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Dangerous Traps in the Fourth Circuit: Three Easy Ways to Lose an Issue on Appeal

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One of the core competencies of a good appellate lawyer is spotting arguments that have been preserved.

Whether you're the appellant or the appellee, knowing when an argument is properly preserved goes a long way.

The United States Court of Appeals for the Fourth Circuit publishes very few opinions, so finding a roadmap for issue preservation can sometimes be tricky. In this article, we'll highlight three common questions about practice before the Court, set out the Court's rules on each, and offer practical advice to help alleviate the stress of responding to a waiver argument.

1. Motions in limine preserve issues, but only if done correctly.

Trial lawyers love a motion in limine. It's often a smart way to lock in a ruling and avoid mid-trial scrambles. But in the Fourth Circuit, just filing one doesn't mean you've preserved all related issues for appeal.

The Court said as much in *United States v. Williams*, 81 F.3d 1321 (4th Cir. 1996). The defendant in that case filed a motion in limine requesting that, if his wife attempted to invoke spousal privilege, the court decide the issue outside the jury's presence. But the court never ruled on the motion, and when the wife took the stand, defense counsel didn't object.

On appeal, the defendant argued his wife's testimony was privileged and should've been excluded. The Fourth Circuit disagreed: that exclusion issue wasn't preserved. Why? Two reasons. First, the motion in limine never directly challenged the testimony—it just asked for a sidebar if privilege came up. Second, the court never ruled on the motion. And although the defense could've preserved the issue by objecting when the testimony was offered, he never did.

The upshot: A motion in limine preserves an issue only if: (1) the party raises the exact argument later asserted on appeal, and (2) the court issues a definitive ruling on that issue. A vague motion or

a provisional ruling won't cut it. If your pretrial motion is denied—or the ruling isn't crystal clear—you need to object again.

2. Even if you don't have to, raise even losing arguments.

When precedent clearly bars your argument, it can feel pointless to make it. Fortunately, in the Fourth Circuit, your client may benefit from a change in the law—whether from the Supreme Court or the en banc Fourth Circuit—even if you didn't raise the foreclosed argument below.

The Court generally won't consider any argument that wasn't raised in the district court.

But that rule might not apply when an argument was foreclosed by "strong precedent" that is later overruled. *United States v. Chittenden*, 896 F.3d 633, 639 (4th Cir. 2018). In those cases, the Court has the discretion to consider new arguments that were previously unavailable.

That said, litigants should be cautious about relying too heavily on the Fourth Circuit's "change in the law" exception. The Court hasn't clearly defined when precedent is "strong" enough to excuse waiver. And in any event, the rule applies only when the legal change arises from someone else's case. If you're trying to change the law, the Court's precedent suggests you must raise the issue clearly at every stage.

3. That footnote might not preserve your argument.

Lawyers love footnotes. And judges—for the most part—read them. But don't count on that last-minute argument you slide in below the line to carry the day.

The Fourth Circuit, like many of its sister circuits, won't consider an argument so unimportant that it appears only in a footnote.

At first, the Court noted that it would not consider an argument relegated to a footnote because the footnote itself was too cursory to comply with the Rules of Appellate Procedure. *Wahi v. Charleston Area Med. Ctr.*, 562 F.3d 599, 607 (4th Cir. 2009).

But what started as a means of enforcing the rule prohibiting underdeveloped arguments later took on a life of its own. In *Foster v. University of Maryland Eastern Shore*, the Court cited *Wahi* to support its conclusion that a "discussion" limited to "an isolated footnote" was not enough to preserve an argument for appeal. 787 F.3d 243, 250 n.8 (4th Cir. 2015).

Quibble with the rule if you'd like, but the best practice is to raise your substantive arguments above the line in your brief. Even if you fully develop a footnoted argument, under *Foster* the Court may conclude you've waived it.

This best practice will also prepare you for practice in several other circuits. The Fifth, Seventh, and Eleventh Circuits have adopted the same view. So if you're briefing an appeal, treat every important argument like it deserves to be heard. If you bury it in a footnote, the court will treat it like you didn't raise it at all.

Final Thoughts

The Fourth Circuit isn't out to trap lawyers. But it does expect precision. Trial lawyers briefing issues

with appellate implications should raise them clearly, object when rulings are vague, and avoid the temptation to write off bad precedent as a reason to stay silent. Appellate counsel should scour the record for footnote-only arguments, fuzzy objections, and unpreserved motions.

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