

County Counselor

Attestation Engagement—Review



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Victor Hurlbert, CGAP

Clay County, Missouri Auditor

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I. Introduction and Scope

Undoubtedly one of the most controversial aspects involving Clay County government over recent years has been the position(s) of County Counselor(s). The reasons appear to stem primarily from two overriding factors. First, the County has been party to at least three high profile and press-worthy lawsuits in which it lost (0-3). Second, the County's legal representation is no longer fulfilled by a full time staff member or members (assistants, etc.). Instead, these services are outsourced to contracted firms paid by the hour. Hence they are not technically on County payroll, but bill the County for their work on a variety of as needed topics.

Returning to the first point about the lost lawsuits, those include two as defendant against the County Sheriff and Kansas City Star. The former dealt with how the Commission majority, in a 2-1 vote, cut the Sheriff's 2019 detention contract budget for inmate healthcare as well as food—so much so that it became wholly inadequate. Courts all the way up to the Western Court of Appeals and, lastly, Missouri Supreme Court ultimately found that the Commission majority did so in retaliation for the Sheriff's investigation of an Administration employee's document tampering. Essentially, the minority Commissioner's signature was physically cut off a warrant batch of purchase order payments to vendors. The Commission was therefore ordered to restore that detention funding from reserve accounts.

Next, the latter legal matter happened when the Kansas City Star sued the County for charging them the respective legal fees by hour (\$373.50) to produce Sunshine Requests—namely when it inquired about how much the County pays legal firms. Of note, this audit will therefore seek to help in any similar future requests and hopefully stave off the need for related lawsuits. Importantly, Sunshine Requests from the public used to be answered by the County Clerk. The Commission majority also stripped that duty of Custodian of Records and likewise moved it to a separate law firm—Spencer Fane in particular. The County is currently appealing the initial circuit court level defeat in this case.

Finally, the County was plaintiff versus the State Auditor over the citizen-petitioned comprehensive and all-encompassing Performance Audit. The County's firm, Husch Blackwell, in this case maintained that the State Auditor can only conduct limited post review financial audits. The circuit court disagreed, but did rule that the State Auditor's subpoenas for executive session minutes and other material should be pursued separately. The County has failed to fully comply with the State Auditor's subpoenas. Thus, the State Auditor initiated yet another lawsuit to enforce the subpoenas and that is pending through the court system.

In light of these concerning developments, this office of County Auditor believes a Review of the County Counselor role is in order. A Review under Generally Accepted Government Auditing Standards (GAGAS) is a sort of Attestation Engagement. As such, the auditor will not present recommendations or opinions to the auditee, nor will there be concurrent management responses. Rather, the auditor is to arrive at conclusions based on adequate and sufficient evidence. Said evidence will meet the required elements of an audit finding with the criteria, the condition, the cause, and the effect.

By way of a disclaimer of sorts, a Review was sought over a Performance Audit or other form because cooperation from the Administration when an auditee has proven to be severely lacking and practically nonexistent. Given the above referenced state audit covering, through subpoena, how these legal agreements were enacted, this office felt that a Review was more appropriate. Our focus is primarily on the efficiency and effectiveness of employing hired legal firms vis-à-vis full time staff on payroll. The fiscal impact to the County is the issue at hand.

II. Background and Audit Plan

The statutory background regarding the ability of a County Commission to even hire outside legal counsel as well as appoint its own Custodian of Records deserves some more attention. These details will provide the necessary context for the following audit. To begin, Revised Missouri Statutes (RSMo) 56.631-56.660 iterate how the Commission has the option to name a County Counsel. Nothing in these laws indicates a requirement per se for the Counsel to be full time and/or on staff. The Commission has the choice to mandate that, however.

As to how a Counsel is hired, typical Human Resources policies would logically apply if selecting an attorney or attorneys to be on County payroll. If opting for a firm, though, then contract law applies. In that instance, Clay County Ordinance 37.39 highlights how professional services needn't be awarded to the lowest bidder, albeit a Request-for-Proposal (RFP) is utilized in place of a formal bid. It is worth pointing out here that, while the contracts for the firms in this audit are on file as copies with the Auditor, no documentation of a RFP has been discovered. County Ordinance 37.08 does call for preference for County and local firms if of equal or lower competitive pricing compared to the out-of-town bidder, but that relates to tangible products and not professional services.

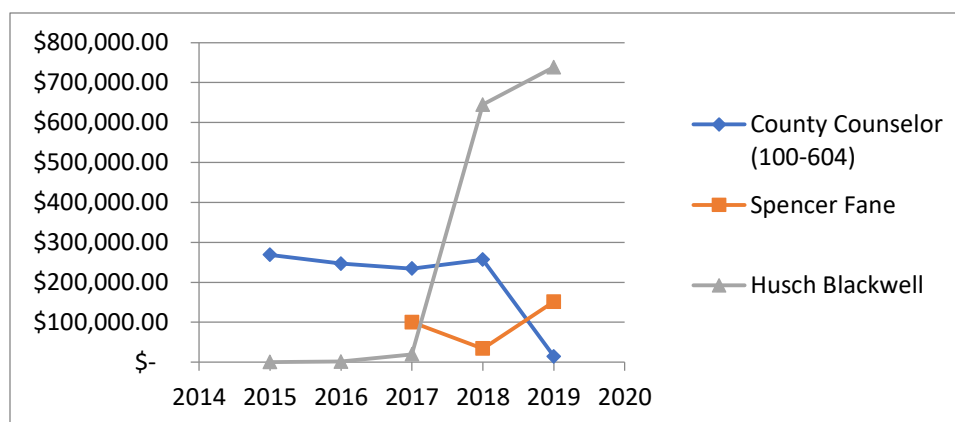
Moving on to the Custodian of Records, RSMo 610.023 does allow the Commission to designate someone other than the Clerk—mainly because the Clerk isn't specifically mentioned in the language. The Clerk would seem an obvious pick for Custodian, and historically it has been, since that position already attests to the validity of documents as a result of Commission meeting decisions (RSMo 51.120). There is legitimacy in thinking that the job was removed from the Clerk's office due to informing the Sheriff about the aforesaid document tampering. Indeed, there was a \$77,237 cut to the Clerk's 2018 budget after the fact, or some 30.4%. The current title of Custodian has proven perfunctory anyway, owing to how Spencer Fane performs Sunshine Request answers derived from those records. The Assistant County Administrator (ACA) for Public Services, deemed Custodian of Records by Resolution 2018-253b, basically acts as a liaison between the law firm and the Administration/Commission majority.

With those parameters defined, the Audit Plan will consist of four main areas for further analysis. First, we will look at how overall spending by the County on legal counsel has changed with the move to hired outside lawyers—mainly in 2017 and beyond. Also in this section, we aim to explore the total number of firms that are active vendors with Clay County. The term "active vendor" implies they have received some sort of payment in recent years from the County and submitted an obligatory IRS W-9 form. Second, this audit discusses the problem of legal firms requesting reimbursement for travel, hotel, and meal expenses associated with their various engagements when representing the County. Of heightened attention will be the dilemma of sales tax on receipts for those expenses. Third, and relatedly, we plan to evaluate the relative accessibility, or lack thereof, for these firms with not just the Commission majority and its Administration, but all other elected officials serving in County government. This will be contrasted with the prior experience of an on-staff and full time Counsel. Certainly the local proximity or nearness of these counselors will be assessed in that vein. Finally, fourth, we strive to tabulate the revenues received from Sunshine Request fees paid by the public for production of those documents. The statistics will be juxtaposed with those when previously received by the Clerk, so that we may then determine the cost or benefit from switching to a legal firm and different Custodian of Records to handle those inquiries.

III. Audit

- Total Spent for County Counsel Staff versus Outside Legal Firms**

Without a doubt, the transition to billable hours for County Counsel has dwarfed the usual budgetary obligation in years past. The graph and chart below best describe this increase:



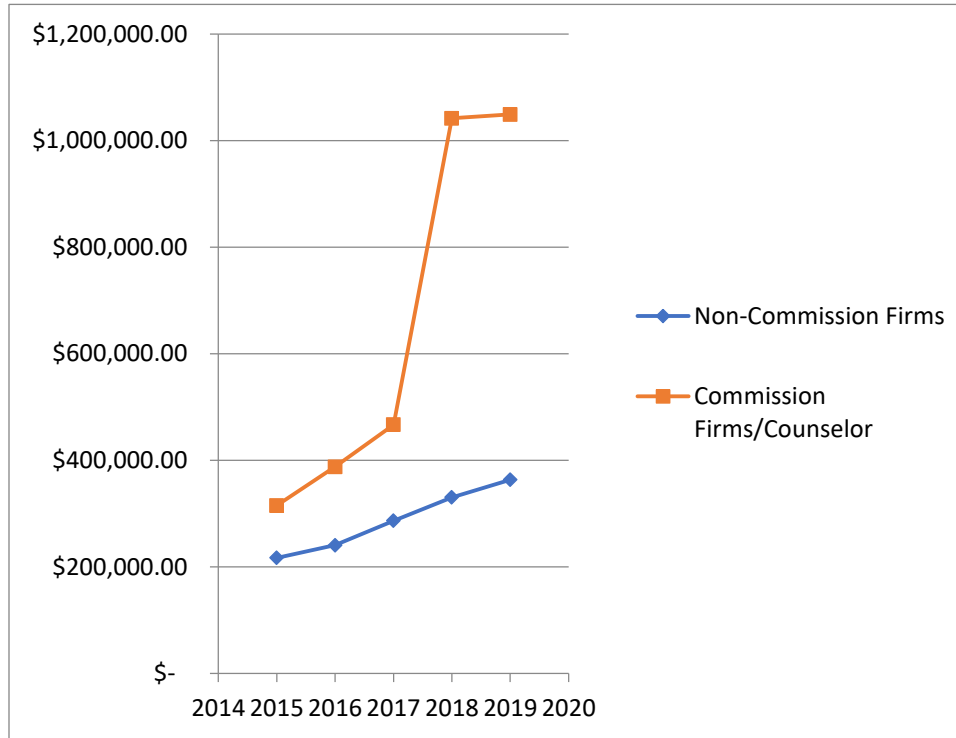
Law Firm/Lawyer	2015	2016	2017	2018	2019	Total
County Counselor (100-604)	\$ 268,749.50	\$ 246,615.29	\$ 234,307.48	\$ 256,594.45	\$ 14,294.34	\$ 1,020,561.06
Spencer Fane			\$ 100,298.62	\$ 34,035.18	\$ 151,343.49	\$ 285,677.29
Husch Blackwell	\$ 395.00	\$ 1,422.00	\$ 19,762.16	\$ 644,702.08	\$ 738,592.15	\$ 1,404,873.39

To explain our method here, we went back five years to establish a good picture of the evolving County Counselor. We included all County Counselor expenditures less those for other hired firms, so as to avoid any duplicated counting. For the year 2020, it is not through, but the two major firms of Husch Blackwell and Spencer Fane are most certainly still being remunerated. Time will tell their complete cost to Clay County. As of this writing, Husch Blackwell has received \$434,376.45 and Spencer Fane has received \$140,695.55 YTD.

The data suggest a dramatic jump in expenses during 2018. This is presumably because of the lawsuits before described. The relationship makes one wonder, in a seemingly subjective and unprovable way, if outside legal firms thereby cause more lawsuits or vice versa. Nevertheless, charging by the hour for legal advice clearly exceeds having Counsel on payroll.

What may come as a surprise, though, is that County government as a whole actually employs numerous other separate law firms for various reasons. Indeed, this audit uncovered some additional 84 firms who received payment from the County treasury (neither by discretionary fund under state statute nor Certificate of Participation debt) in the previous five years. When adding in inactive legal vendors, the accounting system indicates historically (over twenty years) at least 115. These firms are paid mostly from Circuit Court cases such as the Family Court, Probate Court, Juvenile, and so forth. The Collector on occasion employs outside counsel, too. We did not add in the Prosecutor and related costs nor judges paid by the State.

Yet the Commission also claimed another 12 of those 84 firms in the past five years. Some, we must point out, were not paid every one of those years or were paid by other County sources than the Commission in different years. In sum, however, the Commission firms still by far surpassed the others. As the following graph and chart depict, all Commission-hired firms had costs that grew 232.8% from 2015-2019 or \$733,592.56. Non-Commission firms paid by the hour had expenses that rose 67.4% and \$146,381.45 in that timeframe. For the County in all, the figures were 165.3% and \$879,974.01.



Law Firm/Lawyer	2015	2016	2017	2018	2019	Total
Non-Commission Firms	\$ 217,090.11	\$ 240,837.63	\$ 286,616.23	\$ 330,474.75	\$ 363,471.56	\$ 1,438,490.28
Commission Firms/Counselor	\$ 315,144.38	\$ 387,721.42	\$ 466,739.12	\$ 1,041,706.30	\$ 1,048,736.94	\$ 3,260,048.16

Conclusion: County government spending for contracted legal work increased in a statistically significant manner from 2015-2020. This was largely attributable to the Commission majority voluntarily choosing this form of legal advice and its consequential lawsuits, as opposed to simply keeping Counsel on staff. The gap between costs for Commission-appointed legal firms and those otherwise appointed, through mainly Circuit Court cases or property tax matters, widened in this time as well.

- **Reimbursement for Expenses**

One would intuitively think that legal firms, of any company paid by the County, ought to strictly adhere to any and all purchasing rules and regulations. After all, Counsel typically renders opinions on these subjects. They would assumedly practice them as well. Unfortunately, the Auditor's office has had to contact Accounts Receivable with Husch Blackwell upon finding them charging the County for hotel stays in the Kansas City metropolitan area as well as meals while working on County cases—on top of the regular \$365 per hour fee. As a matter of fact, we've reached out regarding some 7 monthly invoices, 2 in 2019 and 5 so far in 2020. We have yet to receive any response whatsoever.

The trouble at hand is not so much the expenses themselves. The contract with Husch Blackwell does allow them to be redeemed for "...expenses incurred in connection with this engagement." It is really how those bills have sales tax on them. The County is exempt from all local and state sales taxes under Clay County Ordinance 37.09. The only true exception is when County employees travel out of town on business, defined by the HR Manual as over 50 miles. In that scenario, a per diem for meals with sales tax included is allowed. Elsewise business meals in town cannot have sales tax. The hotel and meals for this individual firm, though, were not beyond such radius nor are the lawyers County employees.

No other vendor charges the County sales tax. To be fair, one could view these meals and hotel stays as the literal input costs for the ultimate service these attorneys provide. Those wholesale producer costs are always borne by the producer, however, and not the end consumer. So the analogy fails. Normally, if on a purchase order, the Auditor's office would simply reduce the payment by the sales tax amount. These legal bills are now paid via government credit card, meaning the County automatically owes our credit card provider upon the charge occurring. The choice for this office then becomes refusing to pay the entire bill, in turn making the County delinquent on its credit balance, or paying it but noting our objections. We have strenuously done so.

Conclusion: It is a gray area of if contracted legal firms can bill the County for expenses incurred while working on engagements for us and include the sales tax. No other vendor in Accounts Payable does so, leading to an appearance of hypocrisy. When Counsel is on staff and County payroll, they would not be reimbursed for sales tax on their expenses.

- **Accessibility and Travel Requirements**

This if course naturally leads to the quandary of why said firms are even traveling for local County business in the first place. The reason is because the attorneys for at least Husch Blackwell, specifically assigned to Clay County, do not reside here. They alternatively reside or headquarter in Jefferson City, Missouri's state government capital, or even St. Louis. Even for the biweekly Commission meetings, Husch lawyers—who serve as parliamentarian, in place of say again the County Clerk—charge the County for their travel time to Liberty, MO. Without question the coronavirus pandemic has substantially reduced that cost. Meetings are now conducted via teleconference with no video. Spencer Fane, meanwhile, does have a local Kansas City presence.

Aside from that physical separation, access for the rest of County employees or elected officials to these Counselors is severely deficient. These firms were in large part brought on for Commission majority and Administration interests as well as lawsuits. Their lines of communication are solely with those parties. Besides being located downtown in a neighboring County like Jackson County's Kansas City portion (Spencer Fane) or in a different city altogether (Husch Blackwell), there is the added disincentive of the comparatively exorbitant fees associated with their services. It on the whole seems fiscally imprudent, as this audit has shown, to ask these firms any question at all.

The most recent County Counsel on staff was headquartered right across the square from the Old Courthouse. As a County employee on the payroll, too, the person had a County email and phone number. That availability would prove far more efficient and less expensive for County taxpayers. It is also more the norm for other counties and municipalities to have an on-staff Counsel, if they even have one. Many smaller counties simply rely on the attorney for the Missouri Association of Counties (MAC), whereby they share their joint costs.

Conclusion: Contracted legal firms do not provide a better value for the higher cost than an employed on-staff Counsel. In addition to lost lawsuits, access for County officials other than the Commission majority and Administration to these firms is minimal at best. Travel necessities needlessly drive up the bills the County owes to these firms.

- **Revenues from Sunshine Requests**

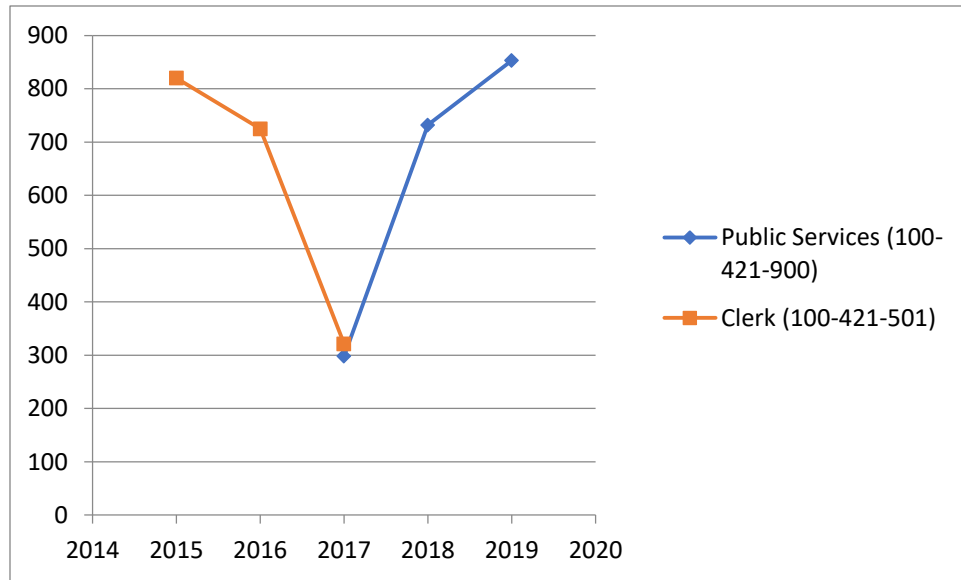
Finally, in the vein of weighing the pros versus cons of contracted legal work, we will focus on the job of fulfilling Sunshine Requests. As discussed before, the Clerk used to handle this duty with the office's existing budgeted resources and on-call staff. There was thus no extra cost to answer the queries, given that these tasks were just some of many others the Clerk and Clerk staff do on a daily basis. Today Spencer Fane performs this job for \$373.50 an hour.

As for the revenue side, RSMo 610.026 limits the fees charged to citizens at a mere \$0.10 per page of a copied document. A governmental body can pass on the actual costs as well for other media like a Compact Disc. The labor rate assessed:

“...shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication.”

Clearly \$373.50 an hour, as the Kansas City Star lawsuit determined, far exceeds that average rate.

As a ramification, the County hasn't been able to truly collect those labor costs for outside Counsel when responding to Sunshine Requests. As the proceeding graph and chart show, there was a negligible \$17.13 difference between Sunshine Request revenues collected by the Clerk versus the Administration/Public Services from 2015-2019.



Sunshine Request Revenues	2015	2016	2017	2018	2019
Public Services (100-421-900)			\$ 298.15	\$ 731.98	\$ 852.92
Clerk (100-421-501)	\$ 819.90	\$ 724.68	\$ 321.34		

Conclusion: The costs associated with hiring contracted Counsel for Sunshine Requests, from charging by the hour to lawsuits as a result, far outweigh any perceived benefit over having the Clerk accomplish that task.

IV. Overall Rating for this Audit



Victor Hurlbert, CGAP

Clay County, Missouri Auditor

1 Courthouse Square,

Liberty, MO 64068

Phone: (816) 407-3592

Fax: (816) 407-3591