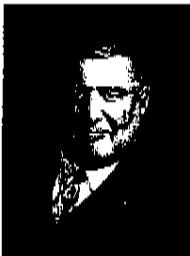


NJSBA Trustee Update

Judicial Restraint

By Arnold Fishman



As a liberal, I tend to side with those who think our laws are living documents. Courts must interpret the law in light of present day reality, rather than seeking the original intent of the drafters. I never understood the utility of asking what Madison would think of the Internet, nanotechnology, or genetic engineering. There is no conceivable way that the founding fathers could have an intent concerning these totally unanticipated revolutionary scientific breakthroughs. Attempting to divine their will on such subjects is hubris at best and disingenuous at worst.

Recently a panel of our Appellate Division has almost convinced me to change my mind. Seventeen years ago, *State v. DiSoma*, 262 N.J. Super. 375 (App. Div. 1993) decided that a prior refusal to submit to a breath test in violation of NJS 39:4-50.4 does not enhance a subsequent violation of NJS 39:4-50 driving while intoxicated. While most of the opinion dwelled on the meaning of the words "under this section," admittedly, part of its rationale was that since the refusal statute required its elements to be proven only by the civil—probable cause to believe—standard, such findings could not logically or constitutionally be used to enhance a violation that had to be proven beyond a reasonable doubt. Since *DiSoma*, knowledgeable attorneys have been advising their clients to plead guilty to the refusal in exchange for a dismissal of the DWI. This advice was sound because, the next time they were convicted of driving drunk that conviction would not count. Recognizing the penal nature of the refusal statute, our Supreme Court, rather than striking the law, saved it by elevating the burden of proof to the criminal—beyond a reasonable doubt—standard. (Holding aside the risk of jail, in most cases, the penalties for refusing to submit to a breath test are indistinguishable from those of DWI, and in some cases even more severe.) That case, *State v. Cummings*, 184 N.J. 84 (2005) is now five years old. In those intervening years, the refusal statute has been amended many times. The Legislature is deemed to have perfect knowledge of

the case law. When it amends a statute and does not address a court's interpretation, it is acceding to that interpretation. Therefore, *DiSoma* was well settled law.

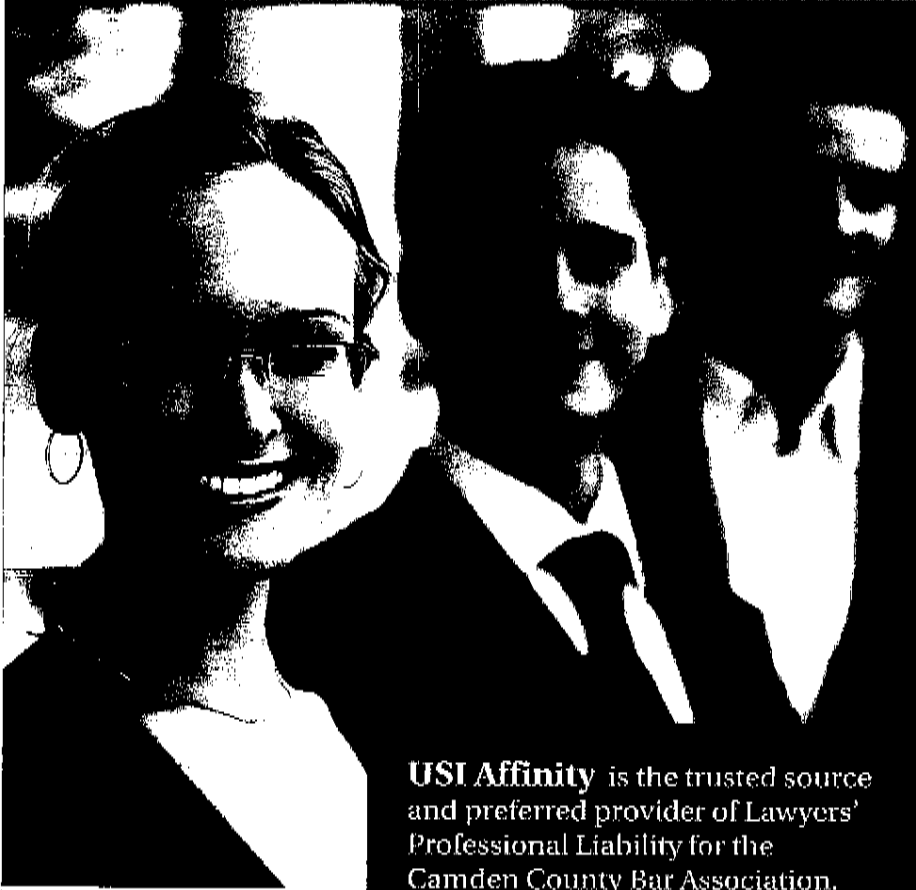
In *State v. Ciancaglini* (A2785-08T4) Approved For Publication January 7, 2010,


another panel of the Appellate Division held that now a prior refusal does in fact enhance a subsequent DWI. Our trial courts are presently struggling with how to deal with this opinion. Does it apply to all refusals, refusal

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Why Not Join the YLC?



By Michael V. Madden

Young Lawyer Corner

I still remember my first Young Lawyer Meeting. Casey Price, forever the young lawyer, was running the show. As I sat there enjoying the free lunch, Casey called me out – “Why are you here?” Startled, I looked at Casey quizzically, kind of like the way a puppy looks at you when you ask him to sit. I thought about the question for a second and although the free pizza was nice, I didn’t have a direct answer. Did I attend the lunch to meet other young attorneys, fresh out of a clerkship or law school? Did I attend to become involved in our local bar association and work with other attorneys on projects and events that would benefit our community? Or did I seek attorneys that I could bounce questions off of as I gained experience in the practice of law? Although I dodged Casey’s question as artfully as possible (it was the pizza), I now know that it was all of the above.

Before I was born, my grandfather, the Honorable Thomas M. Madden, U.S.D.J., once held the prestigious position of Camden County Bar President.

Although I never knew my grandfather, I know he understood the importance of attorneys becoming involved in their local bar associations early on in their profession. The Young Lawyer Committee provides that opportunity. From a practical standpoint, there is absolutely no reason why newly admitted attorneys should not join the bar association. Quite simply, the YLC opens doors for new attorneys, even young associates practicing at some of our larger firms. Over the course of the last seven years, I have met some of my greatest friends and most trusted colleagues through the YLC. Initially, emails and phone calls with the many YLC members revolved around troublesome questions of law that each of us, some more than others, were dealing with. Now, the emails and phone calls begin with talk of our families and end with the issue of where our next YLC happy hour will be held.

The YLC also provides the opportunity to work on numerous community projects. Each year the YLC sponsors a Halloween Party and Easter Party for disadvantaged children at the Anna Sample House in Camden. It’s amazing how a few hours on a Saturday can generate such fantastic smiles from the children and their families as they enjoy pizza, candy and a little magic from Lorenzo! The YLC also assists with the Bar’s Annual Children’s Christmas Breakfast & Party and Annual Children’s Picnic, amazing events that continue to provide local disadvantaged children and their families with a day of fun-filled excitement and memories. As young attorneys practicing in Camden County, there

is not enough emphasis on becoming involved in our community. It is our responsibility to give back and what better way to do so than through the Bar Association? Trust me, attend just one of these events and you’ll see that a few hours on a Saturday truly makes a difference to these children.

I am excited to commence the next year as the YLC Trustee and I hope that more of our young attorneys will join the YLC to see exactly what we have to offer. Not only do I guarantee that new friendships and business relationships will be forged, but I also guarantee that you will actually enjoy it. We have a fantastic group of young attorneys that are all excited about the upcoming year. And, for the first time, the YLC created an annual Scholarship fund benefiting the Larc School, a local non-profit special education school, serving students with a wide range of moderate to severe disabilities. Our scholarship drive culminates with a Lobster Bake at the Tap Room on September 11, 2010. So please save the date as this event is open to all members of the Bar, their friends and their families.

By becoming involved in the YLC, you not only help yourself grow professionally, but you also become part of an exciting and hardworking association working together to better our profession and the community we live in. So, as we start this new year, I thank past chairman, Adam Gersh, for the awesome leadership over the past year and look forward to seeing new friends and old on the first Tuesday of every month at noon at Bar Headquarters. Lunch is on us!

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convictions occurring after Cummings, or just convictions after Ciancinglini? It was applied to unfortunate Mr. Ciancinglini. If the Legislature had done it, it could only be applied prospectively to avoid its being an ex post facto law. The opinion creates some real problematic situations. If a person is convicted of both DWI and refusal arising from a single operation, is he a third the next time? If he has a prior DWI or refusal, and his next time is a DWI and refusal is he a second and a third? If so, if the court convicts on the refusal charge before the

DWI the defendant goes to jail and the other way he does not. If a person had a successful Post Conviction Relief application with respect to a prior DWI and didn’t attack the companion refusal because it didn’t count, what then? Since an illegal sentence can be corrected at any time, should the State move to reopen every sentence where there was an uncounted refusal? These anomalies, and others yet to emerge, militate against a court disregarding the wisdom of the legislature and stare decisis to effect a radical change in the law no matter how beneficial it considers the change to be. I would argue that since both DiSoma and Ciancaglioni are Appellate

Division opinions a trial court is free to apply the one it considers best reasoned, and that DiSoma is the one to follow.

Let’s shift gears. This is the last issue of *The Barrister* before the summer break. Around here the winter is too long. It wears me out. I think winter should start on Christmas Eve and end the day after the New Year. It should snow that entire period of time and get it all out of its system. I love the lazy hazy days of summer. It is a time for reflection, an opportunity to realign your sails and chart a new course. We can ask ourselves where we are headed and how we expect to get there.

Have a great summer! See you in September.