

1.4 What is Not Evidence

The following things are *not* evidence, and you must not consider them as evidence in deciding the facts of this case:

- > First, statements and arguments of the attorneys;
- > Second , questions and objections of the attorneys;
- > Third, testimony that I instruct you to disregard; and

Fourth, anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

Comment

It is advisable to instruct the jury generally about what is not evidence, both as a preliminary instruction at the beginning of the case and as a final instruction at the close of the case. *See* Instruction 1.6 (Ruling on Objections); Instruction 2.12 (Evidence for Limited Purpose); Instruction 6.7 (What Is Not Evidence).

But these general instructions are unlikely to be sufficient when a prompt and specific curative instruction from the court is needed. *See generally United States v. Barragan*, 871 F.3d 689 (9th Cir. 2017) (“A curative instruction can neutralize the harm of a prosecutor’s improper statements if it is given ‘immediately after the damage [is] done’ and mentions ‘the specific statements.’”) (brackets and internal quotation marks in original); Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures* § 3.16 (2013). Thus, a curative instruction should be given immediately after the damage is done and refer to the specific statement or statements that the jury must disregard. *See also United States v. Wells*, 879 F.3d 900, 936-37 (9th Cir. 2018) (“Generally, when evidence is heard by the jury that is subsequently ruled inadmissible, or is applicable only to limited defendants or in a limited manner, a cautionary instruction from the judge is sufficient to cure any prejudice to the defendant [O]ur court assumes that the jury listened to and followed the trial judge’s instruction”) (brackets in original; internal quotation marks and citation omitted).

Revised Sept. 2019