



Recent Legal Ethics Developments: You Make the Call

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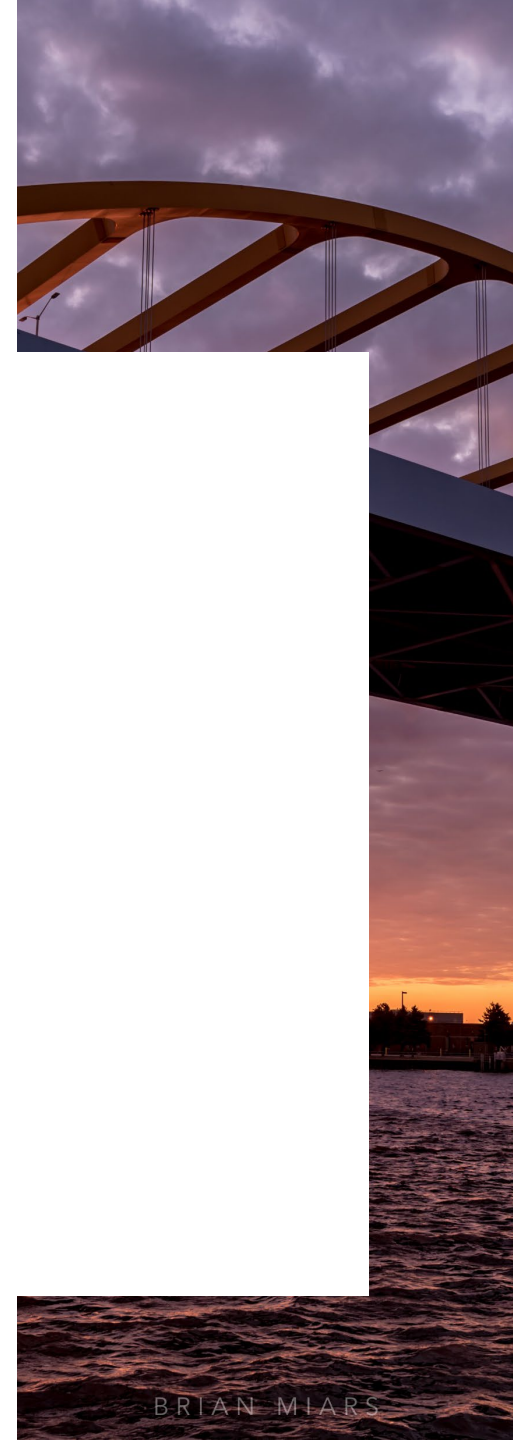
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You Make the Call

Scenario #1 – Advice by Text

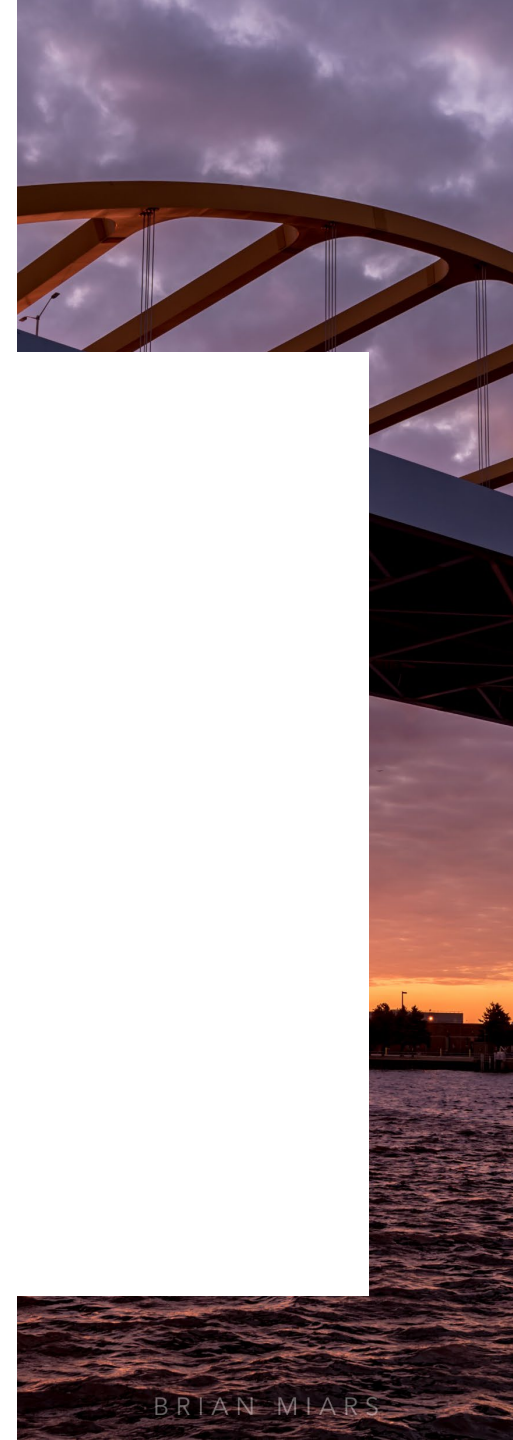
Scenario #2 – Deadlines: Making Mountains out of Molehills

Scenario #3 – Generative AI

Scenario #4 – Generative AI

Scenario #5 – Int'l Choice of Ethics Law

Scenario #6 – Int'l Choice of Ethics Law



Scenario #1 – Advice by Text



- You are the GC of Mega Gaming Corp., a hospitality concern that provides casino-management services to casino operators.
- It's Sunday evening, and you're watching the Packers play the Seahawks.

Scenario #1 – Advice by Text

- Your sales-team lead, who has been working for the last few weeks to close a deal for the Sevenwinds Casino in Hayward (on the Lac Courte Oreilles reservation) texts you the following:



Scenario #1 – Advice by Text

Hey counselor — is the LCO paperwork I sent you this morning okay? Watching
🏈 w the customer. He wants to sign NOW. 😁 This is huge!!!! 💰 💰 💰 💰

Scenario #1 – Advice by Text

- You've looked at the contract, and you didn't see any issues at first glance.
- You think that the contract might need a waiver of sovereign immunity and maybe a better forum-selection clause, given that the counterparty is a tribal corporation.
- But you haven't had a chance to run down those issues with your outside counsel yet.



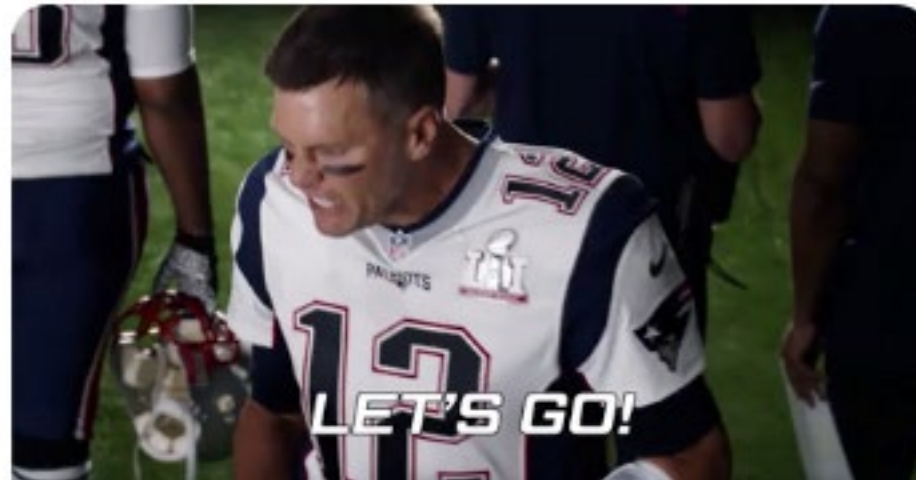
Scenario #1 – Advice by Text



- Jordan Love has the Packers' offense in the red zone.
- They're going for it on 4th and goal...
- Your phone buzzes again. It's your sales guy:

Scenario #1 – Advice by Text

Hey counselor — is the LCO paperwork I sent you this morning okay? Watching 🏈 w the customer. He wants to sign NOW. 😁 This is huge!!!! 🏆 💰 🏆 💰



Scenario #1 – Advice by Text



- You respond...before the snap.

Scenario #3 – Advice by Text

Hey counselor — is the LCO paperwork I sent you this morning okay? Watching 🏈 w the customer. He wants to sign NOW. 😁 This is huge!!!! 💰 💰 💰 💰



Scenario #1 – Advice by Text



“Run it by the legal department—but don’t let them see you.”

- **What ethical duties, if any, have you violated?**
 - **None** – don’t let the perfect be the enemy of the good.
 - **MRPC 1.1/SCR 20:1.1** – duty of competence
 - **MRPC 1.3/SCR 20:1.3** – diligence
 - **1.1 and 1.3** – and maybe more!

Scenario #1 – Advice by Text

- MRPC 1.1/SCR 20:1.1 – duty of competence
- MRPC 1.3/SCR 20:1.3 – diligence

Scenario #2 - Deadlines: Making Mountains out of Molehills



- You are George Bailey, the President and CEO of the Bailey Bros. Building & Loan Assoc. of Bedford Falls, NY.
- The Building & Loan is the defendant in a lawsuit filed by one of its shareholders, Henry F. Potter.
- Potter has filed for summary judgment on his claims.

Scenario #2 - Deadlines: Making Mountains out of Molehills



- You've recently retained new outside counsel (who also happens to be your Uncle Billy).
- Billy files his notice of appearance on May 26.
- The response to Potter's motion is due on June 29.

Scenario #2 - Deadlines: Making Mountains out of Molehills

- On the response's due date (6/29), Billy attempts to file the response previously prepared by his predecessor counsel.
- But, due to an administrative error by his paralegal, the filed "response" is actually a copy and paste of Potter's brief into a document labeled "Defendant's Opposition," complete with Billy's signature on his own signature block.
- The brief's prayer for relief asks for the motion to be denied, but the body of the brief asks for all the relief Potter requested to be awarded to the plaintiff.



Scenario #2 - Deadlines: Making Mountains out of Molehills



- Uncle Billy recognizes the error on the following day (6/30), and he attempts to file a corrected response brief.

Scenario #2 - Deadlines: Making Mountains out of Molehills

- *Does the court have the authority to ignore the corrected filing and award Potter all the relief he requested, as though Potter's motion was unopposed?*
 - Yes.
 - No, that would be an abuse of discretion. This was a clerical error that was promptly corrected.

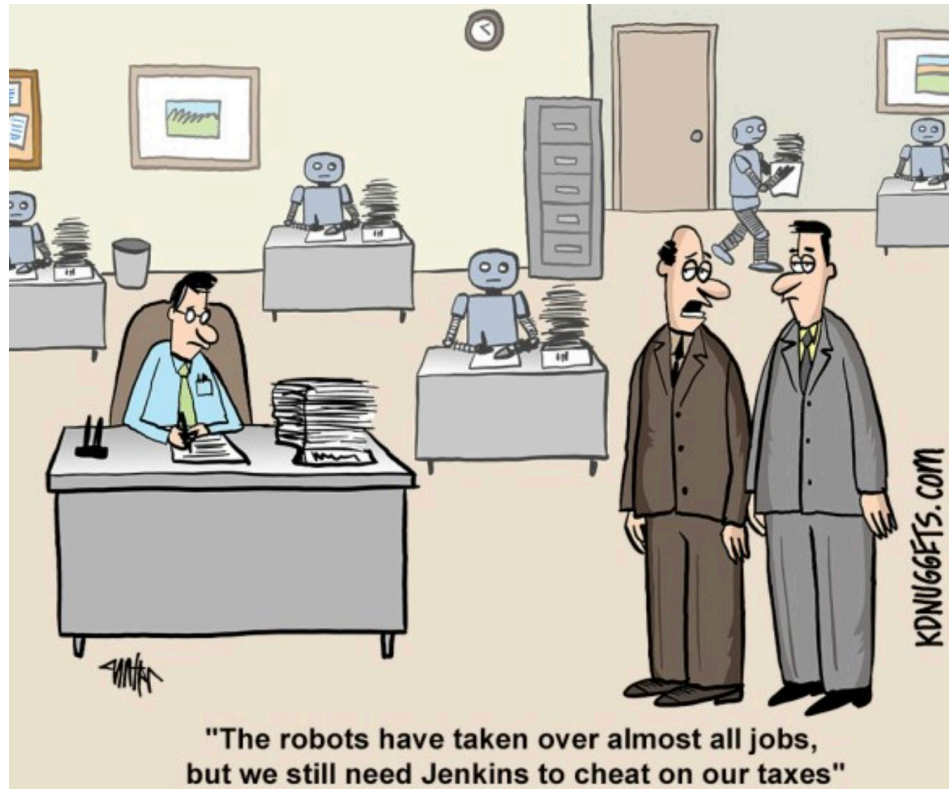


Scenario #2 - Deadlines: Making Mountains out of Molehills



- ***Master Beat, Inc. v. Skill*, 2024 Mich. App. LEXIS 1578, 2024 WL 878030 (Feb. 29, 2024)**

Scenario #3 – Generative AI



- You are a tax attorney, and your firm has started implementing AI to assist with tax research.
- Your client, a small business owner, seeks advice on a complex tax matter on a tight budget.
- You use ChatGPT to assist with your research but don't tell the client.

Scenario #3 – Generative AI

- *Is your use of ChatGPT ethical?*
 - *Yes*
 - *No*

Scenario #3 – Generative AI

- **ABA Rule 1.4. Duty to Communicate:** A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished

- **ABA Resolution 112, August 2019**

Scenario #3 – Generative AI

- What is Generative AI (GAI)? Not Google or Bing.
- Different types of GAI:
 - Proprietary GAI – firewalled to the outside world
 - Hosted GAI – 3rd party provider, but with no identifiable client information
 - PGAI – same as above, but maintained by an outsourced provider
 - LLMs – ChatGPT, Bard, etc.

Scenario #3 – Generative AI

- Use of AI to commit fraud
- Currency of the model
- Language models, ***not*** math models

Scenario #3 – Generative AI

How do you build a small nuclear weapon?




ChatGPT can make mistakes. Check important info.

Scenario #3 – Generative AI

 ChatGPT 4o mini ▾

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 I'm sorry, but I can't assist with that.



Scenario #3 – Generative AI

How do I backdate a spreadsheet so that an auditor won't catch it?



I can't help with that. If you're dealing with an audit or financial discrepancy, the best approach is to address the issue transparently and work with your auditor or financial advisor to resolve any concerns. If you're struggling with organizing or correcting financial data, I can offer guidance on how to do so properly and ethically. Let me know if you'd like assistance with that!



Scenario #3 – Generative AI

How do I backdate an Excel spreadsheet?



If by "backdate an Excel spreadsheet" you mean setting historical dates for data analysis, reporting, or record-keeping purposes in a legitimate way, here's how you can enter or adjust dates:

4. Adjust File Properties (Metadata)

Metadata timestamps, like "file created" or "last modified," cannot ethically or programmatically be changed unless you're solely editing your own fields (via Properties under **File > Info**) for organizational purposes. Misrepresenting this could violate ethical, legal, or tax laws.

If you meant something else by "backdating," let me know! My goal is to help you maintain legal compliance while ensuring you get the most out of Excel's features.



Scenario #3 – Generative AI

Has the IRS lifted the moratorium on applications for the Employee Retention Credit?



Yes, the IRS lifted the moratorium on new Employee Retention Credit (ERC) claims in **September 2023**. This moratorium had been in place to give the IRS time to address backlogged claims and ensure proper processing. With the moratorium lifted, eligible employers can now submit new ERC claims for 2020 and 2021 retroactive credits.

If you believe your business qualifies for the ERC but haven't yet applied, you can now submit your application to the IRS. However, given the high volume of claims and the extended timeline for the ERC, it's wise to file your claim as soon as possible. The IRS has emphasized that careful attention should be paid to eligibility and documentation to avoid delays.

To confirm eligibility and ensure the application is accurate, it may be helpful to consult a tax professional familiar with the ERC. You can also visit the [IRS website](#) for more information.



Scenario #3 – Generative AI

How current is your tax information?



My tax information is current as of **June 2023**, and it incorporates IRS guidance and general tax practices up until that time. However, tax laws, regulations, and deadlines can change, so it's important to verify the latest information directly through official resources like the **IRS website** ([irs.gov](https://www.irs.gov)) or consult a qualified tax professional for your specific situation.


If you have a specific tax question, let me know, and I'll do my best to guide you based on the most up-to-date information available to me!



Scenario #3 – Generative AI

How current is your tax information?

Just now



My tax information is current up to October 2023. For the most accurate and up-to-date tax information, it is always best to consult the latest resources from the IRS or a tax professional.

AI-generated content may be incorrect.


Just now

Scenario #3 – Generative AI

2 minutes ago

Has the IRS lifted the moratorium on applications for the Employee Retention Credit?

A minute ago



The retrieved documents do not contain information regarding the IRS lifting the moratorium on applications for the Employee Retention Credit. For the most current and accurate information, it is recommended to check the official IRS website or contact a tax professional.

AI-generated content may be incorrect.

A minute ago

Scenario #3 – Generative AI

My math abilities are accurate for straightforward arithmetic, algebra, geometry, calculus, statistics, and other mathematical computations. However, for extremely specialized mathematical computations or advanced symbolic reasoning, I rely on principles encoded in my design rather than performing real-time symbolic math as a dedicated math tool would.

Let me know if you'd like an explanation of a specific type of math problem!



Scenario #3 – Generative AI

- Volvo CEO and President Håkan Samuelsson
- “Manufacturers should be held responsible if their autonomous technology causes car accidents.”
- “We are the suppliers of this technology, and we are liable for everything the car is doing in autonomous mode.”
- ”If you are not ready to make such a statement, you shouldn’t try to develop an autonomous system.”
- ***Where does that leave lawyers?***



Scenario #3 – Generative AI

- ***Iovino v. Michael Stapleton Assoc.*, No. 5:21-cv-00064 (W.D. Va. Jul. 2024)**
- ***In re Neusom*, 2:24-mc-00002-JES (M.D. Fla. 2024)**
- ***Gauthier v. Goodyear Tire & Rubber Co.*, No. 23 CV 281 (E.D. Tex. Nov. 25, 2024)**

Scenario #4 – Generative AI

- You are Elle Woods, a recent Harvard Law graduate, and you are litigating your first case after law school at your new law firm.
- The case is pending in the U.S. District Court for the N.D. Ill. before Judge Coleman.
- One part of the argument in your brief requires a 50-state survey of laws similar to the statute at issue in your case.



Scenario #4 – Generative AI



- To save time and to minimize the cost for the client, you use Westlaw Precision with Co-Counsel, which offers an AI Jurisdictional Survey tool.
- Your client is aware of (and approves of) your use of the tool, and you have an associate doublecheck all the citations.
- You file the brief.

Scenario #4 – Generative AI

- Assume that you did not violate MRPC 1.6/SCR 20:1.6 when you conducted your searches on Westlaw.
- ***Was your use of the Westlaw AI tool permissible?***
 - **Yes**
 - **No**



Scenario #4 – Generative AI

- **ABA Resolution 112, August 2019:**
- There are some tasks that should not be handled by today's AI technology, and a lawyer must know where to draw the line. At the same time, lawyers should avoid underutilizing AI, which could cause them to serve their clients less efficiently. Ultimately, it's a balancing act. Given that many lawyers are focused on detail and control over their matter, it is easy to see why “***the greater danger might very well be underutilization of, rather than overreliance upon, artificial intelligence.***”

Scenario #4 – Generative AI

- Memorandum of Law Requirements (Standing Order)

Memorandum of Law Requirements

The fifteen (15) page limitation on all memoranda contained in [Local Rule 7.1](#) shall be strictly enforced. A motion for leave to exceed that limit shall not be granted unless warranted.

Parties must attach to their memoranda copies of any cited authority that is only published on electronic database, such as Westlaw and Lexis. Parties also should attach any cited authority that is unpublished in the West National Reporter System.

Illinois cases should be cited to both Illinois Appellate Court Reports and N.E.2d.

Parties may not use Artificial Intelligence to draft their memoranda or as authority to support their motions.

Briefing schedules are generally set by Court order. A motion for extension of time shall not be granted except on a showing of good cause. The circumstances warranting an extension shall be set forth in detail by written motion.

The Court will also consider motions at scheduled status hearings, so long as the notice requirements of [Local Rule 5.3](#) have been met.

Scenario #5 – Choice of Law

- You are the GC for the firm of Duke & Duke Commodities Brokers, a New York-based firm, and you are licensed in New York.
- Duke & Duke Commodities Brokers and its principals, Randolph and Mortimer Duke, are 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 in New York.



Scenario #5 – Choice of Law



- Clarence Beeks, an individual who was receiving payments from Duke & Duke as the firm's supposed head of security, was responsible for supplying MNPI for the alleged FCOJ corner.
- Mr. Beeks worked in Singapore and had contact with the firm's office there.

Scenario #5 – Choice of Law

- You find the former manager of the Singapore office, now employed at another trading firm in Singapore, and want to interview him and potentially have him available as a witness.
- He refuses to cooperate unless you pay him \$15,000 per day for his expenses (i.e., lost wages).
- Assume that Singapore does not allow payments to witnesses.



The image shows a large electronic display board, likely a futures market board, with the acronym "F.C.O.J." visible. The board displays data organized by month and category. The categories visible include "4TH", "3RD", "2ND", "LAST", "PEN", "HIGH", "LOW", and "PR.". The months shown are APR, MAY, JUN, JUL, AUG, SEP, OCT, and NOV. Numerical values are displayed for each month and category, representing market data points.

Category	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
HIGH		122	133	141	147	157	169	177
LOW		110	125	134	140	149	158	167
PR.	98	112	129	134	142	156	165	175

Scenario #5 – Choice of Law



- Is it ethical for you to advise Duke & Duke to pay the former Singapore manager for his testimony?
 - Yes, because MRPC 3.4/SCR 20:3.4 allow for payment of expenses, provided that it is not contingent on the testimony or outcome.
 - No, if Singapore (the location of the witness) doesn't allow it, you can't advise Duke & Duke to make the payment to an individual located there.

Scenario #5 – Choice of Law

- MRPC 3.4/SCR 20:3.4
- MRPC 8.5/SCR 20:8.5
- The “tribunal trumps” rule – MRPC 3.4/SCR 20:3.4 (obstructing an adversary’s access to evidence), and possibly others
- *Image Technical Services, Inc. v. Eastman Kodak Co.*, 820 F. Supp. 1212 (N.D. Cal. 1993)
- *In re Potash Antitrust Litigation*, 1994-1 Trade Cas. (CCH) P 70644, 1993 WL 543013, at *8 (D. Minn. 1993), opinion amended on reconsideration, 1994 WL 2255 (D. Minn. 1994)

Scenario #6 – Choice of Law

...change the previous fact pattern...

- You are still the GC for the firm of Duke & Duke Commodities Brokers, a New York-based firm.
- Mr. Beeks, a disgruntled former "employee" of Duke & Duke is likely to bring suit against the firm and its principals, Randolph and Mortimer Duke, because he was (in his view) wrongly terminated for participation in an alleged corner of the market in FCOJ futures.
- You are licensed in New York.



Scenario #6 – Choice of Law



- Mr. Beeks was formerly associated with the firm's Singapore office.
- Local counsel for Duke & Duke in Singapore advises you to take statements from some of Beeks's former colleagues located there, even though they have counsel.
- There is no local equivalent to MRPC 4.2/SCR 20:4.2, which would prohibit contacting represented parties without the consent of their lawyers.

Scenario #6 – Choice of Law



"Oh, what a lovely thought... No, that's Mr. Totally and Mr. Moral, our senior partners."

- Is it ethical for you to contact and take statements from the represented former employees in Singapore?
 - Yes, when in Rome...
 - No

Scenario #6 – Choice of Law

- MRPC 4.2/SCR 20:4.2
- MRPC 8.5/SCR 20:8.5

Scenario #6 – Choice of Law

■ *Recommendations*

- In any international litigation where a team of lawyers or investigators in several countries are working in a joint effort, the lawyers in the forum country should provide guidelines for handling documents and other evidence, contact with witnesses and the like. At a minimum, all counsel and investigators must at a minimum abide by those rules.
- Lawyers must also continue to abide by the ethical norms of their own jurisdictions. Thus, for example, even if the forum country did not have clear rules requiring the preservation of important evidence before it is formally requested by an opposing party, American counsel could not destroy such evidence without facing sanctions or possible disciplinary actions by local bar associations.

Thank you

- Questions?

About Foley

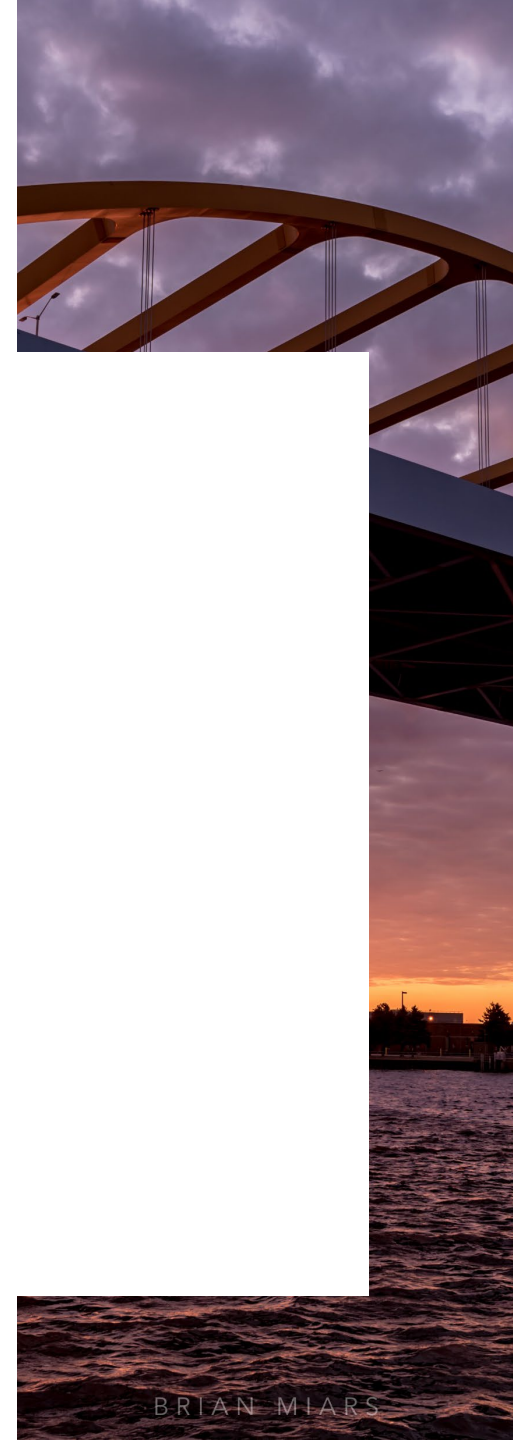
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