

“Petty” Behavior: Sometimes Overlooking An Opponent’s Technical Violation Is The Best Course Of Action

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Should an attorney always seek to have an opponent's late-by-a-few-minutes filing stricken in order to pursue the timing issue? No, according to Judge R. David Proctor, who recently issued a caustic order in *Whitworth v. Mezrano*, No. 2:20-cv-00756-RDP-HNJ (N.D. Ala. Jan. 13, 2023), advising attorneys to save their zealous advocacy efforts for consequential matters only. The defendants in *Whitworth* moved for summary judgment on the plaintiff's claims. The court extended the plaintiff's deadline to respond to the defendants' summary judgment motion to 5:00 p.m. on Thursday, December 15, 2022. While the plaintiff ultimately filed her opposition brief on that Thursday afternoon, she did so at 5:15 p.m. The defendants immediately moved to strike the opposition brief solely on the basis that “it was filed fifteen minutes late.” The court denied the motion, finding the defendants' motion “petty” and unbecoming of the profession. While the court noted that “[t]here are no doubt many other instances when [fifteen] minutes could make a world of difference, . . . the electronic filing of an opposition brief . . . on a late Thursday afternoon [wa]s not one of them.” **Tips:**

- Preservation of the record obviously is important. However, some issues are not worth preserving and may backfire on you. Consider whether the issue is worth preserving or whether doing so may be detrimental to you and your client.
- When considering a move to strike your opponent's late pleading or motion, evaluate all factors. Judges carry out the rule of law, and are thus more likely to welcome filings that assist them in making correct rulings, even if such filings are a bit untimely or otherwise deficient in some minor way.

- As the court emphasized, the takeaway from its order should not be that missed deadlines never should be raised, rather, there are instances where timely submissions are required for preservation of rights. For example, some submissions are subject to jurisdictional deadlines; in those instances, untimely filings usually lead to a forfeiture of rights. In many courts, untimely briefs are automatically rejected, and tardy lawyers are required to move for an extension nunc pro tunc, and such motions are not always granted.

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