

Oral History of Mark Tuohey
Eighth Interview
December 11, 2018

This interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit. This is the eighth session of the oral history of Mark Tuohey. Bill Marmon is the interviewer.

Mr. Marmon: Civil Servant with the Mayor's Office in Washington, DC

Mr. Tuohey: Prior to 2010, the Attorney General of the District of Columbia reported to the DC Mayor. The Attorney General oversaw all legal affairs of the District, including representation of the District in lawsuits filed by private parties and other entities and oversight of the Agency Counsel, who were designated as Assistant Attorneys General. The AG staff, including all Agency lawyers were subordinate to the Mayor in every respect. The Attorney General provided legal advice to the Mayor on all matters and was subordinate to the Mayor. In 2010, the Council of the District of Columbia enacted the Attorney General for the District of Columbia Clarification and Elected Term and Amendment Act of 2010. It amended the District of Columbia Home Rule Act to establish the Attorney General for the District of Columbia as an elected position, independent of the Mayor. In that capacity, the AG has the charge of the conduct of law business of the District and all suits instituted by and against the government. The AG shall furnish legal opinions in writing to the Mayor and Council when requested to do so. After the enactment of the Independent Attorney General legislation, it became clear to the Council that it was necessary for the Mayor to have her own legal counsel to advise on legal issues, and to transfer control of agency counsel from the OAG to the client agencies, and ultimately to the Mayor,

to whom agencies were subordinate. This legislation eliminated the OAG supervisory and coordinating role over those attorneys, and transferred the responsibility for supervision and coordination of the Agency Counsel to a new office – the Mayor’s Office of Legal Counsel (MOLC), which was created by the same law. The Mayor asked me to undertake the role as the first Director of the Mayor’s Office of Legal Counsel when her administration began in January, 2015. The stated purposes of the MOLC are: coordination of hiring, compensation, training and resolution of all personnel related issues for subordinated agency counsel; the provisions of legal and policy advice to the Mayor and executive branch agencies; resolution of inter-agency legal issues for the Mayor; oversight of the agencies in investigative matters before the executive branch of the government congress for the Council of the District of Columbia; and the supervision of outside counsel in matters when the OAG is recused from a matter. The defined duties of the MOLC are inclusive, rather than exclusive, and are read broadly to encompass certain duties and authorities traditionally employed by the OAG, but which are necessary to the execution of duties of the executive branch. Beyond these explicitly defined duties, on a regular basis, the MOLC is responsible for mediating disputes in questions of law arising between agency counsel, supervising agency counsel through the respective agency general counsel, providing legal advice on all sorts of matters to the Mayor and agencies, and working with the Office of Attorney General to provide legal sufficiency reviews for legislation. The office is headed by a Director appointed by the Mayor and serves at the pleasure of the Mayor. During my term as MOLC

Director, the office consisted of a Deputy Director, Ron Ross (a superb attorney who has succeeded me as Director), three senior staff attorneys, two associate attorneys, a Chief of Staff and an office administrative assistant.

Mr. Marmon: How did you get involved?

Mr. Tuohey: After the Mayor was elected in late November of 2014, I received a call to come over and meet with her on a particular matter. I knew the Mayor, as she was my councilmember years before she ran and was elected as Mayor. When I met with her in late November, she asked for my assistance with resolving an issue that had been decided by the Gray administration regarding land allocation for the yet to be constructed new soccer stadium across from the baseball stadium on South Capitol Street. The Mayor asked me to assist because I had overseen the land transfers and construction of the Nationals stadium in my capacity as Chair of the Sports and Entertainment Commission. The Mayor-Elect and Council Chair, Phil Mendelson, were both opposed to the land swap that the Gray administration had devised with the Akridge Development Company, in which Akridge would convey its land on 1st Street, SW (which was one of several partials needed for the soccer stadium) in exchange for the transfer of the Reeves Center property at 14th and U Street, NW (the uptown headquarters for DC government.) Bowser and Mendelson were opposed and wanted me to help resolve the issue with Akridge. I agreed to assist. I met with Akridge Development Company's leadership, who were very unhappy with the change in the agreement they made with Mayor Gray, although it had not been formally approved. Since the resolution required Council approval, and would require the approval of the new mayor, I explained to the

Akridge leadership that the Mayor-Elect and Council Chair were not prepared to support it. Akridge did not agree to resolve it, and I conveyed to Akridge that if they did not agree to a substitute transaction, the city would exercise eminent domain and take title to the 1st Street property, which it later did. Akridge challenged the eminent domain, which involved the amount money the District would have to pay. (The Court valuation awarded Akridge an additional \$10 Million in 2018). The transaction led to the overall development and use of that property, including negotiations with the owners of DC United to build the stadium, which was completed in 2018. After initial discussions and meetings with the Mayor and Akridge, the matter was set down for longer term negotiations, which occurred over the next two years.

The Mayor was preparing for her inauguration on January 1, 2015. Between Christmas and the Inauguration, I invited the Mayor to lunch to discuss ways in which the Bar could assist her administration. I told her I would be happy to assist the administration and bring lawyers to assist in whatever ways would be helpful to the Mayor. Since I had served as the President of the DC Bar, I had access to many lawyers throughout the city. The Mayor listened and said she had different plans. She wanted me to come into her administration as Chief Counsel and Director of the MOLC. I was not prepared to leave private practice at that point, but told her I would think about it. As the job description became clearer in my mind, and after discussions with several people, I decided to rethink my view. Overseeing the Agency Counsel and providing legal advice to the Mayor on a host of issues became more appealing and presented a challenge. The experience

would involve legal advice and supervision over many issues - the environment, education, transportation, Metro, economic development, health, policing, homeland security, among others. The job required common sense and judgment, and I thought it would be interesting for a few years, so I accepted the position in late January, 2015.

Mr. Marmon: Did you leave the firm formally?

Mr. Tuohey: I advised Brown Rudnick that I was prepared to accept the position, and I retired again. I was blessed with a great deputy, Ron Ross, who was an experienced senior partner at Troutman Sanders, and had been a good friend for years. We served on the Sports Commission together 2003-2006. We hired three very able and experienced lawyers. Later, we brought in two interns who were in their last year at GW, and stayed on as associates.

The Mayor offered me a very capable person, Tatiana Torres, to serve as our chief staff, and she helped us organize the office and get moving. One of the early and somewhat enduring issues that occurred throughout much of my three-and-a-half-year tenure was developing and cultivating the relationship with the Office of the Attorney General. Karl Racine, an old friend and a person I had supported, had been elected AG in 2015 as first independent Attorney General. Before Karl announced his intention to run, I had been approached by several lawyers and judges to run for AG, in view of my background. I considered the opportunity, but when I learned Karl Racine, twenty years younger, was interested, I declined to run and supported Karl. When I later decided to accept the Mayor's offer, Karl and I sat down and discussed the relationships between the offices. The

discussions between OAG and MOLC were ongoing over the next few years. We focused on areas of disagreement. Since OAG wanted to continue its relationship and oversight of Agency Counsel, I emphasized to Karl that his predecessor, Irvin Nathan, who was the last appointed AG, had initiated the move to create the MOLC to deal with the reality of subordination. The elected AG was no longer subordinate to the Mayor, but the agencies were. Therefore, the mechanism of MOLC had to be established. There were issues about jurisdiction of legal opinions – on that issue, I agreed with OAG. OAG had the clear responsibility for issuing legal opinions on any issue, the MOLC office did not. I disagreed with the Mayor and her senior advisors (I was one of the four reporting directly to her), and she ultimately agreed. That debate went on for a while. Overall, the relationship with Karl and his staff was very productive for me and MOLC, although it was a constant battle with some of the Mayor's political advisors who felt Racine was a threat to the Mayor and potential competitor. I thought it was nonsense and still do.

The issues I dealt with were interesting and varied. One of the first issues was assisting in the conduct of the investigation of the Metro fire at the L'Enfant Plaza station in 2015 that took the life of an elderly DC resident, and the negligence of the Metro engineers. In that work, I determined that the EMS and fire department workers were absolutely professional and consistent with their responsibilities. It was a failure of proper maintenance (way too much maintenance was deferred over the years when Metro was not being well run as it is now) and the failure of communication mechanisms underground with fire and rescue above ground. I

prepared witnesses for the National Transportation Safety Board hearings and helped oversee the resolution of that investigation from the District's perspective. Related to that, was the long overdue decision to replace the then fire Chief and select a new one. I was involved in the interviews and recommendations of new fire chief candidates to the Mayor. Gregory Dean, the Fire Chief in Seattle, who was hired, and he has done a good job organizing fire and EMS infrastructure. I was also involved in the investigation of the tragic death of a child in NW Washington, in which a housekeeper's negligence in giving a child a grape causing the child to choke, and the failure of a fireman at the Warren Street firehouse to properly direct the engine to the correct address, resulted in the child not being reached in time and suffocating.

Finally, in connection with fire and EMS, Ron Ross and I spent three months successfully negotiating a labor agreement with the fire union over the issue of over-time pay, an issue that laid dormant for years. We were able to successfully resolve it by working with the outside counsel for the union and union leaders. On the issue of policing, I had been involved in the private sector representing former Chief Ramsey in the Pershing Park litigation (which I previously discussed), and later serving as an informal advisor to Chief Ramsey and his successor, Cathy Lanier. When Lanier announced her retirement as Chief to become the Security Director of the National Football League, a new search process began to select a new chief. I was one of two to three people interviewing candidates and advising the Mayor on the process of selection. I strongly recommended that the Mayor appoint Peter Newsham as the next chief of police.

It was the right selection notwithstanding allegations that surfaced about prior incidents with family issues. I investigated those incidents and concluded there was no factual basis, and that Newsham was a superb choice to become our next Chief. History has proved me right. During my time with the Mayor, I worked with Pete Newsham on many issues involving the police department.

A time-consuming matter Ron Ross and I handled together in 2016 was the procurement decisions conducted by the Department of General Services for the St. Elizabeth's infrastructure improvements and construction management services for infrastructure work in connection with the DC United soccer stadium. These procurement issues came to the fore over the processes involved in selection of successful contractors. There were a series of objections, at least one formal protest and the engagement of various members of the Council by the unsuccessful contractors. In this process, the Director at Department of General Services resigned, several employees at DGS were disciplined and Councilmember Mary Cheh initiated an investigation involving testimony from several witnesses resulting in a dispute between her and the Mayor. Ron Ross and I handled the matter which lasted three to four months. We marshalled the evidence, prepared the witnesses, negotiated with Councilmember Mary Cheh and her staff, and the presented evidence. The matter ended with a report by Councilmember Cheh, which criticized the oversight of the Department of General Services and the discipline of employees. In my opinion, DGS and the City Administrator handled the matter properly. The employees should have been disciplined (they resigned). Councilmember Cheh's report was at best,

incomplete, and at worst, incorrect. The procurement decisions did not change. The scoring methodology utilized in those procurements have been amended and adjusted to eliminate any nuanced decision making and to ensure transparency. Again, in connection with the DGS investigation, I advised the Mayor on the review of Mayor's orders. Before those orders are published, the OAG Office of Legal Counsel, having proper jurisdiction, reviews Mayor's orders for legal sufficiency. Our office would get involved from time to time assisting in that process.

A major responsibility involved personnel matters. That included the ongoing training of agency lawyers by the MOLC, as well as coordination with the Office of the Attorney General's training program. We ensured a comprehensive year-round training program of agency lawyers including monthly meetings with agency council and outside and internal speakers discussing a host of topics that

would apply across the board. It was an important part of our work. For six months Ron Ross and I negotiated the new labor agreement with the city's lawyers. It involved getting into the weeds on a host of issues.

Mr. Marmon: How many lawyers were involved?

Mr. Tuohey: There were about 400 lawyers in the city - 200 in the Attorney General's Office / 200 in the Agency. All were represented at the table. We successfully concluded the negotiation in late 2017 working in conjunction with the Office of Labor Relations and Collective Bargaining. On the other side of the table were five representatives from the Lawyers Union including all lawyers working for the government other than supervisors.

Other issues that took considerable time involving personnel included the Department of Insurance Securities and Banking and a number of lawyers that we recommended join that department; the selection of the General Counsel at a number of agencies during that time; the determination of the proper turf for recreation and athletic fields in the city's public schools, an issue that took on several heated meetings with parents and supposed experts on the issue of carcinogens and other substance problems with those fields; the issue of proper attention by the Department of Corrections at the DC jail over temperature control - proper cooling in the summer and proper heating in the winter - that involved monthly meetings with judges of the US District Court, the Superior Court and all relevant agencies, several inspections and visits to the DC jail, and ultimately the replacement of the Director of the Department of Corrections; the resolution of a sticky, technical issue involving representatives of the CFO's office dealing with

pension and retirement benefits, which we were able to resolve after several months of meetings and having the CFO's people take corrective actions; dealing with a number of issues at the Department of Health including the provision of medical and health related services to inmates at the DC jail; dealing with issues of supervision and control at the Department of Youth Rehabilitation Services; assisting in the selection of a new Director at the Department of Forensic Sciences and a realignment of the professional staff at DFS; and the coordination with the Office of Inspector General on investigations by OIG of executive branch individuals.

One of the most challenging issues occurred when the Mayor and City Administrator asked me to take over the negotiations for the resolution of the Pepco merger with Exelon. The resolution ultimately came before the Public Service Commission for approval, and we worked with the Office of the Attorney General, the Office of the People's Counsel and several other organizations to support the merger resolution. The City Administrator directed the MOLC to conduct the direct negotiations with Pepco and Exelon. We assumed the responsibility and over a period of six to eight weeks, Ron Ross and I met with the representatives of Pepco and Exelon. Although we consulted with OAG, People's Counsel and several other related organizations, we negotiated the terms of the merger agreement and helped in the drafting. Technically, the matter was under the jurisdiction of the Office of Attorney General by statute. After we completed our initial negotiations, OAG became involved in a very important way and helped negotiate with the People's Counsel and tenants groups to reach a final

resolution. After much debate and hearings at the Public Service Commission, it was approved.

During my forty months, I was involved in a lot of issues. One of the senior lawyers we hired, Sarah Jane Forman, was detailed to the Office of the State Superintendent of Education in the spring of 2015 to assist in the reorganization of OSSE. Ms. Forman was so important to the work that the Director of OSSE requested that she be named as the new General Counsel, where she still serves. Between and among the public schools, the charter schools and OSSE, we played an important and ongoing role in the resolution of several disputes: the determination of the allocation of public funds to DCPS and the charter schools; the relation between the governance of DCPS and charter schools through the public charter school board; the investigation of the death of a student at one of our public charter schools; and the relationship between OSSE and a new entity overseeing interscholastic athletics in the District of Columbia.

Finally, we were involved in the relationship between the federal government, particularly Congress and the District of Columbia, on matters where the Republican majority of the House of Representatives voiced objections to the District's legislations in areas such as legalized marijuana, abortion rights and budget approvals for the DC government. In a number of these areas Congress threatened interference with the District's proper decision making. In the end, the MOLC, on behalf of the District, challenged Congressional interference, and the District prevailed on most of the issues. In the area of budget, the District prevailed in the challenges to the Budget Autonomy Act, which allows the

District to have its own budget approved by the White House with only a passive approval by the Congress. “Passive Approval” means that if within a very short and specific time period Congress does not vote disapproval, it’s deemed approved. The Mayor stood up for the District, and threats to interfere with Council action in the areas of legalized marijuana and reproductive rights have fallen short. In terms of the executive branch, there has been no real interference. Frankly, there wasn’t much contact over the 40 months of my tenure.

We were involved in virtually every major decision that had legal implications for the District. Numerous actions with regard to the agencies and their work, their personnel and their hiring and training. One of our senior lawyers, Melissa Tucker, took over the responsibility for FOIA appeals and she expertly handled all appeals of agency FOIA decisions. Greg Evans, another senior lawyer, has been involved in issues such as hand gun regulations and licensing established by Metropolitan Police Department and relationships with specific agencies such as the Office of Unified Communications and the Office of Chief Technology Officer.

We had a remarkable staff. Working together with Ron Ross, we established a strong MOLC for future administrations. In the spring of 2018, I decided we had accomplished our goal of solidifying a strong MOLC working relationship with agency counsel and OAG, and provided a solid framework for the future. I could now return to private practice. I left in April to join Baker Hostetler.