

BREATH-TESTING MACHINES IN BARS IS A BAD IDEA
City of Rockford Idea Creates Bad Public Policy, invites Drinking Games, and
Creates Several Significant Liability Issues

By: Michael J. Brown/June 2004

Recently, the Associated Press reported that Rockford, a city of 4,000 people located just north of Grand Rapids, had agreed to buy three breath-testing machines similar to the kind used by police during roadside stops. The coin-operated machines are being "voluntarily" installed at three separate bar/restaurants in Rockford for use as an "amusement" device by patrons. The machines cost approximately \$2,000 each and are allegedly being funded by private donations, although the City will pay the cost initially. Patrons using breath-testing machines will pay fifty cents for each use. The manufacturer of the machine claims that it will measure blood-alcohol content ("BAC") within .02 percentage points of the actual reading. The BAC level of the patron will be displayed electronically, and a computerized voice will indicate the number of the BAC recorded. No permanent recording of the BAC level will be made, and each time a new patron uses the machine, the prior person's information is wiped out. The manufacturer of the machine acknowledges that it requires periodic calibrating in order to maintain accuracy. According to the Associated Press article, the City of Rockford will likely use the money from the machines to fund drug education programs for fifth graders in the City.

Although at first blush it may seem advisable to allow patrons to test their blood alcohol level while in the bar or before they attempt to drive a car, further examination of this issue reveals several potential problems.

First, as acknowledged by the machine's manufacturer, the accuracy of the breath-testing equipment is only within .02 percentage points. Under the new .08 drunk driving limits, a .02 mistake in the reading represents a significant difference between feeling good and being over the limit. Thus, a patron who registers a .07 reading on the breath-testing machine may, according to the machine's manufacturer, actually have a .09 BAC. This person may actually be above the legal limit for operating a motor vehicle, yet may think, based on the erroneous machine reading, that he or she can safely have another drink.

The second problem this scenario creates is when the server or bartender refuses to sell another drink to a person based on their visible level of intoxication, yet the patron believes, based on the machine reading, that he or she is still below the legal limit. The machine, and its possible erroneous reading, will undermine the authority of the server or bartender to enforce the establishment's drink cutoff procedures because the patron will undoubtedly argue, "The machine says I am ok." Bar owners, their servers and bartenders will then be placed in the awkward position of having to argue with their own customers on whether they should be cut off from further alcohol sales. Anyone who has ever worked in a bar knows that is a difficult conversation to have in the first place, and it

Carlin, Edwards, Brown & Howe, PLLC

Attorneys & Counselors at Law
www.cebhlaw.com

John B. Carlin, Jr.+
Scott D. Edwards+
Michael J. Brown*
J. Patrick Howe+

Central Michigan*
6017 West St. Joe Hwy., Suite 202
Lansing, Michigan 48917
P. (517) 321-4616/F. (517) 321-4642

Southeast Michigan+
2855 Coolidge Hwy., Suite 203
Troy, Michigan 48084
P. (248) 816-5000/F. (248) 816-5115

Northern Michigan
213 East Main St., 2nd Floor
Gaylord, Michigan 49735
P. (989) 688-5946/F. (989) 688-5901

will become even more difficult if the patron can point to the machine as "proof" that he or she is not intoxicated.

The third problem this scenario creates is the likelihood that two or more patrons will use the breath-testing machines as a drinking game. One can easily envision a scenario where several people engage in a contest to see who can get to a certain BAC level the fastest, or perhaps the contest will be who can get to a certain BAC level without going over. In short, although the City of Rockford may believe that having these breath-testing machines in the bars will only be used to prevent a person from having too much to drink, it is not that hard to envision several ways in which the machines would be abused for fun or to justify further drinking.

Lastly, from a public policy perspective, it makes little sense to encourage the use of admittedly inaccurate breath-testing machines to determine a person's level of intoxication rather than spending the money to properly educate people on how to use alcohol responsibly. Many studies have shown the value of educating the public on the effects of alcohol, and what factors may play into whether someone becomes intoxicated. Other studies have shown the value of server training programs. Perhaps it would make more sense to spend its public resources on these types of education programs, rather than creating an atmosphere of misinformation and unreliable instant read-outs from a machine. A trained server or bartender who has had the opportunity to observe a patron over a period of time in a given evening, or who has observed the patron perhaps over several visits, is obviously in a better position to determine that patron's ability to "have just one more" than a machine that is prone to inaccurate readings and which must be adjusted or recalibrated periodically.

At best, the breath-testing machine can only take a snapshot in time, and has no way of determining whether a person's BAC is still going up at the time of taking its snapshot reading, and thus may create a "false negative" in measuring whether the person has exceeded the legal limit. A person who slams down three drinks in thirty minutes and then blows into the breath-testing machine may see a reading of .06 at that moment in time. What the machine cannot tell the patron, however, is that ten minutes later, after more of that alcohol has absorbed into their bloodstream, the BAC level may actually be .08. Thus, the person may continue drinking, and demand more drinks, based on this "false negative."

All of this raises some interesting questions should that person later be stopped for operating a motor vehicle while under the influence of alcohol, or worse yet, become involved in a personal injury accident. Can the driver shift any of his or her responsibility to the bar based on the readout from the breath-testing machine? Does the manufacturer of the machine have any liability? Does the City of Rockford have any responsibility? Most likely, the machine contains some form of warning indicating that its results are not to be relied upon as proof of a person's level of intoxication in making the determination on whether to operate a motor vehicle. This disclaimer of liability by the machine's manufacturer would also call into question the very usefulness of such a machine. If the machine's manufacturer will not expose itself to liability based on the machine's readout, why would any bar want to assume such liability? For all of the reasons stated above, in my opinion these machines are a bad idea.