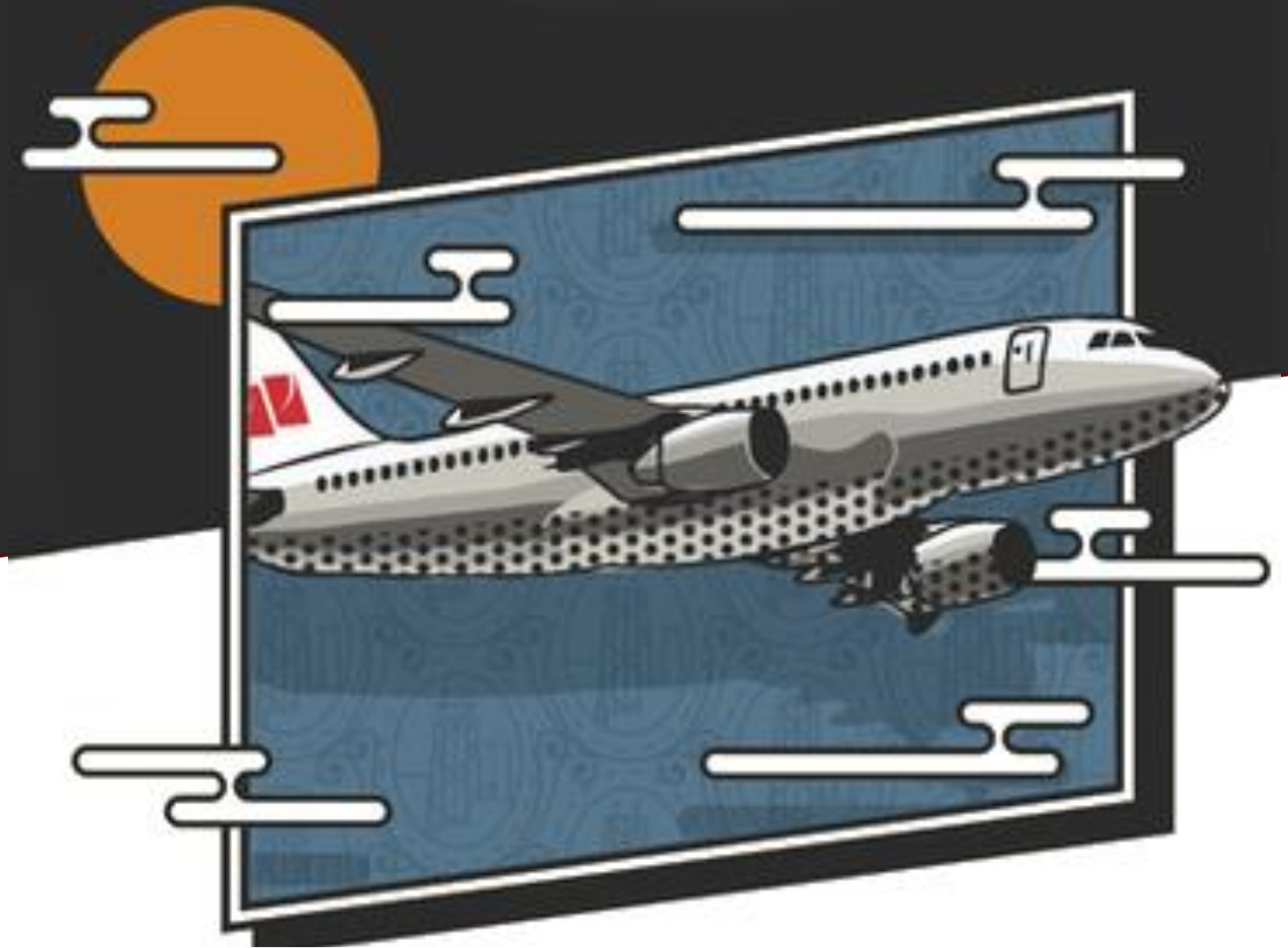




40th Annual  
Airport Law Workshop



Session 11

# Ethics: Interactions with Public Officials and Other Non-Lawyers

# Speakers

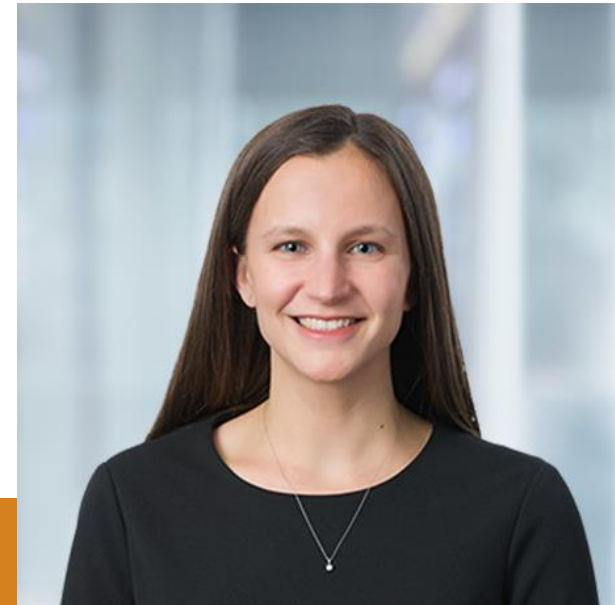
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# Sources of ethical duties

- American Bar Association (ABA) Model Rules of Professional Conduct
- State Rules of Professional Conduct
- ABA and state ethics opinions
- Local government ethics rules





# Unique problems for public agency lawyers

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1. Ethical rules generally drafted for private sector lawyers. (See APA Rule 1.13 cmt. 9.)
2. Ethical rules generally focus on a single transaction, matter, or engagement rather than a continuing representation.
3. Ethical rules provide little guidance on the different roles of government agencies.
4. Elections matter! Ethical rules do not address what happens when a government agency changes positions.



# Why the focus on public agency lawyers?

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- Public agency lawyers face unique ethical constraints, including:
  - Defining the client – practically, politically, and legally
  - Working in a fishbowl
  - Open Records Acts and Open Meeting Acts



# Our protagonist

Maya

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- Previously in private practice
- Recently joined the County Attorney's office
- Assigned to work on airport matters
- Close friends with some of the County Commissioners
- Predecessor was *not* very good at his job
  - Maya has a lot of clean-up





# Who is the client?

## The problem

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- County Commissioner Smith tells Maya he needs a favor. A few years ago, while the airport was completing a development project, he directed the airport director to dispose of contaminated soil in the local landfill.
- Now there's a lawsuit, and the County, the airport director, and Commissioner Smith—in both his official and individual capacity—have all been named.
- Commissioner Smith asks if Maya will help and represent him in the lawsuit.



# Who is the client?

## Rule 1.13: organization as client

**ABA Model Rule 1.13(a):** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

**Comment [9]:** The duty defined in this Rule applies to governmental organizations. **Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context** and is a matter beyond the scope of these Rules.



# Who is the client?

## Rule 1.13: organization as client

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Most states define the client as the agency that employs the lawyer

Determination may depend on a number of factors, including:

- What was the agreement at the outset of employment?
- What conflict issues would representation raise?
- Whose confidences have you received?
- Who is adverse to whom?
- Whose interests are at stake?



# Who is the client?

## Rule 1.13: organization as client

**ABA Model Rule 1.13(g):** A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.

**ABA Model Rule 1.7:** A lawyer shall not represent a client if the representation involves a concurrent conflict of interest *unless*

1. The lawyer can provide competent and diligent representation to both clients;
2. the representation is not prohibited by law;
3. the clients are not directly adverse in the same matter before the same tribunal;  
and
4. each affected client gives informed consent.

# Who is the client?

You decide!

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Should Maya represent Commissioner Smith in his individual capacity?





# Who is the client?

## Another problem

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- Maya decides not to represent Commissioner Smith, risking their friendship but protecting her license.
- Now, Maya has to interview airport employees about the soil disposal fiasco.
- The interviews could uncover incriminating information, but they are all County employees, so Maya thinks it's fine to encourage them to be candid without additional counsel present.



# Who is the client?

You decide!

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Is Maya right – are County employees protected even if they reveal incriminating information in their conversations with her?



# Who is the client?

## Rule 1.13: organization as client

**ABA Model Rule 1.13(f):** In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

### **Corporate Miranda/Upjohn Warning**

- Explain who the client is; make clear who the client is not
- Be explicit about confidentiality and privilege – who holds the privilege, and who can waive it



# Can Maya handle this?

## The problem

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- As the case progresses, Maya realizes she's out of her comfort zone. She was prepared for complex airport regulatory matters, but she knows nothing about environmental law.
- Can Maya ethically continue to represent her client?



# Can Maya handle this?

You decide!

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Can Maya ethically represent her client, even though she is not an expert in environmental law?



# Can Maya handle this?

## Rule 1.1: Competence

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**ABA Model Rule 1.1:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- Does not mean lawyer must have special training or prior experience in a certain area.
- Can provide adequate, competent representation through study or through association with an experienced lawyer.





# Who's the boss? (It's the client)

## The problem

- Maya develops a brilliant legal strategy to protect the County and Commissioner Smith – but it means the airport manager will have to take the blame.



- Can Maya implement the strategy?

# Who's the boss? (It's the client)

## Rule 1.4: Communications

### **ABA Model Rule 1.4:**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# Disclosure of information

## The problem

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- Maya is confident in her defense strategy, but trouble's brewing.
- A local neighborhood group has filed a public records request for materials related to other perceived environmental issues at the airport.
- Are there any limits on what Maya needs to disclose?



# Disclosure of information

## Rule 1.6: Confidentiality of information

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### **ABA Model Rule 1.6:**

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - ...
  - (6) to comply with other law or a court order





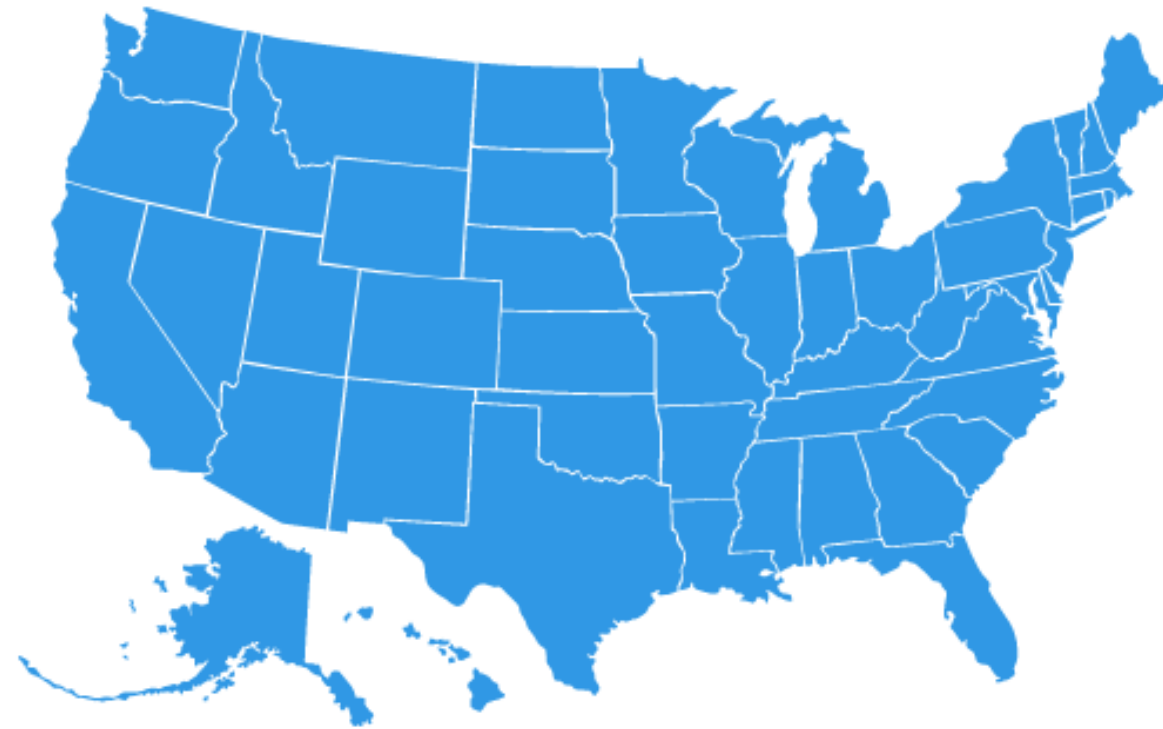
# Disclosure of information

## State-specific requirements and exceptions

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Maya needs to review the open records law in her state.

- Some state disclosure laws **preserve** attorney-client and related privileges
- Some state disclosure laws **narrow** attorney-client and related privileges
- Some state disclosure laws **overrule** attorney-client and related privileges



# Open meetings laws

## Another problem

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- Commissioner Smith tells Maya that the County Commissioners are frustrated with the situation.
- After the County Board meeting next week, a majority of the County Commissioners plan to go out for ice cream and make a plan for addressing the environmental issues at the airport.
- Should Maya let this happen?



# Open meetings laws

## State-specific requirements and exceptions

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### Open meetings Laws:

- Meetings held by public bodies open to the public unless an exception can be demonstrated
- Notice of public bodies' meetings
- Publish minutes of public bodies' meetings
- But there are exceptions...



# Open meetings laws

## Exceptions

### **40 exceptions to the IL open records act including:**

(1) The appointment, employment, compensation, discipline, performance, or dismissal of specific employees...

(2) Collective negotiating matters between the public body and its employees or their representatives...

(5) The purchase or lease of real property for the use of the public body...

(6) The setting of a price for sale or lease of property owned by the public body.

(8) Security procedures, school building safety and security, and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property.

(9) Student disciplinary cases.



# Disclosure of information

## Yet another problem

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- After a properly noticed Executive Session, to discuss the soil situation, the County Commissioners decide to hold a press conference.
- They tell Maya to prepare a public briefing and “not to hold anything back.”
- Can Maya really tell all?



# Disclosure of information

## Rule 1.6: Confidentiality of information

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### ABA Model Rule 1.6:

(a) A lawyer shall not reveal information relating to the representation of a client **unless the client gives informed consent**, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Key here: Get clarity from the client

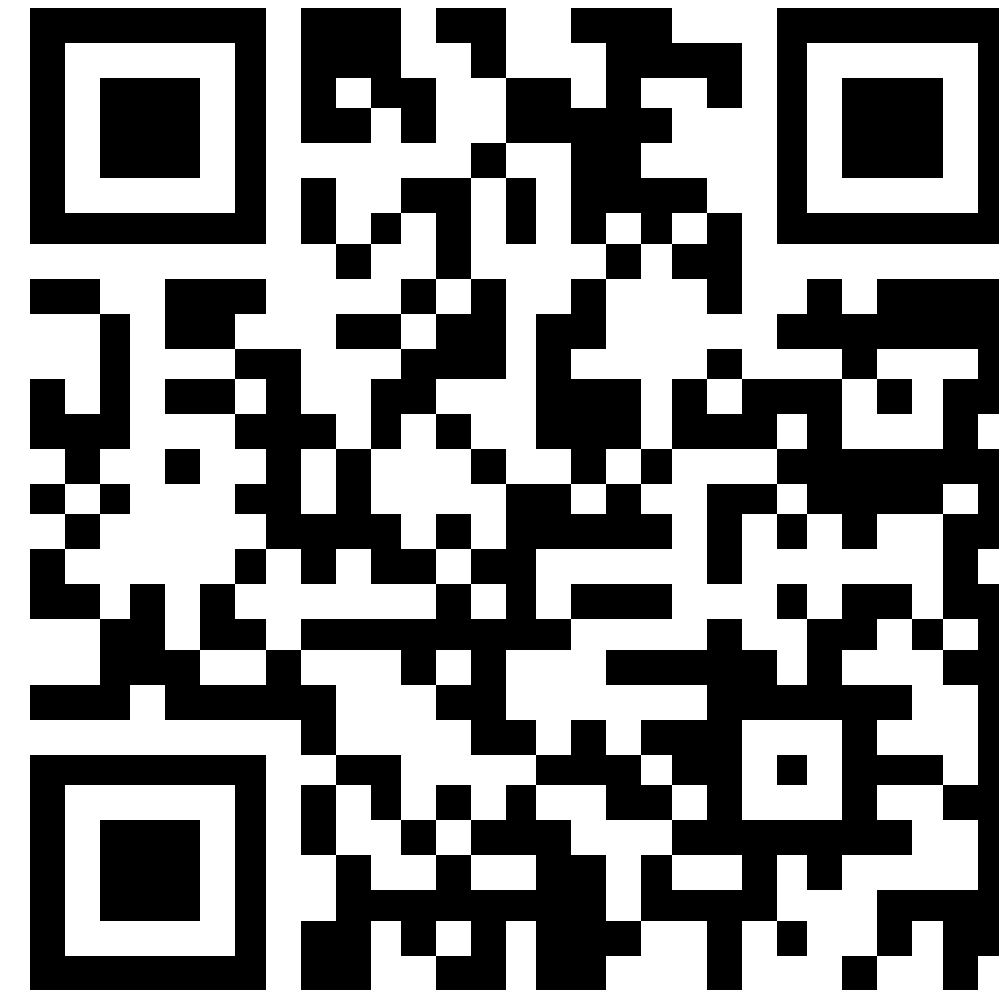


# Disclosure of information

## So many problems

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- Maya is exhausted. It's the night before the press conference, and she still is not prepared.
- To prepare her press statement, she decides to use ChatGPT. She types "My client illegally dumped contaminated soil in the municipal landfill. How should I apologize for the press?"
- Has Maya violated any ethical rules?



# Disclosure of information

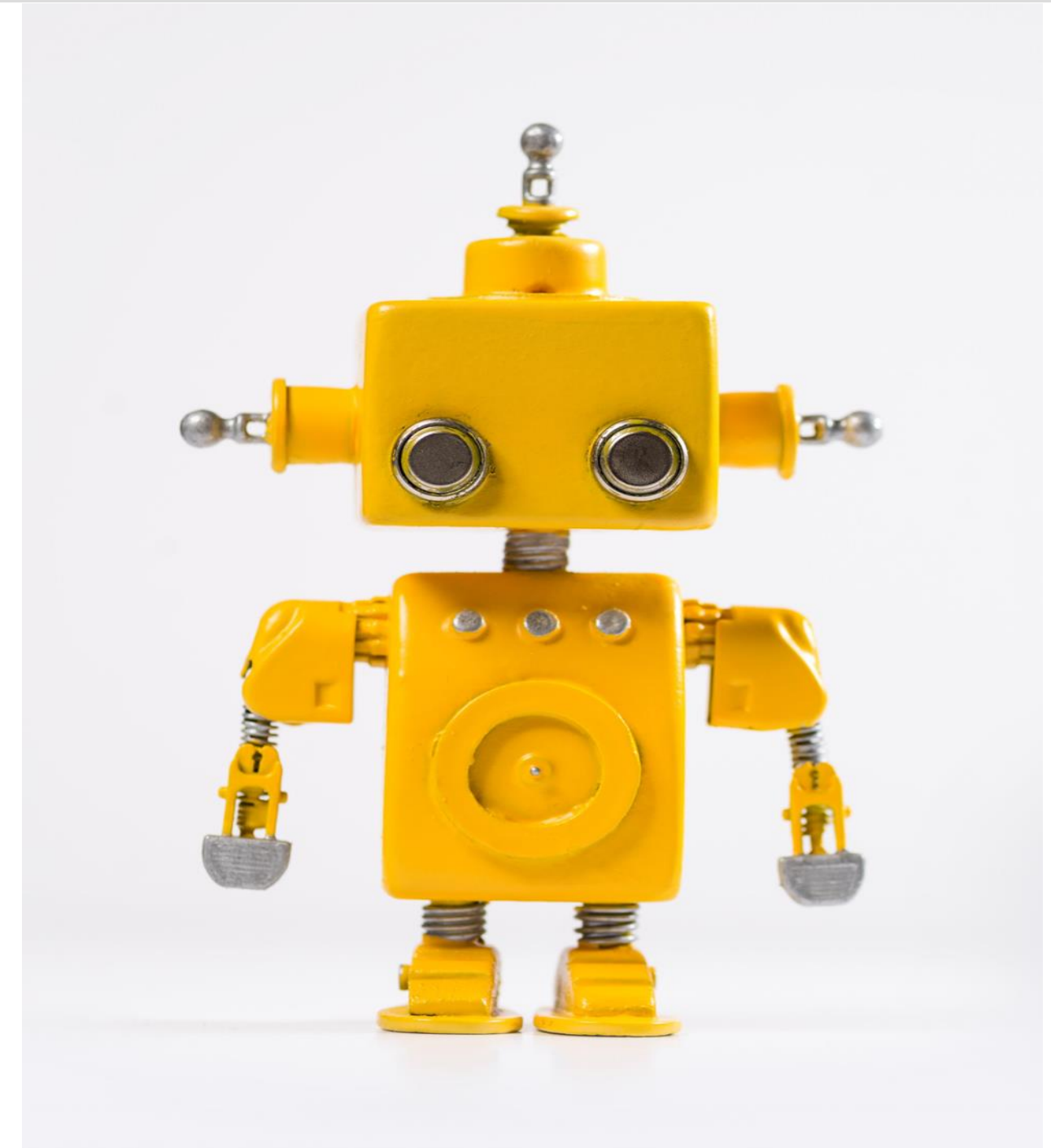
## Rule 1.6: Confidentiality of information

### ABA Model Rule 1.6:

**(a) A lawyer shall not reveal information relating to the representation of a client** unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

**See also ABA Model Rule 1.1 (Competence) – Comment [8]:** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ... .

ChatGPT website says “Don’t share sensitive info. Chats may be reviewed and used to train our models.”





# Disclosure of information

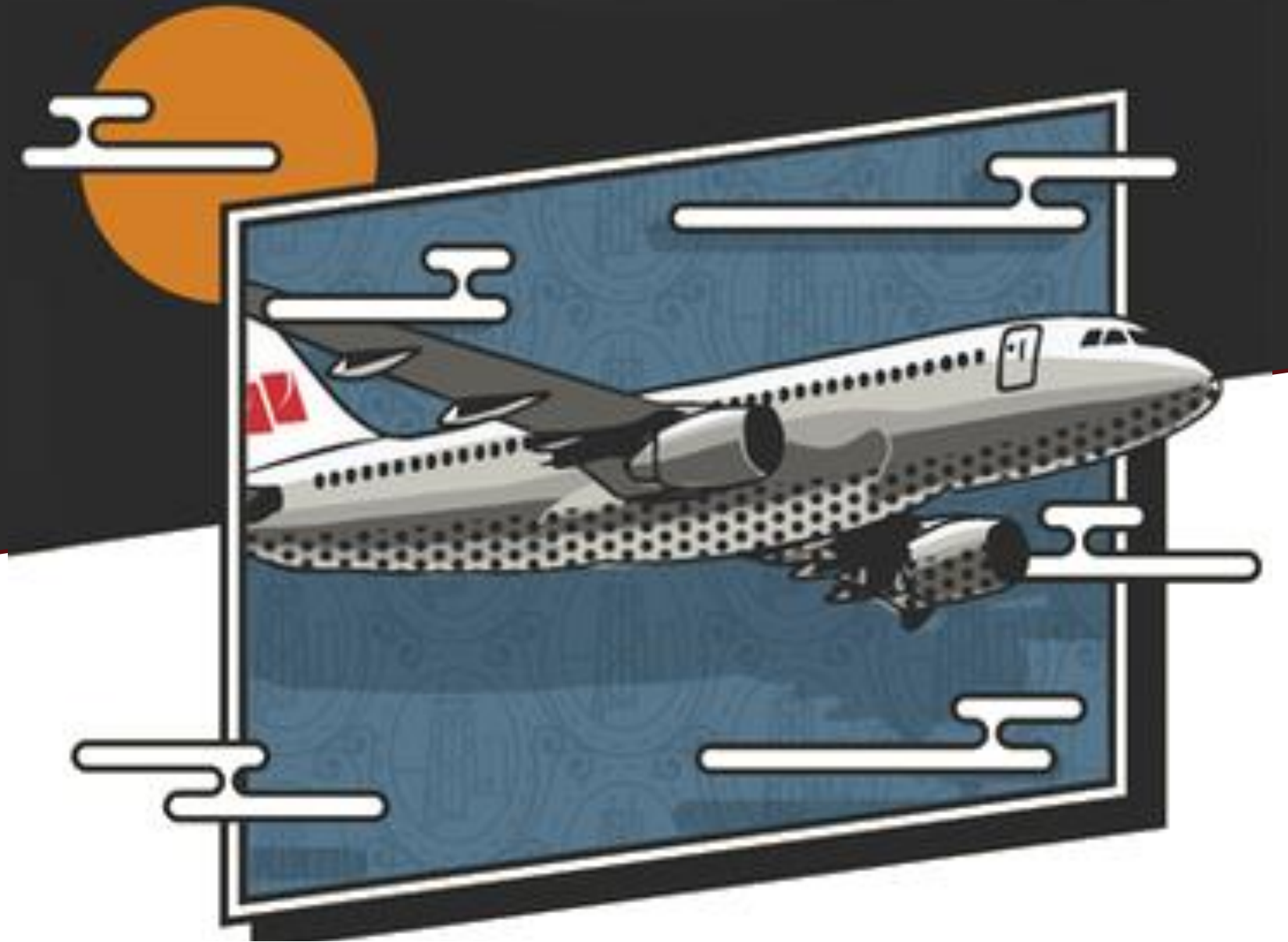
## Best practices

- ✓ Establish document retention and distribution rules
- ✓ Establish practices for privileged material to limit risk of disclosure:
  - Consider value and risk of written memoranda
  - Use executive sessions and one-on-one consultations (as permitted by law)
  - Use PRIVILEGED headings
  - Document management systems – strong authentication, firewalls, intrusion detection
- ✓ Always inform client of risks of inadvertent disclosure





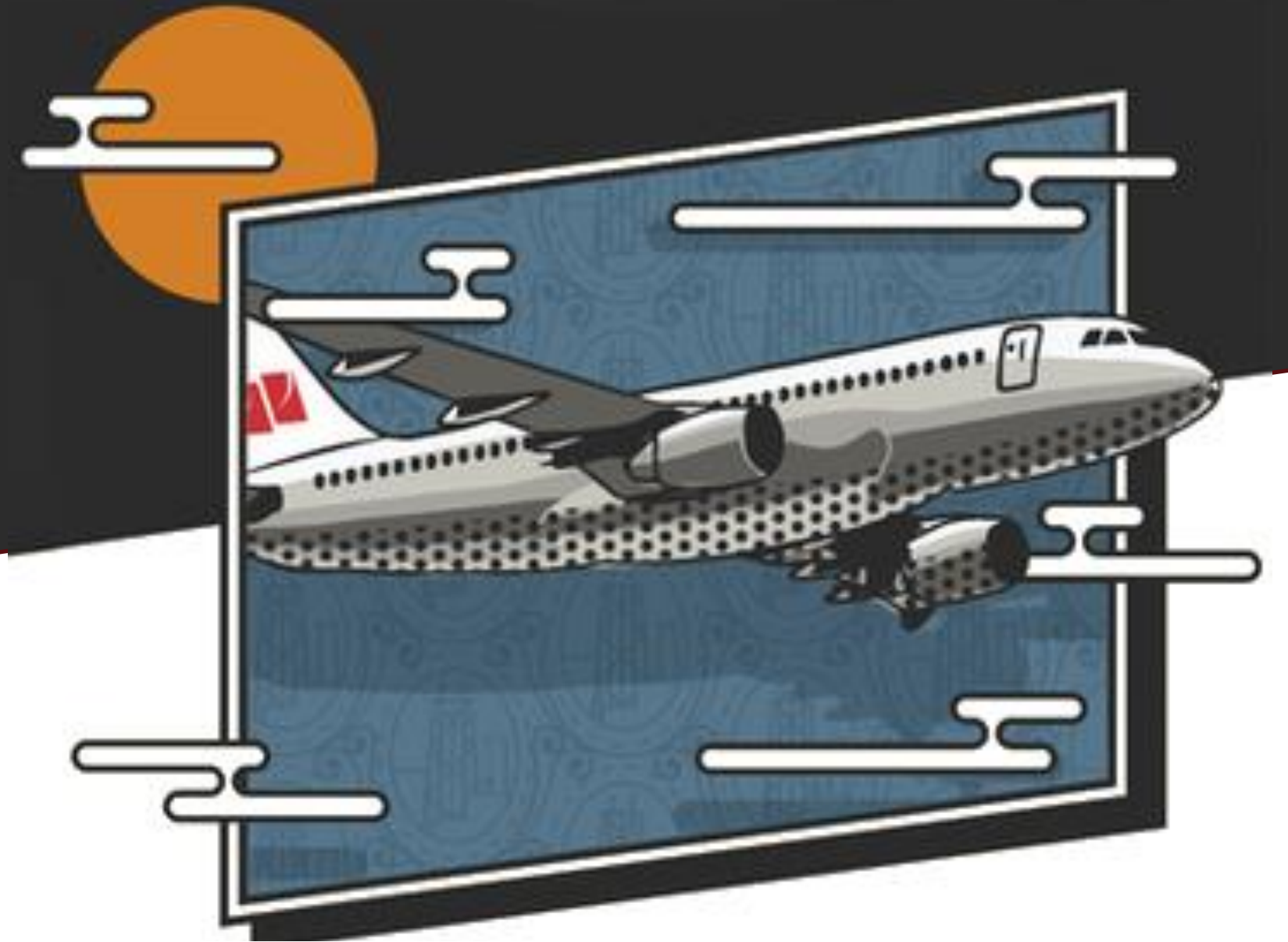
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# QUESTIONS?



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THANK YOU!