining the client, dealing with conflicts issues, ethical obligations that arise when the legislature passes an invalid law, litigating against constituents, deciding on settlements and who has final settlement authority and choosing the litigation forum. I will close by discussing several aspects of the District's legal work that are unique, including the state government aspects of our docket and the upcoming transition from an appointed to an elected Chief Legal Officer in our city.

## Who Is The Client?

As lawyers, we owe the duties of both undivided loyalty and confidentiality to our clients. For the city attorney who represents a public entity the question often arises, "Who is the client?" This can be a harder question to answer than it may first seem. Some say that the client is the Mayor. Some say that the client is the public. In my view, the overriding client interest in the municipal lawyer's work is always that of the city overall, embodied by the corporation that is the city's legal form. The lawyer's first obligation is the government entity itself, and the lawyer's job is not simply to advocate on behalf of, or protect the interests of, individual members of the executive or legislative branch. However, even though the lawyer must ultimately be advancing the interests of the municipality, a lawyer may sometimes represent the mayor,

agencies, and agency directors in particular matters, depending on such factors as who is seeking legal advice and/or who has been sued. It is also sometimes difficult to protect the confidentiality of attorney-client communications. In an age of transparency, accountability and broad Freedom of Information statutes, public pressure can sometimes mount for disclosure of protected, confidential communications. A city attorney must make sure the client, who holds the privilege, recognizes the importance of the privilege and the interests it serves for future privileged communications before yielding to that pressure.

**Dealing with Conflicts of Interest and the Legislature**

The issue of who is the client can become more complex because the city council conducts oversight and influences the funding and resources of the corporation counsel's office. Sometimes the city lawyer is the city council's lawyer, sometimes the city council passes laws that the city lawyer has to defend in litigation and occasionally the city council is in conflict with or even sues the executive office, which the city attorney represents. In these individual situations, the city's counsel must at the outset have a clear-eyed understanding of who the client is, must communicate that to the officials involved, and must be careful to avoid representing multiple parts of the government where one is in conflict with another.

A municipal lawyer may face several different types of conflicts. There are three basic types. First, attorney-client conflicts occur when the personal or professional interests of the municipal attorney conflict with those of the municipal agency client. This conflict can occur when, for example, the municipal attorney and agency disagree on the substantive legal issues involved in a matter. This may come up when the agency client and attorney differ on whether to bring suit, or the attorney advises the agency against a course of action that the agency is determined to pursue. A municipal attorney may advise an agency against a course of action because of a belief that the action is beyond the scope of the agency's authority or be contrary to the general public interest. If such action is challenged in litigation, the agency may be required to obtain outside counsel.

Second, concurrent conflicts can occur when the interests of two municipal agencies conflict. They need not involve a direct lawsuit between agencies, but more typically occur when the interest of one agency client is in conflict, or has the potential to come into conflict, with that of another agency client. These conflicts can also occur when the municipal attorney's office is requested to represent an agency and an agency's employee in litigation when they would normally be on the same side. In such cases, the agency may have an interest in raising defenses that would leave the employee exposed to personal liability, or would deprive the employee of his right to indemnification or

municipal representation (for example, the city might want to argue that the agency employee acted without authorization).

Third, sequential conflicts (also referred to as former client conflicts) occur when the interests of a former agency client of the attorney conflict with those of a present agency client. Conflicts can also arise when the Executive Office is fractured, such as in the District of Columbia with a Mayor and an independent Chief Financial Officer, or as in many West Coast cities and as we will soon have in the District -- an elected Mayor and a separately elected Chief Legal Officer.

In all of these situations, just as in private practice, our professional obligations require that we identify potential and actual conflicts and that where a conflict comes up, we allow the clients to meaningfully weigh in on it so that they know if they can waive it and can make an informed choice about whether to do so. Generally, the practice in my office has as a prudential matter have been to line up private counsel, often on a pro bono basis, where we see a likely or actual conflict so that there is no question that our clients are getting the appropriately focused loyalty owed in a given matter.

**Ethical Obligations**

The ethical and legal obligations of a government lawyer are many, and this is no less the case with municipal lawyers. Some frequent ethical questions that arise are: Are there independent ethical obligations that temper the government attorney's role as a vigorous advocate for the governmental entity? Does the city's government lawyer have an independent obligation to "do justice" by virtue of his or her official position that limits the zeal with which the governmental lawyer can pursue litigation on behalf of a government entity? What obligations does a government lawyer have to protect the long term institutional interests of the governmental entity when those interests arguably conflict with the short term policy goals of the present Chief Executive or incoming Mayor-elect? What are your overriding factors in a settlement (maximizing and protecting the city's treasury or the notion of equity)? All of these issues have to dealt with and navigated in real-world, practical settings.

Another ethical obligation may arise when a government lawyer is faced with a challenge to an arguably illegal law. Generally, as government lawyers, it is our obligation to defend the validity of laws passed by the legislature against challenge. However, where those laws are patently unlawful, particularly if they place government officials at risk as a result, the calculus changes. This issue arose recently in the District when the Council sued our Mayor and Chief Financial Officer, demanding that they enforce a statute that bestowed budget autonomy to the District at the expense of the Congress and the President. My

office had opined that this local law violates the Home Rule Charter under which we operate and other federal law, including a federal law with criminal penalties that could be imposed by the federal government on officials carrying out the law. As a result, the Mayor and the independent CFO had advised the Council they would not implement the statute. Our city council sued, demanding enforcement of this statute. Our office represented the Mayor and CFO, along with eminent outside counsel. The Council was represented by well-respected outside counsel The federal district court evaluating the matter on the merits held for the Mayor and CFO, finding, as we had argued, that the statute is unlawful, in violation of the Home Rule Charter and other federal law, and enjoining its implementation. The Council has taken an appeal to the U.S. Court of Appeals for the D.C. Circuit, where the matter is pending and will be argued next month.

**Litigating Against Constituents**

City attorneys often have to litigate against their constituents, who often sue the city or its officials for one reason or another. When defending against claims for damages or injunctive relief, city attorneys must decide how hard to fight against what may appear to be meritorious claims and what legal issues to rise. These can be difficult decisions. For example, we had a case recently in the District where a patient sued a District hospital obstetrician for alleged medical malpractice occurring more than 20 years earlier, claiming that he failed to provide her with adequate prenatal care and that as a result her son suffered premature birth and permanent severe disability. The now adult son is completely unable to care for himself. These are obviously very sympathetic facts. Yet, given the prejudice to the city from the undue delay in bringing suit, including the loss of records and a stroke suffered by the doctor affecting his memory, we filed a pre-trial motion arguing that the suit against our client, the doctor, should be barred by the equitable defense of laches. We did not prevail. These types of judgment calls, particularly in sympathetic situations covered by the press or scrutinized by the city council, require careful consideration about what is in the city's overall interest and what is fair.

The question of fairness in litigation with constituents is also presented in settlement evaluations. There are different schools of thought on this topic. Some say that our duty to the city is simply to minimize any recovery against the city's treasury, no more no less. I have a different view. In settlements, I believe a necessary part of the calculus of what is best for the city is that the settlement be fair, *i.e.*, be in promotion of a just outcome in the city. For example, we had a case in the District where a mother previously served by our child and family services agency murdered her children. A father of one of the children and some of the grandparents sued the city and, though they had legal standing, they had done little to help the children when they were alive and lacked considerable equities. It was plainly opportunistic of them to sue, and even though on the sympathetic facts, they were likely to receive a substantial jury verdict, it was not

clear how constructively the plaintiffs were likely to use the award. We negotiated a settlement where we insisted that a sizeable portion of the funds would be donated to a charity that protects abused and neglected children, another large part of the money would be put in trusts for surviving children of those family members, and the father and grandparents would receive the remainder.

Who has the authority to settle litigation is another issue peculiar to city council. Different cities handle it in different ways. In some places, the settlement must go before the city council for review. This makes preserving the attorney-client privilege very difficult, particularly if the city attorney has to provide a candid assessment of the potential liability and if the proposed settlement is not approved. In other cities, including the District, the Mayor has ultimate authority, but has delegated this responsibility to the city attorney, up to certain threshold amounts. This makes sense because the Mayor is responsible for the fiscal integrity of the city and has an overall view of the financial condition and needs of the city. But where non-financial concerns are involved, such as whether to press ahead with a case, that could be settled, but where it is important to establish a legal principle, it makes sense for the city attorney to have a definitive say. In the District, the Attorney General must make the legal judgments in litigations. Where there is a disagreement between our office and an agency director about what issues to raise or whether to continue with a litigation that can be settled, the Attorney General's views usually prevail unless the agency director takes the matter to the Mayor and the Mayor is not persuaded by the Attorney General's views. Fortunately, that has not occurred during my tenure. One issue that a city attorney has to consider that may not always be paramount with agency directors is the credibility with the courts of the position that the city is taking. Agency directors may wish to raise far-fetched positions or persist in litigation for vindication where the matter can be settled reasonably, but city attorneys, who are institutional litigants and frequently appear in the same courts, have to insure that the positions they take have credibility for the long-term benefit of the city.

Another critical type of settlement is the consent decree in class actions seeking to reform the ways in which the city provides services. When we entered office, we were faced with seven such decrees, pursuant to which the courts, predominantly the federal courts, were monitoring the manner in which the city was providing such basic services as the juvenile corrections system, the transportation to school of special needs children, the commitment and treatment of the mentally disabled and the care of abused and neglected children. Some of these had been in effect for almost 40 years. Fortunately, we have had success in exiting from a number of these cases, and we have not negotiated any new ones during our tenure. These types of arrangements are costly and undemocratic, as they give the power of elected officials over to the courts and these matters take on a life of their own, saddling future generations with terms and conditions, including financial commitments that are often not part of the law enacted by

legislatures which are in turn controlled by the citizenry. Obviously, the terms of such settlements need to be approved by the policy makers in a jurisdiction, such as the Mayor who can both insure compliance and budget accordingly.

**Forum Selection**

Another issue that city lawyers in litigation, like those in private practice, must always consider is the selection of forum. Even where a case is filed in state court, an initial question government attorneys must ask themselves is "is there federal Jurisdiction?" The right to remove a case to federal court is statutory and is generally available where there is a federal legal question or where the amount in controversy exceeds $75,000 and the suit is between citizens of different states. If federal jurisdiction is feasible, we must decide in which court the city interests will be best protects. There is clearly a presumption to remain in the local courts, but that presumption can be overcome by exceptional circumstances.

Several factors should be analyzed when making this determination. These include the particular judge, counsel, and jury pool involved. Depending on the jurisdiction at issue or the case involved, a judge may already be assigned to a matter or a certain judge or judges may be likely. Information about the prospective judge's experience, demeanor and political inclinations may be perceived as advantageous to one party over another. Different judges may be more knowledgeable than others or have more expertise with particular legal issues or concerning complex cases.

Knowledge of the adversary may also impact an attorney's decision to be in state over federal court. Some questions to consider in this calculus are: Does the adversary regularly practice in the state court? Is he or she well-known or respected in the court? Would he or she be at a disadvantage with a lack of familiarity with federal court practice? If the case will be tried to a jury, it is important to consider the demographics of the potential jury pool. Will an action proceeding in one court be likely to pool jurors more favorable to plaintiff or defendant? What are the differences between voir dire in the state and federal court? Will you or your opponent benefit from a lengthy or in depth voir dire process?

Other factors may also come into play. For example, if the city is the plaintiff and its claim is based on federal law, it may make sense to bring the claim in federal court because the federal judges and their law clerks may very well have experience with the particular federal law at issue. State court judges and clerks may not be as familiar with the federal law at issue. Complexity of the case is important because complex cases are better suited for federal court

because a single judge will oversee the entire case from start to finish and gain an appreciation of its nuances. This is also true for the judge's clerks who will be responsible for researching legal issues and preparing draft opinions. Often in state courts, different judges will preside over different parts of your case. The lack of continuity from judge to judge can be inefficient and unhelpful to your case.

Another difference is that federal courts, at least in the District, appear more likely to grant motions for summary judgment than our local courts, though practices vary from judge to judge. In local courts, an adverse party may have a better chance of convincing a judge that, even if the law is clear, important facts are still in dispute and summary judgment should therefore be denied or deferred. In federal court, judges are more likely to disregard immaterial facts that are not truly important to the dispute and grant summary judgment based on the relevant legal principles. Thus, federal court may be seen as a more favorable forum for parties with strong, technical legal claims or defenses, and local courts may be a more favorable forum for parties with weaker legal claims or defenses but sympathetic facts.

All these factors may play into the decision by city litigation counsel about whether in a given matter to seek removal to federal court, a decision that in my office we are confronted with frequently and in close cases one that we make only after careful consideration.

**Litigation against the United States**

On occasion, cities have a legal issue in tandem with or adverse to the federal government, which is generally represented by the U.S. Department of Justice, the largest law firm in the world and one with great talent and resources. Due to our location, we in the District of Columbia have perhaps a higher incidence of these types of disputes. Like other cities, we have been sued by the Department of Justice when a federal agency believes that our services or actions are not in accord with federal law, such as the Olmstead Act for those confined in nursing homes, mental hospitals or correctional institutions. We have also had occasion to sue the federal government. We are currently involved in a notable litigation against the federal government in a case involving the Davis-Bacon Act, a Depression era labor law statute that imposes higher wage costs on public works projects carried out by the federal or District government. The dispute involves whether a certain large (over three quarter of a billion dollar) privately financed, privately constructed real estate development project carried out on land leased by the District in the city's downtown is subject to the statute. Due to a determination by the Department of Labor that the project was a "public work," with a suggestion that the city was liable for the $20 million differential between

the wages paid by the developer and the prevailing union wages, the District was forced to sue to overturn that decision. If the Department of Labor's position had been sustained, it would have cost the District hundreds of millions of dollars in connection with other similar projects. The District was awarded summary judgment in federal district court, which found as a matter of law that this private project was not a public work. The federal government has filed an appeal and our Solicitor General's office, which has considerable experience in both appellate courts where our cases are heard, will handle the appeal for the District.

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I have thus far mentioned issues common to most city corporation counsel offices. I will close by noting two fairly unique aspects of the District's legal work: our matters arising out of our client's state government responsibilities, and the method of selecting our Chief Legal Officer.

**Litigation Docket**

As noted at the outset, due to the unique status of the District of Columbia, which as a result of legislation passed by Congress four decades ago involves aspects of state, county and city government functions, the legal work conducted by the District's legal office also reflects state or county functions. Thus, for example, in addition to the types of cases mentioned above, we handle child support services cases; wrongful imprisonment cases arising out of federal prosecutions; agency litigation when appealed to our state-level Supreme Court, the D.C. Court of Appeals, and we represent the Board of Elections in election-related controversies. We also handle all juvenile criminal prosecutions, including serious matters such as murder, rape, and armed robbery. We also handle certain adult misdemeanors, including impaired driving offenses and gun control violations. (In the District, as a result of Congressional legislation, all adult felonies and many serious misdemeanors are handled by the United States Attorney's office in both our local and federal courts.)

We deal with a number of statutes unique to the District of Columbia, such as the First Choice Law. That law calls for District contractors who receive D.C. financing to give hiring preferences to District residents unless certain demonstrations can be made of unavailability of sufficiently skilled workers. This law was passed as a response to the unique structural deficit in the District's economy, one created by Congress's ban on the District's being able to tax commuters, a tax revenue source for virtually every state level government... Litigation over this statute raises the interesting question of whether the Privileges and Immunities clause of the U.S. Constitution applies to the District, since that clause applies only to states and the District is not a state, even though it is defined as one in many federal statutes.

The District of Columbia is also unique with respect to its wrongful conviction lawsuits because, as a result of a city council statute, federal prisoners can sue the District for wrongful imprisonment arising out of violations of D.C. criminal code violations, even where the prisoners were prosecuted by federal prosecutors and investigated by the FBI. Even when the investigation is faulty due to an error by the FBI, such as faulty forensics, the District has an obligation, under that statute, to defend against the suit and pay damages as determined by a local judge, a problem that has come into sharp relief recently as the FBI through its forensic review uncovers evidence of wrongful convictions that go back decades.

To give one example of our state level work in the public interest, our regulation of non-profits, a state-like statutory obligation that we have, recently led us to investigate and file suit against a public charter school that has been paying executives more than $13 million in so-called management fees over the last decades, including in years when the purported management work was largely performed by employees of the school. Similarly, several years ago, when we learned through our non-profit investigations work of an improper diversion of city funds by a sitting city council member from a non-profit that he had arranged to receive an earmark intended for youth baseball, we brought civil suit and secured a civil court judgment, leading eventually to the federal criminal prosecution and resignation of the councilman, as well as to ethics reform in our city. Like many state attorneys general, we have parens patriae responsibility to our citizens to be sure they are treated fairly .On that basis and under our statutes, we have brought consumer protection cases. We also appear in CY press proceedings to insure that trusts created in the District are being carried out consistent with the intent of their creators. We are currently involved in one highly publicized matter where we are endeavoring to insure that the Corcoran Gallery of Art, which was established in the late 19th century but which is currently in financial difficulties, is able, with the assistance of the George Washington University and the National Gallery, to remain in its historic building in the city, to continue its prestigious art school, and to exhibit its collection of art in the District.

**An Elected Chief Legal Officer**

Finally, let me note also a major transition coming up in our method of selection of the city's chief legal officer, one that will make us like most states but unlike most cities, at least in the East and Mid-West. In most of those cities, the chief legal officer is appointed by the Mayor, as has been the case in the District for nearly two centuries. In California and some other Western states, the city's lead lawyer is elected. The separate election process has led to some high-profile fights, such as the recent one in San Diego between its elected City Attorney and the separately elected Mayor. District voters in 2010 (prior to my arrival)

approved a charter amendment that for the first time made the attorney general's office an elected position. Though there has been considerable legal debate (and litigation) about when that election was required to be held, our local Court of Appeals, this past June, held that the Charter Amendment requires that the election be held in calendar year 2014.

The election will be held in November 2014 and the winning candidate will take office in early January, 2015, the same day that the city inaugurates a new Mayor. At my direction, our office has done a great deal to prepare for as smooth as possible a transition in January when we have for the first time an elected Chief Legal Officer. One of the major changes that the city council, at our urging, made in preparation for an elected Attorney General is to transfer the reporting lines for general counsel of agencies that are under the control of the Mayor, such as the police and fire departments and the public school system. Currently, under an appointed Attorney General, all such agency counsel report directly to the Attorney General with dotted line responsibilities to agency heads. Under the elected Attorney General, these counsel will report directly to the agency directors who in turn report to the Mayor. This is designed to insure that the elected Attorney General, who may harbor other higher political ambitions, will not be in a position to impede a Mayor's agenda. Of course, the elected Attorney General's office will continue to handle all of the litigation for the city's agencies and will render authoritative legal opinions for the city, its Mayor and its agencies.

It is my hope that under our future elected Chief Legal Officer in the city, when dealing with the raft of the kinds of issues I have outlined here, the legal office will continue to be guided, as so many city law offices are now, by the lodestar of what is best for the city's institutional interests and what the law requires, and not be swayed by political factors.