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Trials & TRIBULATIONS

Can a Breathalyzer be defeated?

One of the most daunting tasks a defense practitioner faces is defending a client against the test results of a Breathalyzer machine in driving while intoxicated trials.

In New York, and pursuant to state Vehicle and Traffic Law Section 1192(2), it is a misdemeanor to operate a motor vehicle with a blood alcohol content of 0.08 percent or higher. While damaging evidence, there are potential defenses that can be explored when representing an individual charged with operation of a motor vehicle in excess of the legal limit.

Extrapolation defense

In New York, only a single test is required to be administered within two hours of the arrest. See 10 NYCRR §59.5. The “extrapolation” defense — arguing your client’s BAC may have risen between the time of operation and the time of the breath test — can be argued in an attempt to convince the trier of fact that your client’s BAC was lower at the time of operation than what actually was recorded.

The New York State Court of Appeals has ruled that it is an error for a trial court to refuse to allow counsel to argue a defendant’s BAC was less than the legal limit at the time of operation. *People v. Mertz*, 68 NY2d 136 (1986).

The extrapolation defense may be raised exclusively through cross examination. Counsel should try to pin down all of the critical times involved in order to use the defense. For example, the length of time between the stop, the arrest, the administration of the warnings for refusing a breath test and the administration of the breath test must be firmly established. Those times can be determined well in advance of trial through interviewing the client and reviewing the police reports associated with the arrest.

During cross examination of the breath test operator — the police officer trained to administer the Breathalyzer — the biological processes concerning the absorption and metabolism of alcohol in the blood stream must be developed. The BTO has received training on the physiological affects of alcohol (10 NYCRR §59.7[a]) and therefore may be cross examined on the topic. Blood alcohol levels are time-dependent — that is, they are not constant or level — which an important issue to raise when questioning the BTO.

Additionally, the BTO should be well versed in alcohol absorption and the fact that blood alcohol concentrations rise and eventually reach a peak. See Alcohol and the Human

Body, www.intox.com/physiology.asp.

How long it takes for alcohol to reach its peak after drinking depends on the type of alcoholic beverages being consumed, the amount of food in the digestive system and other physiological features. *Id.* Eating food or drinking strong liquor also can delay the peak concentration for as long as two hours. *Id.* The BTO should be questioned concerning how blood alcohol levels decline after absorption. The rate of decline is governed in large part by the rate at which alcohol is removed from the blood stream by the liver. *Id.*

The rate of alcohol has been shown to vary more than twofold in healthy individuals. *Id.* As a result of those variables — which can be drawn out from questioning the BTO — it can be argued that it is impossible to determine whether the defendant’s BAC was rising or falling at the time of the operation of the vehicle without administering a second test, which is not required in New York State. Obviously, if the BAC level was rising at the time of the test, the defendant’s BAC may have been markedly lower at the time he or she was driving.

Counsel can argue that, absent a second Breathalyzer test, it is impossible for any such device to determine whether an individual’s blood alcohol level has risen since operating a motor vehicle. Since many cases rise and fall upon a small differential between the legal limit and non-legal limit, the argument can have some merit.

Simulator solution

Another obstacle in trying to argue that a Breathalyzer did not accurately reflect the driver’s BAC at the time of operation is the simulator solution. Whenever a breath test is administered, the BTO relies on the analysis of a referenced standard — the simulator solution — to demonstrate the accuracy of the breath test instrument.

10 NYCRR §59.5(d) requires that “an analysis of a reference standard with an alcohol content greater than 0.08 percent must agree with the reference standard value within the limits of plus or minus 0.01 percent weight per volume. ... [This analysis] shall precede or follow the analysis of the breath of the subject.”

If counsel can successfully cast doubt on the validity of the simulator’s solution test, then doubt also can be cast on the

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validity of the breath test score. The goal is not to convince the trier of fact that the result of the simulator solution is incorrect, but rather that it is irrelevant in evaluating your client's BAC and is a misleading indication of the accuracy of the Breathalyzer.

The analysis of the simulator solution only demonstrates the machine's accuracy under simplified conditions and at one concentration. For example, a person suffering from asthma or emphysema, who takes a breath test, cannot have his or her score validated by a simulator solution unless the solution takes such health conditions into consideration. See *The Effect of Asthma Inhalers on Breathalyzer Tests*, www.ehow.com. By attacking the validity of the simulator solution, one can establish that one or more of the underlying principles of the simulator solution's test does not apply to an individual's physiology.

One can argue that the simulator's test only measures one solution that has an alcohol concentration of 0.10 percent, but does not establish the accuracy or precision of the breath test. In other words, the simulator solution's test does not prove the machine is capable of properly determining alcohol concentrations aside from 0.10 percent, as this is the only concentration measured.

The same argument can be made against the calibration (whether the Breathalyzer is properly functioning) of the machine. For example, the Breath Test Instrument Record of Calibration/Maintenance, completed by the state Department of Criminal Justice Services, indicates that the standard method for checking the calibration of any breath test machine (when it is sent in for calibration and repair every six months) is to run a simulator solution test using a solution of 0.10 percent alcohol concentration. That is the same concentration used by law enforcement agencies as part of the breath test. As a result, it can be argued that the accuracy and precision of the Breathalyzer at concentrations other than 0.10 percent is never checked by anyone after the device arrives from the manufacturer. According to the Certificate of Calibration, no one conducts a simulator test with, for example, a 0.15 percent solution when the machine is calibrated.

Because the topic is covered in breath test operator training programs (10 NYCRR §59.7) and in training manuals, counsel has a basis to develop a simulator solution defense directly from the testimony of the BTO. The BTO should be able to testify, during cross examination, regarding the simulator solution and calibration of the Breathalyzer.

Continuous observation

Another defense that may be used is the lack of continuous observation of a suspect prior to a breath test. The continuous observation of a suspect must be maintained for at least 15 minutes prior to the collection of a breath sample, during which

period the suspect must have not ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, smoked or be allowed to place anything in his or her mouth. 10 NYCRR §59.5(b). Should the subject regurgitate, vomit, smoke or place anything in his or her mouth, an additional 15-minute waiting period is required. The purpose of the observation is to ensure the test is not contaminated by any alcohol brought into an individual's mouth through the stomach. The result of such contamination could be an artificially high BAC.

The defense, again, may be presented through the cross examination of the arresting officers. Counsel must initially have the officer commit to the theory that the driver must be observed for at least 15 minutes prior to the administration of a breath test. The officer should then be asked why the observation period is important and questioned about what the officer is trained to look for during that time period.

Once that is established, the officer's obligations (should the subject belch, regurgitate, etc.) must be developed. Once the practical importance of the observation period and lack of independent verification have been established, a precise time during which the officer claims the observation period occurred must be established. Counsel should then establish what the officer did during the 15-minute timeframe. It should be developed that the officer did not maintain a constant vigil of the suspect, but instead completed other tasks such as writing out the tickets, preparing the machine for the administration of the breath test, or perhaps not even being present during the observation period.

Some officers consider the drive from the scene of the arrest to the breath test site as part of the observation period. Because most alcohol-related arrests occur at night, and the person arrested usually is transported in the backseat of the patrol car, it is unlikely that the officer driving a vehicle could watch the suspect's actions closely enough to observe minor actions such as burping.

Finally, it must be established that the officer never explained the importance of the observation period to the suspect prior to beginning the period. Absent such an explanation, a suspect has no reason to alert the officer to the fact that he or she belched prior to the administration of the breath test. All of these facts can be brought out on cross examination in an attempt to cast doubt on your client's BAC.

Defending against the Breathalyzer is a daunting task for any practitioner; however, many small points can be made on cross examination in order to question the trustworthiness of the device's result and convince a jury that the result was not established beyond a reasonable doubt.

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