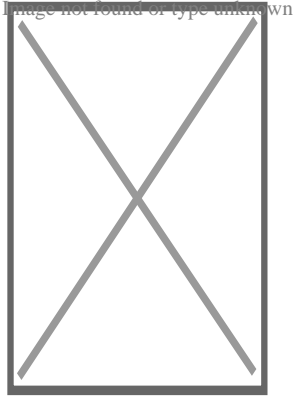


APPELLATE TIP: PRESERVING THE RECORD – TIPS FOR OBJECTING TO JURY INSTRUCTIONS

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Ensuring that your proposed jury instructions and objections to your opponent's jury instructions are properly filed in the trial court is essential to preserving your arguments for any appeal that might occur. Rule 51 in the recent amendments to the Arizona Rules of Civil Procedure addresses jury instructions and how and when to propose and object to them. Here are three quick tips to ensure your objections make it into the trial court record so as to preserve them for appeal.

Scenario: The judge asks you to email him/her your proposed jury instructions and wants to exchange drafts by email.

If you *only* e-mail your proposed jury instructions to the judge, without actually filing a copy of your proposed instructions, your proposed instructions will not be part of the record on appeal. And if your proposed instructions are not in the record, then you cannot argue on appeal that the trial court erred in refusing one of them. See *State v. Zuck*, 134 Ariz. 509, 513 (1982) ("Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court."); *Bliss v. Treece*, 134 Ariz. 516, 519 (1983) (same). Although judges might want to do more things electronically (by email or otherwise) these days, the efficiency of this kind of communication might cost you an argument on appeal, unless you also file those proposed instructions with the clerk.

Scenario: After you propose jury instructions, the trial court gives you a packet of final instructions that either omits an instruction you requested, or changes your proposed instructions in some way you think is erroneous.

It is important for you to make your objections to the final instructions on the record. Your having proposed a jury instruction that differed from the final one might not be sufficient to preserve your argument for appeal. If you think the final instruction is erroneous, you must object on that basis. In 2003, the Arizona Court of Appeals held that a party's failure to object to an erroneous jury instruction waives all but fundamental error. *Data Sales Co. v. Diamond Z Mfg.*, 205 Ariz. 594, 601 (Ct. App. 2003) (citing Ariz. R. Civ. P. 51(a)). Fundamental error is that which "goes to the very foundation" of a case. It "is sparingly applied in civil cases, and only when the error deprives a party of the right to a fair trial." *Czarnecki v. Volkswagen of America*, 172 Ariz. 408, 417 (Ct. App. 1991) (other citations omitted). Therefore, it is important to place your objections to the final instructions on the record. The court should give you an opportunity to do this on the record. See Rule 51(b)(3)(C), Ariz. R. Civ. P. If not, make sure you file your objections in writing. If the court has required the parties to present a set of joint instructions, you can place your objections immediately below your opponent's proposed jury instruction in bold or italics.

Scenario: You've made objections to the final instructions, but weren't specific enough.

Consider whether you need to object to: (1) instructions you believe should not be given; (2) instructions that differ from the version you proposed (unless you decide the court's version is sufficient); and (3) the court's refusal to include instructions you feel should be given.

When objecting, make sure your objections are specific to the instruction at issue and made timely during the settling of jury instructions. See *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 211–12 (Ct. App. 1984), which held that the party's general objection to the court's refusal to give all the party's proposed instructions failed to preserve for appeal the trial court's refusal to give a particular requested instruction; and *Flieger v. Reeb*, 120 Ariz. 31, 34 (Ct. App. 1978), which held that the party waived the issue on appeal when it did not respond to the court's question whether there were any additions or corrections

needed to the court's instructions.

Errors in jury instructions have a good chance of being reversible error. See e.g., *State v. Hunter*, 142 Ariz. 88, 90 (1984) and *State v. Mincey*, 130 Ariz. 389, 398 (1981), *cert. denied*, 455 U.S. 1003 (1982) (holding it was fundamental error to give jury instructions improperly shifting the burden of proof to the defense).

Key Takeaway

Don't risk waiving a good jury instruction issue for appeal by failing to get your timely and specific objection on the record!