RULE 60(B)(6): WHETHER "TAPPING THE GRAND RESERVOIR OF EQUITABLE POWER" IS APPROPRIATE TO RIGHT AN ATTORNEY'S WRONG

I. INTRODUCTION

In the *Pine Barrens* episode from season three of *The Sopranos*, Tony, the boss, sends out his agent Paulie to collect a debt. What should have been a routine collection job goes awry, with Paulie forced to take the debtor, who he believes is dead, out to the remote Pine Barrens area of New Jersey. A number of miscues and one live debtor later, the scenario effectively ends with Paulie shooting at the debtor, who runs off and may or may not be dead.

Upset with Paulie's mishandling of the job, Tony tells Paulie that if the problem resurfaces, he will have to deal with it. While Tony was the boss and the money was his to collect, Paulie was entrusted with the job and was rightly made responsible for his actions. An analogous situation can occur when a client entrusts his attorney to litigate a case properly. What happens when, like Paulie, an attorney mishandles a case to such a degree that a dismissal or default judgment is entered against the client? While the client, like Tony, freely chose who would represent him, should the client be punished for the attorney's wrongdoing?

This question can be of vital importance for federal courts when faced with a litigant's motion for relief from a prior judgment pursuant to Federal Rule of Civil Procedure 60(b). When a litigant suffers an adverse judgment solely because of his attorney's misconduct, an issue arises with respect to how the courts should allow the litigant to proceed: by granting relief from the prior judgment pursuant to Rule 60(b)(6) or steering the litigant toward a malpractice suit against the attorney. The federal circuits are split on their answer to this question.

This Comment will first attempt to provide background on Rule 60(b), and more specifically, Rule 60(b)(6). Part III will explore five cases that represent the current split among the federal circuits. Finally, Part IV, through examining the major arguments on both sides of the issue, will attempt to suggest the proper application of Rule 60(b)(6) relief. This Comment is primarily focused on whether an attorney's misconduct is a proper basis for Rule 60(b)(6) relief—the thesis of this

Comment is that an attorney's misconduct should qualify under Rule 60(b)(6).

II. RULE 60(B): BACKGROUND

Federal Rule of Civil Procedure 60(b),[1] first adopted in 1937, empowers a court in certain situations to relieve a party from a previous judgment or order.[2] To qualify for Rule 60(b) relief, the movant must fall under one of the six specified categories[3] and move for such relief within a reasonable time.[4] The text of the rule provides that relief is appropriate on the basis of:

> (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 (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.[5]

Rule 60(b) empowers a court, when one of the above bases has been satisfied, to exercise its considerable discretion to counteract injustice.[6] In doing so, a court must balance competing judicial interests.[7] For example, in deciding when relief is appropriate, a court must balance such competing concerns as a preference for cases being adjudicated on

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

2. *Id.*

3. *See id.*

4. On the timing of a Rule 60(b) motion, the text states that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." *Id.*; *see also* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 941 (3d ed. 2004); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 707 (6th ed. 2002). While what constitutes a "reasonable time," particularly for the subsections not subject to the one-year time limit, is an important topic worthy of its own discussion, it is outside the scope of this Comment.

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

6. WRIGHT & KANE, *supra* note 4, at 707–08.

7. Brett Warren Weathersbee, Note, *No More Excuses: Refusing to Condone Mere Carelessness or Negligence Under the "Excusable Neglect" Standard in Federal Rule of Civil Procedure 60(b)(1)*, 50 VAND. L. REV. 1619, 1623 (1997) [hereinafter Weathersbee Note].

the merits and trial judges having access to meaningful sanctions in order to move litigation along expeditiously.[8] While the drafters of Rule 60(b) may have felt they struck the proper balance between the competing concerns, the rule nonetheless offers little guidance as to how it should be applied.[9] Because "[n]o consistent pattern or specific set of facts govern application of the Rule,"[10] lack of uniformity in application of the rule among the circuits is not wholly unexpected.

Rule 60(b)(6) is the most textually enigmatic of the six reasons for relief contained in Rule 60(b). The text of Rule 60(b)(6) merely provides for relief when "any other reason justif[ies] relief from the operation of the judgment."[11] Rule 60(b)(6) is frequently referred to as a catch-all provision.[12] Indeed, it should not be entirely surprising that this provision was the most controversial at the time of its adoption—the natural fear being that the provision would grant courts limitless discretion.[13] A number of courts have aptly described the catch-all provision as "a 'grand reservoir of equitable power to do justice in a particular case.'"[14]

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8. Susan Marie Lapenta, Note, Inryco, Inc. v. Metropolitan Engineering Co.: *Inexcusable Neglect by Whom?*, 45 U. PITT. L. REV. 695, 704 (1984). As this Comment will attempt to demonstrate, any court making a determination on Rule 60(b) relief could potentially encounter any number of competing interests. Professor Mary Kay Kane, for example, argued that the question of relief from a civil judgment has been difficult since the beginning of the court system because it forces a court to balance the need for finality against the desire to find truth and render justice. Mary Kay Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HASTINGS L.J. 41, 41 (1978). Professor Kane further explained that the American legal system, as evidenced by the expansion of res judicata and collateral estoppel, ordinarily places finality before truth. *Id.* at 41–42.

9. *See* Weathersbee Note, *supra* note 7, at 1623.

10. Mary C. Cavanagh, Note, *Interpreting Rule 60(b)(6) of the Federal Rules of Civil Procedure: Limitations on Relief from Judgments for "Any Other Reason,"* 7 SUFFOLK J. TRIAL & APP. ADVOC. 127, 137 (2002) [hereinafter Cavanagh Note].

11. FED. R. CIV. P. 60(b)(6). The *other*, of course, refers to reasons other than the first five listed by Rule 60(b). In fact, the grounds for Rule 60(b)(6) relief are distinct from the grounds for the first five provisions; by definition, a set of circumstances qualifying for, say, the excusable neglect provision of Rule 60(b)(1) could not qualify for Rule 60(b)(6) relief. *See* 12 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 60.48[2] (3d ed. 2004); Darden v. Dandridge, 1991 U.S. Dist. LEXIS 12667, at *6 (D. D.C. June 13, 1991). To read Rule 60(b)(6) as not being distinct would dramatically undercut the efficacy of the first five. *See* MOORE, *supra*, ¶ 60.48[2]. As one court succinctly stated, "clause (6) may not be used as a vehicle for circumventing clauses (1) through (5)." *Id.* at n.5 (citations omitted).

12. *See, e.g.*, MOORE, *supra* note 11, ¶ 60.48[1].

13. *See* Kane, *supra* note 8, at 43. Certainly such an argument could be made from a plain reading of the text. In practice, however, as I discuss *infra*, the rule has been anything but limitless.

14. MOORE, *supra* note 11, ¶ 60.48[1] (citations omitted).

Despite this extensive power, courts are not free to dispense Rule 60(b)(6) relief in any circumstance.[15] Generally, relief is limited to "extraordinary circumstances."[16] In *Community Dental Services v. Tani*,[17] for example, the court explained that Rule 60(b)(6) relief is appropriate when the movant establishes "'extraordinary circumstances which prevented or rendered him unable to prosecute [his case].'"[18] However, courts fail to agree on what circumstances are exceptional.[19] Furthermore, courts also fail to agree on the proper test to be applied.[20] Whether an attorney's gross negligence is a proper basis for Rule 60(b)(6) is one such situation where courts have been unable to agree.

A simple example illustrates the manner in which Rule 60(b)(6) can function in the context of an attorney's gross negligence. *A*, driving home from work, is struck by *B*, who ran a red light. *A* retains an attorney and suit is filed in federal court.[21] During discovery, *A*'s attorney disobeys several court orders. The trial court then dismisses the suit as a sanction for *A*'s attorney disobeying the orders. First, *A* will likely want to obtain new counsel. Second, *A* and his new attorney must decide whether to progress by filing a malpractice action against the former attorney or by attempting to have the original suit tried on the merits. If choosing the latter, *A* and his attorney will need to move to have the dismissal vacated pursuant to Rule 60(b)(6). *A* would claim that the dismissal ought to be vacated because the former attorney was grossly negligent in handling the case.

This Comment will attempt to answer the question of whether courts should allow *A* to pursue his rights through the original action or through a malpractice action against the original attorney. The

15. *Id.* (explaining that Rule 60(b)(6) "does not really provide a court with unfettered discretion to set aside a judgment in all cases").

16. *Id.*

17. 282 F.3d 1164 (9th Cir. 2002).

18. *Id.* at 1168 (quoting Martella v. Marine Cooks & Stewards Union, 448 F.2d 729, 730 (9th Cir. 1971)) (per curiam) (alteration in original).

19. *See Tani*, 282 F.3d at 1169 (highlighting the split among circuits concerning whether Rule 60(b)(6) relief is properly applied in situations of attorney gross negligence).

20. *Compare* United States v. 8136 S. Dobson St., 125 F.3d 1076, 1083 (7th Cir. 1997) (citations omitted) ("requiring that the movant show: (1) good cause for the default; (2) quick action to correct the default; and (3) the existence of a meritorious defense to the original action"), *with Tani*, 282 F.3d at 1168 (citations omitted) (explaining that a party merits Rule 60(b)(6) relief if demonstrating that extraordinary circumstances prevented the proper prosecution or defense of the action).

21. While the above hypothetical likely does not lend itself to proper federal subject matter jurisdiction, the assumption, for the sake of simplicity, is that such jurisdiction is proper.

following two sections of this Comment will trace and examine the underlying cases and justifications on both sides in an attempt to suggest which approach is correct.

III. THE CIRCUIT SPLIT

The federal circuits diverge on whether an attorney's gross negligence provides a basis for Rule 60(b)(6) relief.[22] For example, the Seventh Circuit Court of Appeals has held that attorney conduct must always impute the client, but, the Ninth Circuit Court of Appeals has held that, under the right circumstances, attorney gross negligence could warrant a default judgment to be set aside pursuant to Rule 60(b)(6).[23] This section will discuss the important cases that constitute the circuit split, highlighting as well the reasoning employed on both sides of the issue.

A. Link v. Wabash Railroad

Although dealing with principles of agency law rather than specifically Rule 60(b), *Link v. Wabash Railroad Co.*[24] is a Supreme Court case standing generally for the proposition that clients should be tied to the acts of their freely chosen attorneys.[25] In *Link*, the Court heard a case in which the district court dismissed with prejudice the plaintiff's suit after his attorney failed to appear at a pretrial conference.[26] In affirming the dismissal, the Court disagreed with the contention that the plaintiff was being unjustly penalized for his attorney's actions.[27] The plaintiff freely chose his representative in the

22. *Compare* United States v. 7108 W. Grand Ave., 15 F.3d 632, 634–35 (7th Cir. 1994) (holding that attorney conduct, whether willful, negligent, or grossly negligent, must be imputed to his client), *with Tani*, 282 F.3d at 1169 (holding that attorney gross negligence may serve as the basis for setting aside a default judgment pursuant to Rule 60(b)(6)). Other commentators, of course, have acknowledged that the courts have failed to reach a consensus on this issue. *See, e.g.*, Cavanagh Note, *supra* note 10, at 134 (explaining, in the Rule 60(b)(6) context, that "[a]ttorney misconduct or negligence is another factual situation where judicial decisions conflict").

23. *See supra* note 20 and accompanying text.

24. 370 U.S. 626 (1961).

25. *See id.* at 633–34; *see also Tani*, 282 F.3d at 1168; *7108 W. Grand*, 15 F.3d at 634; Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 807 (3d Cir. 1986).

26. 370 U.S. at 628–29. In deciding to dismiss the suit, the Court considered the "drawn-out history of the litigation" and the fact that the attorney failed to provide a reasonable explanation for his absence. *Id.* at 628–29, 633. However, the plaintiff's attorney had called the clerk of the district court and the trial judge's secretary in an effort to have the conference, which he could not attend, delayed. *Id.* at 642 (Black, J., dissenting).

27. *Id.* at 633–34. This notion that the client is not being unjustly punished even though

suit, the Court opined, and therefore must accept the outcome of that choice.[28]

As stated above, *Link* did not expressly deal with Rule 60(b), but the Court's opinion did reference the rule. In discussing the petitioner's situation, the Court twice noted that the petitioner failed to pursue the potential escape hatch for the dismissal contained in Rule 60(b).[29] *Link* is frequently cited in discussions of whether an attorney's gross negligence is proper grounds for Rule 60(b)(6) relief because for a court to determine that such relief is proper, it must do so in a manner that is consistent with the main principle from *Link*: that a client is responsible for the actions of his freely chosen attorney.

B. United States v. 7108 West Grand Avenue

In *United States v. 7108 West Grand Avenue*,[30] the Seventh Circuit Court of Appeals heard a case in which a husband and wife—claimants in the forfeiture proceeding—had three properties, purportedly purchased with illegal drug revenue, that were seized by the government.[31] The claimants had an attorney who represented them in the forfeiture proceedings, but this attorney failed to file a timely claim for any of the three properties on behalf of the husband, and the attorney filed a timely claim for only one of the properties on behalf of the wife.[32] The government filed a motion for default judgment, which the court granted after neither the attorney nor the wife appeared at the motion hearing.[33]

The claimants retained different counsel after the default and filed a motion for relief from the judgment under Rule 60(b).[34] The claimants

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the attorney is responsible for the misconduct is refuted, as will be discussed further *infra*, in certain later cases. *See, e.g.*, Shepard Claims Serv. Inc. v. William Darrah & Assocs., 796 F.2d 190, 195 (6th Cir. 1986) (displaying concern for the inequity of such a situation when stating that "[a] default judgment deprives the client of his day in court, and should not be used . . . for disciplining attorneys. . . . [W]e do not believe that this record exhibits circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits").

28. *Link*, 370 U.S. at 633–34.

29. *See id.* at 632, 635–36. The Court, for example, explained that it need not "consider whether the District Court would have . . . abus[ed] its discretion had it rejected a motion under Rule 60(b)." *Id.* at 635.

30. 15 F.3d 632 (7th Cir. 1994).

31. *Id.* at 634. While the husband was in prison on federal drug charges, his wife was not. *Id.* at 633.

32. *Id.*

33. *Id.*

34. *Id.* Interestingly, the court's opinion never specified which specific portion of Rule

maintained that their former attorney was grossly negligent in the handling of their case, meriting relief under the rule.[35]

Citing *Link*, among other authorities, the court held that all attorney conduct is imputed to the client.[36] In reaching this conclusion, the court reasoned that both the negligent and willful acts of an attorney normally impute the client.[37] Therefore, the court reasoned it would be illogical to treat gross negligence, which falls in between negligent and willful conduct, differently than the two extremes.[38] In addition, the court stated that if clients were insulated from the neglect of their attorneys, "neglect would become all too common" due to neither party being ultimately held responsible.[39]

C. United States v. 8136 South Dobson Street

In *United States v. 8136 South Dobson Street*,[40] the Seventh Circuit Court of Appeals faced a claimant who, like the claimants in *7108 West Grand*, was subject to forfeiture proceedings on property purportedly acquired with illegal drug revenue.[41] After receiving two default judgments and two summary judgments against his properties due in part to poor legal representation,[42] the defendant retained a new

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60(b) the claimants sought to invoke for relief. However, it would appear that they sought relief pursuant to, and the court's analysis took place under, Rule 60(b)(6). Indeed, in a very similar fact situation from the later case of *United States v. 8136 South Dobson Street*, the Seventh Circuit explicitly recognized that relief in such a situation would be granted pursuant to Rule 60(b)(6). *See infra* Part III.C.

35. *7108 W. Grand*, 15 F.3d at 633–34.

36. *Id.* at 634–35.

37. *Id.* at 634.

38. *Id.* To further illustrate this point, the court drew an analogy to a hospital's tort liability. *Id.* Certainly, the court speculated, no lawyer would contend that a hospital, though responsible for the negligence and intentional conduct of its employees, is not responsible for gross negligence. *Id.*

39. *Id.* (citations omitted). Under closer scrutiny, this argument is not entirely convincing. The subtext of the court's concern appears to be that clients and attorneys could somehow manage to neglect certain parts of the litigation when such a strategy becomes advantageous. Courts, though, generally consider the entire context of a case when deciding the merits of a Rule 60(b)(6) motion. *See generally* Cmty. Dental Servs. v. Tani, 282 F.3d 1164 (9th Cir. 2002); Carter v. Albert Einstein Med. Ctr., 804 F.2d 805 (3d Cir. 1986); Darden v. Dandridge, 1991 U.S. Dist. LEXIS 12667 (D. D.C. June 13, 1991). For neglect to indeed "become all too common," the courts would likely have to cease consideration of the case as a whole.

40. 125 F.3d 1076 (7th Cir. 1997).

41. *Id.* at 1078. Rodney Anderson, the defendant, was in fact the subject of forfeiture proceedings on three pieces of real estate and twelve vehicles. *Id.*

42. Anderson's attorney filed a number of claims in response to the forfeiture proceedings on behalf of several of Anderson's family members, but not for Anderson

attorney who motioned for relief from the judgments pursuant to Rule 60(b)(6).[43] The motion was premised on the belief that one of the defendant's former attorneys handled the case with gross negligence and willful misconduct.[44]

The court considered the merit of the Rule 60(b)(6) motion under the following three-part test: "the movant must show (1) good cause for the default; (2) quick action to correct the default; and (3) . . . a meritorious defense to the original action."[45] While evaluating all three portions of the test,[46] the court also rejected the motion because, pursuant to *7108 West Grand*, a client is bound to all the actions of his attorney.[47] Additionally, the court reaffirmed the contention from *7108 West Grand* that, though the client may deserve compensation for the attorney's wrongdoings, the compensation ought to come from bringing a malpractice suit against the attorney, not from prolonging litigation against the nonmoving party.[48]

D. Community Dental Services v. Tani

In *Community Dental Services v. Tani*,[49] the Ninth Circuit Court of Appeals heard a case in which a defendant had motioned for relief under Rule 60(b)(6) in an attempt to reopen a default judgment entered against him.[50] The defendant's attorneys not only ignored multiple court orders to serve opposing counsel with the answer, but they maintained to their client throughout the litigation that the case was progressing

himself. *Id.* at 1078–79.

43. *Id.* at 1080.

44. *Id.* While addressing the merits of Anderson's Rule 60(b)(6) motion, the court was not convinced that he truly was entitled to the relief because none of his original attorneys filed a claim on his behalf, which was necessary to establish him as a party. *Id.* at 1082–84. Nevertheless, the court considered the merits under the assumption that Anderson was eligible for Rule 60(b)(6) relief as the legal representative of his mother. *Id.* at 1083.

45. *Id.* (citations omitted).

46. *Id.* at 1083–87. The court concluded that Anderson's claim failed both the first and third parts of the test. *Id.* at 1087.

47. *Id.* at 1084.

48. *Id.* (quoting United States v. 7108 W. Grand Ave., 15 F.3d 632, 633 (7th Cir. 1994)). As with the court in *7108 W. Grand*, the court here made the argument that recourse in the form of a malpractice suit against the attorney is preferred over drawing out the original litigation. *Id.* Why? Clearly, the court is resting in part upon the notion that it is "unfair" to, in a sense, punish the nonmoving party by reopening the original litigation. The original party ostensibly did something to be named in the suit—drawing out the original litigation is little more than trying the original suit on its merits.

49. 282 F.3d 1164 (9th Cir. 2002).

50. *Id.* at 1166–67.

well.[51]

In determining the merits of the defendant's motion, the court reasoned that a party is due Rule 60(b)(6) relief if he can establish extraordinary circumstances preventing the proper litigation of the case.[52] The district court did not believe the defendant's situation was extraordinary because a client is normally considered to be "chargeable with his counsel's conduct" and apprised of all facts known to his attorney.[53] Citing *Link*, the Court of Appeals acknowledged that an attorney's negligence ought to be imputed to the client, but the court held that a client who demonstrates that his attorney acted with gross negligence is entitled to Rule 60(b)(6) relief.[54] In reaching this conclusion, the court stated that a trial on the merits should be favored whenever possible over the extreme measure of default judgment.[55] The court also contended that "the judicial system loses credibility as well as the appearance of fairness" if "an innocent party is forced to suffer [such] drastic consequences."[56]

E. Carter v. Albert Einstein Medical Center

In *Carter v. Albert Einstein Medical Center*,[57] the Third Circuit Court of Appeals heard a case in which the plaintiff alleged racial discrimination in the termination of his employment with the defendant.[58] The plaintiff's attorney failed to submit overdue answers to interrogatories and failed to appear at a pretrial conference.[59] After the plaintiff's attorney failed to comply with the court's discovery order, the court dismissed the suit.[60] Having dropped his derelict attorney, the

51. *Id.* Tani, in fact, maintained that he was not apprised of the state of his case until the default order was mailed to his office. *Id.* at 1167. Ironically, the only reason Tani received the default order in the mail was because Eugene Salmonsen, Tani's lead attorney, had provided the court with Tani's office as his (Salmonsen's) address of record. *Id.*

52. *Id.* at 1168.

53. *Id.*

54. *Id.* at 1168–69. The court contends that its holding need not conflict with the holding in *Link* because the latter expressly declined to state whether the decision reached the context of a Rule 60(b) motion. *Id.* at 1170. *Link*, the court stated, thus does not bar a finding that gross negligence by a client's attorney may comprise extraordinary circumstances. *Id.* (citing Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 807 (3d Cir. 1986) (distinguishing *Link* upon the same grounds)).

55. *Id.* (citations omitted).

56. *Id.*

57. 804 F.2d 805 (3d Cir. 1986).

58. *Id.* at 806.

59. *Id.*

60. *Id.*

plaintiff, proceeding pro se, appealed the case.[61]

In overturning the district court, the court of appeals held that, rather than dismissing the case, sanctions should be imposed on the attorney when the attorney acts inappropriately.[62] The court, in support of this solution, stressed how potentially inadequate a malpractice suit may be to the wronged client.[63] Not only might it prove difficult to obtain and collect a judgment, but the perception of the judicial system is compromised when the wrongdoing of a lawyer—an officer of the court—prevents his client's case from being tried on the merits.[64] Furthermore, the court believed that relying on malpractice suits "would only multiply, rather than dispose of litigation."[65] In addition, malpractice suits may not deter as effectively as sanctions because the attorney likely would not be punished until after a lengthy suit.[66]

IV. ANALYSIS

Should courts consider an attorney's gross negligence in handling his client's case to be appropriate grounds for Rule 60(b)(6) relief? Yes, for reasons discussed below, the appropriate stance is for courts to recognize attorney gross negligence as a valid basis for relief. First, this Part will outline and comment upon the different justifications advanced on both sides of the issue. Second, this Part will conclude with a suggestion for which Rule 60(b)(6) scheme should be employed.

A. The Arguments For and Against

1. Judicial Efficiency

Undoubtedly, courts require the power to dismiss suits with prejudice in order to police the crowded dockets.[67] As stated in *Link*, courts require this power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[68] While *Link*

61. The plaintiff had apparently paid a $400 fee to his former attorney, but was unable to afford a different attorney. *Id.*

62. *Id.* at 808.

63. *Id.* This argument would appear to be particularly strong when, as was the case here, the plaintiff did not have the financial wherewithal to hire another attorney.

64. *Id.*

65. *Id.* (quoting Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867 (3d Cir. 1984)).

66. *Id.*

67. *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626, 629–30 (1962).

68. *Id.* at 630–31.

specifically dealt with dismissal for want of prosecution,[69] the Court's concerns of judicial efficiency are analogous to concerns present in a Rule 60(b)(6) motion.[70] Acknowledging that courts need effective means to move litigation along expeditiously, is dismissing a case because of attorney wrongdoing an effective tool? By dismissing the original litigation, the court has handled that matter as expeditiously as possible. However, if the larger goal of the court is to manage the overall caseload, dismissing the original litigation due to attorney wrongdoing may not be the best option. As the court in *Einstein Medical* pointed out, such a dismissal actually increases the burden on crowded dockets by multiplying litigation.[71]

Although the *Einstein Medical* court did not include analysis with this contention,[72] a brief look at our hypothetical personal-injury suit will illustrate its validity. Remember, *A* filed suit against *B* over a traffic accident involving both parties. *A*'s original attorney caused the case to be dismissed by disobeying court orders. If the court could penalize the attorney without dismissal, then the case could simply move forward and be tried on its merits.[73] On the other hand, if the court has dismissed and will not vacate the judgment pursuant to Rule 60(b)(6), then *A* must seek compensation by a malpractice action against the original attorney. This malpractice suit makes the total burden on the courts greater because now an entirely new case must be fully litigated. Thus, the court must oversee one entire suit—the malpractice action—and part of another—the original suit—instead of merely the original suit. In this way, judicial efficiency concerns are better served with trying the original case on the merits through Rule 60(b)(6) relief, rather than by relying on compensation through a malpractice action.

2. Malpractice Suits: The Proper Form of Redress?

Besides malpractice compensation actually increasing the burden on the legal system,[74] this approach is problematic in other ways. For example, courts often fail to explore whether malpractice is a truly

69. *See id.* at 629.

70. After all, in both instances the court must deal with stalled litigation. The mode of dilatory behavior may be different, but the strain on judicial resources is the same.

71. 804 F.2d at 808; *see also* Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1171 (9th Cir. 2002). Neither court, unfortunately, included its analysis in reaching this conclusion.

72. *See supra* note 65 and accompanying text.

73. Courts frequently state the belief that a trial on the merits is always preferred over a default judgment. *See, e.g.*, *Tani*, 282 F.3d at 1170 (citations omitted).

74. *See supra* Part IV.A.1.

adequate remedy for the client.[75] In *Tani*, the court faced an excellent example of a client for whom malpractice litigation was a poor option for recourse.[76] Because of a default judgment entered against him, the defendant, a dentist, faced almost two million dollars in damages and a permanent injunction against using a trademarked term in advertising his practice.[77] While the defendant would have recourse against his original attorneys for their gross negligence,[78] the interim period between default judgment and possible recovery via malpractice could spell financial ruin for the defendant and his family, as he would likely struggle mightily to keep his business and home in face of the judgment.[79] Given the problems inherent in malpractice recovery, the *Tani* court properly chose to vacate the default judgment pursuant to Rule 60(b)(6) and continue with the original litigation.[80]

Einstein Medical also illustrates a situation where malpractice litigation was a poor form of redress. As stated above, the plaintiff in *Einstein Medical* was forced to seek vacation of his default judgment pro se because he could not afford to hire another attorney after he paid a $400 fee to his derelict attorney.[81] Litigants with limited financial means are obviously disadvantaged because of the expense involved in retaining new counsel to pursue a malpractice action;[82] a litigant can of course proceed pro se, but the problems with this are obvious.

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75. *See generally* United States v. 7108 W. Grand Ave., 15 F.3d 632 (7th Cir. 1994); United States v. 8136 S. Dobson St., 125 F.3d 1076 (7th Cir. 1997).

76. 282 F.3d at 1171–72.

77. *Id.* at 1166–67.

78. *See id.* at 1171.

79. *See id.* at 1171–72. Furthermore, the court pointed out that any possible malpractice award "cannot restore retroactively the intangible business benefits that ensue from the continued use of a name that has previously identified a business to the public." *Id.* at 1172.

80. *See id.*

81. Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 806 (3d Cir. 1986).

82. The possibility of retaining counsel on a contingent fee arrangement potentially vitiates much of this concern. No provision of the ABA's Model Rules of Professional Conduct precludes a contingent fee arrangement from being used for a legal malpractice action. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(d) (2004) (prohibiting the use of a contingent fee arrangement in criminal defense and certain family law matters). Nevertheless, a contingent fee arrangement is an imperfect solution, as a litigant faces the very real possibility that he will not find an attorney willing to take the case. *See* GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 511–12 (3d ed. 1999) (explaining that "contingency fee lawyers turn down as many cases as they accept"). The litigant in *Einstein Medical*, for example, had to proceed pro se because he could not afford to hire a second attorney. 804 F.2d at 806.

3. The Prestige of the Judicial System

When considering a Rule 60(b) motion, courts are often concerned with the impact the ruling will have on the public perception of the judicial system.[83] For example, in *7108 West Grand*, the court stated that an attorney's negligence and willful misconduct both impute the client; therefore, the court noted, not holding that gross negligence is imputed to the client, even though negligent and willful conduct are, "would make hay for standup comics."[84] Leaving aside the court's perception of suitable standup comedy material, it does make an intriguing point as to the seeming incongruity such a ruling would create. Public perception of the judicial system being diminished because of such a ruling, however, may overstate the public's interest in the consistency of legal reasoning.

Arguably of greater concern is the loss of prestige the judicial system suffers when a client's suit is dismissed solely because of the attorney's wrongdoing.[85] As the court in *Einstein Medical* pointed out, such a dismissal reflects poorly upon the entire system because attorneys are officers of the court.[86] To put it slightly differently, "[w]hen an attorney is grossly negligent . . . the judicial system loses credibility as well as the appearance of fairness, if . . . an innocent party is forced to suffer drastic consequences."[87] Attorney gross negligence, considering notions of judicial prestige, should be a valid basis for Rule 60(b)(6) relief.

4. Judicial Preference for a Trial on the Merits

Courts frequently state that a trial on the merits is preferable to a judgment by default.[88] As frequently, they fail to explicitly state why this is so.[89] Certainly, part of why courts prefer a trial on the merits has to do with concerns of judicial prestige discussed above.[90] As stated, the judicial system loses prestige when an innocent party is punished for the acts of his or her representative.[91] In the same vein, the judicial system loses prestige when the people it governs doubt its ability to adjudicate

83. *See, e.g.*, United States v. 7108 W. Grand Ave., 15 F.3d 632, 634 (7th Cir. 1994); *Einstein Med.*, 804 F.2d at 808.

84. 15 F.3d at 634.

85. *See Einstein Med.*, 804 F.2d at 808.

86. *Id.*

87. *Tani*, 282 F.3d at 1170.

88. *See, e.g., id.* (citations omitted).

89. *See, e.g., id.*

90. *See supra* Part IV.A.3.

91. *See supra* Part IV.A.3.

grievances. Without question, one of the most vital functions of our judicial system is the normative role it plays; people pattern their behavior, or so the theory goes, around the laws and judicial system of our country. If people lose faith in the judicial system because grievances are not properly settled, then the system loses some of its normative power. The preference for a trial on the merits suggests that attorney gross negligence ought to be a valid basis for Rule 60(b)(6) relief.

B. The Proper Method of Rule 60(b)(6) Relief

Assuming that an attorney's gross negligence should be valid grounds for Rule 60(b)(6) relief, the question still remains of how a court is best to evaluate and apply such relief. As discussed, courts have formulated various tests for when Rule 60(b)(6) relief is appropriate.[92] Clearly, Rule 60(b)(6) relief ought to be treated as "an extraordinary remedy . . . [that] is granted only in exceptional circumstances."[93] After all, if courts granted such relief freely, parties could potentially circumvent the appeals process.[94] Thus, a nonspecific standard ensuring that relief is granted only to a truly deserving party is optimal.[95] The court in *Tani* properly required that a party seeking Rule 60(b)(6) relief display extraordinary circumstances preventing the proper litigation of the case.[96] Instead of a mechanical, multipart test,[97] this test allows the court to consider the totality of the circumstances[98] and make a proper judgment as to whether relief is appropriate. In this way, not only is justice most likely to be served, but improper application of the rule is most likely to be avoided.

Even with such a test to determine that appropriate relief is employed, there remains a valid concern that the misconduct of the attorney unfairly burdens the opposing party by saddling him or her

92. *See supra* note 20 and accompanying text.

93. United States v. 8136 S. Dobson St., 125 F.3d 1976, 1082 (7th Cir. 1997) (quoting Dickerson v. Bd. of Educ., 32 F.3d 1114, 1116 (7th Cir. 1994)).

94. MOORE, *supra* note 11, ¶ 60.481.

95. This contention fits well with one of the major themes of Justice Black's spirited dissent in *Link*. In his dissent, Justice Black contended that the Court's rigid adherence to agency principles results in the plaintiff being wronged. *Link*, 370 U.S. at 643–45 (Black, J., dissenting). For Justice Black, how the case transpired "is a good illustration of the deplorable kind of injustice that can come from the acceptance of any such mechanical rule." *Id.* at 645.

96. *See supra* Part III.D.

97. *See supra* note 95 and accompanying text.

98. *See supra* note 39 and accompanying text.

with extra costs associated with litigation prolonged solely by the attorney's misconduct.[99] In *Einstein Medical*, the court acknowledged this concern by ordering that the plaintiff's attorney be personally sanctioned, with her fine going directly to the opposing party to offset his extra costs.[100] This is the ideal arrangement.[101]

V. CONCLUSION

For the foregoing reasons, relief pursuant to Rule 60(b)(6) is the proper court response when a client seeks relief from an adverse ruling caused by a former attorney's gross negligence. There are four major justifications advanced on both sides of the issue: concern for (1) judicial efficiency; (2) malpractice suits; (3) judicial prestige; and (4) a trial on the merits. Taking into account these four vital issues, courts ought to uniformly recognize an attorney's gross negligence as a valid basis for Rule 60(b)(6) relief. As the court in *Tani* stated, "relief under Rule 60(b)(6) may often constitute the only mechanism for affording a client actual and full relief from his counsel's gross negligence—that is, the opportunity to present his case on the merits."[102] *The Sopranos* had it right: the person responsible for the wrongdoing should be the person held directly accountable.

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99. *See* Carter v. Albert Einstein Med. Ctr., 804 F.2d 805, 808 (3d Cir. 1986).

100. *Id.*

101. While reliance on a malpractice action would excuse the nonmoving party from further litigation costs, the extra costs incurred by the nonmoving party while still in the suit would not seemingly be reimbursed, unlike with the sanction scheme from *Einstein Medical*, by a malpractice action.

102. Cmty. Dental Servs. v. Tani, 282 F.3d 1164, 1172 (9th Cir. 2002).

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