

EXPERT WITNESS

When a case involves a technical issue, a person with special training or experience in that technical field is permitted to give his or her opinion about that technical issue, in order to help you as the jury.

Merely because a witness has expressed an opinion, however, does not mean that you must accept that opinion. In the same way as with any other witness, it is up to you to decide whether to rely on it. You may accept it or reject it, and give it as much weight as you think it deserves. In making your assessment, you may consider the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Commonwealth v. Montecalvo, 367 Mass. 46, 54, 323 N.E.2d 888, 893 (1975); *Commonwealth v. Costa*, 360 Mass. 177, 183, 274 N.E.2d 802, 806 (1971); *Commonwealth v. Smith*, 357 Mass. 168, 178, 258 N.E.2d 13, 19-20 (1970). *Manual of Model Jury Instructions for the Ninth Circuit* § 4.16 (1985 ed.); Committee on Pattern Jury Instructions, District Judges Ass'n of the Eleventh Circuit, *Pattern Jury Instructions—Criminal Cases* § 7 (1985 ed.). As to when expert testimony is appropriate, see *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.46. Language from the instruction approved in *Commonwealth v. Rodriguez*, 437 Mass. 554, 561, 773 N.E.2d 946 (2002), should be used with caution because its repeated use of the word "true" could invite speculation about the standard of proof for determining whether facts are "true." *Commonwealth v. Hinds*, 450 Mass. 1, 875 N.E.2d 488 (2007).

The assessment of an expert witness's qualifications is shared by the judge and the jury. The judge must make a preliminary finding that the proffered witness is at least minimally qualified to testify as an expert, and may not abdicate that responsibility to the jury. The jury must then assess the soundness and credibility of the expert's opinion, and one factor in that assessment is the extent of the expert's knowledge and experience. The model instruction avoids the word "expert," since it may prejudice the jury's ultimate responsibility to accept or reject the witness's expertise. *Leibovich v. Antonellis*, 410 Mass. 568, 572-573, 574 N.E.2d 978, 982 (1991).

ALTERNATE INSTRUCTION

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.

Commonwealth v. Hinds, 450 Mass. 1, 875 N.E.2d 488 (2007) (recommending this model instruction as preferable to the standard Superior Court instruction approved in *Commonwealth v. Rodriguez*, 437 Mass. 554, 561, 773 N.E.2d 946 [2002]).

SUPPLEMENTAL INSTRUCTION

Assumed facts.

Members of the jury, you will have noticed that this witness offered you an opinion that was based on certain assumed facts. It is permissible for a witness to testify in that form, because it is your responsibility — and not the witness's — to determine from all the evidence what the facts are.

Obviously, such an opinion is of use to you only if the facts which the witness has been asked to assume, and on which his (her) opinion is based, are in fact true.

If you find that one or more significant facts that the witness was asked to base his (her) opinion upon are not true, then his (her) opinion is not relevant to the facts of this case, and you should not consider his (her) opinion in your

deliberations.

Commonwealth v. Bjorkman, 364 Mass. 297, 306, 303 N.E.2d 715, 721 (1973); *Commonwealth v. Taylor*, 327 Mass. 641, 649, 100 N.E.2d 22, 26-27 (1951). See *Bagge's Case*, 369 Mass. 129, 134, 338 N.E.2d 348, 352 (1975); *Wing v. Commonwealth*, 359 Mass. 286, 287-288, 268 N.E.2d 658, 659-660 (1971); *Commonwealth v. Ward*, 14 Mass. App. Ct. 37, 41-42, 436 N.E.2d 439, 443 (1982).

An expert opinion may be based either on facts or data in evidence or “on facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.” Allowing an opinion to be based on *admissible but not actually admitted* facts “eliminate[s] the necessity of producing exhibits and witnesses whose sole function is to construct a proper foundation for the expert’s opinion.” *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531-532, 499 N.E.2d 812, 821 (1986).

“If a party believes that an expert is basing an opinion on inadmissible facts or data, the party may request a voir dire to determine the basis of the expert opinion.” *Id.* Absent a request for advance voir dire, the witness may offer the jury an expert opinion without disclosing the facts on which it is based, but the other party has the right to explore those facts on cross-examination. This has eliminated the requirement that the proponent elicit expert testimony only through hypothetical questions. *Id.*