



FERRETS AND TRUFFLES AND HOUNDS, OH MY

GETTING BEYOND WAIVER

Andrey Spektor & Michael A. Zuckerman

INTRODUCTION

CONSIDER THE FOLLOWING EXCHANGE between a federal court of appeals judge and an attorney who just raised an issue for the first time on appeal:

Judge: Before we discuss the merits, could you point out where in the record you raised this point below?

Counsel: Your Honor, we didn't press the point in this particular way, but our brief below implied as much, and certainly it was obvious that we were advancing this position from the get-go of the case.

Judge: So you think the trial judge is like a "pig" who should be "hunting for truffles buried in briefs"?¹

Counsel: Why no . . . I didn't meant to suggest . . .

Andrey Spektor received his J.D. from the University of Michigan Law School. Michael A. Zuckerman received his from Cornell Law School.

¹ United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991).

Judge: Ok, not a pig, but maybe a “hound”²? What about a “ferret”³ – counsel, do you think the trial judge is a ferret?

Counsel: No, we simply think that the Court is within its right to address the question now.

Judge: Well, counsel, it sounds to us like you are suggesting that the judge is “supercomputer Watson,”⁴ or an “archaeologist,”⁵ or maybe a “Sudoku master.”⁶ Maybe you think the judge is a “mind-reader”⁷ who could anticipate this issue or a “soothsayer,”⁸ or at the very least “clairvoyant.”⁹

Sound farfetched? It isn’t. Appellate judges have employed each of these metaphors in knocking away arguments as inadequately preserved.

This doctrine is commonly referred to as waiver. (The correct term is actually “forfeiture,”¹⁰ though for simplicity we will use the colloquial term “waiver.”) Waiver occupies a unique space in our

² *United States v. Guerrero*, 488 F.3d 1313, 1316 (10th Cir. 2007) (“Yet this relaxed standard neither requires the trial court, nor the appellate court, to dig through the record, like a hound to a truffle, in search of a claim.”).

³ *Linrud v. Linrud*, 552 N.W.2d 342, 345 (N.D. 1996).

⁴ *United States v. Williams*, 641 F.3d 758, 770 (6th Cir. 2011).

⁵ *N.W. Nat’l Ins. Co. v. Balthes*, 15 F.3d 660, 662-63 (7th Cir. 1994) (“District judges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits – not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.”).

⁶ *In re Boone County Utilities, LLC*, 506 F.3d 541, 543 (7th Cir. 2007).

⁷ *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

⁸ *United States v. Smith*, No. 07-cr-00737, 2007 BL 102225, at *2 (D. Ariz. Sept. 14, 2007).

⁹ *Williams v. Dieball*, 724 F.3d 957, 963 (7th Cir. 2013) (“Judges are not clairvoyant, and if they were required to go out of their way to analyze every conceivable argument not meaningfully raised, their work would never end.”).

¹⁰ Many courts and parties refer to the failure to properly raise or develop arguments as “waiver.” But “forfeiture” – not “waiver” – is actually the correct term to use in this context. “Waiver” means something slightly different, namely, the affirmative disavowal of a claim or argument. *See Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012); *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (“Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.”).

adversarial system. Appellate counsel fear it. Trial counsel frequently overlook it. Parties detest it – few things are as frustrating as losing a case because your attorney waived your winning argument. And judges relish it, employing the kind of imagination and colorful prose that often escape judicial writing. Yet the waiver doctrine is not only discretionary, but largely judge-made.

So why all the commotion? We begin, in Part I, by briefly discussing the rationale for the doctrine and its historical roots. We then provide a practitioner’s guide to overcoming waiver. We first explain why record-based arguments resonate most strongly: they show that the argument was not completely unpreserved and that the opposition cannot claim full surprise. We then remind lawyers of a helpful but oft-forgotten distinction between “issues” and “arguments”: you cannot raise an entirely new issue on appeal, but you can, in some cases, make new arguments relating to an already-raised issue. The distinction can be blurry – not least because courts have blurred it – but ignoring it is unwise. Finally, we describe a few of the accepted exceptions to waiver. The exceptions are well known, but hard to make compelling; we offer several suggestions on how to overcome that obstacle.

I. THE ROOTS AND RATIONALE OF WAIVER

Waiver’s roots trace deep into the 18th century, to the English common law.¹¹ The American judicial system inherited the English courts’ writ-of-error review rather than the equity review of English courts of chancery.¹² Our system, like the writ-of-error review system, is more concerned with resolving errors than with the amorphous (if commendable) goal of serving justice. And there

¹¹ See WILLIAM BLACKSTONE, COMMENTARIES 455 (“[I]t is a practice unknown to our law . . . when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below.”); Rhett R. Dennerline, Note, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 986 (1988).

¹² Dennerline, *supra* note 11, at 986; see also *United States v. Wonson*, 28 F. Cas. 745, 748 (C.C.D. Mass. 1812); *James Hoggatt’s Admr. & Admx. v. Abijah Hunt’s Executors*, 1 Miss. 216, 217, 1 Walker 216, 217 (1826).

are many virtues to an appellate system that reviews decisions below only for errors raised by the parties, even when the standard of appellate review is *de novo*.

First, waiver preserves order in the trial court. The Federal Rules of Evidence and Civil and Criminal Procedure require objections and proffers to be made when trial courts issue rulings and orders, and those provisions would ring hollow if the losing party could wait until the appeal to object.¹³ Attorneys, cautious to disrupt the rhythm of testimony or offend the judge (or anxious to keep a bird in hand), might save some objections for appeal, effectively sandbagging the opposing counsel and the trial judge.¹⁴

Second, waiver ensures efficiency. By requiring a party to raise all issues in the trial court, the waiver doctrine forces the parties to make their arguments up front so that the trial court may make a fully-informed decision.¹⁵ These considerations enhance the depth and quality of appeals, by ensuring that the issues and arguments have been crystallized and passed on at least once below for (potentially) precedential resolution above. Without waiver, appellate courts would have to consider all arguments that parties did not think to make (or chose not to make) below. The quality and depth of appellate decisions would suffer, and the appellate process would devolve into retrials.¹⁶

Third, waiver promotes fairness. Enforcing waiver at the appellate level avoids unfair surprise; the parties generally know what to expect

¹³ See Fed. R. Civ. P. 46; Fed. R. Evid. 103(a).

¹⁴ See *United States v. Vaghari*, 500 Fed. Appx. 139, 150 (3d Cir. 2012).

¹⁵ *Dennerline*, *supra* note 11, at 987; see also Fed. R. Evid. 103(a) – adv. comm. notes (stating that claims at trial must be “called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures”).

¹⁶ *Cf. United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000) (“To require a district court to consider evidence not previously presented to the magistrate judge would effectively nullify the magistrate judge’s consideration of the matter and would not help to relieve the workload of the district court. . . . Equally important, requiring the district court to hear evidence not previously presented to the magistrate judge might encourage sandbagging.”).

Ferrets and Truffles and Hounds, Oh My

and when to expect it.¹⁷ And as explained below, the doctrine is flexible enough to give way in exceptional circumstances where fairness demands it.

Fourth, waiver draws useful boundaries between the functions of trial and appellate courts. Trial and appellate courts are, in a sense, specialized courts of general jurisdiction: they are specialized in either forming or reviewing the records. Trial courts resolve discovery disputes, hear testimony, and take in other evidence – they make a record. Appellate courts review that record. To be sure, appellate courts on rare occasion have considered new evidence,¹⁸ but their institutional capacity for fact-finding is far more limited, making them ill-suited for resolving issues in the first instance. To blur the boundaries is to place appellate courts into unfamiliar territory, risking erroneous results that are unlikely to be corrected through further review.

In sum, waiver allows appellate courts to review a complete record, including the pertinent analysis of the lower court, and gives the parties a chance to sharpen their arguments for the immediate appeal, where the contentions will, in all likelihood, be resolved for the final time. Waiver makes our judicial system less chaotic and more efficient.

II. GETTING BEYOND WAIVER

The prospect of waiver should scare any conscientious lawyer. But in many cases, there are ways to get beyond waiver. We hope that the roadmap set forth below will help guide practitioners out of trouble, and onto the merits (where more trouble may await).

Before we begin, let's be clear: if you have failed to raise a claim or object to a ruling below, your argument is unlikely to be heard on appeal; if you established no factual basis for your contentions,

¹⁷ Dennerline, *supra* note 11, at 989.

¹⁸ See *Shahar v. Bowers*, 120 F.3d 211, 212 (11th Cir. 1997) (“Although we have inherent equitable power to supplement the record with information not reviewed by the district court, such authority is rarely exercised. The reason for this rule is that the district courts are the courts in which cases are to be litigated and decided initially.”) (internal citations, quotations, and alterations omitted).

your argument is unlikely to be heard; and if you did not seek to dismiss an action based on certain legal grounds, then those grounds almost certainly will not be heard on appeal. But lawyers tend to be a risk-averse, diligent bunch; they preserve most serious claims. As a result, waiver disputes on appeal tend to be fought in the margins, about refinements or extensions of arguments rather than new issues – about the scope and precision of objections rather than about objections that were unpreserved altogether.

So what should you do when faced with a waiver argument on appeal? First, don't panic (at least not yet). Waiver is a prudential doctrine, which means it does not deprive appellate courts of jurisdiction. And the Supreme Court has declined to articulate any general rule regarding waiver, leaving it “primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.”¹⁹ Unfortunately, appellate courts do not spend much time articulating the contours of the waiver doctrine and exceptions to it, often dismissing arguments (or arguments about waiver) with a back-of-the-hand citation to a waiver case. But taken as a whole, some general principles can be gleaned from appellate court decisions. Litigants looking for a game plan should consider our recommended steps.

A. Step One: Scour the Record Below

Scrub the record to find any trace of the waived issue. Your goal is to show that the issue was presented below – meaning that there would be no unfair surprise, and that the trial court at least had an opportunity to pass upon the issue.²⁰ You might not have focused on the key precedents or caught important twists, but you might have already raised the broader issue (even if indirectly) – which might just be enough. Was your point included in a larger one? Did the issue raise itself?²¹ Did you mention the issue in passing, at oral argument or a conference, or in a preliminary statement? Did the court address

¹⁹ Singleton v. Wulff, 428 U.S. 106, 121 (1976); see generally Aaron S. Bayer, *Waiver of Arguments*, NAT'L L.J. (2004).

²⁰ See Evans v. Sebelius, 716 F.3d 617, 623 (D.C. Cir. 2013).

²¹ United States v. Salazar, 751 F.3d 326, 332-33 (5th Cir. 2014).

Ferrets and Truffles and Hounds, Oh My

the issue sua sponte? Be sure to emphasize any trace of the issue with citations to the record. Remember, one goal of waiver is to prevent unfair surprise, so if the issue was raised in some fashion, and there was some opportunity to respond to or litigate it, that by itself may be sufficient.

B. Step Two: Consider Whether You Are Dealing with an “Issue” or “Argument”

After scouring the record for any helpful utterance about the waived issue, move on to the next question: is the issue really an issue, or just an argument? Practitioners and courts often treat new arguments and unpreserved issues interchangeably, assuming incorrectly that “unpreserved” arguments are as unwelcomed on appeal as unpreserved claims or issues.

The Supreme Court has drawn a sharp distinction between the two, writing in *Yee v. Escondido* that “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”²² In *Yee*, it was unclear whether the petitioner had raised in the lower courts a regulatory taking argument – rather than a physical taking argument – under the Fifth Amendment. It was likewise unclear whether the Court of Appeals had addressed the regulatory argument. And the two arguments are very different: a regulatory taking is a complaint against state action that diminishes property value; a physical taking is a complaint about government appropriation of property. But the Supreme Court explained that once a taking claim has been made, it preserves all variations of the arguments that can be made in support of the claim.²³

²² *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

²³ *Id.* at 534-35 (“Petitioners’ arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim – that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.”).

The Court adhered to this principle in *Lebron v. National Railroad Passenger Corporation*, where the plaintiff raised in the Supreme Court a First Amendment argument that he not only failed to raise below but had “expressly disavowed.”²⁴ In the two lower courts, the plaintiff had argued that Amtrak was a private company that was connected with federal entities; in the Supreme Court, however, he argued that Amtrak was not a private company but actually part of the government. The Court nevertheless addressed the new contention, viewing the new argument to be part of the same underlying claim.

This distinction between claims (or issues) and arguments is well established, if not well known – many lower courts have respected it, hearing arguments that they admit were not presented below because they tie to a consistent claim.²⁵ And commentators have treated it as black letter law.²⁶ Yet the Federal Reporter is brimming with dismissals of “arguments” made for the first time on appeal.²⁷ Some of these dismissals are only careless (not erroneous) because the underlying issues and claims were also new. Others are erroneous, though perhaps traceable to the attorney’s failure to present the distinction and to trace the issue back to the lower court proceedings. Either way, these statements perpetuate the myth that practitioners are limited by the precise arguments made below. They are not. Nor are they limited to the authority they found below; as one Court wrote, “[a]n argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court, and there is nothing wrong with that.”²⁸

²⁴ 513 U.S. 374, 378 (1995).

²⁵ See, e.g., *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1260 n.3 (9th Cir. 2010); *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1305 n.3 (11th Cir. 2008); *Teva Pharms., USA, Inc. v. Leavitt*, 548 F.3d 103, 105 (D.C. Cir. 2008).

²⁶ Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1526 (2012).

²⁷ See *LeMaire v. La. Dep’t of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007).

²⁸ *Puerta v. United States*, 121 F.3d 1338, 1342 (9th Cir. 1997); accord *Elder v. Holloway*, 510 U.S. 510, 513 (1994).

Ferrets and Truffles and Hounds, Oh My

We note, however, that at least one federal appeals court has gone farther, overtly breaking down the barrier between issues and arguments for purposes of preservation. Because the case – if followed elsewhere – is potentially a game-changer for purposes of the issues/arguments distinction, we will profile it in some detail.

The appeal in *United States v. Joseph* stemmed from a denial of a motion to suppress. In the proceedings below, the defendant argued that the police lacked probable cause to arrest him for possession of counterfeit bills because they could not have known that the bills were in fact fake. But on appeal, the defendant changed his argument against probable cause: he now argued that the officer could not have established his intent to defraud when arresting him. The Third Circuit’s decision turned on the “degree of particularity required for preserving an issue for appeal.”²⁹ The court accurately observed that its own cases, as well as those from other circuits, had been inconsistent in their approach to waiver – some cases referred to “arguments” or “contentions” or “theories”; others talked about “issues” or “theories” or “questions.”³⁰ It then announced the standard distinction between the two groups, explaining that “issues” are broader than “arguments,” such that a single issue can be pressed through different arguments.³¹

The surprise came in the holding: “[R]aising an issue in the District Court is insufficient to preserve for appeal all arguments bearing on that issue.”³² The defendant, the Court held, had to make the same probable cause argument below, based on the “same legal rule or standard” and subject to the same “legal analysis.”³³ It is difficult to square that conclusion with the rule announced by the Supreme Court – “parties are not limited to the precise arguments they made below.”³⁴ Once the defendant raised the claim that the evidence

²⁹ See *United States v. Joseph*, 730 F.3d 336, 339 (3d Cir. 2013).

³⁰ *Id.*

³¹ *Id.* at 341-42.

³² *Id.* at 341.

³³ *Id.* at 342.

³⁴ *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

against him should have been suppressed for lack of probable cause, Supreme Court precedent – which the Third Circuit did not attempt to distinguish – should have dictated that he be allowed to “make any argument in support of that claim.”³⁵ But *Joseph* held otherwise, and is the law in the Third Circuit.

So if you are in the Third Circuit, tread carefully, but (again) don’t panic. The court expressly limited its holding to waiver of suppression arguments in criminal cases, noting that it had no occasion to interpret other criminal rules or waiver in civil cases.³⁶ Other panels have extended *Joseph* to other contexts, albeit in unpublished opinions that are not binding.³⁷ And *Joseph* also left room for appellate counsel to “reframe their argument,” so long as the reframing is “within the bounds of reason.”³⁸ That leaves less wiggle room than the Supreme Court’s rule, but it allows creative attorneys some chance to avoid waiver.

Our second step to avoiding waiver is thus straightforward: ask yourself whether you can plausibly argue that you are presenting only a new argument in favor of a previously-raised issue or claim. If you happen to be in the Third Circuit, then decide whether you can recast the new argument as part of the old, highlight the narrowness of *Joseph*’s holding, and if all else fails, cite this article in an en banc petition to explain why *Joseph* was wrongly decided!

C. Step Three: Deploy An Exception to Waiver

Many attorneys begin with the exceptions, blowing by the actual record and the useful argument/issue distinction. Don’t make that mistake. But if you have considered our first two steps and are still

³⁵ *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

³⁶ *Id.* at 339 n.3.

³⁷ *See Greene v. V.I. Water & Power Auth.*, 557 Fed. Appx. 189 n.11 (3d Cir. 2014) (“*Joseph* simply reinforces distinctions between issues and arguments that have been recognized in civil appeals.”); *United States v. Dwumaah*, 570 Fed. Appx. 193, 196 (3d Cir. 2014) (“Although Dwumaah has repeatedly raised the *issue* of ineffective assistance, he raises for the first time on appeal the *argument* of ineffective assistance on the basis of affirmative misadvice.”).

³⁸ *Joseph*, 730 F.3d at 341.

Ferrets and Truffles and Hounds, Oh My

faced with the threat of waiver, resort to these exceptions. Though our survey of the exceptions is not exhaustive, it provides a good flavor of the types of exceptions that can help get beyond waiver.

1. Novel and Important Issues

Convincing a court that your otherwise waived issue is novel and important is one way around waiver. We clump together “novel” and “important” because courts frequently do as well (at times adding other factors too), and it is doubtful that one of these factors by itself is sufficient to persuade a panel to hear an entirely unpreserved argument. For instance, in declining to address an unpreserved, significant, but seemingly not novel question of law, the First Circuit stated that “[i]mportant issues of statutory interpretation require adequate briefing in all levels of the federal court system, and here we have none.”³⁹

As it turns out, “novel and important” is a familiar legal locution, used by appeals courts to accept a variety of cases they need not address: mandamus petitions, Rule 23(f) appeals from class certification orders, and general interlocutory appeals.⁴⁰ Mated with a truly weighty issue of first impression, the concept might resonate with some judges. After all, many judges relish resolving interesting and important issues, even when they are not quite ripe for resolution.

Consider the Supreme Court’s decision in *Comcast v. Behrend*.⁴¹ The Court granted certiorari on a question different from the one presented, with the change signaling that the review would address the interplay of *Daubert* and class certification. But once it became apparent that any *Daubert* challenge had been waived below, five Justices shifted the focus away from the expert report’s admissibility

³⁹ Cortés-Rivera v. Dep’t of Corr. & Rehab., 626 F.3d 21, 27 (1st Cir. 2010); accord Lesesne v. Doe, 712 F.3d 584, 588 (D.C. Cir. 2013); Thomas v. Crosby, 371 F.3d 782, 801 (11th Cir. 2004).

⁴⁰ See *In re MSTG, Inc.*, 675 F.3d 1337, 1341 (Fed. Cir. 2012); Reese v. BP Exploration, Inc., 643 F.3d 681, 688 (9th Cir. 2011); Maqaleh v. Gates, 620 F. Supp. 2d 51, 57 (D.D.C. 2009).

⁴¹ 133 S. Ct. 1426 (2013).

and onto its contents. Waiver did not stop them from reigning in class certifications in cases requiring expert reports. To be sure, it is difficult to draw any lessons from Comcast; indeed, few cases are amenable to such creative and subtle shifts. The point here is simply that important and weighty issues interest judges of all stripes, sometimes even enough to overcome pesky questions of preservation.

Of course, the exception is a narrow one. Just as frequently (and probably more frequently) courts reject new arguments that are admittedly both important and novel, at times precisely because of their novelty and importance. These courts have concluded that these factors compel careful briefing and analysis below.⁴²

2. Pure Issues of Law

Another exception covers novel and important issues that present pure questions of law. The rationale for the exception is relatively simple: when the unpreserved issue is completely detached from the facts (and thus requires no factual development), any input from the trial court becomes less helpful – particularly where the standard of review is *de novo*.⁴³ In those circumstances, the appellate court would give no deference to the district judge’s analysis even if it existed – at least in theory. (In reality, a district court’s reasoning is perhaps the most important part of the record on appeal, regardless of how much deference it receives.) And even where the standard is deferential, an appellate court is in as good a position as the trial court to decide a legal issue.

For these reasons, federal appellate courts have often excused parties from re-raising “purely legal” arguments in Rule 50 motions after they have been rejected at summary judgment – a failure that might otherwise constitute waiver. As the D.C. Circuit has explained, nothing that happened during trial could have changed the

⁴² See *Forestal Guarani S.A. v. Daros Int’l, Inc.*, 613 F.3d 395, 404 (3d Cir. 2010); *United States v. Samaniego-Lara*, 371 Fed. Appx. 776 (9th Cir. 2010).

⁴³ See *Paese v. Hartford Life & Accident Ins. Co.*, 449 F.3d 435, 446-47 (2d Cir. 2006). More fundamentally, “there are certain issues, such as subject-matter jurisdiction, which cannot be waived.” *Huber v. Taylor*, 469 F.3d 67, 74 (3d Cir. 2006).

Ferrets and Truffles and Hounds, Oh My

legal issue – that is, no relevant evidence could have been put on regarding the issue.⁴⁴

Although some have questioned whether any issue can be “purely legal,”⁴⁵ there is little doubt that characterizing issues in this fashion will advance an advocate’s chance of having an unpreserved issue heard on the merits. For instance, the Third Circuit has explained that because waiver is designed to ensure evidentiary development at the trial level and prevent surprise, a purely legal issue that is fully briefed on appeal is a good candidate for a waiver exception.⁴⁶ But again, this exception is no guaranteed ticket around waiver. As the Eleventh Circuit has recently observed, “courts regularly find that appellants waived purely legal arguments.”⁴⁷

3. Fairness (When All Else Fails)

If the first two exceptions are aimed at the judges’ heads, the last tugs at their hearts. Echoing the statutory command of 28 U.S.C. § 2106, appellate courts will generally overlook waiver where doing so is fair or, more aptly put, necessary to avoid a “manifest injustice.” As the D.C. Circuit explained decades ago, § 2106 empowers appellate courts “not only to correct error in the judgment entered below, but to make such disposition of the case as justice may . . . require.”⁴⁸ But litigants risk overplaying their cards when they summon broad notions of justice to argue against waiver – justice may cut both ways (e.g., against resolving an issue for the first time on appeal against an unsuspecting adversary), and judges will not want to let the fairness exception swallow the waiver rule. Contentions about fairness must be drawn more narrowly to be compelling.

⁴⁴ *Feld v. Feld*, 688 F.3d 779, 782-83 (D.C. Cir. 2012) (collecting cases).

⁴⁵ Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1034 (1987).

⁴⁶ *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 418 (3d Cir. 2011); *accord Citibank (S.D.), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1085 n.2 (9th Cir. 1996).

⁴⁷ *FTC v. Abbvie Prods. LLC*, 713 F.3d 54, 65 (11th Cir. 2013).

⁴⁸ *Brownell v. Kaufman*, 251 F.2d 374, 375 n.1 (D.C. Cir. 1957).

Though a last resort, an attorney should always weave notions of fairness into the brief, convincing the court that getting beyond waiver is the fair thing to do. Did something (or someone) get in the way of raising an issue? Are the consequences of waiver too harsh in your case? Did the other party know the issue would be raised? As always, it pays to think creatively.

CONCLUSION

Waiver comes in many forms and it can strike at any stage of litigation. On appeal, it may lurk in the background until oral argument, when the judge raises unexpected questions about preservation. Indeed, as experience and case law suggest, appellate courts will frequently give the record a good scrub, just to assure themselves that each issue and argument was adequately preserved below. (And yes, you can also waive your waiver argument.⁴⁹) Though there are many ways to waive an argument – for example, by putting it only in a footnote⁵⁰ – we have focused on a particularly common and pernicious one: failure to raise it below. We hope this article will help a seasoned litigator get beyond it.



⁴⁹ *Ramdass v. Angelone*, 530 U.S. 156, 208 n.35 (2000).

⁵⁰ *E.g.*, *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6th Cir. 2005).