

6.7 What is Not Evidence

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence, and you may not consider them in deciding what the facts are:

> 1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, [will say in their] closing arguments, and [have said] at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

> 2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. [In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.]

> 3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Comment

See Comment to Instruction 2.12 (Evidence for Limited Purpose) regarding case law on limiting instructions.

“A jury's exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.” *Raley v. Ylst*, 470 F.3d 792, 803 (9th Cir. 2006) (citing *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995)).

Supplemental instructions to the jury may be proper when counsel's arguments to the jury are legally erroneous or inflammatory. See *United States v. Blixt*, 548 F.3d 882, 890 (9th Cir. 2008).

Revised Mar. 2018