

Breath Testing Machine Changes - A Practitioner's Update

Tim Huey & Blaise Katter

The winds of change are blowing into Ohio, as a multitude of factors are converging and will undoubtedly change the way Ohio does breath-testing. These winds are likely to bring some stormy seas; perhaps for prosecutors, perhaps for defense lawyers, and perhaps for courts – or perhaps all three.

All across the state, the mainstay of breath testing for the past several decades – the BAC DataMaster – is being slowly phased out, at least by the Ohio State Highway Patrol (OSHP). Intoxilyzer 8000 devices (which did not fare well on their initial rollout years ago) are being resurrected from their shallow graves, dusted off, and declared to be wonderful by the OSHP hierarchy.

On top of this, the Ohio Department of Health (ODH) rules relative to breath testing are due to be reviewed and updated next year. This is not news to the folks at the ODH who, long before the Highway Patrol decided to dust off the I-8000s, began drafting new rules – which included approval of new

machines.

This article seeks to help practitioners and others who may have to sail these stormy seas be prepared for what may be in store. Caveat: while a higher power may have a design and plan for the weather, that is not so in Ohio -- prior to and after the rollout of the I-8000, there has never appeared to be a particularly well-thought-out plan for the future of breath-testing in Ohio.

In an effort to forecast the weather on the Ohio breath-testing horizon, we will summarize “what we know,” grab a crystal ball, and gaze into the (not-so-distant) future.

What we Know Now

We know the Intoxilyzer 8000 is being resurrected – at least in most places – and at least for the near future. Keep reading for more about the when, whys and wherefores of that. We know the DataMasters used in Ohio are getting old. However, contrary to

claims by the OSHP, there are no shortage of parts to repair them, but... repairs cost money, time, and effort. And, well, if you look under that pile of dust over there, you will see \$6.5 million dollars worth of breath-testing machines and

We also know that, no later than May of 2019, the ODH is required to do its five-year review of most of its breath, blood and urine testing “rules” contained in the Ohio Administrative Code. Presumably, this required review should prompt a consideration of what is working, what is not and where we should go. The authors of this article also know the ODH has indeed been working on draft rules, as we have received copies via public record requests.

The correspondence received with the records warns that these are only drafts and could change. Perhaps they can be changed for the better with public input? Let’s hope so, because, as discussed below, the draft rules leave way too many holes. The draft rules do call for two new machines to be approved, both of which, many would believe, have to be better than the Intoxilyzer 8000 (but are they really? see more discussion of these machines below).

One problem with the draft rules is they don’t call for the utilization of “advances” built into these new devices and may signal a major shift backward and more “hide the ball” mentality. Please read the discussion of this below as it is our hope the defense bar, the judiciary and even prosecutors will come forward and voice the opinion that, going forward, we want Ohio to reject, not embrace, “hide the ball” and “trust me” practices and decision-making related to the breath testing machines and procedures, especially in light of the fact that these machines produce a number which can be used as the sole evidence supporting a conviction of an accused citizen charged with an OVI ‘per se’ offense. As breath test results are

elevated to such a lofty perch, one would hope that Ohio would strive to promote, not hinder, confidence in those results.

The other problem with the draft rules is that they are “draft” rules. Thus, ODH could change them and leave us with the Intoxilyzer 8000 as the only option for breath tests going forward.

The Resurrection of the Intoxilyzer 8000

Undoubtedly, many of you are beginning to see a local transition away from the BAC DataMaster and back to the Intoxilyzer 8000. Even more of you may be wondering why these machines are returning at all: after all, didn’t we mostly chase those machines away years back?

Practically speaking, the transition back to the 8000 in the short-term is the result of politics within the Ohio State Highway Patrol. In April, the patrol ordered a district-by-district conversion back to the 8000 machines, indicating the State will be transitioning away from the DataMaster and citing unavailability of spare parts and repair options. However, just like the 8000, these reasons are mostly smoke-and-mirrors and have little accuracy. The owner and (former) head of National Patent, the manufacturer of the DataMaster, has stated that they have never yet failed to repair a DataMaster Machine, and they have several years’ worth of spare parts yet in stock.

Nevertheless, in August, the OSHP accelerated their plans and ordered all* posts to immediately stop using the DataMaster (and to stop using other agencies’ DataMasters) and immediately switch to the 8000.

*As the below-referenced article in the Columbus Dispatch cites, however, Franklin County negotiated a special exemption to the requirement. According to the City Attorney, due to the “sophisticated defense bar” in Columbus,

switching to the 8000 could grind the Franklin County courts to a standstill. Therefore, Franklin County troopers will continue to use the DataMaster until its official retirement.

In the short-term, therefore, the DataMaster remains an approved machine. Nevertheless, OSHP cases should have switched to exclusively using the 8000 by now. This is presumably just a stopgap measure until the ODH certifies new machines – see below!



On the Horizon - New ODH Rules (and Machines)

In light of the upcoming rule-review deadline in May of 2019, the authors have been reviewing draft rules to 3701-53 via public records requests. Nearly a year ago, in September of 2017, the ODH provided us with a draft of their upcoming proposed rules. They have recently provided us with a newer draft which remains essentially the same. These drafts help preview the changes ahead. New Machines

According to the “draft”, the Ohio Department of Health will be adding two new machines to the list of “approved evidential devices.” These devices are the Intoxilyzer 9000 and the Intoximeter DMT. Briefly, the 9000 is a newer version of the 8000 and the Intoximeter DMT is the (previously rejected) Datamaster DMT now being sold by a different company – a

company that is much more secretive than the original company, and dealing with them will be much more like dealing with CMI who makes the Intoxilyzer 8000 / 9000. Speaking of which; can you believe the ODH is still willing to dance with them?

New Procedures - I-8000-ish

It appears that the ODH intends to adopt a two-sample testing protocol for both of these machines, with the requirement of a .020 agreement, as adopted for the I-8000. It also appears that the reduced “proficiency test” procedures adopted for the I-8000 will apply to these new machines.

Unlike the I-8000, the ODH will not be responsible for maintaining these new machines. It does not appear the ODH

or the Department of Public Safety will be paying for these machines either. Local Senior Operators will be responsible for doing the required annual checks.

Unlike the I-8000, it does not appear the ODH will utilize a COBRA system for the Intoxilyzer 9000. Thus, there will be no data downloaded to the ODH and no online portal. A similar COBRA system is available to the DMT, but it appears the COBRA system will not be utilized for the DMT either.

However, the most recent draft rules allow for the new machines to be “networked by law enforcement agencies if the network system is purchased” from the manufacturer. That seems to give each individual law enforcement agency the discretion to decide whether to buy the networking capabilities. As noted above, in our public records requests, we are seeking information beyond what has al-

ready been provided. It appears that extracting this information will be like pulling teeth; so stay tuned for more updates!

Improvement? The 1 Million Dollar Questions

It is all well-and-good that new rules may be adopted, which may include some more modern aspects, and all well-and-good that more modern machines will be approved, but what really matters is what is not in the rules.

New machines are not likely to be an improvement if the ODH is able to pull a fast-one and direct the manufactures to eliminate the most important features of these new machines. And that is a real possibility.

Remember: the biggest modification ever related to the BAC Verifier / BAC DataMaster line of machines occurred in the 1990s when it the BAC Verifier was modified and became the BAC DataMaster. This modification allowed for the possibility of downloading data from those devices and allowed for a better idea of how the machine was performing, and so some of the data could be accessed on line (sound familiar?).

But Ohio told the manufacturer early on to disconnect the modem from all Ohio machines and then later said it would be too expensive “fix” this. Thus, due to decisions made by Leonard Porter (remember him?) when Ohio first started buying DataMasters, for three decades Ohio DataMasters have not mastered any data as the data could not be downloaded. The importance of this will become obvious momentarily.

The bottom line is that, at some point way back then, the ODH, with no public notice, told the DataMaster folks “disable that function for all Ohio machines.” This was not contained in any rule. There was no public notice and no hearing held. One of the most important decisions about

breath-testing in Ohio made in the last thirty years was made in secret. And it was the wrong decision.

This could easily happen again – we will need to be very vigilant as this process goes forward.

Data Preservation and the “Graphic Display” are Very Important Improvements

The two most important features that the DataMaster DMT has that our current DataMasters do not have are 1) Data Preservation capabilities and 2) Graphic Display capabilities. Note both the Intoxilyzer 8000 and 9000 have data preservation capability and graphic display capabilities. Typically, Ohio opted not to have graphic display active on its machines (except two that had this capability by mistake.)

Data Preservation

As we have seen with the Intoxilyzer 8000, and other states are seeing with the 9000 and the DMT, being able to download and preserve data for defense or independent review can be very valuable. The data can show the machine is not working properly or can show that a person did not refuse even when it is claimed he did. It can also help determine whether there was extraneous / mouth alcohol present which falsely elevated the results.

We have recently seen data from another state showing that the DMT rounds up, even though manufacturer claims that is impossible.

Graphic Display

The DMT and Intoxilyzer 9000 are designed to have graphic displays which show some of the data produced by the machine in a graphic format. In particular, this shows the alcohol readings during the entire test and the breath flow / pressure.

This information may be the most critical for practitioners in analyzing

the accuracy of any specific test. While we will not unduly lengthen this article to explain the scientific principles behind the alcohol curve [Shameless Plug – detailed information is available in OVI: The Law and Practice by Tim Huey], it is important to note that exculpatory information can be found in the curve. For example, interruptions in breath flow, mouth alcohol, and other indicators that the machine is not properly sampling deep lung air can be deduced from the alcohol curve.

However, the real concern is that this information will be disabled – just like in many other states using these machines.

Conclusion

In terms of the future of Ohio breath testing – these new machines and draft rules are just the tip of the iceberg and maybe the start of a war.

It is time for us to get active and attempt to have an impact on the real decisions that will determine whether Ohio has a fair and open breath testing process in the future – which could stretch 30+ years, as the old decisions relative to the DataMaster have.

About The Authors

Tim Huey is currently the President of the national DUI Defense Lawyers Association and is a former OACDL President. His practice is state-wide, often co-counseling with other OACDL members on OVI, vehicular homicide and assault cases. The Huey Defense Firm can be reached at 614.487.8667.

Blaise Katter is an Associate at the Huey Defense Firm. A rising star in the OACDL, Blaise has given several CLE presentations and has been very active in the organization. Blaise is also the Firm’s legislative and appellate guru with a big recent win in State v. Eversole, 2017-Ohio-8436.