

Not Everyone Qualifies

By Hillary A. Frommer

As a general rule, the degree of an expert's particular expertise or skill goes to the weight of the expert's testimony, and not the admissibility. Thus, courts have consistently held that an expert, whose particular qualifications, knowledge, or skill may be lacking, can still testify at trial.¹ However, regardless of an individual's skills, or lack thereof, qualifying to testify as an expert is not absolute. The party offering the expert testimony must still lay a foundation for the particular testimony the expert will give.

The need to lay a foundation for expert testimony, and thus qualify an expert witness is discussed in two decisions involving an expert in the use and operations of the Intoxilyzer 5000 EN breathalyzer machine. First, in *People v Ivasyuk*,² the District Court of Nassau County refused to qualify a criminal defendant's expert witness, and precluded him from testifying. The defendant was accused of driving while intoxicated and various traffic violations. At trial, the prosecution offered evidence that, following his arrest the defendant was brought to the police precinct where he was given a breath-

alyzer test that measured 0.11. The defendant testified that due to his employment earlier that day, he had been exposed to acetone and toluene; and he sought to present the testimony of an expert in the operation of the particular breathalyzer machine as to the effects of acetone and toluene in the defendant's breath. The District Court refused to qualify that expert, however, finding that the defense failed to lay the proper foundation for his testimony. Specifically, the defendant's expert was not competent to testify that the defendant had in fact inhaled acetone and/or toluene vapors at work on the day of his arrest; that such chemicals could be absorbed through the breath or skin; or that they would in fact be present when the breathalyzer was administered 11 hours later. The court also determined that because the defendant never challenged the machine's operations, the reliability of the breathalyzer reading, or the procedures offered by the prosecution to detect acetone in a breath sample, there was no basis for the expert to testify as to them.



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In *People v Burnet*,³ the defendant charged with driving while intoxicated moved to preclude the court from qualifying the police officer who administered the breathalyzer test to the defendant as an expert in the scientific operation of the Intoxilyzer 5000 EN. The people sought to argue that alcohol vapors caused the machine to experience "ambient air failure." This testimony was critical because when the officer (seeking to testify as an expert) determined that there was ambient air failure, he directed the defendant to step away from the machine and then he recalibrated it. The defendant's second attempt to blow did not register a sufficient sample, and so he was deemed to have constructively refused the test.

The court granted the defendant's motion and refused to qualify the officer as an expert witness. It found that while the officer was trained and qualified to operate the machine, he possessed none of the skills, experience, or knowledge necessary to support the prosecution's unique theory regarding ambient air failure. Indeed, the officer could testify only that the

machine experienced the ambient air failure. Thus, the court found that the prosecution was required, yet failed to present any evidence of the scientific reliability of the supposed ambient air failure, and could not rely solely on common sense.

Note: Hillary A. Frommer is counsel in Farrell Fritz's Estate Litigation Department. She focuses her practice in litigation, primarily estate matters including contested probate proceedings and contested accounting proceedings. She has extensive trial and appellate experience in both federal and state courts. Ms. Frommer also represents large and small businesses, financial institutions and individuals in complex business disputes, including shareholder and partnership disputes, employment disputes and other commercial matters.

¹ *Rojas v Palese*, 94 AD3d 557 (1st Dept. 2012); *Stanley Tuchin Assoc., Inc. v Grossman*, 2002 NY Slip Op 50428(U) (Sup Ct, Nassau County 2002).

² 2012-1640 N CR, NYLJ 1202731804981, at *1 (App. Tm, 2nd, Decided June 22, 2015).

³ NYLJ 7/17/09 at 26 [col. 3] (Criminal Court Bronx County).