Chapter 1: Preliminary Instructions Before Opening Statements

1.01 Preliminary Instructions to Jury Panel

I am Judge *(name),* **the trial judge in this case. You have been called to this courtroom as a panel of prospective jurors for the case of United States v.** *(defendants (s) name(s)).* **This is a criminal case in which** *(name(s)) (is) (are)* **charged with committing the crime***(s)* **of** *(offense(s) charged),* **in violation of federal criminal law.**

From this panel we will select the jurors who will sit on the jury that will decide this case. We will also select alternate jurors, who will be part of this trial and available in the event that one of the regular jurors becomes ill or is otherwise unable to continue on the jury.

We rely on juries in this country to decide cases tried in our courts, so service on a jury is an important duty of citizenship. Jurors must conduct themselves with honesty, integrity, and fairness.

Under our system of justice, the role of the jury is to find the facts of the case based on the evidence presented in the trial. That is, from the evidence seen and heard in court, the jury decides what the facts are, and then applies to those facts the law that I will give in my instructions to the jury. My role as the trial judge is to make whatever legal decisions must be made during the trial and to explain to the jury the legal principles that will guide its decisions.

We recognize that you are all here at some sacrifice. However, we cannot excuse anyone merely because of personal inconvenience, unless serving on this jury would be a compelling hardship.

In a few minutes you will be sworn to answer truthfully questions about your qualifications to sit as jurors in this case. This questioning process is called the voir dire. I will conduct the questioning, and the lawyers for the parties may also participate. It is, of course, essential that you answer these questions truthfully; a deliberately untruthful answer could result in severe penalties.

The voir dire examination will begin with a brief statement about the particulars of this case. The purpose of this statement is to tell you what the case is about and to identify the parties and their lawyers.

Questions will then be asked to find out whether any of you have any personal interest in this case or know of any reason why you cannot render a fair and impartial verdict. We want to know whether you are related to or personally acquainted with any of the parties, their lawyers, or any of the witnesses who may appear during the trial, and whether you already know anything about this case. Other questions will be asked to determine whether any of you have any beliefs, feelings, life experiences, or any other reasons that might influence you in rendering a verdict.

The questions are not intended to embarrass you. If you have a response that you are uncomfortable sharing publicly, please let me know and I will see that you are questioned in private. I also may decide on my own that questions should be asked in private.

After this questioning, some of you will be chosen to sit on the jury for this case. If you are not chosen, you should not take it personally and you should not

consider it a reflection on your ability or integrity.

There may be periods of silence during the voir dire process, when the lawyers and I are not speaking openly. During those times you may talk, but you must not talk about this case or about the voir dire questions and answers.

[If the trial judge wants to give a further explanation of the challenge and selection process, here is alternative language that may be used for that purpose:

Alternative 1: After we complete the questioning, the lawyers and I will decide which of you will be chosen to sit on the jury. Please be patient while we complete the selection process.

Alternative 2: After this questioning is completed, the parties on either side may ask that a member of the panel be excused or exempted from service on the jury in this case. These are called challenges.

First: A prospective juror may be challenged for cause if the voir dire examination shows that he or she might be prejudiced or otherwise unable to render a fair and impartial verdict in this case. I will excuse a prospective juror if I decide that there is sufficient cause for the challenge. There is no limit to the number of challenges for cause. Second: The parties also have the right to a certain limited number of challenges for which no cause is necessary. These are called peremptory challenges, and each party has a predetermined number of peremptory challenges. The peremptory challenge is a right long-recognized by the law as a means of giving the parties some choice in the make-up of the jury. You should understand that if you are eliminated from the jury panel by a peremptory challenge that is not a reflection on your

ability or integrity.]

Comment

This instruction should be given at the beginning of voir dire. It is based on the Handbook for Trial Jurors Serving in the United States District Courts, published by the Administrative Office of the United States Courts. Also *see* Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1 *Federal Jury Practice and Instructions* (6th ed. 2006) [hereinafter OMalley et al] Ch. 4 (Choosing and Empaneling the Jury).

Questioning Prospective Jurors Privately. The trial judge may decide to question prospective jurors privately, either because they express concern about embarrassment or because the judge is concerned that answers could taint other prospective jurors who are listening. Some judges prefer to question panel members privately at sidebar; others prefer to send the panel out of the courtroom and bring prospective jurors back into the courtroom individually for questioning.

Alternative Language Regarding Excusing Jurors. Prospective jurors may be excused in three ways, because of hardship, challenges for cause, or peremptory challenges. How the trial judge handles these and how the judge wants to explain them to the jury panel varies. Many courts handle these matters differently. The alternative language at the end of this instruction suggests ways that these matters may be explained to the panel, but there are many others.

Highly Publicized Cases. In a highly publicized case, where there is likely to be significant media coverage during jury selection, the trial judge may want give a preliminary instruction to the panel similar the paragraph (6) of Instruction 1.03 (Conduct of the Jury).

Sequestration of Jurors. Whether to sequester a jury for the trial is within the discretion of the trial judge and may be ordered sua sponte. *See, e.g., United States v. Shiomos*, 864 F.2d 16, 18-19 (3d Cir 1988); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). If possible, this decision should be made at the beginning of voir dire, because sequestration may affect whether it would be a hardship for potential jurors to serve on the jury. *See United States v. Shiomos.* If the trial judge decides to sequester the jury, the judge should explain that at the beginning of voir dire. The following instruction to the panel is suggested:

Sequestration of Jurors

> I have concluded that the jurors will be sequestered during this trial. That is, the jurors will not be allowed to separate during the recesses in the trial, including overnight, but rather will remain together at all times. I realize that this will be a hardship on you.
>
> I have decided to sequester the jury because this case has already and will likely continue to generate a substantial amount of publicity. I am concerned that this publicity might affect the fairness of the trial and the integrity of the process. I do not lack confidence in your ability as jurors to disregard the publicity and to render a fair verdict based only on the evidence, but I want to avoid a later claim that something that

may have occurred outside this courtroom could have had an influence on the jurys decision.

See 1A OMalley 10.09. In addition, either at the beginning of voir dire or certainly at the beginning of the trial, the judge should also give the jurors detailed instructions about how their personal and family needs will be met while they are sequestered during the trial.

Anonymous Jury. Where the evidence in a particular case provides a basis for legitimate concerns that jurors might fear retaliation against themselves or their families, the trial judge also has the discretion to seat an anonymous jury, ordering at the beginning of jury selection that the names, addresses and other identifying information about the jurors will be disclosed only to the court and its personnel. The Third Circuit has upheld this procedure in order to promote impartial decision making by allaying the jurors fears. *See, e.g., United States v. Scarfo,* 850 F.2d 1015 (3d Cir.), cert. denied, 488 U.S. 910 (1988) (trial judge did not abuse his discretion in withholding information about jurors identities before and after voir dire, where prosecution evidence describing the defendant's organized crime group might have caused anxiety among the jurors). If the judge decides to seat an anonymous jury, the judge should give an instruction at the beginning of voir dire explaining this procedure and the reasons for it, without infringing on the presumption of innocence and protecting the defendant from possible adverse inferences. *See United States v. Scarfo*, 850 F.2d at 1026-28 (upholding trial judges lengthy instruction explaining anonymous jury procedure). *Also see* Eleventh Circuit Pattern Jury Instructions, Trial Instruction # 1 (Preliminary and Explanatory Instructions to Innominate (Anonymous) Jury).

Doctrine of Implied Bias. With respect to the sentence in the eighth paragraph of the instruction, “We want to know whether you are related to or personally acquainted with any of the parties, their lawyers, or any of the witnesses who may appear during the trial . . . ,” the Third Circuit held in *United States v. Mitchell*, 690 F.3d 137 (3d Cir. 2012), that the doctrine of “implied bias” (that certain categories of potential jurors are biased as a matter of law) survived after the Supreme Court’s holding in *Smith v. Phillips*, 455 U.S. 209 (1982), and that it applies to “close relatives.” The court remanded the case to the district court to hold an evidentiary hearing as to whether the cousin of the prosecutor constituted a close relative and instructed the district court to hold a new trial if the court found she was a close relative. The court declined to extend the implied bias doctrine to a co-worker of a police officer who was a government witness.

(Revised 12/12)

1.02 Role of the Jury

Now that you have been sworn, let me tell you what your role is as jurors in this case.

Under our system of justice, the role of the jury is to find the facts of the case based on the evidence presented in the trial. You must decide the facts only from the evidence presented to you in this trial.

From the evidence that you will hear and see in court, you will decide what the facts are and then apply to those facts the law that I will give to you in my final instructions. That is how you will reach your verdict.

Whatever your verdict, it will have to be unanimous. All of you will have to agree on it or there will be no verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up his or her own mind. Therefore, each of you has a responsibility which you cannot avoid and you should do your best throughout the trial to fulfill this responsibility.

I play no part in finding the facts. You should not take anything I may say or do during the trial as indicating what I think of the evidence or about what your verdict should be. My role is to make whatever legal decisions have to be made during the course of the trial and to explain to you the legal principles that must guide you in your decisions.

You must apply my instructions about the law. Each of the instructions is important. You must not substitute your own notion or opinion about what the law is or

ought to be. You must follow the law that I give to you, whether you agree with it or not.

P**erform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, or gender** *[, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community]*.

Comment

See 1A OMalley et al, supra, § 10.01 (Opening Instruction). For variations in other Circuits, *see* First Circuit § 1.01; Fifth Circuit §1.04; Sixth Circuit §1.02; Seventh Circuit §1.01; Eighth Circuit §1.01.

One or more of the characteristics listed in the bracketed language in the last paragraph should be mentioned also, if it appears that there may be a risk that jurors could be influenced by those characteristics in a particular case. The trial judge may need to mention other characteristics that are not listed if it appears that they might influence jurors in a particular case.

1.03 Conduct of the Jury

Here are some important rules about your conduct as jurors:

(1) Keep an open mind. Do not make up your mind about the verdict until you have heard all of the evidence, and I have given final instructions about the law at the end of the trial, and you have discussed the case with your fellow jurors during your deliberations.

(2) Do not discuss the case among yourselves until the end of the trial when you retire to the jury room to deliberate. You need to allow each juror the opportunity to keep an open mind throughout the entire trial. During trial you may talk with your fellow jurors about anything else of a personal nature or of common interest.

(3) During the trial you should not speak to any of the parties, lawyers, or witnesses involved in this case, not even to pass the time of day. 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.

(4) Do not talk with anyone else or listen to others talk about this case until the trial has ended and you have been discharged as jurors. It is important not only that you do justice in this case, but that you give the appearance of justice. If anyone should try to talk to you about the case during the trial, please report that to me, through my courtroom deputy, immediately. Do not discuss this situation with any other juror.

(5) Do not discuss the case with anyone outside the courtroom or at home, including your family and friends. You may tell your family or friends that you have been selected as a juror in a case and you may tell them how long the trial is expected to last. However, you should also tell them that the judge instructed you not to talk any more about the case and that they should not talk to you about it. The reason for this is that sometimes someone elses thoughts can influence you. Your thinking should be influenced only by what you learn in the courtroom.

(6) Until the trial is over and your verdict is announced, do not watch or listen to any television or radio news programs or reports about the case, or read any news or internet stories or articles about the case, or about anyone involved with it. *[In highly publicized cases, the judge may want to add an additional instruction in this regard.]*

(7) Do not use a computer, cellular phone, other electronic devices or tools of technology while in the courtroom or during deliberations. These devices may be used during breaks or recesses for personal uses, but may not be used to obtain or disclose information about this case. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Google+, Facebook, My Space, LinkedIn, and YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it.

(8) Do not do any research or make any investigation on your own about any

matters relating to this case or this type of case. This means, for example, that you must not visit the scene, conduct experiments, consult reference works or dictionaries, or search the internet, websites or blogs for additional information, or use a computer, cellular phone, or other electronic devices or tools of technology, or any other method, to obtain information about this case, this type of case, the parties in this case, or anyone else involved in this case. Please do not try to find out information from any source outside the confines of this courtroom. You must decide this case based only on the evidence presented in the courtroom and my instructions about the law. It would be improper for you to try to supplement that information on your own.

(9) Finally, you should not concern yourselves with or consider the possible punishment that might be imposed if you return a verdict of guilty.

Comment

See 1A OMalley et al, supra, §10.01 (Opening Instruction). For variations in other Circuits, *see* First Circuit §1.07; Fifth Circuit §1.01; Eighth Circuit §1.08; Ninth Circuit1.9; Eleventh Circuit 2.1.

The trial judge 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 parts of it, during the trial as well. For example, if the punishment for the offense(s) charged is mentioned during the trial, the judge should give paragraph (9) of this instruction at that time.

This instruction incorporates the language of the Proposed Model Jury Instructions regarding The Use of Electronic Technology to Conduct Research on or Communicate about a Case, prepared by the Committee on Court Administration and Case Management of the Judicial Conference of the United States (latest version June 2012, available at http://www.fjc.gov). These Proposed Model Instructions suggest that they should be provided to jurors before trial, at the close of a case, at the end of each day before jurors return home, and at other times, as appropriate. The Third Circuit in *United States v. Fumo*, 655 F.3d

288, 305 (3d Cir. 2011), "enthusiastically endorse[d] these proposed model instructions and strongly encourage[d] district courts to routinely incorporate [these proposed instructions] or similar language into their own instructions. Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence."

The following instruction may also be added if necessary:

> (10) 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.

Pre-deliberation Discussions Among Jurors Disapproved. Some states permit pre-deliberation discussions among the jurors themselves. However, the Third Circuit has declared that:

> 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 courts 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.*

Highly Publicized Cases. In a highly publicized case the trial judge might also want to instruct:

> Until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. It is important for you to understand that this case must be decided only by the evidence presented in the courtroom and the instructions I give you.

If potentially prejudicial publicity, such as newspaper, radio, or television reports, appears during trial, the trial judge should also give Instruction No. 2.36 (Prejudicial Publicity

During Trial) at the time the judge learns about that publicity. The trial judge also has the discretion to sequester the jury during trial and to seat an anonymous jury. *See* Comment to Instruction 1.01 (Preliminary Instructions to Jury Panel).

(Revised 12/09, 10/11, & 12/12)

1.04 Bench (Side-Bar) Conferences

During the trial it may be necessary for me to talk with the lawyers out of your hearing. That is called a bench or side-bar conference. If that happens, please be patient. We also ask that you advise me, through my courtroom deputy, if you are able to hear any of the bench or side-bar conferences, because the purpose is to hold these discussions outside the hearing of the jury, for important reasons.

I know you may be curious about what we are discussing. We are not trying to keep important information from you. These conferences are necessary for me to discuss with the lawyers objections to evidence and to be sure that evidence is presented to you correctly under the rules of evidence. We will, of course, do what we can to keep the number and length of these conferences to a minimum. If I think the conference will be long, I will call a recess.

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

Comment

See 1A OMalley et al, supra, § 10.01. For variations in other circuits, *see* First Circuit (Criminal) § 1.05; Eighth Circuit § 1.03; Ninth Circuit § 2.2. For a shortened version of this instruction, *see* Fifth Circuit § 2.7. If, after granting a request for a side-bar conference, the court instructs the clerk to turn on a white noise machine to prevent the jury from hearing what is said, the following instruction may be given:

> A white noise generator is installed over the jury box for use when the lawyers and I are speaking at the bench or at side-bar. This machine neutralizes sound and prevents the jury from hearing what is said without requiring us to whisper.

1.05 Note Taking by Jurors

Option 1:

At the end of the trial you must make your decision based on what you remember of the evidence. You will not have a written transcript of the testimony to review. You must pay close attention to the testimony as it is given.

If you wish, you may take notes to help you remember what witnesses said. My courtroom deputy will arrange for pens, pencils, and paper. If you do take notes, please keep them to yourself until the end of trial when you and your fellow jurors go to the jury room to decide the case. Here are some other specific points to keep in mind about note taking:

(1) <u>Note-taking is permitted, but it is not required.</u> You are not required to take notes. How many notes you want to take, if any, is entirely up to you.

(2) <u>Please make sure that note-taking does not distract you</u> from your tasks as jurors. You must listen to all the testimony of each witness. You also need to decide whether and how much to believe each witness. That will require you to watch the appearance, behavior, and manner of each witness while he or she is testifying. You cannot write down everything that is said and there is always a fear that a juror will focus so much on note-taking that he or she will miss the opportunity to make important observations.

(3) <u>Your notes are memory aids; they are not evidence</u>. Notes are not a

record or written transcript of the trial. Whether or not you take notes, you will need to rely on your own memory of what was said. Notes are only to assist your memory; you should not be overly influenced by notes. (4) In your deliberations, <u>do not give any more or less weight to the views of a fellow juror just because that juror did or did not take notes</u>. Do not assume that just because something is in someones notes that it necessarily took place in court. It is just as easy to write something down incorrectly as it is to hear or remember it incorrectly. Notes are not entitled to any greater weight than each jurors independent memory of the evidence. You should rely on your individual and collective memories when you deliberate and reach your verdict.

(5) <u>You should not take your notes away from court</u>. *[Here the judge should describe the logistics of storing and securing jurors notes during recesses and at the end of the court day. For example, jurors may be told to put their notes in an envelope provided for that purpose at the beginning of each recess and at the end of the day. The jurors could be told to leave the envelope containing the notes on their chairs. The judges courtroom staff could collect the notes and place them in a locked drawer at the end of each day or the jurors might be told to leave their notes in the jury room at the end of the day.]*

My staff is responsible for making sure that no one looks at your notes. Immediately after you have finished your deliberations and I have accepted your verdict, my staff will collect and destroy your notes, to protect the

secrecy of your deliberations.

Option 2:

At the end of the trial you must make your decision based on what you remember of the evidence. Although we have a court reporter here, you will not have a written transcript of the testimony to 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 to the witness appearance, behavior, and 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, you may not take notes during this trial.

Comment

See 1A OMalley et al, supra, § 10.03 (Note-Taking Prohibited) & § 10.04 (Note-Taking Permitted). For variations in other Circuits, *see* First Circuit § 1.08; Fifth Circuit § 1.02; Eighth Circuit § 1.06; Ninth Circuit §1.10, 1.11; Eleventh Circuit § 3.1.

Trial Court Discretion to Allow Juror Note-Taking. In *United States v. Maclean*, 578 F.2d 64 (3d Cir. 1978), the Third Circuit held that the trial judge has discretion to allow jurors to take notes. The court 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 jurors independent recollection of the facts.

Transcript of Testimony; Read backs of Testimony. The instruction also states that

jurors will not have a written transcript of the testimony to review during deliberations. It does not say absolutely that a transcript will not be provided. This instruction is in accordance with *United States v. Bertoli*, 40 F.3d 1384 (3d Cir. 1994), which held that the trial judge has discretion to provide a transcript to jurors during deliberations. The trial judge also has the discretion to order portions of the testimony read back to the jury during deliberations, and the judge may want to tell the jury in his or her preliminary instructions that the judge may allow read backs of selected portions of testimony on request.

Studies on Juror Note-Taking. Two experimental studies suggest that juror note-taking may improve jurors functioning. Lynne ForsterLee et al., *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 LAW & HUM. BEHAV. 567 (1994); David L. Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53 (1994). Another study suggests that note-takings usefulness may vary depending on the complexity of the case. Lynne ForsterLee & Irwin A. Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCHOLOGY 305 (1997). Field studies failed to detect benefits from note-taking, but may not have been likely to do so given their design. Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259 (1997); Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121 (1994); Larry Heuer & Steven Penrod, *Increasing Jurors Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231 (1988). Those field studies found that the asserted disadvantages of note-taking did not materialize. Note-taking gets generally (though not uniformly) positive reviews from judges, lawyers, and jurors. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985); Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003).

1.06 Questions by Jurors of Witnesses

Option 1:

Only the lawyers and I are allowed to ask questions of witnesses. You are not permitted to ask questions of witnesses. *[The specific reasons for not allowing jurors to ask questions may be explained.]* **If, however, you are unable to hear a witness or a lawyer, please raise your hand and I will correct the situation.**

Option 2:

Generally only the lawyers and I ask questions of witnesses. However, I may allow you to submit questions for some witnesses. After the lawyers have finished asking their questions on direct and cross-examination but before I have excused the witness, if you have a question on an important matter and feel that an answer would be helpful to you in understanding the case, please raise your hand. Write your question on a piece of paper and hand it to my courtroom deputy, who will give the question to me. Do not discuss your question with any other juror.

You should only submit questions that will help you decide important issues in this case. Also, the rules of evidence must be considered before any questions can be approved. Therefore, I will discuss your question with the lawyers, outside your hearing, and decide whether the question is allowed under the rules. If the question is not allowed under the rules, I will not ask it. You should not make any conclusions from the fact that I do not ask the question. You should not take it personally if I do not ask the question or if I ask it in a form that is different from what you submitted. 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. Remember that you are here to judge the facts impartially. You can submit a question if testimony of a witness is unclear on an important point or if, after the lawyers have finished questioning the witness, you think there is still an important question that has not been asked. You should not submit a question just to argue with a witness or a question that might suggest your view or conclusion about the outcome of the case.

Comment

See 1A OMalley et al, supra, § 10.05 (Questions by jurors Prohibited), § 10.06 (Questions by jurors Permitted); Federal Judicial Center § 2 (providing both options). For variations in other Circuits, *see* Eighth Circuit § 1.06A (the Notes for Use discuss different methods for juror questioning).

Juror Questions Within Trial Courts Discretion; Options. Whether to allow jury questions is within the discretion of the trial judge. Option 1 is for judges who want to disallow jury questions explicitly. Option 2 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. If a judge does not give an explicit instruction, but a juror inquires about asking questions, the judge should then decide whether to allow or disallow juror questions and, depending on that decision, should instruct in accordance with the appropriate option given above.

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. *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 procedure for jury questions is set forth in Option 2. 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. *Id.* at 724-25. On the other hand, allowing jurors to ask questions may risk turning them into advocates and compromising their neutrality, or it may waste time if there is a very inquisitive juror. *Id*. at 724, citing *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

guilt or innocence.

Studies on Juror Questions. The practice of allowing jurors to submit questions for witnesses has become more prevalent. Field studies indicate that permitting juror questions can aid juror understanding, and that the feared downsides of juror questions do not materialize in practice. Steven D. Penrod & Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*, 3 PSYCHOL. PUB. POL'Y & L. 259 (1997); Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 LAW & HUM. BEHAV. 121 (1994). One field study suggests the benefits of permitting juror questions may increase with the factual and legal complexity of the trial. Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29 (1994). Jurors are in favor of permitting juror questions. Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003). Judges are generally (though not uniformly) favorable, Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985). Lawyers are split, with one study suggesting that plaintiff/prosecution lawyers favor the practice but defense lawyers are less enthusiastic. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985); Neil P. Cohen & Daniel R. Cohen, *Jury Reform in Tennessee*, 34 U. MEM. L. REV. 1 (2003).

1.07 Description of Trial Proceedings

The trial will proceed in the following manner: First: The lawyers will have an opportunity to make opening statements to you. The prosecutor may make an opening statement at the beginning of the case. The defendants *(s)* **lawyer***(s)* **may make** *(an)* **opening statement***(s)* **after the prosecutors opening statement or the defendant***(s)* **may postpone the making of an opening statement until after the government finishes presenting its evidence. The defendant***(s) (is) (are)* **not required to make an opening statement.**

The opening statements are simply an outline to help you understand what each party expects the evidence to show. What is said in the opening statements is not itself evidence.

Second: After opening statements, the government will introduce the evidence that it thinks proves the charge*(s)* **stated in the indictment. The government will present witnesses and the defendants** *(s)* **lawyer***(s)* **may cross-examine those witnesses. The government may also offer documents and other exhibits into evidence.**

Third: After the government has presented its evidence, the defendant*(s)* **may present evidence, but** *(he) (she) (they) (is) (are)* **not required to do so. As I will tell you many times during this trial, the government always has the burden or obligation to prove each and every element of the offense***(s)* **charged beyond a reasonable doubt. The defendant***(s) (is) (are)* **presumed to be innocent of the charge***(s)*. **The law never imposes on a defendant***(s)* **in a criminal case the burden**

of proving *(his) (her) (their)* **innocence by calling any witnesses, producing any exhibits, or introducing any evidence.**

[If the court knows that the defendant will be presenting an affirmative defense, see discussion in the Comment below about possible additional instructions.

Fourth: After all of the evidence has been presented, the lawyers will have the opportunity to present closing arguments. Closing arguments are designed to present to you the parties theories about what the evidence has shown and what conclusions may be drawn from the evidence. What is said in closing arguments is not evidence, just as what is said in the opening statements is not evidence.

Fifth: After you have heard the closing arguments, I will give you orally *[and in writing]* **the final instructions concerning the law that you must apply to the evidence presented during the trial. As I am doing now, I may also give you instructions on certain aspects of the law throughout the trial, as well as at the end of the trial.**

Sixth: After my final instructions on the law, you will retire to consider your verdict. Your deliberations are secret. You will not be required to explain your verdict to anyone. Your verdict must be unanimous; all twelve of you must agree to it.

You must keep your minds open during this trial. Do not make up your mind about any of the questions in this case until you have heard each piece of evidence and all of the law which you must apply to that evidence in other words, until you begin your deliberations.

Comment

See 1A OMalley et al, supra, § 10.01 (Opening Instruction). For model instructions in other Circuits outlining the trial procedures, *see* First Circuit §1.09; Fifth Circuit § 1.01; Eighth Circuit § 1.09.

This instruction, specifically the fifth and sixth paragraphs, should be modified if final instructions are given before closing arguments.

Affirmative Defenses and the Burden of Proof. If the defendant presents at trial an affirmative defense (*i.e.*, a defense that does not involve one of the elements of the offense*(s)* charged) and the law places the burden of persuasion on the defendant as to that defense, then the discussion in the *Third* paragraph of this instruction is somewhat inaccurate or incomplete. Although it will ordinarily be premature to instruct about affirmative defenses during preliminary instructions, if the trial judge knows that the defendant will be presenting such a defense and if the defendant does not object, the judge may want to modify the *Third* paragraph to read as follows:

> The government always has the burden or obligation to prove each and every element of the offense*(s)* charged beyond a reasonable doubt. The defendant*(s) (is) (are)* presumed to be innocent of the charge*(s)*. The law does not impose on the defendant*(s)* the burden of proving *(his) (her) (their)* innocence as to any of the elements of the offense*(s)* charged. The defendant*(s) (name)* in this case will, however, present a defense of *(state the affirmative defense that the defendant(s) will present.)* This is what the law calls an affirmative defense. An affirmative defense does not require the defendant*(s)* to disprove an element of the offense*(s)* charged, but does require the defense to prove certain other things that the law recognizes as a sufficient reason to find the defendant*(s)* not guilty. I will instruct you further on this affirmative defense in my final instructions at the end of the trial.

For model instructions on affirmative defenses and commentary discussing burdens of proof on defenses, *see* Chapter 7 (Defenses and Theories of Defense).

1.08 Evidence (What is; is Not)

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

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; and

(3) Any fact or testimony that is stipulated; that is, formally agreed to by the parties.

The following are not evidence:

(1) Statements and arguments of the lawyers for the parties in this case;

(2) Questions by the lawyers and questions that I might ask. You must not assume that a fact is true just because one of the lawyers or I ask a question about it. It is the witness answers that are evidence. Of course, you may need to consider the question to know what a witness means by his or her answer. For example, if a witness answers yes to a question, you will have to consider the question to understand what the witness is saying.

(3) Objections by lawyers, including objections in which the lawyers state f acts;

(4) Any testimony I strike or tell you to disregard; and

(5) Anything you may see or hear about this case outside the courtroom.

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 and common sense tell you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.

The rules of evidence 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. An objection simply means that the lawyer is asking me to decide whether the evidence should be allowed under the rules. Lawyers have a responsibility to their clients to make objections when they think evidence being offered is improper under the rules of evidence. You should not be influenced by the fact that an objection is made.

You should also not be influenced by my rulings on objections to evidence. If I overrule an objection, the question may be answered or the exhibit may be received as evidence, and you should treat the testimony or exhibit like any other. I may allow evidence (testimony or exhibits) only for a limited purpose. If I do that, I will instruct you to consider the evidence only for that limited purpose, and you must follow that instruction.

If I sustain an objection, the question will not be answered or the exhibit will not be received as evidence. Whenever I sustain an objection, you must disregard the question or the exhibit entirely. Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown. Sometimes a witness may have already answered

before a lawyer objects or before I rule on the objection. If that happens and if I sustain the objection, you should disregard the answer that was given.

Also, I may order that some testimony or other evidence be stricken or removed from the record. If I do that, I will instruct you to disregard that evidence. That means, when you are deciding the case, you must not consider or be influenced in any way by the testimony or other evidence that I told you to disregard.

Although the lawyers may call your attention to certain facts or factual conclusions that they think are important, what the lawyers say is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision. Also, do not assume from anything I do or say during the trial that I have any opinion about the evidence or about any of the issues in this case or about what your verdict should be.

Comment

See 1A OMalley et al, supra, § 12.03. For variations in other Circuits, *see* First Circuit § 1.05; Fifth Circuit § 1.06; Sixth Circuit § 1.04; Eighth Circuit § 1.03.

If the trial judge knows that he or she will be taking judicial notice of any facts, the judge should include in describing what is evidence, (4) Any facts that will be judicially noticed--that is, facts which I say you may accept as true even without other evidence.

1.09 Direct and Circumstantial Evidence

Two types of evidence may be used in this trial, direct evidence and circumstantial (or indirect) evidence. You may use both types of evidence in reaching your verdict.

Direct evidence is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses something the witness has seen, touched, heard, or smelled.

“Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could find or infer the existence of some other fact or facts. An inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. An inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.

For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could find or conclude that it was raining. You would not have to find that it was raining, but you could.

Sometimes different inferences may be drawn from the same set of facts. The government may ask you to draw one inference, and the defense may ask you to draw another. You, and you alone, must decide what inferences you will draw based on all the evidence.

You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you are to decide how much weight to give any evidence.

Comment

See 1A OMalley et al, supra, § 12.04; Hon. Leonard Sand, John S. Siffert, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal* (2003) [hereinafter, Sand et al.] 74-2. For variations in other Circuits, see Fifth Circuit § 1.07; Sixth Circuit § 1.06; Seventh Circuit § 1.05; Eighth Circuit § 1.03 & 1.04; Ninth Circuit § 1.6.

This instruction provides a general explanation of what the terms direct and circumstantial evidence, infer and inference mean in the context of a trial. This instruction should be given in most cases since it is likely that the lawyers will use these terms.

In *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997), the Third Circuit defined direct evidence as evidence that proves an ultimate fact in a case without any process of inference, save inferences of credibility. Direct evidence is evidence given by a witness as to a fact which the witness has observed or perceived. In contrast to direct evidence, circumstantial evidence is offered to prove an ultimate fact, but an inferential step by the fact finder is required to reach that fact. *See United States v. Casper*, 956 F.2d 416 (3d Cir. 1992). It is essential that there be a logical and convincing connection between the facts established and the conclusion inferred. *See, e.g., County Court v. Allen*, 442 U.S. 140 (1979); *United States v. Soto*, 539 F.3d 191, 194 (3d Cir. 2008) (quoting *United States v. Cartwright*, 359 F.3d 281, 287 (3d Cir.2004)). The fact that evidence is circumstantial does not mean that it has less probative value than direct evidence. *See Lukon v. Pennsylvania R. Co.*, 131 F.2d 327 (3d Cir. 1942).

Inferences not Presumptions. In criminal cases, the Constitution mandates the use of permissive inferences rather than presumptions. *See Sandstrom v. Montana*, 442 U.S. 510, 515-17 (1979). The court should avoid the use of the term presume because it may unconstitutionally shift the burden of proof to the defendant.

(revised 12/09)

1.10 Credibility of Witnesses

In deciding what the facts are, you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Is the witness truthful? Is the witness testimony accurate? You may believe everything a witness says, or only part of it, or none of it.

You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gives, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.

In deciding what to believe, you may consider a number of factors:

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

(2) The quality of the witness knowledge, understanding, and memory;

(3) The witness appearance, behavior, and manner while testifying;

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

(5) Any relation the witness may have with a party in the case and any effect that the verdict may have on the witness;

(6) Whether the witness said or wrote anything before trial that is different

from the witness testimony in court;

(7) Whether the witness testimony is consistent or inconsistent with other evidence that you believe *[alternative: how believable the witness testimony is when considered with other evidence that you believe]*; **and**

(8) Any other factors that bear on whether the witness should be believed.

Inconsistencies or discrepancies in a witness testimony or between the testimony of different witnesses may or may not cause you to disbelieve that witness testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should consider whether it is about a matter of importance or an insignificant detail. You should also consider whether the inconsistency is innocent or intentional.

You are not required to accept testimony even if the testimony is not contradicted and the witness is not impeached. You may decide that the testimony is not worthy of belief because of the witness bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.

After you make your own judgment about the believability of a witness, you can then attach to that witness testimony the importance or weight that you think it deserves.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testify. What is more important than numbers is how

believable the witnesses are, and how much weight you think their testimony deserves.

Comment

See 1A OMalley et al, supra, § 15.01 (Credibility of Witnesses--Generally). For variations in other Circuits, *see* First Circuit § 1.08; Fifth Circuit § 1.02; Eighth Circuit § 1.06; Ninth Circuit § 1.10, 1.11; Eleventh Circuit § 3.1.

This instruction should be given in the preliminary instructions at the beginning of the trial. In the final instructions, Instruction No. 3.04 (Credibility of Witnesses) should be given. The last paragraph of this instruction may be given usefully in a case in which witnesses on one side outnumber the other.

Some judges may want to explain the factors in this instruction by presenting them as questions that the jurors should ask themselves. *See* Sixth Circuit § 1.07.

1.11 Nature of the Indictment

The government has charged the defendant *(name)* **with violating federal law, specifically** *(state the offense(s) charged).* **The charge***(s)* **against** *(name) (is) (are)* **contained in the indictment. An indictment is just the formal way of specifying the exact crime***(s)* **the defendant is accused of committing. An indictment is simply a description of the charge***(s)* **against a defendant. It is an accusation only. An indictment is not evidence of anything, and you should not give any weight to the fact that** *(name)* **has been indicted in making your decision in this case.**

Comment

See 1A OMalley et al, supra, 10.01. For variations in other Circuits, *see* First Circuit §1.02; Sixth Circuit § 1.03; Seventh Circuit § 2.01; Ninth Circuit § 1.2; Eleventh Circuit § 2.1.

1.12 Elements of the Offense*(s)* Charged

The defendant *(name)* **is charged in the indictment with committing the offense of** *(state the offense charged).* **To help you follow the evidence, I will now give you a brief summary of the elements of that offense, each of which the government must prove beyond a reasonable doubt in order to convict** *(name)* **of the offense charged. The elements are:**

First: *(State the first element)*;

Second: *(State the second element)*;

Third: *(State the third element)*; **and**

(State each additional element).

(Name) **is also charged with committing the offense of** *(state any additional offenses charged).* **The elements of that offense are:**

(State the elements of any additional offenses, as above.)

What I have just told you is only a preliminary outline of the elements of the offense*(s)* charged. At the end of trial, I will give you final instructions on the elements of the offense*(s)* charged and on other matters of law. Those final instructions will be more detailed; they will guide you in reaching your verdict in this case.

Comment

See 1A OMalley et al, supra, § 10.01. For variations in other Circuits, *see* First Circuit § 1.04; Eighth Circuit § 1.02; Ninth Circuit § 1.2; Eleventh Circuit Basic Instructions § 8

The trial judge should outline the elements of each offense charged, in language that is as plain as possible. In a complex case or where there are complicated charges, the trial judge might find it useful to confer with the attorneys before the preliminary instructions to discuss how to

formulate the preliminary instruction on the elements of the offenses.

Studies on Preliminary Instructions Regarding Elements of Charged Offense(s). Giving the jury in preliminary instructions at the beginning of the trial a brief outline of the elements of the offense(s) charged will assist the jurors in understanding the evidence as it is presented and also in understanding the judges final instructions explaining the elements in more detail. Field studies and experiments suggest that such preliminary instructions (preinstruction) improve jury performance, especially in more complicated cases. Lynne ForsterLee et al., *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCHOL. 14 (1993); Vicki L. Smith, *Impact of Pretrial Instruction on Jurors Information Processing and Decision Making*, 76 J. APPLIED PSYCHOL. 220 (1991); Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409 (1989); Donna Cruse & Beverly A. Browne, *Reasoning in a Jury Trial: The Influence of Instructions*, 114 J. GEN. PSYCHOL. 129 (1987); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOCIAL PSYCHOLOGY 1877 (1979); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977). The benefits of preinstruction may be heightened when jurors are also permitted to take notes during trial. Lynne ForsterLee & Irwin A. Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCHOLOGY 305 (1997). Preinstruction has also received favorable reviews from practitioners in at least one study. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985). A practical problem noted in one study is that, of course, it is not always possible to anticipate the precise nature of the issues before evidence is presented. Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law: A Survey of Judges*, 14 LAW & HUM. BEHAV. 235 (1990).

For comprehensive instructions on the elements of many federal crimes, *see* the model instructions in Chapter 6 (Elements of Offenses).

If the indictment contains multiple counts or if there are multiple defendants who are being tried together, *see* Instructions Nos. 1.14-1.17 (Separate Consideration).

1.13 Presumption of Innocence; Burden of Proof; Reasonable Doubt

The defendant *(name)* **has pleaded not guilty to the offense***(s)* **charged.** *(Name)* **is presumed to be innocent.** *(He) (She)* **starts the trial with a clean slate, with no evidence against** *(him) (her)***. The presumption of innocence stays with** *(name)* **unless and until the government presents evidence that overcomes that presumption by convincing you that** *(name)* **is guilty of the offense***(s)* **charged beyond a reasonable doubt.**

The presumption of innocence requires that you find *(name)* **not guilty, unless you are satisfied that the government has proved guilt beyond a reasonable doubt. The presumption of innocence means that** *(name)* **has no burden or obligation to present any evidence at all or to prove that** *(he) (she)* **is not guilty. The burden or obligation of proof is on the government to prove that** *(name)* **is guilty, and this burden stays with the government throughout the trial.**

In order for you to find *(name)* **guilty of the offense***(s)* **charged, the government must convince you that** *(name)* **is guilty beyond a reasonable doubt. That means that the government must prove each and every element of the offense***(s)* **charged beyond a reasonable doubt. A defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.**

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture or speculation are not reasonable doubts. A reasonable doubt is a fair

doubt based on reason, logic, common sense, or experience. A reasonable doubt means a doubt that would cause an ordinary reasonable person to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

If, after hearing all the evidence, you are convinced that the government has proved *(name)* guilty beyond a reasonable doubt, you should return a verdict of guilty. However, if you have a reasonable doubt as to an element of an offense, then you must return a verdict of not guilty.

Comment

See 1A OMalley et al, supra, §10.01. For variations in other Circuits, *see* First Circuit §1.02, Fifth Circuit §1.01 & 1.05, Sixth Circuit § 1.03, Seventh Circuit § 2.03, Ninth Circuit §1.2, Eleventh Circuit § 2.1.

It is imperative that the trial judge accurately define the governments burden of proof and the meaning of beyond a reasonable doubt. As long as these concepts are accurately conveyed to the jury, there are no specific words that must be used. *See, e.g., United States v. Dufresne*, 58 Fed. Appx. 890 (3d Cir. 2003); *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999). This instruction is modeled after the instructions the Third Circuit approved in these cases. In *United States v. Hoffecker*, 530 F.3d 137, 175 (3d Cir. 2008), the Third Circuit noted that the reasonable doubt instruction upheld in that case and approved in *Hernandez* mirrored our model instruction, Third Circuit Model Criminal Jury Instructions 3.06.

Two Inference Instruction Disapproved. In *United States v. Issac*, 134 F.3d 199 (3d Cir. 1998), the Third Circuit considered a challenge to the district courts instructions on reasonable doubt. Specifically the district court gave the so-called two inference instruction, as follows: So if the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury should, of course, adopt the conclusion of innocence. 134 F.3d at 202. The Third Circuit in *Issac* first noted that in United States v. Jacobs, 44 F.3d 1219, 1226 & n. 9 (3d Cir.), cert. denied, 514 U.S.1101 (1995), it urged trial courts to heed the Second Circuit's criticism of the "two-inference" instruction when it is specifically brought to their attention. (The Courts reference to the Second Circuit was to *United States v. Inserra*, 34 F.3d 83, 91 (2d Cir.1994), which held that the "two-inference" instruction is improper because it "may mislead a jury into thinking that the government's burden is somehow less than proof beyond a reasonable doubt,quoting *United States v. Khan*, 821 F.2d 90, 93 (2d Cir.1987)). The Third Circuit in *Issac* continued, Although we disapproved of the "two-inference" instruction in Jacobs, we did not hold that the instruction was so constitutionally deficient per se that it infected the entire instruction on reasonable doubt. 44 F.3d at 1226. Ultimately, the Third Circuit upheld the

instruction in *Issac*, because this deficiency was rectified by the remainder of the reasonable doubt instruction. 134 F.3d at 202. Courts are, nevertheless, advised to instruct in accordance with the instruction above and to abstain from using the two-inference instruction.
(revised 12/09)

1.14 Separate Consideration - Single Defendant Charged with Multiple Offenses

(Name) **is charged with** *(more than one offense) (several offenses)*; **each offense is charged in a separate count of the indictment.**

The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.

Your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.

Comment

See 1A OMalley et al, supra, § 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.21; Sixth Circuit § 2.01A; Ninth Circuit § 3.12; Eleventh Circuit § 10.1

1.15 Separate Consideration - Multiple Defendants Charged with a Single Offense

The defendants *(names)* are all charged with one offense. In our system of justice, however, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant, and you must return a separate verdict for each defendant. For each defendant, you must decide whether the government has proved that particular defendant guilty beyond a reasonable doubt.

Your decision on one defendant, whether guilty or not guilty, should not influence your decision on any of the other defendants. Each defendant should be considered individually.

Comment

See 1A OMalley et al, supra, § 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.22; Sixth Circuit § 2.01B; Ninth Circuit § 3.13; Eleventh Circuit § 10.03.

1.16 Separate Consideration - Multiple Defendants Charged with the Same Offenses

The defendants *(names)* **are all charged with** *(more than one offense) (several offenses)*; **each offense is charged in a separate count of the indictment. The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant on each offense. For each defendant and offense, you must decide whether the government has proved beyond a reasonable doubt that the particular defendant is guilty of the particular offense.**

Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each defendant and each offense should be considered separately.

Comment

See 1A OMalley e al, supra, § 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.22; Sixth Circuit § 2.01B & C; Ninth Circuit § 3.13; Eleventh Circuit § 10.03.

1.17 Separate Consideration - Multiple Defendants Charged with Different Offenses

The defendants *(names)* are charged with different offenses. I will explain to you in more detail shortly which defendants are charged with which offenses. Before I do that, however, I want to emphasize several things.

The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. Also, in our system of justice, guilt or innocence is personal and individual. You must separately consider the evidence against each defendant on each offense charged, and you must return a separate verdict for each defendant for each offense. For each defendant and each offense, you must decide whether the government has proved beyond a reasonable doubt that a particular defendant is guilty of a particular offense.

Your decision on any one defendant or any one offense, whether guilty or not guilty, should not influence your decision on any of the other defendants or offenses. Each defendant and each offense should be considered separately.

Comment

See 1A OMalley et al, supra, 10.01. For variations in other Circuits, *see* Fifth Circuit § 1.23; Sixth Circuit § 2.01D; Ninth Circuit §3.14; Eleventh Circuit § 10.04.

1.18 Pro Se Defendant

(Name of defendant) **has decided to represent** *(himself) (herself)* **in this trial and not to use the services of a lawyer.** *(He) (She)* **has a constitutional right to do that.** *(His) (Her)* **decision has no bearing on whether** *(he) (she)* **is guilty or not guilty, and it must not affect your consideration of the case.**

Because *(name of defendant)* **has decided to act as** *(his) (her)* **own lawyer, you will hear** *(him) (her)* **speak at various times during the trial.** *(He)(She)* **may make an opening statement and closing argument.** *(He) (She)* **may ask questions of witnesses, make objections, and argue to the court. I want to remind you that when** *(name of defendant)* **speaks in these parts of the trial** *(he) (she)* **is acting as a lawyer in the case, and** *(his) (her)* **words are not evidence. The only evidence in this case comes from witnesses who testify under oath on the witness stand and from exhibits that are admitted.**

Comment

This instruction is derived from Eighth Circuit § 2.22 and Federal Judicial Center § 6.

Assuring Valid Counsel Waiver. This instruction should be given when a defendant exercises the constitutional right under *Faretta v. California*, 422 U.S. 806 (1975), to waive the Sixth Amendment right to assistance of counsel and proceed pro se. In order to assure that the waiver is valid, the court should engage in a colloquy with the defendant following the outline set forth in *United States v. Peppers*, 302 F.3d 120, 136-37 (3d Cir. 2002) (based in part on 1.02 of the *Benchbook for U.S. District Court Judges* (4th ed. 2000)). *See also Iowa v. Tovar*, 541 U.S. 77, 88-91 (2004) (emphasizing that there is no script for the colloquy and that the requirements depend on the particular circumstances of the case and holding that the trial court was not required to inform the defendant that an attorney could provide an independent opinion or that without an attorney the defendant risked overlooking a defense).

The instruction informs the jury of the defendants choice to proceed pro se. In addition, it directs the jury to treat the words spoken by the defendant while functioning as counsel like those of any other lawyer and not to treat them as evidence in the case.

Standby Counsel. The court may appoint standby counsel to assist the pro se defendant. A pro se defendant is not constitutionally entitled to standby counsel or to hybrid representation, in which the defendant shares the role of counsel with standby counsel. *See McKaskle v. Wiggins*, 465 U.S. 168 (1984). Nevertheless, the trial court has discretion to permit either and may even appoint standby counsel over the defendants objection. *See McKaskle*, 465 U.S. 182-83; *Faretta*, 422 U.S. at 834 n.46. In *McKaskle*, the Court held that the pro se defendant is constitutionally

entitled to actual control of the case and the appearance to the jury of actual control; standby counsel must interfere with neither aspect of the right to self-representation. *McKaskle*, 465 U.S. at 187. If the court appoints standby counsel, the court may wish to inform the jury of standby counsels role in the case.

1.19 Corporate Criminal Responsibility *[if there is a corporate defendant]*

The defendant *(name)* **is a corporation. A corporation is a legal entity that may act only through individuals who are called its agents. The agents of a corporation are its officers, directors, employees, and other persons who are authorized by the corporation to act for it.**

You may find a corporate defendant guilty or not guilty of the offense*(s)* **charged under the same instructions that apply to an individual defendant. You must give to a corporate defendant the same impartial consideration of the evidence that you would give to any individual.**

The legal responsibility of a corporation, if any, is based on the conduct of its agents. To find *(name of corporate defendant)* **guilty of the offense***(s)* **charged, you will need to find that the government proved beyond a reasonable doubt that each of the elements of** *(the) (each)* **offense was committed by an officer, director, employee, or some other agent of** *(name of corporate defendant)* **and that this person committed those elements within the course and scope of** *(his) (her)* **employment or agency and that this person committed those elements with the intent to benefit** *(name of corporate defendant*).

This is only a preliminary outline of corporate criminal responsibility. At the end of the trial, I will give you final instructions on corporate criminal responsibility and on other matters of law. Those final instructions will be more detailed; they will guide you in reaching your verdict in this case.

Comment

This instruction should be given as part of preliminary instructions when there is a corporate defendant. In those cases, the final instructions should also include Instruction No. 7.06 (Corporate Criminal Responsibility), which more fully explains corporate criminal responsibility. Neither OMalley et al, supra, nor the other Circuits include a preliminary instruction on this point, but they do include final instructions on corporate criminal responsibility, as listed in the Comment to Instruction 7.06 (Corporate Criminal Responsibility).