

***When to Speak up or Shut up***  
***Role of City Attorney in Meetings***

**Texas Municipal League**  
**Annual Conference**

Texas City Attorneys Association

October 6, 2016  
Austin, Texas

Presented by:

Frank Garza  
Jay Doegey  
Karen Brophy

**Frank Garza**

**Davidson Troilo Ream & Garza**

Texas City Attorneys' Association, President, 2013  
601 NW Loop 410, Suite 100  
San Antonio, TX 78216  
(210) 442-2324  
[fgarza@dtgrglaw.com](mailto:fgarza@dtgrglaw.com)

**Jay Doegey**

Texas City Attorneys' Association, President, 2008  
(817) 313 4054  
[jdoegey1@tx.rr.com](mailto:jdoegey1@tx.rr.com)

**Karen H. Brophy**

Texas City Attorneys' Association, President, 1992  
Assistant City Attorney  
825 W Irving Boulevard  
Irving, TX 75060  
(972) 721 4903  
[Kbrophy@cityofirving.org](mailto:Kbrophy@cityofirving.org)

The complete text of Texas Disciplinary Rules of Professional Conduct, along with commentary, may be found at <http://www.law.uh.edu/libraries/ethics/trpc/index.html>

**Disclaimer:** This paper is presented for the sole purpose of continuing legal education of attorneys. It is intended to provoke thoughtful review by attorneys of the issues presented. No legal advice is intended or provided by this paper. In any specific situation, please consult your attorney. Reliance on this paper as a basis for any act, omission, decision or defense is not intended or authorized.

The scenarios do not represent specific fact situations but are combinations of elements from the speakers' various experiences. These are presented solely as hypothetical situations for their teaching value and not to imply truth to the matters alleged therein.

## Introduction

As we present these scenarios, keep in mind:

What are the red flags, if any?

Should you speak up or shut up?

If you speak up, what can you say? Are there legal and/or ethical implications?

What can you do in advance to head off the situation?

## Scenario 1

- Three Councilmembers (out of 11) show up in your office and request guidance on Robert's Rules and Council Rules on conduct of public meetings.
- The 3 Councilmembers inform you that it is their intent to filibuster so that City's annexation plan does not get approved. You provide guidance on Robert's Rules and Council conduct rules.
- Councilmembers request that you keep the matter confidential from Mayor and the rest of the Council. (*They say they have at least 2 other colleagues who support their position, but they make it clear they do not yet have a majority*).
- The next day, the Mayor contacts you and tells you he has heard rumors about a filibuster on the annexation issue at the next council meeting and wants guidance on how to avoid it. You again provide guidance on Robert's Rules and Council conduct rules.

**Red Flags** Who is the client? Can you commit to confidentiality? Do you let the City Manager and/or Mayor know of what the 3 Councilmembers are planning to do?

**Training** This can be prevented by educating council members and staff on who is the client and there is no such thing as confidentiality for a less than a quorum of council except in extreme circumstances. (i.e. Seeking ethics opinion).

**Speak up or shut up:** Need to tell the 3 Councilmembers that while you can provide them guidance, you cannot keep the matter confidential. They are NOT the CLIENT. If you report to City Manager, should give him a heads up of the issue.

**References:** Tex. Disc Rule of Prof. Conduct 1.12 (a). A lawyer employed or retained **by an organization represents the entity**. 1.12 (b). The lawyer shall proceed as reasonably necessary in **the best interest of the organization**.

## **Scenario 2 Commenting on city liability exposure in an open session**

During an open session discussion of a park project a council member complains about the poor condition of a bike path and asks you if the city is liable if a child playing in the vicinity were injured.

**Red Flags** Delivery of a legal opinion speculating on the city's liability exposure.

**Training** This can be prevented by educating council members and staff on what your response will be if such a question is posed to you in an open meeting.

**Speak up or shut up:** A response could be simply, "I would be happy to discuss this potential liability question either privately, in person, or with the council in executive session."

**References** See attached Principles Governing City Attorney's Legal Advice. Tex. Govt. Code Sec. 551.071; TRPC 1.03 (Communication) (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. TRPC 1.05 (Confidentiality of Information)

## **Scenario 3 Disclosure of confidential information**

A council member routinely passes along the contents of attorney-client or other confidential information to third parties, such as potential legal adversaries.

**Red Flags** Disclosure of confidential information that could be detrimental to the city's legal or financial interest.

**Training** This could possibly be prevented or minimized by educating council members and staff that disclosure of confidential information to unauthorized persons discourages candid discussion among the council members, staff, and legal counsel.

**Speak up or shut up:** A frank reminder in executive session about the reasons and importance of maintaining confidential information could be undertaken.

**References** TRPC 1.03 (Communication) (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. 1.05 (Confidentiality of Information) (b) a lawyer shall not knowingly: (1) Reveal confidential information of a client or a former client to: (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm. 1.12 (Organization as Client), TX AG Op. JM-1004 (exclusion of school board member suing board from school board executive session when board discussing the litigation).

#### **Scenario 4 Omission of material information**

Your city is considering participating in an economic development transaction with a developer to build a multimillion dollar community venue. During an executive session posted for economic development negotiations, the City's financial advisor proposes different ways to finance the project, one of which includes the use of credit default swaps. The advisor tells the council there is little or no risk in using such a device.

**Red Flags** A Financial Advisor [or anyone] saying there is "no risk." Use of undefined jargon. This is the first you are hearing of innovative [untested] financing. What's the basis for this in executive session?

**Training** To minimize surprises, meet with management to understand complete context of topic for executive session prior to agenda posting. Ask management, "What are you presenting? What do you need Council direction on?" Then advise on limits of what can be discussed in executive session.

**Speak up or shut up:** Speak up. All risks must be disclosed to Council to make an informed decision. If straying from topic of executive session, "Mr. Mayor, I'd like to remind the council this matter is posted as \_\_\_\_\_ and we have stepped a bit away from that. We can discuss the methods of financing in the public session."

**References** Rule 1.03 (Communication) (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.12 Comment 6, Decisions by Constituents. When constituents of the organization make decisions for it, **the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.** Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer's responsibility, that the organization is **likely to be substantially injured by the action of a constituent** that is in violation of law **or in violation of a legal obligation to the organization.** In such circumstances, **the lawyer must take reasonable remedial measure.**

#### **Scenario 5. Impromptu conflict of interest determinations**

Just as a vote is cast by a council member, she asks you if she has a conflict regarding a matter she has never revealed or discussed with you.

**Red Flags** If she's asking, there is a problem.

**Training** New council orientation on both state law and Charter or ordinance.

**Speak up or shut up:** If no chance to talk privately, state "If you have a question in your mind whether this has a special economic effect, then out of an abundance of caution I recommend you file the affidavit and abstain from voting."

**References** See attached Arlington Disclosure Statement circulated before every meeting. TX AG LO-98-052 (caution to consider this carefully, considering the criminal penalty)

## **Texas Disciplinary Rules of Professional Conduct**

### **Rule 1.12 Organization as a Client**

(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the initial procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

(1) asking reconsideration of the matter

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(d) Upon a lawyer's resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.

(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

## **Comment - Rule 1.12**

### ***The Entity as the Client***

1. A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

2. As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officer, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization such as an unincorporated association, union, or other, entity.

3. When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.05. Thus, by way of example, if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05.

### ***Clarifying the Lawyer's Role***

4. There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyers should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

5. A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06. If the organization's consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.

### ***Decisions by Constituents***

6. When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer's

responsibility, that the organization is likely to be substantially injured by the action of a constituent that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, the lawyer must take reasonable remedial measure. See paragraph (b). It may be reasonably necessary, for example, for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. At some point it may be useful or essential to obtain an independent legal opinion.

7. In some cases, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest responsible authority. See paragraph (c)(3). Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, such as in the independent directors of a corporation. Even that step may be unsuccessful. The ultimate and difficult ethical question is whether the lawyer should circumvent the organization's highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyer's further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization. If the conduct of the constituent of the organization is likely to result in death or serious bodily injury to another, the lawyer may have a duty of revelation under Rule 1.05(e). The lawyer may resign, of course, in accordance with Rule 1.15, in which event the lawyer is excused from further proceeding as required by paragraphs (a), (b), and (c), and any further obligations are determined by Rule 1.05.

### ***Relation to Other Rules***

8. The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule is consistent with the lawyer's responsibility under Rules 1.05, 1.08, 1.15, 3.03 and 4.01. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.02(c) can be applicable.

### ***Government Agency***

**9. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved.** In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for the purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.



See Preamble: Scope.

#### Derivative Actions

10. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

11. The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with those managing or controlling its affairs.

MEMO

TO: HONORABLE MAYOR AND MEMBERS  
OF THE ARLINGTON CITY COUNCIL

FROM: JAY DOEGEY, CITY ATTORNEY

RE: PRINCIPLES GOVERNING THE CITY ATTORNEY'S LEGAL ADVICE  
AND SERVICES

DATE: MAY 9, 2003

I write to share the principles of municipal law which my Office and I will follow in providing legal representation to the City of Arlington.

The function and operation of the City Attorney's Office rests upon the City's Home Rule power. Under this principle, the City has full constitutional authority to determine its local affairs and government unless there is a specific State law governing such matters. Thus, the first task of the City Attorney's Office in assisting the City Council, the City Manager, and the department heads in achieving the City's lawful goals and objectives, is to ascertain whether the matter is one of local affairs and government and, if so, whether there is any State law which is controlling. If there is, the City's actions cannot, in its exercise of its home rule powers, be inconsistent with the State statute. However, this Office will explore all avenues of legal reasoning and research to determine the lawful means by which the City can achieve its objectives.

The role of the City Attorney's Office is to provide the best legal advice and counsel to support the City Council in achieving its goals for the citizens of Arlington. It is not the function of this Office to make policy determinations which are by their nature reserved to the City Council, unless otherwise delegated. Likewise, administrative questions and information will be channeled to the appropriate City administrative staff for determination and resolution. As City Attorney, I will attempt to avoid becoming involved in the politics of an issue. Legal advice and legal opinions given will be based upon established municipal law and general law principles with an honest and balanced assessment as to the current state of the law.

When consulted, the City Attorney's initial responsibility is to determine whether a proposed City action can be lawfully undertaken. If it cannot be, it is the City Attorney's responsibility to clearly and emphatically inform the client. If the law is not clear with respect to the proposed action, as may frequently be the case, then the City Attorney will convey to the client the likely court or agency determination to result from such proposed action. Although it is not the function of the City Attorney to render an opinion on the wisdom (as opposed to the legality) of a proposed action, it is fundamental to effective legal representation that the City Attorney

describe as accurately as possible to the client the legal consequences of a proposed action and identify the foreseeable risks in that course of action. The responsibility for making such decisions and taking such risks remains, of course, with the client. However, if for legal reasons, the City Attorney believes that one course of action is more prudent than another, it is appropriate and desirable to convey such a recommendation.

In staffing City Council meetings and open meetings of City boards and commissions, the City Attorney must be cautious in participating in such meetings. It is not a function of the City Attorney's Office to participate in the debate as to the policy merits of proposals discussed at such meetings. Likewise, when legal questions are asked of the City Attorney in open session, the City Attorney will always weigh the potential prejudice and harm that could result to the City in answering publicly. Because many meetings are broadcast and taped, any "admission" made at a meeting is preserved for replay by anyone who may wish to pursue litigation against the City. Therefore, there will be occasions where it is in the City's best interest for a response not to be made publicly. It may be that even responding by indicating why it is not appropriate to answer the question in open session is not good legal representation. This is not to say the City Council or boards and commissions should be discouraged in requesting legal advice that aids the Council or a board or commission in their policy-making roles. There are just times when not responding publicly is in the best interest of the City.

On those occasions when it is not prudent to discuss issues publicly, the City Attorney may recommend closed sessions or other legal measures to protect the best interests of the City. It is the public policy of the State that City records and meetings be open to the public. The City Attorney will advise clients as to the necessity of strict compliance with the Texas Open Meetings law and the Public Information Act, including the personal sanctions provided for violation of these laws. The City Attorney will also carefully protect the confidentiality of communications in the attorney-client relationship which are privileged under law. The legislature has recognized situations where confidentiality must be protected; particularly with regard to litigation strategy in matters where prejudice and disadvantage to the City's position would occur. To this end, the City Attorney will recommend closed sessions or undertake other legal measures to protect confidentiality as appropriate.

On those occasions where the City Attorney may appropriately respond, but is not certain of the answer to the question, the City Attorney will so advise the Council, board or commission. Municipal law encompasses so many areas of law which are ever growing and changing that it is impossible for an attorney to field every question that may arise at the council table. The precise answer many times turns on the particular facts of the situation, thereby necessitating additional research and information. Under such circumstances, the City Attorney will respond honestly if additional research and investigation is needed, but will respond as quickly as possible in researching the situation and providing an answer to the client.

## MEMORANDUM

**TO:**

**FROM:**

**SUBJECT:**

**DATE:**

This memorandum seeks to address questions that arise from time to time relative to the confidentiality of executive session discussions.

### Question 1

What are the reasons a city council may go into executive session?

### Answer

The general rule is that all meetings of the city council are open to the public except for the following specific exceptions as provided by the Open Meetings Act:

1. **Consultations with Attorney.**<sup>1</sup> The Open Meetings Act authorizes a city council to seek the advice of its attorney in executive session on legal matters such as pending or contemplated litigation or a settlement offer. In order to protect information deemed confidential by law, the Open Meetings Act allows for certain communications between the city council and its attorney to occur in executive session.
2. **Deliberations about Real Property.**<sup>2</sup> The Open Meetings Act also authorizes the deliberation of the purchase, exchange, lease, or value of real property in executive session *if deliberation in an open meeting would have a detrimental effect on the position of the City in negotiations with a third person.*
3. **Deliberations Regarding Gifts and Donations.**<sup>3</sup> The Open Meetings Act authorizes the city council to deliberate in executive session a negotiated contract for a prospective gift or donation to the City *if deliberation in an open meeting would have a detrimental effect on the City's position in negotiations with a third person.*
4. **Personnel Matters.**<sup>4</sup> The Open Meetings Act authorizes the city council to deliberate in executive session a complaint against a public officer or employee or the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee unless that person requests a public hearing.

---

<sup>1</sup> [Tex. Gov't Code § 551.071.](#)

<sup>2</sup> [Tex. Gov't Code § 551.072.](#)

<sup>3</sup> [Tex. Gov't Code § 551.073.](#)

<sup>4</sup> [Tex. Gov't Code § 551.074.](#)

5. **Deliberations Regarding Security Devices or Security Audits.**<sup>5</sup> The Open Meetings Act allows the city council to deliberate in executive session a security audit or the deployment, or specific occasions for implementation, of security personnel or devices.
6. **Deliberation Regarding Economic Development Negotiations.**<sup>6</sup> The Open Meetings Act allows the city council to discuss or deliberate in executive session:
  - commercial or financial information that the city has received from a business prospect that the city seeks to have locate, stay, or expand in or near the city and with which the city is conducting economic development negotiations; or
  - the offer of a financial or other incentive to a business prospect.

The rationale behind these exceptions to an open meeting is to protect the city's legal, financial and security interests. These interests could be seriously compromised if information protected by the Open Meetings Act exceptions are publicly disclosed. In addition, the rationale for the economic development negotiations exception is to protect the commercial and trade secret information of third parties (economic development prospects) from disclosure to competitors. Please notice that neither public embarrassment, nor political expediency are legitimate reasons for topics to be discussed in executive session. The only exceptions set forth for executive session discussions are those expressly set out in the Open Meetings Act. The decision to hold an executive session on a legitimate executive session matter is entirely that of the city council.<sup>7</sup>

## **Question 2**

What is the propriety of council members maintaining the confidentiality of information received in executive sessions?

## **Answer**

By making the decision to conduct an executive session on a legitimate executive session matter, the city council has implicitly determined there is a public policy reason for doing so. For example, if the city council goes into executive session to discuss contemplated litigation, there is the implicit understanding that it is not in the public interest to jeopardize the city's legal and financial interests by having the discussion occur in public. Regardless of how beneficial it may be for John Q. Citizen to become informed on the city's legal strategy, tactics, liability exposure, and legal defenses; this same information in the hands of the city's legal adversaries would seriously jeopardize all likelihood of city success at trial. Instead of both sides in a lawsuit playing by the same rules, the city would be playing the litigation game with both hands tied behind its back and its pocketbook and that of its residents exposed for the taking. In a negotiation context, if the city negotiator's range of authority is public information, the city could never hope to settle a claim for less than the maximum amount authorized in

---

<sup>5</sup> [Tex. Gov't Code § 551.076.](#)

<sup>6</sup> [Tex. Gov't Code § 551.087.](#)

<sup>7</sup> The personnel matters exception allows that person to request the discussion in public.

the negotiation, all to the severe financial disadvantage of the city and its residents. The city's cost of carrying out its functions would skyrocket.

Council members should refrain from communicating confidential information received in executive sessions for the same public policy reasons that justify the closed sessions. In the area of consultation with council's attorney, the release of such information would make it extremely difficult for the city's attorney to keep the information out of the hands of litigation adversaries. Candid legal opinions of the city's attorneys could be used as weapons against the city if the council decided to disregard the advice tendered. Worse, the city's own attorneys could possibly be forced to *testify against their own client*. This happened several years ago when Dallas' city attorney was forced to testify in deposition after a Dallas city council member allegedly transmitted the city attorney's confidential legal opinion to the attorney whose client was suing Dallas over a land development decision. Thus, the act of one council member can seriously undermine the legal position of the city council as an entity and the ability of the council's attorney to effectively do his or her job.

The attorney-client privilege recognizes that sound legal advice or advocacy serves public ends and that this advice or advocacy depends upon the lawyer being fully informed by the client as was recently reconfirmed by the Supreme Court:

“We readily acknowledge the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications. By assuring confidentiality, the privilege encourages clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation. This, in turn, serves broader public interests in the observance of law and administration of justice.”<sup>8</sup>

The surest way to inhibit candid discussions in executive session on legitimate executive session matters is for it to become commonplace for those confidential discussions or materials to be transmitted to third parties. I have seen this happen in the past. What also occurs is the staff becomes reluctant to provide candid opinions, legal or otherwise to council and vice versa.

It is for these important reasons that the City's Ethics Code prohibits a city official from disclosing any confidential government information gained by reason of the City official's position. Further, the Open Meetings Act makes the disclosure of a certified agenda or tape recording of an executive session a criminal offense. It also makes the discloser civilly liable to anyone injured or damaged by the disclosure.<sup>9</sup>

---

<sup>8</sup> *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (U.S. 2009).

<sup>9</sup> Tex. Gov't Code § 551.146



---

---

**SIGNATURES:**

---

---

---

---

---

---

---

---

**WITNESS:**

---

**INSTRUCTIONS**

An agenda for each meeting shall be attached to a “Disclosure Statement”.

Prior to each meeting, City Officials must review the items on the agenda to determine if a conflict of interest exists which will preclude them from participating in any decisions or votes on the matter. If no conflict exists, the City Official shall disregard Section 2 and sign his/her name.

If a conflict of interest exists with any agenda item, the City Official shall complete Section 2. The agenda item should be identified by number and the nature and extent of the conflict should be specified. The City Official shall then place his/her initials next to his/her remarks and sign the “Disclosure Statement”.

Other matters for required disclosure which do not preclude the City Official from voting shall be identified in Section 2 as well.

Additionally, Texas Local Government Code states that if the City Official has a substantial interest in a business entity or in real property, **THE CITY OFFICIAL SHALL FILE AN ADDITIONAL AFFIDAVIT BEFORE A VOTE OR DECISION ON ANY MATTER INVOLVING THE BUSINESS ENTITY OR REAL PROPERTY.**



In addition, if the City Official has a legal or equitable interest in property which is acquired with public funds, HE/SHE SHALL FILE AN AFFIDAVIT in accordance with Chapter 553 of the Texas Government Code.