Litigation Insights

JULY 2025

LexisNexis®

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.

ELEVENTH AMENDMENT

***Ex parte Young* Exception**

Enbridge Energy, LP v. Whitmer

135 F.4th 467, 2025 U.S. App. LEXIS 9645 (6th Cir. Apr. 23, 2025)

The Sixth Circuit has held that under Ex parte Young, a pipeline operator's suit seeking an injunction prohibiting Michigan officials from taking any steps to impede or prevent the operation of the pipeline was not barred by sovereign immunity.

JUMP TO SUMMARY

PLEADINGS

Fraudulent Concealment

Scharpf v. Gen. Dynamics Co.

137 F.4th 188, 2025 U.S. App. LEXIS 11258 (4th Cir. May 9, 2025)

The Fourth Circuit holds that an unwritten, "non-ink-to-paper" antitrust conspiracy designed to avoid creating evidence can constitute an affirmative act of fraudulent concealment under Federal Rule of Civil Procedure 9(b) sufficient to toll the statute of limitations.

JUMP TO SUMMARY

STANDING

Intervenor

8fig, Inc. v. Stepup Funny, L.L.C.

135 F.4th 285, 2025 U.S. App. LEXIS 9266 (5th Cir. Apr. 18, 2025)

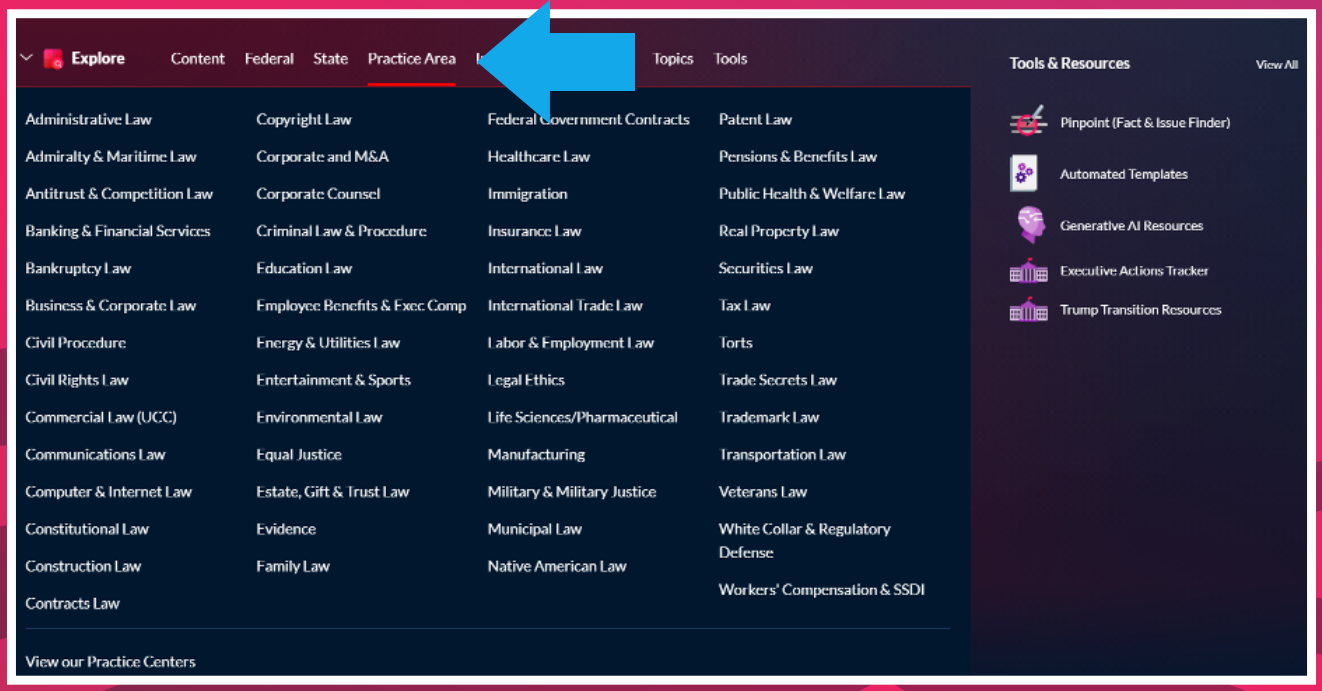
Citing the public's right to access judicial records, the Fifth Circuit recognized a news agency's standing to intervene to challenge a confidentiality order in an effort to obtain information and access judicial records, even though the agency was neither a party to the litigation nor directly restrained by the order.

JUMP TO SUMMARY

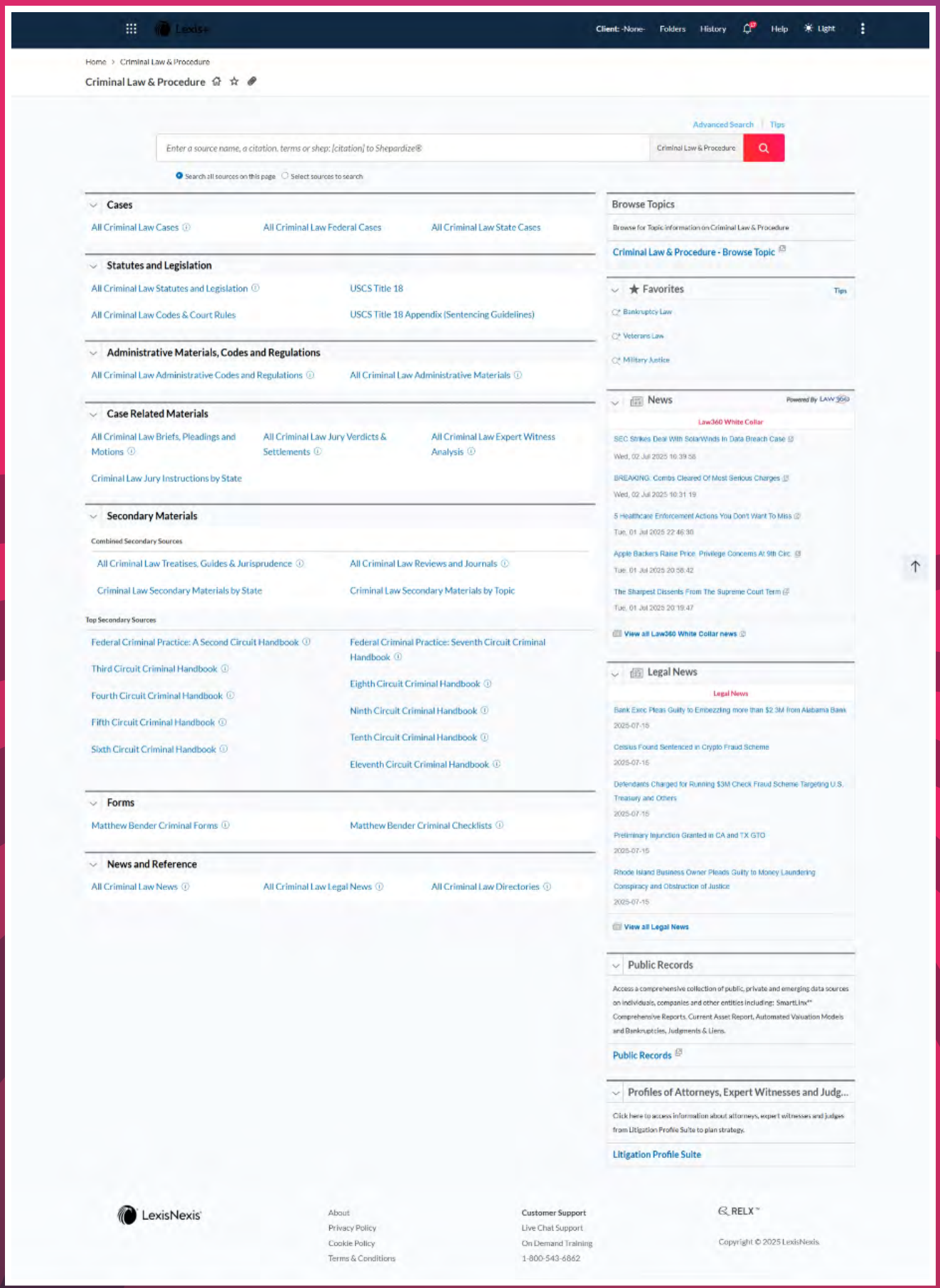
Practice Areas on Lexis+®

By Christine King, Esq.

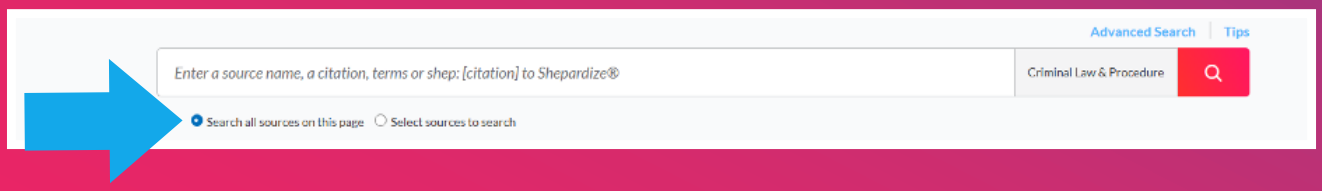
Have you ever EXPLORED the Practice Area's in Lexis®? Lexis has over 60 practice areas available from Administrative Law to Workers' Compensation Law and has both Civil and Criminal Law. Let's explore below.



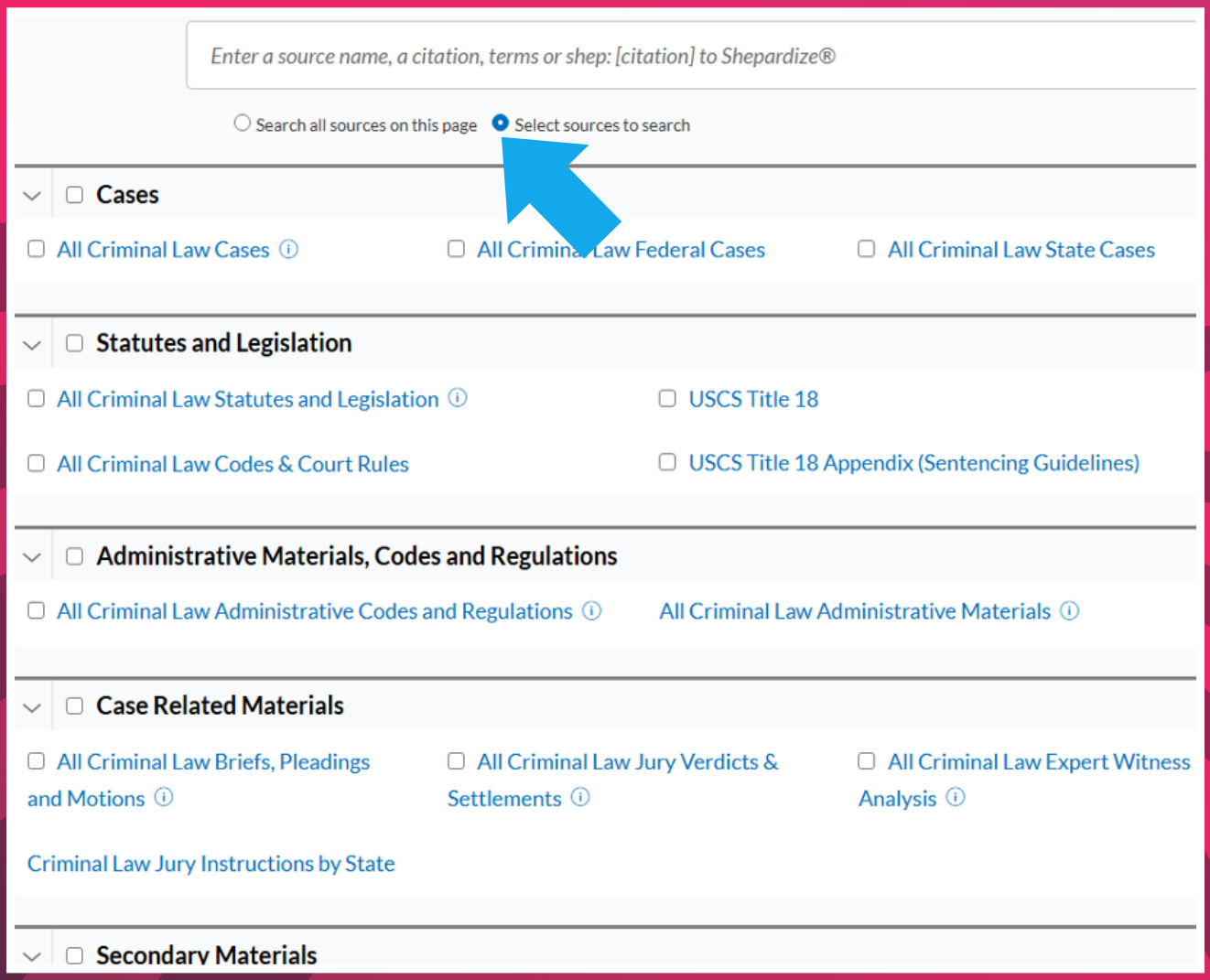
Depending on your role, there are multiple areas that could help you be more efficient and proficient. These practice areas provide curated content, including case law, statutes, legal news, and analysis specific to each field, facilitating a streamlined research process for users seeking information in distinct areas of legal practice.


Lexis+
Client: -None-
Folders
History
Help
Light
Home > Criminal Law & Procedure
Criminal Law & Procedure
Advanced Search | Tips
Enter a source name, a citation, terms or shep: [citation] to Shepardize®
Criminal Law & Procedure
Search all sources on this page
Select sources to search
Cases
All Criminal Law Cases
All Criminal Law Federal Cases
All Criminal Law State Cases
Statutes and Legislation
All Criminal Law Statutes and Legislation
USCS Title 18
All Criminal Law Codes & Court Rules
USCS Title 18 Appendix (Sentencing Guidelines)
Administrative Materials, Codes and Regulations
All Criminal Law Administrative Codes and Regulations
All Criminal Law Administrative Materials
Case Related Materials
All Criminal Law Briefs, Pleadings and Motions
All Criminal Law Jury Verdicts & Settlements
All Criminal Law Expert Witness Analysis
Criminal Law Jury Instructions by State
Secondary Materials
Combined Secondary Sources
All Criminal Law Treatises, Guides & Jurisprudence
All Criminal Law Reviews and Journals
Criminal Law Secondary Materials by State
Criminal Law Secondary Materials by Topic
Top Secondary Sources
Federal Criminal Practice: A Second Circuit Handbook
Federal Criminal Practice: Seventh Circuit Criminal Handbook
Third Circuit Criminal Handbook
Eighth Circuit Criminal Handbook
Fourth Circuit Criminal Handbook
Ninth Circuit Criminal Handbook
Fifth Circuit Criminal Handbook
Tenth Circuit Criminal Handbook
Sixth Circuit Criminal Handbook
Eleventh Circuit Criminal Handbook
Forms
Matthew Bender Criminal Forms
Matthew Bender Criminal Checklists
News and Reference
All Criminal Law News
All Criminal Law Legal News
All Criminal Law Directories
Browse Topics
Browse for Topic information on Criminal Law & Procedure
Criminal Law & Procedure - Browse Topic
Favorites
Tips
Bankruptcy Law
Veterans Law
Military Justice
News
Powered By Law360
Law360 White Collar
SEC Strikes Deal With SolarWinds In Data Breach Case
Wed, 02 Jul 2025 10:39:56
BREAKING: Combs Cleared Of Most Serious Charges
Wed, 02 Jul 2025 10:31:19
5 Healthcare Enforcement Actions You Don't Want To Miss
Tue, 01 Jul 2025 22:46:30
Apple Backers Raise Price, Privilege Concerns At 9th Cir.
Tue, 01 Jul 2025 20:58:42
The Sharpest Dissents From The Supreme Court Term
Tue, 01 Jul 2025 20:19:47
View all Law360 White Collar news
Legal News
Legal News
Bank Exec Pleas Guilty to Embezzling more than $2.3M from Alabama Bank
2025-07-16
Celsius Found Sentenced in Crypto Fraud Scheme
2025-07-16
Defendants Charged for Running $3M Check Fraud Scheme Targeting U.S. Treasury and Others
2025-07-16
Preliminary Injunction Granted in CA and TX GTO
2025-07-15
Rhode Island Business Owner Pleads Guilty to Money Laundering Conspiracy and Obstruction of Justice
2025-07-15
View all Legal News
Public Records
Access a comprehensive collection of public, private and emerging data sources on individuals, companies and other entities including: SmartLinx® Comprehensive Reports, Current Asset Report, Automated Valuation Models and Bankruptcies, Judgments & Liens.
Public Records
Profiles of Attorneys, Expert Witnesses and Judg...
Click here to access information about attorneys, expert witnesses and judges from Litigation Profile Suite to plan strategy.
Litigation Profile Suite
LexisNexis
About
Privacy Policy
Cookie Policy
Terms & Conditions
Customer Support
Live Chat Support
On Demand Training
1-800-543-6862
RELX™
Copyright © 2025 LexisNexis

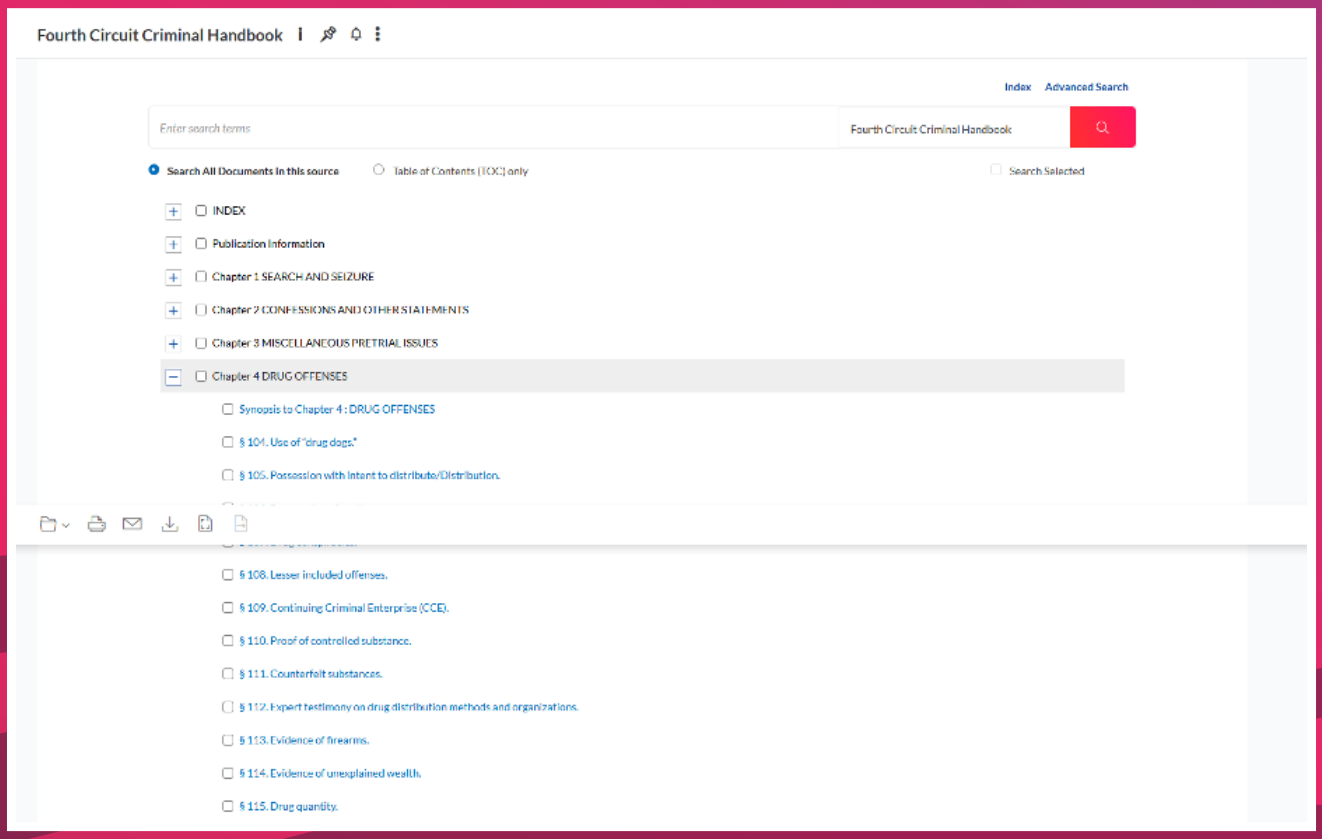
The best part is that you can search all materials and sources in the Practice Area.



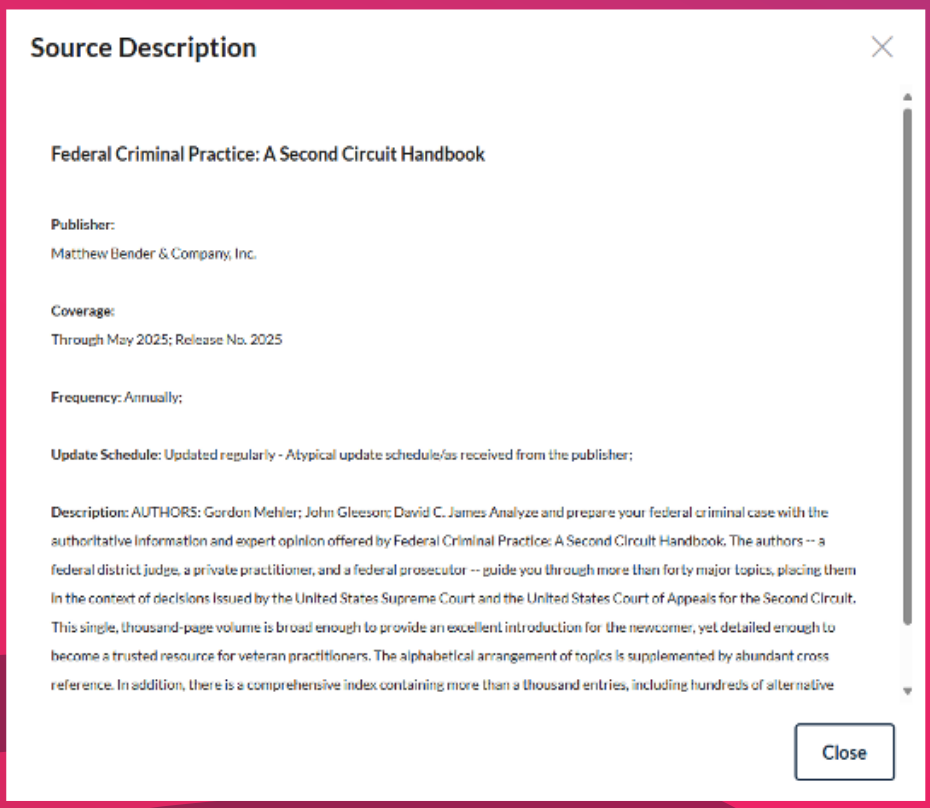
Or you can select specific Sources to search in.



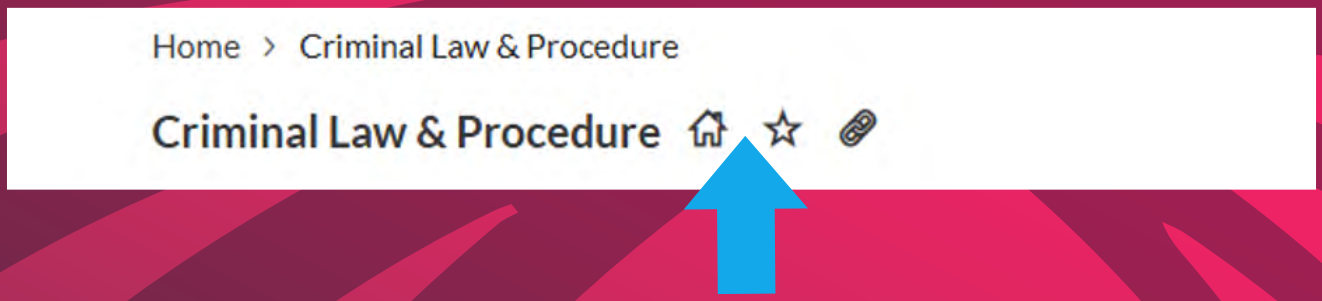
Or you can jump into any of the compiled materials and sources and search within a specific source.



If you are not familiar with a source, just click into the lower case l information button to learn about the source; who publishes the source, how often and a description.



If you rely on the sources and materials in the Practice Areas often, you have the option to make the Practice Area page your home page or just save it as a favorite to return to whenever you need to.



Enjoy Exploring the Practice Areas in Lexis where the sources you need are compiled to help you get where you need to go faster. Want to do a more in-depth look at Lexis Practice Areas? Reach out to your dedicated Lexis Solutions Consultant anytime.

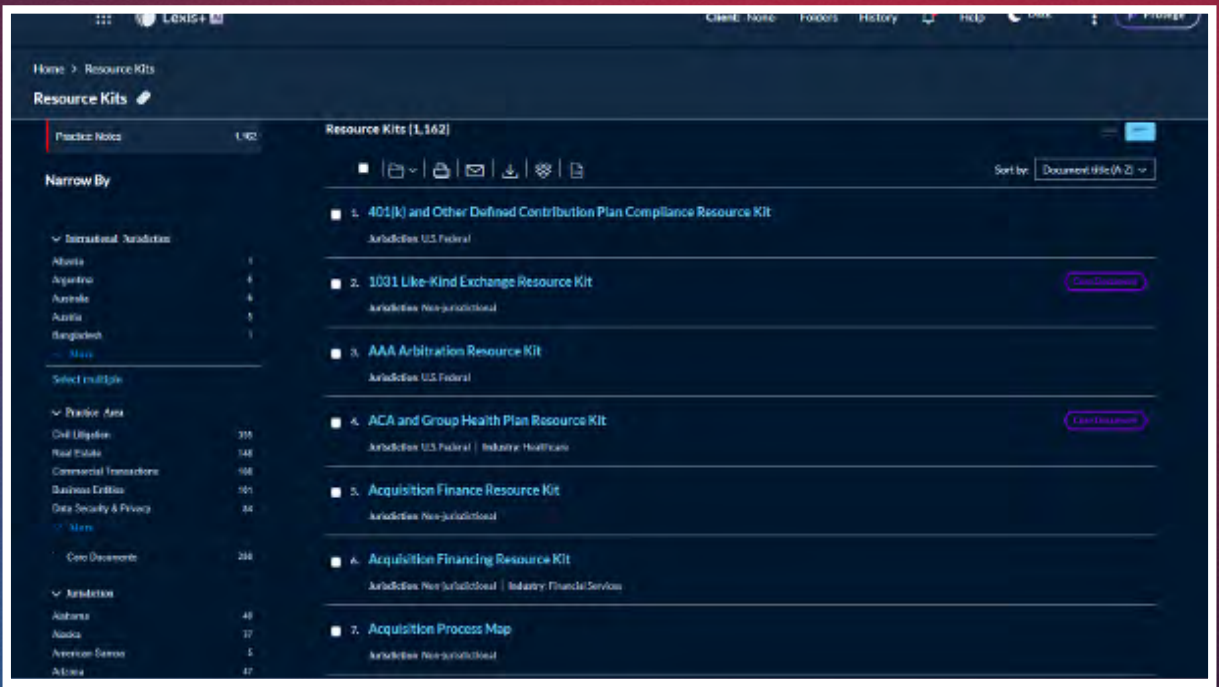
Utilize Key Federal Government Resource Kits on Practical Guidance

By Noah Kanary, LexisNexis® Solutions Consultant, Federal Government

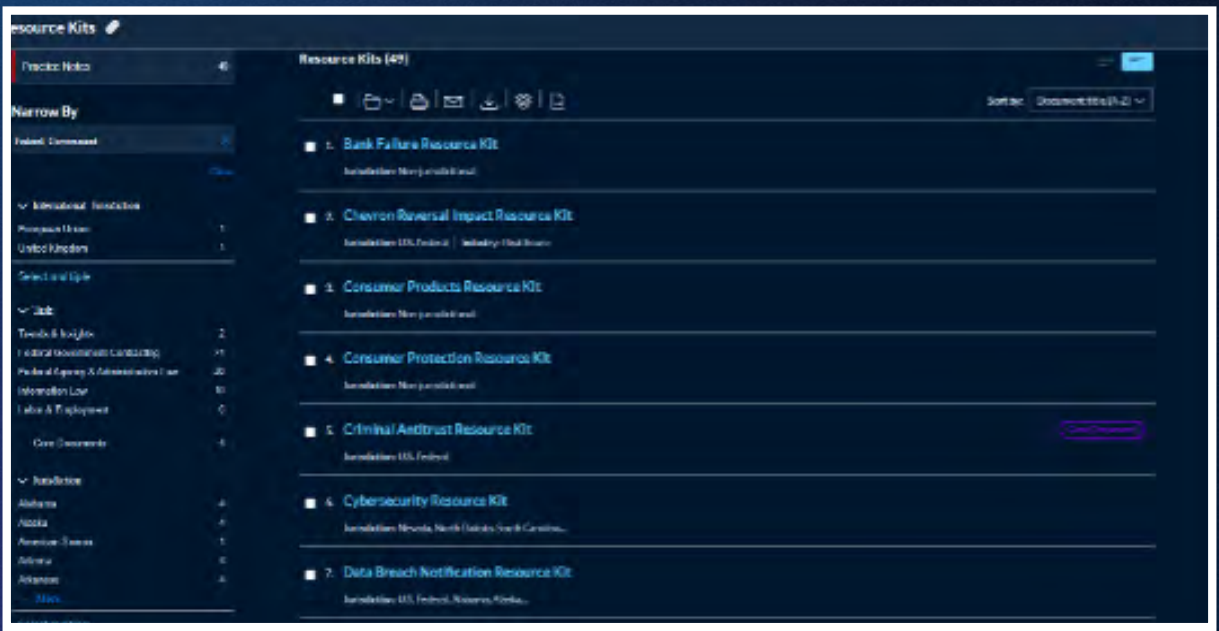
As we are now in July, the days are longer, the nights are warmer, and opportunities abound. And in this spirit, I want to draw your attention to tools within LexisNexis's Practical Guidance experience that are designed to help Federal Government attorneys. This newsletter is going to focus on the essential tools that are resource kits. But what are resource kits? Resource kits on Practical Guidance are comprehensive collections of tools, documents, and information designed to assist users in implementing best practices or managing specific tasks. These kits are curated by experts or organizations and serve as a one-stop resource for practical, actionable advice.

Resource kits can then be found in a number of places across Practical Guidance, but one of the easiest ways to find a resource kit is by selecting the resource kits tool toward the bottom of the Tools and Resources section on the right side of the Practical Guidance homepage.

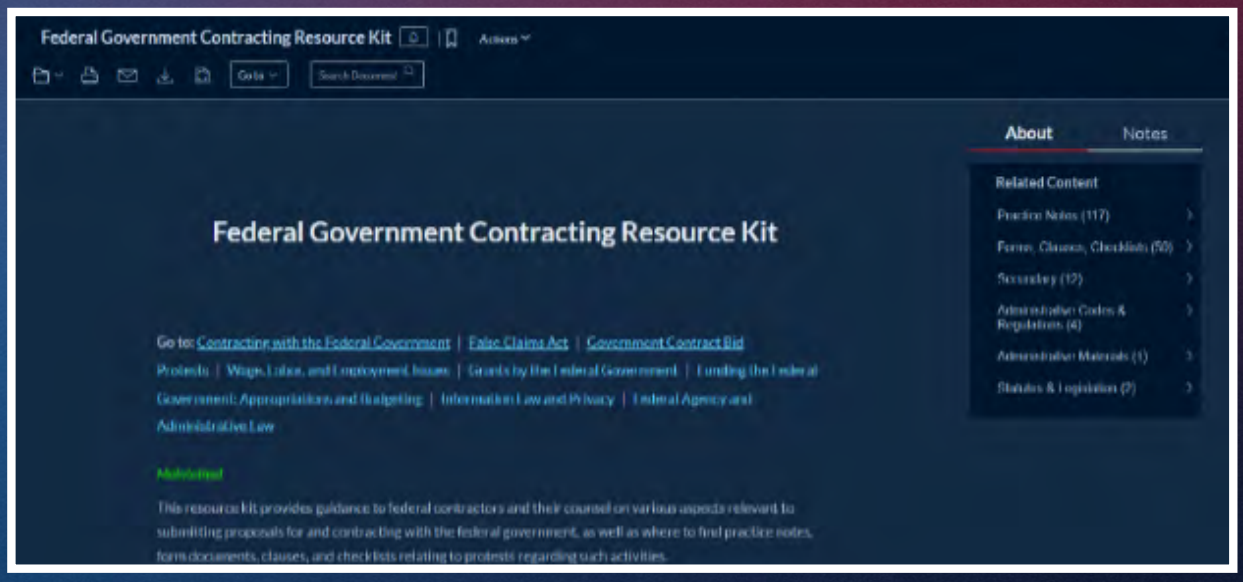
On the landing page, you are then able to see each and every one of the available resource kits across Practical Guidance. This is a rapidly growing tool, but at the time of this writing, you are able to see 1,162 individual resource kits that all focus in on different legal issues and areas of law.

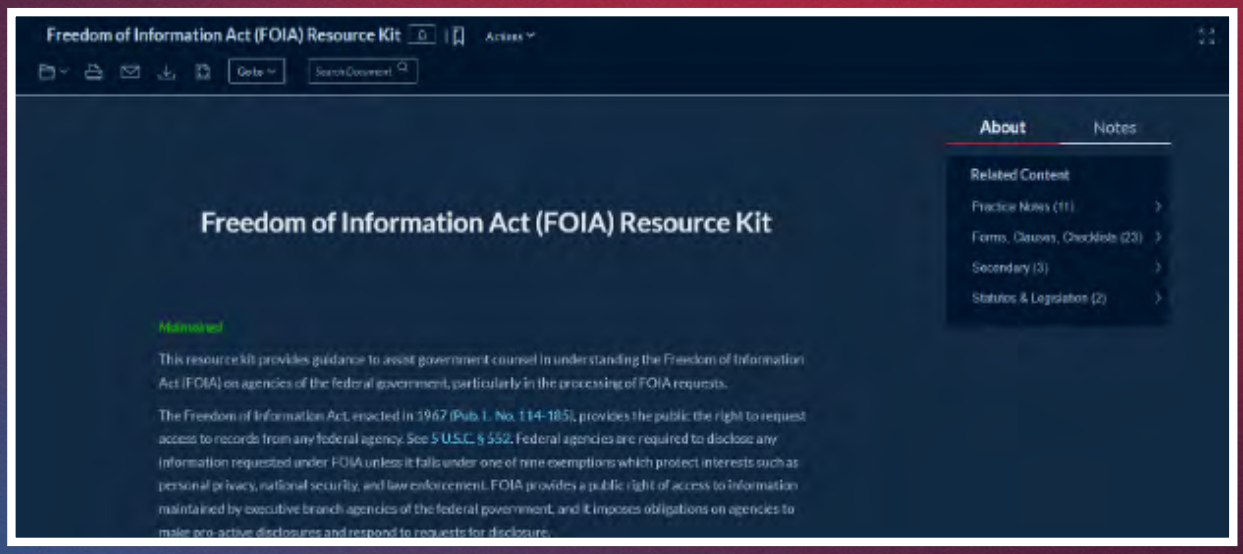


On this page, you also have the option to utilize post-search filters, on the left side of the screen, to narrow down and tailor the resource kits to your needs. We are now going to narrow our resource kits down to those specifically designed for the Federal Government. To do this, we need to expand the Practice Area post-search filter and then select the Federal Government option toward the middle of the list. This brings us to a landing page where you can see that there are now 49 resource kits narrowly tailored to the needs of the Federal Government.



From here you have a large number of resources to fit your needs and role, but I want to highlight just a few of these options. First, we have the Federal Government Contracting Resource Kit, which provides guidance to federal contractors and their counsel on various aspects relevant to submitting proposals for and contracting with the federal government, as well as where to find practice notes, form documents, clauses, and checklists relating to protests regarding such activities. Second, we have the Federal Government Employment (Civil Service) Resource Kit which includes resources on federal employment and anti-discrimination laws, for federal employers. Finally, we then have the Freedom of Information Act (FOIA) Resource Kit, which provides guidance to assist government counsel in understanding the Freedom of Information Act's (FOIA) impact on agencies of the federal government, particularly in the processing of FOIA requests.



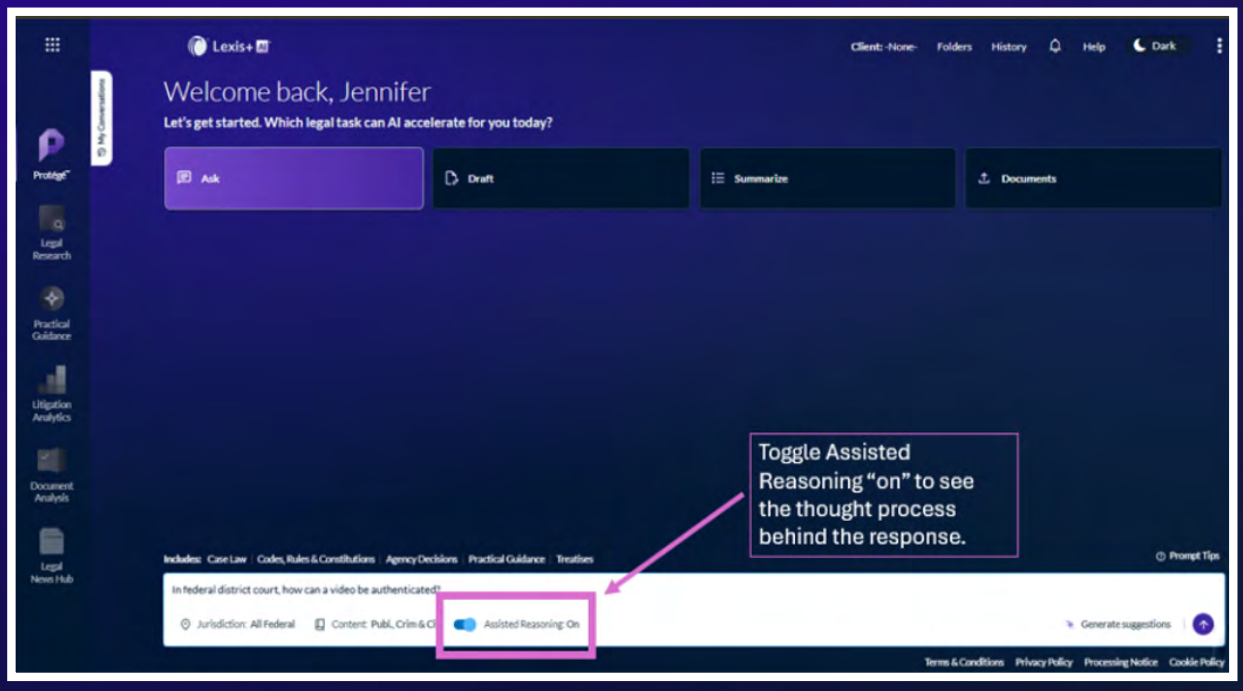


This is simply of taste of the resources available to you under the resource kit tool, and with new resource kits being added all the time, you never know just what tool will be added next. What you can be sure of though is that Practical Guidance will always be there to amplify your research and practical goals.

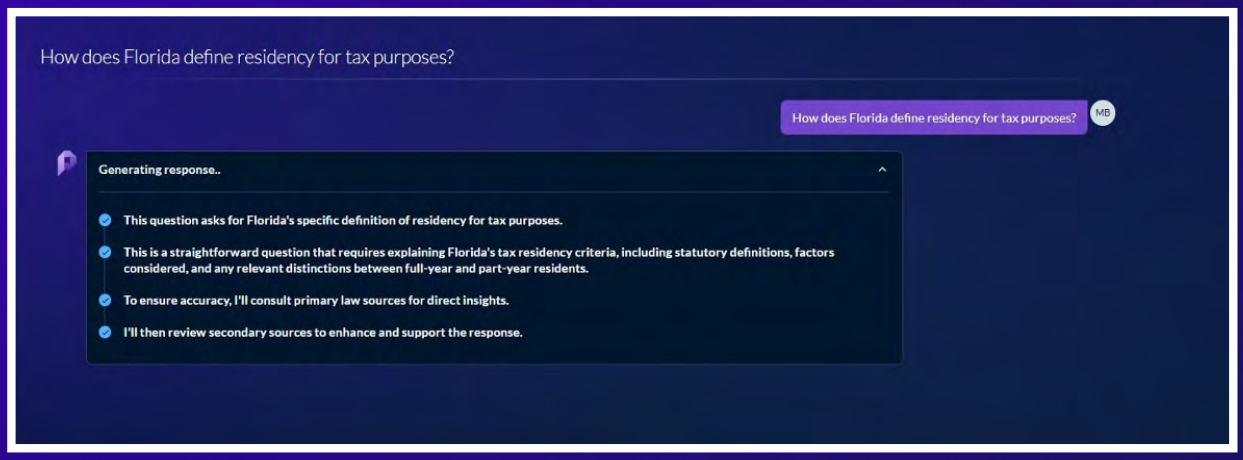
Assisted Reasoning Mode Now in Protégé™ Ask

By Marisa L. Beirne

Assisted Reasoning Mode within Protégé™ Ask enables users to choose when they want a more comprehensive answer along with detailed reasoning behind the AI's conclusions. This enhancement directly addresses user concerns by providing greater transparency into how the Lexis+ AI™ derives its results. By simply toggling the mode to "On," customers can now access the thought process behind every response, building confidence and trust in the outcome.



Once an end user turns on Assisted Reasoning, it will stay turned on for the entire conversation unless the end user elects to turn it off by utilizing the same toggle. End users should turn on Assisted Reasoning for more complex queries where they need deeper analysis. Additionally, the AI generated response, when using Assisted Reasoning, is typically more comprehensive, detailed and citation rich compared to the default mode. Below depicts what an end user who has Assisted Reasoning turned on will see while Protégé analyzes their prompt. Additionally, there is a photo which will show a much more detailed response to the end user's prompt.



Currently, this enhancement is only available in the ASK feature of Protégé. This update not only improves the user experience during response generation but also reinforces the reliability and value of our AI-powered solutions.

ELEVENTH AMENDMENT

Ex parte Young Exception

Enbridge Energy, LP v. Whitmer

135 F.4th 467, 2025 U.S. App. LEXIS 9645 (6th Cir. Apr. 23, 2025)

The Sixth Circuit has held that under Ex parte Young, a pipeline operator's suit seeking an injunction prohibiting Michigan officials from taking any steps to impede or prevent the operation of the pipeline was not barred by sovereign immunity.

Background. Enbridge owns and operates the Line 5 Pipeline, which is part of a pipeline network that transports petroleum products to refineries in the Midwest and parts of Canada. The pipeline runs through state-owned land in the bottomlands of the Straits of Mackinac between Michigan's Upper and Lower Peninsulas.

The pipeline crosses the Straits in accordance with a 1953 easement between Enbridge and the State of Michigan. The state agreed in the easement to permit Enbridge to construct, lay, maintain, use, and operate the pipeline over a portion of the bottomlands of the Straits. The easement stated that Enbridge's permission was subject to a requirement that Enbridge exercise "due care" for the "safety and welfare of all persons and of all public and private property." In addition, the easement required that Enbridge comply with limitations on the pipeline's construction materials, depth, and negative buoyancy.

The terms allowed the state to terminate the easement if, after notifying Enbridge in writing regarding alleged breaches of the easement, Enbridge failed to correct them.

Since 2019, Michigan officials have sought to terminate the easement, contending both that the easement was void from its inception and that Enbridge breached the easement. Those efforts have generated litigation in both state and federal courts.

In June 2019, the Michigan Attorney General sued Enbridge in Michigan state court, seeking to permanently enjoin the operation of the pipeline because the pipeline allegedly presented an unacceptable risk of a catastrophic oil spill, and the operation of the pipeline violated several state laws.

In November 2020, while the Attorney General's lawsuit was pending, the Governor issued a formal notice of revocation and termination of the easement. The notice alleged that the easement had been void from its inception, and that even if the easement were not void, Enbridge had violated it by failing to exercise due care with respect to the operation of the pipeline and by failing to comply with the easement's technical requirements for the pipeline.

The Governor filed her own complaint in Michigan state court seeking to enforce the notice and enjoin the operation of the pipeline.

Within a month of receiving the Governor's notice of revocation, Enbridge responded by filing this suit in federal court, seeking to enjoin the Governor's revocation efforts. In addition, Enbridge timely removed the Governor's state-court case to federal court.

After the district court held that Enbridge's removal of the case was proper, the Governor voluntarily dismissed the case. However, she did not withdraw the notice of revocation.

After that voluntary dismissal, Enbridge sought to remove the Attorney General's case to federal court as well. The district court denied the Attorney General's motion to remand the case to state court, and the Attorney General appealed the denial to the Sixth Circuit. The Sixth Circuit reversed and ordered that the case be remanded to state court, explaining that Enbridge had failed to timely remove the case to federal court, and that no equitable exceptions to the statutory deadline for removal applied [see Nessel v. Enbridge Energy, LP, 104 F.4th 958, 965–967 (6th Cir. 2024)]. Thus, the Attorney General's case was proceeding in state court while Enbridge's action to enjoin the revocation order, the subject of this appeal, proceeded in federal court.

Enbridge's federal suit named the Governor and the Director of the Michigan Department of Natural Resources in their official capacities, seeking a declaration that the defendants' attempts to shut down the pipeline violated federal law and the Constitution. In addition, Enbridge requested an injunction "prohibiting Defendants from taking any steps to impede or prevent" the operation of the pipeline, "including the revocation or termination of the . . . Easement based on the alleged non-compliance with pipeline safety standards in the Easement."

The suit alleged that (1) the efforts to shut down the pipeline violated the Supremacy Clause, as state pipeline safety standards are generally preempted by the federal Pipeline Safety Act [see 49 U.S.C. §§ 60102, 60104(c)]; (2) because the pipeline supplied oil to refineries in several states and in Canada, it was a critical instrument of commerce, and the attempts to shut down the pipeline violated the Interstate Commerce Clause by unreasonably burdening or discriminating against interstate commerce; and (3) the Governor's and Director's actions violated the Foreign Commerce Clause and the related Foreign Affairs doctrine.

The defendants moved to dismiss, arguing that sovereign immunity under the Eleventh Amendment deprived the court of jurisdiction over the claims. The defendants asserted that the case did not fall within the *Ex parte Young* doctrine because the lawsuit was effectively against the state. The district court disagreed and held that Enbridge's action fell within the *Ex parte Young* doctrine, and that no limitation of the doctrine barred the suit.

The defendants timely appealed the district court's ruling.

***Ex parte Young* and *Coeur d'Alene*.** The Sixth Circuit noted that states generally have sovereign immunity from suit in federal court under the Eleventh Amendment. However, in *Ex parte Young*, the Supreme Court established a limit on sovereign immunity when a suit seeks equitable and prospective relief against an official who allegedly is violating the Constitution or federal law [see *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)].

The *Ex parte Young* doctrine "rests on the premise—less delicately called a 'fiction,'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the state for sovereign immunity purposes" [see Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 254, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011)].

Thus, when the complaint alleges an ongoing violation of federal law and seeks prospective relief, a court ordinarily concludes that *Ex parte Young* applies. However, Eleventh Amendment immunity still applies if the suit "is in fact against the sovereign" rather than the named official. The Sixth Circuit emphasized that that distinction is not an easy one to make, because *Ex parte Young* is premised on the "fiction" that an officer suit is really against the officer and not against the state. Under *Idaho v. Coeur d'Alene Tribe*, the Supreme Court instructed courts to examine the *effect* of the relief sought in order to determine whether a suit lies outside *Ex parte Young*'s fiction [see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287–288, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997)].

The Sixth Circuit noted that the defendants did not dispute that on its face, Enbridge's complaint demonstrated that it met the formal *Ex parte Young* requirements, as it sought prospective injunctive relief against the named state officials for allegedly violating federal law. However, the defendants contended that the suit was nonetheless barred by the Eleventh Amendment because a careful examination of the relief sought demonstrated that the suit was in fact against the state. Relying on *Coeur d'Alene*, the defendants argued that the suit was barred because it was the functional equivalent of a quiet title action against the state and would have unduly infringed on the state's sovereignty interests in its submerged bottomlands. Moreover, the defendants argued that the suit was barred because it effectively sought "an order for specific performance of a state's contract."

Coeur d'Alene Exception to *Ex parte Young* Doctrine Did Not Apply. In *Coeur d'Alene*, the plaintiff tribe sued state officials in federal court seeking injunctive relief that would prohibit them from "regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interests in the submerged lands" of Lake *Coeur d'Alene*. Although the suit seemingly fit within the requirements of *Ex parte Young*, the Supreme Court found that it was nevertheless barred by the Eleventh Amendment because the "realities of the relief" sought in the suit would "diminish, even extinguish, the state's control" over the disputed lands.

The Sixth Circuit underscored the Supreme Court's explanation that submerged lands uniquely implicate sovereign interests, as they are "infused with a public trust the state itself is bound to respect." Because the Tribe's suit was the functional equivalent of a quiet title action, the Supreme Court concluded that the lawsuit was "too intrusive into Idaho's state sovereignty to truly be considered a suit against a state officer—as Young pretends—as opposed to against the state itself."

The Sixth Circuit rejected the defendants' contention that Enbridge's lawsuit was virtually identical to *Coeur d'Alene*, finding that the requested relief was not nearly as intrusive into state sovereignty as the Tribe's requested relief in *Coeur d'Alene*. Enbridge sought only declaratory and injunctive relief requiring the defendants not to interfere with the operation of the pipeline, which would not deprive the state of "substantially all benefits of ownership and control" over the submerged lands. Moreover, it would not remove the lands from the state's regulatory jurisdiction or prevent the state's officers from exercising their powers and authority over the lands.

The court reasoned that Enbridge's claims pertained only to its easement on state-owned land. Even if a court granted all the relief that Enbridge requested, the state would still retain title to and ownership of the land. In other words, the requested relief would not deprive the state of "all the sticks in the so-called bundle of sticks" representing the state's property rights.

The Sixth Circuit also rejected the defendants' contention that *Coeur d'Alene* extends to actions that operate to "quiet title" even when a plaintiff seeks less than all benefits of ownership and control over a property. The court did not agree that *Coeur d'Alene* "sweeps so broadly as to encompass any claim implicating a state's property interest." First, the court found the defendants' reliance on Michigan state law's definition of quiet title to be misplaced. The Supreme Court did not focus on the technical definition of quiet title but instead looked "to the degree of intrusion into state sovereignty threatened by the Tribe's requested relief." The Tribe in *Coeur d'Alene* sought relief that would have resulted in Idaho having "virtually no control over the disputed lands." In the instant case, the court found that Enbridge's suit sought relief that would not deprive Michigan of substantially all benefits of ownership and control over the land.

The Sixth Circuit observed that its past precedents applying *Coeur d'Alene* could be instructive. In one case, it held that *Coeur d'Alene* barred a lawsuit over a right-of-way providing access to Lake Michigan, because the suit sought a declaration that part of the right-of-way was the "lawful property of Plaintiffs" [see MacDonald v. Village of Northport, 164 F.3d 964, 972 (6th Cir. 1999)]. However, in another it held that *Coeur d'Alene* did not bar a lawsuit asserting ownership over duck blinds on a lake, because the plaintiffs did not assert "sovereign ownership" or claim "entitlement to the exclusive use and occupancy of" the lake [see Arnett v. Myers, 281 F.3d 552, 557–559 (6th Cir. 2002)].

The court emphasized that Enbridge's requested injunction's potential impact on Michigan's ability to exercise its regulatory authority was not tantamount to extinguishing Michigan's ability to exercise its regulatory and sovereign authority over the disputed lands entirely. "Enbridge seeks only to bring the state's regulatory activities into compliance with federal law and the Constitution. Accordingly, even if Enbridge received its requested relief, the state would retain the ability to regulate the submerged lands so long as its regulation did not violate federal law."

Suit Did Not Seek Order for Specific Performance of State's Contract. >The defendants argued that Enbridge's lawsuit fell outside the *Ex parte Young* doctrine because it allegedly sought an order for specific performance of a state's contract. By seeking an injunction preventing the defendants from interfering with the pipeline, the defendants asserted that Enbridge was attempting to compel the defendants to continue fulfilling their side of the easement contract.

The Sixth Circuit rejected this argument, finding that it ignored the legal basis of Enbridge's claims:

> Enbridge's lawsuit is not premised on allegations that the state has breached or failed to perform its obligations under the easement, and Enbridge does not request relief requiring the state to perform under the contract. Rather, Enbridge contends that the efforts of the defendants (individual state officers) to stop operation of the pipeline violate federal law and the Constitution. And Enbridge requests a quintessential Young injunction prohibiting the defendants from violating federal law.

The court found that the pre-*Ex parte Young* precedents relied on by the defendants did not support their argument. The Supreme Court in *Ex parte Young* cited those precedents as "reflecting the principle that when the ground for a suit is breach of a state contract, the suit is in effect against the state, and therefore barred by the Eleventh Amendment." In the instant case, the thrust of Enbridge's claims was not that Michigan breached a contract and that injunctive relief against state officers was required to prevent that beach from continuing. On the contrary, the requested relief would require the defendants to cease conduct that allegedly violated federal law. The suit, therefore, was not in fact against the state.

Finally, the defendants' reliance on a Third Circuit decision did not alter the Sixth Circuit's conclusion. In that case, the New York Waterfront Commission sued the Governor of New Jersey, requesting an injunction against enforcing a New Jersey statute that sought to withdraw from an interstate compact between New York and New Jersey. The Third Circuit held that the suit was barred by the Eleventh Amendment because it sought specific performance of a contract [see Waterfront Comm'n of N.Y. Harbor v. Governor of N.J., 961 F.3d 234, 241 (3d Cir. 2020)].

The Sixth Circuit found that the Third Circuit case was distinguishable, because in that case the only federal law the Commission argued the Governor was violating "was effectively the contract itself: the Commission argued that the compact had become federal law once Congress had approved it, so violating the compact also meant violating federal law."

Holding. The Sixth Circuit held that Enbridge's lawsuit was not barred by sovereign immunity and affirmed the district court's order denying the defendants' motion to dismiss.

PLEADINGS

Fraudulent Concealment

Scharpf v. Gen. Dynamics Co.
137 F.4th 188, 2025 U.S. App. LEXIS 11258 (4th Cir. May 9, 2025)

The Fourth Circuit holds that an unwritten, "non-ink-to-paper" antitrust conspiracy designed to avoid creating evidence can constitute an affirmative act of fraudulent concealment under Federal Rule of Civil Procedure 9(b) sufficient to toll the statute of limitations.

Facts. Plaintiffs Susan Scharpf and Anthony D'Armiento, former naval engineers, initiated a putative class action against major shipbuilders and naval-engineering consultancies, alleging that the defendants had engaged in a decades-long conspiracy to suppress wages through a covert agreement not to actively recruit or "poach" each other's employees. The conspiracy, described by multiple insiders as a "gentlemen's agreement," was deliberately maintained without written documentation and transmitted orally so as to avoid detection.

The district court initially dismissed the action under Federal Rule of Civil Procedure 12(b)(6), ruling that the plaintiffs' claims were barred by the Sherman Act's four-year statute of limitations. It held that merely keeping an agreement unwritten did not constitute an affirmative act of fraudulent concealment necessary to toll the limitations period.

On appeal, a panel of the Fourth Circuit reversed. It clarified that Federal Rule of Civil Procedure 9(b)'s heightened particularity requirement for pleading fraud is relaxed—but not eliminated—in cases alleging fraudulent concealment by omission or secretive conduct. Specifically, the court emphasized that to toll the statute of limitations through fraudulent concealment, a plaintiff must demonstrate that (1) the defendant engaged in affirmative acts of concealment, (2) the plaintiff failed to discover the concealed facts within the statutory period, and (3) the plaintiff exercised due diligence.

Determining Fraudulent Concealment. The Fourth Circuit traced three tests for fraudulent concealment—the separate-and-apart, self-concealing, and affirmative-acts standards—and reaffirmed that the circuit follows the intermediate affirmative-acts approach adopted in *Supermarket of Marlinton Inc. v. Meadow Gold Dairies Inc.* [71 F.3d 119 (4th Cir. 1995)]. Under that standard, secret agreements and covert meetings can constitute fraudulent concealment even when the concealment consists of omissions rather than express misstatements.

Rule 9(b) Particularity. Although fraudulent-concealment allegations must satisfy Rule 9(b), the panel reiterated that the rule is "relaxed but not eliminated" in omission or concealment cases, because essential facts lie in the defendant's exclusive control. Allegations need only give the defendant fair notice and reflect substantial prediscovery evidence. The complaint in this case met that standard by quoting multiple witnesses who described the unwritten pact, its industry-wide scope, and the defendants' conscious decision never to memorialize it in writing.

"Non-Ink-to-Paper" Agreement as Affirmative Act. The defendants argued that a purely unwritten restraint could never be an affirmative act of concealment. The panel majority rejected that "blanket rule," observing that it would perversely reward conspirators who avoid creating evidence, while penalizing those who reduce illegal conduct to paper and later destroy it. Fraudulent-concealment doctrine, the court reasoned, exists precisely to prevent wrongdoers "cunningly [to] avoid creating evidence of their conspiracy."

The panel emphasized that the complaint alleged intentional steps—oral transmission of the agreement, coded language, and verbal enforcement mechanisms—taken "to evade detection or accountability," conduct that sufficed as affirmative acts under *Marlinton*.

- **Intent and Due Diligence.** Because intent may be pleaded generally, the majority found it reasonable to infer that the defendants concealed the pact to avoid antitrust liability, particularly given the "obvious illegality" of naked no-poach agreements. On diligence, the court deemed the plaintiffs' allegations sufficient at the pleading stage: the engineers had no reason to suspect a conspiracy until insiders revealed it in 2023, and whether earlier wage stagnation or lack of recruitment put them on inquiry notice was a fact question inappropriate for Rule 12(b)(6) resolution.

The Fourth Circuit rejected the notion that fraudulent concealment must involve explicit acts of commission, such as document destruction, finding no logical or precedential basis for distinguishing conspirators who destroy evidence from those who carefully avoid creating evidence. Relying on *Marlinton*, the court stressed that conspirators who deliberately avoid documentation commit affirmative acts of concealment sufficient to satisfy Rule 9(b). It reasoned that a secret conspiracy sustained without written records inherently constitutes affirmative concealment because it demonstrates intentional steps taken to prevent detection.

Moreover, the court distinguished "self-concealing" conspiracies from those requiring affirmative concealment, clarifying that a no-poach agreement is not inherently deceptive. It concluded that the plaintiffs adequately pleaded fraudulent concealment because they provided specific details from industry insiders verifying the existence and secretive nature of the no-poach agreement, thereby meeting Rule 9(b)'s particularity requirement.

Finally, the Fourth Circuit held that the plaintiffs sufficiently alleged due diligence, as their pleadings indicated no reasonable suspicion of the conspiracy before their investigation in 2023.

- **Disposition.** Thus, the Fourth Circuit remanded the case, instructing the district court to proceed with the plaintiffs' claims, confirming that secretive conspiracies maintained through unwritten agreements can qualify as affirmative acts of fraudulent concealment under Federal Rule of Civil Procedure 9(b).

- **Dissent.** Chief Judge Diaz dissented, contending that the majority collapsed *Marlinton's* affirmative-acts standard into a self-concealing rule, "collapsing the analysis down to the sole question of whether a conspiracy existed" and "substantially relax[ing] the required showing under Rule 9(b) that the plaintiffs must satisfy to plead any affirmative acts of fraudulent concealment."

STANDING

Intervenor

8fig, Inc. v. Stepup Funny, L.L.C.

135 F.4th 285, 2025 U.S. App. LEXIS 9266 (5th Cir. Apr. 18, 2025)

Citing the public's right to access judicial records, the Fifth Circuit recognized a news agency's standing to intervene to challenge a confidentiality order in an effort to obtain information and access judicial records, even though the agency was neither a party to the litigation nor directly restrained by the order.

Background. 8fig, Inc., a technology company, entered into agreements with several e-commerce merchants to purchase projected revenue in exchange for an up-front purchase price. 8fig deposited the agreed purchase price to each merchant but did not receive the required remittances. Instead, the merchants transferred the funds to a religious movement (World Olivet Assembly), closed their bank accounts, and went out of business.

8fig sued the merchants in federal court and asserted RICO and various state and common-law claims. The parties, alleging that the case contained confidential and proprietary information that could harm them if third parties disseminated it, filed a joint motion to seal the proceedings so they could settle the dispute without interference. At the time, executives had pleaded guilty to participating in a scheme to defraud, an Olivet University graduate had been arrested for being part of an e-commerce money laundering scheme with ties to "Olivet Entities," and 8fig had accused e-commerce platforms associated with World Olivet Assembly of fraud.

The district court granted the parties' motion to seal, and before 8fig served any defendant, the parties settled. One week later, Newsweek Digital, LLC, moved to intervene and unseal the judicial record, urging that the seal "significantly hindered" its reporting. The district court found that Newsweek met the requirements under Federal Rule of Civil Procedure 24(a) to intervene as of right and granted its motion to unseal. The court also made redactions of some docket entries as requested by some defendants.

The defendants appealed and advanced numerous arguments, including (1) they were never served with the complaint, (2) the district court lacked personal jurisdiction over the defendants, and (3) Newsweek lacked standing to intervene.

The Fifth Circuit affirmed the district court's order granting Newsweek's motion to intervene and unseal the proceedings.

Failure to Raise Insufficiency of Service Constitutes Waiver. Notwithstanding Federal Rule of Civil Procedure 4's requirement that a defendant be served with the summons and complaint, and the defendants' argument that 8fig's failure to serve them was a fatal procedural defect and that actual notice of insufficient service does not satisfy Rule 4, the Fifth Circuit did not find that the district court erred. Rather, the court found that the defendants were sufficiently active to obviate service, citing circuit precedent holding that participation in trial and failure to raise the issue of sufficiency of service constitutes waiver.

Personal Jurisdiction Objections May Be Waived. The Fifth Circuit likewise found that objections to personal jurisdiction may be waived through a general appearance when a party makes some presentation or submission to the court. As the court explained, this may occur when a defendant seeks, takes, or agrees to "some step or proceeding in the cause beneficial to himself or detrimental to plaintiff" other than contesting jurisdiction.

The court found that the defendants took steps of a general appearance when they filed status reports and moved to seal the proceedings, which waived their right to object to a lack of personal jurisdiction. Thus, the appellate court concluded that the district court had personal jurisdiction.

Intervenor as of Right Must Have Article III Standing. The Fifth Circuit started its standing analysis noting that when an intervenor as of right seeks relief that is different from what is sought by a party with standing, the intervenor must have Article III standing. To that end, the intervenor must show an injury in fact that is fairly traceable to the challenged act and that is likely to be redressed by the requested remedy.

Violations of Public Right to Access Judicial Records Are Cognizable Injuries in Fact for Article III Standing. News organizations have been found to have standing to intervene when a court order directed individuals to "refrain from making written or oral comments about any aspects of any drafts of [a] proposed desegregation plan" because it would impede the news agencies' ability to gather the news and receive protected speech, which ability is arguably protected by the First Amendment. The Fifth Circuit said it and other federal circuits "have held that news agencies have standing to challenge confidentiality orders in an effort to obtain information or access to judicial proceedings"—even when the news agencies are neither parties to the litigation nor directly restrained by any orders.

Regarding Newsweek, the court found that even though it had not been subject to a gag order in this case, it nonetheless had standing to seek intervention. The court reasoned that even though the court's order to seal was filed at the parties' request to facilitate settlement, "once settlement was reached, the order to seal had run its course." And that did not diminish Newsweek's right to gather the news.

Regarding the district court's right to unseal the judicial records, the Fifth Circuit noted there is a presumption favoring access to judicial records, and sealing judicial records is heavily disfavored. To that end, the court rejected the defendants' arguments that their freedom to contract privacy and that the district court's alleged failure to consider the personal vendetta of Newsweek's chief executive officer against the defendants required reversal of the district court's decision to unseal.

The court noted that while inspection of court records cannot be used "to gratify private spite or promote public scandal," notwithstanding the Newsweek chief executive's personal desires, the newsworthiness of the case was evident, given the executives who had pleaded guilty, the arrest of the University graduate, 8fig's accusations, and the plethora of coverage by other news organizations about legal proceedings involving entities associated with World Olivet Assembly.

Finally, the court concluded that the parties' general assertions of privacy and confidentiality were insufficient to overcome the presumption of openness. It noted that even if confidentiality was a factor in reaching settlement, this would only weigh in favor of sealing the settlement terms themselves, not the entire judicial record.

Conclusion. The Fifth Circuit affirmed the district court's order granting Newsweek's motion to intervene as of right and its motion to unseal the proceeding.