

## NJSBA Trustee Update

## That Ain't Fair

By Arnold Fishman



I can remember, as a child, when some injustice was visited upon me, crying, "That ain't fair!" I can also remember my mother telling me that things are not always fair. It has taken many years for me to internalize that lesson. I continue to hope, but I no longer expect life to be fair. Yet, I cling to the notion that government has a responsibility to be fair. There is no arena where the need for that fidelity is greater than when it exercises its power to punish people. While a defense attorney has the obligation to advance his client's position, a prosecutor has the obligation of fairness. A defendant, even in the worst of cases, has the right to put the State to its proof, but a prosecutor is not permitted a frivolous prosecution. So too, the police in building the State's case are charged with scrupulous integrity. The courts are the guardians of those duties. As we learned long

ago in law school, due process of law boils down to fundamental fairness—nothing more, but certainly nothing less.

The prosecution of those suspected of driving drunk has assumed paramount importance in New Jersey. Drunken driving prosecutions in the Municipal Courts are the equivalent of murder prosecutions in the Superior Courts—except you can plea-bargain a murder. The legislature has expedited the process by enacting a 0.08% BAC as a *per se* violation, and an equivalent punishment of those who refuse breath testing. Our Supreme Court has misinterpreted its function when it traded its traditional role of making sure that our citizens are given fair trials for joining the legislature in that effort. As *State v. Tischio*, 107 N.J. 504 (1987) reveals, "[t]he overall scheme of these laws reflects the dominant legislative purpose to eliminate intoxicated drivers from the roadways of this State. To this end, the Legislature, working in tandem with the courts, has consistently sought to streamline the implementation of these laws

and to remove the obstacles impeding the efficient and successful prosecution of those who drink and drive." (emphasis supplied) In that climate, it is no wonder that the executive branch has assumed a win-at-all-costs mentality. Cops don't play fair.

Over the years, I have found that the most powerful evidence to refute the State's case is the electronic recording of the accused's performance at the scene and the administration of the breath test at the station. The former is critical to rebut the testimony that the client was a falling down drunk, and the latter to keep the BAC out of evidence. Even with it, there is a high probability of conviction in the municipal court; without it, the officer's verdict is unimpeachable. As a consequence of this truism, many police departments refrain from equipping their cruisers with video recorders and those that do, have learned to perform the ostensible "Standardized Field Sobriety Tests" so as to not be helpful to the defense. They are performed off camera so all you hear are

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critical observations like, "I told you not to start until I said so, I told you not to raise your arms, I told you not to put your foot down," etc. This is coupled with the complaining witnesses' unfettered description of what led up to the motor vehicle stop. To add to the dilemma, very few police departments record the processing of the suspect in the station. However, many departments do have cameras that record everything that is happening in and around their building. They can isolate the defendant so he can be tracked from the time he gets out of the police car to the time he gets into the car that is to drive him home—summons in hand.

The minions of the law have become so skillful at avoiding the creation of exculpatory evidence, that one department has cameras everywhere except where they might jeopardize their "successful prosecution." There is a camera showing the squad car pulling in and the handcuffed suspect walking down the back steps to enter the building, up to and including his descending the front steps, and being driven out of the parking lot. They capture everything: every hallway,

the processing room, even the bathroom. The one place there is no camera is in the room where the breath test is conducted. As a result, you have to take the operator's word when he says he read the "Standard Statement," removed his radio and all cell phones, observed the defendant without interruption—he didn't burp, vomit or place anything in his mouth—for 20 minutes prior to blowing into the machine, changed the mouthpiece between each sample, gave the required instructions, and performed the test properly, etc. That testimony alone or the, "Boy was he drunk!" testimony alone is enough to convict. There can be no jury to interfere with the imposition of draconian mandatory penalties. (A third offender can lose his driver's license and registration privileges for 10 years, unless he refused to blow and then it is 20 years, unless it is in a school zone and then it is forty years.) There is a presumption against incarceration for conviction of a fourth degree crime, yet this traffic offense can result in a mandatory six months in the county jail. Those convicted serve every day of it, and are not even supposed to be allowed to go home from court to get their toothbrushes.

Justice Clifford dissenting in Tisch wrote, "Uncompromising enforcement of the laws designed to rid our highways of the scourge of the drunk driver ranks on slightly behind the veneration of motherhood and probably slightly ahead of the robust hankering after apple pie in the hierarchy of values firmly embedded in our culture. The judiciary has succumbed to that same venerated hankering that drives both the legislative and executive branches. It is time for judges to restore some balance to the system. In *State v Cook* 179 N.J. 533 (2000) the majority said,

The Judiciary bears the responsibility to guarantee the proper administration of justice...and particularly, the administration of criminal justice. Our courts thus have the independent obligation...to take all appropriate measures to ensure the fair and proper administration of a criminal trial. The courts power to fashion remedies in the realm of criminal justice is unquestioned. Where such appropriate measures are available, they should be employed to

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the fullest extent feasible to enhance the fairness of the proceedings (internal quotations and citations omitted)

...  
In the final analysis, a determination of the admissibility of...[evidence] in a criminal proceeding is a purely judicial function. Why we should suffer, for one more day, the funneling of reality... through the lens of partisans, with the concomitant frailty of language and recollection, when a true recording could be made, is simply beyond me."

(Justice Long dissenting in Cook)

Cook led to the adoption of Rule 3:17, which requires the electronic recordation of custodial interrogations for certain enumerated offenses. So should it be in DWI prosecutions. Recordation would protect police officers from false allegations and lend credibility to police work by demonstrating the fairness of the methods used. It would create an objective, reviewable record, thus eliminating countless trials. A rule requiring the electronic recording of the psychophysical tests administered in the field and the administration of the chemical tests in the police station would go a long way in allowing our courts to return to what they were created to do—equitably resolve disputes between parties. It is the perceived fairness in the judicial system that prevents "We the People" from resorting to violence as a solution to our problems. Nowhere is overreaching more pernicious than when one of those parties wields the power of government. As laudatory as it may be for the other two branches of government "to eliminate intoxicated drivers from the roadways of this State," it is even more fundamental for the third branch to remain true to its constitutionally imposed mission of protecting the governed from the excesses of its government.

*The following is a summary of actions taken at the Dec. 11, 2009 meeting of the New Jersey State Bar Association Board of Trustees at the New Jersey Law Center in New Brunswick. This summary does not constitute official minutes.*

**E-filing** The Board of Trustees voted to add its voice to the discussion on electronic filing in the state courts. The electronic filing of lawsuits and other court documents

has already been integrated in the nation's federal courts and increasingly state courts have gotten into the act. New Jersey has some electronic filing for special civil part matters.

In June, a Supreme Court committee released a report that recommended the state courts adopt an e-filing system and, over the course of several years, use it to process the over 4 million transactions it handles each year. Roughly 34 attorneys,

court managers and information officers spent a year examining what kind of system the courts should use, how to integrate a new system with the existing case management systems, how New Jersey can benefit from e-filing and what time frames should be considered for expanding e-filing. The committee made 38 recommendations to the Supreme Court, including developing a

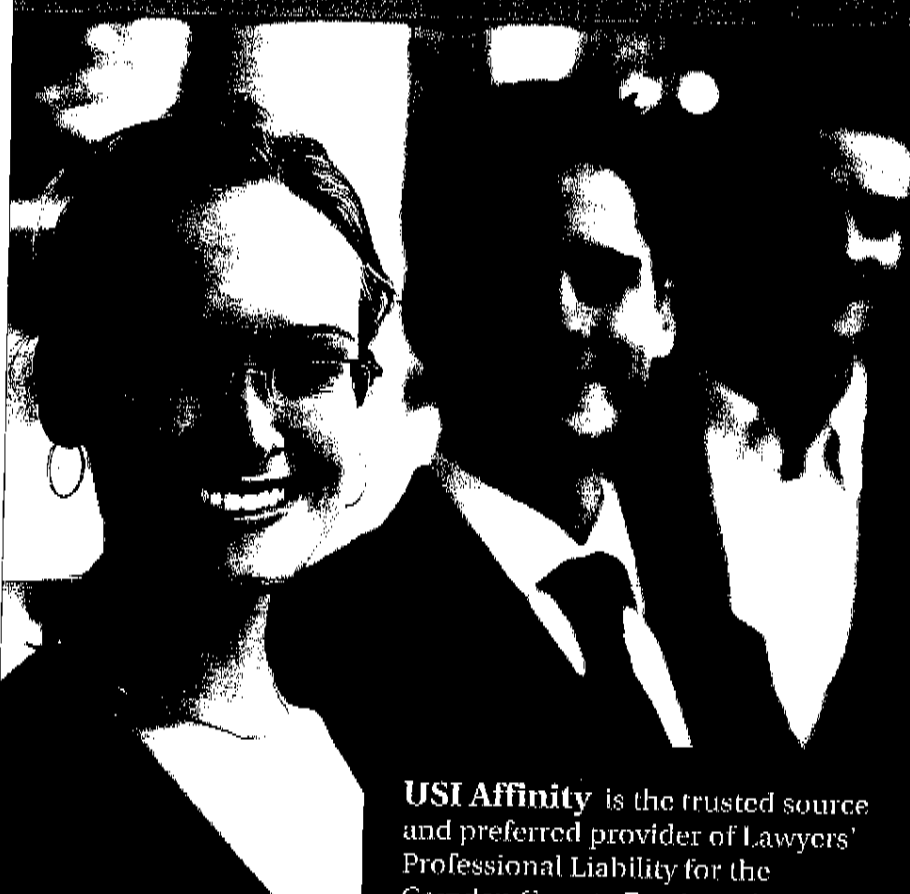
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