

PROFESSIONAL LIABILITY UPDATE

March 25, 2005

Issue No. 212

Juan C. Araneda

Jennifer A. Becker

David P. Borovsky

Robert J. Buccieri

Chip B. Cox

Kim O. Dincel

Kathleen M. Ewins

Howard M. Garfield

Jason A. Geller

J. Michael Higginbotham

John B. Hook

Joseph P. McMonigle

Douglas J. Melton

Jordan Rojas

Jessica B. Rudin

Steven Sharafian

Ann L. Strayer

Jennifer W. Suzuki

Jeanette Traverso

Beth A. Trittipio

Karen L. Uno

Seth E. Watkins

Gerald G. Weisbach

Kevin Whittaker

Irene K. Yesowitch

EXCUSABLE NEGLECT

Federal Law

By Jennifer A. Becker

***Pincay v. Andrews*** (2004) 389 F.3d 853

*The Ninth Circuit decides that the trial court is in the best position to evaluate whether a calendaring error is excusable in the context of a case.*

Laffit Pincay, Jr. and Christopher McCarron (Pincay) obtained a judgment against Vincent S. Andrews, Robert L. Andrews, and Vincent Andrews Management Corp. (Andrews) on July 3, 2002. Andrews’s notice of appeal was due 30 days later, but a paralegal misread the rule and advised Andrews’s attorney that the notice was not due for 60 days. When Andrews’s counsel learned about the error he promptly tendered a notice of appeal and a request for an extension within the 30-day grace period.

The district court found the neglect excusable and granted the motion for an extension of time to file the notice of appeal. When Pincay appealed to the Court of Appeals a majority of a three-judge panel concluded that Andrews’s attorney had improperly delegated the function of calendaring to a paralegal, which was inexcusable as a matter of law.

On rehearing an en banc panel reasoned that the delegation of repetitive tasks to

paralegals is necessary to manage the costs of legal representation. Delegation of tasks to specialized, well-educated non-lawyers could ensure greater accuracy than if each lawyer calculated each filing deadline anew. The responsibility for any error falls on the attorney regardless of whether the error was made by the attorney or a paralegal. Thus, delegation of the calendaring task was not per se inexcusable neglect.

The panel noted the four-part balancing test for determining “excusable neglect.” The factors include: (1) the danger of prejudice to the non-moving party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party’s conduct was in good faith.

The court then turned to whether the misreading of a clear rule could appropriately have been considered excusable. Different courts applying the

balancing test have come to varied results on the question of whether misreading the law constitutes excusable neglect.

Applying an abuse of discretion standard, the court affirmed the trial court. Both the attorney and the paralegal were negligent, but that is only the beginning of the analysis. The parties focused on the “reason for delay.” Andrews argued that the reason was the failure of a “carefully designed” calendaring system operated by experienced paralegals that had worked flawlessly. Pincay stressed the carelessness in failing to read the applicable Rule.

While a lawyer’s failure to read a rule is not a compelling excuse, the balancing test counsels against the creation of any rigid rule. The district court is in a better position than an appellate court to evaluate factors such as whether the lawyer had otherwise been diligent, the propensity of the other side to capitalize on petty mistakes, the quality of representation of the lawyers, and the likelihood of injustice if the error is not excused. The trial court is most familiar with the context of a particular case within which issues of excusable neglect are determined. A *per se* rule that misinterpretation of an unambiguous rule can never be excusable neglect is contrary to the concept that excusable neglect is an elastic concept, equitable in nature.

*Comment:* Had the case been determined against Andrews, the deferential abuse of discretion standard would have withstood appellate scrutiny as well. Many courts would disagree that a misreading of an unambiguous statute could ever be considered

excusable neglect, as demonstrated by the vigorous dissent in this case. Calendaring errors continue to be a fertile source of malpractice claims and *Pincay* should not be considered a license to err.

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. None of the material is intended to imply or establish standards of care applicable to any attorney in any particular circumstance. The reader must consult with counsel to determine how the concepts and decisions discussed herein may apply to specific circumstances.