

# City Ethics Commission and Other Strange Creatures of Lore

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## Ryan Scott Henry

Ryan Henry graduated with honors from New Mexico State University with dual bachelor's degrees in Criminal Justice and Psychology in 1995. He attended law school at Texas Tech School of Law and graduated in May of 1998.

While attending law school, Ryan began clerking for the Lubbock City Attorney's Office. He received his third-year practice card and began prosecuting municipal court complaints and appearing in justice of the peace court for the City. As a result, he began defending governmental entities even before he graduated from law school and so began his career supporting local governments. Upon graduation, Ryan began working in Brownsville, Texas, with the same focus. In June of 2002, Ryan moved to San Antonio and joined a local law firm doing the same type of law. In 2012, Ryan started the Law Offices of Ryan Henry, PLLC. In June 2016 and 2017 Ryan was listed as one of the best lawyers in municipal law by S.A. Scene Magazine in the San Antonio area. Ryan is also on the board for the State Bar of Texas - Government Law Council.

# Three Rules of Alchemy

## 1. No Normal Laws [i.e State Statutes] Apply

When a commission or board, such as an ethics commission, is created, it is not controlled by state law (other than potentially the Texas Open Meetings Act). Such boards and commissions have only the powers and duties authorized by their originating ordinance. As a result, do not assume they will make their own rules or procedures. It becomes a creature outside of the natural law and its authority (DNA so to speak) must be carefully thought out before implementing.

## 2. You Make the Rules.

Since the creatures of the city council are controlled by their originating ordinance, think through the entire logistic and practical execution of the board. Sometimes a council will try to rush the creation of a commission due to public pressure. “Just to put something on the books” without an intent to utilize the board or commission is not unusual. However, once created and members are appointed, the creature can run rampant if not controlled through ordinance or protocols.

If utilized for abusive purposes or political purposes, a creature such as an ethics commission, can create havoc for city employees and citizens. Public inquisition on frivolous charges which is designed to frustrate, or abuse city employees is also

not uncommon. The best way to have the benefits of an ethics commission (or other council creation) is to define its powers and the protocols. Various psychological perspectives occur (both positive and negative) when the process is written out. The written procedures, if done properly, can have a dampening effect on frivolous or malicious claims, while encouraging the submission of valid complaints. One example (and only one example from a host of many) is attached to use as a hearing protocol as well as a generalized protocol for regular hearings.

### 3. It Has a Mind of Its Own

Once its members are appointed, any council creature will begin developing a mind of its own. It is not uncommon for a council to lose control over its creation if it fails to properly monitor the creature. A creature such as an ethics commission, can also turn around and attack members of the council if complaints are filed.

While elected members of the council should not fear an inquiry into compliance with the ethics code, the council should still be aware that poorly worded protocols and procedures can make following the process extremely difficult and costly. Further, procedures which are “slapped together” without much forward thinking are typically more susceptible to abuse by complainants. As a result, the ordinance which creates the board or commission should be carefully reviewed and adapted to the specific needs of the city.

# Example – Commission/Board Procedures – General

Not for Use For Investigation or Hearings on Complaints

## Protocols for Municipal Boards, Commissions and Committees

### ARTICLE I. GENERAL PROVISIONS

#### (A) Definitions

1. *The Board* shall mean the Board \_\_\_\_\_ of the City of \_\_\_\_\_, which is a board established by the city council [ordinance or charter section]. The Board may establish its own rules and procedures, but such are subject to change by City Council resolution or ordinance.
2. *City Secretary* shall mean the City Secretary of the City of \_\_\_\_\_.
3. *Chair* shall mean the chairman of the Board \_\_\_\_\_.
4. *Officers of the Board* shall mean the Chair, Vice-Chair and Board secretary of the Board.
5. *Presiding Officer* shall mean the officer or Board member presiding over any meeting of the Board. By default, the Presiding Officer shall be the Chair.
6. *Vice-Chair* shall mean the vice-chairman of the Board of Adjustment.

#### (B) Purpose and Duties

The Board's primary functions are:

1. To execute its duties as articulated in [ordinance number];
2. To consider and recommend \_\_\_\_\_ to the City Council;  
and
3. [list all other duties, powers, etc.]

#### (C) Office and Custodian of Records

1. The Board designates City Hall, located at \_\_\_\_\_, \_\_\_\_\_, Texas [zip], as its office.

2. The Board further designates the City Secretary as its custodian of records. All records of the Board shall be filed with the City Secretary. The Board, through the assistance of the City Secretary, shall keep minutes of its proceedings that indicate the vote of each member on each question or the fact that a member is absent or fails to vote. The Board shall keep records of its examinations and other official actions, which shall be stored in the Office of the City Secretary.
3. The Board further designates \_\_\_\_\_ as its primary liaison with City administration.
4. The Board designates the Chair of the Board as the primary officer responsible for communications on behalf of the Board and interaction with City administration.

## **ARTICLE II. MEMBERSHIP**

- (A) The Board is composed of five members who are \_\_\_\_\_ [i.e. voters, property owners, citizens, etc.] and may be appointed by the city council. The city council may also appoint three alternate members who shall serve in the absence of one or more regular members. Each member serves as the will of the city council unless otherwise mandated by state law
- (B) Board members are appointed for a term of \_\_\_\_\_ year(s). The terms are not triggered by appointment but run continuously. Any member who is not appointed at the expiration of a term is deemed appointed to fill an unexpired term.
- (C) A vacancy on the Board shall be filled for the unexpired term. The date on which a new member is appointed to serve on the Board shall not extend nor reduce the duration of the term. The new member appointed shall serve until the remainder of the term is complete.

## **ARTICLE III. OFFICERS**

- (A) The officers of the Board shall consist of a chair, vice-chair, and secretary as well as any other officers that are deemed necessary to the operation of the Board. Each officer position is for a term of one year. Elections for officer positions are to be held annually for officer positions, even if the positions were filled due to vacancy at a time prior to the annual election. Vacancies for officer positions shall be filled by an election from the Board membership by the Board.
- (B) The election of officers shall occur by the Board membership by majority vote.
- (C) The Chair shall serve as the Presiding Officer during all Board meetings at which the Chair is present. Should the Chair be unable or unwilling to serve at any particular time, the Vice-Chair shall be the Presiding Officer and shall assume all duties of the Chair during the time the Chair is unable or unwilling to perform his/her duties.

(D) While not an officer of the Board, the City Attorney shall act as the Board's attorney by default. Should a conflict of interest arise, the City Attorney shall be recused from representing the Board for the matter which caused the conflict.

#### **ARTICLE IV. PROCEDURES**

(A) **Meetings:** In general, the Board shall follow the procedures below. Such procedures are subject to policies and ordinances adopted by the City Council by resolution or ordinance and the Texas Open Meetings Act. In the absence of an express procedure, the Presiding Officer is responsible for the orderly progression of any meeting. Meetings of the Board are held at the call of the Presiding Officer and at other times as determined by the Board. The Presiding Officer or acting presiding officer may administer oaths and compel the attendance of witnesses at any meeting.

1. *Call to Order.* Call the meeting to order.
2. *Roll Call.* Acknowledge the presence of members in the room for the purposes of quorum. However, for purposes of any cases before the Board seeking action, each case must be heard by at least four members of the Board.
3. *Citizens to be Heard.* If applicable.
4. *Business.* The Board shall hear any new or old business as designated by the Agenda and the Presiding Officer. It is within the Presiding Officer's discretion to allow presentations of agenda items by applicants before a motion is made.
5. *A Motion.* A motion must be made for each agenda item that is to be discussed. For example, "Motion to approve (or deny) [item as stated on the posted agenda]."
6. *Second to Motion.* A second to the motion must be made before discussion can occur on an agenda item. Seconding an item does not mean the member offering the second agrees with the motion. The second is an acknowledgement the motion should be discussed. If no second is made within a reasonable time of the motion as determined by the Presiding Officer, the motion will not be discussed.
7. *Discussion.* Members may discuss the motion on an agenda item once seconded. Discussion and deliberation are considered one-in-the-same for purposes of these rules.
8. *Call for Vote.* Once a motion has been made, seconded and the opportunity for discussion has passed any member of the Board may call for a vote on the motion. The Presiding Officer shall restate the motion and call for a vote of the members on the motion. The Board members shall vote on the motion. Whether the motion passes or fails depends on the number of affirmative votes under state law and City ordinance. Absent a state law or City ordinance addressing

the vote, a motion is deemed passed by an affirmative vote of a majority of those members present and voting on the motion.

9. *Adjournment.* Once no other business is present for a particular meeting, the Chair will adjourn the meeting and state the time for the record. No motion or second is necessary for adjournment. If business is still present from the agenda, any Board member may still move to adjourn at any time, which would require a second and majority vote to pass.

### **(B) Special Hearings by Application**

1. As the majority of the Boards functions are reactions to requests made by either an applicant or a member of the City staff, the Board is not expected to meet on a regular basis. The Board shall meet as needed based on the proper submission of a request.
2. If a person seeks action or a decision from the Board, the person may fill out the proper application and file it with the City Secretary's Office.
3. An application is only considered filed if complete and the filing fee has been paid, if any.
4. The Board may hear any application authorized by law within its jurisdiction.
5. The Board's authority to act upon an application shall be subject to federal, state, and local regulations.
6. Upon any decision of the Board regarding an application the [Chair or designated city official] shall reduce the decision of the Board to writing and provide a copy to the applicant. A copy must also be placed in the Board's offices, by and through the Office of the City Secretary. Upon request by the Chair, the [City Manager] may assume the duty of reducing the decision to writing and providing all necessary copies to the appropriate persons. The individual facts and though process considered for any decision are different per Board member. When a body, especially a governmental body, makes a decision based on a collective vote, each individual member may have their own reasons and facts supporting their vote. The Chair is not required to list the grounds or reason for any particular decision. The Chair is only required to reduce to writing the final decision result, based on the motion made at the meeting.



**(C) Appeals to the Board [if applicable]**

1. Appeals to the Board may be made by any person aggrieved or affected by a decision of [list official or authority for appeal].
2. Such appeal must be filed within a reasonable time by filing with the official from whom the appeal is taken and with the Board, a notice of appeal specifying the grounds thereof, and by paying a filing fee as required by City policy. Unless otherwise defined by state law, in typical situations, a reasonable time to file an appeal does not exceed fifteen (15) calendar days from the date of the official's decision.
3. Upon the filing of a completed application and payment of the filing fee, the City Secretary shall transmit to the Chair, the [City Manager or other designated liaison] and the official whose actions are being appealed a copy of the appeal. Upon receipt of the notice of appeal, the administrative official whose actions are the subject of the appeal shall forthwith transmit to the Board, by and through the City Secretary's Office, all the papers constituting the record upon which the action appealed from was taken.
4. The Board shall fix a reasonable time for the hearing of the appeal, giving public notice thereof as well as due notice to the parties in interest, and decide the case within a reasonable time.
5. Upon the hearing any party may appear in person or by agent or by attorney.
6. The Board reviews an appeal based on state and local laws. The Board may reverse or affirm, in whole or in part, or modify the decision from which an appeal is taken. The Board may also make the correct order, requirement, decision, or determination, and for that purpose only the Board has the same authority as the administrative official.
7. Upon the Board's decision, the Chair shall reduce the decision of the Board to writing and provide a copy to the appellant. A copy must also be placed in the Board's offices, by and through the Office of the City Secretary. Upon request by the Chair, the [City Manager] may assume the duty of reducing the decision to writing and providing all necessary copies to the appropriate persons.
8. The City Secretary shall then forward the Board's decision to the appellant.

**(D) Judicial Review [if applicable]**

1. Persons and entities authorized by state law may appeal a decision of the Board to a court of competent jurisdiction.
2. [Or state no appeal is permitted and the decision of the board is final.]

**ARTICLE V. AGENDA**

1. Agenda items must be submitted in writing to the City Secretary by an authorized individual no later than forty-eight (48) hours prior to the required seventy-two (72) hour posting deadline for an agenda. This equates to a deadline of at least five (5) calendar days prior to a meeting.
2. *Board Members.* Any Board member can place an item on the agenda for a meeting which has already been scheduled. An item for the agenda must be submitted to the City Secretary in writing by the Board member within the required time period. Items may be submitted by electronic or paper form. The member seeking to add the item must include a clear description of the item, the member's name, and contact information of the member. Board members may place items only upon an agenda for a meeting which has already been called by the Chair. Board members cannot call special meetings by requesting agenda items. Only the Chair or [City Manager or designated City official] may call a special meeting.
3. *City Staff.* The [City Manager or other designated City official] can place an item on an agenda by submitting the item to the City Secretary and copying the Chair. Such agenda items may be submitted by electronic or paper form. If the requested item will impact or involve multiple departments, those department heads may be consulted. A report must be attached with a clear description of the item and supporting documents.
4. *Citizens and Interested Parties.* Citizens and other interested parties are not permitted to place items on an agenda but may request items be placed by submitting an application for [state application ordinance] or an appeal. Such application or appeal must be complete, submit to the City Secretary, and a filing fee must be paid as listed in the City's policies or ordinances. The application or appeal must include a clear description of the action requested of the Board. In order for the request to be considered, the citizen or interested party must state their full name, phone number, and mailing address. If the applicant has an email address, such must also be provided in the application.
5. *No Contact.* Once a request has been filed, applicants cannot directly contact any Board members regarding the application. Directly contacting Board members can be grounds for denial of the application in violation of these rules or may be penalized as authorized by City ordinance.

## Example - Ethics Commission Procedures for Violation hearing

Section \_\_\_\_\_ – Procedures for Violation Hearing by the City of \_\_\_\_\_  
Ethics Commission

- A. **Definitions:** For purposes of a meeting to determine if a violation of the City's Ethics Code has occurred, the following definitions of words and phrases controls.
1. *Complainant* shall mean a person who has filed an official complaint against a public employee, officer, or official of the City of \_\_\_\_\_. While an official complaint is not necessary for the Ethics Commission to investigate a concern the Ethics Code has been violated, when a complaint has been filed, the filer shall be known as the Complainant.
  2. *Ethics Code* shall mean [cite code or ordinance numbers]
  3. *Ethics Commission* shall mean the Ethics Commission of the City of \_\_\_\_\_ created by [cite ordinance or charter provision].
  4. *Ethics Compliance Officer* shall mean an individual designated by the [City Manager or City Council] to examine any complaints filed against a City employee or official. Unless stated otherwise in this procedure, the City Attorney shall be the Ethics Compliance Officer. If the Respondent to a complaint is a member of the City Council the City Attorney may not act as the Ethics Compliance Officer. The [City Attorney] shall appoint an outside independent attorney to assume the role of the Ethics Compliance Officer for the complaint. If the appointment of an outside independent attorney is required, such appointed attorney shall be an attorney or law firm which is not employed by the City and does not have any active representation of the City in order to promote neutrality in the process and a disinterested compliance officer. The [City Attorney or Council] shall ensure the outside independent attorney has sufficient qualifications and experience in municipal or ethics matters to fulfill the obligations of the role.
  5. *Presiding Officer* shall mean the officer charged with presiding over a hearing of the Commission. Unless disqualified by the Charter or other law from acting as the presiding officer, the Chair shall be the presiding officer at all hearings to determine if a violation of the Ethics Code has occurred. If the Chair is unwilling or unable to act as Presiding Officer, the Vice-Chair shall act as the Presiding Officer. If no Vice-Chair is appointed or if the appointed Vice-Chair is unable or unwilling the act as Presiding Officer, then the Commission member with the most continuous seniority on the Commission who is able to deliberate, and vote shall be the Presiding Officer.
  6. *Public Official* shall mean a public officer of the City as defined by state law or an individual appointed by the City Council to hold a specific position, including a position on a City board, commission or committee. An individual may be an

employee, or public official or both, depending on the position held. However, for purposes of this section, the municipal court judge shall not be considered a public official or employee.

7. *Respondent* shall mean a public employee, officer, or official of the City of \_\_\_\_\_ who is the subject of any investigation, disciplinary or referral consideration. The term includes anyone the subject of any charges being investigated by the Ethics Commission.

#### **B. General Process:**

1. All hearings to determine if a violation of the City's Ethics Code has occurred shall be special meetings of the Commission.
2. The Ethics Commission shall have the power to utilize a violation hearing to inquire into the official conduct of any department, agency, appointed boards, office, officers, employees or appointed board members of the City for alleged or suspected violations of the City's Ethics Code. Such includes the actions of any member of the City Council, including the Mayor.
3. A member of the Ethics Commission who is a Complainant or Respondent shall not sit at the dais and shall not participate in deliberation or vote. However, such restrictions do not prevent the Complainant or Respondent from counting towards a quorum or in placing items on an agenda.
4. No public comment shall be allowed during a violation hearing, unless agreed upon by a majority vote of the Commission during the hearing or required by City charter or ordinance.

#### **C. Protocols for Conducting a Violation Hearing**

1. **Order.** Call the meeting to order.
2. **Roll Call.** Acknowledge the presence of quorum.
3. **No Citizen Comments:** No citizen comments or citizens to be heard is permitted unless agreed upon by a majority vote of the Commission during the hearing.
4. **Executive Session:** If executive session is necessary, those members of the City Council permitted to deliberate and vote shall convene into executive session pursuant to the Texas Open Meetings Act.
5. **Open Session:** Read the agenda item for a violation hearing which identifies the charges or investigation against the Respondent(s).
6. **Call for Presentation of Charges:** For the first hearing held where charges have been filed or where they will be considered, the Presiding Officer shall call the Ethics Compliance Officer to publicly read a summary of the charges against each Respondent. If more than one hearing is held regarding the charges, subsequent meetings are not required to read the charges.
7. **Presentation of Investigation Results:** If any investigation has occurred prior to the Ethics Commission convening a violation hearing, the Ethics Compliance Officer shall

present such investigation to the Ethics Commission along with evidence collected. This shall be a summary of the factual findings, unresolved factual questions, and reference to the evidence provided to the Commission regarding the read charges. At least fourteen (14) calendar days prior to the holding of a violation hearing where charges will be considered against a Respondent, the Respondent shall be entitled to a copy of any documentary evidence which is anticipated to be presented to the Commission during a violation hearing which is not protected by the attorney / client privilege.

8. **Presentation by Complainants:** If any Complainants exist and wish to speak to the Commission about their complaints, such Complainants shall be given an opportunity to present a sworn statement at the violation hearing. Such statement may be written or provided orally to the City Council while under oath. Each Complainant must be put under oath and sworn before submitting any statement or evidence during the hearing. Oaths may be administered by the City Secretary or any person authorized to administer oaths in Texas. The Commission question any Complainant about their Complaint during this presentation.
9. **Presentation by Called Witnesses:** At the Ethics Commission's discretion, it may call any witnesses it wishes by majority vote of the members of the Commission present and voting. Such witnesses must be put under oath in order to provide information or evidence at the hearing.
10. **Presentation by Respondent:** The Respondent shall be given an opportunity to respond to the charges and present any relevant evidence including testimony from individuals on his / her behalf
  - a. **[Option 1]** However, the Respondent may not ask any witness questions. Only the members of the Commission may ask witnesses questions. The Respondent may only present information and evidence at the hearing if the Respondent is placed under oath. All witnesses called by Respondent must be placed under oath. Only the members of the Ethics Commission may ask any witness questions or to provide any evidence it determines is necessary. [Only use if utilized by a legislative body considering the membership of the legislative body. i.e. City Council.]
  - b. **[Option 2]** The Respondent may cross-examine any witnesses presented who give testimony against the Respondent. However, any member of the Commission may call any cross-examination questions out of order if such questions are abusive, harassing, badgering, or designed to provide false impression to the Commission. The Presiding Officer has the final say as to any calls to order.
11. **Commission Inquiry:** The members of the Ethics Commission may, by majority vote of those members present and voting, recall any witness or inquire of any person or compel the production of any documents or evidence they determine are necessary for the investigation or to make a determination on any charges. Nothing precludes the members of the Ethics Commission from continuing to seek information, evidence, and testimony, even after the Respondent has provided his / her testimony.

12. **Compelling Documentation:** For the purpose of investigations and hearings, the members of the Ethics Commission, by majority vote of those present and voting, shall have the power to administer oaths, subpoena witnesses, and compel the production of books, papers, and other evidence material to the inquiry.
13. **Deliberation/Motion on Complaints:** Any member of the Commission may make a motion to consider the merits of any investigation, charges, disciplinary action or referral action. However, such motion may not be made until after the Respondent has been provided notice and an opportunity to be heard regarding the charges, disciplinary action or referral action.
  - a. If the members of the Ethics Commission determine the Respondent violated the Ethics Code, they may make a motion to impose a sanction or other penalty authorized by law.
  - b. If the Ethics Commission determines the Respondent did not commit the acts alleged or that such acts do not constitute a violation of the City's Ethics Code, they can move to dismiss the charges or cease any investigation.
14. **Motion on Penalty:** If, and only if, the Ethics Commission determine, by affirmative vote of those members present and voting, that a violation of the City's Ethics Code has occurred the Commission may impose a penalty. Penalties imposed must be voted on separately from the determination of whether a Respondent committed a violation. Penalties available to the members permitted to vote include:
  - a. [List any penalties authorized by ordinance or charter;
  - b. To impose a penalty, including but not limited to:
    - i. Letter of Reprimand;
    - ii. Censure;
    - iii. Impose restrictions designed to prevent future violations;
    - iv. Impose training;
  - c. To direct further investigation necessary to determine an appropriate penalty, such as research into available trainings or other third-party options.
15. **Adjournment.** Once all matters are resolved by the Commission it must adjourn.

**Penalties As To Witnesses and Records:** In addition to the penalties which may be imposed upon a Respondent found to have violated the City's Ethics Code, the Ethics Commission may also impose a penalty upon any person, including Complainant, Respondent, witness, citizen, corporation, or other entity, which the Commission finds failed to properly and fully respond to its subpoena to appear, provide testimony or produce documentation. It may also impose a penalty upon anyone found to be disrupting the violation hearing after such person has received a warning regarding the disruption and persisted with any disruptive behavior. The Commission may refer any criminal charges to the state's attorney. The Commission may impose a civil penalty [If authorized by ordinance] for contempt or disruption after notifying the person charged with contempt or disruption of the charge and allowing them the opportunity to respond at a separate hearing.

