



Recent Legal Ethics Developments: You Make the Call

December 7, 2023

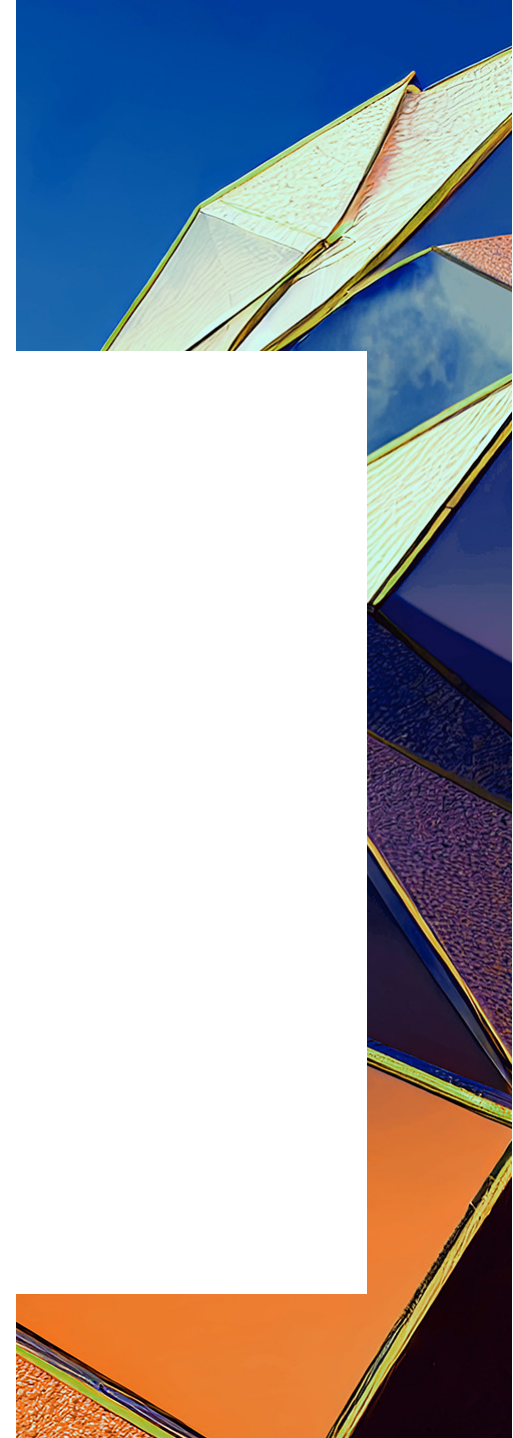
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Presenter



Eric G Pearson
Partner | Milwaukee

T: 414.319.7360
E: epearson@foley.com



Scenario #1 – Coming (Back) to America

- You are Akeem Joffer, the GC of MegaCorp, a multinational company and the world's leading provider of sanitation services to fast-food restaurants (including none other than McDowell's).
- You're a naturalized U.S. citizen.
- You're returning from Zamunda where you've been assisting the executive team with intensive merger negotiations.
- You return to the U.S. via Logan Int'l in Boston and proceed through customs with your luggage and work bag.



Scenario #1 – Coming (Back) to America

- After running through the typical customs questions (“Where are you coming from? Purpose of the trip? Anything to declare?”), the CBP officer picks up your work laptop, opens it, and presses the power button.
- **“We need to inspect this,” he declares. “Please enter the password.”**
- Your work laptop contains, among other things, confidential MNPI concerning the MegaCorp merger and privileged emails containing your advice to the executive team regarding certain litigation and environmental risks faced by MegaCorp’s merger target.



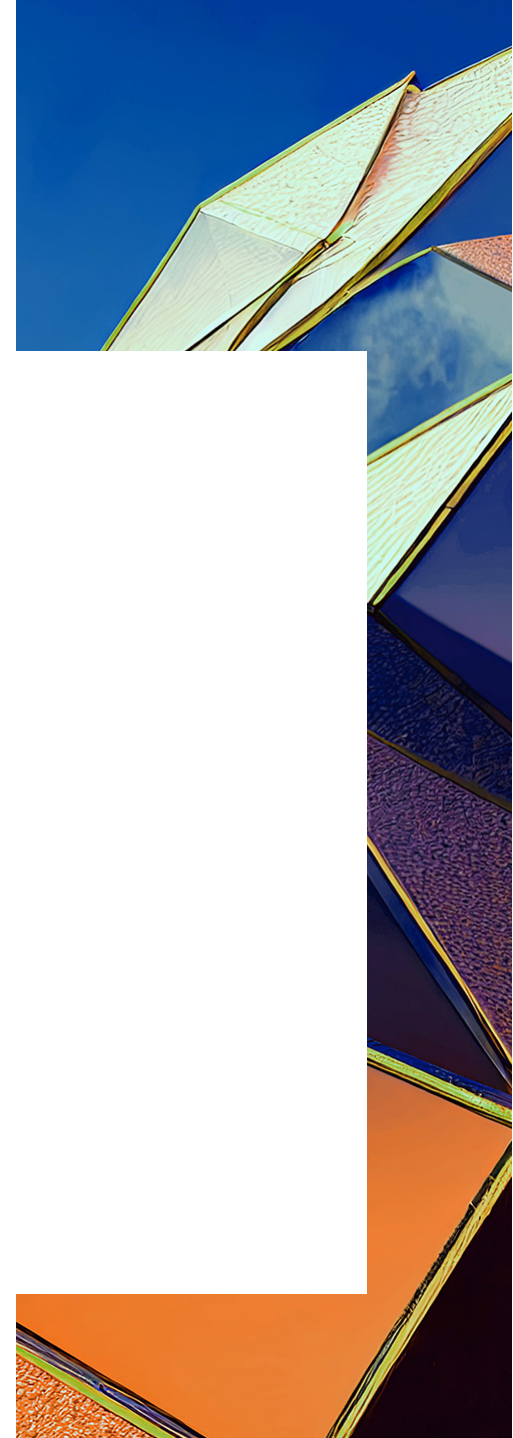
Scenario #1 – Coming (Back) to America



- ***What should you do?***
 - **Provide the password** and tell the border agent to “hurry up”; you need the laptop to send important emails during your next flight.
 - **Refuse any search.** Since you’re a U.S. citizen, the most that the agent can do is detain the laptop, not you.
 - Explain that you’re an attorney with privileged information on the laptop, but provide the password and **permit the search.**
 - Call King Jaffe and the rose-bearers.

Scenario #1 – Coming (Back) to America

- CBP Directive No. 3340-049A
- *United States v. Smith*, 22 CR 352 (S.D.N.Y. May 11, 2023)
- *Alasaad v. Mayorkas*, 988 F.3d 8 (1st Cir. 2021)



Scenario #2 – Preserving ESI

- You are the GC for the firm of Duke & Duke Commodities Brokers.
- Duke & Duke and its principals, Randolph and Mortimer Duke, were under investigation by the CFTC's Division of Enforcement for attempting an illegal corner of the market in FCOJ futures.
- The CFTC has brought an enforcement action in federal court.



Scenario #2 – Preserving ESI

- Traders involved in the alleged corner at Duke & Duke use, and continue to use, Google chat.
- Mindful of this, you know that you need to establish a litigation hold that covers Google chat.

	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV
4TH								
3RD		111	129	137	145	155	164	175
2ND		113	130	139	146	156	166	176
LAST		117	131	136	144	157	165	173
		122	133	141	147	155	166	175
PEN	102	112	127	135	140	150	161	172
GH		122	133	141	147	157	169	177
OW		110	125	134	140	149	158	167
T. PR.	98	112	129	134	142	156	165	174

Scenario #2 – Preserving ESI

- ***What steps should you take to preserve Google chat and avoid sanctions under FRCP 37?***
 - **Turn off Google chat** and insist that the traders communicate via paper memoranda.
 - **Instruct the traders not to use Google chat** to discuss matters relevant to the litigation, but remind them that, if they do, they should turn on the “history” feature to preserve the relevant chat. Document the steps that you’ve taken.
 - **Instruct IT to turn on the “history” feature** so that all of Google chat (relevant or not) is preserved. Given the volume, prepare to build your own data center.

Scenario #2 – Preserving ESI

- *In re Google Play Store Antitrust Litig.*,
21 MD 2981 (N.D. Calif. March 28, 2023)



"I am obligated to inform you that the dog applied our document retention policy to my homework."

Scenario #3



- You are George Bailey, President and CEO of South Bank of Southern Utah.
- Your outside counsel (who also happens to be your Uncle Billy) needs to use the bankruptcy court's ECF system to file a complaint objecting to the discharge of a customer's debts under the Bankruptcy Code.
- The complaint must be filed no later than April 22.

Scenario #3

- Uncle Billy logs on to the ECF system at 11:40 p.m. on April 22 to file the complaint.
- Due to his unfamiliarity with the ECF system and the system's complexity, the complaint is not filed until 12:16 a.m.
- Uncle Billy documents all this in a filing to the court and argues that the complaint should not be dismissed because the ECF system is "complicated" and delayed him.
- The claim is legitimate; the complaint was otherwise flawless.



"Thank goodness you're here—I can't accomplish anything unless I have a deadline."

Scenario #3



"CASE DISMISSED – I JUST REACHED RETIREMENT AGE!"

- **What is the bankruptcy court likely to do with the complaint?**
 - **Dismiss it.** A deadline is a deadline.
 - **Allow it.** The claim was legitimate; justice shall be done.

Scenario #3

- *State Bank of Southern Utah v. Beal*, 19-2043 (Utah Bankr.)
- *State Bank of Southern Utah v. Beal*, 20 CV 298 (D. Utah)
- *State Bank of Southern Utah v. Beal*, 21-4124 (10th Cir. Dec. 14, 2022)



"My incompetence will become the basis of your appeal."

Scenario #4 – The Gumshoe Lawyer

- You are Frank Columbo, outside counsel to the Special Credit Opportunity Fund, a litigation funder.
- The SCOF has been sued by an outside investment fund, claiming that it fleeced the investment fund out of millions of dollars.
- You subpoena a third party, the investment fund's administrator.
- The administrator produces 20 emails, one of which contains an old link to a Dropbox account where the investment fund stored its files.



Scenario #4 – The Gumshoe Lawyer

- You test the link and are surprised to find that it still works, *particularly because it's public*.
- No password or login was required.
- The Dropbox contains internal files for the investment fund that sued SCOF.
- One of the subfolders is named “Legal.”



“I mean, technically this IS a ‘No SQL’ database.”

Scenario #4 – The Gumshoe Lawyer

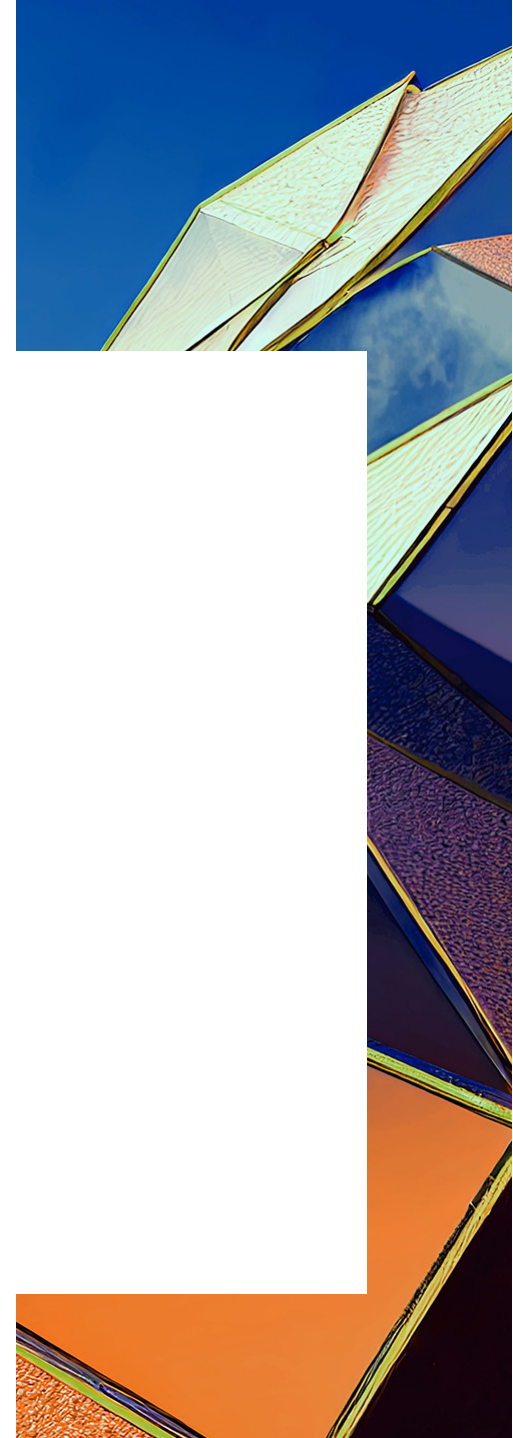


■ *What should you do?*

- This is an inadvertent disclosure. **Close the Dropbox immediately**, inform your opponent, and say three Hail Marys.
- **Don't access the "Legal" folder.** It might contain privileged material or work product. The rest is fair game because the Dropbox was public.
- **Call your trusty associate** and have him or her start digging!

Scenario #4 – The Gumshoe Lawyer

- *Pursuit Special Opportunity Fund v. KrunchCash*, N.Y. S. Ct., No. 651070/2022 (Oct. 4., 2023)



Scenario #5 – Here’s the story of a man named Brady...

- You are an inhouse lawyer (licensed in Wisconsin) for a large architectural firm.
- The firm and Mike Brady, one of the firm’s architects, has been sued for professional malpractice in Wisconsin.
- Mike is nervous. He had a hard time preparing for his deposition.
- During a break in the deposition, he asks you, “How do you think I’m doing so far?”

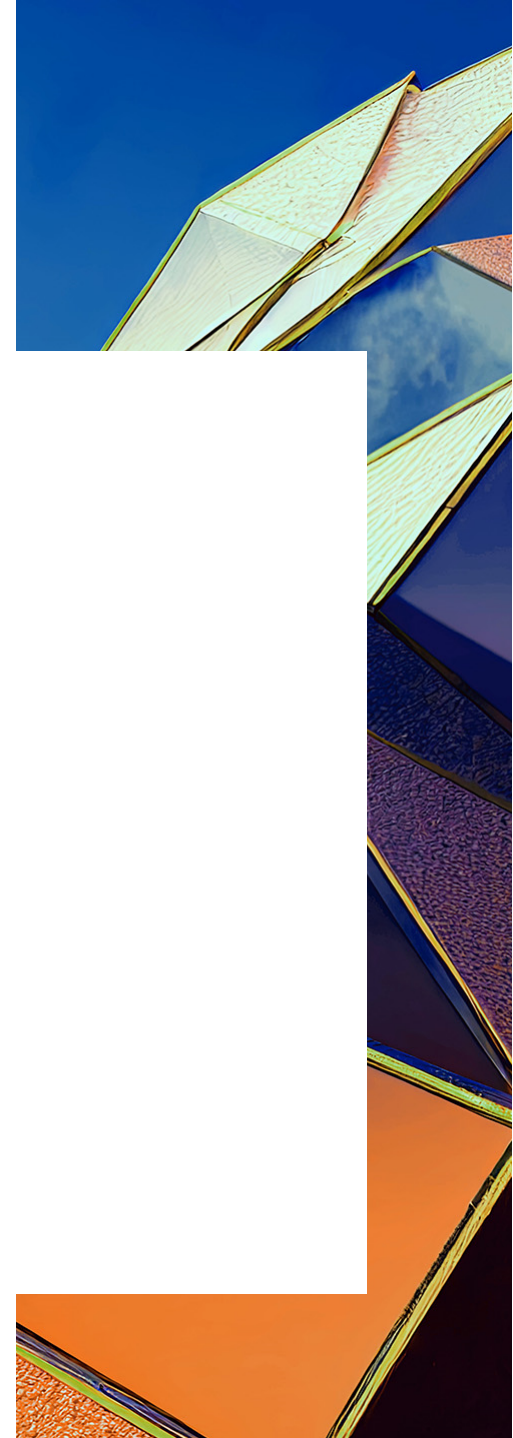


Scenario #5 – Here's the story of a man named Brady...

- You tell Mike to relax and to remember to wait for the questioning attorney to finish her question before answering.
- You also tell Mike to downplay the amount of time that he had to spend with outside counsel to prepare for his testimony.
- Preparation took much longer than it should have, given how nervous Mike was about testifying.

Scenario #5 – Here's the story of a man named Brady...

- ***Was your advice unethical?***
 - Yes.
 - No.



Scenario #5 – Here’s the story of a man named Brady...

- *Ecker v. Wisconsin Central Ltd.*, 2008 WL 1777222, at *3 (E.D. Wis. April 16, 2008) (“the mere fact that counsel ... conferred with the witness during a break after the [opposition] completed his examination does not warrant sanctions”).

Scenario #5 – Here's the story of a man named Brady...

- **ABA Formal Opinion 508**
- Examples of obvious things you can't do:
 - Winking at a witness
 - Kicking a deponent under the table
 - Passing notes or whispering to a witness mid-testimony
 - Instructing a witness not to answer while a question is pending (unless it's privileged)

Scenario #5 – Here’s the story of a man named Brady...

- Closer call:
 - “speaking objection” or “suggestive objection”
 - *See Otis v. Demarasse*, 399 F. Supp. 3d 759 (E.D. Wis. 2019) (Griesbach, J.)

Scenario #6 – Here's a different story...



- Shortly after he was subpoenaed for his deposition in the malpractice suit, Mike dropped by your office and told you that he failed to perform some critical structural calculations before the plans for the project at issue in the suit were finalized.
- He explained that there were a lot going on with his family at the time and that he was distracted.

Scenario #6 – Here's a different story...

- You advise Mike to testify honestly.
- You've also informed the firm's management committee, and they've confirmed, after conducting an internal investigation, that the relevant calculations were not in the file or incorporated into the plans.



Scenario #6 – Here's a different story...



- Yet during his deposition, Mike testifies that **he did perform** the calculations and incorporate them into the plans.
- When you confront Mike about this during a break, he insists that he was previously mistaken and now remembers running the calculations.
- You remind Mike about the importance of honesty and tell him that you have ethical obligations that may require you to take certain steps if he is lying.

Scenario #6 – Here's a different story...

- *Mike tells you to ...*
- ...and he does not change his testimony.
- You advise the management committee of this, but they ask you to soldier on with Mike's version of the events.

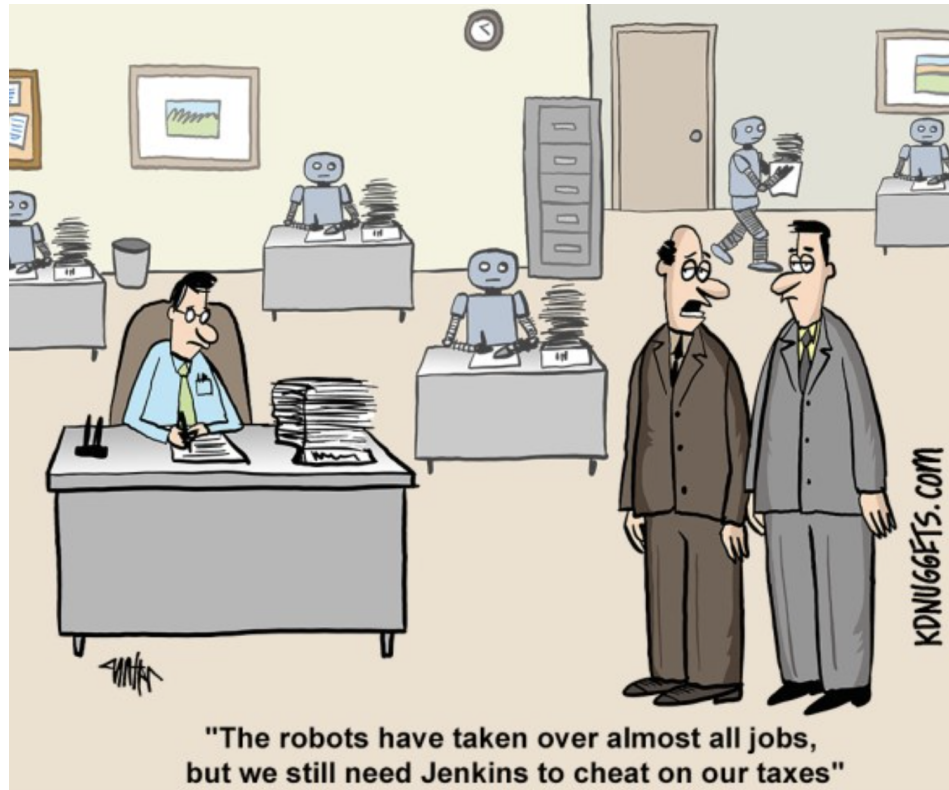


Scenario #6 – Here's a different story...



- ***What, if anything, must you do about this?***
 - Nothing. You advised Mike to testify honestly, and it's Mike Brady. He's as honest as they come. He must have misremembered when he first talked with you.
 - Withdraw. And prepare to retire to a home with an artificial lawn.

Scenario #7 – Artificial Intelligence



- You're a former Asst. DA who has recently moved into civil practice at a private firm.
- A new client (your first!) has hired you to prepare a motion to set aside a judgment in a civil case.
- You've never drafted such a motion before.
- You spend 6 hours looking through templates and other motions.
- Concerned that this is taking too long, you use ChatGPT to find case law that supports your client's position.

Scenario #7 – Artificial Intelligence

- ChatGPT produces some results for your motion, and you check them diligently.
- You remove cases that don't appear to offer support or that you can't seem to find in Westlaw or Lexis.
- You then file the motion.

Scenario #7 – Artificial Intelligence

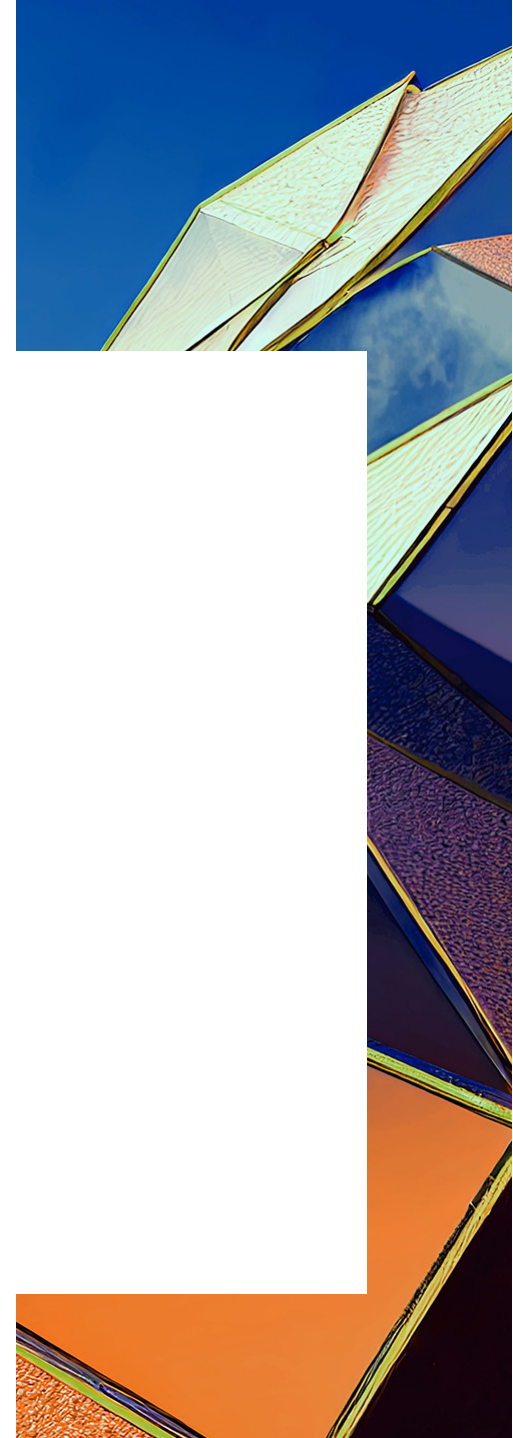
- ***Did you violate your ethical obligations?***
 - **Yes.** Use of ChatGPT is never appropriate for a court filing.
 - **No.** You checked the ChatGPT citations and thus satisfied your duties of competence and diligence.
 - **Maybe.** This is complicated.

Scenario #7 – Artificial Intelligence

- *People v. Zachariah C. Crabill*, 23 PDJ 067 (Nov. 22, 2023)
- 90-day suspension, with the remainder of his 366-day suspension to be stayed upon completion of a 2-year probation period

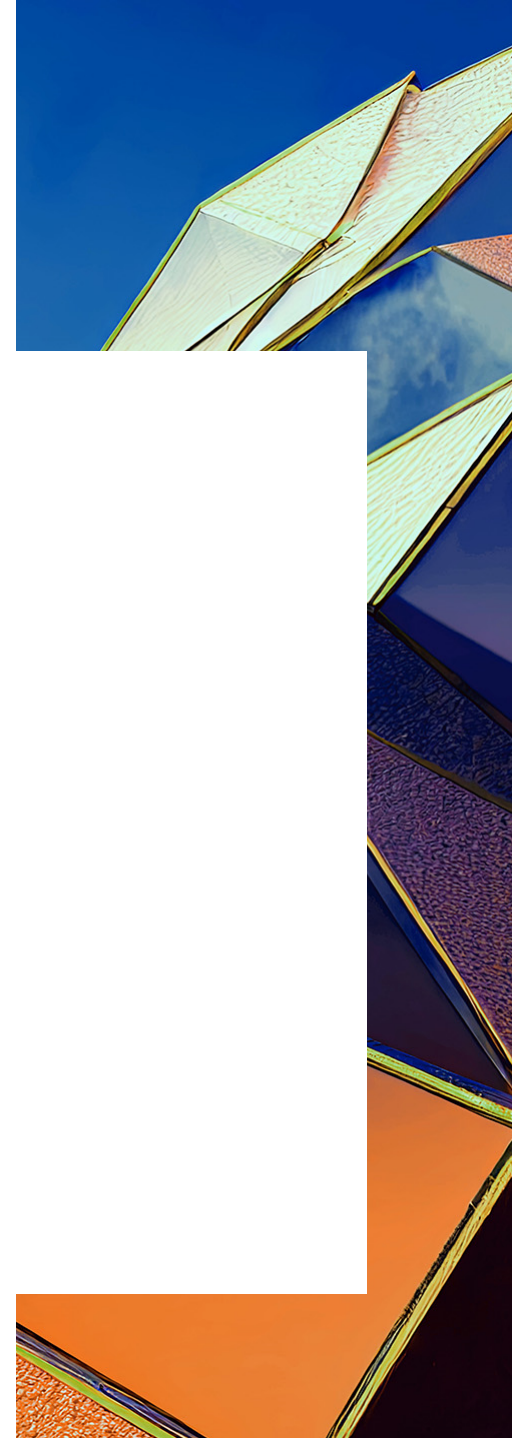
Scenario #7 – Artificial Intelligence

- *Mata v. Avianca*, No. 22 CV 1461 (S.D.N.Y. June 22, 2023)



Thank You

- Questions?



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