42nd Annual AAAE
Airport Law Workshop
Phoenix, AZ

Session #9

The Ethics of Advising Airport Boards: Herding Cats and Battling Mosquitoes

KAPLAN KIRSCH

American Association of Airport Executives
AAAE Delivers Service. Innovation. Results.

International Municipal Lawyers Association
Advancing Excellence in the practice of Local Government Law

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Today’s Session

- **Who is the client?**
  - The airport authority/entity versus individual officials
- **Executive session confidentiality**
  - Preventing and confronting disclosure of privileged advice
- **Divergent interests**
  - Addressing disputes within the organization
- **Counsel's role during governance disputes**
  - Defining counsel’s responsibilities to the board majority, minority members, staff, and the public
- ***Upjohn*-type warnings**
  - Explaining who counsel represents in disputes with individual officials

Ethics Can Be Fun

Text anonymous questions to 503-875-3000

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OK, maybe not always

Text anonymous questions to 503-875-3000

Some Caveats

- We discuss ABA Model Rules and ABA Opinions (and some state rules)
- Even states that adopt the Model Rules have their own interpretations and ethics opinions – *check them*
- Understand local culture and practice
  - Closed/executive session
  - Formality of communications
  - Reporting structure within the organization
- Rule texts provided for reference – we won't read them out loud

Who Is the Client? Some Practical Questions

- Who has the authority to direct action?
- Statements/demands by one Board member?
- Does it matter if those statements are in an open meeting?
- Harder questions when you're in-house
  - Looked to give organizational, not just legal, advice
  - Can't you make them…?

ABA Model Rule 1.13 Organization as a Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

…

(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 Formal Opinion 524 – affirmative obligation to report a violation of law or misconduct by an official to higher agency authority

Disclosure outside the organization only if necessary to prevent substantial injury to the agency

ABA Model Rule 1.13, Comment 9

"…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. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole."

Relationship with Client Staff/Officials

- Remember your client is the agency or entity – not the governing individuals
- Identify authorized officials – define the scope of representation in writing
    - Important to have clear understanding of who may give direction to the lawyer and the scope of that authority
- Take reasonable steps to correct officials' misunderstanding of the lawyer's obligations
- Remind officials early and often; dispel misunderstandings

(ABA Formal Opinions 514, 97-405; NYC Bar Formal Opinion 2025-1)

- No conflict exists when components of an agency disagree – unless the component has independent legal authority to act

(California Formal Opinion 2001-156)

State Variations

- Almost all states define the client of the government lawyer as the agency that employs the lawyer, unless expressly provided to the contrary by appropriate law, regulation, or order.
  - Similar principle applies to outside lawyers retained by the agency
- States diverge significantly on how a lawyer must handle internal wrongdoing (reporting up vs. reporting out), but they do not alter the fundamental premise that the entity is the client whose best interests must be protected.
- Identifying the higher authority is a matter of state administrative hierarchy.

Discussion

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Confidentiality

Confidentiality – Practical Considerations

- “Send me this, but don’t send it to the other Board members.”
  - Does the rationale matter?
  - It will confuse them.
  - I don’t want them to know.
  - I am the chair – if I want them to have it, I’ll send it to them.
- Attorney-Client Communications
  - Label clearly.
  - Impact of a commissioner or employee sharing
    - Argument that the privilege has been waived.
    - Loss of the power of a “secret.”
    - Can’t you make them…?
    - Confrontation is a key tool.

- Practical considerations
  - Know how to encrypt files.
  - Watch your redactions.
  - Know the public records redaction process.
  - Don’t load into AI unless it is a closed system.
- Special rules for SSI
  - Cover sheet in physical folder and virtual folder *with security.*

ABA Model Rule 1.6: Confidentiality

A lawyer shall not reveal information relating to the representation of a client unless

- The client gives informed consent,
- The disclosure is impliedly authorized to carry out the representation, **or**
- The disclosure is permitted by [an exception].

Exceptions:

- To comply with a law or court order
- To prevent death or bodily harm
- To prevent client from committing certain crimes or frauds
- To prevent, mitigate, or rectify injuries to certain financial or property interests
- Other specific instances in Model Rule

What is Confidential?

- **This should be easy, right?**
- Ask the client
- Check with local and state laws (including open records and open meetings laws)
- Consider professional definitions

What is Confidential for Airports?

Ethics rules confidentiality

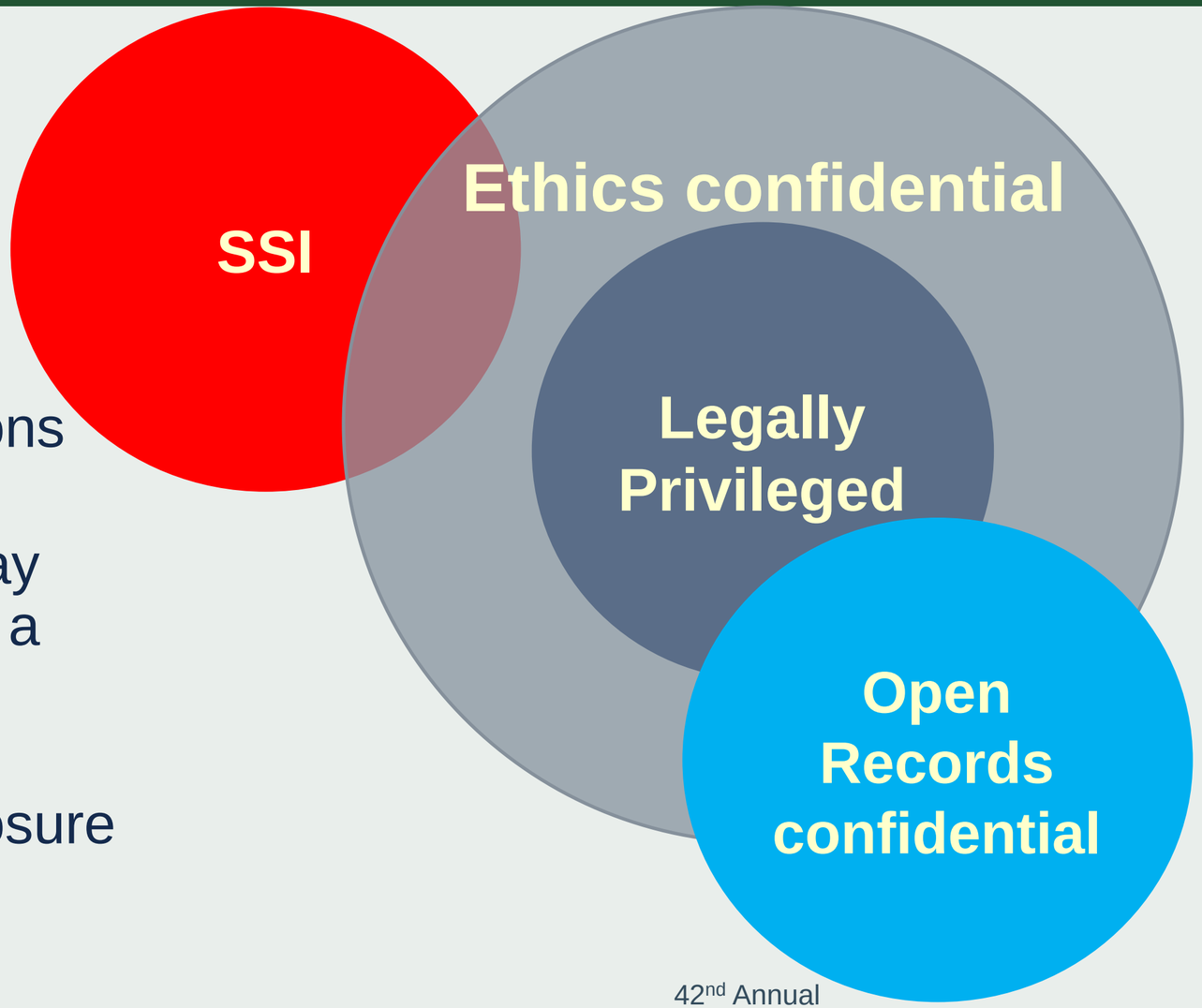
Privileged and confidential (state law)

Open Records Act confidentiality

Sensitive Security Information (SSI)

- May only be disclosed to covered persons with need to know
- Lawyer representing airport sponsor may have need to know to provide advice to a covered person
- Duty to store and handle information to prevent unauthorized access and disclosure

  (49 C.F.R. § 1520)



Other Confidentiality Obligations

- Government ethics rules
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Personally Identifiable Information (5 U.S.C. § 552a)
- Proprietary commercial/business information (Open Records Acts)
- Specific state laws on security information, law enforcement information, information received in confidence

Discussion

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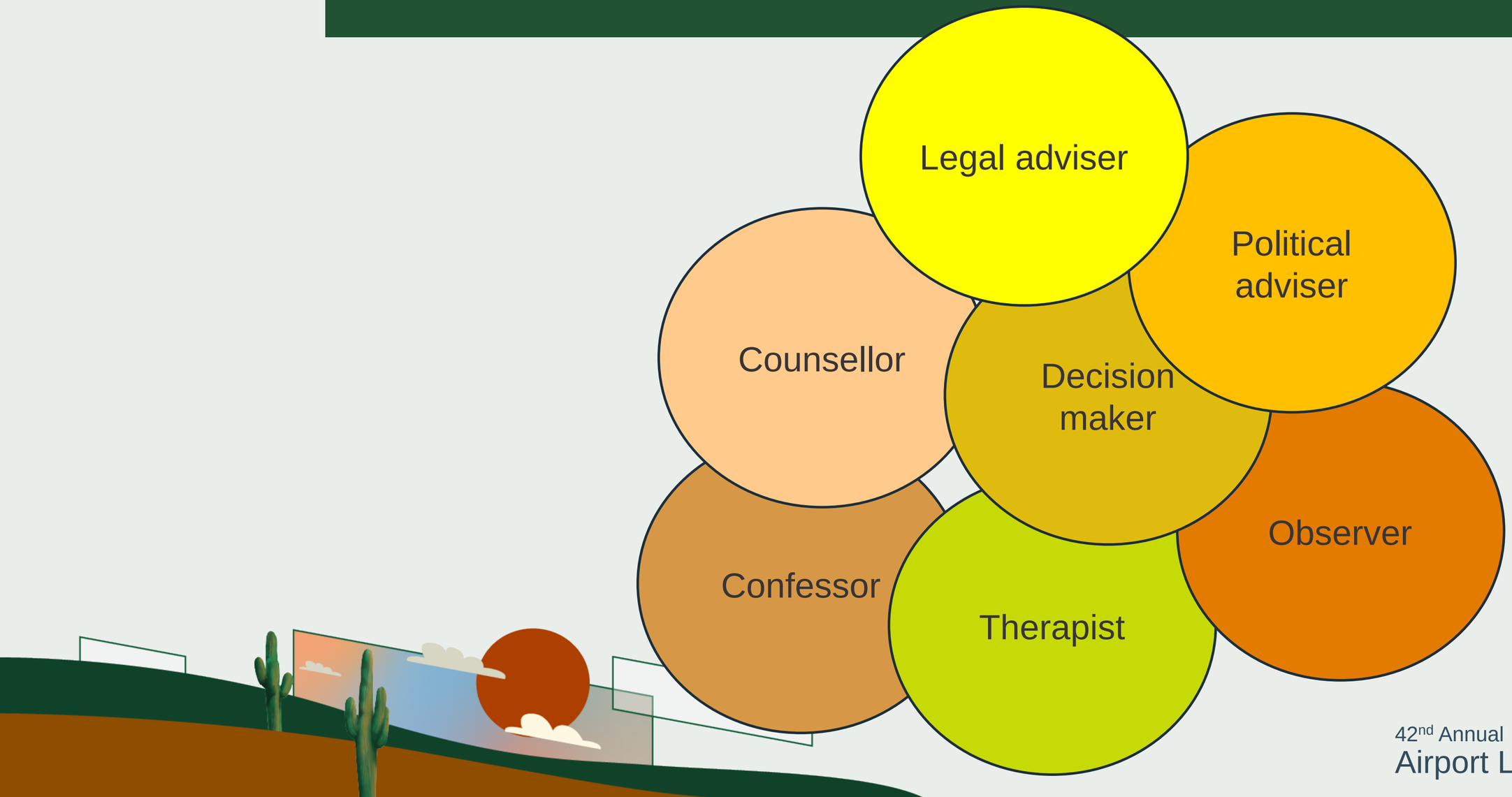
What is your role?



Counsel’s Role in Governance Disputes – Practical Considerations

- Mediator
- In-house counselor (heavy on the counseling)
- Organizational conscience
- Role of outside counsel
  - Messenger when in-house counsel can’t be
- Everyone wants to tell you things (and not tell you things)
  - “We didn’t have this conversation.”
  - You don’t represent them. (*Upjohn* discussion coming up)
- Perception of non-impartiality of counsel is a key issue
  - They’re right, but usually for the wrong reason: You represent the entity – you aren’t impartial.
  - They think in-house counsel is beholden to someone, has allegiances, loyalties, political ties, etc.
  - “You just don’t like me.”
  - Code words used: “professionalism”, “independence”, “protection”, “coverage”
    - These are valued and desired – until they’re not

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Representation of Government Entities

- Unique problems of a entity as a client
- The body's membership may change and it might therefore change its views
  - Entity in conflict with itself?
- Unlike a corporate board:
  - Not always respect governance vs. management distinction
  - Volunteers
  - Not always particularly sophisticated on legal, ethical, and related matters

* * *

- NJ Adv. Comm. on Ethics Op. 187 (1970): lawyer cannot take sides in disputes amongst members of the governing body (no conflict generally but be attentive)
- Michigan Ethics Op. RI-254 (1996): lawyer cannot prepare separate legal opinion for dissenting members of a body whose interests conflict with the majority (official) position

Upjohn Warnings

Upjohn Co. v. United States, 449 U.S. 383 (1981)

- *An **Upjohn*** **warning** is a statement given by an organization's lawyer to an employee during an internal investigation, clarifying that the lawyer represents the organization and not the individual employee.
- Privilege belongs to the organization, not the employee; the organization, not the employee can waive the privilege
- When this matters:
  - Internal investigation
  - Informal disputes (policy disagreements?) among Board members
  - Disagreement between Board and management

Some Practical Considerations

- More than just legal theory.
- Do they get their own lawyer (as a Board or as an individual)?
- Who gets the written investigation reports?
- What about the appointing bodies when a Board member is investigated?

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Questions?

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Thank You!

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