



MAGISTRATE JUDGE SIDNEY I. SCHENKIER
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PRELIMINARY JURY INSTRUCTIONS

Introduction

The following preliminary instructions will generally be used in all civil cases. Bracketed portions will be given where appropriate. Objections to any of these instructions, and any requests for variation, should be brought to the Court's attention at or before the final pretrial conference.

Court's Preliminary Instruction No. 1 **Introductory Paragraph**

Members of the jury, you are now the jury in this case. At the end of the trial, I will give you detailed instructions that will control your deliberations. Before the trial begins, however, I want to give you an overview of what will happen, and I want to give you certain instructions you should have in order to better understand what will be presented before you, what will be expected of you, and how you should conduct yourself during the trial. You should not take anything I say or do during trial as indicating what I think of the evidence, or what your verdict should be.

Court's Preliminary Instruction No. 2
Order of Trial

The trial will proceed in the following order:

First, the plaintiff's attorney may make an opening statement outlining the plaintiff's case. The defendant's attorney then may make an opening statement outlining the defendant's case. What the lawyers say in their opening statements is not evidence, but is simply a summary of what the attorneys expect the evidence to be.

Second, after opening statements, plaintiff will introduce evidence in support of his claim. That evidence may be presented through testimony by witnesses, stipulations, and exhibits. The defendant may cross-examine witnesses the plaintiff calls to testify. At the end of the plaintiff's case, the defendant may introduce evidence. The defendant, however, is not obligated to introduce any evidence or to call any witnesses. If the defendant introduces evidence, again, this may be through testimony by witnesses, stipulations and exhibits. Plaintiff may cross examine witnesses the defendant calls to testify. After each side has completed putting on what we call their "main" cases, plaintiff may be permitted to present rebuttal evidence [and defendant may be permitted to present sur-rebuttal evidence].

Third, after the evidence has been presented, I will instruct you on the law which you are to apply in reaching your verdict.

Fourth, after I have instructed you, the parties will present closing arguments outlining what they consider the evidence has shown, and the inferences which they contend you should draw from the evidence. What is said in closing argument, just as what is said in opening statement, is not evidence. The arguments are designed to present to you the contentions of the parties based on the evidence introduced. The plaintiff has the right to open and to close the argument.

Fifth, you will then go to the jury room to deliberate on your verdict.

Court's Preliminary Instruction No. 3
Evidence

The evidence in the case will generally consist of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; all stipulations (which are matters that the parties agree on, and that you must accept) and all facts which may have been judicially noticed, and which I instruct you to take as true for the purposes of the case.

You will have notebooks of exhibits available for your convenience during trial. Do not look at those exhibit books until directed to them by a party or the Court.

Please remember that the exhibits are not entitled to more weight than testimony just because they are arranged for you in notebooks.

Court's Preliminary Instruction No. 4
Deposition Evidence

Certain testimony may be presented to you by the reading of deposition, consisting of sworn answers to questions asked of the witness in advance of the trial by one or more of the attorneys or the parties to the case.

Deposition testimony presented to you is entitled to the same consideration, and is to be judged as to credibility, insofar as possible, in the same way as if the witness had been present, and had testified from the witness stand. That is to say, you must not decide to accept certain testimony just because it is by deposition, or reject it for that reason.

Court's Preliminary Instruction No. 5
Direct and Circumstantial Evidence

There are two kinds of evidence: direct and circumstantial. Direct evidence is testimony by a witness who claims to have personal knowledge of something: such as, something that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts which tend to show whether something else is true.

You should consider all the evidence in this case, both direct or circumstantial evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence, whether direct or circumstantial.

Court's Preliminary Instruction No. 6
Rulings on Objections

From time to time I will be making rulings on objections posed by the attorneys. There are rules of evidence which control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered and the exhibit cannot be received.

Any evidence as to which an objection is sustained by the court, must be entirely disregarded. Whenever I sustain an objection to a question, ignore the question and do not guess what the answer would have been. Remember, you must not be prejudiced for or against a lawyer or the party that lawyer represents because the lawyer makes objections and I either sustain or overrule the objections.

Do not draw any conclusion from such objections, or from my rulings. These only relate to legal questions that I must decide, and should not influence your thinking.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence which I told you to disregard.

Some evidence may be admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

At times during the trial, it may be necessary for the lawyers and me to discuss certain legal matters out of your presence. The conferences are necessary to insure that the law is properly applied. I will try to keep these conferences to a minimum and as brief as possible. Sometimes, I will try to do it by bench conference where the lawyers approach the bench and we whisper together, while the court reporter records all that we say, but outside your hearing. You should feel free to stand up and stretch your limbs while we are so occupied. If the matter appears to require prolonged attention, I will excuse you from the courtroom for your greater comfort. Please understand that we are working during these conferences to make sure the case goes smoothly and fairly.

Court's Preliminary Instruction No. 7
Inferences

You are to consider only the evidence in the case. However, in our lives, we often look at one fact and conclude from it that another fact exists. In the law, we call this an "inference." A jury is allowed to make reasonable inferences, based on the evidence in the case.

You should use common sense in weighing the evidence, and consider the evidence in light of your own observation in life.

Court's Preliminary Instruction No. 8
Pay Attention

At the end of the trial, it will be your duty to make your decision based on what you recall of the evidence. You will not have a written transcript to consult. So, there will be no instant replay here. For that reason, it is especially important that you pay close attention to the testimony of every witness as it is given.

Listening is hard. It requires work and effort. But it is something you must strive to do, in order to give these parties the fair and impartial trial they deserve.

Court's Preliminary Instruction No. 9
Note Taking Allowed

The court will permit jurors to take notes during the course of the trial.

I recognize that for some people, writing things down helps them to remember. That is not true of everyone. For some people, taking notes may preoccupy them so that they do not hear and evaluate all of the evidence. You are not obliged to take notes. If, however, you do take notes, do not allow note taking to distract you from the ongoing proceedings.

If you take notes, they should be used as memory aids only – that is, to refresh your memory of the testimony given. The notes are not evidence. You should not give your notes precedence over your independent recollection of the evidence. If your memory differs from your notes, you should rely on your memory and not your notes. If you do not take notes, you should rely on your own independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors. I strongly emphasize that notes are not entitled to any greater weight than the independent recollections or impressions of each juror as to what the testimony may have been.

If you want to take notes, and that is entirely up to you, we will provide you with a notepad for that purpose. In taking notes you will be required to follow these procedures:

1. Please place your name on the cover of the notepad. Start your notes on the second page of the notepad. No one else will be allowed to look at your notes at any time. This will include even me.
2. During the trial, you must not take these notes with you when you leave the courtroom. The notes will be collected by my deputy clerk at the close of the court day. No one, including me, will look at your notes when they are in the court's custody.
3. You may use your notes to refresh your memory when you deliberate on your verdict. Your notes are for your use only, not for any other juror's use. Do not show them to anyone at any time. This includes not showing them to other jurors, at any time during the course of the trial and even during that time when the jury will be deliberating on a verdict.
4. At the end of the trial, when you are discharged from further service in this case, the notes will be collected by my deputy clerk. They then will be destroyed. Again, no one will be allowed to look at the notes before they are destroyed.

For those jurors who decide not to take notes, let me repeat that just because a juror has taken notes it does not mean that his or her memory of the evidence is any better than the memory of a juror who has not taken any notes.

Court's Preliminary Instruction No. 10
Credibility of Witnesses

As I have told you, it will be your job to find the facts in this case. An important part of that job will be to make judgments about the testimony of the witnesses. You will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says or only part of it or none of it. And you will have to decide how important the testimony was; how it fits in.

In deciding these things, you may consider a number of factors, including the witness' ability to see or hear or know the things the witness testified to; the quality of the witness' memory; the witness' manner

while testifying; any interest the witness may have in the outcome of the case or any motive, bias or prejudice; any contradiction of the witness by anything the witness said or wrote before trial or by other evidence; and the reasonableness of the witness' testimony when considered in the light of other evidence which you believe.

You are not required to decide what to believe just because there are more witnesses on one side of that point. Your job is to think about the testimony of each witness, and decide what to believe.

Court's Preliminary Instruction No. 11
Expert Witness

There may be expert witness testimony in this case. You should judge the testimony of an expert witness just as you judge the testimony of any other witness, under the factors I already mentioned. In the case of an expert witness, you also should evaluate the expert's training, qualifications and knowledge of the subject matter which the expert is testifying about, and whether the opinions are based on sound reasoning, judgment and information.

The fact that an expert has given an opinion does not mean you are required to accept it. You may accept or reject an expert's opinion in whole or in part, just as with any other witness.

Court's Preliminary Instruction No. 12
Burden of Proof

When I say a particular party must prove something by "a preponderance of the evidence," this is what I mean: when you have considered all of the evidence in the case, you must be persuaded that it is more probably true than not true.

[When I say that a particular party must prove something by "clear and convincing evidence," this is what I mean: when you have considered all of the evidence, you [are convinced that it is highly probable that it is true] [have no reasonable doubt that it is true]].

[That is a higher burden of proof than "more probably true than not true." Clear and convincing evidence must persuade you that it is "highly probably true."]

Those of you who have been jurors in criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case and you should, therefore, put it out of your mind.

Court's Preliminary Instruction No. 13
What Is Not Evidence

In reaching your verdict you may consider only the stipulations and the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are:

- Arguments and statements by lawyers are not evidence;
- Questions and objections by lawyers are not evidence;
- Evidence ordered stricken by the court is no longer evidence in this case and must be entirely disregarded;
- Testimony I have instructed you to disregard is not evidence; and
- Anything you may have seen or heard when the court is not in session, even if what you see or hear is done or said by one of the parties or by one of the witnesses is not evidence and must be totally disregarded.

Court's Preliminary Instruction No. 14
Court's Questions to Witnesses

During the trial, I may occasionally ask questions of a witness. Do not assume that I hold any opinion on the matters to which my questions may have related, or about how the case should be decided.

Court's Preliminary Instruction No. 15
Conduct of Jury

Now, I want to say a few words about your conduct as jurors.

First, do not talk to each other about this case until the end of the case when you go to the jury room to deliberate and decide on your verdict. Do not talk with anyone else about this case or about anyone who has anything to do with it until the trial has ended and you have been finally discharged as jurors. "Anyone else" includes members of your family and your friends. You may tell them that you are a juror in a case but don't tell them anything about it until after you have been discharged. This bears repeating and I will say it again to you during the trial.

The reason for my instruction to you not to discuss this matter with anyone, including your fellow jurors, is to ensure that you maintain an open mind throughout this case and that you not prematurely reach any decision in the case until you have heard all the evidence, as well as the arguments of the parties. If you talk about the case with your fellow jurors, you might find yourself taking a position in the case without having the benefit of seeing and hearing all the evidence that will be presented. And then, human nature being what it is, you might be less receptive and less open to something that happens later in the trial that might be inconsistent with that position.

We don't want that to happen; we want you to approach all the evidence with an open mind. Do not make any judgments until all the evidence is in and I have instructed you on the law and sent you to deliberate. This is why you should not discuss the case with anyone and reserve your decision in the case until all the evidence has been presented.

Second, do not let anyone talk to you about the case or about anyone who has anything to do with it. If someone should try to talk to you, please report it to me immediately. If you need to communicate with me, give a signed note to my deputy, who will give it to me.

Third, do not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it.

Fourth, do not do any research, such as by consulting dictionaries, or the internet, or make any investigation about the case on your own.

Fifth, do not make up your mind about what the verdict should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Court's Preliminary Instruction No. 16
Communications Between Attorneys and Jurors

By reason of the close physical layout of the courtroom and jury chambers, you may have occasion to see the attorneys in this case, in the hallways, and during breaks from the trial. We will try to avoid that as much as possible. Jurors should use the north elevator bank; lawyers the south elevator bank. But it still may happen.

The attorneys are obligated to avoid any contact with the jury. Therefore, do not be offended if the attorneys do not speak with you, avoid eye contact, or do not even acknowledge you. They are not trying to be unfriendly; they are merely trying to avoid contact, which is what the court requires of them. At the conclusion of the trial, after the verdict has been entered, you will have an opportunity to meet with the lawyers if you so desire, but until that time any contact is prohibited.

Court's Preliminary Instruction No. 17
Description of a Trial Day

Starting and ending times:

We generally will begin the trial day at 9:00 a.m. – you'll be required to be in the jury room at 8:45 a.m.

We will take a lunch break for about one hour beginning some time around 12:30 to 1:00 p.m.

We will take a morning and afternoon break of 15 minutes each.

We hope to conclude the trial day by around 4:30 or 5:00 p.m. – maybe a little earlier, but not much later. The only exception will be when the case ends and your deliberations are ongoing.

The jury room will be your home base during the course of the trial. You will always assemble in the jury room at the beginning of the day as well as at the end of lunch break. Your recesses will be in the jury room. You will find restrooms for your personal use in the jury room confines. There will be coffee and rolls provided to you each morning. Hopefully, an afternoon snack will also be provided to you. We will try to make your duties as pleasant and as comfortable as possible. If you have any problems, please let my courtroom deputy clerk know about them. He will then inform me and we will see if we can resolve the matter.

ENTER:

SIDNEY I. SCHENKIER
United States Magistrate Judge

Dated: January 31, 2005