NOTES

A HISTORY AND INTERPRETATION OF RULE 60(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

TABLE OF CONTENTS

I. INTRODUCTION

Rule 60(a) of the Federal Rules of Civil Procedure is the mechanism by which district courts are empowered to correct errors "in judgments, orders, or other parts of the record as well as . . . errors arising from oversight or omission."[1] The rule, along with its much-analyzed counterpart, Rule 60(b),[2] appears under the title "Relief from Judgment or Order," and provides:

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1. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2854 (1973).

2. "Rule 60(b) deals with the power of the district court to grant *substantial relief* from a final judgment on motion of a party." 6A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 60.03[1] (1993) (emphasis added). Under Rule 60(b), a party can seek relief from a final judgment for:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (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 . . .

FED. R. CIV. P. 60(b).

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.[3]

Despite the brevity and the relatively straightforward language of the rule, the question of what constitutes a "clerical mistake" and when corrections can properly be made has spurred a surprising amount of litigation. Because district courts enter thousands of judgments every year,[4] a great many opportunities exist for errors to be made in compiling records, calculating damages, and entering final judgments and orders. As a result, courts are faced with two options. They can either "scrutinize every judgment with great care, [or] use less care but correct scriveners' errors that show up later. . . . Rule 60(a) embodies a conclusion that subsequent correction is preferable to greater vigilance . . . ."[5]

The purpose of this Note is to provide an examination of Rule 60(a) and the various interpretations courts have given to the term "clerical mistake." This Note also considers the historical power of courts to correct such errors, as well as the effect of a subsequent appeal on a district court's ability to alter or amend the record or judgment of a case that was previously before it.

II. COMPETING INTERESTS: FINALITY VERSUS JUSTICE

An application of Rule 60(a) brings into play two competing interests. The first is "litigation must finally and definitely terminate within a reasonable time,"[6] and the second is "justice must be done unto the parties."[7]

Both courts and parties have a strong interest in seeing a dispute brought to an end and "questions that have been fully considered and decided not be subject to openended reconsideration."[8] This finality is important so parties can confidently rely on a court's final judgment and will not be surprised by a subsequent amendment to that judgment, which may place an additional liability on the party at a later time. This concern with finality

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3. FED. R. CIV. P. 60(a).
4. United States v. Griffin, 782 F.2d 1393, 1396 (7th Cir. 1986).
5. *Id.*
6. West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 704 (5th Cir. 1954).
7. *Id.*
8. MOORE ET AL., *supra* note 2, ¶ 60.02.

also provides judicial stability so future cases can be decided with some measure of consistency.[9]

On the other hand, compelling concern exists that a district court's decision in each case be correct. This interest "dictates caution in placing error beyond correction."[10] Therefore, justice requires the finality of a judgment "be subject to corrective power" in order to ensure a correct result is reached.[11] "[T]he desire of courts to repair an injustice wrought by a judgment will overcome the necessity for finality where it is against conscience to execute that judgment and where that judgment was rendered without fault or neglect on the part of the party seeking to reform it."[12]

The Federal Rules of Civil Procedure have attempted to balance these competing interests by providing litigants with a variety of postjudgment remedies. For example, Rule 59(e) permits a party to file a "motion to alter or amend a judgment" within ten days of entry of the judgment.[13] In addition, Rule 60(b) allows the district court to relieve a party from "a final judgment, order, or proceeding" to correct substantive errors in cases of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud, if the motion is filed "within a reasonable time" and not more than one year after entry of the judgment or order.[14]

These rules prescribe strict time limits within which a party must notify the court of the need for relief. In the case of a clerical mistake, however, a party can bring the error to the court's attention "at any time" for amendment or alteration.[15] Although the majority of clerical errors are detected by either the court or the litigants soon after the judgment has been entered, this open-ended time period can present problems when an error is uncovered long after a judgment has been rendered and executed. For example, a party that believed it had satisfied a valid final judgment can, more than a year later, find itself liable for prejudgment interest when it is discovered a clerk mistakenly failed to include the award in the original judgment.[16] One commentator has stated that regardless of when a Rule 60(a) motion is brought, judicial finality is protected because the rule is no more than a device to ensure that the original intent of the judgment is rendered.[17] Although the original intent of the court may be preserved in such a case, the expectations

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9. For example, the doctrine of res judicata underscores the judicial commitment to finality of judgments. *See* James W. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 623 (1946).

10. MOORE ET AL., *supra* note 2, ¶ 60.02.

11. Moore & Rogers, *supra* note 9, at 626.

12. West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 704 (5th Cir. 1954)(citing Marine Ins. Co. v. Hodgson, 11 U.S.(7 Cranch) 332, 336 (1813)).

13. FED. R. CIV. P. 59(e).

14. FED. R. CIV. P. 60(b); *see supra* note 2.

15. FED. R. CIV. P. 60(a).

16. *See, e.g., In re* Merry Queen Transfer Corp., 266 F. Supp. 605 (E.D.N.Y.), *modified in other respects sub nom.* O'Rourke v. Merry Queen Transfer Corp., 370 F.2d 781 (2d Cir. 1967).

17. *See* MOORE ET AL., *supra* note 2, ¶ 60.03.

of at least one of the parties, the underlying rationale for judicial finality, appears to be cast aside in the process.[18]

III. HISTORY

A. *English Common Law*

The English common law always recognized the right and the power of a court to correct its clerical errors before the record had been made up because, until that point, the proceedings were considered inchoate and therefore "subject to the control of the courts."[19] In the early years of the English common law, once the record had been created, no amendment was permitted unless the alteration was made within the same term as the original entry.[20] During that term, the record remained in the "breast of the court" and was alterable at a judge's direction; once the term had passed, however, the record "admitted of no alteration."[21]

Eventually the English courts relaxed these rules and began to allow amendments to the record at any time while the suit was still pending, even though the record had been made up and the term had passed.[22] This was permitted because until a final judgment had been rendered, the proceedings were still in the process of development.[23] After judgment had been entered, however, the record could not be amended at any subsequent term of the court.[24]

In the early days of English jurisprudence, all pleadings were presented to the court orally rather than in writing.[25] If the judge or an opposing party detected an error in the pleading, it was immediately brought to the pleader's attention for correction.[26] The notation of the error and its subsequent correction were then recorded in ancient Yearbooks.[27] This liberal policy of correction was underscored in at least one Welsh statute, which directed pleadings be conducted without strictness to the letter in order to avoid the result that one who fails in one syllable loses the whole cause.[28] Following trial, the judgments were entered immediately by the clerks of court, and any

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18. *See supra* text accompanying notes 8-10.
19. 3 WILLIAM BLACKSTONE, COMMENTARIES *406.
20. *Id.* at *407.
21. *Id.* at *406.
22. *Id.*
23. *Id.* In the English common law, courts referred to proceedings in which judgment had not yet been entered as *in fieri* or in the process of formation. BLACK'S LAW DICTIONARY 778 (6th ed. 1990).
24. BLACKSTONE, *supra* note 19, at *407.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

misentries that had previously gone undetected were "rectified by the minutes or the remembrance of the court itfelf [sic]."[29]

Many of these early English judges, however, abused their power to correct such errors.[30] It became widespread practice for judges to make false entries and to amend records in order to conceal their own wrongdoings.[31] When King Edward I returned to England after a three year absence, he set out to prosecute many of his judges for corruption.[32] The punishment inflicted on these judges so severely alarmed other jurists they resolved not to amend any court record or judgment for fear of being accused of corruption.[33] As a result, even negligible errors detected during the term were not amended to make the record "agreeable to truth."[34]

The fear of prosecution was so widespread among the bench even the most minuscule of errors, including those involving merely a syllable or a letter, were "fatal to the pleader, and overturned his client's cause."[35] Verdicts and judgments were "frequently reversed for slips of the pen or misspellings: and justice was perpetually intangled in a net of technical jargon."[36] To mitigate the harshness of these illogical rulings, Parliament passed legislation that slowly expanded the courts' powers to correct clerical errors both before and after judgments were rendered.[37]

The Acts of Edward III, enacted by Parliament in the mid-fourteenth century, provided courts could amend a judgment in order to cure an erroneous inclusion or omission of a single syllable or letter by the clerk.[38] These tiny defects were to be corrected as soon as discovered.[39] Judges, however, still wary of this discretionary power, held it was only applicable to proceedings prior to the entry of a final judgment.[40] Although later legislation permitted courts to amend the record, plea, or process after judgment had been entered and before the term had ended, these corrections were still limited to one syllable or letter.[41]

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29. *Id.*
30. *Id.* at *408.
31. *Id.*
32. *Id.*
33. *Id.* at *408-09.
34. *Id.* at *409. In fact judges were so reluctant to amend records that in one reported case in which the clerk had erroneously recorded a larger fine than had been imposed, the judge, rather than amending the record, made a second entry of judgment reciting what the earlier justice had orally declared and "left it to be settled by posterity in which of the two rolls that absolute verity reside[d]." *Id.*
35. *Id.*
36. *Id.* at *410.
37. *Id.*
38. 14 Edw. III, St. 1, ch. 6, *reprinted in* Makepeace v. Lukens, 27 Ind. 435, 437 (1867).
39. *Id.*
40. *Id.* at 437-38.
41. *Id. See* Act of 9 Edw. V, St. 1, ch. 4 (1492).

Almost a century later, Parliament enacted legislation greatly expanding the authority of courts to correct their clerical errors contained in the court record.[42] Courts became empowered to amend at their discretion "any record, process, word, plea, warrant of attorney, writ, panel, or return," which the judges deemed to be errors of clerks so no judgment would later be reversed or annulled as a result of the error.[43] This statute also granted parties the right to challenge the appropriateness of any amendment by permitting an interested party to allege the discrepancy in fact reflected the truth.[44]

Finally, in the early seventeenth century, Parliament enacted the broadest-sweeping legislation empowering courts to correct clerical errors in judgments and orders.[45] This statute declared that after a verdict had been rendered, judgment upon it should not be stayed or reversed for "default in form or lack of form" among other defects, concluding "all such omissions, variances, defects, and other matters of like nature, not being against the right of the matter of the suit . . . shall be amended."[46]

B. *Early Federal Common Law*

In the federal system, the common-law rule was the district courts had the power to amend final judgments to correct *substantive* errors contained in judgments only during the term in which they had been entered.[47] After the expiration of the term, the courts were powerless to reconsider these final judgments.[48] The only exceptions were cases in which a party had sought amendment of the judgment during the term or in which "the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period."[49]

In *In re Wight*,[50] the Supreme Court first recognized the inherent power of a federal court to amend its records and correct mistakes of the clerk made during a prior term.[51] *In re Wight* involved a criminal defendant who was convicted by a jury of stealing mail.[52] Upon receiving the verdict, the defendant filed motions to arrest the judgment and to secure a new trial.[53] Before arguments were heard on the motions, however, the district court transferred

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42. 8 Hen. IV, ch. 12, *reprinted in* O'Driscoll v. M'Burney, 11 S.C.L. 23, 24 (2 Nott & McC. 58, 59) (1819).
43. *Id.*
44. *Id.*
45. Acts of 16 and 17 Charles II, ch. 8. *See* Makepeace v. Lukens, 27 Ind. 435 (1867).
46. O'Driscoll v. M'Burney, 11 S.C.L. at 24.
47. Moore & Rogers, *supra* note 9, at 627.
48. *Id.*
49. *Id.*
50. *In re* Wight, 134 U.S. 136 (1890).
51. *Id.* at 146.
52. *Id.* at 137-38.
53. *Id.* at 138.

the case to the circuit court, which denied both motions.[54] On the same day the circuit court rejected the motions, the district court held the case had been improvidently transferred.[55] The district court then proceeded to deny the motions and sentenced the defendant to two years in jail.[56] The defendant challenged the district court's authority to pass sentence upon him because the circuit court had never remanded the case to the district court after denying the motion.[57] Thereupon the circuit court, based on "'its recollection of the facts,'" entered an order remanding the case *nunc pro tunc* to cure the procedural defect.[58]

The Supreme Court held it was within the power of the circuit court to "make *nunc pro tunc* entries to supply some omission in the record of what was done at the time of the proceedings."[59] The Court reviewed several state court decisions acknowledging the power of a court to make *nunc pro tunc* entries after expiration of the term of court.[60] For example, the Court cited with approval a decision in which the Minnesota Supreme Court stated such power would not be exercised when "'there was the least room for doubt about the facts upon which the amendment was sought to be made.'"[61] When the facts were undisputed, however, and the only objection to a *nunc pro tunc* entry was the term had passed, "'it would be doing violence to the spirit which pervades the administration of justice'" to refuse the entry.[62]

In later cases, the Court was careful to distinguish between the power of a court to amend a record to correct mistakes of clerks and the power to recreate the record itself from scratch.[63] In *Gagnon v. United States*,[64] the Supreme Court was confronted with the issue of whether a court could reenter a judgment *nunc pro tunc* when no entry or memorandum appeared on the record or files at the time the original order was allegedly rendered.[65] In *Gagnon*, the petitioner brought suit in a federal claims court under the Indian Depredation Act, which provided only citizens of the United States were permitted relief under the Act.[66] The petitioner alleged he had been granted citizenship by a court of the Nebraska Territory in 1863, but he was unable to provide either the original or a copy of the certificate of naturalization the

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54. *Id.*
55. *Id.* at 138-39.
56. *Id.* at 139.
57. *Id.* at 140.
58. *Id.* at 141. *Nunc pro tunc* entries are those "allowed to be done after the time when they should be done, with a retroactive effect . . . ." BLACK'S LAW DICTIONARY 1069 (6th ed. 1990).
59. *In re* Wight, 134 U.S. at 144.
60. *Id.* at 145.
61. *Id.* (quoting Bilansky v. State, 3 Minn 427 (Gil. 313, 317) (1859)).
62. *Id.*
63. *Id.* at 144.
64. Gagnon v. United States, 193 U.S. 451 (1904).
65. *Id.* at 456.
66. *Id.* at 452.

court would have issued.[67] To meet the citizenship requirements of the Act, the petitioner attempted to present to the federal court the record of a later Nebraska state court, a successor to the territorial court, "purporting to enter *nunc pro tunc* a judgment of naturalization" thirty-three years after the initial judgment had allegedly been granted.[68] Although no entry was found on the territorial court's records, or other proof indicating the original order had ever been granted, the state court held there to be "'competent evidence'" the application of the petitioner had in fact been granted.[69] The federal claims court, however, rejected the use of the state court record.[70] The federal court held because the petitioner could not actually prove the original order had ever existed, the subsequent *nunc pro tunc* order would not be admissible.[71] As a result, the petitioner was not a naturalized citizen of the United States at the time his cause of action arose and thus was ineligible to pursue a claim under the Act.[72]

In upholding the decision of the claims court, the Supreme Court carefully distinguished between the correction of clerical error in the record, which "presupposes an existing record," and the recreation of the record itself.[73] The Court analogized the difference between recreating and amending a record to the difference between the construction and repair of a house:

> If a house . . . be burned or otherwise lost, it can only be rebuilt, and the word "repair" is wholly inapplicable to the subsequent reconstruction. The word "repair," as the word "amend," contemplates an existing structure which has become imperfect by reason of the action of the elements, or otherwise.[74]

The Court held when a judgment or order had been entered on the court's calendar but did not appear in the record, a court may order a *nunc*

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67. *Id.*
68. *Id.*
69. *Id.* The judgment of the state court making the *nunc pro tunc* entry stated the original application for naturalization had been granted but the

> judgment of naturalization was never recorded, and if recorded the record is lost and cannot be found in the records of this court, and it being legal and proper that said record should be supplied, and this court being willing that said error and omission be corrected, it is ordered and adjudged that said judgment so rendered by this court at its September term, 1863, be entered at large on the journal of this court as of the date when it should have been entered, to wit, on the 25th day of September, 1863, and that the clerk issue to the said Charles Gagnon the proper certificate of naturalization.

Id.
70. *Id.* at 453.
71. *Id.*
72. *Id.*
73. *Id.* at 457.
74. *Id.*

pro tunc entry if there are any memoranda in the files of the court.[75] In these cases, "there is no impropriety in ascertaining the fact even by parol evidence, and supplying the missing portion of the records."[76] The power to recreate a record without any supporting documentation was too dangerous, however, to be considered an inherent power of the courts.[77] As a result, because no such memoranda or records existed to support the petitioner's assertion that he had been granted citizenship thirty-three years earlier, the claims court was correct in finding the subsequent *nunc pro tunc* order invalid proof of citizenship, and therefore the claim was properly dismissed.[78]

These decisions demonstrate courts have long considered the correction of clerical errors, subject to certain qualifications, to be among their inherent powers. This power later became codified in the Federal Equity Rules.[79] Equity Rule 72, entitled "Correction of Clerical Mistakes in Orders and Decrees," stated:

> Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court or a judgment thereof, upon petition, without the form or expense of a rehearing.[80]

On its face, the rule implied, contrary to previous common law decisions, that any subsequent corrections had to be made prior to the close of the judicial term. Nonetheless, some district courts held such corrections were possible after expiration of the term regardless of whether or not the court had recessed for the term.[81] The drafters of the current Rule 60(a) purposely omitted this provision and specifically stated an applicable correction could be made "at any time" by the district court.[82]

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75. *Id.* at 458.

76. *Id.*

77. *Id.* at 458-59. The Court observed that on rare occasions legislatures have conferred such power on the courts in cases of "overwhelming necessity." *Id.* at 459. For example, the Illinois General Assembly enacted the Lost Record Act following the great Chicago fire of 1870. *Id.* (citing 1871-72 Ill. Laws 650).

78. *Id.*

79. MOORE ET AL., *supra* note 2, ¶ 60.05. The Federal Rules of Civil Procedure abolished the distinction between actions at law and actions in equity. *See* FED. R. CIV. P. 2. Prior to the Federal Rules of Civil Procedure, the Federal Equity Rules governed practice and procedure for equitable actions in federal courts. 1 CHRISTOPHER J. MILLER, CYCLOPEDIA OF FEDERAL PROCEDURE § 2.164 (3d ed. 1989).

80. FED. EQUITY R. 72.

81. *See, e.g.*, Ommen v. Talcott, 180 F. 925, 927 (C.C.S.D.N.Y. 1910).

82. FED. R. CIV. P. 60(a) advisory committee's note.

IV. WHAT IS A CLERICAL ERROR?

Rule 60(a) allows a district court to correct "clerical mistakes in judgments, orders, or other parts of the record."[83] For example, the court can amend a document in the record or the judgment itself to correct typographical and transpositional errors,[84] computational errors,[85] misnomers,[86] and incorrect dates.[87] Errors resulting from an omission can similarly be rectified under Rule 60(a).[88] For example, a document that has been inadvertently omitted may subsequently be added to the district court's record.[89]

The purpose of Rule 60(a) is to permit the correction of discrepancies in the original record or judgment in order to make them "speak the truth"[90] and "reflect what was intended at the time of trial."[91] The rule deals primarily with "mistakes which do not really attack the party's fundamental right to the judgment at the time it was entered. It permits the correction of irregularities which becloud but do not impugn it."[92]

A frequently litigated issue is whether an error qualifies as clerical, and therefore capable of correction "at any time"[93] or whether it is substantive and therefore must be brought to the court's attention within one year of the entry of the judgment or order.[94] A related issue that now appears to be settled is whether Rule 60(a) applies only to errors made by a clerk of court.

At least one court has held only those errors committed by a clerk of court were included within the scope of Rule 60(a).[95] In *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*,[96] the plaintiff and the defendant

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83. FED. R. CIV. P. 60(a).

84. *See, e.g.*, Esquire Radio & Elecs. v. Montgomery Ward & Co., 804 F.2d 787, 795-96 (2d Cir. 1986) (holding motion to amend jury verdict forms from $269,686.89 to $296,686.89 after judgment had been entered and when evidence and testimony unambiguously referred to $296,686.89 was properly granted under Rule 60(a)).

85. *See, e.g.*, Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 225-26 (10th Cir. 1982) (holding amendment of judgment pursuant to Rule 60(a) was proper when plaintiff's unemployment periods multiplied by her hourly wage did not agree with amount stated on final judgment).

86. *See, e.g.*, Silas v. Paroh S.S. Co., 175 F. Supp. 35, 38-39 (E.D. Va. 1958), *vacated on other grounds by* World Curriers, Inc. v. Bright, 276 F.2d 857 (4th Cir. 1960) (amending default judgment entered against defendant "company" rather than defendant "corporation").

87. *See, e.g.*, Application of Levis, 46 F. Supp. 527, 530-31 (D. Md. 1942) (holding date may be amended if unintentionally and incorrectly entered).

88. *See* FED. R. CIV. P. 60(a).

89. *See, e.g.*, United States v. Stuart, 392 F.2d 60, 62-63 (3d Cir. 1968).

90. 11 WRIGHT & MILLER, *supra* note 1, § 2854.

91. Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976), *aff'd*, 552 F.2d 583 (5th Cir. 1977).

92. United States v. Stuart, 392 F.2d at 62.

93. FED. R. CIV. P. 60(a).

94. FED. R. CIV. P. 60(b).

95. West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 705-06 (5th Cir. 1954).

96. West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir. 1954).

were involved in litigation regarding certain leaseholds.[97] To settle the controversy, the parties entered into a compromise agreement that was incorporated into the record.[98] Based on this compromise agreement, the federal district court rendered a judgment terminating the litigation.[99] Seven years later, the plaintiff alleged the legal description in the compromise agreement had, mistakenly and contrary to the intentions of both parties, assigned several acres of the plaintiff's land to the defendant.[100] The plaintiff, under Rule 60(a), sought correction of both the compromise agreement and the judgment based on it.[101] The court rejected the plaintiff's argument that the erroneous legal description constituted a clerical error under Rule 60(a) because it had not been "made by a clerk in transcribing or otherwise."[102] The court noted this was not a "mere error in transcription,"[103] but rather was a substantive error because the judgment "does not embody what the parties intended in making up the record."[104]

Most courts, however, have since rejected such a narrow view of who can make a clerical error. The prevailing view is "Rule 60(a) clerical mistakes need not be made by a clerk, [but] they must be in the nature of recitation of amanuensis that a clerk might make."[105] For example, the federal district court in *In re Merry Queen Transfer Corp.*[106] rejected the narrow interpretation offered by the court in *West Virginia Oil & Gas Co.*[107] The defendants in *In re Merry Queen Transfer Corp.* argued Rule 60(a) did not apply to amending a final judgment to include interest that was required by statute but inadvertently omitted by the judge because the term "clerical error" encompassed only mistakes "made by a clerk in transcribing or otherwise."[108] The district court rejected this interpretation and held the phrase "clerical error" merely described "the type of error identified with mistakes in transcription, alteration or omission of any papers or documents which are traditionally or customarily handled or controlled by clerks but which . . . may be handled by others."[109] Such an error, the court noted, is one that is mechanical in nature, apparent on the record, and does not involve a legal decision or judgment by an attorney.[110]

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97. *Id.* at 703.
98. *Id.*
99. *Id.*
100. *Id.* at 703-04.
101. *Id.* at 704.
102. *Id.* at 705.
103. *Id.*
104. *Id.*
105. Jones v. Anderson-Tulley Co., 722 F.2d 211, 212 (5th Cir. 1984).
106. *In re* Merry Queen Transfer Corp., 266 F. Supp. 605 (E.D.N.Y.), *modified in other respects sub nom.* O'Rourke v. Merry Queen Transfer Corp., 370 F.2d 781 (2d Cir. 1967).
107. *Id.* at 607.
108. *Id.*
109. *Id.*
110. *Id.*

Other federal courts, including the Eighth Circuit, have similarly rejected any interpretation of Rule 60(a) that limits the scope of clerical errors exclusively to those made by a clerk of court. For example, the district court in *Pattiz v. Schwartz*[111] was not persuaded the type of mistakes envisioned by Rule 60(a) is "necessarily confined to one committed only by the clerk" as had been suggested in *West Virginia Oil & Gas Co.*[112] "To say that a clerical error is 'generally' one made by a clerk is not to say that it is exclusively so," the court noted.[113]

Courts have expanded the scope of Rule 60(a) to correction of errors committed by a party to a proceeding. In *Application of Levis*,[114] the petitioner had originally provided an incorrect birth date on his application for naturalization.[115] The district court held the mistake was excusable in light of the fact the petitioner came to the United States from Lithuania while a teenager, and all birth records in his village had been destroyed during the German occupation of the country in World War I.[116] The court held no ground existed for distinguishing between an error committed by the court and one made by a party when evaluating the propriety of a clerical correction.[117] "The underlying purpose in each case is the same, namely, to have permanent records of the court disclose the actual facts."[118]

In other cases, courts have gone so far as to permit use of Rule 60(a) to correct errors committed by the jury. For example, in *Myrtle v. Checker Taxi Cab Co.*,[119] the court reassembled the jury for the purpose of correcting a clerical error in the verdict.[120] The plaintiff had been injured by one defendant who was driving a car in the course of his employment with the second defendant.[121] The jury found both defendants guilty of negligence on the basis of an agency relationship between them and assessed verdicts of $1000 against the driver and $1 against the employer.[122] The court then permitted the members of the jury to leave for the day but instructed them to return the following morning.[123] Afterward, the judge instructed the clerk to enter judgment for the plaintiff based on the verdict forms.[124] The following morning, the defendants' attorney requested an amended judgment to indicate a

111. Pattiz v. Schwartz, 386 F.2d 300 (8th Cir. 1968).
112. *Id.* at 303.
113. *Id.*
114. Application of Levis, 46 F. Supp. 527 (D. Md. 1942).
115. *Id.* at 528.
116. *Id.* at 527-29.
117. *Id.* at 529-30.
118. *Id.*
119. Myrtle v. Checker Taxi Co., 279 F.2d 930 (7th Cir. 1960).
120. *Id.* at 933.
121. *Id.* at 931.
122. *Id.*
123. *Id.*
124. *Id.*

joint verdict for $1000 between the defendants.[125] The trial court agreed to the change because it considered the error to be clerical rather than substantive.[126] According to the district court judge, it appeared the jury's actual intention had been to assess joint damages because the jury had attempted to include the employer's name on the form assessing the driver's liability at $1000.[127] The district court judge reasoned the jury apparently feared if it had included the sum of $1000 on the form assessing the employer's liability as well, the verdict might have been erroneously interpreted as a total award of $2000.[128] The district court then reassembled the jurors and questioned the foreman as to the jury's intention in assessing damages against both defendants.[129] Afterward, the judge ordered the jury to retire in order to complete the revised verdict forms.[130]

The court of appeals began its decision by noting it is a deprivation of a party's constitutional right to a jury trial when a district court alters the verdict in matters of substance or orders a jury to reassemble after it has been discharged to consider its verdict further.[131] Correction of the error here, however, did not amount to such a deprivation because the district court was merely attempting to make the verdict form consistent with the true intent of the jury.[132] The court noted the "immediate reassembly of the jury . . . confirmed the [district] court's view of the situation."[133] The appellate court also held it was not required to reach the "question of the power of the judge to reassemble a jury, after discharge, to interrogate the members to find their intentions where the clerical error is not apparent from the face of the verdicts."[134]

V. DETERMINING THE INTENTION OF THE COURT

Courts have the "power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake."[135] A motion cannot be brought under Rule 60(a), however, to amend something that was deliberately done.[136] Thus, when a court renders

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125. *Id.* at 932.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 933.
130. *Id.*
131. *Id.* at 934.
132. *Id.*
133. *Id.* The appellate court noted there was "much controversy . . . whether the jury had been discharged after returning its first verdict." *Id.* The court held, however, this matter was not controlling for the resolution of the issue. *Id.*
134. *Id.*
135. American Trucking Ass'ns v. Frisco Transp. Co., 358 U.S. 133, 145 (1958).
136. Security Mut. Casualty Co. v. Century Casualty Co., 621 F.2d 1062, 1065 (10th Cir. 1980).

a judgment based on a mistaken interpretation of the law, most courts have held this to be an error of law rather than a clerical error if the judgment reflected the actual intention of the district court.[137] "If the flaw lies in the translation of the original meaning [of the court] to the judgment, then Rule 60(a) allows a correction; [however,] if the judgment captures the original meaning [of the court] but is infected by error, then the parties must seek another source of authority to correct the mistake."[138]

Not all courts are in agreement on whether such a mistake is legal or clerical. The two competing views can most notably be seen in cases regarding erroneous awards of interest. The majority view is that Rule 60(a) may not be used to correct mistaken rates or omitted awards of interest.[139] On the other hand, some courts hold Rule 60(a) is an appropriate vehicle to produce a correct rate of interest.[140]

In *Morgan Guaranty Trust Co. v. Third National Bank*,[141] the court held even if Rule 60(a) was the proper means to deal with a mistake in the computation of interest, it would be appropriate only in a case in which the judgment reflected the court's intention.[142] When it is plain that the court's interest order was the result of a deliberate choice, not oversight, and the mistake was not clerical but based on an erroneous interpretation of the law, the issue is "well beyond the purview of Rule 60(a)."[143]

The First Circuit endorsed this view in *Scola v. Boat Frances, R., Inc.*[144] In *Scola*, the plaintiff sued the defendant under admiralty law for personal injuries sustained aboard the defendant's boat and was awarded damages of $245,000.[145] Neither party had requested prejudgment interest at trial, and the jury did not award any.[146] The clerk entered judgment for the plaintiff for $245,000 plus interest from the date of the commencement of the action to the date of judgment in the amount of $59,515.[147] Under admiralty law, however, such prejudgment interest was available only at the discretion of the jury.[148] The defendant subsequently appealed the judgment but did not assign as

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137. MOORE ET AL., *supra* note 2, ¶ 60.06[4].
138. United States v. Griffin, 782 F.2d 1393, 1396-97 (7th Cir. 1986).
139. *See infra* notes 141-64.
140. *See infra* notes 165-74.
141. Morgan Guar. Trust Co. v. Third Nat'l Bank, 545 F.2d 758 (1st Cir. 1976).
142. *Id.* at 759-60.
143. *Id.* at 760.
144. Scola v. Boat Frances, R., Inc., 618 F.2d 147 (1st Cir. 1980).
145. *Id.* at 150.
146. *Id.* Prejudgment interest is interest on an award that is calculated from the time of the filing of the complaint until the date the judgment is rendered. West Virginia v. United States, 479 U.S. 305, 310 (1987). Prejudgment interest serves to compensate the plaintiff for the loss of the use of his money as damages during this period, thereby achieving full compensation for the injury suffered by the plaintiff. *Id.*
147. Scola v. Boat Frances, R., Inc., 618 F.2d at 150.
148. *Id.*

error the inclusion of the prejudgment interest.[149] Six months after the court of appeals affirmed the decision, the defendant filed a motion for relief from the judgment pursuant to Rules 60(a), 60 (b)(1), and 60 (b)(6) arguing that the prejudgment interest had been improperly added to the judgment.[150] The district court held the award of the interest was a "clerical mistake" and could be corrected by deleting the amount specified for interest.[151] The district court then proceeded to issue an amended judgment striking the $59,515 allowance for interest, and the plaintiff appealed.[152]

On appeal, the defendant argued the clerk's entry of the judgment was mandatory under Massachusetts law and therefore constituted a mere ministerial duty that involved no discretion on his part.[153] Similarly, the defendant argued, the omission of interest under admiralty law when the jury had not spoken was equally mandatory, and likewise a pure ministerial act capable of correction under Rule 60(a).[154]

The court of appeals rejected the defendant's argument, however.[155] The court pointed out the clerk had erred by applying state law rather than admiralty law.[156] Because the clerk had to exercise judgment over the choice and application of the law regarding prejudgment interest, the error was deliberate and could not be classified as clerical, inadvertent, or ministerial.[157] As a result, the plaintiff was entitled to retain the interest award because the judgment could not be amended under Rule 60(a), and all other postjudgment relief had become time-barred.[158]

The majority rule precluding amendment of interest awards under Rule 60(a) has also surfaced in cases in which a district court has entered judgment for a plaintiff but has included an incorrect rate of interest in the judgment. In *Warner v. City of Bay St. Louis*,[159] for example, a federal district court entered judgment for the plaintiff without knowledge of a recent change in Mississippi law that raised the statutory rate of interest from six to eight percent.[160] On appeal, the plaintiff argued the court's failure to include the higher rate of interest in the judgment constituted a "mere oversight" that was readily capable of correction under Rule 60(a).[161]

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149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 151.
153. *Id.* at 153.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 155-56.
159. Warner v. City of Bay St. Louis, 526 F.2d 1211 (5th Cir. 1976), *aff'd*, 552 F.2d 583 (5th Cir. 1977).
160. *Id.* at 1211.
161. *Id.* at 1212.

The court of appeals disagreed, however, and held the district court's mistake was better characterized as a mistake of law.[162] The appellate court reasoned that because the judgment recited the amount of interest that was actually intended to be awarded, no clerical error existed in the judgment.[163] "The district court allegedly made an error of law, but the judgment did state what was intended. To allow a party to correct alleged errors of law at any time by the mechanism of Rule 60(a) would significantly weaken the policy of finality as embodied in the Federal Rules."[164]

The decisions of the *Scola* and *Warner* courts conflict sharply with the older minority view that when a prevailing party has a statutory right to an award of prejudgment interest, the failure to include the award or the failure to assess the proper rate of interest constitutes a "clerical mistake" that may be corrected at any time under Rule 60(a).

For example, in *Glick v. White Motor Co.*,[165] the plaintiff was awarded $307,400 in a suit against the manufacturer of an allegedly defective truck.[166] A month after the judgment had been entered, the plaintiff filed an untimely motion with the district court under Rule 59(e) to amend the judgment to include prejudgment interest of five percent pursuant to a Michigan statute.[167] Although the district court held the Rule 59(e) motion was untimely, it chose to treat the motion as one timely filed under Rule 60(a).[168] The district court then amended the judgment to include the interest totaling $64,659, and the defendant appealed.[169]

On appeal, the Third Circuit held that because the statute permitted interest as a matter of right, omission of the interest constituted a clerical error under Rule 60(a).[170] The court held the addition of the prejudgment interest under the state statute was "merely a ministerial act which cannot be denied through mere inadvertence, regardless of whether the error goes undiscovered for a period exceeding ten days."[171]

As the *Warner* court stated, however, an interpretation of Rule 60(a) that permits a district court subsequently to alter its original judgment to correct an erroneous omission of interest or an incorrect rate substantially weakens the concept of judicial finality.[172] Because Rule 60(a) imposes no time limits within which to seek relief, a party can return to the district court

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162. *Id.*
163. *Id.*
164. *Id.*
165. Glick v. White Motor Co., 458 F.2d 1287 (3d Cir. 1972).
166. *Id.* at 1290.
167. Glick v. White Motor Co., 317 F. Supp. 42, 44 (E.D. Pa. 1970), *aff'd*, 458 F.2d 1287 (3d Cir. 1972).
168. *Id.* at 45.
169. Glick v. White Motor Co., 458 F.2d at 1289.
170. *Id.* at 1294.
171. *Id.*
172. Warner v. City of Bay St. Louis, 526 F.2d 1211, 1212 (5th Cir. 1976), *aff'd*, 552 F.2d 583 (5th Cir. 1977).

at any time to seek alteration of the original judgment despite the fact the defendant has relied on this decision as being final. Rule 60(a) imposes a potentially open-ended obligation on a defendant to supplement a previously satisfied judgment.

Treating such inadvertencies as legal errors rather than clerical errors protects judicial finality while also allowing a correct decision to be rendered. For example, a party that discovers a previously entered judgment contains less than the statutory rate of interest or omits the interest award altogether would not be precluded from relief. That party could seek correction of the judgment under either Rule 59(e) or 60(b) within the prescribed time limits. After the time limit expires, however, the judgment is final and not subject to alteration. Although this result may appear harsh on the surface, such a narrow interpretation of Rule 60(a) would encourage litigants and their attorneys to scrutinize all orders and judgments with greater care and would avoid protracted litigation years after judgments have been entered and satisfied. Moreover, such a narrow interpretation is consistent with courts that have traditionally sought to discourage parties from presenting claims long after the event giving rise to the claim has occurred by the use of affirmative defenses such as laches and statutes of limitations.

VI. CLERICAL MISTAKES AND APPEALS

After Rule 60(a) was initially enacted, some confusion arose as to whether a district court could amend a judgment after the filing of a notice of appeal.[173] Some courts held once an appeal had been filed, the district court was completely divested of power to correct an error.[174] In 1946, Rule 60(a) was amended to clarify the power of the district court to correct clerical errors during the pendency of an appeal.[175] Rule 60(a) now provides a district court can amend or alter the judgment at any time before an appeal has been docketed.[176] After this time, the district court can amend the judgment only by leave of the appellate court.[177]

Although the 1946 amendment eliminated much of the confusion among the courts, other issues regarding the effect of appeals on Rule 60(a) have been resolved by litigation, at times with differing results.

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173. MOORE ET AL., *supra* note 2, ¶ 60.05.

174. FED. R. CIV. P. 60(a) advisory committee's note. For example, the Seventh Circuit Court of Appeals held a district court did not have authority to vacate its own judgment after an appeal had been taken by one of the parties to the circuit court. Miller v. United States, 114 F.2d 267, 269 (7th Cir.), *opinion adopted in part by* 117 F.2d 256 (7th Cir. 1940), *cert. denied*, 313 U.S. 591 (1941).

175. FED. R. CIV. P. 60(a) advisory committee's note.

176. FED. R. CIV. P. 60(a).

177. *Id.*

A. *Extending the Time to Appeal*

In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*,[178] the Supreme Court held a correction that does not substantively alter a final judgment does not extend the time within which a party can appeal.[179] Honeywell had petitioned the court of appeals to set aside a three-count order issued against it by the Federal Trade Commission (FTC).[180] The FTC in turn cross-petitioned for enforcement of the order.[181] Although Honeywell initially sought reversal of all three counts of the order, it subsequently indicated in its briefs and again during oral argument that it was contesting only the legality of the third count.[182] As a result, the court of appeals declined to rule on the first two counts and confined its judgment solely to the third count of the FTC's order.[183] The court then rendered its judgment, entitled simply "Decree," in which it reversed the third count in favor of Honeywell.[184] Several weeks after the period for filing a petition for a rehearing had passed, the FTC requested the appellate court affirm the first two counts because the court's judgment did not address them.[185] The court of appeals then issued an amended judgment entitled "Final Decree" in which it repeated its earlier decision regarding the third count of the FTC order and expressly affirmed the first two counts.[186] The FTC, relying on the date of the amended judgment, then filed a petition for certiorari with the Supreme Court to review the court of appeal's reversal of the third count.[187]

The issue presented in *Minneapolis-Honeywell Regulator Co.* was at what point the ninety-day period for filing a petition for certiorari had commenced.[188] If, as Honeywell contended, the period began with the issuance of the original decree, the FTC would have missed the deadline for seeking certiorari.[189] The FTC argued, however, the filing period began when the court of appeals issued its amended judgment.[190] The FTC reasoned that "when a court actually changes its judgment, the time to appeal or petition begins to run anew irrespective of whether a petition for rehearing has been filed."[191]

The Supreme Court rejected the petitioner's argument as too liberal an interpretation of its earlier decisions, however, and refused to grant certio-

178. FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952).
179. *Id.* at 207.
180. *Id.* at 208.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 209-10.
187. *Id.* at 210.
188. *Id.* at 207.
189. *Id.* at 211.
190. *Id.*
191. *Id.*

rari.[192] According to the Court, the fact the appellate court's initial judgment had been labeled simply "Decree" although its amended judgment was encaptioned "Final Decree" was not dispositive of the issue.[193] The Court determined, for all practical purposes, the initial judgment was the final judgment because it "put to rest the questions which the parties had litigated in the Court of Appeals."[194] The Court held the "mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought."[195] Under the Court's decision in *Minneapolis-Honeywell Regulator Co.*, the test of whether an amended judgment enlarges the time to appeal is if the amended judgment "has disturbed or revised legal rights and obligations which [the lower court], by its prior judgment, had been plainly and properly settled with finality."[196] "Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew."[197]

Although *Minneapolis-Honeywell Regulator Co.* does not deal with Rule 60(a) specifically because the issue in that case concerned the amended judgment of the court of appeals rather than a district court, the opinion is nonetheless instructive. Correction of an order or judgment under Rule 60(a) likewise would not create additional time during which a party could file an appeal. Rule 60(a) does not permit a district court to alter its original judgment for matters of substance or in a way that materially alters the rights or obligations of a party. An appellate court will, therefore, view the initial judgment of a district court as final and commencing the time for appeal, notwithstanding any alterations made pursuant to Rule 60(a).

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192. *Id.* at 211-13.

193. *Id.* at 213. In a dissenting opinion joined by Justice Douglas, Justice Black contended the petition for certiorari had been timely filed. *Id.* at 214 (Black, J., dissenting). He argued the word "final" was the most ambiguous word of the legal lexicon and both the court of appeals and counsel for the FTC reasonably believed the second decree was the final one, as would many attorneys in light of the Court's prior cases. *Id.* at 215-16 (Black, J., dissenting). For example, in *Rubber Co. v. Goodyear*, a federal circuit court issued an amended judgment encaptioned "Final Decree" in an action regarding a patent infringement. Rubber Co. v. Goodyear, 73 U.S. (6 Wall.) 153, 154 (1867). The only difference between the initial and the amended judgments was although the former referred only to "the patents in this case," the latter listed all of the patents the defendant was found to have misused. *Id.* The Supreme Court held the circuit court's initial judgment contained "all the essential elements of a final decree" and "if it had been followed by no other action of the court, might very properly have been treated as such." *Id.* at 155. The Supreme Court held, however, it was obliged to respect "the obvious intent of the [c]ircuit [c]ourt, apparent on the face of proceedings" in deciding the subsequent judgment was final for the purpose of determining whether an appeal had been properly taken. *Id.* at 155-56.

194. FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 213 (1952).

195. *Id.* at 211.

196. *Id.* at 212.

197. *Id.* at 212-13.

B. *Alterations Following the Docketing of Appeals*

Rule 60(a) permits a district court to correct mistakes and errors in a judgment or other parts of the record only until an appeal has been docketed with the court of appeals.[198] Once the appeal has been docketed, however, a district court must seek leave of the appellate court to make such corrections.[199]

For example, in *United States ex rel. Tillery v. Cavell*,[200] a prison warden filed an appeal following the grant of habeas corpus to a prisoner by a federal district court.[201] Three weeks later, the warden of the federal penitentiary in which the prisoner had been incarcerated filed a motion with the district court under Rule 60(a) to include in the district court's record a transcript of an earlier hearing before a state court.[202] The transcript contained testimony regarding disputed facts that had been presented at an earlier state court hearing on an earlier petition for habeas corpus.[203] The transcript had not been introduced into the district court's record due to an inadvertence on the part of the district court clerk.[204] The district court granted the motion to incorporate the transcript into the record, and the prisoner appealed.[205]

The court of appeals held, however, that the clerk's failure to introduce the testimony into the record could not be cured by the Rule 60(a) motion because the district court had lost all jurisdiction over the case when the warden filed a notice of appeal.[206] According to the court of appeals, the forgotten testimony "became lost to the scrutiny of the [district] court and [was] likewise not properly before [this court] as part of the record on appeal."[207]

Nevertheless, courts appear to be more flexible when their jurisdiction appears to have been usurped at least inadvertently. In *Huey v. Teledyne, Inc.*,[208] the plaintiff had brought an action alleging securities laws violations.[209] The district court issued an order dismissing the case "'*without prejudice*' for want of prosecution."[210] The plaintiff then filed a notice of appeal, while the defendant sought correction of the initial judgment under Rule 60(a) to state "with prejudice."[211] After the appellate court had docketed

198. FED. R. CIV. P. 60(a).
199. *Id.*
200. United States *ex rel.* Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961), *cert. denied sub nom.* Tillery v. Maroney, 370 U.S. 945 (1962).
201. *Id.* at 18.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. Huey v. Teledyne, Inc., 608 F.2d 1234 (9th Cir. 1979).
209. *Id.* at 1236.
210. *Id.*
211. *Id.*

the appeal, the district court granted the defendant's motion and amended its earlier judgment.[212]

The court of appeals noted the district court's correction of the judgment was "technically invalid" because the plaintiff's appeal had already been docketed.[213] The appellate court held, however, when a district court intends to dismiss a petition with prejudice but omits to do so properly and the omission is within Rule 60(a), "remand to effectuate that intent becomes a matter of 'mere form.'"[214] In the court's view, "the same principle should apply when the district court has attempted to correct its error."[215] The appellate court explained that had the district court followed the proper procedure, leave to amend the order would have been granted because the facts clearly suggested the district court had actually intended to dismiss the suit with prejudice.[216] Nonetheless, the court of appeals remanded the case to permit the district court to make a "technical correction of the order of dismissal."[217]

C. *Rule 60(a) Motions After an Appeal Has Been Decided*

Rule 60(a) does not address the issue of whether a district court can properly entertain motions to correct errors once the court of appeals has reviewed its decision. One line of cases holds appellate review of a judgment precludes the district court from altering the judgment. In *Home Indemnity Co. v. O'Brien*,[218] for example, the plaintiff had obtained a judgment for $25,000 on a surety bond in a federal district court.[219] The defendant then appealed the case to the court of appeals, which affirmed the lower court's decision and ordered the district court to execute the judgment.[220] Two months after the affirmance, the district court corrected and amended the judgment to include prejudgment interest, which had not been mentioned in the final judgment.[221] The defendant then appealed the district court's amendment of the judgment.[222]

The court of appeals set aside the amended judgment and ordered the district court to comply with its earlier mandate.[223] According to the appellate court, once the district court received the appellate mandate, its sole duty was

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212. *Id.*
213. *Id.* at 1237.
214. *Id.* (citing Crosby v. Pacific S.S. Lines, 133 F.2d 470, 474 (9th Cir.), *cert. denied*, 319 U.S. 752 (1943)).
215. *Id.*
216. *Id.*
217. *Id.* at 1240.
218. Home Indem. Co. v. O'Brien, 112 F.2d 387 (6th Cir. 1940), *overruled in part on other grounds by* Standard Oil Co. v. United States, 429 U.S. 17 (1976).
219. *Id.* at 388.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*

to execute the judgment.[224] Rule 60 did not modify the well-established common-law rule that a lower court has no authority to alter or amend a judgment once affirmed on appeal.[225] The court reasoned such an alteration "would be not the correction of a mistake, judicial or clerical, but an alteration or amendment of a decision of the reviewing court, which it is not within the power of the district courts to do."[226] Interestingly, the appellate court did not address the propriety of employing Rule 60(a) to correct an erroneous omission of the prejudgment interest in reaching its decision.[227]

In a similar vein, in *Albion-Idaho Land Co. v. Adams*,[228] an action was filed in 1922 to adjudicate water rights over a river and its tributaries.[229] The parties stipulated to incorporate an agreement reached in an earlier case into the court's final decree.[230] The earlier agreement provided water would be diverted from the river annually from April 1 to October 1.[231] The final decree the parties presented to the court, however, stated the water would be diverted from October 1 to October 15 of each year.[232] The district court approved the decree as presented by the parties, and the discrepancy remained undetected for twenty years, until the plaintiff, a successor in interest to one of the original parties, sought to exercise his water rights under the decree.[233] When the plaintiff discovered the error, he petitioned the district court under Rule 60(a) to amend the judgment to reflect the terms of the earlier agreement on which the decree was to have been based.[234]

The district court held, however, it could not exercise jurisdiction over the petitioner's motion because the court of appeals had since affirmed the case.[235] The court held that it had no "authority to alter or amend a judgment affirmed by a higher court [if] the proceedings were under [R]ule 60. . . ."[236] Such a motion, the court held, "could only be entertained with the [a]ppellate [c]ourt's consent."[237]

Other courts have taken a more liberal approach to the issue of whether a district court can modify a judgment following appellate review. For

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224. *Id.*
225. *Id.*
226. *Id.*
227. *See supra* text accompanying notes 141-71.
228. Albion-Idaho Land Co. v. Adams, 58 F. Supp. 579 (D. Idaho 1945).
229. *Id* at 579.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 579-80.
234. *Id.*
235. *Id.* at 581. The district court also held that because 16 years had passed since entry of the initial decree and 14 years since its affirmance by the court of appeals, and in the interval, the rights of other purchasers of land had intervened, the petitioner's Rule 60(a) motion would also be barred by the equitable principle of laches. *Id.* at 581-82.
236. *Id.* at 581.
237. *Id.*

example, in *Dura-Wood Treating Co. v. Century Forest Industries,* [238] the plaintiff recovered $100,000 for damages in a breach of contract action along with costs and attorney's fees as authorized under a state statute.[239] Both parties had stipulated "reasonable and necessary attorney fees" incurred by the plaintiff were $4680 for trial and $2100 for appeal.[240] The trial court's findings of fact stated, however, "'Reasonable and necessary attorney's fees incurred by the Plaintiff in bringing this action equal $2100 as stipulated by the parties.'" [241] The district court then entered judgment for $102,100.[242]

On appeal, the defendants attacked the judgment on several issues regarding the merits of the case.[243] The court of appeals reversed the judgment in part, affirmed a lesser amount of damages for $45,000, and remanded the case "for an entry of a judgment consistent with [its] opinion."[244] "On remand the district court entered judgment for $45,000.00 in damages 'plus the sum of . . . ($6,780.00), which amount represents the reasonable attorney's fee stipulated to by the parties.'" [245] The defendants then appealed the amended judgment, arguing the district court could not subsequently revise the original amount of attorney's fees entered by the district court because it had not been questioned on appeal.[246]

The court of appeals rejected the defendants' contentions, however, and concluded the revision was clerical in nature. Because neither of the parties ever stipulated to fees totaling $2100, the district court had obviously intended to award the stipulated fees but had "mis-recited the stipula tion . . . ."[247] The appellate court also held the district court had properly made the correction on remand because Rule 60(a) expressly authorized correction "'at any time.'" [248] The court held the district court's actions were proper because it had done nothing inconsistent with the appellate court's mandate.[249] The court then queried, "What could be more appropriate than for that court, in the course of entering such a judgment, to correct a clear clerical error apparent on the face of the record?"[250]

Although the decision of the *Dura-Wood Treating Co.* court contrasts sharply with those in both *O'Brien* and *Adams,* these opinions are not necessarily in conflict. In both *O'Brien* and *Adams,* the appellate courts had rendered straight affirmances of the lower courts' judgments. As the *O'Brien*

238. Dura-Wood Treating Co. v. Century Forest Indus., 694 F.2d 112 (5th Cir. 1982).
239. *Id.* at 113.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 114.
248. *Id.* (quoting FED. R. CIV. P. 60(a)).
249. *Id.*
250. *Id.*

court noted, in such a case, there was nothing for the lower courts to do except execute the judgments as mandated.[251] In *Dura-Wood Treating Co.*, however, the court of appeals expressly remanded the case for an entry of judgment "consistent with [its] opinion."[252] Amendment of the award for attorney's fees, however, was not inconsistent because the appellate court had never evaluated attorney's fees during its review of the judgment.

In addition, the error contained in *Dura-Wood Treating Co.* was more blatant. The district court's error was apparent on the face of the record and could not reasonably be considered anything other than a clerical mistake. On the other hand, neither of the "errors" alleged in *O'Brien* or *Adams* involved a clear mis-recitation that could be corrected without having to resort to evidence outside the record itself. Thus, when an error contained in a judgment is so obvious as to be "apparent on the record" and no possibility of the district court disturbing the intended mandate of the appellate court exists, it seems both sensible and economical that the lower court be permitted to amend the judgment without first seeking leave of the appellate court.

VII. CONCLUSION

Both attorneys and parties should scrutinize carefully all judgments and orders entered by the court to uncover possible errors contained in them. Because courts have not reached a uniform interpretation of whether certain discrepancies constitute clerical or legal errors, examination of the judgment or order should be done soon after it is entered by the court.

A party who uncovers a term that varies from the intent of either the court or the parties themselves can then take advantage of a variety of procedural remedies to obtain postjudgment relief if he or she acts on a timely basis. Once the prescribed time limits have expired, however, the party's only possibility for relief is under Rule 60(a). In such a case, the party may find itself without any satisfaction if a district court takes a narrow interpretation of Rule 60(a).

Theodore A. Donahue, Jr.

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251. Home Indem. Co. v. O'Brien, 112 F.2d 387, 388 (6th Cir. 1940), *overruled in part on other grounds by* Standard Oil Co. v. United States, 429 U.S. 17 (1976).

252. Dura-Wood Treating Co. v. Century Forest Indus., 694 F.2d 112, 113 (5th Cir. 1982).