02-053 EMHART VS. HOME INSURANCE

THE COURT: All right. Ladies and gentlemen, it's been a long haul. You've been thanked many times for your attention. I thank you, too. I particularly want to emphasize the importance of a jury. The jury is a magnificent institution. As one of the attorneys said, if the parties can't resolve their disputes, they need the courts to help them; more importantly, they need people like you to help them. You're it in terms of resolving their dispute.

So I'm now going to instruct you on the law that is going to govern your deliberations in this case. You don't need to worry about writing down my instructions or memorizing them. I'm going to provide you a written copy of what I'm going to give you now. So you can just listen, and then you'll have a written copy in the room with you of these instructions.

So you've heard all the arguments of the attorneys, and you've heard the evidence and seen the evidence. You know, as I told you at the beginning of the case -- let me pause for a moment.

So you know based on what I told you at the beginning of the case that your duty as a jury is to find the facts of this case from all the evidence that has been introduced.

Now, to those facts, you will apply the law as

I'm going to give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced in your deliberations by any personal likes or dislikes or opinions or prejudices or sympathies that you may have. That means that you must decide this case solely based upon the evidence that is before you. You'll recall at the beginning of the case that you took an oath to do this.

Now, in following my instructions, you must follow all of them and not single out some or ignore others. They are all equally important. Also, you must not read into these instructions or into anything that I have said or done during the course of this trial as giving any suggestion whatsoever as to what your verdict should be. That is a matter that is entirely up to you.

You should not, as I said, worry about memorizing any of these instructions. And remember that the law is as I give it to you from the bench. The written copy that I give you to take into the jury room will be a guide to assist you in your deliberations.

Now, first some comments on what is evidence. As I told you at the beginning, evidence consists of

the sworn testimony of the witnesses that have testified here; two, the exhibits that have been received into evidence; and three, any facts to which the lawyers have agreed or stipulated to or which I have instructed you to find.

You'll recall at the beginning of this case I read you a fairly lengthy stipulation, and I read you one right before we started today. You'll have a copy of that stipulation in the jury room with you.

Now, there are things that are not evidence, and you may not consider them in deciding what the facts of this case are, and I'm going to list those for you now.

Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments and at other times in the course of this trial is intended to help you interpret the evidence, but it is not evidence in and of itself.

If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

Second, questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the Rules of Evidence. You should not be

influenced by an objection or by my ruling upon an objection. As you remember, if I overruled the objection, you treat the answer as any other. If I sustained the objection, you disregard the answer that was given.

Thirdly, any testimony that has been excluded or stricken during the course of the trial or if I instructed you to disregard a particular answer is not to be considered. It is not evidence.

And fourth, anything you may have seen or heard when court was not in session is not evidence. Once again, you're to decide this case based solely on the evidence that was presented in trial.

Now, as you know, because we've talked about this, evidence may be direct or circumstantial. Direct evidence is the direct proof of a fact such as the testimony of an eyewitness. Circumstantial evidence is the proof of one or more facts from which you can infer the existence of another fact. You should consider both types of evidence. And as a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

Direct evidence can prove a material fact by itself. It does not require any other evidence. It

does not require you to draw any inferences. A witness's testimony is direct evidence when the witness testifies as to what he or she saw, heard or felt.

In other words, when a witness testifies about what is known from his own personal knowledge by virtue of his own senses -- I'm using his, because I don't think we had any female witnesses in this trial, if I remember correctly -- his own senses, what he sees, touches or hears, that is direct evidence. The only question is whether you believe the witness's testimony.

A document or physical object may also be direct evidence when it can prove a material fact by itself

without any other evidence or inference. You may, of course, have to determine the genuineness of the document or the object, which is introduced as evidence.

Now, circumstantial evidence is the opposite of direct evidence. It cannot prove a material fact by itself. Rather, it is evidence that tends to prove a material fact when considered together with other evidence and by drawing inferences. You remember the simple example that I gave you at the beginning of the case about circumstantial evidence, looking out the window, seeing everything was wet, cars, street, grass,

et cetera. You can infer from that that it rained overnight, even though you have no direct proof that it rained.

Now, obviously, all circumstantial evidence situations do not present such a clear and compelling inference as the simple example that I've given you. The strength of the inferences arising from circumstantial evidence is for you to determine.

It is for you to decide how much weight to give any evidence. Inferences from circumstantial evidence may be drawn on the basis of reason, experience, and common sense. Inferences, however, may not be drawn by guesswork, speculation or conjecture.

The law does not require a party to introduce direct evidence. A party may prove a fact entirely upon circumstantial evidence or upon a combination of direct and circumstantial evidence. Circumstantial

evidence is not less valuable than direct evidence. You are to consider all of the evidence in the case, both direct and circumstantial, in determining what facts are and in arriving at your verdict.

Now, some of the testimony before you was presented in the form of depositions, which have been received into evidence. A deposition is a procedure whereby a lawyer for a party questions a witness under

oath in the presence of a court stenographer. You may consider the testimony of a witness at a deposition according to the same standards you would use to evaluate the testimony of a witness at trial.

In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe.

You may believe everything a witness says or part of it or none of it at all. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to see or hear or know the things testified to, the witness's memory, the witness's manner while testifying, the witness's interest in the outcome of the case and any bias or prejudice the witness may have.

You may consider whether other evidence contradicted the witness's testimony and/or whether the witness's own testimony was consistent, and the reasonableness of the witness's testimony in light of all of the evidence.

In assessing the credibility of a witness, you

may also consider whether, on some prior occasion, the witness made statements that contradict the testimony he or she gave at the time of trial. If you conclude that a witness did at some prior time make statements

that were materially different from what the witness said during this trial, you may take this into account in assessing the credibility of such a witness or determining the weight that you will give to such witness's testimony.

In evaluating the testimonial evidence in this case, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness has said.

If in the light of all the evidence you believe that a witness is mistaken or testified falsely or he or she is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness's testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather it's the quality of the witness's testimony that counts. Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced.

If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of evidence lies on the side of that witness.

Similarly, just because there may be more than one witness testifying on one side of an issue than on the other side does not mean that the weight of evidence lies in favor of the greater number of witnesses. Once again, it is the credibility or the quality of the testimony that determines where the weight of the evidence lies.

Now, during this trial, you've heard testimony from witnesses who claimed to have specialized knowledge in a technical field. Such persons are sometimes referred to as expert witnesses. Because of their specialized knowledge, they are permitted to express opinions, which may be helpful to you in determining the facts of the case. Since they do have specialized knowledge, the opinions of expert witnesses, whether expressed personally or in documents which have been admitted into evidence, should not be disregarded lightly.

On the other hand, you are not required to accept such opinions just because the witnesses have specialized knowledge.

In determining what weight to give to the testimony of a so-called expert witness, you should

apply the same tests of credibility that applied to the testimony of any other witness. That is to say, you should consider such things as the witness's opportunity to have observed the facts about which he testified; his apparent candor or lack of candor; the qualifications of the witness, especially in comparison to the qualifications of expert witnesses who may have expressed contrary opinions; the accuracy of the facts upon which the witness's opinions were based, and the reasonableness of the rationale upon which the expert's opinions are based. In short, you should carefully consider the opinions of expert witnesses, but they are not necessarily conclusive.

Now, the law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of businesses or business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case.

A corporate defendant in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide this case with the same impartiality that

you would use in deciding a case that is between two or more individuals.

At all times, you should consider treating this matter as an action between persons of equal standing in the community, of equal worth and holding the same or similar situations in life or in the community.

Corporations act through their agents and their employees.

Now, in considering the issues that you must decide in this case, you may consider the evidence that you have heard regarding the conduct of and the relationship between the New England Container Company and Metro-Atlantic.

You've also heard some testimony in this case regarding various patents, and these patents have been received into evidence.

A patent is granted by the United States Patent and Trademark Office based upon an application that is filed by the named inventor. United States patent laws state that an application must include a signed oath by the inventor that believes himself to be the original and first inventor of the process, machine, manufacture or composition of matter, or improvement thereof, for which he solicits a patent.

Further, under the United States patent laws, a

person is not entitled to a patent where the invention was in public use or on sale in this country more than one year prior to the date of the application for patent in the United States.

I'm going to speak to you for a few minutes about burden of proof. The law imposes on the plaintiff the responsibility or burden of proving its claim. It is not up to the defendant to disprove the claim. Furthermore, the plaintiff must prove the things it claims by what is called a fair preponderance

of the evidence, which I'll shortly describe to you in more detail.

In turn, where I instruct you during the course of these instructions that the defendant has a burden of proof with respect to an asserted defense, the defendant's burden is also by a preponderance of the evidence.

So as I've told you, the burden of proof is on the plaintiff who is making a claim in this case. In a few minutes, I'm going to describe in detail what the plaintiff must prove in order to prevail on its claim, and I'll also tell you what the defendants must prove to succeed in asserting a particular defense.

The plaintiff must prove its claim by what the law refers to as a fair preponderance of evidence,

which is another way that the party must prove the claim or claims by the greater weight of the evidence. To put it another way, you must be satisfied that the evidence shows that what the party making the claim, the plaintiff, is claiming is more probably true than not true.

Do not confuse the burden of proving something by a fair preponderance of evidence with burden of proving something beyond a reasonable doubt. As most of you probably know or heard, in a criminal case, the burden of proof is proof beyond a reasonable doubt. That is a very stringent standard of proof that is restricted to criminal cases. This is not a criminal case. This is a civil case. Therefore, in order to

prevail, the plaintiff need not prove its claim beyond a reasonable doubt. It need only prove the claim by a preponderance of the evidence.

Perhaps the best way to explain to you what a fair preponderance of the evidence is, is to ask you to visualize an old-fashioned scale that has an arm with counter-balancing weights on either side.

If after you've heard all the evidence of the claim, of this claim, you determine that the scale tips in favor of the plaintiff, no matter how slightly it may tip, then the plaintiff has met its burden of

proving that claim to you by a fair preponderance of the evidence because it has made the scale tip in its favor.

If, on the other hand, you determine that the scale tips in favor of the defendant or that the scale is just so evenly balanced that you cannot say whether it tips one way or the other, then the plaintiff has failed to prove its claim by a fair preponderance of the evidence because it has not made the scale tip in its favor.

Now I'm going to move on to instruct you on the specific law that applies to this case. This law will guide you as to the factual determinations you must make and the questions you must answer. I want to say to you, again, you must accept the law as I give it to you whether you agree with it or not.

Now, in this case, Emhart has the burden of proving by a fair preponderance of the evidence the

facts necessary to establish its claims for coverage under the insurance policies.

On the other hand, defendants Century, OneBeacon and North River have the burden of proving by a fair preponderance of the evidence all the facts necessary to establish any exclusion to coverage that they claim.

An exclusion to coverage is a policy term that

removes from coverage some types of losses that policies otherwise cover. My instructions to you will flow logically. First I will instruct you on Emhart's claims concerning coverage, and then I will instruct you on the law concerning any exclusions to coverage and also any exceptions to those exclusions.

First, I'm going to talk to you about what we call the trigger issue, trigger of coverage. The Century, OneBeacon and North River policies provide coverage for damages caused by an occurrence that results in property damage during the respective policy periods.

As I mentioned, Emhart has the burden to prove by a preponderance of the evidence that it is entitled to coverage. This is what we call the trigger of coverage issue.

MR. NATHANSON: Your Honor, there's a typo on the next page.

THE COURT: Where?

MR. NATHANSON: For the Century primary policy the starting date is February 15th, not December 15th, otherwise it's a two-week policy.

THE COURT: Where is this?

MR. NATHANSON: The middle of the page, the Century primary policy was effective from, instead of

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December 15th, it should be February 15th.

THE COURT: Thank you.

MR. NATHANSON: You're welcome.

THE COURT: I'll have to fire the law clerk. I made that change in the jury's copy.

All right. Let me talk to you then about the policy periods. As you probably have noticed in the course of the trial, the policies differ as to the period of time during which they were effective. The North River policy was effective from January 1, 1984 to December 31, 1984. The OneBeacon policy was effective from April 24, 1969 to January 1, 1970.

Now, Century has two policies at issue in this litigation, a primary policy and an excess policy that provides coverage above and beyond the primary policy.

The first policy, the Century primary policy, was effective from February 15th, 1969 to January 1, 1970. The second policy, the Century excess policy, became effective from December 1, 1968 to January 1, 1970. Keep in mind the fact that just because a policy terminated on a certain date does not mean that the insurers' obligations to provide coverage ceased as of that date.

Now let me speak to you about the concept or the issue of occurrence. With respect to the question of

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trigger of coverage, remember I told you that Emhart must prove that property damage was caused by an occurrence.

An occurrence is defined as an accident including injurious exposure to conditions which results during the policy period and property damage neither expected nor intended from the standpoint of the insured. Here this means that any unintended or unexpected property damage is an accident.

In this context, property damage is defined as injury to or destruction of tangible property. There is no dispute that the dioxin pollution or contamination of soil and sediment at issue in this case is property damage. The question for you is whether that property damage occurred during the respective policy periods.

Emhart must thus prove an occurrence, that is, something that resulted in property damage during the respective policy periods. And Emhart can do this in two ways. First, Emhart can prove the positive, that is, it can show that the dioxin contamination was caused by a fortuitous event, such as a leak, a spill, a fire or a flood. It follows that if the act itself was a fortuitous event, the results flowing from that event would be neither expected nor intended.

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Second, Emhart can prove a negative. That is, that Metro-Atlantic neither knowingly nor intentionally

caused this property damage for which its seeks coverage.

The focus of the term "accident" then is on whether the harm was expected or intended, not whether the act that caused the dioxin contamination was expected intended. This means that accidents caused from intentional acts may still constitute an occurrence so long as the resulted property damage was not expected or intended. The harm which resulted in property damage must not have been caused intentionally or with the knowledge that the damage was substantially certain to occur.

Because the definition of occurrence includes the term "from the standpoint of the insured," you are to use a subjective standard in determining whether Metro-Atlantic intentionally or knowingly caused the dioxin contamination based on what it knew when it acted during the 1960's. It is irrelevant what a reasonably prudent person would have intended or would have known.

In other words, it is irrelevant what Metro-Atlantic should have intended or should have known. Rather you must look to the actual knowledge

and intent of Metro-Atlantic to determine whether it expected or intended the contamination.

Now, rarely can intent be proved directly. You may consider any statement made or act done or omitted by a party whose intent is in issue and all other facts and circumstances which indicate his or her state of

mind. You may draw inferences and find that a person intended the natural and probable consequences of acts knowingly done or knowingly omitted. You may consider evidence of the state of knowledge within the industry during the policy period to determine what Metro-Atlantic actually knew provided Metro-Atlantic received and understood that information.

When considering this question of expected or intended, keep in mind that a corporation acts only through its officers, agents and employees. The knowledge of the corporation's officers, agents and employees within the scope of their employment is the knowledge of the corporation.

By "scope of employment," I mean acts that are furthering the business and ends of the corporation. Knowledge gained by an officer, agent or employee in the scope of employment is the knowledge of the corporation whether or not that person communicated the information to anyone else at the corporation.

A corporation cannot plead ignorance by asserting that information gained by one of its officers, agents or employees was not known to any specific individual who would have comprehended its full import.

Once a corporation has gained knowledge through an officer, agent, or employee, it retains that knowledge even if that person leaves the corporation.

Using these instructions, you must decide whether Emhart has proved that property damage was

caused by an occurrence.

Now I want to speak to you about the term "During the policy periods." In order to find that there has been an occurrence, you must conclude that there was property damage during the policy period. Keep in mind that an event that happened prior to the policy period may cause damage during the policy period.

For reasons that you need not be concerned with, the Century and OneBeacon policies trigger somewhat differently than the North River policy. So I'm going to instruct you first on the Century and OneBeacon policies, and the trigger, and then I'll move to the North River.

Under the circumstances of this case, the

Century and OneBeacon policies can be triggered only if property damage was discoverable in the exercise of reasonable diligence during the policy periods.

That is, whether by exercising reasonable diligence Crown-Metro, the successor to Metro-Atlantic, could have discovered the dioxin contamination during the policy periods applicable to the Century and OneBeacon policies. Note that Emhart does not need to show that property damage was actually discovered during the policy periods.

With respect to the question of whether the property damage was discoverable in the exercise of reasonable diligence, you must consider two issues. The first is was dioxin contamination capable of being

detected at the site during the policy periods. This requires Emhart to show that dioxin contamination actually existed at the site during the policy period as well as the existence of technology and expertise that could have detected that dioxin contamination.

The second issue is did Crown-Metro have a reason to test for dioxin contamination at the site during the policy period or other contamination that would have led to the discovery of dioxin contamination at the site during the policy period.

Considering all of the evidence then, you must

decide whether Crown-Metro, in the exercise of reasonable diligence, could have discovered the dioxin contamination.

Now, I'll shift to the North River policy. As I mentioned, the North River policy triggers, if at all, differently than the Century and OneBeacon policies.

For the North River policy, coverage is triggered by a showing of an occurrence during a policy period. That is, Emhart must prove that dioxin caused actual property damage at the site in 1984. However, Emhart does not need to prove that dioxin was discovered in 1984 or that it was visible or apparent in 1984. Moreover, Emhart does not need to prove that dioxin was discoverable in 1984.

Real but undiscovered damage proved in retrospect to have occurred during the policy period could establish coverage irrespective of the time that damage was discovered.

Now, I'm going to move to the exclusions of coverage. If you find there has been an occurrence that triggers coverage as to one or more of the policies, you will then be asked to consider whether the exclusions present in some of the policies nevertheless preclude coverage. Just as the trigger of coverage language operates slightly differently as

between the various policies, so, too, do the exclusions operate differently. So I'll instruct you now on the exclusions starting first again with the Century excess policy.

The Century excess policy precludes coverage for the destruction of property caused by the intentional or willful introduction of waste products, fluids or materials, including oil refuse, gas or gas bleed water into any soil or inland or tidal waters irrespective of whether the insured possessed knowledge of the harmful effects of such acts.

In other words, this exclusion bars coverage for the intentional and damage-causing disposal of waste products, fluids and materials containing dioxin, no matter whether the policyholder knew that the disposal of such substances would be harmful.

The term "waste" means refuse or superfluous material, especially that remaining after a manufacturing chemical process. Now, unlike the North River policy, which we'll get to in a minute, this exclusion only applies to the intentional damage-causing introduction of waste products, fluids

or materials by the insured, that is Metro-Atlantic.

The exclusion does not apply, or in other words, there would still be coverage if someone other than

Metro-Atlantic intentionally introduced damage-causing waste products, fluids or materials.

Century has the burden to prove by a fair preponderance of the evidence that this exclusion applies and bars coverage as a result.

Now the North River policy exclusion. The North River policy exclusion involves a two-step analysis. North River has the initial burden to demonstrate that the pollution exclusion applies. This exclusion narrows the type of event for which coverage is afforded and will preclude coverage where any property damage arises out of the discharge, dispersal, release, or escape of any contaminant or pollutant. The time of the discharge for purposes of the pollution exclusion does not matter.

For instance, the fact that the discharge of contaminants occurred ten years before the policy was purchased is not relevant for determining whether the pollution exclusion applies. Thus, you must first determine whether North River succeeded in showing that Emhart's liability to the EPA for the property damage here occurred from the discharge, dispersal, release, or escape of any contaminant or pollutant into the air, ground or water.

If you find that North River did meet its burden

of establishing this, the burden then shifts to Emhart to show that an exception to the pollution exclusion applies. This exception will restore coverage if Emhart has proven that the discharge, dispersal or release of contaminants or pollutants that caused the property damage was sudden and accidental.

Now, in order for Emhart to restore coverage, it must show that both of the requirements are met. That is, discharges that are either non-sudden or non-accidental do not qualify.

With respect to the "sudden" requirement, if a discharge of a pollutant occurred abruptly, precipitantly or was brought about in a short period of time, it should be considered sudden. Consequently, sudden does not describe a process that occurs slowly and incrementally over a relatively long period of time no matter how unexpected or how unintended the process.

In deciding whether the release was sudden, you must focus on the initial release of the pollutant or contaminant as opposed to the length of time the discharge remains undiscovered, or the length of time that damage to the environment continued as a result of the discharge.

Moreover, once you've determined when the initial release occurred, intervening events, although

they might be sudden and accidental, cannot be considered for purposes of the exception to the exclusion.

Thus, for instance, where the initial release discharged pollutants onto the land, an intervening fire or flood cannot satisfy the sudden and accidental exception. Instead, you must determine whether the initial discharge event was itself sudden. It may be the case, however, that a fire was the initial discharge event, assuming that the fire caused the at-issue property damage, in which case it would be proper to determine whether this event was sudden.

Likewise, the sudden discharge requirement cannot be established by merely showing that the release of pollutant had its onset at some particular point in time. This is because every dispersal of pollution begins with an abrupt entry of some pollutant into the surrounding environment.

Instead, the sudden discharge must be of a quantity sufficient to have some potentially damaging environmental effect.

Therefore, you must determine not only whether the discharge was sudden, that is abrupt, but also whether the discharge was significant enough to have some potentially damaging environmental effect. If you

find this to be the case, then the discharge is sudden.

As I mentioned, however, in order for this exception to apply, a discharge must not only be sudden, but it must be accidental. Accidental in this context means that a discharge occurred unexpectedly or by chance or was unintended. However, any intentional discharge of a pollutant cannot be accidental.

This includes discharges that were made intentionally but where the effect of those discharges were unintentional. Thus, for instance, where a discharge is made knowingly, it will be considered intentional and, therefore, cannot be considered accidental even if the person discharging the material did not know or intend the harm caused.

In the context of the sudden and accidental exception to the North River pollution exclusion, the focus is on the actual act of discharge as opposed to the harm ultimately caused. Thus, where the discharge itself was intentional and knowing, even if the harm caused was unexpected, the accidental standard cannot be satisfied and the exception to the exclusion clause will not be operative.

Now you're going to note that the concepts of accidental and the effect of knowledge and intent are different for the issue that I've just been talking

about, the exception to the exclusion, than they are for the issue of occurrence. I want to point that out to you so that you will take care not to confuse those two concepts. They are different as applied, the concept of accidental is different as applied in the occurrence context than it is when it is applied in the exception to the exclusion context. It's all in the instructions, but just keep that in mind.

Now, additionally, for purposes of this pollution exclusion as compared with Century's waste product exclusion, it does not matter who was the

actual polluter, so you should only focus on whether the discharge was sudden and accidental and not on who actually was responsible for the discharge.

We're almost done. That ends the instructions on the substantive law of the case.

Now a few final instructions before we send you off to the jury room.

When you begin your deliberations, you should elect one member of your group to be your foreperson. The foreperson will preside over the deliberations and will speak for you here in court. You will then discuss the case with your fellow jurors to reach an agreement, if you can do so. Your verdict must be unanimous. Each of you must decide the case for

yourself, but you should do so only after you have considered all of the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of deliberations if the discussion persuades you that you should. Do not come to a decision because other jurors think it is right.

Now, if it becomes necessary during the course of your deliberations to communicate with me, you may do so by sending a note signed by the foreperson through the marshal. That's Charlie.

No member of the jury should ever attempt to contact me except by a signed writing, and I will communicate with the jury or any member of the jury on

anything concerning this case only in writing or here in open court.

I have prepared a verdict form for your use during deliberations. The verdict form has five specific questions on it.

Once you have reached a unanimous verdict, indicate your answers on the verdict form, fill it in, the foreperson will sign it and date it, and then advise the Court through the marshal that you are ready to return to the courtroom.

Remember, your verdict must be unanimous. You cannot return a verdict for either party unless your verdict is unanimous. Therefore, there are two things you need to keep in mind during the course of your deliberations. On one hand, listen carefully to what your fellow jurors have to say, be open-minded enough to change your opinion if you believe after discussion that you were incorrect. On the other hand, recognize that each of you has an independent and individual responsibility to vote for the verdict that you think is correct based on the evidence that's been presented in the case and the law as I've explained it.

Accordingly, you should have the courage to stick to your views if, even though some or all of the other jurors may disagree with you, you have listened to their views with an open mind.

Now, if any reference by the Court or by counsel to any matters in evidence does not coincide with your recollection, it's your recollection that controls in

your deliberations. You've been able to take notes. Remember your recollection controls.

In most trials, the collective recollection of the jury should be sufficient to deliberate effectively.

Occasionally jurors want to hear testimony read

back. Keep in mind that if you do need to or feel you need to rehear testimony, that it's a time-consuming and difficult process. Send your request, make it as narrow as possible, and we'll consider the request. But as I said, the collective memory of the jury typically is sufficient to govern deliberations.

Finally, as I've told you, you'll have a copy of these instructions in the jury room. Also, there should be a television and DVD player in the jury room. That's if you wish to watch any of the DVDs, not if you wish to watch Oprah or something like that. That should all be in the jury room. If you need anything else, you let us know.

I understand you need to leave at two o'clock today, and that's fine. I want you to at least start getting organized for your deliberations.

You'll begin deliberations tomorrow at 9:00 a.m. You'll come back into the courtroom before you're dismissed for the day, and you'll come into the courtroom before you start deliberations in the morning just very briefly.

You'll also have all the exhibits and stipulations in the jury room with you.

Will the clerk swear in the marshal.

(Marshal sworn.)

THE COURT: All right. Charlie will show you into the jury room.

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