



Jury Trials in 2024: Seyfarth's Employment Trial Team on Lessons from the Front Lines

Part 3: The Contingency Plan

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Seyfarth Shaw LLP

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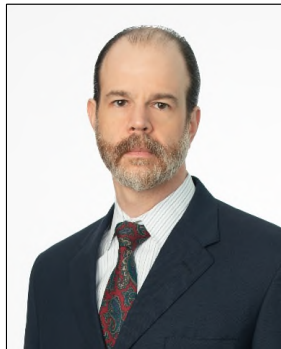
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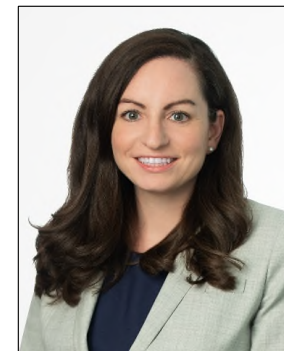
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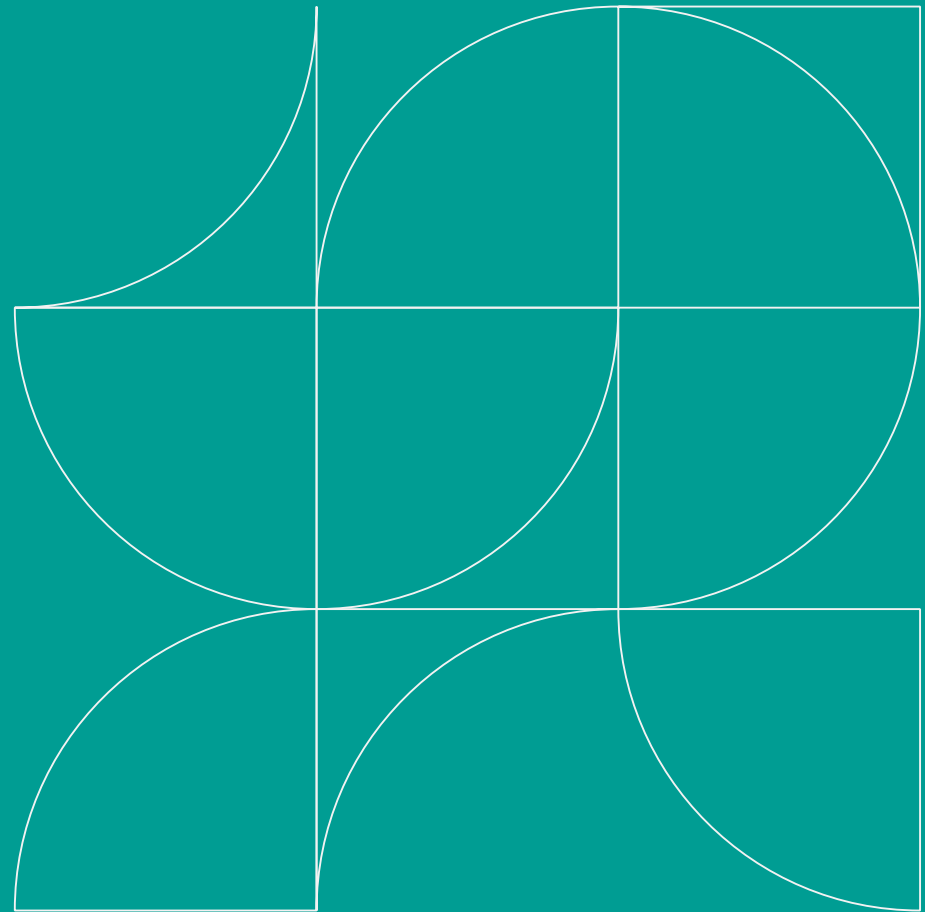


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Agenda

- 01** Introduction to Preservation vs. Waiver
- 02** 7 Key Moments to Preserve Objections at Jury Trials
- 03** Waiver Pitfalls

Introduction to Preservation and Waiver





At trial, you have two overarching goals:

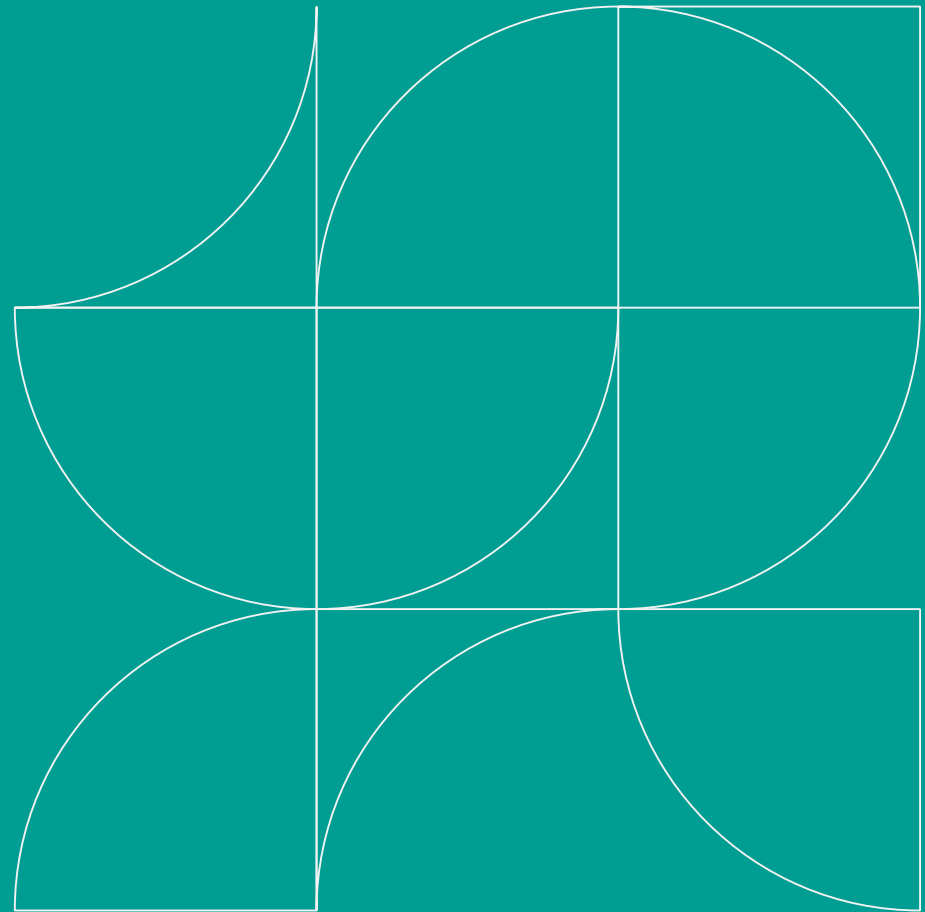
- **winning the trial; and**
- **preserving arguments for any future appeal.**

Even experienced trial lawyers can get tripped up and inadvertently waive appellate issues.

Because trial is so fast-paced, you need to have an **appellate preservation plan** going in.

We're going to cover 7 key moments to preserve objections and also some common ways that trial lawyers make waiver mistakes.

7 Key Moments to Preserve Objections at Jury Trials



Key Moments to Preserve Objections

First Day of Trial



Jury Selection

- During jury selection, exercise peremptory challenges.
- Make a Batson challenge if applicable (or be ready to defend against one).

Seek Clarification on opening statements

Before jury selection, request voir dire questions



Renew objections or object to rulings on motions *in limine*



Opening Statements



Plaintiff's
case-in-chief



After Plaintiff Rests

Be ready to move for directed verdict or judgment as a matter of law

- **Plan this** before trial starts.
- Written motion preferable.
- If verbal, have an outline with citations to the law and the record.
- Make sure the motion is filed on the docket and on the record. Ask for a ruling on the record.



**Defendant's
case-in-chief**

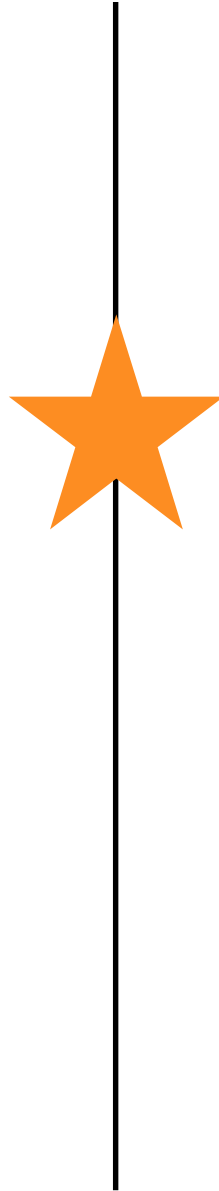


After Defendant Rests

Renew motion for directed verdict

- **Insist on putting motion on the record.**
- Refer back to the earlier motion but layer in defense evidence.
- Cite specific testimony and exhibits.
- Ask for an on-the-record ruling.

**Rebuttal and Surrebuttal
(if permitted by court)**



Charge Conference

This is a critical junction for preserving objections for appeal

- You must preserve all arguments as to jury instructions and verdict form.
- Offer written proposed instructions and verdict form.
- Ideally, also offer written objections to opposing counsel's charge/form.
- **Make sure every single objection is preserved on the record and ideally in writing.**

Before jury charge

Renew objections to any adverse jury instructions.

- Each judge's process differs. Some will give you a written charge to review.
- Use whatever time is available carefully to review and make objections on the record.
- **The judge may be impatient. Make your record anyway.**



Jury Charge

- Listen carefully to the charge as it's given.



Closing Argument



After the jury charge

This is the last chance before deliberations begin to address issues or errors with the charge.

- If there is an error you haven't already preserved, ask for sidebar and object.
- Ask for a clarifying or supplemental instruction if appropriate.



● **Jury deliberations**

Verdict

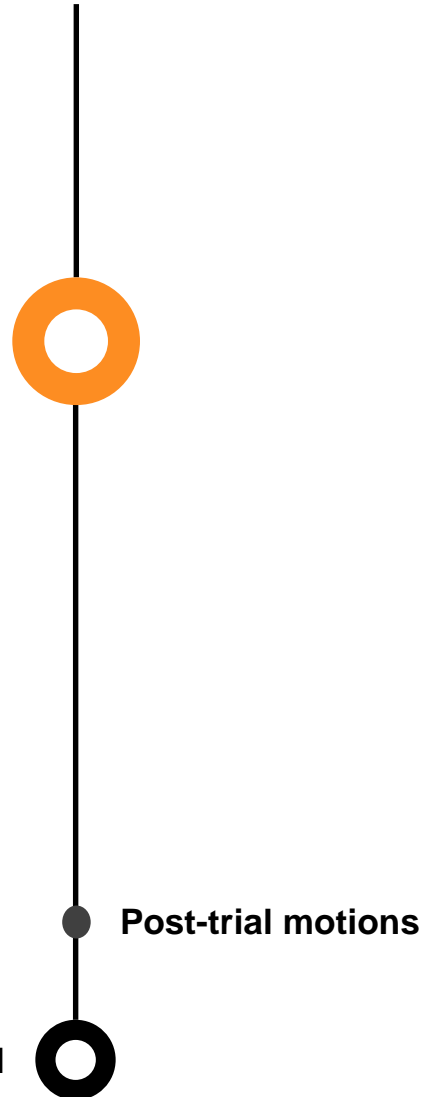




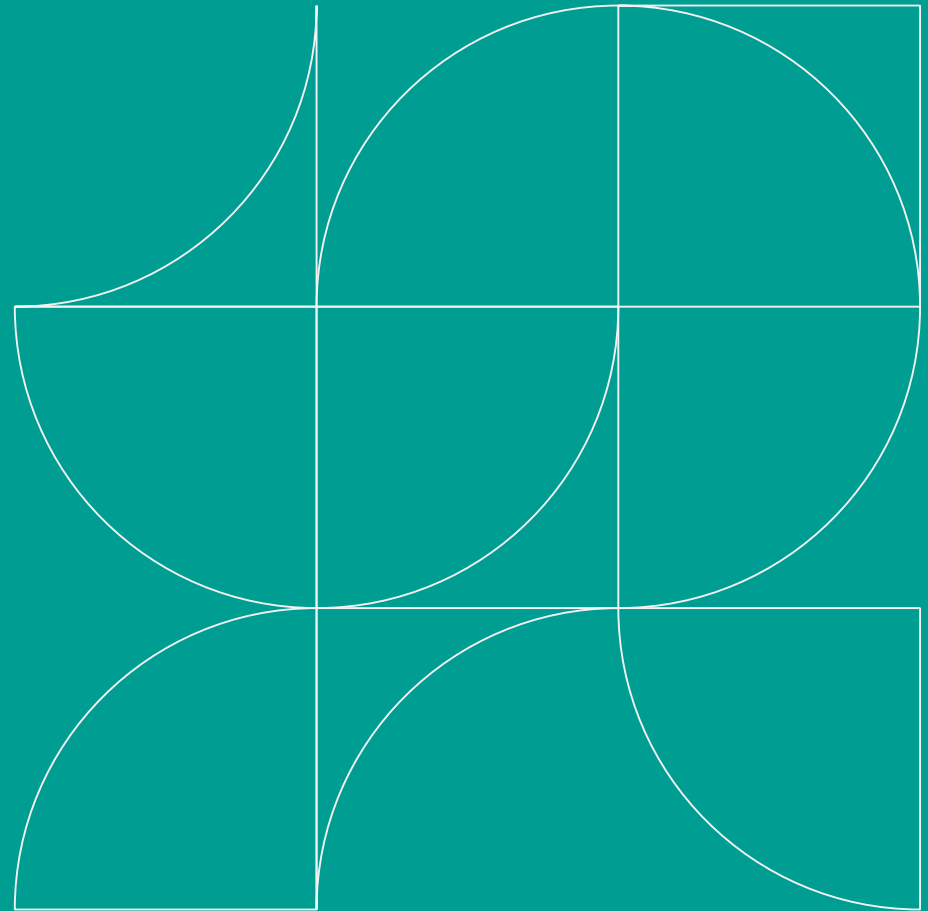
After adverse verdict

Before the jury is dismissed, review the verdict carefully.

- Raise any inconsistency in the verdict with the court at sidebar.
- Ask the court to poll the jury to ensure the verdict meets the requirement of the rule.
- Put on the record that you intend to move for judgment as a matter of law and for new trial. Ask for a briefing schedule.



Waiver Pitfalls





Object, but only kind of, sort of

Three steps to a properly preserved objection:

- state the objection clearly
- on the record
- state the grounds for the objection.

Make sure you have a court reporter present.

Know your jurisdiction's rule for how much specificity is required.



Accidentally Agree to a Bad Jury Charge or Verdict Form

Filing a proposed charge and verdict form is only the beginning of the process, not the end.

You need to continue to object as revised proposed charges are filed or issued by the Court.

If there's an objection that affects both the charge and the verdict form, need to object to *both*.

Diligent preparation is crucial.



“Set and Forget” a Standing Objection

It can be tempting to rely on a “standing objection” to a particular witness or line of questions.

But this may not be enough.

Research the rule in your jurisdiction.

Get a clear ruling defining the parameters of any standing objection.

If later, no one can tell what was part of the standing objection, it may be waived.



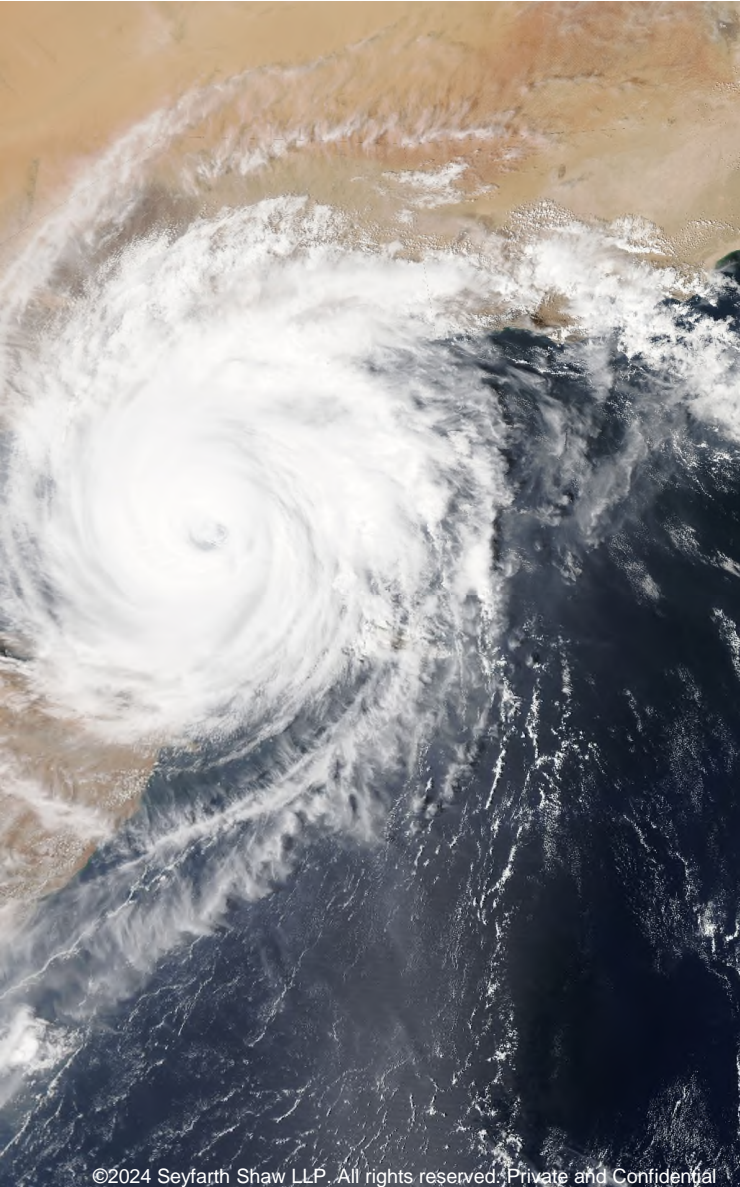
Be Too Polite

Preservation can be *awkward*.

The judge may be pressuring you to move on. Opposing counsel will too.

Need to find the right balance of preserving the objection while not alienating the jury.

Find a way to object without unduly annoying the judge.



Let Bad Evidence Linger Before the Jury

- If, despite best efforts, the jury hears bad evidence, be ready to act.
 - May want to move to strike
 - Or request a curative instruction
 - Or even request a mistrial.
 - If the court refuses, object to the refusal.
- Absent a proper objection, the jury may consider the evidence and you may have waived any objection.



Make Great Arguments – Off the Record

- **An argument is not in the appellate record unless it is made on the record.**
- Watch out for moments that may be off the record.
 - In chambers hearing
 - Side bar
 - Discussion before/after court
- Ask for a court reporter.
 - If not feasible, repeat the objection on the record at the next opportunity.



The Overly Casual Directed Verdict Motion

- When time is tight, it may be tempting to wing it with the DV motion.
- Make a fully developed argument, planned in advance, with citation to authority.
- If plaintiff is claiming punitive damages, include argument that there is no basis for punitive liability.
- **Divide and conquer.** Assign one trial team member to the DV motion while another tackles something else. Short phrases are better than long sentences.

File a Motion *in Limine* and Then Forget About It

- Great to file a motion in limine right up front to keep objectionable evidence out but need to follow up.
- If the court denies the motion, ensure the ruling is on the record and object to the ruling on the record.
- When the objectionable evidence is later offered at trial, **renew the objection.**



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