7.03 Opinion of Lay Witness

(1) The testimony of a witness not testifying as an expert may be given in the form of an opinion or inference when that testimony:

(a) is rationally based on the witness's personal perception;

(b) is within the ambit of common experience or that of a particular witness; and

(c) would be helpful to the finder of fact in understanding the witness's testimony or in determining a fact in issue, especially when 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 of the opinion or inference.

(2) 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.

Note

Subdivision (1). The law recognizes that in their daily lives individuals communicate in part by the expression of statements that constitute an opinion or inference; e.g., "it was snowing," rather than "white flakes were falling from the sky." Beyond those self-evident examples of warranted opinions and inferences, the law has developed parameters within which a lay witness may testify to an opinion, as opposed to a statement of facts upon which the trier of fact will draw a conclusion.

The first requirement for admissibility of a lay witness's opinion or inference, as set forth in paragraph (a), is for the testimony to be rationally based on the witness's personal perception. In other words, it would be reasonable for the witness, on the basis of the perceived facts, to form the opinion or inference. (*See People v Caccese*, 211 AD2d 976, 977 [3d Dept 1995] [where the witness was a nurse who was familiar with calamine lotion, a lay opinion as to the identity of the substance covering marks and bruises was permissible]; *People v Smith*, 194 AD2d

874, 876 [3d Dept 1993] [where the witness was familiar by experience with the odor of blood, he properly rendered a lay opinion about smelling the odor of blood]; *Tulin v Bostic*, 152 AD2d 887, 888] [3d Dept 1989] ["While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert"].)

A close corollary to the first requirement, as set forth in paragraph (b), is that the testimony be within the ambit of common experience or that of a particular witness. Matters within the ambit of experience of a particular witness will normally require foundational testimony establishing the witness's experience with the question presented; matters within the ambit of common experience, such as, color, weight, taste, or observed demeanor of another person, may not. (*See* Jerome Prince, Richardson on Evidence §§ 363, 364 [10th ed 1973]; *People v Eastwood*, 14 NY 562, 566 [1856] ["A child six years old may answer whether a man (whom it has seen) was drunk or sober; . . . the child could not, probably, describe the conduct of the man, so that, from its description, others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded, great injustice would frequently ensue"]; *Teerpenning v Corn Exch. Ins. Co.*, 43 NY 279, 281 - 282 [1871] ["On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks"]; *People v Leonard*, 8 NY2d 60, 61 - 62 [1960] [Lay testimony that a beverage referred to as "rye and ginger ale was ordered, served and paid for was sufficient at least to present a jury question as to whether an alcoholic beverage was served," given that what constituted an alcoholic beverage was a "matter of common knowledge"]; *Senecal v Drollette*, 304 NY 446, 448 [1952] [a 12-year-old boy who "often rode in automobiles and watched their speedometers" was competent to testify to the speed of a car that hit his companion]; *People v Olsen*, 22 NY2d 230 [1968] [speed]; *Soto v New York City Tr. Auth.*, 6 NY3d 487, 493 - 494 [2006] ["The trial court also properly permitted plaintiff to testify regarding an estimate of his running speed. Plaintiff established a sufficient foundation demonstrating the basis of his knowledge . . . . In comparable situations, both police and civilian witnesses with an appropriate basis for knowledge have been permitted to give testimony estimating the speed of moving motor vehicles"]; *People v Christopher*, 161 AD2d 896, 897 [1990] ["In situations where the illegal substance is not available for analysis, drug users who can demonstrate a knowledge of the narcotic are competent to testify"]; *cf. People v Gatewood*, 91 NY2d 905 [1998] ["testimony of the defendant's wife concerning the alleged effects of the drug Prozac upon defendant" was properly excluded]).

Next, as exemplified by the foregoing cases, the opinion or inference must assist the trier of fact in understanding the testimony or determining an issue of fact.

(*See People v Boyd*, 151 AD3d 641, 641 [1st Dept 2017] [Three witnesses who were not eyewitnesses but were familiar with the defendant could properly "give lay opinion testimony . . . that defendant was the man depicted in surveillance videotapes firing a handgun. This testimony 'served to aid the jury in making an independent assessment regarding whether the man in the (videos) was indeed the defendant' "].)

Last, what distinguishes New York from other jurisdictions is, as set forth in paragraph (c), its requirement that the opinion or inference of a lay (or expert) witness must be "necessary" to properly describe the subject matter. (*Teerpenning v Corn Exch. Ins. Co.,* 43 NY 279, 281 [1871] ["As a rule, witnesses must state facts, and not draw conclusions, or give opinions. . . . The cases in which opinions of witnesses are allowable, constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had"]; *Collins v New York Cent. & Hudson Riv. R.R. Co.*, 109 NY 243, 249 [1888] ["We know of no other way in which the witness could have stated his observation" than by the expression of his opinion "as to the fact that the one or the other emitted the most sparks, and hence it was proper that he should have been permitted to answer questions of that nature"]).

Examples of acceptable opinions or inferences of a lay witness, subject to relevance and in some instances a proper foundation as to the qualification of the witness to offer the opinion, include matters of "color, weight, size, quantity, light and darkness, and inferences of identity as to race, language, persons, visibility, [and] sounds" (Jerome Prince, Richardson on Evidence § 364 [a] at 329 [10th ed 1973]); "taste, smell, and touch" (*id.* subd [b]); the "state of emotion exhibited by a person; e.g., whether he appeared to be angry or jesting" (*id.* subd [c]); the "apparent physical condition of a person, which is open to ordinary observation" (*id.* subd [d]); the "[i]dentity and likeness" of a person (*id.* subd [e] at 330); the "identification of a person by his voice" (*id.* subd [f]); intoxication (*id.* subd [h] at 332); ownership of property (*id.* subd [i] at 333); the speed of a vehicle (id. subd [j]); the estimated age of a person (*id.* subd [k] at 334); one's "own intent or belief" (*id.* subd [l]); the "rational or irrational nature of a person's conduct" (but not whether the person was of "sound of unsound mind") (*id.* subd [m]); the "value of property or services" (*id.* subd [n] at 335); and the "genuineness of the handwriting of another" (*id.* subd [o] at 337).

Subdivision (2). Subdivision (2) is derived from Court of Appeals cases that indicate that, once the criteria for admission 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. (*See People v Eastwood*, 14 NY at 566 [testimony that a person was drunk]; *Senecal v Drollette*, 304 NY at 448 [testimony about the speed of a car]; *cf. 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 of an expert on the grounds that it "went to the ultimate question and would usurp the jury's function"]; *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" (citation omitted)]; *People v Lee*, 96 NY2d 157, 162 [2001]; *People v Rivers*, 18 NY3d 222, 228 [2011]).