General Instructions for Civil Cases

Numbering of General Instructions

1. Preliminary Instructions For Use at Commencement of Trial and/or at End of Trial.

2. General Instructions For Use During Trial

1.1 Preliminary Instructions — Introduction; Role of Jury

Model

Now that you have been sworn, I have the following preliminary instructions for your guidance as jurors in this case.

You will hear the evidence, decide what the facts are, and then apply those facts to the law that I will give to you.

You and only you will be the judges of the facts. You will have to decide what happened. I play no part in judging the facts. You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be. My role is to be the judge of the law. I make whatever legal decisions have to be made during the course of the trial, and I will explain to you the legal principles that must guide you in your decisions. You must follow that law whether you agree with it or not.

Comment

This instruction is derived from the Bench Book for United States District Court Judges (Federal Judicial Center), and tracks similar pattern instructions in the First Circuit (Criminal 1.01) and Eleventh Circuit (2.1). *See also* Fifth Circuit 1.1. For other versions of this instruction, see Sixth Circuit (Criminal) 1.02; Eighth Circuit 1.01.

The instruction can be modified to be given at the end of the case when the court is about to give final instructions on the applicable law. *See, e.g.*, Seventh Circuit (Criminal) 1.01:

> Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law. You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone. Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them. Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. [You should not be influenced by any person's race, color, religion, national ancestry, or sex.] Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

See also Ninth Circuit 1.1A - 1.1C (instructions on duty of jurors).

1.2 Preliminary Instructions — Description of Case; Summary of Applicable Law

Model

In this case, [plaintiff] claims that [describe claims]; [defendant] denies those claims [and also contends that [describe counterclaims or affirmative defenses]]. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements that [plaintiff] must prove to make [his/her/its] case:

[Summarize elements of the applicable cause of action].

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

This instruction is derived from the pattern instruction used by United States District Courts in Camden. It is similar to pattern instructions in the Eighth Circuit (1.01) and the Ninth Circuit (1.2).

This preliminary instruction concerning the elements in the case can be used together with the applicable substantive instruction for a particular cause of action. It is not necessary at the outset, however, to give a detailed instruction as to the applicable elements, especially in a complex case. But a brief description of the claims, defenses and counterclaims, if any, is likely to aid jury comprehension.

This instruction can be modified to be given at the beginning of voir dire, or in light of what was given at the beginning of voir dire.

1.3 Preliminary Instructions — Conduct of the Jury

Model

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial and until you have heard all of the evidence and retired to the jury room to deliberate, you are not to discuss the case with anyone, not even among yourselves. If anyone should try to talk to you about the case, including a fellow juror, bring it to my attention promptly. There are good reasons for this ban on discussions, the most important being the need for you to keep an open mind throughout the presentation of evidence. I know that many of you use cell phones, smart phones [like Blackberries and iPhones], and other portable electronic devices; laptops, netbooks, and other computers both portable and fixed; and other tools of technology, to access the internet and to communicate with others. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate orally with anyone about the case on your cell phone, smart phone, or portable or fixed computer or device of any kind; or use these devices to communicate electronically by messages or postings of any kind including e-mail, instant messages, text messages, text or instant messaging services [such as Twitter], or through any blog, website, internet chat room, or by way of any other social networking websites or services [including Facebook, MySpace, LinkedIn, and YouTube].

If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator, or the like, remember it is because they are not supposed to talk or visit with you, either. [That is why you are asked to wear your juror tags. It shows that you are someone who is not to be approached in any way.]

Second, do not read or listen to anything related to this case that is not admitted into evidence. By that I mean, if there is a newspaper article or radio or television report relating to this case, do not read the article or watch or listen to the report. In addition, do not try to do any independent research or investigation on your own on matters relating to the case or this type of case. Do not do any research on the internet, for example. You are to decide the case upon the evidence presented at trial. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Again, do not reach any conclusion on the claims [or defenses] until all of the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

[Finally, if any member of the jury has a friend or family member who is in attendance at this public trial, that visitor must first register with my Clerk because special rules will govern their attendance. You may not discuss any aspect of this trial with the visitor, nor may you permit the visitor to discuss it with you.]

Comment

This instruction is adapted from the pattern instruction used by United States District Courts in Delaware. For variations on this instruction, see First Circuit (Criminal) 1.07; Eighth Circuit 1.05; Ninth Circuit 1.12. *See also* Montana 1.4 (concluding the instruction with a warning that "[f]ailure to observe these precautions might require the retrial of this case, which would result in a long delay, considerable expense to the courts and the parties and a waste of your time and effort."). Portions of the instruction are drawn from Proposed Model Jury Instructions on the Use of Electronic Technology to Conduct Research on or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management (CACM) in December 2009. *See United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011) ("We enthusiastically endorse [the CACM] instructions and strongly encourage district courts to routinely incorporate them or similar language into their own instructions."). CACM released an updated version of the model instructions in June 2012 (the updated model is available at http://news.uscourts.gov/revised-jury-instructionshope-deter-juror-use-social-media-during-trial). Obviously, the relevant technologies will evolve over time; users of these instructions should insert a list of current examples in the appropriate place in the instructions.

The court should give this instruction on jury conduct after the jurors are sworn and before opening statements. Depending on the circumstances, it may be useful to give this instruction, or some part of it, during the trial as well. *See* Wright & Miller, *Federal Practice and Procedure* § 486 (suggesting that there may be occasion during the trial and at the close of the evidence to remind the jury about how it should conduct itself).

The Committee considered whether to delete the instruction that jurors are not to talk among themselves about the case until deliberations. The Committee notes that Arizona permits pre-deliberation discussions among jurors. But the Third Circuit has declared as follows:

> "It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process." *Waldorf v. Shuta*, 3 F.3d 705, 709 (3d Cir. 1993). Partly to ensure that this right is upheld, "it [has been] a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body." [*United States v.*] *Resko*, 3 F.3d [684] at 688 [(3d Cir. 1993)].

United States v. Bertoli, 40 F.3d 1384, 1393 (3d Cir. 1994).

Premature deliberations present a number of concerns, the most important being that jurors who discuss the case among themselves may harden their positions before all of the evidence is presented and the jury is instructed. Moreover, "[o]nce a juror has expressed views on a particular issue, that juror has a 'stake' in the expressed views and may give undue weight to additional

evidence that supports, rather than undercuts, his or her view." *Id.* The Committee therefore concluded that the court should instruct the jurors to refrain from discussing the case among themselves before deliberations.

1.4 Preliminary Instructions — Bench Conferences

Model

During the trial it may be necessary for me to talk with the lawyers out of your hearing by having a bench conference. If that happens, please be patient.

We are not trying to keep important information from you. These conferences are necessary for me to fulfill my responsibility, which is to be sure that evidence is presented to you correctly under the law.

We will, of course, do what we can to keep the number and length of these conferences to a minimum. [While we meet, I will invite you to stand up and stretch and take a short break or perhaps even call a recess if it is a lengthy issue, and permit you to go downstairs for a break.]

I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Comment

This instruction is derived from First Circuit (Criminal) 1.05; 8th Circuit 1.03; and former Ninth Circuit 2.2. *Cf.* Ninth Circuit 1.18. For a shortened version of this instruction, see Fifth Circuit 2.7:

> At times during the trial it may be necessary for me to talk with the lawyers here at the bench out of your hearing, or by calling a recess. We meet because often during a trial something comes up that doesn't involve the jury.

1.5 Preliminary Instructions — Evidence

Model

The evidence from which you are to find the facts consists of the following:

1. The testimony of the witnesses;

2. Documents and other things received as exhibits;

3. Any facts that are stipulated--that is, formally agreed to by the parties; and

[4. Any facts that are judicially noticed--that is, facts I say you must accept as true even without other evidence.]

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the parties in this case;

2. Objections by lawyers.

3. Any testimony I tell you to disregard; and

4. Anything you may see or hear about this case outside the courtroom.

You must make your decision based only on the evidence that you see and hear in court. Do not let rumors, suspicions, or anything else that you may see or hear outside of court influence your decision in any way.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

There are rules that 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. This simply means that the lawyer is requesting that I make a decision on a particular rule of evidence. You should not be influenced by the fact that an objection is made. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe that evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

Also, certain testimony or other evidence may be ordered struck from the record and you will be instructed to disregard this evidence. Do not consider any testimony or other evidence that gets struck or excluded. Do not speculate about what a witness might have said or what an exhibit might have shown.

Comment

This instruction is derived from the Bench Book for United States District Judges (Section 6.05); First Circuit (Criminal) 1.05; Eighth Circuit 1.02; and former Ninth Circuit 1.4. *Cf.* Ninth Circuit 1.7. The third and fourth paragraphs of the instruction are specifically derived from the instruction used by District Judges in Delaware.

This instruction is to be given at the outset of the case, as well as, or in place of, an instruction at the end of the case. The instruction can be given at the end of the case simply by changing the verbs to the past tense.

Instructions concerning the evidence can sometimes help to mitigate the effects of testimony to which an objection is sustained. *See Leonard v. Stemtech Int'l Inc*, 834 F.3d 376, 400 n.24 (3d Cir. 2016) (noting the presumption that jurors follow instructions and observing that "the District Court instructed the jury at the outset of trial that it should disregard evidence to which an objection was lodged when the objection is sustained").

1.6 Preliminary Instructions – Direct and Circumstantial Evidence

Model

Option 1:

Do not be concerned about whether evidence is "direct evidence" or "circumstantial evidence." You should consider and weigh all of the evidence that is presented to you. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

Option 2:

There are two types of evidence that you may use in reaching your verdict. One type of evidence is called "direct evidence." An example of "direct evidence" is when a witness testifies about something that the witness knows through his own senses — something the witness has seen, felt, touched or heard or did. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining. Another form of direct evidence is an exhibit where the fact to be proved is its existence or current condition.

The other type of evidence is circumstantial evidence. "Circumstantial evidence" is proof of one or more facts from which you could find another fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

You should consider both kinds of evidence that are presented to you. The law makes no distinction in the weight to be given to either direct or circumstantial evidence. You are to decide how much weight to give any evidence.

Comment

Option 1 is derived from Fifth Circuit (Criminal) 1.07 (Alternative A). It can be used by those judges who do not wish to say anything about the distinction between direct and circumstantial evidence, but yet might be concerned that jurors would have preconceived notions about these terms.

Option 2 is derived from former Ninth Circuit 3.6. *Cf.* Ninth Circuit 1.9. The instruction does not attempt to provide a definition of "direct" evidence. The definitions given in some instructions simply repeat the word "direct". Other instructions on direct evidence are underinclusive, as they refer only to witness testimony, whereas an exhibit can be direct evidence

of a fact. The example given in the instruction should be sufficient to give jurors a clear idea of "direct" evidence.

1.7 Preliminary Instructions — Credibility of Witnesses

Model

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. "Credibility" means whether a witness is worthy of belief. You may believe everything a witness says or only part of it or none of it. In deciding what to believe, you may consider a number of factors, including the following:

(1) the opportunity and ability of the witness to see or hear or know the things the witness testifies to;

(2) the quality of the witness's understanding and memory;

(3) the witness's manner while testifying;

(4) whether the witness has an interest in the outcome of the case or any motive, bias or prejudice;

(5) whether the witness is contradicted by anything the witness said or wrote before trial or by other evidence;

(6) how reasonable the witness's testimony is when considered in the light of other evidence that you believe; and

(7) any other factors that bear on believability.

[The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.]

Comment

This instruction is derived from First Circuit (Criminal) 1.06 and former Ninth Circuit 1.8. *Cf.* Ninth Circuit 1.11. For variations, see Sixth Circuit (Criminal) 1.07; Seventh Circuit (Criminal) 1.03.

This instruction can be given both at the beginning of the case and at the close of the evidence. For an example of an instruction given at the end of the case, see Eighth Circuit 3.03.

The bracketed material at the end of the instruction may be given usefully at the end of a

case in which witnesses on one side outnumber the other. *See* Instruction 3.2 (Number of Witnesses).

1.8 Preliminary Instructions — Jury Questions for Witnesses

Model

Option 1:

Only the lawyers and I are allowed to ask questions of witnesses. You are not permitted to ask questions of witnesses.

Option 2:

You will have the opportunity to ask questions of the witnesses in writing. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness.

If so, you will write your question on a piece of paper, and hand it to my Deputy Clerk. Do not discuss your question with any other juror. I will review your question with counsel at sidebar and determine whether the question is appropriate under the rules of evidence. If so, I will ask your question, though I might put it in my own words. If the question is not permitted by the rules of evidence, it will not be asked, and you should not draw any conclusions about the fact that your question was not asked. Following your questions, if any, the attorneys may ask additional questions. If I do ask your question you should not give the answer to it any greater weight than you would give to any other testimony.

Comment

The trial judge has discretion to permit or to disallow questions from the jury. Option 1 is for judges who want explicitly to disallow jury questions. *See* Ninth Circuit 1.15 (comment) ("Whether to allow jurors to ask questions is a subject debated among judges."). Option 2 (derived from the instruction given by District Judges in Camden) is for judges who want to tell jurors explicitly that they may submit questions to be asked of witnesses. Some judges, however, may not want to give an explicit instruction allowing or disallowing jury questions, but may wish instead to wait and see if jurors inquire about asking questions, and then rule on whether to allow questions.

In *United States v. Hernandez*, 176 F.3d 719, 723 (3d Cir. 1999), the Third Circuit "approved of the practice [of permitting juror questions] so long as it is done in a manner that insures the fairness of the proceedings, the primacy of the court's stewardship, and the rights of the accused." The court in *Hernandez* also held that, if the trial judge allows jury questions, the court should follow a procedure for questions to prevent jury misconduct. *Id.* at 726 (warning that "the judge should ask any juror-generated questions, and he or she should do so only after allowing

attorneys to raise any objection out of the hearing of the jury"). The court also noted that "properly structured juror questioning in a civil trial poses even fewer" risks than in a criminal trial. *Id.*

The Third Circuit recognized in *Hernandez* that there are arguments for and against allowing jurors to submit questions for witnesses. The best argument in favor of jury questioning is that it helps jurors clarify factual confusions and understand as much of the facts and issues as possible so that they can reach an appropriate verdict. On the other hand, allowing jurors to ask questions may risk turning them into advocates and compromising their neutrality. *See United States v. Bush*, 47 F.3d 511 (2d Cir. 1995). In this regard, it is not appropriate to allow jurors to ask questions that appear to suggest a view about the merits of the case.

1.9 Preliminary Instructions — Note-Taking By Jurors

Model

Option 1:

If you wish, you may take notes during the presentation of evidence, the summations of attorneys at the conclusion of the evidence, and during my instructions to you on the law. My Courtroom deputy will arrange for pens, pencils, and paper. Remember that your notes are for your own personal use -- they are not to be given or read to anyone else.

As you see, we have a court reporter here who will be transcribing the testimony during the course of the trial. But you should not assume that the transcripts will be available for your review during your deliberations. Nor should you consider notes that you or fellow jurors may take as a kind of written transcript. Instead, as you listen to the testimony, keep in mind that you will be relying on your recollection of that testimony during your deliberations. Here are some other specific points to keep in mind about note taking:

1. Note-taking is permitted, not required. Each of you may take notes. No one is required to take notes.

2. Be brief. Do not try to summarize all of the testimony. Notes are for the purpose of refreshing memory. They are particularly helpful when dealing with measurements, times, distances, identities, and relationships. Overuse of note-taking may be distracting. You must determine the credibility of witnesses; so you must observe the demeanor and appearance of each person on the witness stand. Note-taking must not distract you from that task. If you wish to make a note, you need not sacrifice the opportunity to make important observations. You may make your note after having made an observation.

3. Do not use your notes, or any other juror's notes, as authority to persuade fellow jurors. In your deliberations, give no more and no less weight to the views of a fellow juror just because that juror did or did not take notes. As I mentioned earlier, your notes are not official transcripts. They are not evidence, and they are by no means a complete outline of the proceedings or a list of the highlights in the trial. They are valuable, if at all, only as a way to refresh your memory. Your memory is what you should be relying on when it comes time to deliberate and render your verdict in this case. You therefore are not to use your notes as authority to persuade fellow jurors of what the evidence was during the trial. Notes are not to be used in place of the evidence.

4. Do not take your notes away from court. I repeat, at the end of each day, please leave your notes in the jury room. [Describe logistics of storing and securing notes, for example: "If you do take notes, take them with you each time you leave the courtroom and please leave them in the jury room when you leave at night. At the conclusion of the case, after you have used your notes in deliberations, a court officer will collect and destroy them,

to protect the secrecy of your deliberations."]

Option 2:

As you see, we have a court reporter here who will be transcribing the testimony during the course of the trial. But you should not assume that the transcripts will be available for your review during your deliberations. You must pay close attention to the testimony as it is given.

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying and the witness's manner while testifying. One of the reasons for having a number of persons on the Jury is to gain the advantage of your individual and collective memories so that you can then deliberate together at the end of the trial and reach agreement on the facts. While some of you might feel comfortable taking notes, other members of the Jury may not feel as comfortable and may not wish to do so. Notes might be given too much weight over memories, especially the memories of those who do not take notes. So, for those reasons, I ask that you not take notes during the trial.

Comment

Option 1 is derived from the instruction used by District Courts in Delaware. Slight variations are found in First Circuit (Criminal) 1.08 and Eleventh Circuit (Criminal) 3.1. For other variations, see Fifth Circuit 2.21 and Eighth Circuit 1.04.

Option 2 is derived from Eleventh Circuit (Criminal) 3.2. For a slight variation, see Fifth Circuit (Criminal) 1.02.

In *United States v. Maclean*, 578 F.2d 64 (3d Cir. 1978), the court held that the trial judge has discretion to allow jurors to take notes. It stated that if note-taking is permitted, jurors must be instructed that the notes are only aids to memory, that they are not conclusive, and they are not to be given precedence over a juror's independent recollection of the facts. *See also* American Bar Association, Civil Trial Practice Standards (2007) (court ordinarily should permit jurors to take notes, but should also give a cautionary instruction that notetaking is not required and that notes are not to be used in place of the evidence).

The instruction notes that the jurors should not assume that a transcript of testimony will be available to them during deliberations. It does not say absolutely that transcripts will not be provided. This instruction is in accordance with *United States v. Bertoli*, 40 F.3d 1384 (3d Cir. 1994), where the court held that when the trial court decides to provide testimony to the jury during deliberations, it has discretion to do so by providing a transcript. *See generally* Comment 3.3.

1.10 Preliminary Instructions — Preponderance of the Evidence

Model

This is a civil case. [Plaintiff] is the party [who/that] brought this lawsuit. [Defendant] is the party against [whom/which] the lawsuit was filed. [Plaintiff] has the burden of proving [his/her/its] case by what is called the preponderance of the evidence. That means [plaintiff] has to prove to you, in light of all the evidence, that what [he/she/it] claims is more likely so than not so. To say it differently: if you were to put the evidence favorable to [plaintiff] and the evidence favorable to [defendant] on opposite sides of the scales, [plaintiff] would have to make the scales tip somewhat on [his/her/its] side. If [plaintiff] fails to meet this burden, the verdict must be for [defendant]. If you find after considering all the evidence that a claim or fact is more likely so than not so, then the claim or fact has been proved by a preponderance of the evidence.

In determining whether any fact has been proved by a preponderance of evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

[On certain issues, called affirmative defenses, [defendant] has the burden of proving the elements of the defense by a preponderance of the evidence. I will instruct you on the facts that will be necessary for you to find on this affirmative defense. An affirmative defense is proven if you find, after considering all evidence in the case, that [defendant] has succeeded in proving that the required facts are more likely so than not so.]

[[Defendant] has also brought claims for relief against [plaintiff], called counterclaims. On these claims, [defendant] has the same burden of proof as has [plaintiff] on [his/her/its] claims.]

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard of proof and it applies only to criminal cases. It does not apply in civil cases such as this. So you should put it out of your mind.

Comment

This instruction is derived from the following sources: pattern instruction used by District Judges in Camden; pattern instruction used by District Judges in Delaware; Fifth Circuit 3.1 (second paragraph); and Eighth Circuit 3.04.

It is advisable to give this instruction at both the beginning of the case and at the close of the evidence.

It is important that the jury be made aware that the preponderance standard requires an

analysis and weighing of all of the evidence presented by both sides. *See United States v. Montague*, 40 F.3d 1251, 1254-55 (D.C. Cir. 1994):

> Often, under a preponderance-of-the-evidence standard, it is assumed that the trier of fact piles up the evidence arguably on the defendant's side and determines which pile is greater. . . . In fact, a more accurate notion of the preponderance-of-the-evidence standard is "evidence which as a whole shows that the fact sought to be proved is more probable than not."

1.11 Preliminary Instructions — Clear and Convincing Evidence

Model

Clear and convincing evidence is evidence that produces in your mind a firm belief or conviction that the allegations sought to be proved by the evidence are true. Clear and convincing evidence involves a higher degree of persuasion than is necessary to meet the preponderance of the evidence standard. But it does not require proof beyond a reasonable doubt, the standard applied in criminal cases.

Comment

This instruction is derived from Fifth Circuit 2.14. For a variation, see Ninth Circuit 1.4.

The clear and convincing evidence standard has been described as an intermediate standard of proof. *See Cruzan v. Missouri Dep't of Health,* 497 U.S. 261, 285 n.11 (1990). It is used to protect especially important interests in a limited number of federal cases.

1.12 Preliminary Instructions — Description of Trial Proceedings

Model

The trial will proceed in the following manner:

First, attorney(s) for [plaintiff(s)] will make an opening statement to you. Next, attorney(s) for [defendant(s)] may make an opening statement. What is said in the opening statements is not evidence, but is simply an outline to help you understand what each party expects the evidence to show. [A party is not required to make an opening statement.]

After [Before] the attorneys have made their opening statements, [I will instruct you on the applicable law and] then each party is given an opportunity to present its evidence.

[Plaintiff] goes first because [plaintiff(s)] [has/have] the burden of proof. [Plaintiff(s)] will present witnesses whom counsel for [defendant(s)] may cross-examine, and [plaintiff(s)] may also present evidence. Following [plaintiffs'] case, [defendant(s)] may present evidence. Counsel for [plaintiff(s)] may cross-examine witnesses for the defense. [After the parties' main case is presented, they may be permitted to present what is called rebuttal evidence.]

After all the evidence has been presented, [I will instruct you on the law and then] the attorneys will present to you closing arguments to summarize and interpret the evidence in a way that is helpful to their clients' positions. As with opening statements, closing arguments are not evidence. [Once the closing arguments are completed, I will then instruct you on the law.] After that you will retire to the jury room to deliberate on your verdict in this case.

[At this point the court may wish to inform the jury of the scheduling and length of the trial, and other logistical information.]

Comment

This instruction is derived from Fifth Circuit 1.1; Eighth Circuit 1.06; and former Ninth Circuit 1.12. *Cf.* Ninth Circuit 1.19.

Bracketed material allows options to the court on when to give instructions on the law. It is recommended that instructions on the law be given at various points in the trial in order to aid jury comprehension.

2.1 General Instructions For Use During Trial — Impeachment of Witness's Character for Truthfulness

Model

You [are about to hear] [have heard] evidence that [name of witness], a witness, [e.g., has been convicted of a felony, committed forgery on a prior occasion, etc.]. You may use that evidence only to help you decide whether to believe the testimony of the witness and to determine how much weight to give it. That evidence does not mean that the witness engaged in any conduct alleged in this case, and you must not use that evidence as any proof that the witness engaged in that conduct.

Comment

This instruction is derived from Eighth Circuit 2.09 and former Ninth Circuit 3.12. *Cf.* Ninth Circuit 2.8. For variations, see Fifth Circuit 2.17 (covering prior convictions only).

The bracketed alternative allows this instruction to be given not only at the time of testimony but also at the close of the evidence. The instruction is intended to cover the admission of bad acts and convictions under Federal Rules of Evidence 608 and 609.

2.2 General Instructions For Use During Trial — Judicial Notice

Model

The rules of evidence permit the judge to accept facts that cannot reasonably be disputed. This is called judicial notice. I have decided to accept as proved the fact that [state the fact that the court has judicially noticed], even though no evidence has been introduced to prove this fact. You must accept this fact as true for purposes of this case.

Comment

The instruction is derived from former Ninth Circuit 2.5. *Cf.* Ninth Circuit 2.3. For variations, see Fifth Circuit 2.4 and Eighth Circuit 2.04.

An instruction on judicial notice should be given at the time that notice is taken. It may also be given at the time the jury is charged at the close of the evidence.

Federal Rule of Evidence 201(f) provides: "In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive."

2.3 General Instructions For Use During Trial — Stipulation of Testimony

Model

The parties have agreed that if [witness's name] were called as a witness, [he/she] would testify that [state the stipulated testimony]. This testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if [name of witness] had been present to testify. You must accept the fact that [name of witness] would have given that testimony. However, it is for you to determine the effect or weight to be given to that testimony.

Comment

The instruction is derived from Fifth Circuit 2.2, Eighth Circuit 2.02, and former Ninth Circuit 2.3. *Cf.* Ninth Circuit 2.1. The last two sentences are derived from New Mexico Criminal Instruction § 14-113.

When the stipulation is to what a witness would testify to if called, it is error to instruct the jury that it is to consider the stipulated testimony as true. *United States v. Benally*, 756 F.2d 773 (10th Cir. 1985). See Instruction 2.4 if the stipulation is as to an issue of fact.

2.4 General Instructions For Use During Trial — Stipulation of Fact

Model

The [parties] have agreed that [set forth stipulated fact or facts] [is/are] true. [The parties have stipulated that certain facts are true, and those stipulations have been read to you during this trial.] You must therefore treat [this fact] [these facts] as having been proved for the purposes of this case.

Comment

The instruction is derived from Fifth Circuit 2.3 and Eighth Circuit 2.03. For a variation, see Ninth Circuit 2.2 (using "should" rather than "must"). The bracketed material concerning stipulated facts previously read to the jury can be used when the stipulations are too numerous to recount.

This instruction could be applied to matters admitted by way of pleading or a request for admission, as well as to facts stipulated during the trial. If a stipulation or admission is as to a matter of fact, the jury is to be instructed that it must consider the fact as true. *Compare* Instruction 2.3 (stipulation as to what testimony would be if given).

2.5 General Instructions For Use During Trial — Use of Deposition

Model

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

The deposition of [name of witness], which was taken on [date], is about to be [has been] presented to you [by a video] [by reading the transcript]. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

Comment

The instruction is derived from former Ninth Circuit 2.6. *Cf.* Ninth Circuit 2.4. For a variation, see Fifth Circuit 2.23.

This instruction should be given when deposition testimony is admissible and offered as substantive evidence. *See* Fed.R.Evid. 804(b)(1), 801(d)(2); Fed.R.Civ.P. 32(a). It should be given before the testimony is read to the jury. The instruction can be modified to be given at the beginning of the trial, as well as when the evidence is presented.

This instruction is not appropriate if answers are being used for impeachment only.

If more than one deposition is read into evidence or otherwise presented during the trial, the jury may be reminded of how depositions are taken. But it is not necessary to repeat the entire instruction.

2.6 General Instructions For Use During Trial — Use of Interrogatories

Model

You will now hear [have heard] answers that [name of party] gave in response to written questions submitted by the other side. The written questions are called "interrogatories." The written answers were given in writing and under oath, before the trial.

You must consider [name of party]'s answers to interrogatories in the same manner as if the answers were made from the witness stand.

Comment

The instruction is derived from former Ninth Circuit 2.13. *Cf.* Ninth Circuit 2.10.

This instruction should be used before the interrogatories are read to the jury. It can be modified to be given again at the close of the evidence. The instruction is not appropriate if the answers to the interrogatories are used for impeachment only. *See* Fed.R.Civ.P. 33.

This instruction should not be used for requests for admission under Fed.R.Civ.P. 36. The effect of a request for admission is conclusive as to the fact admitted.

2.7 General Instructions For Use During Trial — Charts and Summaries in Evidence

Model

[Name of party] has presented exhibits in the form of charts and summaries. I decided to admit these charts and summaries in place of the underlying documents that they represent in order to save time and avoid unnecessary inconvenience. You should consider these charts and summaries as you would any other evidence.

Comment

The instruction is derived from Sand et al., *Modern Federal Jury Instructions*, No. 74-11 (2004). "[C]harts and summaries are powerful visual displays for which some judicial explanation is required. Such an instruction will ensure that they are not given improper consideration by the jury." *Id.*; *compare* Instruction 2.8 (providing a limiting instruction when charts and summaries are not evidence).

For a variation, see Ninth Circuit 2.13 ("Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.").

2.8 General Instructions For Use During Trial — Charts and Summaries Not Admitted in Evidence

Model

Certain charts and summaries that have not been received in evidence have been shown to you in order to help explain or illustrate the contents of books, records, documents, testimony, or other evidence in the case. [Describe the charts and summaries that have not been admitted.] These charts and summaries are not themselves proof of any facts. They are not binding on you in any way. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the evidence.

Comment

The instruction is derived from former Ninth Circuit 3.9. *Cf.* Ninth Circuit 2.12.

This instruction is applicable to pedagogical devices and illustrations. Use of this material is governed by Rule 611(a) of the Federal Rules of Evidence, and not by Rule 1006 (which applies to summaries of admissible evidence where that evidence is too voluminous to be examined conveniently in court). *See United States v. DeBoer,* 966 F.2d 1066, 1069 (6th Cir. 1992) (summaries of already admitted evidence are permissible "so long as an appropriate limiting instruction informs the jury that 'the chart is not itself evidence but is only an aid in evaluating the evidence'"). If a chart or summary is used only to illustrate or explain evidence already admitted, then it is not itself evidence, and it may not be sent to the jury room.

It is suggested that this instruction be given both at the time the summary is used and at the end of the case. *See, e.g., United States v. Ray,* 370 F.3d 1039, 1047 n.8 (10th Cir. 2004) (suggesting that the court repeat the limiting instruction "in writing at the trial's conclusion"), *vacated on other grounds*, 543 U.S. 1109 (2005).

2.9 General Instructions For Use During Trial — Striking Evidence

Model

I have ordered that [describe the evidence] be struck from the record and I am instructing you that you must disregard that information [testimony]. That means that when you are deciding the case, you must not consider that information [testimony] in any way.

Comment

The instruction is derived from former Ninth Circuit 1.7. *Cf.* Ninth Circuit 1.10. It can also be altered to be given as part of a general instruction on evidence at the beginning of the case. *See* Instruction 1.5. The instruction is to be given when the evidence is struck, and not at the end of the case, as it could be counterproductive to describe the evidence that has been struck at that later point.

2.10 General Instructions For Use During Trial — Evidence Admitted for a Limited Purpose

Model

You [have heard] [will now hear] evidence that was received for [a] particular limited purpose[s]. [This evidence can be considered by you as evidence that (describe limited purpose)]. It may not be used for any other purpose. [For example, you cannot use it as proof that (discuss specific prohibited purpose)].

Comment

The instruction is derived from Fifth Circuit 2.15, Eighth Circuit 2.08B, and former Ninth Circuit 1.5. *Cf.* Ninth Circuit 1.8.

This instruction can be modified slightly to be given again at the close of the evidence. The Court of Appeals has stated, however, that it is error to fail to give a requested limiting instruction "at the time the evidence [i]s admitted." *United States v. Davis*, 726 F.3d 434, 445 (3d Cir. 2013) (identifying this issue in a case where the court gave the instruction "only in the final jury charge").

The Third Circuit has expressed a preference for an instruction that tells the jury both how the evidence can be used and how it must not be used. *See Government of Virgin Islands v. Mujahid*, 990 F.2d 111 (3d Cir. 1993) (trial judge should tell the jury that a guilty plea of a coconspirator can be used for impeachment of the coconspirator but cannot be used as proof of the defendant's guilt). *See also United States v. Lee*, 612 F.3d 170, 191 & n.25 (3d Cir. 2010) (discussing Third Circuit Model Criminal Jury Instruction 4.29 and "encourag[ing] district court judges to delineate the specific grounds for admissibility of 404(b) evidence, even if the entire 404(b) litany has already been recounted"); *United States v. Ciavarella*, 716 F.3d 705, 728 n.15 (3d Cir. 2013) (noting that evidence admitted under Rule 404(b) "must ... 'be accompanied by a limiting instruction (where requested) about the purpose for which the jury may consider it' " (quoting *United States v. Cross*, 308 F.3d 308, 320-21 (3d Cir. 2002))); *Davis*, 726 F.3d at 445 (finding error in jury instruction that "included a wide list of purposes" despite trial court's ruling that the evidence in question was admissible only "to prove knowledge"); *SEC v. Teo*, 746 F.3d 90, 97 (3d Cir. 2014) (concluding that the district court's limiting instruction "provid[ed] a meaningful delineation of character evidence from evidence that goes to intent and the absence of mistake" and that it "capture[d] the key points of this Court's Model [Criminal] Jury Instruction[§ 4:29]"); *United States v. Bailey*, 840 F.3d 99, 128-29 & n.138 (3d Cir. 2016) (quoting an instruction that "undisputedly met" the requirement for a requested limiting instruction under Rule 404(b) by contrasting permissible and impermissible uses of the evidence), *cert. denied*, 137 S. Ct. 1116 (2017); *United States v. Repak*, 852 F.3d 230, 248 (3d Cir. 2017) (holding that the district court "appropriately provid[ed] limiting instructions for the other-acts evidence as requested by" the defendant, and quoting the relevant

instructions, which directed that the evidence could be used "only for the purpose of" proving the defendant's state of mind). *Cf. United States v. Caldwell*, 760 F.3d 267, 274 (3d Cir. 2014) (stressing "that Rule 404(b) must be applied with careful precision, and that evidence of a defendant's prior bad acts is not to be admitted unless both the proponent and the District Court plainly identify a proper, non-propensity purpose for its admission").

For discussions of the importance of a limiting instruction when inadmissible evidence is disclosed to a jury under Evidence Rule 703's balancing test, see the 2000 Committee Note to Evidence Rule 703 ("If the otherwise inadmissible information is admitted under [Rule 703's] balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes."), and *Williams v. Illinois*, 132 S. Ct. 2221, 2241 (2012) (plurality opinion) ("[E]xperts are generally precluded from disclosing inadmissible evidence to a jury. See Fed. Rule Evid. 703 …. [I]f such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises.").

Instruction 2.10 can be used in multiple party cases where evidence is admissible against one party but not another (e.g., a statement by an agent that is admissible against the agent but not the principal).

See Instruction 1.5, including a reference to limited use instructions as part of a general instruction on evidence to be given at the beginning of the case.

2.11 General Instructions For Use During Trial — Opinion Testimony

Model

You have heard [will hear] testimony containing opinions from [name of witness]. In weighing this opinion testimony, you may consider [his/her] qualifications, the reasons for [his/her] opinions, and the reliability of the information supporting those opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. The opinion of [name of witness] should receive whatever weight and credit, if any, you think appropriate, given all the other evidence in the case.

In deciding whether to accept or rely upon the opinion of [name of witness], you may consider any bias that [name of witness] may have, including any bias that may arise from evidence that [name of witness] has been or will be paid for reviewing the case and testifying [or from evidence that [name of witness] testifies regularly and makes a large portion of [his/her] income from testifying in court].

Comment

This instruction is derived from Fifth Circuit 2.19 and former Ninth Circuit 3.7. *Cf.* Ninth Circuit 2.11. For a variation, see Eleventh Circuit 5.2 (adding: "When a witness has been or will be paid for reviewing and testifying concerning the evidence, you may consider the possibility of bias and should view with caution the testimony of such a witness where court testimony is given with regularity and represents a significant portion of the witness' income.").

The instruction avoids labeling the witness as an "expert." If the court refrains from designating the witness as an "expert" this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness' opinion, and will protect against the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials,* 154 F.R.D. 537, 559 (1994). *See* Advisory Committee Note to Federal Rule of Evidence 702 (2000) (cautioning against instructing the jury that the witness is an "expert").

The bracketed material can be used to give the instruction before the expert testifies. For example, the instruction could be given as part of the initial instruction on matters of evidence. *See* Instructions 1.5—1.7.

2.12 General Instructions For Use During Trial — Foreign Language Testimony or Audio Recording

Model

You are about to hear [testimony of a witness who will be testifying in] [an audio recording in] [language used]. The evidence you are to consider is only that provided through the official court [interpreters] [translators]. Although some of you may know the language used, it is important that all jurors consider the same evidence. So you must base your decision on the evidence presented in the English [interpretation] [translation]. You must disregard any different meaning.

[In this case there is a dispute over the translation of certain statements in a foreign language. It is for you to determine which, if either, translation is accurate.]

Comment

The Ninth Circuit has separate instructions for foreign language testimony and foreign language recordings. The model combines them and provides alternatives in brackets. *See* Ninth Circuit 2.6 and 2.7.

The instruction concerning recordings is appropriate only if the accuracy of the translation is not at issue. *See also* Instruction 2.13 on transcriptions of recordings.

2.13 General Instructions For Use During Trial — Transcript of Audio-Recorded Conversation

Model

At this time you are going hear conversations that were recorded. This is proper evidence for you to consider. Please listen to it very carefully. I am going to allow you to have a transcript of the recording [prepared by _____] to help you identify speakers and as a guide to help you listen to the recording. If you believe at any point that the transcript says something different from what you hear on the recording, remember it is the recording that is the evidence, not the transcript. Any time there is a variation between the recording and the transcript, you must be guided solely by what you hear on the recording and not by what you see in the transcript.

[In this case there are two transcripts because there is a difference of opinion as to what is said on the recording. You may disregard any portion of either or both transcripts if you believe they reflect something different from what you hear on the recording. It is what you hear on the recording that is evidence, not the transcripts.]

Comment

The instruction is derived from former Ninth Circuit 2.7. *Cf.* Ninth Circuit 2.5.

This instruction can be modified to be given sometime after the recording is heard, e.g., at the close of the case. See Sixth Circuit (Criminal) § 7.17:

> You have heard some tape recordings that were received in evidence, and you were given some written transcripts of the tapes. Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The tapes themselves are the evidence. If you noticed any differences between what you heard on the tapes and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the tapes, you must ignore the transcripts as far as those parts are concerned.

2.14 General Instructions For Use During Trial — Recess Admonition

Model

We are about to take [our first] [a] recess [and I remind you of the instruction I gave you earlier]. During this recess and any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, do not tell your fellow jurors but tell me about it immediately. [Do not read, watch or listen to any news reports of the trial, or conduct any research or investigation, including on the Internet. Remember that I told you not to use any electronic tools to communicate with anyone about the case or to do research relating to the case.] Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

If you need to speak with me about anything, simply give a signed note to [identify court personnel] to give to me.

[I will not repeat these admonitions each time we recess or adjourn, but you will be reminded of them on occasion.]

Comment

The instruction is derived from Fifth Circuit 2.1, Eighth Circuit 2.01 and former Ninth Circuit 2.1. *Cf.* Ninth Circuit 1.12.

Jurors should be reminded that they have duties and responsibilities even when not in court. *See*, *e.g.*, *United States v. Williams,* 635 F.2d 744 (8th Cir. 1980) (it is essential to a fair trial that the jury be cautioned as to what conduct is permissible when not in court; an instruction is particularly necessary before the jury separates at night when they will converse with friends and relatives or possibly encounter trial publicity).

This instruction may be modified to be given at the beginning of the trial, as well as before a recess. *See also* Instruction 1.3 (providing similar admonitions as part of a broader instruction at the beginning of the case).

3.1 General Instructions For Use At End of Trial — Deliberations

Model

When you retire to the jury room to deliberate, you may take with you [these instructions] [your notes] [and] the exhibits that the Court has admitted into evidence. You should select one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court.

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide if, under the appropriate burden of proof, the parties have established their claims. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

As jurors, you have a duty to consult with each other and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after a full and impartial consideration of all of the evidence with your fellow jurors. Listen to each other carefully. In the course of your deliberations, you should feel free to re-examine your own views and to change your opinion based upon the evidence. But you should not give up your honest convictions about the evidence just because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

When you start deliberating, do not talk to the jury officer, to me or to anyone but each other about the case. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a cell phone, smart phone [like Blackberries or iPhones], or computer of any kind; the internet, any internet service, or any text or instant messaging service [like Twitter]; or any internet chat room, blog, website, or social networking service [such as Facebook, MySpace, LinkedIn, or YouTube], to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong,

incomplete, or inaccurate. Information that you might see on the internet or on social media has not been admitted into evidence and the parties have not had a chance to discuss it with you. You should not seek or obtain such information and it must not influence your decision in this case.

If you have any questions or messages for me, you must write them down on a piece of paper, have the foreperson sign them, and give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take some time to get back to you.

One more thing about messages. Never write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that a certain number is voting one way or another. Your votes should stay secret until you are finished.

Your verdict must represent the considered judgment of each juror. In order for you as a jury to return a verdict, each juror must agree to the verdict. Your verdict must be unanimous.

A form of verdict has been prepared for you. It has a series of questions for you to answer. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will fill it in, and have your foreperson date and sign the form. You will then return to the courtroom and your foreperson will give your verdict. Unless I direct you otherwise, do not reveal your answers until you are discharged. After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so.

Once again, I want to remind you that nothing about my instructions and nothing about the form of verdict is intended to suggest or convey in any way or manner what I think your verdict should be. It is your sole and exclusive duty and responsibility to determine the verdict.

Comment

The instruction is derived from Fifth Circuit 2.11 and 2.12, Eighth Circuit 3.06, former Ninth Circuit 4.1, and the instruction used in the District of Delaware. *Cf.* Ninth Circuit 3.1.

The portion of the instruction concerning electronic media is drawn from Proposed Model Jury Instructions on the Use of Electronic Technology to Conduct Research on or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management (CACM) in December 2009. *See United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011) ("We enthusiastically endorse [the CACM] instructions and strongly encourage district courts to routinely incorporate them or similar language into their own instructions."). CACM released an updated version of the model instructions in June 2012 (the updated model is available at http://news.uscourts.gov/revised-jury-instructionshope-deter-juror-use-social-media-during-trial). Obviously, the relevant technologies will evolve over time; users of these instructions should insert a list of current examples in the appropriate place in the instructions.

It may also be useful to remind the jurors, at this point in the case, of the initial instruction to decide the case based only on the evidence presented at trial. *See* Instruction 1.3; *see also Fumo*, 655 F.3d at 307 (finding no abuse of discretion in district court's conclusion that no substantial prejudice resulted from juror's exposure to extraneous information based partly on fact that "the District Court gave careful and repeated instructions to the jurors, including immediately before deliberation, that they should 'not let rumors, suspicions, or anything else that [they] may have seen or heard outside of the court influence [their] decision in any way'").

The Supreme Court has expressed approval of instructions that "explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind" and that "emphasize the group dynamic of deliberations by urging jurors to share their questions and conclusions with their colleagues." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017) (quoting, as examples, the following instructions: "Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way" and "It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching an agreement if you can do so without violence to individual judgment").

The part of the instruction concerning unanimity may be altered if the parties consent to a non-unanimous verdict. *See* Fed.R.Civ.P. 48.

In the criminal case of *United States v. James*, 955 F.3d 336 (3d Cir. 2020), the Court of Appeals held that a jury verdict was not final until the jury was polled and the verdict accepted. It approved of the removal of a juror after the jury had been polled because the polling, combined with further inquiry, led the District Judge to have concerns about the juror's candor, memory, and English language proficiency

3.2 General Instructions For Use At End of Trial — Number of Witnesses

Model

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves.

Comment

See Instruction 1.7, where this instruction is included as an alternative to be given as part of a general instruction on credibility of witnesses at the beginning of the case.

This instruction is not to be given routinely, but it might be given, on request, when there is a disproportionate number of witnesses on one side of the case.

3.3 General Instructions For Use At End of Trial — Read-Backs of Trial Testimony

Model

At your request, I have decided to have [a transcript of] [describe the testimony] read [provided] to you in order to assist you in your deliberations. I remind you that you must focus on all of the testimony and evidence presented at the trial. You may not give undue weight to the testimony that is read back to you [provided to you].

Comment

The instruction contains a bracketed alternative for allowing the jury to receive a transcript of the testimony that the jurors request to re-hear. On allowing read-backs and transcripts of testimony, *see United States v. Bertoli*, 40 F.3d 1384, 1400 (3d Cir. 1994), where the court stated that two concerns may arise when a jury requests a read-back of testimony:

> (1) such requests may slow the trial when the requested testimony is lengthy; (2) if read only a portion of testimony, the jury may give undue weight to that portion.

The *Bertoli* court held, however, that "unless a trial court's refusal to read back testimony is supported by one of these two concerns, a trial judge abuses his discretion by denying the [jury's] request." *Id.* (internal quotation marks omitted). *See, e.g.*, *United States v. Shabazz*, 564 F.3d 280, 285 (3d Cir. 2009) (it was error to deny jury's request for read-back of testimony that "ran no longer than 25 minutes" and "was not peripheral, as [the witness] was both the only witness to link Shabazz directly to the robbery who was not testifying in connection with a plea agreement and the only one who expressed some uncertainty about his identification"); *United States v. Kolodesh*, 787 F.3d 224, 238-39 (3d Cir. 2015) (there was no abuse of discretion, "let alone … plain error," in trial court's failure to halt proceedings until it could provide testimony transcripts requested by the jury, or in trial court's refusal to provide edited portions rather in than full transcripts, or in trial court's statement to jury that as to one witness, only audio playback was available and not a transcript). The *Bertoli* court further held that a trial court is within its discretion in providing a transcript of the requested testimony. The *Bertoli* court suggested that any transcript or read-back should be accompanied by an instruction "to focus on the entire testimony and evidence." *Bertoli*, 40 F.3d at 1401.

3.4 General Instructions For Use At End of Trial — Deadlock

Model

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so consistent with your individual judgments. Each of you must decide the case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you must be open to their opinions. You should not be influenced to vote a certain way, however, by the single fact that a majority of the jurors, or any of them, will vote in a certain way. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinions of the other jurors.

In the course of your deliberations you should not hesitate to reexamine your own views, and to change your opinion if you are convinced that those views are wrong. To reach a unanimous result you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to reexamine your own views.

Remember that you are not partisans; you are judges — judges of the facts. Your only interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

If you should fail to agree on a verdict, the case is left open and must be resolved at a later time. There is no reason to think that another trial would be conducted in a better way or that a different jury would decide it any better. Any future jury must be selected in the same manner and from the same source as you.

We try cases to dispose of them and to reach a common conclusion if it is consistent with the conscience of each member of the jury. I suggest that, in deliberating, you each recognize that you are not infallible, that you listen to the opinions of the other jurors and that you do so carefully with a view to reaching a common conclusion, if you can. You may take all the time that you feel is necessary.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now retire and continue your deliberations.

Comment

The instruction is derived from Eighth Circuit 3.07 and former Ninth Circuit 4.6. *Cf.* Ninth

Circuit 3.5. *See also* Third Circuit (Criminal) Instruction 9.05.

An instruction encouraging a deadlocked jury to reach a verdict should be given with great caution. Such an instruction was approved in *Allen v. United States,* 164 U.S. 492 (1896). But "Allen" charges often have been criticized as coercive and as an unwarranted intrusion upon the province of the jury.

Note that the model instruction does not specifically encourage those jurors in the minority to reconsider their views or distrust their judgment. An instruction to that effect has been declared to be prohibited in the Third Circuit. *See United States v. Fioravanti,* 412 F.2d 407, 418 (3d Cir. 1969) ("in this circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own judgment if he finds a large majority of the jurors taking a view different from his. Such an instruction will be deemed error, normally reversible error."). While it has been held that the prohibition on instructions targeted at the minority of jurors is limited to criminal cases, *see Cary v. Allegheny Techs., Inc.*, 267 F. Supp. 2d 442 (W.D. Pa. 2003), the danger of coercion in such a charge cautions against its use even in civil cases. In concluding that a modified *Allen* charge was "proper[]" in the context of a particular civil case, the Court of Appeals noted that the charge in question "does not speak specifically to minority jurors." *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 940 & n.32 (3d Cir. 1990).

Courts have also disapproved of statements telling a deadlocked jury that it must reach a decision or "instruct[ing] a deadlocked jury to consider the burdens and expense to the government of a new trial." *United States v. Brennan*, 326 F.3d 176, 193 (3d Cir. 2003) (collecting cases). On the latter point, the Court of Appeals has explained that "a charge is unduly coercive when the trial court not only states that a new trial will result, but goes further and unduly emphasizes the consequences, i.e., time, toil, or expense, that will accompany a failure to arrive at an unanimous verdict." *United States v. Jackson*, 443 F.3d 293, 298 (3d Cir. 2006) (rejecting challenge to trial judge's statement that "the case will have to be retried in front of another jury" and reasoning that "any undue coercion created in this case by the brief mention of a new trial was mitigated by" the trial judge's emphasis on "the government's burden of proof [and] the jurors' responsibility to consider honestly the evidence" and the trial judge's directive that jurors should not "surrender [their] beliefs for the sake of expediency").