Neglect, Excusable and Otherwise

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I. INTRODUCTION

The phrase "excusable neglect" has special meaning in the law. For example, a party that misses a deadline for filing a pleading may still be able to file the pleading after the time for doing so has expired if it can demonstrate that its failure was the product of excusable neglect.[1] A party may be required to demonstrate excusable neglect to avoid sanctions for untimely action,[2] or to obtain relief from a final judgment or order.[3] Perhaps most importantly, a party may have to show excusable neglect if it hopes to pursue an appeal after failing to timely file a notice of appeal. In federal courts, a party that wants to take an appeal from a final judgment or order in a district court must under Federal Rule of Appellate Procedure 4(a) file a notice of appeal with the district clerk

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[1] FED. R. CIV. P. 6(b).

[2] *See, e.g.*, Matajek v. Skowronska, 893 So. 2d 700, 701-02 (Fla. Dist. Ct. App. 2005) (finding no excusable neglect and therefore sanctioning lawyer for late filing of mediation questionnaire).

[3] *See* FED. R. CIV. P. 60(b)(1); *see, e.g.*, Scoggins v. Jacobs, 610 S.E.2d 428, 432 (N.C. Ct. App. 2005) (finding that party's failure to retain counsel was not excusable neglect warranting relief from judgment); Williams Corner Investors, L.L.C. v. Areawide Cellular, L.L.C., 676 N.W.2d 168, 172-74 (Wis. Ct. App. 2004) (refusing under Wisconsin law to set aside default judgment based on excusable neglect).

within thirty days after that judgment or order is entered, or within sixty days if the United States or its agency or officer is a party.[4] A district court may under Rule 4(a)(5)(A) extend the time to file a notice of appeal if (1) a party so moves within the original appeal period or no later than thirty days thereafter; and (2) regardless of whether its motion is filed before or during the time prescribed in Rule 4(a) expires, the party "shows excusable neglect or good cause."[5] Some states have adopted rules of appellate procedure modeled on the federal rules, likewise adopting the excusable neglect and good cause standards for allowing late appeals.[6]

In 2004, the United States Court of Appeals for the Ninth Circuit, sitting en banc, decided *Pincay v. Andrews*,[7] referred to here as *Pincay II*. In *Pincay II*, the court affirmed a district court's finding of excusable neglect—and thus its decision to extend a party's time to appeal—when a lawyer left to a paralegal serving as his law firm's calendaring clerk responsibility for calendaring appellate deadlines and the paralegal calendared the wrong date.[8] The decision in *Pincay II* is noteworthy because courts have traditionally rejected the notion that a lawyer's delegation of tasks to another lawyer or to a non-lawyer employee amounts to excusable neglect if the other lawyer or staff member errs.[9] Furthermore, the real problem in *Pincay II* was that the paralegal charged with calendaring the appellate deadlines inexplicably misread the clear language of Rule 4(a)(1),[10] and courts have overwhelmingly held that a lawyer's failure to understand the plain language of federal rules cannot

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[4] FED. R. APP. P. 4(a)(1).

[5] FED. R. APP. P. 4(a)(5)(A).

[6] *See, e.g.*, Enos v. Pac. Transfer & Warehouse, Inc., 910 P.2d 116 (Haw. 1996).

[7] 389 F.3d 853 (9th Cir. 2004) (en banc) (*Pincay II*).

[8] *Id.* at 854-60.

[9] *See, e.g.*, Cleek Aviation v. United States, 20 Cl. Ct. 766, 767, 770 (1990) (holding that there was no excusable neglect where secretary incorrectly addressed envelope), *superseded by rule as stated in* Cygnus Corp. v. United States, 65 Fed. Cl. 646 (2005); Borio v. Coastal Marine Constr. Co., 881 F.2d 1053, 1056 (11th Cir. 1989) (holding "that it is not excusable neglect when counsel fails to file a timely appeal because his or her secretary misfiles the notice of appeal in her own files"), *abrogated by* Advanced Estimating Sys., Inc. v. Riney, 77 F.3d 1322 (11th Cir. 1996); Airline Pilots v. Exec. Airlines, Inc., 569 F.2d 1174, 1175 (1st Cir. 1978) (finding that secretary's failure to diary the correct date did not constitute excusable neglect), *abrogation recognized by* Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001); Home Ins. Co. v. Law Offices of Jonathan DeYoung, P.C., 156 F. Supp. 2d 488, 491 (E.D. Pa. 2001) (finding no excusable neglect where lawyer directed a newly-hired part time assistant to calendar appellate deadline); United States v. Virginia, 508 F. Supp. 187, 190-93 (E.D. Va. 1981) (finding no excusable neglect where attorney dictated instructions concerning notice of appeal but lawyer working with him never followed up with respect to appeal and tape was lost).

[10] *See Pincay II*, 389 F.3d at 855.

constitute excusable neglect.[11] A different result should not obtain simply because a lawyer delegates the task of reading and applying a rule to non-lawyer support staff.

The decision in *Pincay II* is potentially significant from a professional liability perspective, because legal malpractice specialists urge law firms to create centralized work control systems in which non-lawyer staff record and monitor deadlines.[12] It is also significant as a practical matter because the delegation of tasks such as calendaring deadlines to non-lawyer staff is commonplace today, at least at large and sophisticated law firms. In any event, *Pincay II* appears to dramatically relax the excusable neglect standard and to reward lawyers for abdicating their professional responsibilities. This article explains why *Pincay II* was wrongly decided and discusses some implications for lawyers.

II. EXCUSABLE NEGLECT

Rule 4(a)(5) allows a district court to extend the deadline for filing a notice of appeal if the motion for extension is made within the original appeal period or within thirty days thereafter, and the moving party "shows excusable neglect or good cause."[13] The "excusable neglect" and "good cause" standards in Rule 4(a)(5) are separate and distinct;[14] they "are not interchangeable."[15] Although some courts have reasoned that good cause applies only to requests for extensions made before the original period for filing a notice of appeal expires, while excusable neglect applies to requests made afterwards,[16] that is plainly wrong.[17]

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[11] *See, e.g.*, Kaubisch v. Weber, 408 F.3d 540, 543 (8th Cir. 2005); United States v. Torres, 372 F.3d 1159, 1163-64 (10th Cir. 2004); *Graphic Commc'ns*, 270 F.3d at 7-8; Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 997 (11th Cir. 1997); Prizevoits v. Ind. Bell Tel. Co., 76 F.3d 132, 133-34 (7th Cir. 1996); Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 16 F.3d 501, 503 (2d Cir. 1994).

[12] *See* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.23, at 204 (5th ed. 2000).

[13] FED. R. APP. P. 4(a)(5)(A).

[14] *See* Virella-Nieves v. Briggs & Stratton Corp., 53 F.3d 451, 453 (1st Cir. 1995) (observing when discussing earlier case that "the two standards occupy distinct spheres").

[15] 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 304App.07[2], at 304App.-34 (3d ed. 1997 & Supp. 2004) [hereinafter MOORE'S FEDERAL PRACTICE].

[16] *See, e.g.*, Lorenzen v. Employees Ret. Plan of the Sperry & Hutchinson Co., 896 F.2d 228, 231 (7th Cir. 1990); Parke-Chapley Constr. Co. v. Cherrington, 865 F.2d 907, 909-10 (7th Cir. 1989) (citing cases from several federal judicial circuits); Seyler v. Burlington N. Santa Fe Corp., 121 F. Supp. 2d 1352, 1355 n.3 (D. Kan. 2000) (citing cases).

[17] *See* Bishop v. Corsentino, 371 F.3d 1203, 1207 (10th Cir. 2004); *Virella-Nieves*, 53 F.3d at 453-54; *see also* Enos v. Pac. Transfer & Warehouse, Inc., 910 P.2d 116, 120-23 (Haw. 1996) (discussing HAW. R. APP. P. 4(a)(5), which is modeled on FED. R. APP. P. 4(a)(5)).

The applicability of one standard or the other turns not on when a party moves for an extension of time, but on whether the need for an extension is the movant's fault.[18] Where the movant bears no fault related to the requested extension, as where the extension is necessitated by events beyond the movant's control, the good cause standard applies.[19] Where there is fault, excusable neglect is the measure. As a leading treatise explains:

> The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault—excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.
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> Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.[20]

Good cause is a relatively easy standard to apply and it is rarely invoked.[21] Disputes involving Rule 4(a)(5) mostly turn on the meaning of excusable neglect. Courts long held neglect to be excusable "only in unique or extraordinary circumstances."[22] Then, in 1993, the Supreme Court endorsed a more generous interpretation of excusable neglect in

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[18] *Bishop*, 371 F.3d at 1207 (quoting FED. R. APP. P. 4(a)(5) advisory committee's note (2002 Amendments)); Webster v. Pacesetter, Inc., 270 F. Supp. 2d 9, 14 (D.D.C. 2003) (same).

[19] Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 630 (1st Cir. 2000).

[20] 20 MOORE'S FEDERAL PRACTICE, *supra* note 15, § 304App.07[2], at 304App.-34.

[21] *See Mirpuri*, 212 F.3d at 630 (noting that good cause standard applies to a "narrow class of cases in which a traditional 'excusable neglect' analysis would be inapposite").

[22] Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 4 (1st Cir. 2001) (discussing First Circuit precedent and quoting Pontarelli v. Stone, 930 F.2d 104, 111 (1st Cir. 1991)).

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership.[23]

In *Pioneer,* the Court was called upon to decide whether an attorney's inadvertent failure to timely file a bankruptcy proof of claim could constitute excusable neglect within the meaning of Bankruptcy Rule 9006(b)(1).[24] The Court concluded that the determination of whether a party's neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission."[25] Where appropriate, federal courts may "accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."[26] In determining whether to allow late filings, circumstances that courts should consider 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."[27]

Although decided in the bankruptcy context, the *Pioneer* approach logically applies to controversies under other rules where excusable neglect is the standard for granting extensions of time,[28] such as Rule 4(a)(5).[29] Thus, in deciding whether to allow a party to file a notice of

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[23] 507 U.S. 380 (1993).

[24] *Id.* at 382-83. Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure provides:

> when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

[25] *Pioneer*, 507 U.S. at 395.

[26] *Id.* at 388.

[27] *Id.* at 395.

[28] *See, e.g.*, George Harms Constr. Co. v. Chao, 371 F.3d 156, 163-64 (3d Cir. 2004) (applying the *Pioneer* four-factor analysis in the FED. R. CIV. P. 60(b) context); *In re* Vitamins Antitrust Class Actions, 327 F.3d 1207, 1209-10 (D.C. Cir. 2003) (discussing Rules 60(b) and 6(b) with respect to class action opt-outs); Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223-25 (9th Cir. 2000) (applying *Pioneer* in Rule 60(b) context).

[29] *See In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., 401 F.3d 143, 153-54 (3d Cir. 2005); Halicki v. La. Casino Cruises, Inc., 151 F.3d 465, 469 n.3 (5th Cir. 1998) ("In extending *Pioneer* to Rule 4(a)(5), we follow each of our sister circuits to have addressed the issue."); City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1046 (10th Cir. 1994) ("Because the Court's analysis [in *Pioneer*] of what constitutes 'excusable neglect' in the bankruptcy context rested on the plain meaning of the terms, there is no reason that the meaning would be different in the context of Fed. R. App. P. 4(a)(5).").

appeal out of time, a court should consider (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.[30] These four factors do not bear equal weight; the third factor—the reason for the delay—clearly is the most important.[31] This makes sense, because the first, second and fourth factors easily favor the movant in most cases; non-moving parties are seldom prejudiced because delays in this context are usually short, and delays attributable to bad faith are exceedingly rare.[32]

When it comes to the reason for the delay, it is important to understand that even under the equitable and flexible *Pioneer* standard not any excuse will suffice.[33] The moving party still must offer a "satisfactory explanation" for its tardiness.[34] Courts often hold neglect to be inexcusable.[35] In making excusable neglect determinations, a party's fault or that of its attorneys is the most important consideration.[36]

III. THE NINTH CIRCUIT'S TRANSFORMATION OF EXCUSABLE NEGLECT

In the Ninth Circuit, as elsewhere, a lawyer's mistake of law, such as misinterpreting a clear rule, generally does not constitute excusable neglect.[37] Accordingly, the court's en banc decision in the case we will call *Pincay II*,[38] in which the court reheard a panel decision in the case known as *Pincay I*,[39] surprised many trial and appellate lawyers.

A. The Pincay *Decisions*

The *Pincay* decisions arose out of a RICO action. Pincay obtained a judgment against Andrews in a federal district court on July 3, 2002, and,

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[30] *See* Gibbons v. United States, 317 F.3d 852, 854 (8th Cir. 2003) (quoting *Pioneer*).

[31] *Id.* (quoting Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2003)); Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5-6 (1st Cir. 2001); *City of Chanute*, 31 F.3d at 1046.

[32] *See* Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003) (quoting and citing *Lowry*, 211 F.3d at 463).

[33] *See Graphic Commc'ns*, 270 F.3d at 5.

[34] *Id.*

[35] *See, e.g.*, *Gibbons*, 317 F.3d at 855 (affirming district court's conclusion that neglect was not excusable); Prizevoits v. Ind. Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996) ("If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect.").

[36] *City of Chanute*, 31 F.3d at 1046.

[37] *See, e.g.*, Kyle v. Campbell Soup Co., 28 F.3d 928, 932 (9th Cir. 1994) (concluding that district court abused its discretion by finding that lawyer's mistaken reliance upon FED. R. CIV. P. 6(e) constituted excusable neglect).

[38] Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (en banc) (*Pincay II*).

[39] Pincay v. Andrews, 351 F.3d 947 (9th Cir. 2003) (*Pincay I*), *reh'g granted*, 367 F.3d 1087 (9th Cir. 2004), *on reh'g*, 389 F.3d 853 (9th Cir. 2004) (en banc) (*Pincay II*).

because the government was not a party to the action, Andrews's notice of appeal was due thirty days later.[40] On July 10, the paralegal functioning as calendaring clerk at Boies, Schiller & Flexner ("Boies"),[41] the sophisticated law firm representing Andrews, faxed a copy of the judgment to the lead lawyer, who was out of the office at the time.[42] The lawyer and the paralegal than exchanged e-mails and, in that exchange, the paralegal told the lawyer that Andrews had sixty days to take an appeal under Rule 4, making the notice of appeal due on September 3 in light of the Labor Day holiday.[43] The lawyer accepted this, nonetheless instructing the paralegal to calendar the due date a few days ahead of Labor Day.[44] The lawyer never read Rule 4 himself, nor did he otherwise check the paralegal's time calculation.[45] Of course, Andrews had only thirty days in which to file a notice of appeal, not sixty.[46]

The lawyer learned of trouble with Andrews's appeal on August 22 when Pincay filed a notice in Andrews's parallel bankruptcy proceeding indicating that the judgment was final and that the appeal period had expired.[47] On August 25, Andrews moved to extend the time in which to appeal from the July 3 judgment.[48] In that motion, Andrews asserted that Boies relied on the calendar clerk to calculate appellate deadlines, that the clerk made a mistake, and that this mistake amounted to excusable neglect.[49] The district court applied *Pioneer* and concluded that Andrews's time in which to appeal should be extended because "'attorney mistakes made in good faith with no prejudice to the other party are excusable neglect.'"[50] Pincay appealed.[51]

In *Pincay I*, the court stated that "Andrews's counsel did not show good cause for his failure to file" a timely notice of appeal, nor could he establish excusable neglect.[52] Rather:

> What counsel did was to delegate a professional task to a nonprofessional to perform. Knowledge of the law is a lawyer's

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[40] FED. R. APP. P. 4(a)(1).

[41] The fact that Boies, Schiller & Flexner represented Andrews is not mentioned in the opinion. *See* Charles Delafuente, *Not Late, Just Mistaken*, 3 No. 47 A.B.A. J. E-Report 4 (Dec. 3, 2004) (identifying the law firm).

[42] *Pincay I*, 351 F.3d at 948-49.

[43] *Id.* at 949.

[44] *Id.*

[45] *See id.* at 951.

[46] *See* FED. R. APP. P. 4(a)(1)(A).

[47] *Pincay I*, 351 F.3d at 949.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 954 (Kleinfeld, J., dissenting) (quoting the district court's order).

[51] *Id.* at 949.

[52] *Id.*

> stock in trade. Bureaucratization of the law such that the lawyer can turn over to nonlawyers the lawyer's knowledge of the law is not acceptable for our profession.[53]

On appeal, as he did in the district court, Andrews focused on the calendaring clerk's mistake, which he characterized as "an unexplained aberration by a man experienced in court procedures."[54] The *Pincay I* court thought this focus wrong, stating:

> The focus must be on the lawyer. Paralegals and other nonlawyers perform services in firms; many of the services involve knowledge of the law and were once performed by junior lawyers. The economy of such delegation is evident. But delegation cannot be made of responsibility for personal knowledge. When the lawyer delegates, he retains responsibility for knowing the law.[55]

The lawyer's admitted ignorance of the law, supposedly justifying his reliance on the clerk, did not help Andrews.

> Not knowing the law governing one's practice is different from mere neglect, and it cannot be classified as excusable neglect. No axiom is more familiar than, "Ignorance of the law is no excuse." This ordinary rule is not a per se rule, but it ordinarily applies to those whose profession is the law.
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> Nowhere in the proceedings in this case does the lawyer state that he had read the federal rules governing appeals. Nowhere does he state that he misremembered them. All that the lawyer states is that he relied on his clerk. A lawyer's obligation to know relevant law cannot be delegated in this way to a nonlawyer. A solo practitioner would not even be in a position to attempt this kind of delegation. Membership in a large firm does not give the lawyer leave to delegate to others the basic rules of the lawyer's practice.[56]

The *Pincay I* court concluded that under *Pioneer*, ignorance of clear rules or mistakes in construing them do not ordinarily constitute excusable neglect.[57] In this case, the lawyer's ignorance of the rules was compounded by his delegation of his need to know the rules to a non-

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[53] *Id.* at 950.
[54] *Id.* at 951.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 951-52 (discussing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 388 (1993)).

lawyer whose actions he was unwilling to accept responsibility for.[58] Accordingly, the court held that the district court abused its discretion in extending Andrews's time to appeal.[59]

Judge Kleinfeld dissented, asserting that following *Pioneer* "[i]gnorance of the law and negligent delegation can indeed be classified as excusable neglect."[60] Furthermore, he reasoned, the majority had failed to afford the district court the deference it was due under the abuse of discretion standard of review.[61] Apparently spurred by the dissent, the court as a whole voted to rehear the case en banc "to consider whether the creation of a per se rule against delegation to paralegals, or indeed any per se rule involving missed filing deadlines," is consistent with *Pioneer*.[62] Thus came *Pincay II*.

The *Pincay II* court noted that the calendaring clerk's error was inexplicable. After all, the clerk calendared Andrews's deadline to appeal for sixty days out under Rule 4(a)(1)(B), as though the government were a party, even though the case had been going on for fifteen years, everyone should have known that the government was not a party, and any lawyer or paralegal should have been able to read the applicable rule correctly.[63] The clerk's misreading of Rule 4(a) was a critical error that the district court easily could have concluded was inexcusable, thus ending the litigation.[64] Even so, the lawyer's delegation to the clerk the task of ascertaining the deadline for appealing was not "per se inexcusable neglect."[65] As the court explained:

> In the modern world of legal practice, the delegation of repetitive legal tasks to paralegals has become a necessary fixture. Such delegation has become an integral part of the struggle to keep down the costs of legal representation. Moreover, the delegation of such tasks to specialized, well-educated non-lawyers may well ensure greater accuracy in meeting deadlines than a practice of having each lawyer in a large law firm calculate each filing deadline anew. The task of keeping track of necessary deadlines will involve some delegation. The responsibility for the error falls on the attorney regardless of whether the error was made by an attorney or a paralegal. See Model Rules of Prof'l Conduct R. 5.5 cmt. 2 (2002) ("This Rule does not prohibit a lawyer from

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[58] *Id.* at 952.
[59] *Id.*
[60] *Id.* (Kleinfeld, J., dissenting).
[61] *Id.* at 955-56.
[62] Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004) (en banc) (*Pincay II*).
[63] *Id.*
[64] *Id.*
[65] *Id.* at 856.

> employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.").[66]

The larger question, the *Pincay II* court reasoned, was "whether the [clerk's] misreading of the clear rule could . . . [be] considered excusable neglect."[67] The clerk's misreading of the rule was an "egregious" mistake; the lawyer "undoubtedly" should have read the rule himself rather than relying on the clerk; and the clerk and the lawyer both were negligent as a result.[68] But the fact that the clerk and the lawyer were both negligent was the starting point in the court's excusable neglect analysis, not the end of it.[69] The "real question" was whether the facts were such that the determination of excusable neglect was within the district court's discretion.[70]

In analyzing this issue, the court focused on the third *Pioneer* factor, the reason for the delay.[71] Andrews characterized the reason for the delay as "the failure of a 'carefully designed' calendaring system operated by experienced paralegals that heretofore had worked flawlessly."[72] Pincay, on the other hand, focused on the "degree of carelessness" in the paralegal's failure to read the appropriate subparagraph of Rule 4(a)(1).[73] Noting the equitable nature of the inquiry, the court stated:

> We recognize that a lawyer's failure to read an applicable rule is one of the least compelling excuses that can be offered; yet the nature of the contextual analysis and the balancing of the factors adopted in *Pioneer* counsel against the creation of any rigid rule. Rather, the decision whether to grant or deny an extension of time to file a notice of appeal should be entrusted to the discretion of the district court because the district court is in a better position than we are 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 the representation of the lawyers (in this litigation over its 15-year history), and the likelihood of injustice if the appeal was not allowed. Had the district court declined to permit the filing of the

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66 *Id.*
67 *Id.*
68 *Id.* at 858.
69 *Id.* at 858-59.
70 *Id.* at 859.
71 *Id.*
72 *Id.*
73 *Id.*

> notice, we would be hard pressed to find any rationale requiring us to reverse.
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> *Pioneer* itself instructs courts to determine the issue of excusable neglect within the context of the particular case, a context with which the trial court is most familiar. Any rationale suggesting that misinterpretation of an unambiguous rule can never be excusable neglect is, in our view, contrary to that instruction.[74]

The court reasoned that under *Pioneer* there was no room for a "rigid legal rule against late filings attributable to any particular type of negligence."[75] The *Pincay II* court held that the district court did not abuse its discretion in granting Andrews's motion for an extension of time in which to appeal and affirmed the district court's order.[76]

B. Pincay II *and Beyond*

Although it is true that *Pioneer* counsels a flexible approach to determining excusable neglect and that the abuse of discretion standard by which district courts' determinations of excusable neglect are measured is extremely deferential, *Pincay II* is a seriously flawed decision. For starters, this was not, as Andrews disingenuously contended, a case about "the failure of a 'carefully designed' calendaring system" that had previously "worked flawlessly."[77] The calendaring system was not carefully designed. An unsupervised paralegal read rules and calendared what he believed to be the correct deadlines. It is obvious that no one was responsible for double-checking his work. Absent human supervision, the "system" had no means of detecting errors. Furthermore, the system did not fail; it worked flawlessly. "The wrong date was calendared with meticulous efficiency and accuracy."[78] The problem was that the paralegal misread a crystal clear rule and calendared the wrong date, an error the court understandably described as "egregious."[79] Indeed, if the neglect in this case was excusable, it is hard to imagine a case in which the neglect might be called inexcusable.[80] Although it is easy to feel sorry for the paralegal, who doubtless was horrified by his error and remorseful for it, such feelings do not transform the paralegal's

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[74] *Id.*
[75] *Id.* at 860.
[76] *Id.*
[77] *Id.* at 859.
[78] *Id.* at 862 (Kozinski, J., dissenting).
[79] *Id.* at 858.
[80] *See* Prizevoits v. Ind. Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996) ("Here the rule is crystal clear, the error egregious . . . . If there was 'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect.").

unaccountable lapse into excusable neglect.[81] Even after *Pioneer*, courts generally hold that run-of-the-mill carelessness is not excusable neglect.[82]

Even if it might be argued that a non-lawyer's mere error in failing to record a deadline may amount to excusable neglect,[83] this was not such a case. The problem was not that the calendaring clerk forgot to record the correct deadline, but that he misread a plain rule and thus recorded the wrong deadline. These are quite different errors.

Nor was this a case about "delegation to paralegals," as the court viewed it when voting for rehearing.[84] This was a case about a lawyer's abdication of responsibility. "Abdication" and "delegation" are not synonymous.

Andrews's lawyer received a copy of the underlying judgment on July 10, 2002, when the calendaring clerk faxed it to him; at that point, the judgment was seven days old.[85] Because he was out of the office, the lawyer relied on the paralegal to tell him when the notice of appeal would be due.[86] The lawyer did not question the paralegal's time calculation or the basis for it, he did not ask the paralegal to e-mail the rule to him, nor did he ask the paralegal to confirm his reading of the appellate deadline with a lawyer in the office. When he returned to the office, the lawyer checked the calendar and saw that the deadline in Andrews's case had been recorded.[87] What the lawyer did not do—and what he should have done—was check to see that the *correct* deadline had been calendared.[88] He never read Rule 4(a) to check the calendaring clerk's judgment.[89] As the *Pincay I* court explained: "Knowledge of the

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[81] *See id.* at 133 (explaining that "[a]n unaccountable lapse is not excusable neglect").

[82] *See* Kanida v. Gulf Coast Med. Pers., L.P., 109 F. App'x 670 (5th Cir. 2004) (involving FED. R. CIV. P. 60(b)(6) and lawyer who lost cassette tape allegedly constituting key evidence before trial, but who found tape in her office after trial); *see, e.g.*, Allen v. LTV Steel Co., 68 F. App'x 718, 722 (7th Cir. 2003) (finding no excusable neglect for FED. R. CIV. P. 60(b)(6) purposes where delay was caused by lawyer's "'clerical mistake/oversight'"); Envisionet Computer Servs., Inc. v. ECS Funding L.L.C., 288 B.R. 163, 165-67 (D. Me. 2002) (finding no excusable neglect where lawyer failed to calendar deadline).

[83] *See, e.g.*, Walter v. Blue Cross & Blue Shield United of Wis., 181 F.3d 1198, 1202 (11th Cir. 1999) (finding excusable neglect where lawyer's former secretary failed to record deadline).

[84] Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004) (en banc) (*Pincay II*).

[85] Pincay v. Andrews, 351 F.3d 947, 948-49 (9th Cir. 2003) (*Pincay I*), *reh'g granted*, 367 F.3d 1087 (9th Cir. 2004), *vacated*, 389 F.3d 853 (9th Cir. 2004) (en banc) (*Pincay II*).

[86] *Id.* at 949.

[87] *Id.*

[88] *Pincay II*, 389 F.3d at 858.

[89] *Pincay I*, 351 F.3d at 951.

law is a lawyer's stock in trade. Bureaucratization of the law such that the lawyer can turn over to nonlawyers the lawyer's knowledge of the law is not acceptable for our profession."[90]

It is perhaps understandable that the lawyer, while out of the office, did not question the paralegal's time calculation or ask the paralegal to check with another lawyer in the office to make sure that he was correctly reading the right rule. Although the paralegal's report that Andrews had sixty days in which to take an appeal should have given the lawyer pause,[91] the fact remains that he was out of the office and did not have access to a rulebook or some other means of quickly examining matters for himself. The lawyer's failure to confirm the accuracy of such a critical date upon his return to the office, however, is another matter. It is difficult to imagine how the lawyer could not have thought to check the accuracy of the paralegal's time calculation when he returned to the office. Again, the sixty-day period should have struck him as odd.[92] As the dissent in *Pincay II* pointed out, "the 30-day rule for appeals in federal court is so well known among federal practitioners that, had the lawyer but *thought* about the rule, rather than relying entirely on the calendaring clerk's representation, he surely would have realized that the 60-day period [was] wrong."[93] Although a court understandably might excuse a novice lawyer's lack of instinct or forgive the error of a lawyer who only rarely practices in the federal system,[94] nothing suggests that Andrews's lawyer was either young or a stranger to federal court.

Nowhere did Andrews's lawyer state that he read the Federal Rules of Appellate Procedure, or Rule 4(a) in particular.[95] Nowhere did he state that he knew the rules but simply recalled incorrectly the deadline for taking an appeal.[96] Never did he claim that the rules confused him. Never did he assert that his travels prevented him from checking the paralegal's time calculation.[97] Never did he confess error but claim that his neglect

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[90] *Id.* at 950.

[91] *See* United States v. Virginia, 508 F. Supp. 187, 188 (E.D. Va. 1981) (noting that the sixty days given to the government to appeal is an "extraordinary" time limit).

[92] *See* Mark A. Drummond, *Tardy Appeal Reinstated After Missed Deadline*, LITIG. NEWS, May 2005, at 7 (quoting veteran appellate lawyer as saying "'the 30-day deadline is so well known it seems inconceivable to me that the attorney would not have immediately recognized the error'").

[93] *Pincay II*, 389 F.3d at 863 (Kozinksi, J., dissenting).

[94] *See* United States v. Brown, 133 F.3d 993, 996 (7th Cir. 1998) (affirming district court's finding of excusable neglect in case involving lawyer who was handling only one federal case, the rest of his practice being confined to Wisconsin state courts).

[95] *Pincay I*, 351 F.3d at 951.

[96] *Id.*

[97] Even if the lawyer had made this argument it seems unlikely that the court would have been persuaded by it. *See* Dean v. Chicago Transit Auth., 118 F. App'x 993, 996

was still excusable when judged according to the *Pioneer* test. Unlike the lawyer in *United States v. Brown*,[98] who, "[t]o his credit, . . . [did] not point[] a finger at others for his failing—he blame[d] his own misunderstanding of the rules,"[99] Andrews's lawyer declined responsibility at every turn, always blaming the paralegal for the error.[100] In common parlance, the lawyer threw the paralegal under the bus. That should have done him no good, of course, because a lawyer cannot escape professional responsibility by claiming that he delegated the subject task to his staff,[101] a principle that the *Pincay II* court expressly recognized.[102]

Even accepting the argument that the lawyer delegated responsibility to a paralegal who ran a carefully designed calendaring system rather than abdicating responsibility for knowing the law, that conduct is unrelated to the reason for the delay under the *Pioneer* test. Rather, it bears on the fourth *Pioneer* factor, that being "whether the movant acted in good faith."[103] But there was no allegation that Andrews's lawyer had delayed filing a notice of appeal in bad faith and, absent that, Andrews's good faith was inconsequential. "Extreme good faith has no exonerating power of its own; bad faith can sink an excusable neglect claim, and good faith is nothing but the absence of this negative."[104]

Although the *Pincay II* court repeatedly cited and referred to *Pioneer* to justify a flexible approach to determining excusable neglect and to explain its aversion to per se rules in this area, it is difficult to reconcile the decision in *Pincay II* with the Court's statement in *Pioneer* that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.'"[105] In other words, inadvertence, ignorance of the rules and mistakes construing the rules constitute excusable neglect only in exceptional and rare

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(7th Cir. 2005) ("An attorney's busy schedule, however, does not rise to the level of excusable neglect.").

[98] 133 F.3d 993 (7th Cir. 1998).

[99] *Id.* at 997.

[100] *See Pincay I*, 351 F.3d at 951; Pincay v. Andrews, 389 F.3d 853, 859 (9th Cir. 2004) (en banc) (*Pincay II*).

[101] *See generally* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2004) (stating lawyers' "Responsibilities Regarding Nonlawyer Assistants"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11 (2005) (expressing "A Lawyer's Duty of Supervision").

[102] *Pincay II*, 389 F.3d at 856.

[103] Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993).

[104] *Pincay II*, 389 F.3d at 862 (Kozinski, J., dissenting).

[105] *Pioneer*, 507 U.S. at 392.

circumstances,[106] as where the rule or the way in which it is communicated to litigants are peculiar, or unusually ambiguous or vague.[107] "*Pioneer* did not alter the . . . rule that mistakes of law [generally] do not constitute excusable neglect."[108]

Nothing about the facts or law in *Pincay II* was exceptional or rare. Rule 4(a) is clear. Any lawyer or paralegal should be able to read it correctly.[109] What the *Pincay II* court was presented with was not a lawyer's justifiable misunderstanding of an ambiguous rule, the peculiar or confusing application of one rule when coupled with another, or some complex or novel procedural posture, but garden variety inattention. That is not excusable neglect under *Pioneer*.[110] The simple miscalculation of time deadlines is not excusable neglect after *Pioneer*,[111] just as it was not before.[112] There is good reason for this:

> Calculating time deadlines in the context of the demands of trial practice is routine and ordinary. . . . Indeed, miscalculating the time for filing is among the most ordinary types of neglect. . . . In the absence of unique underlying circumstances that impel a miscalculation, there is no way to verify a lawyer's naked representation that he or she miscalculated time requirements.[113]

In examining the reason for delay, some courts routinely consider as part of that inquiry whether the inadvertence "reflected professional incompetence," such as ignorance of procedural rules, and whether the asserted inadvertence "reflects an easily manufactured excuse incapable of verification by the court."[114] By these measures, Andrews's lawyer clearly did not demonstrate excusable neglect. The lawyer was ignorant of Rule 4(a) and his excuse for non-compliance with this clear rule was easily manufactured.

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[106] *See* Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 6 (1st Cir. 2001) (referring to "'unique or extraordinary circumstances'") (citing Pontarelli v. Stone, 930 F.2d 104, 111 (1st Cir. 1991)).

[107] *See Pioneer*, 507 U.S. at 398-99.

[108] Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 404 (8th Cir. 2000); *see, e.g.*, Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997).

[109] *Pincay II*, 389 F.3d at 855.

[110] Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 464 (8th Cir. 2000).

[111] *See, e.g.*, *Advanced Estimating*, 130 F.3d at 997-98; Villa v. Vill. of Elmore, 252 F. Supp. 2d 492, 494 (N.D. Ohio 2003); Thomas v. Bd. of Educ., 177 F.R.D. 488, 490-91 (D. Kan. 1997).

[112] Cange v. Stotler & Co., 913 F.2d 1204, 1212 (7th Cir. 1990).

[113] Barnes v. Cavazos, 966 F.2d 1056, 1061-62 (6th Cir. 1992) (citation omitted).

[114] Home Ins. Co. v. Law Offices of Jonathan DeYoung, P.C., 156 F. Supp. 2d 488, 490 (E.D. Pa. 2001) (citing *In re* Cendant Corp. Litig., No. 00-2185, 2001 WL 487903, at *12 (3d Cir. May 9, 2001)).

Any argument that the result in *Pincay II* was compelled by the deferential standard of review the court was required to apply must fail. Federal appellate courts regularly reverse district courts' findings of excusable neglect based on abuse of discretion.[115] Consistency and predictability in the law require as much.

The court in *Pincay II* also created two practical problems. First, by affirming the district court's finding of excusable neglect, the court essentially created two different excusable neglect standards: one for lawyers who practice in law firms or other organizations with ample support staff, and one for sole practitioners. If an experienced sole practitioner, who has handled previous appeals flawlessly and has timely filed everything in every appellate case she has ever handled, misreads Rule 4(a) and records the wrong date for filing a notice of appeal in her desk planner, which she scrupulously checks first thing every morning (the same planner in which she has always recorded all of her appellate deadlines), and therefore files the notice of appeal late, can she successfully claim that her client's time to appeal should be extended because of excusable neglect? Has not her client been betrayed by "the failure of a 'carefully designed' calendaring system . . . that heretofore worked flawlessly"?[116] Indeed, is not the sole practitioner's calendaring system better than that employed by Boies, since in our hypothetical case it is actually the lawyer who reads and interprets the applicable procedural rules? The answer to the first question almost certainly is "no" even though the answer to the second and third questions are "yes." The problems posed by that outcome are obvious.[117]

Second, but more important, the *Pincay II* court created exactly what it wanted to avoid: a per se rule on excusable neglect. What is this Ninth Circuit per se rule? It is this: if a law firm maintains a formal calendaring system that depends solely on non-lawyer staff to calendar the correct dates and one of those staff members calendars the wrong date, such a failure constitutes excusable neglect so long as the firm

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[115] *See, e.g.*, United States v. Torres, 372 F.3d 1159, 1162-64 (10th Cir. 2004); Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 462-64 (8th Cir. 2003); Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 370 (2d Cir. 2003); Deym v. von Fragstein, 127 F.3d 1102, 1997 WL 650933, at *3 (6th Cir. Oct. 16, 1997); Prizevoits v. Ind. Bell Tel. Co., 76 F.3d 132, 134 (7th Cir. 1996); Allied Steel v. City of Abilene, 909 F.2d 139, 142-43 (5th Cir. 1990).

[116] Pincay v. Andrews, 389 F.3d 853, 859 (9th Cir. 2004) (en banc) (*Pincay II*).

[117] Of course, a sole practitioner might solve this problem by delegating all calendaring responsibilities to her secretary. To the extent the *Pincay II* decision encourages such delegation it certainly does not promote responsible law practice.

satisfies the other *Pioneer* factors.[118] Why is this a per se rule? Because, as Judge Kozinski noted in his dissent:

> Imagine what will happen the next time we get a case on materially indistinguishable facts, except that the district court found the delay *in*excusable. Will it be just to tell the litigant that his case is lost because he happened to draw the wrong district judge?[119]

It is not reasonable to argue against a per se rule because it is unlikely that the court will some day be called upon to decide a case with materially indistinguishable facts. Andrews's lawyer practiced in a sophisticated law firm.[120] Many large and sophisticated law firms employ centralized calendaring systems that depend on non-lawyer staff for their operation. The delegation of law-related tasks to non-lawyers has become an integral and routine part of modern law practice.[121] The potential for error can be minimized, but it can never be eliminated.

In short, the Ninth Circuit will see other cases arising out of substantially similar facts. The rules involved in these cases may be different—perhaps the court will be construing excusable neglect in connection with Federal Rules of Civil Procedure 6 or 60 rather than Federal Rule of Appellate Procedure 4—but the cases will come. Unfortunately, because those cases probably will turn on the reason for the delay rather than any of the other *Pioneer* factors, the court's decision in *Pincay II* will have the undesirable effect of encouraging and rewarding careless lawyering.[122]

IV. RECOMMENDATIONS FOR LAWYERS

Lawyers should not rely on *Pincay II.* The case is wrongly decided. The Ninth Circuit is out of step with all of its sister courts on this issue.

None of this means, of course, that lawyers and law firms cannot rely on centralized calendaring and docketing systems that are maintained by non-lawyer staff. Such systems are common and generally

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[118] *See supra* note 30 and accompanying text.

[119] *Pincay II*, 389 F.3d at 864 n.4 (Kozinski, J., dissenting).

[120] Pincay v. Andrews, 351 F.3d 947, 951 (9th Cir. 2003) (*Pincay I*), *reh'g granted*, 367 F.3d 1087 (9th Cir. 2004), *vacated*, 389 F.3d 853 (9th Cir. 2004) (en banc) (*Pincay II*).

[121] *Pincay II*, 389 F.3d at 856.

[122] *See* Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 8 (1st Cir. 2001) ("To find this neglect [a party's or counsel's misunderstanding of clear law or misreading of an unambiguous judicial decree] 'excusable' would only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline set in Fed. R. App. P. 4(a)(1) a nullity.").

are accurate and efficient. But, as the saying goes—and as *Pincay I* and *Pincay II* demonstrate—"garbage in, garbage out." The best systems are valueless if the information that is calendared is inaccurate or incorrect. Errors are less likely where a lawyer reads the applicable rule and tells the calendaring clerk the date to record, rather than relying on a non-lawyer staff member to read the rule and correctly calculate due dates. This is because lawyers are less likely than non-lawyers to misread procedural rules. "Studying and practicing law develops certain skills and habits of mind that . . . make lawyers more careful than non-lawyers about reading rules."[123]

At the very least, any system has to include some mechanism for checking the accuracy of the dates being calendared.[124] This may be accomplished by lawyer supervision of non-lawyers within a central system, or it may be accomplished through parallel systems in which lawyers maintain their own calendars of case deadlines in addition to the firm's centralized calendaring system.[125]

Lawyers must assume that courts will treat the failure to read rules, failure to understand rules and failure to properly apply rules as *in*excusable neglect. Few courts are likely to hold otherwise where a lawyer delegates responsibility for rules interpretations to non-lawyer staff. The bottom line is that lawyers must be responsible for reading appropriate rules and deciding upon appropriate deadlines, even if the task of calendaring such deadlines and ministerial acts designed to ensure compliance are delegated to non-lawyers.

V. CONCLUSION

In federal courts, "the timely filing of a simple notice of appeal is the only step required to take an appeal."[126] The timely filing of a notice of appeal is both mandatory and jurisdictional. Nonetheless, a party may file a notice of appeal out of time if it can demonstrate that its delay is the product of "excusable neglect." Other situations, in both federal and state courts, likewise require litigants to demonstrate excusable neglect if they are to be allowed late filing. The phrase thus has special meaning in the law.

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[123] *Pincay II*, 389 F.3d at 863 (Kozinski, J., dissenting).

[124] *See* 1 MALLEN & SMITH, *supra* note 12, § 2.23, at 202 ("First, just as no parachutist with any sense would voluntarily jump with only one chute, no attorney should voluntarily rely on one component of a work-control system to assure that due dates are not missed.").

[125] *See id.*

[126] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 764 (6th ed. 2002).

Traditionally, courts have declined to hold that lawyers' mere inattention, or failure to understand or properly apply clear rules, constitute excusable neglect. Courts have also declined to find excusable neglect where lawyers delegate important tasks to secretaries and legal assistants and those non-lawyers then fail to perform the ostensibly simple tasks delegated to them. Courts do not allow lawyers to delegate away their professional responsibilities.

In *Pincay II*, the Ninth Circuit upset all of these basic principles. The court affirmed a district court's finding of excusable neglect where a lawyer abdicated his professional responsibilities and the paralegal to whom those responsibilities fell misread a crystal clear rule of appellate procedure. Although the court spoke of the need for lawyers to delegate tasks to non-lawyer support staff in the modern practice of law, in *Pincay II* the lawyer delegated nothing. What he did was abdicate responsibility. In doing so, he nearly sank his client's case.

Pincay II was wrongly decided. The court's decision cannot be logically explained. It is no answer to say that the court simply applied a deferential abuse of discretion standard because appellate courts routinely reverse district courts' excusable neglect findings under that standard. Lawyers must assume that courts will treat their failure to read rules, failure to understand rules, and failure to properly apply rules as *in*excusable neglect, and practice accordingly. That is as it should be.