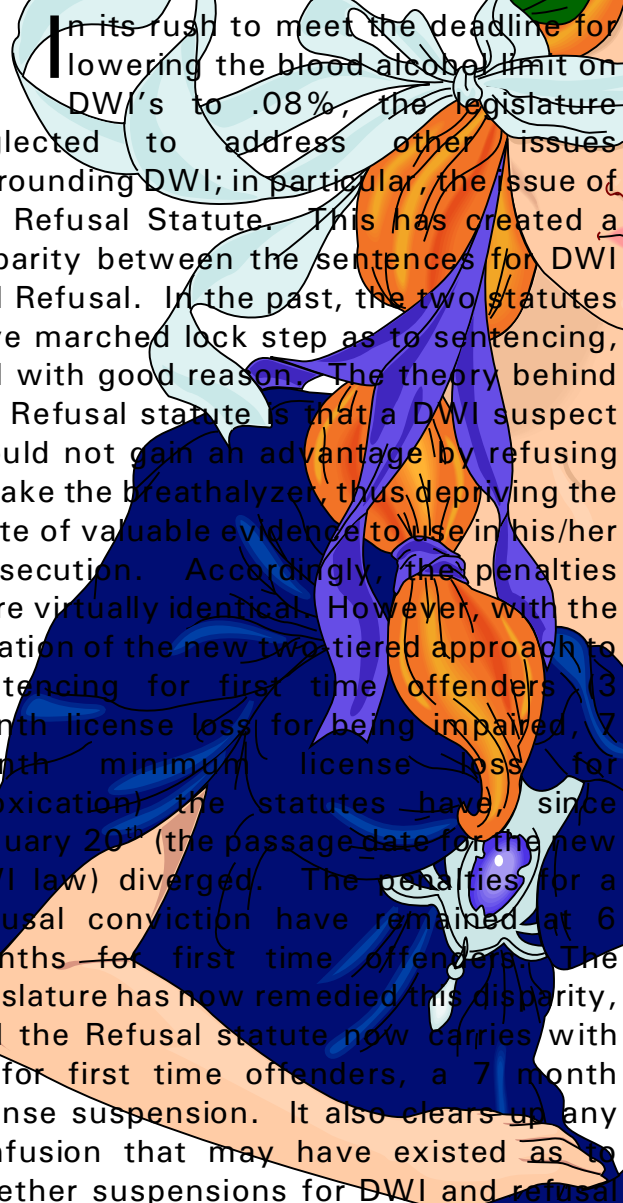

CRIMINAL LAW UPDATE

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the new dwi world



In its rush to meet the deadline for lowering the blood alcohol limit on DWI's to .08%, the legislature neglected to address other issues surrounding DWI; in particular, the issue of the Refusal Statute. This has created a disparity between the sentences for DWI and Refusal. In the past, the two statutes have marched lock step as to sentencing, and with good reason. The theory behind the Refusal statute is that a DWI suspect should not gain an advantage by refusing to take the breathalyzer, thus depriving the State of valuable evidence to use in his/her prosecution. Accordingly, the penalties were virtually identical. However, with the creation of the new two-tiered approach to sentencing for first time offenders (3 month license loss for being impaired, 7 month minimum license loss for intoxication) the statutes have, since January 20th (the passage date for the new DWI law) diverged. The penalties for a Refusal conviction have remained at 6 months for first time offenders. The legislature has now remedied this disparity, and the Refusal statute now carries with it, for first time offenders, a 7 month license suspension. It also clears up any confusion that may have existed as to whether suspensions for DWI and refusal

can run concurrently, or must run consecutively. For first time offenders, under the revised statute, they can run *either* consecutively or concurrently, in the discretion of the sentencing court. (Wanna bet that the pretrial offer will be that on a guilty plea they run concurrently, and if tried they run consecutively?) For second and third offenders, the license suspensions must, by statute, run consecutively.

Did you know that our new DWI statute mandates that the Attorney General create guidelines for the prosecution of DWI offenses? *For a motor vehicle offense???* In the past, municipal courts have been governed by the "Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey" as found as an appendix to Part 7 (or is it VII?) of our court rules. The current applicability of this plea bargaining guideline, at least as it relates to DWI, seems somewhat ambiguous, as the statutes have changed, but the guidelines have not. It would seem that once promulgated, the guidelines would supplant the Supreme Court's guidelines. Or will they? The municipal prosecutor is subject to the

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attorney general; the municipal judge takes his/her direction from the New Jersey Supreme Court and its rules. Maybe there will be a giant *Wrestlemania* between the legislature and the Supreme Court to decide the issue. Alas, I fear, rather than such a truly absorbing and colorful spectacle (on *Pay For View* it would make a fortune), the two guidelines will be read *in pari materia* to effectuate the most restrictive view of prosecutorial discretion.

fees and brotherhood

Fees. Setting them, charging them, collecting them: the bane of our profession. I recently ran across this advice by one of our own, and pass it on for your edification:

// I use a bifurcated fee agreement. One fee for a plea, another fee for a trial. With a few exceptions, I do not do appeals and my retainer reflects this fact. Make certain your fee agreement clearly provides that YOU will hire necessary experts and THEY will pay for them. Clearly state that the experts you use are not your employees. Get your trial fees and your expert witness (and all other ancillary) costs paid in full by the client before the matter is formally set for trial. Whether you win or lose, your services are always worth less to the client after they are provided. Above all, remember this: fear not the judge; fear not the prosecutor; always fear your client. They will (err, have intercourse with) you in a New York second. Always assume your client is wearing a wire. Never say anything to a client that you would not want to see on the front page of the *New York Times* (above the fold).” *He ends with this greeting to those new to the criminal defense fold: “Best of luck and*

welcome to our nightmare! If you stick with us, you will learn that we are a Band of Brothers and Sisters. Our Brethren in this pursuit are the finest people I've ever known.”

miscellaneous

From a press release of March 4th from the National Association of Criminal Defense Attorneys: The second-degree murder trial of Johnny Lee Bell is expected to conclude before lunch today. Rapides Parish (La.) Public Defender Bridgett Brown informed Judge W. Ross Foote on Tuesday that she had only spent 11 minutes with Bell preparing for trial and that she had not yet had time to locate witnesses, retain experts, file a motion to suppress his statement to police or otherwise investigate Bell’s claim that the shooting was accidental – despite the fact that Bell has been held in jail since January 2002. Editor’s note: this says something about an underfunded and overburdened public defender system, and about a callous disregard for the rights of defendants by courts in some parts of our country. Proudly, even defiantly perhaps, this is not how it works in New Jersey.

**Bergen County Bar Association
Municipal Court Seminar
April 19th 4:30 p.m.**

Municipal Court Update
New Cases
New Laws

Judge John Anderson III of Johnson County, Kansas, District Court was not amused when Conrad J. Braun appeared before him wearing a bumblebee costume - complete with a foot-long stinger - to protest a sting

operation by prosecutors. The judge said although there is no rule against wearing such a costume, it did not fit with court decorum. *The judge, contrary to rumor, never instructed him to beehave.*