

Distracted Driving

KEEP BOTH HANDS ON THE WHEEL

Recent Developments in Laws Prohibiting Driving while Using Electronic Communication Devices such as Texting or Talking on a Hand-Held Cellular Telephone



Frank C. Botta and
William B. Pentecost, Jr.*



Uh, Breaker One-Nine, this here's the Rubber Duck. You got a copy on me Pig-Pen? C'mon.

Uh, yeah 10-4 Pig-Pen, fer sure, fer sure. By golly it's clean clear to Flag-Town, C'mon.

Uh, yeah, that's a big 10-4 Pig-Pen, Yeah we definitely got us the front door good buddy. Mercy sakes alive, looks live we got us a convoy.¹

THE ARCHETYPICAL TRUCK DRIVER "JAWING" ON HIS CB RADIO IS NOW ALSO USING CELLULAR PHONES, TEXT MESSAGING, AND SURFING THE INTERNET: MORE WIRELESS COMMUNICATION DEVICES USED WHILE DRIVING HAS A PROPENSITY TO CAUSE OR CONTRIBUTE TO MORE ACCIDENTS – AND THE RECENT TREND TOWARD LEGISLATING SAFER DRIVING.

Not just truckers, but all people in the United States are using cellular telephones and other personal electronic devices to send text messages or emails, more commonly known as "texting," with increasing frequency.² According to the New

York Times, more than 110 Billion (i.e., 110,000,000,000) text messages were sent in the United States during the month of December 2008 alone, which represents a tenfold increase from 2005.³

While texting and portable email are valuable to people and businesses throughout the United States, these services can create an extreme risk when used by individuals while they are operating motor vehicles.⁴ The risk created by texting while driving is increasing on a national level as the use of texting increases nationwide.

The National Highway Traffic Safety Administration ("NHTSA") estimates that 37,313 people, or more than 100 drivers per day, were killed in motor vehicle traffic crashes in 2008.⁶ According to the Fatality Analysis Reporting System ("FARS"), distracted driving was involved in sixteen percent of all fatal crashes in 2008.⁷ Similarly, the General Estimates System ("GES") approximates 22 percent of all injury crashes to have involved distracted driving.⁸

The National Motor Vehicle Crash Causation Survey ("NMVCCS") investigated a total of 6,950 crashes during a three year period from January 2005 to December 2007 and found that eighteen percent of crashes caused by drivers were attributable to distracted driving.⁹ In its 100-Car Naturalistic Driving Study, driver involvement in secondary tasks contributed to over twenty-two percent of all crashes.¹⁰

A 2008 study by Nationwide Insurance found that twenty percent of drivers in the United States send text messages while driving, and a study by Car and Driver Magazine concluded that texting while driving is more dangerous than driving while intoxicated.¹¹ Similarly, a recent study by Virginia Tech Transportation Institute found that operators of motor vehicles had a collision risk that was twenty-three times greater while texting compared to when they were not texting.¹² Another study by the University of Utah found that college students using a driving simulator were eight times as likely to have an accident while texting.¹³ Today's younger generation certainly exhibits an ability to text at a faster rate than most of the general public.

The dangers of using a cellular telephone while driving may not be limited to the manipulation of the device itself (i.e., answering a call, holding the device, etc.), but may also relate to the cognitive processing while engaged in a conversation.¹⁴ Though cognitive processing may play a role, naturalistic data clearly show that keeping a driver's eyes on the forward roadway is a critical component in safe driving and avoiding vehicle crashes. Therefore, any evaluation of driver

* Eckert Seamans Cherin & Mellott, LLC., Pittsburgh, Pennsylvania. The authors wish to acknowledge the input of three other members of Eckert Seamans: John Hall, Raymond A. Kowalski, and Korry A. Greene.

distraction must consider the impact that secondary and/or tertiary tasks have on drawing the driver's eyes away from the forward roadway.¹⁵

In May of 2009, a trolley operator admitted that he was texting when he caused serious accident on the Boston public trolley system.¹⁶ Such a distraction of the trolley operator's attention span from his job responsibilities was the proximate cause of the serious incident that could have otherwise been avoided. A number of the states have already passed laws to prohibit driving while texting. Along with the District of Columbia, fourteen states have banned text messaging for all drivers.¹⁷ (See attached summary of State Distracted Driving Laws at the end of article.)

Following a two-year study, the Olson-Hanowski report sponsored by the U.S. Department of Transportation, Federal Motor Carrier Safety Administration,¹⁸ found and recommended that:

- Fleet safety managers engage and educate their drivers, and discuss the importance of being attentive and not engaging in distracting tasks or behaviors. Even routing types of behaviors (*e.g.*, reaching for an object, putting on sunglasses, or adjusting the instrument panel) can distract and may lead to a safety-critical event.
- Fleet safety managers develop policies to minimize or eliminate the use of in-vehicle devices while driving. The authors also urge that fleet safety managers to be cognizant of devices that drivers may bring in the truck cab and use while driving. These may seem innocuous (*e.g.*, a calculator), but may increase the crash risk, if used while driving.
- Drivers not use dispatching devices while driving and that fleet safety managers educate drivers on the danger of interacting with these devices while driving. Similar to

manually dialing a cell phone, if drivers must interact with a dispatching device, the authors recommend that drivers do so only when the truck is stopped.

- Drivers not text while driving. This is a relatively new phenomenon, but data from the current study clearly shows an increased risk when drivers text while driving.
- Drivers not manually dial cell phones while driving. If a call must be made, the authors suggest that drivers pull off the road to a safe area, and then dial to make the phone call. Another option, requiring further study, is the use of voice-activated, hands-free dialing, which would allow the driver to maintain eyes on the forward roadway. However, this approach may have implications for "cognitive distraction" (through visual distraction would be expected to be reduced).
- Drivers not read, write, or look at maps while driving. What may seem like quick, commonly performed tasks, such as reading, writing, and looking at maps, were found to significantly draw visual attention away from the forward roadway. These activities, which may be integral to the driver's job, are not integral to operating the vehicle and the authors recommend that such tasks never be performed while the vehicle is on and in motion.
- Drivers not be prohibited from talking on a cell phone or CB radio as this was not found to increase risk. Regarding cell phones, the findings from the current study clearly indicated that manual device interaction, and the associated high eyes off forward road time, was the key factor to increased risk. Though "visual distraction" is foremost in manual device interaction, potential "cognitive distraction" of talking/listening was not measured in the

current study. However, based on the analysis of safety-critical events from the current study, talking or listening were not risk factors.

- Designers of dispatching devices consider the increased risk associated with using their devices and work to develop more user-friendly interfaces that do not draw the driver's eyes from the forward roadway. Possible solutions include a hands-free interface and/or blocking manual use while the vehicle is in motion.
- Designers of instrument panels consider the increased risk of adjusting panel controls. The authors suggest that designs be intuitive, user-friendly, and not require long glances away from the forward roadway.
- Further research be undertaken into the protective effects of performing certain tasks. Identifying the characteristics of tasks that had protective effects may lead to safety countermeasures.¹⁹

Last fall, U.S. Department of Transportation (DOT) Secretary Ray LaHood announced new research findings by NHTSA that show nearly 6,000 people died and more than 500,000 were injured in 2008 in crashes that involved distracted or inattentive drivers.²⁰ In response to these sobering statistics, Secretary LaHood convened a distracted driving summit, where he announced that the Federal Motor Carrier Safety Administration ("FMCSA") will issue a rule banning texting by truck drivers and bus drivers, as well as limiting the use of cell phones by all drivers.²¹ Secretary LaHood said: "I'm not coordinated enough to text and drive, but I am coordinated to talk on the phone and drive. We all abuse the privilege, and it is not safe." He said that his department has "been on a kick the last couple of months on distracted driving, which we think is an epidemic, especially

among young people.” Anne Ferro, the recently confirmed administrator of the FMCSA, said the regulation prohibiting commercial drivers from texting while driving will be issued “posthaste” to address these most serious safety issues.

In an effort to have the federal government lead by example in reducing text messaging while driving, President Obama issued an Executive Order on October 1, 2009,²² that prohibits federal employees from text messaging when driving a government vehicle or driving a privately-owned vehicle while on official Government business or when using electronic equipment supplied by the Government while driving. The President reasoned:

With nearly 3 million civilian employees, the Federal Government can and should demonstrate leadership in reducing the dangers of text messaging while driving. Recent deadly crashes involving drivers distracted by text messaging while behind the wheel highlight a growing danger on our roads. Text messaging causes drivers to take their eyes off the road and at least one hand off the steering wheel, endangering both themselves and others.

* * * *

A Federal Government-wide prohibition on the use of text messaging while driving on official business or while using Government-supplied equipment will help save lives, reduce injuries, and set and example for State and local governments, private employers, and individual drivers. Extending this policy to cover Federal contractors is designed to promote economy and efficiency in Federal procurement. Federal contractors and contractor

employees who refrain from the unsafe practice of text messaging while driving in connection with Government business are less likely to experience disruptions to their operations that would adversely impact Federal procurement.

President Obama’s reasoning is not so complex that it should escape anyone who has passed their CDL driving examination. The fact that an individual may need to relay information through a text message while driving, to put it bluntly and succinctly, is beyond irresponsible. Congress has also been at work to pass national legislation to prohibit driving while texting. While Congress cannot directly order states to pass laws to create a uniform prohibition on driving while texting, the landmark case of *South Dakota v. Dole*²³ stands for the proposition that Congress may condition federal highway funding on state compliance with certain conditions, as has been done with setting a national minimum drinking age so as to provide a uniform standard of safety.²⁴

The bills before the Senate, “Alert Drivers Act,” drafted by Senator Schumer of New York,²⁵ and “Distracted Driving Prevention Act,” drafted by Senator Rockefeller of West Virginia,²⁶ both use federal funding to incentivize the states to pass laws prohibiting driving while texting or using a hand-held cellular telephone. To employ efficient means to achieve the goal of state regulations, the “Alert Drivers Act” uses the proverbial “stick” by withholding funds from states that fail to enact such legislation,²⁷ while the “Distracted Driving Prevention Act” holds out a “carrot” in the form of additional funds for the states that do enact such laws.²⁸ These Senate bills prohibit drivers from using hand-held cellular telephones,²⁹ but permit drivers to use hands-free or voice-activated devices.³⁰ Both prohibit texting while driving.³¹

In the House, Representative McCarthy of New York introduced her version of the “Alert Drivers Act,” which is almost identical to Senator Schumer’s bill of the same name.³² Similarly, Representative Engel of New York introduced his version of the “Distracted Driving Prevention Act,”³³ which is all but identical to Senator Rockefeller’s bill. The carrot and the stick comparison of the competing House bills would be the same as what we posited for those in the Senate.

Ford Motor Company supports the bills introduced by Senator Schumer and Congresswoman McCarthy. Sue Cischke, a Ford safety executive, said that this legislative approach addresses a nationwide problem, “and we can all agree is necessary to improve safety.” Ford supports the use of hands-free and voice-activated wireless devices, so that drivers can keep more focused on the road.³⁴

The American Automobile Association (AAA) announced that it would press for a driving while texting ban by 2013.³⁵ The authors would like to commend AAA on its thorough and meticulous review of the patchwork of the various states’ laws on the use of cellular telephones and other electronic devices. The AAA has prepared an excellent chart showing the uniformity of state laws in this regard.³⁶

Drivers who cause accidents while they are using cellular telephones have been found civilly liable.³⁷ For example, in *Wilkerson v. The Kansas City Southern Railway*,³⁸ the decedent was talking on her cellular telephone while she drove across a railroad crossing and failed to see an oncoming train. The court went beyond evidence of ordinary negligence and held: “The fault for this horrific tragedy lies with the inattentive driver who drove into the path of the oncoming train.” While the case law on the subject is still in its infancy, there is a growing body of literature on the role of the use of cellular telephones by drivers in the cause of motor vehicle accidents.³⁹

The wireless industry is also considering implementing motion-sensors in devices so as to prevent them from being used by drivers.⁴⁰ However, such technology would likely have the unintended consequence of preventing passengers from safely using their devices while on board moving vehicles.

Randy Mullett, who is the Vice President of Government Affairs of Con-Way, Inc., testified before Congress on behalf of the American Trucking Associations (ATA) that “America needs strong laws and a systematic approach to make the use of hand-held electronic devices while driving socially unacceptable.”⁴¹ But he cautioned:

Legislation alone will not solve the problem. Public attitudes and perceptions will need to change and any legislation will have to apply to all drivers on the highway. We need to focus on changing behaviors that lead to distracted driving in a systematic and comprehensive manner.⁴²

Despite the wave of legislation and regulations aimed at stopping driving while texting, not all of the trucking industry agrees with the proposed new laws. In fact, Clayton Boyce, who is a spokesman for the American Trucking Associations, said that long-haul truckers can use computers in their cabs to get directions and stay in close contact with dispatchers more safely than cellular telephones or hand-held texting devices.⁴³ Mr. Boyce said that the trucking industry does not condone texting while driving but “computers require less concentration than phones. The trucks have a screen that has maybe two or four or six lines [of text]. And they’re not reading the screen every second.” In fact, Boyce said that banning the use of such devices won’t improve safety.

In fact, many members of the trucking industry have significantly invested in wireless technology for their vehicles. Satellite systems mounted on trucks let companies monitor drivers, send new orders, distribute company-wide messages and transmit training exercises. Drivers also use this technology to send and receive email messages, and to access the Internet.

Some truckers say they actually feel pressure to use their computers while they are driving, rather than pulling over, so as to avoid delays in meeting tight delivery schedules. The Virginia Tech study referenced earlier⁴⁴ found that truck drivers who used on-board computers while driving had a ten times greater risk of crashing, nearly crashing or wandering from their lane than truckers who did not use those devices. That study observed that, when truckers use their computers while they are driving, they take their eyes off the road for approximately four seconds, which, while driving the highway speed limit, is enough time to drive about the length of a football field.⁴⁵

In 2009, the American Trucking Associations’ Safety Task Force published its “Expanding ATA’s Safety Agenda,” wherein it reported that it recently conducted a survey entitled “In-Cab Use of Laptops and Other Viewable Non-Integrated Electronic Devices with Viewing Monitors and Keyboards/Keypads” and found:

- 26 percent of respondents stated they have documentation that e-devices contributed to at least one crash;
- 52 percent stated that ATA should consider a policy advocating federal regulations restricting the use of all non-integrated e-devices—67 percent cell phones; 53 percent laptops; 47 percent PDAs; 7 percent GPS; 26 percent other devices;
- 87 percent responded that rules/laws involving such e-devices

should apply to all vehicles, not just commercial motor vehicles.

In light of these studies, the Task Force made the following:

Recommendation: The Task Force supports the safe use of technologies and encourages drivers and/or motor carriers to consider a range of polices and safeguards intended to reduce, minimize and/or eliminate driver distractions that may be caused by the increased use of electronic technologies (e.g., global positioning systems, cellular phones, etc.) during the operation of all types of motor vehicles. ATA strongly encourages and recommends that manufacturers of these devices, vehicle manufacturers, policymakers, motor carriers, and organizations representing motor carriers and the motoring public promote and adopt awareness, training, and safety policies on the use of such technologies—unless already required by current laws or regulations—during the operation of a motor vehicle on our nation’s highways.⁴⁶

Time will tell whether Congress will opt for the carrot or the stick, but it looks like a safe bet that one of the two versions of the bill will soon become law. Regardless of whether one believes more government intervention is or is not the answer, the momentum set in motion by the numerous studies, President Obama’s Executive Order, the impending federal regulations, and several state laws will usher in a new national standard and hopefully result in safer roads for all of us to use.

In an ironic twist on the headline of this article, we cannot help but notice that none of the pending House or Senate bills, or proposed regulations make any effort to restrict the trucker’s

use of the CB radio. In fact, House Resolution 841 specifically provides in part:

Resolved, That the House of Representatives

(1) encourages—

* * * *

(B) national trucking firms to alert their drivers to be especially focused on driving safely during the heaviest traffic day of the year, and to publicize the importance of

the day using Citizen's Band (CB) radios and in truck stops across the Nation[.]⁴⁷

For now, it seems that truckers are safe to continue using their CB radios. While curbing them from texting and using hand-held cell phones seems to be the *cause de célèbre*, and may prevent many accidents and indeed save lives, we can't help but wonder if the present momentum won't lead to an eventual end to seeing the iconic trucker driving down the interstate with CB in hand. Whether a trucker

is talking on a cell phone, jawing on the CB, or texting away while he's "on the road again," communications technologies, particularly mobile wireless devices, are at the heart of the distracted driving discussion. We will continue in the next *TTL* publication a sequel on this topic and explore the FCC's actions that have taken place to date and its likely future initiatives.

Until then, "10-4, good buddy."



Endnotes

1. Introduction to "Convoy," by Bill Fries and Chip Davis, which was the theme song of the 1978 EMI Films' movie of the same name available at http://www.last.fm/music/C.W.+McCall/_/Convoy.
2. S. 1536, § 2 (4); H.R. 3535, § 2 (4).
3. S. 1536, § 2 (5); H.R. 3535, § 2 (5).
4. S. 1536, § 2 (6); H.R. 3535, § 2 (6).
5. S. 1536, § 2 (14); H.R. 3535, § 2 (14).
6. H.R. Res. 841.
7. H.R. Res. 841.
8. H.R. Res. 841.
9. H.R. Res. 841.
10. H.R. Res. 841.
11. S. 1536, § 2 (7) & (8); H.R. 3535, § 2 (7) & (8).
12. S. 1536, § 2 (9); H.R. 3535, § 2 (9).
13. S. 1536, § 2 (10); H.R. 3535, § 2 (10).
14. Rebecca L. Olson, Richard J. Hanowski, Jeffrey S. Hickman and Joseph Bocanegra, *Driver Distraction in Commercial Vehicle Operations*, U.S. Department of Transportation, Federal Motor Carrier Safety Administration at 9 (September, 2009) available at <http://www.fmcsa.dot.gov/facts-research/research-technology/report/FMCSA-RRR-09-042.pdf> (citing various studies).
15. *Id.*
16. S. 1536, § 2 (11); H.R. 3535, § 2 (11).
17. Timothy M. Pickrell & Tony Jianqiang Ye, *Research Note: Driver Electronic Device Use in 2008, NHTSA's National Center for Statistics and Analysis*, available at www.nrd.nhtsa.dot.gov/CATS. See also S. 1536, § 2 (13). Those states are Alaska, Arkansas, California, Colorado, Connecticut, Louisiana, Maryland, Minnesota, New Jersey, Pennsylvania, Tennessee, Utah, Virginia and Washington.
18. Olson, et al., *supra*, note 14.
19. *Id.* at 154-55.
20. H.R. Res. 841.
21. SMC-Safety Bulletin, Pennsylvania Motor Truck Association. Vol. 9, Issue 2 (December, 2009).
22. Exec. Order No. 13,513, 74 Fed. Reg. 51,225 (Oct. 1, 2009).
23. 483 U.S. 203 (1987)
24. S. 1536, § 2 (16); H.R. 3535, § 2 (16).
25. Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009, S. 1536, 111th Cong. (July 29, 2009).
26. Distracted Driving Protection Act of 2009, S. 1938, 111th Cong. (Oct. 29, 2009).
27. S. 1536, § 3 (b) "...the Secretary shall withhold 25 percent of the amount required to be apportioned to any State . . . for the fiscal year if the Secretary determines that the State does not meet the requirements . . ."
28. S. 1938 § 2 (a) "The Secretary shall make a grant under this section to any State that enacts and implements a statute that meets the requirements . . ."
29. S. 1536, § 3 (a) (A); S. 1938 § 2 (c)(1).
30. S. 1536, § 3 (a) (B); S. 1938 § 2 (c)(2).
31. S. 1536, § 3 (a) (A); S. 1938 § 2 (b).
32. Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009, H.R. 3535, 111th Cong. (Sept. 8, 2009).
33. Distracted Driving Protection Act of 2009, H.R. 3994, 111th Cong. (Nov. 3, 2009).
34. (AP) *Ford backs bill to ban texting while driving*, Sept. 11, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/09/11/financial/f055310D52.DTL>.

35. Glen Creno, *Lawmakers pursue ban on texting*, THE ARIZONA REPUBLIC, Sept. 28, 2009.
36. *AAA State Distracted Driving Laws*, AAA Public Affairs (Nov. 10, 2009).
37. *See generally*, Mitchell Simpson, III, *Don't Curse 'Em, Sue 'Em!: Cell Phone Use While Driving as Evidence of Negligence*, 57 R.I. BAR. J. 17 (2009).
38. 772 So.2d 268 (La. App. 2000).
39. *See generally*, Simpson, III, *supra*, note 37 at 46 n. 17 (citing Jesse A. Cripps, Jr., *Dialing While Driving: The Battle Over Cell Phone Use on America's Roadways*, 37 GONZ. L. REV. 89 (2002); Matthew C. Kalin, *The 411 On Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers*, 39 SUFFOLK UNIV. L. REV. 233 (2006)).
40. Joe Howard, *Another Kind of Cell Block*, Transport Topics, 4, 10 (Dec. 21 & 28, 2009).
41. Brandon Borgna, *Combating Distracted Driving Requires Public Awareness*, Biz Central.Org, American Trucking Associations (Oct. 30, 2009).
42. *Id.*
43. Matt Richtel, *Driven to Distraction*, NEW YORK TIMES, Sec. A, p. 1 (Sept. 28, 2009).
44. S. 1536, § 2 (9); H.R. 3535, § 2 (9);
45. Richtel, *supra* note 43.
46. "Expanding ATA's Safety Agenda," American Trucking Associations (2009) available at <http://www.truckline.com/Newsroom/Policy%20Papers/Safety%20Task%20Force%20Report.pdf>.
47. H.R. Res. 841.

AUTHORS' NOTE:

Just days after the authors submitted this article for publication, on January 26, 2010, Transportation Secretary Ray LaHood announced interim regulatory guidance clarifying existing regulations. Transportation Department Documents, 2010 WLNR 1740231 (Jan. 26, 2010). As stated in the regulatory guidance: "Although the current safety regulations do not include an explicit prohibition against texting while driving by truck and bus drivers, the general restriction against the use of additional equipment and accessories that decrease the safety of operation of commercial motor vehicles applies to the use of electronic devices for texting." 75 Fed.Reg. 4305-01 (Jan. 27, 2010), 2010 WL 285585 (interpreting 49 CFR 390.17).

As this article had not yet been published, the authors cannot claim to have been a catalyst for the new guidance. However, in hindsight, we predicted a growing uniformity of the regulations proscribing texting while driving. . . and that truckers would be allowed to continue to use their iconic CB radios—at least for the time being.