

PRELIMINARY INSTRUCTIONS

Introduction

During its drafting of RAJI (CIVIL) 4th, the Committee determined that superior court judges have a preference for the preliminary instructions contained within the Judicial College of Arizona's Civil/Criminal Benchbook, rather than the RAJI (CIVIL) 3d Preliminary Instructions. These two sets of instructions are quite similar and many of the instructions are identical. Nevertheless, there are a few differences between the two versions and the Committee believed it was preferable to adopt the preliminary instructions that most Arizona trial judges actually use. Placing these Benchbook preliminary instructions in RAJI will make them available for use by trial practitioners, who may not have copies of the Benchbook. The following are the most significant differences between the RAJI (CIVIL) 3d preliminary instructions and the Benchbook preliminary instructions contained in RAJI (CIVIL) 7th:

Evidence (Preliminary Instruction 3) – This instruction gives more detail on what is and is not evidence than the current RAJI (CIVIL) 3d instruction. It sets forth the difference between direct and circumstantial evidence.

Credibility of Witnesses (Preliminary Instruction 5 – This was revised in RAJI (CIVIL) 7th to include the testimony of a law enforcement officer in the event the officer will testify at trial.

Evidence, Statements of Lawyers and Rulings (Preliminary Instruction 7) – This instruction gives the jury guidance on whether lawyers' statements, questions and objections are considered evidence. The Committee made major revisions to this instruction in RAJI (CIVIL) 7th.

Preliminary 8 (No Transcript Available to Jury; Taking Notes) was revised in RAJI (Civil) 7th to address the use of electronic devices while in the courtroom.

The Admonition (Preliminary Instruction 9) – This revised instruction in RAJI 7th addresses Internet research by jurors and jurors' use of other electronic devices to obtain information. Using the Internet, a juror can conduct medical research, access court records, including previous rulings by the court in a particular case, and investigate other litigation by the parties and similar matters. The admonition reminds jurors that they cannot conduct such research, but must make their decision based solely on the evidence produced in court.

Question by Jurors (Preliminary Instruction 11) and was also significantly revised in RAJI (CIVIL) 7th for more clarity.

Exclusion of Witnesses (Preliminary Instruction 12) – Although parties frequently invoke "The Rule," RAJI (CIVIL) 3d did not include an instruction addressing the exclusion of witnesses. The RAJI (CIVIL) 4th, 5th and 6th provided this preliminary instruction and was significantly revised in RAJI (CIVIL) 7th.

Claims Made and Issues to be Proved (Preliminary Instruction 14) – Trial judges frequently request that the parties provide a jointly agreed upon statement of the case that can be read to prospective jurors or the jury panel. This instruction allows the court to briefly describe the claims of the parties and the issues to be determined by the jury during the trial. This instruction was significantly revised in RAJI (CIVIL) 7th.

Preliminary Instructions 15 (Scheduling During Trial) and 16 (Order of Trial) were revised in RAJI (CIVIL) 7th.

Preliminary instructions will be given immediately after the jury is sworn. Ariz. R. Civ. P. 40(c)(1) and 51(b). The jury shall be instructed “concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions of witnesses or of the court...and the elementary legal principles that will govern the proceeding” *Id.*

The Committee believes “the elementary legal principles that will govern the proceeding” will often be based on the preliminary instructions which follow and on the substantive instructions found in other sections of RAJI (CIVIL) 7th. No effort has been made by the Committee to restate substantive instructions as preliminary instructions. This function will be left to the parties and the court.

To some extent, the preliminary instruction process is governed by two competing factors. On the one hand, the preliminary instructions should be limited to “elementary legal principles” to avoid unnecessary complication and possible discrepancies between the preliminary and final substantive instructions. On the other hand, the preliminary instructions should be detailed enough to be consistent with the philosophy of the 1995 rule changes to educate the jury in advance of the evidence.¹

The detail with which the jury is instructed depends to some extent upon the complexity of the particular case and the ability of the parties and the court to resolve substantive disputes prior to the commencement of trial. By their very nature, some disputes cannot be resolved until after the close of evidence. Regardless of whether the parties are in agreement on the substance of the preliminary instructions, the court must instruct the jury on “the legal principles that will govern the proceeding,” and the instructions “should be as readily understandable as possible by individuals unfamiliar with the legal system.”²

Insight into the potential nature of preliminary instructions can be obtained from the report to the Arizona Supreme Court resulting in the 1995 rule changes.³ The instructions should “deal with more than procedural and housekeeping matters.”⁴ The report suggested “substantive and case-specific” instructions⁵ on the elements of the claims and anticipated defenses and definitions of technical terms. In technical or complex cases, the report

¹ “Jurors: The Power of Twelve,” Report to the Arizona Supreme Court, 11/94 p. 81.

² Ariz. R. Civ. P. 51(b)(1) and 51(b)(2)(G).

³ “Jurors: The Power of Twelve,” Report to the Arizona Supreme Court, 11/94, pp. 80-83.

⁴ *Id.* At 80.

⁵ “[I]dentifying the parties by name and referring to the incident or transaction in specific, descriptive terms.” *Id.* at 81.

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recommended “a glossary of terms or other information that would help orient the jury to the case.”

The following preliminary instructions deal primarily with procedural issues. Substantive instructions will vary from case to case and will often be based on the applicable RAJI (CIVIL) 7th substantive instructions.

PRELIMINARY 1

Duty of Jurors

Ladies and Gentlemen:

Now that you have been sworn, I will briefly tell you something about your duties as jurors and give you some instructions. At the end of the trial, I will give you more detailed instructions.

It will be your duty to decide the facts. You must decide the facts only from the evidence presented in court. You must not speculate or guess about any fact. You must not be influenced by sympathy or prejudice.

You will hear the evidence, decide the facts, and then apply the law I will give you to those facts. That is how you will reach your verdict(s). In doing so you must follow that law whether you agree with it or not.

You must not take anything I may say or do during the trial as indicating any opinion about the facts. You, and you alone, are the judges of the facts.

SOURCE: Bench Book For Superior Court Judges.

PRELIMINARY 2
Importance of Jury Service

Jury service is an important part of our system of justice, with a long and distinguished tradition in western civilization.

From the beginning, American law has viewed the jury system as an effective means of drawing on the collective wisdom, experience, and fact-finding abilities of persons such as yourselves. Despite any inconvenience it may cause you, jury service is an important responsibility for you, and I am sure you will take it seriously.

SOURCE: Bench Book For Superior Court Judges.

PRELIMINARY 3

Evidence

You will decide what the facts are from the evidence presented here in court. That evidence will consist of testimony of witnesses, any documents and other things received in evidence as exhibits, and any facts stipulated, or agreed to, by the parties or that I instruct you to accept.

You will decide the credibility and weight to be given to any evidence presented in the case, whether it be direct evidence or circumstantial evidence.

Direct evidence is a physical exhibit or the testimony of a witness who saw, heard, touched, smelled, or otherwise actually perceived an event. Circumstantial evidence is the proof of a fact from which another fact may be inferred. You must determine the weight to be given to all the evidence, whether that evidence is direct or circumstantial.

SOURCE: Bench Book For Superior Court Judges.

PRELIMINARY 4
Rulings of the Court

Admission of evidence in court is governed by rules of law. I will apply those rules and resolve any issues that arise during the trial concerning the admission of evidence.

If an objection to a question is sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit is offered in evidence and an objection to it is sustained, you must not consider that exhibit as evidence. If testimony is ordered stricken from the record, you must not consider that testimony for any purpose.

Do not concern yourselves with the reasons for my rulings on the admission of evidence. My rulings are based on the law and do not reflect any personal belief on my part.

SOURCE: Bench Book For Superior Court Judges.

PRELIMINARY 5
Credibility of Witnesses

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as the witness's ability to see or hear or know the things the witness testified about; the quality of the witness's memory; the witness's manner while testifying; whether the witness has any motive, bias, or prejudice; whether the witness is contradicted by anything said or written before trial, or by other evidence; and the reasonableness of the testimony when considered in light of the other evidence.

[The testimony of a law enforcement officer is not entitled to any greater or lesser believability merely because the witness is a law enforcement officer. You are to evaluate the credibility of the testimony of a law enforcement officer in the same way you have been instructed to evaluate the testimony of other witnesses.]¹

Consider all of the evidence in light of reason, common sense, and experience.

SOURCE: Bench Book For Superior Court Judges.

USE NOTE: ¹ This bracketed language should only be included if a law enforcement officer will testify at trial.

PRELIMINARY 6

Expert Witness

[Give this instruction only if it is known at the start of the trial that the jury will be hearing expert opinion testimony during the trial.]¹

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions.

Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

SOURCE: Bench Book For Superior Court Judges.

USE NOTE: ¹ In a Medical Negligence case, consider also giving Medical Negligence 3 (Limiting Instruction – Expert Witness) as a preliminary instruction.

PRELIMINARY 7

Evidence, Statements of Lawyers and Rulings

As I mentioned earlier, it is your job to decide what the facts are from the evidence. Here are six rules on what is and what is not evidence:

1. **Evidence to be considered:** You are to determine the facts only from the testimony of witnesses, from exhibits received in evidence, and from any facts stipulated or agreed to by the parties or that I instruct you to accept as true.
2. **Lawyers' statements:** Statements or arguments made by the lawyers in the case are not evidence. Their purpose is to help you understand the evidence and apply that evidence to the law. However, if the lawyers for all parties agree or stipulate that a particular fact is true, you should accept that fact as true.¹
3. **Questions to a witness:** A question is not evidence. A question can be used only to give meaning to a witness's answer.
4. **Objections to questions:** If a lawyer objects to a question and I sustain an objection to the question, the witness will not be allowed to answer the question and you must not try to guess what the witness's answer might have been. You must also not treat the objection as evidence or try to guess the reason why the lawyer objected.
5. **Rejected evidence:** At times during the trial, testimony or exhibits will be offered as evidence, but I might not allow them to become evidence. If they never become evidence, you must not consider them.
6. **Stricken evidence:** At times I may order some evidence to be stricken, or thrown out. When evidence is stricken or thrown out, you must not consider it.

SOURCE: Bench Book For Superior Court Judges; *State v. Allen*, 223 Ariz. 125, 127 & n.2, ¶ 11 (2009) (stipulations).

USE NOTE: ¹ In most cases, if parties stipulate to a fact, the court should read the fact into the record but should not admit a written statement of the stipulated fact.

PRELIMINARY 8

No Transcript Available to Jury; Taking Notes

You will not be given written transcripts of witness testimony. You should pay close attention to the testimony as it is given.

You have been provided with note pads and pens. I encourage you to take notes during the trial if you wish to do so. However, do not let note taking distract you so that you miss hearing or seeing other evidence. If you have cell phones, laptops, tablets, cameras, or other electronic devices, please turn them off and do not turn them on while in the courtroom. You may use electronic devices only during breaks, so long as you do not use them to conduct any research of any kind about issues in the case or communicate about anything having to do with the case. You may not use any electronic devices to take notes during the trial. You are permitted only to take notes on the note pads provided by the court.

You may take your notes [and notebooks]¹ with you when you leave the courtroom for recesses, and may use them during [any discussions with other jurors in the jury room during the trial and during]² your deliberations at the end of the trial. Until then, keep your notes to yourself. If you do not want to take your notes [and notebook] with you during the trial, you should leave them on your seat. Whether you take notes or not, you should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors. After you have rendered your verdict(s), the Courtroom Assistant will collect your notes and destroy them.

Do not be influenced by my note-taking. My reasons for note-taking may not be the same as yours and at times might relate to entirely other matters.

SOURCE: Bench Book For Superior Court Judges.

USE NOTE: ¹ The bracketed language regarding the use of notebooks should be used if the court, in its discretion, has authorized their use pursuant to Ariz. R. Civ. P. 40(f).

² The bracketed language regarding juror discussions should be used unless the court has limited or prohibited juror discussions during recesses pursuant to Ariz. R. Civ. P. 40(h)(1)(B).

PRELIMINARY 9

Admonition

I am now going to take some time to discuss your conduct as jurors. In our system it is important that jurors decide the facts based solely on the evidence that is presented by parties here in the courtroom. So I am going to give you some rules designed to ensure that the parties get a fair hearing free from outside influences. These rules are known as “The Admonition”.

Research related to the case, including internet research, is strictly forbidden. Do not do any research or conduct any type of investigation about the case, the facts, the parties, the witnesses, the attorneys, or any person or entity related to the case. Do not look for information on the internet, or from any other source, about the case or about the facts or issues related to the case. In other words, do not try to find out information from any source outside this courtroom. The reason for this is that you must base any decision only on the evidence that is produced here in the courtroom. You must base any decision only on the evidence that is produced here in the courtroom, because the fairness of the trial depends on both parties knowing exactly what evidence you are considering so that they can respond to it or address it in their arguments.

Do not view or visit the locations where the events of the case took place.

Do not talk to anyone about the case, or about anyone who has anything to do with the case, and do not let anyone talk to you about this case, until the trial has ended and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else. You are not allowed to talk about the case with anyone until the trial is over and you have been discharged as jurors.

If someone should try to talk to you about the case, stop him or her or walk away. If you should overhear others talking about the case, stop them or walk away. If anything like this does happen, report it to me or any member of my staff [*insert phone number*] as soon as you can.

The attorneys and parties have been given the same instruction about not speaking with you, so do not think they are being unfriendly to you.

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PRELIMINARY 9

Admonition

Continued

[There is one and only one limited exception to the foregoing rules. During recesses from the trial you may discuss the evidence presented at the trial but: (1) only among yourselves; and (2) only when you are all together; and (3) only in the jury room.

Even though you may discuss the case under the conditions I have described,¹ I do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Both sides have the right to have the case fully presented and argued before you decide any of the issues in the case. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of the trial.

If at any time during the trial you have difficulty hearing or seeing something you should be hearing or seeing, or if you have personal distress for any reason, raise your hand and let me know.

Please wear your juror badge at all times in and around the courthouse so everyone is aware you are a juror.

If you have any questions about parking, restaurants, or other personal matters relating to your jury service, feel free to ask one of the court staff. But do not try to discuss the case with court staff.

Before each recess, I will not repeat the entire Admonition I have just given you. However, please remember that the Admonition still applies at all times during the trial.

SOURCE: Bench Book For Superior Court Judges; Proposed Jury Instruction on the Use of Electronic Technology to Conduct Research on or Communication about a Case; Committee on Court Administration and Case Management, Judicial Conference of the United States (December 2009); Supreme Court of Florida, In Re: Juror's Use of Electronic Devices, Case No. SC10-51; CACI Preliminary Instruction 100, Judicial Counsel of California Civil Jury Instructions (2010); Ariz. R. Evid. 611(a).

USE NOTE: ¹ The bracketed language should be used unless the court has limited or prohibited juror discussions during recesses pursuant to Ariz. R. Civ. P. 40(h)(1)(B). If the court has prohibited juror discussions, the admonition should substitute the following language: "Do not talk to each other about the case, or about anyone who has anything to do with it, until the end of the trial when you go to the jury room to decide your verdict."

PRELIMINARY 10

Media Coverage

There may or may not be media coverage of the trial. What the media covers is up to them. If there is media coverage, you must avoid it during the trial. If you do encounter something about this case in the media during the trial, end your exposure to it immediately and report it to me as soon as you can. [If there are cameras in the courtroom during the trial, do not be concerned about them. Court rules require that the proceedings be photographed or televised in such a way that no juror can be recognized.]

SOURCE: Bench Book For Superior Court Judges.

PRELIMINARY 11
Questions by Jurors

If at any time during the trial you have difficulty hearing or seeing something that you should be hearing or seeing, or if you get into personal distress for any reason, raise your hand and let me know.

[If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the Courtroom Assistant. If your question is for a witness who is about to leave the witness stand, please let the Courtroom Assistant or me know you have a question before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question I will ask the witness the question or provide you with an answer at the earliest opportunity. When we do not ask a question, it is no reflection on the juror submitting it. You should attach no significance to my decision not to ask a question you submitted. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

If a particular question is not asked, please do not try to guess why the questions was not asked or what the witness's answer might have been.]¹

SOURCE: Bench Book For Superior Court Judges.

USE NOTE: ¹ In accordance with Ariz. R. Civ. P. 40(i)(2), the last three paragraphs should be used except where the court has prohibited or limited the submission of questions to witnesses.

PRELIMINARY 12
Exclusion of Witnesses

Witnesses are excluded from the courtroom until they are called to testify. This means that all witnesses must remain outside the courtroom during the trial except when the witness is called to the witness stand. If you see a witness talking to the lawyers you should avoid being present or overhearing.

There are some exceptions to the rule excluding witnesses from the courtroom until they are called to testify. For example, the parties are allowed to remain in the courtroom at all times. [And in this case, the experts and a representative for [name of entity] is allowed to remain in the courtroom.]

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SOURCE: Bench Book For Superior Court Judges.

PRELIMINARY 13

Alternate Jurors

The law provides for a jury of eight persons in a case such as this. We have more than eight jurors so that, if a juror becomes ill or has a personal emergency, the trial can continue without that juror.

At the end of the case, alternate jurors will be determined by lot in a drawing held in open court. Please do not be concerned with who may or may not be chosen as an alternate at the end of the case.

SOURCE: Bench Book For Superior Court Judges.

USE NOTE: This instruction should not be given in cases where the parties have stipulated at the beginning of the trial that alternates may deliberate or that 8 jurors may serve with 7 able to deliberate if one of the eight is unable to finish the trial.

PRELIMINARY 14

Claims Made and Issues To Be Proved

[Give a brief statement of the claims and defenses being asserted, and the elements of those claims and defenses.]¹

SOURCE: Bench Book For Superior Court Judges.

USE NOTE: ¹ The jury will not have any information before trial begins about the claims being made, the legal elements of those claims, the defenses being asserted, or the legal elements of those defenses unless some instruction is given to them during the reading of the Preliminary Instructions. Thus, if at least some instruction does not address claims and defenses, the jury may not appreciate the relevancy of certain evidence.

PRELIMINARY 15
Scheduling During Trial

The trial is expected to last through _____. We will all do our best to move the case along, but delays are sometimes unavoidable. Delays often occur because the attorneys and I need to resolve certain legal matters before evidence may be presented to you in court or because I am busy with emergency matters in other cases.

The usual hours of trial will be from ____ a.m. to ____ p.m. We will take short recesses about every mid-morning and mid-afternoon, and occasionally stretch breaks in place. We will recess at 12:00 noon and begin again at ____ p.m. Unless a different starting time is announced prior to recessing for the evening, you may assume a starting time of ____ a.m. for the next day.

At the beginning of the day, please assemble near the jury room for this division. Please do not come back into the courtroom until you are called by the Courtroom Assistant.

SOURCE: Bench Book For Superior Court Judges.

PRELIMINARY 16

Order of Trial

Soon you will begin hearing the evidence. Before that, each side may make an opening statement. An opening statement is not evidence; it is an outline of the expected evidence. It is offered to help you understand and follow the evidence that will be presented during trial.

Next, plaintiff will present witnesses and defendant may cross-examine them. Then defendant may present witnesses, and plaintiff may cross-examine. Plaintiff may then present further evidence.

After the evidence has been presented, the attorneys will make their closing arguments. I will also give you final instructions on the law.

You will then go to the jury room to deliberate and decide the case.

The final instructions I give you at the end of the trial may differ from these preliminary instructions. If a final instruction is different than a preliminary instruction, you should disregard that particular preliminary instruction and rely instead on the final instruction. Any preliminary jury instructions not replaced by any final jury instructions together with the final instructions will govern your deliberations.

SOURCE: Bench Book For Superior Court Judges.

USE NOTE: Modify as necessary if the trial will proceed in some order other than as stated in the instruction.