Other State Bar Policies

OTHER STATE BARS' POLICIES REGARDING RECUSAL

From Florida State Bar's Standing Board Policies:

1.80 GENERAL RECUSAL POLICY Board members may not participate in a board matter and must recuse themselves if the members' participation in the matter may bring into question the integrity of board proceedings. A board member must disclose any fact or circumstances the member is aware of that may bring into question bias or prejudice of any board member when considering any bar matter at or before the beginning of discussion on the matter, regardless of the board member's intent to recuse. The person presiding over proceedings in which recusal is an issue may order the recusal of any board member involved in the matter with the concurrence of a majority of the members present. A recused board member may not discuss the matter at issue with any board member or group of board members and may not debate or vote on the matter. A recused member may not be present if the matter is being discussed, debated or voted on in executive session. A board member should never be recused merely to avoid participation in a matter. This recusal policy does not create or defeat any substantive rights of individuals associated with any board action.

From Washington State Bar Association Bylaws

Executive session of the BOG may proceed with no persons present except the President, President-elect, Immediate Past President, Governors, Executive Director, General Counsel, and such other persons as the BOG may authorize. An individual may be recused from executive session for conflict of interest or other reasons at the person's request or by a majority vote of the BOG. The President will publicly announce the purpose for meeting in executive session and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the President.

DRAFT PREPARED AT THE REQUEST OF THE POLICY MANUAL SUBCOMMITTEE
(Version 1)

New Policy Manual section:

1.25 Recusal

Board members may not participate in any board matter and must recuse themselves if the members' participation may bring into question the integrity of board proceedings. A board member must disclose any fact or circumstances the member is aware of that may bring into question bias or prejudice of any board member when considering any bar matter at or before the beginning of discussion on the matter, regardless of the board member's intent to recuse. The person presiding over proceedings in which recusal is an issue may order the recusal of any board member involved in the matter with the concurrence of a majority of the members present. A recused board member may not debate or vote on the matter. A recused board member may not be present if the matter is being discussed in an executive session. A board member should never be recused solely to avoid the board member's participation in a matter.

RRO RE REFRAINING FROM VOTING

Article VIII. Section 46 Voting

It is a general rule that no one can vote on a question in which he has a direct personal or pecuniary interest. Yet this does not prevent a member from voting for himself for any office or other position, as voting for a delegate or for a member of a committee; nor from voting when other members are included with him in the motion, even though he has a personal or pecuniary interest in the result, as voting on charges preferred against more than one person at a time, or on a resolution to increase the salaries of all the members.

RRO does not address recusal.

Email to GC re Conflicts of Interest Policy

Joe Longley

From: John Sirman <John.Sirman@TEXASBAR.COM>
Sent: Friday, May 24, 2019 12:51 PM
To: Ross Fischer
Cc: 'Estrella Escobar'; Joe Longley; Randy Sorrels; Gibson, Laura; Tom Vick; 'Jerry Alexander'; Trey Apffel; Don Jones; Lona Chastain
Subject: conflicts of interest policy - attorney-client privileged communication
Attachments: 2019-05-22 PM Subcte - Agenda.docx

Ross,

As you, Trey, Don, and I discussed today, the Policy Manual Subcommittee decided to seek your guidance on the creation of a conflicts of interest policy for the Board to address both items 4, "recusal of directors" and 7, "conflicts of interest" on the May 22 agenda.

The policy would encompass disclosure of actual or potential conflicts and address procedures for recusal/abstention and possible limitations on participation in discussions or receipt of privileged information. The subcommittee agreed that both adverse interests and personal interests such as family or business interests should be addressed.

There was a consensus that any policy will need to be tightly written and narrowly tailored, and should not present an obstacle to Bar business (such as presidential appointments) or be used to quell dissenting views.

As required by your engagement letter, Joe K. Longley, Randy Sorrels, and Estrella Escobar, agreed to this assignment.

Chair Gibson expressed a hope that we could get your input in time for the June 12 meeting. We'll work with you to collect any information you need.

Thanks and best regards,

John

John Sirman
Associate Executive Director and Legal Counsel
State Bar of Texas
office (512)427-1711
mobile (512)825-7678
john.sirman@texasbar.com

POLICY MANUAL SUBCOMMITTEE TELECONFERENCE AGENDA

May 22, 2019
3:00 pm

Call-in # 800.393.0640
Pass code: 971344

For Discussion and Possible Recommendation

1. Email account requirement for directors
2. New policy on Annual Meeting resolutions
3. New policy on international travel
4. New policy on recusal of directors
5. State Bar Spokesperson policy
6. Conflicts of interest policy
7. New award for succession planning efforts in honor of James E. Brill

AG Opinion GA-0334

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 20, 2005

The Honorable Troy Fraser
Chair, Committee on Business and Commerce
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

Opinion No. GA-0334

Re: Application of conflict of interest law and the Open Meetings Act to the governing board of a groundwater conservation district (RQ-0304-GA)

Dear Senator Fraser:

You request a legal opinion on the following issues:

> (1) conflicts of interest involving the members of a groundwater conservation district board;
>
> (2) the meaning of "contemplated litigation" within Government Code section 551.071(1)(A); and
>
> (3) the exclusion of a board member who has threatened to sue the groundwater conservation district from a district executive session meeting to discuss the threat of litigation.[1]

You ask several questions in connection with each issue. Some of these involve questions of fact that cannot be resolved in an attorney general opinion. *See, e.g.*, Tex. Att'y Gen. Op. Nos. GA-0139 (2004) at 5, JC-0328 (2000) at 4, O-2911 (1940) at 2. We will address the other questions in relation to the applicable topic.

I. Background

You are specifically concerned about the Clearwater Underground Water Conservation District (the "GCD" or "district").[2] The district, which has common boundaries with Bell County, was created under Texas Constitution article XVI, section 59 pursuant to special law and is subject

[1]Letter from Honorable Troy Fraser, Chair, Senate Business and Commerce Committee, to Honorable Greg Abbott, Texas Attorney General (Dec. 21, 2004) (on file with Opinion Committee, *also available at* http://www.oag.state.tx.us) [hereinafter Request Letter].

[2]Telephone Conversation with Daniel Womack, Legislative Assistant to Senator Fraser (Mar. 4, 2005) [hereinafter Telephone Conversation with Daniel Womack].

to Water Code chapter 36. *See* Act of May 27, 1989, 71st Leg., R.S., ch. 524, §§ 1, 3, 6(a), 1989 Tex. Gen. Laws 1728, 1729, *amended by* Act of Apr. 25, 2001, 77th Leg., R.S., ch. 22, 2001 Tex. Gen. Laws 32, 32-34 (relating to the election of district directors). *See also* TEX. WATER CODE ANN. § 36.001(1) (Vernon Supp. 2004-05). Four of the district's five directors are elected according to county commissioner precincts, and the other director is elected at large. *See* Act of Apr. 25, 2001, 77th Leg., R.S., ch. 22, § 1, 2001 Tex. Gen. Laws 32-33. The directors serve four-year terms. *See id.* at 33.

You summarize the events that caused the district to raise these issues. *See* Request Letter, *supra* note 1, at 1-2. You state that the general manager of a nonprofit water supply corporation ("WSC" or "corporation") served on the district's board of directors (the "board ") at a time when the water supply corporation applied to the district for a groundwater well permit. *See id.* The district scheduled a permit hearing pursuant to chapter 36 of the Water Code and required the board member who was also general manager of the corporation ("director/general manager") to fill out an affidavit stating his interest in the corporation pursuant to Local Government Code section 171.004. *See id.* at 2.

Local Government Code chapter 171, which regulates conflicts of interest involving local public officers, applies to the district's directors. *See* TEX. WATER CODE ANN. § 36.058 (Vernon 2000) (director of district is subject to Local Government Code chapter 171); *see also* TEX. LOC. GOV'T CODE ANN. ch. 171 (Vernon 1999 & Supp. 2004-05). Section 171.004 sets out the duty of a local public officer who has a substantial interest in a business entity or in real property:

> (a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:
>
> > (1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or
> >
> > (2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

Id. § 171.004(a) (Vernon 1999). *See also id.* § 171.002 (defining "substantial interest" in a business entity or real property).

Pursuant to chapter 171, a board member with a substantial interest in a business entity shall disclose his interest prior to a vote or decision on any matter involving the entity and "shall abstain

from further participation in the matter if . . . the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public." *Id.* § 171.004(a)(1). A knowing violation of section 171.004 is a Class A misdemeanor. *See id.* § 171.003(b).

A person has a substantial interest in a business entity if "funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year." *Id.* § 171.002(a)(2). *See also* Tex. Att'y Gen. Op. Nos. GA-0068 (2003) at 3-4, JM-424 (1986) at 2 (a nonprofit corporation is a business entity within chapter 171). Thus, if the district board member's salary as general manager of the nonprofit water supply corporation exceeded ten percent of his gross income for the previous year, he had a substantial interest in the corporation. Presumably, the director/general manager did have the requisite interest in the water supply corporation because, as you inform us, he filed the affidavit stating the nature and extent of his interest in the water supply corporation as required by Local Government Code section 171.004. *See* Request Letter, *supra* note 1, at 2.

You state as follows:

> After completing the required affidavit, the affected board member made comments to the other GCD board members and the staff of the GCD that his employer, the WSC, expected the GCD to grant the WSC a permit that authorized a specific amount of groundwater production . . . . The affected board member also stated that the WSC intended to file suit against the GCD if the WSC was not granted a well permit with the authorized groundwater production amounts it desired.

Id.

You further state that the district board of directors called an executive session as authorized by the Texas Open Meetings Act, *see* TEX. GOV'T CODE ANN. ch. 551 (Vernon 2004), *id.* § 551.071, "to discuss the threat made by the WSC to file suit against the GCD." Request Letter, *supra* note 1, at 2. "The affected board member informed the other GCD board members and the GCD staff that he intended to attend the executive session in which his employer's threat to file suit and the affected board member's conflict of interest would be discussed."[3] *Id.* The board's concern about the affected board member's attending the executive session caused it to raise the questions at issue here. *See id.*

[3]The affected board member did not attend the executive session to discuss the threatened litigation, nor had the WSC filed any litigation against the district as of March 4, 2005. *See* Telephone Conversation with Daniel Womack, *supra* note 2.

II. Meaning of "Further Participation" in a Matter

We turn to your first inquiry. Section 171.004 prohibits an interested official from "further participation" in a matter before the governmental body involving his business entity or real property if board action on the matter will have a special economic effect on the business entity or value of the real property. *See* TEX. LOC. GOV'T CODE ANN. § 171.004(a) (Vernon 1999). You ask us to define the phrase "further participation" as used in section 171.004(a).

Chapter 171 does not define "participation," but this office has defined the terms "participates" and "participation" in former article 988b, Revised Civil Statutes,[4] the predecessor of Local Government Code chapter 171.[5] *See* Tex. Att'y Gen. Op. No. JM-379 (1985). Former article 988b, section 3 provided that a local public official commits an offense if he knowingly

> *participates in a vote or decision on a matter* involving a business entity in which the local public official has a substantial interest . . . .

Act of May 30, 1983, 68th Leg., R.S., ch. 640, § 3, 1983 Tex. Gen. Laws 4079, 4080 (emphasis added). *See* TEX. LOC. GOV'T CODE ANN. § 171.003(a)(1) (Vernon 1999) (violation of section 171.004 is a prohibited act). Former article 988b, section 4 provided that if a local public official had "a substantial interest in a business entity that would be peculiarly affected by any official action taken by the governing body" the official "before a vote or decision on the matter, shall file an affidavit . . . *and shall abstain from further participation in the matter.*" Act of May 30, 1983, 68th Leg., R.S., ch. 640, § 4, 1983 Tex. Gen. Laws 4079, 4080-81 (emphasis added). *See* TEX. LOC. GOV'T CODE ANN. § 171.004 (Vernon 1999) (Affidavit and Abstention From Voting Required).

Attorney General Opinion JM-379 considered the application of article 988b to a school trustee who owned a substantial interest in a bank that was suing the school district over the property tax valuation of its stock. The interested trustee abstained from voting for or against any matter pertaining to the litigation but discussed the litigation with members of the board of trustees. *See* Tex. Att'y Gen. Op. No. JM-379 (1985) at 1. This office determined that the interested trustee's discussions with other board members constituted "participation in the matter" within former article 988b, section 4 and concluded that "participation 'in a vote or decision' . . . [within former article 988b] includes deliberating with the board about the matter." *See id.* at 4-5. If the interested trustee were able to discuss the matter with the other board members, he could influence the board's final action. *See id.* at 5.

You ask what "objective activities or conduct" may be considered "further participation in," as that phrase is used in section 171.004(a). Request Letter, *supra* note 1, at 3. We cannot

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[4]Act of May 30, 1983, 68th Leg., R.S., ch. 640, §§ 1-8, 1983 Tex. Gen. Laws 4079, 4079-82 (adopting article 988b, Revised Civil Statutes).

[5]*See* Act of May 1, 1987, 70th Leg., R.S., ch. 149, §§ 1, 49, 1987 Tex. Gen. Laws 707, 949-950, 1306 (repealing former article 988b, Revised Civil Statutes and reenacting it as chapter 171 of the Local Government Code); *see also* Act of Feb. 21, 1989, 71st Leg., R.S., ch. 1, §§ 40-41, 1989 Tex. Gen. Laws 1, 45-47 (act conforming Local Government Code to certain acts of the 70th Legislature).

exhaustively describe all conduct that may constitute "further participation." We point out, however, that board members must in any case avoid deliberating by exchanging written communications or communicating through a third party. *See generally* Tex. Att'y Gen. Op. No. JC-0307 (2000) at 5-6.

You also ask whether an affected board member's attendance at an executive session of the governmental body constitutes "further participation in the matter" if the executive session is called (1) to discuss possible litigation contemplated by the affected board member or his employer, or (2) to discuss the board member's conflict of interest. *See* Request Letter, *supra* note 1, at 3. Chapter 171 does not answer this question, and neither the courts nor this office has considered whether "further participation in the matter" also includes attending an executive session called to discuss a matter in which a board member has a substantial interest.[6]

The language you ask us to construe helps define a penal offense. "A local public official commits an offense if the official knowingly . . . violates Section 171.004," which requires an interested official to "abstain from further participation in the matter" under specified circumstances. *See* TEX. LOC. GOV'T CODE ANN. §§ 171.003(a)(1), .004(a) (Vernon 1999). The offense is a Class A misdemeanor. *See id.* § 171.003(b).

Due process requires that criminal statutes give fair notice of activity that is outlawed. *See U.S. v. Lanier*, 520 U.S. 259, 266 (1997). A criminal statute must give persons of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *See id.*; *Margraves v. State*, 34 S.W.3d 912, 920 (Tex. Crim. App. 2000). Moreover, "[p]enal statutes are still strictly construed." *Brown v. De La Cruz*, 156 S.W.3d 560, 565 (Tex. 2004); *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994). In "construing a criminal statute, we seek to effectuate the intent of the Legislature, focusing on the statute's literal text, and we attempt to discern the fair, objective meaning of that text." *Fallin v. State*, 93 S.W.3d 394, 395-96 (Tex. App.–Houston [14th Dist.] 2002, pet. ref'd) (quoting *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)). If the language of a criminal statute is not plain a court may consider, in arriving at a sensible interpretation, extratextual factors such as executive or administrative interpretations of the statute or legislative history. *See Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991). Given the requirement that a criminal statute give fair notice and the rules of construction stated by the Texas Supreme Court and Court of Criminal Appeals, we will not adopt an expansive interpretation of "further participation."[7]

To determine whether "further participation" within section 171.004(a) includes "attendance . . . at an executive session" on a matter in which a board member is substantially interested, we will consider the meaning of the same word as used in other acts of a similar nature. *See Brown v. Darden*, 50 S.W.2d 261, 263 (Tex. 1932); *Tex. Bank & Trust Co. v. Austin*, 280 S.W. 161, 162 (Tex.

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[6]We assume, without deciding, that any such executive session would be held only as authorized by the Open Meetings Act.

[7]The court in *Hamilton v. Town of Los Gatos*, 261 Cal. Rptr. 888, 891 (Cal. Ct. App. 6th Dist. 1989), construing a California conflict of interest statute, determined that "to participate[] in making . . . a governmental decision" included silent attendance at an executive session meeting. This conclusion was based on policy arguments underlying the statute and the state open meetings act. No criminal provision was at issue.

1926); *L&M-Surco Mfg., Inc. v. Winn Tile Co.*, 580 S.W.2d 920, 926 (Tex. Civ. App.–Tyler 1979, writ dism'd); Tex. Att'y Gen. Op. No. GA-0251 (2004) at 3. We note that legislation expressly concerned with meetings uses the terms "participation" and "attend" in a way that helps us construe "further participation" in section 171.004(a).

The term "participate" has been defined as meaning "to take part–to share in common with others." *Reardon v. State*, 4 Tex. Ct. App. 602 (1878). *See also* XI OXFORD ENGLISH DICTIONARY 268 (2d ed. 1989) (defining "participate" as "[t]o take or have a part or share of or in; to possess or enjoy in common *with* others"); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 847 (10th ed. 1993) (defining "participate" as "to take part [as] in class discussions"). "Attend" has, in contrast, been defined as "to be present." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 74 (10th ed. 1993). In the context of Texas statutes on meetings, "attend" means mere passive presence, while "participate" means active engagement in the subject matter at issue in the meeting.

For example, the superintendent of a hospital district created under Health and Safety Code chapter 282 "*may attend board meetings* and meetings of a board committee and *may participate in the discussion of matters within the superintendent's functions*, but . . . may not vote on matters considered by the board." TEX. HEALTH & SAFETY CODE ANN. § 282.027(d) (Vernon 2001) (emphasis added). Under this provision, the superintendent may *attend* all meetings, that is, be present at all meetings, but may *participate* only in the discussion of matters within his function. In another statute, the administrator of the Agricultural Finance Authority may "*attend all meetings and participate*, but not vote, in all proceedings of the authority." TEX. AGRIC. CODE ANN. § 58.015(c) (Vernon 2004) (emphasis added). *See also* TEX. LOC. GOV'T CODE ANN. § 111.007(a) (Vernon 1999) (any taxpayer of a county "may attend and may participate" in a public hearing on the proposed county budget) (counties with a population of 225,000 or less); TEX. TRANSP. CODE ANN. § 22.0745(d) (Vernon Supp. 2004-05) (nonvoting member on a joint airport board is not entitled to "*attend or participate in*" a closed meeting of the joint board) (emphasis added). *See also* Tex. Att'y Gen. Op. No. JC-0308 (2000) at 1 ("attendance" by a quorum of a state agency board at a legislative committee hearing is subject to the Open Meetings Act if a board member participates in the discussion).

We rely on the distinction between the terms "attend" and "participate in" a meeting as used in Texas statutes to construe the phrase "further participation in the matter." TEX. LOC. GOV'T CODE ANN. § 171.004(a) (Vernon 1999). Thus, the limit on "further participation" does not preclude the interested public official from "attending" meetings, including executive session meetings, relevant to the matter in which he has a substantial interest.

A member of a governmental body does not "participate" in a matter for purposes of Local Government Code section 171.004 by merely attending an executive session on the matter and remaining silent during the deliberations. However, it may be wise for the interested public officer to refrain from attending open or closed meetings that address the matter in which he is interested. *See Graham v. McGrail*, 345 N.E.2d 888, 891-92 (Mass. 1976) (advising public officer with conflict of interest under state law to leave meeting).

III. "Pending or Contemplated Litigation" in Government Code Section 551.071(1)(A)

You ask us to define the phrase "contemplated litigation" in section 551.071(1)(A) of the Government Code, which authorizes a governmental body to hold an executive session concerning pending or contemplated litigation. The section provides as follows:

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

TEX. GOV'T CODE ANN. § 551.071 (Vernon 2004). In particular, you ask whether "contemplated litigation" within section 551.071(1)(A) may include a contested hearing before an administrative agency or other governmental agency, including a groundwater conservation district. Request Letter, *supra* note 1, at 3. Although you ask about governmental entities in general, we must limit our answer to a contested hearing before the Clearwater Underground Water Conservation District because this answer is based on provisions of chapter 36 and rules promulgated by this district. We have found no provisions generally applicable to contested hearings conducted by local governmental entities.

This office has concluded that a contested case under the Texas Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000 & Supp. 2004-05), is "litigation" within the context of the Public Information Act, *id.* ch. 552 (Vernon 2004), and the Open Meetings Act. *See* Tex. Att'y Gen. LO-96-116, at 5-6; Tex. Att'y Gen. ORD-588 (1991) at 2. A "contested case" under the Administrative Procedure Act is "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." TEX. GOV'T CODE ANN. § 2001.003(1) (Vernon 2000).

Open Records Decision 588 addressed the exception from public disclosure for information "relating to litigation . . . to which the state or a political subdivision is or may be a party." *Id.* § 552.103(a) (Vernon 2004). It concluded that the term "litigation" includes a "contested case" under the Texas Administrative Procedure Act, *id.* ch. 2001 (Vernon 2000 & Supp. 2004-05). *See* Tex.

Att'y Gen. ORD-588 (1991) at 4.[8] *See also* Tex. Att'y Gen. ORD-301 (1982) at 1-2 ("'litigation' encompasses proceedings conducted in quasi-judicial forums as well as strictly judicial ones") (cited by Tex. Att'y Gen. ORD-588 (1991) at 2). "When a contested case is heard in a quasi-judicial forum, discovery takes place and the evidence is presented at the administrative level, . . . [and] fact questions are heard and resolved by the agency, regardless of whether the case reaches a court for review under the substantial evidence rule." Tex. Att'y Gen. ORD-588 (1991) at 4. Thus, "[s]ection 3(a)(3) [the predecessor of Government Code section 552.103(a)] can have its intended effect only by applying it to information related to a contested case before an administrative agency "to which the state . . . is, or may be, a party." *Id.*

Relying on Open Records Decision 588, this office construed the term "litigation" within Government Code section 551.071(1)(A) to include "contested cases" under the Texas Administrative Procedure Act. *See* Tex. Att'y Gen. LO-96-116, at 5. Letter Opinion 96-116 noted that "an adversary proceeding may encompass a proceeding conducted in a quasi-judicial forum as well as in a judicial forum," stating that

> Government Code section 551.071 is designed to protect a governmental body's interests in an adversary proceeding, where to discuss a pending proceeding with the governmental body's attorney in an open meeting would permit the opposing party to learn the governmental body's strategy, evidence, and vulnerabilities.

Id. at 5-6. *See also* TEX. GOV'T CODE ANN. § 2001.003(2) (Vernon 2000) ("license" includes state agency permit). Thus, a governmental body that is subject to the Administrative Procedure Act may meet in executive session under section 551.071(1)(A) to deliberate about a "contested case" before it.

We point out that Attorney General Letter Opinion 96-116 and Open Records Decision 588 conclude that a contested case under the Administrative Procedure Act is itself "litigation," not merely anticipated or contemplated litigation. We will also consider whether a contested permit hearing before the Board of Directors of the Clearwater Underground Water Conservation District is "litigation" within Government Code section 551.071(1)(A), not just "contemplated litigation."

The district is not a state agency and is therefore not subject to the Administrative Procedure Act. *See id.* § 2001.003(1) ("contested case" is a proceeding, in which a state agency determines the legal rights, duties, or privileges of a party). We will examine the provisions governing the district's permitting authority to determine whether a permit hearing before the board is "litigation" for purposes of the Open Meetings Act exception.

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[8]Open Records Decision 588 (1991) addressed the former Texas Open Records Act, article 6252-17a, Revised Civil Statutes, which was recodified as Government Code chapter 552 in 1993 and renamed the "Public Information Act" in 1995. *See* Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 594; *see also* Act of May 29, 1995, 74th Leg., ch. 1035, § 1, 1995 Tex. Gen. Laws 5127, 5127-42.

A groundwater conservation district "shall require permits for the drilling, equipping, or completing of wells or for substantially altering the size of wells or well pumps." TEX. WATER CODE ANN. § 36.113(a) (Vernon Supp. 2004-05). *See id.* §§ 36.113(c) (information that a district may require to be included in a permit application); 36.1131 (Vernon 2000) (elements of permit application). A district "shall promptly consider and act on each administratively complete application for a permit." *Id.* § 36.114 (Vernon Supp. 2004-05). *See also id.* ("administratively complete" applications include information required under sections 36.113 and 36.1131).

The Clearwater Underground Water Conservation District conducts permit hearings in accordance with procedural rules adopted under section 36.101. *See id.* § 36.101(b) (the district board shall adopt rules to implement chapter 36, including rules governing procedure before the board). The district's rules provide for notice of a permit hearing and authorize the presiding officer to rule on motions and on the admissibility of evidence, administer oaths to persons presenting testimony, and examine witnesses. *See* CLEARWATER UNDERGROUND WATER CONSERVATION DISTRICT, DISTRICT RULES, Rules 8.10.2, 8.10.3(c), (e)-(f) (2004).[9] *See also id.* § 8.10.5 (authority of presiding officer to admit and exclude evidence).

Any interested person, including the district's general manager, may appear at a hearing and "present evidence, exhibits, or testimony, or make an oral presentation as determined by the Board." *Id.* Rule 8.10.4(a). *See also id.* Rule 3.1 (employment and duties of general manager of district). A person who wishes to appear at a permit hearing must provide the district with specific information, such as his name and address, whether he wishes to testify and whether he is contesting the application. *Id.* Rule 8.10.4(a). The general manager of the district must state on the record whether he "proposes denial, a partial grant, or full grant of the application." *Id.*

The rules provide for uncontested and contested hearings. An uncontested hearing is defined as follows:

> Uncontested Hearings: If no interested persons contest the application and the General Manager proposes to grant the application, whether a partial or full grant, the application shall be considered uncontested.... No Hearing Report shall be required for an uncontested hearing.

Id. Rule 8.10.8.

If an interested person has appeared to contest the application, the presiding officer must submit to the board a hearing report, which must include a summary of the subject matter of the hearing, the evidence or public comments received, and the presiding officer's recommendations for board action. *See id.* Rule 8.10.7. Any person who participated in the hearing may review the report and submit written exceptions to the report to the board. *See id.* Within 35 days after the final hearing, the board must decide whether or not to issue a permit or a permit amendment and set the

[9] *Available at* http://www.clearwaterdistrict.org (last visited June 17, 2005).

permitted volume and other terms of the permit. *See id.* Rule 8.10.9. *See also id.* Rule 8.10.10 (request for rehearing and appeal).

After all administrative appeals to the district are final, a person or corporation "affected by and dissatisfied with" a district order may file a suit against the district or its directors to challenge the order's validity. *See* TEX. WATER CODE ANN. § 36.251 (Vernon 2000). In trial of the suit, "[t]he burden of proof is on the petitioner, and the challenged law, rule, order, or act shall be deemed prima facie valid." *Id.* § 36.253. "The review on appeal is governed by the substantial evidence rule as defined by Section 2001.174, Government Code." *Id.*

Thus, the district board finds facts and the courts review its decisions on permit applications according to the substantial evidence rule of the Administrative Procedure Act. Moreover, a contested permit hearing before the district board, as defined by its rules, places the applicant in an adversarial relation to the district's general manager or other person who contests the application. It may ultimately lead to a lawsuit against the district by a person who is "affected by and dissatisfied with" the district's order on the contested permit application. *Id.* § 36.251.

A contested permit hearing of the Clearwater Underground Water Conservation District raises governmental interests like those at issue in Open Records Decision 588 and Attorney General Letter Opinion 96-116. *See* Tex. Att'y Gen. LO-96-116, at 5-6 (discussion of a pending proceeding with the governmental body's attorney in an open meeting would permit the opposing party to learn the governmental body's strategy, evidence, and vulnerabilities). We conclude that a contested permit hearing before the Board of Directors of the Clearwater Underground Water Conservation District is "litigation" that the district board may discuss in executive session under section 551.071(1)(A) of the Government Code. An uncontested permit hearing, as defined by the district's rules, is not an adversary proceeding. Thus, an uncontested permit hearing is neither "litigation" nor "contemplated litigation" within the Open Meetings Act,[10] and the district board may not discuss it in executive session under Government Code section 551.071(1)(A).

IV. Exclusion of a Board Member from an Executive Session and Related Questions

You ask whether a governmental body may exclude a board member from an executive session under Government Code section 551.071(1)(A) to discuss contemplated litigation when the board member or his employer has threatened to bring the litigation that the board will discuss. We note that the affected board member did not attend the executive session to discuss the threatened

[10]In view of our conclusion, we need not consider your general questions about the meaning of "contemplated litigation." *But see* TEX. GOV'T CODE ANN. § 552.103(a) (Vernon 2004) (excepting from required disclosure under the Public Information Act information related to "litigation . . . to which the state or a political subdivision . . . *may* be a party") (emphasis added); Tex. Att'y Gen. ORD-677 (2002) at 3 (mere conjecture that litigation may ensue is insufficient to invoke exception); Tex. Att'y Gen. ORD-183 (1978) at 2 (exception requires reasonable anticipation of litigation relating to a specific matter). *See also* Tex. Att'y Gen. ORD-351 (1982) at 2 (litigation was not reasonably anticipated when individual merely threatened litigation in telephone conversation and did not follow with meaningful action).

litigation, nor has the Water Supply Corporation that employs him filed suit against the district.[11] After this opinion was requested, the district board granted the permit over which the lawsuit was threatened. *See* Clearwater Underground Water Conservation District Meeting Minutes (Jan. 25, 2005), Agenda Item 4.[12] Thus, there is no need to answer this question at present. In addition, this question raises important policy issues concerning the powers and duties of elected and appointed board members and conflicts between their public responsibilities and their personal interests, issues that cannot be satisfactorily addressed in the context of the district's narrow hypothetical question. Moreover, there is virtually no legal authority relevant to this inquiry.[13] Given that question is moot, and that it raises novel issues that cannot be resolved in the abstract, we will not address it.

You also ask us to define "adverse party." *See* Request Letter, *supra* note 1, at 4. An "adverse party" is a party whose interests are opposed to another party to a legal action. *See Highsmith v. Tyler State Bank & Trust Co.*, 194. S.W.2d 142, 145 (Tex. Civ. App.–Texarkana 1946, writ ref'd); BLACK'S LAW DICTIONARY 1144 (7th ed. 1999). This office has used "adverse" and "adverse party" consistently with these definitions. *See* Tex. Att'y Gen. ORD-551 (1990) at 4-5; Tex. Att'y Gen. LO-89-77, at 3.

You ask whether a governmental body's attorney-client privilege would be waived[14] in various circumstances. For example, you wish to know whether waiver would occur if a board member who threatened to sue the board attended an executive session to discuss the proposed suit, or if the board's attorney provided certain legal memoranda information to all board members, including a board member who is adverse to the board or may become adverse to the board. Whether the privilege is waived in a particular case depends upon the relevant facts. *See* TEX. R. EVID. 503; *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 164 (Tex. 1993). This office cannot answer questions of fact and therefore cannot answer these questions. *See, e.g.*, Tex. Att'y Gen. Op. Nos. GA-0139 (2004) at 5, GA-0003 (2002) at 1, JC-0328 (2000) at 4, H-56 (1973) at 3, O-2911 (1940) at 2.

We point out that a member of a governmental entity has a right of access to the entity's records when he requests them in his official capacity. As we stated in Attorney General Opinion GA-0138:

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[11] *See* Telephone Conversation with Daniel Womack, *supra* note 2.

[12] *Available at* http://www.clearwaterdistrict.org (last visited June 17, 2005).

[13] This office and a New Jersey Court have both concluded that a school board member who has sued the school board may be excluded from an executive session to discuss the pending litigation brought by the school board member. *See* Tex. Att'y Gen. Op. No. JM-1004 (1989); *see also Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen*, 598 A.2d 1232, 1233 (N.J. Super. Ct. App. Div. 1991). We find no authority on excluding a board member who merely contemplates litigation against his board.

[14] You ask about waiver of the attorney-client privilege under the Texas Rules of Evidence, not waiver of Government Code section 552.103, which protects from disclosure under the Public Information Act "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party." TEX. GOV'T CODE ANN. § 552.103(a) (Vernon 2004).

> A member of a governing body has a right to access the documents of that body . . . because of the member's inherent powers of office. While there do not appear to be Texas court decisions directly concerning the issue, on several occasions this office has observed that a member of a governing body has an inherent right of access to the records of that body when requested in the member's official capacity and for the member's performance of official duties. *See* Tex. Att'y Gen. Op. Nos. JC-0283 (2000) at 3-4, JC-0120 (1999) at 3-5, JM-119 (1983) at 3; Tex. Att'y Gen. LO-93-069, at 1-2.

Tex. Att'y Gen. Op. No. GA-0138 (2004) at 3. *See also Gabrilson v. Flynn*, 554 N.W.2d 267, 274 (Iowa 1996) (school board members generally should be allowed access to both public and private records necessary for the proper discharge of their duties). Whether a member requests records in his official capacity is a fact question that cannot be resolved in an attorney general opinion. *See* Tex. Att'y Gen. LO-93-069, at 3. However, the fact that a board member has filed suit against the board would raise the question whether he requested records about the lawsuit in his official capacity.

We finally observe that a public officer holds a public trust, and he should discharge his duties with honesty and integrity. *See Alsup v. State*, 238 S.W. 667, 670 (Tex. Crim. App. 1922); *Jones v. State*, 109 S.W.2d 244, 251 (Tex. Civ. App.–Texarkana 1937, no writ). Given these responsibilities, a public officer who is suing or planning to sue his governmental body should avoid using his public position to secure access to information related to the litigation, for example, by voluntarily refraining from attending executive sessions regarding the litigation and from accepting confidential documents related to the litigation.

SUMMARY

The directors of an underground water conservation district are subject to chapter 171 of the Local Government Code, which regulates conflicts of interest involving local public officials. Chapter 171 requires a local public official with a substantial interest in a business entity or real property on which board action will have a special economic effect to disclose his interest and abstain from further participation in the matter. A violation of this requirement is a Class A misdemeanor. When section 171.004(a) requires a local public official to abstain from further participation in a matter, it does not prohibit him from attending an executive session of his governmental body held to discuss the matter.

A contested permit hearing before the Board of Directors of the Clearwater Underground Water Conservation District is "litigation" within Government Code section 551.071(1)(A).

Very truly yours,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

DON R. WILLETT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Susan L. Garrison
Assistant Attorney General, Opinion Committee

AG Opinion GA-0995

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 19, 2013

Ms. Michelle Hunter
Executive Director
State Bar of Texas
Post Office Box 12487
Austin, Texas 78711

Opinion No. GA-0995

Re: Whether State Bar of Texas president-elect candidates who are nominated by petition under subsection 81.019(c), Government Code, are nevertheless subject to State Bar of Texas election rules and policies (RQ-1088-GA)

Dear Ms. Hunter:

You ask whether State Bar of Texas (the "State Bar") president-elect candidates nominated by petition under subsection 81.019(c) of the Government Code are subject to State Bar election rules and policies.[1] The State Bar is defined by statutes as an administrative agency of the judicial department of government whose purpose is to aid the Texas Supreme Court in the Court's regulation of the practice of law in Texas. TEX. GOV'T CODE ANN. § 81.011(a)–(b) (West 2005). The Supreme Court exercises administrative control over the State Bar and promulgates the rules under which the State Bar is governed. *Id.* §§ 81.011(c), .024(a). The State Bar board of directors (the "Board") is the governing body within the State Bar. *Id.* § 81.020(a); Tex. State Bar R. art. IV, § 1(D), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West Supp. 2012) (entitled "State Bar Rules").

Section 81.019 of the Government Code pertains to the election of the State Bar officers, which are the president, president-elect, and immediate past president. TEX. GOV'T CODE ANN. § 81.019(a) (West 2005). Specifically, section 81.019 provides:

> (b) *Except as provided by Subsection (c)*, the officers shall be elected in accordance with rules for the election of officers and directors prepared and proposed by the supreme court as provided by Section 81.024.
>
> (c) *The election rules must permit* any member's name to be printed on the ballot as a candidate for president-elect if a written petition requesting that action and signed by at least five percent of

[1]Letter from Ms. Michelle Hunter, Exec. Dir., State Bar of Tex., to Honorable Greg Abbott, Tex. Att'y Gen. at 1–2 (Oct. 2, 2012), http://texasattorneygeneral.gov/opin ("Request Letter").

> the membership of the state bar is filed with the executive director at least 30 days before the election ballots are to be distributed to the membership.

Id. § 81.019(b)–(c) (emphasis added); *see id.* § 81.024 (directing the Supreme Court to promulgate the rules governing the State Bar).

You ask "whether president-elect candidates nominated by petition under section 81.019(c) are subject to State Bar election rules and policies." Request Letter at 1–2. Subsection (c) is a limited exception to subsection (b). The phrase, "[e]xcept as provided by . . .," in subsection (b) has led some to believe that subsection (c) allows an officer to be elected completely outside of the State Bar election rules promulgated by the Supreme Court. *See* Request Letter at 1. Subsection (c), however, is merely a specific legislative requirement as to what the "election rules must permit." TEX. GOV'T CODE ANN. § 81.019(b)–(c) (West 2005). The phrase, "[e]xcept as provided by Subsection (c)," ensures that the substantive requirements of subsection (c) are in effect regardless of whether those requirements are reflected in the rules. It does not exempt candidates from those rules. *Id.* § 81.019(c). Therefore, subsection (c) does not exempt president-elect write-in candidates from the Supreme Court rules for State Bar elections or from valid Board policies.

We have received briefing suggesting that some portions of the Board's policies are inconsistent with the Supreme Court's rules for the State Bar and with statutes, particularly with regard to the policies and rules governing nomination by petition.[2] Board policy provides that "[a]ny other *qualified* member" may be nominated by petition. State Bar of Tex. Bd. of Dirs. Policy Manual § 2.01.05, at 18 (2012) ("Policy Manual") (emphasis added). Under section 2.01.04 of the Policy Manual, titled "Qualifications," "[a]ny member of the State Bar who meets the eligibility requirements for Officers set forth in the State Bar Act and the State Bar Rules is eligible for nomination for President-elect, *provided such member is not currently serving as a Board [of Directors] member*." *Id.* § 2.01.04 (emphasis added). Thus, under State Bar policy, sitting members of the Board who otherwise meet all eligibility requirements of the State Bar rules nevertheless are precluded from being nominated for president-elect under Board policy.

By contrast, the applicable State Bar rule directly tracks the language of subsection 81.019(c) by permitting "[*a*]*ny other member* of the State Bar" to stand for election for president-elect by petition. Tex. State Bar R. art. IV, § 11(B) (emphasis added). By their plain language, neither section 11(B) nor subsection 81.019(c) prohibits sitting Board members from being nominated for president-elect by petition. Policy Manual sections 2.01.04 and 2.01.05 are therefore inconsistent with State Bar rule article IV, section 11(B).

The State Bar Rules provide that "[t]he board shall . . . adopt such regulations and policies, consistent with [chapter 81 of the Government Code] or these Rules . . . ." *Id.* art. IV,

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[2]Brief from Mr. Steve Fischer, State Bar of Texas Dir. Dist. 11, to Office of the Tex. Att'y Gen., at 2–4 (Oct. 15, 2012) (on file with the Op. Comm.).

§ 1(D). Further, the Policy Manual acknowledges that no State Bar policy established by the Board "shall be inconsistent or conflict with [chapter 81] [or] the State Bar Rules . . . . If there is any such inconsistency or conflict, [chapter 81] [or] the State Bar Rules . . . shall take precedence over [the policy]." Policy Manual at 2. Board policy sections 2.01.04 and 2.01.05, relating to the eligibility of certain members of the State Bar to stand for election for president-elect, conflict with both subsection 81.019(c) of the Government Code and State Bar rule article IV, section 11(B). Therefore, those policies are unenforceable.

SUMMARY

State Bar of Texas president-elect candidates nominated by petition under subsection 81.019(c) of the Government Code are subject to all valid State Bar election rules and policies. Board policy sections 2.01.04 and 2.01.05, relating to the eligibility of certain members of the State Bar to stand for election for president-elect, conflict with both subsection 81.019(c) of the Government Code and State Bar rule article IV, section 11(B). Therefore, those policies are unenforceable.

Very truly yours,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JAMES D. BLACKLOCK
Deputy Attorney General for Legal Counsel

JASON BOATRIGHT
Chairman, Opinion Committee

Stephen L. Tatum, Jr.
Assistant Attorney General, Opinion Committee

Email to JKL Requesting Recusal

From: Gibson, Laura [mailto:laura.gibson@dentons.com]
Sent: Wednesday, February 13, 2019 3:42 PM
To: Joe Longley; Joe Longley
Cc: Trey Apffel; John Sirman; Ross Fischer (rf@gobergroup.com); Randy Sorrels
Subject: FW: Joe Longley letter -- Re: Your letter of February 12, 2019 [DEN-US_Active.FID11607139]

Joe,

Please see my letter and let me know by close of business today whether you will agree to recuse yourself from the Ad Hoc Committee.

Regards,

Laura

DENTONS

Laura Gibson
Laura Gibson PC
Board Certified, Labor & Employment Law
Texas Board of Legal Specialization
Partner

D +1 713 658 4635 | US Internal 64635
laura.gibson@dentons.com
Bio | Website

Dentons US LLP
1221 McKinney Street, Suite 1900, Houston, TX 77010

Hamilton Harrison & Mathews > Mardemootoo Balgobin > HPRP > Zain & Co. > Delany Law > Dinner Martin > Maclay Murray & Spens > Gallo Barrios Pickmann > Muñoz > Cardenas & Cardenas > Lopez Velarde > Rodyk > Boekel > OPF Partners > 大成

From: Del Angel, Lea Ann <leaann.delangel@dentons.com>
Sent: Wednesday, February 13, 2019 3:29 PM
To: Gibson, Laura <laura.gibson@dentons.com>
Subject: Joe Longley letter -- Re: Your letter of February 12, 2019 [DEN-US_Active.FID12738241]

DENTONS

Lea Ann Del Angel
Legal Secretary

D +1 713 658 4616 | US Internal 64616

leaann.delangel@dentons.com
Website

Dentons US LLP

Hamilton Harrison & Mathews > Mardemootoo Balgobin > HPRP > Zain & Co. > Delany Law > Dinner Martin > Maclay Murray & Spens > Gallo Barrios Pickmann > Muñoz > Cardenas & Cardenas > Lopez Velarde > Rodyk > Boekel > OPF Partners > 大成

STATE BAR OF TEXAS

LAURA GIBSON
2018-19 CHAIR OF THE BOARD

Direct Correspondence to:
DENTONS US LLP
1221 McKinney Street, Suite 1900,
Houston, TX 77010
(713) 658-4635
laura.gibson@dentons.com

February 13, 2019

Mr. Joe K. Longley
Law Offices of Joe K. Longley
3305 Northland Drive, Suite 500
Austin, TX 78731

Via Email: joe@joelongley.com

Re: Your letter of February 12, 2019

Dear Joe:

I am writing in response to your February 12, 2019 letter to Bill Whitehurst. I am compelled to point out that your letter misstates the action taken by the State Bar Board at the Board meeting on January 18, 2019. As you are well aware, the action item you removed from the Board Agenda was to amend Board Policy Manual Section 1.23 to allow all lawyers to vote in TYLA elections. The motion made by Director Alastair Dawson was to reaffirm Section 1.23 and the State Bar's longstanding practice of allowing only TYLA members to vote in TYLA elections. The Board did nothing to change existing practice. The TYLA Bylaws have always limited those who are eligible to vote in TYLA elections to TYLA members. The Board's actions did nothing to change that. It is incorrect for your letter to suggest that the Board took action which took away a preexisting right.

It is clear from your January 22, 2019 letter to the Attorney General and your President's Columns that you are not neutral on the issue of who should be entitled to vote in TYLA elections. For that reason, I respectfully request that you recuse yourself from participation in the Ad Hoc Committee which is working on coordinating the State Bar's response to the Attorney General. Given that the position you have taken is contrary to the Board's January 18 vote, you have a conflict of interest which prohibits your participation in the Ad Hoc Committee. Please let me know by the close of business today whether you will agree to recuse yourself from the Committee.

Thank you for your attention to this matter.

Very truly yours,

Laura Gibson
2018-19 Chair of the Board

LG/lad

110273890\V-1

cc: Mr. Ervin A. (Trey) Apffel, III
Executive Director, State Bar of Texas
1414 Colorado Street
Austin, TX 78711-1627

Via E-mail: ***tapffel@texasbar.com***

Mr. John Sirman
Legal Counsel, State Bar of Texas
1414 Colorado Street
Austin, TX 78711-1627

Via E-mail: ***jsirman@texasbar.com***

Mr. Ross Fischer
General Counsel, State Bar of Texas
3595 RR 620 South, Suite 200
Austin, TX 78738

Via E-mail: ***rf@gobergroup.com***

Mr. Randy Sorrels
President Elect, State Bar of Texas
Abraham, Watkins, Nichols, Sorrels, Agosto & Aziz
800 Commerce Street
Houston, TX 77002-1776

Via E-mail: ***rsorrels@abrahamwatkins.com***

JKL Letter to Bill Whitehurst

JOE@JOELONGLEY.COM
WWW.JOELONGLEY.COM

LAW OFFICES
OF
JOE K. LONGLEY
3305 NORTHLAND DRIVE
SUITE 500
AUSTIN, TEXAS 78731

512/477-4444
800/792-4444
512/477-4470 FAX

February 12, 2019

Mr. William O. Whitehurst, JR.
7500 Rialto Blvd., Bldg. II, Ste. 250
Austin, TX 78735
bwhitehurst@nationaltriallaw.com

RE: Your letter dated February 11, 2019

Dear Bill:

The invective you've chosen to use in your letter is most unfortunate, not to mention, uncalled for. You could have easily called me to learn the true facts that are at variance with almost every statement contained in your letter.

For instance, if you care to take the time to view the video of the January 18 Board meeting, you would learn that the pledge that I gave to the TYLA membership on January 11 to table the "action item" on my TYLA election proposal was a promise made and a promise kept. On January 11, I told the TYLA Directors that I would delay my "action item" for 30 Days—and that's exactly what I did. (JKL & Chair Laura Gibson both confirm the no action item. Video at 1:59).

Wherever you got the notion that I "had no intention of keeping that promise" was totally false. Laura Gibson, Trey Apffel, and I all confirmed that we were all on the same page—no action item. That was the state of the discussion when I left the podium.

In fact, in answer to board member questions, I agreed to form a subcommittee to study the issue since it was not going to be voted on as an action item. (Video at 2:00).

However, after hearing from several former TYLA Presidents, the meeting took an unexpected turn. Instead of allowing the issue to benefit from further study by being postponed, Director Alistair Dawson moved that the issue be decided. He moved to maintain the voting status quo—thereby calling for a vote that would effectively exclude 76,000 active bar members from voting in the 2019 TYLA President-elect's race conducted by the State Bar. His motion was seconded by Director Jerry Alexander and carried by a unanimous vote by those voting, with my abstention. (Video at 2:45:47-2:50).

Such a vote to exclude active members from voting in state-wide elections conducted by the State Bar is unprecedented in the Bar's 80 year history.

Prior to that vote, no Board had ever voted to deny "one member-one vote" to active bar members in any state-wide race to put a candidate on the Board of Directors. Thus, the issue was decided without postponement—and without resolution of the constitutional and rule of law questions I had raised.

After the meeting, I reviewed my options as to the best method to seek clarification of what appears to be an invalid Board action taken outside the Constitution, State Bar Act and State Bar Rules. I settled upon seeking an AG Opinion, as State Bar Presidents have done several times in the past when Board action has been uncertain or challenged as invalid. See e.g. AG Op. GA-0995 (2013). Your comment that "I had already decided to circumvent the SBOT Board another way if my proposal was rejected" is simply not true. (State Bar Video at 2:00).

My decision to seek an opinion from the Texas Attorney General was not made until January 19th – the day after the Board had taken its unprecedented action of voter suppression.

I think you'll agree that the right to self-govern the activities of the State Bar of Texas resides within all 103,342 active bar members' right to vote. Likewise, I think you'll not dispute that the statewide race for President-Elect of TYLA is an election *conducted by* the State Bar of Texas. Further, I think you'll agree that over 76,000 active bar members are excluded from voting for TYLA President-Elect despite there being no authority to exclude such members in any of the three governing documents that govern the State Bar of Texas activities-- and no Board vote ever taken to exclude them in the past.

So, for background, here are some undisputed "Bar" facts:

1. 76,000 active bar members are excluded from voting in the statewide election conducted by the SBOT to elect a TYLA president-elect who sits and votes on the Board of Directors (BOD);

2. Such exclusion is based solely on a member "aging-out" of TYLA membership through the passage of time;

3. No authority exists in the bar's governing documents to impose such exclusion on any bar member;

4. No vote prior to 1-18-2019 was ever made by a BOD imposing such an exclusion;

5. The 26th Amendment to the U.S. Constitution prohibits age discrimination in voting;[1]

[1] The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

6. The non-TYLA member voting exclusion is inconsistent with §81.0242 & §81.053 of the State Bar Act;

7. AG Op. GA-0995 (2013) holds that Board actions inconsistent with the State Bar Act or State Bar Rules are invalid and "unenforceable."

After some deliberation, and consistent with my oath of office to "preserve, protect and defend Constitution and laws of the United States, and of this State," I sent my request now referenced as RQ-0265.

It is my hope that an opinion can be issued in time for application, if needed, in the upcoming state-wide bar elections scheduled for April 2019, or at least before the legislature adjourns at the end of May.

In any event, I welcome both you and the State Bar Board to join me in seeking AG clarification through the opinion process. The deadline for submission to the Opinions Committee is February 20.

Next, your characterization of my personal visit to a state senator is likewise inaccurate. Far from having been "leaked out" as you characterized it, there was no secret about my meeting, nor was there any question that the views I communicated were personal rather than official. Prior to meeting with the senator, I had already met with our new Supreme Court Liaison and had imparted the exact same personal views to her.

By the time of both of these meetings, these personal proposals had been previously published in my President's Pages in the TBJ as my personal preferences. (See TBJ November 2018; and TBJ January 2019).

Nevertheless, you requested me as a "personal friend" to request of the senator's office that my personal proposals not be put into "bill form." As you confirm, I agreed to do so at your request and then affirmed to you that it had been done.

To sum up, my request of the AG is not premature, unnecessary, nor inappropriate. In fact it goes to the heart of whether the action vote by the Board of Directors was constitutional, lawful and within the rule of law. The Board of Directors itself made the choice to "finalize" the discussion thereby placing itself in the "awkward position" of having to file briefs addressing these matters which the Board's own precipitous action made ripe. My subsequent action to seek the opinion of the AG was precipitated by the Board moving for a vote on an action item *that I had pulled down.*

The irony of your use of the word "destroy" is thick when it was the Board of Directors who voted to exclude 76,000 active bar members from a statewide vote that puts the President-Elect of TYLA on our governing Board for the next three years. Stated simply, this issue is ripe for determination, not through my actions, but rather through the actions taken by the Board Members calling for a vote on a matter which could have been avoided. The further irony is that usually it is the Board of Directors that seeks to postpone, study,

and create committees and task forces that sometimes seem never ending. Not this time. (Video at 2:45:47-2:50).

As to transparency, you need only read the April 2017 TBJ containing the Q & A's for all the candidates to see that my solo reason for running was to protect our right to vote in a self-governing environment.[2] That I have done, and that I will continue to do.

I have been true to my oath and my pledges and I will continue to deliver on those in the future.

Finally, the issues regarding *Fleck* and *Janus* relating to mandatory versus voluntary use of Bar dues are placed into clear focus based upon the actions of the Board voting on matters so clearly questionable under the United States Constitution, the State Bar Act, and the State Bar Rules. All state bar members are entitled to answers—and I am proud to seek them through the vehicle of RQ-0265. February 20 is the deadline to submit briefs to the Attorney General, and I encourage all interested members of the Bar and public to submit their views.

To close, and with all due respect, I reject the requests you make on the last page of your letter.

Sincerely,

Joe K. Longley

cc via email: All Members State Bar of Texas

[2] **Q**: Why do you want to serve as President of the State Bar of Texas?
A: Longley: Through my candidacy, I seek to reform the way the State Bar currently conducts its business. The State Bar of 2017 seemingly exists only for itself with little thought given to the voting rights of its members.
80 TBJ 217 (2017).

Trey to JKL Email re Draft Disqualification Policy

Joe Longley

From: Jennifer Reames <Jennifer.Reames@TEXASBAR.COM>
Sent: Monday, June 3, 2019 12:08 PM
To: Joe Longley; Joe Longley
Cc: Trey Apffel
Subject: Draft Disqualification Policy
Attachments: 2019.05.31 Draft Disqualification Policy (v1) (002)_rev.docx

Joe,

Trey asked me to send this to you.

Thanks,
Jen

Jennifer Reames
Executive Office
STATE BAR *of* TEXAS
512.427.1415 **direct** | 800.204.2222, ext. 1415
jreames@texasbar.com

Disqualification of Adverse Party~~from Participation~~

A board member who is an adverse party in a lawsuit against the State Bar of Texas may not participate in a discussion of or action on the matter in which he or she is an adverse party related to that lawsuit against the ~~to the~~ State Bar. A board member who is disqualified from participation under this section may not be present if the matter for which the Board member is disqualified is being discussed in any non-public session, including but not limited to executive sessions of the board. If a board member who is an adverse party requests documents relating to the matter, it is presumed that the board member is not seeking the documents in his or her official capacity, and Section 9.06 ("Officer and Board Member Requests for Records") shall not apply to such request.

In this policy, "adverse party" means a party whose interest are opposed to the State Bar of Texas in a legal action.

Disqualification of Adverse Party~~from Participation~~

A board member who is an adverse party in a lawsuit against the State Bar of Texas may not participate in a discussion of or action on the matter in which he or she is an adverse party related to that lawsuit against the ~~to the~~ State Bar. A board member who is disqualified from participation under this section may not be present if the matter for which the Board member is disqualified is being discussed in any non-public session, including but not limited to executive sessions of the board. If a board member who is an adverse party requests documents relating to the matter, it is presumed that the board member is not seeking the documents in his or her official capacity, and Section 9.06 ("Officer and Board Member Requests for Records") shall not apply to such request.

In this policy, "adverse party" means a party whose interest are opposed to the State Bar of Texas in a legal action.

JKL to RF Email re Disqualification Policy

Joe Longley

From: Joe Longley
Sent: Monday, June 3, 2019 1:22 PM
To: Ross Fisher (ross@rossfischer.law)
Subject: 6-4-2019 JKL Draft Disqualification Policy (v1) (002)_rev
Attachments: 2019.05.31 Draft Disqualification Policy (v1) (002)_rev.docx

From: Joe Longley [mailto:Joe.Longley@TEXASBAR.COM]
Sent: Monday, June 3, 2019 1:04 PM
To: Joe Longley
Subject: JKL Draft Disqualification Policy (v1) (002)_rev

10.01 Disqualification of Adverse Party~~from Participation~~

A board member who is an adverse party in a lawsuit pending against the State Bar of Texas ~~may not~~may be disqualified from participatinge in a discussion of or action on ~~the~~ such lawsuit. ~~matter in which he or she is an adverse party related to that lawsuit against the to the State Bar.~~ A board member ~~who is~~so disqualified ~~from participation under this section~~ may not be present if the matter for which the Board member is disqualified is being discussed in any non-public session, including but not limited to executive sessions of the board. If a board member who is an adverse party requests non-public documents relating to the ~~matter~~lawsuit, it is presumed that the board member is not seeking the documents in his or her official capacity, and Section 9.05; 9.06.01,~~6,~~and 9.06.02 ("Officer and Board Member Requests for Records") shall not apply to such request.

In this ~~policy~~section,, "adverse party" means a board member who is a party to a pending lawsuit against the State Bar wherein the board member has alleged a claim against the State Bar of Texas.~~whose interest are opposed to the State Bar of Texas in a legal action.~~

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