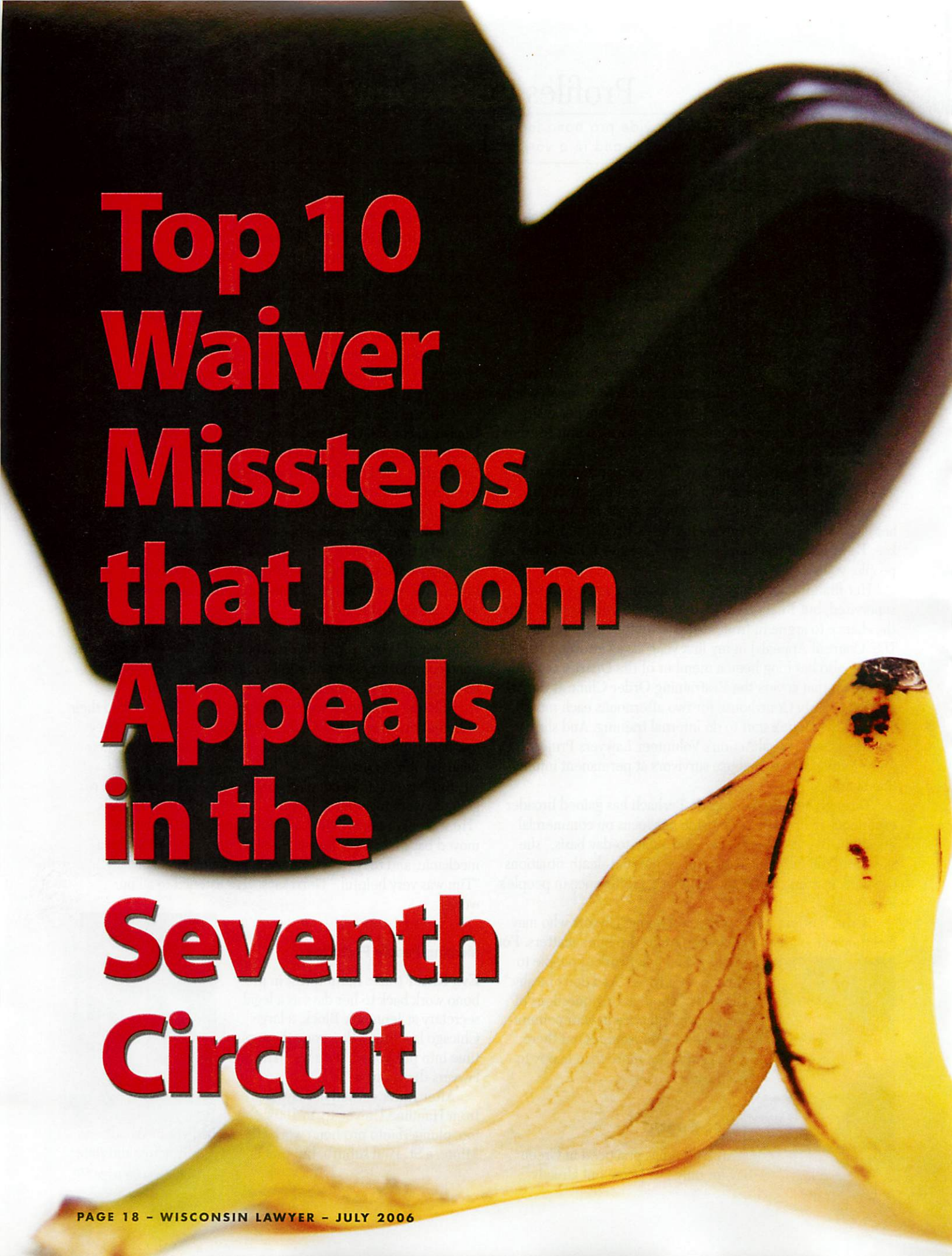
Top 10 Waiver Missteps that Doom Appeals in the Seventh Circuit



Missteps that can occur throughout the life of a lawsuit may serve to waive an issue and thus doom an appeal. Here's an overview of – and tips on how to avoid – the top 10 waiver missteps that may occur before, during, and after the trial of civil cases, as reflected in Seventh Circuit opinions.

by Timothy J. Storm

A losing federal court litigant has the right to appeal to the circuit court of appeals, but the ability to obtain an effective appeal may depend on whether the key issues have been properly preserved for review. Unwelcome opportunities to waive issues in the trial court and thereby doom an eventual appeal can arise throughout the life of a lawsuit. This article provides a brief overview of some basic steps to take to avoid the 10 most common types of waivers that may occur before, during, and after the trial of civil cases, as reflected in opinions of the U.S. Court of Appeals for the Seventh Circuit.[1]

Consider just a few situations in which a small misstep in the district court may lead to big waiver problems on appeal:

Example 1. Your client, a large company, is the defendant in a federal court suit that could potentially cost it millions of dollars. Very early in the litigation, your opponent serves a broad discovery request seeking, among other things, hundreds of pages of documents reflecting communications between your client's general counsel and the company's upper level management. You assert attorney-client privilege and provide a privilege log, which your opponent promptly challenges. You request that the district judge conduct an in camera inspection of the disputed documents, but he refuses to do so because the task would be "unmanageable." Instead, the judge agrees to review only a "sample" consisting of 10 documents from the privilege log. After conducting the review, the judge determines that most of the documents in your log are not privileged and enters an order requiring disclosure of all the disputed documents.[2]

If your client complies with the order and produces the documents, it can still appeal the erroneous discovery order at the end of the case. By that time, however, all of the privileged information will have been disclosed to the other side and may have been used against your client. If you refuse to produce the documents, the court likely will impose severe sanctions, possibly including a judgment against your client.

The judge is wrong, and you know it. But what do you do to preserve the issue and obtain prompt appellate review? (Hint: See tip 3, below.)

Example 2. You represent an employer being sued by a discharged employee who alleges that his firing resulted from age discrimination. Your client asserts that the firing was part of a downsizing. At trial, you intend to introduce into evidence a worker's compensation settlement agreement the plaintiff signed, stating that his "job was eliminated due to corporate downsizing." During a sidebar, the plaintiff's lawyer objects to admission of the document and states that, if it were introduced, he would present evidence that your client drafted the document and that the plaintiff merely signed on the dotted line to get his sorely needed worker's compensation. After hearing all of that, the judge says, "I agree," and immediately returns to the bench, anxious to get on with the trial.[3]

What do you do now? How you respond may either preserve or waive your client's ability to use critical evidence. (See tip 6, below.)

Example 3. Your client has endured the long and expensive defense of a highly contentious case. You have advised her that it appears likely that she will prevail on summary

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TIMOTHY J. STORM, JOHN MARSHALL 1992 WITH HONORS, IS THE PRINCIPAL OF TIMOTHY J. STORM P.C., WITH OFFICES IN CHICAGO AND WAUCONDA, ILL., CONCENTRATING IN APPELLATE LITIGATION IN STATE COURTS OF REVIEW, THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND THE FEDERAL COURTS OF APPEALS OF OTHER CIRCUITS. IN 13-PLUS YEARS OF APPELLATE PRACTICE, HE HAS HANDLED MATTERS IN A VARIETY OF AREAS, INCLUDING CLASS ACTIONS, CRIMINAL DEFENSE, COMPLEX BUSINESS OWNERSHIP AND CONTROL DISPUTES, AND CONSTITUTIONAL ISSUES.

judgment. Before you have the opportunity to file a summary judgment motion, however, the plaintiff "disappears." After giving the plaintiff several chances to pursue the case, the trial court dismisses the case without prejudice for want of prosecution. When the plaintiff resurfaces, the district court denies a motion for reconsideration or relief from the judgment, and the plaintiff appeals.[4] Your client is unhappy with the dismissal because she understands that the case may be refiled, and she believes that the case should have been dismissed with prejudice on the merits.

To have a chance of achieving a dismissal with prejudice, do you need to file a cross-appeal? (See tip 10, below.)

The Meaning and Importance of Waiver

The starting point for avoiding costly waiver mistakes is recognizing that the parties on appeal are limited to the record created in the district court.[5] The court of appeals generally considers only those issues and arguments that were first presented to the district court and were properly preserved for appellate review.[6]

In many cases, issues cannot be addressed on appeal because the trial attorney did not take care to create a complete record in the trial court. A waiver is an "'intentional relinquishment or abandonment of a known right.'"[7] Although defined as "intentional," many waivers of appellate issues are not intentional in the sense that the trial attorney purposefully waived the right. Rather, many "intentional" waivers are more accurately characterized as inadvertent because they arise from the attorney's lack of attention to matters that may seem insignificant in the district court but that gain importance when the case advances to appeal.[8]

Waiver "extinguishes" any error for purposes of appeal.[9] Therefore, it is particularly important for the trial attorney to create a record in the district court that will preserve all necessary issues and arguments on appeal.

Tips to Avoid Waiver Before Trial

1) Protect the claims in an improperly dismissed complaint. Dismissal of a complaint without prejudice ordinarily is not a final and appealable order because the plaintiff is free to replead.[10] A plaintiff confronted with an order of dismissal without prejudice has three options:

1) amend the complaint to include allegations that conform with the ruling;

2) stand on the complaint and wait for the dismissal to become final; or

3) amend the complaint, omitting the previously dismissed claim(s).

Option 1. The plaintiff who repleads to conform with the district court's ruling is considered to abandon the previous claim or position and thereby to waive any error in the dismissal of the prior complaint.[11] To avoid waiving or abandoning arguments, the plaintiff must pursue either option 2 or option 3.

Option 2. The plaintiff may stand on the dismissed complaint, wait for the dismissal to become final, and then appeal.[12] The dismissal will become appealable when the court enters a dismissal with prejudice.[13] Even if the district court does not eventually enter an order of dismissal with prejudice, the dismissal becomes final and appealable when the time to file the amended pleading expires.[14]

Option 3. The plaintiff may replead and omit the previously dismissed claim. The dismissal of that claim may then be appealed when the case is concluded by judgment.[15]

2) Object to a magistrate's report within the required time. A party who has objections to a magistrate's report and recommendation must file those objections with the district court before the court adopts the magistrate's recommendations.[16] The statute allows 10 days for such submissions,[17] and failure to act within that time ordinarily "waives the right to appeal all issues, both factual and legal" that were addressed in the magistrate's report.[18]

The time limits for objecting are usually enforced, but "under certain circumstances the failure to file [timely] objections may be excused because the rule is not jurisdictional and should not be employed to defeat the 'ends of justice.'"[19] For example, the Seventh Circuit has sometimes treated parties who filed objections late more leniently than it has treated parties who filed no objections at all. Late filings have been excused when "the filing was not egregiously late and caused not even the slightest prejudice to the appellees."[20]

On appeal, a party's appellate challenges to the district court's findings based on a magistrate's report and recommendation are limited to the issues that the party raised before the district court.[21] While objections in the district court must specify each issue for which review is sought, it is not necessary to fully state the factual or legal basis of each objection to avoid waiver.[22]

3) Withhold production in the face of erroneous discovery orders. An order directing a party to comply with certain discovery requests is not a final and appealable order.[23] Compliance with the order may not technically waive appellate challenges to the propriety of the order, but because compliance may have substantial negative consequences to the objecting party, immediate review is urgently desired. In this circumstance, "the right means to secure review of a discovery order is to disobey, suffer the consequences under Fed. R. Civ. P. 37(b)(2), and then appeal from the final decision if the district court's resolution affects the final judgment."[24] No means of obtaining interlocutory review, such

as a petition for mandamus, is available with respect to discovery orders.[25]

Thus, in Example 1, the best course of action is to refuse to produce the privileged documents, even if doing so means facing an adverse judgment. No means of immediate review is available and to do other than refuse production would compromise the integrity of the privileged documents.

4) Seek a mandamus if the trial judge denies a recusal motion. By contrast to the rule for discovery orders, a petition for mandamus is sometimes the only proper way to obtain review of an erroneous district court decision. A party who wishes to maintain an objection to the presiding district judge after the court denies a motion for recusal under 28 U.S.C. § 455 must petition the court of appeals for a mandamus before the case is tried.[26] Failure to seek mandamus waives objection to the judge.[27]

Tips to Avoid Waiver at Trial

5) Make specific, timely objections to evidence. When trial counsel affirmatively represents that there is no objection to the admission of certain evidence, it is obvious that the party waives arguments to the contrary.[28] There are other, less obvious but no less harmful, ways to waive evidentiary objections.

To preserve a claim of error concerning the admission of evidence, counsel must raise an objection to the evidence before the district court either in a pretrial motion *in limine* or by an objection at trial. If the trial court denies an *in limine* motion, there is no need for counsel to object at the time the evidence is offered at trial to preserve the objection for review.[29]

If there has been no such definitive ruling of record, counsel must object at the time the evidence is offered at trial or move to strike the evidence.[30] On appeal, an argument that evidence that was admitted should have been excluded is limited to the grounds stated in the trial court; all other grounds are waived.[31] That is why the trial attorney must be sure to "spell out [the] specific ground for objection at the time it is made."[32] Counsel also may preserve a challenge to evidence by seeking a specific continuing objection to the introduction of the evidence.[33]

6) Present an offer of proof for excluded evidence. A trial judge's definitive pretrial ruling to exclude evidence relieves the proponent of the evidence of the need to make further efforts to seek admission of the evidence.[34] When there has been no pretrial ruling or when the district court's ruling "invite[s] a further response from counsel,"[35] counsel cannot maintain claims of error concerning the exclusion of evidence unless the substance of the evidence either was made known to the court by offer of proof or was apparent from the context in which the evidence was offered.[36]

An offer of proof enables the reviewing court to determine whether the evidence would have been helpful.[37] A party need not make a formal offer of proof.[38] However, completely failing to make an offer of proof results in a waiver or forfeiture on appeal of any error in the exclusion of the evidence in question unless the substance of the excluded evidence is clearly present in the record.[39]

As with any issue on appeal, the party must obtain a clear and unambiguous ruling from the district judge to be able to raise that ruling as error. The trial judge's failure to rule on a motion or objection, or the issuance of an ambiguous ruling, cannot be challenged on appeal.[40]

Thus, in Example 2, the trial attorney should specifically request that the trial judge explicitly rule on opposing counsel's objection to the evidence. When faced with an ambiguous ruling or the lack of a ruling, the burden is on the proponent of the evidence to take the steps necessary to clarify the record.

7) Move for judgment as a matter of law at the close of evidence. After a trial on the merits, the court of appeals generally will not review the district court's earlier denial of a motion for summary judgment.[41] Instead, the focus

(continued on page 61)

Avoid the Top 10 Waiver Mistakes

Before trial:

1) Protect the claims in an improperly dismissed complaint, by:
   a) amending the complaint in accordance with the ruling, or
   b) standing on the complaint and waiting for the dismissal to become final, or
   c) amending the complaint, omitting the previously dismissed claim(s).
2) Object to a magistrate's report within the required time.
3) Withhold production in the face of erroneous discovery orders.
4) Seek a mandamus if the trial judge denies a recusal motion.

During trial:

5) Make specific, timely objections to evidence.
6) Present an offer of proof for excluded evidence.
7) Move for judgment as a matter of law at the close of evidence.
8) Do not miss objections during closing arguments.
9) Make a clear record during the jury instruction conference.

After trial:

10) File the notice of appeal on time!

(from page 21)

is on the fully developed record as presented at trial. Therefore, to preserve for appeal a challenge to the sufficiency of the evidence, counsel must bring a motion for directed verdict pursuant to Fed. R. Civ. P. 50(a).[42] With very limited exceptions, failure to make such a motion at trial will preclude appellate review of the sufficiency of the evidence.[43]

8) Do not miss objections during closing arguments. Generally, objections to prejudicial remarks during closing argument are preserved for appeal only if the opponent objects at the time the comments are made.[44] Objections to errors alleged to have occurred during closing argument must be made at the latest before the case is submitted to the trier of fact.[45] In that way, the trial judge has the chance to provide curative instructions.[46]

Because objections in jury cases must be made before the jury retires, a strategic decision to wait until after the opponent's closing argument to interpose an objection may be acceptable. A decision not to object at all, even if made for strategic reasons, operates as a waiver of the issue. The Seventh Circuit has specifically commented that neither "trial tactics nor mere temerity will excuse counsel's failure to object to a remark made in closing argument"[47] and that "risky gambling tactics such as this are usually binding on the gambler."[48]

9) Make a clear record during the jury instruction conference. A party may raise the failure to give a jury instruction as error on appeal only if the party asked that the particular instruction be given.[49] Accordingly, proposed instructions – in writing and in full – should be provided to the trial court.

As to instructions that are given to the jury, a party who does not object to the proposed instruction before the trial court waives any objection to that instruction on appeal.[50] The party objecting to an instruction must provide the reviewing court with a transcript of the jury instruction conference to establish that the party raised the argument that is being advanced on appeal.[51]

In addition, the objection must be specific enough that the "nature of the error is brought into focus."[52] The party must explain what is wrong with the instruction; it is not enough to simply submit an alternative instruction.[53] Moreover, grounds of objection on appeal are limited to those grounds that were stated at trial,[54] and all other "substantively separate and distinct grounds for objections" are waived.[55]

A narrowly construed exception to the objection requirement may exist when: 1) the party's position has been previously made clear to the court; and 2) it is clear that further objection would be unavailing and futile.[56] Even in situations that might arguably fit within the exception, prudence dictates that objections be spelled out on the record during the instruction conference.

Tips to Avoid Waiver After Trial

10) File the notice of appeal on time! Finally, except in the tiny and unpredictable minority of cases in which the court of appeals may find "unique circumstances" permitting late filing,[57] the notice of appeal must be filed within the original time provided by rule (usually 30 days) or within any extension of the original time granted by the district court pursuant to rule.[58] In the ultimate example of waiver, failing to timely file the notice of appeal deprives the court of appeals of jurisdiction to hear the case[59] and thereby precludes appellate review of *all* issues.[60] Any party who seeks affirmative relief from the judgment must cross appeal. A party who fails to cross appeal may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary."[61]

Thus, in Example 3, the appellee also must file a notice of appeal. If a party who has benefited from a dismissal without prejudice wishes to obtain a dismissal with prejudice, a cross-appeal is necessary to permit the court of appeals to hear the request for additional relief.

Conclusion

The "top 10" list is not exhaustive. There are many additional ways to stumble into waiver of issues on appeal. Yet by being particularly aware of the top 10 categories and taking basic, but vital, steps to preserve the record in the district court, trial counsel can easily avoid the types of waivers that are most likely to doom a case to defeat on appeal.

Endnotes

[1]Treatment of certain waiver issues varies between federal circuits. This article addresses only decisions of the Seventh Circuit.
[2]Suggested by the facts of *American National*

Bank & Trust Co. v. Equitable Life Assurance Society of the United States, 406 F.3d 867 (7th Cir. 2005).

[3]Suggested by the facts of *Kasper v. St. Mary of Nazareth Hospital*, 135 F.3d 1170 (7th Cir. 1998).

[4]Suggested by the facts of *Harrington v. City of Chicago*, 433 F.3d 542 (7th Cir. 2006) and *Hanna v. City of Chicago*, 65 Fed. Appx. 565 (7th Cir. 2003).

[5]*Williams v. Leach*, 938 F.2d 769, 773 (7th Cir. 1991).

[6]*Dixon v. Chrans*, 986 F.2d 201, 203 (7th Cir. 1993).

[7]*United States v. Griffin*, 84 F.3d 912, 924 (7th Cir.1996) (*quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

[8]In a technical sense, there is a distinction between "waiving" an issue, which precludes appellate review, and the lesser act of "forfeiting" an issue by failing to timely assert a position, which does not preclude appellate review. *See Griffin*, 84 F.3d at 924. Although most of the "top 10" seem more likely to fall into the category of forfeitures, they are generally treated as waivers in the Seventh Circuit.

[9]*United States v. Pree*, 408 F.3d 855, 872 (7th Cir. 2005).

[10]*Barnes v. Briley*, 420 F.3d 673, 676 (7th Cir. 2005).

[11]*Alejo v. Heller*, 328 F.3d 930, 935 (7th Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004).

[12]*McElroy v. Lopac*, 403 F.3d 855, 858 (7th Cir. 2005).

[13]*Alejo*, 328 F.3d at 935.

[14]*Tifft v. Commonwealth Edison Co.*, 366 F.3d 513, 516 n. 3 (7th Cir. 2004).

[15]*Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990) ("It is not waiver – it is prudence and economy – for parties not to reassert a position that the trial judge has rejected").

[16]*Grosland v. Barnhart*, 127 Fed. Appx. 226, 227-28 (7th Cir. 2005).

[17]28 U.S.C. § 636(b)(1).

[18]*Video Views Inc., v. Studio 21 Ltd.*, 797 F.2d 538, 539 (7th Cir. 1986) (adopting the waiver rule for the Seventh Circuit).

[19]*Id.* at 540.

[20]*Hunger v. Leininger*, 15 F.3d 664, 668 (7th Cir. 1994).

[21]*Willis v. Caterpillar Inc.*, 199 F.3d 902, 905 (7th Cir. 1999). *See also* Fed. R. Civ. P. 72(b).

[22]*Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 741 (7th Cir. 1999) (interpreting Fed. R. Civ. P. 72(b)).

[23]*Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003).

[24]*In re Brown & Brown Inc.*, 107 Fed. Appx. 679, 679 (7th Cir. 2004).

[25]*Id.* at 679-80.

[26]*United States v. Franklin*, 197 F.3d 266, 269 (7th Cir. 1999).

[27]*United States v. Farrington*, 27 Fed. Appx. 640, 643 (7th Cir. 2001). The requirement does not apply to recusal motions brought pursuant to 28 U.S.C. § 144. *Marozsan v. United States*, 90 F.3d 1284, 1290 n. 9 (7th Cir. 1996).

[28]*United States v. Redditt*, 381 F.3d 597, 602 (7th Cir. 2004).

[29]Fed. R. Evid. 103(a). *See also Wilson v. Williams*, 182 F.3d 562, 567 (7th Cir. 1999).

[30]Fed. R. Evid. 103(a)(1). *See also King v. Wal-Mart Stores Inc.*, 50 Fed. Appx. 786, 788 (7th Cir. 2002).

[31]*Wilson*, 182 F.3d at 567.

[32]*Miksis v. Howard*, 106 F.3d 754, 761 (7th Cir. 1997).

[33]*Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 n.2 (7th Cir. 1987).

[34]Fed. R. Evid. 103(a).

[35]*Vaughn v. King*, 167 F.3d 347, 353 (7th Cir. 1999).

[36]Fed. R. Evid. 103(a)(2).

[37]*Okai v. Verfuth*, 275 F.3d 606, 612 (7th Cir. 2001).

[38]*Id.*

[39]*United States v. Vest*, 116 F.3d 1179, 1189 (7th Cir. 1997).

[40]*Franklin*, 197 F.3d at 270 (failure to rule); *Kasper*, 135 F.3d at 1176 (ambiguous ruling).

[41]*Watson v. Amedco Steel Inc.*, 29 F.3d 274, 277 (7th Cir. 1994).

[42]*Chemetall GMBH v. ZR Energy Inc.*, 320 F.3d 714, 719 (7th Cir. 2003).

[43]*Hudak v. Jepsen of Ill.*, 982 F.2d 249, 250 (7th Cir. 1992).

[44]*Doe v. Johnson*, 52 F.3d 1448, 1465 (7th Cir. 1995).

[45]*Deppe v. Tripp*, 863 F.2d 1356, 1364 (7th Cir.1988).

[46]*Holmes v. Elgin, Joliet & E. Ry. Co.*, 18 F.3d 1393, 1398 (7th Cir. 1994).

[47]*Carmel v. Clapp & Eisenberg P.C.*, 960 F.2d 698, 704 (7th Cir. 1992) (internal citations omitted).

[48]*Gonzalez v. Volvo of Am. Corp.*, 752 F.2d 295, 298 (7th Cir.1985).

[49]*King*, 50 Fed. Appx. at 787.

[50]Fed. R. Civ. P. 51(d). *See also Calhoun v. Ramsey*, 408 F.3d 375, 379 (7th Cir. 2005).

[51]*Fisher v. Krajewski*, 873 F.2d 1057, 1068 (7th Cir. 1989).

[52]*Schobert v. Illinois Dep't of Transp.*, 304 F.3d 725, 730 (7th Cir. 2002).

[53]*Pena v. Leombruni*, 200 F.3d 1031, 1035 (7th Cir. 1999).

[54]*Schobert*, 304 F.3d at 730.

[55]*Harper v. Albert*, 400 F.3d 1052, 1068 n.21 (7th Cir. 2005).

[56]*Chestnut v. Hill*, 284 F.3d 816, 820 (7th Cir. 2002).

[57]*Fogel v. Gordon & Glickson*, 393 F.3d 727, 731-32 (7th Cir. 2004).

[58]Fed. R. App. P. 4.

[59]*Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 994 (7th Cir. 2000).

[60]*Browder v. Director, Dep't of Corrections of Ill.*, 434 U.S. 257, 264 (1978).

[61]*Hanna v. City of Chicago*, 65 Fed. Appx. 565, 566 (7th Cir. 2003) (*quoting El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999), *quoting United States v. American Ry. Exp. Co.*, 265 U.S. 425, 434 (1924)).