What am I doing up here?
A Look Inside the Mind and Preparation of a City Attorney During Council Meetings

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Thomas is a Fellow in the Society for Legal Scholars. He has taught attorneys, school trustees, and city council members at over two dozen local, regional and state-wide conferences, and he is the published author of several works, including his weekly newsletter *The Executive Summary*, and his book, *Go Home Early: A Practical Guide to Streamlined Meetings*.

Thomas was the City Attorney of Victoria for thirteen years and a staff attorney at the Texas Association of School Boards for five. He took his TMRS retirement in 2022, and formed The Gwosdz Law Firm. The firm has experienced rapid and steady growth since its inception, and has now represented over twenty local government entities, including cities and economic development corporations across the Gulf Coast and Texas Hill Country.

He has spent his professional career in public service, first as a public school teacher. After law school, he represented public school districts for eight years before becoming the in-house City Attorney in Victoria. There, he led a department of three attorneys and a staff of 10 employees, including managing the City Secretary's office and Municipal Court. The City Attorney's office was intimately involved in all aspects of the government operation. He provided full legal services to City Council members, the City Manager and his three ACMs, all eighteen department heads, and various division managers.

Thomas received his Doctor of Jurisprudence from the University of Houston School of Law in 2001, is licensed by the State Bar of Texas, and is a Fellow in the Texas Bar College's Society of Legal Scholars. He is certified in Employee Relations and Investigations by Cornell University and has been awarded the Merit Certification in Municipal Law by the Texas City Attorneys Association.

Outside of work, he enjoys time with his family, including his wife, five kids and two granddaughters. He is an avid fisherman and cyclist, and has been Scoutmaster of Troop 364, President of the Kiwanis Club of Victoria, Chair of the Riverside Ride, and "beanmaster" for Our Lady of Victory Cathedral's annual church festival.

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One of the core duties of any City Attorney is to attend City Council meetings and advise the client about issues as they arise in real time. This set of skills might be honed over years of practice advising boards and commissions, or it might be quickly developed in the crucible of a City Council meeting gone sideways. Either way, being an effective city attorney in this context requires the application of a broad range of laws and rules to an equally broad range of questions, and the city council will no doubt expect their lawyer to think on his or her feet, without dancing around the subject.

This paper examines some of the laws applicable to the City Council meeting, and the corresponding ethical rule that guides the attorney's conduct. Please do not assume that this paper covers every topic that might possibly arise in a city council meeting. After representing local governments for over 20 years, my next City Council meeting is just as likely to raise a novel issue as was my first. Nevertheless, the following list may provide some guidance.

This paper is structured loosely in the same order that most city council meetings organize their agenda. The primary headings of this paper reflect the primary headings that many cities use for their meeting agendas. Secondary headings in this paper indicate questions or issues that might arise during those agenda topics.

Many of my clients use a model agenda that I have crafted for them. My model agenda is generally based around 10 primary headings, most of which have descriptive language indicating to the audience what the City Council is attempting to accomplish in this section of the meeting. For reference, here are the primary headings and descriptions in my model agenda:

1. **Call to Order.**

2. **Ceremonial Announcements.** *With respect to items not listed elsewhere on this agenda, members may report on items of community interest, including announcing community events, announcing employee or community recognitions, requesting specific factual information or a recitation of existing policy from staff, or requesting placement of items on the agenda for discussion or action at a following meeting.*

3. **Citizen Communication.** *At this time, the public is invited to address the City Council and speak on any matter not specifically listed for public hearing elsewhere in this agenda. Please note*

that the City Council members may not respond to comments or deliberate on topics if they are not included on this agenda.

4. **Public Hearings**. *At this time, the Mayor will invite members of the public to address each item listed in this section. Please limit your comments to the topic of that public hearing. If more than one public hearing is being held, you will be allowed to speak during each topic.*

5. **Staff Reports and Other Discussion items**. *Items in this section are not expected to require action by City Council and are generally for information only. However, all items listed in this section may become action items on request of any Council Member, and City Council may take action on any item listed in this section without further notice.*

6. **Consent Agenda.** *No discussion is anticipated on any of the items in this section because they are routine business, were included in the budget adoption process, or have been previously discussed as a staff report or discussion item. These items will be considered collectively by a single vote, unless a council member requests an item be removed from the consent agenda*.

7. **Action Items.** *City Council will discuss, consider, and take any action deemed necessary on items listed in this section, including the adoption of a minute order, a resolution or an ordinance*.

8. **Executive Session**. *All items listed in this section will be deliberated in a closed session. Members of the public are not generally permitted to attend a closed session. Executive session items may be considered as an action item at the discretion of the Mayor; however, City Council will not take any action in closed session*.

9. **Action on Executive Session Items.** *Council will reconvene in open session and may take action on any item listed in the Executive Session section of this Agenda*.

10. **Adjournment**.

Ceremonial Announcements:

The Texas Open Meetings Act limits the topics that can be deliberated in a meeting to those listed in the notice for the meeting. "A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body." TX. GOV'T CODE §551.041 Generally, a notice is sufficient under the Act if it informs the reader that "some action" will be considered with regard to the topic. *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex.1975); *see also City of San Antonio v. Fourth Ct. of Appeals*, 820 S.W.2d 762, 766 (Tex.1991) (holding that a proposed condemnation posting that only specified the county blocks in which condemnation was to occur and not the individual properties to be condemned was sufficient notice because "readers who did own property in [the] blocks were on notice of some risk that their land might be condemned"). The required specificity of

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the notice is directly related to the level of public interest in the topic to be discussed and increases as the public's level of interest increases. *Cox Enters., Inc. v. Bd. of Trs. of the Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 959 (Tex.1986).

Actions taken by the City Council without providing proper notice are voidable. TX. GOV'T CODE §551.141. "Compliance with the Open Meetings Act is mandatory, and actions taken by a governmental body in violation of the Act are subject to judicial invalidation." *City of Bells v. Greater Texoma Util. Auth.*, 744 S.W.2d 636, 640 (Tex. App. 1987), *citing Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex.1975); *Garcia v. City of Kingsville,* 641 S.W.2d 339, 341 (Tex.App.—Corpus Christi 1982, no writ). Some unposted deliberations by Council Members, such as deliberations during executive sessions, can lead to criminal penalties for Council Members. TX. GOV'T CODE §551.14. *See Tovar v. State* (Cr.App. 1998) 978 S.W.2d 584 (Member of a governmental body can be held criminally responsible for his involvement in the holding of a closed meeting which was not permitted under Open Meetings Act, regardless of his mental state with respect to whether the closed meeting is permitted under the Act).

Several exceptions in the Open Meetings Act allow deliberations on specific topics, even if they haven't been posted in the meeting notice. Section 551.042 allows statements of specific factual information or a recitation of existing policy in response to an inquiry, and requests to place items on future agendas. TX. GOV'T CODE §551.042. Section 551.0415 allows reports on various items of community interest – such as expressions of thanks, announcements of holiday schedules, recognition of employees – so long as no action takes place. TX. GOV'T CODE §551.0415.

Do you have a duty to stop council members from discussing things that aren't listed on the agenda?

Sometimes, the mayor, a member of City Council, or even the city manager may expect the city attorney to interrupt the proceedings of a City Council meeting if the discussion wanders too far away from topics that have been listed in the published meeting notice. In my experience it may be more accurate to say that the mayor and every member of City Council will definitely expect the city attorney to interrupt the proceedings when their political opponent raises an issue that is not on the agenda and with which they disagree.

Attorneys have an obligation to advise their clients on matters of the law when the lawyer knows that a member of the organization has committed or intends to commit a violation of a legal obligation to the organization.

Rule 1.13 Organization as Client, states the following:

> (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.

TX R. PROF. COND. RULE 1.13. The rule comments make clear that the attorney must accept policy decisions of the client, "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

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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" TEX R. PROF. COND. RULE 1.13, Comment 6.

The obligation to take reasonable remedial measures was discussed in Ethics Opinion 603. In that case, a lawyer for an insolvent corporation concluded that the Corporate Representative was engaged in conduct that, although not criminal, constituted a breach of the Corporate Representative's fiduciary duty to the corporation and that the conduct would likely result in substantial harm to the corporation's creditors. Tex. Comm. On Professional Ethics, Op. 603 (2010). In the opinion of the Ethics Commission, the extent of the lawyer's duty turned on the degree of harm to the client corporation:

> An initial question in the circumstances considered here is whether the Corporate Representative's breach of fiduciary duty to the corporation results in conduct by the corporation that constitutes a crime or fraud. In this case, the lawyer has concluded that the corporation's conduct resulting from the breach of fiduciary duty does not constitute a crime. As to fraud, not all breaches of fiduciary duty are fraudulent. See *Duncan v. Lichtenberger,* 671 S.W.2d 948, 954 (Tex. App.-Fort Worth 1984, writ ref'd, n.r.e.) (fraud is not a required element of breach of fiduciary duty). If the Corporate Representative's breach of fiduciary duty does not result in corporate conduct constituting fraud, then nothing in the Texas Disciplinary Rules would authorize the lawyer to reveal the lawyer's conclusions and advice to the corporation's creditors.
>
> On the other hand, if the Corporate Representative's breach of fiduciary duty results in fraud likely to result in substantial financial harm, Rule 1.02(d) requires that the lawyer attempt to dissuade the corporate client from engaging in such conduct.

Tex. Comm. On Professional Ethics, Op. 603 (2010). Ultimately, the commission concluded that the lawyer's duty under Rule 1.13 did not apply to this situation, "because, under the facts presented here, there is no likelihood of significant harm to the corporation." *Id.*

Applying the analysis of Ethics Opinion 603 to the extant question leads me to conclude that a City Attorney is not obligated to interrupt a City Council meeting to stop discussions that are not properly posted in the meeting agenda. My opinion is based on the severity of the harm to my client, the city, if council members engage in a deliberation that isn't properly posted on a meeting agenda. Assuming this conversation is taking place during the open session part of the meeting and that no action will result from the deliberation, there are no criminal penalties for the council members participating in the discussion, and there is no action for a court to void. The harm to the client, in this case, is the damage to public trust that will result from council members flaunting the law so publicly. While I do recommend that city attorneys in this situation advise their clients about the potential harm of going off subject, I do not believe that the ethical rules require that the attorney intervene to stop the discussion.

That analysis, however, is different if the deliberation is taking place inside of a closed meeting, where criminal penalties would apply if the meeting is deemed to be an illegal meeting. In that situation a topic that does not qualify for executive session, or which has not been posted as an executive session topic, could lead to criminal penalties for each participant in the meeting, and the resulting reputational harm to the client likely substantial enough to invoke Rule 1.13.

Can the Mayor (or City Manager) direct you not to intervene?

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A similar, but opposite situation may arise in some clients, where the mayor or city manager might direct the city attorney not to intervene if a council member begins a deliberation that is not clearly posted on the agenda. The second mayor that I worked under gave me a similar instruction. Rule 1.13(a) discusses this situation with sufficient clarity:

> (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.

TX R. PROF. COND. RULE 1.13(a). On one hand, the rule makes it clear that a lawyer represents the entity, and not the individual, whether it's the mayor or the city manager or a city council member. A lawyer might argue that an individual member of the entity doesn't have authority to direct the city attorney, absent a formal resolution of City Council.

On the other hand, in most cities, the mayor and city manager seem to have authority to give direction to the city attorney. In a general law city, the mayor is generally the chief executive officer of the organization, responsible for the day-to-day operation. Directing the city attorney and requesting opinions from the city attorney are likely duties that fall within the scope of the chief executive officer of an entity. In a city operating under the Council/Manager form of government, either under a Chapter 25 election or a home rule charter, the city manager is typically the city's chief executive, and would have similar authority. Even the mayor in a Council/Manager form of government, where the mayor might serve in a purely ceremonial role, the mayor is usually the presiding officer of the City Council meetings. In that situation, the mayor would certainly have authority to request an opinion from the city attorney, or give the city attorney direction regarding items within the scope of his role as the presiding officer of the meeting.

The rule makes clear, however, that the attorney's ethical duty to an organizational client cannot be abrogated by the instructions of one of the entity's constituents. In situations where the attorney has knowledge of a legal violation that is likely to result in substantial injury to the organization, the attorney *shall* take reasonable remedial action.

Consider, however, Rule 1.02, which describes the scope of a lawyer's representation. Paragraph (b) states that a lawyer may limit the scope, objectives, and general methods of the representation if the client consents after consultation. TX R. PROF. COND. RULE 1.02(b). Comment 4 to the rule states that "The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client." TX R. PROF. COND. RULE 1.02, Comment 4. One might wonder whether the ethical duties of Rule 1.13 discussed above can be similarly limited. Comment 5 of the rule makes clear the answer is "no."

> 5. An agreement concerning the scope of representation must accord with the Texas Disciplinary Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01, or to surrender the right to terminate the lawyer's services or the right to settle or continue litigation that the lawyer might wish to handle differently.

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Citizen Comments:

Do you have a duty to investigate allegations of misconduct made at the podium?

It's not uncommon for a member of the public, speaking during a citizen's comment section of the agenda, to accuse a council member or a city executive of misconduct. As an example, I've seen residents come to the podium and allege that the city manager doesn't live in the city limits, and therefore does not comply with the city's charter requirements that the city manager be a resident of the city. I've seen similar complaints about Mayors who supposedly don't live in their city, or council members who don't live in their district. Similarly, some residents come to the podium to complain that City Council members had a conflict of interest related to a business transaction. Absent a request from the client, does the city attorney have an obligation to investigate these allegations, and determine whether the city official is violating the law?

Stated another way, does the resident's statement give rise to the city attorney's obligation under Rule 1.13(b) to take remedial action? The rules do not expressly require that an investigation into whether a violation may have occurred be part of the remedial action that is reuqired after the attorney "knows or learns" of misconduct.

Two statements within the rules do discuss an attorney's – especially a government attorney's – authority or duty to investigate. Comment 9 to rule 1.13 states, "Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority." TX R. PROF. COND. RULE 1.13, Comment 9. Similarly, paragraph 13 of the preamble states,

> The responsibilities of government lawyers, under various legal provisions, including constitutional, statutory and common law, may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. … These rules do not abrogate any such authority.

TX R. PROF. COND. PREAMBLE. However, close reading of these two paragraphs shows that neither creates a responsibility to investigate, they merely state that the rules do not limit or abrogate an obligation that might arise elsewhere from the lawyer's representation of a governmental client.

In considering this question, the lawyer's degree of knowledge is important. An attorney's duty to take reasonable remedial actions does not arise until the attorney "knows or learns" about misconduct that violates the law. A bare assertion by a resident, even one expressed in a public meeting, may not convince an attorney that the attorney knows about the misconduct. On the other hand, the same assertion supported by documentary evidence might cause the attorney to reach a different conclusion.

In my opinion, a bare assertion does not give rise to an obligation that the city attorney investigate the allegation, absent a request or direction from the client to conduct an investigation. However, individual circumstances may lead an attorney to believe that he has knowledge of a violation, in which case the duty under rule 1.13 would attach.

Action Items:

Must the City Attorney ensure that the Council follows Robert's Rules of Order?

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Rule 1.01 requires that an attorney provide competent and diligent representation:

> (a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: TX R PROF COND Rule 1.01
>
> "Competence" is defined in Terminology as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.

TX. R. PROF. COND. RULE 1.01. The comments to the rule make it clear that "[t]he required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences." TX. R. PROF. COND. RULE 1.01, comment 2.

In practice, City Councils often rely on the city attorney for opinions related to rules of procedure, whether that's Roberts Rules of Procedure, Rosenberg's rules of procedure, local rules, or otherwise. Any city attorney should be well versed in the application of Robert's rules of procedure to the adoption of any formal action by the city. Your client simply expects that to be true.

But rules of procedure are rarely a legal matter. Courts of law rarely decide issues based on whether a local government followed Robert's rules or procedure. A good example of this is *In re Deborah Du Pont*, a case from 2004, where Deborah Dupont sought mandamus to require the chairman of the Parker County Republican Party to certify du Pont's name for placement on the general election ballot as the Republican Party nominee for county court at law. DuPont argued that the election code imposed a mandatory duty on the chair to certify du Pont's candidacy. The chair, on the other hand, contended that she had discretion because the Republican Party's parliamentary procedures governing nominations for a replacement candidate were not followed. The court noted that ordinarily, courts do not concern themselves with whether parliamentary rules are followed; instead, courts are concerned with whether the law of the land is followed." *In re Dupont,* 142 S.W.3d 528, 532 (Tex. App. 2004), *citing Reform Party of U.S. v. Gargan*, 89 F.Supp.2d 751, 757–58 (W.D.Va.2000); *see Anderson v. Grossenbacher*, 381 S.W.2d 72, 74 (Tex.Civ.App.-San Antonio 1964, writ ref'd n.r.e.); 59 AM.JUR.2D Parliamentary Law § 5 (current through May 2004) (stating that courts generally do not concern themselves with violations of parliamentary rules in deliberative proceedings); *and* 67A C.J.S. Parliamentary Law § 8 (current through June 2004) (noting that courts will not disturb the ruling on a parliamentary question made by a deliberative body). The court's dismissive tone resonates in the sentence concluding it's review of the chair's parliamentary argument:

> Because we do not concern ourselves with parliamentary procedure, the existence of a factual dispute over whether such procedures were followed has no bearing on our jurisdiction to grant mandamus relief based on undisputed facts relevant to our determination of a controlling question of law.

In re Dupont, 142 S.W.3d 528, 532 (Tex. App. 2004).

There is one notable exception to that rule in Texas Jurisprudence. However, the "bad facts" of the case are noteworthy. They may be the reason that this is the only case I can find where a Texas Court decided a case based in part on a violation of Robert's Rules of Order.

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In 1999, the city of San Antonio city Council took up for consideration and ordinance to rezone and reclassify a property to prevent the sale of alcohol. The site had previously been a bar and pool hall, and was the location of an aggravated assault with injury. Subsequent inspections (the day after the assualt) resulted in the suspension of the food establishment license and the gas and electrical service. Before the business could be reopened, the zoning commission approved a change in zoning, restricting its use to non-alcoholic sales.

When the ordinance was considered by City Council, a motion was made and seconded to approve the ordinance. Council of then heard discussion. At the conclusion of the discussion, and with a quorum present, a voice vote was taken at the direction of the mayor. Seven members and the mayor voted for the ordinance, three members were absent. The mayor announced that the vote failed, and stated that they didn't have enough people, and the city secretary recorded the vote. The mayor then took up the next item on the agenda.

During discussion of the next item, the mayor directed staff to quote bring someone out of the back. Close chords there was number roll call, there was number division of the assembly. While the next item on the agenda was still pending, the chair called for a second vote on the previous ordinance. This time, the chair announced the ordinance had passed, stating "nine." The city secretary noted the change by changing one councilmember's vote from "absent" to "aye."

The court found that Robert's Rules of Order governed the adoption of the ordinance, and that the City Council did not follow the Rules of Order.

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