

# LEGAL MOJO

## The Amazing Motion for New Trial in Criminal Cases

By Carmen Roe

A motion for new trial is an awesome opportunity to claim victory from the jaws of defeat for the savvy practitioner who knows the rules and is ready to be creative in the face of a conviction or sentence. The motion provides the proverbial second bite at the apple. It is also an important opportunity to create a record on appeal that would not otherwise exist, enabling the litigation of appellate issues that otherwise would never see the light of day.

### 1. Be Creative. Be Amazing. Be You.

We start with creativity because it is essential after a plea, trial, or sentence that the same judge and the prosecutor be convinced that something went wrong. Given this procedural posture, bringing something new to the table is critical to any success. That said, never file a motion for new trial with boiler-plate language, such as a claim that “the verdict is contrary to the law and the evidence.” This is a waste of the paper it is written on because it preserves nothing for appeal and provides nothing a judge can rule on in your favor. Instead, this is the time to think outside of the box and go beyond what has already been seen and heard.

### 2. Rules, Rules, Rules

You must know the rules. Motions for new trial are controlled by Texas Rule of Appellate Procedure 21 (“Rule 21”), which has nine sub-parts, and the case law that informs it. Rule 21 is mandatory, unforgiving, and often jurisdictional. The basic aspects of Rule 21 that you must know are as follows:

- a. Any motion must be filed within 30 days from the date “when the trial court imposes or suspends sentence in open court.”<sup>1</sup> The date is not calculated based on the judgment.
- b. You must “present”<sup>2</sup> the motion (bring it to the attention of the trial court) within 10 days of filing.
- c. You must request a hearing in every case, and any hearing must be held within 75 days from the date sentence is imposed.<sup>3</sup> Failure to litigate the motion within 75 days is fatal, and any motion not ruled on by the 76th day is overruled by operation of law. At this point, the trial court loses jurisdiction, and no further action may be taken, even if the parties agree.<sup>4</sup>

### 3. Affidavits, Evidence, and Hearings

Any motion for new trial must include a sworn affidavit (which is not self-proving) and evidence to support the claims raised. Further, you must get a hearing in every case, no matter how formal. A lawyer is entitled to a hearing any time evidence is raised that is not part of the original record. Any attachments to the motion, including affidavits, will not be considered unless offered and admitted in the trial court. A hearing on a motion for new trial is the opportunity to

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develop any evidence that cannot be attached to the motion and offered into evidence. All evidence presented in a motion that is offered and admitted is then part of the appellate record for review in the court of appeals.

#### **4. Do No Harm**

A hearing on a motion for new trial is a critical stage of a criminal proceeding that entitles a client to the right to counsel under the Sixth Amendment to the United States Constitution. If a trial attorney fails to advise the client of the right to file a motion for new trial within 30 days, or fails to litigate the motion, the client may have a colorable claim for ineffective assistance of counsel. It is imperative that the trial attorney file a motion to withdraw as soon as possible so appellate counsel can take over in time to file and proceed on a motion for new trial. Any client who is found to have been denied the right to counsel during this critical stage may be entitled to relief through a post-conviction writ of habeas corpus (a "writ").

The 30-day period happens fast, so you must act quickly to work up the motion or get out of the way so another attorney can get involved. Further, the lawyer must make a decision about whether it is possible to raise certain claims effectively, such as ineffective assistance of counsel. This is an important consideration because if you cannot do an efficient job here, you should wait for the opportunity to file a writ rather than filing any motion. Raising a claim in a motion for new trial may waive that issue later in a writ, which does not carry the same strict timelines. Every case is different. Some clients may never be able to afford a writ, so in some cases it makes sense not to file a motion for new trial. Use your best judgment to decide if it is a case that has enough significant issues to file a motion. If it does not, make a memo to your file detailing your decision to respond to any claim later that you failed to provide assistance during this critical stage.

#### **5. Winner's Circle: "In the Interest of Justice"**

You should raise "in the interest of justice"<sup>5</sup> as a claim in every motion for new trial. This claim provides a great opportunity for the trial court to grant relief without pointing the finger at anyone involved. That said, courts of appeals have made it very clear that a claim in the interest of justice must be accompanied by a stand-alone claim.<sup>6</sup> Without an independent claim, you cannot prevail on appeal.

The greatest opportunity for success in motions for new trial is to make creative, original claims not found in Rule 21 (although the rule does provide mandatory reasons to grant a motion for new trial). The most common claims are as follows:

- a. "ineffective assistance of counsel,"
- b. "newly discovered evidence," and
- c. "jury argument error.

"Ineffective assistance" is common because it allows you to litigate issues that were never raised in the trial court, or to address errors where counsel failed to object.

"Newly discovered evidence" should be raised where the following has occurred:

- a. new evidence was unknown or unavailable;
- b. failure to discover it was not due to the defendant's lack of due diligence;
- c. the new evidence is admissible, and
- d. the evidence is probably true and will probably bring about a different result.<sup>7</sup>

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Finally, “jury argument error” that is unobjected to at trial should be raised in a motion for new trial to preserve this and other record-based claims on appeal.

Motions for new trial are an amazing opportunity to turn a case around or make a record that can change the outcome -- but only if you follow Rule 21 and get creative in preparing a record that will either convince a trial court or persuade the courts of appeals. Often, you have much to gain and little to lose in filing a motion for new trial. The motion can change a lawyer’s position from a loss to a win, and it certainly can change a client’s life in the process.

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<sup>1</sup> Tex. R. App. Proc. 21.4(a).

<sup>2</sup> Tex. R. App. Proc. 21.6.

<sup>3</sup> *See id.*

<sup>4</sup> *See* Tex. R. App. Proc. 21.8.

<sup>5</sup> *See State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007).

<sup>6</sup> *See State v. Thomas*, 426 S.W.3d 233, 238 (Tex. Crim. App. 2014).

<sup>7</sup> *See Carsner v. State*, 444 S.W.3d 1, 4 (Tex. Crim. App. 2014).

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