CARLTON FIELDS

The Air of Preservation Is Now Filled With "Specific" Arguments

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To win, trial lawyers must master the art of persuasion. But when they lose, they are tested by their mastery of the art of preservation. As standards of review in appellate courts have become increasingly demanding, preservation often requires coordination with your appellate attorney.

It used to be safe for trial lawyers to preserve "issues" for appeal. Appellate lawyers could then refine those issues with more detailed arguments in their briefs. But increasingly, appellate judges are rejecting this approach. The evolution began in criminal cases. For example, the Florida Supreme Court in *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) held that an "argument" was not "cognizable" unless "the specific contention" was argued in the trial court. Now, even civil appeals in Florida are often rejected because the "specific" legal argument was not made below.

The Eleventh Circuit still allows "new arguments relating to preserved claims" to be reviewed on appeal. *Black v. Wigington*, 811 F.3d 1259, 1268–69 (11th Cir. 2016). But the Third Circuit has written a scholarly opinion distinguishing "issues" from "arguments" and concluding that "arguments" must be preserved with "exacting" "particularity." *U.S. v. Joseph*, 730 F.3d 336 (3d Cir. 2013).

The point is that trial lawyers must assume that their issues will need to be argued as effectively in the trial court as in the appellate court.

Preservation Issue(s):

- Increasingly appellate courts expect to hear the identical argument from appellate counsel that trial counsel made below.
- This means trial counsel needs to coordinate with appellate counsel early.

Tip(s):

Not every case can justify an appellate lawyer on the trial team. But most cases have strategic events that warrant at least a short consult with your appellate lawyer, or at least with another legal mind. Identify those strategic events early in a case, try to specify the arguments that help you with those events, and don't go it alone. Even when you are allowed to make an oral argument, consider filing a written argument because it will be more specific and can be prescreened by your appellate lawyer. If you are caught off guard by a critical issue, it is better to tell the court that fact and ask for a moment to reflect on a specific argument than to bluff your way through. If you lose on a critical issue and you think your argument may not be sufficiently specific, try to upgrade that argument before it is too late. Sometimes a good motion for rehearing will create the specificity you need. *See Waksman Enterprises, Inc. v. Oregon Properties, Inc.,* 862 So. 2d 35 (Fla. 2d DCA 2003).

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