

***Before, During, and After: Election Issues  
for City Attorneys***

***By Ryan Henry***

**I. City Attorney and Election  
Basics**

The main municipal person the city attorney will be in contact with during any election cycle is likely the city secretary.<sup>1</sup> Under most charters and for general law municipalities, the city secretary or clerk is designated as the elections officer.

This paper is not meant to address all election issues or laws or to be a comprehensive listing of the election process. However, for the most part, the basics are covered and several warnings necessary for dealing with ethical pitfalls for lawyers are discussed.

Elections are controlled largely by the election calendar, which comes out every year. In Texas, the Secretary of State (“SOS”) is the state agency responsible for elections and the Secretary is the chief election officer of the state. The agency website is a good source of information and quick references.<sup>2</sup> It also generates helpful forms to utilize during elections which contain any legislative changes. However, understand, the SOS is not an investigative or enforcement authority for election law violations. Criminal complaints are referred to the Office of Attorney General and some

regulations are controlled by the Texas Ethics Commission.<sup>3</sup>

Elections occur in May and November. Elections are largely controlled by the Texas Election Code. The SOS has TAC regulations which control with more specificity and can be located in Title 1, part 4, Chapter 81 of the Texas Administrative Code.

Elections in Texas are generally run during Uniform Election Dates. Tex. Elec. Code Ann. § 41.001 (West). There are exceptions to the uniform dates, but the dates are the primary source behind the election calendar.

City attorneys typically must deal with general elections and special elections. Most elected city officials must run as independents, and therefore the city attorney normally does not have to deal with primary elections. Tex. Elec. Code Ann. § 143.002 (West). There is a rare exception when a city charter provides for partisan candidates. Tex. Elec. Code Ann. § 143.003(a) (West).

There are different types of issues to be decided by voters for the different elections. General elections are typically for electing officials to start a term. Special elections are for most other types of elections, including filling vacancies of unexpired terms, bonds, charter amendments, special measures, etc.

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<sup>1</sup> Tex. Elec. Code §§51.003, 52.002(3), 66.001.

<sup>2</sup> <http://www.sos.texas.gov/elections/>

<sup>3</sup> Tex. Elec. Code Ann. § 251.032 (West) and Tex. Gov’t Code ch 571.

## **II. Ethical Considerations**

Election time can pose some interesting challenges for a municipal attorney. In addition to having to research and understand the various aspects of election law, the city attorney must also constantly be on the watch to prevent accidentally violating one of the rules on disciplinary conduct applicable to lawyers.

One situation which can occur is when the city attorney advises the city secretary on an election matter for city council seats, such as not being able to reject a candidate's application on its face or with public documents. The candidate is the incumbent. The candidate calls the city attorney asking about what the city secretary can and cannot do.

The incumbent's election race is a "private" matter and not a matter on which the city attorney is giving the city advice. By advising the incumbent on the rules the city secretary must follow, the city attorney is advising a private person about their private legal matter. It would be the same if the incumbent's opponent also called and asked you the same question.

If the incumbent becomes adverse to the decision of the city secretary, your duty is to the city and its officer acting in her official capacity as the city secretary.

Of particular concern is Rule 1.06, conflicts of interest: general rule. It states, in part:

**(a) A lawyer shall not represent opposing parties to the same litigation.**

**(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:**

**(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or**

**(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.**

But note subsection (c):

**(c) A lawyer may represent a client in the circumstances described in (b) if:**

**(1) the lawyer reasonably believes the representation of each client will not be materially affected; and**

**(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. Tex. Disciplinary Rules Prof'l Conduct R. 1.06.**

Rule 1.07 Conflicts of Interest: intermediary states:

**(a) A lawyer shall not act as intermediary between clients unless:**

- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privilege, and obtains each client's written consent to the common representation;
- (2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
- (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
- (b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
- (c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in

the matter that was the subject of the intermediation.

(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Tex. Disciplinary Rules Prof'l Conduct R. 1.07

### **III. Organization as a Client**

A city attorney represents the entity as a whole, not individually. As an attorney representing an organization, it is important that you are familiar with Rule 1.13. It states:

(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 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 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 1.16, 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.**

**Tex. Disciplinary Rules Prof'l Conduct R. 1.13.**

Rule 1.13 and its comments stress the duty of an organization's lawyer to protect the

client's confidential information. In requiring a lawyer confronted with improper or illegal conduct by a constituent of the organization to “proceed as reasonably necessary in the best interest of the organization,” the Rule adds that this be done “without involving unreasonable risks of ... revealing information relating to the representation to persons outside the organization.”

This element of maintaining confidentiality exists within the city as well. Department heads and other employees may not be privy to certain confidential information, so going up the normal chain of command within a city organization may not be possible.

Texas Rule 1.13 requires the lawyer, in dealing with the city officials, to “explain the identity of the client when it is apparent that the city’s interests are adverse to those of the officials (personally) with whom the lawyer is dealing. . . .” This is to be done whenever there is reason to believe the management team does not understand or confuses the client role.

“[A]diversity is a product of the likelihood of the risk and the seriousness of its consequences.” *Nat’l Med. Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996). Parties are adverse when the risk to the formerly represented party is serious, even though the risk may be small. *See id.* An attorney should not be placed in a position where she may be forced to choose between zealously representing his clients and

maintaining the confidentiality of information received from former clients; this situation disqualifies the attorney from representing any defendant in the case. *See In re Roseland Oil & Gas, Inc.*, 68 S.W.3d 784, 787–88 (Tex. App.—Eastland 2001, no pet.).

#### **IV. Before Elections Start**

A city, school district, or other political subdivision can have an election, by itself, by contracting election services with a county, or by holding a joint election. Tex. Elec. Code ch 31, 271.

Given the cost and use of automated voting machines many municipalities either hold joint elections (where the costs are shared by all those participating in the election) or have an election by contracting with the county for election services.<sup>4</sup> The joint elections still require a contract with the county. So, it is important to know you will likely be negotiating with the county or multiple counties for election services long before election day.

It is important to know whether your counties use the countywide polling program, especially if you conduct your elections in November. November elections require use of all polling places in the county, while May elections do not. In May elections, local entities generally have the ability to draw their own precinct lines and select their own polling place locations. November elections

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<sup>4</sup> There are exceptions to the requirement of using electronic voting machines, especially for counties with 20,000 or less in population. However,

applications must be submitted for some exemptions and the deadlines are pretty short after the deadline to call elections.

must use the county's election precincts and polling places that include the city's voters.

Precincts are governed by Chapter 42 of the Election Code.

A contract for election services is a contract between the political subdivision holding an election in the county and the county election officer for specific election services that the county election officer would perform in a countywide election (equipment, ballot programming, etc.). Tex. Elec. Code Ann. § 31.001 (West), et seq. Such contracts normally should be entered into 5-6 months prior to election day. However, sometimes you may not know if you will have an election, so any early contracts must have an escape clause in case an election is canceled.

Regardless of which paths are chosen for who handles the logistics of the election, the City will need to call an election, which must be done by ordinance or order. Tex. Elec. Code Ann. § 3.001 (West); 3.004.

All candidates who have timely filed for a position must be eligible. Eligibility is found generally in the Tex. Elec. Code Ann. § 141.001 (West), but do not forget to look at any city charter provisions. A candidate may be declared administratively ineligible pursuant to Tex. Elec. Code Ann. § 145.003, 009 (West). Candidates must also be aware that all candidate applications, including petitions, are public upon filing. Tex. Elec. Code Ann. § 141.035 (West). Confidentiality for voter registration purposes does not mean a candidate has confidentiality for candidacy purposes.

Once called, the city must have access to machines, prepare and order ballots, find and set polling places, hire and train workers, public notice of the election, etc.

For cities, the city council/commission calls its own elections by default. Tex. Elec. Code §3.04. In some instances, a law may provide for the city to designate the authority to call the election.

Calling the election must be coordinated within your election calendar. Know and understand your 103<sup>rd</sup> day through 78<sup>th</sup> day deadlines and how they apply to your specific city. Tex. Elec. Code Ann. § 3.005 (West).

General elections must occur regardless of whether the order/ordinance is used to call the election, but you do not want to subject any election issue to argument or scrutiny, so timing is important. Special elections cannot be called without an ordinance or order.

Next you must send out election notices and register them with the county. Tex. Elec. Code Ann. § 4.003 (West); 008. In your election notice, very specific information must be contained within the notice. Tex. Elec. Code Ann. § 1.021, 4.004, 85.007 (West).

However, you may be in a situation where the city must cancel an election. The most common reason for this is all candidates for an elected office run unopposed. Tex. Elec. Code Ann. § 2.052 (West). So, there is no need to hold an election. Normally, the city secretary must certify, in writing, that a candidate is unopposed in an election for office and present it to the city council. The certification must be given as soon as possible after the filing deadline for

candidates has expired, including ballot and write in candidates.

Once a certification is received, the city council must, by order or ordinance, declare the unopposed candidates elected and take action to cancel the election. The City must then post a copy of the order or ordinance declaring the unopposed candidates elected at each polling place (including translated versions). Tex. Elec. Code Ann. § 2.052.

The general rule for a candidate who wishes to withdraw is 5 p.m. of the 71st day before election day in elections held on a uniform election date Tex. Elec. Code Ann. § 143.007(c) and §145.092(f) (West). A candidate in an election for which the filing deadline for an application for a place on the ballot is not later than 5 p.m. of the 62nd day before election day may not withdraw from the election after 5 p.m. of the 57th day before election day. Tex. Elec. Code Ann. § 145.092 (West).

If there is a separate election being held at the same time as a cancelled election, the unopposed candidates must be listed on the ballot for that separate election under the heading “Unopposed Candidates Declared Elected”. The candidates shall be grouped in the same relative order prescribed for the ballot generally.

## **V. During Elections**

A public official or election official may not create, alter, modify, waive, or suspend any election standard, practice, or procedure mandated by law or rule in a manner not expressly authorized by this code. Tex. Elec. Code Ann. § 276.019 (West). So, even

though the election is being held in your city does not mean officials can disregard mandatory requirements, especially during election day.

For “election day” I’m going to mention that early voting will count for the process of handling elections, but with special rules. Title 6 of the Election Code covers several topics, many of which are important procedures for the process of running an election at a polling place. Polling place setup and notices are governed by Chapters 61 and 62 of the Election Code. Check-in procedures for voters, including Voter ID, oaths, forms, etc. are controlled by Chapter 63. Procedures for casting ballots are controlled by Chapter 64. However, for early voting, there are some specific requirements in Chapters 84 and 86-87.

One of the most common questions when voting is occurring is the concept of electioneering. The Elections Code prohibits electioneering “within 100 feet of an outside door through which a voter may enter the building or structure in which the early voting polling place is located.” Tex. Elec. Code Ann. § 85.036(a) (West).

Polling place procedure requires that, during the time an early voting polling place is open for the conduct of early voting, a person may not electioneer for or against any candidate, measure, or political party in or within 100 feet of an outside door through which a voter may enter the building or structure in which the early voting polling place is located, and a person commits an offense if the person electioneers in violation of this provision. For such purposes, “early

voting period" means the period prescribed by statute and "electioneering" includes the posting, use, or distribution of political signs or literature. Tex. Elec. Code Ann. § 85.036(e).

Each early voting and election day polling place must be organized with 100-foot distance markers posted at surrounding outside entrances to the building. During the voting period and inside this protected area, it is prohibited to electioneer, including expressing preference for or against any candidate, measure, or political party, **regardless of whether they are or are not on the ballot**, or relating to the conduct of an election. Tex. Elec. Code Ann. § 61.003, 85.036 (West).

Election judges have authority to prohibit electioneering inside the 100 foot marker, but no authority outside the 100 foot marker. Tex. Elec. Code Ann. § 32.075(e) (West).

People are not allowed to use wireless communications devices within 100 feet of the voting stations. Additionally, people are not allowed to use mechanical or electronic devices to record sound or images within 100 feet of the voting stations. Tex. Elec. Code Ann. § 61.014, 81.002 (West).

When candidates violate these provisions or are suspected of violating these provisions, the city attorney may have to give advice to the city secretary. However, if the election is

being conducted under a joint election agreement or an agreement for election services, the city attorney must be aware of giving advice to the correct client. The election judge onsite may be a county employee, but under contract. This can muddy the waters regarding the proper client for the city attorney.

Also, be aware that Section 46.03(a) of the Texas Penal Code generally prohibits a person from bringing a firearm onto the premises of a polling place. The legislation allowing open carry of handguns does NOT change the law as it pertains to guns in the polling place. However, this prohibition does not apply to a peace officer, regardless of whether the police officer is on or off duty. For this and other potentially applicable exceptions, see Tex. Pen. Code Ann. § 46.15 (West).

## **VI. Post-Election**

Canvassing procedures for the election and the deadlines are controlled by Chapter 67. The Texas Secretary of State has several advisory opinions which are helpful when conducting canvassing activities.<sup>5</sup>

After election day, several post-election tasks must or could occur. These include not only canvassing, recounts, runoffs, certifications, etc.

The canvass must be conducted within a specific window after the election before elected officials can be sworn into office. The

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<sup>5</sup> SOS Election Advisory No. 2025-02 (2025), SOS Election Advisory No. 2025-01. Additional advisories found at :

<https://www.sos.state.tx.us/elections/laws/election-division-advisories.shtml>



canvassing must occur in an open meeting of the governing body. Only two officers are needed for a quorum for a canvassing meeting. Tex. Elec. Code Ann. § 67.004(a) (West).

The canvass cannot occur until the early voting ballot board has: (1) qualified and counted all provisional ballots, if a provisional ballot has been cast in the election; (2) counted all timely received late-arriving ballots, including next business day, military and overseas ballots; and (3) counted all ballots contained in previously defective carrier envelopes which were corrected by voters by the required deadline. See summary of late-arriving ballots below. (Tex. Elec. Code Ann. § 67.003 (West)). Canvassing is a ministerial duty. Tex. Elec. Code Ann. § 67.002 (West).

No newly elected official may qualify for office before the official canvass of the election has been conducted (or would have been conducted, in the event of a cancelled election).

The presiding officer of the canvassing authority prepares the Certificate of Election. Tex. Elec. Code Ann. § 67.016 (West).

If a recount request has been filed, this does not halt the canvass. However, the canvassing authority must make a note on the canvass that a recount has been requested. Filing a recount petition delays the issuance of a certificate of election and qualification for the office involved in the recount pending completion of recount. Tex. Elec. Code Ann. § 212.033, 212.0331 (West).

The mayor and council members elected in a **Type A general law city** may not assume

office until at least the fifth day after the election, excluding Sundays. Tex. Loc. Gov't Code Ann. § 22.036 (West). Section 22.036 of the Texas Local Government Code further requires that the newly elected governing body of a Type A municipality “meet at the usual meeting place and shall be installed.” Tex. Loc. Gov't Code Ann. § 22.036. Type A cities have authority to require a bond. Tex. Loc. Gov't Code Ann. § 22.072 (West). Additionally, if a Type A officer-elect fails to qualify for office (be sworn in) within 30 days after the date of the officer's election, the office is considered vacant. Tex. Loc. Gov't Code Ann. § 22.007 (West) (emphasis added).

However, some of the rules are a little different at a canvassing. For example, two council members is all that is required to constitute a quorum for canvassing the election results and declaring any results. Tex. Elec. Code Ann. § 67.004.

The partial manual count (“PMC”) is a post-election audit that is required under Texas Elections Code § 127.201. It is a hand count of select ballots that is designed to verify the accuracy of the tabulation equipment used in the election. Only ballots that are read by a scanning device are required to be part of the PMC. However, ballots cast on a paperless system are exempt from the partial manual count. Tex. Elec. Code § 127.201(g).

Section 65.016 of the Code provides that election results information must be posted on the county and city websites. A county that holds an election or provides election services for an election for a public entity must post certain information

regarding election results on their website after the election.

After the canvass, the presiding officer of the election (usually the mayor) prepares the certificates of election to be given to each official and for each measure. Tex. Elec. Code Ann. § 67.016.

However, no elected city official can assume office until they take the Statement of Officer and their oath of office (commonly referred to as the constitutional oath as required by Tex. Const. art. XVI, § 1). The Statement of Officer is filed with the city secretary, not with the secretary of state.

Until the new elected officials take office, the old members technically “hold over” and must continue to perform their duties. Tex. Const. art. XVI, § 17.

The process also requires the county to report the results of any election results to the SOS and is controlled by Chapter 68. However, local political subdivisions, other than a county, do not have to file electronic precinct-by-precinct returns with the Secretary of State’s office. Tex. Elec. Code Ann. § 67.017 (West).

It is also important to remember that record preservation is extremely important. All election records must be preserved by the City for at least 22 months after election day. Tex. Elec. Code Ann. § 66.058(a) (West). But the preservation is more complicated as the Code requires the voted ballots to be preserved in a secured, locked ballot box, inside a locked room, for at least sixty (60) days after election day. Tex. Elec. Code Ann. § 66.058. Additionally, the custodian must take images of all voted ballots and cast votes

to make them available for public inspection Tex. Elec. Code Ann. § 1.012 (West). However, mandatory redactions must occur before any public distribution. Advisory No. 2024-05.

## **VII. Practice Tips**

- Anytime an election cycle role around, refresh by reviewing the rules to keep in mind the situations which can cause problems.
- Pull the election calendar from the Secretary of State’s Website and compare to what your city secretary or other election officer will be using.
- To aid the city secretary, basic legal information (as opposed to legal advice) can be created for public distribution which the city secretary can hand out. However, it is usually better to simply use SOS information or direct inquires to the SOS.
- When possible, have staff obtain legal advice from the SOS attorney call-in number, which is required to be provided. Then, multiple people from different entities can get the same advice as the SOS does not represent anyone specifically.
- Avoid giving any advice directly to elected officials during this time, even if they are not up for election. This is difficult and sometimes impossible given the relationships formed with individual members of the client but are important to keep separate.
- The Texas Ethics Commission handles campaign treasurer appointments and

spending. So, giving advice to any officials or members of the public regarding the treasurer, spending, or proper signage could be ethically dangerous.

- If the city attorney is going to act as an intermediary between the city secretary and a candidate or elected official, follow the disclosure and scope requirements of Tex. Disciplinary Rules Prof'l Conduct R. 1.07.
- When trying to help with quick fire answers on election procedures or immediate problems during early voting or election day, keep in mind the actual client and any client confidential information that cannot be shared.