



2022

CLE Week

December 5-16, 2022



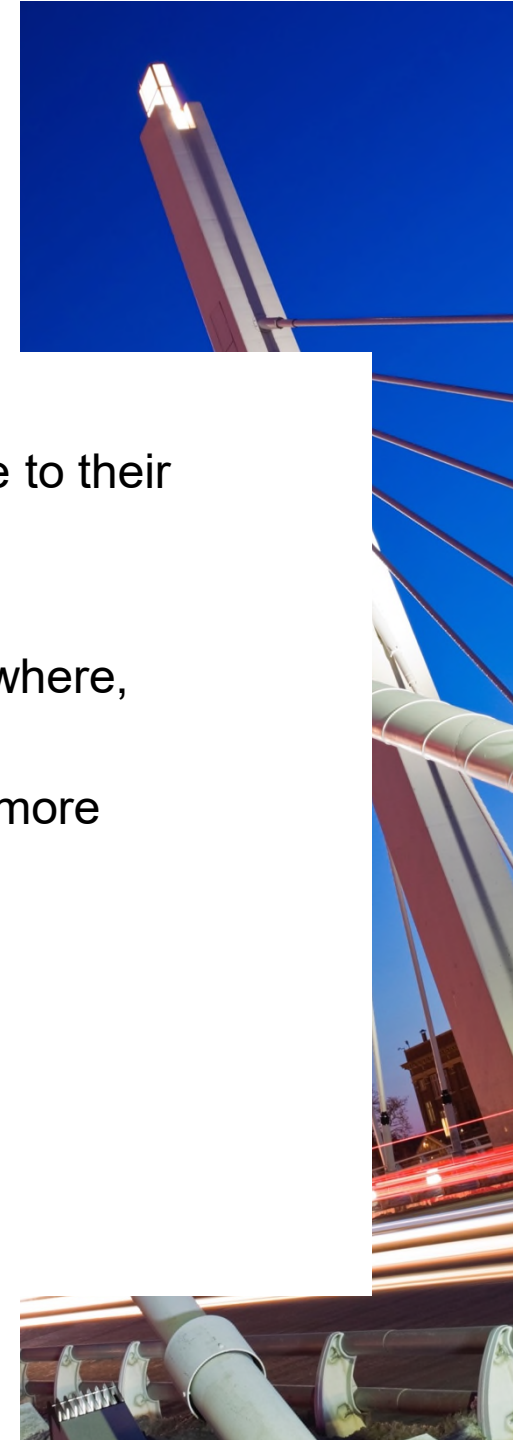
Civility In the Practice of Law

- Roadmap
 - It Starts with the Oath
 - Examples of Bad Behavior
 - Rules Implicated
 - What to Do?



It Starts with the Oath

- American Board of Trial Advocates recently started urging states to add civility language to their oaths.
 - WHY DO WE NEED THIS?
 - Civility used to be a given, but...current culture of political division = incivility everywhere, including in the legal profession.
 - Discourtesy, hostility, and other unprofessional conduct prolong litigation making it more expensive for litigants and the court system.
 - It's not just litigation: incivility interferes with transactions of every kind.



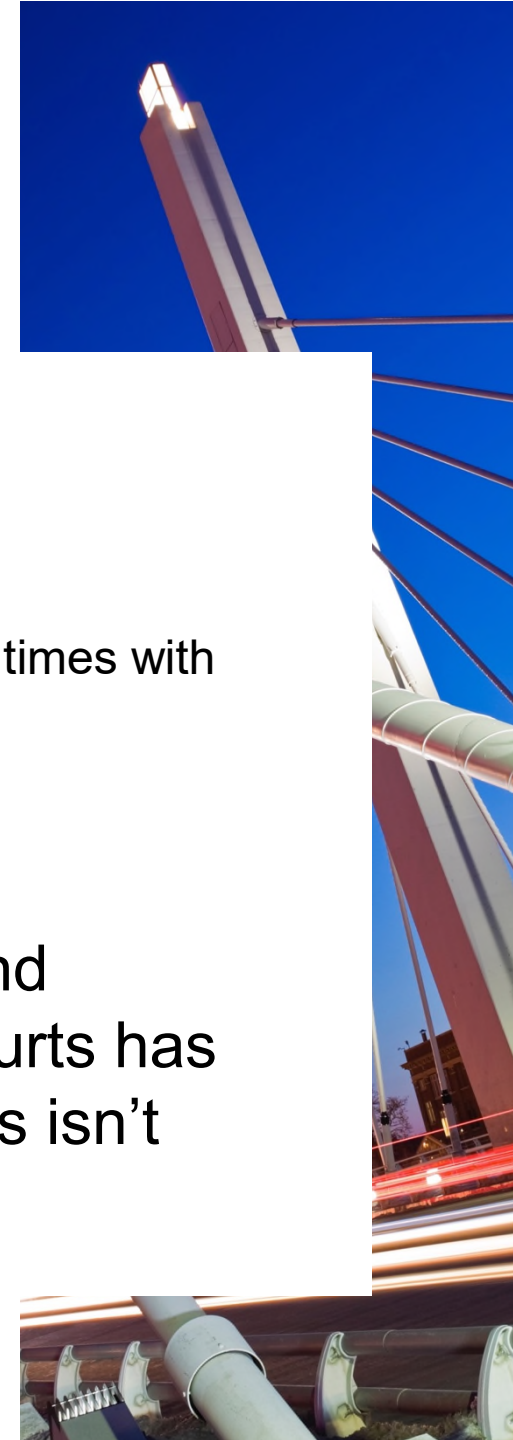
Every Oath Should Address Civility

- According to the ABA, each state's oath should require attorneys to “conduct oneself with [integrity and civility](#).”



Sample Oath

- California Rule of Court 9.7 (took effect May 2014)
 - Added new language to the attorney oath of admission in 2014.
 - Must swear or affirm: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity."
 - Almost half the states have civility oaths, but there is a general consensus this is not enough
 - "The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are." (*In re Mahoney* (2021) 65 Cal. App.5th 376.)



Examples of Bad Behavior

- *The Stories You Are About To See Are True. The Names Have Been Changed To Protect The Innocent.*



The Keyboard Warrior



From: Nnice@nicelaw.com
Sent: Thursday, September 1, 2022 12:07 PM
To: Acrooked@crokedlaw.com
Subject: Case Name, Case No.

Dear Mr. Crooked,

We are in receipt of the Demand for Arbitration submitted by you to the Kelly County JAMS Local Center. However, the Mutual Dispute Resolution Agreement signed by your client states that “[t]he arbitration shall be administered by JAMS in the county in which the dispute arose.” As you know, the dispute arose in Boone County and not in Kelly County. Please either request for the arbitration to be transferred to the JAMS Local Center in Boone County or withdraw this Demand for Arbitration and re-file in Boone County.

Sincerely,
Nancy Nice

From: Acrooked@crokedlaw.com
Sent: Thursday, September 1, 2022 12:10 PM
To: Nnice@nicelaw.com
Subject: Re: Case Name, Case No.

Or what?

Sent from my T-Mobile 5G Device

What Would You Do?

- How would you respond to this email?
 - Ignore?
 - Escalate?
- How did Nancy Nice respond to this email?



Here's What Nancy Did ...

From: Nnice@nicelaw.com

Sent: Thursday, September 1, 2022, 12:30 PM

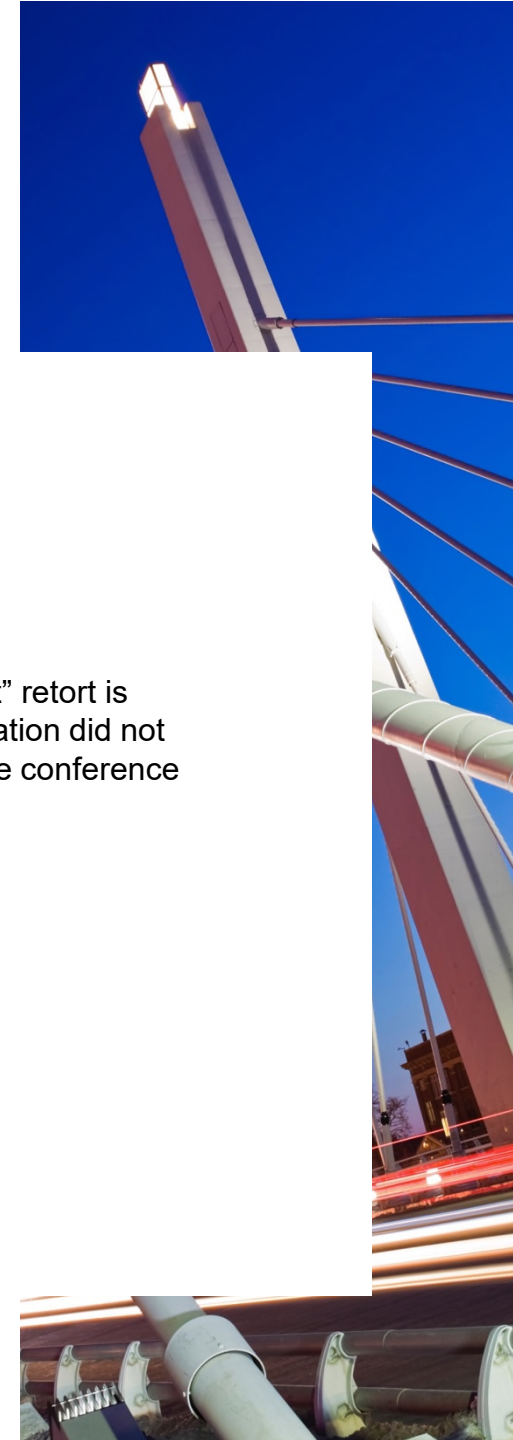
To: Acrooked@crokedlaw.com

Subject: Re: Case Name, Case No.

It is the expectation of the State Bar, and of me personally, that attorneys treat each other with respect. Your playground “or what” retort is inappropriate. My email did not make a threat, but simply outlined the terms of the contract, and noted that the Demand for Arbitration did not adhere to those terms. If you do not agree to move the arbitration to the proper venue, Respondents will request an administrative conference pursuant to Rule 6(a) of the JAMS Employment Arbitration Rules & Procedures. Please let us know.

Best,
Nancy Nice

- What do you think happened next?
 - Crooked apologized?
 - Crooked escalated?



Here's What Happened Next

From: Acrooked@crokedlaw.com

Sent: Thursday, September 1, 2022 12:34 PM

To: Nnice@nicelaw.com

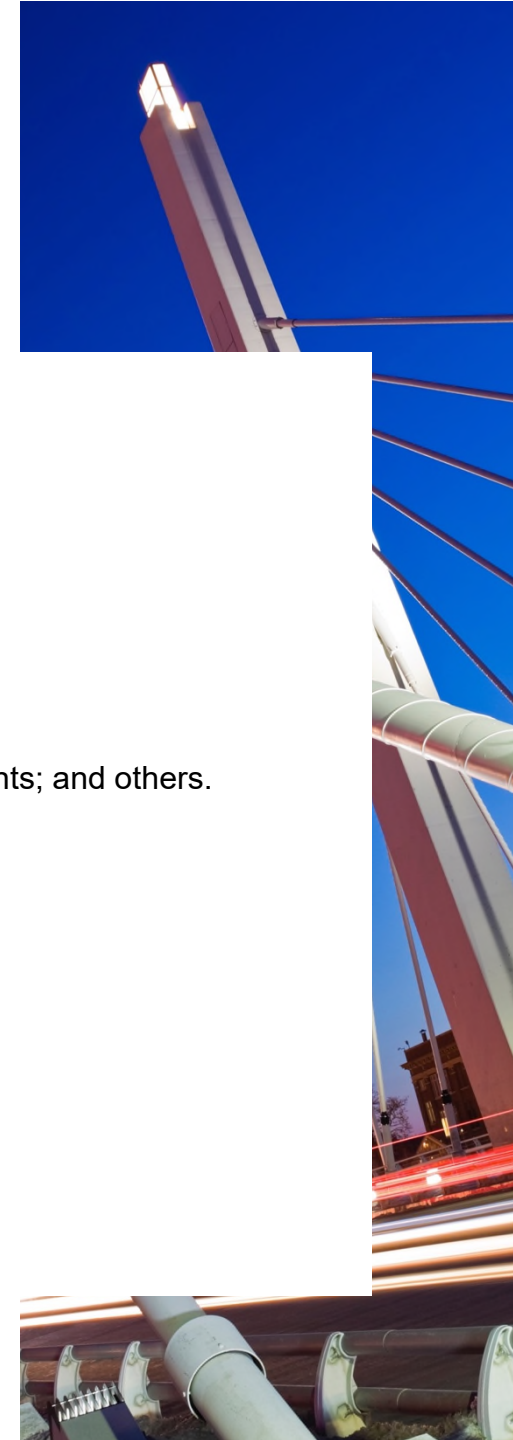
Subject: Re: Case Name, Case No.

Spare me your lessons on professionalism or on anything for that matter. I asked you a question, get over yourself.

Rather than waste my time with this dribble, you should be asking yourself whether you are acting in the best interest of your clients; and others.

Do whatever you have to, we are unmoved.

Sent from my T-Mobile 5G Device



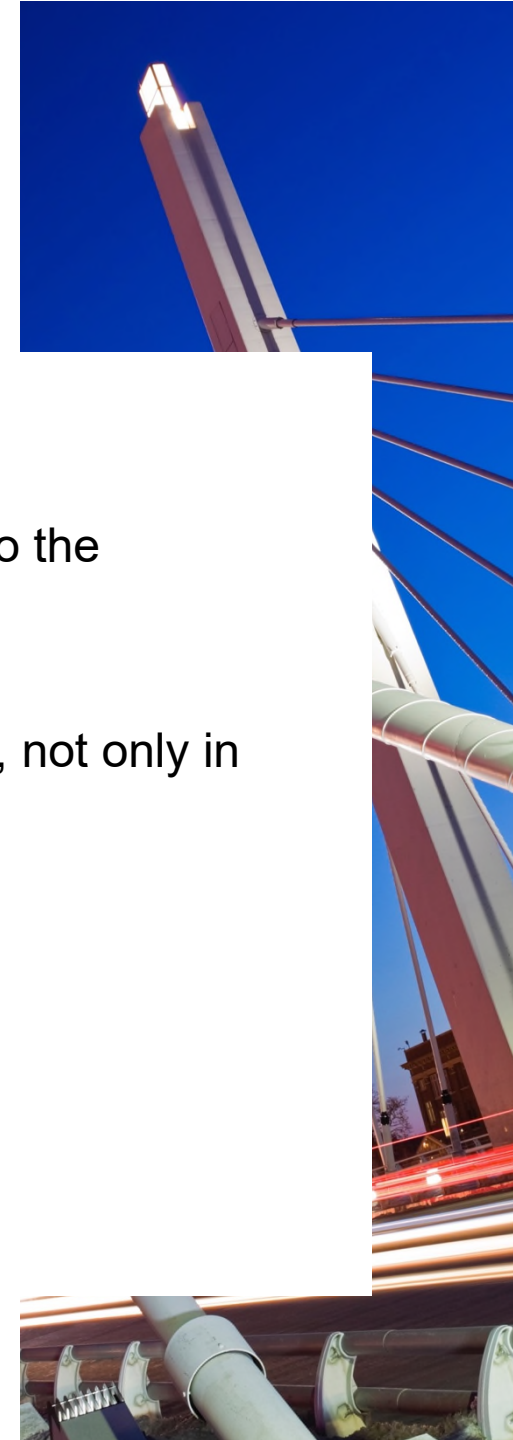
The Outcome

- Nancy Nice informed JAMS the arbitration demand was filed in the wrong venue.
- Despite his bluffing, Crooked did not dispute this when asked by JAMS.
- JAMS moved the arbitration to the correct venue.
- Crooked's refusal to cooperate cost Nancy's client unnecessary fees.



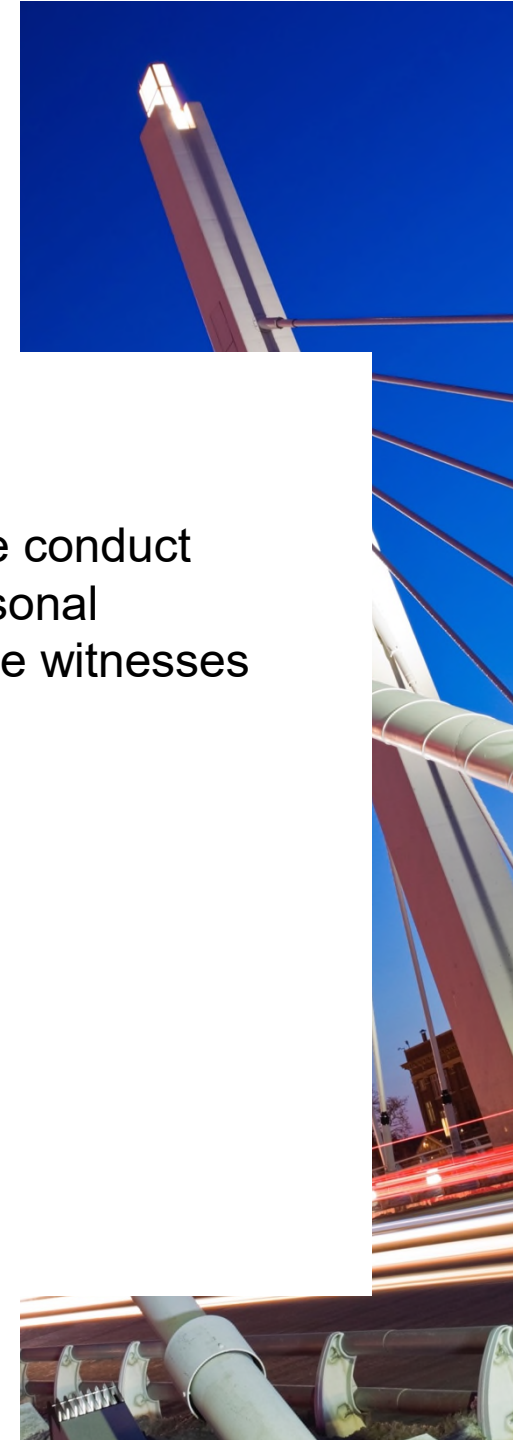
Rules Implicated

- Rule 8.4 (d)
 - “It is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice.”
- ABA Civility Guidelines
 - We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court but also in all other written and oral communications.



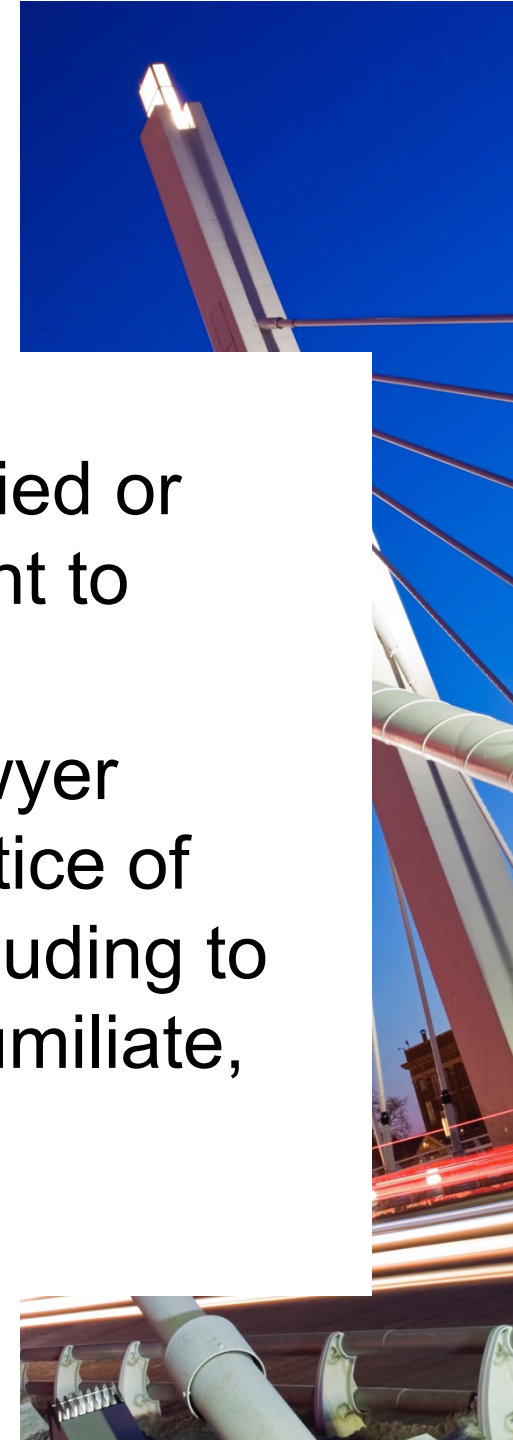
Rules Implicated

- ABA Civility Guidelines
 - “We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.”



State Rule Examples

- Michigan Rule 3.5 Comment – “Refraining from undignified or discourteous conduct is a corollary of the advocate’s right to speak on behalf of litigants.”
- Fla Rules of Professional Conduct, Rule 4-8.4(d) – A lawyer shall not “engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis”



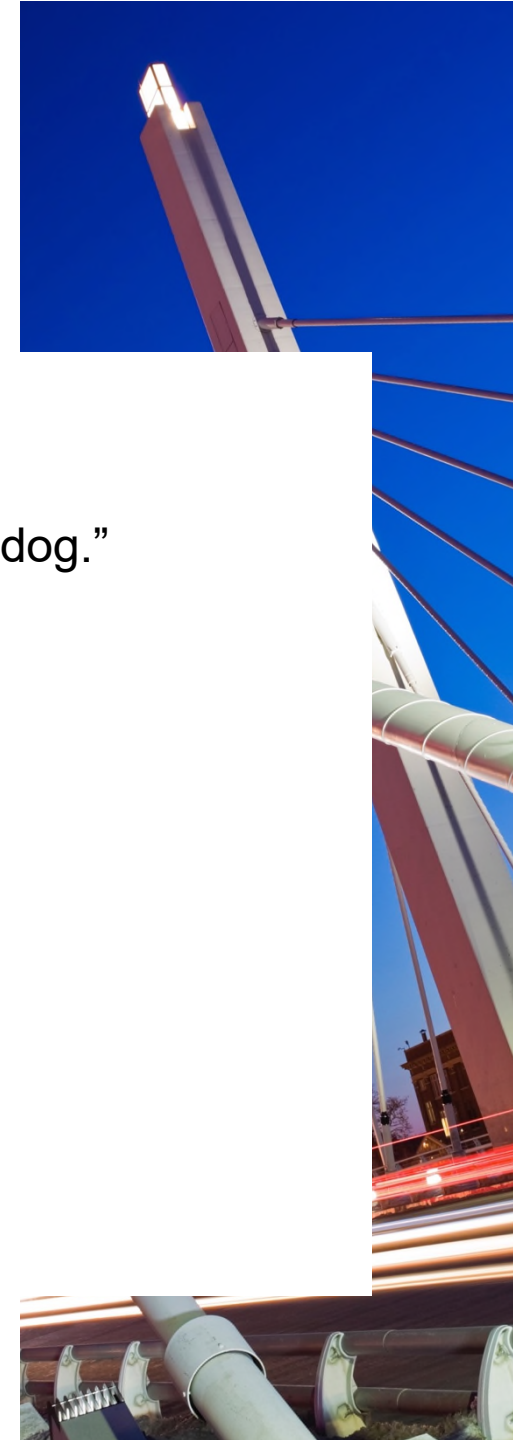
Why Must This Be Fixed?

- \$\$\$\$\$\$\$\$
 - Failure to be civil likely means failure to reach a resolution
 - The cost of tit-for-tat emails adds up fast
- Stress takes a toll
 - Adding unnecessary bullying to an already stressful profession
- Crying Wolf



What To Do?

- Look for outside counsel with a reputation for civility as opposed to seeking out the “bulldog.”
- Take the high road when faced with a lack of civility.
- Keep civility guidelines in mind at all times.
- Do not email when angry – wait to cool off.



One More Example

From: Acrooked@crokedlaw.com
Sent: Tuesday, November 22, 2022, 2:03 PM
To: Nnice@nicelaw.com
Subject: Re: Case Name, Case No.

We need dates to depose your client. Now.

I want dates in early January so you can have a nice holiday.

Also, I plan to depose every single person you obtained a declaration from. And I mean all these people. Every. Single. One.

We are going to be friends for a long time and I wouldn't worry about your billables for next year. I got you.

From: Nnice@nicelaw.com
Sent: Wednesday, November 23, 2022, 10:02 AM
To: Acrooked@crokedlaw.com
Subject: Re: Case Name, Case No.

The next availability we have is February 2-3 and February 7-10. Please let us know if any of those dates work so we can reserve them.

Hope you and your team enjoy a happy Thanksgiving.

From: Acrooked@crokedlaw.com
Sent: Wednesday, November 23, 2022, 11:30 AM
To: Nnice@nicelaw.com
Subject: Re: Case Name, Case No.

Thanks, none of those dates work because of preexisting obligations. Please provide other dates.

Foley & Lardner LLP

Have a happy and safe Thanksgiving as well!



About Foley

Foley & Lardner LLP is a preeminent law firm that stands at the nexus of the energy, health care and life sciences, innovative technology, and manufacturing sectors. We look beyond the law to focus on the constantly evolving demands facing our clients and act as trusted business advisors to deliver creative, practical, and effective solutions. Our 1,100 lawyers across 25 offices worldwide partner on the full range of engagements from corporate counsel to IP work and litigation support, providing our clients with a one-team solution to all their needs. For nearly two centuries, Foley has maintained its commitment to the highest level of innovative legal services and to the stewardship of our people, firm, clients, and the communities we serve.



[FOLEY.COM](https://www.foley.com)

ATTORNEY ADVERTISEMENT. The contents of this document, current at the date of publication, are for reference purposes only and do not constitute legal advice. Where previous cases are included, prior results do not guarantee a similar outcome. Images of people may not be Foley personnel.

© 2022 Foley & Lardner LLP

