

# Jury Instructions on Expert Testimony

## Introduction

In the United States, the federal constitution and all state constitutions guarantee to criminal defendants and many civil litigants the right to be tried by an impartial jury [1]. For a jury of ordinary citizens to serve as the “factfinder” in criminal prosecutions and to resolve civil disputes, the jurors must be provided with instructions on the law. Courts are responsible for ensuring that jurors are adequately and accurately instructed on the law [2]. Jury instructions serve the important role of giving the jurors the legal concepts necessary to fairly decide the merits of the case. A fundamental premise of the justice system is that jurors follow the law in the jury instructions provided by the court. The United States Supreme Court has stated:

The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions . . . and strive to understand, make sense of, and follow the instructions given them . . . . [W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions. [3]

Almost every state [4] and most federal circuits [5] have adopted a set of pattern (or “model” or “official”) jury instructions that address common legal concepts and issues that may arise at trial. A variety of groups have assumed responsibility for drafting these pattern instructions, but most pattern instructions are developed by judicial associations, court administrative offices, or bar associations. The primary purposes of pattern jury instructions have been to “increase the legal accuracy of instructions and thereby avoid reversals, eliminate argumentative language, [and to improve efficiency and] juror comprehension of instructions” [6, p. 2].

## Expert Witness Testimony

An expert is a witness who possesses qualifications that permit the witness to testify as to opinions

and conclusions derived from knowledge beyond the average juror [7]. Expert witnesses have generally been considered a special category of witness, but most evidentiary rules focus on the nature of the testimony, with no prohibition against one witness providing both lay (ordinary or fact) and expert testimony [8]. Expert testimony is governed by different evidentiary rules delineating the proper scope of the testimony [9]. However, the law provides that expert testimony is not entitled to greater weight than the testimony of lay witnesses. Concerning expert witnesses, the majority of jurisdictions have similar pattern instructions that emphasize that expert witness opinion testimony must be assessed in the same manner as lay witness testimony:

### OUJI-CR 13–21

#### Credibility of Opinion Witnesses

Testimony has been introduced of certain witnesses who purport to be skilled in their line of endeavor or who possess peculiar knowledge acquired by study, observation, and practice.

You may consider the testimony of these witnesses, and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine. You are not required to surrender your own judgment to that of any person testifying, based on that person’s education, training or experience. You need not give controlling effect to the opinion of such witnesses for their testimony, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive. [10]

#### 1.21 Expert Witnesses

You have heard [a witness] [witnesses] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness’s qualifications, and all of the other evidence in the case. [11]

These instructions focus exclusively on ensuring that jurors do not afford the expert testimony more weight than lay testimony, with some jurisdictions adopting pattern instructions that stress the jurors’ prerogative to ignore the expert testimony entirely:

Instruction 3.640: Expert Witness – Alternate Instruction

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There is one more point about witnesses to address: expert witnesses. This term refers to witnesses who have specialized training or experience in a particular field. Generally, in cases that are tried in our courts, both civil and criminal, witnesses may testify only to facts that are within their own personal knowledge – that is, things that they have personally seen or heard or felt. However, in a variety of cases, issues arise that are beyond the experience of lay persons, and in those types of cases, we allow a person with specialized training or experience, called an expert witness, to testify, and to testify not only to facts, but also to opinions, and the reasons for his or her opinions, on issues that are within the witness’s field of expertise and are relevant and material to the case. Because a particular witness has specialized training and experience in his or her field does not put that witness on a higher level than any other witness, and you are to treat the so-called expert witness just like you would treat any other witness. In other words, as with any other witness, it is completely up to you to decide whether you accept the testimony of an expert witness, including the opinions that the witness gave. It is also entirely up to you to decide whether you accept the facts relied on by the expert and to decide what conclusions, if any, you draw from the expert’s testimony. You are free to reject the testimony and opinion of such a witness, in whole or in part, if you determine that the witness’s opinion is not based on sufficient education and experience or that the testimony of the witness was motivated by some bias or interest in the case. You must also, as has been explained, keep firmly in mind that you alone decide what the facts are. If you conclude that an expert’s opinion is not based on the facts, as you find those facts to be, then you may reject the testimony and opinion of the expert in whole or in part.

You must remember that expert witnesses do not decide cases; juries do. In the last analysis, an expert witness is like any other witness, in the sense that you alone make the judgment about how much credibility and weight you give to the expert’s testimony, and what conclusions you draw from that testimony. [12]

Some jurisdictions do not have separate pattern instructions on expert testimony. These jurisdictions recommend that no instruction be given on the subject, indicating that discussion of the credibility of the expert testimony is properly reserved for argument [13].

Pattern jury instructions have reduced the number of appellate reversals based on deficient jury instructions by using standardized language derived from

existing legal standards. Such instructions, however, may not address the specific issues of an individual case and do not necessarily improve juror comprehension. Some jurisdictions, such as Delaware, have tried to provide jurors with some factors to be used in assessing expert testimony, but these instructions emphasize when to disregard the testimony:

### Delaware 4.6

You have heard the testimony of an expert witness. Expert witnesses are permitted to testify concerning their opinions, and the reasons for their opinions, because as the result of their education, training, or experience, they have become “expert” in their respective fields.

However, you must give expert testimony only the weight that it deserves. You may disregard expert witness testimony entirely if you conclude that:

(A) The expert opinion is based upon insufficient education, training, or experience; (B) the reasoning in support of the testimony is not sound; or (C) the testimony is outweighed by other evidence. [14]

Vermont uses a pattern instruction that has factors that enhance the value of an expert opinion (“the facts used by the expert are proven by the evidence” and “the expert is highly qualified [and] impartial”), but concludes by emphasizing jurors’ discretion in accepting the opinion at all:

### Vermont CR05-201 06/01/07

#### Expert Witnesses

You have heard testimony from [an expert witness] [expert witnesses], namely, \_\_\_\_\_. An expert is a witness who has extra knowledge, skill, experience, training, or education about a particular subject. The value of an opinion given by an expert witness depends upon his or her ability, and upon the facts he or she uses as the basis for his or her opinion. If the facts used by the expert are proven by the evidence, and if the expert is highly qualified, and if he or she is impartial, then his or her opinion may be of great value. On the other hand, if the expert’s opinion is based upon one or more facts that are not supported by the evidence, or if the expert is biased or not qualified, then his or her testimony may be of little or no value. As with any other witness, you may accept all, or part, or none of the expert’s testimony. You may give the expert’s testimony whatever weight you think it deserves, and consider it together with all the other evidence. [15]

The majority of pattern jury instructions on expert testimony are particularly uninformative and do not address the factors jurors may use in determining the weight of the evidence or guide jurors on the proper use of expert testimony concerning scientific or technical results. The American Bar Association (ABA) recently adopted a resolution to encourage the use of more detailed instructions in cases involving expert testimony to provide jurors with factors to consider in weighing the testimony [16]. The factors include whether the expert witness can explain the theoretical and factual basis for their opinion, the methodology used, the limitations of that methodology, and the reliability of the evidence [16, Items 1, 3, 4]. Additionally, the extent to which the opinion is based on valid scientific research should also be considered by the jury [16, Item 5]. The ABA urged judges and lawyers to include in jury instructions additional specific factors in an individual case, which would be important to a “jury’s ability to fairly assess the reliability of and the weight to be given expert testimony on particular issues in the case” [16, Item 7].

### Related Instructions

Some courts have prohibited the use of “scientific” or “science” in referring to opinions in certain fields to avoid misleading the jury [17], or have removed the label “expert” from the instructions [18]. The intent behind prohibiting the use of the label “expert” is to avoid influencing the jury in its evaluation of the evidence through the acknowledgment of the witness’s expertise by the court [19]. Some jurisdictions have amended their pattern instructions replacing the reference to “expert” with “opinion”:

#### 7.03 Opinion Testimony

(1) You have heard the testimony of \_\_\_\_\_, who testified as an opinion witness. (2) You do not have to accept \_\_\_\_\_’s opinion. In deciding how much weight to give it, you should consider the witness’s qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of the witnesses. (3) Remember that you alone decide how much of a witness’s testimony to believe, and how much weight it deserves. [20]

However, these restrictions on the use of the term “expert” are not commonly used [21] despite long-standing ABA practice standards that advise against

risking undue juror influence by the court’s use of the term “expert” [22]. Recently, the ABA adopted a resolution advising that courts “should prohibit parties from tendering witnesses as experts and should refrain from declaring witnesses to be experts in the presence of the jury” [16, Item 6].

Special problems may arise when a witness presents both expert and lay (percipient or factual) testimony. The situation most commonly occurs with law enforcement witnesses who both investigate a crime and are called to provide expert testimony on a subject beyond the common understanding of the jurors, such as the practices of drug dealers in transporting and concealing contraband [23]. The concerns that may arise in such situations include: “unmerited credibility” for the factual testimony if the witness also testifies as an expert; inhibiting cross-examination because questions testing expert qualifications may inadvertently enhance credibility as a fact witness; increased danger that the expert testimony will stray to “sweeping conclusions” about the defendant’s activities; and juror confusion over the basis of the testimony [24]. The failure to provide a cautionary instruction about the dual roles of the witness’s testimony may require reversal of the judgment [25]. A pattern jury instruction on dual purpose witnesses has been adopted in some jurisdictions:

#### 7.03A Witness Testifying to Both Facts and Opinions

(1) You have heard the testimony of \_\_\_\_\_, who testified to both facts and opinions. Each of these types of testimony should be given the proper weight. (2) As to the testimony on facts, consider the factors discussed earlier in these instructions for weighing the credibility of witnesses. (3) As to the testimony on opinions, you do not have to accept \_\_\_\_\_’s opinion. In deciding how much weight to give it, you should consider the witness’s qualifications and how he reached his conclusions along with the other factors discussed in these instructions for weighing the credibility of witnesses. (4) Remember that you alone decide how much of a witness’s testimony to believe, and how much weight it deserves. [20]

Merely providing the standard instruction on opinion testimony at the end of the trial may be insufficient [23, p. 426, 26] and some courts have stated that the instruction should be provided before a dual purpose witness testifies “and then flag for the jury when

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[the witness] testifie[s] as a fact witness and when he testifie[s] as an expert” [23, p. 426].

Some jurisdictions have also approved pattern jury instructions to specifically address one factor that may affect credibility determinations concerning expert witnesses who have been paid in connection with their testimony:

3.6.2 Expert Witness – When Expert Fees Represent a Significant Portion of the Witness’s Income  
When scientific, technical, or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn’t mean you must accept the witness’s opinion. As with any other witness’s testimony, you must decide for yourself whether to rely upon the opinion.

When a witness is being paid and testifying concerning the evidence, you may consider the possibility of bias and should view with caution the testimony of such witness where court testimony is given with regularity and represents a significant portion of the witness’s income. [27]

### Conclusion

The United States justice system requires an integrated system of science and the law. The NAS Report [28] highlighted the limitations and failings of the justice system with respect to scientific testimony and evidence. The need for reform and opportunities for change, however, are not confined to the laboratories and are not limited to the work of scientists. Trial attorneys must approach expert opinion testimony with better education, skill, and knowledge than they have demonstrated in the past. Juries cannot properly assess the weight of expert testimony if judges and attorneys do not adequately instruct them on such evidence. Courts must ensure that jurors understand the law they are to apply and the factors they may properly consider in determining the issues. The goals of jury instructions are not just to avoid reversals but also to improve juror comprehension. Unfortunately, pattern jury instructions, while reducing reversals by using language from appellate opinions setting legal standards, do not necessarily track the specific issues of the case or help jurors to properly assess the weight of the evidence. Few pattern jury instructions address the factors jurors may use in determining the weight of the expert testimony. Instructions should be provided to jurors that are tailored to the facts of

each individual case, and where expert testimony is presented, the instructions should include the factors affecting the value of that testimony.

### References

- [1] See, e.g., U.S. Const., Amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . .”); U.S. Const. Amend VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”); Constitution of Virginia, Art. I, §8 (“That in criminal prosecutions a man . . . shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty.”); Constitution of Virginia, Art. I, §11 (“That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.”).
- [2] See also *Taylor v. Commonwealth*, 186 Va. 587, 592, 43 S.E.2d 906, 909 (1947) (“It is always the duty of the court at the proper time to instruct the jury on all principles of the law applicable to the pleadings and the evidence.”); *Williams v. Lynchburg Traction and Light Co.*, 142 Va. 425, 432, 128 S.E.2d 732, 734 (1925) (The trial court’s “imperative duty [to properly instruct the jury as to the law] . . . is one which can neither be evaded nor surrendered.”).
- [3] *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985); see also *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (emphasizing the “invariable assumption of the law that jurors follow their instructions”).
- [4] Many state jurisdictions have posted their pattern jury instructions online through the state bar organizations or the state court system. Various websites have attempted to compile a listing of the online resources by state. See Bissett, J. & Heinen, M. (2007) *Reference from Coast to Coast: Jury Instructions Update*. <http://www.llrx.com/node/1866/print> (accessed Nov 2013).
- [5] Most federal circuits also post their pattern jury instructions online. A listing of online sites by federal circuit is available on the Federal Evidence Review page. <http://federalevidence.com/evidence-resources/federal-jury-instructions> (accessed Nov 2013). This resource page also has links to pattern jury instructions in several states. Not every federal circuit has pattern jury instructions. For example, the Fourth Circuit does not have pattern jury instructions for criminal or civil cases. Privately published compilations are available from various sources. See Horn III, C. (2012). *Horn’s Federal Criminal Jury Instructions for the Fourth Circuit*, 2012 Edition, Fourth Circuit Seminars & Publications, Charlotte, NC; Ruschky, E.W. (2011). *Pattern*

- Jury Instructions for Federal Criminal Cases: District of South Carolina*, South Carolina Bar, Columbia, SC.
- [6] Hannaford-Agor, P.L. & Lassiter, S.N. (April 2008). *Contemporary Pattern Jury Instructions Committees: A Snapshot of Current Operations and Possible Future Directions*. National Center for State Courts, Center for Jury Studies. <http://www.ncsc-jurystudies.org/what-we-do/~media/microsites/files/cjs/what%20we%20do/contemporary%20pattern.ashx> (accessed Nov 2013).
- [7] Federal Rules of Evidence, Rule 702. Testimony by Expert Witnesses: “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) 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; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”
- [8] As noted by the Advisory Committee on Rules, “it is possible for the same witness to provide both lay and expert testimony in a single case.” FRE 701 Advisory Committee Note (2000 Amendment). [http://www.law.cornell.edu/rules/fre/rule\\_701](http://www.law.cornell.edu/rules/fre/rule_701) (accessed Nov 2013).
- [9] See, e.g., Federal Rules of Evidence, Rules 703, 704, and 705.
- [10] *Oklahoma Uniform Jury Instructions – Criminal*. <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=81567> (accessed Nov 2013).
- [11] The Committee on Pattern Civil Jury Instructions of the Seventh Circuit. (2009). *Federal Civil Jury Instructions of the Seventh Circuit*. [http://federalevidence.com/pdf/JuryInst/7th\\_Civ\\_Ins\\_Rev2009.pdf](http://federalevidence.com/pdf/JuryInst/7th_Civ_Ins_Rev2009.pdf) (accessed Nov 2013).
- [12] Massachusetts Court System. *Criminal Model Jury Instructions* (Revised January 2013). <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/jury-instructions/criminal/> (accessed Nov 2013); see *Commonwealth v. Hinds*, 450 Mass. 1, 875 N.E.2d 488 (2007) (recommending this instruction as preferable).
- [13] See *Illinois Pattern Instructions Criminal* 3d 3.18 (1992). <http://federalevidence.com/pdf/JuryInst/III.CrimJI.pdf> (accessed Nov 2013); see also *People v. Cloutier*, 156 Ill.2d 483, 509–510, 622 N.E.2d 774, 788 (1993) (noting that the IPI Committee “specifically advises against any comment on the weight to be given [expert] testimony”).
- [14] Superior Court of the State of Delaware. *Pattern Criminal Jury Instructions*. [http://courts.delaware.gov/Superior/pattern/pattern\\_criminal\\_jury\\_rev\\_2012.pdf](http://courts.delaware.gov/Superior/pattern/pattern_criminal_jury_rev_2012.pdf) (accessed Nov 2013).
- [15] *Vermont Model Criminal Jury Instructions*. <http://www.vtjuryinstructions.org/criminal/MS05-201.htm> (accessed Nov 2013).
- [16] Resolution (101C) adopted at the ABA Midyear Meeting (February 2012). [http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/101c\\_-\\_adopted\\_asre.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/101c_-_adopted_asre.html) (accessed Nov 2013)
- [17] *United States v. Starzecpzel*, 880 F.Supp. 1027, 1038 (S.D.N.Y. 1995).
- [18] The term “expert” should not be used; instead the trial court should use the term “opinion witness” to avoid “[lending] a note of approval to the witness that inordinately enhances the witness’s stature and detracts from the court’s neutrality and detachment.” *United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007); See also *United States v. Gutierrez-Castro*, 805 F. Supp.2d 1218,1234-1235 (D. NM 2011) (fingerprint examiner not qualified as an “expert” before the jury and “expert” reference removed from jury instructions to avoid influencing jury assessment of weight of the evidence).
- [19] See *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1988).
- [20] Committee on Pattern Criminal Jury Instructions, District Judges Association, Sixth Circuit. (June 10, 2011). *Pattern Criminal Jury Instructions*. [http://federalevidence.com/pdf/JuryInst/6th\\_Crim\\_2011.pdf](http://federalevidence.com/pdf/JuryInst/6th_Crim_2011.pdf) (accessed Nov 2013).
- [21] See *United States v. Serafino*, 281 F.3d 327, 330–331 (1st Cir. 2002) (court mitigated “whatever special aura the jury might otherwise have attached to the term ‘expert’” by instructing that expert testimony should be considered just like other testimony); *United States v. Brown*, 7 F.3d 648, 655 (7th Cir. 1993) (recognizing that in close case danger of unfair prejudice may be heightened by “aura of special reliability” of expert testimony, but concluding that instruction to jury that expert opinion was not binding and that jury should consider expert opinion in light of all evidence mitigated any danger of unfair prejudice).
- [22] “Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion . . . .” ABA Civil Trial Practice Standard 17 (February 1998).
- [23] In *United States v. York*, 572 F.3d 415 (7th Cir. 2005), the government presented the testimony of two law enforcement witnesses to interpret a recorded telephone conversation that appeared facially benign, but that the government argued contained cryptic, coded “drug jargon” concerning the negotiation of a drug deal. For example, the agents testified that “nine probably hard” referred to “nine ounces of crack cocaine.” *York*, 572 F.3d at 429.
- [24] *United States v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007); *United States v. York*, 572 F.3d 415 (7th Cir. 2009).
- [25] See *United States v. Lopez-Medina*, 461 F.3d 724, 744 (6th Cir. 2006). (“A general instruction on weighing officer testimony does not guard against a jury mistakenly weighing opinion testimony as if the opinion were

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fact, nor does it instruct the jury that they are free to reject the opinions given.”)

- [26] But see *United States v. Anchrum*, 590 F.3d 795 (9th Cir. 2009) (conviction upheld where the expert and lay witness testimony were clearly separated and the standard instruction on weighing opinion testimony was provided at the end of the trial).
- [27] Eleventh Circuit. (2013). *Civil Pattern Jury Instructions*.
- [28] Committee on Identifying the Needs of the Forensic Science Community, National Research Council of the National Academies (2009). *Strengthening Forensic Science in the United States: A Path Forward*, The National Academies Press, Washington DC.

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