
From: Michael Chagares
Sent: Tuesday, March 3, 2020 8:52 PM
To: Raymond Kethledge
Cc: Sara Sun Beale; Nancy King; David Campbell; Rebecca Womeldorf; Ed Hartnett; Catherine T Struve; Coquillette, Daniel
Subject: Suggestion for a Rules Study Regarding Variants of Waiver

Dear Ray:

I had a suggestion that the Advisory Committee on the Criminal Rules might want to study.

The Supreme Court in Hamer v. Neighborhood Housing Services of Chicago, 138 S. Ct. 13, 17 n.1 (2017), reminded us all of the important distinction between waiver and forfeiture and observed that courts and attorneys have frequently overlooked the difference. The Court previously held that "forfeiture is the failure to make the timely assertion of a right," while "waiver is the 'intentional relinquishment or abandonment of a known right.'" United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The consequences of a waiver and a forfeiture are significant and indeed distinct — particularly regarding whether a waived or forfeited matter may be resurrected. See Wood v. Milyard, 566 U.S. 463, 471 n.5 (2012) (observing that "a federal court has the authority to resurrect only forfeited defenses"); Olano, 507 U.S. at 733 ("Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under [Federal Rule of Criminal Procedure] 52(b).").

I have been reviewing the criminal rules and think that there are some rules your committee may want to review to ensure that a variant of "waiver" was not used indiscriminately or improperly. Of course, uses of waiver (or variants thereof) in the rules may reflect deliberate policy choices. Below is a short, non-exclusive list of rules that might warrant study by the committee:

Rule 49.1(h) – note that the Rule provides that "[a] person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal." The 2007 Advisory Committee Note acknowledges that indeed a person "may wish to waive the protection," but it also states that "[i]f a person files an unredacted identifier by mistake, that person may seek relief from the court." (emphasis added).

Rules 59(a), (b)(2) – the Rules provide that the "[f]ailure to object in accordance with this rule waives a party's right to review." But a failure to object is generally the classic example of a forfeiture, see, e.g., Brown v. Colvin, 845 F.3d 247, 254 (7th Cir. 2016), and, as one court has noted, "[c]lassifying a failure to object as a waiver when a right is well known and regularly involved would largely collapse the distinction between waiver and forfeiture" United States v. Chavarria-Ortiz, 828 F.3d 668, 671 (8th Cir. 2016). That has apparently led at least a few courts to treat "waiver" under these Rules as a forfeiture. See, e.g., United States v. Kelley, 774 F.3d 434, 439 (8th Cir. 2014)

("Because Rule 59(a) . . . 'is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice.'" (quoting Thomas v. Arn, 474 U.S. 140, 155 (1985)); United States v. George, 573 F. App'x 465, 471 (6th Cir. 2014). Further, the 2005 Advisory Committee Note states that "[d]espite the waiver provisions [in Rules 59(a) and (b)], the district court retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed."

Best,

Mike