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Avoiding Waiver at All Steps of Litigation

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From Monopoly to baseball, it isn't fair or fun when the opponent tries to win by changing the rules in the middle of a game. It isn't fair because of the surprise. It isn't fun because arguing about rules ruins the game and it takes too long to play. But if the rules are changed before the game, it doesn't seem unfair. Why? Because the appropriate time to finalize and adequately explain the rules is before the game starts.

The doctrine of waiver exists for similar reasons. As the courts note, waiver is founded on considerations of practical necessity in the orderly administration of the law and of fairness to the court and the opposite party. It is unfair to an opposing party to make new arguments without affording an opponent adequate opportunity to respond. It is also inefficient from the courts' perspective. Courts dislike being forced to consider an argument that should have been evaluated before or one that will require remand or reconsideration.

To be clear, there are different kinds of waiver. A party can waive an issue by estoppel — causing the other party to rely on a representation to their detriment (think equitable tolling). Or a party can waive an issue by intentionally relinquishing a right (think Miranda warnings). In a way, the general doctrine of waiver relates to both of these paradigms. The waiver discussed here, however, is better thought of as "procedural waiver." It arises when a party belatedly advances a new argument or fails to properly support an argument. (Technically, the correct term for this form of procedural waiver is "forfeiture," as "waiver" is the intentional relinquishment of a known right, but since "waiver" is used more commonly by both courts and litigants, it also is employed here.)

Despite the fact that courts dislike considering untimely arguments and parties dislike losing the ability to make them, waiver sometimes cannot be avoided. Parties develop and analyze evidence and discover something new. Litigants consider and test theories and make new arguments. While parties may intentionally conceal arguments or fail to cite evidence because it is harmful to their case (sometimes ironically referred to as "gamesmanship"), procedural waiver usually comes about by mistake or because the attorney thought of a new argument or discovered new evidence after the ideal time to raise it had passed.

Whether by mistake or design, waiver is an issue in a significant percentage of cases. Even considering only procedural waiver, there are simply too many ways and too many reasons why an issue, argument, or objection might be waived to warn about all of them. Nonetheless, from an appellate perspective, two general principles emerge. Litigators who keep these principles in mind may be able to reduce incidents of unintended waiver and be better prepared to attack the other side's theories that have been waived.

TIMING

First, litigators must be cognizant of timing and vigilant at each step in the litigation. Consider carefully where thresholds in the continuum occur. At each of these doorways, develop and refer to a checklist for arguments or issues that must be raised at that time or will thereafter be waived.

For example, arguably the most well-known instance of waiver is failing to file a lawsuit within the statute of limitations. Indeed, actions filed too late are commonly referred to as being "time-barred." Thus, the initial filing of the complaint is the first doorway litigants pass through. There are a host of similar thresholds that can also stop claims or defenses in their tracks if the right arguments are not made timely.

After that first doorway of the complaint, defendants must respond; usually an answer or, in federal practice, a motion under Federal Rules of Civil Procedure 12(b). Hence, if a defendant seeks to argue that the federal district court lacks personal jurisdiction over the defendant, it must be done in the first motion or the argument is waived. Summary judgment presents a second threshold. In attacking the other side's evidence on summary judgment, parties must either object orally at the hearing or timely file separate, written evidentiary objections or they will be unable to do so later. The trial presents another vast doorway that closes once the parties pass through it. For instance, parties cannot object to evidence introduced at trial for the first time on appeal, they must object during the trial.

On appeal, there are further thresholds. Not only are arguments made for the first time on appeal untimely, but arguments not raised in an opening brief cannot be raised initially in the reply brief of an appellant. Likewise, the ultimate, last-minute filing by the federal appellate lawyer — supplemental "28(j) letters" under Fed. R. App. Proc. 28(j) — is too late to raise substantive issues on appeal.

This is not an exhaustive or even a representative list. Procedural waiver can occur in different ways, in different courts, and under different substantive laws. It is, therefore, up to each practitioner to consider his or her practice and where these thresholds occur. In most instances, once the litigant is through, the way back is closed forever.

SUBSTANCE AND FORM

Second, particularly on appeal, the manner in which an argument is made can either preserve or waive it. Here, the critical aspect is to ensure that each theory is supported by argument and citation to the record. Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, they are considered waived. Nor does summarily mentioning an issue in a footnote, without reasoning to support the appellant's argument, preserve it on appeal. Not only must issues be supported by argument and citation, but the California Rules of Court require that each point have a separate heading. One court recently relied on a party's failure to provide a separate heading for an argument as part of its justification for refusing to consider the point at all. See *San Joaquin River Exch. Contractors Water Auth. v. State Water Res. Control Bd.*, 183 Cal.App.4th 1110, 1135 (2010). Such a procedural rule demonstrates that it is not only the substance of the argument that counts, but also its form (although appellate courts are probably stricter in applying this rule).

CONCLUSION

Waiver can arise at each stage of the case, from pre-filing to post-appeal. Sometimes, issues or arguments are waived intentionally, but usually, waiver arises because of wrong timing or deficient argument. To avoid that risk, litigators are advised to think of each step in the litigation as a doorway — once the threshold is crossed, certain theories or evidence are left behind. Attorneys should also make sure that arguments potentially worth making are sufficiently supported by citation to law and facts. With these principles in mind, unintended waiver will hopefully become less common.

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