

# **WALK HARD:**

## **THE WALKING QUORUM STORY**

TCAA Summer Conference

South Padre Island Your kitchen table

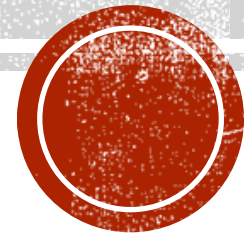
June 18, 2020

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# A QUICK HISTORY OF TOMA AND ITS GOALS

- First adopted in 1967
- Every meeting is open to the public, except for authorized closed sessions.
- Public notice for time, place, and subject matter of meetings.
- To exercise authority, governing body must take vote, during noticed public meeting, w/ quorum.
- Actions taken in violation of TOMA are voidable.
- Any interested person (including the media) can file a civil suit to void actions taken in violation of TOMA.
- Criminal prosecution may result from TOMA violations



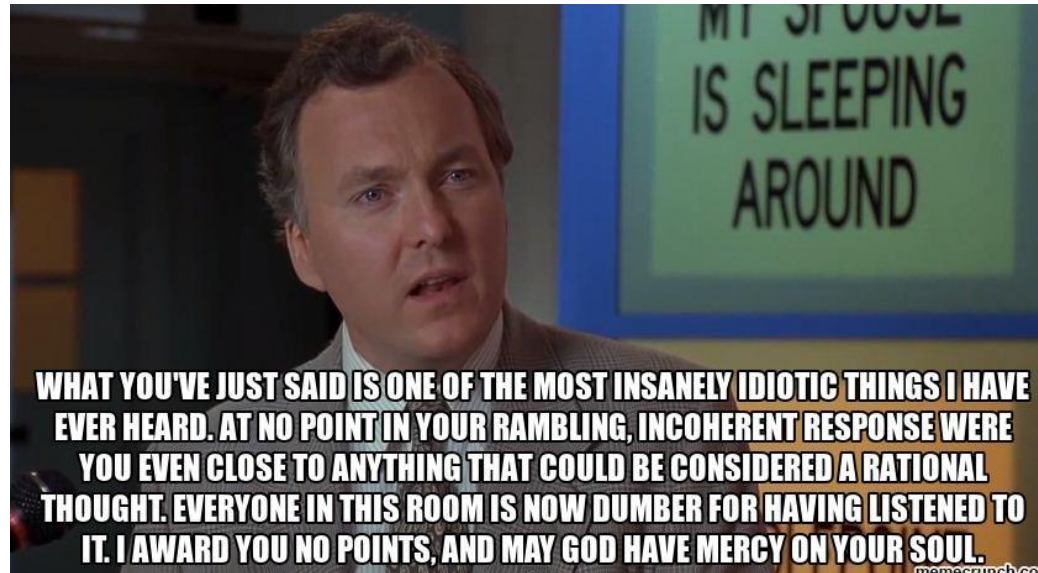
# KEY DEFINITIONS IN TOMA

- **“Meeting”** = deliberation between a quorum of a body during which public business is deliberated, or between a quorum and another person.
- “Meeting” also includes a **“gathering”** which is conducted by the body, with a quorum present, called by the body, where the members receive info, give info, ask questions, or receive questions from anyone (including an employee) about public business or public policy.
- **“Deliberation”** means a verbal exchange (including oral or written communication) concerning the public business of the governmental entity among a quorum, or between a quorum and another person.
- **“Quorum”** means a majority of the governmental body, unless differently defined by other law.

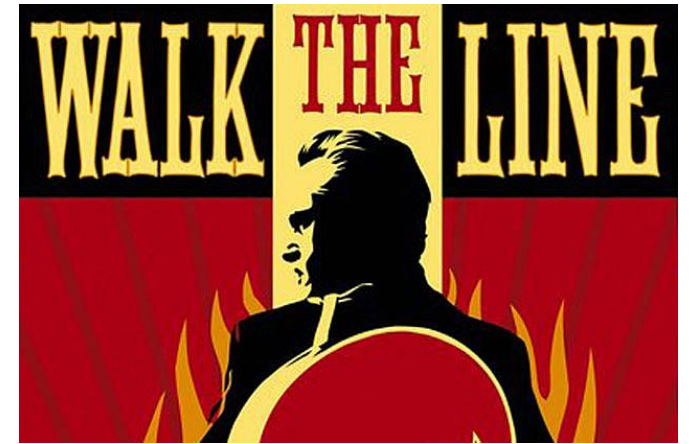


# WHAT'S NOT A MEETING?

- A quorum convening at a social function unrelated to public business of the body.
- A quorum attending a regional, state, or national convention or workshop, ceremonial event, or press conference,
- A quorum attending a candidate forum, appearance, or debate to inform the electorate
- BUT ONLY IF:
  - FORMAL ACTION IS NOT TAKEN AND ANY DISCUSSION OF PUBLIC BUSINESS IS INCIDENTAL TO THE SOCIAL FUNCTION, CONVENTION, WORKSHOP, CEREMONIAL EVENT, PRESS CONFERENCE, FORUM, APPEARANCE, OR DEBATE.



# WALK THE LINE

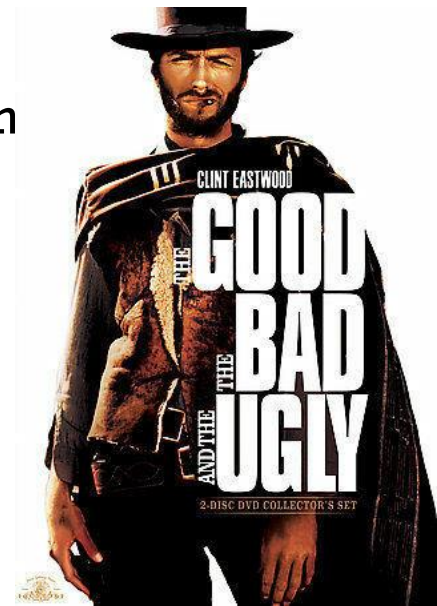


- Although TOMA applies to a “deliberation” of a “quorum” of the members of the body, the: (1) words need not be spoken in person; and (2) members need not be in the physical presence of each other to constitute a quorum.
- Electronic communication (including email or text) may constitute “deliberation” and a “meeting” under TOMA -- thereby requiring TOMA compliance.
- **AG: A determination of whether the members of the body violated TOMA involves an analysis of the “respective states of mind” of each member involved in an alleged violation -- because the TOMA “walking quorum” statute (§551.143) requires the violator to “knowingly” commit the violation.**
- **Risk exists for a “walking quorum” in view of the widespread use of electronic communication -- including email, texting, and social media.**



# THE GOOD, THE BAD, AND THE UGLY (IE, PRE-2019)

- TOMA §551.143, as it was: “A member or a group of members of a governmental body commits an offense if the member or group of members **knowingly conspires** to **circumvent** this chapter by meeting in numbers less than a quorum for the purpose of **secret deliberations** in violation of this chapter.”
- **“Walking Quorum”** = prohibited, sequential conferencing in numbers less than a quorum.
- Members of a governmental body may “violate the Open Meetings Act even though they are not physically present in one place, for example by discussing public business of the governmental body over the telephone.”  
Tex. Att’y Gen. No. LO-055 (1995) at 3-4



# TRUTH OR CONSEQUENCES

- **TOMA 551.144: Criminal penalties for knowing participation in a closed meeting.**
  - Fine of between \$100 and \$500
  - Confinement in county jail for between 1 and six months; or
  - **BOTH**



# THE DEATH OF THE WALKING QUORUM

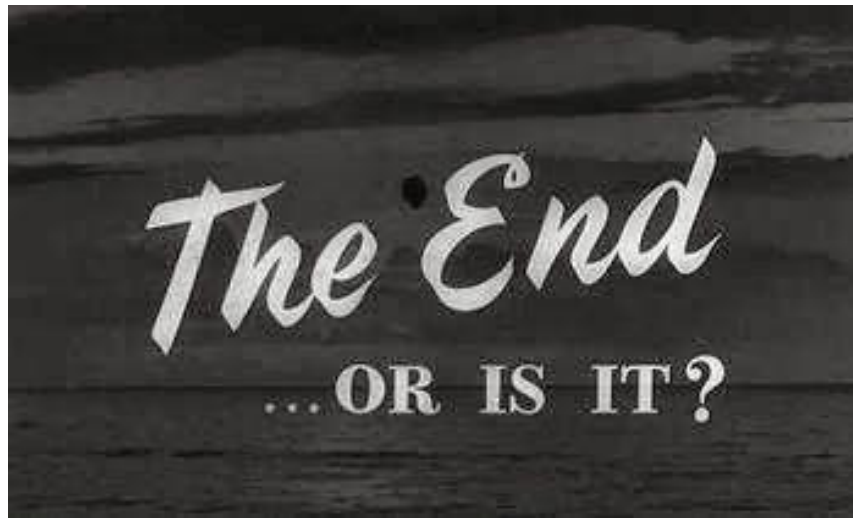
- CCA found walking quorum criminal conspiracy provision “unconstitutionally vague” in *Texas v. Doyle*, 589 S.W.3d 136 (Tex. Crim. App. 2019) and thus violated the 1<sup>st</sup> Amendment
  - Montgomery County judge and two commissioners were charged under 551.143 for knowingly conspiring to circumvent TOMA.
    - Allegedly they were talking about contents of a road bond
  - Too vague for 1<sup>st</sup> Amendment: “**knowingly conspires to circumvent** this chapter by meeting in numbers less than a quorum for the purpose of **secret** deliberations in violation of this chapter.”
    - Because of these words, city attorneys have always advised elected officials not to talk about public business at all outside of a public meeting in less than a quorum.
  - “a law that imposes criminal liability must be sufficiently clear to: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) establish determinate guidelines for law enforcement.”





# *TEXAS V. DOYLE*, CONTINUED

- Court holds Section 551.143 is “hopelessly indeterminate” and abstract.
- “A broad view of what constitutes a ‘walking quorum’ would constrain one-on-one lobbying for votes or even one-on-one discussions . . . [w]e do not doubt the legislature’s power to prevent government officials from using clever tactics to circumvent the purpose and effect of the Texas Open Meetings Act . . . . But the statute before us wholly lacks any specificity . . . .”



# THE AFTERMATH

- As of Feb. 27, 2019, the walking quorum/conspiracy provision of TOMA is unconstitutionally vague on its face and unenforceable.
- The walking quorum is dead, long live the walking quorum.
- AG ruled after *Doyle* that criminal penalties are gone, but civil penalties remain (ie, action taken in violation of statute is voidable)
- BUT the 86<sup>th</sup> Legislature was just underway...



# HERE COMES THE CAVALRY



- S.B. 1640 (Kirk Wats) is signed by Gov. Abbott on June 10, 2018.
- Effective upon adoption
- SB 1640 fixes the statute with a new formulation of the conspiracy/walking quorum prohibition:
  - It's an offense if a member of a governmental body:
    - (1) **knowingly** engages in at least one communication among a series of communications that each occur outside of a meeting authorized by this chapter and that concern an issue within the jurisdiction of the governmental body in which the members engaging in the individual communications constitute fewer than a quorum of members but the members engaging in the series of communications constitute a quorum of members, and
    - (2) **knew at the time the member engaged in the communication** that the **series of communications**:
      - (A) **involved or would involve a quorum**; and
      - (B) would constitute a **deliberation** once a quorum of members engaged in the series of communications.”



# THE FIX IS IN



- SB 1640:
  - Still must be a “knowing” violation in 2 ways –both that the communication is related to issue of public business, and that, at the time the communication was made, that the communication would **be part of a series** of communications that constitute deliberation amongst a quorum
    - No more “circumvent” or “secret” or “conspire”
  - Still contains penalty of \$100-\$500 fine and 1-6 months in county jail or both
  - Legislature also **revised “deliberation” to specifically include written communications**. Again, it did before, but now laid out in the act. You can violate TOMA across any number of technologies, and in doing so you’re creating a record subject to the PIA.



# SO WHAT DOES THAT MEAN?

- New law: It's a criminal offense if a member of a governing body:
  - (1) knowingly engages in at least one communication among a series of communications;
  - (2) that each occur outside of an meeting authorized under the Act;
  - (3) concerning a matter within that body's jurisdiction in which the members engaging in the individual communications constitute fewer than a quorum, and
  - (4) the member knew at the time he or she engaged in the communications that the series of communications involved or would involve a quorum, and would constitute a deliberation once a quorum of members ultimately engaged in the series of communications.



# THE QUICK AND THE DEAD

- Can a council member still have a one-on-one conversation with another councilmember about public business?
- Are prior cases or AG opinions on 551.143 conspiracy still controlling? Persuasive? Relevant?
- Prosecutors and juries will still decide if conduct rises to the level of criminality.



# HOW THE WEST WAS WON (BEST PRACTICES)

- One on one conversations outside of a meeting are generally ok, but beware of the “daisy-chain” of communications.
  - “So I have heard from Jacob and Eliza on Issue 5 that....”
- Talk to your governing bodies about restricting their communications to more formal settings. Email is probably the easiest to control, and for the PIA it’s the easiest to reproduce without screenshotting things.
- Best practice when you email your bodies is to use blind copy. For example, send an email to yourself, explain that everyone is blind copied, and explicitly tell them not to forward or respond.
- Know your enemy: It is “Reply All.”
- Notice of Possible Quorum: If your council is going to be in a situation where they are all together but it’s not a meeting, post a notice of possible quorum to be safe.



# QUESTIONS?

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