ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

Sec. 7-1. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

COMMENTARY

Section 7-1 sets forth standards for the admissibility of nonexpert opinion testimony. Section 7-1 is based on the traditional rule that witnesses who did not testify as experts generally were required to limit their testimony to an account of the facts and, with but a few exceptions, could not state an opinion or conclusion. E.g., *Robinson* v. *Faulkner*, 163 Conn. 365, 371–72, 306 A.2d 857 (1972); *Stephanofsky* v. *Hill*, 136 Conn. 379, 382, 71 A.2d 560 (1950); *Sydleman* v. *Beckwith*, 43 Conn. 9, 11 (1875). Section 7-1 attempts to preserve the common-law preference for testimony of facts but recognizes there may be situations in which opinion testimony will be more helpful to the fact finder than a rendition of the observed facts only.

In some situations, a witness may not be able to convey sufficiently his or her sensory impressions to the fact finder by a mere report of the facts upon which those impressions were based and, instead, may use language in the form of a summary characterization that is effectively an opinion about his or her observation. [For example, a witness' testimony that a person appeared to be frightened or nervous would be much more likely to evoke a vivid impression in the fact finder's mind than a lengthy description of that person's outward manifestations.] See *State* v. *McGinnis*, 158 Conn. 124, 130–31, 256 A.2d 241 (1969). As a matter of practical necessity, this type of nonexpert opinion testimony may be admitted because the facts upon which the witness' opinion is based "are so numerous or so complicated as to be incapable of separation, or so evanescent in character [that] they cannot be fully recollected or detailed, or described, or reproduced so as to give the trier the impression they gave the witness . . . ." *Atwood* v. *Atwood*, 84 Conn. 169, 173, 79 A. 59 (1911); accord *State* v. *Spigarolo*, 210 Conn. 359, 371, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct.

322, 107 L. Ed. 2d 312 (1989); *Stephanofsky* v. *Hill*, supra, 136 Conn. 382; *Sydleman* v. *Beckwith*, supra, 43 Conn. 12.

Some of the matters upon which nonexpert opinion testimony has been held admissible include: the market value of property where the witness is the owner of the property; *Misisco* v. *LaMaita*, 150 Conn. 680, 684, 192 A.2d 891 (1963); the appearance of persons or things; *State* v. *McGinnis*, [supra,] 158 Conn. 124, 130–31, 256 A.2d 241 (1969); *MacLaren* v. *Bishop*, 113 Conn. 312, 313–14, 155 A.2d 210 (1931); sound; *Johnson* v. *Newell*, 160 Conn. 269, 277–78, 278 A.2d 776 (1971); the speed of an automobile; *Acampora* v. *Asselin*, 179 Conn. 425, 427, 426 A.2d 797 (1980); *Stephanofsky* v. *Hill*, supra, 136 Conn. 382–83; physical or mental condition of others[.]; *Atwood* v. *Atwood*, supra, 84 Conn. 172–74; and safety of common outdoor objects, such as a fence, or the state of repair of a road. See *Czajkowski* v. *YMCA of Metropolitan Hartford, Inc.*, 149 Conn. App. 436, 446–47, 89 A.3d 904 (2014) (citing cases). In other contexts, however, nonexpert opinion testimony has been held inadmissible. See, e.g., *Pickel* v. *Automated Waste Disposal, Inc.*, 65 Conn. App. 176, 190, 782 A.2d 231 (2001) (trial court properly excluded lay opinion regarding cause of accident).

Whether nonexpert opinion testimony is admissible is a preliminary question for the court. See Section 1-3 (a); see also, e.g., *Turbert* v. *Mather Motors, Inc.*, 165 Conn. 422, 434, 334 A.2d 903 (1973) (admissibility of nonexpert opinion testimony within court's discretion).

Sec. 7-2. Testimony by Experts

A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.

COMMENTARY

[Section 7-2 imposes two conditions on the admissibility of expert testimony. First, the witness must be qualified as an expert. See, e.g., *State* v. *Wilson*, 188 Conn. 715, 722, 453 A.2d 765 (1982); see also, e.g., *State* v. *Girolamo*, 197 Conn. 201, 215,

496 A.2d 948 (1985) (bases for qualification). Whether a witness is sufficiently qualified to testify as an expert depends on whether, by virtue of the witness' knowledge, skill, experience, etc., his or her testimony will "assist" the trier of fact. See *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 631, 561 A.2d 443 (1989); see also, e.g., *State* v. *Douglas*, 203 Conn. 445, 453, 525 A.2d 101 (1987) ("to be admissible, the proffered expert's knowledge must be directly applicable to the matter specifically in issue"). The sufficiency of an expert witness' qualifications is a preliminary question for the court. E.g., *Blanchard* v. *Bridgeport*, 190 Conn. 798, 808, 463 A.2d 553 (1983); see Section 1-3 (a).]

[Second, the expert witness' testimony must assist the trier of fact in understanding the evidence or determining a fact in issue. See, e.g., *State* v. *Hasan*, 205 Conn. 485, 488, 534 A.2d 877 (1987); *Schomer* v. *Shilepsky*, 169 Conn. 186, 191–92, 363 A.2d 128 (1975). Crucial to this inquiry is a determination that the scientific, technical or specialized knowledge upon which the expert's testimony is based goes beyond the common knowledge and comprehension, i.e., "beyond the ken," of the average juror. See *State* v. *George*, 194 Conn. 361, 373, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 963, 105 L. Ed. 2d 968 (1985); *State* v. *Grayton*, 163 Conn. 104, 111, 302 A.2d 246, cert. denied, 409 U.S. 1045, 93 S. Ct. 542, 34 L. Ed. 2d 495 (1972); cf. State v. Kemp, 199 Conn. 473, 476–77, 507 A.2d 1387 (1986).]

The subject matter upon which expert witnesses may testify is not limited to the scientific or technical fields, but extends to all areas of specialized knowledge. See, e.g., *State* v. *Correa*, 241 Conn. 322, 355, 696 A.2d 944 (1997) (FBI agent [may] permitted to testify about local cocaine distribution and its connection with violence); *State* v. *Hasan*, 205 Conn. 485, 494–95, 534 A.2d 877 (1987) (podiatrist permitted to testify about physical match between shoe and defendant's foot).

Section 7-2 requires a party offering expert testimony, in any form, to show that the witness is qualified and that the testimony will be of assistance to the trier of fact. A three-part test is used to determine whether these requirements are met. See, e.g., *Sullivan* v. *Metro-North Commuter R. Co.*, 292 Conn. 150, 158–59, 971 A.2d 676 (2009). First, the expert must possess knowledge, skill, experience, training, education or some other source of learning directly applicable to a matter in issue. See, e.g.,

Weaver v. *McKnight*, 313 Conn. 393, 406–409, 97 A.3d 920 (2014); *State* v. *Borrelli*, 227 Conn 153, 166–67, 629 A.2d 1105 (1993), State v. *Girolamo*, 197 Conn. 201, 214–15, 496 A.2d 948 (1985). Second, the witness' skill or knowledge must not be common to the average person. See, e.g., *State* v. *Guilbert*, 306 Conn. 218, 234–42, 49 A.3d 705 (2012); *State* v. *Borrelli*, supra, 167–172. Third, the testimony must be helpful to the fact finder in considering the issues. See, e.g., *State* v. *Hasan*, supra, 205 Conn. 494 ("[t]he value of [the witness'] expertise lay in its assistance to the jury in reviewing and evaluating the evidence"). The inquiry is often summarized in the following terms: "The true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or jury in determining the questions at issue." (Internal quotation marks omitted.) *Going* v. *Pagani*, 172 Conn. 29, 35, 372 A.2d 516 (1976).

The case law imposes an additional admissibility requirement with respect to some—but not all—types of scientific expert testimony. **[**In**]** This additional requirement derives from *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which **[**the state Supreme Court directed**]** directs trial judges, in **[**admitting**]** considering the admission of certain types of scientific **[**evidence**]** expert testimony, to serve a gatekeeper function in determining whether such evidence will assist the trier of fact. Id., 73. **[**In**]** *Porter* **[**, the court opted for**]** adopted an approach similar to that taken by the United States Supreme Court in construing the **[**relevant**]** analogous federal rule of evidence in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *State* v. *Porter*, supra, 61, 68. For scientific expert testimony subject to *Porter*, the three-part test discussed above is supplemented by a fourth threshold requirement. Id., 81; see *Maher* v. *Quest Diagnostics, Inc.*, 269 Conn.154, 168, 847 A.2d 978 (2004); *Weaver* v. *McKnight*, supra, 313 Conn. 414–15. **[**In accordance with *Porter*,**]** This fourth requirement itself has two parts. *State* v. *Porter*, supra, 63–64; see, e.g., *Weaver* v. *McKnight*, supra, 413–14.**[**, t**]** The **[**trial judge**]** proffering party first must **[**determine**]**

establish that the [proffered] scientific [evidence] expert testimony is reliable. [Id.,] *State* v. *Porter*, supra, 64. Scientific [evidence] expert testimony is reliable if the underlying reasoning or methodology [underlying the evidence] is scientifically valid. Id. [In addition to reliability, the trial judge also must determine that the proffered scientific evidence is relevant, meaning that the reasoning or methodology underlying the scientific theory or technique in question properly can be applied to the facts in issue. Id. In] The *Porter* [the court listed] decision identifies several factors that should be considered by a trial judge [should consider in deciding] to help decide whether scientific [evidence] expert testimony is reliable. Id., 84–86. This list of factors is not exclusive; id., 84; and the operation of each factor varies depending on the specific context in each case. Id., 86–87. The second part of the *Porter* analysis requires the trial judge to determine that the proffered scientific evidence is relevant to the case at hand, meaning that the reasoning or methodology underlying the scientific theory or technique in question properly can be applied to the facts in issue. Id. "In other words, proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply valid in the abstract." Id., 65; see *Weaver* v. *McKnight*, supra, 414. This is sometimes called the "fit requirement" of *Porter*. *State* v. *Guilbert*, supra, 306 Conn. 232; see *State* v. *Porter*, supra, 83. The relevance and prejudice analysis under Article IV of the Code also remains fully applicable to scientific expert testimony. See *State* v. *Kelly*, 256 Conn. 23, 74–76, 770 A.2d 908 (2001).

The *Porter* analysis applies only to certain types of scientific expert testimony. *State* v. *Reid*, 254 Conn. 540, 546, 757 A.2d 482 (2000); see *Maher* v. *Quest Diagnostics, Inc.*, supra, 269 Conn. 170 n.22 ("certain types of evidence, although ostensibly rooted in scientific principles and presented by expert witnesses with scientific training, are not 'scientific' for the purposes of our admissibility standard for scientific evidence, either before or after *Porter*"). The cases have articulated two categories of scientific expert testimony that are not subject to the additional analysis required under *Porter*. The first category reflects the fact that "some scientific principles have become so well established [in the scientific community] that an explicit *Daubert* analysis is not necessary for admission of evidence thereunder." *State* v. *Porter*, supra, 241 Conn. 85 n.30 ("a very few scientific principles are so firmly established as to have

attained the status of scientific law, such as the laws of thermodynamics" [internal quotation marks omitted]); see *State v. Kirsch*, 263 Conn. 390, 402–403, 820 A.2d 236 (2003). The second type of scientific expert testimony exempt from the *Porter* analysis is evidence that leaves the jury "in a position to weigh the probative value of the [expert] testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions based on his special skill or knowledge." *State* v. *Hasan*, supra, 205 Conn. 491; see *State* v. *Reid*, supra, 546–47. This exception recognizes that certain expert testimony, though scientific in nature, may be presented in a manner, or involve a subject matter, such that its admission does not risk supplanting the role of "lay jurors awed by an aura of mystic infallibility surrounding scientific techniques, experts and the fancy devices employed." (Internal quotation marks omitted.) *State* v. *Hasan*, supra, 490.

[Subsequent to both *Daubert* and *Porter*, t]The United States Supreme Court [decided that, with respect to Fed. R. Evid. 702,] has held that the trial judge's gatekeeping function under Fed. R. Evid. 702 applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge, and that the trial judge may consider one or more of the *Daubert* factors if doing so will aid in determining the reliability of the testimony. *Kumho Tire Co., Ltd.* v. *Carmichael*, 526 U.S. 137, 147–49, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). The Code takes no position on [such] an application of *Porter* to testimony based on technical and other specialized knowledge. Thus, Section 7- 2 should not be read either as including or precluding the *Kumho Tire* rule. See *State* v. *West*, 274 Conn. 605, 638 n.37, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L.Ed. 2d 601 (2005) (declining to decide issue).

In cases involving claims of professional negligence or other issues beyond the field of the ordinary knowledge and experience of judges or jurors, expert testimony may be required to establish one or more elements of a claim. See, e.g., *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 567, 864 A.2d 1 (2005) (medical malpractice); *Davis* v. *Margolis*, 215 Conn. 408, 415–16, 576 A.2d 489 (1990) (legal malpractice); see *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 377-78, 119 A.2d 462 (2015) (holding that expert testimony not required to assess risk of

relapse of alcoholic priest, known to defendant as child molestor, whose tendencies were exacerbated by alcohol); *LePage* v. *Home*, 262 Conn. 116, 125–26, 809 A.2d 505 (2002) (expert testimony required in case involving consideration of risk factors for sudden infant death syndrome).

Sec. 7-3. Opinion on Ultimate Issue

(a) General rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.

(b) Mental state or condition of defendant in a criminal case. "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone." General Statutes § 54-86i.

COMMENTARY

(a) General rule.

An ultimate issue is one that cannot "reasonably be separated from the essence of the matter to be decided [by the trier of fact]." (Internal quotation marks omitted.) *State* v. *Finan*, 275 Conn. 60, 66, 881 A.2d 187 (2005). The common-law rule concerning the admissibility of a witness' opinion on the ultimate issue is phrased in terms of a general prohibition subject to numerous exceptions. E.g., *State* v. *Spigarolo*, 210 Conn. 353, 373, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); *State* v. *Vilalastra*, 207 Conn. 35, 41, 540 A.2d 42 (1988). Subsection (a) adopts the general bar to the admission of nonexpert and expert opinion testimony that embraces an ultimate issue.

Subsection (a)**[**, however,**]** recognizes an exception to the general rule for expert witnesses in circumstances where the jury needs expert assistance in deciding the

ultimate issue. A common example is cases involving claims of professional negligence. See, e.g., *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 328–29, 430 A.2d 1 (1980). Where there is particular concern about invading the province of the fact finder, courts may allow the expert to testify regarding common behavioral characteristics of certain types of individuals; *State* v. *Vilalastra*, supra, 207 Conn. 41–43 (behavior of drug dealers); but will prohibit the expert from opining as to whether a particular individual exhibited that behavior. See, e.g., *State* v. *Taylor G.*, 315 Conn. 734, 762–63, 110 A.3d 338 (2015) (behavior of child victim of sexual abuse). [See, e.g., *State* v. *Rodgers*, 207 Conn. 646, 652, 542 A.2d 1136 (1988); *State* v. *Vilalastra*, supra, 207 Conn. 41–43; *State* v. *Johnson*, 140 Conn. 560, 562–63, 102 A.2d 359 (1954); cf. *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 328–29, 430 A.2d 1 (1980). This exception for expert opinion embracing an ultimate issue is subject to the limitations set forth in subsection (b).] Expert opinion on the ultimate issue [otherwise] admissible under subsection (a) [nevertheless] also must satisfy the [general] admissibility requirements [for the admissibility of], applicable to all expert [opinion] testimony, set forth in Sections 7- 2 and 7-4.

[The cases have sometimes used the term "ultimate issue" imprecisely. One example is *State* v. *Spigarolo*, supra, 210 Conn. 372–74, in which the court appeared to relax the general restriction on the admissibility of nonexpert opinion testimony that embraces an ultimate issue. At issue was whether a non-expert witness could render an opinion on whether the testimony of a child sexual assault victim would be less candid if the victim were required to testify in the presence of the accused. Id., 370–71. The court identified this issue as an "ultimate issue" for purposes of the case. See generally id., 372–74.]

[In drafting the Code, however, the issue in *Spigarolo* was deemed an important factual issue, not an ultimate one. Thus, *Spigarolo* was regarded as a case properly analyzed under Section 7-1. To the extent that *Spigarolo* recognized an exception to the inadmissibility of nonexpert opinion testimony that embraces an ultimate issue, it is rejected in favor of a complete ban on the admissibility of such testimony. See, e.g., *LaFrance* v. *LaFrance*, 127 Conn. 149, 155, 14 A.2d 739 (1940).]

(b) Mental state or condition of defendant in a criminal case.

[The term "opinion or inference" appears in subsection (b) by virtue of the verbatim incorporation of the language of General Statutes § 54-86i.] Subsection (b), including its use of the term "opinion or inference," is taken verbatim from General Statutes § 54-86i. The Code [draws no distinction] attributes no significance to the difference between the term "opinion or inference," as used in subsection (b), and the term "opinion" or "opinions," without the accompanying "or inference" language, [the latter term appearing] used in other provisions of Article VII of the Code.

Sec. 7-4. Opinion Testimony by Experts; Bases of Opinion Testimony by Experts; Hypothetical Questions

(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert's opinion.

(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.

(c) Hypothetical questions. An expert may give an opinion in response to a hypothetical question provided that the hypothetical question: (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case[.]; (2) is not worded so as to mislead or confuse the jury[.]; and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence.

COMMENTARY

(a) Opinion testimony by experts.

Connecticut case law requires disclosure of the "factual basis" underlying an expert witness' opinion before the expert witness may render that opinion. See

Borkowski v. *Borkowski*, 228 Conn. 729, 742, 638 A.2d 1060 (1994); *State* v. *John*, 210 Conn. 652, 677, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *State* v. *Asherman*, 193 Conn. 695, 716, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985); see also Practice Book § 13-4 (b) (1); *Going* v. *Pagani*, 172 Conn. 29, 34, 372 A.2d 516 (1976). Subsection (a) incorporates this principle by requiring **[**that sufficient facts on which the expert's opinion is based be shown as the foundation for the opinion**]** the party offering the evidence to show that the expert's opinion rests upon an adequate factual foundation. This requirement applies whether the expert's opinion is based on personal knowledge or secondhand facts made known to the expert at or before trial. E.g., *State* v. *John*, supra, 676–78 (secondhand data customarily relied on by other experts); *Going* v. *Pagani*, supra, 32 (firsthand observation); *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 666, 136 A.2d 918 (1957) (secondhand facts made known to expert through use of hypothetical question).

Subsection (a) contemplates that disclosure of the "foundational" facts will, in most cases, occur during the examination undertaken by the party calling the expert and before the expert states his or her opinion. The requirement of preliminary disclosure, however, is subject to the trial court's discretionary authority to admit evidence upon proof of connecting facts**[**,**]** or subject to later proof of connecting facts. Section 1-3 (b); see *Schaefer & Co.* v. *Ely*, 84 Conn. 501, 509, 80 A. 775 (1911). Nothing in subsection (a) precludes further exploration into the factual basis for the expert's opinion during cross-examination of the expert. Whether sufficient facts are shown as the foundation for the expert's opinion is a preliminary question to be decided by the trial court. *Liskiewicz* v. *LeBlanc*, 5 Conn. App. 136, 141, 497 A.2d 86 (1985); see Section 1-3 (a).

The admissibility of expert testimony rendered by a physician—whether a treating or nontreating physician—is governed by the same evidentiary standard **[**governing**]** applied to the testimony of expert witnesses generally. *George* v. *Ericson*, 250 Conn. 312, 317, 736 A.2d 889 (1999), overruling *Brown* v. *Blauvelt*, 152 Conn. 272, 274, 205 A.2d 773 (1964).

(b) Bases of opinion testimony by experts.

Subsection (b) allows an expert witness to base his or her opinion on "facts" derived from one or more of three possible sources. First, the expert's opinion may be based on facts "perceived by" the expert ["perceived"] at or before trial, in other words, facts the expert observes firsthand. E.g., *State* v. *Conroy*, 194 Conn. 623, 628–29, 484 A.2d 448 (1984); *Donch* v. *Kardos*, 149 Conn. 196, 201, 177 A.2d 801 (1962); *Wilhelm* v. *Czuczka*, 19 Conn. App. 36, 42, 561 A.2d 146 (1989). For example, a treating physician often will base an expert opinion on observations made by the physician [made] while examining the patient. See generally *State* v. *McClary*, 207 Conn. 233, 236–38, 541 A.2d 96 (1988).

Second, the expert's opinion may be based on facts "made known" to the expert at trial. This [second variety] category includes facts learned by the expert [learns of when the expert attends] while attending the trial and listen[s]ing to the testimony of other witnesses prior to rendering his or her own opinion. See *DiBiase* v. *Garnsey*, 106 Conn. 86, 89, 136 A. 871 (1927). It also includes facts presented to the expert in the form of a hypothetical question. See, e.g., *Keeney* v. *L & S Construction*, 226 Conn. 205, 213, 626 A.2d 1299 (1993); *State* v. *Auclair*, 33 Conn. Sup. 704, 713, 368 A.2d 235 (1976).

Finally, the expert's opinion may be based on facts, of which the expert has no firsthand knowledge, made known to the expert before trial [and of which the expert has no firsthand knowledge], regardless of the admissibility of those facts themselves. See, e.g., *State* v. *Gonzalez*, 206 Conn. 391, 408, 538 A.2d 210 (1988) (expert's opinion based on autopsy report of another medical examiner); *State* v. *Cosgrove*, 181 Conn. 562, 584, 436 A.2d 33 (1981) (expert's opinion derived from reports that included observations of other toxicologists).

Although [facts derived from] the factual basis for expert opinions resting on the first two sources of information [—] (i.e., facts gleaned from firsthand observation [and] or facts made known to the expert at trial[—often will be admissible and admitted in evidence]) normally do not encounter obstacles to admissibility, case law is inconsistent [as] with respect to the admissibility of expert opinion [when] based on facts [made known to the expert before trial and of] in the last category (i.e., facts themselves inadmissible at trial and as to which the expert has no firsthand knowledge). In

accordance with the modern trend in Connecticut, subsection (b) provides that [the facts upon which an expert bases his or her] an expert may offer an opinion [need not be] based on facts that are not themselves admissible if those facts are of a type customarily relied on by experts in the particular field in forming their opinions. E.g., *George* v. *Ericson*, supra, 250 Conn. 324–25; *State* v. *Gonzalez*, supra, 206 Conn. 408; *State* v. *Cuvelier*, 175 Conn. 100, 107–108, 436 A.2d 33 (1978). [For purposes of subsection (b), inadmissible "facts" upon which experts customarily rely in forming opinions can be derived] Facts of this nature may come from sources such as conversations, informal opinions, written reports and data compilations. Whether [inadmissible] these facts are of a type customarily relied on by experts in forming opinions is a preliminary question to be decided by the trial court. See Section 1-3 (a).

In a criminal case, when an expert opinion is based on facts not in evidence, the court and parties should be aware of constitutional concerns. See *State* v. *Singh*, 59 Conn. App. 638, 652, 757 A.2d 1175 (2000) (opinion based on information provided by others does not violate confrontation clause if expert is available for cross-examination concerning nature and reasonableness of reliance), rev'd on other grounds, 259 Conn. 693, 793 A.2d 226 (2002); cf. *In re Barbara J.*, 215 Conn. 31, 43–44, 574 A.2d 203 (1990) (termination of parental rights). This added requirement, which is not included in subsection (b) as an independent prerequisite under the Code, has been mentioned in dicta in civil cases as well. See *R.I. Pools, Inc.* v. *Paramount Concrete, Inc.*, 149 Conn. App. 839, 849, 89 A.3d 993 ("expert may give an opinion based on sources not in themselves admissible in evidence, provided [1] the facts or data not in evidence are of a type reasonably relied on by experts in the particular field, and [2] the expert is available for cross-examination concerning his or her opinion" [internal quotation marks omitted]), cert. denied, 312 Conn. 920, 94 A.3d 1200 (2014); *Birkhamshaw* v. *Socha*, 156 Conn. App. 453, 484, 115 A.3d 1, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015).

Subsection (b) expressly [forbids] states that the facts [upon which the expert based his or her opinion to be admitted for their truth] forming the basis of the expert opinion are not thereby made admissible as substantive evidence (i.e., for their truth) unless otherwise [substantively] admissible as such under other provisions of the Code.

See *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 726–28, 80 A.3d 887 (2013). Thus, subsection (b) does not constitute an exception to the hearsay rule or any other exclusionary provision of the Code. However, because subsection (a) requires disclosure of a sufficient factual basis for the expert's opinion, and because the cross-examiner often will want to explore the expert's factual basis further, subsection (b) does not preclude the trial court, in its discretion, from admitting the underlying facts relied on by the expert for the limited purpose of explaining the factual basis for the expert's opinion. [See, e.g., 2 C. McCormick, Evidence (5th Ed. 1999) § 324.3, p. 356.] *DeNunzio* v. *DeNunzio*, 151 Conn App. 403, 413, 95 A.3d 557, (2014), aff'd on other grounds, 320 Conn. 178, 128 A.3d 901 (2016).

(c) Hypothetical questions.

Subsection (c) embraces the common-law rule concerning the admissibility of a hypothetical question and, necessarily, the admissibility of the ensuing expert's opinion in response to the hypothetical question. *Floyd* v. *Fruit Industries, Inc.*, supra, 144 Conn. 666; accord *Shelnitz* v. *Greenberg*, 200 Conn. 58, 77, 509 A.2d 1023 (1986); *Schwartz* v. *Westport*, 170 Conn. 223, 225, 365 A.2d 1151 (1976). In accordance with case law, subsection (c) recognizes that the hypothetical question must contain the essential facts of the case; see *State* v. *Gaynor*, 182 Conn. 501, 509–10, 438 A.2d 739 (1980); see also *Keeney* v. *L & S Construction*, supra, 226 Conn. 213 ("the stated assumptions on which a hypothetical question is based must be the essential facts established by the evidence"); but need not contain all the facts in evidence. E.g., *Donch* v. *Kardos*, supra, 149 Conn. 201; *Stephanofsky* v. *Hill*, 136 Conn. 379, 384, 71 A.2d 560 (1950).

Subsection (c) states the rule concerning the framing of hypothetical questions on direct examination. See, e.g., *Schwartz* v. *Westport*, supra, 170 Conn. 224–25. The rules governing the framing of hypothetical questions on direct examination and for the purpose of introducing substantive evidence are applied with increased liberality when the hypothetical question is framed on cross-examination and for the purpose of impeaching and testing the accuracy of the expert's opinion testimony given on direct examination. See, e.g., *State* v. *Gaynor*, supra, 182 Conn. 510–11; *Kirchner* v. *Yale University*, 150 Conn. 623, 629, 192 A.2d 641 (1963); *Livingstone* v. *New Haven*, 125 Conn. 123, 127–28, 3 A.2d 836 (1939); *Rice* v. *Dowling*, 23 Conn. App. 460, 465, 581

A.2d 1061 (1990), cert. denied, 217 Conn. 805, 584 A.2d 1190 (1991). Common law shall continue to govern the use of hypothetical questions on cross-examination.