

# New Jersey Law Journal

©2006

---

## Alcotest Hearings To Be Long Haul

Charles Toutant

09-25-2006

Hearings on the accuracy of New Jersey's new drunken-driving tester began last week, and judging by opening day, Special Master Michael King seems accurate in his prediction that they will run until Thanksgiving.

The reason: sheer numerosity. The state attorney general is proffering 11 witnesses to testify to the reliability of the Alcotest 7110 Mark III, a high-tech device intended to replace the Breathalyzer, and there are 10 defense lawyers to cross-examine each of them. And that's in addition to the five or six experts the defense expects to call.

Based on King's eventual report, the state Supreme Court will determine the admissibility of Alcotest readings in drunken-driving prosecutions. King is serving as special master in *State v. Chun*, which consolidates about two dozen drunken-driving prosecutions from Middlesex County, all based at least in part on Alcotest readings.

Alcotest won judicial sanction three years ago from Camden County Superior Court Judge Francis Orlando in *State v. Foley*, 370 N.J. Super. 341 (2003), but that case never underwent appellate review and was not followed in Middlesex.

In the meantime, Alcotest has been rolled out in all counties except Essex, Hudson, Bergen and Monmouth. On Jan. 10, the Court said that until it rules in *Chun*, Alcotest readings are admissible but execution of sentence is stayed for first-time offenders. Drivers may conditionally plead guilty and then request post-conviction relief if the Court finds the device unreliable.

During Monday's hearing, King afforded wide latitude to the defense lawyers cross-examining the first expert witness for the state, Edward Conde of the U.S. Department of Transportation's John A. Volpe National Transportation Systems Center in Cambridge, Mass. Since there is no lead counsel, each of the 10 defense lawyers can have a turn.

But several times, when the lawyers got too strident with Conde, King had to back them off. "Don't yell at him. Don't point fingers at him. Ask less complicated questions," King told defense lawyer **Bartholomew Baffuto**, a Manasquan solo.

King took defense lawyers to task for lecturing Conde, directing objections about the testimony to the witness instead of the court, lecturing the witness, asking open-ended questions but not allowing enough time for the answer.

Conde, who appeared dumfounded by the aggressive questioning, testified that after completing a battery of tests in 1996, his agency placed the Alcotest 7110 on a conforming-product list, intended as a guide for government procurers.

But under cross-examination by Freehold solo Matthew Reisig, Conde admitted that his tests did not account for drafty rooms, hyper- or hypoventilation; the tests received no peer review; no human subjects were used; air samples produced by a breath simulator were at a lower temperature than human breath; and that breath temperature could affect the test results. Conde admitted that his simulator could not approximate human breath but said he didn't know, when Reisig pressed him, whether diabetes or gastric reflux would affect Alcotest results in humans.



**KEEPING IT CIVILIZED: When defense lawyers got too strident with the state's expert witness, Special Master Michael Patrick backed them off.**

Conde also acknowledged under Reisig's questioning that Alcotest 7110 MkIII devices in Alabama, the only other place where the machine is in statewide use, are configured with breath temperature

sensors and modems that send test results from local police departments to a central location - two features not contemplated by New Jersey.

Defense lawyers complained repeatedly Monday to King that the lawyer representing the state, Deputy Attorney General Christine Hoffman, spoke too softly.

Hoffman, in turn, twice complained to King about the defense lawyers' failure to produce their expert list. King, noting the defendant's "fiscal issues," asked Hoffman to be patient, assuring both sides that "I'm going to try and keep a fair fight and an even playing field."

Hoffman and two of her co-counsel, Deputy Attorneys General Jessica Oppenheim and Stephen Monson, also appeared in the *Foley* case.

Two other expert witnesses were questioned by the time the hearing broke up for the week on Thursday afternoon.

The defense team consists of seven lawyers for individual defendants and three more for the amici curiae New Jersey State Bar Association and Association of Criminal Defense Lawyers-New Jersey.

The defendants' lawyers have lined up at least three experts, and the State Bar also plans to present two or three experts. Not all the defense experts have submitted their reports.

The defense lawyers sought, but were denied, state funding for experts in the case, and they sought to raise funds for experts with a continuing legal education event, but that effort went poorly.

The defense had hoped to engage experts to examine Alcotest's internal programming, but the state refused to turn over the machine's source codes, saying they belong to the manufacturer, Draeger International of Durango, Colo., which is not a party. In May, King said he would draw a negative inference from that refusal. The state offered to arrange an off-the-record meeting in which Draeger's president would describe the coding to King, but the special master declined.