OPEN GOVERNMENT COMPLIANCE AND ENFORCEMENT
THE TEXAS OPEN MEETINGS ACT:
"WHAT CAN WE SAY?!"

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I. INTRODUCTION

Is criminal prosecution for an offense that can include jail time appropriate for discussions between elected officials that ultimately involve a quorum of their governmental body? What about discussion amongst less than a quorum? Many state legislatures and attorneys general believe so, but the issue isn't really one of public policy at this point.

After years of litigation, the legality of that reality was upheld by the courts. The Fifth Circuit Court of Appeals ultimately decided, with the approval of the U.S. Supreme Court, that imprisonment as a punishment for speech does not violate the First Amendment to the U.S. Constitution.

That leaves attorneys who advise elected officials (or any public officials who are subject to the Texas Open Meetings Act [TOMA]) with the same challenge they've had for decades: How to succinctly, but completely, advise those officials about what conversations they can or should have without violating TOMA. Doing so appears simple, but appearances can be deceiving.

Knowing the background of the legal challenges, understanding the specific provisions of TOMA, and applying the relevant Texas Rules of Disciplinary conduct, will assist with how an attorney ultimately answers the inevitable question: "Can I speak to other members of my governmental body without violating the law?"

II. THE FIRST CONSTITUTIONAL CHALLENGE TO THE OPEN MEETINGS ACT

A. The Background

In October 2004, a member of the city council in Alpine, Texas, sent an email to other councilmembers asking if they wanted to place an item on a future council agenda. The following day, one of the other councilmembers responded to recipients of the first e-mail, agreeing that the item should be discussed. Here's the actual text of those emails:

> *Original E-mail: Avinash, Manuel ... Anna just called and we are both in agreement we need a special meeting at 6:00 pm Monday ... so you or I need to call the mayor to schedule it (mainly you, she does'nt [sic] like me right now I'm Keri's MOM).. we both feel Mr. Tom Brown was the most impressive..no need for interviewing another engineer at this time ... have him prepare the postphonment [sic] of the 4.8 million, get us his firms [sic] review and implementations for the CURE for South Alpine....borrow the money locally and get it fixed NOW....then if they show good faith and do the job allow them to sell us their bill of goods for water corrections for the entire city.....at a later date..and use the 0% amounts to repay the locally borrowed money and fix the parts that don't meet TECQ [sic] standards....We don't have to marry them ... with a life long contract, lets [sic] just get engaged! Let us hear from you both. KT*
>
> *Response E-mail: Hello Katie....I just talked with John Voller of Hibb and Todds of Abilene ... and invited him to come to the Monday meeting.... I asked him to bring his money man also.... these guys work for Sul Ross ... He said ... he will be at meeting Monday....I'll talk with Tom Brown also after my 8:00 class ... Thanks for the advice..... and I'll talk with Mickey as per your, Anna, and Manuel directions ... and arrange the meeting on Monday....We must reach some sort of decision SOOOOOOOOOOOOON. Avinash*

The local prosecutor decided that the e-mail exchange violated the TOMA because the emails ultimately involved a quorum of the city council. As a result, two of the councilmembers were criminally indicted by a grand jury.

The two councilmembers who were trying to get an item on a future agenda now have an arrest record and could have been imprisoned for up to six months. The TOMA provides that: "A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly...participates in the closed meeting, whether it is a regular, special, or called meeting." An offense under the TOMA is "a misdemeanor punishable by: (1) a fine of not less than $100 or more than $500; (2) confinement in the county jail for not less than one month or more than six months; or (3) both the fine and confinement." TEX. GOV'T CODE § 551.144.

Although the indictments were later dismissed, the two councilmembers sued in federal court claiming that the criminal provision of the TOMA infringed upon their right to freedom of speech under the First

Amendment. *Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas, Plaintiffs v. Frank D. Brown, 83rd Judicial District Attorney, Gregg Abbott, Texas Attorney General, and the State of Texas, Defendants*, P-05-CV-075 (W.D. Tex. Nov. 7, 2006). TOMA, like other states' open meetings laws, limits government officials' freedom of speech by providing for certain topics that may not be discussed with certain other people at certain times. Most officials accept that limitation and recognize that it must be balanced with the importance of open government.

But the limitation on their speech raised an important question: What penalty should be imposed on a government official who commits a violation? In Texas, the penalty can be imprisonment. Several other states, including Arkansas, California, Florida, Hawaii, Illinois, Michigan, Nebraska, Nevada, North and South Dakota, Oklahoma, South Carolina, and Utah, also provide for imprisonment as a penalty. ARK. CODE 25-19-104; CAL. GOV'T CODE § 54950.5; FLA. STAT. § 286.011; HAW. REV. STAT. § 92-13; 5 ILL. COMP. STAT. 120/4 (2006); MICH. COMP. LAWS § 15.272; NEB. REV. STAT. § 84-1414; NEV. REV. STAT. § 241.040; N.D. CENT. CODE § 44-04-21.3; OKLA. STAT. tit. 25, § 314; S.C. CODE § 30-4-110; S.D. CODIFIED LAWS § 1-25-1; UTAH CODE § 52-4-1. That leaves thirty-six states in which violations are punished by some other means, such as a civil or criminal fine.

B. The District Court's Ruling

On November 7, 2006, the judge issued his ruling. The following summed up his holding:

> *Because the speech at issue is uttered entirely in the speaker's capacity as a member of a collective decision-making body, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment from the restrictions imposed by the Texas Open Meetings Act.*

In other words, the district court concluded that, when a person accepts public office, his or her constitutional rights are limited. The decision cited a Kansas Supreme Court opinion upholding the constitutionality of that state's open meetings laws. In the Kansas case, actual secret meetings were prearranged, planned, and carried out for the purpose of deliberations and decisions that were not open to the public. *State ex rel. Murray v. Palmgren*, 646 P.2d 1091, 1099 (Kan. 1982). In addition, the Kansas Open Meetings Act does not have criminal penalties, only the possibility of a civil fine of no more than $500. Those are not the same facts as the Texas case.

The judge also relied on the U.S. Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) for the proposition that government can restrict elected officials' speech in the same way as it can restrict public employees' speech. (*Garcetti* relied on the *Pickering/Connick* employee speech precedent. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983).) The Alpine officials appealed to the U.S. Court of Appeals for the Fifth Circuit.

C. The Fifth Circuit Panel Decision

In April 2009, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit released its opinion. *Rangra v. Brown*, 566 F.3d 515 (5th Cir. (Tex.) 2009). The panel held that district court incorrectly applied the *Pickering/Connick* analysis to the case:

> *Indeed, the Supreme Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general. Further, the [U.S. Supreme] Court reaffirmed that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.*

According to the panel, the district court assumed that there is no meaningful distinction between the speech of elected officials and that of public employees and held that, under *Garcetti*, the plaintiffs' speech pursuant to their official duties was not protected by the First Amendment. *See Garcetti*, 547 U.S. at 421. The panel disagreed, and opined that "[w]e agree with the plaintiffs that the criminal provisions of TOMA are content-based regulations of speech that require the state to satisfy the strict scrutiny test in order to uphold them." *Id*. at 521. They concluded that the penalty provision of TOMA is "content-based" because whether a quorum of public officials may communicate with each other outside of an open meeting depends on whether the content of their speech refers to "public business or public policy over which the governmental body has supervision or control." *Id*. at 522.

The panel's opinion was based largely on *Jenevein v. Willing*, 493 F.3d 551, 557-58 (5th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)). In that case, the Fifth Circuit applied the strict scrutiny test to a state

judiciary commission's order censuring an elected judge's speech and concluded that, because the order was based on content, it violated the judge's First Amendment right. The censure order, which disciplined the judge for holding a press conference at which he addressed alleged abuses of the judicial process by lawyers in a pending case, shut down all communication between the elected judge and his constituents. *See id.* at 556-58. The court held that the censure order, in substantial part, was an unconstitutional, content-based restriction of the elected official's speech because the state had failed to prove that it was narrowly tailored to further a compelling state interest. *See id.* at 559-60.

The panel ultimately reversed the district court's judgment and remanded the TOMA case for the application of strict scrutiny review.

D. The *En Banc* Dismissal

Shortly after the opinion was issued, both parties filed for rehearing *en banc*. The State of Texas argued that the panel's decision should be overturned. The city officials argued that no additional trial proceedings were necessary and that the court should simply declare the criminal provision of TOMA unconstitutional.

The court granted both motions, and was set to hear oral arguments. However, the court dismissed the case on September 10, 2009, by a sixteen-to-one decision without hearing oral arguments. The case was dismissed for lack of standing. The plaintiff is no longer a city official (he was term-limited as a councilmember), and the court in a one-sentence order deemed the case moot. *Rangra v. Brown*, 584 F.3d 206, 207 (5th Cir. (Tex.) 2009)(The lone dissenting justice chided the other members of the court for doing so. *Id*. at 207 (Dennis, J., dissenting).).

III. THE "TOMA II" CHALLENGE

A. The Background

Because of the dismissal of the first case, several city officials agreed to serve as new plaintiffs to "start over" at the district court with a new lawsuit based on the same legal principles. See *Asgeirsson v. Abbott* (TOMA II), 773 F. Supp. 2d 684, 688 (W.D. Tex. 2011). The plaintiffs in TOMA II filed their lawsuit at the end of 2009 and argued that the Act is facially overbroad and unconstitutional as applied. They sought a declaratory judgment and injunction against the state, which prevented the criminal provisions of the Act from being enforced because those provisions violate the First Amendment-both on its face and as applied.

B. The District Court Ruling

The court held a bench trial in November 2010. Several city officials testified at the trial. The attorney general's attorneys cross-examined those witnesses but put on no evidence of their own.

On March 25, 2011, Judge Junell issued his ruling. After a finding that the parties "stipulate[d] that the substantive legal issues of this case [were] the same as those tried before this Court in the Alpine Case, he addressed one of the key issues in the case." That issue was whether the three-judge panel decision in the previous suit, which held that strict scrutiny should apply to the dispute, had precedential value.

The city official plaintiffs pointed out that legal scholars, judges, and attorneys had already cited the panel decision as precedent. Further, the plaintiffs contended that, although the Fifth Circuit ultimately dismissed the Alpine Case on mootness grounds, the decision to dismiss did not invalidate the panel decision. Judge Junell disagreed and concluded that the panel decision had no precedential value. In an interesting move, however, he covered his bases by addressing the constitutionality of the Act under the strict scrutiny standard anyway. The plaintiffs sued as an "as-applied" challenge to the Act. That simply meant that they believe TOMA, as applied to each of them, is unconstitutional. The defendants argued that, because none of the plaintiffs had ever been indicted under TOMA, the suit is actually a "facial challenge." That means that TOMA would be unconstitutional regardless of whether it has ever applied to anyone. The court concluded the challenge was facial because the plaintiffs were not indicted under TOMA. The distinction is important because, under a facial challenge, a plaintiff must show that the law in question prohibits "'a substantial amount of protected speech"' for it to be unconstitutional.

C. Content-Based Analysis

The court acknowledged the difficulty in balancing a public official's right to freedom of speech and the citizens' right to open meetings. *Id.* at 694. In doing so, however, it cited to Supreme Court precedent holding that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* at 695. Further, the court reasoned that a "permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." The court concluded that TOMA is a permissible time, place, and manner restriction, and ruled that it does not unconstitutionally ban the free speech of public officials. According to the court, the Act is:

> . . . content-neutral because: (1) [it] is viewpoint neutral-the regulation does not prohibit certain speech because of the ideas expressed; (2) [it] does not prevent speech from reaching the [public]; (3) [the purpose of the law] is unrelated to a desire to suppress speech . . . . ; and (4) [its requirement that speech be disclosed at an open meeting] does not suppress speech.

"Plaintiffs are merely asked to limit their group discussions about these ideas to forums in which the public may participate." Oddly, the court also "bootstrapped" its decision by applying First Amendment law relating to sexually-oriented business. *Id.* at 696 (citing *City of Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986)).

The court cited the case of *City of Renton v. Playtime Theatres, Inc.*, for the proposition that "a law that appears to be content-based on its face [is considered] content-neutral when the regulation is justified by a content-neutral purpose" (e.g., prohibiting crime around sexually oriented business or prohibiting secret meetings). This means the Texas legislature presumably intended for the Act to prohibit the negative effects of having "secret" meetings, so it is thus acceptable to limit the speech of an individual to accomplish that goal. The negative effects of closed meetings, according to the court, are that "(1) closed meetings prevent transparency; (2) [they] encourage fraud and corruption; and (3) [they] foster mistrust in government."

"Thus, at no point are members of governmental bodies . . . prevented from speaking. Public officials are allowed to talk about any topic they please [and] are only required to disclose [their speech to their constituents]." Based on its findings, the court applied intermediate scrutiny to TOMA's criminal provisions. *Id.* at 701.

D. Intermediate Scrutiny/Strict Scrutiny Analyses

"Content-based speech prohibitions receive strict scrutiny from courts determining a statute's constitutionality." Id. at 694. "However, content-neutral statutes that minimally affect speech rights are examined under intermediate scrutiny." Under intermediate scrutiny, "content-neutral laws must (1) 'leave open ample alternative channels of communication' and (2) be 'narrowly-tailored to serve a significant government interest.'" The court concluded that TOMA meets criteria (1) because a council that holds an illegal closed meeting "can correct their violation [at] a subsequent open meeting." *Id.*

In a civil law context, that conclusion might make sense. But in the criminal law sense, it appears to be incorrect. Why? Because once the closed meeting occurs, by accident or otherwise, the officials met the elements of the crime. A public official is then subject to prosecution, at the discretion of the prosecuting attorney.

The court continues the analysis by stating that city council members can "even discuss public business one-on-one with their fellow city council members as long as they do not knowingly conspire to circumvent [TOMA]." *Id.* at 701.

As for whether TOMA is narrowly-tailored to serve a significant government interest, the court concluded that, because a city official can rely on an attorney general opinion or the city attorney, he or she is protected from prosecution for actions that might otherwise be crimes under the Act. *Id.* at 703. TOMA does provide an affirmative defense to prosecution for reliance on those things, but that does not prohibit a prosecutor from seeking an indictment and even moving forward with a trial.

Even though the court concluded that no court in the nation has ever applied strict scrutiny to any of the fifty states' open meetings laws, it applied that standard to this case. *Id.* at 695 (citing *Hays Cnty. Water Planning P'ship v. Hays Cnty.*, 41 S.W.3d 174, 181-82 (Tex. App.-Austin 2001, no pet.) ("However, we see no restriction of the right of free speech by the necessity of a public official's compliance with the [Act] when the official seeks to exercise that right at a meeting of the public body of which he is a member.")). Judge Junell applied the standard to show that, even if the plaintiffs appealed the case, and the Fifth Circuit Court of Appeals required him to apply it, he would still uphold TOMA as constitutional.

To pass strict scrutiny analysis, the government must show that the regulation (1) serves a compelling state interest and (2) is narrowly-tailored. The court briefly explained why the Act would meet the higher standard based on the same conclusions it applied to intermediate scrutiny.

E. Overbreadth/Vagueness Analysis

The court heard testimony from city council members that the Act suppresses their speech at social functions. Many public officials clearly have this worry. Judge Junell dismissed this fear by quoting from Section 551.001 of the Act, which provides that if a quorum attends a social function and does not take formal action or more than incidentally discusses public business, the Act does not apply. *Id.* at 705. The court also heard from council members who do not talk to each other – even individually – outside of open meetings because of the fear of establishing a "walking quorum." Judge Junell also dismissed these complaints

by stating that, so long as the council members do not "knowingly conspire to circumvent [the Act]," they are not committing a crime. *Id.* at 706.

An attorney advising a governmental body could use some of the language in the opinion to argue that one-on-one conversations are acceptable; council members "do not violate [the Act] when they communicate with their fellow city council members . . . one-on-one by phone or e-mail about public business outside of a quorum." Id. at 707 (citing Tex. Gov't Code Ann. § 551.143(a) (West 2004)). However, doing so may not be the safest advice.

On August 11, 2011, the plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit.

F. The Fifth Circuit Panel Decision

Oral arguments were heard in April 2012 in Houston. A three-judge panel asked numerous questions of both sides, including whether TOMA merely limits the time and place in which elected officials speak, or whether it actually prohibits them from speaking. In addition, one judge noted that every state has an open meetings law, and that this is the first challenge of its type. The plaintiffs responded that most states do not include jail time as a punishment for speech, as Texas does.

In September 2012, a three-judge panel issued its opinion. *Asgeirsson v. Abbott*, 696 F.3d 454, 460 (5th Cir. 2012). In short, the city officials lost. The trial court had ruled that the Act is a valid "time, place, and manner restriction." In other words, the trial court concluded that the Act does not limit what city officials can say (i.e., the content of their speech), but merely limits when and where they can say it (e.g., at a properly-posted open meeting). The Fifth Circuit upheld the trial court's ruling, and the court analogized TOMA to regulations that govern the operation of sexually oriented business.

In *Renton v. Playtime Theaters*, the court upheld a zoning ordinance that was facially content-based because it regulated only theaters showing sexually explicit material. The court reasoned that the regulation was content-neutral because it was not aimed at suppressing the erotic message of the speech but instead at "secondary effects," such as crime and lowered property values, that tend to accompany such theaters. In other words, the court concluded that a regulation is not content-based merely because the applicability of the regulation depends on the content of the speech. A statute that appears content-based on its face may still be deemed content neutral if it is justified without regard to the content of the speech.

The Fifth Circuit applied the same logic to TOMA. It held that – even though the Act applies only to speech that relates to public business (i.e., it is "facially content-based") – it is aimed at prohibiting the secondary effects of closed meetings. According to the court, closed meetings: (1) prevent transparency; (2) encourage fraud and corruption; and (3) foster mistrust in government. 696 F.3d at 461. Those justifications are unrelated to the messages or ideas that are likely to be expressed in closed meetings.

The court held that, if a quorum of a governing body were to meet in secret and discuss knitting or other topics unrelated to their powers as a governing body, no harm would occur. That situation is analogous to *Playtime Theaters*, in which adult movie theaters attracted crime and lowered property values, but not because the ideas or messages expressed in adult movies caused crime.

Footnote 13 in the opinion cites an *amicus curiae* brief:

> ` *In its brief as amicus curiae, the Texas Municipal League offers other situations in which TOMA arguably could prohibit constitutionally-protected speech. For example, amicus mentions a situation in which a city council member is prohibited from attending a civic event at which a fellow member who is running for re-election will be speaking about public-policy issues. Amicus argues that that is prohibited, because it is a quorum discussing government policy at an event not open to the general public.*
>
> *The potential situations listed, however, are not from actual cases but are only examples of advice attorneys have given to local government officials. Furthermore, such broad interpretations of the law are suspect, given that TOMA appears to exclude such gatherings from its definition of "meeting":*
>
> > *["Meeting"] does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.*

While the footnote could be used to defend against prosecution, it doesn't change the fact the governmental officials should exercise caution at any event in which a quorum of their governmental body is present and public business is being discussed. The court's opinion may not take into account the broad interpretations of the Act by the attorney general and some prosecutors.

The opinion was appealed directly to the U.S. Supreme Court.

G. The U.S. Supreme Court

In March 2013, the U.S. Supreme Court denied the petition for writ of *certiorari*. *Asgeirsson v. Abbott*, 133 S. Ct. 1634, 185 L. Ed. 2d 616 (2013). The court's denial brought eight years of litigation to a close. The legal result of the court's decision is that the Fifth Circuit's opinion upholding the Act is the law of the land in Texas.

The practical result is that attorneys for governmental bodies are still left trying to properly advise on the legality of speaking with other members outside of a properly-posted open meeting. Government officials are now left in the same place as before the appeal: They should use caution when communicating outside of an open meeting to avoid possible criminal prosecution.

IV. WHAT DO I TELL MY CLIENTS?

A. Confusion Remains

Most government attorneys in Texas agree that government officials subject to the TOMA are frequently confused about whether they can communicate – either in person, on the phone, or electronically – with other members of their governmental body outside of a properly-posted meeting. The short answer is, "no, if you want to be 100 percent sure you don't go to jail." Obviously, most officials are not satisfied with that answer.

Advice relating to intentionally-planned, secret meetings to make decisions outside of the public view is easy. Those would clearly violate the TOMA. For example, in *Esperanza Peace and Justice Center v. City of San Antonio*, the plaintiffs challenged the adoption of a city's budget. 316 F. Supp. 2d 433, 474 (W.D. Tex. 2001). On the eve of the budget vote, the mayor, city manager, and several councilmembers met in small groups in the city manager's office to reach a consensus on changes to the city budget. The participants were careful to avoid the physical presence of a quorum. In fact, on several occasions throughout the evening, the city manager told the group that there were too many people together, and they were at risk of violating TOMA. The court held that "the facts of this case present a classic fact pattern of deliberation by a quorum that purposely attempts to avoid the technical definitions of the Act by shuffling members in and out of an office. Clearly, a quorum of council members deliberated and reached agreement concerning the budget…" *Id.*

The tougher advice is to government officials communicating with one another to share information, learn about an issue, or discuss whether an issue warrants consideration by their entire governmental body. The complete answer requires a long, drawn-out explanation. In Texas, like in many other states, any gathering of members of a governmental body is subject to the requirements of TOMA (including a 72-hour notice, an agenda, minutes or a tape recording, and certain other requirements) if the following two elements are met: (1) a quorum is present; and (2) public business is discussed. TOMA actually has two definitions of a meeting, but for purposes of explaining when it applies, the "two-element" test is the most clear. It seems simple enough to explain, but even a simple test can be deceptive.

Why? The main reason is that TOMA has been interpreted to apply to situations in which members of a governmental body are not in each other's physical presence. For example, email communications, texts, social media posts, telephone calls, and written correspondence that ultimately involve a quorum may constitute a violation. That is true even if the quorum is not physically present in the same location and the discussion does not take place at the same moment in time. Op. Tex Att'y Gen. Nos. DM-95 (1992) & LO-95-055 (1995) (members of a governmental body may violate the Act by signing a letter on matters relevant to public business without meeting to take action on the matter in a properly posted and conducted open meeting); JC-0307 (2000) (the circulation of any document that requires approval of the governing body to take effect in lieu of its consideration at a meeting would violate the Act). *But see* Op. Tex. Att'y Gen. No. DM-95 (1992)(the mere fact that two councilmembers visit over the phone does not in itself constitute a violation of state law However, if city councilmembers are using individual telephone conversations to poll the members of the council on an issue or are making such telephone calls to conduct their deliberations about public business, there may be the potential for criminal prosecution.); *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.—San Antonio 1985, no writ)(members of a school board violated the Act by deciding to send out a letter to all parents of the school district without discussion of the matter in an open meeting).

Discussions between government officials may not amount to any systematic attempt to circumvent or avoid the purposes of TOMA. However, a Texas

attorney general opinion, and opinions from other states, coined the term "walking quorum." Op. Tex. Att'y. Gen. No. GA-326 (2005). The term seems to indicate, assuming that a governmental body's quorum is three, that: If councilmember A deliberates with councilmember B, then councilmember B deliberates with councilmember C, and finally councilmember C deliberates with councilmember A, a quorum was formed. The Texas opinion actually dealt with the criminal conspiracy provision of the TOMA, under which discussions among less that a quorum can be a crime. TEX. GOV'T CODE Section 551.143(a) (Providing that an elected official commits an offense of he or she knowingly conspires with less than a quorum to circumvent TOMA). That provision requires intent to circumvent TOMA, so casual conversations aren't necessarily a violation of the provision. Even so, the reference to the term "walking quorum" blurs the line between discussions that involve less than a quorum and those that involve a quorum. It thus calls into question the "intent" requirement.

In spite of the Texas attorney general's interpretation and the Alpine indictment, at least one Texas appellate opinion indicates that TOMA is not violated by using the telephone to discuss agendas for future meetings. *See Harris County Emergency Serv. Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App.—Houston [14th Dist.] 1999, no writ). Therein lies the ambiguity. If government officials speak to one another outside of a meeting, whether to simply share information or to decide whether to place an item on a future agenda, a prosecutor might infer that a meeting of the minds occurred prior to any formal meeting, even if none did.

Of course, it is difficult to run a governmental entity without any communications at all except in public meetings that may occur as infrequently as once a month. Beyond that advice, there is a continuum of behavior to consider, with criminal prosecution being a possibility.

B. What is a meeting?

A regular meeting of a city council, school board, or county commissioners court, where agenda items are discussed and formal action is taken, is clearly a meeting. However, according the TOMA, many other gatherings of the members of a governmental body may constitute a meeting. Sections 551.001(4)(A) & (B) of the Government Code are the statutory provisions of TOMA that define whether a gathering of members of a governmental body constitutes a meeting. If the facts of a particular situation fall under *either* of the definitions, the requirements of TOMA will apply, including seventy-two hours notice, a posted agenda, and minutes.

A regular, special, or called meeting or hearing in which discussion or formal action will be taken will always be considered a "meeting." For other gatherings to be considered a meeting under § 551.001(4)(A), the following elements must be satisfied:

1. a **quorum** of the governmental body must be present;
2. a **deliberation** (verbal exchange) must take place;
3. the deliberation must be between **members of the governing body** or a **member of the governing body and *any other person;*** and
4. the governmental body must have **supervision or control over the topic being deliberated.**

An additional definition of a meeting, Section 551.001(4)(B), was added in 1999 to eliminate the "staff-briefing exception," which allowed a governmental body to receive information (usually a staff report) from a third person without posting the meeting. The elements necessary to establish a gathering as a meeting under Section 551.001(4)(B) are:

1. a **quorum** of the governmental body must be present;
2. the governmental body **calls** the gathering;
3. the governmental body is **responsible for** or **conducts** the gathering;
4. members of the governmental body ***receive information from*, give information to, ask questions of, or receive questions from *any third person***; and
5. the information concerns **public business** or **policy** over which the governmental body has **supervision** or **control.**

The following do not constitute meetings under TOMA:

1. the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body; or
2. the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.

For example, if a quorum attends a state workshop on TOMA, that attendance is not subject to TOMA. In addition, if a quorum attends a cocktail party and does not take formal action or more than incidentally discuss public business, TOMA does not apply.

The attorney general's now-defunct "Open Meetings Act Made Easy" publication provided a more understandable, if equally broad, definition:

> *A meeting occurs and the Act applies whenever a quorum of a governmental body is present and discusses public business, regardless of whether any action is taken.*

Several attorney general opinions (also available online at www.oag.state.tx.us) and courts have broadly interpreted the definition of a "meeting":

- **Opinion No. JC-0203 (April 4, 2000):** If quorum of a governmental body desires to attend the same speaking engagement or lecture, an attending member participates in the discussion, and the deliberation relates to public business or public policy over which the quorum of the governing body in attendance has supervision or control, the attendance will be subject to the requirements of the Act.
- **Opinion Nos. JC-0248 (July 10, 2000) & JC-0308 (November 20, 2000):** If a quorum of the members of a governmental body attends a meeting or hearing of another governmental body, and one or more of the attending members testifies, answers questions, or in any manner supplies information, the attending members will be found to have held a "meeting" under the Act. If, on the other hand, any number less than a quorum of the governing body, attend the public hearing, no meeting takes place. Similarly, even if a quorum of members of the governing body attends, but no one among them testifies, answers questions, or in any manner furnishes information, the attending members will not have held a "meeting." (**Note:** Section 551.0035 of the Act states that "the attendance by a quorum of a governmental body at a meeting of a committee or agency of the *legislature* is not considered to be a meeting of that governmental body if the deliberations at the meeting by the members of that governmental body consist only of publicly testifying at the meeting, publicly commenting at the meeting, and publicly responding at the meeting to a question asked by a member of the legislative committee or agency." Under § 551.0035, a governmental body is generally exempt from complying with the Act *only when it attends a meeting of a legislative committee.*)
- **Opinion No. JC-0313 (November 30, 2000):** If a quorum of a governmental body attends a meeting of a committee created by the governmental body, and the members of the governmental body "receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy" over which the governmental entity has authority, the attendance is subject to the requirements of the Act, regardless of whether the members engage in a deliberation A committee posting indicating that "a quorum of [a city council] 'may attend' a committee meeting" complies with the notice requirements of the Act for the city council. Op. Tex. Att'y Gen. No. GA-0957 (2012).
- **Opinion No. GA-326 (May 18, 2005):** Coined the term "walking quorum."
- ***Harris County Emergency Service Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App – Houston [14th Dist.] 1999, no writ)**: Indicates that the Act is not violated by using the telephone to discuss agendas for future meetings. The record in that case showed "that the board members discussed only what they needed to put on the agenda for future meetings" and that there was "no evidence that the district members were attempting to circumvent the [Act] by conducting telephone polls with each other." *Harris County*, 999 S.W.2d at 169.

Prior to the decision in *Harris County*, however, the attorney general's office had stated that "agenda preparation procedures may not involve deliberations among a quorum of members of a governmental body except in a public meeting for which notice has been posted." Op. Tex. Att'y Gen. No. DM-473 (1998) at 3. That opinion dealt with a City of Dallas policy that requires five of fifteen councilmembers to agree to place an item on an agenda. After the *Harris County* case, and in spite of DM-473, it was relatively safe to advise city officials that discussions about whether or not to place an item on a future agenda are clearly permissible. But a 2009 attorney general opinion cites DM-473 with approval. That opinion, which once again calls into question any discussions outside of meeting, states that: "As was the case with agenda preparation, the procedures for calling a special meeting under the charter provision may not involve deliberations among a quorum of the city council outside of a public meeting for which notice has been posted." Op. Tex. Att'y Gen. No. GA-717 (2009) at 3.

- **TOMA I and TOMA II (the "Alpine" case):** Discussed in detail above.
- **Opinion No. GA-1079 (2014):** Confirms that the Open Meetings Act allows a city council to hold a meeting by videoconference call if certain conditions are met. *See* TEX. GOV'T CODE § 551.127.

Criminal Penalties under the Act can include fines and/or jail time. TOMA provides that a closed meeting involving a quorum of members is an offense:

> *Sec. 551.144. CLOSED MEETING; OFFENSE; PENALTY.*
>
> *(a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member **knowingly**:*
>
> *(1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;*
> *(2) closes or aids in closing the meeting to the public, if it is a regular meeting; or*
> *(3) **participates in the closed meeting**, whether it is a regular, special, or called meeting.*
>
> *(b) An offense under Subsection (a) is a misdemeanor punishable by:*
>
> *(1) a fine of not less than $100 or more than $500;*
> *(2) confinement in the county jail for not less than one month or more than six months; or*
> *(3) both the fine and confinement.*
>
> *(c) It is an affirmative defense to prosecution under Subsection (a) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.*

The Act also provides that a closed discussion amongst less than a quorum of members can be a crime:

> *Sec. 551.143. CONSPIRACY TO CIRCUMVENT CHAPTER; OFFENSE; PENALTY.*
>
> *(a) A member or 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.*
> *(b) An offense under Subsection (a) is a misdemeanor punishable by:*
>
> *(1) a fine of not less than $100 or more than $500;*
> *(2) confinement in the county jail for not less than one month or more than six months; or*
> *(3) both the fine and confinement.*

V. CONCLUSION

All of the legal precedent above suggests logistical challenges, and could be interpreted to say that:

1. A member of a governmental body may wish to consider not discussing the substance of matters over which the body has supervision or control outside of a properly-posted open meeting.
2. While modern conveniences such as the telephone, email, texts, and social media may be used to facilitate the exchange of information, these tools should not be used to discuss substantive policy issues. (One exception could be a "message board" authorized by Section 552.006 – for more information go to http://www.tml.org/p/SB-1297-and-Facebook-July2013.pdf.)
3. A member of a governmental body may wish to consider not discussing public business with less than a quorum of the body outside of a properly posted meeting.
4. A governmental body may want to adopt a policy governing councilmember communications.
5. Government officials should inquire of their local prosecutor as to his or her interpretation of the Act. (The local district or county attorney's interpretation of the Act may be the key factor.)

Should government officials be able to communicate with one another to share information, learn about an issue, or discuss whether an issue warrants consideration by the entire governmental body outside of a properly-posted open meeting? Some would say yes, some would say no. But in any case, the role of the governmental body's attorney is to advise about the risks of doing so.

VI. RELEVANT TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

A. Rule 1.06 Conflict of Interest: General Rule

(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 laws firm's own interests.

(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.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

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

B. Rule 1.12 Organization as a Client

(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 1.15, 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.

C. Comment - <u>Rule 1.12</u>

1. <u>The Entity as the Client</u>

1. A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.
2. As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officesr, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization such as an unincorporated association, union, or other entity.
3. When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.05. Thus, by way of example, if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05.

2. <u>Clarifying the Lawyer's Role</u>

1. There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances 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. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.
2. A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders,

or other constituents, subject to the provisions of Rule 1.06. If the organization's consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate official or officials of the organization other than the individual who is to be represented, or by the shareholders.

3. Decisions by Constituents

    1. When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. 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. See paragraph (b). It may be reasonably necessary, for example, for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. At some point it may be useful or essential to obtain an independent legal opinion.
    2. In some cases, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest responsible authority. See paragraph (c)(3). Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, such as in the independent directors of a corporation. Even that step may be unsuccessful. 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.

4. Relation to Other Rules

    1. The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule is consistent with the lawyer's responsibility under Rules 1.05, 1.08, 1.15, 3.03 and 4.01. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.02(c) can be applicable.

5. Government Agency

    1. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting

obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. 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. See Preamble: Scope.

6. Derivative Actions

1. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.
2. The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with those managing or controlling its affairs.