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perspectives

Message from the Chair

by Amy E. Boyle

As Chair of the Younger Lawyers Division, it is my honor to introduce you to this year's first YLD *Perspectives* e-newsletter. This is our first newsletter during my term as Chair.

With over 4,000 members, the YLD engages younger members of the FBA and serves as a resource to local Chapters and other Sections and Divisions looking to engage with younger members. This year, we are excited to begin to return to in-person programming and remain open to the opportunities ongoing virtual programming presents to reach our broader membership. You can find information on the YLD's ongoing programming on our website: www.fedbar.org/younger-lawyers-divsion/. We will also be posting updates this year on our LinkedIn Page.

This month, we are excited to be hosting the YLD's annual Thurgood Marshall Memorial Moot Court Competition in-person on March 22-23, 2023, in the Washington D.C. area. This year's problem involves whether a state statute permitting former felons to vote only if they meet certain conditions violates the Equal Protection Clause because it discriminates on the basis of wealth in the availability of voting rights and whether it violates the Twenty-Fourth Amendment.

We are also pleased to announce the YLD will be able to host its annual United States Supreme Court Admissions Ceremony this year. The event will take place on Thursday, May 18, 2023.

The YLD also continues to host and co-sponsor a variety of CLEs and webinars throughout the year. Notably, on May 31, 2023, the YLD is hosting a CLE featuring Dr. Artika Tyner entitled "Being an Inclusive Leader." This program is being co-sponsored by the FBA's Diversity and Inclusion Committee.

The Honorable Constance Baker Motley Diversity, Equity, and Inclusion Young Professional Essay Writing Competition is also currently underway. Created to promote its namesake's legacy, the competition is open to all law students and younger lawyers who are under the age of 40 or have been practicing 10 years or less. Submissions should address strategies to promote, achieve, and sustain diversity, equity, and inclusion in federal practice and be no longer than 500 words. Submissions must be received by May 12, 2023.

We hope you will join us for these events and consider getting involved with the YLD!

Amy E. Boyle
2022-2023 YLD Chair

Message from the Editors

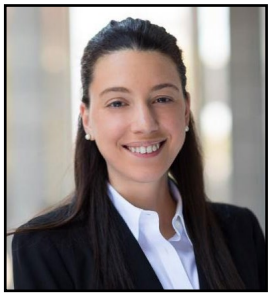
by Ashley Gallagher and Dan Weigel

Dear Younger Lawyers Division Members:

Happy New Year! And welcome to the Winter 2023 edition of *Perspectives*, the Federal Bar Association Younger Lawyers Division's newsletter. Our names are Ashley Gallagher and Dan Weigel, and it is our pleasure to serve as Co-Chairs of the *Perspectives* Publications Committee.

For this edition, we were fortunate to have received a diverse collection of articles authored by attorneys from across the United States. For example, this edition features a substantive discussion on removal to federal court based on diversity, motion practice as it pertains to the first-to-file rule, and tips for working with law clerks from the perspective of a teacher-turned lawyer. In addition, this edition features an article discussing a local chapter's community service efforts, which we hope will inspire other local YLD committees to give back to their communities in similarly meaningful and unique ways.

Special thanks to our fantastic authors, the 2022-2023 Publications Committee, Younger Lawyers Division Chair Amy Boyle, Director of Sections and Divisions Mike McCarthy, and Program Coordinator Daniel Hamilton.



Ashley Gallagher is a Partner at Johnson Jackson PLLC in Tampa, Florida, practicing management-side labor and employment law in both the private and public sectors. She has served on the board of the Federal Bar Association Younger Lawyers Division since 2020 and is currently Vice President of the Tampa Bay Chapter of the Federal Bar Association.

Dan Weigel is a Litigation Attorney at Taylor English Duma, LLP in Atlanta, Georgia, with a practice focusing on Intellectual Property and Commercial Litigation matters. He has served on the board of the Federal Bar Association Younger Lawyers Division since 2020 and is an active member of the Atlanta Division of the Federal Bar Association.

Diversity Destroyed. Jurisdiction Sunk?[1]

by Melanie Kalmanson

You are defending an action in which you removed the action to federal court based on diversity. But what happens if diversity is later destroyed?

One of the following two answers probably came to mind: (1) The court retains jurisdiction because the basis for removal is established on the face of the pleadings; or (2) The court no longer has jurisdiction and must remand to state court. Regardless which one it was, you are right. As with almost every question in the law, the answer is: "It depends." The sticking point is *what* destroyed diversity.

Establishing a Basis for Removal

Under 28 U.S.C. § 1441, a defendant may remove a case filed in state court to federal court if the federal court has federal-question jurisdiction (28 U.S.C. § 1331) or diversity jurisdiction (28 U.S.C. § 1332). This article focuses on the latter. To establish diversity jurisdiction, the defendant must establish two elements. First, the amount in controversy must exceed $75,000, exclusive of interest and costs. Second, there must be diversity among the parties; the most common way this occurs is where the matter is between "citizens of different States."

The purpose of removal based on diversity is to "protect defendants" and give diverse defendants the option between state and federal court. Courts have characterized this as the flip side of the plaintiff's right to choose the forum.

The basis for diversity jurisdiction is reviewed at the time of removal based on the pleadings.

Amending with the Same Parties, New Information

After the case has been removed to the federal district court, an amendment that destroys diversity does not divest the court of its jurisdiction. For example, the court retains jurisdiction even if the plaintiff files an amended complaint that lowers the amount in controversy under the statutory threshold. The same is true where new information becomes available about the parties' citizenship.

The key in these examples is that the parties do not change. So long as the parties remain the same, it is very difficult for a plaintiff to "amend away jurisdiction" after removal.

Adding New, Non-Diverse Parties

The answer changes where the amendment seeks to add a non-diverse party. Under 28 U.S.C. § 1447 (e), "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." Therefore, when faced with a motion for leave to amend to join a non-diverse party after removal, the district court has two options: (1) deny the amendment and retain jurisdiction; or (2) allow the joinder and remand to state court.

To the extent there is conflict between Rule 15(a) of the Federal Rules of Civil Procedure, which directs courts to liberally allow leave to amend, with section 1447(e), federal courts have determined that section 1447(e) trumps in this instance. Thus, district courts view amendments after removal that add non-diverse parties with "greater scrutiny."

> The analysis of whether to allow joinder is a balancing test, in which
>
> the district court should consider: (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction, (2) whether plaintiff has been dilatory in asking for amendment, (3) whether plaintiff will be significantly injured if amendment is not allowed, and (4) any other factors bearing on the equities.

When considering whether plaintiffs may seek leave to amend to avoid federal jurisdiction, the U.S. District Court for the Southern District of Florida has cautioned that courts should be especially wary where "a plaintiff seeks to add a nondiverse defendant immediately after removal but before any additional discovery has taken place."

Ultimately, the court should not allow the joinder "unless strong equities support the amendment," and "the parties do not start out on equal footing" in that analysis. The Southern District of Florida has explained that the reason for this defendant-friendly analysis is to protect the "defendant's interest in the choice of the federal forum," which is the purpose of removal.

If the Court denies the amendment, then the Court maintains jurisdiction. However, if the Court allows the amendment adding the non-diverse party, then section 1447(e) directs that the district court must remand the matter to state court because diversity jurisdiction no longer exists.

Conclusion

For purposes of determining whether a federal district court retains subject matter jurisdiction when diversity is destroyed, there is a distinction between: (1) a change in the citizenship of the original parties upon which diversity was established; and (2) adding new, non-diverse

defendants. In the former, the Court does not lose jurisdiction. However, in the latter, the Court loses jurisdiction and must remand the case to state court.

Melanie Kalmanson is an Associate at Quarles & Brady LLP in Tampa, Florida. She focuses her practice in commercial litigation, representing clients in all phases of litigation in state and federal court. Before private practice, she served as a law clerk to Florida Supreme Court Justice Barbara J. Pariente. PS. For anyone who missed it, the title is a Battleship® reference.

Endnotes

[1]This article will also be published in the Federal Bar Association Litigation Section newsletter, the *SideBAR*.

[2]*See* 28 U.S.C. § 1441(b).

[3]28 U.S.C. § 1332(a).

[4]28 U.S.C. § 1332(a)(1).

[5]*Clark v. Unum Life Ins. Co. of Am.*, 95 F. Supp. 3d 1335, 1345 (M.D. Fla. 2015); *accord Small v. Ford Motor Co.*, 923 F. Supp. 2d 1354, 1357 (S.D. Fla. 2013) (citing *Bevels v. Am. States Ins. Co.*, 100 F. Supp. 2d 1309, 1313 (M.D. Ala. 2000)).

[6]*See Small*, 923 F. Supp. 2d at 1357 ("Just as plaintiffs have the right to choose to sue in state court when complete diversity does not exist, non-resident defendants have the right to remove to and litigate in federal court when diversity of citizenship does exist.").

[7]*See, e.g.*, *Bevels*, 100 F. Supp. 2d at 1312 ("[T]he propriety of removal should be considered based upon the pleadings as of the date of removal.") (citing *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989)).

[8]*Id.* ("[E]vents occurring after removal that destroy diversity or reduce the amount in controversy will not divest the court of its jurisdiction." (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-90 (1938))).

[9]*Id.* ("[E]vents occurring after removal that destroy diversity or reduce the amount in controversy will not divest the court of its jurisdiction." (citing *St. Paul Mercury Indem.*, 303 U.S. at 288-90)).

[10]*See id.* (citing *Wis. Dep't of Corr. v. Schacht,* 524 U.S. 381, 391 (1998)).

[11]*Id.* (citing 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 3721 (3d ed. 2009) ("[O]nce a case has been properly removed, there is very little that a plaintiff can do that will defeat federal subject-matter jurisdiction and force a remand to state court.")).

[12]28 U.S.C. § 1447 (e).

[13]*Id.*; *see Bevels v. Am. States Ins. Co.*, 100 F. Supp. 2d 1309, 1312 (M.D. Ala. 2000) ("[W]hen an amendment to the complaint would destroy diversity jurisdiction, a district court has the authority to deny the plaintiff's right to amend.").

[14]*See Bevels*, 100 F. Supp. 2d at 1312 (collecting cases); *see, e.g.*, *id.* at 1312-13 (finding that following section 1447(e) was the appropriate approach because Section 1447(e) "specifically addresses amendments in the context of the court's exercise of its jurisdiction in a removed case," and Section 1447(e) provides "the better approach from a practical standpoint").

[15]*Espat v. Espat*, 56 F. Supp. 2d 1377, 1382 (M.D. Fla. 1999) (citing *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987)); *accord Small v. Ford Motor Co.*, 923 F. Supp. 2d 1354, 1357 (S.D. Fla. 2013).

[16]*Small*, 923 F. Supp. 2d at 1356-57; *accord Bevels*, 100 F. Supp. 2d at 1313 (citing *Hensgens*, 833 F.2d at 1182).

[17]*Small*, 923 F. Supp. 2d at 1357 (quoting *Ibis Villas at Miami Gardens Condo Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 799 F. Supp. 2d 1333, 1335 (S.D. Fla. 2011)).

[18]*Id.* (quoting *Sexton v. G & K Servs., Inc.*, 51 F. Supp. 2d 1311, 1313 (M.D. Ala. 1999)) (citing *Smith v. White Consol. Indus., Inc.*, 229 F. Supp. 2d 1275, 1281 (N.D. Ala. 2002)); *accord Bevels*, 100 F. Supp. 2d at 1313.

[19]*Small*, 923 F. Supp. 2d at 1357.

[20]*See, e.g.*, *Bevels*, 100 F. Supp. 2d at 1314.

The Early Bird Gets the Worm: How the First-to-File Rule Can Determine Venue for Similar Subsequently Filed Cases, and Recommendations for Motion Practice

by Anitra Raiford Clement and Sarah B. O'Rourke

Whenever there are two or more cases with the same or similar facts, legal issues, and parties, yet the cases are in different federal district courts, many questions can arise. For example, should the cases remain where they are initially filed? Should any case be transferred or, perhaps, consolidated? Should any case be stayed? Should any case be dismissed? Should a defendant respond to a complaint before a transfer, stay, or dismissal? This article will provide an overview of the first-to-file rule and its application in the Eleventh Circuit.

Courts often apply the first-to-file rule whenever there are lawsuits involving similar issues and parties in two or more federal courts. "There is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule." That is, the firsttofile rule gives court where the first case was filed the authority to resolve the full dispute—despite supplemental filings in other courts—to conserve judicial resources and prevent conflicting court rulings.

Courts applying the first-to-file rule consider three key factors: (1) the chronology of the pending lawsuits; (2) the similarities of the parties; and (3) the similarities of the legal issues. The pending lawsuits do not need to be identical. If the cases involve closely related legal issues or even common subject matter, then the first-to-file rule controls.

Courts have discretion on how to apply the first-to-file rule. A court may exercise its discretion to transfer, stay, or dismiss a later-filed lawsuit. An exception is when a second-filed matter advances beyond a first-filed matter "such that it becomes impractical to dismiss or stay the second-filed matter." Transfer to the first-filed jurisdiction is effectuated through a transfer motion in the venue from which the party wants to transfer away (*i.e.*, the later-filed forum). A party opposing the application of the first-to-file rule has the heavy burden of demonstrating that there are compelling circumstances that warrant an exception to the well-established rule.

A. Chronology of the Pending Lawsuits

The first factor a court looks to when applying the first-to-file rule is the order in which the cases were filed. This factor is viewed literally, and the duration of time between filings has been found to be immaterial. In fact, the precise language of the rule has been upheld when competing cases were filed only *minutes* apart.

For example, in *Cerro Wire Inc. v. Southwire Co.*, plaintiff Cerro Wire filed a declaratory judgment of non-infringement and invalidity regarding one of defendant Southwire's patents in the Northern District of Georgia. A patent infringement suit was filed 68 minutes later in the Eastern District of Texas where Southwire, there the plaintiff, alleged that Cerro infringed the same patent. The declaratory judgment suit was filed at 12:02 a.m. Eastern Daylight Time ("EDT") while the patent infringement suit was filed at 1:10 a.m. EDT the same day. In applying the first-to-file rule, the Northern District of Georgia declined to depart from the first-to-file rule "merely because the two competing suits were filed within minutes of each other."

Other courts have come to the same conclusion when the competing cases were initiated weeks, months, or years after the first-filed case.

B. Similarities of the Parties

The rule requires only a fraternal relationship. The plaintiff(s) need not be identical, the defendant(s) need not be identical, and the parties may even be on the other side of the subsequently-filed lawsuit to satisfy this element. The rule applies where "some of the parties in one matter are also in the other matter, regardless of whether there are additional unmatched parties in one or both matters."

Class action lawsuits often involve putative plaintiff classes arising from multiple states. Regardless of the individual plaintiff differences, "dissimilar plaintiff classes do not defeat application of the first-to-file rule." The same is true for defendants. All defendants need not be the same for the rule to apply. In *Chapman v. Progressive American Insurance Company*, although the first-filed case was against two distinct defendants, both actions were filed against a common defendant: Progressive. Applying the first-filed rule, the *Chapman* court stayed the case pending resolution of a class certification motion in the first-filed case.

The rule has also been applied where the parties in a subsequently-filed lawsuit are on the opposite side of the first-filed lawsuit (*i.e.*, a plaintiff in one lawsuit and a defendant in the other). Such cases involve disputes over similar, if not identical, issues.

C. Similarities of the Legal Issues

Like the parties, the legal issues must only be similar; a mirror image is not required for application of the first-to-file rule. Complaints alleging violations of different "laws is not enough

to render them substantially dissimilar for purposes of the first-to-file analysis." Likewise, complaints alleging different causes of action are not enough to forego application of the first-to-file rule. As one district court has said, "it would be impossible for the claims to overlap exactly where the actions are brought in different states, and the purpose of the rule would be defeated. There would be nothing to stop plaintiffs in all 50 states from filing separate nationwide class actions based upon their own state's law." Most courts, then, are willing to apply the rule despite differences in both the law and the claims made.

D. Motion Practice, Procedural Uncertainties, and Recommendations

Once it is known that a similar subsequently-filed case is pending and the decision to move under the first-to-file rule is made, there are a few considerations to keep in mind. First, Federal Rule of Civil Procedure 12(a) requires that a defendant serve a responsive pleading within 21 days after service of the summons and complaint. Neither the Rules nor Eleventh Circuit case law are instructive as to whether a first-to-file motion is considered a responsive pleading. Both a response to the complaint and a motion under the first-to-file rule could be filed; however, a response may be futile if the court grants the first-filed motion. In order to avoid a penalty, the possibility of responding to the complaint in two jurisdictions, and to conserve resources, we have found best practice is to request an extension of time to respond to the complaint. Should the court not rule on the pending first-filed motion before the response deadline terminates, an additional request for an extension may be warranted. This approach neither jeopardizes your license, places the client at risk of default, nor spends needless attorney time and client funds.

Additionally, alternative pleading is permissible. Given that courts have the discretion to transfer, stay, *or* dismiss a case pursuant to the first-filed rule, requesting one form of relief does not bar counsel from requesting alternative relief. Specifically, counsel may move to transfer the case to the first-filed jurisdiction, and, in the alternative, move to stay the case pending resolution of the first-filed case. The same is true for dismissal. Counsel may move to dismiss the case under the first-to-file rule, and in the alternative move to transfer or stay the case.

Anitra Raiford Clement is a partner in the Product Liability, Class Action, and Complex Litigation practice groups in the Tampa, FL office of Shook, Hardy & Bacon L.L.P. Ms. Clement is the president-elect of the Tampa Bay Chapter of the Federal Bar Association. She received her B.S. and J.D. from the University of Florida.

Sarah B. O'Rourke is an associate in the Product Liability practice group in the Tampa, FL office of Shook, Hardy & Bacon L.L.P. Ms. O'Rourke received her A.A. from Florida State University, her Pharm.D. from the University of Florida, and her J.D. cum laude from Stetson University College of Law.

Endnotes

[1]While most of the cases cited in this article arise from the Eleventh Circuit, the first-to-file rule is a "well established doctrine" that has been applied throughout all federal circuits. *See e.g.*, *TPM Holdings, Inc. v. Intra-Gold Indus., Inc.*, 91 F.3d 1, 4 (1st Cir. 1996); *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 106 (2d Cir. 2006); *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir. 1941); *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 594–95 (4th Cir. 2004); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, S. Atlantic & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 728 (5th Cir. 1985); *Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assocs., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001); *Research Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 980 (7th Cir. 2010); *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir.1985); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *Buzas Baseball, Inc. v. Bd. of Regents of the Univ. Sys. of Ga.*, 189 F.3d 477 (table), 1999 WL 682883, at *2 (10th Cir. Sept. 2, 1999); *Stone & Webster, Inc. v. Georgia Power Co.*, 965 F. Supp. 2d 56, 61 (D.D.C. 2013), *aff'd*, 779 F.3d 614 (D.C. Cir. 2015); *Merial Ltd. v Cipla Ltd.*, 681 F.3d 1283, 1299 (Fed. Cir. 2012). In fact, the first-to-file rule was articulated first in 1824 by the Supreme Court, stating "[i]n all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it." *Smith v. McIver*, 22 U.S. 532, 535 (1824).

[2]The majority of federal courts "have held that the first-to-file rule has no application when one case is pending in federal and the other is pending in state court (as opposed to two cases pending in different federal courts)." *Amos v. Advanced Funding, Inc.*, No. 1:04-CV-2911-WBH, 2005 WL 8155844, at *1 (N.D. Ga. Apr. 20, 2005) (citing *Zide Sport Shop of Ohio, Inc*, 16 F. App'x at 437) ; *Pragmatic C Software Corp. v. Antrim Design Sys., Inc.*, No. 02-2595 2003 WL 244804 (D. Minn. 2003); *Healthcare Capital, LLC v. Healthmed, Inc.*, 213 F.Supp.2d 850 (S.D. Ohio 2002); *United States Fid. & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras*, No. 98 Civ. 3099, 2000 WL 48830 (S.D.N.Y. 2000).

[3]*Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa.*, 713 F.3d 71, 78 (11th Cir. 2013) ("The first-filed rule provides that when parties have instituted competing or parallel litigation in separate courts, the court initially seized of the controversy should hear the case."); *Banegas v. Procter & Gamble Co.*, No. 0:16-CV-61617, 2016 WL 5940104, at *1 (S.D. Fla. Sept. 28, 2016); *Vital Pharms., Inc. v. PhD Mktg., Inc.*, Case No. 0:20-cv-60993-WPD, 2020 WL 6162794, at *1 (S.D. Fla. July 28, 2020) (citing *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005)); *Toran v. Hyundai Motor Am.*, No. 8:20-CV-2669-WFJ-CPT, 2021 WL 252382, at *1 (M.D. Fla. Jan. 26, 2021); *Shapiro v. Hyper Healing, LLC*, Case No. 8:20-cv-1268-T-02CPT, 2020 WL 5095303, at *1 (M.D. Fla. Aug. 27, 2020); *Actsoft, Inc. v. Alcohol Monitoring Sys., Inc.*, Case No. 8:08-cv-628-T-23-EAJ, 2008 WL 2266254, at *1 (M.D. Fla. June 3, 2008).

[4]*Manuel*, 430 F.3d at 1135 (citing *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir. 1990) (describing the first-filed rule as "well-established")).

[5]*Vital Pharms., Inc.*, 2020 WL 6162794, at *1; *Shapiro*, 2020 WL 5095303, at *1 (quoting *First Equitable Realty, III, Ltd. v. Dickson*, Case No. 13-20609-CIV, 2013 WL 5539076, at *3 (S.D. Fla. Oct. 8, 2013)); *accord Rudolph & Me, Inc. v. Ornament Cent., LLC*, Case No. 8:11-cv-670-T-33EAJ, 2011 WL 3919711, *1 (M.D. Fla. Sept. 7, 2011) (quoting *Allstate Ins. Co. v. Clohessy*, 9 F. Supp. 2d 1314, 1316 (M.D. Fla. 1998)). As its name implies, the rule does not apply in the reverse (*i.e.*, transfer of the first-filed case to a subsequently-filed venue).

[6]*Women's Choice Pharms., LLC v. Rook Pharms., Inc.*, No. 16-cv-62074, 2016 WL 6600438, at *2 (S.D. Fla. Nov. 8, 2016) (quoting *Lianne Yao v. Ulta Beauty Inc.*, No. 18-22213-CIV, 2018 WL 4208324, at *1 (S.D. Fla. Aug. 8, 2018)); *Toran*, 2021 WL 252382, at *2 (citing *Bankers Ins. Co. v. DLJ Mortg. Capital, Inc.*, Case No. 8:10-cv-419-T-27EAJ, 2012 WL 515879, at *3 (M.D. Fla. Jan. 26, 2012)); *Shapiro*, 2020 WL 5095303, at *1.

[7]*Toran*, 2021 WL 252382, at *2 (quoting *Strother v. Hylas Yachts, Inc.*, Case No. 12-80283-CV, 2012 WL 4531357, at *2 (S.D. Fla. Oct. 1, 2012)); *Elliott v. Williams*, 549 F. Supp. 3d 1333, 1339 (S.D. Fla. 2021) (citing *Vital Pharms., Inc.*, 2020 WL 6162794, at *1).

[8]*Toran*, 2021 WL 252382, at *2; *Strother*, 2012 WL 4531357, at *2; *Banegas*, 2016 WL 5940104, at *1.

[9]*Toran*, 2021 WL 252382, at *2 (quoting *Strother*, 2012 WL 4531357, at *1); *Shapiro*, 2020 WL 5095303, at *2; *Glasgo v. Uber Techs., Inc.*, No. 8:19-CV-97-T-33AAS, 2019 WL 1998326, at *1 (M.D. Fla. May 3, 2019) (quoting *Tech Data Corp. v. Mainfreight, Inc.*, Case No. 8:14-cv-1809-T-23MAP, 2015 WL 628901, at *3 (M.D. Fla. Feb. 12, 2015)).

[10]*Toran*, 2021 WL 252382, at *2 (quoting *Strother*, 2012 WL 4531357, at *1); *Abreu v. Pfizer, Inc.*, No. 21-62122-CIV, 2022 WL 481184, at *4 (S.D. Fla. Feb. 16, 2022) (quoting *Collegiate Licensing Co.*, 713 F.3d at 78).

[11]*ttix v. Carrington Mortg. Servs., LLC*, No. 1:20-CV-22183-UU, 2020 WL 9849821, at *4 (S.D. Fla. Oct. 13, 2020) (citing *Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc.*, 544 F. Supp. 2d 949, 963 (N.D. Cal. 2008) (finding first to file rule did not apply where second action passed a motion to dismiss and first filed action did not)); *Ulta Beauty Inc.*, 2018 WL 4208324, at *4 (recognizing the Intersearch exception existed but finding the exception did not apply because no motion to dismiss had been filed yet in either action); *Abromats v. Abromats*, No. 16-CV-60653, 2016 WL 5941888, at *3 (S.D. Fla. Oct. 13, 2016) (declining to apply the first-to-file rule given "the significant judicial resources" already devoted to the second-filed case); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Payless Shoesource, Inc.*, No. C-11-1892 EMC, 2012 WL 3277222, at *9 (N.D. Cal. Aug. 9, 2012) ("[C]ourts have rejected the [first-to-file] rule when the second-filed action had developed further than the initial suit.") (citing *E.E.O.C. v. Univ. of PA.*, 850 F.2d 969, 976 (3d Cir. 1988)); *Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1355 (S.D.N.Y. 1992) (declining to apply the first-to-file rule, in part, because second-filed action had proceeded further than the first).

[12]*breu*, 2022 WL 481184, at *4 (citing *Kelly v. Gerber Prods. Co.*, No. 21-60602-CIV, 2021 WL 2410158, at *2 (S.D. Fla. June 11, 2021) ("The motion to transfer is properly made before the second forum; once the case is transferred, the first forum may decide whether the action should proceed independently.")); *see also Vina Dona Paula, S.A. v. Vineyard Brands, Inc.*, No. 11-20524-CIV, 2011 WL 4527441, at *1 (S.D. Fla. Sep. 28, 2011) (transferring later-filed case pursuant to the first-to-file rule); *Zampa v. JUUL Labs, Inc.*, No. 18-256005-CIV, 2019 WL 1777730, at *5 (S.D. Fla. Apr. 23, 2019) (same); *Ulta Beauty Inc.*, 2018 WL

4208324, at *4 (same); *Laskaris v. Fifth Third Bank*, 962 F. Supp. 2d 1297, 1299 (S.D. Fla. 2013) (same); *Rojas v. Am. Honda Motor Co.*, No. 19-21721-CIV, 2019 WL 6324616, at *3 (S.D. Fla. Nov. 26, 2019) (same); *Philibert*, 2005 WL 525330, at *2 (same)).

[13]*lta Beauty Inc.*, 2018 WL 4208324, at *1 (quoting *Manuel*, 430 F.3d at 1135); *Vital Pharms., Inc.*, 2020 WL 6162794, at *2; *Toran*, 2021 WL 252382, at *2; *Shapiro*, 2020 WL 5095303, at *2; *Glasgo*, 2019 WL 1998326, at *1.

[14]*ee supra* at fn.5.

[15]*erro Wire Inc. v. Southwire Co.*, 777 F. Supp. 2d 1334, 1338 (N.D. Ga. 2011) (citing *Genentech v. Eli Lilly Co.*, 998 F.2d 931, 938 (Fed. Cir. 1993), *abrogated on other grounds* by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995) and *Lab. Corp. of Am. Holdings v. Chiron Corp.*, 384 F.3d 1326, 1332 (Fed. Cir. 2004)).

[16]*d*.

[17]*d*. at 1337.

[18]*Id*.

[19]*Id*.

[20]*Id*.

[21]*Kelly v. Gerber Prods. Co.*, No. 21-60602-CIV, 2021 WL 2410158, at *2 (S.D. Fla. June 11, 2021) (filing dates of February 5, 2021 versus March 18, 2021); *Steelers Keys, LLC v. High Tech Nat'l, LLC*, No. 19-23630-CIV, 2019 WL 6609214, at *2 (S.D. Fla. Dec. 4, 2019) (June 20, 2019 versus Aug. 29, 2019).

[22]*Shapiro v. Hyper Healing, LLC*, No. 8:20-CV-1268-T-02CPT, 2020 WL 5095303, at *1 (M.D. Fla. Aug. 28, 2020) (filing dates of late 2019 versus June 2020); *see also Goldstein v. Beliv, LLC*, No. 22-CV-80643-RAR, 2022 WL 16540185, at *1 (S.D. Fla. Oct. 28, 2022) (filing dates of Oct. 21, 2021 versus Apr. 26, 2022).

[23]*Elliott v. Williams*, 549 F. Supp. 3d 1333, 1339 (S.D. Fla. 2021) (filing dates of Nov. 14, 2018 versus Aug. 6, 2020).

[24]*Cadenasso v. Metro. Life Ins. Co.*, No. 13-CV-05491-JST, 2014 WL 1510853, at *10 (N.D. Cal. Apr. 15, 2014) (internal citations omitted) (the mutually exclusive class of plaintiffs was not dispositive).

[25]*See, e.g.*, *Goldstein*, 2022 WL 16540185, at *2 (Florida case purported to represent plaintiff classes in Florida, Georgia, Alabama, Arkansas, and South Carolina, whereas the New York action purported to represent plaintiff classes in New York, Massachusetts, and Connecticut).

[26]*Id*.; *see also Abreu v. Pfizer, Inc.*, No. 21-62122, 2022 WL 481184, at *6 (S.D. Fla. Feb. 16, 2022), *reconsideration denied*, No. 21-62122, 2022 WL 3370932 (S.D. Fla. Aug. 16, 2022) ("[A]lthough Harris and Abreu are two separate individuals [as plaintiffs], each alleges similar claims against Pfizer and purport to represent a class and subclass of plaintiffs.").

[27]*Chapman v. Progressive Am. Ins. Co.*, No. 3:17-CV-102/MCR/CJK, 2017 WL 3124186, at *2 (N.D. Fla. July 24, 2017).

[28]*Goldstein*, 2022 WL 16540185, at *2.

[29]*Panaprint, Inc. v. Prestige Mag. Co.*, No. 5:09-CV-175 (CAR), 2009 WL 10713571, at *2 (M.D. Ga. Aug. 3, 2009).

[30]*Id*. (each party filed its own breach of contract claim, over the same contract and same series of transactions, in different jurisdictions).

[31]*Kelly v. Gerber Prod. Co.*, No. 21-60602-CIV, 2021 WL 2410158, at *3 (S.D. Fla. June 11, 2021) ("But identical legal issues are not the standard; the relevant inquiry is whether the actions are largely based on the same conduct and the issues overlap.").

[32]*Id*. (citing *Peterson v. Aaron's, Inc.*, 2015 WL 224750, at *3 (N.D. Ga. Jan. 15, 2015) and quoting *Askin v. Quaker Oats Co.*, 2012 WL 517491, at *4 (N.D. Ill. Feb. 15, 2012)); *Banegas v. Proctor & Gamble Co.*, No. 16-61617, 2016 WL 5940104, at *1 (S.D. Fla. Sept. 28, 2016) (applying the first-to-file rule when the "only difference is the application of California versus Florida substantive law. . . . ").

[33]*Strother v. Hylas Yachts, Inc.*, Case No. 12-80283-CV, 2012 WL 4531357, at *2 (S.D. Fla. Oct. 1, 2012) (even though the cases featured "some different causes of action and different parties[,]" the issues overlapped sufficiently to warrant application of the first-to-file rule).

[34]*Zampa v. JUUL Labs, Inc.*, No. 18-256005-CIV, 2019 WL 1777730, at *5 (S.D. Fla. Apr. 23, 2019) (quoting *Catanese v. Unilever*, 774 F. Supp. 2d 684, 689 (D.N.J. 2011)).

[35]If defendant "timely waived service under Rule 4(d), [a response is due] within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States." Fed. R. Civ. P. 12(a)(1)(A)(ii).

[36]Notably, we have not located any case analyzing a first-to-file motion that has considered it analogous to a Rule 12(b)(3) – Improper Venue motion. All Eleventh Circuit cases consider the concepts distinct.

A Teacher-Turned-Lawyer's Tips for Working with Law Clerks

by Ben Bauer

When given the support necessary to succeed, law clerks can produce high-quality work that saves attorney time, contributes to the success of a case, and pushes them forward on their path to becoming lawyers. Without that support, law clerks may churn-out unhelpful work, or worse, consume more attorney-time than the law clerk's work saves.

Lawyers sometimes forget that many law clerks are still students who may not be ready to contribute in the way we envision without proper support. Providing that support can seem daunting and time-intensive, but it doesn't have to be. As a former educator, I've found that channeling my teaching experience and adapting certain techniques to the lawyer/law clerk context can help prepare law clerks for success without investing too much of our most valuable resource: time. Following these techniques to invest a small amount of time on the front-end can help ensure that the lawyer/law clerk relationship achieves its dual purpose: producing meaningful work that saves attorney time and ensuring law clerks have a valuable learning experience as they begin their career.

1. Provide an Exemplar End-Product

The first time I asked my students to write a "paragraph" summarizing a story we read, I got everything from a one-sentence answer to multiple pages of surprisingly insightful literary criticism. I learned the hard way that anyone new to a task is more successful when provided an exemplar they can strive to meet.

For best results, lawyers need to do more than assign a "memo" or "analysis" of a topic. Although the differences may be less drastic than with my seventh graders, a law clerk's understanding of a quality end-product is likely different than an experienced attorney's understanding. They may think that a long, detailed overview is best when you're looking for a page of succinct analysis. Or maybe you're more interested in a list of relevant cases and less in their analysis of each case. How can they know what you're hoping for without an example?

If you assign a memo (or any other project), providing an exemplar memo can help the law clerk understand what theirs should look like. This sets the law clerk up for success, avoids the confusion that stems from inexperience and not understanding which questions to ask, and increases the odds that you'll get a helpful end-product. If you don't do so already, you should start keeping examples produced by past law clerks to use as exemplars for similar projects. If this law clerk does a great job, let them know you'll use their work as an exemplar in the future.

2. Provide Oral and Written Directions

Many lawyers like to provide directions in person, which we think saves us time and allows a law clerk to ask any clarifying questions immediately. But we often think we're being clearer than we actually are, and a law clerk may not have the background knowledge to know which questions to ask to clarify the directions. This leads to wasted time correcting unnecessary mistakes or redoing a project. Plus, have you ever (like me) forgotten exactly what it was you asked for when you spoke to the law clerk two weeks earlier?

Everybody (even top-tier law students) retains information better when also seeing it in writing. Accordingly, it's best to provide directions both in person and in writing. It can be as simple as a follow-up email stating "As we discussed, I'd like you to research X, Y, and Z" and assigning a due date. This helps clear-up any unknown ambiguities or misunderstandings that neither party is aware of. It also sets the stage for clearer and more effective feedback regarding the scope of the assignment. Feedback along the lines of "this is not what I asked for" is not helpful. Specific feedback like "my email asked for X, Y, and Z but you only focused on X and Y" is much more helpful.

3. Assign a Draft or a Small First Project and Provide Specific Feedback

My students had the most success when I sought ways to provide feedback quickly before the final product was complete. We referred to this as a "check for understanding." In any context, people are unlikely to turn in a perfect end-product on the first try. We as lawyers should anticipate that.

For a first assignment, new law clerks can benefit from a smaller, shorter project that allows the lawyer to quickly gauge a law clerk's skill and knowledge and redirect as necessary before minor issues become larger problems. This could also be a "draft" that is not meant to be a final product so the law clerk can correct any mistakes based on the lawyer's feedback.

But feedback must be specific to be helpful. Telling a law clerk that "Case 1 if more helpful than Case 2" may not help them fix the problem, even if the logic may seem obvious to you. A savvy law clerk will follow-up and ask why, but many will make a similar mistake again. The more specific feedback, the better. For example: "Case 1 is helpful because it involves claims under § 1104(a), like our claims. Case 2 is not helpful because it involves claims under § 1106(b), which we haven't brought here. You should focus on § 1104(a) cases like Case 1." This takes the lawyer almost no additional time but is much more likely to prevent future mistakes.

Overall, providing meaningful feedback can take as little as five-to-ten minutes of attorney time but will save far more than that in the long-run.

4. Provide a Big-Picture View of the Work

Every college and law school class provided a syllabus detailing the course-arc and how each lesson contributed to the course's overarching goals. That is because people new to any type of work are likely to adapt faster when they understand how an individual project or lesson fits into the bigger picture.

Providing a similar birds-eye view of your work can help a law clerk better understand their work in context. For example, many law clerks have never experienced the lifecycle of a case. Most law clerks don't follow the same case from start-to-finish, and without a big-picture view they may lack the necessary context to understand what is important about the work that they've been assigned. In other words, it is difficult to understand what is important to the current stage of your case without understanding where you've already been and where you hope to go.

Explaining the big-picture can look different based on your context. It could be as simple as an overview of where the project fits in the scope of your work, and how it will contribute to your success. In a complex class action that typically lasts years, a lawyer might provide an "outline" of a typical case from a complaint to post-trial briefing to help a law clerk understand the sequence of a case and why each stage is important. You only need to create one "outline" that can be re-used for each new law clerk. As an added bonus, it can also help clarify your directions by helping you articulate your needs and goals for assigning the project and invest the clerk by helping them understand how their work can influence the case.

5. Keep Their Development in Mind

One complaint I constantly heard from students was "WHY do I need to learn this?" A law clerk likely won't be so bold as to let out a similar groan, but that doesn't mean they won't be groaning to themselves (or the other law clerks). Like anyone else, even the highest-achieving law student is not above becoming bored and uninterested if they don't view their work as meaningful.

To a lawyer, a project might seem meaningful simply from the fact that we assigned it. But a law clerk may not realize why they've been assigned yet another research project on a topic they may never revisit. Even if it seems obvious, you should always explain why the work you're assigning is important for the law clerk and important to the work you do. You hired them, so you should know what interests them and why they applied to work with you. Keep that in mind as you assign work.

For example, explaining why a project that seems less exciting could help you prevail on the case can excite a law clerk who cares about the broader subject-matter or wants to be a team player. This simple step takes almost no time but helps lawyers live up to our end of the bargain to provide law clerks with meaningful opportunities, which leads to an improved work product and a more successful lawyer/law clerk relationship.

Ben is an attorney at Nichols Kaster and represents workers in breach of fiduciary duty class actions in federal court. Prior to joining the firm, Ben taught 7th grade English and continued to work in schools while receiving his law degree in Mitchell Hamline's night program.

Serving Tampa Bay: The Young Lawyer's Division of the Tampa Bay Chapter Excels in Providing Community Outreach Programs for Children and Students

by Michelle Moretz-Smith and Soma Nwokolo

Each year, the Young Lawyers Division of the Tampa Bay Chapter of the Federal Bar Association ("Tampa Bay YLD") works to craft a schedule of events that includes educational programs, social and networking opportunities, and community outreach projects that provide members with unique ways to give back to the Tampa Bay community. In 2022, the Tampa Bay YLD hosted several events that combined all of these elements, with the goal of providing educational opportunities and resources for children and students in the Tampa Bay community.

At the start of 2022, the Tampa Bay YLD was faced with uncertainty about its ability to host inperson events in the wake of the ebbs and flows of COVID spikes. The prior year, the Tampa Bay YLD launched its first entirely virtual book drive to commemorate Black History Month. To do so, committee members set up an Amazon Wishlist

that included books focused on diversity and inclusion. To help identify schools in need of such books, the Tampa Bay YLD committee partnered with the Hillsborough County Public Schools Transformation Network, which works to create equitable access to quality education for vulnerable communities in the Hillsborough County.[1] The virtual book drive provided members with a streamlined way to participate, even in the midst of the pandemic.

Based on the success of the first book drive, the Tampa Bay YLD decided to make it an annual event. In February of 2022, the committee again created an Amazon Wishlist filled with books featuring diverse and inclusive protagonists. The Tampa Bay YLD received tremendous support from the legal community and beyond, collectively donating more than 450 books. Some of those donations came from Joseline Hardrick, author and the Chapter's Diversity and Inclusion Chair, who donated several copies of her own books.

Following the book drive, members of the Tampa Bay YLD committee coordinated with the Transformation Network to deliver the donated books to five local elementary schools in the Tampa Bay area. This year, Tampa Bay YLD members were able to meet with students during the delivery for the first time. Each of the students picked out a new book, and the excitement on their faces was palpable.

As the year went on, the Tampa Bay YLD took advantage of loosening COVID restrictions to plan a large-scale summer event at the federal courthouse for law students completing legal internships in the

Tampa Bay area. Ultimately, in July, the Tampa Bay YLD hosted a free "Morning at the Courthouse" program for more than 100 attendees. The law students were provided breakfast and lunch, courtesy of the Middle District of Florida's Bench Bar Fund committee, and heard from United States Bankruptcy Judge Catherine McEwen about opportunities for pro bono representation in federal court, observed sentencing hearings before United States District Judges William Jung and Kathryn Mizelle, and participated in post-hearing question-and-answer sessions with both the presiding judges and the attorneys appearing at the hearings, including Federal Defender for the Middle District of Florida, Alec Hall. Participants also attended a federal practitioners panel and a networking lunch with judges and attorneys.

In August, the Tampa Bay YLD hosted a Back-to-School Drive in partnership with the Hillsborough County Bar Association's Young Lawyers Division and the Hillsborough Association for Women Lawyers. Like the book drive, the Tampa Bay YLD used an Amazon Wishlist so that members could purchase school supplies online and have them

delivered directly to Tampa Bay YLD members. The drive culminated with a joint social, where members of the three sponsoring organizations

were invited to network and donate supplies in person. The donated items were later delivered to the Tampa Joshua House, a safe haven for abused, abandoned, and neglected school-age children.[2]

In November, the Tampa Bay YLD partnered with the George Edgecomb Bar Association to host a tour of the Sam M. Gibbons United States Courthouse in Tampa for students from Ferrell Middle School, an all-girls magnet middle school. The Tampa Bay YLD received funding for the event from the Federal Bar Association's Shaw Young Lawyer Public Service Grant. With the grant, the Tampa Bay YLD paid for lunch and transportation for the students.

Judge McEwen was instrumental in helping organize the event and coordinated with numerous

judges and departments to create an engaging program. At the start of the tour, the students learned about the role of judges and juries in court proceedings. The students then toured the United States Marshal's Office, where they watched everything happening in the courthouse on security cameras. The students also observed part of an ongoing trial before United States District Judge Mary Scriven and had the opportunity to ask Judge Scriven questions during a break in the trial. Later, the students heard from Joely Andrews with Pretrial Services and United States Magistrate Judge Christopher Tuite about his prior work with the United States Attorney's Office. During lunch, the students were introduced to United States District Judge Charlene Honeywell and United States Magistrate Judge Julie Sneed. After lunch, Judge Scriven and Judge Honeywell spoke with the students about how to prepare for a successful career, as well as their own experiences in overcoming obstacles and setbacks.

Lastly, in December, the Tampa Bay YLD partnered with the Tampa East chapter of Sleep in Heavenly Peace, an organization that builds, assembles, and delivers beds to local families in

need.[3] The Tampa Bay YLD received a grant from the Young Lawyers Division of the Florida Bar and a matching gift from the Younger Lawyers Division for the Federal Bar Association to buy the supplies for the beds. To help meet the build goal, the Tampa Bay YLD was paired with a local volunteer group from First Advantage.

At the event, Sleep in Heavenly Peace set up an assembly line where volunteers measured, sawed, drilled, sanded, branded, and assembled wooden planks to create headboards, footboards, bedframes, and slats for 40 beds.

The Tampa Bay YLD is lucky to have a supportive executive board and a committee of driven and compassionate members who spearheaded these projects. These events would not have been possible without them.

Michelle Moretz-Smith served as the 2022 co-chair for the Young Lawyers Division of the Tampa Bay Chapter. She is the Career Law Clerk to United States Circuit Judge Charles R. Wilson on the U.S. Court of Appeals for the Eleventh Circuit and a 2019 graduate of Stetson University College of Law. Previously, Michelle served as a law clerk to United States Magistrate Judge Amanda Arnold Sansone and United States Magistrate Judge Anthony E. Porcelli in the Middle District of Florida, Tampa Division.

Soma Nwokolo served as the 2022 co-chair for the Young Lawyers Division of the Tampa Bay Chapter. She is a civil Assistant United States Attorney in Tampa and a 2015 graduate of the University of Florida Levin College of Law. Prior to joining the United States Attorney's Office, Soma worked at Bradley Arant Boult Cummings LLP in the firm's government enforcement and investigations practice group in Tampa, in the Washington Criminal II section of the U.S. Department of Justice Antitrust Division in D.C., and as law clerk to United States District Judge Roy B. Dalton, Jr. in Orlando.

Endnotes

[1]*Overview – Transformation Network*, Hillsborough County Public Schools, https://www.hillsboroughschools.org/Page/4748 (last visited Dec. 9, 2022).

[2]*About Us*, Joshua House, https://www.friendsofjoshuahouse.org/about-us/ (last visited Dec. 9, 2022).

[3]*About*, Sleep in Heavenly Peace, https://shpbeds.org/about-sleep-heavenly-peace/ (last visited Dec. 9, 2022).

If you have enjoyed reading the Younger Lawyers Division newsletter, you may also enjoy reading the Antitrust & Trade Regulation Section's newsletter, *Antitrust Trends*—or better yet, submit an article! *Antitrust Trends* features articles regarding all aspects of antitrust law, and each issue includes an "Antitrust Apprentice" piece that introduces a facet of antitrust law to new practitioners. The Winter 2023 edition includes part two of a thought-provoking piece on the potential overreach of increasing antitrust regulation and current calls to broaden enforcement. Another article chronicles the steps taken by the Biden Administration to implement an executive order on promoting competition. Current and past editions of *Antitrust Trends* are available here: https://www.fedbar.org/antitrust-trade-regulation-section/atr/section-newlsetter.

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Federal Bar Association
4075 Wilson Boulevard, 8th Floor
Arlington, VA 22203