


Yes Counselor You Argued That Below, But No It Is Not Preserved

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 Don't assume that just because your argument is clearly reflected somewhere in the record that it is preserved for appeal. Often for purposes of preservation, the procedural context for the argument is just as important as the argument itself. For example, in *Goss v. Board of County Commissioners*, Nos. 14-5128, 15-5004, 2016 WL 1638086 (10th Cir. Apr. 26, 2016), the plaintiffs raised two distinct arguments before the clerk of court in opposing a costs award. After the clerk awarded costs, the plaintiffs challenged the award before the District Court but failed to specifically raise there either of the arguments they had presented to the clerk. On appeal, the Tenth Circuit acknowledged that the arguments made to the clerk were in the record, but nonetheless held that the costs challenge was not preserved for appeal. Even though the plaintiffs sought review of the costs award before the District Court as required by Rule 54(d)(1), “[r]aising the issue before the Clerk of Court does not qualify as raising it before the district court.” **Preservation Issue:**

- Even an argument that is clearly reflected in the record is not preserved for appeal unless it is raised in the proper procedural context. Make sure to present your arguments to the final decision-maker on the issue, even if that requires repetition or reference to other filings.

Tip: Many litigants think that the analysis of whether an issue is preserved goes only so far as asking whether it was raised below. But *Goss* shows why that approach is incomplete: *how* an issue is raised and *by whom* it is ruled upon can likewise make or break the availability of appellate review. *Goss* demonstrates this principle in the context of costs, but many other common circumstances present the same danger. Litigants should be particularly vigilant to avoid this preservation pitfall any time multiple decision-makers are involved, e.g., when arguing before a magistrate, litigating administrative proceedings, or petitioning for second-tier certiorari. Of course, the rules will vary by jurisdiction and court, so make sure to consult the appropriate Local Rules and other procedural authorities in your jurisdiction during your evaluation. Ultimately, as the practice of law grows increasingly complex and sees more delegation of decision-making authority, *Goss* illustrates the importance of strict adherence to the requirements of error preservation. Further, it underscores the wisdom of engaging appellate counsel early in the case to make sure that any errors in the proceeding are properly raised so as to be correctable on appeal.

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