

**Los Angeles County  
Metropolitan Transportation Authority  
Office of the Inspector General**

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**Audit of MTA Litigation Cost  
Management Practices**

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*The audit identified opportunities for the County Counsel Transportation Division to improve policies, procedures, and practices over litigation cost management.*

Report No. 11-AUD-04

November 1, 2010



**Audit of MTA Litigation Cost Management Practices  
Report No. 11-AUD-04**

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**DATE:** November 1, 2010

**TO:** Assistant County Counsel Transportation Division  
LACMTA Board of Directors  
Chief Executive Officer

**FROM:** *Jack Shigetomi*  
Jack Shigetomi  
Deputy Inspector General for Audits

**SUBJECT: Audit of MTA Litigation Cost Management Practices  
Report No. 11-AUD-04**

## **INTRODUCTION**

The Los Angeles County Metropolitan Transportation Authority (MTA) Board of Directors directed the Office of the Inspector General (OIG) to conduct a comprehensive audit of MTA's litigation costs and cost management performance, including:

- A. An inventory of all claims, and litigation cases within the last 5 years.
- B. Evaluation of the efficacy and effectiveness of current policies, procedures, and practices.
- C. Any other information that would provide context, background, and/or analysis to the MTA Board about how litigation costs are currently managed.

## **SCOPE AND METHODOLOGY OF AUDIT**

The OIG developed a two-part approach for the mandated audit. The OIG performed Part A of the Board directed audit, and the results are discussed in Part A of this report. An audit consulting firm (Thompson, Cobb, Bazilio & Associates, P.C.) performed the review of Parts B and C of the audit, and the results are discussed in Part B of this report.

The scope of Part A of this report includes review of the preparation of the inventory of litigation cases and review of invoices for legal services from outside law firms and the County Counsel.

The scope of Part B of this report includes a review of MTA's litigation costs and cost management performance including evaluating the efficacy and effectiveness of MTA's policies, procedures, and practices in the following areas as directed by the Board:

- Case management practices and supervision
- Risk management
- Compliance with policies, procedures, and practices
- Adherence to industry best practices in limiting costs/expenditures
- Review and approval process of payouts and settlements
- Communication with MTA Board members
- Advice to Metro management to limit future liability payouts
- Follow-up on recommendations in prior California State Auditor report
- Analyze litigation cost trends
- Organizational structure of the Transportation Division of the County Counsel
- County Counsel billing rates
- Conflicts checks for in-house and outside attorneys

The Board was advised that the audit would not include the cost related to County Counsel transactional matters, and the audit would review a sample of the cases within the last 5 years based on a dollar threshold such as payouts and/or expenses exceeding \$200,000.

The audit did not evaluate the quality of legal services.

## **BACKGROUND**

MTA is a public agency separate and distinct from the County of Los Angeles. In 1994, the MTA Board of Directors appointed the County of Los Angeles, Office of County Counsel to serve as the MTA's general counsel. The County Counsel, through its Transportation Division, employs attorneys and paralegals who are assigned to work at the MTA headquarters. The Transportation Division is assigned four support staff who are employed by the MTA. In addition, the MTA also provides the Transportation Division office space and administrative support at no cost such as telephones, computers, office equipment, and office supplies. The County Counsel's FY 2010 actual expenditures totaled \$13.9 million<sup>1</sup> and the FY 2011 budget is \$16.8 million.<sup>1</sup>

The County Counsel Transportation Division litigates cases using in-house counsel and/or outside counsel. The County Counsel monitors outside counsel who represent the MTA in a variety of legal matters. The County Counsel also directly represents the MTA in

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<sup>1</sup> Includes inside and outside counsel litigation costs, transactional costs, and other expenses; but not settlement and payout costs.

transactional matters such as reviewing contracts and providing legal opinions. There is no written contract or agreement between MTA and the County Counsel; however, there is an understanding that County Counsel will bill the MTA at an hourly rate for attorneys and paralegals that is sufficient to cover the costs for legal services provided to the MTA. The County Counsel also bills the MTA for other costs on an itemized basis such as court reporter transcripts, serving subpoenas, library services, legal research services, and copying services.

## **SUMMARY OF RESULTS**

Overall, the audit identified opportunities for the County Counsel Transportation Division to improve policies, procedures, and practices over litigation cost management. Specific areas are:

- County Counsel and outside counsel invoices (see Part A for details)
  - Areas needing improvement
    - Case numbers should be assigned to all cases to ensure that all costs are recorded.
    - Case numbers should be referenced on all outside counsel invoices.
    - Declarations certifying the accuracy of the charges should be cited on all outside counsel invoices.
    - Outside law firms should obtain County Counsel’s prior approval for consultants, expert witnesses, and other extraordinary expenses.
  - Areas that are satisfactory
    - County Counsel Transportation Division staff reviewed and approved all billing statements prior to payment to outside law firms.
    - Outside counsel billing rates on invoices were correct.
    - Outside counsel costs were charged to the correct General ledger Account.
    - No discrepancies were found in County Counsel invoices for legal services.
- Litigation cost management policies and procedures needing improvement (see Part B for details)
  - Written litigation cost management and case management policies and procedures should be developed and implemented.
  - An automated case management system should be obtained and utilized to improve case management and cost reporting.
  - Case evaluation plans should be prepared and documented.

- Case budgets should be prepared and documented.
  - Outside counsel should prepare case evaluation plans and budgets as required by their contracts.
  - Not-to-exceed amounts should be established for the use of consultants and experts.
  - Documentation of risk assessments should be improved.
  - A litigation cost manager should be utilized to evaluate certain significant cost litigation cases.
  - Use of alternative fee arrangements should be considered for some cases.
- Board communications and approval areas needing improvement (see Part B for details)
    - Written policies and procedures should be established for Board Communications.
    - Outside counsel legal expenditures exceeding the approval threshold in the MTA Procurement Policy should be approved by the Board.
    - All significant adverse judgments should be communicated to the Board.
    - All settlements should be communicated to and approved by the Claims Committee.
- Follow-up on prior California State Auditor Report (see Part B for details)
    - Recommendations in the prior California State Auditor Report should be implemented. These recommendations pertain to requiring outside counsel to prepare case evaluation plans and budgets, and provide task-based billing invoices.
- Additional litigation cost management areas (see Part B for details)
    - Areas needing improvement
      - Best practices to improve management of litigation costs should be considered.
      - Written procedures should be developed for conflict of interest checks.
      - A written agreement between MTA and County Counsel should be developed.
      - MTA funds totaling \$250,000 have remained on deposit with the Court for over 3 years since the settlement agreement.

- Areas that are satisfactory
  - The audit concluded that County Counsel's hourly billing rates appear reasonable.
  - The County Counsel Transportation Division's organization appears sufficient.

## COUNTY COUNSEL COMMENTS

On October 29, 2010, the County Counsel Transportation Division provided a response to the audit findings and recommendations presented in the reports prepared by the OIG and the audit consultant firm. (See Part C for copy of County Counsel's response.)

- **OIG Report Covering Inventory of MTA Litigation Cases and Invoice Review (Part A)**: The County Counsel Transportation Division concurred with the recommendations and stated that the recommendations have been implemented.
- **Audit Consultant Report Covering Evaluation of Litigation Cost Management Policies, Procedures, and Practices (Part B)**: The County Counsel Transportation Division agreed with the majority of the recommendations, and stated that they have already implemented some of the recommendations and will soon be implementing others. However, County Counsel stated that they take issue with many of the statements, including assumptions and specific findings, contained in the final audit report.

## Report Distribution List

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# **PART A**

## **Office of Inspector General Report Covering Inventory of MTA Litigation Cases and Invoice Review**

**Los Angeles County  
Metropolitan Transportation Authority  
Office of the Inspector General**

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**Inventory of MTA Litigation Cases  
and Invoice Review**

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*The audit found that some payouts were not included in the litigation case inventory list. The audit also found that outside law firm and County Counsel invoices for litigation expenses were accurate, but some requirements in contracts with outside law firms were not always followed.*

Report No. 11-AUD-03

November 1, 2010



# Audit of MTA Litigation Cases and Invoice Review

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## **INTRODUCTION**

The Board of Directors of the Los Angeles County Metropolitan Transportation Authority (MTA) directed the Office of the Inspector General (OIG) to conduct an audit of MTA litigation cost management practices. As part of this audit, the OIG reviewed the preparation of the inventory of litigation cases and invoices for legal services from outside law firms and the County Counsel, and the results are discussed in this report. An audit consulting firm reviewed MTA's litigation costs and cost management performance including evaluating the efficacy and effectiveness of MTA's policies, procedures, and practices. The consultant prepared a separate report, which is being concurrently reported under Part B.

The audit found that some payouts were not included in the litigation case inventory list. The audit also found that outside law firms and County Counsel invoices for litigation expenses were accurate, but some requirements in contracts with outside law firms were not always followed.

## **OBJECTIVES, SCOPE AND METHODOLOGY OF AUDIT**

The objectives of the audit were to work with County Counsel Transportation Division staff to develop an inventory of cases litigated by the County Counsel within the last 5 years, test the accuracy and completeness of the inventory, and review the accuracy of outside law firms and County Counsel invoices for legal services.

To meet this objective, we performed the following:

- Requested County Counsel Transportation Division staff to prepare an inventory of all litigation cases closed during the period January 1, 2005 through February 28, 2010, and open as of February 28, 2010.
- Reviewed the inventory and related case costs.
- Reviewed outside law firms and County Counsel invoices.
- Compared payout amounts in the Financial Information System to the amounts on the inventory.
- Gained an understanding of the accounting system that tracks the costs and expenditures for litigation cases.
- Interviewed County Counsel Transportation Division attorneys and staff.

The audit was performed in accordance with Government Auditing Standards. Those standards require that the audit be planned to obtain sufficient, appropriate evidence to provide a reasonable basis for the findings and conclusions related to the audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions related to the audit objectives.

## **RESULTS OF AUDIT**

As requested by the MTA Board, the County Counsel prepared an inventory of MTA litigation cases within the last five years. The inventory list included litigation costs and settlements and recoveries incurred from January 1, 2005, through February 28, 2010. The costs incurred prior to January 1, 2005, were not included for those cases opened prior to that date because the costs were incurred outside the audit period. We also found that outside law firms and County Counsel invoices for litigation expenses were accurate. However, some requirements in contracts with outside law firms were not always followed.

### **A. Inventory of Litigation Cases**

We requested County Counsel Transportation Division staff to prepare an inventory of MTA litigation cases that their attorneys handle and supervise. The inventory included 228 open and closed cases and a total of \$41.4 million in litigation costs (\$29.4 million for outside counsel and \$12.0 million for County Counsel). Of the 228 cases:

- 190 litigation cases were closed during the period January 1, 2005, to February 28, 2010; for these cases, the inventory showed that litigation costs totaled \$17.8 million, payouts/settlements totaled \$52.4 million<sup>1</sup> and recoveries totaled \$5.4 million. Outside counsel costs totaled \$8.9 million, or about 50% of the total litigation costs for closed cases on the inventory. (See Attachment A for additional details.)
- 38 litigation cases were open as of February 28, 2010; for these cases, the inventory showed that litigation costs, so far, totaled \$23.7 million and payouts/settlements totaled \$60,000. Outside counsel costs totaled \$20.5 million, or about 87% of the total litigation costs for open cases on the inventory. (See Attachment A for additional details.)
- Analysis showed that litigation costs<sup>2</sup> incurred totaled less than \$100,000 for 179 (78%) of the 228 cases in the litigation case inventory. Of the remaining cases, 41 (18%)

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<sup>1</sup> About 86% of this amount represents one settlement for insurance coverage issues involving the construction of the Red Line.

<sup>2</sup> Includes outside counsel and County Counsel litigation costs incurred during the period January 1, 2005 to February 28, 2010.

incurred litigation costs ranging from \$100,000 to under \$1 million, and 8 cases (4%) incurred costs exceeding \$1 million. (See Attachment B for additional details.)

- Analysis of the litigation case inventory showed that 39 of the 228 cases incurred payout/settlement payments totaling \$52.4 million.<sup>3</sup> Of this total, 23 payout/settlement payments were under \$100,000, 14 payments fell in the range from \$100,000 to under \$1 million, and 2 payments exceeded \$1 million. (See Attachment C for additional details.)

The litigation case inventory list showed 61 case types/categories. The top five case types accounted for 104 (46%) of the cases. These five case types in order of magnitude are: employment, public liability/public damage<sup>4</sup> (PL/PD), wrongful termination, breach of contract, and civil rights (see Attachment B for entire list of case types). We suggest that County Counsel consider providing MTA management data trends on the type of litigation cases aimed at limiting future litigation and payouts. For example, the case inventory included 30 cases related to employment and 21 cases related to wrongful termination. This could be an area for future management emphasis of practices in these areas and assessment of manager training needs.

## 1. Litigation Expenses and Settlement Costs

Litigation expenses and settlement costs for some open and closed cases in the litigation case inventory list provided to us did not include all expenses incurred during the life of the cases because the costs were incurred outside the audit period. The inventory included costs incurred during the period January 1, 2005, to February 28, 2010. However, 78 (34%) of the 228 open and closed cases were initiated prior to January 1, 2005, (63 cases started in 2000 to 2004 and 15 cases started prior to 2000).

We believe that County Counsel staff made a reasonable and responsive effort to prepare the litigation case inventory list. Case cost information is maintained in and retrieved from two separate systems.

- An analyst at the County Counsel Transportation Division maintains Microsoft Excel spreadsheets to record the invoices submitted to MTA for payment. The spreadsheets contain invoice amounts from outside law firms and County Counsel. The analyst also maintains separate spreadsheets with running totals for outside law firms and County Counsel costs incurred for each case since July 1, 2004.

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<sup>3</sup> Includes payout/settlement payments incurred during the period January 1, 2005 to February 28, 2010.

<sup>4</sup> A third party administrator supervised by MTA's Risk Management Department processes and handles about 3,000 PL/PD claims a year. Outside law firms, retained through County Counsel legal services contracts, are used to litigate these claims. The County Counsel provides legal services for some of the PL/PD claims.

- The analyst obtains costs, if needed, from prior periods from the County Counsel’s office at the County Administration Building.

We requested that County Counsel staff provide us with the total litigation expenses for six large cases, which were opened prior to 2000.

Case	Expenses Included In Inventory (1)	Expenses Not Included in Inventory (2)	Total Litigation Expenses (3)
1	\$13,147,594	\$23,991,065	\$37,138,659
2	4,436,460	15,434,650	19,871,110
3	1,867,523	6,369,799	8,237,322
4	552,465	178,527	730,992
5	259,175	13,336,631	13,595,806
6	247,967	640,286	888,253
TOTALS	\$20,511,184	\$59,950,958	\$80,462,142

- Notes: (1) Expenses incurred from January 1, 2005 to February 28, 2010  
(2) Expenses incurred prior to January 1, 2005  
(3) Total expenses as of February 28, 2010

The audit consulting firm performed additional work in the area of implementing an automated case management system that would provide centralized, real-time access to case information, status, and costs; and made a recommendation in its separate report, which is being concurrently reported under Part B.

**2. Settlement and Payout Amounts**

We found that settlement payments totaling \$495,797 were not included on the litigation case inventory list provided to us.

**a. RMIS Case Numbers Were not Always Assigned.**

MTA litigation settlement payments are recorded in the Financial Information System (FIS) account number 50919, “Misc Claims/Awards.” We reviewed transactions in this account for the period of January 2005 through February 2010 and traced the settlements to the litigation case inventory list prepared by County Counsel Transportation Division staff.

We found five payout/settlement payments,<sup>5</sup> totaling \$291,347 for four cases, that were not included in the litigation case inventory. County Counsel staff acknowledged that they prepared the check requests for these payouts. They did

<sup>5</sup> Four of the five payments were in 2009.

not include these cases in the inventory list because a Risk Management Information System<sup>6</sup> (RMIS) case number had not been assigned; thus, there was no tracking of these cases. We were told that the reason these cases were not assigned a RMIS number was they were considered small cases that did not require much legal work and the work was done in-house rather than by an outside law firm. All hours worked on these types of cases were included on the invoices presented to MTA in one of the “Overhead” codes. We believe that all litigation cases should be assigned a RMIS case number so that the cases and related expenses can be tracked and managed.

**b. Settlements Were Inadvertently Omitted from the Inventory List.**

We found that 2 payouts/settlements in FIS totaling \$204,450 were not included on the initial litigation case inventory list provided to the OIG by the County Counsel Transportation Division.<sup>7</sup> The cases for these payouts were assigned a RMIS case number and the cases were listed on the inventory. The analyst at the County Counsel confirmed that these 2 payouts should have been included on the inventory list. County Counsel officials advised us that one settlement was not included in the inventory because the analyst who prepared the inventory did not understand that payouts for attorney fees are part of the settlement. In the other instance, the analyst misunderstood and pulled payout information by fiscal year rather than calendar year.

We believe that an automated accounting system and/or case management system will facilitate the tracking of all expenses and payouts associated with each case.

**B. Review of County Counsel Invoices**

**1. Billing Hours and Rates**

Our review of County Counsel invoices for Transportation Division attorney and paralegal legal services did not identify any deficiencies.

The County bills MTA by the hour for attorney and paralegal<sup>8</sup> services. These individuals maintain timesheets that record the RMIS case numbers and hours they worked. This information is entered into RMIS. The County uses information from this

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<sup>6</sup> RMIS is an automated system that is maintained by the County Counsel office at the County’s Administration Building.

<sup>7</sup> After we identified this deficiency, we adjusted the case inventory list to include the \$204,450 that had been omitted from the inventory.

<sup>8</sup> The rates charged for attorneys and paralegals are fully burdened rates that include benefits and a proration of the costs of the Assistant County Counsel and legal secretaries. These rates are lower than the normal County Counsel rates to reflect the value of overhead costs provided by MTA.



system to prepare the monthly bill to MTA. The billable hourly rates for FYs 2009 and 2010 were:

<b>Job Title</b>	<b>Hourly Billing Rates (A)</b>	
	<b>FY 2009</b>	<b>FY 2010</b>
Assistant County Counsel	\$0	\$0
Principal/Senior Deputy County Counsel	\$194.05	\$182.95
Deputy County Counsel	\$164.11	\$154.72
Senior Associate County Counsel	\$135.73	\$127.96
Senior Paralegal	\$84.55	\$79.71
Paralegal	\$75.86	\$71.52
Legal Secretary	\$0	\$0

Note (A): These rates reflect Metro providing overhead expenses for the County Counsel Transportation Division working in the MTA Gateway building.

During Calendar Year 2009, the County invoiced MTA for 26,541.5 hours totaling \$4,566,192.48. We reviewed the invoice for January 2009, which totaled \$372,544. We obtained the supporting timesheets for the two pay periods<sup>9</sup> in January 2009. We determined that the total number of hours on the timesheet for each individual agreed with the total number of hours on the invoice. In addition, the hourly rates on the invoice were the correct rates for FY 2009. We also tested the December 2009 invoice and found that the hourly rates billed were the correct rates for FY 2010.

**2. Invoiced Amounts for Other Services**

We found that the County’s bill for other services appeared reasonable and appropriate for legal work. We reviewed the County’s invoices for other services for the period January 1, 2009, through March 3, 2010, which totaled \$700,615.69. These expenses were for a variety of goods and services such as court reporter transcripts, serving subpoenas, library services, Lexis Nexis on-line services, copying services, and supplies and services provided by the County. In our opinion, these expenses appeared appropriate and related to legal services.

We determined that there were a total of 15 invoices (totaling \$6,931.80) for reproduction and duplication services that were sent to an outside firm rather than having the work performed by the MTA’s reproduction department. We interviewed the three attorneys that ordered these services. They provided us reasons for not using MTA reproduction

<sup>9</sup> The County Counsel uses exactly two pay periods for each calendar month, covering the first through the fifteenth and the sixteenth through the end of the month.

services in these 15 instances, such as need for confidentiality, quick turn-around, and multiple copies in the format with tabs, and bound as required by the courts.

### C. Review of Outside Law Firm Invoices

The County Counsel's Transportation Division uses Los Angeles County contracts (service agreements) to engage outside law firms for its litigation cases. We selected for review all 55 invoices that were identified in Financial Information System (FIS) with an invoice date in January 2009, February 2009, and January 2010. The 55 invoices were submitted by 12 outside law firms. The service agreements for the 12 law firms we reviewed were effective prior to August 1, 2008. The billed amounts on the 55 invoices totaled \$1,229,636; of this total, \$521,567 represented costs for outside consultants and experts. For these 55 invoices, we:

- Verified whether five key requirements in the service agreements with outside law firms were followed.
- Compared the amount paid by MTA to the amount on the invoices.
- Compared the hourly billing rates on the invoices to the County Counsel's list of authorized billing rates for each law firm for the period reviewed.
- Reviewed the Invoice Approval – Assigned Attorneys form to determine whether invoices were properly approved for payment, and the correct general ledger account was cited on the form.

We found that County Counsel staff reviewed and approved the invoices for payment. Our review did not find discrepancies in the amounts paid to firms, hourly billing rates on the invoices, authorization to pay invoices, and general ledger accounts charged. However, we found that improvements were needed in several areas to ensure compliance with contract requirements. Specifically, requirements in 4 of 5 contract areas reviewed were not always followed as discussed below.

### Review of Service Agreement Requirements

1. **Requirement:** The current Guidelines for Billing Invoices in the Service Agreement states that billing invoices shall contain the current/correct County Counsel RMIS case number.

We found that 26 out of the 55 invoices did not contain a RMIS number. Invoices containing the County Counsel RMIS number help ensure that the invoiced amount is charged to the correct litigation case. All of the contracts reviewed were older contracts that did not include the requirement to reference RMIS numbers on

invoices. These law firms included some form of case identification (e.g., name of case) on their invoices. County Counsel Transportation Division officials told us that they will request the law firms to reference the RMIS case number on future invoices.

- 2. Requirement:** The Guidelines for Billing Invoices in the Service Agreement states that all invoices must include the following statement signed by the firm's supervising attorney: *"I have personally examined this billing statement. All entries are in accordance with the Agreement for Professional Legal Services, are correct and reasonable for the services performed and costs incurred, and no item on this statement has been previously billed to County."*

We found that 9 invoices submitted by three law firms did not have the required billing declaration statement signed and dated by the firms' supervising attorney. The declaration statement signed by the firm's supervising attorney ensures the supervising attorney takes responsibility for the correctness of the invoice billed. County Counsel Transportation Division staff told us that if the required declaration is not included in the invoice, they are now requesting the law firm to submit the declaration.

- 3. Requirement:** The Guidelines for Billing Invoices in the Service Agreement states that the invoice must include the date and who gave prior approval for incurring extraordinary expenses such as consultants, experts, investigative services, and travel outside Los Angeles, Orange, Riverside, San Bernardino, and Ventura counties.

All 17 invoices that billed for extraordinary expenses did not contain the required information as to who preapproved the extraordinary expenses and the date of approval.<sup>10</sup> Twelve of the 17 invoices contained billings for consultants and experts totaling \$521,567.28.

- 4. Requirement:** The Guidelines for Billing Invoices in the Service Agreement states that the billing invoice and backup material should be current, readable, and understandable. The Billing Invoice should describe on its face what services were rendered, and what expenses were incurred and why, without necessary reference to any other documentation.

We found that an invoice and back-up material for coping services did not adequately describe the methodology for the amount billed, what services were rendered, and what expenses were incurred without necessary research and reference to other documentation. One law firm billed Metro \$381.73 monthly for coping services. The only documentation submitted with the invoice was an estimate cost sheet for a Xerox

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<sup>10</sup> A California State Auditor report issued in July 2004 recommended that MTA should "ensure outside counsel adhere to all billing requirements detailed in contract provisions and billing guidelines, including requiring that outside counsel receive written prior approval to use consultants and expert witnesses within an established budget."

Work Center submitted from a third party vendor in October 2006. The cost sheet stated: “12 months: \$260.26/month plus sales tax of 8.25% plus estimated \$100/month for supplies based on an average office use of 10,000 copies/prints, \$381.73 due each month on the 15<sup>th</sup> from October to September 2007.” A handwritten statement on the cost sheet circled the \$381.73 and stated: okay per [the supervising attorney] agreement to bill MTA.”

We determined the law firm billed MTA \$381.73 monthly for coping services from October 2006 through February 2010 (41 months). Based on the documentation provided with the invoice (the third party vendor cost estimate discussed above), it appeared the law firm might have over billed MTA. We referred this matter to County Counsel staff for further research with the law firm. On August 19, 2010, the law firm responded that no lease contract was ever signed with the third party vendor who prepared the October 2006 cost estimate. The law firm made a decision to purchase a Xerox copier and used the \$381.73 estimate to bill MTA for simplicity. The law firm invoiced MTA \$381.73 monthly starting October 2006 because this cost estimate was the lowest best estimate from a vendor. The law firm stated that their tests of the costs showed average costs exceeding \$450, which indicates that MTA is being billed less than the actual costs.

We believe that County Counsel staff should request the law firm to submit documentation that more accurately describes the rationale for billing \$381.73 monthly for coping services.

- 5. Requirement:** Exhibit I of the Service Agreement states that the County’s legal and accounting staff shall review all billing statements prior to payment to outside law firms.

We found compliance with this requirement. Our review of 55 invoices found that County Counsel Transportation Division staff reviewed the invoices prior to payment. The County Counsel’s practice is for the Administrative Analyst to check invoices to determine whether the hourly billing rates are correct per the contract. Then the invoices are forwarded to the Supervising Attorney for review of the invoiced items such as professional services and the other disbursements before payment.

## Review of Other Areas

We performed other audit tests for the 55 invoices selected for review. These tests did not disclose any deficiencies. Specifically, we:

- **Reconciled Invoiced Amount to Payment Amount**

For all 55 invoices reviewed, we found that the amount MTA paid matched the invoiced amount.

- **Verified Hourly Billing Rates on Invoices**

We found that the hourly billing rates on the outside law firms' invoices were correct. The Administrative Analyst had previously corrected one invoice where an incorrect billing rate was used prior to making payment to the firm.

- **Verified Approval of Invoices Prior to Payment**

We found that all 55 invoices were approved prior to payment by the County Counsel, Supervising Attorney, and Administrative Analyst. This was documented on the Invoice Approval – Assigned attorneys form.

- **Verified Costs Were Charged to the Correct General Ledger Account**

We determined that the 55 invoices were charged to the correct general ledger account. We verified the accounts associated with the invoices to the General Ledger Chart of Accounts in the Financial Information System.

## **RECOMMENDATIONS**

We recommend that the County Counsel Transportation Division:

1. Assign RMIS case numbers to all litigation cases to ensure that the cases are tracked and costs and payouts for every case can be identified.
2. Request outside law firms that have older contracts to reference the RMIS case numbers on invoices.
3. Request outside law firms to execute on the original of each billing statement the required declaration certifying the accuracy of the charges if such declarations are not being submitted with the invoices.
4. Ensure that outside law firms (a) obtain County Counsel's prior approval for consultants, expert witness, out-of-town travel, and other extraordinary expenses, and (b) provide the pre-approval date and name of the approving County Counsel supervising attorney on their billing statements; and ensure that the amount billed corresponds to the amount pre-approved. If it is impractical to obtain prior approval due to emergent circumstances, require outside firms to explain on their invoices the reason pre-approval was not obtained.

5. Request the law firm to submit documentation that more accurately describes the rationale for billing \$381.73 monthly for coping services.

## **COUNTY COUNSEL COMMENTS**

On October 29, 2010, County Counsel provided us with a response, which agreed to the recommendations made in the report and stated that the recommendations have been implemented. Specific corrective actions initiated are:

- RMIS case numbers will be assigned to all litigation cases.
- All outside law firms have been instructed to reference the assigned RMIS case number on all invoices. Any invoice without a RMIS number will not be paid until the appropriate RMIS number is provided.
- All outside law firms have been instructed to execute on each invoice the required declaration certifying accuracy of the charges. Any invoice without a declaration number will not be paid until the declaration is provided.
- Outside law firms have been informed of the need to obtain County Counsel's prior approval for consultants, expert witnesses, out-of-town travel, and other extraordinary expenses. The law firms were also informed to provide the pre-approval date and name of the approving County Counsel supervising attorney on their billing statements. County Counsel will further ensure, as part of the invoice review and approval process, that the amount billed corresponds to the amount pre-approved.
- Documentation has been requested and received that supports the law firm's explanation that the monthly charges of \$381.73 are less than the actual costs incurred.

See Part C for the entire text of the County Counsel Transportation Division's response.

## Summary of Litigation Case<sup>1</sup> Inventory

	Closed Cases <sup>2</sup>	Open Cases <sup>3</sup>	Total
Total Number of Cases	190	38	228
<b>Litigation Costs<sup>4</sup></b>			
County Counsel Costs	\$8,868,274	\$3,140,570	\$12,008,844
Outside Counsel Costs	<u>8,898,890</u>	<u>20,535,467</u>	<u>29,434,357</u>
Total Litigation Costs	<u>\$17,767,164</u>	<u>\$23,676,037</u>	<u>\$41,443,201</u>
<b>Payouts/Settlements<sup>4,5,6</sup></b>			
	\$52,253,677	\$90,000	\$52,343,677
<b>Recoveries<sup>4,7</sup></b>			
	\$5,425,721	\$0	\$5,425,721

Notes:

1. Includes litigation cases handled and supervised by County Counsel attorneys. The inventory does not include Workers' Compensation claims and most Public Liability/Property Damage claims. A contractor hired by MTA's Risk Management Department processes and handles about 3,000 PL/PD claims a year, and Risk Management uses outside law firms for legal matters concerning these claims. However, the County Counsel provides legal services for some PL/PD claims.
2. Includes litigation cases closed during the period January 1, 2005, through February 28, 2010.
3. Includes litigation cases open as of February 28, 2010.
4. Includes costs, payouts, and recoveries incurred from January 1, 2005, to February 28, 2010. Costs, payouts, and recoveries prior to January 1, 2005, are not included for those cases opened prior to that date.
5. Includes \$214,450 that was not included in the initial inventory of litigation cases prepared by County Counsel staff. The OIG found that 3 payouts/settlements totaling \$214,450 were not on the inventory list.
6. Includes 5 payouts totaling \$45,655,000 found by the audit consultant that were not included in the initial inventory of litigation cases prepared by County Counsel staff.
7. Includes 2 recoveries totaling \$2,532,919 found by the audit consultant that were not included in the initial inventory of litigation cases prepared by County Counsel staff.

**Schedule of Litigation Expenses  
Made During the Period January 1, 2005 to February 28, 2010**

---

Litigation Expenses (1)	Number of Cases		
	Closed (2)	Open (3)	Total
> \$10 million	0	1	1
> \$5 million and <= \$10 million	0	0	0
> \$1 million and <= \$5 million	4	3	7
> \$500,000 and <= \$1 million	4	2	6
> \$400,000 and <= \$500,000	1	0	1
> \$300,000 and <= \$400,000	8	2	10
> \$200,000 and <= \$300,000	3	1	4
> \$100,000 and <= \$200,000	16	4	20
> \$50,000 and <= \$100,000	25	7	32
> \$0 and <= \$50,000	<u>129</u>	<u>18</u>	<u>147</u>
<b>TOTALS</b>	<u>190</u>	<u>38</u>	<u>228</u>

Note 1: Litigation expenses include both outside counsel and County Counsel costs.

Note 2: Includes cases closed during the period January 1, 2005 to February 28, 2010.

Note 3: Includes cases open as of February 29, 2010.



**Schedule of Payouts/Settlements**  
**Made During the Period January 1, 2005 to February 28, 2010**

---

	Case Status As of 02/28/2010	Payout/Settlement Amount
1	closed	\$45,000,000.00
2	closed	3,000,000.00
3	closed	600,000.00
4	closed	375,000.00
5	closed	280,000.00
6	closed	275,000.00
7	closed	275,000.00
8	closed	247,968.98
9	closed	211,576.19
10	closed	200,000.00
11	closed	200,000.00
12	closed	198,000.00
13	closed	175,000.00
14	closed	175,000.00
15	closed	150,000.00
16	closed	112,700.00
17	closed	95,000.00
18	closed	91,750.00
19	closed	80,000.00
20	closed	75,000.00
21	closed	67,500.00
22	open	50,000.00
23	closed	50,000.00
24	closed	45,000.00
25	closed	43,000.00
26	open	40,000.00
27	closed	36,000.00
28	closed	31,992.60
29	closed	30,000.00
30	closed	25,000.00
31	closed	25,000.00
32	closed	25,000.00
33	closed	16,000.00
34	closed	15,000.00
35	closed	10,000.00
36	closed	9,500.00
37	closed	8,000.00
38	closed	5,500.00
39	closed	4,189.30
		<b>\$52,353,677.07</b>

## County Counsel Litigation Matters by Case Type January 2005 to February 2010

---

Case Type	Total
Americans with Disability Act	9
Admin Record Certified	2
Age Discrimination	9
Arbitration	1
Bad Faith, Breach of Contract	1
Breach of Contract	17
Breach of Contract, Breach of Warranty, Fraud	1
Breach of Insurance Policy	1
CEQA	1
Civil Rights	11
Condemnation	2
Construction	6
Contract	2
Contract	1
Contract - Personal Injury	1
CPUC-Noise Mitigation	1
Criminal (Coordinating Witnesses & Produce Records Only)	1
Debarment	1
Disability Discrimination	6
Discrimination	10
Electricity Rate Violation	1
Eminent Domain	3
Employment	30
Employment Discrimination (Defend Deposition Only)	1
Employment Discrimination	4
Encroachment (Never Filed)	1
Environmental	2
Environmental Cleanup	1
Excessive force, sec. 1983	1
False Claims	1
Gold Line	1

Case Type	Total
Gold Line Claims	1
Injunction	1
Inverse Condemnation	6
Labor Code	1
Lease	1
Medical Malpractice	1
Metrolink	1
MTA Claim	1
Negligence	1
Orange Line	1
Pasadena Claims - Gold Line	1
Personal Injury	3
Petition To File Late Claim	1
PL/PD	25
Preservation of Evidence	1
Public Records	1
Public Records Litigation	1
Qui Tam	1
Quiet Title	1
Racketeering	1
Redline Segment 2	1
Restitution	1
Set Aside Fraudulent Transfer	1
Sexual Harassment	5
Stop Notice	1
Transactional	7
Vandalism	1
Writ of Mandamus	2
Writ of Mandate	1
Wrongful Termination	21
(Blank)	<u>6</u>
<b>Grand Total</b>	<b><u>228</u></b>

# **PART B**

## **Audit Consultant Report Covering Litigation Cost Management Policies, Procedures, and Practices**

# **THOMPSON, COBB, BAZILIO & ASSOCIATES, PC**

**CERTIFIED PUBLIC ACCOUNTANTS AND MANAGEMENT, SYSTEMS, AND FINANCIAL CONSULTANTS**

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**October 28, 2010**

**Karen Gorman, Acting Inspector General  
Los Angeles County Metropolitan Transportation Authority  
818 W. 7<sup>th</sup> Street, Suite 500  
Los Angeles, CA 90017**

Dear Ms. Gorman,

Thompson, Cobb, Bazilio & Associates, PC is pleased to present our final report on the Audit of MTA's Litigation Cost Management Practices. This performance audit covered the period of time beginning January 1, 2005 and ended February 28, 2010. The attached report contains twenty-two (22) recommendations for the Transportation Division County Counsel to consider in improving its management and control of litigation costs.

We would like to thank the Transportation Division County Counsel and staff for their time and cooperation afforded to us during this audit.

Sincerely,

*Thompson, Cobb, Bazilio & Associates, PC*

# **LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY**

## **AUDIT OF MTA LITIGATION COST MANAGEMENT PRACTICES**

*October 2010*

*Submitted by*

**TCBA**

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**THOMPSON, COBB, BAZILIO & ASSOCIATES, PC**

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## **EXECUTIVE SUMMARY**

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In February 2010, the Board of Directors of the Los Angeles County Metropolitan Transportation Authority (MTA) directed the Office of the Inspector General (OIG) to conduct a comprehensive audit of MTA's litigation costs and cost management performance. This audit's primary objective was to evaluate the efficacy and effectiveness of MTA and the Transportation Division (TD) County Counsel's current policies, procedures and practices to control and manage its legal fees and expenses.

The OIG developed a two part approach for the audit. The OIG performed the first part of the Board directed audit, which included an inventory of all claims and litigation cases within the last 5 years, the accuracy and completeness of the inventory, and review of invoices for legal services of outside law firms and County Counsel. The OIG has issued a separate report on their results. Our firm, Thompson, Cobb, Bazilio & Associates, PC performed the review of the case management and cost practices, and the results of our audit are discussed in this report.

To achieve the objective stated above, we evaluated the following:

- Case management practices and supervision
- Risk Management
- Compliance with policies, procedures, and practices
- Adherence to industry best practices in limiting litigation costs and expenditures
- Review and approval process of payouts and settlements, and
- Communication with MTA Board members

In addition, we also assessed and evaluated changes in management policies, procedures, and practices aimed at limiting future liability payouts and reviewed other information that would provide context, background, and analysis to the Board about how litigation costs are managed.

### **Results in Brief**

The MTA Board requested this audit due to concerns about high legal costs for some cases and whether appropriate controls, reviews, and approvals took place in recent cases. Overall, our audit found that TD County Counsel should improve its litigation cost controls and have an automated case management system in place to more effectively monitor its cases and to account for and report litigation expenditures to the MTA Board. As a result, litigation case status and costs are not being routinely reported to the Board, which has caused concerns among some Board members whether appropriate controls, reviews and approvals are in place.

Our audit found the following areas for improvement in TD County Counsel's management of MTA's litigation caseload:

- No written policies and procedures existed for litigation case management, prior to February 2010.
- Legal expenditures for outside counsel, consultants, and experts exceeding \$200,000<sup>1</sup> are not approved by the MTA Board.
- Case evaluation plans and budgets were not documented in case files prior to February 2010.
- An automated case management system is not used; implementing a system would significantly enhance the reporting of case status and costs.
- Litigation case files did not contain written risk assessments. A risk assessment is a tool for management in deciding whether the case should be settled early on to avoid substantial litigation costs or to continue to litigate for legal precedence or policy issues.
- No policies and procedures were in place for what, when, and how litigation information should be communicated to the Board.

In February 2010, TD County Counsel adopted a Litigation Management Protocol (LMP) process. The LMP is a written policy and procedure that requires preparation of a Case Evaluation Plan and a Case Budget for each case, which should enhance controls over the management of MTA litigation costs. The LMP also requires that roundtables attended by MTA management and counsel be held periodically for each case. However, this audit did not assess the LMP process because TD County Counsel was still in the early stages of implementing the LMP process for all active cases.

Below, we summarize the more significant findings noted during our audit. We provide further detail of these and other findings in the body of this report.

***TD County Counsel should develop written policies and procedures for litigation cost management and case management***

An adequate system of internal controls is key to ensuring financial accountability and essential in protecting an entity's assets from waste, loss or abuse. One of the key elements in establishing an adequate internal control environment is well-documented policies and procedures. During the period under review, from January 2005 through February 2010, we found that TD County Counsel did not have written policies and procedures for litigation cost management and case management. Written policies and procedures would establish a format for the documentation and management of cases, which would assist in the decision-making process.

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<sup>1</sup> As of July 1, 2010, the threshold for non-sealed bid contracts requiring Board approval was increased to purchases exceeding \$500,000.



**Legal expenditures for outside counsel, consultants, and experts exceeding \$200,000 should be approved by the MTA Board**

Purchases for services exceeding \$200,000 should be approved by the Board, per MTA Procurement Policy. We reviewed 15 cases in which outside counsel was utilized and expenses incurred were over \$200,000 for each case. The costs for these cases totaled over \$26 million and represents 76% of the total costs of the cases we reviewed. Two cases accounted for nearly \$18 million of this amount. Prior to 2001, most contracts for legal services were between MTA and the law firms. Currently, contracts for legal services are between TD County Counsel and the law firms. Because the law firms are not contracting directly with MTA, legal expenditures are not being brought to the Board for approval.

**Case evaluation plans and budgets should be prepared and documented**

We reviewed 8 major cases that had expended over \$1 million each in litigation costs. The table below shows the date the case was opened and whether the case is active or closed. In addition, litigation costs are shown for each of these cases only from January 2005 through February 2010, which is the period of our review. Outside counsel handled all 8 of these cases.

CASE	DATE OPENED	DATE CLOSED	COSTS
1	1995	Active	\$ 13,503,230
2	1996	Active	4,436,460
3	1998	2003	1,867,523 <sup>2</sup>
4	2004	2008	1,472,237
5	2004	Active	1,109,659
6	2005	2006	1,005,020
7	2006	2007	1,015,118
8	2006	Active	1,149,207

We reviewed the case files to determine whether key policies, procedures and best practices for managing and controlling litigation costs were followed. The table below summarizes the results of our case file review of these 8 major cases.

---

<sup>2</sup> Although documents indicated that this case was closed in 2003, payments were made on the case until 2005. TD County Counsel staff included this case in the litigation case inventory provided to the auditors.

	CASES								TOTALS	
	1	2	3	4	5	6	7	8	YES	NO
Initial Case Evaluation Plan	N	N	N	N	N	N	N	Y	1	7
Initial Case Budget	N	Y	N	N	Y	N	N	N	2	6
Estimate of Potential Liability/Exposure Range	Y	N	N	Y	Y	Y	Y	N	5	3
Estimate of Anticipated Attorney Fees	N	Y	N	Y	Y	N	Y	N	4	4
Anticipated Costs and Expenses	Y	Y	N	Y	Y	N	Y	N	5	3
Memo to Board communicating significant events	Y	N	N	N	Y	Y	N	N	3	5
Updates to case evaluations	N	Y	N	Y	N	Y	Y	Y	5	3
Updates to case budgets	N	N	N	N	N	N	N	N	0	8
Engagement Letter with Outside Counsel	N	N	N	N	N	N	N	N	0	8
Outside Counsel case budgets/estimates	N	Y	N	Y	Y	N	Y	N	4	4

Based on the results above, case evaluation plans and budgets were generally not documented in the case files. We found evidence of cost estimates provided at various points during the life of the case. Some cases had no cost estimates or potential liability amounts documented in the case files. Most case files did not document any memos to the Board communicating significant events. Our review of Board agenda minutes indicated that cases may have been discussed during closed session; however, documentation of the subject and extent of the communication to the Board was not available in the case files or in closed session minutes.

***TD County Counsel should utilize an automated case management system***

A case management system documents all aspects of the entire life-cycle of cases. An automated case management system facilitates the efficient, proactive management of cases and matters. We found that TD County Counsel does not utilize a case management system in managing their cases. There is no centralized, real-time access to information or databases tracking case/matter assignments, status, and costs. We found that there is no integrated litigation cost accounting system. Case costs are maintained in two separate systems and cost information must be retrieved manually from the two systems in order to obtain case cost information. Implementing an automated system would help TD County Counsel provide management with timely, accurate, and relevant information.

***Risk assessments should be documented and performed sooner***

The crucial time period for effective oversight over litigation is in the initial months after the suit is filed or during the investigation phase. At this time, counsel is in a position to provide an initial evaluation of the likely course and outcome of the litigation. This evaluation is necessary for management to make the decisions about the litigation strategy. We found that risk assessments may not have been conducted at the earliest point possible and/or were not documented. A risk assessment is the primary tool for management in deciding whether the case should be settled early on to avoid substantial litigation costs or to

continue to litigate for legal precedence or policy issues. We did not find documentation of risk assessments in the litigation files.

***Policies and procedures for litigation communication protocol to the Board should be developed***

We found that there are no policies and procedures in place for communication litigation protocol to the Board. Establishing communications protocol between TD County Counsel and the Metro Board would provide a formalized procedure for communicating relevant information and strategy to the Board in a timely manner so that it can make informed decisions.

**Limitations and Restrictions**

The results of this report are limited to the audit objectives and procedures outlined in this report. Other matters might have come to our attention had additional procedures been performed. We did not evaluate the quality of legal decisions.

This report is intended solely for the information of the MTA Board of Directors, MTA OIG, MTA management and the County Counsel-Transportation Division and is not intended to be and should not be used by anyone other than these specified parties.

## **CHAPTER 1 – BACKGROUND, OBJECTIVES, SCOPE & METHODOLOGY**

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### **Background**

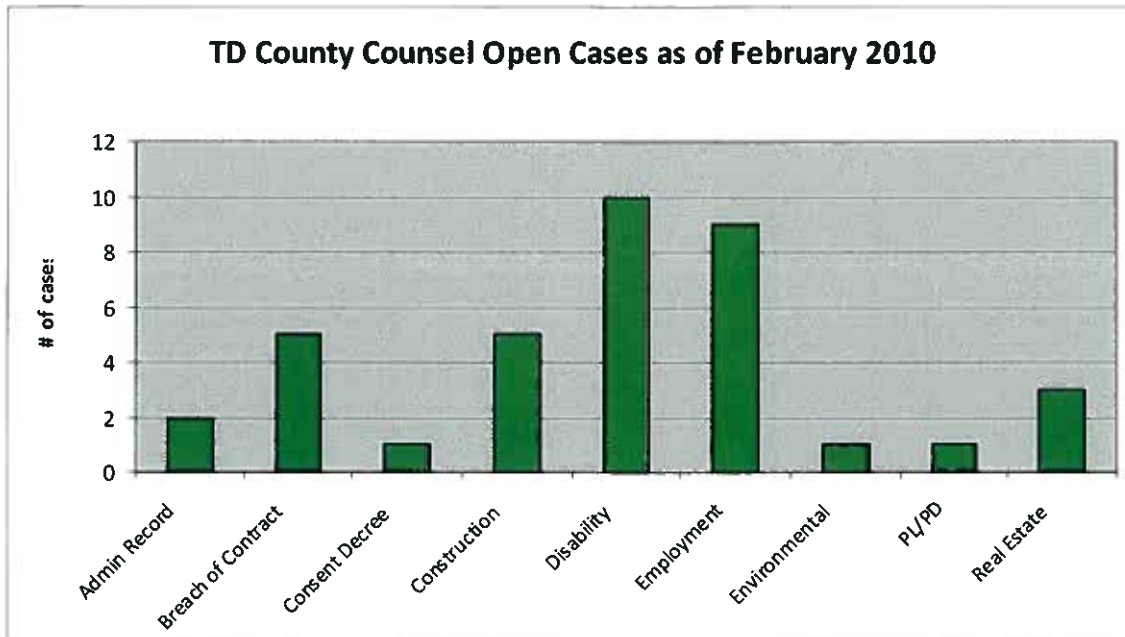
The Los Angeles County Metropolitan Transportation Authority (MTA) serves as the planner, coordinator, and operator of the public transportation system for the County. It is governed by a Board of Directors.

MTA is a public agency separate and distinct from the County of Los Angeles. In 1994, the MTA Board of Directors appointed the County of Los Angeles, Office of County Counsel to serve as the MTA's general counsel. The County Counsel, through its Transportation Division (TD), employs 14 attorneys and various support staff who are located at the MTA headquarters. The County Counsel directly represents the MTA in transactional matters such as reviewing contracts and providing legal advice. The County Counsel also litigates cases using in-house counsel and/or outside counsel; these cases include some, but not all, public liability and property damage cases. The County Counsel also monitors outside counsel who represent the MTA in a variety of legal matters. There is no written contract or agreement between MTA and the County Counsel; however, there is an understanding that County Counsel will bill the MTA at an hourly rate sufficient to cover the costs it incurs in representing the MTA.

The TD County Counsel's FY 2010 actual costs, including transactional work totaled \$13.9 million and the FY 2011 budget is \$16.8 million. For the past 5 years, the County Counsel has directly litigated or supervised the litigation of 190 closed cases. Outside counsel costs account for a substantial proportion of the litigation costs for these cases.

Public liability and property damage (PL/PD) and Workers' Compensation claims are managed by another MTA department with the assistance of a third party administrator. County Counsel directly supervises the litigation of a few PL/PD cases. The scope of this audit does not include PL/PD and Workers' Compensation cases, except for those PL/PD litigation cases that are directly supervised by the County Counsel.

MTA is the defendant in a majority of the litigation cases. Litigation cases handled by TD County Counsel include employment, disability, construction, contract, environmental, and real estate. Currently, TD County Counsel litigation cases are primarily employment cases. As of February 2010, TD County Counsel has a total of 38 open litigation cases. The table below shows the breakdown of the open cases being handled by TD County Counsel by case type.



The graph below illustrates the Transportation Divisions' total costs (including transactional work) from FY 1996 to FY 2011. As illustrated the legal costs peaked in FY 2002 at \$31 million and declined as costs for major construction-related cases closed or wound down.



## Objectives

We conducted a comprehensive audit of MTA's litigation cost management practices, and evaluated the efficacy and effectiveness of MTA's current policies, procedures, and practices. The objectives of this audit were as follows:

1. Determined the adequacy of current case management and supervision of outside counsel by the Office of County Counsel.
2. Determined the effectiveness of procedures in place to analyze the potential value of each case and to minimize the risk that MTA may incur unreasonable or unsubstantiated legal costs in cases assigned to outside counsel.
3. Identified and evaluated the adequacy of policies, procedures and practices to control legal fees and expenses by reviewing 25 cases closed in the past 5 years and by reviewing 9 active cases.
4. Determined whether County Counsel adheres to industry best practices of legal departments of comparable government or transit agencies.
5. Determined whether there are policies and procedures for MTA and the Board in considering approval of settlement agreements, settlement payments and legal fees and expenses; and determine whether MTA and the Board adhere to these policies and procedures.
6. Determined whether there are policies and procedures concerning the manner and content of communication to the Board when providing case updates about significant developments or expenditures, recommending litigation strategy, or settlement of litigation. Determined whether County Counsel has adhered to these policies and procedures for closed cases.
7. Determined whether there are changes that can be made in policies and procedures to improve case management.
8. Conducted a follow-up on the implementation of the recommendations of the California State Auditor (CSA) Report; and analyzed various expenses and costs, including trends, for the cases supervised by County Counsel for the 5-year period of 2005 to 2009. Analyzed whether the organizational structure of the County Counsel's Transportation Division is adequate to supervise the case load, and evaluated checks for conflicts of interest.

### **Scope of Audit**

The period covered by the audit was January 1, 2005 to February 28, 2010, for closed litigation cases, and the cut-off date for open cases was February 28, 2010, or a later date, if appropriate.

Our scope did not include a review or analysis of the merits of the case or the legal strategies of the cases.

### **Methodology**

Our audit was performed in accordance with Generally Accepted Government Auditing Standards (GAGAS). GAGAS requires that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained



provides a reasonable basis for our findings and conclusions based on our audit objectives. We engaged a legal consultant to work on the audit as a subject matter expert. To accomplish our audit objectives we performed the following:

1. Case management and supervision

- Determined what case management system is currently in place and evaluated the adequacy of the system for managing and tracking litigation costs. Determined whether the case management system provides management timely, accurate, and relevant information to track and manage litigation costs.
- Evaluated whether the use of an automated case management system would improve and facilitate management of litigation costs.
- Evaluated whether there is adequate supervision such as pre-approval of expenses, budget reviews, or timely notice of significant events for litigation cases handled by outside counsel, and in-house attorneys.
- Evaluated the adequacy of the approval process (at County Counsel management, MTA management, and/or MTA Board levels) for litigation expense budgets, and revisions to budgets; timely reporting of cost overruns on cases to MTA management and/or the Board; and seeking approval from MTA management and/or Board for case litigation expenses that exceed a predetermined amount.
- Evaluated the adequacy of the case budget process including a life of project budget and approval when budgeted amount is exceeded.

2. Risk management

- Determined the effectiveness of procedures in place to reduce cost risks.
- Determined whether risk is analyzed at the beginning of each litigation case, the analysis is documented in the case file, and the analysis is periodically updated as events affecting the case occur.
- Evaluated the methodology used to analyze and minimize risk for each case.

3. Compliance with policies, procedures, and practices

- Identified key policies, procedures, and practices for managing and controlling litigation costs.
- Evaluated whether these policies, procedures, and practices are adequate for managing and controlling costs.
- Selected 25 cases closed in the last 5 years (January 1, 2005 to February 28, 2010) to review based on those that had the highest payout, settlement and/or litigation expenses. For these cases, we performed tests to determine whether the key policies, procedures, and practices for managing and controlling litigation costs were followed. Also, we reviewed these cases to determine whether:



- Analyses were made of actual costs versus budgeted costs, by major types of expenses.
  - Budget revisions were approved.
  - There is evidence of supervision of litigation costs.
- Selected 9 open cases for review based on those with the highest potential payout, settlement, and/or litigation expenses. Determined whether policies, procedures, and practices for controlling costs were followed.
4. Adherence to industry best practices
- Identified best practices used by legal departments in other government or transit agencies.
  - Determined whether the current policies, procedures, and practices in place to manage and control litigation costs are in conformance with best practices.
5. Review and approval process of payouts and settlements
- Determined the procedures and requirements for MTA and/or Board approval of payouts and settlements.
  - For the closed cases selected for review, determined compliance with the requirements and policies for approval of payouts and settlements.
6. Communication with MTA Board members
- Determined the procedures and requirements for communication with the MTA Board.
  - Evaluated whether these requirements are adequate to keep the Board informed about significant potential payouts, settlements, and expenses; risks; and significant case developments.
  - For the closed cases selected for review, determined compliance with requirements and policies to concerning communication to the MTA Board of Directors.
  - For open and closed cases, determined whether pre-approval was obtained from the Board and/or MTA on significant expenditures and the Board and/or MTA were notified on significant developments in major cases.
7. Advice to management aimed at limiting future liability payouts through changes in management, policies, procedures, and practices
- Determined whether there is a process to provide MTA management advice on (“lessons learned”) limiting payouts by recommending changes in management, policies, procedures, and practices; and determine compliance of this process for the closed cases selected for review.

8. Any other information that would provide context, background, and/or analysis to the MTA Board about how litigation costs are currently managed.
  - Conducted a follow-up on the implementation of the following recommendations in California State Auditor report (2003-119, July 2004). That report recommended, that to better monitor outside counsel, MTA, in conjunction with County Counsel, should take the following actions:
    - Require outside counsel to prepare flexible case plans and budgets detailed by phase, as well as budget revisions where outside counsel expect costs to exceed budgets.
    - Consider requiring outside law firms to submit invoices using a task-based format if they have the ability to do so.
    - Ensure that outside counsel adhere to all billing requirements detailed in contract provisions and County Counsel billing guidelines, including that payments are only made at agreed billing rates.
    - Ensure that outside counsel receive written prior approval to use consultants and expert witnesses within an established budget.
    - Update County Counsel's billing guidelines to address allowable expenses related to new technologies and air travel.
  - Analyzed cost trends of litigation cases supervised by the County Counsel. Determined whether the organizational structure of the County Counsel's Transportation Division is appropriate for the efficient management/supervision of litigation cases and costs.
  - Determined the formula and make-up of the various expenses in the County Counsel in-house billing rates charged to the MTA. Determined the extent of MTA management's involvement in the billing rates as to review and acceptance of the rates.
  - Determined whether the County Counsel performs a conflicts check for in-house and outside attorneys to ensure that there is no financial interest in the assignment of attorneys to each case.

## CHAPTER 2 – REVIEW OF MTA LITIGATION COST MANAGEMENT PRACTICES

We reviewed a total of 34 cases (25 closed and 9 open) during the period of our review from January 2005 through February 2010. The total costs incurred for these cases during the period of our review was \$35,122,397 to include all fees and costs for both in-house and outside counsel. Outside counsel fees and costs totaled \$27,631,720, or almost 80% of the total legal costs incurred. The costs for these cases represent only those costs incurred under the period of our review. Half of the cases we reviewed were opened prior to January 2005 and do not include costs incurred before January 2005. The table below is a summary of the cases we reviewed:

	No. of Cases	Total Costs	% of Costs	Settlements/ Payouts	Recoveries <sup>3</sup>
Construction	9	\$ 23,122,473	65.8%	\$ 46,247,969 <sup>4</sup>	\$ 4,292,802
Employment	13	4,884,097	13.9%	4,978,000 <sup>5</sup>	
Real Estate	6	4,139,132	11.8%	811,576 <sup>6</sup>	32,919
Consent Decree	3	1,389,833	4.0%		
Civil Rights	2	1,192,662	3.4%	65,000	
Environmental	1	394,201	1.1%		
	34	\$ 35,122,397		\$ 52,102,545	\$ 4,325,721

The above cases were reviewed to evaluate compliance with policies, procedures and best practices for controlling litigation costs. Below are the results of our review.

**Finding No. 1: TD County Counsel should develop written litigation cost management and case management policies and procedures**

An adequate system of internal controls is key to ensuring fiscal accountability and essential to protecting an entity's assets from waste, loss or abuse. These controls specify not only the procedures to be followed in everyday operations, but also establish the level of involvement and oversight by management and the Board of Directors. The internal control environment of an organization is established by top management and includes factors such as management's commitment to structure,

<sup>3</sup> Recoveries represent the amount received by MTA through settlements and/or court-ordered payments.

<sup>4</sup> Settlements and payouts represent those payments made by MTA to settle a case or as required by the court. Ninety-seven percent (97%) of this amount represents one settlement for insurance coverage issues involving the construction of the Redline. One million of this amount is for a settlement that may have been paid prior to 2005.

<sup>5</sup> Approximately 60% of this amount is a payout for one case resulting in a plaintiff verdict.

<sup>6</sup> Approximately 74% of this amount is a settlement payment for an eminent domain case.

accountability, ethical values, and well-documented policies and procedures. Written policies and procedures provide a clear explanation of what is expected and allow management to guide operations without constant management intervention.

We found that there were no written policies and procedures in place for litigation cost management and case management for the period under review. Based on our discussions with County Counsel attorneys and our review of case files, each attorney acts independently and case files are the responsibility of each attorney. Because there is no standardized filing system, case files were organized differently and there was no consistency as to what documents were maintained in each case file. Documents retained by some attorneys were not being kept by others and some attorneys scanned their documents, while others did not.

Written standard policies and procedures provide a consistent format for the documentation and management of cases.

**Recommendation 1:**

We recommend that TD County Counsel develop written litigation cost management and case management policies and procedures.

**Recommendation 2:**

We recommend that TD County Counsel develop a standardized case filing system and develop a policy that specifies what documents should be retained in the case file, and whether case files be scanned and retained in an electronic format.

**Finding No. 2: TD County Counsel does not utilize an automated case management system, which would improve case management and cost reporting**

TD County Counsel does not utilize an automated case management system. There is no centralized, real-time access to information or database that tracks case/matter assignments, status, and costs. Currently, information and documents are being filed and stored in disparate systems.

An automated case management system facilitates the efficient, proactive management of cases and matters. Case management systems provide case/matter management of pertinent data and information, documents, calendaring, case budgets, departmental budgeting, cost management, outside counsel/experts/consultants budgets, and actual billing. Case management systems also serve as data warehouses preserving the institutional knowledge of the organization for all active and inactive cases/matters in

order to leverage the use of prior work product, as well as assist in performing conflicts checking and evaluating outside counsel performance.

LA County Counsel utilizes an automated case management system called Risk Management Information System (RMIS) for County litigation. However, we found that TD County Counsel utilizes RMIS only to track time charges by case/matter. Financial data, exposure levels, case budgets, and pertinent case information are not maintained in RMIS for MTA cases.

We met with LA County Counsel's RMIS Unit/Application Development to discuss the capabilities, reporting, and security as it relates to RMIS and to explore the possibilities of implementing RMIS for MTA cases. Based on our discussions, we learned that RMIS is integrated directly with the County system and can produce cost reports, such as case costs reports, actual to budget variance reports, quarterly fees reports, settlement reports, and reserves reports. However, RMIS would be limited in providing this cost information for MTA cases because MTA maintains its own accounting system that is not integrated with the RMIS system. TD County Counsel does not utilize RMIS for case management because of confidentiality concerns. A segregated module within RMIS can be developed for MTA cases, however, that would require customization to the RMIS system, and the extent of financial information that can be maintained may still be limited.

The benefit of maintaining an automated system is to have all case information centralized. If RMIS were utilized, TD County Counsel would still have to maintain different systems for case management and cost management. Thus, we believe that TD County Counsel should have a fully integrated case management system that captures all case information in one centralized location. Also, with the limited number of cases TD County Counsel handles it may be a better alternative for MTA to utilize its own case management system, which would also address the confidentiality issues raised by TD County Counsel.

### **Recommendation 3:**

We recommend that TD County Counsel work with MTA to obtain and utilize an automated case management system to improve and facilitate case/matter management, as well as litigation cost management. TD County Counsel and MTA should explore automated case management systems that provide a comprehensive set of features and functionality including, but not limited to:

- Litigation calendaring
- Maintenance of client information and profiles
- Maintenance of all cases and matters
- Integration of document management

- Process conflict checks
- Ability to produce management reports and financial reports
- Maintenance of outside counsel and vendor performance metrics
- Integration with accounting and financial systems
- Cost management

**Finding No. 3: MTA funds totaling \$250,000 has remained on deposit with the Court for over three years since the settlement agreement; an automated case management system would improve tracking of such matters**

The California Code of Civil Procedure, Section 1255.030 (e) states that, "if the court determines that the amount deposited exceeds the probable amount of compensation, it may permit the plaintiff to withdraw the excess not already withdrawn by the defendant." This section allows MTA to recover the deposit because the plaintiff has already been paid with other funds.

Eminent domain cases are generally handled by a Principal Deputy of the Los Angeles County Counsel's office, not by TD County Counsel. Based on our discussion with the attorney handling this case, eminent domain cases require the plaintiff to put the approximate value of the property on deposit with the court. A settlement agreement was signed in February 2007 and final judgment was made in March 2007. Rather than having the settlements paid with the funds on deposit with the court, it was decided that the MTA would make the payments and seek recovery of the deposit at a later date, in order to expedite the settlement.

In August of 2008, Transportation Division counsel inquired about the matter, but the deposit still remains with the Court. Counsel stated that an immediate withdrawal of the funds was not filed because they were concerned that this may prompt the property owner to file an opposition to the withdrawal of the funds. As of July 21, 2010, Counsel was instructed to file a motion to the trial court to have the principal and interest returned to the MTA.

There is no case management system or central expense, fee and cost database maintained for individual cases to alert TD County Counsel of the status of pre-paid costs for open litigation cases. A case management system would ensure that deposits with the court are tracked and timely action is initiated to recover the deposits.



**Recommendation 4:**

We recommend that Counsel immediately file a motion with the Court to release the deposit and accrued interest. We also recommend that TD County Counsel follow-up with Counsel to ensure that the motion is filed.

**Finding No. 4: Case Evaluation Plans (CEP) should be prepared and documented**

Case Evaluation Plans (CEP) are an integral part of the overall supervision and monitoring of a case. CEPs are one of the primary management tools used to provide an analysis of the potential costs of the case, potential liability/exposure and the likelihood of an adverse judgment.

The crucial time period for effective oversight of civil litigation is in the initial months after the suit is filed. Because of court rules and timetables, defense counsel must react promptly, and with little latitude, in that period. At the same time, however, the defense counsel should be gathering information to evaluate the suit so that management can make informed strategic decisions about the direction of the litigation.

Once the lawyers are in a position to provide an initial evaluation of the likely course and outcome of the litigation, management can make the decisions about whether the case will be driven by money, principle, publicity, future relationships (either business or regulatory) or some other reason. That business decision will, in turn, dictate the litigation strategy.

We found that 11 out of 34 case files<sup>7</sup> did not have CEPs documented. Based on our discussions with TD County Counsel, case evaluations, strategy and approaches are informally discussed with MTA management and were not necessarily documented during the audit period.

The importance of developing and documenting a CEP is illustrated by a case we reviewed. The initial liability exposure for this case was \$1,000,000 for the initial claim filed. Mediations took place early on with estimated demand values of \$400,000 to settle the case. Lead Counsel estimated a likelihood of 75% that MTA would prevail in trial. An adverse judgment was estimated to be roughly \$1,000,000. TD County Counsel stated that the demand for this initial claim was more than what they estimated the claim was worth and was instructed to continue to trial. After further discovery, the complaint was amended by the plaintiff and the liability exposure amount increased to

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<sup>7</sup> We were only able to review 32 case files to determine if CEPs were prepared and documented because 2 case files were destroyed in compliance with the MTA Document Retention Policy.

\$2,000,000. The case continued to trial and resulted in a plaintiff verdict for about \$3.4 million, to include attorney fees plus penalties of 3 times the attorney fees.

Because the CEPs were not documented in writing, the auditors could not evaluate their effectiveness. We believe that the preparation of written CEPs would serve to document the analysis performed by TD County Counsel for managing the litigation and minimizing MTA's exposure and litigation costs.

**Recommendation 5:**

We recommend that TD County Counsel prepare CEPs and periodically update the plans as significant events take place or at certain time intervals.

**Finding No. 5: Case Budgets should be prepared and documented**

Case budgets are integral parts of the overall supervision and monitoring of a case. Case budgets provide a plan for the conduct of cases and allow for an evaluation of the reasonableness of billed legal costs by providing estimates with which they may be compared.

LA County Counsel's Litigation Management Handbook requires case budgets to be prepared within 30-90 days of assignment, depending on the priority level of the case. Our benchmarking survey revealed that case budgets are prepared and not-to-exceed amounts are established for each litigation case.

Based on our review of 34 case files and interviews with TD County Counsel, we found that case budgets and estimates were not prepared and TD County Counsel does not monitor the costs for each case. TD County Counsel confirmed that case budgets were not prepared for cases during the period of our review. While case costs may be obtained from TD County Counsel's Administrative Analyst, we found that attorneys do not actively monitor or track the total costs incurred for each of their cases. We found no documentation in the file of discussions of case costs with MTA management or evidence that in-house attorney fees and cost estimates are prepared.

Requiring case budgets and establishing a cost reporting requirement would provide TD County Counsel with management tools to effectively monitor and provide oversight over legal costs. Based on our review of 25 closed cases, we found that the legal costs for 5 of the 25 closed cases reviewed exceeded the settlement value. Legal costs for one of those cases were almost 4 times the actual settlement value. Another case resulted in a judgment for the plaintiff with the payment equal to that of the legal costs incurred. The table below details the cost information for each of the 5 cases.



Case	Legal Costs	Actual Settlement Payout	Estimated Potential Liability Exposure <sup>8</sup>
1	\$ 593,574	\$ 375,000	\$ 2,000,000
2	381,374	280,000	600,000
3	1,866,009 <sup>9</sup>	1,000,000	7,500,000
4	1,005,020	275,000	600,000
5	272,426	275,000	1,000,000

The information above only reflects the financial aspect of the case and does not take into account other factors that may have influenced the case. It should be noted that early settlement may not have been an option because the plaintiff may not have been willing to settle. Our review did not include an analysis of the merits of the case or an evaluation of the case strategies. Based on the cost information above, it appears that if budgets were prepared and periodically reviewed, additional efforts to settle the case could have been made to reduce litigation costs.

**Recommendation 6:**

We recommend that TD County Counsel develop case budgets for all cases. The case budgets should be periodically updated as significant events take place, at certain time intervals, or when budget increases are needed.

**Finding No. 6: Outside counsel should prepare case evaluation plans and budgets as required in their contract**

The County of Los Angeles Professional Legal Services agreements between TD County Counsel and outside law firms require that the firms are to provide CEPs within 30 calendar days after receiving the case. The CEP should include, but is not limited to:

1. Facts and identified legal issues
2. Statement of precedent-setting or sensitive issues
3. Statement of injuries and damages
4. Statement of liability exposure
5. Recommendations
6. Initial cost estimates (Costs shall be budgeted on a total and annualized basis and shall include, attorney fees, consultant and expert witnesses, deposition and transcripts, fees and expenses through different stages)

<sup>8</sup> Estimated Potential Liability Exposure amounts were provided by TD County Counsel and not found in the case files.

<sup>9</sup> Legal fees and costs for this case are understated. This case originated in 1998 and costs prior to January 2005 are not included in this amount.

Outside counsel is used when case/matters cannot be handled in-house. The decision to utilize outside counsel is made at the onset of the case. It is the practice of TD County Counsel to obtain cost estimates by fiscal year from outside counsel to prepare the TD County Counsel budget for MTA. Outside counsel provide estimates of the anticipated legal fees and costs regarding cases when requested by TD County Counsel. However, these estimates are not requested for the purpose of cost reporting by case.

We found overall that written CEP and case budgets were not provided or documented for all cases handled by outside counsel. We found that less than half of the case files had a CEP documented and maintained in the file. In addition, only 20% of the cases reviewed had case cost estimates from outside counsel. The responsible attorney requests estimates from outside counsel of what they anticipate costs will be for that fiscal year. However, this information is rarely documented and included in the file, nor are these estimates broken down by phase or task.

TD County Counsel stated that budget preparation for complex cases may be difficult to estimate and hard to predict. However, with detailed case budgets, TD County Counsel management can more effectively evaluate the reasonableness of outside legal counsel costs and make informative decisions to settle a case early to avoid significant legal fees.

**Recommendation 7:**

We recommend that TD County Counsel require outside attorneys to prepare CEPs and case budgets as required in their legal services contract. The CEPs and budgets should be periodically updated as significant events take place or at certain time intervals.

**Finding No. 7:            Outside counsel legal expenditures exceeding \$200,000 should be approved by the Board**

MTA Procurement Policy requires Board review and approval for procurement contracts exceeding \$200,000 and modification/amendments exceeding an aggregate of \$100,000<sup>10</sup>. The Procurement Policy prescribes general procurement policies, which shall guide the solicitation, award and administration of all MTA contracts and purchases for supplies, services, equipment and construction.

Based on our review of 34 open and closed case files, we identified 15 out of 34 cases in which outside counsel was utilized and expenses incurred were over \$200,000 for each

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<sup>10</sup> In July 2010, the Board approval thresholds for procurement contracts were revised. Board approval is required for contracts awarded under sealed bid procedures that exceed \$1 million. All other contracts exceeding \$500,000 require Board approval. Board approval is also required for contract modifications that increase the aggregate price by more that \$100,000 up to \$500,000 depending on the dollar amount of the original contract award.

case. The costs for these cases totaled over \$26 million and represents 76% of the total costs of the cases we reviewed.

Prior to 2001, contracts for legal services were between MTA and the law firms. Currently, contracts for legal services are between TD County Counsel and the law firm. Because the law firms are not contracting directly with MTA, approvals for legal expenditures are not being brought to the Board for approval. However, purchases for services exceeding \$200,000 should be approved by the Board, per MTA Procurement Policy.

In order to control litigation costs, legal expenditures exceeding \$200,000 should be approved by the Board. Although the contracts are directly between TD County Counsel and the outside law firm, it is the MTA who is ultimately paying for these services. Thus, the MTA should require that a not-to-exceed amount be established in order to prevent and ensure that significant legal expenditures are properly approved and communicated to the Board.

**Recommendation 8:**

We recommend that TD County Counsel establish not-to-exceed/budget amounts in their contracts with outside counsel and obtain Board approval for legal expenditures per the threshold in the MTA Procurement Policy or a threshold established by the MTA Board.

**Finding No. 8: Not-to-exceed amounts should be established for the use of consultants and experts**

Not-to-exceed amounts and budgets are necessary in monitoring and controlling expenses. The budget is a tool that provides the mechanism for identifying and focusing on departures from the plan. Establishing a not-to-exceed amount in contracts with consultants or experts will allow for proper monitoring and controlling of expenses. Any increases will need to be justified and explained by the expert and/or consultant before incurring additional expenses.

Other than attorney's fees, one of the most expensive components of complex litigation is expert consultant fees. The first step in controlling expert costs is at retention. Upon retaining an expert, the attorney should require a budget from that expert as part of the retention agreement.

Based on our review of 34 open and closed case files, we identified two open cases for which legal costs incurred for consultants and experts totaled over \$8 million for both cases. While these cases originated in the mid 1990's and are complex construction

litigation cases that require extensive use of consultants and experts, these costs are significant. Based on our review, we found that only one case established not-to-exceed amounts for consultants and experts in their contract. Approval to increase the amount was then provided to TD County Counsel for approval and the consultant contract was amended. However, this is not the standard for all experts and consultants used.

Establishing not-to-exceed amounts for consultants and experts is important for those cases that are expert/consultant driven. The establishment of budgets will improve control over costs incurred. The comparison of actual to budget amounts will allow oversight on what is being done and the appropriateness of the billings for the work performed. This proved to be beneficial in one of the cases under review, where expert and consultant costs represented more than half of the billings under review and close to 80% of the billings over the life of the case.

**Recommendation 9:**

We recommend that TD County Counsel establish not-to-exceed amounts for the retention of outside experts and consultants for MTA litigation.

**Finding No. 9: Documentation of case risk assessments could be improved**

Risk management involves controlling, accounting, and reporting for litigation costs in order to reduce litigation costs to the extent possible. Risk management also includes an assessment of the case, proposed litigation approach, estimated case budgets, and re-evaluation of the case after significant events.

TD County Counsel's practice is to notify the appropriate organization unit within MTA of the complaint, the nature and facts of the case, the relief plaintiff seeks, the assessment of the case, plan of litigation, and the next report on the status of the case. However, this initial assessment does not include documentation of estimated case costs or budgets. From this point on, the responsible attorney will manage the litigation at their discretion, in consultation with the appropriate MTA representative.

Based on our review of 34 closed and open cases, we found 13 of the 34 case files reviewed had some potential liability amounts documented at various points during the life of the case. However, we cannot determine whether these estimates were conducted at the earliest point possible, such as during the investigation phase or during the initial months after the suit is filed. We found documentation of cost estimates and/or potential liability amounts years after the claim was filed. While the liability exposure amounts for each of the cases were provided to us, we found no documentation of these risk assessments or potential liability amounts in 19 of the 34

cases we reviewed<sup>11</sup>. The potential liability exposure amounts provided to us did not correspond to the liability amounts reported in status reports to the financial auditors. As a result, different exposure amounts are being provided on an ad hoc basis.

A complete risk assessment would include not only a case evaluation plan, but an assessment of the case budgets, cost estimates, and damages sought. While outside counsel may provide cost estimates, the cost of in-house counsel are not being included in the overall assessment which is necessary to provide a complete picture of the actual cost risks for each case.

For the period under review, TD County Counsel’s practice was to conduct risk assessments; however these evaluations were not documented. It should also be noted that TD County Counsel operates in an informal environment and communications are done verbally. With no uniform or consistent method in place for communicating with the client, it is at the discretion of the attorney and at the client’s request how they will be updated.

We acknowledge that cases are brought to trial for precedence issues and that each case may be unique. However, without documented risk assessments, we are unable to determine if cases were litigated for legal precedence or policy issues and whether cases could have settled early on to avoid substantial litigation costs. The case strategies and decisions to litigate should be documented in the case files as part of the evaluation process.

Based on our review, we found three (3) cases where legal costs incurred, including settlements and payouts, exceeded the estimated liability exposure amount. Below is a summary of these 3 cases.

<b>Case</b>	<b>Actual Legal Fees &amp; Costs</b>	<b>Actual Settlement/ Payout</b>	<b>Total Costs Incurred</b>	<b>Estimated Exposure</b>
1	\$ 470,800	\$ 3,000,000	\$ 3,470,800	\$ 2,000,000
2	381,374	280,000	661,374	600,000
3	1,005,020	275,000	1,280,020	600,000

Case 1 resulted in a plaintiff verdict that was more than the initial estimated liability exposure amount (atypical case<sup>12</sup>). Case 2 settled for an amount less than the initial liability exposure amount, but legal costs incurred and the settlement amount is greater than the estimated exposure amount. Case 3 incurred legal fees and settlement payouts of twice the liability exposure amount.

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<sup>11</sup> We were only able to review 32 case files to determine if risk assessments were prepared and documented because 2 case files were destroyed in compliance with the MTA Document Retention Policy.

<sup>12</sup> Adverse judgment awarded excessive penalties to plaintiff.

While it is evident that some legal costs will need to be incurred to determine the merits of a case, cost estimates and updated case evaluations would help to monitor and control costs. The information about the three cases discussed above reflects only the financial component of the cases and other factors may have impacted the decision to continue to litigate cases. However, we were unable to assess these factors, because there was no documented case evaluation plan or risk assessment found in the files.

**Recommendation 10:**

We recommend that TD County Counsel develop case cost estimates and exposure estimates at an early stage and document the evaluation of the case for settlement or litigation based on the merits, precedential or policy issues.

**Finding No. 10: All settlements were not communicated and approved by the Claims Committee**

MTA Administrative Code, Chapter 2-40-020 requires that the PL/PD Claims Committee shall review and approve all settlements of claims, exceeding \$50,000 for... employment disputes, and construction contract and other contract disputes. A claim settlement with a value exceeding \$200,000 will be reviewed and approved by the PL/PD Claims Committee, but after approval by that Committee the settlement must be presented to the Board of Directors for final approval.

MTA Administrative Code, Chapter 2-40-030 Settlements Requiring Special Consideration states that if the General Counsel determines that the consideration of a proposed settlement, regardless of its value, is of particular urgency or involves policy or other considerations not necessarily within the expertise of the members of the PL/PD Claims Committee, the matter may be brought directly to the Board of Directors for consideration without first having been presented to the Claims Committee.

Based on our review of twenty-five (25) closed cases, we identified nine (9) cases that resulted in settlements equal to and exceeding \$200,000. We found that five (5) of those nine (9) settlements were not approved by the Claims Committee. Two (2) settlements involved very complex construction issues that may have required special consideration, which allowed the settlement to be brought directly to the MTA Board of Directors for approval. Neither of these settlement agreements is retained on file with TD County Counsel. The settlement agreements were maintained in the case files of outside counsel. Two (2) other settlements involved real estate issues of eminent domain and inverse condemnation, which were not approved by the Claims Committee, but were both approved by the Board. The last settlement was an employment issue with a settlement value over \$200,000 that was approved by the MTA Board, but not



approved by the Claims Committee. We were unable to determine if these five (5) cases required special consideration per MTA Administrative Code 2-40-030 and did not require Claims Committee approval.

TD County Counsel stated that settlements over \$200,000 require approval by the Board. TD County Counsel also stated that settlements are brought directly to the Board for approval when scheduling conflicts occur with the Claims Committee and settlement agreements need to be expedited.

**Recommendation 11:**

We recommend that all cases, as stated in the Administrative Code, be brought to the Claims Committee for approval, unless circumstances provide otherwise. If Claims Committee approval is not required or bypassed, an explanation detailing the reason for not obtaining Claims Committee approval should be documented and included in the case file.

**Recommendation 12:**

We also recommend that all final settlement agreements be retained in the litigation files maintained in-house by TD County Counsel.

**Finding No. 11: All significant adverse judgments should be communicated to the Board**

Based on our review of 34 open and closed cases, we found 2 cases for which the court ordered payments of over \$200,000 to be paid by the MTA. We found no evidence that these adverse judgments were communicated to the Board. However, it is unclear if these two cases should have been communicated to the Board.

MTA Administrative Policy, Chapter 2-40 requires that settlements over \$200,000 require Board approval; however, we found no policy or procedure for court ordered payments (adverse judgments) over \$200,000. While judgments do not require Board approval, we believe that court ordered payments over \$200,000 should be communicated to the Board.

The decision to appeal the case is an alternative to approving the court ordered payout. We did not find any documentation regarding the discussion of appealing judgments. However, TD County Counsel advised that such discussions are held in closed session meetings of the Board.

**Recommendation 13:**

We recommend that TD County Counsel work with MTA to develop an MTA policy on how payouts for claims should be communicated to MTA management and the Board, if necessary.

**Recommendation 14:**

We recommend that TD County Counsel document in the case file communications with the Board regarding whether to appeal or accept the court ordered payouts.

**Finding No. 12: TD County Counsel should develop written policies and procedures for Board communications**

We found that there are no policies and procedures in place for communicating information regarding litigation cases to the Board. The current practice by TD County Counsel is to update the Board on cases during closed sessions. We were unable to determine what was discussed during closed session meetings and what information was provided to the Board.

As of February 2010, TD County Counsel is providing periodic reports to the Board about pending litigation cases. These reports include a brief summary of the litigation case, the significant events that have occurred and the current status of the case. Case costs are also provided to include a breakdown between in-house and outside counsels' fees and costs.

There are no written policies and procedures that dictate what, when and how information on litigation cases should be communicated to the Board. Establishing policies and procedures for communications protocol between TD County Counsel and the Board would ensure that relevant information is communicated in a timely manner that could be critical in deciding either to proceed to trial or begin efforts for settlement.

**Recommendation 15:**

We recommend that TD County Counsel work with MTA to develop policies and procedures or a Board policy that states what, when and how information is communicated to the Board by TD County Counsel.



**Finding No. 13:            A Litigation Cost Manager should be utilized to evaluate litigation cases**

A Litigation Cost Manager is used to provide independent analysis by: (1) reviewing bills based on a set of prescribed rules provided by the legal department; (2) determining what line items are not acceptable; and (3) ascertaining how legal dollars ultimately are being spent. LA County Counsel utilizes a Litigation Cost Manager to help monitor and control the cost of litigation cases and the costs of settling of cases.

TD County Counsel did not utilize a Litigation Cost Manager to assist in its evaluation of cases during the period under review. Because MTA cases are not County cases, they were not required to be reported to the County Counsel's Litigation Cost Manager.

However, in April 2010, TD County Counsel enlisted the LA County Counsel Litigation Cost Manager to review the billings and provide additional analysis for a case involving significant litigation costs. As a result of the Litigation Cost Manager's review, a task-based budget was prepared by outside counsel through the conclusion of the case.

The Litigation Cost Manager can act as an objective party to assist in analyzing and providing oversight over litigation costs.

**Recommendation 16:**

We recommend that TD County Counsel utilize the LA County Counsel's Litigation Cost Manager for all high priority cases and other cases on a case-by-case basis.

**Finding No. 14:            No written agreement exists between MTA and County Counsel to provide legal services**

Written agreements are used to clarify the expectations of clients and counsel with respect to such issues as the scope of services, the responsibilities of the attorney and the client, and the basis for compensation. Such clarifications help to define standards that might otherwise become the subject of dispute. The California Business and Professions Code, Section 6148 requires attorneys with cases in which expenses to a client, including attorney fees, are expected to exceed \$1,000 to have written agreements with their clients.

Since the inception of the MTA in 1993, TD County Counsel has been providing legal services for transactional work and litigation work for the MTA. The Board took action, in June 1993, to formally appoint LA County Counsel to represent them as General Counsel for the MTA as required by the California Public Utilities Code (PUC) Section

130051.9(d) which states that the Los Angeles County Metropolitan Transportation Authority shall appoint a general counsel and board secretary.

There is no written agreement between the MTA and the LA County Counsel to provide legal services. Each year LA County Counsel provides the MTA with the billing rates for TD County Counsel. However, a written agreement between County Counsel and the MTA would clarify the services to be provided, the roles of the parties, and the basis of compensation.

**Recommendation 17:**

We recommend that TD County Counsel work with MTA and LA County Counsel to develop a written agreement that at a minimum details billing rates, description of services to be provided, and defines the roles and responsibilities of all parties.

**Finding No. 15: TD County Counsel's billing rates appear reasonable**

TD County Counsel billing rates are set by County Counsel each year. The TD billing rates charged to MTA are reduced rates because the MTA provides office space, equipment, phones, office supplies, and administrative support for TD County Counsel at no cost. We obtained a detailed breakdown of the billing rates and reviewed documentation to determine if the rates were reasonable and adequately supported. The table below shows the billing rates charged to MTA compared to those charged to other legal divisions within the County for FY09-10.

<b>Office of the County Counsel Legal Services Billing Rates for FY 2009-2010</b>		
	<b>Transportation</b>	<b>Other Legal Divisions</b>
Assistant County Counsel	\$ -	\$ -
Principal/Sr. Deputy County Counsel	182.95	226.41
Deputy County Counsel	154.72	191.47
Senior Paralegal	79.71	98.64
Paralegal	71.52	88.51

Based on our review, the billing rates appear to be reasonable and adequately supported.

**Finding No. 16:** TD County Counsel should develop written policies and procedures for conflict of interest checks

The Rules of Professional Responsibility require attorneys to avoid representation of adverse interests. It requires members of the State Bar to notify their client of any potential conflict of interests.

LA County Counsel's Litigation Management Protocol-12 states that any such consent or waiver, if approved by the County Counsel, shall be in writing, which is approved, prior to release, by the County Counsel or the Chief Deputy.

No written policies and procedures for conflicts of interest checks exist. The current practice is that each attorney within TD County Counsel is responsible for performing their conflict checks for each case. Each outside law firm is also responsible for performing their conflicts check. TD County Counsel has a practice of reviewing any potential conflicts of interest presented by outside counsel and either issuing a written waiver of the conflict if it determines that there is no real potential for the MTA's work to be compromised or dismissing outside counsel from the case.

We found limited evidence that conflict of interest checks were performed. We only found documentation of conflict checks and waivers for 3 cases. Based on our review of 34 open and closed case files, we found that only one firm retained an initial conflict of interest check form in their case file and two other cases retained conflict waiver forms in the case files.

We found no written policy or procedures in place that required documentation that conflict of interest checks were performed. As such, we were unable to determine if conflict checks had been performed prior to the assignment of cases. Also, conflicts may exist for in-house counsel representing the MTA. As required by the State Bar, attorneys are to notify County Counsel of any potential conflicts. With no centralized database of all parties and witnesses involved in their current or closed cases, TD County Counsel is reliant on each attorney's memory to the parties and witnesses involved in present and prior cases to assess any conflicts.

This could result in the MTA's interests being compromised by unwittingly entering into a potential conflict of interest by engaging law firms, consultants or expert witnesses that may have conflicts by the fact that insufficient information may be given by TD County Counsel to conduct a pre-engagement conflict of interest checks. Furthermore, dependence on institutional memory may be inadequate if there are any personnel changes in TD County Counsel.

**Recommendation 18:**

We recommend that TD County Counsel develop formal written policies and procedures to ensure that conflict checks are performed by both in-house and outside counsel before cases are assigned.

**Finding No. 17:      Alternative Fee Arrangements should be considered**

The use of alternative fee arrangements (AFAs) by corporate entities is a best practice for in-house counsel in appropriate cases. The primary goal is to manage legal fees through contracts. There are several types of AFAs, including partial or whole contingent fees, flat fee (or set price), result-based premiums that may include an initial discounted hourly rate and an additional premium if desired results are achieved. This best practice is equally applicable to a large public entity like the MTA. The increasing prevalence of using AFAs has been confirmed in the Hildebrandt's 2009 Law Department Survey, including 100 Fortune 500 companies. See also, the ABA published "Winning Alternatives to Billable Hour: Strategies That Work" (2002).

Contingent fee arrangements are one type of AFA, for services provided where the fee is only payable from a money judgment. Contingent fees are usually calculated as a percentage of the client's net recovery. This type of fee arrangement is more applicable for cases where MTA is the plaintiff that seeks to recover money damages from another party. It is not appropriate in cases where recovery of damages is not sought, such as a decree or injunction.

Based on our review of 34 open and closed cases, we identified 4 cases for which MTA was the plaintiff. Litigation costs for these cases totaled over \$6.5 million dollars during the period of our review. Three of the four cases were assigned to outside counsel on an hourly rate compensation basis. An alternative fee arrangement could have been utilized for these 3 cases, resulting in a potential for cost savings. In addition, we did not identify the use of any other type of AFA in cases where MTA was a defendant. TD County Counsel identified one case (not part of the cases under review) for which attorneys were retained on a contingent fee basis.

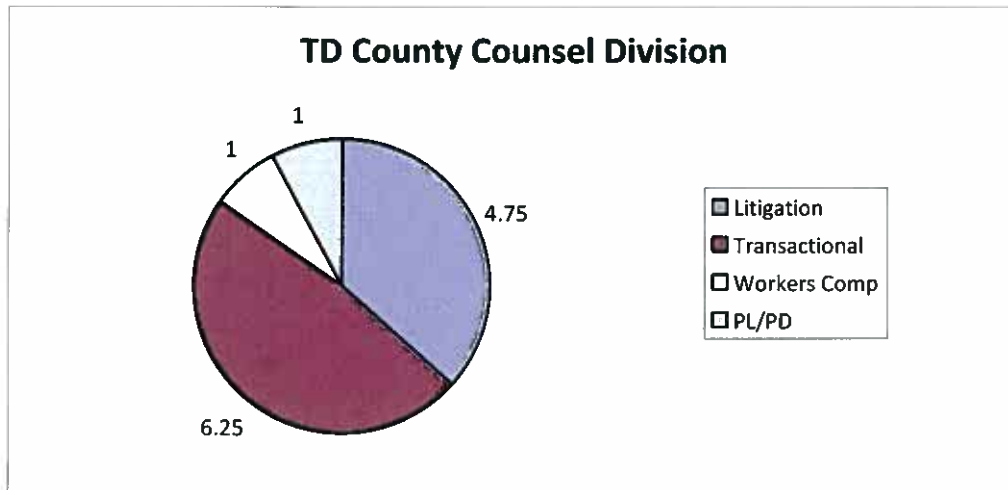
The vast majority of cases handled by TD County Counsel are when MTA is the defendant. There is no policy in place for the consideration of retaining firms on an AFA basis, whether it is a whole or partial contingent fee, flat fee, or result-based premium basis. AFAs may be beneficial in controlling litigation costs, and shift some of the risks of poor outcomes onto the outside firm.

**Recommendation 19:**

We recommend that TD County Counsel consider utilizing alternative fee arrangements for cases initiated by MTA when contracting with outside law firms.

**Finding No. 18: TD County Counsel’s organizational structure appears sufficient**

TD County Counsel consists of 1 Assistant County Counsel, 13 Principal Deputies, 4 legal secretaries, 1 Senior Paralegal, 1 Paralegal, 2 secretaries, and 2 Administrative Analysts. The secretaries and administrative analysts are provided by MTA, all others are County employees. The 13 attorneys report directly to the Assistant County Counsel. A total of 7 attorneys provide litigation services either on a full-time or part-time basis.



The remaining are transactional attorneys who are responsible for procurement, public records, providing training to Records Management, real estate, acquisition, eminent domain, labor law, environmental, employment, and providing advice to Human Resources.

The paralegals report to the Principal Deputy County Counsel responsible for assigning litigation cases. The administrative analysts report to the Principal Deputy County Counsel responsible for preparing the department’s budget. The secretaries report to the chief secretary.

The flat structure appears to be the most effective structure for the TD County Counsel. Two attorneys supervise the Workers Comp and PL/PD cases that are handled by third party administrators. Their work is more predictable and routine, requiring less oversight by management. Four attorneys deal primarily with transactional work which

also requires less supervision. The remaining 7 attorneys work on litigation cases, predominantly defending the MTA.

While the current structure appears to be sufficient, the use of a Litigation Cost Manager, as recommended in this report, could improve oversight over the litigation costs. The use of a Litigation Cost Manager would provide an additional resource to evaluate litigation costs and assist in minimizing litigation costs.

**Finding No. 19: TD County Counsel should consider litigation management best practices to improve management of litigation costs**

Methods for managing civil litigation have developed over time with, many major “litigation cost management” or “legal spend management” systems being developed in the last twenty years. These efforts have been lead by corporate counsel in response to the demand of corporate management to control and manage the rising cost of civil litigation. While these developments have been primarily focused on the private corporate sector, many of the lessons and components are equally applicable to a public corporate entity, such as the MTA and it’s inside counsel, the County Counsel’s Office. The results of the survey of transit agency legal counsel indicate that these methods are being used at public agencies.

Our survey focused on identifying best practices for cost containment, case management, and supervision. We identified 15 comparable transit agencies and sent them a survey to obtain information on litigation cost management best practices utilized by the responsible legal counsel’s office of these agencies. We received only 3 survey responses. The best practices can be organized into three major categories and should be considered by TD County Counsel. The categories are case and matter management, risk and cost management, and communications.

**Case and Matter Management**

- Case and matter management systems are used to track on-going litigation spending by case number in real time.
- Case budgets are established for each case and a not-to-exceed budget is established for outside counsel.
- A centralized litigation cost and expense accounting system is maintained. Cost reports are prepared for each case.
- Contracts with outside law firms contain a not-to-exceed amount.
- Task-based billing will assist in management of litigation costs through budgeting for distinct tasks needed in the course of litigation.

**Risk Management**

- Litigation case approaches/strategies are approved by their client.

- Mechanisms to limit litigation costs are conducted through periodic evaluations of cases, alternative dispute resolutions, and an assessment of settlement amounts versus costs of trial and risks.

**Communications**

- Consultations are conducted with their clients after significant events.
- Legal memorandums are prepared that provide case re-evaluations after significant events.

**Recommendation 20:**

We recommend that TD County Counsel consider implementing litigation management best practices to improve management of litigation costs.



## **CHAPTER 3 – FOLLOW-UP OF CALIFORNIA STATE AUDITOR'S REPORT**

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The California State Auditor issued an audit report on July 2004 on the MTA's legal practices. The review focused on compiling and noting trends in MTA's legal costs, to determine the sufficiency of the MTA's oversight of its outside legal counsel and associated costs, and to review the reasonableness of legal expense billings.

The significant findings in the prior State Auditor's report were:

- "Contracts generally include recommended management tools, such as case plans and budgets; however, case files often did not contain evidence of them."
- "A task based billing format would ... aid in the review of invoices by allowing for a quick determination of how much outside counsel spent on particular efforts."
- "There was often a lack of written prior approvals for the use and cost of consultants and expert witnesses."

The former Assistant County Counsel and former MTA Chief Financial Officer (CFO) prepared MTA's response to the State Auditor Report and recommendations. The response did not indicate whether MTA and/or the County Counsel would implement any of the recommendations in the report. The MTA CFO contended in the response that the State Auditor's report did not conform to generally accepted government auditing standards. The State Auditor disagreed with MTA's contentions. (See Attachment A for a copy of MTA's response.)

Our follow-up review of the recommendations in the State Auditor report found that two recommendations (concerning case plans and budgets and task based billings) were not implemented; one recommendation was partially implemented; and another recommendation was fully implemented.

As of February 2010, case plans and budgets were generally not prepared by outside counsel. However, in our review of case files, we found that a case plan and budget were prepared for one case in June 2010 for the next fiscal year (FY 2011). The budget detailed by phase the projected budget for the balance of the litigation and provided an explanation for the fees and costs spent to date. In addition, outside law firms are generally not preparing task based billings, and prior written approval for use of expert witnesses and consultants is not routinely done.

Attachment B details the State Auditor's recommendations, any actions that have been taken by TD County Counsel and our current audit recommendations.



ATTACHMENT A

*Agency's comments provided as text only.*

Los Angeles County Metropolitan Transportation Authority  
One Gateway Plaza  
Los Angeles, CA 90012-2952

June 29, 2004

Elaine M. Howle\*  
California State Auditor  
Bureau of State Audits  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

Dear Ms. Howle:

Based on your audit report for the Joint Legislative Audit Committee (JLAC) there is no indication that the Los Angeles County Metropolitan Transportation Authority (MTA) litigation and audit practices jeopardize public transportation funds, increase procurement costs or adversely effect the viability of transportation projects in the Los Angeles region.

The primary objective of the JLAC's audit request to the MTA was to review the Agency's litigation and audit practices to determine their impact on procurement costs. The audit request stated that Senator Richard Alarcon believed that these practices might jeopardize public transportation funds and the viability of key transportation projects in the Los Angeles region. The Bureau of State Audits (BSA) did not conclude or comment on the audit objective in their report, but rather focused their efforts on providing "best practice" recommendations for legal case management. ①

Further, we believe that several of the legal case management audit findings reported by the BSA are not significant enough based on Generally Accepted Government Auditing Standards (GAGAS) to warrant a reportable item and should be omitted from the report. County Counsel has been very successful in the past at representing the MTA's best interests through effective case management and diligent review of outside legal costs. Their management techniques in case management, including yearly budgets and intensive daily oversight of outside counsel, are just as effective at mitigating risk as the BSA recommended task based billing, legal phase budgets and case plans. ②

Your performance audit report does not conform to GAGAS as set forth by the United States General Accounting Office (GAO). The California State Auditor is required by Section 8543 et seq. of the California Government Code to perform performance audits in accordance with GAGAS. The audit report only addresses the scope and methodology that the State Auditor used in its testing of the MTA. The following GAGAS requirements were not addressed by this report: ③

- Audit objective was not identified and included

\* California State Auditor's comments begin on page 51.

**ATTACHMENT A**

- Conclusion of the audit findings as it pertains to the audit objective was not made
- Significance of the audit findings relative to the audit objectives are not stated

GAGAS specifically require the BSA to include these reporting and fieldwork criteria in performance reports. The exclusion of these reporting elements renders this report incomplete and it does not provide the report user the necessary information to understand the materiality of the audit findings.

In conclusion, the MTA is committed to providing an efficient and effective transportation system in a fiscally responsible manner. We believe our internal control practices sufficiently safeguard taxpayer resources. We appreciate the opportunity to review and respond to the BSA's audit report regarding the MTA.

Respectfully,

*(Signed by: Richard D. Brumbaugh)*

Richard D. Brumbaugh  
Chief Financial Officer

**ATTACHMENT B**

**FOLLOW-UP ON CSA REPORT RECOMMENDATIONS**

<b>CSA Recommendation</b>	<b>Status (As of 2/2010)</b>	<b>Current Status (As of August 2010)</b>	<b>TCBA Recommendations</b>
<p>1. To more effectively monitor outside counsel, the MTA, in conjunction with County Counsel, should require outside counsel to prepare flexible case plans and budgets detailed by phase, as well as budget revisions where outside counsel expect costs to exceed budget.</p>	<p>NOT IMPLEMENTED</p>	<p>Prior to February 2010, case plans and budgets were not prepared by outside counsel. However, in our review of case files, we found that a case plan and budget were prepared for one case in June 2010 for the next fiscal year (FY 2011). The budget detailed by phase the projected budget for the balance of the litigation and provided an explanation for the fees and costs spent to date.</p> <p>As of August 2010, outside counsel have been notified of the requirement of providing case evaluation plans and budgets and are in the early stages of implementation of the LMP.</p>	<p><a href="#">Recommendation 21:</a></p> <p>We recommend that TD County Counsel require that outside counsel prepare and provide case evaluation plans and budgets, pursuant to their legal services contract. (Reference recommendation 7 in this report.)</p>

**ATTACHMENT B**

CSA Recommendation	Status (As of 2/2010)	Current Status (As of August 2010)	TCBA Recommendations
<p>2. To more effectively monitor outside counsel, the MTA, in conjunction with County Counsel, should consider requiring outside law firms to submit invoices using a task-based billing format if they have the ability to do so.</p>	<p>NOT IMPLEMENTED</p>	<p>Outside firms are billing hourly, presenting detailed line-item descriptions of the time spent by each attorney on a case each day.</p> <p>Task-Based Billing Implemented on some cases.</p> <p>County Counsel is in the process of implementing E-billing for outside law firms and it is anticipated to be completed by the end of the calendar year. E-billing will allow for sorting of the bills by tasks. LA County Counsel intends to include e-billing as a requirement in the legal services contracts.</p>	<p><b>Recommendation 22:</b></p> <p>We recommend that TD County Counsel request outside counsel to provide task-based billing invoices, if they have the ability to do so. If outside counsel cannot, TD County Counsel should request cost reports that show budgeted to actual broken down by task.</p>

**ATTACHMENT B**

<b>CSA Recommendation</b>	<b>Status (As of 2/2010)</b>	<b>Current Status (As of August 2010)</b>	<b>TCBA Recommendations</b>
<p>3. The MTA, in conjunction with County Counsel, should ensure that outside counsel adhere to all billing requirements detailed in contract provisions and County Counsel billing guidelines, including that payments are only made at agreed billing rates. Further, the MTA should ensure that outside counsel receive written prior approval to use consultants and expert witnesses within an established budget.</p>	<p>PARTIALLY IMPLEMENTED</p>	<p>TD County Counsel's practice is to provide informal prior approval of the use of experts and consultants. Prior written approval is not routinely done. The OIG performed work in the area of reviewing invoices of outside counsel and made a recommendation in this area in a separate report.</p>	<p>See Recommendation 4 in OIG Report.</p>
<p>4. The MTA should request that County Counsel update its billing guidelines to address expenses related to new technologies and air travel.</p>	<p>IMPLEMENTED</p>	<p>Implemented – Legal services contracts have been updated to reflect allowable expenses for new technologies and air travel.</p>	

## **ATTACHMENT C**

### **RESPONSE TO DRAFT REPORT**

On October 29, 2010, the Transportation Division County Counsel provided a response to the findings and recommendations in the draft report. County Counsel stated that they agreed with the majority of the recommendations, and have already implemented some of the recommendations and will soon be implementing others. However, County Counsel stated that they take issue with many of the statements, including assumptions and specific findings, contained in the final audit report. County Counsel also stated that they provided the auditors written notice of their concerns regarding these statements in the draft audit report, yet many of those same statements were carried forward in the final audit report. (See Part C for copy of County Counsel's response.)

### **TCBA'S COMMENTS TO COUNTY COUNSEL'S RESPONSE**

We believe that our report is objective and accurate. The primary focus of our findings is the need for improving policies, procedures, and practices over litigation costs. We thoroughly reviewed and considered all of County Counsel's concerns and comments made during the report preparation period. We held several meetings with Transportation Division County Counsel officials, and made refinements to the report on several occasions based on County Counsel's input, concerns, and comments.

- On August 11, 2010, we held an exit conference with Transportation Division County Counsel officials to discuss our preliminary findings; and we also provided them with copies of the findings.
- On August 23, 2010, we held a follow-up conference with Transportation Division County Counsel to provide them additional information and feedback on our audit findings, and to gain further insight on County Counsel's views of the findings.
- On September 3, 2010, we issued a draft report to Transportation Division County Counsel. In preparing the draft report, we considered all of the County Counsel's concerns and comments received as of that date.
- Based on verbal feedback of County Counsel concerns, we made additional refinements and provided County Counsel with updated drafts on September 14 and 21, 2010.

**ATTACHMENT C**

- On October 22, 2010, the Transportation Division County Counsel provided us with a draft response and a “marked up” copy of our draft report, which expressed their concerns and comments. We thoroughly reviewed the County Counsel’s concerns, and made changes where we believed it was appropriate.
- On October 28, 2010, we issued our final audit report to the Office of Inspector General.

# **PART C**

## **County Counsel Transportation Division Response to Audit Report**





COUNTY OF LOS ANGELES  
OFFICE OF THE COUNTY COUNSEL


TRANSPORTATION DIVISION  
ONE GATEWAY PLAZA  
LOS ANGELES, CALIFORNIA 90012-2952

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ANDREA SHERIDAN ORDIN  
County Counsel

October 29, 2010

TO: KAREN GORMAN  
Acting Inspector General

FROM: CHARLES M. SAFER   
Assistant County Counsel  
Transportation Division

RE: **Audit of MTA Litigation Cost Management Practices**

In February 2010, the MTA Board directed the Inspector General to conduct a comprehensive audit of MTA's litigation costs and cost management performance. The audit consists of two parts. The first part of the audit consists of an inventory of all claims and litigation cases within the last five years. The second part of the audit consists of an evaluation of the efficacy and effectiveness of MTA's current policies, procedures and practices, plus any other information that would provide context, background and/or analysis to the MTA Board about how litigation costs are currently managed. The Inspector General conducted and prepared the first part of the audit with its own staff, and contracted with the accounting firm of Thompson, Cobb, Bazilio & Associates ("TCBA") to conduct and prepare the second part of the audit.

We have reviewed the audit report, and our responses to the audit recommendations are set forth below.

**GENERAL COMMENTS**

As background, County Counsel serves as General Counsel for MTA. The Transportation Division of County Counsel is responsible for providing legal representation to MTA's Board, executive management and staff in litigation and transactional matters. The Transportation Division also provides advice to the MTA Board and management regarding all areas of the law affecting the duties and responsibilities of the MTA.

The Transportation Division handles a wide variety of litigation on behalf of the MTA, including, but not limited to, employment litigation, disability

discrimination, contract actions, construction litigation, environmental matters (CEQA and NEPA), and eminent domain and inverse condemnation cases. In some cases handled by Transportation Division attorneys, outside counsel is associated if additional specialization or resources are needed. While the audit acknowledged the Transportation Division's role in providing legal advice and transactional services to MTA, the audit was limited to a review of litigation management and litigation costs.

The audit covered a 5-year period from January 2005 to February 2010. While the audit acknowledged the litigation management protocols instituted by the Transportation Division of County Counsel in February 2010 for MTA litigation, the audit findings and recommendations are based on a period which preceded the implementation of those protocols. The litigation management protocols now in effect provide specific written procedures for managing MTA litigation and controlling costs. The protocols establish a litigation severity index by which each case is assigned a priority level. The protocols also require a case evaluation plan (CEP) and a budget for each case. Furthermore, the protocols require "roundtables" to be conducted for each case, comprised of MTA representatives and Transportation Division County Counsel and outside counsel. The timing of preparation of the CEP, the budget and scheduling of roundtables is set by the priority level assigned to each case. Furthermore, CEPs and budgets are periodically updated based on the progress of the case and discussion at roundtables.

Although the audit did not identify any specific cases in which the lack of written procedures, standardization or incomplete file documentation hindered the management of litigation or decision making, or resulted in unnecessary or increased costs, the recent implementation of litigation management protocols, including case evaluation plans, case budgets, roundtables and enhanced file documentation will assist in the management of litigation and control of litigation costs.

Our specific responses to each of the audit recommendations are set forth below. We have divided our responses to the audit recommendations into two sections for purposes of this memorandum. The responses in the first section are offered in response to the recommendations contained in the portion of the audit conducted by the OIG. The responses in the second section are offered in response to TCBA's recommendations in the second part of the audit.



**SPECIFIC RESPONSES BY COUNTY COUNSEL TO AUDIT  
RECOMMENDATIONS CONTAINED IN THE PORTION OF THE  
AUDIT ENTITLED "INVENTORY OF MTA LITIGATION CASES AND  
INVOICE REVIEW (REPORT NO. 11-AUD-03) CONDUCTED AND  
PREPARED BY THE OFFICE OF INSPECTOR GENERAL**

County Counsel concurs with the recommendations made in this part of the audit, and the recommendations have been implemented, as discussed below.

**Recommendation 1:**

Assign RMIS case numbers to all litigation cases to ensure that the cases are tracked and costs and payouts for every case can be identified.

**Response 1:**

RMIS numbers will be assigned to all litigation.

**Recommendation 2:**

Request outside law firms that have older contracts reference the RMIS numbers on invoices.

**Response 2:**

All outside law firms, including those with older legal services contracts, have been instructed to reference the RMIS number assigned to a case on all invoices presented for the case. Invoices without RMIS numbers will not be paid until the appropriate RMIS number is provided.

**Recommendation 3:**

Request outside law firms to execute on the original of each billing statement the required declaration certifying the accuracy of the charges if such declarations are not being submitted with the invoices.

**Response 3:**

All outside law firms have been instructed to execute on the original of each invoice the required declaration certifying the accuracy of the charges. Invoices without declarations will not be paid until the declaration is provided.

**Recommendation 4:**

Ensure that outside law firms (a) obtain County Counsel's prior approval for consultants, expert witness, out-of-town travel, and other extraordinary expenses, and (b) provide the pre-approval date and name of the approving County Counsel supervising attorney on their billing statements; and ensure that the amount billed corresponds to the amount pre-approved. If it is impractical to obtain prior approval due to emergent circumstances, require outside firms to explain on their invoices the reason pre-approval was not obtained.

**Response 4:**

Outside law firms have been informed of the need to obtain County Counsel's prior approval for consultants, expert witness, out-of-town travel, and other extraordinary expenses, and provide the pre-approval date and name of the approving County Counsel supervising attorney on their billing statements. County Counsel will further ensure, as part of the invoice review and approval process, that the amount billed corresponds to the amount pre-approved. Payment of any invoiced costs that should have been pre-approved but were not, will require an explanation for the reason pre-approval was not obtained.

**Recommendation 5:**

Request the law firm to submit documentation that more accurately describes the rationale of billing \$381.73 monthly for coping services.

**Response 5:**

Documentation has been requested and received. The documentation supports the law firm's explanation that the monthly \$381.73 charges are less than the actual costs incurred.

**SPECIFIC RESPONSES BY COUNTY COUNSEL TO AUDIT RECOMMENDATIONS CONTAINED IN THE PORTION OF THE AUDIT ENTITLED "*Audit of MTA Litigation and Cost Management Practice*" CONDUCTED AND PREPARED BY THOMPSON, COBB, BAZILIO & ASSOCIATES (TCBA).**

County Counsel takes issue with many of the statements, including assumptions and specific findings, contained in the final TCBA audit report. We provided the auditors written notice of our concerns regarding these statements contained in the draft TCBA audit report, yet many of those same statements were carried forward into the findings contained in the final TCBA audit report. Notwithstanding the foregoing, we agree with the majority of the recommendations, and have already implemented some and will soon be implementing others, as discussed below.

**Recommendation 1:**

We recommend that TD County Counsel develop written litigation cost management and case management policies and procedures.

**Response 1:**

Effective February 2010, County Counsel established litigation management protocols (LMPs) for MTA litigation. The LMPs are applicable to cases handled by County Counsel itself and to cases supervised by County Counsel and assigned to outside counsel. The LMPs include tools and procedures for managing litigation. The LMPs establish a litigation severity index by which each case is assigned a priority level. The LMPs also require a case evaluation plan (CEP) and a budget to be prepared for each case. Also, the LMPs require that "roundtables" be conducted for each case, and that MTA representatives and County Counsel and outside counsel, if any, participate in the roundtables. The timing of preparation of the CEP, the budget and the scheduling of roundtables is set by the severity index (priority level) assigned to the case. Additional protocols may be applied to MTA litigation as appropriate. Notwithstanding the lack of LMPs during the audit period, the auditor did not identify any instances of inappropriate or poor decision making during the audit period.

**Recommendation 2:**

We recommend that TD County Counsel develop a standardized case filing system and develop a policy that specifies what documents should be retained in the case file, and require that case files be scanned and retained in an electronic format.



**Response 2:**

While the auditor did not identify any specific cases in which lack of standardization or incomplete documentation hindered the management of the case, County Counsel will develop a standard protocol as to documents which should be maintained in a case file. We will also consider the benefits and practicality of retaining documents in an electronic format.

**Recommendation 3:**

We recommend that TD County Counsel work with MTA to obtain and utilize an automated case management system to improve and facilitate case/matter management, as well as litigation cost management. TD County Counsel and MTA should explore automated case management systems that provide a comprehensive set of features and functionality including, but not limited to:

- Litigation calendaring
- Maintenance of client information and profiles
- Maintenance of all cases and matters
- Integration of document management
- Process conflict checks
- Ability to produce management reports and financial reports
- Maintenance of outside counsel and vendor performance metrics
- Integration with accounting and financial systems
- Cost management

**Response 3:**

We will investigate available automated case management systems and evaluate the benefits of such systems for MTA litigation in light of the volume of cases and cost of such systems.

**Recommendation 4:**

We recommend that Counsel immediately file a motion with the Court to release the deposit and accrued interest. We also recommend that TD County Counsel follow-up with Counsel to ensure that the motion is filed.

**Response 4:**

The deposit was made in an eminent domain case to obtain possession of real property for construction related to a transit capital project. County Counsel and

MTA staff were aware that the funds remained on deposit with the court, but chose to leave them there for strategic reasons. The full amount of the principal has since been returned to the MTA, and a motion has been made for payment of the accrued interest.

**Recommendation 5:**

We recommend that TD County Counsel prepare CEPs and periodically update the plans as significant events take place or at certain time intervals.

**Response 5:**

Effective February 2010, County Counsel began preparing Case Evaluation Plans for all MTA litigation. The CEPs are updated as justified by the progress of the litigation. Although written CEPs were not prepared prior to February 2010, County Counsel attorneys conducted informal CEPs as part of their analysis of each case. The auditor did not identify any facts or situations in which the lack of a written CEP resulted in inappropriate decision making or unnecessary costs. The auditor did reference one case in which a jury rendered an adverse judgment against MTA during the audit period. However, the auditor cites no facts to conclude that a CEP would have changed MTA's reasoned decision, made in consultation with MTA management, to go to trial instead of accepting a settlement demand that was unreasonable under the circumstances.

**Recommendation 6:**

We recommend that TD County Counsel develop case budgets for all cases. The case budgets should be periodically updated as significant events take place, at certain time intervals, or when budget increases are needed.

**Response 6:**

Although litigation files may not document discussions with MTA management regarding litigation costs, such costs are forecasted annually for each case as part of the MTA budget process. The auditor noted that in some cases the settlement amounts were less than litigation costs. On occasion, litigation costs exceed the actual settlement amount for a case. This is especially true when the plaintiff insists upon an unreasonable settlement demand and finally compromises after the litigation process exposes the weakness of his or her case. This defense, however comes at a cost. Without an adequate defense, MTA would not be able to defend itself from unreasonable claims and monetary demands, and would be vulnerable to excessive and unwarranted settlement demands and judgments.

Effective 2010, County Counsel began preparing budgets for all MTA litigation. The budgets are updated and reviewed at least once a year and updated at every roundtable as justified.

**Recommendation 7:**

We recommend that TD County Counsel require outside attorneys to prepare CEPs and case budgets as required in their legal services contract. The CEPs and budgets should be periodically updated as significant events take place or at certain time intervals.

**Response 7:**

The same litigation management protocols that were put into effect in February 2010, apply to both in-house and outside counsel. County Counsel has directed all outside counsel to prepare CEPs and budgets for all MTA litigation and to periodically update those CEPs and budgets as justified. Roundtables will be conducted for cases handled by outside counsel, and outside counsel will be required to participate in the roundtables.

**Recommendation 8:**

We recommend that TD County Counsel establish not-to-exceed/budget amounts in their contracts with outside counsel and obtain Board approval for legal expenditures per the threshold in the MTA Procurement Policy.

**Response 8:**

Although a not-to-exceed amount is not specifically set forth in a task order or assignment for legal services, a not-to-exceed amount is effectively established through the MTA budget process. Furthermore, that amount is evaluated and adjusted as the case progresses. Additionally, in some circumstances e.g., bond counsel, we have negotiated flat fees for legal services.

County Counsel will keep the Board apprised of cases that have significant litigation fees and costs, including costs of experts and consultants, so that the Board can make informed decisions about the direction of the litigation. Consistent with this effort, and as further discussed in Response 15 below, County Counsel will develop protocols to keep the Board informed of significant litigation developments and costs.



**Recommendation 9:**

We recommend that TD County Counsel establish not-to-exceed amounts for the retention of outside experts and consultants.

**Response 9:**

Although a not-to-exceed amount is not specifically set forth in a task order or assignment for outside experts and consultants, a not-to-exceed amount is effectively established through the budget process. Furthermore, that amount is periodically evaluated and adjusted as the case progresses.

As discussed in Response 8 above, County Counsel will keep the Board apprised of cases that have significant litigation fees and costs, including costs of experts and consultants, so that the Board can make informed decisions about the direction of the litigation. Consistent with this effort, and as further discussed in Response 15 below, County Counsel will develop protocols to keep the Board informed of significant litigation developments and costs.

**Recommendation 10:**

We recommend that TD County Counsel develop case cost estimates and exposure estimates at an early stage and document the evaluation of the case for settlement or litigation based on the merits, precedential or policy issues.

**Response 10:**

Effective February 2010, cost and liability estimates are included in the Case Evaluation Plans and budgets now prepared for all litigation handled by County Counsel and outside counsel. CEPs and budgets are prepared in accordance with the time parameters for the case's priority ranking, e.g., within 90 days of assignment for a Priority 1 case.

**Recommendation 11:**

We recommend that all cases, as stated in the Administrative Code, be brought to the Claims Committee for approval. If Claims Committee approval is not required or bypassed, an explanation detailing the reason for not obtaining Claims Committee approval should be documented and included in the case file.

**Response 11:**

It has been, and will continue to be, the practice that settlements in excess of \$50,000 are brought to the Claims Committee for approval. In cases where it is determined that Claims Committee approval is not required or should be bypassed, the reason will be documented in the case file.

**Recommendation 12:**

We also recommend that all final settlement agreements be retained by TD County Counsel.

**Response 12:**

Copies of final written settlement agreements will be retained in the litigation file maintained in-house.

**Recommendation 13:**

We recommend that TD County Counsel work with MTA to develop an MTA policy on how payouts for claims should be communicated to MTA management and the Board, if necessary.

**Response 13:**

Fortunately, there have been very few adverse judgments rendered against MTA in cases handled by County Counsel and its outside counsel. However, when there are significant rulings against MTA, the Board is notified by County Counsel. Notwithstanding the foregoing, County Counsel will recommend to the Board a policy for reporting adverse judgments.

**Recommendation 14:**

We recommend that TD County Counsel document in the case file communications with the Board regarding whether to appeal or accept the court ordered payouts.

**Response 14**

Communications with the Board regarding whether judgments should be appealed will be documented in the litigation file. In reporting adverse judgments to the Board, County Counsel will include strategies and intentions regarding appeal.

**Recommendation 15:**

We recommend that TD County Counsel work with MTA to develop policies and procedures or a Board policy that states what, when and how information is communicated to the Board by TD County Counsel.

**Response 15:**

Beginning in October, 2010 (for the third calendar quarter) County Counsel will be sending quarterly status reports to the Board on all cases. Additionally, as events dictate, County Counsel will provide updates to the Board on individual cases.

**Recommendation 16:**

We recommend that TD County Counsel utilize the LA County Counsel's Litigation Cost Manager for all high priority cases and other cases on a case-by-case basis.

**Response 16:**

The County Counsel Litigation Cost Manager has been available to assist in the evaluation of the costs of MTA litigation to a limited extent, and will continue to be available as needed.

**Recommendation 17:**

We recommend that TD County Counsel work with MTA and LA County Counsel to develop a written agreement that at a minimum details billing rates, description of services to be provided, and defines the roles and responsibilities of all parties.

**Response 17:**

County Counsel will work with the CEO to develop an agreement that documents the relationship and obligations between the MTA and LA County Counsel.

**Recommendation 18:**

We recommend that TD County Counsel develop formal written policies and procedures to ensure that conflict checks are performed by both in-house and outside counsel before cases are assigned.



**Response 18:**

While we believe that conflict checks have always been appropriately performed, County Counsel will develop a written policy to ensure that conflict checks are performed by both in-house and outside counsel before cases are assigned.

**Recommendation 19:**

We recommend that TD County Counsel consider utilizing alternative fee arrangements for cases initiated by MTA when contracting with outside law firms.

**Response 19:**

We agree that in appropriate cases or matters, alternative fee arrangements should be considered and can prove cost-effective. County Counsel and MTA have used alternative fee arrangements and will continue to do so as appropriate under the circumstances. For example, County Counsel uses fixed fee contracts when retaining bond financing counsel for MTA. County Counsel will continue to explore the use of alternative fee arrangements in other matters.

**Recommendation 20:**

We recommend that TD County Counsel consider implementing litigation management best practices to improve management of litigation costs.

**Response 20:**

County Counsel and MTA work collaboratively to provide the best litigation management practices and will continue to monitor the state of the practice for the benefit of the MTA. The new Litigation Management Protocols, including case evaluation plans, case budgets, and roundtables, plus enhanced file documentation and focusing on cost containment, are some of the best practice techniques currently being utilized to control MTA litigation costs.

**Recommendation 21:**

We recommend that TD County Counsel require that outside counsel prepare and provide case evaluation plans and budgets, pursuant to their legal services contract. (Reference recommendation 7 in this report.)

**Response 21:**

The same litigation management protocols that were put into effect in February 2010 apply to both in-house and outside counsel. County Council has directed all outside counsel to prepare CEPs and budgets for all MTA litigation and to periodically update those CEPs and budgets as justified. Roundtables will be conducted for cases handled by outside counsel, and outside counsel will be required to participate in the roundtables.

**Recommendation 22:**

We recommend that TD County Council request outside counsel to provide task-based billing invoices, if they have the ability to do so. If outside counsel cannot, TD County Council should request cost reports that show budgeted to actual broken down by task.

**Response 22:**

Task-based billing has been implemented previously in select cases and has proven an effective way to assist in monitoring costs. In cases or matters for which the budget can be broken down by task with accuracy and reliability, County Council will work with outside counsel to set up task-based billing.

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