

LITIGATION INSIGHTS

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.

CLASS ACTIONS

Attorney's Fees

Linneman v. Vita-Mix Corp.

970 F.3d 621, 2020 U.S. App. LEXIS 25597 (6th Cir. Aug. 12, 2020)

The Sixth Circuit holds that CAFA allows district courts to use the lodestar method instead of the percentage method when determining attorney's fees in cases involving coupon settlements.

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PERSONAL JURISDICTION

Minimum Contacts

Defense Distributed v. Grewal

971 F.3d 485, 2020 U.S. App. LEXIS 26429 (5th Cir. Aug. 19, 2020)

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TAKING OF TESTIMONY

Live Testimony by Video

Rodriguez v. Gusman

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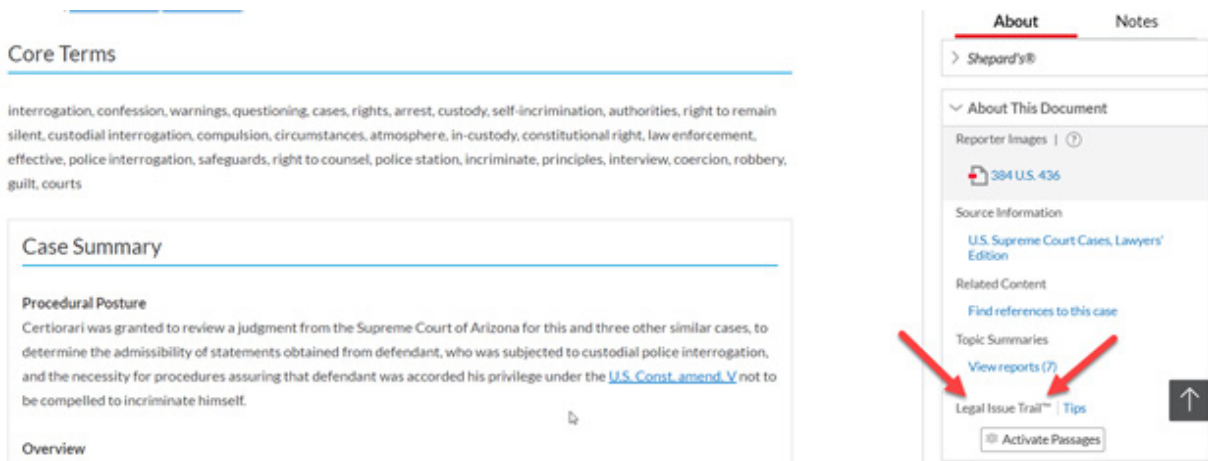
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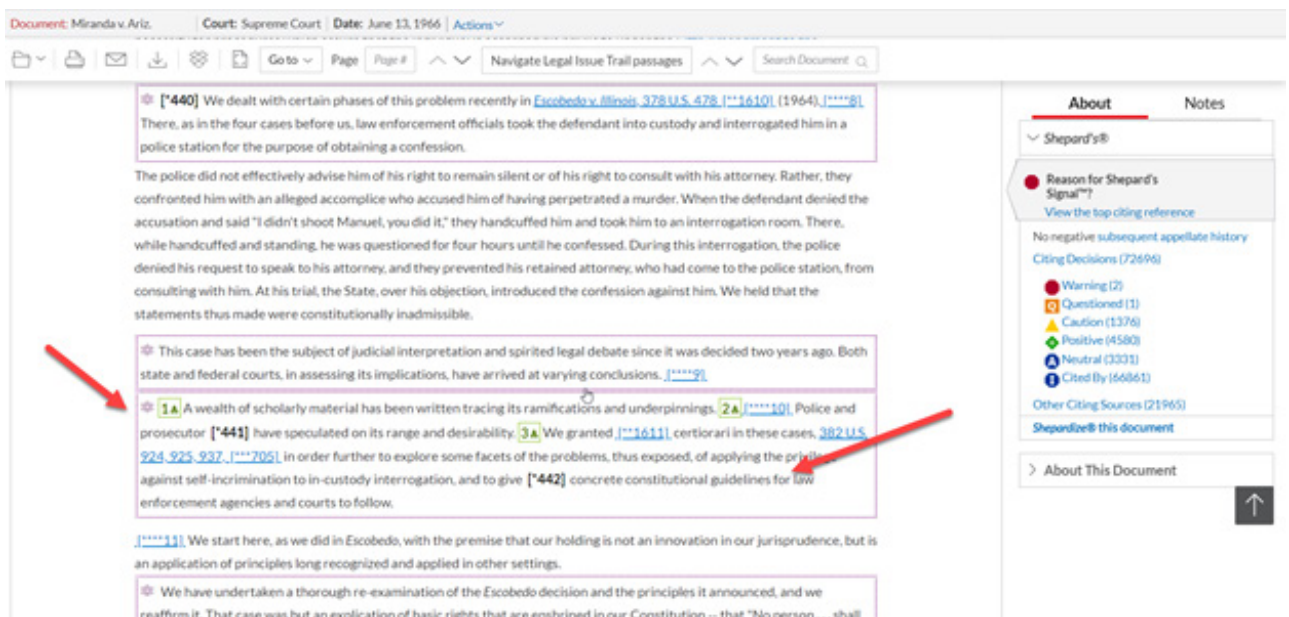
Candace Kelly, Regional Solutions Consultant

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Legal Issue Trail™: *Miranda v. Ariz.*, 384 U.S. 436

Selected Passage: 1 A wealth of scholarly material has been written tracing its ramifications and underpinnings. 2 A Police and prosecutor [441] have speculated on its range and desirability. 3 A We granted [1611] certiorari in these cases, 382 U.S. 924, 925, 937, [705] in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give [442] concrete constitutional guidelines for law enforcement agencies and courts to follow.

Citations (6)

Miranda v. Ariz., 384 U.S. 436 cited the following cases for this issue

- 1. **People v. Hartgraves**, 31 Ill. 2d 375

In coming to this conclusion we are mindful of apparently contrary conclusions reached in *State v. Neely*, (Sup. Ct. Ore., September 30, 1964), Ore., 395 P.2d 557; and *People v. Dorado*, 40 Cal. Rptr. 264, 394 P.2d 952. In the Oregon case the court held a confession inadmissible, concluding that the Escobedo decision required that the State must effectively show that the accused was affirmatively warned of his right to remain silent prior to confessing. In the Dorado case a divided California court, also relying on Escobedo, struck down a confession because the accused had neither affirmatively waived his right to counsel nor had been affirmatively advised of such right.

Jurisdiction: Illinois
Court: Supreme Court
Date: Jun 01, 1964
- 2. **United States v. Childress**, 347 F.2d 448

The motion was denied and the defendant failed to renew such motion at the close of all the evidence. In this situation, the sufficiency of all the evidence to support the verdict was not presented to the district court and therefore defendant cannot raise it on appeal to this court. *United States v. Calderon*, 348 U.S. 160, 164, 75 S.Ct. 186, 99 L.Ed. 202 footnote No. 1; *United States v. Manos*, 3 Cir., 340 F.2d 534, 536-537 (1965).

Jurisdiction: U.S. Federal Court
Court: 7th Circuit Court of Appeals
Date: Jun 29, 1965
- 3. **Collins v. Beto**, 348 F.2d 823

It has been suggested that the court in Escobedo treated the request for counsel merely as evidence that the investigation had begun to focus on the defendant. *People v. Dorado*, Cal., 1964, 40 Cal. Rptr. 264, 394 P.2d 952; *People v. Dorado*, Cal., 1965, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 176, 398 P.2d 361 (on rehearing en banc); Note, The Right to Counsel During Police Interrogation: The Aftermath of Escobedo, 53 Calif. L. Rev. 337, 361. This view finds support in the following passage from the opinion:

Jurisdiction: U.S. Federal Court
Court: 5th Circuit Court of Appeals
Date: Jun 18, 1965
- 4. **People v. Dorado**, 62 Cal. 2d 338

The United States Supreme Court held that "where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment.' *Gideon v. Wainwright*, 372 U.S., at 342 [84 S.Ct. 1758, 12 L.Ed.2d 977], and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (*Escobedo v. Illinois*, supra, 378 U.S. 478, 490-491.) In its conclusion the court stated: "We hold only that when the process shifts from investigatory to accusatory -- when its focus is on the accused and its purpose is to elicit a confession -- our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." (Id., at p. 492.)

Jurisdiction: California
Court: Supreme Court
Date: Jan 29, 1965

The following cases cited *Miranda v. Ariz.*, 384 U.S. 436 for this issue

- 5. **Moran v. Burbine**, 475 U.S. 412

Well-settled principles of law lead inexorably to the conclusion that the failure to inform Burbine of the call from his attorney makes the subsequent waiver of his constitutional rights invalid. Analysis should begin with an acknowledgment that the burden of proving the validity of a waiver of constitutional rights is always on the government. When such a waiver occurs in a custodial setting, that burden is an especially heavy one because custodial interrogation is inherently coercive, because disinterested witnesses are seldom available to describe what actually happened, and because history has taught us that the danger of overreaching during incommunicado interrogation is so real.

Jurisdiction: U.S. Federal Court
Court: Supreme Court
Date: Mar 30, 1986
- 6. **State v. Lockhart**, 298 Conn. 537

The majority also contends that "[r]equiring the police to record all confessions and interrogations in places of detention might severely inhibit the police in pursuing, by constitutionally valid methods, confession evidence"; (emphasis added; internal quotation marks omitted); including the use of trickery and deceit when necessary to induce a confession. This purely speculative argument, which the majority accepts uncritically solely on the basis of the state's unsubstantiated concerns, also is unfounded. In fact, "[a]lthough police officers and prosecutors may fear that [judges and] jurors will condemn many of the psychological ploys caught on tape, this has not proven to be the case." *M. Thurlow, 'Lights, Camera, Action: Video Cameras as Tools of Justice,'* 23 J. Marshall J. Computer & Info. L. 771, 800-801 (2005).

Jurisdiction: Connecticut
Court: Supreme Court
Date: Oct 12, 2010

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The screenshot shows the LexisNexis interface for the document *Miranda v. Ariz.*. The document text is displayed in the main pane, with several passages highlighted in pink boxes. The sidebar on the right contains a 'Shepard's®' section and an 'About This Document' section. In the 'About This Document' section, there is a 'Legal Issue Trail™ | Tips' area with a 'Deactivate Passages' button. A red arrow points to this button.



Keeping Current with Courtlink Tracks and Alerts

Heather Robinson, Regional Solutions Consultant

Courtlink is a docket research tool which includes both federal and state court dockets and provides users with additional features not available on Pacer. It allows users to Track activity on existing dockets and create a variety of Alerts for newly filed actions based on categories such as Litigant name, Nature of Suit, Bankruptcy chapter, Criminal defendant, and Keyword. Users can share these Track and Alert notifications with colleagues who also have an active Lexis i.d.

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In addition to Tracking activity of existing dockets, Courtlink provides users with the ability to create Alerts which notify of newly filed actions. For example, if you need to know when a particular individual or business becomes involved in additional litigation, you can create a Litigant Alert. Or, if it is important for you to keep statistical information regarding the number of cases filed within your jurisdiction under a certain Nature of Suit, Courtlink allows for creation of such an Alert. The process of creating an Alert is simple and mirrors the process of setting up a docket search.

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CLASS ACTIONS

Attorney's Fees

Linneman v. Vita-Mix Corp.

970 F.3d 621, 2020 U.S. App. LEXIS 25597 (6th Cir. Aug. 12, 2020)

The Sixth Circuit holds that CAFA allows district courts to use the lodestar method instead of the percentage method when determining attorney's fees in cases involving coupon settlements.

▾ **Background.** The defendant was a company that made and sold high-performance blenders. The plaintiff class alleged that blenders they had bought from the defendant were defective in that normal wear and tear would cause tiny flecks of polytetrafluoroethylene used in the seals of the blenders to rub off from the seals and end up in the blender container.

The parties agreed to a settlement that provided for two classes of plaintiffs. Class members who owned a household blender could request either a \$70 gift card or a replacement blade assembly, which included a non-flecking blender seal. Class members who owned a commercial blender could request only a replacement blade assembly. The settlement also specified that class counsel were entitled to attorney's fees but that the parties had not agreed on the amount. The district court granted preliminary approval to this settlement. The district court eventually decided to calculate fees by multiplying the hours class counsel reasonably worked on the case by a reasonable hourly rate. That calculation resulted in a fee award of a little over \$2.2 million. Based on the purportedly exceptional nature of the litigation, the court enhanced this figure by 75 percent for a final award of just under \$4 million.

Method of Fee Calculation in Coupon Settlements. Generally, courts have discretion whether to use the lodestar method or the percentage method in determining attorney's fees. The lodestar method multiplies the number of hours reasonably worked on the case by a reasonable hourly fee, with the possibility of an enhancement in certain cases. The percentage method calculates fees as a percentage of the class members' recovery in the case. The court must ensure, whichever method it uses, that the final award is reasonable under the circumstances [Fed. R. Civ. P. 23(h)].

The Class Action Fairness Act (CAFA) places further restrictions on fees in "coupon settlements" [28 U.S.C. § 1712]. Neither party disputed that the gift cards in this case were "coupons" or that § 1712 applied. This section provides as follows:

(a) Contingent Fees in Coupon Settlements. If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

(b) Other Attorney's Fee Awards in Coupon Settlements. (1) In General. If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action. (2) Court Approval. Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) Attorney's Fee Awards Calculated on a Mixed Basis in Coupon Settlements. If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief— (1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and (2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

The court of appeals noted that as “several of our sister circuits have noted, this statute is not a model of draftsmanship.” Subsection (a) prohibits the use of the face value of coupons rather than their redemption rate when calculating attorney’s fees based on the percentage method. In other words, the provision requires district courts to determine how many class members use a coupon rather than how many class members are entitled to one. However, subsection (a) does not require use of the percentage method. Only the portion of the fee award “attributable to the award of the coupons” must be based on the value to class members of the coupons that are redeemed. Subsection (b) makes clear that (1) a district court might not use a portion of a coupon award to determine the attorney’s fee, and (2) in such cases the court should determine the fee based on the amount of time class counsel reasonably expended working on the action (i.e., the lodestar method). Subsection (c) reinforces this reading; it explains that courts may sometimes calculate an attorney’s fee award on a “mixed basis,” using both approaches laid out in the prior subsections.

Accordingly, the statute contemplates discretion in how district courts calculate fees. Courts are not required to calculate fees based on the value of the coupons redeemed in every coupon settlement. Rather, courts must do so only when the attorney’s fees are “based upon” the coupons—that is, when a district court grounds its fees decisions in the coupons. The majority of other circuits to consider this question have also read § 1712 as generally allowing district courts to use the lodestar method in coupon settlements.

The defendant argued that, even if the statute allows district courts to use the lodestar method in coupon settlements, the district court must use the percentage method as a “crosscheck” on the lodestar calculation. However, nothing in § 1712 instructs district courts to conduct a crosscheck and, as a general rule, courts are not required to conduct a crosscheck in every case. This does not mean that district courts may entirely ignore the coupon redemption rate when they use the lodestar method. A district court must ensure that a fee award is reasonable, which includes as the most critical factor the degree of success obtained. A district court will often abuse its discretion if it fails to consider the redemption rate as part of that analysis. In sum, the district court correctly held that § 1712 permitted it to use the lodestar method in this case.

▼ **Abuse of Discretion in Calculating Fee Award.** The defendant challenged various aspects of the fee award, including (1) the determination of the billing rates, (2) the use of an upward multiplier, and (3) the reasonableness of the final award. The court of appeals first decided that the district court abused its discretion when it determined the billing rates. The Sixth Circuit uses the “community market rule” to calculate a reasonable billing rate; under that rule, the billing rate should not exceed what is necessary to encourage competent lawyers within the relevant community to undertake legal representation. Courts in the Southern District of Ohio often look to a list of pre-calculated billing rates tiered by years of experience (called the Rubin rates) to determine a reasonable rate for the area. However, the district court had departed from these rates, commenting that “the practice of law has become an increasingly national practice,” and had applied a higher rate to reflect the national practice and experience of class counsel. As a result, a majority of the attorneys had received rates of around \$500 per hour and the most senior attorneys had received rates exceeding \$600 per hour. This departed from the community market rule. Local lawyers litigating a case in a local courthouse should receive local billing rates, the court of appeals said, and the district court had erred when it concluded otherwise.

The district court also erred when it determined the billing rates based solely on class counsel’s affidavits. A lawyer seeking fees has the burden to show the reasonableness of the billing rate with something in addition to the attorney’s own affidavits. The affidavits by themselves shed little light on what would be a reasonable billing rate. In fact, class counsel’s own affidavits undercut the reasonableness of their requested rates because attorneys with similar levels of experience often reported vastly differently billing rates, and sometimes attorneys with fewer years of experience reported significantly higher billing rates than those with more experience.

Next, the court of appeals determined that the district court had erred in its use of an upward multiplier. A multiplier may be used only in “rare and exceptional circumstances” and only when the lawyer seeking fees has provided specific evidence that the lodestar fee would not have been adequate to attract competent counsel. Here, the district court had not made a finding that this was the rare and exceptional case that justified a multiplier, nor was there any reason to think that such a finding would be justified.

Finally, the district court had also abused its discretion as to the reasonableness of the attorney's fees. The district court should have considered the defendant's offer under Civil Rule 68 to settle the attorney's fees dispute for \$3.1 million. After class counsel rejected this settlement offer, the parties had litigated the issue of attorney's fees for another twenty-one months. On remand, the court of appeals said, the district court should ask whether \$3.1 million was a reasonable (or frankly generous) fees award at the time of the settlement offer. If it was, then the district court should exclude any hours that class counsel had worked after they rejected the settlement.

The district court also erred when it analyzed the value of the settlement for the class. The most critical factor when it comes to the reasonableness of a fee award is the degree of success obtained. District courts must provide a reasonably specific explanation of this factor to allow for adequate appellate review. Here, the district court had failed to make any specific findings about the value of the settlement, even though the parties had presented evidence on the issue. On remand, the court of appeals said, the district court should carefully consider the value of the settlement, including the coupon redemption rate, and then provide a reasonably specific explanation of its findings. Although CAFA does not require district courts to calculate attorney's fees based on the percentage method in every coupon settlement, redemption rates should still play a crucial role in assessing the reasonableness of a fees award.

For all these reasons, the district court had abused its discretion when it calculated the award of attorney's fees. The court of appeals directed the district court, on remand, to recalculate the award in light of these considerations.

PERSONAL JURISDICTION

Minimum Contacts

Defense Distributed v. Grewal

971 F.3d 485, 2020 U.S. App. LEXIS 26429 (5th Cir. Aug. 19, 2020)

The Fifth Circuit has held that the New Jersey attorney general was subject to personal jurisdiction in Texas based primarily on a cease-and-desist letter to the plaintiff, a Texas company, threatening legal action.

▼ **Background.** The plaintiff in this suit was a Texas company. It produced information related to the 3D printing of firearms and distributed this information to the public by publishing files on its websites and letting visitors download them. It also distributed digital firearms information via mail and at a brick-and-mortar public library in Austin, Texas. These efforts were initially met with opposition from the U.S. Department of State. After a period of litigation, the parties reached a settlement agreement that granted the plaintiff a license to publish its files. Shortly thereafter, nine attorneys general, including the New Jersey attorney general, filed suit on behalf of their respective states in the Western District of Washington to enjoin the State Department from authorizing the release of the plaintiff's files. The Western District of Washington quickly issued a temporary restraining order, followed closely by a nationwide preliminary injunction.

Just before the Washington suit, the plaintiff instituted the present action, in the Western District of Texas, challenging enforcement actions taken by the state attorneys general. Relevant here, the plaintiff alleged that the New Jersey attorney general had (1) sent a cease-and-desist letter to the plaintiff in Texas threatening legal action if the plaintiff published its files, (2) sent letters to third-party internet service providers based in California urging them to terminate their contracts with the plaintiff, (3) initiated a civil lawsuit against the plaintiff in New Jersey, and (4) threatened the plaintiff with criminal sanctions at a live press conference. These actions, coupled with the injunctive orders issued in the Washington litigation, caused the plaintiff to cease publication of its materials. The plaintiff asserted, inter alia, that these actions infringed the exercise of its First Amendment freedoms and constituted tortious interference with the State Department's settlement agreement.

The New Jersey attorney general moved to dismiss for lack of personal jurisdiction. The district court dismissed the action without prejudice.

▼ **Minimum Contacts.** The constitutional requirement for specific jurisdiction is that the defendant have “minimum contacts” with the forum state such that imposing a judgment would not offend traditional notions of fair play and substantial justice. The issue here was whether the New Jersey attorney general had established sufficient minimum contacts with Texas. He argued that *Stroman Realty, Inc. v. Wercinski* [513 F.3d 476 (5th Cir. 2008)] controlled. *Stroman Realty* was a Texas-based real estate firm. The commissioner of the Arizona Department of Real Estate attempted to exercise regulatory authority over *Stroman’s* timeshare sales business. The totality of the commissioner’s contacts with Texas involved a cease-and-desist order and correspondence with *Stroman’s* attorneys. The Fifth Circuit concluded that specific personal jurisdiction could not be exercised based on those contacts.

The facts of the present case bore a resemblance to those in *Stroman*, but *Stroman* was distinguishable in at least two respects. First, the plaintiff’s claims in the present suit were based on the New Jersey attorney general’s cease-and-desist letter. *Stroman’s* claim was more a product of Arizona’s regulatory scheme than of the cease-and-desist letter itself. Second, and more important, *Stroman* found that the Arizona public official did not purposefully direct her conduct at Texas because she was simply asserting nationwide authority over any real estate transactions involving Arizona residents or property. In the present case, the assertion of legal authority was broader: the New Jersey attorney general demanded that the plaintiff cease publication of the materials generally, without specifying that the plaintiff cease marketing its materials to New Jersey residents. The New Jersey attorney general’s conduct beyond sending the cease-and-desist letter confirmed his intent to crush the plaintiff’s operations and not simply limit the dissemination of digital files in New Jersey.

Instead, the court of appeals determined that the case should be resolved under the *Calder* effects test, citing *Wien Air Alaska, Inc. v. Brandt* [195 F.3d 208 (5th Cir. 1999)], and *Calder v. Jones* [465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)]. The attorney general’s communications with the plaintiff, specifically the cease-and-desist letter delivered into Texas, gave rise to distinct tort causes of action, such as the intentional tort of unconstitutional censorship and intentional interference with a contractual relationship. When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment. The defendant was purposefully availing himself of the privilege of causing a consequence in Texas.

Accordingly, the New Jersey attorney general had established sufficient minimum contacts with Texas to subject him to the jurisdiction of Texas’s courts. The court of appeals noted that “[q]uestions of personal jurisdiction typically do not lend themselves to broad generalizations. . . . They require an understanding of particular facts and an application of general principles.” Under the particular facts here, the New Jersey attorney general was subject to personal jurisdiction in Texas based on the cease-and-desist letter aimed at Texas. The judgment of the district court was reversed and remanded.

TAKING OF TESTIMONY

Live Testimony by Video

Rodriguez v. Gusman

974 F.3d 108, 2020 U.S. App. LEXIS 27631 (2d Cir. Aug. 31, 2020)

The Second Circuit holds that, under Federal Rule of Civil Procedure 43(a), the court has discretion to allow live testimony by video for good cause in compelling circumstances, and a party's immigration status constitutes good cause to permit video testimony.

▸ **Background.** Plaintiff was a resident of the Dominican Republic and a former resident of the United States. While plaintiff was incarcerated at New York's Eastern Correctional Facility, he began suffering from a rapid heart rate and irregular breathing. Plaintiff ultimately had a stroke, which left him partially paralyzed. He alleged that defendants' deliberate indifference to his medical needs while he was incarcerated led to his stroke. Plaintiff further alleged that defendants failed to respond to his complaints about his symptoms over several months, did not consult his medical doctors or provide a Spanish interpreter, did not prescribe any medication, did not adequately monitor his condition, and minimized his complaints.

Plaintiff filed suit as a pro se prisoner. Initially, he raised only an Eighth Amendment deliberate-indifference claim. Acting sua sponte, the district court dismissed the complaint with prejudice as time barred. After appointing pro bono counsel, the Second Circuit vacated and remanded, holding that the district court erred in failing to provide plaintiff an opportunity to amend. Pro bono counsel subsequently amended the complaint and added claims of First Amendment retaliation and access to the courts. In the amended complaint, plaintiff alleged that after he filed the above-mentioned appeal, he was, without justification, transferred to a remote prison near the Canadian border, which made it difficult for him to meet with counsel, and that he was subject to new limitations on the number and length of calls with counsel.

After discovery had begun and plaintiff had been released from prison, he was deported to the Dominican Republic. Plaintiff was prohibited from returning to the United States for 20 years absent special permission from the Attorney General. The case continued to be actively litigated by pro bono counsel, with counsel taking at least six depositions over an 11-month period. Nevertheless, during a telephonic discovery conference, the Magistrate Judge sua sponte raised the issue of whether the case should be administratively closed until plaintiff's return to the United States. After the parties briefed the issue, the Magistrate Judge administratively closed the case, stating that "the logistical difficulties and substantial cost of continuing with discovery; the logistical difficulties, required technological resources from the court, and prohibitive cost of trying the case without the plaintiff in the courtroom; and the inefficient use of judicial resources in addressing the difficulties and disputes between the parties that would no doubt arise and require court intervention and resolution throughout the litigation, including throughout the remaining discovery and at trial," supported no longer maintaining the action on the open docket.

Plaintiff moved for reconsideration, but the district court adopted the Magistrate Judge's report and recommendation. The district court acknowledged that federal district courts should not dismiss or administratively close actions in which litigants are unable to appear without first considering less drastic alternatives. The district court then listed those alternatives, including making provisions so the prisoner can travel and attend the trial in person; trying the case on depositions or affidavits, or with video; and trying the case without a jury at a location near where the prisoner is located. The district court found that "none of the alternatives are practical," but failed to explain why. The district court also focused on the fact that "the nature of Plaintiff's allegations and alleged injuries will more than likely require additional examinations of Plaintiff." It decided that defendants would not have a reasonable opportunity to depose any physicians treating plaintiff in the Dominican Republic, but again did not explain why. Finally, the district court found that the case "will likely require the retention of an expert witness, who would necessarily be forced to conduct a physical examination of" plaintiff in the Dominican Republic. The district court concluded that it "would be unduly prejudicial to defendants and an inefficient use of judicial resources" to allow the case to continue absent plaintiff's return. Plaintiff timely appealed.

▼ **Administrative Closure Is Last Resort.** The Second Circuit noted that the issue of what standard a court should apply in deciding whether to administratively close a case was an issue of first impression in the Circuit. Adopting the reasoning in an analogous case from the Fourth Circuit, the court explained that an indefinite stay should only be considered, if at all, as a last resort, after all other alternatives have been rejected [see *Muhammad v. Warden*, 849 F.2d 107, 112–113 (4th Cir. 1988)]. The Second Circuit held that other alternatives must be virtually impossible, or so impractical as to significantly interfere with the operations of the district court or impose an unreasonable burden on the party opposing the plaintiff’s claim, in order to justify an administrative closure. The court reasoned that an administrative closure lasting years or even decades makes finding witnesses and conducting discovery “difficult if not impossible.” In such a case, an administrative closure effectively ends the case.

The court also noted that avoiding administrative closure is even more important in civil rights suits given the weighty public interest in ensuring accountability for officials who violate the Constitution. This interest exists regardless of whose rights are violated. But when plaintiffs are unavailable due to incarceration or deportation, in particular, administrative closure may insulate officials from liability for violating the rights of prisoners or immigrants subject to removal. A strict standard is necessary to ensure that these plaintiffs are not deeply prejudiced.

The court acknowledged that a district court possesses inherent authority to control the disposition of cases on its docket and has power to stay an action as an incident of that authority. Thus, the holding limits district courts’ ability to administratively close a case as a matter of convenience in light of the countervailing prejudice to plaintiffs, but it does not bar administrative closure when appropriate. If, for instance, there is only a slim likelihood that an alternative will be possible, a district court may nonetheless administratively close the case.

In this case, the court found that video testimony under Rule 43 was a viable alternative to administrative closure of the case.

▼ **Application of Rule 43.** The district court’s first basis for closing the case was plaintiff’s unavailability to appear at trial. The Second Circuit concluded that the use of video depositions or videoconference at trial would have allowed the case to go forward and avoid administrative closure. Under Federal Rule of Civil Procedure 43(a), the judge has discretion to allow live testimony by video for good cause in compelling circumstances and with appropriate safeguards. A party’s immigration status constitutes such good cause. The appellate court found no evidence in the record to suggest that appropriate safeguards would be unavailable or that testimony by video would be infeasible, let alone virtually impossible. Nor were there any other reasons why plaintiff’s physical presence at trial would be required. Thus, because there was no support for the conclusion that the alternatives to plaintiff’s appearance at trial were virtually impossible or so impractical as to significantly interfere with the operations of the district court or impose an unreasonable burden on defendants, plaintiff’s need to testify did not provide sufficient grounds to justify the district court’s conclusion that the case had to be administratively closed.

The district court also found that gathering additional medical evidence while plaintiff was located in the Dominican Republic would be too burdensome for defendants. The Second Circuit found that allowing the case to continue without plaintiff in the United States would not unduly prejudice defendants. Although a plaintiff is usually required to appear in the forum for a medical examination under Rule 35, this requirement may give way when the plaintiff can demonstrate that the trip would be injurious to his or her health, or that there is any other compelling reason for the inability to appear in the forum. Plaintiff established a compelling or substantial reason for his inability to appear in New York for an examination: he was legally barred from reentering the United States absent special permission from the Attorney General. Similar to medical conditions or financial hardship, plaintiff’s immigration status impeded his ability to travel to the United States. Thus, plaintiff had ample justification for a waiver of the general requirement of appearing in the venue of jurisdiction for an examination. In fact, an individual’s immigration status is “good cause” to waive the typical requirement that trial testimony be provided in person. The court found that the same reasoning should apply to medical examinations.

Defendants had options in the event that plaintiff needed to be examined—such as sending a physician from the United States to the Dominican Republic or hiring a local physician to examine plaintiff. At oral argument, other options like using telemedicine or hiring a U.S.-based physician already planning travel to the Dominican Republic for unrelated reasons, such as vacationing, were discussed as well. Defendants argued that sending a physician would be cost-prohibitive and that they should not be required to use a local physician who was unfamiliar to them. However, the court found the record devoid of any evidence to support the assertions as to cost, and there was likewise no apparent reason why defendants could not find and vet a local physician to conduct the examination or use the alternatives raised at oral argument.

The third basis the district court relied on in administratively closing the case was the need for additional depositions. Again, the Second Circuit found that this did not warrant administrative closure of the case. Many courts allow depositions by videoconference when the deposed individuals live abroad, even when coordination of document review is necessary. Other courts permit depositions to occur in a third, mutually accessible location distinct from the forum district. Nothing in the record suggested that one of the above-mentioned alternatives would be virtually impossible or so impractical as to significantly interfere with the operations of the district court or impose an unreasonable burden on defendants. Absent such evidence, the district court erred in concluding that the need for additional depositions justified the administrative closure.

- ▼ **Conclusion.** The Second Circuit held that the district court erred in ordering administrative closure of plaintiff's case due to his deportation because an administrative closure is a last resort that is appropriate only when all other alternatives are virtually impossible or so impractical as to significantly interfere with the operations of the district court or impose an unreasonable burden on the party opposing the plaintiff's claim. In this case, numerous alternatives to the issues identified by the district court existed, including the taking of live testimony by video.