

3.15 Dual Role Testimony

[Option 1—Facts and Expert Opinions]

[You [have heard] [are about to hear] testimony from [name] who [testified] [will testify] about facts and [his] [her] opinions and the reasons for those opinions. Fact testimony is based on what the witness personally saw, heard, or did. Opinion testimony is based on the specialized knowledge, skill, experience, training, or education of the witness.

As to the testimony about facts, it is your job 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.

As to the testimony about the witness's opinions, this testimony is allowed because of the specialized knowledge, skill, experience, training, or education of this witness. Opinion testimony should be judged like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness's knowledge, skill, experience, training, or education, the reasons given for the opinion, and all the other evidence in the case.

You also should [pay careful attention as to whether the witness is testifying] [consider whether the witness testified] to personal observations or involvement as a fact witness or testifying to an opinion based on specialized knowledge, skill, experience, training, or education. When a witness provides opinion testimony based on knowledge, skill, experience, training, or education, that person might rely on facts that are not based on his or her personal observations or involvement, but that opinion cannot serve as proof of the underlying facts.

[You should also consider the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of witnesses.]

[Also, the fact that a witness is allowed to express opinions based on that person's specialized knowledge, skill, experience, training, or education should not cause you to give that witness undue deference for any of aspect of that person's testimony or otherwise influence your assessment of the credibility of that witness.]]

[Option 2—Lay and Expert Opinions]

[You [have heard] [are about to hear] testimony from [name] who [testified] [will testify] about [his] [her] opinions and the reasons for those opinions. Some of the opinion testimony you [will hear] [have heard] from this witness is based on the specialized knowledge, skill, experience, training, or education of this witness. This testimony is allowed because of the knowledge, skill, experience, training, or education of this witness. It should be judged like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness's knowledge, skill,

experience, training, or education, the reasons given for the opinion, and all the other evidence in the case.

Other opinion testimony you [will hear] [have heard] from this witness is called “lay opinion testimony.” Lay opinion testimony is based on inferences drawn from the witness’s direct perceptions and must be rationally based on those perceptions and not on speculation or what someone else has said. You should judge lay opinion testimony like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves. When considering lay opinion testimony, however, you should not give it any extra credence based on the specialized knowledge, skill, experience, training, or education of this witness.

You also should [pay careful attention as to whether the witness is testifying] [consider whether the witness testified] about a lay opinion based on the witness’s perceptions or testifying to an opinion based on specialized knowledge, skill, experience, training, or education. When a witness provides opinion testimony based on knowledge, skill, experience, training, or education, that person might rely on facts that are not based on his or her personal observations or involvement, but that opinion cannot serve as proof of the underlying facts.

[You should also consider the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of witnesses.]

[Also, the fact that a witness is allowed to express opinions based on that person’s specialized knowledge, skill, experience, training, or education should not cause you to give that witness undue deference for any of aspect of that person’s testimony or otherwise influence your assessment of the credibility of that witness.]]

[Option 3—Facts, Lay Opinions, and Expert Opinions]

[You [have heard] [are about to hear] testimony from [name] who [testified] [will testify] to both facts and two types of opinions and the reasons for those opinions. I will describe all three types of testimony. The first is fact testimony. Fact testimony is based on what the witness personally saw, heard, or did. The second is opinion testimony based on the specialized knowledge, skill, experience, training, or education of the witness. The third is what is called “lay opinion testimony.”

As to the testimony about facts, it is your job 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.

As to the opinion testimony based on the witness’s specialized knowledge, skill, experience, training, or education, you should judge this testimony like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves, considering the witness’s knowledge, skill, experience, training, or

education, the reasons given for the opinion, and all the other evidence in the case.

As to the lay opinion testimony, this testimony is based on inferences drawn from the witness's direct perceptions and must be rationally based on those perceptions and not on speculation or what someone else has said. You should judge this testimony like any other testimony. You may accept all of it, part of it, or none of it. You should give it as much weight as you think it deserves. When considering lay opinion testimony, however, you should not give it any extra credence based on the specialized knowledge, skill, experience, training, or education of this witness.

You also should [pay careful attention as to whether the witness is testifying] [consider whether the witness testified] to personal observations or involvement as a fact witness, testifying about a lay opinion based on the witness's perceptions, or testifying to an opinion based on specialized knowledge, skill, experience, training, or education. When a witness provides opinion testimony based on knowledge, skill, experience, training, or education, that person might rely on facts that are not based on his or her personal observations or involvement, but that opinion cannot serve as proof of the underlying facts.

[You should also consider the factors discussed earlier in these instructions that were provided to assist you in weighing the credibility of witnesses.]

[Also, the fact that a witness is allowed to express opinions based on that person's specialized knowledge, skill, experience, training, or education should not cause you to give that witness undue deference for any of aspect of that person's testimony or otherwise influence your assessment of the credibility of that witness.]]

Comment

In *United States v. Holquin*, 51 F.4th 841 (9th Cir. 2022), the Ninth Circuit explained:

> We have previously emphasized that trial courts should endeavor to explain clearly the differences between lay percipient testimony, lay opinion testimony (as governed by Rule 701), and expert opinion testimony (as governed by Rule 702) in settings where all three arise. In many cases, designating an umbrella category of “opinion testimony” may fail to provide an appropriate level of nuance to guide the jury’s evaluation of dual role testimony. Glossing over this three-way distinction may lead to the jury applying the instructions that they were given about “opinion” testimony to lay opinion even though it was intended for expert testimony. In doing so, the jury would consider the witness’s experience, training, and specialized knowledge in evaluating lay opinion – exactly the kind of bolstering of lay opinion with expert credentials about which we have warned.

Id. at 864 (quotation marks, internal citations, and brackets omitted) (citing *United States v. Rodriguez*, 971 F.3d 1005, 1118 (9th Cir. 2020)).

In some cases, a witness may provide only expert opinion testimony. In that event, Instruction 3.14 should suffice.

In other cases, a witness may testify both as an expert witness and as a fact witness without offering any lay opinion testimony. Option 1 addresses this situation. The word “expert,” which is used in the title of Option 1, should not be used in the presence of the jury. *See* Comment to Instruction 3.14 (Opinion Evidence, Expert Witness).

If a witness testifies to both facts and expert opinions, a cautionary instruction on the dual role of such a witness must be given. This situation can arise, for example, when a law enforcement witness testifies as both a fact witness and a witness offering an expert opinion. *See United States v. Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015); *United States v. Vera*, 770 F.3d 1232, 1246 (9th Cir. 2014). In a criminal case, omitting such a cautionary or curative instruction is plain error, even if no party requests such an instruction or affirmatively opposes it. *Id.* at 1246 (holding that court’s failure to instruct jury on how to evaluate agent’s dual role testimony prejudiced defendant when agent testified as both expert witness and lay, or fact, witness); *see also Torralba-Mendia*, 784 F.3d at 659 (noting holding in *Vera* and finding error in district court’s omission of dual role instruction differentiating between lay and expert testimony). Indeed, in *Torralba-Mendia*, the government proposed such an instruction, the defendant objected, and the court declined to give the instruction; the Ninth Circuit found plain error. *Id.*

The court might also consider bifurcating a witness’s testimony, separating a witness’s percipient, or factual, testimony from the witness’s expert opinions. *See United States v. Anchrum*, 590 F.3d 795, 803-04 (9th Cir. 2009) (holding that district court “avoided blurring the distinction between [the case agent’s] distinct role as a lay witness and his role as an expert witness” when it “clearly separated [the agent’s] testimony into a first ‘phase’ consisting of his percipient observations, and a second ‘phase’ consisting of his credentials in the field of drug trafficking and expert testimony regarding the modus operandi of drug traffickers”).

In addition, if an opinion witness is allowed to present otherwise inadmissible evidence under Fed. R. Evid. 703, an additional instruction may be needed. *See* Comment to Instruction 3.14 (Opinion Evidence, Expert Witness).

In still other cases, a witness may provide both expert opinion testimony and lay opinion testimony (but not as a percipient witness testifying about facts). Option 2 addresses this situation. Again, the word “expert,” which is used in the title of Option 2, should not be used in the presence of the jury. *See* Comment to Instruction 3.14 (Opinion Evidence, Expert Witness). As with Option 1, the judge also might consider bifurcating this witness’s testimony by separating a witness’s expert opinions from the witness’s lay opinions. The lay opinion testimony instruction is based on Rule 701 of the Federal Rules of Evidence and the Ninth Circuit’s discussion in *Vera*, 770 F.3d at 1242.

And in still other cases, as mentioned in both *Holguin* and *Rodriguez*, a witness may provide all three types of testimony: fact testimony, lay opinion testimony (as governed by Rule 701), and expert opinion testimony (as governed by Rule 702). Option 3 addresses this situation. Again, the word “expert,” which is used in the title of Option 3, should not be used in the presence of the jury. *See* Instruction 3.14 (Comment). And again, as with Option 1, the judge also might consider trifurcating this witness’s testimony by separating a witness’s fact testimony, expert opinions based on education or experience, and lay opinions.

The cautionary statements within each option come from the Ninth Circuit’s statement of the need to explain clearly the differences between lay percipient testimony, lay opinion testimony, and expert opinion testimony and “to provide an appropriate level of nuance to guide the jury’s evaluation of dual role testimony.” *Rodriguez*, 971 F.3d at 1018.

Finally, each option concludes with a “no deference” statement in brackets. The Ninth Circuit does not require this statement, and it typically is not given in cases involving witnesses who provide only expert opinions. *See, e.g.*, Instruction 3.14. It might be helpful, however, to avoid undue prejudice in cases dealing with dual (or triple) testimony.

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