LexisNexis®

LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE & PROCEDURE
WAGSTAFFE'S CIVIL PROCEDURE BEFORE TRIAL

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

ATTORNEY'S FEES

Jump to full summary

Time for Filing Fee Motion

Sinkler v. Berryhill

932 F.3d 83, 2019 U.S. App. LEXIS 23227 (2d Cir. Aug. 2, 2019)

The Second Circuit holds that the time to apply for attorney's fees in litigation under the Social Security Act is governed by Civil Rule 54(d), and that when the court reverses an administrative denial of benefits and remands for further proceedings, the time to apply for fees is tolled until the claimant receives notice of the amount of any benefits award.

DISCOVERY

Jump to full summary

Evans v. Griffin

932 F.3d 1043, 2019 U.S. App. LEXIS 23593 (7th Cir. Aug. 7, 2019)

The Seventh Circuit holds that sanctions for failure to attend a deposition under Rule 37(d) are available only when a witness literally fails to show up for a deposition, and not when the witness attends but refuses to answer.

PRETRIAL CONFERENCES

Jump to full summary

Settlement Conferences

Doe v. Univ. of Michigan (In re Univ. of Michigan)

2019 U.S. App. LEXIS 25304 (6th Cir. Aug. 23, 2019)

The Sixth Circuit holds that a district court does not have the power under Federal Rule of Civil Procedure 16 to require a specific high-ranking official to attend a settlement conference or to order that the settlement conference be held publicly.

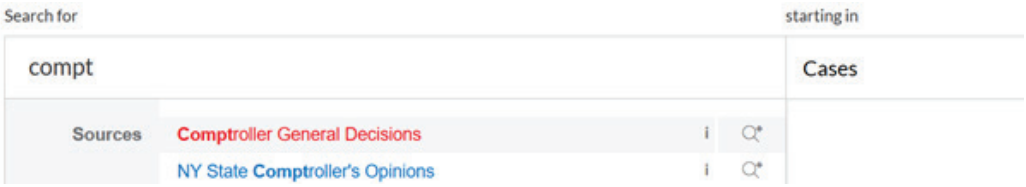
Continue on next page

Advanced Search on Lexis Advance®

Would you like to search for opinions written by a specific judge? To limit a search in the USC or CFR to just the unannotated portion – that is, to have the search ignore the case notes and research guides? Or to search the Congressional Record by a speaker's name, or news articles by the writer's name? Advanced Search allows you to perform each of these targeted searches, along with many others, in an easy-to-use search form. As a result, it is one of the most powerful tools in your LexisNexis repertoire. This article will show you how to find and use Advanced Search and provide you with a short list of some useful targeted searches.

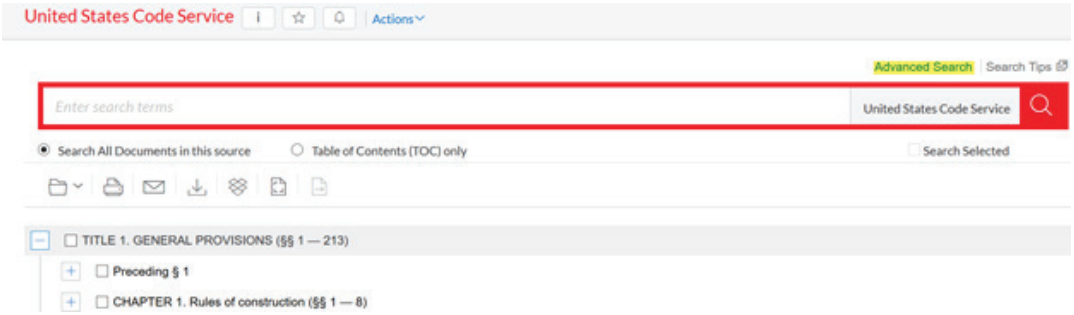
FINDING ADVANCED SEARCH

There are two ways to access an Advanced Search form. If you know the name of the source that you wish to search, the most direct way is to start to type the name of the source in the search box on the front page, then click on the name of the source as the Word Wheel suggests it.

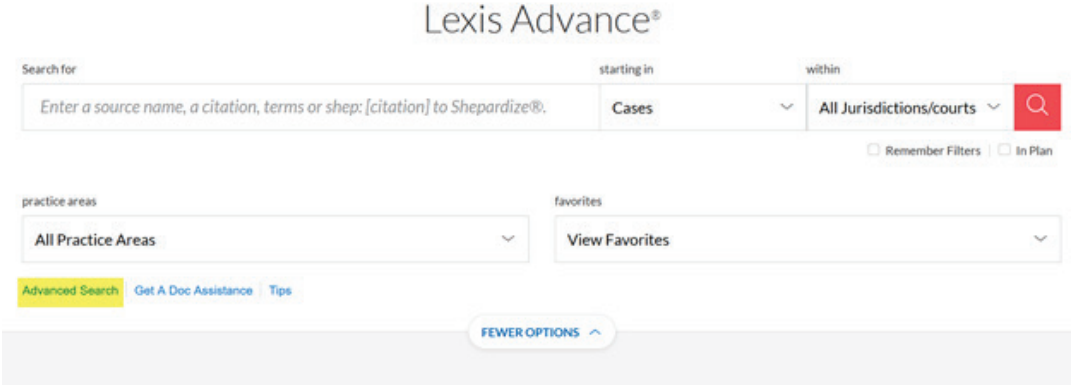


(Of course, other ways of finding a source, such as using Explore Content, will also work.)

In most instances, this will take you to the Advanced Search Form for that specific source. If the source is one with a Table of Contents, such as a code, law review, treatise, etc., then it will take you first to the TOC. Once there, you can search the TOC, or click the Advanced Search link at the top:



To find the Advanced Search form for a more general category, such as all case law or all news, or to browse a list of such forms, make sure the More Options area on the front page is open, then click the Advanced Search link at the bottom left:



Continue on next page

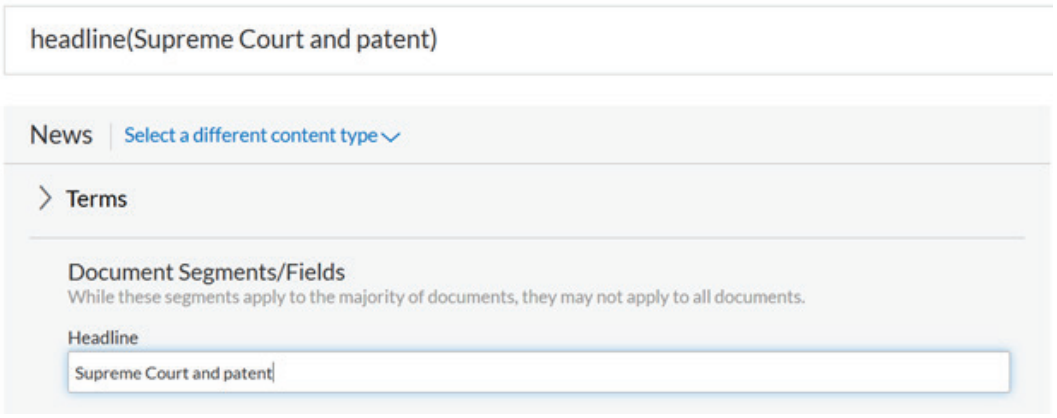
This will take you to the "Search Everything" form, where you can click the "Select a specific content type" link to see a list of all forms. Simply click the one you want. Note that the list is much longer than what is visible in the screen capture below, with entries for additional types of Secondary Sources, Administrative Codes, News, and Directories appearing further down the list.

USING AN ADVANCED SEARCH FORM

There are three parts to an Advanced Search Form. At the top there is a search box that you can use directly, and which will also fill in automatically as you use the Terms and Document Segments/Fields features.

Second, there is a Terms tool that allows you to create "AND", "OR", and "NOT" searches. For instance, you can type termination cause fraud in the All of These Terms box, then click the "Add" button to create a search for termination AND cause AND fraud.

Third, there is the Document Segments/Fields area, which contains the powerful targeted searches. Simply find the specific target you want and type in your desired criteria to create a targeted search. It will automatically populate the search box at the top:



SHORT LIST OF SOME USEFUL TARGETED SEARCHES

CASE LAW

Written By, to find opinions, concurrences or dissents by a specific judge. (There are also options to search just for ***Opinion By, Dissent By, and Concurrence By***, as well as for ***Judges***, whether they wrote the opinion or not.)
Attorney, to find cases presented by a specific attorney
Summary and Headnotes, to search these two LexisNexis editorial enhancements, to find cases that are often most directly on point.

Continue on next page

STATUES AND LEGISLATION

Unannotated, in Codes, to search only the official text and not the Case Notes and other editorial items
Sponsor, in Bill Text, to find bills sponsored by a particular legislator
Speaker, in the Congressional Record, to find debate involving a specific Representative or Senator

NEWS

Byline, to find articles or by a specific person. This search will also find appearances on interview shows.
Headline or ***Headline and Lead Sections***, to find articles containing your search term in a position of prominence or higher importance.

LAW REVIEWS

Author, to find articles by a specific author or contributor

COMPANY PROFILES

Company, to limit your results to those that are specifically about your company, rather than those that mention it in passing.

That New Lexis Advance Screen Where Did My Stuff Go?

It's been a couple of months since the new Lexis Advance front page was introduced, and while most people have reacted quite favorably to the new streamlined look, there are still some users asking the big question: Where did my stuff go? So, let's take a look at some of the features and functionality previously resident on the Front page, and where they can be found now. In fact, they are all just a click away.

WHERE ARE MY…

FAVORITES?

Your favorites are still there on the front page, under the More Options button, in the center of the page. If you click on More Options, it will slide down, revealing a drop-down menu with all your favorites. A few best practices – if you leave the More Options window open, it will remain that way, with the Favorites menu always visible. And it's now much easier to remove a favorite – simply click the X next to it in the menu.

ALERTS?

Your Alerts can now be accessed via the same More button as Folders. Simply click on More, then Alerts to go to the main Alerts page. If you see a blue dot next to the Alerts button, your Alerts have new results.

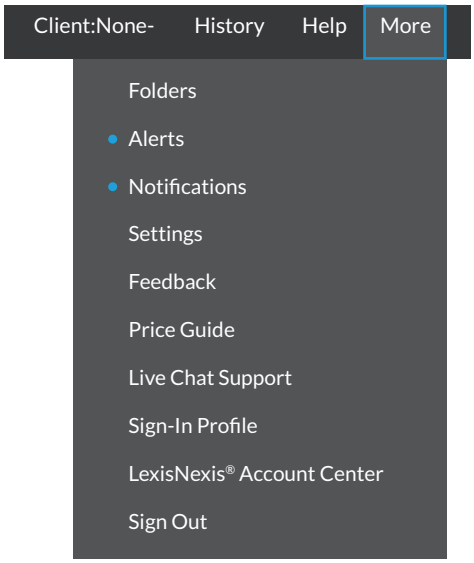
FOLDERS?

Folders and many other items are now available under the More button at the top right. Simply click on More, then on Folders, to be taken directly to the main Folders page to access stored documents, share folders, etc. (Note – not all accounts have access to the Folders feature. If you're not sure, ask your LexisNexis Solutions Consultant or Client Manager.)

Continue on next page

HISTORY?

The black tool bar at the top also contains a direct link to your History, just to the left of the More and Help tabs. This link will display your last five searches, documents accessed and Shepard's reports, with links to a full 90 days' worth of each, as well as the innovative and powerful Research Map.



BROWSE SOURCES?

To browse or search through all your LexisNexis sources, click the Find a Source tab in Explore Content. Here you will find three options:

a search box, to search for a source by its name or a word in its description, which could include the publisher, subject area, jurisdiction covered, or even an author.

a View All Sources button, to retrieve a list of every source offered by LexisNexis. The list will display in alphabetical order, with a variety of filters on the left to help you focus on the content that is most relevant.

a View In Plan Sources button, which will display the same list, prefiltered to include only those sources included in your subscription.

Once you find a source, you can easily add it to your search or set up a Publication Alert by clicking the down arrow to the right of the source name. And you can also see the source description by clicking the large letter i icon at the far right.

PRACTICE CENTERS?

To easily find Practice Centers, open the Explore Content feature then click on either the ***State*** or ***Practice Area*** or ***Industry*** tabs. There is a link to a list of our Practice Centers at the bottom left corner of each of these tabs. As a reminder, Practice Centers, are curated pages contains direct links to the primary and secondary sources most relevant to a specific practice area, along with legal news, key topics, and other related content. The list of sources often contains combinations of interest to a practitioner, such as the ***GAO, US Court of Federal Claims, and US Court of Appeals for the Federal Circuit*** source under Government Contracts, as well as pinpoint "sub-sources", such as specific titles or chapters of the USC, CFR, etc. Best practice tip – click the little house icon at the top left to make that Practice Center your start page in Lexis Advance.

BROWSE TOPICS?

Similarly, to browse or search through the LexisNexis topics library, click the Find a Topic tab in Explore Content. Here you can either locate a topic by entering a specific word or browse through the hierarchy. Either way, once you find the desired topic, click on it to get a result set of every case, administrative decision, statute, law review or treatise article, etc., that has been indexed with that topic.

Continue on next page

Drill Baby Drill: Diversity Jurisdiction in the 21st Century

Getting in or out of federal court on the ground of diversity jurisdiction frequently involves exploring important citizenship issues seemingly below the surface. When they say drill baby drill, they could just as well be describing the 21st Century innovations in analyzing the presence of diversity of citizenship.

Before surveying the "below the surface" approach to citizenship issues in federal court, it is best to remember how important diversity can be. Almost from the beginning of the Republic, litigants could file actions in or remove them to federal court if there was complete diversity of citizenship between the parties — even if the case involved only state law claims.[1]

The diversity mining challenge starts with the established general proposition that there must be complete diversity of citizenship before an action can be filed or removed to federal court. As I have been teaching judges and lawyers for years, this essentially means writing down in columns the states of citizenships of all plaintiffs, the states of citizenship of all defendants and checking to be sure that the same state is not on both sides of the line.

Citizenship Rules for Diversity Jurisdiction

The general rules governing citizenship determinations for diversity actions are easy to state. These rules can be summarized as follows:

a. Individuals

For diversity purposes, natural persons are considered to be citizens of the state in which they are domiciled (not merely residing)—meaning where they are and intend to remain permanently. Ordinarily, this poses no analytic challenge unless someone has multiple residences or is temporarily located somewhere (e.g. students, military personnel, prisoners, etc.).[2]

In close cases, courts will drill down and examine the objective indicia in locating the person's singular domicile. This means evaluating matters like primary residence, property ownership, voter registration, tax filings, etc. See The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial, § 7-III[B][2][b].

b. Corporations

Similarly, there are bright line rules established by statute and case law for determining the citizenship of corporations. Specifically, corporations are citizens for diversity purpose in every state in which they are incorporated and the state in which the entity has its principal place of business. 28 U.S.C. § 1332(c)(1).

Determining an entity's states of incorporation involves fairly shallow drilling. One identifies all states of incorporation and does not use the core sample of a State merely because the company is registered to do business there.

Discovering principal place of business "oil" is only slightly more complicated. The Supreme Court tells us to locate the entity's "nerve center" — meaning where it conducts, coordinates and directs corporate activity at the highest level. This will most frequently equate with the company's formal headquarters and not simply where the company is conducting its business, even if at its largest volume.[3]

c. Non-Corporate Entities

The drilling effort becomes more complicated if parties on either side of the "v" line in litigation (i.e., plaintiffs or defendants) are non-corporate entities (e.g. partnerships, LLCs, LLPs, unincorporated associations, etc.). In this situation under established law, the entity takes on the citizenship of each of its members, completely ignoring where it supposedly has its principal place of business or was formally created under law.4 The drilling effort is extraordinarily important under a host of new federal court decisions.

Continue on next page

First, one must ascertain whether the entity is, in fact, a corporation and thus limiting its citizenship to states of incorporation and principal place of business (and not where its shareholders, officers or directors are domiciled). When the entity's status is ambiguous, recent case law tells us that one must do, shall we say, a bit of "fracking" (i.e., examining the nature of the entity and whether it has the elements of "person-hood" with shares issued to investors who enjoy limited liability).[5]

Second, the drill baby drill excavation becomes even more important when exploring the citizenship of these non-corporate artificial entities when they have sub-members below the surface. The following drilling rule often is overlooked: the citizenship inquiry means that if the non-corporate party has another artificial entity as a partner or member (e.g. one of the members of an LLC is itself an LLC) then you drill down again and include the members of the constituent entity as well. One circuit called this "a factor tree."[6]

Finally, the jurisdictional status of some entities has been unclear over the years. For example, it has only been in the last few years that courts have clarified the citizenship of trusts for diversity purposes. It was only in 2016 that the U.S. Supreme Court clarified that the citizenship of business trusts (e.g., REITs) is that of each of their members as if they were a partnership.7 On the other hand, if a party is a traditional trust characterized by fiduciary duties then the courts recently and uniformly have looked only to the citizenship of the trustee himself or herself for diversity purposes.[8]

Significance of the Drill Down Jurisdictional Exercise

Importantly, therefore, if the citizenship of any non-corporate entity (meaning all its members and sub-members below the surface) is the same as anyone on the other side of the case, there is no complete diversity. Such cases cannot be originated in or removed to federal court on diversity grounds.

Simply put, the 21st Century diversity drilling exercise often will uncover a seemingly "irrelevant" sub-member of a non-corporate entity that will defeat complete diversity. For example, the citizenship of every partner—general, limited, silent—counts in assessing the presence of complete diversity. The same can be said for every member of an LLC, an LLP or an unincorporated association. If one constituent member of such an entity is from the same state as a party on the other side, then this drill down destroys complete diversity.[9]

A shockingly high number of cases in the past few years have resulted in dismissals (or remands) for the first time at the appellate stage when courts sua sponte have identified that, indeed, there may never have been complete diversity when the parties' citizenships are explored under the drill down approach.10 This often happened because the lawyers either were unaware of the drill down rules or simply did not know or investigate the citizenship of all the levels of their entity clients. (To be fair, sometimes due to privacy or other concerns, the client simply declines to disclose the citizenship of its more publicity-shy participants.)

The proposed amendment to Federal Rule of Civil Procedure 7.1 should address this problem and perhaps nip it in the bud. Lawyers are already familiar with the corporate disclosure requirement of existing Rule 7.1 designed to enable judges to conduct a conflicts analysis at the inception of cases. The amended rule would require that all parties to a diversity case file a disclosure statement that names and identifies the citizenship of every individual or entity whose citizenship is attributed to that party at the time the action is filed. Thus, the drill down rule could become a disclosure obligation at the very outset of the case—right when the "jurisdiction first" principle is most important.

Continue on next page

Survival Tips

Survival tips for such diversity drilling exploration are easy to identify and mandatory to follow.

1. Attorneys must conduct a reasonable investigation to identify the citizenship of all real parties in interest to determine if complete diversity exists.

2. Attorneys must also determine the citizenship of all members of non-corporate entities, including those in the sub-strata of ownership of such entities.

3. In performing their drilling tasks, attorneys must remember the "snapshot" rule, i.e., diversity of citizenship will be measured at the time jurisdiction is invoked, unaffected by later changes to such citizen-ship by relocation or changed ownership.

4. Finally, attorneys must convince their clients to join them as members of the "jurisdiction first society"—meaning it is essential to ascertain the citizenship of all parties (individuals, corporations and non-corporate members and sub-members) so as to avoid the utter waste of time and money when the absence of jurisdiction will mandate dismissal no matter how long the action has been pending in federal court.

At bottom, attorneys must be hyper-aware at the outset of potential citizenship issues, or risk having to write that truly awful email status report to a client explaining that the late-show jurisdiction defect means, in the blunt language of one appellate judge, that since there was no jurisdiction "from the get-go... close the hymnals because mass is over... Go home. Case dismissed."[11]

Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

---

[1] See The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial, Ch. 2 "State Versus Federal Procedures."

[2] *Eckerberg v. Inter-State Studio & Publishing Co.*, 860 F.3d 1079 (8th Cir.2017) – that military person assigned to various places did not change his original Florida domicile.

[3] *Hertz Corp. v. Friend*, 559 U.S. 77, 93 (2010); *Bearbones, Inc. v. Peerless Indemnity Ins. Co.*, 2019 U.S. App. LEXIS 24908 (1st Cir. August 21, 2019)—court uses neurological metaphor of "corporate brain"; *3123 SMB LLC v. Horn*, 880 F.3d 461, 463 (9th Cir. 2018)—newly formed holding company's nerve center is location of its board meetings.

[4] See *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990)—count citizenship of all partners; *Siloam Springs Hotel, L.L.C. v. Century Surety Co.*, 781 F.3d 1233, 1237 (10th Cir. 2015)—same for LLCs; see also The Wagstaffe Practice Guide: Fed. Civ. Proc. Before Trial, § 7-III[D][3].

[5] See *Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equipment Co.*, 759 F.3d 787, 791 (7th Cir. 2014)—Chinese entity treated as LLC for diversity purposes; *Hawkins v. i-TV Digitalis Tavkozlesi zrt*, 2019 U.S. App. LEXIS 24311 (4th Cir. August 15, 2019)—if governing sovereignty treats entity as a corporation, it will be treated as such for diversity purposes—Hungarian kft—law unclear; *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 481 (1933)—Puerto Rican sociedad en comandita treated as corporation; *Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 739-43 (7th Cir. 2004)—professional corporation treated as corporation; see also The Wagstaffe Group Practice Guide: Fed. Civ. Proc. Before Trial § 7-III[C][2][b].

[6] *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1220 (11th Cir. 2017).

[7] *Americold Realty Tr. v. ConAgra Foods, Inc.*, 136 S.Ct. 1012, 1016 (2016). See The Wagstaffe Group Practice Guide: Fed. Civ. Pro. Before Trial § 7-III[D][3][d].

[8] *Demarest v. HSBC Bank*, 920 F.3d 1223 (9th Cir. 2019); *GBForefront, L.P. v. Forefront Mg't Group, LLC*, 888 F.3d 29 (3d Cir. 2018); *Raymond Loubier Irrevocable Trust v. Loubier*, 858 F.3d 719 (2nd Cir. 2017); *Byname v. Bank of New York Mellon*, 866 F.3d 351 (5th Cir. 2017); *Doermer v. Oxford Financial Group*, 884 F.3d 643 (7th Cir. 2018); *Wang v. New Mighty U.S. Trust*, 843 F.3d 487 (D.C. Cir. 2016).

[9] See Footnote 3, supra.

[10] See *Midcap Media Finance, L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310 (5th Cir. 2019); *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218 (11th Cir. 2017); *Settlement Funding LLC v. Rapid Settlements, Limited*, 851 F.3d 530 (5th Cir. 2017).

[11] *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 320 (7th Cir. 1988) (Evans, J.).

ATTORNEY'S FEES

Time for Filing Fee Motion

Sinkler v. Berryhill

932 F.3d 83, 2019 U.S. App. LEXIS 23227 (2d Cir. Aug. 2, 2019)

The Second Circuit holds that the time to apply for attorney's fees in litigation under the Social Security Act is governed by Civil Rule 54(d), and that when the court reverses an administrative denial of benefits and remands for further proceedings, the time to apply for fees is tolled until the claimant receives notice of the amount of any benefits award.

Fee Awards Under Social Security Act. The Social Security Act, in 42 U.S.C. § 406(b), authorizes a court that enters a judgment favorable to a social security claimant to award, "as part of its judgment," a reasonable fee for counsel's representation before the court, not to exceed 25 percent of the total past-due benefits to which the claimant is entitled "by reason of such judgment" [42 U.S.C. § 406(b)(1)(A) (Social Security Commissioner may certify amount of court-ordered fee for payment out of past-due benefits)].

In the present case, the district court entered judgment reversing a denial of benefits to the claimant and remanded for further agency consideration of benefits (a "sentence four" remand) [see 42 U.S.C. § 405(g), sentence 4 ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.")]. Because calculation of the maximum fee under § 406(b) depends on the past-due benefits ultimately obtained, it is settled that a district court that makes a sentence four remand may await the conclusion of the agency proceedings before considering an application for fees [see Jackson v. Astrue, 705 F.3d 527, 531 (5th Cir. 2013); Bergen v. Comm'r of Soc. Sec., 454 F.3d 1273, 1276–1277 (11th Cir. 2006); McGraw v. Barnhart, 450 F.3d 493, 501–502 (10th Cir. 2006); Smith v. Bowen, 815 F.2d 1152, 1155 (7th Cir. 1987); Fenix v. Finch, 436 F.2d 831, 835 (8th Cir. 1971); Philpott v. Gardner, 403 F.2d 774, 775 (6th Cir. 1968); Conner v. Gardner, 381 F.2d 497, 500 (4th Cir. 1967)].

Issue in This Case: Time for Filing Fee Application. The Second Circuit in this case had to decide on the time limit for a claimant to file an application for § 406(b) attorney's fees. Federal Rule of Civil Procedure 54(d)(2)(B) generally requires a motion for attorney's fees to be made within 14 days of "judgment," which is defined to include "any order from which an appeal lies" [Fed. R. Civ. P. 54(d)(2)(B); see Fed. R. Civ. P. 54(a)]. And a sentence four remand is a final and appealable judgment [see Forney v. Apfel, 524 U.S. 266, 270–271, 118 S. Ct. 1984, 141 L. Ed. 2d 269 (1998)]. Therefore, the Second Circuit said, a fee application in such a case is presumptively subject to the 14-day filing limitation of Rule 54(d)(2)(B). But the court of appeals noted a practical problem with filing a motion within that time: the Commissioner typically does not calculate the amount of past-due benefits until months after the district court remands, and § 406(b) caps attorney's fees at 25 percent of the benefits award. Thus, a fee request cannot be quantified until the Commissioner finally calculates the past-due benefits. As a result, if a sentence four judgment orders remand, Rule 54(d)(2)(B) may present a deadline that cannot be met within 14 days of that judgment.

Circuit Split. Other circuits are split on the question. The Tenth Circuit has declined to apply Rule 54 in this context. Instead, it has derived a "reasonableness" standard from language in Civil Rule 60, which permits a court to relieve a party from a final judgment, order, or proceeding for any reason that justifies relief, on a motion made within "a reasonable time" [Fed. R. Civ. P. 60(b)(6), (c)(1)]. The Tenth Circuit has reasoned that Rule 60's "grand reservoir of equitable power to do justice" provides the best option for addressing the practicalities of sentence four judgments ordering remand. Thus, the Tenth Circuit holds that a motion for attorney's fees pursuant to § 406(b) is timely if filed within a reasonable time of the Commissioner's decision awarding benefits [McGraw v. Barnhart, 450 F.3d 493, 501–502 (10th Cir. 2006)].

By contrast, the Third Circuit has held that Rule 54(d)(2)(B) applies to § 406(b) applications following sentence four remands.

Continue on next page

That court has found little support for using Rule 60 in this context and has remarked that reliance on Rule 60 appears to conflict with Supreme Court jurisprudence instructing that a postjudgment motion for attorney's fees is not properly asserted as a motion to amend or alter judgment [Walker v. Astrue, 593 F.3d 274, 279 (3d Cir. 2010) (citing White v. N.H. Dep't of Emp't Sec., 455 U.S. 445, 451, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) (fees request is not appropriate under Fed. R. Civ. P. 59(e))]. The Third Circuit avoids the practical problem caused by the delay in quantifying past-due benefits on remand by tolling Rule 54(d)(2)(B)'s filing deadline until the notice of award is issued by the Commissioner on remand and counsel is notified of that award [Walker v. Astrue, 593 F.3d 274, 280 (3d Cir. 2010)]. The Fifth and Eleventh Circuits agree [Bergen v. Comm'r of Soc. Sec., 454 F.3d 1273, 1277 & n.1 (11th Cir. 2006); Pierce v. Barnhart, 440 F.3d 657, 663–664 (5th Cir. 2006)].

Second Circuit Applies Rule 54(d)(2)(B). The Second Circuit panel in this case joined the Third, Fifth, and Eleventh Circuits, concluding that Rule 54(d)(2)(B) provides the applicable deadline for filing § 406(b) fee motions. The appellate panel reasoned that tolling the Rule 54(d)(2)(B) period, rather than applying Rule 60, best resolves the practical concerns that can arise when a district court judgment reverses a denial of social security benefits and remands the case to the agency for further proceedings. The court noted that its precedent recognizes that limitations periods are generally subject to equitable tolling when necessary to prevent unfairness to a plaintiff who is not at fault for a late filing [see Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011)]. The court found that this principle sensibly applies to Rule 54(d)(2)(B)'s period because parties who must await the Commissioner's award of benefits on remand cannot be expected to file an application for attorney's fees that are statutorily capped by the amount of an as-yet-unknown benefits award. The Court concluded that once counsel receives notice of the benefits award—and can therefore calculate the maximum attorney's fees that may be claimed—there is no sound reason not to apply Rule 54(d)(2)(B)'s 14-day limitations period to a § 406(b) filing, just as it would apply to any other final or appealable judgment.

The Second Circuit found it significant that Rule 54(d)(2)(B)'s 14-day period is not absolute. The rule expressly states that the specified period applies "[u]nless a statute or a court order provides otherwise" [Fed. R. Civ. P. 54(d)(2)(B)]. District courts are thus empowered to enlarge that filing period when circumstances warrant. The court of appeals acknowledged that courts cannot adopt local rules or orders that are inconsistent with federal rules of procedure [see 28 U.S.C. § 2071; Fed. R. Civ. P. 83(a)(1)]. But because the national rule in this instance expressly confers discretion to alter the specified filing time, the court of appeals will generally defer to a district court in deciding when such an alteration is appropriate in a particular case.

Application to Present Case. The claimant in this case filed her § 406(b) fee application more than six months after receiving notice of the Commissioner's calculation of benefits on remand. The Second Circuit found this to be far outside the 14-day period prescribed by Rule 54(d)(2)(B), even when tolled as warranted following the sentence four remand by the district court. The court of appeals concluded, therefore, that the district court had reasonably denied the motion as untimely.

The claimant argued that although Rule 54(d)(2)(B)'s 14-day filing period could apply prospectively to future § 406(b) applications, it should not have been applied to her case. She contended that, because Rule 54(d)(2)(B)'s applicability was not settled until the Second Circuit's decision in this case, she should have been allowed a "reasonable time" to file her § 406(b) motion. The court of appeals rejected this argument, pointing out that the claimant had offered no factual basis for concluding that it was reasonable to file the motion six months after receiving notice of the benefits calculation on remand.

Because the claimant's § 406(b) application was untimely—not only under the controlling provision of Rule 54(d)(2)(B), but also under the reasonableness standard that the claimant argued for—the Second Circuit affirmed the district court's judgment denying the application.

Continue on next page

DISCOVERY

Evans v. Griffin

932 F.3d 1043, 2019 U.S. App. LEXIS 23593 (7th Cir. Aug. 7, 2019)

The Seventh Circuit holds that sanctions for failure to attend a deposition under Rule 37(d) are available only when a witness literally fails to show up for a deposition, and not when the witness attends but refuses to answer.

Background. Plaintiff was a state prisoner with a number of serious medical problems. Plaintiff alleged that he developed nasal polyps and that the prison medical staff refused to authorize surgery, which an outside medical provider said was the only effective remedy for the condition. He filed an action under 42 U.S.C. § 1983, alleging that defendants exhibited deliberate indifference to his serious medical needs in violation of his Eighth Amendment rights (as applied to the states through the Fourteenth Amendment). The district court never reached the merits of that claim, however, because it dismissed the case with prejudice as a discovery sanction.

In its case management order, the district court had granted the defendants "leave to depose the plaintiff at his place of confinement," as Federal Rule of Civil Procedure 30(a)(2)(B) requires for depositions of incarcerated persons. Shortly before the close of discovery, Dr. Francis Kayira, one of the defendants, noticed the deposition by mail on Thursday, February 16, 2017, for the next Tuesday, February 21. Plaintiff asserted that he did not receive that notice until February 22, the day after the designated time. When, on the 21st, he was brought out from his cell to meet with the defendants' lawyers, he said he had no idea why they were there. Further, he was feeling ill and could not sit for the deposition. Plaintiff refused to be sworn or to answer any questions.

Kayira moved for sanctions, seeking either reimbursement for the costs of the failed deposition or dismissal with prejudice. Plaintiff responded with a sworn statement explaining that he had been in segregation since February 4 and did not receive the notice of deposition until the guards passed out mail to the segregated prisoners at 6:30 p.m. on February 22, 2017, the day after the attempted deposition. He reiterated that as a result of the prison's mail-distribution policy he "had no idea" that the deposition was going to occur until he was brought to the videoconferencing room. The district court granted the dismissal, citing Federal Rules of Civil Procedure 37(b) and 37(d) and finding that a sanction of costs would be fruitless because plaintiff was an indigent prisoner. Plaintiff appealed.

Sanctions Were Not Warranted Under Rules 37(b) or (d). In addressing whether the district court correctly relied on Rules 37(b) and 37(d) for its sanctions order, the Seventh Circuit explained that Rule 37(d) applies only when "a party . . . fails, after being served with proper notice, to appear for that person's deposition" [Fed. R. Civ. P. 37(d)(1)(A)(i) (emphasis added)]. Setting aside the question of notice, the court noted that it has interpreted this rule to apply only when a party literally fails to show up for a deposition. Plaintiff physically appeared for his deposition. The problem was a refusal to participate, not a failure to show up. The court explained that if a party does in fact appear physically for the taking of his deposition but refuses to cooperate, the proper procedure is to obtain an order from the court, as authorized by Rule 37(a), directing the party to be sworn and to testify.

The court rejected the argument that the Seventh Circuit has abandoned this strict interpretation of Rule 37(d). Even if the court had receded from this position, however, the court found that sanctions could not be imposed under Rule 37(d). That part of the rule applies only after the proposed deponent has been served with proper notice. Taking the facts in the light most favorable to plaintiff, the court found that plaintiff was not properly served in this case. Therefore, the appellate court rejected Rule 37(d) as a basis for the district court's order.

The Seventh Circuit also found that sanctions were not proper under Rule 37(b). Sanctions are permissible under Rule 37(b) only when a litigant fails "to comply with a court order." Use of Rule 37(b) is therefore improper if there is no court order in place. A party lays the predicate for Rule 37(b) sanctions by filing a motion under Rule 37(a) seeking "an order compelling disclosure or discovery" [see Fed. R. Civ. P. 37(a)(1)]. Only if the court grants that order, and then the person subject to the order fails to comply with it, may the party seeking discovery move under Rule 37(b) for sanctions. The court observed that Kayira skipped the essential first step of this process, instead immediately seeking sanctions.

Continue on next page

Perhaps recognizing this misstep, Kayira argued that the district court's orders permitting him to take plaintiff's deposition and setting a deadline for the close of discovery were equivalent to an order to compel testimony. The appellate court disagreed, noting that neither of those orders compelled plaintiff to sit for a deposition. Both were form orders that the district court uses in many pro se prisoner cases. They were case-management and scheduling orders, not targeted orders requiring compliance with a particular discovery request, as contemplated by Rule 37(a).

The district court's order permitting plaintiff's deposition stated only that "[c]ounsel for the defendants is hereby granted leave to depose the plaintiff at his place of confinement. Counsel for the defendants shall arrange the time for the deposition." The court noted that this language did not compel plaintiff to do anything, but instead was directed toward defendants' counsel. Its language was permissive, not mandatory. The district court's scheduling order required the parties to complete discovery by March 1, 2017. It did not direct either party to engage in any specific course of discovery. Thus, neither was an order compelling discovery on which to base sanctions.

Sanctions Were Not Proper Under Court's Inherent Power. Defendant also argued that sanctions were appropriate based on the district court's inherent authority to impose sanctions for discovery abuses. The court cautioned that this power must be exercised with restraint. In addition, the district court's use of its inherent power must be grounded in factual findings supported by the record. In this case, the district court made no finding that plaintiff received notice. Without proper notice, plaintiff was not required to sit for what amounted to "a surprise-attack deposition." Rule 30(b)(1) requires "reasonable written notice" before the taking of an oral deposition. Plaintiff's uncontradicted sworn statement asserted that he did not receive timely notice.

Furthermore, defendant placed the deposition notice in the U.S. mail on Thursday for a Tuesday morning deposition, allowing only five days for delivery through both the U.S. and prison mail system. Courts have long recognized the sluggishness of prison mail, even going so far as to create special rules to stop delays in that system from causing unwarranted prejudice to prisoner-litigants. Throughout this case, a week or more often elapsed between when plaintiff placed a document in the prison mail system and when it was filed with the district court. Thus, the court found it plausible, if not likely, that the mailed deposition notice did not reach plaintiff before the deposition.

Even if the notice had reached plaintiff before the deposition, it still might have been untimely if it reached him so late that he had no time to prepare. Rule 30(b)(1)'s "reasonable written notice" requirement is designed to ensure that a deponent has the opportunity to prepare adequately for the deposition. If the facts are simple or the parties are clearly prepared, notice of even one day may be reasonable. However, that was not the situation in this case. There were numerous documents for plaintiff to review, which defendant's counsel in fact brought to the deposition. There was no guarantee that plaintiff would have immediate access to these documents while incarcerated. To the contrary, plaintiff alleged that he did not have immediate access to his legal documents.

Finally, the Seventh Circuit observed that dismissing a case with prejudice is one of the harshest sanctions a court can impose, and so courts must be especially careful before taking that step. Even though a monetary fine may not have been appropriate for an indigent prisoner, other sanctions were available: for example, a warning from the court, a small financial sanction, taking certain facts to be established in favor of the party that secured an order compelling discovery, or dismissal without prejudice. One of these will often be enough to deter and punish misconduct. Furthermore, the choice of sanction must take into account the gravity of the misconduct. In this case, the district court went too far by dismissing the case with prejudice for the assumed discovery violation.

Conclusion. For these reasons, the Seventh Circuit reversed the judgment of the district court and remanded for further proceedings.

Continue on next page

PRETRIAL CONFERENCES

Settlement Conferences

Doe v. Univ. of Michigan (In re Univ. of Michigan)

2019 U.S. App. LEXIS 25304 (6th Cir. Aug. 23, 2019)

The Sixth Circuit holds that a district court does not have the power under Federal Rule of Civil Procedure 16 to require a specific high-ranking official to attend a settlement conference or to order that the settlement conference be held publicly.

Background. John Doe sued the University of Michigan for violating his due-process rights during a school disciplinary hearing. The district judge, apparently frustrated with the University's foot-dragging, scheduled a settlement conference and required the University's president to attend. The University requested that the president be allowed to attend by telephone or send a delegate in his place, but the district judge refused. The University then requested permission to send someone with both more knowledge about the sexual assault policy at issue and full settlement authority. The district judge again refused. Instead, the district judge ordered the president to be there even if someone else with full settlement authority attended. Two days before the settlement conference, the district judge decided that the conference (which he had assured the University would be private) should be a public event because the case involved "matters of public interest" and had sparked media attention. The University sought a writ of mandamus to review these actions.

District Court Lacked Power to Make These Orders. The Sixth Circuit explained that any power a lower federal court exercises must have some basis in either an act of Congress or the Constitution. Otherwise, it has no basis in law. In this case, the district judge sought to do two things: (1) require the University president to attend the settlement conference, and (2) make that settlement conference open to the public and the media. The appellate court found that neither had a basis in law. Thus, the district judge abused his discretion.

Orders Not Authorized by Rule 16. The Sixth Circuit acknowledged that Congress has given district courts great control over their dockets. The Federal Rules of Civil Procedure provide tools to manage a busy docket, including the valuable tool of encouraging parties to settle when appropriate [see Fed. R. Civ. P. 16]. The district judge was frustrated with the University because he believed the University was not acting in good faith. The district judge also expressed surprise that the University could not name a specific individual with full settlement authority besides the president. Yet the district judge had a lawful avenue for dealing with bad-faith settlement practices, if he thought the University's actions reached that level. The Federal Rules provided the district judge with the power to sanction the University if it failed to appear at a pretrial conference or did not participate in a pretrial conference in good faith [see Fed. R. Civ. P. 16(f)(1)].

On the other hand, the rules do not authorize a district judge to require a specific high-ranking government official to attend a settlement conference. Rule 16 provides that a "court may require that a party or its representative be present or reasonably available by other means to consider possible settlement" [Fed. R. Civ. P. 16(c)(1)]. In addition, the federal rules generally allow a district court to order someone with settlement authority to attend a settlement conference. However, this power is more limited when it comes to government actors. The Advisory Committee Notes explain that in cases involving government officials, it may be that nobody with settlement authority can attend, to say nothing of the highest-ranking official with such authority. There, "the most that should be expected is access to a person who would have a major role in submitting a recommendation to the body or board with ultimate decision-making responsibility" [see Fed. R. Civ. P. 16 Advisory Committee Notes (1993 Amendments)].

The Sixth Circuit noted that the University, a state actor, went further than the rules require: it offered to send a representative with full settlement authority. The district judge refused, insisting that the president attend the conference because the president had a duty to explain University policy to his constituents. The Sixth Circuit found that this was not a valid reason. Similarly, the district judge's desire to settle the case was not a compelling reason for requiring the presence of the President, because the University offered to send someone with full settlement authority. Thus, the district judge abused his discretion when he ordered a specific high-ranking state official to serve as a party's representative at the settlement conference.

Continue on next page

The appellate court also found that the district court abused its discretion when it required that the settlement conference be public. Rule 16 names sixteen matters for consideration at pretrial conferences, including things like "disposing of pending motions," "amending the pleadings if necessary or desirable," and "facilitating in other ways the just, speedy, and inexpensive disposition of the action" [see Fed. R. Civ. P. 16(c)(2)(B), (K), (P)]. The appellate court reasoned that to achieve the purposes that the rule does permit, settlement conferences should be private, not open to the media and the public. Although a judge may order a pretrial conference to facilitate settlement [see Fed. R. Civ. P. 16(a)(5)], for a settlement conference to work, "parties must feel uninhibited in their communications" [see Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003)]. They must be free to make candid assessments, admit their strengths and weaknesses, and offer concessions. For this reason, settlement discussions are traditionally found to be confidential. Given the important interest in private settlement negotiations, the district judge abused his discretion by ordering that the private conference become an open discussion.

Power Not Granted Under Constitution. The Sixth Circuit also concluded that the Constitution does not grant a district judge the power to require a specific high-ranking state official to attend a public settlement conference. The court explained that, to fall under the category of "inherent powers" vested in Article III courts, a power must be necessary to the court's function. The district judge's asserted power to require a specific person—regardless of the availability of other representatives—to attend a public settlement conference does not meet the high bar of "inherent powers." It was not "necessary" for the court to perform its functions. The Sixth Circuit observed that courts have long been empowered to decide cases or controversies, but not to hold press conferences on "matters of public interest." Further, federalism and separation-of-powers principles counsel strongly against recognizing such a power.

Mandamus Review Was Proper. Finally, the Sixth Circuit addressed the question of its own power to remedy the district judge's conduct. The appellate court acknowledged that mandamus is an extraordinary remedy. For the writ to issue, an applicant must (1) have no other adequate means of obtaining relief, (2) demonstrate a right to issuance that is clear and indisputable, and (3) show that issuance of the writ is appropriate under the circumstances. Mandamus is appropriate to remedy a clear abuse of discretion or judicial usurpation of power. Courts have discretion to exercise power within the bounds of their law-given authority. However, when courts exercise a power beyond that authority, they abuse their discretion. In those cases, mandamus may be appropriate.

The Sixth Circuit found that the district judge took two actions that together warranted mandamus relief. He summoned a specific high-ranking state official to attend a settlement conference and required, at the eleventh hour, that the settlement conference be open to the public and the media. First, mandamus was warranted because the University had no other means of obtaining relief. No "controlling question of law" that would "materially advance the ultimate termination of the litigation" could have given rise to a discretionary interlocutory appeal under 28 U.S.C. § 1292(b). Thus, the University had no other legal recourse. Second, the district judge clearly abused his discretion at the expense of important federalism principles. Third, mandamus was appropriate because the district judge's actions presented a clear case of judicial overstep.

Conclusion. Accordingly, the Sixth Circuit found that neither Congress nor the Constitution granted the district judge the power to order a specific high-ranking state official to attend a public settlement conference, and he abused his discretion by doing so. Therefore, the appellate court granted the University's petition for mandamus.