

The DUI Trial with a Blood Test

A Quick Lesson the the Confrontation Clause by Vincent C. Todd

The Prosecution has a blood test from
one of their Certified labs – not from
RMIL – but they have no chemical test
for Sodium Fluoride

Motions

- You need to File the **MOTION TO DECLARE § 42-4-1301 (6) (G), COLORADO REVISED STATUTES, UNCONSTITUTIONAL AS A VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE II, SECTION 16, CONSTITUTION OF COLORADO**
- You need to File the **MOTION TO DECLARE § 42-4-1301 (6) (F), COLORADO REVISED STATUTES, UNCONSTITUTIONAL AS A VIOLATION OF SAMPLE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW PURSUANT TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE II, SECTION 25, CONSTITUTION OF COLORADO**
- Just in case it wasn't clear from the § 42-4-1301 (6) (g) motion, you need to give notice pursuant to § 16-3-309 (5), COLORADO REVISED STATUTES, that the Defendant demands all witness against him testify in person and are subjected to cross examination.

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- Neither the preprinted Certificate of Compliance in the DUI Blood Kit, nor the Assembler's actual 21 CFR § 820 Certificate combined with the Becton Dickinson and Company 21 CFR § 820 Certificate of Compliance (which will be offered under § 42-4-1301 (6) (g), Colorado Revised Statutes, meet the Confrontation Clause requirements of live testimony by a person with personal knowledge under *Melendez-Diaz v. Massachusetts*, — US —, 129 S. Ct. 2527 (2009).
- Even if the Court does not grant the (6) (g) motion, you need to **object to the Certificate** and then you need to **object to any testimony that kit complies** with 5 CCR § 7.1.2.1 or that **the draw complies** with 5 CCR § 7.1.2.1 **without a chemical test of the blood in the tube for sodium fluoride.**

7.1.2 After Collection, Blood Specimens must be:

7.1.2.1 Dispensed or collected directly into two sterile tubes resulting in a sodium fluoride concentration greater than 0.90 percent weight.

5 CCR 1005-2 (2009)

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- The whole point of § 42-4-1301 (6) (f) is burden shifting. *People v. Bowers*, 716 P.2d 471, 475 (Colo. 1986), told them that if they did not have strict compliance with the Board of Health Rules they could still use the test if they laid a foundation from scratch that it was **scientifically valid**.
- Section 42-4-1301 (6) (f) was passed to say that the court must find that the non-compliance is presumed to go only to weight. Constitutionally it can't. Burden shifting is not permitted, the court must have **evidence** before it can make any finding.
(f) Chemical test--admissibility. Strict compliance with the rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibility of test results at trial **unless the court finds that the extent of noncompliance with a board of health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results.**
- **Object to any finding that is not based upon evidence in the record that the non-compliance with the Rules of the Board of Health are not devastating to scientific reliability. Require a Shreck hearing on the witness who is going to opine as to alcohol content without compliance.**

Lack of strict compliance with Board of Health Rule means full CRE 702 foundation must be laid

We conclude, therefore, that even though chemical testing of a driver's breath has not been conducted in strict compliance with a Board of Health rule, the test results may nonetheless be admitted if the trial court is satisfied that **the proponent of such evidence has adequately established that the breath test actually administered was scientifically valid and reliable and was conducted by a qualified person using properly working testing devices.** See, e.g., *Adams*, 59 Cal.App.3d 559, 131 Cal.Rptr. 190; *Jones*, 118 Misc.2d 687, 461 N.Y.S.2d 962; *McClary*, 59 Or.App. 553, 651 P.2d 145. Under our holding here, it will be incumbent on the trial court to determine, as a preliminary question of admissibility under CRE 104, whether the extent of noncompliance with a Board of Health rule has so impaired the validity and reliability of the testing method and the test results as to render the evidence inadmissible. If the trial court rules the chemical testing evidence admissible, then the opponent of such evidence may show, as a matter affecting weight, that the normal testing procedures promulgated by the Board of Health were not followed.

People v. Bowers, 716 P.2d 471, 475 (Colo. 1986).