

Garden State CLE Presents:

Here We Go Again:
Get Ready For The ALCOTEST 9510



Instructors:



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TEN Questions for Evan Levow

- 1) Why is the Attorney General doing this now? What is the compelling need to spend the time, money and training resources on a new breath measuring device when the model 7110 is working just fine?
- 2) What will the training of the police involve?

Memorandum to Monmouth County Law Enforcement

The New Jersey State Police Alcohol Drug Testing Unit has tentatively scheduled the Alcotest 9510 conversion training to begin on Monday May 2, 2022, at the Monmouth County Fire Academy. You can find the schedule attached on pages two and three. Please note there are morning sessions starting at 0800 and afternoon sessions starting at 1230 each day. This training is a 4-hour course for VALID Alcotest 7110 operators' last recertified or initial certification in 2020, 2021 or 2022. Officers attending the conversion course must bring their valid Alcotest 7110 card with them to the training as proof of this prerequisite. It is also important to note that all Alcotest 7110 Operators must still attend their Alcotest 7110 recertification course when they are due. This conversion training does overlap with the Alcotest 7110 recertification at Lakehurst the week of May 9th. We did everything possible to avoid scheduling agencies at both locations at the same time but could not accommodate this for agencies with numerous operators.

The Alcotest 7110 and Alcotest 9510 certifications are separate and must be maintained independently. Once the Alcotest 9510 is found scientifically reliable by the New Jersey Supreme Court we can stop recertifying on the Alcotest 7110. We are only running new operator courses for the Alcotest 7110 at this time. Please make sure you are still sending members to this course if your agency was assigned spots in 2022. We will begin

running new operator courses for the Alcotest 9510 sometime in the future.

3) Is there going to be a FRYE hearing? The Attorney General will surely take the position that the 9510 has already been approved for general use in New Jersey by way of N.J.A.C. 13:51-3.5 back in 2018:

13:51–3.5 Approved instruments for the testing of a person’s breath by chemical analysis

Currentness

(a) The Attorney General, pursuant to P.L. 1966, c. 142, Sec. 3, as amended by P.L. 1971, c. 273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, c. 103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, c. 39, Sec. 8 (N.J.S.A. 12:7-56) and this subchapter, approves the following instruments for use in the testing of a person’s breath by chemical analysis:

1) The Alcotest 7110 MKIII, is a chemical breath test instrument that employs both infrared analysis and electrochemical analysis as a dual system of chemical breath testing and is an approved instrument for use in the testing of a person’s breath by chemical analysis.

2) The Alcotest 9510 is a chemical breath test instrument that employs both infrared analysis and electrochemical analysis as a dual system of chemical breath testing and is an approved instrument for use in the testing of a person’s breath by chemical analysis.

4) What are the new features and benefits that the model 9510 has that are not part of the 7110?

Examples

- a) Portability - Can be brought to the scene of roadblocks
- b) Windows based operating system
- c) Touch screen technology and internet links
- d) Dry Gas as opposed to wet bath solution
- e) Optical card scanner for operator
- f) Scan suspect’s d/l

Technical Features

- a) Infrared (IR) and Electrochemical Cell (EC)
- b) Software Updates - Remotely or via USB Drive
- c) Ethanol Dry Gas
- d) IR Energy Attenuated
- e) Interfering Substances Detection
- f) Dual Detection Technology and Change in IR spectrum
- g) Sample Chamber Shielded from RF

Breath Sample Criteria

- a) Starting flow rate is 8.0L/min.
- b) Minimum flow rate of 4.0L/min.
- c) Minimum blow duration of 5.0 sec.
- d) Minimum breath volume of 1.5L.
- e) Slope (plateau) detection
- f) The alcohol concentration must always be increasing or plateauing. A plateau is recognized as increasing $\leq 4\%$ in 1 second.
- g) All four test results (IR and EC from each of the two breath samples) must be within $\pm 10\%$ of the mean of all four test results.

For additional details, see 9510 Technical Manuals at:

https://www.wsp.wa.gov/breathtest/docs/webdms/Draeger/Tech_Man/Draeger%20Alcotest%209510%20Technical%20Manual%20WA%20State%20Version%203.2.pdf

https://wsp.wa.gov/breathtest/docs/webdms/Draeger/Op_T/Draeger%20for%20Legal%20Professionals-Revised%20061917.pdf

https://www.wsp.wa.gov/breathtest/docs/webdms/Draeger/Tech_Man/Draeger%20Alcotest%209510%20Technical%20Manual%20WA%20State%20Version%203.2.pdf

5) If I pick up a Monmouth County 9510 case, should I demand a FRYE hearing from the municipal prosecutor as a condition of admissibility?

a) Novel Scientific Evidence – The *Frye* test

A novel scientific test not previously approved by the Appellate Division or the Supreme Court, must meet the test articulated in *Frye vs. U.S.*, 293 F. 1013(App.D.C.1923) in order to be deemed admissible in evidence.

Initially, under the *Frye* test, expert testimony in fields involving novel scientific tests or technology, must meet the standard of “state of the art” scientific reliability. Scientific reliability under *Frye* can be proven in three different manners.

First, the expert may simply testify that the scientific community in his field accepts as reliable the foundational bases of his opinion.

Secondly, scientific literature can evidence reliability where that literature reveals a consensus of acceptance regarding the technology.

Finally, a party proffering expert testimony may demonstrate reliability by pointing to existing judicial decisions of appellate authority that announce that particular evidence or testimony is generally accepted in the scientific community.

The burden of proof when demonstrating scientific reliability in a criminal case is by clear and convincing evidence.

b) The New Jersey View

In the landmark expert opinion case of *State vs. Harvey*, 151 N.J. 117, 171(1997), the Supreme Court ruled that the proof of general acceptance within a scientific community can be elusive, and satisfying the test involves more than simply counting how many scientists accept the reliability of the selected technique. General acceptance entails the strict application of the scientific method, which requires an extraordinarily high level of proof based on prolonged, controlled, consistent, and validated experience. The proponent of the technique has the burden to clearly establish general acceptance.

The *Frye* test remains the accepted method of determining scientific reliability in criminal and quasi-criminal cases in New Jersey. By contrast, a different standard is applied in civil cases under *Daubert vs. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–95(1993).

c) Examples

Horizontal Gaze Nystagmus Test – State vs. Doriguzzi, 334 N.J.Super 530(App.Div.2000)

Breathalyzer model 900A - Romano vs. Kimmelman, 96 N.J. 66(1984)

Alcotest 7110 - State vs. Chun, 194 N.J. 54(2008)

6) Has there been a successful challenger to the Alcotest 9510 anywhere in the United States as of yet?

Commonwealth vs. Ananias, 2019 WL 6719036 and 2020 WL 12893642 are unpublished decisions that ordered the exclusion of 9510 results based upon the State's failure to provide exculpatory evidence in 432 cases. However, the trial court did find the instrument to be scientifically reliable.

7) Is the 9510 in use in any other jurisdictions?

Massachusetts and Washington State

Commonwealth vs. Hourican, 85 Mass.App.Ct. 408(2014) (Results inadmissible due to gap between readings in violation of administrative code)

Commonwealth vs. Costa, 88 Mass.App.Ct. 750(2015) (Gas cylinder calibration issues)

8) Are there any requirements that the Alcotest 9510 include software changes that will address the issues ordered and subsequently ignored by the Supreme Court in Chun?

9) How do you plan to defend your first 9510 case in municipal court and beyond?

10) How long do you estimate it will take the 9510 to be in use statewide?