

COUNTY LITIGATION RISKS, LAWSUITS AND HIRING CIVIL LAWYERS

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## COUNTY LITIGATION RISKS, LAWSUITS AND HIRING CIVIL LAWYERS

### I. THE MORE TROUBLESOME LAWSUIT RISKS ARE THE HARDER ONES TO GET AHEAD OF BEFORE SOMETHING BAD HAPPENS

- Some lawsuit risks are harder to get in front of than others.
- The easier ones require fewer team members or follow well worn grooves in the substantive law or procedure.
  - Contracts (risks considered up front)
  - Condemnation (few issues, very predictable)
  - Worker's comp (injury prevention is difficult, but the process is very well known and predictable)
  - Declaratory judgment, injunction, mandamus
    - What are our rights? What does the contract or statute mean?
    - What will the court order us to do?
    - As an elected official, what must I do?Getting legal advice up front helps manage these risks.
- The tougher ones require more team members and are more unpredictable
  - Employment cases
  - Tort cases
    - Mostly accidents
  - Risks associated with policy statements
  - Constitutional law cases

### II. RISKS? WHAT RISKS?

- Employment Risks
  - Counties hire a lot of people
  - People “are only human” (not much of a legal defense)
    - “It's not in my nature (human nature of course) to \_\_\_\_\_”(fill in the blank).”
  - Human nature creates lawsuit risks.
  - Getting ahead of employment related risks of lawsuits requires teamwork, top to bottom. To get everyone on the same page, counties must have policy and procedure.
- Tort risks
  - Non-contractual personal injury and property damage cases. Wherever your employees conduct business and whatever they may do presents risks.

- Tort Claims Act damage claims against Counties and employees are capped.
- Constitutional law cases
  - Largely actionable because of problem policy.
  - Law enforcement, sheriff's department personnel including jail personnel present particularly serious risks.
  - No damage caps.
- Role of Official County Policy and policy risks to avoid
  - Personnel Policy: Articulates what is to be expected in terms of behavior and treatment of employees county-wide and at the department level.
  - Operational Policy: Used at both county and department levels to help control how things get done.
  - Policy is most anything the Commissioners Court or other policymaker writes or permits to exist in order to get business done. It can be written, unwritten, an existing practice or procedure for getting things done.
  - Personnel policy is glue. It sticks individual human beings together to get business done.
  - Employees come unstuck because they refuse to follow good policy or the policy is too weak or too poorly enforced.
  - Operational policy is glue too on how to get things done.
  - Consistency is desirable to minimize risks.
    - Departmental policy should be consistent with overall county policy.
    - Similar departments should have consistent operational policies.
    - Employment policy, should be as consistent as is possible county-wide.
  - County and departmental policy must not be deliberately indifferent to the constitutional rights of employees and others.
  - Policy should treat everyone the same way on matters of how everyone must behave.
  - Policy should not discriminate.
  - Policy should treat everyone the same way on matters of operations unless differences can be justified.
  - Policy should be enforced.
  - Policy should be fairly enforced.

### III. MINIMIZING EMPLOYMENT SUIT RISKS (HR + County Leadership + Legal) Hiring

- Good HR can:

- Help management, elected officials and other department heads and supervisors, to decide what employees they need.
- Help prepare and update job descriptions and recommend minimum qualifications for the job.
- Help vet new employees as may be needed.
- Arrange notice and posting for job openings and test candidates, if required.
- Help management personnel avoid asking the wrong questions and saying the wrong things in the interview process - the ones that can cause trouble.
- Help develop and revise departmental and county personnel policies and procedures on hiring.
- Acquaint new employees to standing policy and “commit” them to follow it by requiring them to sign in receipt of written county policy. (Can be done at the departmental level as well.)
- Help keep policy consistent to the greatest extent possible.
- Work with legal.

#### Risks During Employment

- Solid HR can:
  - Help arrange necessary training and continuing education on hot topics like sexual harassment and other forms of discrimination.
  - Help arrange and coordinate safety training and safe workplace programs.
  - Help leadership to stay ahead of changing HR trends and law changes.
  - Steer troubled employees in need to help programs.
  - Give advice on progressive discipline, documentation and witness serious personnel action conferences. (Lawyers should not be witnesses).
  - Advise leadership on standing grievance or civil service procedures.
  - Help keep employee treatment consistent.
  - Work with legal.

#### Risks at Termination of Employment

- Solid HR Leadership:
  - Is familiar with grievance and county civil service rules and procedure.
  - Guides investigation or furnishes an investigator to develop the underlying facts of any problems with employer/employee relationships.
  - Works with legal.
- Solid HR leadership is essential to avoiding employment related lawsuit risks.

- Role of Department Heads and Elected Officials in Avoiding Employment Lawsuits

#### Hiring

- Know what job you need done.
- What job qualifications, experience, education and training are needed for the job.
- Stick to business. Pick the best applicant (personal and political relationships can be dangerous if the applicant is not well qualified).
- Read all the applications. (HR can narrow the field)
- Vets the candidates (HR can help).
- Always interviews.
- WARNING: Commissioners court members must tread very lightly in connection with hiring decisions to be made by others. Talk to your lawyer about this statute. Local Gov't Code, § 151.004. Commissioners Court May Not Influence Appointment

**The commissioners court or a member of the court may not attempt to influence the appointment of any person to an employee position authorized by the court under this subchapter.**

#### During Employment

- Follows policy guidelines.
- Documents unacceptable performance and behavior (and arms himself or herself, the county and your lawyers in the process).

#### Firing

- Follow policy guidelines.
- Consider having a reason for firing even if the employee is “at will.”
- Consults with the county’s civil lawyer before taking final action.

#### IV. MINIMIZING TORT AND CONSTITUTIONAL RISKS

- Tort
  - Safe workplace awareness programs.
  - Safe driving and equipment operations.
  - Provide safety gear.
  - Make people use it.
  - Train.
  - Consider designating a county and departmental safety coordinator.

- Constitutional Claims
  - When it comes to governmental action and policy pertaining to the federal Bill of Rights, free speech, expression, religion, search and seizure, equal protection, and due process, etc., consult with your lawyer before taking action. Common sense may not get you through it.
  - Law enforcement and jail need to have rock solid operational policies for all aspects from intake to release or transfer.
  - Jail infirmary policies have to be wired tight.
  - Licensing for police officers and certifications for jailers is critical.
  - Train and periodically retrain deputies and jailers on use of force and restraint devices.
  - High speed chase.
  - Require proficiency training on weaponry used.

V. ENOUGH ON POLICY: OTHER THINGS TO CONSIDER THAT MAY REDUCE RISKS OF LAWSUITS

- Consider your options on how to do the business of government.
  - Can the county contract the work (and avoid or shift risk to others)?
- Know who the County is legally responsible for. Don't take on more responsibility than you have under law.
- Know who your county policymakers are and are not. This is very important in constitutional claims defense and for training purposes.
- Who do we have to control?
- Who do we actually control (could be two different things)?
- How do other counties do the things your county does?
- Are they doing it right?
- Examine the well worn grooves around your county from time to time. Examine reports that "we've always done it this way." There is probably a legal reason for it, but maybe not. Laws change from time to time. Standards change from time to time.
- What do state oversight departments say about what you do?
- What do other organizations dedicated to county governmental affairs, like Texas Association of Counties or Texas Association of County Judges and Commissioners say?
- Generally, the more you can do county business the way others successfully and legally do it, the more proof there is that the way you do it is considered reasonable.
- Your other elected officials and department heads can help by using tried and true methods to do what they do too.

## VI. BEFORE SOMETHING BAD HAPPENS

- Have a reporting procedure.
- Assign someone to report to.
- Have a trained investigator ready to go.
- Train your leadership.
- Train others on reporting procedures.
- Have a lawyer ready to work too.

## VII. WHEN SOMETHING BAD HAPPENS

- Follow your reporting procedure and call your legal advisor.
- Involve your lawyer every step of the way from incident to resolution.
- Investigate.
- Gather all reports of other agencies if possible and preserve the evidence.
- Don't lose or destroy any of it.

## VIII. WHEN THE LAWSUIT COMES

- Whomever may be sued:
  - Must get the lawsuit papers to your county's legal advisors as soon as possible.
  - Must assist in any further investigation and preservation of evidence.
  - Must not overreact.
  - Must limit communications about the lawsuit to lawyer and lawyer's agents.
  - Must avoid the urge to apologize.
  - Must follow legal advice.

## IX. LET'S PAUSE FOR SOME GOOD NEWS ABOUT THE LAW

- Counties and county personnel will likely qualify for special treatment under law.
- Immunity from suit and liability for counties.
- Judicial, prosecutorial, qualified and derivative immunities for employees and certain officials.
- Caps on damages in state cases (no cap in constitutional cases).
- Suing a county and its officials and staff is not a slam dunk by any means. There are plenty of reasons to believe a lawsuit can be successfully defended or minimized.

## X. HIRING THE COUNTY'S CIVIL LAWYERS

- Role
  - Trusted legal advisor
    - Analyzes the issue and explains your options
    - Explain the risks and likely outcomes of your choice
    - Represents the county/official/employee on the option chosen (unless it is illegal)

- Lawyers are not:
  - Business consultants
  - Engineers
  - Accountants
  - Political advisor
  - Psychologists
  - Chaplain
  - Witnesses
  - HR Directors
  - Policymakers (though it is sometimes hard to tell)
- What are the options?
  - Elected lawyers and staff:
    - The County Attorney
    - The District Attorney
    - The Criminal District Attorney
    - Outside private lawyers and law firms
    - In house private lawyers hired by the commissioners court
    - Lawyers provided by insurance agreement are not really an option, they are a matter of contractual rights under the insuring agreement.
- Who can be your lawyer?
  - There is always an argument that commissioners courts should decide who it is to be.

The County Commissioners ... shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

Tex. Const. art. V, § 18. Tex. Const. art. V, § 18. Texas courts have routinely held that the Commissioners Court not only has the power to conduct all County business, but it also has the power over budgetary matters involving the County.” *See, e.g., Cascos v. Cameron Co. Atty.*, 319 S.W.3d 205, 231 (Tex. App. 2010) (brackets added, footnotes omitted]abrogated on other grounds, *In re State Bd. for Educator Certification*, No. 13-0537, 2014 WL 7204548 (Tex. Dec. 19, 2014). But it is not quite that simple.

“Elected attorneys generally do not have exclusive power over civil legal affairs of the county.”

*Hill Farm, Inc. v. Hill County*, 425 S.W.2d 415, 419(Tex. Civ. App.-Waco, 1968),



*aff'd* 436 S.W.2d 320 (Tex.1969).

- How will you know whether you are bound to be advised by elected county lawyers? Get legal advice on the question.

“The initial step in determining the civil duties of a prosecuting attorney is consulting the special statute creating the office or applicable to it.”

36 David B. Brooks, *Tex. Prac., County And Special District Law* § 21.14 (2d ed.)[footnotes omitted]

- Here is what local elected lawyers must do for you:
  - Give written legal advice upon request about the duties of the county official. TEXAS GOVERNMENT CODE Sec. 41.007.
  - Answer the call of a county official or employee who gets sued for something arising from the performance of public duties (except the county they work for). LOCAL GOVERNMENT CODE Sec. 157.901.
  - But these statutes alone do not give elected attorneys exclusive rights to represent the county in civil matters. The Commissioners Court may not hire a private firm for civil legal representation if that employment would “... impinge on the statutory duties of other officials... .” *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993)” Because the duties of local elected attorneys are largely controlled by statute, you will need to get legal advice about your options in your county.
- Choices: Unless bound by law otherwise you can:
  - Agree to use your local elected attorneys
  - Hire an outside firm
    - This may be advisable or required where several elected officials or employees or both have been sued because of actual or potential conflicts of interests.
  - Start a county commissioners court “in house” civil legal division.
- Politics aside, the decision on who you hire is like any other decision about lawyers.
  - What kind of lawyer do you need?
  - What experience does the lawyer or law firm have?
  - What kind of reputation does the lawyer or firm have?
  - Do you need a specialized firm?

- Do you need a lawyer to sue or defend a lawsuit?
- Do you need a lawyer to help with day to day matters as they arise?
- Do you want a lawyer that is a politician?

James Collins, Travis County Executive Assistant County Attorney<sup>1</sup> summed it up this way here at this conference two years ago:

“Why use your local elected attorney?

1. Public policy.
2. He or she is an expert or has access to experts on county law.
3. He or she understands the issues which confront an elected official.
4. He or she is cheaper than a private lawyer.”

Looked at a bit differently:

1. Public policy on hiring lawyers is what you say it is unless otherwise bound by law.
2. Private outside and individually employed in house lawyers are experts or have access to experts on county governmental law too depending on what you want.
3. Private outside and “in house” lawyers understand the legal issues which confront the County and its elected officials too.
4. Private outside counsel have to pay overhead and generally charge higher fees for service that may well cost more than the costs of salaries and overhead for in house lawyers, elected or not.

Though care must be taken, most probably the choice is yours.

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<sup>1</sup> James was kind enough to allow me to borrow from his talk given in 2013.