

Witness: Rick Swope

Subject/Topic: Intoxilyzer 5000

Area of Cross Exam: Claims, errors, and flaws in “expert” testimony about the Intoxilyzer 5000

Fact Points

Source/Exhibit

Machine is “accurate” but not “reliable”. Machine is accurate in that it will detect alcohol but it is not “reliable” because the numerical value/result is not always right. Ciriago, Zigarac.

Concessions:

- 1) Always testifies, whenever asked that the Intoxilyzer is not reliable. Zigarac, p. 100
- 2) Whenever he testifies about the intoxilyzer, he always testifies that it is not reliable regardless of the facts of the particular case. Zigarac, p. 100

Tip: Will say that he believed this about the Intoxilyzer when he was still a LEO and that he would have said so if ever asked. Might be worthwhile to ask him whether he ever informed anyone of his concerns about the reliability and validity of the instrument, and remind him that he relied on that instrument and the results in making arrests and getting statistics, especially as DUI Taskforce Administrator despite his “concerns.” Caution: don’t ever go here or anywhere with your cross unless you know what the answer is going to be. If you’re going here, do a deposition or at least a brief interview prior to Court to find out what his answer will be. At least have a cop or investigator present for this in case you need someone to testify on impeachment if a different answer is given in court.

- 3) All breath testing is unreliable and should be completely abolished. Hatfield

The primary reason why variable readings on the Intoxilyzer is that the length of blow into the machine affects the numerical result, i.e. the harder the blow, the higher the result. The lighter the blow or interruptions in it can make result lower.

Ciriago, pp. 21,24, 33

Concessions:

- 1) Readings shouldn’t vary unless there is mouth alcohol

Or some type of interferant or mechanical or software problem. Note: this is a contradictory statement from what he said in Ciriago.

Hatfield, p. 18

Tip: This is all bogus, the result printed by the instrument has nothing to do with the length or strength of the “blow”. Variable readings are an indicator of mouth alcohol so this is a great win. Get some basic knowledge about breath testing instruments in your state and how they function and the basic principles that they are built upon. Also, get some basic pharmacology and toxicology as related to breath testing and alcohol drug metabolism. Talk to your toxicologist and to the people who are responsible to do the maintenance on your instrument. There are several reasons why there would be variations in result. None have to do with the length or strength of the blow into the instrument or with lung capacity. This basic knowledge will assist if not in cross, then in argument. Also, you may want your own expert, preferably your toxicologist or director of your state breath testing program to tell the jury the real reasons why there are variations.

- 2) Most likely will admit he is not familiar with the recognized Studies and accepted scientific literature on this subject, and Will say that he doesn’t need it in order to support his conclusion Because of his experience and studies on the Intoxilyzer.
- 3) His conclusions are based on his prior experience as a cop With the intoxilyzer and with “privately” defense attorney Owned instruments that he has maintained not according To any recognized State standard, but according to his own Where he has deliberately tried to tear down, rebuild, and “blow up” the device.

Tip: See the CV and Qualifications worksheet. Not only is he not qualified to make these conclusions but also he doesn’t follow any scientifically recognized or credible standards of any kind nor is he using instruments that are even remotely similar to those used for evidentiary breath testing in the criminal setting. It’s apples and oranges that he is comparing, and he isn’t qualified to make any comparisons.

- 4) Not an electrical engineer, or chemical engineer or computer

engineer. Also, he's not a toxicologist.

Tip: These concessions make the point that he is not qualified to make these conclusions.

Intoxilyzer machine isn't reliable because it produces different readings at different times and an individual's bac will vary based on several factors in a short period of time and because 2100:1 partition ration is based on an "average" of the population so that it isn't really a valid basis for the intoxilyzer to calculate bac on the individual.

Note: He does this by using the breath test ticket in the case to make his point. Printout with 3 different numerical results or "readings" used by him to show that the instrument isn't reliable because it gave 3 different readings that were different on 3 different samples. Concludes that this has to do with the quality of the blow and demonstrates that the length of the blow and difference in the tests (though within acceptable testing parameters show that there is mouth alcohol or other problem with the instrument that demonstrates that the intoxilyzer isn't "reliable".

Tips: Know your science behind the breath test device and behind your administrative rules, regulations and statutes. Also, know some basic toxicology. This instrument is designed to give additional readings if the first two are not within .02 of each other. .02 is the scientifically acceptable variance and anything outside that indicates mouth alcohol so that the fact that the two tests are outside that parameter causes a third and subsequent reading until the result is within that .02 accepted variance. All this doesn't mean that the instrument is inherently not reliable, it means that the instrument functioned properly, and could have been detecting mouth alcohol or other interferent. This is just one of the safeguards in breath testing to ensure that a good sample is tested and not contaminated by mouth alcohol. Ask about other safeguards against contamination by mouth alcohol or something being introduced to inflate the result, i.e. the 20 minute deprivation period which is designed to ensure against mouth alcohol contaminating or falsely inflating the result. If the deprivation period has been followed, and the machine gives multiple different meanings until it gets to two samples within .02, then the machine has functioned properly and the result is a good one. You'll probably need your director of your breath test program/toxicologist come in and explain all this to the jury so that you can argue to the court or the jury why this guy's assertions are all wrong on the Intoxilyzer.

Deep lung air produces higher bac results. Duh, that's why we want the deep lung alveolar air. Note: this is one of this person's "greatest hits."

Tip: See above; You want the fully saturated air from deep in the lungs because that is where the alcohol is passing out of the blood and into the respiration to be eliminated from the body. The instrument is designed to capture and sample that deepest part because that is where the alcohol concentration will be the highest, and that sample will not be compromised by mouth alcohol or anything else at that point. If he knows so

much about the intoxilyzer and toxicology, which he doesn't, he would know this which is why this claim is so ridiculous.

Because the body changes rapidly and the partition ratio is 2100:1 is an average, the intoxilyzer gives an unreliable result because there are some people who will be different from 2100:1 or the individual could be varying his breath. Result could vary by 50%.

The Intoxilyzer does not produce reliable results and is "junk" because appropriate procedures are not used in test administration. The administrative rules and regulations regarding administering a breath test for evidentiary use in the criminal case are not correct. There are better more appropriate procedures, such as the ones this "expert" uses in his testing and experimentation with the machine that should be followed and produce more reliable results.

Concessions:

- 1) He did not participate in the administrative/statutory rule making design and process as related to administering breath tests for criminal purposes.
- 2) He's no longer a certified breath test technician and had even let his requalification lapse years ago.
- 3) His maintenance and test procedures on the private instruments he works on aren't the same as those required for the evidentiary breath test instruments used in criminal prosecutions. Those standards are good enough for the criminal case, but not for him?

Tip: He's not qualified to speak to these issues. It's apples and oranges, and he isn't an engineer or a toxicologist or an expert on the applicable administrative regs to talk in this area. As with all of his testimony about the Intoxilyzer, he should not be allowed to testify in this regard, so that the starting point is a deposition or statement to find out what the testimony will be followed by a Motion in Limine, Motion to Suppress or other pretrial motion to get him excluded. We have two examples where courts have found that he is not qualified as an expert to talk about the Intoxilyzer and we have a Motion in Limine on file that has been used in the past. Even if the court allows the testimony, he may be limited or should be limited in what he is allowed to say on this subject. He really has nothing to say in this area or any other area that is beyond the laymen's knowledge nor does he really possess any specialized relevant knowledge that the LEO who is involved in the particular case who is familiar with the specific, relevant facts has, so efforts should be made to shut this guy down and never let the jury even see him.