

NOTICE

Adoption of Revisions to the Connecticut Code of Evidence

Notice is hereby given that on April 25, 2023, the justices of the Supreme Court adopted revisions to Section 7-3 of the Connecticut Code of Evidence and the commentary thereto, to become effective upon promulgation in this Connecticut Law Journal of May 2, 2023.

Hon. Richard A. Robinson
Chief Justice, Supreme Court

INTRODUCTION

Contained herein are amendments to the Connecticut Code of Evidence. The amendments are indicated by bold brackets for deletions and underlines for added language.

Supreme Court

**AMENDMENTS TO THE CONNECTICUT CODE OF EVIDENCE
ARTICLE VII—OPINIONS AND EXPERT TESTIMONY**

Sec. 7-3. Opinion on Ultimate Issue

(a) General rule; Exceptions. 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[,]: (1) 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; and (2) a lay witness may give an opinion that embraces an ultimate issue identifying any person in video recordings or photographs, if such testimony meets the standards for the admissibility of lay witness opinion testimony in Section 7-1.

(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; Exceptions.

“[A]n 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).] *State v. Favoccia*, 306 Conn. 770, 786, 51 A.3d 1002 (2012). 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. 359, 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 t]The general bar to the admission of nonexpert and expert opinion testimony that embraces an ultimate issue, with certain exceptions, remains intact, following the decision in *State v. Gore*, 342 Conn. 129, 269 A.3d 1 (2022). See *id.*, 135 n.7.

Subsection (a) (1) recognizes an exception to the general rule for expert witnesses in circumstances in which the jury needs expert assistance in deciding the ultimate issue. A common example is a case involving claims of professional negligence. See, e.g., *Pisel v. Stamford Hospital*, 180 Conn. 314, 328–29, 430 A.2d 1 (1980). When 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. 45 (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). Expert opinion on the ultimate issue admissible under subsection (a) (1) also must

satisfy the admissibility requirements applicable to all expert testimony set forth in Sections 7-2 and 7-4.

Subsection (a) (2) recognizes an exception, established in *State v. Gore*, supra, 342 Conn. 129, to the “ultimate issue rule” in circumstances in which the admission of lay opinion testimony identifying persons in surveillance videos or photographs would be helpful to the jury due to the witness’ familiarity with the depicted individuals. The holding is not limited to surveillance video but, rather, applies to any type of video recording or photograph. *Id.*, 132 n.2. Lay opinion testimony in this context is admissible under subsection (a) (2) if the opinion meets the requirements of Section 7-1 because it is “rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue.”

In considering the admissibility of testimony under subsection (a) (2), courts should evaluate “the totality of the circumstances” under the four factor test adopted in *State v. Gore*, supra, 342 Conn. 151, and its progeny.

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

Subsection (b), including its use of the term “opinion or inference,” is taken verbatim from General Statutes § 54-86i. The Code 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, used in other provisions of Article VII of the Code.
