

VIRGINIA LAWYERS WEEKLY

As published in *Virginia Lawyers Weekly*, July 23, 2007 – Scott Surovell, Surovell Markle Isaacs & Levy et al discusses the impact of 'dated' intoxilyzers, including his success in recent DUI cases involving the reliability and use of such machines. **Scott Surovell can be reached for comment at 703-277-9750 or via email at ssurovell@smillaw.com.**

State to Replace 'dated' Intoxilyzers

2007 Assembly OK'd \$1.76M for breath-test machinery

By Alan Cooper
Virginia Lawyers Weekly Reporter
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Budget documents from the Virginia Department of Forensic Science describe the instruments that measure the level of intoxication content as "dated, unstable and unreliable."

Peter M. Marone, director of the department, says a more accurate description of the Intoxilyzer 5000 SN 68 is that "they're starting to wear out. They break down more often." They aren't any more likely to generate a false positive and result in an erroneous drunken driving conviction than they when they were new 10 years ago, he says.

If the department was using the stronger language to justify replacing the Intoxilyzers, it worked. The General Assembly appropriated \$1.76 million to replace them over the next two years.

The state has about 220 Intoxilyzers in law enforcement agencies across the state. Marone's department is responsible for maintaining them and certifying their accuracy. The analysis from those machines is responsible for the large majority of DUI convictions in the state.

Two attorneys, Bob Keefer from Harrisonburg and **Scott Surovell** from Fairfax, aren't so sure of the reliability of the instruments. They have used the Freedom of Information Act to obtain internal documents from the agency that they contend raise questions about their accuracy.

"It's outrageous that they're having trial by machine, and the machines are defective and they're still using them," Keefer said. "A DUI conviction is devastating and we're allowing a machine ... to make that call."

Keefer and **Surovell** have obtained maintenance records for the individual machines that were used to test a client, and Surovell contends that trouble calls from law enforcement agencies are inconsistent with maintenance records of the department.

"It's clear to me from the records that these machines are glitchy," he said. He and Keefer also alleged that technical aspects of the machine, including measurement of voltages in them, have changed after software upgrades.

Surovell said he was successful in convincing a Fairfax judge in one case that a machine was unreliable. He also had a small victory last week when Fairfax General District Judge William J. Minor Jr. did not credit a machine's

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reading that a client had a blood alcohol content of 0.15 percent. Minor still found the client guilty of drunken driving, but his refusal to accept the BAC level eliminated a requirement of mandatory jail time.

Surovell also won a contempt of court citation against CMI Inc., the Kentucky-based manufacturer of the Intoxilyzers, for ignoring a subpoena duces tecum. He had sought the company's records on the parts supplied for a machine and had served the subpoena on its registered agent, **Surovell** said. The company contends that state law does not require it to respond, he said.

Arlington General District Judge Karen A. Henenberg fined the company \$250, and the case is still pending, **Surovell** said. He added that he will argue that the test results should be excluded because of the failure to provide the information.

Marone acknowledges that the machines are at the end of their useful life. They are analogous to computers with three- to five-year life cycles, and they have been in use twice that long. "The software isn't as compatible or as reliable as it used to be," he said, and parts, while generally available, have become more expensive. CMI has produced two new generations of the machines since the state's machines were purchased.

Still, "there are so many safeguards with the instrument" that prevent a false positive, he said.

He also acknowledges that the challenges to the machine are "causing some logistical issues on our part," with employees spending time in court rather than maintaining the machines and training law enforcement agencies how to use them.

He doesn't expect that to change when the new machines arrive and go into service. A different company, Intoximeters Inc., based in St. Louis, Mo., won the contract for about \$1.3 million, substantially less than the department had budgeted. Defense attorneys will be looking for flaws in the those machines as well, Marone predicted.

"They're so hotly litigated," Marone said of the DUI cases. Attorneys "take every issue and argue it until it's not arguable any more. ... It's almost part of doing business. You have to answer those claims until they go away."

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