



Intoxilyzer 9000 Breath Test Admission Quick Guide (8/10/22)

A Montana TSRP Training Program

Pretrial:

- Provide 803(6) notice of breath test result.
- Discovery Checklist:
 - Breath Alcohol Report Form from the sample
 - Implied Consent Advisory Form from the case
 - Magic 5 Certification Documents:
 - Field certification from within 30 days prior to sample (check serial #s)
 - Annual certification from within 1 year prior to sample (check serial #s)
 - Gas Sample Approval/Certifications
 - 1 page from the crime lab
 - 1 page from the manufacturer
 - Serial # should match the case's sample and field certification
 - Administering officer's annual operator certification from w/in 1 year prior to sample
 - Senior Operator Certification (SOP) from the Intoxilyzer's monthly certification administrator from w/in 1 year prior to sample

At Trial:

It is typically worthwhile to inquire into whether defense stipulates to admission of the breath test results to the jury and submission of the certification documents to the judge. If there are stipulations, can submit certification documents to court without questioning, and then omit questions 1 through 13.

The following should be inserted into your direct examination before admission of breath test results. Your judge may require more or less foundation for each certification document, but this technically meets the requirements. Be flexible and responsive to your court's expectations. Meet and prepare with officer pre-trial including reviewing the "magic 5" certification documents so the officer is familiar with them. [Brackets] indicate likely answers.

1. How many Intoxilyzer certification documents did you review before trial?
 - a. [5 or 6, depending on whether 1 or 2 monthly certs]
2. Let's walk through those.
3. Permission to approach your honor?
4. I am showing defense counsel and the witness what I have marked State's Exhibits 3 through 7.¹
5. Do you recognize these certification documents?
6. Who oversees these certifications?

¹ 5 typically, but 6 total if submitting both pre and post testing monthly field certs

- a. [Forensic Sciences Division – aka Crime Lab]
- 7. Let's start with Exhibit 3.
- 8. What is Exhibit 3?
 - a. [Officer's own Operator Cert from year of subject test]
 - b. Does this appear to be a fair and accurate copy of the certification document?
 - c. The State moves to submit to **your honor** State's Exhibit 3 under Montana R. Evid. 104.* (Do not publish to jury)
- 9. What is Exhibit 4?
 - a. [Annual Intox Certification]
 - b. What is the serial number of the Intoxilyzer associated with this annual certification?
 - c. How is that serial number related to Defendant's breath test?
 - i. [This is the same instrument which measured Defendant's breath test in this case]
 - d. Does this appear to be a fair and accurate copy of the certification document?
 - e. The State moves to submit to **your honor** State's Exhibit 4 under Montana R. Evid. 104.* (Do not publish to jury)
- 10. What is Exhibit 5?
 - a. [Monthly Field Cert from within 30 days preceding subject test]
 - b. What is the serial number of the Intoxilyzer associated with this field certification?
 - c. Who administered this field certification?
 - d. Is this a fair and accurate copy of the certification document?
 - e. The State moves to submit to **your honor** State's Exhibit 5 under Montana R. Evid. 104.* (Do not publish to jury)
- 11. What is Exhibit 6?
 - a. [Senior Operator Cert who performed Monthly Field Cert]
 - b. Does this appear to be a fair and accurate copy of the certification document?
 - c. The State moves to submit to **your honor** State's Exhibit 6 under Montana R. Evid. 104.* (Do not publish to jury)
- 12. What is Exhibit 7?
 - a. [The Gas Standard Certification documents]²
 - b. How does the serial number for the gas standard compare to the monthly field cert? (Should match)
 - c. How does the serial number compare to the subject test?³
 - d. Does this appear to be a fair and accurate copy of the certification documents?

² The manufacturer's certification page isn't technically necessary for certification/admission of the intox. Results, but we include it because it's part of the Crime Lab's documentation and for completeness of the document.

³ Very rarely the gas standard (it's a gas bottle) will be changed in between field test and subject test. If so, enter *both* gas standard approvals.

- e. The State moves to submit to **your honor** State's Exhibit 7 under Montana R. Evid. 104.* (Do not publish to jury)
13. Now that we've submitted the certification documents to the court, let's turn to Defendant' breath test.
14. I am showing defense counsel and the witness what I have marked as State's Exhibit 8.
15. Do you recognize the document I just handed you?
- a. What is it?
 - b. Whose subject breath test is this?
 - c. How do you know that?
 - d. Who is the officer who administered it?
 - e. What date and time was this test taken?
 - f. How often do you administer Intoxlyzer tests?
 - g. How are these reports memorialized?
 - h. How are the results retained?
 - i. Did you retain a copy of Defendant's test as part of your DUI file?
 - i. Is this a regular part of (Agency / sheriff's office / PD) business?
 - j. What Intoxilyzer does this result come from?
 - k. How does that serial number compare to the certification documents we submitted to the court?
 - l. Is this a fair and accurate copy?
16. The State moves to enter into evidence, **and publish to the jury**, Exhibit 8.** (803(6))

***Certification Documents for Court's Rule 104 Review:**

Goes to judge not jury: The foundational certifications for admission of a breath test result are not substantive evidence of a DUI offense. *State v. Delaney*, 1999 MT 317, ¶ 18. The certifications "merely provide[] the foundation required for the admission of other substantive evidence." *Id.*

Rules of Evid don't apply to cert docs – Authentication, Hearsay, Etc. inapplicable: "When a district court is considering the State's foundation evidence preliminary to determining whether to admit the results of a breath test, it must proceed under M. R. Evid. 104(a)." *State v. Jenkins*, 2011 MT 287, ¶ 8 (Citing *State v. Delaney*). "It is established that when a district court is determining whether there is adequate foundation for admission of breath test results in a DUI prosecution, Rule 104(a) authorizes the court to do so without regard to whether the certification forms are hearsay." *Jenkins*, ¶ 8.

Confrontation doesn't apply to cert docs: The certifications are not accusatory in the same manner as other evidence, such as a chemical analysis. *State v. Delaney*, 1999 MT 317, ¶ 18. Therefore, admission of the certifications does not violate the right to confrontation. *Id.* at ¶ 19.

****Breath Test Admission:**

The Montana Supreme Court has repeatedly held that Intoxilyzer breath test results are admissible during the trial of a person alleged to have committed the offense of driving under the influence upon submission of the required foundational certifications. *See e.g. State v Poitras*, 2015 MT 287, ¶ 9; *State v Jenkins*, 2011 MT 287, ¶ 5; *State v. Incashola*, 1998 MT 184, ¶¶ 8 & 19. We have submitted the required foundational certifications: The operator certification, monthly field cert, annual cert, senior operator cert who conducted the monthly cert, and the gas standards.

803(6):

The witness has testified that this is a report or record of the defendant's condition made at or near the time of the breath test which is kept in the regular course of business for all DUIs, as testified by the officer who retains a copy of the record or report.

Nuclear Options:

- 1 - Ask to address the legal issues outside the presence of the jury.
- 2 - Submit the bench brief to the court.
- 3 - (Absolute last resort) Denying admission of a breath alcohol test for foundational reasons "effectively suppress[es] the breath test evidence" and may be appealed by the State pursuant to Mont. Code Ann. § 46-20-103(2)(e). *Incashola*, ¶ 6. You can technically do it – but make sure you didn't miss/screw up any foundational documents (such as mismatching serial #s, dates, gas standards, etc.).