

2.14 [Expert] Opinion Testimony

You [have heard] [are about to hear] testimony from [name] who [testified] [will testify] about [his] [her] [other pronoun] opinions and the reasons for those opinions. This opinion testimony is allowed, because of the specialized knowledge, skill, experience, training, or education of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness's specialized knowledge, skill, experience, training, or education, the reasons given for the opinion, and all the other evidence in the case.

Comment

See Fed. R. Evid. 702-05.

According to Federal Rule of Evidence 702, “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702(a). An expert’s general qualifications alone do not satisfy Federal Rule of Evidence 702, which governs the admissibility of expert opinion. *See, e.g., United States v. Rodriguez*, 971 F.3d 1005, 1018 (9th Cir. 2020). Instead, district courts must ensure an expert’s methods of forming her opinions “are both reliable and adequately explained.” *Id.* (quoting *United States v. Vera*, 770 F.3d 1232, 1241 (9th Cir. 2014)). Under Federal Rule of Evidence 703, an expert’s opinion must be based on facts or data in the case that the expert has been made aware of or personally observed. Fed. R. Evid. 703. The facts and data need not be admissible so long as experts in the particular field would reasonably rely on such facts and data. *Id.*

This instruction avoids labeling the witness as an “expert.” If the court refrains from designating the witness as an “expert,” this will “ensure[] that trial courts do not inadvertently put their stamp of authority” on a witness’s opinion and will protect against the jury’s being “overwhelmed by the so-called ‘experts.’” *See* Advisory Committee Note, Fed. R. Evid. 702 (2000) (quoting Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154

F.R.D. 537, 559 (1994).

In addition, Fed. R. Evid. 703 (as amended in 2000) provides that facts or data that are the basis for an expert’s opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.

This instruction is appropriate for a witness who provides only expert opinion testimony. If the same witness provides expert opinion testimony and percipient witness testimony (whether fact testimony, lay opinion testimony, or both), these different roles should be clarified for the

jury, even in a civil case. Model Criminal Instruction 3.15 (Dual Role Testimony) provides guidance.

In *BillFloat Inc. v. Collins Cash Inc.*, 105 F.4th 1269, 1276-77 (9th Cir. 2024), the plaintiff alleged trademark infringement. At trial, the plaintiff did not present survey evidence showing consumer confusion but was not required to do so. The defendant, however, called an expert witness who had conducted a survey that purportedly showed an absence of consumer confusion. The plaintiff also called an expert witness, who simply challenged the opinions of the defendant's expert. The Ninth Circuit held that the district court did not abuse its discretion by declining to instruct the jury that it "should not draw any inference about the existence or absence of consumer confusion from the fact that Plaintiff did not also offer market survey evidence," explaining that a jury is free to "use its common sense and experience when weighing the evidence offered by the parties, including the absence of a survey."

In *Yonay v. Paramount Pictures, Inc.*, 163 F.4th 685, 698-99 (9th Cir. 2026), the Ninth Circuit held that the district court did not abuse its discretion in excluding an expert witness who opined on the issue of substantial similarity in a copyright infringement action because the expert failed to differentiate between protected and unprotected elements under copyright law and instead opined that a factual article described facts as being facts "with the feeling of fiction" and that there were no "naked" facts contained within the article.

Revised March 2026