

REGULATIONS? WE DO NEED STINKIN' REGULATIONS!

"Substantial compliance" with Ohio Administrative Regulations is required in order for the result of a breath test to be admissible as evidence at trial. The question remains, "What is substantial compliance?" The Ohio Supreme Court has held that when a procedure is required by the use of the word "shall," the failure to comply with that procedure amounts to something less than substantial compliance. Despite this mandate, courts continue to allow the admission of breath test instrument results based upon a previous standard of law, which has been specifically limited.

Prior to 2003, the failure to follow a Regulation, whether or not required by the use of the word "shall," usually resulted in a finding that law enforcement substantially complied with the Regulations.

The state was required to show "substantial compliance" by coming close to following the Regulations. Once "substantial compliance" was shown, the burden shifted to the Defendant to show prejudice based upon regulatory errors. The Supreme Court changed this rule of law, in 2003.

In *State v. Burnside*, the Ohio Supreme Court unanimously stated, "To avoid usurping a function that the General Assembly has assigned to the Department of Health, however, we must limit the substantial compliance standards set forth in *Plummer* to excusing only errors that are clearly de minimus." *Plummer* was the case that set the old standard.

The use of the word "shall" in the regulations does not simply "advise" the procedure, it "demands" it. The failure to comply with such a procedure when required by the use of the word "shall," cannot be found to be a de minimus error.

Prejudice to the Defendant becomes relevant only in circumstances where the state can demonstrate substantial compliance and errors are found to be de minimus. An error is de minimus if "advised" and not "demanded" by the Regulations.

Some courts have found that the lack of substantial compliance with the Regulations is irrelevant where the instrument was determined to be in "proper working order" at the time the test at issue was administered. Such reliance is misplaced as the state has three requirements to meet prior to the admission of the results of a breath test at trial: (1) The instrument was in proper working order; (2) The operator had the proper qualifications to conduct the test; and (3) The test was conducted in substantial compliance with Ohio Department of Health Regulations.

The fact that the instrument is determined to be in "proper working order" does not negate the requirement of "substantial-compliance" with the Regulations. The same holds true with respect to the lack of proper qualifications of the operator.

Despite all attempts to render the Regulations meaningless, the Ohio Supreme Court gave new life to the regulations with the decision of *State v. Burnside*. Now, the the rest of the courts need to recognize that the Regulations are alive and well.

REGULATIONS? *We do need stinkin' Regulations!*

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Tap Into This...

I'm afraid that if I had a little more money, I'd decide to spend all the rest of my life drinking beer.

-Edmund Wilson

For the Bar... OVI Case Law Update

The Court of Appeals, 2nd District, held that the filing of a "shotgun" Motion to Suppress Evidence, similar to the sample motion in the "Ohio Driving Under the Influence Law" publication, is sufficient to challenge the admissibility of a breath test result. In reversing the trial court's decision, the Court of Appeals stated that such a Motion meets the "particularity" requirements set forth by the Ohio Supreme Court.

State v. Conley 2008-Ohio-609



Last Call...

We, as criminal defense lawyers, are forced to deal with some of the lowest people on earth, people who have no sense of right and wrong, people who will lie in court to get what they want, people who do not care who gets hurt in the process,. It is our job – our sworn duty – as criminal defense lawyers, to protect our clients from those people.

-Cynthia Rosenberry

Also see us at:
www.888oviohio.com

Who's On Tap...

Jon J. Saia was again selected as the only "Super Lawyer" in the practice area of DUI/OVI Defense in Ohio by Ohio Super Lawyers, 2008 Edition, the publishers of Cincinnati Magazine.

Scott M. Grace was recently certified by National Patent Analytical Systems, Inc., the manufacturer of the BAC Datamaster, in the operation, diagnostic, verification and calibration of the BAC Datamaster Breath Alcohol Testing Instruments. The BAC Datamaster is the most commonly used breath alcohol testing instrument in Ohio.



Ohio's Scarlet Letters...

*Defending People
Accused of
Drunk Driving*



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