



**STATE OF OKLAHOMA
BOARD OF TESTS FOR ALCOHOL AND DRUG INFLUENCE**

Post Office Box 36307

Oklahoma City, Oklahoma 73136-2307

Phone: (405) 425-2460 Fax: (405) 425-2490

www.bot.ok.gov

Dr. Kenneth E. Blick, Ph.D.
Chairman

Joshua Smith
State Director

DECLARATORY RULING OR OTHER ORDER

DISPOSABLE MATERIALS, SUPPLIES AND PARAPHERNALIA

Adopted May 18, 2021 Regular Board Meeting

Background:

The Oklahoma Department of Public Safety filed a petition for declaratory ruling¹ with the Board of Tests State Director on October 9, 2020 via email and hand delivered the original notarized petition October 13, 2020. During its November 10, 2020 regular board meeting, the Board motioned and voted for the Director to notify interested parties and collect responses with a thirty (30) day deadline. All known interested parties were notified and given thirty (30) days to submit replies, arguments or information regarding the filed petition. After review of the responses received from interested parties, the Board, held a special virtual meeting on March 10, 2021. Comments were heard by all interested parties. The Board continued the matter to the next Board meeting due to technical audio and video issues. At its May 18, 2021 meeting, in accordance with the procedures in Board rule OAC 40:1-1-5, the Board voted to issue the following ruling or other order. The petition and responses received from interested parties concerned the amendments and revoked language in Title 40 of the Oklahoma Administrative Code related to disposable materials, supplies, and paraphernalia.

The Petition:

Excerpt taken from the received petition:

"The Department contends the disposable mouthpiece, as important as it may be, is not necessary to obtain a valid breath test from a subject. Specifically, the Department contends the purpose of the disposable mouthpiece is twofold:

- 1. To protect the breath test instrumentation from damage from vomitus, mucus, or other contaminants.*
- 2. To protect breath test subjects from the spread of disease.*

¹ It is unclear whether the matter before the Board is properly a declaratory ruling or other order. Nevertheless, the Board is authorized by OAC 40:1-1-5 to issue "other orders . . . whether affirmative, negative, injunctive, or declaratory in form." To the extent that this ruling or other order may be construed to be a rule that was not properly promulgated, both a declaratory ruling and "orders by an agency" are expressly excluded from the definition of "rule" in the Administrative Procedures Act. 75 O.S. § 250.3(17)(b) and (e).

Neither of these purposes have any effect on the validity of the breath test itself. Indeed, a valid breath test could be obtained without the use of a disposable mouthpiece. In the event a breath test were administered with no mouthpiece, there is no valid reason to believe the breath test result would be somehow effected by the lack of a mouthpiece.

*Similarly, the Board's existing operating procedure contains a provision regarding hard plastic items in a breath test subject's mouth. Specifically, the operating procedures require the operator to "determine that the subject's mouth has no presence of any substantial loose material(s), foreign substance(s), or any such substance. Metal, porcelain, or **hard plastic** need not be removed." OAC 40:30-I-3(b) (emphasis added). This statement suggests hard plastic objects need not be removed from the mouth. In other words, hard plastic materials have no effect on the administration of a breath test.*

This conclusion is supported by the rule-making record prepared by the Board in 2017. Therein, as previously described, the rules regarding disposable materials, including mouthpieces, were deemed "unnecessary". If the rule regarding the approval of mouthpieces was unnecessary in 2017, the intervening years have not made it necessary. There has been no rash of breath tests administered without a mouthpiece. Law enforcement officers are trained to use a mouthpiece to protect the instrument and the test subject. The change to the rules has no practical impact on the administration of breath tests in Oklahoma.

Likewise, the Board demonstrated it had the capacity to determine whether a disposable item is necessary to the administration of a valid test. Specifically, in the same rule-making action, the Board adopted explicit language approving "10 milliliter (mL) glass vacuum tubes labeled by the manufacturer as containing 100 milligrams (mg) of sodium fluoride and 20 milligrams (mg) of potassium oxalate" for the collection of blood samples. Therefore, the Board was fully capable of, and competent to, revoke the rules approving some disposable materials (mouthpieces) and approving others (blood tubes). The distinction made by the Board in 2017 supports the contention that the rule revoking the approval of mouthpieces reflects the rule is no longer necessary."

Findings of fact:

A review of the 2017 Board of Tests rule-making record clearly documents that the adopted rules were required to conform to the Court of Civil Appeals' opinion in *Sample v. DPS*, 2016 OK CIV APP 62. In *Sample*, the Court of Civil Appeals held that the Board exceeded its authority by delegating the approval of disposable materials to its State Director. All administrative rules and actions regarding disposable materials previously approved by the State Director were affected by *Sample*. The potential inability to introduce evidential results into evidence in Oklahoma Courts caused by the resulting conflicting language would effectively shut down the State's evidential breath and blood testing programs if not corrected. Language regarding disposable materials, supplies, and paraphernalia were moved to 40 O.A.C. 20-1-3 and all unnecessary language was revoked after full review and input from the Board members and staff. Emergency action was approved and taken on October 7, 2016 by the Board *en banc* during a Special Meeting and subsequently received gubernatorial approval on October 10, 2016. These amendments to the rules were approved and adopted again by the Board *en banc* February 28, 2017 with a proposed effective date of August 3, 2017 in compliance with the Oklahoma Administrative Procedures Act. The final adoption occurred June 13, 2017 via Governor's Declaration with a permanent effective date of September 11, 2017.

Conclusion:

The Board agrees that the mouthpiece is important, but it is important from a point of sanitation and protection from exposure to disease for persons being tested; it is not used for the protection of the breath sample. The Board affirms that the mouthpiece serves no scientific role

in determining or measuring alcohol in breath. The mouthpiece exclusively serves as a means of sanitation between multiple users of the instrument.

As cited in 47 O.S. § 759 (C) *"The Board is authorized to prescribe uniform standards, conditions, methods, procedures, techniques, devices, equipment and records for the collection, handling, retention, storage, preservation and delivery of specimens of blood, breath, saliva and urine obtained for the purpose of determining the alcohol concentration thereof or the presence or concentration of any other intoxicating substance therein. The Board may take such other actions as may be reasonably necessary or appropriate to effectuate the purposes of Sections 751 through 761 of this title and Sections 301 through 308 of Title 3 of the Oklahoma Statutes, and may adopt, amend and repeal such other rules consistent with this chapter as the Board shall determine proper."* The statute clearly states that the Board is authorized, not mandated, to prescribe uniform standards, devices, equipment, etc. and is statutorily authorized to repeal and amend rules to appropriately effectuate the purposes of 47 O.S. Sections 751 through 761 as the Board determines proper. The Board has adopted rules that scientifically effectuate the purposes of 47 O.S. Sections 751 through 761. Devices and equipment as statutorily listed are considered active components in chemical testing, for example, the breath alcohol simulator, Intoxilyzer 8000 or other breath analyzers, and reference alcohol solutions.

Disposable materials for blood and breath collection, such as the mouthpiece, syringe, or needle, do not play a scientific role in the measurement of blood or breath alcohol concentration and therefore, need no formal approval by rule. Oklahoma's bordering states; Arkansas, Colorado, Kansas, Missouri, and Texas have no mouthpieces approved in their administrative rules and have also adopted the same training practices. New Mexico is the only bordering state that has a rule approving mouthpieces in their administrative code as cited from NMAC 7.33.2.9 (H.) *"Any disposable, individually wrapped, standard mouthpiece that is compatible with the Intoxilyzer 8000."* New Mexico additionally cites in their definition NMAC 7.33.2.7 (W.) *"Supplies" - items that are used in the process of administering a breath or blood test but do not impact the test results, including but not limited to mouthpieces, and printer paper."*

Dr. Kurt Dubowski was well aware of disposable mouthpieces and their function for breath testing instrumentation. Dr. Dubowski did not include mouthpieces when he published many articles including "Quality Assurance in Breath-Alcohol Analysis" *Journal of Analytical Toxicology*, Vol.18, October 1994, pp. 306-311, to his peers (excerpt cited) *"Particularly important are the following necessary scientific safeguards as components of quality control: (a) a pretest deprivation-observation period of at least 15 minutes; (b) blank tests immediately preceding each breath-collection step; (c) analysis of at least duplicate breath specimens; and (d) a control test accompanying every subject test. These safeguards have withstood adversarial challenges in the judicial system for more than 30 years."* A formal rule requiring approval of supplies or materials such as needles, syringes, mouthpieces, ink pens, printer paper, external printers, keyboard covers, etc. to be used with the approved breath testing instrument or blood collection process is unnecessary and plays no scientific role in the measurement procedure or quality assurance.

The same rule of practice is displayed by civil and criminal jury instructions when defining elements of a crime to a jury. The Board's rule amendments have defined the scientific elements required to collect blood and analyze a breath sample with accuracy as Dr. Dubowski has outlined. The rules adopted by the Board in 2016 - 2017 related to disposable materials, supplies, and paraphernalia in response to the Court of Civil Appeals' opinion given in *Sample v. DPS* do not require amendment.

Ruling/Order:

Disposable materials used by qualified professionals in the capacity of their employment to withdraw/collect blood into Board approved vials is equivalent to the disposable materials an operator uses to collect breath. Such medical professionals or phlebotomists are trained to use and practice universal precautions while performing those tasks just as the Oklahoma Breath Testing Operator is trained and permitted to use

and practice universal precautions to perform a breath test collection. The purpose of the mouthpiece exclusively serves as a means of sanitation between multiple users of the instrument.

The Board hereby informs all parties, regarding the Intoxilyzer 8000, that no particulate or foreign matter may enter the sample chamber and interfere with analysis. The Intoxilyzer 8000 has additional filtering components in multiple locations internally that prevent such matter from entering the testing chamber. Multiple instrument safeguards are also incorporated into the testing sequence to ensure the continued protection of the breath samples and the quality/accuracy of the test result.

Any party that claims analysis cannot be completed precisely without a mouthpiece is hereby informed that the instrument analyzes dry gas samples during the testing sequence without a mouthpiece and it also analyzes known alcohol reference solutions from simulators during maintenance without mouthpieces. For any party to take a scientific stance that the mouthpiece plays a role in scientific measurement stands against Dr. Dubowski's professional articles and scientific findings affirmed by other forensic colleagues.

The issue at hand does not appear to be an issue of failure to use a mouthpiece. The Board has not received any complaint from the public or legal community regarding an operator's failure to use a mouthpiece. The permitted operator is formally trained regarding the mouthpiece's role, proper mouthpiece use and sanitary practices. The use or non-use of a mouthpiece has no scientific weight or affect in the infrared measurement of ethanol as demonstrated by the dry gas calibration check and bench check report printed during maintenance. The use or non-use of a mouthpiece does not invalidate an otherwise valid test. The amendments, relocations, and revocation of Title 40 of the Oklahoma Administrative Code related to disposable materials, supplies, and paraphernalia is a reflection of this scientific conclusion and action that was taken by the Board in 2016.

Respectfully,

Board *en Banc*

Response Voted and Approved May 18, 2021 Regular Board Meeting
Oklahoma Board of Tests for Alcohol and Drug Influence

Affirmed Signatures:



Dr. Kenneth Blick
Board Chair



Joshua Smith
Director