

Taking Advantage of Preliminary Substantive Jury Instructions and Preliminary Charge Conferences: Practical Considerations and Tips

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Many litigators recognize the benefits of giving jurors a set of substantive jury instructions before opening arguments. Such preliminary substantive jury instructions are a beneficial and effective tool. This is not a new idea. Two decades ago, Florida's Jury Innovations Committee recommended that "[c]ase-specific preliminary jury instructions should be given at the outset of trial," stating:

Research indicates that the more jurors are informed in advance about the substantive issues in a case, the better their recall, understanding, and ability to organize and apply instructions to this information. Research also indicates that, along with this increased comprehension comes greater juror satisfaction and increased opportunity for a just result. One commentator has observed that not giving pre-instructions is like telling jurors to watch a baseball game and decide who won without telling them the rules until the end of the game.

The NYU School of Law Civil Jury Project thereafter published a fact sheet on preliminary substantive instructions and reported that, in the 2005 New York State Jury Trial Project (involving 26 civil trials), 92% of judges and 79% of attorneys "thought that preliminary substantive instructions were helpful to jurors' understanding of the law." It also reported that, in the 2008 ABA Seventh Circuit Project (involving 34 trials), more than 80% of the jurors, 85% of the judges, and 70% of the attorneys who participated "stated they believed that the intended goal of enhancing juror understanding was accomplished." In addition, since 2010, the Florida Supreme Court Committee on Standard Jury Instructions in Civil Cases "recommends giving the jury at the

beginning of the trial a complete as possible set of instructions on the Substantive law, Damages, and General Instructions.” Now, over a decade later, the concept of preliminary substantive jury instructions before opening arguments is no longer novel. Courts and attorneys have increasingly embraced this practice. Notwithstanding, some practical considerations must be addressed to obtain the benefits of this practice. First, proposed jury instructions must be assembled earlier in the trial preparation process. Although some attorneys routinely get their proposed jury instructions together very early in the development of the case to guide their discovery and legal motion practice, other attorneys traditionally have waited until closer to trial to prepare proposed instructions on only those claims that have survived to be tried. If preliminary substantive charges are going to be requested, however, attorneys need to build in time to assemble sets of proposed preliminary substantive instructions and for consultation with opposing counsel about areas of agreement and disagreement. Then, of course, the proposed preliminary instructions should be filed in the record, not simply handed to the judge or emailed to chambers. Second, attorneys need to remember the need for a charge conference *before* trial. For that to occur, a significant block of time must be reserved on the court’s calendar while it is still available. It is not uncommon to see this overlooked until the final weeks before trial. When attorneys then seek to set a preliminary charge conference, there are no hearing times left before trial to hold such a (usually lengthy) charge conference. That may lead to a lost opportunity; the court may be left to give only the standard procedural instructions before opening statements, with the charge conference scheduled, as it traditionally has been, only toward the end of trial. The parties are thereby denied the chance to get earlier legal rulings to delineate the scope of the trial, and the jury is deprived of a helpful roadmap as to the law controlling the issues it will be asked to decide on the evidence it is hearing at trial. **Tips:**

- Prepare your proposed jury instructions early and broach the idea of preliminary substantive instructions with the court and opposing counsel well in advance of the trial.
- Reserve time on the court’s calendar for a preliminary charge conference early enough that significant blocks of time are still available before trial.
- Depending on how favorable the preliminary instructions are, consider asking the court whether preliminary substantive jury instructions will impact traditional limitations on opening statements. Some courts may agree that the traditional constraints on arguing the law during opening arguments should be relaxed if the jury has been preliminarily instructed on the law by the court.

- Be prepared for instances where a preliminary substantive instruction must be omitted or modified in the final instructions, based on rulings at trial. In Florida, the standard jury instructions are set up to allow the judge to inform the jury of this possibility before giving the preliminary substantive jury instructions: “I will not know for sure all of the law that will apply in this case until all of the evidence is presented. However, I can anticipate most of the law and give it to you at the beginning of the trial so that you will better understand what to be looking for while the evidence is presented. If I later decide that different or additional law applies to the case, I will tell you.” If decisions during trial make it clear that the final instructions will be modified in some respect, consider asking for an interim instruction to the jury at that point to alert the jury to the change.
- If the court decides to modify an instruction after giving it to the jury as a preliminary instruction, be sure to object on the record if you disagree with the modification and explain why you disagree. Try to get a clear ruling from the court that explains the modification so that you may be able to correct any evidentiary deficiencies perceived by the court.

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