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Federal Rule of Evidence 704 states:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
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> (b) 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. Such ultimate issues are matters for the trier of fact alone.[1]

Rule 704, which applies to both lay and expert witnesses, abolished the traditional rule against admitting testimony on an ultimate issue.[2] This traditional rule was criticized as depriving the fact finder of useful information and being difficult to apply.[3] A further criticism was that the traditional approach was unduly restrictive because it "often unfairly obstruct[ed] the presentation of a party's case . . . ."[4] Because of the difficulty in applying the

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1. FED. R. EVID. 704.

2. *See* MCCORMICK ON EVIDENCE § 12, at 48 (John William Strong ed., 4th ed. 1992). The traditional rule was that "such testimony 'usurps the function' or 'invades the province of the jury'" *Id.* (citations omitted); *see, e.g.*, United States v. Spaulding, 293 U.S. 498, 506 (1935) (holding that opinion evidence was inadmissible because it involved the "ultimate issue to be decided by the jury upon all the evidence . . . [and] experts ought not to have been asked or allowed to state their conclusions on the whole case").

3. *See* United States v. Taylor, 562 F.2d 1345, 1358 (2d Cir. 1977). The court held that it did not have to decide whether questions asked by the prosecution "invaded the province of the jury" because testimony relating to an ultimate issue is admissible. *Id.* at 1358-59. The *Taylor* court noted that the appellant did not cite to any cases decided after 1952 which adopted the traditional approach. *Id.* at 1358 n.8; *see also* United States v. Fernandez, 480 F.2d 726, 740 (2d Cir. 1973) (holding that a rule precluding an opinion on the ultimate issue "has long since been abandoned").

4. MCCORMICK, supra note 58, § 12, at 49.

traditional approach, courts began abandoning it in favor of a more liberal one. Rule 704 was enacted in response to these criticisms.[5]

Rule 704 provides that a lay or expert witness may not be precluded from testifying to an ultimate issue if the testimony is otherwise admissible and it would be "helpful to the trier of fact."[6] To be "helpful," an opinion or inference that embraces an ultimate issue must satisfy the requirements of Rules 701,[7] 702,[8] and 403.[9] Because such testimony must meet the standards of Rules 701, 702 and 403, Rule 704 does not set a standard of admissibility, but removes an obstacle which would prevent such testimony from assisting the trier of fact.[10]

Furthermore, Rule 704(b), which was amended by Congress in the Comprehensive Crime Control Act of 1984,[11] prohibits expert

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5. FED. R. EVID. 704(a) advisory committee's note (citing to numerous cases, dating as far back 1941, where the court allowed opinion testimony on an ultimate issue).

6. FED. R. EVID. 704 advisory committee's note.

7. FED. R. EVID. 701. Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Id.

8. FED. R. EVID. 702. Rule 702 provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.*

9. FED. R. EVID. 403. Rule 403 provides: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

10. By requiring lay witness testimony to meet the standards of Rules 701 and 403 testimony by these individuals, on the ultimate issue, will rarely be admissible because it is unlikely to be helpful to the trier of fact, in that the opinion of the jury is just as good as that of the lay witness'. *See* MCCORMICK ON EVIDENCE § 12, at 49 n. 11.

11. S. REP. NO. 225, 98th Cong., 2nd Sess. 4 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3412.

witnesses from testifying as to the mental state of a defendant at the time of the alleged incident. The reasoning behind Rule 704(b) is to eliminate battles which often occur between expert witnesses contradicting each other with respect to the criminal defendant's state of mind.[12] As a result, expert psychiatrists are limited to "presenting and explaining their diagnosis."[13] This limitation permits testimony addressing "whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been."[14]

In *United States v. DiDomenico*,[15] the Second Circuit held that a psychiatrist's testimony concerning the defendant's dependent

12. *Id.* at 3412-13. The amendment was originally enacted to apply only in actions where the defense of insanity was invoked by the defendant. *Id.* at 3413. In these cases, the rule would limit psychiatric testimony. However, the rule also applies to any situation where expert testimony is sought as to a defendant's mental state which constitutes an element of the crime the defendant is being charged with. *Id.*

13. *Id. See also* United States v. Reno, 992 F.2d 739, 743 (7th Cir. 1993) (holding that a psychiatrist may testify "about the characteristics of the [defendant's] mental disease, as opposed to subjective [statements] leading to conclusions about the defendant's personal knowledge, intent or ability") (internal quotes omitted); United States v. West, 962 F.2d 1243, 1250 (7th Cir. 1992) (excluding psychiatrist's testimony that defendant was "suffer[ing] from a severe mental disease or defect and was suffering from it on the day he robbed the bank").

14. *Id.* at 3412. *See also* MCCORMICK ON EVIDENCE § 12, at 52-53 (John William Strong ed., 4th ed. 1992):

> Presumably the medical expert is able to answer the questions, 'Was the accused suffering from a mental disease or defect?'; 'Explain the characteristics of the mental disease and defect.'; and 'as his act the product of that disease or defect?' However, the expert may not answer the question 'Was the accused able to appreciate the nature and quality of his acts', or 'Was the accused able to appreciate the wrongfulness of his acts?' Whether Rule 704(b) is having its intended effect of substantially moderating the battle of experts when mental state or condition is an issue remains to be determined.

Id. (citations omitted).

15. 985 F.2d 1159 (2d Cir. 1993). In *DiDomenico*, the defendant was indicted and convicted on one count of wire fraud and one count of interstate transportation of stolen property. *Id.* at 1160. The Court of Appeals for the Second Circuit affirmed the district court's decision. *Id.*

personality disorder did in fact embrace the "ultimate issue."[16] However, the court reasoned that the testimony inferred whether the defendant had the requisite mental state to commit the crime charged.[17] Accordingly, the Second Circuit held that the district court did not err by excluding the testimony.[18] The court reasoned that the "bottom-line inference" made by the expert witness in conjunction with its questionable "helpfulness" to the jury, under Rule 702, justified exclusion of the testimony.[19]

In New York, the admissibility of opinion testimony on an ultimate issue is generally limited to expert testimony.[20] In *People v. Cronin*,[21] the court of appeals reaffirmed the long standing rule for admissibility of expert testimony embracing an ultimate

16. *Id.* at 1165. Prior to trial the defendant stated her intent to call C. Scott Grove, a psychiatrist, to testify that her dependent personality disorder is a recognized "'mental disease, defect, or condition' which appears as a designation in the Diagnostic and Statistical Manual of Medical Disorders . . . ." *Id.* at 1161.

17. *Id.* The court further stated that: "[w]e read Dr. Grove's proffered testimony as stating the bottom-line inference, and leaving it to the jury merely to murmur 'Amen.'" *Id.*

18. *Id. See also* United States v. Schatzle, 901 F.2d 252, 257 (2d Cir. 1990) (holding that the trial court may exclude ultimate issue testimony when the jury could assess the reasonableness of the defendant's conduct on its own or when such testimony would be unduly prejudicial).

19. *DiDomenico*, 985 F.2d at 1165.

20. GARY SHAW, CANUDO ON EVIDENCE LAW OF NEW YORK § XII, at 192 (1995):

> It is up to the trier of facts to draw its own conclusions or inferences from the facts. The many exceptions to this, however, show the extent to which the courts have compromised the conflict between the exclusionary principle that forms the general rule and the probative need for opinion testimony. The exceptions ordinarily include common experiences that, for the most part, can be described only in the form of conclusions, matters of common knowledge, opinions based on familiar experiences, and matters peculiarly within the knowledge of persons who, because of education or experience in particular fields, are competent to express opinions to help the trier of the facts in arriving at a conclusion. The exceptions, therefore, fall into two categories: opinions expressed by an ordinary witness, and opinions expressed by an expert witness.

Id.

21. 60 N.Y.2d 430, 458 N.E.2d 351, 470 N.Y.S.2d 110 (1983).

issue.[22] The court reviewed the trial court's exclusion of certain expert testimony regarding whether the defendant could have had the requisite intent to commit burglary after he consumed "a case of beer, smoked several marihuana cigarettes, and ingested 5 to 10 Valium tablets."[23] The trial court allowed the expert to testify generally as to the defendant's condition.[24] The court, however, would not permit questions regarding, or indirectly related to, the defendant's "state of mind, his intent or ability to have intent or blackouts," concluding that those issues were the ultimate questions that the jury should decide.[25]

The New York Court of Appeals reversed the conviction and ordered a new trial because the trial court's limitation on the expert testimony deprived the jury of necessary information.[26] The court stated that the admissibility of expert testimony is contingent upon "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.'"[27] The court reasoned that although jurors could render an opinion on a mental state of a person, when that person is under the influence of alcohol, it was not "within the ken of the typical juror" to be familiar with the combined effects of alcohol, marihuana and valium, "on a person's ability to act

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22. *Id. See also* Dougherty v. Milliken, 163 N.Y. 527, 533, 57 N.E. 757, 759 (1900) (holding that an expert may testify to "conclusions to be drawn from the facts stated, as well as the facts themselves" when this knowledge is outside the range of the ordinary juror"); Van Wycklen v. City of Brooklyn, 118 N.Y. 424, 429, 24 N.E. 179, 180 (1890) (stating "it is no longer a valid objection to the expression of an opinion by a witness, that it is upon the precise question which the jury are to determine, evidence of that character is allowed when . . . the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate opinion judgment thereon, and no better evidence than such opinions is attainable") (citations omitted).

23. *Id.* at 432, 458 N.E.2d at 352, 470 N.Y.S.2d at 111.

24. *Id.*

25. *Id.*

26. *Id.* at 433, 458 N.E.2d at 352, 470 N.Y.S.2d at 111.

27. *Id.* at 432-33, 458 N.E.2d at 352, 470 N.Y.S.2d at 111 (quoting Van Wycklen v. City of Brooklyn, 118 N.Y. 424, 429, 24 N.E. 179, 180 (1890)).

purposefully . . . ."[28] Consequently, the trial court has the discretion to determine whether jurors can form a conclusion solely from the testimony and their "day-to-day experience," "common observation," and "knowledge," or if they would benefit from the knowledge of the expert witness.[29]

New York common law and Rule 704 are similar because both, in certain circumstances, allow opinion testimony addressing ultimate issues, and both recognize that the situation where a lay witness would be permitted to testify to an ultimate issue is a rare occurrence.[30]

New York's law regarding the admissibility of witness testimony on an ultimate issue can be distinguished from Rule 704(b) in one respect: New York law allows an expert witness (psychiatrist or licensed psychologist) to testify regarding a criminal defendant's

28. *Id.* at 433, 458 N.E.2d at 353, 470 N.Y.S.2d at 112.
29. *Id.* at 433, 458 N.E.2d at 352, 470 N.Y.S.2d at 111.
30. *See supra* notes 67 and 77 and accompanying text.

mental state.[31] Unlike the Second Circuit's decision in *DiDomenico*, The New York Court of Appeals, in *Cronin*, held that it was permissible for a psychiatrist to determine whether the defendant could have acted with the requisite intent to commit the crimes charged.[32] However, Rule 704(b) precludes opinions or

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31. *See* N.Y. CRIM. PROC. LAW § 60.55(1) (McKinney 1992). Section 60.55(1) provides:

> 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 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 opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequences 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 diagnosis and opinion, and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

Id.

32. *Cronin*, 60 N.Y.2d at 434, 458 N.E.2d at 353, 470 N.Y.S.2d at 112.

inferences with respect to a criminal defendant's mental state in to avoid a battle between expert witnesses.