



CIVIL JURY PROJECT
at NYU School of Law

FACT SHEET:

Preliminary Substantive Instructions

Summary: Preliminary substantive jury instructions are instructions provided to jurors at the start of a trial, before the presentation of evidence by the parties, on the elements of a claim or defense. Such instructions aim to facilitate (1) better decision making by jurors, and (2) greater understanding by jurors of their duty in the decision-making process by providing them with a legal framework for the parties' argument.¹ These instructions address Principle 6 of the American Bar Association's *Principles for Juries and Jury Trials*, which suggests that "[c]ourts should educate jurors regarding the essential aspects of a jury trial."²

Empirical Studies: 2005 New York State Jury Trial Project: Tested in twenty-six (26) civil trials. Ninety-two percent (92%) of judges and seventy-nine percent (79%) of attorneys thought that preliminary substantive instructions were helpful to jurors' understanding of the law.³

2008 ABA Seventh Circuit Project: In thirty-four (34) trials, more than eighty percent (80%) of the jurors, eighty-five percent (85%) of the judges and seventy percent (70%) of the attorneys who participated stated they believed that the intended goal of enhancing juror understanding was accomplished.⁴

2009 Houston Project: While no data was formally collected, more than seventy-five percent (75%) of jurors in nine (9) trials found that preliminary substantive instructions were helpful in keeping jurors focused on the evidence, increased the fairness of the trial, increased the efficacy of the trial, and should be used in future trials.⁵

Current Usage: In 2015, a National Center of State Courts survey of participants in state and federal civil trials noted that nineteen percent (19%) included preliminary instructions on the legal elements of the claims involved in the case.⁶ An ongoing questionnaire circulated by the NYU Civil Jury Project noted that

¹ SEVENTH CIRCUIT BAR ASS'N AMERICAN JURY PROJECT COMM'N, *SEVENTH CIRCUIT AMERICAN JURY PROJECT FINAL REPORT* 25 (Sept. 2008), <http://www.uscourts.gov/file/3467/download>.

² American Bar Ass'n, *Principles for Juries & Jury Trials* § III (Aug. 2005).

³ *Final Report of the Committees of the Jury Trial Project*, NEW YORK STATE UNIFIED COURT SYSTEM 31-40 (2005), https://www.nycourts.gov/publications/jury-materials/Final_Report_of_the_Committees_of_the_Jury_Trial_Project.pdf.

⁴ SEVENTH CIRCUIT BAR ASS'N AMERICAN JURY PROJECT COMM'N, *supra* note 1, at 25.

⁵ Data compiled from results submitted to the Committee of the Jury Innovations Project. *JURY INNOVATIONS PROJECT: AN EFFORT TO ENHANCE JURY TRIALS IN TEXAS STATE AND FEDERAL COURTS* (2009), <http://www.txs.uscourts.gov/sites/txs/files/PilotProgramManual.pdf>.

⁶ See generally Paula Hannaford-Agor, *But have we made any progress? An update on the status of jury improvement efforts in state and federal courts*, NAT'L CTR. FOR STATE COURTS (NCSC) CTR. FOR JURY STUDIES (2015),

eighty-one percent (81%) of judges have employed preliminary substantive instructions.⁷ [Highlighting present because it is unclear whether our questionnaire actually asked about preliminary substantive instructions.]

Legal Support: Federal Rule of Civil Procedure 51(b)(3) provides courts with considerable leeway in determining when to instruct a jury. FED. R. CIV. P. 51(b)(3) (“The court may instruct the jury at any time before the jury is discharged.”).⁸ The Advisory Committee Notes to the 1987 Amendment of Rule 51 also explain that instructing jurors before argument:

gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying a natural outline so that arguments may be directed to the essential fact issues which the jury must decide Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions. Finally, by instructing ahead of argument the court has the attention of the jurors when they are fresh and can give their full attention to the court’s instructions. It is more difficult to hold the attention of jurors after lengthy arguments.

While preliminary substantive instructions have been discussed in depth with regard to criminal cases,⁹ only the Ninth Circuit has explicitly addressed substantive preliminary instructions in civil trials. *Jerrold Elecs. Corp. v. Wescoast Broad. Co.*, 341 F.2d 653, 665 (9th Cir. 1965), *cert. denied*, 382 U.S. 817 (1965) (trial court’s conduct in advising jury at outset of trial of the nature of the case and anticipated issues was not prejudicial to defendants as violation of rule that jury should be instructed after argument).

Some state rules of civil procedure explicitly permit the administration of preliminary substantive jury instructions. MINN. R. CIV. P. 39.03 (2016) (“After the jury has been impaneled and sworn, and before opening statements of counsel, the court may instruct the jury as to the respective claims of the parties and as to such other matters as will aid the jury in comprehending the trial procedure and sequence to be followed.”); MASS. R. CIV. P. 51 (“At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.”). Furthermore, though a criminal case, *People v. Harper*, 818 N.Y.S.2d 113, 2006 WL 1543932 (N.Y. App. Div. 2006), cited the ABA Principles for Juries and Jury Trials alongside the 2005 New York State study as demonstrating the usefulness of a trial court providing preliminary substantive instructions to juries.

http://www.law.nyu.edu/sites/default/files/upload_documents/But-have-we-made.pdf. Data was collected from 1,673 state and federal court trials. Other types of preliminary jury instructions are more prevalent. For example, 87% of cases included preliminary instructions on jury conduct; 70% included preliminary instructions on internet use by jurors; and 49% included preliminary instructions on the burden of proof

⁷ Out of twenty-one (21) judicial advisors to the project, eleven (11) judges regularly use the innovation, six (6) judges have used it, and four (4) judges have never used it. Questionnaire for Judges on Use of Jury Innovations (on file with the NYU Civil Jury Project), data current as of April 2016.

⁸ See also 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS—CIVIL ch. 101 (5th ed. 2009) (stating that preliminary instructions should provide a preliminary statement of legal principles and factual issues and explain briefly the basic elements of claims and defenses to be proved).

⁹ JURY INNOVATIONS PROJECT, *supra* note 5, at 80-83 (collecting cases).