Basic Information to Consider:

The issue here is that approximately 100 "BD Vacutainer® Fluoride Tubes for Blood Alcohol Determinations" were manufactured and released without an additive containing a necessary preservative and anticoagulant. The lack of this additive has the potential to artificially inflate or decrease the blood alcohol testing result due to decomposition of the blood. It is important to note that only a single lot of the vacutainers was affected and even from that lot, only around one in 1 in 2,400 vacutainers were affected. While the chances of encountering a vacutainer missing the additive is slim, the potential for inaccurate blood alcohol measurements are worth consideration. Below are steps an attorney may consider when involved in a case which deals with blood alcohol analysis:

Step 1: First Questions

- Was blood drawn/is a blood alcohol test being introduced as evidence at trial?
    - Was the blood stored in a vacutainer created by BD (although not necessarily distributed by them)? This is very likely if a blood alcohol test was performed.
        - A lab might be willing to answer this question.
- Was the blood drawn after August 31, 2018?

Step 2: Discovery

- Although it is unlikely this information is contained in the discovery packet prior to June 2019, look to see if the packet has any of the following information (indicating it may be in the affected lot). The NC State Crime Lab has begun documenting the vacutainer lot number since receiving notice of the recall.
    - The Color Top of the Vacutainer: **Grey**
    - The Expiration date of the container: **7/31/2020**
    - The catalogue number: **367001**
    - The affected lot number is: **8187663**
- Is there coagulation or clotting recorded in the report?
    - This is an indication that the additive may not have been present.
    - A lack of coagulation does *not* mean that the additive was present.
- All parties that bought the affected tubes should have received a notice of recall from BD.
    - It might be worthwhile to request if the entity that drew the blood has received notice of the vacutainer recall.

Step 3: Physical Examination

- If it is possible, physical examination might be required to see if the vacutainer is subject to the recall.
- If the label is visible, check to see if the information on the vacutainer matches the affected lot number.

    - If the label does not appear to be a BD label, check whether the vacutainer is a repackaged/relabeled BD vacutainer distributed by another company.
- If the label is not visible, see if it would be possible for the custodial agency to remove the obstruction without destroying the label.

Step 4: Consider Filing a Motion Challenging the Blood Test

- Even if it is not possible to identify which lot the grey-topped vacutainer came from, it might be beneficial to challenge the admission of the blood alcohol test.
    - The State should have the burden to demonstrate that the blood test was properly conducted using reliable methods. The finder of fact should determine whether the proponent of the evidence has met their burden of showing the reliability of their testing.

Additional Considerations:

- If the nurse or other trained person who drew the blood is not called as a witness, consider whether this violates the defendant's right to confrontation. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 (2009) ("Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.")
    - According to BD's own recall, after blood is drawn into the vacutainer there is no way to determine the presence of the anticoagulant. The only person who can testify to its presence is the person who drew the blood, so that person is needed to establish the reliability of the analysis.
- If there is no evidence that the vacutainer was functioning then there is no evidence the test is accurate.
    - Crime labs have strict procedural steps that must be followed when conducting forensic analysis. Accredited laboratories keep records that lab equipment used for testing is calibrated and properly functioning. Why would safeguards be any less strenuous when manufacturer error has resulted in 100 defective products being produced?