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Home > This Week's Issue > **Appellate Practice: How to Beat Waiver Arguments**

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Appellate Practice: How to Beat Waiver Arguments

By **Martin J. Siegel** [Contact](#) [All Articles](#)

Texas Lawyer June 18, 2012



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Who hasn't dreamed of time travel? Go back and take that other job, swish that jumper, delete that email before sending. In F. Scott Fitzgerald's "The Great Gatsby," Nick Carraway tells Jay Gatsby to forget about regaining his long-lost love, Daisy Buchanan: "I wouldn't ask too much of her," [Nick] ventured. "You can't repeat the past." "Can't repeat the past?" [Gatsby] cried incredulously. "Why of course you can!"

Appellate lawyers often find themselves desperate to relive the past, yearning to appear magically in the lower court and make that killer argument they now fear was waived and forever lost.

Sadly, beating waiver demands something more reliable than the Wayback Machine. But don't just surrender to an opponent's waiver argument. When it seems trial counsel overlooked a potentially winning argument to the trial judge, options remain.

• *Step No. 1: Make sure the argument is waivable in the first place.* If it helps the appellee, it isn't. The 5th U.S. Circuit Court of Appeals and Texas courts of appeals uphold lower court decisions on any ground supported in the record, including newly presented ones, though some federal circuits will not. In most courts, therefore, waiver isn't the appellee's headache.

Even for the appellant, certain arguments are waiver-proof. Everyone knows lack of subject matter jurisdiction can't be waived. Ditto for standing, mootness, most versions of sovereign immunity and other jurisdictional cousins. Also unwaivable are the law of the case doctrine, attacks on void orders, defects in the substance of affidavits and questions about the judge's authority to hear the case, among others.

What if the argument turns on a new rule of law announced after the trial court decision? Lawyers usually can urge these on appeal. A party can't waive what it couldn't have argued to begin with.

• *Step No. 2: Argue about preservation.* Luckily, there is ample wiggle room here. As long as the lower court could consider and rule on the point, it has been preserved for appellate review. There is no requirement that the trial court expressly have discussed or rejected the specific argument advanced on appeal, though it must have decided the larger motion, request or objection.

The new-ish argument need not have been the main one in the lower court or presented as clearly as it could have been. Appellate courts will tolerate some elaboration and new emphasis. As the 5th Circuit put it while rejecting waiver in *Goetz v. Synthesys Technologies Inc.* (2005): "Although the issue was admittedly raised in a muddled fashion, the fact that the district court was able to rule on the issue is sufficient for us to consider it raised, even in a refined form on appeal."

It will help if the trial court acknowledged the argument in some way, even in passing. The same goes for the appellee, who will find it harder to claim waiver having addressed the point in the lower court.

• *Step No. 3: If the preservation dog won't hunt, proceed to plain error.* Under the U.S. Supreme Court's 1993 decision in *United States v. Olano*, federal appellate courts have discretion to reverse plain error affecting substantial rights and seriously threatening the fairness, integrity or public reputation of judicial proceedings.

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Previous [1](#) [2](#)

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Not surprisingly, predicting the outcome of something so discretionary isn't easy. Judges mostly just know plain error when they see it. At a minimum, the trial court's mistake must have been glaring and likely must have influenced the case's outcome.

As for the part about fairness and integrity, this usually devolves into little more than whether the error seems especially harmful or egregious. Courts often deploy the helpfully all-purpose phrase "miscarriage of justice." If appellate counsel can drag in concerns for the courts or third parties — such as whether judicial resources will be consumed with a retrial, as in the 5th Circuit's *Crawford v. Falcon Drilling Co. Inc.* (1997); or whether taxpayers are affected, as in the 1st U.S. Circuit Court of Appeals' *Diaz-Fonseca v. Puerto Rico* (2006) — all the better.

While state courts don't always use the plain-error standard, they have similar escape hatches for exceptional cases. In Texas, courts may review unpreserved complaints where there is "fundamental error," which "exists in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas," according to the Texas Supreme Court in *Wal-Mart Stores Inc. v. Alexander* (1993) (quotation omitted).

One final aspect of waiver bears remembering: Parties can waive waiver itself. There is always the chance the other side will fail to object to the new position on appeal and unwittingly cure any problem. True, devoting lots of ink to a potentially waived argument crowds out others and risks imperiling credibility, but sometimes there is no alternative.

In the end, avoiding waiver isn't always possible. After all, Gatsby's attempt to relive the past ends badly. If the argument is waivable, can't be extracted from the record somehow and won't qualify as plain error, the jig may be up. In that case, forget Fitzgerald and remember William Shakespeare. As Paulina said in "The Winter's Tale," "What's gone and what's past help,/Should be past grief."

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