

## **7.01 Opinion of Expert Witness**

**(1) A person qualified as an expert by knowledge, skill, experience, training, or education, may testify to an opinion or information concerning scientific, technical, medical, or other specialized knowledge when:**

**(a) the subject matter is beyond the knowledge or understanding, or will dispel misconceptions, of a typical finder of fact; and**

**(b) the testimony will help the finder of fact to understand the evidence or determine a fact in issue, especially when the facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter.**

**(2) Where the subject matter of the testimony is not based on the personal training or experience of the witness but rather is based on scientifically developed procedures, tests, or experiments, it must also be (or have been) established that: (a) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the procedure, test, or experiment; (b) there is general acceptance within the relevant scientific community that the procedure, test, or experiment is reliable and produces accurate results; and (c) the particular procedure, test, or experiment was conducted in such a way as to yield an accurate result.**

**(3) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.**

**(4) An expert need not assert a conclusion with certainty, so long as the expert demonstrates a degree**

**of confidence in the conclusion sufficient to satisfy accepted standards of reliability in the expert's field.**

**(5) (a) Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form. The expert may base an opinion on facts in the record or known to the witness, and the expert may state an opinion and reasons without first specifying the data upon which it is based; however, an expert who relies on facts within personal knowledge that are not contained in the record is required to testify to those facts prior to rendering the opinion.**

**(b) An expert also may rely on out-of-court material if:**

**(i) it is of a kind accepted in the profession as reliable in forming a professional opinion, provided that there is evidence establishing the reliability of the out-of-court material.**

**(ii) it comes from a witness subject to full cross-examination by the opposing party.**

**(c) In a criminal case, while an expert may rely upon hearsay statements in formulating an opinion, the constitutional right of confrontation precludes the expert from testifying on direct examination to a statement made by a person who was not available for cross-examination.**

**(d) Defense of lack of criminal responsibility (CPL 60.55)**

**(i) When, in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, a psychiatrist or licensed psychologist testifies at a trial concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he [or she] must be**

permitted to make a statement as to the nature of any examination of the defendant, the diagnosis of the mental condition of the defendant and his [or her] opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct, or its wrongfulness, was impaired as a result of mental disease or defect at that time. The psychiatrist or licensed psychologist must be permitted to make any explanation reasonably serving to clarify his [or her] diagnosis and opinion, and may be cross-examined as to any matter bearing on his [or her] competency or credibility or the validity of his diagnosis or opinion.

(ii) Any statement made by the defendant to a psychiatrist or licensed psychologist during his [or her] examination of the defendant shall be inadmissible in evidence on any issue other than that of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. The statement shall, however, be admissible upon the issue of the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, whether or not it would otherwise be deemed a privileged communication.

(e) **Sex Offender Civil Case.** In a sex offender civil management case under article 10 of the Mental Hygiene Law, an expert may testify to hearsay offered to explain the basis of the expert's opinion when the proponent demonstrates through evidence that the hearsay is reliable and that its probative value in helping the jury evaluate the expert's opinion substantially outweighs its prejudicial effect.

## Note

**Subdivision (1).** Subdivision (1) reflects the basic New York rule that it is for the jury to determine the facts and that they “may be aided, but not displaced,” by expert testimony “where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence.” (*People v Inoa*, 25 NY3d 466, 472 [2015]; *People v Cronin*, 60 NY2d 430, 432 - 433 [1983] [“For testimony regarding both the ultimate questions and those of lesser significance, admissibility turns on whether, given the nature of the subject, ‘the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable’ ”]; cf. *People v Clyde*, 18 NY3d 145, 154 [2011]) [in responding to the defendant’s argument that “physicians were improperly allowed to testify as to their conclusions” regarding injuries, the Court held that “admissibility turns on whether, given the nature of the subject, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon” [citing *Cronin*]. The facts that underlie physical injury and risk of serious physical injury can readily be stated to a jury so as to enable the jurors to form an accurate judgment concerning the elements of assault and unlawful imprisonment. It was therefore error to overrule [the defendant’s] objections and permit this expert testimony”].)

What distinguishes New York from other jurisdictions is its emphasis on opinion evidence being “necessary” to properly describe the subject matter. (*See Ferguson v Hubbell*, 97 NY 507, 514 [1884] [The rules admitting opinions of experts should not be unnecessarily extended]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 [1871].) That “necessity” requirement in recent times appears subsumed by the requirement that the subject matter be beyond the knowledge or understanding of a typical juror or will dispel misconceptions a juror may hold and thereby help a juror to understand the evidence or determine a fact in issue. (*People v Rivers*, 18 NY3d 222, 228 [2011] [“ ‘The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror’ ”]; *People v LeGrand*, 8 NY3d 449, 455 - 456 [2007] [“A court’s exercise of discretion depends largely on whether jurors, after the court considers their ‘day-to-day experience, their common observation and their knowledge,’ would benefit from the specialized knowledge of an expert witness”]; *People v Keindl*, 68 NY2d 410, 422 [1986] [“Opinion testimony of an expert witness is admissible where the conclusions to be drawn ‘depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence’ ”]; *People v Lee*, 96 NY2d 157, 162 [2001] [“Despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror”].)

In the end, it is for the trial court “to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.” (*People v Cronin*, 60 NY2d at 433; *People v Keindl*, 68 NY2d at 422; *People v Lee*, 96 NY2d at 162 [2001].)

**Subdivision (2).** Subdivision (2) sets forth New York’s continued adherence to the rule of *Frye v United States* (293 F 1013 [DC Cir 1923]). (*People v Wesley*, 83 NY2d 417 [1994]). “Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted.” (*People v Brooks*, 31 NY3d 939, 941 [2018].)

The *Frye* rule does not apply where experts base their testimony on personal training or experience of the expert. (*People v Oddone*, 22 NY3d 369, 375 [2013].) In *Oddone*, the court permitted a doctor to testify that the deceased’s neck had been compressed for “something in the range of 2, 3, 4 minutes.” The defendant claimed that the doctor “was advancing a scientific principle that had not gained general acceptance in its field, in violation of the rule of *Frye* . . . . The flaw in defendant’s reasoning is that [the doctor] did not claim to rely on any established scientific principle. He made clear that his testimony was based on his personal ‘experience’—meaning what he had observed, heard and read about particular cases. Such evidence is not barred by *Frye*” (*Oddone*, 22 NY3d at 375 - 376).

The *Oddone* court added a caveat:

“We acknowledge that it may not be possible to draw a neat line between scientific principles and experience-based testimony. Indeed, it has been observed that the many cases applying *Frye* to evidence based on scientific principles shed little light on exactly what a ‘scientific principle’ is . . . . We do not imply that an expert is allowed to say anything he or she likes to a jury if the statement is prefaced by the words ‘in my experience.’ To allow an expert to say, based only on his or her alleged experience, that smoking does not cause lung cancer or that baldness is related to the phases of the moon would be to tolerate the admission of junk science and to undermine the basic purpose of *Frye*.” (*Oddone*, 22 NY3d at 376).

The Court of Appeals has stressed that a *Frye* inquiry, whether required or not, is “separate and distinct from the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case” (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 447 [2006]). The foundation is lacking if the trial court determines that “ ‘there is simply too great an analytical gap between the data and the opinion proffered.’ ” (*Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 [2014], quoting *General Electric Co. v Joiner*, 522 US 136, 146 [1997].) The question boils down to whether the expert’s opinion sufficiently relates to existing

data or, to the contrary, “is connected to existing data only by the *ipse dixit* [unproven word] of the expert.” (*Joiner*, 522 US at 137; *see Brooks*, 31 NY3d at 941.)

Examples of accepted expert testimony include testimony that explains the following: the terminology used in the illegal drug trade (*People v Garcia*, 83 NY2d 817 [1994]); the inconsistency of the quantity of drugs recovered and packaging with personal use (*People v Hicks*, 2 NY3d 750 [2004]); the significance of the absence of the buy money in an undercover “buy and bust” when the reason for its absence is not inferable from the circumstances (*People v Brown*, 97 NY2d 500 [2002]; *cf. People v Gonzalez*, 99 NY2d 76 [2002]; *People v Smith*, 2 NY3d 8 [2004]); the impact on the ability to act with the requisite intent when a defendant had consumed up to a case of beer, smoked several marijuana cigarettes, and ingested 5 to 10 Valium (*People v Cronin*, 60 NY2d 430, 432 [1983]); the “range of psychological reactions of child victims who suffer from sexual abuse at the hands of their stepparents” (*People v Keindl*, 68 NY2d 410, 422 [1986]); the “sexually abused child syndrome” (*Matter of Nicole V.*, 71 NY2d 112 [1987]); whether a fire was intentionally set (*People v Rivers*, 18 NY3d 222 [2011]); an estimated time of a victim’s death (*People v Miller*, 91 NY2d 372 [1998]); GPS evidence (*Carniol v New York City Taxi & Limousine Commn.*, 126 AD3d 409, 410 - 411 [1st Dept 2015]); and the mechanism of an injury or physiological process by which an injury occurs (*Sadek v Wesley*, 117 AD3d 193, 201 [1st Dept 2014], *affd* 27 NY3d 982, 983 - 984 [2016]).

**Subdivision (3).** Subdivision (3) is derived from Court of Appeals cases that indicate that, once the criteria for admissibility are demonstrated, it matters not that the testimony may appear to invade the province of the jury or constitute evidence of the “ultimate” issue in the case. (*People v Hicks*, 2 NY3d 750, 751 [2004] [“Since the expert testimony was beyond the ken of the average juror, it matters not whether the testimony related to the ultimate issue in the case”]; *People v Cronin*, 60 NY2d at 433 [trial court erred in precluding an opinion on the grounds that it “went to the ultimate question and would usurp the jury’s function”]; *Dufel v Green*, 84 NY2d 795, 797 [1995] [It was not error for plaintiff’s doctors to testify to “two of the statutory components of the ‘serious injury’ threshold as defined by Insurance Law § 5102 (d)”]; *see People v Jones*, 73 NY2d 427, 430 - 431 [1989] [“Expert opinion testimony is used in partial substitution for the jury’s otherwise exclusive province which is to draw ‘conclusions from the facts’ . . . It is a kind of authorized encroachment in that respect”]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Rivers*, 18 NY3d at 228.)

**Subdivision (4).** Subdivision (4) is taken from *Matter of Anthony M.* (63 NY2d 270, 280 - 281 [1984] [“Though sometimes perceptible to lay witnesses . . . the progression from injury to death, often unseen and not readily comprehended, will generally be a subject for expert medical opinion. To establish a causal connection, conclusions which are only “contingent, speculative, or merely possible” . . . will not suffice, but neither is absolute certainty and the exclusion of

every other possibility required”). A reasonable degree of certainty within the subject field of the testimony should suffice (*Matott v Ward*, 48 NY2d 455, 459 - 460 [1979] [“Granted that ‘a reasonable degree of medical certainty’ is one expression of such a standard . . . it is not, however, the only way in which a level of certainty that meets the rule may be stated. . . . (A)ny formulation from which it can be said that the witness’ ‘whole opinion’ reflects an acceptable level of certainty (will suffice),” and the weight of the testimony is then to be assessed by the trier of fact]; *People v Brown*, 67 NY2d 555, 560 [1986]).

**Subdivision (5).** Subdivision (5) derives primarily from a series of Court of Appeals cases.

- Subdivision (5) (a): The first sentence is taken verbatim from CPLR 4515. The second sentence is a combination of decisional law (*Cassano v Hagstrom* (5 NY2d 643, 646 [1959] [“opinion evidence must be based on facts in the record or personally known to the witness”]; *Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 725 - 726 [1984] [same]), and the portion of CPLR 4515 that reads “the witness may state his opinion and reasons without first specifying the data upon which it is based.” The Court of Appeals has qualified that latter portion of CPLR 4515 in two ways.

The first qualification is as set forth in the rule’s exception for an expert who relies on facts within personal knowledge. (*People v Jones*, 73 NY2d 427, 430 [1989] [an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion]; *Mandel v Geloso*, 206 AD2d 699, 700 [3d Dept 1994].)

Second, while the expert may state an opinion without first specifying the data that would support that opinion, the expert’s testimony or the record must supply the data. (*Jones*, at 431 [“In failing to supply an evidentiary predicate for their own chemist expert’s ultimate conclusion [that a particular drug was a controlled substance], the People presented an insufficient case”].) That the opposing party under CPLR 4515 may of course cross-examine the expert does not shift the burden to that party to fill in the missing data. (*Id.*; see Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4515; Barker and Alexander, Evidence in New York State and Federal Courts § 716 [2d ed].)

- Subdivision (5) (b): *People v Sugden* (35 NY2d 453, 460 - 461 [1974] [“The psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion. . . . He may also rely on material, which if it does not qualify under the professional test, comes from a witness subject to

full cross-examination on the trial”]); *People v Stone* (35 NY2d 69, 73 [1974] [“the Trial Judge was very careful to satisfy himself that an independent, legally competent basis existed for the [expert] opinion in the doctor's interviews with the defendant and in the medical records in evidence”]); *Hambusch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] [“In order to qualify for the [*Sugden*] ‘professional reliability’ exception, there must be evidence establishing the reliability of the out-of-court material . . . Plaintiff presented no such evidence in the instant case and therefore the physician’s opinion was inadmissible”]); *People v Jones* (73 NY2d 427, 430 [1989] [“an expert who relies on necessary facts within personal knowledge which are not contained on the record is required to testify to those facts prior to rendering the opinion . . . Conversely, expert opinions of the kind needing material evidentiary support for which there is none otherwise in the direct evidence or in some equivalently admissible evidentiary form have been excluded”]).

The Appellate Division, while confirming the rule set forth in (5) (b) has added an additional requirement, namely, that the out-of-court material “does not constitute the sole or principal basis for the expert’s opinion” (*Tornatore v Cohen*, 162 AD3d 1503, 1505 [4th Dept 2018] [internal quotation marks omitted]). The Court of Appeals has yet to rule on that issue.

- Subdivision (5) (c): *People v Goldstein* (6 NY3d 119, 129 [2005] [“the statements made to [the expert] by her interviewees were testimonial. . . . [The interviewees] knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making ‘a casual remark to an acquaintance’; all of them should reasonably have expected their statements ‘to be used prosecutorially’ or to ‘be available for use at a later trial.’ . . . Responses to questions asked in interviews that were part of the prosecution’s trial preparation are ‘formal’ in much the same sense as ‘depositions’ and other materials that the Supreme Court identified as testimonial”]). *Goldstein* also viewed the statements in question as hearsay because they were effectively being offered for their truth; if they were not being offered for their truth, the Confrontation Clause would not normally be implicated. In *Matter of State of New York v Floyd Y.* (22 NY3d 95, 107 [2013]), however, the Court of Appeals in a civil case under New York’s sex offender civil management statute (Mental Hygiene Law art 10) held that “basis hearsay [hearsay offered to explain the basis of an expert’s opinion] does not come into evidence for its truth, but rather to assist the factfinder with its essential article 10 task of evaluating the experts’ opinions.” That holding seemingly creates a criminal-civil dichotomy on whether the statements are hearsay. Thus far, *Floyd Y.’s* holding has not been applied in any reported decision other than cases under article 10 of the Mental Hygiene Law.



- Subdivision (5) (d) is taken verbatim from CPL 60.55. That section includes a requirement that the court give the jury the following limiting instruction: “Upon receiving the statement [of the defendant] in evidence, the court must instruct the jury that the statement is to be considered only on the issue of such affirmative defense and may not be considered by it in its determination of whether the defendant committed the act constituting the crime charged” (CPL 60.55 [2]).
- Subdivision (5) (e): *Matter of State of New York v Floyd Y.* (22 NY3d 95 [2013]). Using the terminology “hearsay basis evidence” to refer to hearsay offered to explain the basis of an expert’s opinion, the Court held (at 109): “Due process requires any hearsay basis evidence to meet minimum requirements of reliability and relevance before it can be admitted at [a Mental Hygiene Law] article 10 proceeding. In article 10 trials, hearsay basis evidence is admissible if it satisfies two criteria. First, the proponent must demonstrate through evidence that the hearsay is reliable. Second, the court must determine that the ‘probative value in helping the jury evaluate the [expert’s] opinion substantially outweighs [its] prejudicial effect.’ ”