Appendix C

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 *State* v. *Edwards*, 325 Conn. 97, 127–28, ___ A.3d ___ (2017) (explaining what qualifies as expert testimony); 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).