IF IT'S BROKE, FIX IT!

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This very serious paper discusses how to try to fix things that have gone wrong at trial or with the perfection of the appeal. It happens more often than you think it does.

I. Oops—I forgot to move for a directed verdict at the close of all evidence.

A party's objections to the jury charge on grounds of lack of sufficiency of the evidence can satisfy the purposes of Rule 50(a). *See Greenwood v. Societe Francaise De*, 111 F. 3d 1239, 144-45 (5th Cir. 1997); *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610-11 (5th Cir. 1996).

II. Oops again—I forgot to move for judgment as a matter of law after the trial.

If you file a motion for judgment as a matter of law at the close of all evidence, but do not renew it after the trial, the best you can hope for on an appeal challenging the sufficiency of the evidence is a new trial. *E.g.*, *Cone v. West Virginia Pulp & Paper Co*., 330 U.S. 212, 217-18 (1947); *Whitehead v. Food Max*, 163 F.3d 265 (5th Cir. 1998); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1315 (5th Cir. 1995). Thus, you should at least file a motion for new trial attacking the sufficiency of the evidence.

But that will still be of little help. In this situation, the standard of review becomes that of plain error-whether "any evidence" supports the verdict. Whitehead, 163 F.3d at 269.

III. Double secret oops—I forgot to preserve this at all during trial.

You might be able to preserve the complaint with a motion for new trial. The general rule is that a party cannot raise new issues for the first time in post-trial motions. *See*, *e.g. Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1454 (5th Cir. 1987). Yet the trial court has discretion to consider them. *See*, *e.g. Quest Medical, Inc. v. Apprill*, 90 F.3d 1080, 1087 (5th Cir. 1996); *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 629 n.59 (5th Cir. 1993); *Southwestern Eng'g Co. v. Cajun Elec. Power Co-op, Inc*., 915 F.2d 972, 979 (5th Cir. 1990).

IV. Oops, oops, oops-I just noticed a miscalculation in the interest award.

You can challenge more technical mistakes with a motion to alter or amend the judgment.

V. Is there a doctor in the house?

When all else fails, or as Ross Perot would say, you are in "deep doo-doo,"[1] try a motion for relief from judgment under Federal Rule of Civil Procedure 60. But these are limited to narrow situations. One basis is to correct clerical errors. FED. R. CIV. P. 60(a). The other bases are (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. FED. R. CIV. P. 60(b).

Your time for filing the motion varies according to why you are filing it. If you want to correct a clerical mistake in the judgment, you can file the motion at any time. If you are moving on the basis of (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence, or (3) fraud, misrepresentation, or other misconduct of an adverse party, you must file the motion within one year of "the judgment, order, or proceeding entered or taken." FED.R.Civ.P.60(b). For the other complaints, as well as those just listed, the motion must be filed "within a reasonable time." *Id.*

If you file the motion after you have noticed an appeal, things get more complicated. If you are trying to correct a clerical mistake, you must obtain leave from the Fifth Circuit to permit the district court to make the correction.

If your motion is based on one of the other grounds, the district court can only deny the motion; then, you must either file a separate notice of appeal or amend your prior notice to obtain review of the denial of that motion. *See Williams v. Chater*, 87 F. 3d 702, 705 n.1 (5th Cit. 1996). If the district court wants to grant the motion, it must obtain leave from the court of appeals. *Id.*; *see also Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 699 (5th Cir. 1955).

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A. Clerical errors

As the Fifth Circuit noted in *In re West Texas Marketing Corp.*, 12 F.3d 497, 504-05 (5th Cir. 1994),

> [T]he relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correctable under the Rule. As long as the intentions of the parties are clearly defined and all the court need do is employ the judicial eraser to obliterate a mechanical or mathematical mistake, the modification will be allowed. If, on the other hand, cerebration or research into the law or planetary excursions into facts is required, Rule 60(a) is not a perpetual right to apply different legal rules or different factual analyses to a case. It is only mindless and mechanistic mistakes, minor shifting of facts, and no new additional legal perambulations which are reachable through Rule 60(a).

B. Substantive mistakes

Legal errors usually do not constitute the kind of "mistake" that will justify relief, *McMillan v. MBank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir. 1993). Nor will inexcusable neglect by counsel. *See Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350-57 (5th Cir. 1993); *see also Pryor v. United States Postal Serv.*, 769 F.2d 281, 287-89 (5th Cir. 1985).

Whether to set aside a default judgment depends on "(1) the extent of prejudice to the plaintiff; (2) the merits of the defendant's asserted defense; and (3) the culpability of [the] defendant's conduct." *Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 938-39 (5th Cir. 1999) (quoting *Hibernia National Bank v. Administracion Central Sociedad Anonima*, 776 F. 2d 1277, 1280 (5th Cir. 1985)).

To obtain relief on the basis of newly discovered evidence the evidence must be "newly discovered" not "new" (post-trial) evidence. *See Longden v. Sunderman*, 979 F.2d 1095, 1102-03 (5th Cir. 1992); *Chilson v. Metropolitan Transit Auth.*, 796 F.2d 69, 70 (5th Cir. 1986). But it must not have been discoverable before the time to file a motion for new trial had expired. FED. R. CIV. P. 60(b)(2). The newly discovered evidence must be so important that it would have changed the outcome of the trial. See *New Hampshire Ins. Co. v. Manech USA, Inc.*, 993 F.2d 1195, 1200-01 (5th Cir. 1993); *Brown v. Petrolite Corp.*, 965 F.2d 38, 50 (5th Cir. 1992).

With regard to fraud or misconduct by your opponent, you must prove by clear and convincing evidence that the adverse party engaged in misconduct that you from fairly presenting your case. *E.g.*, *Washington v. Paths*, 916 F.2d 1036, 1039 (5th Cir. 1990).

If the judgment is void because there was no jurisdiction, then a rule 60(b) motions can be appropriate. *New York Life Ins. Co. v. Brown*, 84 F. 3d 137, 143 (5th Cir. 1996); *United States v. 119.67 Acres of Land*, 663 F.2d 1328, 1331 (5th Cir. 1981).

When the judgment has been satisfied, released or discharged; a prior judgment upon which it is based has been reversed or vacated; or it is no longer equitable that the judgment should have prospective application, a rule 60(b) motion can be used. But reversal of a prior judgment matters only for claim or issue preclusion.

VI. Is our malpractice coverage up to date?

You forgot to file the notice of appeal on time. GULP!

"The district court may extend the time to file the notice of appeal if (i) a party so moves no later than 30 days after the time prescribed by [FRAP] 4(a) expires; and (ii) that party shows excusable neglect and good cause." FED. R. APP. P. (4)(a)(5)(A).

So what is "excusable neglect?"

> the determination [of what constitutes "excusable neglect"] is at bottom an equitable one, taking into account all of the relevant circumstances surrounding the party's omission. These include ... the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 395 (1993), *cited in Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 468-470 (5th Cir. 1998). Generally, a misunderstanding of the deadline by counsel won't cut it. *Halicki*, 151 F.3d at 470.

VII. This record won't play.

Suppose a transcript is unavailable. You should "prepare a statement of the evidence or proceeding from the best available means, including the appellant's." FED. R. APP. P. 10(c)). You also should serve your "statement of the evidence" on the appellee, "who may

serve objections or proposed amendments thereto within 10 days after service." *Id*. Then, you should submit both "to the district court for settlement and approval." *Id*. Whatever the court then approves becomes the record. *Id.*

If, as is more common, the record is available but contains a mistake, you can correct it:

> If any difference arises as to whether the record truly discloses what occurred in the district court,. the difference shall be submitted to and settled by that court and record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

FED. R. APP. P. 10(e) But rule 10(e) does not permit a party "to introduce new evidence in the court of appeals." *S&E Shipping Corp. v. Chesapeake & O. Ry.*, 678 F.2d 636, 641 (6th Cir. 1981); *see also United States v. Smith*, 493 F.2d 906, 907 (5th Cir. 1974)

VIII. If all else fails . . . .

Call a better lawyer or move to Tahiti!

I recommend the latter. Good luck!