**2.13 [Expert] Opinion Testimony**

You [have heard] [are about to hear] testimony from [*name*] who [testified] [will testify] about [his] [her]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, “[t]he purpose of expert testimony is to ‘assist the trier of fact to understand the evidence or to determine a fact in issue’ by providing opinions on ‘scientific, technical, or other specialized knowledge.’ ” *Wagner v. County of Maricopa*, 701 F.3d 583, 589 (9th Cir. 2012) (quoting Fed. R. Evid. 702). 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* Fed. R. Evid. 702 advisory committee’s note

(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.”

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