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More Than a Buzzword: Why “Civility” Can Be Sound Litigation Strategy

Parties that act with civility in litigation are more likely to be seen as credible than those that do not.

By Joseph Schaeffer

Most lawyers are likely to have encountered an appeal to “civility.” But what is civility? It is a nebulous concept that escapes easy definition and is most often identified by its absence. Take, for example, a motion to strike a summary judgment response that was recently filed in a case pending in the U.S. District Court for the Northern District of Alabama. *Whithworth v. Mezrano*, No. 2:20-cv-00756 (N.D. Ala. Jan. 13, 2023). The underlying infraction? Perhaps the plaintiff relied on a sham affidavit? Or perhaps the plaintiff included scandalous and impertinent material of no relevance to the case? No, none of those things. The plaintiff had filed her opposition brief at 5:15 p.m.—15 minutes after the 5:00 p.m. deadline.

The district court was not amused. Finding no prejudice to the defendants from the plaintiff’s 15-minute delay, it denied the motion, but not before taking counsel to task for a pettiness that represented a further lowering of the bar for professionalism in an already contentious case. The defendants’ attempt to take advantage of their opponent’s mistake thus backfired by damaging their own credibility with the district court.

The defendants’ error here was thinking that every infraction deserves a remedy. The defendants would have done better to let such a trivial delay pass by unremarked and count on the district court identifying it on its own. Or if commentary were truly necessary, the defendants should at least have acted proportionally—noting the issue briefly in reply, rather than seeking what would presumably be a case-dispositive sanction for such a minor issue.

Arguments in litigation are colored by the behavior of the parties presenting them, and parties that act with civility in litigation are more likely to be seen as credible than those that do not. Avoiding petty fights over minor rules infractions accordingly not only avoids needless expense, but it is also good litigation strategy, too.

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