The Windshield and the Bug:
Sometimes, when TDRCP intersects TOMA,
Splat happens.

Thomas A. Gwosdz
City Attorney
Victoria, Texas
(361) 485-3520
tgwosdz@victoriatx.org

Thomas has been the City Attorney in Victoria for 1,342 days, some of them longer than others.

During that time he has represented the City in numerous real estate transactions (including the purchase of property for a proposed wastewater treatment plant), a few successful economic development projects (including the final assembly plant for large yellow-and-black hydraulic excavators), and exactly zero criminal indictments (zero and counting). For the last two election cycles, Thomas has been developing an expertise in "what the bloody hell just happened here?"

In 2007, Thomas opened the law firm of "Thomas A. Gwosdz, Attorney at Law," an incident which prompted him to later (frequently) advise clients and strangers alike to "never open a new business on the cusp of the deepest economic downturn in 90 years."

Prior to that unfortunate decision, Thomas was staff attorney at the Texas Association of School Boards, where he enjoyed both travelling the state teaching school board members why they couldn't fire the football coach, and coming home to a small house in the Texas hill country filled to the brim with five wonderful children and a strong Texas woman.

Thomas has also represented large corporate clients in transactions involving too many zeroes.

Due to the eight years he spent teaching high school English to reluctant teenagers, Thomas eschews obfuscation whenever possible, and delights in reducing complex, convoluted Texas law to practical paradigms.

Outside of the office, Thomas maintains his sanity by riding a bicycle around in circles as fast as possible. He has been known to beat his frienemies at this exercise. Thomas has been signing his email messages with his initials since before Al Gore invented the internet, and he contains his mild exasperation that no one has started calling him Tag yet.

The Windshield and the Bug:
Sometimes, when TDRCP intersects TOMA,
Splat happens.

Thomas A. Gwosdz
City Attorney
Victoria, Texas
(361) 485-3520
tgwosdz@victoriatx.org

The Texas Disciplinary Rules of Professional Conduct, with the mandate for confidential communication which founds Rule 1.05, is, at its core, contrary to the Open Meetings Act's hard-line focus on sunlight and transparency in government. Where these two edicts intersect, a city attorney is well-advised to be wary.

This paper examines some of the unusual circumstances that can arise at the intersection of attorney-client privilege and TOMA closed session exception, especially when one or more city council members may be adverse to the city on an issue of city business. Consider the following hypothetical:

> *Springfield is a small Texas town in which both the topography and socioeconomics decline from the north to the south. Springfield needs a new wastewater treatment plant, and staff has advised placing it on the south side of town to take advantage of gravity. Poor, minority south side residents are not happy with the decision, but the 5 member council approves the plant on a 3-2 split vote. Springfield moves forward with permitting the plant, and TCEQ sends the permit application to a contested case hearing on the request of the Southside Action Committee (SAC), a hastily organized association of south Springfield residents.*
>
> *In the next council election, Mr. Abbott, a Southside resident, runs a successful campaign by promising to overturn council's decision and cancel the plant. As his first act after taking office, Mr. Abbott calls for a budget amendment to eliminate funding for the wastewater treatment plant. One of the two council members who previously voted "nay" rejects the amendment, and the plant survives again, 3-2. The next day, Springfield receives a settlement offer from SAC, signed by its Vice-President, Mr. Abbott.*
>
> *The local paper, smelling Denmark, writes a scathing editorial, accusing the new three-member majority and the outgoing councilmember of conducting secret meetings in violation of the Open Meetings Act, and vows to find proof. The paper subsequently requests all email and phone communications, on all city-owned and personal accounts, between and among all council members, including the recently defeated member, during the six months leading up to the failed budget amendment.*

I. The Windshield

The Disciplinary Rules of Professional Conduct

Rule 1.03: Communication.

Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct mandates a lawyer's conduct with respect to keeping his client informed about the subject of his representation. It states:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[1]

The comments to the Rule indicate that "the lawyer should reasonably fulfill client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[2] Although a lawyer may, in some circumstances, temporarily delay sharing information with the client, the Rule does not permit a lawyer to withhold information to serve the lawyer's own interest or convenience.[3]

As with many of the Rules of Professional Conduct, reported cases interpreting Rule 1.03 illustrate extreme examples of poor communication and should not be used as a guide for minimum standards. In *Eureste v. Comm'n For Lawyer Discipline*,[4] the attorney Eureste contended the only evidence of inadequate communication with his client Granado was Granado's testimony that he did not believe Eureste communicated with him enough. The trial court disagreed, and found that he had violated Rule 1.03. The court of appeals, examining the legal and factual sufficiency of the evidence, found that,

> It is clear from Granado's testimony that his expectations were not met. Granado testified that when he tried to call Eureste at his office, he was told Eureste was not there or was unavailable. Then, the staff in the Amarillo office became angry at Granado and told him: "you are supposed to come to us before you talk to him." However, the staff never explained to Granado what they were doing to help him. Instead, Granado testified the staff told him "you are just going to have to talk to Mr. Eureste. He is your lawyer." According to Granado, Eureste called him about four times, but Eureste never told Granado what he was doing to help him.[5]

---

[1] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03
[2] *Id.* Cmt. 2
[3] *Id.* Cmt. 4
[4] 76 S.W.3d 184 (Tex. App.—Houston [14th Dist.] 2002, no pet.)
[5] *Id at* 200-01.

Significantly, the appellate court looked to the client's subjective expectation of communication, not an objective standard, to determine whether Eureste had complied with the rule. The appellate court found it "most important" that the attorney, or his staff, led the client to believe that the attorney had an obligation to help the client obtain surgery. Without determining whether the attorney had an actual obligation regarding the surgery, the appellate court found the evidence legally and factually sufficient to show that Eureste failed to keep his client reasonably informed because the client was left with the expectation that the attorney would help him obtain surgery.

As discussed further below, determining what level of communication with an organizational client will be sufficient to meet the organization's expectations can be difficult. To assist in that determination, a city attorney should establish clear guidelines with the client about the level of information expected by its elected representatives and senior staff. "Communicating about the communication" should be done frequently and early.

In the hypothetical situation being considered for this paper, the obligation to meet the client's expectations regarding communication can conflict with the lawyer's obligation not to reveal confidential information under Rule 1.05, because at least one member of city council is an adverse party in a contested case hearing.

Rule 1.05: Confidentiality of Communication.

The confidentiality provided to the client by Rule 1.05 may be the best-known effect of the principles contained in the TDRPC. For the limited scope of this paper, the relevant portion of Rule 1.05 is contained in paragraph (b), which states in part,

> (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
>
> > (1) Reveal confidential information of a client or a former client to:
> >
> > > (i) a person that the client has instructed is not to receive the information; or
> > >
> > > (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
> >
> > (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation[6].

The commentary to Rule 1.05 states the intent of providing such confidentiality to the client. "Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients

[6] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05

to seek early legal assistance."[7] Of particular note to city attorneys, the comments expressly state that the confidentiality provided by Rule 1.05 applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.[8]

Subparagraphs (b)(2) and (4) subject a lawyer to discipline for using information relating to the representation in a manner disadvantageous to the client or beneficial to the lawyer or a third person, absent the informed consent of the client.[9] When facing a situation where some contingent of a city's governing body may be adverse to the city itself, a city attorney must first determine whether the members of the contingent are, in fact, adverse to the city. If so, the city attorney should carefully examine and follow Rule 1.12 as it relates to the attorney's duty to an organization as a client.

Finally, if the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1).[10] Neither Rule 1.05 nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.[11]

Rule 1.12: Organization as a Client.

Compliance with Rules 1.03 and 1.05 is made more complicated when an attorney represents an organization. A city attorney should clearly understand the scope of representation. For a home-rule city, the city's charter may set forth the extent of the attorney's representation.[12] In the ordinary course, the city attorney represents the city itself, and not individual council members. In that situation, Rule 1.12 governs many aspects of the attorney's representation. With respect to unlawful conduct by a constituent of the organizational client, Rule 1.12 provides, in part:

> (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;

[7] *Id.* Cmt 1, *see also Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759, 761 (Tex. 1995) ("A lawyer has a solemn obligation not to reveal privileged and other confidential client information, except as permitted or required in certain limited circumstances as provided in the rules.")

[8] *Id.* Cmt 5

[9] *Id.* Cmt 8

[10] *Id.* Cmt 21, *see also Plunkett v. State*, 883 S.W.2d 349, 355 (Tex. App.—Waco 1994, pet. ref'd) ("If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw.")

[11] *Id.*

[12] For example, the Home Rule Charter of the City of Victoria states: "The City Attorney shall be the legal adviser and attorney for the Mayor and the City Council, the City Manager and all other officers and employees of the City with respect to any legal question involving an official duty or any matter pertaining to the affairs of the City of Victoria." Art. III, Sec. 7.

(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.[13]

The rule requires an attorney to take remedial action whenever the lawyer learns that any person associated with the organization has committed or intends to commit a violation which reasonably might be imputed to the organization. The constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officers, employees, shareholders, members, and others serving in capacities similar to those positions or capacities.[14]

The rule does not allow the attorney to distinguish between officers who support the organization and those who might be adverse to the organization, except when those adverse positions might not reasonably be imputed to the organization.[15] The comments to the Rule do, however, provide that 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.[16]

The duty to take remedial action does not arise for a city attorney when the city, or constituents of the city, pursue policy goals with which the attorney does not agree. The comments make clear that "Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[17] 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. Subsection (c) details proper remedial actions the attorney may take:

(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 internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a 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

[13] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12

[14] *Id.* Cmt 2.

[15] Consider whether, in the context of city representation, citizens might contend that *any* action by a sitting council member, whether or not that council member is legally or factually adverse to the city, could reasonably be imputed to the organization.

[16] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 Cmt 4.

[17] *Id.*cmt 6.

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.

For a city attorney, the rule requires that the lawyer first attempt to resolve a violation by taking measures within the organization. If the misconduct originates from a subordinate employee who acts contrary to the attorney's advice, referring that matter to a higher employee, potentially including the city council, is appropriate.

However, a more difficult situation arises for a city attorney when a sitting council member is the source of the misconduct. In this situation, the attorney's diplomatic position may be precarious, but his conduct is prescribed. The rule's suggestion, to refer the matter to the highest authority, may prompt the city attorney to brief the city council, in executive session, on the misconduct of one of its members. This action is likely to result in one of three outcomes, two of which are bad.[18] The first is that some members of council may see the attorney's act as politically motivated. The second is that the council as a whole may disregard the attorney's advice and allow the misconduct to continue. The rules address only this second potential outcome.

> 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.[19] (emphasis added.)

---

[18] The third possible outcome, of course, is that the council listens to the sage advice of its attorney, corrects the misbehaving rascal, sets course on a straight and narrow path, and never speaks of the matter publicly. Let me know if that ever happens.

[19] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 Cmt 7.

In this comment, the Rules make clear that the lawyer's first obligation is within the client organization: to refer the misconduct to an internal authority that can address the misconduct. But the comment also reminds attorneys that there is a secondary obligation under Rule 1.02 not to assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent.[20] Once the lawyer has referred the misconduct to the highest internal authority, and the organization opts to continue the misconduct, the lawyer may reveal confidential information under Rule 1.05(c)(7) "to prevent the client from committing a criminal or fraudulent act."

II. The Bug

The Texas Open Meetings Act

The Texas Open Meetings Act was adopted in 1967 to help make governmental decision-making accessible to the public[21]. Together with the Public Information Act, it is sometimes referenced as one of the Texas "Sunshine Laws." In the introduction to his *Open Meetings Handbook*, the Texas Attorney General says "The Texas Open Meetings Act honors the principle that government at all levels in this state should operate in a way that is open and accessible to the people." A city attorney's representation often includes advising city leaders on compliance with TOMA.

However, that compliance can sometimes be complicated when it implicates an attorney's responsibility to maintain client confidentiality. TOMA recognizes this conflict, and seeks to address it by granting an exception to allow attorney-client privileged conversations to take place in closed sessions. TOMA provides that:

> A governmental body may not conduct a private consultation with its attorney except:
>
> (1) when the governmental body seeks the advice of its attorney about:
>
> (A) pending or contemplated litigation; or
>
> (B) a settlement offer; or
>
> (2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.[22]

The Attorney-Client exception does not permit a governmental body to engage in general policy discussions in executive session merely because an attorney is present.[23]

---

[20] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(C).
[21] The Act was adopted in 1967 as article 6252-17 of the Revised Civil Statutes, substantially revised in 1973, and codified without substantive change as Government Code chapter 551. It has been amended many times since its enactment.
[22] Tex. Gov't Code Ann. § 551.071 (Vernon)
[23] *Finlan v. City of Dallas*, 888 F. Supp. 779, 790 (N.D. Tex. 1995), *citing* Op.Tex.Att'y Gen. No. JM–100 (1983).

For example, the exception allows a governmental body to consult with its attorney in executive session to receive advice on the legal issues raised by a proposed contract, but the governmental body may not discuss the merits of the proposed contract, financial considerations, or other non-legal matters related to the contract merely because its attorney is present.[24]

If the governmental body exceeds the scope of the attorney-client exception, then the closed session may violate TOMA. For example, TOMA allows a governing body to admit to closed session a person necessary to the closed session discussion. In 2002, Attorney General John Cornyn considered a situation where the Smith County Commissioner's Court allowed the county auditor to attend a closed session convened under the attorney-client exception, and opined that,

> the commissioners court may include the county auditor in a closed discussion of litigation or settlement offers if it determines that the auditor is necessary to the discussion, that the auditor's interests are not adverse to the county's, and that the auditor's presence is consistent with the attorney-client privilege. If, however, a court subsequently finds that, because of the auditor's presence, the communications are not privileged, then the commissioners court may also be found to have violated section 551.071 of the Government Code.[25]

Though somewhat retroactive in effect, the attorney general's logic makes sense on one level. If the communication with the attorney was not confidential under the TDRPC, then § 551.071(2) should not apply, and the governing body "may not conduct a private consultation with its attorney." As the opinion states, the fact that correspondence had been disclosed to county auditor and other county offices "is some evidence either that the communications were never intended to be confidential, or that the privilege was waived by disclosure to third parties."[26]

Consider, however, whether the exception might still apply under § 551.071(1). A plain reading of the statute might suggest that a governing body may conduct a private consultation with its attorney when the governmental body seeks the advice of its attorney about pending or contemplated litigation or a settlement offer, irrespective of whether the communication is privileged. The Attorney General's 2002 opinion neglects to adequately consider the implication of the "or" that joins subsections (1) and (2). Considering that conjunction, a court might conclude that subsection (1) permits closed sessions to discuss with an attorney matters related to litigation or settlement offers. Nevertheless, I have not located a published court opinion that contradicts the Attorney General, and I therefore advise my clients accordingly.

---

[24] *Killam Ranch Properties, Ltd. v. Webb County* (App. 4 Dist. 2012) 376 S.W.3d 146

[25] Op. Tex. Att'y Gen. No. JC-0506 (2002)

[26] *Id, quoting Cameron County v. Hinojosa,* 760 S.W.2d 742, 746 (Tex. App.-Corpus Christi 1988, no writ)

The penalty for knowingly participating in the unpermitted closed meeting is a fine of not less than $100 or more than $500; confinement in the county jail for not less than one month or more than six months, or both the fine and the confinement.[27]

If the Attorney General is right, and the governmental body is not permitted to have a private consultation with its attorney in closed session if the attorney-client privilege is waived, then the fact pattern provided in the hypothetical presents an interesting dilemma. At least one sitting council member is clearly adverse to the city by being an adverse party in pending litigation. When the city seeks a closed session deliberation to consult with its attorney on that litigation, or when the City Attorney must brief council on the litigation under the lawyer's Rule 1.03 obligation to communicate with the client, that closed session deliberation in the presence of an adverse party waives the attorney-client privilege.[28]

Fortunately, the governmental body may be permitted to exclude from closed session a person who is adverse to the governmental body. In 1984, Attorney General Jim Maddox considered whether staff members of the Harris County Commissioner's Court and other county offices were authorized to attend executive sessions of the commissioner's court related to pending litigation concerning conditions at the county jail. Examining the question under prior law, General Maddox concluded that,

> governmental bodies may admit to executive sessions held under section 2(e) those officers and employees who are their representatives or agents with respect to the particular litigation in question and whose presence is necessary to effective communication with the attorney. Furthermore, the governmental body may not admit to its closed discussion of litigation those third parties who are adversaries or whose presence would otherwise prevent privileged communication from taking place.[29]

The 1984 opinion considered officers and employees of the county, but did not clearly extend the analysis to sitting members of the governmental body itself. Attorney General Maddox extended the analysis in 1989, when his office considered whether a member of a school district board of trustees who has sued the other six members may be excluded from an executive session held to discuss the litigation.[30] In a beautifully-written, policy-based argument, Attorney General Maddox discusses the reason that he concludes that a sitting member of the governing body who is an adverse party in litigation can be excluded from the closed session of the governing body:

> The policy assuring private consultation also applies to the six members of the school board who have been sued by an individual school trustee. They have a right to communicate privately with their attorney outside of

[27] Tex. Gov't Code Ann. §551.144 (West)

[28] For example, disclosure of attorney-client communications to a third party lacking a common legal interest will result in a waiver of the attorney-client privilege. *S.E.C. v. Brady*, 238 F.R.D. 429, 439 (N.D. Tex. 2006) *citing In re Auclair*, 961 F.2d 65, 69 (5th Cir.1992); *See Ferko v. Nat'l Ass'n For Stock Car Auto Racing, Inc*., 218 F.R.D. 125, 134 (E.D.Tex.2003)

[29] Op. Tex. Att'y Gen. No. JM-238 (1984)

[30] Op. Tex. Att'y Gen. No. JM-1004 (1989)

> the presence of the opposing party in the lawsuit. This policy, in our opinion, justifies an exception from the usual rule that each board member must have an opportunity to attend all board meetings. The purpose of this rule, as already pointed out, is to allow each member of the board to contribute his ideas, arguments, and judgment to his associates, so that the board's decision may be the judgment of the whole. When one member's disagreement with the board leads him to invoke the adversary system of justice against the rest of the board, there is little likelihood that a composite judgment on the matter can be reached through discussion. Thus, no injury is done to the policy entitling all board members to attend all board meetings if the plaintiff board member is excluded from the board's private consultations with its attorney. Admitting the plaintiff board member to such attorney-client conferences would moreover undermine the common law and statutory protection given attorney-client communications and compromise the efficacy of the adversary system of justice. We conclude that the board member who has filed the lawsuit against other members may be excluded from an executive session during which the only agenda topic is the defense of the lawsuit.[31]

Attorney General Maddox expressly cautioned that his opinion was limited to the specific facts presented in that case.[32]

In 2005, Attorney General Greg Abbot refused to address this rule when examining whether a sitting director of the Clearwater Underground Water Conservation District could be excluded from an executive session called to discuss a lawsuit that the director had merely threatened, but not filed. Prior to the writing of the opinion, the District had granted the permit that was subject of the contemplated litigation, and the Attorney General found the question to be moot.[33]

Consequently, with respect to the second hypothetical, where sitting council members are the subject of a public information act request which implicates potential criminal conduct, there appears to be no authority to exclude those members, as they are not adverse parties. An "adverse party" is a party whose interests are opposed to another party to a legal action.[34] The Attorney General's office has used "adverse" and "adverse party" consistently with these definitions.[35] In the context of a public information act request, and indeed in the context of a subsequent individual criminal trial, the council member is not adverse to the city, but to the state.

III. The Conclusion

[31] Op. Tex. Att'y Gen. No. JM-1004 (1989)
[32] *Id.*
[33] Op. Tex. Att'y Gen. No. GA-0334 (2005) (We find no authority on excluding a board member who merely contemplates litigation against his board.)
[34] *See Highsmith v. Tyler State Bank & Trust Co.,* 194. S.W.2d 142, 145 (Tex. Civ. App.-Texarkana 1946, writ ref'd); Black's Law Dictionary 1144 (7th ed. 1999).
[35] See Tex. Att'y Gen. ORD-551 (1990) at 4-5; Tex. Att'y Gen. LO-89-77, at 3.

Avoiding Splat

My seventeen year-old son and I have long shared an odd tradition. Driving through South Texas country roads late at night, it's not unusual to hear a soft, ripe *splat!* and see a creamy yellow smear suddenly spread on the windshield. Inevitably, my son or I will say, "That took a lot of guts." And the other is compelled to answer "I bet he doesn't have the guts to do it again."

Avoiding the splat that can happen at the intersection of the TDRPC and TOMA is about having a different kind of guts: the guts of a lawyer to be a counselor rather than an attorney; the guts of a politician to stand on his own public integrity. A good lawyer, a friend, once advised me that the best answer to this difficult situation is for the council member to simply agree not to participate in the executive session, and that my job was to help the council member to see the value of that choice. I took that advice, and so did my councilmember.

I know this is an aspirational conclusion to an ethics presentation. In fact, I contend there is no better conclusion. But I leave you with this, lest you stand on my opinion alone:

> … a public officer holds a public trust, and he should discharge his duties with honesty and integrity. Given these responsibilities, a public officer who is suing or planning to sue his governmental body should avoid using his public position to secure access to information related to the litigation, for example, by voluntarily refraining from attending executive sessions regarding the litigation and from accepting confidential documents related to the litigation.[36]
>
> -- Attorney General Greg Abbott (2005)

[36] Op. Tex. Att'y Gen. No. GA-0334 (2005) *citing See Alsup v. State,* 238 S.W. 667, 670 (Tex. Crim. App. 1922)*; Jones v. State,* 109 S.W.2d 244, 251 (Tex. Civ. App.-Texarkana 1937, no writ).