



## Federal Post-Judgment Motion Practice

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These questions and answers will assist anyone involved in filing post-judgment motions in federal courts to navigate the minefield between judgment and appeal.

# Twenty-Five Questions and Answers You Should Know

Post-judgment motions are usually brought by the party against whom the judgment has been entered. From the perspective of the trial attorneys, the most important purpose of the motion is to try to reverse judgment, in whole

or in part, or at least to obtain a new trial. From the appellate team perspective, however, the main purpose of the motion is to preserve or perfect issues for appeal, or both. If the attorneys preparing the case for the appeal are not specialists in appellate work, many questions can arise that need to be resolved in short order so as not to blow the appeal or waive issues. The following are 25 of those questions and their answers. They will assist anyone involved in filing post-judgment motions in federal courts to navigate the transitional minefield from entry of judgment to appeal.

### An Initial Caveat: Check Your Own Circuit

Although federal post-judgment motion practice is governed nationwide by the Federal Rules of Civil Procedure, there may be variances within each circuit regarding what parties must do to preserve errors for

appeal. For example, the circuits are split on whether a party must object to inconsistent special verdicts to preserve the issue for appeal. The Third, Fifth, and Tenth Circuits have held that a party need not object to inconsistencies in a special verdict before the jury is discharged to preserve the issue for appeal. *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 145 (3d Cir. 1984); *Mercer v. Long Mfg. N. C., Inc.*, 671 F.2d 946, 947 (5th Cir. 1982); *Heno v. Sprint United Mgmt. Co.*, 208 F.3d 847, 851–52 (10th Cir. 2000). To the contrary is the First Circuit, which has held that a party must object to such an inconsistency prior to the jury's discharge to prevent a forfeiture of the issue. *Correia v. Fitzgerald*, 354 F.3d 47, 56–57 (1st Cir. 2003). And an "intra-circuit" conflict on the point appears to exist in the Eleventh Circuit. See *Sands v. Kawasaki Motors Corp. U.S.A.*, 513 Fed. Appx. 847, 857, n.6 (11th Cir. 2013) (not-



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ing that some conflict seems to exist in the Eleventh Circuit over whether an objection must be made to inconsistent special verdicts before the jury is excused to preserve the issue for appeal).

The lesson to be learned is always to check your own circuit's law on point before undertaking any post-judgment motion. And be mindful of "intra-circuit" conflicts on preservation issues. When in doubt, take the most protective or redundant approach to assuring that your client's rights are preserved.

## Basic Principles

### 1. Is a post-judgment motion typically necessary to preserve issues for appeal?

For jury trials, the answer is yes, with respect to seeking an appeal of a judgment as a matter of law or a new trial based on the sufficiency of the evidence. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401–07 (2006) (stating that the failure to make a post-trial Fed. R. Civ. P. 50(b) motion forfeited the right to obtain a judgment on appeal or a new trial based on the sufficiency of the evidence); *Consumer Products Research & Design, Inc. v. Jensen*, 572 F.3d 436, 437–38 (7th Cir. 2009) ("A party's failure to comply with Rule 50(b) forecloses any challenge to the sufficiency of the evidence on appeal."). Be aware that motions for judgment as a matter of law under Fed. R. Civ. P. 50(a) were formerly known as motions for a directed verdict, and renewed motions for judgment as a matter of law were formerly known as motions for judgment notwithstanding the verdict. The name change was solely technical, so case law referring to either name remains valid.

For judgments following non-jury trials, no post-judgment motion is typically necessary to preserve issues for appeal. See Fed. R. Civ. P. 52(a)(5); *Moore's Federal Practice* §52.63[1] (Matthew Bender 3d ed. 2016). If the issue has not previously been raised, however, or if it has been inadequately raised, then raising it in a post-judgment motion may be appropriate to help preserve it for review, regardless of the necessity of the motion otherwise. A downside to filing the motion in non-jury cases is that it may give the trial court judge the opportunity to create a better record.

### 2. What relief typically is sought as part of a post-judgment motion?

For jury trials, the relief includes judgment as a matter of law, a new trial, remittitur, and costs and attorneys' fees. Fed. R. Civ. P. 50; Fed. R. Civ. P. 59(a)(1)(A); Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 54(d). For non-jury trials, the relief includes amended findings, rehearing, alteration or amendment of judgment, correction of clerical errors, and other relief. Fed. R. Civ. P. 52(b); Fed. R. Civ. P. 59(a)(1)(B), (e); Fed. R. Civ. P. 60(a), (b).

### 3. Must a post-judgment motion be in writing?

Yes, a post-judgment motion must be made in writing, unless it is made during a recorded hearing or trial. See Fed. R. Civ. P. 7(b)(1)(A); 9 *Moore's Federal Practice* §50.43[1]. Even if otherwise permissible, however, oral motions, which always have a high likelihood of being denied outright, should be avoided because they may foreclose a subsequent written motion, and upon denial, they will trigger the time for filing a notice of appeal.

### 4. Must specific issues be raised to preserve them for appeal, or is a generalized motion sufficient?

Fed. R. Civ. P. 7(b)(1)(B) generally requires that all motions be stated with particularity. Failure to plead with sufficient particularity can result in the motion being stricken and nullify any extension of time to file an appeal. *Riley v. Northwestern Bell Tel. Co.*, 1 F.3d 725, 726–27 (8th Cir. 1993) (striking a bare-bones post-trial motion, making notice of appeal untimely); *Martinez v. Trainor*, 556 F.2d 818, 819–20 (7th Cir. 1977) (supporting memorandum insufficient to save bare-bones motion rendering appeal untimely). Nevertheless, overly technical rulings with respect to the particularity requirement are generally disfavored. When reasonable, courts have taken into consideration other previously or closely filed pleadings to determine whether sufficient notice of the grounds for relief have been provided and whether the other side has a fair opportunity to respond. *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 793–794 (8th Cir. 2003); *Cambridge Plating Co. v. Napco, Inc.*, 85 F.3d 752 (1st Cir. 1996) (skeletal motion allowed to stand where motion for exten-

sion to file memorandum in support adequately stated grounds for relief); *Brown v. United States Postal Service*, 860 F.2d 884, 887 (9th Cir. 1988) (motion for reconsideration adequate despite omission of particular ground where parties already briefed and argued issue).

### 5. Can a motion after a jury trial seek a new trial as an alternative to judgment as a matter of law?

Yes, the movant may file a renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) and may include an alternative or joint request for a new trial. Fed. R. Civ. P. 59(a)(1)(A); Fed. R. Civ. P. 50(b).

### 6. Is an order granting a motion for a new trial immediately appealable?

No. An order granting a new trial is interlocutory and thus not immediately appealable. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188 (1980).

## Timing of Motion

### 7. What is the deadline for filing?

With the exception of costs and attorneys' fees, the motion must be filed within 28 days after entry of judgment. This represents a change from the pre-2009 rules, which provided a 10-day filing period. Fed. R. Civ. P. 50(b), (d); Fed. R. Civ. P. 52(b); Fed. R. Civ. P. 59(b), (e). A motion for costs and attorneys' fees must be filed no later than 14 days from entry of judgment. Fed. R. Civ. P. 54(d).

### 8. Are extensions of time possible?

No. Fed. R. Civ. P. 6(b)(2) expressly provides that the court may not extend the time to act under Fed. R. Civ. P. 50(b), 52(b), (d), (e), and 60(b). If the parties and court are agreeable, however, the court might delay the entry of judgment, which could effectively lengthen the time for post-judgment motions.

### 9. Does the filing of a motion by one party extend the time to file for another party?

No. See Fed. R. Civ. P. 6(b)(2).

## Prerequisites for Motion

### 10. Is a motion during trial a prerequisite to filing the post-judgment motion?

The prerequisites differ between jury cases and non-jury cases. For jury cases, the an-



swer is yes with respect to a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b). A pre-verdict motion for judgment as a matter of law under Fed. R. Civ. P. 50(a) must be filed prior to submission of the case to the jury to preserve the movant's right to file a (renewed) motion for judgment as a matter of law post-judgment under Fed. R. Civ. P. 50(b). *Allied Bank-West, N.A. v. Stein*, 996 F.2d 111, 115 (5th Cir. 1993)(describing the pre-verdict motion as "virtually jurisdictional"). Moreover, the post-trial motion is limited in scope to what was raised in the pre-verdict motion. *Isbell v. DM Records, Inc.*, 774 F.3d 859, 867 (5th Cir. 2014)(Fed. R. Civ. P. 50(b) motion cannot assert grounds not included in Fed. R. Civ. P. 50(a) motion). Cf. *American & Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 159 (6th Cir. 1997)(judge may not *sua sponte* raise a new issue post-verdict and overturn jury verdict on that basis).

Some circuits have carved out an exception to the general rule when there was no evidence whatsoever to support the jury's verdict. The Ninth Circuit, for example, has permitted review of a Fed. R. Civ. P. 50(b) motion on grounds not previously asserted in a Fed. R. Civ. P. 50(a) motion in situations involving plain error that would result in a manifest miscarriage of justice. *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009).

For non-jury cases, no motion during trial is a prerequisite to making the post-judgment motion. See Fed. R. Civ. P. 59. However, a motion or objection during trial may be necessary to preserve the error for the post-judgment motion.

## Standards of Review

### 11. What is the standard of review for typical post-judgment motions?

In the district court, a motion for judgment as a matter of law is allowed under Fed. R. Civ. P. 50(a) only against a party who has been fully heard and when a reasonable jury would not have a legally sufficient basis to find for the party. It is allowed under Fed. R. Civ. P. 50(b) only after construing the evidence strictly in favor of the party who prevailed before the jury, where the determination is made that the verdict could not reasonably be based on that evidence. *Pasananti v. Cook County*, 689 F.3d 655, 659 (7th Cir. 2012). The review on appeal for a judgment as a matter of law motion is *de novo*. *Id.*

The general standard in the district court for a motion for new trial based on inadequacy of evidence is whether the verdict is contrary to the manifest weight of the evidence. In such cases, the district court may weigh the evidence and assess credibility, but cannot grant a new trial simply because it believes that the jury got it wrong. *Whitehead v. Bond*, 680 F.3d 919, 927–29 (7th Cir. 2012). The review on appeal for new trial motions is typically abuse of discretion. *Id.* at 927–28. But see *12 Moore's Federal Practice* §59.54[4][a] (suggesting that a heightened standard may apply to the grant of a new trial following a jury verdict because of the deference due the jury). The First Circuit has stated that it uses a heightened standard where the basis for the new trial is the evaluation of the weight of evidence instead of trial error causing an unfair result. *Payton v. Abbott Labs.*, 780 F.2d 147, 152 (1st Cir. 1985).

The district court review of motions to set aside findings in a bench trial is based on a clearly erroneous standard. Fed. R. Civ. P. 2(a)(6). The review on appeal of motions to alter or amend under Fed. R. Civ. P. 59(e) is abuse of discretion. *Shelby County Health Care Corp. v. Majestic Star Casino*, 581 F.3d 355, 375 (6th Cir. 2009). See also Fed. R. Civ. P. 61 (requiring court to disregard errors and defects that are harmless and do not affect a party's substantial rights). However, when the Fed. R. Civ. P. 59(e) motion seeks review of a grant of summary judgment, a *de novo* standard of review applies. *Wilkins v. Baptist Healthcare*, 150 F.3d 609, 613 (6th Cir. 1998).

## Damages

### 12. Can the post-judgment motion seek relief as to damages?

Yes. A post-judgment motion seeking a new trial can ask for a remittitur as an alternative. See *12 Moore's Federal Practice* §59.13[2][g][iii] (describing remittitur practice). Unlike in some state court practice, however, a plaintiff accepting a remittitur, with or without qualifications, may not challenge it on appeal. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977). Of course, a post-judgment motion can seek damage relief in other ways as well, for example, by attacking the district court's rulings on the admission of damage-related evidence.

## Effect of Post-Judgment Motion

### 13. Does a post-judgment motion automatically extend the time for appeal?

Yes, if timely filed pursuant to Fed. R. Civ. P. 50(b); 52(b); 54 (for attorneys' fees if time extended under 58); 59; or 60 (filed within 28 days of judgment). See Fed. R. App. P. 4(a)(4)(A).

### 14. May successive post-judgment motions be filed that extend the time for appeal?

No, successive post-judgment motions do not further extend the time for appeal. *Ysais v. Richardson*, 603 F.3d 1175, 1178 (10th Cir. 2010) (stating that a second or successive post-judgment motion does not affect the time for appeal). However, a further post-judgment motion may be directed to any *new or amended judgment* resulting from an earlier motion, in which case the further motion directed to that judgment would extend the time for appeal. See *Martinez v. City of Chicago*, 499 F.3d 721, 726 (7th Cir. 2007) (indicating that the test for such a further motion is whether the movant's legal rights were affected by the new judgment). In addition, a party intending to challenge an order disposing of a post-judgment motion has 30 days in which to file its notice of appeal, measured from the disposition of the last remaining motion. Fed. R. App. P. 4(a)(4)(B).

### 15. If a party files a notice of appeal prior to disposition of a timely post-judgment motion, is the notice of appeal still effective as to the original judgment?

Yes. The notice of appeal becomes effective upon disposition of the post-judgment motion. Fed. R. App. P. 4(a)(4)(B)(i).

### 16. If a party files a notice of appeal prior to disposition of a timely post-judgment motion, must that party file a new (or amended) notice of appeal after disposition to preserve its right to challenge the disposition order?

Yes. Fed. R. App. P. 4(a)(4)(B)(ii).

### 17. Does a post-judgment motion automatically stay execution of a money judgment?

No, the motion itself does not trigger a stay of execution. However, a 14-day automatic stay of execution applies under Fed.

R. Civ. P. 62(a). In addition, Fed. R. Civ. P. 62(b) authorizes the district court judge to grant a stay of execution during the pendency of a motion under Fed. R. Civ. P. 50, 52(b), 59, or 60.

**Caveat:** An execution gap may still occur during the period between the ruling on the motion and the posting of bond under Fed. R. Civ. P. 62(d). Counsel may therefore want to seek an extension of the stay until the bond is posted.

### Mixed Judgments

**18. In a jury case, if the jury decides some issues but the court decides other issues, such as entering judgment as a matter of law or partial summary judgment, which applies to post-judgment motions, the jury or the non-jury rules?**

No case is directly on point, unfortunately. Without clarification by the court, a careful practitioner should take the conservative approach and file a post-judgment motion in accordance with the rules applicable to jury cases.

### Interlocutory Judgments

**19. Does the deadline for filing post-judgment motions apply to final judgments entered prior to disposition of the entire case when the final judgment is accompanied by a finding under Fed. R. Civ. P. 54(b)?**

Yes. The “interlocutory” judgment accompanied by a Fed. R. Civ. P. 54(b) finding is treated like a final and appealable judgment for purposes of post-judgment motions. *Madison v. Vintage Petroleum*, 114 F.3d 514, 516 (5th Cir. 1997) (finding that a Fed. R. Civ. P. 59(e) motion was timely filed following a Fed. R. Civ. P. 54(b) judgment, and that the appeal was timely filed following disposition of the Fed. R. Civ. P. 59(e) motion).

**20. Does the deadline for filing post-judgment motions apply to orders entered prior to disposition of the entire case when no finding is made under Fed. R. Civ. P. 54(b)?**

No. The 28-day deadline for filing the post-judgment motion is generally timed from the entry of “judgment,” which is defined in Fed. R. Civ. P. 54(a) as “any order from which an appeal lies.”

**21. Will a motion directed to a non-final interlocutory order toll the time to appeal the interlocutory order when the interlocutory order is appealable as of right or by permission?**

Probably yes for appeals as of right. Fed. R. App. P. 4 governs interlocutory appeals as of right under 28 U.S.C. §1292(a) (allowing for interlocutory appeals of injunctive orders as of right). See 20 *Moore’s Federal Practice* §304.03[1]. Fed. R. App. P. 4(a)(4)(A)(vi), in turn, tolls the time to appeal upon the filing of a motion under Fed. R. Civ. P. 60, which may be directed against both “judgments” and “orders.”

On the other hand, a motion directed to a non-final interlocutory order probably will not toll the time to appeal an interlocutory order appealable only by permission under 28 U.S.C. §1292(b). Such appeals are governed by Fed. R. App. P. 5, which makes no provision for tolling the time for petitioning to appeal. However, some authority exists under Fed. R. Civ. P. 23(f) applicable to permissive interlocutory appeals of class certification orders (also governed by Fed. R. App. P. 5) for tolling the time to petition due to a motion for reconsideration. See 20 *Moore’s Federal Practice* §305.10[1].

### Other Types of Motions Within Time to Appeal

**22. Apart from motions filed under Federal Rules Of Civil Procedure 50, 52, 54, 59, and 60, are there post-judgment motions, which, if filed within the time to appeal, have the effect of extending the time to appeal?**

Probably not. Any motion making an otherwise final judgment non-final will have the further effect of delaying the time for appeal. However, most if not all such post-judgment motions at the federal level will fall within at least one of the rules listed in Fed. R. App. P. 4(a)(4)(A) (i.e., Fed. R. Civ. P. 50, 52, 54, 59, or 60), for which provision is expressly made for tolling the time for appeal. For example, a motion for pre-judgment interest is considered a motion pursuant to Fed. R. Civ. P. 59(e) and therefore extends the time for filing a notice of appeal. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989). Similarly, a motion for attorneys’ fees, if made within 14 days of the entry of judgment under Fed. R. Civ. P. 54(d)(2)(B)(i), will have the effect of extend-

ing the time for appeal, at least if the district court so orders pursuant to Fed. R. Civ. P. 58(e).

Note that, unlike the procedure in some state courts, a motion for sanctions under Fed. R. Civ. P. 11 does not delay the time for appeal and is separately appealable. *Cleveland v. Berkson*, 878 F.2d 1034, 1036 (7th Cir. 1989). See also 2 *Moore’s Federal Practice* §11.28[1].

### 23. Are there post-judgment motions that do not extend the time for appeal?

The following motions have been found not to toll the time for appeal in federal court:

- Motion to tax costs. *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268 (1988) (motion for costs is not a Fed. R. Civ. P. 59(e) motion); *Moody Nat'l Bank of Galveston v. GE Life & Annuity Assur. Co.*, 383 F.3d 249, 253 (5th Cir. 2004).
- Motion for leave to amend. *Sooner Products Co. v. McBride*, 708 F.2d 510, 511 (10th Cir. 1983). But see *Quartana v. Utterback*, 789 F.2d 1297, 1300 (8th Cir. 1986) (motion for leave to amend should be treated as a Fed. R. Civ. P. 59(e) motion tolling appeal time period).
- Motion for appointment of counsel to proceed *in forma pauperis*. *Brinton v. Gaffney*, 560 F. Supp. 28, 30 (E.D. Pa. 1983).
- Motion for extension of time to file motion pursuant to Fed. R. Civ. P. 59(e). *Western Industries, Inc. v. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983); *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 848 (7th Cir. 1981).
- Motion for stay of execution. *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 848 (7th Cir. 1981); *Milligan v. Matthews*, 166 Fed. Appx. 335, 338 (105th Cir. 2006).
- Motion for sanctions pursuant to Fed. R. Civ. P. 11. *Cleveland v. Berkson*, 878 F.2d 1034, 1036 (7th Cir. 1989); *Young v. West Coast Indus. Relations Ass’n.*, 144 F.R.D. 206, 212 (D. Del. 1992). See also 2 *Moore’s Federal Practice* §11.28[1].

**Caveat:** If a motion that does not toll the time for appeal is combined with a motion that does toll the time, the court’s ruling on the latter will trigger the time for appeal, even if no ruling has been made on the former. Consequently, it may be necessary to file the notice of appeal prior to a decision on the non-tolling motion.



### Protective Notice of Appeal

#### 24. If a post-judgment motion creates uncertainty concerning the tolling of the time to appeal, does a remedy exist?

Yes. If uncertainty exists over whether the time to appeal has been tolled, the party seeking to appeal should file a protective notice of appeal within the time to appeal without regard to the disposition of the motion. See *A.D. Weiss Lithograph Co. v. Illinois Adhesive Products Co.*, 705 F.2d 249, 250 (7th Cir. 1983) (referring to a “protective” notice of appeal to address what was at that time an ambiguity as between a Fed. R. Civ. P. 59(e) motion and Fed. R. Civ. P. 60(b) motion). In fact, the Second Circuit encourages the filing of such “protective notice[s] of appeal” where the timeliness of a subsequent appeal could be called into question. *United States v. Owen*, 553 F.3d 161, 165 (2d Cir. 2009).

### Motions After Expiration of Time for Appeal

#### 25. Can a post-judgment motion going to the merits of the case be brought after the time for filing a notice of appeal has expired?

Yes. Fed. R. Civ. P. 60(b) provides for relief from a judgment by motion after the time for appeal has expired based on the following:

- (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud... misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged...;
- (6) any other reason that justifies relief.

The motion must be brought “within a reasonable time” and within a year if based on “mistake, inadvertence, surprise, or excusable neglect,” newly discovered evidence, or fraud, misrepresentation, or misconduct of an opposing party. An order denying relief under Fed. R. Civ. P. 60(b) is regarded as a final and appealable judgment, but the granting of a 60(b) motion may leave the case pending in an interlocutory and therefore non-appealable state. See *Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 366 (7th Cir. 1983); 12 *Moore’s Federal Practice* §§60.68[1], [2].

### Conclusion

Careful adherence to the requirements for a post-judgment motion is critical for both adequate consideration of the motion at the trial level and the preservation of the issues raised in the motion for appeal. Familiarity with the questions and answers above will go a long way toward assuring the best possible treatment in the court of appeals. FD